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Tribune Talks to Be Guided by Mediator

By SHIRA OVIDE

Tribune Co. said a court-appointed mediator will help negotiate among sparring creditors in the media company's 21-month stint in bankruptcy, a sign of how contentious the process has become.

Tribune also said its board formed a special committee to oversee its progress in the bankruptcy process.

The moves illustrate the hurdles still facing Tribune, which owns newspapers such as the Los Angeles Times and a string of TV stations, as it attempts to exit Chapter 11 protection. Tribune tipped into bankruptcy in December 2008, weighed down by nearly $13 billion in debt largely from a 2007 buyout deal led by real-estate investor Sam Zell.

The company's biggest creditors, which include J.P. Morgan Chase & Co. and investment firm Angelo Gordon & Co., are poised to take over the company. First, though, these and other Tribune debt holders have to agree on Tribune's blueprint to exit bankruptcy, and the creditor negotiations have broken down, people familiar with the matter have said.

"We're pleased that the court has appointed a mediator; this is a clear sign that reaching consensus is a valuable part of this process," Tribune Chief Executive Randy Michaels said in a statement Wednesday.

The newly appointed special committee of Tribune's board consists of Mark Shapiro, former chief executive of amusement-park company Six Flags Entertainment Corp.; Jeffrey Berg, CEO of talent agency International Creative Management, Inc.; Frontier Communications Corp. CEO Maggie Wilderotter; and Frank Wood, who heads venture-capital firm Secret Communications, LLC.

The mediator in the case is Kevin Gross, a judge in the Delaware federal bankruptcy court, the company said.

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Tribune Creditors Group Seeks Permission to Sue Zell, Others

By PATRICK FITZGERALD

Tribune Co.'s unsecured creditors are seeking approval from a bankruptcy judge to sue Sam Zell and a group of other participants in the disastrous 2007 leveraged buyout that pushed the media giant to the brink of collapse.

In a filing Monday in U.S. Bankruptcy Court in Wilmington, Del., the committee representing Tribune's unsecured creditors said it wants approval to sue Mr. Zell, the deal's architect, as well as company directors, officers and big shareholders who "collectively caused massive damage" to the company by approving "the ruinous LBO transactions."

The committee is asking the bankruptcy court for authority to sue because, it says, Tribune executives are "hopelessly conflicted" and "have no interest in litigating claims" involving the LBO. A hearing on the creditors' request is scheduled for Oct. 22.

The creditors' bid comes as court-appointed mediator tries to broker a bankruptcy-exit deal for Tribune, which publishes the Los Angeles Times and Chicago Tribune and operates a string of broadcast outlets, after support for its exit plan crumbled.

The Tribune buyout is the latest to face scrutiny by creditors of a company in bankruptcy. Creditors can try to boost their recovery in a bankruptcy case by filing a lawsuit claiming that a buyout was a fraudulent transaction that provided no benefit to creditors.

In a key decision in another bankruptcy case, a Florida bankruptcy judge ruled that loans made to Tousa Inc. prior to its bankruptcy filing were "fraudulent transfers" and ordered the home builder's lenders to turn over more than $600 million. That decision has buoyed the hopes of creditors seeking recoveries from such litigation.

Tribune's committee is seeking to sue Zell and other insiders for breaching their fiduciary duty and to recover all payments made to the insiders stemming from the buyout. They're also seeking to void payments made to shareholders as fraudulent transfers.

Tribune filed for bankruptcy in December 2008, and since then the company has been grappling with creditors about who should be held accountable for the LBO.

The company's bankruptcy-exit plan was designed to confer blanket immunity on lenders, executives, professionals and others connected to the LBO. But a bankruptcy examiner's findings that fraud and dishonesty likely tainted the $8.2 billion leveraged buyout that saddled the company with debt upset Tribune's Chapter 11 plan, sending the company into mediation.

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

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

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

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

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

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

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

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

Financing Closing Date, Tribune's actions were guided by its contractual rights and obligations principally under the Merger Agreement (and related agreements entered into on April 1, 2007), the Credit Agreement, and the Step Two Commitment Letter. The Merger Agreement obligated Tribune to exercise reasonable best efforts to effectuate the Merger,[102] including to "enforce its rights under the Financing Commitments."[103] The Credit Agreement and the Step Two Commitment Letter (which, together, embodied the financing commitments in effect at the time of the Step One Financing Closing Date), in turn, authorized Tribune to compel the LBO Lenders to fund the Step Two Debt if the conditions precedent to that funding otherwise were satisfied. [redacted][105] In other words, if

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

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

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

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

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

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

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

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

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

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

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

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

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

(1) Solvency and Value Received.

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

[108] *Id.* at § IV.B.4.a.

[109] *Id.*

[110] *Id.*

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

(2) The Refinancing Representation.

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

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[111] *Id.* at § III.H.3.g.(4).

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

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

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

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

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

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

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

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

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

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

[119] *See* Report at § III.H.3.g.(3).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[133] *Id.* at JPM_00499996.

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

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

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

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

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

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

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

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

[138] *See* Report at § III.H.3.g.

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

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

(i) Attempting to Reconcile the Testimony.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(ii) Assessing the Conflicting Testimony.

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

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

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

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

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

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

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

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155 *See* Report at § III.F.8.

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

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

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

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

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

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

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

believes that, faced with all of these circumstances, Mr. Bigelow and/or Mr. Grenesko in advance of the scheduled December 4, 2007 Tribune Board meeting pushed the envelope beyond what Morgan Stanley had said to them, in order to get past the final major hurdle standing in the way of the Step Two Closing. Having succeeded in doing so, the persons involved then were able to create the impression that Morgan Stanley agreed that Tribune could successfully refinance its debt by referring to conversations between Morgan Stanley and management. Two weeks later, Tribune then went further and apparently told the Lead Banks that Morgan Stanley actually had evaluated and concurred with VRC's solvency opinion.

The Examiner's conclusions are reached without the necessity of assessing whether one or more witnesses were not candid in their interviews with respect to these issues. Presented with Mr. Whayne's rather emphatic and, the Examiner finds, credible testimony concerning what did and did not transpire and the conflicting statements made by one or more members of Tribune's senior financial management to VRC about what he had said, the Examiner attempted to determine what actually happened when those events transpired. For the above-discussed reasons, it is the Examiner's view that Mr. Whayne's version of events is more plausible and more consistent with the contemporaneous documentary record.

(iii) Did These Events Make a Difference?

Finally, the Examiner considered whether these events made any difference to the eventual Step Two Closing. This inquiry contains two subparts. First, did statements made to VRC concerning Morgan Stanley's position affect VRC's decision to issue its opinion? Second, did Tribune make false written responses to the Lead Banks and a false representation letter to VRC referencing discussions with Morgan Stanley concerning refinancing?

The first question is largely a matter of conjecture. The record shows that VRC wanted management to confer with Morgan Stanley about the refinancing question "[b]ecause [this] was a highly leveraged transaction, and we wanted to make sure that [prospective ability to refinance] was a fair assumption. So we took it very seriously. It [was] something that . . . the committee wanted to make sure . . . was looked at very closely."[161] Although Mose Rucker testified that VRC probably would have issued its solvency opinion even if Morgan Stanley in fact had not concurred with management's views on this question,[162] both Mr. Rucker and Mr. Browning further testified that had any management dishonesty regarding this matter come to light, this likely would have caused VRC to reevaluate its reliance on what management had told them about this and perhaps other matters.[163] For reasons discussed in another part of the Report,[164] however, it is exceedingly difficult for the Examiner to understand VRC's actions in the period leading up to the Step Two Closing and issuance of its solvency opinion, and the Examiner does not have a clear picture of VRC's various interactions with management during that time. The Examiner believes that, ultimately, a court need not answer the question "what if." One cannot know what would have happened had the above-described events come to light before the Step Two Closing. What is known is that this was not a tangential episode. It is worth stating again that without the management representation on refinancing satisfactory to VRC, VRC would not issue its opinion.[165] The events that did unfold lead directly to VRC's issuance of its opinion and to the Step Two Closing.

To address the second question (the truthfulness of Tribune's response to the Lead Banks and Tribune's representation to VRC regarding the refinancing question), it is necessary to focus

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161 Examiner's Sworn Interview of Mose Rucker and Bryan Browning, June 30, 2010, at 216:22-217:7.

162 *Id.* at 243:18-24 ("Because we rely upon --heavily upon our own analysis, even though we get rep letters from management or we may get rep letters from other parties. At the end of the day, our own analysis has to support those conclusions."). This testimony is consistent with the view expressed by Mr. Sell.

163 *Id.* at 305:5-10, 307:2-6 ("So you have to rely upon the veracity of management. And if you find out that you have been lied to, the question becomes: What else have you been lied about.").

164 *See* Report at § III.H.3.f.

165 Examiner's Sworn Interview of Mose Rucker and Bryan Browning, June 30, 2010, at 307:22-25.

on what these documents said as well as the background of the statements. Tribune's response to the Lead Banks dated December 7, 2007 stated:[166]

> VRC has assumed that the Company will be able to refinance its debts as they become due. This assumption is based upon a review of the forecasted total debt and guaranteed debt leverage ratios at the time of the required refinancing, recent leveraged debt multiples, and representation from the Company which states that based upon recent discussions with Morgan Stanley, the Company would be able to refinance debt in its downside forecasts without the need for additional asset sales.

Tribune's December 20, 2007 representation letter to VRC stated:[167]

> Based upon (i) management's best understanding of the debt and loan capital markets and (ii) management's recent discussions with Morgan Stanley, management believes that it is reasonable and appropriate for VRC to assume that Tribune, in the downside forecast . . . delivered to VRC via email on November 21, 2007 ("Tribune Downside Forecast"), would be able to refinance (i) any outstanding balances of Term Loan B under the Credit Agreement dated May 17, 2007, as amended (the "Credit Agreement"), that mature in 2014 and (ii) any outstanding balances under the Senior Unsecured Interim Loan Agreement to be dated as of the closing date (or any notes issued to refinance such facility) that mature in 2015, in each case, without the need for any asset sales other than those incorporated into the Tribune Downside Forecast.

Both writings referred to discussions with Morgan Stanley, without disclosing what Morgan Stanley had said. Tribune's response to the Lead Banks states the basis on which VRC assumed that the debt could be refinanced and the content of the representation Tribune would give to VRC. The Examiner does not have any specific basis to dispute that the statement represents what VRC believed at the time. Tribune's representation letter to VRC states that, based on the two stated predicate assumptions, "management" believes that the refinancing assumption is reasonable. Senior financial management certainly had discussions with Morgan Stanley about this matter and did receive precedent transaction information from Morgan

166 Ex. 281 at TRB0398562 (Memorandum from Mr. Browning and Mr. Rucker to Mr. Bigelow, dated December 7, 2007).

167 Ex. 739 (Letter from Donald Grenesko to VRC, dated December 20, 2007).

Stanley. Thus, the statement might be literally correct if, in fact, management based its belief on discussions with Morgan Stanley. The problem, however, is that the representation letter does not appear to tell the whole truth. It does not disclose that Morgan Stanley would not opine, formally or informally, on the refinancing question. If Mr. Whayne's testimony is to be believed, moreover, the letter fails to disclose that Morgan Stanley was asked and refused to ascribe to management's views on the subject of the representation. The statements apparently made by Tribune to the Lead Banks at the December 17, 2007 conference call concerning Morgan Stanley's alleged involvement in VRC's opinion provide context and raise particular concerns regarding Tribune's honesty in this matter.[168]

The Examiner recognizes that the events described in this Section occurred over a short span of time well over two years ago. Having conducted lengthy witness interviews involving the participants referred to in this Section and having reviewed the underlying documents, however, the Examiner finds that the evidence adduced shows that Tribune, acting through one or more of its senior financial management members, was not honest in this matter and that these circumstances directly related to the satisfaction of the closing conditions to Step Two. These circumstances, standing alone, might not be sufficient in the Examiner's view to support a finding of an intentional fraudulent transfer, but, considered in tandem with the other considerations discussed in this Section of the Report, do support such a finding.

Finally, the Examiner appreciates that the above phrase, "one or more senior financial management members," does not identify, by name, who was or might have acted in this fashion. The Examiner chose this phrase carefully. As discussed in the Report, as required by the

168 In the context of evaluating the good faith of the Lead Banks for purposes of applying defenses to constructive fraudulent transfer claims, the Examiner also evaluated whether these events furnish a basis for those lenders to assert that they are entitled to good faith defense under Bankruptcy Code section 548(c). *See* Report at § IV.B.7.b.(3). to §IV.B.7.b.(8).

Bankruptcy Court's order, the Examiner conducted the Investigation on an expedited basis. It was not possible to interview (and re-interview) all of the people the Examiner would have, had he had more time. Given the compressed time frame, the Examiner simply was not able to conduct the inquiry necessary to conclusively identify specific individuals as having engaged in dishonesty. The Examiner has done his best in the Report to set forth the facts adduced in the Investigation, but determined that it would be premature to draw conclusions regarding specific individuals. The Examiner cautions that the Report's use of the phrase, "one or more senior financial management members," should not cast a shadow of suspicion on individuals who acted innocently and in good faith.

(3) Information Concerning Out-Year Growth Rate Assumptions and Valuation Implications of Such Assumptions.

As discussed in greater detail in the Report,[169] **Tribune management's October 2007 forecast contained an important and, the Examiner believes, unjustifiable growth rate assumption for the years 2013 to 2017, by assuming that the consolidated growth rate of 2.4% from 2011 to 2012 (an election year) would be replicated each year from 2013-2017. The election year-inspired extrapolation growth rate was replicated for each and every year through 2017, resulting in a compounding that effectively assumed every year beyond 2012 would be an election year.** Tribune Chief Financial Officer Donald Grenesko acknowledged in his sworn interview that Tribune applied the assumed growth rate across all of Tribune's business segments.[170] This

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[169] *See* Report at § III.H.3.f.(1).

[170] Mr. Grenesko testified: "You have to look at them individually. You have to look at the growth rates of each individual group, which is just what we did. I mean we didn't want to just broad brush some growth rate across all of our businesses." Examiner's Sworn Interview of Donald Grenesko, July 8, 2010, at 191:4-9. The Examiner responded: "But isn't that what happens when you extrapolate a uniform growth rate for five years? Aren't you broad brushing the growth rate across the businesses?" Mr. Grenesko answered: "For -- by group.

resulted in a significant increase in the growth rate for the out-years from what was projected in February 2007, under which management projected out-year growth of 0.47% on a consolidated basis (using an extrapolated growth rate from 2010 to 2011). To place this assumption into further perspective, whereas Tribune was failing to meet its February 2007 projections as 2007 unfolded and the October 2007 projections assumed lower performance in the earlier years from what was projected in February, the October 2007 projections assumed a substantially accelerated growth rate starting in year 2012.

Unlike the out-year projections developed by management in Step One, the Step Two out-year projections figured prominently in VRC's Step Two valuation and were the subject of a separate Tribune representation letter by Tribune (signed by Mr. Grenesko) to VRC on which VRC relied in opining on solvency.[171] In its Step One analysis, VRC calculated enterprise cash flows for the first five years of the projection period, discounted the results to present value, and added to the present value of the discrete period cash flows the present value of the terminal period value (calculated on the basis of an exit multiple).[172] In its Step Two analysis, by contrast, VRC calculated enterprise cash flows for the first *ten* years of the projection period, discounted the results to present value, and added to the present value of the discrete period cash

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yes." *Id.* at 191:10-14. (In an errata sheet dated July 20, 2010, which is appended to the transcript of Mr. Grenesko's sworn interview, Mr. Grenesko changed a portion of this testimony to add the following point: "Also, the Operating Enterprise Value in 2007 is based upon consolidated operating cash flow growth rates of 2.5% from 2012-2017. This is below the 3.1% CAGR from 2007-2012 in the October 2007 Operating Plan and below the 3.9% growth from 2011-2012.") Mr. Grenesko also furnished substantial testimony during his sworn interview regarding Tribune's assumptions on growth, which is addressed in another part of the Report. *See* Report at § III.H.3.f.(1). Although one could argue that the February 2007 model contained the opposite flaw (in effect assuming that no election would occur between 2012 and 2016), in fact the 2012 to 2016 forecast contained in the February 2007 model was consistent with Tribune's historical performance. *See* Report at § III.H.3.f.(1).

171 Ex. 739 (Seven letters from Donald Grenesko to VRC, each dated December 20, 2007). By contrast, the analog management representation letter sent to VRC at Step One makes no mention of extrapolated projections or a longer projection period. Ex. 250 (Four letters from Donald Grenesko to VRC, each dated May 9, 2007). *See* Report at § III.H.3.f.(1).

172 Ex. 271 at VRC0051430 (Mednik E-Mail, dated May 4, 2007).

flows the present value of the terminal period value (calculated on the basis of an exit multiple).[173] VRC's methodological shift (which occurred very late in VRC's valuation work) resulted in approximately $613 million in additional incremental value at Step Two.[174] At a minimum, the fact that VRC required a specific, separate Tribune representation letter underlying this assumption suggests that VRC itself recognized that this assumption merited special attention. Before the Tribune Board met on December 4, 2010 to consider VRC's opinion, at least one member of senior financial management (but not the Tribune Board) was aware that VRC had revised its analysis to include the extrapolated out-years in reaching its valuation conclusions for Tribune at Step Two.[175] Yet, the presentation materials furnished to the Tribune Board and Special Committee on December 4 and later that month never mentioned the growth assumptions for the out-years, the role these assumptions play in VRC's solvency opinion, or the fact that Tribune would be making a representation to VRC regarding these projections, and there is no evidence that these matters ever were brought to the attention of the Tribune Board or Special Committee.[176] Mr. Grenesko testified he had no understanding why a

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[173] Ex. 740 at VRC0060998 (VRC Internal Review Document, Tribune Company Preliminary Solvency Analysis dated December 3, 2007).

[174] *See* Report at § III.H.3.f.(1).

[175] Ex. 888 (Bigelow E-Mail, dated December 2, 2007). Mr. Grenesko initially testified that he had no recollection of this difference. Examiner's Sworn Interview of Donald Grenesko, July 8, 2010, at 195:8-196:2, 200:4-7. Later in his interview, documents presented by the Examiner refreshed his recollection, but he indicated that he did not recall whether he was aware of this difference in the December timeframe. *Id.* at 218:15-219:4.

[176] *Id.* at 175:16-21, 186:13-18, 187:8-10. (In an errata sheet dated July 20, 2010, Mr. Grenesko changed portions of his testimony addressing this point. When asked whether the model presented to the Tribune Board "included the extrapolated growth rates from 2013 to 2017 or was it only a five-year model," Mr. Grenesko originally responded: "I believe that was just a five-year." Examiner's Sworn Interview of Donald Grenesko, July 8, 2010, at 175:16-21. The errata sheet, which is appended to the transcript of Mr. Grenesko's sworn interview, changes the answer to: "I believe that was just a five-year model in our plan, but I believe VRC's solvency report included projections beyond the initial five years." Similarly, when asked whether the detailed numbers for years 2013 through 2017 "were [ever] provided to the board in a board meeting," Mr. Grenesko originally responded: "I don't believe so." Examiner's Sworn Interview of Donald Grenesko, July 8, 2010, at 186:13-18. The errata sheet changes the answer to: "I believe VRC's solvency reports included projections beyond the original five years."). As discussed in text, however, materials presented to the Tribune Board and the Special Committee did not disclose the out-year growth rate assumptions or their effect on VRC's solvency opinion.

draft version of VRC's analysis provided to him two days before the Tribune Board's December 4, 2007 meeting containing a discounted cash flow valuation analysis showing the assumed out-year growth rate was not presented to the Tribune Board.[177] Mr. Grenesko also testified that he had no recollection why an e-mail from Mose Rucker to him and others indicated that those materials (described by Mr. Rucker as "our internal review document") would not be shared with the Tribune Board.[178] (The Examiner did not find any evidence that the out-year growth assumptions accompanying the February 2007 projections were ever presented to the Tribune Board. As noted, however, the out-year projections did not play any role in VRC's Step One solvency opinion and were not the subject of a Tribune representation letter to VRC at Step One.)

Although the Examiner found no direct evidence that this information was purposely withheld from the Tribune Board or Special Committee in December 2007,[179] the Examiner finds it difficult to accept that the failure to apprise the Tribune Board and Special Committee of this change to the Step One solvency valuation, and to the representation given by Tribune to VRC, was unintentional.[180]

[177] *Id.* at 205:4-207:8; *see also* Ex. 975 (Rucker E-Mail, dated December 2, 2007); Ex. 737 (Presentation Materials, dated December 4, 2007).

[178] Examiner's Sworn Interview of Donald Grenesko, July 8, 2010, at 206:14-207:8.

[179] This is not surprising. Direct evidence rarely is found that a transferor set about to hinder, delay or defraud creditors. *See Liquidation Trust of Hechinger Inv. Co. v. Fleet Retail Fin. Group (In re Hechinger Inv. Co.)*, 327 B.R. 537, 550 (D. Del. 2005) ("Direct evidence of fraudulent intent, however, is often unavailable and courts usually rely on circumstantial evidence, including the circumstances of the transaction, to infer fraudulent intent.") (citing authorities), *aff'd*, 278 F. App'x 125 (3d Cir. 2008).

[180] In response to the Examiner's question "why wasn't the board presented with a 10-year growth model if that was the model that was being generated for VRC and others?," Mr. Grenesko testified: "The focus of -- the focus of the group, the focus of management, I think the focus of the board was on the five years. That's where the real -- the whole bottoms up, this is how we are going to do things. That's where the whole focus was." *Id.* at 175:22-176:12. Mr. Grenesko also acknowledged that VRC was interested in the out-year projections because of the debt maturities in 2014 and 2015. *Id.* at 176:19-177:1.

(4) The October 2007 Forecast.

The Examiner also considered whether the projections produced by Tribune management in October 2007, on which VRC offered its Step Two solvency opinion, support an inference that Tribune perpetrated an intentional fraudulent transfer. The Examiner appreciates that sometimes management teams exhibit optimism in the expected performance of the businesses they operate or in their own ability to achieve projected results. Indeed, one of senior management's responsibilities is to carefully evaluate whether members of lower-tier management are being too cautious in their recommendations for forecasted performance. Mindful that those projections likely will be used to set next year bonus targets, division heads and other personnel might exhibit a downward bias in forecasting expectations for the following year. Senior management must critically review the input they receive from subordinates, and there is nothing per se improper in making changes to reflect more optimistic assumptions. More generally, there is nothing nefarious about generating projections, in good faith, that turn out to be too optimistic in retrospect. Indeed, virtually by definition, in a failed leveraged buyout transaction such as this one, the underlying projections turn out wrong. For example, the Examiner does not find any impropriety in management's February 2007 projections, even though those numbers turned out to be wrong shortly after they were issued.

The circumstances surrounding the preparation of the October 2007 forecast, however, required that the Examiner investigate management's honesty in the context of Step Two. As noted, after Step One closed, the Tribune Entities' financial performance deteriorated significantly, both in relation to comparable periods in prior years and in comparison to the February 2007 plan.[181] The Examiner evaluated whether a fair inference may be drawn that Tribune management improperly "boosted" the projected performance in the October 2007

[181] *See* Report at § III.F.2.

forecast of certain aspects of Tribune's business in order to counteract the effect of Tribune's generally poor 2007 performance and other negative trends. In this regard, a critical observer would pay particular attention to those aspects of the October 2007 forecast that involve elements of Tribune's business as to which management had greater room to project more growth, either because the particular business segment did not have a lengthy track record or generate a predictable revenue stream or the time period itself was far enough in the future to enable management to posit a positive change in future performance. The Examiner considered whether two aspects of the October 2007 forecast fit this profile:

First, the revised October forecast (although downwardly revising near term expectations of revenue and operating profitability overall relative to the pre-existing February model) nonetheless contemplated that Tribune would significantly mitigate the effects of the secular declines then affecting the traditional publishing segment (*i.e.*, newspapers and corresponding print advertising), by substantially growing its interactive business. In fact, the October projections showed that Tribune's interactive business would create significant revenues ahead of what was assumed in the February 2007 projections starting in 2009.[182] Management's assumptions of robust growth in the interactive division had a significant impact on Tribune's projected profitability and VRC's ultimate solvency opinion at Step Two, accounting for approximately $1.77 billion or 17.4% of VRC's mid-point discounted cash flow valuation.[183]

The Examiner interviewed Timothy Landon, who headed Tribune's interactive division and served as the chief executive officer of Classified Ventures (a start-up venture in which Tribune invested) at the time of the Leveraged ESOP Transactions. Before showing Mr. Landon Tribune's October 2007 projections, when the Examiner asked Mr. Landon whether he would

182 *See id.* at § III.H.3.f.(1).

183 *See id.* at § III.H.3.f.(3).

have expected the growth rates in interactive to be greater in the February or October 2007 forecast. Mr. Landon stated that he would have expected the October forecast to be flat or lower,[184] and acknowledged that interactive performed about 4-5% below plan in 2007.[185] He expressed surprise when the Examiner pointed out that Tribune's October forecast assumed significant increases in growth in interactive after 2009 ahead of what was projected in February.[186] David Williams, who was at the time of the Leveraged ESOP Transactions the president and chief executive officer of Tribune Media Services, Inc., a Tribune subsidiary, told the Examiner that "interactive revenues are hard to forecast and hard to predict."[187] Harry Amsden, Vice President of Finance of Tribune Publishing, described interactive as more "speculative" than other aspects of Tribune's business.[188] The Zell Group viewed interactive as misguided and adding little value to Tribune.[189] Mr. Grenesko testified that the assumptions concerning increased spending on the interactive business and increased personnel devoted to

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184 Examiner's Interview of Timothy Landon, June 22, 2010 ("I would have expected that by December we were anticipating a recession, so near term revenue would be less, then some recovery, and the question is what is the slope of that recovery. I would say that the December model is the same or lower in the abstract.").

185 *Id.*

186 *Id.* ("I'm disappointed in these numbers. It's not what I would have expected. These are the only numbers that I've looked at today that I don't feel good about. The other ones were ok, even though they might've turned out wrong. But I don't believe in the logic behind this. I take responsibility for that."). Mr. Landon also told the Examiner that an appropriate discount rate to present value of the interactive division's future performance would be double digits, representing a way to quantify mathematically the probability of success on new ventures. *Id.* The Examiner found Mr. Landon, who is not currently employed by Tribune, to be a credible witness.

187 Examiner's Interview of David Williams, June 18, 2010. Mr. Williams was a credible witness.

188 Examiner's Interview of Harry Amsden, July 2, 2010. Mr. Amdsen was credible and cooperative.

189 Examiner's Interview of Samuel Zell, June 14, 2010 ("As we looked at the interactive side, they were working on a whole bunch of projects that were going to create revenue in 2016. They didn't know what they were doing. Other than it was very important. I think we have gotten rid of most of the people. And now we're working on projects that produce revenue next week."). *See also* Examiner's Sworn Interview of Nils Larsen, July 7, 2010, at 57:4-10 ("And, you know, I think the funnel of ideas was narrowed substantially, but, you know, we certainly would not have an aversion to spending capital thoughtfully. I think our view would be that working on 120 different projects at the same time was not the best use of people's time and effort."). Mr. Larsen could not recall whether he alerted management to his concerns about management's assumptions concerning interactive. *Id.* at 57:1-2, 57:11-58:10.

that business supported management's growth assumptions.[190] Much of the projected growth in interactive, however, came from shifting resources and capital (as opposed to increasing spending on interactive on an absolute basis) into what was referred in the October projections as "internal development" of revenues (which did not figure prominently in Tribune's projections for interactive in the February projections), and, as discussed in another part of the Report, VRC's own internal analysis suggested that Tribune's assumptions regarding this business were unreasonable.[191]

Although the Examiner finds that management's projections regarding the interactive business were aggressive, based on the record adduced he does not conclude that senior financial management at Tribune prepared them in bad faith. In large measure, as discussed in another part of the Report,[192] the problem, insofar as the interactive business is concerned, involves how the projected revenue stream derived from that business was valued. Although Bryan Browning and Mose Rucker of VRC testified that they discussed management's assumptions underlying this assumed growth, as also discussed in another part of the Report, VRC applied no greater discount to this revenue,[193] and there is no evidence that they ever brought to management's attention VRC's own concerns regarding the projected growth and revenue assumptions despite expressing them internally.[194] The result was to attribute an unreasonably large component of the value to the projected interactive business revenue stream, which by nature was speculative and merited a hefty discount for valuation purposes. Although the Examiner does not have a complete picture of the interactions between VRC and senior financial management at Tribune

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190 Examiner's Sworn Interview of Donald Grenesko, July 8, 2010, at 170:9-171:4, 172:16-173:2.

191 *See* Report at § III.H.3.f.(2).

192 *See id.* at § III.H.3.f and Annex A to Volume Two (DCF Valuation Analysis).

193 Examiner's Sworn Interview of Mose Rucker and Bryan Browning, June 30, 2010, at 94:5-98:6.

194 *See* Report at § III.H.3.f.(2).

during this timeframe (particularly in late October through early December, when VRC developed a detailed critical evaluation of management's projections, only to turn around and adopt those projections wholesale),[195] based on the record adduced in the Investigation the Examiner did not find evidence of complicity by management in this aspect of VRC's valuation.

A second area of inquiry involved the unjustifiable assumption contained in the October 2007 forecast concerning Tribune's performance in 2012 to 2017, which, as discussed above, VRC then used to determine solvency at Step Two.[196] The Examiner's findings concerning the reasonableness of this assumption and the effect of VRC's use of this assumption in its solvency opinion are addressed in detail in other parts of the Report.[197] The Examiner finds unconvincing the various explanations given to the Examiner by witnesses regarding this assumption, as detailed elsewhere in the Report.[198] Moreover, although Mr. Browning and Mr. Rucker testified that they discussed management's out-year assumptions,[199] there is no evidence that VRC ever contested management's assumptions directly to management. As discussed in another part of the Report, other aspects of the October 2007 projections (particularly in Tribune's classified

195 *See id.* at § IV.E.3.c.(5). For example, as discussed previously in text, the Examiner was unable to determine what was said between VRC and senior financial management on the question whether the out-year projections, and VRC's use of those projections as a late inning addition to its valuation, would be shared with the Tribune Board.

196 It appears that the approach was undertaken at the direction of Chandler Bigelow, who in an e-mail to Rosanne Kurmaniak of Citigroup (the individual responsible for maintaining Tribune's complex projection models), suggests: "How about we make post 2012 revenue /OCF CAGRs the same as the growth assumed in 2012 for both Publishing/Broadcasting?" Ex. 889 (Bigelow E-Mail, dated September 27, 2007). In an earlier e-mail, Mr. Bigelow suggested that a reduction in the post 2012 growth assumption would be proper. Ex. 889 (Bigelow E-Mail, dated September 27, 2007). Although Ms. Kurmaniak testified that she felt that extrapolating the growth from 2012 to later years was reasonable, she acknowledged that she did not focus on the fact that 2012 was an election year and possibly an outlier. Examiner's Sworn Interview of Rosanne Kurmaniak, July 7, 2010, at 139:6-14; 140:1-4. She suggested that if something other than an extrapolation from 2012 were used, adjustments in the out-year projections would have to be made based on the timing of elections and other anticipated occurrences in those years. *Id.* at 142:20-22-143:1-13. Mr. Bigelow did not believe CGMI had any involvement in this assumption. Examiner's Sworn Interview of Chandler Bigelow, June 17, 2010, at 100:11-19. He described the out-year assumptions as being "some extrapolation." *Id.* at 15-16.

197 *See* Report at § III.H.3.f. and Annex A to Volume Two (DCF Valuation Analysis).

198 *See* Report at § III.H.3.f. and Annex A to Volume Two (DCF Valuation Analysis).

199 Examiner's Sworn Interview of Mose Rucker and Bryan Browning, June 30, 2010, at 118:3-5; 118:24-120:7.

business segment) were unreasonable in light of information available to Tribune and VRC.[200] Yet, despite reservations expressed internally, VRC simply accepted those projections as the predicate to its solvency valuation. The logical inference that the Examiner draws, and certainly that management could draw from their multi-month interactions with VRC personnel, is that VRC would accept almost any estimate of future performance that management presented to VRC.[201] Although the Investigation uncovered no direct evidence that Tribune's management was deceitful in the preparation and issuance of this aspect of the October forecast, the Examiner finds it implausible that members of Tribune's senior financial management believed in good faith that the out-year growth assumption contained in the October 2007 forecast (or the related Tribune representation letter) represented a reasonable estimate of Tribune's future performance. Rather, this assumption bears the earmarks of a conscious effort to counterbalance the decline in Tribune's 2007 financial performance and other negative trends in Tribune's business, in order to furnish a (very significant) source of additional value to support a solvency conclusion.

(5) The Tribune Board and Special Committee Deliberations.

The record shows that when the baton was handed from Tribune management to the Tribune Board and Special Committee in December 2007 to consider the question of VRC's solvency opinion, the directors failed to adequately perform their responsibilities. To be clear, the Examiner found no evidence that the Tribune Board or the members of the Special Committee intentionally engaged in any wrongdoing, but the problem is that the fiduciaries charged with ultimate responsibility for allowing Step Two to close failed to discharge their duties to carefully scrutinize the information presented by management and VRC and make an

200 *See* Report at §§ III.H.3 f.(2)., III.H.3.f.(4)., and Annex A to Volume Two (DCF Valuation Analysis).

201 *See* Report at §§ III.E.3.b., III.H.3 f., IV.B.5.d.(9)., and IV.B.5.d.(10). *See also* Annex A to Volume Two (DCF Valuation Analysis).

informed decision that Step Two was not going to render Tribune insolvent. Indeed, the only matter for the Tribune Board and Special Committee to take up in the December 2007 timeframe was whether consummation of Step Two would render Tribune insolvent, but unlike Step One, in which the Tribune Board's and the Special Committee's respective Financial Advisors actively evaluated management's projections and VRC's work product, nothing like that happened at Step Two.[202] Tribune's Financial Advisors were not even advising Tribune at this time.[203] Thus, unlike the process in which the Financial Advisors evaluated VRC's opinion in the period between the Tribune Board's April 1, 2007 approval of the Leveraged ESOP Transactions and the Step One closing, the Tribune Board took up the critical question whether the Step Two Transactions would render Tribune insolvent without retaining an outside advisor to evaluate management's projections or VRC's work.[204] Tribune's management likewise did not have a Financial Advisor to which to turn, causing members of management (including Tribune Chief Financial Officer Donald Grenesko and Tribune Treasurer Chandler Bigelow) to reach out to the Special Committee's Financial Advisor (Morgan Stanley) for guidance. Morgan Stanley, however, was not engaged to provide financial advice to Tribune, and, as previously discussed, offered relatively little assistance to management.[205] Management, therefore, was largely

202 Examiner's Interview of Christina Mohr, June 29, 2010; Examiner's Sworn Interview of Thomas Whayne, July 2, 2010, at 20:6-13 ("Q: But in step 2, because you were not preparing a fairness opinion or any kind of opinion for that matter, you were not asked by the special committee to look at the reasonableness of the assumptions behind the projections? A: Behind the projections, no.").

203 *See* Ex. 643 at TRB041566-67 (October 17 Tribune Board Minutes) (referring to CGMI); Examiner's Interview of Michael Costa, June 4, 2010; Examiner's Interview of Christina Mohr, June 29, 2010.

204 Tribune General Counsel Crane Kenney expressed the view that retention of an outside advisor in connection with Step Two was unnecessary. Examiner's Sworn Interview of Crane Kenney, July 8, 2010, at 75:15-21 ("We had the financing, and we had the deal. Now it's a whole list of certificates and other things that need to be procured, which are -- in my -- if you're asking my opinion, I don't think we needed a financial adviser to basically tick and tie the last, you know, the elements of the closing."). In light of the record adduced in the Investigation, the Examiner strongly disagrees.

205 *See* Report at § III.H.4.c.(2).(i). Morgan Stanley's December 3, 2007 request for a discretionary fee on account of its work at Step Two contains references to Morgan Stanley providing advice and services to "the Company" and "the Company's Management" in connection with financing negotiations with the Lead Banks. Ex. 1048 at

unaided as the Step Two Financing Closing Date approached and the solvency diligence questions posed by the Lead Banks became more pointed.

Tribune's Special Committee, entrusted to monitor the Leveraged ESOP Transactions, met once after the Step One Financing Closing Date, on December 18, 2007, to consider the question of Tribune's solvency and VRC's solvency opinion.[206] In their presentations to the Examiner, certain Parties cited to the Examiner the minutes from that meeting as important evidence that Tribune's directors exercised due care in connection with the Step Two Transactions, that VRC's Step Two solvency opinion was reasonable, and that the Step Two Transactions did not constitute an intentional fraudulent transfer. The minutes prepared by the Special Committee's outside counsel (set forth in detail elsewhere in the Report)[207] state that William Osborn, the Chair of the Special Committee, "requested that the representatives of Morgan Stanley comment on the solvency opinion and the analysis behind it that was just

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MS_69131 & MS_69133 (Overview of Morgan Stanley's Role in the Tribune Special Committee Review Process, dated December 3, 2007). Thomas Whayne of Morgan Stanley testified that "throughout step 1 and step 2 [Morgan Stanley was] representing the special committee," Examiner's Sworn Interview of Thomas Whayne, July 2, 2010, at 51:9-10, and as part of that representation Morgan Stanley "had been asked to work . . . in this final phase with management because the banks that had been advising primarily management during the first step transaction were no longer willing to serve in that capacity. . . . " *Id.* at 25:6-11. The record reflects that Morgan Stanley did, in fact, advise the full Tribune Board regarding the Lead Banks' proposal to modify the Step Two Financing. Ex. 702 (Tribune Board Meeting Minutes, dated November 21, 2007). There is no evidence, however, that Morgan Stanley undertook representation of Tribune at Step Two, and (given the explicit provisions of Morgan Stanley's engagement letter), it would not have been reasonable for management to have assumed otherwise. *See* Ex. 25 at MS_00213 (Morgan Stanley Engagement Letter) ("Morgan Stanley will act under this letter agreement as an independent contractor with duties solely to the [Special] Committee."). *See also* Examiner's Sworn Interview of Thomas Whayne, July 2, 2010, at 33:8-14 ("Q: What's your understanding of who Morgan Stanley's client was? A: Our client was the special committee. Q: And that was your only client in this case? A: Yes."); Examiner's Sworn Interview of Paul Taubman, July 1, 2010, at 22:13-22 ("Q: The special committee was [Morgan Stanley's] client, is that right? A: The special committee was the client. Q: [W]as Tribune Company the client? A: No. Q: And was the board in general the client? A: No."); Examiner's Sworn Interview of Donald Grenesko, June 25, 2010, at 57:1-5 ("Q: Had Morgan Stanley's engagement changed from being financial advisor to the special committee to being financial advisor to the entire board? A: I don't believe so, no.").

206 Morgan Stanley made presentations to the Tribune Board (the membership of which largely overlapped with the Special Committee) following the Step One Financing Closing Date. *See, e.g.*, Ex. 643 (Tribune Board Meeting Minutes, dated October 17, 2007); Ex. 727 (Tribune Board Meeting Minutes, dated December 4, 2007); Ex. 726 (Tribune Board Meeting Minutes, dated November 5, 2007); Ex. 702 (Tribune Board Meeting Minutes, dated November 21, 2007).

207 *See* Report at § III.G.1.

presented to the Board of Directors by VRC."[208] The minutes then summarize remarks made by Thomas Whayne and Paul Taubman of Morgan Stanley, culminating in Morgan Stanley's conclusion that "VRC's solvency analysis was conservative and that VRC's opinion was something upon which a director could reasonably rely."[209] Specifically, Mr. Whayne was reported to have:[210]

- "indicated that the analysis by VRC seemed thorough and appropriate,"
- "noted [that VRC's] earnings and termination value multiples for the publishing and broadcasting industries [were] consistent (but not identical) with those used by Morgan Stanley as well as Merrill Lynch and Citibank in previous advice to the Board of Directors,"
- observed that "VRC's selection of precedent transactions and its discounted cash flow analysis used metrics very similar to that previously used by each of the investment banks,"
- "commented on VRC's analysis of the net present value of [the anticipated S-Corporation/ESOP] tax savings, [including the discount rate],"
- "commented on VRC's valuation of the PHONES debt and other assets and liabilities of the Company," and
- "concluded that VRC's solvency analysis was conservative and that VRC's opinion was something upon which a director could reasonably rely."

The minutes reflect that Mr. Taubman next "reiterated the conservative nature of VRC's analysis," and "stated that the Company has additional value not represented in the VRC presentation because the Company has a number of different assets and businesses that readily

208 Ex. 704 at TRB0533007 (Special Committee Meeting Minutes, dated December 18, 2007).

209 *Id.*

210 *Id.*

could be sold for fair value and that this additional financial [flexibility] is of incremental value to a company."[211]

Like certain other aspects of the Leveraged ESOP Transactions discussed in the Report, however, what appears at first blush is not the case on closer inspection:

First, the above excerpted document is not minutes but, rather, *draft* minutes. The document is not even accompanied by a signature line, let alone a signature. Because the Special Committee never met again and never approved the draft minutes prepared by counsel,[212] no duly adopted minutes memorializing the Special Committee's proceedings on December 18, 2007 exist.[213]

Second, from the draft and official Tribune Board minutes cited by the Parties, it appears that the Special Committee met for no more than fifteen minutes. The minutes of the full Tribune Board meeting reflect that the Special Committee meeting took place while the full

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211 *Id.*

212 Examiner's Interview of Charles Mulaney, June 24, 2010. The draft minutes prepared by counsel are unsigned, as are the final, duly adopted minutes of prior Special Committee meetings. Ex. 704 (Special Committee Meeting Minutes, dated December 18, 2007). *See, e.g.*, Ex. 143 (Special Committee Meeting Minutes, dated April 1, 2007).

213 The existence of these draft minutes appears to have colored the factual record to a certain degree, with Parties and witnesses repeatedly citing and relying on Morgan Stanley's alleged use of the adjective "conservative." *See, e.g.*, Examiner's Sworn Interview of William Osborn, June 24, 2010, at 27:1-7 ("Q. Now, when you say they used the word 'conservative,' do you remember them saying that to you, or do you just remember reading that in the minutes? A. I don't – one, for me to sit here and say I remember them saying it, I can't remember that. I did see it in the minutes."); Examiner's Sworn Interview of Dennis FitzSimons, June 25, 2010, at 101:7-18 ("Q. Do you have a specific recollection that [Morgan Stanley] approved VRC's solvency opinion as conservative and appropriate, or is that based on what you read [?] A. That's what I read [in the] board minutes, yes. Q. Aside from what you read in the board minutes, do you have any independent recollection that Morgan Stanley made that claim? A. No."). The potential skewing effect of the draft Special Committee minutes extends to other matters (beyond the alleged "conservative" characterization) as well, as evidenced by correspondence the Examiner's counsel received from counsel for Dennis FitzSimons and Donald Grenesko. Ex. 1118 (Letter from George Dougherty, dated July 15, 2010). In asserting that "the contemporaneous documents conclusively show that Morgan Stanley was fully aware of Tribune's [refinancing] representation and had numerous opportunities to object to it," counsel relies on the draft December 18, 2007 Special Committee minutes: "Morgan Stanley's stated opinions that VRC's analysis was 'conservative,' 'thorough,' and 'appropriate' and that the 'VRC Opinion' was something upon which a director could reasonably rely had to be based on, at a minimum, a review of the solvency opinion letter," which referenced management's conversations with Morgan Stanley. *Id.* at 2. VRC's Step Two solvency opinion, however, is dated December 20, 2007 — two days *after* the December 18, 2007 Special Committee meeting — and there is no evidence that Morgan Stanley was furnished with a draft of the opinion.

Tribune Board meeting was in recess prior to its 3:00 p.m. adjournment,[214] and the draft minutes state that the Special Committee "convened at 2:45 p.m."[215]

Third, Mr. Whayne and Mr. Taubman told the Examiner that they had never seen the draft minutes before being interviewed by the Examiner, despite the prominent role the two of them allegedly played at the meeting.[216] Likewise, as noted previously, VRC's opinion was also never provided to Morgan Stanley.[217] (Although, unlike at Step One, VRC's opinion was not filed with the SEC, the Examiner does not believe that the failure to do so violated applicable securities laws.[218])

Fourth, and most importantly, although he did not dispute commenting to the Special Committee regarding the earnings and value multiples and precedent transactions, as well as the discount rate used by VRC in valuing the S-Corporation/ESOP tax benefits and its valuation of the PHONES Notes indebtedness,[219] Mr. Whayne stated in his interviews with the Examiner that neither he nor Mr. Taubman offered any opinion or conclusion concerning the substantive merits

[214] Ex. 11 at TRB0415685-86 (Tribune Board Meeting Minutes, dated December 18, 2007).

[215] Ex. 704 at TRB0533007 (Special Committee Meeting Minutes, dated December 18, 2007). The Special Committee meeting was likely even shorter, as the Tribune Board's minutes reflect that the full Tribune Board met in executive session for an undisclosed amount of time immediately prior to the Tribune Board's 3:00 p.m. adjournment. Ex. 11 at TRB0415686 (Tribune Board Meeting Minutes, dated December 18, 2007).

[216] Examiner's Interview of Thomas Whayne, June 11, 2010; Examiner's Sworn Interview of Paul Taubman, July 1, 2010, at 83:11-17.

[217] Examiner's Interview of Thomas Whayne, June 11, 2010; Examiner's Sworn Interview of Thomas Whayne, July 2, 2010, at 21:6-24:5; Examiner's Sworn Interview of Paul Taubman, July 1, 2010, at 89:2-90:22. Nor, as noted, was Morgan Stanley given a copy of Mr. Grenesko's refinancing representation letter referencing discussions with Morgan Stanley. *Id.* at 94:16-95:16; Examiner's Sworn Interview of Thomas Whayne, July 2, 2010, at 138:3-139:22.

[218] At Tribune's Section 341 meeting held after the Petition Date, the U.S. Trustee's representative asked Mr. Bigelow whether the two VRC solvency opinions were publicly filed. Mr. Bigelow replied that the first opinion was publicly filed, but the second was not, stating that "to the best of my knowledge we had no obligation to publicly file the second step of the solvency opinion." Audio Recording of Section 341(a) Meeting of Creditors, January 16, 2009. Because Step One involved the Tender Offer, Tribune included the first VRC solvency opinion in its public filings with the SEC apparently to meet the requirements of the SEC's Schedule TO and Schedule 13E-3. Step Two did not involve a tender offer, and the Examiner's analysis is that there does not appear to be any law or regulation that required Tribune to file VRC's Step Two solvency opinion with the SEC.

[219] Examiner's Sworn Interview of Thomas Whayne, July 2, 2010, at 127:13-131:22.

of VRC's solvency opinion, nor did he or Mr. Taubman tell the Special Committee they could reasonably rely on the fact that Tribune would be solvent after Step Two.[220] With regard to the *process* by which VRC reached its conclusions, Mr. Whayne stated that he indicated to the Special Committee that VRC's work "seemed thorough and appropriate" and appeared to be something the Special Committee "could take [a] level of comfort in" in determining that Tribune had satisfied the Merger Agreement's condition precedent of an independent solvency opinion.[221] According to Mr. Whayne, however, these remarks went *solely* to whether the work done by VRC complied with the solvency opinion condition precedent of the Merger Agreement:[222]

> [W]e were not in any way shape or form speaking to the substance of the solvency opinion. . . . The board completely understood that we weren't speaking to whether the company was solvent from a substance matter [nor] were we saying whether this opinion was right or wrong. All we were saying was from a process standpoint of fulfilling the condition the board could rely on the opinion for process not substance.

Mr. Taubman testified that he did not recall whether Mr. Whayne commented to the Special Committee on the reasonableness of VRC's solvency opinion at the Special Committee meeting, and Mr. Taubman was "more than doubtful" that Mr. Whayne characterized VRC's solvency opinion as "conservative."[223] Both Mr. Whayne and Mr. Taubman disputed that they personally characterized VRC's ultimate opinion as "conservative."[224] Mr. Taubman did acknowledge that he used the adjective "conservative" or "not aggressive"[225] in addressing "one

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220 Examiner's Interview of Thomas Whayne, June 11, 2010.

221 *Id.*

222 *Id.*; Examiner's Sworn Interview of Thomas Whayne, July 2, 2010, at 134:16-137:8.

223 Examiner's Sworn Interview of Paul Taubman, July 1, 2010, at 83:1-6.

224 *See* Report at § III.H.4.c.(2).(ii).

225 Examiner's Sworn Interview of Paul Taubman, July 1, 2010, at 111:9.

specific aspect of [VRC's] analysis where they could have been more aggressive and they were not and I recall pointing that out to the members of the committee. . . . [VRC] had not assumed that if need be individual assets could be sold piece by piece." [226] "I said I had a single point to make which is on this one dimension of analysis where one could have assumed a whole host of asset sales at premium values if you went asset by asset, it didn't appear that they had done that."[227] In fact, this is almost verbatim what the draft minutes report that Mr. Taubman stated, as excerpted above, except for the comment attributed to him that he "reiterated the conservative nature of VRC's opinion,"[228] one of the two sound bites from the draft minutes cited by the Parties. Mr. Whayne offered consistent testimony:[229]

> Just to expound on one thing, you know, consistent with what I said last time the only comment that was made regarding, you know, assumption as part of the analysis that the company was making any asset sales. So I do remember that Paul made an observation that they could sell asset sales if there was – if they had liquidity issues and that was not part of VRC's analysis, but that addressed liquidity. So that was something that we discussed last time and I do recall that. So that is – that – I don't think Paul said that the nature of the analysis – he didn't say the analysis was conservative, but Paul did make the comment that there is additional value not represented in the presentation because the company has assets and business that it could sell if it got into duress. That there were additional assets – that the VRC analysis did not incorporate any analysis of potential asset sales as a way of dealing with potential liquidity issues and Paul did make the observation that from the standpoint of viewing liquidity issues only was conservative because the company, indeed, did have a number of assets, the Cubs, et cetera, that could be sold if the company needed to raise money. So as we discussed before, he

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226 *Id.* at 84:16-85:15.

227 *Id.* at 109:15-19.

228 Ex. 704 at TRB0533007 (Special Committee Meeting Minutes, dated December 18, 2007).

229 Examiner's Sworn Interview of Thomas Whayne, July 2, 2010, at 130:19-132:8; Examiner's Interview of Thomas Whayne, June 11, 2010 ("I think only thing someone could've heard was that VRC opinion didn't make any assumption around if company hit an air pocket, if it could've sold assets. I think that's what's being construed as being conservative. It's consistent on what we said from day 1 - asset rich but cash flow challenged given the environment.").

did make that comment, but it was from the standpoint narrowly of the company's ability to deal with any sort of liquidity issues that can serve face in the future and not from the standpoint of the core valuation or solvency.

Others interviewed by the Examiner who were present during the December 18, 2007 Special Committee meeting had no specific, independent recollection of the term "conservative" being used by Morgan Stanley (although several individuals stated to the Examiner that they had no reason to question the accuracy of the draft Special Committee meeting minutes).[230] In contrast, Mr. Whayne and Mr. Taubman, the persons who allegedly made these comments, testified specifically that the draft minutes did not accurately represent what they said to the Special Committee.

It is undisputed that Mr. Whayne and Mr. Taubman made brief, oral observations at the December 18, 2007 Special Committee meeting. The statement in the draft minutes attributing to Mr. Whayne the conclusion "that VRC's solvency analysis was conservative and that VRC's opinion was something upon which a director could reasonably rely,"[231] however, appears to be incorrect. In the course of vigorously denying that he or Mr. Taubman ever made this statement, Mr. Whayne pointed out that having given written presentations to the Special Committee on previous occasions, but having prepared no such presentation for the December 18, 2007 Special

230 Examiner's Sworn Interview of William Osborn, June 24, 2010, at 27:1-7 ("Q: Now, when you say they used the word 'conservative,' do you remember them saying that to you, or do you just remember reading that in the minutes? A: I don't -- one, for me to sit here and say I remember them saying it, I can't remember that. I did see it in the minutes."); Examiner's Sworn Interview of Dennis FitzSimons, June 25, 2010, at 101:7-18 ("Q: Do you have a specific recollection that [Morgan Stanley] approved VRC's solvency opinion as conservative and appropriate, or is that based on what you read[?] A: That's what I read [in the] board minutes, yes. Q: Aside from what you read in the board minutes, do you have any independent recollection that Morgan Stanley made that claim? A: No."). The author of the draft minutes stated to the Examiner that he believed the word conservative was used, but he has no specific recollection and bases his belief "on how these minutes are prepared." Examiner's Interview of Charles Mulaney, June 24, 2010. There is no evidence that the draft Special Committee meeting minutes were prepared prior to the actual meeting (as may have been the case with at least one other set of Tribune minutes). The Examiner obtained and reviewed Mr. Mulaney's invoice covering this period. and the December 2007 time records of the Special Committee's outside counsel reflect some work by counsel on the minutes the day following the meeting.

231 Ex. 704 at TRB0533007 (Special Committee Meeting Minutes, dated December 18, 2007).

Committee meeting and having offered only brief comments, neither he nor Mr. Taubman would have made the kind of definitive statements attributed to them in the minutes.[232] Considered in the context of what Morgan Stanley was doing in December 2007, the Examiner finds Mr. Whayne's and Mr. Taubman's testimony credible. The Examiner does not have a sufficient basis, however, to determine why the draft minutes state otherwise and why they were never furnished to Mr. Whayne and Mr. Taubman for review and comment. Although the Examiner cannot furnish answers to these questions, the Examiner finds that this episode is another instance in which Morgan Stanley's alleged seal of approval of VRC's Step Two solvency opinion does not withstand scrutiny.

Special Committee Chair William Osborn described Morgan Stanley's role with respect to the VRC opinion as "mak[ing] certain that the solvency opinion was appropriate and made sense so that we would have the confidence that . . . we could move forward with the second step,"[233] a characterization with which Mr. Whayne agreed.[234] This type of evaluation, however, is qualitatively different from the type of evaluation VRC made with respect to Tribune's solvency and capital adequacy. Morgan Stanley was not asked to, nor did it, undertake or present a comprehensive evaluation of VRC's Step Two solvency opinion. Moreover, neither Morgan Stanley nor any other Financial Advisor was asked to look at Tribune management's

232 Examiner's Sworn Interview of Thomas Whayne, July 2, 2010, at 134:16-137:8; Examiner's Sworn Interview of Paul Taubman, July 1, 2010, at 82:11-22.

233 Examiner's Sworn Interview of William Osborn, June 24, 2010, at 26:11-14.

234 Examiner's Sworn Interview of Thomas Whayne, July 2, 2010, at 151:1-18.

October 2007 projections,[235] the good faith and reasonableness of which are a foundation of VRC's solvency analysis.[236]

Juxtaposed against the limited consideration given by the Tribune Special Committee on December 18, 2007 on the question of solvency (on which the Tribune Board quickly reconvened and approved VRC's solvency opinion),[237] the facts and circumstances known or ascertainable by the directors made it imperative that the Tribune Board and the Special Committee carefully evaluate the opinion delivered by VRC. They knew or should have known that: (i) the Tribune Entities' financial performance had deteriorated appreciably after Step One and that the Step Two Closing would subject the Tribune Entities to $3.6 billion more debt; (ii) management's February 2007 projections had missed the mark only shortly after those projections were issued; (iii) management's October 2007 projections served as the foundation for VRC's opinion and members of senior management were to receive significant additional compensation if Step Two closed and might be looking for continued employment under the auspices of the new owners;[238] (iv) VRC was relying on management's projections as the critical underpinning of its solvency opinion;[239] (v) VRC had been required in its engagement letter to use a definition of "fair market value" and "fair saleable value"[240] that was contrary to long-established principles of sound valuation and that directly affected VRC's solvency conclusions

235 *Id.* at 151:19-22.

236 *See* Ex. 267 at TRB0412757 (VRC Engagement Letter, dated April 11, 2007) (requiring that financial forecasts and projections provided to VRC must "have been prepared in good faith . . . based upon assumptions that, in light of the circumstances under which they are made, are reasonable").

237 Ex. 4 (Tribune Board Meeting Minutes, dated December 18, 2007).

238 *See* Report at § III.F.8.

239 *See id.* at § III.E.3 b.(1).(ii).

240 *See id.* at § III.E.3.b.(1).(i).

at Step Two; and (vi) market indicia were strongly suggesting that incurrence of the Step Two Debt would render Tribune insolvent.[241]

All of these circumstances served, or should have served, as red flags to the members of the Tribune Board and Special Committee that they needed to do more to discharge their responsibilities. Unfortunately, they did not.

(6) Factors that Mitigate Against the Conclusion that Step Two Constituted an Intentional Fraudulent Transfer and Conclusion.

The Examiner evaluated factual and legal considerations that weigh against the conclusion that the Step Two Transactions were an intentional fraudulent transfer.

First, as noted, nothing in the record suggests that the Tribune Board or the members of the Special Committee knowingly or intentionally committed any fraud or acts of dishonesty. However, as discussed above, there is some reason to conclude that one or more members of Tribune's senior financial management engaged in dishonesty or, at a minimum, were not candid in their dealings with the participants. As a matter of law, those acts are ascribed to Tribune for fraudulent transfer purposes.[242] Nevertheless, the Examiner notes that, unlike many other transactions found to be intentionally fraudulent, this is not a case in which the Tribune Board engaged in any kind of foul play.

Second, by all appearances, through and including the closing of the Step Two Transactions, the Zell Group remained eager to proceed with the Step Two Closing.[243] One

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[241] *See id.* at §§ III.H.3.f.(4). and IV.B.5.d.(10).

[242] *See* text accompanying footnotes 48-51.

[243] 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.").

could argue that if the Zell Group, a highly-sophisticated player, still was prepared to go forward and pay the approximate $56 million in net amount it had to put in to make Step Two happen, this furnished tangible evidence that the Step Two Transactions were not going to render Tribune insolvent. After all, why would Samuel Zell pay *anything* for nothing? As William Osborn, the Chair of the Special Committee testified in his sworn interview with the Examiner: "Mr. Zell had made an investment and wanted to proceed with this transaction."[244] The Examiner finds that this is a factor mitigating against a finding that the Tribune Entities perpetrated an intentional fraudulent transfer at Step Two.

Third, the LBO Lenders advanced $3.6 billion at Step Two despite the fact that the Lead Banks posed questions regarding VRC's valuation work and retained their own outside advisor. That the LBO Lenders funded this money is some evidence supporting an inference that a party other than VRC had reached a favorable conclusion regarding Tribune's solvency. On balance, however, the Examiner does not find this factor to meaningfully militate against a conclusion that Step Two was an intentionally fraudulent transfer. As discussed in another part of the Report,[245] the LBO Lenders came to Step Two with contractual baggage resulting from their commitments made at Step One to advance funds in Step Two. It would have been one thing had Tribune actually gone out and obtained fresh financing for Step Two in the fall of 2007, but what happened was that the LBO Lenders ended up honoring preexisting contractual undertakings. That the LBO Lenders had made a preexisting commitment to fund was not lost on Tribune.[246]

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[244] Examiner's Sworn Interview of William Osborn, June 24, 2010, at 41:19-20.

[245] *See* Report at §§ IV.B.7.b.(2).-IV.B.7.b.(8).

[246] *See* Examiner's Sworn Interview of William Osborn, June 24, 2010, at 38:8-18 ("So the issues became mainly around those that were underwriting the transaction, and they were large financial institutions, and generally speaking, if an institution makes a commitment, they normally live by those commitments. There were some institutions during -- starting in the period of time we're talking about but mainly going into the next year that

The legal question is whether, applying Third Circuit law governing intentional fraudulent transfers, the record supports or falls short of supporting the conclusion that the Step Two Transactions were intentionally fraudulent. As discussed previously,[247] the law in the Third Circuit furnishes only limited guidance in the leveraged buyout context. On the one hand, if the evidence shows that the debtor knew that what it was doing would render it insolvent or hinder creditors, a finding that an intentional fraudulent transfer occurred is not difficult to draw. On the other hand, when the evidence only supports the inference that insolvency or hindrance of creditors was foreseeable, something other than an intentional fraudulent transfer has occurred.[248] In the Examiner's view, the instances of dishonesty or lack of candor described above are evidence of consciousness that proceeding honestly and with candor would jeopardize the Step Two Closing. The natural consequence of proceeding in this fashion is that a transaction that should not have happened, did. It is reasonable to infer from those acts knowledge that hindering, delaying, or defrauding creditors would follow. Although there is no evidence that the Tribune Board and Special Committee acted with such knowledge, their acquiescence allowed Step Two to close when it should not have and, therefore, their actions are relevant to the intentional fraudulent transfer inquiry.

Although the Examiner recognizes that the facts adduced in the Investigation do not fit the ordinary pattern of an intentional fraudulent transfer, the combination of acts and omissions rises to what appears to be a level of impropriety—when weighed against the natural consequences formulation adopted by the Third Circuit Court of Appeals[249]—leads the Examiner

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started to back out of transactions. But I was -- I felt that there were commitments made and the institutions that made those would stand by those commitments.").

[247] *See* Report at § IV.B.4.a.

[248] *See id.*

[249] *United States v. Tabor Court Realty Corp.*, 803 F.2d 1288, 1305 (3d Cir. 1986).

to conclude that a court would be somewhat likely to find an intentional fraudulent transfer at Step Two. To summarize, those factors include that the Step Two Transactions conferred disproportionately unreasonably small consideration on the Tribune Entities and rendered them insolvent and without adequate capital, that one or more participants in the transactions appear to have engaged in acts of dishonesty proximately related to the transfers and obligations at Step Two, and that the fiduciaries charged with overseeing management did not act as a check to prevent this from happening. These were a natural recipe for failure.

5. Constructive Fraudulent Transfer Claims.

a. Examiner's General Conclusions.

Evaluation of whether the transfers and obligations comprising the Leveraged ESOP Transactions may be avoided as constructive fraudulent transfers entails a component-by-component evaluation, set forth below, of the elements of such claims and the defenses.

b. Examiner's Conclusions and Explanation Concerning Equivalence of Value Provided at Step One and Step Two—the Question of "Collapse."

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

It is highly likely that a court would collapse all of the transactions within each of Step One and Step Two for purposes of evaluating the equivalence of the consideration given and received by the estates. This conclusion does not necessarily mean that a court would collapse Step One and Step Two together, or determine that Step Two Debt should be included in the solvency, capital adequacy, or intention to incur debt analysis, which are discussed separately in the Report.[250]

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[250] *See* Report at §§ IV.B.5.d.(6).(i).. IV.B.5.d.(6).(iii).

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directors' failure to perform their monitoring function was so egregious as to support a conclusion that they consciously abdicated their responsibilities under Delaware law.

In sum, the Examiner believes that although the Tribune Board and Special Committee certainly did not do what was expected of them at Step Two, a court is somewhat unlikely to conclude that the directors breached their fiduciary duties at Step Two.

(5) Tribune Officers at Step Two.

Unlike Tribune's directors, Tribune's officers are not protected by the exculpation provisions in Tribune's Amended and Restated Certificate of Incorporation.[1167] As a result, to the extent a Tribune officer engaged in gross negligence or recklessness, for purposes of applying the duty of care, those acts are measured under the entire fairness standard.[1168] Moreover, any indemnification afforded by Tribune to its officers cannot cover acts not taken in good faith or in the best interests of the corporation.[1169] As discussed in another part of the Report,[1170] the Examiner believes that the record adduced indicates that one or more members of Tribune's senior financial management were not honest or candid in connection with key aspects of the Step Two Transactions, and that these circumstances led proximately to the Step Two Closing, to the detriment of Tribune's creditors. These acts go well beyond gross negligence or recklessness but enter into the terrain reserved for intentional misconduct. Based on the acts of dishonesty or lack of candor in the record, it is reasonably likely that a court would find that such

[1167] *See id.* at § IV.E.2.d.

[1168] *See* text accompanying footnotes 1042-1046.

[1169] *VonFeldt v. Stifel Fin. Corp.*, 1999 Del. Ch. LEXIS 131, at *7 (Del. Ch. June 11, 1999).

[1170] *See* Report at § IV.B.4.c.

individual or individuals also breached their fiduciary duties during this time frame, whether it be the duty of care or loyalty.[1171]

As the Examiner emphasized in his discussion of intentional fraudulent transfer issues at Step Two, however, the Examiner's conclusions are based on the Investigation conducted to date. As also previously noted, the Examiner chose the phrase "one or more senior financial management members" carefully.[1172] Additional investigation is warranted and would be required to determine the acts of specific members of senior financial management to determine individual culpability.

(6) Guarantor Subsidiary Directors at Step Two.

The activities undertaken by the Subsidiary Directors in connection with the Step Two Transactions present unique issues. The Guarantor Subsidiaries were not parties to the Merger Agreement or the related agreements entered into in the spring of 2007 giving rise to the Leveraged ESOP Transactions. Thus, those entities had no say in whether Tribune consummated the Merger or the related agreements with the Zell Group and others at Step Two. Moreover, the Subsidiary Guarantee entered into by the Guarantor Subsidiaries imposed liability on those entities for any indebtedness incurred by Tribune under the Credit Agreement, including the amounts that might be advanced in connection with Step Two. When Tribune borrowed under the Incremental Credit Agreement Facility at Step Two, the Guarantor Subsidiaries automatically became primarily liable on that indebtedness. On the other hand, the Guarantor Subsidiaries affirmatively undertook liability on the Bridge Debt at Step Two when they

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[1171] Because the Parties did not raise the question of what recovery might be available if a director or officer were found to have violated a fiduciary duty, the Report does not consider this question.

[1172] *See* Report at § IV.B.4.c.(2).(iii).

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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

[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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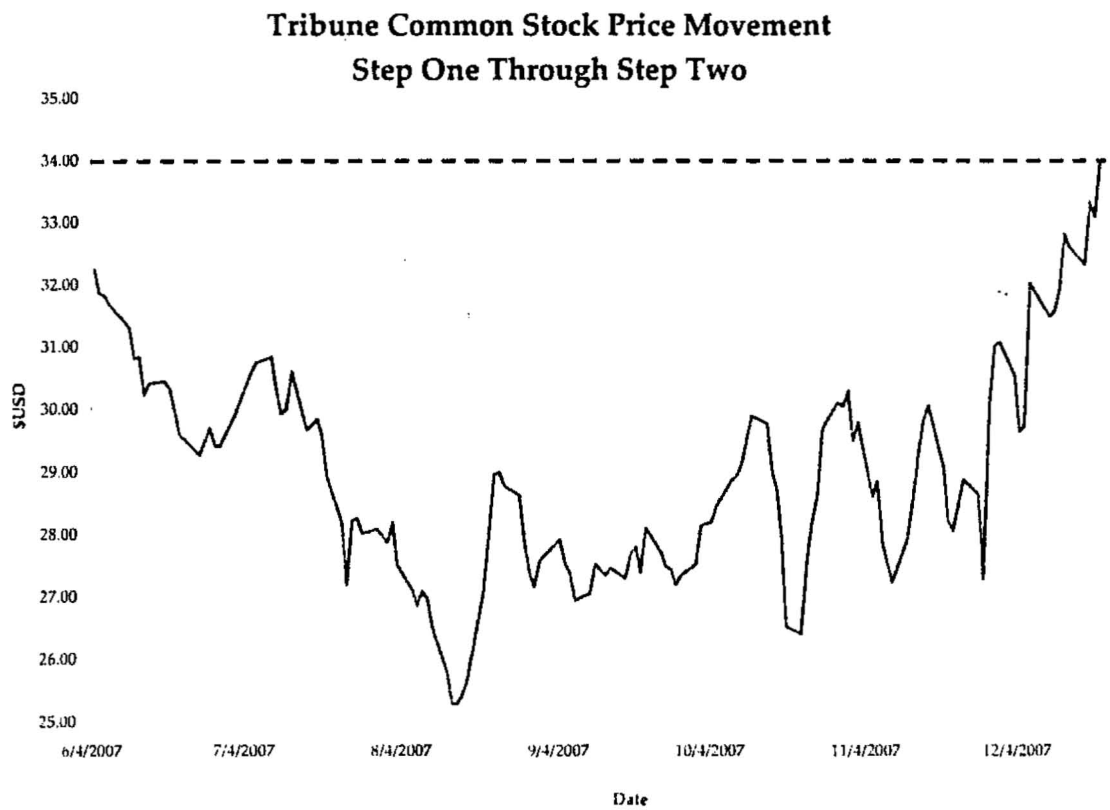

The Examiner notes that the trading value of Tribune Common Stock increased to approximate the Tender Offer price as the Step Two Financing Closing Date neared.

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

(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	4.50	4.17	3.72	3.21	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

[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		[illegible]		[illegible]		[illegible]		[illegible]	

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	$ 5,428.2	$ 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		[illegible]	-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	24.1%	23.6%	23.9%	23.7%	24.1%	24.4%	24.6%	25.1%	25.4%	25.6%	25.9%	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	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Guaranteed Leverage Ratio	8.32	8.43	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	8.37	8.00	7.85	7.70	7.59	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	[illegible]	[illegible]	[illegible]	1.11	1.13	1.15	[illegible]	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	$4,913.7	$5,018.1	$5,073.1	$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	$5,531.3	$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		[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]

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	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	22.0%	[illegible]	[illegible]	22.1%	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]

(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)	[illegible]	($ 354.6)	($ 597.3)	[illegible]	($ 1,742.0)	[illegible]	($ 2,221.2)	($ 2,430.1)	[illegible]	[illegible]	($ 3,111.6)	[illegible]
Guaranteed Leverage Ratio	7.97	7.99	[illegible]	[illegible]	[illegible]	9.07	[illegible]	[illegible]	6.67	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
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	[illegible]	[illegible]	1.05	[illegible]	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	[illegible]	($ 98.1)	($ 167.[illegible])	[illegible]	[illegible]	($ 261.0)	[illegible]	[illegible]	($ 187.1)	[illegible]
Guaranteed Leverage Ratio	8.46	8.48	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	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	[illegible]	[illegible]	[illegible]	1.21	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	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Guaranteed Leverage Ratio	8.11	8.04	8.25	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
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	[illegible]	[illegible]	1.15	[illegible]	1.17	[illegible]	1.19	1.20	1.21	[illegible]
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