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

DEBTORS' POST-TRIAL BRIEF IN SUPPORT OF DEBTORS' AMENDED JOINT PREARRANGED CHAPTER 11 PLAN DATED SEPTEMBER 4, 2015 (ENTERPRISE VALUATION AND CONFIRMATION ISSUES)

YOUNG CONAWAY STARGATT & TAYLOR, LLP
Robert S. Brady (No. 2847)
Sean M. Beach (No. 4070)
Margaret Whiteman Greecher (No. 4652)
Patrick A. Jackson (No. 4976)
Ryan M. Bartley (No. 4985)
Rodney Square
1000 North King Street
Wilmington, Delaware 19801
Telephone:(302) 571-6600
Facsimile: (302) 571-1253

Counsel for the Debtors and Debtors in Possession

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[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.

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PRELIMINARY STATEMENT

To find that the Plan[2] meets the "fair and equitable" requirement of section 1129(b) of the Bankruptcy Code, the Court need not determine the exact enterprise value of the Debtors; instead, the Court need only find that the Debtors have shown by a preponderance of the evidence that their total enterprise value ("**TEV**") does not exceed the Debt Hurdle[3] of $312,000,000 or even the Creditors Committee's own artificially low hurdle of $302,900,000.[4] The Debtors have met this burden. The Lazard Report[5] establishes that the Debtors have a midpoint TEV of $210,000,000—or more than $100,000,000 below the Debt Hurdle. Although the Creditors Committee disputes the Debtors' valuation, the Court's determination does not need to be reduced to a battle of the experts because all other evidence of value (aside from Alvarez & Marsal's ("**A&M**") anomalous and flawed DCF analysis) conclusively shows that the TEV of the Debtors is at least tens of millions of dollars lower than the Debt Hurdle. This includes, among other things:

a. An initial pre-petition marketing process followed by a court-sanctioned post-petition due diligence period that, effectively, had the Debtors "for sale" over

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2 Unless otherwise defined herein, all capitalized terms shall have the meaning ascribed to them in the *Debtors' Amended Joint Prearranged Chapter 11 Plan*, dated September 4, 2015 [D.I. 470].

3 Mr. Nystrom testified that the amount of secured debt that would need to be paid in full to satisfy all of the secured claims against the Debtors' operating assets was $312,000,000 (the "**Debt Hurdle**"). 9/21 Tr. 84:14-23 (Nystrom).

4 *See In re Chemtura Corp.*, 439 B.R. 561, 579 (Bankr. S.D.N.Y. 2010) ("But for the purposes of this controversy, I don't need to find an exact valuation. To determine that the Plan does not violate section 1129(b)'s 'fair and equitable' requirement by paying creditors more than in full, I need only find that the Debtors' TEV doesn't exceed the TEV underlying the Settlement."); s*ee also In re Genco Shipping & Trading Ltd*, 513 B.R. 233, 241-242 (Bankr. S.D.N.Y. 2014); *In re PTL Holdings LLC*, Case No. 11-12676 (BLS), 2011 Bankr. LEXIS 4436, at *8 (Bankr. D. Del. Nov. 10, 2011).

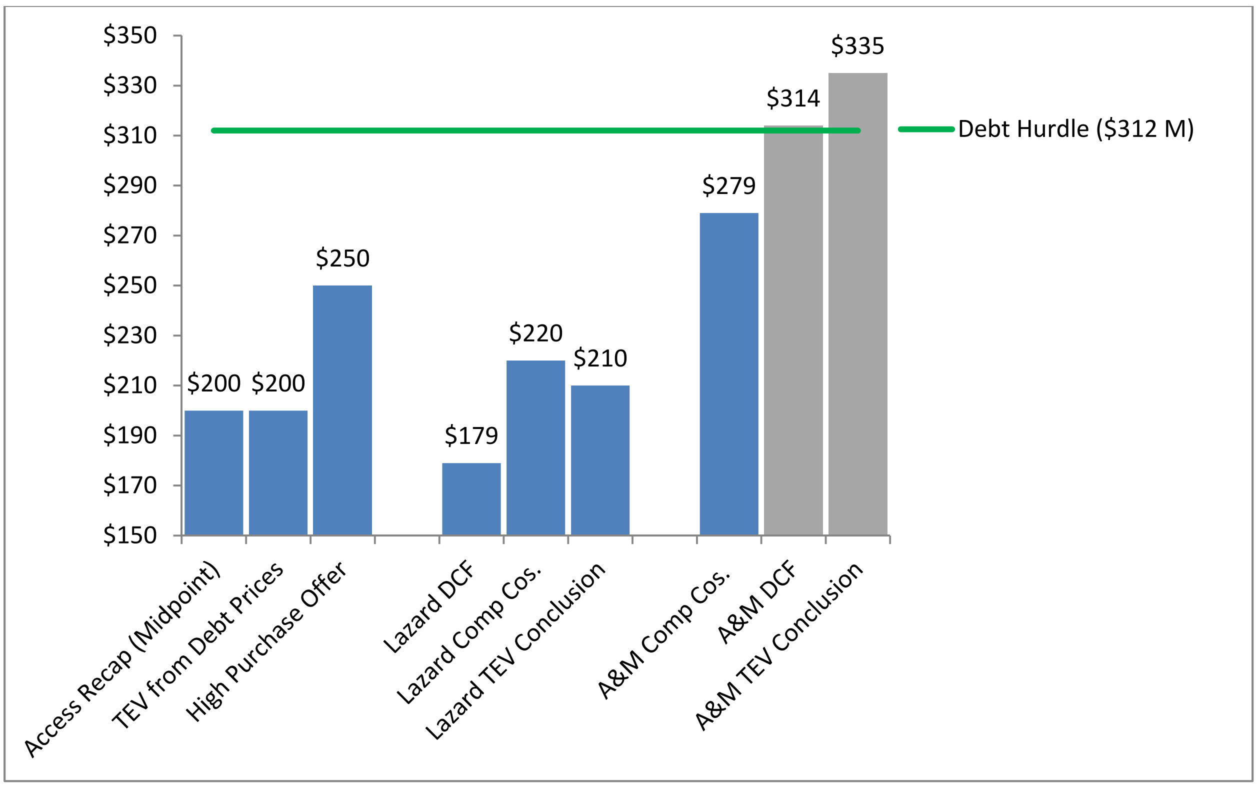
5 Tab 31, Lazard Valuation Report (hereinafter "**Lazard Report**") at 6.

a four-month period and yielded contingent, preliminary offers of only **$225,000,000** and **$250,000,000**;[6]

b. Market-based trading prices of the Debtors' term loan debt at a 50% discount that implied a TEV of approximately **$200,000,000**;[7] and

c. Pre-petition recapitalization proposals from Access Tubulars, the Debtors' equity sponsor, which implied a TEV between **$190,000,000** and **$210,000,000**.[8]

Not only is A&M's view that unsecured creditors are "in the money" against the great weight of the evidence, it is in contrast to A&M's ***own*** flawed comparable companies analysis. The disconnect between A&M's final TEV with all other valuations and related indicia are illustrated below:



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6 Tr. of Hr'g Before Hon. Mary F. Walrath U.S. Bankr. Judge (Sept. 21, 2015) [D.I. 568] (hereinafter "**9/21 Tr.**") 63:11-13 (Nystrom); Lazard Report at 40.

7 9/21 Tr. 63:6-8 (Nystrom).

8 9/21 Tr. 63:8-11 (Nystrom).

The highest outcome A&M reaches and, coincidentally, the sole valuation methodology it ultimately relies on—its DCF analysis—just marginally places unsecured creditors in the money with a midpoint TEV of $314,000,000.[9] However, to even get there, A&M relied on a two- or five-company peer set (depending on what metric A&M was measuring) developed by professionals with no meaningful experience in, or understanding of, the oil and gas and oilfield services industries or the particular business sector the Debtors operate in. This lack of knowledge led to selecting peers with limited operational or financial resemblance to the Debtors. The undermining effect of A&M's lack of expertise on the reliability of the A&M Report was further compounded by a desire to clear the Debt Hurdle, which was evident in the questionable and inconsistent metrics it used in performing its comparable companies analysis that A&M asserts "corroborated" its DCF analysis. Indeed, A&M did not accord any weight to the results of its suspect comparable companies analysis, because doing so would have resulted in a lower TEV.

To boost the "barely-there" valuation conclusion from its DCF analysis, A&M inappropriately layered on an additional $21,000,000 of value related to hypothetical "cost savings,"[10] which the Debtors' management team did not believe were appropriate to include in its projections.[11]

Lazard's analysis, on the other hand, was rooted in a comprehensive understanding of the oil and gas and oilfield services industries supplied by professionals who actively participate in

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9 *See* Tab 47, Alvarez & Marsal Boomerang Tube Valuation Report (hereinafter "**A&M Report**") at 9.

10 A&M Report at 9.

11 Mr. Nystrom testified that the most significant of these costs savings, which related to a foreign steel provider, was "nowhere near a deal" and his view was "it's unlikely I will get a deal." *See* 9/21/2015 Tr. 50:20-25, 51:1, 147:1-3 (Nystrom).

those industries. Lazard adhered to valuation principles that provided robust and conservative DCF and comparable companies analyses consistent with best practices in the oil and gas and oilfield services industries. Lazard was able to supply the Court with a credible valuation of the Debtors that was ***actually*** corroborated by objective evidence of company value rather than a constituent-driven result.

After a review of the record before it, the Court must find that the preponderance of the evidence demonstrates that the Debtors' TEV does not exceed the Debt Hurdle. The Court would need to accept A&M's DCF analysis wholesale ***to the exclusion of all other evidence in the record*** to place unsecured creditors in the money.

Further, contrary to the Creditors Committee's objections, the Plan properly proposes to provide releases and exculpations to key contributors to the Debtors' restructuring, whose involvement with the Debtors and these cases were essential to ***actually reorganizing*** the Debtors, rather than liquidating them. The uncontroverted testimony demonstrates the extensive benefits and consideration the Debtors, their estates, and their creditors have received through the restructuring contemplated by the Plan, which has only been made possible by the contributions made by the parties to the Plan Support Agreement. Those contributions are conditioned upon, among other things, confirmation of the Plan with the proposed releases. Further, the traditional factors considered by courts in this district weigh heavily in favor of approving the releases, including that the majority of both creditors and interest holders support the Debtor Release.

Finally, the Court should not lose sight of the fact that the Debtors' business has been "in play" since at least May, when Lazard began its pre-petition marketing process, and the Debtors and the Creditors Committee, who was appointed approximately four months ago, have been actively seeking to find a potential transaction counterparty post-petition.[12] Notwithstanding the Creditors Committee's view that its constituency is in the money—with a putative valuation of well in excess of $300,000,000—not a single alternative to the Plan has been presented, or even suggested, let alone one with viable and committed financing.

For all of the reasons set forth herein and developed in the record at the Confirmation Hearing,[13] the Court should confirm the Plan.

ARGUMENT

I. THE DEBTORS' FINANCIAL PROJECTIONS ARE REASONABLE AND FOUNDED UPON MANAGEMENT'S GOOD FAITH, INFORMED JUDGMENTS AND SHOULD BE ACCEPTED WITHOUT MODIFICATION BY THE CREDITORS COMMITTEE

2. Determining projected EBITDA is "largely a matter of judgment."[14] Where, as here, a debtor exercises informed judgment in developing financial projections that are "balanced, taking into account both positive and negative forces and trends," courts will accept such projections, even in the face of an objecting party presenting evidence that suggests a higher projected EBITDA.[15] Consistent with that approach, courts in this district almost invariably rely

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[12] 9/21 Tr. 79:4-8 (Nystrom). ("Q: To your knowledge did the Committee professionals attempt to find potential purchasers? A. I think they did. And some of the key parties that I heard from they told me they were referred to me by the Committee's financial advisors.").

[13] The Debtors incorporate by reference into this brief the arguments made in their opening brief [D.I. 537] with respect to the remaining confirmation requirements under section 1129 of the Bankruptcy Code and any unresolved objection to confirmation of the Plan that are not expressly addressed herein.

[14] *In re Genesis Health Ventures, Inc.*, 266 B.R. 591, 614 (Bankr. D. Del. 2001).

[15] *Id.* at 614; *Statutory Comm. of Unsecured Creditors ex rel. Iridium Operating LLC v. Motorola, Inc. (In re Iridium Operating LLC)*, 373 B.R. 283, 347 (Bankr. S.D.N.Y. 2007) ("An informed judgment from management regarding projected earnings, which took into account anticipated events and expectations, was a reasonable valuation.") (internal quotation marks, citation omitted); *In re Coram Healthcare Corp.*, 315 B.R. 321, 340 (Bankr. D. Del. 2004) (accepting management's projections where the "overall product was reasonable").

on management projections when performing valuations in the context of a contested confirmation.[16]

3. Here, the Debtors exercised their considered, informed, and balanced judgment and knowledge of the industry in developing the assumptions that underlie the Debtors' financial projections ("**Financial Projections**"). Indeed, the Financial Projections, and the model used to derive the projections, were prepared by an experienced, comprehensive and cohesive team led by Mr. Nystrom (whose expertise in preparing such projections was not disputed at trial) and comprised of all other key members of the Debtors' management team, with support from the Debtors' other employees and Zolfo Cooper.[17] The Financial Projections were prepared consistent with the Debtors' past practices, where the Debtors began by projecting revenues, then built a cost structure that would derive from the particular level of revenue.[18] Those initial revenue projections (and the subsequent cost structure) take into account various industry data, including rig counts, inventory supplies, imports, pricing, relative market share, and OCTG manufacturing capacity in the United States.[19] Specifically, the Debtors:

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16 *See PTL Holdings*, 2011 Bankr. LEXIS 4436, *9 (rejecting objections to financial projections as being premised on pessimistic or faulty assumptions, and accepting the debtor's projections, prepared by management); *U.S. Bank Nat'l Ass'n v. Wilmington Tr. Co. (In re Spansion, Inc.)*, 426 B.R. 114, 132 (Bankr. D. Del. 2010) (approving the use of management's base-case and contingency-case projections and rejecting plan objector's criticism that debtor failed to include an "'upside' case to offset the risks identified in the Contingency Case Projections"); *Coram Healthcare Corp.*, 315 B.R. at 340-41 (accepting management projections and rejecting plan objector's claim that the projections were inconsistent with historical or industry experience); *In re Exide Techs.*, 303 B.R. 48, 65 (Bankr. D. Del. 2003) (noting that "no less weight should be accorded to DCF because it relies upon [management's] projections.").

17 9/21 Tr. 37:20-24, 38:3-9, 40:25, 41:1-5, 41:8-12 (Nystrom); Tab 49, Boomerang Model 7/31/15 v2.

18 9/21 Tr. 38:14-25, 39:1-14 (Nystrom).

19 9/21 Tr. 39:24-25, 40:1-6 (Nystrom).

a. Principally relied upon rig count projections from Spears & Associates ("**Spears**"), an industry expert in rig count projections with whom the Debtors have a regular dialogue;[20]

b. Utilized a multitude of industry data, spoke directly to end-customers and suppliers, and reviewed the filings of public E&P companies to, among other things, determine projected capital spend and drilling programs;[21]

c. Analyzed OCTG inventory availability to assess likely demand;[22]

d. Considered pricing projections, including forward curves, for steel, the Debtors' most significant cost;[23]

e. Reflected cuts in costs related to labor reduction and reasonably anticipated deals with vendors;[24]

f. Accounted for industry shifts, such as the continuing advent of fracking as a predominant technology in the natural gas industry and advancements in overall drilling technology to increase per rig consumption rates;[25] and

g. Projected an "aggressive" growth in market share from their current share of 8% to 8.5% up to 10% in 2016 and 2017.[26]

4. Mr. Nystrom also testified in detail that he took into account market developments when preparing the Financial Projections. Specifically, he and the management team updated the Financial Projections in June and again in July when it became clear that recovery of the Debtors' business would not occur in the third quarter of 2015 as originally anticipated.[27] Indeed, after the Debtors' June financial projections were completed, it "became evident that there was further or more uncertainty on whether or not these E&P companies would

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20 9/21 Tr. 45:15-25, 46:1-19 (Nystrom).

21 9/21 Tr. 34:22-25, 35:1-5, 38:18-22, 39:1-25, 40:1-6 (Nystrom).

22 9/21 Tr. 43:6-12 (Nystrom).

23 9/21 Tr. 48:1-14 (Nystrom).

24 9/21 Tr. 50:3-7 (Nystrom).

25 9/21 Tr. 42:17-25, 43:1-5 (Nystrom).

26 9/21 Tr. 45:7-14 (Nystrom).

27 9/21 Tr. 38:10-25 (Nystrom).

continue or build on drilling programs" as the volatility of oil prices continued and became even more precarious.[28] Accordingly, the Debtors modified their model in two ways: they (i) deferred their projected turn-around until after the third quarter of 2015 and (ii) determined to extend the overall Financial Projections only through 2018, removing the previously projected 2019.[29]

5. While the Creditors Committee attempts to fault the Debtors' decision to eliminate 2019 from their Financial Projections, the record is clear that such a decision was both informed and sound. Spears develops its two-year rig count forecasts through surveys and direct discussions with E&P market participants, with projections for subsequent years reflecting nominal linear increases.[30] Given the lack of uncertainty in forward projections for the volatile and cyclical U.S. onshore drilling industry that drives the demand for the Debtors' products, the Debtors' three and half year projections are reasonable.[31] Ultimately, the decision to remove the 2019 projections was a result of the management team's informed decision that three and a half year projections in the current market environment were more reliable and prudent than longer projections.[32] Neither expert testified that the Financial Projections had any infirmity because they lacked projections past 2018.

6. Based on the foregoing, Mr. Nystrom's uncontroverted testimony established that the Financial Projections represent the best efforts of an experienced management team after

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[28] 9/21 Tr. 38:20-22 (Nystrom).

[29] 9/21 Tr. 38:22-25, 48:17-25, 49:1-6 (Nystrom).

[30] 9/21 Tr. 46:4-15 (Nystrom); *see also* 9/21 46:10-12 (Nystrom) ("[N]o one can really say what their drilling programs are going to be out in three, four, five years down the road.").

[31] *See* Hon. Christopher S. Sontchi, *Valuation Methodologies: A Judge's View*, 20 Am. Bankr. Inst. L. Rev. 1, 8 (2012) ("Given the inherent uncertainty in predicting the future, one generally only uses three to five years of projections in performing a DCF analysis."); s*ee also* 9/21 Tr. 48:25, 49:1-2 (Nystrom) ("It's reasonable to have projections from three to five years in a business plan; our projection [was] for three and half years.").

[32] 9/21 Tr. 48:19-25, 49:1-6 (Nystrom).

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significant diligence, and reflect a business plan that the management team fully supports as being realistic and feasible.[33]

7. In addition to the Debtors' management team, both Lazard and A&M vetted, accepted and ultimately relied on the Financial Projections as reasonable. Following its review, Lazard determined that the Financial Projections were sound and reasonable and did not make changes or adjustments before utilizing the projections to conduct its analysis.[34]

8. Indeed, A&M, the Creditors Committee's expert, noted that

> it's incumbent on the valuation professional to at least test that assumption a little bit. So we looked at the, again, model architecture, some of the inputs to make sure that we felt that they were reasonable.[35]

After undertaking such an analysis, A&M recognized the quality of management's model and its architecture, and Mr. Wisler testified A&M, in general, "accepted and adopted" the Financial Projections, with "the exception of one item" (not including the $21 million "cost savings" addition).[36] What A&M actually did, notwithstanding its acceptance and adoption of the Financial Projection, was to make two adjustments that drove A&M's valuation conclusion ***upward*** by at least $39 million—the first, an adjustment related to fresh start accounting and the second, an adjustment to add tenuous future cost savings, each of which are discussed below.[37]

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33 9/21 Tr. 48:17-19 (Nystrom); s*ee Iridium Operating*, 373 B.R. at 347 ("An informed judgment from management regarding projected earnings, which took into account anticipated events and expectations, was a reasonable valuation.") (internal quotation marks, citation omitted); *Coram Healthcare*, 315 B.R. at 340 (accepting management's projections where the "overall product was reasonable").

34 9/21 Tr. 167:14-25, 168:1-15 (Pohl).

35 Tr. of Hr'g Before Hon. Mary F. Walrath U.S. Bankr. Judge (Sept. 24, 2015) [D.I. 577] (hereinafter "**9/24 Tr.**") 19:10-14 (Wisler).

36 9/24 Tr. 19:19-20 (Wisler).

37 9/24 Tr. 19:22-25, 20:1-11, 69:23-25, 70:1-11 (Wisler).

In adopting the Debtors' Financial Projections as its base, the Creditors Committee has expressly endorsed the Debtors' management as the superior source of business and industry-specific assumptions regarding the Debtors. As a result, any departure from the Financial Projections would have to be justified by evidence demonstrating "persuasive reasons"[38] for the adjustment—any evidence Mr. Wisler presented in support of the "cost saving" adjustment was firmly rebutted by Mr. Nystrom's testimony.

A. The Debtors Properly Applied Generally Accepted Accounting Principles and A&M's Adjustment Is Driven by Its Own Valuation Conclusion

9. A&M's "sole" exception to its full adoption of the Debtors' Financial Projections is the Debtors' write down of property, plant & equipment related to the amounts set forth in the Lazard Valuation.[39] A&M concedes that a company emerging from bankruptcy is required to "repeg" its balance sheet.[40] Specifically, GAAP requires that, in the event of a 50% change in ownership in a restructuring where the value of the assets is less than the liabilities and allowed claims, a company applies fresh start accounting upon emergence to mark net assets to enterprise value.[41] In accordance with GAAP, the Financial Projections A&M received included an adjustment form the Financial Projections Lazard received to apply fresh start accounting to the Debtors' pro forma balance sheet using an enterprise valuation of $210 million, which was based

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[38] *IQ Holdings, Inc. v. Am. Commercial Lines Inc.*, C.A. No. 6369-VCL, 2013 Del. Ch. LEXIS 234, at *5 (Del. Ch. Mar. 18, 2013) ("Post-merger litigation adjustments are viewed skeptically, but American and Knoll provided *persuasive reasons* for the modifications" (emphasis added)).

[39] 9/24 Tr. 18:19-21, 19:19-25, 20:1-5 (Wisler).

[40] 9/24 Tr. 20:15-17 (Wisler).

[41] *See Financial Accounting Standards Board Accounting Standards Codification (FASB ASC)* 852-10-45-19, *et seq*.

on the TEV conclusion derived from the Debtors' expert, Lazard.[42] Any upward adjustment in the Debtors' enterprise value would only be applicable in the event that this Court determines that Lazard's valuation is incorrect, despite all other indications of value (other than the A&M's DCF analysis) to the contrary. In other words, the adjustments A&M applied presupposes that A&M's conclusion on valuation is correct.

B. A&M Inflates Its Enterprise Valuation over the Debt Hurdle by Tacking On Nonexistent Cost Savings to the Debtors' Financial Projections

10. To artificially inflate its valuation conclusion, A&M took the liberty of adding $21 million of enterprise value by tacking on certain "cost-savings" related to ***potential*** deals with the Debtors' foreign steel supplier and one of its quality control vendors that are not otherwise included as part of the Financial Projections. Notably, by creating $21 million of "cost savings," A&M increases the range of its DCF analysis to rest entirely above the Creditors Committee's purported (and artificially low) debt hurdle of $302.9 million.[43] Notwithstanding this blatant attempt to manufacture the desired result, this inclusion is particularly egregious since (i) the Debtors' Financial Projections already encompass cost savings where they exist or are anticipated with a reasonable degree of certainty, (ii) Mr. Nystrom testified that the Debtors are "nowhere near a deal" for the cost-savings A&M seeks to include, (iii) A&M attempts to simply "layer on" these alleged beneficial cost savings to the July projections without considering any negative financial circumstances that have taken place since July, and (iv) any agreement with a foreign steel supplier may have negative ramifications to the favorable pricing from domestic steel providers currently included in the Financial Projections.

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[42] 9/21 Tr. 51:21-25 (Nystrom); 9/24 Tr. 24:14-22 (Wisler).

[43] *See* A&M Report at 9 and 47 (addition of the $21 million present value of cost savings increases A&M's low point in its valuation range from $291 million to $312 million).

11. **First**, as discussed above, the Debtors' Financial Projections were fully vetted by the Debtors' management team and already reflect significant current and anticipated cost savings. These savings include, among other things, (i) cuts in labor costs, (ii) vendor deals known to the Debtors as of July, and (iii) anticipated cost reductions for the SBI heat treat equipment payments from $230,000 a month to $55,000 a month.[44] In addition, the Debtors included beneficial pricing and amortization payments related to prepetition settlements with their domestic steel suppliers.[45]

12. **Second**, the record is clear that, not only did the Debtors remain "nowhere near a deal" with foreign-sourced steel suppliers as of the Confirmation Hearing, but it is unlikely that the Debtors will reach a deal ***at all***.[46] Instead, the most certain scenario today is the pricing structures under the Debtors' existing prepetition agreements with domestic steel providers, which are, as noted above, already included in the Debtors' financial projections.[47] The other purported cost savings added to the Financial Projections relates to one of the Debtors' quality control inspectors, Patterson.[48] Even if the Debtors achieved the terms they are seeking with Patterson, the Debtors estimated a net cost savings increase of only $1,500,000.[49] Moreover, the Financial Projections already anticipate certain vendor transactions known or likely to be achieved at the time of the development of the Financial Projections in July.[50] By using the

[44] 9/21 Tr. 50:1-10 (Nystrom).

[45] 9/21 Tr. 147:1-8 (Nystrom).

[46] 9/21 Tr. 50:20-24, 147:1-3 (Nystrom).

[47] 9/21 Tr. 50:20-24, 147:1-8 (Nystrom).

[48] 9/24 Tr. 71:19-25, 72:1-3 (Wisler).

[49] 9/21 Tr. 50:15-19 (Nystrom).

[50] 9/21 Tr. 50:1-10 (Nystrom).

specter of deals with vendors that are nowhere near final and that may never be finalized, the Creditors Committee attempts to derive value where there simply is none.

13. As demonstrated above, management's Financial Projections, including their pricing and cost assumptions, properly take into consideration both positive and negative factors.[51] It is incredible that, after hearing the ***undisputed*** testimony of the Debtors regarding the status of the negotiations and A&M's own admission that any potential vendor deals are subject to ongoing dialogue amongst the parties, A&M continues to argue that inclusion of $21 million in cost savings "makes sense."[52] Mr. Wisler did not adequately explain why it was appropriate to substitute his judgment for that of the Debtors' informed management team or why he was willing to tinker with management's projections to add in deals that were "not likely" to close even though.

14. **Third**, even assuming that it was appropriate to factor into the Debtors' financial projections speculative contractual arrangements, A&M cannot simply "layer on" cost savings into the Financial Projections based on an isolated potentially beneficial development. If it were appropriate to update the Financial Projections with any particular development, then ***all changes*** impacting the Debtors' overall outlook should be considered; not merely those that drive value up.[53] Multiple other facts and assumptions have changed in the three months since the Debtors' Financial Projections were created, including:

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[51] *In re Genesis Health Ventures, Inc.*, 266 B.R. at 614 (adopting management projections when "judgment exercised by management . . . appeared to be balanced, taking into account both positive and negative forces and trends.").

[52] 9/24 Tr. 71:13-18 (Wisler).

[53] 9/21 Tr. 148:9-13 (Nystrom) (emphasis added).

a. 20% and 15% decreases in Spears' U.S. onshore rig count projections for 2016 and 2017, respectively;[54]

b. missed projections for the Debtors' sales volume by over 19% in August and a projected miss by over 12% in September, which were compounded by lower prices than projected in each month;[55]

c. further decrease in capital expenditures by the Debtors' end-user customer base from 2015-2016, where a decline in E&P capex spending from 2015 to 2016 "[m]ay not be a good omen to [the Debtors' financial] projections or to [the Debtors'] 2016 business;"[56] and

d. increased volatility in oil prices since the time the Financial Projections were finalized.[57]

A&M didn't, however, see fit to make these changes (all of which would have had a negative impact on TEV).

15. A&M also ignores both positive and negative factors relating to the deal itself, including the potential for tariffs on foreign steel.[58] Further, the current Financial Projections are premised on settlement agreements that provide preferential pricing terms in exchange for, among other things, a commitment to purchase 90% of the Debtors' steel made by those domestic suppliers.[59] Because such a large purchase commitment would not be fulfilled if the Debtors reached a deal with the foreign steel supplier, the preferential pricing with domestic steel providers would need to be adjusted within the Financial Projections. This cost dynamic is important in light of Mr. Nystrom's testimony that the Debtors cannot source all of their steel

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54 9/21 Tr. 47:15-19 (Nystrom).

55 9/21 Tr. 49:13-18 (Nystrom).

56 9/21 Tr. 49:22-25, 148:6-8 (Nystrom).

57 9/21 Tr. 148:6-8 (Nystrom).

58 9/21 Tr. 147:14-23 (Nystrom).

59 9/21 Tr. 114:22-25, 115:1-7 (Nystrom).

internationally, and the Debtors would still need to obtain domestic steel for their operations,[60] which, under the changed circumstances, would likely occur at higher prices.[61] A&M did not take this into account in their analysis when they simply "stapled" $21 million of cost savings on top of the Financial Projections.

16. Based on all of the above factors, the Court should reject the efforts of A&M to "top-up" the Creditors Committee's desired valuation by including these nonexistent cost savings to the Financial Projections.

II. ALL CREDIBLE EVIDENCE SUPPORTS THE CONCLUSION THAT THE DEBTORS' ENTERPRISE VALUATION DOES NOT EXCEED THE SECURED DEBT HURDLE

17. As discussed above, the Debtors must show by a preponderance of the evidence that the Debtors' TEV does not exceed the Debt Hurdle, and all indicia of value in these cases (save A&M's DCF analysis) point to the inescapable conclusion that it does not. However, if the Court determines it must weigh the merits and credibility of the two experts and their valuation reports, its focus should be on the propriety of the methods used to perform the valuation.[62] Here, Lazard and A&M purported to apply the same valuation methodologies[63] and came to wildly different results.[64] In fact, A&M's TEV conclusion is more than 50% higher than Lazard's TEV conclusion. As a result, the Court must test the propriety of the methods used by A&M and Lazard. As discussed below, Lazard's sound analyses are based on a broad and

60 9/21 Tr. 115:21-23 (Nystrom).

61 9/21 Tr. 115:14-20 (Nystrom) (testifying that pricing would be higher if he did not assume the settlement agreements with domestic steel providers).

62 *Coram Healthcare*, 315 B.R. at 339 ("Although valuations are subjective, there are proper and improper methods of performing a valuation.").

63 *Compare* Lazard Report at 5-6 and 9/21 Tr. 159:13-18 (Pohl) *with* A&M Report at 8-9 and 9/24 Tr. 17:7-15 (Wisler).

64 *Compare* Lazard Report at 5-6 *with* A&M Report at 8-9.

informed examination of the oilfield services ("**OFS**") industry, consistent with best practices for enterprise valuations of a company like the Debtors, and fundamentally superior to those of A&M.

18. Among other reasons, the Court must be circumspect of A&M's TEV conclusion given that A&M singularly relies on a DCF analysis.

> [An expert's] sole reliance on the DCF analysis to the exclusion of other valuation methodologies substantially diminishes the weight to be accorded to his opinion. Here, [the expert's] use of only one valuation methodology simply [does] not provide the necessary check on the value he arrived at that would render that value a reliable measure of the company's worth.[65]

Even though A&M allegedly corroborated its DCF conclusion with a comparable companies analysis that used unconventional metrics for valuing a company like the Debtors, A&M's comparable companies analysis was still tens of millions of dollars less than the Debt Hurdle.[66] When one considers what constituency A&M represents, it is ***not surprising*** that this result was afforded ***no weight*** in A&M's ultimate TEV conclusion. What ***is surprising,*** however, is that A&M nonetheless contends that this analysis "corroborates" its ultimate conclusion that unsecured creditors were in the money despite deriving a range of TEV 11% and 25% less than that derived in its DCF analysis at the low and mid-point, respectively.[67]

19. Even with respect to its DCF analysis, A&M appears to have tilted virtually every input to favor a higher TEV. Most critically, A&M relied on a small number of "comparable" companies that in fact are not similar to the Debtors from a financial perspective. Doing so

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[65] *Iridium Operating*, 373 B.R. at 347 (quotations and citation omitted).

[66] A&M Report at 36-45.

[67] A&M Report at 9. Lazard ***actually*** reported the results of all three valuation methodologies (*i.e.*, DCF, comparable companies and precedent transactions) but chose to exclude the precedent transactions analysis because of the paucity of data points and age of transactions. Lazard Report at 38.

allowed A&M to utilize in its DCF calculations an artificially low levered beta of 1.13—implying that the Debtors, an undiversified "start-up company"[68] exposed principally to the highly volatile U.S. onshore OFS industry, have only slightly more investment risk than the overall public equity markets—resulting in a WACC that is significantly lower than Lazard's and ultimately driving TEV substantially upward. As explained by Lazard, A&M's "comparable" companies bear little resemblance to the Debtors with respect to the parameters that matter for a valuation analysis: the fundamental economic drivers of the business and its financial results.[69]

20. In fact, as illustrated at trial, A&M's reliance on the wrong "comparable" companies is so misplaced that even if one were to accept all of A&M's other DCF inputs, the only way to create a valuation materially higher than Lazard's is to rely solely on A&M's small and inaccurate peer set. Yet, if one adds A&M's Tier 1 Peers to Lazard's Downhole Peers and uses all of A&M's other WACC inputs (including the use of historical betas, rather than Barra betas), the implied TEV would be substantially in line with Lazard's TEV of $210,000,000.[70] In other words, the Court would have to adopt A&M's analysis wholesale, and specifically accord ***no weight*** to the comparable companies selected by Lazard, to find that the unsecured creditors are even close to being in the money.

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68 9/24 Tr. 29:16.

69 9/21 Tr. 163:7-25, 201:22-207:22 (Pohl).

70 9/21 Tr. 220:7-221:12 (Pohl); Demonstrative entitled "WACC-A&M's Other WACC Assumptions" a copy of which is attached hereto as **Exhibit A** ("**Lazard Peers with All A&M Assumptions Demonstrative**"). This Demonstrative was also included in the binder for Pohl's direct examination as Tab D.

A. The Lazard Valuation Is the Product of a Collaboration of Experts in Restructuring and the Oil & Gas Industry, While A&M's Results-Oriented Valuation Is Plagued by an Overall Lack of Industry Experience and Company Knowledge

21. Lazard's valuation is the product of a collaborative effort of a team of experienced restructuring ***and*** OFS industry professionals. The result of this combined-team approach was a thorough understanding of the Debtors' business, its macroeconomic drivers, and the market in which the Debtors operate. As described more fully below, not only did the Lazard team properly consider and perform the three generally accepted valuation methodologies, giving weight to two of these methodologies in its TEV conclusion, but it also considered multiple factors within the methodologies, providing for a comprehensive and accurate enterprise valuation of the Debtors.[71] In contrast, A&M's valuation team did not have any experts in the oil and gas industry, and none of the three professionals working on the engagement had ever valued an OCTG company before.[72] Unsurprisingly, A&M quickly concluded that its small set of global companies hit the "bull's-eye," stopped looking for a more accurate set of comparable companies[73] and derived a valuation that is far beyond, and entirely inconsistent with, any other indication of value in the record of these cases.

22. Mr. Pohl, who has 25 years of restructuring experience as both an attorney and an investment banker,[74] led the Lazard engagement as part of a collaborative effort among professionals in Lazard's restructuring group and OFS industry group.[75] Mr. Pohl assembled a

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71 9/21 Tr. 166:21-25, 167:1-11 (Pohl).

72 9/24 Tr. 82:4-22, 83:11-15 (Wisler).

73 *See* 9/24 Tr. 47:7-19 (Wisler).

74 9/21 Tr. 153:22-25, 154:1-4 (Pohl).

75 9/21 Tr. 153:1-9 (Pohl).

team of senior advisors in Lazard's restructuring group in both New York and Chicago and at least four professionals within Lazard's OFS industry group.[76]

23. Lazard's OFS team was led by Doug Fordyce, the head of Lazard's OFS industry group based in Houston, Texas, the heart of the U.S. oil and gas industry and that is less than fifty miles from the Debtors' Liberty, Texas facility. Also from the OFS industry group were, among others, Andrew Chang and John Taplett, who are day-to-day OFS industry investment bankers.[77] As is typical of Lazard's internal collaborations, teaming the restructuring group with the relevant industry group provides restructuring experts with "[a] deep wealth of knowledge about the industry in which the target company . . . operates."[78]

24. The Lazard team, spearheaded by their OFS industry professionals, spent hundreds of hours over approximately five weeks deciding the appropriate comparable companies to include in the peer groups for purposes of analyzing the Debtors' TEV.[79] As discussed below, Lazard engaged in a comprehensive review of potential peer companies to determine if they were comparable to the Debtors for valuation purposes. Lazard also provided a balanced approach in weighing the other two generally accepted valuation methodologies, ultimately giving some weight to the comparable companies methodology.[80] Indeed, by giving weight to the comparable companies analysis, Lazard actually ***increased*** its valuation range above the range derived from its DCF analysis alone.[81]

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[76] 9/21 Tr. 153:14-17 (Pohl).

[77] 9/21 Tr. 155:10-23 (Pohl).

[78] 9/21 Tr. 160:24-25, 161:1-3 (Pohl); *see also* 9/21 Tr. 153:1-9 (Pohl).

[79] 9/21 Tr. 157:23-25, 165:19-25, 166:1-5 (Pohl).

[80] 9/21 Tr. 166:21-25, 167:1 (Pohl).

[81] 9/21 Tr. 187-88 (Pohl).

25. In contrast, Mr. Wisler's testimony amply demonstrated that he and his team lacked the industry and company-specific knowledge necessary to value the Debtors or even credibly critique Lazard's work. While Mr. Wisler testified that, when valuing a company, "it's important to know what the company does, where it does it, where its manufacturing processes are, who its customers and competition are," Mr. Wisler was at a loss to understand basic information regarding the Debtors.[82] For example:

- Despite a lack of expertise in the oil and gas industry, no one spoke with any of the Debtors' customers, end-users, or competitors to gain a better understanding of the industry or the Debtors' products.[83] In fact, Mr. Wisler did not even speak with other A&M professionals advising the Creditors Committee to assess market interest for the Debtors.[84]

- Mr. Wisler did not have any prior knowledge of the difference between welded and seamless pipe.[85] Even so, in the face of Mr. Nystrom's testimony that (i) the Debtors are unable to sell to offshore customers with their welded product line, and (ii) despite trying "all the time," the Debtors have only been successful in converting one customer from seamless to welded in limited applications, Mr. Wisler continued to assert that the contrast between welded and seamless pipe was not a "distinction with a difference."[86]

- Mr. Wisler testified extensively regarding the commodity nature of OCTG products being central to A&M's valuation,[87] including his statement that "by

[82] 9/24 Tr. 91:2-11 (Wisler).

[83] 9/24 Tr. 85:20-25, 86:1-14 (Wisler).

[84] 9/24 Tr. 83:19-25, 84:1-6 (Wisler).

[85] 9/24 Tr. 83:3-10 (Wisler).

[86] 9/21 Tr. 36:7-19, 145:4-9 (Nystrom); 9/24 Tr. 40-41 (Wisler).

[87] 9/24 Tr. 34:3-5, 78:13-23 (Wisler) (testifying that the Debtors generate a commodity product, subject to commodity price influences); 9/24 Tr. 40:19-25, 41:1-12 (Wisler) (testifying that both ERW and seamless pipe are both commodity products); 9/24 Tr. 43:12-14 (Wisler) (testifying that, "at the end of the day these are commodity products and the returns generally over time should be relatively low."); 9/24 Tr. 44:8-14 (Wisler) (each of A&M's selected peer companies derives a majority of 80 percent plus of its revenue from "steel pile and tubular goods, again, sort of a global commodity, steel pipe, tubular goods."); 9/24 Tr. 67:12-14 (Wisler) (A&M considering precedent transactions "relevant, but the issue is that in a commodity business you want to look for a normalized earnings parameter."); 9/24 Tr. 79:3-

> looking at the commodity-type businesses . . . we've captured the spirit of that return expectation by investors. And that is so central as it tracks through the weighted average cost of capital calculations and other areas of the analysis that I just don't want it to be missed here."[88] ***Notwithstanding this testimony, Mr. Wisler testified that while performing his valuation, he had no view on whether OCTG was a commodity product***.[89]

26. With this lack of basic knowledge of the Debtors' business model and industry, it is unsurprising that Mr. Wisler and his two colleagues identified five international steel companies that happen to manufacture and sell some OCTG products among their product lines, determined that they had found the "bull's eye," and "stayed there."[90] Mr. Wisler conducted no further work at that point, notwithstanding that (a) only a fraction of the revenue generated by the companies he identified is derived from sales of what the Debtors sell (ERW pipe) and (b) most of those companies' revenues are derived from sales of products whose demand is not driven by the same economic and business factors as the drivers of the Debtors' revenues. Indeed, upon quickly identifying these five "Steel Peers," Mr. Wisler testified that "that was sufficient for us,"[91] this remained the case even after the Tier 1 peer set resulted in a levered beta of 1.13 for the Debtors, a single-commodity manufacturer exposed to a highly volatile end-use market.

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5 (Wisler) (testifying that what he "was trying to frame is the concept of the return expectation of an investor in a commodity business, for example").

88 9/24 Tr. 35:1-6 (Wisler).

89 9/24 Tr. 80:10-15 (Wisler).

90 9/24 Tr. 47:18-19, 48:8-15 (Wisler). *But see* Tr. of Hr'g Before Hon. Mary F. Walrath U.S. Bankr. Judge (Sept. 22, 2015) [D.I. 572] (hereinafter "**9/22 Tr.**") at 84:19-25, 85:1-18 (Pohl) ("We, Boomerang, compete for business with [some of these steel peers that manufacture OCTG product]. That's not the same things as saying that we are comparable companies in terms of how we are capitalized, should be capitalized, how our stock is going to trade, how volatile it's going to be, et cetera[.]").

91 9/24 Tr. 130:16-21 (Wisler).

27. This five-company "sufficiency" not only makes little sense because the companies selected by A&M have little to no similarity to the Debtors in product mix and geographic scope and, therefore, are exposed to fundamentally different business drivers,[92] but also because A&M further breaks down its small peer group into two ***smaller*** tiers.[93] During its valuation, without explanation, A&M uses data from Tier 1—which is comprised of only two companies—and, in other instances uses data from Tier 1 and 2 (comprised only of five companies total).[94] As Mr. Pohl testified, "an average of two … financially dissimilar companies does not have much statistical meaning,"[95] which is why such limited peer sets are not preferred by courts and valuation professionals.[96]

B. Lazard Performed a DCF Analysis Consistent with Well-Accepted Industry Practices and Principles of Finance, Whereas A&M's DCF Analysis Was Designed Only to Get Over the Debt Hurdle

1. A&M's "Bulls-Eye" Misses the Mark

28. Both experts testified that the key factor differentiating their TEV conclusions was the selection of comparable companies for purposes of deriving their respective betas and the resulting WACC calculations.[97] The evidence at trial demonstrated that Lazard performed a comprehensive and holistic review and analysis of the financial and operational drivers of the

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[92] 9/21 Tr. 202:8-11, 204:23-25, 205:1-5 (Pohl); Demonstrative entitled "Comparable Peer Set Comparison" a copy of which is attached hereto as **Exhibit B** ("**Comparable Peer Set Comparison Demonstrative**"). This Demonstrative was also included in the binder for Pohl's direct examination as Tab A.

[93] 9/21 Tr. 201:4-5 (Pohl).

[94] 9/21 Tr. 201:4-10 (Pohl).

[95] 9/21 Tr. 209:6-9 (Pohl).

[96] *See* CONTESTED VALUATION IN CORPORATE BANKRUPTCY: A COLLIER MONOGRAPH, ¶ 11.05 (Robert J. Stark et al. eds., 2011) (cautioning against the selection of peer groups that are too small and suggesting that a peer group as a large as four may be too small).

[97] 9/21 Tr. 200:18-19 (Pohl); 9/24 Tr. 31:18-25, 32:1-2 (Wisler).

Debtors' business and then developed peer sets of companies with comparable financial and operational drivers. A&M, on the other hand, simply checked the box for the first five companies it could find that displayed the letters OCTG on their websites and stopped its analysis.[98] As a result, A&M's peer set is a small group of companies that are simply not financially comparable to the Debtors, causing A&M to include data points in its WACC analysis that are inappropriate and that artificially inflate its valuation. For example, by using large, stable, global steel companies as "peers," A&M derived outputs such as a levered beta of 1.13 (discussed below) and a debt-to-capital ratio of 40%, a ratio that was uncharacteristically high for companies in the OFS industry that are subjected to significant volatility,[99] such as the Debtors who manufacturer of a single commodity product with a volatile end use. The Court should not credit A&M's analysis, which lacked rigor and was clearly uninformed.

29. Lazard's selection of peer sets and derivation of its WACC reflected a sophisticated and nuanced understanding of the oil and gas and OFS industries, including the financial factors impacting those industries and the Debtors' TEV. The Debtors are a pure-play ERW OCTG manufacturer in the United States and their business performance is driven by a number of notable characteristics, including that: (i) they manufacture only one product (ERW pipe); (ii) they have only one facility, which is located outside of Houston, Texas; (iii) the Debtors' product is primarily sold to distributors in the United States; and (iv) the Debtors' products are used only for on-shore applications.[100] Importantly, the Debtors' revenues are most

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[98] 9/24 Tr. 130:16-21 (Wisler) ("Ms. Norman: And you looked to see if there were any OCTG companies out there. You identified some and then you stopped, right? Mr. Wisler: I think we identified some and as a result of reviewing those, two others came to our attention, which constituted the five set universe that we used, yes. That was sufficient for us.")

[99] 9/21 Tr. 182:7-11 (Pohl).

[100] 9/21 Tr. 159:20-25, 160:1-8, 203:8-9, 203:17-19 (Pohl).

directly tied to U.S. onshore rig counts, and their revenues are heavily impacted by fluctuations in rig counts:[101] "Few[er] rigs, likely fewer drilling and activity, likely less demand for OCTG piping."[102]

30. The Lazard team spent hundreds of hours over approximately five weeks deciding which companies were appropriate comparisons to be included in the Debtors' peer group.[103] The companies Lazard considered were vetted both by valuation experts and specialists in the OFS industry.[104] Over these hundreds of hours, the Lazard team went through several iterations to arrive at two potentially comparable (but not equal) peer sets: the "Downhole" Peers and Steel Peers with OCTG exposure.[105]

31. The Lazard team initially identified public companies that sell products similar to those the Debtors manufacture. However, Lazard soon realized that those companies had significant differences that affected the "actual comparability, from a financial point of view, of those companies,"[106] including, among others: (i) significant or majority of revenues from non-OCTG business lines irrelevant to the valuation of the Debtors;[107] (ii) substantial or majority international sales that are exposed to completely different business drivers than the Debtors;[108] (iii) orders-of-magnitude size differences that affect capitalization, cross-selling ability, and

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101 9/21 Tr. 42:8-16 (Nystrom).

102 9/21 Tr. 47:22-23 (Nystrom).

103 9/21 Tr. 157:23-25, 165:19-25, 166:3-6 (Pohl).

104 9/21 Tr. 165:19-25, 166:1-5 (Pohl).

105 9/21 Tr. 164:8-10 (Pohl).

106 9/21 Tr. 161:23-25 (Pohl).

107 9/21 Tr. 202:12-25, 203:1-5, 203:12-16, 208:19-25, 207:1-6 (Pohl).

108 9/21 Tr. 205:17-25, 208:1-18 (Pohl).

purchasing power for raw materials;[109] and (iv) majority sale of premium seamless tubing, as opposed to the commodity ERW product that the Debtors sell exclusively, which affects revenue margins and riskiness.[110] Given these significant differences, the Lazard team, including its OFS industry leaders, looked at other companies in the OFS industry that were more comparable from a financial and operational point of view and thus, would provide a more accurate and reliable peer group for valuation purposes.[111]

32. These industry experts were able to identify companies that sell "consumable" products to drillers operating onshore in the United States and who use these products ***together*** with ERW OCTG pipe (*i.e.*, the Downhole Peers) in downhole applications.[112] Like the Debtors, the Downhole Peers' revenues, profits and financial performance are closely tied to U.S. onshore exploration and production, which exposes their business models to the same economic drivers as the Debtors and makes these companies the most appropriate peers for use in a valuation of the Debtors' go-forward business.[113] Because U.S. onshore rig count is a proxy for these drivers, as demonstrated at trial, the performance of Lazard's Downhole Peers has been highly correlated to U.S. onshore rig counts and WTI oil price,[114] just as the Debtors' performance has been since

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[109] Lazard Report at 28.

[110] 9/21 Tr. 207:7-21 (Pohl).

[111] 9/21 Tr. 179:15-25, 180:1-20 (Pohl); *see also* Tim Koller, Marc Goedhart, & David Wessels, VALUATION: MEASURING AND MANAGING THE VALUE OF COMPANIES 286 (6th ed. 2015) ("To improve the precision of beta estimation, use industry, rather than company-specific, betas. Companies in the same industry face similar *operating* risks, so they should have similar operating betas.") (emphasis in original) (internal citations omitted).

[112] 9/21 Tr. 164:12-14 (Pohl) (describing application of Downhole Peers' products).

[113] 9/21 Tr. 161:11-25, 162:1-24, 164:8-25, 178:16-19 (Pohl); Lazard Report at 28.

[114] *See* Demonstrative entitled "Relative Price Performance," a copy of which is attached hereto as **Exhibit C** ("**Relative Price Performance Demonstrative**"). This Demonstrative was also included in the binder for Pohl's direct examination as Tab B.

their formation.[115] By contrast, A&M's peer set did not exhibit the same correlative pattern as the Debtors and Lazard's Downhole Peers[116] because A&M's peer set is comprised of companies that are fundamentally different from the Debtors.[117]

33. While Mr. Pohl testified extensively regarding why the eight Downhole Peers are the best peer set for performing a financial valuation of the Debtors, Lazard, in fact, also considered companies that sold OCTG products as part of a larger array of steel products.[118] Lazard identified a full complement of these companies as part of their Steel Peers with OCTG exposure.[119] While Lazard did not formulaically weight the Downhole Peers and Steel Peers when determining its overall WACC for the Debtors, Lazard incorporated both sets of peers, giving the Downhole Peers more consideration, when arriving at a WACC in range of 12-14%.[120] Likewise, Lazard included the Steel Peers in performing its comparable companies analysis, but did not assign them as much weight as the Downhole Peers.[121]

34. On the other hand, A&M pursued a myopic search for companies that sell some OCTG as the start and end of its comparable companies "analysis," ostensibly relying on Mr. Wisler's "common sense" approach.[122] However, that approach makes no sense at all, as demonstrated by Mr. Pohl's testimony and, in fact, is in conflict with Mr. Wisler's own standard approach to valuing companies. Mr. Wisler testified that his normal approach to selecting

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115 Lazard Report at 8, 11, 15.

116 *See* **<u>Exhibit C</u>**, Relative Price Performance Demonstrative.

117 9/21 Tr. 202:8-11, 204:23-25, 205:1-5, 210:21-25, 211:1-2. (Pohl).

118 9/21 Tr. 165:6-14; 9/22 Tr. 86:14-87:8 (Pohl).

119 *Id.*

120 9/21 Tr. 178:14-20 (Pohl).

121 Lazard Report at 39.

122 9/24 Tr. 130:22-25, 131:1-2 (Wisler).

comparable companies involved considerations of what the company does, how it does it, what its products are, who its competitors are, where it competes, and the company's specific industry segment.[123] All of these factors were considered by Lazard in selecting its comparable companies, which yielded a primary peer set in the OFS industry in which the Debtors operate. In contrast, Mr. Wisler abandoned all but one of those factors in a talismanic pursuit of OCTG companies. A&M's ability to analyze more deeply and accurately whether a company is actually comparable to the Debtors was inherently handicapped because no member of the team had any experience or understanding of the OFS industry,[124] and Mr. Wisler himself was without even a basic understanding of the OCTG products manufactured and sold by the very company he was valuing.[125] Despite the fact that the "top-line" of the Debtors' entire Financial Projections are rig counts,[126] Mr. Wisler said the words "oil" or "gas" just once during his direct testimony.[127]

35. Not surprisingly, the peer sets that A&M selected are very much ***unlike*** the Debtors. Mr. Nystrom testified that the firms in A&M's peer set were international in their reach, had a broader array of products offered than the Debtors, had capabilities to make seamless pipe, and serviced offshore drilling clients.[128] Mr. Pohl similarly testified that A&M's peer set was significantly different from the Debtors, in size, business model, product diversity,

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[123] 9/24 Tr. 14:2-11 (Wisler).

[124] 9/24 Tr. 82:4-22, 83:11-15 (Wisler).

[125] 9/24 Tr. 82:23-25, 83:1-10 (Wisler).

[126] 9/21 Tr. 42:12 (Nystrom).

[127] 9/24 Tr. 33:10-13 (Wisler). Indeed, counsel to the Creditors Committee did not elicit ***any*** testimony from Mr. Wisler concerning the "Industry Overview" section of the A&M Report, which section spans more than 10 pages in length. *See* A&M Report at 15-25. The reason for the lack of any such testimony is clear—Mr. Wisler knows nothing about the information contained in that section. As such, the Court should afford the Industry Overview section of the A&M Report no weight.

[128] 9/21 Tr. 35:6-25, 36:1-25, 37:1-2 (Nystrom).

product type, product application, and geographic location of sales. He specifically noted that of the two companies that comprise A&M's Tier 1 peer set, 81% of Tenaris's sales and 96% of Vallourec's sale were of non-ERW pipe (either seamless or some other product), and 52% of Tenaris's sales and 69% of Vallourec's sales were outside of North America.[129] Mr. Wisler, on the other hand, demonstrated through his testimony that he lacked a basic understanding of the very companies in his own Tier 1 peer set, despite there being only two companies, including whether Vallourec or Tenaris made products for onshore or offshore usage,[130] had additional debt capacity,[131] or had more pricing power relative to the Debtors.[132]

36. Mr. Wisler gave significant testimony at trial explaining how his valuation thesis was based on the "commodity" nature of OCTG and how his selection of comparable companies was intended to reflect the return on invested capital investors sought when investing in commodity producers.[133] However, Mr. Wisler's testimony on the stand is confounding given that the word "commodity" does not appear once in the A&M Report[134] and, less than a week before the Confirmation Hearing, Mr. Wisler had no view on the commodity nature of OCTG:

> Question: Is [OCTG] a commodity product? Commodity?
>
> Answer: I don't know. I don't think I have a view on that, whether it's a commodity product or not.[135]

37. Mr. Wisler levered beta for the Debtors of 1.13 punctuates how off-base A&M was in performing its valuation. Beta is used to measure how closely a security's price moves

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[129] 9/21 Tr. 202:12-25, 203:1-25, 204:1-25, 205:1-5 (Pohl).

[130] 9/24 Tr. 104:22-25 (Vallourec); 9/24 Tr. 109:16-19 (Tenaris) (Wisler).

[131] 9/24 Tr. 107:19-24 (Vallourec); 9/24 Tr. 110:1-5 (Tenaris) (Wisler).

[132] 9/24 Tr. 107:25, 108:1-4 (Vallourec); 9/24 Tr. 109:20-25 (Tenaris) (Wisler).

[133] 9/24 Tr. 33:8-25, 34:1-11, 78:14-25, 79:1-5 (Wisler).

[134] *See* A&M Report.

[135] 9/24 Tr. 80:13-15 (Wisler).

relative to a given market index, such as the S&P 500.[136] In effect, a beta higher than one indicates a stock that is more volatile or "riskier" than the index, while a beta lower than one indicates a stock that is less volatile.[137] Accordingly, A&M's beta of 1.13 implies that the Debtors are only marginally more volatile than the overall U.S. public equities market. When asked whether such a result raised any red flags, Mr. Wisler testified that he did not think he should reevaluate his peer set based on the derived beta of 1.13,[138] even though the Debtors are a small, five-year-old manufacturer of a single commodity product sold for a highly volatile end use—a company that Mr. Wisler himself dubbed a "start-up."[139]

38. To put A&M's levered beta calculation of 1.13 into real-world context, of the five comparable companies that A&M considered to be the Debtors' peers, only Tenaris S.A., a 14 year-old Luxembourg-based company with a ***$13.6 billion enterprise value,*** global sales and manufacturing capabilities, and diversified products and customers, had a levered beta of 1.04, only slightly less than what A&M derived for the Debtors.[140] The other four companies in A&M's peer set all had substantially higher levered betas:

- Tubos Reunidos SA, a 123 year-old Spanish company with a $396 million enterprise value had a levered beta of 1.29; [141]
- Vallourec SA, a 116 year-old French company with a $3.6 billion enterprise value had a levered beta of 1.33;[142]

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136 9/21 Tr. 171:14-20 (Pohl).

137 9/21 Tr. 171:14-20 (Pohl).

138 9/24 Tr. 112:16-19 (Wisler).

139 9/24 Tr. 29:16 (Wisler).

140 A&M Report at 32, 53.

141 A&M Report at 32, 55.

142 A&M Report at 32, 52.

- Tubacex, S.A., a 52-year old Spanish company with a $513 million enterprise value had a levered beta of 1.56;[143] and

- OAO TMK a 14-year old Russian company with a $3.7 billion enterprise value had a levered beta of 2.20.[144]

39. In an effort to restore Mr. Wisler's credibility on this point, the Creditors Committee attempted, but failed, to show that the Debtors and Lazard viewed A&M's peer set as financially comparable to the Debtors. First, while Lazard included three of A&M's five peer set members in its Steel Peers, Lazard expressly found that they were less similar to the Debtors than the Downhole Peers and, thus, for all purposes gave the data derived from these steel companies far less weight than the Downhole Peers.[145]

40. Second, although the point is somewhat self-evident, Lazard testified about why the appearance of certain companies in its own pre-retention pitch materials and references to competitors in company marketing materials were not relevant to a formal valuation exercise.[146] As Judge Shannon stated in *PTL Holdings:*

> The CIM was a marketing piece created to support a fund-raising effort in the capital markets that ultimately failed. It was created in a somewhat different time frame and for a completely different purpose than the Debtors' Disclosure Statement and the LMM Valuation. Indeed, the CIM was presumably prepared to foster enthusiasm in the capital markets for the Debtors as an attractive investment opportunity.[147]

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[143] A&M Report at 32, 56.

[144] A&M Report at 32, 54.

[145] *See* discussion, *supra*.

[146] 9/22 Tr. 20:10-18, 84:6-25, 86:1-6 (Pohl).

[147] *PTL Holdings*, 2011 Bankr. LEXIS 4436, at *28; *see also Coram Healthcare*, 315 B.R. at 340 ("Those projections were a sales piece prepared by EB/SSG at a time when the Trustee was contemplating a sale of the Debtors. No buyer would have relied upon them as an indication of the Debtor's value, nor should [the court].").

The Lazard pitch book[148] and the sales teaser in the prepetition sales process[149] are irrelevant to the valuation analyses at issue in this trial for several reasons. Marketing materials are prepared to foster enthusiasm in a sale transaction and should be warily considered in the context of a valuation given the motivation of the seller making the statements. Further, Mr. Pohl credibly testified that the Lazard pitch book was put together in under 24 hours without any time for analysis using an "off the shelf" framework[150] and that the pre-petition teaser was prepared to "paint the rosiest potential sales picture,"[151] and has nothing to do with a valuation analysis.[152] Tellingly, even with this rosy view of the Debtors, no buyer ever came forward with a viable offer, let alone one that could exceed the level of secured debt.

41. In sum, although Lazard and A&M did not share the same view on a number of other WACC inputs (each as discussed below), if this court agrees that either (a) Lazard's peer set selection was credible and valid or (b) the Downhole Peers plus A&M's Tier 1 peers would be an appropriate peer set, nothing else need be decided. In each of those cases, using all of A&M's other assumptions yields a valuation well below the Debt Hurdle.[153]

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148 Tab 32, Lazard Discussion Materials.

149 Tab 8, Boomerang Tube, LLC Investor Presentation May 2015.

150 9/22 Tr. 16:20-24 (Pohl).

151 9/22 Tr. 89:24-25, 90:5-6 (Pohl).

152 9/22 Tr. 90:5-6 (Pohl). Finally, the Court should accord little weight, if any, to the statements included in the November 2012 Board Minutes given that no witness in these proceedings was at the meeting in question and the statements were attributed to Morgan Stanley, who was presumably engaged in marketing either an IPO or IPO-advisory services, a scenario that Judge Shannon cautioned against in *PTL Holdings*. *See* Tab 33, Boomerang Board Meeting Materials.

153 *See* **Exhibit A**, Lazard Peers with All A&M Assumptions Demonstrative.

2. Lazard's Usage of Barra Predictive Beta Is Standard in the Industry and Reflects the Forward Looking Nature of a DCF Analysis

42. While there are multiple service providers that calculate betas, Lazard used a Barra predictive beta while A&M chose a historical beta approach sourced from (and only from) Capital IQ. A&M's criticism of Lazard's use of Barra predictive betas is perplexing because using A&M's preferred beta source, Capital IQ historical betas, would not have materially changed Lazard's valuation conclusion.[154] In any case, Barra predictive betas are an industry standard data source for calculating costs of equity in company enterprise valuations, used both in day-to-day investment banking work and in litigation valuation disputes, including in bankruptcy courts. Accordingly, Lazard's use of Barra predictive betas is appropriate.

43. As testified to in detail by Mr. Pohl, Barra is an independent, widely used and highly reputable industry standard for beta data.[155] Barra's predictive beta statistics are just that—what Barra has estimated a subject company's beta looking forward should be.[156] Many investments banks use Barra predictive betas as 'the' beta input for WACC calculations.[157] Indeed, Lazard's Opinion Committee, a group of valuation professionals dedicated to keeping abreast of academic literature, case law and valuation trends for the sole purpose of promulgating

154 Mr. Pohl testified that using A&M's levered historical betas (and blending A&M's Tier 1 companies into Lazard's Downhole Peers) results in a TEV range of $179 million to $233 million, with a ***lower*** midpoint of $206 million. 9/21 Tr. 219:5-25, 220:1-5 (Pohl); Demonstrative entitled "WACC-A&M's Levered Historical Beta" a copy of which is attached hereto as **Exhibit D** ("**WACC-A&M's Levered Historical Beta Demonstrative**"). This Demonstrative was also included in the binder for Pohl's direct examination as Tab D.

155 9/21 Tr. 172:7-10 (Pohl).

156 9/21 Tr. 212:25, 213:1-5 (Pohl).

157 *See, e.g.*, Widen, R. Scott, *Practioner Note: Delaware Law, Financial Theory and Investment Banking Valuation Practice*, 4 N.Y.U. J. L. & Bus. 579, 585-86 (2008); 9/21 Tr. 213:4-5.

valuation guidelines for their global practices, has determined that Barra predictive beta is the starting point for valuation betas.[158]

44. Indeed, Mr. Pohl provided comprehensive reasoning for using predictive betas. First, because the DCF is intended to be forward looking, it is good practice to prefer a forward-looking beta calculation.[159] Second, usage of historical betas to determine forward looking valuations invites estimation errors because the historical data is impacted by past actions that may not have any relevance in the future. For example, historical beta data can reflect M&A activity, unusual capital markets transactions or fundamental industry changes that are not indicative of a company's future prospects.[160] Accordingly, use of Barra predictive beta provides a superior alternative to "historical noise."[161] Third, usage of historical betas can be statistically manipulated by (and less reliable as a result of) an expert's selection of, among other things, how long to look back historically and how often to pull the beta data (*i.e.*, weekly, monthly or otherwise).[162]

45. A&M's sole criticism with the usage of predictive beta is that, because Barra uses a proprietary formula that has identified size as one of the many factors for generating predictive beta, the usage of Barra predictive beta ***may*** result in double counting when a size premium is also applied.[163] In support of this proposition, A&M cites to a 2010 opinion from Vice

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158 9/21 Tr. 215:7-20; 172:7-10; 9/22 Tr. 93:3-25, 94:1-25, 95-1-25, 96:1-3.

159 9/21 Tr. 213:17-18.

160 9/21 Tr. 213:23-25, 214:1-8.

161 9/22 Tr. 94:17-25, 95:1-4.

162 9/21 Tr. 212:23-24, 214:1-20; 9/22 Tr. 95:6-25, 96:1-23.

163 *See* 9/24 Tr. 113:25-114:10 (Mr. Wisler testifying that there is no authoritative source stating that such use is, in fact, double counting).

Chancellor Strine rejecting the use of Barra beta in that particular case.[164] This criticism is not only inconsistent with the continued use of Barra predictive betas across the investment banking industry, but also inherently suspect for several reasons.

> **First**, Mr. Wisler's testimony that Barra beta "has been universally rejected" [165]in his experience is belied by the very case in which he cites to discredit the use of Barra beta. Indeed, then Vice Chancellor Strine expressly acknowledged the fact that the financial community is relying on Barra beta[166] and emphasized that he did not reject the Barra beta for use in later cases.[167]
>
> **Second**, at the same time the Chancery Court declined to use Barra beta in the context of *Global*, it also determined that the simple use of historical beta, as utilized here by A&M, "is not the best method to use in calculating [the company's] cost of equity."[168] Indeed, the *Global* Court recognized that companies that are more unstable, leveraged, less established, riskier and otherwise susceptible to political risk should have higher betas. *Id.* Accordingly, given the totality of the circumstances of our case, the analysis by then Vice Chancellor Strine actually ***supports*** Lazard's higher beta calculation.
>
> **Third**, Mr. Wisler conceded that ***he*** may have used Barra predictive beta in his past valuations.[169] This potential "flip flop" of approaches not only raises doubts regarding the "universal rejection" of Barra beta, but is ***precisely*** one of the factors Vice Chancellor Strine used to reject the experts' usage of predictive beta in *Global*.[170] On the other hand, as discussed above, Mr. Pohl testified that it is a standard practice at Lazard to utilize Barra betas.[171]
>
> **Fourth**, Mr. Wisler was wholly unaware of decisions subsequent to the *Global* opinion in which courts accepted the use of Barra beta alongside size premiums. In fact, Mr. Wisler testified that a decision such as *IQ Holdings, Inc.* explicitly

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164 *Global GT LP v. Golden Telecom, Inc.* 993 A.2d 497, 521 (Del. Ch. 2010), *aff'd*, 11 A.3d 214 (Del. 2010).

165 9/24 Tr. 113:15-18.

166 *See Global GT LP*, 993 A.2d at 519-20 ("Gompers touts the Barra beta as one that has been relied upon by the financial community for equity valuations. I accept that is the case….").

167 *Id*. at 521 ("I wish to emphasize that I do not reject the Barra beta for use in later cases.")

168 *Global GT LP*, 993 A.2d at 521.

169 9/24 Tr. 113:5-8.

170 993 A.2d at 520-21 ("Gompers advocacy of Barra beta is inconsistent with a DCF valuation Gompers submitted to this court…").

171 9/21 Tr. 215:7-20; 172:7-10; *see also* note 158, *supra*.

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using Barra beta and size premiums would have been relevant to his valuation analysis.[172]

46. Notwithstanding the intrinsic flaws within Mr. Wisler's argument, the potential for "double counting" of a size effect in a valuation arising from the use of Barra predictive betas is also incorrect as a matter of finance, as the beta and size premium are two entirely different measurements within the WACC formula.[173] Even if these measurements did somehow overlap, Lazard used a size premium of 2.64, which A&M conceded is lower than (i) what Lazard could have appropriately applied for a company with a market cap equal to the Debtors as well as (ii) A&M's own size premium of 3.7.[174] Moreover, while Lazard determined that the Downhole Peers were a better set of comparable companies for valuation purposes, Lazard derived its overall valuation from a blending of Downhole Peers and Steel Peers, which resulted in a lower beta than if Lazard had used solely Downhole Peers.[175] Both of these adjustments err on the side of finding ***more value***. This provides yet another example of Lazard taking a reasoned, rather than results-driven, approach that served to ***increase*** its overall TEV range, despite the Creditors

[172] 9/24 Tr. 114:23-25, 115:1-25, 116:1-4; *IQ Holdings*, 2013 Del. Ch. LEXIS 234, *11-12 (expressly adopting experts' use of Barra predictive beta as appropriate beta alongside a 2.67% size premium); *see also In re Tribune*, 464 B.R. 126, 151 (Bankr. D. Del. 2011) (implicitly accepting the use of Barra predictive beta by concluding that plan proponents' experts, who used the predictive Barra beta alongside a size premium, "provided rational explanations for their weighting of the comparable companies and DCF methodologies in the Lazard Expert Report and, considering their experience and knowledge of the applicable industries, I find their analysis on these issues to be convincing . . . . I conclude that the DCL's experts' weighting was sound."); *see also Chemtura.*, 439 B.R. at 582 (Judge Gerber determining Lazard's DCF valuation, in which Lazard used both Barra predictive beta and size premium, was superior to UBS's analysis and, therefore, implicitly adopting the usage of Barra predictive beta).

[173] 9/22 Tr. 64:2-13 (Pohl).

[174] 9/24 Tr. 116:18-24, 117:1-10; *see also* 9/22 Tr. 96:19-25, 97:1-6 (Lazard utilized a smaller size premium by approximately 50% of what the Ibbotson's report suggested).

[175] 9/21 Tr. 179:1-10.

Committee's allegation that Lazard "retrofitted" its valuation to meet the valuation implied by the Plan (and, frankly, all other objective evidence in the record).

3. Lazard's Use of Ibbotson Equity Risk Premium is Consistent with Accepted Valuation Techniques

47. As set forth in the Creditors Committee's Confirmation Objection, Lazard used the historical equity risk premium ("**ERP**") of 7.0% from the 2015 Ibbotson Associates *Risk Premium Over Time Report*, a third party source that "is widely utilized, highly respected, and is the source utilized by most large investment banks for most valuations."[176] And Mr. Wisler conceded, as he must, that the historical ERP selected by Lazard is derived from a "widely-available, reputable source[]."[177] Indeed, Ibbotson has been accepted as the appropriate source for ERP by many Delaware courts,[178] and the historical ERP is a preferred estimate.[179]

48. By contrast, Mr. Wisler selected an ERP by disregarding the historical and supply-side ERP estimates employed by practitioners and courts. Instead, Mr. Wisler cobbled together a couple of academic sources to support an unreasonably low ERP of 6.0% that deviates from accepted valuation practices and suggests that the future will be meaningfully less risky

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[176] 9/21 Tr. at 170:23-25, 171:1-10 (Pohl).

[177] 9/24 Tr. at 117:13-17 (Wisler).

[178] *See In re Appraisal of Ancestry.com, Inc.*, Civil Action No. 8173-VCG, 2015 Del. Ch. LEXIS 21, at *67-68 (Jan. 30, 2015) (relying on ERP from Ibbotson); *Laidler v. Hesco Bastion Envtl., Inc.*, Civil Action No. 7561-VCG, 2014 Del. Ch. LEXIS 75, at *48-49 n.100 (May 12, 2014) (same).

[179] *See Global GT*, 993 A.2d at 514 (describing historical ERP as "the most traditional estimate of the ERP"); *In re PNB Hldg. Co. S'holders Litig.*, No. Civ.A. 28-N., 2006 WL 2403999, at *30 (Del. Ch. Aug. 18, 2006) (approving expert's use of historical ERP as "consistent with accepted valuation techniques"); s*ee also* Magdalena Mroczek, *Unraveling the Supply-Side Equity Risk Premium*, The Value Examiner, at 19 (Jan./Feb. 2012) (historical ERP is "[t]he first and most widely used approach."); Pablo Fernandez, *The Equity Premium in 150 Textbooks* (Jan. 9, 2015), http://ssrn.com/abstract=1473225 (reflecting that a majority of 150 finance and valuation textbooks use historical ERP).

than the past. But, Mr. Wisler offered no evidence suggesting that aggregate risk in the economy or the OCTG industry has lessened.

4. ROIC v. WACC – Wrongly Chosen and Wrongly Calculated

49. Mr. Wisler criticizes Lazard's enterprise valuation conclusion on the basis of an alleged "mismatch" between the cost of capital used in Lazard's DCF analysis "to the return on invested capital ("**ROIC**") implied by [the Debtors'] Management Forecasts."[180] This criticism fails. First, A&M's purported valuation check is an apples–to–oranges comparison between a valuation based on estimated future free cash flows and a GAAP-accounting assumption (i.e., ROIC).[181] ROIC is a financial performance metric calculated by dividing net operating profits after taxes ("**NOPAT**") by total invested capital, which is a company's book value. Both data points used in calculating ROIC are ***historical*** GAAP figures taken from a company's balance sheet that include non-cash information. By contrast, WACC is not a financial performance metric; rather, it is a measure of a company's overall cost of capital.[182] Comparison of WACC and ROIC therefore is "not common" and "not standard" practice by valuation professionals.[183] In fact, neither Mr. Pohl nor anyone on his team from Lazard had ever seen ROIC used as a method to corroborate a company's WACC in an applied valuation context.[184] Even the source cited for Mr. Wisler's comparison of ROIC and WACC dissuades practitioners from its use as a

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180 *See* A&M Report at 64.

181 9/21 Tr. at 222:24-25, 223:1 (Pohl) ("[Y]ou are sort of [mixing] apples and oranges to look at [GAAP] driven data vs. free cash flow projections.").

182 9/21 Tr. at 223:21-22 ("[T]here's no real correlation, and that's why it is not used.") (Pohl).

183 9/21 Tr. at 222:21-22 (Pohl).

184 9/21 Tr. at 222:15-22 (Pohl); *see also* 9/21 Tr. at 223:23-24 (Pohl) ("maybe it's interesting, but no one uses it"); 9/21 Tr. at 224:10-12 (Pohl) ("it's not logical that anybody would use it").

practical valuation tool: "[i]n most cases, we do not use this formula in practice," because "it is overly restrictive, as it assumes a constant ROIC and growth rate going forward."[185]

50. Second, even if this putative reasonableness check were viable, Mr. Wisler's argument actually supports Lazard's valuation more than his own. In putting forth its argument, A&M mistakenly compared a ROIC derived from one valuation (a ROIC of 9.8% derived from a $258 million valuation) to a WACC derived from a different valuation (a WACC of 9.75% corresponding with a $314 million midpoint valuation). After correcting for Mr. Wisler's errors, Mr. Pohl demonstrated that Lazard's TEV analysis derived a WACC of 11.75% and ROIC of 11.1%, which were substantially closer to each other than the WACC of 9.75% and ROIC of 8.1% derived in A&M's TEV Analysis.[186] In short, even if one accepts that ROIC is an instructive reasonableness check on WACC as Mr. Wisler posits, that metric ***favors*** the Lazard analysis. What is unmistakable is that A&M's faulty ROIC vs. WACC analysis reveals yet another long-shot attempt to justify an unreasonable valuation.

C. A&M Adopted Non-Standard Valuation Techniques and Rejected Accepted Valuation Techniques to Drive Up the Valuation in its Comparable Companies Analysis

1. A&M's Use of Multiples Is Flawed

51. A&M's reliance on multiples as a "check" on the reasonableness of the TEV derived from its DCF analysis is flawed and inconsistent with accepted practices in valuing companies such as the Debtors. First, Mr. Wisler relied on "atypical multiple ranges to make the numbers sort of look more correlative."[187] He applied three different sets of multiples: enterprise

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[185] Tim Koller, Marc Goedhart, & David Wessels, VALUATION: MEASURING AND MANAGING THE VALUE OF COMPANIES 32 (6th ed. 2015).

[186] 9/21 Tr. 226:6-25, 227:1-25 (Pohl); *See* **Exhibit A**, Lazard Peers with All A&M Assumptions Demonstrative.

[187] 9/21 Tr. 229:12-13 (Pohl).

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value to EBITDA ("**EV/EBITDA**"), enterprise value to revenue ("**EV/Revenue**"), and enterprise value to EBITDA less capital expenditures ("**EV/EBITDA-CAPEX**"). EV/EBITDA is "the most standard multiple," as evidence by Mr. Pohl's testimony regarding the experience of Lazard's OFS industry bankers.[188] EV/Revenue and EV/EBITDA-CAPEX are particularly suspect in this valuation context because both require subjective adjustments. For example, EV/Revenue multiples must be subjectively adjusted to "neutralize for significant differences in margin between the company that you're trying to value and the public companies that you're observing."[189] Here, A&M used companies that had approximately twice the EBITDA margins of the Debtors (therefore, more profitability than the Debtors) and then applied the same revenue multiples to the Debtors' projections, without making any adjustments for the substantial disparity in margins. Applying this multiple without adjusting for the relative differences in margins has the effect of significantly increasing the implied valuation result.

52. Using EV/EBITDA-CAPEX likewise requires adjustments. Mr. Wisler assumes, on the one hand, that there will never be another down cycle in the oil and gas and, by extension OCTG, industries and that Boomerang's perpetuity growth rate will keep growing forever;[190] on the other hand, he assumes that capital expenditures will remain constant at the $8 million management forecasted for maintenance through 2018.[191] But, one "can't just look at the steady state maintenance capex for three years and say that's what it's going to be forever, but [the target company is] going to grow forever and then compare that to these big multi-national

188 9/21 Tr. 190:10-12 (Pohl).

189 9/21 Tr. 230:20-25, 231:1-8 (Pohl).

190 9/21 Tr. 231:20-25, 232:1-5 (Pohl).

191 9/24 Tr. 65:21-22 (Wisler).

companies that have a very different capex profile."[192] Nevertheless, Mr. Wisler appears to have seized on what Mr. Pohl explained was an "opportunity to subjectively slant the numbers"[193] by disregarding differences in margins between the Debtors and the A&M-selected comparable companies to reach an untenably high enterprise valuation.

53. Second, A&M's comparable companies analysis uses only an EV/EBITDA multiple for 2018.[194] By dispensing with one-year and two-year forward EV/EBITDA multiples (2016 and 2017) and instead relying only on 2018 multiples, A&M has cherry-picked the multiple most in line with its desired result while ignoring the significant problems that cause industry valuation practitioners like Lazard's experts to avoid such calculations. Forward estimates for 2018 are inherently less reliable than forward multiples for 2016 and 2017 because they are further out into the future.[195] Yet A&M chooses to base its conclusion only on 2018 multiples without justification for why 2016 and 2017 are not more appropriate.

54. In addition, 2018 forward estimates rely on limited analyst coverage and are therefore suspect in their accuracy. It is axiomatic that "you have to have enough analyst[s] covering the company to make that data useful or credible,"[196] and "you can't have a consensus of one or two or three."[197] Yet Mr. Wisler does not even know how many analysts covered Vallourec, one of his only two Tier 1 peers, for 2018. Despite this ignorance, he purports to rely on "consensus analyst views" in a valuation analysis.[198] Even if one relies on non-consensus

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[192] 9/21 Tr. 232:1-5 (Pohl).

[193] 9/21 Tr. 231:3-7 (Pohl).

[194] S*ee* A&M Report at 47.

[195] 9/21 Tr. at 232:17-24 (Pohl).

[196] 9/21 Tr. 189:24-25, 190:1-3 (Pohl).

[197] 9/22 Tr. 116:13-15 (Pohl).

[198] 9/24 Tr. 126:4-12 (Wisler).

analyst coverage, "far less weight" should have been given to the output of 2018 multiples.[199] Had A&M considered the 2016 median EV/EBITDA multiple of 7.5x for its overall peer set[200] and the Debtors' 2016 projected EBITDA of $27 million,[201] A&M would have derived a valuation of approximately $203 million.

55. Third, in another attempt to bolster the credibility of its analysis, A&M's summary of its valuation includes implied enterprise value multiples meant to show that its overall conclusions are reasonable. However, Mr. Pohl testified extensively as to how A&M ignores the fact that its valuation actually implies shockingly high multiples relative to the peers considered by either Lazard or A&M.[202] As an initial matter, without any explanation, A&M decided not to show these multiples as a function of its actual valuation conclusion, but rather on a lower number that would make the implied multiples look more reasonable. For example, A&M states that its midpoint valuation of $314 million is only 6.4x the Debtors' 2018 EBITDA of $49 million.[203] Yet, A&M's actual valuation midpoint was $335 million, so the correct implied multiple should be 6.8x the Debtors' projected 2018 EBITDA, which is more than ***two full turns*** (*i.e.*, 2.0x) higher than A&M's peer group's already suspect average 2018 EV/EBITDA multiple of 4.7x.[204] Next, A&M showed only multiples relative to the Debtors' 2018 projected EBITDA.[205] But critically, the $335 million midpoint valuation is 12.4x the

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199 9/22 Tr. 116:21-25, 117:1-2 (Pohl).

200 *See* A&M Report at 41

201 *See* 9/21 Tr. 107:7-9.

202 9/21 Tr. 233:1-25, 234:1-25, 235:1-10; Demonstrative entitled "A&M's EV Conclusion for Boomerang" a copy of which is attached hereto as **Exhibit E** (""). This Demonstrative was also included in the binder for Pohl's direct examination as Tab E.

203 A&M Report at 9.

204 *See* 9/21 Tr. 234:20-25, 235:1-10; **Exhibit E**, A&M's EV Conclusion Demonstrative.

205 A&M Report at 9.

01:17851446.4

Debtors' projected 2016 EBITDA (a more appropriate comparison than the more distant 2018 multiple), which is more than ***four full turns*** (*i.e.*, 4.0x) higher than A&M's peer group average 2016 EV/EBITDA multiple of 8.1x.[206] A&M's valuation conclusion simply does not comport with the implications of even its own flawed peer set, and A&M's overstated valuation cannot simply hide behind the (mistakenly calculated) 2018 implied EV/EBITDA multiples.

56. Finally, Mr. Wisler employed exit multiples derived from precedent M&A transactions,[207] at the same time that Mr. Wisler expressly rejected any reliance on an M&A transaction analysis.[208] This selective use of multiples—which is not an apples-to-apples comparison[209]—from an analysis that Mr. Wisler ***gave no weight*** reveals that Mr. Wisler's approach was improperly results-oriented. As Mr. Pohl testified, "if you say . . . data derived from these transactions are not reliable for purposes of valuation and, therefore, they shouldn't be included, then they shouldn't be included. You can't cherry pick."[210]

2. Lazard Correctly Used a Cycle EBITDA

57. With respect to its Comparable Companies analysis, Mr. Pohl testified that Lazard often applies a "cycle" EBITDA when valuing a company that operates in a cyclical industry to avoid letting a peak or trough year within a business cycle have a disproportionate impact on TEV analysis. Specifically with regard to the Debtors, Mr. Pohl testified that Lazard's OFS investment bankers and other industry participants and investors regularly use the cycle EBITDA

[206] *See* 9/21 Tr. 234:6-13; **Exhibit E**, A&M's EV Conclusion Demonstrative.

[207] 9/24 Tr. at 68:2-5 (Wisler) ("we used an exit multiple methodology but to determine that exit multiple we considered the M&A transaction analysis . . .").

[208] A&M Report at 37.

[209] Such a comparison is not an apples-to-apples comparison because, among other things, M&A multiples contain control premiums. 9/22 Tr. at 110:14-18 (Pohl).

[210] 9/22 Tr. at 114:23-25, 115:1-2 (Pohl).

because cyclicality is so important for a company like the Debtors.[211] Based on this industry understanding and expertise, Lazard included a cycle EBITDA component to its valuation of the Debtors.[212] Demonstrating either a lack of industry knowledge or a desire to obtain an ever higher valuation, A&M chose to ignore the cyclicality of the Debtors' business in arriving at its own TEV conclusion and criticized Lazard's calculation of the cycle EBITDA. Courts have endorsed the application of a cycle EBITDA because "for cyclical businesses, taking the business cycle into account makes for a better analysis— that trying to forecast the next cycle is not only futile but dangerous, and that it is far better to normalize earnings and cash flows across the cycle."[213]

58. Mr. Pohl credibly testified that the oil and gas and OFS industries are cyclical[214] and that the last six-year cycle provided a balanced, normalized view of peak years, trough years, and years in between.[215] The Creditors Committee provided no testimony to controvert Mr. Pohl's testimony on either point. Instead, A&M's report criticized Lazard's use of a cycle

[211] 9/21 Tr. 191:13-23 (Pohl).

[212] Lazard Report at 29, 39; 9/21 Tr. 191:13-25, 192:1-2 (Pohl).

[213] *Chemtura*, 439 B.R. at 582 (quoting Aswath Damodaran, Ups and Downs: Valuing Cyclical and Commodity Companies (2009)) (internal punctuation and quotation marks omitted).

[214] 9/21 Tr. 236:18-25, 237:1-7 (Pohl) ("Oil is commodity. It's a cyclical business. There isn't worldwide geopolitical stability. Nobody sitting here today can promise you that OPEC isn't going to gerrymander their output based on market share vs. price. So until we get, you know, there is too much that goes into the price of oil around the world to say within comfort that it's no longer going to behave like a commodity just because we don't know, with precision, the reason that it's going to crash the next time. What we do know is that it's a cyclical commodity, the price is cyclical and U.S. rig count rises and falls dramatically with it. That has been evidenced. It's going to continue and it's going to continue to massively negatively impact companies like Boomerang and the other downhole peers. That will matter."). Mr. Nystrom's testimony also demonstrated that the Debtors' revenues and cash flow were tied to rig counts in the domestic oil and gas industry. 9/21 Tr. 47:20-23 (Nystrom).

[215] 9/22 Tr. 77:2-7, 103:2-23 (Pohl).

EBITDA and suggested that, should a cycle EBITDA be used, Lazard should have eliminated the cycle trough by ignoring the Debtors' 2015 results, even though ignoring the trough of a cycle defeats the purpose of using a cycle analysis in the first place.[216] As Mr. Pohl correctly pointed out: (i) A&M's approach to cycle EBITDA simply "wished away the low point," which would conveniently serve to inflate the Debtors' TEV;[217] (ii) if the selective elimination of trough years was appropriate, the peak years should also be eliminated;[218] (iii) the years that A&M did suggest Lazard should include were limited to "five pretty good years;"[219] and (iv) the price of oil had, in fact, crashed twice in the last seven years.[220]

59. Nonetheless, Lazard conservatively adjusted the range of the multiples applied to its cycle EBITDA upward to account for Lazard's view that 2015 was a very low trough year, which adjustment had the same effect on value as increasing the cycle EBITDA to $31 million from $26 million.[221] Consistent with Lazard's comprehensive valuation approach, cycle EBITDA was one of multiple TEV calculations Lazard incorporated into its valuation and, in fact, had the tendency of increasing Lazard's overall valuation conclusion.[222]

D. All Non-Expert Indications of Value Are Well Below the Debt Hurdle and Corroborate the Lazard Valuation

60. Courts have recognized that, in general, "debtors [are inclined] to undervalue themselves and plan objectors to overvalue the company to support their arguments."[223] The

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[216] A&M Report at 67 & 69 (Pohl).

[217] 9/21 Tr. 237:9-13 (Pohl).

[218] 9/22 Tr. 107:11-13 (Pohl).

[219] 9/21 Tr. 236:1-4 (Pohl).

[220] 9/21 Tr. 236:15-17 (Pohl).

[221] 9/22 Tr. 107:23-25, 108:1-3 (Pohl).

[222] 9/22 Tr. 109:2-12 (Pohl).

[223] *See In re Wash. Mut., Inc. ("WaMu II")*, 461 B.R. 200, 228 (Bankr. D. Del. 2011).

Debtors' valuation, however, is corroborated by both the Debtors' market check and multiple other facts surrounding the Debtors' business.

1. The Debtors' and Creditors Committee's Marketing and Due Diligence Efforts Unearthed ***No*** Viable Alternatives to the Debtors' Plan

61. In the spring of 2015, the Debtors retained Lazard to assist them with their restructuring. Lazard ran an approximately 30-day process to assess whether the restructuring being discussed with the Debtors' lenders at the time was the only transaction available or whether there was sufficient interest in the Debtors from third parties for a strategic transaction.[224] The goal was to see what levels of interest existed, but it was not expected to result in any firm offers for a binding strategic transaction.[225]

62. At the conclusion of this market check, the Debtors received three indications of interest, all of which were subject to diligence—the highest had an indicative value of $250 million, the next highest had an indicative value of $225 million, and the third did not have a purchase price attached to it.[226] These three indications of interest were all based on an earlier set of management projections that reflected ***materially higher*** and ***better*** financial performance for the Debtors than the Financial Projections that are currently before the Court.[227] As Mr. Nystrom testified, it was likely that these contingent offers, which remained subject to diligence, would reduce in price prior to the execution of a definitive agreement.[228] He further testified that the indicative purchase prices were less than the amount of the prepetition debt outstanding at that

[224] 9/22 Tr. 88:3-13 (Pohl); 9/21 60:13-15 (Nystrom).

[225] 9/22 Tr. 90:11-18 (Pohl).

[226] 9/22 Tr. 90:19-25, 91:1 (Pohl); 9/21 60:15-25 (Nystrom); *see also* Lazard Report at 40.

[227] *See, e.g.*, 9/21 Tr. 106:22-25, 107:1-21 (Nystrom) (Mr. Nystrom testifying to downward revisions to Financial Projections made in July).

[228] 9/21 Tr. 61:1-6 (Nystrom).

time.[229] Without funding to continue a more fulsome sale process or any indication of interest in excess of the existing secured debt, the Debtors entered into the Plan Support Agreement and began prosecution of the Plan.[230]

63. Following this Court's welcomed ruling that the Debtors must consider all strategic options and provide interested parties with the opportunity to conduct due diligence, the Debtors immediately began taking action to comply with the Court's directive.[231] The Debtors and the Plan Support Parties worked with the Creditors Committee to develop formal due diligence procedures, which were consented to by the Creditors Committee and approved by this Court, and specifically excluded (at the request of the Creditors Committee) any requirement of a minimum purchase price or other consideration.[232] Interested parties were provided a copy of the Plan and a timeline so they could determine if they had significant interest in advance of the confirmation hearing.[233] While the bid deadline was set for September 11, 2015, the Debtors were able to extend the deadline upon request.[234]

64. The record is uncontroverted that, even before the due diligence procedures were formalized, the Debtors went above and beyond the Court's directive and actively marketed the Debtors' business. Led by Mr. Nystrom, who has ample experience in providing such services as a Managing Director of Zolfo Cooper,[235] the Debtors not only took calls, but affirmatively

[229] 9/21 Tr. 126:16-22, 127:24-25, 128:1-12 (Nystrom).

[230] 9/21 Tr. 125:17-19 (Nystrom).

[231] 9/21 Tr. 76:24-25, 77:1-11 (Nystrom).

[232] 9/21 Tr. 77:10-25, 78:1-12 (Nystrom); *Disclosure Statement for Debtors' Amended Joint Prearranged Chapter 11 Plan Dated August 13, 2015,* dated August 13, 2015 [D.I. 378] at § 1.6.

[233] 9/21 Tr. 77:16-22 (Nystrom).

[234] 9/21 Tr. 77:23-25, 78:1-3 (Nystrom).

[235] 9/21 Tr. 75:11-19 (Nystrom).

sought out the parties identified in Lazard's prepetition marketing process, negotiated and executed non-disclosure agreements, provided marketing projections to parties and invited them to visit the populated data room, conducted tours of the Debtors' manufacturing facilities, and invited parties to meet the management team.[236] While admittedly not a "full-blown process," potential parties in interest during both the pre- and post-petition marketing efforts were contacted over four months prior to confirmation and had approximately 80 active days to evaluate the Debtors.[237] Moreover, the Debtors' efforts were buttressed by the Creditors Committee, who also actively sought and referred key parties to the Debtors for participation in the diligence process.[238]

65. Despite these combined, cumulative efforts, the Debtors received ***no*** indications of interest and ***no*** requests for additional time.[239] Of all the parties contacted by the Debtors and the Creditors Committee, all of whom had a full and fair opportunity to diligence the company if they were interested, Mr. Nystrom testified that only four prospective purchasers entered the data room, only two parties completed a plant tour and no parties accepted the invitation to meet with management.[240] The party that the Debtors believed was the most likely to submit a proposal—a pre-prepetition interested party who was very active in the post-petition data room and sent seven employees to the plant—***affirmatively declined*** to proceed with any transaction.[241] While the Debtors do not suggest that the pre- and post-petition market check alone is dispositive as to

[236] 9/21 Tr. 78:18-25, 79:1-8 (Nystrom).

[237] 9/21 Tr. 82:10-21 (Nystrom); 196:19-25, 197:1-14 (Pohl).

[238] 9/21 Tr. 79:4-8 (Nystrom).

[239] 9/21 Tr. 79:17-25, 80:1-8, 81:2-4, 81:20-22 (Nystrom); Tab 106, Email to Kevin Nystrom re: Notice; Tab 107, Interested Parties Spreadsheet.

[240] 9/21 Tr. 79:1-3, 79:13-25, 80:1-8, Tab 107, Interested Parties Spreadsheet.

[241] 9/21 Tr. 80:3-5, 80:19-25, 81:1-4 (Nystrom), Tab 106, Email to Kevin Nystrom re: Notice.

value, the lack of an offer despite the parties' collective efforts is highly corroborative of Lazard's valuation.[242]

2. Additional Market Indicators Support the Lazard Valuation

66. In addition to the Debtors' court-approved due diligence process, multiple other prepetition market indicators support the Lazard Valuation. Indeed, despite the Creditors Committee's attempts to use failed prepetition restructuring deals to insinuate that general unsecured creditors were somehow in the money, the evidence is clear that neither the Debtors nor parties in interest ever believed that the value of the company was more than the secured debt.[243]

67. **First**, in January 2015, the Debtors' then-CEO, Greg Eisenberg, attempted to raise capital for the Debtors. While Mr. Eisenberg reached out to five to six different investors, he came up empty-handed.[244]

68. **Second**, during the course of prepetition negotiations, Access Tubulars made two out-of-court recapitalization proposals, under which Mr. Nystrom believed the Debtors' TEV was estimated to be "in a range of about $190 to $210 million."[245] All but one of the Term Loan Lenders had agreed to this deal, and thus, tacitly agreed with this valuation.[246]

69. **Third**, the trading value of the prepetition term debt was approximately 50% of par, implying an enterprise valuation of around $200 million.[247]

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[242] 9/21 Tr. 82:18-21 (Nystrom), 196:19-25, 197:1-4 (Pohl).

[243] 9/21 Tr. 57:9-12 (Nystrom).

[244] 9/21 Tr. 52:16-20, 63:4-6 (Nystrom).

[245] 9/21 Tr. 63:8-11 (Nystrom); *see also* 9/21 Tr. 53-54, 85:4-11 (Nystrom).

[246] 9/21 Tr. 54:5-9 (Nystrom).

[247] 9/21 63:6-8, 85:7-11 (Nystrom), 196:7-18 (Pohl).

70. Each of these independent and uncontroverted indications of value support and weigh in favor of the Court finding that the Debtors' TEV does not exceed the Debt Hurdle.

III. THE RELEASES AND EXCULPATION SHOULD BE APPROVED (AS MODIFIED)

A. The Debtor Release Is Appropriate, Fair and Reasonable

71. Section 1123(b)(3)(A) of the Bankruptcy Code provides that a Plan may "provide for the settlement or adjustment of any claim or interest belonging to the debtor or to the estate."[248] Such a release is proper if it "is a valid exercise of the debtor's business judgment, is fair, reasonable, and in the best interests of the estate."[249] In evaluating the propriety of a debtor's release of the debtor's and estate's causes of action, courts must "[weigh] the equities of the particular case after a fact-specific review."[250] In conducting their analysis of a debtor's proposed release (as opposed to non-debtor release), courts often consider the following five factors:

> 1. An identity of interest between the debtor and non-debtor, such that a suit against the non-debtor is, in essence, a suit against the debtor or will deplete resources of the estate;
>
> 2. Substantial contribution by the non-debtor of assets to the reorganization;
>
> 3. The necessity of the release to the reorganization;
>
> 4. The overwhelming acceptance of the plan and release by creditors and interest holders; and

248 11 U.S.C. § 1123(b)(3)(A).

249 *Spansion*, 426 B.R. at 143; *see also In re Wash. Mut., Inc. ("WaMu I")*, 442 B.R. 314, 346 (Bankr. D. Del. 2011) (finding that court may approve a release after determining that it is fair); *Tribune*, 464 B.R. at 186 (same).

250 *WaMu I*, 442 B.R. at 346

> 5. A provision in the plan for payment of all or substantially all of the claims of creditors and interest holders under the plan.[251]

"These factors are neither exclusive nor conjunctive requirements, but simply provide guidance in the Court's determination of fairness."[252] As discussed below, the equities of these cases, including the first four factors listed above, weigh heavily in favor of granting the Debtor Release. Notably, the impaired consenting class of Term Loan Lenders (the largest secured and largest unsecured creditors of the Debtors, holding approximately $100 million of unsecured claims) has voted in favor of the Plan containing the Debtor Release,[253] and Access Tubulars, who owns over 80% of the equity interest in the Debtors, has agreed to support the Debtor Release under the Plan Support Agreement. While the Debtors acknowledge that unsecured creditors may likely receive only a *de minimis* distribution under the Plan and have, in fact, rejected the Plan, the facts, circumstances and equities of the Chapter 11 Cases nonetheless warrant approval of the Debtor Release.

72. <u>Background to the Plan and Release Provisions.</u> The Plan is the result of a prepetition process that resulted from key contributions and concessions from (i) the financial institutions participating in the ABL Facility prepetition, now participating in the DIP ABL Facility, and proposed to provide the Exit ABL Facility (the "**ABL Group**"), (ii) the financial

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[251] *Spansion*, 426 B.R. at 143 n.47; *see also In re Indianapolis Downs, LLC*, 486 B.R. 286, 303 (Bankr. D. Del. 2013).

[252] *Tribune*, 464 B.R. at 186 (citation omitted); *WaMu I*, 442 B.R. at 346 (approving of debtor releases with parties that made tangible consideration while disapproving of debtor releases for parties who did nothing beyond serving their fiduciary duties or who did not yet exist, noting that factors "are neither exclusive nor conjunctive requirements, but simply provide guidance in the Court's determination of fairness").

[253] The fact that holders of a majority of the unsecured claims against the Debtors support the Debtor Release is compelling, objective evidence, in and of itself, that no legitimate claims exist.

institutions participating in the Term Loan Facility and the (since-refinanced) bridge facility prepetition, now participating in the DIP Term Facility, and proposed to provide the Exit Term Facility (the "**Term Loan Group**"), (iii) the Debtors' equity sponsor, Access Tubulars, LLC ("**Access Tubulars**"), and its affiliated entities, including Access Tubular Lender, LLC ("**Access Lender**"), a Term Loan Lender, and including all other entities defined as the Sponsor (collectively, "**Access**"), and (iv) the Debtors' directors and officers (the "**D&Os**").

73. At the outset of 2015, the Debtors were facing a potential liquidity crisis brought on by a "perfect storm" for the Debtors: dropping oil prices, dropping drilling activity, cut-back in OCTG inventory on-hand by Boomerang's customers, and record levels of OCTG imports from foreign sources.[254] The Debtors' board retained Zolfo Cooper to assist with managing that crisis, including the threat of potential defaults under either or both of their secured credit facilities, and the Debtors began aggressively managing their vendor relationships to conserve cash and reducing their overhead costs and employee counts.[255] At that time, the Debtors' indebtedness consisted of about $55 million of debt under the ABL Facility, $204 million of debt under the Term Loan Facility, $44 million of accounts payable, and $10 million of capital lease obligations.[256]

74. In February 2015, the Debtors' then-President and CEO, Gregg Eisenberg attempted to raise funds from private investors. He was unsuccessful, and the message from potential investors was that they needed to understand or obtain an agreement from the Debtors'

[254] Tab 111, Tr. of Hr'g Before Hon. Mary F. Walrath U.S. Bankr. Judge (July 17, 2015) [D.I. 276] (hereinafter "**7/17 Tr.**") 12:20-25, 13:1-4 (Nystrom).

[255] 9/21 Tr. 52:10-15 (Nystrom); 7/17 Tr. 14:15-22 (Nystrom).

[256] 7/17 Tr. 12:6-8 (Nystrom).

current lenders regarding the Debtors' debt service obligations or to subordinate their liens.[257] Shortly after those meetings, on February 19, 2015, Mr. Nystrom was appointed as President, Interim CEO and CRO.[258] Mr. Nystrom immediately opened a dialogue with the ABL Facility Lenders and Term Loan Lenders to address the Debtors' worsening liquidity situation and debt service obligations.[259]

75. The Debtors' management met with certain of the Term Loan Lenders to negotiate relief from the upcoming amortization and interest payment obligations that would soon be due, but the response from the Term Loan Lenders was that any debt relief would require some form of equity consideration in return.[260] Around that same time, the ABL Facility Agent engaged in a routine valuation of its collateral and, as a result of that valuation, determined that the Debtors were in violation of their borrowing base covenant and in an over-advance position.[261] By March 2015, the defaults that looked all but imminent at the outset of the calendar year had become a reality; on March 4, 2015, the ABL Facility Agent declared a default under the ABL Facility.[262]

76. Under the ABL Facility Documents, the ABL Facility Lenders had a lien on the Debtors' cash, receivables, and inventory, and as a result of the existing event of default under the ABL Facility Documents, the Debtors could not use that working capital without the ABL

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[257] 9/21 Tr. 52:16-23 (Nystrom); 7/17 Tr. 16:3-6 (Nystrom).

[258] 9/21 Tr. 29:14-15 (Nystrom); Tab 108, Nystrom Decl. ¶ 1.

[259] 9/21 Tr. 52:24-25 (Nystrom).

[260] 9/21 Tr. 53:10-15 (Nystrom).

[261] 9/21 Tr. 53:3-10 (Nystrom).

[262] Declaration of Kevin Nystrom, Chief Restructuring Officer, Interim Chief Executive Officer, and President of Boomerang Tube, LLC, in Support of Chapter 11 Petitions and First Day Pleadings [D.I. 2] ("**First Day Decl.**") ¶ 27; 9/21 Tr. 53:8-10 (Nystrom).

Facility Lenders' consent.[263] The Debtors were at a critical point for their businesses. Without payroll funding, the Debtors "would have [had] to send everybody home and effectively shut the plant down."[264] After much effort, on March 17, 2015, the Debtors, the ABL Facility Lenders and the ABL Facility Agent were able to enter into a forbearance agreement that permitted the Debtors to borrow approximately $2 million under the ABL Facility and under which the ABL Facility Lenders agreed to forbear from exercising remedies until March 23, 2015.[265]

77. Prior to entering into the first forbearance agreement with the ABL Facility Lenders, the Debtors solicited Access Tubulars and certain Term Loan Lenders to see if those parties were willing to provide funding to the Debtors. In mid-March, Access Tubulars made its first of two proposals to recapitalize the company. The proposal involved Access Tubulars contributing $40 million in exchange for half of the equity in the Debtors, the ABL Facility Lenders waiving the existing default and continuing to advance loans without a revaluation of the collateral, the Term Loan Lenders equitizing approximately $100 to $110 million of the Term Loans in exchange for the other 50% equity stake in the Debtors and reducing the cash interest costs and amortization of the loans under the Term Loan Facility, and the Debtors obtaining settlements from and reductions of accounts payable to two of their large steel providers.[266] The initial Access Tubulars' proposal gained traction with the Debtors' lenders, but was ultimately unsuccessful when one of the then-lenders under the Term Loan Facility refused to consent to the proposal, which required unanimity.[267] Importantly, this proposal was

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[263] 9/21 Tr. 54:11-13 (Nystrom).

[264] 9/21 Tr. 54:19-21 (Nystrom).

[265] First Day Decl. ¶ 28; 9/21 Tr. 54:16-17 (Nystrom).

[266] 9/21 Tr. 53:16-25, 54:1-5.

[267] 9/21 Tr. 54:2-9

supported by the independent Managers of the Debtors, as those Managers affiliated with Access had recused themselves.[268]

78. At the expiration of the first one-week forbearance, the Debtors found themselves in a similar position. The Debtors, the ABL Facility Lenders and the ABL Facility Agent entered into a second forbearance agreement that permitted the Debtors to borrow money that was necessary to fund employment obligations and other necessary costs related to their restructuring efforts, and under which the ABL Facility Lenders agreed to forbear from exercising remedies until March 30, 2015.[269] As a condition to this second forbearance, the ABL Facility Lenders required, and Access Tubulars granted, the Limited Sponsor Guaranty, which was a limited guaranty of $500,000 for the repayment of certain advances under the ABL Facility utilized primarily to fund payroll obligations.[270] Absent Access Tubulars extending the Limited Sponsor Guaranty, effectively providing $500,000 of liquidity needed to pay employee salaries and payroll, the Debtors would have been forced to "shut the plant down."[271]

79. At the expiration of the second one-week forbearance period, the Debtors, the ABL Facility Lenders and the ABL Facility Agent entered into a third forbearance agreement that permitted the Debtors to borrow yet more money necessary to fund employment obligations and other necessary costs related to their restructuring efforts, and under which the ABL Facility Lenders agreed to forbear from exercising remedies until April 6, 2015.[272] As a condition to this third forbearance, the ABL Facility Lenders required, and the Term Loan Facility Agent granted,

[268] 7/17 Tr. 19:17-20.

[269] First Day Decl. ¶ 30.

[270] First Day Decl. ¶ 30; 9/21 Tr. 54:22-25, 55:1-3 (Nystrom).

[271] 9/21 Tr. 54:22-25, 55:1-3 (Nystrom).

[272] First Day Decl. ¶ 31.

a superpriority lien on the Term Loan Facility Priority Collateral securing up to the amount of $2.774 million to guarantee the repayment of certain advances under the ABL Facility.[273]

80. At the time the third forbearance was entered into, the Debtors had not yet been able to obtain unanimous Term Loan Lender consent to the Access Tubulars' recapitalization proposal and the period created by the third forbearance was intended, among other things, to provide the parties time to further negotiate.[274] Ultimately, the Debtors and Term Loan Lenders could not garner the required unanimity needed to approve the initial Access Tubulars' recapitalization proposal, and the Debtors and certain Term Loan Lenders began to focus on in-court restructuring measures.[275] During this period, Access Tubulars renewed its offer to make a substantial investment in the business as part of an out-of-court restructuring, which was ultimately unsuccessful.[276]

81. To fund the Debtors' preparations for a potential chapter 11 filing that they would support, the Term Loan Lenders entered into a bridge financing facility and agreed to lend approximately $6.5 million to the Debtors.[277] In connection with this facility, the Debtors, the ABL Facility Lenders, and the Term Loan Lenders entered into forbearance agreements that initially went through May 11, 2015, and were subsequently extended through the Petition Date.[278] Under such forbearance agreements, the Debtors continued to borrow under the ABL

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[273] First Day Decl. ¶ 31; 9/21 Tr. 55:3-8 (Nystrom).

[274] First Day Decl. ¶ 31.

[275] First Day Decl. ¶ 32; 9/21 Tr. 55:11-25, 56:1 (Nystrom).

[276] First Day Decl. ¶ 32; 9/21 Tr. 67:1-7 (Nystrom).

[277] First Day Decl. ¶ 32; 9/21 Tr. 56:2-11.

[278] First Day Decl. ¶ 33, 35.

Facility and borrowed substantially all of the amounts available under the Term Loan Lenders' bridge facility.[279]

82. From April to June, the Debtors negotiated with the Term Loan Lenders and ABL Facility Lenders over the terms of a restructuring under chapter 11. Mr. Nystrom testified that it was the view of himself, the management team, Access Tubulars, and the Debtors' Board that the costs and impact on the business of a chapter 11 that impaired unsecured creditors would be higher than a chapter 11 that left unsecured creditors unimpaired. Accordingly, these parties believe that unsecured creditors should not be impaired, and Mr. Nystrom told the lenders the same.[280] Mr. Nystrom testified that the Debtors' Board remained very active throughout the process, vigorously campaigned for parties throughout the capital structure to be treated fairly and fought for parties throughout the capital structure to receive distributions.[281]

83. Despite this advocacy, the Debtors understood that it was not likely that unsecured creditors would be entitled to a distribution, a view that was informed by several data points (many of which are discussed above), including the (i) inability of Gregg Eisenberg to raise any financing in February, (ii) fact that term loan debt was trading at 50% of par, (iii) implied valuation in the Access Tubulars' recapitalization proposals, and (iv) indicative prices submitted in connection with the Lazard pre-petition marketing process.[282] Notwithstanding the ample evidence that unsecured creditors were out of the money, the Debtors worked hard to try to leave unsecured creditors unimpaired and Mr. Nystrom testified that had,

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[279] 9/21 Tr. 59:18-21 (Nystrom).

[280] 9/21 Tr. 57:5-17 (Nystrom).

[281] 9/21 Tr. 58:15-25, 59:1-15 (Nystrom).

[282] 9/21 Tr. 63:3-15 (Nystrom); *see also* Part II(D), *supra.*

he been able to obtain favorable concessions from certain trade creditors, he believed that result still may have been possible.[283]

84. The Debtors then entered into the Plan Support Agreement, which outlined a chapter 11 plan that is substantially the same as the Plan before the Court, with certain technical changes. Under the Plan: (i) holders of secured, administrative and priority claims will be paid in full; (ii) the DIP ABL Facility will be rolled over as an exit facility, with a $5 million overadvance facility (separate from the availability determined under the facility's borrowing base), loosened reporting requirements, loosened financial covenants (including suspension of the fixed charge coverage ratio testing until 2016), and suspension of collateral re-valuations until the second half of 2016; (iii) the DIP Term Facility will be rolled over as an exit facility and will have an accordion feature that provides an incremental $20 million to the Debtors; (iv) Term Loan Lenders will have their claims cancelled, waive any deficiency claims, receive their pro rata share of equity interests in a newly created New Holdco (which equity interests are subject to dilution in accordance with the terms of the Plan), and receive $55 million in new Subordinated Notes;[284] and (v) general unsecured claims will share in the GUC Trust, which is effectively the collection of unencumbered assets in these cases but expressly excluding any claims against the Released Parties.[285] Finally, under the Plan, existing equity interests in the Debtors will be cancelled,[286] including all of the equity interest of Access Tubulars, who had previously invested approximately [redacted] into the Debtors.

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283 9/21 Tr. 57:23-25, 58:1-5; 63:23-25, 64:1-8 (Nystrom).

284 9/21 Tr. 61:21-25, 62:1-13 (Nystrom).

285 9/21 Tr. 22:3-13 (Mr. Brady announcing Plan modifications on the record).

286 *See* Plan, Art. 3.2(i) – (k).

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85. Benefits from the Plan. Rather than pursue an immediate liquidation (which would not have benefitted any constituency), the ABL Group, the Term Loan Group and Access Tubulars "doubled-down" and began negotiations in earnest for a restructuring of the Debtors and their obligations. Importantly, this decision allowed for the Debtors' employees to continue their employment, customers to continue to receive OCTG product, and trade vendors to continue to have a business partner on a go-forward basis. Additionally, the various priority claim holders, critical vendors, customers, contract counterparties and employees who have received (or can expect to receive) a recovery on their claims in these cases would have received nothing.

86. Various contributions to the Debtors' restructuring were made by the Released Parties in the approximately three month period prior to the commencement of these cases:

- Through a series of agreements, the ABL Group agreed to forbear on exercising remedies under the ABL Facility and, in fact, continued to make addition loans to the Debtors despite the existence of a large over-advance and other events of default.[287]

- The Term Lender Group first agreed to a carve-out of its collateral and provided a priming lien securing the ABL Facility Agent in the amount of approximately $2.3 million to secure additional funding in this period[288] and, then, more importantly, quickly mobilized and provided the Debtors with a much needed $6.5 million bridge loan that gave the Debtors approximately 60-days to determine an appropriate course of action.[289]

- Access Lender, in its capacity as a Term Lender, supported the Term Lender Group's initiatives to aid the Debtors in their restructuring, including participating in the $6.5 million bridge financing; additionally, Access Lender is agreeing to waive a substantial deficiency claim and any potential superpriority

[287] 9/21 Tr. 54:10-21, 69:1-5 (Nystrom); Tab 108, Nystrom Decl. ¶¶ 28-33.

[288] 9/21 Tr. 67:20-25, 68:1-8 (Nystrom).

[289] 9/21 Tr. 67:14-19 (Nystrom).

administrative expense claims, and equitize the remaining portion of its claims, in exchange for its release.[290]

- Access Tubulars, in its capacity as an equity holder, made two separate pre-petition offers to recapitalize the Debtors that would have substantially reduced the Debtors' debt obligations and rationalized their balance sheet, and also agreed to provide the Limited Sponsor Guaranty with a value of $500,000, a condition to obtaining additional availability under the ABL Facility.[291]

- Under the amended Management Agreement, Access Tubulars agreed to waive approximately $269,000 in fees and expenses, subject to assumption of the Management Agreement and obtaining the Debtor Release.[292]

- During the prepetition period, the D&Os worked tirelessly on negotiations with the ABL Group, Term Lender Group and Access Tubulars to pursue all available avenues for a restructuring. In addition, the officers were asked to manage both the numerous demands related to these restructuring negotiations while simultaneously keeping the business together amid its own liquidity crisis and global turmoil in the oil and gas industry. Indeed, the record is clear that the D&O's pressed the Term Loan Lenders throughout the negotiations to provide as much value to as many stakeholders as possible.[293]

87. These contributions allowed the Debtors time to explore a number of alternative proposals—including the Access Tubulars-proposed recapitalization, the lender-proposed restructurings, and an opportunity to test the market to determine whether any parties were willing to engage in a strategic transaction—and ultimately to arrive at a plan supported by the Released Parties (including the parties to the Plan Support Agreement). Mr. Nystrom testified that, in his belief, as a principal party negotiating the plan with all stakeholders on behalf of the Debtors, that the parties to the Plan Support Agreement, collectively, provided sufficient consideration to support the release being provided to all of the Released Parties under the

[290] 9/21 Tr. 66:9-11, 68:15-17 (Nystrom).

[291] 9/21 Tr. 66:11-17, 67:1-13 (Nystrom).

[292] 9/21 Tr. 66:17-19 (Nystrom).

[293] 9/21 Tr. 58:20-25; 59:1-15 (Nystrom).

Plan,[294] that the release of the Released Parties was essential and, in fact, a "requirement to get the support we garnered for the plan,"[295] and that the Released Parties themselves made contributions that were essential to the Plan and absent which the Debtors would have liquidated.[296]

88. The restructuring proposal contemplated by the Plan Support Agreement, including the Plan, provides myriad benefits to the Debtors' stakeholders:

- Employees continue their employment with the Debtors and have or will receive payment in full of their wages, continuation of their healthcare benefits, and satisfaction of any remaining obligations entitled to priority under the Bankruptcy Code.[297]
- Contract and lease counterparties whose agreements are assumed will have any defaults under their agreements cured, which claims are otherwise unsecured.[298]
- The Debtors' on-going vendors and suppliers (including counterparties to contract and leases that are assume) will have a financially stable business partner.[299]
- The Debtors' customers will retain a valued and reliable supplier of premium OCTG products, including a supplier that can stand behind its warranty obligations.

None of these benefits would have been available in a chapter 7 liquidation. Moreover, in chapter 11 and as contemplated by the Plan Support Agreement, the Debtors were provided with access to almost $100 million in post-petition liquidity from the Term Loan Facility Lenders, including Access Lender, and the ABL Facility Lenders, with committed exit financing and a roadmap for a quick exit from chapter 11. The Debtors will further benefit from the exit

[294] 9/21 Tr. 71:18-21, 72:8-12 (Nystrom).

[295] 9/21 Tr.71: 22-24 (Nystrom).

[296] 9/21 Tr. 71:25, 72:1-7 (Nystrom).

[297] *See* 9/21 Tr. 65:18-21 (Nystrom).

[298] *See* Tab 108, Nystrom Decl. ¶ 18.

[299] *See* 9/21 Tr. 65:21-23 (Nystrom).

financing described above, which is necessary to implement the Debtors' restructuring, that the ABL Group and Term Lender Group have agreed to provide under the Plan Support Agreement and related documents. Notably, unsecured creditors will benefit substantially from the Term Loan Lenders agreement to waive approximately $100 million of deficiency claims ($7 million of which is attributed to Access Lender), which will reduce by at least two-thirds the unsecured claims pool.[300] Finally, Access Tubulars has agreed to contribute $250,000 to fund employee-related benefits in exchange for the Debtor Release.[301]

89. It is through this lens that the Court must evaluate the Debtor Release, which, as demonstrated below, is appropriate.

90. <u>There is an identity of interest with the Released Parties.</u> The "identity of interest" factor is satisfied where the Debtors have an obligation to indemnify the party receiving the release.[302] The Released Parties are entitled to indemnification from the Debtors either under the Debtors' governance documents, an applicable loan agreement, or the Management Agreement.[303] This factor is particularly apt in these cases where Access entities have filed

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[300] *See* 9/21 Tr. 62:7-9, 68:15-23 (Nystrom).

[301] *See* 9/21 Tr. 22:15-22 (Mr. Brady announcing Plan modifications on the record). Mr. Nystrom—a person unaffiliated with any Access entity—was asked on cross-examination whether, in his judgment, he believed $250,000 was sufficient to warrant a release of the equity sponsor, he answered that it was, comparing the amount Access Tubulars was offering to the value of any projected claims against it. *Id.* 142:21-25, 143:1-5 (Nystrom). That testimony is uncontroverted. The Committee proffered no evidence of claims against Access Tubulars (or any Access entity, for that matter) or of why $250,000 is not substantial consideration. The only argument alluded to by the Committee during its cross-examination of Mr. Nystrom whether $250,000 is substantial in light of the amount of money Access Tubulars had already invested in the Debtors. *Id.* 143:6-9 (Nystrom). But this argument is non-sequitur. It suggests that the more money a sponsor *contributes* prepetition, the more it should be required to contribute for a release. The suggestion finds no support in logic or law.

[302] *See Indianapolis Downs*, 486 B.R. at 303 (citation omitted).

[303] *See* Tab 108, Nystrom Decl. ¶ 37; 9/21 Tr. 131:13-20, 133:11-15 (Nystrom).

proofs of claim against the Debtors on account of contingent indemnification claims under the Debtors' Limited Liability Agreement, as well as proofs of claim for indemnification under the Management Agreement.[304]

91. In addition, Access has alleged that there is a broad indemnification provision that constitutes part of the "Secured Term Loan Obligations" under the Term Loan Agreement (which obligations have been finally allowed without challenge under the DIP Term Facility Order), requiring the Debtors to "pay, indemnify or reimburse" each Term Loan Lender, including Access Lender, and affiliates and other related parties of each Term Loan Lender, for a broad range of "Indemnified Liabilities" (which include the fees, charges, and disbursements of any counsel for any indemnified party).[305] Those fees and expenses have priority over principal

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[304] *See* Proof of Claim Nos. 109-114; 124-129.

[305] Section 11.5 of the Term Loan Agreement provides, in relevant part:

> The Borrower agrees…(d) to pay, indemnify or reimburse each Lender, each Lead Arranger, each Agent (and any sub-agent thereof) and each Related Party of any of the foregoing Persons (each, an "Indemnitee") for, and hold each Indemnitee harmless from and against, any and all other liabilities, obligations, losses, claims, damages, penalties, actions, judgments, suits, costs, expenses or disbursements of any kind or nature whatsoever (including the fees, charges and disbursements of any counsel for any Indemnitee), incurred by any Indemnitee or asserted against any Indemnitee by any Person (including the Borrower or any other Loan Party) other than such Indemnitees and its Related Parties arising out of, in connection with, as a result of or with respect to the execution, delivery, enforcement, performance and administration of this Agreement, the other Loan Documents and any such other documents or instrument contemplated hereby or thereby, including any of the foregoing relating to the use of proceeds of the Loans, the violation of, noncompliance with or liability under, any Environmental Law applicable to the operations of the Borrower or any of its Restricted Subsidiaries or any of the property of the Borrower or any of its Restricted Subsidiaries, of any actual or prospective claim, litigation, investigation or proceeding relating to any of the foregoing, whether based on contract, tort or any other theory, whether brought by a third party or by the Borrower or any other Loan Party and regardless of whether any Indemnitee is a party thereto, IN ALL CASES, WHETHER OR NOT CAUSED BY OR ARISING, IN WHOLE OR IN PART, OUT OF THE COMPARATIVE, CONTRIBUTORY OR SOLE

and interest owing to the Term Loan Lenders,[306] who have agreed to exchange their secured claims for equity, and to waive their deficiency claims. If the current Plan containing the Debtor Release in favor of each of the Access entities is not approved, Access Tubulars, Access Lender, and the other Access entities may seek to establish an indemnification or reimbursement reserve, putting at risk the ability to confirm an alternative plan prior to final adjudication of any such indemnified claims.[307]

92. In addition, courts in this district have found that a common goal of confirming a plan and implementing a restructuring of a debtor establishes an identity of interest.[308] Given the extensive efforts of the Released Parties to restructure the Debtors, as detailed above,[309] the Released Parties clearly have an identity of interest with the Debtors for purposes of the *Master Mortgage* analysis.

93. Substantial Contribution. Here, the contribution of the Released Parties for the Debtor Release, *inter alia*, is the Plan itself and the entire restructuring process supported by the Released Parties over the last seven months. In *Spansion*, Judge Carey noted that "activ[e] involve[ment] in negotiating and formulating the plan" serves as a basis for providing a release

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> NEGLIGENCE OF THE INDEMNITEE (all the foregoing in this clause (d), collectively, the "Indemnified Liabilities") ….

(emphasis in original). This indemnification obligation does not cover "the gross negligence or any willful misconduct," or "the material breach of the Loan Documents" of any such Lender, or "claims against such Indemnity or related party brought by any other Indemnity that do not involve claims against any Lead Arranger or Agent in its capacity as such." *Id.*

306 *See* Term Loan Agreement, §10.13

307 A majority of the Term Loan Lenders (*i.e.*, those other than Access Lender) and the Term Loan Agent have informed the Debtors that they disagree with Access's broad interpretation of the indemnification provisions in the Term Loan Agreement.

308 *See Tribune*, 464 B.R. at 187; *In re Zenith Elecs. Corp.*, 241 B.R. 92, 110-11 (Bankr. D. Del. 1999).

309 *See* Tab 108, Nystrom Decl. ¶ 37.

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from the debtor.[310] Here, the Released Parties' consideration includes the following tangible economic benefits: (i) pre-petition, DIP and exit funding provided by the lender-Released Parties, including Access Lender, (ii) the pre-petition Limited Sponsor Guarantee provided by Access Tubular in the amount of $500,000, (iii) the approximately $2.3 million prepetition priming lien that the Term Loan Agent extended to the ABL Facility Lender, and (iv) the $250,000 Access Tubulars has agreed to contribute for employee-related benefits. Moreover, the Debtors and their estates have also received intangible benefits from the Released Parties, including the stewardship over the Debtors by the D&Os in the period spanning the restructuring negotiations and chapter 11 cases, the two Access Tubulars-proposed recapitalizations that served as a platform from which the Debtors were able to negotiate their ultimate restructuring, and an overall willingness to work together by the Released Parties to preserve the value of the Debtors and avoid a liquidation.

94. Here, since the Debtors' secured debt is greater than the enterprise value of the Debtors, substantially all of the distributions (other than proceeds of the GUC Trust Assets) to parties in these Chapter 11 Cases that are not secured lenders serve as the (substantial) consideration supporting the Debtor Release.[311] Further, the Term Loan Lenders have agreed to substantially reduce recoveries in exchange for their claims and, given that the Term Loan

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[310] *Spansion*, 426 B.R. at 143.

[311] *See Genesis Health Ventures*, 266 B.R. at 607 n.16 (finding that donation of value to other creditors provided substantial consideration); *cf. Exide Techs.*, 303 B.R. at 73 (finding that there was not substantial consideration provided to unsecured creditors under the plan when the court found that the secured lenders were oversecured and, therefore, there was no donation of value).

Lenders have agreed to equitize their claims, the Plan itself would not be possible absent that agreement.[312]

95. In addition to the overall benefits to the Debtors and their estates that are provided by the Plan, general unsecured creditors are also receiving economic benefits from the Plan. Certain Released Parties are waiving valuable claims and economic rights that would come ahead of or dilute recoveries to unsecured creditors. For instance, the Term Loan Lenders, including Access Lender, have agreed in the contest of the Plan, to (i) not pursue a superpriority diminution in value claim, which would likely be substantial given that they were primed by $60 million in financing under the DIP Term Facility[313] and the administrative expenses on account of professionals' fees alone have already reached approximately $11 million[314] and (ii) waive massive unsecured deficiency claims which would substantially dilute the pro rata recoveries of unsecured creditors. Further, Access Tubulars is waiving management fees and reimbursement rights under the Management Agreement.[315] Courts have found that an agreement to waive claims constitutes a substantial contribution to the Debtors' estates.[316]

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[312] *See In re Genco Shipping and Trading Ltd.*, 513 B.R. 233, 272 (Bankr. S.D.N.Y. 2014) (considering the fact that secured creditors agreed to convert their secured debt into equity of the reorganized debtors, "relief that is not available to the Debtors under the Bankruptcy Code," as a concession in return for which it was appropriate to grant even a third-party release).

[313] *See Final Order Pursuant to 11 U.S.C. §§ 105, 361, 362, 363, 364 and 507: (A) Authorizing the Debtors to Obtain Post-Petition Term Loan Financing; (B) Granting Liens and Providing Superpriority Administrative Expense Status; (C) Granting Adequate Protection; (D) Modifying Automatic Stay; and (E) Granting Related Relief* [D.I. 291].

[314] 9/21 Tr. 83:15-17 (Nystrom).

[315] *See Zenith Elecs.*, 241 B.R. at 111 (finding substantial contribution where lender's agreement to fund plan resulted in distribution that would not be available in a liquidation).

[316] *See In re Air Cargo Inc.*, 2006 WL 4748135, at *1 (Bankr. D. Md. May 18, 2006) (considering reduction of claims to be a substantial contribution); *see also In re MPM Silicones, LLC*, No. 14-22503-RDD, 2014 WL 4436335, at *33 (Bankr. S.D.N.Y. Sept. 9, 2014) aff'd, 531 B.R. 321 (S.D.N.Y. 2015) (approving of modified third-party release in

96. With respect to the D&Os, courts have determined that service as an officer or director of a debtor constitutes "substantial contribution" under the *Master Mortgage* test,[317] while other courts have determined that additional consideration may be warranted in the case of a contested release.[318] Such additional consideration and related benefits to the Reorganized Debtors exist here. First, the Debtors expect that their current officers will remain in place post-Effective Date, thereby providing further contribution.[319] Second, to the extent the Court finds that additional consideration is required, the value provided by the parties to the Plan Support Agreement, who have indicated their desire to obtain a release of the D&Os as part of the Plan, serves as additional consideration. Here, the parties to the Plan Support Agreement opted for a restructuring followed by peace for the Reorganized Debtors as opposed to liquidation followed by litigation and those parties have supplied ample consideration to support the Debtor Release.

97. Finally, the Creditors Committee relies extensively on this Court's decision in *WaMu I*, in which the debtors' proposed releases of settlement parties, including the creditors committee and a group of noteholders, were not approved on the basis that those parties' contributions were not sufficiently substantial to justify the releases.[320] As this Court is well aware, the Creditors Committee's citation is inapposite. In *WaMu I*, the proffered contribution made by the parties was merely their participation in settlement negotiations. However, as this

favor of secured creditors that agreed not to seek pari passu treatment on deficiency claims with other unsecured creditors).

[317] *See Zenith Elecs.*, 241 B.R. at 111.

[318] *See Exide Techs.*, 303 B.R. at 74 n.37; *see also WaMu I*, 442 B.R. at 350.

[319] *Cf. WaMu I*, 442 B.R. at 350 (in denying release to directors and officers, holding "[n]or is there any evidence that any of the [legions] of directors, officers, or professionals covered by the Debtors' releases are necessary for the reorganization (which may be limited to the run off of WMMRC's insurance business)").

[320] *WaMu I*, 442 B.R. at 348-349.

Court noted, "[t]hey [had] not contributed cash or anything of tangible value to the Plan or the creditors."[321] Here, the Released Parties have provided significantly more than intangible contributions to the restructuring process, which are detailed herein. In fact, the only similarities between the cases seem to be proposed debtor releases of third parties, and the Court deciding the fairness of such releases. Unlike *WaMu I*, the proposed releases in these Chapter 11 Cases are indisputably supported by tangible consideration.

98. Necessary to the Restructuring. The Plan Support Agreement is the roadmap for the Debtors' restructuring. The Plan Support Agreement is a heavily-negotiated "package deal," and the various provisions are interdependent on each other. Mr. Nystrom provided uncontroverted testimony that this restructuring was a carefully orchestrated activity that required all of the input of the Released Parties and that required all of the Released Parties to receive the release contemplated by the Plan Support Agreement.[322] Importantly, the Plan is also the only viable proposal for a restructuring of the Debtors. The Debtor Release is a key component of the Plan Support Agreement and, therefore, necessary to and an integral part of the restructuring proposed under the Plan.[323] The Creditors Committee cannot simply pick and choose the provisions of the Plan proposed under the Plan Support Agreement that they want—e.g., payment of all amounts required to be paid under section 1129(a)(9) of the Bankruptcy Code from the lenders' collateral, funding of the GUC Initial Funding Amount, and committed exit financing—and ignore the provisions that they do not like, namely the Debtor Release, and compel the parties to the Plan Support Agreement to proceed with a restructuring that they did not bargain for.

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[321] *Id.* at 348.

[322] 9/21 Tr. 71:22-25, 72:1-7 (Nystrom).

[323] *See Zenith Elecs.*, 241 B.R. at 111.

99. Moreover, many of the Released Parties will have key roles in the Reorganized Debtors, including as lenders under the Exit ABL Facility and Exit Term Loan Facility, shareholders of New Holdco, and officers of the Debtors. This court has recognized that elimination of post-emergence distractions of such shareholders demonstrates a necessity to the restructuring.[324] Further, many of the Released Parties are entitled to indemnification from the Debtors, and failure to indemnify them for (even baseless) litigation will frustrate the Reorganized Debtors' efforts to emerge from these Chapter 11 Cases. Eliminating these disruptions and financial burdens are key reasons for implementing the Debtor Release.

100. Each of the foregoing *Master Mortgage* factors demonstrates that the Debtor Release negotiated under the Plan Support Agreement is necessary to implement Debtors' restructuring.

101. <u>Creditor Support for Plan with Releases.</u> Perhaps the most objective factor considered by courts when assessing the fairness of a release is "the overwhelming acceptance of the plan and release by creditors and interest holders."[325] This factor overwhelmingly supports the Debtor Release under the Plan. The following graph shows the weight of creditor support for the Plan, including the releases, based on the votes cast.[326]

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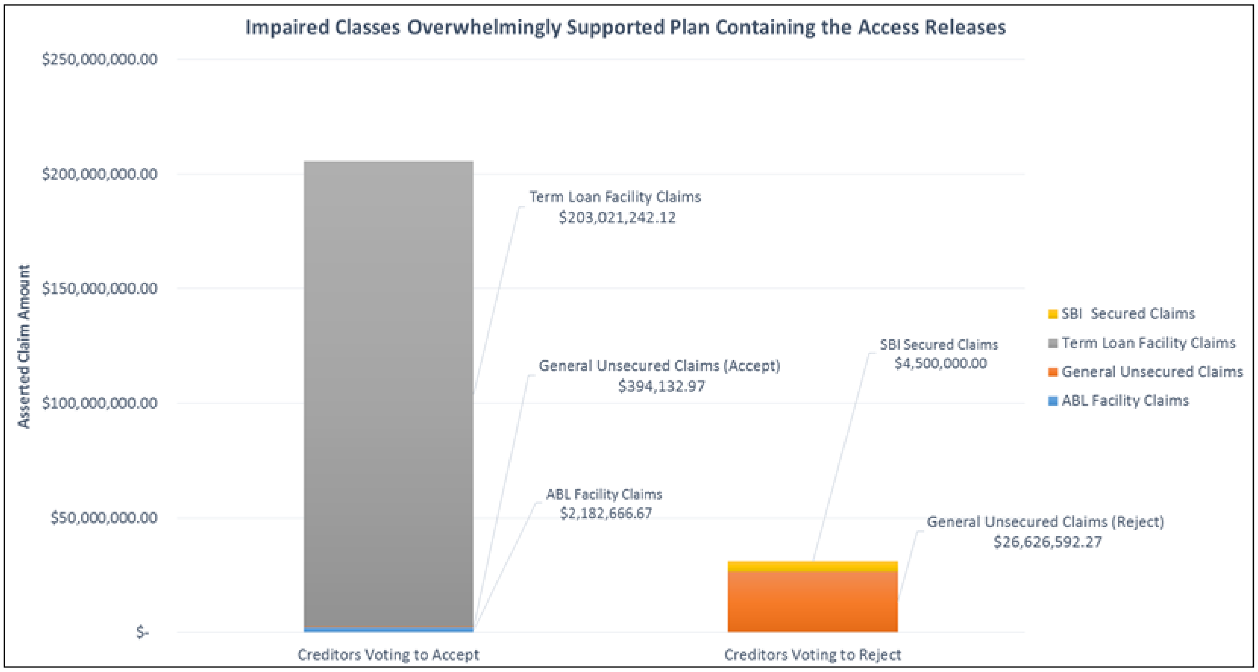
324 *Zenith Elecs.*, 241 B.R. at 111.

325 *Wash Mut.*, 442 B.R. at 346 (citing *Zenith Elecs.*, 241 B.R. at 110).

326 Demonstrative derived from evidence contained within Tab 109, *Declaration Of Jung W. Song On Behalf Of Donlin, Recano & Company, Inc. Regarding Voting And Tabulation Of Ballots Accepting And* Rejecting *Debtors' Amended Joint Prearranged Chapter 11 Plan Dated August 13*.



In addition, Access Tubulars, who owns over 80% of the equity in the Debtors, supports the Debtor Release.

102. <u>No viable claims have been asserted against the Released Parties.</u> Other than the putative preferential transfers related to the ABL Facility, discussed below, and the baseless allegations of a breach of care related to the Plan and Plan Support Agreement, discussed in Part VI of this Memorandum, the Creditors Committee has identified no other claims against the Released Parties. Moreover, under the DIP ABL Facility Order and DIP Term Facility Order, any claims against the lender parties related to the financing documents were required to be asserted at this point or were released. This fact is notable given the extensive investigation that the Creditors Committee has conducted in these cases, including obtaining discovery from, and deposing representatives of, Black Diamond (the largest Term Loan Lender) and Access (including on behalf of Access Tubulars and Access Lender). Indeed, the Creditors Committee made extensive allegations against each of those parties in their objection to the Debtors' debtor-

in-possession financing motion. Given that the Creditors Committee was targeting Black Diamond and Access from the outset of these cases, the Creditors Committee's continued silence regarding these two parties is telling. Courts have found the absence of viable claims to be relevant to the reasonableness of a debtor's proposed release of a party, and such absence weighs in favor of the Court's approval of the Debtor Release here.[327]

103. Additionally, as disclosed to the Court at the beginning of the Confirmation Hearing, the Debtors are investigating certain conduct that occurred approximately three years ago with respect to one of their current officers. The issue came to the Debtors' attention during the course of post-petition discovery related to recharacterization of the SBI Financing Agreement.[328] The investigation is ongoing. However, the Term Loan Lenders, the proposed owners of the Reorganized Debtors under the Plan have informed the Debtors that, based upon information adduced to date during the course of the Debtors' investigation, they believe the officer should continue to be included in the scope of the Debtor Release to insure the officer will continue to perform his functions, which both the Debtors and the Term Loan Lenders believe have been, and will continue to be, critical to the preservation of the Debtors' business. The Term Loan Lenders have so informed the Debtors and their Board of their position and that

[327] *See Spansion*, 426 B.R. at 143 (weighing the fact that there was no pending litigation that would be discontinued as a result of the plan release); *In re DBSD N. Am., Inc.*, 419 B.R. 179, 217 (Bankr. S.D.N.Y. 2009) (approving a debtor's release of third parties where the debtor testified that it was unaware of any significant potential claims that were being released); *In re Lear Corp.*, No. 09–14326 (ALG), 2009 WL 6677955, at *7 (Bankr. S.D.N.Y. Nov. 5, 2009) (finding that pursuing claims released under the plan was "not in the best interest of the Debtors' estates' various constituencies as the costs involved likely would outweigh any potential benefit from pursuing such claims" and approving the Debtors' releases); *see also MPM Silicones*, 2014 WL 4436335, at *33 (finding it appropriate to weigh releasee's contribution against court's evaluation of the putative claims and whether such claims appeared to be "strike suits").

[328] As a result of this information, the Debtors have agreed, with the consent of the Term Loan Lenders, to remove Gregg Eisenberg from the definition of Released Parties under the Plan. *See* 9/21 Tr. 21:21-24.

any changes to the Debtor Release require the consent of the Term Loan Lenders. Because the Plan remains the ***best*** and ***only viable*** option to reorganize the Debtors and provides the greatest benefit to stakeholders, and based on the view of the Term Loan Lenders, the Board determined to continue to pursue confirmation of the Plan as contemplated by the Plan Support Agreement, without further modification to the Debtor Release.

104. As set forth below, the Debtors do not believe the alleged preference action against the ABL Facility Lenders has any value, and, unlike the Creditors Committee, the Debtors are not willing to undertake the time and expense of speculative litigation simply to find out that the Debtors' belief is correct.

105. <u>The Creditors Committee's Supplemental Deposition Designations Relating to Access</u>. After the commencement of the Confirmation Hearing, the Creditors Committee designated portions of deposition testimony taken of Access's Rule 30(b)(6) witness, Don Wagner. No witnesses were asked question about Mr. Wagner's testimony, and the testimony shows nothing more than the amounts Access Tubulars and Access Lender invested, initially in capital contributions and later in debt, and what those entities recovered on those investments. [redacted]

[redacted]

[redacted]

Other than to show an arithmetic calculation, the designations are not probative of anything.

B. The Claims Alleged by the Creditors Committee Against the ABL Facility Lenders are Not Viable

106. The Creditors Committee's putative preference claim against the ABL Facility Lenders is without merit, standing should be denied, and the ABL Facility Lenders should be permitted to enjoy the benefit of the Debtor Release. The Creditors Committee's claim is based on a "net improvement" theory – effectively that an under-secured creditor has lessened the amount of its deficiency claim in the 90-day look back period. However, Section 547(c)(5) of the Bankruptcy Code prohibits a trustee from avoiding any transfer that creates a perfected security interest "in inventory, a receivable, or the proceeds of either," which the ABL Facility Agent and ABL Facility Lenders have, except to the extent that such transfer "caused a reduction, as of the date of the filing of the petition *and* to the prejudice of other creditors holding unsecured claims, of any amount by which the debt secured by such security interest exceeded the value of all security interests."[332] In other words, there must be an improvement

[redacted]

[332] 11 U.S.C. § 547(c)(5) (emphasis added).

(*i.e.*, reduction in a deficiency that was in existence 90 days out) and prejudice to other unsecured creditors.

107. As stipulated in the DIP ABL Facility Order, the Debtors believe that the ABL Facility Lenders were over-secured by not less than $13 million (*i.e.*, a 50% equity cushion) on the Petition Date. At the Confirmation Hearing, Mr. Nystrom provided uncontroverted testimony that, as of 90 days prior to the Petition Date, the ABL Facility Lenders were also over-secured.[333] He formed this view based on his view of the market value of the collateral securing the ABL Facility, which consisted primarily of the Debtors' receivables and inventory. He further elaborated that he held this view even though the loan was in violation of its borrowing base covenant because the borrowing available under the borrowing base is determined with reference to a value of the collateral that is just over the "fire sale" liquidation value rather than the market value.[334] With respect to prejudice to other unsecured creditors, Mr. Nystrom also testified that the ABL Facility Lenders made a number of loans to the Debtors, and these funds were used to make payments to unsecured creditors in the 90 days.

108. On the merits it appears that the ABL Facility Lenders have an absolute defense with respect to the lack of an initial deficiency 90 days out and on the Petition Date. Moreover, the ABL Facility Agent, the ABL Facility Lenders, and the Debtors believe the ABL Facility Lender have a number of other additional defenses. Given the ABL Facility Lenders' defenses, the possibility that they would seek indemnity from the Debtors if such a litigation was commenced and their continued support for the Debtors and the Plan, the Debtors submit that there is no value to pursuing the putative preference claims against the ABL Facility Lenders.

[333] 9/21 Tr. 69:21-25 (Nystrom).

[334] 9/21 Tr. 70:4-12 (Nystrom).

C. The Third Party Releases Are Consensual

109. Courts in this jurisdiction have held that a chapter 11 plan can contain releases by third parties that are the result of the affirmative consent of the party granting the release.[335] Article 8.3 of the Plan includes a third-party release of the Released Parties to be granted by the Releasing Parties, which the Debtors submit is consensual and permissible in accordance with *Zenith Electronics.*

110. **First**, the following entities are parties to the Plan Support Agreement and, as parties thereto, have agreed to support the Plan, which includes the Third Party Releases: the Term Loan Agent; holders of Term Loan Facility Claims; the ABL Facility Agent, holders of ABL Facility Claims; the DIP ABL Facility Agent; holders of DIP ABL Facility Claims; the DIP Term Facility Agent; holders of DIP Term Facility Claims; the Sponsor; the ABL Facility Guarantor; and the parties to the Plan Support Agreement.[336] Therefore, the Third-Party Release is consensual with respect to these parties and should be approved.

111. **Second**, the Plan also provides that parties who are unimpaired and are deemed to accept the Plan (without an opportunity to vote) are also deemed to grant the Third-Party Release. Courts in this jurisdiction have found that such a release is permissible; holding that payment in full to a releasing creditor serves as sufficient consideration for the release.[337] Specifically, in *Indianapolis Downs*, the court noted that courts in this jurisdiction may take a

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[335] *See Zenith Elecs.*, 241 B.R. at 111.

[336] The DIP ABL Facility Agent, DIP Term Facility Agent and the holders of DIP ABL Facility Claims and DIP Term Facility Claims are not parties to the Plan Support Agreement. However, the individual entities that fulfill such roles are parties to the Plan Support Agreement in their capacities as ABL Facility Agent, Term Loan Agent and holders of Term Loan Facility Claims and ABL Facility Claims. Therefore, the Debtors submit that such entities have consented to granting the Third Party Release and, further, none of these parties has objected to granting the Third-Party Release.

[337] *See Indianapolis Downs, LLC*, 486 B.R. at 306; *Spansion*, 426 B.R. at 144.

"more flexible approach" in evaluating whether a release was consensual.[338] In the context of a party who is deemed to accept (*i.e.*, consent to) the Plan, the Debtors submit that the Third-Party Release—which is, itself, limited to a release by unimpaired entities solely in their capacity as creditors of the Debtors—is permissible where the creditor in question is being paid in full. Moreover, no party in the Chapter 11 Cases has objected to the Third Party Release.[339]

112. **<u>Third</u>**, the last category of creditors that are deemed to grant the Third-Party Release are the current officers and directors of the Debtors. These parties are the beneficiaries of the Debtor Release and the Third Party Release. Further, many of the Debtors' officers were involved in the negotiation and formulation of the Plan, and the Debtors' board directed and oversaw management in that process and was fully informed of, and approved, the terms of the Plan. In the absence of an objection by any current D&O, the Debtors submit that the Third Party Release should be approved as to the current D&Os, in light of the consideration they are receiving in the form of mutual releases from the Debtors and the other Releasing Parties, and the role they played in the overall Plan process.

113. Based on their consensual nature and the fact that no party has objected to the grant and implementation of the Third-Party Releases, the Debtors submit that they are appropriate and should be approved.

D. The Exculpation is Appropriate

114. Section 1123 of the Bankruptcy Code provides, in pertinent part, that a chapter 11 plan "may . . . include any other appropriate provision not inconsistent with the applicable

338 486 B.R. at 305.

339 *See Spansion*, 426 B.R. at 144 (finding "the silence of the unimpaired classes on this issue is persuasive" and overruling U.S. Trustee's objection the releases as to unimpaired creditors who were deemed to accept the plan).

provisions of this title."[340] Among the permissive provisions customarily included in chapter 11 plans in this district (and elsewhere) under section 1123(b)(6) are exculpation provisions stating that parties shall have no liability to any person in connection with the chapter 11 case absent fraud, gross negligence, or willful misconduct. After the Third Circuit found in *In re PWS Holding Corp.*, 228 F.3d 224 (3d Cir. 2000), that creditors' committee members and other professionals could benefit from exculpation, courts in Delaware have confirmed chapter 11 plans that provided for exculpation of parties other than committee members and estate professionals, implicitly reasoning that such exculpation was "appropriate" under the circumstances and "not inconsistent with" the Bankruptcy Code as required by section 1123(b)(6).[341]

115. Here, the Plan has recently been amended to remove the Debtors' lenders and their agents, the Sponsor, the other Plan Support Agreement parties, and their related parties from the definition of Exculpated Parties, leaving only estate fiduciaries subject to the exculpation provision. However, these parties have agreed to the amendment of the definition of Exculpated Parties subject to the Court's approval of the Debtor Release that includes these parties, and they have reserved the right to seek exculpation if they do not receive the benefit of the Debtor Release under the Plan.

[340] 11 U.S.C. § 1123(b)(6).

[341] *See, e.g.*, July 28, 2014 Hr'g Tr. [D.I. 1152] at 26-28, *In re FHA Liquidating Corp. (f/k/a Fisker Auto. Holdings, Inc.)*, Case No. 13-13087 (KG) (Bankr. D. Del. July 28, 2014) (overruling U.S. Trustee objection to exculpation of purchaser and senior lender, expressly reasoning that *PWS Holding* did not limit exculpation to estate fiduciaries and that exculpation of other parties may be appropriate in "particular circumstances") (excerpt attached hereto as **Exhibit F**).

IV. THE GUC TRUST PROCEDURES (AS MODIFIED) ARE APPROPRIATE

116. As an initial matter, in addition to certain other changes made at the request of the Creditors Committee the Plan will be modified to amend and restate the definition of GUC Trust Assets as set forth on the record at the Confirmation Hearing.[342]

117. The Creditors Committee asserts that by virtue of the GUC Trust Waterfall, the Debtors are seeking to "unload the obligations of the ABL Facility Lenders and Term Loan Lenders onto the backs of the unsecured creditors."[343] This notion mischaracterizes both the ABL Facility Lenders and Term Loan Lenders' purported "obligations" and the general unsecured creditors' perceived entitlement to a guaranteed recovery from the estates.

118. Taking these errors in turn, the ABL and Term Loan Lenders are not obligated to fund an infinite amount of administrative expenses. In fact, the Court severely limited these obligations when it granted the lenders section 506(c) waivers in exchange for the ABL Facility Lenders and Term Loan Lenders' agreement to fund these cases:

> There's nothing that requires a buyer to pay anything to the unsecureds if it feels that the enterprise does not have that value. What Courts do require is that any process in the bankruptcy case has to include a commitment to pay for the cost of that process. And I think this DIP does. It pays for the administrative expenses or all expenses that are anticipated to accrue during the period of the process and that is, I think, all that is required.[344]

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342 9/21 Tr.22:3-14 (Mr. Brady describing amendment to definition of GUC Trust Assets).

343 *See 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] at ¶ 77.

344 7/17 Tr. 106:7-12.

01:17851446.4

The "anticipated" expenses that the Court referred to in making its ruling, however, are qualified by the Court-approved DIP Budget.[345] At this point, Professional Claims have drastically exceeded the amounts set forth in the DIP Budget. There is nothing in the DIP orders or otherwise that requires the ABL Facility Lenders and Term Loan Lenders to bear the burden of those additional expenses. Despite having no obligation to do so, the ABL Facility Lenders and Term Loan Lenders, through the Plan, have consented and committed to the use of their collateral to provide an advance to pay all allowed Professional Claims above and beyond the amounts in the DIP Budget, on the condition that they receive reimbursement from the unencumbered GUC Trust Assets for Professional Claims that are Allowed in amounts in excess of the DIP Budget. In other words, all allowed Administrative Claims and Professional Claims will be paid by the Reorganized Debtors, but the unencumbered assets of the estates—rather than the secured lenders—will bear responsibility for Professional Claims in excess of what the ABL Facility Lenders and Term Loan Lenders agreed to pay in the DIP Budget.

119. As noted by the Court at the July 17 hearing when pressed by the Creditors Committee to force the ABL Facility Lenders and Term Loan Lenders to fund a marketing initiative, "[the Court] cannot require the lender to pay the costs of a full sale process."[346] So too with the excess administrative claims of the Debtors' estates.

120. Moving to the GUC Trust Waterfall itself, the Creditors Committee is laboring under the misconception that because the Court refused to grant the ABL Facility Lenders and Term Loan Lenders liens on unencumbered assets, those unencumbered assets "belong" to the general unsecured creditors. But that is incorrect. Unencumbered assets belong to the Debtors' *estates* and are to be distributed to the Debtors' stakeholders in accordance with the priority and

[345] *See* DIP Budget [D.I. No. 293, Ex. B].

[346] 7/17 Tr. 106:23-24.

distribution scheme set forth in the Bankruptcy Code. There is no dispute that administrative priority claims are entitled to payment before general unsecured claims. By virtue of the GUC Trust Waterfall, the Debtors are doing just that—paying the Professional Claims that exceed the DIP Budget (which are entitled to administrative expense priority) before any distributions are made to holders of GUC Claims. Through operation of the GUC Trust Waterfall, the Debtors are in no way capping the payment of administrative claims. In fact, the Debtors are doing exactly the opposite, and ensuring that administrative claims are paid in full before any distribution to general unsecured creditors, as required by the Bankruptcy Code.[347]

V. DISCRIMINATORY TREATMENT OBJECTIONS SHOULD BE OVERRULED

A. All Holders of Claims Within a Class Receive the Same Treatment

121. The Plan contains only one class of general unsecured creditors at each Debtor—Class 6—and all parties holding Allowed Claims in Class 6 receive the same treatment—*i.e.*, their pro rata share of the GUC Trust Proceeds allocated to General Unsecured Claims in accordance with the GUC Trust Waterfall. Given that creditors within Class 6 receive the exact same treatment, there can be no discrimination. The very argument presented by the Creditors Committee here—that payments of unsecured claims ***outside*** of a plan results in discriminatory treatment ***under*** a plan—was rejected by Judge Shannon in the *Motor Coach Industries* case, which decision was affirmed by Judge Robinson on appeal.[348]

122. The "discriminatory" treatment the Creditors Committee appears to be complaining of, payment of claims of critical vendors, does not occur under the Plan but, instead,

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[347] *See* 11 U.S.C. § 1129(a)(9)(A) (requiring plan to provide for payment in full of administrative claims).

[348] *Official Comm. of Unsecured Creditors of Motor Coach Indus. Int'l v. Motor Coach Indus. Int'l (In re Motor Coach Indus. Int'l),* Civ. No. 09-078-SLR, 2009 U.S. Dist. LEXIS 10024, *8-9 (D. Del. Feb. 10, 2009).

under the Bankruptcy Court's "critical vendor" order [D.I. 207] (the "**Critical Vendor Order**"). A confirmation hearing is not the proper venue to raise a collateral attack on a final order that was entered with the consent of the Creditors Committee and granted the Creditors Committee consultation rights. Indeed, given that the final critical vendor order was entered over 60 days ago and the Debtors have made payment arrangements with 63 critical vendors (after consulting with the Creditors Committee), it is curious that the Creditors Committee's first objection before the Bankruptcy Court to any critical vendor payments is only being raised on the eve of the Confirmation Hearing.

123. Nonetheless, at the Confirmation Hearing, Mr. Nystrom testified that he has honored the terms of the Critical Vendor Order, specifically paragraph 10 that requires consultation with the Creditors Committee.[349] Notably, Mr. Nystrom testified that the Creditors Committee has not once objected to payment of a critical vendor.[350] He also testified that the Debtors do have some on-going discussions with critical vendors and those discussions, generally, commenced in June shortly after the Petition Date but some of those negotiations remain on-going.[351]

B. Once the Management Agreement Is Assumed, Access Is Not an Unsecured Creditor and Section 1129 Does Not Apply to Claims under the Management Agreement

124. Section 1123(b)(3) of the Bankruptcy Code allows the proponent of a plan to assume, reject or assign any executory contract, subject to Section 365. The Plan provides for the assumption of the Management Agreement. Mr. Nystrom testified that the assumption of the Management Agreement as set forth in Section 5.3 of the Plan was a condition of the Plan

[349] 9/21 Tr. 73:15-74:4 (Nystrom).

[350] 9/21 Tr. 74:5-7 (Nystrom).

[351] 9/21 Tr. 74:11-23 (Nystrom).

Support Agreement and the benefits of the Plan Support Agreement provide for the necessary business justification for the decision to assume the Management Agreement.

125. In the Third Circuit, if a contract is assumed, the obligations under the contract are entitled to payment in full and the non-debtor counter-party is no longer an unsecured creditors.[352] The Court must overrule the Creditors Committee as it relates to the purported discriminatory treatment of Access on account of claims arising under the Management Agreement because, upon assumption, Access will no longer be a holder of a General Unsecured Claim under the Plan with respect to the obligations assumed under the Management Agreement.

VI. THE PLAN WAS PROPOSED IN GOOD FAITH AND THE BOARD APPROPRIATELY DISCHARGED ITS FIDUCIARY DUTIES

126. In arguing that the Plan was not proposed in good faith in their pretrial objection, the Creditors Committee simply reiterates its valuation argument, which fails for the reasons set forth above. The Creditor Committee also asserts that the Debtors' board breached its fiduciary duty of care by approving the Plan Support Agreement before having obtained the Lazard Valuation or conducted a "market test" to determine the value of the business. The Creditors Committee's assertion has no legal or factual basis, and contradicts its own support of the Debtors' assumption of the Plan Support Agreement.[353]

127. The duty of care requires directors to inform themselves, "prior to making a business decision, of all material information reasonably available to them."[354] Delaware law

[352] *See Kimmelman v. Port Auth. of N.Y. & N.J. (In re Kiwi Int'l Air Lines, Inc.)*, 344 F.3d 311, 318 (3d Cir. 2003).

[353] The Creditors Committee withdrew its objection to the assumption of the Plan Support Agreement by the Debtors at the August 11, 2015 disclosure statement and assumption hearing. Tr. of Hr'g Before Hon. Mary F. Walrath U.S. Bankr. Judge (Aug. 11, 2015) [D.I. 389] 5:6-11, 10:6-8. A true and correct copy of the cited portion of the transcript from the August 11, 2015, hearing is attached as **Exhibit G** hereto.

[354] *Smith v. Van Gorkom*, 488 A.2d 858, 872 (Del. 1985).

looks at the specific facts of each case to determine whether directors have met this burden without mandating any particular form of valuation or marketing process; rather, it is clear that "there is no single blueprint that a board must follow to fulfill its duties" and that a court should examine "whether the directors made a reasonable decision, not a perfect decision."[355] A board's methods should be "designed to determine the existence and viability of possible alternatives," and might include "conducting an auction, canvassing the market, etc."[356] Nevertheless, "[w]hen . . . directors possess a body of reliable evidence with which to evaluate the fairness of a transaction, they may approve that transaction without conducting an active survey of the market . . . . [Again,] there is no single method that a board must employ to acquire such information."[357]

128. The record leading to the execution of the Plan Support Agreement (both prior to and in connection with confirmation) clearly establishes that the Debtors worked tirelessly for months with their senior creditors to negotiate a consensual restructuring to address the Debtors' severe liquidity issues and ensure that the business could continue as a going concern.[358] These negotiations produced several restructuring proposals that contemplated paying general unsecured creditors in full, but all ultimately fell through.[359] Only then, when faced with the stark choice of shuttering operations and liquidating—thereby destroying hundreds of jobs and

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355 *C&J Energy Servs. v. City of Miami Gen. Emps.' & Sanitation Emps.' Ret. Tr.*, 107 A.3d 1049, 1067 (Del. 2014) (quoting *Unitrin v. Am. Gen. Corp.*, 651 A.2d 1361, 1385-86 (Del. 1995)).

356 *Paramount Commc'ns v. QVC Network Inc. (In re Paramount Commc'ns Inc. S'holders Litig.)*, 637 A.2d 34, 44 (Del. 1994).

357 *Barkan v. Amsted Indus., Inc.*, 567 A.2d 1279, 1286-87 (Del. 1989).

358 Tab 108, Nystrom Decl. ¶7-14; 7/17 Tr. 12:10-25:13 (Nystrom); *see also* Wagner Dep. Tr. 55:4-56:5; 66:19-67:11; 81:12-83:19.

359 *Id.*

millions of dollars in value—or supporting the transactions embodied in the Plan Support Agreement—which included fiduciary out language—did the board approve the Plan Support Agreement.[360] Far from "g[iving] away the store without any knowledge of what was on the shelves," the board's decision ensured that the lights of the store would stay on, preserving the going concern value of the business for the benefit of all stakeholders in these Chapter 11 Cases.

129. Moreover, after securing the necessary liquidity under the interim DIP facilities, the board immediately reopened negotiations on the Plan Support Agreement, ultimately obtaining funding for the Lazard valuation and filing a plan of reorganization that did not specify a treatment for general unsecured creditors pending the outcome of the valuation.[361] Significantly, the Debtors and the board consistently pushed for broad fiduciary out language in the Plan Support Agreement,[362] clearly communicated to all parties that the Court would expect it, and welcomed the Court's remarks at the July 17, 2015 final DIP financing hearing expanding its scope.

130. As discussed above, the Debtors went beyond the Court's direction and affirmatively contacted financial and strategic leads identified by Lazard during its prepetition marketing process. All of these prospective purchasers received draft NDAs, eight executed NDAs to facilitate due diligence, four obtained access to the data room and two visited the Debtors' plant in Liberty, Texas.[363] When this diligence process did not yield higher or better

[360] 7/17 Tr. 24:19-26:15 (Nystrom); Wagner Dep. Tr. 90:10-91:9.

[361] 7/17 Tr. 26:16-21 (Nystrom).

[362] 9/21 Tr. 76:5-20 (Nystrom).

[363] 9/21 Tr. 79:12-25, 80:1-8 (Nystrom); Tab 107, Interested Parties Spreadsheet.

offers for the business than the valuation contemplated by the Plan, it confirmed that the Plan presented the best available outcome for the Debtors and their estates.[364]

131. The Creditors Committee's assertion that, by virtue of the execution of the Plan Support Agreement, "the horse had left the barn" and is similarly off base. The assumption of the Plan Support Agreement—including the revised and "true" fiduciary out—was approved by this Court on August 12, 2015 as an exercise of the Debtors' reasonable business judgment.[365] Accordingly, the Debtors' Board fully preserved the right to terminate the Plan Support Agreement without penalty if it discovered a more favorable alternative for the Debtors. Thus, the Board fulfilled its fiduciary obligations by commissioning the expert valuation conducted by Lazard, independently corroborating that valuation with its marketing efforts, and confirming that the Plan represented the best available outcome for the Debtors and their estates.

[364] *Id.*

[365] *See Order Authorizing the Debtors to Assume Plan Support Agreement* [D.I. 372].

VII. CONCLUSION

132. For the foregoing reasons, as well as those set forth in the Debtors' pretrial memorandum, the Debtors respectfully request that the Court enter an order confirming the Debtors' Plan.

Dated: October 16, 2015
Wilmington, Delaware

/s/ Robert S. Brady

YOUNG CONAWAY STARGATT & TAYLOR, LLP
Robert S. Brady (No. 2847)
Sean M. Beach (No. 4070)
Margaret Whiteman Greecher (No. 4652)
Patrick A. Jackson (No. 4976)
Ryan M. Bartley (No. 4985)
Rodney Square
1000 North King Street
Wilmington, Delaware 19801
Tel: (302) 571-6600
Fax: (302) 571-1253
Email: rbrady@ycst.com
sbeach@ycst.com
mgreecher@ycst.com
pjackson@ycst.com
rbartley@ycst.com

Counsel for the Debtors and Debtors in Possession