

## Delaware Slashes Clearwire Value; Favors Management Projections

Observers expecting another decision from Delaware Chancery Court favorable to petitioners got a big surprise last month, as the string of above-merger price appraisals came to an end. On July 21, 2017, Vice Chancellor Laster ruled in the Clearwire Corp appraisal proceeding that the fair value of Clearwire's stock at the time of its merger with Sprint was \$2.13 per share, some 57 percent below the merger price of \$5.00 per share.<sup>1</sup> This comes on the heels of two recent Chancery Court appraisal decisions, Dell, Inc. and ISN Software Corporation, where fair value was determined to be 27 percent and 158 percent higher than the buyout prices, respectively, rewarding petitioners for pursuing the costly process of seeking an appraisal.<sup>2</sup> The Vice Chancellor was again presented with wildly different valuations, like the ISN case,<sup>3</sup> with Petitioner's expert valuing Clearwire at \$16.08 per share, and Respondent's expert at \$2.13 per share. According to the Opinion, the value rested largely on which set of cash flow projections was more likely achievable for Clearwire as of June 2013, when the merger agreement was signed. The Opinion provides some interesting insight into the oft-complex process in determining fair value.

### *Key Case Highlights:*

- In September 2012, Sprint agreed to allow Softbank to acquire 70 percent of the company and give it the capital necessary to take Clearwire private. The initial purchase price for Clearwire was set at \$2.00 per share.
- Sprint approached a group of strategic investors in Clearwire with the \$2.00 purchase price, which was approximately 50 percent higher than the current trading price of \$1.30 per share. News of the Sprint/Softbank deal fueled market speculation that Clearwire was in play, sending its stock price up to \$2.22 per share in October 2012.
- Sprint struck a deal with a 5 percent owner to buy its Clearwire shares for \$2.97 per share. Sprint then negotiated a merger agreement with Clearwire's board to take the company private at \$2.97 per share. The merger agreement was signed December 17, 2012.

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<sup>1</sup> ACP Master, Ltd., *et al.*, v. Clearwire Corporation, C.A. No. 9042-VCL, Memorandum Opinion (the "Opinion"), July 21, 2017.

<sup>2</sup> In Re: Appraisal of Dell Inc., C.A. No. 9322-VCL; In Re: ISN Software Corporation Appraisal Litigation, C.A. No. 8388-VCG.

<sup>3</sup> Experts presented valuations for ISN ranging from \$29,360 per share to \$230,000 per share.

- Investors were not satisfied with the \$2.97 offer. DISH Network Corp. immediately proposed a tender offer for Clearwire’s shares at \$3.30 per share, conditioned on obtaining certain corporate governance provisions. Such provisions ran counter to an equityholders’ agreement, however, and DISH dropped its bid in February 2013.
- Facing increased shareholder disapproval, and an almost certain “no” vote by Clearwire shareholders, Sprint increased its offer to \$3.40 per share on May 20, 2013.
- On May 29, 2013, DISH reemerged offering \$4.40 per share for Clearwire prompting Sprint to increase bid to \$5.00 per share.
- Minority stockholder Aerelius Capital Management LP filed a lawsuit challenging the fairness of the merger and the adequacy of the price.
- Petitioner’s expert valued Clearwire at \$16.08 per share. Respondent’s expert valued Clearwire at \$2.13 per share. Both experts used a DCF analysis, but relied on different cash flow projections.

*Opinion Overview:*

In December 2012, Clearwire’s Special Committee retained investment banking firm Centerview to opine on the \$2.97 per share offer from Sprint. Centerview prepared a DCF analysis, using two contemporaneous sets of Clearwire management projections, the Single Customer Case and the Multi Customer Case.<sup>4</sup> At the time these projections were prepared, Sprint was Clearwire’s only wholesale customer. Multiple attempts had been made to acquire additional customers – i.e. additional revenue – but no such customer(s) was forthcoming.<sup>5</sup> Respondent’s expert relied upon the Single Customer Case cash flow projections in developing his DCF analysis.

Petitioner’s expert relied upon a set of cash flow projections prepared by Sprint management known as the “Full Build” projections. The Vice Chancellor rejected these projections as they were “not created in the ordinary course of business,” but to “convince Softbank to top DISH’s tender offer,” and they were not created by Clearwire’s management team.<sup>6</sup> The two sets of projections resulted in vastly different projected revenue – some \$20.9 billion over the forecast period under the Full Build, and just \$4.7 billion under the Single Customer.<sup>7</sup> The Court concluded that the Full Build projections were not achievable if the Sprint/Clearwire deal did not close, given Clearwire’s depressed financial condition. The difference in cash flow projections accounted for 90 percent of the difference in the two experts’ valuations.

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<sup>4</sup> Clearwire Schedule 14A, June 25, 2013.

<sup>5</sup> Opinion pp. 20-21 and fn. 65.

<sup>6</sup> Ibid. 78.

<sup>7</sup> Ibid. 37.

The other significant contributor to the valuation gap was the perpetuity growth rate applied to determine the terminal value. Respondent's expert utilized the mid-point of inflation and GDP growth, or 3.35 percent; while Petitioner's expert applied GDP growth of 4.5 percent, explaining that it was supported by strong growth under the Full Build. The Vice Chancellor rejected the higher rate, as he did the Full Build projections,<sup>8</sup> and pointed out that the application of a generic rate, such as GDP growth, or inflation, without valid reasoning, is not acceptable. Respondent's expert explained the mid-point rate gave nod to a range of potential outcomes for Clearwire, including higher growth.

*Monument's Take:*

Like his opinion in the *Dell* appraisal, the Vice Chancellor rejected the merger price as indicative of Clearwire's value, recognizing, it seems, that the bidding war which transpired with DISH drove up the price of the shares beyond intrinsic value. Unlike *Dell* and *ISN*, however, the process of determining value was straightforward, and largely rested on which of the experts' cash flow projections were more reliable at the time of the deal. Valuation experts are often faced with the dilemma of valuing a target company "as is," meaning in its present state or financial condition, or using projections reflecting "what could be," assuming a set of strategic enhancements. As in the present case, the projections can be wildly different, resulting in a huge valuation chasm. This decision conveys a preference for management's target projections, made in the normal course of business, reflecting the company's current state of affairs.

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<sup>8</sup> Ibid. 88.