UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	:	Chapter 11
TRIBUNE COMPANY, *et al.*,[1]	:	Case Number 08-13141 (KJC) (Jointly Administered)
Debtors.	:	
	:	

REPORT OF KENNETH N. KLEE, AS EXAMINER

(VOLUME TWO)

(FINDINGS AND CONCLUSIONS CONCERNING QUESTION ONE)

---

1 The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, are: Tribune Company (0355); 435 Production Company (8655); 5800 Sunset Productions Inc. (5510); Baltimore Newspaper Networks, Inc. (8258); California Community News Corporation (5306); Candle Holdings Corporation (5626); Channel 20, Inc. (7399); Channel 39, Inc. (5256); Channel 40, Inc. (3844); Chicago Avenue Construction Company (8634); Chicago National League Ball Club n/k/a Tribune CNLBC, LLC (0347); Chicago River Production Company (5434); Chicago Tribune Company (3437); Chicago Tribune Newspapers, Inc. (0439); Chicago Tribune Press Service, Inc. (3167); ChicagoLand Microwave Licensee, Inc. (1579); Chicagoland Publishing Company (3237); Chicagoland Television News, Inc. (1352); Courant Specialty Products, Inc. (9221); Direct Mail Associates, Inc. (6121); Distribution Systems of America, Inc. (3811); Eagle New Media Investments, LLC (6661); Eagle Publishing Investments, LLC (6327); forsalebyowner.com corp. (0219); ForSaleByOwner.com Referral Services, LLC (9205); Fortify Holdings Corporation (5628); Forum Publishing Group, Inc. (2940); Gold Coast Publications, Inc. (5505); GreenCo., Inc. (7416); Heart & Crown Advertising, Inc. (9808); Homeowners Realty, Inc. (1507); Homestead Publishing Co. (4903); Hoy, LLC (8033); Hoy Publications, LLC (2352); InsertCo, Inc. (2663); Internet Foreclosure Service, Inc. (6550); JuliusAir Company, LLC (9479); JuliusAir Company II, LLC; KIAH, Inc. (4014); KPLR, Inc. (7943); KSWB Inc. (7035); KTLA Inc. (3404); KWGN Inc. (5347); Los Angeles Times Communications LLC (1324); Los Angeles Times International, Ltd. (6079); Los Angeles Times Newspapers, Inc. (0416); Magic T Music Publishing Company (6522); NBBF, LLC (0893); Neocomm, Inc. (7208); New Mass. Media, Inc. (9553); New River Center Maintenance Association, Inc. (5621); Newscom Services, Inc. (4817); Newspaper Readers Agency, Inc. (7335); North Michigan Production Company (5466); North Orange Avenue Properties, Inc. (4056); Oak Brook Productions, Inc. (2598); Orlando Sentinel Communications Company (3775); Patuxnet Publishing Company (4223); Publishers Forest Brook Productions, Inc. (2598); Sentinel Communications News Ventures, Inc. (2027); Shepard's Inc. (7931); Signs of Distinction, Inc. (3603); Southern Connecticut Newspapers, Inc. (1455); Star Community Publishing Group, Inc. (5612); Stemweb, Inc. (4276); Sun-Sentinel Company (2684); The Baltimore Sun Company (6880); The Daily Press, Inc. (9368); The Hartford Courant Company (3490); The Morning Call, Inc. (7560); The Other Company LLC (5337); Times Mirror Land and Timber Company (7088); Times Mirror Payroll Processing Company, Inc. (4227); Times Mirror Services Company, Inc. (1326); TMLH 2, Inc. (0720); TMLS I, Inc. (0719); TMS Entertainment Guides, Inc. (6325); Tower Distribution Company (9066); Towering T Music Publishing Company (2470); Tribune Broadcast Holdings, Inc. (4438); Tribune Broadcasting Company (2569); Tribune Broadcasting Holdco, LLC (2534); Tribune Broadcasting News Network, Inc. (1088); Tribune California Properties, Inc. (1629); Tribune Direct Marketing, Inc. (1479); Tribune Entertainment Company (6232); Tribune Entertainment Production Company (5393); Tribune Finance, LLC (2537); Tribune Finance Service Center, Inc. (7844); Tribune License, Inc. (1035); Tribune Los Angeles, Inc. (4522); Tribune Manhattan Newspaper Holdings, Inc. (7279); Tribune Media Net, Inc. (7847); Tribune Media Services, Inc. (1080); Tribune Network Holdings Company (9936); Tribune New York Newspaper Holdings, LLC (7278); Tribune NM, Inc. (9939); Tribune Publishing Company (9720); Tribune Television Company (1634); Tribune Television Holdings, Inc. (1630); Tribune Television New Orleans, Inc. (4055); Tribune Television Northwest, Inc. (2975); ValuMail, Inc. (9512); Virginia Community Shoppers, LLC (4025); Virginia Gazette Companies, LLC (9587); WATL, LLC (7384); WCWN LLC (5982); WDCW Broadcasting, Inc. (8300); WGN Continental Broadcasting Company (9530); WLVI Inc. (8074); WPIX, Inc. (0191); and WTXX Inc. (1268). The Debtors' corporate headquarters and the mailing address for each Debtor is 435 North Michigan Avenue, Chicago, Illinois 60611.

KLEE, TUCHIN, BOGDANOFF & STERN LLP
1999 Avenue of the Stars, 39th Floor
Los Angeles, CA 90067
Telephone: (310) 407-4000
Facsimile: (310) 407-9090

Lee R. Bogdanoff
Martin R. Barash
David A. Fidler
Ronn S. Davids
Jennifer L. Dinkelman

Counsel to Examiner

SAUL EWING LLP
222 Delaware Avenue, Suite 1200
P.O. Box 1266
Wilmington, DE 19899
Telephone: (302) 421-6800
Facsimile: (302) 421-6813

Mark Minuti
Charles O. Monk, II
Nicholas J. Nastasi
Cathleen M. Devlin

Delaware Counsel to Examiner

LECG, LLC
201 South Main, Suite 450
Salt Lake City, UT 84111
Telephone: (801) 364-6233
Facsimile: (801) 364-6230

F. Wayne Elggren

Financial Advisor to Examiner

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

UNITED STATES CONSTITUTION

CASES

FEDERAL CASES

STATE CASES

STATUTES

FEDERAL

RULES

FEDERAL

OTHER AUTHORITIES

FEDERAL REGULATION

LEGISLATIVE HISTORY

SECONDARY MATERIALS

JOURNALS, PERIODICALS, AND WEB SITES

IV.

PRINCIPAL FINDINGS AND CONCLUSIONS CONCERNING QUESTION ONE

A. Overview of the Kinds of Claims at Issue in Question One.

Both before[2] and after[3] the commencement of the Chapter 11 Cases, attention focused on the Leveraged ESOP Transactions and whether the Tribune Entities could satisfy the substantial amount of debt imposed on them in those transactions—matters that are at the heart of Question One. As discussed extensively in the Statement of Facts, the Leveraged ESOP Transactions were implemented in two phases in June and December of 2007, referred to in the Report as "Step One" and "Step Two," respectively. These transactions gave rise to the vast majority of the indebtedness asserted against these estates. At the most elemental level, the disputes underlying Question One pit those creditors whose claims arose out of the Leveraged ESOP Transactions (the LBO Lenders) against the rest of the Tribune Entities' creditors (the Non-LBO

---

[2] *See, e.g.,* Richard Pèrez-Peña, *Sam Zell: A Tough Guy in a Mean Business*, THE N.Y. TIMES, April 7, 2008, *available at* http://www.nytimes.com/2008/04/07/business/media/07zell.html?_r=1&scp=110 &sq=zell&st=nyt ("Of course, if this house is ablaze, Mr. Zell has supplied much of the kindling. Almost $8 billion of Tribune's debt came from the highly leveraged deal, which he engineered, that took the company private. That borrowing now looms as the biggest threat to the company . . . ."); Dennis K. Berman, *How Solvent is Tribune Co.?*, WSJ BLOGS: DEAL JOURNAL, December 6, 2007, *available at* http://blogs.wsj.com/deals/ 2007/12/06/how-solvent-is-tribune-co/; Miles Weiss, *Zell's Tribune LBO Runs Into Funds Seeking a Default*, BLOOMBERG, June 7, 2007, *available at* http://www.bloomberg.com/apps/news?pid=newsarchive&refer=home &sid=aVxwowcOuoY4 ("The leveraged buyout is making Tribune one of the riskiest newspaper companies, according to John Puchalla, a media analyst at Moody's Investors Service in New York.").

[3] *See, e.g.,* Michael J. de la Merced & Brian Stelter, *Request Seeks Details of Tribune's Buyout*, THE N.Y. TIMES, August 27, 2009 ("[T]he firm is seeking documents related to the leveraged buyout to help prove that the 2007 deal was done despite knowing it could render the company insolvent"); Peg Brickley, *Tribune Creditors Follow the Money To McCormick Foundation*, WSJ BLOGS: BANKRUPTCY BEAT, June 11, 2009, *available at* http://blogs.wsj.com/bankruptcy/2009/06/11/tribune-creditors-follow-the-money-to-mccormick-foundation/?KEYWORDS=tribune+co ("Papers filed Wednesday in a Delaware bankruptcy court don't say exactly why creditors are probing the merger. However, highly technical portions of the Bankruptcy Code provide that anyone who comes near a company a year before it goes belly-up and walks away richer is going to get banged on like a dinner gong by creditors."); *see also Application of the Official Committee of Unsecured Creditors of Tribune Company, et al., Pursuant to 11 U.S.C. §§ 328 and 1103 and Fed. R. Bankr. P. 2014 for an Order Authorizing the Employment and Retention of Zuckerman Spaeder LLP as Special Counsel Nunc Pro Tunc to August 6, 2009* filed on August 12, 2009 at 3-4 [Docket No. 1953] ("From the inception of these cases, it has been apparent to all parties that a major issue in connection with any proposed plan of reorganization for the Debtors is the investigation and resolution of certain potential claims and causes of action in favor of the Debtors' estates arising from the series of transactions during calendar year 2007.").

Creditors). It has not been lost on anyone that this entire dispute arises, fundamentally, from the fact that, by all accounts, the Tribune Entities have insufficient value to pay in full all of their indebtedness.[4] Representatives of the Non-LBO Creditors would note that the Tribune Entities still have sufficient value to repay their Non-LBO Debt, and that it is no coincidence that inclusion of the incremental LBO Lender Debt incurred in the Leveraged ESOP Transactions is what tips the Tribune Entities into insolvency.

The LBO Lender Debt, aggregating approximately $10.19 billion as of the Petition Date, is comprised of the Credit Agreement Debt, totaling about $8.57 billion[5], and the Bridge Debt, totaling about $1.62 billion. About $7.015 billion of the Credit Agreement Debt was funded in Step One, whereas $2.105 billion of the Credit Agreement Debt (under the Incremental Credit Agreement Facility) and all of the Bridge Debt were funded in Step Two. The Credit Agreement Debt: (i) has recourse on an unsecured basis to Tribune as borrower; (ii) is secured by the Stock Pledge; and (iii) is jointly and severally guaranteed on an unsecured basis by the Guarantor

---

4 The Court-approved Disclosure Statement states as follows regarding the enterprise value of the Debtors:

> Based on these Projections and solely for purposes of the Plan, Lazard estimates that the Enterprise Value of the Reorganized Debtors falls within a range from approximately $2.6 to $3.1 billion, with an approximate mid-point estimate of $2.9 billion as of the Assumed Effective Date. Adding the estimated cash balance at the Assumed Effective Date of approximately $1.4 billion and the value of the Other Assets of approximately $1.5 to $2.0 billion (with an approximate mid point value of $1.8 billion) to the Enterprise Value range yields a range of Distributable Value for the Reorganized Debtors from $5.6 billion to $6.6 billion with a mid-point of $6.1 billion.

Disclosure Statement at 131.

None of the Parties challenged these assumptions in their submissions to the Examiner. Accordingly, the Examiner is relying on the foregoing in the analysis contained in Annex B to Volume Two (Recovery Scenarios).

5 This amount is net of principal reductions following the issuance of this indebtedness in the Leveraged ESOP Transactions, plus amounts advanced after the Leveraged ESOP Transactions under the Revolving Credit Facility and the Delayed Draw Facility. This amount also does not include approximately $150.948 million outstanding under the Swap Documents. Under the terms of the Credit Agreement, Tribune was required to enter into hedge arrangements to offset a percentage of its interest rate exposure under the Credit Agreement and other debt with respect to borrowed money. On July 2 and July 3, 2007, Tribune entered into the Swap Documents. The obligations of Tribune under the Swap Documents do not constitute Credit Agreement Debt, but are guaranteed by the Guarantor Subsidiaries pursuant to the Credit Agreement Subsidiary Guarantee.

Subsidiaries. The Bridge Debt: (i) has recourse on an unsecured basis to Tribune as borrower and (ii) is jointly and severally guaranteed on an unsecured basis by the Guarantor Subsidiaries (but, under the Subordinated Bridge Subsidiary Guarantee, the Guarantor Subsidiaries' obligations on the Bridge Debt are contractually subordinated to their obligations on the Credit Agreement Debt). Although the LBO Lender Debt is pari passu with the other unsecured debt at the Tribune level (except for the PHONES Notes, described below), the LBO Lenders enjoy structural seniority over creditors with recourse only against Tribune because, as part of the Leveraged ESOP Transactions, the Guarantor Subsidiaries (comprising most of the value available from the estates) guaranteed the LBO Lender Debt. This means that the LBO Lenders, along with the Guarantor Subsidiaries' other unsecured creditors, enjoy primary access to the lion's share of the value from the estates. The Bridge Debt is inferiorly situated in comparison to the Credit Agreement Debt because the Guarantor Subsidiaries' obligations to repay the Bridge Debt are contractually subordinated to the Credit Agreement Debt under the terms of the guarantees. As a result, at least on certain avoidance questions, the current holders of the Bridge Debt share more in common with the Non-LBO Creditors than they do with the Credit Agreement Agent and the lenders under that facility.

Poised against all of the LBO Lenders are the Non-LBO Creditors, holding aggregate claims against the Tribune Entities as of the Petition Date of approximately $2.156 billion. At the Tribune level, this group comprises: (i) approximately $759 million of indebtedness under the PHONES Notes; (ii) approximately $1.283 billion under the Senior Notes; and (iii) approximately $114 million of remaining indebtedness.[6] The Senior Notes are contractually

[6] This figure includes approximately $35 million in lease cure amounts.

EGI-TRB, an entity wholly owned by EGI, and 24 other entities, hold the EGI-TRB Notes in the approximate principal amount of $225 million, under which they assert claims of approximately $10 million in unpaid interest. These amounts are not included in the $2.156 billion tally on Non-LBO Debt of Tribune for purposes senior to the PHONES Notes and are secured by the Stock Pledge on a pari passu basis with the LBO Lender Debt. The PHONES Notes are contractually subordinated to all funded indebtedness at the Tribune level (in other words, all obligations represented by notes or indebtedness for borrowed money) and are not secured. Neither the PHONES Notes nor the Senior Notes have any recourse to the Guarantor Subsidiaries or their assets. Finally, Non-LBO Creditors assert approximately $120 million in indebtedness against the Guarantor Subsidiaries. These creditors share ratably with the LBO Lender Debt against those entities.

The lenders under the Credit Agreement and their agent seek to enforce their nonbankruptcy rights and priorities regarding the Tribune Entities (including their structurally senior position at the Guarantor Subsidiaries' level) that existed immediately before the commencement of the Chapter 11 Cases. In contrast, the Non-LBO Creditors want to adjust those rights and priorities through the successful prosecution, by or on behalf of the estates, of potential claims, causes of action, and remedies available under the Bankruptcy Code and nonbankruptcy law. The latter claims include actions against Tribune's current and former fiduciaries who approved and effectuated the Leveraged ESOP Transactions and third parties who assisted in the Leveraged ESOP Transactions or otherwise facilitated them.

When a bankruptcy occurs following a highly leveraged transaction—such as the Leveraged ESOP Transactions at issue here—stakeholders investigate and estate representatives often assert a cluster of claims and causes of action against various parties that fall into three broad categories: first, claims to avoid fraudulent transfers and obligations under Bankruptcy Code sections 548 and 544(b) and to recover amounts transferred under Bankruptcy Code

---

of this discussion. These notes are subordinate and junior in right of payment to all obligations, indebtedness, and other liabilities of Tribune other than those that, by their express terms, rank pari passu or junior to Tribune's obligations under the EGI-TRB Notes and trade payables incurred in the ordinary course of business.

section 550;[7] second, actions to subordinate certain claims to other claims and to cause any liens securing such claims to be transferred to the estate, pursuant to Bankruptcy Code sections 510(c)(1) and (c)(2);[8] and third, a series of common law claims against parties who effectuated or participated in the highly leveraged transaction, including claims for breach of fiduciary duty, aiding and abetting breach of fiduciary duty, unjust enrichment, and recovery of illegal dividends, pursuant to Bankruptcy Code section 541(a)(1).[9]

These three categories of claims typically are asserted together, and common facts often support more than one claim or applicable defense.[10] Thus, as a general matter, many of the same facts underlie the questions whether a debtor engaged in a transaction to defraud, hinder, or delay creditors and whether the debtor's officers or directors breached their fiduciary duties. By the same token, and again as a generalization, common facts typically underlie the questions whether a particular transferee or obligee of an alleged fraudulent transfer acted in good faith and whether that recipient aided and abetted a debtor-insider's breach of a fiduciary duty. Nevertheless, the three above-described kinds of claims are legally distinct. It is conceivable, for example, that a particular transfer made in conjunction with a highly leveraged transaction is found to be neither actually nor constructively fraudulent under bankruptcy law, but the

---

[7] 11 U.S.C. §§ 544, 548 and 550 (2006). A trustee or debtor in possession may use Bankruptcy Code section 544(a) to assert a fraudulent transfer action that would be available to any one of three kinds of hypothetical creditors under other applicable law. 11 U.S.C. § 544(a)(1)-(3) (2006). Section 544(a), however, only confers on the estate representative the standing of a hypothetical creditor "as of the commencement of the case," *i.e.*, the estate representative may assert only the rights of a creditor who acquired its claim after the Leveraged ESOP Transactions. Under Bankruptcy Code section 544(b), however, the estate representative can assert the rights of any Tribune creditor in the case, including creditors whose claims arose before the Leveraged ESOP Transaction, to avoid transfers. 11 U.S.C. § 544(b) (2006); *Moore v. Bay (In re Sassard & Kimball, Inc.)*, 284 U.S. 4 (1931).

[8] 11 U.S.C. §§ 510(c)(1) and (c)(2) (2006).

[9] 11 U.S.C. § 541(a)(1) (2006).

[10] *See Liquidation Trust of Hechinger Inv. Co. v. Fleet Retail Fin. Group (In re Hechinger Inv. Co.)*, 327 B.R. 537, 542 (D. Del. 2005), *aff'd*, 278 F. App'x 125 (3d Cir. 2008); *Rosener v. Majestic Mgmt. (In re OODC, LLC)*, 321 B.R. 128, 134 (Bankr. D. Del. 2005); *Murphy v. Meritor Savs. Bank (In re O'Day Corp.)*, 126 B.R. 370, 372-73 (Bankr. D. Mass. 1991).

fiduciaries responsible for the overall transaction are found to have engaged in grossly imprudent or reckless behavior or self-dealing under applicable nonbankruptcy law governing, for example, breach of fiduciary duty.[11] Likewise, a particular holder of indebtedness whose claim otherwise survives a fraudulent transfer challenge nevertheless may have engaged in the kind of improper actions meriting equitable subordination. As a result, and in accordance with the Examiner Order, the Report addresses as independent matters all of the assorted claims (and the relevant defenses) to the extent asserted by the Parties.

B. Fraudulent Transfer Claims.

1. The Transfers and Obligations Potentially Subject to Avoidance and/or Recovery.

The Parties identified to the Examiner the following transfers and obligations incurred that may be subject to avoidance and/or recovery:

Potential Avoidable Transfers and Obligations

<u>Obligations</u>	
Credit Agreement Debt incurred at Step One	$7,015,000,000
Incremental Credit Agreement Debt at Step Two	$2,105,000,000
Bridge Debt at Step Two	$1,600,000,000
Total Obligations	**$10,720,000,000**
<u>Payments</u>	
<u>Step One</u>	
Payments to Selling Stockholders - Step One	**$4,283,999,988**

11 *See Hechinger,* 327 B.R. at 550-52.

Step One Financing Fees, Costs, and Expenses[12]	
JPM Entities	$35,042,750
Merrill Entities	$34,992,750
Citigroup Entities[13]	$32,529,375
BofA Entities	$18,002,625
Barclays[14]	$3,375,000
LaSalle Bank National Association[15]	$2,187,500
Lehman Brothers[16]	$2,187,500
Sumitomo Mitsui Banking Corporation[17]	$2,187,500
Other Step One Financing Costs and Expenses[18]	**$3,585,523**
Total Step One Financing Fees, Costs, and Expenses	**$134,090,523**
Step One Tender Offer/Dealer Manager Fees	
Merrill Entities	$460,000
Citigroup Entities	$450,000
BofA Entities	$225,000
JPM Entities	$374,976
All Other Tender Offer Fees	$3,444,274

12 As noted above, the record developed by the Examiner during the course of the Investigation does not resolve the question of whether these non-advisory fees (and fees similarly paid at Step Two) were paid to or for the benefit of the investment banking entities (MLPFS, CGMI, JPMorgan, and BAS), which constituted the "Lead Arrangers" under the Credit Agreement and Bridge Credit Agreement, their lender-affiliates (MLCC, Citicorp, JPMCB, Bank of America, and Banc of America Bridge), which constituted "Initial Lenders" and held other titles under the Credit Agreement and Bridge Credit Agreement, or both. *See* Report at § III.D.16.

13 Of this amount, $3,250,000 was the result of payments made via JPMorgan to all non-Lead Banks.

14 Payments made via JPMorgan to all non-Lead Banks.

15 Payments made via JPMorgan to all non-Lead Banks.

16 Payments made via JPMorgan to all non-Lead Banks.

17 Payments made via JPMorgan to all non-Lead Banks.

18 Includes the payment of out-of-pocket expenses, legal fees, and various other financing-related costs in connection with Step One.

Total Step One Tender Offer/Dealer Manager Fees	**$4,954,250**
Step One Related Advisor Fees, Costs, and Expenses	
Morgan Stanley[19]	$7,667,704
Total Step One Related Advisor Fees, Costs, and Expenses	**$7,667,704**
All Other Step One Related Fees, Costs, and Expenses[20]	**$14,173,727**
<u>Post-Step One / Pre-Step Two</u>	
Interest and Principal Payments	
Interest Payments on Credit Agreement Debt	$197,610,456
Principal Payments on Credit Agreement Debt	$113,787,500
Total Interest and Principal Payments	**$311,397,956**
<u>Step Two</u>	
Merger Consideration to Selling Stockholders	$3,982,119,576
Interest and Principal Payments	
Interest Payments on Credit Agreement Debt	$95,740,199
Transactions with EGI-TRB, LLC	
Repayment of Exchangeable EGI-TRB Note	$206,418,859
Reimbursement of Expenses incurred by EGI-TRB	$2,500,000
Payment of Merger Consideration to EGI-TRB	$49,999,992

19 The payment of these Morgan Stanley Advisor Fees was made on May 9, 2007. In addition, the Morgan Stanley engagement agreement provided for an upfront fee of $2,500,000, which was paid on November 13, 2006.

20 "All Other Step One Related Fees, Costs, and Expenses" generally consists of all other amounts (in addition to those otherwise specifically categorized above) which are assumed to be related to Step One based on the fact that they were expensed in either Q1 or Q2 2007. With the exception of the Wachtell portion of these fees ($600,000) which is known to have been part of a payment made to Wachtell on June 4, 2007, actual payment dates are generally unknown.

Issuance of EGI-TRB Note	$(225,000,000)
Purchase by EGI-TRB of the Warrant	$(90,000,000)
Net Received from EGI-TRB	**$(56,081,149)**
Step Two Financing Fees, Costs, and Expenses	
JPM Entities	$13,767,054
Merrill Entities	$37,883,125
BofA Entities	$6,883,527
Citigroup Entities	$11,472,545
Other Step Two Financing Fees, Costs, and Expenses[21]	**$3,436,240**
Total Step Two Financing Fees, Costs, and Expenses	**$73,442,490**
Step Two Related Advisor Fees, Costs, and Expenses	
CGMI[22]	$12,837,360
MLPFS[23]	$12,768,422
Total Step Two Advisor Fees, Costs, and Expenses	**$25,605,782**
Other Step Two Related Fees, Costs, and Expenses[24]	**$21,577,816**
Post-Step Two	
Post-Step Two Interest and Principal Payments	
Interest Payments on Credit Agreement Debt	$499,621,384

21 Includes the payment of out-of-pocket expenses, legal fees, and various other financing-related costs paid in connection with Step Two.

22 The payment of these CGMI Advisor Fees was made on January 15, 2008.

23 The payment of these MLPFS Advisor Fees was made on January 15, 2008.

24 "All Other Step Two Related Fees, Costs, and Expenses" generally consists of all other amounts (in addition to those otherwise specifically categorized above) which are assumed to be related to Step Two based on the fact that they were expensed in either Q3 or Q4 2007. With the exception of the Wachtell portion of these fees $4,350,000) which is known to have been part of a payment made to Wachtell on December 20, 2007, actual payment dates are generally unknown.

Principal Payments on Credit Agreement Debt	$964,387,500
Interest Payments on Bridge Debt	$114,529,555
Total Post-Step Two Interest and Principal Payments	**$1,578,538,439**

2. What Is at Stake in the Fraudulent Transfer Disputes?

Because the LBO Lender Debt dwarfs the other claims against the Tribune Entities and, owing to the Subsidiary Guarantees, occupies a structurally senior position, if this indebtedness is not avoided, subordinated, or disallowed, the holders of those claims would recover most of the value available from the Debtors' bankruptcy estates. Avoidance of the LBO Lender Debt affords the Non-LBO Creditors an opportunity to unravel its structural seniority at the Guarantor Subsidiaries level, and thereby move to the head of the line. Thus, among the above-listed potential avoidances and recoveries underlying Question One, the actions to avoid the LBO Lender Debt are the proverbial "main event."

One way to place the issues presented by the claims relating to the LBO Lender Debt into perspective is to envision all of the creditors of these estates (both the LBO Lenders and the Non-LBO Creditors) standing together at the entryway of a very long hallway. Each creditor brings to that gathering its own legal and contractual rights against the Tribune Entities and against creditors and shareholders. Not all the Non-LBO Creditors share the same rights. Most of those creditors do not have recourse to the asset-rich Guarantor Subsidiaries, but others do. The PHONES Notes are contractually subordinated to all other funded indebtedness of Tribune, but not to trade liabilities. As among the LBO Lenders, the Bridge Debt and the Credit Agreement Debt are not of equal rank at the Guarantor Subsidiaries level. Thus, creditors arrive at the gathering with a host of inter-creditor rights and arrangements, in addition to differing rights against particular Tribune Entities. At the far end of the hallway are the distributions creditors will receive on their claims, either under a plan of reorganization in the Chapter 11

Cases or in distributions under chapter 7. As each creditor proceeds from entry to exit, each strives to maximize its own recovery from the distributions at the end, whether directly from a Debtor or pursuant to turnover rights under an inter-creditor agreement. One conclusion appears certain: the total consideration available from the Tribune Entities' businesses and assets is insufficient to enable all creditors to receive payment in full.

To enforce their contractual entitlements against the Tribune Entities and ultimately other creditors—and thereby maximize their overall recovery—the Credit Agreement lenders and their agent must successfully pass through the gauntlet of challenges arising under fraudulent transfer law. Under their worst-case scenario, if they fail to defeat these challenges, their claims would be avoided against each estate and/or subordinated to all of the Non-LBO Debt.[25] Various other outcomes are possible.[26] Avoidance, in turn, could affect enforcement of the contractual subordination of the PHONES Notes at the Tribune level and the Bridge Debt at the Guarantor Subsidiary level.[27] To stop the holders of the LBO Lender Debt from proceeding to the exit with their full bundle of legal and contractual rights against the Tribune Entities intact, the estate representatives not only must satisfy the elements necessary to prove avoidability, but also must overcome defenses that the LBO Lenders would raise.[28] Each element of avoidance, and each defense asserted, in turn, raises discrete issues of fact and law. The ultimate question is whether the Bankruptcy Code avoidance provisions will adjust the priorities and recoveries of creditors when distributions occur in these bankruptcy cases. Not surprisingly, the Parties' perspectives on

---

25 The Bridge Facility Lenders and their agent face a more nuanced task: If all of the LBO Lender Debt survives intact, this would prove a largely Pyrrhic victory for the Bridge Facility Lenders because the subordination of their debt to the Credit Agreement Debt at the Guarantor Subsidiaries means that most of the value from the estates would go to satisfy the Credit Agreement Debt.

26 *See* Annex B to Volume Two (Recovery Scenarios).

27 *See id.*

28 This is not to suggest that the estate representative will have the burden of proof on each defense, but rather to make the point that, to prevail, the estate representative essentially must win each battle.

the assorted legal and factual questions comprising Question One were driven by how the answers to these questions affect their respective recoveries. As the consequences to the various creditor groups differed widely depending on the answers given, the Examiner had the benefit of a wide divergence of advocacy from the Parties.

The Report turns to the Examiner's substantive analysis of the claims, causes of action, and defenses raised by the Parties in Question One.

3. Examiner's Conclusions and Explanation Concerning Choice of Law Issues Presented by Fraudulent Transfer Claims.

Examiner's Conclusions:

Because all of the transfers and obligations in Question One occurred within two years of the Petition Date, and because the avoidance provisions contained in Bankruptcy Code section 548 are at least as favorable to an estate representative as the provisions of the NY UFCA, the Examiner will only analyze applicable Bankruptcy Code avoidance and recovery provisions.

Explanation of Examiner's Conclusions:

The Bankruptcy Code affords an estate representative two potential bases upon which to avoid fraudulent transfers and obligations: actions enumerated in Bankruptcy Code section 548(a)(1) and state law fraudulent transfer actions, the latter of which are applicable in a bankruptcy case due to the trustee's status as a hypothetical lien creditor under Bankruptcy Code section 544(a),[29] and assertion of the rights of an actual unsecured creditor under section 544(b).[30] All of the transfers and obligations raised by the Parties in Question One occurred

[29] 11 U.S.C. §§ 544(a) and 548(a)(1) (2006); *see also Zilkha Energy Co. v. Leighton*, 920 F.2d 1520, 1522 n.7 (10th Cir. 1990). Because section 544(a) only confers the hypothetical rights of the specified creditors "as of the commencement of the case," it is only of utility to the trustee where a particular state law permits avoidance of a transfer or obligation by a future creditor.

[30] 11 U.S.C. § 544(b) (2006) (stating that a trustee may avoid "any transfer of an interest of the debtor in property . . . that is voidable under applicable law by a creditor holding an unsecured claim that is allowable under [Bankruptcy Code section 502].").

within the two year reach-back under Bankruptcy Code section 548(a)(1).[31] In an effort to focus the Parties on issues that could affect the outcome, the Examiner notified the Parties that he was only interested in their evaluation of choice of law issues that are outcome-determinative. Two possibilities were raised, only one of which is within the scope of the Investigation.

Certain Parties contended that, whether directly or by analogy, the estates could abandon to individual creditors and/or vest in a creditor trust established under a plan of reorganization the rights to pursue fraudulent transfer claims that might otherwise be insulated from recovery under Bankruptcy Code section 546(e), and argued that choice of law could be outcome determinative on this point.[32] Relinquishment of the claims allegedly would enable individual creditors to assert state law fraudulent transfer claims to which section 546(e) allegedly would have no application. As discussed in the Report,[33] the Examiner concludes that this contention is outside the scope of the Investigation and thus the Report does not address this matter.

In addition, one Party argued that if the NY UFCA were to apply to avoidance actions concerning the LBO Lender Debt, an estate representative could take advantage of the provisions of that statute defining "fair consideration" to impose the additional requirement of good faith, meaning that a transfer for approximate equivalent value still may be avoided when the transferee lacks good faith.[34] That Party provided a brief choice of law analysis supporting the contention that the NY UFCA would apply here, and no other Party presented a contrary analysis

---

[31] 11 U.S.C. § 548(a)(1) (2006).

[32] 11 U.S.C. § 546(e) (2006).

[33] *See* text accompanying footnote 676.

[34] N.Y. DEBT. & CRED. LAW § 272 (McKinney 2010); *Crowthers McCall Pattern, Inc. v. Lewis*, 129 B.R. 992, 997 (S.D.N.Y. 1991) ("Under § 272 of the New York Debtor and Creditor Law, fair consideration for conveyance of property or an obligation may be found only if 'a fair equivalent therefor' is received by the transferor *and* such consideration is given by the transferee in good faith."); *Sec. Investor Prot. Corp. v. Rossi (In re Cambridge Capital, LLC)*, 331 B.R. 47, 63 (Bankr. E.D.N.Y. 2005); *Le Café Crème v. Le Roux (In re Le Café Crème, Ltd.)*, 244 B.R. 221, 241 (Bankr. S.D.N.Y. 2000).

or challenged this conclusion. The Examiner, however, does not believe that the possible application of the NY UFCA is outcome-determinative for the following three reasons:

First, as discussed in another part of the Report,[35] even though the plain language of Bankruptcy Code section 548(a)(1) (read in conjunction with section 548(c)) entirely defers the question of transferee or obligee good faith to a defense, under the "totality of circumstances" test articulated by the Third Circuit Court of Appeals, discussed below, transferee or obligee good faith is considered in conjunction with the determination of reasonably equivalent value under section 548(a). Thus, the Third Circuit's consideration of reasonably equivalent value is functionally very similar to the question of fair consideration under the NY UFCA.

Second, based on the Examiner's analysis of applicable Third Circuit law under section 548,[36] the Examiner does not believe that a court applying that authority[37] (whether as part of a "totality of circumstances" analysis or in conjunction with consideration of a section 548(c) defense) would permit an obligee who conferred less than reasonably equivalent value in exchange for an obligation and did not act in good faith in connection therewith to enforce any portion of that obligation. Such a result is consistent with what would happen under the NY UFCA.

Finally, the Third Circuit's Court of Appeals adoption of an "objective" test for good faith under Bankruptcy Code avoidance is no less favorable to an estate representative than the test for good faith under the NY UFCA.[38] As a result, it is difficult to envision a circumstance in which

---

35 *See* Report at § IV.B.5.b.

36 *Id.*

37 No Party argued that any of the fraudulent transfer claims addressed in the Report should or would be commenced in any forum other than one in the Third Circuit. Consistent with the scope of the Investigation, therefore, the Examiner has assumed that any such action would be brought in a forum within the Third Circuit.

38 *Compare Wasserman v. Bressman (In re Bressman)*, 327 F.3d 229, 236-37 (3d Cir. 2003) ("[S]ome facts suggest the underlying presence of other facts. If a transferee possesses knowledge of facts that suggest a transfer may be fraudulent, and further inquiry by the transferee would reveal facts sufficient to alert him that

a transferee or obligee in these cases would be found to have acted in good faith under section 548 but not under the NY UFCA.

For these reasons (which may help explain why the Parties devoted so little attention to this issue), the Report does not further consider the application of the NY UFCA and instead solely focuses on avoidance under Bankruptcy Code section 548.

4. Intentional Fraudulent Transfer Claims.

a. The Legal Standard.

Under Bankruptcy Code section 548(a)(1), a transfer can be avoided if the transferor "made such transfer or incurred such obligation with actual intent to hinder, delay, or defraud any entity to which the debtor was or became . . . indebted . . . ."[39] The three forms of intent that a transferor may demonstrate—hinder, delay, or defraud—are disjunctive such that satisfaction of any one is sufficient to render the transaction avoidable.[40]

Generally, an intentional fraudulent transfer requires that the transferor engage in wrongdoing,[41] which must relate to the transfer or obligation that the estate representative seeks

---

the property is recoverable, he cannot sit on his heels, thereby preventing a finding that he has knowledge. In such a situation, the transferee is held to have knowledge of the voidability of the transfer.") (quotations and citations omitted), *with S. Indus., Inc. v. Jeremias*, 411 N.Y.S.2d 945, 949 (N.Y. App. Div. 1978) ("[A] person seeking to set aside a conveyance upon the basis of lack of good faith must prove that one or more of the following factors is lacking: (1) an honest belief in the propriety of the activities in question; (2) no intent to take unconscionable advantage of others; and (3) no intent to, or knowledge of the fact that the activities in question will hinder, delay, or defraud others.") (citation omitted). *See* Report at § IV.B.7.b.

39 11 U.S.C. § 548(a)(1)(A) (2006).

40 *See Shapiro v. Wilgus*, 287 U.S. 348, 354 (1932) ("A conveyance is illegal if made with an intent to defraud the creditors of the grantor, but equally it is illegal if made with an intent to hinder and delay them."). Thus, the statute does not require a showing that the debtor placed assets outside of the reach of creditors to support a finding that an intentional fraudulent transfer has occurred. *Id.*; *see also Flushing Sav. Bank v. Parr*, 438 N.Y.S.2d 374 (N.Y. App. Div. 1981) (same).

41 *Off. Comm. for Unsecured Creditors v. Aust (In re Network Access Solutions, Corp.)*, 330 B.R. 67, 77 (Bankr. D. Del. 2005) ("[A] claim for actual fraud requires that there be conscious wrong-doing."); *Silverman v. Actrade Capital, Inc. (In re Actrade Fin. Techs., Ltd.)*, 337 B.R. 791, 810 (Bankr. S.D.N.Y. 2005) ("[I]ntentional fraudulent conveyance claims should be relegated to their proper sphere, *i.e.*, where there is a knowing intent on the part of the defendant to damage creditors.").

to avoid.[42] However, an intentional fraudulent transfer "could, in principle, occur without genuine fraud."[43] For example, it is well recognized that "[a] general scheme or plan to strip the debtor of its assets without regard to the needs of its creditors can support a finding of actual intent [to defraud]."[44] A strong inference of fraudulent intent may be established either by (i) facts demonstrating that the defendant had both the motive and the opportunity to commit fraud, or (ii) facts that "constitute strong circumstantial evidence of conscious misbehavior or recklessness."[45]

To avoid a transfer as intentionally fraudulent, the focus is on the intention and knowledge of the transferor.[46] Although the actions of third parties may be considered, those acts are not imputed to the transferor for purposes of this analysis. The transferee's knowledge may be useful in confirming the transferor's intent: "Where the transferor and transferee have knowledge of the claims of creditors and know that the creditors cannot be paid and where

---

[42] *Sharp Int'l Corp. v. State Street Bank & Trust Co. (In re Sharp Int'l Corp.)*, 403 F.3d 43, 56 (2d Cir. 2005) (finding that repayment was not fraudulent transfer because "[t]he fraud alleged in the complaint relates to the matter in which Sharp obtained new funding from the Noteholders, not Sharp's subsequent payment of part of the proceeds to State Street"); *see also Actrade*, 337 B.R. at 810 ("The fact that Actrade misled its own shareholders does not prove that Actrade intended to defraud Allou's creditors, let alone participated in such a fraud.").

[43] *Plotkin v. Pomona Valley Imports (In re Cohen)*, 199 B.R. 709, 716 (B.A.P. 9th Cir. 1996); *see also Fisher v. Sellis (In re Lake States Commodities, Inc.)*, 253 B.R. 866, 871 (Bankr. N.D. Ill. 2000) ("The focus in the inquiry into actual intent is on the state of mind of the debtor. Neither malice nor insolvency are required.") (citations omitted).

[44] *Voest-Alpine Trading USA Corp. v. Vantage Steel Corp.*, 919 F.2d 206, 213-14 (3d Cir. 1990); *see also ASARCO LLC v. Ams. Mining Corp.*, 396 B.R. 278, 370-71 (S.D. Tex. 2008) (interpreting Delaware's Uniform Fraudulent Transfer Act); *Wieboldt Stores, Inc. v. Schottenstein*, 94 B.R. 488, 504 (N.D. Ill. 1988) (construing 11 U.S.C. § 548); *Dorocke v. Farrington*, 193 N.E.2d 593, 596 (Ill. App. Ct. 1963) (interpreting fraudulent transfer statute).

[45] *Responsible Person of Musicland Holding Corp. v. Best Buy Co. (In re Musicland Holding Corp.)*, 398 B.R. 761, 774 (Bankr. S.D.N.Y. 2008); *see also Pereira v. Grecogas Ltd., (In re Saba Enters., Inc.),* 421 B.R. 626, 642 (Bankr. S.D.N.Y. 2009).

[46] *Rubin v. Mfrs. Hanover Trust Co.*, 661 F.2d 979, 995 (2d Cir. 1981); *Elway Co. v. Miller (In re Elrod Holdings Corp.)*, 421 B.R. 700, 709 (Bankr. D. Del. 2010) ("[T]he central focus of § 548(a) is the debtor's intent . . . ."); *Dobin v. Hill (In re Hill)*, 342 B.R. 183, 198 (Bankr. D.N.J. 2006); *Silverman v. Actrade Capital, Inc. (In re Actrade Fin. Techs., Ltd.)*, 337 B.R. 791, 808 (Bankr. S.D.N.Y. 2005); *In re Pinto Trucking Serv., Inc.*, 93 B.R. 379, 385 (Bankr. E.D. Pa. 1988).

consideration is lacking for the transfer the Court may infer an intent to hinder, delay, or defraud creditors."[47]

In determining whether a corporation had the requisite knowledge and intention, courts look to the knowledge and intention of the corporation's directors, officers, and other agents who act for the corporation.[48] "[T]he fraud of an officer of a corporation is imputed to the corporation when the officer's fraudulent conduct was (1) in the course of his employment, and (2) for the benefit of the corporation. This is true even if the officer's conduct was unauthorized, effected for his own benefit but clothed with apparent authority of the corporation, or contrary to instructions."[49] In the fraudulent transfer context, as in other situations involving alleged fraud by a corporation, as a general matter, acts perpetrated by the corporations' agent are ascribed to the corporation.[50] A corporation is not ascribed the knowledge, intention, or acts of an agent who is acting contrary to the interests of the corporation. However, even the acts and knowledge of an agent acting adversely to the interests of the principal may be attributed to the principal where the principal receives the benefits of the agent's acts.[51]

---

[47] *United States v. Gleneagles Inv. Co.,* 565 F. Supp. 556, 580 (M.D. Pa. 1983), *aff'd in relevant part sub nom. United States v. Tabor Court Realty Corp.*, 803 F.2d 1288 (3d Cir. 1986); *see also Wieboldt Stores,* 94 B.R. at 504; *Aluminum Mills Corp. v. Citicorp N. Am. Inc. (In re Aluminum Mills Corp.)*, 132 B.R. 869, 887 (Bankr. N.D. Ill. 1991) (denying motion to dismiss intentional fraudulent transfer count and stating that "courts will look to whether LBO participants had knowledge of: (1) the true financial condition of the debtor at the time of the LBO; and (2) whether the corporate acquisition was to be accomplished via the leveraging of the debtor's assets"). This does not mean, however, that an intentional fraudulent transfer claim may be validly asserted based solely on the acts and knowledge of the transferee. The central focus is on the transferor. *See* footnote 46. The Examiner rejects the contrary contention asserted by certain Parties.

[48] *McNamara v. PFS (In re Pers. & Bus. Ins. Agency)*, 334 F.3d 239, 242-43 (3d Cir. 2003); *Schnelling v. Crawford (In re James River Coal Co.)*, 360 B.R. 139, 161 (Bankr. E.D. Va. 2007); *In re Anchorage Marina, Inc.*, 93 B.R. 686, 691 (Bankr. D.N.D. 1988); *Nordberg v. Republic Nat'l Bank (In re Chase & Sanborn Corp.)*, 51 B.R. 739, 740 (Bankr. S.D. Fla. 1985).

[49] *In re Personal & Bus. Ins. Agency*, 334 F.3d 239, 242-43 (3d Cir. 2003).

[50] *J.J. McCaskill Co. v. United States*, 216 U.S. 504, 514-15 (1910).

[51] *See Off. Comm. of Unsecured Creditors of Allegheny Health, Educ. & Research Found. v. Pricewaterhouse-Coopers, LLP*, 607 F.3d 346, 351-53 (3d Cir. 2010); *Conn. Fire Ins. Co. v. Commercial Nat'l Bank*, 87 F.2d 968, 969 (5th Cir. 1937) ("The transaction of the unfaithful agent may indeed be not binding on his principal in the sense that because of fraud the principal can repudiate or rescind it, but if he elects to retain its specific

United States v. Gleneagles Investment Co.[52] is the leading case addressing intentional fraudulent transfer in the leveraged buyout context. In that case, Great American purchased Raymond Group using the proceeds of a loan by IIT. At the time of the sale, Raymond Group was "on the brink of insolvency," with multi-million dollar liabilities for federal income taxes, trade accounts, pension fund contributions, strip mining obligations, back-filling obligations, and municipal real estate taxes.[53] In connection with the sale, Raymond Group guaranteed the loan to Great American and pledged its assets as security. Following the closing, Raymond Group lacked the funds to pay its taxes and routine operating expenses. Within two months of the transfer, Raymond Group was forced to begin shutting down its operations, and, within six months, it ceased all operations and bankruptcy ensued.[54]

The District Court for the Middle District of Pennsylvania found that Raymond Group had engaged in an intentional fraudulent transfer, holding that "[w]here the transferor and transferee have knowledge of the claims of creditors and know that the creditors cannot be paid and where consideration is lacking for the transfer the Court may infer an intent to hinder, delay, or defraud creditors."[55] Even though it could not be directly shown that Raymond Group

---

results to the detriment of a third person justice requires that he take the transaction with its actual infirmities . . . . When authority to do the act is present, every agent fully represents his principal in that act. And when the act is done by an agent of any class and advantage is claimed under it there can be no question of the authority to do it."); *cf. N.Y. Cent. & Hudson River R.R. Co. v. United States*, 212 U.S. 481, 494-95 (1909) ("[T]here is a large class of offenses . . . wherein the crime consists in purposely doing the things prohibited by statute. In that class of crimes we see no good reason why corporations may not be held responsible for and charged with the knowledge and purposes of their agents, acting within the authority conferred upon them. . . . If it were not so, many offenses might go unpunished and acts be committed in violation of law, where, as in the present case, the statute requires all persons, corporate or private, to refrain from certain practices forbidden in the interest of public policy.") (internal citations omitted). *See* Report at § IV.B.7.b.(1).

52 *United States v. Gleneagles Inv. Co.*, 565 F. Supp. 556 (M.D. Pa. 1983), *aff'd in relevant part sub nom. United States v. Tabor Court Realty Corp.,* 803 F.2d 1228 (3d Cir. 1986).

53 *Id.* at 571, 581.

54 *Id.* at 572.

55 *Id.* at 581; *see also Aluminum Mills Corp. v. Citicorp N. Am. (In re Aluminum Mills Corp.)*, 132 B.R. 869, 887 (Bankr. N.D. Ill. 1991).

intended to hinder or delay paying creditors, the court deduced a fraudulent intent: "If the parties could have foreseen the effect on creditors resulting from the assumption of the IIT obligation by the Raymond Group, a company in a serious financial condition, the parties must be deemed to have intended the same."[56]

On appeal, the Third Circuit Court of Appeals declined to approve the "could have foreseen" standard stated by the lower court, but instead endorsed the lower court's alternative finding that "a party is deemed to have intended the *natural consequences of his acts*." [57] Other courts have similarly focused on the effect of a transfer as indicative of intent: "When the legal effect of a conveyance is to hinder or delay creditors, the intent [to defraud] will be presumed, regardless of the actual motives of the parties."[58] In *Moody v. Security Pacific Business Credit*, a later Third Circuit case involving a failed leveraged buyout, the Court of Appeals ruled that because the transferor was "not on the brink of insolvency" at the time of the transfer, it did not necessarily follow that the leveraged buyout would hinder, delay, or defraud creditors and thus there was no fraudulent transfer.[59]

The "natural consequences" analysis represents an effort to determine the transferor's intent in the leveraged buyout context by focusing on the readily discernible consequences of

---

56 *Gleneagles,* 565 F. Supp. at 582.

57 *United States v. Tabor Court Realty Corp.,* 803 F.2d 1288, 1305 (3d Cir. 1986) (emphasis added); *see also Moody v. Sec. Pac. Bus. Credit*, 971 F.2d 1056, 1075 (3d Cir. 1992) ("In *Tabor Court Realty Corp.* we relied in part on the principle that 'a party is deemed to have intended the natural consequences of his acts' in upholding the district court's finding of intentional fraud."); *MFS/Sun Life Trust-High Yield Series v. Van Dusen Airport Servs. Co.*, 910 F. Supp. 913, 935-36 (S.D.N.Y. 1995) (rejecting argument that actual intent could be inferred if creditor could merely have foreseen the harmful effect of transfer, because such a standard "is incompatible with the concept of actual fraud"); *Bull v. Bray*, 26 P. 873, 876 (Cal. 1891) (ruling, in the context of finding the intent to avoid a fraudulent conveyance, "every man intends the usual and ordinary consequences of his voluntary acts") (internal citation omitted).

58 *Freehling v. Nielson (In re F&C Servs.)*, 44 B.R. 863, 869 (Bankr. S.D. Fla. 1984); *see also Rosener v. Majestic Mgmt. (In re OODC, LLC)*, 321 B.R. 128, 140 (Bankr. D. Del. 2005) (holding that complaint adequately alleged intentional fraudulent transfer where "Trustee alleges that the Defendants were aware of the creditors' claims and that the LBO would leave the Debtor with too much debt, making it unable to pay those claims").

59 971 F.2d 1056, 1075-76 (3d Cir. 1992).

such a transaction. The standard, however, is not precise (indeed it is less a standard than a characterization of the underlying facts and consequences), and the courts have not put a fine pencil on the question of what, precisely, the transferor must know or suspect for a court to find that hindering, delaying, or defrauding creditors is the "natural consequence" of a failed leveraged buyout transaction. The relatively straightforward case in favor of finding an intentional fraudulent transfer in these circumstances arises when the debtor transfers property when it is not paying its debts or is otherwise insolvent, and the evidence shows that the debtor knows this to be the case: the "natural consequence" of the transfer is that creditors are hindered, delayed, or defrauded.[60] A more difficult question may arise when the evidence shows that the debtor was aware of red flags suggesting a *possibility* or *likelihood* of insolvency or inadequacy of capital, but proceeded with the transaction in any event. The estate representative plainly must prove more than that insolvency or bankruptcy were foreseeable at the time of the leveraged buyout, but it is not clear just how much more must be proven.[61]

[60] *See SEC v. Haligiannis*, 608 F. Supp. 2d 444, 451 (S.D.N.Y. 2009) (avoiding mortgage because "[w]hen [transferor] executed the mortgage, he almost certainly was aware that he was insolvent (or on the verge of insolvency), and that his fraud was about to be revealed") (citations omitted); *In re Process-Manz Press, Inc.*, 236 F. Supp. 333, 347 (N.D. Ill. 1964) ("It is elementary that a party is held to intend the natural consequences of his acts. Armstrong's arranging for and causing the unwarranted withdrawal of $2,000,000 in working capital from Manz at a time when Manz was having difficulty paying its debts clearly and conclusively justifies the Referee's conclusion that the transaction of December 14, 1961 is voidable under § 67, sub. d(2)(d) of the Bankruptcy Act."), *rev'd on other grounds*, 369 F.2d 513 (7th Cir. 1966); *Miller v. Greenwich Capital Fin. Prods. (In re Am. Bus. Fin. Servs.)*, 384 B.R. 66, 75 (Bankr. D. Del. 2008); *see also Rosener v. Majestic Mgmt. (In re OODC, LLC)*, 321 B.R. 128, 140 (Bankr. D. Del. 2005) (noting the close relationship between the parties to the transaction, the fact that the LBO occurred outside the ordinary course of the parties' business, and the fact that the defendant was aware that the LBO would leave the debtor with too much debt); *Murphy v. Meritor Sav. Bank (In re O' Day Corp.)*, 126 B.R. 370, 411 (Bank. D. Mass 1991) ("At no time during the course of this case has the Trustee even suggested that the company was anything but healthy prior to the 1987 LBO. This distinction alone provides a sufficient reason for this Court to reject an application of the ruling in *Gleneagles* to the facts of this case."); *Aluminum Mills Corp. v. Citicorp N. Am., Inc. (In re Aluminum Mills Corp.)*, 132 B.R. 869, 887 (Bankr. N.D. Ill. 1991) (explaining that the lender had direct knowledge that LBO would render debtor insolvent and agreed to withdraw demand for a solvency letter, an independent accountant's review and fairness letter).

[61] "Because of the difficulty in proving intentional fraud, challenges to leveraged buyouts tend to be predicated on constructive fraud . . . ." *Moody*, 971 F.2d at 1064.

The problem of determining what a debtor knew and intended is hardly unique to failed leveraged buyouts. Since the English Parliament enacted the Statute of Anne, courts have grappled with the question of how to apply intentional fraudulent transfer statutes. Because "[d]irect evidence of fraudulent intent . . . is often unavailable and courts usually rely on circumstantial evidence, including the circumstances of the transaction, to infer fraudulent intent,"[62] in evaluating the transferor's actions, courts have looked to various "badges of fraud" that include: (1) the relationship between the debtor and the transferee; (2) consideration for conveyance; (3) insolvency or indebtedness of the debtor; (4) how much of the debtor's estate was transferred; (5) reservation of benefits, control or dominion by the debtor; and (6) secrecy or concealment of the transaction.[63]

Although a single badge of fraud is insufficient, it is not necessary for an estate representative to show all of these badges of fraud (or any one in particular) to prove fraudulent intent.[64] "Depending on the context, badges of fraud will vary in significance, though the presence of multiple indicia will increase the strength of the inference."[65] Thus, an intentional fraudulent transfer may occur even when the transferee allegedly imparted fair consideration or

---

62 *Liquidation Trust of Hechinger Inv. Co. v. Fleet Retail Fin. Group (In re Hechinger Inv. Co.)*, 327 B.R. 537, 550-51 (D. Del. 2005) (citing authorities), *aff'd*, 278 F. App'x 125 (3d Cir. 2008).

63 *Id.*; *see also Moody v. Sec. Pac. Bus. Credit, Inc.*, 127 B.R. 958, 990 (Bankr. W.D. Pa. 1991), *aff'd*, 971 F.2d 1056 (3d Cir. 1992).

64 *See Brown v. Third Nat'l Bank (In re Sherman)*, 67 F.3d 1348, 1353-54 (8th Cir. 1995) ("The presence of a single badge of fraud is not sufficient to establish actual fraudulent intent; however, 'the confluence of several can constitute conclusive evidence of an actual intent to defraud, absent significantly clear evidence of a legitimate supervening purpose.'") (internal quotations omitted); *Max Sugarman Funeral Home, Inc. v. A.D.B. Investors*, 926 F.2d 1248, 1254-55 (1st Cir. 1991) ("The presence of a single badge of fraud may spur mere suspicion; the confluence of several can constitute conclusive evidence of an actual intent to defraud, absent significantly clear evidence of a legitimate supervening purpose.") (citations and internal quotations omitted). *But see Geltzer v. Artists Mktg. Corp. (In re Cassandra Group)*, 338 B.R. 583, 598 (Bankr. S.D.N.Y. 2006) (upholding an actual fraud claim under the NY UFCA based on the presence of only one badge: inadequate consideration).

65 *MFS/Sun Life Trust-High Yield Series v. Van Dusen Airport Servs. Co.*, 910 F. Supp. 913, 935 (S.D.N.Y. 1995); *see also Moody.*, 971 F.2d at 1064; *Dobin v. Taiwan Mach. Trade Ctr. Corp. (In re Victor Int'l)*, 97 F. App'x 365, 369 (3d Cir. 2004).

reasonably equivalent value on account of a transfer.[66] In addition, some courts have looked to other factors in addition to the traditional "badges of fraud" to determine whether a transaction is intentionally fraudulent.[67]

Finally, it bears noting in this Section of the Report that the Examiner concludes that a court is highly likely to "collapse" transactions for purposes of evaluating intentional fraudulent transfer claims when the various factors supporting such a result in a constructive fraudulent transfer context also are present in an intentional fraudulent transfer setting.[68] Collapse in this context affects questions of defenses available to the transferee or obligee of an intentional fraudulent transfer under Bankruptcy Code section 548(c), discussed in another part of the Report.[69]

b. Examiner's Conclusions and Explanation Concerning Intentional Fraudulent Transfer Claims in the Step One Transactions.

<u>Examiner's Conclusions</u>:

A court is reasonably unlikely to find that the Tribune Entities incurred the obligations and made the transfers in the Step One Transactions with actual intent to hinder, delay, or defraud any entity to which the Tribune Entities were or became, on and after the date that such transfers were made or such obligations were incurred, indebted.[70]

---

66 *See, e.g., Dean v. Davis*, 242 U.S. 438, 444-45 (1917) (finding that a mortgage constituted an intentional fraudulent transfer, even where the debtor received the loan proceeds, because the debtor used the loan proceeds with intent to hinder, delay, or defraud creditors).

67 *See ASARCO LLC v. Ams. Mining Corp.*, 396 B.R. 278, 370-71 (Bankr. S.D. Tex. 2008).

68 *See, e.g., United States v. Tabor Court Realty Corp.,* 803 F.2d 1288, 1302, 1304 (3d Cir. 1986) (collapsing transaction and approving lower court's finding of intent to hinder creditors); *id.* at 1297 n.3 ("Although a rational creditor might under certain circumstances consent to a risky but potentially beneficial leveraged buy-out of a nearly insolvent debtor, no reasonable creditor would consent to the intentionally fraudulent conveyance the district court found the transaction to be. Thus, the application of fraudulent conveyance law to the instant transaction appears consistent even with Baird and Jackson's analysis."). *See* Report at § IV.B.5.b.

69 11 U.S.C. § 548(c) (2006). *See* Report at §§ IV.B.5.b. and IV.B.7.b.(1).

70 11 U.S.C. § 548(a)(1)(A) (2006).

Explanation of Examiner's Conclusions.

The Examiner did not find any direct or "smoking gun" evidence that the Tribune Entities entered into the Step One Transactions with the intention to hinder, delay, or defraud creditors. Nor did the Examiner find sufficiently probative "badges" of fraud at Step One:

(1) Relationship between the debtor and the transferee. As discussed in the Report,[71] it is clear that the Selling Stockholders (including Tribune's Large Stockholders and members of Tribune's management and the Tribune Board who held shares) were the principal beneficiaries of the Step One Transactions and received a substantial portion of the consideration received from the advances giving rise to the LBO Lender Debt. However, the Special Committee and the Tribune Board considered and approved the Leveraged ESOP Transactions, with the active input of the Financial Advisors. There is no credible evidence, moreover, that the Lead Banks controlled the Tribune Entities or would otherwise qualify as "insiders" within the meaning of the Bankruptcy Code.[72]

(2) Consideration for conveyance. As discussed in another part of the Report,[73] the Examiner finds that none of the Tribune Entities received reasonably equivalent value in Step One in exchange for the obligations incurred and payments made.

(3) Insolvency or indebtedness of the debtors. As discussed elsewhere in the Report,[74] the Examiner finds it is highly unlikely that a court would find that the Step One Transactions rendered the Tribune Entities insolvent (assuming the Step Two Debt is not included at Step One for solvency purposes).

---

[71] *See* Report at §§ III.D.16., III.F.8.e., and III.G.4.d.

[72] 11 U.S.C. § 101(31)(B) (2006).

[73] *See* Report at § IV.B.5.c.

[74] *See* Report at § IV.B.5.d.(7).

(4) Amount of the debtor's estate transferred. Although the Leveraged ESOP Transactions rendered all of the Tribune Entities liable on the Step One Debt, and the Stock Pledge was granted in connection therewith, the transactions did not result in the transfer away of all of the Tribune Entities' assets.

(5) Reservation of benefits, control, or dominion by the debtors. This badge is not relevant to the Leveraged ESOP Transactions.

(6) Secrecy or concealment of the transaction. The Step One Transactions were not secretive or concealed from participants in that transaction or from the public generally. The record establishes that Tribune regularly disclosed pertinent financial performance information in the period leading up to the Step One Financing Closing Date.[75] Nor is there any evidence that the Tribune Entities (through management or others) withheld information underlying Tribune's projections or other aspects of the transaction or engaged in dishonesty or wrongdoing in connection with the Step One Transactions.

Although application of the traditional "badges" weigh against the conclusion that an intentional fraudulent transfer occurred here, certain Parties contended that Step One transfers and obligations were intentionally fraudulent based on the following allegations: (i) the Tribune Entities knew that they could not service and satisfy the massive amount of LBO Lender Debt incurred, but proceeded with the transactions nonetheless so that the Tribune Entities' insiders would receive cash bonuses in addition to payments as Selling Stockholders; (ii) driven by these

---

[75] *See* Ex. 79 (Tribune Press Release, dated May 14, 2007). *See also* Ex. 55 (Tribune Form 10-Q, filed May 9, 2007); Ex. 891 (Ratings Agency Presentation, dated March, 2007); Ex. 180 at 31-32 (Transcript of Lenders Meeting, dated April 26, 2007); Ex. 181 (Lenders' Presentation, dated April 26, 2007); Ex. 973 at cover letter (Tribune Board Notebook, dated May 9, 2007). To be sure, however, public disclosure alone is not sufficient to insulate an otherwise intentionally fraudulent transfer from avoidance. *See, e.g., In re Morse Tool, Inc.*, 108 B.R. 389, 390 (Bankr. D. Mass. 1989).

motivations, the Tribune Entities (acting through their management) procured an unrealistic solvency opinion from VRC and failed to take into account the Tribune Entities' declining financial performance during the first quarter of 2007 and leading up to the closing of Step One; and (iii) the Tribune Entities, acting in conjunction with the LBO Lenders, structured various transactions so as to place all of the risk of failure on Tribune's creditors. The Examiner did not find these contentions persuasive.

First, the evidence amply demonstrates that before Tribune entered into the Merger Agreement and related agreements on April 1, 2007, Tribune was aware that this was a highly leveraged transaction and that the Tribune Entities had missed their February 2007 projections on an overall basis.[76] However, as discussed in another part of the Report,[77] the Examiner does not conclude that Tribune unreasonably continued to rely on the February 2007 projections up to and including the closing of Step One. Some evidence additionally supports the view that the Tribune Entities' management believed that various cost-cutting initiatives then underway would counterbalance the decline in revenues.[78]

Second, it is true that members of Tribune's senior management as well as directors (including Special Committee members) stood to benefit personally from the Leveraged ESOP Transactions: senior management from cash bonuses and phantom stock awards under the Special Incentive Awards,[79] and both senior management and directors through accelerated restricted and stock options and as Selling Stockholders.[80] The management cash awards were

---

76 *See* Report at §§ III.E.1. and III.D.1.f.

77 *See* Report at § IV.B.5.d.(9).

78 *See* Ex. 66 at 102:20-104:21 (Rule 2004 Examination of Harry Amsden, December 16, 2009)*; see also* Ex. 180 at 18, 34, and 73 (Transcript of Lenders Meeting, dated April 26, 2007); Report at § III.D.10.a.

79 *See* Report at §§ III.F.8.c. and III.F.8.e.

80 *See* Report at § III.F.8.e. All members of the Special Committee tendered shares of Tribune Common Stock in connection with the Tender Offer with the exception of Mr. White. As neither Mr. White nor Mr. Reyes were

significant.[81] The Compensation Committee (none of the members of which received Special Incentive Awards) openly approved and adopted the Special Incentive Awards, precluding any assertion that the awards were a secret benefit conferred on management.[82] More generally, the fact that members of senior management, the Tribune Board, and the Special Committee personally benefited materially from the Leveraged ESOP Transactions may be reason to carefully scrutinize their actions and credibility—particularly in the case of senior management as Step Two approached (and the additional financial benefits that they would receive on the Step Two Closing became closer to reality)—does not by itself support an inference that these insiders caused Tribune to perpetrate an intentionally fraudulent transfer at Step One.

Third, the picture that emerges from the record is that, having succeeded in generating a transaction that was very favorable to the Selling Stockholders and that would satisfy the long-standing demands of several Large Stockholders, Tribune effectuated a leveraged transaction to maximize stockholder recovery. In pursuit of this objective, senior management aggressively tried to meet the conditions necessary to close Step One, including obtaining a solvency opinion that would provide a basis for Tribune to certify solvency under the Credit Agreement.[83] However, although the amount paid to VRC to render its opinions as well as certain assumptions VRC made in its Step One opinion raise questions,[84] the evidence does not demonstrate deception by Tribune's senior management or directors at Step One. Tribune's instruction to

---

members of the Tribune Board upon consummation of the Merger, the Examiner is unable to determine whether Mr. White or Mr. Reyes owned shares of Tribune Common Stock at the Effective Time of the Merger and therefore directly benefited from the consummation thereof.

81 Two members of Tribune management (Mr. FitzSimons and Mr. Smith) did not participate in the cash bonus pool. Ex. 5 at 47 (Tender Offer). However, Mr. FitzSimons received $15,966,121 (including tax gross-up) under the Transitional Compensation Plan as a result of the termination of his employment in December 2007.

82 Ex. 663 (Compensation Committee Meeting Minutes, dated April 1, 2007).

83 Management had to act quickly to engage a firm willing to consider furnishing a solvency opinion. *See* Examiner's Sworn Interview of Chandler Bigelow, June 17, 2010, at 111:20-22, 112:1-3.

84 *See* Report at § III.E.3.a.

VRC that it should not include the Step Two Debt in determining solvency at Step One probably was correct, whereas the instruction not to consider the Step Two Debt for purposes of other analyses (such as capital adequacy) probably was wrong (the latter evidencing an erroneous conclusion[85] but, the Examiner believes, not actual fraudulent intent). The Examiner finds perplexing and troubling the provisions contained in VRC's engagement letter requiring that VRC measure fair value as the consideration that would change hands between a willing buyer and a willing seller "both having structures similar to the structure contemplated in the Transactions by the subject entity (an S-Corporation, owned entirely by an ESOP, which receives favorable federal income tax treatment), or another structure resulting in equivalent favorable federal income tax treatment."[86] But VRC's adherence to this requirement did not affect VRC's Step One solvency opinion.[87]

---

85 *See* Report at § IV.B.5.d.(6).(ii).

86 Ex. 263 at 3-4 (VRC Solvency Engagement Letter, dated April 11, 2007).

87 This provision of VRC's engagement letter became highly relevant at Step Two. *See* Report at § IV.B.5.d.(10). As support for this provision, one Party cited to the Examiner cases addressing whether it is appropriate to "tax affect" the value of stock in an S-Corporation when that stock is passed to an heir (which would result in a lower valuation of the stock in the heir's hands and hence less tax owing to the Internal Revenue Service resulting form the transfer). *See generally Gross v. Comm'r*, 272 F.3d 333, 342 (6th Cir. 2001); *Dallas v. Comm'r*, 92 T.C.M. (CCH) 313 (T.C. 2006); *Estate of Adams v. Comm'r*, 83 T.C.M. (CCH) 1421 (T.C. 2002); *Estate of Heck v. Comm'r*, 83 T.C.M. (CCH) 1181 (T.C. 2002); *Wall v. Comm'r*, 81 T.C.M. (CCH) 1425 (T.C. 2001). The courts deciding these cases agreed with the position taken by the Internal Revenue Service that the value of that stock is not reduced by the hypothetical corporate tax rate (in other words, the value should not be "tax affected"), implying that an S-Corporation would be valued higher than a C-Corporation, *ceteris parabus*. Academic literature also has addressed the implications of these judicial decisions on S-Corporation valuation issues. *See, e.g.*, GEORGE B. HAWKINS & MICHAEL A. PASCHALL, CCH BUSINESS VALUATION GUIDE ¶ 1523 (2007); Roger J. Grabowski, *S Corporation Valuations in the Post-Gross World-Updated,* BUSINESS VALUATION REVIEW, Sept. 2004. These cases are inapposite to the Tribune case and therefore furnish no justification for the valuation methodology prescribed in VRC's engagement letter. They involved circumstances in which the tax advantaged position enjoyed by the old owner was actually passed on to the heir; hence, the question before these courts was whether to value the stock in the heir's hands recognizing that the heir would enjoy the same tax advantage as its predecessor.

Whether a hypothetical buyer of Tribune, however, could construct its own tax avoidance structure would not represent value attributable *to Tribune* (or any other seller for that matter) and should not be counted as an element of its fair market value:

> To review, a common definition of fair market value (which is the litmus test for valuations of privately held stock held by ESOPs), is "the value at which an asset would trade hands between a willing buyer and willing seller, both having access to relevant facts, neither being under compulsion to act." Generally, this

Fourth, the Examiner did not find credible evidence to support the contention that the Tribune Entities structured the Leveraged ESOP Transactions to hinder or delay their creditors. As noted, Tribune's creditors had no recourse to the Guarantor Subsidiaries or contractual protection against efforts by third party creditors to obtain structural superiority over Tribune's creditors. Without more, structuring the funding necessary to make the Leveraged ESOP Transactions happen by taking advantage of the existing structural subordination of Tribune's

---

> definition is interpreted to refer to hypothetical, average buyers and sellers in the marketplace, without regard to special purpose buyers (e.g., strategic buyers) or sellers (e.g. liquidation sellers).
>
> As a result, the definition of fair market value, when considered with respect to the S Corporation ESOP, does not confer value from the ESOP tax structure on the value of the subject stock. While it is true that the ESOP receives an economic advantage that translates to additional value for the participants, this economic benefit does not confer additional value on the stock itself. Only another special-purpose buyer (e.g. another S Corporation ESOP) could enjoy the same economic advantage. Therefore, the economic benefit is not part of the fair market value of the subject stock."

David Ackerman and Susan E. Gould, *S Corporation ESOP Valuation Issues (Chapter 6) in* THE HANDBOOK OF BUSINESS VALUATION AND INTELLECTUAL PROPERTY ANALYSIS 148-49 (Robert F. Reilly and Robert P. Schweihs, eds., 2004).

If this were not the case, then any asset in a seller's hands would have to be valued higher based on the theoretical possibility that a buyer could acquire that asset on a tax-advantaged basis. Solvency valuation assumes a hypothetical disposition by a willing seller to a willing buyer. *See* footnotes 387 and 568. There is no basis to attribute value to the *seller* based on the supposition that a special purpose buyer would acquire the seller or its assets on its own tax advantaged basis:

> [A]s discussed above, the analyst should estimate value based only on a hypothetical willing buyer and willing seller (rather than on a special purpose buyer). As a result, the analyst should not conclude an enhanced fair market value of the corporation stock due solely to the tax exempt status of the ESOP trust. This is because only another S Corporation ESOP (*i.e.* a special purposes buyer) could purchase this enhanced value.

Id. at 153.

The Examiner also considered whether the preceding conclusion differs based on the prospect that Tribune might be able to further effectuate one or more dispositions under a leveraged partnership transaction (a structure that apparently was used in the Cubs and Newsday sale transactions), under which Tribune might monetize assets and still obtain the tax avoidance benefit that it would otherwise have to wait ten years to achieve by holding such assets. *See* Exh. 1119 (TOM R. WECHTER, SELLING CHICAGO CUBS WITHOUT RECOGNIZING ANY TAXABLE GAIN: HOW CHICAGO TRIBUNE DID IT (2009)). This is not a benefit that is passed on to the buyer, but, rather, if successful permits Tribune to shield the income from the asset monetized as if Tribune held and generated income from the asset. In this fashion, this benefit is no different for fair market value purposes from the S-Corporation/ESOP structure generally. Although this structure, to the extent still available, might affect the net consideration remitted to creditors from a disposition of Tribune's assets, it would not affect the fair market value of Tribune's assets, in other words, it would not affect the price paid by a willing buyer for those assets.

creditors simply is not evidence of intent to hinder or delay creditors.[88] The same is true regarding the repayment of the 2006 Bank Debt at Step One. Under the terms of the 2006 Credit Agreement and 2006 Bridge Credit Agreement, rendering the Guarantor Subsidiaries liable on the LBO Lender Debt would have been an event of default. Thus, absent waiver, Step One could not have happened without repayment of this debt. There is no evidence pointing to invalidity of this debt. Even though lenders holding the 2006 Bank Debt also held the LBO Lender Debt, in the context of the Leveraged ESOP Transactions, it is neither surprising nor suspicious that the 2006 Bank Debt was repaid and replaced with the Step One Debt.

Fifth, the evidence does not support the contention that the FinanceCo/Holdco Transactions constituted an effort to hinder or delay Tribune's creditors. These transactions did not violate the terms of the Senior Notes or the PHONES Notes.[89] Indeed, the Senior Notes received the same security granted under the Credit Agreement in the form of the Stock Pledge on a ratable and pari passu basis with the Credit Agreement Debt, as required by their indentures.[90] Separate from what the applicable indentures permitted or required, the evidence

---

[88] *See Moody v. Sec. Pac. Bus. Credit*, 971 F.2d 1056, 1073 n.27 (3d Cir. 1992) (finding that voluntary creditors may be able to protect themselves against harm supposedly caused by leveraged buyout through protections in negotiated credit agreements); *see also In re Owens Corning*, 419 F.3d 195, 212-23 (3d Cir. 2005) ("To begin with, the Banks did the 'deal world' equivalent of 'Lending 101.' They loaned $2 billion to OCD [the parent] and enhanced the credit of that unsecured loan indirectly by subsidiary guarantees covering less than half the initial debt. What the Banks got in lending lingo was 'structural seniority'–a direct claim against the guarantors (and thus against their assets levied on once a judgment is obtained) that other creditors of OCD did not have. This kind of lending occurs every business day. To undo this bargain is a demanding task."); *Aluminum Mills*, 132 B.R. at 896 ("[A] non-fiduciary may act strategically to protect itself to the potential detriment of others.") (citation omitted); *Prod. Res. Group, L.L.C. v. NCT Group*, 863 A.2d 772, 777, 790 (Del. Ch. 2004) ("Creditors are typically better positioned than stockholders to protect themselves by the simple tool of contracting . . . . Creditors are often protected by strong covenants, liens on assets, and other negotiated contractual protections.").

[89] *See Moody*, 971 F.2d at 1073 n.27; *see also In re W.T. Grant Co.*, 699 F.2d 599, 609 (2d Cir. 1983) ("We entirely agree with [the] conclusion that a creditor is under no fiduciary obligation to its debtor or to other creditors of the debtor in the collection of its claim."); *In re Aluminum Mills Corp.*, 132 B.R. 869, 896 (Bankr. N.D. Ill. 1991) ("[A] non-fiduciary may act strategically to protect itself to the potential detriment of creditors.").

[90] *See* Ex. 216 (S&P Recovery Report) at TRB 0125760 (noting that existing Senior Notes "will benefit from the security package as the proposed bank facility due to negative pledge covenants in existing bond indentures").

does not support contentions by certain Parties that the FinanceCo/Holdco Transactions were structured to create, in effect, a Maginot Line against Tribune's creditors if the Subsidiary Guarantees subsequently were avoided following a bankruptcy for the Tribune Entities. There is no reason to believe that FinanceCo or Holdco (as established pursuant to the FinanceCo/Holdco Transactions) would be uniquely immune from avoidance of the Subsidiary Guarantees if bankruptcies were to occur, or that the Tribune Entities or other participants believed that those transactions would provide the Credit Agreement lenders with any special protection from the consequences of avoidance of the Credit Agreement Subsidiary Guarantee.

Instead, as discussed above, the evidence shows that Tribune had a business reason for structuring the FinanceCo/Holdco Transactions. First, JPM and the other banks attempting to syndicate the Step One Financing required that Tribune provide at least a partially secured facility so the Credit Agreement Debt could be marketed to a broader universe of lenders, such as collateralized debt obligation lenders.[91] The FinanceCo/Holdco Transactions facilitated the furnishing of some security in respect of the Credit Agreement Debt. Second, considerations relating to securities reporting requirements appear to have driven the specific structure of the FinanceCo/Holdco Transactions. As noted, Tribune had not previously prepared financial statements by entity, but rather had historically reported by business segment.[92] Had Tribune pledged the stock in its existing subsidiaries, which JPM preferred it do,[93] absent a waiver of applicable reporting requirements, Tribune would have been required to prepare audited financial

---

[91] *See* Ex. 197 (Sell E-Mail, dated March 28, 2007); *see also* Ex. 178 at 29 (Step One Confidential Information Memorandum).

[92] *See* Ex. 197 (Sell E-Mail, dated March 28, 2007); Ex. 4 at 8-21, 138-142 (Tribune 2007 Form 10-K).

[93] Jeffrey Sell, former Head of JPM's Special Credits Group, informed the Examiner that "I recall that I considered this baloney- that these guys gave this up for the weekend because some comptroller couldn't give the financial statements. . . . I wanted the pledge of stock in the subsidiaries. I probably asked for a lien on the assets and was told no so a pledge on the stock of the subsidiaries was second choice. Pledge on holding companies was next." Examiner's Interview of Jeffrey Sell, June 3, 2010. *See also* Ex. 197 (Sell E-Mail, dated March 28, 2007).

statements for each of the entities giving stock pledges.[94] The FinanceCo/Holdco Transactions permitted the Tribune Entities to avoid that result,[95] and, thus, they are not evidence of Tribune's intent to hinder, delay, or defraud creditors.[96]

The evidence also does not support a conclusion that the transactions effectuated at or around the Step One Transactions involving the LATI Notes were done with actual intent to hinder, delay, or defraud creditors. The Credit Agreement specified, as a condition to closing, satisfaction of the intercompany amounts shown on a schedule to the Credit Agreement as running in favor of LATI.[97] Although no direct evidence supports this inference, this provision of the Credit Agreement may have been driven, at least in part, by the fact that Tribune's twenty-one subsidiaries allegedly obligated on the LATI Notes were Guarantor Subsidiaries under the Credit Agreement.[98] As such, the Lead Banks probably desired the elimination of a nearly $4 billion "liability" of Guarantor Subsidiaries to LATI, especially as LATI was *not* a guarantor. For the Tribune Entities' part, this provision may have been motivated by tax considerations relating to the S-Corporation/ESOP structure.[99]

Regardless of any possible motives, it is highly unlikely that these transactions harmed Tribune or its creditors.[100] Although the result was that Tribune arguably ended up with a $3.98 billion "liability" to LATI, LATI is a wholly owned subsidiary of Tribune, is not a Guarantor

94 *See* 17 C.F.R. § 210.3-16 (2010).

95 *See* Ex. 200 (Kaplan E-Mail, dated March 21, 2007); Ex. 199 (Chen E-Mail, dated March 30, 2007).

96 For this reason, there would be no basis for a court to direct any type of "reverse corporate veil piercing" involving FinanceCo or Holdco due to the lack of any evidence that the FinanceCo/Holdco Transactions were unjust or improper. *See ASARCO, LLC v. Ams. Mining Corp*., 396 B.R. 278, 317 (S.D. Tex. 2008).

97 Ex. 179 at §§1.01, 3.01(m) and Schedule 1.01(d) (Credit Agreement).

98 Ex. 189 at Annex I (Credit Agreement Subsidiary Guarantee).

99 *See* 26 C.F.R. §§1.1361-4(a)(2); 1.332-2(b) (2010); s*ee also* Report at § III.D.13.

100 The question addressed here is separate from the question whether certain of the Guarantor Subsidiaries received "value" from these transactions, which the Examiner concludes later in the Report that they did not. *See* Report at § IV.B.5.c.(3).

Subsidiary, and does not appear to have any significant indebtedness of its own.[101] As a consequence, the value of any "claim" that LATI might hold against Tribune, in effect, is an asset of Tribune and ultimately would be available for the benefit of Tribune's creditors.

Any time a transaction or series of transactions involving affiliated entities involves circular book-entry movements of money, red flags of constructive and possibly intentional fraudulent transfers appear. The transactions involving FinanceCo, Holdco, and LATI certainly seem suspect at first blush, but examination of the transactions and their impact on creditors reveals no evidence of impropriety.

c. Examiner's Conclusions and Explanation Concerning Intentional Fraudulent Transfer Claims in the Step Two Transactions.

Examiner's Conclusions:

A court is somewhat likely to find that the Tribune Entities incurred the obligations and made the transfers in the Step Two Transactions with actual intent to hinder, delay, or defraud creditors to which the Tribune Entities were or became liable, on and after the date that such transfers were made or such obligations were incurred.

Explanation of Examiner's Conclusions:

The context in which the Tribune Entities incurred and made the Step Two obligations and transfers differed materially from what happened at Step One. The period leading to Step One was characterized by two distinct phases: the time preceding the April 1, 2007 Tribune Board approval of the Leveraged ESOP Transaction and Tribune's entry into the Merger Agreement and the time following those events and leading up to the Step One Financing Closing Date. After these events occurred and during the period leading up to the Step Two

[101] *See* Ex. 6 (Tribune Organization Chart); Ex. 189 at Annex I (Credit Agreement Subsidiary Guarantee); Ex. 206 (LATI Schedules indicating approximately $70,000 of intercompany debt owed by LATI).

Financing Closing Date, Tribune's actions were guided by its contractual rights and obligations principally under the Merger Agreement (and related agreements entered into on April 1, 2007), the Credit Agreement, and the Step Two Commitment Letter. The Merger Agreement obligated Tribune to exercise reasonable best efforts to effectuate the Merger,[102] including to "enforce its rights under the Financing Commitments."[103] The Credit Agreement and the Step Two Commitment Letter (which, together, embodied the financing commitments in effect at the time of the Step One Financing Closing Date), in turn, authorized Tribune to compel the LBO Lenders to fund the Step Two Debt if the conditions precedent to that funding otherwise were satisfied. The main conditions to the Step Two Closing that Tribune had the power to influence, if not control their procurement or satisfaction, were the Credit Agreement's and the Step Two Commitment Letter's requirement of a solvency certificate and solvency representation as a condition to the Step Two Funding and the Merger Agreement's requirement of a solvency opinion as a condition to the Merger.[104] The requirement of solvency as a prerequisite to Step Two was viewed at the time of Step One as a form of built-in protection for Tribune and the Tribune Board against the improvident incurrence of the Step Two Debt.[105] In other words, if

---

[102] Ex. 151 at §5.6(a) (Merger Agreement).

[103] *Id.* at §5.11(a) (Merger Agreement).

[104] *See* Report at §§ III.D.3.b., III.D.10.c.

[105] *See* Examiner's Sworn Interview of Crane Kenney, July 8, 2010, at 20:14-20 ("I think Tribune I believe probably on the advice of Wachtell, Sidley and Skadden, I think the law firms advised the board in order to assure yourselves that you're not over extending the company, you should receive a solvency opinion, so I think it was Tribune that sought the solvency opinion."). However, Mr. Kenney (Tribune's General Counsel) did not believe that obtaining a solvency opinion was going to present any difficulties. Examiner's Sworn Interview of Crane Kenney, July 8, 2010, at 73:2-9; Examiner's Sworn Interview of Thomas Whayne, July 2, 2010, at 51:19-52:1-3 ("I think as I told you before it was Wachtel [sic] Lipton in step 1 that felt like it was important to have the solvency opinion as a way of protecting the board and the board only and so, you know, as we got into step 2 and there started to be, you know, solvency issues, they were the domain of Steve Rosenblum."); Examiner's Interview of Christina Mohr, June 29, 2010 ("The solvency requirement came from the board to protect itself and the Company."). Citigroup's Christina Mohr in particular emphasized in her Examiner interview that whereas Tribune and its Financial Advisors had little difficulty with the amount of Step One Debt (particularly given the leveraged recapitalization alternative then under active consideration), this was not true with respect to the indebtedness contemplated at Step Two. According to Ms. Mohr, there "was a lot of back and forth and

the Step Two Debt would render Tribune insolvent as that term was defined in the transaction documents, Step Two was not supposed to happen.

The solvency opinion, the solvency certificate, and solvency representation were inexorably related. Without a Step Two solvency opinion, there was no reasonable likelihood that management would give a solvency certificate and represent that Tribune was solvent,[106] and without that opinion, the Merger could not occur. Had these items not been obtained and delivered, the Tribune Entities would not have incurred the Step Two Debt and the Selling Stockholders would not have received almost $4 billion dollars in payments at Step Two. Thus, by design at Step One, a direct causal nexus exists between the obligations incurred and transfers made at Step Two and the procurement and issuance of the solvency opinion and solvency certificate and representation.

Not only did Step One and Step Two differ in context, but the difference in consequences resulting from the two steps was stark. As discussed in another part of the Report,[107] the Examiner concludes that there is a high likelihood that the Step Two Transactions rendered Tribune insolvent and without adequate capital (and a reasonable likelihood that the Step Two Transactions rendered the Guarantor Subsidiaries insolvent and without adequate capital). This is in contrast to the Examiner's conclusions concerning Step One solvency and capital adequacy. A clear demarcation therefore separates Step One and Step Two: Before the Step Two Financing Closing Date, the Tribune Entities' assets and revenue-generating capacity exceeded their

---

tug of war. It wasn't flip or decided in an hour; it was a lot of soul searching." "People got up some mornings and were comfortable, and other mornings people said that they were uncomfortable with the risk. It was reflected in the financing; people said it was skinny." Examiner's Interview of Christina Mohr, June 29, 2010.

[106] *See* Examiner's Sworn Interview of Chandler Bigelow, June 17, 2010, at 135:11-18; Examiner's Sworn Interview of William Osborn, June 24, 2010, at 41:1-7.

[107] *See* Report at §§ IV.B.5.d.(10)., IV.B.5.d.(11)., IV.B.5.d.(12).

liabilities and the likely demands imposed by creditors for payment of interest and principal when due. After that date, this no longer was true.

Although insolvency and gross disparity in the consideration given and received are not prerequisites to finding an intentional fraudulent transfer in the way that they are for constructive fraudulent transfers, these are two of the six "badges" of an intentional fraudulent transfer.[108] Both existed at Step Two. Without question, however, finding an intentional fraudulent transfer cannot rest on a conclusion that insolvency or capital inadequacy "could have been foreseen" on the eve of Step One.[109] As previously noted, the law in the Third Circuit states that if the "natural consequence" of the debtor's actions is that its creditors will be hindered, delayed, or defrauded, a finding that an intentional fraudulent transfer occurred will follow.[110] To conclude that an intentional fraudulent transfer occurred at Step Two, it need not be shown that the Tribune Entities set about to hinder, delay, or defraud creditors, only that the Tribune Entities knew that those consequences would follow naturally from their acts.

The Examiner's conclusion that a court is somewhat likely to conclude that the Tribune Entities incurred the obligations and made the transfers in Step Two with actual intent to hinder, delay, or defraud creditors is based on his review of the evidence taken in aggregate, the components of which are addressed below.

(1) Solvency and Value Received.

As noted, the Examiner finds in another part of the Report that it is either highly or reasonably likely that a court would conclude that the Step Two Transactions rendered each of the Tribune Entities insolvent and that these entities received far less than reasonably equivalent

---

108 *Id.* at § IV.B.4.a.

109 *Id.*

110 *Id.*

value for the obligations incurred and payments made. These are two badges of fraud. Standing alone, these badges are not sufficient to warrant a finding that an intentional fraudulent transfer occurred at Step Two. If they were, then every constructive fraudulent transfer would qualify as an intentionally fraudulent one. As shown below, however, the Examiner finds that a series of facts under the general rubric of secrecy, concealment, or dishonesty tend to support the conclusion that the Step Two Transactions were intentionally fraudulent transfers.

(2) The Refinancing Representation.

During a December 2, 2007 telephone conversation between two members of Tribune's senior financial management (Donald Grenesko and Chandler Bigelow) and Bryan Browning of VRC, Mr. Grenesko and/or Mr. Bigelow reported to Mr. Browning certain statements allegedly made previously by Thomas Whayne of Morgan Stanley to the two of them concerning the question whether Tribune could refinance its indebtedness in 2014.[111] The statements attributed to Mr. Whayne did not relate to just any matter: they involved the condition that VRC's opinion letter committee had imposed as a precondition to authorizing VRC to issue its solvency opinion — namely, a representation that Tribune could refinance its debt in 2014 under a scenario in which much of Tribune's debt would come due and Tribune otherwise would run out of money. Because a favorable solvency opinion was the principal remaining condition to the Step Two Closing, at least from Tribune's perspective, satisfaction of VRC's concerns regarding the refinancing question was the principal remaining issue standing in the way of that closing. The relevant conversations occurred before a scheduled Tribune Board meeting to consider VRC's analysis and just after VRC's opinion letter committee had met and raised the refinancing assumption as a gating issue.

---

111 *Id.* at § III.H.3.g.(4).

In their December 2, 2007 conversation with Mr. Browning, Mr. Grenesko and/or Mr. Bigelow told Mr. Browning that Morgan Stanley agreed that Tribune could refinance its debt in a 2014 downside scenario.[112] VRC then apparently proceeded to rely, in its solvency opinion, on a Tribune representation setting forth management's belief that Tribune could refinance its debt based in part on discussions between Tribune management and Morgan Stanley. Yet, in his sworn interview Mr. Whayne testified that he never told anyone at Tribune that Morgan Stanley agreed that Tribune's debt could be refinanced when much of it was scheduled to come due and, indeed, specifically refused Mr. Grenesko's and Mr. Bigelow's entreaties to have Morgan Stanley weigh in on that question.[113] Although Morgan Stanley did furnish Tribune management with precedent debt issuances and leveraged ratios in response to management's request, Mr. Whayne testified that in doing so he was "crystal clear" that Morgan Stanley was not making or offering its own assessment that Tribune could refinance, or agreeing with Tribune's assessment.[114] Mr. Whayne noted that Mr. Grenesko "was looking for us very actively to help him with the work underlying his solvency [certificate]," including "to do the analysis for him and actually to do the [calculations] . . . to prove that there was equity value."[115] Mr. Whayne testified that he explained to Mr. Grenesko that Morgan Stanley was willing to do no more than provide information such as "publicly available data around where high yield bond or leverage loans are trading . . . but what we will not do is go beyond that. So we'll provide you facts, but not

---

[112] *Id.* Tribune General Counsel Crane Kenney was also on the call, and VRC's Mose Rucker may have participated, too. Examiner's Sworn Interview of Mose Rucker and Bryan Browning, June 30, 2010, at 256:5-16. Mr. Kenney testified that he had no recollection of what Morgan Stanley said on this topic. Examiner's Sworn Interview of Crane Kenney, July 8, 2010, at 43:16-44:16, 47:13-19, 48:15-21.

[113] Examiner's Sworn Interview of Thomas Whayne, July 2, 2010, at 84:12-87:21.

[114] *Id.* at 94:17-96:20.

[115] *Id.* at 95:3-14.

judgments."[116] Although Mr. Grenesko testified that Morgan Stanley told him that it "would be reasonable to assume that the company could refinance in 2014,"[117] and Mr. Bigelow testified that "they [Morgan Stanley] communicated that it was reasonable for us to believe that we could refinance,"[118] neither of them had any specific recollection of the December 2, 2007 telephone conversation.[119]

The disputed testimony regarding who said what in telephone conversations among Morgan Stanley, Tribune, and VRC held over two years ago, and how Tribune management and VRC used this information to address the refinancing question, are not the beginning and end of the matters adduced in this Investigation relating to these events. After VRC's opinion letter committee determined to issue VRC's opinion purportedly in reliance on Tribune's representation to VRC concerning refinancing, the Lead Banks posed questions (and then follow-up questions) to Tribune regarding this assumption, and discussions transpired between Tribune and VRC regarding the content of the representation letter that Tribune would issue to VRC concerning refinancing. Both Tribune's responses to the Lead Banks and its representation letter to VRC concerning Tribune's ability to refinance its debt referred to management's discussions with Morgan Stanley as support for management's view that Tribune could refinance its debt in the downside scenario in 2014.[120] The record indicates that, on December 12, 2007, Mr. Bigelow

---

116 *Id.* at 96:1-13.

117 Examiner's Sworn Interview of Donald Grenesko, June 25, 2010, at 100:10-101:4 (including Mr. Grenesko's testimony both before and after the statement excerpted in text).

118 Examiner's Sworn Interview of Chandler Bigelow, June 17, 2010, at 200:7-201:20 (including testimony preceding the portion excerpted in text). Similarly, at a later point in his sworn interview, Mr. Bigelow characterized management's discussions with Morgan Stanley as having "left us with the impression that it would be reasonable to assume we could refinance." Examiner's Sworn Interview of Chandler Bigelow, June 17, 2010, at 199:5-6, 210:9-15 ("Q. What I'm asking is, do you have any specific recollection of Morgan Stanley telling you that it would be reasonable to refinance? A. Again, I don't recall the conversation, but my present recollection as I sit here today and look at these materials is yes, they did that.").

119 *See* Report at § III.H.3.g.(3).

120 *Id.* at §§ III.H.3.g.(10) and III.H.3.g.(12).

forwarded to Mr. Whayne an e-mail containing the follow-up questions posed by the Lead Banks including, "does VRC know whether Morgan Stanley understands that Tribune is relying upon its view?"[121] Mr. Whayne stated to the Examiner that although he does not recall receiving Mr. Bigelow's e-mail with the lenders' follow-up questions, he does not doubt that he did, in fact, receive it.[122] Based on the Examiner's review of the relevant e-mails and Mr. Whayne's further testimony, however, management never told Morgan Stanley that Tribune's representation letter or VRC's opinion would refer to Morgan Stanley. Mr. Whayne testified during his interview with the Examiner that he never told Tribune management that Morgan Stanley believed or concurred with any belief that Tribune could refinance indebtedness in the future,[123] and that if Mr. Whayne had seen the representation letter or a draft of it, he would have said "take our name out. You're not allowed to . . . rely on anything that we said for purposes of this relationship that you have with VRC."[124] Mr. Whayne stated that it was not until he was shown these documents in his interview with the Examiner that he was made aware of their contents.[125] Paul Taubman of Morgan Stanley similarly testified that he would have "objected":[126]

> [on] the basis that, first of all, on many, on many bases. One is I don't know what discussions they're referring to, what information they believe that they received from Morgan Stanley, what analysis was shared with them, what was said and I certainly would not have been comfortable with any, anything we said becoming the basis for a VRC solvency opinion since we had very carefully adhered to the policy that we were not providing these opinions or assisting it.

---

121 Ex. 755 at VRC0070618-19 (Rucker E-Mail, dated December 12, 2007).

122 Examiner's Sworn Interview of Thomas Whayne, July 2, 2010, at 107:22-109:10. Mr. Whayne stated he had no recollection of reading the e-mail.

123 *Id.* at 75:7-80:14.

124 *Id.* at 140:1-8.

125 Examiner's Interview of Thomas Whayne, June 11, 2010; Examiner's Sworn Interview of Thomas Whayne, July 2, 2010, at 21:3-22:1.

126 Examiner's Sworn Interview of Paul Taubman, July 1, 2010, at 92:6-16.

Tribune's response to the LBO Lenders and its representation letter on refinancing, and VRC's opinion referring to Tribune's representation, all referred to discussions between management and Morgan Stanley concerning the refinancing question, but did not discuss the contents of those communications.[127] Those documents stated just enough to create the impression that Tribune's views on this question had the benefit of Morgan Stanley's blessing, without stating so explicitly. Indeed, several witnesses told the Examiner that they thought Morgan Stanley concurred that Tribune could refinance its debt.[128]

This is no accident: Mr. Bigelow testified that the Lead Banks' follow-up questions were answered verbally, with no written response.[129] Tribune furnished verbal responses during a December 17, 2007 conference call with the Lead Banks that included, among others, representatives of Murray Devine, a firm hired by the Lead Banks to "educate" them on solvency

---

127 *See* Report at §§ III.H.3.g.(10)., III.H.3.g.(12)., and III.H.3.g.(13).

128 Examiner's Sworn Interview of Mose Rucker and Bryan Browning, June 30, 2010, at 240:10-17 ("So if your question is do I think Morgan Stanley told them they can refinance the debt, based upon the representation letters that we received, if I'm correct, unless I'm mistaken, I do think that Morgan Stanley told them that."); Examiner's Interview of Rajesh Kapadia, June 25, 2010 (Q: "As I read this, [quote from e-mail] it says "if we were to fund stage 2", then the company may well have a great deal of difficulty. Was there a question? A: Yes, that is the topic. I think we had asked this question of the company through their experts they had provided some perspectives on it and I believe the company sought Morgan Stanley or somebody's opinion on the company's ability to refinance debt as it comes to you."); Examiner's Interview of Jeffery Sell, June 3, 2010 ("I think they had relied on expert advice from a third party. This was part of the solvency opinion and at the end of the day we were satisfied."). However, in response to the question, "If you had known then before the closing of step 2 that one of Tribune's financial advisors refused to make a representation that Tribune would be able to refinance the debt and instead the company made that representation would that have changed your opinion?," Mr. Sell stated: "Putting the solvency opinion aside, probably not." *Id*. Daniel Petrik of BofA offered similar testimony. Examiner's Sworn Interview of Daniel Petrik, July 8, 2010, at 133:2-16 ("Q: Would it have mattered whether management had discussions with Morgan Stanley about its ability to refinance or not? A: Not to me it wouldn't. Q: Because you were focused on the revolver? A: Yes. And my relationship was with Tribune I mean, the fact that they got advice from another party or a confirmation from another party is always nice in the same way I ask for audited financial statements, it is an extra set of eyes providing me with an independent validation of their numbers. In this way it is kind of an independent addition to the Tribune's view.").

129 Examiner's Sworn Interview of Chandler Bigelow, June 17, 2010, at 241:4-10. Mr. Grenesko did not recall the questions or whether any answers were given. Examiner's Sworn Interview of Donald Grenesko, June 25, 2010, at 143:18-144:20.

matters.[130] The Murray Devine representative's handwritten notes from that call state: "Co. has used Morgan Stanley as solvency advisory. Mgt. believes company is solvent and can service debt."[131] Notes produced by a JPM attendee on the conference call state: "VRC is independent & Morgan Stanley to review solvency."[132] The notes further indicate: "'Accurate & complete.' -- VRC Report," and directly afterward: "'MS assumptions & recommendations fair & reasonable in light of fairness opinion.'" The quotation marks appear to represent what was stated on the call. Later, the notes state: "MS will be @ board mgt to answer questions."[133] The notes indicate that participants on the call included "TRB Team, Citi, Merrill, JPM, Counsel," but do not list Morgan Stanley as an attendee. Finally, the Merrill Entities produced a document entitled "Tribune Company - Preliminary Draft Board of Directors Presentation" (which Mr. Bigelow circulated in advance of this conference call)[134] during this conference call, with a handwritten notation at the top of the cover page stating: "Fair and reasonable\ - MS believes this as well."[135]

Given the references to Morgan Stanley and its services and opinions concerning solvency in the above-referenced notes from the December 17, 2007 conference call, which the Examiner discovered late in the Investigation and after the completion of most witness

---

130 Ex. 757 (Handwritten Notes of Murray Devine Representative, dated December 17, 2007) (five pages of notes from a conference call with Tribune management addressing Lead Banks' follow-up questions). Examiner's Interview of Rajesh Kapadia, June 25, 2010 (hiring and role of Murray Devine).

131 Ex. 757 at MD000550A (Handwritten Notes of Murray Devine Representative, dated December 17, 2007). The author of these notes testified that he had no recollection of a statement made at the meeting about Tribune's use of Morgan Stanley for solvency advisory services. Examiner's Sworn Interview of Thomas Kenny, July 9, 2010, at 50:22-24-51:2-3. The Examiner was unable to obtain a transcript of this call or ascertain whether one exists.

132 Ex. 890 at JPM_00499993 (Handwritten Notes of JPMCB Representative). The notes are dated December 17, 2006, although from the context it is clear they refer to the December 17, 2007 conference call.

133 *Id.* at JPM_00499996.

134 Ex. 886 at JPM_00450061 (Bigelow E-Mail, dated December 17, 2007) (forwarding to Lead Banks VRC's draft December 18, 2007 solvency analysis for "discuss[ion] with you on our call this afternoon").

135 Ex. 859 at ML-TRIB-0009950 (VRC Preliminary Solvency Analysis, dated December 18, 2007).

interviews, the Examiner's counsel contacted Morgan Stanley's counsel and asked, in writing, whether anyone from Morgan Stanley was invited to attend the December 17, 2007 conference call or any other call or meeting on or about that date or had any comments regarding the notes prepared by JPM of that call.[136] Morgan Stanley's counsel responded in writing as follows:[137]

> I am writing on behalf of [Morgan Stanley] in response to your July 12, 2010 email inquiring as to (i) Morgan Stanley's knowledge of a December 17, 2007 conference call or meeting held between Tribune and the [Lead Banks] relating to VRC's solvency opinion, and (ii) Morgan Stanley's understanding of its role in or around December 2007 as it related to providing advice regarding Tribune's solvency.
>
> Mr. Whayne has no recollection of ever being invited to that conference call or meeting, nor was he aware at that time that such a conference call or meeting was going to take place. As such, given that Mr. Whayne was not a participant at the meeting, he cannot confirm the accuracy or substance of the handwritten notes attached to your [e-mail].

A fair inference from the notes is that Tribune told the Lead Banks that VRC's solvency opinion had Morgan Stanley's blessing in a conference call that Morgan Stanley did not attend. As discussed later in this Section of the Report, this was not the last time that Tribune used views allegedly attributed to Morgan Stanley, but disputed by Mr. Whayne and Mr. Taubman in the course of the Investigation, to endorse VRC's solvency work.

The Examiner invites the reader to review the detailed narrative setting forth these events contained in the Report.[138] The Examiner's conclusions, based on the record and his participation in the relevant witness interviews, are as follows: (i) the statements of Mr. Grenesko and/or Mr. Bigelow to Mr. Browning on December 2, 2007 concerning Morgan

---

[136] Ex. 1043 (Nastasi E-Mail, dated July 12, 2010).

[137] Ex. 1044 (Letter from Jonathan Polkes, dated July 19, 2010).

[138] *See* Report at § III.H.3.g.

Stanley's views on the refinancing question were not accurate; (ii) these statements appear to have served as a predicate on which VRC concluded that it would accept Tribune's representation on Tribune's ability to refinance; (iii) the statements contained in Tribune's representation letter to VRC on refinancing referring to management's discussions with Morgan Stanley created a false impression that Morgan Stanley told management it concurred with management's views concerning the refinancing question; (iv) the statements apparently made by Tribune to the Lead Banks concerning Morgan Stanley's involvement in VRC's opinion were false; and (v) the preceding events led directly to VRC's issuance of its Step Two opinion letter, the solvency certificate, the solvency representation, and hence the Step Two Closing.

In drawing these conclusions, the Examiner evaluated the entire record adduced and considered whether the discrepancy in the testimony can be reconciled, if the testimony is irreconcilable, whether there is any basis to conclude that one person's recollection of what happened is more plausible than another's, and whether these events made any difference to whether Step Two ultimately closed. These considerations are discussed below.

(i) Attempting to Reconcile the Testimony.

As noted, although Mr. Whayne was emphatic in his testimony to the Examiner that he never told Tribune management that Morgan Stanley agreed that Tribune could refinance its indebtedness in 2014 and had never authorized Tribune to advise VRC of any such thing, Mr. Whayne did testify that in the course of his conversations with management he may have said "that you could refinance it," "with the emphasis on you [*i.e.*, management] could make that assumption, but . . . I never would have said [Morgan Stanley] would make that assumption."[139]

[139] Examiner's Sworn Interview of Thomas Whayne, July 2, 2010, at 75:17-76:6, 79:5-9; *see also* Examiner's Sworn Interview of Chandler Bigelow, June 17, 2010, at 201:18-20 (asserting that Morgan Stanley "communicated that it was reasonable for us to believe that we could refinance"); *Id.* at 199:5-6 (characterizing

In addition, Mr. Whayne did furnish precedent transaction information to management addressing the question of Tribune's ability to refinance its debt.[140] Mr. Whayne, however, was equally emphatic that in doing so he made it very clear to Tribune personnel that Morgan Stanley was not making its own assessment that Tribune could refinance its debt.[141] As noted, for their part, neither Mr. Bigelow nor Mr. Grenesko had any specific recollection of their December 2, 2007 conversation with Mr. Whayne, although Mr. Grenesko testified Morgan Stanley had communicated that it would be reasonable to assume that the company could refinance in 2014,[142] and Mr. Bigelow testified that "[Morgan Stanley] communicated that it was reasonable for us to believe that we could refinance."[143]

The Examiner considered whether Mr. Bigelow and Mr. Grenesko could have construed Mr. Whayne's statements to them, and Morgan Stanley's provision of precedent information, as conveying that whereas Morgan Stanley was not in a position to agree with a management position that Tribune could refinance its debt, Morgan Stanley did agree that *management* could reasonably conclude that Tribune could refinance its debt. The Examiner, however, does not

---

management's discussions with Morgan Stanley as having "left us with the impression that it would be reasonable to assume we could refinance").

140 Examiner's Sworn Interview of Thomas Whayne, July 2, 2010, at 91:22-93:18. During his informal interview with the Examiner, Mr. Whayne noted that it was his personal belief that it was not "an unreasonable assumption at the time" for management to assume Tribune could refinance in 2014 and 2015. Examiner's Interview of Thomas Whayne, June 11, 2010. In his sworn testimony, Mr. Whayne expressed the view that the precedent transactions, however, would not support the conclusion that Tribune could refinance its debt in 2014: "Well, because those multiples would, would only have been useful as one of a number of analyses to try to validate whether or not the company was actually solvent at that point in time. That's --- and that's a snapshot as of that date. It doesn't have anything to do with whether the company would have a liquidity profile going forward and being able to pay off its debt X years down the road." Examiner's Sworn Interview of Thomas Whayne, July 2, 2010, at 82:21-83:7.

141 Examiner's Sworn Interview of Thomas Whayne, July 2, 2010, at 94:17-96:20.

142 *See* Report at § III.H.3.g.(3); s*ee also* Examiner's Sworn Interview of Chandler Bigelow, June 17, 2010, at 202:2-203:5; Examiner's Sworn Interview of Donald Grenesko, June 25, 2010, at 121:4-6 ("I believe there was a call, but I don't specifically remember the details of the call."); *id.* at 121:18-20 ("Q: What do you recall was told to the VRC people on the telephone call? A: I don't recall.").

143 Examiner's Sworn Interview of Chandler Bigelow, June 17, 2010, at 200:7-201:20 (including testimony preceding the portion excerpted in text).

find that this is a plausible explanation for the disparity between what Mr. Whayne testified he told Mr. Bigelow and Mr. Grenesko, what they testified Mr. Whayne said to them, and what they and/or other members of Tribune's senior financial management reported to Mr. Browning regarding Morgan Stanley's position on the refinancing question. Mr. Browning's notes from his conversation with Tribune management on December 2, 2007 (written after the conversation, using less comprehensive notes that he apparently jotted down during the call) state: "MS said they believe it would be refinanceable at the levels outlined in the downside case and that would be before any asset sales."[144] Consistent with his notes, Mr. Browning testified in his sworn interview that:[145]

> We had discussions with management about refinancing and where the sources of refinancing would be, generally speaking. Then we also had, during those discussions, . . . I think management said, well, Morgan Stanley has told us that we can refinance at those levels even . . . under the downside scenario, they believed they still could refinance the debt. . . .
>
> And then we asked how they knew that or why they thought that, and they said Morgan Stanley has data that would support them being able to do that. And I think it was a number of comparables or a number of transactions that were out there. And we asked if they could provide that information to us, which they did. They provided a schedule of transactions that had high LBO debt.

Although Mr. Browning understood that Morgan Stanley was unwilling to provide a written representation to that effect,[146] the record shows that one or both of Mr. Bigelow or Mr. Grenesko told Mr. Browning that Morgan Stanley agreed that Tribune could refinance its debt.[147]

---

[144] Ex. 748 (Handwritten Notes of Bryan Browning, dated December 2, 2007); Ex. 747 (Handwritten Notes of Bryan Browning, dated December 2, 2007).

[145] Examiner's Sworn Interview of Mose Rucker and Bryan Browning, June 30, 2010, at 214:9-215:12. *See also Id.* at 289:3-6 ("[W]e felt that what management was telling us that Morgan Stanley said was, in fact, the case."). When asked "who at the company did you speak with?," Mr. Browning replied: "I think it was a team of people. Probably Chandler [Bigelow], maybe Don Grenesko, and maybe Crane Kenney . . . and others. I'm not sure, but there was a team that we typically talked to when we had conference calls." *Id.* at 215:21-216:8.

[146] *Id.* at 272:8-273:17. The Examiner found no evidence that VRC had any reason to disbelieve what senior management told them about Morgan Stanley's position.

[147] As noted above, Tribune General Counsel Crane Kenney was also on the call, but he testified that he had no recollection of what was said. Examiner's Sworn Interview of Crane Kenney, July 8, 2010, at 43:1-44:16, 47:13-19, 48:15-21. The Examiner found Mr. Kenney to be a credible witness.

The statements made to Mr. Browning concerning Morgan Stanley's views were unequivocal. In contrast, Mr. Whayne credibly told the Examiner that he never said what Mr. Bigelow or Mr. Grenesko reported that he had said to Mr. Browning,[148] specifically refuting contrary testimony read to him in his sworn interview.[149]

As noted, Mr. Bigelow forwarded to Mr. Whayne the e-mail containing the follow-up questions posed by the Lead Banks asking whether Morgan Stanley knew that Tribune is relying on its view concerning refinancing.[150] This fact undercuts the suggestion that Mr. Bigelow attempted to hide from Mr. Whayne what was said to VRC and the Lead Banks about Morgan Stanley's involvement (although it does not appear that Mr. Whayne had any involvement in responding to the LBO Lenders' follow up questions).[151] As also noted, however, the record reflects that management never told Morgan Stanley that Tribune's representation letter or VRC's opinion would refer to Morgan Stanley or that VRC's opinion would so state. Despite having left no reason to doubt what Morgan Stanley's position was on the refinancing question in their conversation with Mr. Browning, the communications generated by Tribune senior financial management afterward referred generically to conversations between Morgan Stanley and management and Morgan Stanley's involvement, without disclosing details. As observed above, this left the impression that Morgan Stanley was in accord with Tribune's views. Then, in one of the last communications with the Lead Banks before the Step Two Closing (outside of Morgan

---

[148] Examiner's Sworn Interview of Thomas Whayne, July 2, 2010, at 76:7-14. ("Q: On the call between management and Morgan Stanley earlier this day on December 2nd, did anyone from Morgan Stanley tell Dennis FitzSimons, Don Grenesko or Chandler Bigelow that Morgan Stanley concurred with Tribune that it would be able to refinance its debt even in the downside case? A: No.").

[149] *Id.* at 154:6-156:1.

[150] Ex. 755 at VRC0070618-19 (Rucker E-Mail, dated December 12, 2007).

[151] *See* Examiner's Sworn Interview of Thomas Whayne, July 2, 2010, at 110:16-21.

Stanley's presence), Tribune apparently stated that Morgan Stanley had provided solvency advisory services and allegedly made favorable analyses and recommendations concerning VRC's opinion. As discussed elsewhere in the Report, Morgan Stanley performed no such services or evaluation.[152]

The Examiner finds that the versions of what transpired cannot be reasonably reconciled based on a good faith misunderstanding at the time between Mr. Whayne and the Tribune personnel with whom he interacted, or a good faith misunderstanding of Morgan Stanley's services in connection with VRC's solvency opinion.

(ii) Assessing the Conflicting Testimony.

The Examiner considered the fact that, at the time these events transpired, Morgan Stanley was attempting to convince the Special Committee to award Morgan Stanley a discretionary fee in the days preceding the closing of Step Two.[153] This raises the question whether Morgan Stanley had a motive to help management clear the refinancing hurdle presented by VRC and otherwise evaluate and approve of VRC's solvency work, which in turn would pave the way for the Step Two Closing and possibly additional compensation to Morgan Stanley. Mr. Whayne testified that Morgan Stanley personnel had no motive to ingratiate themselves with management, noting that Morgan Stanley did not represent Tribune or management.[154] The Examiner found Mr. Whayne and Mr. Taubman to be credible and their version of the events also was more plausible: Morgan Stanley would have no reason to interject

---

152 *See* Report at § III.H.4.c.(2).(i).

153 Examiner's Sworn Interview of Thomas Whayne, July 2, 2010, at 141:18-142:1-3.

154 *Id.* at 144:2-11 ("Management didn't have any standing on whether we were going to be paid a discretionary fee because that's not who we were working for. Our client was the special committee. Our letter was to the special committee, and it was Bill Osborn obviously consulting with other special committee members who would make the decision whether or not it was appropriate to pay us a discretionary fee. Nothing to do with management.").

itself in the assumptions underlying VRC's solvency opinion or Tribune's representation to VRC, or even to suggest to Tribune management that it could rely on Morgan Stanley to address VRC's concerns.

On the other hand, albeit in greatly varying degrees, the members of senior financial management involved in these events stood to receive substantial compensation if Step Two closed.[155] In addition, although Mr. Bigelow testified that he did not have any discussion with the Zell Group regarding his promotion to Chief Financial Officer of Tribune until well after the Step Two Closing,[156] it appears that he had developed a strong, positive working relationship with the Zell Group.[157] Nils Larsen of EGI gave the Examiner a window into what Mr. Bigelow might have reasonably thought about his future under new Tribune ownership:[158]

> Q. Did you tell Chandler Bigelow that there would be a place for him in the company after the closing of Step 2?
>
> A. Whether I told him in those type of words, I think we certainly would have signaled that we thought he was a very talented individual and, you know, somebody who the company would not be better off if he were to leave.

---

155 *See* Report at § III.F.8.

156 Examiner's Sworn Interview of Chandler Bigelow, June 17, 2010, at 36:1-5.

157 Before Step One closed, for example, Mr. Bigelow passed on to Nils Larsen a privileged communication from Tribune's counsel. *See* Ex. 603 (Bigelow E-Mail, dated March 29, 2007); Examiner's Sworn Interview of Chandler Bigelow, June 17, 2010, at 115:10-117:12. Mr. Bigelow was also first on Mr. Larsen's list of "allies" within Tribune, *see* Ex. 827 (Larsen E-Mail, dated October 5, 2007) (responding with three names — Chandler Bigelow, Crane Kenney, and Dave Eldersveld—to a request for the names of "allies inside Tower" who could be trusted to "drink the Kool Aid"), and Samuel Zell stated during his interview with the Examiner that Mr. Bigelow was "a breath of fresh air in a world of obfuscation." Examiner's Interview of Samuel Zell, June 14, 2010.

158 Examiner's Sworn Interview of Nils Larsen, July 7, 2010, at 62:7-22. Mr. Larsen also expressed admiration for Mr. Kenney. *Id.* at 63:15-20 ("I did not have any conversations with him with regard to a promotion, you know. Crane again I think was certainly a very talented, you know, individual, and again I think the company would have been better off, you know, with his active services."). Mr. Larsen, though, expected that Mr. Kenney would not stay with Tribune long term. *Id.* at 63:21-65:1. Mr. Grenesko testified that his intention at the time was to stay at Tribune but that he did not have discussions about his future. Examiner's Sworn Interview of Donald Grenesko, July 8, 2010, at 213:17-214:10. In contrast, Tribune Chief Executive Officer Dennis FitzSimons was told that he would not be staying on. Examiner's Sworn Interview of Dennis FitzSimons, June 25, 2010, at 107:1-8.

> Q. Did you personally have discussions with Chandler Bigelow that you believe at the time would have led Chandler Bigelow to believe that there would be a place for him in the company after the closing of Step 2?
>
> A. I'm sure that he would have gotten the sense from conversations with me that I thought that he was a valuable member of the team.

As discussed in another part of the Report, in the period following Step One, Tribune's financial performance declined, as did the price of its stock. Despite these setbacks, Tribune's management had generated what can be fairly described as aggressive projections, and VRC had exhibited a willingness to favorably opine on solvency based on those projections, but subject to the satisfactory resolution of the refinancing question. Tribune had procured favorable Step Two Financing that could not be replicated in the then prevailing market and would be lost if Step Two did not close,[159] and the prospective new owners wanted Step Two to happen. Tribune no longer could use Tribune's two Financial Advisors, MLPFS and CGMI, which had recused themselves, and Morgan Stanley was not prepared to offer much assistance.[160] When VRC put the onus on Tribune management to address VRC's stated concern on refinancing, management in turn had a strong incentive to try to obtain some cover from an outside advisor. At that time, Morgan Stanley was the only advisor within the vicinity of Tribune that was left. The Examiner

159 Tribune General Counsel Crane Kenney testified that Tribune retained Quinn Emanuel Urquhart & Sullivan, LLP in case the Lead Banks attempted to back out of their Step Two commitments. Examiner's Sworn Interview of Crane Kenney, July 8, 2010, at 16:18-17:3 ("But between the special committee, you know, the company, the Chandlers, you know, you had a team of lawyers looking -- lawyers and bankers looking at every aspect of the deal, and on top of that I remember telling my CEO I want to hire yet another law firm specifically to make sure if they breach our commitment we have recourse. That was Quinn [Emanuel].").

160 Examiner's Sworn Interview of Thomas Whayne, July 2, 2010, at 24:10-25:2 ("Well, as we discussed last time, you know, there were a number of discussions with management, you know, with Mr. Grenesko as well as Mr. Bigelow where particularly Mr. Grenesko had asked us to help him do a lot of the underlying work and analysis that was going to be part of his solvency certificate. We said no, we could not help him with that and, you know, he didn't like that answer and we had a number of subsequent discussions on that. I believe Chandler was part of a lot of those phone calls so he sort of knew, you know, what our position was on that issue. So, you know, so we certainly had discussions around solvency and we said no."); *see also* Examiner's Sworn Interview of Paul Taubman, July 1, 2010, at 38:7-14.