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IN THE SUPREME COURT OF THE STATE OF DELAWARE

ACP MASTER, LTD., AURELIUS CAPITAL MASTER, LTD., and AURELIUS OPPORTUNITIES FUND II, LLC,	:	**PUBLIC VERSION** **Filed on December 26, 2017**
Plaintiffs-Below, Appellants,	:	No. 382, 2017
v.	:	On Appeal from the Court of Chancery of the State of Delaware, C.A. No. 8508-VCL
SPRINT CORPORATION, SPRINT COMMUNICATIONS, INC., STARBURST I, INC., and SOFTBANK CORP.,	:	
Defendants-Below, Appellees.	:	
ACP MASTER, LTD., AURELIUS CAPITAL MASTER, LTD., and AURELIUS OPPORTUNITIES FUND II, LLC,	:	
Petitioners-Below, Appellants,	:	No. 380, 2017
v.	:	On Appeal from the Court of Chancery of the State of Delaware, C.A. No. 9042-VCL
CLEARWIRE CORPORATION,	:	
Respondent-Below, Appellee.	:	

APPELLEES SPRINT AND CLEARWIRE'S
ANSWERING BRIEF ON APPEAL

DATED: December 11, 2017

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NATURE OF THE PROCEEDINGS

This consolidated appeal challenges the Court of Chancery's conclusions after a two-week trial that the merger (the "Merger") of Sprint Corporation ("Sprint") and Clearwire Corporation ("Clearwire") was entirely fair to Clearwire's minority stockholders and the fair value of Clearwire stock at the time of the Merger was $2.13 per share.

Appellants (Plaintiffs/Petitioners below) are ACP Master, Ltd., Aurelius Capital Master, Ltd. and Aurelius Opportunities Fund II, LLC (collectively, "Aurelius"). Aurelius is a famously litigious investor in distressed debt. In October 2011, it bought Clearwire debt and urged it to go into bankruptcy. A year later, it bought some Clearwire shares and then sold them all at a profit when the Merger was announced.

But 2012 and 2013 were frothy days for "appraisal arbitrage." The Court of Chancery had issued a series of opinions determining fair values substantially in excess of deal prices. Fair value determinations below the deal price were almost unheard of. Profiting from appraisal seemed like a sure thing. Aurelius bought Clearwire shares and exercised its dissenter's rights, making a $125 million bet that its talented legal team could make money through appraisal litigation, just as others had.

But for its first foray into appraisal arbitrage, it chose poorly.

From the beginning, the merger of Sprint and Clearwire was driven by synergy. The business plan embodied in Clearwire's 2008 recapitalization – that Clearwire would build an independent wireless telecommunications network rented by a variety of wholesale customers – had been a spectacular and costly failure. Sprint stood alone as Clearwire's only customer. The economics of the wireless industry are characterized by high fixed costs (to build a network) and negligible marginal costs (to run traffic over it). Clearwire had wireless spectrum licenses, but needed billions in capital to reboot its network around a different technology in order to have a product (network capacity) that it could sell to Sprint. Sprint wanted to buy network capacity, but was understandably unwilling to hand over capital to the entirely independent board of directors of an independent company. In their commercial negotiations, Sprint and Clearwire attempted to replicate some aspects of a merger by transferring to Sprint both the downside (high up-front fixed costs) and the upside (low marginal costs) of being an "owner" rather than a "renter" of network capacity. But their negotiations were frictious and inefficient because as independent companies they had different interests. Sprint and Clearwire were a business school case study for vertical integration.

Clearwire's Chairman, John Stanton, pitched Sprint (and its soon-to-be controlling stockholder, SoftBank Corp. ("SoftBank")) on the merits of a merger with a deck that included a synergy estimate of more than $3 billion (almost $4 for

every Clearwire share not already owned by Sprint). Sprint management privately advised its board that "Clearwire's standalone business has little to no value," but also estimated billions of dollars in synergies from a merger.

Although Sprint owned a majority of Clearwire shares, Clearwire's corporate governance documents empowered its board (not a single member of which was affiliated with Sprint) and its minority investors to negotiate at arm's-length to capture the value of merger synergies. Clearwire's Equityholders' Agreement (the "EHA") hardwired the dual protections this Court endorsed in *Kahn v. M & F Worldwide Corp.*: the EHA prohibited a merger with Sprint unless it was approved by a majority of the Clearwire directors not appointed by Sprint *and* a majority of the shares not owned by Sprint. (The EHA also gave each member of the "Strategic Investor Group" (the "SIGs") a veto right over a merger with Sprint.) Clearwire's Special Committee and its minority stockholders each used their veto power to extract the synergy value of the Merger for Clearwire stockholders, ultimately inducing Sprint to pay $5.00 per share – an enormous 285% premium to Clearwire's $1.30 per share unaffected price (the "Unaffected Price").

Along the way, Sprint's rival, DISH Network Corp. ("DISH"), sought its own strategic relationship with Clearwire and saw Sprint's efforts to acquire Clearwire as an opportunity to extract strategic value for itself. DISH was the

largest owner of unused spectrum licenses in the country, and also the largest holder of Clearwire debt. Taking advantage of the majority-of-the-minority requirement in the EHA, DISH offered to make a tender offer for Clearwire's minority shares in exchange for governance rights that would give it the ability to block any commercial agreement between Sprint and Clearwire. But after Sprint offered $5.00 per share and the Court of Chancery cast doubt on the enforceability of the governance rights it sought, DISH dropped out of the bidding.

After a lengthy trial, the Court of Chancery found that the $5.00 per share Merger price was "far beyond" what stockholders could have expected by themselves and "substantially more in value than what they had before." The Court of Chancery criticized Sprint and SoftBank for some of the steps they took in their unsuccessful efforts to get minority stockholder approval of the original deal priced at $2.97 per share, but held that any flaws in that process were cleansed by subsequent events that led to the deal priced at $5.00 per share.

The Court of Chancery also rejected Aurelius's argument that, entirely unbeknownst to anyone else, Clearwire was really worth $16.08 per share. Aurelius had bet its case on the argument that Clearwire management's contemporaneous projections should be rejected in favor of a particular scenario prepared by Sprint (the so-called "Full Build Projections"). The central factual dispute at trial was whether Sprint's witnesses were lying (as Aurelius claimed)

when they explained that the Full Build Projections were never intended to reflect Clearwire's operative reality in the absence of a merger, but were merely a "mechanical exercise" designed to show SoftBank that it would be economically disastrous to attempt to pursue an acquisition-based business plan in the absence of an acquisition. The Court of Chancery saw the testimony, weighed the evidence, and found that Sprint witnesses were telling the truth. Then, relying on Clearwire's contemporaneous management forecast, corroborated by extensive market evidence, the Court of Chancery found that Clearwire's fair value was $2.13 per share based on the discounted cash flow ("DCF") methodology that both sides contended was the best method to determine Clearwire's fair value. This appeal followed.

SUMMARY OF ARGUMENT

1. Denied. First, Aurelius is wrong about the standard of review. To be sure, in a statutory appraisal, the law requires the Court of Chancery to consider "all relevant factors." That does not mean that this Court must remand every time the Court of Chancery fails to discuss a particular piece of evidence in the analysis portion of its written opinion. Here, the Court of Chancery's opinion included a thorough discussion of DISH's actions and motives. The fact that the Court of Chancery did not expressly discuss in the appraisal portion of its analysis why DISH's $4.40 per share bid was immaterial to the fair value analysis does not mean the court failed to "consider" it. The Court of Chancery did not rule that DISH's bid was legally irrelevant, but simply concluded that the record evidence proved a fair value lower than $4.40. That conclusion should be reviewed only for abuse of discretion.

Second, there was no abuse of discretion. Record evidence showed that DISH's bids were driven by strategic and commercial value, not Clearwire's standalone value. Indeed, Aurelius concedes at the outset of its appeal brief that DISH "desired a partnership with Clearwire to leverage Clearwire's network infrastructure and expertise." By itself, that defeats Aurelius's argument. Regardless, even if DISH's bids were a piece of evidence pointing to a higher fair value (and they were not), there was a wealth of other evidence in the record

supporting the Court of Chancery's conclusion that Clearwire's fair value was $2.13 per share.

Third, Aurelius wrongly accuses the Court of Chancery of basing its appraisal findings on the assumption that Sprint would breach its fiduciary duties in the absence of a merger. The Court of Chancery never made such an assumption. In any event, the portion of the Opinion to which Aurelius refers was not a "pillar" of the analysis but simply one of many independent factual findings supporting the Court of Chancery's rejection of Aurelius's story at trial. Aurelius does not argue that the others were erroneous.

The Court of Chancery adopted Professor Cornell's opinion of fair value, which in turn was based on a DCF analysis using the Single Customer Case projections (the "SCC") prepared contemporaneously by Clearwire's independent fiduciaries. Aurelius does not contend that when it prepared the SCC, Clearwire management assumed that Sprint would breach any fiduciary duty. Nor does Aurelius contend that in conducting his DCF analysis, Professor Cornell assumed that Sprint would breach any fiduciary duty.

Aurelius's argument also fails because the elements of Sprint's fallback plan, such as keeping Clearwire out of bankruptcy by offering dilutive financing, would not constitute breaches of fiduciary duty.

2. Denied. The Court of Chancery's ruling in Aurelius's breach of fiduciary duty case was not "driven" by its ruling in the appraisal case. The entire fairness test is a unitary standard, and the Court of Chancery appropriately found fairness in both the process and the price of the merger that was actually consummated. The Court of Chancery's conclusion that $5.00 per share was a fair price was not dependent upon its later conclusion that $2.13 per share was Clearwire's fair value under Section 262. Rather, the Court of Chancery relied upon a host of significant market, documentary, testimonial and expert evidence supporting its conclusion that the final transaction was, in the end, fair to Clearwire's stockholders.

COUNTERSTATEMENT OF FACTS

The trial record consisted of more than 2,500 exhibits, twenty-nine lodged depositions, a 547-paragraph Stipulated Pre-Trial Order and live testimony over ten days from eleven fact witnesses and seven experts. (Op. 2)[1] The parties' pre- and post-trial briefing totaled 766 pages. (Op. 2) The Opinion was 95 pages long.

Aurelius does not claim that any of the Court of Chancery's factual findings were erroneous, and yet its Statement of Facts includes many assertions contrary to the facts found. Most notably, Aurelius does not claim that the Court of Chancery erred in resolving the central factual dispute of the trial – finding that Sprint's witnesses were telling the truth when they explained that the Full Build Projections were not intended to represent Clearwire's operative reality, but were a "mechanical exercise" designed to show SoftBank that it would be financially ruinous to attempt to make large-scale use of Clearwire's network without owning Clearwire – and yet, in its Statement of Facts, Aurelius retells the same story the Court of Chancery considered and rejected. (*E.g.*, ACP Br. at 29-36) An appellant is bound to the factual findings of the trial court unless it establishes they were not "supported by the record" and not "the product of an orderly and logical deductive

[1] Citations to the Memorandum Opinion issued by the trial court (the "Opinion"), attached as Exhibit A to Appellants' Opening Brief in Nos. 380, 2017 and 382, 2017 ("ACP Br."), will be in the form "(Op. __)."

reasoning process." *See CDX Holdings, Inc. v. Fox*, 141 A.3d 1037, 1042 (Del. 2016). By not challenging these factual findings in its opening appeal brief, Aurelius's "ability to challenge t[hese] finding[s] has been waived on appeal." *Wheeler v. Wheeler*, 636 A.2d 888, 892 (Del. 1993). *See also* Supr. Ct. R. 14(b)(vi)(A)(3); *RBC Capital Mkts., LLC v. Jervis*, 129 A.3d 816, 850 (Del. 2015) (affirming trial court's judgment because "RBC does not challenge the predicate factual findings upon which the trial court's *Revlon* holding rests" and "[t]here [wa]s sufficient evidence in the record to support the trial court's conclusions").

The facts presented in this Counterstatement are taken from the Opinion and the record in this case.

A. Clearwire Was Formed To Provide Capacity To Network Operators.

In November 2008, Clearwire was recapitalized. (Op. 2; A3328 ¶ 95) Sprint contributed all of its 2.5 GHz spectrum to Clearwire in exchange for 51% of the equity. (Op. 2; A3328-29 ¶¶ 95, 97) The SIGs – Comcast, Intel, Time Warner, Google and Bright House Networks – contributed $3.2 billion in cash in exchange for 22% of the equity. (Op. 2; A3329 ¶ 96) Clearwire's business plan was to use the SIGs' cash to construct the world's first 4G wireless network and then sell that capacity wholesale to Sprint, the SIGs and others. (Op. 3)

B. Clearwire's Equityholders' Agreement Prevented Sprint From Controlling Clearwire.

Clearwire, Sprint, Clearwire's founder, Craig McCaw (through his entity, Eagle River), and the SIGs entered into the EHA. (Op. 2; A3318 ¶ 47) The EHA was incorporated into Clearwire's charter. (Op. 2 n.1) The EHA gave governance rights to each of the EHA parties, and precluded Sprint from controlling Clearwire. (B16:8-19 (Hersch))

For example, the EHA allowed Sprint to nominate only seven of Clearwire's thirteen directors, and one of those seven had to be independent. (Op. 2; B1878-79) After June 2011, antitrust concerns caused Sprint to nominate independent directors to all of its seven seats. (A3333 ¶ 110; B1880) Through consummation of the Merger, no Clearwire director had any affiliation with Sprint. (A3333 ¶ 110)

The EHA prohibited any "Related Party Transaction," including any commercial agreement with Sprint, unless it was approved by a majority of disinterested directors. (B1634, 1715) The EHA also prohibited a Sprint-Clearwire merger unless it was approved by both a majority of non-Sprint nominees to the Clearwire board of directors (the "Board") and a majority of non-Sprint shares. (Op. 3; A3332 ¶ 105; B1634, 1673-74) Key corporate decisions,

including the appointment or removal of the CEO and his or her direct reports, required approval of at least ten of thirteen directors. (A3330-31 ¶ 102)

C. Clearwire's Business Plan Failed Immediately.

Sprint followed through on the business plan with a wholesale agreement to buy network capacity from Clearwire, but the SIGs never bought any material amount of wholesale capacity from Clearwire. (Op. 3) Sprint became Clearwire's only major customer. (Op. 3) Despite Clearwire's constant attempts to find a second major wholesale customer, Clearwire's survival depended on Sprint. (Op. 2) Making matters worse, Clearwire's chosen 4G wireless standard, WiMAX, lost out in a VHS/Betamax-style battle to LTE. (Op. 3; A3335-36 ¶ 122)

D. Clearwire Tried Unsuccessfully To Find Additional Revenue.

Recognizing Clearwire's distress, the Board established a strategic committee of independent directors, including Chairman Stanton, to explore alternatives (the "Strategic Committee"). (Op. 3-4) Among other things, they sought to raise money by selling a substantial block of spectrum. (Op. 4; B1896)

The Strategic Committee also looked at a merger between Clearwire and its only major customer, Sprint. (B1954; B1978-79; B5:8-B7:4 (Schell)) Sprint and Clearwire frequently discussed a merger, but Sprint could not afford to add Clearwire's debt to its balance sheet. (*E.g.*, B1952; B1966-67; B3:20-B4:2 (Schell); B35:7-B36:16 (Cowan)) Instead, Sprint regularly provided "lifeline"

financing to keep Clearwire out of bankruptcy. (B31:18-B33:5 (Cowan); B59:4-17 (Stanton)) In June 2011, Sprint gave back a portion of its voting position to drop below 50% and prevent a cross-default if Clearwire went bankrupt. (Op. 4)

E. Aurelius Invested In Clearwire's Distressed Debt And Lobbied For Bankruptcy.

When the Strategic Committee struck out, Clearwire knew its survival depended on its ability to provide LTE capacity to Sprint and others. (Op. 4) To do that, it needed an LTE network. (Op. 4) Clearwire had already incurred billions in debt from building its WiMAX network (A3335 ¶ 119; B1905, 1912-13); now it had to spend billions more to convert to LTE. (Op. 4; B8:10-B9:2 (Schell); B2575-76)

Along came Aurelius. Aurelius is a hedge fund "primarily focused on activist distressed investing." (B2190) Aurelius's core strategy is to buy debt of financially distressed companies and then wage creative legal campaigns, sometimes succeeding and sometimes failing. (B1946-49) In October 2011, Aurelius began buying Clearwire's first lien debt at a steep discount. (A3340 ¶ 142; B2794-800; B1987) Aurelius called Clearwire and urged it to file for bankruptcy. (A3341 ¶ 146; B1983-84) In December 2011, Aurelius expected that "there will be a [Clearwire] bankruptcy absent a miracle." (B1985)

F. Sprint Continually Pressed Clearwire For Lower Rates To Permit It To Increase Traffic Volume.

In November 2011, Clearwire asked Sprint to prepay for rental of the LTE network Clearwire hoped to build. (Op. 4) Sprint wanted lower rates. (*Id.*) The parties reached a compromise whereby Sprint would pay a flat fee of $926 million to rent unlimited capacity on Clearwire's existing WiMAX network for two years in exchange for agreeing to make $350 million in pre-payments for future LTE capacity, which would accrue at $5.00 to $6.00 per gigabyte. (Op. 5) Sprint also received a right of first refusal over any sale of Clearwire's "'core spectrum.'" (*Id.* (citation omitted))

G. Clearwire's Original Investors Fled, And The Market Rejected Clearwire Commercially And Financially.

Days after Sprint and Clearwire finalized their revised commercial partnership, the SIGs made their abandonment of Clearwire public. Comcast, Time Warner and Bright House announced that they had agreed to buy network capacity from Verizon. (Op. 5) In March 2012, Google sold all of its Clearwire shares at $2.26 per share. (*Id.*; A3344 ¶ 156) While Sprint, Eagle River and the SIGs each had a Right of First Offer ("ROFO") under the EHA for Google's shares, none chose to buy. (A3344 ¶ 156)

Clearwire continued to burn cash. It tried a public offering in May 2012, but abandoned it in July after the price plunged through the $1.20 per share floor.

(A3346 ¶ 163) Clearwire "'talked to every conceivable party,'" but its efforts to find another major wholesale customer and to sell spectrum continued to go nowhere. (Op. 5-6 (citation omitted)) At a July 24, 2012 Board meeting, management told the Board that Clearwire only had "'sufficient cash to get through the first half of 2013.'" (Op. 6 (citation omitted)) Clearwire's two sets of "ordinary course" projections, the SCC and the Multi Customer Case (the "MCC"), had funding gaps of $4 billion and $2 billion, respectively. (Op. 20; B2575)[2]

In September 2012, Time Warner sold all of its shares for $1.37 per share. (A3351 ¶ 180) Once again, no one exercised its ROFO. (*Id.*)

H. SoftBank Sought To Merge Sprint And T-Mobile To Compete With Verizon And AT&T.

In July 2012, SoftBank began negotiations with both Sprint and T-Mobile to finance a merger of the two companies. (Op. 7) SoftBank sought to create a strong third U.S. wireless company to compete with Verizon and AT&T. (Op. 6)

When talks stalled, SoftBank's founder, Chairman and CEO, Masayoshi Son, pivoted and decided to acquire Sprint first. (Op. 7) However, Son never gave up on acquiring T-Mobile. (*Id.*)

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[2] The SCC assumed that Sprint remained Clearwire's only large wholesale customer, and the MCC assumed that Clearwire obtained additional large wholesale customers. (Op. 20)

SoftBank had experience with 2.5 GHz spectrum in Japan and wanted Sprint to explore acquiring Clearwire. (Op. 6-7) SoftBank anticipated that Sprint would pay $2.00 per share to acquire Clearwire. (Op. 7)

I. Sprint Bought Eagle River's Clearwire Shares To Unlock The SoftBank Transaction.

SoftBank's lenders refused to fund a transaction with Sprint unless Sprint cleared a path to be able to nominate a majority of non-independent Clearwire directors. (Op. 7) Sprint could achieve that under the EHA if one of the other SIGs or Eagle River sold their shares. (Op. 7-8)

On October 11, 2012, news of the Sprint-SoftBank transaction leaked and Clearwire's stock jumped over 70% from $1.30 per share to $2.22. (Op. 8-9) Eagle River now knew of SoftBank's interest. (Op. 9) Exploiting its leverage, Eagle River drove up the price for its block of Clearwire shares (which included certain governance rights) to $100 million, which worked out to $2.97 per share. (Op. 9-10; A3354-55 ¶ 194; B2160-61) Sprint told SoftBank that the unique strategic benefits and "streamlin[ing]" of Clearwire's governance justified paying the price for Eagle River's small number of shares and was "most definitely … not an indication of what Sprint is willing to pay per share across the entire base of Clearwire shares." (B2160-61) Again, no SIG exercised its ROFO. (Op. 10)

On October 15, 2012, Sprint and SoftBank announced that SoftBank had agreed to acquire 70% of Sprint for approximately $20 billion. (A3355 ¶ 197) Aurelius bought Clearwire stock for the first time that same day. (A3356-57 ¶ 201)

J. The "First Phase" Begins: With The Board's Approval, Stanton Tries To Get Sprint To Buy Clearwire.

The Court of Chancery found that the Merger process had "two phases." (Op. 49-50) Phase one began in earnest when the Sprint-SoftBank merger leaked. During October and early November 2012, Stanton continuously updated the members of Clearwire's Strategic Committee and Audit Committee on the day-to-day developments with Sprint, and the Clearwire directors met frequently. (B1997 (Oct. 5, 2012); B2007 (Oct. 7, 2012); B2020 (Oct. 8, 2012); B2028 (Oct. 9, 2012); B2038 (Oct. 10, 2012); B2044 (Oct. 11, 2012); B2046 (Oct. 11, 2012); B2048 (Oct. 12, 2012); B2060 (Oct. 14, 2012); B2103 (Oct. 15, 2012); B2114 (Oct. 21, 2012); A1368-71 (Oct. 29, 2012); B2166 (Nov. 2, 2012); B2187 (Nov. 4, 2012); B2191 (Nov. 6, 2012); B2196 (Nov. 9, 2012); B1998; B2102; B2116; B2128; B2143; B2189) The Board favored "aggressively" pursuing an offer from Sprint and SoftBank. (B2156; B11:3-23 (Schell); B21:12-21, B22:22-B23:12 (Hersch))

On November 2, 2012, Stanton delivered a presentation to Son, Ron Fisher (SoftBank's Vice Chairman) and Dan Hesse (Sprint's CEO) designed to get Sprint

to make an offer to buy Clearwire. (Op. 12; B2167-84) Stanton extolled an estimated $3 billion of synergies from a merger. (Op. 12; *see also* B2508)

K. While Clearwire Negotiated With DISH And Sprint, DISH Bought Up Clearwire's Debt.

At the same time, Clearwire also courted DISH. Clearwire-DISH negotiations had been ongoing since 2011. (A244-45; B1994; B2199) In August 2012, DISH made a proposal to acquire a chunk of Clearwire's best spectrum for $2.2 billion and to provide Clearwire with convertible financing at $1.25 per Clearwire share. (A3348 ¶ 170; A669) DISH was not interested in Clearwire's standalone value. As Aurelius concedes, DISH said that its proposed investment in Clearwire "has been developed as a coordinated program of financial, strategic and commercial arrangements," which would "allow DISH and Clearwire to work together to economically bring high capacity, high speed mobile and fixed broadband services to the majority of the United States population." (ACP Br. at 12-13 (internal quotations omitted))

Clearwire did not think it could sell the spectrum DISH wanted because "we don't have the channels, or the channels are in use." (B2152) Nevertheless, Clearwire engaged Evercore Group LLC ("Evercore") to help negotiate with DISH. (A3348-49 ¶ 171) At the same time, DISH acquired approximately 18% of Clearwire's debt at substantial discounts, which DISH could credit-bid at face

value in a Clearwire bankruptcy. (A3357-58 ¶ 206; B2154-55; B2191-95; B2426; B2561; B46:21-B48:3 (Schwartz))

L. Clearwire Created A Special Committee From Its Entirely Independent Board.

Anticipating an offer from Sprint, on November 5, 2012, the Strategic Committee and Audit Committee of the Board met and agreed it was time to ask the Board to form a special committee to oversee negotiations with Sprint and DISH. (Op. 13; B18:6-12, B19:2-8, B20:5-15 (Hersch)) They also agreed that Clearwire would need bridge financing in any deal with Sprint so that it could stay out of bankruptcy long enough to complete a transaction. (Op. 13; B24:16-B25:10 (Hersch))

The Board formed the special committee on November 13, 2012, consisting of Dennis Hersch, Ted Schell and Kathleen Rae (the "Special Committee"). (Op. 15-16) Like the rest of the Board, none of the Special Committee members had ties to Sprint. (Op. 16) They were "informed, independent fiduciaries." (Op. 65)

The Special Committee selected Stanton to lead negotiations "because he was a 'legendary figure in the telecommunications world' who 'would have enormous credibility and impact in negotiating with Sprint and Soft[B]ank.'" (Op. 16)

M. The Special Committee Extracted A Huge Premium.

On November 21, 2012, Sprint sent Clearwire its initial offer of $2.60 per share, representing a 100% premium over the Unaffected Price and a 22% premium over Clearwire's $2.12 closing price the prior day. (Op. 16-17) (DCF analyses of Clearwire presented to the Sprint board of directors (the "Sprint Board") valued Clearwire at $1.11-$1.12 per share. (A1146)) Sprint also proposed $600 million in convertible financing with a 1% interest rate and a $1.25 per share conversion price. (Op. 17; A3363 ¶ 230)

On December 3, 2012, the Special Committee met and evaluated its alternatives. Its independent financial advisor, Centerview Partners LLC ("Centerview"), warned in publicly filed board presentations that DISH "[m]ay seek [to] pursue conversion of debt securities into controlling equity position" and "[w]ill have standing to influence process and has expertise in chapter 11 spectrum deals …; has resources to aggressively pursue investment." (B2430-31) The Special Committee determined that a spectrum sale would not solve Clearwire's long-term cash needs, and that stockholders' recovery in bankruptcy was not likely to exceed Sprint's initial offer of $2.60 per share. (Op. 17) Knowing Sprint's offer was the best option available, the Special Committee still countered at $3.15 per share. (Op. 17; A3365-66 ¶ 241) Clearwire got Sprint to raise its price to

$2.80 and then to $2.90, and each time the Special Committee countered with $3.15. (Op. 18-19)

On December 12 and 13, 2012, the Sprint Board met to determine whether to offer Clearwire the same $2.97 per share price it agreed to pay Eagle River. The Sprint Board approved the increase to $2.97. (B2201-02) SoftBank also gave its consent. (A3371-72 ¶ 263)

On December 16, 2012, the Special Committee and full Board met to consider Sprint's $2.97 offer. DISH had refused to increase its price. (Op. 20) Both the Special Committee and Centerview concluded that Clearwire's MCC projections were not viable and that the SCC projections reflected Clearwire's operative reality. (Op. 21) (Centerview's DCF analysis of the SCC topped out at $0.75 per share. (Op. 21)) Both the Special Committee and the Board received fairness opinions from their respective independent financial advisors. (Op. 20; A3373-74 ¶¶ 269-270) Both voted unanimously to accept Sprint's $2.97 offer. (A3373-74 ¶ 270; B2213-15)

On December 17, 2012, Sprint and Clearwire announced that the parties had entered into a merger agreement at $2.97 per share. (Op. 21-22) As required by the EHA, the Merger was conditioned on approval of a minority of non-Sprint shares and each of the SIGs. (Op. 22) The remaining SIGs (Intel, Comcast and Bright House) each entered into voting agreements and ROFO agreements

whereby Sprint agreed to buy their shares at the then-prevailing Sprint offer if the Merger were voted down. (Op. 22; A3375 ¶ 275)

At $2.97, Aurelius got out. By December 31, 2012, it had sold all of its Clearwire shares. (A3379 ¶ 284)

N. The "Second Phase" Begins: DISH's Proposal "Changed The Negotiating Landscape."

After the $2.97 merger agreement was executed, the Special Committee received (and exploited) new leverage from two additional sources: (1) a vocal and well-capitalized group of minority stockholders who held out for a higher price and (2) DISH.

Some Clearwire stockholders began a public campaign to hold out for more. (Op. 22-23) One particularly vocal minority stockholder, Glenview Capital Management, LLC ("Glenview"), thought the Special Committee had done well to get $2.97, but believed that Sprint would pay more because "[s]ometimes it's about what it's worth to [the] acquirer." (A1428)

DISH responded to the $2.97 announcement by telling Clearwire that it would make a tender offer at $3.30 per share. (Op. 23) However, it conditioned its tender offer on, among other things, the Board agreeing to give DISH governance rights, a commercial agreement to use Clearwire's network and a sale

of a large block of Clearwire's best spectrum. (Op. 23; A3378 ¶ 281; A1444, 1446-47)

DISH had been trying to enter the wireless market, and had spent billions acquiring 2.0 GHz spectrum from bankrupt companies. (Op. 11; B2571) DISH recently had received approval to use its satellite spectrum for cellular wireless use. (A3369 ¶ 254) However, DISH still needed a network – both to realize value for its spectrum and to satisfy the FCC's requirement that it cover 40% of the population within four years. (Op. 11; B2243-44; B2692) A commercial agreement with Clearwire could accomplish both.

"DISH's intervention at $3.30 per share changed the negotiating landscape." (Op. 23) It "started a bidding war." (Op. 23, 58) Even though the Special Committee believed that the governance rights DISH demanded made its proposal non-actionable, to "'leverag[e]'" Sprint, the Special Committee began negotiating with DISH. (Op. 23-24)

After several months of negotiating with Clearwire, on April 15, 2013, DISH switched tactics and made a competing offer for *Sprint*. (Op. 25) DISH hoped that its Sprint proposal would help defeat the Sprint-Clearwire Merger and then DISH could use its large stake in Clearwire debt to acquire Clearwire's spectrum in bankruptcy. (Op. 25-26)

Stanton warned Sprint that Clearwire's minority stockholders would not approve the Merger at $2.97 per share and that Clearwire then faced bankruptcy, where DISH would be waiting. (Op. 26, 30; B2559-60; B2561-62)

O. Sprint Considered Alternatives To A Merger And Bumped To $3.40.

Faced with defeat, the Sprint directors began to consider a price bump and Sprint's fallback options if the Merger were voted down. In a presentation to the Finance Committee of the Sprint Board on May 5, 2013, Sprint management recommended a bump and presented a plan for offering Clearwire $1 billion in financing to keep it out of bankruptcy. (Op. 27-28) All Clearwire stockholders would be invited to participate in the financing *pro rata*. (Op. 28, 31, 82; A2059; B2577; B40:12-18 (Schwartz)) The presentation also contemplated acquiring Clearwire a year later for the same $2.97 per share price. (A2079; B41:3-19 (Schwartz)) The Sprint Finance Committee resolved to authorize a price increase and "to 'continue to work on the financing plan' as a fallback." (Op. 28 (citation omitted))

On May 20, 2013, the Sprint Board met to consider a price increase as well. Management made clear that its recommendation of a price bump was not based on Clearwire's intrinsic value, stating: "Clearwire's standalone business has little to no value." (A2176; B42:12-B43:9 (Schwartz)) Instead, management justified the

price increase by pointing to synergies, telling the Sprint Board that the "Clearwire acquisition provides synergies estimated at $1.5B - $2.0B NPV, [or] $1.95 - $2.60 per non-Sprint owned Clearwire share …." (A2176; *see also* Op. 75, 76 n.243) These synergy estimates represented "just the most easily identifiable duplicative costs and didn't capture all of the cost savings that would arise from being able to manage the network directly." (B2841:1-B2843:3 (Schwartz Dep.))

The Sprint Board approved a price increase to $3.40 per share. SoftBank consented. (Op. 30) Clearwire agreed. (A3389-90 ¶¶ 336-337)

P. DISH Launched A Tender Offer, And The Special Committee Recommended Against The Merger.

On May 29, 2013, DISH re-entered the Clearwire process and made a tender offer for $4.40 per share, conditioned on the same financing and governance rights it sought originally (the "DISH Tender Offer"). (Op. 32; A3392 ¶¶ 345-346) To "'maximize[] [its] leverage with Sprint,'" the Special Committee and the Board recommended in favor of the DISH Tender Offer. (Op. 34; A3395-96 ¶¶ 359-360) Sprint sued Clearwire and DISH in the Court of Chancery to prevent Clearwire from giving away Sprint's rights. (A3398-99 ¶ 367)

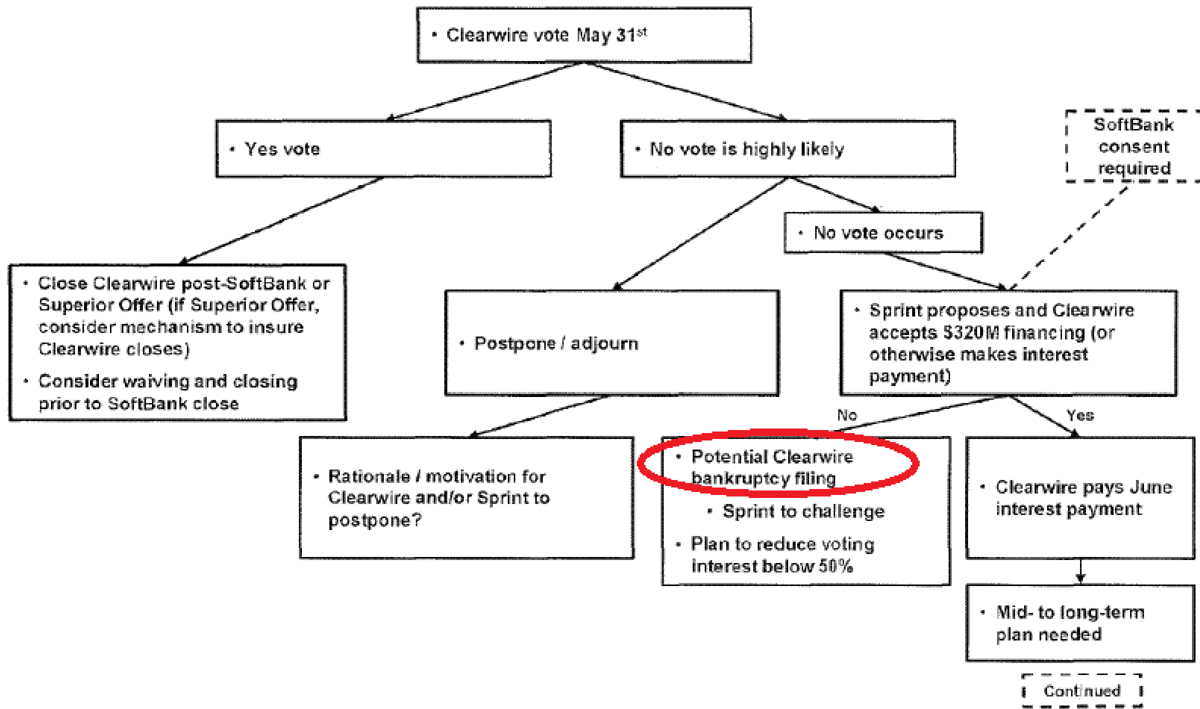
Q. Sprint Again Considered Alternatives, And, Fearing DISH And A Potential Clearwire Bankruptcy, Agreed To Bump To $5.00.

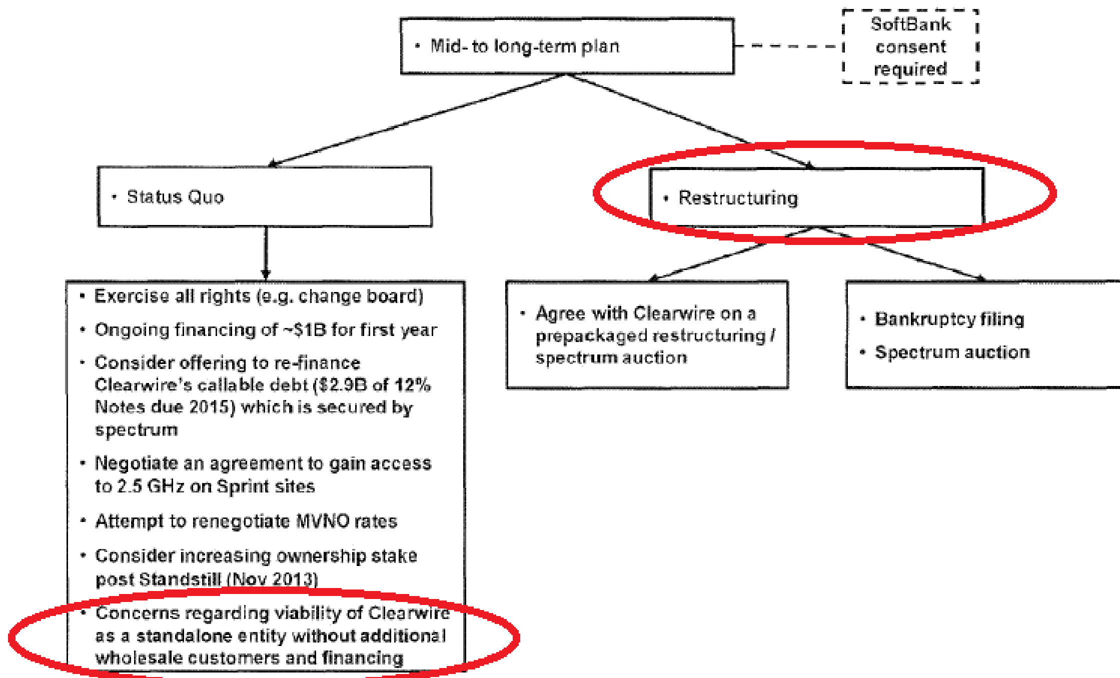
The same day DISH made its $4.40 per share offer, the Sprint Finance Committee met to discuss alternatives. Management outlined components of

Sprint's plan in the event of a "no" vote, which included: (1) reducing Sprint's voting interest to below 50% "'[t]o avoid potential cross-default risk, … similar to what has been done in the past'" and (2) approximately $1 billion in financing for Clearwire's upcoming interest payment and to continue operations. (Op. 33, 82-83; *see also* A2348)[3]

Management presented the Sprint directors with a decision tree. (Op. 33) The "No vote" branch of the tree resulted in a possible Clearwire bankruptcy at every turn, and the "Status Quo" included the same references to lifeline-type financing and concerns about a Clearwire bankruptcy that Sprint had faced for years:

[3] The Sprint Board received the same presentation the next day. (Op. 33-34; A2386-91)





(A2349-50; A2389-90 (emphasis added); Op. 33-34)

DISH's conduct "exposed a fault line between Soft[B]ank and Sprint" because Sprint thought it should bump again and SoftBank did not. (Op. 34) SoftBank viewed $3.40 as its "'best and final offer.'" (Op. 30 (citation omitted); B2664; B2665-66) SoftBank, which had left public floats in other mergers (including its merger with Sprint), thought another bump was too rich for Clearwire. (Op. 34)

Sprint management created a presentation titled "Clearwire Alternatives" designed to help convince SoftBank that Sprint needed to increase its offer. (Op. 35) It listed four alternatives: (1) the cost to bump; (2) the estimated cost to try to effectuate the aggressive network plan that Sprint had prepared on the assumption that it owned Clearwire, but without owning Clearwire ("Alternative 2"); (3) the estimated impact of a smaller network build under the existing wholesale agreement (the "Limited Build"); and (4) a list of some alternative spectrum purchase options. (Op. 35-36)

Alternative 2 summarized the Full Build Projections. As the Court of Chancery found, the Full Build Projections "did not represent Sprint's plans for Clearwire if the Clearwire-Sprint Merger did not close" (Op. 84) and "were not created in the ordinary course of business" (Op. 78). Instead, the Full Build Projections were a "'mechanical exercise'" that took the network plan that Sprint had built on the assumption that it acquired Clearwire (and could then use its

network and spectrum for little marginal cost) and instead assumed that Sprint attempted to replicate the same network plan while buying capacity from Clearwire on a marginal basis. (Op. 35-36 (citation omitted)) Not surprisingly, the financial impact was enormous: negative $23.9 billion in Operating Income Before Depreciation and Amortization ("OIBDA").[4] (A2876)

The Court of Chancery found that it was "implausible that Sprint's demand for spectrum would not decrease" if it had to rent Clearwire capacity. (Op. 78-79 ("Sprint in fact would use less spectrum because paying Clearwire for spectrum had a much higher marginal cost.")) It also found that Sprint management had concluded that the Limited Build, which assumed much less use of Clearwire's network and correspondingly lower payments to Clearwire, was (from Sprint's perspective) financially superior to the Full Build because subscriber loss under the Limited Build was "'more than offset by the savings from the much lower 2.5 tonnage and resulting payment to [Clearwire].'" (Op 37 (citation omitted))

On June 17, 2013, the Sprint Board met to determine whether to increase the offer for Clearwire. Management's presentation added a new slide that listed the reasons for management's request to bump the Merger price again:

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[4] OIBDA is "'effectively the same' as EBITDA." (Op. 80 n.259 (citation omitted))

Rationale for Updated Approach

- Sprint's preference is to acquire 100% of Clearwire, but with a fall back position if that was not possible, Sprint could reasonably expect to enter into a commercial agreement that would provide access to 2.5 GHz. There was also a possible path to acquiring Clearwire at a later date at a reasonable price.
- Dish tender creates significant risk to this plan. If Dish obtains its desired stake and some or all of its desired governance rights, Sprint may not be able to (1) enter into a commercially reasonable agreement with Clearwire to access 2.5 GHz, and (2) acquire the remaining stake in Clearwire at a reasonable price.
- There has been no change to the intrinsic value of Clearwire. We remain convinced that the original price of $2.97 was full and fair. All estimates of Clearwire value using traditional DCF methodologies, including Clearwire's Single Customer Case (Clearwire has stated that its Multi Customer Case does not appear viable), provide values well below Sprint's initial offer to Clearwire.
- Given Sprint's current network deployment plan, a successful Dish tender could create substantial "hold up" value: Dish's potential ability to block Sprint's current plans could create a negative impact on Sprint that exceeds Clearwire's value, while also destroying value for Clearwire.
- Given these circumstances, management recommends pursuing an amendment to the Merger Agreement at an increased price.

(Op. 38; A2946) The Sprint Board "agreed to pay that [$5.00] price because of the massive synergies from the transaction and the threat that DISH posed as a hostile minority investor." (Op. 70) It never saw Alternative 2 or the Full Build Projections. (Op. 38)

R. SoftBank Negotiated Directly With The Vocal Minority To Reach A Market-Clearing Price.

SoftBank believed that, in the event of a "no" vote, Sprint could "increase [its] ownership [of Clearwire] at a much lower valuation" over the next couple of years and Sprint would have been "able to enter into commercial arrangements that would be workable." (B2665) But the spectre of DISH in the Clearwire boardroom with the ability to block commercial arrangements between Sprint and

Clearwire persuaded SoftBank to agree to pay "headache medicine" and consent to a bump. (Op. 70; A3592:23-A3595:11 (Son); B51:1-B52:12, B53:9-17 (Fisher))

Stanton pushed Fisher to negotiate directly with Glenview to find a market-clearing price. (B2679; B67:15-B68:16 (Stanton)) On June 19, Fisher negotiated with Glenview over a Clearwire price, and they agreed that the so-called "Gang of Four" would support the Merger for $5.00 per share. (Op. 39) Fisher reported to Son that the price was "'higher … than what I would have liked but we eventually agreed to settle on this as a price that neither of us are happy with, but gets the deal done.'" (Op. 39 (citation omitted))

After reaching agreement with the Gang of Four, on June 19, 2013, Sprint increased its offer to $5.00 per share for all Clearwire stockholders. (Op. 39) The Special Committee weighed Sprint's offer against continued discussions with DISH and, after receiving a revised fairness opinion from Centerview, recommended unanimously in favor of the Merger. (Op. 40; A3400 ¶ 373) The Board, after receiving a revised fairness opinion from Evercore, likewise unanimously approved the $5.00 per share offer. (Op. 40; A3400 ¶ 374) A few hours later, at a preliminary hearing on Sprint's suit against Clearwire and DISH, the Court of Chancery stated that Sprint's challenge to Clearwire's attempt to give governance rights to DISH had "'vibrant, vibrant color'" "because it [was] absolutely clear that DISH will not pay the stated amount [$4.40] solely to the

stockholders of Clearwire simply to get the shares and the rights that attach to those shares currently." (A3004; A3400-01 ¶ 376) DISH never made another offer. (Op. 67)

$5.00 per share represented a 285% premium to the Unaffected Price. 82% of the non-Sprint shares voted in favor of the Merger, which closed on July 9, 2013. (Op. 40; A3401-02 ¶¶ 377, 386)[5] The Sprint-SoftBank merger closed the next day. (Op. 40)

[5] Excluding Intel, approximately 70% of the non-Sprint shares approved the Merger. (Op. 50, 63, 71) The Court of Chancery found that Comcast and Bright House "agreed to sell … solely because they believed that price was a good one" and that "Intel's vote had no effect on the outcome." (Op. 63, 68)

ARGUMENT

I. THE COURT OF CHANCERY PROPERLY CONCLUDED THAT THE FAIR VALUE OF CLEARWIRE SHARES WAS $2.13 PER SHARE.

A. Question Presented.

Did the Court of Chancery abuse its discretion when it concluded, under 8 *Del. C.* § 262, that the fair value of Clearwire's shares on July 9, 2013 was $2.13 per share? (Op. 95)

B. Scope Of Review.

This Court applies "an abuse of discretion standard and grant[s] significant deference when [it] review[s] factual findings in a statutory appraisal proceeding." *Golden Telecom, Inc. v. Glob. GT LP*, 11 A.3d 214, 217 (Del. 2010). "The Court of Chancery abuses its discretion only when either its factual findings do not have record support or its valuation is clearly wrong. This is a formidable standard and [the Court] accord[s] Court of Chancery determinations of value a high level of deference on appeal." *Id.* at 219. A decision by the trial court to "'ignore[]'" certain evidence "is within the discretion of the trial court" and "will not be second-guessed on appeal." *SIGA Techs., Inc. v. PharmAthene, Inc.*, 132 A.3d 1108, 1135 n.155 (Del. 2015).

C. Merits Of Argument.

Aurelius claims that the Court of Chancery made two errors in the appraisal case. First, it says the Court of Chancery erred by appraising Clearwire "without considering DISH's bid." Second, it says that the Court of Chancery erred by appraising Clearwire "on the assumption that Sprint would continue to breach its fiduciary duties." Both claims are wrong.

1. The Court of Chancery did not abuse its discretion by not finding that the DISH Tender Offer established a lower bound of fair value.

Aurelius claims that the trial court erred because it calculated the fair value of Clearwire shares "without regard for the amount that a third party had bid for a minority stake in Clearwire," namely the $4.40 per share DISH Tender Offer. (ACP Br. at 42) Aurelius argues that "DISH's bid establishes a *lower bound* on Clearwire's value." (ACP Br. at 43)

(a) The Court of Chancery's determination of the weight to give the DISH Tender Offer in determining fair value was factual, not legal.

Aurelius says the Court of Chancery made an error of law, but the conclusion it challenges was one of fact. Aurelius cannot identify any legal ruling. The Court of Chancery did not hold that the DISH Tender Offer was legally irrelevant. Nor did it bar evidence of the DISH Tender Offer under Delaware Rule of Evidence 402. Aurelius does not identify anything in the appraisal statute or in

prior case law that compelled the Court of Chancery to conclude that DISH's bid established a "lower bound" for Clearwire's fair value. Instead, Aurelius simply argues that DISH's bid should have persuaded the court that Clearwire's fair value was at least $4.40 per share. The Court of Chancery's determination about whether or not DISH's bid was persuasive evidence of fair value, when combined with all of the other evidence in the case, was a factual matter, submitted to its discretion. A trial court does not "commit[] legal error every time it adopts a view of the evidence contrary to that held by the losing party." *Rapid-American Corp. v. Harris*, 603 A.2d 796, 802 (Del. 1992).

(b) The Court of Chancery did not fail to consider the DISH Tender Offer.

In any event, there is no reason to believe that the Court of Chancery failed to "consider" the DISH Tender Offer. The fact that a trial court does not reference a piece of evidence in a particular portion of its written ruling does not mean that it was not considered. *See Vargas v. Gamino*, 918 A.2d 339, 2007 WL 39316, at *1 (Del. Jan. 8, 2007) (TABLE) (rejecting argument that evidence was not considered because it was not addressed in opinion). To hold otherwise would impose an entirely unworkable burden upon the trial courts.

Regardless, the Opinion is chock-full of references to DISH and its various proposals and motivations. (Op. 11, 16, 18, 20, 23-26, 32, 34-35, 38-40, 49-50, 55, 58, 63-67, 69-70, 72, 78, 90, 92-94) The trial court found that DISH:

- "wanted to enter into the cellular wireless market" (Op. 11);
- "lacked a network of its own" (Op. 11);
- conditioned its offers on "governance rights, including the right to veto 'material transactions with related parties (including Sprint)'" (Op. 23 (citation omitted); *see also id.* at 32, 66);
- "thought that its merger proposal [for Sprint] would encourage Clearwire's stockholders to vote down the Clearwire-Sprint Merger, and that Clearwire would then file for bankruptcy" (Op. 25-26); and
- believed it "could … acquire Clearwire's spectrum cheaply through a bankruptcy auction" (Op. 26).

Each of these factual findings, unchallenged by Aurelius, supports a conclusion that DISH's proposals were not based on Clearwire's standalone value.

It is more than a little brassy for Aurelius to ask this Court to infer that the Court of Chancery failed to consider the DISH Tender Offer simply because the court did not refer to it in the appraisal portion of its analysis. Aurelius itself made no mention of DISH in the appraisal portion of its 42,000 word post-trial answering brief. (A3906-09) Nor, at post-trial argument, did Aurelius's counsel even once mention "$4.40," much less argue that it was relevant to fair value. No one who saw the trial or read the pre- and post-trial briefs could have thought that

Aurelius contended that the DISH Tender Offer was persuasive evidence of Clearwire's standalone value; Aurelius said fair value was $16.08 per share based on the Full Build Projections. Indeed, under *Aurelius's* theory of the case, DISH's bid was irrelevant; it was *Defendants* who pointed to market evidence and the actions of Clearwire's independent fiduciaries to corroborate their expert's DCF analysis. By contrast, the consistent and central theme of Aurelius's valuation case before the trial court was that market- and Clearwire-based valuation evidence was irrelevant because Clearwire's *true* operative reality was hidden from everyone but Sprint (because only Sprint knew that it supposedly planned to pay billions of dollars to Clearwire for network capacity). (A3820-46, 3878-79, 3890, 3906-09; A3939, 3994-99, 4013-23) The only time Aurelius argued that DISH's offer was relevant to the appraisal case was in a post-trial *sur-reply* brief, where it argued that DISH's offer was one of several facts allegedly undercutting Defendants' argument that market-based evidence corroborated Professor Cornell's DCF valuation of $2.13 per share. (A3988-92) This Court can reject an argument on appeal that "did not feature in the same way" before the trial court. *See DFC Glob. Corp. v. Muirfield Value Partners, L.P.*, --- A.3d ---, 2017 WL 3261190, at *12-13 (Del. Aug. 1, 2017); *Alaska Elec. Pension Fund v. Brown*, 988 A.2d 412, 420 (Del. 2010).

(c) DISH's offer was based on DISH's strategic and commercial interests, not Clearwire's standalone value.

The Court of Chancery correctly concluded that fair value was less than the $4.40 per share DISH offered. Aurelius says that was error because the fair value of Clearwire cannot be less than a third party offered for a minority stake. No case holds that, and no expert opined that.

Fair value in a statutory appraisal is "stand-alone value"; it "exclude[s] any portion of value that might be attributed to a synergy premium a buyer might pay." *DFC Glob.*, 2017 WL 3261190, at *16. Aurelius concedes that offers can sometimes exceed fair value because of expected synergies, but dismissively asserts that DISH could not have expected "synergies" because it could not have expected to acquire complete control of Clearwire. (ACP Br. at 47 n.208) That is too narrow a view of the kinds of motivations that can cause an offer to be poor evidence of a target's standalone value. Here, the record demonstrates that DISH had strategic and commercial motivations unrelated to Clearwire's fair value as measured in a statutory appraisal.

(i) DISH's interest in Clearwire was strategic and commercial, not financial.

DISH is a TV and broadband services company that uses spectrum to reach its customers. (A3320 ¶ 58) As of 2012, DISH had recently purchased a large

quantity of spectrum from several bankrupt wireless operators. (Op. 11; *see also* B1982) DISH wanted to enter the cellular wireless market and was seeking approval from the FCC to deploy its spectrum, but lacked a network. (Op. 11) When the FCC approved DISH's application to re-deploy its existing spectrum for cellular wireless use in December 2012, the FCC required DISH to deploy its spectrum over 40% of the United States' population within four years (a governmental "use it or lose it"). (A3369 ¶ 254; B2243-44)

DISH focused on Clearwire as a way to further expand its spectrum holdings and gain commercial access to a network. As DISH later disclosed, "'[t]he Clearwire spectrum portfolio has always been a key component to implementing our wireless plans of delivering a superior product and service offering to customers.'" (ACP Br. at 28 (quoting A2633))[6]

The Court of Chancery found that DISH "represented both a potential purchaser of Clearwire's spectrum and a potential strategic partner." (Op. 11) Aurelius does not challenge that finding. On the contrary, Aurelius concedes that DISH did not have a network and "desired a partnership with Clearwire to leverage Clearwire's network infrastructure and expertise." (ACP Br. at 1; *see also id.* at 21 ("DISH told investors that its 'first preference' was a partnership with

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[6] The market also surmised that DISH sought leverage to obtain commercial access to *Sprint's* network. (*E.g.*, B2231; B2269; B2222)

Clearwire….”)) In other words, DISH wanted to create value by “leverag[ing]” assets *it* had with assets *Clearwire* had. That is the definition of synergy. (*See* B1996)

To pursue its strategic interest in Clearwire, DISH accumulated a “large stake in Clearwire’s debt.” (Op. 26) Clearwire and Sprint both believed, and the Court of Chancery found, that DISH hoped that this investment in Clearwire’s distressed debt would allow it to “acquire Clearwire’s spectrum cheaply through a bankruptcy auction.” (*Id.*) Indeed, the Court of Chancery found that DISH made its proposal to acquire Sprint in April 2013 – a fact Aurelius ignores entirely – because “DISH thought that its merger proposal [for Sprint] would encourage Clearwire’s stockholders to vote down the Clearwire-Sprint Merger, and that Clearwire would then file for bankruptcy.” (Op. 25-26) Sprint understood that in a Clearwire bankruptcy, DISH would have the upper hand because it could credit-bid its debt in any auction of Clearwire’s spectrum. (B46:21-B48:3 (Schwartz)) Centerview noted DISH’s prior spectrum acquisitions from bankruptcy and warned the Special Committee that DISH could try to take over Clearwire in a bankruptcy. (B2430-31, 2438)

Announcement of the Merger gave DISH a new opportunity to pursue its strategic and commercial goals. The Merger could not be accomplished without

the approval of a majority of non-Sprint shares, and DISH went about trying to exploit that by making competing offers for the minority's shares.

(ii) The terms of DISH's proposals confirm that DISH was not motivated by Clearwire's standalone value.

DISH never made an offer simply to buy Clearwire stock; rather, every proposal it made to Clearwire involved some kind of side deal designed to advance its strategic and commercial interests. Indeed, although Aurelius touts that DISH's board approved offers for Clearwire of up to $5.00 per share, the DISH board minutes that Aurelius cites reflect a discussion of the "strategic rationale" for making the DISH Tender Offer, and not a word about Clearwire's value. (A2276-77)

DISH's first proposal was to pay $3.30 per share for Clearwire's minority shares in exchange for Clearwire agreeing to (i) sell DISH the most valuable subset of Clearwire spectrum for just $2.183 billion,[7] (ii) accept DISH financing and reject Sprint's bridge financing, (iii) give DISH governance rights and (iv) enter into a commercial agreement to provide DISH access to a network. (A3378 ¶ 281;

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[7] This would have given DISH Clearwire's best spectrum for the same price per MHz-pop that Sprint was offering to pay for *all* of Clearwire's spectrum, good, bad and ugly. (A669; B2592; B2363; B37:9-B39:10 (Schwartz))

A1444, 1446-47; ACP Br. at 20-22) The market saw the import of these conditions, highlighting the fact that DISH was seeking Clearwire's best spectrum, questioning DISH's motives and noting that, without a network, DISH could not achieve the FCC's 40% coverage requirement. (*See, e.g.*, B2228, 2238-44)

The governance rights DISH demanded included representation on the Board and the ability to veto commercial agreements between Sprint and Clearwire. (Op. 66; A1446-47) The ability to veto any commercial agreement between Clearwire and Sprint would be strategically valuable to DISH because it would include both the power to extract value from Sprint (in exchange for its consent) and the power to drive Clearwire into bankruptcy (by blocking it from contracting with its only major customer). DISH told Clearwire these governance rights were "critical" to its offer. (B2361)

Although DISH later dropped its demand for a crown-jewel spectrum sale and tabled negotiation of a commercial agreement with Clearwire, its May 2013 offer – the $4.40 bid on which Aurelius focuses – maintained the financing and governance rights conditions. (A3392-93 ¶¶ 345-347; B2675-77) Thus, the Court of Chancery found that "[w]hen DISH raised its price, it demanded the right to appoint directors and veto transactions between Clearwire and Sprint." (Op. 66) This alone is sufficient to reject it as reflective of Clearwire's standalone value.

Aurelius claims that DISH withdrew the governance rights condition by confirming that it would tender "with *or without* th[e] governance rights" (ACP Br. at 29; *see also id.* at 49), but that is not true. DISH never withdrew the governance rights condition, and it never submitted a bid for Clearwire or its stock without significant commercial or governance conditions. (Op. 66-67; A3401-02 ¶¶ 380, 384) At all times, DISH insisted that Clearwire grant it Board seats and blocking rights over transactions with Sprint. What DISH *did* do in the end was merely agree that it would not seek damages from Clearwire if the governance rights were later held to be unenforceable. (A3012)

Moreover, DISH never renewed its tender offer in the face of the Court of Chancery's preliminary comments about the enforceability of the governance rights. (Op. 66-67) When Sprint sued Clearwire and DISH, arguing that the governance rights would be invalid, the Court of Chancery stated in a preliminary hearing that Sprint's claims had "vibrant, vibrant color." (A3004)[8] But DISH

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[8] At the hearing on Sprint's Motion to Expedite, the Court of Chancery agreed that DISH was not bidding merely "for a minority stake," and observed that the $4.40 offer was

> not for the value of the stock which is held by the Clearwire stockholders. It is for the value of that stock as enhanced by contractually binding promises that the Clearwire directors are supposedly to give to DISH in advance of DISH actually giving any money to the people who own stock. Those people don't

could not have known the court's views at the time it made its offer three weeks earlier. And before the lawyers entered the courthouse that day, Sprint had already agreed to pay $5.00 per share for Clearwire; shortly thereafter, DISH terminated its offer. (A3399-401 ¶¶ 370-376) Thus, contrary to Aurelius's suggestion, DISH never made an offer in the face of the Court of Chancery's comments about the enforceability of the governance rights. It could have, but never did. (Op. 66-67)

At a minimum, even if all of DISH's governance rights were ultimately and completely invalidated (which no one could know at the time), DISH knew that if its tender offer closed, DISH would have the power to veto any merger of Sprint and Clearwire. (The DISH Tender Offer included a 25% "Minimum Condition" (A2521), and the EHA barred a merger without 75% stockholder approval (B1639).) That veto power would permit it to demand the value of Sprint's own merger synergies as a consent fee. And even if the tender offer did not close, DISH would still have succeeded in forcing its rival Sprint to pay more of its limited cash to Clearwire's public stockholders. (*See* B2229 (stating that DISH's CEO "has made a career of squeezing his rivals"))

> have those contractual rights, so you're not purchasing anything they have.

(A3002; *see also* A3003-14)

(iii) All parties understood that DISH's motivations were strategic and commercial, not financial.

Aurelius now seeks to disparage the evidence of DISH's strategic interests as an "urban legend," but the record shows that all of the relevant parties – including Aurelius itself – believed it.

Sprint certainly recognized the strategic value DISH was trying to extract from Clearwire. Sprint management told its board that the DISH Tender Offer could "create substantial 'hold up' value" and that "Dish's potential ability to block Sprint's current plans could create a negative impact on Sprint that exceeds Clearwire's value, while also destroying value for Clearwire." (Op. 38; A2946)[9] The trial court agreed, finding that Sprint and SoftBank "agreed to pay that [$5.00] price because of the massive synergies from the transaction and the threat that DISH posed as a hostile minority investor." (Op. 70) And, as noted, Sprint feared the threat of a DISH blocking position enough to sue Clearwire and DISH in the Court of Chancery. (Op. 39; A3398-99 ¶¶ 366-367)

Clearwire also recognized DISH's strategic motivations. Clearwire and DISH conducted a joint "deep dive" into the "Network Synergies" and "commercial opportunities." (B1996) The Special Committee wrestled with the

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[9] The Opinion mistakenly quotes the Sprint Board deck as saying that the DISH Tender Offer would "'also destroy[] value for Sprint.'" (Op. 38 (quoting A2946))

fact that the governance rights conditions to the DISH Tender Offer could imperil a cash-starved Clearwire and "'result in years of litigation.'" (Op. 66 (citation omitted)) And the Special Committee used the spectre of DISH's controlling position in a Clearwire bankruptcy to "rattle Sprint's cage" and to leverage more money from Sprint. (B2559; B14:4-B15:17 (Schell); B26:19-B28:7 (Hersch))

Even Aurelius internally questioned whether the DISH Tender Offer was genuine, surmising that "DISH may have the ulterior motive of pressuring Sprint into doing some sort of deal with DISH (e.g., full acquisition or network sharing deal)." (B2669) Moreover, the day DISH launched its $4.40 per share tender offer, Aurelius once again started selling off its equity stake in Clearwire, for less than $4.40 per share. (B2758) Why would anyone sell something for less than the "lower bound" of its fair value?

(d) The record contains ample evidence supporting the trial court's conclusion of fair value.

In any event, even if the DISH Tender Offer were reliable evidence of Clearwire's standalone value, the Court of Chancery would still have been within its discretion to conclude that Clearwire's fair value was $2.13 per share. So long as there is support anywhere in the record "sufficient for a factual finding," the standard of review "'compels [this Court] to defer to the trial court.'" *See RBC*

Capital Mkts., LLC v. Jervis, 129 A.3d 816, 851 (Del. 2015) (citation omitted). Here, there is plenty.

First, the trial court's decision to adopt in full Professor Cornell's DCF analysis (Op. 95) is "entirely proper" and supported by the record. *M.G. Bancorporation, Inc. v. Le Beau*, 737 A.2d 513, 526 (Del. 1999). The central dispute at trial was whether Sprint's "Full Build Projections" represented the secret truth as to Clearwire's operative reality (as Aurelius contended), or were simply a "mechanical exercise" by Sprint designed to show SoftBank that it could not feasibly pursue an acquisition-based business plan without an acquisition (as Sprint witnesses explained). The Court of Chancery credited the testimony of Sprint's witnesses. (Op. 35-36 & n.118) Although Aurelius spends much of its Statement of Facts rearguing its case for the Full Build Projections, it does not actually claim that the Court of Chancery's factual finding was unsupported. That unchallenged finding resolved 90% of the difference in opinion between the experts. (Op. 77) The perpetuity growth rate and discount rate adopted by Professor Cornell are likewise supported by the record and unchallenged on appeal. (Op. 88-89) Finally, the Court of Chancery detailed the flaws with Aurelius's spectrum valuation argument (which Aurelius does not appeal) and explained its decision to adopt Professor Cornell's plaintiff-friendly assumption for the value of Clearwire's excess spectrum assets. (Op. 94; *see also* B1481-83)

Second, market evidence corroborates the Court of Chancery's finding:

- Clearwire abandoned its 2012 equity offering because the price crashed below the $1.20 floor (A3346 ¶ 163);

- Clearwire's stock traded below $1 in the summer of 2012 (B2788);

- two of Clearwire's sophisticated founders – Time Warner and Google – sold all of their 78 million shares at prices of $1.37 and $2.26 per share, respectively, and no one exercised its ROFO (Op. 5; A3368 ¶ 253);

- Clearwire's founder, with knowledge of SoftBank's offer for Sprint, his governance rights and "considerable bargaining leverage," sold his shares to Sprint for $2.97, and no one exercised its ROFO (Op. 9-10; A3352-55 ¶¶ 182-194, 253);

- in December 2012, after news of the Sprint-SoftBank transaction leaked, Clearwire's stock traded around $2.40 per share (Op. 68);

- Clearwire approached other potential buyers of spectrum or the company (including DISH) for several years and again in December 2012, and no one came forward with a higher proposal than the $.21/MHz-pop implied at $2.97 (Op. 6; B2212; B2490; B2581, 2592-93, 2603, 2605, 2608-09; B2635);

- Comcast and Bright House agreed to sell "solely because they believed that [the $2.97] price was a good one" (Op. 68; A3375 ¶ 275), and Comcast testified that it believed Clearwire's alternative was bankruptcy (B2849:4-21 (Forsyth Dep.)); and

- Verizon's April 2013 proposal for Clearwire's leased spectrum in Top 25 markets was only for $.22-$.30/MHz-pop, which dropped to $.08/MHz-pop once lease payments were removed (Op. 69 n.218; B2557).

Third, Sprint's and SoftBank's internal statements also support this finding.

For example:

- in September 2012, SoftBank anticipated that Sprint would pay $2.00 per share to acquire Clearwire (Op. 7);

- Sprint told SoftBank in November 2012 that Sprint agreed to pay $2.97 price for Eagle River's shares "because it streamlined Clearwire governance," and that "the $2.97 blended price most definitely is not an indication of what Sprint is willing to pay per share across the entire base of Clearwire shares" (B2160-61; *see also* B2185 (Sprint viewed negotiation "bookends" at $1.20 and $2.97); B2112 (when discussing disclosure of Eagle River's $2.97 price, Sprint's CEO states: "I'm trying to avoid the belief we're willing to pay $3/share for the company, which we're not."));

- the only DCF of Clearwire that Sprint management presented to the Sprint Board valued Clearwire at $1.11-$1.12 (A1146);

- in January 2013, Sprint's internal projections of capacity payments to Clearwire closely mirrored the SCC (B2373);

- when Sprint management requested in May and June 2013 that the Sprint Board approve an increased offer, it told the Sprint Board that "Clearwire's standalone business has little to no value," "[t]here has been no change to the intrinsic value of Clearwire" and "[w]e remain convinced that the original price of $2.97 was full and fair" (Op. 38; A2176; A2946); and

- Sprint management told the Sprint Board that a Clearwire bankruptcy was possible in all "no" vote scenarios, and Sprint's back-up plan included again giving back some of its voting interest to avoid a potential cross-default (Op. 33; *see also id.* at 34; A2349-50; A2389-90).

Fourth, Clearwire's private and public statements support this finding, including that:

- the Special Committee concluded that the SCC projections were Clearwire's operative reality (Op. 21);

- Centerview and Evercore, both of whom opined that $2.97 was fair, calculated the DCF values of the SCC projections, which topped out at $0.75 and $1.39 per share, respectively (Op. 20-21; A3373-74 ¶¶ 269-270; B2523, 2544);

- Clearwire publicly stated that the $2.97 price "**PROVIDE[D] THE BEST STRATEGIC ALTERNATIVE FOR CLEARWIRE'S MINORITY STOCKHOLDERS AND REPRESENT[ED] FAIR, ATTRACTIVE AND CERTAIN VALUE**" (B2616; A3388 ¶ 326; *see also* B2658; A3388 ¶ 331); and

- Clearwire published a document on May 1, 2013 explaining why the criticisms of the $2.97 price were wrong and ill-informed. (*See* B2563-615) In it, Clearwire told its stockholders that it was "[u]nlikely to have buyer interest for all 47 billion MHz-POPs of Clearwire spectrum above [the] $0.21/MHz-POP value implied by [the] Sprint proposal" (B2593).

Fifth, the expert evidence supports fair value. Professor Cornell's valuation was corroborated by Carlyn Taylor, the only wireless industry expert to testify, and Dr. Scott Wallsten, who used a hedonic regression to value Clearwire's spectrum. Taylor testified without rebuttal that she was "100 percent sure" that Sprint would never have implemented the Full Build Projections. (Op. 78-79 nn.252-254; B71:5-B76:24, B77:15-B80:9, B81:6-13 (Taylor)) Dr. Wallsten's regression, before accounting for lease payments, yielded $.24/MHz-pop for all of Clearwire's spectrum. (Op. 91) Once lease payments were deducted, the result was $.08-

$.17/MHz-pop. (B2833) These ranges were similar to offers Clearwire had received for portions of its spectrum. (B2835)

Sixth, the trial court's conclusions are supported by the synergies being forecast for the Merger. The Court of Chancery found that $2.97 reflected the Special Committee's successful extraction of a portion of the synergies Sprint hoped to achieve. (Op. 69) It also found that the deal price "provided an exaggerated picture of Clearwire's value because the transaction generated considerable synergies." (Op. 75) Sprint's forecast for "just the most easily identifiable duplicative costs" was $1.5-$2 billion, or $1.95-$2.60 per share. (Op. 75; B2841:1-B2843:3 (Schwartz Dep.)) Clearwire forecast higher synergy numbers: $3 billion. (Op. 12, 76 n.243) Its advisors' forecasts were higher still. (Op. 76 n.243) And SoftBank's advisor's forecast was even higher. (*Id.*)

In sum, the Court of Chancery witnessed a ten-day trial and reviewed a massive record. That record supports the Court of Chancery's finding that the fair value of Clearwire stock was $2.13 per share.

2. The Court of Chancery did not base its appraisal decision on the assumption that Sprint would breach its fiduciary duties in the absence of a merger.

Aurelius's second asserted error is also wrong. Once again pretending that a factual finding was a legal error, Aurelius claims that the Court of Chancery erred in rejecting the Full Build Projections because it improperly assumed that

Clearwire's operative reality included Sprint breaching its fiduciary duties in future dealings with Clearwire if the Merger did not occur. (ACP Br. at 42, 51-52) Specifically, Aurelius cites the Court of Chancery's assumptions that, in the event of a "no" vote, Sprint would: (i) replace its seven nominees with insiders; (ii) undertake open market purchases of Clearwire stock; (iii) provide Clearwire with dilutive financing; and (iv) acquire Clearwire in the future. (ACP Br. at 58-59; Op. 81-86)

Aurelius's claim fails for two reasons. First, the Court of Chancery's findings were not based on the assumptions Aurelius cites. The Court of Chancery explained a series of reasons why the SCC represented Clearwire's operative reality and a series of reasons why Sprint's Full Build Projections did not; none of those reasons are dependent on assumptions about what governance rights Sprint would exercise in the future, or how or on what terms Clearwire would find financing to stay out of bankruptcy in the absence of the Merger. Second, nothing in the Court of Chancery's assumptions constitutes a breach of fiduciary duty.

(a) The trial court identified multiple separate and independent reasons to adopt the SCC and reject Aurelius's argument that Sprint's Full Build Projections reflected Clearwire's operative reality.

To begin, while Aurelius focuses on the Court of Chancery's rejection of the Full Build Projections, it ignores the projections that the Court of Chancery *did*

credit: Clearwire's own SCC. There is no evidence that in preparing and periodically updating the SCC, Clearwire management assumed that Sprint would take any of the actions that Aurelius says would have been a breach of Sprint's fiduciary duties. There is no evidence that Clearwire management assumed that any Board members would be replaced, and the SCC assumes nothing at all about who owns how much of Clearwire's stock or how its funding gap will be financed. Nor does Aurelius claim that when Professor Cornell conducted a DCF analysis based on the SCC he assumed that Sprint would breach its fiduciary duties. This Court can and should reject Aurelius's second assignment of error on this basis alone.

In any event, the Court of Chancery explained at least four reasons why it rejected Aurelius's arguments for the Full Build Projections that had nothing to do with assumed breaches of fiduciary duty:

- "First, the Full Build Projections assumed that Sprint would use the same quantity of Clearwire's spectrum, paying by the gigabyte, as Sprint would if it owned the spectrum itself," when "[t]he evidence at trial showed that Sprint in fact would use less spectrum because paying Clearwire for spectrum had a much higher marginal cost" (Op. 78);

- "Second, the Full Build Projections assumed that Sprint could extract major price concessions from Clearwire," without explanation, when "Clearwire had strongly resisted Sprint's push for a rate reduction" previously and "also assumed that Sprint could 'achieve [the] same build on [the] same timeline' without 'accounting for friction arising from working with Clearwire,'" even though "[t]here was likely to be

substantial friction, as illustrated by the contentious negotiations over the Accelerated Build" (Op. 79);

- "Third, the Full Build Projections had financial holes," including (1) "that Sprint would borrow $5 *billion* at market rates, give the money to Clearwire …, and never get the money back," and (2) "that Clearwire could refinance $4.3 billion in debt 'without support from Sprint,'" which the Court of Chancery found "implausible given Clearwire's financial condition" without the Merger (Op. 80 (emphasis added)); and

- "Finally, the Full Build Projections assumed that Sprint would pay Clearwire a staggering amount of money" – "$20.8 billion in cost of service payments from 2014 to 2018" – and "[a]lthough Sprint and Soft[B]ank technically could have afforded to pursue this value-destructive plan, it is unlikely that they would have done so" (Op. 80).

The documents and testimony cited in those four items only scratch the surface of the record support for the Court of Chancery's conclusions. The Court of Chancery also found that the Full Build Projections could not have represented Sprint's plan for the future because they:

i. assumed expanded market share, which the trial court found "implausible … because Sprint had lost market share in four of the preceding five years" (Op. 81 n.261);

ii. were inconsistent with Sprint management's forecast to its board in May 2013 of $500 million for Clearwire cost of service payments in 2014 (the Full Build Projections assumed $1.2 billion) (Op. 82);

iii. were inconsistent with Sprint management's contemporaneous concerns about Clearwire's solvency in the event of a "no" vote (Op. 83); and

iv. were inconsistent with Sprint management's contemporaneous statements in June 2013 that it believed Sprint could acquire Clearwire later at a reasonable price if the Merger failed (Op. 83).[10]

The Court of Chancery could certainly have stopped there, and Aurelius would not have had even an excuse for a claim of error. But it went further and separately addressed and rejected Aurelius's extraordinary argument that only the Full Build Projections could represent Clearwire's operative reality because there was nothing else that Sprint could possibly have done. (Op. 80-81; ACP Br. at 55-57) Because it only takes a single counterexample to disprove a rule, the Court of Chancery explained that the Limited Build was a "starting point" for a network plan that did not use as much of Clearwire's spectrum and, "[a]t the very least," Sprint could have pursued something like the Limited Build while it assessed its options. (Op. 81) It then explained that Sprint had expressed an intent to replace its designees on the Board in the event of a "no" vote, to continue to finance Clearwire to keep it out of bankruptcy and to consider opportunities to increase its ownership percentage. (Op. 81) The Court of Chancery then went on to discuss the record evidence that was consistent with this possible path, and inconsistent

[10] In addition, the Sprint Defendants created an appendix compiling documents that supported their arguments on projections, including the Full Build Projections (previously called the "June Projections" or "June Full Build Scenario") and Clearwire's SCC projections. (*See* B425-32, 444-54, 461-862, 1133-314)

with the notion that Sprint would attempt to pursue the Full Build Projections. (Op. 81-84)

In sum, the Opinion does not support Aurelius's claim that the Court of Chancery's appraisal decision was based on an assumption that Sprint would take any particular action in the event of a "no" vote, breaching or otherwise. The Court of Chancery simply concluded, supported by the overwhelming weight of the evidence, that whatever Sprint did, it was not going to be the Full Build.

(b) None of the steps the Court of Chancery hypothesized would be breaches of fiduciary duties.

In any event, none of the steps the Court of Chancery mentioned that Sprint might have taken in the event of a "no" vote would have breached any fiduciary duty.

First, Sprint had a contractual right under the EHA to replace its seven designees. Exercising a contract right is not a breach of fiduciary duty. *See, e.g.*, *In re Molycorp, Inc. S'holder Deriv. Litig.*, Consol. C.A. No. 7282-VCN, 2015 WL 3454925, at *9 (Del. Ch. May 27, 2015). There is no evidence, and Aurelius does not claim, that the Court of Chancery assumed that once elected to the Board, Sprint's new nominees (whoever they might be) would breach their own fiduciary duties.

Second, Sprint would not have breached a fiduciary duty by making open market purchases in the event of a "no" vote. (Op. 33-34) *See In re Sirius XM S'holder Litig.*, C.A. No. 7800-CS, 2013 WL 5411268, at *7, *10 (Del. Ch. Sept. 27, 2013) (finding that alleged controller did not breach fiduciary duties by making open market purchases after expiration of contractual standstill); *Savin Bus. Machs. Corp. v. Rapifax Corp.*, C.A. No. 5331, 1978 WL 2498, at *8 (Del. Ch. Feb. 15, 1978) ("[T]he act of increasing that [majority] representation through the purchase of authorized stock equally available to the minority shareholder does not, of itself, constitute such a breach of that fiduciary duty….").

Third, Sprint would not have breached a fiduciary duty by offering Clearwire equity financing to make its interest payments and stay out of bankruptcy, even if that financing diluted minority stockholders. Sprint had been doing that for years – it was the only way Clearwire had survived. (B12:23-B13:24 (Schell); B31:18-B33:5 (Cowan); B59:4-17 (Stanton)) And Clearwire was already warning its stockholders that future financing "may be challenging, expensive and dilutive." (B2610) In addition, the EHA would still require a majority of disinterested Clearwire directors to approve any "Related Party Transaction." (A3331-32 ¶ 103; B1634, 1715) Because Sprint could not appoint more than seven of Clearwire's thirteen directors unless it owned 100% of Clearwire, at least four non-Sprint designees would have to approve any

transaction between Clearwire and Sprint. (A3331-32 ¶ 103; Op. 2) And Sprint's internal documents show that its fallback financing plan included inviting minority stockholders to participate *pro rata* so they could avoid dilution if they wished. (Op. 31; A2059)

Finally, there is nothing inherently wrong with a majority stockholder (assuming it has control) cashing out the minority, so long as it conditions the transaction on the appropriate procedural protections or demonstrates its entire fairness. *See Kahn v. M & F Worldwide Corp.*, 88 A.3d 635, 642-45 (Del. 2014); *In re Sirius XM S'holder Litig.*, 2013 WL 5411268, at *10. Delaware courts cannot presume that a hypothetical future sale will result in a breach of fiduciary duty. *See Huffington v. Enstar Corp.*, C.A. No. 7543, 1984 WL 8209, at *3 (Del. Ch. Apr. 25, 1984) (refusing to "speculate" on a future sale of a company and rejecting plaintiffs' request "to assume that the Board will breach its fiduciary duties and conclude a sale that is not in the best interests of the stockholders or which is not fair"); *Agranoff v. Miller*, 734 A.2d 1066, 1073 (Del. Ch. 1999), *aff'd*, 737 A.2d 530 (Del. 1999) (TABLE). The fact that Sprint thought it could have acquired Clearwire later at a cheaper price (Op. 38, 83) only underscores the significant premium that Sprint believed it was paying now, and, as the Court of Chancery found, that Sprint was not planning to transfer billions of dollars in value to Clearwire through the Full Build Projections (Op. 83).

II. THE COURT OF CHANCERY PROPERLY CONCLUDED THAT THE MERGER WAS ENTIRELY FAIR.

A. Question Presented.

Did the trial court abuse its discretion when it concluded in the fiduciary action that (1) the Merger process may have contained some defects, but there were also indicators of fair process; (2) the $5.00 merger price was "far beyond" what stockholders could have expected by themselves and "substantially more in value than what they had before"; and (3) in its judgment, under the unitary entire fairness standard, the Merger was fair and Sprint did not breach its assumed fiduciary duties?

B. Scope Of Review.

This Court will defer to factual findings "unless they are clearly erroneous or not arrived at through a logical process." *Kahn v. Lynch Commc'n Sys., Inc.*, 669 A.2d 79, 84 (Del. 1995) ("*Lynch*"). This Court's "review of the formulation and application of legal principles, however, is plenary and requires no deference." *Id.*

C. Merits Of Argument.

Despite justifying its Motion for Consolidation on the need to address its appeals in both the fiduciary and appraisal actions (Dkt. 6), Aurelius spends less than two pages of its opening brief on its argument in the fiduciary action. It simply argues that the Court of Chancery's finding of fair value in the appraisal action was wrong, and that, "[b]y extension, … the court's finding of no-breach

was predicated on an erroneous foundation." (ACP Br. at 67) Aurelius is wrong.

1. The Court of Chancery's "fair price" determination was based on multiple factors independent of its fair value conclusion in the appraisal case.

Recognizing that "[t]he fair price aspect can be 'the predominant consideration in the unitary entire fairness inquiry,'" the Court of Chancery found that there was "ample evidence indicating … that the original deal price of $2.97 per share was fair to Clearwire and its minority stockholders" and "[t]here [wa]s overwhelming evidence that the final deal price of $5.00 per share was fair to Clearwire and its minority stockholders." (Op. 67) The Court of Chancery found "[m]any factors support[ing] the fairness of the original deal price of $2.97 per share," in addition to the fair value found in its appraisal evaluation, including:

- that $2.97 was the product of arm's-length bargaining by independent directors who took their responsibilities seriously;
- that Eagle River sold at $2.97 after news of the Sprint-SoftBank transaction leaked, and none of the SIGs exercised its ROFO to purchase Clearwire shares;
- that the SIGs executed voting and support agreements at $2.97 and committed to sell their shares at that price;
- the "[m]arket indications" discussed above (*see* § I.C.1.(d), *supra*); and
- the expert evidence at trial.

(Op. 67-69)

The Court of Chancery then explained why the proposed deal at $2.97 per share was irrelevant, and how the evidence showed that the $5.00 per share deal that was actually consummated was fair, noting, among other things, that (i) the analyst price targets were "far less than $5.00 per share," (ii) there was no Sprint or SoftBank document stating that Clearwire was worth $5.00 per share, and (iii) "Stanton and the [Special] Committee never contemplated, much less proposed, anything close to $5.00 per share." (Op. 68-70) None of these reasons rely on the DISH Tender Offer or the Court of Chancery's conclusions about Sprint's plan in the event of a "no" vote. All represent independent reasons on which this Court can affirm the trial court's judgment in the plenary action.

2. The Court of Chancery did not determine that the process leading to the $5.00 per share price was unfair.

The Court of Chancery noted that "'[p]erfection is not possible, or expected as a condition precedent to a judicial determination of entire fairness.'" (Op. 72 (citation omitted)) Indeed, Delaware courts have repeatedly upheld the entire fairness of transactions that contained "'flawed'" processes. *See Cinerama, Inc. v. Technicolor, Inc.*, 663 A.2d 1156, 1175, 1178 (Del. 1995) (citation omitted) (affirming finding of fair process and entire fairness even though target's lack of any market check rendered the process "clearly deficient"); *Lynch*, 669 A.2d at 86 (affirming finding of fair process and entire fairness because any evidence of

coercion was not "material with respect to the transaction as a whole"); *Emerald Partners v. Berlin*, C.A. No. 9700, 2003 WL 21003437, at *23 (Del. Ch. Apr. 28, 2003) (holding process fair and transaction entirely fair despite "flawed" process caused by conflicted directors' presence at board meetings and meetings with the target's financial advisor), *aff'd*, 840 A.2d 641 (Del. 2003) (TABLE); *In re Trados Inc. S'holder Litig.*, 73 A.3d 17, 56, 76 (Del. Ch. 2013) (holding transaction entirely fair even though "[t]he evidence pertinent to fair dealing weighed decidedly in favor of the plaintiff" because "there was no contemporaneous evidence suggesting that the directors set out to deal with the common stockholders in a procedurally fair manner"); *In re Cysive, Inc. S'holders Litig.*, 836 A.2d 531, 544, 554 (Del. Ch. 2003) (holding process fair and transaction entirely fair despite the "marred" process caused by the "unwise and improper" decision by the target's CFO to withhold a requested budget from the special committee because it "did not impair the functioning of the special committee or its advisors").

Here, while the Court of Chancery identified flaws in the first phase of negotiations and in Sprint and SoftBank's unsuccessful efforts to obtain minority stockholder approval at $2.97 per share, it still found the transaction that was ultimately consummated to be entirely fair. There is ample evidence in the Opinion and record supporting fairness in the process, including, among other

things, that:

- the timing was fair: Clearwire was actively considering bankruptcy (Op. 17; B2596; B10:5-11 (Schell); B17:1-10 (Hersch)); Clearwire's directors sought out the Merger (Op. 11; B2167; B56:6-9, B57:12-B59:3, B60:6-B66:21 (Stanton)); and there is no evidence that the $1.30 per share Unaffected Price did not reflect the market's view of Clearwire at that time;

- the structure was fair: the EHA required approval by a majority of non-Sprint designees on the Board and a majority of non-Sprint shares (Op. 22; A3332 ¶ 105; B2203);

- the Special Committee was fully empowered and independent: there is no dispute that the Special Committee was comprised of independent directors who were fully empowered, informed, independently advised and serious about their responsibilities (Op. 15-16, 20, 55);

- the negotiations were arm's-length: in conjunction with the Gang of Four and the DISH proposals, the Special Committee manufactured a "bidding war," recommended against the Merger (even though DISH's offers were "uncertain[]," at best) and persuaded Sprint to increase its price five times, ultimately securing $5.00 (Op. 16, 18-19, 21, 30, 34, 39-40, 55, 58, 66); and

- the Merger was approved by independent stockholders: after holding out at $2.97 and $3.40, approximately 70% of the non-Sprint shares (excluding Intel) approved the Merger at $5.00 (Op. 63).[11]

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[11] In addition, after noting the ways the process could have been deemed flawed, the Court of Chancery separately noted the countervailing evidence weighing on any process finding. For example, the Court of Chancery noted that Intel's vote had no effect, Google did not want to deal directly with Clearwire, the accelerated build negotiations were disclosed and no stockholders were coerced. (Op. 63-64)

Thus, there is more than enough evidence to support the Court of Chancery's conclusion that the Merger was entirely fair.

CONCLUSION

For all of the foregoing reasons, the judgments below should be affirmed.

Respectfully submitted,

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