IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re: BOOMERANG TUBE, LLC, a Delaware limited liability company., *et al.*,[1] Debtors.	Chapter 11 Case No. 15-11247(MFW) (Jointly Administered) **Re: D.I.: 470, 502** **REDACTED VERSION**

POST-CONFIRMATION HEARING BRIEF OF THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS IN FURTHER OPPOSITION TO CONFIRMATION OF DEBTORS' AMENDED JOINT PREARRANGED CHAPTER 11 PLAN

BROWN RUDNICK LLP
One Financial Center
Boston, Massachusetts 02111
(617) 856-8200

-and-

Seven Times Square
New York, New York 10036
(212) 209-4800

-and-

MORRIS NICHOLS ARSHT & TUNNELL LLP
1201 North Market Street, Suite 1600
Wilmington, DE 19801
(302) 658-9200

Dated: October 16, 2015

[1] The Debtors in these cases, along with the last four digits of each Debtor's federal tax identification number, are: Boomerang Tube, LLC (9415); BTCSP, LLC (7632); and BT Financing, Inc. (6671). The location of the Debtors' corporate headquarters is 14567 North Outer Forty, Suite 500, Chesterfield, Missouri 63017.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

Other Authorities

The Official Committee of Unsecured Creditors (the "Committee") appointed in the above-captioned proceedings (these "Chapter 11 Cases" or "Cases") of Boomerang Tube, LLC, *et al.* (referenced alternatively herein as "Boomerang," the "Debtors," or the "Company"), by and through its undersigned co-counsel, respectfully submits this post-Confirmation Hearing brief (this "Post-Trial Brief"), following the Court's three-day Confirmation Hearing trial (September 21-22, 24, 2015) (collectively, the "Trial"), in further opposition to confirmation of the *Debtors' Amended Joint Prearranged Chapter 11 Plan* [D.I. 470] dated September 14, 2015 (as further amended, supplemented, or modified, the "Plan")[2], for failure to comply with the applicable provisions of title 11 of the United States Code (the "Bankruptcy Code") and in further support of the *Objection of the Official Committee of Unsecured Creditors to Confirmation of Amended Joint Prearranged Chapter 11 Plan of Boomerang Tube, LLC and its Affiliated Debtors and Debtors-in-Possession* [D.I. 502] (the "Committee Objection").[3] In continued opposition to the Plan and in further support of the Committee Objection (fully incorporated herein by reference), the Committee respectfully states as follows:

PRELIMINARY STATEMENT

1. The central question in these Cases has always been the same: should the Debtors be allowed, during a record industry trough, to hand over all of the value of Reorganized Boomerang to the Term Lenders while leaving unsecured creditors out in the cold with a *de minimis* recovery? In order for that outcome to be accepted by this Court, the question emanating from the three-day Confirmation Hearing is whether the Debtors have satisfied their

---

[2] Unless otherwise noted, all citations herein refer by tab number to the documents listed in the *Joint Exhibit List for Confirmation Hearing (Enterprise Valuation and Confirmation Issues)* [D.I. 612] (abbreviated herein as "J.E. __). For the Court's convenience, the Appendix (abbreviated herein as "Appx. __) attached to this Post-Trial Brief provides copies of, or excerpts from, the Confirmation Hearing transcripts and certain deposition testimony.

[3] Capitalized terms used but not defined herein shall have the meanings ascribed to them in the Plan, the Disclosure Statement, or the Committee Objection, as applicable.

burden of proving that the prospective value of the Debtors' business (once it emerges from the trough and its operations normalize) is so moribund that no other outcome is permissible. The answer compelled by the evidence at Trial is that the intrinsic value of Boomerang is such that allowing the Term Lenders to take it all for themselves would result in a violation of the absolute priority rule. Furthermore, three additional non-valuation aspects of the Plan were established at Trial to offend the confirmation requirements of Section 1129 of the Bankruptcy Code. As a result, the Debtors have failed to satisfy their burden, and consequently the Plan may not be confirmed.

2. First, the Debtors have failed to prove that the Plan satisfies the "fair and equitable" rule of Section 1129(b)(1) of the Bankruptcy Code. This, in turn, hinges on the valuation dispute that occupied center stage during the Confirmation Hearing. It is axiomatic that a plan that pays one class of creditors more than they are owed violates the absolute priority rule and may not be confirmed. As Plan proponent, it is the Debtors' burden to prove their valuation case to this Court—which, all along, has been that the Reorganized Debtors' total enterprise value ("TEV") is less than the amount of their debt obligations (the "Funded Debt Hurdle"). In this critical respect, the Debtors have failed to prove their case. Rather, the evidence adduced at Trial established a value for the Debtors ranging between $312.0 million and $361.0 million; the midpoint of that valuation range ($335.0 million) exceeds the Funded Debt Hurdle ($302.9 million). Importantly, even if the Court does not fully concur with the Committee's valuation thesis, the Plan nonetheless cannot be confirmed because it is the Debtors' independent burden to prove their valuation case by a preponderance of the evidence. The Debtors may not, therefore, hand over the keys to the Company to the Term Lenders,

leaving unsecured creditors with a pittance as a recovery, without violating the absolute priority rule.

3. To be sure, and as this Court is doubtless aware, any valuation analysis requires the valuation expert to make a number of judgment calls. Valuation, of course, is not an exact science. However, these judgment calls must be reasonable, and they must be substantiated by reliable record evidence. Here, however, at virtually every node of the valuation decision tree, the Debtors' expert, Timothy R. Pohl ("Mr. Pohl") and his firm Lazard Freres & Co. LLC ("Lazard"), selected data points that resulted in downward pressure on their valuation opinion.[4] Whether purposeful or not, over and over, Mr. Pohl exercised his judgment outside the range of reasonableness dictated by generally-accepted valuation principles and the numerous publicly-available sources for specific valuation inputs. In fact, in several instances, Mr. Pohl did not consult ***any*** outside sources to corroborate his "judgment," choosing instead to rely solely on Lazard orthodoxy as determined by an opaque internal opinion committee that is not a testifying witness in these Cases. Mr. Pohl's process of justification by self-reference (e.g., the "self" being his employer, Lazard) contrasts starkly with the approach taken by the Committee's expert, Philip Wisler ("Mr. Wisler") and his firm Alvarez & Marsal Valuation Services LLC ("A&M"), which involved analyzing numerous reputable sources and using them to inform a judgment as to valuation within their imputed range.[5] Furthermore, while weighing the reliability of the Pohl Report versus the Wisler Report, this Court must also keep in mind the context within which the Pohl Report was developed; that is, in the aftermath of the Debtors' decision to abort a sale process after less than thirty days (precisely because the Term Lenders

[4] Mr. Pohl's valuation report is referenced herein as the "Pohl Report."

[5] Mr. Wisler's valuation report is referenced herein as the "Wisler Report."

refused to permit it to continue) and thereafter hand the keys to the Term Lenders. As a result of the PSA, at the time Mr. Pohl began his valuation analysis the Debtors' transfer of value to the Term Lenders was a *fait accompli*. This context, combined with Mr. Pohl's use of several out-of-bounds inputs in conducting his analysis, should give the Court pause.

4. While Mr. Pohl's valuation opinion cannot pass muster for many reasons, five such reasons are especially critical. Most fundamentally, the principal set of comparable companies (the so-called "Downhole Peers," referenced herein as the "Sand, Chemical and Tool Comps") relied upon by Mr. Pohl in his DCF analysis are so dissimilar to Boomerang in nearly every meaningful respect as to permit the inference that they were selected precisely to skew the value downwards. Simply put, none of the Sand, Chemical and Tool Comps relied upon by Mr. Pohl to drive his value conclusion actually manufacture and sell OCTG pipe—the very crux of Boomerang's business model.

5. Mr. Pohl's use of incomparable "comparable companies" is more than an academic error. In many ways, this Court's determination of Reorganized Boomerang's value—and by extension, these Cases—boils down to which set of comparable companies it finds more persuasive. The Committee's expert, Mr. Wisler, testified that the most straight-forward and traditional way one determines comparability is to identify companies that do the same thing as the subject company being valued; in this case, other companies whose principal focus is the manufacture and sale of OCTG pipe. Accordingly, in his comparable companies analysis Mr. Wisler included five companies that, like Boomerang, primarily sell OCTG pipe (the "OCTG Comps"). Because a number of such companies existed here (and were recognized not only as the Company's prime competitors but also its closest comparables for valuation purposes by nearly everyone—including the Debtors—before Mr. Pohl provided his valuation opinion), Mr.

Wisler did not need to cast about for a different set of companies that do nothing similar to Boomerang and then try to rationalize similarity based on some self-created sub-set of indicia. The fact that Mr. Pohl had to "work so hard" to first eliminate the publicly-traded OCTG companies as comparables and second to recast the Sand, Chemical and Tool Comps as "similar enough" provides the Court with all the evidence necessary to reach the conclusion that the Pohl Report is fundamentally and fatally flawed and must be rejected *in toto*.

6. The erroneous comparable company selection would in and of itself have caused Mr. Pohl to derive a "beta" value, utilized in the weighted-average cost of capital ("WACC") formula, that was excessively high (and thus value depressing), but he then compounded his error by relying on so-called "predictive" betas published by an entity known as BARRA. As the evidence established, BARRA betas are calculated by the BARRA company based on a non-public, subscription-only, "black-box" proprietary algorithm known only to BARRA. BARRA betas purport to assess not only volatility as derived from a regression of historic stock performance versus an appropriate market index (as is the case with traditional historic betas that may actually be calculated and are routinely utilized by valuation professionals), but also to "predict" the future risk associated with a particular set of companies based on some conglomeration of between 13 and 100 factors. BARRA betas therefore represent the professional judgment of BARRA as opposed to the testifying expert (in this case Mr. Pohl), cannot be reverse-engineered by the valuation professional and thus, cannot be independently verified for accuracy (including with respect to the potential for "double-counting" other variables already included in the WACC formula). All of these issues led Vice Chancellor Strine of the Delaware Chancery Court to reject the use of BARRA betas in Global GT LP v. Golden Telecom, Inc., 993 A.2d 497, 521 (Del. Ch. 2010). Mr. Pohl's response to this red flag is to ask

this Court to substitute for the black-box BARRA calculation the equally black-box determination of Lazard's internal opinion committee that BARRA betas are "reliable." The repeated fallback by Mr. Pohl to the infallibility of the so-called "Lazard Opinion Committee" compels the inference that Mr. Pohl cannot justify the use of BARRA betas other than by citing the professional, non-testimonial opinion of someone other than himself. As with the selection of comparable companies, Mr. Pohl's selection of BARRA betas over historical betas is more than an academic issue: as explained by Mr. Wisler, Mr. Pohl's use of BARRA (combined with his use of the dissimilar Sand, Chemical and Tool Comps) causes him to artificially depress the Reorganized Debtors' TEV by $119.0 million.

7. Mr. Pohl next utilizes the highest-available market risk premium (7.0%) in his WACC calculation, once more justified solely on the basis that it is Lazard orthodoxy. But as Mr. Wisler testified, a substantial body of academic literature over the past 20 years demonstrates that market risk premiums are lower today than they were historically; thus, Mr. Wisler utilized a midpoint market risk premium (6.0%) reflecting neither the very lowest of published premiums, nor the very highest. Although this one percent discrepancy may sound immaterial, the impact on valuation is anything but: as Mr. Wisler testified, Mr. Pohl's use of an inflated market risk premium of 7.0% causes him to understate the Reorganized Debtors' TEV by $25.0 million. Again, the blind selection of the highest possible market risk premium by Mr. Pohl, justified with nothing more than reference to the "Lazard Way," permits the inference that Mr. Pohl's opinion is excessively and unrealistically value depressive.

8. Mr. Pohl next incorporates a debt-to-capital ratio in his WACC calculation that is imputed from the Sand, Chemical and Tool Comps that Mr. Pohl erroneously adjudged to be comparable. The 25.0% debt-to-capital assumption used by Mr. Pohl originates, however, from

a set of companies that do not manufacture OCTG pipe and therefore exhibit a much different (and lower) level of leverage than Boomerang and companies that are similar to Boomerang. Had Mr. Pohl paid due attention to his own set of so-called "Steel Comps" (which includes a handful of companies that do sell OCTG products), he would have seen that OCTG companies are nearly twice as leveraged as non-OCTG companies. Because, all else equal, a company's cost of debt is significantly lower than its cost of equity, Mr. Pohl's decision to apply an inapposite (and lower) debt-to-capital ratio resulted in a higher WACC and hence a lower value. Once again, the evidence adduced at Trial compels the inference that whenever a judgment was needed as to a particular variable in the WACC formula, Mr. Pohl selected a direction that resulted in depressing value.

9. The evidence also establishes that Mr. Pohl's opinion of value is artificially depressed because his DCF calculation is contradicted by his own market-based analyses. Mr. Pohl's DCF suggested value of $179.0 million implies a terminal multiple of only 4.8x the Company's projected 2018 EBITDA, whereas even the erroneous Sand, Chemical and Tool Comps Mr. Pohl relies upon (as well as the precedent transactions he identifies but then ignores) indicate that a multiple over 7.0x should be observed. This mathematical dissonance should have caused Mr. Pohl to stop and question whether there was something awry in his DCF analysis. After all, as the evidence established, that is the very purpose of considering market-based approaches to valuation. Thus, putting aside his erroneous reliance on the Sand, Chemical and Tool Comps, Mr. Pohl's valuation is facially unreliable because its concluded valuation range between the low-end (DCF low-end valuation of $155.0 million) and the high-end (comparable companies high-end valuation of $270.0 million) encompasses a Grand Canyon-like

chasm of $115.0 million. Such an extreme valuation range is highly suggestive of an error in judgment and further permits the inference that Mr. Pohl's overall valuation is unreliable.

10. In addition, the Plan cannot be confirmed because it incorporates illegal releases of, in particular, Access (the Debtors' largest shareholder and private equity Sponsor) and the Debtors' current and former officers and directors (four of whom are Access employees). The law in this Circuit is clear: in order to qualify for a plan release, non-debtors must make a "substantial contribution" of assets to the reorganization. And yet, over the course of the three-day Trial, the Debtors could not introduce one scintilla of proof of a substantial contribution made to these Cases by either Access or the Debtors' officers and directors. To be sure, the Debtors will argue—indeed, have argued—that the eleventh-hour, unsolicited offer of payment by Access of $250,000 toward certain employee obligations justifies their release. This assertion, however, is both factually and legally misplaced. Indeed, this gratuitous "tip" represents less than one-tenth of one percent of the Debtors' purported midpoint valuation. The Bankruptcy Code does not permit plan releases to be bought and sold on the cheap. Moreover, the participation of the Debtors' officers and directors in the restructuring process also does not constitute a substantial contribution—that is what they are paid to do. And, although the Committee has no present obligation to establish colorable claims against Access or the Debtors' officers and directors, the releases are particularly galling considering certain facts unearthed by the Committee so far that may, upon further factual investigation, give rise to valuable claims against these parties.

11. Further precluding Plan confirmation is the Debtors' continuing disregard for this Court's Critical Vendors Order. The Critical Vendors Order authorized the Debtors to use their $7.25 million slush fund only to make payments "necessary to avoid irreparable harm."

However, as the Debtors' Chief Restructuring Officer Kevin Nystrom ("Mr. Nystrom") testified, the Debtors continue to engage in payment negotiations—over four months after the filing of these Cases—with certain purported "critical" vendors. Certain of these vendors have not supplied the Debtors with ***any*** goods or services during these Cases, forcing Mr. Nystrom to admit that the interruption in regular deliveries from such vendors has neither impacted business operations nor diminished estate value. Thus, by the Debtors' own admission, these vendors are not "critical" under the Critical Vendors Order or applicable law. Rather, the Debtors' creation in effect of an unsecured creditor caste system—in which a favored subset of preferred vendors receives [redacted] payment while an underclass of disfavored unsecured creditors receives nothing—constitutes impermissible "unfair discrimination" under Section 1129(b)(1) of the Bankruptcy Code.

12. Finally, the Debtors' proposed GUC Trust Initial Funding Amount of $25,000 is so unrealistically meager that it renders the entire Plan infeasible. It bears repeating that the Debtors—directed by the Term Lenders—chose to leave unsecured creditors out in the cold with a *de minimis* recovery. Because of their actions, unsecured creditors' ***only*** potential source of meaningful recovery in these Cases is proceeds from Avoidance Actions.[6] But pursuing these Avoidance Actions, of course, requires a reasonable level of funding in order to first retain an experienced GUC Trustee and thereafter absorb the costs of administering the GUC Trust, conducting the claims resolution process, and ultimately investigating such actions. The miserly GUC Trust Initial Funding Amount virtually ensures that no one will be able to effectively occupy the role of GUC Trustee. And even if unsecured creditors do find a party willing to serve

[6] The Debtors and the Committee have identified three types of unperfected collateral that unsecured creditors will be able to look to for recovery in these Cases. See Committee Objection ¶ 78. However, on information and belief, recoveries (if any) from such unperfected collateral will be *de minimis*.

as GUC Trustee, such an infinitesimal funding level obviates the Trustee's ability to effectively administer the GUC Trust and coordinate the claims resolution process. Adding insult to injury is that under the Plan's GUC Trust Waterfall, the first $25,000 of GUC Trust Proceeds is routed directly to the Reorganized Debtors as repayment for the GUC Trust Initial Funding Amount. After that, the next tranche of GUC Trust Proceeds is delivered not to unsecured creditors, but instead to the Reorganized Debtors until they are reimbursed for ***all*** professional fees in excess of budgeted amounts. As of this writing, professional fees in these Cases exceed budgeted amounts by approximately ***$6.0 million***. It is only after this approximately $6.0 million is placed into the pockets of the Reorganized Debtors that GUC Trust Proceeds are eligible to fund the GUC Trust's administrative costs and thereafter make distributions to unsecured creditors. As a consequence of this inequitable scheme, the GUC Trust is incapable of fulfilling its Plan-specified role—thereby rendering the Plan infeasible under Bankruptcy Code Section 1129(a)(11).

13. To confirm the Plan, the Court must find for the Debtors on ***all*** of these issues. The evidence adducted at Trial precludes such a finding. Plan confirmation therefore must be denied.

ARGUMENT

14. The Debtors bear the burden of proving to the Court that the Plan satisfies every applicable confirmation requirement under Bankruptcy Code Sections 1129(a) and (b). See In re Exide Techs., 303 B.R. 48, 58 (Bankr. D. Del. 2003); In re Quigley Co., Inc., 437 B.R. 102, 125 (Bankr. S.D.N.Y. 2010). This burden is a heavy one. See In re 203 North LaSalle St. Ltd. P'ship, 190 B.R. 567, 576 (Bankr. N.D. Ill.1995). In a non-consensual case such as this one, the Debtors "must also show that the plan meets the additional requirements of § 1129(b), including

the requirements that the plan does not unfairly discriminate against dissenting classes and the treatment of dissenting classes is fair and equitable." See In re Exide Techs., 303 B.R. at 58; In re Genesis Health Ventures, Inc., 266 B.R. 591, 599 (Bankr. D. Del. 2001).

15. As discussed more fully below, the evidence adduced at Trial demonstrates that the Debtors have failed to satisfy these burdens. Accordingly, the Plan is unconfirmable.

I. THE COURT CANNOT CONFIRM THE PLAN BECAUSE THE DEBTORS' VALUATION THESIS IS UNSUPPORTABLE; THE DEBTORS THEREFORE HAVE FAILED TO SATISFY THEIR BURDEN THAT THE PLAN IS FAIR AND EQUITABLE.

16. As Plan proponent, it is the Debtors' burden to prove to this Court that the Plan does not afford any class value in excess of the amount of its claim. See, e.g., In re Johns-Manville Corp., 68 B.R. 618, 636 (Bankr. S.D.N.Y. 1986); 7 Collier on Bankruptcy ¶ 1129.02[4]. The issue of the Reorganized Debtors' TEV directly impacts this analysis. See In re Exide Techs., 303 B.R. at 60-61 ("[a] determination of [a] Debtor's value directly impacts the issues of whether the proposed plan is 'fair and equitable'").

17. The Debtors have failed to satisfy their burden that the Plan's transfer of value to the Term Lenders is "fair and equitable" because the Trial evidence establishes that the Pohl Report is simply not credible. Rather, as testified to by Mr. Wisler, the Reorganized Debtors' TEV (in a range between $312.0 million and $361.0 million) exceeds the Debtors' Funded Debt Hurdle. The Plan—which seeks to deliver this surplus value to the Term Lenders—therefore is not confirmable.

A. The Debtors' Purported Valuation Of $210.0 Million Is Erroneous And Unreliable.

18. The $210.0 million midpoint TEV proposed by the post-hoc Pohl Report is the lynchpin of the Debtors' Plan: it is their entire justification to support the Board's previous uninformed decision to hand the keys to the Company to the Term Lenders and dismiss

unsecured creditors with a *de minimis* recovery. However, as summarized briefly in the table below, the Pohl Report suffers from five principle flaws, all of which are interrelated and combine to render Mr. Pohl's valuation conclusion artificially low:

Valuation Input	Pohl Report	Wisler Report	Impact of Mr. Pohl's Assumption on Valuation
Selection of comparable companies	Sand, Chemical and Tool Comps (do not make OCTG pipe)	OCTG Comps (make OCTG pipe)	Increases beta and decreases debt-to-capital → higher WACC
Unlevered beta (component of cost of equity under CAPM)	BARRA beta (black-box, subscription-only)	Historical beta (Capital IQ) (calculable, verifiable)	Understates TEV by $119.0 million
Market risk premium (component of cost of equity under CAPM)	7.0% (Lazard orthodoxy)	6.0% (midpoint of numerous sources)	Understates TEV by $25.0 million
Debt-to-capital ratio (used to re-lever beta and calculate WACC)	25.0% (derived from Sand, Chemical and Tool Comps)	40.0% (derived from OCTG Comps)	Increases WACC → decreases TEV
Terminal value	4.8x 2018E EBITDA	7.5x 2018E EBITDA	Understates TEV
Total Impact of Mr. Pohl's Assumptions			**Understates TEV by *at least* $144.0 million**

19. The Debtors and their expert witness had three days at Trial to meet their burden of proof that the Pohl Report is reliable. For the reasons that follow, the Debtors have failed to do so.

i. Mr. Pohl's Sand, Chemical And Tool Comps Are Fundamentally Incomparable To Boomerang.

20. The Pohl Report is premised on the following illogical premise: namely, that a manufacturer of OCTG pipe (i.e., Boomerang) is more similar to companies that make chemical, tooling, and sand products than it is to other readily-identifiable companies that, like Boomerang, also manufacture OCTG pipe. The Committee respectfully disagrees and, at Trial, advanced the following principle that borders on the obvious: for valuation purposes, an OCTG pipe

manufacturer such as Boomerang is more comparable to companies that actually make OCTG pipe (i.e., Mr. Wisler's OCTG Comps) than it is to companies that make unrelated products (i.e., Mr. Pohl's Sand, Chemical and Tool Comps). This analytical point of departure quite literally makes or breaks the case for unsecured creditors because the selection of comparable companies directly impacts the variables that drive the WACC calculation.[7] The evidence established at Trial supports the Committee's position.

21. The logical starting point for selecting an accurate set of comparable companies is to identify firms that compete within the same industry as the firm being valued. See Merion Capital, L.P. v. 3M Cogent, Inc., No. 6247-VCP, 2013 WL 3793896, at *5 (Del. Ch. July 8, 2013) ("[T]he utility of a market-based method depends on actually having companies that are sufficiently comparable . . . . When there are a number of corporations competing in a similar industry, these methods are most reliable. On the other hand, when the 'comparables' involve companies that offer different products or services . . . a comparable companies or comparable transactions analysis is inappropriate."). As this Court has succinctly stated: "[t]he more similar the guideline companies are, the more supportable the use of the Comparable Companies method. Use of companies that are clearly not comparable will lead to unsupportable conclusions." In re Nellson Nutraceutical, Inc., No. 06-10072 (CSS), 2007 WL 201134, at *21 (Bankr. D. Del. 2007). Importantly, "[t]he burden of proof on the question whether the comparables are truly comparable lies with the party making that assertion." In re Nine Sys. Corp. S'holders Litig., 2014 WL 4383127, at *44 (Del. Ch. Sept. 4, 2014). At Trial, the Debtors fell well short of meeting this burden.

---

[7] See *Transcript of September 21, 2015 Hearing* [D.I. 568] (attached hereto as "Appx. 1") at 170:15-17 ("[T]here are two data points in this formula that you need to rely on looking at comparable companies in order to . . . derive the data. One is beta and the other is your target debt-to-capital ratio.").

22. Common sense dictates—and courts understand intuitively—that comparable companies sell similar products or services. See LongPath Capital, LLC v. Ramtron Int'l Corp., 2015 WL 4540443, at *18 (Del. Ch. June 30, 2015) ("Reliance on a comparable companies or comparable transactions approach is improper where the purported 'comparables' involve significantly different products or services than the company whose appraisal is at issue" . . . .). Unsurprisingly, the weight of Delaware caselaw demonstrates that comparable companies must, absent unusual circumstances, sell the same or similar products as those sold by the target company being valued. See Gilbert v. MPM Enters., Inc., 709 A.2d 663, 672 (Del. Ch. 1997) (crediting comparable companies selected by respondent's expert that sold similar products); In re Nine Sys. Corp. S'holders Litig., 2014 WL 4383127, at *44 (crediting comparable companies that, like the subject company, sold streaming media products); LeBeau v. M.G. Bancorp, Inc., No. 13414, 1998 WL 44993, at *8 (Del. Ch. Jan. 29, 1998) (crediting comparable companies that, like the subject company, were suburban banks); Doft & Co. v. Travelocity.com, Inc., No. 19734, 2004 WL 1152338, at *8 (Del. Ch. May 20, 2004) (crediting use of Expedia, an online travel services provider, as comparable company for valuing Travelocity, also an online travel services provider); Gotham Partners, L.P. v. Hallwood Realty Partners, L.P., 855 A.2d 1059, 1075-76 (Del. Ch. 2003) (crediting use of comparable companies that, like the subject company, operated income-producing real estate properties); Taylor v. Am. Specialty Retailing Grp., Inc., No. 19239, 2003 WL 21753752, at *8 (Del. Ch. July 25, 2003) (crediting comparable companies that, like the subject company, sold sporting goods).

23. And the converse also holds true: companies that sell different products are ***not*** comparable for valuation purposes. See Gilbert, 709 A.2d at 671-72 (finding target company, a manufacturer of screen printers, was not comparable to companies in the integrated circuit and

semiconductor industry); Prescott Grp. Small Cap, L.P. v. Coleman Co., No. 17802, 2004 WL 2059515, at *22 (Del. Ch. Sept. 8, 2004) (finding target company, a maker of camping goods, was not comparable to apparel and tool companies); Laidler v. Hesco Bastion Envtl., Inc., No 7561-VCG 2014 WL 1877536, at *7 (Del. Ch. May 12, 2014) (finding that "when the 'comparables' involve companies that offer different products or services . . . a comparable companies or comparable transactions analysis is inappropriate."); Reis v. Hazelett Strip-Casting Corp., 28 A.3d 442, 477 (Del. Ch. 2011) (finding target company, a machine manufacturer, incomparable to companies that made only spare machine parts); In re Orchard Enters., No. 5713-CS, 2012 WL 2923305, at *10 (Del. Ch. July 18, 2012) (finding target company, a music retailer, incomparable to companies that did not primarily sell music); In re Radiology Assocs., Inc. Litig., 611 A.2d 485, 498 (Del. Ch. 1991) (rejecting companies as comparable where product offering differed). In fact, Mr. Pohl's thesis that similar macroeconomic drivers renders comparable otherwise disparate companies has been discredited by applicable caselaw. See Lane v. Cancer Treatment Ctrs. of Am., Inc., No. 12209-NC, 2004 WL 1752847 (Del. Ch. July 30, 2004) (rejecting companies as comparable notwithstanding expert's "generalized assumptions about . . . macroeconomic trends").

24. Mr. Pohl's selection of the Sand, Chemical and Tool Comps runs afoul of this well-settled law. Instead of identifying comparable companies that, like Boomerang, sell OCTG pipe, Mr. Pohl confected an impossibly granular "test" to filter out well-known OCTG companies and then, after (unsurprisingly) finding that no company in the world could pass his test, reached for unrelated companies that make unrelated products as diverse as sand, chemicals, and tools.[8] The result of Mr. Pohl's unorthodox approach is a valuation conclusion that is

[8] See J.E. 31 at 28 (setting forth Lazard criteria for rejecting OCTG companies as comparable).

significantly lower than what Mr. Pohl would have found had he, like Mr. Wisler, selected comparable companies that actually produce and sell OCTG pipe.

25. Indeed, Mr. Pohl testified that in identifying his universe of Sand, Chemical and Tool Comps, he gave more weight to companies that "are more comparable from a financial point of view than . . . companies that happen to necessarily make pipes."[9] Mr. Pohl testified that although there are other public companies "that do sell the same product"[10] as Boomerang, "there is not a perfect comp out there . . . [because] [t]here [is not] somebody who looks exactly like Boomerang."[11] As a result, Mr. Pohl reached to include companies "that make other things" but are purportedly more similar to Boomerang "in terms of who they sell to, what part of the world they sell to, macroeconomic drivers, [and] industry drivers."[12] In other words, instead of considering companies that, like Boomerang, manufacture OCTG pipe, Mr. Pohl looked to companies that do not manufacture OCTG pipe but, in his view, "bear similar financial characteristics to Boomerang."[13] This approach finds no support in either the law or learned treatises. It goes without saying that no two companies are completely identical. See Gotham Partners, L.P., 855 A.2d at 1075 (observing that "like any comparable, it was not identically situated to [the company being valued]"); J.E. 40 (Reorganization Value by Peter V. Pantaleo and Barry W. Ridings[14]) at 422 ("[I]n virtually all cases, perfectly comparable companies do not

[9] Appx. 1 at 162:2-4.

[10] Id. at 161:18.

[11] Id. at 161:16-17.

[12] Id. at 162:8-10.

[13] See *Transcript of September 22, 2015 Hearing* [D.I. 572] (attached hereto as "Appx. 2") at 24:1-2.

[14] Incidentally, according to Mr. Pohl, Mr. Ridings is a senior advisor at Lazard whose views are often sought out in valuation cases.

exist). The lack of perfectly comparable OCTG companies does not, however, give Mr. Pohl license to invent a new gauge of comparability (i.e., similar "macroeconomic drivers"). See In re Spansion, Inc., 421 B.R. 151, 159-60 (Bankr. D. Del. 2009) (rejecting expert's purported comparable companies which competed in different industry sector and explaining that "[w]hile there may be no easy comparables for the Debtors, it does not necessarily follow . . . that the entire semiconductor industry . . . can be used in the absence of 'good' comparables."); J.E. 59 (Tim Koller, Valuation: Measuring and Managing the Value of Companies) at 346 ("It is better to have a smaller number of peers of companies that truly compete in the same markets with similar products and services."); J.E. 40 at 423 (identifying ten factors that make companies comparable for valuation purposes and not including "macroeconomic drivers" as factor).

26. The Trial evidence establishes that Mr. Pohl conjured up a four-part, conjunctive filter to ascertain whether there existed companies that are perfectly comparable to Boomerang. Under his litmus test, in order to be deemed comparable to Boomerang, a company would have to: (i) be incorporated in the United States; (ii) sell a single, "pure-play" product focused solely on OCTG pipe manufacturing; (iii) sell its pipe for use solely in onshore rigs; and (iv) sell its pipe to customers located only within North America.[15] After finding that no company in the world could satisfy ***all*** four requirements, Mr. Pohl felt it was appropriate to look to companies that do not sell OCTG pipe at all but instead sell dissimilar products.[16] Accordingly, Mr. Pohl's

[15] Appx. 2 at 25:8-17 ("Q. So that's what I -- when I read that, I read that as you saying that if I didn't -- if you didn't have those four characteristics, meaning domestic, pure play OCTG manufacturer, focused solely on OCTG pipe manufacturer, for us[e] on onshore exploration and production, in markets located only in North America, that you were now -- could move beyond OCTG companies and look for other types of characteristics. . . . Is that fair? A. Yes, it's fair.").

[16] See id.

Sand, Chemical and Tool Comps contain three companies that mine for sand, two chemical companies, and three companies that manufacture tools.[17]

27. Plainly, Mr. Pohl's litmus test is at once so unnecessarily granular that it should come as no surprise that he concluded that none of the OCTG Comps identified by Mr. Wisler are comparable to Boomerang, and yet so completely meaningless that he applies none of those criteria to the companies he actually selected. Thus, unpacking the purported "requirements" of Mr. Pohl's litmus test demonstrates that each prong exists only to disqualify the OCTG comparables. For example, Mr. Pohl's emphasis on geography is inconsistently applied. On the one hand, Mr. Pohl criticizes Mr. Wisler's OCTG Comps because they derive sales from non-North American markets, while on the other he includes sand, chemical and tool companies within his own set of comparables that feature similar geographic diversity in sales. So while Mr. Pohl omitted Vallourec, Tenaris, and OAO TMK as comparables because they have a worldwide footprint, he included Flotek Industries, Schoeller-Bleckmann, and Forum Energy Technologies notwithstanding that these companies have similar geographic footprints.[18]

28. Similarly, Mr. Pohl's insistence on a meaningful onshore-versus-offshore divide seems to apply only when he finds it convenient. Thus, Mr. Pohl testified that companies are not comparable to Boomerang if their products are used in offshore—as opposed to onshore—rigs

[17] See id. at 37:21-38:15 (discussing that CARBO, Fairmount, and U.S. Silica are sand companies, Flotek and Newpark Resources are chemical companies, and Forum Energy, Hunter, and Schoeller-Bleckmann are tooling companies).

[18] Id. at 37:12-17 ("Q. And the other distinguishing factor that I think you testified to was the geographic mix of sales for --between Boomerang on the one hand solely in North America and the other OCTG companies which had a more worldwide footprint; is that right? A. That's right."). According to Mr. Pohl, non-North American customers are more "willing to spend through the down cycles" and, consequently, are less sensitive to U.S. rig count. Appx. 1 at 205:25. But both Vallourec and Tenaris derive a plurality of their total sales from the North American market. J.E. 47 (Alvarez & Marsal Boomerang Tube Valuation Report) at 39.

(as is the case with companies such as Tenaris, Vallourec, and OAO TMK).[19] But when one of his own Sand, Chemical and Tool Comps (Forum Energy Technologies) sells its products for offshore applications, the previous disqualification no longer applies. On top of this, Mr. Pohl inexplicably ignores the Debtors' own marketing materials, which advertise that Boomerang's products can be used for offshore wells.[20]

29. Further, the record demonstrates that Mr. Pohl's focus on a purported seamed-versus-seamless divide is a distinction without a difference. First, Mr. Pohl argues that his exclusion of Tenaris and Vallourec from his set of Sand, Chemical and Tool Comps is proper because these companies sell seamless pipe in addition to seamed (or ERW) pipe.[21] Because seamless pipe is a more expensive product, Mr. Pohl concluded that Boomerang (which exclusively makes seamed pipe) is not comparable to any other OCTG pipe company for whom seamless pipe constitutes some percentage of sales.[22] However, the Trial evidence refutes this assertion. That Boomerang has been able to generate an 8.0% market share in North America against competitors who primarily sell seamless pipe evidences that, from a customer's perspective, in some applications the two products are interchangeable.[23] Indeed, Mr. Pohl

---

[19] Appx. 2 at 36:10-13 ("Q. You also thought that one significant distinguishing factor was some of these OCTG companies had offshore capabilities that Boomerang did not have; right? A. That's right.").

[20] J.E. 8 (Boomerang Tube, LLC Investor Presentation May 2015) at 11; J.E. 31 (Lazard Valuation Report) at 43.

[21] Appx. 1 at 202:12-23 ("If you look at Tenaris, for example, in their tier 1 peer set, only 19 percent of Tenaris' revenue as a company is derived from the sale of ERW pipe. The rest is derived from the sale of seamless pipe, which is different in a lot of ways . . . Vallourec, next on the page. Almost all of Vallourec's OCTG product is seamless pipe. There is a little bit of seam. . . ").

[22] Id. at 207:7-9 ("The relationship to seamed [versus] seamless is that seamless product is the premium product. . . . It's more expensive."). It never seemed to have occurred to Mr. Pohl that sand products are less like ERW pipe than is seamless pipe.

[23] J.E. 31 (Lazard Valuation Report) at 10.

conceded this interchangeability at Trial.[24] Mr. Pohl's insistence on a meaningful seamed-versus-seamless divide is also contradicted by Mr. Nystrom, who testified that Boomerang has succeeded in migrating one large customer from seamless to ERW pipe.[25] Mr. Nystrom also testified that the price differential between seamless and seamed pipe is marginal at best; whereas Boomerang's seamed pipe sells for an average price per ton of $1,275,[26] seamless pipe sells for an additional $100-$200 per ton (representing a premium of between 7 and 15 percent).[27] It defies credulity that such a marginal price differential renders seamless companies incomparable to ERW companies. And according to Boomerang's own management, the price differential between seamless and seamed OCTG pipes has compressed over time.[28] Moreover, as Mr. Wisler described at Trial, seamed and seamless manufacturers exhibit similar ROICs in the long run because although seamless sells for a slight premium as compared to seamed pipe, the manufacture of seamless pipe requires heavier up-front capital investment.[29] Significantly, long before it was convenient to commission a valuation opinion that results in all value being turned over to the Term Lenders, Boomerang's management represented that there was no material difference between seamed and seamless pipe in its May 2015 investor presentation, in which the Company touts its "[s]uccess in moving seamless users to premium alloy welded technology."[30]

---

[24] Appx. 2 at 29:4-5 ("There are customers for which those products can compete with one another.").

[25] Appx. 1 at 36:15-17 ("And to date, I really have only been successful in one program in swapping out an E&P customer's seamless for my premium alloy [seamed product] that was EOG.").

[26] Id. at 49:13-15.

[27] Id. at 36:14-15 ("Seamless typically is $100 to $200 more expensive per ton.").

[28] J.E. 8 (Boomerang Tube, LLC Investor Presentation May 2015) at 28.

[29] *Transcript of September 24, 2015 Hearing* [D.I. 577] (attached hereto as "Appx. 3") at 43:9-14.

[30] J.E. 8 (Boomerang Tube, LLC Investor Presentation May 2015) at 5.

30. Furthermore, Mr. Pohl's assertion that Boomerang is more comparable to companies that sell sand, chemicals, and tools than it is to OCTG manufacturers is belied by his own precedent transactions analysis. Of the eight precedent transactions the Pohl Report identifies, seven are acquisitions of target companies that sell OCTG pipe.[31] Nowhere are there listed any companies that sell sand, chemicals, or tools.[32] This begs the question: if Mr. Pohl is so confident that Boomerang is closely comparable to companies that sell non-OCTG products, why is this not reflected in his precedent transactions analysis?

31. Equally telling is that the Sand, Chemical and Tool Comps do not, upon closer analysis, satisfy Mr. Pohl's own litmus test. Consider, for example, the case of Flotek Industries, which Mr. Pohl includes in his Sand, Chemical and Tool Comps.[33] Flotek is a chemical company—only 25 percent of its sales are derived from what Mr. Pohl broadly describes as "drilling."[34] Further, 62 percent of Flotek's sales are to non-U.S.-based customers.[35] This, of course, directly contradicts Mr. Pohl's testimony that companies with international sales channels are not "closely comparable" to Boomerang because non-U.S.-based customers are "not directly correlated to rig count" in the United States.[36] The same is true of Schoeller-Bleckmann, which Mr. Pohl includes in his Sand, Chemical and Tool Comps notwithstanding that 48 percent of its sales are international,[37] as well as Newpark Resources, 37 percent of

---

[31] J.E. 31 (Lazard Valuation Report) at 38.

[32] Id.

[33] Id.

[34] Id.

[35] Id.

[36] Appx. 1 at 163:11-12.

[37] J.E. 31 at 43.

whose sales are international.[38] However, Mr. Pohl excluded Vallourec and Tenaris from his Sand, Chemical and Tool Comps notwithstanding that these companies' percentage of U.S. sales are similar to (or, in the case of Tenaris, greater than) Flotek's.[39] All of this goes to show that the filter through which Mr. Pohl screened and identified his Sand, Chemical and Tool Companies is so formless and subjective as to render it meaningless.

32. To the contrary, the Trial evidence shows that the OCTG Comps identified by Mr. Wisler are appropriate. Mr. Wisler's OCTG Comps comprise five companies—Vallourec, Tenaris, OAO TMK, Tubos Reunidos, and Tubacex—that, like Boomerang, actually sell OCTG pipe.[40] Company management has on numerous occasions made clear that Boomerang operates within the OCTG sector and competes directly with the OCTG Comps. For instance, the Boomerang investor presentation dated May 2015 identifies Tenaris, Vallourec, and OAO TMK—three of Mr. Wisler's OCTG Comps—as Boomerang's competitors within the North American OCTG market.[41] In 2012, Morgan Stanley—at that time the Company's investment banker—similarly identified Tenaris, Vallourec, and OAO TMK as companies comparable to Boomerang when describing the Company's business model to prospective capital markets investors.[42] That different companies compete with each other for the same customers is

[38] Id. As a fallback, Pohl argued that the Sand, Chemical and Tool Comps are more comparable to Boomerang than OCTG companies because there is a "very close correlation between the equity performance of those companies" and fluctuations in WTI prices and rig count. See Appx. 2 at 47:23-48:2 ("[Y]ou can see a very close correlation between the equity performance of those companies and those two factors [oil prices and rig count] that you just mentioned, a much stronger correlation than with respect to the other companies, that's right."). This argument, which is not supported by any record evidence, is meritless. Moreover, Mr. Pohl testified that he is not an oil and gas industry expert. Appx. 1 at 155:18-23.

[39] J.E. 31 (Lazard Valuation Report) at 44 (48.0% of Tenaris' sales generated in North America; 31.0% of Vallourec's sales generated in North America).

[40] See J.E. 47 (Alvarez & Marsal Boomerang Tube Valuation Report) at 38.

[41] See J.E. 8 (Boomerang Tube, LLC Investor Presentation May 2015) at 30.

[42] See J.E. 33 (Boomerang Board Meeting Materials) at Bates No. 0005130-0005131.

quintessential corroboration that, for valuation purposes, the companies are "comparable." See Andaloro v. PFPC Worldwide, Inc., Nos. 20336, 20289, 2005 WL 2045640, at *4 (Del. Ch. Aug. 19, 2005) (finding that target company's competitors were most useful in valuation analysis); Borruso v. Commc'ns Telesystems Int'l, 753 A.2d 451, 455 (Del. Ch. 1999) (rejecting use of purported comparable companies that did not compete with target company).

33. Major investment banks have also framed the OCTG segment as a discrete industry sector and have identified Mr. Wisler's OCTG Comps as being situated within that sector.[43] At some level, Mr. Pohl too understands this; in fact, as recently as April 2015, Lazard identified Tenaris and Vallourec as companies that are most comparable to Boomerang.[44] The Pohl Report itself notes that Tenaris, Vallourec, and OAO TMK compete with Boomerang for North American market share.[45] Mr. Pohl testified as well that the Debtors consider Tenaris and Vallourec to be competitors within the North American market for OCTG pipe.[46] Nonetheless, instead of including these companies as its primary set of comparables, Mr. Pohl instead relied on his Sand, Chemical and Tool Comps.[47]

34. In an effort to downplay the dissimilar nature of his Sand, Chemical and Tool Comps, at Trial Mr. Pohl referred to a demonstrative that purports to show that even if Mr. Pohl had properly considered OCTG companies such as Tenaris and Vallourec in addition to his Sand,

[43] See J.E. 128 (Tubos Reunidos, Santander Analyst Report) at 6 (identifying comparable company set including Tenaris, Vallourec, Tubos Reunidos, OAO TMK, and Tubacex); J.E. 127 (Tenaris SA, J.P. Morgan Analyst Report) at 1 (identifying comparable company set including Tenaris, Vallourec, and OAO TMK).

[44] J.E. 32 (Lazard Discussion Materials) at Bates No. 19345 (including Tenaris, Vallourec, and TMK as companies comparable to Boomerang).

[45] J.E. 31 (Lazard Valuation Report) at 10.

[46] Appx. 2 at 23:7-12 ("Q. So there's no question in your mind that the company considers Tenaris [and] Vallourec . . . to be their competitors; right? A. To be their competitors . . . in North America, yes.").

[47] J.E. 31 (Lazard Valuation Report) at 31 (including Tenaris, Vallourec, and OAO TMK as Steel Peers).

Chemical and Tool Comps, his ultimate valuation conclusion would have remained the same.[48] This demonstrative, however, is misleading in two critical respects. First, it is a law of mathematics that if one adds two new numbers to an existing number series—one of which is below the existing median and one of which is above the existing median—the updated median remains constant. So, while it purports to account for the OCTG companies that Mr. Pohl ignored in his market-based analyses, the demonstrative actually also ignores these companies. Second, and more to the point, Mr. Pohl's demonstrative does not change the stubborn fact that his Sand, Chemical and Tool Comps are not comparable to Boomerang. It is self-evident that adding two comparable companies (Tenaris and Vallourec) to a set of eight incomparable companies (Mr. Pohl's Sand, Chemical and Tool Comps) does not somehow alchemize the entire set into accurate comparables. Like a vintner who adds a drop of grape juice to a barrel of water and calls it wine, Mr. Pohl's attempt to justify his selection of inapposite companies by blending them together with two OCTG companies is, in actuality, a transparent effort to obfuscate. This demonstrative, in short, gets Mr. Pohl no closer to the goal line.

35. The selection of accurate comparable companies is a crucial driver of any reliable valuation. See In re Radiology Assocs., 611 A.2d at 1265 ("The utility of the comparable company approach depends on the similarity between the company the court is valuing and the companies used for comparison."). Mr. Pohl's Sand, Chemical and Tool Comps are fundamentally different from Boomerang. Accordingly, his DCF conclusion is unreliable. This Court should instead credit Mr. Wisler's OCTG Comps as part of its valuation analysis.

[48] See generally Appx. 1 at 215-221 (discussing mechanics behind Defendant's Demonstrative D). For this demonstrative, Mr. Pohl added Tenaris and Vallourec (two of Mr. Wisler's OCTG Comps) to his existing set of eight Sand, Chemical and Tool Comps.

ii. BARRA Betas Are Incalculable, Untested, And Untrustworthy.

36. After the selection of comparable companies, perhaps the most impactful driver of the Pohl Report's depressed valuation is the selection of beta, which substantially influences the derivation of the WACC used in DCF analysis.[49] The Debtors were provided ample time at Trial to persuade this Court why, counter to recent Delaware caselaw and scholarly articles, Mr. Pohl's use of an incalculable, black-box BARRA beta is nonetheless appropriate. They have failed to do so. Mr. Pohl's justification for his use of BARRA betas boils down to that because Lazard customarily uses BARRA, it must be reliable. This, of course, falls well short of the Debtors' burden of proof.

37. Mr. Pohl used BARRA betas for each of his eight Sand, Chemical and Tool Companies to derive a median unlevered beta of 1.42.[50] This was analytically deficient for several reasons. First, Mr. Pohl was unable to describe for the Court how BARRA betas are computed.[51] Mr. Pohl conceded that by using BARRA betas, Lazard is necessarily relying upon BARRA's professional judgment and expertise.[52] However, Mr. Pohl's sole justification for his blind reliance on BARRA betas is that somebody told him that investment banks use BARRA on a regular basis.[53] This explanation is insufficient, particularly given that Mr. Pohl also testified that BARRA's methodology for computing beta is secret and cannot be replicated.[54]

---

[49] Appx. 2 at 59:21-25 ("Q. Okay. And just as a matter of impact on the math, the higher the beta in your cost of equity formula, ultimately the higher your weighted average cost of capital, all other things being held equal. A. Correct.").

[50] J.E. 31 (Lazard Valuation Report) at 22.

[51] Appx. 2 at 57:3-6 ("Q. And, of course, the judge here will make her own decision as to what is reliable or not, but you can't tell the Court how the Barra formula works, right? A. Nobody can.").

[52] Id. at 52:22-25.

[53] Id. at 53:1-5.

[54] Id. at 52:1-6.

38. Second, although Mr. Pohl did purportedly perform a "sanity check" on his BARRA betas by comparing them against historical betas to ascertain whether significant differences existed, he provided no corroborating evidence of this and Mr. Wisler's testimony and backup calculations, both before the Court, are to the contrary.[55] The Court will have to determine whose testimony is more reliable in this regard. Ultimately, Mr. Pohl's selection of his Sand, Chemical and Tool Comps drives significantly higher betas to begin with as compared to their corresponding historical betas, which is then compounded by reliance on the BARRA beta.[56] For example, had Mr. Pohl selected an accurate universe of comparable companies that included Mr. Wisler's OCTG Comps, he would have noticed that the BARRA-versus-historical beta gap is particularly profound; that is, a greater than 40.0% difference between the two, with the BARRA beta invariably higher and thus value-depressing.[57] Mr. Pohl also did not stop to question why BARRA's median unlevered beta for his so-called "Steel Peers" (which include Tenaris, Vallourec, and OAO TMK) is substantially lower than BARRA's median unlevered beta for the Sand, Chemical and Tool Comps.[58] The answer, as testified to by Mr. Wisler, is that the capital structures of the two types of businesses are entirely different, the historically-realized returns are different, and hence investors' expectations for return on invested capital ("<u>ROIC</u>") are very different.[59] The cost of equity component of WACC is designed to capture an

---

[55] J.E. 47 (Alvarez & Marsal Boomerang Tube Valuation Report) at 32, 61 (computing median unlevered historical beta for OCTG Comps of 0.80; comparing historical betas to Barra betas); Appx. 3 at 53:3-4 ("[W]e sanity checked our betas with historical data.").

[56] J.E. 47 (Alvarez & Marsal Boomerang Tube Valuation Report) at 61 (noting median Barra beta for Sand, Chemical and Tool Comps of 1.70 versus median historical beta for these companies of 1.47).

[57] <u>See</u> <u>id.</u> at 61 (comparing Tenaris' Barra beta of 1.62 versus Tenaris' historical beta of 1.04 (36% difference); comparing Vallourec's Barra beta of 1.72 versus Vallourec's historical beta of 1.33 (26% difference)).

[58] J.E. 31 (Lazard Valuation Report) at 22-23 (median unlevered beta of 1.42 for Sand, Chemical and Tool Comps is more than double the median unlevered beta of 0.66 for Mr. Pohl's so-called "Steel Peers").

[59] Appx. 3 at 41:7-12.

investor's expectation of return on the equity he or she invests. That is why over the long-run a company's WACC cannot exceed its ROIC—a hypothetical investor will not invest in an entity that generates a ROIC lower than its WACC.[60] Therefore, putting aside the opacity of BARRA betas, BARRA's own data should have given Mr. Pohl pause about whether his beta variable in the WACC calculation was unreasonably high (and consequently value-dilutive).

39. Third, Mr. Pohl was unable at Trial to say with any confidence whether BARRA's inclusion of a size premium in its black-box renders duplicative the additional use of a size premium in computing the WACC. As Mr. Pohl testified, the purpose behind including a size premium in the calculation of WACC is "to compensate for the type of equity return that investors demand in the marketplace when investing in smaller companies versus larger companies."[61] It is thus possible, then, that Mr. Pohl's use of a BARRA beta (which in some undisclosed way accounts for size) ***and*** a separate size premium (whose purpose is also to account for size) may be duplicative. Indeed, the very source relied on by the Debtors in their Memorandum of Law as support for the assertion that BARRA betas will one day be adopted by Delaware courts specifically identifies this "double counting" risk as one reason why valuation professionals should be wary of using BARRA betas.[62] The risk of "double counting" the size premium is also one of the reasons why Mr. Wisler rejected the use of BARRA betas for

[60] J.E. 47 at 64-65.

[61] Appx. 2 at 61:25-62:3.

[62] J.E. 191 (Widen, R. Scott, *Practitioner Note: Delaware Law, Financial Theory and Investment Banking Valuation Practice*, 4 N.Y.U.J.L. & Bus. 579, 586-87 (2008) ("In light of Barra using a 13 factor model, investment bankers must be cognizant of the nature of these factors so as not to apply further adjustments that result in a "double counting" of certain risk adjustments. For example, Barra uses size (market capitalization) as one input into its predicted beta.")).

valuation purposes.[63] Mr. Pohl's use of a separate size premium of 2.6% in addition to the size premium already baked into his BARRA beta causes his cost of equity—and hence his WACC—to be materially higher than it otherwise would have been.[64]

40. Mr. Pohl's inability to shed any light on the inner workings of BARRA betas underscores precisely why the Delaware Chancery Court rejected their use in Global GT LP, 993 A.2d at 521. The one case cited by the Debtors in their Memorandum of Law[65] as accepting BARRA betas, IQ Holdings, Inc. v. Am. Commercial Lines, Inc., C.A. No. 6369-VCL, 2013 WL 4056207, at *4 (Del. Ch. Mar. 18, 2013), did so without discussion (hence there is no indication of whether the use of BARRA betas was challenged on the grounds of reliability) and, moreover, explicitly rooted its approval of the BARRA beta on the grounds that it "***fell at the midpoint***" of the various betas urged by the competing experts.

41. As Mr. Wisler testified, BARRA betas are unreliable for several reasons. Because they are incalculable, the valuation practitioner cannot "sanity check" their accuracy.[66] It should come as no surprise then that the overwhelming weight of Delaware jurisprudence shows that historical betas—not black-box BARRA betas—should be used for valuation purposes. See Andaloro, 2005 WL 2045640, at *15 (approving use of historical betas); In re PNB Holding Co. S'holder Litig., No. 28-N, 2006 WL 2403999, at *30 (Del. Ch. Aug. 18, 2006) (approving use of Ibbotson peer group beta); Cede & Co. v. JRC Acquisition Corp., No. 18648-

---

[63] Appx. 3 at 61:15-18 ("So that certainly opens the prospect for double counting and that's particularly why we reject the use of . . . Barra betas in the first place.").

[64] J.E. 31 (Lazard Valuation Report) at 50 (setting forth how size premium is a direct add-on to the cost of equity computation).

[65] See *Debtors' Memorandum of Law in Support of and in Response to Objections to Confirmation of Debtors' Amended Joint Prearranged Chapter 11 Plan Dated September 4, 2015* [D.I. 528] (the "Memorandum of Law").

[66] Appx. 3 at 53:3-6.

NC, 2004 WL 286963, at *10 (Del. Ch. Feb. 10, 2004) (endorsing use of historical Ibbotson beta); In re AT&T Mobility Wireless Operations Holding Appraisal Litig., No. 5736-VCL, 2013 WL 3865099, at *4 (Del. Ch. June 24, 2013) (approving use of two-year historical beta); In re Orchard Enters., 2012 WL 2923305, at *18 n.116 (endorsing historical Ibbotson betas). To the contrary, only one reported decision indirectly endorses the use of BARRA betas; and Vice Chancellor Laster was quick to condition his finding in that case on the ground that the BARRA beta was within the range of historical betas. See IQ Holdings, 2013 WL 4056207, at *4.

42. The selection of beta has an enormous impact on valuation; all else equal, a higher beta results in a higher WACC and, consequently, a lower valuation.[67] Replacing Mr. Pohl's black-box, unsubstantiated beta with a calculable historical beta reveals that his use of BARRA beta serves to depress the Reorganized Debtors' intrinsic TEV by approximately $119.0 million.[68] Where, as here, one input has such a significant influence on valuation, the Debtors cannot satisfy their burden of proof by referring this Court to an incalculable black-box.

iii. Mr. Pohl Cherry-Picked An Unjustifiably High Market Risk Premium.

43. Mr. Pohl's selection of a 7% market risk premium suffers from the same analytical defect apparent in his selection of beta: namely, a willingness to consider only one data point and then justify that data point on the basis that it is Lazard orthodoxy.[69] Here again, instead of consulting the myriad other estimates of market risk premium relied upon by experts

---

[67] Appx. 2 at 59:21-25 ("Q. And just as a matter of impact on the math, the higher the beta in your cost of equity formula, ultimately the higher your weighted average cost of capital, all other things being held equal? A. Correct").

[68] J.E. 47 (Alvarez & Marsal Boomerang Tube Valuation Report) at 62; Appx. 3 at 59:13-17 ("[R]e-running the calculations at the newly-calculated WACC using the beta change changes the enterprise value by $119 million.").

[69] Appx. 2 at 71:11-14 ("Q. You said that you used the 7 percent equity premium -- equity risk premium because -- from Ibbotson's because that's what Lazard's policy is; right? A. That's right.").

in the field, Mr. Pohl zeroed in on one piece of information and, at Trial, fell back on the same old "trust us" tautology. This also does not satisfy the Debtors' burden of proof.

44. To compute the WACC for his DCF, Mr. Pohl used a market risk premium of 7.0% based solely on one source.[70] Mr. Pohl testified that instead of surveying other available literature, he relied upon Lazard's internal opinion committee.[71] Mr. Pohl added that it is "the Lazard state-of-the-art practice" to use a 7.0% market risk premium.[72] Contrary to the Debtors' assertion in their Memorandum of Law that "Lazard has surveyed substantially all of the applicable literature"[73] with respect to market risk premium, Mr. Pohl in fact relied entirely upon the directive of the Lazard opinion committee—which is not, of course, a testifying witness in this case.[74]

45. Applicable caselaw demonstrates that courts by and large have endorsed the use of a lower market risk premium more in line with Mr. Wisler's 6.0% metric. See IQ Holdings, 2013 WL 4056207 at *4 (adopting 5.5% equity risk premium); Cede & Co., Inc. v. MedPointe Healthcare, Inc., C.A. No. 19354-NC, 2004 WL 2093967, at *19 (Del. Ch. Sept. 10, 2004) (adopting 4.5% equity risk premium); Global GT LP, 993 A.2d at 524 (adopting 6.0% equity risk premium); In re Orchard Enters., 2012 WL 2923305, at *19 (applying Ibbotson supply-side equity risk premium of 5.2%); Gearreald v. Just Care, Inc., No. 5233-VCP, 2012 WL 1569818, at *10 (Del. Ch. Apr. 30, 2012) (adopting equity risk premium of 5.73%); Laidler, 2014 WL

[70] J.E. 31 (Lazard Valuation Report) at 22; Appx. 2 at 67:15-18.

[71] Appx. 2 at 70:1-3.

[72] Appx. 1 at 171:10.

[73] Memorandum of Law ¶ 79.

[74] Appx. 2 at 70:1-3 ("We applied Lazard policy. It's promulgated on a worldwide basis by our Opinion Committee for use by bankers around the world.").

1877536, at *13 (adopting equity risk premium of 6.14%); Merion Capital, L.P., 2013 WL 3793896, at *18 (adopting 5.2% equity risk premium). Moreover, one of the Debtors' own sources cited in their Memorandum of Law points out that the market risk premium has declined over time to a current rate of 5.7 percent.[75] Academic experts also argue for a lower market risk premium.[76]

46. The 6 percent market risk premium used by Mr. Wisler is based on rigorous factual research—not just "trust us" tautology. Unlike Mr. Pohl, Mr. Wisler considered a variety of sources and then picked the average in order to arrive at his 6 percent market risk premium.[77] For good reason, courts find analysis by triangulation more persuasive than one-off estimates. See IQ Holdings Inc., 2013 WL 4056207 at *4.

47. As is the case with beta, the selection of market risk premium has a significant impact on valuation. Replacing Mr. Pohl's cherry-picked market risk premium of 7 percent with Mr. Wisler's carefully-vetted market risk premium of 6 percent demonstrates that Mr. Pohl's unsubstantiated judgment call serves to further depress his valuation of the Reorganized Debtors' TEV by $25.0 million.[78]

---

[75] See Memorandum of Law ¶ 79 (citing J.E. 192 (Pablo Fernandez, The Equity Premium in 150 Textbooks (Jan. 9, 2015)); Appx. 2 at 70:24-71:3 ("Q. And [Fernandez] also says that the five-year moving average [of the market risk premium] has declined from 8.4 percent in 1990 to 5.7 percent in 2008 to 2009. Do you see that? A. I do.").

[76] See J.E. 54 (Aswath Damodaran, Equity Risk Premiums (ERP): Determinants, Estimate and Implications - The 2015 Edition, Updated March 2015) at 77 (estimated ERP of 5.78%); J.E. 39 (Stocks, Bonds, Bills, and Inflation, 2015 Ibbotson SBBI Market Report) at 16 (estimated ERP of 6.19%); J.E. 191 at 587 ("In recent years, however, academic studies have questioned the appropriateness of using such a long historical measurement in light of evidence that the size of the equity risk premium has declined over time."). .

[77] Appx. 3 at 58:11-12 ("We look at the average and means of those and in this case that suggested six percent.").

[78] J.E. 47 (Alvarez & Marsal Boomerang Tube Valuation Report) at 62; Appx. 3 at 59:24-25 ("The change of that variable in isolation causes a $25 million change in value.").

iv. Mr. Pohl Used An Inaccurate Debt-To-Capital Ratio.

48. Likewise, Mr. Pohl's selection of an unreasonably low debt-to-capital ratio is inaccurate insofar as it is derived from its faulty set of Sand, Chemical and Tool Comps and runs afoul of standard corporate valuation theory.

49. To compute Reorganized Boomerang's WACC, Mr. Pohl utilized a "target" (i.e., aspirational) debt-to-capital ratio in a range between 10.0%-40.0% based upon his set of Sand, Chemical and Tool Comps.[79] Ultimately, the Pohl Report's midpoint WACC of 13.0% corresponds to a target debt-to-capital ratio for Reorganized Boomerang of 25.0%, which Mr. Pohl argues is in line with the Company's long-term debt-to-capital target.[80]

50. In the first instance, using a company's target capital structure is incorrect is a matter of valuation theory; as Mr. Wisler testified, the proper method is to derive an industry-wide capital structure from the selection of comparable companies and then apply the industry average debt-to-capital ratio to the target company.[81] Courts also have been reluctant to accept the use of an idealized target capital structure in valuation analyses. See Cede & Co. v. MedPointe Healthcare, Inc., 2004 WL 2093967, at *17 (finding that expert could "not provide a solid basis for projection of the future capital structure of the Company"); see also J.E. 59 at 297 ("To place the company's current capital structure in the proper context, compare its capital structure with those of similar companies."). Further, Mr. Pohl's application of such a low debt-to-capital variable is inappropriate under the Pohl Report's own comparable companies analysis:

[79] J.E. 31 (Lazard Valuation Report) at 22 (median debt to capitalization ratio for Sand, Chemical and Tools Comps of 23.4%); Appx. 1 at 174:18.

[80] Appx. 1 at 175:4-11 ("We used a target capital structure range in our valuation . . . We ended up with a target debt-to-cap range for Boomerang, in our view, of 10 to 40 percent.").

[81] Appx. 3 at 62:24-63:1 ("The correct way to do this is to assign an industry normalized or industry debt-to-equity or debt-to-total capital ratio as opposed to using a company's target"); J.E. 31 at 51 (illustrating how Mr. Pohl's assumed debt-to-capital ratio of 25.0% is used to re-lever BARRA betas).

Mr. Pohl's so-called "Steel Peers" (which, unlike his Steel, Chemical and Tool Comps, include three companies that make OCTG pipe) reflect a significantly higher leverage level (median debt-to-capital ratio of 55.3%) than his Sand, Chemical and Tool Comps (median debt-to-capital ratio of 23.4%)[82] The fact that his Steel Peers are over twice as leveraged as his Sand, Chemical and Tool Comps should have prompted Mr. Pohl to question the accuracy of his WACC computation; indeed, these data points demonstrate that OCTG manufacturers are more leveraged (and consequently have lower WACCs) than manufacturers of sand, chemicals and tools. Moreover, the Debtors' management forecasts a post-Emergence debt-to-capital ratio of 73.3%.[83] Here again, the weight of this evidence compels the inference that Mr. Pohl applied a target debt-to-capital ratio in order to depress his valuation of the Reorganized Debtors.

51. To the contrary, Mr. Wisler's OCTG Comps indicate that companies that, like Boomerang, manufacture OCTG pipe have a relatively higher percentage of debt in their capital structures (and consequently lower WACCs) than companies that, like Mr. Pohl's Sand, Chemical and Tool Comps, do not make OCTG pipe.[84] On that basis, Mr. Wisler incorporated a 40 percent industry-wide debt-to-capital ratio into his WACC computation.[85] As with Mr. Pohl's other subjective adjustments, the use of a debt-to-capital structure that does not accurately

[82] J.E. 31 (Lazard Valuation Report) at 22-23.

[83] J.E. 28 (Exhibit F, Disclosure Statement for Debtors' Amended Joint Prearranged Chapter 11 Plan Dated August 13, 2015) at 355 (Company management estimates post-emergence enterprise value of the Reorganized Debtors of $210.0 million, of which $56.0 million is equity value. Accordingly, management imputes post-Emergence debt of $154.0 million, or a debt-to-capital ratio of ($154.0 million divided by $210.0 million) 73.3%).

[84] J.E. 47 (Alvarez & Marsal Boomerang Tube Valuation Report) at 32 (median debt to capital ratio for OCTG Comps of 52.8%).

[85] Appx. 3 at 62:11-14 ("We multiplied that by the industry debt to capital structure for debt of 40 percent to get a cost of debt portion"); J.E. 47 (Alvarez & Marsal Boomerang Tube Valuation Report) at 32 (using industry debt/capital ratio of 40.0% for WACC computation).

capture the average debt-to-capital ratio of OCTG companies artificially depresses his valuation of the Reorganized Debtors.[86]

v. Mr. Pohl's DCF Valuation Is Contradicted By His Other Market-Based Valuation Methodologies.

52. The Debtors' valuation thesis also unravels because the Pohl Report is self-contradictory. Mr. Pohl testified, for example, that he used his comparable companies and precedent transactions analyses as a way to verify, or "sanity check," his DCF analysis.[87] Mr. Pohl's assertion lacks credibility, however, because the implied multiple of the Reorganized Debtors' terminal value in Mr. Pohl's DCF (as compared to management's projected 2018 EBITDA) is almost twice as low as what his comparable companies analysis alone would suggest. This mathematical dissonance should have revealed to Mr. Pohl, as it did to Mr. Wisler, that there was something askew in the various judgments he made.

53. The Pohl Report's midpoint DCF valuation proposes a TEV of $179.0 million.[88] A substantial amount of this concluded value derives from Mr. Pohl's determination of the terminal value of the Debtors beyond the year 2018, which is then discounted to present day using Mr. Pohl's 13.0% WACC rate. Mr. Pohl's DCF pegs the Debtors' terminal value (in 2018 dollars) at $234.0 million; management estimates 2018 EBITDA of $49.0 million.[89] Therefore, the Pohl Report's terminal value estimate corresponds to a 4.8x multiple of 2018 EBITDA.[90]

[86] J.E. 31 at 50-51 (As shown by Mr. Pohl's valuation formulas, all else equal, an assumption of a lower debt-to-capital ratio increases the cost of equity input into the WACC formula and ultimately drives a lower valuation).

[87] Appx. 2 at 77:11-16 ("Q. I'm sorry. I said one of the purposes of performing a comparable company analysis is to compare it with your DCF valuation result to make sure that there's no particular deviations that look so large as to cause you to have concern that one or the other of your approaches is incorrect; right? A. Yes.").

[88] J.E. 31 (Lazard Valuation Report) at 26.

[89] Id. at 26.

[90] Id. (equals concluded terminal value of $234.0 million divided by projected 2018 EBITDA of $49.0 million).

54. Mr. Pohl testified that the 4.8x terminal value multiple should be "loosely corroborative with observed trading comparables."[91] But a closer analysis reveals that, by Mr. Pohl's own testimony, the Pohl Report's terminal value estimate is substantially understated. Even assuming, *arguendo*, that Mr. Pohl's Sand, Chemical and Tool Comps are comparable to Boomerang, the Pohl Report's terminal value of $234.0 million does not hold water. By the Pohl Report's own calculations, the Sand, Chemical and Tool Comps trade at 9.1x 2016 EBITDA and 7.2x 2017 EBITDA.[92] It bears repeating that these multiples are calculated by taking the subject company's ***current TEV*** and dividing that figure by the same company's ***future EBITDA*** estimates; as a result, the farther out one projects EBITDA, the more compressed and reduced trading multiples become. However, comparing the Pohl Report's DCF conclusion of $179.0 million to the Debtors' projected 2016 and 2017 EBITDA corresponds to multiples of only 6.3x and 5.0x, respectively.[93] And Mr. Pohl offered no justification as to why Boomerang would warrant more than a 30.0% discount to its purported peers as measured by multiples of 2017 EBITDA.[94] In other words, on the basis of its own comparable companies, the Pohl Report understates Reorganized Boomerang's terminal value—far and away the largest driver of TEV—by over 30.0%, and it does so without explanation.

55. Rather, because a terminal value to EBITDA multiple captures the Debtors' value as if the practitioner were standing in 2018, a more accurate comparison is to juxtapose the 4.8x

---

[91] Appx. 2 at 79:17-20.

[92] J.E. 31 at 30.

[93] Id. at 26. The 6.3x multiple is calculated by dividing Mr. Pohl's DCF conclusion ($179.0 million) by management's projected 2016 EBITDA of $27.0 million. The 5.0x multiple is calculated by dividing Mr. Pohl's DCF conclusion ($179.0 million) by management's projected 2017 EBITDA of $36.0 million.

[94] This discount is computed by comparing the median TEV/2017 EBITDA multiple for Mr. Pohl's Sand, Chemical and Tool Comps (7.2x) with the 5.0x multiple implied by Mr. Pohl's DCF conclusion.

implied multiple with current year (or next year's projected) trading multiples or precedent M&A transaction multiples. See In re Nellson Nutraceutical, Inc., 2007 WL 201134, at *28-29 (rejecting debtors' argument that terminal value is only comparable to trading multiples and explaining that this understanding is "incorrect because [it] ignore[s] that, in using a terminal multiple . . . a valuation expert is attempting to estimate what the company would be worth were it acquired . . . in the terminal year. By definition, therefore, the appropriate proxy for this value is to be found in a Comparable Transactions analysis . . . ."). In this regard, Mr. Pohl's own precedent transactions analysis demonstrates that if Reorganized Boomerang were to sell itself in 2018, it would do so at a significantly higher multiple of EBITDA. The Pohl Report shows, in fact, that in precedent transactions OCTG companies have been purchased for a median multiple of 8.2x EBITDA.[95] Mr. Pohl's testimony is unable to explain the nearly 71.0% discrepancy between the 4.8x terminal value multiple implied by his DCF and the 8.2x median multiple at which similar OCTG companies have been acquired in similar transactions.[96] Conversely, Mr. Wisler's DCF corresponds to a terminal value multiple of 7.5x.[97] This is consistent with Mr. Wisler's comparable companies analysis (median 2015 TEV/EBITDA multiple of 8.6x)[98] and precedent transactions analysis (median TEV/EBITDA multiple of 9.3x)[99], and also coincides with Mr. Pohl's own comparable companies and precedent transactions analyses.

56. The disconnect between the 4.8x terminal multiple implied by Mr. Pohl's DCF and the substantially higher multiples observed in his comparable companies and precedent

---

[95] J.E. 31 (Lazard Valuation Report) at 38.

[96] Id. (Lazard Valuation Report) at 30.

[97] J.E. 47 (Alvarez & Marsal Boomerang Tube Valuation Report) at 34.

[98] Id.

[99] Id.

transactions analyses renders the Pohl Report's DCF unreliable. See, e.g., In re Nellson Nutraceutical, Inc., 2007 WL 201134, at *29 (explaining that it is proper to compare terminal value to multiples implied by precedent transactions); Gotham Partners, L.P., 855 A.2d at 1076 n.31 (discussing dangers of significantly deviating from the mean or median of guideline companies' multiples because the analysis becomes too biased and subjective); Taylor, 2003 WL 21753752, at *9 (by basing valuation conclusion on drastically reduced multiple, "[an expert] demonstrate[s] that he believes the guideline companies are not truly comparable"); J.E. 191 at 598 ("If a terminal multiple were selected based on a universe of comparable companies, a court arguably would have a tougher time justifying a terminal multiple selection outside of the range implied by the comparable companies.").

57. It is also worth noting that Mr. Pohl's WACC of 13.0% is implausibly high insofar as it exceeds the Debtors' terminal year projected ROIC of 9.8%.[100] As established by the Wisler Report and Mr. Wisler's testimony, a company only creates value in the long run if its ROIC exceeds its WACC. By assuming that Reorganized Boomerang's WACC of 13.0% will exceed management's projected ROIC by over three percentage points, Mr. Pohl is effectively concluding that the Company will destroy investor value into perpetuity.[101]

58. At bottom, the Pohl Report is unreliable. As a consequence, the Debtors have failed to satisfy their burden that the Plan's transfer of value to the Term Lenders comports with the absolute priority rule. See In re Exide Techs., 303 B.R. at 60-61. While the Committee believes that the evidence established at Trial supports the Wisler Report's valuation conclusion, even if this Court does not ultimately accept the Wisler Report's valuation range of between

[100] Id. at 64-65.

[101] J.E. 31 at 26.

$312.0 million and $361.0 million, the Plan nonetheless cannot be confirmed because the Debtors have not met their independent burden of proof.

B. Reorganized Boomerang's TEV Of $335.0 Million Leaves Residual Value That Belongs To Unsecured Creditors.

59. The Wisler Report credibly shows that the Reorganized Debtors' TEV is in a range between $312.0 million and $361.0 million, with a midpoint of $335.0 million.[102] This exceeds the Debtors Funded Debt Hurdle by approximately $32.1 million.[103] Under the absolute priority rule of Section 1129(b)(2)(B) of the Bankruptcy Code, this excess value belongs to the Debtors' unsecured creditors. See In re Penn Cent. Transp. Co., 596 F.2d 1102, 1110 (3d Cir. 1979) ("[A] plan is not 'fair and equitable' unless . . . the value of the debtor's assets supports the extent of the participation afforded each class of claims or interests included in the plan."); In re Granite Broadcasting Corp., 369 B.R. 120, 140 (Bankr. S.D.N.Y. 2007) ("There is no dispute that a class of creditors cannot receive more than full consideration for its claims, and that excess value must be allocated the junior classes of debt or equity, as the case may be."); In re Exide Techs., 303 B.R. 48 at 61 (denying confirmation of plan that afforded secured lenders value in excess of the amount of their claims); In re Genesis Health Ventures, Inc., 266 B.R. at 612 ("A corollary of the absolute priority rule is that a senior class cannot receive more than full compensation for its claims."). The Plan, which delivers this value to the Term Lenders, therefore cannot be confirmed.

---

[102] See J.E. 47 (Alvarez & Marsal Boomerang Tube Valuation Report) at 7; Appx. 3 at 17:3-6 ("A&M's range of enterprise value for Boomerang is $312 to $361 million with a midpoint of approximately $335 million as of the valuation date").

[103] J.E. 87 (A&M Analysis, Hurdle 9/15/15) (computing Funded Debt Hurdle of $302.9 million). Mr. Nystrom testified that the Debtors' Funded Debt Hurdle is closer to $312.0 million, but could not explain why his estimate exceeds that of A&M. Appx. 1 at 113:17-21.

60. Moreover, as a policy matter, a distribution to unsecured creditors in these Cases accords with the American Bankruptcy Institute Commission's 2014 Report (the "ABI Report"), which recommends a modification to chapter 11's priority scheme to account for debtors in naturally cyclical industries.[104] Recognizing that valuations that occur "during a trough in the debtor's business cycle . . . may result in a reallocation of the reorganized firm's future value in favor of senior stakeholders and away from junior stakeholders in a manner that is subjectively unfair and inconsistent with the Bankruptcy Code," the ABI Commission recommends that "the general priority scheme of chapter 11 should incorporate a mechanism to determine whether distributions to stakeholders should be adjusted due to the possibility of material changes in the value of the firm within a reasonable period of time after the plan effective date." This recommendation seeks to remedy the harmful results of cases such as Lyondell, in which unsecured creditors who were stuck with a *de minimis* plan recovery could only watch as senior creditors (who were handed the reorganized debtors' equity in exchange for their claims) generated windfall returns shortly after plan confirmation.[105]

II. THE PLAN CANNOT BE CONFIRMED BECAUSE THE DEBTORS HAVE FAILED TO SATISFY THEIR BURDEN THAT THE PLAN'S RELEASES OF THE DEBTORS' OFFICERS AND DIRECTORS AND ACCESS ARE SUPPORTED BY A SUBSTANTIAL CONTRIBUTION.

61. The Debtors bear the burden of proving that the Plan's proposed releases of third parties by the Debtors (the "Debtor Releases") are appropriate under the Bankruptcy Code and

[104] See American Bankruptcy Institute Commission To Study The Reform Of Chapter 11: 2012-2014 Final Report And Recommendations, at 207-211.

[105] The Lyondell bankruptcy wiped out Access's equity ownership stake in the pre-chapter 11 LyondellBasell companies. However, using its influence in those cases, Access positioned itself as one of—if not the—largest holders of the new equity issued at exit. Lyondell's stock has skyrocketed post-emergence (at least sixfold) and Access is believed to have made upwards of $7 billion on that single trade. See, e.g., Nathan Vardi, "How One Billionaire's Bet On LyondellBasell Turned Into The Greatest Deal In Wall St. History," Forbes Magazine, July 30, 2014, available at http://www forbes.com/sites/nathanvardi/2014/07/30/the-greatest-deal-of-all-time/.

applicable law in this Circuit. See Gillman v. Cont'l Airlines (In re Cont'l Airlines), 203 F.3d 203, 214 (3d Cir. Del. 2000); In re Global Ocean Carriers Ltd., 251 B.R. 31, 43 (Bankr. D. Del. 2000). Under the five-factor Zenith Electronics test applied by courts in this Circuit, the Debtors must show, *inter alia*, that their proposed released parties have made a "substantial contribution" to the Plan. See In re Zenith Elecs. Corp., 241 B.R. 92, 110-11 (Bankr. D. Del. 1999); In re Exide Techs, 303 B.R. at 72 (Bankr. D. Del. 2003).

62. The Debtors concede in their Memorandum of Law that they cannot satisfy factors four and five of the Master Mortgage/Zenith Electronics test, but argue nonetheless that the Debtor Releases should be approved because factors one through three are met.[106] This assertion is belied by the record evidence. The Debtors have failed to meet their burden of proof that the Debtors' officers and directors and Access have made a "substantial contribution" to the Plan. Therefore, the Plan cannot be confirmed.

A. The Debtors Have Failed To Identify One Fact Indicative Of A Substantial Plan Contribution By Either The Debtors' Officers And Directors Or Access.

63. Over the course of three days at Trial, the Debtors could not identify one fact to support their contention that their officers and directors and Access have made a substantial contribution to these Cases.

64. In order for a released party to make a "substantial contribution" worthy of a plan release, that party must provide a "cognizable and valid contribution to the debtor as part of the debtor's reorganization." Nat'l Heritage Found, Inc. v. Highbourne Found., No. 13-1608, 2014

[106] Memorandum of Law ¶ 90. Under the five-factor Zenith Electronics test, courts in this district consider the following factors to determine whether a debtor's release of a non-debtor under a chapter 11 plan is appropriate: (i) an identify of interest between the debtor and the third party such that a suit against the non-debtor will deplete estate assets; (ii) a substantial contribution to the plan by the released party; (iii) the necessity of the release to the plan; (iv) the overwhelming acceptance of the plan and release by creditors; and (v) the payment of all or substantially all claims under the plan. See In re Zenith Elecs. Corp., 241 B.R. at 110.

WL2900933, at *3 (4th Cir. June 27, 2014). The party must contribute something tangible to the Plan, whether in the form of cash or providing an "extraordinary service" to the case. In re Washington Mutual, Inc., 442 B.R. 314, 348 (Bankr. D. Del. 2011). The second Zenith factor asks "whether the released non-debtor contributed substantial assets to the reorganization." In re Congoleum Corp., 362 B.R. 167, 193 (Bankr. D.N.J. 2007). Importantly, officers and directors do not make a substantial contribution to the restructuring merely by conceptualizing, negotiating, and executing the restructuring—that is what they get paid to do. See In re Genesis Health Ventures, Inc., 266 B.R. 591, 606-07 (Bankr. D. Del. 2001); Congoleum, 362 B.R. at 195 ("the Court does not consider the work done by the parties toward confirmation to be a contribution of assets to the estate.").

65. The eleventh-hour modification of Access' management agreement—which narrowed Access' right to indemnification from the Company—hardly constitutes a substantial contribution to the Plan. Had Access' management agreement been rejected by the Debtors as part of the bankruptcy process, Access' indemnity claim would constitute a rudimentary general unsecured claim; indeed, Mr. Nystrom testified to this fact at Trial.[107]

66. Similarly, the Debtors argued at Trial that Access' waiver of certain management fees owed under their management agreement amounts to a substantial Plan contribution.[108] But this is a transparent sleight of hand. Absent the waiver, these amounts owed would also constitute run-of-the-mill general unsecured claims; Mr. Nystrom testified to this fact at Trial.[109] Plainly, Access' decision to "forego" claims that would be paid nothing under the Plan cannot

[107] Appx. 1 at 133:16-20.

[108] Id. at 133:2-3 ("Access did waive the majority of the dollar amounts due under that management agreement.").

[109] Id. at 134:10-17.

constitute a substantial contribution. Moreover, Access is not providing any additional, post-Effective Date management services.[110] Mr. Nystrom also testified at Trial that Access, as Sponsor, did not provide any monetary consideration to the Plan as it was being formulated, negotiated, filed and solicited.[111]

67. Indeed, the only contribution to the Plan made by Access that the Debtors could articulate at Trial is the literally-at-the-last-possible-second offer of a one-time payment of $250,000 to "fund certain employee obligations."[112] Access did not commit to fund the $250,000 until the morning of September 21st—the first day of the Plan Confirmation Hearing.[113] The funds were apparently unsolicited; indeed, Mr. Nystrom was not involved in their negotiation and was not certain whether any Boomerang officers had negotiated, or were even aware of, Access' last-minute offer or, frankly, what the fungible cash was allegedly intended to satisfy.[114] How can such a contribution be substantial if the Debtors' CRO was not even aware of it, the Debtors' case for feasibility was cemented when the Disclosure Statement was approved in August, and the evidence shows the Debtors already have enough cash ($28.0 million) to leave them on the Effective Date with in excess of $4 million of cash plus an additional $20.0 million available under an accordion exit facility?

68. Similarly, the Debtors' officers and directors have also done nothing to deserve a release under the Plan. Under the Plan, all seven current directors—four of whom are employees of Access—are slated to receive releases. The mere involvement by these individuals in the

[110] Id. at 134:7-9.

[111] Id. at 141:20-25.

[112] Id. at 139:10-20.

[113] Id. at 22:15-19.

[114] Id. at 142:11-20.

restructuring process does not constitute a substantial contribution. See In re Washington Mutual, Inc., 442 B.R. at 349. Furthermore, this Court should be especially hesitant to bless any releases of the Debtors' officers and directors given that these individuals failed to exercise any oversight over Gregg Eisenberg's ownership take in Pinnacle Machine Works (an affiliate of SBI Boomerang).[115] [redacted][116]

69. The Debtors are not permitted under the Bankruptcy Code to effectively "traffic" in releases. The releases of the Debtors' officers and directors and Access are not supported by any contribution to the Plan, let alone a substantial contribution. In particular, Access' attempt to purchase a release on the cheap by dint of slipping an eleventh-hour, unsolicited pittance into the Debtors' pocket, is an affront to the Bankruptcy Code and this Court. Accordingly, the Plan cannot be confirmed.

B. Here, Potential Claims Exist Against The Debtors' Officers And Directors And Access That The Committee And GUC Trustee Have A Right To Investigate.

70. Putting aside the Debtors' inability to identify one scintilla of factual support for the releases given to Access and the Debtors' directors and officers, the releases are especially inappropriate in light of the potential existence of valuable estate claims against such parties that the Committee and GUC Trustee have a right to investigate.

---

[115] Id. at 137:24-138:7.

[116] [redacted]

i. Potential Claims Exist Against The Debtors' Officers And Directors.

71. The Committee Objection explains in detail how the Board's ignorance of Boomerang's valuation while agreeing to a restructuring that transfers substantially all of the Reorganized Debtors' value to the Term Lenders constitutes a breach of the fiduciary duty of care.[117]

72. There may also exist claims against the Debtors' officers and directors for over-leveraging the Company. Indeed, the Debtors' expert testified at Trial that the Company was over-levered, resulting ultimately in the filing of these Cases.[118]

ii. Potential Claims Exist Against Access As Sponsor.

73. The Committee has no doubt that Access and the Debtors will assert that the Committee has not alleged any claims against Access and, therefore, Access should be entitled to a release in accordance with the PSA and, as noted above, it made an unsolicited offer to pay the Debtors a sum that the Debtors clearly do not need to make their plan feasible and that is far from the substantial contribution necessary to merit a release. There are several responses to this expected assertion.

74. First, the Committee was never charged with doing, nor did it do, an extensive pre-confirmation investigation into claims against Access. These Cases have been on a very tight PSA/DIP-governed schedule. The Debtors' asserted timing urgency was the topic of discussion at the Final DIP Hearing (the first hearing after the Committee was appointed) and, as a result, the Court set deadlines for the Committee to perform its investigation into potential

[117] See Committee Objection ¶¶70-73.

[118] Appx. 1 at 181:24-25 ("So if you over-lever a company in this industry too much, you end up here, you end up in Chapter 11.").

claims against the lenders or challenges to the lenders' claims and liens, but solely in their capacity as lenders. The Committee made it a point that any such deadlines did not apply to Access other than in Access' capacity as a DIP and prepetition lender.[119] While some aspects of the Committee's investigation covered Access' conduct, most or all of that conduct was in Access' capacity acting through its Board designees in connection with the chapter 11 process and the events that preceded the filing of the Petition and entry into the PSA.

75. It bears repeating that the Committee is not obligated (nor is anyone else obligated) to make a showing of any claim (colorable or otherwise) against Access in order to successfully oppose an Access release. The burden, of course, is on Access and the Debtors to prove their entitlement to a release. No such proof has been offered.

76. Nonetheless, for purposes of giving the Court the benefit of relevant facts discovered during the Committee's investigation (unrelated to the focus of its investigation), briefly summarized below are certain facts that, at a minimum, merit further investigation to determine the existence of valid claims against Access:

- Access initially funded the Debtors with a $76.0 million equity capital contribution during 2008-2009.[120] In 2010, Access provided its second round of funding in the form of a $123.0 million "high yield loan."[121] The loan carried a 23.0%[122] interest rate and a 10.0% prepayment penalty to boot.[123] This begs the question: why would a private equity owner impose such onerous terms and extract such excessive prepayment fees from its own portfolio company? For a portfolio company in its early stages of growth, a usurious loan like this from its private equity sponsor—

[119] See Final DIP Order [D.I. 291] ¶ 40.

[120] J.E. 29 (Access chart of investments and payments to Access).

[121] Id.

[122] Although documentation of the 23.0% interest rate on Access' loan is not part of the Trial record, this rate may be inferred by reference to J.E. 29, which documents Access' receipt of $88.5 million in cash and PIK interest on its $123.0 million loan over a period of approximately two and one-half years.

[123] J.E. 30.

which allowed Access to siphon from the Company substantial distributions in the form of high yield interest payments—certainly should raise this Court's eyebrow and, upon further investigation, could be revealed as being more "equity-like" than "debt-like" and, therefore, subject to recharacterization. And a recharacterization finding could lead to an avoidance claim relating to certain distributions Access withdrew from the Company. Indeed, at a minimum, recapturing the $18.8 million[124] prepayment penalty Access extracted from Boomerang for the benefit of unsecured creditors would in and of itself provide the approximately $40.0 million unsecured creditor pool with a meaningful recovery.

- With an instrument nominally labeled "debt," Access put itself in position to withdraw not only a substantial portion of its "debt" *cash* investment, but also a substantial portion of its initial $76.0 million "equity" *cash* investment. Below is a chart that sets forth the aggregate cash contributions ([redacted])[125] Access made and the aggregate cash distributions ([redacted]) Boomerang made to Access from inception through the most recent payment.[126] With only [redacted] left on the table (representing only [redacted]% of Access' overall investment), it is not surprising that Access was willing to "walk away" from its equity position and, as a result, leave the fight for value to the Committee.

Time Period	Activity	Amount	Contributions	Distributions
2008-2009	Equity capital contributions to Boomerang	$75.92 million	$75.92 million	
2010 - October 1, 2012	Access funding of high yield loan to Boomerang	$123.0 million	$123.0 million	
	PIK interest added to principal	$62.0 million	*Non-cash event*	
	Cash interest paid on loan	$26.5 million		$26.5 million
October 2012 - Petition Date				
	Refinancing transaction (owed a total claim of $203.5 million)			
	Principal paid	$65.0 million		$65.0 million
	Accrued interest paid	$62.0 million		$62.0 million
	Prepayment penalty	$18.5 million		$18.5 million
	$43.4 million reinvested in Preferred C $14.55 million reinvested in	$58.0 million	*Non-cash event*	

[124] Id.

[125] [redacted].

[126] The chart referenced above is a recreation of J.E. 29 (Access chart of investments and payments to Access); J.E. 33 (Boomerang Board Meeting Materials) at [Bates No. Debtors0005071] ("As a result of [$230.0 million Term Loan B] transaction total proceeds to Access were $160.1 million less $14.6 million reinvested in the Term B for a net of $145.5 million.").

Time Period	Activity	Amount	Contributions	Distributions
	Term Loan B			
Total Access Contributions			[redacted]	
Total Access Distributions				[redacted]

- Having funded Boomerang with only [redacted] on a net cash basis while levering the Company with over $250.0 million of debt financing, a finder of fact may find that Access left Boomerang undercapitalized. Indeed, Boomerang's own expert witness identified Boomerang's over-leveraged capital structure as a reason for this bankruptcy filing[127], especially when compared to Mr. Pohl's Sand, Chemical and Tool Comps, which Mr. Pohl referred to as having "relatively low levels of debt,"[128] and, as a result, surviving the downturn, unlike Boomerang.

III. THE PLAN CANNOT BE CONFIRMED BECAUSE THE DEBTORS' CONTINUED VIOLATION OF THIS COURT'S CRITICAL VENDORS ORDER RENDERS THE PLAN UNFAIRLY DISCRIMINATORY AS TO UNSECURED CREDITORS.

77. The Trial record makes plain that the Debtors continue to flout this Court's Critical Vendors Order[129], which authorized the Debtors only to make payments "necessary to avoid irreparable harm to the Debtors and their estates." Nonetheless, the Debtors continue to negotiate and reach settlements with certain preferred vendors ([redacted]) notwithstanding that (i) these purported "critical" vendors have not supplied the Debtors with any goods or services during these Cases, and (ii) the interruption in such goods and services has not had any detrimental impact on the Debtors' regular operations or the value of the estate. This effective creation of two sets of unsecured creditors—a favored class of preferred vendors and an underclass of disfavored vendors—represents impermissible "unfair discrimination" under Section 1129(b)(1) of the Bankruptcy Code.

[127] Appx. 1 at 181:24-25 ("So if you over-lever a company in this industry too much, you end up here, you end up in Chapter 11.").

[128] Id. at 182:3.

[129] See J.E. 42 (Critical Vendors Order) ¶ 3.

A. The Debtors' Own Testimony Demonstrates That Their Ongoing Negotiations With Certain Purported "Critical" Vendors Are Arbitrary, Capricious, And Not In Accordance With This Court's Critical Vendors Order.

78. Simply put, the vendors with whom the Debtors continue to negotiate preferable payment terms are not "critical" in any way, shape, or form. It is self-evident that in order to qualify as a "critical vendor" under applicable law, the vendor's business relationship with the debtor must be "critical to the Debtors' reorganization" or "essential to the survival of the debtor." See In re Just For Feet, Inc., 242 B.R. 821, 826 (D. Del. 1999). A debtor's desire merely to "appease[ ] [its] major creditors" does not suffice. See In re Copy Crafters Quickprint, Inc., 92 B.R. 973, 982 (Bankr. N.D.N.Y 1988).

79. Consider, for instance, Mr. Nystrom's ongoing negotiations with one particular foreign steel supplier. Although this purported critical vendor has not provided the Debtors with one ounce of steel during these Cases, the Debtors' operations have not been interrupted.[130] Nor has the suspension of steel shipments from this particular vendor impaired the Debtors' ability to service their customers or diminished the value of the estate.[131] And yet, despite all evidence to the contrary, Mr. Nystrom continues to negotiate favorable terms for repayment of prepetition unsecured claims with purported "critical" vendors that are not being made available to all unsecured creditors.[132]

[130] Appx. 1 at 121:4-18.

[131] Id.

[132] Id. at 122:12-18 ("Q. So if I look at August, I'll see four numbers that are shaded gray . . . [a]nd those are all companies that you are in discussions with, or maybe you've come close to retaining a deal but you don't have a signed agreement, right? A. Correct.").

B. The Debtors' Numerous Preferential Settlements With Certain Purported "Critical" Vendors Constitute Unfair Discrimination Against Unsecured Creditors.

80. The Debtors' generous payment arrangements with certain preferred vendors, when juxtaposed with the *de minimis* recovery slated for disfavored unsecured creditors, plainly constitute unfair discrimination. Courts are especially apt to find unfair discrimination where, as here, the difference in percentage recovery between favored and disfavored creditors is large. See In re Sentry Operating Co. of Tex., Inc., 264 B.R. 850, 863-64 (Bankr. S.D. Tex. 2001) (denial of plan confirmation where plan paid 100% to one class of unsecured creditors while remaining unsecured creditors were paid 1% of claims notwithstanding that both classes held equal rights to payment); In re Aztec Co., 107 B.R. 585, 588-89 (Bankr. M.D. Tenn. 1989) (unfair discrimination to pay insider unsecured claims in full while paying other unsecured claims 3% recovery). Here, as the Court is aware, the Debtors have in many instances reached settlements with purported critical vendors at between [redacted], while disfavored "ordinary" unsecured creditors receive nothing (or a pittance at best). Indeed, many of these last-minute deals continue to be negotiated.[133] Such dissimilar treatment of similarly situated creditors is forbidden under Section 1129(b)(1) of the Bankruptcy Code.

IV. THE PLAN'S MINISCULE POST-EFFECTIVE DATE FUNDING RENDERS IT INFEASIBLE.

81. The Plan provides for a GUC Trust Initial Funding Amount of $25,000 to be provided to the GUC Trust by the Reorganized Debtors.[134] All other costs, including the costs of administering the GUC Trust, are to be borne exclusively by the GUC Trust.[135]

---

[133] Id. at 122:12-123:4 (discussing vendors with whom, as recently as August 2015, Mr. Nystrom continues to negotiate).

[134] J.E. 100 (Debtors' Amended Joint Prearranged Chapter 11 Plan) at §1.1.93.

[135] Id. at §4.18(c).

82. Section 1129(a)(11) requires as a condition of confirmation that the court find that confirmation "is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor or any successor to the debtor under the plan." 11 U.S.C. §1129(a)(11). Also known as the "feasibility test," this Bankruptcy Code provision requires that a plan "propose a realistic and workable framework." See In re American Capital Equip., LLC, 688 F.3d 145, 156 (3d Cir. 2012). The purpose of §1129(a)(11) is to "prevent confirmation of visionary schemes which promise creditors more under a proposed plan that which the debtor can possibly attain after confirmation." Berkeley Fed. Bank & Trust v. Sea Garden Motel & Apartments (In re Sea Garden Motel & Apartments), 195 B.R. 294, 304 (D.N.J. 1996). Of particular relevance, a feasible plan requires a debtor to demonstrate that it has sufficient funds to meet any incremental professional fees that may come due in the future. See In re Premier Int'l Holdings, Inc., No. 09-12019, 2010 WL 2745964, at *14 (Bankr. D. Del. Apr. 29, 2010) (evaluating as part of feasibility analysis whether debtors could "meet their financial obligations as contemplated pursuant to the Plan, including the incremental professional fees associated with the reorganization"); In re Doemling, 157 B.R. 565, 575 (Bankr. W.D. Pa. 1993) (denying plan as infeasible where payment of claims depended on future funding that was "potentially available but is not certain [and which was] not, however, presently available."); In re Heritage Organization, L.L.C., 375 B.R. 230, 310-312 (Bankr. N.D. Tex. 2007) (evaluating feasibility of creditors' trust by comparing initial funding amount with anticipated costs of future litigation).

83. The miniscule GUC Trust Initial Funding Amount proposed by the Debtors renders the GUC Trust unworkable and, by extension, makes the Plan infeasible under Section 1129(a)(11) of the Bankruptcy Code. Under the Plan, the GUC Trustee is required to, *inter alia*, take the following actions:

- "[L]iquidate to Cash the GUC Trust Assets, including by sale, litigation, compromise or settlement" (Plan §4.8);
- "Reconcil[e] all General Unsecured Claims asserted against the Debtors" (Plan §4.18(b));
- "Distribut[e] the GUC Trust Assets, and any proceeds therefrom" (Plan §4.18(e));
- "[F]ile objections to disallow in full or reduce the amount of General Unsecured Claims." (Plan §7.2);
- "[M]aintain a bond approved by the Bankruptcy Court . . . the cost and expense of which shall be paid by the Trust." (GUC Trust Agreement §4.8);
- "[F]ile, if necessary, any and all tax returns with respect to the Trust; pay taxes, if any, properly payable by the Trust; and make distributions to the beneficiaries net of such taxes" (GUC Trust Agreement §3.2(i)); and
- "[U]tilize the Trust Assets to purchase or create and carry all appropriate insurance policies and pay all insurance premiums and costs necessary." (GUC Trust Agreement §3.2(p)).

84. The Debtors' position that these varied and labor-intensive tasks can be accomplished with only $25,000 of funding strains credulity. This position is especially untenable considering that the Plan requires the GUC Trust to first reimburse the Reorganized Debtors for this initial funding and then further reimburse them for unbudgeted professional fees (in excess of $6.0 million) before the GUC Trust itself—or, more importantly, unsecured creditors—receive a dime. For this reason too, the Plan may not be confirmed.

REMAINDER OF PAGE INTENTIONALLY LEFT BLANK

CONCLUSION

WHEREFORE, for the reasons discussed herein, the Committee respectfully requests that this Court: (i) sustain the Committee Objection; (ii) deny confirmation of the Plan; and (iii) grant to the Committee such other and further relief as the Court may deem just, proper and equitable.

Dated: October 16, 2015
Wilmington, Delaware

MORRIS NICHOLS ARSHT & TUNNELL LLP

/s/ Daniel B. Butz
Derek C. Abbott (No. 3376)
Curtis S. Miller (No. 4583)
Daniel B. Butz (No. 4227)
1201 North Market Street, Suite 1600
Wilmington, DE 19801
Telephone: (302) 658-9200
Facsimile: (302) 658-3989
Email: dabbott@mnat.com
cmiller@mnat.com
mkoch@mnat.com

-and-

BROWN RUDNICK LLP
Steven D. Pohl, Esq.
Sunni P. Beville
One Financial Center
Boston, MA 02111
Telephone: (617) 856-8200
Facsimile: (617) 856-8201
Email: spohl@brownrudnick.com
sbeville@brownrudnick.com

Bennett S. Silverberg
7 Times Square
New York, NY 10036
Telephone: (212) 209-4800
Facsimile: (212) 209-4801
Email: bsilverberg@brownrudnick.com

Co-counsel to the Committee