IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

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

DEBTORS' CORRECTED[2] MEMORANDUM OF LAW IN SUPPORT OF AND IN RESPONSE TO OBJECTIONS TO CONFIRMATION OF DEBTORS' AMENDED JOINT PREARRANGED CHAPTER 11 PLAN DATED SEPTEMBER 4, 2015

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Dated: September 20, 2015

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

[2] This Memorandum of Law corrects certain typographical and formatting errors in the version filed September 18, 2015.

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7 *Collier on Bankruptcy* (Alan N. Resnick & Henry J. Sommers eds., 16th ed.)....................16, 82

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Hon. Christopher S. Sontchi, *Valuation Methodologies: A Judge's View*, 20 Am. Bankr. Inst. L. Rev. 1, 8 (2012) 33, 41

Magdalena Mroczek, *Unraveling the Supply-Side Equity Risk Premium* 38

Pablo Fernandez, *The Equity Premium in 150 Textbooks* (Jan. 9, 2015) 38

Widen, R. Scott, *Practitioner Note: Delaware Law, Financial Theory and Investment Banking Valuation Practice*, 4 N.Y.U. J. L. & Bus. 579 (2008) 36, 37

I. PRELIMINARY STATEMENT[3]

1. The dramatic decline in oil prices and drilling rig counts in the United States resulted in the Debtors' revenues decreasing by 62% in the first quarter of 2015 as compared to the fourth quarter of 2014. The Debtors' financial woes were compounded by an updated inventory valuation performed by the ABL Facility Agent, which significantly reduced the existing valuation of the Debtors' inventory and resulted in a substantial decline in borrowing base and overadvance under the ABL Facility. Defaults under the ABL Facility and Term Loan Facility soon followed.

2. Given the lack of liquidity available to the Debtors, by the end of March, the Debtors were facing the possibility of being unable to pay their workforce and shuttering their plant, and a very real prospect of filing for protection under chapter 7. As this Court is aware, the Debtors, the ABL Group, Term Loan Group and Access spent months negotiating a restructuring of the Debtors and their obligations, during which the ABL Group continued to fund the Debtors, subject to certain guarantees provided by Access and the priming liens consented to by the Term Loan Group. In an effort to maintain the Debtors so negotiations could continue, certain members of the Term Loan Group provided a $6.2 million Bridge Facility.

3. These negotiations were hard-fought and ultimately the Debtors again found themselves in a precarious situation, having nearly exhausted the liquidity provided by the Bridge Facility. To avoid a liquidation and further negative impact on the business which subsisted on limited liquidity for months, on June 9, 2015, the Debtors entered into the Plan Support Agreement with the ABL Group, the Term Loan Group, and Access and promptly commenced these Chapter 11 Cases.

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[3] Capitalized terms not defined in this Preliminary Statement have the meanings ascribed to them elsewhere in this Memorandum.

4. Since filing these cases, the Debtors obtained a "true" fiduciary out under the Plan Support Agreement, thereby making the Plan Support Agreement the "floor" in which to test the market. The Debtors restarted their prepetition marketing efforts and both the Debtors and the Creditors Committee scoured the globe for interested buyers or alternative transaction parties. Eight interested parties executed NDAs through the revitalized due diligence process. Four of these parties obtained access to the data room, and two visited the Debtors' manufacturing facility in Liberty, Texas. Ultimately, the marketing process yielded no higher or better offers for the business than the valuation contemplated by the Plan.

5. At the same time, the Debtors engaged their investment banker, Lazard, to perform an enterprise valuation of the Reorganized Debtors in connection with the Plan. As the Debtors expected from various market indicators, including among other things (i) previous discussions with potential investors, (ii) the impact of the Debtors' negative EBITDA position and (iii) term debt trading at 50 percent, the Lazard Valuation estimated the Reorganized Debtors' enterprise value in the range of $200 million to $220 million with a midpoint of $210 million.

6. The Plan Support Agreement (as amended) requires, among other things, that the Debtors (i) prosecute a plan that provided general unsecured creditors with a recovery only from unencumbered assets and (ii) seek recharacterization of a putative equipment lease with SBI as a secured financing transaction that resulted in Boomerang's ownership of the equipment. The current Plan, which is consistent with these terms of the Plan Support Agreement and is the only viable proposal for a restructuring of the Debtors, is contested by the parties in interest which respect to these two issues—the Creditors Committee who seeks a gifted recovery for its

constituency despite no entitlement to it and SBI who seeks to maintain ownership of the equipment purportedly "leased" to Boomerang.

7. Although the Debtors certainly hoped for and worked hard towards a better recovery for general unsecured creditors during the Plan Support Agreement negotiations, the simple fact is that without a viable alternative transaction or additional funding, this is the only confirmable chapter 11 plan available and the Debtors are once again out of time and liquidity.

8. While both disputes arise in the context of confirmation of the Plan, they represent very distinct factual and legal issues, and logistical constraints (relating to the availability of witnesses). As a result, while the Debtors address both the Committee's and SBI's objections to the Plan in this Memorandum, the Debtors propose to proceed with the Confirmation Hearing (which is anticipated to take multiple days over a few weeks, given the Court's and parties' calendars) in two phases: (i) the enterprise valuation trial (and ancillary issues raised by the Creditors Committee) which will commence on Monday, and (ii) the SBI litigation, which will commence on or around October 5, 2015.

II. INTRODUCTION

9. On June 9, 2015 (the "**Petition Date**"), Boomerang Tube, LLC ("**Boomerang**") and its affiliates, the debtors and debtors in possession in the above-captioned cases (the "**Debtors**") each filed voluntary petitions (collectively, the "**Chapter 11 Cases**") for relief under chapter 11 of the Bankruptcy Code. Before the Court is the *Debtors' Amended Joint Prearranged Chapter 11 Plan*, dated September 4, 2015 [D.I. 470] (as the same may be further

amended, supplemented or modified, the "**Plan**").[4] The Confirmation Hearing is scheduled for September 21, 2015, at 10:30 a.m. (prevailing Eastern Time). In connection with the Confirmation Hearing, the Debtors submit this Memorandum of Law (the "**Memorandum**") in support of entry of the Confirmation Order. This Memorandum addresses the requirements set forth in the Bankruptcy Code for confirmation of the Plan and responds to certain objections to the Plan. In support of this Memorandum and confirmation of the Plan, the Debtors incorporate by reference (i) the *Declaration of Kevin Nystrom, Chief Restructuring Officer, Interim Chief Executive Officer, and President of Boomerang Tube, LLC, in Support of Chapter 11 Petitions and First Day Pleadings* [D.I. 2] (the "**First Day Declaration**"), (ii) the *Declaration of Jung W. Song on Behalf of Donlin, Recano & Company, Inc. Regarding Voting and Tabulation of Ballots Accepting and Rejecting Debtors' Amended Joint Prearranged Chapter 11 Plan Dated August 13* [D.I. 511] (the "**Voting Declaration**"), and (iii) the *Declaration of Kevin Nystrom In Support of Confirmation of Debtors' Amended Joint Prearranged Chapter 11 Plan, Dated September 4, 2015* [D.I. 520] (the "**Confirmation Declaration**" and, collectively with the First Day Declaration and the Voting Declaration, the "**Declarations**").

III. OVERVIEW OF THE PLAN[5]

10. Although proposed jointly for administrative purposes, the Plan constitutes a separate Plan for each Debtor for the resolution of outstanding Claims against and Interests in

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[4] Capitalized terms used but not otherwise defined herein shall have the meanings assigned to such terms in the Plan or Disclosure Statement, as applicable. The rules of interpretation set forth in Article I of the Plan are fully incorporated herein. In addition, in accordance with Article I of the Plan, any term used in the Plan that is not defined in the Plan, but that is used in the Bankruptcy Code or the Bankruptcy Rules, has the meaning given to that term in the Bankruptcy Code or the Bankruptcy Rules, as applicable.

[5] The following is a brief overview of the material provisions of the Plan and is qualified in its entirety by reference to the full text of the Plan.

each Debtor pursuant to the Bankruptcy Code. Each Debtor is a proponent of the Plan pursuant to section 1129 of the Bankruptcy Code. The Plan does not contemplate substantive consolidation of any of the Debtors.

11. Article III sets forth the following Classes of Claims which shall be deemed to apply separately with respect to each Plan proposed by each Debtor, as applicable:

- **Class 1 (Other Secured Claims)** consists of any Secured Claim other than (a) an ABL Facility Claim; (b) a Term Loan Facility Claim; (c) a DIP Facility Claim; or (d) an SBI Secured Claim.

- **Class 2 (Other Priority Claims)** consists of any Claim entitled to priority in right of payment under section 507(a) of the Bankruptcy Code, other than an Administrative Claim or a Priority Tax Claim.

- **Class 3 (ABL Facility Claims)** consists of any Claim arising under, derived from, or based upon the ABL Facility Documents that has not been repaid on a final and indefeasible basis as of the Effective Date.

- **Class 4 (Term Loan Facility Claims)** consists of any Claim arising under, derived from, or based upon the Term Loan Facility Documents.

- **Class 5 (SBI Secured Claims)** consists of the secured portion of a Claim arising under the SBI Financing Agreement, which collectively shall be equal to the aggregate principal amount of the SBI Secured Notes, against Boomerang.

- **Class 6 (General Unsecured Claims)** consists of any Claim other than an Administrative Claim, a Professional Claim, an Other Secured Claim, a Priority Tax Claim, an ABL Facility Claim, a Term Loan Facility Claim, a DIP Facility Claim, an SBI Secured Claim, or a Section 510(b) Claim against any Debtor.[6]

- **Class 7 (Intercompany Claims)** consists of any Claim held by a Debtor against another Debtor.

- **Class 8 (Intercompany Interests)** consists of an Interest held by a Debtor with respect to any other Debtor.

[6] While Class 6 includes General Unsecured Claims against any Debtor, as of the Voting Record Date, and as of the date hereof, with respect to BT Financing, Inc. and BTCSP, LLC, there were no Claims in Class 6.

- **Class 9 (Boomerang Preferred Units)** consists of all Boomerang Class A, Class B, and Class C Preferred Units.
- **Class 10 (Boomerang Common Units)** consists of all common units issued by Boomerang.
- **Class 11 (Boomerang Other Equity Securities)** consists of all vested and unvested options, unexercised warrants, or other rights to acquire Common Units or other equity interests issued or granted by Boomerang, whether or not in-the-money, as well as any other outstanding equity interests issued by Boomerang.
- **Class 12 (Section 510(b) Claims)** consists of any Claim against the Debtors arising from rescission of a purchase or sale of a security of the Debtors or an Affiliate of the Debtors, for damages arising from the purchase or sale of such a security, or for reimbursement or contribution allowed under section 502 of the Bankruptcy Code on account of such a Claim.

12. In accordance with section 1123(a)(1) of the Bankruptcy Code, Administrative Claims, DIP Facility Claims, Professional Claims, and Priority Tax Claims have not been classified and thus are excluded from the Classes of Claims set forth in Article III of the Plan.

13. As more fully described in the Plan, the Plan provides for the discharge of Claims through (i) the issuance of New Holdco Common Stock; (ii) the issuance of the Subordinated Notes; (iii) the reinstatement of certain Claims and Interests; and (iv) the payment of Cash. The Debtors will consummate the Transaction, pursuant to which the Debtors will be recapitalized and restructured, on the Effective Date of the Plan.

IV. PLAN SOLICITATION AND VOTING

14. On August 14, 2015, following a hearing on the adequacy of the *Disclosure Statement for Debtors' Amended Joint Prearranged Chapter 11 Plan Dated August 13, 2015* [D.I. 378] (the "**Disclosure Statement**"), the Court entered an Order (the "**Solicitation Procedures Order**") [D.I. 384], pursuant to which the Court, among other things, (i) approved the Disclosure Statement pursuant to section 1125 of the Bankruptcy Code, (ii) established

procedures for the solicitation and tabulation of votes to accept or reject the Plan, and (iii) scheduled the Confirmation Hearing and established related deadlines. In accordance with the Solicitation Procedures Order, on August 17, 2015 (the "**Solicitation Date**"), the Debtors commenced the solicitation of votes to accept or reject the Plan from the holders of Claims in Classes 3, 4, 5, and 6 (the "**Voting Classes**") who held such Claims or Interests as of August 10, 2015 (the "**Voting Record Date**"). Specifically, the Debtors caused Donlin, Recano & Company, Inc., the claims and noticing agent in these Chapter 11 Cases ("**Donlin Recano**"), to transmit copies of (i) the Disclosure Statement and all exhibits thereto, including the Plan and all exhibits thereto; (ii) the procedures approved by the Bankruptcy Court for soliciting acceptances of the Plan; (iii) a notice detailing certain information regarding the Confirmation Hearing and deadline to object to the Plan (the "**Confirmation Hearing Notice**"); (iv) a cover letter from the Debtors (a) describing the contents of the Solicitation Package (as defined below) and (b) urging the holders of Claims in each of the Voting Classes to vote to accept the Plan; (v) the appropriate ballot and applicable voting instructions; (vi) with respect to Class 6 only, the Creditors Committee Letter; and (vii) any supplemental documents the Debtors filed with the Court (collectively, the "**Solicitation Packages**"). On August 19, 2015, John Burlaco of Donlin Recano executed an affidavit of service (which Donlin Recano filed with the Court on August 19, 2015 [D.I. 412] (the "**Solicitation Affidavit**")) regarding the mailing of the Confirmation Hearing Notice and the Solicitation Packages in accordance with the terms of the Solicitation Procedures Order.

15. As described more fully in the Voting Declaration, the Debtors did not solicit votes on the Plan from the holders of (i) Administrative Claims, DIP Facility Claims, Professional Claims, or Priority Tax Claims (each in their capacity as such), which are

Unclassified under the Plan and therefore are not entitled to vote on the Plan; (ii) Claims in Classes 1, 2, 7, or 8, which are Unimpaired and therefore are conclusively presumed to accept the Plan; or (iii) Claims in Classes 9, 10, 11, or 12, which are Impaired under the Plan, are entitled to no recovery under the Plan, and are therefore deemed to reject the Plan.

V. THE PLAN SHOULD BE CONFIRMED BECAUSE IT COMPLIES WITH THE REQUIREMENTS OF SECTION 1129 OF THE BANKRUPTCY CODE

16. Section 1129 of the Bankruptcy Code governs confirmation of a chapter 11 plan and sets forth the requirements that must be satisfied in order for a plan to be confirmed. The Debtors bear the burden of establishing that all elements necessary for confirmation of the Plan under section 1129(a) of the Bankruptcy Code have been met by a preponderance of the evidence. *See In re Tribune Co.*, 464 B.R. 126, 151-52 (Bankr. D. Del. 2011) ("The plan proponent bears the burden of establishing the plan's compliance with each of the requirements set forth in § 1129(a) . . . ." (internal quotation marks omitted)); *see also Heartland Fed. Sav. & Loan Ass'n v. Briscoe Enters., Ltd. II (In re Briscoe Enters., Ltd. II)*, 994 F.2d 1160, 1165 (5th Cir. 1993) (stating that the bankruptcy court must find that the debtor has satisfied the provisions of section 1129 by a preponderance of the evidence); *In re Alta+Cast, LLC*, Case No. 02-12082 (MFW), 2004 Bankr. LEXIS 219, *6 (Bankr. D. Del. Mar. 2, 2004) (same). This Memorandum and the Declarations, together with the evidence to be adduced at the Confirmation Hearing, demonstrate that, by a preponderance of the evidence, the Plan complies with the requirements of section 1129(a) of the Bankruptcy Code with respect to all Classes of Claims or Interests. Accordingly, the Plan should be confirmed.

1) The Plan Complies with All Applicable Provisions of the Bankruptcy Code - 11 U.S.C. § 1129(a)(1)

17. Section 1129(a)(1) of the Bankruptcy Code provides that a court may confirm a chapter 11 plan only if "[t]he plan complies with the applicable provisions of [the Bankruptcy Code]." 11 U.S.C. § 1129(a)(1).[7] A principal objective of section 1129(a)(1) is to assure compliance with the sections of the Bankruptcy Code governing classification of claims and interests and the contents of a plan. Accordingly, the determination of whether the Plan complies with section 1129(a)(1) requires an analysis of the compliance with sections 1122 and 1123 of the Bankruptcy Code. As set forth below, the Plan complies with these sections of the Bankruptcy Code.

a. The Classification of Claims and Interests in the Plan Satisfies the Requirements of Section 1122 of the Bankruptcy Code

18. Section 1122(a) of the Bankruptcy Code provides that the claims or interests within a given class must be "substantially similar." 11 U.S.C. § 1122(a). Section 1122(a), however, does not mandate that all "substantially similar" claims be classified together. *See In re Jersey City Med. Ctr.*, 817 F.2d 1055, 1061 (3d Cir. 1987) (noting that section 1122 permits the grouping of similar claims in different classes); *In re Coram Healthcare Corp*., 315 B.R. 321, 348 (Bankr. D. Del. 2004) (noting that "section 1122 . . . provides that claims that are not 'substantially similar' may not be placed in the same class; it does not expressly prohibit placing 'substantially similar' claims in separate classes").

[7] The legislative history of section 1129(a)(1) explains that this provision encompasses the requirements of sections 1122 and 1123, which govern the classification of claims under the plan and the contents of the plan, respectively. *See* H.R. Rep. No. 95-595, at 412 (1977); S. Rep. No. 95-989, at 126 (1978); *see also In re Century Glove, Inc.*, Civ. A. No. 90-400-SLR, 1993 WL 239489, at *6 (D. Del. Feb. 10, 1993); *In re Resorts Int'l, Inc.*, 145 B.R. 412, 446-47 (Bankr. D.N.J. 1990); *In re Elsinore Shore Assocs.*, 91 B.R. 238, 256 (Bankr. D.N.J. 1988).

19. Courts have generally permitted the separate classification of substantially similar claims so long as the claims were not classified to "gerrymander" an accepting impaired class. *See Phoenix Mut. Life Ins. Co. v. Greystone III Joint Venture (In re Greystone III Joint Venture)*, 995 F.2d 1274, 1279 (5th Cir. 1991) ("Thou shalt not classify similar claims differently in order to gerrymander an affirmative vote on a reorganization plan."); *see also John Hancock Mut. Life Ins. Co. v. Route 37 Bus. Park Assocs.*, 987 F.2d 154, 158 (3d Cir. 1993). While gerrymandering claims in order to create an impaired accepting class is not permissible, section 1122 provides debtors with a great degree of flexibility in classifying claims and interests for legitimate business purposes, and courts have broad discretion in approving a proponent's classification scheme and to properly consider the specific facts of each case before rendering a decision. *See In re Jersey City Med. Ctr.*, 817 F.2d 1055, 1060-61 (3d Cir. 1987) ("Congress intended to afford bankruptcy judges broad discretion [under section 1122] to decide the propriety of plans in light of the facts of each case.").

20. As outlined above, Article III of the Plan separately classifies twelve (12) Classes of Claims against and Interests in each Debtor, as applicable, that are more fully described in the Plan and the Disclosure Statement. In accordance with section 1122(a) of the Bankruptcy Code, each Class of Claims against and Interests in each Debtor contains only Claims or Interests that are substantially similar to the other Claims or Interests within that Class. In addition, valid business, factual, and legal reasons exist for separately classifying the various Classes of Claims against and Interests in each Debtor under the Plan. Based upon the foregoing, the Debtors submit that the Plan satisfies the requirements of section 1122 of the Bankruptcy Code.

b. The Plan Satisfies the Requirements of Section 1123(a) of the Bankruptcy Code

21. The Plan also complies with section 1123(a) of the Bankruptcy Code, which sets forth seven requirements with which every plan under chapter 11 of the Bankruptcy Code must comply. 11 U.S.C. § 1123(a). As demonstrated below, the Plan complies with each such requirement:

- Section 1123(a)(1). As discussed above, Article III of the Plan properly designates all Claims and Interests that require classification, as required by section 1123(a)(1) of the Bankruptcy Code. Pursuant to section 1123(a)(1) of the Bankruptcy Code, Administrative Claims, DIP Facility Claims, Professional Claims, and Priority Tax Claims are not required to be designated into Classes.

- Section 1123(a)(2). In accordance with section 1123(a)(2) of the Bankruptcy Code, Article III of the Plan specifies each Class of Claims or Interests that is Unimpaired under the Plan. In particular, Article III of the Plan provides that Class 1 (Other Secured Claims), Class 2 (Other Priority Claims), Class 7 (Intercompany Claims), and Class 8 (Intercompany Interests) are Unimpaired under the Plan.

- Section 1123(a)(3). In accordance with 1123(a)(3) of the Bankruptcy Code, Article III of the Plan specifies the treatment of each Class of Claims and each Class of Interests that is Impaired under the Plan. In particular, Article III of the Plan specifies the treatment of Class 3 (ABL Facility Claims), Class 4 (Term Loan Facility Claims), Class 5 (SBI Secured Claims), Class 6 (General Unsecured Claims), Class 9 (Boomerang Preferred Units), Class 10 (Boomerang Common Units), Class 11 (Boomerang Other Equity Securities), and Class 12 (Section 510(b) Claims).

- Section 1123(a)(4). In accordance with section 1123(a)(4) of the Bankruptcy Code, Article III of the Plan provides the same treatment for each Claim or Interest in a given Class unless the holder of such Claim or Interest agrees to less favorable treatment.

- Section 1123(a)(5). In accordance with section 1123(a)(5) of the Bankruptcy Code, Article IV of the Plan provides adequate means for the Plan's implementation. For example, the Plan provides for the discharge of Claims through (i) the issuance of New Holdco Common Stock and New Opco Common Units; (ii) the issuance of the Subordinated Notes; (iii) the reinstatement of certain Claims and Interests; and (iv) the payment of Cash. Article IV also provides for the execution of the Exit ABL Facility Loan Documents and the Exit Term Facility Loan Documents and the vesting of all property in each Debtor's Estate, all Causes of Action, and any property acquired by the Debtors under the Plan in each respective Reorganized Debtor, with the exception that the GUC Trust Assets will be vested in the GUC Trust. The GUC Trustee will then have the sole authority to reduce to Cash the GUC Trust Assets,

including by sale, litigation, compromise, or settlement. Accordingly, the Plan satisfies the requirements set forth in section 1123(a)(5) of the Bankruptcy Code.

- Section 1123(a)(6). Under Article IV of the Plan, the New Holdco Certificate of Incorporation, the New Holdco Bylaws, and the New Opco Governance Documents shall be consistent with the provisions of the Plan and the Bankruptcy Code. The New Holdco Documents shall, among other things: (i) authorize the issuance of the New Holdco Common Stock; and (ii) pursuant to and only to the extent required by section 1123(a)(6) of the Bankruptcy Code, include a provision prohibiting the issuance of non-voting Equity Securities. The New Opco Governance Documents shall, among other things: (i) authorize the issuance of the New Opco Common Units and the Subordinated Notes; and (ii) pursuant to and only to the extent required by section 1123(a)(6) of the Bankruptcy Code, include a provision prohibiting the issuance of non-voting Equity Securities. Therefore, section 1123(a)(6) of the Bankruptcy Code is satisfied.

- Section 1123(a)(7). Section 1123(a)(7) requires that a plan "contain only provisions that are consistent with the interests of creditors and equity security holders and with public policy with respect to the manner of selection of any officer, director, or trustee under the plan and any successor to such officer, director, or trustee." 11 U.S.C. § 1123(a)(7). The Plan satisfies the requirements set forth in 1123(a)(7) of the Bankruptcy Code. Article IV of the Plan provides that the members of the board of directors of any subsidiary of the Reorganized Debtors shall be satisfactory to the Majority Consenting Term Lenders. In addition, the members of Boomerang's board of directors shall be deemed to have resigned as of the Effective Date. On the Effective Date, the New Board will consist of seven members, (i) one of whom will be New Holdco's chief executive officer, (ii) four of whom will be appointed initially by the Majority Holder, (iii) one of whom will be appointed initially by the second largest holder (including any affiliated holder or holders under common control with respect to such holder) of New Holdco Common Stock on the Effective Date, and (iv) one of whom will be appointed initially by the holders of a majority of the New Holdco Common Stock on the Effective Date other than the two largest holders (including, with respect to each such holder, any affiliated holder or holders under common control with respect to such holder) of the New Holdco Common Stock. On the Effective Date, the existing officers of the Debtors shall serve in their current capacities for the Reorganized Debtors. The members of the New Board will be identified prior to confirmation.

c. The Plan Complies With the Requirements of Section 1123(b) of the Bankruptcy Code

22. Section 1123(b)(6) of the Bankruptcy Code provides that a chapter 11 plan may "include any other appropriate provision not inconsistent with the applicable provisions of [the Bankruptcy Code]." To that end, section 1123(b) of the Bankruptcy Code contains various

discretionary provisions that may be included in a chapter 11 plan. Here, the Plan employs various provisions in accordance with the discretionary authority under section 1123(b) of the Bankruptcy Code.

(i) The Plan Leaves Certain Classes Impaired and Certain Classes Unimpaired.

23. As set forth in Article III of the Plan, the Plan leaves certain Classes of Claims Unimpaired and Impairs the remaining Classes of Claims and Interests. Specifically, Classes 1, 2, 7, and 8 are Unimpaired, and Classes 3, 4, 5, 6, 9, 10, 11, and 12 are Impaired.

(ii) The Plan Provides for the Assumption or Rejection of Executory Contracts and Unexpired Leases.

24. The Plan provides for the rejection of all of the Debtors' Executory Contracts and Unexpired Leases on the Effective Date unless such Executory Contract or Unexpired Lease: (i) was assumed or rejected previously by the Debtors; (ii) previously expired or terminated pursuant to its own terms; (iii) is the subject of a motion to assume or reject filed on or before the Effective Date; or (iv) is identified as an Executory Contract or Unexpired Lease to be assumed pursuant to the Plan Supplement before the Effective Date.[8] Specifically, the Plan provides that entry of the Confirmation Order by the Bankruptcy Court shall constitute an order approving the assumptions or rejections of such Executory Contracts or Unexpired Leases as set forth in the Plan, all pursuant to sections 365(a) and 1123 of the Bankruptcy Code. Section 365(a) provides that a debtor, "subject to the court's approval, may assume or reject any executory contract or unexpired lease." 11 U.S.C. § 365(a).

25. The decision to reject or assume an executory contract is a matter within the business judgment of the debtor. *See In re Pinnacle Brands, Inc.*, 259 B.R. 46, 53 (Bankr. D.

[8] (*See* Plan § 5.1 (Assumption of Executory Contracts and Unexpired Leases).)

Del. 2001) ("The Debtors' decision to assume or reject an executory contract is based upon its business judgment."). The burden or hardship on the contract party to a rejected contract is not a factor to be considered. *Borman's Inc. v. Allied Supermarkets*, 706 F.2d 187, 189 (6th Cir. 1983), *cert. denied*, 464 U.S. 908 (1983). If the Debtors determine to assume an executory contract, they must cure defaults and provide adequate assurance of future performance. 11 U.S.C. § 365(b)(1).

26. Here, the Debtors' determination to assume, which may include to assume as amended, or to reject Executory Contracts and Unexpired Leases is a valid exercise of their sound business judgment. In light of the nature and scope of the Debtors' post-emergence businesses and operations, the Debtors respectfully submit that their determinations as to the assumption or rejection of Executory Contracts and Unexpired Leases embodied in the Plan are appropriate. Further, the Debtors believe that the assumption and rejection of Executory Contracts and Unexpired Leases under the Plan will aid in the implementation of the Plan and is in the best interests of the Debtors, their Estates, and other parties in interest in these Chapter 11 Cases. Finally, the Debtors have and will demonstrate that they will promptly pay Cures and provide adequate assurance of future performance. As a result, the proposed assumptions and rejections provided for in the Plan should be approved in connection with confirmation of the Plan.

(iii) The Plan Contains Procedures for the Allowance and Disallowance of Claims and Interests and Distributions to Holders of Any Such Allowed Claims or Allowed Interests.

27. The provisions of Articles VI and VII of the Plan regarding the Distributions under the Plan and the resolution of Disputed Claims and Interests should be approved in all respects. On the first Distribution Date, the Distribution Agent shall make initial distributions

under the Plan on account of Claims (other than General Unsecured Claims) Allowed on or before the Effective Date, subject to the Reorganized Debtors' right to object to Claims (other than General Unsecured Claims) and certain other limitations. A Distribution Date shall occur no less frequently than once in every thirty (30) day period after the Effective Date, as necessary, in the Reorganized Debtors' sole discretion. The GUC Trust shall be established as a trust for the primary purpose of (i) monetizing the GUC Trust Assets and distributing the GUC Trust Proceeds in accordance with the GUC Trust Waterfall, and (ii) reconciling all General Unsecured Claims asserted against the Debtors at any time, with no objective to continue or engage in the conduct of a trade or business.

(iv) The Plan Provides for the Bankruptcy Court to Retain Jurisdiction Over Certain Matters.

28. Section 1123(b)(6) of the Bankruptcy Code provides that a plan may "include any other appropriate provision not inconsistent with the applicable provisions of [the] Bankruptcy Code." In that regard, Article XI of the Plan provides that, among other things, the Bankruptcy Court shall retain exclusive jurisdiction over all matters arising out of, or related to, the Chapter 11 Cases and the Plan pursuant to sections 105(a) and 1142 of the Bankruptcy Code. This provision is appropriate because the Bankruptcy Court otherwise has jurisdiction over all of these matters during the pendency of the Chapter 11 Cases, and case law establishes that a bankruptcy court may retain jurisdiction over the debtor or the property of the estate following confirmation. *See Gruen Mktg. Corp. v. Asia Commercial Co. (In re Jewelcor Inc.)*, 150 B.R. 580, 582 (Bankr. M.D. Pa. 1992) ("There is no doubt that the bankruptcy court's jurisdiction continues post-confirmation to protect its confirmation decree, to prevent interference with the execution of the plan and to aid otherwise in its operation." (internal quotation marks, citation omitted)).

(v) The Plan Contains Certain Releases, Exculpation, and an Injunction That Are Integral Components of the Plan.[9]

29. Article VIII of the Plan contains provision that provide for the release of claims by the Debtors and their estates of claims against the Released Parties (section 8.2), a limited release by certain third-parties of claims against the Released Parties (section 8.3), and an exculpation provision in favor of the Exculpated Parties (section 8.4). As discussed further below, each of these provisions is permissible under section 1123(b) and appropriate in the Chapter 11 Cases.

(vi) The Plan Contains a Request for Recharacterization of the SBI Financing Agreement and Valuation of the SBI Heat Treat Line Collateral.[10]

30. As discussed further below, pursuant to section 105(a) of the Bankruptcy Code and through the Plan, the Debtors seek the equitable relief of a declaratory judgment that (a) the SBI Financing Agreement constitutes a secured financing transaction and (b) the value of the SBI Heat Treat Line Collateral is $4.5 million.

2) The Debtors Have Complied with the Applicable Provisions of the Bankruptcy Code — 11 U.S.C. § 1129(a)(2)

31. Section 1129(a)(2) of the Bankruptcy Code requires that the "proponent of the plan comply with the applicable provisions of this title." 11 U.S.C. § 1129(a)(2). Whereas section 1129(a)(1) of the Bankruptcy Code focuses on the form and content of a plan itself, section 1129(a)(2) is concerned with the applicable activities of a plan proponent. *See Collier on Bankruptcy* ¶ 1129.03 (Alan N. Resnick & Henry J. Sommers eds., 16th ed.). The legislative history to section 1129(a)(2) reflects that this provision is intended to encompass the disclosure

[9] (*See* Plan §§ 8.2, 8.3, 8.4 & 8.5.)

[10] (*See* Plan § 12.1.)

and solicitation requirements under sections 1125 and 1126. H.R. Rep. No. 95-595, at 412 (1977); S. Rep. No. 95-989, at 126 (1978) ("Paragraph (2) [of section 1129(a)] requires that the proponent of the plan comply with the applicable provisions of chapter 11, such as section 1125 regarding disclosure."); *see also In re Resorts Int'l, Inc.*, 145 B.R. 412, 468-69 (D.N.J. 1990); *In re Elsinore Shore Assocs.*, 91 B.R. 238, 258 (D.N.J. 1988). In determining whether a plan proponent has complied with this section, courts focus on whether the proponent has adhered to the disclosure and solicitation requirements of sections 1125 and 1126. *See In re PWS Holding Corp.*, 228 F.3d 224, 248 (3d Cir. 2000).

32. The Debtors have complied with all solicitation and disclosure requirements set forth in the Bankruptcy Code, the Bankruptcy Rules, and the Solicitation Procedures Order governing notice, disclosure, and solicitation in connection with the Plan and the Disclosure Statement. Among other things, as evidenced by the Solicitation Affidavit, it is clear that the Debtors have complied with all previous orders of the Court regarding solicitation of votes, including the Solicitation Procedures Order, and that the Debtors have complied with the Bankruptcy Code, the Bankruptcy Rules, and other applicable law with respect to the foregoing. Accordingly, the requirements of section 1129(a)(2) have been satisfied. *See In re Drexel Burnham Lambert Grp. Inc.*, 138 B.R. 723, 769 (Bankr. S.D.N.Y. 1992) (section 1129(a)(2) satisfied where debtors complied with all provisions of Bankruptcy Code and Bankruptcy Rules governing notice, disclosure and solicitation relating to the plan).

3) The Plan Has Been Proposed in Good Faith and Not by Any Means Forbidden by Law — 11 U.S.C. § 1129(a)(3)

33. Section 1129(a)(3) of the Bankruptcy Code requires a plan to have been "proposed in good faith and not by any means forbidden by law." 11 U.S.C. § 1129(a)(3). Although the Bankruptcy Code does not define "good faith" as that term is used in this section,

the Third Circuit has indicated that "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." *PWS Holding Corp*., 228 F.3d at 242 (quoting *In re Abbotts Dairies of Pa., Inc*., 788 F.2d 143, 150 n.5 (3d Cir. 1986)); *see also In re Combustion Eng'g, Inc*., 391 F.3d 190, 247 (3d Cir. 2004); *In re Armstrong World Indus., Inc*., 348 B.R. 136, 164 (Bankr. D. Del. 2006).

34. Courts generally view the good faith requirement in light of the totality of the circumstances surrounding the establishment of the chapter 11 plan. *See In re Zenith Elecs. Corp.*, 241 B.R. 92, 107-08 (Bankr. D. Del. 1999). In assessing good faith, the Court may look to whether a plan has been proposed with a legitimate purpose and with a basis for expecting that reorganization consistent with the Bankruptcy Code's objectives can be effectuated. *See, e.g.*, *id.* (holding that the plan was proposed in good faith where such plan was "proposed with the legitimate purpose of restructuring [debtor's] finances to permit [debtor] to reorganize successfully," which was "exactly what chapter 11 of the Bankruptcy Code was designed to accomplish" (internal quotation marks, citation omitted)); *In re Surfango, Inc.*, No. 09-30972 (RTL), 2009 WL 5184221, at *8-9 (Bankr. D.N.J. Dec. 18, 2009) (stating that the court should focus on "whether the plan serves a valid bankruptcy purpose, e.g., by preserving a going concern or maximizing value" and "whether the plan is proposed to obtain a tactical litigation advantage").

35. Good faith is not lacking simply because a plan "may not be one which the creditors would themselves design and indeed may not be confirmable." *Fin. Sec. Assurance Inc. v. T-H New Orleans Ltd. P'ship (In re T-H New Orleans Ltd. P'ship)*, 116 F.3d 790, 803 (5th Cir. 1997) (affirming finding of good faith against allegations that the debtor did not

effectively market the property so as to produce a bidder who would compete against lender at confirmation hearing); *In re Montgomery Court Apartments, Ltd.*, 141 B.R. 324, 330 (Bankr. S.D. Ohio 1992) ("The Court fails to see how [the creditor's] unhappiness with the Plan's terms can give rise to a finding of bad faith on the part of the Debtor under 11 U.S.C. § 1129(a)(3). Chapter 11 plans routinely alter the contractual rights of parties."); *Zenith*, 241 B.R. at 107 (noting that one creditor receiving better treatment than another under plan does not preclude a finding of good faith). Simply put, the good faith standard does not demand that a debtor offer more to its creditors than the Bankruptcy Code requires. *See In re G-I Holdings Inc.*, 420 B.R. 216, 262 (D.N.J. 2009); *see also Platinum Capital, Inc. v. Sylmar Plaza, L.P. (In re Sylmar Plaza, L.P.)*, 314 F.3d 1070, 1075 (9th Cir. 2002) ("In enacting the Bankruptcy Code, Congress made a determination that an eligible debtor should have the opportunity to avail itself of a number of Code provisions which adversely alter creditors' contractual and nonbankruptcy rights . . . . [T]he fact that a debtor proposes a plan in which it avails itself of an applicable Code provision does not constitute evidence of bad faith." (internal quotation marks omitted, citing *In re PPI Enter., Inc.*, 228 B.R. 339, 344-45, 347 (Bankr. D. Del. 1998))).

36. The Debtors submit that the record in these Chapter 11 Cases and the Declarations establish that the Debtors, as plan proponents, have proposed the Plan in good faith, with the legitimate purpose of maximizing stakeholder value, and not by any means forbidden by law, in satisfaction of section 1129(a)(3). The Plan provides for the distribution of significant value to creditors and ensures for payment in full of Administrative Claims, DIP Facility Claims, Professional Claims, Priority Tax Claims, Other Secured Claims, Other Priority Claims, and statutory fees due and owing to the U.S. Trustee, and further provides for a distribution to holders of Allowed General Unsecured Claims. Additionally, the record of these cases

demonstrates that the Debtors and their directors, officers, employees, agents, affiliates and professionals (acting in such capacity) have acted in "good faith" within the meaning of section 1125(e) of the Bankruptcy Code. The treatment of the holders of Claims and Interests under the Plan was proposed in good faith, is fair and equitable, and is supported by a valuation of the Debtors that is consistent with accepted valuation methodologies. Accordingly, the Debtors have satisfied the requirements of section 1129(a)(3) of the Bankruptcy Code.

4) The Plan Provides that Payments Made by the Debtors for Services or Costs and Expenses are Subject to Approval — 11 U.S.C. § 1129(a)(4)

37. Section 1129(a)(4) of the Bankruptcy Code provides that the Court shall confirm a plan only if "[a]ny payment made or to be made by the proponent, [or] by the debtor . . . for services or for costs and expenses in or in connection with the case, or in connection with the plan and incident to the case, has been approved by, or is subject to the approval of, the court as reasonable." 11 U.S.C. § 1129(a)(4). In other words, the Debtors must disclose to the Court all professional fees and expenses, and such professional fees and expenses must be subject to Court approval. *See New York Life Ins. Co. v. Chase Manhattan Bank, N.A. (In re Texaco, Inc.)*, 85 B.R. 934, 939 (Bankr. S.D.N.Y. 1988).

38. In accordance with section 1129(a)(4) of the Bankruptcy Code, no payment for services or costs and expenses in connection with the Chapter 11 Cases, or in connection with the Plan and incidental to the Chapter 11 Cases, including Professional Claims, has been or will be made by the Debtors other than payments that have been authorized by order of the Bankruptcy Court. Article II of the Plan provides for the payment of various Professional Claims, which are subject to Bankruptcy Court approval and the standards of the Bankruptcy

Code. Accordingly, the provisions of the Plan comply with section 1129(a)(4) of the Bankruptcy Code.

5) The Debtors Will Have Disclosed the Identity of Directors and Officers and the Nature of Compensation of Insiders — 11 U.S.C. § 1129(a)(5)

39. Section 1129(a)(5)(A) requires the proponent of any plan to disclose the "identity and affiliations of any individual proposed to serve, after confirmation of the plan, as a director, officer, or voting trustee of the debtor, an affiliate of the debtor participating in a joint plan with the debtor, or a successor to the debtor under the plan," and requires a finding that "the appointment to, or continuance in, such office of such individual, is consistent with the interests of creditors and equity security holders and with public policy." 11 U.S.C. § 1129(a)(5)(A)(i)-(ii). Additionally, section 1129(a)(5)(B) requires the proponent of a plan to disclose the "identity of any insider that will be employed or retained by the reorganized debtor, and the nature of any compensation for such insider." 11 U.S.C. § 1129(a)(5)(B). The Debtors will provide the information required under section 1129(a)(5) at or before the Confirmation Hearing. In addition, the Creditors Committee will select the GUC Trustee to administer the GUC Trust.

40. Based upon the foregoing, the Plan satisfies the requirements of section 1129(a)(5) of the Bankruptcy Code.

6) The Plan Does Not Contain Any Rate Changes Subject to the Jurisdiction of Any Governmental Regulatory Commission — 11 U.S.C. § 1129(a)(6)

41. Section 1129(a)(6) of the Bankruptcy Code requires that any regulatory commission having jurisdiction over the rates charged by the reorganized debtor in the operation of its business approve any rate change under the plan. The Plan does not provide for any rate

changes subject to the jurisdiction of any governmental regulatory commission. Accordingly, the Debtors submit that section 1129(a)(6) of the Bankruptcy Code is inapplicable to the Plan.

7) The Plan is in the Best Interests of Creditors — 11 U.S.C. § 1129(a)(7)

42. Section 1129(a)(7) of the Bankruptcy Code requires that a plan be in the best interests of creditors and equity holders. This "best interests" test focuses on individual dissenting creditors rather than classes of claims. *See Bank of Am. Nat'l Tr. & Sav. Ass'n v. 203 N. LaSalle St. P'ship*, 526 U.S. 434, 441 n.13 (1999). The best interests test requires that each holder of a claim or equity interest either accept the plan or receive or retain under the plan property having a present value, as of the effective date of the plan, not less than the amount such holder would receive or retain if the debtor was liquidated under chapter 7 of the Bankruptcy Code. 11 U.S.C. § 1129(a)(7). If a class of claims or equity interests unanimously approves the plan, the best interests test is deemed satisfied for all members of that class. *In re Drexel Burnham Lambert Grp., Inc.*, 138 B.R. 723, 761 (Bankr. S.D.N.Y. 1992). Under the Plan, Classes 3, 4, 5, 6, 9, 10, 11, and 12 are Impaired. The test, therefore, requires that each Holder of a Claim or Interest in Classes 3, 4, 5, 6, 9, 10, 11, and 12 either accept the Plan or receive or retain under the Plan property having a present value, as of the effective date of the Plan, not less than the amount that such holder would receive or retain if the Debtors were liquidated under chapter 7 of the Bankruptcy Code.

43. The Debtors have satisfied section 1129(a)(7) with respect to Classes 3, 4, 5, 6, 9, 10, 11, and 12 and believe that the Plan provides the same or a greater recovery for holders of Allowed Claims and Interests as would be achieved in a liquidation under chapter 7 of the Bankruptcy Code. This belief is based on a number of considerations, including: (i) the Debtors' primary assets are intangible and include goodwill and customer relationships, which would have

little to no value in a chapter 7 liquidation; and (ii) the absence of a robust market for the sale of the Debtors' assets in which such assets could be marketed and sold.

44. In addition, conversion to a chapter 7 would generate additional Administrative Claims and costs connected to the chapter 7 liquidation. The chapter 7 trustee's professionals, including legal counsel and accountants, would add administrative expenses that would be entitled to be paid ahead of Allowed Claims against, or Allowed Interests in, the Debtors. The Estates would also be obligated to pay all unpaid expenses incurred by the Debtors and the Creditors Committee during these Chapter 11 Cases (such as compensation for professionals). In addition, the Cash to be distributed to Creditors and Interest holders would be reduced by the chapter 7 trustee's statutory fee, which is calculated on a sliding scale from which the maximum compensation is determined based on the total amount of monies disbursed or turned over by the chapter 7 trustee. Additionally, it is likely that distributions from a chapter 7 estate would be significantly deferred. As a result, the present value of such distributions is likely to be lower than if made under the Plan. Therefore, under a chapter 7 liquidation, holders of Allowed Claims would receive significantly less than they would receive under the Plan.

45. The Debtors provided all parties in interest with an unaudited liquidation analysis (the "**Liquidation Analysis**"), attached as Exhibit E to the Disclosure Statement. The Liquidation Analysis includes a discussion of the effects that a chapter 7 liquidation would have on the recoveries of holders of claims and interests and was distributed to all parties in interest.

46. For the reasons set forth above and as set forth in the Liquidation Analysis, the Debtors believe that the Plan provides a recovery at least equal to, if not better than, the recovery in a chapter 7 case for holders of Claims, and the Plan meets the requirements of the "best interests" test.

8) The Plan Has Been Accepted by Certain Impaired Voting Classes — 11 U.S.C. § 1129(a)(8)

47. Section 1129(a)(8) of the Bankruptcy Code requires that each class of claims and interests either has either accepted or is not impaired under a chapter 11 plan. As indicated in Article III of the Plan, Classes 1, 2, 7, and 8 are Unimpaired under the Plan and are conclusively presumed to have accepted the Plan pursuant to section 1126(f) of the Bankruptcy Code. As evidenced in the Voting Report, Classes 3 and 4 voted to accept the Plan with respect to each Debtor. With respect to Debtor Boomerang, Classes 5 and 6 voted to reject the Plan. There were no parties in Class 5 and 6 with respect to Debtors BTCSP, LLC and BT Financing, Inc. that were entitled to vote on the Plan in accordance with the Solicitation Procedures Order. However, as discussed below, pursuant to section 1129(b), the Plan may be confirmed despite the failure of Classes 5 and 6 to affirmatively accept the Plan as long as the Plan does not discriminate unfairly and is fair and equitable with respect to such class of claims and interests.

9) The Plan Provides for Payment in Full of All Allowed Priority Claims — 11 U.S.C. § 1129(a)(9)

48. Under section 1129(a)(9) of the Bankruptcy Code, unless otherwise agreed, a plan must provide that:

- the holder of a claim entitled to priority under section 507(a)(2) or (3) will receive cash for the allowed amount of the claims on the effective date of the plan;
- the holder of a claim entitled to priority under section 507(a)(1), (4), (5), (6) or (7) will receive either deferred cash payments for the allowed amount, or cash for the allowed amount of the claim on the effective date of the plan;
- the holder of a tax claim entitled to priority under section 507(a)(8) will receive regular installment payments in cash (i) of the total value, as of the effective date of the plan, equal to the allowed amount of such claim; (ii) over a period ending not later than 5 years after the date of the order for relief under section 301, 302, or 303; and, (iii) in a manner not less favorable than the most favored nonpriority unsecured claim provided for by the plan (other than cash payments made to a class of creditors under section 1122(b)); and

- the holder of a secured claim which would otherwise meet the description of an unsecured claim of a governmental unit under section 507(a)(8), but for the secured status of that claim, will receive cash payments on account of that claim in the same manner and over the same period as a tax claim entitled to priority under section 507(a)(8).

11 U.S.C. § 1129(a)(9).

49. As required by section 1129(a)(9) of the Bankruptcy Code, Article II of the Plan provides for full payment of all Allowed Administrative Claims, Allowed Priority Tax Claims, and Professional Claims and Article XIII provides for the payment in full of all statutory fees due and owing to the U.S. Trustee, other than as may have been otherwise agreed with a party. Therefore, the Debtors respectfully submit that the Plan satisfies the requirements of section 1129(a)(9) of the Bankruptcy Code.

10) At Least One Impaired, Non-Insider Class Has Accepted the Plan — 11 U.S.C. § 1129(a)(10)

50. Section 1129(a)(10) of the Bankruptcy Code requires that at least one impaired class of claims must accept the plan, excluding the votes of insiders. 11 U.S.C. § 1129(a)(10). Classes 3 and 4 voted to accept with Plan with respect to each Debtor. Accordingly, the Debtors believe that the Plan satisfies the requirements of section 1129(a)(10) of the Bankruptcy Code.

11) The Plan is Feasible — 11 U.S.C. § 1129(a)(11)

51. Pursuant to section 1129(a)(11) of the Bankruptcy Code, a chapter 11 plan may be confirmed only if "[c]onfirmation 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). Pursuant to section 1129(a)(11) of the Bankruptcy Code, the Bankruptcy Court must determine, among other things, that confirmation of the Plan is not likely to be followed by the liquidation or need for further financial reorganization of the Debtors or any successors to the

Debtors under the Plan (unless such liquidation or reorganization is proposed in the Plan). These conditions are referred to as the "feasibility" of the Plan.

52. The Plan is feasible. First, as set forth in section 8.4 of the Disclosure Statement, the Debtors thoroughly analyzed their post-confirmation ability to meet their obligations under the Plan and continue as a going concern without the need for further financial restructuring. As a result, the Debtors submit that confirmation is not likely to be followed by liquidation. Second, as set forth in the Disclosure Statement and the Declarations, the Debtors prepared projections of the Debtors' financial performance through fiscal year 2018. These financial projections demonstrate the Debtors' ability to meet their obligations under the Plan. And third, upon the Effective Date, the Debtors expect to have sufficient funds to make all payments contemplated by the Plan. Accordingly, the Debtors believe that the Plan satisfies the requirements of feasibility under section 1129(a)(11) of the Bankruptcy Code,

12) All Statutory Fees Have Been or Will Be Paid — 11 U.S.C. § 1129(a)(12)

53. Section 1129(a)(12) of the Bankruptcy Code provides that a court may confirm a chapter 11 plan only if "[a]ll fees payable under section 1930 of title 28, as determined by the court at the hearing on confirmation of the plan, have been paid or the plan provides for the payment of all such fees on the effective date of the plan." 11 U.S.C. § 1129(a)(12). Section 13.2 of the Plan provides for the payment, on or before the Effective Date, of any fees due pursuant to section 1930 of title 28 of the United States Code or other statutory requirement. Therefore, the Plan meets the requirements of section 1129(a)(12) of the Bankruptcy Code.

13) The Plan Appropriately Treats Retiree Benefits — 11 U.S.C. § 1129(a)(13)

54. Section 1129(a)(13) of the Bankruptcy Code requires that a chapter 11 plan provide for the continued payment of certain retiree benefits "for the duration of the period that the debtor has obligated itself to provide such benefits." 11 U.S.C. § 1129(a)(13). Article IV of the Plan provides that "pursuant to section 1129(a)(13) of the Bankruptcy Code, from and after the Effective Date, all retiree benefits (as such term is defined in section 1114 of the Bankruptcy Code), if any, shall continue to be paid in accordance with applicable law." Accordingly, the Debtors submit that the Plan satisfies the requirements of section 1129(a)(13) of the Bankruptcy Code.

14) Sections 1129(a)(14)-(16) of the Bankruptcy Code are Inapplicable

55. None of the Debtors are (a) required to pay any domestic support obligations, (b) individuals, or (c) nonprofit corporations or trusts. Accordingly, the Debtors submit that sections 1129(a)(14) through (16) of the Bankruptcy Code are not applicable. *See In re Sea Launch Co., L.L.C.*, Case No. 09-12153 (BLS), 2010 Bankr. LEXIS 5283, *41 (Bankr. D. Del. July 30, 2010) ("Section 1129(a)(16) by its terms applies only to corporations and trusts that are not moneyed, business, or commercial.").

15) The Plan Is Not an Attempt to Avoid Tax Obligations — 11 U.S.C. 1129(d)

56. Section 1129(d) of the Bankruptcy Code provides that a court may not confirm a plan if the principal purpose of the plan is to avoid taxes or the application of section 5 of the Securities Act of 1933 (the "**Securities Act**"). The Plan meets these requirements because the principal purpose of the Plan is not the avoidance of taxes or the avoidance of the application of the Securities Act, and no party in interest has filed an objection alleging otherwise. The

principal purpose of the Plan is to effectuate the Debtors' recapitalization and restructuring through the Transaction. Accordingly, the Plan satisfies the requirements of section 1129(d) of the Bankruptcy Code.

VI. THE PLAN SATISFIES THE "CRAMDOWN" REQUIREMENTS FOR CONFIRMATION UNDER SECTION 1129(b) OF THE BANKRUPTCY CODE

57. The Plan has been accepted by all of the Voting Classes, except for Classes 5 and 6, and section 1129(b) of the Bankruptcy Code is also implicated by the Plan with respect to the classes 9 through 12, which are deemed to reject the Plan. Section 1129(a)(8) of the Bankruptcy Code requires that each class of claims and interests either accept a plan or be unimpaired under the plan. Section 1129(b) of the Bankruptcy Code provides that if all applicable requirements of section 1129(a) are met—notwithstanding a failure to comply with section 1129(a)(8)—a plan may be confirmed so long as it does not discriminate unfairly and is fair and equitable with respect to each class of claims and interests that is impaired and has not accepted the plan. 11 U.S.C. § 1129(b).

58. Therefore, in order to confirm a plan that has not been accepted by all impaired classes, the plan proponent must show that the plan "does not discriminate unfairly" against, and is "fair and equitable" with respect to, the non-accepting impaired classes. *See John Hancock Mut. Life Ins. Co. v. Route 37 Bus. Park. Assocs.*, 987 F.2d 154, 157 n.5 (3d Cir. 1993); *Zenith*, 241 B.R. at 105.

59. As discussed below,[11] the Plan satisfies the "cramdown" requirements in section 1129(b) of the Bankruptcy Code to confirm the Plan.

[11] The objections of the Creditors Committee and SBI regarding cramdown are discussed in Part VII of this Memorandum.

a. The Plan Does Not Unfairly Discriminate With Respect to Any Class

60. The Plan does not discriminate unfairly with respect to an Impaired Class that has rejected the Plan. The Bankruptcy Code does not provide a standard for determining when "unfair discrimination" exists. *See In re 203 N. LaSalle St. Ltd. P'ship*, 190 B.R. 567, 585 (Bankr. N.D. Ill. 1995), *rev'd on other grounds*, *Bank of Am. Nat'l Tr. & Sav. Ass'n v. 203 N. LaSalle St. P'ship*, 526 U.S. 434 (1999) (noting "the lack of any clear standard for determining the fairness of a discrimination in the treatment of classes under a Chapter 11 plan" and that "the limits of fairness in this context have not been established."). Rather, courts typically examine the facts and circumstances of each particular case to determine whether unfair discrimination exists. *See In re Bowles*, 48 B.R. 502, 507 (Bankr. E.D. Va. 1985) ("[W]hether or not a particular plan does so [unfairly] discriminate is to be determined on a case-by-case basis . . . ."). At a minimum, however, the unfair discrimination standard prevents creditors and interest holders with similar legal rights from receiving materially different treatment under a proposed plan without sufficient justifications for doing so. *See Liberty Nat'l Enters. v. Ambanc La Mesa Ltd. P'Ship (In re Ambanc La Mesa Ltd. P'ship)*, 115 F.3d 650, 655 (9th Cir. 1997); *In re Johns-Manville Corp.*, 68 B.R. 618, 636 (Bankr. S.D.N.Y. 1986).

61. A threshold inquiry to assessing whether a chapter 11 plan unfairly discriminates against a dissenting class is whether the dissenting class is equally situated to a class allegedly receiving more favorable treatment. To determine whether there is unfair discrimination in a chapter 11 plan, the Third Circuit has applied a "rebuttable presumption" test that initially examines whether a proposed plan provides for either a materially lower recovery or a greater allocation of risk for the dissenting creditors or holders of interests. *In re Armstrong*, 348 B.R. 111, 121-22 (Bankr. D. Del. 2006) (citing *In re Dow Corning Corp.*, 244 B.R. 696, 702 (Bankr.

E.D. Mich. 1999)). The Plan does not unfairly discriminate against any Class because the Claims in each Class are legally and factually distinct from other Claims and Interests in other Classes.

b. The Plan is Fair and Equitable With Respect to the Impaired Classes That Voted to Reject The Plan

62. Section 1129(b)(2) sets forth the "fair and equitable" standards for claims and interests. Specifically, the Plan complies with the "fair and equitable" standards in sections 1129(b)(2)(B) and 1129(b)(2)(C) of the Bankruptcy Code because (i) no Claim or Interest junior to the Claims or Interests in another Class will receive or retain any property on account of such junior Claim or Interests, and (ii) based on the valuations, as well as the projections, liquidation analysis and other information contained in the Disclosure Statement, no Classes will receive more than full payment on account of their Claims. These sections set forth a central tenet of bankruptcy law—the "absolute priority rule"—and provide that a plan is fair and equitable with respect to a particular class of unsecured claims or interests if it provides that the holder of any claim or interest in a class junior to the claims or interests of that particular class will not receive a distribution or retain any rights under the plan on account of such junior claim or interest in property. *See* 11 U.S.C. § 1129(b)(2)(B)(ii) & (C)(ii); *Norwest Bank Worthington v. Ahlers*, 485 U.S. 197, 202 (1988) (noting the absolute priority rule "provides that a dissenting class of unsecured creditors must be provided for in full before any junior class can receive or retain any property [under a reorganization] plan"); *Bank of Am. Nat'l Tr. & Sav. Ass'n v. 203 N. LaSalle St. P'ship*, 526 U.S. 434, 441-42 (1999) ("As to a dissenting class of impaired unsecured creditors, such a plan may be found to be 'fair and equitable' only if the allowed value of the claim is to be paid in full, § 1129(b)(2)(B)(i), or, in the alternative, if 'the holder of any claim or interest that is junior to the claims of such [impaired unsecured] class will not receive or retain

under the plan on account of such junior claim or interest any property,' § 1129(b)(2)(B)(ii). That latter condition is the core of what is known as the 'absolute priority rule.'"). Another condition under the absolute priority rule is that senior classes cannot receive more than a 100% recovery for their claims. *See In re Exide Techs.*, 303 B.R. 48, 61 (Bankr. D. Del. 2003); *In re Genesis Health Ventures, Inc.*, 266 B.R. 591, 612 (Bankr. D. Del. 2001).

63. To show that the Plan does not violate the absolute priority rule, the Debtors must establish that their valuation of the company is reasonable by a preponderance of the evidence. *In re Mirant Corp.*, 334 B.R. 800, 825 n.77 (Bankr. N.D. Tex. 2005). As discussed further below in connection with the objection of the Creditors Committee, the Debtors will meet this burden at the Confirmation Hearing.

VII. PENDING AND RESOLVED OBJECTIONS

64. Objections to the Plan were filed by the Creditors Committee [D.I. 502] and SBI [D.I. 497], which are discussed below. Limited objections to the Plan were also filed by the U.S. Trustee [D.I. 496] and certain state taxing authorities [D.I. 491 & 493], and the Environmental Protection Agency informally responded to the Plan. The U.S. Trustee's objection is addressed below in connection with the Creditors Committee's objection to the Plan's exculpation provisions. The objections of the state taxing authorities and the informal response of the Environmental Protection Agency have been resolved by the inclusion of language in the proposed Confirmation Order.

1) The Creditors Committee's Valuation Objection is Meritless

65. Valuation in bankruptcy involves determining the ongoing earning capacity of a company. *See Consol. Rock Prods. Co. v. DuBois*, 312 U.S. 510, 526 (1941) (valuations should

consider "all facts relevant to future earning capacity and hence to present worth"). Courts focus on the propriety of the methods used to perform the valuation. *In re Coram Healthcare Corp.*, 315 B.R. 321, 339 (Bankr. D. Del. 2004) ("Although valuations are subjective, there are proper and improper methods of performing a valuation."). The appropriate method of valuing a debtor's business is a "straight forward application of the valuation methodologies to arrive at a better understanding of whether the Debtor's Plan treats creditors fairly and equitably." *Exide*, 303 B.R. at 66.

66. Here, the Debtors have met their burden of establishing that the Plan does not deprive rejecting classes of any value to which they are entitled. The Debtors' valuation is based on the Debtors' own carefully developed financial projections (the "**Financial Projections**") and the straightforward application of standard valuation methodologies. These projections, which were prepared by the Debtors in good faith following a thorough process, encompass the fully-informed and sound business judgment of the Debtors and represent the Debtors' best estimate of the future performance of the Reorganized Debtors. The Financial Projections and the valuation performed by the Debtors' investment banker, Lazard Freres & Co., LLC ("**Lazard**" and the "**Lazard Valuation**"), demonstrate that there is no distributable value to general unsecured creditors. Moreover, the Lazard Valuation is supported by surrounding facts and circumstances, including (i) the failure to receive any indications of interest as part of the Debtors' due diligence market check, and (ii) a third-party valuation performed by Duff & Phelps, LLC as the expert witness hired by SBI, which indicates the Debtors' enterprise valuation is even lower than the Lazard Valuation. In contrast, the Committee's valuation put forth by Alvarez & Marsal Valuation Services LLC ("**Alvarez**" and the "**Alvarez Valuation**") attempts to drive up the enterprise value to a point where general unsecured creditors are putatively "in the money" by,

among other things, improperly (i) manipulating the Debtors' Financial Projections, (ii) using the wrong comparable companies, and (iii) applying overly conservative betas.

(i) The Debtors' Financial Projections Are the Result of Management's Informed Judgment and Reasonably Estimate the Debtors' Earning Potential

67. The Financial Projections were finalized by the Debtors and project the Debtors' EBITDA from 2015 through 2018. Determining projected EBITDA is "largely a matter of judgment." *In re Genesis Health Ventures, Inc.*, 266 B.R. at 614; Hon. Christopher S. Sontchi, *Valuation Methodologies: A Judge's View*, 20 Am. Bankr. Inst. L. Rev. 1, 8 (2012) ("Given the inherent uncertainty in predicting the future, one generally only uses three to five years of projections in performing a DCF analysis."). When, as here, a debtor has exercised informed judgment that appears to be "balanced, taking into account both positive and negative forces in trends" when developing its projections, courts have approved such projections, even if objectors have presented evidence that suggests a higher projected EBITDA. *Genesis Health,* 266 B.R. at 614. *See Iridium IP LLC v. Motorola, Inc. (In re Iridium Operating LLC)*, 373 B.R. 283, 347 (Bankr. S.D.N.Y. 2007) ("An informed judgment from management regarding projected earnings, which took into account anticipated events and expectations, was a reasonable valuation.") (internal quotation marks, citation omitted); *Coram Healthcare Corp.*, 315 B.R. at 340 (accepting management's projections where the "overall product was reasonable").

68. Consistent with that approach, courts in this district almost invariably rely on management projections when performing valuations in the context of a contested confirmation. *See, e.g.*, *In re PTL Holdings LLC*, No. 11-12676 (BLS), 2011 WL 5509031, at *3-4 (Bankr. D. Del. Nov. 10, 2011) (rejecting objections to financial projections as being premised on pessimistic or faulty assumptions, and accepting projections as properly prepared); *U.S. Bank*

Nat'l Ass'n v. Wilmington Tr. Co. (In re Spansion, Inc.), 426 B.R. 114, 132 (Bankr. D. Del. 2010) (approving the use of management base-case and contingency-case projections and rejecting plan objector's criticism that debtor failed to include an "'upside' case to offset the risks identified in the Contingency Case Projections"); *Coram Healthcare Corp.*, 315 B.R. at 340-41 (accepting management projections and rejecting plan objector's claim that the projections were inconsistent with historical or industry experience); *Exide*, 303 B.R. at 65 (all experts utilize management projections in performing discounted cash flow analyses); *Genesis Health*, 266 B.R. at 614 (accepting management projections where valuations based on those projections were adjusted upward to reflect improvements in the debtors' industry sector).

69. As will be discussed more fully at the Confirmation Hearing, the Debtors exercised informed and balanced judgement in developing the data and assumptions regarding their business and industry that were incorporated into the Financial Projections. Notably, the Committee's own expert used the Financial Projections as the base on which it performed adjustments. In adopting the Debtors' Financial Projections as its base, the Committee has expressly endorsed the Debtors' management as the superior source of business and industry specific assumptions regarding the Debtors, and the Debtors' model in applying those inputs in operational and financial forecasting.

(ii) <u>The Lazard Valuation Adheres to Accepted Valuation Methodologies and Appropriately Calculates the Debtors' Enterprise Value Between $200 Million and $220 Million, with a Midpoint of $210 Million</u>

70. The Lazard Valuation properly considers the following generally accepted valuation methodologies: (i) the discounted cash flow ("**DCF**") analysis, (ii) the comparable company analysis, and (iii) the precedent transaction analysis. Lazard relied primarily on DCF, gave consideration to comparable company analysis, and decided to give no weight to precedent

transactions. Consistent with generally accepted practice and case law, Lazard considers the conclusions reached under each approach in arriving at its expert opinion on the Debtors' enterprise valuation based upon the availability of reliable data points, if any, with respect to each methodology. *See Exide*, 303 B.R. at 65 ("When other helpful valuation analyses are available, as in this case, each method should be weighed and then all methods should be considered together.").

71. Company Comparables. In connection with its DCF and comparable company analysis, Lazard reviewed two potential peer groups: the downhole consumable peers ("**Downhole Peers**") and the steel peers with OCTG exposure (the "**Steel Peers**"). Lazard concluded that the Downhole Peers were more comparable to the Debtors for purposes of valuation, but also considered the Steel Peers in their analysis. (Lazard Valuation at 30-31.) In doing so, Lazard considered multiple criteria including, among others, (i) line of business, (ii) geographic end markets, (iii) customer base and end markets, (iv) business risks, (v) growth prospects, (vi) maturity of business, (vii) capital investment needs, (viii) product portfolio, and (ix) size and scale of business. (*Id.* at 27.)

72. Lazard's view that the Downhole Peers, and to a lesser extent the Steel Peers, are the appropriate peer sets to be considered reflects a true understanding of the Debtors' business dynamics. Crucial to this determination is an understanding of the Debtors' OCTG product and market.

73. Here, the Debtors are leading manufacturers of *welded* OCTG, and 100% of their sales are to North American onshore drillers. The Debtors do not have an international customer base, and their domestic customers use the Debtors' product only to the extent that the customers' projects can use the Debtors' Electric Resistance Welded ("**ERW**") pipe, which has a

more limited application than that of seamless OCTG. Indeed, while the Debtors' ERW product is of the highest quality, ERW and seamless OCTG are simply not interchangeable.

74. The Downhole Peers manufacture materials that are used in the drilling and completion of wells; and while their product lines are not OCTG, their products are used primarily by North American onshore drillers just like the Debtors' products. As a result, the performance of the Downhole Peers is closely correlated with U.S. rig counts in the same manner as the Debtors' ERW product line.

75. In contrast, the Steel Peers considered by Lazard (as well as the even more limited list of companies used by Alvarez without question) are much less like the Debtors—they are large, international steel companies with a diversified product line and geographic scope. Indeed, Alvarez's comparison set generates only 31% of its revenue from North America, and most of Alvarez's Steel Peers' revenue does not come from the sale of ERW pipe. For those Steel Peers that do manufacture ERW, ERW sales are a minority of their overall sales. As noted above, the ERW is a different product class than seamless pipe, and the two products have different price points, manufacturing processes, end use customers, and applications. And while the Debtors may compete with some Steel Peers for sales to ERW customers, that competition is with respect to a small portion of the Steel Peers' business. The majority of the Steel Peers' business does *not* correlate as strongly to U.S. rig counts, making the Debtors far less comparable to those Steel Peers than the Downhole Peers.

76. <u>Proper Selection of Beta.</u> Lazard properly uses the Barra predictive beta, a 13-factor model used by substantially all Wall Street investment banks and which has been both explicitly and implicitly relied upon by Delaware courts. *See, e.g.*, Widen, R. Scott, *Practitioner Note: Delaware Law, Financial Theory and Investment Banking Valuation Practice*, 4 N.Y.U. J.

L. & Bus. 579, 585-86 (2008) ("Many investment banks now use predicted Barra betas in their fairness opinion analyses. Some use it as 'the' beta input into WACC calculations, others use it as one data point in choosing an appropriate beta."); *IQ Holdings, Inc. v. Am. Commercial Lines Inc.*, C.A. No. 6369-VCL, 2013 Del. Ch. LEXIS 234, at *11 (Del. Ch. Mar. 18, 2013) (expressly adopting experts' use of Barra predictive beta as appropriate beta); *In re Tribune*, 464 B.R. 126, 151 (Bankr. D. Del. 2011) (implicitly accepting the use of Barra predictive beta by concluding that plan proponents' experts, who used the predictive Barra beta, "provided rational explanations for their weighting of the comparable company and DCF methodologies in the Lazard Expert Report and, considering their experience and knowledge of the applicable industries, I find their analysis on these issues to be convincing . . . . I conclude that the DCL's experts' weighting was sound.").

77. The Committee relies on two inapposite cases to discount the use of Barra predicted betas. While Vice Chancellor Strine rejected the usage of the Barra predicted beta in the *Global GT* case, he expressly stated that he "wish[ed] to emphasize that [he did] not reject the Barra beta for use in later cases." *Global GT LP v. Golden Telecom, Inc.* 993 A.2d 497, 521 (Del. Ch. 2010), *aff'd*, 11 A.3d 214 (Del. 2010). And the 12-year-old regulatory opinion upon which the Committee relies for the proposition that "Barra is not nearly a well-known or widely circulated [beta] . . . " is simply outdated. *Compare In re Matter of Petition of Worldcom Inc.,* 18 FCC Reg. 17722, 2003 WL 22038242, at *24-25 & n.275 (Aug. 29, 2003), *with* Widen, 4 N.Y.U. J. L. & Bus. 579, 585-86 (noting that, as of 2008, many investment banks use Barra predictive betas) *and Global GT LP*, 993 A.2d at 519-20 (accepting that Barra beta has been relied upon by the financial community for equity valuations).

78. Application of the "Cycle" EBITDA Multiple. Lazard also appropriately considered an EBITDA multiple based on a six-year average of the Debtors for years 2012-2017. This cycle is consistent with the fluctuations in OCTG consumption. (Lazard Valuation at 11.) Alvarez chose to pretend that 2015 (and implicitly 2008) didn't exist, and that the huge economic losses suffered industry-wide twice in the last 7 years had no relevance to the Debtors. Alvarez assumes that the cyclicality and volatility repeatedly observed in this industry will somehow be ignored by investors and the markets—an assumption that defies credulity.

79. Market Risk Premium. Lazard has surveyed substantially all of the applicable literature and applied its real-world experience to come to the conclusion that the Ibbotson historical long-horizon expected equity risk premium ("**ERP**") is the most reliable risk premium available. This conclusion is consistent with applicable case law. *See, e.g.*, *Global GT LP*, 993 A.2d at 514 (describing historical ERP as "the most traditional estimate of the ERP"); *In re PNB Holding Co. S'holders Litig.*, No. Civ. A. 28-N, 2006 WL 2403999, at *30 (Del. Ch. Aug. 18, 2006) (approving expert's use of historical ERP as "consistent with accepted valuation techniques"); *see also* Magdalena Mroczek, *Unraveling the Supply-Side Equity Risk Premium*, The Value Examiner, at 19 (Jan./Feb. 2012) (historical ERP is "[t]he first and most widely used approach"); Pablo Fernandez, *The Equity Premium in 150 Textbooks* (Jan. 9, 2015), *available at* http://ssrn.com/abstract=1473225 (reflecting that a majority of 150 finance and valuation textbooks use historical ERP). Furthermore, using an ERP lower than the historical arithmetic average (as Alvarez does), one would have to assume that the future will be meaningfully less risky than the past. That is an unsupportable position and Alvarez offers no reason why it would be appropriate to do so here.

(iii) The Alvarez Valuation Is Derived By Improper Modifications to the Debtors' Financial Projections and Improper Application of the Accepted Valuation Methodologies

80. In an attempt to manufacture a result that puts the unsecured creditors in the money, Alvarez improperly manipulates the Debtors' Financial Projections[12] and exclusively focuses on global steel peers to create the image of a level of stability in the market not realized by the Debtors.

81. First, the Committee's expert asserts that the Debtors' Financial Projections do not account for certain anticipated costs savings. While Alvarez adjusts the Debtors' Financial Projections by creating a $21 million cost-savings related to "anticipated steel agreements and other expected settlements with key suppliers," Alvarez fails to identify a single agreement or counterparty—existing or anticipated—that is included within its $21 million calculation. (Alvarez Valuation at 47-48). This failure is particularly egregious since (i) the Debtors' Financial Projections already encompass cost savings where they exist, (ii) the Financial Projections also anticipate certain cost savings with vendors and suppliers even though there are yet-to-be-agreed-on terms, (iii) Mr. Nystrom testified in his deposition that the Debtors are not far enough along in their negotiations with third-party steel providers and may be forced to assume pricing agreements with other steel providers (Nystrom Dep. 8/28/15 Tr. 36:15-22), and

[12] Alvarez also takes issue with the Debtors' write down of PP&E related to the amounts set forth in the Lazard Valuation. This argument is a red herring. Alvarez does not dispute with the Debtors' application of GAAP Accounting Principles which require that, in the event of a 50% change in ownership in a restructuring where the value of the assets is less than the liabilities and allowed claims, a company apply fresh start accounting upon emergence to mark net assets to enterprise value. *See Financial Accounting Standards Board Accounting Standards Codification (FASB ASC)* 852-10-45-19, *et seq*. Using the estimated valuation, and subsequently modifying the write down to reflect the valuation performed by the Debtors' advisors is standard accounting practice. What Alvarez does dispute is the overall enterprise valuation by Lazard, which drives the write down. The proper valuation of the Reorganized Debtors, however, will be decided by this Court and the Reorganized Debtors will adjust its books according to this Court's decision.

(iv) the $21 million cost savings tips Alvarez's enterprise valuation range over their asserted $302.9 Funded Debt Hurdle. (*See* Committee Obj. at ¶ 22 (asserting $302.9 "Funded Debt Hurdle"); Alvarez Valuation at 47 (enterprise valuation range between $291 million to $340 million, with a midpoint of $335 million before adding the $21 million cost-savings).) Accordingly, the Court should reject the Committee's attempts to replace management's projection with unsupported and unsupportable suppositions of non-existent trade terms. *See In re Iridium Operating LLC*, 373 B.R. at 347 ("Without a firm basis to replace management's cost projections with those developed for litigation, the starting point for a solvency analysis should be management's projections.") (internal quotation marks, citation omitted).

82. Second, Alvarez's application of the valuation methodologies is similarly improper. The Debtors provide the following non-exhaustive list of flaws, each of which will be addressed more fully at the Confirmation Hearing:

- **Improper Historical Beta Selection.** Alvarez uses a single source for its selection of historical beta, when many are available. The usage of this single source and atypical methodology, applied to the wrong peer set, inappropriately inflates Alvarez's valuation by $119 million. Notably, Vice Chancellor Strine rejected the simple use of historical beta as performed by Alvarez. *Glob. GT LP*, 993 A.2d at 521 ("I am persuaded that the simple use of historical beta is not the best method to use in calculating Golden's cost of equity . . . the literature does tend to suggest that . . . companies that are more unstable and leveraged, less established and financially and competitively secure, and in colloquial terms 'riskier' should have higher betas. Betas can also take into account considerations like political risk to the extent they are priced by the market."). Alvarez's methodology fares no better here, since the levered beta ascribed to Boomerang of 1.13 is significantly lower than four of the five Steel Peers (1.29-2.20) selected by Alvarez, suggesting that Boomerang is somehow "less risky" than those companies. But how can Boomerang—a small, private company singularly focused on onshore upstream oil and gas in North America—be less risky than large, multi-billion dollar, global steel companies with diversified products, end markets, and geographies?

- **Improper Selection of Comparable Companies.** As discussed above, Alvarez uses a collection of European headquartered steel manufacturers as comparable companies. While some of the Steel Peers are competitors, they are not comparable. This group of international steel manufacturers has limited correlation to the Debtors

because the group has limited exposure to both (i) the ERW market (the sole product market in which the Debtors operate, which differs from seamless pipe in quality and is not able to be used in offshore or other more complex drilling) and (ii) the U.S. upstream market (the sole geographic market in which the Debtors operate). Unsurprisingly, using these widely diversified portfolio companies as its benchmark, Alvarez ultimately selects a beta of .80, which again ignores the vast differences in business profiles between the Debtors and the Steel Peers. *See In re Radiology Assocs., Inc.*, 611 A.2d 485, 490 (Del. Ch. 1991) ("The utility of the comparable company approach depends on the similarity between the company the court is valuing and the companies used for comparison. At some point, the differences become so large that the use of the comparable company method becomes meaningless for valuation purposes.") Sontchi, *Valuation Methodologies* at 11 ("Use of companies that are clearly not comparable will lead to unsupportable conclusions.").

- **Creation of a Faulty "Steady State" Cycle.** The Committee seeks to undermine the Lazard valuation by calling the Debtors' 2015 negative EBITDA nothing more than a "cataclysmic collapse in the global oil market" and an "aberration." (Committee Obj. at ¶ 55). Similarly, the Alvarez Valuation asserts that the negative EBITDA "should be deemed an aberration that is clearly non-recurring for the subject company and omitted for purposes of applying a valuation multiple." (Alvarez Valuation at 67). This omission essentially ignores the volatile nature of oil and gas industry and applies a multiple that ignores the Debtors' troughs while taking advantage of its peaks. They have cherry-picked the good years and ignored the bad—a method that bears no resemblance to reality.

(iv) Independent Support Exists for the Lazard Valuation

83. Courts have recognized that, in general, "debtors [are inclined] to undervalue themselves and plan objectors to overvalue the company to support their arguments." *See In re Wash. Mut., Inc.*, 461 B.R. 200, 228 (Bankr. D. Del. 2011). The Debtors' valuation, however, is corroborated by both the Debtors' market test and the valuation conducted by Duff & Phelps, LLC, on behalf of SBI, which is in litigation adverse to the Debtors.

84. First, following this Court's welcomed ruling that the Debtors must consider all strategic options and provide interested parties with the opportunity to conduct due diligence, the Debtors immediately began taking action to update their data room, provide non-disclosure agreements to parties expressing an interest in conducting diligence, and otherwise seek potential

alternatives. Indeed, the Debtors worked with no less than eight prospective purchasers or potential transaction counter-parties, two of which went so far as to tour the Debtors' manufacturing facilities.[13] Despite these efforts (which had essentially begun in May), the Debtors received ***no*** indications of interest and ***no*** requests for additional time. In fact, one potential purchaser that provided an expression of interest prior to the Petition Date conducted further diligence postpetition and determined not to bid. *See* Exhibit A.[14] As a result, the Debtors believe that the market has spoken with respect to the Debtors' value.

85. Second, and notably absent from the Committee's Objection, is the fact that a third-party valuation by Duff & Phelps, LLC—on behalf of a party adverse to the Debtors with an incentive to inflate the enterprise valuation—determined the Reorganized Debtors' enterprise value to be $200 million, which is ***lower than*** the value midpoint stated in the Lazard Valuation. In connection with the SBI recharacterization litigation, SBI engaged American Appraisal, a division of Duff & Phelps, to conduct a valuation of the heat treat equipment. As part of its valuation of the equipment, which improperly utilized an income approach to estimate the value the equipment, American Appraisal completed an overall business enterprise valuation with respect to the Reorganized Debtors. Using the DCF method, American Appraisal estimated the enterprise value at $200 million, $10 million ***less than*** the midpoint of the Lazard Valuation. While the Debtors do not believe the income approach is a valid approach to valuation of the heat treat equipment (as discussed further herein), it is notable that SBI had every incentive to

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[13] While the Court directed the Debtors to respond to any inquiries from potentially interested parties, the Debtors, freed from a restrictive fiduciary out provision, did more and contacted every party that signed a non-disclosure agreement during the Lazard marketing process in May, 2015 and advised them of the data room and the timetable by which to propose an alternative transaction.

[14] To protect the confidential nature of the information contained therein, Exhibit A has been filed under seal, and a motion seeking authority to seal such exhibit is filed concurrently herewith.

press for a higher enterprise value because, on its valuation theory, that would have resulted in a higher value for the SBI Heat Treat Line Collateral under SBI's methodology. This independent enterprise valuation of the Debtors is corroborative of the Lazard valuation and serves to highlight the motives behind the Alvarez Valuation.

2) The Creditors Committee's Non-Valuation Objections are Also Meritless

86. While the crux of the Committee's Objection is based on valuation issues, the Committee raises a host of miscellaneous objections in an attempt to muddy the waters. Each of these is without merit, and addressed in turn.

a. The GUC Trust Waterfall Is Permissible and Appropriate

87. The Creditors Committee asserts that by virtue of the GUC Trust Waterfall, the Debtors are seeking to "unload the obligations of the ABL Lenders and Term Lenders onto the backs of the unsecured creditors." (Committee Obj. at ¶ 77.) This notion mischaracterizes both the ABL and Term Lenders' purported "obligations" and the general unsecured creditors' perceived entitlement to guaranteed a recovery from the estates.

88. Taking these errors in turn, the ABL and Term Lenders are not obligated to fund an infinite amount of administrative expenses. The Court did indeed grant a section 506(c) waiver in exchange for the ABL and Term Lenders' agreement to fund the "expenses that are anticipated to accrue" during the bankruptcy process. (Hr'g Tr. July 17, 2015, at 106:11.)[15] The "anticipated" expenses, however, were quantified by the Court-approved DIP Budget [D.I. 293]. As events have unfolded, the actual expenses of the bankruptcy have significantly exceeded the amounts included in the DIP Budget. There is nothing in the DIP Order or otherwise that

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[15] A true and correct copy of the transcript from the July 17, 2015, hearing is attached as Exhibit B hereto.

requires the ABL and Term Lenders to bear the burden of those additional expenses. Despite having no obligation to do so, the ABL and Term Lenders, through the Plan, are in fact consenting to and committing to the use of their collateral to pay all expenses above and beyond the budgeted amounts, provided that they are effectively seeking reimbursement from the unencumbered GUC Trust Assets for Professional Claims that are Allowed in amounts in excess of the DIP Budget. In other words, all Administrative Claims and Professional Claims will be paid by the Reorganized Debtors, but the unencumbered assets of the estates—rather than the secured lenders—will bear responsibility for Professional Claims in excess of what the ABL and Term Lenders agreed to pay in the DIP Budget. Yet the Committee is not satisfied and moves the Court to compel the ABL and Term Lenders to pay these estate expenses regardless of what was established by the DIP Budget and the final debtor-in-possession financing orders. As noted by the Court at the July 17 hearing when pressed by the Creditors Committee to force the ABL and Term Lenders to fund a marketing initiative, "[the Court] cannot require the lender to pay the costs of a full sale process." (Hr'g Tr. July 17, 2015, at 106:23-24.) So too with the excess administrative claims of the Debtors' estates.

89. Moving to the GUC Trust Waterfall itself, the Creditors Committee is laboring under the misconception that because the Court refused to grant the ABL and Term Lenders liens on unencumbered assets, those unencumbered assets "belong" to the general unsecured creditors. But that is incorrect. Unencumbered assets belong to the Debtors' *estates* and are to be distributed to the Debtors' stakeholders in accordance with the priority and distribution scheme set forth in the Bankruptcy Code. There is no dispute that administrative priority claims are entitled to payment before general unsecured claims. By virtue of the GUC Trust Waterfall, the Debtors are doing just that—paying the Professional Claims (which are entitled to administrative

expense priority) before any distributions are made to holders of GUC Claims. Through operation of the GUC Trust Waterfall, the Debtors are in no way capping the payment of administrative claims. In fact, the Debtors are doing exactly the opposite, and ensuring that administrative claims are paid in full before any distribution to general unsecured creditors, as required by the Bankruptcy Code. *See* 11 U.S.C. § 1129(a)(9)(A) (requiring plan to provide for payment in full of administrative claims).

b. The Proposed Debtor Release Is Appropriate

90. Section 1123(b)(3)(A) of the Bankruptcy Code provides that a Plan may "provide for the settlement or adjustment of any claim or interest belonging to the debtor or to the estate." 11 U.S.C. § 1123(b)(3)(A). Such a release is proper if it "is a valid exercise of the debtor's business judgment, is fair, reasonable, and in the best interests of the estate." *U.S. Bank Nat'l Assoc. v. Wilmington Trust Co. (In re Spansion, Inc.)*, 426 B.R. 114, 143 (Bankr. D. Del. 2010); *see also In re Wash. Mut., Inc.*, 442 B.R. 314, 346 (Bankr. D. Del. 2011) (finding that court may approve a release after determining that it is fair); *In re Tribune Co.*, 464 B.R. 126, 186 (Bankr. D. Del. 2011) (same). In evaluating the propriety of a debtor's release of the debtor's and estate's causes of action, courts must "[weigh] the equities of the particular case after a fact-specific review." *In re Indianapolis Downs, LLC*, 486 B.R. 286, 303 (Bankr. D. Del. 2013). In conducting their analysis, courts often consider the following five factors:

> 1. An 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 impaired class of classes "overwhelmingly" votes to accept the plan; and
>
> 5. A provision in the plan for payment of all or substantially all of the claims of the class or classes affected by the injunction.

Indianapolis Downs, 486 B.R. at 303; *see also Wash. Mut.*, 442 B.R. at 346. "These factors are neither exclusive nor conjunctive requirements, but simply provide guidance in the Court's determination of fairness." *Tribune*, 464 B.R. at 186; *Wash. Mut.*, 442 B.R. at 346. As discussed below, the equities of this case, including the first three *Master Mortgage* factors weigh in favor of granting the Debtor Release. While the Debtors acknowledge that General Unsecured Creditors may likely receive only a de minimis distribution under the Plan and have, in fact, rejected the Plan (the fourth and fifth *Master Mortgage* factors), the facts, circumstances and equities of the Chapter 11 Cases nonetheless warrant approval of the Debtor Release.

91. Background to the Plan and Release Provisions. The Plan is the result of a prepetition process that resulted from key contributions and concessions from (i) the financial institutions participating in the ABL Facility prepetition, now participating in the DIP ABL Facility, and proposed to provide the Exit ABL Facility (the "**ABL Group**"), (ii) the financial institutions participating in the Term Loan Facility and the (since-refinanced) bridge facility prepetition, now participating in the DIP Term Facility, and proposed to provide the Exit Term Facility (the "**Term Loan Group**"), (iii) the Debtors' equity sponsor and its affiliated entities (inclusive of the Sponsor-entities, "**Access**"), and (iv) the Debtors' directors and officers (the "**D&Os**").

92. Less than three months prior to the Petition Date, the Debtors were in dire financial straits as a result of the cratering of the global oil and gas industry that began at the end of 2014. By not later than March 17, 2015, the Debtors were in default under the ABL Facility, including, among other things, the existence of an over-advance situation relative to the Debtors' borrowing base; by not later than March 31, 2015, the Debtors were in default under the Term Loan Facility, including, among other things, the failure to pay interest and amortization owed to the Term Loan Lenders. These defaults were accompanied by various other non-financial defaults under the loan facilities agreements, as well as various cross-defaults, including between the two loan facilities. Given the lack of liquidity available to the Debtors, by the end of March, the Debtors were facing the possibility of being unable to pay their workforce and shuttering their plant, and a very real prospect of filing for protection under chapter 7. Based on the Debtor's liquidation analysis attached to the Disclosure Statement as Exhibit E, in a chapter 7 liquidation only the ABL Facility Lenders and Term Lenders would be expected to receive a recovery, each of which would be paid less than par and the Term Lenders projected to receive less than 10% on account of their claims. Additionally, the various priority claim holders, critical vendors, customers, contract counterparties and employees who have received (or can expect to receive) a recovery on their claims in these cases would have received nothing.

93. Rather than pursue an immediate liquidation (which would have benefitted no creditor constituency), the ABL Group, Term Loan Group and Access "doubled-down" and began negotiations in earnest for a restructuring of the Debtors and their obligations. Importantly, this decision allowed for the Debtors' employees to continue to have jobs, customers to continue to receive OCTG product, and trade vendors to continue to have a business partner on a go-forward basis. Various contributions to the Debtors' restructuring were

made by the Released Parties in the approximately three month period prior to commencing these cases:

- Through a series of agreements, the ABL Group agreed to forbear on exercising remedies under the ABL Facility and, in fact, agreed to continue to provide the Debtors access to funds despite the existence of the over-advance and other events of default.

- The Term Lender Group first agreed to a carve-out of its collateral and provided a priming lien to the ABL Facility Agent to secure additional funding in this period and, then, more importantly, quickly mobilized and provided the Debtors with a much needed $6 million bridge loan that gave the Debtors approximately 60-days to determine an appropriate course of action.

- Access, in its capacity as an equity holder, proposed a recapitalization of the Debtors' that would substantially reduce the Debtors' debt obligations and rationalize their balance sheet, and also agreed to provide the Limited Sponsor Guaranty, which was a condition to obtaining additional availability under the ABL Facility. Also, in its capacity as a Term Lender, Access supported the Term Lender Group's initiatives to aid the Debtors in their restructuring, including participating in the $6 million bridge financing.

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

94. These contributions allowed the Debtors time to explore a number of alternative proposals—including the Access-proposed recapitalization, the lender-proposed restructurings, and an opportunity to test the market to determine whether any parties were willing to engage in a strategic transaction—and ultimately to arrive at a plan supported by the Released Parties (including the parties to the Plan Support Agreement). The restructuring proposal contemplated by the Plan Support Agreement, including the Plan, provides myriad benefits to the Debtors' stakeholders:

- Employees continue their employment with the Debtors and have or will receive payment in full of their wages, continuation of their healthcare benefits, and

satisfaction of any remaining obligations entitled to priority under the Bankruptcy Code.

- Contract and lease counterparties whose agreements are assumed will have any defaults under their agreements cured, which claims are otherwise unsecured.
- The Debtors' on-going vendors and suppliers (including counterparties to contract and leases that are assume) will have a financially stable business partner.
- The Debtors' customers will retain a valued and reliable supplier of premium OCTG products, including a supplier that can stand behind its warranty obligations.

None of these benefits would have been available in a chapter 7 liquidation. Moreover, in chapter 11 and as contemplated by the Plan Support Agreement, the Debtors were provided with access to almost $100 million in post-petition liquidity and committed exit financing and a roadmap for a quick exit from chapter 11.

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

96. <u>There is an identity of interest with the Released Parties.</u> The "identity of interest" factor is satisfied where the Debtors have an obligation to indemnify the party receiving the release. *See Indianapolis Downs*, 486 B.R. at 303. The Released Parties are entitled to indemnification from the Debtors. In addition, courts in this district have found that a common goal of confirming a plan and implementing a restructuring of a debtor establishes an identity of interest. *See, e.g.*, *Tribune*, 464 B.R. at 187; *In re Zenith Elecs Corp.*, 241 B.R. 92, 110-11 (Bankr. D. Del. 1999). Given the extensive efforts of the Released Parties to restructure the Debtors, as detailed above, the Released Parties clearly have an identity of interest with the Debtors for purposes of the *Master Mortgage* analysis.

97. <u>Substantial Contribution.</u> Here, the contribution of the Released Parties for the Debtor Release is the Plan itself and the entire restructuring process supported by the Released Parties over the last six months. In Spansion, Judge Carey noted that "active[e] involve[ment] in

negotiating and formulating the Plan" serves as a basis for providing a release from the debtor. *Spansion*, 426 B.R. at 143. The consideration provided by the Released Parties, which is more fully outlined above, including the funding provided by the lender-Released Parties (including Access (who is a prepetition term loan, bridge, DIP, and exit financing lender)) and the Limited Sponsor Guarantee provided by Access pre-petition, resulted in tangible economic benefits to the Debtors and also resulted in intangible benefits to the Debtors, including stewardship over the Debtors by the D&Os in that period and providing sufficient time to explore restructuring alternatives.

98. Here, since the Debtors' secured debt is greater than the enterprise value of the Debtors, all of the distributions to parties in these Chapter 11 Cases that are not secured lenders serve as the (substantial) consideration supporting the Debtor Release. *See In re Genesis Health Ventures, Inc.*, 266 B.R. 591, 607 n.16 (Bankr. D. Del. 2001) (finding that donation of value to other creditors provided substantial consideration); *cf. In re Exide Techs.*, 303 B.R. 48, 73 (Bankr. D. Del. 2003) (finding that there was not substantial consideration provided to unsecured creditors under the plan when the court found that the secured lenders were over secured and, therefore, there was no donation of value). In addition to the overall benefits provided by the Plan, certain Released Parties are foregoing (in the case of Access, which is waiving management fees and reimbursement rights) or obtaining reduced recoveries on account of (in the case of the Term Lenders) their claims. *See Zenith Elecs.*, 241 B.R. at 111 (finding substantial contribution where lender's agreement to fund plan resulted in distribution that would not be available in a liquidation).

99. Finally, while Courts have acknowledged that service as an officer or director of a debtor can meet the contribution element under the *Master Mortgage* test, *see Zenith Elecs.*, 241

B.R. at 111, some courts have held that additional consideration may be warranted in the case of a contested release. *See Exide Techs.*, 303 B.R. at 74 n.37; *see also Wash. Mut.*, 442 B.R. at 350. First, the Debtors expect that their current officers will remain in place post-Effective Date, thereby providing further contribution. *Cf. Wash. Mut.*, 442 B.R. at 350 (in denying release to directors and officers, holding "[n]or is there any evidence that any of the [legions] of directors, officers, or professionals covered by the Debtors' releases are necessary for the reorganization (which may be limited to the run off of WMMRC's insurance business)."). Second, to the extent the court finds that additional consideration is required, the value provided by the parties to the Plan Support Agreement, who have indicated their desire to obtain a release of the D&Os as part of the Plan, serves as additional consideration. Here, the parties to the Plan Support Agreement opted for a restructuring followed by peace for the Reorganized Debtors as opposed to liquidation followed by litigation.

100. Necessary to the Restructuring. The Chapter 11 Cases are a restructuring of the Debtors, and the Plan Support Agreement accomplishes that. The Plan Support Agreement is a heavily-negotiated "package deal," and the various provisions are interdependent on each other. Importantly, the Plan is also the only viable proposal for a restructuring of the Debtors. The Debtor Release is a key component o*f* the Plan Support Agreement and, therefore, necessary to and an integral part of the restructuring proposed under the Plan. *See Zenith Elecs.*, 241 B.R. at 111. The Creditors Committee cannot simply pick and choose the provisions of the Plan proposed under the Plan Support Agreement that they want—e.g., payment of all amounts required to be paid under section 1129(a)(9) of the Bankruptcy Code from the lenders' collateral, funding of the GUC Initial Funding Amount, and committed exit financing—and ignore the

provision that they do not like, namely the Debtor Release, and compel the parties to the Plan Support Agreement to proceed with a restructuring they did not bargain for.

101. Moreover, many of the Released Parties will have key roles in the Reorganized Debtor, including as lenders under the Exit ABL Facility and Exit Term Loan Facility, shareholders of New Holdco, and officers of the Debtors. This court has recognized that elimination of post-emergence distractions of such shareholders demonstrates a necessity to the restructuring. *Zenith Elecs.*, 241 B.R. at 111. Further, many of the Released Parties are entitled to indemnification from the Debtors, and indemnifying them for (even baseless) litigation will frustrate the Reorganized Debtors' efforts to emerge from these Chapter 11 Cases. Eliminating these disruptions and financial burdens are key reasons for implementing the Debtor Release.

102. Each of the foregoing *Master Mortgage* factors demonstrates that the Debtor Release negotiated for under the Plan Support Agreement is necessary to implement the restructuring thereunder.

103. No viable claims have been asserted against the Released Parties. Other than the putative preferential transfers related to the ABL Facility, discussed in the next paragraphs, and the baseless allegations of a breach of care related to the Plan and Plan Support Agreement, discussed in Part VI(1)(f) of this Memorandum, the Creditors Committee has identified no other claims against the Released Parties. This fact is notable given the extensive investigation that the Creditors Committee has conducted in these cases, including obtaining discovery from, and deposing representatives of, Black Diamond (the largest Term Loan Lender) and Access. Moreover, under the DIP ABL Facility Order and DIP Term Facility Order, any claims against the lender parties related to the financing documents were required to be asserted at this point or were released. As set forth below, the Debtors do not believe the alleged preference action

against the ABL Facility Lenders has any value, and, unlike the Creditors Committee, the Debtors are not willing to undertake the time and expense of speculative litigation to find out that the Debtors' belief is correct.

104. The Creditors Committee's Alleged "Net Improvement" Preference Claim Has Little to No Value to the Estates. As stipulated in the DIP ABL Facility Order, the Debtors believe that the ABL Facility Lenders were oversecured by not less than $13 million (*i.e.*, a 50% equity cushion) on the Petition Date. The Debtors see no value in pursuing an expensive valuation trial[16] to determine that the ABL Facility Lenders were undersecured for purposes of section 547(b) of the Bankruptcy Code, particularly in light of the magnitude of the ABL Facility Lenders' equity cushion, the potential recovery from such a preference action (if ever successful), and ABL Facility Lenders' defenses and their continued support for the Debtors and the Plan.

105. Even if the prerequisites of section 547(b) of the Bankruptcy Code could be satisfied, the ABL Facility Lenders have a strong defense under section 547(c)(5) of the Bankruptcy Code. Section 547(c)(5) prohibits a trustee from avoiding any transfer that creates a perfected security interest "in inventory, a receivable, or the proceeds of either" except to the extent that such transfer "caused a reduction, as of the date of the filing of the petition *and* to the prejudice of other creditors holding unsecured claims, of any amount by which the debt secured by such security interest exceeded the value of all security interests." 11 U.S.C. § 547(c)(5) (emphasis added).

[16] The Debtors submit that the value of the ABL Facility Lenders' collateral determined at such trial would be substantially more than the apparently forced liquidation value attributed to it by the Creditors Committee.

106. Given that the ABL Facility Lenders were oversecured by 50% or more on the filing date, it should be uncontroverted that the ABL Facility Lenders were fully secured on a going-concern basis 90 days prior to the filing date. The Creditors Committee cites an approximately $5.5 million improvement in the ABL Facility Lenders' borrowing base during the preference period. However, the Creditors Committee ignores the fact that the Debtors' borrowing base is merely a subset of the ABL Facility Lender's collateral and is determined using "eligible" accounts and inventory, with advance rates, sublimit and reserves. The Debtors' borrowing base, by definition, ascribes no value to significant amounts of the ABL Facility Lenders' collateral. The extent of the ABL Facility Lenders' equity cushion must be determined by reference to the ABL Facility Lenders' entire collateral package. The evidence will support the conclusion that the ABL Facility Lenders were oversecured at both points relevant for section 547(c)(5) purposes. On this basis alone, section 547(c)(5) likely bars any preference claim against the ABL Facility Lenders.

107. Making matters worse for the Creditors Committee's preference allegations is the fact that there was no "prejudice to unsecured creditors" during the preference period. To cause "prejudice to unsecured creditors" means to diminish the estate. *See, e.g.*, *Coral Petroleum, Inc. v. Banque Paribas-London*, 797 F.2d 1351, 1355 (5th Cir. 1986). To the extent inventory and receivables are generated during the preference period solely out of a secured creditor's collateral, no prejudice is caused. *In re Universal Foundry Co.*, 30 F.3d 137 (7th Cir. 1994). In this case, any inventory or receivables generated during the preference period arose from the Debtors' pre-preference period working capital (*i.e.*, proceeds of the ABL Facility Lenders' existing collateral) or from the ongoing operations financed by the Debtors' secured lenders. As one court observed, there is "no persuasive authority from which this court can conclude, in light

of [creditor's] properly perfected security interest and the fact that increases in the collateral were based on financing by [creditor], why the attachment of liens to new inventory and accounts was to the prejudice of other creditors." *In re Castletons, Inc.*, 154 B.R. 574, 580 (D. Utah 1992) aff'd, 990 F.2d 551 (10th Cir. 1993); *see also In re Carper*, 63 B.R. 582, 585 (Bankr. W.D. Va. 1986). Throughout the preference period, substantially all of the Debtors' inventory suppliers required cash in advance or cash on delivery payment; few extended the Debtors credit terms. To pay for these purchases, the Debtors borrowed revolving loans from the ABL Facility Lenders. To be specific, the Debtors received approximately $12.9 million of new inventory during the preference period, but the Debtors made in excess of $13.6 million of payments to such suppliers during that same period. Later, after the Petition Date, several of these vendors were also beneficiaries of critical vendor payments made possible in part by the DIP ABL Facility provided by the same lenders under the ABL Facility, and many of such prepetition suppliers have continued as ongoing suppliers of the Reorganized Debtors. Any improvement of the ABL Facility Lenders' preference period position resulted from monetizing existing collateral and new collateral paid for by their loan proceeds.

108. In light of the foregoing, and without belaboring the other defenses the ABL Facility Lenders may have to the alleged preference claim (*e.g.*, new value for revolving loans that they continued to make throughout the preference period), the Debtors have reasonably determined to release and, thereby, settle the preference claim alleged by the Committee against the ABL Facility Lenders. The limited value (if any) of such claim compared to the value of the ABL Facility Lenders' support of the Debtors during this restructuring, including providing the DIP ABL Facility and committing to provide the Exit ABL Facility, provide ample support for the Debtors' determination to release claims (if any) against the ABL Facility Lenders.

109. The "related persons" release is fair and appropriate. The final clause of the definition of Released Person includes a list of parties related to the other Released Parties, such as officers, directors and agents, that will be released "in their capacity as such." In Tribune, the court found that such a provision was permissible to the extent that the primary parties to whom they were related were entitled to a release. *See Tribune*, 464 B.R. at 188. Here, the Debtors submit that inclusion of Related Persons is appropriate. The Debtors are not proposing to release Related Persons in their individual capacity but only in the capacity in which they are related to the other Released Party. The failure to provide Related Persons the releases set forth in the Plan would frustrate the goals of the Debtor Release. For example, if the ABL Facility Lenders are granted a release, but the officers of the ABL Facility Lenders are not, a party may bring an action against one or more officers, directors or other agents of an ABL Facility Lender which would, in effect, force that ABL Facility Lender to defend against the claim. To prevent such a result, the Debtors submit that the Related Persons are appropriate parties to include in the Debtor Release.

110. For all of the foregoing reasons, the Debtor Release is fair, reasonable and appropriate, in the best interest of the Debtors and the Estates, and should be approved.

c. The Proposed Third-Party Releases Are Appropriate

111. Courts in this jurisdiction have held that a chapter 11 plan can contain releases by third parties that are the result of the affirmative consent of the party granting the release. *See, e.g.*, *In re Zenith Elecs. Corp.*, 241 B.R. 92, 111 (Bankr. D. Del. 1999). First, the following entities are parties to the Plan Support Agreement and, as parties thereto, have agreed to support the Plan, which includes the Third Party Releases: the Term Loan Agent; holders of Term Loan Facility Claims; the ABL Facility Agent, holders of ABL Facility Claims; the DIP ABL Facility

Agent; holders of DIP ABL Facility Claims; the DIP Term Facility Agent; holders of DIP Term Facility Claims; the Sponsor; the ABL Facility Guarantor; and the parties to the Plan Support Agreement.[17] Therefore, the Third-Party Release is consensual with respect to these parties and should be approved.

112. Second, the Plan also provides that parties who are unimpaired and are deemed to accept the Plan (without an opportunity to vote) are also deemed to grant the Third-Party Release. Courts in this jurisdiction have found that such a release is permissible, holding that payment in full to a releasing creditor serves as sufficient consideration for the release. *See Indianapolis Downs, LLC*, 486 B.R. at 306; *Spansion*, 426 B.R. at 144. Specifically, in *Indianapolis Downs*, the court noted that courts in this jurisdiction may take a "more flexible approach" in evaluating whether a release was consensual. 486 B.R. at 306. In the context of a party who is deemed to accept (*i.e.*, consent to) the Plan, the Debtors submit that the Third-Party Release—which is, itself, limited to a release by entities solely in their capacity as creditors of the Debtors—is permissible where the creditor in question is being paid in full. Moreover, no party in the Chapter 11 Cases has objected to the Third Party Release. *See Spansion*, 426 B.R. at 144 (finding "the silence of the unimpaired classes on this issue is persuasive" and overruling U.S. Trustee's objection the releases as to unimpaired creditors who were deemed to accept the plan).

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

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

d. The Proposed Exculpation is Appropriate

114. As discussed above, section 1123 of the Bankruptcy Code provides, in pertinent part, that a chapter 11 plan "may . . . include any other appropriate provision not inconsistent with the applicable provisions of this title." 11 U.S.C. § 1123(b)(6). Among the permissive provisions customarily included in chapter 11 plans in this district (and elsewhere) under section 1123(b)(6) are exculpation provisions stating that parties shall have no liability to any person in connection with the chapter 11 case absent fraud, gross negligence, or willful misconduct. After the Third Circuit found in *In re PWS Holding Corp.*, 228 F.3d 224 (3d Cir. 2000), that creditors' committee members and other professionals could benefit from exculpation, courts in Delaware have confirmed chapter 11 plans that provided for exculpation of parties other than committee members and estate professionals, implicitly reasoning that such exculpation was "appropriate" under the circumstances and "not inconsistent with" the Bankruptcy Code as required by section 1123(b)(6). *See, e.g.*, Hr'g Tr. July 28, 2014 [D.I. 1152] at 26-28, *In re FHA Liquidating Corp. (f/k/a Fisker Auto. Holdings, Inc.)*, Case No. 13-13087 (KG) (Bankr. D. Del. July 28, 2014)

(overruling U.S. Trustee objection to exculpation of purchaser and senior lender, expressly reasoning that *PWS Holding* did not limit exculpation to estate fiduciaries and that exculpation of other parties may be appropriate in "particular circumstances") (excerpt attached hereto as Exhibit C)*;* Hr'g Tr. July 10, 2014 [D.I. 612] at 35-36, *In re Laboratory Partners, Inc.,* Case No. 13-12769 (PJW) (Bankr. D. Del. July 10, 2014) (overruling U.S. Trustee objection to exculpation of secured lender who funded chapter 11 case, reasoning: "I thought this was going to be a liquidation case when it was filed. That's been avoided and I think that [the lender] was a contributor to that result, and therefore, I think the exculpation is appropriate.") (excerpt attached hereto as Exhibit D).

115. While in *Washington Mutual* this court made the categorical holding, relying on *PWS Holding*, that exculpations under a chapter 11 plan must be limited to estate fiduciaries, that holding appears to be premised on the assumption that because only the exculpation of estate fiduciaries has been upheld by the Third Circuit, the exculpation of non-estate fiduciaries would not be upheld. The Debtors submit that such an inference goes beyond the holding of the Third Circuit in *PWS Holding*. As Judge Gross recognized in *Fisker*, *PWS Holding* left open that exculpation of non-fiduciaries might be appropriate in other circumstances. Hr'g Tr. July 28, 2014 [D.I. 1152] at 26-28, *In re FHA Liquidating Corp. (f/k/a Fisker Auto. Holdings, Inc.)*, Case No. 13-13087 (KG) (Bankr. D. Del. July 28, 2014). Here the non-fiduciary parties that are receiving Exculpation under the Plan—effectively the parties to the Plan Support Agreement—have made substantial contributions to these cases. These parties stepped up when the Debtors were facing a near liquidation, and provided incremental financing to get to a chapter 11. Once in chapter 11, they provided DIP financing. And upon emergence from chapter 11, they will provide exit financing. These substantial contributions, which averted a near-liquidation

prepetition, *see Laboratory Partners*, *supra*, and which have resulted in the rehabilitation of the Debtors that will provide employees, vendors, and customers a stable business partner on the other side of chapter 11, are precisely the kind of "particular circumstances" that Judge Gross identified in *Fisker* to warrant expanding exculpation beyond estate fiduciaries. As a result, the Debtors submit that all Exculpated Parties, as defined in the Plan, are entitled to the benefits of the Exculpation.

e. The Plan Does Not Unfairly Discriminate Against Unsecured Creditors

116. The Plan contains only one class of general unsecured creditors at each Debtor—Class 6—and all parties holding Allowed Claims in Class 6 receive the same treatment—i.e., their pro rata share of the GUC Trust Proceeds allocated to General Unsecured Claims in accordance with the GUC Trust Waterfall. Given that creditors within Class 6 receive the exact same treatment, there can be no discrimination. The very argument presented by the Creditors Committee here—that payments of unsecured claims *outside* of a plan results in discriminatory treatment *under* a plan—was rejected by Judge Shannon in the *Motor Coach Industries* case, which decision was affirmed by Judge Robinson on appeal. *Official Comm. of Unsecured Creditors of Motor Coach Indus. Int'l v. Motor Coach Indus. Int'l (In re Motor Coach Indus. Int'l)*, Civ. No. 09-078-SLR, 2009 U.S. Dist. LEXIS 10024, *8-9 (D. Del. Feb. 10, 2009).

117. The "discriminatory" treatment the Creditors Committee appears to be complaining of, payment of claims of critical vendors, does not occur under the Plan but, instead, under the Bankruptcy Court's "critical vendor" order [D.I. 207]. The Plan confirmation hearing is not the proper venue to raise a collateral attack on a final order that was entered with the consent of the Creditors Committee and which granted the Creditors Committee consultation rights. Indeed, given that the final critical vendor order was entered over 60 days ago and the

Debtors have made payment arrangements with 63 critical vendors, after consulting with the Creditors Committee, it is curious that the Creditors Committee's first objection before the Bankruptcy Court to any critical vendor payments is only being raised on the eve of the Confirmation Hearing.

f. The Plan Was Proposed in Good Faith, and the Board Discharged its Fiduciary Duties

118. In arguing that the Plan was not proposed in good faith, the Creditors Committee simply reiterates its valuation argument, which fails for the reasons set forth above. The Creditors Committee also asserts that the Debtors' board breached its fiduciary duty of care by approving the Plan Support Agreement before having obtained the Lazard Valuation or conducted a "market test" to determine the value of the business. The Creditors Committee's assertion has no legal or factual basis, and is difficult to square with its acquiescence to the Debtors' assumption of the Plan Support Agreement.[18]

119. The duty of care requires directors to inform themselves, "prior to making a business decision, of all material information reasonably available to them." *Smith v. Van Gorkom*, 488 A.2d 858, 872 (Del. 1985). Delaware law looks at the specific facts of each case to determine whether directors have met this burden without mandating any particular form of valuation or marketing process; rather, it is clear that "there is no single blueprint that a board must follow to fulfill its duties" and that a court should examine "whether the directors made a reasonable decision, not a perfect decision." *C&J Energy Servs. v. City of Miami Gen. Emps.' & Sanitation Emps.' Ret. Tr.*, 107 A.3d 1049, 1067 (Del. 2014) (quoting *Unitrin v. Am. Gen. Corp.*,

[18] The Creditors Committee withdrew its objection to the assumption of the Plan Support Agreement by the Debtors at the August 11, 2015, disclosure statement and assumption hearing. (Hr'g Tr. Aug. 11, 2015, at 4:6-11, 10:6-7.)

651 A.2d 1361, 1385-86 (Del. 1995)). A board's methods should be "designed to determine the existence and viability of possible alternatives," and might include "conducting an auction, canvassing the market, etc." *Paramount Commc'ns v. QVC Network Inc. (In re Paramount Commc'ns Inc. Shareholders Litig.)*, 637 A.2d 34, 44 (Del. 1994). Nevertheless, "[w]hen . . . directors possess a body of reliable evidence with which to evaluate the fairness of a transaction, they may approve that transaction without conducting an active survey of the market . . . . [Again,] there is no single method that a board must employ to acquire such information." *Barkan v. Amsted Indus., Inc.*, 567 A.2d 1279, 1286-87 (Del. 1989).

120. The record of the facts leading to the execution of the Plan Support Agreement clearly establishes that the Debtors worked tirelessly for months with their senior creditors to negotiate a consensual restructuring to address the Debtors' severe liquidity issues and ensure that the business could continue as a going concern. (Hr'g Tr. July 17, 2015, at 12:10-25:13; *see also* Wagner Dep. Tr. at 55:4-64:23, 66:19-67:11, & 81:12-83:18.)[19] These negotiations produced several restructuring proposals that all contemplated paying general unsecured creditors in full, but ultimately fell through. (*Id.*) Only then, faced with the stark choice of shuttering operations and liquidating—thereby destroying hundreds of jobs and millions of dollars in value—or supporting the transactions embodied in the Plan Support Agreement—which included fiduciary out language—the board approved the Plan Support Agreement. (Hr'g Tr. July 17, 2015, at 24:19-26:15; Wagner Dep. Tr. at 90:10-91:9.) Far from "g[iving] away the store without any knowledge of what was on the shelves," the board's decision ensured that the

[19] A true and correct copy of the relevant portions of the transcript of the September 9, 2015, deposition of Don Wagner is attached hereto as Exhibit E. To protect the confidential nature of the information contained therein, Exhibit E has been filed under seal and a motion seeking authority to seal such exhibit has been filed concurrently herewith.

lights of the store would stay on, preserving the going concern value of the business for the benefit of all stakeholders in these Chapter 11 Cases.

121. Moreover, after securing the necessary liquidity under the interim DIP facilities, the board immediately reopened negotiations on the Plan Support Agreement, ultimately obtaining funding for the Lazard Valuation and filing a plan of reorganization that did not specify a treatment for general unsecured creditors pending the outcome of the Lazard Valuation. (Hr'g Tr. July 17, 2015, at 26:16-21.) Significantly, the Debtors and the board consistently pushed for broad fiduciary out language in the Plan Support Agreement, clearly communicated to all parties that the Court would expect it, and welcomed the Court's remarks at the July 17, 2015 final DIP financing hearing expanding its scope:

> The Debtor has a fiduciary duty to consider all options and I will direct the Debtor to fulfill that duty. I am concerned; in fact, I direct the Debtor to answer any questions from anybody expressing any interest in the company either through a sale or through a competing plan. I think that it is inappropriate for anybody to tie the Debtors' hands with respect to that.

(Hr'g Tr. 7July 17, 2015, at 106:16-22.) Taking this direction to heart, the Debtors went an extra step and affirmatively contacted ten financial and strategic leads identified by Lazard during its prepetition marketing process. All ten of these prospective purchasers received draft NDAs, eight executed NDAs to facilitate due diligence, four obtained access to the data room and two visited the Debtors' plant in Liberty, Texas. Ultimately, this diligence process did not yield higher or better offers for the business than the valuation contemplated by the Plan, confirming that the Plan presented the best available outcome for the Debtors and their estates.

122. The Creditors Committee's assertion that by virtue of the execution of the Plan Support Agreement "the horse had left the barn" and the Debtor's Board had committed to the Plan in violation of its fiduciary duties is similarly off base. The assumption of the Plan Support

Agreement—including the revised and "true" fiduciary out—was approved by this Court on August 12, 2015 as an exercise of the Debtors' reasonable business judgment. [*See* D.I. 372.] Accordingly, the Debtors' Board fully preserved the right to terminate the Plan Support Agreement without penalty if it discovered a more favorable alternative for the Debtors. Thus, the Board fulfilled its fiduciary obligations by commissioning the expert valuation conducted by Lazard, independently corroborating that valuation with its marketing efforts, and confirming that the Plan represented the best available outcome for the Debtors and their estates.

3) The SBI Objection Is Meritless

123. Article 12.1 of the Plan includes a request that the Court declare that a putative lease agreement (the "**SBI Financing Agreement**") between SB Boomerang Tubular, LLC ("**SBI**") and Boomerang concerning one of Boomerang's two heat treat furnaces (the "**Heat Treat Line**") is in reality a financing transaction. SBI objects to this request, and also objects to the proposed treatment of its claims under the Plan. For the reasons discussed below, these objections should be overruled.

a. The Putative Equipment Lease Is Properly Recharacterized

124. SBI's objection to the proposed recharacterization of the SBI Financing Agreement attempts to avoid both the legal and economic realities of the transaction. Contrary to SBI's assertions, the SBI Financing Agreement has the legal and economic characteristics of a financing agreement, and the parties have recognized that throughout their relationship.

(i) The SBI Financing Agreement Is a Financing Arrangement as a Matter of Law

125. "Whether an agreement is a true lease or a secured financing arrangement under the Bankruptcy Code is a question of state law." *In re Pillowtex, Inc.*, 349 F.3d 711, 716 (3d Cir. 2003); *see Butner v. United States*, 440 U.S. 48, 55 (1979) ("Property interests are created and

defined by state law"). Paragraph 31 of the SBI Financing Agreement[20] provides that it "is governed by and must be interpreted under Texas law." Under Texas law, the Texas Business and Commerce Code "controls the determination of whether a transaction, in the form of a lease, creates a lease or security interest." *Excel Auto & Truck Leasing, LLP v. Alief Indep. Sch. Dist.*, 249 S.W.3d 46, 50 (Tex. App. 2007). Because the Texas Business and Commerce Code is an adoption of the Uniform Commercial Code, Texas courts "are guided by decisions from other jurisdictions which interpret this uniform statute." *Id.* at 51.

126. Section 1-203(b) of the Texas Business and Commerce Code sets forth a two-part conjunctive test to find that "[a] transaction in the form of a lease creates a security interest." The first element is that "the consideration that the lessee is to pay the lessor for the right to possession and use of the goods is an obligation for the term of the lease and is not subject to termination by the lessee." Tex. Bus. & Com. Code § 1.203(b).

127. The second element of the test is satisfied by demonstrating any one of the following four factors:

> (1) the original term of the lease is equal to or greater than the remaining economic life of the goods;
>
> (2) *the lessee is* bound to renew the lease for the remaining economic life of the goods or is *bound to become the owner of the goods*;
>
> (3) the lessee has an option to renew the lease for the remaining economic life of the goods for no additional consideration or for nominal additional consideration upon compliance with the lease agreement; or
>
> (4) the lessee has an option to become the owner of the goods for no additional consideration or for nominal additional consideration upon compliance with the lease agreement.

Tex. Bus. & Com. Code § 1.203(b) (emphasis added).

[20] A true and correct copy of the SBI Financing Agreement is attached hereto as Exhibit F.

128. Leases that satisfy this "bright-line" two-part test are *per se* security agreements. *Excel Auto*, 249 S.W.3d at 51 (citing *In re Triplex Marine Maint. Inc.*, 258 B.R. 659, 668–69 (Bankr. E.D. Tex. 2000)); *In re Pillowtex, Inc.*, 349 F.3d at 717 (stating that, under the U.C.C., if the bright-line test is satisfied, a lease "would be considered to create a security interest as a matter of law"); *In re Fleming Cos., Inc.*, 308 B.R. 693 (Bankr. D. Del. 2004) (ruling that a lease was actually a security interest under the U.C.C. because the debtor could not terminate the lease's obligations and one of the four factors was satisfied).

129. No one disputes that the SBI Financing Agreement satisfies the first element of the section 1-203(b) test, because Boomerang was not entitled to terminate its own obligations before the end of the term of the agreement. (*See* SBI Financing Agreement § 15; SBI Obj. ¶ 12.)

130. The SBI Financing Agreement satisfies the second element of the test as well, because Boomerang is bound to become the owner of the goods at the conclusion of the agreement's term. Paragraph 7(d) of the SBI Financing Agreement requires that, "[i]f the parties fail to either renew this Lease or enter into a new lease, then (a) Lessor may require Lessee to purchase the Equipment for a purchase price equal to 50% of Total Cost (the "Sale Option") or (b) Lessee may require the Lessor to sell the Equipment for a purchase price equal to 50% of the Total Cost."

131. SBI attempts to avoid the clear language of the test and the agreement by claiming that Boomerang is not "unconditionally obligated" to buy the Heat Treat Line at the end of the lease term due to SBI's sale "option." (SBI Obj. ¶ 14.) That argument fails for two reasons. First, it misstates the test: Texas law does not require an unconditional obligation, only that the lessee is "bound to become the owner of the goods." *See* Tex. Bus. & Com. Code § 1.203(b)(2).

Boomerang is bound to take ownership of the goods at a fixed price upon mere notice from SBI. Boomerang has no ability to avoid this result. That is enough to determine that Boomerang is legally bound to become owner of the goods at the conclusion of the agreement. The fact that SBI can decide, in its sole discretion, to relieve Boomerang of this obligation by deciding not to exercise this "forced put"—as far-fetched as that possibility is—does not alter this result.

132. Second, even though SBI's forced put is styled as an option, it is clear on the face of the agreement that SBI *will* ultimately exercise the right to force Boomerang to purchase the equipment and that this forced put option was built into SBI's anticipated rate of return on this financing. At the end of the lease, after SBI has received payments totaling the entire acquisition cost of the equipment plus additional amounts equaling a 12% internal rate of return, SBI will then have the option to receive a payment from Boomerang for an additional $7,000,000. No reasonable person reading the SBI Financing Agreement, with its steadily increasing purchase options (counterintuitive to notions of asset depreciation), would expect that SBI did not contemplate Boomerang owning the equipment at the end of the term (and, as set forth below, SBI actually *did* contemplate this).

133. Because Boomerang was legally bound to become owner of the property, the bright-line test is satisfied, and "the inquiry comes to an end—such leases constitute security interests as a matter of law." *See Triplex Marine*, 258 B.R. at 668–69.

(ii) <u>The Economic Realities of the SBI Financing Agreement Demonstrate That it Is Not a True Lease</u>

134. Even if this Court finds that the bright-line test is not satisfied by the plain text of the SBI Financing agreement, the Court "may examine additional facts, recognized by the statute, to determine whether the economic realities of a particular transaction create a security interest." *Excel Auto and Truck Leasing,* 249 S.W.3d at 51. The terms of the SBI Financing

Agreement itself, and statements of the parties, strongly indicate the SBI Financing Agreement is a disguised financing, and not a true lease.

135. For example, in pricing the deal, SBI produced a deal summary that indicated a 23% rate of return on its equipment acquisition cost, a return that assumed SBI would exercise the forced put option. (*See* Gupta Dep., Ex. 4, "Boomerang Deal Summary.")[21] SBI never analyzed the economic consequences of *not* exercising the forced put, including the dramatically reduced recovery it could expect to receive if it had to remove the Heat Treat Line and sell used, uninstalled equipment to a third party.

136. In fact, SBI's parent company touted on its website that it had entered into "*a financing arrangement* with Boomerang Tube LLC whereby SB has purchased a new, state-of-the-art heat treatment line from F&D Furnaces and leased the equipment to Boomerang Tube." *See* SBI International, http://sbisteel.com/ventures/sb-american-tubulars (last visited Sept. 16, 2015) (emphasis added). SBI also indicated that the total cost of the project was "over $20 million," an amount that can only assume the exercise of the forced put option. *See* Deal Summary (total recovery of $23 million premised upon exercise of $7 million forced put).

137. Moreover, on April 12, 2013, Gregg Eisenberg, Boomerang's former CEO, secretly emailed Satish Gupta, SBI's CEO, requesting that Boomerang and SBI amend the purchase option provisions of the lease so that Boomerang could change the lease from a capital lease to an operating lease on its books,[22] in order to increase Boomerang's equity split in a

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[21] A true and correct copy of the referenced exhibits to the Gupta deposition are attached as Exhibit G hereto.

[22] With a capital lease, the lessee records the equipment as an asset on its books and recognizes a liability on its balance sheet equal to the present value of the minimum lease payments. http://www.investopedia.com/exam-guide/cfa-level-1/liabilities/capital-operating-leases-effects.asp (last visited September 18, 2015). An operating lease, by contrast, is accounted

potential merger with Paragon. (*See* Gupta Dep., Ex. 13, E-mail dated 4/12/13.) In particular, Eisenberg asked Gupta to amend the lease to add a "market value" option at the end of the lease rather than the fixed price. (*See id.*) Eisenberg also promised to provide a side agreement to guarantee that Boomerang would pay the same amount under the forced put option, i.e., $7 million, to buy the equipment at the end of the lease term. (*See id.*) Gupta agreed to Eisenberg's proposal so long as SBI's interests were protected and further inquired what documents would be necessary to make this change. (*See id.*) Gupta never indicated to Eisenberg that SBI believed the lease was an operating lease and did not require any modification. Simply put, all parties to this transaction knew and acted in accordance with the economic reality that the SBI Financing Agreement was a financing and not a true lease.

138. SBI's objection to the Plan also discusses various other factors courts have considered in evaluating whether a lease is a disguised financing, including this Court's decision in *In re Integrated Health Services, Inc.*, 260 B.R. at 76. However, these factors also weigh in favor of finding that the SBI Financing Agreement is indeed a disguised financing.

139. Lessee Purchase Option/Nominal Consideration: Boomerang's $7 million purchase option mirrors SBI's sale option. But this purchase option is surplusage. Under the sale option, Boomerang agreed up front to take title to the property at the end of the lease for another $7 million unless SBI decided otherwise. Because SBI always intended to exercise the sale option at a 23% rate of return on the equipment acquisition cost, (*see* Gupta Dep., Ex. 4, "Boomerang Deal Summary,") Boomerang's purchase "option" is irrelevant.

140. Lease Payments Exceed Original Cost of Equipment: The SBI Financing Agreement states that Boomerang will make periodic payments to SBI in an amount equal to "an

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for as a rental expense and does not result in assets or liabilities on the balance sheet. http://www.investopedia.com/terms/o/operatinglease.asp (last visited September 18, 2015).

amount that would yield an internal rate of return of 12% per annum on the Total Cost [i.e., the price SBI paid to buy the equipment from F&D Furnaces, plus accrued interest through the Lease Commencement Date]." (SBI Financing Agreement § 6(b).) Taking into account these interest components, the total payments due from Boomerang clearly exceed the original cost of the Heat Treat Line. In addition, when one includes the $7 million forced put option—a provision omitted by SBI in the calculations in its Objection—the total payments under the SBI Financing Agreement *greatly* exceed the cost of the equipment. Thus, the payment stream did not reflect market-priced rental payments for the "use" of the equipment, and SBI's assertion that the total payments under the agreement "is some $767,000 less than the Total Cost of the Equipment" is contradicted by the plain language of the Agreement. As a result, this factor weighs strongly in favor of finding a disguised financing.

141. Calculation of Payments; Ensure Rate of Return or Market-Driven Use Payments: As stated above, the payment stream under the SBI Financing Agreement was calculated based upon SBI's equipment acquisition cost (plus a 12% internal rate of return) and a $7 million fixed forced put option, rather than market-driven "use" payments. These two factors strongly weigh in favor of finding a disguised financing.

142. Other Indicia of Ownership: Furthermore, as SBI attempts to downplay in its objection, the SBI Financing Agreement contains indicia of ownership on the part of Boomerang not normally found in a lease arrangement. Boomerang was to bear the entire risk of loss of the equipment (SBI Financing Agreement § 14); repair the equipment (*id.* § 16); maintain insurance on the equipment (*id.* § 17); pay taxes related to the equipment (*id.* § 19); and indemnify SBI for many losses related to the equipment (*id.* § 20). While these provisions alone do not create a

security interest, *see* Tex. Bus. & Com. Code § 1.203(c), they weigh in favor of finding a disguised financing.

143. Equipment Purchased for Boomerang's Use: There is no dispute that SBI bought the equipment from F&D Furnaces for Boomerang's use. This factor strongly weighs in favor of finding a disguised financing.

144. In sum, the application of the legal factors to the facts strongly demonstrates that the economic realities of the SBI Financing Agreement reflect a financing arrangement, and not a true lease. Accordingly, the Court should find that Boomerang is the owner of the Heat Treat Line pursuant to an installment sale contract with SBI (i.e., the SBI Financing Agreement), and SBI holds a purchase-money security interest in the Heat Treat Line.

b. The Inclusion and Treatment of the SBI Lender Claim in the Plan Is Appropriate

145. As discussed above, the putative equipment lease with SBI is properly characterized as an installment sale contract with reservation of a purchase-money security interest by SBI. This security interest was properly perfected by SBI by its filing of a financing statement prepetition. Accordingly, the Plan as originally formulated treated SBI as a secured creditor and proposed that SBI retain its lien in the Heat Treat Line post-confirmation.

146. At the time they formulated the Plan, the Debtors knew that SBI had purchased the Heat Treat Line from the manufacturer, F&D Furnaces, prior to selling it to Boomerang. What the Debtors did not know, but later learned through discovery, was that SBI had obtained secured financing from Wells Fargo Equipment Finance, Inc. (the "**SBI Lender**," as defined in the Plan) for its purchase of the Heat Treat Line from F&D Furnaces. Thus, at the time SBI sold the Heat Treat Line to Boomerang—and in apparent violation of the agreement between SBI and Boomerang—the Heat Treat Line was encumbered by a purchase-money security interest in

favor of the SBI Lender.[23] And like SBI, the SBI Lender protectively filed UCC-1 financing statements against Boomerang prepetition, covering the Heat Treat Line.[24] Accordingly, it now appears that Boomerang purchased the Heat Treat Line subject to the security interests of *both* the SBI Lender *and* SBI. Moreover, as discussed below, it appears that the SBI Lender's security interest has priority over SBI's security interest.

147. All of this presented a problem under the Plan as originally formulated, since the SBI Lender Secured Claim would necessarily fall into the category of "Other Secured Claims," which are unimpaired by the Plan, yet the Plan also provided for SBI to receive the full $4.5 million present value of the Heat Treat Line (over time). Clearly Boomerang could not provide the full value of the Heat Treat Line to two different creditors. Accordingly, the Debtors amended the Plan on September 4, 2015 [*see* D.I. 471 Ex. 1 (blackline of Plan changes)], to (i) define the SBI Lender Secured Claim and provide it would be allowed in an amount to be determined, but not to exceed the value of the Heat Treat line (Plan § 1.1(144)), (ii) provide that the consideration provided to SBI under the Plan on account of the SBI Secured Claim would be reduced by the amount of the SBI Lender Secured Claim, and any liens securing the SBI Secured Claim would be junior to the liens securing the SBI Lender Secured Claim (*see id.* § 1.1(145) & (147)), and (iii) clarify that the SBI Lender Secured Claim constitutes an "Other Secured Claim" under the Plan (*see id.* § 3.2(a)(1)).

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[23] The putative lease agreement required SBI to purchase the equipment "free and clear of any lien or encumbrance." (SBI Fin. Agmt. § 9(d).) The Debtors fully reserve their rights, and those of the Reorganized Debtors, to pursue claims against SBI, or any of its affiliates, for damages based on the breach of the SBI Financing Agreement.

[24] The Debtors were aware of the SBI Lender's financing statements, but they were unaware of the SBI Lender's basis for filing them. Accordingly, the Debtors identified the SBI Lender on Schedule D of their Schedules of Assets and Liabilities [D.I. 169] as having a contingent, unliquidated, disputed claim.

148. In its objection, SBI argues the SBI Lender Secured Claim is "nonexistent" because Boomerang "*has no direct agreements with [the SBI Lender]*" (emphasis in original) and because the SBI Lender has not filed a proof of claim in the bankruptcy case. Both of these observations, while true, are irrelevant.

149. Under the Bankruptcy Code, a claim enforceable against property of the debtor is treated as a claim against the debtor for all purposes, even if the claimant has no contractual privity with, and thus would have no recourse against, the debtor. *See* 11 U.S.C. §§ 102(2) (rule of construction providing that "'claim against the debtor' includes claim against property of the debtor") & 1111(b)(1)(A) (providing a claim secured by property of the debtor is to be allowed or disallowed under § 502 as if the claimant had recourse against the debtor, even if it would have no such recourse under any agreement or applicable law); *Johnson v. Home State Bank*, 501 U.S. 78, 83-84 (1991) (holding *in rem* mortgage interest in chapter 13 debtor's home was a "claim" subject to inclusion in the chapter 13 plan, despite that the debtor's *in personam* liability on the mortgage was previously discharged in chapter 7); *In re 680 Fifth Ave. Assocs.*, 29 F.3d 95, 98 (2d Cir. 1994) (where debtor acquired property subject to a purchase-money mortgage but did not assume the mortgage, mortgagee had a "claim" in the debtor's bankruptcy despite the lack of contractual privity with the debtor).

150. Under the Plan, it is not necessary for the SBI Lender to have filed a proof of claim to have an "Allowed" claim, because the term "Allowed" encompasses claims that are allowed under the Plan (Plan § 1.1(11)) and the Plan provides that the SBI Lender Secured Claim "shall be Allowed in an amount to be determined by the Bankruptcy Court" (*id.* § 1.1(144)). But since SBI apparently believes a proof of claim is necessary, the Debtors will consider simply filing one on the SBI Lender's behalf within the time provided by Bankruptcy Rule 3004. *See* 11

U.S.C. § 501(c) ("If a creditor does not timely file a proof of such creditor's claim, the debtor . . . may file a proof of claim."); Fed. R. Bankr. P. 3004 (allowing debtor to file proof of claim on behalf of a creditor within 30 days after the applicable bar date). The Debtors' reason for doing so would be simply to ensure that the SBI Lender Secured Claim and the lien securing it will receive treatment under the Plan, failing which, the SBI Lender could arguably seek to foreclose upon the Heat Treat Line post-confirmation. *See In re Claremont Towers Co.*, 175 B.R. 157, 163 (Bankr. D.N.J. 1994) (noting that secured creditor's failure to file a proof of claim does not extinguish its lien, which may be enforced post-confirmation).

151. SBI also argues that the SBI Lender Secured Claim is "contingent and completely derivative of [SBI]'s claims," but that is not true. The agreement between SBI and the SBI Lender provides for monthly payments over a specific term, to repay amounts actually advanced to SBI. There is nothing "contingent" about SBI's liability to the SBI Lender, which is secured by the Heat Treat Line. Nor is the SBI Lender's claim against SBI in any way "derivative" of SBI's claim against Boomerang. The amounts owed to the SBI Lender were actually borrowed by SBI, and SBI would be required to repay them even if it had not sold the Heat Treat Line to Boomerang. While SBI may have been using the installment payments from Boomerang to service its debt to the SBI Lender, that does not render the SBI Lender's claim against SBI "derivative" of SBI's claim against Boomerang.

152. Finally, SBI argues that the Plan's subordination of its lien in the Heat Treat Line to the lien of the SBI Lender is improper because SBI filed its UCC-1 against Boomerang before the SBI Lender filed its UCC-1. But SBI provides no analysis and cites no authority for the proposition that lien priority as between SBI and its own lender would be governed by a "first to file" rule as opposed to the terms of the parties' contract. That contract clearly provides that

SBI's interest in the Heat Treat Line is subject to the SBI Lender's purchase-money security interest.[25] Because intercreditor agreements regarding priority are enforceable in bankruptcy, 11 U.S.C. § 510(a), if the Plan had *not* provided for the subordination of SBI's lien to the SBI Lender's lien, the SBI Lender may well have objected to the Plan. The fact that the Plan does not allow SBI to improve its lien position vis-à-vis the SBI Lender is certainly not a valid objection to confirmation of the Plan.

c. The Value of the Heat Treat Line for Plan Purposes is $4.5 Million

153. In *Rash*, the Supreme Court held that where the chapter 13 debtors' plan proposed to retain an encumbered tractor truck for use in one debtor's freight-hauling business, the proper standard for valuation of the secured creditor's interest in the truck for plan purposes was "replacement value," which the Court described as (i) "the cost the debtor would incur to obtain a like asset for the same 'proposed . . . use,'" 520 U.S. at 965 (quoting 11 U.S.C. § 506(a)(1)), and (ii) "fair-market value," which the Court defined as "the price a willing buyer in the debtor's trade, business, or situation would pay a willing seller to obtain property of like age and condition," *id.* at 959 n.2. The Court went on to clarify that replacement value "should not include certain items." *Id.* at 965 n.6. For example, "where the proper measure of the replacement value of a vehicle is its retail value, an adjustment of that value may be necessary" because "[a] creditor should not receive portions of the retail price, if any, that reflect the value of items the debtor does not receive when he retains the vehicle, items such as warranties, inventory storage, and reconditioning." *Id.* The Court added: "Nor should the creditor gain from

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[25] Indeed, it would be quite odd if an article 9 debtor could prime its own purchase-money lender simply by conveying encumbered collateral to another party and retaining a purchase-money security interest.

modifications to the property—e.g., the addition of accessories to a vehicle—to which a creditor's lien would not extend under state law." *Id.*

154. In *Heritage Highgate*, the Third Circuit Court of Appeals held that the valuation standard set forth in *Rash* also governed in the chapter 11 context. 679 F.3d 132, 141-42. In that case, the debtor owned an unfinished residential real estate development (the "**Project**") that was encumbered by senior liens in favor of a bank group and junior liens in favor of an investor group. The debtors obtained an appraisal of the fair market value of the Project in connection with a contested cash collateral hearing early in the case, which showed that the fair market value of the Project was sufficient to cover all secured debt. The debtors later filed a chapter 11 plan that provided for the debtors to retain the Project, complete the development and sell off the finished lots, pay the bank and lender groups in full, and thereafter pay a dividend of 20% to unsecured claims. The creditors' committee filed a motion pursuant to Bankruptcy Rule 3012 to value the investors' secured claims at $0 because, when reducing the prior appraised value of the Project by the realized value of lots sold in the interim, the remaining value of the Project was insufficient to satisfy the senior bank debt. The investor group objected to the committee's motion, arguing that their claims should be deemed fully secured because the debtor's plan provided for the debtor to retain and complete the Project, and the financial projections that accompanied the plan estimated that the Debtors would derive income from the Project sufficient to pay their claims in full. The Third Circuit Court of Appeals rejected the investors' "wait-and-see" approach to valuation of the Project, finding that it "would in effect do away with bankruptcy courts' obligation to determine value under § 506(a)," and noting that § 506(a)'s mandate that "the 'proposed disposition or use' [of the Project] should be factored into the valuation does not mean that the time as of which the property is valued is to be postponed or

altered." *Heritage Highgate*, 679 F.3d at 142. The court found the investors' reliance on the plan's financial projections was misplaced, reasoning as follows:

> [T]he projections regarding monies to be realized from the sale of lots over time do not equate to "value" as of confirmation because they anticipate Debtors spending time and money to realize value at a later date. That future value should not be credited to the secured creditor at confirmation. A "probability" of realizing the budget is not a certainty of its realization. In sum, valuations must be based on realistic measures of present worth.

Id. at 143 (emphasis added).

155. With these controlling authorities in mind, the Debtors commissioned an appraisal of the Heat Treat Line from William E. Cook, ASA, CEA, an experienced machinery and equipment appraiser, on a "Fair Market Value – Removal" ("**FMV-R**") basis, which is defined by the American Society of Appraisers[26] as:

> [a]n opinion, expressed in terms of money, at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or to sell and both having reasonable knowledge of the relevant facts, considering removal of the property to another location, as of a specific date.

A FMV-R valuation considers the cost of the equipment itself, without taking into account related installation costs, which is appropriate in this case because the Plan contemplates Boomerang will retain the Heat Treat Line and continue using it, and thus will not incur any additional installation costs. *See Rash*, 520 U.S. at 965 n.6 (noting replacement cost should not include the value of items the debtor does not actually receive when keeping the property, as opposed to acquiring the property anew). Exclusion of installation costs is also appropriate because if they were included in the valuation of the Heat Treat Line, SBI would benefit from items it did not finance, and to which its lien would not extend under state law, such as

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[26] http://www.appraisers.org/Disciplines/Machinery-Technical-Specialties/mts-appraiser-resources/DefinitionsOfValue (last visited Sept. 17, 2015).

(i) concrete foundations, walkways, electrical work, and other improvements made to Boomerang's facility and (ii) sunk costs incurred by Boomerang for engineering services, labor, and the like. *See id.* (noting replacement cost should not include modifications to property to which the secured creditor's lien would not extend under state law).

156. SBI argues that the "removal" valuation standard is inappropriate because the Debtors do not actually intend to remove the Heat Treat Line. But as noted above, valuing the Heat Treat Line on a FMV-R basis isolates the market value of the equipment itself, independent from any installation costs that would not be incurred by Boomerang if the property were to remain in place. It is SBI's "continued-use" valuation that distorts reality by adding installation costs that are purely hypothetical and to which SBI's lien would not extend under state law in any event. *See Rash*, 520 U.S. at 965 n.6.

157. As Mr. Cook will explain at trial, applying accepted valuation methodologies in light of his decades of experience as a machinery and equipment appraiser, he estimated the FMV-R of the Heat Treat Line as of September 21, 2015, to be $4.5 million. This amount reflects Mr. Cook's expert opinion as to the amount Boomerang would need to pay to obtain like property in like condition from a willing seller. Mr. Cook's opinion was corroborated by discussions with John Bouley of Furnace Brokers, Inc., a global network dealer with more than 40 years of experience in the marketing and sale of used heat treat furnaces, who estimated that a buyer might be willing to pay in the $4 to $5 million dollar range for the Heat Treat Line in the current market.[27]

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[27] SBI seems to misapprehend the point of this conversation, arguing that Mr. Cook "improperly assumed that the [Heat Treat Line] would be sold." (SBI Obj. ¶ 54.) He made no such assumption. But even if he had, in a fair market valuation, the price Boomerang would get from a willing buyer for the Heat Treat Line is, *by definition*, the same price Boomerang would have to pay to a willing seller for property of like type, condition, and age

158. The Debtors' expert appraisal of the Heat Treat Line is sufficient to rebut the presumed validity of SBI's proof of claim and to shift the burden to SBI to prove its valuation of $12,638,000 (nearly the full original purchase price of 3-year-old equipment. *See Heritage Highgate*, 679 F.3d at 145 (holding committee's submission of appraisal by a "veteran appraiser" who "used well-accepted techniques of real estate appraisal to calculate the Project's fair market value" satisfied the committee's burden of coming forward and shifted the burden to the investors to prove their valuation of the Project).

159. SBI cannot satisfy its evidentiary burden. Its valuation is based on an appraisal by John Ray II, ASA, of Duff & Phelps, LLC, who admitted in his deposition that his appraised value:

- does *not* represent the price a buyer would pay to acquire property of like type, condition, and age to the Heat Treat Line;
- instead represents his view of the post-emergence value of the Heat Treat Line to the Debtors based on future economic and business projections;
- would only be realized in a market transaction if a buyer purchased the Debtors' entire operation as a going concern;
- includes potentially unnecessary costs (e.g., duplicative engineering services) associated with the purchase of a brand new heat treat line from a manufacturer, as well as one-time, non-recurring installation costs incurred by Boomerang in connection with the existing Heat Treat Line, neither of which he can separate out with any precision; and
- is dependent upon the Debtors' projected future earnings and the recovery of the oil and gas market.

In light of the foregoing, and putting aside the other problems with Mr. Ray's methodology (which will be addressed at trial), it is clear that Mr. Ray has nothing whatsoever to say about the

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as the Heat Treat Line. So whether Boomerang was the buyer or the seller in a hypothetical transaction would be immaterial to determining the replacement cost of the Heat Treat Line.

"replacement cost" of the Heat Treat Line, which is what SBI must prove at trial. Accordingly, the Court should find the proper fair market value of the Heat Treat Line is $4.5 million.

d. SBI's Remaining Objections are Moot Because SBI's Claims are Fully Unsecured

160. SBI's remaining objections relate to the Plan's treatment of the SBI Secured Claim and SBI's section 1111(b)(2) election. However, these issues are moot because, on information and belief, [redacted] . As a result, SBI's claims are fully unsecured and are not entitled to treatment under Class 5 of the Plan. And SBI cannot avoid this result by making the section 1111(b)(2) election because its lien is "of inconsequential value" (i.e., $0). *See* 11 U.S.C. § 1111(b)(1)(B)(i); *In re O'Leary*, 183 B.R. 338, 341 (Bankr. D. Mass. 1995) (collecting cases, noting they are "unequivocal that a completely undersecured creditor is not entitled to make an election").

e. Even if SBI's Claims Were Partially Secured, the Plan Satisfies the Cramdown Standard

161. Assuming *arguendo* that the SBI Secured Claim is at least partially secured, the claim is entitled to treatment under Class 5 of the Plan, which provides for the following:

- A seven-year note with a principal amount equal to the present value of SBI's lien in the Heat Treat Line, bearing 4% interest per annum and payable in arrears on a monthly basis, and secured by a lien in the Heat Treat Line (the "**SBI Secured Note**").

- If SBI's § 1111(b)(2) election is valid (i.e., its lien is not of "inconsequential value"), a twelve-year nonrecourse note bearing no interest and payable in full in a single balloon payment at maturity, and secured by a lien in the Heat Treat Line (the "**SBI Nonrecourse Note**"). The principal amount of the SBI Nonrecourse Note will be equal to the Allowed amount of SBI's claim under the SBI Financing Agreement (which SBI has asserted is $12,590,518.64), *less* (i) the amount of the Allowed SBI Lender Secured Claim, and (ii) the dollar amount of all principal and interest payments scheduled to be made under the SBI Secured Note.

(Plan § 3.2(e) (treatment provision), § 1.1(147) ("SBI Secured Note" definition), & § 1.1(145) ("SBI Nonrecourse Note" definition).) SBI objects to the proposed interest rate on the SBI Secured Note, and objects that the SBI Nonrecourse Note is not fair or feasible. SBI is wrong on both counts.

162. First, the proposed interest rate follows the "prime-plus" formula that was endorsed by a plurality of the Supreme Court justices in *Till v. SCS Credit Corp.*, 541 U.S. 465 (2004), and has been applied by numerous other courts. Specifically, and as acknowledged by SBI in its objection, the proposed interest rate on the SBI Secured Note represents a 0.75% risk premium over the current prime rate of 3.25%. The Debtors submit that this premium is appropriate under the circumstances, including because (i) SBI itself believes the value of the Heat Treat Line will increase as the oil and gas industry recovers over the next several years, (ii) payment of the SBI Lender Secured Claim (which his secured by a senior lien in the Heat Treat Line) will necessarily improve SBI's loan-to-value ratio going forward, and (iii) in proportion to the prime rate, a 0.75% risk premium is well within the range of risk premiums approved by other courts.[28]

163. SBI argues the prime-plus formula is inapplicable, based on dictum from the plurality opinion in *Till* suggesting a market rate may be appropriate in chapter 11. SBI then proffers an expert opinion as to the amount of interest SBI could get in the market if it were to

[28] For instance, in *In re S.E.T. Income Properties, III*, 83 B.R. 791 (1988), a case relied upon by SBI in its objection, the court found that 1.5% was an appropriate risk premium over the prime rate where the debtor was "overwhelmingly insolvent" and its income "ha[d] fallen drastically, . . . making the likelihood of the debtor realizing sufficient cash flow to fund the reorganization less probable." *Id.* at 794. However, at the time the prime rate was 8.5%, *id.*, so the risk premium as a percentage of the prime rate was 17.6%. By contrast here, the 0.75% proposed risk premium as a percentage of the current 3.25% prime rate is approximately 23.1%, yet Boomerang's financial outlook post-confirmation is much better than that of the debtor in *S.E.T.*

make a loan with the same characteristics as the SBI Secured Note. There are two problems with this approach, however. First, it looks very much like the "coerced loan" approach to cramdown interest rates that was in fact rejected by a majority of the justices in *Till*.[29] Second, the expert assumed certain characteristics of SBI Secured Note based on the original Plan, but the actual characteristics of the SBI Secured Note may not be determinable until the Court has made its ruling on the Plan (including whether the SBI Lender Secured Claim is properly included in the Plan, the value of the Heat Treat Line) and until the Plan goes effective (at which time, a determination would be made whether to pay the SBI Lender Secured Claim in cash or reinstate the debt, either of which would have an effect on the terms of the SBI Secured Note).

164. Regarding the SBI Nonrecourse Note,[30] SBI contends that the balloon payment feature is unprecedented and fails to give effect to SBI's section 1111(b)(2) election. Quite the contrary, the balloon payment is *necessary* to give effect to SBI's election, while at the same time avoiding unfair discrimination against other creditors.

165. The purpose of the section 1111(b)(2) election is to protect a secured creditor from being "cashed out" on the effective date of the plan based on a judicially-determined value of its collateral, where the creditor believes the collateral will appreciate in value post-confirmation. 7 *Collier on Bankruptcy* ¶ 1111.03[3][c]; *Tampa Bay Assocs., Ltd. v. DRW Worthington, Ltd. (In re Tampa Bay Assocs., Ltd.)*, 864 F.2d 47, 49 (5th Cir. 1989) (noting that "under the former Bankruptcy Act a debtor could file bankruptcy proceedings during a period when real property values were depressed, propose to repay secured lenders only to the extent of

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[29] A plurality of four endorsed the "prime-plus" approach, but Justice Thomas filed a concurrence indicating that in his view, the prime rate alone would suffice, with no added risk premium. *Till*, 541 U.S. at 478-85 (plurality) & 488 (Thomas, J., concurring).

[30] For the sake of discussion it is assumed *arguendo* that SBI's lien would be of more than inconsequential value, so that it would be eligible to make the election. The Debtors reserve all rights as to SBI's actual eligibility to make the election.

the then-appraised value of the property, and 'cram down' the secured lender class, preserving any future appreciation for the debtor"); *In re Century Glove, Inc.*, 74 B.R. 958, 962 (Bankr. D. Del. 1987) ("The purpose of § 1111(b)(2) is to give the creditor power to decide how it will be treated and prevent a 'cash out' situation."). An electing secured creditor foregoes any deficiency claim and instead treats its claim as if it is fully secured by the collateral. Instead of receiving payments equal to the value of its lien, the electing secured creditor receives payments equal to the total amount of its claim. 11 U.S.C. §§ 1111(b)(2) & 1129(b)(2)(A)(i). However—and importantly—the present value of those payments as of the effective date of the plan cannot exceed the value of the electing creditor's lien. *Id.*; *see In re Wandler*, 77 B.R. 728, 733 (Bankr. D.N.D. 1987) ("If larger payments were made other unsecured creditors would be discriminated against . . . as [the electing creditor] would be receiving more than the present value of its claim.").

166. The SBI Secured Note was designed to provide SBI the present value of its lien as of the effective date, by having a principal amount equal to the value of the lien, payable over time using an appropriate discount rate. The SBI Secured Note does not, however, provide for payment of the full amount of SBI's claim as required in the 1111(b)(2) election scenario. The SBI Nonrecourse Note accomplishes that, but in order not to discriminate against other creditors, the SBI Nonrecourse Note cannot have any value as of the effective date of the Plan—this was the reason behind the lack of interest payable on the note, its nonrecourse nature, and its payment in a single balloon payment at the end of the equipment's useful life. *See Wandler*, 77 B.R. at 733 (noting that, to provide an electing secured creditor the full amount of its claim without providing it more than the present value of its lien it might be necessary to have a 30- or 40-year note with a balloon payment). Despite having no value as of the effective date, however, the SBI

Nonrecourse Note does protect SBI from the situation where the Reorganized Debtors sell the Heat Treat Line post-confirmation for a profit and keep the upside for themselves—i.e., because SBI has a lien up to the full amount of its claim, it would need to be paid in full before the Reorganized Debtors could realize any value from disposition of the Heat Treat Line. In sum, the dual-note approach complies with both the letter and spirit of 1111(b)(2), and should be approved.

167. In contrast, SBI's proposed alternative treatment does not work. SBI requests that the full amount of its claim (asserted as $12,590,518.64) be paid in equal monthly installments over seven years. However, because the net present value of that payment stream as of the effective date would far exceed the value of SBI's lien, SBI could not be paid at that level without unfairly discriminating against other creditors. *See Wandler*, 77 B.R. at 733.

VIII. CONCLUSION

168. For the reasons set forth in this Memorandum, the Debtors respectfully request that the Court enter an order confirming the Plan, in substantially the form of the proposed Confirmation Order that the Debtors have filed concurrently herewith.

Dated: September 20, 2015
Wilmington, Delaware

/s/ Robert S. Brady

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EXHIBIT A

Filed Under Seal

EXHIBIT B

Transcript of July 17, 2015, Hearing

1 UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

2

3 IN RE:) Case No. 15-11247 (MFW)
) Chapter 11
4 BOOMERANG TUBE, LLC, a Delaware)
Limited Liability Company,)
5 *et al.*,)
Debtors.) Courtroom No. 4
6) 824 Market Street
) Wilmington, Delaware 19801
7)
) July 17, 2015
8) 10:30 A.M.

9 TRANSCRIPT OF HEARING
BEFORE HONORABLE MARY F. WALRATH
10 UNITED STATES BANKRUPTCY JUDGE

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1 THE CLERK: All rise. You may be seated.
2 THE COURT: Good morning.
3 MR. BRADY: Good morning, Your Honor, Robert Brady
4 of Young Conaway Stargatt & Taylor on behalf of Boomerang
5 Tube, LLC. Your Honor, referring, today, to the amended
6 agenda, which was filed yesterday, I think in the evening,
7 the first matter was our bar date motion. We understood,
8 from Chambers, that the Court had a question on that.
9 THE COURT: I would prefer a set date rather than 30
10 days from service because I don't know how many Claimants are
11 going to know when you serve it and they are not going to go
12 on the docket and look at your certificate of service.
13 MR. BRADY: I think our notice did contemplate that
14 we actually fixed a date in it.
15 THE COURT: Did it?
16 MR. BRADY: When we served it. We did it 30 from
17 service because we needed to determine the service date, but
18 when it is served it will provide a fixed date.
19 THE COURT: Okay. I didn't look at the notice.
20 Okay. All right, then, I will just sign that order.
21 MR. BRADY: Thank you, Your Honor. Mr. Jackson was
22 here for that particular motion, so if he could be excused.
23 THE COURT: He may.
24 MR. ABBOTT: Good morning, Your Honor, Derek Abbott
25 from Morris Nichols, proposed counsel for the Official

1 Committee, Your Honor. The next motion is ours. Before I
2 get to that, I would just to like introduce my co-counsel. I
3 don't think he has appeared before Your Honor before, Steven
4 Pohl from Brown Rudnick as well as Mark Baldwin who will be
5 handling later events.
6 THE COURT: Okay.
7 MR. ABBOTT: Your Honor, the second item on the
8 agenda related to the Committees' motion to seal certain
9 portions of its objection to the DIP motion that the Debtors
10 filed. We initially filed it under seal and then worked with
11 the Debtors to file a redacted form. There are still a
12 handful of things in that that we needed to redact. I don't
13 believe there is any objection. We have discussed it with
14 the U.S. Trustee and I have, Your Honor, if I may approach,
15 an order on the motion to shorten the sealing motion and an
16 order on the sealing motion.
17 THE COURT: Okay. You may hand that up.
18 MR. ABBOTT: Thank you, Your Honor.
19 THE COURT: I will enter both orders.
20 MR. ABBOTT: Thank you, Your Honor.
21 MR. BRADY: Your Honor, just jumping past the DIP
22 for one moment to indicate that we were able to resolve the
23 objections to the Debevoise retention.
24 THE COURT: Okay.
25 MR. BRADY: That's matter 4. Two supplemental

1 declarations were filed yesterday with that, as well as a
2 revised form of order that does address the objection raised
3 by the U.S. Trustee and we believe a joinder of the Committee
4 as well.
5 THE COURT: I'm not sure I got the revised form of
6 order. I got the two declarations.
7 MR. BRADY: Your Honor, we can hand that up at some
8 point today.
9 THE COURT: Okay.
10 MR. BRADY: And then, also, just to note that matter
11 5 on the agenda, which was the settlement with Marubeni, the
12 Committee had filed an objection to that. We were able to
13 resolve the Committees' objection by a change to the proposed
14 settlement and that was submitted under certification of
15 counsel as well.
16 THE COURT: I got that this morning and I entered
17 that order, then, this morning.
18 MR. BRADY: Your Honor, I do have the Debevoise
19 order, so maybe we can clear that out now. This is a
20 resolution reached with the Trustees office.
21 THE COURT: Okay. Thank you. The scope of services
22 in paragraph 4 is the same as in the declaration of Nystrom,
23 I think.
24 MR. BRADY: Yes, Your Honor.
25 THE COURT: All right, then, I will enter that

1 order.

2 MR. BRADY: Your Honor, so that takes us to the DIP

3 financing. Just some updates on that. As Your Honor knows,

4 there are two separate facilities; there is an ABL facility

5 and a term. With respect to the ABL facility, the ABL

6 Lenders, the Debtors and the Committee have resolved all of

7 the issues with respect to that final order, except a

8 reservation by the Committee on the 506(c), 552(b) waiver

9 issue. So for the hearing today, consider the ABL resolved

10 other than on that issue.

11 With respect to the term, the term has indicated

12 they would increase the Committees' investigation budget from

13 25 to 50. So combined with the ABL, that's $100,000.00

14 budget for the Committees' investigation. It's my

15 understanding that with that change to the budget, the

16 Committee is okay with the budget component of the DIP order,

17 the investigation budget.

18 So other than that, there were some changes made by

19 the ABL, but we are not sure at this point whether they have

20 resolved or narrowed any of the issues with the Committee,

21 but there are, obviously, still issues that are for the Court

22 to address.

23 THE COURT: Okay.

24 MR. BRADY: I spoke to the parties beforehand. I

25 think everyone is comfortable not doing opening statements,

1 unless Your Honor wants opening statements.
2 THE COURT: That's not necessary.
3 MR. BRADY: Okay.
4 THE COURT: I have read the papers.
5 MR. BRADY: So we have one witness and it's Mr.
6 Kevin Nystrom. The only issue I would raise, Your Honor, to
7 see if the Court thinks it's necessary, there was a lot of
8 discussion in the papers about the prepetition restructuring
9 negotiations and how we got to where we are today.
10 Obviously, the Debtors believe that that is an issue for
11 another day, in connection with the PSA assumption motion,
12 disclosure statement, confirmation, etc.
13 As the Court may be aware, the plan remains in flux
14 with the consent of the term lenders and the ABL lenders, we
15 filed a plan that left blank the recovery for unsecured
16 creditors because there is a valuation analysis going on
17 right now by Lazard and we will have that in early August.
18 At that point, the Debtors will either fill in that, based on
19 the Lazard analysis as no recovery to unsecured creditors or,
20 frankly, if their valuation shows unsecured's are in the
21 money, we are back to the negotiating table.
22 We wanted to just bring to the Court's attention
23 that we could present Mr. Nystrom, really on some of the more
24 discreet DIP issues, or we can present him on the whole story
25 of how we got here. We are really looking for some guidance

1 from the Court as to whether we are going to just focus on
2 the DIP issues today or if the Court wants to hear that
3 broader story.
4 THE COURT: Let me hear from the Committee.
5 MR. POHL: Thank you, Your Honor, good morning,
6 Steven Pohl from Brown Rudnick, proposed co-counsel to the
7 Committee. Your Honor, we don't think it's quite so black
8 and white as, I think, our papers would suggest. We think
9 that some background is necessary and, to be honest, what I
10 heard from the Debtors was they expected maybe a half hour on
11 direct. I can tell you that our cross is about a half hour.
12 If we were precluded from background, its 20 minutes, but
13 since this is the first big hearing in the case, this is an
14 important issue.
15 We think it's critical that the Court have the
16 background of what happened. On top of that, we are dealing
17 with a DIP that is tied to a PSA and now we have a PSA that,
18 kind of, has a hole in it. It's open as to what the
19 Committee is getting. So not only are we dealing with a DIP
20 tied to a PSA, we are now dealing with a DIP tied to an
21 uncertain PSA where Mr. Brady just told us if the lenders
22 don't like what Lazard finds out, we are back to the table.
23 So, I think it's clearly relevant to what we have before the
24 Court today. Thank you.
25 THE COURT: All right, I'll let the Debtor give us

1 the background.
2 MR. BRADY: Thank you, Your Honor. Mr. Dorsey is
3 going to put Mr. Nystrom on. Just to make one statement
4 clear, it's not that if the lenders don't like what's in the
5 valuation, it's if the valuation shows unsecured's are in the
6 money, the Debtors would need to then go negotiate and
7 confirm a plan.
8 THE COURT: Okay.
9 MR. DORSEY: Good morning, Your Honor, John Dorsey
10 on behalf of the Debtors. The Debtors would call Kevin
11 Nystrom to the stand, please.
12 THE COURT: Please, step up and remain standing so
13 you can be sworn by the clerk.
14 KEVIN NYSTROM, SWORN
15 THE CLERK: Please state your full name and spell
16 your last name for the record.
17 MR. NYSTROM: Kevin Nystrom, N-y-s-t-r-o-m.
18 THE CLERK: Thank you. You may be seated.
19 DIRECT EXAMINATION
20 BY MR. DORSEY:
21 Q. Good morning, Mr. Nystrom.
22 A. Good morning.
23 Q. Could you just remind the Court what your position is
24 with the Debtors?
25 A. I'm the CRO, the interim CEO and interim president.

1 Q. Can you briefly describe for the Court your educational
2 background and work history?
3 A. I have a degree in accounting from the University of
4 South Dakota. I worked at Deloitte Touché for about eight
5 years. I worked for National Mortgage Company and American
6 Asset Investors Corporation, they dealt with mortgage
7 securities. I have been at Zolfo Cooper for 15 years.
8 Q. What is your position at Zolfo Cooper?
9 A. I am a managing director.
10 Q. Can you describe to the Court your experience in dealing
11 with companies that are in need of reorganization?
12 A. I have been working in the turnaround business,
13 turnaround consulting business for 15 years at Zolfo Cooper.
14 I have been a CRO several times, interim management several
15 times, creditor advisor several times.
16 Q. And can you give the Court some of the cases that you
17 have worked on in the past?
18 A. I was the CRO of Dolan, it was a newspaper and e-
19 discovery business, CRO of Barnes Bay, COO of Hawaiian
20 Telcom, CRO of American Mortgage Corporation.
21 Q. Can you remind the Court, just very briefly, what the
22 business of the Debtors is, what they do?
23 A. We make, manufacture OCTG; that is Oil Country Tubular
24 Goods. Its high strength pipe, casing pipe that goes down an
25 oil well hole and our product works on vertical and long

1 horizontal wells, both in the oil wells and gas wells.
2 Q. And how long has the company been in business?
3 A. For about five years.
4 Q. Can you describe for us the capital structure of the
5 Debtors as of January 2015?
6 A. We had about $55 million of ABL debt. We had $204
7 million of term lender debt. We had about $44 million of
8 accounts payable, $10 million of capital leases and then
9 beyond that we had preferred equity and common equity.
10 Q. And can you describe for the Court what were the events
11 that led to the liquidity issues that the Debtor was dealing
12 with in early 2015?
13 A. In late 2014 oil prices were dropping and they
14 precipitously dropped following an OPEC meeting in
15 Thanksgiving 2014. As a result, many of the E&P companies in
16 the US and Canada significantly scaled back their drilling
17 programs and on top of that, they looked at their OCTG
18 inventories and set out plans to reduce their inventories.
19 We generally sell to distributors that sell to E&P companies.
20 So in January 2015 we kind of had a perfect storm; oil
21 prices dropped, projected drilling activity dropped. People
22 that had OCTG inventory became focused on reducing their
23 inventory and then on top of that we had, historically about
24 50 percent of the OCTG needs in the US come from foreign
25 sources. Well, imports of OCTG were at record levels. In

1 fact, January 2015 was a high point of imports coming into
2 the US. So we, a manufacturer of OCTG, saw our demand drop
3 significantly. Our revenues from 2014 to 2015 dropped 60
4 percent.
5 Q. Did anything else happen in that early 2015 period with
6 regard to the lenders and how that effected the Debtors
7 liquidity issues?
8 A. Well, the significant drop in revenues put us in a
9 liquidity crunch. We looked ahead and saw that we couldn't
10 make the debt service payments to the term debt. On top of
11 that, the ABL lenders, because the industry is going through
12 a down turn, initiated a valuation of our inventory
13 collateral. As a result of that appraisal, they
14 significantly reduced the value of our inventory. That
15 caused a reduction in our buying base and caused us to be in
16 default of our ABL facility. On top of that, it was clear
17 that we couldn't afford some of the payments to our more
18 significant trade vendors and we entered into discussions to,
19 effectively, freeze the amounts owed until the interest would
20 turn around.
21 Q. How did the Debtors deal with the default under the ABL
22 facility?
23 A. Well, we spoke to the appraiser firm. We challenged and
24 pushed them on their assumptions, tried to negotiate with the
25 ABL lenders to give us a break on this and reconsider the

1 valuation, but they went forward with the inventory valuation
2 it received and sent us the default notice.
3 Q. And what happened after you received the default notice?
4 How did you deal with that with the ABL lenders?
5 A. After that we worked under a series of forbearance
6 agreements. At about the same time, it was clear that we
7 would have issues making the principal interest payments due
8 to the term lenders in March 2015. We got them involved in
9 the discussions. Effectively, we worked with temporary
10 forbearance agreements all the way from mid-March to the date
11 we filed.
12 Q. How did the Debtors deal with the fact that the lending
13 base was no longer sufficient to meet the collateral needs of
14 the ABL lenders?
15 A. We initiated several cost reduction activities. We
16 reduced our work force, substantially; nearly 40 percent. We
17 delayed payments to vendors and extended our payables as best
18 we could. We looked for opportunities to sell inventory to
19 generate cash, anywhere we could. We initiated discussions
20 with our two lender groups and some of our significant trade
21 vendors to try to have them help us through a restructuring
22 period.
23 Q. Were there any guarantees provided to the ABL lenders in
24 order to deal with the collateral issue?
25 A. While we were going through our forbearance period, this

1 is in April, the lenders limited our cash availability to
2 amounts that cover payroll and professional fees. We had no
3 cash for a period of about four, four/five weeks. We had no
4 cash to buy steel, to pay for trucking, to buy coupling, to
5 pay for any goods or services needed to manufacture our
6 products. As a result, our manufacturing activity slowed
7 down dramatically.
8 In a couple of the weekly forbearance extensions, one
9 week we needed a guarantee by our sponsor Access Industries
10 of $500,000.00 to cover the upcoming payroll disbursement for
11 that week and then two other weeks we needed a priming lien,
12 a $2.7 million dollar priming lien provided by the term
13 lenders to the ABL lenders to backstop some of the payroll
14 and professional fee disbursements we were incurring in that
15 timeframe.
16 Q. During this early January/February timeframe, what was
17 the Debtors' view of the best way to deal with its liquidity
18 issues on a long term basis?
19 A. Well, back in January/February, like I said, we had
20 meetings with our various lender groups and a couple of
21 significant trade vendors. We also had some cost cutting
22 activities, some reductions in payroll, reduction in terms of
23 certain of our vendors, stretching of payables. We also went
24 out and tried to raise funding for the company. We had four
25 meetings that I'm aware of, two I participated in where we

1 went to groups that typically invest in out of favor
2 industries, went to them, and tried to raise some capital.
3 The message from everybody we met with was consistent in
4 that they all asked for what kind of haircuts can the term
5 lenders make or will they allow us to put investment in front
6 of them. We also, at the time, looked for DIP financing. We
7 reached out to several institutions that --
8 Q. Well, before we get into the DIP financing, let's go back
9 to this January/February timeframe.
10 A. Yes.
11 Q. When the Debtors were first trying to deal with their
12 liquidity issues. Did the Debtors believe it was better to
13 have an in Court or out of Court restructuring process? How
14 did the Debtors view that?
15 A. The Debtors, I, and the board and the management team all
16 preferred an out of Court restructuring. The reasons why we
17 didn't want the negativity of a bankruptcy impacting any of
18 the thoughts of our customers, or vendors or employees on the
19 business. We thought that a bankruptcy would make it harder
20 for us to sell our product and easy for our competitors to
21 steal customers from us.
22 You need to understand that we sell, well half of our
23 sales are into drilling programs. A customer relies on you
24 to be able to deliver pipe, pursuant to a program, and two,
25 stand behind warranty obligations. The tarnish of a

1 bankruptcy could cause them to rethink from ordering from us.
2 Also, I always felt that the cost of a bankruptcy and risk of
3 a bankruptcy were hard to measure and afford. The cost
4 meaning all the professional fees and things like that.
5 Risks, you know, you go to Bankruptcy Court and you never
6 know what is going to happen.
7 Q. How did the Debtors pursue this out of Court
8 restructuring in the first instance?
9 A. First, I went to the term lenders and made a proposal
10 where we would significantly reduce their debt service
11 obligations, give them higher pick interest and other returns
12 that they could recover once the industry turns around, but
13 they weren't interested in that. We did get from our
14 sponsor, Access Industries, an offer to infuse $40 million
15 dollars into the company, but it had conditions. The
16 requirement was that it would be an out of Court
17 restructuring. They requested that the term debt, at the
18 time it was about $211 million, to reduce that down to about
19 $110 million and they would receive about 49 percent of the
20 company. Another condition was all the equity would be wiped
21 out, but Access Industry, in exchange for providing the $40
22 million dollar capital infusion, would get 51 percent of the
23 equity and we requested that the ABL lenders, effectively,
24 stand still until we can get through the restructuring.
25 Q. What were the other proposed terms of this restructuring

1 that Access had proposed?
2 A. Well, like I said, one requirement is that it would be
3 done out of Court. It needed unanimity among the term
4 lenders; unanimity with support among the term lenders to
5 stay out of Bankruptcy Court.
6 Q. And how were unsecured creditors proposed to be dealt
7 with in this Access proposal?
8 A. There were two significant trade vendors that we would
9 work out settlement agreements with them and pay them at
10 discount. They were generally agreeable to that, but all
11 other unsecured creditors would be paid in the normal course
12 of business.
13 Q. Why did the Debtors want to have all the unsecured
14 creditors paid in full?
15 A. We thought, for business reasons, it's good for us. One,
16 we could avoid the cost and risk of a bankruptcy; two, we
17 thought that going forward we were more apt to get credit
18 terms from them, which we needed because we were still in a
19 liquidity crunch; and three, we thought that they would be
20 much more supportive to the business, much more reliable
21 customers and things like that, and we could continue to get
22 some of the pricing discounts that we were benefited up to
23 that date.
24 Q. Was there a belief, at this time, that if a bankruptcy
25 hadn't been filed the unsecured creditors would get paid in

1 full?
2 A. In general, we thought of it based upon various data
3 points that the value of the enterprise was less than the
4 amount of debt. Some of those data points were conversations
5 we had with potential investors into the company. If you
6 looked at the trading value, the term debt, it was trading
7 around 50 cents. The market thought that the value of the
8 enterprise was less than the debt. So what I was concerned
9 about was a true bankruptcy, any return to the unsecured
10 creditors would, in effect, be a gift, but in my mind it was
11 for benefit of the future operations of the business.
12 Q. Was this proposal, by Access, presented to the board of
13 directors?
14 A. Yes, it was.
15 Q. And can you tell us what the results of that vote were at
16 the board of director's level?
17 A. The board supported, but more specifically the
18 independent directors of the board supported it. The Access
19 members had to, because Access was making the investment,
20 they had to preclude themselves from voting on that.
21 Q. Can you describe to the Court what the makeup of the
22 board of directors is?
23 A. The board is seven members, four of which are employees
24 of Access Industries and three of which are independent
25 directors.

1 Q. Do the independent directors have any equity position
2 with the Debtors?
3 A. Two of the independent directors had small amounts of
4 equity, *de minimis* amounts of equity in the company.
5 Q. Did that proposal end up going forward after the board
6 approved it?
7 A. No, we were not able to get a unanimity of support from
8 the term lenders. There was one hold out term lender. As a
9 result it could not go forward. We couldn't accomplish it
10 out of Court.
11 Q. Which of the term lenders opposed it?
12 A. It was Oppenheimer.
13 Q. After the proposal failed because of Oppenheimer's
14 objection, what happened next in terms of the Debtors'
15 attempt to restructure its debt position?
16 A. The term lenders came to us with a proposal of an in
17 Court restructuring. They would infuse $50 million dollars
18 into the company, in the form of a DIP loan, they would
19 reduce their term debt and at that point, like I said $211
20 million, they would reduce that to a $55 million dollar PIK
21 note. So the debt service requirements for the company were
22 significantly reduced. The ABL lenders, who at the time were
23 about $5 million dollars over advanced on the collateral
24 value, agreed to freeze that over advance through the
25 restructuring and then amortize it down over six months upon

1 emergence from bankruptcy.
2 Initially, the plan was to impair trade creditors and
3 assume the settlement agreement we had with the two large
4 trade creditors, but I, the board, the management team still
5 felt that it was put into the long term interest of the
6 company to see if we could pay the unsecured creditors, our
7 trade vendors. We were able to convince the steering
8 committee of the term lenders to amend the plan to provide
9 for payment in full to the trade vendors with the exception
10 of the two settlement agreements with two of the large trade
11 vendors.
12 Q. Again, at this time, why did the Debtors believe it was
13 important to pay the unsecured's in full?
14 A. For all the reasons I said before, plus we thought that a
15 prepack bankruptcy would be shorter because, theoretically,
16 fewer parties thinking the plan, having a contentious view of
17 the plan, so we could accomplish, get in and out of
18 bankruptcy in a quicker period of time, and it would have a
19 less impact on the business, there would be less risk then
20 whatever happens in a Bankruptcy Court and there would be
21 fewer professional fee costs associated with the bankruptcy.
22 Q. How did the Debtors deal with the lack of cash while the
23 negotiations over this prepack were going on?
24 A. The term lenders advanced to us a facility, a credit
25 facility of $6.7 million that allowed us to buy necessary

1 products and services to continue the business operating
2 during a timeframe where we could prepare for the bankruptcy
3 filing.
4 Q. Was this prepack proposal presented to the board of
5 directors as well?
6 A. Yes, it was.
7 Q. What were the results of the voting on this proposal?
8 A. Well, during our best to negotiate terms, things like
9 that, the board did unanimously support this plan?
10 Q. What were the questions or the additions they wanted to
11 the terms?
12 A. Well, the board, looking out for all constituents, did
13 encourage us to go back and see if we could get some kind of
14 piece of equity for existing equity. They did encourage us
15 to try to get better terms on the DIP financing, both the
16 term lender DIP and the ABL DIP.
17 Q. Did the creditors, ultimately, approve this prepack deal?
18 A. The board was on board with it, the ABL lenders were on
19 board with it and the term lenders, when it came down to the
20 final day, they could not get the required 50 percent and 67
21 percent support.
22 Q. Did they explain why they were unable to get that
23 support?
24 A. They had a new participant in the group, Black Diamond
25 Capital Management, that had bought up, I think at that time,

1 more than 35 percent and they had asked to reconsider the
2 treatment of unsecured creditors in the plan.
3 Q. How did they want the unsecured creditors to be
4 reconsidered?
5 A. Well, initially it began as, you know, they wanted to
6 understand the situation and I, and the term lender advisors,
7 spent quite a bit of time bringing them up to speed on the
8 treatment, our proposed treatment of unsecured creditors.
9 They did spend a lot of time focused on two particular
10 creditors, one being SBI. SBI had equipment financing. They
11 financed a heat treat furnace in our plant, and we also had a
12 coupling supply agreement and a cost plus OCTG sale agreement
13 with the SBI related family of companies. Also, they wanted
14 to go back and look at a proposed settlement agreement we had
15 with one large steel provider.
16 Q. Who was the steel provider?
17 A. Nucor.
18 Q. What was the result of the attempts to negotiate
19 settlements with these particular vendors?
20 A. Initially, I went back to SBI and tried to negotiate with
21 them to amend their equipment financing. Our position was
22 that its equipment financing, the secured claims should be
23 limited to the fair value of your collateral. We had a
24 position that the collateral was worth $4 million dollars and
25 we also argued that the term should be more economically

1 reasonable and discussions expanded into how do we amend and
2 assume the coupling supply agreement and the OCTG cost plus
3 sales agreement. The discussions, initially, were with me
4 and SBI, then eventually Black Diamond became involved in
5 those settlement discussions.
6 Q. What resulted from those settlement discussions, if
7 anything?
8 A. We could not come to a meeting of the mind of the three
9 parties. At the same time, I was running out of liquidity.
10 I used up all my $6.7 million financing provided by the term
11 lenders. Both the term lenders and the ABL lenders were very
12 anxious to not provide me any further funding unless it was
13 under the protection of the bankruptcy, so they wanted a
14 bankruptcy filing.
15 Q. What period of time are we talking about when this
16 finally resulted in the out of Court restructuring?
17 A. Some of the discussions with SBI were late May and I
18 think it led to our filing on June 9th.
19 Q. What was the Debtors' financial position as of the end of
20 May 2015?
21 A. At that point some of our critical vendors, including
22 trucking companies and some of our testing equipment
23 providers were refusing to provide a service because, for
24 example, the two testing equipment providers hadn't been paid
25 since December. So they had been providing a service for

1 five months with no payment. Truckers, they obviously know
2 their leverage and they were saying unless you pay me up
3 front, I am not coming to pick up any pipe. Obviously, of
4 course, I need truckers to sell my pipe. The same with
5 truckers to deliver my steel coils. I need them to deliver
6 steel coils and they are refusing to provide service unless
7 they had cash in hand.
8 At that point I had no further sources of liquidity
9 to pay these people. So I was in a pinch. I needed the DIP
10 financing. The ABL and term lenders were resolute in their
11 positions. So we went to the board and sought board approval
12 to file for bankruptcy under the terms offered by the
13 lenders.
14 Q. What were the terms offered by the lenders?
15 A. We were able to increase the DIP size from $40 to $60
16 million. There were some upfront fees, an interest rate,
17 some back end transfers of equity. As I said before, the ABL
18 lenders were going to freeze their over advanced position,
19 but needed a repayment of the over advanced position over a
20 six month period upon emergence from bankruptcy. We were
21 able to negotiate with the ABL lenders a moratorium on
22 opportunities to revalue the inventory by them through July
23 2016. In general, it was to provide $60 million of DIP
24 financing for me to continue operations and continue the
25 restructuring process.

1 Q. Under this proposed plan support agreement, how were the
2 unsecured creditors to be dealt with?
3 A. Initially, it was that they were not going to receive
4 anything. Since then we amended it to, as said initially,
5 leave that, any recoveries to the unsecured creditors blank
6 until we do a valuation of the enterprise.
7 Q. Did the board approve this plan?
8 A. Yes.
9 Q. Why did the board approve the plan if they had wanted to
10 pay unsecured's in full, why did they change their position
11 on that?
12 A. It was a requirement of the financing provided by the
13 lenders. So the board reluctantly approved the plan because
14 we needed financing to continue the business and continue the
15 restructuring.
16 Q. Now you mentioned that there has been a waiver of certain
17 conditions since the bankruptcy was filed over the treatment
18 of unsecured creditors. How did that come about?
19 A. After the board, the company continuing request to the
20 lenders to fund an investment banker to do a valuation of the
21 enterprise.
22 Q. Why didn't the Debtors do a valuation of the enterprise
23 prepetition?
24 A. We wanted to, but there was no funding for that.
25 Q. Was there any other process, prepetition, to try to come

1 up with other solutions?
2 A. We did ask for funding for a sales process. We were
3 provided limited funding to do a 30 day sale process.
4 Q. What were the results of that 30 day sale process?
5 A. We received three letters of interest, two of which had
6 an implied enterprise value; one for $250 million, one for
7 $225 million and the third said that it's too early for us to
8 determine an enterprise value.
9 Q. Was that a sufficient offer or suggestion of interest to
10 pay off the secured debt?
11 A. No.
12 Q. Since the filing of the Debtors' bankruptcy, what does
13 its earnings look like?
14 A. We are still running negative EBITDA. We are generally
15 performing as expended. We had been able to generate a
16 little bit more liquidity than anticipated, but these are,
17 generally, just timing issues. I'd say we are performing on
18 track with our DIP budget.
19 Q. You mentioned earlier that there were some data points
20 that led you to believe that, in a freefall bankruptcy, the
21 unsecured's would not have been able to be paid at all. Can
22 you describe what those data points were, again, for the
23 Court?
24 A. Well, I am not sure what you mean by freefall bankruptcy,
25 but it would have been a liquidation. We did do an analysis

1 of recoveries to lenders in a liquidation, if I had to shut
2 the place down. Our predictions indicated that the term
3 lenders would be significantly impaired and the ABL lenders
4 would also be impaired.
5 Q. Without a prepetition valuation, how did you determine
6 that it was in the best interest of the Debtors to file or to
7 enter into the PSA without that valuation having been done?
8 What were the indications that showed you that that was
9 something that could be done?
10 A. Let me clear. I wanted a valuation. I wanted sale
11 process, but I didn't have any funds to do it. Just from
12 various data points like conversations with potential
13 investors in February, discussions with potential DIP lenders
14 in March, looking at the trading value of the term debt,
15 trading at 50 cents on the dollar and at least in the OCTG
16 industries, it's a fairly common knowledge that we were
17 struggling, likely insolvent and there was no indications to
18 me from anybody that anybody was willing to pay more than the
19 debt for this company.
20 Q. You mentioned that your attempts to find alternative DIP
21 financing, can you describe what those efforts were for the
22 Court?
23 A. I went to five different entities that play in this
24 space. Consistently, of the five, only one of them wanted to
25 execute an NDA. We executed an NDA with Cerberus and they

1 looked at the numbers. Consistently among the five, they
2 were troubled by, one, the industry. Obviously, the industry
3 is in a down cycle and they were worried about, because the
4 industry is down, collateral value and in particular the
5 inventory values. Two, they saw that there would be a
6 priming fight and they had no interest in a priming fight.
7 Q. Your deposition was taken a couple weeks ago. You had
8 indicated at that time that there were three entities that
9 you had spoken to?
10 A. Yeah, I did go back and look at the e-mails I noted in my
11 deposition and there were actually five. It was Cerberus, as
12 I indicated, Fortress, Prominence Equity, H.I.G. Capital and
13 I'm drawing a blank on the fifth one. It's hard to keep
14 track of all these names, but the responses were consistent.
15 They had no interest.
16 Q. Did they say why they were not interested?
17 A. Two big reasons; nobody was real clear as to when it
18 would turn around and two is they were not interested in a
19 priming fight.
20 Q. Who was involved in the process of the negotiations over
21 the DIP that's before the Court today?
22 A. It was myself, members of my management team, legal
23 counsel to the company from the Debtors and from the lenders
24 side it was, on the ABL, it was the two ABL lenders and their
25 advisors, and on the term debt side it was the term debt

1 steering committee and their advisors.
2 Q. And did the terms of the DIP change over the course of
3 the negotiation process?
4 A. Yes, minor tweaks to it. We were able to upsize it. We
5 were able to stretch the period and inventory valuation could
6 not be done. We tried our best to reduce some of the cost,
7 the fees, the backend fees, but the lenders would not budget
8 on those terms.
9 Q. Was the terms of the DIP presented to the Debtors' board
10 of directors?
11 A. Yes, it was.
12 Q. What was their reaction to it?
13 A. They asked if we did our best at negotiating terms. We
14 actually went back and tried to push again on some of the
15 terms, but after that the board then signed off on the DIP.
16 Q. Was there a vote to approve the DIP?
17 A. A unanimous vote to approve the DIP.
18 Q. If the DIP had not been approved, what was your view of
19 what would have happened to the Debtors?
20 A. If I didn't have financing, I was to the point where I
21 would probably have to shut the place down.
22 Q. How would that have affected the creditors of the Debtor?
23 A. From my analysis of kind of a liquidation analysis, the
24 term lenders would be significantly impaired. The ABL
25 lenders would be impaired. There is no meaningful

1 unencumbered asset, so that would leave nothing to the trade
2 vendors other then 503(b)(9) claims they may have.
3 Q. Have the Debtors prepared any projections of future
4 earnings?
5 A. Yes, we have.
6 Q. Can you describe what those projections are, generally?
7 A. Well, we change them a lot. Our industry is based upon
8 numerous factors that are outside of our control. Oil and
9 gas prices, oil and gas drilling activity, imports of OCTG,
10 supplies of OCTG in the market place, our ability to execute
11 our business plan and all of those change everything; many of
12 those change every day. By way of example, just two weeks
13 ago oil dropped $10.00 and hasn't recovered. So just by
14 that, from talking to some of our customers and our vendors,
15 people are once again reassessing their future drilling
16 programs. And if they are reassessing their drilling
17 programs based upon lower prices, that likely means that they
18 are going to drill less and that means less OCTG demand.
19 MR. DORSEY: May I have just one second, Your Honor?
20 THE COURT: You may.
21 BY MR. DORSEY:
22 Q. Going back to your testimony about negotiation over the
23 PSA and the request by the board for a tip for shareholders,
24 do you recall that?
25 A. Yes.

1 Q. Was that for all shareholders?
2 A. We had a meeting where the board asked us to go back and
3 ask for some equity for the new company for the existing
4 equity holders. At that meeting, Access said they would
5 consider waiving their share of any PIK, if we could get it,
6 and they were going to come back to us. But it became a moot
7 point because we never got the equity anyway.
8 MR. DORSEY: That's all I have, Your Honor.
9 THE COURT: All right, cross.
10 MR. BALDWIN: I do, Your Honor. Mark Baldwin from
11 Brown Rudnick for the Committee. Your Honor, we may refer to
12 a couple of --
13 THE COURT: Wait a minute. Excuse me.
14 MR. BRADY: I think, Your Honor, we agreed before
15 the hearing that everyone on, sort of, supporting the DIP
16 would ask the witness questions.
17 THE COURT: I'm sorry, there were questions by
18 others?
19 MR. JOWERS: I don't have a lot here, Your Honor.
20 Austin Jowers with King & Spalding on behalf of Cortland, the
21 agent to the DIP lenders and the term lenders.
22 BY MR. JOWERS:
23 Q. Mr. Nystrom, there is one point I wanted to fix with
24 respect to the out of Court term sheet that you discussed. I
25 believe you said access was going to get 51 percent of the

1 equity out of that process and when I went back and looked at
2 that, I believe, isn't it correct that 57 percent of the
3 equity was going to go to Access and that included their debt
4 piece, and that 43 percent was going to go to the other term
5 lenders?
6 A. You're correct. I stand corrected. It was 57, yes.
7 Q. I just wanted to clarify that for the record. And isn't
8 it true, Mr. Nystrom, that with respect to that out of Court
9 restructuring, Access informed everyone that they implied a
10 value to the company on a pre-money basis between $197 and
11 $207 million dollars, and on a post-money basis of between
12 $237 and $247 million dollars?
13 A. Yes, Access said that.
14 Q. To be clear, was Black Diamond a lender in the facility
15 at the time of those out of Court negotiations, to your
16 knowledge?
17 A. To my knowledge, no.
18 Q. And they were not part of the steering committee at that
19 time, were they?
20 A. They were not part of the steering committee and not
21 every mentioned to me as a lender at that time.
22 Q. With respect to the Lazard engagement for the initial 30
23 day sale process that you discussed, when that was put in
24 place, you mentioned you received a lot of, essentially, push
25 back from the lenders about spending the money to run that

1 process. Can you elaborate, you know, why the term lenders
2 pushed back or your perception of why the term lenders pushed
3 back at that time?
4 A. Well, they effectively were funding it. I guess I am
5 spending their money and they wanted to be prudent about the
6 money they gave me. They did tell me that they didn't think
7 that anybody was going to come up with a value of an amount
8 that was in excess of their debt. We made it clear to them
9 that, you know, it's just good procedure to test the market.
10 Eventually, they agreed on the 30 day sale process.
11 Q. That 30 day sale process, when it was negotiated, was
12 Black Diamond part of the steering committee at that time?
13 A. No, they were not.
14 Q. Now let's fast forward to the time, you mentioned Black
15 Diamond bought a blocking position, we'll call it, about 35
16 percent of the debt here shortly after a prepack plan that
17 would have paid unsecured's in full was negotiated, correct?
18 A. Yes.
19 Q. And that was, effectively, a day or so after we reached
20 an agreement on that prepack plan, correct?
21 A. I don't know if it was a day or so, but it was shortly
22 after.
23 Q. Correct. And you mentioned one of the first things that
24 Black Diamond starting looking at was the SBI equipment
25 lease, isn't that correct?

1 A. Yes.
2 Q. And prior to that time, had your or any of the Debtors
3 other professionals looked at the issue of whether that SBI
4 lease was, in fact, a disguise financing?
5 A. We did. This equipment is critical to our business and
6 we also knew that SBI, a related company of SBI is in the
7 pipe manufacturing business and they would love to have that
8 heat treat furnace. Their plant doesn't have a heat treat
9 furnace. We were very scared of them ripping it out. So
10 considering all the risks, the rewards, we decided let's just
11 honor this and not risk the chance of us losing this fight
12 and losing this heat treat furnace.
13 Q. Prior to the time that Black Diamond got involved, had
14 you discussed this analysis of the, you know, disguise
15 financing versus a true lease with the term lenders or any of
16 their professionals?
17 A. I did discuss the heat treat facility and the equipment.
18 We did discuss why it is extremely critical to our business
19 and why we felt this way.
20 Q. Right, but the analysis of whether it was a true lease or
21 a financed lease, those discussions hadn't happened before
22 Black Diamond got involved, correct?
23 A. That is correct.
24 Q. And isn't it true once the professionals looked at that
25 lease, myself at King & Spalding, the professionals at

1 Skadden and the Debtors' professionals all agreed, after
2 examining the lease, that this was most likely a disguised
3 financing arrangement, isn't that correct?
4 A. Equipment financing.
5 Q. Equipment financing?
6 A. Yes.
7 Q. And based on the information you had at that time, isn't
8 it correct you informed us that you believed that that
9 equipment was worth in the neighborhood of $4 million
10 dollars, correct?
11 A. Yes, a kind of a back of the envelope valuation. I put
12 it at $4 million dollars.
13 Q. And the stream of payments, if this lease were treated as
14 a true lease, that stream of payments, that's in the
15 neighborhood of around $60 million dollars, isn't that
16 correct?
17 A. Yes.
18 Q. And you said during the period, but when we were
19 negotiating the prepack, there was a lot of back and forth
20 between those term lenders as to whether we would go the
21 prepack and prearranged route, correct?
22 A. Yes, there was.
23 Q. From that point on you mentioned that yourself, and Black
24 Diamond and other professionals began to negotiate with SBI
25 regarding the treatment of their lease, correct?

1 A. Yes.
2 Q. Up until days before the filing, wasn't it the case that,
3 you know, we had daily calls and we discussed a plan A
4 staying on the table, and that plan A was a prepack plan with
5 a settlement with SBI, correct?
6 A. Yes.
7 Q. And that was a plan and, of course, that was supported by
8 Black Diamond, isn't that correct?
9 A. Yes.
10 Q. Black Diamond, up until days before the filing was still
11 negotiating with you and with SBI with respect to a potential
12 resolution of their lease, isn't that correct?
13 MR. BALDWIN: Objection, Your Honor, all of this is
14 leading.
15 THE COURT: Sustained.
16 BY MR. JOWERS:
17 Q. Mr. Nystrom, how much do you estimate it would cost to
18 clear, but the existing debt, and the DIP in order for
19 someone to come in here and buy the company?
20 A. I'll discuss all funding debt, but today I owe $215 to
21 the term lenders, with their accrued interest up to the
22 filing date, about that. I owe $35 to the ABL lenders. I
23 owe $10 to various capital leases and the DIP, I will owe $60
24 on that just to get me through restructuring. So that is
25 close to $320 million that I would have to cover.

1 Q. How much do you think it would cost, approximately, in
2 professional fees and other costs to the company to run a,
3 you know, 60 to 90 day sale process using someone similar to
4 Lazard or another investment banker?
5 A. If you take their engagement letter, they'd get a $3
6 million dollar fee and on top of that you would have an extra
7 month, maybe two of all the other professionals, which are
8 currently running about $2 million a month. So it is
9 expensive.
10 Q. And you mentioned earlier in your direct testimony, you
11 refer to the payment to the unsecured's in the prepack as a
12 gift, is that based on your belief that the value of this
13 company does not exceed the debt here?
14 A. Yes.
15 MR. BALDWIN: Objection, Your Honor, he's not a
16 valuation [indiscernible].
17 THE COURT: Overruled. He can testify to his
18 opinion.
19 BY MR. JOWERS:
20 Q. Finally, do you believe that if the Debtor pursued the
21 sale process, which you estimate to be $4 million plus
22 dollars, in your professional opinion, do you believe that
23 sale process would result in a bid that is going to clear the
24 $320, $325 dollar number of the secured debt that you just
25 testified to?

1 MR. BALDWIN: Objection, Your Honor; foundation for
2 that testimony.
3 THE COURT: Overruled. He is the CRO.
4 THE WITNESS: No, I don't think we will get a bid
5 more than $320 million.
6 MR. JOWERS: Thank you, Mr. Nystrom.
7 THE COURT: All right, anybody else supporting the
8 DIP?
9 MR. DOWNS: Good morning, Your Honor, Jeremy Downs
10 of Goldberg Kohn on behalf of Wells Fargo Capital Finance.
11 BY MR. DOWNS:
12 Q. Good morning, Mr. Nystrom.
13 A. Good morning.
14 Q. I only have a couple of questions. Were you here at the
15 first day hearing in this case?
16 A. Yes.
17 Q. Do you recall having a discussion with the Court, on the
18 record, about the budget relating to the DIP order?
19 A. Yes.
20 Q. And you understand that there was a budget attached to
21 those interim DIP orders, correct?
22 A. Yes.
23 Q. Are you aware that there will also be a budget attached
24 to the DIP orders presented today?
25 A. Yes.

1 Q. Who had primary responsibility for preparing that budget?
2 A. I am, the CFO, yes.
3 Q. Do you believe that that budget contains all of the
4 expenses that you would reasonably expect the estate to incur
5 during the period of that budget?
6 A. Yes.
7 MR. DOWNS: Thank you. No more questions, Your
8 Honor.
9 THE COURT: Thank you. Now we can hear from the
10 Committee.
11 MR. BALDWIN: I'm going to ask, Your Honor, if I
12 could, we may refer to some exhibits during this brief cross
13 examination. I have them in a binder, if I could hand those
14 up, I would appreciate it.
15 THE COURT: You may. Thank you. Counsel has copies
16 of them?
17 UNIDENTIFIED SPEAKER: I do not, Your Honor.
18 MR. BALDWIN: Also, I understand the Debtors may
19 have some confidentiality concerns regarding some of the
20 exhibits in this binder. I am going to try to avoid those,
21 if I can, during my cross, so that we don't get into those
22 issues.
23 THE COURT: Okay.
24 CROSS EXAMINATION
25 BY MR. BALDWIN:

1 Q. Good morning, Mr. Nystrom, how are you?
2 A. Good, Mark.
3 Q. We met a couple of weeks ago in New York City, is that
4 correct?
5 A. Yes.
6 Q. And it was at that time that we took your deposition?
7 A. Yes.
8 Q. Okay. I am not going to go through background or at
9 least all of the background in terms of how we got here. I
10 want to pick up in March. I believe during your direct
11 examination you were testifying that in January and February
12 you were negotiating with various lenders, is that correct?
13 A. Yes.
14 Q. The game plan, at least at that time, was to do some sort
15 of out of Court restructuring, is that correct?
16 A. Yes.
17 Q. And you actually went to the trouble in March of putting
18 together an RSA, is that right?
19 A. Yes.
20 Q. And, I believe, if you look in your binder at tab 1, you
21 will see a copy of that.
22 A. Yes.
23 Q. July 2nd, was that correct?
24 A. How do I verify that?
25 Q. If you look at the bottom right hand corner you will see

1 it.

2 A. Oh yes, there I see it.

3 Q. Exhibit tab. Can you tell us who drafted this document,

4 sir?

5 A. It was my counsel. I believe it was Debevoise, but it

6 could have been Young Conaway.

7 Q. Okay and I believe that you, in a summary fashion,

8 summarized what the deal was contemplating, at least as of

9 late March, but could you do that again for us just to put us

10 into perspective here?

11 A. If my memory serves me right, Access was going to put in

12 $40 million. They would end up with 57 percent of the

13 company. The term lenders would reduce their debt from, at

14 the time, $211 million to about $110 million. They would

15 have the remaining 43 percent of equity. The existing equity

16 would be wiped out. Also the debt service requirements on

17 the $110 would be reduced. There was a portion of PIK

18 interest, and cash pay interest and no principal

19 amortization. The ABL lenders agreed to, effectively, freeze

20 their over advanced position through a period in time and

21 then amortize that off over a six month period. They also

22 agreed to not revalue the inventory for a period of time.

23 They required a settlement with two significant trade vendors

24 and, otherwise, all other trade vendors would generally be

25 paid in full.

1 Q. As of March 23rd, 2015, the date of this restructuring
2 support agreement, you were negotiating with the term
3 lenders, the ABL lenders and Access as well, is that correct?
4 A. Yes, it's just that it was the steering committee of the
5 term lenders.
6 Q. Now we heard a little bit about Black Diamond. Back on
7 March 23rd, the date of this particular document, Black
8 Diamond did not have a seat at the table, is that correct?
9 A. That's correct.
10 Q. As far as you knew, at that time, Black Diamond had no
11 interest in the company?
12 A. I was not aware that they had any interest in the
13 company.
14 Q. But as we sit here today, Black Diamond is a term lender,
15 correct?
16 A. Yes.
17 Q. Now back, if I understood your deposition testimony, back
18 on March 22nd the Debtors' board of directors unanimously
19 approved this RSA, is that correct?
20 A. I don't remember the exact dates, but the board did
21 approve this RSA, yes.
22 Q. On or around the date of the document?
23 A. Yes.
24 Q. And you were also in favor of supporting this RSA back at
25 the relevant time?

1 A. Yes.
2 Q. And as I understood your deposition testimony, all of
3 Boomerang's senior management was in favor of this deal as
4 well, correct?
5 A. Yes.
6 Q. And by that time, Boomerang had certain professionals
7 working with it, is that correct?
8 A. Yes, we did.
9 Q. And as I understood your deposition testimony, the
10 professionals were also fully supporting this deal at the
11 time, is that correct?
12 A. Yes.
13 Q. So as of March 22nd or March 23rd, everybody from
14 Boomerang's perspective was on board with this deal, right?
15 A. Yes.
16 Q. But the RSA, that we have in front of us as Exhibit 10,
17 was never finalized, correct?
18 A. Correct.
19 Q. And that was because there was one --
20 THE COURT: Excuse me, its Exhibit 1.
21 MR. BALDWIN: Exhibit 1, I'm sorry, Your Honor.
22 THE COURT: All right, go ahead.
23 MR. BALDWIN: It was deposition Exhibit 10.
24 BY MR. BALDWIN:
25 Q. There was one loan hold out and that was Oppenheimer, and

1 that, effectively, killed the deal, is that correct, sir?
2 A. Yes.
3 Q. And if I understood your testimony on direct examination,
4 after the RSA was, in effect, killed, the steering committee
5 turned its attention to a prepacked bankruptcy, is that
6 correct?
7 A. Initially they wanted a pre-arranged and we were able to
8 convince them to pay unsecured creditors in full, with the
9 exception of a couple settlements. So they started at a pre-
10 arranged and it got to a prepack.
11 Q. Okay. Tell us who was on that steering committee back in
12 the late March time period, do you recall?
13 A. I'll give you the names I remember. It was GSO, Babson,
14 Octagon, Tennenbaum, there was one more and I forgot the
15 name.
16 Q. But there was no Black Diamond?
17 A. No Black Diamond.
18 Q. If I understand the chronology, after the Exhibit 1
19 restructuring support agreement was killed, the term loan
20 steering committee started to formulate a plan to provide the
21 company with DIP financing, is that right?
22 A. Yes.
23 Q. The steering committees initial plan at that time was to
24 restructure the company, blow out Access's equity and the
25 term lenders would, in effect, take the equity, is that

1 correct?
2 A. Eliminate all of the existing equity and yes, the term
3 lenders would convert their debt for a combination of equity
4 and a smaller amount of debt.
5 Q. All right, also it was my understanding from your
6 deposition, at around that time, you started to look for some
7 alternative DIP financing, is that right?
8 A. Yes.
9 Q. And I was a little bit confused by your testimony this
10 morning. I understood that you only went to three sources.
11 Now I hear that you went to five, is that correct?
12 A. Yes, after my deposition I went back and checked my e-
13 mails and there were actually five.
14 Q. Were those e-mails produced to us, do you know, in
15 connection with this Debtor?
16 A. No, and I apologize. I didn't think they were asked for,
17 but I can happily produce them. They are generally
18 introduction e-mails.
19 Q. Okay. Was any substantive information provided to these
20 potential DIP lenders?
21 A. I worked through them, our current operations, the
22 industry in general. Cerberus executed an NDA and we
23 provided Cerberus historical financial information and
24 projections we had at the time.
25 Q. And who are the names of these other four?

1 A. It was H.I.G. Bayside, Fortress, Providence Equity and
2 the fourth one I forget right now. It's hard for me to keep
3 track of the names. I forget the fourth one.
4 Q. Okay. So Cerberus, H.I.G., Fortress, Providence and
5 another fifth that we can't recall at this point?
6 A. Farallon Capital.
7 Q. Do you know how to spell that?
8 A. F-a-r-r-a-l-l-o-n, I believe. Either one R or two R's.
9 Q. Okay and what type of information did you provide to
10 H.I.G.?
11 A. Talked about the industry. Talked about the business I'm
12 in. Talked about our recent financials, what's happened in
13 the first quarter, my view, at the time, of when it will turn
14 out? They had questions on the collateral, particularly
15 receivables and inventory. We described the inventory,
16 described the receivables, who are my customers, out of the
17 inventory how much is finished goods, coils, steel, how much
18 is other stuff, coupling, supplies, things like that; so
19 really talked them through what they would be lending into.
20 Q. Did H.I.G. sign an NDA?
21 A. No, they did not.
22 Q. What about Fortress?
23 A. No.
24 Q. Providence?
25 A. No.

1 Q. And the last one?
2 A. No, they did not.
3 Q. So the only one that signed an NDA was Cerberus?
4 A. Cerberus.
5 Q. Okay.
6 A. And we also talked about, they all asked are their
7 current lenders willing to let us step in front and I told
8 them no, the current lenders are not willing to be priming.
9 Q. All right, now it's my understanding that in addition to
10 negotiating a prepack, in early April you also started to
11 look for financial advisors, is that right?
12 A. Yes.
13 Q. And can you tell us why you started to look for financial
14 advisors at that point?
15 A. We anticipated the Court would have an issue of how do I
16 establish value and we thought our best opportunity, that was
17 one part of it, and the other was should we look to see if
18 there is anybody that would have a perception of value in
19 excess of the debt. So we decided to go out and hire a
20 financial advisor firm.
21 Q. Isn't it true that at that time the company wanted to see
22 if there was a third party out there who would be interested
23 in acquiring the company?
24 A. Yeah, I thought I said that, but yes.
25 Q. So you sought financial advisors in order to organize a

1 sales effort, isn't that correct?
2 A. Yes.
3 Q. And this sales effort was supposed to be an alternative
4 to what the steering committee was proposing at that point?
5 A. Not an alternative to what the steering committee was
6 proposing. I am not sure what you are asking there. It was,
7 to your original question, see if we can find a buyer who
8 would come up with value that benefit more of the
9 stakeholders of the case and really test our assumptions on
10 enterprise value.
11 Q. Well, what was it that the steering committee was
12 proposing at that time?
13 A. They, at the time we were operating under a budget, a
14 funding budget, with them and they did not want us to spend
15 money on that. They were worried about both the cost of an
16 investment banker and the cost of an extension of a
17 bankruptcy process of a lengthy sales process.
18 Q. Isn't it true that at that time the discussions with the
19 steering committee focused around the steering committee
20 ultimately taking the equity of this company?
21 A. Yes.
22 Q. And a sale effort would be inconsistent with that,
23 correct?
24 A. I don't know. If these guys are turning their debt at 50
25 cents on the dollar, I would assume that somebody is paying

1 them off would be a home run.
2 Q. Well, the steering committee, and its constituents and a
3 third party buyer can't all own the same company, correct?
4 A. That is factually correct, but I don't see a buyer that
5 pays out of par as not good for term lenders.
6 Q. My point though, sir, is that the sales effort was going
7 down a parallel path with the prepack that you were
8 negotiating with the steering committee, correct?
9 A. That's true.
10 Q. Okay and as part of that potential sales process, you
11 spoke with Lazard and a couple of other investment bankers?
12 A. Yes.
13 Q. And you actually signed an engagement letter with Lazard,
14 is that true?
15 A. Yes.
16 Q. And I think that's already part of the Court's records.
17 I believe you filed a retention application back on June 20th,
18 does that ring a bell?
19 A. Yes, we did.
20 Q. Okay. But if I understood your direct examination, the
21 term lenders blocked some of Lazard's fees, is that right?
22 A. Yes, there was negotiation of how much to pay Lazard,
23 yes.
24 Q. And do you recall, as you sit here today, what, in
25 particular, the term lenders bought that?

1 A. The cost of a full blown sales process, it was going to
2 have a minimum of $3 million dollars. We were able to
3 successfully negotiate, amongst all the parties, a 30 day
4 sale process that would cost $500,000.00.
5 Q. So, ultimately, the term lenders were willing to finance
6 an abbreviated sales process, is that right?
7 A. A sales process for 30 days in which Lazard would be paid
8 $500,000.00.
9 Q. The fees that Lazard was to receive at that point was
10 only to cover that abbreviated sales process, right?
11 A. Correct, but we had options to pay them if necessary, if
12 their services were necessary in a bankruptcy filing.
13 Q. And anything beyond services provided, other than the
14 bankruptcy filing beyond that 30 day period, would require
15 additional approval from the term lenders, correct?
16 A. Yes.
17 Q. And the sales process that Lazard undertook, it was going
18 to be limited to 30 days, right?
19 A. Yes.
20 Q. And it was envisioned that it would not include a full
21 blown confidential information memo sales process, correct?
22 A. Yes, we did prepare a teaser and the company prepared an
23 information package for people to execute an NDA.
24 Q. You, earlier today, gave some testimony about your
25 background as a CRO. I take it, as a CRO of several

1 companies, you have some experience in selling companies,
2 correct?
3 A. I have been in restructuring where we did sell assets or
4 companies, yes.
5 Q. And I take it you would agree with me that 30 days is not
6 sufficient to sell a company of this nature?
7 A. It's a short timeframe to do a full blown sale process.
8 Q. You've never seen a company, of this nature, sold in 30
9 short days, correct?
10 A. No, I have not.
11 Q. So in early May you were commencing this abbreviated
12 sales process and you were simultaneously negotiating the
13 prepack with the steering committee, right?
14 A. Yes.
15 Q. Can you describe for us the prepack that you ultimately
16 negotiated as of early May?
17 A. It was a deal where the term lenders would exchange their
18 debt, at that time $211 million, I think, down to a $55
19 million dollar PIK note. They would get equity in the
20 company. The existing equity company would be wiped out.
21 The ABL lenders would stay at their position, at that time
22 $10 million dollars over advanced, but we got it down to $5
23 million. The $5 million dollar over advance would stay to a
24 restructuring and to be amortized down over a six month
25 period following restructuring. There were settlements with

1 two large trade vendors and other then that all other
2 unsecured creditors would be paid in the normal course of
3 business.
4 Q. The Debtors' professionals actually --
5 A. I'm sorry, I forgot, they were going to give me a $50
6 million dollar DIP to cover the cost of the restructuring.
7 Q. In early May the Debtors' professionals actually put
8 together a set of documents to memorialize the prepack that
9 was being negotiated at that time, correct?
10 A. Yes.
11 Q. And they are actually in the binder in front of you, sir.
12 Could you take a look at Exhibit 5 and tell me what that is?
13 A. That is the plan support agreement that memorializes what
14 I just described.
15 Q. And this had been negotiated by and between the parties
16 as of early May?
17 A. Obviously, there was negotiations coming up to that, but
18 culminating in early May.
19 Q. And if we look at Exhibit 6, can you tell us what that
20 document is?
21 A. This is the Debtors' joint prepackage Chapter 11 plan on
22 the same date. I believe it's the same restructuring plan.
23 Q. So this was also part of that early May prepack that had
24 been negotiated, is that true, sir?
25 A. Yes.

1 Q. What about Exhibit 7, can you tell us what that is?
2 A. A draft disclosure statement related to the same plan.
3 Q. This was also a document that had been negotiated by and
4 between the parties as of early May, correct?
5 A. Yes.
6 Q. Now we don't need to go through Exhibit 5, 6 and 7 in
7 chapter and verse, but can you tell us what the deal was, at
8 least with respect to the unsecured's as of early May?
9 A. In general, other than these two large trade vendors that
10 we had separate settlement agreements with, everybody else
11 was being paid in the normal course of business.
12 Q. Do you recall participating in a board meeting on or
13 around May 6th at which you presented Exhibits 5, 6 and 7?
14 A. Yes, I remember the meeting where we presented these.
15 Q. And you fully supported the deals as contained in
16 Exhibits 5, 6 and 7 as of that time, correct, sir?
17 A. Yes.
18 Q. And Boomerang's other senior management were also fully
19 in support of the deal contained in 5, 6 and 7, correct?
20 A. Yes.
21 Q. And its advisors were also in favor of that deal as well?
22 A. Yes.
23 Q. And if I understood your testimony earlier today, the
24 board at or around May 6th unanimously supported that deal?
25 A. Yes.

1 Q. If I understood your testimony earlier today, as of May
2 6th when the board approved these documents, Black Diamond
3 held a relatively small interest in the term debt, is that
4 correct?
5 A. I don't know how much Black Diamond owned at May 6th. I
6 think the first time I heard the name is when I became aware
7 that they owned a position of about 35 percent.
8 Q. Well, if you look at the signature blocks at Exhibit 5,
9 you can see, can you not, how much Black Diamond held at that
10 point?
11 A. Which Exhibit? I'm sorry.
12 Q. Its Exhibit 5 in your binder.
13 A. Got it.
14 Q. I direct your attention to the page bearing baits ending
15 in 1939.
16 A. You're right.
17 Q. So it appears, by looking at that signature block, as of
18 early May Black Diamond has an interest in the term debt a
19 little bit north of $16 million dollars, is that fair?
20 A. Correct.
21 Q. And I believe you testified earlier that in connection
22 with that March RSA that we talked about a minute ago, it was
23 your understanding Black Diamond held no interest at that
24 point?
25 A. It was my understanding that I had never heard that they

1 had owned any position at that date.
2 Q. So would you agree with me that it appears that sometime
3 between March and early May that Black Diamond has acquired,
4 at least, $16 million dollars' worth of term debt?
5 A. Yes.
6 Q. Now we heard some testimony earlier today about whether
7 the term loan steering committee supported payment to the
8 unsecured's, but the bottom line is as of May 6th they were
9 fully in support of paying the unsecured's, correct?
10 A. I don't know if they executed this page.
11 Q. You presented this to the board on May 6th?
12 A. I presented it to the board and I told the board that we
13 still need term lender approval. At that point, I don't know
14 if all the term lenders had executed. When I presented it to
15 the board, it was conditioned upon term lender approval.
16 Quite frankly, it was condition upon, not 100 percent term
17 lender approval, but the 50 percent number and 67 percent
18 dollar of term lender approval.
19 Q. Have you had the chance to read your deposition
20 transcript?
21 A. Yes.
22 Q. I'm sure you don't have a copy with you. Let me hand you
23 a copy.
24 A. Certainly.
25 Q. I will direct your attention to the top of page 128.

1 THE COURT: All right, don't be talking while you
2 walk away from the mic, unless you don't want the record to
3 include your comments.
4 BY MR. BALDWIN:
5 Q. Sir, while I was walking away I was directing your
6 attention to page 128.
7 A. Yes.
8 Q. And I believe in your deposition I had asked you the same
9 question. I said, but at least as of the time these documents
10 were created, and I was referring to the same documents that
11 we were just talking about, the steering committee was on
12 board with that, is that fair? Your testimony at that time
13 was yes, is that correct?
14 A. Yes, the steering committee was in favor of it.
15 Q. Okay. I understand.
16 A. I don't know if the individual term lenders, and it was a
17 condition that they would get signatures from individual term
18 lenders, including enough to satisfy the bankruptcy
19 requirement.
20 Q. Fair enough. My question was bad. Let's just focus on
21 the steering committee. You were dealing with the steering
22 committee. They were on board at the time that these
23 documents were created and approved by the board of
24 directors, they were on board with paying the unsecured's?
25 A. Yes.

1 Q. Okay. And just so the record is crystal clear, the game
2 plan at that time was to pay the unsecured's, except for the
3 two vendors that you previously described, having a separate
4 negotiated deal with, correct?
5 A. Correct.
6 Q. All right.
7 A. One thing I forgot. There was also a settlement
8 agreement with Access and their management fees. Their
9 management fees were going to be impaired also, per the
10 settlement agreement.
11 Q. Now as of May 6th, when the board approved the prepack as
12 contained in Exhibits 5, 6 and 7, Black Diamond was not on
13 that steering committee, correct?
14 A. Not to my knowledge.
15 Q. Was the May 6th prepack finalized and signed by the
16 various parties?
17 A. No.
18 Q. And can you tell us why it was not finalized at that
19 time?
20 A. At one point, and I forget the exact time, the term
21 lenders could not deliver the required signatures, the 50
22 percent and 67 percent. The term lender advisors informed me
23 that Black Diamond had accumulated around 35 percent and they
24 wanted to re-look at the treatment of unsecured creditors in
25 the plan.

1 Q. So you learned, shortly after May 6th, that Black Diamond
2 had accumulated what we had heard was, earlier today, a
3 blocking position?
4 A. My understanding 35 percent, yes.
5 Q. But as you sit here today, you understand Black Diamond
6 holds well in excess of 31 percent, correct?
7 A. I understand that they own in excess of 50 percent.
8 Q. Okay. Shortly after you learned that, didn't you start
9 to have discussions with Black Diamond?
10 A. Yes.
11 Q. And didn't Black Diamond tell you, in early May, that
12 they liked the company and they wanted to be a controlling
13 shareholder?
14 A. Yes.
15 Q. And who told you that, in particular?
16 A. People from Black Diamond.
17 Q. Do you recall who?
18 A. Steve Deckoff.
19 Q. Who is he?
20 A. I think he's the principal of Black Diamond, one of the
21 principals of Black Diamond.
22 Q. What about a Mr. Meyer?
23 A. Less was in the meeting, but Steve is the one who sent
24 him.
25 Q. Do you know what his role is with Black Diamond?

1 A. I don't know his title, but in common nomenclature he's
2 the boss.
3 Q. Do you recall when you had that conversation with those
4 representatives from Black Diamond?
5 A. It was either late June or early July.
6 Q. Do you recall that there was another board meeting on or
7 about May 11th at which you told the board that, in effect,
8 the deal was off because of Black Diamond?
9 A. Yes.
10 Q. And didn't you also tell the board at that time that
11 Black Diamond did not want to pay the secured's?
12 THE COURT: The secured's?
13 MR. BALDWIN: Unsecured's; I'm sorry. Thank you,
14 Your Honor.
15 THE COURT: Okay.
16 THE WITNESS: I think they were all in favor of
17 paying the secured's. I don't remember if it was I said they
18 weren't in favor or they wanted to explore it. Around that
19 time, I think they were just exploring and hadn't made their
20 decision yet.
21 BY MR. BALDWIN:
22 Q. Ultimately, though, Black Diamond decided not to pay the
23 unsecured's, correct?
24 A. Correct.
25 Q. All right, so by May 11th the prepack that you had

1 negotiated, that we looked at, as contained in Exhibits 5, 6
2 and 7 was functionally dead, correct?
3 A. Correct.
4 Q. But as of May 11th you, personally, still felt that it was
5 in the company's best interest to pay the unsecured's,
6 correct?
7 A. Yes.
8 Q. Because as of May 11th, at least, nothing had really
9 changed from your perspective?
10 A. Yes, and I will caveat it outside of those settlement
11 agreements we discussed, yes.
12 Q. Let me change gears. We mentioned a minute ago that
13 Lazard was going down a parallel path as you were negotiating
14 that prepack, correct?
15 A. Yes.
16 Q. And they were doing that abbreviated sales effort,
17 correct?
18 A. Yes.
19 Q. And Lazard had put together certain abbreviated limited
20 marketing materials, correct?
21 A. They pulled together a teaser and we, with the help of
22 Lazard, pulled together an information package and investor
23 package.
24 Q. But you didn't do the full blown bible type --
25 THE COURT: Do we have to go over that again? I

1 think we have heard it.
2 MR. BALDWIN: I can move along quickly, Your Honor.
3 THE COURT: Thank you.
4 BY MR. BALDWIN:
5 Q. Ultimately Lazard found three interested purchasers,
6 correct?
7 A. Yes.
8 Q. And those three signed NDA's?
9 A. One of three did not. They prepared a letter without the
10 benefit of the investor package, but they had information
11 through term lenders.
12 Q. But none of those potential buyers did full blown due
13 diligence, correct?
14 A. Correct.
15 Q. And none of them visited the plant, correct?
16 A. Correct.
17 Q. And none of them had meaningful meetings with management?
18 A. Correct.
19 Q. And, as I understand it, a data room was put together, at
20 that time, but these people did not get access to the data
21 room, correct?
22 A. Correct.
23 Q. And at the end of that 30 day abbreviated period, Lazard
24 delivered three letters of interest, right?
25 A. Yes.

1 Q. And one was from Nexteel?
2 A. Nexteel.
3 Q. And could you tell us what that company is?
4 A. They are a Korean company involved in steel
5 manufacturing.
6 Q. They manufacture pipe as well?
7 A. Yes, they do.
8 Q. I believe you indicated earlier that they had an
9 indicated enterprise value of $250 million dollars?
10 A. Yes.
11 Q. Isn't it true that Nexteel wanted to participate in a
12 management presentation at that time?
13 A. They had requested one in their letter.
14 Q. And that never took place, correct?
15 A. Correct.
16 Q. And they also requested a plant tour and that never took
17 place, correct, sir?
18 A. Correct.
19 Q. And it never took place because the term lenders did not
20 want to fund it, correct?
21 A. I will be specific, the term lenders didn't want to fund
22 an extended sales process beyond the 30 days.
23 Q. Well, these letters were gathered at the end of that 30
24 day process, right?
25 A. Yes.

1 Q. A second group indicated an interest and that was a group
2 led by Lee Equity, correct?
3 A. Yes.
4 Q. And that included a company called Paragon, is that
5 right?
6 A. Yes.
7 Q. And they also submitted a letter of interest, correct?
8 A. Yes.
9 Q. Paragon is also a pipe manufacturer, is that correct?
10 A. Tubing pipe.
11 Q. And SBI was also part of that collective group?
12 A. I'm sorry, they do both tubing and lang pipe. They don't
13 do OCTG. Go back to your question; I'm sorry.
14 Q. My next question was SBI was also part of that group?
15 A. Yes.
16 Q. And they're also in the pipe business, correct?
17 A. Yes, they make pipe and couplings.
18 Q. And they expressed a view of enterprise value based on
19 that abbreviated sales process of $225 million, is that
20 correct?
21 A. Yes.
22 Q. And I believe a third company submitted a letter, SIA, is
23 that right?
24 A. Yes.
25 Q. What kind of company is SIA?

1 A. They are a combination of steel manufacturers in Korea.
2 Q. Would you agree with me that sometimes if a sales process
3 like this plays out longer than 30 days, a prospective
4 purchaser will actually offer more than their original
5 indication of interest?
6 A. It goes both ways. You know, this was before diligence
7 and a lot of times after diligence the price goes down.
8 Sometimes in a process, prices go up. It could either way,
9 either up or down.
10 Q. Sometimes it goes up, sometimes it goes down?
11 A. Yes.
12 Q. But we never got that far in this process?
13 A. Correct.
14 Q. The board of directors reviewed these letters, did it
15 not?
16 A. Yes.
17 Q. Didn't the board want to continue in this process, but it
18 simply had no money?
19 A. Yes.
20 Q. Isn't it true that the term lenders, via the steering
21 committee, concluded that none of these letters of value were
22 sufficient to cause them to continue in the process?
23 A. Yes.
24 Q. Didn't that group that we just identified, which included
25 Lee, Equity, Paragon and SBI come back to you at that time

1 and ask for the names of the term lenders because they wanted
2 to continue in this process?
3 A. They came back to me and asked how do we continue or make
4 a case for our letter. I told them well why don't you call
5 the term lenders directly.
6 Q. So they wanted to continue talking?
7 A. They wanted to explain their letter.
8 Q. They wanted to continue talking?
9 A. Yes.
10 Q. But as of early June, you sent a letter to Lazard saying
11 stop?
12 A. Yes.
13 Q. Because you did not have the money?
14 A. Correct.
15 Q. Were you aware that, at least two of those prospective
16 purchasers remained interested in the company as of this
17 week?
18 A. I heard that this week, but I heard different names.
19 Q. Who did you hear?
20 A. Charles Bank, who did not submit a letter of interest.
21 It is hear say.
22 Q. So people are still interested?
23 A. People are interested, but I have not heard any of them
24 say they are interested in an amount more than the debt.
25 Q. Under the PSA that has been submitted to this Court, in

1 connection with this bankruptcy, have you been allowed to
2 pursue those?
3 A. I am not.
4 Q. Now the PSA that has been filed, in connection with this
5 bankruptcy, doesn't provide for any payment to the
6 unsecured's, correct?
7 A. That is correct.
8 Q. And if I heard your testimony --
9 A. Excuse me; back up. Other than amounts considered as
10 critical vendor payments.
11 Q. And if I heard your testimony earlier today, that PSA
12 that has been filed in connection with this bankruptcy was
13 negotiated and approved by the board of directors with no
14 valuation having been done, is that correct?
15 A. No formal valuation prepared by Lazard, correct.
16 Q. Just a couple of quick follow-up questions. I believe
17 you indicated during direct that you had done some sort of
18 liquidation analysis to determine whether the unsecured's
19 were out of the money, is that right?
20 A. That would be a buy product. It was initially to
21 determine a return on the secured lenders and there were, to
22 my knowledge, no meaningful assets that were not pledged as
23 collateral.
24 Q. You're not a valuation guy, right?
25 A. No.

1 Q. And I believe you also testified about a model that you
2 were working with, is that the June model that we discussed
3 in your deposition or is there another model that you are
4 working from now?
5 A. As I said in my deposition, it seems like I have a
6 version every week, yes. I do work on financial projections
7 of the company, yes.
8 Q. But the June model, is it still the latest and best?
9 A. Yes, it is, but we are looking at it right now, given the
10 drop in oil prices two weeks ago.
11 Q. Before that June model, what was the previous version of
12 the model? Was that back in March?
13 A. Mark, I don't mean to be rude, but it seems like every
14 two weeks I have got a new version of a model and yes, it's
15 not a June version and a March version. There are versions
16 all the way along.
17 Q. But has the committee been provided with a version other
18 than the June, I believe it's the June 16th model that we
19 discussed in your depo?
20 A. No, they were provided the current version of the model
21 when they asked for it. I have done my best to be proactive
22 and give them all the information they have requested.
23 Q. Quick question for you. Generally, are you running ahead
24 of budget right now?
25 A. I'm sorry.

1 Q. Are you running ahead of budget right now?
2 A. Sales we are. Operating costs, we are. Professional and
3 bankruptcy costs, no, we are way over.
4 Q. The professionals cost more?
5 A. Yes. I would say not meaningful ahead. We are pretty
6 much tracking.
7 Q. Pretty much tracking budget?
8 A. Yes.
9 MR. BALDWIN: Your Honor, I would just offer
10 Exhibits 1, 5, 6 and 7 into evidence, please.
11 THE COURT: Any objections?
12 MR. DOWNS: No objection.
13 THE COURT: They're admitted.
14 MR. BALDWIN: Thank you, Your Honor. Nothing
15 further, Your Honor.
16 MR. DOWNS: Just a couple of quick questions, Your
17 Honor.
18 REDIRECT EXAMINATION
19 BY MR. DORSEY:
20 Q. Going back to the letters of interest that had been
21 received by the Debtors following the Lazard sale process,
22 the highest amount that was indicated in those letters was
23 how much?
24 A. $250 million.
25 Q. The amount of the outstanding secured debt at that time

1 was how much?

2 A. It's really the question of what will it be when we

3 emerge and that could be as high as $320 million. You've got

4 to consider, I need that $60 million, so you have to add that

5 on top of it. So its $320 million.

6 Q. And under the terms of the PSA you were asked about,

7 pursuing these opportunities, does the PSA allow the Debtors

8 to pursue a transaction that would pay off the secured debt?

9 A. Yes, it does.

10 MR. DORSEY: Thank you, Your Honor.

11 THE COURT: Anybody else?

12 MR. BALDWIN: Real quick.

13 RECROSS EXAMINATION

14 BY MR. BALDWIN:

15 Q. That $250 million dollar indication of interest, was that

16 for an abbreviated 30 day sales process, correct?

17 A. Yes.

18 Q. With no formal due diligence having been connected,

19 correct?

20 A. Yes.

21 THE COURT: All right, thank you. You may step

22 down.

23 MR. BRADY: Your Honor, the Debtor has no additional

24 testimony.

25 THE COURT: All right, does anybody else in support

1 of the DIP, does the Committee have any evidence to present?
2 MR. POHL: No more than the cross we just did.
3 THE COURT: Okay. I'll hear argument then.
4 MR. BRADY: Thank you, Your Honor, again Robert
5 Brady, for the record, for Boomerang Tube. Your Honor, you
6 got the background, the whole story. I think what you heard
7 was the Debtors came really close, really close to an out of
8 Court restructuring first and really close to a prepackage
9 bankruptcy, but did not get there.
10 So we are here today under the current structure.
11 We are in the midst of a valuation at the present time and
12 the Court will have that before the hearing on the PSA and
13 the hearing on a disclosure statement. Again, the plan filed
14 with the consent of the term lenders currently provides a
15 blank for the treatment of general unsecured creditors until
16 we see what the Lazard valuation provides.
17 What we are here today on are seeking orders, final
18 orders on our proposed DIP financing. The Committee devotes
19 a substantial portion of their objection and on the cross
20 today on this prepetition timeline and they attempt to paint
21 an elaborate scheme by a couple economic parties in the case
22 to use the downturn in the oil industry to swoop in and steal
23 the value of this company for themselves and leave unsecured
24 creditors with nothing. The Debtors, the term lenders,
25 Access all filed pleadings and responses. I think we

1 corrected the Committees' version of events, Your Honor.
2 The Committee had deposed Mr. Nystrom before they
3 filed their objection and a number of the statements they
4 made in that objection just simply weren't true about Black
5 Diamonds involvement and the point in time when they came in.
6 Mr. Nystrom, the only witness, Your Honor, today. So I think
7 in argument we are going to hear a lot of innuendo,
8 speculation about what happened, but for the record today we
9 only have Mr. Nystrom's testimony.
10 So let me tell you what you didn't hear, Your Honor.
11 If you didn't see it in their objection, you didn't hear it
12 today is that any argument that the Debtors don't require
13 this financing to continue to operate and to avoid
14 liquidation. Mr. Nystrom's testimony supports, fully, that
15 the Debtor needs this money or faces liquidation. You did
16 not hear, you didn't see it in the objection, you didn't hear
17 it today, any credible argument that an alternative source of
18 DIP financing exists for this Debtor. Mr. Nystrom's
19 testimony supports that this was shopped, five different
20 parties were contacted, no one was prepared to put a
21 different financing package before the Debtors.
22 So the Committees overall complaint, really, raised
23 in the objection is aimed at the PSA and potential recoveries
24 under the plan, rather than the propriety of these DIP
25 facilities. We made it clear in our papers, though, Your

1 Honor, and today that the issues with the PSA and the plan
2 are in flux. Again, the Debtors have an ongoing valuation
3 and that will be available before the Court considers either
4 the disclosure statement or the plan support agreement.
5 I said it before we started the hearing today, Your
6 Honor, to the extent that that valuation shows unsecured
7 creditors are out of the money, we will proceed with a plan
8 that provides that, but the Committee will be free to
9 challenge that valuation. They will be free to come to
10 confirmation and put in evidence that the valuation is wrong.
11 But if that Lazard valuation says the unsecured creditors are
12 in the money, frankly, Your Honor, we are back to the
13 negotiating table. It's a place we have been since February,
14 as you've heard, and we will be back there. But the Court
15 will have ample opportunity to hear about the Debtors'
16 restructuring efforts, how we got here, at the disclosure
17 statement hearing, at the hearing on the assumption of the
18 PSA and, ultimately, at confirmation.
19 The Committee will tell you today that if you sign
20 these DIP orders, you are putting the Debtors on a path where
21 they have to confirm a plan that wipes out value for the
22 general unsecured creditors and there is nothing you can do
23 about it, but that's, obviously, not the case, Your Honor.
24 The Court will have the final say of whatever plan the
25 Debtors' pursue and whether it meets the confirmation

1 standards of the bankruptcy code. The Committees' arguments
2 and ability to challenge the plan are fully preserved.
3 What today is about is getting the funding necessary
4 to continue the restructuring effort and to keep these
5 companies operating. When you take away all the posturing,
6 really by all sides, at the bottom you have a handful of DIP
7 financing issues that are commonly brought before this Court
8 for decision. I suggest we really focus on those today, Your
9 Honor, because, again, no one is here today saying that the
10 Debtor need DIP financing.
11 So let's walk through some of the objections raised
12 by the Committee. One is that the DIP is really an effort to
13 control the case, that approval of the DIP is a *de facto*,
14 approval of the PSA. The Committee attempts to vilify a
15 number of these milestones and termination events, but really
16 most of them are very common, Your Honor. They are commonly
17 bargained for protections by lenders and, therefore,
18 legitimate business reasons.
19 The Debtor did not cede control to the term lenders
20 in this case, but rather agreed to milestones, and this is
21 from Mr. Nystrom's testimony, agreed to milestones in order
22 to obtain financing to avoid liquidation. That is what the
23 Debtors' board determined to do; the same board that also
24 insisted that there be a valuation before the treatment of
25 unsecured creditors was filled out in the plan. There is a

1 fiduciary out here, Your Honor. If someone comes forward and
2 provides a proposal that pays off the debt, the Debtor is
3 free to pursue that, free to provide information to those
4 parties, free to continue that process. No one has come
5 forward anywhere near what the debt would be.
6 THE COURT: Well, is that a fiduciary out, if their
7 first offer has to be more than the secured debt?
8 MR. BRADY: It's a non-binding proposal. The
9 fiduciary out does not require that it be a committed
10 proposal, Your Honor, it simply says somebody has to come
11 forward and put an expression of interest in, fully subject
12 to diligence that they would pay more than the debt of this
13 company. The lenders have put that in there, Your Honor. I
14 think you heard it from Mr. Nystrom because it's a cost
15 factor. Mr. Nystrom said between the $3 million dollar
16 Lazard and $2 million dollars a month of additional cost, you
17 are talking $5 to $7 million dollars of additional cost.
18 The one thing you didn't hear in any of Mr.
19 Nystrom's testimony is that throughout the negotiation
20 process of the out of Court or the prepack, that anyone
21 involved really thought that the company could achieve a
22 value greater than the debt. The recovery to unsecured
23 creditors in those agreements was really a gift for the good
24 of the business, for the good of the business that the term
25 lenders would ultimately own under these proposals. But no

1 one, there was no data point that the company looked at and
2 still has not seen a single data point that someone is out
3 there that would pay more than this debt. But if there is,
4 if somebody would put a piece of paper in front of the
5 Debtors that said we will pay the debt, non-binding, we are
6 permitted, at that point, to start sharing information with
7 them.
8 As a practical matter, Your Honor, whether there is
9 a PSA or not, the Debtors have to move forward on a plan
10 process. The financing we have, $60 million dollars of new
11 money, a little more then $50 million dollars of actual
12 liquidity when you pay off the bridge loan, we must get to a
13 point in this case where we can confirm a plan before we
14 exhaust that funding, where the Debtors would find itself
15 unable to reorganize at that point. So, again, whether is a
16 PSA or not, there is a limited amount of time, based on the
17 funding the Debtors have, to get to a plan. So we have to get
18 started on that.
19 The standard for the Court today, the Committee
20 throws out that this is an entire fairness standard case.
21 The reason they do is because, as you heard, Access employees
22 are four of the seven members of the board. You didn't hear
23 anything about from the Committee, but you heard from Mr.
24 Nystrom that there are three independent directors. Those
25 three independent directors have been deeply engaged and

1 involved every step of the way. This not an LA Dodgers case,
2 Your Honor. I was Debtors' counsel in the LA Dodgers case
3 and I know quite well the Court's primary ruling in that was
4 that Major League Baseball had offered an unsecured DIP and
5 under the code a Debtor can't go forward on secured financing
6 when unsecured financing is available.
7 The second component of that ruling was that Mr.
8 McCourt was a dominant figure in the Debtors' decisions and
9 selecting one DIP eliminated some personal liability of Mr.
10 McCourt whereas selecting a different DIP did not. The Court
11 found that based on Mr. McCourt's dominant role and the fact
12 that one DIP eliminated personal liability, the other didn't,
13 that an entire fairness should be applied. There are no such
14 facts here, Your Honor. We have independent directors and we
15 didn't have a choice. There is no other DIP out here for it
16 to choose from. The board was presented with one DIP
17 financing package, notwithstanding the shopping effort of Mr.
18 Nystrom, and this is it. It is liquidation or sign the DIP.
19 This thought that Access, somehow, is part of some
20 scheme with Black Diamond to take control of the company, I
21 think you have already heard, under this proposal, Access is
22 81 percent equity interest is wiped out under this plan.
23 Access has been, and still is, the term lender. It's simply
24 participating as a passive participant in the term under, I
25 think it's, a 6.5 percent interest in the term. So to

1 somehow believe that Access is prepared to go forward with a
2 plan that wipes out their 81 percent interest so that they
3 can get 6.5 interest just doesn't make any sense, Your Honor.
4 Now turning to some of the more common DIP elements
5 that the Court is used to addressing, the objections of the
6 challenge period. Sixty days in there, Your Honor, that's
7 fairly common in this jurisdiction. The budget was
8 originally $25,000.00 from the term. I reported at the
9 beginning they raised that to $50. That with the $50 of the
10 ABL takes it to $100. I believe the Committee is okay with
11 that. They asked for automatic standing.
12 What the term lenders have given them is if they
13 file a standing motion within the 60 days that tolls the
14 period, Your Honor. So that does provide them with some
15 additional time to get into Court if they think there is
16 something there. Also, the order provides that the period
17 can be extended for cause. So they will have an opportunity
18 to come before the Court if for some reason they think that
19 period should be extended.
20 The lien on and super priority claim on estate
21 causes of action; no credible dispute, Your Honor, that this
22 is $60 million dollars of new money to fund the operations of
23 the Debtors and the Chapter 11 process. The term lenders
24 have confirmed for the Committee they are not seeking a lien
25 or super priority claim as adequate protection. They are

1 just seeking it with respect to the new money and the DIP.

2 The Debtors have no material unencumbered assets.

3 Mr. Nystrom testified to that, to provide as collateral for

4 this new money. Obviously, the lenders are faced with

5 significant business risk, including this continued down turn

6 in the oil and gas industry and Mr. Nystrom's testimony that

7 oil recently dropped another $10.00 a barrel.

8 So, again, the lien on claims, estate causes of

9 action, is only on the new DIP. Again, the Committee is

10 fairly emphatic in their objection that they think that the

11 unsecured's are in the money, that the value is there that

12 exceeds the debt. If that is the case, this is much ado

13 about nothing because the lenders are over secured and the

14 creditors are in the money.

15 The questions about the releases, Your Honor, that

16 they are too broad, too early in the case, I think it's clear

17 in the documents, they are all subject to the investigation

18 period, but the term lenders have clarified that the releases

19 are solely in their capacities as such. So we are not

20 talking about a situation, I think they raise about Access as

21 the equity sponsor or members of the board. This is only in

22 their capacities as lenders, as the term DIP lenders and,

23 therefore, I think that narrowly tailors those releases and

24 their pretty commonly granted in this jurisdiction.

25 Adequate protection, sort of a global objection from

1 the Committee that there is just too much adequate
2 protection. We are talking about roll-ups and cross
3 collateralization. I think they have settled with the ABL on
4 the roll-up feature, so we are really talking about cross
5 collateralization. Again, Your Honor, $60 million dollars of
6 new money, more than $50 million dollars of liquidity here.
7 We think it's appropriate because it's limited to diminution
8 and value as a form of adequate protection. Again, remember
9 when the Debtors negotiated this, they were dangerously low
10 on case. I think Mr. Nystrom said they were out of cash and
11 were facing almost certain liquidation without a cash
12 infusion. The cross collateralization features, subject to
13 the investigation rights, this DIP was widely shopped, as Mr.
14 Nystrom indicated.
15 Payment of professional fees, again dealing with the
16 term here now because I think any issues with respect to the
17 ABL was resolved. It provides for payment of the agents and
18 one outside counsel; that would be Skadden for Black Diamond.
19 The term lenders have made the revision they said they would
20 in their objection that they now have included language that
21 to the extent payment of prepetition professional fees is
22 ultimately determined inappropriate due to the unsecured
23 nature of the term lenders position, the secured portion of
24 the claim will be reduced by such amount of disgorged if the
25 Court finds that the term lenders do not have a lien worth as

1 much as the amount of prepetition fees. So there is a review
2 period on this, Your Honor, while they got the fees for the
3 prepetition counsel, the term lenders have put in a
4 protection mechanism if that turns out not to have been
5 providently granted.
6 506(c), 552(b) waivers, the Committee says they are
7 inappropriate here. The main reason is because the case
8 doesn't benefit anyone but the term lenders, but, obviously,
9 Your Honor, I think you heard today this case benefits a lot
10 more people than just the term lenders. The critical vendors
11 over $7 million dollars of payments will go out, 503(b)(9)
12 Claimants, employees, other priority Claimants, parties to
13 assume the agreements, vendors, customers. I think you heard
14 on direct that the budget that is proposed does cover the
15 anticipated operating expenses and cost of this Chapter 11,
16 all being funded by the lenders. As a result, Your Honor, we
17 think 506(c), 552(b) waivers are appropriate.
18 Credit bid, Your Honor, people the [indiscernible]
19 Fisker, but this has nothing to do with Fisker. In that case
20 there was a question whether the lender was perfected in
21 certain assets. Here there is an investigation period. So
22 really the credit bid right is subject to the investigation
23 period. If they find some flaw in the perfection, obviously
24 that would be accounted for and any right to credit bid.
25 This is well settled under 363(k), the Submicron decision and

1 others that a secured creditor can bid up to the full face
2 value of their secured claims.
3 Again, obviously, if there ever is a situation where
4 the term lenders would have to credit bid, that investigation
5 period will have run. We will know whether there is any flaw
6 in their secured status and that would impact any right to
7 credit bid. So we think that's a standard protection, again,
8 subject to the investigation rights.
9 I didn't get into the fees and the cost of the DIP,
10 the terms lenders did that extensively in their objection,
11 but, again, you heard Mr. Nystrom's testimony. The Debtors
12 negotiated all of these points hard, did not have any
13 competing proposal to leverage against, negotiated the best
14 deal it could and, I think, based on the analysis from the
15 term lenders, this is within the range of reasonableness for
16 a financing package, but, again, it's not as if the Debtor
17 had another alternative.
18 So, Your Honor, to sum up, we had one witness today.
19 Those are the only facts in evidence for purposes of this
20 hearing. We are here on financing that no one disputes we
21 need and no one has come forward with another package.
22 Really, the decision for today is if no DIP financing, the
23 Debtors would be forced to liquidate and we know at that
24 point the unsecured creditors are out of the money. Keeping
25 the company operating, keeping the financing in place allows

1 for the valuation to be done, allows for negotiations to
2 happen and allows us to see what the treatment of unsecured
3 creditors will be. At that point, if the Committee doesn't
4 like it, they will be free to present those arguments to the
5 Court.
6 THE COURT: Thank you.
7 MR. JOWERS: Good morning, Your Honor, Austin Jowers
8 on behalf of Cortland. When these cases were filed, Your
9 Honor, the company was completely out of money. It had
10 generated $20 million dollars in negative EBITDA for the
11 first five months of this year and that was between negative
12 $3 and $6 million EBITDA for each of those months.
13 Companies' revenues are down substantially, 60 percent as
14 compared to last year. If the company's budget projections
15 are right, the picture doesn't get a whole lot prettier in
16 the short term.
17 In fact, this company is projected to burn through
18 between $40 and $50 million dollars in cash while these cases
19 are going on and that is net or restructuring fees; that's
20 operating losses. That is largely because the company is
21 operating in the most challenging oil and gas industry in
22 decades. Just in the month since this case has been filed,
23 the price of oil and gas has dropped by $10.00 a barrel.
24 China, the world's second largest consumer of oil, has seen
25 their stock market lose 30 percent of its value and just last

1 week there was a deal announced with Iran that may result in
2 even more oil flooding the market. It doesn't get a lot
3 uglier then where we are right now.
4 In the face of all that, the term lenders are still
5 here and they are still willing to make a $60 million dollar
6 loan to this company, a loan that I would point out, that
7 based on the liquidation analysis that was filed by the
8 company is most likely under secured on day one, on a net
9 liquidation basis. The pleadings filed with the disclosure
10 statement show that that is a net liquidation value of the
11 term lender collateral of $45 million dollars.
12 Notwithstanding all of this risk, the DIP loan has an
13 interest rate that is only half a percent higher than the
14 prepetition term loan and has a closing fee that is actually
15 100 basis points lower than the closing fee for the
16 prepetition term loan.
17 The protections that we are asking for in the DIP,
18 and I thought Mr. Brady did a great job of walking you
19 through in how these are no different than those that have
20 been approved in dozens and dozens of cases in this Court and
21 others, and you can see the voluminous sites and the
22 pleadings that we have filed with respect to that. Yes, the
23 DIP financing does contain milestones that are tied to a plan
24 process. That is not something we are trying to hide and not
25 something that we are trying to deny, but this is a plan

1 process that was mapped out and negotiated in good faith
2 between the lenders and the company based on the $60 million
3 dollar DIP funding that has been committed by the lenders to
4 run these cases. That $60 million dollars has a very finite
5 life and it's important for the lenders to know that they
6 will continue to be on a path that will allow the company to
7 exit these cases prior to the time that the DIP financing is
8 exhausted.
9 Your Honor, the Committees' primary attack on the
10 DIP loan is based on a false narrative and is based on an
11 incomplete and often inaccurate timeline in their pleadings.
12 The Committee would have the Court believe that the DIP loan
13 the plan process are the result of some scheme carried out by
14 Black Diamond; that Black Diamond swooped in, cancelled an
15 ongoing sale process and then started taking hyper aggressive
16 actions that resulted in the unsecured's getting left out in
17 the cold. That is simply not consistent with the facts.
18 If you look at the facts, you will see that many of
19 the term lenders actions that the Committee complains about
20 occurred at a time before Black Diamond was there or held a
21 significant amount of the loans. You will also see that
22 Black Diamond acted consistently with the other term lenders
23 in this case throughout the process. Specifically, Black
24 Diamond didn't unilaterally cancel or shorten the original
25 Lazard prepetition sale process and Black Diamond didn't

1 unilaterally switch from a prepackaged plan that paid
2 unsecured creditors in full to a prearranged plan that
3 didn't.
4 With respect to that prepetition sale process, that
5 30 day process was put in place by the term lenders at a time
6 when Black Diamond only owned 1 percent of the debt and was
7 not a member of the steering committee. The lenders
8 agreement to fund that process was an accommodation granted
9 to the company's board in the context of a prepackage plan.
10 The board wanted to test the waters, go out, see what would
11 happen in a short process as a matter to insulate them
12 against potential attacks from minority shareholders.
13 There was never any belief on the part of the
14 lenders, the company, any of the professionals as was
15 testified to by Mr. Nystrom today that a full sale process
16 would ever result in proceeds that were --
17 THE COURT: I'm not sure he said that. He did not
18 testify there was no way they would ever come up with --
19 MR. JOWERS: Fair, Your Honor.
20 THE COURT: He didn't say what the lenders
21 believed or what anybody else believed.
22 MR. JOWERS: That is correct, Your Honor. I did
23 ask him whether he thought the process would result in
24 proceeds that would clear the debt and he said that he did
25 not. That was the testimony. With respect to the plan

1 process, itself, I do think it's important for the Court to
2 understand that the term lenders, as Mr. Nystrom testified,
3 debated for quite a while and he gave them information to
4 help them with their debate before Black Diamond was evolved
5 as to whether this would be a prepackaged plan or a
6 prearranged plan.
7 It's true that the term lenders came before Black
8 Diamond was involved, reached an agreement on a prepackaged
9 plan in early May, and that Black Diamond came in at that
10 time and started asking for more information to determine
11 whether that was the appropriate route. Specifically, they
12 asked for more information the SBI equipment lease. I will
13 be very frank, Your Honor, I have been living with this
14 matter around the clock for two months before this process,
15 before Black Diamond got involved. Until Black Diamond got
16 involved, I don't ever recall hearing the name SBI and we
17 certainly weren't discussing that lease on any of the calls
18 we were having with the company.
19 THE COURT: Please don't testify now, okay.
20 MR. JOWERS: Sure, Your Honor. But after a short
21 review of that lease, Mr. Nystrom did testify that the
22 various professionals and the company came to the conclusion
23 that they believed it was a disguised financing and they
24 believed that that property was worth about in the
25 neighborhood of $4 million dollars. He also testified that

1 the stream of payments under that lease, if it were treated
2 as a true lease, would be around the neighborhood of $16
3 million dollars. Based on this new information, as Mr.
4 Nystrom testified, he, Black Diamond and others went to try
5 and negotiate a settlement with SBI.
6 THE COURT: I've heard the testimony. Just tell
7 me what the point is.
8 MR. JOWERS: Well, I think the point here is that
9 the narrative that the lenders are trying to do something
10 inappropriate, the facts are not consistent with the
11 Committees' narrative on that point.
12 THE COURT: Okay.
13 MR. JOWERS: As for the plan, the Committee has
14 said and would have this Court believe that approving this
15 DIP is, effectively, approving the plan process and a plan
16 process that would only benefit the term lenders. I believe
17 Mr. Brady, you know, eloquently said it's not true it would
18 only, you know, help the term lenders here, it would help
19 many people. The $7.5 million dollars of critical vendor
20 payments have already been approved. That's over 10 percent
21 of the budget. It's going to keep 350 people employed. It's
22 going to continue to preserve relationships with the
23 customers and vendors in this case.
24 Second, approving the DIP financing isn't a fate
25 of *fait accompli* with respect to the plan process. The

1 company will still be required to demonstrate value and
2 satisfy, you know, the requirements of 1129 of the Bankruptcy
3 Code. The lenders strongly believe that based on the facts
4 that have been demonstrated today, that there is no need for
5 a full 60 to 90 day sale process that is going to cost, as
6 testified to today, between somewhere north of $5 million
7 dollars. The lenders believe that that can be supported by a
8 valuation expert that is far less expensive at the
9 confirmation hearing.
10 Ultimately, and this is the important point that
11 Mr. Brady raised, is the Committee will have their day in
12 Court on that issue. If Your Honor says you haven't
13 demonstrated value, you haven't satisfied the provisions of
14 the code, we are going to be left with a tough choice. It's
15 going to be do we cut a deal with the Committee or do we
16 begin to call a default under our loan and exercise new
17 remedies. That is part of the reason we are here today, is
18 to make sure that if we end up in that second scenario, that
19 we are not going to leave the estate in a worse place.
20 We provided a very significant carve out, $5
21 million dollars of budgeted professional fees, $75,000.00 for
22 a wind down after any default is called and we believe that
23 in light of that, there is going to be no harm to the
24 unsecured creditors if we get to the end and, unfortunately,
25 we have been wrong about what we need to do to prove

1 valuation in these cases, Your Honor. Thank you.
2 THE COURT: Thank you.
3 MR. POHL: Good afternoon again, Your Honor,
4 Steven Pohl from Brown Rudnick, proposed co-counsel for the
5 Committee. A couple of quick points before I get to my
6 presentation. Number one, I don't think I have ever stood up
7 before a Court and started down the path of innuendo. So you
8 are not going to hear any of that from me. Number two, I
9 think we heard from Mr. Brady exactly what I expected to hear
10 and I will address it. He said if we don't have money, we
11 liquidate, we don't have an alternative. The Court has heard
12 that probably many, many times in your career. I won't
13 address that. Three, after the case was filed, after we
14 filed our objection, we now have an offer that there is going
15 to be a valuation. Well that is great, you know, that's one
16 experts view. There will be another expert, but that is not
17 the real test of value, a sale is.
18 We know from the record that Black Diamond does
19 not want that sale. The Court is also quite familiar with
20 how these things work. It seems to me that the testimony of
21 additional cost today was quite convenient. I'm sure that
22 the Court understands the process is dual tracked and we have
23 management time per sales and we have people kicking the
24 tires. We don't end up having a whole new set of
25 professionals and a whole new additional set of fees just for

1 the sale that's dual tracked with a plan. So I would be a
2 little bit suspect on that.
3 We are told that the Debtor is free of its
4 fiduciary handcuffs because great, it can engage with folks
5 that make a bid for all the debt, but yet the keys to the
6 door are locked, no one can get in the door. So how does
7 someone make a bid for all the debt without being in the
8 door? That is just ridiculous.
9 Counsel for Black Diamond stood up and said, I'm
10 going to address this, this DIP was negotiated in good faith.
11 I wonder about that. The Board really wanted to do something
12 different, good faith with your head over a barrel and no
13 cash is not really good faith. I think the record is quite
14 clear, from Mr. Nystrom's testimony, that things shifted when
15 Black Diamond bought the debt; it's as simple as that, they
16 shifted, that is all we are really trying to show, nor
17 innuendo, they shifted.
18 THE COURT: Well, is it relevant? Is it really
19 relevant? We are where we are, whether or not it's because
20 Black Diamond got involved or not.
21 MR. POHL: I completely agree, Your Honor. I
22 completely agree and I am going to address what I believe is
23 relevant to what we are here for today. So we have been here
24 for three weeks, Judge. We have been hard at work and from
25 day one we did try to see if there was a deal to be had. We

1 do think that the Debtors would like to cut a deal. We will
2 see. We don't think Black Diamond does and maybe today will
3 give us something that helps us toward that progress.
4 We have made progress with the ABL lenders and I
5 don't think that was put on the record, so I should make it
6 clear because some of its relevant to the points that I will
7 make about the rest of the DIP with the term lenders. The
8 ABL lenders did agree to extend the timeline for the
9 Committee to investigate affirmative claims, separate and
10 apart from perfection analysis, which is not too complicated.
11 There is a lot more work to be done with respect to
12 affirmative claims.
13 They have agreed that triggers, potential defaults
14 under the DIP that are tied to the PSA, they won't act on
15 them unless and until the term lenders do. So we will sort
16 of stay in the case, sit behind the term lenders with respect
17 to the timeline. They have taken off the table their request
18 for this Court to do more then what the code says, but to
19 enter a finding and a ruling that they get to credit bid.
20 They are reserving that. The investigation budget, Mr. Brady
21 addressed, and we agree with that, 100 total is fine. It
22 certainly won't be enough, but we will deal with that at a
23 later time.
24 The ABL's have agreed to state something on the
25 record to the effect that they will engage in good faith

1 discussions with respect to the maturity of their loan.
2 Their maturity is 150 days from the petition date. Its 30
3 days outside the term. If we get to a point where we have to
4 push this off, we will have that discussion, nothing minute.
5 We have reserved for the moment. We will see where we go in
6 this hearing on the 506(c) and the 552 waivers.
7 So what, Your Honor, is our beef and what is it
8 that we would like the Court to do. So our beef is, as
9 you've heard, we don't like getting a zero. We don't like
10 the DIP being tied to the plan support agreement, which it
11 is. This plan support agreement in this case feels as much
12 as any other case as a foreclosure. That is what a zero case
13 is for unsecured's. If as the lenders allege, this is an
14 underwater case, then this is a foreclosure for their
15 benefit.
16 They say that lots of others are benefiting.
17 Well, let's think about that. They are benefiting exactly
18 those parties that they would have to benefit if they did
19 this outside of Court, without the benefit of the Bankruptcy
20 Court, without the benefit of the Bankruptcy Code. On top of
21 that, they wouldn't get the releases they want and they
22 wouldn't get handed to them the corporate structure that they
23 all want when they come into bankruptcy.
24 While there is nothing wrong with loan to own, we
25 hear it all the time, we hear it all the time, when you come

1 into Court with a zero for the "rest of the estate,"
2 notwithstanding this offer that there is going to be a
3 valuation, that just feels like it gets to the line, is over
4 the line, is it just this side of the line, it's really
5 pushing the line. On top of that the record is clear that
6 the plan that was negotiated, the DIP that was negotiated,
7 that we are hearing today, was forced upon the board because
8 the strings were cut out from underneath them. It was clear
9 that the board, itself, thought the process was flawed. They
10 wanted to continue with the sale process. They had very
11 little time to "shop the DIP." This was not a well shopped
12 DIP. This is a DIP that was a few phone calls to the hard
13 money lenders, no more than that.
14 I am going to skip the part about Access. We will
15 scrutinize their role. WE will address them solely with
16 respect to the DIP and the standards, but we suggest, Your
17 Honor that if Black Diamond wants to own this company and we
18 know that they control the term loan, then it's not we who
19 have stapled the plan support agreement, its they. If there
20 is going to be a change in control, the board needs to do
21 more. This will address in a month, but because we are tying
22 this to the DIP, the point being if there is a change --
23 THE COURT: There is nothing in the DIP that
24 requires me to approve the plan support agreement.
25 MR. POHL: No, there isn't, but there is plenty of

1 things in the DIP that are triggers that today, if the Court
2 approves the DIP, and the PSA has not been terminated. These
3 Debtors have to follow or the DIP will be subject to an event
4 of default.
5 THE COURT: It will be an event of default. There
6 is nothing wrong with that. That is not unusual. Take the
7 typical case. You got to have a sale process in 60 days or
8 it's an event of default.
9 MR. POHL: Okay.
10 THE COURT: I'm struggling with why that's a
11 problem. I am not approving the plan support agreement. I am
12 not confirming the plan. If they are wrong, there is an event
13 of default 60 days from now. What is the problem with that?
14 The Debtors bought 60 days.
15 MR. POHL: Well, Your Honor, if this were a real
16 DIP, we would have a little bit more time than that.
17 THE COURT: I'm not sure you would.
18 MR. POHL: Okay.
19 THE COURT: In recent cases --
20 MR. POHL: Okay. Well, let's talk about the DIP
21 and the milestones and the points that we think are wrong
22 with the DIP. Number one, and this has been addressed
23 already, there is an extremely narrow fiduciary out, okay.
24 So if this Court approves the DIP, its tied to a plan support
25 agreement which says that nobody, nobody can get into the

1 data room. Today we know that there are already people that
2 are looking to get in the data room.
3 THE COURT: Okay.
4 MR. POHL: So that is a control feature, Your
5 Honor that while it may be customary, I don't think it's
6 customary in cases where there is a zero for the trade. So
7 we don't like the milestones that are tied to the plan
8 support agreement.
9 THE COURT: Okay.
10 MR. POHL: That's number one. We have tied up
11 this company so they can't even consider another plan. That
12 may have to do with the fact that we have Access on the
13 board. Everybody knows that we could come up with a plan,
14 potentially, that is a [indiscernible] style plan, with a
15 plan support agreement that says no other plan with Access on
16 the board, and in the term, and in the DIP, how are we ever
17 going to have our fiduciary consider other plans. We are
18 not. That is going to be in today, with the DIP, with the
19 PSA in place. What else would we like to level the playing
20 field, Your Honor?
21 We have talked about the investigation. With
22 respect to the term lenders, we need more time on affirmative
23 claims with the investigation for the term lenders. We were
24 okay with the 60 days, with respect to the perfection, but we
25 are not okay with 60 days for affirmative claims. Avoidance

1 actions that may be all we have here. There has been an
2 offer made that with respect to avoidance actions, the term
3 lenders don't want it for the prepetition debt, but only for
4 the real money new DIP. That might be useful if there was
5 some sort of marshaling requirement so that they don't walk
6 away, up front, with any avoidance action proceeds, apply it
7 towards the DIP and then the rest of the collateral is left
8 for the prepetition. So, in effect, they give it from one
9 hand and take from the other. So I don't think that's an
10 offer.
11 In light of a case where we are not getting
12 anything else, and this is not really a third party DIP where
13 new money lender needs to come in and have that, we think
14 under some of the other cases where avoidance actions have
15 not been granted, this Court has done the same. We have
16 indicated that in our papers. Judge Gross has done the same
17 in Trump, recently, and Judge Sontchi, some years ago, in
18 Joann Fabrics. With respect to the waivers, again, because
19 we see this, at least at the moment, Your Honor, as a strict
20 foreclosure for the benefit of Black Diamond, other Court's
21 in this District, including again Judge Gross in Trump, have
22 denied, at this point, an early stage with a fast case the
23 waivers, the 506(c) waiver and the 552 waiver.
24 Legal fees, okay, let's just be precise what we
25 are talking about here. If as the lender suggests this is an

1 underwater case, then an underwater secured creditor under
2 506(b) is not entitled to have its legal fees paid. So what
3 do we have here? We have prepetition legal fees, a couple
4 million dollars that were paid as part of the interim; that
5 would be not allowable under 506(b). We do have fees
6 associated with the DIP. I get it. Those can be paid, but a
7 lot of this case is not going to be run just for the DIP.
8 It's going to be run for the benefit of the prepetition
9 secured lenders, 506(b) and Timbers say you don't get that.
10 Now, what will they say in response? Well, its
11 customary adequate protection. We negotiate that all the
12 time as a proxy for adequate protection. Other Courts have
13 said no, that doesn't quite work. You can't end a run with
14 506(b) with a deemed stipulation on adequate protection when
15 you don't come into Court, prove diminution and there is no
16 evidence that the legal fees that you are incurring are
17 associated with the diminution. More to the point here, to
18 what end? How flexible is that?
19 In this case, we happen to have two law firms, one
20 for the agent and one for one of the lenders, Black Diamond.
21 So is that standard, you just get to pick how many law firms
22 you want. That's adequate protection? We would suggest,
23 Your Honor that that's not the standard and payment of legal
24 fees associated with the prepetition term debt should not be
25 permitted. The Court in Trump, not in this jurisdiction, in

1 a prior Trump case Judge Wizmur held exactly that way.
2 Credit bid, again, we think the code is sufficient
3 here. It says what it says. They can rely on that. This
4 sticks out a bit like a sore thumb because it's these lenders
5 that have shut down the sale process. They don't want it to
6 happen. If and when there is a sale process, we can revisit
7 the question of whether they ought to be entitled to credit
8 bid their prepetition debt.
9 Roll-up, again, if this is a case for the benefit
10 of just the lenders, why are we rolling up any of the term
11 debt. They have come in and said we need $60 million, here
12 is our $60 million. Well, we took 10 percent of that on day
13 one and paid off the prepetition debt of the bridge advance.
14 Well, we shouldn't do that. We should just leave it at a
15 lower number so we have less of a hurdle.
16 The only point I would make on the economics, Your
17 Honor, if we were ever to be able to open this case up to a
18 sale process, which we think we ought to be able to do, at
19 least to let people come in and kick the tires to see if
20 there is anyone that would pay more than the debt is the exit
21 fee of some $2.5 million dollars of a term debt, I believe,
22 and, I think, the lesser amount closer to a $1 or $1.2 on the
23 ABL if those are paid off prior to maturity, there is your
24 early payment fee. That seems like a chill to any potential
25 alternative plan or any potential for a sale process.

1 What are the DIP standards? They are all in our
2 papers. It's got to be fair and reasonable. It's got to be
3 in the best interest of all creditors and must be fair
4 dealing and at arm's length. We would suggest, as well, that
5 the Debtors' proposal to get it approved, via the business
6 judgment rule, is undermined by the decision in the LA
7 Dodgers case. That decision is not dependent just on the
8 fact that there was an alternative DIP available. It was
9 focused on the fact that the DIP lender, as proposed, was an
10 insider and, therefore, had to be considered on the entire
11 fairness standard.
12 Here, Access, an insider, is in control of the
13 board, is a member of the term loan syndicate and is a
14 participant in the DIP. We would suggest, Your Honor, that
15 that puts it in the entire fairness standard. Nonetheless,
16 we think that even under the business judgment standard and
17 the regular standards that this is not fair and reasonable
18 for the various reasons that are just, as I think Your Honor
19 would suggest DIP related, and in our view tied to the plan
20 support agreement, which even as we are here today, isn't
21 even an inked deal, if you will, because it's completely open
22 as to what the Debtors are required to do by way of recovery
23 for unsecured's.
24 So 30 days has past, more than 30 days has passed
25 since this case was filed June 9th. Had the sale process

1 continued, we would be well along the way. A few more months
2 of this case, giving us an opportunity to see if there is a
3 real market test versus just fighting people's views on
4 valuation, we don't think will cost a lot and we think it's
5 something that should be afforded to the creditors. If you
6 give me one moment, Your Honor, I will see if I have anything
7 else to add. That's all I have, Your Honor.
8 THE COURT: Thank you.
9 MR. DOWNS: Good afternoon, Your Honor, Jeremy Downs
10 for Wells Fargo Capital Finance. I warn you in advance that
11 this may be much more boring than what you've otherwise heard
12 today. But with respect to the ABL DIP I could go through
13 some specific changes.
14 THE COURT: No I don't want to talk about that. I
15 want to hear about the remaining objections that you have,
16 anything on.
17 MR. DOWNS: There is, Your Honor, and that goes, I
18 think, only to the Committee's statement that they've
19 reserved their rights with respect to the surcharge and the
20 552(b) provision that's in our order. We've accommodated
21 them in every other regard that we got. We got to an
22 agreement with them on everything else. We've agreed to the
23 budget which contains, as we heard, all these expenses in
24 carve outs. We think it's appropriate generally and fair and
25 reasonable in this case.

1 THE COURT: All right thank you.
2 MR. DOWNS: Thank you.
3 MR. POHL: I should have added; I'm sorry. I didn't
4 address that. There was a budget that was originally filed
5 with the Court with only one line item for all professionals.
6 Last night, a new one was filed and we've been informed that
7 the line item for the Committee which we think is low will be
8 viewed as a combined line item with the Debtors for the
9 perspective of Debtors and Committee's professionals. And
10 with that, Your Honor, we'll be fine with the budget and
11 agree to pull our objections with respect to 506(c) and 552.
12 MR. DOWNS: I apologize, Your Honor. I made a
13 commitment to Committee counsel to make a statement regarding
14 maturity date and I didn't do that. And that is the
15 prepetition revolving loan lenders have agreed to respond
16 promptly in good faith to request by the Debtors to extend
17 the termination date from time to time providing that this
18 shall not be deemed to a commitment to any such extension or
19 forbearance. Thank you.
20 THE COURT: Okay.
21 MR. FOURNIER: Good afternoon, Your Honor, for the
22 record David Fournier on behalf of SB Boomerang Tubular.
23 Your Honor, as the Debtor noted in the agenda filed with the
24 Court we have worked out language for inclusion in both the
25 orders with respect to the protection of what the Debtors

1 have been calling SBI's interest under its lease. So, Your
2 Honor, that does resolve our limited objection. I just note
3 for the record, Your Honor, that counsel for Cortland did a
4 nice job of previewing their and the Debtors' view of the SBI
5 lease and the valuation of the equipment. It will come as no
6 surprise to the Court that SBI has a very different view of
7 those things. The parties are engaged in discovery on those
8 issues now and those will come before the Court at the
9 appropriate time.
10 THE COURT: All right.
11 MR. FOURNIER: Thank you, Your Honor.
12 MR. BRADY: Your Honor, one clarification then three
13 points and I'll sit down. With respect to the budget, the
14 budget that we filed was really filed to add the Lazard fee
15 for the valuation. All we did was break out the detail on
16 how we got to the budget and numbers for professionals fees.
17 But we have made it clear with the Committee that we would
18 view as combined the Debtors and the Committee, the estate
19 professional line items for purposes of the carve outs. We
20 weren't attempting to cap the Committee at any specific line
21 item for their fees.
22 I think I heard counsel for the Committee say that
23 they're good on 506(c) and 552(b) now, at least, with respect
24 to the ABL. Is that also with respect to the term?
25 MR. POHL: Yes.

1 MR. BRADY: Okay thank you. So, Your Honor, again,
2 now just three points. The sale fees if we were to go with
3 the sale process Lazard's fee under its engagement letter is
4 $3 million dollars, so we do know at a minimum regardless of
5 what other costs would be incurred to start Lazard on a sale
6 process as a $3 million dollar fee.
7 THE COURT: And what is their evaluation fee?
8 MR. BRADY: It's a $150,000.00 a month. It's a
9 monthly fee. And we started them on July 1. So at this
10 point we'll have a valuation in August. We would need them
11 obviously for testimony so they would be in through
12 confirmation as well, but it's a $150,000.00.
13 On the shopping of the DIP I heard Mr. Pohl say that
14 this was not a well shopped DIP. We'll just stand on the
15 testimony of Mr. Nystrom. We think it was well shopped.
16 And on the fiduciary out, Your Honor, just to update
17 the Court on some discussions the Committee advised us and
18 the term lenders that there were parties who were still
19 interested in looking at the company. They asked the term
20 lenders to waive any condition that the Debtor have to
21 providing information to allow the Debtors to go forward.
22 The term lenders did respond and indicated they'd like to
23 know who those parties are and what they're asking for, and
24 they would consider any requests by the Debtors for a waiver
25 under the current fiduciary out that a party come forward

1 with an expression of interest and excessive debt.

2 So these discussions are happening among the

3 Debtors, the term lenders and the Committee. And so to the

4 extent there is someone out there who's interested and who

5 might come to a point where they could pay off the debt, we

6 would make a waiver request for the term lenders. They've

7 already given us one in connection with the valuation one.

8 And so we would do that and you know I think at that point

9 the Debtors would be able to pursue providing diligence to

10 interested parties; again, under certain circumstances with

11 the consent of the term lenders.

12 So the process does have a way of working. It's not

13 sort of a just a door shut. If people are coming forward the

14 Debtors would have an opportunity to seek a waiver and then

15 provide that information.

16 MR. POHL: Just one response, Your Honor, on the

17 fees. We're not beholding to Lazard since they're not today

18 doing a sale process. Lots of hungry bankers out there. I'm

19 pretty confident that we can find one much less; perhaps,

20 even the Committee's advisor. Thank you.

21 THE COURT: Anybody else. Well let me give some

22 preliminary thoughts. I think in a discussion with counsel

23 from the Committee I made it clear I'm not sure that their

24 argument that the fact that the DIP is "tied to the PSA" that

25 results in the Unsecured Creditors getting zero is a

1 convincing argument. There's nothing wrong with the DIP
2 that's paying only for a sale process or a process where the
3 result will be the DIP lenders will end up owing the company.
4 There's nothing that requires a buyer to pay anything to the
5 unsecured's if it feels that the enterprise does not have
6 that value.
7 What Courts do require is that any process in the
8 bankruptcy case has to include the commitment to pay for the
9 cost of that process. And I think that this DIP does. It
10 pays for the administrative expenses or all expenses that are
11 anticipated to accrue during the period of the process and
12 that is, I think, all that is required. But I am concerned
13 with the restrictions on the Debtors' ability to pursue
14 alternatives to the PSA either through a sale or through
15 another plan.
16 The Debtor has a fiduciary duty to consider all
17 options and I will direct the Debtor to fulfill that duty. I
18 am concerned; in fact, I direct the Debtor to answer any
19 questions from anybody expressing any interest in the company
20 either through a sale or through a competing plan. I think
21 that it is inappropriate for anybody to tie the Debtors'
22 hands with respect to that.
23 I cannot require the lender to pay the costs of a
24 full sale process. But that has to be balanced against the
25 Debtors' fiduciary duty. And if anybody expresses any

1 interest in the Debtor, the Debtor must allow due diligence,
2 must allow access to the data room that has been established,
3 must keep that data updated, must allow management and site
4 visits if requested to anyone who's interested in buying the
5 Debtor. Whether or not they have a bid that's enough to pay
6 the secured lenders in full or not, that's not for me to
7 decide today. It's for me to decide if a competing offer is
8 made. And at that time the Debtor in its fiduciary capacity,
9 the Committee in its fiduciary capacity and the Court can
10 determined whether any competing offer is higher or better or
11 can, otherwise, be crammed down if it's through a plan
12 process.
13 With respect to the issue on the lien on avoidance
14 actions, I have said this before. While a party can tie a
15 DIP or is not required in proposing a DIP to propose any
16 payment to Unsecured Creditors either in a plan or in a gift,
17 right now the avoidance actions belong to the Unsecured
18 Creditors. There is no lien on them. And I have said before
19 and I'll say it now the Creditors Committee has a choice.
20 I will not grant a lien on them. And if the DIP
21 lender will not lend, I will convert the case today, because
22 the Unsecured Creditors will be assured they at least have
23 those. So I'm going to leave it up to the parties to discuss
24 that, but I'm not inclined to grant a lien over the objection
25 of the Unsecured Creditors.

1 While the DIP lenders suggest that they have to be
2 given collateral in order to give the DIP, I think that it's
3 clear that the DIP lenders have other motives for giving the
4 DIP and that is to allow the process to proceed so that the
5 plan that they are supporting can be confirmed. But I'll
6 take a break in a minute and allow the parties to decide
7 whether they do or do not want to proceed with that 506(c)
8 and 552 waivers as moot that's been settled or the objection
9 has been withdrawn.
10 With respect to the credit bid 363(k) gives
11 creditors the right to credit bid. And in the absence of
12 evidence such as presented in Fisker and other cases that is
13 sacrosanct. I haven't the facts presented to me to date to
14 show there's any reason to suggest that the credit bid should
15 not be afforded. But I don't think I need to decide that at
16 this point. There may be additional evidence presented to
17 convince me otherwise, but for now I'm not going to preclude
18 any credit bid.
19 With respect to the fees I'm not concerned with any
20 of the fees except I agree on the early payment fee. That
21 might chill alternative bids. And so I have some concern
22 about that. But, again, I'll let the parties talk about what
23 would or would not be appropriate. But I'm concerned about
24 anything that requires competing -- I'm concerned with
25 putting in today through the DIP anything that would chill

1 alternative bids. And I see that exit fee as being something
2 that does possibly do that.
3 With respect to the payment of the professional fees
4 of the lenders, I think that that is appropriate to the
5 extent that there is a challenge to their position that can
6 be disgorged or otherwise dealt with if they're only
7 partially not perfected or partially avoided. So I think
8 I've covered everything. But as I said I will give the
9 parties time to talk about it before rendering a final
10 ruling. So let's take 15 minutes. If you need more, let me
11 know. All right we'll stand adjourned.
12 [Recess 1:15:48 - 1:43:56]
13 MR. BRADY: Thank you, Your Honor, Robert Brady on
14 behalf of the Debtors for Boomerang Tube. Good news, Your
15 Honor, we're not converting the case.
16 THE COURT: Well darn it.
17 MR. BRADY: Let me just go through the points in
18 Your Honor's preliminary ruling. In connection with the
19 Debtors' duty and direction by the Court to honor information
20 request and provide access diligence, site visits, etcetera,
21 Debtors are more than prepared to do that, Your Honor. Just
22 one clarification as a fiduciary the Debtor may make certain
23 decisions in dealing with competitors or other sensitive
24 customer information and the like with some restrictions on
25 potentially interested parties.

1 What we would propose to do is keep the Committee
2 and the term lenders and the ABL informed. If there's anyone
3 who's come forward asked for anything and we've denied in any
4 way, we'll tell them who and why. And if someone has a
5 problem with that and we can't work it out, we can always
6 come back to Your Honor.
7 THE COURT: That's fine.
8 MR. BRADY: The line and super priority on avoidance
9 actions, both lenders have agreed to remove that as
10 collateral. So neither order will provide a lien or super
11 priority claim on the avoidance actions of the Debtors. And
12 with the term pre-payment fee, Your Honor, they've agreed to
13 not seek that today, will not be in the order. What they
14 would like to do is reserve the right that if circumstances
15 arise where they think that fee may be appropriate to bring a
16 motion before the Court and have it heard in those
17 circumstances, but it's not going to be approved as part of
18 this order.
19 THE COURT: Okay.
20 MR. BRADY: So I think that resolved Your Honor's
21 preliminary ruling. And I know from the Committee they do
22 want to check in with Your Honor on the investigation period
23 with respect to the term lenders because Your Honor did
24 specifically address it and they'd like to raise it.
25 THE COURT: Okay.

1 MR. POHL: Your Honor, we had described the
2 arrangement we reached with the ABL's which was to keep the
3 60 days for perfection review and they extended until the
4 plan objection deadline affirmative claims. What we were
5 asking for with respect to the term was something similar.
6 We're fine with the 60 days for perfection analysis, but you
7 know we're already three weeks into what would be a total of
8 eight weeks and we have to do discovery. So we would like
9 more time on the affirmative claims and we've asked the term
10 lenders and they've rejected. So we're just looking for a
11 ruling on that if the Court just didn't tell us that or maybe
12 you denied our request. So if you did, I apologize for
13 suggesting otherwise.
14 THE COURT: I did not deal with it so let me hear
15 from the term --
16 MR. JOWERS: Your Honor, my only response to that
17 and you've heard you know the various theories of the case
18 today there, you know, the Committee's views and the
19 Committee's potential plans with respect to the term lenders
20 prepetition behavior, even post-petition behavior needs to be
21 vetted fairly quickly in the context of the path we're
22 heading now, so I don't think we have a lot of flexibility to
23 extend that beyond the 60 days that we have in the order
24 already, Your Honor.
25 THE COURT: Well let me do this I will give an

1 additional 30 days without prejudice to ask for more. But I
2 think I agree it's got to be decided sooner rather than later
3 if that's going to be an issue in this case. So I'll give
4 you the 30 days but I may not give you more.
5 MR. JOWERS: Your Honor, would the additional 30
6 days just be with respect to the affirmative planning --
7 THE COURT: Exactly with respect to the affirmative
8 only.
9 MR. JOWERS: Thank you, Your Honor.
10 MR. BRADY: Your Honor, with that it's going to take
11 us a little while to work on the orders. We probably won't
12 have them over today. We'll shoot for Monday. The good news
13 is we're still okay operating under the interim order, so we
14 have a little time to work on that and get it to Your Honor.
15 THE COURT: All right. Then we'll stand adjourned
16 and I'll look for that to come over on Monday.
17 MR. BRADY: Thank you, Your Honor.
18 (Court Adjourned)
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1 CERTIFICATE

2

3 I certify that the foregoing is a correct transcript from the

4 electronic sound recording of the proceedings in the above-

5 entitled matter.

6

/s/Mary Zajaczkowski   July 19, 2015

7 Mary Zajaczkowski, CET**D-531   Date

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EXHIBIT C

Excerpts from July 28, 2014, Hearing in *In re FHA Liquidating Corp. (f/k/a Fisker Auto. Holdings, Inc.)*, Case No. 13-13087 (KG) (Bankr. D. Del.)

1
2 UNITED STATES BANKRUPTCY COURT
3 DISTRICT OF DELAWARE
4 Case No. 13-13087(KG)
5 -x
6 In the Matter of:
7
8 FAH LIQUIDATING CORP., ET AL.,
9 f/k/a FISKER AUTOMOTIVE HOLDINGS, INC.,
10
11 Debtors.
12
13 -x
14
15 United States Bankruptcy Court
16 824 North Market Street
17 Wilmington, Delaware
18
19 July 28, 2014
20 10:05 AM
21
22 B E F O R E:
23 HON. KEVIN GROSS
24 U.S. BANKRUPTCY JUDGE
25 ECR OPERATOR: GINGER MACE

1 note that -- Wanxiang, in particular, I think, is a good
2 example of being entitled to a contra -- entitled is the wrong
3 phrase -- but the exculpation, as Your Honor pointed out, is
4 part of an overall negotiation and a settlement which resolved
5 what could've otherwise been significant if not potentially
6 catastrophic litigation, certainly, for unsecured creditor
7 recoveries. And Wanxiang, in that settlement, though, is not
8 simply taking a payment and walking away but contributing
9 significant value to the debtors at the same time in the form
10 of both claims waivers and then an enhanced warranty program
11 which is directly administered by Wanxiang itself, not the
12 Chapter 11 estates and is something that Fisker car owners, I
13 think, have been vocal about from the beginning which is
14 something that they very much wanted into the plan and Wanxiang
15 is committed to do in a materially enhanced way.
16 THE COURT: All right. Thank you, Mr. Dahl. Anyone
17 else wish to be heard on this point?
18 Mr. Baldiga?
19 MR. BALDIGA: Not on the exculpation.
20 THE COURT: Not on exculpation. Very well.
21 Well, I do recognize that colleagues of mine in this
22 court have found that the exculpation clauses that appear in
23 plans are applicable only to fiduciaries, but I don't think
24 that in those cases they had quite the circumstances that we
25 have here, and I think this is what the Third Circuit meant

1 when it spoke of particular circumstances. And the particular
2 circumstances are a very significant contribution by Wanxiang
3 which protects the unsecured creditors and protects, as well,
4 car owners who will benefit from the enhanced warranty program.
5 And under those circumstances, I think that the exculpation
6 provision is appropriate and is permissible.
7 Wanxiang has played a particularly key role in
8 this -- in this bankruptcy case, and I think to reject its
9 desire for an exculpation clause would really, I believe, not
10 give recognition to all of the benefits that the debtors'
11 estates have received as a result of Wanxiang's activities in
12 the case. And I certainly am not telling people and not ruling
13 that in other cases an exculpation provision would be applied
14 to a nonfiduciary. I think that it has to be extremely
15 restricted, as we're doing here, to an exceptional situation,
16 and I think that Wanxiang has satisfied the particular
17 circumstances, very exceptional circumstances, situation. So
18 I'll overrule that objection.
19 MR. DAHL: Thank you, Your Honor. I did want to note,
20 though, for the record --
21 THE COURT: Yes.
22 MR. DAHL: -- that Hybrid, as a nonestate fiduciary,
23 would also be included.
24 THE COURT: Forgive me. And Hybrid as well has
25 also -- thank you, thank you. I did not mean to restrict it to

1 Wanxiang and I'm glad you raised that point.

2 You know, Hybrid came in with different expectations

3 in this case, and rather than fight to the end which would have

4 only, I think, driven expenses very high and reduced recoveries

5 for creditors, Hybrid worked with everyone to resolve its

6 issues. And I think that under those circumstances it, too,

7 satisfies a particular circumstances test and I will also

8 permit that exculpation provision as applicable to Hybrid.

9 MR. DAHL: Thank you, Your Honor.

10 THE COURT: Thank you, Mr. Dahl.

11 MR. DAHL: Your Honor, then moving to what may be the

12 last open issue and as I'll discuss we really don't think it's

13 necessarily an issue that's a confirmation issue. And before I

14 do, I did want to note that -- and reiterate my prior

15 statements which is that the debtors could not be more pleased

16 than we are today having a fully consensual plan supported by

17 every layer of our capital structure and, frankly, every major

18 creditor constituency.

19 This has been a tremendous accomplishment. There's

20 been a significant amount of work that's gone into it from all

21 involved, certainly, the Court itself, and we appreciate the

22 burdens that sometimes we have present duly placed on the Court

23 but we are very pleased to be here. So --

24 THE COURT: I'm pleased to have you here under these

25 circumstances, Mr. Dahl.

1

2 C E R T I F I C A T I O N

3

4 I, Ellen S. Kolman, certify that the foregoing transcript is a

5 true and accurate record of the proceedings.

6

7 July 30, 2014

8 ______________________ ______________

9 ELLEN S. KOLMAN DATE

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EXHIBIT D

Excerpt from July 10, 2014, hearing in *In re Laboratory Partners, Inc.*, Case No. 13-12769 (PJW) (Bankr. D. Del.)

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

IN RE:	.	Chapter 11
	.	
LABORATORY PARTNERS, INC., et al.,	.	Case No. 13-12769 (PJW)
	.	824 North Market Street
Debtors.	.	Wilmington, DE 19801
	.	
	.	Thursday, July 10, 2014
. . . .	.	3:02 p.m.

TRANSCRIPT OF DEBTORS' MOTION FOR ENTRY OF AN ORDER PURSUANT TO 11 U.S.C. § 1121(D) FURTHER EXTENDING THE EXCLUSIVE PERIODS DURING WHICH ONLY THE DEBTORS MAY FILE A CHAPTER 11 PLAN AND SOLICIT ACCEPTANCES THEREOF; DEBTORS' THIRD MOTION PURSUANT TO BANKRUPTCY CODE SECTION 105(A) AND BANKRUPTCY RULES 9006(B) AND 9027 FOR ORDER ENLARGING THE TIME TO FILE NOTICES OF REMOVAL OF RELATED PROCEEDINGS; DEBTORS' FIRST AMENDED JOINT CHAPTER 11 PLAN
BEFORE THE HONORABLE PETER J. WALSH
UNITED STATES BANKRUPTCY COURT JUDGE

APPEARANCES:

For the Debtor:	Morris, Nichols, Arsht & Tunnell, LLP By: ROBERT J. DEHNEY, ESQ. ERIN R. FAY, ESQ. 1201 North Market Street P.O. Box 1347 Wilmington, DE 19899-1347
	Pillsbury Winthrop Shaw Pittman, LLP By: LEO T. CROWLEY, ESQ. MARGOT P. ERLICH, ESQ. 1540 Broadway New York, New York 10036

(Continued)

ECRO:	Michael Miller
Transcription Company:	Ad Hoc Transcription, LLC 241 Sussex Avenue Newton, New Jersey 07860 (888) 516-5553 www.adhoctranscription.com

Proceedings recorded by electronic sound recording, transcript produced by transcription service.

1 THE COURT: Okay.
2 MR. SCHEPACARTER: Can I add one point, Your Honor?
3 I'll be very brief. Very brief.
4 There's been an assertion that without any evidence
5 that Marathon would walk away from the plan, that it would
6 become somehow unconformable, that they would object to the
7 plan but there's been no evidence on the point. I just wanted
8 to highlight that for Your Honor. Thank you.
9 THE COURT: Okay. Anyone else wish to be heard?
10 MS. SLIGHTS: Your Honor, I promise to be brief, too.
11 Ellen Slights with the U.S. Attorney's Office on behalf of CMS.
12 I just wanted to withdraw the objection that CMS did file to
13 the plan. It is based on the language that was put in to
14 Paragraph 38.
15 I also just wanted to mention to Your Honor we have
16 tried very hard to catch all of the provisions that are
17 inconsistent with this language that are in the plan and order
18 confirming plan and I think we've got them but just in case, if
19 there's anything where there's the conflict, 38 does embody the
20 agreement that we had with the debtors. So I just wanted to
21 put that on the record.
22 Thank you so much.
23 THE COURT: Okay. The exculpation is unusual but the
24 secured lenders' activities in this case I won't say they're
25 unprecedented in my career but it surely is very unusual, and I

1 thought this was going to be a liquidation case when it was
2 filed. That's been avoided and I think that Marathon was a
3 contributor to that result, and therefore, I think the
4 exculpation is appropriate.
5 What else do we have?
6 MR. CROWLEY: I think we're ready to ask you to sign
7 the confirmation order at this point.
8 THE COURT: Okay. I have it. I'll sign it. If I
9 can find the original. I have it.
10 (Counsel confer.)
11 MR. CROWLEY: Your Honor, Beckman Coulter, as you
12 know, they objected to the sale. They've been engaged in
13 dialogue with us every since then and we've reached what I
14 would describe as an agreement in concept or an agreement in
15 principle that would result in -- we don't have it reduced to a
16 signed writing yet but that would in effect result in the
17 debtors' agreements with Beckman Coulter being modified in
18 accordance with the price schedule that I think is pretty much
19 agreed and then being assumed as modified and then being
20 assigned in connection with the long-term care transaction.
21 THE COURT: Okay. All right. I'll sign the
22 confirmation. We stand in recess.
23 MR. SCHEPACARTER: Thank you, Your Honor.
24 MR. POSNER: Thank you, Your Honor.
25 (Concluded at 3:47 p.m.)

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7 **C E R T I F I C A T I O N**

8 I certify that the foregoing is a correct transcript

9 from the electronic sound recording of the proceedings in the

10 above-entitled matter.

11

12

13 Kathleen M. Price DATE: July 18, 2014

14 Kathleen Price, AAERT Cert. No. 325

15 Certified Court Transcriptionist

16 AD HOC TRANSCRIPTION, LLC

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EXHIBIT E

Excerpt of the September 9, 2015, Deposition of Don Wagner

(Filed Under Seal)

EXHIBIT F

SBI Financing Agreement

EQUIPMENT LEASE AGREEMENT

This Equipment Lease Agreement (this "Lease") is dated as of February 18, 2011, by and between SB Boomerang Tubular, LLC, a Texas limited liability company ("Lessor"), and Boomerang Tube LLC, a Delaware limited liability company ("Lessee"). This Lease replaces and supersedes in all respects the Equipment Lease Agreement entered into by the parties on September 16, 2010.

In consideration of the mutual covenants contained in this Lease, and for other good and valuable consideration, the receipt and sufficiency of which are acknowledged, the parties agree as follows:

1. **Purchase of Equipment**. Lessor will purchase the equipment listed in attached Exhibit A (the "Equipment") from F&D Furnaces, LLC (the "Manufacturer"), pursuant to a purchase contract between Lessor and the Manufacturer (the "Purchase Contract").

2. **Lease of Equipment**. Lessor agrees to lease to Lessee, and Lessee agrees to lease from Lessor, in accordance with the terms and conditions set forth herein, the Equipment set forth in attached Exhibit A.

3. **Delivery**. The Manufacturer will deliver the Equipment directly to Lessee at Lessee's manufacturing facility located at 1100 FM 3361 in Liberty, Texas 77575 (the "Facility"). Lessor hereby authorizes one or more employees of Lessee, to be designated by Lessee, as the authorized representative or representatives of Lessor to accept delivery of the Equipment at the Facility. If Lessee refuses to accept any Equipment that is conforming, free of defects and fully operational, Lessee agrees to indemnify and hold harmless Lessor from any claims or losses, including court costs and attorneys' fees, arising out of Lessor's purchase of the Equipment at Lessee's request.

4. **Certain Definitions**.

(a) "Accrued Interest" means the product obtained by multiplying (i) the product of (x) 12% divided by 365 and (y) the actual number of days in the Installation Period, and (ii) the product of Equipment Cost less the Advance Payment and 66.67%.

(b) "Equipment Cost" means the total cost Lessor will pay the Manufacturer for the Equipment, which amount is expected to be approximately $13,000,000.

(c) "Installation Costs" means all costs and expenses associated with the installation of the Equipment at the Facility, which amount is expected to be approximately $3,000,000.

(d) "Installation Period" means the time period beginning on the date hereof and ending on the day before the Lease Commencement Date.

(e) "Lease Commencement Date" means the earlier to occur of (i) the date that installation and commissioning of all of the Equipment at the Facility is complete or (ii) six (6) months following the Manufacturer's delivery of the Equipment to Lessee at the Facility.

(f) "Total Cost" means the sum of Equipment Cost and Accrued Interest.

(g) "UCC" means the Uniform Commercial Code as enacted in the state of Texas.

5. **Installation Period.**

(a) During the Installation Period, Lessee will properly install the Equipment at the Facility in accordance with instructions provided by the Manufacturer. Lessee will use commercially reasonable efforts to install the Equipment according to an installation schedule agreed to by both parties.

(b) Lessee is responsible for and agrees to promptly pay when due all Installation Costs. Lessor will in no way be liable for any Installation Costs, including any amounts in excess of the expected Installation Costs.

(c) Lessee will provide Lessor with written notice of the Lease Commencement Date within five (5) business days of such date.

(d) Lessor will provide Lessee with written notice of Lessor's calculation of Total Cost within thirty (30) days of the Lease Commencement Date.

(e) Lessee will commence lease payments to Lessor within thirty (30) days of the Lease Commencement Date.

6. **Lease Term; Lease Payments; Advance Payment.**

(a) The lease term will begin on the Lease Commencement Date and continue for a period of seven (7) years (the "Lease Term").

(b) During the Lease Term, Lessee will make monthly lease payments ("Lease Payments") to Lessor equal to an amount that would yield an internal rate of return of 12% per annum on the Total Cost. A detailed Lease Payment schedule will be prepared by Lessor and approved by Lessee upon Lessor's final payment for the Equipment. Lessee will make the first scheduled Lease Payment no later than thirty (30) days after the Lease Commencement Date, and Lessee will make each successive monthly Lease Payment no later than thirty (30) days after the beginning of each month after the Lease Commencement Date. Lessee will make all Lease Payments by wire transfer of immediately available funds to an account designated by Lessor or as otherwise agreed in advance by Lessor.

(c) Lessee will pay to Lessor a non-refundable advance payment in the following amounts and upon the following dates: $1,000,000 upon execution of this Lease; $1,000,000 on or before July 30, 2011; and $500,000 upon successful commissioning and final acceptance of the Equipment by Lessee (collectively, the "Advance Payment"). The Advance Payment shall be made by Lessee by wire transfer of immediately available funds to an account designated by Lessor. The Advance Payment will be applied towards and reduce the amount of Lease Payments owed to Lessor during the final two years of the Lease Term (with the Advance Payment being applied in 24 equal increments to the monthly Lease Payments due during the sixth and seventh years of the Lease Term).

(d) If Lessee fails to make any Lease Payment within ten (10) days of the date such payment comes due, Lessee must pay Lessor a late charge equal to 1% of any such amount plus interest on such amount calculated at an interest rate of 1% per month prorated for the number of days late and the expenses of any collection agency, service or attorney employed by Lessor to collect such payments.

7. **Purchase and Sale Options.**

(a) *First Purchase Option.* For a period of six months beginning on August 7, 2012, Lessee shall have the option (the "First Purchase Option") to purchase the Equipment from Lessor for a purchase price equal to (i) all outstanding principal under the Lease payment schedule attached hereto as Appendix A (the "Lease Payment Schedule") and accrued and unpaid interest, if any, up to the purchase date, plus (ii) an amount equal to 35% of Total Cost. Lessee may exercise the First Purchase Option by giving written notice to Lessor at any time within the sixth month period.

(b) *Second Purchase Option.* For a period of 45 days immediately following the second anniversary of the Lease Commencement Date, Lessee shall have the option (the "Second Purchase Option") to purchase the Equipment from Lessor for a purchase price equal to (i) all outstanding principal under the Lease Payment Schedule and accrued and unpaid interest, if any, up to the purchase date, plus (ii) an amount equal to 35% of Total Cost. Lessee may exercise the Second Purchase Option by giving written notice to Lessor at any time within the 45 day period immediately following the end of the second year of the Lease Term.

(c) *Third Purchase Option.* For a period of 45 days immediately following the third anniversary of the Lease Commencement Date, Lessee shall have the option (the "Third Purchase Option") to purchase the Equipment from Lessor for a purchase price equal to (i) all outstanding principal under the Lease Payment Schedule and accrued and unpaid interest, if any, up to the purchase date, plus (ii) an amount equal to 40% of Total Cost. Lessee may exercise the Third Purchase Option by giving written notice to Lessor at any time within the 45 day period immediately following the end of the fourth year of the Lease Term.

(d) *Options Following Lease Term.* At the end of the Lease Term, the parties may (a) renew this Lease or (b) enter into a new lease, in either case on terms mutually agreeable to both parties. If the parties fail to either renew this Lease or enter into a new lease, then (a) Lessor may require Lessee to purchase the Equipment for a purchase price equal to 50% of Total Cost (the "Sale Option") or (b) Lessee may require the Lessor to sell the Equipment for a purchase price equal to 50% of Total Cost (the "Final Purchase Option" and, together with the First Purchase Option, the Second Purchase Option and the Third Purchase Option, the "Purchase Options"). Lessor may exercise the Sale Option or Lessee may exercise the Final Purchase Option by providing written notice to the other party no later than 180 days prior to the last day of the original Lease term.

(e) Lessee agrees to purchase the Equipment from Lessor upon Lessor's exercise of the Sale Option and Lessor agrees to sell the Equipment upon Lessee's exercise of any of the Purchase Options. Any sale of the Equipment from Lessor to Lessee will be "where is," "as is," and without representation or warranty. Upon any such sale and purchase this Lease shall be

terminated and of no further force and effect and all liens and security interests created hereby or pursuant hereto shall be automatically and forever satisfied, released and discharged without further action, and Lessor shall promptly execute and deliver Uniform Commercial Code termination statements (and, to the extent permitted under the Uniform Commercial Code in effect in any relevant jurisdiction, does hereby authorize the Lessee and its counsel from and after such sale and purchase to file such termination statements) and such other instruments of release and discharge pertaining to such liens and security as Lessee may reasonably request to effectuate, or reflect of public record, the release and discharge of all such security interests and liens.

8. **Representations and Warranties of Lessee.** Lessee represents and warrants to Lessor as follows:

(a) Lessee is a limited liability company duly organized, validly existing and in good standing under the laws of the State of Delaware and has all required limited liability company power and authority to enter into this Lease and to carry out the obligations contemplated hereby.

(b) The execution, delivery and performance of this Lease have been duly authorized by the governing authority of Lessee and no other action on the part of Lessee is necessary. The execution and delivery of this Lease and the performance of any obligations set forth herein does not and will not: (i) violate, conflict with, or result in a default under any contract or obligation to which Lessee is a party or violate or conflict with any provision of the organizational documents of Lessee; (ii) violate or result in a violation of, or constitute a default under, any provision of any applicable law; (iii) require from Lessee any notice to, registration or declaration or filing with, or consent or approval of, any governmental authority or other third party; or (iv) accelerate any obligation under, or give rise to a right of termination of, or constitute a material breach of, any agreement, permit, license or authorization to which Lessee is a party or by which Lessee is bound.

(c) This Lease is a valid and legally binding obligation of Lessee and is enforceable against Lessee in accordance with its terms, subject to applicable bankruptcy, reorganization, insolvency, moratorium and similar laws affecting creditors' rights generally and to general principles of equity.

9. **Representations and Warranties of Lessor.** Lessor represents and warrants to Lessor as follows:

(a) Lessor is a corporation duly organized, validly existing and in good standing under the laws of the State of Texas and has all required corporate power and authority to enter into this Lease and to carry out the obligations contemplated hereby.

(b) The execution, delivery and performance of this Lease have been duly authorized by the governing authority of Lessor and no other action on the part of Lessor is necessary. The execution and delivery of this Lease and the performance of any obligations set forth herein does not and will not: (i) violate, conflict with, or result in a default under any contract or obligation to which Lessor is a party or violate or conflict with any provision of the organizational documents of Lessor; (ii) violate or result in a violation of, or constitute a default under, any

provision of any applicable law; (iii) require from Lessor any notice to, registration or declaration or filing with, or consent or approval of, any governmental authority or other third party; or (iv) accelerate any obligation under, or give rise to a right of termination of, or constitute a material breach of, any agreement, permit, license or authorization to which Lessor is a party or by which Lessor is bound.

(c) This Lease is a valid and legally binding obligation of Lessor and is enforceable against Lessor in accordance with its terms, subject to applicable bankruptcy, reorganization, insolvency, moratorium and similar laws affecting creditors' rights generally and to general principles of equity.

(d) Lessor shall purchase the Equipment from the Manufacturer free and clear of any lien or encumbrance. Lessor shall further provide to Lessee a bill of sale or other like documentation evidencing Lessor's ownership of the Equipment within a commercially reasonable time period after delivery of the Equipment to the Facility but no later than six (6) months after delivery.

10. **Title.** The Equipment is and at all times during the term of this Lease will remain Lessor's sole and exclusive personal property. Lessee will have no right, title or interest in the Equipment, other than the right to maintain, possess and use the Equipment during the Lease Term, but only if and so long as Lessee complies with all of the terms and conditions of this Lease. Lessee agrees to keep the Equipment free and clear of all levies, liens and encumbrances during the Lease Term.

11. **Status of Parties; Security Interest; UCC Filings.**

(a) The parties intend to create a lease on the Equipment, and not a conditional sale. To provide solely for the eventuality that a court might hold this to be a conditional sale, Lessor hereby retains a purchase money security interest to secure payment of the sales price of the Equipment as determined by such court, and Lessee grants to Lessor all rights given to a secured party under Article 9 of the UCC in addition to Lessor's other rights hereunder.

(b) This Lease is intended to be a "finance lease" as defined in Article 2A of the UCC. Lessor has not selected, manufactured or supplied the Equipment. Lessee has selected the Manufacturer. Lessor is acquiring the Equipment in connection with this Lease and at the request of Lessee. Lessee has received a copy of and has approved the Purchase Contract before signing this Lease. Lessor advises Lessee that Lessee may have rights under the Purchase Contract and advises Lessee to contact the Manufacturer for a description of any such rights.

(c) To secure all of Lessee's obligations under this Lease, Lessee hereby grants to Lessor a second priority continuing security interest, which shall be subordinate to Wells Fargo Capital Finance, LLC's ("Wells Fargo") first priority security interest, in all of Lessee's right, title and interest in and to (i) the equipment described in attached Exhibit B (the "Collateral") and (ii) all rights, remedies and claims of Lessee with respect to the Collateral, whether now existing or hereafter at any time or from time to time arising. This Lease is conditioned upon Lessor, Lessee, Wells Fargo and Access Tubulars, LLC entering into a subordination or intercreditor agreement or agreements, in form satisfactory to Lessor, under which Access

Tubulars, LLC will subordinate its security interest in the Collateral and the Equipment to the security interest granted to Lessor under this Lease. Lessee represents and warrants that no person or entity other than Wells Fargo or Access Tubulars, LLC has or will have any security interest in the Collateral or the Equipment, and Lessee agrees not to sell or otherwise transfer any of the Equipment or the Collateral or permit any lien or material encumbrance thereon without the written consent of Lessor.

(d) Legend: This Lease and the liens and security interests evidenced hereby are subordinate in the manner and only to the extent set forth in that certain Subordination and Intercreditor Agreement (the "Subordination Agreement") dated as of February 18, 2011, among Lessor, Lessee, and Wells Fargo, to the liens and security interests of Wells Fargo securing the indebtedness (including interest) owed by Lessee pursuant to that certain Credit Agreement dated as of December 10, 2010, among Lessee, Wells Fargo and the lenders from time to time party thereto and the other Senior Debt Documents (as defined in the Subordination Agreement), as such Credit Agreement and other Senior Debt Documents have been and hereafter may be amended, supplemented or otherwise modified from time to time and to indebtedness refinancing the indebtedness under those agreements as contemplated by the Subordination Agreement; and each holder of this instrument, by its acceptance hereof, irrevocably agrees to be bound by the provisions of the Subordination Agreement. This subsection will automatically terminate and be of no effect upon termination of the Subordination Agreement.

(e) As an alternative to and relinquishment of the requirements and obligations set forth in Section 11(c) above, Lessee may instead, from time to time at any time during the term of this Lease, issue a standby letter of credit in Lessor's favor in the amount of $2,500,000 (the "Standby LC") to secure payments owed hereunder. Upon issuance of the Standby LC, all security interests and other liens granted to or held by Lessor pursuant to Section 11(c) above shall be automatically and forever satisfied, released and discharged without further action, and Lessor shall promptly execute and deliver Uniform Commercial Code termination statements (and, to the extent permitted under the Uniform Commercial Code in effect in any relevant jurisdiction, does hereby authorize the Lessee and its counsel from and after the issuance of the Standby LC to file such termination statements) and such other instruments of release and discharge pertaining to the security interests and other liens described in Section 11(c) above as Lessee may reasonably request to effectuate, or reflect of public record, the release and discharge of all such security interests and liens.

(f) To further secure all of Lessee's obligations under this Lease, Lessee hereby grants to Lessor a first priority continuing security interest in all of Lessee's right, title and interest in and to (i) the Equipment and all additions, attachments and accessions thereto, (ii) the insurance and other proceeds required to be secured by Lessee in Section 17 hereof to cover the Equipment and (iii) the Advance Payment.

(g) Lessee irrevocably appoints Lessor, its officers and employees, as Lessee's agent and attorney-in-fact, with full power in Lessor's or Lessee's name to execute and file all such financing statements and other documents as Lessor deems necessary or advisable hereunder. Lessee will execute or obtain and deliver to Lessor, upon Lessor's request, such instruments, financing statements and assurances as Lessor deems necessary or advisable for the protection or

perfection of this Lease and Lessor's rights hereunder and will pay all costs incident thereto. Lessee agrees that Lessor may file a reproduction of this Lease as a financing statement.

(h) Lessee will not change its name, identity or structure in any manner which might make any financing or continuation statement filed hereunder seriously misleading within the meaning of the UCC without Lessor's prior written consent.

12. **Personal Property; Location; Inspection**. The parties intend and agree that the Equipment will remain personal property and will not be deemed a fixture, and Lessor's title to the Equipment will not be impaired, notwithstanding the Equipment being affixed to any real property. Lessee will obtain and deliver to Lessor (to be recorded at Lessee's expense), from any landlord, mortgagee or other person having an interest in the property where the Equipment is to be located, waivers of any lien, encumbrance or interest which such person might claim with respect to the Equipment, in form and content satisfactory to Lessor. The Equipment must at all times be located at the Facility, and Lessee may not move the Equipment from the Facility without the prior written consent of Lessor. Lessor, or any employee or agent of Lessor, will have the right, at any reasonable time, to enter upon the premises where the Equipment is located for the purpose of confirming the existence, condition and proper maintenance of the Equipment. Lessor will have the right to affix labels to the Equipment in a prominent place to identify Lessor's ownership thereof. Lessee will not sell, attempt to sell or otherwise transfer the Equipment to any other person or entity.

13. **Disclaimer of Warranties and Remedies.**

(a) Lessee acknowledges and agrees that the Equipment is of a size, design and capacity selected by Lessee, that Lessor is neither a manufacturer nor a vendor of such equipment, and that LESSOR HAS NOT MADE, AND DOES NOT HEREBY MAKE, ANY REPRESENTATION, WARRANTY, OR COVENANT, EXPRESS OR IMPLIED, WITH RESPECT TO THE MERCHANTABILITY, CONDITION, QUALITY, DURABILITY, DESIGN, OPERATION, FITNESS FOR PARTICULAR USE OR PURPOSE, OR SUITABILITY OF THE EQUIPMENT IN ANY RESPECT WHATSOEVER OR IN CONNECTION WITH OR FOR THE PURPOSES AND USES OF LESSEE, OR ANY OTHER REPRESENTATION, WARRANTY, OR COVENANT OF ANY KIND OR CHARACTER, EXPRESS OR IMPLIED, WITH RESPECT THERETO, AND LESSOR WILL NOT BE OBLIGATED OR LIABLE TO LESSEE OR ANY OTHER PERSON OR ENTITY FOR ANY LIABILITY, CLAIM, LOSS, DAMAGE OR EXPENSE OF ANY KIND (INCLUDING STRICT LIABILITY IN TORT) ARISING OUT OF OR IN CONNECTION WITH THE USE OR PERFORMANCE OF THE EQUIPMENT AND THE MAINTENANCE THEREOF. Lessee agrees to look solely to the Manufacturer for any and all claims relating to the Equipment, and Lessee may not withhold or fail to make any Lease Payment due to Lessor hereunder. Lessor will not be liable for damages for any reason for any act or omission of the Manufacturer. LESSEE AGREES THAT AFTER THE EQUIPMENT IS COMMISSIONED LESSEE IS LEASING THE EQUIPMENT "WHERE-IS, AS IS" AND "WITH ALL FAULTS." Lessor assigns to Lessee during the Lease Term, so long as no event of default has occurred hereunder and is continuing, all Manufacturer's warranties, if any, with respect to the Equipment.

(b) To the extent permitted by applicable law, Lessee hereby waives any and all rights and remedies conferred upon a lessee by the UCC or other applicable law, including without limitation, Lessee's rights to (i) cancel this Lease; (ii) repudiate this Lease; (iii) reject the

Equipment or accept partial delivery of the Equipment; (iv) revoke acceptance of the Equipment; (v) recover damages from Lessor for any breaches of warranty; (vi) claim a security interest in the Equipment in Lessee's possession or control for any reason; or (vii) deduct from any amount Lessee owes Lessor all or any part of any claimed damages resulting from Lessor's default, if any, under this Lease. Notwithstanding the preceding sentence, Lessee does not waive any rights or remedies it may have against the Manufacturer. To the extent permitted by applicable law, Lessee also hereby waives any rights now or hereafter conferred by statute or otherwise which may require Lessor to sell, lease or otherwise use any Equipment in mitigation of Lessor's damages or which may otherwise limit or modify any of Lessor's rights or remedies under this Lease.

14. **Risk of Loss**. Upon final acceptance of the Equipment by Lessee following installation and commissioning, Lessee assumes and agrees to bear the entire risk of loss or destruction of or damage to the Equipment from any cause whatsoever, whether or not insured. No such loss or damage will relieve Lessee from any obligation under this Lease. In the event of damage to, loss or destruction of the Equipment, Lessee will notify Lessor in writing of such fact and will, at the option of Lessor, (a) repair the Equipment and restore it to good condition and working order or (b) replace the Equipment with like equipment in good condition and working order and transfer clear title to such replacement equipment to Lessor, whereupon such equipment will be subject to this Lease and be deemed to be the Equipment for purposes hereof.

15. **Absolute and Unconditional**. Lessee acknowledges and agrees that this Lease is non-cancelable and that Lessee's obligations to make all Lease Payments and to perform all other obligations under this Lease are absolute, irrevocable, unconditional and independent and will be made and performed without abatement, deduction, or offset of any kind or nature whatsoever.

16. **Use, Maintenance and Repair**. Lessee will at all times comply, and will ensure that the Equipment complies, in all material respects, with all applicable laws, codes, ordinances, regulations, insurance requirements and policies applicable to the installation and use of the Equipment and the performance by Lessee of its obligations under this Lease. Lessee will obtain and maintain all required federal, state and local permits necessary for storing and operating the Equipment. Lessee agrees to use the Equipment in the manner for which it was intended, solely for Lessee's business purposes, in accordance with all applicable manuals and instructions and in conformity with the terms and conditions of any insurance policy obtained on the Equipment. Lessee, at Lessee's own cost and expense, will keep the Equipment in good repair, condition and working order, ordinary wear and tear from proper use excepted, and will furnish all parts, maintenance and servicing required. All replacement parts and repairs made to or placed upon the Equipment will become the property of Lessor. Lessee may, with Lessor's prior written consent, make such modifications to the Equipment as Lessee may deem desirable in the conduct of its business, provided such modifications do not diminish the value or utility of the Equipment, or cause the loss of any warranty or insurance thereon or any certification necessary for the maintenance thereof. Lessee agrees to pay (on behalf of Lessor) all installation expenses referred to in the "Warranty" section of the Purchase Contract.

17. **Insurance**. Lessee agrees to keep the Equipment fully insured against theft and all risks of loss or damage from every cause whatsoever (showing Lessor as loss payee) for not

less than the fair market value of the Equipment, and Lessee will carry comprehensive general liability insurance (showing Lessor as additional insured) with a combined single limit of not less than $5,000,000 per occurrence or such higher amount as Lessor may at any time reasonably request. Lessee further agrees to provide, on behalf of Lessor, all insurance and insurance certificates required under the Purchase Contract. All insurance must be in a form and with companies reasonably satisfactory to Lessor. Lessee and Lessee's insurance company or companies will provide Lessor not less than thirty (30) days written notice of cancellation of any required insurance coverages. Lessee will pay the premiums for and be responsible for all deductible portions of all such insurance coverage. Lessee irrevocably appoints Lessor as Lessee's attorney-in-fact to make claim for, receive payment of, and execute and endorse all documents, checks or drafts in payment for loss or damage under any such insurance policies. Lessee agrees to provide Lessor with certificates or other evidence of insurance on the Lease Commencement Date and thereafter as requested by Lessor.

18. **Financial Statements.** Lessee shall furnish or cause to be furnished to Lessor (a) its annual financial statements, including balance sheets and income statements, within 90 days after each fiscal year end for the respective reporting period; (b) its quarterly financial statements (including balance sheets and income statements) as soon as available; and (c) with reasonable promptness, such interim financial statements of the Company, together with such additional information, reports or statements in connection therewith, as Lessor may from time to time reasonably request.

19. **Taxes.** The Lease Payments hereunder are net to Lessor, and Lessee agrees to pay when due all taxes (including, without limitation, all sales, use, rental, documentary, stamp, and personal property taxes), fees, assessments, fines, interest, penalties and similar charges imposed on Lessee or Lessor (except taxes based on Lessor's income) with respect to the Lease Payments hereunder, the Equipment, or the use of the Equipment, and Lessee will reimburse Lessor upon demand for any such taxes or fees Lessor has paid or advanced. Lessor will not be obligated to contest any valuation of or tax imposed on the Equipment or this Lease.

20. **Indemnity**. Lessee assumes liability for and agrees to indemnify, defend (if requested by Lessor) and hold harmless Lessor and its affiliates and its and their respective officers, directors, employees and agents from and against any and all claims, losses, liabilities (including negligence, tort and strict liability), damages, judgments, suits and all legal proceedings and any and all costs and expenses in connection therewith (including court costs and attorneys' fees and expenses) that arise out of or in any way relate to the Equipment or this Lease, including, without limitation, (a) the ownership of the Equipment, (b) the selection, manufacture, purchase, acceptance, rejection, delivery, installation, lease, possession, maintenance, use, condition, repair, return, operation or disposition of the Equipment, (c) any patent, copyright or trademark infringement, (d) any act or omission on the part of Lessee or any of its officers, employees, agents, contractors, lessees, licensees or invitees, (e) any misrepresentation or inaccuracy in any representation or warranty of Lessee, or a breach by Lessee of any of its covenants or obligations under this Lease, (f) any claim, loss, cost or expense involving damage to the environment, (g) any personal injury, wrongful death or property damage arising under any statutory or common law or tort law theory, or (h) any latent or other defects in the Equipment whether or not discoverable by Lessee or Lessor. Lessee agrees to give Lessor prompt notice of any such claim or liability.

21. **Default**. Any of the following events or conditions will constitute an event of default: (a) Lessee fails to make any Lease Payment or any other sum due to Lessor under this Lease after its due date and such failure continues for a period of ten (10) days; (b) Lessee fails to observe, keep or perform any other term, covenant or condition of this Lease and such failure continues for a period of ten (10) days; (c) Lessee abandons the Equipment or permits any other entity or person to use it without Lessor's prior written consent; (d) a writ of attachment or execution is levied upon the Equipment unless released, satisfied or stayed within ten (10) days of such levy; (e) Lessee files or an entity or person files against Lessee a petition under any bankruptcy or insolvency law of any jurisdiction unless, with respect to a petition filed against Lessee, it is dismissed within thirty (30) days; (f) Lessee fails to pay its debts when they become due; (g) the voluntary or involuntary making of an assignment for the benefit of creditors, the appointment of a receiver or trustee for Lessee or for Lessee's assets, the commencement of any formal or informal proceeding for dissolution, liquidation, settlement of claims against or winding up of the affairs of Lessee, or Lessee ceases doing business as a going concern; (h) any representation or warranty Lessee has made to Lessor pursuant to this Lease or any related document is incorrect or misleading in any material respect when made; (i) Lessee merges with or into another entity, enters into a joint venture (other than in the ordinary course of business), consolidates or sells all or substantially all of its assets without notifying Lessor in advance and obtaining Lessor's written consent; (j) Lessee uses or permits use of the Equipment in violation of applicable law or in a manner or place not covered by the required insurance policies; or (k) without the prior written consent of Lessor, Lessee attempts to remove, sell, transfer, encumber, part with possession, or sublet any of the Equipment.

22. **Remedies**. Upon an event of default under this Lease, Lessor may exercise any one or more of the following remedies: (a) enter the premises where the Equipment or the Collateral is located and take possession of it by summary proceedings or otherwise without liability to Lessee or others; (b) sell all or any part of the Equipment or the Collateral at public or private sales, with or without notice, or re-lease or otherwise dispose of it and apply the net proceeds of the sale, re-lease or other disposition (after deducting the costs and expenses of the sale or re-lease, such as costs of repossession, transportation, storage, repairs, broker's fees, and all of Lessor's legal charges for in-house and external legal services) to Lessee's obligations to Lessor under this Lease, with Lessee remaining liable for any deficiency; (c) immediately exercise the Sale Option; (d) declare immediately due and payable all amounts due and to become due under this Lease (including all amounts due upon Lessor's exercise of the Sale Option) and sue for and recover from Lessee all such amounts; and (e) exercise or pursue any other remedy at law or in equity, including specific performance and any remedies available to Lessor under the UCC. Neither Lessee's return of the Equipment nor Lessor's repossession of it will mean that Lessor has terminated or cancelled this Lease unless Lessor so notifies Lessee in writing. Lessee agrees to pay all of Lessor's costs and expenses incurred in exercising any of Lessor's rights or remedies or enforcing any of the terms and conditions of this Lease, including court costs and attorneys' fees. If Lessor obtains a judgment against Lessee, the amounts then due to Lessor will accrue interest at the then-prevailing judgment rate of interest under Texas law. Lessor's exercise of any right or remedy above does not preclude it from exercising any other right or remedy it may have, and Lessor may enforce them separately or concurrently. Lessee agrees to pay Lessor the cost of repair and storage of any Equipment returned to Lessor or repossessed by Lessor.

23. **Assignment**. Lessor may assign this Lease, and its assignee may further assign this Lease, without notice to or consent of Lessee. Any such assignee will succeed to all rights and obligations of Lessor hereunder. LESSEE MAY NOT ASSIGN, SUBLEASE, MORTGAGE OR OTHERWISE TRANSFER THIS LEASE OR ANY INTEREST HEREIN WITHOUT THE PRIOR WRITTEN CONSENT OF LESSOR, AND ANY SUCH TRANSFER OR ASSIGNMENT WITHOUT SUCH CONSENT WILL BE VOID. Title to the equipment subject to this Lease is retained by Lessor, and Lessee covenants that it will not pledge or encumber the Equipment in any matter whatsoever, nor permit any liens, charges, or encumbrances to attach thereto. Lessee will not abandon or relinquish possession of the Equipment to any party other than Lessor.

24. **Lessor's Payment**. In the event Lessee fails to pay any taxes or other amounts due under this Lease, or to procure the insurance required pursuant to Section 17 hereof, or to perform any of its obligations under this Lease, Lessor may, at its option, pay such amounts or perform such obligations. Lessee agrees to reimburse Lessor, upon demand, the amount of such payment or cost of such performance together with interest thereon at a per annum rate of interest equal to 12%.

25. **Exclusion of Certain Damages**. Each party waives all claims against the other party (and against the affiliates of each and their respective shareholders, officers, directors, agents and employees) for any consequential, incidental, indirect, special, exemplary or punitive damages (including loss of actual or anticipated profits). The foregoing waiver does not apply to any such damages included in a third party claim for which a party is entitled to indemnification under this Lease.

26. **Survival**. All indemnities, representations and warranties contained in this Lease will survive and continue in effect following the execution and delivery of this Lease and the expiration or termination of this Lease.

27. **No Waiver**. Time is of the essence in this Lease. Any failure or delay on the part of Lessor to exercise any remedy or right under this Lease will not operate as a waiver. The failure of Lessor to require performance of any of the terms, covenants or provisions of this Lease by Lessee will not constitute a waiver of any of Lessor's rights under this Lease. No forbearance by Lessor to exercise any rights or privileges under this Lease will be construed as a waiver, but all rights and privileges will continue in effect as if no forbearance had occurred. Acceptance by Lessor of any Lease Payment or other payments made by Lessee after default will not be deemed a waiver of Lessor's rights and remedies arising from Lessee's default. No covenant or condition of this Lease may be waived except by the written consent of Lessor. Any such written waiver of any term of this Lease will be effective only in the specific instance and for the specific purpose given.

28. **No Third-Party Beneficiaries**. This Lease is intended for the benefit of the parties hereto and their respective successors and permitted assigns and is not for the benefit of, nor may any provision hereof be enforced by, any other party.

29. **Construction**. The language used in this Lease will be deemed to be the language chosen by the parties to express their mutual intent, and no rules of strict construction will be applied against any party.

30. **Notices**. All notices and other communications hereunder must in writing and will be deemed to have been received only if and when (a) personally delivered, (b) on the third day after mailing, by United States mail, first class, postage prepaid or by certified mail return receipt requested, addressed in each case as listed below, (c) sent by facsimile to the fax number listed below or (d) sent by electronic mail to the email address listed below, or to such other place as each party may designate as to itself by written notice to the other party in accordance with this paragraph.

If to Lessor:

SB Boomerang Tubular, LLC
3626 North Hall Street, Suite 910
Dallas, Texas 75219
Attention: JP Wu
Fax: (214) 526-1503
E-mail: JP@sbisteel.com

With copy to:

SB Boomerang Tubular, LLC
3626 North Hall Street, Suite 910
Dallas, Texas 75219
Attention: Michael Fielding
Fax: (214) 526-1503
E-mail: MFielding@sbisteel.com

If to Lessee:

Boomerang Tube LLC
14567 North Outer Forty, Suite 500
Chesterfield, Missouri 63017
Attention: Gregg Eisenberg
Fax: 636-534-5567
E-mail: geisenberg@boomerangtube.com

With copy to:

Boomerang Tube LLC
14567 North Outer Forty, Suite 500
Chesterfield, Missouri 63017
Attention: Mike Cullen
Fax: 636-534-5657
E-mail: mcullen@boomerangtube.com

31. **Applicable Law**. This Lease is governed by and must be interpreted under Texas law, without regard to its choice-of-law provisions. Any disputes arising out of or seeking to

enforce this Lease will be subject to, and each party hereby consents to, the exclusive jurisdiction of the courts located in Dallas County, Texas. THE PARTIES HEREBY WAIVE JURY TRIAL AND BIND THEMSELVES TO BENCH TRIAL.

32. **Severability**. If any part of this Lease is held indefinite, invalid, or otherwise unenforceable, the rest of this Lease will continue in full force.

33. **Counterparts**. This Lease may be executed in any number of counterparts (including counterparts by facsimile or other electronic transmission), each of which will be deemed to be an original and all of which together will be deemed to be one and the same instrument.

34. **Further Assurances**. Lessee agrees to execute and deliver to Lessor upon request all documents or instruments reasonably requested by Lessor to carry out the intent and purpose of this Lease.

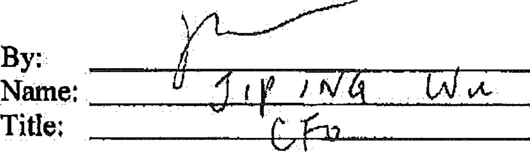
35. **Entire Agreement**. This Lease constitutes the entire agreement of the parties with respect to the subject matter hereof and supersedes all prior agreements and understandings, oral or written, with respect to such matters. Any amendment of this Lease may only be accomplished by a writing signed by both parties.

[*Signature Page Follows*]

IN WITNESS WHEREOF, the parties hereto have executed this Lease as of the date first above written.

LESSOR:

SB Boomerang Tubular, LLC



By: ________________________
Name: JIPING Wu
Title: CFO

LESSEE:

Boomerang Tube LLC

By: ________________________
Name: ________________________
Title: ________________________

IN WITNESS WHEREOF, the parties hereto have executed this Lease as of the date first above written.

LESSOR:

SB Boomerang Tubular, LLC

By: ______________________
Name: ______________________
Title: ______________________

LESSEE:

Boomerang Tube LLC

By: Gregg Eisenberg
Name: Gregg Eisenberg
Title: President & CEO

EXHIBIT A

Equipment

Heat treatment quench and temper equipment and handling equipment manufactured by F&D Furnaces, LLC (the "Manufacturer") for installation at Boomerang Tube LLC's manufacturing facility in Liberty, Texas, as described in the attached excerpt from the Manufacturer's Technical Specification P9349-9, dated January 7, 2011.

B. SCOPE OF PROPOSAL

F&D Furnaces proposes to furnish equipment design, foundation plan, materials and project management for the following:

- One (1) - Direct gas fired, walking beam, Austenitizing Furnace with 49 load spaces on 7.5" centers with eleven (11) charge end conveyor rolls and eleven (11) discharge end conveyor rolls.
- One (1) – Reversing OD / ID Quench with fourteen (14) rolls, three (3) 4,000 gpm, 300 HP quench pumps, one (1) descaler unit with 60 HP motor, and one (1) descaler ring. The Quench will be constructed of type 304 stainless steel.
- One (1) - Gas fired, convection walking beam, Tempering Furnace with 73 load spaces on 7.5" centers, eleven (11) charge end conveyor rolls and eleven (11) discharge end conveyor rolls.
- One (1) Lot of Handling Equipment including:
  - One (1) Austenitizing Furnace Charge Rack with adjustable tube stop, one (1) motor operated rotary transfer arm, and fifteen (15) conveyor rolls.
  - One (1) Transfer Table between OD / ID Quench and Temper Furnace. The counter chain table includes nine (9) inlet conveyor rolls and ten (10) outlet conveyor rolls, and two (2) motor operated rotary transfer arms.
  - One (1) Straightener Discharge Table and Conveyor to Exit Cooling Bed. The table receives tubes from the straightener outlet conveyor and a rotary transfer places them on the discharge conveyor. The discharge conveyor includes twenty (2) rolls.
  - One (1) – Cooling Bed approximately 44' long. The Cooling Bed will consist of nine stationary and nine walking beams. The tubes will be carried in pockets on 7.5"centers similar in shape to the furnace walking beams. The lift and push mechanisms will be the same as the Temper furnace. There are two push and two lift mechanisms.
  - One (1) Cooling Bed Discharge Conveyor. The tubes from the cooling bed are placed on the discharge conveyor. The discharge conveyor includes thrity-one (31) rolls and one (1) trannsfer.

EXHIBIT B

Collateral

ALL EQUIPMENT OWNED BY BOOMERANG TUBE LLC AT ITS MANUFACTURING FACILITY LOCATED AT 1100 FM, LIBERTY, TEXAS.

Appendix A

Lease Payment Schedule

(See Attached)

Appendix A - Lease Payment Schedule

Equipment Cost	$	13,000,000
Plus: Accrued Interest	$	840,042
Less: Advance Payment	$	(2,500,000)
Total	$	11,340,042
Monthly lease payment (years 1-5)		
Total cost amortization	$	200,183
Advance Payment amortization	$	29,762
Total monthly lease payment	$	229,945
Monthly lease payment (years 6-7)		
Total cost amortization	$	200,183
Advance Payment amortization	$	29,762
Advanced Payment rebate	$	(104,167)
Total monthly lease payment	$	125,778

Note: Accrued Interest assumes 1 year Installation Period
This schedule will be updated and finalized once the Lease Commencement Date is known.

AMENDMENT TO EQUIPMENT LEASE

This amendment ("Amendment") is made and entered into as of June 10, 2014 (the "Effective Date") between SB Boomerang Tubular, LLC, a Texas limited liability company ("SB"), and Boomerang Tube LLC, a Delaware limited liability company ("Boomerang").

WHEREAS, SB and Boomerang are parties to that certain Equipment Lease Agreement dated as of February 18, 2011 (the "Lease Agreement"); and

WHEREAS, SB and Boomerang are parties to that certain Sales Agreement dated as of February 18, 2011 (the "Sales Agreement"); and

WHEREAS, on October 11, 2012, pursuant to Section 11(e) of the Lease Agreement, Boomerang provided SB with a standby letter of credit in favor of SB in the amount of $2,500,000 issued by Wells Fargo Bank, N.A (the "LC"); and

WHEREAS, SB and Boomerang want to amend the Lease Agreement and the Sales Agreement as set forth herein.

NOW, THEREFORE, in consideration of the premises and the mutual covenants of the parties, and for other good and valuable consideration, the receipt and sufficiency of which are acknowledged, the parties agree as follows:

1. SB hereby agrees to relinquish the LC. SB will send the original LC to Boomerang (attention: Mike Cullen) via certified mail no later than two business days after the Effective Date.

2. In return, to further secure all of Boomerang's obligations under the Lease Agreement, Boomerang hereby grants to SB a third priority continuing security interest, which shall be subordinate to Wells Fargo's first priority security interest and Encana Corporation's second priority security interest, in all of Boomerang's right, title and interest in and to (i) the spare parts inventory described in attached Exhibit A (the "Collateral") and (ii) all rights, remedies and claims of Boomerang with respect to the Collateral, whether now existing or hereafter at any time or from time to time arising.

3. Boomerang represents and warrants that no person or entity other than Wells Fargo or Encana has or will have any security interest in the Collateral. Following the release of Encana's second priority security interest in the Collateral, which Boomerang represents will occur by no later than December 31, 2015, SB will hold a second priority security interest in the Collateral. Boomerang agrees to promptly notify SB if the value of the Collateral should fall below the current fair market value of the Equipment and Boomerang shall have 10 business days from the date of notice to cure by increasing the value of the Collateral to an amount equal to or above the current fair market value of the Equipment. Boomerang has received all consents or other approvals necessary from Wells Fargo or Encana to grant SB a continuing security interest in the Collateral.

4. Boomerang irrevocably appoints SB, and its officers, as Boomerang's agent and attorney-in-fact, with full power in SB's or Boomerang's name to execute and file all such financing statements as SB deems necessary or advisable hereunder. Boomerang will execute or obtain and deliver to SB, upon SB's request, such instruments, financing statements and assurances

as SB deems necessary or advisable for the protection or perfection of the security interest set forth above and SB's rights under this Agreement.

5. Further, Boomerang hereby waives its Second Purchase Option, as defined in the Lease Agreement.

6. Upon an event of default by Boomerang under the Lease Agreement, the Sales Agreement, or any material debt agreement or obligation (including without limitation any of Boomerang's agreements with Wells Fargo, Encana, or Boomerang's bondholders or other lenders), Boomerang shall subject to the approval of Wells Fargo, Encana, Boomerang bondholders and other lenders promptly issue a standby letter of credit in SB's favor in the amount of $2,500,000 to secure all payments and other obligations under the Lease Agreement.

7. Upon an event of default by Boomerang under the Lease Agreement and following 10 business days from the date of notice to cure such event of default, Boomerang agrees (during the continuance of such event of default) to provide SB, on a first-priority basis, with 7,500 tons per quarter of tubular products that are heat treated using the Leased Equipment (as defined in the Sales Agreement), which shall be in lieu of the 4,500 tons per quarter which Boomerang is currently obligated to provide SB. Pricing for such products will be determined in accordance with Section 2 of the Sales Agreement.

8. The execution and delivery of this Amendment and the performance of any obligations set forth herein does not and will not: (i) violate, conflict with, or result in a default under any contract or obligation to which Boomerang is a party or violate or conflict with any provision of the organizational documents of Boomerang; (ii) violate or result in a violation of, or constitute a default under, any provision of any applicable law; (iii) require from Boomerang any notice to, registration or declaration or filing with, or consent or approval of, any governmental authority or other third party; or (iv) accelerate any obligation under, or give rise to a right of termination of, or constitute a material breach of, any agreement, permit, license or authorization to which Boomerang is a party or by which Boomerang is bound.

9. The parties agree that, except as specifically modified by this Amendment, all of the provisions of the Lease Agreement and the Sales Agreement are hereby ratified and confirmed to be in full force and effect.

10. This Amendment may be executed in any number of counterparts (including counterparts by facsimile or other electronic transmission), each of which will be deemed to be an original and all of which together will be deemed to be one and the same instrument.

[*Signature Page Follows*]

IN WITNESS WHEREOF, this Amendment has been duly executed by the parties effective as of the Effective Date.

SB Boomerang Tubular, LLC

By: [signature]
Name: Michael Fielding
Title: VP & General Counsel

Boomerang Tube LLC

By: [signature]
Name: Michael P. Cullen
Title: V.P. & General Counsel

EXHIBIT A

Description of Collateral

Goods that constitutes spare parts, packaging, and shipping materials, supplies used or consumed in Boomerang's business subject to that collateral pledged pursuant to that certain Wells Fargo Capital Finance, LLC Amended & Restated Credit Agreement dated October 11, 2012 and that certain Subordination and Intercreditor Agreement between Encana Oil & Gas USA, Inc., Boomerang Tube, LLC and Wells Fargo Capital Finance, LLC and dated December 20, 2010

EXHIBIT G

Selected Exhibits from the August 26, 2015, Deposition of Arish Gupta

(Filed Under Seal)