likelihood of the contingency coming to pass and therefore discounted "by the probability that the contingency will occur and the liability become real."[455]

The *Xonics* analysis is not relevant to the question considered here. It is true that in *Xonics*, the court evaluated the debtor's guarantee obligations in assessing whether the debtor was solvent at the time of an allegedly preferential transfer to a creditor; and it is likewise true that this inquiry bears a resemblance to the question of solvency and capital adequacy presented here. But the specific inquiry in *Xonics* was whether the company was insolvent at the time of the transfer, *not whether the transfer itself rendered the company insolvent*. It is this second question that must be evaluated, namely, whether the Leveraged ESOP Transactions (and in particular the incurrence of the LBO Lender Debt) rendered Tribune *and* the Guarantor Subsidiaries, as obligors and guarantors on this same massive indebtedness, insolvent or inadequately capitalized. If this question is answered in the affirmative, absent a fresh capital contribution, there would be no reasonable likelihood that Tribune could meet its obligations on the LBO Lender Debt, and not a likelihood but a certainty that the guarantees would be called. The converse is true. In the circumstance presented here, applying *Ollag* and *Mellon Bank* to take into account rights of contribution, subrogation, and indemnity of the Guarantor Subsidiaries against one another and Tribune is all that is required.

In sum, for purposes of solvency and capital adequacy analysis, the liability of the Guarantor Subsidiaries on the LBO Lender Debt should be measured collectively, notwithstanding that each entity is fully liable on that debt, but without applying any "discount."

Nevertheless, if an individual Guarantor Subsidiary were insolvent before it incurred the Step One Debt (after giving effect to intercompany claims, discussed below), the estate

[455] *Id.*

representative of that particular Guarantor Subsidiary should be able to avoid that particular Subsidiary Guarantee of Step One Debt.[456] To determine whether any significant Guarantor Subsidiary was insolvent before the Step One Financing Closing Date, the Examiner analyzed the net worth of some of such entities before giving effect to the Step One Transactions. To perform this analysis, the Examiner's financial advisor isolated certain of the largest Guarantor Subsidiaries in the Publishing Segment and the Broadcasting Segment, according to the relative size of their recorded book values of assets:[457]

- Publishing Segment: Los Angeles Times, Chicago Tribune, Newsday, Eagle New Media, Orlando Sentinel, Sun Sentinel, and Baltimore Sun.
- Broadcasting Segment: KTLA, WPIX, and Tower Distribution.[458]

In assessing the pre-Step One solvency of these Guarantor Subsidiaries, the Examiner's financial advisor first compared the recorded book value of each Guarantor Subsidiary's assets to its recorded liabilities.[459] The chart below presents the results of this "book basis" comparison for each of these entities (excluding intercompany balances) based on data as of the end of May 2007, just before the Step One Financing Closing Date:

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456 *See* 11 U.S.C. § 548(a)(1)(B)(ii)(I) (2006) (stating that transfers and obligations are subject to avoidance where transferor "was insolvent on the date that such transfer was made or such obligation was incurred, *or* became insolvent as a result of such transfer or obligation") (emphasis added). *See generally W.E. Trucker Oil Co. v. First State Bank of Crossett (In re W.E. Tucker Oil Co.)*, 55 B.R. 78, 81 (Bankr. W.D. Ark. 1985) ("The trustee's evidence clearly and unmistakably establishes that the debtor was insolvent before and after the transfers and that after the transfers an unreasonably small amount of capital remained for the debtor to engage in its business.").

457 Given the time constraints of the Investigation, the Examiner's financial advisor relied on asset book values to identify and prioritize for evaluation certain of the largest Guarantor Subsidiaries. Although significant differences may exist between the book value and market value of the assets of these selected Guarantor Subsidiaries, selecting Guarantor Subsidiaries based on market value size would have effectively required the individual fair market valuation of numerous Subsidiaries, an unrealistic expectation given the number of Tribune Subsidiaries. The Examiner's financial advisor selected Guarantor Subsidiaries based not only on size (*i.e.*, highest book value) but also on the availability of EBITDA information as discussed herein.

458 In this analysis, Tower Distribution and WGN Continental Broadcasting are combined.

459 The Examiner's financial advisor specifically identified the assets and liabilities associated with intercompany amounts separately.

TRIBUNE LARGE SUBSIDIARIES w/o I/C - Period 5 (May), 2007 ($000)										
	Publishing Segment							Broadcasting Segment		
	Los Angeles Times	Chicago Tribune	Newsday	Eagle New Media Invest.	Orlando Sentinel	Sun Sentinel	Baltimore Sun	KTLA	WPIX	Tribune Distribution
Assets										
Cash and Equivalents	$ 78	$ (4,942)	$ 1,785	$ 41,768	$ 1,281	$ 1,550	$ 1,060	$ 1,096	$ 895	$ -
Accounts Receivable	93,300	77,303	42,056	1,532	22,696	32,391	29,218	27,306	41,742	7,113
Inventory	15,235	7,226	6,354	562	3,114	3,651	3,136	-	-	-
Broadcast Rights	-	-	-	-	-	-	-	58,969	68,841	-
Investment in Subs	903,283	17	589,664	1,451,638	-	857	386,060	-	-	-
Other	307,673	56,730	28,650	110	17,924	15,821	7,673	(1,275)	10,513	293
Net Properties	434,083	307,587	177,912	1,264	75,577	113,428	148,820	10,146	13,695	10,651
Intangibles	1,840,072	49,324	1,003,940	36,579	11,773	10,617	617,352	285,231	-	153,937
Total	3,593,724	493,245	1,850,361	1,533,453	132,365	178,315	1,193,319	381,473	135,686	171,994
Liabilities										
Broadcast Rights Payable	-	-	-	-	-	-	-	78,473	96,652	-
Long Term Debt	-	-	2,500	-	1,631	-	-	-	-	11,130
Accounts Payable	18,978	15,245	3,988	193	4,885	7,234	4,571	1,637	2,429	166
Deferred Taxes	246,517	58,420	47,169	11,458	20,213	61,771	37,622	30,124	9,320	35,121
Other Current	46,817	35,509	28,823	360	14,097	14,049	15,269	3,027	16,679	1,060
Other Long Term	13,113	7,795	6,892	916	1,827	2,583	5,954	3,982	6,468	161
Total	325,425	116,969	89,372	12,927	42,653	85,637	63,416	117,243	131,548	47,638
Equity	$ 3,268,299	$ 376,276	$ 1,760,989	$ 1,520,526	$ 89,712	$ 92,678	$ 1,129,903	$ 264,230	$ 4,138	$ 124,356

As shown in the chart above, on a book basis, each selected Guarantor Subsidiary is "book basis" solvent before intercompany receivables and payables are considered. Book value solvency, of course, is not synonymous with solvency for purposes of fair valuation.[460] To assess whether a significant disparity exists between book value and fair value of the selected Guarantor Subsidiaries, the Examiner's financial advisor considered the implied values for each such Guarantor Subsidiary using a selected range of EBITDA multiples, which then were applied to each selected Guarantor Subsidiary's estimated EBITDA, based on data compiled by VRC.[461] In all circumstances, the implied value exceeded each Guarantor Subsidiary's interest-bearing

[460] The proper standard is fair value. *See* Report at IV.B.5.d.(2).

[461] *See* Ex. 1070 (LECG Comparison Analysis of Recently Updated Tribune Performance). For purposes of this analysis, an approximation of the lowest Step Two LTM EBITDA identified by VRC was used. This is extremely conservative because cohort multiples, as quantified by VRC, declined significantly between VRC's Step One and Step Two analyses.

debt, indicating that each of the above large Guarantor Subsidiaries was solvent before the Step One closing:

TRIBUNE LARGE SUBSIDIARIES w/o I/C - Period 5 (May), 2007 ($000)										
	Publishing Segment							Broadcasting Segment		
	Los Angeles Times	Chicago Tribune	Newsday	Eagle New Media Invest.	Orlando Sentinel	Sun Sentinel	Baltimore Sun	KTLA	WPIX	Tribune Distribution
Assets										
Cash and Equivalents	$ 78	$ (4,942)	$ 1,785	$ 41,768	$ 1,281	$ 1,550	$ 1,060	$ 1,096	$ 895	$ -
Accounts Receivable	93,300	77,303	42,056	1,532	22,696	32,391	29,218	27,306	41,742	7,113
Inventory	15,235	7,226	6,354	562	3,114	3,651	3,136	-	-	-
Broadcast Rights	-	-	-	-	-	-	-	58,969	68,841	-
Investment in Subs	903,283	17	589,664	1,451,638	-	857	386,060	-	-	-
Other	307,673	56,730	28,650	110	17,924	15,821	7,673	(1,275)	10,513	293
Net Properties	434,083	307,587	177,912	1,264	75,577	113,428	148,820	10,146	13,695	10,651
Intangibles	1,840,072	49,324	1,003,940	36,579	11,773	10,617	617,352	285,231	-	153,937
Total	3,593,724	493,245	1,850,361	1,533,453	132,365	178,315	1,193,319	381,473	135,686	171,994
Liabilities										
Broadcast Rights Payable	-	-	-	-	-	-	-	78,473	96,652	-
Long Term Debt	-	-	2,500	-	1,631	-	-	-	-	11,130
Accounts Payable	18,978	15,245	3,988	193	4,885	7,234	4,571	1,637	2,429	166
Deferred Taxes	246,517	58,420	47,169	11,458	20,213	61,771	37,622	30,124	9,320	35,121
Other Current	46,817	35,509	28,823	360	14,097	14,049	15,269	3,027	16,679	1,060
Other Long Term	13,113	7,795	6,892	916	1,827	2,583	5,954	3,982	6,468	161
Total	325,425	116,969	89,372	12,927	42,653	85,637	63,416	117,243	131,548	47,638
Equity	$ 3,268,299	$ 376,276	$ 1,760,989	$ 1,520,526	$ 89,712	$ 92,678	$ 1,129,903	$ 264,230	$ 4,138	$ 124,356
2007E EBITDA	$ 197,000	$ 205,300	$ 96,100	$ 26,600	$ 60,700	$ 96,900	$ 53,600	$ 40,100	$ 69,700	$ 132,800
Multiple	5	5	5	5	5	5	5	8	8	8
Implied Value	$ 985,000	$ 1,026,500	$ 480,500	$ 133,000	$ 303,500	$ 484,500	$ 268,000	$ 320,800	$ 557,600	$ 1,062,400

Intercompany payables and receivables were then summarized for each selected Guarantor Subsidiary. As would be expected, some Guarantor Subsidiaries were net obligors and others net obligees,[462] but all reflect solvency on a book basis, net of intercompany balances:

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462 The existence of significant intercompany obligations and the collectability of intercompany receivables could affect individual Subsidiary solvency. However, additional analysis of collectability as to an individual intercompany receivable and an evaluation of the substance of the transactions informing such balances would be necessary to ensure that "due from" and "due to" balances are properly characterized (*e.g.*, that they reflect true obligations and recovery rights versus, for example, equity investments). This evaluation would require additional investigation. Regardless, as discussed in another part of the Report (*see* Report at § IV.B.5.d.(7).(ii)), on the Step One Financing Closing Date, both Tribune and the Guarantor Subsidiaries likely were solvent, even after taking into account the Step Two Debt (as contemplated as of that date). Thus, intercompany balances are assumed to be collectible for purposes of this presentation, although additional investigation would be required to verify this assumption.

TRIBUNE LARGE SUBSIDIARIES w/o I/C - Period 5 (May), 2007 ($000)										
	Publishing Segment							Broadcasting Segment		
	Los Angeles Times	Chicago Tribune	Newsday	Eagle New Media Invest.	Orlando Sentinel	Sun Sentinel	Baltimore Sun	KTLA	WPIX	Tribune Distribution
Assets										
Cash and Equivalents	$ 78	$ (4,942)	$ 1,785	$ 41,768	$ 1,281	$ 1,550	$ 1,060	$ 1,096	$ 895	$ -
Accounts Receivable	93,300	77,303	42,056	1,532	22,696	32,391	29,218	27,306	41,742	7,113
Inventory	15,235	7,226	6,354	562	3,114	3,651	3,136	-	-	-
Broadcast Rights	-	-	-	-	-	-	-	58,969	68,841	-
Investment in Subs	903,283	17	589,664	1,451,638	-	857	386,060	-	-	-
Other	307,673	56,730	28,650	110	17,924	15,821	7,673	(1,275)	10,513	293
Net Properties	434,083	307,587	177,912	1,264	75,577	113,428	148,820	10,146	13,695	10,651
Intangibles	1,840,072	49,324	1,003,940	36,579	11,773	10,617	617,352	285,231	-	153,937
Intercompany Receivable	3,610,854	2,509,042	1,638,773	16,022	841,492	1,198,677	983,467	790,242	641,904	894,991
Total	7,204,578	3,002,287	3,489,134	1,549,475	973,857	1,376,992	2,176,786	1,171,715	777,590	1,066,985
Liabilities										
Broadcast Rights Payable	-	-	-	-	-	-	-	78,473	96,652	-
Intercompany Payable	4,972,144	2,510,364	3,043,499	-	777,100	1,150,786	1,597,265	396,020	543,170	886,186
Long Term Debt	-	-	2,500	-	1,631	-	-	-	-	11,130
Accounts Payable	18,978	15,245	3,988	193	4,885	7,234	4,571	1,637	2,429	166
Deferred Taxes	246,517	58,420	47,169	11,458	20,213	61,771	37,622	30,124	9,320	35,121
Other Current	46,817	35,509	28,823	360	14,097	14,049	15,269	3,027	16,679	1,060
Other Long Term	13,113	7,795	6,892	916	1,827	2,583	5,954	3,982	6,468	161
Total	5,297,569	2,627,333	3,132,871	12,927	819,753	1,236,423	1,660,681	513,263	674,718	933,824
Equity	$ 1,907,009	$ 374,954	$ 356,263	$ 1,536,548	$ 154,104	$ 140,569	$ 516,105	$ 658,452	$ 102,872	$ 133,161

(ii) Tribune.

As noted above, Tribune and the Guarantor Subsidiaries all are liable on the LBO Lender Debt. However, unlike the Subsidiary Guarantees, which give rise to guarantor contractual rights of contribution, subrogation, and indemnity against Tribune, nothing in these documents (or the Credit Agreement, Subrogation Subordination Agreement, or Bridge Subrogation Subordination Agreement) gives Tribune contractual rights of contribution, subrogation, or indemnity against the Guarantor Subsidiaries. Moreover, Tribune's liability on the LBO Lender Debt is not contingent (although under the Subsidiary Guarantees, the Subsidiary Guarantors also are primary obligors on the LBO Lender Debt). Nonetheless, for three reasons, it does not follow that Tribune's liability on the LBO Lender Debt must necessarily be considered on a standalone basis, as opposed to being considered collectively with the Guarantor Subsidiaries in connection with a solvency or capital adequacy analysis.

First, as noted, the Guarantor Subsidiaries are not just sureties. Each one serves as a "primary obligor" of the LBO Lender Debt.[463] In this sense, the Guarantor Subsidiaries are no

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[463] *See* Ex. 189 at § 1 (Credit Agreement Subsidiary Guarantee); Ex. 414 at § 1 (Subordinated Bridge Subsidiary Guarantee).

different from Tribune. Although Tribune is without contractual rights of contribution, subrogation, or indemnity against the Guarantor Subsidiaries, it may separately hold such rights under common law as a co-obligor.[464] As such, there is no basis to set Tribune apart from each of the Guarantor Subsidiaries regarding the LBO Lender Debt, and the bases for viewing the LBO Lender Debt as an obligation of the Guarantor Subsidiaries separately and collectively applies with equal force to Tribune.

Second, even if Tribune does not hold an asset in the form of a common law right of contribution, subrogation, and indemnity against the Guarantor Subsidiaries,[465] Tribune holds the analog of that very asset. To the extent Tribune was required to satisfy the LBO Lender Debt, this would reduce the liability of the Guarantor Subsidiaries on such debt, thus increasing solvent Guarantor Subsidiaries' net worth. Tribune, as the parent entity, would be the beneficiary of that difference.[466] As such, the mathematical example cited above would yield analogous results in considering Tribune's solvency notwithstanding the absence of any contribution, subrogation, or indemnity rights.[467]

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464 In this regard, there would be no basis to treat Tribune differently from the Guarantor Subsidiaries if they are all primary obligors on the LBO Lender Debt. *See, e.g.*, *Md. Cas. Co. v. W.R. Grace & Co.*, 218 F.3d 204, 210 (2d Cir. 2000) ("It is also a well-settled principle in the law of contribution that when one party jointly liable on an obligation pays more than its pro rata share, it may compel the co-obligors to contribute their share of the amount paid.") (citing HENRY L. MCCLINTOCK, HANDBOOK OF THE PRINCIPLES OF EQUITY, 542 (2d ed. 1948)).

465 *See Ollag Constr. Equip. Corp. v. Goldman (In re Ollag Constr. Equip. Corp.)*, 578 F.2d 904, 908 (2d Cir. 1978).

466 When reporting separately, a parent that has significant control over a subsidiary will record as an asset its equity interest in a subsidiary. An increase in the equity of a solvent subsidiary then increases the assets of the parent company. Ex. 941 (KERMIT D. LARSON, FUNDAMENTAL ACCOUNTING PRINCIPLES, 806-08 (12th ed. 1990)).

467 Here, assume that a parent and two wholly owned subsidiary guarantors, each with an equity value of $150 are jointly and severally liable on a $300 debt. If the parent paid $200 of this debt, the two subsidiary guarantors would be collectively liable for $100, and the residual net worth of the subsidiary guarantors after paying the remainder of the debt would be $200 collectively. The parent would thus have a $200 asset in the form of the residual net worth of the two subsidiary guarantors. If instead the parent paid $0 of this debt, the subsidiary guarantors would be collectively liable for $300 and the residual net worth of the subsidiary guarantors after paying off the debt would be $0. In this case, the parent would also have a $150 asset, this time in the form of its initial equity value. In both cases, the parent is solvent.

Finally, as noted, it cannot be the case that Tribune's and the Guarantor Subsidiaries' liability for the LBO Lender Debt, even if independent, should be viewed as comprising multiple $11 billion liabilities. The LBO Lender Debt need only be satisfied once. To the extent Tribune or a Guarantor Subsidiary partially or fully satisfied this debt, this would reduce the collective liabilities of all of the co-obligors.

The preceding discussion suggests that for purposes of measuring Tribune's and the Guarantor Subsidiaries' solvency and capital adequacy, it is appropriate to consider as offsetting assets the contributions that such entities could enforce, or would benefit from, if one such entity bore a disproportionate share of liability on the LBO Lender Debt.

(5) Examiner's Conclusions and Explanation Concerning the Role of Intercompany Claims at the Time of the Leveraged ESOP Transactions on Solvency and Capital Adequacy Analysis.

Examiner's Conclusions:

A court is highly likely to consider valid intercompany claims in a solvency and capital adequacy analysis of Tribune and the Guarantor Subsidiaries. Under the circumstances presented here, however, intercompany claims should not materially affect the results of such analysis.

Explanation of Examiner's Conclusions:

The Bankruptcy Code contains no mandate to treat intercompany claims differently from other claims asserted against a debtor.[468] As such, the Examiner finds no basis to exclude intercompany claims (to the extent valid) that existed at the time of Step One and Step Two from a solvency or capital adequacy analysis, and these claims should be included as liabilities of

[468] *See* 11 U.S.C. § 101(5) (2006).

Tribune and the Guarantor Subsidiaries to the extent they constituted liabilities. Nevertheless, for the reasons discussed below, the existence of valid intercompany claims should not affect the ultimate conclusions on solvency or capital adequacy of Tribune and the Guarantor Subsidiaries whether: (i) Tribune and the Guarantor Subsidiaries are considered on a consolidated basis; (ii) the Guarantor Subsidiaries are considered alone; or (iii) Tribune is considered alone.

(i) Tribune and the Guarantor Subsidiaries.

If the solvency and capital adequacy analysis of Tribune and the Guarantor Subsidiaries are considered on a consolidated basis, intercompany claims will have no effect on their collective solvency and capital adequacy. On a consolidated basis, the intercompany claims between and among Tribune and all of the Guarantor Subsidiaries cancel each other out. Not unexpectedly, Tribune did not account for intercompany claims in its public financial reporting undoubtedly for this reason.[469]

(ii) The Guarantor Subsidiaries.

The effect of intercompany claims on the solvency and capital adequacy of the Guarantor Subsidiaries is somewhat more complicated but yields the same conclusions. As explained in the preceding Section, for purposes of solvency and capital adequacy analysis, the liability of the Guarantor Subsidiaries on the LBO Lender Debt should be measured collectively.[470] This conclusion results from, among other things, the fact that each Guarantor Subsidiary held liable on the LBO Lender Debt would have corresponding rights of contribution, subrogation, and indemnity against both Tribune and each of the Guarantor Subsidiaries. Intercompany claims

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[469] *See* Ex. 4 at 87. The same result applies when, for example, separate estates are substantively consolidated. *See In re H.H. Distribs., L.P.*, 400 B.R. 44, 53-54 (Bankr. E.D. Pa. 2009). Viewing them on a consolidated basis nets out the intercompany liabilities.

[470] *See* Report at § IV.B.5.d.(4).(i).

among the Guarantor Subsidiaries must first be taken into account to determine each such entity's net worth. That calculation in turn determines the relative amount each entity ultimately will be called on to pay on account of the LBO Lender Debt. The existence of intercompany claims serves only to determine the net worth of each Guarantor Subsidiary that must be applied to satisfy the LBO Lender Debt.

Viewed in this light, intercompany claims should have little effect, if any, on the ultimate solvency of the Guarantor Subsidiaries. An example similar to the one in the previous Section of the Report illustrates this point. Assume three guarantors, A, B, and C each with $200 cash, jointly, severally and unconditionally guarantee a $1,000 debt. Also assume that C owes A $100. On a standalone basis, A has $300 in assets ($200 *plus* $100 owed to it by C), B has $200, and C has $100 in assets ($200 of assets *minus* $100 owed to A). Clearly in this instance, A, B, and C are collectively insolvent (by $400); thus, the existence of an intercompany claim between A and C is not relevant to a solvency or capital adequacy analysis of the guarantors collectively. Similarly, if A, B, and C jointly, severally and unconditionally guaranteed a $250 debt, the guarantors would be collectively solvent because if any one of them paid this debt, the paying guarantor would nonetheless have sufficient assets in the form of contribution rights to be left solvent, even accounting for the intercompany claim C owed A. Applying this scenario to the above example, assuming A paid the entire debt, it would have contribution rights against both B and C in the amount of $83.33. C—the least solvent guarantor—would have nonetheless be left with sufficient assets to remain solvent ($100 - $83.33 = $16.67).[471]

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[471] These examples assume that the Guarantor Subsidiaries have comparable net worth. As discussed in the preceding Section of the Report, however, even if the net worths of the individual Guarantor Subsidiaries differ dramatically, in the context of solvency analysis, a court is likely to apportion the collective liability among the

Next, assume A, B, and C jointly, severally and unconditionally guaranteed a $500 debt. Here, the guarantors would still be collectively solvent. In this instance, also factored in is the existence of the Credit Agreement Subrogation Subordination Agreement and Bridge Subrogation Subordination Agreement (or in the case of the Step One Debt, principles analogous to these provisions for the solvency determinations at Step One).[472] The result is that A, B, and C would each be liable on the $500 debt in proportion to their relative net worth *taking into account the intercompany claims*, i.e., A would be liable for $250 (A's $300 net worth is 50% of the group's $600 collective net worth), B would be liable for $166.67 (B's $200 net worth is 33.3% of the group's $600 collective net worth) and C would be liable for $83.33 (C's $100 net worth is 16.6% of the group's $600 collective net worth).

In sum, because the Guarantor Subsidiaries share joint and several liability on the LBO Lender Debt, it is appropriate to value them collectively. Valued collectively, intercompany claims between the Guarantor Subsidiaries have no effect on the conclusion concerning collective solvency or capital adequacy.

(iii) Tribune.

As explained in the previous Section, in evaluating Tribune's solvency and capital adequacy, it is appropriate to consider as offsetting assets of Tribune the contributions of the Guarantor Subsidiaries on the LBO Lender Debt. For these same reasons, the examples cited

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Guarantor Subsidiaries on the LBO Lender Debt in an amount equal to the proportion of each entity's net worth to the net worth of all of the Guarantor Subsidiaries. If, however, a particular Guarantor Subsidiary had a negative net worth after consideration of intercompany claims but before consideration of the liability on the LBO Lender Debt, that entity's estate could avoid the LBO Lender Debt.

[472] The Examiner has reached no conclusion whether the Credit Agreement Subrogation Subordination Agreement and Bridge Subrogation Subordination Agreement, or the implementation of marshalling, should be applied in the first two scenarios, because this additional factor does not affect the outcome in the first two scenarios.

directly above would apply equally to intercompany claims running between Tribune and the Guarantor Subsidiaries as they do to intercompany claims running solely among the Guarantor Subsidiaries, and should not affect a solvency and capital adequacy analysis of Tribune. In sum, and for the reasons explained above and in the previous Section, because Tribune and the Guarantor Subsidiaries share joint and several liability on the LBO Lender Debt, it is appropriate to take into account their collective resources to satisfy the LBO Lender Debt. Intercompany claims running by and against Tribune serve only to help allocate which entity contributes more to satisfy the LBO Lender Debt. Viewed in this fashion, intercompany claims between and among Tribune and the Guarantor Subsidiaries have no material effect on the conclusion concerning collective solvency or capital adequacy.

(6) Examiner's Conclusions and Explanation Concerning the Question of Inclusion of Step Two Debt with Step One Debt for Purposes of Analysis of Solvency, Capital Adequacy, and Intention to Incur Debts Beyond Reasonable Ability to Pay Adequacy Analysis.

(i) Examiner's Conclusions and Explanation Concerning Inclusion of Step Two Debt in Solvency Analysis.

Examiner's Conclusions:

Although the question is close, the Examiner concludes that a court is somewhat unlikely to include the Step Two Debt for purposes of determining solvency at Step One.

Explanation of Examiner's Conclusions:

This question contains two subparts: first, whether the Step Two Debt should be considered a Step One liability for purposes of evaluating Step One solvency, and, if so, how much should be included in the Step One solvency measurement; second, if the first inquiry is answered in the negative, whether the above-discussed collapse doctrine[473] nevertheless should be applied not just to the transactions *within* Step One and Step Two, but *between* Step One and Step Two, to determine Step One solvency.[474]

The answer to the first inquiry is straightforward. The Bankruptcy Code defines (i) the term "insolvency" to mean a financial condition in which "the sum of [an] entity's debts is greater than all of such entity's property, at a fair valuation;" (ii) the term "debt" to mean "liability on a claim;" and (iii) the term "claim" to include a "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured."[475] Thus, to the extent the Step Two Debt constituted a liability at the time of the Step One Financing Closing Date, that debt must be factored into the liability side of the equation for purposes of solvency.

Under the Merger Agreement executed before Step One closed, Tribune was obligated to exercise reasonable best efforts to effectuate the Merger.[476] In particular, the Merger Agreement specifically required Tribune to exercise reasonable best efforts to "enforce its rights under the Financing Commitments."[477] The Credit Agreement (which embodied the financing commitments in effect at the time of the Step One Financing Closing Date) and the Step Two Commitment Letter, in turn, authorized (but did not require) Tribune to compel the LBO Lenders to fund the Step Two Debt, subject to the satisfaction of the conditions precedent to those

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473 *See* Report at § IV.B.5.b.

474 In the course of advocating their respective positions, certain Parties chose to describe Step One and Step Two as "Phase One" and "Phase Two" or the "Recapitalization" and the "Merger." These labels were designed to drive home various contentions on the question of collapse. If the law governing collapse means anything, it is that labels mean nothing. The Examiner chose to use the defined terms "Step One" and "Step Two" because this is actually how the participants referred to them at the time of the Leveraged ESOP Transactions.

475 *See* 11 U.S.C. § 101 (5)(A), (12), and (32) (2006) (emphasis added); *see also JELD-WEN, Inc. v. Van Brunt (In re Grossman's Inc.)*, 607 F.3d 114, 122 (3d Cir. 2010) (en banc).

476 Ex. 151 at § 5.6(a) (Merger Agreement).

477 *Id.* at § 5.11(a).

fundings.[478] The lenders were required to fund at Step Two on satisfaction of the requisite conditions, which were finite.[479] In a very real sense, the Credit Agreement and the Step Two Commitment Letter afforded Tribune the financial means—and the Merger Agreement imposed on Tribune the contractual obligation to take advantage of the right—to incur that additional debt.

Although the preceding discussion amply establishes that Tribune had the means to borrow the money necessary to close Step Two if the other conditions precedent were satisfied, and Tribune undoubtedly would have faced some liability had it breached those obligations,[480] it does not follow that Tribune was contingently liable *to the Step Two Lenders* on the Step Two Debt before Step Two closed.[481] A simple example illustrates why this is so. Suppose A agrees with B that it will purchase B's automobile for $25,000 if A can borrow that amount from A's bank. A obtains a commitment from its bank to advance this sum to A if A so requests. A files

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478 Ex. 179 at § 2.17 (Credit Agreement); Ex. 1010 (Amended Step Two Commitment Letter).

479 *See* Report at § III.D.9.b. for a discussion of the closing conditions under the Credit Agreement and the Step Two Commitment Letter. For example, as discussed later in this Section, the definition of "Company Material Adverse [Event] or Event" was narrowly drawn. Although Tribune was required to represent that it was "Solvent" (a term that was specifically defined in the Credit Agreement) after giving effect to Step Two, the Credit Agreement specified the manner in which that representation would be confirmed via the delivery of a certificate that relied on VRC's solvency opinion. *See* Ex. 179 at § 2.17 (Credit Agreement); Ex. 187 (Form of Credit Agreement Solvency Certificate); Ex. 175 at § 3.01(b)(i) (Bridge Credit Agreement); Ex. 709 (Form of Bridge Credit Agreement Solvency Certificate).

480 *See Hexion Specialty Chems., Inc. v. Huntsman Corp.*, 965 A.2d 715, 749 (Del. Ch. 2008) (finding that party's obligation under merger agreement to use "reasonable best efforts" to obtain financing obligated that party to take any act that "was both commercially reasonable and advisable to enhance the likelihood of consummation of the financing . . . . To the extent that Hexion deliberately chose not to act, but instead pursued another path to *avoid* the consummation of the Financing, Hexion knowingly and intentionally breached this covenant"). Both the Merger Agreement and the EGI-TRB Purchase Agreement contain Delaware choice of law provisions.

481 *See Smurfit Newsprint Corp. v. Se. Paper Mfg. Co.*, 368 F.3d 944, 951 (7th Cir. 2004) (stating that conditions precedent "must be literally met or exactly fulfilled or no liability can arise on the promise qualified by such conditions") (citations omitted); *IDT Corp. v. Tyco Group S.A.R.L.*, 918 N.E.2d 913, 916 (N.Y. 2009) ("Although there was a valid settlement agreement in this case, Tyco's obligation to furnish [value] never became enforceable because agreed-upon conditions [precedent] were not met."); *Perry v. Estate of Carpenter,* 918 N.E.2d 1156, 1161 (Ill. App. Ct. 2009) ("It is well settled that where a contract contains a condition precedent, the contract is neither enforceable nor effective until the condition is performed . . . .") (internal quotations and citations omitted).

bankruptcy after entering into its agreement with B and obtaining the bank commitment but before exercising its right to borrow the funds from the bank. In this circumstance, there is little question that at the time of A's bankruptcy B is a creditor of A, but the bank is not; the bank only made a commitment to A which A might or might not have exercised, and until A did so, the bank had no right to payment (conditional or otherwise) on account of the amounts A could borrow. The bank holds no claim against A, and, similarly, A has no liability to the bank for those amounts.[482]

This conclusion derives from the fact that "[t]he plain meaning of a 'right to payment' is nothing more nor less than an enforceable obligation . . . . "[483] The Bankruptcy Code's definition of "claim" is exceedingly broad,[484] and certainly encompasses contingent liabilities, but this does not transform every future liability into a bankruptcy claim:[485]

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482 *See In re Dowell*, 1998 U.S. Dist. LEXIS 22029, at *16-17 (D.N.J. Aug. 26, 1998) ("The court will not infer an obligation to repay advances absent a contractual agreement, unless the surrounding circumstances require such an inference."); *see also Smurfit Newsprint*, 368 F.3d at 951; *IDT*, 13 N.Y.3d at 214.

483 *Pa. Dep't of Pub. Welfare v. Davenport,* 495 U.S. 552, 559 (1990) (emphasis added); *see also LTV Steel Co. v. Shalala (In re Chateaugay Corp.),*53 F.3d 478 (2d Cir. 1995) ("A claim will be deemed pre-petition when it arises out of a relationship recognized in, for example, the law of contracts or torts. A claim exists only if before the filing of the bankruptcy petition, the relationship between the debtor and the creditor contained all of the elements necessary to give rise to a legal obligation – 'a right to payment' – under the relevant nonbankruptcy law.") (citing and quoting *In re Nat'l Gypsum Co.*, 139 B.R. 397, 405 (N.D. Tex. 1992)) (internal quotations omitted).

484 *See FCC v. NextWave Pers. Commc'ns Inc*., 537 U.S. 293, 302 (2003) ("We have said that 'claim' has 'the broadest available definition.'"); *JELD-WEN, Inc. v. Van Brunt (In re Grossman's Inc.)*, 607 F.3d 114, 121 (3d Cir. 2010) (en banc) (overruling the *Frenville* accrual test); *Kilbarr Corp. v. Gen. Servs. Admin. (In re Remington Rand)*, 836 F.2d 825-26, 829 (3d Cir. 1998) (finding that "Congress defined 'claim' in the broadest possible terms" and "unambiguously stated its intent to address all possible legal obligations in defining a bankruptcy claim") (citations omitted).

485 2 COLLIER ON BANKRUPTCY ¶ 101.05 (Alan A. Resnick & Henry J. Sommer eds., 16th ed.); *see also Knutson v. Tredinnick (In re Tredinnick),* 264 B.R. 573, 577-76 (B.A.P. 9th Cir. 2001) ("[T]he broad definition of a claim, however, is not boundless. . . . A key phrase in § 101(5)(A) is 'right to payment' and here, Knutson's right, strictly speaking, arose postpetition, given that all the legal services performed by Knutson for the Tredinnicks occurred subsequent to their petition.") (internal citations omitted); *In re Texaco Inc.,* 254 B.R. 536, 559 (Bankr. S.D.N.Y. 2000) ("Simply stated, the basic rule is that claims arising after confirmation from a contractual relationship are not barred by a confirmation order. It is only where the liability asserted in a claim is based upon a breach of contract that occurred before confirmation that the claim must be filed in the bankruptcy.

> However, the broad definition of claim is not boundless. The fact that an entity may have a claim in the future does not mean that the entity has a claim on the date of the petition. A person who might be injured in the future due to a manufacturing defect in a product made before bankruptcy does not have a prepetition claim if the person did not have a prepetition relationship with the debtor or the product. A parent corporation's asserted interest in customer obligations it was to transfer under an operating agreement to its finance subsidiary, a chapter 11 debtor, was not a claim. . . . Retirement advances that may have to be repaid under certain contingencies have been found not to be "claims" where the obligation is dependent on the debtor's choice of future actions. A *sue* [sic] *sponte* monetary sanctions award that was ordered postpetition in a lawsuit that was filed prepetition, in a case in which no party could have fairly contemplated such an award when the bankruptcy petition was filed, has also been found not to be a prepetition "claim." Similarly, new or continuing postpetition acts in violation of a statute that the debtor had been violating before filing the petition can give rise to postpetition claims, separate from the prepetition claims based on prepetition violations.

Looking at the circumstances at the time of the closing of Step One, the Step Two Lenders had no claim against Tribune and Tribune had no liability to the Step Two Lenders until Tribune drew funds. The circumstance was no different in the case of the Guarantor Subsidiaries. Although the Credit Agreement Subsidiary Guarantee imposed liability on the Guarantor Subsidiaries for any indebtedness incurred by Tribune under the Credit Agreement, including the amounts that might be advanced in connection with Step Two, these entities did not incur any such additional liability until Tribune drew the additional funds under the Credit Agreement. In other words, insofar as the Step Two funding under the Incremental Credit Agreement Facility was concerned, the Guarantor Subsidiaries were in the same position as Tribune.[486] Because the Step Two Debt was not a contingent liability at the time of Step One, it

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Potential claims for liabilities for breach of obligations which might occur after confirmation cannot be filed before confirmation even if they could be anticipated . . . .") (citations omitted).

[486] This conclusion should not be confused with the Examiner's earlier conclusion that, under the law in the Third Circuit law, a lender can confer value on a debtor by making a commitment to advance funds even though the debtor does not borrow the money until later. *See* Report at § IV.B.5.c.(4). Thus, if a lender provides a funding commitment and, in exchange, receives a fee which an estate representative subsequently seeks to recover, the

is not necessary for the Examiner to evaluate whether a court would include the full amount of that debt, or something less, for solvency purposes. The same is true regarding the obligations imposed under the Merger Agreement to pay the consideration to the Selling Stockholders on the consummation of the Merger.[487]

The next inquiry is whether it is nevertheless appropriate to collapse Step One and Step Two for solvency purposes and thereby include the Step Two Debt as a liability at Step One. In other words, even though the Step Two Debt was not a liability at Step One, should a court disregard the two separate steps in favor of viewing them as one transaction for solvency analysis? The issue of collapsing Step One and Step Two requires application of the three above-discussed considerations applied by courts in the Third Circuit: whether the parties had

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lender may assert a defense under Bankruptcy Code section 548(c) based on the value the lender imparted to the debtor when the commitment was made. *See id.* at §§ IV.B.5.c.4. and IV.B.5.c.6.

487 Because this consideration was only payable if the Merger occurred, *see* Ex. 151 at § 2.1 (Merger Agreement) ("At the Effective Time, by virtue of the Merger . . . ."), no enforceable right to payment in favor of a Selling Stockholder could exist until the Merger closed. *See Carrieri v. Jobs.com Inc.*, 393 F.3d 508, 524 (5th Cir. 2004) ("The touchstone of any 'claim' is that there is an 'enforceable obligation' of the debtor or an enforceable 'right to payment' from the debtor."); *see also* Ex. 151 at § 8.10 (Merger Agreement) (third party beneficiary rights conferred as to § 2.1(a), which in turn is conditioned on the occurrence of the Effective Time). There also is authority to support the further contention that even if the Merger had occurred, stockholders would have had no right to payment unless Tribune were solvent. *See Carrieri.*, 393 F.3d at 522 ("[T]he rights of shareholders to redeem stock are equity interests because they are not guaranteed the right to payment, as claims are, but rather are dependent on the solvency of the corporation."); *Pereira v. Dow Chem. Co. (In re Trace Int'l Holdings, Inc.)*, 287 B.R. 98, 110 (Bankr. S.D.N.Y. 2002) ("Ordinarily, a stock redemption obligation that is conditioned on the issuer's solvency is not considered a liability in determining the issuer's solvency."); *Joshua Slocum, Ltd. v. Boyle (In re Joshua Slocum, Ltd.*), 103 B.R. 610, 622-24 (Bankr. E.D. Pa. 1989) (finding stock redemption obligation not "debt" on the debtors' balance sheet for insolvency purposes because "[s]tate law prohibits the redemption of shareholder stock by a corporation that is insolvent"), *aff'd*, 121 B.R. 442 (E.D. Pa. 1989); *see also Brown v. Shell Can. (In re Tenn. Chem. Co.)*, 143 B.R. 468, 473 (Bankr. E.D. Tenn. 1992) ("The court will not count the redemption price as a debt."), *aff'd in part and rev'd in part on other grounds*, 112 F.3d 234 (6th Cir. 1997); *In re Revco D.S., Inc.*, 118 B.R. 468, 474 (Bankr. N.D. Ohio 1990) ("Generally, the rights of shareholders to redeem stock are not guaranteed but are dependent on the financial solvency of the corporation. Accordingly, the mandatory redemption provision of convertible preferred stock is an interest and not a claim as New York Life asserts."). Either or both of these principles answers any contention that Tribune's payments to the Selling Stockholders at Step Two constituted the satisfaction of preexisting obligations incurred when Tribune was solvent at the time it entered into the Merger Agreement. Tribune had no obligation to make these payments unless and until the Merger conditions were satisfied; and if it is established that these transfers were made pursuant to an intentional fraudulent transfer, they may be avoided and recovered.

knowledge of the multiple transactions; whether each transaction would have occurred on its own; and whether each transaction was dependent or conditioned on the other transaction.[488]

Although the collapse principle typically has been applied for purposes of testing reasonably equivalent value,[489] there is no principled reason why the collapse principle could not apply to the question of solvency consistent with the bankruptcy court's broad powers to look to the substance and disregard the form of a transaction.[490] Moreover, the fact that the closings of Step One and Step Two were separated by considerable time should not, by itself, forestall application of the collapse principle.[491] It is not beyond the realm of possibility that a planned interval between the beginning and end of an integrated transaction is just an effort to camouflage what is in substance a single transaction, nor is a transaction removed per se from the realm of collapse just because specified conditions must be met in order for a later step to

[488] *Mervyn's LLC v. Lubert-Adler Group IV, LLC (In re Mervyn's Holdings, LLC)*, 426 B.R. 96, 104 (Bankr. D. Del. 2010) (setting forth three-part test).

[489] *See Off. Comm. of Unsecured Creditors v. Clark (In re Nat'l Forge)*, 344 B.R. 340, 347-48 (W.D. Pa. 2006) (stating that the integration or step transaction doctrine "has often been applied in the context of leveraged buyouts" and is typically invoked "for purposes of demonstrating that the insolvent target company did not, in the aggregate, receive fair consideration or reasonably equivalent value for the transfer in question"); *MFS/Sun Life Trust-High Yield Series v. Van Dusen Airport Servs. Co.*, 910 F. Supp. 913, 937 (S.D.N.Y. 1995) (finding that "[i]t is the debtor who must have received value as a result of the transfer. In the context of an LBO, this issue is determined after 'collapsing' the transaction" in certain circumstances); *Foxmeyer Drug Co. v. GE Capital Corp. (In re Foxmeyer Corp.)*, 286 B.R. 546, 574 (Bankr. D. Del. 2002) ("Integration of the two transfers reveals that the debtor in a paradigmatic scheme [did] not receive reasonably equivalent value . . . ."); *see also Boyer v. Crown Stock Distrib., Inc.*, 587 F.3d 787, 792, 795 (7th Cir. 2009); *United States v. Tabor Court Realty Corp.*, 803 F.2d 1296, 1302-03 (3d Cir. 1986); *HBE Leasing Corp. v. Frank*, 48 F.3d 623,659, 635-36 (2d Cir. 1995); *Jones v. Nat'l City Bank of Rome (In re Greenbrook Carpet Co.)*, 722 F.2d 659, 660-61 (11th Cir. 1984) (per curiam).

[490] *See In re Sw. Equip. Rental, Inc.*, 1992 WL 684872, at *14 (E.D. Tenn. July 9, 1992) (collapsing a series of transactions over a three week period "for purposes of determining whether [the debtor] received fair consideration *or was rendered insolvent*" by the transactions) (emphasis added); s*ee also Vintero Corp. v. Corparacion Venezolana de Fomento (In re Vintero Corp.)*, 735 F.2d 740, 742 (2d Cir. 1984) ("A bankruptcy court has broad equitable powers which may be invoked to see 'that substance will not give way to form, that technical considerations will not prevent substantial justice from being done.'") (quoting *Pepper v. Litton*, 308 U.S. 295, 304-05 (1939)); *Off. Comm. of Unsecured Creditors of Midway Games, Inc. v. Nat'l Amusements Inc. (In re Midway Games, Inc.)*, 2010 Bankr. LEXIS 337, at *41 (Bankr. D. Del. Jan. 29, 2010) (stating that the purpose of recharacterization is to elevate the substance of the transaction over form).

[491] *Orr v. Kinderhill Corp.*, 991 F.2d 31, 33, 35-36 (2d Cir. 1993) (collapsing multiple transactions notwithstanding passage of time between transactions); *A.J. Heel Stone, L.L.C. v. Evisu Int'l, S.R.L.*, 2006 U.S. Dist. LEXIS 34152, at *4, *12 (S.D.N.Y. May 25, 2006) (collapsing series of transactions over the course of several months in fraudulent transfer action).

happen. It is the substance and meaningfulness, not just the existence, of any such conditions that are dispositive.[492] One could posit any number of leveraged buyout transactions nominally structured to contain conditions that in fact lack substance. Consistent with the bankruptcy court's power to elevate substance over form, however, the question is whether a particular condition has substance.

Applying the first of the above noted three-part inquiry courts use to evaluate the appropriateness of collapse, it is undisputed that all relevant parties had knowledge of the multiple transactions. Thus, the first inquiry favors collapse. The second inquiry is more of a mixed bag but, on balance, also tends to favor collapse. On the one hand, Tribune originally considered undertaking a recapitalization that would have been quite similar in effect to the Step One transactions.[493] Indeed, Step One bore many similarities to the 2006 Leveraged Recapitalization effectuated only the year before. Thus, it is conceivable that Tribune would have proceeded with a transaction similar to Step One had the Leveraged ESOP Transactions not been proposed. Moreover, although in theory all of the transactions could have been held in abeyance pending satisfaction of all conditions to the Merger, by design that is not how the

[492] *See generally Boyer v. Crown Stock Distrib., Inc.*, 587 F.3d 787, 793 (7th Cir. 2009) ("Fraudulent conveyance doctrine . . . is a flexible principle that looks to substance rather than form . . . .") (internal citations and quotations omitted); *Kinderhall*, 991 F.2d at 35 ("[W]here a transfer is only a step in a general plan, the plan must be viewed as a whole with its composite implications."); *Off. Comm. of Unsecured Creditors of Buckhead Am. Corp. v. Reliance Capital Grp., Inc. (In re Buckhead Am. Corp.)*, 178 B.R. 956, 970 (D. Del. 1994) ("Courts which have previously addressed the application of [illegal dividend statutes] to LBO transactions have rejected arguments which concentrate on the form of the transaction rather than its substantive economic effect."); *Big V Supermarkets Inc. v. Wakefern Food Corp. (In re Big V Holding Corp.)*, 267 B.R. 71, 92 (Bankr. D. Del. 2001) ("[B]y linking together all interdependent steps with legal or business significance, rather than taking them in isolation, the result may be based on a realistic view of the entire transaction.") (internal quotation marks omitted).

[493] *See* Report at § III.D.1. (discussion of the deliberations of the Tribune Board and the Special Committee leading up to Step One); *see also* Ex. 141 (Confidential Discussion Materials Prepared for Committee of Independent Directors of the Tribune Board, dated March 30, 2007).

transaction was structured. By design, significant consideration flowed to the Selling Stockholders at Step One.[494]

On the other hand, the Leveraged ESOP Transactions were formulated and structured so that, provided all conditions were met, Tribune would become a privately-held company under new ownership, utilizing the potentially significant tax benefits that would flow from the S-Corporation/ESOP structure. Without question, the key transaction documents were designed to enable Tribune to have the financial wherewithal to make Step Two happen after Step One. Thus, the Credit Agreement explicitly provided for Tribune to have access to an "Incremental Facility" at Step Two. The Step One Commitment Letter and the Step Two Commitment Letter—executed at the same time—obligated the parties thereto to provide the requisite financing to enable Step Two to occur.[495] As noted, the Merger Agreement obligated Tribune to exercise reasonable best efforts to effectuate the Merger. The Tribune Board approved the Leveraged ESOP Transactions in their entirety, including both the Step One Transactions and the Step Two Transactions, on April 1, 2007.[496] A press release issued immediately following the announcement of the Merger Agreement stated: "With the completion of its strategic review process, Tribune Company (NYSE:TRB) today announced a transaction which will result in the company going private . . . . Sam Zell is supporting the transaction with a $315 million investment. Shareholders will receive their consideration in a two-stage transaction."[497] Tribune

[494] Examiner's Interview of Thomas Whayne, June 11, 2010 ("I think it would've been hard for us to recommend going down the path with Zell unless we had the up front distribution that was same level as the recap. I'm comfortable that Chandlers & McCormicks wouldn't have supported it either.").

[495] Ex. 944 (Amended Step One Commitment Letter); Ex. 1010 (Amended Step Two Commitment Letter).

[496] Ex. 146 (Tribune Board Meeting Minutes, dated April 1, 2007).

[497] Ex. 148 (Tribune Press Release, dated April 2, 2007).

also publicly described its detailed financing commitments for the Leveraged ESOP Transactions, including $4.2 billion committed for Step Two.[498]

Looking at the circumstances at the time of Step One, moreover, it was highly likely that Step Two would close and therefore that the objectives of the Leveraged ESOP Transactions would be realized:

First, in the period immediately following the Step One Financing Closing Date and therefore most reflective of market sentiment at that time, the Tribune Common Stock traded at a relatively small discount to the $34 share price,[499] indicative of market optimism that Step Two would become a reality.

Second, the parties to the Merger Agreement had strong motivations to see that Step Two would happen. Among other things, the potential tax benefits from the S-Corporation/ESOP structure could only be achieved if both Step One and Step Two were completed.[500] Completion of only Step One would have left the Company in public hands and left its earnings subject to federal tax absent the implementation of some other transaction or structure.

Third, Tribune had just completed an auction process. The fact that approximately 90% of all outstanding shares of Tribune Common Stock were tendered in the Tender Offer[501] is

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[498] Ex. 148 (Tribune Press Release, dated April 2, 2007).

[499] Ex. 865 at 1 (stock price chart showing average share price of $31.27 in the ten days after the Tender Offer closed, a price which was approximately 92% of the Tender Offer price).

[500] Tribune's Treasurer Chandler Bigelow noted the tax benefits that would be conferred. *See* Examiner's Sworn Interview of Chandler Bigelow, June 17, 2010, at 135:11-18. *See also* Ex. 180 at 40-41 (Transcript of Lenders Meeting, dated April 26, 2007). Tribune's presentation to the rating agencies similarly emphasized the benefits of the ESOP-associated tax savings. Ex. 891 at 10 (Tribune Rating Agency Presentation, dated March 2007). In addition, Mr. Zell was enthusiastic to see Step Two close. Examiner's Interview of Samuel Zell, June 14, 2010 ("Did we think we bought a great company? We thought we bought a great opportunity. What allowed us to do it was the asset base. We convinced ourselves that the asset base, we had the value of the newspaper and TV stations as a result of 2008, we didn't know it at the time but we thought we had the raw pieces and the bases that's why we agreed to the [Tranche] X. We were intent on the Cubs, we were convinced we could sell other assets.").

[501] Ex. 225 (Tribune Press Release, dated May 31, 2007).

tangible evidence that most stockholders were satisfied with the results of that process. Although Tribune retained the right to exercise a "fiduciary out" at a relatively modest price ($25 million) if a better offer was forthcoming, the "fiduciary out" provision itself was narrowly tailored and limited Tribune's ability to seek out higher bidders.[502] Tribune did not have an unconditional right to buy its way out of the Merger Agreement by paying $25 million. Other than due to a breach of the Merger Agreement by the ESOP or the failure of the Merger to close before the drop-dead date, Tribune's only unilateral right to terminate the Merger Agreement was if it actually accepted a Superior Proposal (in substance, a proposal for a merger or other acquisition of Tribune; an acquisition of 50% or more of the consolidated assets of the Tribune Entities; an acquisition of 50% or more of the outstanding Tribune Common Stock; or a tender offer for more than 50% of the outstanding Tribune Common Stock that the Special Committee or Tribune Board determined in good faith was more favorable to Tribune and its stockholders than the Merger).[503] If Tribune exercised this Superior Proposal termination right, it had to pay EGI-TRB a $25 million termination fee. For its part, EGI-TRB could only unilaterally terminate the EGI-TRB Purchase Agreement if Tribune Board's recommendation changed, approval of the Merger was not obtained, the Merger failed to close before the drop-dead date, or Tribune materially breached or failed to perform its obligations under the Merger Agreement, in which case Tribune would have to pay a $25 million termination fee to EGI-TRB.[504]

Fourth, in addition to the fact that 90% of the stockholders at Step One, the Chandler Trusts (holding 20% of the outstanding shares and the single largest stockholder of the

[502] *See* Report at §§ III.D.3.b. and III.D.3.c.

[503] Ex. 151 at § 7.1 (Merger Agreement).

[504] Ex. 152 at § 7.1 (EGI-TRB Purchase Agreement).

Company) agreed to vote for the Merger on April 1, 2007.[505] Stockholders ultimately approved the Merger at the Company Meeting on August 21, 2007, when approximately 65% of the total shares outstanding and entitled to vote at the meeting approved the Merger.[506] Thus, stockholder approval did not appear to present a serious obstacle to the Step Two Closing.

Fifth, although Section 6.1(g) of the Merger Agreement required as a condition to the Merger that Tribune have "obtained the Financing on the terms set forth in the Financing Commitments, or alternative financing on substantially similar terms that are not materially more onerous than the terms reflected in such Financing Commitments, sufficient to consummate the Merger and the transactions contemplated by this Agreement,"[507] the Step Two Commitment Letter was procured and obtained contemporaneously, before the Step One Transactions closed. The Credit Agreement, entered into at Step One, obligated the Step Two Lenders to advance funds under the Incremental Credit Agreement Facility if requested by Tribune at the time of Step Two.

Sixth, the above-noted Commitment Letters (as well as the Credit Agreement) contained an extremely limited, and in the Examiner's experience, rather unusual material adverse event out (incorporated by reference from the definition of Company Material Adverse Effect in the Merger Agreement) that excluded from consideration "changes in general economic or political conditions or the securities, credit or financial markets in general" and "general changes or developments in the industries in which the Company and its Subsidiaries operate, including general changes in law or regulation across such industries" but only "to the extent such facts,

[505] Ex. 5 at 25 (Tender Offer). On June 7, 2007, however, the Chandler Trusts sold the remainder of the Tribune Common Stock owned by them following the Tender Offer and therefore did not vote at the Company Meeting. *See* Report at § III.F.3.

[506] *See* Report at § III.F.5.

[507] Ex. 151 at § 6.1(g) (Merger Agreement).

circumstances, events, changes or developments referred to therein have a disproportionate impact on the Company and its Subsidiaries, taken as a whole, relative to other companies in the industries or in the geographic markets in which the Company conducts its businesses after taking into account the size of the Company relative to such other Companies."[508] Lender personnel recognized that these provisions furnished no practical basis for the Step Two Lenders to refuse to proceed with funding on the Incremental Credit Agreement Facility.[509]

Seventh, although the accuracy of Tribune's representation of solvency at Step Two was a condition to funding of the Incremental Credit Agreement Facility, the Credit Agreement specified the manner in which this representation would be confirmed at the closing in the form of a solvency certificate. If Tribune presented the requisite solvency certificate, the Credit Agreement lenders (and the Bridge Facility Lenders) would face difficulties were they to refuse to fund at Step Two. The record shows that the Lead Banks were aware of these dynamics as Step Two approached.[510]

In sum, although Tribune might have gone forward with a transaction very similar to Step One on a stand-alone basis had the Leveraged ESOP Transactions not been available, by the time the April 1, 2007 agreements were in place, Tribune had crafted a comprehensive transaction that

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508 *Id.* at § 3.1. The Merger Agreement further specified that "[f]or the avoidance of doubt, the parties agree that any decline in the stock price of the Company Common Stock on the New York Stock Exchange or any failure to meet internal or published projections, forecasts or revenue or earning predictions for any period shall not, in and of itself, constitute a Company Material Adverse Event, but the underlying causes of such decline or failure shall be considered to the extent applicable (and subject to the proviso set forth in the immediately preceding sentence) in determining whether there is a Company Material Adverse Event." *Id.*

509 Examiner's Sworn Interview of Julie Persily, July 8, 2010, at 145: 11-12 ("There was no market MAC unfortunately for everybody involved."). A draft internal memorandum prepared by JPM in approximately September 2007 stated: "JPMorgan deal team's peer analysis indicates that although Tribune's publishing segment has underperformed its peers in the recent quarter, the entire industry is experiencing very difficult operating environment and deteriorating performance." Ex. 958 (Tribune Company Financing Memo September 2007).

510 Examiner's Interview of Rajesh Kapadia, June 25, 2010 ("We had a legally binding commitment and specific set of conditions that we had to honor. We could walk away from this, and it would feel good for a day, but that's a legally binding commitment."). *See also* Report at § III.H.4.

would culminate in the Merger and the replacement of old ownership with new, and that could be fully implemented subject to satisfaction of the conditions precedent to Step Two. Moreover, as of the Step One Financing Closing Date, it was highly likely that Step Two would become a reality. On balance, and in the context of what transpired in the spring of 2007, one cannot say that each of Step One and Step Two would have occurred on its own, and thus, the second factor leans in favor of collapse.

The case for collapse encounters obstacles, however, when confronted with the third inquiry: whether Step One and Step Two, and the transactions effectuated *inter se*, were mutually dependent or conditioned. In the cases in which a court in the Third Circuit has collapsed a leveraged buyout transaction, this factor was present.[511] This is not surprising. The existence of reciprocally-dependent transactions goes to the heart of the question of collapse. This is what allows the court to disregard the intricate moving pieces that lawyers and financial advisors sometimes conjure up to disguise a transaction's substance.

A court might begin the consideration of this third inquiry by observing that although Step Two could not have occurred without Step One, Step One did not depend and was not conditioned on the occurrence of Step Two. Having made that observation, the analysis could end quickly with the conclusion that Step One and Step Two simply were not reciprocally dependent on each other. But the Examiner believes that stopping there would be inconsistent with a court's responsibility to look beneath a transaction's surface until the substance is reached. As a matter of appearance, Step One might not have depended on Step Two, but if the occurrence of both steps were a foregone conclusion, appearances would be deceiving. The evidence shows that participants in the Leveraged ESOP Transactions not only contemplated the

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[511] *See* Report at § IV.B.5.b.

possibility that Step Two might not happen, they structured the documents so that Step One could stand alone if necessary. In fact, a fair inference from the events culminating in the acceptance of the Zell Group bid is that the two-step structure enabled stockholders to receive substantial upfront consideration. The inferior alternative (from the perspective of stockholders at least) would have been to defer everything until all the requisite regulatory approvals could be obtained. The two-step structure permitted the parties to accomplish as much of the transaction as they could upfront. Significantly, the Examiner has found no evidence that the phased or two-step structure that resulted from the auction process in Spring 2007 was designed as a subterfuge.

To be sure, had there been a way to structure the transactions so that only one giant step were necessary, the transaction would have been structured accordingly. It also is evident from the transaction documents and other evidence that (i) Tribune and the Zell Group did their best to ensure that the LBO Lenders were required to fund if the Step Two conditions were met (and to narrow the conditions that had to be satisfied) and (ii) Tribune and the Zell Group did their best vis-à-vis one another to ensure that each would be obligated to work diligently to make Step Two happen. On the other hand, the participants recognized that because more than one step would be necessary to complete the Leveraged ESOP Transactions, they could not simply afford to make the assumption that Step Two would close. The relevant documents and circumstances leading up to Step Two amply demonstrate that the participants did not make that blanket assumption.

First, the Credit Agreement did not obligate Tribune to obtain the Step Two Financing and did not make Tribune's failure to obtain that financing an event of default.[512] Indeed, although the matter is not free from doubt, a court probably would interpret the Credit

[512] The Credit Agreement states: "Borrower may . . . elect to request the establishment of a new term loan commitment on the Second Step Closing Date, which may be additional Tranche B Commitments or commitments to provide a new tranche of term advances . . . ." Ex. 179 at § 2.17(a) (Credit Agreement).

Agreement as not containing any Tribune representation effective at Step One concerning Tribune's solvency in the future if Step Two were to close.[513] The Credit Agreement was structured to enable Tribune to obtain the Incremental Credit Agreement Facility funding if Tribune otherwise satisfied the specified closing conditions. Tribune obtained separate financing commitments for Step Two encompassing what became the Incremental Credit Agreement Facility and the Bridge Facility.[514]

Second, the transaction documentation provided a mechanism for EGI-TRB and the ESOP to sell their Tribune shares through a Tribune-sponsored registration statement if the Merger did not occur.[515]

Third, Tribune's public filings disclosed that Step Two might not close, noting that separate commitments were entered into in connection with each transaction and that Step Two was subject to satisfaction of specified conditions.[516] Certain of Tribune's directors and officers also testified in the *Garamella* litigation that Step One and Step Two were independent.[517]

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513 Section 4.01(l)(ii) of the Credit Agreement contains a representation regarding Step Two solvency "[u]pon and after consummation of the Second Step Transactions and as of the Second Step Closing Date." *Id.* at § 4.01(l)(ii) (Credit Agreement). Under the Credit Agreement, all representations and warranties (other than the no material adverse effect representation) were to be correct on the Step One Financing Closing Date. *Id.* at § 3.02(i) (Credit Agreement). Although it is not clear why this representation was included in the representations made as of the Step One Financing Closing Date, read in context it appears to constitute a representation that would only speak as of the closing of Step Two (if and when Step Two was ready to occur) and was not a representation given at Step One about Tribune's future solvency if and when Step Two occurred. The accuracy of this representation was a condition to funding under the Incremental Credit Agreement Facility under the Credit Agreement, which was tied to the Step Two Closing. *See* Report at § III.D.11.

514 *See* Report at § III.D.9.b.

515 *See id.* at § III.D.8.

516 *See id.* at §§ III.D.1.f. and III.F.l.b.

517 *Garamella* was a class action lawsuit brought by a Tribune stockholder in May 2007 that sought to enjoin Step One of the Leveraged ESOP Transactions on the ground that, among other things, that the $34 per share price was inadequate. *Garamella* sought a preliminary injunction against the Tender Offer. In successfully defending against that motion, the defendants in *Garamella* emphasized that the Leveraged ESOP Transactions had been structured in a way to permit stockholders to receive a return of equity through a Tender Offer that was economically similar to the leveraged recapitalization alternative that was also being considered at the time. As the Chairman of the Special Committee testified:

Fourth, the Merger was conditioned on FCC approval, which was not obtained until November 30, 2007,[518] and Major League Baseball approval, which was not obtained until December 17, 2007.[519]

Fifth, the rating agencies and market analysts recognized that the transactions would be effectuated in two steps (although their ratings leading up to and following Step Two included all LBO Lender Debt issued and expected to be issued).[520]

By necessity, obtaining the requisite third party approvals would take time, and, in theory, the passage of time interjected uncertainty into the equation. There was the possibility that Tribune might slip into insolvency if the massive Step Two Debt were added to the balance sheet. Thus, the Merger Agreement required a solvency opinion as a condition to the Merger, and the Credit Agreement (and the Step Two Commitment Letter) required a solvency certificate as a condition to funding under the Incremental Credit Agreement Facility. There was a possibility that the conditions to Step Two might not be met. Thus, the Credit Agreement gave Tribune the right, but did not impose any obligation, to borrow and did not place Tribune into

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> [The Tender Offer thus offered] the "best of both worlds." Under both the Tender Offer and the recapitalization plan, Tribune shareholders would receive the economic equivalent of $17.50 in cash (assuming all shareholders participate fully in the Tender Offer). The Tender Offer thus provides security to shareholders because, even if the [Step Two Transactions] do[] not close as expected, the Company will more or less stand in the same position it would have if Tribune had what was viewed as the next best option. And in that circumstance, Tribune could still pursue other options such as spin of the [Broadcasting Segment] or a sale of specific assets, such as the Chicago Cubs.

Ex. 210 at Declaration of William A. Osborn at 29 (Briefing and Declarations (and exhibits thereto) filed in *Garamella*). *See also* Ex. 210 at Declaration of Michael Costa at 280 (Briefing and Declarations (and exhibits thereto) filed in *Garamella*). ("We pointed out that the economic impact of the first step of the EGI transaction and the leveraged recapitalization were essentially the same to shareholders [which meant] even if the EGI merger was unable to close for some reason, the Company and shareholders would essentially be in the same position as if it had done a leveraged recapitalization . . . ."). *Id.*

518 Ex. 659 (FCC Order, dated November 30, 2007).

519 Ex. 661 (Major League Baseball Letter, dated December 17, 2007).

520 *See* Report at §§ III.C.2., III.D.15.a., III.D.15.b., III.F.1.a., and III.G.4.f. Certain analysts also raised questions concerning the likelihood that Step Two would close and in particular regarding FCC approval (although expressing the view that FCC approval probably would be forthcoming). *See id.* at § III.F.1.a.

default if Step Two failed to occur. Finally, there was a built-in time lag between the closing of Step One and the closing of Step Two. If the time lag extended into 2008, stockholders would receive a "ticking fee" to compensate for the delay.[521] Tangible evidence that uncertainty over closing Step Two was not just a theoretical concern may be deduced from the fact that the Tribune Common Stock traded at a discount to the Merger price in the months following Step One.[522]

Although the preceding militates against collapsing Step One and Step Two, the inquiry does not end there. Consistent with the underlying principle that substance must take primacy over form,[523] collapse might yet be warranted if Step One and Step Two in reality were reciprocally dependent despite the structure, the outward appearance of the transactional documents, and the public utterances of Tribune and its directors.

The question actually is relatively close. As noted, the Examiner finds that at the time of Step One and in the days shortly following the Step One Financing Closing Date, it was highly likely that Step Two would happen. Tribune had procured comprehensive financing commitments for Step Two and, under the above-noted restrictive definition embodied in Company Material Adverse Effect, had limited the circumstances in which a decline in Tribune's performance alone could jeopardize funding or the Merger. Although the financing commitments were conditioned on a solvency certificate as well as the veracity of Tribune's representation concerning solvency at the proposed Step Two Closing—and thus to the extent that deterioration in Tribune's operating performance combined with the new Step Two Debt would render Tribune insolvent, the Step Two Lenders could refuse to fund their Step Two

[521] Ex. 151 at § 2.1(a) (Merger Agreement).

[522] *See* Report at § III.F.2.d.

[523] *See, e.g.*, *United States v. Tabor Court Realty Corp.*, 803 F.2d 1288, 1302-03 (3d Cir. 1986).

commitments—by design the structure of the lending documents made it difficult for the Step Two Lenders to refuse to close. Indeed, the evidence shows that one of the most active of the Lead Banks, JPM, analyzed the Leveraged ESOP Transactions as a whole, and never sought internal approval to provide the Step One Financing independent of the Step Two Financing.[524] The overwhelming stockholder subscription to the Tender Offer combined with the Chandler Trusts' commitment to support the Merger as the then largest stockholder meant that stockholder approval was highly likely. Notwithstanding that consummation of the Merger was conditioned on FCC approval of a transfer of control and an extension of the Company's cross-ownership waivers,[525] the market generally expected that the FCC Order would be granted.[526] Finally, the Merger not only would enable Tribune to cash out all of its stockholders, but also to take advantage of the tax benefits made available only at the Step Two Closing from the

524 Ex. 289 at 116:3-9 (Kowalczuk Deposition). Mr. Sell did, however, request and review an analysis "showing just step 1, assuming step 2 never got done." Ex. 290 at JPM_00260070 (Tonnesen E-Mail, dated March 29, 2007).

525 Ex. 151 at § 6.1(c) (Merger Agreement); Ex. 226 at 71-72 (Proxy Statement, dated July 13, 2007). *See* Examiner's Sworn Interview of William Osborn, June 24, 2010, at 67:20-68:4 ("Q: I'm trying to gauge how confident were you. Mildly confident, somewhat confident, reasonably confident, highly confident, how high in terms of a scale, how great a likelihood did you think there was in April when you closed Step 1 or in June when you closed Step 1. A: I felt very confident.").

526 Ex. 178 at 47 (Step One Confidential Information Memorandum); Ex. 626 at 13-14 (Deutsche Bank Rating Upgrade, dated July 1, 2007). Tribune Chief Executive Officer Dennis FitzSimons, however, testified in his sworn interview that obtaining FCC approval was a matter of concern to him. Examiner's Sworn Interview of Dennis FitzSimons, June 25, 2010, at 65:8-13 ("Q: You expected the second step to happen as of the April 1st frame, you expected at some point down the line the second step would occur? A: Yes, but there were a number of things that had to happen for that [on can] [sic] our. "); *id.* at 66:11-67:1 ("Q: Had you formed a view about how likely it would be for Step 2 to close before the end of 2007? A: No, I don't think I could because there were all those conditions that we had to make happen, hopefully through successful lobbying with legislators as well as the FCC and making our case there, and I was very familiar with that. The financing, that was something that the banks were going to have to make their decisions on. So there were still lots of things that had to happen before we knew the second step was going to happen."); *id.* at 127:15-128:3 ("Q: At any point after Step 1 closed in June of 2007, did Tribune not consider—or consider not proceeding with Step 2? . . . A: No, our intent was to close the transaction unless—and it was our view that we should seek to overcome the obstacles, the FCC approval. We did what we could in each of those -- on each of those issues that I mentioned to get the transaction closed because we believed that it was the best transaction for all involved.").

S-Corporation/ESOP structure.[527] Thus, there was a business reason and plenty of motivations all around (including management incentives and bonuses keyed to the Step Two closing) to make the Merger happen.

Although supporting the conclusion that the Step Two closing was highly likely, however, the preceding observations do not necessarily lead to the further conclusion that the satisfaction of the conditions to Step Two was a mere formality. It would have been impossible for anyone at the time of Step One to do more than just place odds on the prospect of FCC approval, a point highlighted by the discussions of this question in certain analyst reports following Step One.[528] No one was in a position to guarantee that this approval would be forthcoming (and notably, when the FCC Order came, it was accompanied by two vigorous dissents).[529] Moreover, the state of affairs in May of 2007 could change as time went forward. Although it was virtually impossible for a decline in Tribune's business after Step One to give rise to a Company Material Adverse Effect sufficient to give the Step Two Lenders an out, this did not render a severe decrease in Tribune's financial performance irrelevant to the Step Two Closing. Depending on the degree of the decline, the prospective addition of the Step Two Debt to a severely deteriorating business (and hence balance sheet) could have caused one or more of the LBO Lenders, the Zell Group, or Tribune to conclude that Step Two could not proceed. On

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527 *See* Report at § III.H.b.(3).; *see also* Examiner's Sworn Interview of Daniel Petrik, July 8, 2010, at 94:21-95:2 ("Q. Before we move to that exhibit, just following up on that last answer, if at the front end of the deal you knew that there would be no S corp election, would you have been less willing to enter into the revolver deal? A. Yes."). However, Mr. Petrik also testified: "The amount of tax benefits were not as great as avoiding the interest on the additional debt in Step 2, that is my recollection." *Id.* at 144:1-3.

528 *See* Report at § III.F.1.a.

529 Ex. 943 at JPM_00338376 (Dissenting Statement of Commissioner Michael J. Copps, dated November 30, 2007) ("If this Order were a newspaper, the banner headline would read 'FCC Majority Uses Legal Subterfuge to Push for Total Elimination of Cross-Ownership Ban.'"); *id.* at JPM_00338377 (Dissenting Statement of Commissioner Jonathan S. Adelstein, dated November 30, 2007) ("[T]oday's order is a regulatory hostage taking—a desperate maneuver to use the Tribune transaction as a human shield, while the Commission marches down the treacherous path toward greater media consolidation. Notwithstanding congressional rebuke and widespread public opposition, this Commission is determined to use any conceivable ploy to achieve its misguided goals.").

this score, the fact that the Tribune Common Stock traded at a discount to the Merger price in the months following Step One provides a measure of market validation that the downside risks were not imaginary.

On the far other end of the spectrum, the relatively modest $25 million break-up fee meant that if Tribune performed beyond expectations in the months after Step One, another party might step forward to compete with the Zell Group. Although any competing bidder would have had to put together a massive combination of new replacement debt financing and equity contributions to present a Superior Proposal, the Examiner concludes that the $25 million break-up fee did not present a meaningful barrier to entry given the size of the transaction.[530] Had access to the debt markets not tightened so materially between the time of Step One and Step Two and had the market concluded, contrary to the state of affairs as they unfolded, that the Zell Group had grabbed a bargain, some third party likely would have found a way to put an overbid on the table. Tribune certainly would have been bound to consider, and quite possibly to accept, a Superior Proposal.[531]

On balance, the Examiner cannot conclude that the conditions to the Step Two Closing were without substance or that a Step Two Closing was assured from the outset to the end. In this regard, the Examiner believes a court would be constrained by the jurisprudence on the collapse principle, which, read fairly, focuses not on the *probability* that particular elements of a leveraged buyout transaction are reciprocally dependent but on the *fact* that they are actually dependent. Although some of the closing conditions undoubtedly were, to speak colloquially,

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[530] *See* Ex. 210 at Declaration of William A. Osborn at 9 (Briefing and Declarations (and exhibits thereto) filed in *Garamella*). Separate and apart from this evidence, as a relative matter, the break-up fee was small.

[531] Examiner's Interview of Thomas Whayne, June 11, 2010. Mr. Whayne noted to the Examiner that although an overbidder could have replicated the ESOP structure: "By fall of 2007 there was no debt financing. He [Zell] had commitment papers he had inked in April of 2007 that by the fall of 2007 just weren't available in the market place so there's no one who could compete with him in terms of ability to raise financing." *Id.*

"in the bag" from day one, this would not be a fair characterization of all of them. The requirement of FCC consent alone belies painting the transaction with such a broad brush. Moreover, for the above-discussed reasons, the built-in passage of time added some modicum of uncertainty into satisfaction of certain of the other conditions. The Examiner finds that against these circumstances, a court would be somewhat unlikely to conclude that the prerequisites established under the applicable law for collapse of Step One and Step Two are met here.

A court would not just have to expand on the existing law to reach that result. Collapsing Step One and Step Two for solvency purposes would require, in effect, reconstituting the Tribune Entities' balance sheets to add the debt that was incurred in December to what actually was incurred in June. Although one certainly can make reasonable assumptions, it is not entirely clear how a court would grapple with the Tribune Entities' performance in the intervening months. In addition, even though the tax benefits generated by the S-Corporation/ESOP structure (which benefits could only be realized following the Step Two Closing) could not be passed on to a purchaser of the Tribune Entities or their assets, would it be equitable or appropriate to disregard this value entirely in a Step One solvency determination in which the Step Two Debt is considered a liability months before that indebtedness actually was added to the balance sheet? The amount of debt undertaken at Step Two, moreover, turned out to be lower than was planned at Step One. Would the expected (as opposed to the actual) Step Two Debt be added to the newly-constructed Step One balance sheet? Messiness and complexity alone are not reasons to detour from a conclusion required by the law, but sometimes they are probative of whether the law's path leads in that direction in the first place.[532] The Examiner finds it is somewhat likely that a court would veer away from that path.

A final consideration tips against collapse for solvency purposes: As discussed, when collapse is applied for reasonably equivalent value analysis in a leveraged buyout context, the fact that the debtor nominally receives proceeds from lender advances for a moment in time is easily disregarded when the money necessarily moves immediately into the selling stockholders' or other participants' hands. Disregarding where the money was destined to go would elevate form over substance. But here the reason why the Step Two Debt was not a liability of the Tribune Entities at Step One for solvency purposes does not derive from the elevation of form over substance but, rather, from the very real fact that the Tribune Entities had not, and *could not*, complete the Merger at Step One. Nor could Tribune's stockholders receive the proceeds from any Step Two advances until the Step Two conditions were met and the Merger closed. The fact that half the Tribune Common Stock remained outstanding following the close of Step One obviously was not a matter of form to those stockholders. Collapsing Step One and Step Two for solvency purposes, therefore, would entail disregarding not just the form but, in a very tangible way, substantive aspects of the Leveraged ESOP transactions.

Although the question admittedly is close, the Examiner concludes that a court is somewhat unlikely to collapse Step One and Step Two for solvency analysis.

[532] As discussed above, the Examiner grappled with these questions in evaluating Step One solvency in a "collapse" scenario, which the Examiner analyzed in the event that a court were to disagree with the Examiner's conclusions concerning collapse. *See* Report at § IV.B.5.d.(7).(ii).

(ii) Examiner's Conclusions and Explanation Concerning Inclusion of Step Two Debt in Capital Adequacy Analysis.

Examiner's Conclusions:

The analysis in the preceding Section concerning collapse also applies to capital adequacy analysis. In measuring capital adequacy at the time of Step One, however, a court is highly likely to consider all obligations that were reasonably foreseeable at the time of Step One, including those caused by Step Two.

Explanation for Examiner's Conclusions:

There is no principled basis on which to distinguish the preceding Section's collapse analysis in considering the question of capital adequacy. Whereas the absence of a liability on account of the Step Two Debt is dispositive on the question of inclusion of Step Two Debt as a liability for solvency analysis, the answer is different for capital adequacy analysis. As reflected in the discussion earlier in the Report,[533] solvency and capital adequacy analyses are distinct. Unlike solvency, unreasonably small capital is not strictly limited to consideration of those liabilities that reside on the balance sheet on the date of measurement. At its core, "the test for unreasonably small capital is reasonable foreseeability . . . whether the parties' projections were reasonable."[534] By definition, this entails a forward-looking analysis. Solvency focuses on the debtor's liabilities at a given moment, whereas capital adequacy focuses on the debtor's ability to

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533 *See* Report at §§ IV.B.5.d.(2). and IV.B.5.d.(3).

534 *Moody v. Sec. Pac. Bus. Credit, Inc.*, 971 F.2d 1056, 1072-73 (3d Cir. 1992); *see also* Markell, footnote 412, at 497 (stating that unreasonably small capital exists when non-payment of the plaintiff's claim was a reasonably foreseeable effect given the amount of the transferor's assets/capital remaining and reasonably foreseeable cash resources).

meet its obligations over time. In addressing capital adequacy, therefore, it is necessary to consider liabilities reasonably expected to be incurred over time:[535]

> We are also of the opinion that the delivery of the mortgages and guarantee mortgages to IIT occurred when the Raymond Group was engaged or about to engage in a "business or transaction for which the property remaining in [its] hands after the conveyance is an unreasonably small capital." 39 Pa. Cons. Stat. § 355. Both before the November 26, 1973 transaction as well as thereafter, the Raymond Group did not have the capital resources it needed to carry on its business. *Moreover, Durkin planned to continue selling the surplus lands of the Raymond Group and would therefore incur additional income tax liabilities to the United States.* The provisions of the Note Purchase and Loan Agreement were such that relatively little, if any, proceeds of the land sales would be available for general creditors. *Durkin also planned to continue the Raymond Group's coal mining operations and would therefore incur additional liabilities to trade creditors, the Anthracite Health and Welfare Fund, and the Commonwealth for backfilling obligations.*

Applied here, in view of the Examiner's conclusion that at the time of Step One, Step Two was highly likely to occur, it is necessary to consider the Tribune Entities' ability at the time of Step One to service and satisfy those Step Two liabilities when they were expected to arise. This analysis does not assume that all of the Step Two Debt became due and payable at the time of Step One; nor is the evaluation performed with the benefit of hindsight, but, rather, is conducted using an objective test at the time of Step One. In short, because incurrence of the Step Two Debt was probable at the time of Step One, the Step Two Debt must be considered to properly analyze the Tribune Entities' capital adequacy at Step One.

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535 *United States v. Gleneagles Inv. Co.*, 565 F. Supp. 556, 580 (M.D. Pa. 1983) (emphasis added) (citations omitted), *aff'd in relevant part sub nom. United States v. Tabor Court Realty Corp.*, 803 F.2d 1288 (3d Cir. 1986); *see also* Ex. 262 at 52:9-53:1 and 60:2-63:9 (Rule 2004 Examination of Bryan Browning, December 4, 2009); John E. Sullivan III, *Future Creditors and Fraudulent Transfers: When a Claimant Doesn't Have a Claim, When a Transfer Isn't a Transfer, When a Fraud Doesn't Stay Fraudulent, and Other Important Limits to Fraudulent Transfers Law for the Asset Protection Planner*, 22 DEL. J. CORP. L. 955, 1010-12 (1997) ("In assessing whether the transferor has reasonably calculated her future obligations . . . the fact finder . . . might include . . . [i]s the transferor likely to incur substantial consensual debt in the future . . . ."); Examiner's Interview of Rajesh Kapadia, June 25, 2010 ("I think the marketplace, the fundamental thing around this deal, in the syndication of Step 1, was $6 billion . . even though we're syndicating $6 billion was the market is looking at it is really $8 billion because it's the second step.").

One Party nevertheless contended to the Examiner that it is inappropriate to consider the Step Two Debt at the time of Step One in view of the requirements under (i) the Merger Agreement for a solvency opinion (which was a condition to the Merger) and (ii) the Credit Agreement for a Tribune solvency certificate and representation of "Solvency"[536] as broadly defined in the Credit Agreement (which was a condition to the Step Two Financing). This Party essentially argued that, at the time of Step One, creditors and the Tribune Entities knew that Tribune's solvency and capital adequacy would be separately tested as prerequisites to proceeding with Step Two and that, therefore, Step Two could not have occurred if that transaction would have rendered the Tribune Entities insolvent or left them with unreasonably small capital. Under this view, because Step Two could not happen if its occurrence would render the Tribune Entities inadequately capitalized, inclusion of that debt for purposes of analyzing Step One capital adequacy would be improper.[537]

The problem with this contention is that it conflates what the documents required, what Tribune might have represented under those agreements, and what opinion VRC or someone else might have given at the time of Step Two, with the applicable standard governing capital adequacy. The representations and opinions actually given to make Step Two happen might be based on a flawed definition of solvency or simply wrong as applied, looking at the circumstances then known at that time but applying an objective test, as the law requires.[538] As

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[536] *See* Report at § III.D.10.c.

[537] This Party advanced a similar argument on the question of collapse of Step One with Step Two for solvency purposes. The Examiner finds this argument similarly untenable for the reasons discussed in text.

[538] *See generally Mellon Bank, N.A. v. Off. Comm. of Unsecured Creditors of R.M.L., Inc. (In re R.M.L., Inc.)*, 92 F.3d 139, 156 (3d Cir. 1996) ("The bankruptcy court correctly determined that a debtor's creative accounting practices, which have the effect of grossly overstating its financial condition, cannot be the basis of a court's solvency analysis."); *Ferrari v. Barclays Bus. Credit, Inc. (In re Morse Tool, Inc.)*, 148 B.R. 97, 133 (Bankr. D. Mass. 1992) ("Lambert's projections were unreasonable and imprudent; this was discernable from information available before the buyout; and both Lambert and Barclays had reason to be skeptical and to inquire into the assumptions that rendered the projections so unreasonable.").

to the former point, the Credit Agreement and the Bridge Credit Agreement defined "fair value" and "fair market value" for purposes of Step Two solvency as involving a willing seller and willing buyer "*in a transaction having a similar structure*."[539] This is, in substance, the same flawed definition that VRC agreed to use in its original engagement letter and that governed VRC's Step Two opinion.[540] Indeed, applying the argument advocated by the above-noted Party to fraudulent transfer analysis generally, if the representations concerning solvency or capital adequacy given by the participants as conditions precedent to the challenged transfer always were accepted after the fact as true, then in theory a transfer that would render a debtor insolvent or without reasonable capital could never occur; and in evaluating these questions a court would be obliged to assume that the transaction never happened. Although it is possible to draw distinctions between the current situation and other circumstances before the slippery slope leads to such an absurd result, the Examiner finds the argument unavailing when applied here. The Examiner finds that consistent with the objective nature of the capital adequacy test and that test's focus on the debtor's future prospects at the time of the relevant transfer, a court is reasonably likely to reject the contrary approach advocated by one Party. Rather, a court is reasonably likely to conclude that because, at the Step One Financing Closing Date, the Tribune Entities were highly likely to incur the Step Two Debt, the Tribune Entities' wherewithal to satisfy that debt must be considered for capital adequacy purposes at Step One.

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539 *See* Ex. 179 at § 1.01 (Credit Agreement) (emphasis added); Ex. 175 at § 101 (Bridge Credit Agreement) (emphasis added).

540 *See* Report at § III.E.3.b.(1).(i).

(iii) Examiner's Conclusions and Explanation Concerning Inclusion of Step Two Debt in Analysis of Intention to Incur Debts Beyond Reasonable Ability to Pay.

Examiner's Conclusions:

The same analysis above concerning the question of collapse also applies to the question of intention to incur debts beyond reasonable ability to pay. However, like capital adequacy analysis, it is necessary to consider the obligations that were reasonably foreseeable at Step One, including the Step Two Debt in conjunction with the closing of Step Two.

Explanation of Examiner's Conclusions:

The plain language of Bankruptcy Code section 548(a)(2)(B)(iii)[541] explicitly requires consideration of obligations that may be incurred in the future.[542] In other words, unlike solvency but like capital adequacy, this test requires consideration of future liabilities.

(7) Examiner's Conclusions and Explanation Concerning Solvency of Tribune at Step One.

Examiner's Conclusions:

The Examiner finds that a court is highly likely to find that Tribune was solvent as of, and after giving effect to, the Step One Transactions if the Step Two Debt is not included for purposes of that determination. The Examiner finds that to the extent that the effects of Step Two (including the Step Two Debt) are considered in connection with Step One solvency, credible assertions could be made that Tribune was insolvent at Step One, but the Examiner

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[541] 11 U.S.C. § 548(a)(2)(B)(iii) (2006).

[542] *Id.* ("[i]ntended to incur, *or believed that the debtor would incur*, debts that would be beyond the debtor's ability to pay as such debts matured") (emphasis added); *Hall v. Quigley (In re Hall)*, 131 B.R. 213, 217 (Bankr. N.D. Fla. 1991) ("Provision (B)(iii) does not require that the debtor be insolvent to maintain a fraudulent transfer action. If the transfer causes the debtor to be unable to meet all his debts at some point in the future it may be avoided pursuant to (B)(i) or (ii).").

concludes that it is somewhat likely (although a very close call) that a court nonetheless would find that Tribune was solvent in that circumstance as well.

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

As shown below, market indicia, the Tribune auction process leading to the Tribune Board's approval of the Leveraged ESOP Transactions on April 1, 2007, and the magnitude of solvency reflected in valuations performed in the period leading up to Step One, all support the conclusion that Tribune was solvent at the Step One Financing Closing Date if the Step Two Debt is not included in the determination of solvency.[543]

(i) Step One: No Collapse With Step Two.

(A) Market Indicia of Solvency.

Before the approval and announcement of the Leveraged ESOP Transactions in April 2007 through the Step One Financing Closing Date, Tribune Common Stock traded publicly in a liquid market. Tribune reported its financial results in SEC filings and publicly disclosed other information bearing on its financial performance (*e.g.,* press releases). Because this information informed the trading price of Tribune Common Stock, trading prices of that stock before the Step One Financing Closing Date furnishes relevant market-based information on Step One solvency. Before the announcement of the Leveraged ESOP Transactions on April 2, 2007, however, the trading value of Tribune Common Stock was influenced by Tribune's previous announcement of its evaluation of strategic alternatives for Tribune, thereby potentially biasing trading prices upward. Likewise, after the announcement of the Leveraged ESOP Transactions on April 2, 2007, the trading price of Tribune Common Stock was upwardly biased in comparison to how it

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543 Although certain Parties advocated the inclusion of a contingent liability at Step One in the amount of the "probability-of-closing" adjusted pro forma Step Two Debt, the Examiner has concluded, as discussed in another part of the Report, that it would be improper to do so. *See* Report at § IV.B.5.b.

otherwise would have traded.[544] That price (and corresponding equity value), however, would likely be "inflated" due to market expectations of a $34 per share Tender Offer price. Thus, it is necessary to grapple with the potential upward bias in the trading price of Tribune Common Stock before drawing any solvency conclusions using the market capitalization of Tribune Common Stock.

Recognizing that approximately $4.3 billion of the proceeds from the Step One Debt would be used to acquire only a portion of the then-outstanding Tribune Common Stock,[545] a substantial residual equity value remained after giving effect to the Step One Transactions post-closing based on the observed pre-Step One closing trading price of Tribune Common Stock.[546] Because only the equivalent of $17.61 in equity value was being replaced with debt at Step Two,[547] a comparison of that price to prevailing market prices pre-Step One establishes a substantial unadjusted residual equity value of $16.39 per share (*i.e.*, $34.00 - $17.61 = $16.39), or "solvency cushion," after giving effect to the Step One Transactions. The following chart compares both the Tender Offer price and the above-noted $16.39 figure to the prevailing prices of Tribune Common Stock before the Step One Financing Closing Date:

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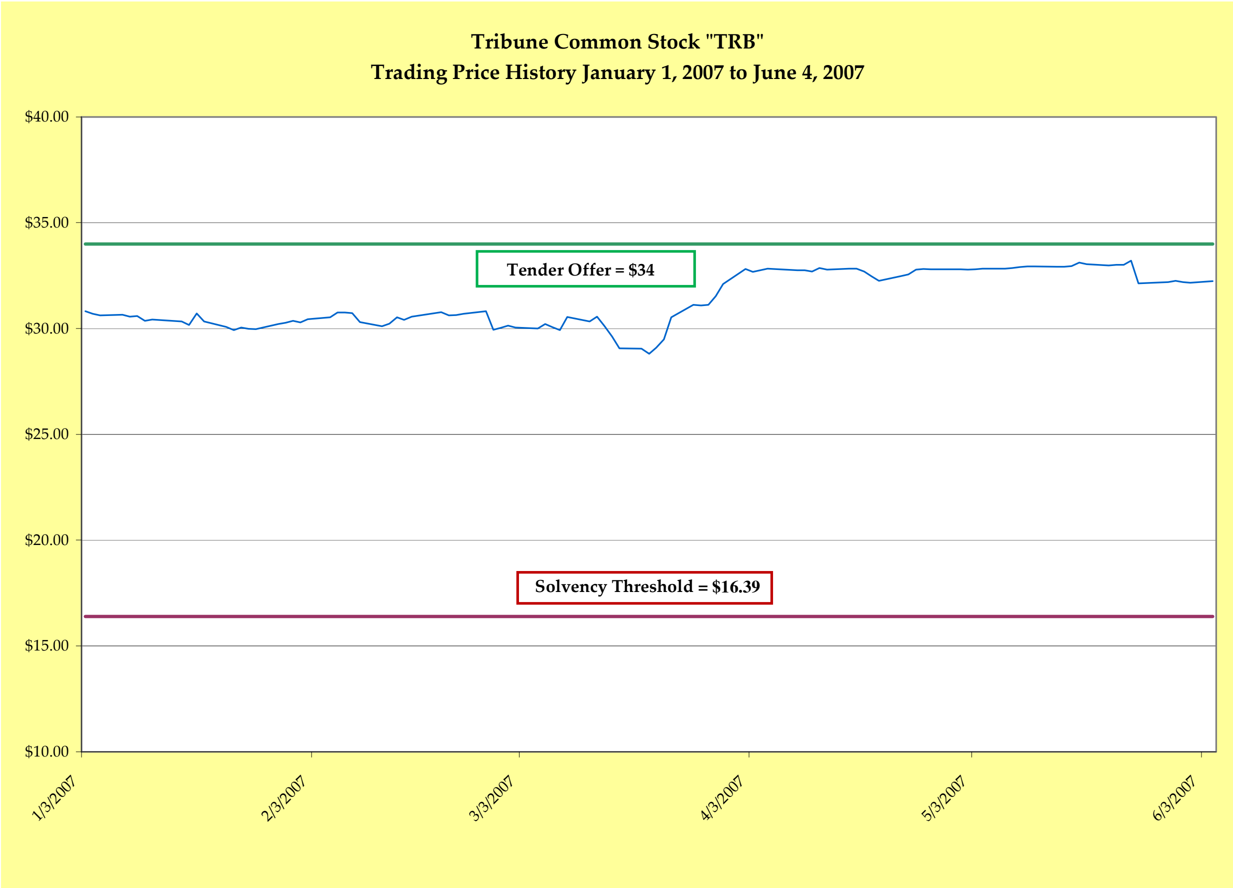
[544] The announcement of Tribune's plan to initiate the Tender Offer at $34 per share, when its stock was trading at a price below $34, would cause the price to increase based on at least some probability of completing such Tender Offer at a price higher than the prevailing price, adjusted for time value of money effects between the date of stock price observance and the expected closing date of the Tender Offer, all other things being equal. *See* Ex. 5 (Tender Offer).

[545] A portion of the Step One Debt (about $2.8 billion) was used to repay the 2006 Bank Debt. Therefore, only about $4.3 billion of the Step One Debt was available to purchase shares in connection with the Tender Offer. *See* Ex. 628 (Tribune Form 10-Q, filed August 9, 2007).

[546] Stated differently (and greatly simplified), at a trading price of $34 per share and with approximately 242.8 million shares outstanding, Tribune had an implied equity value of about $8.3 billion ($34 x 242.8 million shares). Therefore, essentially replacing $4.3 billion of equity value with debt would still leave substantial residual equity value of about $4.0 billion.

[547] The total number of shares of Tribune Common Stock purchased by Tribune, 125,738,955, divided by the number of shares of Tribune Common Stock outstanding, 242,833,053, times the $34 per share Tender Offer price, equals $17.61, which is the equity value per share of the Tribune Common Stock replaced with debt. *See* Ex. 1065 (Calculation of Implied Stock Price).



To address the above-noted possible effect of the upward bias in the trading price of Tribune Common Stock, the Examiner's financial advisor analyzed whether, even assuming that the market assumed a high probability that Step One would close,[548] the resulting probability-adjusted Tribune Common Stock price could credibly support a conclusion that Tribune was insolvent (*i.e.*, that Tribune's stock would have traded below $16.39 per share absent any "inflationary" effects of the Tender Offer price of $34 per share on the trading price of Tribune Common Stock).Because Step One contemplated exchanging indebtedness equal to approximately one-half the equity value implied by a $34 per share price, for Tribune to remain solvent on a market-based basis when approximately half of its stock was redeemed for debt at

548 This is, in reality, a conservative assumption that would minimize the effects of any upward bias informing observed stock prices.

$34 per share, the minimum pre-Step One price of Tribune Common Stock would be approximately $16.39 per share (*i.e.*, as long as Tribune's stock was trading above $16.39 per share, Tribune would be solvent on a market capitalization basis even after adding $4.3 billion of incremental debt, as happened at Step One).[549] Using $16.39 per share as a proxy for the pre-Step One solvency threshold price, the Examiner's financial advisor evaluated the probability that, absent any extraneous factors affecting the price of the Tribune Common Stock, the trading values would reasonably have declined below that price. This analysis considered the trading price of Tribune Common Stock during periods unaffected by the potential upward bias caused by market expectations of Tribune pursuing strategic transactions.

For the three months before Tribune's announcement of its intent to pursue strategic alternatives on September 22, 2006[550] (a period unaffected by announcements relating to Tribune's consideration of potential stockholder value-enhancing activities which ultimately resulted in the Tender Offer), Tribune Common Stock traded between a low of $28.23 (on July 27, 2006) and a high of $32.04 per share (on July 11, 2006).[551] Following Tribune's announcement of its intention to pursue strategic alternatives, Tribune's stock price appears to have reacted significantly:[552]

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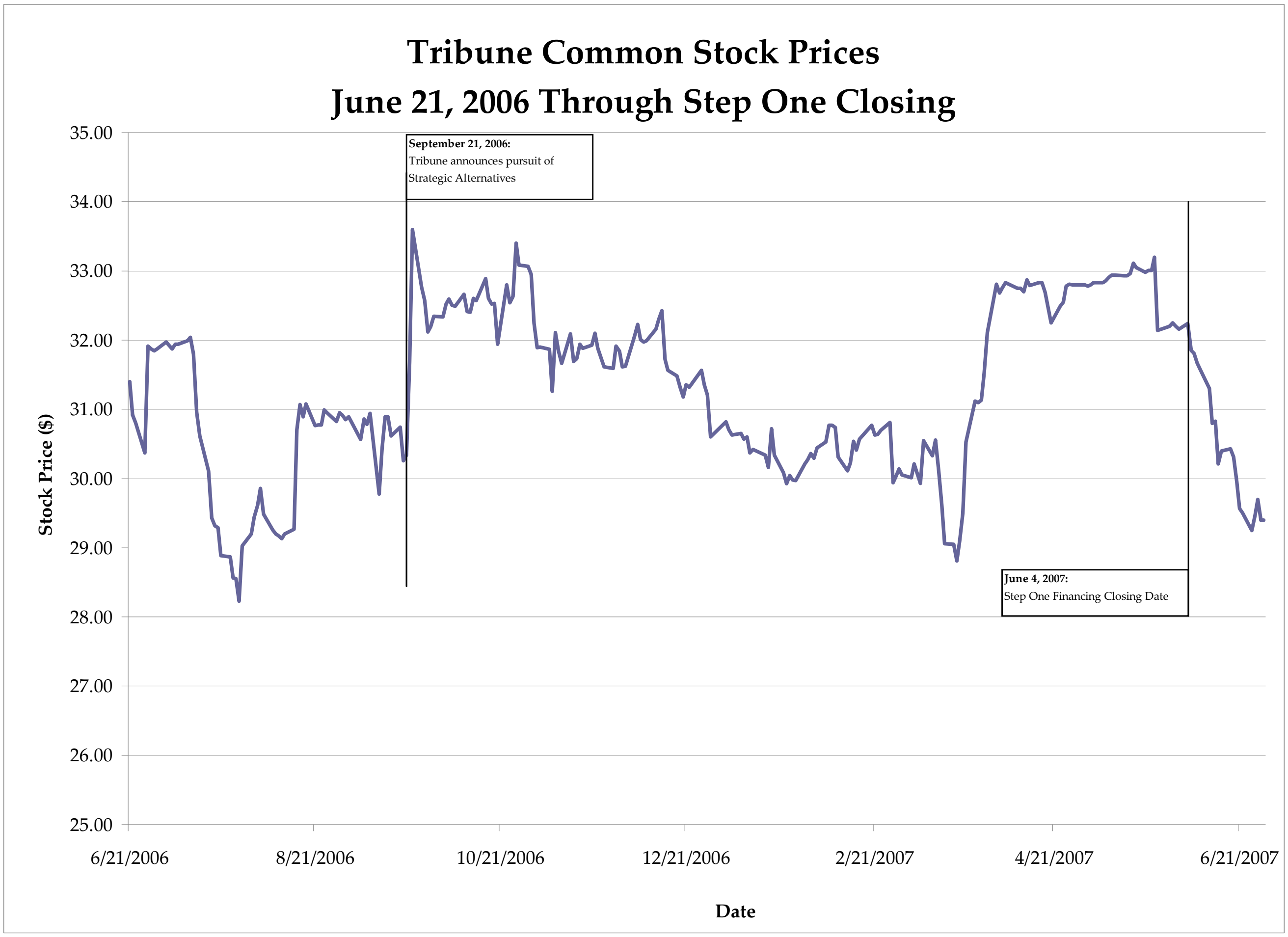
[549] This is simply a variation of the calculation in footnote 546. At a trading price of $16.39 per share and 242,833,053 shares outstanding, Tribune would have an implied equity value of approximately $4.0 billion. Therefore, if Tribune replaced this equity value with just under $4.0 billion of debt, Tribune would still be balance sheet solvent based on market indicia.

[550] *See* Ex. 1042 (Tribune Form 8-K, filed September 22, 2006).

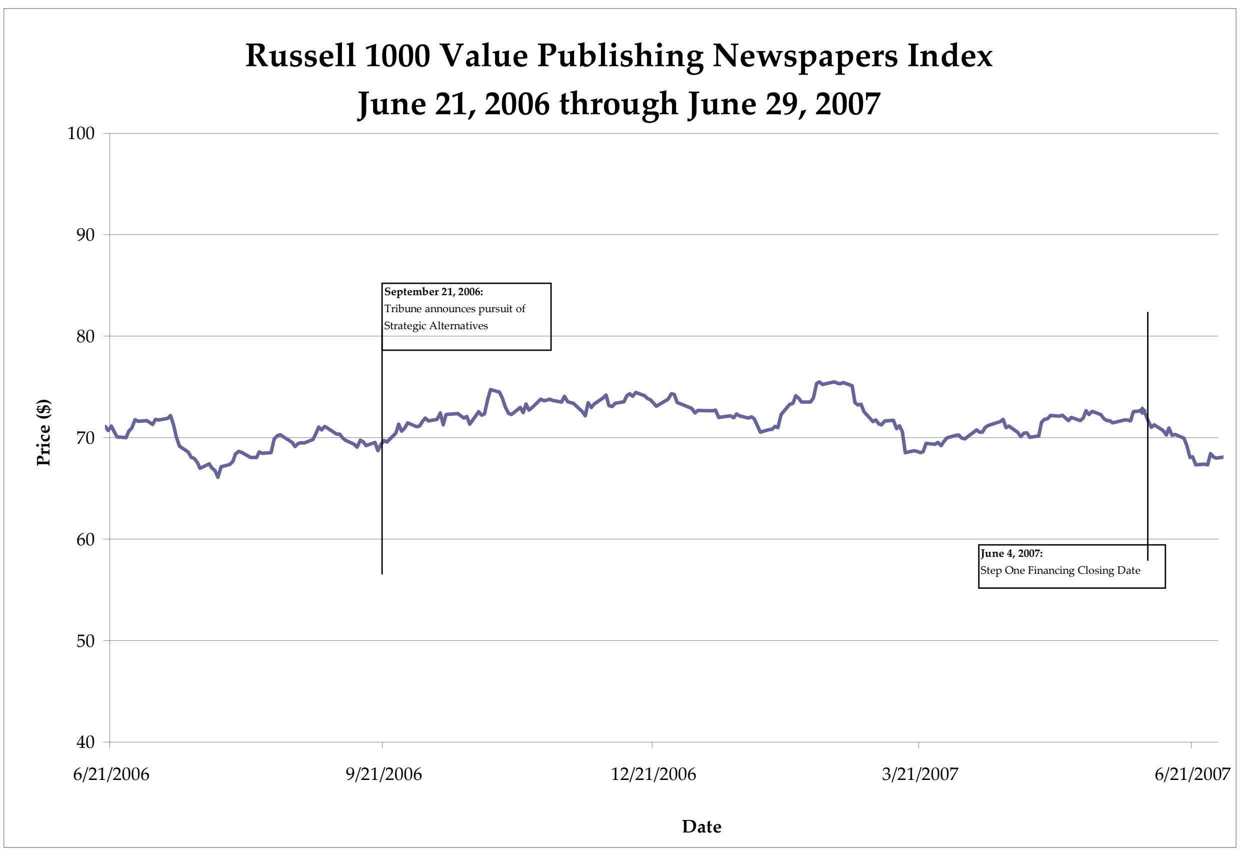
[551] For purposes of this discussion, the Examiner's financial advisor considered the trading prices of Tribune Common Stock between June 21, 2006 and September 21, 2006 (a period of three months). *See* Ex. 75 (Tribune Stock Prices).

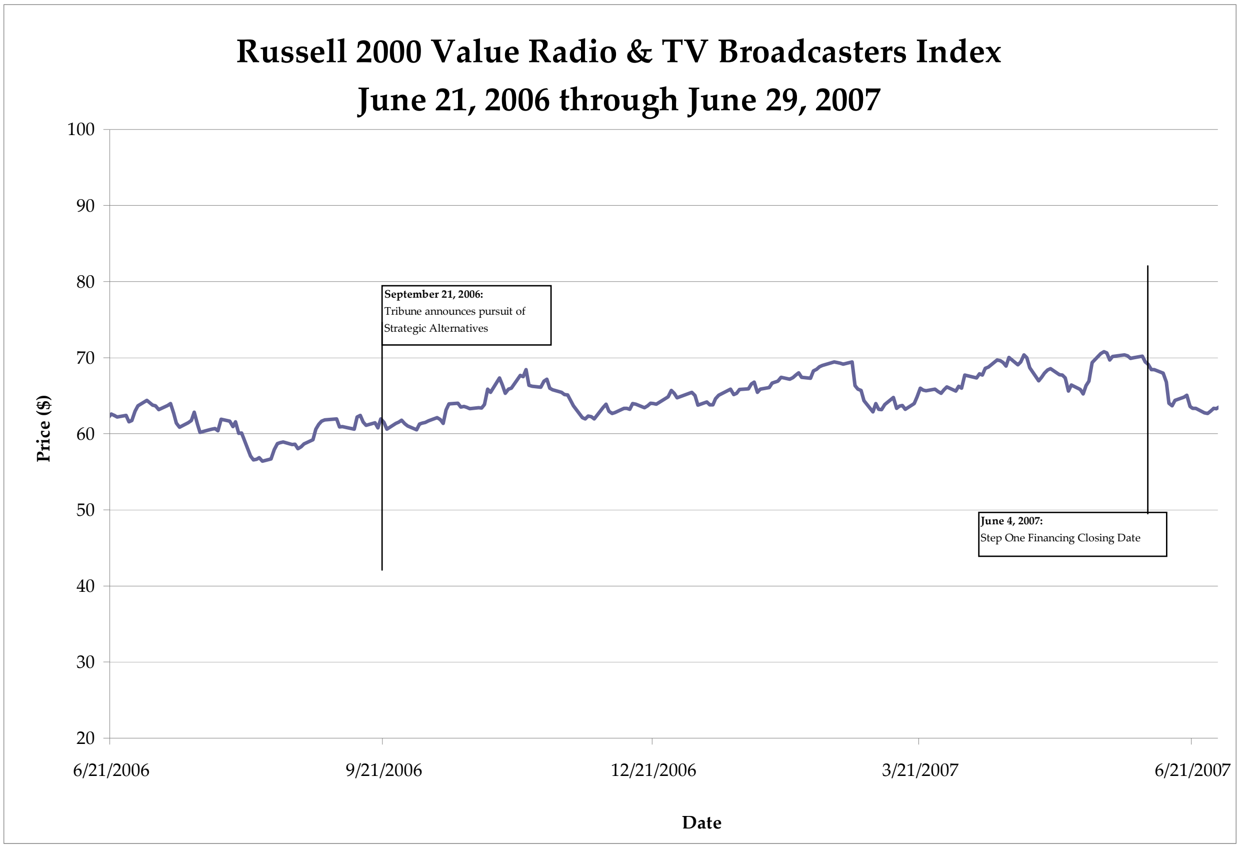
[552] Again, this is an inferential observation as opposed to an analytical result of, for example, a statistically significant events study.



If, for purposes of this analysis, the entire observed change in price that occurred on the announcement date is assumed to have resulted solely from that announcement (such that, absent the beneficial effects associated therewith, the price of the Tribune Common Stock would have remained at pre-announcement levels), it is possible to assess the likelihood that the price of the Tribune Common Stock would have declined between the announcement date and the Step One Financing Closing Date by an amount necessary to evidence a market-based condition of Tribune insolvency (*i.e.*, a stock price below $16.39). The relevant question, therefore, is whether, before the Step One Financing Closing Date, Tribune Common Stock would have traded to less than $16.39 per share absent the upward bias caused by Tribune's announcement of its intent to pursue strategic alternatives in September 2006, followed by its April 2007 announcement of the Leveraged ESOP Transactions.

As shown in the table above, from its low point of $28.23 per share on July 27, 2006, Tribune's stock price would had to have declined by almost $12 per share to reach the above-noted insolvency threshold. A decline of this magnitude would represent a drop of more than 40% from Tribune Common Stock's lowest pre-announcement trading price during the three-month period before the September 2006 announcement. Tribune's post-announcement stock price did not exhibit this degree of volatility in response to disclosures concerning Tribune's financial performance, nor, perhaps more significantly, did the stock prices of cohort companies or benchmark indices reflect anywhere near this degree of decline:





Based on the preceding analysis, which the Examiner acknowledges involves various simplifying assumptions, there is no credible basis to conclude that Tribune Common Stock would have traded below the above-noted solvency threshold, even accounting for the upward bias caused by Tribune's announcements of strategic alternatives.

Other market indicia directly support this conclusion. Tribune's publicly-held bond prices showed little change in response to the announcement of the Leveraged ESOP Transactions on April 2, 2007, despite the fact that those prices should have been influenced by the anticipated closing of Step One (and the incremental senior debt obligations associated therewith) and the possibility that Step Two might also occur, thereby further increasing the amount of senior debt comprising Tribune's capital structure. Further, by the time of the Step

One Financing Closing Date, rating agency commentary[553] revealed a downgrade of Tribune's corporate debt rating caused by the Merger announcement, a fact that should have placed additional downward pressure on Tribune's bond prices. In view of the negligible changes in Tribune's bond prices immediately after the April 2, 2007 announcement of the Leveraged ESOP Transactions through the Step One Financing Closing Date, and notwithstanding that bond prices were arguably further downwardly biased to account for the possibility of Step Two Closing (which, as noted, would result in even more debt senior to the bonds), market pricing data for the Tribune bonds corroborates a conclusion that Tribune was solvent at Step One.[554]

(B) Balance Sheet Solvency: The Auction Process and Contemporaneous Valuations.

Based on the evidence adduced in the Investigation, the Examiner finds that the auction process that led to the Leveraged ESOP Transactions[555] furnishes additional indicia of solvency at Step One without factoring in the Step Two Debt. First, as shown above, the $34 per share Tender Offer price represents a valuation substantially greater than the aggregate indebtedness of the Tribune Entities on the Step One Financing Closing Date (without including the Step Two Debt). Second, the evidence adduced in the Investigation shows that Tribune and its Financial Advisors conducted a multi-month effort culminating in the selection of the EGI proposal. Tribune's consideration of so-called "self-help" alternatives to third-party bids (such as a leveraged recapitalization of Tribune, a spin-off of the Broadcasting Segment and leveraged

[553] *See, e.g.*, Ex. 80 (Standard & Poor's Research Report, dated April 2, 2007); Ex. 216 (Standard & Poor's Recovery Report, dated April 19, 2007); Ex. 1060 (Standard & Poor's Ratings Direct, dated May 18, 2007).

[554] Certain Parties have asserted that bond prices trading below par evidence insolvency. This assertion is erroneous because yield differences associated with interest rate changes and returns on comparable risk investments can explain such phenomena. Here, Tribune's equity prices belie insolvency assertions based solely on observed bond prices trading at discounts to par.

[555] *See* Report at § III.D.1.

recapitalization of the Publishing Segment, and a leveraged recapitalization combined with a spin-off and sale of the Broadcasting Segment) and communication of those alternatives to bidders, provided an important counterweight to the third-party bids and helped exert pressure on EGI to increase its offer as the process reached conclusion.[556] Third, the competing third-party bids from Broad/Yucaipa and to a lesser degree, Carlyle, belie any contention that the Zell Group was the "only game in town." Although it is true that the March 29, 2007 Broad/Yucaipa Proposal was not accompanied by any further documents or financing commitments, the Examiner cannot conclude that this proposal was not serious (and the evidence shows that the Special Committee gave this proposal serious attention). The frenetic activity that preceded the Tribune Board's acceptance of the EGI proposal resulted in further improvements in EGI's proposal. Although some participants in the auction process expressed concern that the auction was on the verge of failing or already had failed, these assessments proved premature. In sum, the Examiner concludes that, contrary to the contention of certain Parties, the auction process furnishes meaningful evidence of contemporaneous valuations in the marketplace pointing toward Step One solvency for Tribune.

Given the substantial positive equity values reached in contemporaneous valuations of Tribune performed at or in connection with the auction process, those valuations would have to have been profoundly flawed for Tribune to have been insolvent. In the course of its deliberations, the Special Committee considered equity and asset values associated with several alternatives to the Leveraged ESOP Transactions as evaluated by the Financial Advisors.[557] This process, and the valuation determinations made contemporaneously therewith, tend to corroborate the Tender Offer price and are evidence of Tribune's solvency at Step One (given

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[556] Examiner's Interview of Thomas Whayne, June 11, 2010; s*ee also* Report at § III.D.1.e.

[557] *See* Report at § III.D.1.

that the incremental Step One Debt was incurred to finance a tender for only a portion of Tribune's then-outstanding shares). In fact, several other valuation analyses performed in connection with the evaluation and/or approval of the Leveraged ESOP Transactions, and the information derived from these analyses, further substantiates Tribune's solvency at Step One.[558] Although each of these valuation analyses pre-dated the Step One Financing Closing Date and some were conducted for purposes other than an assessment of solvency per se (*e.g.*, to opine as to the fairness of transaction consideration or in connection with financing due diligence), they nonetheless provide meaningful information.

Despite making different assumptions and/or adopting different valuation methodologies, each of these "contemporaneous voices" evaluating the Leveraged ESOP Transactions before June 4, 2007 support a conclusion that Tribune was solvent (on a consolidated basis) at the Step One Financing Closing Date.[559] The following table sets forth information derived from valuation analyses conducted by each advisor in the period preceding the Step One Financing Closing Date:

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558 Ex. 1061 (JPM Project Tower Presentation, dated February 2007); Ex. 145 (Morgan Stanley Opinion Letter, dated April 1, 2007); Ex. 167 (Duff & Phelps Opinion, dated April 1, 2007); Ex. 268 (VRC Step One Solvency Opinion, dated May 9, 2007); Ex. 141 (Confidential Discussion Materials Prepared for Committee of Independent Directors of the Board of Directors of Tribune, dated March 30, 2007); Ex. 1062 (Blackstone Presentation, dated May 23, 2007).

559 Specifically, Morgan Stanley delivered a fairness opinion on April 1, 2007 in connection with its role as Financial Advisor to the Special Committee. Ex. 145 (Morgan Stanley Opinion Letter, dated April 1, 2007). Merrill, in its capacity as a Financial Advisor to Tribune, also delivered a fairness opinion on the same date. Ex. 141 (Confidential Discussion Materials Prepared for Committee of Independent Directors of the Board of Directors of Tribune, dated March 30, 2007). Duff & Phelps, retained by GreatBanc, and Blackstone, advising the McCormick Foundation, also delivered opinions. Ex. 167 (Duff & Phelps Opinion, dated April 1, 2007); Ex. 1062 (Blackstone Presentation, dated May 23, 2007). JPM also conducted analyses bearing on the value of Tribune's assets as a part of its financial evaluation. Ex. 1061 (JPM Project Tower Presentation, dated February 2007).

VALUATION COMPARISON ($mm) (1)												
	JPMorgan Feb-07		Merrill/Citigroup 3/30/2007		Morgan Stanley 4/1/2007 (2)		Duff & Phelps 4/1/2007		Blackstone 5/23/2007 (2)		VRC 5/9/2007 (3)	
	Low	High	Low	High	Low	High	Low	High	Low	High	Low	High
Comparable Companies	n/a	n/a	$ 9,995.6 (4)	$ 11,942.8 (4)	$ 9,957.0	$ 10,579.0	n/a	n/a	$ 9,345.7	$ 10,591.8	$ 11,335.8	$ 13,493.8
Precedent Transactions	n/a	n/a	n/a	n/a	$ 9,857.0	$ 12,346.0	n/a	n/a	$ 10,657.2	$ 12,127.3	$ 11,753.4	$ 13,493.8
Discounted Cash Flow	$ 10,435.0	$ 13,113.0	$ 9,807.1 (4)	$ 11,440.3 (4)	$ 9,733.0	$ 11,118.0	n/a	n/a	$ 9,095.9	$ 10,371.2	$ 9,830.7	$ 11,262.6
Sum of the Parts	$ 12,100.0	$ 14,500.0	$ 9,681.5 (4)	$ 10,937.8 (4)	$ 9,861.0	$ 12,351.0	$ 10,600.0	$ 11,800.0	$ 9,602.0	$ 10,410.0	$ 11,487.3	$ 13,972.1
Operating Asset Value (5)	**$ 11,267.5**	**$ 13,806.5**	**$ 9,828.1**	**$ 11,440.3**	**$ 9,852.0**	**$ 11,598.5**	**$ 10,600.0**	**$ 11,800.0**	**$ 9,675.2**	**$ 10,875.1**	**$ 11,101.8**	**$ 13,055.6**
Equity/Other Investments	$ 2,500.0	$ 2,500.0	$ 1,951.0	$ 1,951.0	$ 2,200.0	$ 2,200.0	$ 2,020.0	$ 2,410.0	$ 1,851.0	$ 1,938.1	$ 2,412.0	$ 2,961.0
Cash	$ 294.0	$ 294.0	$ 175.0	$ 175.0	$ 185.0	$ 185.0	$ 174.7	$ 174.7	$ 182.0	$ 182.0	$ 182.1	$ 182.1
PHONES Notes Tax Savings	$ -	$ -	$ -	$ -	$ -	$ -	$ -	$ -	$ -	$ -	$ 382.7	$ 382.7
Contingent Liabilities	$ -	$ -	$ -	$ -	$ -	$ -	$ -	$ -	$ -	$ -	$ (97.1)	$ (97.1)
Total Enterprise Value	**$ 14,061.5**	**$ 16,600.5**	**$ 11,954.1**	**$ 13,566.3**	**$ 12,237.0**	**$ 13,983.5**	**$ 12,794.7**	**$ 14,384.7**	**$ 11,708.2**	**$ 12,995.2**	**$ 13,981.5**	**$ 16,484.3**
Less: Debt at Close of Step One	$ (9,463.8) **(6)**	$ (9,463.8) **(6)**	$ (9,463.8) **(6)**	$ (9,463.8) **(6)**	$ (9,463.8) **(6)**	$ (9,463.8) **(6)**	$ (9,463.8) **(6)**	$ (9,463.8) **(6)**	$ (9,463.8) **(6)**	$ (9,463.8) **(6)**	$ (9,463.8) **(6)**	$ (9,463.8) **(6)**
Implied Step One Residual Equity Value	**$ 4,597.7**	**$ 7,136.7**	**$ 2,490.3**	**$ 4,102.5**	**$ 2,773.2**	**$ 4,519.7**	**$ 3,330.9**	**$ 4,920.9**	**$ 2,244.4**	**$ 3,531.4**	**$ 4,517.7**	**$ 7,020.5**

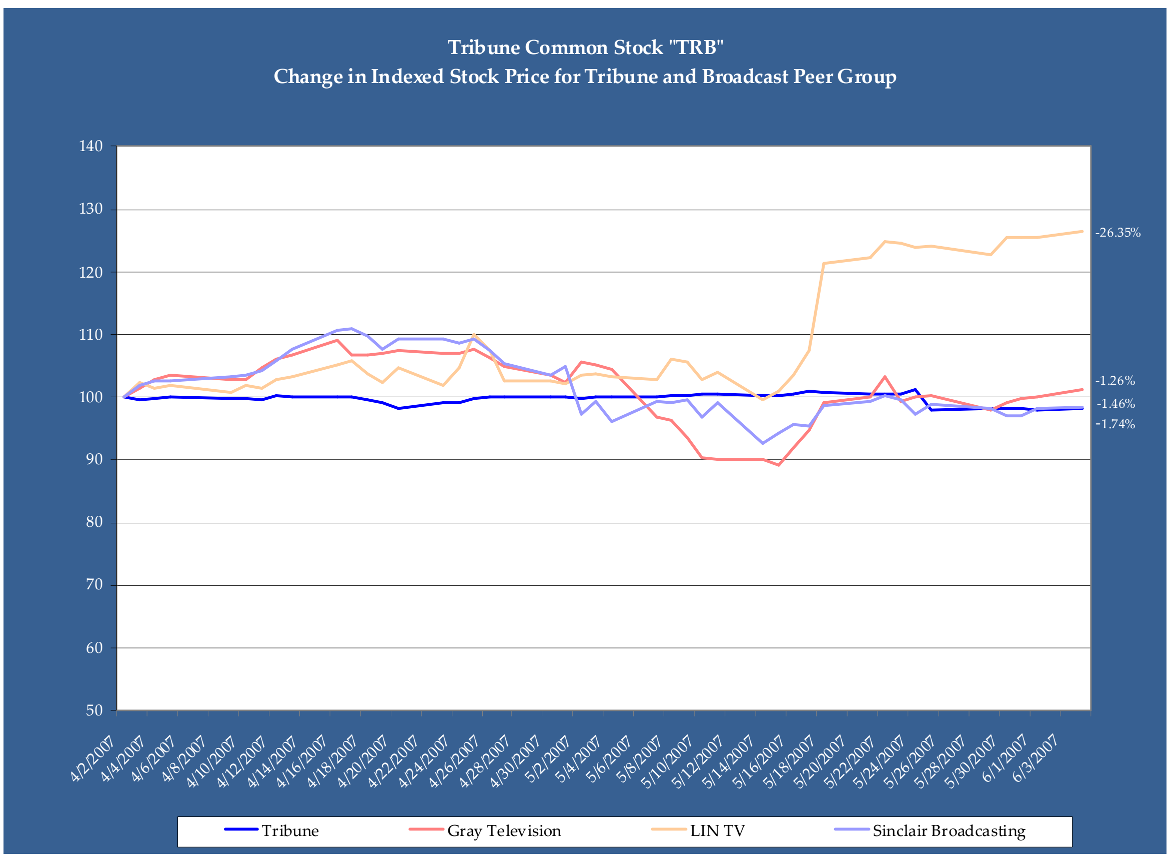
(1) General Note: With the exception of VRC, the valuation analyses set forth herein were conducted for reasons other than assessing solvency. Values attributed to certain assets by one advisor may not have been considered by others (e.g., VRC's quantification of the value of deferred tax attributes associated with the PHONES Notes). This comparative presentation is not intended to reflect an opinion regarding the veracity of the specific assets, or the value attributed thereto, by any particular advisor. Rather, the presentation is intended to illustrate the range of values ascribed by each advisor to Tribune's assets on the basis of the particular review conducted without regard to its purpose.
(2) The amounts presented herein were arrived at by examining the underlying valuation analyses conducted by each financial advisor (Ex. 1061 (JPM Project Tower Presentation, dated February 2007); Ex. 145 (Morgan Stanley Opinion Letter, dated April 1, 2007); Ex. 167 (Duff & Phelps Opinion, dated April 1, 2007); Ex. 268 (VRC Step One Solvency Opinion, dated May 9, 2007); Ex. 268 (VRC Step One Solvency Opinion, dated May 9, 2007); Ex. 141 (Confidential Discussion Materials Proposed for Committee of Independent Directors of the Board of Directors of Tribune, dated March 30, 2007); Ex. 1062 (Blackstone Presentation, dated May 23, 2007)
(3) VRC Operating Asset Value was calculated inclusive of a methodological error, the result of which is an understatement of calculated value in its DCF analysis.
(4) In order to arrive at these equity values, share prices located in the Merrill valuation were multiplied by an assumed 251.25 million shares outstanding. From that amount, Equity/Other Investments was subtracted, as was $5.1 billion in debt.
(5) Operating Asset Value is assumed to be an average of the approaches quantified in each valuation.
(6) Debt at close of Step One is assumed to be VRC's amount of Step One Debt per VRC's May 9, 2007 solvency analysis. Ex. 273 (Step One Solvency Analysis, dated May 9, 2007).

Although certain assumptions underlying these analyses may be subject to challenge, any realistic adjustments to the values presented would be insufficient to demonstrate that Tribune was insolvent on the Step One Financing Closing Date. The table below shows the degree of "overstatement" in value of each advisor's determination that would be necessary in order for the Step One Debt to consume the residual value of Tribune's equity value implied by each of the Tribune asset values assumed by each advisor (*i.e.*, for Tribune to be insolvent):

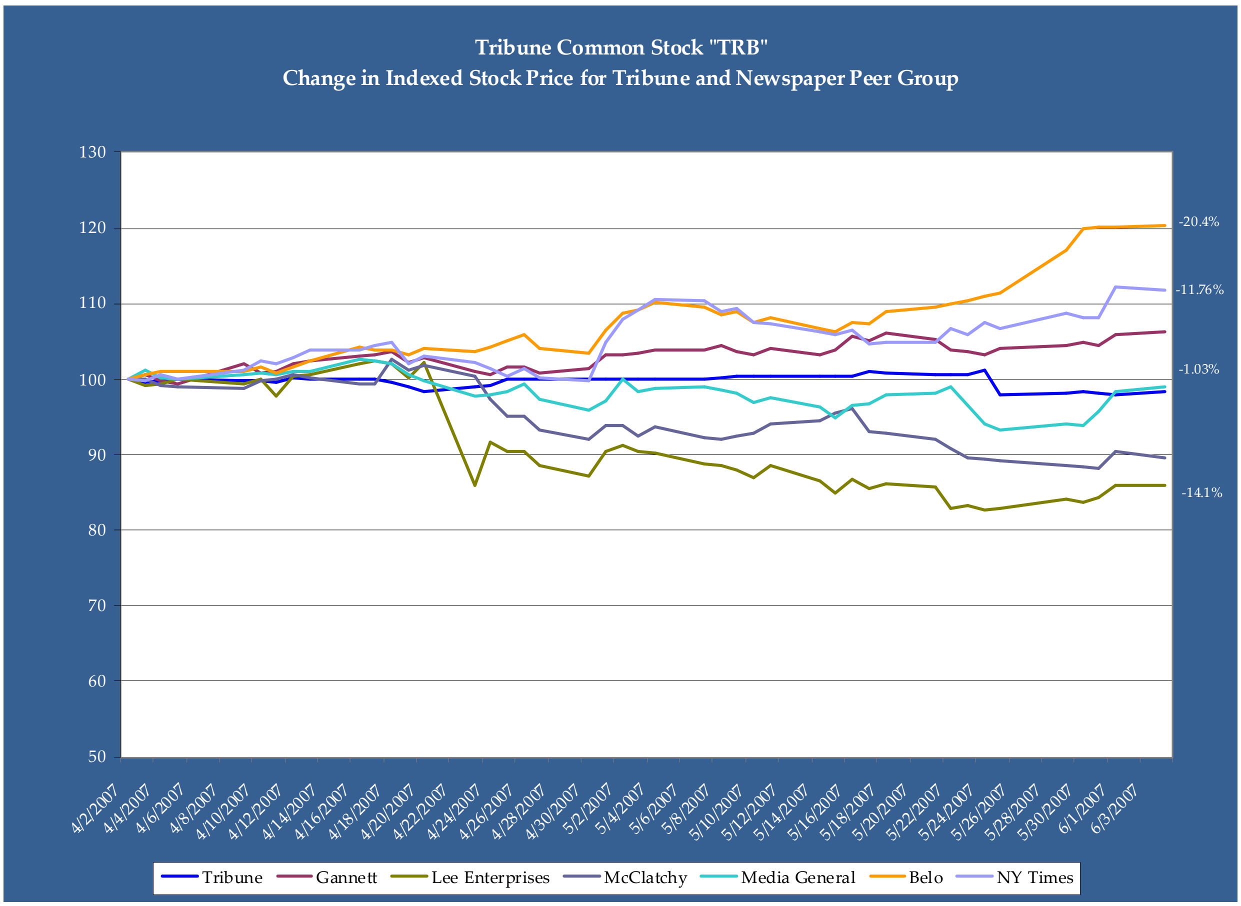
TEV DECLINES FOR BREAKEVEN SOLVENCY AT STEP ONE												
	JPMorgan 2/2007		Merrill/Citigroup 3/30/2007		Morgan Stanley 4/1/2007		Duff & Phelps 4/1/2007		Blackstone 5/23/2007		VRC 5/9/2007	
	Low	High	Low	High	Low	High	Low	High	Low	High	Low	High
Implied TEV	$ 14,061.5	$ 16,600.5	$ 11,954.1	$ 13,566.3	$ 12,237.0	$ 13,983.5	$ 12,794.7	$ 14,384.7	$ 11,708.2	$ 12,995.2	$ 13,981.5	$ 16,484.3
Less Step One Debt	($ 9,463.8)	($ 9,463.8)	($ 9,463.8)	($ 9,463.8)	($ 9,463.8)	($ 9,463.8)	($ 9,463.8)	($ 9,463.8)	($ 9,463.8)	($ 9,463.8)	($ 9,463.8)	($ 9,463.8)
Implied Equity Value	**$ 4,597.7**	**$ 7,136.7**	**$ 2,490.3**	**$ 4,102.5**	**$ 2,773.2**	**$ 4,519.7**	**$ 3,330.9**	**$ 4,920.9**	**$ 2,244.4**	**$ 3,531.4**	**$ 4,517.7**	**$ 7,020.5**
Implied Equity Value as a % of TEV (i.e., Percentage Decline Necessary to Demonstrate Breakeven Solvency)	32.7%	43.0%	20.8%	30.2%	22.7%	32.3%	26.0%	34.2%	19.2%	27.2%	32.3%	42.6%

In sum, the contemporaneous analyses would have had to been wrong by substantial percentages if Tribune were in fact insolvent. Even though each analysis was prepared before the Step One Financing Closing Date, any decline in value due to market conditions between the date of each valuation analysis and the Step One Financing Closing Date likely would be insufficient to support a further adjustment that would tip Tribune into insolvency at Step One.[560]

560 For example, some of the cohort companies identified by the advisors experienced declines in market capitalization between April 2007 and June 4, 2007. Those declines were modest in comparison to the degree of value change necessary to render Tribune insolvent at Step One.



In light of the Examiner's firm conclusion, based on the preceding considerations that Tribune was solvent at the Step One Financing Closing Date if just the Step One Debt is considered, the Examiner did not perform additional quantitative analyses or adjust for the previously-identified deficiencies informing VRC's Step One solvency analyses. The Examiner finds with a high degree of likelihood that despite containing significant mistakes, as discussed



And, although analyst expectations of Tribune revenue and earnings were declining during this period, the percentage declines in near-term expected EBITDA would be insufficient to support a conclusion of insolvency.

TRIBUNE IBES ESTIMATES ($mm)

	2007 Estimates				2008 Estimates			
	Revenue		EBITDA		Revenue		EBITDA	
	Median	Mean	Median	Mean	Median	Mean	Median	Mean
March 31, 2007	$ 5,367.8	$ 5,369.0	$ 1,277.6	$ 1,255.1	$ 5,399.6	$ 5,412.5	$ 1,237.1	$ 1,244.5
April 30, 2007	$ 5,323.0	$ 5,318.1	$ 1,211.8	$ 1,214.1	$ 5,288.1	$ 5,327.2	$ 1,239.6	$ 1,214.4
May 31, 2007	$ 5,335.5	$ 5,323.9	$ 1,218.4	$ 1,217.4	$ 5,304.2	$ 5,335.4	$ 1,244.3	$ 1,219.7
June 30, 2007	$ 5,248.5	$ 5,250.4	$ 1,179.5	$ 1,180.2	$ 5,257.6	$ 5,217.7	$ 1,164.2	$ 1,170.5

in another part of the Report,[561] and assuming the Step Two Debt is not added into the mix, VRC's ultimate conclusion that the Step One Transactions would leave Tribune solvent was correct.

(ii) Step One: Collapse—Inclusion of Step Two Debt at Step One.[562]

The inclusion of the financial consequences of the Step Two Transactions to the solvency analysis at Step One requires, as threshold matters, a determination and assessment of the amount of incremental Step Two Debt that should be included in that analysis as well as the potential economic benefits derived from the consummation of the Merger. Without doubt, including the Step Two Debt in this analysis, if legally appropriate,[563] increases the probability that Tribune was rendered insolvent at Step One.

Regarding the amount of debt that would be included in this scenario, the Examiner finds that it is appropriate to consider the approximately $4.2 billion of additional LBO Lender Debt that, at the time of the Step One Financing Closing Date, was expected to be incurred by Tribune in connection with the Step Two Transactions. Although this exceeds the amount of debt that Tribune actually incurred at Step Two, using the higher expected amount is consistent with using the Step One Financing Closing Date as the date for valuation. Using the actual amount incurred at the Step Two Financing Closing Date would violate the fundamental principle that valuation is

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561 *See* Report at § III.E.3.c.

562 As explained above, the Examiner has determined that the Step One Financing Closing Date and Step Two Financing Closing Date are the correct dates for assessing the solvency of the Tribune Entities. *See* Report at § IV.B.5.d.(1). However, this determination does not readily answer which of those two dates should be used for the solvency assessment in a collapse scenario. The Examiner believes that, consistent with the underlying principles governing collapse discussed at length on other Sections of the Report, the correct date for assessing solvency in a collapse scenario would be the Step One Financing Closing Date (the date in which the Leveraged ESOP Transactions would be deemed to have occurred under a collapse scenario).

563 The Examiner has concluded that it is not legally appropriate to collapse the Step One Transactions and the Step Two Transactions. *See* Report at § IV.B.5.b.

not a retroactive exercise, but rather, is based on information reasonably available at the relevant moment of valuation. For the same reason, because the solvency determination is made as of the Step One Financing Closing Date, it is appropriate in this scenario to disregard Tribune's post-Step One financial performance.

As described previously, financial advisors consulting on, or participating in, the Leveraged ESOP Transactions before the Step One Financing Closing Date concluded as follows:[564]

VALUATION COMPARISON ($mm) (1)

	JPMorgan 2/2007		Merrill/Citigroup 3/30/2007		Morgan Stanley 4/1/2007 (2)		Duff & Phelps 4/1/2007		Blackstone 5/23/2007 (2)		VRC 5/9/2007 (3)	
	Low	High	Low	High	Low	High	Low	High	Low	High	Low	High
Comparable Companies	n/a	n/a	$ 9,995.6 (4)	$ 11,942.8 (4)	$ 9,957.0	$ 10,579.0	n/a	n/a	$ 9,345.7	$ 10,591.8	$ 11,335.8	$ 13,493.8
Precedent Transactions	n/a	n/a	n/a	n/a	$ 9,857.0	$ 12,346.0	n/a	n/a	$ 10,657.2	$ 12,127.3	$ 11,753.4	$ 13,493.8
Discounted Cash Flow	$ 10,435.0	$ 13,113.0	$ 9,807.1 (4)	$ 11,440.3 (4)	$ 9,733.0	$ 11,118.0	n/a	n/a	$ 9,095.9	$ 10,371.2	$ 9,830.7	$ 11,262.6
Sum of the Parts	$ 12,100.0	$ 14,500.0	$ 9,681.5 (4)	$ 10,937.8 (4)	$ 9,861.0	$ 12,351.0	$ 10,600.0	$ 11,800.0	$ 9,602.0	$ 10,410.0	$ 11,487.3	$ 13,972.1
Operating Asset Value (5)	**$ 11,267.5**	**$ 13,806.5**	**$ 9,828.1**	**$ 11,440.3**	**$ 9,852.0**	**$ 11,598.5**	**$ 10,600.0**	**$ 11,800.0**	**$ 9,675.2**	**$ 10,875.1**	**$ 11,101.8**	**$ 13,055.6**
Equity/Other Investments	$ 2,500.0	$ 2,500.0	$ 1,951.0	$ 1,951.0	$ 2,200.0	$ 2,200.0	$ 2,020.0	$ 2,410.0	$ 1,851.0	$ 1,938.1	$ 2,412.0	$ 2,961.0
Cash	$ 294.0	$ 294.0	$ 175.0	$ 175.0	$ 185.0	$ 185.0	$ 174.7	$ 174.7	$ 182.0	$ 182.0	$ 182.1	$ 182.1
PHONES Notes Tax Savings	$ -	$ -	$ -	$ -	$ -	$ -	$ -	$ -	$ -	$ -	$ 382.7	$ 382.7
Contingent Liabilities	$ -	$ -	$ -	$ -	$ -	$ -	$ -	$ -	$ -	$ -	$ (97.1)	$ (97.1)
Total Enterprise Value	**$ 14,061.5**	**$ 16,600.5**	**$ 11,954.1**	**$ 13,566.3**	**$ 12,237.0**	**$ 13,983.5**	**$ 12,794.7**	**$ 14,384.7**	**$ 11,708.2**	**$ 12,995.2**	**$ 13,981.5**	**$ 16,484.3**
Less: Debt at Close of Step One	$ (9,463.8) (6)	$ (9,463.8) (6)	$ (9,463.8) (6)	$ (9,463.8) (6)	$ (9,463.8) (6)	$ (9,463.8) (6)	$ (9,463.8) (6)	$ (9,463.8) (6)	$ (9,463.8) (6)	$ (9,463.8) (6)	$ (9,463.8) (6)	$ (9,463.8) (6)
Implied Step One Residual Equity Value	**$ 4,597.7**	**$ 7,136.7**	**$ 2,490.3**	**$ 4,102.5**	**$ 2,773.2**	**$ 4,519.7**	**$ 3,330.9**	**$ 4,920.9**	**$ 2,244.4**	**$ 3,531.4**	**$ 4,517.7**	**$ 7,020.5**

(1) General Note: With the exception of VRC, the valuation analyses set forth herein were conducted for reasons other than assessing solvency. Values attributed to certain assets by one advisor may not have been considered by others (e.g., VRC's quantification of the value of deferred tax attributes associated with the PHONES Notes). This comparative presentation is not intended to reflect an opinion regarding the veracity of the specific assets, or the value attributed thereto, by any particular advisor. Rather, the presentation is intended to illustrate the range of values ascribed by each advisor to Tribune's assets on the basis of the particular review conducted without regard to its purpose.
(2) The amounts presented herein were arrived at by examining the underlying valuation analyses conducted by each financial advisor. Ex. 1061 (JPM Project Tower Presentation, dated February 2007); Ex. 145 (Morgan Stanley Opinion Letter, dated April 1, 2007); Ex. 167 (Duff & Phelps Opinion, dated April 1, 2007); Ex. 268 (VRC Step One Solvency Opinion, dated May 9, 2007); Ex. 141 (Confidential Discussion Materials Proposed for Committee of Independent Directors of the Board of Directors of Tribune, dated March 30, 2007); Ex. 1062 (Blackstone Presentation, dated May 23, 2007)
(3) VRC Operating Asset Value was calculated inclusive of a methodological error, the result of which is an understatement of calculated value in its DCF analysis.
(4) In order to arrive at these equity values, share prices located in the valuation were multiplied by an assumed 251.25 million shares outstanding. From that amount, Equity/Other Investments was subtracted, as was $5.1 billion in debt.
(5) Operating Asset Value is assumed to be an average of the approaches quantified in each valuation.
(6) Debt at close of Step One is assumed to be VRC's amount of Step One Debt per VRC's May 9, 2007 solvency analysis. Ex. 273 (Step One Solvency Analysis, dated May 9, 2007).

Although perhaps overly-simplistic for purposes of drawing conclusions regarding Step One solvency in a "collapse" environment, the introduction of the Step Two Debt, in isolation, causes the "equity cushions" implied by the advisors' analyses to significantly decline or evaporate entirely:

564 Other economic benefits associated with the closing of the Step Two Transactions were contemplated as well, including the avoidance of Tribune 401(k) cash contributions and the possible avoidance of certain (but not all) SEC filing requirements. Ex. 242 (Rating Agency Presentation, dated March 2007).

VALUATION COMPARISON ($mm) (1)												
	JPMorgan Feb. 2007		Merrill/Citigroup 3/30/2007		Morgan Stanley 4/1/2007 (2)		Duff & Phelps 4/1/2007		Blackstone 5/23/2007 (2)		VRC 5/9/2007 (3)	
	Low	**High**	**Low**	**High**	**Low**	**High**	**Low**	**High**	**Low**	**High**	**Low**	**High**
Comparable Companies	n/a	n/a	$ 9,995.6 **(4)**	$ 11,942.8 **(4)**	$ 9,957.0	$ 10,579.0	n/a	n/a	$ 9,345.7	$ 10,591.8	$ 11,335.8	$ 13,493.8
Precedent Transactions	n/a	n/a	n/a	n/a	$ 9,857.0	$ 12,346.0	n/a	n/a	$ 10,657.2	$ 12,127.3	$ 11,753.4	$ 13,493.8
Discounted Cash Flow	$ 10,435.0	$ 13,113.0	$ 9,807.1 **(4)**	$ 11,440.3 **(4)**	$ 9,733.0	$ 11,118.0	n/a	n/a	$ 9,095.9	$ 10,371.2	$ 9,830.7	$ 11,262.6
Sum of the Parts	$ 12,100.0	$ 14,500.0	$ 9,681.5 **(4)**	$ 10,937.8 **(4)**	$ 9,861.0	$ 12,351.0	$ 10,600.0	$ 11,800.0	$ 9,602.0	$ 10,410.0	$ 11,487.3	$ 13,972.1
Operating Asset Value (5)	**$ 11,267.5**	**$ 13,806.5**	**$ 9,828.1**	**$ 11,440.3**	**$ 9,852.0**	**$ 11,598.5**	**$ 10,600.0**	**$ 11,800.0**	**$ 9,675.2**	**$ 10,875.1**	**$ 11,101.8**	**$ 13,055.6**
Equity/Other Investments	$ 2,500.0	$ 2,500.0	$ 1,951.0	$ 1,951.0	$ 2,200.0	$ 2,200.0	$ 2,020.0	$ 2,410.0	$ 1,851.0	$ 1,938.1	$ 2,412.0	$ 2,961.0
Cash	$ 294.0	$ 294.0	$ 175.0	$ 175.0	$ 185.0	$ 185.0	$ 174.7	$ 174.7	$ 182.0	$ 182.0	$ 182.1	$ 182.1
PHONES Notes Tax Savings	$ -	$ -	$ -	$ -	$ -	$ -	$ -	$ -	$ -	$ -	$ - **(6)**	$ -
Contingent Liabilities	$ -	$ -	$ -	$ -	$ -	$ -	$ -	$ -	$ -	$ -	$ (97.1)	$ (97.1)
Total Enterprise Value	**$ 14,061.5**	**$ 16,600.5**	**$ 11,954.1**	**$ 13,566.3**	**$ 12,237.0**	**$ 13,983.5**	**$ 12,794.7**	**$ 14,384.7**	**$ 11,708.2**	**$ 12,995.2**	**$ 13,598.8**	**$ 16,101.6**
Less: Debt at Close of Step One	$ (9,463.8) **(7)**	$ (9,463.8) **(7)**	$ (9,463.8) **(7)**	$ (9,463.8) **(7)**	$ (9,463.8) **(7)**	$ (9,463.8) **(7)**	$ (9,463.8) **(7)**	$ (9,463.8) **(7)**	$ (9,463.8) **(7)**	$ (9,463.8) **(7)**	$ (9,463.8) **(7)**	$ (9,463.8) **(7)**
Implied Step One Residual Equity Value	**$ 4,597.7**	**$ 7,136.7**	**$ 2,490.3**	**$ 4,102.5**	**$ 2,773.2**	**$ 4,519.7**	**$ 3,330.9**	**$ 4,920.9**	**$ 2,244.4**	**$ 3,531.4**	**$ 4,135.0**	**$ 6,637.8**
Less: Debt at Close of Step Two	$ (4,205.0)	$ (4,205.0)	$ (4,205.0)	$ (4,205.0)	$ (4,205.0)	$ (4,205.0)	$ (4,205.0)	$ (4,205.0)	$ (4,205.0)	$ (4,205.0)	$ (4,205.0)	$ (4,205.0)
Implied Step One Residual Equity Value	**$ 392.7**	**$ 2,931.7**	**$ (1,714.7)**	**$ (102.5)**	**$ (1,431.8)**	**$ 314.7**	**$ (874.1)**	**$ 715.9**	**$ (1,960.6)**	**$ (673.6)**	**$ (70.0)**	**$ 2,432.8**

(1) General Note: With the exception of VRC, the valuation analyses set forth herein were conducted for reasons other than assessing solvency. Values attributed to certain assets by one advisor may not have been considered by others (e.g., VRC's quantification of the value of deferred tax attributes associated with the PHONES Notes). This comparative presentation is not intended to reflect an opinion regarding the veracity of the specific assets, or the value attributed thereto, by any particular advisor. Rather, the presentation is intended to illustrate the range of values ascribed by each advisor to Tribune's assets on the basis of the particular review conducted without regard to its purpose.

(2) The amounts presented herein were arrived at by examining the underlying valuation analyses conducted by each financial advisor (Ex. 1061 (JPM Project Tower Presentation, dated February 2007); Ex. 145 (Morgan Stanley Opinion Letter, dated April 1, 2007); Ex 167 (Duff & Phelps Opinion, dated April 1, 2007); Ex 268 (VRC Step One Solvency Opinion, dated May 9, 2007); Ex 141 (Confidential Discussion Materials Proposed for Committee of Independent Directors of the Board of Directors of Tribune, dated March 30, 2007); Ex 1062 (Blackstone Presentation, dated May 23, 2007)

(3) VRC Operating Asset Value was calculated inclusive of a methodological error, the result of which is an understatement of calculated value in its DCF analysis.

(4) In order to arrive at these equity values, share prices located in the Merrill valuation were multiplied by an assumed 251.25 million shares outstanding. From that amount, Equity/Other Investments was subtracted, as was $5.1 billion in debt.

(5) Operating Asset Value is assumed to be an average of the approaches quantified in each valuation.

(6) Because Tribune would not be subject to taxes upon closing of Step Two, the tax savings of the PHONES Notes would no longer be applicable.

(7) Debt at close of Step One is assumed to be VRC's amount of Step One Debt per VRC's May 9, 2007 solvency analysis. Ex. 273 (Step One Solvency Analysis, dated May 9, 2007).

The proposed S-Corporation/ESOP structure, effective upon the Merger, enabled Tribune to avoid tax on non-gain related earnings following the Step Two Closing. The value of any such tax savings is of paramount importance in considering solvency in a collapse scenario. Although the value of those savings depends on assumptions regarding the level of taxable earnings informing each analyst's projections of EBIT as well as specific assumptions informing computations of, for example, discount rates (including costs of debt and equity, and the relative weighting of debt in assumed capital structures, etc.), those expected savings plainly are significant using the range of Tribune pre-tax earnings forecasted by each analyst.[565] Thus, even in circumstances in which implied Tribune residual equity values turn negative when the Step Two Debt is added as of the Step One Financing Closing Date, the tax savings (if recognized as

[565] For example, VRC estimated the value of the S-Corporation/ESOP tax savings at almost $1.4 billion in its May 17, 2007 analysis, and Duff & Phelps estimated the value as between $977 million and almost $1.2 billion in its "April 1, 2007 Tribune Company ESOP Analysis, Preliminary Draft." Ex. 283 (VRC Solvency Analysis, dated May 17, 2007); Ex. 1063 (Duff & Phelps Preliminary ESOP Analysis, dated April 1, 2007).

an additional "asset" for solvency assessment purposes) could serve as an important "add-back."[566]

One can argue that, in a scenario in which indebtedness that was not incurred until the Step Two Financing Closing Date is added to Tribune's balance sheet at Step One, it is appropriate to include the tax savings "add-back" in the Step One solvency determination. In other words, Tribune would only incur the Step Two Debt if the Merger occurred, which itself would generate these tax savings that clearly have value.[567] Thus, arguably, inclusion of that value in the solvency determination goes hand in hand with collapse. Based on applicable valuation methodologies, however, the Examiner finds that it is reasonably likely that a court would not include the value associated with Tribune's ability to avoid taxes following Step Two because any such value is unique to the structure of ownership imposed by the Merger, and as such, does not represent a "fair market value" asset of Tribune.[568] In other words, just as it is appropriate to disregard these savings in connection with the Step Two solvency determination,

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[566] Certain presentations, for example, did not attribute value to PHONES Notes tax savings (although, arguably, in a "collapse" environment, no such savings would be obtainable), or include a recognition of other "contingent liabilities" that were estimated by management in connection with VRC's Step One solvency opinion. Ex. 268 (VRC Step One Solvency Opinion, dated May 9, 2007). The presentations set forth herein have not been normalized to account for such differences.

[567] *See* Report at § IV.B.5.c(6).

[568] Fair market value is a conversion to cash equivalency that determines the value of an asset (here, Tribune's consolidated portfolio of assets) on the basis of an amount of money that would be exchanged in a hypothetical sale where both the buyer and seller are fully informed and neither is compelled to transact. *See* footnotes 87, 387 (containing substantial discussions regarding this matter). *See also Liquidation Trust v. Fleet Retail Fin. Grp. (In re Hechinger Inv. Co.)*, 278 F. App'x 125, 129-30 (3d Cir. 2008); *Amerada Hess Corp. v. Comm'r*, 517 F.2d 75, 83 (3d Cir. 1975) ("According to the classic formulation, 'fair market value is the price at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or to sell and both having reasonable knowledge of relevant facts.'") (citations omitted). IRS Revenue Ruling 59-60, for example, defines fair market value as follows:

> Section 20.2031-1(b) of the Estate Tax Regulations (section 81.10 of the Estate Tax Regulations 105) and section 25.2512-1 of the Gift Tax Regulations (section 86.19 of Gift Tax Regulations 108) define fair market value, in effect, as the price at which the property would change hands between a willing buyer and a willing seller when the former is not under any compulsion to buy and the latter is not under any compulsion to sell, both parties having reasonable knowledge of relevant facts. Court decisions frequently state in addition that the hypothetical buyer and seller are assumed to be able, as well as willing, to trade and to be well informed about the property and concerning the market for such property.

so must these savings be disregarded even in the "collapse" scenario. Based on the above-noted contemporaneous valuations, as adjusted, if the value of the S-Corporation/ESOP tax attributes is excluded from consideration, but the contemplated Step Two Debt is included, the dial tends to point toward insolvency as of the Step One Financing Closing Date.

A market-based argument supports this conclusion. In the period before the Step One Financing Closing Date, Tribune Common Stock traded below the $34 per share Tender Offer price. This is not unusual in and of itself because most acquisitions of public companies take place at a premium to historical stock prices.[569] The acquisition of Tribune Common Stock using debt in an amount equivalent to the Tender Offer price, but higher than the actual trading value of Tribune Common Stock, tends to support the view that Tribune was insolvent on a market basis. Indeed, even though, as discussed previously, Tribune Common Stock undoubtedly exhibited an upward bias based on the prospect of the Merger, the stock nonetheless traded lower than the Tender Offer price.

Two countervailing arguments in ascending order of importance, however, undercut the preceding argument that Tribune was rendered insolvent under a collapse scenario.

First, the trading price of Tribune Common Stock price reflects the price paid to dispose of and acquire minority interests in Tribune, whereas, under the Leveraged ESOP Transactions, Tribune would be sold to a new control owner who would obtain control. Control premiums, as noted, can cause parties to pay premiums above prevailing trading values.[570] Thus, the fact that Tribune Common Stock traded somewhat (but not significantly) lower than the Tender Offer

[569] These premiums are referred to as "control premiums," and there is substantial empirical literature devoted to that subject. *See, e.g.,* SHANNON R. PRATT, ET AL., VALUING A BUSINESS 343-61 (4th ed. 2000).

[570] *See, e.g.*, Ex. 1064 (Mergerstat Control Premium Study, 4th Quarter 2007).

price during the Step One timeframe would be expected and does not necessarily mean that the equity in Tribune was worth less than $34 in the new owner's hands.[571]

Second, as noted above, Tribune's bond prices[572] exhibited little negative price reaction after the announcement of the Leveraged ESOP Transactions through the Step One Financing Closing Date.[573] The bond market invariably recognized the contemplated S-Corporation/ESOP tax attributes and the cash flow attributes that such savings would have on Tribune's ability to fund capital costs, including debt amortization and the payment of interest obligations (assuming viability). Thus, the bond markets would have implicitly factored that potential benefit into pricing decisions, along with the prospect that Step Two would close. Regardless of what might have influenced the pricing, the bonds certainly did not trade at levels that would be associated with Tribune insolvency.

In sum, if the Step Two Debt is included in determining Tribune's solvency at Step One, the case for insolvency is exceedingly close, although market-based information tends to support a conclusion that Tribune was nonetheless still solvent at Step One. On balance, the Examiner finds that it is somewhat unlikely (but, to emphasize, a very close call) that a court would conclude that Tribune was rendered insolvent at Step One even in a collapse scenario that includes the Step Two Debt.

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571 As the trading value of Tribune Common Stock went lower in the months following the Step One closing, however, this reasoning becomes more tenuous and, ultimately, untenable.

572 As noted, the Tribune bonds were junior to the debt contemplated to be incurred in connection with the Leveraged ESOP Transactions.

573 The Examiner does note that the Tribune bond prices observed as of the Step One Financing Closing Date could have been upwardly biased, given the potential that the Step Two Closing might not occur, although this probability was likely perceived to be relatively low given that Tribune equity traded at or near the Tender Offer price immediately after the closing of Step One.

(8) Examiner's Conclusions and Explanation Concerning Solvency of the Guarantor Subsidiaries at Step One.

Examiner's Conclusions:

The Examiner finds that a court is highly likely to find that the Guarantor Subsidiaries were solvent as of, and after giving effect to, the Step One Transactions if the Step Two Debt is not included for purposes of that determination. The Examiner finds that to the extent that the effects of Step Two (including the Step Two Debt) are considered in connection with Step One solvency, a court is somewhat more likely to conclude that the Guarantor Subsidiaries nevertheless were solvent when that scenario is applied to Tribune.

Explanation for the Examiner's Conclusions:

Considering Tribune's capital structure, because it is highly likely that Tribune was solvent at Step One if the Step Two Debt is not included, it necessarily follows that the Guarantor Subsidiaries were, on a consolidated basis, also solvent at Step One if the Step Two Debt is not included. Stated simply, if Tribune had sufficient value to satisfy the claims of all its creditors, including the Step One Debt, then such creditors need not look specifically to the Guarantor Subsidiaries to satisfy their claims.

Additional analysis, however, is required if the $4.2 billion of Step Two Debt contemplated at the time of the Step One Financing Closing Date is considered. As discussed in another part of the Report, the Examiner has concluded that it is appropriate to value the Guarantor Subsidiaries collectively for purposes of the solvency analysis.[574] To determine the Guarantor Subsidiaries' collective solvency (given that, under a collapse scenario, a case might be made that Tribune was insolvent at Step One),[575] the Examiner first considered Tribune's

[574] *See* Report at § IV.B.5.d.(4).

[575] *See id.* at § IV.B.5.d.(7).

solvency, independent of the value of its equity in the Guarantor Subsidiaries and its co-liability under the LBO Lender Debt. If on a stand-alone basis, Tribune had liabilities independent of debts guaranteed by its Subsidiaries greater than the value of its own assets (*i.e.,* assets owned outright by Tribune, or valuable equity ownership interests in non-Guarantor Subsidiaries), then it is possible to isolate Tribune's individual solvency and thereby draw conclusions regarding the collective solvency of the Guarantor Subsidiaries.

Two examples illustrate this methodological approach. Assume Tribune is insolvent by $100 (after giving effect to the LBO Lender Debt and Tribune's equity in the Guarantor Subsidiaries). Assume further that Tribune holds assets, independent of its equity ownership interests in the Guarantor Subsidiaries, of $150, but also is obligated on $175 of Tribune-level only debt (in other words, debt having no recourse to the Guarantor Subsidiaries and thus excluding the LBO Lender Debt). In that case, the net Tribune-only deficit of $25 can be deducted from its concluded insolvency—$100—in order to determine collective insolvency at the Guarantor Subsidiary level, namely $75. Alternatively, if Tribune were insolvent by $100 (after giving effect to the LBO Lender Debt and Tribune's equity in the Guarantor Subsidiaries), but was insolvent by $50 taking into account solely Tribune-level assets and liabilities, this would mean that $50 of the $100 of Tribune insolvency, after giving effect to the LBO Lender Debt and Tribune's equity in the Guarantor Subsidiaries, translates into $50 of collective insolvency at the Guarantor Subsidiary level.

Applying these examples to Tribune's actual capital structure at the time of Step One, based on analysis prepared by his financial advisor, the Examiner determined that Tribune, independent of the value of its ownership interests in the Guarantor Subsidiaries, held assets worth approximately $1.231 billion at, or proximate to, the Step One Financing Closing Date.[576]

These assets, and the values associated with each, are summarized in the table below:

TRIBUNE ASSETS AT JUNE 2007 ($mm)		
Assets	**June 2007**	**Notes**
Cash and Equivalents	$ 109.0	[1]
Chicago Cubs	$ 603.0	[2]
Time Warner Shares	$ 345.0	[3]
Real Estate - Baltimore/St. Louis	$ 41.0	[4]
Investments - Classified Ventures	$ 113.0	[5]
Investments - Legacy.com	$ 6.0	[5]
Equity in Non-Guarantor Subsidiaries	$ 14.0	[5]
Total Assets	**$ 1,231.0**	

Notes:
[1] Balance sheet amounts as of month end as indicated.
[2] Ex. 900 (VRC Real Estate FMV Summary).
[3] Shares outstanding at $21.23 at June 2007.
[4] Ex. 899 (Tribune Company Cubs Sale Update).
[5] Value determined from review of valuation consultants' presentations.

576 Certain data limitations precluded a precise determination of Tribune asset value on June 4, 2007. As such, proxies of value as alternative data for certain assets were considered a reliable estimate.

On the liability side, independent of the LBO Lender Debt, Tribune had Tribune-only indebtedness of approximately $2.372 billion as of the Step One Financing Date:

TRIBUNE LIABILITIES AT JUNE 2007 ($mm)

Liabilities	June 2007	Notes
Medium - Term Notes	$ 262.6	[1]
Property Financing Obligations	$ 46.2	[1]
2010 Notes	$ 449.5	[1]
Debentures	$ 716.5	[1]
Other Notes and Obligations	$ 34.1	[1]
PHONES Notes	$ 663.0	[1]
Exchangeable EGI-TRB Note	$ 200.0	[1]
Total Liabilities	**$ 2,371.9**	

Notes:
[1] Ex. 4 (Tribune 2007 Form 10-K).

As a result, independent of the LBO Lender Debt and its interest in the Guarantor Subsidiaries, Tribune had liabilities exceeding the value of its assets by approximately $1.14 billion as of the Step One Financing Closing Date:

TRIBUNE ESTIMATED DISTRIBUTABLE VALUE AT JUNE 2007 ($mm)

	June 2007	Notes
Assets	$ 1,231.0	
Liabilities	$ 2,371.9	
Distributable Value (Deficiency)	($ 1,140.9)	[1]

Notes:
[1] Excludes the impact of intercompany accounts and LBO Lender Debt.

Taking into account the preceding analysis and the analysis set forth in the preceding Section of the Report (which, as noted, admittedly includes a series of simplifying assumptions),[577] it is reasonable to infer that Tribune was solvent at Step One (without inclusion of the Step Two Debt) by an amount well in excess of $1.14 billion, if the value attributable to the Guarantor Subsidiaries, net of the LBO Lender Debt, is included. As a result, the above-calculated $1.14 billion Tribune-only deficiency should not be sufficient to render the Guarantor Subsidiaries (which represent the remainder of the value available, after giving effect to the Step One Debt) insolvent on a collective basis at Step One, if the Step Two Debt is not included in the mix.

As explained in the previous Section,[578] the Examiner found that even if $4.2 billion in (originally contemplated) Step Two Debt were included in the calculation of solvency at Step One, market-based indicia tend to support a conclusion that Tribune was solvent at Step One. The same conclusion applies to the Guarantor Subsidiaries. Indeed, by parity of reasoning based on the analysis presented above, because Tribune on a standalone basis likely *detracted* from the collective solvency of the Tribune Entities, but Tribune likely was solvent nonetheless in that scenario, the Guarantor Subsidiaries also likely would be solvent (more so) if the contemplated $4.2 billion of Step Two Debt were factored into the calculation of solvency at Step One.

(9) Examiner's Conclusions and Explanation Concerning Capital Adequacy of Tribune and the Guarantor Subsidiaries at Step One.

Examiner's Conclusions:

The Examiner finds that it is reasonably likely that a court would find that each of Tribune and the Guarantor Subsidiaries were left with adequate capital after giving effect to the Step One Transactions.

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577 *See* Report at § IV.B.5.d.(7).

578 *See id.*

Explanation of Examiner's Conclusions:

In assessing Tribune's capital adequacy at Step One, the Examiner's financial advisor reviewed the May 17, 2007 cash flow projection model developed by VRC, which in turn was based on Tribune's projections.[579] This model appears to have served as the basis for VRC's opinions regarding Tribune's capital adequacy (as well as Tribune's reasonable ability to pay its debts) in VRC's "bring down" solvency opinion, dated May 24, 2007.[580] VRC's May 17, 2007 model included both a base case cash flow forecast (based on management's projections) and a stress case scenario designed to assess Tribune's ability to meet its cash requirements (both operational and, financing related) while maintaining compliance with covenants.[581]

Certain Parties contended that reliance on these projections was unreasonable in light of the negative variances between actual results for Tribune after February 2007 but before the Step One Financing Closing Date. For the first three months of 2007, Tribune's year-to-date actual results approximated the results anticipated in Tribune's February 2007 plan on a consolidated basis. Although April 2007 (the last month in which Brown Book financial performance data would have been available prior to June 4, 2007) showed negative variances to the 2007 operating plan,[582] in the Examiner's view these variances were not significant enough to justify revision to the 2007 operating plan, which includes a much longer horizon. Preparation of the

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579 VRC did not include in its projections of cash flows certain cash savings anticipated by management that were incorporated into the projections provided to VRC. Specifically, although management forecasted operating cash flows that included the expectation of $20 million in annual "Other Expense Reductions" (apparently related to savings anticipated to be derived from taking Tribune private), VRC did not include these savings in "Adjusted EBITDA" in its May 17, 2007 model. Apart from this difference, all revenue and expense amounts can be reconciled between the VRC May 17, 2007 model and May 14, 2007 projections prepared by management. *Compare* Ex. 83 (ESOP Transaction Model, dated May 14, 2007) *with* Ex. 1104 (VRC Solvency Analysis, dated May 17, 2007).

580 *See* Ex. 269 (VRC Step One Solvency Opinion Bring-Down Letter, dated May 24, 2007).

581 Ex. 1104 (VRC Solvency Analysis, dated May 17, 2007).

582 S*ee* Report at § III.C.1. There is also some evidence that management believed that cost-cutting measures would help reverse negative variances on the revenue side of the business. *See* footnote 78.

Brown Book for May 2007 likely occurred after the closing of the Step One Transactions, although certain information bearing on May 2007 financial performance was probably known to Tribune management before closing. For example, Tribune prepared and issued weekly "flash" reports reporting advertising revenue and circulation.[583] Although the May "flash" reports would have shown at least some of the negative variance reflected in Tribune's May results, significantly, management's projected 2007 revenue and EBITDA generally was consistent with analyst expectations at the time (and, significantly, Tribune was not providing market guidance).[584] In light of these considerations, applying an objective test to measure capital adequacy based on what was known and ascertainable at the time, the Examiner finds that a court would likely conclude that it would be inappropriate to revise the February 2007 projections based on declines in performance in April and May.

The Examiner's financial advisor adopted the general analytical framework of VRC's capital adequacy assessment model for purposes of this review (including VRC's reliance on management's base case projections), but made certain adjustments to that model:

- The Examiner's financial advisor incorporated into the model the effects of incremental debt contemplated at the Step One Financing Closing Date in connection with Step Two, including $2.105 billion in additional borrowings under the Incremental Credit Agreement Facility, $2.1 billion in borrowings contemplated under the Bridge Facility, and the $225 million subordinated EGI-TRB Note (which would essentially replace the Exchangeable EGI-TRB Note).[585] Interest and principal amortization also were factored into the analysis.

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583 *See, e.g.*, Ex. 66 at 20:14-21:8 (Rule 2004 Examination of Harry Amsden, December 16, 2009).

584 *See* Report at § III.C.2.

585 As discussed in another part of the Report, ultimately at Step Two the $2.1 billion in expected borrowings under the Bridge Facility were reduced to $1.6 billion at the Step Two Financing Closing Date. *See* Report at § III.A.4.a.(1).

Notably, the VRC May 17, 2007 model does not account for *any* such debt instruments despite the fact that the Exchangeable EGI-TRB Note had already been issued on April 23, 2007.

- Based on a review of the underlying credit agreements, the Examiner's financial advisor conformed the calculations of interest expense, among other changes, to the terms of the Step One Debt.[586] In addition, consistent with modeling the full implications of the inclusion of the Step Two Debt into the capital adequacy model, the Examiner's financial advisor assumed that Tribune would incur no taxes as a result of the S-Corporation/ESOP structure at the Merger, which, for purposes of the financial advisor's model, was assumed to occur on January 1, 2008.
- It was assumed that Tribune would be able to refinance its senior guaranteed debts as they matured.
- Finally, the Examiner's financial advisor modified certain calculation mechanics associated with the determination of discretionary debt repayments.[587]

As discussed previously, certain financial advisors for participants in the Step One Transactions also performed financial analyses. In connection with these evaluations, as well as analyses performed by Standard & Poor's,[588] "stress-case" scenarios were created and related downside projections of financial performance were made. The Examiner's financial advisor used these analyses in assessing Tribune's capital adequacy by incorporating certain downside financial expectations into its capital adequacy assessment model.[589] Based on these sources,

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586 Adjustments included determining the interest rate margin on the Revolving Credit Facility based on the level of the covenants, setting the interest rate margin on the Tranche X Facility equal to 2.50% for the period between the closing of Step One and the closing of Step Two, and creating an interest rate hedge on $2.5 billion in debt related to the Tranche B Facility (although the Credit Agreement calls for the hedging of interest rate risk, the overall value and implementation of the hedged debt was derived from what appears to be a general assumption by VRC at Step Two). In addition, the Examiner's financial advisor assumed that Tribune would have letters of credit outstanding on the Revolving Credit Facility totaling approximately $65 million annually. This amount is derived from a review of average amount of letters of credit held historically by Tribune.

587 More specifically, VRC calculated interest expense based on the average of beginning and ending balances associated with each debt instrument, which, in years in which Tribune experienced positive cash flow, often included discretionary prepayments. Interest expense, however, is also a key component of the determination of cash flow available for discretionary prepayments. VRC's May 17, 2007 model was structurally modified to calculate interest expense on the basis of averaging beginning and ending balances before any discretionary prepayments were determined. Ex. 1104 at VRC 0039351-64 (VRC Solvency Analysis, dated May 17, 2007).

588 Financial advisors included VRC, Duff & Phelps, Blackstone, and Morgan Stanley. Standard & Poor's also evaluated Tribune under "downside" conditions. *See* Ex. 145 (Morgan Stanley Opinion Letter, dated April 1, 2007); Ex. 167 (Duff & Phelps Opinion, dated April 1, 2007); Ex. 268 (VRC Step One Solvency Opinion, dated May 9, 2007); Ex. 141 (Confidential Discussion Materials Prepared for Committee of Independent Directors of the Board of Directors of Tribune, dated March 30, 2007); Ex. 1062 (Blackstone Presentation, dated May 23, 2007); Ex. 212 (Standard & Poor's Letter, dated March 29, 2007).

589 Each advisor's downside assessment was performed over varying time horizons. The Examiner's financial advisor incorporated these downside expectations into its cash flow model only for the periods for which those

Tribune's capital adequacy was assessed, including the amount of any capital adequacy cushion, or deficit, implied by, and any non-compliance with financial covenants resulting from, the incorporation of each advisor's downside assumptions into the Examiner's financial advisor model.[590]

expectations were specifically projected. For purposes of modeling expectations for periods beyond those specifically identified by the various advisors, the parameters based on the base case expectations contained in the Examiner's financial advisor's model were adopted.

590 The capital adequacy "cushion" represents the cash flow available for discretionary prepayments in addition to the availability under the Revolving Credit Facility. The Examiner recognizes that, as in most circumstances for other companies, Tribune could ostensibly sell assets to attempt to fund capital adequacy deficiencies to the extent such circumstances existed prospectively. Because of the limited time to conduct the Investigation, the Examiner's financial advisor focused its analysis on Tribune's ability to fund its operational and financial commitments as Tribune's business was structured, as contrasted with a business that would engage in substantial asset dispositions. Additional investigation would be warranted regarding this possible means of addressing deficiencies in capital.

As shown in the table below, all of these downside scenarios assumed that Tribune's 2007 revenues would be lower than what was assumed in VRC's base case model. Most of the analysts projected yearly revenues in their respective downside cases in amounts between VRC's base and stress cases (although in its analysis, Blackstone consistently projected annual revenues in amounts exceeding those of VRC's base case): [591]

STEP ONE STRESS CASE CONSOLIDATED REVENUE COMPARISON ($mm)

	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017
VRC Base Case	**$ 5,357.6**	$ 5,177.8	$ 5,071.8	$ 5,137.4	$ 5,161.5	$ 5,185.8	$ 5,210.2	$ 5,234.7	$ 5,259.4	$ 5,284.2	$ 5,309.2
% Growth		***-3.4%***	***-2.0%***	***1.3%***	***0.5%***	***0.5%***	***0.5%***	***0.5%***	***0.5%***	***0.5%***	***0.5%***
VRC Stress Case	**$ 5,357.6**	$ 4,921.6	$ 4,686.3	$ 4,584.0	$ 4,494.2	$ 4,406.2	$ 4,320.0	$ 4,235.6	$ 4,152.9	$ 4,072.0	$ 3,992.6
% Growth		***-8.1%***	***-4.8%***	***-2.2%***	***-2.0%***	***-2.0%***	***-2.0%***	*-2.0%*	*-2.0%*	*-1.9%*	*-1.9%*
Duff & Phelps Stress Case	**$ 5,299.0**	$ 5,023.5	$ 4,938.1	$ 4,864.0	$ 4,791.0	$ 4,819.8	$ 4,848.7	$ 4,877.8	$ 4,907.0	$ 4,936.5	$ 4,959.8
% Growth		***-5.2%***	***-1.7%***	***-1.5%***	***-1.5%***	***0.6%***	***0.6%***	***0.6%***	***0.6%***	***0.6%***	*0.5%*
Blackstone Stress Case	**$ 5,338.0**	$ 5,338.0	$ 5,268.6	$ 5,237.0	$ 5,168.9	$ 5,193.2	$ 5,217.7	$ 5,242.2	$ 5,267.0	$ 5,291.9	$ 5,316.9
% Growth		***0.0%***	***-1.3%***	***-0.6%***	***-1.3%***	*0.5%*	*0.5%*	*0.5%*	*0.5%*	*0.5%*	*0.5%*
Morgan Stanley Downside Case A	**$ 5,107.0**	$ 5,045.7	$ 4,954.9	$ 4,905.3	$ 4,846.5	$ 4,869.3	$ 4,892.2	$ 4,915.2	$ 4,938.4	$ 4,961.8	$ 4,985.2
% Growth		***-1.2%***	***-1.8%***	***-1.0%***	***-1.2%***	*0.5%*	*0.5%*	*0.5%*	*0.5%*	*0.5%*	*0.5%*
Morgan Stanley Downside Case B	**$ 5,066.0**	$ 4,949.5	$ 4,840.6	$ 4,738.9	$ 4,639.4	$ 4,661.2	$ 4,683.2	$ 4,705.2	$ 4,727.4	$ 4,749.8	$ 4,772.2
% Growth		***-2.3%***	***-2.2%***	***-2.1%***	***-2.1%***	*0.5%*	*0.5%*	*0.5%*	*0.5%*	*0.5%*	*0.5%*
Standard & Poor's Stress Case	**$ 4,952.3**	$ 4,634.2	$ 4,450.9	$ 4,508.1	$ 4,529.5	$ 4,551.1	$ 4,572.8	$ 4,594.6	$ 4,616.6	$ 4,638.7	$ 4,660.9
% Growth		***-6.4%***	***-4.0%***	*1.3%*	*0.5%*	*0.5%*	*0.5%*	*0.5%*	*0.5%*	*0.5%*	*0.5%*

As shown in the table below, all of these scenarios also assumed operating margins below those incorporated in the VRC base case model:

STEP ONE STRESS CASE CONSOLIDATED OPERATING MARGIN COMPARISON (1)

	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017
VRC Base Case	**25.3%**	**26.4%**	**26.7%**	**27.0%**	**26.8%**	**26.8%**	**26.8%**	**26.7%**	**26.7%**	**26.7%**	**26.7%**
VRC Stress Case	25.3%	**24.1%**	**23.4%**	**24.2%**	**25.9%**	**26.5%**	**26.5%**	**26.5%**	**26.5%**	**26.5%**	**26.5%**
Duff & Phelps Stress Case	**25.4%**	**24.4%**	**24.4%**	**24.2%**	**23.3%**	**23.3%**	**23.2%**	**23.2%**	**23.2%**	**23.2%**	26.7%
Blackstone Stress Case	**23.7%**	**24.2%**	**24.4%**	**24.5%**	**24.2%**	26.8%	26.8%	26.7%	26.7%	26.7%	26.7%
Morgan Stanley Downside Case A	**24.3%**	**23.8%**	**23.3%**	**22.6%**	**21.6%**	26.8%	26.8%	26.7%	26.7%	26.7%	26.7%
Morgan Stanley Downside Case B	**23.9%**	**23.0%**	**21.9%**	**21.0%**	**19.6%**	26.8%	26.8%	26.7%	26.7%	26.7%	26.7%
Standard & Poor's Stress Case	**25.9%**	**25.2%**	**23.9%**	**26.9%**	**26.7%**	**26.7%**	**26.7%**	**26.6%**	**26.6%**	**26.6%**	**26.6%**

(1) Excludes Corporate Expenses.

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591 In the tables that follow, assumptions that improve Tribune's position vis-à-vis VRC's base case are highlighted in green. Assumptions less favorable in comparison to VRC base case determinations are highlighted in red.

Because increases in capital expenditures represent dollar-for-dollar decreases in funds available for the payment of expenses and debt principal amortization, capital expenditures and acquisition expenditures affect cash availability. As shown in the table below, although some advisors projected increased capital expenditures and acquisition expenditures, for reasons that the Examiner's financial advisor cannot determine, others projected lower amounts:

STEP ONE STRESS CASE CONSOLIDATED CAPITAL EXPENDITURES COMPARISON ($mm)

	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017
VRC Base Case	($ 149.5)	($ 169.7)	($ 124.0)	($ 123.9)	($ 123.9)	($ 124.5)	($ 125.2)	($ 125.8)	($ 126.5)	($ 127.1)	($ 127.8)
VRC Stress Case	($ 149.5)	($ 169.7)	($ 124.0)	($ 123.9)	($ 123.9)	($ 124.5)	($ 125.2)	($ 125.8)	($ 126.5)	($ 127.1)	($ 127.8)
Duff & Phelps Stress Case	($ 149.5)	($ 150.0)	($ 127.0)	($ 126.0)	($ 126.0)	($ 126.0)	($ 127.0)	($ 128.0)	($ 129.0)	($ 129.0)	($ 127.8)
Blackstone Stress Case	($ 199.0)	($ 174.0)	($ 129.0)	($ 129.0)	($ 129.0)	($ 124.5)	($ 125.2)	($ 125.8)	($ 126.5)	($ 127.1)	($ 127.8)
Morgan Stanley Downside Case A	($ 171.0)	($ 276.0)	($ 76.0)	($ 74.0)	($ 74.0)	($ 124.5)	($ 125.2)	($ 125.8)	($ 126.5)	($ 127.1)	($ 127.8)
Morgan Stanley Downside Case B	($ 161.0)	($ 256.0)	($ 56.0)	($ 54.0)	($ 54.0)	($ 124.5)	($ 125.2)	($ 125.8)	($ 126.5)	($ 127.1)	($ 127.8)
Standard & Poor's Stress Case	($ 100.0)	($ 90.0)	($ 90.0)	($ 123.9)	($ 123.9)	($ 124.5)	($ 125.2)	($ 125.8)	($ 126.5)	($ 127.1)	($ 127.8)

STEP ONE STRESS CASE CONSOLIDATED ACQUISITION EXPENDITURES COMPARISON ($mm)

	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017
VRC Base Case	($ 50.0)	($ 100.0)	($ 100.0)	($ 100.0)	($ 100.0)	($ 100.0)	($ 100.0)	($ 100.0)	($ 100.0)	($ 100.0)	($ 100.0)
VRC Stress Case	($ 50.0)	($ 100.0)	($ 50.0)	($ 50.0)	($ 50.0)	($ 50.0)	($ 50.0)	($ 100.0)	($ 100.0)	($ 100.0)	($ 100.0)
Duff & Phelps Stress Case	($ 50.0)	($ 225.0)	($ 50.0)	($ 50.0)	($ 50.0)	($ 50.0)	($ 50.0)	($ 50.0)	($ 50.0)	($ 50.0)	($ 100.0)
Blackstone Stress Case	($ 100.0)	($ 212.0)	($ 79.0)	($ 60.0)	($ 60.0)	($ 100.0)	($ 100.0)	($ 100.0)	($ 100.0)	($ 100.0)	($ 100.0)
Morgan Stanley Downside Case A	($ 50.0)	($ 100.0)	($ 100.0)	($ 100.0)	($ 100.0)	($ 100.0)	($ 100.0)	($ 100.0)	($ 100.0)	($ 100.0)	($ 100.0)
Morgan Stanley Downside Case B	($ 50.0)	($ 100.0)	($ 100.0)	($ 100.0)	($ 100.0)	($ 100.0)	($ 100.0)	($ 100.0)	($ 100.0)	($ 100.0)	($ 100.0)
Standard & Poor's Stress Case	($ 275.0)	($ 100.0)	($ 100.0)	($ 100.0)	($ 100.0)	($ 100.0)	($ 100.0)	($ 100.0)	($ 100.0)	($ 100.0)	($ 100.0)

The Examiner's financial advisor incorporated into its cash flow model the downside assumptions of the various advisors. The results of that assessment are shown in the table below. Analytical results indicated only two instances in which stress case assumptions resulted in covenant non-compliance and only one case demonstrating insufficient capital:

STEP ONE CAPITAL ADEQUACY OVERVIEW		
Stress Case	Negative Capital Adequacy Cushion	Covenant Violation
VRC	No	No
Duff & Phelps	No	No
Blackstone	No	No
Morgan Stanley Downside A	No	No
Morgan Stanley Downside B	No	Yes
Standard & Poor's	Yes	Yes

The stress case assumptions developed by Standard & Poor's, however, were based on aggressive downside assumptions.[592]

592 For example, the Standard & Poor's stress case makes aggressive assumptions about Tribune's debt carry costs in its downside case. Standard & Poor's assumes both that the interest rate margins on each of Tribune's Eurodollar rate advances would increase by 150 basis points and assumes that the LIBOR rate also increases by 150 basis points. These two assumptions in combination increase cash interest expense dramatically and are the principal drivers of Tribune's resulting capital inadequacy under the Standard & Poor's scenario. Ex. 212 at ML-TRIB-0431974 (Standard & Poor's Letter, dated March 29, 2007).

Detailed model output is provided below:

STEP ONE STRESS CASE CAPITAL ADEQUACY CUSHION SUMMARY ($mm)											
	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017
VRC Base Case	$ 1,384.4	$ 1,533.7	$ 924.1	$ 592.7	$ 984.3	$ 1,150.7	$ 1,140.9	$ 1,292.2	$ 1,056.0	$ 1,467.1	$ 1,586.3
VRC Stress Case	$ 1,384.4	$ 1,356.6	$ 704.1	$ 334.6	$ 511.4	$ 740.3	$ 852.1	$ 898.2	$ 598.4	$ 856.9	$ 993.4
Duff & Phelps Stress Case	$ 1,372.3	$ 1,287.2	$ 798.5	$ 400.5	$ 529.2	$ 709.1	$ 822.5	$ 943.2	$ 674.9	$ 1,043.3	$ 1,265.2
Blackstone Stress Case	$ 1,161.5	$ 1,019.2	$ 393.3	$ 145.8	$ 346.7	$ 683.7	$ 994.5	$ 1,130.8	$ 879.2	$ 1,275.3	$ 1,382.6
Morgan Stanley Downside Case A	$ 1,208.3	$ 1,249.0	$ 731.1	$ 309.6	$ 339.6	$ 612.2	$ 854.7	$ 1,055.0	$ 795.7	$ 1,183.6	$ 1,282.3
Morgan Stanley Downside Case B	$ 1,177.1	$ 1,205.1	$ 651.3	$ 171.1	$ 64.9	$ 252.7	$ 402.4	$ 670.5	$ 666.2	$ 1,037.3	$ 1,145.0
Standard & Poor's Stress Case	$ 1,051.1	$ 454.9	($ 393.7)	($ 1,016.6)	($ 1,177.2)	($ 1,297.9)	($ 1,491.9)	($ 1,577.1)	($ 1,954.7)	($ 1,952.2)	($ 1,890.8)

Based on the preceding, which includes a variety of downside analyses, the Examiner finds that it is reasonably likely that a court would conclude that the Step One Transactions left Tribune with adequate capital, even factoring in the contemplated Step Two Debt. A fundamental premise underlying the Examiner's conclusion is that Tribune management's projections developed in February 2007 (as thereafter revised, and ultimately relied on by VRC) should be used for purposes of testing capital adequacy, notwithstanding operating variances from the projected performance in April and (as probably reflected in "flash reports" available to management) May 2007. For the reasons discussed previously in this Section, the Examiner does not accept the contention advanced by certain Parties that, in view of what was known or ascertainable as of the Step One Financing Closing Date, the February 2007 projections were unreasonable, particularly in comparison to contemporary analyst expectations. Thus, even

STEP ONE STRESS CASE GUARANTEED LEVERAGE RATIO SUMMARY

	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017
VRC Base Case	7.21	6.23	6.00	5.79	5.41	4.94	4.55	4.07	3.75	3.20	2.60
VRC Stress Case	7.21	7.22	7.55	7.55	6.89	6.47	6.30	6.09	6.09	5.83	5.52
Duff & Phelps Stress Case	7.26	7.08	6.95	7.11	7.13	6.72	6.46	6.09	5.91	5.48	4.41
Blackstone Stress Case	7.84	7.27	7.07	7.06	6.87	5.94	5.61	5.20	4.95	4.47	3.95
Morgan Stanley Downside Case A	7.94	7.37	7.43	7.78	7.91	6.16	5.86	5.47	5.26	4.81	4.31
Morgan Stanley Downside Case B	8.14	7.79	8.14	8.75	9.24	6.71	6.44	6.10	5.94	5.53	5.09
Standard & Poor's Stress Case	7.80	8.27	8.76	7.59	7.40	7.14	6.96	6.78	6.59	6.41	6.21

STEP ONE STRESS CASE INTEREST COVERAGE RATIO SUMMARY

	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017
VRC Base Case	2.71	1.56	1.67	1.78	1.84	1.95	2.09	2.24	2.47	2.70	3.13
VRC Stress Case	2.71	1.37	1.36	1.42	1.50	1.57	1.60	1.63	1.68	1.71	1.81
Duff & Phelps Stress Case	2.69	1.41	1.47	1.49	1.45	1.51	1.57	1.62	1.72	1.79	2.17
Blackstone Stress Case	2.54	1.40	1.49	1.52	1.52	1.71	1.80	1.87	2.01	2.13	2.37
Morgan Stanley Downside Case A	2.50	1.37	1.39	1.38	1.33	1.65	1.73	1.79	1.91	2.01	2.21
Morgan Stanley Downside Case B	2.44	1.30	1.28	1.25	1.16	1.54	1.60	1.65	1.73	1.80	1.95
Standard & Poor's Stress Case	2.38	1.09	1.01	1.13	1.14	1.17	1.18	1.20	1.23	1.28	1.33

when the contemplated Step Two Debt is factored into the analysis of capital adequacy, it is reasonably likely that Tribune still had adequate capital at Step One.

With respect to the Guarantor Subsidiaries, because the collective indebtedness of those entities is less than the Tribune-only indebtedness, and because Tribune held few cash generating assets (other than the Chicago Cubs, which Tribune anticipated selling, the proceeds of which were incorporated into the Examiner's cash flow model),[593] the Examiner similarly concludes that it is reasonably likely that the Guarantor Subsidiaries also were adequately capitalized after giving effect to the Step One Transactions, factoring in the contemplated Step Two Debt.

(10) Examiner's Conclusions and Explanation Concerning Solvency of Tribune at Step Two.

Examiner's Conclusions:

The Examiner finds that a court is highly likely to conclude that the Step Two Transactions rendered Tribune insolvent.

Explanation of the Examiner's Conclusions:

As discussed in another part of the Report, for purposes of assessing solvency, assets are valued at "fair value" as of the valuation date.[594] As also discussed elsewhere in the Report, VRC used definitions of "fair value" and "fair saleable value" in its Step Two valuation that are at odds with the generally accepted definition of fair market value.[595] The result was to overstate the solvency of Tribune by including as a component of this value the tax avoidance characteristics of the S-Corporation/ESOP structure.[596] To assess the effect of this

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593 Regardless, the Examiner notes that there was no prohibition on using cash from assets held solely at Tribune to fund payments on guaranteed debt.

594 *See* footnotes 87, 387, and 568.

595 *See* Report at §§ III.H.3.e. and IV.B.4.b.

596 The Examiner notes that, in connection with VRC's May 2007 solvency opinions, VRC used a traditional fair market value definition in assessing solvency at Step One.

overstatement, the Examiner's financial advisor first restated VRC's concluded range of equity values to eliminate the (final) value VRC ascribed to the tax savings attributes of the S-Corporation/ESOP structure:

Effect of Removing the Value of S-Corporation/ESOP Tax Savings from VRC's December 20, 2007 Solvency Determination ($mm)			
	Low	Mid	High
VRC December 20, 2007 Concluded Equity Value	$ 931.6	$ 1,777.2	$ 2,622.8
VRC Value Ascribed to S-Corp/ESOP Tax Savings	$ (815.8)	$ (876.0)	$ (936.1)
Revised VRC Equity Value	$ 115.8	$ 901.2	$ 1,686.7

This adjustment alone results in near insolvency in the low-case under VRC's Step Two solvency analysis, and a solvency "cushion" in the mid-case of only approximately 6% of the total enterprise value of Tribune.[597] The substantial errors in VRC's calculation of the value of Tribune's assets (as summarized below, and as discussed and quantified elsewhere in the Report),[598] however, eliminate any residual equity value that VRC ascribed to Tribune as of December 20, 2007, and therefore this cushion is illusory. Each of the problems underlying VRC's analysis is significant:

- The value VRC ascribed to Tribune's operating assets using the DCF methodology assumed, as a predicate, that the underlying financial projections were reasonable. Based on the analysis set forth in Annex A to this Volume of the Report, the Examiner concludes that the projections (particularly with respect

[597] Calculated as follows: $901.2 million equity value divided by $14.565 billion total Tribune enterprise value as determined by VRC. *See* Ex. 1045 at TRB0293989 (VRC Solvency Analysis, dated December 20, 2007).

[598] *See* Report at § III.H.3.f.

to excessive revenue and EBITDA growth rates informing those expectations) were not reasonable.[599]

- VRC failed to adjust the value of Tribune's operating assets to account for the significant risk of not achieving the projected growth for the interactive business' revenue and profitability, which growth was a basis for portions of VRC's DCF (in particular) and multiples-based valuations (in part, and to a lesser degree).

- VRC's valuation of Tribune's operating assets using market multiples evidences the use of excessive multiples based on, among other things, the use of multiples derived from clearly non-comparable companies (*e.g.*, The Washington Post), and multiples that were likely significantly inflated due to VRC's use of book values of cohort company non-operating assets to adjust the value of cohort companies in determining multiples.

- VRC likely overstated the value of Tribune's non-operating assets due to VRC's failure to reduce quantified values for applicable discounts, and to adjust base values for the companies in which Tribune held equity ownership interests for size and other differentiating characteristics, among other reasons.

Market-based indicia also support the conclusion that Tribune was rendered insolvent at Step Two. Most notably, the trading price of Tribune Common Stock between Step One and Step Two reflected significant discounts to the Tender Offer price,[600] despite the previously-

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[599] *See also id.* at § III.H.3.f.(1).

[600] The following chart reflects the trading values of Tribune Common Stock between the Step One Financing Closing Date and the Step Two Financing Closing Date:

discussed built-in upward bias based on the prospect of the Step Two Closing. Although this fact alone is not dispositive of insolvency, Tribune's publicly traded bond debt also traded at steep discounts to par[601] (and credit default swap pricing on those securities transcended levels of credit default swap pricing for other cohort companies), and Tribune's pre-existing Step One Debt likewise began trading at discounts to par in excess of levels explained by market factors.[602] Both considerations indicate that the difference between the trading prices of Tribune Common Stock and the Tender Offer price could not justifiably be explained merely by a control

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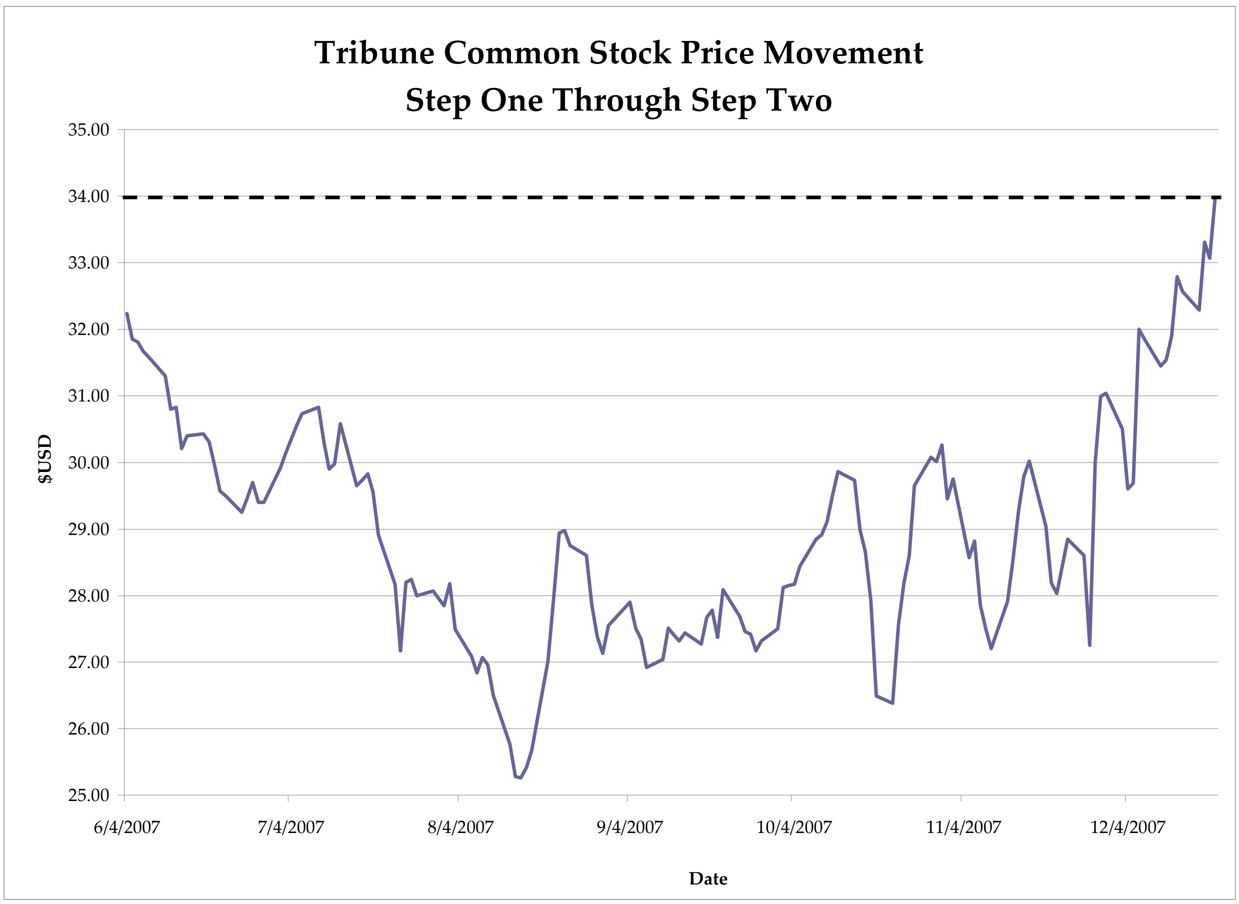

The Examiner notes that the trading value of Tribune Common Stock increased to approximate the Tender Offer price as the Step Two Financing Closing Date neared.

601 Tribune bonds exhibited additional price erosion in 2008 after Tribune announced fourth quarter and full-year 2007 financial results on March 20, 2008.

602 Ex. 761 (Morgan Stanley Discussion Materials, dated November 21, 2007).

premium.[603] Moreover, the discounts in the prices of Tribune's debt instruments suggest a market-based conclusion that Tribune would be unable to satisfy its liabilities and would be rendered insolvent by the addition of the Step Two Debt to the balance sheet.

The Examiner's financial advisor further assessed the question of Tribune's solvency at Step Two by employing the DCF Valuation Analysis in Annex A to this Volume of the Report, using information available at the time of the Step Two Transactions.[604] The following summarizes the Examiner's principal conclusions based on the DCF Valuation Analysis:

Based on the discounted value of both the discrete period projections of Tribune's cash flow and the discounted value of the terminal value as determined for each of Tribune's legacy (*i.e.,* traditional publishing and broadcasting) and interactive businesses, Tribune's operating assets had a value of $7.799 billion as of December 20, 2007, as shown in the table below:[605]

PRESENT VALUE AT DECEMBER 20, 2007			
	Interim Period Cash Flow	**Terminal Value**	**Total**
Value of Tribune's Publishing Segment and Broadcasting Segment Assets (excluding Interactive)	$ 2,356.4	$ 4,488.8	$ 6,845.1
Value of Tribune's Interactive Assets	$ 447.6	$ 506.1	$ 953.7
Total Value of Tribune's Operating Assets as of December 20, 2007	**$ 2,804.0**	**$ 4,994.9**	**$ 7,798.8**

603 *See* Report at § III.H.3.f.(4).

604 This analysis also enabled the Examiner's financial advisor to approximate a value of the S-Corporation/ESOP tax attributes for purposes of evaluating reasonably equivalent value considerations, and more precisely gauge the degree of solvency (or insolvency) at the Guarantor Subsidiary level. The Examiner also notes that this alternative valuation analysis was prepared under significant time constraints, and on the basis of a partial review of information available to the Examiner. With additional time and resources, refinements to this analysis are possible, although the conclusion resulting from this analysis (a finding of insolvency) would be unlikely to change based on such refinements. In connection with its assessment of Tribune solvency at Step Two, the Examiner's financial advisor, consistent with VRC's general approach, recognized that Tribune's assets were comprised of two distinct components (Tribune's operating assets, including its Publishing Segment and Broadcasting Segment, and Tribune's ownership interests in non-operating asset equity investments). Those components require separate evaluation.

605 For a detailed explanation of the DCF Valuation Analysis performed by the Examiner's financial advisor and the bases for these concluded values, *see* Annex A to Volume Two (DCF Valuation Analysis).

Tribune's equity investments had a value of $3.024 billion at Step Two ($392 million less than the $3.416 billion value determined by VRC).[606] With respect to the remaining variables bearing on Tribune's solvency at Step Two, the Examiner adopted the same assumptions regarding cash, debt, and identified contingent liabilities as set forth in VRC's December 20, 2007 solvency analysis.[607]

Based on the preceding, as discussed at length in the DCF Valuation Analysis, the Examiner concludes that Tribune was rendered insolvent as a result of the Step Two Transactions by approximately $1.965 billion:

SOLVENCY CONCLUSION ($ mm)

	December-07	
Operating Asset Value	**$7,798.8**	
+ Equity Investments and Other Assets	$3,024.4	[1]
Adjusted Enterprise Value	**$10,823.2**	
+ Cash	$197.7	[2]
- Debt	($12,898.8)	[2]
- Identified Contingent Liabilities	($86.8)	[2]
= Solvency/(Insolvency)	**($1,964.7)**	

Notes and Sources:

[1] VRC valued Tribune's equity investments at $3.416 billion. *See* Ex. 1045 (VRC Solvency Analysis, dated December 20, 2007). The Examiner's financial advisor reduced this amount by approximately $392 million to reflect the conclusion that VRC overstated the value ascribed to Career Builder and TV FoodNetwork.

[2] *See* Ex. 1045 (VRC Solvency Analysis, dated December 20, 2007). The Examiner's financial advisor has adopted VRC's numbers for cash, debt, and identified contingent liabilities.

606 As explained in Annex A to Volume Two (DCF Valuation Analysis), this downward adjustment was based on the Examiner's financial advisor's reductions in the value associated with Tribune's investments in CareerBuilder and TV Food Network.

607 Ex. 1045 at TRB0293989 (VRC Solvency Analysis, dated December 20, 2007).

Although the above quantifications of Tribune's total enterprise (or total asset) value could be refined based on additional investigation and analysis if the Investigation were not limited in duration, the Examiner finds, on the basis of the analysis conducted through July 25, 2010, that a court is highly likely to conclude that Tribune was rendered insolvent as a result of the Step Two Transactions.

(11) Examiner's Conclusions and Explanation Concerning Solvency of Guarantor Subsidiaries at Step Two.

Examiner's Conclusions:

The Examiner finds that a court is reasonably likely to conclude that the Guarantor Subsidiaries were rendered insolvent on a collective basis as a result of the Step Two Transactions.

Explanation of the Examiner's Conclusions:

As discussed in connection with the Examiner's analysis of the solvency of the Guarantor Subsidiaries at Step One, Tribune's degree of insolvency can be used to calculate the degree of solvency or insolvency of the Guarantor Subsidiaries.[608] The following chart shows the Examiner's assessment of Tribune's assets as of the Step Two Financing Closing Date (excluding the value of its ownership interests in the Guarantor Subsidiaries) compared to the Tribune-only debt (*i.e.*, non-LBO Debt):

[608] *See id.* at § IV.B.5.d.(8).

TRIBUNE ESTIMATED DISTRIBUTABLE VALUE AT DECEMBER 2007 ($mm)		
	December 2007	**Notes**
Assets	$ 1,468.0	
Liabilities	$ 2,256.4	
Distributable Value (Deficiency)	($ 788.4)	[1]

Notes

[1] Excludes the impact of intercompany accounts and LBO Lender Debt.

The following chart details the value of certain of Tribune's assets as of the Step Two Financing Closing Date:

TRIBUNE ASSETS AT DECEMBER 2007 ($mm)		
Assets	**December 2007**	**Notes**
Cash and Equivalents	$ 179.0	[1]
Chicago Cubs	$ 850.0	[2]
Time Warner Shares	$ 265.0	[3]
Real Estate - Baltimore/St. Louis	$ 41.0	[4]
Investments - Classified Ventures	$ 113.0	[5]
Investments - Legacy.com	$ 6.0	[5]
Equity in Non-Guarantor Subsidiaries	$ 14.0	[5]
Total Assets	**$ 1,468.0**	

Notes

[1] Balance sheet amounts as of month end as indicated.

[2] Ex. 900 (VRC Real Estate FMV Summary).

[3] Shares outstanding at $16.36 at December 2007.

[4] Ex. 899 (Tribune Cubs Sale Update).

[5] Value determined from review of valuation consultants' presentations.

The following chart details the amount of Tribune's non-LBO Debt liabilities as of the Step Two Financing Closing Date:

TRIBUNE LIABILITIES AT DECEMBER 2007 ($mm)		
Liabilities	**December 2007**	**Notes**
Medium - Term Notes	$ 262.6	[1]
Property Financing Obligations	$ 35.7	[1]
2010 Notes	$ 449.6	[1]
Debentures	$ 717.0	[1]
Interest Rate Swaps	$ 119.0	[1]
Other Notes and Obligations	$ 15.1	[1]
PHONES Notes	$ 597.0	[1]
Exchangeable EGI-TRB Note	$ 0.0	[1]
EGI-TRB Note	$ 60.3	[1]
Total Liabilities	**$ 2,256.4**	

Notes
[1] Ex. 4 (Tribune 2007 Form 10-K).

Because the magnitude of insolvency attributable to Tribune, based on the preceding Tribune-only analysis (resulting in an approximate $788 million deficiency), is substantially less than the Tribune's aggregate insolvency after giving effect to the LBO Lender Debt and the value attributable to the Guarantor Subsidiaries ($1.965 billion), it follows that the Step Two Transactions rendered the Guarantor Subsidiaries collectively insolvent as well.

Market-based considerations do not alter this conclusion. Although Tribune's public bonds traded at a significant discount to par before the Step Two Financing Closing Date, these bonds still traded at values above zero, from which it is possible to infer a market-based belief that the Guarantor Subsidiaries had some positive net value even taking into account the LBO Lender Debt and were therefore solvent.[609] However, as discussed in another part of the

609 It should be noted, however, that just prior to the Step Two Financing Closing Date, Tribune's had not yet reported fourth quarter 2007 results (although some, albeit much less comprehensive information, e.g., press releases regarding performance for October and November, had been issued).

Report,[610] other market indicia, such as the difference between the trading price of Tribune Common Stock and the Tender Offer price and the fact that Tribune's Step One Debt traded at discounts to par, lead to the opposite conclusion (although it is also possible that certain debt traded at a discount based on unfavorable pricing factors). In light of the equivocal inferences that could be drawn from these various market-based indicia and the significant contrary evidence that supports a conclusion that the Guarantor Subsidiaries were rendered insolvent at Step Two, the Examiner finds that it is reasonably likely that the Step Two Transactions rendered the Guarantor Subsidiaries insolvent on a collective basis.

(12) Examiner's Conclusions and Explanation Concerning Capital Adequacy of Tribune and the Guarantor Subsidiaries at Step Two.

Examiner's Conclusions:

The Examiner finds that: (i) it is highly likely that a court would conclude that Tribune was left without adequate capital after giving effect to the Step Two Transactions, and (ii) it is reasonably likely that a court would conclude that the Guarantor Subsidiaries were left without adequate capital after giving effect to the Step Two Transactions.

Explanation of Examiner's Conclusions - Tribune:

In assessing Tribune's capital adequacy at Step Two, the Examiner's financial advisor reviewed the December 20, 2007 cash flow projection model developed by VRC, which served as the basis for VRC's capital adequacy (as well as reasonable ability to pay debts) conclusions in its Step Two solvency opinion letter dated December 20, 2007.[611] VRC's model, in turn,

[610] *See* Report at § III.H.3.f.(4); *see also* footnotes 600-602.

[611] *See* Ex. 913 (VRC Valuation Summary); Ex. 728 (VRC Step Two Solvency Opinion, dated December 20, 2007). The Examiner notes that, in addition to relying on the results of its financial modeling in rendering its Step Two solvency opinion letter, VRC also explicitly relied on certain management representations regarding Tribune's ability to refinance certain debt. *Id*. at TRB0294010.

incorporated projected financial information provided by Tribune management.[612] Although adopting the general framework used by VRC to assess these matters,[613] in this analysis, like the Step One capital adequacy analysis discussed in another part of the Report,[614] several significant changes were made:

- Most importantly, for the reasons discussed in the DCF Valuation Analysis, the Examiner's financial advisor developed cash flow projections using an objective standard of reasonableness based on information known and reasonably ascertainable at the time of the Step Two Financing Closing Date, which also served as the basis for the assessment of capital adequacy at Step Two.

- Tribune's Broadcasting Segment and radio business were combined into a single stand-alone division.

- Adjustments were made to management's projections of cash to be received from equity investments to recognize only forecasted amounts to be received from Tribune's investment in TV Food Network, as this was the only Tribune investment that had been paying cash dividends at the time of Step Two.[615] As a result, projected cash flows from equity investments (other than those projected for TV Food Network) were eliminated.[616]

- VRC's modeling assumptions regarding Tribune's post-Step Two Closing debt structure were corrected to ensure that the computation of interest coincided properly with the terms of the Credit Agreement and the Bridge Credit Agreement.[617]

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612 Although Tribune management distributed other projection models to VRC, including those issued on September 19, 2007, September 20, 2007, and September 30, 2007 the November 21, 2007 model was the last iteration in this series and, as reflected in its December 20, 2007 solvency opinion letter, was the management projection ultimately relied on by VRC. *Id*. at TRB0294009; Ex. 721 (Tribune Company Model, last updated November 21, 2007).

613 For example, forecasting operating cash flows, scheduling interest and principal repayments according to credit terms, assessing covenant compliance, etc.

614 *See* Report at § IV.B.5.d.(9).

615 This adjustment was deemed appropriate not only because such treatment was consistent with past Tribune results (*see* Annex A to this Volume of the Report) but also because Mr. Amsden, during his July 16, 2010 interview, indicated that Tribune did not receive equity dividend income from its interactive business equity investments and that such investments generally contemplated equity appreciation as contrasted with current income generation. Mr. Amsden also observed that profits from interactive business equity investments generally were reinvested in their respective businesses. Examiner's Interview of Harry Amsden, July 16, 2010.

616 The management projections relied on by VRC reflect equity income from the Broadcasting Segment as being derived solely from Tribune's investment in TV Food Network. All other equity income was presented in a summary-level aggregate amount, without specific attribution to discrete Publishing Segment equity investments. Publishing Segment equity investments all related to Tribune's interactive business.

617 Additional changes to the VRC model included (a) determining the interest rate margin on the Revolving Credit Facility based on the level of the covenant compliance, (b) setting the interest rate margin on the Tranche X Facility equal to 2.50% for the period between the closing of Step One and the closing of Step Two,

- The Examiner extended the capital adequacy model to include periods from 2008 through 2022.[618]
- Finally, as detailed previously in connection with the Examiner's discussion of Tribune's capital adequacy at Step One, certain spreadsheet modifications were made to VRC's model in a manner consistent with the adjustment explained in that Section.[619]

After adjusting the capital adequacy model to incorporate these changes, the Examiner's financial advisor evaluated Tribune's capital adequacy at Step Two by downwardly adjusting certain key operating assumptions (*e.g.*, the level of projected revenues) to determine the effects of those changes on Tribune's ability to meet operational cash needs, comply with debt covenants, and make scheduled principal and interest payments. (The Examiner considered, but rejected, the contention by certain Parties that the sale of assets would meaningfully contribute to the capital adequacy of Tribune or, for that matter, the Guarantor Subsidiaries.)[620] The

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(c) modeling the interest rate on the Bridge Facility based on actual increases (instead of assuming that it would have accrued interest at its maximum interest rate in the first year), and (d) assuming that the proceeds obtained from the financing of $300 million in asset-backed notes securitized by Tribune accounts receivable would go immediately to pay down a portion of the Tranche X Facility. In addition, based on an assessment of Tribune's use of letters of credit, the Examiner's financial advisor assumed that Tribune would have letters of credit outstanding on the Revolving Credit Facility totaling approximately $65 million annually. This amount is derived from the average annual amount of letters of credit outstanding historically. Finally, the Examiner's financial advisor assumed that Tribune would be able to refinance its senior guaranteed debt due in 2014 and 2015 as it matured.

618 This was necessary to accommodate certain other analyses undertaken by the Examiner's financial advisor (*e.g.*, in order to value the benefit to Tribune of the S-Corporation/ESOP tax attribute).

619 *See* Report at § IV.B.5.d.(9).

620 Tribune possessed valuable assets which, in theory, it could sell piecemeal. Although Tribune management's forecasts generally did not contemplate substantial asset sales, the Examiner considered how asset sales might affect both Tribune's and the Guarantor Subsidiaries' capital adequacy. As a general matter, asset sales would correspondingly reduce the cash flow contributed by any business segment sold. Some of these businesses were sources of cash and were therefore accounted for in the cash flow models of both VRC and the Examiner's financial advisor (*e.g.*, TV Food Network). Others were not. Selling a dividend-paying asset such as TV Food Network would correspondingly eliminate the periodic cash inflows incorporated into cash flow models by converting a future stream of cash to an upfront one-time payment. Selling cash producing or non-cash producing assets in a distressed environment (such as to fund an immediate or impending cash deficit) might well result in fire-sale values, and could further trigger tax obligations depending on, for example, gain treatment and transaction structure. Sales could also adversely affect Tribune's other operating assets to the extent operations (such as CareerBuilder) were interdependent with Tribune. Finally, the ability to "fill" a capital adequacy deficit depends both on the size of the deficit anticipated and the amount that could be obtained from a sale. If the capital adequacy deficit exceeds reasonably attainable net sale proceeds, a disposition of such assets would likely prove irrelevant to curing such deficit.

Examiner's financial advisor performed various stress tests against base case expectations of future financial performance.[621] The table below shows that, under the Examiner's financial advisor's base case, Tribune would be expected to maintain compliance with debt covenants and have ample cash to meet operational and financial commitments:

EXAMINER'S BASE CASE RESULTS at STEP TWO (TRIBUNE) ($mm)

	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020	2021	2022
Capital Adequacy Cushion	**$ 1,360.7**	**$ 749.1**	**$ 377.0**	**$ 502.8**	**$ 674.0**	**$ 815.9**	**$ 962.5**	**$ 704.2**	**$ 1,071.5**	**$ 1,140.2**	**$ 1,209.9**	**$ 1,286.6**	**$ 1,371.0**	**$ 1,463.4**	**$ 1,564.4**
Guaranteed Leverage Ratio	**7.19**	**6.84**	**6.79**	**6.60**	**6.22**	**5.90**	**5.52**	**5.34**	**4.97**	**4.58**	**4.17**	**3.72**	**3.23**	**2.71**	**2.15**
Maximum Covenant Ratio	9.00	8.75	8.50	8.25	8.25	8.25	8.25	8.25	8.25	8.25	8.25	8.25	8.25	8.25	8.25
Interest Coverage Ratio	**1.37**	**1.47**	**1.46**	**1.44**	**1.49**	**1.55**	**1.62**	**1.71**	**1.76**	**1.88**	**2.01**	**2.17**	**2.37**	**2.63**	**2.99**
Minimum Covenant Ratio	1.15	1.20	1.25	1.25	1.25	1.25	1.25	1.25	1.25	1.25	1.25	1.25	1.25	1.25	1.25

Because the values assigned to non-operating assets may not be sufficient in certain Tribune downside scenarios (*e.g.*, a deficit capital circumstance of more than $2 to $3 billion, as discussed in this Section of the Report), the question whether asset sales would be sufficient to shore up liquidity may be moot. The prospect of selling assets theoretically is more germane at the Guarantor Subsidiary level, however, because the cash deficit may be smaller, although the consequences of such sales (taxes, disruptions, etc.) would need to be evaluated further. In addition to the above-discussed considerations, the Examiner finds that asset sales would be highly unlikely to materially improve the capital adequacy of the Guarantor Subsidiaries:

First, because the Credit Agreement and the Bridge Credit Agreement required Tribune and the Guarantor Subsidiaries to use all of the net proceeds from dispositions to prepay LBO Lender Debt, asset sales from non-performing assets generally would not create liquidity for operations. Mandatory prepayments under the Credit Agreement of the net cash proceeds of sales of assets with an aggregate fair market value in excess of $10 million by Tribune or its Subsidiaries were required to be applied first to the Tranche X Facility, in forward order of maturity, until the $1.5 billion principal amount of the Tranche X Facility was repaid, second to the Tranche B Facility totaling approximately $7.62 billion as of the Step Two Closing (on a pro rata basis among the scheduled amortization payments, unless Tribune elects to apply such prepayments to the next four installment payments scheduled to occur after the date of the prepayment), and third to the Revolving Credit Facility. Ex. 179 at § 2.10(b)(iv) (Credit Agreement). Thus, proceeds from asset sales generally were required to prepay principal and did not materially ease the amortization burden imposed on the Tribune Entities. Although one still could argue that paying down indebtedness would create value against which the Tribune Entities could borrower to fund operations, that was untrue as of Step Two. As the Examiner previously found, the Step Two Transactions rendered the Tribune Entities insolvent by approximately $1.965 billion. Thus, the first $1.965 billion of sale proceeds would not create equity against which the Tribune Entities could borrow.

Second, the Tribune Entities operated under a centralized cash management system that combined revenues, which was coordinated through Tribune. Developing a scenario in which one or more of the Guarantor Subsidiaries would survive by selling off assets, while Tribune and other Guarantor Subsidiaries would operate without sufficient cash to meet their own obligations, is largely a theoretical exercise.

Third, as discussed in the Examiner's analysis of solvency at Step Two, it is highly unlikely that Tribune, and reasonably unlikely that the Guarantor Subsidiaries, could generate sufficient value from their respective (and collective) assets to satisfy their liabilities. Thus, when all is said and done, asset sales would not be sufficient to permit the Guarantor Subsidiaries (or Tribune) to meet their liabilities.

621 The base case projections are the projections developed by the Examiner's financial advisor as discussed in connection with the Step Two solvency analysis described earlier herein. *See* Report at IV.B.5.d.(10).

The Examiner's financial advisor then applied a downside to this base case. In considering how, and to what degree, to "stress" the base case, the Examiner's financial advisor considered, among other things, the volatility of Tribune's historical financial performance as well as, to a much lesser degree, downside financial scenarios evaluated by VRC. Tribune's pre-Step Two financial performance evidenced considerable volatility, and thus downside risk.[622] This risk was exacerbated by secular declines in the publishing industry, maturation of the Broadcasting Segment, and significant uncertainty associated with future growth and profitability for Tribune's interactive business.[623] The Examiner's financial advisor also reviewed Tribune's actual performance during 2007 in comparison to Tribune's February 2007 forecast. Through period 11 (*i.e.*, through November 2007), Tribune's Brown Book reflected

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[622] Normalized 2002 through 2006 results, as reported in Tribune's 2006 10-K, for example, reflected significant volatility in operating profit margin. *See* Report at § III.C.1.

Annual Operating Profit Change, 2002 - 2006 ($000)

	2002		2003		2004		2005		2006
Total Operating Revenues	$ 5,285,277		$ 5,494,416		$ 5,631,431		$ 5,511,283		$ 5,517,708
Total Operating Profit	1,215,402		1,323,688		1,187,278		1,127,191		1,085,010
Operating Profit %	23.00%		24.09%		21.08%		20 45%		19 66%
Nominal Annual Change		1.09		(3.01)		(0.63)		(0.79)	

Source:
Ex. 14 (Tribune 2006 Form 10-K).

Normalized 2003 through 2007 results, as reported in Tribune's 2007 10-K, also reflected significant volatility in operating profit margins, recognizing that 2007 results were impacted by Merger related costs.

Annual Operating Profit Change, 2003 - 2007 ($000)

	2003		2004		2005		2006		2007
Total Operating Revenues	$ 5,440,788		$ 5,542,595		$ 5,426,846		$ 5,443,564		$ 5,062,984
Total Operating Profit	1,316,770		1,190,108		1,121,259		1,084,761		633,917
Operating Profit %	24.20%		21.47%		20.66%		19.93%		12.52%
Nominal Annual Change		(2.73)		(0.81)		(0.73)		(7.41)	

Source:
Ex. 4 (Tribune 2007 Form 10-K).

[623] *See* Annex A to Volume Two; *see also* Report at § III.C.1.

that Tribune experienced an adverse revenue variance to plan of 5%, and a negative operating profit variance to plan of 8%.[624]

In light of these considerations, the downside case assumed a continuation of the 2007 decline in revenues, at diminishing rates of decline (5.0%, 4.0%, 3.0%, 2.0% and 1.0% through 2012) and flat growth in revenues thereafter.[625] The Examiner's financial advisor also assumed a 2% nominal EBITDA decline, before corporate expenses, from what was projected in the base case projections, in recognition of the historical volatility in Tribune's operating profitability. This assumption recognized that, at lower levels of revenues, margins would be expected to decline in view of the fixed elements of Tribune's cost structure:[626]

STEP TWO STRESS CASE REVENUE SUMMARY ($mm)

	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020	2021	2022
Examiner's Base Case	**$ 4,842.2**	**$ 4,878.2**	**$ 4,911.7**	**$ 5,018.1**	**$ 5,075.1**	**$ 5,165.1**	**$ 5,241.1**	**$ 5,310.6**	**$ 5,366.2**	**$ 5,401.1**	**$ 5,420.2**	**$ 5,442.8**	**$ 5,468.8**	**$ 5,498.4**	**$ 5,531.5**	**$ 5,568.2**
% Growth		*0.7%*	*0.7%*	*2.2%*	*1.1%*	*1.8%*	*1.5%*	*1.3%*	*1.0%*	*0.7%*	*0.4%*	*0.4%*	*0.5%*	*0.5%*	*0.6%*	*0.7%*
Examiner's Stress Case	**$ 4,842.2**	$ 4,600.1	$ 4,416.1	$ 4,283.6	$ 4,198.0	$ 4,156.0	$ 4,156.0	$ 4,156.0	$ 4,156.0	$ 4,156.0	$ 4,156.0	$ 4,156.0	$ 4,156.0	$ 4,156.0	$ 4,156.0	$ 4,156.0
% Growth		*-5.0%*	*-4.0%*	*-3.0%*	*-2.0%*	*-1.0%*	*0.0%*	*0.0%*	*0.0%*	*0.0%*	*0.0%*	*0.0%*	*0.0%*	*0.0%*	*0.0%*	*0.0%*

STEP TWO STRESS CASE OPERATING MARGIN SUMMARY (1)

	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020	2021	2022
Examiner's Base Case	*25.1%*	*25.6%*	*25.9%*	*25.7%*	*26.1%*	*26.4%*	*26.8%*	*27.1%*	*27.4%*	*27.6%*	*27.8%*	*28.0%*	*28.2%*	*28.4%*	*28.6%*
Examiner's Stress Case	*23.1%*	*23.6%*	*23.9%*	*23.7%*	*24.1%*	*24.4%*	*24.8%*	*25.1%*	*25.4%*	*25.6%*	*25.8%*	*26.0%*	*26.2%*	*26.4%*	*26.6%*

(1) Excludes Corporate Expenses.

These factors were modeled, in combination, to assess capital adequacy at Step Two. The results of the Examiner's analysis are set forth in the table below, and show that, under these stress conditions, Tribune has insufficient capital:

624 *See* Report at § III.H.1

625 The Examiner notes that these rates of annual revenue decline are not inconsistent with rates of decline considered by various advisors as discussed in the Step One capital adequacy assessment section of the Report. *See* Report at § IV.B.5.d.(9).

626 The Examiner's review of Tribune historical financial performance indicated the relationship. The phenomenon is particularly true with regard to Tribune's Broadcasting Segment.

EXAMINER'S STRESS CASE RESULTS at STEP TWO (TRIBUNE) ($mm)

	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020	2021	2022
Capital Adequacy Cushion	$ 1,201.5	$ 374.4	($ 232.9)	($ 444.7)	($ 658.1)	($ 938.4)	($ 1,117 8)	($ 1,600.9)	($ 1,731.1)	($ 1,835.8)	($ 1,922.4)	($ 1,991.1)	($ 2,042.2)	($ 2,076.4)	($ 2,094 5)
Guaranteed Leverage Ratio	8.32	8.43	8.82	8.93	8.78	8.57	8.36	8.17	8.00	7.85	7.70	7.55	7.40	7.26	7.11
Maximum Covenant Ratio	9.00	8.75	8.50	8.25	8.25	8.25	8.25	8.25	8.25	8.25	8.25	8.25	8.25	8.25	8.25
Interest Coverage Ratio	1.20	1.23	1.14	1.09	1.09	1.11	1.13	1.15	1.18	1.21	1.23	1.25	1.28	1.30	1.32
Minimum Covenant Ratio	1.15	1.20	1.25	1.25	1.25	1.25	1.25	1.25	1.25	1.25	1.25	1.25	1.25	1.25	1.25

As discussed in another part of the Report,[627] VRC prepared an assessment, dated October 29, 2007, of Tribune management's projections provided to VRC in September 2007. This work, which the Examiner previously has noted contained detailed and, in many instances, cogent analyses of Tribune's business and financial prospects, substantiates the analysis performed by the Examiner's financial advisor.[628] As part of this assessment, VRC ran a variety of valuation scenarios to test the effect that different assumptions of Tribune future performance would have on Tribune value. The Examiner's financial advisor identified a set of projections, prepared by VRC and labeled "VRC Downside Case," which appear to correspond closely to the downside scenario parameters discussed in memoranda prepared by VRC analysts.[629] The nominal revenue and EBITDA estimates made by VRC, as reflected in that downside case model, were incorporated into the Examiner's cash flow test model to assess Tribune capital adequacy under stress case conditions considered by VRC in October:

STEP TWO STRESS CASE REVENUE SUMMARY ($mm)

	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020	2021	2022
Examiner's Base Case	$ 4,842.2	$ 4,878.2	$ 4,911.7	$ 5,018.1	$ 5,075.1	$ 5,165.1	$ 5,241.1	$ 5,310.6	$ 5,366.2	$ 5,401.1	$ 5,420.2	$ 5,442.8	$ 5,468.8	$ 5,498.4	$ 5,531.5	$ 5,568.2
% Growth		0.7%	0.7%	2.2%	1.1%	1.8%	1.5%	1.3%	1.0%	0.7%	0.4%	0.4%	0.5%	0.5%	0.6%	0.7%
VRC 10/28/2007 Downside	$ 4,856.7	$ 4,688.6	$ 4,565.9	$ 4,486.7	$ 4,433.3	$ 4,397.7	$ 4,362.8	$ 4,328.3	$ 4,294.3	$ 4,260.9	$ 4,228.0	$ 4,195.6	$ 4,163.7	$ 4,132.3	$ 4,101.5	$ 4,071.1
% Growth		-3.5%	-2.6%	-1.7%	-1.2%	-0.8%	-0.8%	-0.8%	-0.8%	-0.8%	-0.8%	-0.8%	-0.8%	-0.8%	-0.7%	-0.7%

627 *See* Report at § III.H.3.f.(2).

628 For reasons that the Examiner did not have an adequate opportunity to evaluate, as discussed in another part of the Report, VRC abandoned this analysis in favor of adopting, wholesale, Tribune management's projections and performing an untenable capital adequacy analysis. *See* Report at § III.H.3.f.(2).

629 *See* Ex. 1004 at VRC0034820-21 and VRC003456-85 (Mednick E-Mail, dated October 31, 2007).

STEP TWO STRESS CASE OPERATING MARGIN SUMMARY (1)	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020	2021	2022
Examiner's Base Case	25.1%	25.6%	25.9%	25.7%	26.1%	26.4%	26.8%	27.1%	27.4%	27.6%	27.8%	28.0%	28.2%	28.4%	28.6%
VRC 10/28/2007 Downside	23.6%	23.9%	23.4%	22.8%	21.9%	21.9%	22.0%	22.0%	22.0%	22.1%	22.1%	22.2%	22.2%	22.3%	22.3%

(1) Excludes Corporate Expenses.

When those revenue and EBITDA projections are incorporated into the Examiner's financial advisor's capital adequacy model, the results indicate inadequate capitalization as early as 2010, with deepening shortfalls in cash to meet required obligations thereafter. Moreover, by 2010, both the leverage ratio and interest coverage ratios are breached under the assumptions of VRC's downside case.

VRC OCTOBER 28, 2007 DOWNSIDE CASE RESULTS at STEP TWO (TRIBUNE) ($mm)	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020	2021	2022
Capital Adequacy Cushion	$ 1,247.0	$ 472.0	($ 100.6)	($ 298.6)	($ 554.8)	($ 897.3)	($ 1,158.7)	($ 1,742.0)	($ 1,987.7)	($ 2,221.2)	($ 2,450.1)	($ 2,674.6)	($ 2,894.9)	($ 3,111.6)	($ 3,325.5)
Guaranteed Leverage Ratio	7.97	7.99	8.61	8.82	9.13	9.07	9.00	8.94	8.87	8.79	8.72	8.64	8.57	8.48	8.40
Maximum Covenant Ratio	9.00	8.75	8.50	8.25	8.25	8.25	8.25	8.25	8.25	8.25	8.25	8.25	8.25	8.25	8.25
Interest Coverage Ratio	1.25	1.29	1.18	1.10	1.05	1.05	1.05	1.06	1.07	1.08	1.09	1.09	1.10	1.11	1.12
Minimum Covenant Ratio	1.15	1.20	1.25	1.25	1.25	1.25	1.25	1.25	1.25	1.25	1.25	1.25	1.25	1.25	1.25

Based on the analysis performed by the Examiner's financial advisor, which is largely corroborated by the preceding downside case analysis performed by VRC but unfortunately not adopted in its final solvency opinion, the Examiner concludes that it is highly likely that a court would find that the Step Two Transactions left Tribune without adequate capital.

Explanation of Examiner's Conclusions - The Guarantor Subsidiaries:

The Examiner 's financial advisor next assessed the capital adequacy of the Guarantor Subsidiaries after giving effect to the Step Two Transactions. In structure, the capital adequacy model developed by the Examiner's financial advisor makes the same assumptions as the Tribune-level model, with the following significant difference:

- The model eliminates the requirement to fund principal and interest payments associated with Tribune-only debt, including any discretionary payments associated therewith.[630]

After making this adjustment, the Examiner's financial advisor evaluated the capital adequacy of the Guarantor Subsidiaries by testing the same base case and downside case projection parameters as developed for the Tribune-level analysis discussed above. The results, presented below, show that although under the Examiner's financial advisor's base case the Guarantor Subsidiaries would be expected to maintain compliance with debt covenants and have ample cash to meet operational and financial commitments, under the downside case the Guarantor Subsidiaries would not.

EXAMINER'S BASE CASE RESULTS at STEP TWO (GUARANTOR SUBSIDIARIES) ($mm)

	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020	2021	2022
Capital Adequacy Cushion	$ 1,194.6	$ 695.4	$ 932.7	$ 949.3	$ 1,010.3	$ 1,078.0	$ 1,154.5	$ 1,234.8	$ 1,315.7	$ 1,404.4	$ 1,497.7	$ 1,600.1	$ 1,717.2	$ 1,839.9	$ 2,000.1
Guaranteed Leverage Ratio	7.32	6.88	6.43	6.14	5.68	5.21	4.73	4.24	3.74	3.23	2.67	2.07	1.43	0.74	0.00
Maximum Covenant Ratio	9.00	8.75	8.50	8.25	8.25	8.25	8.25	8.25	8.25	8.25	8.25	8.25	8.25	8.25	8.25
Interest Coverage Ratio	1.52	1.67	1.64	1.67	1.76	1.87	2.00	2.16	2.35	2.62	2.96	3.45	4.19	5.46	9.20
Minimum Covenant Ratio	1.15	1.20	1.25	1.25	1.25	1.25	1.25	1.25	1.25	1.25	1.25	1.25	1.25	1.25	1.25

EXAMINER'S STRESS CASE RESULTS at STEP TWO (GUARANTOR SUBSIDIARIES) ($mm)

	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020	2021	2022
Capital Adequacy Cushion	$ 1,035.4	$ 320.7	$ 272.3	$ 180.8	$ 81.7	($ 12.5)	($ 98.1)	($ 167.6)	($ 221.5)	($ 250.4)	($ 261.0)	($ 253.7)	($ 228.9)	($ 187.1)	($ 129.3)
Guaranteed Leverage Ratio	8.46	8.48	8.56	8.75	8.68	8.55	8.36	8.17	8.00	7.85	7.70	7.55	7.40	7.26	7.11
Maximum Covenant Ratio	9.00	8.75	8.50	8.25	8.25	8.25	8.25	8.25	8.25	8.25	8.25	8.25	8.25	8.25	8.25
Interest Coverage Ratio	1.33	1.40	1.29	1.24	1.23	1.23	1.24	1.26	1.28	1.31	1.33	1.36	1.38	1.41	1.43
Minimum Covenant Ratio	1.15	1.20	1.25	1.25	1.25	1.25	1.25	1.25	1.25	1.25	1.25	1.25	1.25	1.25	1.25

The Examiner's financial advisor then tested the same previously discussed VRC downside model, taking into account Guarantor Subsidiary debt. The results are as follows:

[630] Such Tribune-only debt includes the EGI-TRB Notes, $300 million in asset-backed notes, the TMCT lease expiring in 2009, the Senior Notes, the PHONES Notes, and certain other notes and obligations. These liabilities, for purposes of the capital adequacy model, total approximately $2.445 billion in the aggregate. It should be noted that few of the Tribune-only assets generated meaningful cash flow. Thus, consideration of the Guarantor Subsidiary capital adequacy did not necessitate adjustments to cash flow.

VRC OCTOBER 28, 2007 DOWNSIDE CASE RESULTS at STEP TWO (GUARANTOR SUBSIDIARIES) ($mm)															
	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020	2021	2022
Capital Adequacy Cushion	$ 1,080.8	$ 418.3	$ 403.9	$ 335.9	$ 205.8	$ 59.3	($ 103.7)	($ 273.3)	($ 442.7)	($ 600.3)	($ 753.3)	($ 901.8)	($ 1,046.2)	($ 1,187.0)	($ 1,324.8)
Guaranteed Leverage Ratio	8.11	8.04	8.25	8.50	8.91	8.99	9.00	8.94	8.87	8.79	8.72	8.64	8.57	8.48	8.40
Maximum Covenant Ratio	9.00	8.75	8.50	8.25	8.25	8.25	8.25	8.25	8.25	8.25	8.25	8.25	8.25	8.25	8.25
Interest Coverage Ratio	1.39	1.47	1.33	1.27	1.20	1.18	1.16	1.15	1.15	1.17	1.18	1.19	1.20	1.21	1.22
Minimum Covenant Ratio	1.15	1.20	1.25	1.25	1.25	1.25	1.25	1.25	1.25	1.25	1.25	1.25	1.25	1.25	1.25

Albeit to a lesser degree, as is the case with Tribune, both the downside case developed by the Examiner's financial advisor and the above discussed VRC downside case scenario yield results consistent with the conclusion that the Guarantor Subsidiaries did not have adequate capital. As a result, the Examiner concludes that it is reasonably likely that a court would find that the Step Two Transactions left the Guarantor Subsidiaries without adequate capital. As a general matter, the key difference between the Examiner's capital adequacy analysis at Step One and Step Two is the substantial adjustments the Examiner's financial advisor made to Tribune management's October 2007 forecast, the latter of which the Examiner has found was unreasonable. By contrast, the Examiner did not find Tribune management's February 2007 forecast unreasonable for purposes of testing capital adequacy at Step One.

6. Intention to Incur or Belief that the Tribune Entities Would Incur Debts Beyond Their Reasonable Ability to Pay.

a. The Legal Standard.

Bankruptcy Code section 548(a)(1)(B)(ii)(III) provides for the avoidance of a transfer or obligation when the debtor "intended to incur or believed that the debtor would incur, debts that would be beyond the debtor's ability to pay as such debts matured."[631] Although several courts have held that this provision requires proof of the debtor's subjective intent or belief that it would incur debts beyond its ability to pay,[632] other courts have inferred the requisite intent from the

631 11 U.S.C. § 548(a)(1)(B)(ii)(III) (2006).

632 *See Off. Unsecured Creditors Comm. of Valley-Vulcan Mold Co. v. Microdot, Ins. (In re Valley-Vulcan Mold Co.)*, 1994 Bankr. LEXIS 2347, at *13 (N.D. Ohio) (citing *Yoder v. T.E.L. Leasing, Inc. (In re Suburban Motor Freight, Inc.)*, 124 B.R. 984, 1001 (Bankr. S.D. Ohio 1990)); *In re Taubman Realty Co.,* 160 B.R. 964, 986

facts and circumstances regarding the transfer, essentially applying an objective or reasonable person standard.[633]

b. Examiner's Conclusions and Explanation Concerning Application to Step One.

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

If a court were to apply a subjective or objective test, a court would be reasonably unlikely to find that the Tribune Entities intended to incur or believed they would incur debts beyond their ability to pay as such debts matured at Step One.

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

For many of the same reasons discussed in the Report's analysis of the question of intentional fraudulent transfer at Step One,[634] there is insufficient evidence to support a finding that the Tribune Entities entered into Step One subjectively intending not to pay their debts as they matured. If a court were to apply an objective test, then for all practical purposes the question is whether the Tribune Entities had adequate capital and the answer to that question likely would be the same here.

(Bankr. S.D. Ohio 1993) ("This prong . . . requires the court to undergo a subjective, rather than objective inquiry into the party's intent.").

633 *See WRT Creditors Liquidation Trust v. WRT Bankr. Litig. Master File (In re WRT Energy Corp.)*, 282 B.R. 343, 415 (Bankr. W.D. La. 2001) ("While the statute suggests a standard based on subjective intent, the courts have held that the intent requirement can be inferred where the facts and circumstances surrounding the transaction show that the debtor could not have reasonably believed that it would be able to pay its debts as they matured."); *Suburban Motorfreight*, 124 B.R. at 1001 (finding stockholders could not have reasonably believed company would have been able to pay debts as they matured). *See also ASARCO LLC v. Ams. Mining Corp.*, 396 B.R. 278, 399 (S.D. Tex. 2008) (applying Delaware fraudulent transfer law).

634 *See* Report at § IV.B.4.b.

c. Examiner's Conclusions and Explanation Concerning Application to Step Two.

Examiner's Conclusions:

If a court were to apply a subjective test, a court would be somewhat likely to find that the evidence supports the conclusion that at Step Two the Tribune Entities intended to incur or believed they would incur debts beyond their ability to pay as such debts matured. If a court were to apply an objective test on this question, however, the same answer would be given to this question and the question of capital adequacy at Step Two.

Explanation for Examiner's Conclusions:

Applying a subjective test, if a court were to agree with the Examiner's conclusion concerning intentional fraudulent transfer at Step Two, it is somewhat likely that a court would also find that the Tribune Entities believed that they would incur debts beyond their ability to pay as such debts matured. Largely the same evidence on the question of intentional fraudulent transfer would point in the same direction on this question. If a court were to apply an objective test, then for all practical purposes the question is whether the Tribune Entities had adequate capital and the answer to that question furnished above likely would be the same here.

7. Asserted Defenses to Fraudulent Transfer Claims.

The Report turns to issues concerning defenses that might be asserted to the above-discussed fraudulent transfer claims.

a. Defenses Under Bankruptcy Code section 546(e).

(1) Examiner's Conclusions and Explanation Concerning Section 546(e) Defenses.

Examiner's Conclusions:

A court is highly likely to find that Bankruptcy Code section 546(e)[635] protects payments to the Selling Stockholders on account of their stockholder interests in Tribune under the Leveraged ESOP Transactions, except to the extent the transfers constitute intentional fraudulent transfer. Whether or not intentional fraudulent transfers are involved, a court is reasonably likely to find, however, that section 546(e) does not protect against avoidance of the obligations incurred under the Credit Agreement or the Stock Pledge, guarantees, or promissory notes given in connection therewith.[636]

Explanation of Examiner's Conclusions:

Absent an intentional fraudulent transfer under Bankruptcy Code section 548(a)(1)(A),[637] which is not superseded under section 546(e), the application of the 546(e) defense to the Selling Stockholders on account of payments made under the Leveraged ESOP Transactions is straightforward. Section 546(e) provides that a "trustee may not avoid a transfer" that is

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[635] 11 U.S.C. § 546(a) (2006).

[636] Because the scope of the Investigation is limited to claims and defenses asserted by the Parties, the Report does not address potential 546(e) defenses that might be asserted by other parties with respect to other payments made in the Leveraged ESOP Transactions. Absent further order of the Bankruptcy Court expanding the scope of the Investigation, the Examiner is not permitted to consider these matters.

[637] *Hechinger Inv. Co. v. Fleet Retail Fin. Grp. (In re Hechinger Inv. Co.),* 274 B.R. 71, 75 (D. Del. 2002) ("[T]he Committee is correct that section 548(a)(1) claims for intentional fraudulent transfers . . . are exempted from . . . section 546(e). . . .").

"settlement payment" and which is "made by or to (or for the benefit of) commodity broker, forward contract merchant, stock broker, financial institution, financial participant, or securities clearing agency."[638] The Third Circuit Court of Appeals has held that section 546(e) bars recovery of payments made to selling stockholders in the context of a leveraged buyout transaction.[639] Courts have held that the term "settlement payment" means "the transfer of cash or securities made to complete a securities transaction" and that the term "made by or to . . . a financial institution" is satisfied by a wire transfer of payment from the debtor's bank account to the selling stockholder. [640] Courts have applied this defense to bar recovery of payments in a leveraged buyout even from significant selling stockholders, including insiders.[641]

The payments made to the Selling Stockholders in the Leveraged ESOP Transactions were effectuated by wire transfers through a financial institution, and, under applicable Third Circuit law, those transfers likely are insulated from avoidance or recovery absent the successful prosecution of a claim for intentional fraudulent transfer under Bankruptcy Code section 548(a)(1)(A). Although the court in *Mervyn's LLC v. Lubert-Adler Group IV, LLC (In re Mervyn's Holdings, LLC)*[642] recently stated that "section 546(e) does not apply to 'collapsed' transactions," that statement would not support a different conclusion regarding the payments made to the Selling Stockholders. The *Mervyn's* case arose out of a scheme to strip the real

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[638] 11 U.S.C. § 546(e) (2006).

[639] *See Brandt v. B.A. Capital Co. LP (In re Plassein Int'l Corp.)*, 590 F.3d 252, 258-59 (3d Cir. 2009); *Lowenschuss v. Resorts Int'l, Inc. (In re Resorts Int'l Inc.)*, 181 F.3d 505, 514-16 (3d Cir. 1999); *see also PHP Liquidating, LLC v. Robbins,* 291 B.R. 603, 606-07 (D. Del. 2003), *aff'd sub nom. PHP Liquidating Trust, LLC v. Robbins (In re PHP Healthcare Corp.)*, 128 F. App'x 839 (3d Cir. 2005). *Accord In re Kaiser Steel Corp.*, 952 F.2d 1230, 1240 (10th Cir. 1991).

[640] *Resorts Int'l*, 181 F.3d at 515; *see also Off. Comm. of Unsecured Creditors of IT Group, Inc. v. Acres of Diamonds, L.P. (In re IT Group, Inc.)*, 359 B.R. 97, 99-102 (Bankr. D. Del. 2006).

[641] *See Off. Comm. of Unsecured Creditors of Nat'l Forge Co. v. Clark (In re Nat'l Forge Co.)*, 344 B.R. 340, 367-70 (W.D. Pa. 2006) (suit against inside stockholders in LBO similar to this case); *Hechinger*, 274 B.R. at 87; *Elway Co. v. Miller (In re Elrod Holdings Corp.)*, 394 B.R. 760, 763-64 (Bankr. D. Del. 2008); *Loranger Mfg. Co. v. PNC Bank (In re Loranger Mfg. Corp.),* 324 B.R. 575, 585-86 (Bankr. W.D. Pa. 2005).

[642] 426 B.R. 488, 500 (Bankr. D. Del. 2010).

estate assets out of the debtor, Mervyn's LLC, a wholly owned subsidiary of Target Corporation, and to sell those assets to a group of three private equity firms. In considering the section 546(e) defense, the bankruptcy court reasoned that the protection afforded by that statutory provision could not be extended to encompass steps not involving settlement payments that had actually inflicted the damage and had driven the debtor into bankruptcy.[643] In contrast to the facts of that case, any action to recover the payments made to the Selling Stockholders would not be based on an interim conveyance, but on the final and core transaction protected by Section 546(e)–*i.e.*, the payment of funds to stockholders in return for or on account of their securities. Regardless, the *Mervyn's* court's blanket suggestion that section 546(e) does not apply to collapsed transactions is at odds with the applicable law in the Third Circuit.[644] In sum, unless the transfers in question are avoided as intentional fraudulent transfers under Bankruptcy Code section 548(a)(1)(A), payments to Selling Stockholders cannot be avoided under the Bankruptcy Code's avoiding powers.

The possible application of section 546(e) to bar constructive fraudulent transfer avoidance of the obligations incurred under the Credit Agreement as well as the Stock Pledge requires a finer analyses. Because the obligations incurred and security interests granted to the LBO Lenders are not settlement or margin payments, the application of section 546(e) in this instance depends on the amendments to section 546(e) enacted in the Financial Nettings Improvement Act of 2006. Because of that Act, section 546(e) currently provides: [645]

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[643] *Id.* ("Target's attempt to have this Court apply section 546(e) to a single conveyance within the entire transaction is not persuasive.").

[644] Section 546(e) has been applied on numerous occasions to protect payments to stockholders in LBO cases in which the various transactions might otherwise have been collapsed. *See In Resorts Int'l*, 181 F.3d at 515 & n.7; *Hechinger*, 274 B.R. at 83-89.

[645] 11 U.S.C. § 546(e) (2006) (changes in emphasis), adopted under Financial Netting Improvements Act of 2006 § 5(b), Pub. L. No. 109-390, 120 Stat. 2697 (Dec. 12, 2006).

> Notwithstanding sections 544, 545, 547, 548(a)(1)(B), and 548(b) of this title, the trustee may not avoid a transfer that is a margin payment, as defined in section 101, 741, or 761 of this title, or settlement payment, as defined in section 101 or 741 of this title, made by or to (*or for the benefit of*) a commodity broker, forward contract merchant, stockbroker, financial institution, financial participant, or securities clearing agency, *or that is a transfer made by or to (or for the benefit of) a commodity broker, forward contract merchant, stockbroker, financial institution, financial participant, or securities clearing agency, in connection with a securities contract, as defined in section 741(7), commodity contract, as defined in section 761(4), or forward contract*, that is made before the commencement of the case, except under section 548(a)(1)(A) of this title.

The case for application of expanded section 546(e) as a complete defense to a constructive fraudulent transfer action to avoid the obligations under the Credit Agreement as well as the Stock Pledge requires a demonstration of four elements: (1) the broad definition of "transfer" under Bankruptcy Code section 101(54)(D), which encompasses "each mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing or parting with—(i) property; or (ii) an interest in property,"[646] extends to the obligations incurred under the Credit Agreement, the Stock Pledge, and the guarantees and promissory notes in connection therewith; (2) the Credit Agreement Agent and the other lenders under the Credit Agreement are financial institutions, financial participants and/or stockbrokers for purposes of section 546(e);[647] (3) either or both of the Merger Agreement and the Credit Agreement constituted a "securities contract;"[648]

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646 11 U.S.C. § 101(54)(D) (2006).

647 A "financial institution" includes, *inter alia*, "an entity that is a commercial or savings bank . . .; or an investment company registered under the Investment Company Act of 1940." *See* 11 U.S.C. § 101(22) (2006). The term "financial institution" also includes any "customer" of such an institution when the institution is acting as an "agent . . . in connection with a securities contract." *Id.* Similarly, a "financial participant" includes any entity with certain minimum levels of particular kinds of financial activity. *See* 11 U.S.C. § 101(22A) (2006).

648 Congress expanded the definition of "securities contract" when it enacted the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA") § 907(a)(2), Pub. L. 109-8, 119 Stat. 173 (2005) to include, inter alia, "(i) a contract for the purchase, sale, or loan of a security; . . . (iv) any margin loan; . . . (v) any extension of credit for the clearance or settlement of securities transactions; . . . (vii) any other agreement or transaction that is similar to an agreement or transaction referred to in this subparagraph . . . ; (xi) any . . . other credit enhancement related to any agreement referred to in this subparagraph, including any guarantee . . . ." 11 U.S.C. § 741(7)(A) (2006). Prior to enactment of BAPCPA, the definition of "securities contract" under section 741 was limited to a "contract for the purchase, sale, or loan of a security, including an option for the purchase

and (4) the obligations, the Stock Pledge, and the guarantees and promissory notes in connection therewith all were transfers made "in connection with" a "securities contract."[649]

No reported decision has interpreted revised section 546(e) in the context asserted here. The bankruptcy court in *Global Crossing Estate Representative v. Alta Partners Holdings LDC (In re Global Crossing, Ltd.)*,[650] made passing reference to the amendments, but nothing more. A similar acknowledgment in *Collier* that Congress broadened the scope of section 546(e) is equally unenlightening.[651] The fact that Congress expanded section 546(e) in certain respects does not answer whether those changes are relevant to the instant dispute. The legislative history to this amendment is limited and, despite the Parties' vigorous advocacy, does not illuminate the question posed.[652] Thus, ordinary tools of statutory construction must be deployed to address this question.

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or sale of a security, certificate of deposit, or group or index of securities (including any interest therein or based on the value thereof), or any option entered into on a national securities exchange relating to foreign currencies, or the guarantee of any settlement of cash or securities by or to a securities clearing agency." 11 U.S.C. § 741(7) (2000). The House Report on the legislation enacting these changes furnishes little explanation regarding these changes. The discussion of clause (v) covering "extensions of credit" states the amendment was "intended to confirm that the definition encompasses credit extended for the execution, clearance and settlement of securities transactions, which provide important liquidity to the securities markets." *See* H.R. Rep. No. 109-648 (2006) *as reprinted in* 2006 U.S.C.C.A.N. 1585, 1589. Of course, this does not address whether the term was intended to cover a loan made to a borrower to redeem its own publicly held stock, and, on the contrary, the natural reading of the clause suggests a much more narrow construction.

649 *Casa de Cambio Magapara, S.A. de C.V. v. Wachovia Bank, N.A. (In re Casa de Cambio Magapara)*, 390 B.R. 595, 597-99 (Bankr. N.D. Ill. 2008) (finding that "prejudgment attachments were obtained 'in connection with' swap agreement"); *Interbulk, Ltd. v. Louis Drefus Corp. (In re Interbulk, Ltd.)*, 240 B.R. 195, 202 (Bankr. S.D.N.Y. 1999) ("A natural reading of 'in connection with' suggests a broad meaning similar to 'related to.'") (citations omitted).

650 385 B.R. 52, 57 (Bankr. S.D.N.Y. 2008) ("[L]ater amendments to the Code—inapplicable to this transaction but instructive as to what Congress was thinking about—broaden that definition and section 546(e)'s safe harbor . . .").

651 5 COLLIER ON BANKRUPTCY ¶ 546.06, at n.14 (Alan A. Resnick & Henry J. Sommers eds., 16th ed.).

652 The legislative history stated that this was a "technical and clarifying change[.]" H.R. Rep. No. 109-648, pt. 1, at 6-7 (2006), *as reprinted in* 2006 U.S.C.C.A.N. 1585, 1591-92. *See Hutson v. E.I. du Pont de Nemours & Co. (In re Nat'l Gas Distribs., LLC*, 556 F.3d 247, 257 (4th Cir. 2009) (noting that the revisions to the definitions as part of the Financial Netting Improvement Act of 2006 were "technical and clarifying changes."). *See also In re Lehman Bros. Holdings, Inc.*, 2010 Bankr. LEXIS 1260, *25-26 (Bankr. S.D.N.Y. May 5, 2010) (rejecting contention that 2006 amendments eliminated requirement of mutuality from the automatic stay exceptions found in Bankruptcy Code section 362(d) and stating that "[t]he legislative history of FNIA reveals that

For this defense to succeed, each component of the above-summarized argument (i.e., (1) - (4)) must hold up. If any one does not, the defense fails. The Examiner finds that the defense does not make it past its first element—that the obligations incurred under the Credit Agreement resulting from the advances of loans by the lenders thereunder constituted a "transfer" within the meaning of the Bankruptcy Code. The plain language of Bankruptcy Code section 546(e) simply does not protect obligations that are avoidable under sections 544 and 548. Moreover, although the Bankruptcy Code's definition of "transfer" is indisputably broad, the term does not encompass an "obligation," whether or not embodied in an instrument (e.g., promissory note or loan agreement) delivered to a "stockbroker, financial institution [or] financial participant."

The most cursory reading of the Bankruptcy Code shows that the term "transfer" and "obligation" are not one and the same. Bankruptcy Code sections 544 and 548, for example, specify two distinct avoidance powers: the avoidance of a transfer and the avoidance of an

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Congress intended merely to make "technical changes to the netting and financial provisions" of the Bankruptcy Code to "update the language to reflect current market and regulatory practices" and that "[t]hese technical amendments cannot be read as authority for so fundamental a change in creditor rights") (internal citations omitted). The general purpose of the 2006 amendments was described as follows:

> H.R. 5585 makes technical changes to the netting and financial contract provisions incorporated by the [2004 Amendments] to update the language to reflect current market and regulatory practices, and help reduce systemic risk in the financial markets by clarifying the treatment of certain financial products in cases of bankruptcy or insolvency.

H.R. Rep. No. 109-648 (2006) *as reprinted in* 2006 U.S.C.C.A.N. 1585, 1591-92. The legislative history specific to section 546(e) stated that the language was amended to conform to section 546(f).

> Section 5(b) amends Sections 546(e) and 546(f) of the Bankruptcy Code, which protect margin payments and settlement payments, to also protect transfers made by or to a commodity broker, forward contract merchant, stockbroker, financial institution, financial participant, securities clearing agency, or repo participant, in connection with a securities contract, commodity contract, forward contract, or repurchase agreement. This amendment conforms the language of Sections 546(e) and 546(f) to the language in 546(g), regarding the protection of transfers in connection with swap agreements.

Id. at 8.

Statements from the House floor are not particularly illuminating. *See* 152 CONG. REC. H7601 (daily ed. Sept. 27, 2006) (statement of Rep. Schultz) ("The primary goal of our legislation is to minimize systemic risks in situations when the procedure for resolving a single insolvency could trigger other failures elsewhere in the market."); 152 CONG. REC. H8651 (daily ed. Nov. 15, 2006) (statement of Rep. Baker) ("[T]here is considerable market uncertainty as to how a bankruptcy . . . would affect market liquidity. The unwinding of these obligations . . . go[es] to the broader financial marketplace.").

obligation.[653] If an obligation always were a transfer, the separate references to an obligation in these sections alone would be a surplusage.[654] "The fraudulent conveyance essentially has to do with the consummated effort of the debtor to pass the asset beyond the creditor's reach by means of creating an alien interest in it."[655] In contrast, the incurring of an obligation for less than reasonably equivalent value increases the claims against property in the debtor's hands. There is simply no transfer out. Thus, Bankruptcy Code section 551 provides that an avoided transfer "is preserved for the benefit of the estate."[656] There is no reason to "preserve" an avoided obligation because, by definition, avoidance of an obligation correspondingly reduces the debtor's liabilities proportionate to the commission of a constructive or actual fraud.[657] Likewise, Bankruptcy Code section 550(a) provides that to the extent a transfer is avoided, the estate representative may recover "the property transferred, or if the court so orders, the value of such property . . . ."[658] There is nothing to "recover" when an obligation is avoided.

The cornerstone of a transfer, within the meaning of Bankruptcy Code section 101(54), is an interest in property, whether in the form of a lien, retention of title, a debtor's equity of redemption, or otherwise, which is then disposed of in some fashion.[659] In contrast, an

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653 11 U.S.C. §§ 544(b)(1) and 548(a)(1) (2006).

654 *See Rake v. Wade*, 508 U.S. 464, 471 (1993) ("To avoid deny[ing] effect to a part of a statute, we accord significance and effect . . . to every word.") (internal citations omitted); *Hoffman v. Conn. Dep't of Income Maint.*, 492 U.S. 96, 103 (1989) ("It is our duty to give effect, if possible, to every clause and word of a statute. . . .") (citations omitted).

655 GARRARD GLENN, THE LAW OF FRAUDULENT CONVEYANCES § 3, at 5 (1931).

656 11 U.S.C. § 551 (2006).

657 11 U.S.C. § 548(a), (c) (2006).

658 11 U.S.C. § 550(a) (2006); *see Coleman v. Cmty. Trust Bank (In re Coleman)*, 426 F.3d. 719, 726 (4th Cir. 2005) (noting the distinction in context of section 544).

659 11 U.S.C. §101(54) (2006); *see also Barber v. Dunbar (In re Dunbar)*, 313 B.R. 430, 435 (Bankr. C.D. Ill. 2004) ("The hallmark of a 'transfer' is a change in the rights of the transferor with respect to the property after the transaction.") (citations omitted); *Towers v. U.S. Dep't of Treasury (In re Feiler)*, 218 B.R. 957, 962 (Bankr. N.D. Cal. 1998) (treating debtor's election to carry forward NOL's as a transfer), *aff'd*, 218 F.3d 948 (9th Cir. 2000).

obligation is a duty imposed by contract, law, or the moral universe.[660] A right to payment starts its life as an obligation to pay something to someone else; when that obligation is honored and funds move from one party's hands to another, a transfer on account of the obligation occurs, but the fact that an obligation may give rise to a transfer does not make an obligation a transfer. The two are very different things. *Barnhill v. Johnson*[661] illustrates the distinction nicely. There, a debtor delivered a check outside the 90-day preference period, but the drawee bank honored the check during the preference period. To determine when the transfer occurred for purposes of Bankruptcy Code section 547, the Court distinguished between a transfer and a right to payment embodied in a chose in action:[662]

> We acknowledge that § 101(54) adopts an expansive definition of transfer, one that includes "every mode . . . absolute or conditional . . . of disposing of or parting with property or with an interest in property." *There is thus some force in petitioner's claim that he did, in fact, gain something when he received the check. But at most, what petitioner gained was a chose in action against the debtor. Such a right, however, cannot fairly be characterized as a conditional right to property," § 101(54), where the property in this case is the account maintained with the drawee bank.* For as noted above, until the moment of honor the debtor retains full control over disposition of the account and the account remains

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660 *See also Black's Law Dictionary* 1104 (8th ed. 2004) (defining obligation as "anything that a person is bound to do or forbear from doing, whether the duty is imposed by law, contract, promise, social relations, courtesy, kindness, or morality").

661 503 U.S. 393 (1992).

662 *Id.* at 400-01 (emphasis added). The bankruptcy court in *In re Asia Global Crossing, Ltd.*, 333 B.R. 199 (Bankr. S.D.N.Y. 2005) fleshed out these principles. In that case, 360networks prepaid $100 million to GC Bandwidth for "telecommunications capacity"; the debtor, Asia Global, guaranteed GC Bandwidth's performance of its obligations. *Id.* at 201. 360networks never received the telecommunications capacity and, when Asia Global filed for bankruptcy, it filed a $100 million proof of claim. *Id.* Asia Global's trustee objected to the claim pursuant to Bankruptcy Code section 502(d), which disallows the claim of a transferee of an avoidable transfer but does not speak to the obligee of an avoidable obligation. The court held that section 502(d) was inapplicable:

> Like the check in *Barnhill*, the Guaranty gave 360networks a chose in action against Asia Global, conditioned on the default by GC Bandwidth. It did not grant 360networks any interest in or right to Asia Global's property. As such, it was an "obligation" rather than a "transfer" within the meaning of § 101(54).

Id. at 203; *see also Covey v. Commercial Nat'l Bank*, 960 F.2d 657, 661 (7th Cir. 1992) ("Although a note or guarantee is not a "transfer" for purposes of 11 U.S.C. § 101(54) . . . either is an obligation.") (internal citation omitted).

> subject to a variety of actions by third parties. To treat petitioner's nebulous right to bring suit as a "conditional transfer" of the property would accomplish a near-limitless explanation of the term "conditional." In the absence of any right against the bank or the account, we think the fairer description is that petitioner had received no interest in debtor's property, not that his interest was "conditional."

A contractual right is a species of an obligation. Its lineage and the protections to which a holder of such right is entitled under bankruptcy law are distinct from an interest in property of the debtor and the rights of a holder of an interest in property of the debtor:[663]

> An unsecured simple contract creditor has, in the absence of statute, no substantive right, legal or equitable, in or to the property of his debtor. This is true, whatever the nature of the property; and, although the debtor is a corporation and insolvent. The only substantive right of a simple contract creditor is to have his debt paid in due course. His adjective right is, ordinarily, at law. He has no right whatsoever in equity until he has exhausted his legal remedy. After execution upon a judgment recovered at law has been returned unsatisfied he may proceed in equity by a creditor's bill.

When a property interest is involved, in contrast, important constitutional considerations, not to mention substantive Bankruptcy Code protections, arise and must be addressed.[664] The object of a transfer is the disposition of a property interest, not an obligation. Indeed, the Bankruptcy Code does not even refer to the holder of an obligation as a "transferee" but rather an

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[663] *Pusey & Jones Co. v. Hanssen*, 261 U.S. 491, 497 (1923); *see also Faitoute Iron & Steel Co. v. City of Asbury Park*, 316 U.S. 502, 509-10 (1942) ("In effect, therefore, the practical value of an unsecured claim against the city is inseparable from reliance upon the effectiveness of the city's taxing power. The only remedy for the enforcement of such a claim is a mandamus to compel the levying of authorized taxes."); GLENN at footnote 655, § 9, at 15-16 ("The relation of debtor and creditor embodies nothing but the right to sue, and the right to defend on the merits. Until the creditor gets judgment, he has no right to touch or interfere with any of the debtor's assets.") (citations omitted). *See also* 11 U.S.C. §§ 361, 363(f) (2006).

[664] The limitations, however, are limited indeed. *See generally Wright v. Union Cent. Life Ins. Co.*, 304 U.S. 502, 518 (1938) ("Property rights do not gain any absolute inviolability in the bankruptcy court because created and protected by state law. Most property rights are so created and protected. But if Congress is acting within its bankruptcy power, it may authorize the bankruptcy court to affect these property rights, provided the limitations of the due process clause are observed."); *Wright v. Vinton Branch of Mountain Trust Bank*, 300 U.S. 440, 470 (1937). On the other hand, the substantive rights afforded under the Bankruptcy Code on account of interests in property are significant.