would require re-solicitation of the Committee Plan.

Of the provisions describing circumstances of default under the Credit Agreement, several describe the default that results from a transaction that precipitates a change of control. To avoid triggering the change of control provisions, section 6.01(j) of the Credit Agreement requires that Mr. Young, his immediate family members and certain persons controlled by Young (the "Affiliates" and together with Young and his immediate family members, the "Young group"), as well as members of management, have more than 40% of the Voting Stock by number of votes. Section 6.01(k)(i) of the Credit Agreement requires that if any person or group owns more than 30% of the total outstanding Voting Stock of the Debtors, then the Young group must own more than 30% or alternatively, the Young group must have the right or ability by voting power, contract, or otherwise to elect or designate for election a majority of the Debtors' board of directors. Section 6.01(k)(ii) requires that during any two-year period, those individuals who were directors at the beginning of such period constitute the majority of directors at the end of such period. To meet the "continuing" director requirement, it is sufficient if such director was elected (or was a shareholder-nominated director who was approved) by the majority of the directors or any earlier elected "continuing" director.

In the Credit Agreement, Voting Stock of a Person[16] is defined as the

16 Person is defined in the Credit Agreement as any individual, corporation, partnership, joint venture, association, joint-stock company, limited liability company, trust, unincorporated organization or government or any agency or political subdivision thereof. Credit Agreement § 1.01.

> Capital Stock[17] of such Person of the class or classes pursuant to which the *113 holders thereof have the general voting power under ordinary circumstances to elect the board of directors, managers or trustee of such Person (irrespective of whether or not at the time stock of any other class or classes shall have or might have voting power by reason of the happening of any contingency).

17 Capital Stock of any Person is defined as any and all shares, interests, rights to purchase, warrants, options, participations or other equivalents of or interests in (however designated) corporate stock or other equity participations, including partnership interests, whether general or limited, of such Person, including any preferred stock. Credit Agreement § 1.01.

Credit Agreement, § 1.01.

Under the Committee Plan, the board of directors is divided into two classes (A and B), and the Voting Stock to be issued is divided into two classes. There are a total of 5 million shares of New Common Stock in Class A and 500,000 shares of New Common Stock in Class B. The Class A stock represents 90% of the equity interests and the Class B stock represents 10% of the equity interests. Class A and Class B stockholders can vote for directors in both Class A and Class B in certain amounts. The Class A shareholders have a combined total of 105,000,000 director votes—with each of the 5 million shares entitled to 20 votes for Class A directors (100,000,000 votes) and 1 vote (5,000,000 votes) for class B directors. There are six Class A directors. There is only one Class B shareholder—Mr. Young, who can cast 500,500,000 director votes, as each of his 500,000 shares entitles him to 1000 votes (500,000,000 votes) for the Class B director and 1 vote (500,000 votes) for Class A directors.

The combined total of director votes for both Class A and B is 605,500,000 and Mr. Young can cast 500,500,000 of those votes. The Committee argues that this calculation gives Mr. Young over 82% of the vote, substantially in excess of the 40% required by the Credit Agreement. The Committee contends that the allocation of votes to Mr. Young technically complies with the requirement that he have at least 40% of the votes "by number of votes."

The Lenders argue that the change of control provisions in the Credit Agreement are intended to ensure that Mr. Young[18] maintain control of the Company. The Lenders contend that the Committee's manipulation of the votes allocated to the Voting Stock is an effort to circumvent the protections negotiated by the Lenders. The Lenders note that the Committee Plan clearly indicates that Mr. Young only has a 10% equity interest in the Company. Through the issuance of the Class B stock, owned exclusively by Mr. Young, he is allocated more than 40% of the "votes" for the directors. However, Mr. Young only has a nominal number of votes in connection with the election of the Class A directors and the overwhelming number of votes for the one Class B director. As such, Mr. Young cannot elect the 40% of the directors. Instead, he can only control the election of one of the seven directors, the one director-himself-elected as the Class B director.

18 Technically, under the terms of the Credit Agreement it is the Young group and members of management that should maintain control of the Company, however, because of that group only Mr. Young receives stock under the Committee Plan, that structure effectively would require Mr. Young to maintain that control.

The Lenders argue that the interpretation advanced by the Committee would eliminate the protections negotiated by the Lenders to ensure that Mr. Young exert control over the board of directors. The Lenders contend that an entity acquiring control of the Company could always manipulate the voting rights of shareholders ***114** to provide that certain shareholders had the requisite votes while actually exerting no control, thereby eliminating the protection intended by a change of control provision.

The Lenders also maintain that the allocation does not even technically comply with the requirements set forth in the Credit Agreement to avoid triggering a change of control because the Credit Agreement specifically defines Voting Stock as "Capital Stock ... of the class or classes pursuant to which the holders thereof have *the general voting power under ordinary circumstances* to elect the board of directors." (emphasis added). The Lenders argue that, pursuant to the Committee Plan, only Class A stock has general voting power that may be exercised under ordinary circumstances to elect the board of directors. The Lenders maintain that the capital stock granted to Mr. Young only grants him the right to elect himself as a member of the board of directors. Therefore, the Lenders contend that only the holders of Class A stock have the power to elect and control the board of directors. The Lenders note that "ordinary voting power" has been interpreted as the power to influence the composition of a board of directors. *See JPMorgan Chase Bank, N.A. v. Charter Commc'ns Operating, LLC (In re Charter Commc'ns),* 419 B.R. 221, 238, 248 (Bankr.S.D.N.Y.2009) (noting "that the ordinary voting power for the management of [a company] is exercised by means of shareholder votes for directors who in turn govern the management").

Each side cites to *Charter* to support their position. The Committee contends that it is sufficient if a plan allows for a "formalistic retention of control" notwithstanding a shift in the economic ownership. *Charter,* 419 B.R. at 248. The Lenders argue that, apart from the shift in economic ownership, the voting structure set forth in the Committee Plan does not allow for the Young group and members of management to retain the 40% control required by the Credit Agreement. The Lenders note that the structure set forth in the *Charter* plan complied with the specific terms of the credit agreement at issue there, which required that the relevant group retain the ability to control 35% of the board of directors. In *Charter,* because the structure set forth in the plan allowed the relevant group to elect 4 of the 11 directors, that group retained the power to elect over 36% of the directors and the condition requiring at least 35% control was met. *Id.* In the Committee Plan, by contrast, despite allocating all of the votes for the Class B shares to Mr. Young, he can only control the election of one director in Class B out of a total of seven directors in the combined Class A and B board of directors. Thus, for the combined board of directors, Mr. Young has less than 15% control while the terms of the Credit Agreement require that he, his family, the Affiliates, and the members of management retain 40%.

The Lenders also argue that the Committee Plan violates section 6.01(k)(i) of the Credit Agreement by ceding control of over 30% of the Voting Stock of the Company to a group other than the Young group. The Lenders note that, under the Committee Plan, the Backstop Parties will own more than 30% of the Voting Stock. Capital Research Group is an investment advisor that administers certain funds and together with those funds it constitutes a "group" under Section 13(d) of the Securities and Exchange Act of 1934, which is the relevant definition for group under the Credit Agreement. The Lenders contend that Capital Research funds will control approximately 80% of the Voting Stock. The Lenders argue that the Committee Plan will also replace the board of directors ***115** in violation of section 6.01(k)(ii) of the Credit Agreement as the Backstop Parties and the Committee would control the election of the board of directors.

In disputing that the Young group would cede control of the board of directors to another group, the Committee again premises its argument on its interpretation of how the votes are calculated by number. Therefore, the Committee contends that because Mr. Young will have over 80% of the Voting Stock by number of votes, no other group can have more than 30%. With respect to the Lenders' argument concerning the replacement of the existing directors, the Committee notes that the terms of the Credit Agreement recognize that directors elected or approved by the current board of directors qualify towards the count of continuing directors. The Committee maintains that the requirement of the Credit Agreement is met because, although the Backstop Parties and the Committee would designate most of the directors, the board of directors has the discretion to nominate the directors.

Pursuant to section 1124(2) of the Bankruptcy Code, even if a holder of a claim or interest is entitled to accelerated payments of its claim after the occurrence of a default, a plan of reorganization can provide (with certain exceptions) that the default be cured, 11 U.S.C. § 1124(2)(A), and for reinstatement of the pre-default maturity, 11 U.S.C. § 1124(2)(B). This is all subject to the plan not altering any legal, equitable, or contractual rights to which the claim or interest is entitled. 11 U.S.C. § 1124(2)(E).[19]

[19] Section 1124 of the Bankruptcy Code provides as follows:

Except as provided in section 1123(a)(4) of this title, a class of claims or interests, is impaired under a plan unless, with respect to each claim or interest of such class, the plan—

(1) leaves unaltered the legal, equitable, and contractual rights to which such claim or interest entitles the holder of such claim or interest; or

(2) notwithstanding any contractual provision or applicable law that entitles the holder of such claim or interest to demand or receive accelerated payment of such claim or interest after the occurrence of a default—

(A) cures any such default that occurred before or after the commencement of the case under this title, other than a default of a kind specified in section 365(b)(2) of this title or of a kind that section 365(b)(2) expressly does not require to be cured;

(B) reinstates the maturity of such claim or interest as such maturity existed before such default;

(C) compensates the holder of such claim or interest for any damages incurred as a result of any reasonable reliance by such holder on such contractual provision or such applicable law:

(D) if such claim or such interest arises from any failure to perform a nonmonetary obligation, other than a default arising from failure to operate a nonresidential real property lease subject to section 365(b)(1)(A), compensates the holder of such claim or such interest (other than the debtor or an insider) for any actual pecuniary loss incurred by such holder as a result of such failure; and

(E) does not otherwise alter the legal, equitable, or contractual rights to which such claim or interest entitles the holder of such claim or interest.

Therefore, if the Debtors seek to reinstate the maturity of the loan, the Committee Plan must cure any defaults. The Lenders argue that the new corporate governance provisions under the Committee Plan will result in a change of control that constitutes a default under the terms of the Credit Agreement that has not been cured, precluding the reinstatement of its loan.

[2] [3] [4] [5] [6] [7] Thus, it is necessary to analyze the change of control provisions of the ***116** Credit Agreement. Section 8.06 of the Credit Agreement provides that it is to be governed by, and construed, in accordance with the laws of the State of New York. Pursuant to New York law, in construing a contract, the plain meaning of the language controls. *City of Hartford v. Chase,* 942 F.2d 130, 134–35 (2d Cir.1991) (quoting *Berger v. Heckler,* 771 F.2d 1556, 1568 (2d Cir.1985)). When interpreting the contract, the court's role is to "give effect to the intent of the parties as revealed by the language they chose to use." *Seiden Assocs. Inc. v. ANC Holdings, Inc.,* 959 F.2d at 425, 428 (2d Cir.1992) (citing *Slatt v. Slatt,* 64 N.Y.2d 966, 488 N.Y.S.2d 645, 477 N.E.2d 1099 (1985)). The terms employed are given their ordinarily-attributed meanings unless that procedure would lead to an absurd result. *Mastrovincenzo v. City of New York,* 435 F.3d 78, 104 (2d Cir.2006) (citations omitted). Thus, "deference is to be paid to the plain meaning of the language ... and the normal usage of the terms selected." *City of Hartford,* 942 F.2d at 134 (omission in original) (quoting *Berger,* 771 F.2d at 1568). The Court's objective is to "give effect to the expressed intentions of the parties." *Hunt Ltd. v. Lifschultz Fast Freight, Inc.,* 889 F.2d 1274, 1277 (2d Cir.1989). In addition, there is a presumption that every clause was intended to have an effect. *City of Hartford,* 942 F.2d at 135.

[8] [9] [10] [11] [12] [13] Where the language has a "definite and precise meaning," which cannot be misconstrued, and where a reasonable person could only draw one conclusion as to its meaning, the contract is unambiguous. *Hunt,* 889 F.2d at 1277. Under New York law, whether the language employed in a contract is ambiguous is a question of law. *Seiden Assocs.,* 959 F.2d at 429. The court determines whether a contract is ambiguous by reference to the contract alone. *See Goodheart Clothing Co. v. Laura Goodman Enters.,* 962 F.2d 268, 272 (2d Cir.1992). If it is determined that the contract is unambiguous, its meaning is determined from the contract without resorting to any type of extrinsic evidence. *Goldman v. Comm'r of Internal Revenue,* 39 F.3d 402, 406 (2d Cir.1994) (citing *Goodheart,* 962 F.2d at 268); *see also Hunt,* 889 F.2d at 1277 (citations omitted). "Evidence outside the four corners of the document as to what was really intended but unstated or misstated is generally inadmissible to add to or vary the writing." *W.W.W. Assocs., Inc. v. Giancontieri,* 77 N.Y.2d 157, 162, 565 N.Y.S.2d 440, 443, 566 N.E.2d 639, 642 (1990). Extrinsic evidence is not admissible to create an ambiguity in a written

agreement that is complete and clear and unambiguous on its face. *W.W.W. Assocs.,* 77 N.Y.2d at 163, 565 N.Y.S.2d at 443, 566 N.E.2d at 642.

[14] [15] [16] In determining whether a contract is ambiguous, a court examines the entire contract and the circumstances surrounding its implementation, including the relationship of the parties. *Kass v. Kass,* 91 N.Y.2d 554, 566, 696 N.E.2d 174, 180–81(1998). Moreover, words are not viewed in isolation but in context. *Id.* Thus, the terms of the contract are considered in the context of the obligation as a whole and the intention of the parties as shown by the words selected. *Id.* A court must discern "a sensible meaning" for the words selected. *Id.* (quoting *Atwater & Co. v. Panama R.R. Co.,* 246 N.Y. 519, 524, 159 N.E. 418 (1927)).

[17] Therefore, although it has been observed that where a contract is unambiguous, a contract is formed, regardless of whether the parties had any "unexpressed intention," *Hunt,* 889 F.2d at 1277, nevertheless, "where the document makes clear the parties' over-all intention, courts examining isolated provisions should then choose that construction which will carry ***117** out the plain purpose and object of the [agreement]." *Kass,* 91 N.Y.2d at 567, 673 N.Y.S.2d 350, 696 N.E.2d at 181 (alteration in original) (citations and internal quotations omitted).

[18] [19] Where the language in the contract is plain, it does "not become ambiguous merely because the parties urge different interpretations." *Hunt,* 889 F.2d at 1277. If the parties do not agree on the interpretation of contract clauses, the court must decide if the contract clauses are ambiguous when analyzed in "the context of the entire integrated agreement and ... cognizant of the customs, practices, usages and terminology as generally understood in the particular trade or business." *JA Apparel Corp. v. Abboud,* 568 F.3d 390, 396–97 (2d Cir.2009) (citations and internal quotations omitted).

The Credit Agreement defines Voting Stock as "general voting power under ordinary circumstances to elect the board of directors...." As noted by the *Charter* court, "ordinary voting power for the management of [a company] is exercised by means of shareholder votes for directors who in turn govern the management." *Charter,* 419 B.R. at 238. As such, general voting power must involve the power to influence the composition of the board of directors. Thus, if section 6.01(j) of the Credit Agreement requires that the Young group, together with members of management have 40% of the Voting Stock, the plain meaning of the provision requires that this group have the power to influence 40% of the composition of the entire board. Under the proposed plan, Mr. Young only retains the power to control less than 15% of the entire board.

The Committee relies on *Charter* to argue that the voting can be manipulated to technically conform to the requirements of the agreement. However, in *Charter,* the credit agreement at issue required that the incumbent group have 35% of the voting power for the management of the relevant company in that case. In accordance with that contractual requirement, even after the "manipulation" of the voting stock, the group was entitled to appoint 4 of the 11 directors of its board and therefore retained more than 35% of the voting power for the management. Thus, the relevant Charter group retained the minimum amount of control to comply with the credit agreement. As previously noted, the Young group only retains the power to control less than 15% of the entire board.

Thus, the Charter case is distinguishable because that court was addressing the separation of economic interests from voting power. Although the relevant control person in *Charter* only retained 10% of the economic interest, he continued to exert the requisite 35% general voting power. In the instant matter, however, the proposed structure will utilize two classes to dilute the general voting power of the current control group.

The Committee asserts that the only general voting power that the Voting Stock must have is the "general voting power to elect the board of directors" and that the Young group has power to elect members of the board of directors. The Committee contends that the structure complies with the 40% requirement because the Young group has 40% of the votes to elect directors even though those votes only allow them to elect one director in class B. The Committee further asserts that there is no control requirement because where the election of a majority of the board of directors is required elsewhere in the Credit Agreement, the terms of the agreement expressly provide for it. The Committee also argues that the *Charter* case noted that a credit agreement should be construed narrowly to enable a borrower to ***118** engage in permissible corporate engineering.

The Lenders, however, are not arguing that the Young group should be empowered to control a majority of the board of directors. Rather, the Lenders maintain that, to comply with the Credit Agreement, the Young group and members of management have to control the election for 40% of the board of directors. Further, the Lenders argue that such an interpretation would accord with the purpose of the change of control provisions. According to the Lenders, those provisions are intended to protect the Lenders from a situation in which an outside party takes over the Company and holds the ability to dividend-out value from the Company and otherwise squeeze out value for the short term gain, leaving the Lenders with security worth less than the outstanding debt. The Lenders argue that the Committee Plan will allow such conduct because it does not bar the issuance of dividends. According to the Lenders, the Backstop Parties are financial institutions with a short-term investment plan.

[20] In interpreting the Credit Agreement, all of the provisions must be read as part of an integrated agreement and each clause must be intended to have some effect. In analyzing all of the change of control provisions, the Court finds that their purpose is to preclude another group from gaining more control than the Young group and current management. Section 6.01(j) requires that 40% of the voting power be retained by the Young group and management. Section 6.01(k)(i) of the Credit Agreement provides that if another group acquires more than 30% of the Voting Stock, then the Young group is required to own at least that percentage. In a public company, a block acquiring 30% of the voting power could influence management. Reading sections 6.01(j) and 6.01(k)(i) together, it is clear that the intent of the change of control provisions was to insure that no one person or group would have more control than the Young group and management. Thus, by allowing Mr. Young to control a large number of votes that have no power to influence the composition of the entire board of directors, the proposed structure would not accord with the purpose of precluding another group from gaining more control than the Young group. The purpose of section 6.01(j) of the Credit Agreement is to provide the Young group and members of management with power to influence the composition of the board of directors and the voting structure proposed by the Committee Plan would not accord with that purpose. By creating the different classes of directors and only allowing Mr. Young to elect one director of the total of 7–directors board, the Committee's interpretation undermines the intent of those two sections.

As the proposed corporate governance structure precludes compliance with section 6.01 of the Credit Agreement, which requires retention of 40% of the Voting Power by the Young group and management, the loan cannot be reinstated under that structure.[20] The Committee, however, has also proposed an alternate structure that it maintains complies with the Lenders' interpretation of the change of control provisions.

20 Inasmuch as the Court has determined that reinstatement of the loan is precluded because the Committee's main proposed board structure would violate section 6.01(j) of the Credit Agreement, the Court does not address the parties' dispute concerning the proper application of the two subsections of section 6.01(k).

The alternate board of directors structure proposed by the Committee provides for two classes of new common stock (A ***119** and B) but only one class of directors. The Class A New Common Stock still represents 90% of the equity of the Company and the Class B New Common Stock represents 10% of the equity of the Company. Mr. Young will hold all of the class B common stock. The new class A and Class B common stock would vote together as a single class in all matters (other than certain class specific matters), including the election of directors. The class A shares would have 60% (by number of votes) and the class B shares would have 40% (by number of votes).

There would be seven directors on the board of directors and Mr. Young would be one of the directors as the Company's Chief Executive Officer. All of the directors would be nominated by the existing board of directors. Five of the new directors on the board would be designated by the Backstop Parties holding a majority of the equity commitment, three of which would be independent. An additional independent board member would be approved by the Committee. The board will be staggered with three classes of directors. The first of which would include the CEO. Upon the Class B conversion described in the Plan or the expiration of the two year employment term set forth in Mr. Young's employment Agreement, whichever occurs later, at the director's option, Mr. Young would be required to resign. Thereafter, the first class would have a one-year term. The second class would include the Committee board nominee and have a two-year term. The third class would include the remaining board members and have a three year term. The Amended and Restate By-laws or Amended and Restated Certificate of Incorporation or any Stockholders' Agreement would provide that Permitted Holders (as defined in the Credit Agreement) would have the right or ability by voting power, contract, or otherwise to elect or designate for election a majority of the board of directors.

The Committee maintains that there would be no default of the change of control provisions of the Credit Agreement because Mr. Young would continue to hold record and beneficial title to at least 40% (by number of votes) of the Voting Stock. In addition, the Committee asserts that no person, other than Mr. Young, would beneficially own more than 30% (by number of votes) of the Voting Stock.

The Lenders contend that the disclosure statement did not provide sufficient information concerning the alternative board structure to determine whether it complies with the change of control provisions of the Credit Agreement. The Lenders also argue that even if the proposed structure does comply, it is a material change to the Committee Plan and would require re-solicitation.

Pursuant to section 1127(a) of the Bankruptcy Code, with certain limitations, a proponent of a plan may modify its plan prior to confirmation and such modified plan then becomes its proposed plan. However, the disclosure requirements of section 1125 must be met, 11 U.S.C. § 1127(c). Moreover, Federal Rule of Bankruptcy Procedure 3019 provides, in relevant part that in a chapter 11 case,

> after a plan has been accepted and before its confirmation, the proponent may file a modification of the plan. If the court finds after hearing ... that the proposed modification does not adversely change the treatment of the claim of any creditor or the interest of any equity security holder who has not accepted in writing the modification, it shall be deemed accepted by all creditors and equity security holders who have previously accepted the plan.

The Lenders argue that the proposed alternate structure would be a material ***120** change in the Committee Plan as it pertains to the Backstop Parties' control of the board.

The Committee argues that its proposal to implement the alternate plan structure complies with the disclosure requirements of 1125 of the Bankruptcy Code because it was described in a footnote in the Supplement to the Disclosure Statement. The Committee further argues that the proposal is not a modification to the proposed Committee Plan but that even if it is deemed a modification, it does not require re-solicitation under either Bankruptcy Code section 1125 or Federal Rule of Bankruptcy Procedure 3019 because it is a technical fix that does not alter any economic interest and, therefore, is not material or adverse to the Noteholder class, which was the only class that accepted the Committee's proposed Plan.

The description of the alternate board structure is contained in a footnote to the Supplemental Disclosure Statement, dated November 9, 2009. The information contained in that footnote is as follows:

> Alternatively, the board of directors of the Reorganized Company may consist of seven (7) board members (one of whom would be Vincent Young as the Reorganized Company's Chief Executive Officer). Five (5) members of the New Board shall be designated by the existing board, subject to the approval of the Backstop Parties. At least three of these board members would be independent, and one (1) member of the New Board would be independent and approved by the Creditors' Committee. The organizational documents will provide for a staggered board under § 141(d) of the Delaware General Corporation Law whereby there will be three classes of directors. The first class would include the Chief Executive Officer and have a one year term; the second class would include the Creditors' Committee board nominee and have a two year term; and the third class would include the five remaining board members and have a three year term.

This description does not provide sufficient information to determine if it complies with the change of control provisions of the Credit Agreement. For example, there is no indication whether the Young group and management get 40% of the Voting Stock or whether the Young group would have more than any other person or group that might acquire 30% of the Voting Stock. Nor does the Committee provide enough information concerning the proposed amendment to the By-laws and Certificate of Incorporation and requirement that any Stockholder's Agreements would provide that Permitted Holders (as defined in the Credit Agreement) would have the right or ability by voting power, contract, or otherwise to elect or designate for election a majority of the board of directors.

[21] The proposed modification is a modification to the corporate governance of the Company. Under the Committee Plan, in addition to the rights afforded to certain of the Noteholders to participate in the Rights Offering, the Noteholders will receive 10% of the Class A New Common Stock. Thus, all of the Noteholders will be stockholders and the provisions concerning corporate governance will impact the voting rights of the stock that they receive under the Committee's Plan. As such, it is a

material modification. *See In re Am. Solar King Corp.,* 90 B.R. 808, 824 (Bankr.W.D.Tex.1988) (noting that a plan modification is material if a creditor would be motivated to reconsider its prior acceptance if it knew of it, even if the creditor did not ultimately alter its acceptance). A material modification requires sufficient ***121** disclosure to comply with section 1125 of the Bankruptcy Code. Therefore, the material modification to the corporate governance requires re-solicitation. Moreover, the Committee has not indicated that the Noteholder class has accepted the modification to the plan in writing, as permitted by Federal Rule of Bankruptcy Procedure 3019.

Under other circumstances, the Court might have allowed the Committee to re-solicit and more fully describe the suggested alternative proposed board structure. In addition to providing the required disclosure, permitting the Committee to elaborate concerning the proposed structure would have provided a basis upon which to determine whether that structure complied with the change of control provisions. In the context of these cases, however, and for the reasons that will be discussed in this Opinion, the Court does not reach the issue of whether the Committee should be afforded an opportunity to re-solicit its plan.

Motion in Limine

The Court now turns to the admissibility of Kuhn's expert report and testimony regarding the Company's ability to sell or refinance in November 2012 and his expert report and testimony regarding the Debtors' valuation.

Legal Standard for Admissibility of Expert Testimony

The admissibility of expert testimony is analyzed under Rule 702, which as amended in 2000, provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.
>
> FED.R.EVID. 702.

[22] The proponent of the expert testimony at issue must establish its admissibility by a preponderance of evidence. *Daubert v. Merrell Dow Pharms., Inc.,* 509 U.S. 579, 592, n. 10, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993); *Lippe v. Bairnco, Corp.,* 288 B.R. 678, 685 (S.D.N.Y.2003). The Supreme Court stated that trial courts are to serve as gatekeepers, which "entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue." *Daubert,* 509 U.S. at 592–93, 113 S.Ct. 2786; *United States v. Williams,* 506 F.3d 151, 160–61 (2d Cir.2007). This "gatekeeping" obligation applies to scientific testimony as well as to "testimony based on 'technical' and 'other specialized knowledge.' " *Kumho Tire Co., Ltd. v. Carmichael,* 526 U.S. 137, 141, 119 S.Ct. 1167, 143 L.Ed.2d 238, (1999).

[23] As courts have explained, Rule 702 requires a court to make three determinations: (1) whether a witness is qualified as an expert to testify as to a particular matter; (2) whether that opinion is based upon reliable data and methodology; and (3) whether the expert's testimony is relevant. *See Nimely v. City of New York,* 414 F.3d 381, 396–97 (2d Cir.2005) (citation omitted); *Schneider v. Fried,* 320 F.3d 396, 404 (3d Cir.2003)("Rule 702 embodies a trilogy of restrictions on expert testimony: qualification, reliability, and fit." (citing *In re Paoli R.R. Yard PCB Litig. (Paoli, II),* 35 F.3d 717, 741–3 (3d Cir.1994), *cert. denied,* 513 U.S. 1190, 115 S.Ct. 1253, 131 L.Ed.2d 134 (1995))).

122 *Qualification Standards

[24] First, the witness proffered to testify as to specialized knowledge must be qualified as an expert. *See Zaremba v. General Motors Corp.,* 360 F.3d 355, 360 (2d Cir.2004)(noting that, where the witness lacked qualification, an analysis of the remaining *Daubert* factors "seems almost superfluous"). Courts have liberally construed this requirement, holding that an expert's qualification can be based on a broad range of knowledge, skill, experience, training, or education. *See United States*

v. Brown, 776 F.2d 397, 400 (2d Cir.1985) (qualification requirements of Rule 702 "must be read in light of the liberalizing purpose of the Rule"); *In re Paoli R. Yard PCB Litig. (Paoli I),* 916 F.2d 829, 855 (3d Cir.1990)("[V]arious kinds of 'knowledge, skill, experience, training, or education' qualify an expert as such." (quoting FED.R.EVID. 702)); *In re Fosamax,* 645 F.Supp.2d 164, 173 (S.D.N.Y.2009); *TC Systems, Inc. v. Town of Colonie, N.Y.,* 213 F.Supp.2d 171, 174 (N.D.N.Y.2002);

These bases for qualification are disjunctive such that practical experience may be crucial for one type of expert opinion while academic training may be essential for another. *See e.g., Friendship Heights Assocs. v. Vlastimil Koubek, A.I.A.,* 785 F.2d 1154, 1159–60 (4th Cir.1986) (an expert was not unqualified merely because she lacked practical experience where she was qualified on the basis of her education); *Berry v. City of Detroit,* 25 F.3d 1342, 1349–52 (6th Cir.1994) (noting that an expert could testify to the principles on the basis of either formal training or experience alone, but rejecting the testimony of the instant witness for lacking both). Further, it is not required that an expert cite to publications that support his/her expert opinion. *Heller v. Shaw Indus.,* 167 F.3d 146, 155 (3d Cir.1999) (finding no requirement "that a medical expert must always cite published studies on general causation in order to reliably conclude that a particular object caused a particular illness").

[25] Essentially, a court is to consider the totality of a witness's qualifications in its analysis. *See Atl. Specialty Ins. Co. v. Gold Coast Devs., Inc.,* No. 05–CV–4863, 2008 WL 974411, at *6, 2008 U.S. Dist. LEXIS 28744 (E.D.N.Y. Apr. 8, 2008).

[26] Disputes regarding matters such as an expert's credentials go to the weight, not admissibility, of an expert's testimony. *McCullock v. H.B. Fuller Co.,* 61 F.3d 1038, 1043 (2d Cir.1995); *SR Int'l Bus. Ins. Co. v. World Trade Ctr. Props., LLC,* 467 F.3d 107, 134 ("To the extent that there are gaps or inconsistencies in [the expert]'s testimony, those issues 'go to the weight of the evidence, not to its admissibility.' " (quoting *Campbell v. Metro. Prop. & Cas. Ins. Co.,* 239 F.3d, 179, 186 (2d Cir.2001))).

Kuhn's Qualifications

[27] The Lenders argue that Kuhn is not qualified because, *inter alia,* he has no M.B.A. or business education credentials, he is not an economist, he has no commercial banking experience, and he has published no articles on the subject matter of his expert testimony.

The Court finds that Kuhn is qualified to testify as an expert under the *Daubert* standard; his background and practical experience in media-related transactions and the broadcast television industry qualify as expertise through "experience, training, or education" under Rule 702. Specifically, Kuhn has been a Managing Director at A & C for the last nine year, advising media/entertainment clients in mergers and acquisitions, financings, asset sales, and restructurings[21] (Kuhn Decl. ¶¶ 2–3; ***123** Kuhn Dep. at 22). Prior to his employment at A & C, Kuhn was a Senior Vice President and General Counsel of USA Networks, Inc., where he worked on that company's financings, mergers and acquisitions, and general legal issues[22] (Kuhn Decl. ¶ 4). As a result of his experience at USA Networks, through actively participating in various aspects of the company's business, such as the budgeting and planning process (1/19/10 Hrg. Trans. at 230–31), Kuhn believes he has gained significance expertise in the economics and operations of television stations in general (Kuhn Dep. at 24).

21 During his tenure at Allen & Company, Kuhn advised approximately 28 transactions, 18 of which were in the media and communications industry (Kuhn Decl. ¶ 3; Kuhn Dep. 22–23).

22 During Kuhn's tenure at USA Networks, the company owned and operated 12 stations similar to the stations operated by the Debtors (JX–5 at 34).

The fact that Kuhn does not have an M.B.A. or related business credentials does not necessarily exclude him as an expert. Courts have held that academic training is not necessary if an expert's practical experience is sufficient to qualify him. *See Friendship Heights Assocs.,* 785 F.2d at 1159–60; *Berry,* 25 F.3d 1342. In any event, with respect to opinions regarding financing and acquisitions of media companies, practical experience is likely more relevant than an academic degree in business and finance. Similarly, the fact that Kuhn has not published articles on the subject matter of which he is proffered to testify is also insufficient as grounds to exclude him as an expert in light of his professional expertise due to his work in numerous financings, restructurings, and mergers and acquisition transactions.

Further, although Kuhn was never a commercial banker who made lending decisions, he has had significant experience on the borrower side, as an advisor for substantial borrowers (1/19/10 Hrg. Trans. at 222), which left him with experience and knowledge of issues relating to media financing deals. To the extent that the Lenders challenge Kuhn's conclusions because he lacks experience as a commercial lender, such challenges were addressed on cross-examination and affect the weight, rather than the admissibility, of his testimony.

Upon considering the totality of Kuhn's background and qualifications in the context of the underlying goals and requirements of Rule 702, the Court finds that Kuhn qualifies as an expert in this case.

Reliability Standard

[28] In addition to establishing the qualification of a proffered expert witness, the Committee must also prove, by a preponderance of evidence, that the proffered expert testimony is both relevant and reliable.[23] *Kumho Tire Co. v. Carmichael,* 526 U.S. 137, 141, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999); *Daubert,* 509 U.S. 579, 597, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993) (citing *Bourjaily v. United States,* 483 U.S. 171, 175–76, 107 S.Ct. 2775, 97 L.Ed.2d 144 (1987)). In *Daubert,* the Supreme Court abandoned the bright-line rule articulated in *Frye v. United States*[24] and replaced it ***124** with a standard that it deemed was more consistent with the liberal thrust of the Federal Rules. *See Daubert,* 509 U.S. at 588, 113 S.Ct. 2786; *see also Zuchowicz v. United States,* 140 F.3d 381, 386 n. 5 (2d Cir.1998) (discussing the Supreme Court's rejection of the *Frye* standard). In evaluating the reliability of an expert testimony, the Supreme Court has provided a list of nondispositive and non-exclusive factors for trial judges to consider. Among others, trial courts may consider: (1) whether a theory or method can be, and has been tested; (2) whether the theory or method has been subjected to peer review and publication; (3) a method's known or potential rate of error and the existence of standards controlling the method's operation; and (4) whether a particular theory or method has gained general acceptance in the relevant scientific or professional community.[25] *Daubert,* 509 U.S. at 593, 113 S.Ct. 2786; *Kumho Tire,* 526 U.S. at 151, 119 S.Ct. 1167; *Lippe,* 288 B.R. at 687–688; *In re Med Diversified Inc.,* 334 B.R. at 95 (citing *Daubert,* 509 U.S. at 593–94, 113 S.Ct. 2786; *Kumho Tire,* 526 U.S. at 149, 119 S.Ct. 1167).

23 "Rule 702[ ] requires that the evidence or testimony 'assist the trier of fact to understand the evidence or to determine a fact in issue.' " *Daubert,* 509 U.S. 579 at 591, 113 S.Ct. 2786. The Lenders do not object to the admissibility of Kuhn's testimony on the ground that it is irrelevant. Rather, the entire focus of their objection here is to reliability of the expert opinion. Therefore, the Court limits its analysis to the reliability factor under Rule 702.

24 *Frye v. United States,* 293 F. 1013 (D.C.Cir.1923), predates Rule 702 and stands for the proposition that expert opinions based on a scientific technique is inadmissible unless the technique is "generally accepted" as reliable in the relevant scientific community. *Daubert v. Merrell Dow Pharms., Inc.,* 951 F.2d at 1128, 1129–30 (1991), *vacated,* 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). The *Frye* court further stated that expert opinion based on methodology that "diverge[s] significantly from the procedures accepted by recognized authorities in the field cannot be shown to be 'generally accepted as a reliable technique.' " *Daubert,* 951 F.2d at 1130 (quoting *United States v. Solomon,* 753 F.2d at 1522, 1526 (9th Cir.1985)).

25 In *United States v. Downing,* 753 F.2d 1224 (3d Cir.1985), the Third Circuit delineated additional factors that courts may consider with respect to the reliability of an expert testimony; these factors are, "[1] the degree to which the expert testifying is qualified, [2] the relationship of a technique to 'more established modes of scientific analysis,' and [3] the 'non-judicial uses to which the scientific technique are put.' " *Paoli II,* 35 F.3d at 742 (citing *Downing,* 753 F.2d at 1238–39).

These factors are not meant to be a definitive checklist as the reliability inquiry under Rule 702 is a flexible one. *Nimely v. City of New York,* 414 F.3d 381, 397 (2d Cir.2005); *Amorgianos v. Nat'l R.R. Passenger Corp.,* 303 F.3d 256, 266 (2d Cir.2002)("[T]he *Daubert* inquiry is fluid and will necessarily vary from case to case.").[26]

26 Depending on the facts of each case, the *Daubert* factors may or may not be pertinent in evaluating the reliability of an expert's

testimony. *See Kumho Tire,* 526 U.S. at 150, 119 S.Ct. 1167.

[29] [30] As a general matter, the standard for determining reliability of an expert testimony is not high: "The test of admissibility is not whether a particular scientific opinion has the best foundation, or even whether the opinion is supported by the best methodology or unassailable research. Rather the test is whether the 'particular opinion is based on valid reasoning and reliable methodology.' " *In re TMI Litigation,* 193 F.3d 613, 665 (3d Cir.1999), *amended on other grounds,* 199 F.3d 158 (2000), *cert. denied,* 530 U.S. 1225, 120 S.Ct. 2238, 147 L.Ed.2d 266 (2000) (quoting *Kannankeril v. Terminix Int'l Inc.,* 128 F.3d 802, 806 (3d Cir.1997)). In its analysis, a court "must focus on the principles and methodology employed by the expert, without regard to the conclusions the expert has reached or the [court]'s belief as to the correctness of those conclusions." *Amorgianos,* 303 F.3d at 266 (citing *Daubert,* 509 U.S. at 595, 113 S.Ct. 2786).

[31] [32] [33] [34] [35] On the other hand, expert testimony should be excluded if it is speculative or conjectural. *Boucher v. U.S. Suzuki Motor Corp.,* 73 F.3d 18, 21 (2d Cir.1996) (citing *In re Air Disaster at Lockerbie* ***125** *Scotland,* 37 F.3d 804, 824 (2d Cir.1994), *cert. denied,* 513 U.S. 1126, 115 S.Ct. 934, 130 L.Ed.2d 880 (1995)); *see also Gumbs v. Int'l Harvester, Inc.,* 718 F.2d 88, 98 (3d Cir.1983) (expert testimony based on speculative assumptions should not be admitted). Likewise, assumptions that are " 'so unrealistic and contradictory as to suggest bad faith' or to be in essence an 'apples to oranges comparison' " should also be excluded. *Boucher,* 73 F.3d at 21 (quoting *Shatkin v. McDonnell Douglas Corp.,* 727 F.2d 202, 208 (2d Cir.1984)). "Nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that connected to existing data only by the *ipse dixit* of the expert. A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered." *General Electric Co. v. Joiner,* 522 U.S. 136, 146, 118 S.Ct. 512, 139 L.Ed.2d 508 (1997); *see Heller,* 167 F.3d at 163 (3d Cir.1999) ("[A] district court must examine the expert's conclusions in order to determine whether they could reliably follow from the facts known to the expert and the methodology used."). Critically, *Daubert* requires that an expert illustrate the reliability of his methodology and analysis at every step. *Paoli II,* 35 F.3d at 745 ("[A]ny step that renders the analysis unreliable under the *Daubert* factors renders the expert's testimony inadmissible."). In sum, the court's task "is to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." *Lippe,* 288 B.R. at 686 (quoting *Kumho Tire,* 526 U.S. at 152, 119 S.Ct. 1167).

Kuhn's Testimony Regarding Sale and Refinancing

[36] The Lenders argue that Kuhn's report and testimony regarding the Company's ability to consummate a sale or refinance must be excluded under *Daubert* because his opinion is "pure speculation" and assumes improvement of the credit market and overall economic environment.

Contrary to the Lenders' assertion that Kuhn relied on a layperson's pure speculation when making his financing opinion, Kuhn reviewed and analyzed industry data, applied them to the Debtors' circumstances, and arrived at a conclusion based on his background and experience in media transactions. In arriving at the conclusion about a sale in November 2012, Kuhn selected an exit multiple range in broadcast cash flow ("BCF") based on his analysis of historical precedent transactions and current public comparable companies (JX–5 at 13, 38–40). With respect to the likelihood of refinancing, Kuhn considered the leverage ratios of recent broadcast transactions (JX–5 at 14). Significantly, even though the two arrived at different conclusions on the same issue, the data that Kuhn considered are not dissimilar to those considered by Peter Cohen ("Cohen"), the expert retained by the Lenders, in forming his expert opinion.

Further, although Kuhn does assume an improvement of the economy, contrary to the Lenders' contention, this assumption is not the sole basis of Kuhn's opinion regarding a potential sale and refinance transaction. Without ruling on the propriety of this assumption, the Court does not find so wide of an "analytical gap between the data and the opinion proffered" to exclude Kuhn's opinion on this issue. Since exclusion of expert testimony is the exception rather than the rule, the Court finds that any weakness in this analysis goes to the weight rather than the admissibility of his opinion. Exclusion at this point would be an unwarranted expansion of the Court's "gatekeeper" function since ***126** the reasonableness of assumptions made by experts can be tested through rigorous cross-examination and rebutted by contrary evidence at trial.

Therefore, the Court finds that Kuhn's proffered testimony regarding a sale or a refinance transaction in 2012 is admissible as it contains sufficient indicia of reliability and satisfies the *Daubert* standard.

Kuhn's Testimony Regarding Valuation

[37] The Lenders assert that Kuhn's testimony regarding valuation of the Debtors is inadmissible because Kuhn's levered discount cash flow (the "Levered DCF") analysis is not a reliable method for purposes of valuation. It is undisputed that many courts have found discount cash flow ("DCF") to be the most commonly-used and accepted method of valuing an enterprise. *Steiner Corp. v. Benninghoff,* 5 F.Supp.2d 1117, 1129 (D.Nev.1998) (DCF is "in theory the single best technique to estimate the value of an economic asset") (quoting *Cede & Co. v. Technicolor, Inc.,* Civ. A. No. 7129, 1990 WL 161084, *7, 1990 Del. Ch. LEXIS 259 (Del. Ch.1990), *aff'd in part, rev'd in part on other grounds,* 634 A.2d 345 (Del.1993)); *see Lippe,* 288 B.R. at 689; *In re Exide Techs.,* 303 B.R. 48, 63–65 (Bankr.D.Del.2003); *In re Zenith Elecs. Corp.,* 241 B.R. 92, 103–05 (Bankr.D.Del.1999); *In re Cellular Info. Sys. Inc.,* 171 B.R. 926, 930–37 (Bankr.S.D.N.Y.1994). In fact, although Kuhn performed both comparable company analysis and precedent transaction analysis, he attributed little weight to those two methods and relied primarily on the Levered DCF analysis to determine a range of valuations for the Debtors.

The Lenders argue that Kuhn misleadingly labeled his analysis a Levered DCF without having undertaken the necessary steps in a DCF analysis, which renders his valuation opinion unreliable and inadmissible. The Committee, on the other hand, contends that Kuhn utilized a method that is a reliable variation of the DCF analysis and simply made adjustments to fit the Debtors' circumstances. The question before the Court is twofold: (1) whether Kuhn conducted an acceptable variant of DCF analysis, and hence a DCF analysis, and (2) if Kuhn did not conduct a DCF analysis, whether the Levered DCF is a reliable method under the *Daubert* standard.

A DCF analysis arrives at a value, or a range of values, for a company by performing the following steps: (1) determine the projected distributable cash flow of a company within a forecast period of time; (2) determine the company's terminal value by the end of a forecast period, by applying a selected metric of value, which is usually a company's EBITDA, to an appropriate multiple; (3) determine the present value of both free cash flow and terminal value of the company by applying an appropriate discount rate; (4) calculate the sum of the present value of cash flow and present value of terminal value, which represents the total enterprise value of the company. *See In re Exide Techs.,* 303 B.R. at 63; *Steiner Corp.* 5 F.Supp.2d at 1130; *In re Nellson Nutraceutical, Inc.,* 356 B.R. 364, 367 (Bankr.D.Del.2006).

Kuhn, on the other hand, performed the following steps in his analysis: (1) determined zero projected distributable cash flow because the Committee assumes all cash will be accumulated to pay off the Debt upon maturity in November 2012; (2) determined the approximate value of equity in 2012 and assumed a sale of the Company at that value; (3) subtracts net debt and preferred stock outstanding from the projected sale value and labeled it "terminal value;" and (4) applied a discount rate, that accounts for only the cost of ***127** equity, to determine the present value of the common equity.[27]

27 The discount rate is the cost of capital, which consists of calculating the company's cost of equity, cost of debt, and determine the weighted average of the costs of equity and debt, according to the company's capital structure or ratio of debt to equity. *See Steiner Corp.,* 5 F.Supp.2d at 1133.

The Court finds that, although Kuhn uses DCF terminologies, there are practically no substantive similarities between the generally accepted DCF method and the Levered DCF method. Kuhn has made multiple novel assumptions that do not exist in the DCF analysis, such as an assumed sale of the company and a discount rate that accounts for the cost of equity instead of both the cost of debt and equity.[28] Kuhn's analysis altered another key component of the DCF method, which is the way a company's terminal value should be calculated. By assuming a sale in 2012, Kuhn completely failed to calculate the terminal value of the Company by applying appropriate metrics to multiples. It is a court's duty, as the gatekeeper, to ensure that an expert establishes the reliability of his methodology at every step. In light of the significant missteps and speculative assumptions in Kuhn's novel valuation approach, the Court finds that he did not conduct an appropriate DCF analysis.

28 The Committee argues that the weighted cost of debt is zero in the Levered DCF analysis because Kuhn had already accounted the cost of debt in the capital structure when determining the value of common equity in 2012. However, Kuhn failed to explain how he derived a discount rate range of 200% in his expert report. More importantly, the assumption he made is yet another example of Kuhn's impermissible modification of the generally accepted DCF method.

The inquiry does not end here, however, because Kuhn's valuation analysis may still be admissible if the Court determines that the Levered DCF contains sufficient indicia of reliability under *Daubert.* It does not. The Levered DCF fails to meet any of the *Daubert* factors: it is not a method that has been tested or relied upon by other experts, it had never been subjected to peer review or discussed in any publication, the potential rate of error is unknown, and there is no evidence that this method was ever employed, discussed, and certainly not generally accepted in any academic or professional community.

The Committee attempts to distinguish the facts of this case by contending that, unlike experts who could not offer any explanation as to why they failed to utilized the DCF method,[29] Kuhn clearly stated that the Levered DCF is more appropriate to the facts of this case because it accounts for the value of the substantially below-market terms of the reinstated debt under the Committee Plan. Kuhn's explanation on the issue does not give him free rein to employ a brand new valuation method that he conceded has never been used by any valuation expert in court. In evaluating the reliability of an expert testimony, trial courts must focus on the methodology rather than the ultimate conclusions derived from the method. Methodologies that cannot be evaluated warrant exclusion. *24/7 Records, Inc. v. Sony Music Entm't, Inc.,* 514 F.Supp.2d 571, 575 (S.D.N.Y.2007) (excluding testimony when expert witness based calculations on "intrinsic value" without justifying how that value had been translated into dollars, a methodology the court found could not be evaluated). Here, Kuhn's application ***128** of facts to an untested method does not reflect the prerequisite level of "intellectual rigor that characterizes the practice of an expert" in the field of media valuation. *Lippe,* 288 B.R. at 686. Conclusions derived from the Levered DCF, therefore, are not products of reliable principles and methodologies, and the Court cannot simply rely on Kuhn's *ipse dixit* assertions about the reliability of such an analysis. Thus, the portion of Kuhn's expert report and testimony regarding valuation is inadmissible under Rule 702.

[29] *Chartwell Litig.,* 334 B.R. at 99 (the expert never determined that the DCF method was inappropriate as a valuation method and failed to explain why he did not use it in his valuation analysis); *Lippe,* 288 B.R. at 695–97 (expert could not explain his failure to conduct a DCF analysis or why he chose certain multiples).

For the foregoing reasons, the Daubert Motion is granted, in part, and denied, in part.

Feasibility of the Committee Plan

[38] In considering confirmation of a plan of reorganization, a court has an affirmative obligation to scrutinize the plan and determine whether it is feasible. *See In re Johns–Manville Corp.,* 68 B.R. 618, 635 (Bankr.S.D.N.Y.1986), *aff'd,* 78 B.R. 407 (S.D.N.Y.1987), *aff'd sub nom, Kane v. Johns–Manville Corp.,* 843 F.2d 636 (2d Cir.1988); *In re Lakeside Global II, Ltd.,* 116 B.R. 499, 506 (Bankr.S.D.Tex.1989); *In re Landmark at Plaza Park, Ltd.,* 7 B.R. 653, 659 (Bankr.D.N.J.1980).

Confirmation under section 1129(a)(11) requires that:

> Confirmation of the plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor or any successor to the debtor under the plan, unless such liquidation or reorganization is proposed in the plan.

11 U.S.C. § 1129(a)(11).

[39] The proponent of a proposed plan bears the burden of proving essential elements of confirmation by a preponderance of the evidence. *Heartland Fed. Sav. & Loan Ass'n v. Briscoe Enters. Ltd., II (In re Briscoe Enters., Ltd., II),* 994 F.2d 1160 (5th Cir.1993), *cert. denied,* 510 U.S. 992, 114 S.Ct. 550, 126 L.Ed.2d 451 (1993); *see also In re Danny Thomas Props. II Ltd. P'ship,* 241 F.3d 959, 963 (8th Cir.2001).

[40] [41] The feasibility standard as set forth in section 1129(a)(11) requires a court to determine whether "a plan is workable and has a reasonable likelihood of success." *In re WorldCom, Inc.,* No. 02–13533, 2003 Bankr.LEXIS 1401, at *168 (Bankr.S.D.N.Y.2003); *In re The Leslie Fay Cos.,* 207 B.R. 764, 788 (Bankr.S.D.N.Y.1997); *see also Johns–Manville,* 843 F.2d at 649 ("[T]he feasibility standard is whether the plan offers a reasonable assurance of success."); *In re Waern Bldg. Corp.,* 145 F.2d 584, 588 (7th Cir.1944) ("[T]he word feasible does not connote absolute insurance of success but only

reasonable assurance of success."); *In re Woodmere Investors, L.P.*, 178 B.R. 346, 361 (Bankr.S.D.N.Y.1995); *In re 8315 Fourth Ave. Corp.*, 172 B.R. 725, 734 (Bankr.E.D.N.Y.1994); *In re Whittaker Mem'l Hosp. Ass'n, Inc.*, 149 B.R. 812, 816 (Bankr.E.D.Va.1993) ("It is not a blanket guarantee which is required, but rather a reasonable likelihood of success."). As the Second Circuit explained, the key inquiry is whether, as a practical matter, provisions specified in the proposed plan of reorganization can be done post confirmation. *In re Bergman*, 585 F.2d 1171, 1179 (2d Cir.1978); *In re Greene*, 57 B.R. 272, 277–78 (Bankr.S.D.N.Y.1986).

[42] [43] The purpose of the feasibility test is " 'to prevent confirmation of visionary schemes which promise creditors and equity holders more under a proposed plan than the debtor can possibly attain after confirmation.... [W]here the financial realities do not support the proposed plan's projections or where proposed assumptions are unreasonable, confirmation of the plan should be denied." *In re Investors* ***129** *Fla. Aggressive Growth Fund, Ltd.*, 168 B.R. 760, 765 (Bankr.N.D.Fla.1994) (quoting *In re Lakeside Global II, Ltd.*, 116 B.R. 499, 507 (Bankr.S.D.Tex.1989)); *see In re Prudential Energy Co.*, 58 B.R. 857, 862 (Bankr.S.D.N.Y.1986) (a plan based on impractical or visionary expectations cannot be confirmed); *Stapleton v. Archer Daniels Midland Co. (In re Stapleton)*, 55 B.R. 716, 721 (S.D.Ga.1985).

[44] [45] Courts have found that "the feasibility test is firmly rooted in predictions based on objective fact." *In re Clarkson*, 767 F.2d 417, 420 (8th Cir.1985). While future projections are indicative of feasibility of a proposed plan, such projections must not be speculative, conjectural, or unrealistic. *In re Inv. Co. of the Sw., Inc.*, 341 B.R. 298, 311 (10th Cir.BAP2006) (citing *In re Trevarrow Lanes, Inc.*, 183 B.R. 475, 482 (Bankr.E.D.Mich.1995)). For instance, "[a] glaring discrepancy between the facts surrounding past performance and activity and predictions for the future is strong evidence that a debtor's projections are flawed and the plan is not feasible." *Trevarrow Lanes*, 183 B.R. at 482.

[46] [47] On the other hand, just as speculative prospects of success cannot sustain feasibility, the mere prospect of financial uncertainty cannot defeat feasibility. *See In re U.S. Truck Co.*, 47 B.R. 932, 944 (E.D.Mich.1985). Success need not be guaranteed, so long as the plan has a "reasonable likelihood of success." *In re Adelphia Bus. Solutions, Inc.*, 341 B.R. 415, 421–22 (Bankr.S.D.N.Y.2003) (citing *Johns–Manville*, 843 F.2d at 650 (the feasibility standard is whether a plan of reorganization offers a reasonable assurance of success); *In re Texaco Inc.*, 84 B.R. 893, 910 (Bankr.S.D.N.Y.1988) (only a reasonable assurance of commercial viability is required); *Prudential*, 58 B.R. at 862 ("Guaranteed success in the stiff winds of commerce without the protection of the Code is not the standard under § 1129(a)(11)."); *In re Briscoe Enters., Ltd. II*, 994 F.2d 1160, 1166 (5th Cir.1993) ("Only a reasonable assurance of commercial viability is required.") (quoting *In re Lakeside Global II*, 116 B.R. at 507)).

[48] In assessing the feasibility of a proposed plan, courts have identified the following probative factors:

1. the adequacy of the capital structure;

2. the earning power of the business;

3. economic conditions;

4. the ability of management;

5. the probability of the continuation of the same management; and
6. any other related matters which will determine the prospects of a sufficiently successful operation to enable performance of the provisions of the plan.[30]

30 *In re Drexel Burnham Lambert Group, Inc.*, 138 B.R. 723, at 762–63 (Bankr.S.D.N.Y.1992) (citing, *In re Toy & Sports Warehouse, Inc.*, 37 B.R. 141, 151 (Bankr.S.D.N.Y.1984); *Prudential*, 58 B.R. at 862–63); *see also In re Clarkson*, 767 F.2d at 420; *Leslie Fay*, 207 B.R. at 789; *In re Sound Radio, Inc.*, 93 B.R. 849, 856 (Bankr.D.N.J.1988), *aff'd in part*, 103 B.R. 521 (D.N.J.1989), *aff'd*, 908 F.2d 964 (3d Cir.1990); *In re Adamson Co.*, 42 B.R. 169, 174 (Bankr.E.D.Va.1984).

[49] However, the foregoing factors are neither exhaustive nor exclusive[31] as the analysis is fact intensive and merits a case by case analysis. *In re Eddington Thread Mfg. Co.*, 181 B.R. 826, 833 (Bankr.E.D.Pa.1995).

31 *Drexel*, 138 B.R. at 763 *Cf. In re U.S. Truck Co.*, 800 F.2d 581, 589 (6th Cir.1986).

[50] The key issue in determining feasibility of the Committee Plan is whether it *130 is reasonably probable that the Debtors will be able to pay the Debt when it matures in November 2012, either through (1) a sale of the Company, or (2) refinancing of the Debt.

Tom Kuhn's Expert Opinion

In support of the feasibility of the Committee Plan, Kuhn of A & C was retained to perform extensive analysis of the Debtors' business and financial projections to determine: (1) adequacy of the capital structure of the Company;[32] (2) recovery analysis for the Debtors' creditors; and (3) potential valuation of the Company upon a sale or refinancing (JX–5 at 3). A & C performed the foregoing analysis based on projections[33] (the "Projections") prepared and provided by the Debtors (the "Base Case") and a more conservative scenario for projections (the "Stress Case")[34] that it created.

32 In evaluating the adequacy of the Company's capital structure, Kuhn examined the Company's working capital, prospective availability of credit, its ability to meet debt service, and Capex (defined herein) requirements.

33 A & C made the following adjustments to the Projections: assuming an effective date of February 28, 2010 (one month later than assumed in the Projections); investment of $45.6 million in new preferred equity with a 15% PIK coupon; reinstatement of $337 million existing debt based on the terms of the Credit Agreement excluding $2.2 million of annual management fees paid to Gray Consulting under the Debtors Plan and including $1.6 million of deferred compensation paid to senior management in 2010 (Kuhn Decl. at 8).

34 The Stress Case assumes no growth in advertising revenue until 2011, except cyclical political advertising revenue, and lower base revenue in each subsequent year. It also assumes an additional $2 million in annual operating expenses (*Id.*).

Kuhn concludes that, under the Committee Plan, the Company will have sufficient financial resources to cover its Capital Expenditure ("Capex") requirements, service financial obligations, and pay the balance due when the Debt matures in November 2012. Kuhn formed his opinion based on analysis under three methodologies: (1) comparable company analysis; (2) precedent transaction analysis; and (3) Levered DCF (*Id.* at 22). He stated he primarily relied on the Levered DCF when forming his expert opinion.[35]

35 A & C did not attribute significant weight to the Comparable Company Analysis because it asserts that (1) the television broadcasting sector has been highly volatile over the past year and using a valuation range based on a specific point in time is not meaningful; (2) the comparable companies are highly levered such that implied trading values may reflect assumptions regarding the leverage in their capital structure as opposed to the underlying business fundamentals; and (3) unlike other industries, trading multiples in the broadcasting sector have historically been lower in a period of reduced cash flow, which could result in disproportionately depressed valuation in the current economy (*Id.* at 23). Similarly, A & C did not attribute significant weight to its Precedent Transactions Analysis because it asserts that (1) nearly all transactions occurred during or before 2007, where the economic environment was significantly different from the current economic environment, and (2) financing has become more difficult to arrange since mid–2008, resulting in less capital available in today's market (*Id.* at 25).

For purposes of valuation, Kuhn testified that he did not determine the total enterprise value ("TEV") of the Debtors upon emergence from Chapter 11 because he did not consider it relevant to the issue of the Company's ability to service the Debt through a sale or refinancing in November 2012 (1/20 Hrg. Trans. at 14–15). Instead, Kuhn relied primarily on the Levered DCF method in determining the Company's value to equity in 2012. First, based on historical precedent transactions *131 that ranged from 8.1x—16.1x projected Broadcast Cash Flow ("BCF") and current public comparable companies trading at 6.4x—8.8x average 2009/2010 BCF, not including a control premium which would be expected in a sale transaction, Kuhn selected an exit multiple range of 7x—11x BCF for a sale of the Company in November of 2012 (JX–5 at 13). Given this selected range, the implied enterprise value (or value to equity) of the Company is $401.1—$597.3 million under the Base

Case (*Id.* at 13) and $353.7—$522.7 million under the Stress Case (*Id.* at 17). Kuhn opines that, under both the Base Case and the Stress Case, the sale of the Company in 2012 would not result in a value lower than the net debt outstanding at that time (*Id.* at 13, 17). Significantly, Kuhn assumes the existence of at least one third-party purchaser in November 2012 and further assumes that a third-party purchaser will offer to buy the Company at a price that reflects what he opines as the implied enterprise value of the Company in November 2012.[36]

36 To determine the implied present value of the Debtors based on a presumed sale in November 2012, A & C applied a discount rate range of 20%–30% to the equity value of the Debtors upon sale (JX–5 at 28).

Kuhn further opines that, in the event that the Company chooses not to sell, it will still be well-positioned to obtain refinancing in November 2012 because the net debt balance implies a debt to 2012/2013 EBITDA ratio of 5.4x and 6.9x under the Base Case and the Stress Case, respectively, which are both leverage ratios below the multiples at which historical broadcast transactions have been financed (*Id.* at 14, 17, and 40). Critically, Kuhn derived the leverage ratios by using an implied projected net debt balance of $239.5 million instead of the Debt's book value of $325 million and selected the 2012/2013 EBITDA even though the loan matures and must be refinanced by November 2012.

Peter Cohen's Expert Opinion

In evaluating the feasibility of the Committee Plan, Cohen of Blackstone Advisory Partners ("Blackstone") was retained by the Lenders to opine on (1) the overall value of the Debtor under its business plan, including how much a potential buyer would pay for the Company, and (2) the likelihood that the Debt will be refinanced at maturity in November 2012.

In valuing the Debtors, Cohen considered comparable company analysis, precedent transactions analysis, DCF, as well as the result of the recent auction process under which the Credit Bid ultimately prevailed. Cohen concluded that the TEV of the Debtors, based on projections of the Base Case, is $250—$300 million upon emerging from Chapter 11, a value range that is less than the value of the Debt (JX–4 at 8). Using the same methodologies and under the Stress Case projections, Cohen concluded the Debtors' TEV is $200—$250 million (*Id.*). Further, if the Credit Agreement were reinstated, the Company's total debt ratio upon exiting bankruptcy is 10.1x average 2009/2010 EBITDA, which significantly exceeds the current market value multiples for TEV of broadcasters (*Id.*).

With respect to meeting their obligations under the reinstated Credit Agreement through the prospect of a sale, Cohen opines that the assumption of a sale of the Company in 2012 based on 9.0x 2012/2013 BCF is unreasonable in light of (1) the bids generated in the previous auction for the Debtors, which were significantly below 9.0x BCF, and (2) current trading levels of comparable companies at approximately 7.0x 2009/2012 BCF, which ***132** is also significantly lower than the Company's 9.0x multiple (*Id.* at 9).

Cohen further opines that the Company will be unable to refinance the Debt under the Committee Plan when it matures in November 2012 because the credit markets have significantly contracted and the Company will remain excessively levered with 2010/2011 net debt to EBITDA of 6.9x, which is at the high end of current and precedent leverage multiples for total debt of a television broadcaster (*Id.* at 36). Significantly, Cohen concludes that a "look back" average 2010/2011 EBITDA is the more appropriate figure to potential refinancers than a "look forward" average 2012/2013 EBITDA.[37] Further, Cohen observes that since the reinstated Credit Agreement has limited restrictions on dividends, in the event that the Company's equity owners distribute dividends prior to November 2012, the debt leverage will be even higher by the time the Debt reaches maturity (*Id.*).

37 Cohen stated that the "look-back" average of 2010/2011 EBITDA is more appropriate because the Company will likely need to refinance the Debt by March 2012 to avoid receiving a "going concern" opinion from its auditors.

The Debtors' Business Plan Projections

Since both Kuhn's and Cohen's expert opinions are based on the Projections, the Court will first turn to the issue of whether the Projections are reasonable and reliable in light of the evidence presented.[38]

38 On March 31, 2010 and April 6, 2010, two separate hearings were held before the Court in the Debtors' chapter 11 cases on issues unrelated to the confirmation of the competing plans. At these two hearings, the Debtors' counsel made various statements regarding recent developments in the Debtors' business operations. The Court did not consider those statements in making its findings in this Opinion as the Debtors did not move to re-open the record on confirmation that was closed as of February 16, 2010. It appears that had the record been re-opened and had the Court considered the statements made by the Debtors at these two hearings, they would not have materially altered the Court's analysis or determination on the issue before the Court.

Revenue Growth
Although the Debtors' management alleges that the Projections are conservative and reflect slow, consistent growth, the Court disagrees and finds the Company's projected growth to be aggressive and unrealistic. For example, the Debtors projected their EBITDA (earnings before interest, taxes, depreciation and amortization) to grow from $20.9 million in 2009 to $43.9 million in 2010 and their BCF to grow from $28.9 million in 2009 to $48.4 million in 2010. It is undisputed that the Company's projected EBITDA and BCF are significantly higher than what they were historically under both the Base Case and the Stress Case:

Historic Performance:

	2007	2008	2009
EBITDA	$32.3 million	$25.4 million	$20.9 million
BCF	$45.1 million	$39.3 million	$28.9 million

See JX–4 at 17–18.

Base Case Projections:

	2010	2011	2012
EBITDA	$43.9 million	$35.1 million	$52.7 million
BCF	$48.4 million	$39.8 million	$57.4 million

See JX–5 at 15.

Stress Case Projections:

	2010	2011	2012
EBITDA	$37.3 million	$28.7 million	$45.5 million
BCF	$42 million	$33.3 million	$50.2 million

See JX–5 at 18.

***133** Further, the Debtors' BCF compound annual growth rate ("CAGR") and EBITDA CAGR also seems aggressive compared to those of their public peers during 2008 through 2010, which means that the Company's earnings are projected to grow at a much higher rate than that of their industry competitors during this period:

BCF CAGR 2008–2010

Young	Average w/out Young	Nexstar	Gray	Sinclair	LINTV	Entravision	Belo
12.8%	–4.6%	1.0%	–1.1%	–3.7%	–5.8%	–7.2%	–10.9%

See JX–4 at 23

EBITDA CAGR 2008–2010

Young	Average w/out Young	Nexstar	Gray	Sinclair	LIN TV	Entravision	Belo
33.8%	–6.7%	–3.7%	3.7%	–5%	–5.3%	–7.5%	–22.3%

See JX–4 at 23.

The Court is particularly troubled by the aggressive EBITDA and BCF projections for 2012, which are approximately twice the EBITDA and BCF Projections for 2008, the last presidential election year.[39] Benchmark analysis of comparable companies beyond 2009–2010 have not been presented to show that the extent of revenue growth projected for the Company with respect to 2011 and 2012 is reasonable as compared to the rest of the TV broadcasting industry. The Court is also skeptical about the Debtors' ability to accurately make business projections and competently execute them as the same management group has historically failed at both tasks.[40]

39 *See supra* note 4.

40 The Debtors attempt to justify their inability to meet historic performance projections by representing that business plans prior to the Debtors' chapter 11 cases were used internally and revenue projections were designed to be aggressive in order to motivate the Debtors' sales team to exceed their goals (Morgan Decl. ¶ 13). However, the Court finds that this assertion is inconsistent with the fact that management made public statements on multiple occasions regarding the Debtor's revenue projections. (1/19 Hrg. Trans. at 155–160). Thus, the Court is not persuaded by the Debtors' explanation and finds that there is significant evidence showing the Debtors' historic failure to accurately make and execute revenue projections.

Despite projecting aggressive growth in earnings with no change in their asset base, the Debtors estimate corporate expenses to be approximately one-third of what they were in past years and at a level considerably lower than corporate expenses of their public peers:[41]

41 Even accounting for cost savings that the Debtors have achieved in chapter 11, their corporate expenses projections for 2010 through 2012 still appear to be low.

Corporate Expense

	2007	2008	2009
Corporate Expense	$12.8 million	$13.9 million	$4.5 million

See JX–3 at 11.

	2010	2011	2012
Corporate Expense	$4.5 million	$4.7 million	$4.8 million

See JX–3 at 11.

Corporate Expense % of Revenue 2010

Young	Average w/out Young	Belo	Nexstar	Entravision	LINTV	Sinclair	Gray
2.7%	6.0%	9.6%	9.0%	6.7%	4.6%	4.3%	1.5%

See JX–4 at 24.

***134** The Debtors assert that the Projections are conservative because the Company's BCF and EBITDA margins are conservative compared to those of their public peers (Morgan Decl. at ¶ 22; JX–3 at 13).[42] Yet, the benchmarking analysis with respect to BCF and EBITDA margins is limited to 2008–2010 and does not address the aggressive projections for 2011 and 2012. Even with respect to BCF and EBITDA margins for 2009–2010, the Projections reflect an increase nearly double those of the Company's peers: (1) the Company's BCF margin is projected to increase by 38.2% while comparable companies' BCF margins are projected to increase by 17.29%; (2) the Company's EBITDA margins are projected to increase by 45.35% while comparable companies' EBITDA margins are projected to increase by 23.1% (1/19 Hrg. Trans. at 116–17). Further, conservative BCF and EBITDA margins do not automatically lead to conservative overall projections because margins reflect a company's profitability and not its overall revenue growth. Any perceived benefits from a conservative approach to projected margins would be offset by the extremely aggressive approach to projected revenue growth. For the reasons discussed, the Court finds the Company's projected EBITDA and BCF, particularly for 2011 and 2012, to be aggressive and overly optimistic.[43]

42 The Debtors' projections show estimated BCF margins of approximately 21.2% in 2009, 29.3% in 2010, compared to projected margins of over 31.8% in 2009 and 37.3% in 2010 of comparable companies (Morgan Dec. at ¶ 22; JX–3 at 13).

43 Without a definitive plan to improve KRON, it also is unreasonable to project that this station would produce even modest profits upon plan confirmation. KRON's alleged improvement has been mixed and inconsistent at best. With respect to KRON's performance in 2009, Morgan testified that "During the summer, KRON was soft. KRON rebounded in September. It came back and started approaching its budget numbers. Its fourth quarter, it was a little under budget but it was coming back at the end...." (1/19 Hrg. Trans. at 179).

Capex

The Court also finds that the Debtors provided for inadequate Capex to support the rate of growth reflected in the Projections. First, the Debtors have deferred Capex over the last several years (JX–4 at 24; 1/19 Hrg. Trans. at 136). In fact, the Debtors' Capex has been lower than the Capex of their public peers from 2004 through 2009 (JX–3 at 15). In particular, ***135** the Debtors' Vice President of Business Development and Operations Manager of various stations, Robert Peterson ("Peterson") testified that in 2009 management was very conservative in Capex budgeting and replaced only broken items and items that needed to be replaced to meet the company's FCC (Federal Communications Commission) requirements (1/20 Hrg. Trans. at 143–144), even though a number of the stations' equipment has reached the end of their useful lives (1/20 Hrg. Trans. at 147–149; Lender Ex. 50). In one of Peterson's emails to the Debtors' Chief Financial Officer, Executive Vice President, and Secretary, James A. Morgan ("Morgan"), which discusses Capex, Peterson stated that "it was very clear that we were to only consider emergency needs so I no longer tried to develop a plan to implement a budget for 2009." (Lender Ex. 53).

Though the Debtors assert that the projections were created using a bottom-up process, the Court finds that, although the opinions of Peterson and station managers were solicited and considered, Capex budgets were principally generated by upper management and did not necessarily reflect the Company's Capex needs. For instance, Peterson submitted Capex plans on multiple occasions in 2009, but even items that he identified as "key elements" were not approved by upper management. In one of his emails, Peterson expressed his frustration and stated, "We have never actually implemented any of the multitude of capx (sic) plans that have been submitted. I assume the next one will just be more of the same." (Lenders Ex. 52; 1/20 Hrg. Trans. at 161–162). In another email dated March 26, 2009, Morgan clearly instructed Peterson to create a Capex plan that would fit within an $8 million per year budget, an amount management previously deemed appropriate (Lender Ex. 44).[44] When asked whether he had understood his task to create a plan that would fit within the eight million dollar model, Peterson testified that he assumed his task was to let Morgan know whether it is acceptable to create a Capex plan by spending eight million dollars a year. However, the Court does not find Peterson's representation on this point to be credible because his email response to Morgan and his answer given in deposition on this point are inconsistent with his testimony. The Court finds that Peterson did, in fact, interpret Morgan's email instructions to mean that Peterson should create a Capex plan that would fit within the eight million dollar model. (1/20 Hrg. Trans. at 155).[45] Unsurprisingly, the budgets in Debtors' Five–Year Capital Plan were also generated by upper management (1/20 Hrg. Trans. at 162–164 (Peterson testified that the budgets in the "Debtors' Five Year Capital Plan" were produced by someone in the corporate office, and the first time he saw the document was shortly before his deposition after Thanksgiving 2009)).

44 In the email, Morgan wrote "... Our model assumes $8mm of capex per year starting now, 2009, forward (escalating at 1.5% per year) I need a "capex plan" for each year from now through 2013...." (Lender Ex. 44).

45 "Q. And your response to Bob is that you'll go ahead and do this, correct?

A. That is correct.

Q. And he says his model assumes eight million of capex. Were you—did you understand your task to create a plan that would fit into this model?

A. Yes."

(Lenders Ex. 76 (Peterson Dep. at 45–46)).

Further, the Debtors also failed to create a Capex budget for its biggest station, KRON. The Capex Projections for KRON included a small amount in 2011 and none in 2012 (1/19 Hrg. Trans. 122; JX–21) ***136** because it assumed that KRON would enter a shared-services agreement with another station. The Debtors' President, Debra McDermott ("McDermott"), testified that she has been exploring opportunities for KRON since March 2009 but no agreement has been signed to date (1/21 Hrg. Trans. at 52–53,121). Alternatively, McDermott mentioned the possibility of selling the building in which KRON is currently located, yet management has not even assessed the value of the building since eighteen months ago (Morgan Dep. at 66–68; 1/21 Hrg. Trans. at 52). Given the lack of a definitive and viable plan for KRON, the Debtors should have included a Capex budget for KRON in the Projections.

Considering the amount of the Debtors' deferred Capex over the last several years, the inadequate Capex plan for KRON,[46] and the Debtors' management's unpersuasive testimony that, despite compelling evidence to the contrary, KRON's Capex was generated via a bottom-up process, the Court finds the Debtors' $8 million per year Capex budget is insufficient to keep the Company competitive upon confirmation. By underestimating the amount of Capex, the Debtors have, in effect, inflated the EBITDA of the Company as reflected in the Projections.

46 The Court finds that the Capex budget in the Debtors' business plan is insufficient on the basis of the amount of deferred Capex over the last several years alone, regardless of whether KRON eventually enters a shared-services agreement or is sold.

The key deficiency in the Debtors' business plan is that the projected rate of growth in revenue necessarily presumes either a substantial improvement in the industry, increased industry market share within 2.5 years of emerging from bankruptcy, or both.[47] Although the Debtors may have reduced costs, made operational improvements, and cured some of the problems that led them into bankruptcy in the first place, there is simply not enough evidence on the record to suggest that cost reduction alone would necessarily give the Company sufficient advantages over its competitors to achieve the Projections. Even assuming that the Company will emerge from Chapter 11 as a leaner and more efficient entity, without adequate Capex and identifiable and unique competitive advantages, it is unreasonable to project that the Company could achieve substantially higher rate of growth than those of its competitors in an industry that shows no sign of dramatic turnaround within the next 2.5 years.

47 There is no evidence that the broadcast television ("TV") industry would significantly improve over the next 2.5 years. To the contrary, broadcast TV has been losing market shares to cable and satellite TV (JX–4 at 12) as well as other forms of media (*Id.* at 13). According to Veronis Suhler Stevenson's Communications Industry Forecast 2009–2013, advertising spending will not begin to turn around from its recent dip until 2011 and will show no growth until 2012 (JX–1 at 21) ("The ad market will dip another 1.0 percent in 2010 before posting a modest turnaround in 2011. Growth will pick up in 2012 due to the influx of political and Olympics advertising. Overall, ad spending will post a CAGR of 0.4 percent during the 2008–2013 period ... continuing to be the slowest growing of the four communications sectors."). Moreover, local advertising, which is important to the Debtors' business, will not rebound as quickly as national advertising (*Id.* at 22). For purposes of this case, the Court is only concerned about the forecast up to November 2012; thus, the Court will not reach the question of whether the decline in the TV industry is cyclical or secular.

For the foregoing reasons, the Court finds that the Company would be unable to successfully execute its business plan and achieve the plan's optimistic projections.

Assumed Sale of the Company

Pursuant to the Court's holding in the Daubert Motion, any conclusions reached ***137** by Kuhn based upon the Levered DCF is excluded. Thus, Kuhn's opinion that the Debtors would be able to satisfy the Debt upon maturity through an assumed sale in November 2012 is excluded from the record. However, even if that portion of Kuhn's testimony were not excluded, the Court finds that the assumed sale of the Company in November 2012 at a price that is equivalent to its future common equity value is not supported by any reasonable analysis.

First, Kuhn assumes that in approximately three years, "the overall economic environment will have improved to provide more liquidity and appetite for acquisitions in the broadcasting sector." (JX–5 at 29). Kuhn provided no explanation as to why this assumption is appropriate, particularly when he does not have specific experience and background in making predictions about the overall health of the economy.

More importantly, Kuhn assumes that a potential buyer would purchase the Company at a price that is equivalent to the Company's implied future common equity. On this point, the Court agrees with Cohen's opinion that a potential buyer would likely bid below the intrinsic value to achieve a desired return on equity invested. (JX–4 at 27). It is unrealistic to assume that a potential purchase price would include the full extent of the Company's intrinsic value, particularly when a balloon payment under the reinstated Credit Agreement is looming.[48]

48 Cohen also opines that a potential buyer would not pay for the intrinsic value of the Company because buyers (1) may not have full confidence in the Company's management and their projections, and (2) would also account for future tax attributes. (JX–4 at 27).

In sum, the Court finds that the prospect of the Company's assumed sale at a price equivalent to its future common equity value in November 2012 is both unsubstantiated and purely speculative.

Refinancing[49]

49 The Credit Agreement does not require establishing a reserve account to satisfy the Debt in November 2012. Although the Lenders are not entitled to the protection afforded by a reserve account, the fact that the Committee would not commit to establishing such an account in its Plan is relevant in determining the amount that needs to be refinanced when the Debt matures in November 2012.

Aside from an assumed sale, the Committee argues that the Company will be able to refinance the Debt before it comes due. The Committee makes this assertion because the Company's net debt to EBITDA multiples in 2011 and 2012 fall within the range of market value debt to EBITDA ratios of two comparable companies in the broadcasting industry, Sinclair Broadcast Group ("Sinclair") and Belo Corporation ("Belo"), both of which refinanced in late 2009.[50] Based on the Projections, the Company's net debt to EBITDA ratio in 2011 is 6.9x and its net debt to EBITDA ratio in 2012 is 5.6x, while Sinclair and Belo's total book debt to EBITDA are 6.3x ***138** and 6.5x, respectively.[51] (JX–4 at 40–41; 1/25/10 Hrg. Tr. at 69). However, the Committee's argument, specifically its use of the net debt balance instead of the Debt balance that comes due in November 2012, is premised on faulty assumptions.

50 Given that the Debt matures in November 2012, the Company would need to begin negotiations with potential lenders in the spring of 2012, particularly when there's evidence that the Company would otherwise receive a going concern opinion from its auditors. Potential lenders will definitely rely on the "look back" average of the Company's 2010/2011 EBITDA and will likely consider the Company's projected EBITDA for 2012. Any informed lender would also account for the fact that 2012 is a presidential election year with higher-than-average expected earnings. In addition, EBITDA projections of 2013 must incorporate higher debt service cost, as new financing almost certainly will require higher interest payment and more restrictive covenants than those present in the Credit Agreement.

51 The market value of debt to EBITDA of Sinclair and Belo are 6.2x and 5.9x, respectively (JX–4 at 40)

Using the Company's net debt balance of $239.5 million under the Base Case instead of the principal balance of the debt in the amount of $325 million due in November 2012, yields a substantially lower debt to EBITDA ratio, which appears in the Committee's analysis. The net debt amount is the principal balance of the debt, $325 million, minus the Company's annual cash accumulated based on the Projections.[52] Thus, the issues are: (1) the reasonableness of the assumption that the Company could, in fact, accumulate the projected cash accumulated under the Debtors' business plan; and (2) the probability that the Company's equity owners will preserve and contribute all of the accumulated cash upon the Debtors' exiting chapter 11 through November 2012 towards paying the Debt when it comes due so that the Company would only need to refinance the net debt balance.

52 Under the Base Case, the Company's cash accumulation is $87.4 million and the net debt balance is $239.5 million. Under the Stress Case, the Company's cash accumulation is $67.2 million and the net debt balance is $259.7.

The amount of cash accumulated impliedly assumes the soundness of the Projections and the Debtors' ability to execute their business plan. But as the Court found it unlikely that the Company could achieve its Projections, it is therefore unlikely that the purported amount of cash could be accumulated to achieve the net debt balance upon which the net debt to EBITDA ratio is premised.

Second, achieving the net debt balance also assumes if the Company accumulates cash, it will not distribute dividends to equity holders prior to November 2012. The Committee asserts that the new equity holders do not intend to distribute dividends and such payment would require board approval. However, under the Committee Plan, the Backstop Parties will have control over the board to obtain approval of such payments and it is alleged by the Lenders, and unrebutted by the Committee, that the Committee has refused to restrict the ability of new equity holders to distribute dividends pending satisfaction of the reinstated Credit Agreement.

Given the (1) uncertainty as to the amount of accumulated cash under the Projections, and (2) lack of legal restrictions preventing the equity holders from both distributing dividends and requiring the Company to set aside the cash accumulation for the November 2012 balloon payment, the Court finds that it is unreasonable for the Committee to assume that the Company will only need to refinance the net debt balance of $239.5 million rather than the Debt of $325 million. By implication, the Committee's theory that the Company will be able to refinance based on its net debt to EBITDA ratio, rather than the Debt to EBITDA ratio, is purely speculative. Therefore, the Committee has not met its burden in establishing that the Company will obtain refinancing when the Debt comes due in November 2012.

In conclusion, the Court finds that the Committee Plan is not feasible under section 1129(a)(11) because the Committee has failed to establish that the Company could satisfy the Debt upon maturity in ***139** November 2012 through either a sale or by refinancing.[53]

[53] By way of urging the Court to find its plan feasible, the Committee analogizes the facts of this case to *In re DBSD N. Am., Inc.,* 419 B.R. 179 (Bankr.S.D.N.Y.2009), *aff'd* No. 09 Civ. 10156(LAK), 2010 WL 1223109 (S.D.N.Y. March 24, 2010), where a bankruptcy court confirmed a reinstatement plan over an objecting secured creditor and found that the debtor would be able to satisfy a balloon payment in four years by obtaining further financing or collaborating with a strategic partner. The facts of *DBSD,* however, are distinguishable from the facts of this case. At the time of its confirmation hearing, *DBSD* had already obtained three strategic transactions proposals, one of which came from the objecting secured creditor. By contrast, the Debtors have offered no evidence of any potential buyer of the Company. Further, *DBSD* had significant competitive advantages over comparable companies in the industry, both in terms of its superior technology and capital structure. The Debtors, on the other hand, offered no evidence of competitive advantages over comparable TV broadcasting companies, such as Sinclair and Belo, that would justify their aggressive revenue growth projections over the next 2.5 years. In fact, both Sinclair and Belo are larger companies with substantially lower senior debt to leverage ratio than that of the Debtors. Most importantly, the *DBSD* court found that the company's total enterprise value to be 6 to 8.44 times the amount of the objector's secured debt; the Debtors' total enterprise value upon exiting bankruptcy is less than the amount of debt owed to the Lenders.

Cramdown Requirements

[51] The Lenders object to confirmation of the Committee Plan on the basis that it violates section 1129(b)(2)(B)(ii) because the Committee has failed to establish that the plan does not "discriminate unfairly" and is "fair and equitable." The Committee responded by arguing that the Lenders waived such claims by not asserting them before the court-imposed deadline and that they have no standing to assert such claims. The Court need not reach the issues of waiver and standing because it has an independent duty to ensure that the requirements of 11 U.S.C. § 1129 are satisfied, even if no objections to confirmation have been made. *See In re Mid-State Raceway, Inc.,* No. 04–65745, 2006 Bankr.LEXIS 3950, *42(Bankr.N.D.N.Y.2006) (citing *In re Lernout & Hauspie Speech Prods., N.V.,* 301 B.R. 651, 656 (Bankr.D.Del.2003), *aff'd,* 308 B.R. 672 (D.Del.2004)); *In re Valley Park Group, Inc.,* 96 B.R. 16, 21–22 (Bankr.N.D.N.Y.1989); *In re Bolton,* 188 B.R. 913, 915 (Bankr.D.Vt.1995) (exercising its independent duty by examining whether plan is saved by "new value" exception to the absolute priority rule).

Section 1129(a)(8) requires that each class of claims or interests under a proposed plan either accept the plan or be unimpaired under the plan. *11 U.S.C. § 1129(a)(8).* Section 1129(b) allows for "cramdown" of a proposed plan even where the plan has not been accepted by all impaired classes of claims. 11 U.S.C. § 1129(b)(1) provides:

> Notwithstanding section 510(a) of this title, if all of the applicable requirements of subsection (a) of this section other than paragraph (8) are met with respect to a plan, the court, on request of the proponent of the plan, shall confirm the plan notwithstanding the requirements of such paragraph if the plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan.

11 U.S.C. § 1129(b)(1).

Unfair Discrimination

[52] Under 1129(b)(1), a plan unfairly discriminates when it treats similarly situated classes differently without a reasonable ***140** basis for the disparate treatment. *See Johns–Manville,* 68 B.R. at 636; *In re Pine Lake Village Apartment Co.,* 19 B.R. 819, 829–30 (Bankr.S.D.N.Y.1982). Where, however, a reasonable basis for the disparate treatment of two classes of similarly situated creditors exists, there is no unfair discrimination. *See In re WorldCom, Inc.,* No. 02–13533(AJG), 2003 WL 23861928, at *59 (Bankr.S.D.N.Y. Oct.31, 2003).[54]

54 Courts have considered the following factors to determine whether a plan discriminates unfairly: (1) whether there is a reasonable basis for discriminating; (2) whether the debtor can consummate the plan without discriminating; (3) whether the discrimination is proposed in good faith; and (4) the degree of discrimination is in direct proportion to its rationale. *WorldCom,* 2003 WL 23861928, at *59.

[53] The Lenders contend that the Committee Plan unfairly discriminates against the general unsecured creditors, who are receiving $1 million in the aggregate while the Noteholders are receiving 10% of the equity in the Company and the opportunity to participate in a rights offering under which the they can purchase a pro rata share of $45.6 million of preferred stock plus 80% of the common stock in the Company. The Committee argues that, based on Kuhn's valuation opinion, the Noteholders projected recovery of 10% of the Company's equity is approximately 2% of their claims which is less than the 5% cash recovery to trade creditors. Further, even if the plan is discriminatory, there is a reasonable basis for disparate treatment: the Noteholders and trade creditors bargained for different forms of recovery.

There is insufficient evidence on the record on this issue because the Committee has neither provided any evidence regarding the value of the subscription rights received by the Noteholders under the Committee Plan nor any evidence that the Noteholders and trade creditors bargained for different forms of recovery. Therefore, the Committee has failed to meet its burden in establishing by a preponderance of the evidence that the Committee Plan does not unfairly discriminate against the general unsecured creditors.

Fair and Equitable

[54] Section 1129(b)(2)(B)(ii), known as the absolute priority rule, provides in relevant part:

> For the purpose of this subsection, the condition that a plan be fair and equitable with respect to a class includes the following requirements:
>
> (B) with respect to a class of unsecured claims—
>
> (ii) the holder of any claim or interest that is junior to the claims of such class will not receive or retain under the plan on account of such junior claim or interest any property

11 U.S.C. 1129(b)(2)(B)(ii).

In *Bank of America Trust and Savings Association v. 203 North LaSalle Street Partnership,* the Supreme Court examined § 1129(b)(2)(B)(ii) and determined that the best reading of the phrase "on account of" indicated that "a causal relationship between holding the prior claim or interest and receiving or retaining property is what activates the absolute priority rule." *Bank of Am. Nat'l Trust and Savings Ass'n v. 203 N. LaSalle St. P'ship,* 526 U.S. 434, 451, 119 S.Ct. 1411, 143 L.Ed.2d 607 (1999). In *Charter,* as referenced and discussed previously, the bankruptcy court confirmed a debtor's plan of reorganization, which included in part, a large financial settlement to an old equity holder of the company, in order to satisfy a change of control provision in a reinstated credit agreement. ***141** *In re Charter Commc'ns,* 419 B.R. at 230–32. The *Charter* court found that, despite the significant financial gain to the old equity holder, the plan did not violate the absolute priority rule because the settlement provided to the old equity holder was not "on account of" his former equity interest, but only due to his cooperation during and after the reorganization process. In particular, the old equity holder had agreed to maintain the requisite voting power within the proposed reinstated credit agreement, transfer his valuable interests in solvent affiliates of the debtor, and compromise certain contract claims. *Id.* at 269. Since old equity holders are not universally precluded from gaining consideration, absent some evidence of a causal relationship, the *Charter* court would not find the new property interest to be "on account of" the equity holder's junior interest. *Id.* (citing *In re PWS Holding, Corp.,* 228 F.3d 224, 242 (3d Cir.2000)); *see also LaSalle,* 526 U.S. at 453, 119 S.Ct. 1411 (noting that in some cases, old equity may be best equipped to pilot a reorganized company and "work out an equity-for-value reorganization").

The Lenders argue that the Committee Plan violates the absolute priority rule by providing Young with new equity in the Company even though general unsecured creditors were not paid in full and had voted to reject the Committee Plan. The Committee asserts that the Committee Plan expressly provides for cancellation of all old equity interests, and Young is not receiving any interest "on account of" his preexisting equity interest but rather than "on account of" his work going forward and the necessity of his cooperation so as to comply with the Credit Agreement.

The Court finds that the Committee has failed to meet its burden of establishing that its Plan fulfills the absolute priority rule. In *Charter,* the court found that the $375 million paid to old equity, although substantial in absolute dollar amount, was outweighed by the estimated $3 billion in benefits and savings to the debtor through reinstatement of a credit agreement, future tax savings, and proceeds of a rights offering under the proposed plan of reorganization. *In re Charter,* 419 B.R. 221 at 241 (noting that the value to the estate and its creditors outweighed old equity's consideration by a "high multiple"). Here, the Committee argues that the 10% economic interest distributed to Young is "on account of" the value added to the Debtors by way of reinstating the Credit Agreement with a below-market interest rate. However, the Committee has failed to quantify the value of the reinstated Credit Agreement to the Debtors compared to the 10% economic interest distributed to Young under the Committee Plan. As with the unfair discrimination standard, the Court finds that the Committee has failed to meet its burden of proof on the issue, as there is insufficient evidence on the record to evaluate whether the direct and indirect benefits to the Debtors of reinstating the Credit Agreement are of a greater value than the 10% interest distributed to Young under the Committee Plan.[55]

55 In light of the Court's holding regarding the Committee Plan's feasibility, the Court does not reach the issue of whether it would be appropriate to afford the Committee an opportunity to supplement the record to satisfy its burden with respect to the cramdown requirements under section 1129(b).

Confirmation of the Debtors Plan

The Committee objects to the Debtors Plan and argues that it is unconfirmable because (1) the terms, conditions, and covenants under the $10 million exit facility (the "Exit Facility")[56] for the Company ***142** under the Debtors Plan are not sufficiently disclosed and (2) if the Committee Plan is confirmable, the Lenders will have received, as a matter of law, more than they are entitled to under the Debtors Plan in violation of the cramdown requirements of the Bankruptcy Code.

56 Under Article VI.C of the Debtors Plan, "Exit Facility" means "a $10 million revolving credit facility for Reorganized Young, secured by all assets of Reorganized Mr. Young and its subsidiaries (as guarantors), entered into on the Effective Date."

In response to the Committee's objection regarding the Exit Facility, the Lenders filed secured letters of intent from two providers for $20 million of chapter 11 exit financing with term sheets attached to the Declaration of Wachovia Bank, N.A. (the "Wachovia Declaration") on January 12, 2010. The Court finds that the Wachovia Declaration is sufficient for the purpose of disclosing of terms, conditions, and covenants under proposed Exit Facility.

Regarding the Committee's objection that the Lenders are receiving more value than their claim under the Debtors Plan in violation of the Bankruptcy Code, the Court finds it is undisputed that Debtors' current TEV is less than the amount of the Lenders' claim and any evidence of purported future valuation of the Company in November 2012 is purely speculative. Thus, the Lenders will receive less value than what they are owed under the Debtors Plan and the Committee's objection is overruled.

The Court finds that, with the exception of section 1129(a)(8), the Debtors Plan satisfies all applicable requirements of the Bankruptcy Code pursuant to section 1129(a). Further, the Court finds that the Debtors Plan does not "discriminate unfairly" and is "fair and equitable" with respect to the dissenting classes; therefore, the cramdown requirements under section 1129(b) are satisfied. In sum, the Debtors Plan satisfies all applicable criteria of section 1129 and is confirmable.

Accordingly, for the foregoing reasons, the Committee's motion to confirm the Committee Plan is DENIED. The Debtors' motion to confirm the Debtors Plan is GRANTED.[57] The Debtors are directed to settle an order consistent with this Opinion and submit a proposed order confirming the Debtors Plan.

57 At the Confirmation Hearing, the Debtors requested the Court to consider confirmation of the Debtors Plan only if the Court finds the Committee Plan unconfirmable.

Parallel Citations

53 Bankr.Ct.Dec. 16

End of Document

426 B.R. 114
United States Bankruptcy Court,
D. Delaware.
In re SPANSION, INC., et al.[1] Debtors.

1 The Debtors being jointly administered in this case pursuant to an Order dated March 4, 2009, are: Spansion, Inc., a Delaware corporation; Spansion Technology, LLC, a Delaware limited liability company; Spansion LLC, a Delaware limited liability company; Cerium Laboratories, LLC, a Delaware limited liability company; and Spansion International, Inc., a Delaware corporation (the "Debtors" or "Spansion").

U.S. Bank National Association, as trustee, Plaintiff,
v.
Wilmington Trust Company, Spansion, Inc., Spansion Technology LLC, Spansion LLC, Cerium Laboratories LLC and Spansion International, Inc., Defendants.
Bankruptcy No. 09–10690(KJC). | Adversary No. 09–52274. | April 1, 2010.

Synopsis
Background: Chapter 11 debtors moved for confirmation of amended joint plan of reorganization, and objected were raised. Ad hoc committee of convertible noteholders moved to vacate order approving debtors' disclosure statement, to adjourn confirmation hearing, and for appointment of trustee or examiner, and bank moved for summary judgment in its adversary proceeding.

Holdings: The Bankruptcy Court, Kevin J. Carey, J., held that:

[1] debtors did not obtain approval of disclosure statement based upon misconduct and misrepresentations, as might warrant relief from disclosure statement order;

[2] appointment of examiner was not warranted, even though statutory debt threshold for appointment of examiner was met;

[3] appointment of trustee was not warranted;

[4] debtors' refusal to accept alternative equity financing proposal did not, on its own, demonstrate bad faith;

[5] proposed plan could not include non-consensual release that applied to all holders of claims or interests; and

[6] reorganized debtors' common stock did not fall within subordinated indenture's definition of "permitted junior securities" and was not exempt from indenture's subordination provisions.

Ordered accordingly.

Attorneys and Law Firms

***118** Eric Lopez Schnabel, Robert W. Mallard, Dorsey & Whitney (Delaware) LLP, Wilmington, DE, for Plaintiff.

Mark E. Felger, Cozen O'Connor, Michael R. Lastowski, Duane Morris LLP, Wilmington, DE, for Defendants.

Opinion

OPINION ON CONFIRMATION.[2]

2 This Opinion constitutes the findings of fact and conclusions of law, required by Fed.R.Bankr.P. 7052. This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 1334 and 157(a). This is a core proceeding pursuant to 28 U.S.C. 157(b)(1) and (b)(2)(K), (L) and (O).

KEVIN J. CAREY, Bankruptcy Judge.

At a hearing held before this Court on February 24, 25, and 26, 2010, and March 1 and 2, 2010 (the "Confirmation Hearing"), a combined record was made for the following matters:

(i) The request for confirmation of the Debtors' Second Amended Joint Plan of Reorganization (as amended);[3]

3 As described below, the Debtors' Second Amended Joint Plan of Reorganization was amended on various dates prior to the Confirmation Hearing. The Debtors argue that the revisions do not materially or adversely affect the recoveries of creditors, or, any creditors that are affected have already rejected the plan and, therefore, re-solicitation the plan and disclosure statement is not required. After all of the amendments, the plan version before me for confirmation is the Debtors' Second Amended Joint Plan of Reorganization (as Amended) dated February 23, 2010 (D.I. 2915)(the "Plan").

(ii) The *Ad Hoc* Committee of Convertible Noteholders' Emergency Motion for Order (a) Vacating Order Approving Debtors' Disclosure Statement Pursuant to Fed.R.Bankr.P. 9024 and Adjourning Confirmation Hearing and (b) Directing Appointment of Trustee or Examiner Pursuant to 11 U.S.C. §§ 1104(a)(1) and (2) and 1104(c)(2) (D.I. 2391) (the "Motion to Vacate"); and

(iii) The Plaintiff's Motion for Summary Judgment in *U.S. Bank National Association, as Trustee v. Wilmington Trust Company et al.* (Adv. No. 09–52274) (D.I. 14) (the "Summary Judgment Motion").

A number of parties filed objections to confirmation of the Plan. Some objections were resolved prior to the Confirmation Hearing, but the objections that remained were filed by: (1) the *Ad Hoc* Committee of Convertible Noteholders (the "Convert Committee")(D.I. 2479 and 2715), (2) the *Ad Hoc* Committee of Equity Security Holders ("AHEC")(D.I. 2476), (3) Joseph Rubino[4] (D.I. 2522), (4) Tessera, Inc. ("Tessera") (D.I. 2469), (5) The John Gorman 401(k) ("Gorman") (D.I. 2474), (6) ***119** U.S. Bank, National Association, as trustee to the Senior Noteholders ("US Bank") (D.I. 2468), (7) the United States Trustee (the "UST") (D.I. 2493), and (8) the Wilmington Trust Company, as indenture trustee for the 2.25% Exchangeable Debentures due 2016 ("Wilmington Trust") (D.I. 2493).[5]

4 Neither Mr. Rubino nor anyone on his behalf appeared at the Confirmation Hearing to press this objection and, accordingly, it is overruled for his failure to appear and prosecute his objection. (Tr. 3/1/2010 at 322). Moreover, Mr. Rubino's pleading appears to object to venue in Delaware, good faith in proposing the Plan, and treatment of unsecured creditors. Venue is proper pursuant to 28 U.S.C. § 1408. His other objections are also overruled on the merits for the reasons set forth in this decision.

5 Wilmington Trust also filed a joinder to the Convert Committees' objection (D.I. 2561), Gorman filed a joinder to the AHEC objection (D.I. 2560), and the Convert Committee filed a joinder to Wilmington Trust's objection (D.I. 2840).

The parties filed post-hearing submissions on March 8, 2010. For the reasons set forth below, I conclude that (i) the Debtors' Plan cannot be confirmed in its present form, (ii) the Convert Committee's Motion to Vacate will be denied, and (ii) the Summary Judgment Motion will be granted and judgment entered in favor of U.S. Bank.

BACKGROUND

(1) *Overview of the Debtors' Business.*
The Debtors are semiconductor device companies which design, develop, manufacture, market and sell Flash memory products and solutions. Spansion's products are integrated into a broad range of electronic products, including mobile phones, consumer electronics, automotive electronics, networking and telecommunications equipment, servers and computer peripherals. (Ex. D–5, Second Amended Disclosure Statement For Debtors' Second Amended Joint Plan of Reorganization dated December 16, 2009 (the "Disclosure Statement") at 15.)

Flash memory is a "non-volatile" memory solution, meaning that it retains its contents even after the power is shut off, allowing memory contents be retrieved at a later time. (*Id.* at 17.) There are two main types of Flash memory: NOR and NAND.[6] (*Id.* at 18.) Spansion designs, develops, manufactures, markets and sells NOR Flash memory products and solutions, ***120** and in 2008, together with Numonyx, accounted for 64% of the NOR Flash memory market. (Ex. C–1 at 7.)

6 The Disclosure Statement describes these two types of semiconductor memory as follows:

> The terms NOR and NAND refer to the architecture of the connections between the memory cells of the device which produce the different characteristics of the two memory types.... NAND offers a number of desirable attributes: it is relatively inexpensive, a small device can hold a great amount of information, and its performance characteristics are particularly well suited to data storage such as music, pictures, video, etc. The market for NAND Flash memory has grown rapidly in recent years owing to the growing popularity of devices that consumers can use to access their personal media in a portable, battery-powered format.
>
> ....
>
> NOR Flash memory has different characteristics than NAND Flash memory.... Though NOR Flash memory is more expensive than NAND for comparable densities [capacity], it is also available in much lower densities with lower prices than NAND and for this reason alone is preferred in many applications that do not require the greater storage capacity of NAND. At higher densities similar to NAND, the high reliability and ease of use of NOR, in addition to its ability to support a more efficient and cost effective memory sub-system in certain applications, make it a favored solution. These characteristics continue to drive NOR Flash memory use in embedded applications. For example modern automobiles are dependent on NOR Flash memory for engine control, transmission control, ABS systems, anti roll systems and a multitude of other operations in the vehicle. The majority of cell phones continue to use NOR Flash memory. The telecommunication, networking, consumer electronics, and industrial control industries rely on NOR Flash memory.

(Disclosure Statement at 20.)

In fiscal year 2008, the net sales of wireless applications (such as mobile phones) and embedded applications (such as gaming, set top boxes, DVD Players and automotive and industrial electronics) each represented about 50% of the Debtors' total net sales. (Disclosure Statement at 20.) The Debtors are currently restructuring their business to focus their energies on the embedded market, while winding down their participation in the less profitable wireless market. (Tr. 2/24/2010 at 24:1–5 (Devost).)

(2) *The Chapter 11 Case*
The Debtors filed voluntary petitions for relief under chapter 11 of the Bankruptcy Code on March 1, 2009. Throughout this case, the Debtors have made operational adjustments and negotiated with various creditor constituencies, some more than others, to attain a financial restructuring, as well. Early in this case, the Debtors' negotiations involved discussions primarily with the *ad hoc* consortium of certain Senior Secured Floating Rate Notes Due 2013 (the "FRNs")[7] and the Official Committee of Unsecured Creditors, appointed by the United States Trustee (the "Creditors' Committee"). In September 2009, the FRNs, the Creditors' Committee and the Debtors agreed to proposed terms for a plan of reorganization, resulting in the Debtors' filing of the Debtors' Joint Plan of Reorganization dated October 26, 2009 (the "Initial Plan"), and accompanying disclosure statement.[8] However, in November 2009, the Creditors' Committee withdrew its support for the Initial Plan. Negotiations continued and other creditor groups became more involved in the case, including an informal group of certain holders of the 11.25% Senior Notes due 2016 (the "Senior Noteholders"), the Convert Committee, and AHEC.[9]

7 As of the petition date, the FRNs were owed approximately $625 million in principal amount, and approximately $8.3 million in interest. (Disclosure Statement at 25.)

8 This plan was characterized by some at the Confirmation Hearing as the "take it or leave it" plan.

9 By memorandum and order dated December 18, 2009, I denied AHEC's request for appointment of an official equity committee. *In re Spansion,* 421 B.R. 151 (Bankr.D.Del.2009). AHEC, nonetheless, has continued its active participation in the case.

The Debtors filed amended versions of their plan of reorganization, including the Debtors' Second Amended Joint Plan of Reorganization Dated December 16, 2009 (D.I. 2032) (the "December 16 Plan") and the Disclosure Statement (Ex. D–5).

By order dated December 18, 2009, over various objections, including a call to slow the confirmation process, the Court entered the Order (I) Approving Disclosure Statement, (II) Scheduling Confirmation Hearing, (III) Approving Solicitation and Other Procedures, Including Fixing the Voting Record Date and Establishing Deadlines for Voting on the Plan and Objecting to the Plan, and (IV) Approving the Solicitation Package and Forms of Notice (D.I. 2042) (the "Disclosure Statement Order"). Among other things, the Disclosure Statement Order established deadlines for plan voting and for filing plan objections, and scheduled a hearing, beginning February 11, 2010, to consider confirmation of the Plan (which was later adjourned to the dates of the Confirmation Hearing).[10]

10 On December 21, 2009, the Senior Noteholders filed a motion seeking a standstill of certain dates in the Disclosure Statement Order (D.I. 2065) (the "Standstill Motion"). At the Confirmation Hearing, the Senior Noteholders advised the Court that the Standstill Motion was being adjourned. (Tr. 2/24/10 17:14–20). As a result of the Court's decision here, the Standstill Motion will be dismissed as moot.

***121** In anticipation of confirmation, the Debtors continued to negotiate with creditors in an attempt to resolve disputes and objections to the Plan. The Debtors entered into settlements with Samsung Electronics Co., Ltd. ("Samsung") to establish a reserve for Samsung's general unsecured claim [D.I. 2332 and 2519], and with Spansion Japan Limited ("Spansion Japan")[11] with respect to the significant administrative expense claim asserted by Spansion Japan [D.I. 2340 and 2552]. The Debtors and various parties participated in a judicial mediation (not with the undersigned) with respect to valuation issues on February 5 and 8, 2010, but no settlement resulted.

11 Spansion Japan Limited, a Japanese corporation and wholly-owned subsidiary of Spansion LLC, commenced its own proceeding under the Corporate Reorganization Law (Kaisha Kosei Ho) of Japan on February 10, 2009, and its foreign representative commenced a chapter 15 proceeding in this Court on April 30, 2009 (Case No. 09–11480). Consequently, Spansion LLC has lost control of its former subsidiary.

Also, in anticipation of confirmation, the Court held a hearing on January 29, 2010 to consider the Debtor's motion to estimate the maximum amount of Tessera's administrative claim, and issued a bench ruling on February 9, 2010, estimating Tessera's administrative claim in the amount of $4,232,986.13. On February 12, 2010, the Court heard the Debtors' motion to determine proper classification of Spansion Japan's rejection damages claim, and issued a bench ruling on February 19, 2010, determining that Spansion Japan's rejection damages claim must receive the same treatment as other unsecured claims.

As a result of the continued negotiations and court rulings, the Debtors filed a Plan Supplement to the December 16 Plan, which was amended numerous times.[12] To incorporate the various modifications, the Debtors filed amended plans, culminating with the Debtors' Second Amended Joint Plan of Reorganization (As Amended) dated February 23, 2010 (D.I. 2915)(the "Plan").

12 The Debtors filed their Plan Supplement (D.I. 2356) on January 19, 2010, the First Addendum to the Plan Supplement (D.I. 2410) on January 22, 2010, the Second Addendum to the Plan Supplement (D.I. 2692) on February 8, 2010, the Third Addendum to the Plan Supplement (D.I. 2857) on February 22, 2010, the Fourth Addendum to the Plan Supplement (D.I. 2919) on February 23, 2010, the Fifth Addendum to Plan Supplement (D.I. 2984) on March 1, 2010, the Sixth Addendum to Plan Supplement (D.I. 3140) on March 19, 2010, and the Seventh Addendum to Plan Supplement (D.I. 3190) on March 26, 2010.

(3) ***Summary of Selected Plan Provisions***[13]

13 Capitalized terms not otherwise defined herein are defined in the Plan.

A summary of the classification scheme in the Debtors' Plan and, as applicable, whether those classes eligible to vote accepted or rejected the Plan, follows:

Class	*Designation*	*Impairment*	*Entitled to Vote*	*Reject or Accept Plan*
1	Secured Credit Facility Claims	Impaired	Yes	Accept
2	UBS Credit Facility Claims	Unimpaired	No*	
3	FRN Claims	Impaired	Yes	Accept
4	Other Secured Claims	Unimpaired	No*	
4A	Travis County, Texas Tax Claims	Unimpaired	No*	
5A	Senior Notes Claims	Impaired	Yes	Accept
5B	General Unsecured Claims	Impaired	Yes	Accept
5C	Exchangeable Debentures Claims	Impaired	Yes	Reject
6	Convenience Class claims	Unimpaired	No*	
7	Non–Compensatory Damages Claims	Impaired	No**	
8	Interdebtor Claims	Impaired	No**	
9	Old Spansion Interests	Impaired	No**	
10	Other Old Equity	Unimpaired	No*	
11	Other Old Equity Rights	Impaired	No**	
12	Securities Claims	Impaired	No**	
13	Non–Debtor Intercompany Claims	Impaired	No**	

* Unimpaired classes deemed to accept the Plan.

** Impaired classes deemed to reject the Plan.

***122** (Plan, §§ 2.4, 2.5, 2.6.)

The Plan obligations to be paid on or, as soon as practicable, after the Effective Date include a cash distribution to the FRNs pursuant to a cash-out option under the Plan, payments to holders of allowed Administrative Expense, Priority and Convenience Claims, and payment of certain Secured Claims. (Memorandum in Support of Confirmation, D.I. 2690, ¶ 92.) The cash necessary for the Debtors to make the payments required by the Plan is available from existing cash balances, the operations of the Debtors or the Reorganized Debtors, the Exit Financing Facility, the New Spansion Debt (if issued or incurred), the Rights Offering, and other cash available to the Debtors, as applicable. (Plan, § 6.2.)

The "Rights Offering" is a rights offering of New Spansion Common Stock in an amount of up to $109,375,000 to be offered to the Holders of Class 5A, 5B, or 5C Claims that are deemed allowed and are in an amount equal to or greater than $100,000 for purposes of voting of on the Plan.[14] (Plan, § 1.1(137) and (139), *see also* § 6.10.) The Plan provides that the Debtors may elect to enter into a Backstop Rights Purchase Agreement with a Backstop Party in connection with the Rights Offering. (Plan, § 1.1(14) and (15).) The purpose of the Backstop Rights Purchase Agreement is to ensure that the total equity offering is fully subscribed. (Tr. 2/24/10 at 147:17–19 (Sarkisian).) On December 17, 2009, the Debtors filed a motion seeking authority to enter into a Backstop Rights Purchase Agreement with Silver Lake Sumeru, L.P. ("Silver Lake"), and approval of the fees associated therewith (D.I. 2039) (the "Backstop Motion"). The Convert Committee objected to the Backstop Motion and, after a hearing on January 7, 2010, the Court overruled the objection and granted the relief requested in the Backstop Motion (D.I. 2198). As of ***123** the Confirmation Hearing, the Rights Offering, with the participation of Silver Lake as the Backstop Party, (the "Silver Lake Rights Offering") was fully subscribed and the monies in escrow. (Tr. 2/24/10 at 151:21–25 (Sarkisian).)

14 "New Spansion Common Stock" means shares of common stock or other ownership interests of Reorganized Spansion, Inc., par value of $0.01 per share, to be issued or reserved for issuance by Reorganized Spansion, Inc. on or after the Effective Date of the Plan. (Plan, § 1.1(99).)

Section 7.3 of the Plan sets forth the terms of the "New Employee Incentive Compensation Programs," which reserves 9,005,376 shares of New Spansion Common Stock for issuance under an equity incentive plan for employees, management, and the directors of the Reorganized Debtors (the "Equity Incentive Plan"). (Plan, § 7.3.)

Sections 11.3 and 11.4 of the Plan set forth broad releases by the Debtors and by holders of claims and interests, which are discussed in more detail *infra.* (the "Plan Releases").

(4) *The alternative rights offering.*

On January 15, 2010, and as supplemented on January 20, 2010, members of the Convert Committee made an alternative equity financing proposal to the Debtors, offering $112 million at a price of $19.21 per share, which represents a 12% discount of the implied equity value derived from a $1.5 billion enterprise value for the Debtors (the "Alternative Rights Offering"). A letter dated January 20, 2010 was sent to the Debtors' counsel (i) advising of the proposed Alternative Rights Offering, (ii) attaching a proposed Amended Exit Financing Agreement, and (iii) advising that the Convert Committee's attorneys held in escrow executed signature pages for the subscriptions in the total amount of $112 million. (*See* Ex. G to the Convert Committee's Preliminary Objection to the Plan (D.I. 2469).)

DISCUSSION

A. *The Convert Committee's Motion to Vacate.*

The Convert Committee's Motion to Vacate, which was joined by AHEC,[15] asks this Court to vacate the Disclosure Statement Order due to the number of "fundamental misrepresentations" contained in the Disclosure Statement. In particular, the Convert Committee and AHEC (the "Movants") argue that "the assumptions underlying the low valuation case set forth in the Disclosure Statement are intentionally, i.e., knowingly, disingenuous and misleading." (Motion to Vacate, ¶ 4.) In addition, the Motion to Vacate seeks appointment of an examiner pursuant to Bankruptcy Code § 1104(c)(2), or a trustee pursuant to § 1104(a)(1) and (2), to investigate the misrepresentations. On February 22, 2010, the Convert Committee filed a supplement to the Motion to Vacate (D.I. 2877), asserting that the Debtors refused to consider the Convert Committee's alternative equity financing proposal in good faith.

15 On January 25, 2010, AHEC filed the Joinder of Ad Hoc Committee of Equity Security Holders to the "Ad Hoc Committee of Convertible Noteholders' Emergency Motion For Order (A) Vacating Order Approving Debtors' Disclosure Statement and Adjourning Confirmation Hearing and (B) Directing Appointment of Trustee or Examiner Pursuant to 11 U.S.C. §§ 1104(a)(1) and (2) and 1104(c)(2)" (D.I. 2420)(the "AHEC Joinder").

The Debtors and the Senior Noteholders (the "Respondents") objected to the Motion to Vacate (D.I. 2630 and D.I. 2631.) The Respondents argue that the Motion to Vacate is a litigation tactic to derail confirmation and leverage the Movants' "limited economic position."[16] The Respondents ***124** further argue that the true nature of the Motion to Vacate is, in substance, a dispute the Debtors' value that is more appropriately heard as part of the Convert Committee's objection to Plan confirmation.

16 It has been said that in such vigorously disputed cases, "[j]unior creditors invoke expensive and time-consuming procedures merely to extract a payout exceeding their entitlements." Douglas G. Baird & Donald S. Bernstein, *Absolute Priority, Valuation Uncertainty, and the Reorganization Bargain,* 115 YALE L.J.1930, 1932 (2006).

[1] The Motion to Vacate first seeks to vacate the Disclosure Statement Order pursuant to Fed.R.Civ.P. 60(b)(3), made applicable hereto by Fed.R.Bankr.P. 9024, which provides that "[o]n motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for ... fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party." To prevail on a Rule 60(b)(3) motion, "the movant must show that the adverse party engaged in fraud or other misconduct, and this conduct prevented the movant from fully and fairly presenting his case." *Linear Tech. Corp. v. Monolithic Power Sys., Inc.,* 2009 WL 3805567, *3 (D.Del. Nov. 12, 2009). *See also* In re Chipwich, Inc., 64 B.R. 670, 676 (Bankr.S.D.N.Y.1986) ("A motion to vacate an order for fraud in its procurement pursuant to Fed.R.Civ.P. 60(b)(3) must be proved by clear and convincing evidence.")

I note that many of the Movants' arguments were considered and rejected during the hearing on approval of the Disclosure Statement. However, to the extent the Movants allege new evidence of the Debtors' misconduct, I will consider the Motion to Vacate.

[2] As evidence that the Disclosure Statement Order was procured with intentional and material misrepresentations, the Convert Committee relies upon written materials provided by the Debtors and their advisors at presentations to prospective lenders and ratings agencies, and other public statements, which the Convert Committee argues present an analysis of the Debtors' business that is materially inconsistent with the information provided in the Debtors' Disclosure Statement.[17] Specifically, the Convert Committee alleges that the Disclosure Statement (i) relies heavily on projections that are based upon an inordinate number of overstated risks, which the Debtor now admits are irrelevant, and fails to disclose revenue opportunities or present an "upside case" for the Debtors' future prospects,[18] (ii) fails to attribute any value to certain assets, such as the intellectual property portfolio, probable litigation recoveries, and net operating losses, and (iii) fails to disclose the Debtors' true growth strategy, which has been described to audiences at the Presentations as a "business model targeting profitable growth" or characterizing the Debtors as "a dominant player in an attractive and emerging market." (Motion to Vacate, ¶¶ 9–12.) AHEC joins in the foregoing, and adds that during discovery in November 2009, the Debtors denied having developed ***125** any "upside case." Yet, AHEC argues, the Debtors presented "upside case projections" to creditors in September 2009 and, more recently, in the Presentations. (AHEC Joinder, ¶¶ 7–10.)

17 The Convert Committee specifically refers to the presentation given by the Debtors' management to rating agencies on December 10, 2009 (the "Rating Agency Presentation")(Ex. C–55), and the presentation given by the Debtors' management to potential lenders on January 12, 2010 (the "Lender Presentation") (Ex. C–61 and Ex. C–62) (jointly, the "Presentations").

18 Much of the valuation battle centered around the Debtors' "Base Case Projections"—projections intended to reflect the expected future performance of the Debtors—and the "Contingency Case Projections"—projections reflecting certain risks which might adversely impact the Debtors' future performance. The projections are described in more detail, *infra.*

The Debtors retort that the Convert Committee and AHEC are taking comments out of context and distorting the record.

First, the Debtors note that they have not abandoned the Contingency Case Projections in connection with their asserted enterprise value, although some of the risks identified in those projections have been reduced. For example, some of the risks and costs associated with Spansion Japan are no longer speculative due to the settlement (although the amount of Spansion Japan's substantial prepetition rejection damages claim ($761,238,570) is still an open issue).[19] While the Debtors advised potential lenders that they were focused on the Base Case Projections, they acknowledged that other risks identified in the Contingency Case Projections remain. (Ex. C–62 at 33–35.) Second, the Debtors have been reluctant to place a value on certain assets the Movants deem "material," due to uncertainty whether any value will be realized from those assets. The most recent valuation by the Debtors' expert, however, values some of those assets, such as the NOLs and potential litigation recoveries, in determining Distributable Value.[20] (Ex. D–1, at 23). Finally, certain growth opportunities identified in the Presentations were not included in the projections because the Debtors view these opportunities as speculative. While not conceding any puffery, the Debtors noted that the hypothetical revenue numbers that could arise from the potential growth opportunities were prepared by the marketing department, and "have not been subjected to any financial analysis to determine necessary capital and resource expenditures and the ultimate impact, if any, on the Debtors' EBITDA."[21] (Debtors post-hearing submission, D.I. 3061, at 2, citing Tr. 2/24/10 at 72–73 (Devost).)

19 On October 9, 2009, the Debtors filed a motion for an order authorizing the rejection of the Second Amended and Restated Foundry Agreement dated March 30, 2007 between Spansion LLC and Spansion Japan (the "Rejection Motion") (docket no. 1293). On November 19, 2009, this Court entered an order approving the Rejection Motion (docket no. 1716).

20 In his expert report, Henry Owsley of Gordian Group, LLC writes that he was asked to analyze the value available for distribution to the Debtors' constituencies (the "Distributable Value"), which he defined as: (i) the estimated value of the Reorganized Debtors' operations on a going-concern basis (the "Enterprise Value"); plus (ii) the value associated with other specific assets not reflected as part of the Debtors' operations on an on-going basis (for example, the value associated with certain auction rate securities, proceeds from the sale of a facility in China, net operating losses, anticipated litigation recoveries, and others); less (iii) estimated administrative and priority expense claims (whether assumed to be paid at the Effective Date or thereafter); less (iv) payments related to the settlement with Spansion Japan not otherwise reflected in the projections or in the administrative and priority expenses.

21 "EBITDA" is an acronym for "Earnings Before Interest, Taxes, Depreciation and Amortization."

The Movants criticize the Debtors' overly optimistic emphasis on future opportunities—or "tailwinds"—when speaking of their aspirations for the company to potential lenders or ratings agencies, while relying on more conservative, less optimistic financial projections in the Disclosure Statement and Plan. The Disclosure Statement, however, states that the Debtors "identified a number of risks *and opportunities* that could impact the Debtors' ability to perform consistently with the Base Case [projections]." (Disclosure Statement ***126** at 61)(emphasis added). At bottom, what the Movants resist are the underlying assumptions in the Debtors' enterprise valuation. Such objections are appropriately considered as objections to confirmation. The record does not support a conclusion that the Debtors obtained approval of the Disclosure Statement based upon misconduct and intentional misrepresentations.

[3] The Motion to Vacate also seeks appointment of an examiner, pursuant to Bankruptcy Code § 1104(c)(2), to investigate the Debtors' alleged intentional and material misrepresentations.[22] Section 1104(c)(2) provides:

22 The Convert Committee asks, first, for appointment of an examiner under § 1104(c)(2) or, in the alternative, appointment of a trustee under § 1104(a)(1) or (2).

> (c) if the court does not order the appointment of a trustee under this section, then at any time before confirmation of a plan, on request of a party in interest or the United States trustee, and after notice and a hearing, **the court shall order** the appointment of an examiner to conduct an investigation of the debtor **as is appropriate,** including an investigation of any allegations of fraud, dishonesty, incompetence, misconduct, mismanagement, or irregularity in the management of the affairs of the debtor of or by current or former management of the debtor; if—

(1) such appointment is in the interests of creditors, any equity security holders, and other interests of the estate; or

(2) the debtor's fixed, liquidated, unsecured debts, other than debts for goods, services, or taxes, or owing to an insider, exceed $5,000,000.

11 U.S.C. § 1104(c)(2) (emphasis added). It is not disputed that the § 1104(c)(2) debt threshold is met in this case. The Movants, therefore, argue that § 1104(c)(2) requires appointment of an examiner. *See, e.g., In re Revco D.S., Inc.,* 898 F.2d 498, 500–01 (6th Cir.1990) (appointing an examiner because the plain meaning of the statute provides that a bankruptcy court "shall" order the appointment of an examiner when the total fixed, liquidated, unsecured debt exceeds $5 million, if the trustee requests one).

While some courts have agreed that the language of § 1104(c)(2) mandates appointment of an examiner if the $5,000,000 debt threshold is met, courts also have decided that "it is well-established that the bankruptcy court has considerable discretion in designing an examiner's role." *Loral Stockholders Protective Comm. v. Loral Space and Commc'ns, Ltd. (In re Loral Space and Commc'ns, Ltd.),* 2004 WL 2979785, *5 (S.D.N.Y. Dec.23, 2004). *See also In re Erickson Retirement Communities, LLC,* 2010 WL 881727, *2 (Bankr.N.D.Tex. March 5, 2010) ("[If] the $5 million unsecured debt threshold is met, a bankruptcy court ordinarily has no discretion. The only judicial discretion that comes into play is in defining the scope of the examiner's role/duties."). Collier on Bankruptcy recognizes this conflict, opining that the language of § 1104(c)(2) is mandatory, but noting that the provision "was not intended and should not be relied on to permit blatant interference with the chapter 11 case or the plan confirmation process." 7–1104 Collier on Bankruptcy ¶ 1104.03[2] (2009).

The statute requires appointment of an examiner "to conduct an investigation of the debtor *as is appropriate* " if the debtor's unsecured debts exceed $5 million. (*Id.*)(emphasis added.) In *In re Winston Indus., Inc. (In re Shelter Resources* ***127** *Corp.),* 35 B.R. 304, 305 (Bankr.N.D.Ohio 1983), the Court decided:

> No evidence has been offered to this Court indicating fraud, mismanagement or irregularities in the management of the debtor or the debtor-in-possession.... It is the opinion of this Court, therefore, that confronted with the facts and circumstances that presently exist in this particular case, to slavishly and blindly follow the so-called mandatory dictates of Section 1104(b)(2) [now, § 1104(c)(2)] is needless, costly and non-productive and would impose a grave injustice on all parties herein.

Some courts have appointed examiners with no duties to reconcile the mandatory appointment/ discretionary duty conflict of § 1104(c)(2). In *Erickson,* the Court wrote:

> [T]his court, were there no standing/waiver problem on the part of the [movant], would be hard pressed to find any useful purposes for an examiner. Much like Judge Schmidt did in the case of *In re Asarco, LLC,* No. 05–21207, docket entry 7081 (Bankr.S.D.Tex. March 4, 2008), this court (in light of the mandate of Section 1104(c)) would ... appoint an examiner with no duties, unless and until otherwise ordered by the court.

2010 WL 881727 at *6.[23] I find no sound purpose in appointing an examiner, only to significantly limit the examiner's role when there exists insufficient basis for an investigation. To appoint an examiner with no meaningful duties strikes me as a wasteful exercise, a result that could not have been intended by Congress.

23 Faced with similar inappropriate requests for examiners in cases that met the debt threshold, courts have found other reasons to deny the requests. In *In re Bradlees Stores, Inc.,* 209 B.R. 36 (Bankr.S.D.N.Y.1997), the Court wrote that the request for an examiner was "inappropriate, improper, and improvident," (*Bradlees,* 209 B.R. at 40), but did not decide whether the language of § 1104(c)(2) was mandatory, because it held that the movants waived any right under § 1104(c)(2) by allowing the debtors to conduct a thirteen-month investigation at significant cost to the estate, and, therefore, the examiner's investigation would be duplicative, needless and wasteful. In *Erickson,* the Court held that the movant lacked standing to request an examiner because, in a subordination agreement, the movant had waived its right to file any action until the senior lenders were paid in full. *Erickson,* 425 B.R. at 315–16. The *Erickson* Court decided the motion for an examiner was:

> unmistakably aimed at slowing down the confirmation process and gaining leverage to enhance or create recoveries for the Subordinated Creditors. This is the very type of obstructionist behavior that the [subordination] agreements are intended to suppress.

Id. The *Erickson* Court further noted that appointment of an examiner was not in the best interests of the creditors or the estate, because the issue before it concerned a dispute about whether value was properly allocated between two debtors. *Id.* at 315. The Court wrote that it would hear evidence and decide the value issue at confirmation. *Id.*

Collier on Bankruptcy notes:

> Section 1104(c)(2) is the only remnant of the "public company" exception contained in the original Senate bill, S. 2266. The Senate bill would have provided for the mandatory appointment of a trustee in "public company" cases, which were defined as cases in which unsecured debt totalled[sic] at least $5,000,000 and there were not less than 1,000 security holders. The requirement that the court appoint an examiner if requested in any case where the specified debts exceed $5,000,000 was included in the Code as part of the compromise under which the "public company" provisions were deleted.

7–1104 Collier on Bankruptcy ¶ 1104.03[2] (2009). This provision was designed "to ***128** provide extra protection to stockholders of public companies through the mechanism of an independent fiduciary." *Loral,* 2004 WL 2979785 at *4. Here, due to the Debtors' enterprise value, equity is entitled to no distribution under the Plan. Moreover, while not an official committee, AHEC has been extraordinarily active in this chapter 11 proceeding and has advocated vigorously views of equity.

The record before me does not provide sufficient evidence of conduct that would make an investigation of the Debtors "appropriate," but rather reveals deep and heated differences of opinion about the value of the Debtor companies. Moreover, the allegations of bad faith against the Debtors' management for rejecting the Convert Committee's Alternative Rights Offering provides a classic confirmation dispute, rather than grounds for an investigation by an examiner. Throughout this case, the Creditors Committee and various *ad hoc* committees have vigorously represented the interests of unsecured creditors. All of the parties have had ample opportunity to conduct—and have conducted—extensive discovery, and to investigate the Debtors. Appointment of an examiner at this time, based on this record, is neither warranted nor appropriate, and would cause undue cost to the estate, which would be harmful to the Debtors and would delay the administration of this chapter 11 case. The request for appointment of an examiner pursuant to § 1104(c)(2) will be denied.

[4] The Movants alternatively seek appointment of a trustee pursuant to Bankruptcy Code § 1104(a)(1) and (2), which provide:

> (a) At any time after commencement of the case but before confirmation of a plan, on request of a party in interest or the United States trustee, and after notice and a hearing, the court shall order the appointment of a trustee—
>
> (1) for cause, including fraud, dishonesty, incompetence, or gross mismanagement of the affairs of the debtor by current management, either before or after the commencement of the case, or similar cause, but not including the number of holders of securities of the debtor or the amount of assets or liabilities of the debtor; [or]
>
> (2) if such appointment is in the interests of creditors, any equity security holders, and other interests of the estate, without regard to the number of holders of securities of the debtor or the amount of assets or liabilities of the debtor.

The Third Circuit Court of Appeals has held that appointment of a chapter 11 trustee is an extraordinary remedy that is the exception, and not the rule. *See In re Sharon Steel Corp.,* 871 F.2d 1217, 1225 (3d Cir.1989). For the same reasons as set forth above in relation to § 1104(c)(2), I conclude that appointment of a trustee would not be in the best interests of the estate or its creditors, and would unduly delay confirmation and cause the Debtors to incur unnecessary costs.[24]

24 If the Debtors are unable to amend the Plan consistent with this Opinion, it may be that a request for appointment of a chapter 11 trustee is then warranted. *See In re Marvel Entertainment Group, Inc.,* 140 F.3d 463 (3d Cir.1998).

For the reasons set forth above, the Motion to Vacate, in all of its parts, will be denied.

B. *Plan Confirmation*

1. *Plan Confirmation Requirements and Remaining Objections.*

[5] [6] The Debtors' Plan can be confirmed only if it complies with the requirements *129 of Bankruptcy Code § 1129. As I noted in *Exide Technologies:*

> The plan proponent bears the burden of establishing the plan's compliance with each of the requirements set forth in § 1129(a), while the objecting parties bear the burden of producing evidence to support their objections. *Matter of Genesis Health Ventures, Inc.,* 266 B.R. 591, 598–99 (Bankr.D.Del.2001); *Matter of Greate Bay Hotel & Casino, Inc.,* 251 B.R. 213, 221 (Bankr.D.N.J.2000) (citations omitted). In a case such as this one, in which an impaired class does not vote to accept the plan, the plan proponent must also show that the plan meets the additional requirements of § 1129(b), including the requirements that the plan does not unfairly discriminate against dissenting classes and the treatment of the dissenting classes is fair and equitable. *Id.*

In re Exide Techs., 303 B.R. 48, 58 (Bankr.D.Del.2003).

The main issues raised in the remaining objections to confirmation of the Debtors' Plan include the following:

(i) whether the Plan proponents have under-valued the Debtors, thereby unfairly impairing unsecured creditors and violating § 1129(a)(3) and § 1129(b)(1) and (2);

(ii) whether the Equity Incentive Plan provides too much value to the management and employees of the Reorganized Debtors, at the expense of unsecured creditors, especially when the value of the Equity Incentive Plan is determined in light of a proper valuation of the Debtors, thereby violating § 1129(a)(3) and § 1129(b)(1) and (2);

(iii) whether the Debtors wrongfully refused to consider the Alternative Rights Offering proposed by the Convert Committee, which would provide greater recovery to unsecured creditors, thereby violating § 1129(a)(3) and § 1129(b)(1) and (2);

(iv) whether the Debtors provided false and misleading information in the Plan and Disclosure Statement regarding the Debtors' future prospects, thereby violating § 1129(a)(2);[25]

25 This objection is overruled for the same reasons I deny the Motion to Vacate, *supra.*

(v) whether the proposed Plan Releases violate applicable bankruptcy law, thereby violating § 1129(a)(1);

(vi) whether the Debtors improperly refused to consider Tessera's multiple votes on the Plan, based upon Tessera's multiple claims against the Debtors, thereby violating § 1129(a)(1);

(vii) whether the Debtors' proposed treatment of Tessera's administrative claim violates § 1129(a)(9); and

(viii) whether the Plan unfairly proposes that only the "Claims Agent" will have authority to file objections to disputed unsecured claims, thereby depriving other creditors of their statutory right to object to claims and violating § 1129(a)(1), (3) and § 1129(b)(1) and (2).

[7] The role of the Court in a contested confirmation is to ensure that the proposed plan is fair and equitable to the dissenting class, which includes finding that no class will be paid more than the allowed amount of their claims. 11 U.S.C. § 1129(b)(1), 7–1129 Collier On Bankruptcy ¶ 1129.05 [3] (2009) ("Put another way, if equity is to be eliminated, ... then equity holders can force a valuation of the reorganized debtor to ensure that whoever does *130 receive the equity interests in that entity will not be overcompensated.")

It has been aptly observed that "entity valuation is much like 'a guess compounded by an estimate.' " *Id.* quoting Peter Coogan, *Confirmation of a Plan Under the Bankruptcy Code,* 32 Case W.Res.L.Rev. 301, 313 n. 62 (1982).[26] "Regardless of the method used, the result will rarely, if ever, be without doubt or variation. As the [United States] Supreme Court has put it:

26 Put another way, "[i]n Chapter 11, a single, non-expert judge is expected to value the reorganizing business on the basis of the testimony of experts who, far from being impartial, are advocates for competing points of view." Baird, *supra,* n. 16, at 1936.

Since its application requires a prediction as to what will occur in the future, an estimate, as distinguished from mathematical certitude, is all that can be made. But that estimate must be based on an informed judgment which embraces all facts relevant to future earning capacity and hence to present worth, including, of course, the nature and condition of the properties, the past earnings record, and all circumstances which indicate whether or not that record is a reliable criterion of future performance."

7–1129 Collier on Bankruptcy ¶ 1129.05[3][c] quoting Consolidated Rock Prods. Co. v. du Bois, 312 U.S. 510, 526, 61 S.Ct. 675, 684–85, 85 L.Ed. 982, 991 (1941).

The Debtors argue that the Plan is confirmable no matter what value the Court determines for the Debtors. However, a number of other issues surrounding confirmation, specifically whether the Plan is offered in good faith, as required by § 1129(a)(3), and is fair and equitable to the dissenting class, as required by § 1129(b)(1), require an analysis of the Debtors' value. As directed by the Supreme Court in Consolidated Rock, my determination of value must be informed by the record before me.

[8] Some plan objectors argue that the Debtors' value is best determined by referring to the active market for buying claims. There is some evidence before me about the amounts being paid for the various types of claims (Tr. 3/1/2010 at 301:2–11 (Morgner)); however, there is no evidence beyond the mere statement of certain trading prices. There is no record on the number of trades, over what period of time such trades occurred, how open the market is to participants or other factors that may be relevant. At least one court has determined that preconfirmation claims trading is not an accurate measure of a debtor's value. *See* In re Mirant Corp., 334 B.R. 800, 832 (Bankr.N.D.Tex.2005).

Instead, in this case, value must be determined by relying on the expert opinions in the record. As noted by Judge Peck in the *Iridium* decision, I recognize that, in a contested matter such as this, the hired experts often approach their valuation task from an advocate's point of view. Statutory Comm. Of Unsecured Creditors v. Motorola, Inc. (In re Iridium Operating LLC), 373 B.R. 283, 291 (Bankr.S.D.N.Y.2007). *See also* In re Mirant Corp., 334 B.R. at 814–15 ("That experts may be anxious to serve the interests of the parties retaining them is neither startling nor enough reason to disregard their testimony.... It simply means the court must be cautious itself, avoiding undue optimism while at the same time ensuring that assumptions and data used for valuing [the debtor] give full value to the business as rehabilitated through chapter 11.") Therefore, bearing in mind the allegations regarding the underlying motives of the competing parties, together with my assessment of each witness's competency and ***131** credibility, I turn to evaluation of the competing expert opinions.

2. *Valuation.*

Three expert witnesses testified at the Confirmation Hearing about the Debtors' valuation.[27] The Debtors' witness, Henry Owsley of the Gordian Group, LLC ("Gordian"), concluded that the Debtors' total enterprise value falls within the range of $700 million to $850 million. (Ex. D–1 at 17.) The Senior Noteholders' witness, Michael J. Genereux of The Blackstone Group ("Blackstone"), concluded that the Debtors' total enterprise value falls within the range of $799 million to $944 million. (Ex. SN–1 at 42.) The Convert Committee's witness, Richard W. Morgner of Jefferies & Company, Inc. ("Jefferies") concluded that the Debtors' total enterprise value falls within the range of $1.054 billion and $1.419 billion. (Ex. C–1 at 4.)

27 Also included in the record, although not discussed in detail, were two expert reports relied upon at the November 30, 2009 hearing to consider AHEC's motion appoint an official equity committee: (i) an expert report of Houlihan Lokey, prepared at the request of the FRNs, which determined that the Debtors' enterprise value fell within a range of $671 million and $833 million (Ex. SN–28 at 32), and (ii) an expert report of Oppenheimer & Company, Inc., prepared at the request of AHEC, which determined, through a discounted cash flow analysis, that the Debtors could have a value in a range as high as $1.264 billion to $3.231 billion (Ex. SN–26 at 8.)

In arriving at their respective valuation conclusions, the experts used three customary valuation methodologies: discounted cash flow analysis, publicly traded company analysis (or the "comparable company" analysis), and comparable M & A transaction analysis.

(a) ***Base Case Projections vs. Contingency Case Projections.***
[9] The Debtors prepared two sets of projections during the bankruptcy case. In April and May 2009, the Debtors developed the "Base Case" forecast of financial statements, which represented management's best estimate as of May 2009 of the Debtors' future performance over the 2010 to 2012 period. (Disclosure Statement at 60–61; Tr. 2/24/10 at 21:14–26:20 (Devost).) The Base Case Projections were prepared to include "a realistic plan [the Debtors] could achieve, essentially make it a balanced plan, aggressive but achievable." (Tr. 2/24/10 22:6–9 (Devost).) Thereafter, the Debtors identified a number of risks that would impact the Debtors' ability to achieve the results of the Base Case Projections and, in July 2009, the Debtors' financial advisors (Gordian) worked with management to develop a "Contingency Case" forecast by refining the Debtors' view of potential downsides to the 2010 business plan, as well as extending the downside analyses to the 2011 and 2012 forecast years (Disclosure Statement at 62; Tr. 2/24/10 29:6–30:7 (Devost).) The risks identified by the Debtors included a downturn in the Pachinko business,[28] market share loss due to the bankruptcy filing, increased competition, litigation, and the claims of Spansion Japan. (Ex. D–15.)

28 Pachinko is a gaming business that is popular in Japan. Various gaming machines are built using significant quantities of NOR Flash memory chips. The Debtors believe that, as a result of the chapter 11 cases, they are losing a large market share in this business as customers seek other sources for the products. (*See* Disclosure Statement, Ex. C "Projections" at C–7; Tr. 2/24/10 at 32:16–25 (Devost).)

The Convert Committee argues that the Contingency Case Projections are no longer relevant, and criticizes the Gordian and Blackstone valuations for improperly including the Debtors' Contingency Case ***132** Projections in their analyses to lower the value ranges. The Base Case Projections are more reliable, the Convert Committee argues, because the Base Case resulted from a bottoms-up, two-month, rigorous business planning process. Moreover, in the second through fourth quarters of 2009, the Debtors performed even better than forecast in the Base Case Projections. (Ex. D–8 at 49; Tr. 2/24/10 at 58:12–60:18 (Devost).) Jefferies, therefore, did not include the Contingency Case Projections in its valuation.

The Debtors argue in reply that, although they have focused on the Base Case Projections, most of the risks identified in the Contingency Case Projections continue to be present and have a significant negative impact on the business. (Tr. 2/24/10 at 65:11–17, 98:23–99:5 (Devost).) At the Confirmation Hearing, it was demonstrated that some of the risks associated with the Contingency Case, such as those arising from the Debtors' relationship with Spansion Japan, have been mitigated. (Tr. 2/24/10 at 33:23–35:6 (Devost).) However, other risks—including the Debtors' loss of market share while in bankruptcy, the Debtors' loss of a significant part of the Pachinko business in Japan, and increased competition in certain products—remain outstanding. (Ex. D–15; Tr. 2/24/10 at 32:14–33:22 (Devost).)

The Convert Committee also criticizes the lack of an "upside" case to offset the risks identified in the Contingency Case Projections. The Convert Committee relies upon more recent statements by the Debtors regarding "growth opportunities" that are not reflected in the Base Case or Contingency Case Projections. However, the Debtors included growth assumptions in their Base Case Projections, despite forecasts by industry analysts that the NOR market is declining. (Ex. SN–D1.) The Debtors also presented testimony that the growth opportunities are speculative and long-term and, therefore, have not yet been quantified. (Tr. 2/24/10 at 65:11 –21, 99:6–12 (Devost).)

The Gordian valuation weighted the Base Case Projections at 75% and the Contingency Case Projections at 25%. (Ex. D–1 at 54.) The Blackstone valuation also used both projections, weighting the Base Case at 85% and the Contingency Case at 15%. Based on the record before me, I conclude that both Gordian and Blackstone properly included the Contingency Case Projections in their analyses, but justifiably accorded those projections less weight than the Base Case Projections.

(b) ***Comparable Company Analysis: Revenue Multiple.***
Another issue that distinguishes the expert reports from one another is the use of revenue multiples in calculating value under the comparable company analysis. Both Gordian and Blackstone claim that Jefferies incorrectly used a revenue multiple in its comparable company analysis, which significantly increased the valuation. (Ex. D–27 at 11; Ex. SN–D5.) Gordian and Blackstone used only EBITDA multiples in their comparable company analysis. Jefferies argued that a combination of both multiples should be used. Mr. Genereux of Blackstone opined that an EBITDA multiple (or cash flow multiple) was more appropriate for valuing the Debtors, explaining:

> [C]ompanies are valued based upon how profitable they are. If you generate cash flow you're worth more. If you generate less cash flow, you're worth less. Companies don't trade on revenue volume. They trade on profitability.... [T]his company has a consistent track record for generating cash flows ... it's expected to generate cash flow going ***133** forward even though the industry's declining. But, cash flows are there, and if cash flows are there I believe that's the appropriate for valuing a company on a public market multiple basis.

(Tr. 2/26/10 at 106:14–23 (Genereux).)[29] The valuation calculated in Jefferies' comparable company analysis using the EBITDA multiple is somewhat consistent with the other experts' valuations, showing a range between $871 million and $1.140 billion. (Ex. D–27 at 11; Ex. SN–D5.) However, when the revenue multiple is applied, the Jefferies' comparable company analysis increases the valuation range to $1.309 billion and $1.913 billion. (*Id.*,) This variance is too great to ignore. Jefferies weighted the comparable company analysis (which combined both the EBITDA and revenue multiple calculations) at 45% in its opinion of the Debtors' enterprise value. (Ex. C–1 at 4.) I agree with the Debtors and Senior Noteholders that Jefferies' use of the revenue multiple caused its comparable company analysis, and overall valuation, of the Debtors to be too high.

29 Mr. Genereux also opined that there are situations in which a revenue multiple would be appropriate in a comparable company analysis. (*See* Tr. 2/26/10 at 108:13–109:9.) *See also* D–78, Aswath Damodaran, *Investment Valuation: Tools and Techniques for Determining the Value of Any Asset,* Chapter 20 (2d ed. 2002) ("For new economy firms that have negative earnings, multiples of revenues have replaced multiples of earning in many valuations....The biggest disadvantage of focusing on revenues is that it can lull you into assigning high values to firms that are generating high revenue growth while losing significant amounts of money. Ultimately, a firm has to generate earnings and cash flows for it to have value.")

(c) *Discounted Cash Flow issues.*

The parties have criticized each other's discounted cash flow analyses (or "DCF"), arguing that certain subjective assumptions manipulated the valuations to be either too high or too low. For the reasons stated previously, both Gordian and Blackstone appropriately considered both the Base Case and Contingency Case Projections in their DCF analyses.

An important piece of the DCF analysis is a determination of the discount rate, or the weighted average cost of capital ("WACC").[30] *See Mirant,* 334 B.R. at 839 ("The WACC is the key component for calculating a value using the DCF Method.") Gordian calculated the WACC at 15%, Blackstone at 14.7%, and Jefferies at 13.8%.[31] The parties agree that "the lower the WACC, the higher the value." (Tr. 2/26/10 at 82:4–6 (Genereux), Tr. 3/1/10 at 272:1–4 (Morgner).) One of the first steps in calculating the cost of equity portion of the WACC is selecting a peer group of publicly traded companies to establish a "beta."[32] Both Gordian and Blackstone criticized Jefferies' beta analysis because it ***134** relied upon 12 "comparable" companies engaged in the sale of memory semiconductor products, yet only two of those companies are engaged specifically in the NOR business.[33] (See Ex. C–1 at 52; Tr. 2/26/10 at 87:11 –88:9 (Genereux), Tr. 3/1/10 at 272:23–274:4 (Morgner), Ex. D–27 at 14.) The effect of using the overly broad peer group is to lower the WACC. (Tr. 2/26/10 at 89:18–22 (Genereux).)

30 The DCF has been described as a forward-looking method that "measure[s] value by forecasting a firms' ability to generate cash." *Exide,* 303 B.R. at 63 quoting Peter V. Pantaleo and Barry W. Ridings, *Reorganization Value,* 51 Bus.Law. 419, 427 (1996.) DCF is calculated by adding together (i) the present value of the company's projected distributable cash flows (i.e., cash flows available to all investors) during the forecast period, and (ii) the present value of the company's terminal value (i.e., the value of the firm at the end of the forecast period.) *Id.* The WACC is based upon a combined rate of the cost of debt capital and the cost of equity capital. *Id.* at 64.

31 Ex. SN–D2 shows that Jefferies' 13.8% WACC was also lower than that used in other expert valuation analyses submitted previously in this case, including the Houlihan Lokey report (16%), and the Oppenheimer report (14%). *See, supra,* n. 25.

32 A "beta" "reflects the risk associated with an equity investment in the firm relative to the risk of an investment in the equity market as a whole." Pantaleo, *supra* n. 30, at 434.

33 The Convert Committee argues that Jefferies' beta analysis also included a company-specific risk premium to raise the cost of equity and offset any disparity with the "comparable" companies. (Tr. 3/1/10 at 216:6–17 (Morgner).) However, the other experts also included risk premiums. (Ex. SN–1 at 53; Ex. D–1 at 52.)

A second important piece of the DCF analysis is the terminal value. Blackstone applied a perpetuity growth rate range of negative 2.5% to positive 2.5%, which has a midpoint of 0% growth rate, in its terminal value.[34] (Ex. SN–1 at 55; Tr. 3/1/10 94:20–95:20 (Genereux).) Mr. Genereux testified that the 0% perpetuity growth rate assumes that the Debtors' market share is growing, even as the NOR markets are shrinking. (*Id.*) Gordian's terminal growth rates were identical. (Ex. D–1 at 13.) Jefferies' applied a perpetuity growth rate range of 0% to 3%, with a midpoint of 1.5%. (Ex. C–1 at 19.) A perpetuity growth rate of 1.5% appears to be at odds with the industry projections of negative growth rates for the NOR products. (Tr. 3/1/10 at 96:11–18 (Genereux).) The higher the perpetuity growth rate, the higher the terminal value. (Tr. 2/26/10 at 265:12–16 (Morgner).)

34 A perpetuity growth method of calculating the company's terminal value assumes that the company's cash flow is expected to continue after the end of the forecast period. (Pantaleo, *supra,* n. 30, at 429).

Another item of contention in calculating the DCF is the "out-years projection."[35] Jefferies' out-years projection gradually reduced the Debtors' free cash flows over a period from 2012 through 2019. (Ex. C-l at 49.) Blackstone relied upon management's out-years analysis, which reduces revenue and EBITDA beginning in 2013.[36] (SN–1 at 55, 57.) The Convert Committee argues that the Debtors' out-years projections incorrectly assume an abrupt reduction of revenue and EBITDA beginning in 2013, because that assumes that the Debtors will be outsourcing 100% of its manufacturing beginning 2013.[37] Instead, Management's testimony ***135** reveals that the outsourcing will occur over a 5–10 year period. (Tr. 2/26/10 at 139:23–141:20 (Genereux), Tr. 2/24/10 at 77:23–78:12 (Devost).) This testimony is not consistent with using 2013 as the out-year, employed by Blackstone, but is more in line with the gradual decrease of EBITDA, over a period ending with 2019 as the out-year, employed by Jefferies.

35 A discounted cash flow analysis necessarily requires an analysis of the company's cash flow projections over a forecasted period, or what is described here as the "out years projection." The length of the forecast period will vary, depending on the circumstances. Although there is no specific rule on the length of a forecast period, "the goal is to forecast through a complete business cycle until a steady state of growth or maturity is reached, at which point the terminal value can be calculated." Pantaleo, *supra,* n. 30, at 431.

36 Although the Convert Committee argues that Gordian also used out-year projections starting at 2013, Gordian's report indicates that it performed a sensitivity analysis illustrating that the operating impact of the out-years analysis does not occur for seven years. (D–1 at 15, ¶ 44.)

37 Management (Donald Devost, the vice president of finance and acting treasurer for the Debtors) explained that the drop in EBITDA starting 2013 reflects a changed business model, in which the Debtors' fabrication is outsourced. (Tr. 2/24/10 at 78:1–8 (Devost).) He testified that the Debtors have one fabrication facility in Austin, Texas. (*Id.* at 28:8–9.) That facility can manufacture chips at certain nanometers, mostly 110, 90 and 65 nanometers. (*Id.* at 28:10–18.) The Debtors have determined that it is not economically feasible to expand or modify the facility to keep up with the technology and fabricate chips "beyond a 65 nanometer note." (*Id.*) Eventually, the Debtors will no longer use the Austin, Texas facility, but will completely outsource the chip fabrication.

Blackstone prepared a sensitivity analysis showing that the effect of using the Jefferies' gradual out-years projection with Blackstone's WACC (14.7%) and perpetuity growth rate (0%) resulted in an enterprise value of $965 million. (Ex. SN–D4.) The range for Blackstone's DCF, based on 2013 out-years projection (and using the WACC of 14.7% and 0% perpetuity growth rate), was $770 million to $928 million. (Ex. S–1 at 52.) Accordingly, Blackstone's use of the 2013 out-years projection, rather than a gradual out-years projection over a longer time period, lowered its valuation conclusion, although not too drastically.

Jefferies also argued that Gordian and Blackstone used the wrong tax rate in calculating their DCF analyses. Gordian and Blackstone used a tax rate of 40% based upon the Debtors' projections, while Jefferies used a tax rate of 35% based upon the Debtors' current tax rate. (Ex. D–1 at 54, Ex. C–1 at 49, Ex. S–1 at 53.) Jefferies argues that using the lower tax rate would result in a $40 million to $50 million difference in the DCF value. (Tr. 3/1/10 at 217:24–218:2 (Morgner).) Unfortunately, none of the parties provided sufficient evidence to demonstrate which tax rate is appropriate.

(d) *Comparable M & A Transactions.*

Each of the experts also performed a comparable M & A transaction analysis in valuing the Debtors.[38] While the parties disagreed whether different transactions relied upon by the experts were truly relevant, they all agreed that certain transactions concerning Numonyx are very relevant to valuing the Debtors, even if limited information was available, because Numonyx is a private company. Numonyx is the Debtors' main competitor in the NOR market. One expert compared the two as alike as "Coke and Pepsi." (Tr. 2/26/10 at 112:11–16; 113:15–22 (Genereux).)

38 In a comparable M & A transaction analysis, the expert determines a multiple based upon recent merger and acquisition transactions involving comparable companies in the industry and then applies that multiple to the target company.

There were two Numonyx transactions that the parties considered. The first transaction, announced in 2007 and closed in 2008, resulted from Intel's and STMicroelectronics' combination of their respective NOR and NAND assets, with financing from Francisco Partners, to form Numonyx. (Ex. D–1 at 11.) The second, announced in February 2010, was Micron Technology, Inc.'s ("Micron") acquisition of Numonyx. (Tr. 2/26/10 at 114:7–8 (Genereux).) In its report, Gordian determined an implied revenue multiple from the first Numonyx transaction in the range of 0.60x to 0.72x. (D–1 at 11.) Blackstone calculated the same revenue multiples from the first Numonyx transaction. (S–1 at 49.) Jefferies' looked at five different M & A transactions involving "memory companies," and calculated a revenue multiple range of 1.2x to 1.7.x. (Ex. C–1 at 21.) Mr. Genereux testified that the Jefferies analysis introduced a set of companies that were not comparable. (Tr. 2/26/10 at 121:22–122:3 (Genereux).)

After limited information was made available about the second Numonyx transaction, Blackstone updated its comparable M & A transaction analysis and calculated the revenue multiple in a similar ***136** range of 0.59x to 0.71x. (Ex. SN–D6.) Jefferies agreed that a revenue multiple of 0.68x would be implied from the second Numonyx transaction, but argued that there was insufficient information available to rely upon the Numonyx transactions alone. (Ex. C Dem–4.) Mr. Genereux, however, testified that the Numonyx information was reliable because it based upon information provided by its acquirer, Micron, a public company, to its investors. (Tr. 2/26/10 at 115:8–117:10 (Genereux); Ex. S–7.)

Jefferies also criticized Gordian's and Blackstone's use of a revenue multiplier for the comparable M & A transaction analyses, arguing instead that a mix of revenue and EBITDA multiples should be used.[39] (See Ex. C–1 at 21.) Mr. Genereux explained that the use of a revenue multiple was necessary in comparing the Numonyx transactions because it was the only information available. (Tr. 2/26/10 at 112:25 –113:22 (Genereux).)[40]

39 Jefferies found this switch to revenue multiples particularly ironic since it was criticized for using revenue multiples instead of EBITDA multiples in its comparable company analysis.

40 The transcript includes the following exchange between Genereux and Senior Noteholders' counsel:

Q: [W]hy did you use a revenue multiple here when valuing the Numonyx transaction?

A: Because it was available .... this transaction was very, what I would describe as, private ... [T]here were two revenue numbers that were cited at the time the transaction was announced, and that was the only two pieces of data that we had to be able to calculate a multiple.

Q: Mr, Genereux, if you were forced to use a revenue multiple analysis then why consider the Numonyx transaction at all?

A. To ignore Numonyx would be foolish and reckless.... It would be like me valuing Pepsi and ignoring Coke ... [D]espite limited data, to ignore Numonyx and ignore this data point would be, I think, reckless. This is the company you want to look at when you're benchmarking Spansion.

Tr. 2/26/10 at 112:25 –113:22 (Genereux.)

The enterprise value as determined by the Blackstone's updated comparable M & A transaction analysis was $695 million to $835 million. (Ex. SN–D6.) This range falls within the enterprise value range calculated by Blackstone using the other methodologies. (Ex. SN–1 at 42.) Gordian's comparable M & A transaction analysis resulted in an enterprise value range of $497 million to $712 million when applied to the Debtors' 2010 revenues, and a range of $598 million to $808 million when applied to the Debtors' 2012 and out-years' revenues. The enterprise value as determined by Jefferies' comparable M & A transaction analysis was $1.690 billion to $2.098 billion. (Ex. C–1 at 21.) This enterprise value range is so far above the ranges calculated by Jefferies' other methodologies that its soundness, and, therefore, its usefulness is doubtful. Jefferies must have considered this, too, because it accorded only 10% weight to the comparable M & A transaction analysis in its final summary of valuation. (Ex. C-l at 4.)

(e) ***Value Conclusion.***

After weighing the experts' testimony, and after consideration of the criticisms raised by the parties to each other's expert reports, I conclude that Blackstone's valuation was appropriately weighted and rested on assumptions that, of the three reports, were the most sound for determining the Debtors' worth at this time and in this industry. Blackstone's report was more transparent than Gordian's, whose explanations were not as clear, and more in line with common valuation practices than Jefferies' report. The Blackstone report was not flawless, however, and may have resulted in a slightly higher valuation ***137** if Blackstone's out-years projection (in the DCF analysis) was adjusted to account for a more gradual decline in EBITDA, consistent with management's testimony. I conclude that the Debtors' enterprise value falls within the higher end of the total enterprise valuation determined by Blackstone. Based upon this record, I conclude that the enterprise value of the Debtors is in the range of $872 million to $944 million.

The parties also calculated a "distributable value" for the Debtors, which was determined by adding sources of additional value (that is, certain auction rate securities, net operating losses, potential litigation recoveries, proceeds from the sale of the Suzhou facility, cash projected to be on hand at emergence, and NAND value) to the enterprise value to arrive at a gross distributable value. (*See* Ex. S–1 at 43; Ex. D–1 at 24; Ex. C–1 at 4.)[41] The sum of the Spansion Japan settlement and the projected administrative and priority claims are then subtracted to arrive at a net distributable value. (*Id.*) Adding to Blackstone's figures for the sources of additional value (which are not materially in dispute, see Ex. SN–1 at 43) in the amount of $496 million to the enterprise value range ($872 million to $944 million), results in an gross distributable value range of $1.368 billion to $1.440 billion. Subtracting the estimated administrative claims of $121 million, results in a net distributable value range of $1.247 billion to $1.319 billion. (*Id.*)

41 Jefferies does not list the net operating losses as a source of additional value since the NOLs are included in its enterprise value conclusion. Blackstone also added in the Rights Offering of $105 million to its net distributable value.

3. ***In light of the foregoing valuation, does the plan treat Class 5C (which rejected the Plan) fairly and equitably?***

[10] The distributable value range as determined above indicates that the Plan treats Class 5C Claims fairly and equitably. Relying on the figures in Ex. SN–D13, and assuming, without deciding, that the Senior Noteholders claims are in the total amount of $282 million, and that the general unsecured creditor claims pool is in the lower amount of $640 million, then there are insufficient funds for the Class 5C Exchangeable Debentures Claims to share in the recovery. At this lower range of claim amounts, the estimated value threshold for Class 5C to share in the recovery requires a net distributable value of $1.526 billion. (Ex. SN–D13 at 2.) Therefore, based on this valuation, the Plan treats all of the unsecured creditors fairly and equitably.

4. ***Is the Equity Incentive Plan offered in good faith?***

[11] The objecting parties argue that the Plan has not been proposed in good faith, as required by § 1129(a)(3), because the

Equity Incentive Plan is not reasonable and, therefore, is not consistent with the objectives and purposes of the Bankruptcy Code. *In re PWS Holding Corp.,* 228 F.3d 224, 242 (3d Cir.2000) ("For purposes of determining good faith under section 1129(a)(3) ... the important point of inquiry is the plan itself and whether such a plan will fairly achieve a result consistent with the objectives and purposes of the Bankruptcy Code.") The objecting parties argue that the Equity Incentive Plan is so generous that it is proposed with ulterior motives, that is, to enrich management at the expense of the unsecured creditors by reserving a large percentage of equity for employees, including management, that will be worth a great deal more than disclosed ***138** after the Debtors' emergence from chapter 11.

In the *Granite Broadcasting* decision, the Court wrote:

> The issue of compensation and benefits provided to executive management in connection with Chapter 11 cases is a sensitive one that involves the interests of creditors, stockholders and all other stakeholders, as well as the public interest. Congressional concern with executive compensation in chapter 11 cases is evidenced by § 503(c) of the Bankruptcy Code, added by the 2005 Amendments, and by the very recent hearings on the issue. *See, e.g.,* Hearings before the Subcommittee on Commercial and Administrative Law of the House Judiciary Committee, 110th Cong., 1st Sess., Apr. 17, 2007.

In re Granite Broadcasting Corp., 369 B.R. 120, 138 (Bankr.S.D.N.Y.2007). The *Granite Broadcasting* Court decided that there was "no evidence that the Plan provisions relating to ... compensation and benefits are unusual or unreasonable based on the market or other plans of reorganization." *Id.*

The Debtors argue that the Equity Incentive Plan is an important part of the Plan that will allow the company to be competitive in attracting and keeping talented employees upon its emergence from chapter 11. Equity is often used as a meaningful part of an employee's compensation package in the technology industry and, particularly, for companies in the Silicon Valley. (Tr. 3/1/10 at 134:21 –135:3 (Sirras).) While I accept the premise that equity is a meaningful part of employee compensation in this industry, I review whether this particular proposal is permissible.

The Debtors provided testimony of Todd Sirras, of Semler Brossy Consulting Group, who advises companies on strategic compensation issues, including the use of equity incentive plans in a compensation program. (Tr. 3/1/10 at 119:20–120:2 (Sirras).) Sirras reviewed the Equity Incentive Plan which reserves 9,005,367 shares for the Equity Incentive Plan, amounting to 13.2% of the total common shares outstanding. (*Id.* at 137:14–17.) Of that amount, approximately 5.2% of the total common shares are "full value" shares, while the balance are reserved as options that would be issued by the board at market rate. (*Id.* at 137:18–138:3. *See also* Ex. D–2 at 4.)

Mr. Sirras opined that the Equity Incentive Plan was reasonable and appropriate. He reviewed different market references—including a "peer group" of the Debtors, companies emerging from bankruptcy, and recent initial public offerings in the S & P Technology sector—and determined that "appropriate" incentive plans reserved common shares in a range of 11.9% to 16.3% of common shares outstanding. (Ex. D–2 at 7–11.) Based upon this data, he concluded that the percentage of shares reserved in the Debtors' Equity Incentive Plan was reasonable. (Tr. 3/1/10 at 142:4–13 (Sirras).)

However, the objecting parties questioned the market reference groups underlying Mr. Sirras' analysis. In particular, they noted that the peer group of companies was selected by the compensation committee of the Debtors' board in June 2009, rather than selected by the compensation expert. (*Id.* at 141:21–23, 169:17–170:4.) Moreover, and probably more importantly, the benchmark group of bankruptcy companies emerged from chapter 11 in the period between 2003 and 2006. (Ex. D–2 at 8.) That there have been dramatic—and most certainly adverse—changes in the economy and the marketplace since that time frame is beyond dispute. The world of executive/employee ***139** compensation has not gone unaffected by these events. The objecting parties introduced Exhibit CDEM–11, which sets forth a list of companies emerging from chapter 11 in Delaware after January 2009. This exhibit reflects that the equity allocation for management in the more recent chapter 11 cases averaged 8.5% of the outstanding common shares. (Ex. CDEM–11.) The Debtors respond that Exhibit CDEM–11 is of limited relevance to this analysis, because it includes only two technology companies. However, I conclude that the evidence is sufficient to call into question the reliability and relevance of the market references used in the Sirras report.

The objecting parties also argue that the Equity Incentive Plan is not offered in good faith because the Debtors' have purposefully lowered enterprise valuation to receive a windfall from the Equity Incentive Program after Plan confirmation, based upon the assertion that the reorganized Debtors' shares will trade at a much higher value than that advanced by the Debtors. The Debtors argue in response that the Equity Incentive Plan shares' value does not depend upon this Court's conclusions about valuation, but will depend upon the New Spansion Common Stock's trading price at the time shares are actually issued. It is true that the post-Effective Date market is not bound by this Court's determination of enterprise value, which ultimately, may or may not prove to be an accurate measure of value, but the Debtors' argument that, for purposes of confirmation of the Plan, the Court should ignore its own conclusion of enterprise value as it relates to near-term future share price for shares covered by the Equity Incentive Plan is counterintuitive.

Here, the record does not demonstrate sufficiently that the Equity Incentive Plan is usual or reasonable for this market at this time. Therefore, to achieve confirmation of a plan with an equity incentive component, the Debtor must devise an incentive scheme that garners uniform support from its constituencies or is demonstrably reasonable and within the market.

5. *Whether the Debtors wrongfully refused to adopt the Alternative Rights Offering?*

[12] The objecting parties, in particular the Creditors' Committee, also have argued that confirmation of the Debtors' Plan should be conditioned upon the Debtors' acceptance of the Alternative Rights Offering proposed by the Convert Committee. The Creditors' Committee, the Convert Committee, AHEC, and others argue that the $112 million Alternative Rights Offering is superior to the Silver Lake Rights Offering. They argue that the Debtors' failure to accept the Alternative Rights Offering is evidence of the Debtors' bad faith in proposing the Plan (because, *inter alia,* it imputes a higher share value than asserted by the Debtors).

In response, the Debtors assert that they are entitled to have the Plan judged as a whole for satisfaction of the requirements of § 1129: creditors are not free to pick the provisions they like and excise the provisions they dislike. The Debtors note that the Plan has been proposed, voted on, and the Confirmation Hearing has been completed within the exclusivity period of Bankruptcy Code § 1121(b), as extended by order of this Court.[42] The purpose of ***140** the exclusivity period is to provide a debtor, at the outset of a chapter 11 case, with "the unqualified opportunity to negotiate a settlement and propose a plan of reorganization without interference from creditors and other interests." *In re Texaco, Inc.,* 81 B.R. 806, 809 (Bankr.S.D.N.Y.1988) citing H.R.Rep. No. 595, 95th Cong., 2d Sess. 221–222 (1978), U.S.Code Cong. & Admin.News 1978, pp. 5787, 6180–82. The Debtors write that compelling them to reconceptualize their reorganization would deprive the Debtors of their exclusive right to formulate and propose their manner of reorganization as they see fit, subject, of course, to the limitations of the Bankruptcy Code. (Debtors' Response to Statement of Position of Official Committee of Unsecured Creditors, D.I. 2863 at ¶ 12.) I agree. *See In re Adelphia Commc'ns Corp.,* 336 B.R. 610, 676 (Bankr.S.D.N.Y.2006) citing *In re Geriatrics Nursing Home, Inc.,* 187 B.R. 128, 134 (D.N.J.1995)(noting that a creditor constituency's unhappiness or dissatisfaction with a debtor's proposed plan, without more, does not constitute cause to end exclusivity and undermine the debtor's chance of obtaining confirmation of its plan during that period).

42 By Order dated February 18, 2010, the Court established March 8, 2010 as the deadline for the period during which only the Debtors may solicit votes to accept or reject a proposed plan of reorganization. (D.I. 2811.) The Debtors filed a fourth motion to extend exclusivity on March 8, 2010 (D.I. 3066), requesting extension of exclusivity to April 30, 2010. This motion is set for an April 26, 2010 hearing.

Even assuming the Alternative Rights Offering provides "a better deal" for some creditors, the Debtors' refusal to accept the proposal does not, on its own, demonstrate "bad faith." As noted in the confirmation opinion in *Celotex:*

> This Court's responsibility with respect to consideration of the Plan is to consider as a matter of law (i) whether the Plan Proponents have met their burden under the Bankruptcy Code, (ii) whether each impaired class has accepted the Plan and (iii) the merits of any timely filed objections to the Plan. The Court need not and ought not consider if a proposed plan is the "best" plan of reorganization that could be promulgated, providing for the highest return to creditors of the Debtors' Estates. Instead, the Chapter 11 process is controlled by the various constituencies in a case, including holders of Claims and Interests. It is not the Bankruptcy Court's role to substitute its judgment for the judgment of the various classes of creditors who have voted overwhelmingly in favor of the Plan. Accordingly, the Bankruptcy Court is not required to compare the Plan to a hypothetical plan. Therefore, in order to

> meet their obligations under Section 1129(a)(7) of the Bankruptcy Code, Plan Proponents must prove that the distribution to creditors under the Plan is no less valuable, as of the Effective Date of the Plan, than the distribution such creditors would receive if the Debtors were liquidated under Chapter 7 of the Bankruptcy Code.

In re Celotex Corp., 204 B.R. 586, 611–12 (Bankr.M.D.Fla.1996). The Debtors provided evidence, which was not challenged, that creditors will receive more under the Plan than would be available if the Debtors were liquidated in a chapter 7 case. (*See* Ex. D–3.) It is not appropriate to substitute the judgment of the objecting creditors over the business judgment of the Debtors, who have determined that the Silver Lake Backstop Agreement is preferable for the Debtors' reorganization. The Debtors chose Silver Lake as a Backstop Party for the Rights Offering based on its extensive operating experience and management roles at other technology companies. (Disclosure Statement at 84, Tr. 2/24/10 at 159:11–160:2 (Sarkisian).)[43] ***141** The Debtors also were concerned that choosing the Alternative Rights Offering would have an adverse impact on the timing of confirmation, specifically that it might require a resolicitation of votes on the Plan and a new confirmation hearing, all of which would push confirmation after April 8, 2010, which is the expiration date for the Exit Financing Facility.[44] (*Id.* at 134:21–25.) Further, the Debtors claimed that substituting the Alternative Rights Offering might cause many creditors who have voted in favor of the Plan to abandon their support of the Plan. (*Id.* at 136:13–137:8.)

43 In particular, the Disclosure Statement states: "Silver Lake's principals possess a wealth of operating experience and have had management roles at companies including IBM, Cisco, Sun Microsystems, Hewlett–Packard, Oracle, Adobe, Force Computers, and including memory semiconductor companies such as SMART Modular Technologies, Samsung, and AMD." (Disclosure Statement at 84.)

44 The objectors' argue that the Plan is "self-correcting" because it refers to a rights offering in general terms, or allows the Debtors the option of having no rights offering and, therefore, does not require new solicitation and voting for a substitute rights offering. Even if true, this does not require the Debtors to accept an alternative proposal.

The objecting parties have attacked the motives of the Debtors' management in dealing with Silver Lake. However, the record does not support a finding that management's cooperation with Silver Lake throughout this process involved any self-dealing or improper motives. There is no credible evidence that Silver Lake has been "orchestrating" the Debtors' reorganization or has tried to manipulate plan voting. Prior to the Confirmation Hearing, Silver Lake did not attend any board meetings and was not involved in day-to-day management of the company. (Tr. 2/24/10 at 149:13–21 (Sarkisian).) However, post-confirmation, Silver Lake is expected to be involved in the Reorganized Debtors' business. Silver Lake will designate a person to serve on the Reorganized Debtors' board of directors. (Plan, § 7.2.) The Debtors' management admitted they selected Silver Lake as the Backstop Party based, in part, upon their in-depth knowledge and experience and expertise in managing technology companies. If the Alternative Rights Offering were chosen, it is likely that Silver Lake would not agree to serve on the board. (Tr. 2/25/10 at 137:10–138:17 (Sarkisian).)

The objecting parties argue that Silver Lake's acquisition of a partial interest in the large unsecured claim of ChipMos Technologies, Inc. (the "ChipMos Claim"), and the Debtors' failure to object to that claim, is further proof of improper motives to allow Silver Lake to take control the Debtors' Rights Offering and enrich itself to the detriment of other unsecured creditors. However, the record shows that Silver Lake did not acquire an interest in the ChipMos claim until January 25, 2010, more than six weeks after the December 14, 2009 Rights Offering Record Date (i.e., the date by which Holders of Class 5A, 5B and 5C Claims were determined eligible to participate in the Rights Offering). Moreover, the Order authorizing the Debtors to enter into the Backstop Agreement with Silver Lake was not entered until January 7, 2010—well after the Rights Offering Record Date. Therefore, there is no evidence that the Debtors' decision not to object to the ChipMos Claim prior to Rights Offering Record Date had any connection to Silver Lake. The Debtors admitted that they were aware that Silver Lake was bidding to acquire part of the ChipMos claim, and that the Debtors even "put in a good word" with ChipMos on behalf of Silver Lake, because the Debtors determined that it would be favorable to have the large ChipMos claim "in the hands of a ***142** stable long term holder, like Silver Lake." (Tr. 2/25/10 at 141:13–142:23 (Sarkisian).) If ChipMos was going to sell its claim, the Debtors believed it would be better for Silver Lake to own it than "someone who was going to try and leverage that position for their own short term gain." (*Id.* at 143:4–21.)

This case is illustrative of what has been and is now occurring in many of the larger chapter 11 cases filed in this Court:

"Trading of claims in advance of Chapter 11 or shortly afterward ensures that [various constituencies in Chapter 11] consist largely of seasoned professionals who specialize in recapitalizing distressed businesses." Baird, *supra,* n. 16, at 1938. "The contest is most often among seasoned investors (banks hedge funds, and other institutional investors) who hold debt at different levels of the debtor's capital structure." *Id.* at 1933. The history of this chapter 11 proceeding is replete with evidence of behavior by such parties clearly designed to further competing strategies. Nowhere is this more apparent than in connection with the disclosure and confirmation process, but I cannot conclude, on this record, that the Debtors' rejection of the Alternative Rights Proposal demonstrates a lack of good faith in seeking confirmation of the Plan. Absent some demonstrable impropriety in the confirmation process, it is not for the Court to supplant the Debtors' business judgment with its own.

6. *Whether the proposed Plan Releases violate applicable bankruptcy law?*

Some of the objecting parties (specifically including the Convert Committee, the UST, and Gorman) argue that the Plan cannot be confirmed because the Plan Releases contained in sections 11.3 and 11.4 violate applicable bankruptcy law, specifically Bankruptcy Code § 524(e), and are not fair and equitable, or in the best interests of the Debtors' estates.[45]

45 Section 524(e) of the Bankruptcy Code provides in pertinent part: "discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt." 11 U.S.C. § 524(e).

(a) *The Debtors' Release.*

[13] Section 11.3 of the Plan (the "Debtor Release") sets forth the terms of the Debtors' release of certain parties, including (without limitation) (i) the Debtors' current directors, officers and employees, and the Debtors' current and former professionals (including attorneys, financial advisors, investment bankers, accountants, etc); (ii) the Creditors' Committee and its professionals; (iii) secured creditors, the FRNs, and their advisors; (iv) the Backstop Party and its advisors, directors, officers, and employees; (v) the Debtors and their affiliates, and their officers, directors, employees, and advisors; and (vi) the Senior Noteholders and their advisors (the "Debtor Releasees") of any and all claims occurring on or prior to the Plan's Effective Date that relate in any way to the Debtors, the Reorganized Debtors, the chapter 11 case, the Plan and Disclosure Statement.[46]

46 This description of the release in Section 11.3 summarizes its provisions. Spansion Japan and its officers, directors and advisors are specifically excluded from the "Debtor Releasees."

[14] [15] Section 11.3 is a release of claims belonging to the Debtors and the bankruptcy estate. Courts in this district have held that a plan may provide for releases by a debtor of non-debtor third parties after considering the specific facts and equities of each case. ***143** *In re Zenith Elec. Corp.,* 241 B.R. 92, 110 (Bankr.D.Del.1999).[47] Moreover, a debtor may release claims in a plan pursuant to Bankruptcy Code § 1123(b)(3)(A), if the release is a valid exercise of the debtor's business judgment, is fair, reasonable, and in the best interests of the estate.[48] *In re DBSD North America, Inc.,* 419 B.R. 179, 217 (Bankr.S.D.N.Y.2009).

47 When deciding whether a plan may include a debtor's release of non-debtor third parties, notwithstanding section 524(e), a court may consider the following:

(1) the identity of interest between the debtor and the third party, such that a suit against the non-debtor is, in essence, a suit against the debtor or will deplete assets of the estate;

(2) substantial contribution by the non-debtor of assets to the reorganization;

(3) the essential nature of the injunction to the reorganization to the extent that, without the injunction, there is little likelihood of success;

(4) an agreement by a substantial majority of creditors to support the injunction, specifically if the impacted class or classes "overwhelmingly" votes to accept the plan; and

(5) provision in the plan for payment of all or substantially all of the claims of the class or classes affected by the injunction.

Zenith, 241 B.R. at 110 citing *In re Master Mortgage Inv. Fund, Inc.,* 168 B.R. 930, 937 (Bankr.W.D.Mo.1994). *See also Exide,* 303 B.R. at 72. The *Master Mortgage* Court recognized that these factors are neither exclusive nor are they a list of conjunctive requirements. Master Mortgage, 168 B.R. at 935. Instead, they are helpful in weighing the equities of the particular case after a fact-specific review. *Id.*

48 Section 1123(b)(3)(A) provides in pertinent part: "[A] plan may provide for the settlement or adjustment of any claim or interest belonging to the debtor or to the estate." 11 U.S.C. § 1123(b)(3)(A). Although there is no evidence of any potential claims here, it is not unreasonable for the Debtors to provide a broad release of its claim in return for creditors' agreement to the Plan.

Here, four of the five classes of creditors entitled to vote on the Plan voted overwhelmingly in favor of the Plan. (Ex. D–71.) Unlike *Exide,* in which the plan release would have barred continuation of an adversary proceeding brought by the creditors' committee against prepetition lenders, the record does not reflect that there is any pending litigation in this case that would be discontinued by such a release. *See Exide,* 303 B.R. at 73. *See also DBSD,* 419 B.R. at 217 (approving a debtor's release of third parties when the debtor testified that it was unaware of any significant potential claims that were being released).

The Debtor Releasees were actively involved in negotiating and formulating the Plan. It is a valid exercise of the Debtors' business judgment to include a settlement of any claims it might own against such parties as a discretionary provision of the plan. *DBSD,* 419 B.R. at 217.

(b) *The Third Party Release.*

Section 11.4 of the Plan (the "Third Party Release") provides for a release of the Debtor Releasees by (i) any entity that voted to accept the Plan or is presumed to have voted for the Plan under § 1126(f) (i.e., unimpaired classes), (ii) each entity who obtains a release under the Plan, (iii) and each entity that held, holds, or may hold a Claim or Interest (as applicable law allows) (the "Release Obligors") of any and all claims existing as of the Plan's Effective Date.[49]

49 The Third Party Release specifically excludes any causes of action in Adversary Mo. 09–52274.

The Debtors argue that the release provision does not make the Plan unconfirmable, because it only releases claims "to the fullest extent permissible under applicable law, as such law may be extended or interpreted subsequent to the Effective Date." (Plan, § 11.4.) I am aware that some confirmed ***144** chapter 11 plans include release provisions styled this way. There is some allure to the Debtors' suggestion to leave to a future date the issue of enforcement (i.e., permissible breadth) of the release—and there may be some circumstances under which that is appropriate. Here, there are specific objections to inclusion of a broad release of non-debtor third parties in the Plan. I am, therefore, required to resolve them.

In *Continental,* the Third Circuit declined to establish a rule governing conditions under which non-consensual third party releases would be permissible. *In re Continental Airlines,* 203 F.3d 203, 213–14 (3d Cir.2000). However, the Court recognized that other circuits have allowed releases in extraordinary circumstances. *Id.,* 203 F.3d at 212. In *Continental,* the Court determined that the "hallmarks of permissible non-consensual releases—fairness, necessity to the reorganization, and specific factual findings to support these conclusions"—were absent. *Id.,* 203 F.3d at 214.

In *Genesis,* the Court evaluated whether a non-consensual release fit the "hallmarks" discussed in *Continental,* by considering whether: (i) the non-consensual release is necessary to the success of the reorganization; (ii) the releasees have provided a critical financial contribution to the debtor's plan; (iii) the releasees' financial contribution is necessary to make the plan feasible; and (iv) the release is fair to the non-consenting creditors, i.e., whether the non-consenting creditors received reasonable compensation in exchange for the release. *Genesis,* 266 B.R. at 607–08. *See also Exide,* 303 B.R. at 75. Even so, the *Genesis* Court continued to be mindful of *Continental's* citation to cases "which warned against the exercise of unfettered discretion to discharge nondebtors from liability, and explained that a permanent injunction limiting the liability of nondebtor parties is a rare thing that should not be considered absent a showing of exceptional circumstances." *Genesis,* 266 B.R. at 608 quoting *Continental,* 203 F.3d at 213, n. 9.

[16] The United States Trustee objects to the Third Party Release to the extent it binds parties who have not taken affirmatively

any action to accept the release (including those who are "deemed" to have accepted the Plan and all other entities who hold Claims or Interests). Courts have determined that a third party release may be included in a plan if the release is consensual and binds only those creditors voting in favor of the plan. *In re Specialty Equip. Cos., Inc.,* 3 F.3d 1043, 1047 (7th Cir.1993). The UST objection criticizes the form of ballot, arguing that even unimpaired classes should be able to fill out a ballot and "opt out" of the release. This specific procedure was proposed in connection with the motion for approval of the voting procedures, yet the issue was not the subject of any objection raised at the December 14, 2009 hearing. Further, I note that no creditor or interest holder whose rights are affected by the "deemed" acceptance language has objected to the Plan. While I recognize—and fully appreciate—the importance of the UST's supervision of the administration of bankruptcy cases pursuant to 28 U.S.C. § 586 and her right to be heard chapter 11 cases pursuant to Bankruptcy Code § 307, the silence of the unimpaired classes on this issue is persuasive. This aspect of the Third Party Release is not over-reaching. The unimpaired classes are being paid in full and have received adequate consideration for the release. I will overrule the objection to the extent that the UST opposes applying the Third Party Release to those parties who are "deemed" to have accepted the Plan.

***145** [17] However, the portion of the Third Party Release that applies to all holders of Claims or Interests requires further examination. In addition to the UST objection, the Convert Committee and Gorman also objected to the Third Party Release. The Debtors argue that this part of the Third Party Release is critical to the success of the Reorganized Debtors, particularly to prevent management from being distracted from "running the Debtors' highly technical operations." (Debtors' Omnibus Reply, D.I. 2688, at 12.) The Debtors claim that all of the Debtor Releasees provided contributions to the Debtors' Plan "both financially and through countless hours of planning, negotiating, and development, often at great personal sacrifice on behalf of management, professionals, and their families, which sacrifice is not otherwise compensated by their salaries." (*Id.,*) Further, the Debtors argue that secured creditors will receive a full recovery under the Plan, and unsecured creditors will receive significant value (through New Spansion Common Stock), in excess of typical chapter 11 cases of similar size and complexity. (*Id.,*)

While I have little doubt that many of the Debtor Releasees undertook substantial (and certainly sometimes exhausting) efforts to formulate and negotiate the current (and former) Plans, I do not believe that those contributions rise to the level of the critical financial contribution contemplated in *Continental* and *Genesis* that is needed to obtain approval of non-consensual releases. *See Continental,* 203 F.3d at 215 ("[W]e have found no evidence that the non-debtor D & Os provided a critical financial contribution to the Continental Debtors' plan that was necessary to make the plan feasible in exchange for receiving a release of liability"), *Genesis,* 266 B.R. at 606–07 ("[T]he officers, directors and employee have been otherwise compensated for their contributions, and the management functions they performed do not constitute contributions of 'assets' to the reorganization.") Further, relieving the Reorganized Debtors and their management from the distractions of litigation does not make the non-consensual releases "necessary to the reorganization."

Finally, secured creditors receiving a full recovery under the Plan and unsecured creditors receiving value in the form of equity (which is more than they would receive in a liquidation) may provide, under appropriate circumstances, sufficient value in exchange for the releases. The objecting parties, however, are not receiving anything under the Plan.[50] For these reasons, the proposed non-consensual Third Party Release does not pass muster under *Continental.*

50 This is not to say that under the Bankruptcy Code's priority scheme, applicable pre-petition agreements, and this Court's determination of the Debtors total enterprise value that these parties are entitled to any distribution.

7. *Tessera's Objections.*

Tessera objected to the Plan on two grounds. First, Tessera argues that the Plan violates § 1129(a)(9)(A) because it does not establish a reserve for Tessera's alleged administrative claim. Second, Tessera argues irregularities in voting solicitation and tabulation require a re-solicitation of votes for the Plan.

[18] Tessera initially challenged the feasibility of the Plan due to its assertion of an administrative claim in an amount of more than $100 million, based upon patent infringement claims asserted against the Debtors in litigation proceeding in the District Court for the Northern District of California and before the United States International Trade Commission. Prior to ***146** the Confirmation Hearing, the Debtors filed a motion asking the Court to estimate the amount of Tessera's alleged administrative claim for purposes of demonstrating Plan feasibility under § 1129(a)(11) (D.I. 2272) (the "Tessera Estimation Motion"). On

February 9, 2010, I issued a bench ruling estimating the amount of Tessera's alleged administrative expense claim at $4,232,986.13. Tessera withdrew its feasibility objection, but asserts that the Plan must either provide for immediate payment of its administrative claim or set aside a reserve in the amount of the estimated claim. Section 1129(a)(9)(A), provides in pertinent part, that a court shall confirm a plan if it meets the following requirement:

> (9) Except to the extent that the holder of a particular claim has agreed to a different treatment of such claim, the plan provides that—
>
> > (A) with respect to a claim of a kind specified in section 507(a)(2) [including administrative expense claims allowed under section 503(b)] ... on the effective date of the plan, the holder of such claim will receive on account of such claim cash equal to the allowed amount of such claim.

11 U.S.C. § 1129(a)(9)(A). The Debtors argue in response that, by withdrawing its feasibility objection, Tessera implicitly conceded that the Debtors will have the ability to pay the alleged administrative claim. Further, the Debtors argue, persuasively, that the evidence regarding the Debtors' future financial stability shows that the Debtors will have the ability to pay this administrative expense claim when it is finally determined.

Section 1129(a)(9)(A) requires a debtor to pay an administrative claim holder, on the plan's effective date, "cash equal to the allowed amount of such claim." This necessitates a determination of an "allowed amount" of that claim. At the same time, the Code grants a right to priority of payment to administrative claimants. This priority should not be subject to the risk that the newly reorganized debtor lacks the funds or the motivation to resolve the outstanding dispute. In *Adelphia,* the Court ordered the debtors to set aside a reserve for a disputed administrative claim to "go effective" under the plan. *In re Adelphia Bus. Solutions, Inc.,* 341 B.R. 415, 419 (Bankr.S.D.N.Y.2003). This is a reasonable compromise of the competing concerns. Accordingly, I conclude that, in this case, the Debtors can satisfy the confirmation requirement of § 1129(a)(9)(A) by setting aside a reserve in the amount of Tessera's estimated claim.

Tessera's second objection to the Plan asserts that the Debtors failed to properly count Tessera's three plan ballots, which were based upon Tessera's three asserted unsecured claims, because the Debtors deemed the ballots to be duplicative. The Debtors respond that they acted in accordance with paragraph 9 of the Disclosure Statement Order, which provided:

> A creditor which holds multiple Claims that are deemed to be "allowed" for voting purposes against a single Debtor or multiple Claims against multiple Debtors, all of which Claims are based upon or relate to the same or similar indebtedness or obligations, whether by reason of guarantee, indemnity agreement, joint and several obligation or otherwise, shall be entitled to vote only the largest of all such similar Claims.

(Disclosure St. Order, ¶ 9.) The Debtors reasonably determined that Tessera's claims were "similar" and treated them in accordance with the procedures set by the Disclosure Statement Order. Furthermore, the Debtors demonstrated that, even assuming Tessera were permitted to vote its three claims separately, the Plan voting ***147** outcome for Class 5B would not change. (Ex. D–80.) Class 5B would still accept the Plan in the requisite number and amount of claims. (*Id.*) Therefore, I will overrule Tessera's second objection to the Plan.

8. *Whether the proposal to limit the right to object to unsecured claims to the appointed "claims agent" violates applicable bankruptcy law?*

[19] AHEC argues that the Plan does not comply with the provisions of the Bankruptcy Code because it deprives creditors of their right to object to claims under § 502(a). AHEC also argues that this provision is a material change added after approval of the Disclosure Statement and the deadline for Plan confirmation objections.

Section 9.2(4) of the Plan states, in pertinent part: "After the Effective Date, ... only the Claims Agent shall have the authority to File, prosecute, settle, compromise, withdraw or litigate to judgment objections to Disputed Classes 5A–5C Claims, Claims Agent Avoidance Actions or 510(c) Actions...."

While it is undisputed that § 502(a) grants creditors the right to object to claims, it has been recognized that "the needs of orderly and expeditious administration do not permit the full and unfettered exercise of such right." 4–502 Collier on Bankruptcy ¶ 502.02[d] (2009) citing 1983 Advisory Committee Note to Fed.R.Bankr.P. 3007. I conclude, based upon this record, that appointment of a claims agent to file such objections after confirmation is not unusual and is reasonable for the orderly and expeditious administration of disputed claims in accordance with the Plan. This objection will be overruled. If any creditor believes the claims agent is acting improperly, it can always file a motion so advising the court and requesting appropriate relief.

9. *Plan Confirmation Conclusion.*

For the reasons stated above, the Debtors' Plan cannot be confirmed in its present form because (i) the Debtors have not demonstrated that the Equity Incentive Plan is being proposed in good faith, and is fair and equitable to creditors, (ii) the Third Party Release in Section 11.4 of the Plan violates applicable bankruptcy law, and (iii) the Debtors must set aside a reserve in the estimated amount of Tessera's administrative claim to meet the requirement of § 1129(a)(9)(A). All other objections to the Plan are overruled.

C. *Motion for Summary Judgment in Adv. No. 09–52274*

[20] As part of the Confirmation Hearing, the Court agreed to hear oral argument on the Motion for Summary Judgment pending in Adversary Proceeding No. 09–52274.[51] This adversary proceeding ***148** was filed on October 19, 2009, by U.S. Bank, as Senior Trustee, against Wilmington Trust, as Subordinate Trustee, seeking a declaration pursuant to 28 U.S.C. § 2201 that the Senior Noteholders (Class 5A) are entitled to receive the Debtors' distribution of New Spansion Common Stock to the Exchangeable Debentures holders (Class 5C) pursuant to the Subordinated Indenture (defined below). A Subordinated Indenture provision states that a distribution of "Permitted Junior Securities" is not subject to the agreement's subordination provisions. (*See* Subordinated Indenture, § 11.10.) The parties interpret the term "Permitted Junior Securities" differently, particularly, whether it includes the New Spansion Common Stock that the Debtors will distribute to unsecured creditors under the Plan.

51 Wilmington Trust filed a motion to dismiss the adversary complaint pursuant to Fed.R.Civ.P. 12(b)(1) and Fed.R.Bankr.P. 7012(b)(1), or in the alternative, for abstention pursuant to 28 U.S.C. § 1334(c)(1) (D.I. 5)(the "Motion to Dismiss"). US Bank objected to dismissal (D.I. 14) and oral argument on the Motion to Dismiss was held on January 7, 2010. Wilmington Trust argued that this Court did not have jurisdiction to decide the adversary proceeding because it involves a dispute between two non-debtor parties that would not affect the administration of the bankruptcy estate. *See, e.g., Saul, Ewing, Remick & Saul v. Provident Sav. Bank,* 190 B.R. 771, 775 (D.Del.1996)("[D]isputes between parties other than the debtor generally do not invoke the court's "related to" jurisdiction of § 1334 unless the action would have some effect on the bankruptcy estate.")

An earlier version of the Debtors' plan provided that the shares of New Spansion Common Stock allocated to holders of the Exchangeable Debentures of Class 5C would be distributed into an escrow fund pending determination by a court of competent jurisdiction of the intercreditor dispute regarding subordination. By order dated January 8, 2010, further consideration of the Motion to Dismiss was deferred pending consideration of the Summary Judgment Motion and Plan confirmation.

The Plan now under consideration provides, instead, that the New Spansion Common Stock allocated to Class 5C Exchangeable Debenture claimants will be distributed to Class 5A Senior Note Claims. (*See* Plan, § 3.7 and § 3.18). The Second Circuit Court of Appeals determined that a bankruptcy court has subject matter jurisdiction when it enforces a contractual subordination agreement as part of the plan confirmation process, writing:

> Fixing the order of priority of creditor claims against a debtor is an integral and historic bankruptcy function, and without this power the bankruptcy court would be rendered powerless to rehabilitate a debtor. While enforcing subordination agreements is not listed as a core proceeding, the power to prioritize distributions has long been recognized as an essential element of bankruptcy law.... As the bankruptcy court here correctly noted:
>
> > It is hard to imagine an issue that is more at the heart of the bankruptcy process than is this. Enforcement of a contractual subordination agreement clearly involves the adjustment of the debtor-creditor relationship, determinations of the priority of liens, and administration of the estate and so falls within the ambit of 28 U.S.C. § 157(b)(2)(A), (K), and (O).

Resolution Trust Co., Inc. v. Best Products Co., Inc. (In re Best Products, Inc.), 68 F.3d 26, 31–32 (2d Cir.1995) citing *In re Best Products Co., Inc.,* 168 B.R. 35, 66–67 (Bankr.S.D.N.Y.1994). *See also Boyer v. Simon (In re Fort Wayne Telstat, Inc.),* 403 B.R. 590 (Bankr.N.D.Ind.2009) in which the court wrote:

> "[A]n action under § 510 seeking ... to enforce a subordination agreement comfortably fits within the court's jurisdiction. To the extent § 510 is seen as creating the basis for the action, it would come within the scope of the "arising under title 11" jurisdiction of § 1334(b). To the extent § 510 does not create a right, but, instead, provides the vehicle by which a non-bankruptcy right of subordination may be enforced in a bankruptcy case, it would come within the scope of the "arising in ... a

case under title 11" jurisdiction of § 1334(b). Either way, the court has jurisdiction."
Id. at 593. I conclude that I have core jurisdiction to consider this adversary. The Motion to Dismiss is denied.

US Bank seeks a declaration from the Court that the New Spansion Common Stock that the Debtors propose to distribute under the Plan is not a "Permitted Junior Security," as defined in the Subordinated Indenture.[52] The Plan provides that the holders of Class 5C—Exchangeable Debentures Claims—will be treated as follows:

52 US Bank also filed an objection to confirmation of the Plan (D.I. 2468) raising, for the most part, the same issues as the adversary proceeding: namely, that the Plan is not confirmable unless it gives effect to the subordination provisions in the Subordinated Indenture by requiring the Debtors to distribute all shares of New Spansion Common Stock allocated to the holders of the Exchangeable Debentures to the Senior Noteholders.

Subject to Section 3.18 below, each Holder of an Allowed Class 5C Claim will receive such Holder's Unsecured ***149** Claims Pro Rata share of 46,247,760 shares of New Spansion Common Stock.
Plan, § 3.7. But, Section 3.18 of the Plan provides, in pertinent part:

> Unless the Confirmation Order provides otherwise and unless and until all Allowed Class 5A Claims have been satisfied in full in accordance with the provisions of the Exchangeable Debentures Indenture and the Senior Notes Indenture, no Distribution shall be made on account of Class 5C Claims to the Indenture Trustee for the Exchangeable Debentures or the Holders of Exchangeable Debentures Claims. Accordingly, unless the Confirmation Order provides otherwise, the Pro Rata portion of any Distribution allocable to Allowed Class 5C Claims shall be distributed to Holders of Allowed Class 5A Claims unless and until all Allowed Class 5A Claims have been satisfied in full in accordance with the provisions of the Exchangeable Debentures Indenture and the Senior Notes Indenture.

Plan, § 3.18.[53]

53 The "Exchangeable Debentures Indenture," the term used in the Plan, is the same as the "Subordinated Indenture," the term used here.

(1) ***Background—The Governing Documents.***
US Bank is the successor trustee under that certain Indenture dated as of December 21, 2005 (the "Senior Notes Indenture"), originally among Spansion LLC, as issuer, (the "Issuer") Spansion, Inc. and Spansion Technology Inc., as guarantors (the "Guarantors"), and Wells Fargo Bank, N.A., as trustee, pursuant to which the Issuer issued those certain 11.25% Senior Notes due 2016 in the original aggregate principal amount of $250 million (the "Senior Notes".) Wilmington Trust is the successor indenture trustee under that certain Indenture dated as of June 12, 2006 (as amended and supplemented on August 14, 2006) (the "Subordinated Indenture") originally by and among the Issuer, the Guarantors, and Wells Fargo, as trustee. Pursuant to the Subordinated Indenture, the Issuer issued those certain 2.25% Senior Exchangeable Debentures due 2016 in the original aggregate principal amount of $207 million (the "Exchangeable Debentures".)

The Subordinated Indenture sets forth the terms by which the Exchangeable Debentures are subordinated to the Senior Notes:

> The Indebtedness evidenced by the [Exchangeable] Debentures is subordinated in right of payment, to the extent and in the manner provided in this Indenture, to the prior payment of all Senior Indebtedness. The subordination provisions are for the benefit of and enforceable by the holders of the Senior Indebtedness.[54]

54 There is no dispute that the Senior Indebtedness includes the Senior Notes.

(Subordinated Indenture, § 11.01.) Section 11.02 of the Subordinated Indenture sets forth certain rules that govern if the

Issuer (here, the Debtors) distribute assets in a bankruptcy, reorganization, or related proceeding, providing:

> [U]ntil the Senior Indebtedness is paid in full, any distribution to which Holders would be entitled but for these subordination provisions shall instead be made to holders of Senior Indebtedness as their interests may appear.

(Subordinated Indenture, § 11.02(2).) The dispute, here, arises out of a provision regarding "payments in Permitted Junior Securities," which provides, in pertinent part:

> ***150** Notwithstanding anything to the contrary,
>
> ....
>
> (ii) distributions to Holders in the form of Permitted Junior Securities of the Issuer are not subordinated to the prior payment of any Senior Indebtedness or otherwise subject to these subordination provisions, and none of the Holders will be obligated to pay over any such payments or distributions to any holder of Senior Indebtedness.

(Subordinated Indenture, § 11.10.) "Permitted Junior Securities" is defined as follows:

> "**Permitted Junior Securities**" means, as to the Issuer or a Guarantor, as the case may be, any securities of the Issuer or such Guarantor, as the case may be, that constitute either (x) capital stock of the Issuer or the Guarantor, as the case may be, or (y) Indebtedness of the Issuer or the Guarantor, as the case may be, subordinated in right of payment to all Senior Indebtedness of the Issuer or Guarantor, as relevant, then outstanding to at least the same extent as the [Exchangeable] Debentures are subordinated as provided in this Indenture.

(Subordinated Indenture, § 1.01.)This is sometimes known as the "X–Clause."

(2) *Discussion*

[21] In support of its position that it is entitled to any distribution otherwise payable to the Class 5C Noteholders, U.S. Bank cites my prior decision, *Kurak v. Dura Automotive Sys, Inc. (In re Dura Automotive Sys., Inc.),* 379 B.R. 257 (Bankr.D.Del.2007), and the cases relied on therein, particularly *Deutsche Bank AG v. Metromedia Fiber Network, Inc. (In re Metromedia Fiber Network, Inc.),* 416 F.3d 136 (2d Cir.2005) and *In re Envirodyne Indus., Inc.,* 29 F.3d 301 (7th Cir.1994). Three courts decided that the X–Clause at issue should be read in the context of the entire subordination agreement and determined that common stock being distributed in a plan to creditors did not fall within the X–Clause and was not exempt from the various indentures' subordination provisions. *Metromedia,* 416 F.3d at 139–40, *Envirodyne,* 29 F.3d at 305–06, *Dura,* 379 B.R. at 270.[55]

[55] In *Metromedia,* the Court explained the use and purpose of an X–Clause as follows:

> Helpful guidance is found in the American Bar Foundations' *Commentaries on Model Debenture Indenture Provisions* (1971) [hereinafter *Commentaries*]. In a nutshell, when subordinated and senior note holders are given securities under a plan of reorganization, an X–Clause allows the subordinated note holder to retain its securities only if the securities given to the senior note holder have higher priority to future distributions and dividends (up to the full amount of the senior notes.) This provides for full payment of the senior notes before any payment of the subordinated notes is made. In such a case, the senior note holder enjoys unimpaired the priority to payment that it had under its notes, *i.e.,* payments on the subordinated note holder's securities are "subordinate ... to the payment of all Senior Indebtedness." *See Commentaries, supra,* § 14–5, at 570 (X–Clause is triggered where "mortgage bonds, preferred stock or similar higher class security" are provided to senior note holders and "common stock" is provided to subordinated note holders because "this kind of distribution gives practical effect to the subordination and therefore turnover is not required"); Ad Hoc Committee for Revision of the 1983 Model Simplified Indenture, *Revised Model Simplified Indenture,* 55 Bus. Law. 1115, 1221 (2000)("If Senior Debt were to receive preferred stock and the subordinated debt were to receive common stock, for example, where the preferred stock precluded distributions to common stockholders until the preferred stock was redeemed, the X–Clause would permit that distribution.") This approach assures that the junior creditor remains fully subordinated without requiring it to yield assets that are not required for full payment of the senior creditor and that would therefore make a round-trip to the senior creditor and back with the attendant delay, friction, and transaction cost.

Metromedia, 416 F.3d at 139–140 (footnote omitted).

***151** In response, Wilmington Trust argues that the plain language defining "Permitted Junior Security" in the Subordinated Indenture specifies that capital stock (such as the New Spansion Common Stock) is exempt from the subordination provisions.

As I recognized in *Dura,* each X–Clause is different and must be considered in the specific context of the applicable contract. *Dura,* 379 B.R. at 270. Upon consideration of the definition of "Permitted Junior Securities" in the Subordinated Indenture, I cannot conclude that setting off "capital stock" separates the term from the remaining words and clauses in the definition. "Capital stock" is modified by the concluding language "subordinated in right of payment" The X–Clause must not be considered on its grammatical structure alone, but also within the context of the entire agreement, which is more reflective of the parties' intent that, except in limited circumstances, no payment can be made to the holders of the Exchangeable Debentures until (i) the Senior Noteholders are paid in full, or (ii) the Senior Noteholders consent. *Id.* The language in the Subordinated Indenture is even clearer here than the X–Clause at issue in *Dura.* Therefore, applying the same reasoning as in *Dura,* I conclude that the New Spansion Common Stock is not a "Permitted Junior Security" and is not exempt from the subordination provisions.

Alternatively, Wilmington Trust argues that summary judgment is not appropriate if the Court determines that the Subordinated Indenture is ambiguous (which is not the case), or because there are disputed issues of fact regarding the value of the shares and whether the Senior Noteholders will be paid in full.

Summary judgment "should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c)(2), made applicable to this adversary proceeding by Fed. R. Bankr.P. 7056. US Bank seeks summary judgment on the legal issue of whether the New Spansion Common Stock is a Permitted Junior Security. I need not now determine whether the Senior Noteholders will actually be paid in full by virtue of the Plan distribution. If this issue ripens into an actual dispute, resolution may be left for another time and, perhaps, another forum. Therefore, I conclude that summary judgment is appropriate and will be entered in favor of U.S. Bank.

CONCLUSION

For the reasons set forth above, I conclude that (i) the Motion to Vacate will be denied, (ii) the Plan cannot be confirmed in its present form, (iii) the Senior Noteholders' Standstill Motion will be dismissed as moot, (iv) the Defendant's Motion to Dismiss in Adversary Proceeding No. 09–52274 will be denied, and (v) the Motion for Summary Judgment in Adversary Proceeding No. 09–52274 will be granted in favor of the Plaintiff, U.S. Bank.

An appropriate order follows.

ORDER

AND NOW, this 1st day of April, 2010, upon consideration of:

(i) The *Ad Hoc* Committee of Convertible Noteholders' Emergency Motion for Order (a) Vacating Order Approving ***152** Debtors' Disclosure Statement Pursuant to Fed.R.Bankr.P. 9024 and Adjourning Confirmation Hearing and (b) Directing Appointment of Trustee or Examiner Pursuant to 11 U.S.C. §§ 1104(a)(1) and (2) and 1104(c)(2) (D.I. 2391) (the "Motion to Vacate");

(ii) The request for confirmation of the Debtors' Second Amended Joint Plan of Reorganization (as Amended) dated

February 23, 2010 (D.I. 2915) (the "Plan").

(iii) The Plaintiff's Motion for Summary Judgment in *U.S. Bank National Association, as Trustee v. Wilmington Trust Company et al.* (Adv. No. 09–52274) (D.I. 14) (the "Summary Judgment Motion"),

and the responses and objections thereto, and after a hearing held on February 24, 25, and 26, 2010, and March 1 and 2, 2010, and for the reasons set forth in the foregoing Opinion on Confirmation, it is hereby **ORDERED** and **DECREED** that:

1. The Motion to Vacate is **DENIED,**

2. The request for confirmation of the Plan, in its present form, is **DENIED,** for the reasons stated in the Opinion, and all other objections to the Plan are hereby **OVERRULED;**

3. The Senior Noteholders' motion seeking a standstill of certain dates in the Disclosure Statement Order (D.I. 2065) is **DISMISSED** as moot;

4. A status hearing will be held on **April 6, 2010** at 1:00 p.m. in Bankruptcy Courtroom No. 5, 824 Market Street, Fifth Floor, Wilmington, Delaware; and

5. In Adversary Proceeding No. 09–52274,

(A) the Defendant's motion to dismiss the adversary complaint pursuant to Fed.R.Civ.P. 12(b)(1) and Fed.R.Bankr.P. 7012(b)(1), or in the alternative, for abstention pursuant to 28 U.S.C. § 1334(c)(*l*) (D.I. 5) is **DENIED;**
(B) the Plaintiff's Motion for Summary Judgment is hereby **GRANTED** and it is hereby **DECLARED** that the New Spansion Common Stock that the Debtors propose to distribute under the Plan is not a Permitted Junior Security as that term is defined and used in Section 11.10 of the Subordinated Indenture.[1]

1 All capitalized terms not defined in this Order shall have the meanings ascribed to them in the Opinion.

This Opinion and Order shall be docketed in both the main bankruptcy case and in Adversary Proceeding No. 09–52274.

End of Document

Ethical Issues in Valuation

40000/0598-9416286v1

Overview of Ethical Issues in Valuation[1]

Valuation is an integral part of the plan confirmation process and establishing value requires expert opinions and ultimately, expert testimony. This is where ethical quandaries arise.

Six "C"s for Consideration

Robert F. Reilly proposes the following six "C"s of ethics considerations in performing business and stock valuation services for bankruptcy-related purposes:

1) **Compliance** with promulgated professional standards;
2) **Competency** to perform the subject valuation analysis;
3) **Completion** of the subject valuation analysis;
4) **Correctness** of the valuation analysis and value conclusion;
5) **Confusion** caused by analyst in the valuation analysis; and
6) **Consistency** with previous valuation positions.

See Robert F. Reilly, *Analyst Ethics Considerations in Bankruptcy Business/Stock Valuations,* ABI JOURNAL, 56 (Apr. 2007)

Practice Pointer

Presenting an expert who is incompetent and/or not credible may damage counsel's credibility.

Consulting v. Testifying Experts

Ethically there are two levels of care required of an attorney managing a valuation consultant: (i) when the expert is a consultant with no potential for testifying, counsel can act with minimal care; and (ii) when the consultant is a testifying expert, counsel must act with a high level of care and oversight.

Practice Pointer

If otherwise privileged documents are used to refresh an expert's recollection or prepare for testimony, most courts find any privilege waived and will require production of documents.

See David F. Herr, Roger S. Haydock & Jeffrey W. Stempel, *Fundamentals of Litigation Practice* § 3:7 (2011 ed.).

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[1] The information provided herein is largely gleaned from presentation materials prepared for American Bankruptcy Institute and UNLV Law by Patton Boggs LLP Michael P. Richman, Esq., Darren R. Luft, Esq.

Ethics Rules To Consider When Using An Expert

In using an expert, the Lawyer should confirm that --

- the potential expert completes a conflict check with respect to the matter in which the potential expert is to be employed, even if the conflicts rules do not apply to the potential expert.

- the expert hired to prove one thing has not previously testified that the opposite is true.

- the expert is qualified, competent and diligent.

- the expert is doing the work him/herself and reviewing and double-checking the work of subordinates. An attorney must avoid influencing an expert opinion to obtain a desired result. Occulto v. Adammar of New Jersey Inc., 125 F.R.D. 611, 612-13 (1989) (submitted draft report bore the typewritten legend across the top "PLEASE HAVE RE-TYPED ON YOUR OWN STATIONARY. THANK YOU.")

- the expert is candid to the tribunal.

> **Del. Lawyers' Rules of Prof'l Conduct R. 3.3 –**
> **Candor Toward the Tribunal**
>
> (a) A lawyer shall not knowingly:
>
> (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;
>
> * * *
>
> (3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

> **Del. Lawyers' Rules of Prof'l Conduct R. 3.4 –**
> **Fairness to Opposing Party and Counsel**
>
> A lawyer shall not:
>
> * * *
>
> (b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

Del. Lawyers' Rules of Prof'l Conduct R. 3.1 –
Meritorious Claims and Contentions

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law.

Del. Lawyers' Rules of Prof'l Conduct R. 8.4 –
Misconduct

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so or through the acts or another;

* * *

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice;

* * *

Del. Lawyers' Rules of Prof'l Conduct R. 1.7 –
Conflict of Interest: Current Client

(a) ... A lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client;

(d) there is a significant risk that the representation of one or more client will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

* * *

When Hiring and Working with an Expert,
Look for the Following Red Flags:[2]

- Unusual social network participation
- Difficult to contact and slow to respond
- Does not request information to check for conflicts of interest
- Uses the word "We" incorrectly ("we argued X"), indicating his/her belief that he/she is an advocate, not a neutral, independent third party
- Uses a referral service instead of his/her own advertising and word of mouth referrals to obtain expert engagements
- Argues with opposing side (or the court)
- Opines on issues outside of his/her "knowledge" or "comfort" zone. Not all financial experts are experts in all things financial.
- Deviates from traditional valuation methodologies and, consequently, his/her applications require additional, detailed justifications
- Has no understanding of the critical facts of the case (*e.g.* relies on others projections; no independent review and analysis)
- Holds on to theories even in light of different facts (*e.g.* fails to revise projections to account for change in market)
- Cannot explain his/her opinion or logic of analysis
- Cannot identify sources relied upon in developing expert report
- Allows for contingent-fee and/or incentive-based compensation arrangements (*e.g.* earn $$$$$ if opinion issued stating "X")

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[2] *See* John C. "Kit" Weitnauer, *Valuation Questions Raised by TOUSA*, ABI Journal, 38 (Mar. 2010); Evelyn H. Biery, Prof. Nancy B. Rapport, Michael P. Richman, *Ethics Issues in Valuation Matters*, 2012 Educational Materials (presentation materials prepared for American Bankruptcy Institute and UNLV Law); Robert J. Keach, Jessica A. Lewis, *Selecting, Qualifying an Expert in Bankruptcy Proceedings: One Type Does Not Fit All: Part II*, ABI Journal, 26 (Mar. 2008).

ADDITIONAL RESOURCES ON THIS TOPIC

Harr, Haydock & Stempel FUNDAMENTALS OF LITIGATION, § 3/7 (2-11 ed).

Keach & Lewis, *Selecting, Qualifying an Expert in Bankruptcy Proceedings: One Type Does Not Fit All Part I*, ABI Journal, 26 (Feb. 2008)

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Pantaleo & Ridings, *Reorganization Value*, 51 BUS. LAW. 419 (1996)

Powlen, *Triple Trouble: Valuation of Companies in Chapter 11*, THE JOURNAL OF CORPORATE RENEWAL (Sept. 2008)

Pratt, *Valuing A Business, The Analysis and Appraisal of Closely Held Companies* (5th ed. 2008)

Reilly, *Analyst Ethics Considerations in Bankruptcy Business/Stock Valuations,* ABI JOURNAL, 56 (Apr. 2007)

Reilly, *Update on AICPA Professional Valuation Standards*, ABI JOURNAL, 68 (Aug. 2010)

Resnick & Sommer, 7 COLLIER ON BANKRUPTCY (15th ed. rev. 2004)

Shaked & Reilly, A PRACTICAL GUIDE TO BANKRUPTCY VALUATION (Am. Bankr. Inst. 2013)

Sontchi, *Valuation Methodologies: A Judge's View*, 20:1 ABI LAW REVIEW (Vol. 20:1, 2012)

Weitnauer, *Valuation Questions Raised by TOUSA*, ABI JOURNAL, 38 (Mar. 2010)