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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE:	) CASE NO. 03-44662
	)
WCI STEEL, INC., *et al.*,	) CHAPTER 11
	)
DEBTOR(S)	) JUDGE MARILYN SHEA-STONUM
	)
	)
	) OPINION RE: CONFIRMATION OF
	) PROPOSED COMPETING PLANS OF
	) REORGANIZATION

This matter is before the Court on two proposed competing plans of reorganization, one filed by the Debtors (as hereinafter defined) and one filed by the Secured Noteholders (as hereinafter defined). The hearing to consider confirmation of both plans was held on July 21, 2004, August 30, 2004 through September 3, 2004 and September 10, 2004. Closing arguments were held on October 25 and 26, 2004. For the reasons set forth below, I conclude that, although the economic backdrop of this case provides every reason to believe that a plan can and should be confirmed in this case soon, neither of the two plans now under consideration can be confirmed.

OVERVIEW

A confluence of unusual factors causes this case to present "quality problems." Among those factors are, on the one hand, (1) the determination of existing equity, Renco (as hereinafter defined), to continue its ownership of the debtor entities after reorganization, (2) the exposure of existing equity and affiliates to controlled group liability for unfunded pension obligations should the existing pension plan for hourly workers be terminated and (3) the resulting treatment of pension plan issues in the Debtors' proposed plan that has garnered that plan the intense loyalty of both the USWA (as hereinafter defined) and the PBGC (as hereinafter defined). On the other hand, a well-organized group of holders of notes secured by the plant, property and equipment of the Debtors has proposed a competing plan under which that group (1) proposes to take majority control of the reorganized debtor and (2) has identified two individuals with significant experience in the steel industry for proposed roles of chief executive officer and chief financial officer. The treatment of pension issues in the Secured Noteholders' proposed plan would export the liability of those claims in methods that are neither wholly predictable nor, in the view of the current workforce, as reliable as the treatment of pension issues in the Debtors' proposed plan. That treatment creates the possibility, though the proponents of the Secured Noteholders' proposed plan argue that it is a *de minimis* one, that the PBGC might have to fund pension benefits of retirees. That treatment raises the procedural question of whether all of the bases necessary for such an approach have been touched and the policy question of whether, in a situation where such treatment does not appear absolutely necessary, such an overburdened safety net should be further stretched, even theoretically.

In the contest between competing plans of reorganization, the bankruptcy court must examine all of these issues through the lens of appropriate distribution of value to holders of claims, analyzing the priority, or lack thereof, of the classes of creditors as each plan proponent has crafted such classes. The foundation for this examination is the value of the enterprise of the reorganized debtor as of the effective date of the particular plan of reorganization. This is always a moving target and must necessarily be something of an approximation. Contributing to the "quality problems" in this case is the red hot seller's market that has emerged in the worldwide steel commodities markets since the filing of these cases nearly 15 months ago. Determination of enterprise value in a cyclical industry will always present challenges, and those challenges are greater when reorganization plans provide relatively fixed creditor treatment, while directing the balance of what could be a very large upside to the parties who would emerge with equity under either plan.

In short, this company is a small but agile niche player in the U.S. steel industry as evidenced by its relatively strong performance in the worst part of the cycle for the U.S. steel industry and by these two determined suitors, as well as a third would-be plan proponent. In an age when all too many chapter 11 cases appear to require the sale of substantially all of the operating assets in sales pursuant to § 363(b),[1] this case has seen the filing of two competing plans that were set for simultaneous confirmation hearings with a third one waiting in the wings.

This is a company that can and will be reorganized. Over the course of my involvement with this case,[2] I have held numerous case management conferences. At the end of closing arguments, in two such conferences held pursuant to § 105(a), I shared with counsel for the two competing plan proponents, as well as counsel for the Creditors Committee (as hereinafter defined), the USWA, the PBGC and the United States Trustee, the serious concerns of this Court regarding the failure of the Debtors' proposed plan to incorporate the

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1 Unless otherwise specifically noted, all statutory section references in this Opinion shall be to chapter 11 of title 11of the United States Code (the "Bankruptcy Code").

2 This case was filed in Youngstown and assigned to Judge William Bodoh. Upon his retirement on January 2, 2004, the so-called mega cases on his docket were assigned temporarily by lot to each of the active judges on the bankruptcy court for the Northern District of Ohio. In July 2004 Judge Kay Woods was named to the bankruptcy bench in Youngstown. All of the cases that had been temporarily assigned during the period of vacancy on the bankruptcy bench in Youngstown returned to her docket, including this one. However, since I had significant familiarity with the competing plans in this case and she had an ample amount on her docket, she and I agreed that I should continue to address the plan confirmation issues in this case through the confirmation of a plan.

good news regarding the reorganized debtor's likely enterprise value. Permeating all of the credible valuation evidence at the confirmation hearing were the increases in value stemming from the worldwide steel market and the new operating conditions inherent in a newly negotiated collective bargaining agreement between the Debtors and the USWA. I once again sought to focus the Secured Noteholders' attention on the huge feasibility problems presented by their plan with its absence of a collective bargaining agreement. Ironically, the Secured Noteholders and the Debtors' union employees share the fact that they have each had a glimpse of alternative futures: The Secured Noteholders when they reached an agreement in principle with the USWA in the spring of 2004, only to see that agreement negated within days by the pension-driven agreement that the USWA reached with the Debtors; and the USWA members, currently employed by or retired from the Debtors, who have now seen a future where retirement benefits that have been seriously shaved in so many other chapter 11 cases of steel makers can survive intact in this particular case.

Simply put, the requirements necessary for confirmation have not been met by either of the two plans that were considered in full at the confirmation hearing.[3] Thus, the decision being documented here will come as no surprise to either of these plan proponents or their professionals. In the last of the Court's case management conferences, the Debtors' professionals called the Court's attention to the guidance provided by the court in *In re Coram Heathcare Corp.*, 315 B.R. 321 (Bankr. D. Del. 2004). They asked that this Court provide

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3 A third plan, filed by D.E. Shaw Laminar Portfolios, L.L.C., an investment fund and holder of \$1,000,000 in secured notes, and MIC Capital, Inc., a financing affiliate of a supplier of raw materials to the steel industry (collectively, "DE Shaw"), after the approval of the two disclosure statements for the Debtors' proposed plan and the Secured Noteholders' proposed plan, respectively, so closely mimics the inadequate enterprise valuation in the Debtors' proposed plan and the Secured Noteholders' proposed plan with regard to absence of a collective bargaining agreement that this Court will briefly consider it in this Opinion so as to spare the very limited resources of this Court's chambers with respect to further consideration of that plan in its current form.

similar guidance. This Court can do so only in the broadest strokes.

As discussed further below, with respect to the Debtors' proposed plan, among the issues that would have to be addressed before that plan could obtain confirmation are:

- The Debtors' overly conservative reckoning of the enterprise value of the reorganized debtor and aggressive characterization of the new value being provided by existing equity;

- The Debtors' undervaluation of the Secured Noteholders' collateral, *i.e.*, plant, property and equipment;

- The Debtors' invocation of the "business judgment rule" to justify huge disparities in the percentage dividends being afforded various classes of holders of unsecured claims; it is true that even in a nonconsensual plan the business judgment rule may support the creation of a variety of classes of unsecured claims for the purpose of providing different payment features, but particularly in a "cramdown" case any such sorting of holders of general unsecured claims must be examined in light of principles of unfair discrimination; with the possible exception of a class of small claims that are paid promptly to ease administrative burdens, the business judgment rule cannot be used to justify substantial economic disparities in the present value amounts paid to holders of general unsecured claims; as presently drafted the Debtors' proposed plan relies on a gerrymandering of the claims pool, such that their contention of having accepting classes, a requirement to allow them to invoke § 1129(b), is at best a pyrrhic victory because the Debtors' proposed plan fails to survive the necessary scrutiny that must be given under that section with respect to unfair discrimination both as between Class 5 and Class 7 and possible unfair discrimination in the treatment of various holders of claims within Class 7; and

- The Debtors' obligation under § 1129(b) to show that the holder of existing equity is providing fair equivalent new value for the equity that it would receive under the Debtors' proposed plan; the termination of exclusivity does not satisfy the obligation; the Debtors' effort to assign the savings that the reorganized debtor will realize under the new collective bargaining agreement as a component of new value that should be credited to the existing equity holder ignores the record evidence that the Secured Noteholders had reached an agreement in principle with the USWA with substantially similar economic terms.

Because the Secured Noteholders' proposed plan assumes the ability of that group to successfully negotiate a collective bargaining agreement with the USWA and further assumes that the pension obligations of the Debtors can be laid at the doorstep of the PBGC through one of a variety of possible outcomes over which those plan proponents have no control, this Court finds that the Secured Noteholders have not met their burden of proof as to the central issue of feasibility.

In short, the Debtors, allied with the existing equity holder whose commitment to fund the great majority of pension and related benefits of existing retirees would spare the Debtors a variety of big dollar claims in this case, a savings that can be translated into a component of new value on the part of existing equity, have the inside track on proposing a confirmable plan. If they fail to do so, the Secured Noteholders have given strong evidence of their willingness to fill that void, should it continue.

JURISDICTION

This proceeding arises in a case referred to this Court by the Standing Order of Reference entered in this District on July 16, 1984. It is a core proceeding pursuant to 28 U.S.C. §157(b)(2)(L) over which this Court has jurisdiction pursuant to 28 U.S.C. §1334(b). This opinion constitutes the Court's findings of fact and conclusions of law required by Federal Rule of Bankruptcy Procedure 7052.

BACKGROUND OF THIS CASE[4]

The Bankruptcy Filing: On September 16, 2003, WCI Steel, Inc. ("WCI") and certain of its affiliates,[5] each a debtor and debtor in possession in the above-captioned cases (collectively, the "Debtors"), filed voluntary petitions for relief under the Bankruptcy Code

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4 The parties in interest in this matter have filed various stipulations which are incorporated in this Court's opinion as set forth below [docket ##653, 725, 754, 755, 756, 762, 764 and 769]. In addition, the parties have submitted proposed findings of fact and conclusions of law [docket ## 675, 676, 677 and 678] and pre-hearing briefs [docket ## 682, 683, 684, 685 and 686] which this Court has also found helpful in making the findings and conclusions set forth herein.

5 The affiliated debtor subsidiaries are WCI Steel Metallurgical Services, Inc., WCI Steel Production Control Services, Inc., WCI Steel Sales L.P., Youngstown Sinter Company and Niles Properties, Inc.

with this Court. By Order entered on September 17, 2003, the Debtors' chapter 11 cases have been consolidated for procedural purposes only and are being administered jointly. The Debtors continue to operate their business and manage their properties as debtors in possession pursuant to §§ 1107 and 1108. [Stip. ¶7 - docket #653]. On September 24, 2003, the United States Trustee for Region 9 appointed the Official Committee of Unsecured Creditors (the "Creditors Committee").[6]

Summary of the Debtors' Business: WCI is the primary operating entity among the Debtors. It is a niche oriented integrated producer of value-added, custom steel products. WCI fills a market niche by offering specialized service to its customers, many of whom order in small quantities that might otherwise require them to deal with middlemen. WCI has supplied at least 135 kinds of steel and is willing to accept orders as small as 15 tons for specialty steels. It owns and operates a plant on approximately 1,100 acres in Warren, Ohio. The other Debtors are wholly-owned direct or indirect subsidiaries of WCI. [Stip. ¶3 - docket #653].

Together, the Debtors employ about 1,800 people, approximately 75% of whom are hourly employees and the remainder salaried employees. In addition, there are approximately 686 recipients of pension benefits, including retirees and surviving spouses. Most of the hourly employees are represented by the United Steelworkers of America, AFL-CIO, CLC (the "USWA"). WCI is a party to various collective bargaining agreements (individually a "CBA") with the USWA effective from September 1, 1999 through on or after November 1, 2004 (collectively the "Current CBA"). The Current CBA requires the establishment and

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[6] The Creditors Committee consisted of the following seven members: United States Steel Corporation, the USWA, Cleveland-Cliffs Inc., the PBGC, FirstEnergy Corporation, Ogelbay Norton Company and Carmeuse North America. On March 5, 2004, the United States Trustee reconstituted the Creditors Committee to include all the original committee members except for United States Steel Corporation. In light of subsequent assumptions of certain members' contracts, perhaps the United States Trustee should revisit the constitution of the Creditors Committee.

maintenance of the WCI, Inc.-USWA Defined Benefit Pension Plan (the "Current Pension Plan"). [Stip. ¶4 - docket #653].

The Renco Group, Inc. ("Renco") purchased the assets of the Debtors in 1988 out of the first LTV chapter 11 case for approximately $61 million plus the value of the inventory (resulting in a total purchase price of approximately $66 million). [Stip. ¶1 - docket #653].

On November 27, 1996, the Debtors issued $300 Million face amount of 10% Senior Secured Notes due 2004, Series A and Series B (the "Secured Notes"). The Secured Notes are secured by substantially all of the Debtors' real property, plant and equipment. [Stip. ¶2 - docket #653]. The "Secured Noteholders" consist of Wilmington Trust Company, as indenture trustee, together with holders of approximately $275 million principal face value amount of the Secured Notes. Harbert Distressed Investment Master Fund, Ltd. ("Harbert") is the single largest holder of the Secured Notes. [Stip. ¶¶2, 5 and 6 - docket #653].

WCI performed a reline of its blast furnace during the summer of 2004 which was completed in July 2004. [Stip. ¶9 - docket #653].

The Plan Process: On December 4, 2003, the Debtors filed a motion to extend the exclusive periods provided by § 1121 for a debtor to file a plan and solicit votes in support thereof (the "Exclusive Periods"). The Secured Noteholders objected to granting such extension. On December 22, 2003, over the Secured Noteholders' objection, the Court granted to the Debtors an extension of the Exclusive Periods through and including May 14, 2004 and July 14, 2004, respectively. [Stip. ¶16 - docket #653].

On March 26, 2004, the Secured Noteholders filed a motion to terminate the Debtors' Exclusive Periods (the "Exclusivity Termination Motion"). The Secured Noteholders represented in the Exclusivity Termination Motion that they had formulated a proposed plan of reorganization. [Stip. ¶17 - docket #653].

On April 6, 2004, the Debtors filed a proposed disclosure statement (as amended from time to time thereafter, the "WCI Disclosure Statement") describing and attaching their proposed plan of reorganization (as amended from time to time thereafter, the "Debtors' Plan"). [Stip. ¶18 - docket #653].

The Court held a hearing in connection with the Exclusivity Termination Motion on May 4, 2004. At the conclusion of the presentation of evidence, the Court continued the hearing until May 11, 2004 to allow each party to make a closing argument. Prior to the resumption of the hearing, the Debtors advised the Court and the parties that the Debtors were prepared to consent to the termination of the Exclusive Periods. [Stip. ¶19 - docket #653]. Accordingly, the Court entered a Stipulated and Agreed Order terminating the Exclusive Periods. [Stip. ¶20 - docket #653].

On May 11, 2004 the Secured Noteholders filed a proposed plan (as amended from time to time thereafter, the "Secured Noteholders' Plan") and a Disclosure Statement in support of that plan (as amended from time to time thereafter, the "Secured Noteholders' Disclosure Statement"). [Stip. ¶21 - docket #653]

The Court entered an Order setting June 8, 2004 as the hearing date to consider approval of the disclosure statements and fixing June 3, 2004 as the deadline for objecting to either or both disclosure statements. [Stip. ¶22 - docket #653].

On or about June 3, 2004, the Debtors, Renco and the Creditors Committee filed separate objections to the Secured Noteholders' Disclosure Statement and the Secured Noteholders filed an objection to the WCI Disclosure Statement. [Stip. ¶¶23 and 24 - docket #653].

The Court considered the adequacy of the disclosure in each of the disclosure statements at a hearing held on June 8 and 9, 2004. On June 14, 2004, the Court entered an

Order approving both the Secured Noteholders' and the WCI Disclosure Statements. [Stip. ¶25 - docket #653].

Various objections to both the Debtors' Plan and the Secured Noteholders' Plan have been filed with the Court.[7]

Plan Summaries: The following is a summary comparison of the classification and treatment of claims as set forth in the proposed plans of reorganization that have been filed in this case.

CLAIMS/INTERESTS	DEBTORS	SECURED NOTEHOLDERS	DE SHAW
Secured Lender	payment in full/payment pursuant to Exit Facility	payment in full/ payment pursuant to DIP Order	payment in full/ sale proceeds of property securing the allowed secured claim/ legal, equitable and contractual rights to remain unaltered
Secured Noteholders	$94 mil. principal NewCo. Notes, 9% interest per annum, maturity in 2014	$100 mil. principal NewCo Notes, 9% interest per annum, maturity date in 2014	$100 mil. principal notes, 9.5% interest per annum, maturity date of 2014

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7 Objections were filed to the Secured Noteholders' Plan by MIC Capital, D. E. Shaw Laminar Portfolios, L.L.C. [docket # 586]; WCI Steel, Inc. [docket # 584]; The BOC Group, Inc.[docket # 582]; the USWA [docket # 577]; the Creditors Committee [docket # 574]; Congress Financial Corporation [docket # 573]; the PBGC [docket # 572] and the Commonwealth of Pennsylvania, Department of Revenue [docket #539].

Objections were filed to the Debtors' Plan by MIC Capital, D. E. Shaw Laminar Portfolios, L.L.C. [docket #586]; the Secured Noteholders [docket # 583]; The BOC Group, Inc.[docket #579] and the Commonwealth of Pennsylvania, Department of Revenue [docket #377] .

The objections of Congress Financial, the Commonwealth of Pennsylvania and the BOC Group were resolved by agreement of the parties. Because of the Court's findings below regarding the non-confirmability of both plans, the Court does not address all of the issues raised in the remaining objections.

CLAIMS/INTERESTS	DEBTORS	SECURED NOTEHOLDERS	DE SHAW
Other Secured Claims			
Convenience Class	85%	100%	100%
Continuing Vendor	50% payable in ten consecutive quarterly payments	N/A	50% payable in ten consecutive quarterly payments
Other Unsecured Creditors	pro-rata share of $5 mil. -offers option to sell claim to Renco for cash payment -plus potential add'l distribution based on EBITDA in 2006 - 2014	pro-rata share of $5 mil. (plus proceeds of any avoidance actions)	pro-rata share of $5 mil.

Plan Voting: The following is a summary of the results of the voting as to the Debtors' Plan and the Secured Noteholders' Plan [Decl. of Laura DiBiase - docket # 589]:

Plan Class	Passing	Ballots Accepted	% Count	Amount Accepted	% Amount
WCI Plan/ Class 2- Secured Noteholders	Fail	17	20.48%	$1,792,266.66	21.4%
Noteholders Plan/Class 2 - Secured Noteholders	Pass	79	96.34%	184,849,666.65	99.63%
WCI Plan/Class 4 - Convenience Class	Pass	273	96.47%	$793,560.31	97.00%
Noteholders' Plan/Class 4-Convenience Class	Fail	85	36.17%	$193,730.78	28.50%
WCI Plan/Class 5 - Continuing Vendor Claims	Pass	56	100.00%	$4,511,069.20	100.00
Noteholders' Plan/Class 5	N/A	N/A	N/A	N/A	N/A
WCI Plan/Class 7 - Other Unsecured Claims	Fail	112	62.57%	$38,173,818.14	15.95%
Noteholders' Plan/Class 7 - Other Unsecured Claims	Fail	89	43.00%	$119,112,676.43	83.37%

DISCUSSION

The requirements for confirmation are set forth in § 1129. Each plan proponent bears the burden of establishing the plan's compliance with each of the requirements set forth in § 1129(a). If an impaired class does note vote to accept the plan, the plan proponent must also prove that the plan meets the additional requirements of § 1129(b), including that the plan does not unfairly discriminate against dissenting classes and the treatment of the dissenting classes is fair and equitable. *In re Exide Technologies, et al.*, 303 B.R. 48, 58-59 (Bankr. D. Del. 2003). The Court will now discuss each proposed plan in turn and, in doing so, will separately set forth findings of fact and conclusions of law as they relate to each plan.

I. THE DEBTORS' PLAN

The Court believes in the potential for the Debtors to propose a confirmable plan using the basic structure proposed in its current plan. However, the Debtors' valuation both of its entire enterprise and of the Secured Noteholders' collateral is intellectually suspect and generally unreliable and the plan unfairly discriminates against the Secured Noteholders.

A. The Debtors' Plan Violates § 1129(b) because Renco is Retaining 100% of the Debtors' New Equity While Failing to Contribute New Value that is Worth the Reasonably Equivalent Value of Such Equity.

Section 1129(b) provides, in pertinent part,

> (1) ... the court shall confirm the plan ... if the plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan.
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> (2) For the purpose of this subsection, the condition that a plan be fair and equitable with respect to a class includes the following requirements: ...
>
> (B) With respect to a class of unsecured claims -
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> ...
>
> (ii) the holder of any claim or interest that is junior to the claims of such class will not receive or retain under the plan on account of such junior claim or interest any property.

Class 7 is impaired under the Debtors' Plan and has rejected the Debtors' Plan. Thus, the Debtors' Plan can only be confirmed if is "fair and equitable" with respect to Class 7, as required by § 1129(b)(1) and if it also provides, as required by § 1129(b)(2)(B)(ii), that "the holder of any claim or interest that is junior to claims of such class will not receive or retain under the plan on account of such junior claim or interest any property." *Bank of America National Trust & Savings Associates v. 203 N. LaSalle Street Partnership*, 526 U.S. 434, 441-42 (1999).

The Court's determination of what the equity of the reorganized debtor is worth begins with an analysis of the enterprise value of the reorganized debtor as of the hypothetical effective date of the Debtors' Plan.

1. Findings of Fact Re: Enterprise Value

A1. The Debtors and the Secured Noteholders each offered their own experts to testify about WCI's enterprise value. All of the experts used the same three methodologies for calculating such value: (1) comparable company analysis; (2) precedent transaction analysis (sometimes referred to as mergers and acquisitions); and (3) discounted cash flow. Those methodologies which rely on cash flow analysis are more persuasive to the Court in light of Renco's proposal to retain the Debtors' current equity.

a). Weighting

A2. The Debtors presented the expert testimony and valuation analysis of Timothy O'Connor, a managing director of Jeffries & Company, Inc. ("Jeffries"), and Brett Levy, a senior research analyst, managing director and co-director of high yield research with Jeffries. [*See* Ex. 96]. Before joining Jeffries, Mr. Levy was a metals industry analyst with RBC Capital Markets ("RBC"). As a part of his work at RBC, he analyzed the Debtors and, based upon publicly available information and consideration of the Debtors in relation to the changing worldwide steel market, made forecasts as to the current and future value of the Debtors and their equity. [Trial Trans. - Levy at 466-67].

A3. Although Mr. Levy now works for Jeffries and has testified in support of Jeffries' valuation opinion, the Court is more persuaded by the statements concerning the

Debtors' evolving value made by Mr. Levy in analyst reports he wrote while at RBC. When Mr. Levy was at RBC, he was not associated with any of the current plan proponents and his professional reputation depended upon offering "objective" analysis of the future prospects of the steel companies that he followed. In this context he published two reports that directly addressed the issue of the Debtors' value. In March 2004, Mr. Levy's report presented a valuation analysis based almost entirely on comparable public companies, using EBITDA[8] and production capacity multiples. [Ex. 102 - pp. 3-5]. Mr. Levy placed little emphasis on general precedent transactions analysis because he felt that most of the transactions were not good comparables for valuing the Debtors. [Trial Trans.- Levy at 595]. Mr. Levy's value forecast in March 2004, *i.e.*, relatively early in the upturn of the steel commodity market, placed a value of $250 million on the Debtors' enterprise. Mr. Levy testified that he does not believe the value of the Debtors has decreased since March 2004.

A4. In contrast, Jeffries weighted each of the methodologies nearly evenly in its analysis. Jeffries' calculations set forth in Exhibit 96 are summarized as follows:

Methodology	Weight	Range (in Millions)	
		Low	High
Comparable Company Analysis	30%	$220	$320
Precedent Transaction Analysis	35%	$160	$205
Discounted Cash Flow	35%	$170	$230
Weighted Average	100%	$181.5	$248.3
Concluded Enterprise Valuation Range		$190	$250

Jeffries ultimately opined that the total enterprise value was between $190 million and $250 million. [*See* Ex. 96 - p.11].

A5. The Secured Noteholders' presented the expert testimony and valuation

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[8] EBITDA connotes a calculation of earnings before interest, taxes, depreciation and amortization.

analysis of Richard Schmitt, the Chief Operating Officer and Executive Vice President of Accuval Associates, Inc. ("Accuval"), as to the value of the Secured Noteholders' security interest in the Debtors' real property, plant and equipment. Accuval approached the valuation of that collateral from the top down, *i.e.*, starting with the enterprise value derived from the income generated by WCI less working capital and amounts purporting to approximate the value of each category of intangible assets associated with that income stream. In doing so, Accuval also selected an even weight for each methodology. The values derived by Accuval for each method are: $344 million under a Comparable Company Analysis; $260 million under a Precedent Transaction Analysis and $245 million under a Discounted Cash Flow Analysis. Accuval's report reflects a total enterprise value of $285 million. [*See* Ex.112 - p. 52].

A6. The Secured Noteholders also presented the expert testimony and valuation analysis of Steven Strom, a managing director in CIBC World Markets ("CIBC") Restructuring Group and Mark Henkels, a managing director and head of CIBC's Industrial Growth Group. [*See* Exhibit 50]. CIBC opined that the total enterprise value was between $300 million and $350 million. [*See* Ex. 50 - p. 7].

A7. CIBC's ultimate calculations set forth in Exhibit 50 are summarized as follows:

Methodology	Weight	Range (in Millions)	
		Low	High
Comparable Company Analysis	55%	$325	$375
Precedent Transaction Analysis	10%	$215	$270
Discounted Cash Flow	35%	$280	$335
Weighted Average	100%	$298	$351
Concluded Enterprise Valuation Range		$300	$350

CIBC concluded that the precedent transaction analysis was not as reliable in this instance given the improvement to the steel industry since the time of the transactions and the lack of similarity in circumstances between the comparable companies and WCI, *i.e.*, auction sale v. plan of reorganization. [*See* Trial Trans. - Strom at 1066-69; Ex. 50 - p. 29]. Therefore, CIBC weighted the comparable company analysis more heavily.

b). Choice of Comparables

A8. In addition to the differences in weight given to each methodology, the experts selected different comparable companies for the purpose of analyzing the value of WCI under the Precedent Transaction Analysis and Comparable Companies Analysis.

A9. Jeffries chose five companies in its comparable company analysis: (1) International Steel Group; (2) Dofasco; (3) AK Steel Holdings, (4) Wheeling-Pitt and (5) Algoma Steel. Mr. Levy testified that he believed these were appropriate comparable companies because they were domestic or North American steel companies. [Trial Trans. - Levy at 487-96].

A10. With the exception of Algoma Steel, CIBC relied upon the same companies. CIBC also considered U.S. Steel, Arcelor, Corus Group, Steel Dynamics and Nucor in its analysis. [Ex. 50 - p. 10]. In its updated valuation analysis, CIBC included Algoma Steel, Inc. in its Comparable Company Analysis, but this inclusion did not change CIBC's expert opinion as to the valuation numbers. [*See* Ex. 111 - p. 2].

A11. In its Precedent Transaction Analysis, Jeffries relied on the acquisitions of Weirton Steel, Republic Engineered Products, Rouge Industries, Bethlehem Steel and National Steel Corp. Each acquisition took place in 2003 or 2004. Mr. Levy indicated that Jeffries believed these transactions to be directly comparable to WCI's, in part due to the fact that many of these transactions occurred in a bankruptcy context. [*See* Trial Trans. - Levy at

491, 505-06]. That analysis did not distinguish between sales under § 363, often when continued operating funds were in jeopardy, and sales pursuant to reorganization plans.

A12. In addition to these acquisitions, CIBC included some older transactions, such as, Co-Steel, Birmingham Steel, RTI, LTV Corp. and Inland Steel. These older transactions generally took place at higher multiples of revenue, EBITDA and tons capacity than the 2003 transactions focused on by Jeffries. Mr. O'Connor testified that the state of the steel market in 2002 was more similar to present circumstances than the state of the steel market in 2003. [Trial Trans. - O'Connor at 398-400]. Christopher Plummer of Metal Strategies, Inc., a well respected expert in the steel industry, testified that he routinely uses transactions that took place in 2002 in his presentations and calculations if the situations are otherwise factually similar. [*See* Ex. 95 - p. 32; Trial Trans. - Plummer at 1012-13].

c). Projections

A13. Finally, the experts relied on different sets of projections to calculate enterprise value.

A14. Jeffries relied upon the Projected Financials in Exhibit 3 of the WCI Disclosure Statement and did not rely on or incorporate any subsequent financial information which may have been available from WCI for the enterprise valuation. [Stip. ¶2 - docket #754]. These projections are "conservative" and are not the most reasonable projections in light of the current state of the steel market. [Trial Trans. - Plummer at 995] ("given the magnitude and totally unexpected degree of change in the marketplace, I think it would be obvious that the absolute dollar values of our forecasts were no longer valid.").

A15. In addition, Jeffries' financial projections are not based on a normalized fiscal year. This failure to normalize the financial projections for the calendar year resulted in an "apples to oranges" comparison. [Trial Trans. - Strom at 1053]. Using projections that have not been normalized caused Jeffries' ultimate valuation numbers to be lower than those of CIBC. If Jeffries had used normalized projections, which it should have, its comparable company analysis would have yielded a higher valuation range.

A16. A 13 Week Cash Flow was filed under seal with this Court on October 22, 2004. That document, which sets forth the Debtors' expected cash flow from October 1, 2004 to December 31, 2004, casts further doubt on the reliability of the projections used by Jeffries and lends more credence to the projections used by CIBC.

A17. Based upon the evidence submitted at the confirmation hearing, the Court finds that the enterprise value of the reorganized debtor operating under the CBA that is part of the Debtors' Plan is likely to be not less than $300 million. Because confirmation is not occurring now, the question of enterprise valuation is one that must be determined in relation to the effective date of the plan, that issue may need to be revisited if revised competing plans are submitted in this case. Recognizing that value issues will be the subject of further discussion and, one hopes, negotiation among the key players in this case, it may be useful to recognize that the most relevant metric is discounted future cash flow. Focus on flexible instruments that would distribute cash flows that were not necessary to the continued economic health of the reorganized debtor's operations ought to result in those key players reaching agreement on a consensual chapter 11 plan.

2. Findings of Fact Re: Debtors' Implied Equity Value

A18. The value of equity in a company can be calculated by subtracting the total long term debt against the entity from the enterprise value. The debt to be subtracted from the enterprise value of the reorganized debtor includes the value of the new notes, the loan from the State of Ohio, the cure payments on executory contracts, and the balance on the revolving credit agreement.

A19. The Court finds that the reorganized debtor's long term debt, as of the effective date of a plan, would include, at a minimum, (1) approximately $100 million in new notes, with the terms and characteristics of the notes proposed under the Secured Noteholders' Plan, (2) a $5 million loan from the State of Ohio, (3) approximately $21 million earmarked for cure payments on executory contracts under the Debtors' Plan, (4) a $5 million distribution[9] to Class 7 claimants in the "out years," and (5) the approximately $35 million balance on the revolving credit agreement,[10] for a total of approximately $166 million.

A20. Assuming an enterprise value of, say, $320 million at the time of the effective date of a plan, the implied equity value of the reorganized debtor, prior to the infusion of new value by existing equity, would be approximately $154 million.

3. Findings of Fact re: Renco's Contribution

a). Cash

A21. The Debtors' Plan provides that Renco would pay, on the effective date of the plan, $35 million in exchange for all of the equity in the reorganized debtor. The Debtors' Plan proposes that the reorganized debtor will retain the $35 million rather than distribute any of that money to the Debtors' creditors.

A22. Because the cash is to be retained by the reorganized debtor, the cash contribution by Renco actually increases the equity value of the reorganized debtor. Therefore, the Court finds that to the extent the cash contribution is treated as new value, it

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9 The Debtors argue that the distribution in the out years is potentially much larger, growing to approximately $30 million. Even if the Debtors' calculations are correct, it does not change the Court's conclusion that Renco's contribution falls short of being the fair equivalent value of the equity of the reorganized debtors. Indeed since such payments are subject to a cap, it exacerbates it.

10 The 13 Week Cash Flow projections show that the Debtors' assumption about the projected amount of the revolver was inflated. At the time of eventual confirmation the amount of the revolver will not be $60 million, but likely will be half of that number, or less.

directly increases the reorganized debtor's equity value.

b). Labor Savings

A23. The USWA has entered into a new CBA with WCI (the "Revised WCI CBA").

A24. Thomas Gentile, the Debtors' Treasurer and acting Chief Financial Officer, testified that the labor savings achieved under the Revised WCI CBA are $42 million in the first year and approximately $149 million over the life of the agreement. Although Mr. Gentile's testimony is undisputed with respect to the amount of labor savings, the Court finds that the Debtors failed to prove that these labor savings should be attributed to Renco in determining the value of Renco's contribution. Rather, the record evidence shows that the USWA was ready to enter into a contract with similar benefits to the company with the Secured Noteholders, such terms having now become something of industry norms.[11] The source of the value of the labor savings, then, is from the workforce. This is not irrelevant to this analysis because it provides real consideration to support the contractual right of the USWA to block a sale of a reorganized debtor's assets or stock, particularly to the extent that such a sale would alter the controlled group for purposes of pension liability.

c). Pension Savings

A25. The Court finds that the appropriate measure of the value of the pension savings to the Debtors is the amount of pension liability to be assumed by Renco, for which Renco cannot seek reimbursement from the Debtors. According to an excerpt from the March 26, 2004 agreement between WCI, Renco and the USWA, which is attached to the WCI Disclosure Statement as Ex. 5, Renco will be obligated to contribute $54 million over the first three years and $12 million thereafter as the initial minimum contributions for the current Pension Plan for a total of $66 million (defined as the "Minimum Renco Contribution").

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11 *See* Findings of Fact D3 - D6, *infra*.

A26. The reorganized debtor can upstream payments to Renco under certain circumstances in certain amounts. According to the excerpt, the reorganized debtor may upstream payments to Renco in the following amounts:

> c. Provided such Upstreamed funds are directly contributed to the Old Pension Plan [as per Union's Pension Proposal] in any given year, the greater of (I)(A) the minimum contribution to the Old Pension Plan required under law [to be defined]; minus (B) the Minimum Renco Contribution (as defined below); minus (C) any Upstreaming that has occurred under d below since the Effective Date; and (ii) 20% of Net Income [to be defined]...
>
> d. Beginning in 2007, provided the Company has made capital expenditures of at least the amount indicated on Attachment C hereto, the lesser of (a) 50% of Net Income after deducting all Upstreaming payments made under a-c above including, in the case of Upstreaming payment made under c, above, all such payments made since the Effective Date; and (b) an amount which, after such Upstreaming, would leave the Company with total liquidity [to be defined] both immediately and on a projected basis over the succeeding twelve months, of at least $75 Million.

A27. The best that the Court can do is discuss this theoretically because, on the evidence before the Court, there is no means of calculating an actual dollar figure. However, based on the record before it, the Court finds that the value of Renco's new value contributions under the Debtors' Plan totals significantly less than the value of the equity that the existing equity holders would receive under the Debtors' Plan.

4. Conclusions of Law

a). Absolute Priority and New Value

In order for old equity holders to retain the equity of a reorganized entity, a contribution must be (1) in the form of money or money's worth; (2) necessary to the reorganization and (3) reasonably equivalent to the value of the interest being purchased. *In re Beaver Office Prods., Inc.*, 185 B.R. 537, 542 (Bankr. N.D. Ohio 1995). The Debtors have the burden of proving that Renco is not receiving the reorganized debtor's equity "on account of" its existing equity interest, but rather on account of new value in "money or money's worth" equal or equivalent to the value of the reorganized debtor. "This involves looking at the need for the contribution and whether [the equity holder] paid a fair price for its interest." *In re U.S. Truck*, 800 F.2d 581, 588 (6^{th} Cir. 1986); *see also In re Economy Lodging Sys., Inc.* 205 B.R 862, 865 (Bankr. N.D. Ohio 1997) (recognizing the new value exception, but declining to confirm the proposed plan due to insufficiency of the proposed new value).

The Debtors argue that they have satisfied the requirements of the absolute priority rule and the new value corollary by terminating exclusivity and engaging in a so-called marketing process. Contrary to the Debtors' contention, the Supreme Court did not hold that either the termination of exclusivity or engaging in a "marketing process" automatically satisfy the absolute priority rule.[12] The Supreme Court simply held that, as a matter of law, plans providing junior interest holders with exclusive opportunities free from competition and without the benefit of market valuation fall within the prohibition of § 1129(b)(2)(B)(ii). *203 North LaSalle*, at 458. In other words a marketing process and the termination of exclusivity are necessary, but are not independently sufficient steps to prove compliance with § 1129(b)(2)(B)(ii).

In a case like this where the market was not or cannot be tested, plan confirmation centers on enterprise value. As in *In re Exide Techs.*, 303 B.R. 48 (Bankr. D. Del. 2003), the market based approach should be rejected and other valuation methods embraced. *Id.* at 65-66. The Debtors argue that *In re Union Financial Servs. Group, Inc.*, 303 B.R. 390 (Bankr. E.D. Mo. 2003) directs this Court to find § 1129(b) satisfied by virtue of the Debtors'

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12 Furthermore, the marketing process in this instance does not constitute the type of process that could be considered to adequately test the market for the Debtors' assets and equity.

marketing process. *In re Union Financial Servs. Group, Inc.* is not controlling authority. Further, it is not analogous factually. In *Union Financial*, the marketing process began prior to the petition date and was an open and independent process. Further, the court in *Union Financial* was not asked to confirm a plan over the objection of an impaired creditor, but rather over the objection of a frustrated bidder. *Id.* at 425. Therefore, the Court finds *Union Financial* inapposite to this case.

It is the burden of the Debtors to prove, by a preponderance of the evidence, that Renco is paying "top dollar" for the reorganized debtor's equity. Renco argues that its contributions should be viewed to included three main components - a cash contribution, all of the projected savings under the Revised WCI CBA and the assumption of pension liabilities.

(1) Cash Contribution

A cash contribution clearly is money or money's worth. However, Renco's cash contribution does not constitute new value because it is not being distributed to creditors. It is being used to increase the equity value of the reorganized debtor. This is impermissible round housing. *See In re One Times Square Assocs. Ltd. Partnership*, 159 B.R. 695, 708 (Bankr. S.D. N.Y. 1993) (finding that proposed new value contribution did not satisfy the absolute priority rule because only the new equity holder would benefit from such repairs); *In re Miami Ctr. Assocs. Ltd.*, 144 B.R. 937, 942 (Bankr. S.D. Fla. 1992); *cf. In re 8315 Fourth Ave. Corp.*, 172 B.R. 725, 739 (Bankr. E.D. N.Y. 1994).

(2) Revised WCI CBA

The Debtors argues that the labor savings under the Revised WCI CBA should be considered value contributed by Renco because Renco closed the final deal with the USWA. The Debtors cite to *In re Union Financial* and *In re Treasure Bay Corp.*, 212 B.R. 520, 545

(Bankr. S.D. Miss. 1997) for the proposition that the value the court should consider is the value to the estate, not a credit to the contributor. In *Treasure Bay Corp.*, the creditors argued that the debtors failed to prove that the property contributed to the estate was worth $4,500,000. The court disagreed. The court wrote,

> The evidence showed that Shoreline purchased the Budget Inn property on February 15, 1995 for $3,667,596.26. Given that over two years has passed, that real property values in Biloxi have been increasing because of gambling, and the particular advantages the Budget Inn property brings to the Treasure Bay Casino, the court finds that the contribution of the Budget Inn property is reasonably equivalent to a value of $4,500,000.

Id.

In contrast, the Secured Noteholders argue that new value must consist of money or money's worth - meaning that it should be capable of exchange in any market for something of value to creditors today. *In re Economy Lodging, Sys., Inc.*, 205 B.R. at 868. New value contributions must be "balance sheet" assets that provide value to a reorganized debtor in the event of a failed reorganization. *See Kham & Nate's Shoes No. 2 v. First Bank of Whiting*, 908 F.2d 1351, 1362 (7th Cir. 1990). Further, the Secured Noteholders argue that the Revised WCI CBA is a market rate contract and the contribution of a market rate contract does not constitute new value. *See In re SunCruz Casino*, 298 B.R. at 841.

The Court finds that the full value of the labor savings under the Revised WCI CBA are not attributable to Renco as new value.

(3) Pension Liabilities

The Debtors argue that another component of the new value being contributed by Renco is Renco's assumption of the Debtors' pension liabilities relative to the Current Pension Plan. The Debtors argue that this has a value of $48 million to $86 million attributable to Renco. The Secured Noteholders counter that Renco's assumption of liabilities for which it was already responsible, albeit secondarily, does not constitute new value.

The Court believes that the value appropriately attributable to Renco is the amount of pension liability assumed by Renco for which the Debtors will no longer be primarily liable and for which Renco cannot seek reimbursement from the Debtors. It is arguable that the computation of new value should be limited to what this bankruptcy estate would pay on the claims that are entirely avoided because of this highly unusual treatment of the pension issues. Because this Court recognizes the importance of a highly motivated work force charged with every incentive to make the reorganized debtor successful, the Court concludes that on the facts and circumstances of this case it is appropriate to give dollar for dollar new value credit to the existing equity to the extent that it will pay such benefits without any ability to be reimbursed by the reorganized debtor.[13]

b.) Fair and Equitable

Separate and apart from satisfaction of the absolute priority rule, a plan must be fair and equitable. *In re Dow Corning*, 244 B.R. 678, 687-95 (Bankr. E.D. Mich. 1999) (discussing the breadth of the "fair and equitable" requirement of § 1129(b)); *203 North LaSalle*, 526 U.S. at 449-50. Treatment of Class 7 is not fair and equitable in light of the retention of 100% of the equity by Renco in exchange for a contribution of $35 million plus the present value of the portion of future pension payments that equity is obligated to make without any ability to seek reimbursement. The implied equity of the reorganized debtor under the Debtors' Plan is worth one or more multiples of the new value credit to which Renco is entitled. This is further corroborated by the market evidence (even as dampened as it has been by the signals from Debtors' management and thus not a product of truly adequate market exposure) showing another buyer would pay the equivalent of $85 million.

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13 *See* Finding of Fact A27, infra.

Viewed from yet another perspective, excluding the monies directed to Class 7 under the Debtors' Plan, the reorganized debtor's long term debt, at the time of confirmation, would include, at a minimum, (1) approximately $100 million (the amount provided in the Secured Noteholders' Plan and therefore an appropriate place holder for the purpose of discussions) in new notes, (2) a $5 million loan from State of Ohio, (3) approximately $21 million earmarked for cure payments on executory contracts under the Debtors' Plan and (4) the balance on the revolving credit agreement,[14] say for this discussion's sake, a total of approximately $155 million. Assuming an enterprise value of, say, $310 million at the time of the effective date of the plan, the question that all of the key players should address when they (re)turn to negotiations is who would have what entitlement to implied remaining value of, say, $155 million.

In addition, the enterprise value of the reorganized debtor depends on certain intangibles. Thus, the enterprise value of the reorganized debtor will vary depending upon, *inter alia*, the ownership structure. For instance, the Debtors' Plan, which seems to include the preservation of workforce morale, would probably generate a reorganized debtor with a higher enterprise value.

B. *The Debtor's Plan is Not Confirmable Because its Distribution of $94 Million in new 9% 10 year Notes Does not Comply with the Requirements of § 1129(b)(2)(A).*

In order for the Debtors' Plan to be capable of confirmation, it must provide for payment on the Secured Noteholders' Class 2 claims to the full extent of the value of their collateral or provide treatment to which the Secured Noteholders have agreed. *See* § 1129(b)(2)(A).

[14] *See* fn. 10, supra.

1. Findings Re: Value of Secured Noteholders's Collateral

B1. The Secured Noteholders' collateral includes substantially all of the Debtors' real property, plant and equipment (the "PP&E"). It does not include any other tangible or intangible assets or the Debtors' goodwill.

B2. The Debtors' audited financial statements at the time these bankruptcy cases were filed listed the value of the PP&E as $185,433,000.

B3. During the confirmation hearing, the Debtors presented the testimony and valuation analysis of John Connolly, an Executive Vice President and the Chief Operating Officer of Nationwide Consulting Company, Inc. ("NCC"). Mr. Connolly testified that he believed the value of the PP&E to be $94 million as of the petition date, September 16, 2004. Mr. Connolly also testified that he did not believe the value of the PP&E had changed significantly between the petition date and the time of his testimony.

B4. The Court finds that Mr. Connolly's/NCC's appraisal is not entitled to any weight because neither NCC's report nor its workfile disclose the reasoning, basis, and support purportedly underlying Mr. Connolly's conclusions. Mr. Connolly's testimony revealed several inexcusable departures from required documentation necessary to support a valid appraisal. Second, the values Mr. Connolly attributes to each category of the Secured Noteholders' collateral are inconsistent with the limited documentation that does exist in his workfile. In other words, the documentation that exists provides no basis for the slashing of asset values evident in Mr. Connolly's final report. Finally, Mr. Connolly testified that he used an overall depreciation factor, based on the LTV II transaction, to value the PP&E. The Court finds the testimony and analysis of Mr. Connolly wholly incredible and unreliable.

B5. Accuval approached the valuation of the PP&E from the top down, *i.e.*, starting with the enterprise value derived from the income generated by WCI less working capital and amounts purporting to approximate the value of each category of intangible assets associated with that income stream. Using this methodology and current projections and market data for steel companies, Accuval arrived at a value for the Secured Noteholders' collateral of the PP&E of $184 million as of October 1, 2004.

B6. The Secured Noteholders's Plan offers new notes to Class 2 Claimants in the amount of $100 million.

B7. The Court finds that currently the only possibly useful evidence of value of the PP&E is the valuation analysis by Accuval and the Secured Noteholders' Plan.

2. Conclusions of Law

The Debtors have the burden of proving, by a preponderance of the evidence, that the Debtors' Plan satisfies the requirements of § 1129(b)(2)(A) that the Secured Noteholders are being paid the value of their collateral. Valuation for the purposes of "cramming down" a proposed plan is to be determined as of the effective date of the plan. *See In re Kidd*, 315 F.3d 671, 676-77 (6th Cir. 2003); Collier on Bankruptcy ¶ 506.03[10]. In addition, the valuation is to be done in light of the purpose for the valuation. *See Assocs. Comm. Corp. v. Rash*, 520 U.S. 953, 963 (1997).

In this circumstance, where the Debtors are proposing to retain the PP&E for future use in place, the Debtors argue the appropriate measure of value of a secured creditor's claim against specific assets is defined by the going concern value of its collateral and not by values the collateral may have when combined with other assets that are not secured by such creditor's claim. *In re TennOhio Transp. Co.*, 247 B.R. 715, 720 (Bankr. S.D. Ohio 2000). In contrast, the Secured Noteholders argue that, because the Secured Noteholders' collateral is used to generate income in the form of an integrated manufacturing facility, the appropriate valuation method must consider the income generated by the collateral. *In re Fiberglass*

Indus., Inc., 74 B.R. 738, 742 (Bankr. N.D. N.Y. 1987). The Secured Noteholders cite to *In re LTV Steel*, 285 B.R. 259, 277 (Bankr. N.D. Ohio 2002) for the proposition that with respect to steel mills in particular, courts have valued property, plant and equipment based upon the income generated by the mill, minus the working capital needed to get it up and running. The Court recognizes the incentives, on each side, to either overvalue or undervalue Debtors' enterprise and their constituent assets. *In re Coram Healthcare, Corp.*, 315 B.R. 321, 339 (Bankr. D. Del. 2004) *citing In re Exide Technologies*, 303 B.R. 48, 61 (Bankr. D. Del. 2003). In addition, the Court recognizes that valuation is a mixture of art and science, and therefore, experts often disagree. Nonetheless, the Court does not credit the opinion of NCC and discounts the opinion of Accuval because of its top down approach.

As the record is now developed the only reliable evidence of value of the Secured Noteholders' collateral is measured by the value of what the Secured Noteholders themselves proposed to distribute on account of the old notes, *i.e.*, new notes in the amount of at least $100,000,000 with terms, conditions and restrictions so that they would trade at par. The Court understands that this treatment was in the context of a plan that directed all of the remaining enterprise value to holders of general unsecured claims. It is notable that one of the few matters on which the Debtors, the Secured Noteholders, the union and existing equity appeared to have a consensus was that the reorganized debtor should not have excessive fixed debt. While not a one to one relationship, the amount of debt that could be reliably serviced from the operation of the PP&E is relevant to its value in use by the reorganized debtor.

C. *The Debtors' Plan Unfairly Discriminates Against the Secured Noteholders in Violation of § 1129(b).*

1. **Findings of Fact**

a.) **Class 4**

C1. Class 4 is a convenience class that includes general unsecured creditors holding claims of $5,000 or less, or those holding claims of more than $5,000 but agreeing to reduce their claims and be treated under Class 4. Class 4 claimants will receive 85% of their allowed claim in cash on the effective date. There are over 300 claims in Class 4. Class 4 voted to accept the Debtors' Plan

b.) **Class 5**

C2. Class 5 claims are defined in the Debtors' Plan as follows:

> Unsecured Claims for liabilities that were incurred by the Debtors prior to the Filing Date for the purchase of products or services in the ordinary course of business of the Debtors by creditors which (a) have been identified by the Debtors as vendors which are to continue to provide Debtors with products or services important to the Debtors' operations after the Confirmation Date, and (b) have agreed to provide such products or services to the reorganized Debtors on commercial terms approved as beneficial by the Debtors....

See Debtors' Plan, Definition of "Continuing Vendor Claims."

C3. The Debtors' Plan proposes to pay Class 5 claimants 50% of their allowed claims in ten consecutive quarterly cash installments, each in the amount of 5% of the allowed claim beginning January 1, 2005.

C4. The Debtors classified the claims of 74 trade creditors as Class 5 - Continuing Vendor Claims. The trade creditors placed in Class 5 (the "Class 5 Vendors") consist of (1) 28 trucking companies and 1 railroad; (2) six "outside processors" and warehouses; and (3) 39 "suppliers," of which 11 "original equipment manufacturers" provide parts and services to maintain and repair original equipment sold to WCI; eight provide professional consulting services concerning environmental, actuarial and legal matters; eight supply commodities; one, the City of Warren, Ohio, provides water and sewer service; and 11 supply other goods and services. [Stip. ¶1 - docket #765].

C5. In the first few weeks after the bankruptcy filing, the Debtors' strategy "was to do whatever [WCI] needed to do to continue to receive the material or service that was critical ..., to [the Debtors'] continued operation." [Stip. ¶12 - docket #765].

C6. In the first few weeks after the bankruptcy filing, some vendors requested or required that WCI agree to tighter payment terms. WCI generally acquiesced to the new terms, in some instances after negotiating over the particular payment terms that would apply during its bankruptcy. [Stip. ¶13 - docket #765].

C7. Of the vendors who requested and obtained tighter payment terms incident to WCI's bankruptcy, some 31 were later placed in Class 5. The other 43 vendors later placed in Class 5 never changed their payment terms. [Stip. ¶14 - docket #765].

C8. Many vendors later placed in Class 4 (*i.e.*, "Convenience Claims") and Class 7 (*i.e.*, "Unsecured Claims") also requested and received tighter payment terms from WCI in the weeks immediately after the bankruptcy. WCI agreed to tighter payment terms with substantially more than 31 Class 4 vendors (of the approximately 300 vendors in that Class) and substantially more than 31 Class 7 vendors (of the approximately 200 vendors in that Class). [Stip. ¶15 - docket #765].

C9. After the "initial shock" of the bankruptcy filing had dissipated, WCI was "able to fend off" the tightening of payment terms requested by other vendors and rather kept vendors on their pre-petition payment terms. [Stip. ¶16 - docket #765].

C10. WCI expected that almost all of its vendors would revert to their normal pre-petition payment terms following WCI's emergence from bankruptcy. None of the vendors later placed in Class 5 had ever stated, prior to being notified of their placement in Class 5, that they would refuse to do business with WCI postconfirmation unless their pre-petition claims received preferential treatment in the bankruptcy proceeding. [Trial Trans. - Gentile at 112, 117-18]. However, Carmeuse Lime, Inc. ("Carmeuse"), which had one of the largest pre-petition claims of any trade creditor ($767,112.60) and an existing, but about to expire, executory contract with WCI, unsuccessfully pressed WCI on its claim soon after the bankruptcy filing. After Carmeuse's executory contract expired and was rejected, Carmeuse was later placed in Class 5. [Stip. ¶¶17-18 - docket #765].

C11. All or substantially all of the Class 5 Vendors have long-standing business relationships with WCI. [Trial Trans. - Gentile at 80-81]. Most of the supplier and outside processor vendors later placed in Class 5 had (and still have) "blanket" purchase orders in place with WCI. A "blanket" purchase order commits a vendor to supply its goods or services, at a specified price, for a term of typically one year. In practice, regardless of whether a vendor could do so as a legal matter, vendors with blanket purchase orders have not cancelled such orders other than for reasons of non-payment or non-availability of product. [Stip. ¶¶19-20 - docket #765].

c.) Class 7

C12. The general unsecured claims not included in either Class 4 or 5 have been placed in Class 7. The Class 7 claims include the deficiency claims of the Secured Noteholders. Under the Debtors' Plan, Class 7 claimants will receive a pro rata share of $5 million plus accumulated interest on the fifth anniversary of the effective date of the plan. Class 7 claimants may also receive the "Earnings Based Class 7 Distributions" as defined in an amendment to the Debtors' Plan.

C13. Renco offered to purchase approximately $8 million in Class 7 claims held by vendors for 15% of the face amount of the claims upon confirmation of the Debtors' Plan. Renco's offer to purchase the claims is contained in the WCI Disclosure Statement. A Class 7 vendor creditor agreed to sell its claim to Renco by checking a box on its ballot and voting for the Debtors' Plan.

2. Conclusions of Law

Section 1122(a) governs the classification of claims. This section does not demand that all similar claims be placed in the same class; however, a debtor may not classify similar claims differently solely to gerrymander an affirmative vote on a plan. *In re Snyders Drug Stores, Inc.*, 307 B.R. 889, 893 (Bankr. N.D. Ohio 2004). A separate classification of similar claims can be justified if a debtor proves that there is a legitimate business reason supporting the classification. *Id.* In *In re Snyders Drug Stores, Inc.* the debtors created a class ("class 10") made up of primarily but not exclusively trade creditors with whom the reorganized debtor hoped to do business after the reorganization. The court found that the debtors separate classification was justified by a legitimate business reason: the intention to do business with those creditors in the future. *Id.* at 893-94.

Despite the ability of the debtors in *In re Snyders Drug Stores, Inc.* to meet the requirements of § 1122, the debtors were not able to show that the different treatment afforded to its class 10 claimants was anything other than unfair discrimination prohibited by § 1129(b).

As in the *Snyders Drug Store* case, the Debtors have proposed a separate class made up primarily of trade creditors with whom the reorganized debtor hopes to do business after the reorganization. Even assuming the Debtors have a legitimate business reason for the separate classification resulting in Class 5, the Debtors have not shown that the different treatment granted to Class 5 claimants is anything other than unfair discrimination prohibited by § 1129. Thus, the Debtors may have the acceptance of one or more impaired classes of claims, but the Debtors have not met the burden of showing that the plan does not unfairly discriminate between classes of creditors.

a.) Intra Class Discrimination

Section 1123(a)(4) provides that: (a) ... a plan shall - (4) provide the same treatment for each claim or interest of a particular class, unless the holder of a particular claim or interest agrees to a less favorable treatment of such particular claim or interest. Thus, the treatment intra class must be the same. The Secured Noteholders argue that Renco's offer to the creditors with Class 7 claims, excluding the Secured Noteholders, to purchase those claims allows certain members of Class 7 to receive better treatment than that offered to the Secured Noteholders with respect to their deficiency claim. *See In re Allegheny Int'l., Inc.*, 118 B.R. 282, 292-94, 316 (W.D. Pa. 1990) (condemning agreement negotiated by debtors that permitted some, but not all, of the debtors' bank creditors to sell their claims to a third party for cash instead of the stock distributed under the Plan); *In re P-R Holding Corp.*, 147 F.2d 895, 897 (2d Cir. 1945) (plan proponents discriminated between assenting and dissenting bondholders by purchasing the dissenters' claims for cash, leaving the accepting bondholders to receive stock under the plan).

The Debtors suggest that a third party offer providing for the use of non-estate funds to purchase creditor claims as disclosed in their disclosure statement does not contravene the requirements of § 1123. *See In re Cajun Electric Power Co-op, Inc.*, 150 F.3d 503, 507 (5th

Cir. 1998). The distributions approved in *Cajun Electric* were offers to reimburse the legal fees of certain creditors and were separate and apart from the proposed distributions to those creditors on their claims.

b.) Inter Class Discrimination

The question is whether the discrimination is unfair within the meaning of § 1129(b)(1). Courts use a four-part test to determine if the discrimination is unfair: (1) whether the discrimination is supported by a reasonable basis; (2) whether the debtor can confirm and consummate a plan without the discrimination; (3) whether the discrimination is proposed in good faith; and (4) how the class that is being discriminated against is treated. *In re Snyders Drug Stores, Inc.*, 307 B.R. 889, 894-95 (Bankr. N.D. Ohio 2004); *In re Graphic Communications, Inc.*, 200 B.R. 143, 148 (Bankr. E.D. Mich. 1996); *In re Creekstone Apartments Assoc., L.P.*, 168 B.R. 639, 644 (Bankr. M.D. Tenn. 1994).

With respect to the first factor, some courts have allowed a plan to discriminate if the proposed discrimination protects a relationship with specific creditors that the debtor needs to reorganize successfully. *Id.*

In this case, as in *Snyder Drugstore,*

> The testimony did not, however, go far enough to prove that the general propositions discussed above justify discrimination in this particular case. Several things weigh against the explanation provided for the proposed discrimination. First, class 10 is not solely made up of trade vendors. Instead, the class of nearly 2569 creditors includes: (1) trade vendors; (2) service providers; and (3) lessors of stores which the reorganized debtor will continue to operate. There was no evidence to support the preferential treatment afforded to the lessors included in class 10. Second, there was no evidence to prove that the trade and service creditors included in class 10 would refuse to deal with the reorganized debtor on acceptable terms going forward absent some preferential payment under the plan. Class 10 is not, therefore, reasonably tailored to foster only those relationships that are critical to the

success of the reorganized debtor. [FN9 omitted] The plan proponents did not prove that there was a reasonable basis for the discrimination.

307 B.R. at 895. The Debtors have not met their burden of showing that the discrimination is reasonably tailored or has a reasonable basis. The discrimination is unfair.\

With respect to Class 4, an impaired class that voted to accept the Debtors' Plan, the Secured Noteholders argue that Class 4 is artificially impaired and, thus, cannot be used to satisfy the requirements of § 1129(A)(10). Given the Court's findings and conclusions with respect to Class 5 and unfair discrimination, the Court does not need to address this argument.

II. THE SECURED NOTEHOLDERS' PLAN

In addition to the previously mentioned confirmation requirements, a chapter 11 plan must provide an "adequate means for the plan's implementation" and the plan proponent bears the burden of proving by a preponderance of the evidence that, *inter alia*, "[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. . . ." § 1123(a)(5); § 1129(a)(11). *See also* § 1129(a)(1) (which requires that, to be confirmed, the "[t]he plan [must] compl[y] with the applicable provisions of this title"). Objections were raised regarding the adequacy of implementation and feasibility of the Secured Noteholders' Plan in relation to two specific issues: (1) a collective bargaining agreement (or lack thereof) between the reorganized debtor and the USWA and (2) the pension plan that would be offered to USWA workers by the reorganized debtor.[15]

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15 Other objections to confirmation of the Secured Noteholders' Plan were also raised including one by the USWA that confirmation of the Secured Noteholders' Plan would violate the successorship clause in the Current CBA and the provisions of § 1113(f). Because of the Court's findings herein regarding adequacy of implementation and feasibility of the Secured Noteholders' Plan, it need not reach all the other issues raised in all pending objections.

A. *The Lack of a Collective Bargaining Agreement Between the USWA and the Reorganized Debtor under the Secured Noteholders' Plan Renders that Plan Unfeasible.*

1. Findings of Fact

D1. The USWA is the collective bargaining representative for over 1,300 employees of WCI and serves as the authorized representative pursuant to § 1114(c) of WCI's bargaining unit retirees and surviving spouses. The USWA has represented bargaining unit employees of WCI and its predecessor companies for many years. [Stip. ¶9 - docket #725].

D2. The Current Pension Plan provides, among other benefits, normal retirement benefits, early retirement benefits and special shut down benefits in the event of a shutdown of WCI. [Joint Ex. 127].

D3. The USWA has entered into many innovative collective bargaining agreements over the years, including the groundbreaking contract reached with International Steel Group in December 2002, which has served as the model for many recent contracts. [Stip. ¶5 - docket #725].

D4. The USWA has also not hesitated to meet forcefully and effectively the challenge of major labor disputes, whether strikes or lockouts, including those with US Steel (1986), LTV I (1987), Ravenswood Aluminum Corp. (1990-92), Bridgestone/Firestone (1994-96), WCI Steel (1995), Wheeling-Pittsburgh Steel (1996-98), Georgetown Steel Corp. (1997-98), GST Steel Co. (Kansas City facility) (1997), Magnetic Specialties, Inc. (Marietta, Ohio) (1997-98), Rocky Mountain Steel (1997-2004), RMI Titanium Co. (Niles, Ohio)(1998-99; 2003-present), Southwire Co. (1998-99), Titan Tire Co. (Des Moines) (1998-2001), Titan Tire Co. of Natchez (Natchez, Miss.) (1998-2001), Kaiser Aluminum and Chemical Corp. (1998-

2000), Continental General Tire (1998-99), Rubatex Corp. (1999-2001), Newport News Shipbuilding (1999) and AK Steel (Mansfield, Ohio) (1999-2002). [Stip. ¶6 - docket #725].

D5. In 1995, an extremely acrimonious labor dispute occurred at WCI that had a devastating impact on the company. Two principal issues in the dispute were pension benefits and the successorship clause in the CBA. [Stip. ¶10 - docket #725].

D6. Following the closing of LTV Steel in 2001, the USWA Basic Steel Conference adopted a statement in 2002 that emphasized, *inter alia*, that the USWA would bargain based on principles that included the following:

> Financial viability. The Company must have a financial structure that allows it to invest in its facilities and meet its obligations, even if it means financial restructuring, in or out of bankruptcy. . . .
>
> Protecting our pensions. A retirement with dignity means, among other things, a defined benefit pension, which provides us with guaranteed pension benefits. . . .
>
> Sharing in the company's success. If companies do well, it will be because of our efforts, so the benefits of any success should also belong to us.
>
> Strengthened corporate protections. We're not fixing our companies for somebody else's benefit. We need commitments to invest in our plants and restrictions on the ability of management and owners to line their pockets at our expense.

[Stip. ¶8 - docket #725].

D7. Beginning on September 22, 2003, Lawrence M. Clark, Jr. of Harbert traveled to Pittsburgh six times, along with counsel and financial advisors, to meet with Ron Bloom, the USWA's Assistant to the President. [Stip. ¶11 - docket #653].

D8. In January, February and March 2004, the Secured Noteholders were in frequent and continuing contact with Ron Bloom and David McCall, the USWA District

Director for Ohio. [Stip. ¶12 - docket #653].

D9. On March 9, 2004, representatives of the USWA and the Secured Noteholders reached an agreement in principle, subject to certain conditions, on both the material terms of a plan of reorganization and the overall economic terms of a CBA. On March 11, 2004, the USWA and the Secured Noteholders reconfirmed their agreement in principle and began discussing its implementation. On March 26, 2004, the USWA and the Secured Noteholders reached agreement in principle on documentation permitting the USWA to support the Secured Noteholders' Exclusivity Termination Motion. [Stip. ¶13 - docket #653].

D10. The USWA at all times had reserved the right to continue collective bargaining negotiations with the Debtors and Renco, in their respective capacities as employer of the USWA's members and owner of the employer. During the USWA's negotiations with the Secured Noteholders, the union was also conducting competing negotiations with the Debtors and Renco. [Stip. ¶14 - docket #653].

D11. On April 1, 2004, Ron Bloom informed Joseph O'Leary, the Secured Noteholders' labor counsel, that the USWA had reached an agreement with the Debtors and Renco that it considered to be better for the USWA's members and retirees than the agreement it had reached with the Secured Noteholders. [Stip. ¶15 - docket #653].

D12. The USWA then entered into the Revised WCI CBA and strongly supports confirmation of the Debtors' Plan. The USWA has not entered into a CBA with the Secured Noteholders and opposes confirmation of the Secured Noteholders' Plan. The USWA reached these decisions in good faith after many months of meetings with all relevant parties. The USWA has determined that the Debtors' Plan and the Revised WCI CBA best serve the interests of the employees and retirees represented by the USWA. [Stip. ¶¶1-2 - docket #725].

D13. The leadership of the USWA and the USWA local union endorsed the Revised WCI CBA and recommended that the membership vote in favor of ratification. A ratification vote took place on July 15, 2004 and the tentative agreement has been ratified. The tentative agreement remains subject to confirmation of the Debtors' Plan. [Stip. ¶12 - docket #725].

D14. The Revised WCI CBA provides, *inter alia*, for continued investment in WCI through capital improvement commitments and limitations on dividends and other "upstream payments" by the reorganized debtor to its corporate affiliates, although it does permit upstream payments to Renco after five years, if approved by the board of the reorganized debtor, that purportedly will be controlled by independent directors, including a USWA nominee. [Stip. ¶14 - docket #725].

D15. The USWA has maintained contact with the Secured Noteholders' labor counsel subsequent to the rejection of the March 26, 2004 agreement in principle.

2. Treatment of the CBA Under the Secured Noteholders' Plan

D16. The Secured Noteholders' Plan sets forth the following with respect to a CBA between the USWA and the reorganized debtor:

> **ARTICLE 1.**
> **WHAT YOU GET UNDER THE PLAN**
>
> **1.1** Summary of Plan.
>
> * * *
>
> **(b) USWA.** NewCo ***will*** assume the Debtors' existing obligations in respect of retirees' medical and health benefits (**"Retiree Medical Benefits",** as defined more fully in Article 8). NewCo ***will not*** assume the Debtors' existing obligations, under their existing pension plans, in respect of all pension benefits earned through the effective date of the Plan.

> The Debtors, and their controlling shareholder, Renco Group, Inc. ("***Renco***"), will remain liable for earned pension benefits. With respect to pension benefits to be earned in the future, NewCo will provide such benefits through a new pension plan to be negotiated with the [USWA] pursuant to a new collective bargaining agreement. The USWA has not entered into, and its members have not ratified a new collective bargaining agreement with NewCo and there is no assurance that the USWA will do so, but NewCo will offer employment to USWA members on terms and conditions set forth in a 230-page collective bargaining agreement that the Secured Noteholders fully negotiated with the Noteholders over three months ending March 26, 2004 (the **"March 26 Agreement"**). NewCo intends to negotiate a final new collective bargaining agreement no less favorable to the USWA than the March 26 Agreement.

[Secured Noteholders' Plan, Art. 1 - docket #374].

D17. Article 6 of the Secured Noteholders' Plan addresses "Conditions Precedent to Confirmation and to Consummation." [Secured Noteholders' Plan, Art. 6 - docket #374]. As none of those conditions requires the reorganized debtor to have entered into a CBA with the USWA, the Secured Noteholders propose that their plan of reorganization would become effective with or without a CBA in place.

3. Conclusions of Law

The plan of reorganization proposed by the Secured Noteholders provides for the reorganized debtor to continue as an operating steel company which, *inter alia*, requires a skilled workforce to exist. The Secured Noteholders clearly understand the need for a skilled workforce as evidenced by the time, energy and resources expended in attempting to negotiation a new CBA with the USWA. The Secured Noteholders also clearly understand the possible repercussions should it be unable to ultimately negotiate a new CBA:

> It is possible that USWA members could refuse to work at NewCo without a final CBA, causing NewCo to cease operations temporarily, or in some instances, even permanently. The Secured Noteholders believe this is unlikely, but no assurances can be given that such work stoppages and

cessation of operations will not occur.

[Secured Noteholders' Discl. Stmnt. at p. 40 - docket #512]. During a deposition of James Wareham, who the Secured Noteholders propose to appoint as chief executive officer of the reorganized debtor, he acknowledged that WCI could probably not successfully reorganize without a new CBA:

Q: Have you done any formulation in your own mind or any thinking in your own mind as to what the business plan of this company should be?

* * *

A: I have given the subject some thought, yes.

Q: Okay. What's your thinking on the subject?

* * *

A: I think there are three or four areas that probably need specific addresses. One is the cost structure of this company.

* * *

Q: Let's talk about the cost structure. Is it fair to say in your mind the most significant portion of cost structure is a revised USWA agreement?

A: That's certainly a large one. I don't know if it is – it's – certainly it's not the only one.

Q: I didn't say that.

A: And I'm not even sure that I would say it is the major one.

Q: Do you believe this company can emerge from bankruptcy and successfully reorganize without a new USWA collective bargaining agreement?

A: No, I don't.

[Wareham Depo. at pp. 45-47 - docket #749].

As set forth in their plan, the Secured Noteholders intend to offer employment to USWA members on the same terms and conditions in the agreement reached with the USWA in March 2004. [*See* Secured Noteholders' Plan, Art.1 - docket #374]. In support of its contention that the lack of a pre-negotiated CBA does not render its plan unfeasible, the Secured Noteholders rely upon its history of negotiations with the USWA and the fact that the USWA would, if the Secured Noteholders' plan was confirmed, be obligated to negotiate in good faith with the reorganized debtor. The Secured Noteholders also rely upon *Teamsters Nat'l Freight Indus. Negotiating Comm. v. U.S. Truck Co., Inc.*, 800 F.2d 581 (6th Cir. 1986) for the proposition that the unresolved issue of a collective bargaining agreement does not render the Secured Noteholders' Plan unfeasible.

In its *U.S. Truck* decision, the Sixth Circuit was asked to review, *inter alia*, the trial court's finding that a proposed plan of reorganization was feasible despite the absence of a pre-negotiated labor agreement with the union. In determining that the trial court's factual finding was not clearly erroneous, the Sixth Circuit took specific note of the labor union's "sincere willingness" to cooperate with the reorganized debtor to reach a labor contract so as to ensure continued viability of the company. *In re U.S. Truck*, 800 F.2d. 581, 589 (6th Cir. 1986).

In this case, the USWA has not expressed a "sincere willingness" to enter into a new CBA with the Secured Noteholders because of the fact that is has successfully negotiated a new CBA with the Debtors. Although the USWA would be under a duty to negotiate in good faith with the Secured Noteholders if their plan was confirmed, this Court will not discredit the statements of the USWA's counsel during the hearing in this matter that the Secured Noteholders would face an uphill battle with the union in such negotiations. Moreover, it is extremely doubtful that the union would be willing to negotiate a new CBA with the Secured Noteholders on the same (or even similar) terms as the parties' March 2004 agreement given (1) the change in the worldwide steel market; (2) the increase in WCI's operating profits and (3) the intervening Revised WCI CBA which, *inter alia*, preserves historic pension liabilities in favor of union employees.

The Court is also mindful of the fact that the USWA could (as it has in the past at this very plant) refuse to work until a new CBA is finalized and this potential work stoppage raises serious questions as to the feasibility of the Secured Noteholders' Plan. There was no evidence presented during the confirmation hearing that the reorganized debtor under the Secured Noteholders' Plan has a strategy (or strategies) to deal with the very real possibility that, upon confirmation, members of the USWA would refuse to work given the absence of a CBA.

The Secured Noteholders rely upon the similarities between the Revised WCI CBA and the agreement in principle that the Secured Noteholders reached with the USWA on March 26, 2004 as a basis for its argument that it would likely enter into a new CBA with the USWA. Although there do appear to be some similar provisions, one very real difference exists. Under the plan of reorganization proposed by the Debtors, existing pension benefits would not be materially changed while the Secured Noteholders' Plan specifically provides for the rejection of the Current Pension Plan. [Secured Noteholders' Plan, Art. 4, as amended - docket ##374, 550].

The reorganized debtor under the Secured Noteholders' Plan intends to offer pension benefits through participation in the Steelworkers Pension Trust (the "SPT"), a multi-employer pension plan. However, the Mulitemployer SPT Trust Agreement requires, in order for an employer to participate on behalf of bargaining unit employees, a CBA providing for such participation and a decision by the SPT as to what benefits would be provided. [*See* Joint Ex. 129 and Joint Ex. 130]. *See also* 29 U.S.C. § 186(c)(5) (which requires a written agreement for participation in a joint-board Mulitemployer pension plan).

The Secured Noteholders have also argued that they bear all the risk in the event that they are unable to reach a deal with the USWA subsequent to confirmation of their plan because all other classes of creditors under their plan will receive 100% of their allowed claims through distributions to be made on the effective date of the plan with no contingencies. This argument ignores, however, the impact that potentially lengthy negotiations for a new CBA would have on the future viability of the reorganized debtor as an operating steel producer. Should that viability be jeopardized, there exists a very real possibility that this reorganization would be followed in short order by another bankruptcy filing.

In order to prove feasibility, a plan proponent must demonstrate that its plan has a reasonable prospect of success and is workable. *In re Crosscreek Apartments, Ltd.*, 213 B.R. 521, 539 (Bankr. E.D. Tenn. 1997). Although a plan proponent need not prove certainty, it cannot provide only speculation as to a key component of the proposed plan of reorganization, which in this case is a CBA with the USWA. *In re Crosscreek Apartments, Ltd.*, 213 B.R. 521, 539 (Bankr. E.D. Tenn. 1997). This is especially so when, as here, the Court is presented with a competing plan which provides for a new CBA and is strongly supported by the USWA.

B. Treatment of the Current Pension Plan Under the Secured Noteholders' Plan Renders that Plan Unfeasible.

1. *Findings of Fact*

E1. WCI is the named sponsor of the Current Pension Plan, a single-employer defined benefit pension plan insured by the PBGC under ERISA.[16]

E2. WCI is the administrator of the Current Pension Plan and named fiduciary as meant by 29 U.S.C. §§ 1002(1)(A), 1102(a) and, assuming the Secured Noteholders' Plan is confirmed, would continue to function as such, through its directors, officers and professionals hired for that purpose. [Stip. ¶3 - docket #756].

E3. Renco and WCI, together with certain other entities, are members of a "controlled group" as defined under ERISA, and rules and regulations adopted thereunder by the PBGC and the Internal Revenue Service. [Stip. ¶2 - docket #764].]

E4. As a member of a controlled group, Renco is jointly and severally liable for all unfunded pension liabilities of the Current Pension Plan.

E5. The Current Pension Plan has approximately $100 million in assets under management. [Stip. ¶4 - docket #756].

E6. The Current Pension Plan has approximately 1,300 active participants with approximately 600 retirees, disabled employees and surviving spouses receiving monthly

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[16] ERISA is the Employee Retirement Income Security Act of 1974, *as amended*, 29 U.S.C. §§ 1001-1461 (2000 & Supp. I 2001). ERISA's fiduciary standards are codified at 29 U.S.C. §§ 1101-1114, and the pension insurance program, which it Title IV of ERISA, is codified at 29 U.S.C. §§ 1301-1461.

pensions. [Stip. ¶1 - docket #756].

E7. About 380 employees covered under the Current Pension Plan have enough service for an immediate unreduced "30 and Out" pension.

E8. About 200 employees covered under the Current Pension Plan have enough age and service to qualify for an immediate unreduced pension ("70/80" or "Rule of 65") if they lose their jobs due to shutdown or layoff.

E9. Approximately 250 active employees are expected to retire under a proposed headcount reduction if either the Debtors' Plan or the Secured Noteholders' Plan is confirmed. [Stip. ¶2 - docket #756].

E10. The PBGC timely filed a proof of claim for, among other things, the unfunded benefit liabilities of the Current Pension Plan in the amount of $197,300,000 (the "UBL Claim"). The UBL Claim is a contingent general unsecured claim. The PBGC does not believe that any of its other claims are likely to become liquidated in any significant amount. [Stip. ¶5 - docket #756].

E11. In the event of termination of the Current Pension Plan, the PBGC has statutory authority to pursue recovery of the UBL Claim against Renco, as well as certain other entities that are jointly and severally liable under 29 U.S.C. § 1362. The UBL Claim would also become a liquidated general unsecured claim against WCI, which would be classified in Class 7 under the Secured Noteholders' Plan. [Stip. ¶8 - docket #756]

2. Pension Plan Treatment Under the Secured Noteholders' Plan

E12. The Secured Noteholders' Plan sets forth the following with respect to the Current Pension Plan:

4.1 **Assumption and Rejection of Executory Contracts and Unexpired Leases.** Pursuant to Bankruptcy Code §§ 365 and 1123(b)(2), on the Effective Date, all executory contracts and unexpired leases to which the Debtors are parties shall be ***assumed and assigned to NewCo,*** except (i) all defined benefit pension plans . . . .

[Secured Noteholders' Plan, Art. 4, as amended - docket ##374, 550]. As to post-confirmation administration of the rejected Current Pension Plan, the Secured Noteholders' Plan provides the following:

5.8 **Post-Confirmation Administration of the WCI Steel-USWA Pension Plan.** The WCI Steel-USWA Pension Plan (the "Pension Plan") will continue to be sponsored and administered by WCI until such time as, (i) Renco assumes sponsorship of the Pension Plan, or (ii) the Pension Plan is terminated, pursuant to Section 4041 or 4042 of ERISA.

(a) Bank One Trust Company is, and will remain, trustee of the Pension Plan's assets. Subjection only to direction from WCI's board of directors or its designee, Bank One Trust Company has, and will continue post-confirmation to have, fiduciary responsibility for the maintenance and investment of all assets of the Pension Plan (the "Plan Trustee Functions"). Bank One Trust Company's fees and expenses are properly reimbursable our of the assets of the Pension Plan, and therefore do not require any ongoing payments by WCI.

(b) All administrative and actuarial functions with respect to the Pension Plan (the "Non-Plan Trustee Functions") will continue to be performed by or at the direction of WCI, under the supervision and ultimate responsibility of WCI's board of directors.

(c) The Secured Noteholders have consulted with Hewitt Associates ("Hewitt"), a nationally prominent firm that specializes in providing administrative and actuarial services to pension plan. Hewitt has provided the Secured Noteholders with an estimate of the maximum fees that would be payable to a third-party administrator if it became necessary to "outsource" all

> Non-Plan Trustee Functions with respect to the Pension Plan, including both implementation and ongoing administration fees for a full year following confirmation of the Secured Noteholders' Plan (the "Maximum Fee Estimate"). The Maximum Fee Estimate is $500,000. The Secured Noteholders will establish a cash reserve in the amount of $500,000 upon confirmation of the Secured Noteholders' Plan (the "Pension Plan Administration Reserve") for use by WCI in the event that WCI does not have sufficient cash to pay for performance of the [N]on-Plan Trustee Functions following confirmation. This reserve will continue to be available to WCI (with drawdown subject to Court approval) to defray the cost of employing its own personnel to provide Non-Plan Trustee Functions or hiring a third-party administrator, until such time as (I) Renco assumes sponsorship of the Pension Plan, or (ii) the Pension Plan is terminated, pursuant to Section 4041 or 4042 of ERISA. ***The Secured Noteholders expect that one of these two eventualities will occur promptly following confirmation of the Secured Noteholders' Plan.***

[Secured Noteholders' Plan, Art. 5, as amended - docket ##374, 645] (emphasis added).

E13. The Secured Noteholders' Plan provides that "Equity Interests in each Debtor shall not be cancelled but shall remain outstanding" and further provides the following as to the continuance of WCI directors after confirmation

> (e) In the unlikely event that all directors of WCI resign or otherwise cease to serve following confirmation of the Secured Noteholders' Plan, the Secured Noteholders shall in that circumstance be empowered, pursuant to the Order confirming the Secured Noteholders' Plan, to appoint a director for WCI, in order to ensure the continued orderly administration of the Pension Plan through use of the Pension Plan Administration Reserve, until such time as (I) Renco assumes sponsorship of the Pension Plan, or (ii) the Pension Plan is terminated, pursuant to §4041 or 4042 of ERISA.

[Secured Noteholders' Plan, Art. 5.8, as amended - docket ##374, 645].

3. Conclusions of Law

The Secured Noteholders' Plan explicitly proposes to decline assumption of the Current Pension Plan, which is one of WCI's largest liabilities. Instead, the Secured Noteholders propose to leave the Current Pension Plan with a WCI corporate shell to pend its ultimate fate, which depends upon the actions of third parties over which the Secured Noteholders have no control.

Pursuant to their plan, the Secured Noteholders have identified two possible outcomes for the Current Pension Plan. The first possible outcome is that WCI will remain the sponsor of the Current Pension Plan until Renco volunteers to become the plan's new sponsor. The second possible outcome is that Renco refuses to assume sponsorship of the Current Pension Plan and it is ultimately terminated by the PBGC. Because neither of these outcomes would immediately occur, the Secured Noteholders' Plan provides for the appointment of a third party to administer the Current Pension Plan while its fate is being decided.

Even if the Court were to assume that one of the two identified outcomes for the Current Pension Plan would eventually occur, the Secured Noteholders have failed to identify (and then address) the potential liabilities to the estate under each of the possible outcomes. Moreover, the Secured Noteholders have incorrectly assumed that the Current Pension Plan will be dealt with in a manner that leaves no negative impact upon the estate.

First Possible Outcome: WCI will remain as sponsor of the Current Pension Plan until Renco assumes sponsorship. The Secured Noteholders contend that this outcome is "virtually certain" to occur because (a) if the Current Pension Plan is terminated, the PBGC could seek to collect payment on the UBL Claim against Renco (as a member of the controlled group) and (b) the UBL Claim is larger than Renco's obligation to fund the Current Pension Plan. During the confirmation hearing, the only evidence presented by the Secured Noteholders to support this contention was the expert report of William Daniels:

> Based upon my experiences in similar situations, the most likely outcome is that the plan sponsorship will be assumed by a member of the Renco controlled group of companies. This outcome occurs either directly because the controlled group realized that it is responsible or by inducement/agreement with the PBGC, which precipitates the action by threatening an involuntary plan termination that would cause the controlled group to incur higher cost than if they [sic] assumed the plan. For Renco, . . ., the Total Benefit Liability is $230,714,000 for an assumed plan termination as of October 31, 2003. Plan assets as of that date equaled $92,900,000 resulting in an immediate claim by the PBGC in the amount of $137,814,000. This value is substantially greater than the costs of maintaining the plan.

[William Daniels Expert Rpt. at pp. 1-2 - docket #757]. Aside from a stipulation that Renco "has cash substantially in excess of the . . . maximum termination liabilities [of the Current Pension Plan] plus securities and other assets," there was no evidence presented regarding Renco's other liabilities. [Stip. ¶5 - docket #764]. Nor was there any evidence presented to support an assumption that Renco would necessarily act in what appears to be the most economically reasonable manner.[17]

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[17] Renco is a New York corporation which is solely owned and/or controlled by Ira Rennert. That corporation's balance sheet is not a matter of public record or the record in this case. When asked in his deposition about specifics of that corporation's operations, Mr. Rennert was often times unable to recall basic information.

> Q: You are the sole owner of the Renco Group?
>
> A: Myself and trusts for my children.
>
> Q: And do I understand there are five separate trusts that own Renco?
>
> A: I don't know. I don't know.

Rennert Depo. at pg. 14.

> Q: Do you have any sort of identified committee that has any

Even if the Court were to accept that Renco would eventually assume sponsorship of the Current Pension Plan, there are state corporate law issues that arise given the Secured Noteholders' proposal to maintain WCI as a corporate shell pending Renco's decision. Through their plan, the Secured Noteholders provide that WCI's current board of directors would remain responsible for "[a]ll administrative and actuarial functions with respect to the

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responsibility for decision-making at Renco?

A: No.

Q: Is there a board of directors?

A: I believe so.

Q: Who are the members of that board?

A: I don't recall.

Q: Would it be fair to say that you were the final decision-maker at Renco?

* * *

A: Yes, that would be fair to say.

Rennert Depo. at pg. 17.

Q: What records, if any, are kept of corporate decisions made by Renco?

A: I don't know.

Q: Is there a minute book, as far as you know?

A: I don't know.

Q: Have you ever seen any corporate resolutions?

A: Yes.

Q: And where are corporate resolutions kept?

A: I don't know.

Rennert Depo. at pg. 23.

[Current] Pension Plan." [Secured Noteholders' Plan, Art. 5.8, as amended - docket ##374, 645]. That plan further provides that "in the unlikely event" that WCI's directors resign, the Secured Noteholders would be entitled, pursuant to the confirmation order, to appoint a director for WCI "to ensure the continued orderly administration of the [Current] Pension Plan." [Secured Noteholders' Second Amend. to Plan, Art. 5.8, as amended - docket ##374, 645].

Ohio Revised Code § 1701.55 provides that the shareholders of the corporation are empowered to elect directors. The Secured Noteholders are not shareholders of WCI and they have set forth no authority to justify preemption of state corporate law by an order confirming a chapter 11 plan. "[F]or proponents to preempt state law . . . they will need to rely on more than just the general policy of Chapter 11 favoring reorganizations. They must show that enforcing such state law would be an 'obstacle to the accomplishment and execution of the full purposes of the bankruptcy law'." *In re Pacific Gas & Elec. Co.*, 273 B.R. 795, 813 (Bankr. N.D. Cal. 2002).

Although the Secured Noteholders' Plan establishes a $500,000 cash reserve to pay a third-party administrator, there has been no evidence of how long such funds would last nor do the Secured Noteholders address what would happen if those funds were depleted while the fate of the Current Pension Plan was still being decided. The Secured Noteholders have also not addressed whether an assumption of the Current Pension Plan by Renco could give rise to Renco then having a claim against the estate and, if such a claim could arise, how it would be treated under their proposed plan.

Second Possible Outcome: Renco does not assume sponsorship of the Current

Pension Plan and it is terminated by the PBGC. If the Current Pension Plan is ultimately terminated by the PBGC, the UBL Claim would become a liquidated general unsecured claim against WCI which would be classified in Class 7 of the Secured Noteholders' Plan and, pursuant to the terms of that plan, not paid in full. Additionally, the PBGC would have statutory authority to pursue recovery of the UBL Claim against Renco. As noted above, aside from a stipulation that the Renco "has cash substantially in excess of the . . . maximum termination liabilities [of the Current Pension Plan] plus securities and other assets," there is no evidence before the Court as to Renco's other liabilities. Even if Renco could pay the UBL Claim in full, there is nothing to indicate that such claim would be paid immediately upon demand by the PBGC so that the PBGC would not have to expend its limited resources[18] to pursue Renco for such payment.

Additionally, if the Current Pension Plan were terminated, the PBGC would be constrained by applicable policies and procedures to reduce the benefit payments to guaranteed levels, at least until it has performed valuations of the plan and of its expected recovery from liable parties. The burden of such reduced payments would be borne by participants of the Current Pension Plan who may be the least able to absorb such loss.

As noted, a plan proponent need not prove with "certainty" that its plan is workable and would succeed. *See In re Crosscreek Apartments, Ltd.*, 213 B.R. 521, 539 (Bankr. E.D.

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18 The PBGC is the United States government agency created to administer the defined benefit pension plan termination insurance program under Title IV of ERISA. That agency receives no funds from general tax revenues and is not backed by the full faith and credit of the government. Operations are financed largely by insurance premiums paid by companies that sponsor PBGC-insured pension plans and by PBGC's investment returns. As of the end of fiscal year 2003, the PBCG has a record deficit of $11.2 billion. As the same time, the PBGC estimated that total underfunding in single-employer pension plans exceeding $350 billion, and that underfunding in plans sponsored by financially troubled companies exceeding $80 billion.

Tenn. 1997). However, in order to demonstrate that a plan is feasible, the plan proponent cannot simply leave the fate of one of the largest liabilities in the case to a third party over which the proponent has no control. Such speculation renders the Secured Noteholders' Plan unfeasible.

Finally, these uncertainties play against the backdrop of a competing plan that appears to avoid the need to call upon the PBGC's limited resources, including its presumably overworked legal staff, and further avoids contentious litigation in which it is unclear how this estate's interests would be represented. Thus, this Court is urging the Secured Noteholders to direct their energies toward the negotiation of a consensual plan that resolves all issues, rather than creating unresolved issues for which any reserves that are established would probably prove inadequate.

CONCLUSION

None of the legal requirements discussed in this Opinion should come as any surprise to the sophisticated professionals advising the primary interested parties in this case. It is not unusual for chapter 11 plans that are consensual, *i.e.*, accepted by each class of claims holders entitled to vote, to depart from some of the § 1129 requirements. But absent such consensus, the Court must consider each of the confirmation requirements. In chambers conferences, this Court has reminded the competing plan proponents on innumerable occasions that defeating their opponent's plan would not result in the default confirmation of their own plan.

Since at least May of this year, while scheduling a variety of procedurally mandated hearings on these competing plans, this Court has noted the collision course that the Debtors with their plan funder and the Secured Noteholders have been pursuing. Often in such scenarios the Creditors Committee adopts a moderating role. In this case the opposite has happened. The Creditors Committee apparently unilaterally defined its constituency not to include the holders of deficiency claims resulting from the undersecured status of the Secured Notes. The USWA, which has otherwise done a great deal to contribute to the potential success of any operating entity that will emerge from this case, sought to cap the distribution to holders of claims secured by the PP&E at $74 million, a number that totally ignores the value of that collateral and therefore the legal rights of the Secured Noteholders. Meanwhile the majority of the Secured Noteholders have ignored the limits of their legal entitlement, believing that they could leverage their property rights in the PP&E to the potential detriment of retirees, both present and future. And existing equity creates the impression that it views chapter 11 as a form of hat trick, allowing it to pretend to comply with new value requirements without any regard for the actual application of those concepts. Yet the attempted sleight of hand suffered as the $35 million of new value proposed in the Debtors' Plan dangled without a clear application that inured to the benefit of any party other than the equity holder.

The good news for all of these interested parties and indeed for all holders of claims and interests in this case is that, despite the legal maneuvering that has been the hallmark of this case since its filing, industry conditions still exist to allow for a successful plan of reorganization. Among those conditions are both worldwide demand and the correction in domestic production capacity that has occurred over the last several years. The *real* enterprise value of the reorganized debtor as of the effective date of any confirmed plan will be much more a function of these factors and the costs of raw materials, power and other goods and services needed for production than any of the proxies for value on which valuation experts necessarily focus. While generally reorganization plans can take an almost endless variety of forms, as the major parties begin to answer the question "what next?" in this case, there is a clear anchor. Maintaining the current control for pension purposes is an obvious starting point. Providing dividends to holders of large general unsecured claims in the form of notes that have features allowing participation in future realization of the enterprise value is a way to get promptly to a confirmable plan; avoiding arbitrary caps on such participation would help to avoid future issues under *203 North LaSalle*.

Because the type of litigation that has marked this case for the last six months literally drains value that could be available for distribution to holders of non priority claims in this case, on its own motion, this Court is directing that, prior to January 17, 2005, no party shall file an amended plan or a new plan in this case, without prior court authorization, unless such plan has the support of the Debtors and their plan funder, the Secured Noteholders, the USWA, the Creditors Committee and the PBGC. On January 14, 2005 this Court will hold a § 105 status conference to consider whether cause exists to extend the moratorium on the filing of unilateral plans. The Court expects that representatives of each of those parties be available to work with maximum efficiency toward the development of a consensual plan. Although the parties are free to identify other approaches to plan development, the Court suggests that they first consider what amendments might be made to the Debtors' Third Amended Plan [docket #514] that could avoid the need for an additional round of balloting on such a plan. *See* § 1127.

The rulings being announced in this Opinion are interlocutory in nature. Thus, the only appeals that would be appropriate of the orders denying confirmation would be interlocutory appeals. The Court will refrain from entering orders or judgments consistent with this Opinion until, at the earliest January 17, 2005. It is the Court's explicit intention in refraining from the entry of judgment with respect to each of the plans considered hereunder to eliminate questions about the appeal period. Until judgments consistent with this Opinion are entered, the appeal period has not begun. In taking this step, the Court is seeking to channel all of the resources available in this case to the development of a consensual plan. The Court has scheduled a case management conference to coincide with the filing of this decision for the purpose of discussing protocols that the parties believe may be effective in the development of a consensual plan.

M Shea-Stonum

Marilyn Shea-Stonum
United States Bankruptcy Judge