UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

In re:	)	
	)	Chapter 11
HARNISCHFEGER INDUSTRIES, INC.,	)	
et al.,	)	Case No. 99-2171 (PJW)
	)	(Jointly Administered)
Debtors.	)	
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EXHIBIT I

COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW
RELATING TO EQUITY COMMITTEE OBJECTION TO CONFIRMATION

Introduction

Harnischfeger Industries, Inc. ("HII") is the parent of a group of separate global mining equipment businesses (collectively, the "Debtors") that design, manufacture, market and distribute mining equipment and machinery, and provide a wide range of after-market services, including the sale of spare parts. HII's two primary subsidiaries, Harnischfeger Corporation ("P&H") and Joy Technologies Inc. ("Joy") directly and indirectly own most of HII's other subsidiaries.

The Debtors seek confirmation of their Plan of Reorganization (the "Plan") and hearings thereon were held on April 3, 10 and 11, 2001. The Plan proposes to issue new stock in reorganized HII to HII creditors. It proposes cancellation of all existing HII shares such that creditors will have 100% ownership of reorganized HII.

The Official Committee of Equity Security Holders ("Equity Committee") objects to Plan confirmation. It argues the Plan violates a fair and equitable requirement of Bankruptcy Code § 1129(b)[1] because it pays HII creditors more than 100% of their claims while extinguishing the rights of dissenting shareholders. At issue, then, is the enterprise valuation of reorganized HII.

This is the Court's findings of fact and conclusions of law following the two day evidentiary hearing on the Equity Committee's objection to confirmation of the Plan. The matter is a core proceeding over which this Court has jurisdiction pursuant to 28 U.S.C. §§ 157 and 1334. For the reasons set forth below, I will overrule the Equity Committee's objection to confirmation.

The Equity Committee's objection is directed solely to the valuation of the Joy portion of HII's business. Joy manufactures and services underground mining equipment. P&H manufactures and services surface mining equipment. The Equity Committee does not challenge the valuation of P&H. (Tr. 574:17 - 575:16).

Several factors precipitated the Debtors' bankruptcy filing in June 1999. Although HII reported record revenues for fiscal year 1997, covering November 1996 through October 1997, its

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[1] All references to "§___" herein are to the United States Bankruptcy Code, 11 U.S.C. § 101 <u>et seq.</u>

revenues for fiscal year 1998 dropped dramatically primarily because of the Asian financial crisis in late 1997. (Tr. 35:16 - 36:15). The Asian crisis caused a global restructuring of the mining industry and further consolidated Joy's customer base. This resulted in substantially reduced business opportunities for Joy, particularly for its original equipment sales. (Tr. 38:1 - 38:17, 56:2 - 59:5; Debtors' Exh. 8(b) - 8(f)).

During the same period, deflated pulp and paper prices across the Pacific Rim significantly reduced spending by pulp and paper producers worldwide. (Tr. 35:16 - 35:23, 37:9 - 37:22). Compounding this challenge, HII's then-third major subsidiary, Beloit Corporation, built four large paper-making machines at a contract price of about $600 million while incurring a $150 million cost overrun. The customer refused to accept two of the largely finished machines. (Tr. 36:1 - 36:7). Consequently, by late 1998 HII faced a severe liquidity crisis and was unable to obtain the financing necessary to avoid bankruptcy. (Tr. 36:12 - 36:15). The Debtors' Plan contemplates the liquidation of Beloit Corporation. The issue addressed herein relates only to the enterprise value of the Reorganizing Debtors, i.e., excluding Beloit Corporation and its subsidiaries.

The following witnesses testified at trial:

(1). John Nils Hanson ("Hanson") for Debtors. Hanson is the Chairman, President and Chief Executive Officer of Harnischfeger. (Hanson, Tr. 27:04 - 27:07). He has an undergraduate degree and masters degree in chemical engineering from the Massachusetts Institute of Technology in addition to a Ph.D. in nuclear science and engineering from Carnegie Mellon University. (Hanson, Tr. 27:12 - 28:9). Hanson has over fifteen years experience in restructuring distressed and troubled companies. (Hanson, Tr. 33:22 - 34:2). He joined Joy in 1990 and became Chief Operating Officer of Harnischfeger at the end of 1994 after the two companies merged. (Hanson, Tr. 33:13, 34:5 - 34:15). He became CEO of Harnischfeger in May 1999 shortly before it filed for chapter 11 relief. (Hanson, Tr. 34:13 - 34:21).

(2). Mark T. Morey ("Morey") for Debtors. Morey is a principal of the coal consulting practice at Resource Data International ("RDI"). (Morey, Tr. 147:10 - 147:17). RDI provides consulting services to the energy industry. Morey consults for companies involved in the production, transportation, service and consumption of coal. (Morey, Tr. 147:13 - 148:2). He has been involved with the coal industry for over twenty years. (Morey, Tr. 149:7 - 149:9). Prior to his engagement at RDI, Morey was employed at some of the nation's largest coal producers, including a position as Senior Coordinator of Strategic Studies at CONSOL Energy[2] and Vice President of Marketing and Development at AMVEST Corporation. (Morey, Tr. 150:9 - 150:24).

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[2] CONSOL Energy was formerly known as Consolidation Coal Company. (Morey, Tr. 150:9).

(3). Timothy R. Coleman ("Coleman") for Debtors. Coleman is a senior partner in the restructuring department at the Blackstone Group, L.P. ("Blackstone"). (Coleman, Tr. 230:1 - 230:24). Blackstone is a financial advisory firm and has provided services in over 110 restructuring transactions representing over $ 140 billion in debt. (Coleman, Tr. 231:1 - 231:5). Coleman has over fifteen years experience in restructuring and corporate finance. (Coleman, Tr. 236:1 - 236:3). He has a bachelor of arts and an MBA from the University of Southern California. (Coleman, Tr. 236:6 - 236:9). HII retained Blackstone and Coleman in the fall of 1999 to assist in the development and critique of a business plan, business forecast, valuation, debt capacity analysis and development of a chapter 11 reorganization plan. (Coleman, Tr. 236:21, 237:1 - 237:24).

(4). David R. Hilty ("Hilty") for the Official Committee of Unsecured Creditors for the Debtors Other than Beloit ("Creditors' Committee") which supports the Plan. Hilty is a director of the investment banking firm of Houlihan, Lokey, Howard & Zukin ("Houlihan Lokey"). (Hilty, Tr. 351:18 - 351:20). Houlihan Lokey has one of the largest restructuring groups in the country. (Hilty, Tr. 352:9 - 352:13). Hilty has a bachelor of science in finance from the University of Virginia and has worked in Houlihan Lokey's financial restructuring department for the past eight years. (Hilty, Tr. 352:18, 354:1 - 354:2).

(5). Seth Schwartz ("Schwartz") for the Equity

Committee. Schwartz is a founding partner of Energy Ventures Analysis ("EVA"). (Schwartz, Tr. 418:12 - 418:19). EVA provides consulting services to the coal mining and power generation industries. It also engages in economic engineering studies for private sector energy companies. (Schwartz, Tr. 418:24 - 419:8). Schwartz graduated from Princeton University with a degree in geological engineering. (Schwartz, Tr. 422:15 - 422:19). From June 1999 until October 2000 he acted as President and Chief Executive Officer of a Western Kentucky coal producer, Centennial Resources, during its chapter 11 reorganization. (Schwartz, Tr. 422:2 - 422:8).

(6). Seymour Preston, Jr. ("Preston") for the Equity Committee. Preston is a Managing Director at Goldin Associates, a consulting firm principally engaged in the area of distressed businesses, bankruptcies and workouts. (Preston, Tr. 540:4 - 540:15). Preston started in the industry approximately 30 years ago working with venture capital investments. (Preston, Tr. 540:12 - 540:15). He has an undergraduate degree from Princeton University, a law degree from the New York University School of Law, and is a designated Chartered Financial Analyst. (Preston, Tr. 545:9 - 545:20). The Equity Committee retained Preston and Goldin in June 2000 to assess Blackstone's valuation of Joy. (Preston, Tr. 546:6 - 546:15).

In addition to the witnesses, the parties submitted portions of a number of deposition transcripts and approximately 70 exhibits, including the expert reports of Blackstone, Houlihan Lokey, Preston and Schwartz, which were admitted into evidence.

FINDINGS OF FACT

1. Creditor claims against HII and its direct and indirect subsidiaries, the reference point for purposes of an enterprise valuation calculation, total $1.63 billion. (Hanson, Tr. 79:17). Thus, for the equity interest to be "in the money" the enterprise value must exceed $1.63 billion. The valuation conclusions offered by the experts are as follows (Debtors' Exh. 25):

(1) Blackstone: $1.020 billion

(2) Houlihan Lokey: $1.050 billion

(3) Preston: $2.040 billion (low)
$2.220 billion (high)

The gap between the valuations of the Plan supporters and the valuation of the Equity Committee is obviously very wide. Stated differently, the Debtors' and the Creditors' Committee's valuations suggest that the shareholders are out of the money by at least $.6 billion; whereas, the Equity Committee argues it is approximately $.4 billion in the money.

DEBTORS' BUSINESS PLAN.

2. In late 1999, executives at HII, Joy and P&H -- with the assistance of Blackstone professionals -- began designing a

"bottom-up" business plan to emerge from bankruptcy. (Hanson, Tr. 39:2 - 39:9, 39:24 - 41:24). The development of that document continued through the first quarter of 2000 (the "Business Plan"). (Debtors' Exh. 3).

3. The Business Plan serves two primary functions. First, it is the Reorganizing Debtors' operational blueprint. As such it creates "a strong level of accountability with the management team" and sets "aggressive operating targets." (Hanson, Tr. 39:2 - 39:6). Second, it is the basis for the Plan, including the Reorganizing Debtors' valuation. (Hanson, Tr. 39:7 - 39:9).

4. Joy and P&H engaged in a "bottom-up" forecasting process to develop the Business Plan wherein field staff collect extensive data on their customer requirements and future outlooks. (Hanson, Tr. 39:24 - 41:24). The 12 to 24 month near-term data include very specific, unit-by-unit customer purchasing plans. (Hanson, Tr. 41:2 - 41:24). The two year longer-term data reflect customer strategic plans for new mines and expansions of existing mines, as well as customer replacement philosophies and strategies. (Id.).

5. The nature of HII's business enabled its staff to access the market for products on a detailed basis. For both Joy and P&H, equipment sales volume for large mining equipment is very small - typically ranging anywhere from as few as three to as many as 40 to 50 units per year, depending on the product line. (Hanson, Tr. 40:1 - 40:5). Furthermore, most of the original

equipment sales represent replacement business, i.e., a sale of HII original equipment tends to replace existing equipment rather than support a new mine or new facility. (Hanson, Tr. 40:6 - 40:9). In addition to original equipment sales, much of HII's revenue flows from aftermarket business: services including rebuilds, repairs, refurbishments, upgrades, component exchanges, and whole machine exchanges. (Hanson, Tr. 40:10 - 40:18). Given the long-term customer relationships inherent in this type of business, HII employs a marketing strategy in which its sales and service teams focus on specific mines and specific operations and handle all products and all services associated with those operations. This customer-specific market knowledge is the basis of HII's formulation of the Business Plan. (Hanson, Tr. 40:19 - 41:11).

6. After collecting customer-specific data for the Business Plan, HII's field staff worked with finance personnel to build a revenue forecast, broken down by product, type of service, and region. (Hanson, Tr. 41:12 - 41:24). The management of each region then reviewed the forecasts and rolled them into global segments, and then into the global Joy and P&H forecasts. (Id.). The senior management of each business reviewed the global forecasts prior to final review by HII's executive management. (Id.). Once the sales plans were approved at all levels, HII personnel essentially repeated the same process, bottom up, from a cost perspective. (Hanson, Tr. 42:5 - 42:7).

7. In building the Business Plan, HII cross-checked its

customer-based projections against macroeconomic trends and projected metals and coal demand to test their reasonableness. (Hanson, Tr. 42:13 - 42:18). Thus, HII verified customer requirements and customer plans for sense and consistency with macroeconomic trends and projected metals and coal demand. (Hanson, Tr.42:13 - 42:18, 44:2 - 44:22). HII also used these broader market trends to identify potential demographic changes or changes in terms of mix that might impact the Business Plan in later years. (Hanson, Tr. 44:6 - 44:9).

8. Blackstone, the Debtors' financial advisors, assisted management throughout the development of the Business Plan, from developing its structure and process through critiquing its key assumptions. (Hanson, Tr. 44:12 - 45:1; Coleman, 237:1 - 237:24). The Equity Committee points out that the Blackstone representatives assigned to the Debtors' engagement were not experts in forecasting the outlook for coal production. (Coleman, Tr. 298:15; Hanson, Tr. 87:14 - 87:16). However, Debtors' management did not look to them for such expertise and the Business Plan was developed on the basis of examining the market for coal production equipment, not just the market for coal, the latter being the focus, and in my view (as described below) the shortcoming, of the Equity Committee's valuation approach.

9. For the Debtors, the cost of bad planning is very high due to the businesses' level of capital intensity. (Hanson, Tr. 42:23 - 43:21). Both Joy and P&H produce a relatively small

number of units, and the production lead times for those units is very long. (Id.). As a result, if forecasts are too high, the Debtors build a large amount of inventory and use a large amount of cash in the business, and their performance deteriorates very rapidly. (Id.). If forecasts are too low, because of the necessary lead times, the Debtors are unable to ramp up quickly enough to meet the missed customer demand. (Id.). Thus, the success of the Reorganizing Debtors' business is directly tied to the accuracy of the Business Plan.

10. Since its initial development, the Debtors' management has regularly reevaluated the Business Plan. (Hanson, Tr. 43:17 - 43:21, 45:2 - 45:24). Beginning in August 2000, HII performed a comprehensive review of the Business Plan to confirm it still made sense. (Hanson, Tr. 45:9 - 45:19). Management concluded the forecasts were still appropriate although Joy performed just short of the Business Plan's initial forecasts. (Hanson, Tr. 46:1 - 46:5).

11. Management's observation that the markets served by Joy and P&H somewhat improved partly motivated the August 2000 review. (Hanson, Tr. 45:20 - 45:24). After the August review of the Business Plan, management nevertheless concluded adjustments were not necessary because the Business Plan had anticipated the market changes. (Hanson, Tr. 46:1 - 46:5).

12. The Business Plan assumes and depends upon a recovery in the basic commodity industries both on the P&H and Joy

side (Hanson, Tr. 52:15 - 52:21, 142:9 - 142:14, 663:14 - 663:20; Debtors' Exh. 3 at 3) and assumes there will not be an economic downturn or recession that could impact their businesses. (Hanson, Tr. 52:19 - 52:21).

13. The Business Plan reflects management's belief that both Joy and P&H are strong businesses in their respective markets, and that they will continue to be the major players in their industries. (Hanson, Tr. 80:17 - 80:23). Nevertheless, the Business Plan posits Joy as needing a strong recovery in the coal mining industry to meet its projections. (Hanson, Tr. 142:13 - 142:14).

14. Actual results after more than one full year under the Business Plan are consistent with the Business Plan projections to date. (Hanson, Tr. 46:10 - 46:22). During fiscal year 2000, Joy's bookings were about $45 million short of the Business Plan's forecast, its sales fell about $30 million short, and its operating profit was about $ 3 million low. (Hanson, Tr. 48:5 - 48:10; Debtors' Exh. 6 at EC-010099). And, in the first quarter of 2001, Joy's actual bookings have been about $ 30 million below the Business Plan's projected bookings (Hanson, Tr. 49:8 - 49:10; Debtors' Exh. 7 at HII-021736), its sales about $7 million below the Business Plan, and its gross margins about $ 1 million below the Business Plan. (Hanson, Tr. 50:5 - 50:12; Debtors' Exh. 7 at HII-021762). However, Joy's gross profit is consistent with the Business Plan's forecast due to reduced operating costs and

manufacturing variances, and its operating profit is slightly ahead of the Business Plan due to lower administrative expenses. (Id.)

15. For the remainder of 2001, the testimony suggests Joy may have difficulty meeting the Business Plan's targets because two longwall system orders reflected in the Business Plan were recently lost to a competitor (Hanson, Tr. 50:17 - 51:4). Joy may end the year short on revenues, and the shortfall will have to be made up through increases in aftermarket business and further cost containment. (Hanson, Tr. 50:17 - 51:4).

16. Although the Business Plan projects a substantial turnaround in Joy's business, it also reflects the following factors as limiting Joy's long-term growth prospects: (Debtors' Exh. 3 at 26-29).

(a). Long-term improvements in machine productivity continue to substantially exceed increases in long-term coal demand and production. (Hanson, Tr. 54:4 - 54:16; Debtors' Exh. 8(a)-(e); Debtors' Exh. 3 at 27). For example, over the past 25 years, the tons of coal produced per underground mine has increased roughly four-fold. (Hanson, Tr. 56:2 - 56:5; Debtors' Exh. 8(a)). And while the number of longwall faces has declined, the output of longwall mining has increased. (Hanson, Tr. 57:1 - 57:3, 57:20 - 57:21; Debtors' Exh. 8(c)-(d)). As a result of improvements in the efficiency of the mining equipment, the productivity of each longwall face has increased roughly eight-fold over the past fifteen years. (Hanson, Tr. 57:24 - 58:2; Debtors' Exh 8(e)). Thus, management believes the increasing productivity of Joy equipment offsets even a substantial increase in coal demand, i.e., an increase in coal demand may not correlate with an increase in demand for Joy equipment which management believes is reflected by a gradual decline of Joy's unit sales over time. (Hanson, Tr. 59:2 - 59:5; Debtors' Exh. 8(f)).

(b). United States' coal demand has steadily trended towards low-sulfur surface-mined coal and away from underground coal. (Debtors' Exh. 3 at 26). While the predominantly underground coal production east of the Mississippi has been relatively flat over the past twenty-five years, the almost entirely surface production of low-sulfur coal west of the Mississippi has shown significant growth. (Hanson, Tr. 59:14 - 60:8; Debtors' Exh. 8(g) - (h)). This trend is an important limitation on Joy's business, since its equipment is used only in underground mining. (Id.).

(c). Joy's customers continue to consolidate which exerts an additional downward pressure on Joy's sales. (Debtors' Exh. 3 at 26). Consolidation allows customers to reallocate equipment thereby slowing the rate of equipment replacement. It also significantly increases customer buying power and leverage. (Hanson, Tr. 143:11 - 144:7; Business Plan at 26). Consolidation may also result in mine closures, as the number of underground mines has decreased by approximately two-thirds over the last 25 years. (Hanson, Tr. 55:2 - 56:23, 143:11 - 143:15; Debtors' Exh. 8(b), (d)).

(d). Joy's key competitors have grown and consolidated, which threatens Joy's market share and profit margins. (Debtors' Exh. 3 at 26 - 28). For example, just the week before the confirmation hearing, two of Joy's largest competitors announced their merger. (Hanson, Tr. 143:3 - 143:10). This merger eliminates Joy's considerable prior advantage as the world's only supplier of complete longwall systems. (Id.) As a result, Joy may face new competitive pressures which the Business Plan does not anticipate.

17. The Equity Committee's valuation does not take into account any of the above recited limitations on Joy's business prospects.

BLACKSTONE'S AND HOULIHAN LOKEY'S VALUATIONS AND DEBTORS' OTHER EVIDENCE OF VALUE.

18. Both Blackstone's and Houlihan Lokey's reports rely on the Business Plan's assumptions regarding HII's future performance. (Coleman, Tr. 243:12; Hilty, Tr. 365:2 - 366:14).

19. In early 2000, Blackstone gave a preliminary valuation presentation to HII's Board of Directors. (Coleman, Tr. 239:20 - 240:1). Even using what it considered aggressive assumptions, Blackstone's initial valuation showed that HII's total value was at least $400 million below the creditor claims likely to be asserted, and that equity was therefore substantially out of the

money. (Hanson, Tr. 72:3 - 72:9; Coleman, 240:16 - 241:3).

20. The Board formed an ad hoc committee to work with Blackstone to find possible sources of equity value. (Hanson, Tr. 72:24 - 73:6; Coleman, 241:13 - 241:17). At the direction of the Board, Blackstone performed numerous sensitivity analyses over the next several months to discover any reasonable set of assumptions under which shareholders could recover. The Board ultimately concluded there simply was no value for equity under any reasonable scenario. (Hanson, Tr. 73:1 - 73:13; Coleman, 242:19 - 242:21).

21. For the reasons discussed below, the Court finds Blackstone's and Houlihan Lokey's valuations more reasonable and reliable than Preston's valuation.

22. Working together with the Board and HII management, Blackstone uses financial and revenue projections from the companies themselves that, in management's view and experience, are achievable. (Coleman, Tr. 255:7 - 255:20). On the other hand, the Equity Committee relies on projections that management and Coleman simply do not believe achievable. (Coleman, Tr. 260:6 - 262:1; Debtors' Exh. 21 - 24).

23. Blackstone follows the commonly accepted practice of using three separate valuation methods - comparable company, comparable acquisition, and discounted cash flow ("DCF") - as a critical cross-check on its valuation. (Coleman, Tr. 244:5 - 244:20, 348:17 - 348:24; Debtors Exh. 4 at BG-02342, BG-02372). Blackstone's DCF exit multiple is derived from the well-accepted

method of determining current trading multiples for comparable companies. (Coleman, Tr. 273:18 - 274:17; Debtors' Exh. 4 at BG-02342 - BG-02343, BG-02359 - BG-02360).

24. Blackstone also ran a series of sensitivity analyses, which support the conclusion that there is no reasonable set of assumptions under which equity value can be found. (Coleman, Tr. 280:3 - 280:6; Debtors' Exh. 4 at BG-02376 - BG-02379). Blackstone's DCF analysis concludes the Reorganizing Debtors' enterprise value is between $960 million and $1.12 billion. Blackstone's comparable-company analysis values the enterprise at $600 million to $ 900 million, while its comparable acquisition analysis values the enterprise at $850 million to $1.05 billion. (Coleman, Tr. 248:10 - 248:16, 254:11 - 254:14; Debtors' Exh. 4 at BG-02372).

25. Giving primary weight to its DCF valuation, Blackstone concludes the Reorganizing Debtors' enterprise value is $900 million to $1.05 billion, and its reorganization value including excess cash and the value of net operating losses is $980 million to $1.170 billion. (Coleman, Tr. 278:9 - 280:2; Debtors' Exh. 4 at BG-02372).

26. Houlihan Lokey performed an independent valuation. (Hilty, Tr. 353:5 - 353:20; Debtors' Exh. 16). Like Blackstone, Houlihan Lokey derives its exit multiple from current trading multiples of comparable companies and corroborated this analysis using several accepted valuation methods. (Debtors' Exh. 16 at

HOU-05436 - HOU-05440). Houlihan Lokey reached a valuation for the Debtors of $ 1.05 billion - virtually identical to Blackstone's valuation conclusion and still only about half of the Equity Committee's valuation. (Hilty, Tr. 360:11 - 360:12; Debtors' Exh. 16 at HOU-05443).

27. Both before and during the bankruptcy proceedings, the Board and management made several efforts to sell the company. (Hanson, Tr. 73:14 - 75:9; Coleman, 249:22 - 253:4). After Blackstone's preliminary valuation, Hanson contacted Caterpillar to discuss a possible acquisition price at which equity might be in the money. The Caterpillar representative "laughed" at Hanson's proposal. (Hanson, Tr. 74:20 - 75:9). Senior HII management also approached other strategic buyers about the possibility of investing in or acquiring the company. (Hanson, Tr. 73:14 - 74:8). The sole preliminary indication of interest for the combined company, however, was in the range of $ 700 million - substantially below the Blackstone valuation. (Coleman, Tr. 252:17 - 252:19).

28. Blackstone's $1 billion valuation has been public for months. Coleman testified that Blackstone's "phone would have been ringing off the hook" if HII were worth anything close to the $ 2.2 billion claimed by the Equity Committee. (Coleman, Tr. 284:3 - 284:10). Preston acknowledges there is no interest in the company at a price anywhere near the Blackstone valuation. (Preston, Tr. 644:19 - 645:7). Hanson similarly received no

indication of any purchaser interest in the company. (Hanson, Tr. 74:5 - 74:8).

THE EQUITY COMMITTEE'S VALUATION.

29. Preston values HII at $2.2 billion (Equity Comm. Exh. 42(a) at 18-20), about twice the level of the Blackstone and Houlihan Lokey valuations.

30. For the reasons discussed below, the Court finds that Preston's valuation conclusion and his confirmation hearing testimony in support thereof not reasonable.

31. Preston knew from the beginning that Blackstone valued the company at about $1 billion, and that he had to generate an extra $.6 billion of value before equity would see its first dollar. (Preston, Tr. 570:7 - 571:17). Consequently, to put equity in the money, Preston knew he would have to conduct what he describes as an "off the beaten path inquiry" which "focus[es] only on those areas that could provide substantial incremental value." (Preston, Tr. 572:1 - 573:18; Debtors' Exh. 11). I find Preston's valuation flawed in significant respects.

32. First, unlike Blackstone and Houlihan Lokey, Preston does not cross-check his results by employing the conventional three valuation methods: comparable company, comparable acquisition, and DCF, although he admits it is common and accepted practice to do so and that, even in his own analyses of other companies, he has done so himself. (Preston, Tr. 635:16 - 637:21).

33. Preston states he does not use the comparables methods because there are no comparables. (Preston, Tr. 637:19, 639:19 - 639:24). Admittedly, it is an unusual situation where a valuation report identifies a "perfect" comparable, but I reject as unreasonable Preston's opinion that there are no comparables against which to test the value of the Reorganizing Debtors. I find that the comparables used by Blackstone and Houlihan Lokey in their valuations are appropriate and reasonable.

34. Even using Preston's aggressive exit multiple of 9.23, the evidence shows that a standard comparable-company analysis based on the last twelve months' results would yield a valuation of just $1.05 billion - a value no higher than that established by Blackstone and Houlihan Lokey. (Preston, Tr. 643:5 - 643:22).

35. Second, to generate a DCF valuation that puts equity in the money, Preston assumes Joy will achieve the same reported revenues and operating profits by 2002 that Joy enjoyed in 1997, its best year ever, and that the Debtors will continue to enjoy unceasing, compounded growth in revenue and profits from that 2002 assumption. (Coleman, Tr. 255:24 - 256:5; Preston, Tr. 588:1 - 588:14; Equity Comm. Exh. 42(a) at 5, 11-12). For a number of reasons, I find this assumption unreasonable.

(a). Preston relies solely on the Equity Committee's coal expert, Schwartz, for this key assumption. (Preston, Tr. 578:12 - 579:21, 588:4 - 588:14, 600:20 - 601:5; Equity Comm. Exh.

42(a) at 5). Schwartz, however, has no expertise or qualifications to forecast Joy's equipment sales. (Schwartz, Tr. 487:20 - 488:20). He acknowledges he is not an expert in forecasting Joy's equipment sales and that HII management, which forecasts much lower numbers, knows more than he does about Joy's business. (Schwartz, Tr. 487:20 - 491:11). He also admits he never projected Joy's actual equipment sales during the Business Plan period. (Schwartz, Tr. 490:19 - 490:23). As discussed below, I find Schwartz’s sweeping opinions about robust future coal demand to be of questionable support for this key assumption in Preston's valuation.

(b). Preston also fails to adjust the 1997 reported results to account for non-recurring items, even though Schwartz put him on notice of one of them. (Preston, Tr. 589:7 - 592:14). The evidence at trial is undisputed that in 1997 Joy made unusual sales to Russia and in Britain which will not be repeated. (Hanson, Tr. 67:9 - 68:24; Coleman, 264:7 - 268:1; Hilty, Tr. 384:10 - 385:16). Reversal of reserves and gains on asset sales not related to Joy's operating performance further inflated Joy's 1997 operating profit by $44.1 million. (Coleman, Tr. 264:24 - 266:3). Adjusted for these nonrecurring items, Joy's normalized 1997 revenues and profit margins are nearly identical to the Business Plan's projections for 2002. (Preston, Tr. 598:16 - 599:14; compare Debtors’ Exh. 4 with Equity Comm. Exh. 42(a)). By ignoring these adjustments, Preston relied on an unrealistic profit margin of 13.5% versus a normalized profit margin of 9.8%. (Debtors’ Exh. 40).

(c). The Business Plan's revenue and profit projections are reasonably optimistic. The Business Plan assumes a compounded annual growth rate of 4.7% for revenues, 18.1% for EBIT, and 10.2% for EBITDA over the five year plan period. (Coleman, Tr. 260:6 - 262:1; Debtors' Exh. 24). Preston's projections, on the other hand, are not just optimistic, but, as Coleman of Blackstone testified, "they are quite extreme." (Coleman, Tr. 261:24 - 262:1). Preston projects compounded annual growth of 12.9% for revenues, 42.3% for EBIT, and 27.3% for EBITDA. (Debtors' Exh. 24). In the Court's view, the Equity Committee does not present credible evidence justifying such aggressive projections.

36. Third, Preston does not use the accepted method - analyzing current trading multiples of comparable companies - to determine his exit multiple, a key value driver. (Coleman, Tr. 273:3 - 277:19; Hilty, Tr. 385:5 - 385:16). Instead, he uses the "average" of certain historical multiples for selected parts of HII business. (Coleman, Tr. 275:7 - 275:23; Preston, Tr. 619:7 - 621:11). Even then, Preston excludes 1999 results, which would lower his historical average multiple from 9.23 to 8.3 and reduce his valuation by hundreds of millions of dollars. (Preston, Tr. 620:1 - 623:22). Likewise, Preston disregards Beloit's 1998 performance in deriving his historical average multiple but includes Beloit from 1994 through 1997. (Preston, Tr. 624:2 -

625:11). The Court finds Preston's use of an "historical average" multiple merely values an hypothetical and different company in an hypothetical and different market. Significantly, Preston admits he has never before used an "historical" method for determining an exit multiple. (Preston, Tr. 628:9 - 628:20).

37. Finally, Preston assumes a lower discount rate than Blackstone or Houlihan Lokey to reflect a lower risk of achieving high performance results. This assumption appears unreasonable on its face and is methodologically flawed. The Debtors' and Creditors Committee's valuation experts explain a proper discount rate under the Capital Asset Pricing Model requires an upward adjustment to the calculated cost of equity to reflect the additional return equity investors expect when investing in a company emerging from bankruptcy. (Coleman, Tr. 271:20 - 272:13; Hilty, Tr. 385:19 - 386:4, 391:22 - 392:16). In contrast, Preston simply leaves his 14% calculated cost of equity unadjusted. (Preston, Tr. 631:4 - 633:23). Even this 14% assumption is internally inconsistent and contrary to the evidence of the returns that purchasers of HII debt - which will be converted to equity upon confirmation - are expecting from HII. Preston himself admits that market investors purchasing HII unsecured debt would earn a return on investments far exceeding the 14% he assumes if his valuation is correct. (Id.).

38. In sum, the Court finds Preston's valuation is not reasonable, and unlike the Business Plan, is not based on a

realistic and supportable approach to the Debtors' business. Furthermore, Preston does not follow standard and well-accepted valuation methodologies. Blackstone and Houlihan Lokey's valuations, on the other hand, are reasonable and employ standard methodologies.

RECENT COAL MARKET EVENTS.

39. The foundation for Preston's valuation is his assumption that there has been a "sea change in the long-term demand for coal." (Preston, Tr. 575:21 - 578:18; Equity Comm. Exh. 42(a) at 5). The Equity Committee's expert, Schwartz, testified extensively regarding recent developments in the energy industry which he believes suggests this "sea change" and which he believes HII management did not properly account for in developing the Business Plan. For example, Schwartz testified to the following:

(a). In his opinion, the Business Plan's suggestion of a decline in underground coal production is not supported by historical experience and trends in changes of coal production in the United States. (Schwartz, Tr. 429:8 - 429:18).

(b). Whereas the Debtors' Business Plan contains an assumption regarding a fall in the sale of longwall "shearers," Schwartz believes the assumption is "unsupported by any reasonable outlook for longwall mining in this country." (Schwartz, Tr. 437:16 - 437:17, 440:10 - 440:21).

(c). Schwartz is critical of the Business Plan's projected decline in the after market sales during the five year plan period because the profit margin on after market sales is much higher than the profit margin on original equipment. (Schwartz, Tr. 441:14 - 441:17; Debtors' Exh. 3 at 3).

(d). Schwartz is also critical of the Business Plan's failure to recognize South Africa, China and Australia as a significant source of future growth for the production of coal. (Schwartz, Tr. 442:7 - 442:17; 446:1 - 446:8).

40. In support of these sweeping criticisms of the Business Plan, Schwartz offers his opinions on what he views are dramatic changes since March 2000 and managment's failure to update the Business Plan in light of these changes. These dramatic changes include the following:

(a). Rolling blackouts in California since March 2000 and predictions of similar shortages in the Northeastern United States expose an immediate need for new power plant construction. (Schwartz, Tr. 450:3 - 450:18).

(b). The President of the United States announced the country is experiencing an energy crisis. (Schwartz, Tr. 462:23 - 463:1).

(c). Natural gas prices experienced a "sharp and unexpected increase and have been sustained at much higher levels than the historical basis [which] make[s] natural gas no longer the economic choice for new power plant construction." (Schwartz, Tr.

451:3 - 451:8).

(d). These developments result in a "total change in the investment climate for building new coal fired power plants in this country" (Schwartz, Tr. 453:24 - 454:2) as evidenced by a surge in announcements of proposed coal fired power plants since management finalized the Business Plan. (Schwartz, Tr. 453:4 - 453:17).

(e). International coal prices have climbed to near record highs and Schwartz believes this represents a "dramatic recovery which signals the need to expand production of coal worldwide." (Schwartz, Tr. 458:3 - 458:6).

(f). Stock prices of the largest producers of coal have more than doubled over the past three months and stock market analysts following the coal industry are now bullish on the industry. (Schwartz, Tr. 461:22 - 462:16).

(g). A change in presidential administration has changed the U.S. political climate for coal as a fuel source. A new national energy policy is being formulated that will emphasize reliance on coal for new power plants. (Schwartz, Tr. 463:3 - 463:7). The U.S. withdrew its support of the Kyoto Treaty that would regulate green house gasses and the President recanted his earlier pledge to regulate carbon dioxide emissions. (Schwartz, Tr. 463:8 - 463:12).

While these events in the energy industry and the political arena are undisputed, I do not believe they support a conclusion that the long term outlook is for Joy's sales to significantly improve. I say this for a number of reasons. First, coal is only one of several sources for meeting increased energy demands. Second, a significant increase in coal production, if it occurs, does not necessarily convert into a significant increase in Joy's sales of coal production equipment and services. (See discussion in ¶ 16 above.) For example, underutilization of existing capacity might account for future increased production. Third, to the extent the new presidential administration announced a need for additional energy production and a relaxation of environmental regulations and assuming that this converts into a greater production of coal burning generating plants, it is premature to suggest how this new policy will be specifically formulated and implemented, if accepted by non-administration political forces. Fourth, Schwartz’s conclusion that the recent dramatic spike in natural gas prices will cause power plants to switch to coal for energy production cannot be accepted without question. If we know anything from the last thirty years of lurching from one energy crisis to another it is that market forces make it inadvisable to predict long term trends on the basis of short term events relating to energy sources. For example, I take judicial notice of the fact that currently we are experiencing significant increases in gasoline prices but the fact of the matter is that after adjustment for inflation, gasoline prices are less today than what they were following the Arab oil embargo in the 1970's. In this regard it is worth noting that Schwartz is of the opinion that the "great changes" in the coal markets in the last twelve months are similar in importance to the impact of the Arab oil embargo on those markets in the 1970's. (Schwartz Tr. 477:22 - 478:4). Schwartz does not explain what impact the Arab oil embargo had on the coal markets, but Preston acknowledges that for the past 20 years the growth rate for demand for coal has only been 1 to 2% a year. (Preston Tr. 582:22 - 583:2). Fifth, with respect to the recent dramatic increase in the equity values of large coal producing companies in the United States, those values may have been previously undervalued for a number of reasons, including excess capacity. (Morey, Tr. 216:2 - 216:4). The Equity Committee has not accounted for a reduction of any overcapacity vis-a-vis their projected significant increase in Joy sales of new equipment and servicing of existing equipment.

41. Most of Schwartz's testimony about coal prices focuses on spot-market pricing (Equity Comm. Exh. 11(a)-(c)), a type of pricing he admits has a limited relationship to the actual prices obtained by coal producers. (Schwartz, Tr. 525:11 - 526:8). Morey confirms that short-term spot market price spikes have little, if anything, to do with greater long-term demand for coal, much less for Joy's equipment, principally because more than 80% of coal is sold at contract rather than spot prices. (Morey, Tr. 177:2 - 179:9; Debtors' Exh. 5 at RDI-00759; Debtors' Exh. 36).

42. In addition, although there is increased interest in potential new coal-fired power plants, Morey explains that "you

have to look at these announcements very closely and. . . really understand what they are." (Morey, Tr. 175:2 - 175:4). Preliminary expressions of interest in potential new plants are not the same as actual plants burning only coal. (Morey, Tr. 175:2 - 176:18). Schwartz acknowledges that even if every "announced" power plant were built, and if each one burned only coal mined with Joy equipment, and if all such plants were actually built during the plan period, total U.S. coal demand would increase by less than 1.5% on an annualized basis. (Schwartz, Tr. 511:24 - 522:11). It is highly unlikely that all of these "ifs" will occur. In any event, such a result is not inconsistent with the Business Plan.

43. While there have been certain very recent changes in coal markets, I find the evidence presented by the Equity Committee in support of a "sea change" in the long-term demand for coal unpersuasive. All the witnesses who addressed this issue at the confirmation hearing made predictions that long-term, annualized growth in coal demand will remain approximately the same as it has been for the last 20 years.

44. Hanson testified the coal industry may be seeing 1 or 2% growth in coal production or consumption. (Hanson, Tr. 54:11 - 54:15).

45. Morey of RDI, relying on information from the Department of Energy, testified that historical coal demand growth in the U.S. from 1990 through 2000 averaged 1.1% per year. (Morey, Tr. 165:4 - 165:19; Debtors' Exh. 28). He further testified that

RDI's most recent forecasts - published in November 2000 - estimate average U.S. annual growth at about 1%. (Morey, Tr. 167:20 - 167:24; Debtors' Exh. 30). Blackstone, relying on Department of Energy information, likewise predicts slow and steady growth in demand at less than 1 1/2% per year. (Debtors' Exh. 4 at BG-02328).

46. Hilty offers a similar assessment based on a Merrill Lynch analyst's report which concluded there will not be a substantial increase in coal output anytime soon. (Debtors' Exh. 16 at HOU-05426 - HOU-05427).

47. Preston also admits the growth rate in coal demand has consistently been 1 to 2% per year over the last 20 years - essentially what the Business Plan projects. (Preston, Tr. 582:22 - 583:2).

48. Significantly, although Schwartz relies on a number of factors which support a potentially substantial increase in future coal demand, his firm's published analyses of long term coal demand are not materially different than the views expressed by the witnesses for the Plan supporters. EVA's July-September 2000 quarterly report shows U.S. coal demand essentially flat from 2000 through 2005. (Debtors' Exh. 32). EVA's September 2000 "COALCAST: Long- Term Outlook for Coal," which Schwartz expressly relies on in his expert report (Schwartz, Tr. 492:22 - 492:23), shows annualized U.S. coal demand growing at far less than 1% per year during the plan period. (Equity Comm. Exh. 41(a) at 9-10). EVA's most recent generally available projection, the February 2001

"COALCAST: Short-Term Outlook for Coal," shows U.S. demand for coal by 2002 only slightly higher than its September 2000 COALCAST projection. (Compare Debtors' Exh. 34 with Debtors' Exh. 33). Schwartz's expert report shows world coal demand, as reported by EIA-IEO, growing at about 1 1/2% from 1998 through 2020. (Equity Comm. Exh. 41(a) at 10).

49. Lacking a "sea change" in long-term coal demand, Schwartz and the Equity Committee focus on other aspects of the coal market, but in the Court's view, these changes do not alter the market fundamentals underlying the Business Plan's projections. They certainly do not justify the dramatic increase in Preston's valuation over the Business Plan's projections.

THERE IS A LARGE MARGIN FOR ERROR IN THE DEBTORS' VALUATION SHOWING.

50. In assessing the merits of the conflicting valuations, I find the value placed on these Debtors by the market in which the claims are traded significant. Hilty states that as of March 15, 2001, the claims are trading at \$.44 to \$.45 in a large and active market. This produces a market enterprise valuation of approximately \$.8 billion. (Hilty, Tr. 378:12 - 378:18). Blackstone's similar market analysis concludes the market values the enterprise at between \$.6 and \$.8 billion. (Coleman, Tr. 284:23 - 285:21). This testimony is uncontested. Indeed,

Preston acknowledges the claims are currently trading in the range of $.40. (Preston, Tr. 633:7 - 633:8). I ascribe considerable significance to the undisputed fact that the claims trading market is valuing these Debtors at approximately $.8 billion. If the trading market is only half right, the shareholders are still out of the money.

51. It is undisputed that the Reorganizing Debtors must be worth in excess of $ 1.63 billion before shareholders can recover the first dollar. (Debtors' Exh. 27(b)). Thus, Blackstone, Houlihan Lokey and the marketplace must not only be wrong, but grossly wrong - by over $.6 billion. As demonstrated by Preston's own "sensitivity analyses" created after the first day of trial, before shareholders realize any recovery, every driver of value on which the Business Plan, Blackstone and Houlihan Lokey rely must be revised upward to assume materially higher revenues, profits and exit multiple than is justifiable in the current marketplace, in addition to requiring use of a significantly lower discount rate. (Preston, Tr. 609:01 - 614:15; Equity Comm. Exh. 52 - 55).

52. For the reasons discussed above, the Court finds that the Blackstone and Houlihan Lokey valuations are probative and reliable, whereas the Equity Committee's valuation is not. Even assuming that the Blackstone and Houlihan Lokey valuations understate the enterprise value by several hundred millions of dollars, the evidence is convincing that the Equity Committee has not come close to closing the gap to reach a valuation of $1.63

billion - the aggregate amount of the creditor claims.

CONCLUSIONS OF LAW

53. The Debtors have the burden of proving the Plan satisfies the confirmation requirements of § 1129(a) and (b). United States v. Arnold and Baker Farms (In re Arnold and Baker Farms), 177 B.R. 648, 654 (B.A.P. 9th Cir. 1994) aff'd 85 F.3d 1415 (9th Cir. 1996); In re Greate Bay Hotel & Casino, Inc., 251 B.R. 213, 221 (Bankr. D.N.J. 2000); see also In re Global Ocean Carriers, Ltd., 251 B.R. 31, 46 (Bankr. D. Del. 2000)(burden of establishing compliance with element of § 1129 is on plan proponent).

54. The emerging majority view, and precedent in this Circuit, requires a plan proponent to satisfy the cramdown requirements of § 1129(b) by a preponderance of the evidence. E.g., Heartland Fed. Sav. and Loan Ass'n v. Briscoe Enters., Ltd., II (In re Briscoe Enters., Ltd., II), 994 F.2d 1160, 1165 (5th Cir. 1993)(preponderance of the evidence is appropriate standard of proof under § 1129(a) and (b)); Arnold and Baker Farms, 177 B.R. at 655 (same); Corestates Bank, N.A. v. United Chemical Tech., Inc., 202 B.R. 33, 45 (E.D. Pa. 1996)(same); Aetna Realty Investors, Inc. v. Monarch Beach Venture, Ltd. (In re Monarch Beach Venture, Ltd.), 166 B.R. 428, 432 (C.D.C. 1993)(same); In re Byrd Foods, Inc., 253 B.R. 196, 199 (Bankr. E.D. Va. 2000); In re Atlanta S. Bus. Park, Ltd., 173 B.R. 444, 448 (Bankr. N.D. Ga. 1994)(same); In re

Cellular Info. Sys., Inc., 171 B.R. 926, 937 (Bankr. S.D.N.Y. 1994)(same); In re Investors Florida Aggressive Growth Fund, Ltd., 168 B.R. 760, 765 (Bankr. N.D. Fla. 1994)(same); In re Kennedy, 158 B.R. 589, 601 n.17 (Bankr. D. N.J. 1993)(burden is on debtor to show by preponderance of the evidence that protection provided to creditor under proposed plan meets statutory requirements, citing Briscoe).

55. But see NCNB Texas Nat'l Bank v. Hulen Park Place, Ltd. (In re Hulen Park Place, Ltd.), 130 B.R. 39, 42 (N.D. Tex. 1991)(debtor must establish by clear and convincing evidence that plan is fair and equitable before plan can be "crammed down" over objection of dissenting creditor); United States v. Woodway Stone Co. Inc., 187 B.R. 916, 918 (W.D. Va. 1995)(same); In re New Midland Plaza Assocs., 247 B.R. 877, 883 (Bankr. S.D. Fla. 2000)(appropriate standard of proof at confirmation hearing is by clear and convincing evidence); In re Miami Ctr. Assocs., Ltd., 144 B.R. 937, 940 (Bankr. S.D. Fla. 1992)(same); In re Birdneck Apartment Assocs., II, L.P., 156 B.R. 499, 507 (Bankr. E.D. Va. 1993)(same); see also In re MCorp Fin., Inc., 137 B.R. 219, 225 (Bankr. S.D. Tex. 1992)(proponent's burden of proof under § 1129(a) is by preponderance of the evidence but under § 1129(b) is by clear and convincing evidence).

56. In holding that the preponderance of the evidence standard applies to confirmation under § 1129(b), I am persuaded by the reasoning of the Court of Appeals for the Fifth Circuit. In

Briscoe, the Fifth Circuit concluded that the clear and convincing standard in civil cases is reserved for cases in which "the interests at stake are . . . more substantial than mere loss of money." 994 F.2d at 1164. Thus, the Supreme Court has used the clear and convincing standard in cases involving particularly important individual liberty interests, e.g., cases involving deportation, denaturalization and involuntary commitment to a mental institution. Id. citing Addington v. Texas, 441 U.S. 418, 423, 99 S.Ct. 1804, 1807 (1979); see also Grogan v. Garner, 498 U.S. 279, 286, 111 S.Ct. 654, 659 (1991)(preponderance of the evidence standard is presumed applicable in civil actions between private litigants and is appropriate standard for nondischargeability under § 523(a)).

57. The Fifth Circuit found that a confirmation hearing under § 1129 does not implicate any quasi-liberty interests and therefore does not warrant proof by clear and convincing evidence. Briscoe, 994 F.2d at 1165. It also noted that § 1129 and its legislative history are both silent as to the appropriate burden of proof. Consequently, the Fifth Circuit concluded that

> [t]his case is solely about money. . . . Congress provides protections for creditors, and in many instances it allows debtors to impinge on creditor's state law rights. Bankruptcy frequently rewrites the secured creditor's state law bargain. An example of this is the automatic stay of § 362, as a result of which the creditor has lost the right of foreclosure. The calculation of claims under § 502 is another example of the Code rewriting the secured creditor's bargain.

> The combination of legislative silence, Supreme Court holdings, and the structure of the Code leads this Court to conclude that preponderance of the evidence is the debtor's appropriate standard of proof both under § 1129(a) and in a cramdown.
>
> Briscoe, 994 F.2d at 1165.

58. I find this analysis persuasive. I also note that courts have applied the clear and convincing standard mostly in single asset real estate cases in which the debtor had little hope of achieving plan confirmation. Perhaps this factual context invites the application of a more rigorous evidentiary standard as an alternative to a finding of bad faith. I do not believe this approach proper.

59. I therefore hold that the appropriate standard of proof under § 1129(a) and (b) is proof by a preponderance of the evidence. Briscoe, 994 F.2d at 1164-65; United Chemical, 202 B.R. at 45. Consequently, the Debtors must provide evidence to persuade the fact finder that their propositions are more likely true than not. Arnold & Baker Farms, 177 B.R. at 654 ("proof by the preponderance of the evidence means that it is sufficient to persuade the finder of fact that the proposition is more likely true than not") citing In re Winship, 397 U.S. 358, 371, 90 S.Ct. 1068, 1076 (1970); compare Colorado v. New Mexico, 467 U.S. 310, 316, 104 S.Ct. 2433, 2437-38 (1984) (clear and convincing evidence requires a high probability of success).

60. The sole issue in the present controversy is whether

the Debtors' Plan is "fair and equitable" for purposes of § 1129(b). The Equity Committee argues the Plan does not meet this requirement because it proposes to pay the Debtors' general unsecured claims in full while not providing any recovery for existing equity.

61. Section 1129(b)(1) permits a debtor to obtain plan confirmation over the objection of a creditor "if the plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan." 11 U.S.C. § 1129(b)(1). Section 1129(b)(2) then sets forth several requirements a plan proponent must meet.

62. Technical compliance with § 1129(b)(2), however, does not assure that a plan is "fair and equitable." Fed. Sav. & Loan Ins. Corp. v. D & F Constr., Inc. (In re D & F Constr., Inc.), 865 F.2d 673, 675 (5th Cir. 1989). "A court must consider the entire plan in the context of the rights of the creditors under state law and the particular facts and circumstances when determining whether a plan is 'fair and equitable.'" Id. (citations omitted).

63. The Equity Committee argues that a plan which pays general unsecured creditors "more than 100% of their claims while extinguishing the rights of dissenting shareholders violates the fair and equitable requirement of section 1129(b)." Equity Committee Post-trial Brief, Doc. # 10137, at 5. This argument is

implicitly premised on the absolute priority rule which provides that a senior class of creditors must receive 100% of its claims, but no more than 100%, before a junior class receives any payments. United Chemical, 202 B.R. at 54 n.16. "Since participation by junior interests depends upon the claims of senior interests being fully satisfied, whether a plan of reorganization excluding junior interests is fair and equitable depends upon the value of the reorganized company." Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson, 390 U.S. 414, 441, 88 S.Ct. 1157, 1172. (1968). It therefore follows that the value of the Reorganized Debtors, specifically the enterprise value of Joy, becomes the outcome determinative factor in this controversy. See also H.R.REP. NO. 595, 95TH CONG., 1ST SESS. 414 (1977), U.S.C.C.A.N. 1978, PP. 5787, 6378 ("While section 1129(a) does not contemplate a valuation of the debtor's business, such a valuation will almost always be required under section 1129(b) in order to determine the value of the consideration to be distributed under the plan.").

64. The Equity Committee argues that the proper legal standard for valuing a company for purposes of fair and equitable treatment under § 1129(b) is based solely on the future earning capacity of the reorganized entity. Equity Committee Post-trial Brief, Doc. # 10137, at 5 citing TMT Trailer Ferry, 390 U.S. at 441, 88 S.Ct at 1172.

65. According to TMT Trailer Ferry:

[T]he commercial value of property consists in

> the expectation of income from it. *** Such criterion is the appropriate one here, since we are dealing with the issue of solvency arising in connection with reorganization plans involving productive properties. *** The criterion of earning capacity is the essential one if the enterprise is to be freed from the heavy hand of past errors, miscalculations or disaster, and if the allocation of securities among the various claimants is to be fair and equitable. *** Since its application requires a prediction as to what will occur in the future, an estimate, as distinguished from mathematical certitude, is all that can be made. But that estimate must be based on an informed judgment which embraces all facts relevant to future earning capacity and hence to present worth, including, of course, the nature and condition of the properties, the past earnings record, and all circumstances which indicate whether or not that record is a reliable criterion of future performance.
>
> TMT Trailer Ferry, 390 U.S. at 442, 88 S.Ct. at 1172 quoting Rock Prod. Co. v. Du Bois, 312 U.S. 510, 526, 61 S.Ct. 675, 685 (1941).

66. I agree with the Equity Committee that TMT Trailer Ferry sets forth an appropriate standard for valuing a company undergoing reorganization. 390 U.S. at 441-42, 88 S.Ct. at 1172. I disagree with the Equity Committee's assertion, however, that the Debtors have not met this standard.

67. The Supreme Court reversed the bankruptcy court in TMT Trailer Ferry because the bankruptcy court relied solely on the debtor's past earnings as the basis for determining the debtor's going concern value. 390 U.S. at 453, 88 S.Ct. at 1177-78. In contrast, by using the comparable company analysis, the comparable acquisition analysis and the DCF analysis for valuation, (Tr. at

244:3 - 244:13), the Debtors' financial experts have relied on predictions of future earning capacity as a basis for present value. Accord TMT Trailer Ferry, 390 U.S. at 442 n.20, 88 S.Ct. at 1172 ("Value is the present worth of future anticipated earnings. It is not directly dependent on past earnings; these latter are important only as a guide in the prediction of future earnings").

68. It seems to me that the issue here is not whether the Debtors have applied the proper legal standard for valuation. I find that the Debtors methodology comports with the standard set forth in TMT Trailer Ferry. Accordingly, there is no error of law in the Debtors' measure of value nor does this dispute center on an erroneous valuation caused by application of an erroneous legal standard as the Equity Committee argues. Rather, this dispute turns on fundamentally different views of the merits of the Debtors' cash flow projections as articulated in the Debtors' Business Plan.

69. A bankruptcy court's valuation of property and the issue of "fair and equitable" treatment under § 1129(b) are both questions of fact. Arnold and Baker Farms, 177 B.R. at 653.

70. For the reasons set forth above, I find that the Debtors have established, by a preponderance of the evidence, that the value of the Reorganized Debtors is substantially less than $1.63 billion. Consequently, the shares owned by existing shareholders have no value. Existing shareholders are therefor not entitled to any recovery under the Plan, nor does the Plan provide

creditors with recovery in excess of 100% of their claims. Accordingly, the Plan is fair and equitable to shareholders within the meaning of § 1129(b).