IN THE SUPREME COURT OF THE STATE OF DELAWARE

ACP MASTER, LTD., AURELIUS CAPITAL MASTER, LTD., and AURELIUS OPPORTUNITIES FUND II, LLC,

Plaintiffs-Below, Appellants,

v.

SPRINT CORPORATION, SPRINT COMMUNICATIONS, INC., STARBURST I, INC., and SOFTBANK CORP.,

Defendants-Below, Appellees.

No. 382, 2017

On Appeal from the Court of Chancery of the State of Delaware, C.A. No. 8508-VCL

PUBLIC VERSION
FILED: JANUARY 17, 2018

ACP MASTER, LTD., AURELIUS CAPITAL MASTER, LTD., and AURELIUS OPPORTUNITIES FUND II, LLC,

Petitioners-Below, Appellants,

v.

CLEARWIRE CORPORATION,

Respondent-Below, Appellee.

No. 380, 2017

On Appeal from the Court of Chancery of the State of Delaware, C.A. No. 9042-VCL

APPELLANTS' REPLY BRIEF

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INTRODUCTION

Sprint does not dispute that an appraisal court is required to consider all relevant factors, that a third-party bid is quintessentially relevant, and that the Court of Chancery failed even to *mention* the DISH bid in its appraisal analysis. Sprint urges this Court to affirm anyway. Its arguments are dizzying, and uniformly unpersuasive: Maybe the court *did* consider the DISH bid, Sprint suggests, it just did so silently.[1] (The appraisal statute does not countenance silent reflection, especially on key issues.) Maybe it was Plaintiffs' fault for not making the argument clearly enough below.[2] (The record shows otherwise.) Or maybe the court should not have considered the DISH bid after all, because DISH's "strategic" and "commercial" motives show that it was bidding for synergies, thereby rendering its bid irrelevant.[3] (That is not how synergies work.)

Sprint likewise fails to justify the court's assumption that Clearwire's operative reality, failing a merger, was to be victimized by Sprint (its fiduciary) until minority stockholders cried uncle. This "temporary" dystopia, the metric by which the court valued Clearwire, is inconsistent with both appraisal and fiduciary-duty law. Sprint does not argue otherwise, and instead avoids the point altogether.

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[1] Sprint Br. 35-36.

[2] Sprint Br. 36-37.

[3] Sprint Br. 38-46.

First, Sprint denies the premise—insisting that the court's appraisal did not rest on this erroneous assumption. But the opinion speaks for itself: The Court of Chancery *explicitly* based its selection of the Single-Customer Case on the premise that Sprint would continue to engage in conduct that the court (*elsewhere* in its decision) recognized to be a breach of Sprint's fiduciary duty.[4] *Second*, Sprint turns to straw men, arguing that certain tactics in Sprint's freeze-out plan would have been perfectly lawful in a vacuum. True enough, but we are not in a vacuum. Sprint's overall strategy, the Court of Chancery found, was to exploit its unique position as Clearwire's dominant customer and controlling stockholder to depress Clearwire's stock price and clear the path to a cheaper acquisition. Such military strategies are not available to fiduciaries.

Next, Sprint urges that the plenary case should be affirmed even if the appraisal case is remanded because the Court of Chancery cited reasons, in addition to the appraisal finding, in concluding that the merger was entirely fair. But Sprint ignores that the court's findings in the plenary action were driven by—indeed, they expressly incorporated—the court's appraisal determination. Further, even if the Court of Chancery continues to regard the merger price as "fair" following its reconsidered valuation, the court may wish to award a "fairer" price

[4] Op. 82-86.

in light of Sprint's and SoftBank's "extensive, intentional, and manipulative" unfair dealing.[5]

SoftBank, for its part, urges this Court to affirm the aiding-and-abetting claim even if it remands the rest of the plenary case. SoftBank does so, however, by inviting this Court to decide a factual question (*i.e.*, whether SoftBank acted with scienter) that the Court of Chancery never reached, and advancing a stunning theory of appellate waiver that no court, to our knowledge, has ever endorsed.

[5] Op. 58. Those acts of unfair dealing, which the Court of Chancery reproved at some length, have been conveniently whitewashed from Sprint's narrative. The word "Intel," for instance, scarcely appears in Sprint's brief—despite the Court of Chancery's holding that Sprint and SoftBank engaged in unfair dealing by "buying" Intel's vote and by "fail[ing] to disclose the side deal with Intel." Op. 59-60. Sprint similarly elides the Court of Chancery's findings that Sprint and SoftBank stymied Clearwire's business opportunities, imposed coercive and dilutive financing on Clearwire, and misled and threatened Clearwire's minority stockholders. Op. 60-62.

ARGUMENT

I. THE COURT OF CHANCERY ERRED AS A MATTER OF LAW BY APPRAISING CLEARWIRE WITHOUT CONSIDERING DISH'S BID

Sprint accepts most of Plaintiffs' argument about DISH's bid. Sprint does not dispute, for example, that the Court of Chancery must "take into account all relevant factors."[6] Sprint does not dispute that a third-party bid is often highly relevant to fair value.[7] Nor does Sprint dispute that DISH's bid—an unsolicited offer by a party with no control over its target—is the kind of bid that Delaware courts often rely on. And Sprint does not dispute (how could it?) that the court did not even *mention* DISH's bid in its appraisal analysis.[8]

Sprint nonetheless urges affirmance for two reasons. First, Sprint claims that the Court of Chancery, despite its silence on the issue, did consider DISH's bid. And second, Sprint claims that DISH had "strategic and commercial

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[6] 8 *Del. C.* § 262(h); *see* Plaintiffs' Br. 44.

[7] *See* Plaintiffs' Br. 45.

[8] Sprint Br. 36. Sprint insists that courts are free to "ignore[]" evidence, as the Court of Chancery did here. Sprint Br. 33 (quoting *SIGA Techs., Inc. v. PharmAthene, Inc*., 132 A.3d 1108, 1135 n.155 (Del. 2015)). But the decision that Sprint quotes (out of context, no less) was not an appraisal case (where a Delaware statute commands consideration of all relevant factors).

motivations" for its bid that somehow render the bid irrelevant.[9] On both counts, Sprint gets the law and the facts wrong.

A. The Court Of Chancery Failed To Consider DISH's Bid

Sprint says that the Court of Chancery "did not fail to consider" DISH's bid.[10] All right, then: Where did the court consider DISH's bid? What did it conclude? Sprint cannot say. Indeed, Sprint concedes that the court's fair-price ruling did not "rely on the DISH Tender Offer."[11] The best Sprint can do to show that the court considered DISH's bid *at all* is to recite certain "factual findings" the court made.[12] But to state the facts is not to consider them. Were it otherwise, the statute's command to "take into account all relevant factors"[13] would be satisfied by a comprehensive background section. That is not the law.[14]

Unable to show that the Court of Chancery *actually* considered DISH's bid, Sprint surmises that the court must have considered the bid, but without saying

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[9] Sprint Br. 38.

[10] Sprint Br. 35.

[11] Sprint Br. 61.

[12] Sprint Br. 36.

[13] 8 *Del. C.* § 262(h).

[14] *E.g.*, *Weinberger v. UOP, Inc.*, 457 A.2d 701, 714 (Del. 1983) ("Although the Chancellor received the plaintiff's evidence, his opinion indicates that the use of it was precluded because of [the 'block method' that *Weinberger* abandoned].").

so.[15] That does not work, either. A court, of course, need not "include in its opinion every fact adduced at trial."[16] But when a statute directs the court to consider certain factors, the court should do so expressly.[17] The appraisal statute is no exception. An appraisal court "demonstrates its consideration" of relevant factors by "thorough[ly] examin[ing]" them in its ruling.[18] Such an examination is necessary for this Court to assess "the Court of Chancery's reasoning."[19]

Inferring that the Court of Chancery considered DISH's bid *sub silentio* would be especially unwarranted here. DISH's bid was not some peripheral event that might float beneath the court's radar. It was advanced on the very eve of the Sprint-Clearwire merger; it thereby took account of the latest market

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[15] Sprint Br. 35.

[16] *Vargas v. Gamino*, 918 A.2d 339, at *1 (Del. 2007) (Table) (cited at Sprint Br. 35).

[17] *See ibid.*

[18] *Dell, Inc. v. Magnetar Global Event Driven Master Fund Ltd.*, --- A.3d ---, 2017 WL 6375829, at *16 (Del. Dec. 14, 2017); *accord, e.g.*, *M.P.M. Enters., Inc. v. Gilbert*, 731 A.2d 790, 796 (Del. 1999) ("The Court of Chancery properly rejected [the factor the appellant believed relevant] because it focused on the elements of value that would arise from the merger, rather than on the going concern value of MPM.").

[19] *Dell*, 2017 WL 6375829, at *12. Sprint protests that it would be "entirely unworkable" to require a court to identify the evidence it considers. Sprint Br. 35. Of course it wouldn't. And Sprint's preferred approach would be all *too* workable: Affirmance-minded jurists could insulate themselves on appeal by cross-referring to the entire trial record and including a disclaimer that "all relevant facts have been considered."

developments; and it was the product of sustained internal deliberation within DISH. Indeed, when issuing its ruling in the plenary case (but oddly, not in the appraisal case), the Court of Chancery regarded the DISH bid as "so substantial[]" that it actually "changed the landscape," shifting the court's ruling from one *against Defendants* to one *against Plaintiffs*.[20]

It may be added that when the Court of Chancery *wanted* to consider a relevant fact but then reject it on the merits, it knew exactly how to do so. In its appraisal analysis, the court discussed the merger price of $5.00 per share, expressly declined to "consider" it, and provided a rationale for that declination.[21] It did no such thing with DISH's bid.

Sprint's heroic efforts to rewrite the Court of Chancery's opinion are unavailing. DISH's $4.40 bid is singularly relevant to the fair value of Clearwire, yet the court disregarded it without explanation. That was error.[22]

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[20] Op. 50.

[21] Op. 76.

[22] Sprint cannot resist thumbing its nose at Plaintiffs for pursuing their appraisal rights, boasting that, until now, "[f]air value determinations below the deal price were almost unheard of." Sprint Br. 1. Sprint is correct that this case is a remarkable outlier. But that is not a feature worth heralding. The decision below is unprecedented precisely because it is legally erroneous.

Essentially conceding that the court failed to consider DISH's bid, Sprint blames Plaintiffs for the failure.[23] Tellingly, though, Sprint does not claim that Plaintiffs' argument was not "fairly presented to the trial court."[24] Nor could it: Sprint's own counsel admitted at post-trial argument that "Aurelius says that DISH's actions confirm that Clearwire was worth no less than $5 per share. This is an important issue for Aurelius and . . . candidly, I think it's worth looking at very seriously."[25] For once, we agree.

To be sure, Plaintiffs' principal argument at trial was that the Court of Chancery should credit the Full Build Projections.[26] But Sprint misleads this Court when it claims, inexplicably, that "no expert opined that" Clearwire's value "cannot be less" than DISH's $4.40 bid.[27] As detailed in Plaintiffs' opening brief,[28] Plaintiffs' expert, Professor Gregg Jarrell, testified point blank that, in light

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[23] Sprint Br. 36-37.

[24] *See* Del. S. Ct. R. 8 (waiver standard).

[25] AR73:4-8.

[26] *See* Sprint Br. 37.

[27] Sprint Br. 38.

[28] *See* Plaintiffs' Br. 37 & n.171.

of DISH's bid, "the fair value of Clearwire must be not less and likely more than 4.40."[29] And Plaintiffs raised the issue in their post-trial briefs.[30]

B. Whatever "Strategic And Commercial Motivations" DISH Had Do Not Undermine The Relevance Of Its Bid

Pivoting from its claim that the Court of Chancery did consider DISH's bid, Sprint asserts that the court should not have considered DISH's bid. According to Sprint, DISH "had strategic and commercial motivations" for its bid, which render the bid "poor evidence" of Clearwire's value.[31]

That argument, too, is a nonstarter. The question is not whether DISH had "strategic and commercial motivations." That can be said of virtually any market participant. The question is whether DISH had plans to extract *synergistic* value from Clearwire that must be deducted from its $4.40 bid. And the answer is no. Accordingly, even were Sprint correct that the Court of Chancery silently "considered" DISH's bid but wordlessly chose to assign it no weight due to DISH's supposed motives, such a finding lacks "ground[ing] in accepted financial principles" and would constitute an abuse of discretion.[32]

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[29] AR20:23-21:2 (Jarrell); *see also, e.g.*, A3706:8-A3709:9 (Jarrell).

[30] A3842-43; A3988-92. Sprint correctly notes (Br. 36) that Plaintiffs' post-trial answering brief covered the issue outside its appraisal section.

[31] Sprint Br. 38.

[32] *See Dell*, 2017 WL 6375829, at *22.

1. Sprint Wrongly Conflates "Strategic And Commercial Motivations" With "Synergies"

Just as some of the best fiction has some grounding in fact, Sprint's argument begins with a kernel of legal support. It is true, as Sprint says, that appraisal must exclude synergies. This Court, guided by the appraisal statute,[33] has held that appraisal courts must "exclude any value that the selling company's shareholders would receive because a buyer intends to operate the subject company, not as a stand-alone going concern, but as a part of a larger enterprise, from which synergistic gains can be extracted."[34]

But, from that kernel, Sprint makes a bounding leap: Because "[f]air value in a statutory appraisal is 'stand-alone value,'"[35] Sprint reasons, a bidder's "strategic and commercial motivations" may defeat the relevance of its bid.[36] That leap is unwarranted for two reasons.

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[33] 8 *Del. C.* § 262(h) ("[T]he Court shall determine the fair value of the shares exclusive of any element of value arising from the accomplishment or expectation of the merger or consolidation."). This exclusion would not apply to DISH's bid, as buying a minority stake is not a "merger or consolidation." *Id.* § 251(a).

[34] *DFC Global Corp. v. Muirfield Value Partners, L.P.*, 172 A.3d 346, 368 (Del. 2017) (quotation marks omitted).

[35] Sprint Br. 38 (quoting *DFC Global*, 172 A.3d at 368).

[36] *Ibid.*

First, the value of synergistic gains derives not from a bidder's subjective *motivations* for bidding, as Sprint says, but from its *plans* for the company. If the bidder plans to absorb the company or to operate it differently, appraisal should exclude the value of those plans.[37] But, if the bidder simply sees commercial value in the company that others do not, that motivation forms part of the "crucible of objective market reality"[38] that renders market evidence useful.[39]

Second, and in any event, the requirement to deduct synergistic value from a market bid does not render the bid "poor evidence."[40] It merely requires courts to calculate the synergistic value (if there is an evidentiary basis for doing so) and deduct it from the bid.

2. DISH Was Not Bidding For Synergies

DISH had no plans to operate Clearwire in any way other than as a standalone going concern. Indeed, DISH's tender offer would result in DISH

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[37] *E.g.*, *Gonsalves v. Straight Arrow Publishers, Inc.*, 1996 WL 483093, at *2 (Del. Ch. Aug. 22, 1996) (Courts should "not consider, as contributing to fair value, evidence of the capitalized value of possible changes that may potentially be made in the firm by new management.").

[38] *Van de Walle v. Unimation, Inc.*, 1991 WL 29303, at *17 (Del. Ch. Mar. 7, 1991).

[39] *E.g.*, *DFC Global*, 172 A.3d at 374 n.145 ("That [the acquiror] expected to profit does not mean that the collective view of value that results from the deal price is not a reliable indicator of fair value.").

[40] Sprint Br. 38.

owning at most a third of Clearwire's stock, so DISH could not operate Clearwire as "part of a larger enterprise." Thus, its bid included no "synergistic gains" that must be deducted in appraisal.[41]

a. Sprint points out that "DISH did not have a network and desired a partnership with Clearwire to leverage Clearwire's network infrastructure and expertise," and argues that DISH's bid therefore should not count.[42] That is a non sequitur. DISH's $4.40 bid did not require—indeed, did not even *mention*—a commercial agreement with Clearwire.[43] Accordingly, however much DISH may have desired a commercial deal with Clearwire, those desires were not reflected in the $4.40 bid that the Court of Chancery ignored.

But even had DISH conditioned its $4.40 bid on a commercial agreement, the agreement DISH sought would be like any deal between standalone companies, especially because DISH would be only a minority stockholder in Clearwire. DISH had spectrum; Clearwire had expertise and a network. In the proposals preceding the $4.40 bid, DISH envisioned that Clearwire would provide services including "construction, operation, maintenance, and management of a wireless

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[41] *See DFC Global*, 172 A.3d at 368 (quotation marks omitted).

[42] Sprint Br. 39 (quotation marks omitted); *see id.* at 6, 40, 41-42.

[43] A2285-88; *see* Sprint Br. 42 (admitting that, by the time of the $4.40 bid, DISH had "tabled negotiation of a commercial agreement with Clearwire").

network."[44] DISH, in turn, would pay "a negotiated rate or no more than cost plus 10%," and the deal would span "an initial term of ten years with renewal terms."[45]

Any value that would arise from an ordinary commercial deal like this one is not the type of synergistic gain that appraisal courts must exclude. To qualify as a synergistic gain, the value must be obtainable "only by accomplishment of the merger."[46] That is not true of DISH's desired agreement. DISH could have struck such a deal without investing a penny in Clearwire. (Indeed, DISH and Clearwire were negotiating a commercial deal before anyone contemplated a DISH investment.[47]) Conversely, investing in Clearwire would not have allowed DISH to execute a more favorable deal than it otherwise could have (Sprint would have made sure of that). Thus, any value the commercial relationship would create would come from Clearwire "operat[ing] . . . as a stand-alone going concern," not "as a part of a larger enterprise."[48]

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[44] A1446; *accord* Plaintiffs' Br. 1, 12-13, 17, 20, 21-22, 28.

[45] A1446.

[46] *Huff Fund Inv. P'ship v. CKx, Inc.*, 2014 WL 2042797, at *3 (Del. Ch. May 19, 2014); *accord, e.g.*, *Merlin Partners LP v. AutoInfo, Inc.*, 2015 WL 2069417, at *17 n.202 (Del. Ch. Apr. 30, 2015) (requiring that claimed synergies "could only have been realized through accomplishment of a merger").

[47] *E.g.*, B1996.

[48] *See DFC Global*, 172 A.3d at 368 (quotation marks omitted).

b. Paradoxically, Sprint also insists that DISH wanted the exact opposite of a commercial partnership with Clearwire: to pummel Clearwire into bankruptcy and loot its spectrum assets. Sprint floats this theory repeatedly.[49] But "[r]epetition does not transform [falsity] into a truth."[50] There is not a whisper of proof, aside from Sprint's own speculation, to support this theory. Nor is there any rationale—Sprint offers none—for how DISH, a minority stockholder, *could* have caused a Clearwire bankruptcy.[51]

DISH knew its plans best, and nothing it said or did is consistent with angling for a Clearwire bankruptcy. What is more, had DISH's tender offer succeeded, it would have spent more than $1.7 billion on Clearwire equity.[52] In Sprint's conspiracy theory, Clearwire's spectrum must have been extremely

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[49] Sprint Br. 18-19, 23-24, 36, 38-39, 40, 42, 45-46.

[50] Franklin D. Roosevelt, Radio Address to the New York Herald Tribune Forum (Oct. 26, 1939), http://www.presidency.ucsb.edu/ws/?pid=15828.

[51] As Plaintiffs acknowledge (Br. 49-50), the Court of Chancery suggested in its statement of facts, without citation or explanation, that bankruptcy of Clearwire might have motivated DISH's bid for *Sprint*. *See* Op. 25-26. This Court should credit any such factual finding only if it is "sufficiently supported by the record." *Biolase, Inc. v. Oracle Partners, L.P.*, 97 A.3d 1029, 1035 (Del. 2014) (quotation marks omitted). And the prospect that DISH's investment in *Sprint* could somehow result in a *Clearwire* bankruptcy is even more farfetched.

[52] *See* DISH Schedule TO (June 17, 2013), http://bit.ly/2lkS2lV ("approximately 401 million Shares need to be tendered" at $4.40 per share).

valuable for DISH to pay that much for the mere possibility of buying the spectrum out of bankruptcy.

Sprint responds that DISH's desire for governance rights proves that it intended to drive Clearwire into bankruptcy.[53] That hardly follows. DISH had ample reasons to desire governance rights—most prominently to protect itself from Sprint, which would continue to dominate Clearwire. Sprint also suggests that DISH's discussion of a "strategic rationale" for its bid evinced a plan to bankrupt and loot Clearwire.[54] Like a Rorschach test, that unsupported suggestion says more about Sprint than about DISH.[55]

Clearwire, likewise, did not see DISH's bid as a step toward bankruptcy. Clearwire's directors voted to recommend the DISH tender offer to stockholders.[56] Had they thought that DISH planned to bankrupt Clearwire, they were inviting a fiduciary-duty lawsuit. The directors knew, as Sprint says, that DISH owned some 18% of Clearwire's debt.[57] But they connected that fact to bankruptcy only when

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[53] Sprint Br. 42.

[54] Sprint Br. 41 (quoting A2276).

[55] As explained *infra* 21-28, Sprint's plans to loot Clearwire in the event of a no-vote were eerily similar to the plans it now projects onto DISH.

[56] Op. 34.

[57] Sprint Br. 18-19; B2191-92; *see* A3357-58; B2154-55; B2426-31.

Clearwire's chairman, John Stanton, tried to persuade Sprint to top DISH's bid.[58] And, as Stanton admitted at trial, this was a pure negotiating tactic: Clearwire "didn't know" whether a Clearwire bankruptcy would benefit DISH, but "we wanted Sprint and SoftBank to believe that."[59]

That leaves only Sprint's beliefs about DISH's plans. Sprint told its board to top DISH's bid because, among other things, DISH "could create substantial 'hold up' value."[60] That language, Sprint now insinuates, was code for "Clearwire bankruptcy."[61] Well, apparently no one was in on the code. Sprint's CEO testified that this language meant that DISH's Chairman "was well known to be a very difficult partner, and that [Sprint] *didn't really know what his motives were*."[62] The only other evidence Sprint cites on this issue is the redirect testimony of another Sprint executive,[63] who claimed that Sprint "did a bunch of analysis" of DISH's ability to buy spectrum in a Clearwire bankruptcy.[64] But (i) no such

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[58] B2559; B2561.

[59] B66:20-21 (Stanton); *see also*, B27:1-8 (Hersch) ("[I]t did not appear to me at that point that bankruptcy was probably going to be the likely outcome, but . . . raising it as a possibility seemed perfectly appropriate."); B15:6-17 (Schell).

[60] A2946.

[61] Sprint Br. 45.

[62] AR13:3-14:23 (Hesse) (emphasis added).

[63] Sprint Br. 19, 40.

[64] B47:2-3 (Schwartz).

analysis is in evidence; (ii) the executive did not testify that DISH intended to bankrupt Clearwire; and (iii) most importantly, Sprint cannot wrest a fact finding about DISH's plans from a Sprint executive's recollection about what he speculated that DISH might be thinking.

In short, neither DISH, nor Clearwire, nor Sprint contemporaneously believed that DISH was bidding to put Clearwire into bankruptcy. So even if Sprint is correct that the Court of Chancery secretly made such a finding, that finding is groundless.

c. Last, Sprint urges that the governance rights DISH sought in connection with its $4.40 bid are alone "sufficient to reject [the bid] as reflective of Clearwire's standalone value."[65] The cases say the opposite. Usually, when courts rely on a third-party bid to appraise a company, it is the winning bid. And, usually, that winning bid is for 100% of the company's equity. So the bidder is getting every governance right there is. Nonetheless, courts in this context have repeatedly relied on the third-party bid without hesitation.[66] *A fortiori*, when a bidder would (like DISH) receive only a subset of governance rights, that does not make the bid defective.

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[65] Sprint Br. 42; *see id.* at 41-44.

[66] *E.g.*, *In re PetSmart, Inc.*, 2017 WL 2303599, at *27-31 (Del. Ch. May 26, 2017); *Merion Capital LP v. BMC Software, Inc.*, 2015 WL 6164771, at *14-17 (Del. Ch. Oct. 21, 2015).

In fact, the bid likely understates the value. As Plaintiffs have explained without response, appraisal petitioners are *entitled* to receive the value of control.[67] Thus, Plaintiffs are entitled to any value attributable to the governance rights DISH sought. Indeed, Plaintiffs are entitled to more: DISH's governance rights would have given it, at most, partial control of a Sprint-dominated company,[68] and, as Sprint concedes, whether DISH could lawfully receive those rights was uncertain at best.[69]

3. Even If DISH Had Plans To Extract Synergistic Gains, There Is No Evidence Of Their Value

Even were Sprint correct that DISH's bid reflected "synergistic gains" beyond Clearwire's standalone value, that would be no reason to disregard the bid altogether. Rather, the appraisal court should start with the bid, then "determine

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[67] Plaintiffs' Br. 49 & n.213.

[68] *See, e.g.*, Shannon P. Pratt, *Business Valuation: Discounts and Premiums* 18 (2d ed. 2009) ("Many factors can affect the degree of control and, consequently, the magnitude of the . . . premium for elements of control.").

[69] Sprint now suggests that DISH was unaware of the legal impediments to its request for governance rights until the Court of Chancery made comments to that effect. Sprint Br. 43-44. Nonsense. Sprint and Clearwire had been warning DISH for months that its requested governance rights were unlawful. *E.g.*, A1452; AR3; AR8.

the value of those synergies and back them out."[70] This process is routine when a court relies on a third-party bid.[71]

An important corollary of this rule, however, is that the value of synergistic gains must first be established. Courts will not deduct synergies without evidence of their value.[72] Sprint's arguments, here and in the Court of Chancery, lack even the faintest hint about the value of any *DISH* synergies. That is because, again, there is no such evidence.[73]

In any event, even if synergistic gains drag down the appraisal value derived from DISH's bid, there are countervailing factors pushing that value up. DISH was bidding for a minority stake, and appraisal "require[s] that any minority

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[70] Op. 76; *see id.* at n.244.

[71] *E.g.*, *LongPath Capital, LLC v. Ramtron Int'l Corp.*, 2015 WL 4540443, at *26 (Del. Ch. June 30, 2015); *Highfields Capital, Ltd. v. AXA Financial, Inc.*, 939 A.2d 34, 61 (Del. Ch. 2007); *Union Illinois 1995 Inv. Ltd. P'ship v. Union Fin. Grp., Ltd.*, 847 A.2d 340, 353-54, 364 (Del. Ch. 2004).

[72] *E.g.*, *AutoInfo*, 2015 WL 2069417, at *17 ("[T]he reliability of the purported cost savings has not been tested. [Respondent] has thus failed to establish that any downward adjustment to the Merger price is warranted." (footnotes omitted)); *CKx*, 2014 WL 2042797, at *3 ("Because I have no evidentiary basis to determine otherwise, I find that the merger price does not include any value derived from the accomplishment or expectation of the merger, and therefore decline to adjust the merger price downward.").

[73] Sprint cites scattered evidence that *Sprint* realized synergies by acquiring Clearwire. *E.g.*, Sprint Br. 2-3, 18, 24-25, 51. But those claimed synergies (which vary wildly, and which Plaintiffs dispute) were specific to Sprint, and have no bearing on whether *DISH*, which would merely be a minority stockholder, would have obtained synergies. *See id.* at 2.

discount be ignored."[74] And, as Plaintiffs have explained without contradiction, Clearwire's sale process differed from the paradigmatic auction in ways that depressed the bids.[75] Accordingly, there is no evidential basis to discount DISH's $4.40 bid in appraising Clearwire.

C. Sprint's Favorite Facts Do Not Void The Statute's Requirement

Sprint concludes its DISH section with what amounts to a closing argument for a jury.[76] That has no place here. The question—a question of law—is whether the Court of Chancery heeded the statute's directive to "take into account all relevant factors."[77] It did not. Thus, it erred. The fact that the Court of Chancery considered *some* evidence does not absolve its legal error for ignoring *other* evidence. Because it is impossible to know whether the court's $2.13 valuation would have come out differently had the court considered DISH's $4.40 bid—indeed, precisely because it is impossible to reconcile those two numbers—reversal is warranted.

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[74] *DFC Global*, 172 A.3d at 367.

[75] Plaintiffs' Br. 46-47.

[76] Sprint Br. 46-51. Of course, Sprint's one-sided account of the facts is less persuasive when measured against the whole record. *E.g.*, Plaintiffs' Br. 7-14, 19-22, 26-36.

[77] 8 *Del. C.* § 262(h).

II. THE COURT OF CHANCERY ERRED AS A MATTER OF LAW BY APPRAISING CLEARWIRE ON THE ASSUMPTION THAT SPRINT WOULD CONTINUE TO BREACH ITS FIDUCIARY DUTIES

As explained in Plaintiffs' opening brief,[78] the Court of Chancery's appraisal rested upon a hopelessly flawed premise—namely, that Clearwire's operative reality was to be "temporar[ily]" abused by Sprint, its spectrum-starved controller, until Sprint had destroyed enough of Clearwire's value to allow for a "more favorable" acquisition at some later date by Sprint.[79] It was that thesis that informed the court's rejection of the Full Build Projections.[80] And it was that thesis that drove the court to adopt for its DCF the dire Single-Customer Case projections.[81] Indeed, the court offered two "key" rationales for adopting the Single-Customer Case, one of which was that (the court assumed) Sprint would temporarily suppress its tonnage demands to harm Clearwire.[82]

Sprint does not squarely address this fundamental error. It rattles off a series of actions that Sprint planned to take in the event the merger failed—replacing the board, issuing dilutive financing, etc.—and insists that each of these actions, taken in isolation, would have been perfectly legal. Sprint's effort gives straw men a bad

[78] Plaintiffs' Br. 51-59.

[79] Op. 81.

[80] Op. 80-81.

[81] Op. 85-86.

[82] Op. 84-85.

name. Of course those actions are lawful when considered in isolation. The problem for Sprint is that every one of those actions, the Court of Chancery found, was part of a broader stratagem to depress Clearwire's stock price and set the stage for an opportunistic takeover by Sprint. Delaware law does not permit fiduciaries to behave in this manner.

A. Sprint Concedes That Operative Reality, For Valuation Purposes, Cannot Assume Breaches Of Fiduciary Duties

An appraisal must account for a company's full value based on its operative reality on the date of the merger.[83] That reality includes the value realized when fiduciaries are "faithful to their fiduciary duties,"[84] which is assumed by the court. However, if the court finds that operative reality includes breaches of fiduciary duties, the value the company could have recovered for those breaches should be added to the appraisal.[85] Put differently, a company should not be appraised on the premise that its fiduciary will breach its duties with impunity.[86]

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[83] Op. 74 (quoting *M.G. Bancorporation, Inc. v. Le Beau*, 737 A.2d 513, 525 (Del. 1999)).

[84] *Beam ex rel. Martha Stewart Living Omnimedia, Inc. v. Stewart*, 845 A.2d 1040, 1048 (Del. 2004).

[85] *E.g.*, *In re Cox Radio, Inc. S'holders Litig.*, 2010 WL 1806616, at *14 (Del. Ch. May 6, 2010), *aff'd*, 9 A.3d 475 (Del. 2010).

[86] *See* Plaintiffs' Br. 52-53.

Sprint does not deny those principles.[87] Indeed, it does not address the legal standard at all. Thus, to the extent the Court of Chancery valued Clearwire based even in part on the assumption that Sprint would breach its fiduciary duties without redress, the Court should vacate the court's appraisal holding.

B. The Court Of Chancery Found, As Fact, That Sprint Would Undertake A Strategic Plan To Depress Clearwire's Price

Sprint opens its argument by attacking its Full Build Projections. It identifies "four reasons" that the Court of Chancery gave for declining to adopt those projections, each of which has "nothing to do with assumed breaches of fiduciary duty."[88] All amount to the same thing: the Court of Chancery agreed with Sprint that the Full Build Projections were too expensive for Sprint and therefore unlikely to come to pass.[89]

Sprint's argument is both wrong and irrelevant. It is wrong because the viability of a given path can be judged only by reference to its alternatives. Here, the Court of Chancery's evaluation of the Full Build Projections was necessarily (and quite plainly) informed by its assumption that Sprint had "other, less expensive and more profitable options"—namely, to "keep Clearwire barely

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[87] *See* Sprint Br. 51-58.

[88] Sprint Br. 53-54.

[89] Op. 78-80.

solvent while preparing to acquire Clearwire in the future."[90] Its belief that the Full Build Projections were "too darn expensive"[91] was based on that legally flawed supposition. Put differently, if the court had recognized that Sprint is *not* entitled to benefit from its future breaches of fiduciary duties, the court might well have concluded that, in the absence of a Clearwire acquisition, pursuing the Full Build would have been the value-maximizing strategy for Sprint.[92]

In any event, Sprint's argument is irrelevant because it does not matter why the Court of Chancery declined to rely on the Full Build Projections. What matters is why the court chose to rely on the Single-Customer Case projections as the basis for its appraisal. More specifically, what matters is whether the choice of the Single-Customer Case rested on the premise that Sprint would continue to breach its fiduciary duties. The answer is yes.

It's all there in the court's opinion. According to the Court of Chancery, the choice of the Single-Customer Case rested on two "key assumptions" about Clearwire's operative reality as of the merger date: (i) that "Sprint would remain

[90] Op. 80, 83.

[91] AR127:20-21.

[92] As explained in our opening brief, Sprint's contemporaneous assessment revealed that the Full Build would not only be feasible for Sprint, but profitable. Br. 31-32. And that was *before* accounting for the fact that Sprint would own roughly 79% of Clearwire even if the merger failed. *Ibid*.

Clearwire's only customer"[93] (an assumption that was never in dispute and likewise was true of the Full Build Projections); and (ii) that Sprint's wholesale payments to Clearwire would not increase "astronomically"[94] in the event of a no-vote. The latter, critical assumption was predicated on the court's belief that Sprint would temporarily curb its payments to Clearwire to drive down its market price and clear the way for a future acquisition. As the court explained, "Clearwire's status quo would not have changed dramatically if the Clearwire-Sprint Merger was voted down," for Sprint "was unlikely to dramatically increase its use of Clearwire's spectrum" (not for lack of demand, but because Sprint would temporarily suppress that usage) and instead "would have laid the groundwork for a future acquisition."[95]

Sprint pooh-poohs all of this, claiming that none of it mattered to the court's opinion anyway. According to Sprint, the court could simply have "stopped" after rejecting the Full Build Projections without making these additional findings about what Clearwire's future held in the event of a no-vote.[96] But companies are not appraised by process of elimination. The Court of Chancery was obligated to

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[93] Op. 84.

[94] *Ibid*.

[95] Op. 85-86.

[96] Sprint Br. 55.

determine Clearwire's operative reality on the merger date.[97] And that operative reality was highly dependent on Sprint's plans for Clearwire. The Court of Chancery knew this: it found that "Clearwire's value largely depended on how much demand Sprint had for Clearwire's spectrum."[98] It further found that Sprint lacked viable spectrum alternatives, and that "customer demand would have required Sprint to make greater use of Clearwire's spectrum" if the merger failed.[99]

It therefore was incumbent upon the Court of Chancery to figure out what Sprint would have done in the event of a no-vote.[100] And that's just what it did. According to the court, Sprint would have artificially stanched its usage of Clearwire's spectrum in order to drive down Clearwire's stock price.

The court recognized that this strategy could be only "temporary."[101] Sprint was dependent on Clearwire, and the scenario hypothesized by the Court of

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[97] *Dell*, 2017 WL 6375829, at *13 ("To reach this per-share valuation, the court should first envisage the entire pre-merger company as a 'going concern,' as a standalone entity, and assess its value as such. … The valuation should reflect the '"operative reality" of the company as of the time of the merger.'" (footnotes omitted)).

[98] Op. 57.

[99] Op. 36, 81, 86.

[100] It therefore is irrelevant whether Clearwire's management and Professor Cornell "assumed that Sprint would breach any fiduciary duty" when they created and analyzed the Single-Customer Case, respectively. Sprint Br. 7. The relevant question is why the *Court of Chancery* elected to use those projections.

[101] Op. 81.

Chancery would have severe short-term consequences: Sprint would alienate customers, lose market share,[102] and suffer from degraded network service across the country.[103] Sprint could not strangle Clearwire forever without cutting off its own source of oxygen.

But, as with any good long game, Sprint would end up on top. The *purpose* of this strategy, the Court of Chancery found, was to "keep Clearwire barely solvent" so Sprint could "acquire Clearwire in the future" "on more favorable terms."[104] Critically, the Court of Chancery did not find—nor could it—that Sprint's plan had any legitimate *commercial* justification.[105] Instead, Sprint had a single aim: to depress Clearwire's market price so that Sprint could grab it on the cheap in the near future.

[102] The Court of Chancery noted Sprint's contemporaneous recognition that the prospect of its increasing market share while pursuing the Limited Build was "implausible." Op. 81 n.261.

[103] A2878.

[104] Op. 81, 83.

[105] This is perhaps best demonstrated with a thought experiment: Imagine every fact in this case were the same, except Sprint were *not* Clearwire's controlling stockholder. If Sprint and Clearwire were simply arm's-length counterparties—with Sprint dependent on Clearwire for spectrum, and Clearwire dependent on Sprint for revenue—would Sprint's suffocation strategy have made any business sense? Would Sprint have shunned its only outside source of spectrum, scuttled its network plans, driven away customers, and sacrificed its market share—all in the vain hope of one day acquiring Clearwire, looting its spectrum, and *then* getting Sprint's business back on track? To ask the question is to answer it.

This strategy—a critical assumption of the court's appraisal ruling—turns fiduciary-duty law on its ear. "'[A] calculated effort to depress the market price' of a stock 'until the minority stockholders are eliminated by merger or some other form of acquisition' constitutes unfair dealing."[106] It was not open to Sprint, as Clearwire's controlling stockholder, to intentionally drive down Clearwire's value to open the door to a cheaper acquisition.

Sprint addresses none of this. It does not grapple with Plaintiffs' core argument that the various "steps" that the Court of Chancery found Sprint would take in the event of a no-vote were part of a larger, value-destroying strategy designed to enrich Sprint at the expense of Clearwire's minority stockholders. The Court of Chancery's appraisal of Clearwire on that basis was legal error.

C. Sprint's Response—That Certain Aspects Of Its Plan Were Lawful When Viewed In Isolation—Misses The Point

Rather than grapple with the Court of Chancery's central finding that Sprint would have undertaken a strategy to depress Clearwire's market price, Sprint responds by parsing certain *components* of that strategy and urges that each component, standing alone, was unobjectionable. That misses the forest for the trees.

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[106] Op. 51 (quoting *Sealy Mattress Co. of N.J. v. Sealy, Inc.*, 532 A.2d 1324, 1336 (Del. Ch. 1987) (alterations omitted)).

First, Sprint argues that its exercising its right under the Equityholders' Agreement to replace its Clearwire board designees is not a breach of fiduciary duty.[107] Plaintiffs have never argued otherwise.

Second, Sprint contends that it would not have breached its fiduciary duties merely by making open market purchases of Clearwire's shares.[108] Again, no one has argued to the contrary.

Third, Sprint asserts that offering Clearwire financing, even if it had the effect of diluting minority stockholders, would not have been a breach of duty.[109] The Court of Chancery thought otherwise,[110] but that is neither here nor there. Even assuming Sprint's plan to issue dilutive financing was not a standalone wrong, diluting minority stockholders in furtherance of a strategy to depress Clearwire's market price surely was.

Fourth, Sprint correctly points out that there is "nothing inherently wrong" with a controller's "cashing out the minority," so long as "*it conditions the transaction on the appropriate procedural protections or demonstrates its entire*

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[107] Sprint Br. 56.

[108] Sprint Br. 57.

[109] Sprint Br. 57.

[110] Op. 62-65.

fairness."[111] There's the rub. The first step of Sprint's cash-out plan, the Court of Chancery found, was to "depress the market price of [Clearwire's] stock" to grease the wheels for a transaction.[112] That is the antithesis of entire fairness. Sprint also points to the well-settled rule that courts should presume that fiduciaries will behave consistent with their duties.[113] Precisely! By valuing Clearwire in the shadow of anticipated breaches of duty by Sprint, the court violated that very precept.

Sprint's contingency plan in the event of a no-vote—which the Court of Chancery found to define Clearwire's operative reality—was predicated on the notion that Sprint could exploit its power as a dominant customer and controlling

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[111] Sprint Br. 58 (emphasis added). Notably, SoftBank's chairman had declared his intent to proceed *without* procedural protections in a subsequent takeover effort, A2172, and Sprint conditioned its $5.00 per-share offer on Clearwire's waiving the provision in the Equityholders' Agreement requiring a deal with Sprint to be approved by a majority of Clearwire's minority stockholders, A3100.

[112] *See* Op. 51 (quotation marks and alterations omitted). According to Sprint, the fact that it expected to buy Clearwire more cheaply in the future demonstrates only that Sprint paid a "significant premium" in July 2013. Sprint Br. 58. The contemporaneous documents say just the opposite: Sprint knew Clearwire's market price would *increase* as Sprint's dependence on Clearwire grew. *E.g.*, A2176 ("Clearwire may become more valuable as Sprint traffic and payments increase," meaning that "Sprint may transfer value to other shareholders" in the event of a no-vote). The whole point of Sprint's plan to suffocate Clearwire then swoop in for an acquisition was to *prevent* that result.

[113] Sprint Br. 58 (citing *Agranoff v. Miller*, 734 A.2d 1066, 1073 (Del. Ch. 1999); *Huffington v. Enstar Corp.*, 1984 WL 8209, at *3 (Del. Ch. Apr. 25, 1984)).

stockholder to bleed Clearwire until no one else wanted it. That plan was conceived with one goal in mind: to harm Clearwire while enriching Sprint. Nothing in Sprint's answering brief grapples with, much less refutes, that point.

III. THE PLENARY ACTION SHOULD BE REMANDED AS WELL

Defendants concede—and the Court of Chancery acknowledged—that "[t]he fair price aspect can be the predominant consideration in the unitary entire fairness inquiry."[114] That was true here. The court found that Sprint and SoftBank had engaged in unfair dealing six ways from Sunday, yet it held that the merger was entirely fair because the $5.00 merger price was "substantially more" than the fair value of Clearwire's stock.[115] That finding was driven by the court's determination in the appraisal case that the fair value of Clearwire's stock was only $2.13 per share. In fact, the court expressly *incorporated* its appraisal determination into its discussion of why the merger satisfied entire fairness.[116] This makes sense: "The economic inquiry called for by the fair price aspect [of entire fairness] is the same as the fair value standard under the appraisal statute."[117] It therefore is impossible to disentangle the court's ruling in the plenary action from its valuation in the appraisal action. Accordingly, should the Court remand the appraisal action, it likewise should remand the plenary action.

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[114] Sprint Br. 60 (quoting Op. 67).

[115] Op. 72.

[116] *See* Op. 69 ("As discussed in the [appraisal] section, this decision finds persuasive Professor Bradford Cornell's valuation of Clearwire, which determined that Clearwire had a fair value of $2.13 per share.").

[117] Op. 45 (collecting cases).

Sprint responds that the court relied on more than its $2.13 valuation in finding the $5.00 per-share merger price to be fair.[118] But those additional findings, like the court's valuation, were made without proper consideration of the DISH bid and based on an erroneous view of Clearwire's operative reality. Further, even if the Court of Chancery continues to regard the merger price as "fair" after those legal errors are corrected, it could well decide to award a "fairer" price in light of Sprint's and SoftBank's sharp tactics.[119] After all, the court believed that the $2.97 per-share price was "fair," yet would have awarded damages had the merger closed at that price.[120]

SoftBank, for its part, urges the Court to affirm the aiding-and-abetting claim even if it remands the rest of the plenary case. The Court of Chancery dismissed that claim as a matter of housekeeping when it found that Sprint (the principal) had not breached its fiduciary duties.[121] As best we can tell, SoftBank argues that because Plaintiffs have not separately *sought reversal* on an issue the court below *never reached* (*i.e.*, whether SoftBank acted with scienter), Plaintiffs thereby "waived" their ability to pursue on remand the aiding-and-abetting claim

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[118] Sprint Br. 60-61.

[119] *See, e.g.*, *In re Dole Food Co. S'holder Litig.*, 2015 WL 5052214, at *45 (Del. Ch. Aug. 27, 2015).

[120] Op. 65.

[121] Op. 72-73.

against SoftBank, and therefore *this* Court should affirm as to that claim on the alternative ground (which, again, the court below never reached) that Plaintiffs failed to prove the element of scienter.

SoftBank offers no legal authority for its extraordinary view of appellate practice, nor does it offer any factual basis for this Court to find that SoftBank did not act with the requisite scienter. Should this Court remand the plenary case, it likewise should remand the aiding-and-abetting claim so that the Court of Chancery may consider in the first instance any arguments SoftBank may raise.

CONCLUSION

The Court should vacate the Court of Chancery's orders in both the appraisal action and the plenary action, and remand both actions.

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