CLERK OF THE COURT
FILED
OCT 02 2020
JUDICIAL CENTRE
OF CALGARY

CLERK'S STAMP

COURT FILE NUMBER	2001 - 08434
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
MATTER	IN THE MATTER OF THE *CANADA BUSINESS CORPORATIONS ACT*, R.S.C. 1985, c. C-44, as amended AND IN THE MATTER OF THE PROPOSED ARRANGEMENT OF 12178711 CANADA INC., CALFRAC WELL SERVICES LTD., CALFRAC (CANADA) INC., CALFRAC WELL SERVICES CORP. and CALFRAC HOLDINGS LP, by its General Partner CALFRAC (CANADA) INC.
APPLICANTS	12178711 CANADA INC., CALFRAC WELL SERVICES LTD., CALFRAC (CANADA) INC., CALFRAC WELL SERVICES CORP. and CALFRAC HOLDINGS LP, by its General Partner CALFRAC (CANADA) INC.
DOCUMENT	**AFFIDAVIT OF JAMES. M. PECK**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	BENNETT JONES LLP Barristers and Solicitors 4500, 855 – 2nd Street S.W. Calgary, Alberta T2P 4K7 Attention: Chris Simard/Kevin Zych/Michael Shakra Tel No.: 403-298-4485/416-777-5238/ 416-777-6236 Fax No.: 403-265-7219/416-862-6666 Client File No. 44609.111

AFFIDAVIT OF JAMES M. PECK

Sworn on October 1, 2020

I, James M. Peck, of New York, New York, U.S.A., SWEAR AND SAY THAT:

1. I currently serve as the head of the Cross-Border Restructuring practice in the New York office of Morrison & Foerster LLP ("Morrison & Foerster"), a global law firm. Before joining Morrison & Foerster in March 2014, I served as a United States Bankruptcy Judge for the Southern District of New York from the date of my appointment in January, 2006 until January 31, 2014. Before my judicial service, I had been in private practice for over 35 years with prominent, general practice law firms in Philadelphia and New York. I have considerable experience in dealing with domestic and international restructuring issues from a rich diversity of vantage points. I was first admitted to practice in New York in 1971, and currently I am an active member of the New York State bar in good standing. A copy of my curriculum vitae is appended as **Exhibit 1**.

2. Throughout a lengthy legal career, dating back to my first significant bankruptcy representation as a young lawyer in 1977, my professional work has focused on corporate restructuring from multiple perspectives. I have represented a variety of key stakeholders, including debtors, corporate boards, acquirers, liquidity providers, secured and unsecured creditors and equity holders. As a former judge who has returned to private practice, my work in the restructuring field has grown in recent years to now include mediation of insolvency related disputes and engagements to furnish expert opinions for submission to courts in a number of foreign jurisdictions, including Canada, England, Cyprus, the Cayman Islands, and Luxembourg. I have developed collaborative and cordial relationships with judges and law professors from all over the world and have been invited to lecture on insolvency issues at international conferences

in far-flung places such as Sidney, Singapore, Barcelona and Kathmandu. Closer to home, I have on a number of occasions made presentations regarding United States bankruptcy law and practice to audiences of practitioners and Canadian Judges at the Annual Review of Insolvency Law Conference in Toronto and Vancouver and at meetings of the Canadian Association of Insolvency and Restructuring Professionals (CAIRP, as it is known for short).

3. I believe that this wide-ranging international exposure is a consequence of the visibility of certain cases that were assigned to me while I was on the bench. During my judicial career, I was responsible for certain especially notable chapter 11 cases, including *In re Lehman Brothers Holdings Inc.,* et al., Case No. 08-13555 (JMP) (Bankr. S.D.N.Y), the largest chapter 11 filing in history, and *In re Charter Communications Inc.,* et al., Case No. 09-11435 (JMP) (Bankr. S.D.N.Y), one of the most complex and contentious chapter 11 restructurings ever attempted. I had the good fortune of presiding over a fascinating docket that included these and other so-called "mega" bankruptcy cases at the height of the global financial crisis.

4. The Charter Communications case was particularly interesting and is extremely relevant to the subject matter of this expert witness statement (the "Statement"). The case involved, among other issues, the question of whether the doctrine of reinstatement could be used permissibly as a restructuring tool to compel a class of senior secured creditors to continue to be bound by the terms of an existing credit facility that was huge in amount and essential to the reorganization. In the course of presiding over the Charter Communications case, I had the occasion to carefully consider the purposes and uses of reinstatement as a tactical device to compel a class of unimpaired secured claims to be deemed to have accepted a reorganization plan in appropriate circumstances. Following a heavily contested and unusually protracted confirmation

hearing, I concluded in Charter Communications that the factors supporting reinstatement were all satisfied and that reinstatement was appropriate.

5. This background while I was on the bench may help to explain why I have been asked by Calfrac Well Services Ltd., together with certain related entities ("Calfrac" or the "Company"), in consultation with its attorneys at the law firms of Bennett Jones LLP in Calgary ("Bennett Jones") and Latham & Watkins LLP in New York ("Latham & Watkins"), to prepare and submit this Statement. I have undertaken this assignment for the sole purpose of helping the Court of Queen's Bench of Alberta (the "Court") to better understand the legal doctrine of reinstatement under title 11 of the United States Code, as amended (the "Bankruptcy Code").[1] I am advised by lawyers at Bennett Jones and Latham & Watkins that the discussion of reinstatement under the Bankruptcy Code as set forth in this Statement may be useful to the Court in its analysis of certain issues in the arrangement proceedings in relation to the Company (the "CBCA Proceedings") that are now pending in this Court under the Canada Business Corporations Act (the "CBCA").

6. In connection with preparing this Statement I have had several conversations with attorneys from Bennett Jones and Latham & Watkins who are involved in this engagement, and I (or my colleagues working under my direct supervision and direction) have reviewed various pleadings and orders entered by the Court in the CBCA Proceedings, including the proposed plan of arrangement, as amended (the "Plan of Arrangement") as it relates to the treatment of the second lien notes held by Wilks Brothers, LLC ("Wilks Brothers") and other holders (the "Second Lien Notes") as well as related affidavits and various other background materials. I have also paid

[1] References to the "Bankruptcy Code" are references to the revised title 11 of the United States Code, which was enacted as part of the Bankruptcy Reform Act of 1978, Pub. L. No. 95-598 (1978), as amended.

attention to developments in the chapter 15 case brought by Calfrac's Foreign Representative in the United States Bankruptcy Court for the Southern District of Texas, Houston Division (the "Chapter 15 Case"). A comprehensive list of the documents provided by Bennett Jones, along with the authorities I have reviewed in preparing this Statement, is attached hereto as **Exhibit 2**.

7. Prior to my being contacted for the first time by certain attorneys for Calfrac on August 5, 2020, I had no knowledge of the Company or the CBCA Proceedings and no then existing relationship with Calfrac or any of its stakeholders, including Wilks Brothers. Except for my independent work in preparing this Statement (for which I am being compensated at my standard hourly rate), neither I nor Morrison & Foerster has any disclosable financial interest in relation to the CBCA Proceedings, and I believe myself to be a disinterested expert on corporate restructuring under the Bankruptcy Code with relevant professional experience.

I. STATEMENT OF ISSUES ADDRESSED

8. This Statement discusses reinstatement as a well-recognized approach to the treatment of secured claims under chapter 11 of the Bankruptcy Code that is available for use by any plan proponent consistent with the requirements listed in Section 1124(2) of the Bankruptcy Code. Reinstatement, as codified in the Bankruptcy Code, allows issued and outstanding debt, notwithstanding acceleration that may have been triggered as a consequence of the commencement of bankruptcy, to remain in place strictly in accordance with its existing contractual provisions as if the bankruptcy filing had never taken place.

9. The premise is statutory but entirely logical. A class of secured claims has no cause to quarrel with its plan treatment if those claims are simply passing through the bankruptcy without any change in terms and without suffering any commercial harm. This is the very meaning of unimpaired claims. For claims to be unimpaired the legal, equitable or contractual rights

applicable to those claims are not being altered or impacted by anything that happens in bankruptcy. Holders of unimpaired claims are entirely unaffected by the bankruptcy process and for that reason are excused from having a vote on a proposed plan of reorganization that by its terms only addresses the treatment of other parties in interest.

10. My experience as the presiding judge in Charter Communications has given me a pragmatic understanding of the manner in which reinstatement can be used for strategic advantages in chapter 11 cases. For the convenience of the Court, a copy of my published opinion in Charter Communications is attached to this Statement as **Exhibit 3**. The circumstances described in the opinion are certainly not routine but they do serve to illustrate how reinstatement can be used as an effective strategy to achieve restructuring objectives when dealing with classes of secured claims that fit the statutory requirements and qualify for such treatment. In short, from the perspective of the debtor company in a chapter 11 case there can be strategic advantages in leaving certain qualifying classes of claims "as is" and not using the bankruptcy process to adjust or impair them. The election to pursue this strategy is left entirely to the discretion of the debtor as plan proponent.

11. In Charter Communications, the Debtors proposed and aggressively prosecuted a plan predicated on a creative reinstatement strategy. The credit facility in question was enormous (approximately $12 billion) and could not be replaced in the midst of the global financial crisis. The success of the restructuring depended on being able to retain Charter's rights to continue to borrow under that facility and preserve the extremely beneficial credit terms that could not be replicated in the market, including tremendously valuable notional savings on interest expense. The lenders presented strenuous objections based on the alleged presence of incurable defaults relating to the valuation of the enterprise, the asserted inability of the borrower to transfer

cash within its layered capital structure and to satisfy debts as they came due and a covenant breach due to a material (and allegedly fatal) diminution in the stipulated minimum equity stake that was supposed to be held continuously by the founder of the company. The question before me was whether reinstatement was possible and could be approved in light of these fact-sensitive defaults identified by the lenders.

12. The unusually complex factual setting and high stakes made Charter an exceptional case, but its central thesis for purposes of this Statement actually is fairly benign. The significance of the case is that reinstatement is an option that can work, even when the facts are tangled and in good faith dispute, as a means to achieve a successful restructuring. Importantly, the hotly contested confirmation hearing provided a sufficient record to enable me to make the findings that were needed to support confirmation of the plan.

13. Reinstatement is rarely as pivotal and controversial as this. It is a fairly mundane method for managing certain kinds of financial claims and retaining rights under prepetition credit agreements that, but for the occurrence of the bankruptcy itself, are not otherwise in default and are worth preserving without amendment for the benefit of the reorganized business. To provide further background on this restructuring alternative, I have set forth the statutory prerequisites for reinstatement along with some additional case authorities in the following section of this Statement. I am also providing some further framing references and context regarding the meaning of impairment and the plan process in chapter 11.

II. STATUTORY BACKGROUND, CONTEXT AND REQUIREMENTS FOR REINSTATEMENT UNDER CHAPTER 11

14. Chapter 11 of the Bankruptcy Code, as the successor to Chapters X, XI and XII of the former Bankruptcy Act, is widely regarded as one of the most flexible and useful statutory

vehicles for the rehabilitation of business debtors in financial difficulty.[2] The primary objective of chapter 11 is the formulation and ultimate confirmation of a plan of reorganization in compliance with the Bankruptcy Code's statutory requirements. The process is structured to promote consensual outcomes, but the availability of cram down as an option to confirm a plan in the event of rejection by a class of claims and the ability to bind dissenters within each class of claims are guard rails that discipline the negotiations.[3]

15. Sections 1121 through 1129 of the Bankruptcy Code lay out the statutory requirements for the structuring, filing and confirmation of plans of reorganization. The statutory requirements are prescriptive, but not rigid, and considerable flexibility is allowed with respect to the contents of chapter 11 plans. Plan formulation is an exercise in the art of the possible.

16. Section 1123(a) of the Bankruptcy Code requires, among other things, that a plan (i) classify the debtor's claims and interests and specify which are impaired under the plan, (ii) specify that creditors having similar rights are afforded similar treatment, and (iii) provide adequate means for the plan's implementation. Subject to Section 1123(a) requirements, Section 1123(b) enables a plan proponent to do all that is appropriate and otherwise statutorily permitted to effect the reorganization of the debtor, including impairing or leaving unimpaired any class of claims or interests.

17. The confirmation process is ultimately governed by Section 1129 of the Bankruptcy Code which requires that a plan can only be confirmed if each class of impaired claims or interests accepts the plan by requisite voting percentages. The statutory acceptance procedures for chapter

---

[2] References to the "Bankruptcy Act" are references to the former Bankruptcy Act of 1898, as amended by the Chandler Act of 1938, which was repealed upon the enactment of the Bankruptcy Code.

[3] Cram down is a colloquial term commonly used to describe confirmation of a plan of reorganization notwithstanding rejection of the plan by one or more voting classes of impaired creditors.

11 plans are found in Section 1126. In 1984, Congress amended Section 1126(f) to provide that a class that is not impaired under the plan is conclusively presumed to have accepted the plan. Thus, an unimpaired claim is deemed to accept the plan and has no right to vote on the plan.

18. This backdrop is needed to understand the concepts of impairment and reinstatement as set forth in Section 1124 of the Bankruptcy Code. Section 1124(1) describes when a class of claims or interests is considered unimpaired, and Section 1124(2) outlines the requirements for reinstatement of unimpaired claims.

19. Section 1124(1) states that a class is not impaired if the plan "leaves unaltered the legal, equitable, and contractual rights to which such claim or interest entitles the holder of such claim or interest." Therefore any alteration of those rights constitutes impairment. *In re GSC, Inc.,* 453 B.R. 132, 177 (Bankr. S.D.N.Y. 2011); *Downtown Athletic Club of N.Y. City v. Caspi Dev. Corp.*, (*In re Downtown Athletic Club of N.Y. City*), Case No. 98 B 41419 (JLG), 1998 Bankr. LEXIS 1642 (Bankr. S.D.N.Y. Dec. 21, 1998); *see, e.g.*, *In re Union Meeting Partners*, 160 B.R. 757, 771 (Bankr. E.D. Pa. 1993) (" '[I]mpairment' is a term of art and includes virtually any alteration of a claimant's rights … even where a creditor's rights are improved by a plan."); *In re Am. Solar King Corp.*, 90 B.R. 808, 819 (Bankr. W.D. Tex. 1988) ("[E]ven the smallest impairment … entitles a creditor to participate in voting.").

20. In the 2005 amendments to the Bankruptcy Code, Congress clarified that in order for a class of claims or interests to be unimpaired for purposes of Section 1124(2), a plan must cure any default, other than an *ipso facto* default, irrespective of whether such default occurred before or after commencement of the bankruptcy case.[4]

---

[4] The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 328(b)(1) (2005). Defaults which do not need to be cured include the *ipso facto* defaults specified in section 365(b)(2) of the Bankruptcy Code, and defaults that section 365(b)(2) expressly does not require to be cured, including breaches of provisions

21. Provided that the plan does nothing to alter the legal, equitable or contractual rights to which the holder of the claim or interest is entitled, Section 1124(2) permits a plan proponent to reverse a contractual or legal acceleration and reinstate the original maturity of the claim or interest as it existed before the default without impairing the claim or interest. *See, e.g.*, *DiPierro v. Taddeo (In re Taddeo)*, 685 F.2d 24, 28–29 (2d Cir. 1982) (chapter 13 case in which the court, referring to Section 1124(2), wrote that "curing a default, even though it inevitably changes a contractual acceleration clause, does not thereby 'impair' a creditor's claim").

22. Being able to use Section 1124(2) in plan formulation can be a useful tool. If, for instance, a debtor has defaulted under a long-term debt obligation with a favorable interest rate in relation to the current market, the plan can "de-accelerate" and reinstate the original maturity of the obligation and the original, lower interest rate, if the plan provides for (a) the curing of any payment or performance defaults which are not *ipso facto* defaults, (b) compensation for any damages caused by the claimant's reasonable reliance on the right of acceleration, and (c) affirmation of the agreement according to its original terms.

23. These requirements, when viewed in combination, enable a plan proponent to deem a claim or interest unimpaired, thereby allowing for a recapture of valuable rights that would otherwise be lost because of the act of having filed for bankruptcy in the first place. This is consistent with an overall policy objective of benefitting the reorganized enterprise by preserving value where possible and preventing needless value destruction.

---

relating to: (i) the insolvency or financial condition of the debtor at any time before the closing of the case; (ii) the commencement of a case under title 11; (iii) the appointment of, or taking possession by, a trustee in a case under title 11 or a custodian before commencement of a case; or (iv) the satisfaction of any penalty rate or penalty provision relating to a default arising from any failure by the debtor to perform nonmonetary obligations under an executory contract or unexpired lease.

24. The concept of being able to reinstate unimpaired obligations as codified in Section 1124 of the Bankruptcy Code is vitally important, hardly new and relates back to Section 107 of Chapter X of the Bankruptcy Act (*see* Senate Report No. 95-989 at 120 (1978), reprinted in App. Pt. 4(e)(i)) which provided in relevant part that a "creditor[] or stockholder[] or any class thereof 'shall be deemed to be 'affected' by a plan only if their or its interest shall be *materially and adversely affected* thereby'." (emphasis added). The logic is plain. If a claim passes through a bankruptcy without being affected by the bankruptcy, the debtor should be able to restore its rights under that prepetition obligation provided that in so doing the creditor suffers no harm. Section 1124(2), as noted below, provides for preservation of the terms of the original bargain between creditor and debtor.

25. The first requirement in order to de-accelerate or place the creditor in its original position and leave it unimpaired is to "cure" any prepetition or postpetition defaults, except for those relating to insolvency and the commencement of the chapter 11 case itself. *See* Sections 1124(2)(A) and 365(b)(2). These defaults must be cured on the effective date of the plan. Although the Bankruptcy Code does not define what it means to "cure," the Court of Appeals for the Second Circuit has held:

> A default is an event in the debtor-creditor relationship which triggers certain consequences. … Curing a default commonly means taking care of the triggering event and returning to pre-default conditions. The consequences are thus nullified. This is the concept of "cure" used throughout the Bankruptcy Code.

In re Taddeo, 685 F.2d at 26–27; *but see MW Post Portfolio Fund Ltd. v. Norwest Bank Minn.* (*In re Onco Inv. Co.*)*,* 316 B.R. 163, 165–168 (Bankr. D. Del. 2004) (where the plan reinstated senior notes under section 1124(2) by paying interest at the non-default rate and paying the senior notes in full, and the senior noteholders sought to recover the default interest and other penalty from distributions under the debtor's plan to subordinated noteholders pursuant to the terms of a subordination agreement between the senior noteholders and the junior, subordinated noteholders, the court held that allowing the senior noteholders to recover the default interest rate amounts from the subordinated noteholders would undermine the intended effect of reinstatement under section 1124(2)).

26. The second requirement for reinstatement is that the plan provide compensation for damages incurred by the reinstated creditor as a result of any reasonable reliance on acceleration rights and any actual pecuniary loss resulting from the debtor's failure to perform a nonmonetary obligation. *See* Sections 1124(2)(C) and (D). Although Section 1124(2) does not specifically state when compensation for damages must be paid, courts have addressed the issue and have held that damages, like cure amounts, must be paid as of the effective date of the plan. *See, e.g.*, *In re Schatz*, 426 B.R. 24 (Bankr. D.N.H. 2009); *In re Bernard*, 70 B.R. 181, 184 (Bankr. E.D. Ark. 1986); *In re Holthoff*, 58 B.R. 216, 219 (Bankr. E.D. Ark. 1985); *In re Jones*, 32 B.R. 951, 958–59 (Bankr. D. Utah 1983); *In re Otero Mills, Inc.*, 31 B.R. 185 (Bankr. D.N.M. 1983).

27. The final requirement for reinstatement is that the creditor's legal, equitable and contractual rights not be otherwise altered. *See* Section 1124(2)(E). If the holder of a claim or interest, upon the occurrence of a default, has a contractual or legal right to receive accelerated payment with respect to the claim or interest, the holder of the claim or interest has, as a matter of non-bankruptcy law, the right to receive payment of the full amount due. Upon acceleration of the debtor's obligation, the terms of the original agreement relating to the claim or interest no longer apply. Thus, a plan that proposes to pay the amount due in respect of the claim or interest according to the original terms of the agreement alters the legal, equitable and contractual rights of the holder

of the claim or interest. Nonetheless, the Bankruptcy Code under Section 1124(2) overrides and neutralizes that impairment.

28. A party that receives the benefits of its original bargain is not impaired even if the plan modifies the party's rights by preventing the party from using a contractual or legal right of acceleration to terminate a valuable contract of the debtor in circumstances where the debtor is willing to cure past defaults and perform under the original terms of the agreement. *See In re Southeast Co.*, 81 B.R. 587 (B.A.P. 9th Cir. 1987), *aff'd*, *Fl. Partners Corp. v. Southeast Co.* (*In re Southeast Co.*), 868 F.2d 335 (9th Cir. 1989) (cure, reinstatement and reasonable reliance damages permit unimpairment even if there is some slight alteration (*e.g.*, penalty interest need not be paid after default) and payment of post-default rate of interest, even if no acceleration, is not required in order to leave claim unimpaired); *see, e.g.*, *United States Tr. Co. of N.Y. v. LTV Steel Co.* (*In re Chateaugay*), 150 B.R. 529, 542 (Bankr. S.D.N.Y. 1993) (allowance of bondholders' claims in full, including postpetition interest at pre-default contract rate to original bond maturity date, and post-maturity rate from the original bond maturity date permissible to unimpair claims); *In re Singer Island Hotel, Ltd.*, 95 B.R. 845 (Bankr. S.D. Fla. 1989) (payment of default rate of interest or state judgment rate of interest not necessary to cure or compensate for damages); *In re Kizzac Mgmt. Corp.*, 44 B.R. 496 (Bankr. S.D.N.Y. 1984).

29. A reorganized entity's obligation to perform under the original terms of the agreement has been addressed by a number of courts in the context of postpetition compliance with certain financial covenants following consummation of the plan, and the question of whether consummation of the plan itself results in a breach of material covenants under the agreement that would trigger a default and render reinstatement impermissible. For example, the court in *In re Texas Rangers Baseball Partners*, held that in order to satisfy Section 1124(1) of the

Bankruptcy Code, the chapter 11 plan had to grant the creditors "their rights under their loan documents prospectively … [and] allow them to exercise their rights … following the effective date" by retaining the right to sue the debtor for breach of contract prospectively. However, the plan did not need to specifically honor the lender's contractual right to veto the sale of the Rangers. *In re Texas Rangers Baseball Partners*, 434 B.R. 393, 410 (Bankr. N.D. Tex. 2010).

30. Among such covenants, change in control provisions have been the subject of a number of reinstatement disputes. In the chapter 11 cases of Young Broadcasting, filed shortly after Charter Communications, the plan in question was proposed by the official committee of unsecured creditors, not the debtor company. *In re Young Broad. Inc.*, 430 B.R. 99, 108 (Bankr. S.D.N.Y. 2010). Ultimately, the debtors were unsuccessful in their attempt to reinstate senior debt because the plan was unable to overcome provisions in the credit agreement mandating that the company retain control of at least forty percent of its voting stock. The court determined that reinstatement was not permissible because the plan violated this change of control provision finding that the benefit of the bargain and the plain meaning of the credit agreement required Young Broadcasting to have the power to influence forty percent of the composition of the board, not merely the power to cast forty percent of the total votes for directors.

31. Charter Communications, discussed earlier in this Statement, also involved a dispute over a change in control provision. After analyzing language of the underlying agreements, I found that the requirement that Charter's founder retain a minimum percentage of voting power did not require maintenance of an equivalent ongoing economic interest. This conclusion was supported by the fact that the credit agreement had previously contained an economic interest requirement that had been eliminated when the agreement was amended to reduce the voting requirement from fifty one percent to thirty five percent. *JPMorgan Case Bank,*

N.A. v. Charter Commc'ns Operating, LLC (*In re Charter Commc'ns*), 419 B.R. 221, 237-239 (Bankr. S.D.N.Y. 2009).

32. Just a few weeks ago, Judge Robert D. Drain confirmed a plan of reorganization for the Frontier Communications debtors which preserved the option to reinstate debt under a prepetition credit facility, in whole or in part. *In re Frontier Communications Corporation*, Case No. 20-22476 (RDD) (Bankr. S.D.N.Y) [Docket No. 1005]. Plan objectors initially included an ad hoc group of secured creditors who argued that reinstatement was impermissible because, among other things, the plan did not comply with Section 1124 of the Bankruptcy Code and would substantially alter their legal, equitable, and contractual rights. Specifically, the creditors asserted that the plan would violate a change in control provision, thereby causing an event of default that would preclude reinstatement. The objectors cited to both Young Broadcasting and Charter Communications in support of their argument that a change of control that constitutes an incurable default precludes reinstatement of the debt.[5] The debtors and creditors ultimately reached a settlement in which the creditors consented to reinstatement regardless of the disputed change in control provision.[6]

33. The decisions in Charter Communications and Young Broadcasting, and very recently in Frontier Communications, demonstrate the importance of reinstatement of debt as a viable plan component.[7] Reinstatement is a permissible element whenever it is desirable to retain

---

[5] *In re Frontier Commc'ns Corp.*, Case No. 20-22476 (RDD) (Bankr. S.D.N.Y) [Docket No. 857] (citing *In re Young Broad. Inc*., 430 B.R. 99, 115 (Bankr. S.D.N.Y. 2010); *In re Charter Commc'ns*, 419 B.R. 221, 238 (Bankr. S.D.N.Y. 2009).

[6] See *Debtors' Supplemental Brief in Support of (I) Approval of the Secured Creditor Settlement and (II) Confirmation of the Fourth Amended Joint Plan of Reorganization of Frontier Communications Corporation and its Debtor Affiliates Pursuant to Chapter 11 of the Bankruptcy Code.*

[7] Daniel P. Winikka and Paul M. Green, *Reinstatement of Debt: Having Your Cake and Eating It Too;* Pratt's Journal of Bankruptcy Law (July/August 2012).

otherwise qualifying pre-filing date debt. Such plan provisions are routine in plain vanilla settings, but, as noted in the cases cited, can be more challenging from a structuring perspective when there are good faith disputes and motivated adversaries.

34. Generally speaking, reinstatement should be allowed whenever the statutory requirements are met and it can be shown that the essential benefit of the original bargain is being preserved for the creditor whose debt is being reinstated.

III. DISCUSSION AND APPLICATION

35. This Statement, while prepared and submitted at the request of Calfrac, does not purport to express any opinion regarding Calfrac's proposed recapitalization transaction nor does it address the merits of any of the proceedings now pending before this Court and in the chapter 15 Case.

36. My objective throughout this Statement is to provide the Court with an explanation of the law and practice applicable to reinstatement as that doctrine has evolved under chapter 11 of the Bankruptcy Code. My views on the subject are being offered with the understanding that this Court may find it useful to evaluate this evidence in relation to Calfrac's Plan of Arrangement. I have been advised by Calfrac's counsel that reinstatement as a means to classify and treat certain indebtedness is a subject matter that may be pertinent because of certain procedural arguments and objections that have been made by Wilks Brothers.

37. In preparing this Statement, I have read and have become familiar with various pleadings and transcripts in these proceedings and in the Chapter 15 Case as a result of which I am generally aware that these are contested matters in Canada and the United States. I know that the restructuring proposition being advanced by Calfrac is being vigorously opposed by Wilks Brothers and that Wilks Brothers has urged Calfrac's stakeholders to favorably consider a

restructuring alternative sponsored by Wilks Brothers. This opposition by Wilks Brothers, as I understand it, also extends beyond the substantive terms of the restructuring itself to certain of the procedural choices made by Calfrac in pursuing a plan of arrangement under the CBCA along with a parallel Chapter 15 Case rather than seeking to reduce leverage within the capital structure by means of a chapter 11 filing in the United States.

38. I have no direct or indirect knowledge of the strategic thinking, planning and preparations that went into the decision to restructure Calfrac's funded financial obligations under provisions of the CBCA in conjunction with the Chapter 15 Case. I assume that strategy was undertaken deliberately and based on a number of factors including efficiency and cost, the availability of effective relief under the CBCA, and after considering other restructuring alternatives including a chapter 11 plan of reorganization. I have no experience with CBCA arrangements, but I have been informed that the treatment being afforded to the Second Lien Notes is functionally equivalent to reinstatement of that debt, namely an effective elimination of the automatic acceleration of payment of the Second Lien Notes caused by the commencement of the Chapter 15 Case and a restoration of all of the pre-filing date payment terms and conditions applicable to the Second Lien Notes.

39. As highlighted in this Statement, the very same treatment of the Second Lien Notes that has been proposed in Calfrac's Plan of Arrangement under the CBCA also could have been proposed by Calfrac as a debtor-in-possession in a hypothetical chapter 11 plan of reorganization if Calfrac had filed for plenary relief in the United States. This assumes, of course, that Calfrac decided that it was in its own commercial best interest to commence such a case and file such a plan and had the ability to satisfy the statutory mandates of Section 1124(2) of the Bankruptcy Code.

40. The rationale and reasoning for being able to achieve the same treatment of the Second Lien Notes under both the CBCA and chapter 11, regardless of the consent of the holders to that treatment, are described in detail in the above paragraphs of this Statement.

41. Chapter 11 debtors have the inherent flexibility and discretion to use a variety of restructuring tools that are set forth in the Bankruptcy Code, and in my experience plan proponents will resort to using those permitted tools that are calculated to lead to favorable restructuring outcomes. As has been shown, one such restructuring option is to reinstate prepetition debt in accordance with its original terms without altering the contractual, legal or equitable rights of the holders of that debt.

42. Based upon my understanding of the manner in which the claims of holders of the Second Lien Notes have been addressed within the CBCA Proceedings, I believe that there is no material difference in the treatment of the holders of these claims in the CBCA Proceedings and the treatment that would have been permissible if the restructuring of Calfrac's funded debt had been pursued in a chapter 11 case commenced in the United States under the Bankruptcy Code.

43. I say this without knowing all of the potential arguments that might be raised by Wilks Brothers and other holders of the Second Lien Notes regarding the applicability and appropriateness of reinstatement and without knowing how a bankruptcy court in the United States would actually view and decide fully briefed arguments in opposition to reinstatement that might arise within such a chapter 11 case. This Statement does not speculate on this ultimate question and takes no position, as a result, on whether reinstatement would be authorized and ordered by a bankruptcy court if presented in the context of a contested confirmation hearing.

44. However, I can state with a high degree of confidence that Calfrac would have the flexibility and discretion, if it had chosen to use chapter 11 as its restructuring regime, to propose a plan of reorganization predicated on reinstatement of the Second Lien Notes.

45. While I am unable to compare what can be achieved typically by means of a plan of arrangement under the CBCA with what I know can be accomplished by means of a plan of reorganization under the Bankruptcy Code, I can state that what has been proposed in relation to the Second Lien Notes in Calfrac's Plan of Arrangement in this Court appears to me to be equivalent in all material respects to what could have been achieved if that same class of claims had been reinstated by means of a plan of reorganization under the Bankruptcy Code.

46. I am not aware of any facts or circumstances that could be cited by the holders of the Second Lien Notes to block reinstatement of these notes by Calfrac in accordance with their original terms and tenor assuming that a plan of reorganization for Calfrac under chapter 11 were otherwise confirmable under the confirmation standards of section 1129 of the Bankruptcy Code.

47. I am, therefore, satisfied that Calfrac would have been able to propose a plan of reorganization under the Bankruptcy Code predicated on reinstatement of the Second Lien Notes that, if confirmed, would result in claim resolution that from the perspective of the holders of the Second Lien Notes would be equivalent in all material respects to what has been provided to that class of creditors under the Plan of Arrangement.

48. In conclusion, it is my opinion that both the CBCA regime and the chapter 11 regime are capable of yielding what are essentially identical restructuring outcomes to members of the class of Second Lien Notes. Under both regimes, the Company can preserve these obligations by providing creditors with reinstated credit terms offering creditors the same benefits as their original pre-filing date commercial bargain.

I swear this Affidavit to explain the matters of New York and U.S. law described herein, and for no other or improper purpose.

SWORN BEFORE ME in the City of New York, in the State of New York, U.S.A., this 1st day of October, 2020.	))))))	
A Notary Public in and for the State of New York	)))	JAMES M. PECK

JEFFREY J. POULIOT
Notary Public, State of New York
No. 01PO4973751
Qualified in New York County
Commission Expires March 20, 2023

ny-1980949

Exhibit “1”

THIS IS EXHIBIT "1" REFERRED TO IN THE AFFIDAVIT OF JAMES M. PECK AFFIRMED BEFORE ME THIS 1ST DAY OF OCTOBER, 2020

____

A Notary Public
in and for the State of New York

JEFFREY J. POULIOT
Notary Public, State of New York
No. 01PO4973751
Qualified in New York County
Commission Expires March 20, 2023

Curriculum Vitae

James M. Peck

U.S. Bankruptcy Judge, S.D.N.Y. (Retired)
250 West 55th Street
New York, NY
10019-9601, USA
(212) 468-8094

Professional Employment

Senior Of Counsel and Head of Cross-Border Restructuring Practice
Morrison & Foerster LLP
New York, New York
2014-Present
Now offering services in consulting, expert testimony, and mediation.

United States Bankruptcy Judge
Southern District of New York
New York, New York
2006-2014

Co-head, Business Reorganization Department, Schulte Roth & Zabel LLP,
New York, New York
1990-2006

Associate and then Partner, Duane Morris LLP,
Philadelphia, Pennsylvania
1975-1990

Bar Admissions

New York (1971)

Education

Dartmouth College (B.A., 1967)

New York University School of Law (J.D., 1971)

Professional Activities

Fellow, American College of Bankruptcy

Panel of Recognized International Market Experts in Finance

International Insolvency Institute (former President, Executive Committee member, and Co-Chair of the 16th Annual Conference)

The American Bankruptcy Institute's Annual New York City Bankruptcy Conference (former Judicial Chair)

The American Bankruptcy Institute's Advisory Committee on Safe Harbors (former Co-Chair)

Advisory Committee of the Asian Business Law Institute

Member, Advisory Panel to Insolvency Rules Committee of Singapore International Commercial Court

Mediation panels of INSOL International, the Singapore Mediation Center, and the Singapore International Mediation Center

INSOL International's Judicial Steering Committee (former member)

The Panel of Arbitrators for Financial Services Disputes of the Hong Kong International Arbitration Center

National Conference of Bankruptcy Judges Board of Governors (former member)

Publications

"Mediation Meditations: Understanding the Mediation Culture of Chapter 11," *International Insolvency & Restructuring Report 2018/19*

"The Supreme Court Reshapes the Section 546(e) Safe Harbor," *Morrison & Foerster Client Alert*, March 5, 2018

"The Importance of Being Truly Independent," *American Bankruptcy Institute Journal*, January 2018 Edition

"The Art of the Ad Hoc – Introduction," *Global Restructuring Review*, November 2017 Edition

“MoFo Brexit Briefing: Flourishing by becoming familiar: how to attract restructuring investors to the post-Brexit UK,” *Morrison & Foerster Client Alert*, July 27, 2016

“UCC Standing Blocked in Recent Sabine Decision,” *Morrison & Foerster Client Alert*, April, 27, 2016

“Cross-border observations derived from my Lehman judicial experience,” *Journal of International Banking and Financial Law*, March 1, 2015

“Bankruptcy Mediation: Case Studies, Considerations and Conclusions,” Chapter in *The International Comparative Legal Guide to: Corporate Recovery & Insolvency 2014 Edition*, July 1, 2014

“Stern Revisited: Big Questions Remain Unresolved,” *Morrison & Foerster Client Alert*, June 19, 2014

“Settlement Talks in Chapter 11 after ‘WAMU’: A Plan Mediator’s Perspective,” *American Bankruptcy Institute Law Review*, Vol. 22, No. 1, Winter 2014

Educational Offerings, Lectures and Continuing Legal Education

Speaker (virtually), Insolvency Lawyers Association, panel discussion on UK law reform, 2020

Speaker, Harvey R. Miller Annual Awards Luncheon, Distressed Investing Conference, December 2, 2019

Speaker, TMA Brazil Conference in São Paulo, Chapter 11 Developments, November, 2019

“The ADR (or Arbitration) Alternative – A New Approach for a New Age in Cross-Border Insolvencies,” the International Insolvency Institute’s 19th Annual Conference June 18, 2019

“Cov Lite in the Next Downturn,” June 11, 2019, London, United Kingdom

“Plan Mediation as an Effective Restructuring Tool,” Singapore Academy of Law, April 1, 2019

“The Global Financial Crisis One Decade Later: How Did We Do, and Could We Have Done Better?” the International Insolvency Institute’s 18th Annual Conference, September 24, 2018

"The Lehman Saga and Cross Border Insolvency," International Insolvency Institute's Latin America Regional Conference, February 28, 2017

"Improving Cross-Border Cooperation in International Cases: The Model Law, E.I.R. and More," III NextGen Leadership Program and Class V Induction, June 5, 2016

"The Empire Strikes Back: The LSTA's Response to the ABI Chapter 11 Commission Report," the 20th Annual Loan Syndications and Trading Association Conference, October 28, 2015

Keynote Address, The State Bar of California's 88th Annual Meeting, October 10, 2015

"Does the ABI Commission's Recommendation to Eliminate One Impaired Voting Class Appropriately End Gamesmanship and Litigation?" Bankruptcy 2015: Views from the Bench, October 9, 2015

"Singapore as a Key Player in the Regional and International Insolvency and Restructuring – The Way Forward," the 2nd National Insolvency Conference, September 11, 2015

"Refereeing the mess – Judicial reflections on addressing novelty and complexity in mega-bankruptcies," the 32nd Annual Conference of the Banking & Financial Services Law Association, September 4, 2015

"Metals & Mining: Current & Future Outlook," Turnaround Management Association's New York City Chapter, June 25, 2015

"Financial Derivatives in Bankruptcy: Containing or Creating Systemic Risk?" the International Insolvency Institute's 15th Annual Conference, June 15, 2015

"Arbitration and Cross-Border Insolvency: A 21st Century Global Insolvency Toolkit," the 21st Annual IBA Global Insolvency and Restructuring Conference, May 19, 2015

Group of Thirty-Six Meeting, INSOL International College of Mediation, May 7, 2015

"Restructuring 2015," Handelsblatt's 11th Annual Restructuring Conference, April 22, 2015

"Lessons Learned from Lehman," the Canadian Association of Insolvency and Restructuring Professionals, March 31, 2015

"The Corporate Group Restructuring," INSOL San Francisco, March 23, 2015

"The Treatment of Financial Contracts in Bankruptcy and Bank Resolution," Annual BJCFCL Symposium, February 27, 2015

"What You Don't Know About Cross-Border International Restructuring," the 2015 TMA Distressed Investing Conference (DIC), February 13, 2015

Multi-Debtor Debate, the 2014 ABI Winter Leadership Conference, December 5, 2014

"Lehman and Beyond: Lessons Learned from the Bench and the Bar Seminar," Seminar, November 11, 2014

"Watching the Hedges Grow: Inside the Mind of Distressed Investors," the 2014 NCBJ Chicago, October 8, 2014

"Judicial Colloquium – Cross-Border Insolvency: Judicial Perspective," the Regional Insolvency Conference, August 25, 2014

"TMA Webinar - Venue Reform Tug-of-War: Will Anything Ever Really Change?" Webinar, July 16, 2014

"Insolvency: Local Issues, Global Views," the Nepalese Insolvency Practitioners Association, INSOL International, July 2014

"Plan Mediation in Bankruptcy," New York City Bar Association Committee on Bankruptcy and Corporate Reorganization, June 2, 2014

"Workshop on Judicial Cooperation in Cross-Border Cases," the 20th Annual Global Insolvency and Restructuring Conference, May 19, 2014

"Rise of Mediation in Major Bankruptcy Cases," the 16th Annual New York City Bankruptcy Conference, May 15, 2014

Biographical

James M. Peck is head of the Cross-Border practice of Morrison & Foerster's Business Restructuring & Insolvency Group and is based in the firm's New York office. Before joining Morrison & Foerster, former Judge Peck served as a United States Bankruptcy Judge for the Southern District of New York from 2006 to 2014. During his judicial service, he presided over the chapter 11 and SIPA cases of Lehman Brothers and its affiliates and a number of other major chapter 11 and chapter 15 cases. As a judge, he issued multiple legal decisions that have helped to define the impact of the safe harbors on qualified financial contracts.

Former Judge Peck has extensive experience as a mediator of sophisticated commercial disputes. As mediator, he has brokered settlements in a number of high–profile cases, including American Airlines, Syms/Filenes, MF Global, General Motors, Residential Capital, Excel Maritime, Toisa Limited, and Mesabi Metallics.

Former Judge Peck belongs to a great many professional organizations and over the years has served in a variety of leadership roles. By invitation, he is a fellow of the American College of Bankruptcy and a member of the Panel of Recognized International Market Experts in Finance. From June 2016 to June 2017, he served as president of the International Insolvency Institute and remains active on its Executive Committee. He has also served on the National Conference of Bankruptcy Judges Board of Governors and was judicial chair of the American Bankruptcy Institute's annual New York City Bankruptcy Conference.

Former Judge Peck was co–chair of the ABI's Advisory Committee on the Safe Harbors. He is a member of the Advisory Committee of the Asian Business Law Institute and is listed as a qualified member of mediation panels maintained by INSOL International, the Singapore Mediation Center, and the Singapore International Mediation Center and has been named to the Panel of Arbitrators for Financial Services Disputes of the Hong Kong International Arbitration Center.

Former Judge Peck has been retained on a number of occasions to furnish expert witness statements for submission to the High Court in London in relation to issues of New York law, comity, and the recognition of main and non–main insolvency proceedings. He is also a frequent speaker worldwide on insolvency issues, and has participated as keynote speaker and panel chair across the globe in conferences presented by numerous international organizations and law schools. These include INSOL International, the International Bar Association, INSOL Europe, and the National Conference of Bankruptcy Judges. He has authored articles published in the American Bankruptcy Institute Journal and International Insolvency and Restructuring Report and is an editor of a recently published book titled "The Art of the Ad Hoc."

Before his judicial appointment, former Judge Peck was in private practice for over 35 years, concentrating for much of that time on bankruptcy law, business reorganization, and creditors' rights. He was a partner in the reorganization and finance section of Duane Morris LLP and co–head of the business reorganization department of Schulte Roth & Zabel LLP. He is recommended by *Legal 500 US* in the area of corporate restructuring.

Exhibit "2"

THIS IS EXHIBIT "2" REFERRED TO IN THE
AFFIDAVIT OF JAMES M. PECK
AFFIRMED BEFORE ME THIS 1ST DAY
OF OCTOBER, 2020

____
A Notary Public
in and for the State of New York

JEFFREY J. POULIOT
Notary Public, State of New York
No. 01PO4973751
Qualified in New York County
Commission Expires March 20, 2023

Table of Authorities and Background Documents

Case Authorities

1. *DiPierro v. Taddeo* (*In re Taddeo*), 685 F.2d 24 (2d Cir. 1982)
2. *Downtown Athletic Club of N.Y. City v. Caspi Dev. Corp.*, (*In re Downtown Athletic Club of N.Y. City*), Case No. 98 B 41419 (JLG), 1998 Bankr. LEXIS 1642 (Bankr. S.D.N.Y. Dec. 21, 1998)
3. *Great W. Bank & Tr. v. Entz-White Lumber & Supply, Inc. (In re Entz-White Lumber & Supply, Inc.)*, 850 F.2d 1338 (9th Cir. 1988)
4. *In re Am. Solar King Corp.*, 90 B.R. 808 (Bankr. W.D. Tex. 1988)
5. *In re Bernard*, 70 B.R. 181 (Bankr. E.D. Ark. 1986)
6. *JPMorgan Case Bank, N.A. v. Charter Commc'ns Operating, LLC (In re Charter Commc'ns)*, 419 B.R. 221 (Bankr. S.D.N.Y. 2009)
7. *In re Frontier Commc'ns Corp.*, Case No. 20-22476 (RDD) (Bankr. S.D.N.Y) [Docket Nos. 857, 1005]
8. *In re GSC, Inc., 4*53 B.R. 132 (Bankr. S.D.N.Y. 2011)
9. *In re Holthoff*, 58 B.R. 216 (Bankr. E.D. Ark. 1985)
10. *In re Jones*, 32 B.R. 951 (Bankr. D. Utah 1983)
11. *In re Kizzac Mgmt. Corp.*, 44 B.R. 496 (Bankr. S.D.N.Y. 1984)
12. *In re Otero Mills, Inc.*, 31 B.R. 185 (Bankr. D.N.M. 1983)
13. *In re Schatz*, 426 B.R. 24 (Bankr. D.N.H. 2009)
14. *In re Singer Island Hotel, Ltd.*, 95 B.R. 845 (Bankr. S.D. Fla. 1989)
15. *In re Southeast Co.*, 81 B.R. 587 (B.A.P. 9th Cir. 1987), *aff'd*, *Fl. Partners Corp. v. Southeast Co.* (*In re Southeast Co.*), 868 F.2d 335 (9th Cir. 1989)
16. *In re Texas Rangers Baseball Partners*, 434 B.R. 393 (Bankr. N.D. Tex. 2010)
17. *In re Union Meeting Partners*, 160 B.R. 757 (Bankr. E.D. Pa. 1993)
18. *In re Young Broad., Inc.*, 430 B.R. 99 (Bankr. S.D.N.Y. 2010)
19. *MW Post Portfolio Fund Ltd. v. Norwest Bank Minn.* (*In re Onco Investment Co.*)*,* 316 B.R. 163 (Bankr. D. Del. 2004)
20. *United States Tr. Co. of N.Y. v. LTV Steel Co. (In re Chateaugay)*, 150 B.R. 529 (Bankr. S.D.N.Y. 1993)

__Other Authorities__

1. Bankruptcy Abuse Prevention & Consumer Protection Act of 2005, Pub. L. No. 109-8, § 328(b)(1) (2005)
2. Bankruptcy Reform Act of 1978, Pub. L. No. 95-598 (1978), as amended
3. Daniel P. Winikka and Paul M. Green, Reinstatement of Debt: Having Your Cake and Eating It Too; Pratt's Journal of Bankruptcy Law, 391-401 (2012)

__Transcripts of Proceedings Provided by Bennett Jones__

1. Transcript of Proceedings held on July 13, 2020
2. Transcript of Proceedings held on July 23, 2020
3. Transcript of Proceedings held on July 27, 2020
4. Transcript of Proceedings held on August 6, 2020
5. Transcript of Proceedings held on August 7, 2020

__Case Documents Provided by Bennett Jones__

1. Affidavit of Ronald P. Mathison filed on July 13, 2020
2. Originating Application filed on July 13, 2020
3. Bench Brief of the Calfrac Entities in Support of the Preliminary Interim Order Application dated July 13, 2020
4. Preliminary Interim Order filed on July 14, 2020
5. Affidavit of Sherry Nadeau dated July 18, 2020
6. Bench Brief of Wilks Brothers in Support of Comeback Application dated July 18, 2020
7. Affidavit of Mary Lewis filed July 22, 2020
8. Bench Brief of the Calfrac Entities in Reply to Comeback Application dated July 22, 2020
9. Reply Bench Brief of Wilks Brothers in Support of Comeback Application dated July 23, 2020
10. Notice of Comeback Application dated July 23, 2020
11. Application for Interim Order filed on July 30, 2020
12. Affidavit No. 2 of Ronald P. Mathison dated July 30, 2020
13. Bench Brief of the Calfrac Entities filed July 31, 2020

14. Affidavit of Lance Williams dated August 6, 2020
15. Bench Brief of Wilks Brothers in Reply to the Interim Order Application dated August 6, 2020
16. Supplemental Ronald P. Mathison Affidavit filed August 6, 2020
17. Interim Order filed August 7, 2020
18. Affidavit of Grant Hughes filed August 12, 2020
19. Order Dismissing Comeback Application filed August 13, 2020
20. Affidavit No. 3 of Ronald P Mathison dated September 25, 2020
21. Affidavit of Sherry Nadeau dated September 28, 2020

Exhibit “3”

THIS IS EXHIBIT "3" REFERRED TO IN THE
AFFIDAVIT OF JAMES M. PECK
AFFIRMED BEFORE ME THIS 1ST DAY
OF OCTOBER, 2020

____
A Notary Public
in and for the State of New York

JEFFREY J. POULIOT
Notary Public, State of New York
No. 01PO4973751
Qualified in New York County
Commission Expires March 20, 2023

KeyCite Yellow Flag - Negative Treatment
Declined to Follow by In re Tribune Co., Bankr.D.Del., October 31, 2011

419 B.R. 221
United States Bankruptcy Court,
S.D. New York.

In re CHARTER COMMUNICATIONS, et al., Debtors.
JPMorgan Chase Bank, N.A. as Administrative Agent, Plaintiff,
v.
Charter Communications Operating, LLC and CCO Holdings, LLC, Defendants.

Bankruptcy No. 09–11435 (JMP).
|
Adversary No. 09–01132 (JMP).
|
Nov. 17, 2009.

Synopsis

Background: Confirmation hearing was held on pre-packaged Chapter 11 plan of related debtor entities, pursuant to which debtors sought to restructure their debt while reinstating senior loans that they had obtained on favorable terms.

Holdings: The Bankruptcy Court, James M. Peck, J., held that:

language in credit agreement between lenders and Chapter 11 debtor-borrower that was part of multi-layered capital structure involving multiple intermediate limited liability holding companies, providing that it would be event of default if any of the designated holding companies "shall generally not, or shall be unable to, or shall admit in writing its inability to, pay its debts as they become due," could not be interpreted as having prospective application;

language in credit agreement, providing that it would be event of default if group headed by well-known billionaire did not maintain at least 35% of "ordinary voting power for the management of the Borrower," had to be interpreted as requiring this group to maintain at least 35% of ordinary voting power at level of debtor-borrower's ultimate corporate parent;

restructuring would not result in "change in control," of kind triggering a default under credit facility and preventing reinstatement of debtors' senior loans;

cross-default provision in credit agreement was in nature of "ipso facto clause";

settlement incorporated in plan would be approved;

third-party releases in favor of individual who would be relinquishing his substantial equity interest in debtors and other individuals associated with him, which debtors proposed to grant as part of their proposed reorganization plan to secure individual's cooperation in avoiding default under a multimillion dollar credit facility that debtors were seeking to reinstate as key component of plan, would be approved;

plan was proposed in "good faith";

plan satisfied "best interests of creditors" requirement;

debtors did not improperly classify noteholders whose unsecured claims were convertible to equity apart from general unsecured creditors for purpose of obtaining acceptance of their proposed plan by one impaired class;

plan did not discriminate unfairly against objecting class of noteholders or otherwise fail to satisfy "cramdown" requirements; and

incorporate settlement with insider did not cause plan to violate absolute priority rule.

Objections to confirmation overruled.

Attorneys and Law Firms

***229** Paul Basta, Esq., Stephen E. Hessler, Esq., Kirkland & Ellis, LLP, Albert Togut, Esq., Richard K. Milin, Esq., Togut Segal & Segal LLP, New York, NY, Mark E. McKane, Esq., Kirkland & Ellis, LLP, San Francisco, CA, Jonathan D. Brightbill, Esq., Daniel T. Donovan, Esq., Jeffrey S. Powell, Esq., Kirkland & Ellis, LLP, Washington, D.C., Ray Schrock, Esq., Mathew Regan, Esq., Kirkland & Ellis, LLP, Chicago, IL, Attorneys for Debtors.

Peter Pantaleo, Esq., George Wang, Esq., Bryce Friedman, Esq., Bruce Angiolillo, Esq., Susannah Geltman, Esq., Mary Elizabeth McGarry, Esq., Stephen Fitzgerald, Esq., Simpson Thacher & Bartlett, LLP, New York, NY, Attorneys for JPMorgan Chase Bank.

David S. Elkind, Esq., Russell Lippman, Esq., Mark R. Somerstein, Esq., Nila Williams, Esq., Ropes & Gray, LLP, New York, NY, Attorneys for Creditors' Committee.

Alan Kornberg, Esq., Andrew J. Ehrlich, Esq., Daniel Leffell, Esq., Paul, Weiss, Rifkind, Wharton & Garrison LLP, New York, NY, Attorneys for the Unofficial Committee of Holders of CCH I, LLC and CCH II, LLC notes.

Kurt Ramlo, Esq., Andrew Garelick, Esq., Skadden, Arps, Slate, Meagher & Flom LLP, Los Angeles, CA, Jay Goffman, Esq., Robert E. Zimet, Esq., Susan Saltzstein, Esq., Jeremy Berman, Esq., Skadden, Arps, Slate, Meagher & Flom LLP, New York, NY, Attorneys for Paul G. Allen.

Kenneth H. Eckstein, Esq., Phillip Kaufman, Esq., Joel Taylor, Esq., Kramer Levin Naftalis & Frankel LLP, New York, NY, Attorneys for the First Lien Lender Group.

David Molton, Esq., Daniel Saval, Esq., Brown Rudnick LLP, New York, NY, Attorneys for Wells Fargo Bank, as Agent for the Third Lien Secured Lenders.

Dwight Healy, Esq., Gerard Uzzi, Esq., Andrew Hammond, Esq., Greg Starner, Esq., Fernando Menendez, Esq., Karen M. Asner, Esq., White & Case, LLP, New York, NY, Attorneys for the Law Debenture Trust Company of New York.

Susan Power Johnston, Esq., David Haller, Esq., Covington & Burling LLP, New York, NY, Attorneys for Wilmington Trust Company.

Alan S. Maza, Esq., U.S. Securities and Exchange Commission, New York, NY, Attorneys for the U.S. Securities and Exchange Commission.

Leslie C. Heilman, Esq., Ballard Spahr Andrews & Ingersoll, LLP, Wilmington, DE, Benjamin M. Schmidt, Esq., Ballard Spahr Andrews & Ingersoll, LLP, Philadelphia, PA, Attorneys for Creditor, Comcast Communications.

Mark Hebbeln, Esq., Foley & Lardner, LLP, Chicago, IL, Attorneys for Creditor, UMBA N.A.

Jeffrey M. Schlerf, Esq., Sheldon Rennie, Esq., Fox Rothschild, LLP, Wilmington, DE, Attorneys for R Squared Communications.

Suzanne Trowbridge, Esq., Goodwin & Goodwin, LLP, Charleston, WV, Attorneys for Community Antenna Services.

Jason Bramlett, Esq., Friday, Eldredge & Clark, LLP, Fayetteville, AR, Attorneys for Creditor, Key Colony Fund LP.

OPINION ON CONFIRMATION OF PLAN OF REORGANIZATION AND ADJUDICATION OF RELATED ADVERSARY PROCEEDING

JAMES M. PECK, Bankruptcy Judge.

Introduction

Since these cases were filed on March 27, 2009, Charter Communications, Inc. ***230** ("CCI" and, together with its affiliated debtors, "Charter" or the "Debtors") has been engaged in one of the most hotly contested confirmation battles ever conducted. The conflict certainly is one of the longest and no doubt also among the most costly. The Court heard extensive testimony and argument for nineteen days during the period from July 20 through October 1, 2009. At stake is the reorganization and recapitalization of the country's fourth largest cable television company, a leading provider of broadband and cable television services now under the control of Paul Allen, co-founder of Microsoft and a public figure due to his personal wealth and accomplishments. Partly due to the importance of the issues and partly due to Mr. Allen's prominence and the billions that he has invested in Charter, these cases are highly visible and have generated considerable public interest.

These are perhaps the largest and most complex prearranged bankruptcies ever attempted, and in all likelihood rank among the most ambitious and contentious as well. The business proposition presented aims high, particularly at a time of great dislocation, uncertainty and volatility in the economy. Charter seeks to remove more than eight billion dollars from its highly leveraged capital structure, to secure the investment of approximately $1.6 billion in new capital through a rights offering back-stopped by a group of bondholders that will be appointing members of CCI's reconstituted board and to reinstate a senior secured credit facility and certain junior secured debt with the objective of preserving favorable existing credit terms and saving hundreds of millions of dollars in incremental annual interest expense that otherwise would be payable if this senior secured debt had to be replaced at current market pricing.

JPMorgan Chase Bank, N.A.[1] ("JPMorgan"), as agent for a syndicate of senior lenders, forcefully and skillfully asserts that reinstatement is not an available option here due both to existing events of default relating to the prepetition financial condition of certain holding companies within the Charter corporate structure and to a change of control default that they claim will occur on the effective date of the Debtors' proposed plan of reorganization (the "Plan") in violation of covenants in the senior secured credit agreement mandating that Mr. Allen retain a stipulated minimum percentage of voting control.

The restructuring premise depends upon Mr. Allen's holding not less than thirty-five percent in voting power over the management of Charter Communications Operating, LLC ("CCO" or the "Borrower"), the operating company borrower named in the senior credit agreement. This aspect of the transaction requires approval of a settlement between Mr. Allen and Charter (the "CII Settlement" or "Settlement") in which Mr. Allen agrees to maintain his voting percentage at thirty-five percent as a means to avoid triggering the applicable change of control covenants and to preserve valuable tax attributes.

This nominal retention of voting power has been attacked as a gimmick fashioned by corporate lawyers to obscure a takeover of the company by bondholders that are well known for their use of so-called "loan to own" strategies. The restructuring effectively wipes out Mr. Allen's eight billion dollar investment in Charter and strips him of any meaningful ongoing economic interest in the company. Regardless ***231** of the residual voting power to be held by Mr. Allen, no one seriously disputes that Mr. Allen is walking away from his investment in Charter and is agreeing to maintain his voting power as a structuring device that benefits Charter and its stakeholders. In practical terms, Charter will cease to be a Paul Allen company assuming that the Plan is consummated. His exit clears the way for new investors to influence the management of a restructured Charter.

While this creative arrangement to preserve value clearly benefits Mr. Allen, it was not his idea. Lazard Frères & Co. LLC ("Lazard"), as restructuring advisor to Charter, was the chief architect. Lazard recognized the vital importance to the reorganization of avoiding a change of control by means of a structure in which Mr. Allen would agree to retain the requisite voting power. As a consequence and despite the fact that all CCI shareholders will lose everything as their equity is cancelled, Mr. Allen as controlling shareholder occupies a position of strength in these cases.

His willingness to participate in the structure is pivotal to two sources of value for the Charter estates—the ability to hold on to attractively priced financing and to preserve net operating losses to shelter future income. Mr. Allen, acting through his representatives, has demanded and has secured the right to receive substantial compensation in exchange for his cooperation. These bargained-for "gives" and "gets" relating to the settlement with Mr. Allen[2] have been challenged by Law Debenture Trust Company, the indenture trustee for the holders (the "CCI Noteholders") of $479 million in aggregate principal amount of 6.50% Convertible Senior Notes due 2027 issued by CCI (the "CCI Notes"). The CCI Noteholders also complain at length that they have been shortchanged and that the Plan has not treated them fairly and is not confirmable.

As expected in cases involving billions of dollars and unusually complex legal issues that are both fact-intensive and subject to differing interpretations and characterizations, tremendous resources have been dedicated to this litigation. The issues presented are important ones—whether the restructuring arrangements negotiated prepetition with an informal committee of bondholders known as the "Crossover Committee" are appropriate and should be confirmed, whether defaults exist that preclude reinstatement of senior secured indebtedness, whether the most junior creditors in the capital structure are receiving more value than they would receive in a liquidation and whether the so-called linchpin settlement between Charter and Mr. Allen is reasonable and should be approved.

Notably, the issues presented arise in an uncommonly complicated setting—a large operationally sound business saddled with almost twenty-two billion dollars in debt at various levels of a capital structure stacked with multiple intermediate limited liability holding companies. This complex enterprise is endeavoring with singular creativity and determination to reduce its heavy debt load and recapitalize itself during perhaps the most challenging period in the modern era of global corporate finance. Given the state of the capital markets, the restructuring proposed here by Charter represents an extraordinary achievement provided that the resulting Plan is confirmable as a matter of bankruptcy law. ***232** And that is the task for the Court—to determine based on the evidence whether this Plan designed in the midst of an historic financial crisis succeeds in reaching its lofty goals.

This subject matter—reinstatement, the CII Settlement and fairness of treatment proposed under the Plan—is addressed generally in this introduction and in greater depth in later sections of this opinion. Following careful deliberation, the Court finds that Charter has met its burden and that the Plan should be confirmed.

Prepetition Negotiations At A Time of Crisis

Following the bankruptcy of Lehman Brothers Holdings, Inc. on September 15, 2008, the global credit markets went into the financial equivalent of cardiac arrest. Commercial lending came to a virtual halt. Smart, sophisticated and otherwise confident business people panicked. No one who lived through the period will ever forget the fear engendered by a worldwide crisis of confidence and the inability to obtain credit by conventional means.

This was the context for much of the evidence presented during the trial of this matter[3]. Charter was a highly leveraged company under the control of a prominent man with enormous personal wealth. The company had a patron with deep pockets and a variety of financing and refinancing options available to it during normal market conditions. Those options became far more limited in the immediate aftermath of the upheaval of last fall[4].

The board, senior management and Charter's advisors certainly were aware that the company was in serious trouble due to the dislocation of the credit markets, lower valuation multiples applicable to peer companies in the cable sector and its own excessive leverage. Charter needed to restructure promptly to avoid a potentially catastrophic free-fall bankruptcy, and it did so in what may be record time.

The principal architect of Charter's strategy during the period from November 2008 through February 2009 was Jim Millstein, who at the time was co-head of the restructuring practice at Lazard and who now works as the senior restructuring officer for the U.S. Treasury. Mr. Millstein had been an advisor to Charter for a number of years and had worked on the design of Charter's many-layered, tax-driven holding company structure. His advice helped to guide Charter's board throughout this critical period. Mr. Millstein was behind the decision to engage in a high velocity negotiation with the bondholders ***233** while leaving the senior debt in place to take full advantage of favorable pricing applicable to the existing senior indebtedness. Given the uncertainty in the credit markets at the time, it was also unclear whether a senior credit facility this large could be replaced at all on any terms[5].

His strategy was to prevent a change of control by motivating Mr. Allen to retain his voting power over management, to encourage the bondholders to organize an ad hoc committee (i.e., the "Crossover Committee") that would retain experienced restructuring professionals at Charter's expense, and to trim debt and raise new equity by having holders of fulcrum[6] debt securities convert their bonds to equity interests and agree to invest in the reorganized capital structure. Mr. Millstein and his colleagues at Lazard started to implement this strategy in December. On December 12, 2008, the Company issued a press release announcing the commencement of discussions with bondholders about potential restructuring options and through Lazard urged the bondholders to get organized[7]. The negotiations were given an added sense of urgency when Charter elected not to make an interest installment due in the middle of January and took advantage of the thirty-day grace period applicable to this interest payment. That decision not to pay interest energized the discussions among Charter, the Crossover Committee and Mr. Allen relating to a so-called "strawman" proposal for restructuring the enterprise.

All parties who participated in this process confirm that the negotiations were pursued aggressively, at arms length and in good faith, resulting in an agreement among Mr. Allen and certain members of the Crossover Committee that has become the foundation of Charter's pre-negotiated Plan. This agreement succeeded in eliminating the risks of a "free fall" bankruptcy while providing for new investment, debt forgiveness, preservation of intangible assets and a stripping down of Mr. Allen's economic stake.

The resulting Plan, however, has attracted quite a lot of criticism. Parties who were not at the table during this process have become the main objectors to confirmation. The senior lenders complain that their secured claims are impaired and that their debt may not be reinstated. They allege a series of non-monetary defaults under the senior credit agreement, but they openly admit that their goal here is to obtain an increased interest rate that reflects what would be charged for a new loan in the current market for syndicated commercial loans. The senior lenders have been paid everything that they are owed under the existing facility and have ***234** even received default interest during the bankruptcy cases.

The claimed defaults are the means by which the lenders hope to improve their return by obtaining a premium over amounts payable under the existing loan documentation. JPMorgan and other members of the lending syndicate are troubled that they are being denied the chance to renegotiate the terms of the loan and that bondholders who invested at a junior level of the capital structure are poised to greatly improve their own internal rate of return at the lenders' expense. Viewed simplistically, the litigation over confirmation amounts to an inter-creditor dispute over which class of creditors should receive enhanced returns. Viewed more theoretically, the litigation is a test of the chapter 11 process itself. The parties who negotiated the Plan did so knowing that this major struggle with the lenders would follow. Accordingly, this contest is the culmination of calculated pre-bankruptcy planning (that might even be called a gamble) designed to obtain significant restructuring benefits over the foreseeable strenuous objections of formidable adversaries.

Surplus And The Ability To Pay Debts As They Come Due

JPMorgan contends that Charter had reason to know that it was in serious financial trouble on November 5, 2008 when it elected to draw down $250 million on its senior credit facility at a time that its enterprise value was depressed to the point that financial disaster was likely. The case against reinstatement really starts here at a board meeting convened in November 2008 to consider whether there was adequate surplus to move cash from one level of the capital structure to another by means of dividends from CCO to those Designated Holding Companies (as defined in the senior credit agreement)[8] that needed to make upcoming scheduled interest payments.

JPMorgan contends that Charter recognized the gravity of the situation and knew that it was in the midst of a genuine crisis at this point. The Court heard a great deal of testimony from a number of witnesses regarding Charter's corporate state of mind in November 2008 and its self-awareness as to the fair value of the enterprise. JPMorgan's thesis is that there is a connection between the determination of surplus for purposes of being able to make a permissible cash distribution under Delaware corporate law and the occurrence of a default under the senior credit agreement. Expert witnesses offered conflicting opinions during the trial on the question of whether certain of Charter's Designated Holding Companies had adequate surplus as of the date that Charter drew down $250 million under its senior credit facility. A finding of surplus would require a total enterprise value of not less than $18.7 billion. Notably, the enterprise value for purposes of Charter's Plan is well below that figure at $15.4 billion[9].

The surplus calculation relates to the contention of JPMorgan that certain Designated ***235** Holding Companies at the time could not prospectively pay their debts as they came due in violation of section 8(g)(v) of the credit agreement. This alleged default is central to JPMorgan's adversary complaint seeking a determination that the default precludes reinstatement of the indebtedness evidenced by the senior credit facility. The Court is satisfied that the Charter board acted reasonably when it relied on its advisors in determining that there was adequate surplus at the Designated Holding Company level even though in hindsight other plausible alternative valuation scenarios might place Charter's enterprise value below the minimum amount needed for finding surplus. The Court does not believe that sufficient evidence has been presented to establish that Designated Holding Companies were unable to meet their obligations as they came due.

Valuing a business such as Charter's is neither simple nor objective, and no single generally accepted standard exists for measuring value. Valuation of an enterprise as complex as this one calls for using multiple approaches to value, comparing the business to be valued with others having similar characteristics, making appropriate adjustments and reasoning by analogy. The art of valuing a business requires the exercise of well-informed judgment. Experts in corporate valuation are often required to weigh multiple valuation methodologies that are not always congruent or consistent. These methodologies include comparable companies, precedent transactions, publicly available market data (including the views of Wall Street analysts) and the use of a discounted cash flow analysis that depends on projections of future free cash flows and mathematical calculations. In the case of Charter, other factors to be considered include the treatment of tax attributes and the possible addition of a so-called control premium.

In part due to the complexity of the valuation process and in part due to the frequent role of the valuation expert as an advocate for a particular value proposition, bankruptcy courts commonly confront conflicting opinions as to value offered by qualified professionals. This case is no exception. Witnesses testified regarding valuation issues from Lazard, FTI Consulting, Alix Partners, Alvarez & Marsal, and Duff & Phelps. Not surprisingly, these witnesses focused on different considerations and did not agree with each other. Depending on the weight given to the testimony of these witnesses, the Court could conclude that Charter's business was worth more than $21 billion in November 2008 or as little as $15.4 billion in September 2009. The swing in value is major and hard to reconcile. The challenge in fairly valuing Charter is also illustrated by the fact that conflicting indications of value were offered by Charter itself[10].

With respect to the subject of Charter's provable enterprise value at different points in time, the Court finds itself in the quandary of wondering what happened to all that money and questioning the dependability of much of the valuation evidence that has been presented. Billions of notional dollars have disappeared during a period when the markets have stabilized and when no corporate event has taken place that would explain any sharp decline in value. Conveniently, Charter asserts that its business was worth more during the turbulent markets of last fall when it needed surplus to move funds through its ***236** capital structure than it is deemed to be worth in the fall of 2009.

What this demonstrates is that valuation is a malleable concept, tough to measure and tougher to pin down without a host of explanations, sensitivities and qualifiers. Because point of view is an important part of the process, outcomes are also highly dependent on the perspectives and biases of those doing the measuring. When it comes to valuation, there is no revealed, objectively verifiable truth. Values can and do vary, and consistency among valuation experts is rare, especially in the context of high stakes litigation[11].

It is the considerable challenge of proving a reliable value for Charter as of November 2008 coupled with Charter's well-understood ability to move funds throughout its highly leveraged capital structure by means of inter-company transfers that defeats JPMorgan's very skillfully presented arguments against reinstatement, particularly in relation to an awkwardly constructed loan covenant referencing the ability of structurally subordinated companies in the capital structure to pay debts as they come due. That covenant is painfully hard to apply and cannot reasonably be interpreted as having prospective application.

Much has been said and written throughout this litigation concerning the meaning of Section 8(g)(v) of the loan agreement. JPMorgan contends that the provision is forward-looking and designed to address the ability of Designated Holding Companies to meet identifiable obligations as they shall come due in the future. That interpretation is not practical, especially for a company like Charter that has a variety of options to fund or defer future obligations.

The language used in the loan agreement is not a model of clarity, leaving open the prospective gloss urged by JPMorgan as one of the possible interpretations of the provision[12]. Nonetheless, the Court is convinced that the language is not prospective and that, fairly read, the covenant deals with a present inability to pay debts as they come due, not one that may occur at some point in the future. A covenant tied to events that might or might not come to pass lacks specificity and is virtually impossible to apply in practice.

The forward-looking reading suggested by JPMorgan is not the best way to construe the language. Looking into a future filled with payables that are coming due is a speculative and unworkable exercise for an enterprise such as this. Given the inherent unpredictability of future events and Charter's multiple strategies for moving cash within the corporate family, it is not practical for a lender to declare a default based on what may seem to be well-founded presumptions as to the ability of a holding company to pay debts in the future. Those presumptions could well be wrong. Additionally, rational loan administration requires measurable and verifiable events of default not based on speculation. The provision is most logically read ***237** as addressing the actual as opposed to the possible future inability to pay a debt that shall come due.

The evidence demonstrates that Charter had concerns during relevant periods prior the restructuring about available surplus and the ability to transfer funds between companies within its capital structure, but such concerns did not rise to the level of establishing lack of surplus and are not the stuff of which covenant defaults are made. A number of witnesses employed by the lenders testified that an event of default such as the one set forth in Section 8(g)(v) had never been called before in their experience. This adds credence to the notion that in the context of Charter's publicly announced restructuring discussions with its bondholders, JPMorgan issued a notice of default on February 5, 2009 as a strategy to gain leverage and as a means to get a seat at the table with the objective of increasing the pricing of the senior debt.

Even if Section 8(g)(v) were to be read as applying to a provable prospective inability of a holding company to pay its debts as they shall come due, the evidence is still inconclusive in demonstrating a future inability to pay such debts. JPMorgan did prove that Charter had doubts as to the adequacy of surplus and changed its public disclosures on the issue. JPMorgan's expert witness, Carlyn Taylor, offered credible testimony that the value of Charter was less than the $18.7 billion threshold needed for there to be surplus at the level of CCH I (one of the Designated Holding Companies), but that testimony was not by itself sufficient given the contradictory evidence presented by Charter concerning surplus and the ability to move funds regardless of surplus.

The surplus question is a close call, but the answer is not decisive in determining whether Charter had the ability to pay holding company debts when due. Charter knew that it needed to restructure itself and was running out of time to do so, but Charter's board relied on its advisors to conclude that the enterprise had adequate surplus and also had various other permissible means to move funds to levels where cash was needed. Despite a very well-presented case, JPMorgan failed to show convincingly that any Designated Holding Company was unable to pay debts within the meaning of Section 8(g)(v) of the credit agreement.

Consummation Of The Plan Will Not Result In A "Change Of Control" Because Paul Allen Will Retain Sufficient Voting Power And The Bondholders Have Not Acted as a Group

The change of control inquiry requires an examination of the relevant covenants of the credit agreement between JPMorgan and CCO dealing with the percentage of voting power that must be held by the Paul Allen Group (as defined in the senior credit agreement). These are provisions that have evolved over time to make it easier for Charter to enter into transactions that dilute Mr. Allen's influence as measured by voting power.

Under the 2002 version of the credit agreement, the Paul Allen Group was required to have the power to vote or direct the voting of equity interests having at least 51 % of the ordinary voting power for the management of the borrower and to own at least 25% of Charter's economic interests. That ownership requirement has been watered down to a point that Mr. Allen no longer needs to be in "control" in the traditional sense of the word.

Sections 8(k)(i) and 8(k)(ii) under the currently applicable form of the credit agreement reduce the minimum voting percentage from 51% to 35% and eliminate the requirement that Mr. Allen hold any economic interests in Charter. The changes appear to have been intended to ***238** make it easier for Charter to reduce its dependence on Mr. Allen and to attract equity investments from persons other than Mr. Allen while at the same time continuing to impose a minimum level of voting control. These provisions appear designed to allow for a formalistic retention of control but for the economic reality to shift in the very manner proposed by Charter in its Plan. Section 8(k), as it has changed over time, almost invites smart lawyers to come up with a transaction or series of transactions to restructure Charter without tripping the covenant. Charter's advisors have managed to accomplish that objective.

Section 8(k)(i) makes it an event of default if the Paul Allen Group ceases to have at least 35% (determined on a fully diluted basis) of the ordinary voting power for the management of the Borrower. Section 8(k)(ii) complicates the analysis by also mandating against "the consummation of any transaction ... the result of which is that any 'person' or 'group' (as such terms are used in Section 13(d)[13] and 14(d) of the Securities Exchange Act of 1934, as amended), other than the Paul Allen Group has the power, directly or indirectly, to vote or direct the voting of Equity Interests having more than 35% ... of the ordinary voting power for the management of the Borrower, unless the Paul Allen Group has the power, directly or indirectly, to vote or direct the voting of Equity Interests having a greater percentage ... of the ordinary voting power for the management of the Borrower than such 'person' or 'group'...." JPX 2, at JPM–CH00006003 (emphasis added). Thus, a default can occur only on consummation of a transaction that results in a change of control as described in these two sections.

The change of control issue presented in the above language is the most challenging problem for Charter in seeking reinstatement. Finding a change of control would defeat reinstatement and result in denial of confirmation. The analysis calls for a determination of what is meant by the phrase "ordinary voting power for the management of the borrower" and whether certain members of the Crossover Committee should be considered a group as that term is used in Section 13(d).

Both subsections of section 8(k) deal with Mr. Allen's retained power to control Charter following hypothetical corporate transactions that would have the effect of reducing the ordinary voting power for the management of the borrower. Because the Borrower is a limited liability company with membership interests that are 100% owned by one of a number of intermediate holding companies within the organizational structure, the measurement of voting power must occur at the CCI level. CCI, the public company, directs activity within each of the business units through its board of directors. Thus, it is from this vantage point, removed from the operating assets, that the ordinary voting power for the management of the Borrower is exercised by means of shareholder votes for directors who in turn govern the management of CCI and its subsidiaries, including CCO.

Section 8(k)(i) imposes the requirement that Mr. Allen have not less than 35% of the ordinary voting power for the management of CCO. The restructuring satisfies that requirement by granting Mr. Allen equity that on a fully diluted basis has the right to appoint four out of eleven directors to the board of reorganized CCI, but the analysis does not end there. Section 8(k)(ii) adds the element of relative ***239** voting power in situations where any group may end up with more that 35% of the ordinary voting power unless Mr. Allen has a greater percentage. This additional measurement comes into play only if a group formed for the purpose of acquiring, holding, or disposing of Charter's securities holds more than 35% of the ordinary voting power for the management of CCO.

Section 8(k)(ii) calls for a mathematical balancing of relative voting percentages in those instances where a person or group acquires more than 35% of ordinary voting power. The provision is something of a mystery, however. Throughout the trial, all parties assumed that the formula, if applicable and if out of balance, had the potential of derailing the Plan, but no one offered a cogent explanation as to the practical importance of the covenant that went beyond its mere existence and mandated technical requirements.

The business rationale for the formula is unstated. Presumably, the provision is intended to serve as a proxy for ongoing control by Mr. Allen despite material new investment by another investor or group of investors. But given the modification over time to the change of control covenants in the loan agreement, it is difficult to discern how a slight variation in the percentages, one way or the other, could have any impact on the credit risk of the borrower. It is simply part of the bargain that Charter struck with its lenders, a corporate land mine to be avoided if reinstatement is to be achieved.

The Court has deliberated at length regarding the conduct of the bondholder members of the Crossover Committee in relation to Section 8(k)(ii) and has concluded that these bondholders do not constitute a group. Just because parties are similarly situated and perhaps also similarly motivated does not necessarily lead to the conclusion that they constitute a group as that term is used in Section 8(k)(ii). Accordingly, this loan covenant does not apply to the restructuring transactions set forth in the Plan.

The term "group" for purposes of Section 8(k)(ii) is given a meaning that is borrowed from the definition that appears in Section 13(d) of the Securities Exchange Act, but the application of the defined term is different. Section 13(d) is a regulatory provision that speaks to disclosure obligations and, as a result, should be liberally construed to achieve the statutory objectives of increased reporting and transparency while Section 8(k)(ii) is a loan covenant that prohibits only a limited category of change of control transactions as such transactions are described and shaped by the language of that covenant. Because the covenant functions as a trigger to a potential default under a credit facility, it should be construed narrowly so as to enable the Borrower to engage in permissible corporate engineering. With that perspective in mind, the most active members of the Crossover Committee (i.e., Apollo Management L.P. ("Apollo"), Oaktree Capital Management, L.P. ("Oaktree") and Crestview Partners, L.P. ("Crestview")) do not constitute a group for purposes of Section 8(k)(ii)[14].

Apollo, Oaktree and Crestview certainly are members of a group in the sense that they are working together to maximize their investments in Charter and to achieve common economic goals, but they do not fit the definition of a group as used in Section 13(d). Separate investors would be considered a group and would have ***240** reporting obligations under the securities laws when two or more parties have agreed to acquire, hold, or dispose of shares of an issuer. Here, members of the purported group clearly are working cooperatively and have done so in the past in other comparable transactions, but they are not connected by any formal or informal agreement to act jointly with respect to Charter's securities.

There are, however, certain informal indications of cooperative behavior and overlapping business objectives to be achieved collectively. JPMorgan has focused on a number of statements made in internal e-mails (particularly those at Crestview) commenting about controlling a reorganized Charter and the willingness of Apollo and Oaktree to appoint Jeff Marcus of Crestview to the board even though Crestview's ownership percentage was below the minimum needed for board representation. Crestview also prepared internal memoranda describing the arrangements among the bondholders as a joint effort to control Charter. These statements, in the Court's view, candidly reflect how the business people involved in the transaction felt at the time and viewed their parallel interests—the theme is one of “we are in this together” with coordination being in everyone's best interest.

The Court simply is not convinced that these bondholders that found themselves by happenstance conscripted into the same restructuring were acting as a partnership, syndicate or other group for purposes of acquiring, holding or disposing of securities. No agreements, express or implied, have been shown to exist, and the testimony of the bondholders makes this point emphatically clear. The Court also does not find the expert testimony of JPMorgan's expert on this issue to be persuasive. Certain of the bondholders may be private equity firms with “loan to own” investment strategies, but their prime objective in these cases based on the testimony is a combination of loss mitigation and opportunism in their capacity as holders of Charter debt. Wanting to maximize a recovery by means of joining an ad hoc committee of bondholders is not equivalent to forming a group to acquire securities in the sense that 13(d) uses that term.

The Court concludes that the bondholders worked collectively and in a coordinated fashion but never formed a 13(d) group; they are independent actors who were brought together in this transaction by the unwanted circumstances of a restructuring initiated by Charter. Consequently, regardless of the aggregate equity or relative board power held by the so-called “takeover group,” Section 8(k)(ii) does not apply to the transaction, and Mr. Allen's board representation satisfies the requirement of Section 8(k)(i) that he hold not less than 35% of the ordinary voting power for the management of CCO.

Following Careful Scrutiny, The Settlement With Paul Allen Should Be Approved

The agreement with Paul Allen is a central but controversial feature of the proposed restructuring of Charter. The Court has focused considerable attention on this aspect of the Plan and has concluded that it represents an appropriate compromise of conflicting positions, negotiated vigorously and in good faith and otherwise satisfies the *Iridium* factors for approval of a settlement. It is uniquely valuable to the Charter estate by establishing the grounds for reinstatement of the senior debt and for realizing potential tax savings that aggregate billions of dollars.

Nonetheless, given Mr. Allen's position as chairman of Charter's board and controlling shareholder, the Court has viewed the CII Settlement with heightened scrutiny and some skepticism. The Court has ***241** even questioned why Mr. Allen should be receiving any valuable consideration at all for cooperating with Charter and doing things for the benefit of Charter that seem to fall into the category of the proper thing to do. After all, Mr. Allen has been closely associated with Charter for years and the involvement of such a well-heeled sponsor no doubt has been, until recently, an ongoing source of comfort to shareholders and creditors alike. Although the Hippocratic Oath does not apply, it is not unreasonable to expect someone in Mr. Allen's position to do no harm to those stakeholders.

Skepticism notwithstanding, the Court recognizes that Mr. Allen is a businessman and that Charter is not and never was a philanthropic venture. As explained by Mr. Millstein in his rebuttal testimony, the restructuring premise from the outset assumed that Mr. Allen would be entitled to compensation for his cooperation in preventing a change of control that, depending on one's perspective, either created or avoided the destruction of substantial value for other stakeholders. The CII Settlement also indisputably is the product of a spirited negotiation in which sophisticated adversaries and their expert advisors bargained with each other aggressively and in good faith at a time when the prospect of a free-fall bankruptcy loomed large in the minds of the negotiators. The give and take of that process helps to validate the fairness of the result.

Additionally, the numbers themselves are undeniably powerful. Mr. Allen is to receive \$375 million including approximately \$180 million classified as pure settlement consideration[15] while the benefits to the estate from reinstatement, future tax savings and proceeds of the rights offering are estimated to total well over \$3 billion. The amounts to be paid to Mr. Allen, while significant in absolute dollars, are not excessive in comparison to what Charter is to receive. And that is the main economic reason for approving the CII Settlement. The direct and indirect value to the estate and its creditors outweighs by a high multiple the amounts allocated to Mr. Allen.

Importantly, the CII Settlement was reviewed and approved by independent directors of Charter's board of directors who, while not members of a formal special committee, functioned as an independent group within the board. The independent directors, some of whom testified during the trial, are highly qualified individuals who had a regular practice during board meetings of convening separately from Mr. Allen and his designated directors to consider what was in Charter's best interest. These independent directors considered and approved the CII Settlement and concluded unanimously that approval was in the best interest of Charter. Given the role played by the independent directors and the evidence indicating that Mr. Allen did not exert any undue influence over Charter in negotiating the CII Settlement, the CII Settlement should be evaluated under the standards applicable to approval of bankruptcy settlements in this Circuit and not under the "entire fairness" standard of Delaware law applicable to transactions with controlling insiders.

***242** After giving this subject considerable thought, the Court is satisfied that the CII Settlement is fair, in the best interests of the estate, and should be approved. The releases relating to the CII Settlement are also appropriate under the circumstances presented and are enforceable.

The CCI Noteholders Have Failed To Show That They Are Not Being Treated Fairly

Under the provisions of 11 U.S.C. §§ 101 *et seq.* (the "Bankruptcy Code"), the CCI Noteholders are entitled to receive distributions "of a value, as of the effective date of the [P]lan, that is not less than the amount that [they] would so receive ... if the [Debtors] were liquidated under chapter 7". 11 U.S.C. § 1129(a)(7). The CCI Noteholders are, contrary to their argument, receiving in excess of that. The Debtors' liquidation analysis shows that in a liquidation under chapter 7, the CCI Noteholders would receive recoveries in the range of approximately 18.4% of their claims. Their recoveries under the Plan far exceed that range, providing an estimated recovery of 32.7%. Indeed, the CCI Noteholders are receiving the highest recovery under the Plan among all of the Debtors' unsecured noteholders.

The CCI Noteholders base their unfair treatment argument in large part on a series of "add-ons," including recoveries from alleged preference and avoidance actions, programming contracts, stock options and other intercompany receivables, that their expert witness, Edward McDonough, identified as sources from which the Debtors and, thereby, the CCI Noteholders, may receive additional recoveries in a liquidation. The CCI Noteholders failed, however, to present any evidence as to the likelihood that there will be any actual or meaningful recoveries on account of the "add-ons." Indeed, Mr. McDonough admitted during cross examination that the CCI Noteholders' potential recovery from the additional sources he identified could be lower than as stated in his expert report—he even admitted that the potential recovery from any or all of the additional sources could be zero. As such, his testimony is largely speculative.

The CCI Noteholders also claim that net operating losses ("NOLs") generated through losses of the operating companies "belong" to CCI and that the CCI Noteholders therefore should receive additional distributions under the Plan to compensate them for the NOLs. Notably, every witness who testified during the trial with respect to the NOLs claimed not to be a tax expert. Furthermore, there is no evidence in the record that establishes CCI's right to independently exploit and derive value from the NOLs, regardless of which Charter entity actually "owns" them.

Finally, the CCI Noteholders also failed to produce any evidence (or rebut the Debtors' evidence via Mr. Doody's testimony to the contrary) that their claims were improperly classified separately from Class A–3 CCI General Unsecured Claims.

The various challenges to confirmation of the Plan presented by the CCI Noteholders are long on rhetoric but short on proof. These creditors have been unable to show that they will not be receiving under the Plan more value than they would receive in a liquidation nor have they succeeded in proving that the Plan fails to satisfy all applicable standards for confirmation.

In the following sections of this Opinion the Court will address, in turn, issues related to reinstatement of the credit agreement, the settlement with Paul Allen (including releases to be given in connection with that settlement) and those confirmation requirements that have been contested by the CCI Noteholders.

243 *Reinstatement

Under the Plan, the Debtors propose to reinstate the claims of their senior secured lenders pursuant to Section 1124(2) of the Bankruptcy Code. The Debtors maintain that reinstatement will leave the senior lenders unimpaired and entitle them to payment in full in accordance with the credit agreement. JPMorgan, as agent, objects to confirmation of the Plan, asserting the existence of various defaults that preclude reinstatement. Anticipating the reinstatement issue, on the petition date, JPMorgan for itself and as agent, filed an adversary complaint, docketed at Adversary Proceeding No. 09–01132(JMP)[16], (i) asserting the occurrence of a prepetition default identical to the alleged default identified in JPMorgan's objection to Plan confirmation, (ii) asserting that the adversary proceeding is not a core proceeding and (iii) refusing to consent to entry of final orders or a judgment by this Court. *See generally, JPMorgan Chase Bank, N.A. v. Charter Comm'ns Operating, LLC (In re Charter Comm'ns),* 409 B.R. 649, 651–53 (Bankr.S.D.N.Y.2009) (providing procedural and factual background of Adversary Proceeding No. 09–01132(JMP)).

The Debtors moved to dismiss the adversary complaint and also sought a determination as to whether the litigation brought by JPMorgan is a core proceeding under 28 U.S.C. § 157. (Adv. Proc. Mot. Dismiss.) At a hearing held on May 5, 2009, the Court issued an oral ruling on the record holding that the dispute is core. Adv. Proc. Tr. 58:14–23 (May 5, 2009). In a Memorandum Decision dated July 7, 2009, the Court further explained its ruling but declined to make a determination with respect to the alleged prepetition default, which determination would likely be dispositive of whether or not reinstatement is permissible as contemplated in the Plan. *In re Charter Comm'ns,* 409 B.R. at 657 (internal quotation marks and citations omitted).

Given the extensive trial record, it is now appropriate for the Court to address all alleged defaults in the context of both JPMorgan's objection to Plan confirmation and the adversary proceeding. As explained in the introduction and for the reasons that follow, JPMorgan's objections to the Plan on the grounds of reinstatement are overruled, and judgment will be entered for Charter with respect to the adversary proceeding.

The basis for JPMorgan's Plan objection comprises three alleged defaults under the credit agreement. Specifically, JPMorgan asserts that (i) the Designated Holding Companies were unable to pay their debts as they become due in violation of section 8(g)(v) of the credit agreement; (ii) the consummation of the Plan will cause a change of control to occur in violation of section 8(k) of the credit agreement; and (iii) an acceleration of debt of the Designated Holding Companies due to the filing of the bankruptcy cases has caused a cross-acceleration default under the credit agreement. JPMorgan Br. Opp'n at 42, 66, 84. In the adversary proceeding, JPMorgan confines its arguments to those related to section 8(g)(v) of the credit agreement.

Burden of Proof

As Plan proponent, Charter bears the burden of establishing compliance with the factors set forth in Bankruptcy Code section 1129. *See, e.g. Heartland Fed. Sav. & Loan Ass'n v. Briscoe Enters. (In re Briscoe Enters.),* 994 F.2d 1160, 1165 (5th Cir.1993) (stating that "[t]he combination of legislative silence, Supreme Court ***244** 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"); *In re World Com, Inc.*, 2003 WL 23861928, *46, 2003 Bankr.LEXIS 1401 at *136 (Bankr.S.D.N.Y.2003) (citing *Briscoe*).

However, as the party objecting to reinstatement under the Plan and as plaintiff in the adversary proceeding, JPMorgan has the burden of producing evidence to support the occurrence of defaults under the credit agreement. This finding that JPMorgan has the burden to prove a default under the credit agreement is based on a long line of cases addressing the issue of burden of proof with respect to contract assumption in the bankruptcy context. *See, e.g., In re Cellnet Data Systems, Inc.,* 313 B.R. 604, 608 (Bankr.D.Del.2004) (stating that "the nonbankrupt party [to an executory contract] bears [the] burden to assert any defaults prior to" assumption of such contract) (internal quotation marks and citations omitted); *Kings Terrace Nursing Home v. New York State Dep't of Soc. Servs. (In re Kings Terrace),* 1995 WL 65531 at *9 (explaining that a party opposing contract assumption "has the burden of coming forward with all alleged defaults and demonstrating that those defaults have been properly noticed on the debtor") (citations omitted).

The Debtors and JPMorgan each has the independent concurrent burden to persuade the Court by a preponderance of the evidence that, in the case of the Debtors, reinstatement is appropriate because no defaults have occurred or will occur under the credit agreement and, in the case of JPMorgan, that such defaults have occurred or will occur. It is a curious posture that could create a dilemma if neither party had succeeded in carrying its burden. The Court is satisfied, however, that the Debtors have met their burden in establishing the grounds for reinstatement and that JPMorgan has failed to prove the occurrence of defaults under the credit agreement.

Standard for Reinstatement

It is an axiomatic principle of chapter 11 practice that creditors cannot be elevated to a better position than their pre-petition legal entitlements. *Butner v. United States,* 440 U.S. 48, 55, 99 S.Ct. 914, 59 L.Ed.2d 136 (1979). To that end, Bankruptcy Code sections 1123 and 1129 provide that a chapter 11 plan of reorganization may in appropriate circumstances treat certain obligations as unimpaired and reinstate the terms of a pre-petition debt obligation. 11 U.S.C. §§ 1123(b)(1), 1123(b)(5), 1129(a)(1). *See also* 7 Collier on Bankruptcy ¶ 1124.03 (15th ed. Rev.) (explaining that the Bankruptcy Code "permits the plan to reinstate the original maturity of the claim or interest as it existed before the default without impairing the claim or interest").

To reinstate a pre-petition obligation, a plan must de-accelerate any acceleration of such debt, reinstate the original maturity applicable to the debt, and provide for the cure of certain defaults that my have occurred. 11 U.S.C. § 1124(2). Bankruptcy Code section 1124 allows a debtor to cure any defaults, nullifying any consequences of such defaults, and returning the parties to pre-default conditions. *See Southland Corp. v. Toronto Dominion (In re Southland Corp.),* 160 F.3d 1054, 1058 (5th Cir.1998). When a debt obligation is reinstated, a creditor is "thereby given the full benefit of his original bargain." *In re Gillette Assocs., Ltd.,* 101 B.R. 866, 875 (Bankr.N.D.Ohio 1989). "The holder of a claim or interest who under the plan is restored to his original position, when others receive less or nothing at all, is fortunate indeed and has no ***245** cause to complain." S. Rep. 95–958, at 120 (1978), U.S.Code Cong. & Admin.News 1978, p. 1935.

Applying this standard to the present controversy leads to a determination of whether defaults have occurred or will occur under the credit agreement and whether it is appropriate to treat JPMorgan and the other senior lenders as unimpaired creditors who are not entitled to vote for or against the Plan. This determination calls for a careful examination of the credit agreement itself and the disputed facts regarding Charter's value and sources of liquidity.

Surplus

JPMorgan alleges various defaults under the credit agreement pursuant to section 8(g)(v) thereof. JPMorgan argues that (i) when CCO drew down $250 million under the credit agreement on November 5, 2008, such borrowing was based on a misrepresentation that CIH and CCH were able to pay their debts as they become due, and (ii) when CCO requested additional funds on February 3, 2009, such request also was based on a misrepresentation that CIH and CCH were able to pay their debts as they become due. JPMorgan Br. Opp'n at 66. JPMorgan further asserts that, at a November 14, 2008 meeting, the Debtors' board of directors improperly determined that CCH I had a surplus sufficient to make a dividend to CIH, which dividend enabled CIH to make an interest payment on its debt. (The distribution to CCH enabling it to make its interest payment was made through payment of an intercompany account.)

JPMorgan bases its assertions on the claim that in November 2008, CIH and CCH had $224 million of interest payments due between November 2008 and April 2009 and no available source of cash to make those interest payments. JPMorgan Br. Opp'n at 66. Further, as of February 3, 2009, CIH and CCH had not made their $72 million January 2009 interest payments, had $81 million of debt due in April 2009, and no available source of cash to make those payments. JPMorgan Br. Opp'n at 66. JPMorgan asserts that CCO's alleged misrepresentations that CCH and CIH had the ability to pay their debts as they become due were contractual defaults that preclude reinstatement of the credit agreement. JPMorgan Br. Opp'n at 66.

Section 8(g)(v) of the credit agreement provides that it shall be an event of default if any of the Designated Holding Companies "shall generally not, or shall be unable to, or shall admit in writing its inability to, pay its debts as they become due." JPX 2 § 8(g)(v). JPMorgan asserts that section 8(g)(v) is prospective in nature leading to the conclusion that a prepetition default has occurred that is not curable and that precludes reinstatement. The Court disagrees.

Representatives from various participants in the lender syndicate testified at trial—none could identify an instance where a lender had declared an event of default based on a prospective assessment of what *may* occur at an unspecified time in the future. Notably, JPMorgan's own witness, who has 29 years of banking experience, had never called a default based on a prospective reading of a clause like 8(g)(v), nor is she generally aware of JPMorgan's ever having called such a default. 8/25/09 Tr. 116:14–25 (Kurinskas). Moreover, no witness from any of the lenders under the credit agreement who testified with respect to 8(g)(v) could describe definitively how far into the future such a prospective obligation should extend. 7/31/09 Tr. 49:5–50:8 (Hooker) (unsure as to how far in the future); 8/18/09 Tr. 14:25 (Kurinskas) (4–5 quarters into the future); 8/18/09 Tr. 13:24 (Ojea–Quintana) (no specific ***246** period of time applies); 8/18/09 Tr. 75:12 (Morris) (6–12 months into the future).

These varying estimates of the forward looking time period covered by the covenant support the Court's conclusion that the provision is simply too uncertain as a financial benchmark if it were interpreted as having prospective application. Despite the varying views expressed as to the period covered by the test of the ability to pay debts, it is JPMorgan's position that section 8(g)(v) is intentionally vague. 8/25/09 Tr. 30:9 (Kurinskas). But vagueness is hardly a desirable characteristic for identifying a potential default under a multi-billion dollar credit facility. Making a covenant such as this intentionally vague as to future events would naturally invite disputes as to the proper way to apply the provision. Given the disagreement among the lenders as to how long the prospective period of 8(g)(v) should be construed and the obvious problem in applying an "intentionally vague" covenant, the Court finds that a prospective reading of 8(g)(v) is so speculative, so impractical and so potentially problematic in its application as to be unworkable and implausible.

As argued by the Debtors, such a forward-looking interpretation "would leave the borrower in the dark as to whether or when to report that a default has occurred." Debtors' Br. Supp. at 14. Accordingly, the most logical and commercially realistic reading of 8(g)(v) is that it relates to the *actual* inability to pay a debt that shall become due. Such a reading of the language of section 8(g)(v) from a linguistic perspective is also fully consistent with other triggering events within the same section of the credit agreement that use the word "shall" in terms of the present tense, not the future ("shall generally not" ... "shall admit in writing").

Even if the Court were to agree with JPMorgan and interpret section 8(g)(v) prospectively, the evidence is inconclusive in demonstrating that CCH and CIH would be unable to pay their debts as of any future date. JPMorgan has proven that there was doubt on the part of the Debtors as to the adequacy of surplus—indeed, the Debtors deleted the representation from their traditional public disclosure that "we believe that our relevant subsidiaries currently have surplus and are not insolvent" just after the November 5, 2008 draw-down. JPX 69 at 38 (stating that "[p]rimarily in light of the economic environment, it is uncertain whether we will have, at the relevant times, sufficient surplus at CIH and its parents, or potentially its subsidiaries, to make distributions"). Additionally, JPMorgan's expert credibly testified that the valuation of the Debtors as of November 5, 2008 was less than the $18.7 billion threshold needed for surplus. *See* 8/31/09 Tr. 27:4–30:10 (Taylor). The credit agreement, however, does not require that the Designated Holding Companies have surplus or even be solvent. *See* 8/25/09 Tr. 84:7–8, 119:22–120:1 (Kurinskas). Rather, surplus is a requirement under Delaware law, to be measured at the time a dividend is declared. Del.Code Ann. Tit. 8, § 170(a).

The Court finds persuasive the record evidence regarding various other methods that the Debtors had available to enable the Designated Holding Companies to pay scheduled future debts. The declaration of a dividend (requiring surplus) is not the only means by which the Designated Holding Companies may make and have made interest payments. *See* 8/25/09 Tr. 120:15–124:12 (Kurinskas). The Debtors have, for example, used intercompany notes and intercompany transfers to make interest payments from the Designated Holding Companies. *See* CX 101, §§ 7.6, 7.8; CX 110 at JPM–CH 00029446; CX 305; ***247** 7/31/09 Tr. 81:22–82:21 (Schmitz). These alternative payment methods do not require surplus. *See* 7/21/09 Tr. 205:14–16 (Smit); 8/25/09 Tr. 121 (Kurinskas). Here, it is significant that the Designated Holding Companies in fact paid all of their debts as they became due prior the filing of these chapter 11 cases. The Debtors have shown that they had the flexibility and ingenuity to access capital and distribute funds throughout their corporate structure in order to make interest payments such that there has been no pre-petition violation of section 8(g)(v).

Given that flexibility in moving funds and the role played by Charter's legal and financial advisors, the Debtors' board of directors did not act improperly in evaluating the surplus question. Under Delaware law, a determination of surplus is subject to the business judgment standard and may be set aside only on a finding of bad faith or fraud on the part of the board. *See Klang v. Smith's Food & Drug Ctrs., Inc.,* 702 A.2d

150, 156 (Del.1997) (explaining that, in determining a claim based upon a section of the Delaware General Corporation Law (Del.Code Ann., tit. 8) requiring surplus, the "court may defer to the board's measurement of surplus" and that "[i]n the absence of bad faith or fraud on the part of the board, courts will not substitute [their] concepts of wisdom for that of the directors") (internal quotation marks and citations omitted).

There are sufficient facts presented here for the Court to defer to the Charter board. At its November 14, 2008 meeting, the Charter board of directors decided with input from its advisors that there was sufficient surplus to make a distribution to CIH through the payment of a dividend. 7/31/09 Tr. 85–100 (Schmitz); 7/21/09 Tr. 206:13–215:4 (Smit); 7/22/09 Tr. 186–95 (Merritt); 7/21/09 Tr. 36–42 (Millstein). Specifically, the board considered a draft Duff & Phelps analysis prepared in connection with the Debtors' annual franchise impairment valuation on October 1, 2008. The analysis showed a total enterprise value of $21.6 billion and a surplus at the relevant Designated Holding Company of $2.839 billion. *See* CX 225 at 4; 7/21/09 Tr. 208:23–209:18, 211:14–212:25 (Smit).

The board also reviewed information that sensitized the financial projections, utilizing substantially lower levels of assumed EBITDA growth, and still concluded that there would be sufficient surplus for a dividend of $62,812,000 to CIH. CX 225 at 5; 7/21/09 Tr. 209:18–210:4, 213:1–214:21 (Smit). Finally, the board sought and obtained the advice of its financial advisor, who confirmed the reasonableness of the Duff & Phelps analysis. 7/21/09 Tr. 37:9–42:9 (Millstein). While not determinative, it is worth noting that the estimates of value used by the board were either lower than, or equivalent to, contemporaneous enterprise valuations prepared by JPMorgan itself and various other market analysts. CX 33; 8/3/09 Tr. 122:8–125:10 (DenUyl). This contemporaneous corroboration by informed market participants supports a finding that the board acted reasonably in its deliberations regarding surplus.

Given the foregoing, there is no showing of bad faith or fraud, and the Court will not substitute its judgment for that of the board. Importantly, regardless of whether the ability to pay debts as they become due is to be measured under section 8(g)(v) as of the present or as of an unspecified future date, JPMorgan has not established that there has been a pre-petition breach of this section of the credit agreement. JPMorgan's Plan objection based on section 8(g)(v) is, therefore, overruled and its adversary proceeding for a declaratory judgment as to the occurrence of a pre- ***248** petition default under this section is dismissed.

Change of Control

JPMorgan next argues that implementation of the Plan will result in a change of control under sections 8(k)(i) and 8(k)(ii) of the credit agreement, thereby triggering a default under the credit agreement that impairs JPMorgan's contractual rights and prevents reinstatement. JPMorgan Br. Opp'n at 42.

Section 8(k) of the credit agreement provides, in relevant part, that it shall be an event of default for certain specified changes to occur in the ordinary voting power for the management of the Borrower, as noted below:

> (i) the Paul Allen Group shall cease to have the power, directly or indirectly, to vote or direct the voting of Equity Interests having at least 35% (determined on a fully diluted basis) of the ordinary voting power for the management of the Borrower, [or]
>
> (ii) the consummation of any transaction ... the result of which is that any 'person' or 'group' (as such terms are used in section 13(d) and 14(d) of the Securities Exchange Act of 1934, as amended), other than the Paul Allen Group has the power, directly or indirectly, to vote or direct the voting of Equity Interests having more than 35% (determined on a fully diluted basis) of the ordinary voting power for the management of the Borrower, unless the Paul Allen Group has the power, directly or indirectly, to vote or direct the voting of Equity Interests having a greater percentage (determined on a fully diluted basis) of the ordinary voting power for the management of the Borrower than such 'person' or 'group' ....

JPX 2 §§ 8(k)(i), (ii).

Although the phrase "ordinary voting power for the management of the Borrower" is undefined, based on the record and a fair reading of the language, given Charter's holding company structure that voting power only can be exercised at the CCI level. Voting power at the parent necessarily extends to the management of all Debtor entities, including the Borrower (CCO). Because CCO is a limited liability company with membership interests that are 100% owned by an intermediate holding company within the organizational structure of the Debtors, the measurement of the percentage of voting power must occur at CCI. Indeed, CCO and its immediate parent entities have no separate boards of directors or other management—the board and management of CCI manage all Debtor entities, including CCO. 7/21/09 Tr. 191:16–193:11 (Smit). In addition, there is a Management Agreement between CCO and CCI (the "Management Agreement"), pursuant to which CCO appoints CCI as its manager and CCI agrees to provide all "management services" for CCO. *See* CX 305.

The board of CCI, which governs the management of CCI and its subsidiaries, including CCO, is elected by the shareholders of CCI. Under the Plan and Certificate of Incorporation for reorganized CCI, the Paul Allen Group will have more than 38.4% of the voting power of the shares of CCI on a fully-diluted basis and will also control four of the eleven board seats (36.36%) at CCI. 8/24/09 Tr. 20–21 (Goldstein); CX 406 at 4. Therefore, the restructuring proposed in the Plan easily satisfies the requirements of section 8(k)(i) of the credit agreement.

The more complicated question involves the balancing of relative percentages of ownership to the extent that section 8(k)(ii) is deemed to apply due to the existence of a section 13(d) group, consisting of Apollo, Oaktree, Crestview and ***249** Franklin (these members of the Crossover Committee are referred to collectively as the "Bondholders"). Upon Plan consummation, the shareholdings of these Bondholders will aggregate in excess of 35% of the voting rights of the equity of the reorganized debtors. JPMorgan alleges that the Bondholders—colorfully dubbed the "Takeover Group"—have acted and are acting together in a concerted effort to acquire equity securities of the Debtors. Accordingly, if the Bondholders really are a "Takeover Group," the restructuring will violate section 8(k)(ii) of the credit agreement.

The Securities Exchange Act of 1934 characterizes a 13(d) "group" as two or more persons who "agree" to "act as a partnership, limited partnership, syndicate, or other group for the purpose of acquiring, holding, or disposing of securities of an issuer...." 15 U.S.C. § 78m(d)(3); Rule 13d–5(b)(1), 17 C.F.R. § 240.13d–5(b)(1). The evidence in the record does not support a finding that the Bondholders constitute a 13(d) group. The Bondholders came together only after each made an independent decision to purchase Charter debt. *See* 8/24/09 Tr. 233:12–234:18 (Gompers). In fact, it was Charter's financial advisor that suggested the Bondholders form an *ad hoc* committee. 7/21/09 Tr. 50:25–53:21 (Millstein). While each of them may be similarly motivated to make the best of a currently distressed investment, there are no binding agreements of any kind that tie the Bondholders together as a group for purposes of dealing with Charter's equity securities.

To be sure, the record reflects indications of cooperative behavior among the Bondholders, and that is not surprising. *See, e.g.,* 7/28/09 Tr. 73:5–11 (Zinterhofer) (Apollo representative testifying that he considers Oaktree, Crestview and Franklin as "partners" in the Charter investment.) However, the case law makes clear that the existence of a group must be established by proof of an actual agreement. *See, e.g., Quigley Corp. v. Karkus,* 2009 WL 1383280, *3, 2009 U.S. Dist. LEXIS 41296, *9–*10 (E.D.Pa.2009) (stating that a "[m]ere relationship, among persons or entities, whether family, personal or business, is insufficient to create a group ... [and][t]here must be agreement to act in concert") (citation omitted); *Litzler v. CC Invs., L.D.C.,* 411 F.Supp.2d 411, 415 (S.D.N.Y.2006) (explaining that "[g]eneral allegations of parallel investments by institutional investors do not suffice to plead a 'group' "). Even JPMorgan's own expert concedes that there is no express agreement or understanding among the Bondholders. 8/24/09 Tr. 243:25–245:21 (Gompers). To the extent that this expert concludes that an agreement can be inferred based on the observed behavior of private equity funds in other transactions, the Court rejects such opinion testimony as speculative, unreliable and of no probative value.

Although the Bondholders worked collectively, they never formed a 13(d) group; they are independent actors who were brought together in this transaction by the restructuring initiated by the Debtors. Consequently, regardless of the aggregate equity or relative board power that the Bondholders hold as a group, Section 8(k)(ii) does not apply to the transaction, and no impermissible change of control will occur under this section upon consummation of the Plan. Accordingly, JPMorgan's[17] Plan objection based on section 8(k) is overruled.

***250** *Cross–Acceleration*

JPMorgan's final argument against reinstatement relates to cross acceleration resulting from alleged defaults of the Designated Holding Companies under section 8(f) of the agreement that it claims are not *ipso facto* defaults and for which no cure is provided under the Plan. JPMorgan Br. Opp'n at 84.

Section 8(f) provides, in pertinent part, that it shall be an event of default under the credit agreement if any Designated Holding Company other than CCOH shall (i) fail to pay any installment of principal on any indebtedness exceeding $200 million, or (ii) fail to make an interest payment or cause any other event of default with respect to such indebtedness, provided that the failure to make such interest payment or such other event of default results in the acceleration of such indebtedness. JPX 2 § 8(f).

When CCH, CIH, CCH I and CCH II (each a Designated Holding Company) filed bankruptcy petitions, each had over $200 million in debt governed by indentures which contain identical or nearly identical provisions providing that (i) a bankruptcy filing is a default and (ii) all outstanding notes shall be accelerated upon a bankruptcy default. JPX 369 (CCH Indenture) at 6.01 and 6.02; JPX 370 (CCH Indenture) at 6.01 and 6.02; JPX 371 (CCH Indenture) 6.01 and 6.02; JPX 372 (CCH Indenture) 6.01 and 6.02; JPX 373 (CIH Indenture) at 6.01 and 6.02; JPX 374 (CCH I Indenture) at 6.01 and 6.02; and JPX 375 (CCH II Indenture) at 6.01 and 6.02.

JPMorgan argues that such acceleration constitutes an event of default under section 8(f) of the credit agreement and that this default is not an *ipso facto* default because its Borrower under the credit agreement, CCO, is solvent. JPMorgan Br. Opp'n at 84. JPMorgan bases its acceleration argument on the fact that section 8(f) does not speak to CCO's financial condition or bankruptcy but rather to the financial condition of affiliated, non-obligor Designated Holding Companies. JPMorgan Br. Opp'n at 87. JPMorgan contends that where a debtor is solvent, a court's role is to enforce creditors' rights pursuant to contract terms, including those terms set forth in section 8(f).

Bankruptcy Code section 365(e) prohibits termination or modification of a contract "solely because of a provision in such contract ... that is conditioned on [*inter alia*] the insolvency or financial condition of the debtor [or] the commencement of a case under this title." 11 U.S.C. § 365(e). In addition, Bankruptcy Code section 1124(2)(A) carves out of its cure requirements "a default of a kind specified in section 365(b)(2) ... or of a kind that section 365(b)(2) expressly does not require to be cured." 11 U.S.C. § 1124(2)(A). Section 365(b)(2), in turn, specifies that those same two relevant categories of default need not be cured—i.e., those relating to "the insolvency or financial condition of the debtor at any time before the closing of the case" and "the commencement of a case under this title." 11 U.S.C. § 365(b)(2)(A),(B).

Under relevant case law, because "cross-default provisions are inherently suspect, ... [b]efore enforcing them, a court should carefully scrutinize the facts and circumstances surrounding the particular transaction to determine whether enforcement of the provision would contravene an overriding federal bankruptcy ***251** policy and thus impermissibly hamper the debtor's reorganization." *Kopel v. Campanile, (In re Kopel),* 232 B.R. 57, 64 (E.D.N.Y.1999) (citations omitted); *see also Lifemark Hospitals, Inc. v. Liljeberg Enters. (In re Liljeberg Enters.),* 304 F.3d 410, 445 (5th Cir.2002) (quoting *In re Kopel).* Thus, a determination to enforce a cross-default provision necessarily is fact-specific. The question presented is whether the enforcement of section 8(f) urged by JPMorgan would contravene the overriding federal bankruptcy policy that *ipso facto* clauses are, as a general matter, unenforceable. *See, e.g., In re Chateaugay Corp.,* 1993 WL 159969, *5, 1993 U.S. Dist. LEXIS 6130, *15–*16 (S.D.N.Y.1993) (explaining that Bankruptcy Code section 365 "abrogates the power of *ipso facto* clauses" and, therefore, "[n]o default may occur pursuant to an *ipso facto* clause").

The section 8(f) default is one relating to the insolvency or financial condition of a debtor and therefore need not be cured under Bankruptcy Code section 1124. Charter is an integrated enterprise, and the financial condition of one affiliate affects the others. Debtors' Br. Supp. at 69; 7/22/2009 Tr. 209–11 (Merritt). JPMorgan itself has long linked the financial condition of the Designated Holding Companies to that of CCO.[18] Indeed, JPMorgan's own witness testified that "[t]o the extent that there's a default at one of [CCO's] affiliates, that could have an impact on CCO." 8/25/2009 Tr. 64 (Kurinskas). The record also shows that JPMorgan was the lead underwriter in a March 2008 issuance of CCO notes in which the offering memorandum provided that, because CCI "is [CCO's] sole manager, and because [CCO is] wholly owned by Charter Holdings, CIH, CCH I, CCH II, and CCO Holdings, their financial liquidity problems could cause serious disruption of [CCO's] business and could have a material adverse affect on [CCO's] operations and results." CX 134; 8/25/2009 Tr. 67 (Kurinskas).

The JPMorgan witness further testified that "because of the relationship between CCO at the bottom and the holding companies, including designated holding companies above, JPMorgan specifically negotiated defaults and events of defaults specifically linking the financial condition of the designated holding companies and the financial condition of CCO." 8/25/2009 Tr. 64:23–65:4 (Kurinskas); *see also* Adv. Proc. Compl. ¶¶ 5, 34, *In re Charter Comm'ns,* 409 B.R. at 658 (stating that "[c]oncentrating attention on a single solvent entity within the corporate structure disregards relationships within the integrated corporate enterprise," and noting that in drafting the adversary complaint, "JPMorgan acknowledged the close relationship between CCI and its affiliates") (internal quotation marks omitted).

Given the foregoing, an event of default based on the financial condition of a Designated Holding Company is necessarily connected both factually and contractually to the financial condition of CCO. Thus, any such cross acceleration event of default is an *ipso facto* default that either is ineffective and unenforceable or does not need not to be cured. Accordingly, section 8(f) of the credit agreement is not a bar to reinstatement.

Motion to Dismiss the JPMorgan Adversary Proceeding Now Moot

The motion to dismiss filed by Charter remains outstanding with respect to the ***252** adversary proceeding filed by JPMorgan on the first day of these bankruptcy cases. The Court ruled on the core versus noncore aspect of that motion but held in abeyance any ruling on the adequacy of the complaint. In light of the trial on the merits of JPMorgan's complaint, the motion to dismiss has been rendered moot.

Dismissal on the pleadings is not appropriate because there has been a full evidentiary hearing in which JPMorgan was unable to prove the existence of any prepetition defaults under the credit agreement. As noted above, the Court has concluded that Section 8(g)(v) of the credit agreement should not be read prospectively, and even if it were to be so interpreted, the facts do not support a finding that any of the Designated Holding Companies was unable to pay its debts as they become due. Accordingly, judgment in the adversary proceeding is granted in favor of Charter.

Settlement With Paul Allen

Standard

The CII Settlement is a key component of the Plan that, for reasons noted in those sections of this opinion dealing with reinstatement, is a necessary condition for Charter to reinstate its senior secured debt. To the extent that a Plan includes a settlement, the settlement is to be judged in accordance with the law applicable to the approval of a settlement under Rule 9019 of the Federal Rules of Bankruptcy Procedure. *Motorola, Inc. v. Official Comm. of Unsecured Creditors (In re Iridium Operating LLC),* 478 F.3d 452, 462 (2d Cir.2007).

A bankruptcy court may approve a settlement under *Rule 9019* if it is fair and equitable and in the best interests of the estate. *Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc. v. Anderson,* 390 U.S. 414, 424–425, 88 S.Ct. 1157, 20 L.Ed.2d 1, (1968). In order to determine if a settlement meets these standards a court must be apprised of all "factors relevant to a full and fair assessment of the wisdom of the proposed compromise." *Id.* And while the "approval of a settlement rests in the Court's sound discretion, the debtor's business judgment should not be ignored." *In re Stone Barn Manhattan LLC,* 405 B.R. 68, 75 (Bankr.S.D.N.Y.2009) (internal citations omitted).

Courts in the Second Circuit evaluate whether a proposed settlement is in the best interests of the estate and fair and equitable by applying the factors set forth in *In re Iridium Operating LLC.*[19] 478 F.3d at 462. The standard does not require that the settlement be the best the debtor could have obtained nor does it require the court to conduct a mini-trial of the questions of law and fact. *In re Adelphia Comm'ns Corp.,* 327 B.R. 143, 159 (Bankr.S.D.N.Y.), *adhered to on reconsideration,* 327 B.R. 175 (Bankr.S.D.N.Y.2005), *and aff'd,* 337 B.R. 475 (S.D.N.Y.) *aff'd,* 224 Fed.Appx. 14 (2d Cir.2006). ***253** Rather, the Court must "canvass the issues raised by the parties" and determine whether the settlement is reasonable. *In re Stone Barn Manhattan,* 405 B.R. at 75; *In re Teltronics Servs., Inc.,* 762 F.2d 185, 189 (2d Cir.1985).

The CII Settlement

The CII Settlement is the cornerstone of the Plan and the means by which the Debtors avoid a change of control. Reinstatement (made possible by the CII Settlement) will save the Debtors and their estates hundreds of millions of dollars in annual interest expense. 8/24/09 Tr. 16:18–17:3 (Goldstein); VDX 3 (CII Settlement: "Gives" and "Gets"). The Settlement also provides for Mr. Allen's forbearance from exercising his prepetition exchange rights and maintenance of a one percent interest in Charter Communications Holding Company, LLC ("Holdco"). This forbearance results in the Debtors' preservation of approximately $2.85 billion of NOLs, with an estimated cash value of over one billion dollars. *See* Degnan Aff. ¶ 9; 8/24/09 Tr. 16:18–17:3 (Goldstein); VDX 3 (CII Settlement: "Gives" and "Gets"). Additional aspects of the CII Settlement include the $1.6 billion rights offering, a stepped-up tax basis in a significant portion of the Debtors' assets, and the purchase of Mr. Allen's CC VIII Preferred Units. *See* VDX 3 (CII Settlement: "Gives" and "Gets"). The Debtors are receiving in excess of $3 billion in the CII Settlement. In exchange for this value, the Debtors are providing Mr. Allen with approximately $375 million.[20] *Id.* The breakdown of the "gives" and "gets" is as follows:

***254** *The CII Settlement Meets the 9019 Standard*

The CII Settlement is a controversial feature of the Plan not because of the manifest benefits to the estate but because of the agreement to transfer substantial consideration to Mr. Allen. The Court has carefully considered the relative benefits and costs summarized in the above chart and is convinced for the reasons noted in the following sections that this essential component of the Plan complies in all respects with the *Iridium* standards, is in the best interests of the Debtors' estates and is fair and equitable.

Best Interests of the Estate

The CII Settlement is in the best interests of the Debtors estates because it (i) renders the Debtors' Plan feasible and (ii) is a reasonable settlement. The Debtors' Plan is premised on the twin goals of debt reinstatement and preservation of tax attributes. Achieving these goals required an agreement with Mr. Allen to take certain actions that he had no legal duty to perform, and to refrain from taking certain actions he was legally permitted to perform.[25] 8/24/09 Tr. 13:20–14:14, 155:5–156:13 (Goldstein); 7/21/09 Tr. 61:5–62:6 (Millstein). Mr. Allen's agreement to hold a controlling position in Charter within the meaning of the credit agreement was necessary for the reinstatement of the Debtors' senior secured debt. *Id.* at 62:1–6. Likewise, his agreement not to exercise his exchange rights leaves the Debtors' corporate structure in place and preserves an estimated $1.14 billion in NOLs. *Id. See also* 8/24/09 Tr. 155:5–23 (Goldstein).

Fundamental to the Plan is the Debtors' reinstatement of $11.4 billion in senior secured debt at favorable interest rates. Reinstating this credit facility saves the Debtors hundreds of millions of dollars in annual interest expense thereby greatly benefiting the Debtors' estates. 8/24/09 Tr. 16:18–17:3 (Goldstein). Critically, as discussed above, reinstatement depends on the agreement of Mr. Allen to maintain 35% of the voting power of CCI to avoid a change of control default. *See* Goldstein Decl. ¶ 24–25; 9/2/09 Tr. 68:17–23, 148:15–23 (Conn). The CII Settlement, thus, is central to the mechanism by which the Debtors are able to reinstate their senior bank debt.

The CII Settlement will also enable the Debtors to achieve significant tax savings by preserving $2.8 billion of NOLs. Degnan Decl. ¶¶ 8–9; 8/24/09 Tr. 16:9–17 (Goldstein). These potential tax savings are available because the Debtors have ***255** had "substantial operating losses as a tax matter for many years." 7/21/09 Tr. 48:2–3 (Millstein). The NOLs are valuable now, because upon emergence from bankruptcy the Debtors project having positive income against which to apply their NOLs. *Id.* 48:4–15. The ability to utilize these valuable tax attributes in the future is purely a function of Mr. Allen's cooperation. 8/31/09 Tr. 184:21–24 (Johri); 7/22/09 Tr. 202:24–203:18 (Merritt); 7/21/09 Tr. 222:19–223:4, 224:2–18 (Smit); 8/17/09 Tr. 239:4–8 (Doody).

The adverse impact to the Debtors if the CII Settlement is not approved is real and significant. The Debtors will remain in bankruptcy, inevitably face materially higher borrowing costs, and potentially forfeit billions of dollars in tax savings. The benefits of the CII Settlement far outweigh its costs. Accordingly, despite the significant consideration being paid to Mr. Allen, the CII Settlement is in the best interests of the estate.

The Benefits of the CII Settlement Outweigh the Likelihood of Success on the Merits

The first factor of the *Iridium* test calls for comparing the likelihood of success in litigation with a settlement's future benefits for the estate. This factor is hard to apply because approval or denial of the settlement will not necessarily result in litigation but rather the inability to confirm a prenegotiated Plan for Charter with resulting incremental administrative expenses and risks to the Debtors' estates of a potentially prolonged and uncertain bankruptcy process. The settlement has been proposed because of the extreme difficulty in obtaining the benefits of the CII Settlement through litigation. *See* Doody Decl. ¶ 33. The benefits of the CII Settlement are substantial and obvious. The Settlement permits reinstatement by "avoiding a change of control that could trigger the acceleration of the bank debt" and "optimizing the tax structure so as to preserve as much of the NOL[s] as possible." 7/21/09 Tr. 61:24–62:6 (Millstein); 7/22/09 Tr. 202:24–203:18 (Merritt).

The Likelihood of Complex and Protracted Litigation

The Plan has already generated complex and protracted litigation relating in part to the proposed Settlement. While it is foreseeable that disapproval of the settlement will defeat the Plan and lead to alternative proposals for restructuring Charter that could involve future litigation among the parties, that adverse outcome will not necessarily be followed by complex and protracted litigation as to the subject matter of the settlement itself. Accordingly, this factor is not relevant to the Court's consideration of the proposed settlement terms.

The Interest of Creditors

The CII Settlement is fundamental to the Debtors' Plan and has the enthusiastic support of the Official Committee for Unsecured Creditors. *See* 7/20/09 Tr. 88:11–89:1 (Elkind); *See also* Comm. Br. Supp. The Settlement brings enormous value to the estate and increases the recoveries for creditors generally. *See* 9/2/09 Tr. 148:15–23 (Conn); 9/10/09 Tr. 25:10–13 (Millstein). Notably, the compromise reached regarding the amounts to be received by Mr. Allen was the product of intense discussions with Charter's bondholders (who served as a proxy for the interests of other creditors), and reflects agreed payments that creditors themselves recognized were for the good of the enterprise.

Other Parties in Interest

As discussed above, the Crossover Committee and the Creditor's Committee support the Settlement and recognize its central importance to the Plan. The CCI Noteholders, on the other hand, have been ***256** vocal in their opposition to the Settlement and have complained that Mr. Allen is receiving too much and that CCI (as opposed to the entire Charter enterprise) is receiving too little (particularly in respect of NOLs allegedly attributable to CCI that are being preserved under the Settlement). *See* Law Debenture Trust Br. Opp'n at 83–90. As discussed below in the section of this opinion dealing with confirmation standards, the CCI Noteholders have not proven that the Settlement as a whole is not beneficial nor have they demonstrated any particularized entitlement to share separately in any portion of the value associated with the NOLs. Charter's many stakeholders, including thousands of employees, are benefited by a Settlement that adds so much value to the enterprise, and so this factor favors approval of the CII Settlement.

The Competency and Experience of Counsel

All parties to the CII Settlement were represented by highly regarded law firms and financial advisors with ample relevant experience in the restructuring field. *See* Doody Decl. ¶ 32; *see also* 8/17/09 Tr. 25:25–26:11 (Doody). The Court also notes that the parties to the Settlement themselves are sophisticated and experienced in high-stakes negotiations. This factor favors approving the settlement.

The Law Debenture Trust Company alleges that no fiduciary or advisor to CCI played a meaningful role during the Settlement negotiations and that this factor detracts from the fairness of the CII Settlement. Law Debenture Trust Br. Opp'n at 68–69. The evidence is otherwise and supports a finding that the Board, in conjunction with its advisors, fulfilled its fiduciary duties and, following independent review, approved a settlement that maximized value for all stakeholders, including the CCI Noteholders. 7/22/09 Tr. 241:2–2:43:11 (Merritt); 8/31/09 Tr. 156:23–157:20 (Johri).

The Nature and Breadth of Releases for Officers and Directors

The CII Settlement does not independently release directors and officers, but it does require that the Plan provide for such releases. 7/16/09 Doody Decl. ¶ 39; *See* CX 407, Plan at Art. X.D, X.E. These releases, discussed in more detail below, are appropriate and justified as essential to the structure of the CII Settlement and are provided in return for substantial and unique consideration from Mr. Allen. *See* 9/2/09 Tr. 86:10–88:20 (Conn); 8/17/09 Tr. 62:18–63–18 (Doody). Indeed, as measured by the difference between the benefits of the CII Settlement and its costs, the resulting net consideration easily amounts to billions of dollars. *See* Goldstein Affidavit ¶ 22–

30; 9/2/09 Tr. 176:7–177:13 (Conn). Accordingly, substantial consideration supports the releases.

The Extent to which the CII Settlement is the Result of Arm's–Length Bargaining

The unrebutted testimony proves that the CII Settlement is the product of vigorous and hard-fought three-way negotiations involving the Debtors, Mr. Allen, and the Crossover Committee. *See* 7/21/09 Tr. 55:9–12, 73:4–9 (Millstein); 7/21/09 Tr. 222:19–21, 224:1 (Smit); 8/17/09 Tr. 26:12–19 (Doody); 7/22/09 Tr. 172:19–173–5 (Merritt). These negotiations spanned more than a month, included multiple proposals and counter-proposals, and yielded concessions and modifications from all parties. *See* 8/17/09 Tr. 28:24–29:9 (Doody); 7/29/09 Tr. 210:18–211:18 (Liang).

Because these discussions involved parties with clearly divergent economic interests, the negotiations were well suited to develop a practical and fair result. *See* 7/29/09 Tr. 209:24–210:8 (Liang). The outcome is thus market tested in the sense ***257** that the Crossover Committee was negotiating as an adversary with its own dollars at stake against Mr. Allen. Any value flowing to Mr. Allen from the CII Settlement came directly from the Crossover Committee's pocket. *Id.* The Court is satisfied that the CII Settlement represents the considered judgment of economically motivated parties who were negotiating at arm's-length to reach the best settlement that could be achieved under the circumstances.

The CII Settlement is Fair, Equitable, and Reasonable

The Court's role in deciding whether to approve a settlement is to canvass the record and ensure that the settlement is (i) fair and equitable and (ii) does not "fall below the lowest point in the range of reasonableness." *In re Teltronics Servs.,* 762 F.2d. at 189. The extensive record establishes that the CII Settlement is fair and equitable. It unquestionably falls above the lowest point in the range of reasonableness and satisfies the standards required for approval of settlements in this Circuit.

Debtors' Releases

Article X.D of the Debtors' Plan provides that the Debtors shall fully discharge and release all claims and causes of action against the Debtor Releasees[26] arising from or related in any way to the Debtors (the "Debtor Releases"). Debtors are authorized to settle or release their claims in a chapter 11 plan. *See* 11 U.S.C. § 1123(b)(3)(A) (permitting a plan to provide for "the settlement or adjustment of any claim or interest belonging to the debtor or to the estate."); *see also In re Adelphia Comm'ns Corp.,* 368 B.R. at 264 n. 289. When reviewing releases in a debtor's plan, courts consider whether such releases are in the best interest of the estate. *See generally, In re Bally Total Fitness of Greater New York, Inc.,* 2007 WL 2779438, at *12 (Bankr.S.D.N.Y.2007). Here, the Debtor Releases are an integral part of a comprehensive Plan that provides substantial value to the estates. Doody Decl. ¶ 36; *see also* 7/22/09 Tr. 268:15–269:19 (Merritt). These releases have limited value and are procedurally efficient, in view of the fact that most of the Debtor Releasees have indemnification rights such that any claims by the Debtors against them would ultimately lead to claims being asserted against the Debtors. *See* Doody Decl. ¶ 36.

Third Party Releases

In addition to the Debtor Releases, Article X.E of the Plan, in conjunction with the CII Settlement, provides for certain third party releases (the "Third Party Releases"). Certain parties (collectively, the "Release Objectors") object to confirmation on the grounds that these Third Party Releases are improper.[27] The Third Party ***258** Releases, under the circumstances presented, satisfy the requirements for such releases in the Second Circuit, and are accordingly approved.

Non-debtor releases are permissible in the Second Circuit where "truly unusual circumstances render the release terms important to success of the plan." *Deutsche Bank AG v. Metromedia Fiber Network, Inc. (In re Metromedia Fiber Network, Inc.),* 416 F.3d 136, 142–43 (2d Cir.2005); *SEC v. Drexel Burnham Lambert Group, Inc. (In re Drexel Burnham Lambert Group, Inc.),* 960 F.2d 285, 293 (2d Cir.1992) ("In bankruptcy cases, a court may enjoin a creditor from suing a third party, provided the injunction plays an important part in the debtor's reorganization plan."). Courts will only tolerate non-debtor releases, however, in "circumstances that may be characterized as unique." *In re Metromedia,* 416 F.3d at 142. Adhering to the Second Circuit's indication that non-debtor releases should be rare, courts have found that "the mere fact of financial contribution by a non-debtor cannot be enough to trigger the right to a *Metromedia/Drexel* release." *Cartalemi v. Karta Corp. (In re Karta Corp.),* 342 B.R. 45, 55 (S.D.N.Y.2006). The non-debtor contribution must do more.

Given the unusual features of the Plan, the non-debtor contributions extend well beyond the level required for a release. The *Metromedia* Court noted that this determination is "not a matter of factors and prongs," but did provide guidance as to the settings where non-debtor releases may be appropriate. *In re Metromedia,* 416 F.3d at 142.[28] The record establishes that the Third Party Releases are permissible here—the Debtors are to receive substantial financial and non-financial consideration in exchange for the non-debtor releases, there is an identity of interest between the debtors and the non-debtor releasees by indemnification agreements, and this case involves truly unusual circumstances that render the Third Party Releases important to the success of the Plan.

Substantial Consideration

The Debtors' estates will be receiving substantial consideration in exchange for the Third Party Releases. The CII Settlement Claim Parties[29] agreed to undertake actions to permit the reinstatement of senior secured debt at favorable interest rates ***259** and refrain from taking action that would degrade the value of the Debtors' potentially valuable NOLs. 8/17/09 Tr. 34:4–24 (Doody). Notably, while the result of the CII Settlement confers billions of dollars in value on the Debtors, these are not mere financial exchanges. *See* 8/17/09 Tr. 238:9–239:8 (Doody); *see also* 7/22/09 Tr. 202:24–203:18 (Merritt). The value of the CII Settlement is driven by the identity of and binding promises by the CII Settlement Claim Parties. Due to these uniquely personal structuring benefits, no other party could stand in their shoes and achieve the same result. The Third Party Releases, therefore, are being granted in exchange for very substantial consideration in a rare restructuring context.

Identity of Interest

The indemnification obligations between the Debtors and their directors, officers, agents, and professionals produce an identity of interest between the Debtors and the CII Settlement Claim Parties. *See* 8/17/09 Tr. 62:25–63:9 (Doody); *see also* Doody Decl. ¶ 40. This identity of interest supports approving the Third Party Releases.

Unusual Circumstances

The CII Settlement would be a notable and innovative restructuring at any time, but is especially remarkable having been negotiated at the height of the so-called "Great Recession." It is unusual in a number of important respects. First, Mr. Allen and individuals associated with him, the CII Settlement Claim Parties, were uniquely able to support the structure of the Plan. *See* 9/2/09 Tr. 152:11–153:2 (Conn). Second, Charter's structure is complex, its debt load is enormous, and its bankruptcy is one of the largest prearranged cases ever filed. *See* 8/17/09 Tr. 63:10–18 (Doody). Third, by means of the rights offering Charter has succeeded in raising substantial capital during an exceptionally difficult and uncertain time in the credit markets. *Id.* Fourth, the Plan is only possible if the senior secured debt is reinstated and the company's NOLs are preserved, and both of these goals require voluntary participation in the Plan by the CII Settlement Claim Parties. *See* Goldstein Decl. ¶ 28. Fifth, Mr. Allen is an individual well known for his wealth; such a conspicuously public figure may be expected to attract litigation relating to Charter without the protection of releases. Overall, the unique manner in which value is being created, the sheer magnitude of the cases, and the once-in-a-lifetime market conditions in which this creative restructuring took place, in combination, justify approval of the Third Party Releases.

Essential to the Plan Process

The Third Party Releases also are an integral part of the Plan. Third Party Releases were included by the CII Settlement Parties in their first response to the strawman restructuring proposal, remained a part of the transaction, and were never negotiated away. *See* 8/17/09 Tr. 62:18–63:2 (Doody). These Third Party Releases are essential to the CII Settlement. 9/2/09 Tr. 86:10–88:1 (Conn). As a requirement of the CII Settlement, the Third Party Releases are thus an essential component of the Plan that has been accepted by nearly all creditor classes entitled to vote. *See* Doody Decl. ¶ 39. The CII settlement and the Third Party Releases are vital to the Plan and are approved.

Plan Satisfies Confirmation Standards

Bankruptcy Code section 1129(a) delineates the requirements that chapter 11 plans must satisfy to be confirmed by a bankruptcy court. *See* 11 U.S.C. § 1129(a) ***260** ("The court shall confirm a plan only if all of the following requirements are met: (1) ... (16)"). It is undisputed[30] that the Plan satisfies a majority of the applicable[31] confirmation requirements. The Court has determined that the Plan satisfies each of the remaining contested confirmation requirements and overrules the objections of the CCI Noteholders. For administrative ease, the Court addresses these confirmation requirements contested by the CCI Noteholders in sequence below.

Plan Was Proposed In "Good Faith" In Satisfaction Of 11 U.S.C. § 1129(a)(3)

Bankruptcy Code section 1129(a)(3) requires that a chapter 11 plan of reorganization be "proposed in good faith and not by any means forbidden by law." As used in this context, "good faith" requires that a plan be "proposed with 'honesty and good intentions' and with 'a basis for expecting that reorganization can be effected.' " *Kane v. Johns–Manville Corp.,* 843 F.2d 636, 649 (2d Cir.1988) (quoting *Koelbl v. Glessing (In re Koelbl),* 751 F.2d 137, 139 (2d Cir.1984)).

The Plan has been proposed in good faith in compliance with section 1129(a)(3). Several of the Debtors' directors testified that they supported the Plan because they believed it maximized value. *See* 7/21/09 Tr. at 46:24–47:4 (Smit) ("maximiz[ing] value to the extent possible so it could provide a greater recovery to the creditors' losses ... was ... the goal of these exercises, generally"); 7/22/09 Tr. at 243:6–11 (Merritt) ("The objective of the board was to maximize the overall enterprise value").[32] Moreover, the record includes extensive testimony that the Plan resulted from arms-length negotiations, which is indicative of good faith. *In re Enron Corp.,* 2004 Bankr.LEXIS 2549 at *80 (Bankr.S.D.N.Y. July 15, 2004) (confirming plan and finding good faith requirement satisfied in part because plan resulted from "extensive arm's-length discussions"). *See, e.g.,* 7/21/09 Tr. at 73:4–9:10 (Millstein) (negotiations were at arms length); 7/21/09 Tr. at 223:10–224:12 (Smit) (the settlement parties had separate ***261** counsel and advisors and conducted arms length negotiations).

The Plan further complies with Bankruptcy Code section 1129(a)(3) because it was not proposed "by any means forbidden by law." 11 U.S.C. § 1129(a)(3). The CCI Noteholders contend that the Plan fails to satisfy section 1129(a)(3) because this provision requires the Plan, and the embedded CII Settlement, to satisfy the "entire fairness" standard under Delaware corporate law. Law Debenture Trust Br. Opp'n at 86–87. ("A central element of the proposed plan is a transaction between the Debtors and Mr. Allen ... the Debtors must prove that the Allen Settlement and the Plan are entirely fair" in satisfaction of Delaware fiduciary duty standard).

This argument fails for two reasons. First, the "entire fairness" standard does not apply in light of the record showing that the negotiations that resulted in the settlement were initiated by Lazard for the benefit of the enterprise, not by Mr. Allen for his benefit, and that the settlement was approved by independent members of Charter's board. Second, even if the "entire fairness" standard were applicable, the plain language of section 1129(a)(3) does not require that the Plan's contents comply "in all respects with the provisions of all nonbankruptcy laws and regulations" because it "speaks only to the proposal of a plan ..." *In re Buttonwood Partners, Ltd.,* 111 B.R. 57, 59 (Bankr.S.D.N.Y.1990), quoting 5 Collier on Bankruptcy, ¶ 1129.02, 129–23 (15th ed.); *In re General Dev. Corp.,* 135 B.R. 1002, 1007 (Bankr.S.D.Fla.1991) (holding that proposed plan satisfied Bankruptcy Code section 1129(a)(3) even if its distribution of stock to the objecting municipalities could be construed to violate the Florida Constitution).

CCI Noteholders Will Receive More Under The Plan Than They Would Receive Under Hypothetical Chapter 7 Liquidation

Notwithstanding the CCI Noteholders' objection, the Plan satisfies section 1129(a)(7) because it proposes a recovery that exceeds by a substantial percentage what they would receive under a liquidation in chapter 7. 11 U.S.C. § 1129(a)(7) ("with respect to each impaired class of claims or interests —(A) each holder of a claim or interest of such class ... (ii) will receive or retain under the plan on account of such claim or interest property of a value, as of the effective date of the plan, that is not less than the amount that [they] would so receive ... if the [Debtors] were liquidated under chapter 7").

In the event of liquidation under chapter 7, the CCI Noteholders' recovery would amount to approximately 18.4% of their claims that are structurally subordinated to the claims of all other creditors of the Debtors, including more than $19 billion in other debt. *See* 8/17/09 Tr. at 55–57 (Doody); Cmte. Br. Supp. at 45. The Plan is demonstrably more favorable and is structured to provide the CCI Noteholders with a recovery well in excess of that amount—approximately 32.7%. Indeed, despite their subordinated rank in the capital structure, the CCI Noteholders are being offered the highest percentage recovery under the Plan among all of the Debtors' unsecured noteholders.

The CCI Noteholders object to the Debtors' valuation and rely heavily on the testimony of their retained expert, Edward McDonough whose opinions are based on limited independent analysis. The Court did not find Mr. McDonough's testimony to be persuasive or to rebut the reliability of Debtors' liquidation analysis. Perhaps most critically, Mr. McDonough engaged ***262** in a largely speculative exercise of listing possible incremental recoveries and offered no reliable opinions as to the likelihood that any of these identified sources of possible extra value would ever materialize. He also did not create his own liquidation analysis. 9/1/09 Tr. at 153:1–2 (McDonough) ("Q: Did you do a ground-up analysis of what the liquidation value of the Debtors would be? A: No. I started with what was Exhibit E and added to that").

Mr. McDonough's analysis does not take into account the sizeable gap between the CCI Noteholders' projected recovery under the Plan (32.7%) and the CCI Noteholders' hypothetical recovery under the Debtors' liquidation analysis (18.4%). McDonough insisted that the existence of only a few flaws in the Debtors' liquidation analysis would suffice to prevent confirmation of the Plan under section 1129(a)(7). *See* 9/1/09 Tr. at 147:5–8 (McDonough) ("my point is, [the] hurdle is fairly low .... you don't have to hit a, you know, grand slam here ... it's a bunt single basically"); Law Debenture Trust Br. Opp'n at 72 ("It would only require a very small recovery from the other identified sources to allow the holders of CCI Notes Claims to obtain more in a liquidation than under the Plan").

But given the 14.3% gap in distribution percentages between recoveries under the Plan and those to be realized in a hypothetical liquidation, Mr. McDonough's speculation as to the relative ease of obtaining more value at the CCI level through possible add-ons does nothing to prove that any additional value can ever be realized or to undermine the reliability of the liquidation analysis itself. Because his testimony is based more on conjecture than hard analysis, the Court gives little weight to his opinion regarding the possibility of higher recoveries at CCI in a hypothetical liquidation.

The CCI Noteholders argue that the Debtors overlooked a series of possible incremental recoveries from alleged preference and avoidance actions, programming contracts, stock options and other intercompany receivables. Mr. McDonough identified these "add-ons" as sources from which the Debtors and, thereby, the CCI Noteholders, may receive additional recoveries in a hypothetical chapter 7 liquidation. *See* McDonough Report. The CCI Noteholders failed, however, to present any evidence that there would or could be any actual or significant recoveries on account of the "add-ons."[33]

Tellingly, Mr. McDonough acknowledged during cross examination that the potential recovery from the additional sources he identified could be lower than as stated in his expert report or even worth nothing at all—he even admitted that the potential recovery from any or all of the additional sources could be zero. *See, e.g.,* 9/1/09 Tr. at 186:22–24, 190:9–16 ***263** (McDonough) ("Q: You agree that that 22.4 recovery [for insider payments]—potential recovery could be between a range of zero to 22.4 million, correct? A: It could be between zero and 22.4, that's correct").

Mr. McDonough's criticism of the Debtors' valuation of the new preferred stock to be distributed to the CCI Noteholders under the Plan is also questionable. The Debtors value the stock according to its face value in the amount of $138 million. Debtors' Br. Supp. at 42. Mr. McDonough, however, argues that the Debtors overestimate the projected recovery under the Plan by overvaluing these shares by 20% due to the fact that it is a minority interest. 9/1/09 Tr. at 112:6–24 (McDonough). Mr. McDonough's opinion is suspect, however, because his previous reports utilized the same 20% discount based on other justifications. Initially, Mr. McDonough discounted the Debtors' valuation of the new preferred stock by 20% because of the lack of a public market for the shares. At that time, Mr. McDonough noted the minority nature of the stock but presumably did not deem such minority status by itself as sufficient cause to justify a 20% discount. Then, after the Debtors increased the marketability of the new preferred stock, Mr. McDonough appears to have simply kept the same 20% discount but modified its rationale. Such an ends-oriented analysis is not persuasive.

The Debtors' liquidation analysis, on the other hand, appears to have relied on reasonable assumptions. For example, the liquidation analysis properly assumes that, in a hypothetical chapter 7 liquidation, the Debtors' businesses would likely be sold by means of a distressed going concern sale, as opposed to a piecemeal liquidation of assets. Debtors' Br. Supp. at 42. This assumption, which values the Debtors' businesses at a discount of 10–20% of the midpoint of the Plan value, is a conservative assumption expected to result in a higher liquidation value than a piecemeal liquidation. 8/24/09 Tr. at 18:4–19:13 (Goldstein); 8/24/09 Tr. at 18:4–19:13, 128:11–14 (Goldstein) (piecemeal asset sale would have yielded much less value to creditors than distressed sale). Indeed, piecemeal liquidation would likely generate a particularly low recovery for CCI because CCI has no significant assets, aside from some intercompany claims and its equity stake in its subsidiary. *See* 7/31/09 Tr. at 134:11–15 (Schmitz) ("Q: Are there any cable customers or telephone or HSI customers at the CCI level? A: No.").

The Debtors' liquidation analysis also properly reflects the fact that, in a hypothetical chapter 7 liquidation of CCI, the NOLs would have no value and thus not be a source of potential added recovery for the CCI Noteholders. *See* 8/17/09 Tr. at 37–41 (Doody). This is so because CCI is not an operating company and does not produce any income of its own against which the NOLs could be utilized. *Official Comm. of Unsecured Creditors v. PSS Steamship Co., Inc. (In re Prudential Lines, Inc.),* 107 B.R. 832, 841 (Bankr.S.D.N.Y.1989), aff'd, 928 F.2d 565 (2d Cir.1991). *See also Loop Corp. v. U.S. Trustee,* 379 F.3d 511, 518–19 (8th Cir.2004) (affirming bankruptcy court's conversion of case from chapter 11 to chapter 7 despite the fact that the debtor's NOLs may have value in a chapter 11 but would have no value in a chapter 7 liquidation); *Maytag Corp. v. Navistar Int'l Transp. Corp.,* 219 F.3d 587, 590–91 (7th Cir.2000) ("Tax attributes cannot be sold or given away; only the company that generated the losses may use them. When the bankruptcy wrapped up, accumulated tax losses were a major asset of the estate. It would have been folly to throw them away, as a liquidation would have done").

***264** Moreover, while the CCI Noteholders focused considerable attention during the trial on the potential value of the NOLs, no tax expert testified for any party, and the record is devoid of any reliable evidence relating to the actual value to CCI of the NOLs even if CCI were considered to be the owner the NOLs. Generally, NOLs are deemed to belong to the operating entity that generated them. Under the circumstances of this case, that would be CCO, not CCI. *See, e.g., Nisselson v. Drew Indus. Inc. (In re White Metal Rolling and Stamping Corp.),* 222 B.R. 417, 424 (Bankr.S.D.N.Y.1998) ("It is beyond peradventure that NOL carrybacks and carryovers are property of the estate of the loss corporation that generated them"). However, regardless of which Charter entity generated the NOLs, because of the lack of any convincing proof of ownership or the ability to convert the NOLs into measurable proceeds, the Court is unable to find that CCI has been deprived of any value associated with Charter's tax attributes.

Plan Satisfies 11 U.S.C. § 1129(a)(10)

The CCI Noteholders argue that the Plan does not satisfy the requirement of section 1129(a)(10) that at least one impaired class of claims accept the plan. *See* 11 U.S.C. § 1129(a)(10) ("If a class of claims is impaired under the plan, at least one class of claims that is impaired under the plan has accepted the plan ..."). Although the Plan has been accepted by ten different impaired classes of claims,[34] including Class A–3 General Unsecured Creditors (CCI General Unsecured Creditors) and Class C–3 General Unsecured Creditors (Holdco General Unsecured Creditors), the CCI Noteholders argue that these classes should not be counted for purposes of Bankruptcy Code section 1129(a)(10) because they were "artificially gerrymandered" solely for purposes of obtaining the approval of an impaired class of creditors. *See* Law Debenture Trust Br. Opp'n at 36–37; *Boston Post Road Ltd. P'ship v. FDIC (In re Boston Post Road Ltd. P'ship),* 21 F.3d 477, 483 (2d Cir.1994) ("separate classification of unsecured claims solely to create an impaired assenting class will not be permitted; the debtor must adduce credible proof of a legitimate reason for separate classification of similar claims"). Specifically, the CCI Noteholders contend that the Plan should not separately classify CCI and Holdco's noteholders from their other general unsecured creditors.

The Debtors, however, have provided a reasonable explanation for the Plan's classification scheme.[35] The Plan's separate classification appears appropriate given the disparate legal rights and payment expectations of the CCI Noteholders and the CCI General Unsecured Creditors. *See* 8/17/09 Tr. at 53:10–54:16 (Doody) (distinguishing the Class A–3 CCI General Unsecured Claims from the Class A–4 CCI Notes Claims). First, the claims of the CCI General Unsecured Creditors arise from litigation, employment, or operational relationships, while claims of the CCI Noteholders arise from the holding of CCI Notes. *Id.* Significantly, the CCI Notes are convertible into equity and structurally subordinated to the debt at all other Charter subsidiaries. *See* 6.5% Convertible ***265** Senior Notes due 2027 Indenture, dated October 2, 2007 between CCI and The Bank of New York Trust Company, N.A., CX 287, Ex. 4.7; 9/1/09 Tr. at 157:23–159:7 (McDonough) (CCI Notes were convertible and subordinated).

CCI and its noteholders also are entitled to an alternate source of recovery against Holdco that is unavailable to the CCI General Unsecured Creditors because the CCI Notes were issued in conjunction with that certain 6.50% Mirror Convertible Senior Note of Holdco due October 1, 2027 issued pursuant to the Holdco Mirror Notes Agreement, dated as of October 2, 2007, between CCI and Holdco (the "Mirror Note"). *See* 6.50% Mirror Convertible Senior Note of Holdco due October 1, 2027 issued pursuant to the Holdco Mirror Notes Agreement, dated as of October 2, 2007, between CCI and Holdco, attached as Ex. 10.3 to the CCI SEC Form 8–K, dated as of October 5, 2007, CX 306. Additionally, unlike claims of the CCI Noteholders, CCI general unsecured claims for expenses associated with CCI's duties as manager to CCO are reimbursable in full under the Management Agreement. *See* CX 305 at §§ 3(a)(i)-(ii) (including for costs to pay employees and third party providers such as vendors, attorneys, consultants, and other advisors, as well as related litigation claims). Thus, multiple material distinctions exist in the relative legal rights of the CCI Noteholders and the rights of holders of CCI general unsecured claims to justify separate classification.

The CCI Noteholders complain about classification but have failed to produce any evidence (or rebut the Debtors' evidence) to support their allegation of gerrymandering. Lacking any evidence of actual intent to gerrymander, the CCI Noteholders instead assert that gerrymandering is the only possible explanation for the separate classification scheme given the fact that the claims of both the noteholders and the general unsecured creditors are of "identical priority and character." *See* Law Debenture Trust Br. Opp'n at 37.

But that assertion by the CCI Noteholders is wrong. As discussed above, the Debtors have offered several legitimate justifications for the separate classification scheme—most persuasively, that the legal rights of each class are not identical. Nor is the CCI Noteholders' reliance on *Boston Post Road* in its opposition to this issue[36] helpful given the different rights and privileges available to the CCI Noteholders under applicable nonbankruptcy law. For one thing, the opinion's language cited by the CCI Noteholders indicates that the court considered the different legal origins of claims to be a relevant factor in the separate classification, albeit not a dispositive one: "The different origins of the FDIC's unsecured deficiency claim and general unsecured trade claims, claims which enjoy similar rights and privileges within the Bankruptcy Code, do not ***alone*** justify separate segregation". *Id.* (emphasis added).[37] Here, however, the different ***266** legal origins of the two classes of claims is one of several reasons for separate classification offered by the Debtors.

Indeed, far from being an anomaly indicative of an intent to gerrymander, bankruptcy courts administering other large chapter 11 cases have accepted separate classification of convertible note claims from general unsecured claims. *See, e.g., In re Calpine,* No. 05–60200, 2007 WL 4565223 (Bankr.S.D.N.Y. Dec. 19, 2007) (order confirming chapter 11 plan separately classifying convertible unsecured notes claims from general unsecured claims); *In re Coram Healthcare Corp.,* 315 B.R. 321, 350–51 (Bankr.D.Del.2004) (finding noteholders represented "a voting interest that is sufficiently distinct from the trade creditors to merit a separate voice in this reorganization case").

The Debtors also produced substantial evidence that the separately classified classes of general unsecured claims are legitimately impaired[38] because members of such classes will not receive post-petition interest. *See* 8/17/09 Tr. at 59:20–60:4 (Doody) (noting that Classes A–3 and C–3 are legitimately impaired because they are to be reinstated or paid without post-petition interest). The fact that the Plan's nonpayment of post-petition interest reflects the terms of the Management Agreement further evidences a justification for classification other than intent to gerrymander.[39] *See* CX 305 ¶ 3.

Notably, given the Plan's structure, the requirement of section 1129(a)(10) would be satisfied even if Classes A–3 and C–3 were not deemed to be legitimately impaired. This is so because it is appropriate to test compliance with section 1129(a)(10) on a per-plan basis, not, as the CCI Noteholders argue, on a per-debtor basis. *See In re Enron Corp.,* No. 01–16034 (Bankr.S.D.N.Y. July 15, 2004) (confirming joint chapter 11 plan where each debtor did not have an impaired accepting class); *In re SGPA, Inc.,* No. 01–02609, 2001 WL 34750646 (Bankr.M.D.Pa. Sept. 28, 2001) (same). Here, the evidence supports a finding that the business of Charter is managed by CCI on an integrated basis making it reasonable and administratively convenient to propose a joint plan. That joint Plan has been accepted by numerous other impaired accepting classes, thereby satisfying the requirement of section 1129(a)(10).

***267** *Plan Satisfies "Cramdown" Requirements Of 11 U.S.C. § 1129(b)*

Section 1129(b)(1)of the Bankruptcy Code provides that, in the event an impaired class does not vote in favor of a plan, but all other requirements of 1129(a) are satisfied, then the Court may only confirm the plan if it "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). The Plan satisfies the requirements for "cram down" under Bankruptcy Code section 1129(b) because it (i) does not unfairly discriminate against the CCI Noteholders and (ii) is fair and equitable in that it does not violate the absolute priority rule.

Plan Does Not Unfairly Discriminate Against CCI Noteholders In Violation Of 1129(b)(1)

The CCI Noteholders object on the grounds that the Plan unfairly discriminates against them by awarding their class a 32.7% recovery, while awarding the Class A–3 General Unsecured Creditors a 100% recovery. Noting that discrimination occurs when a plan treats similarly situated creditors differently,[40] the CCI Noteholders insist that they are "similarly situated" to the CCI General Unsecured Creditors. The CCI Noteholders, for reasons noted above in the section dealing with classification, are not similarly situated to CCI's general unsecured creditors and thus the Plan's divergent treatment of the two classes does not constitute discrimination.[41]

The argument of the CCI Noteholders regarding unfair discrimination is weak to the point of being meritless. The CCI Notes (i) are convertible into equity and structurally subordinated to debt at other Charter subsidiaries, (ii) enjoy an alternate source of recovery against Holdco that is unavailable to its general unsecured creditors because the CCI Notes were issued in conjunction with the Mirror Note, and (iii) are not entitled to reimbursement for expenses associated with CCI's management of CCO. There is no support whatsoever to the strained argument that claims arising under the notes should receive the same treatment as CCI's General Unsecured Creditors.

The CCI Noteholders attempt without success to gloss over obvious differences in legal entitlement by noting that "[t]he holders of CCI Notes and the holders of CCI General Unsecured Claims may only recover against CCI's estate and thus are similarly situated." Law Debenture Trust Br. Opp'n at 49. Such an analysis distorts ***268** the facts and elevates superficial form over substance. For example, the CCI Noteholders overlook the fact that CCI General Unsecured Claims for reimbursement of certain expenses are passed through CCI to CCO for eventual payment in full. Debtors' Br. Supp. at 78. Thus, although CCI's general unsecured creditors and noteholders both have unsecured claims against CCI, creditors other than the CCI Noteholders have what amounts to recourse against CCO. The Plan respects this legitimate distinction in legal rights by providing the CCI General Unsecured Creditors with a higher recovery than the CCI Noteholders. In light of this very meaningful difference in the right to be paid, the CCI Noteholders' formalistic insistence that the two classes are similarly situated because they are of "the same priority level" is plainly wrong and appears to willfully disregard the rights of other CCI creditors.[42]

Plan Is Fair And Equitable In Satisfaction Of 11 U.S.C. § 1129(b)(2)(B)(ii)

The CCI Noteholders further object on the grounds that the Plan is not "fair and equitable" as required by Bankruptcy Code section 1129(b)(1). Section 1129(b)(2)(B) sets forth the test for whether a plan is "fair and equitable": "the condition that a plan be fair and equitable with respect to a class includes the following requirements: ... (B) [w]ith respect to a class of unsecured claims—... (ii) the holder of any claim or interest that is junior to the claims of such class will not receive or retain under the plan on account of such junior claim or interest any property ..." Courts commonly refer to this test as the absolute priority rule. Contrary to the arguments of the CCI Noteholders, the Plan does not violate the absolute priority rule. In fact, no holder of a CCI claim or interest junior to the CCI Noteholders is receiving a recovery.

The argument of the CCI Noteholders with respect to the absolute priority rule focuses attention again on Charter's NOLs. They argue that the NOLs generated through losses of the operating companies "belong" to CCI and that the Plan therefore improperly siphons recovery traceable to this value away from CCI for the benefit of creditors of the operating Debtors. This is an argument made in a vacuum.

As discussed above, the CCI Noteholders have argued about the existence and possible value of NOLs without offering any evidence that CCI actually had any rights to separately profit from or harvest the value of these tax attributes that may actually belong to CCO.[43] *See In re Prudential Lines, Inc.,* 928 F.2d 565, 569–70 (2d Cir.1991) (affirming order enjoining parent corporation from taking action that would affect debtor subsidiary's use of NOLs generated as a result of subsidiary operations on the basis that the debtor subsidiary owned the NOLs); ***269** *Nisselson v. Drew Indus., Inc. (In re White Metal Rolling and Stamping Corp.),* 222 B.R. 417, 424 (Bankr.S.D.N.Y.1998) ("It is beyond peradventure that NOL carrybacks and carryovers are property of the estate of the loss corporation that generated them"). Regardless of which legal entity in fact owns the NOLs, the CCI Noteholders have not established that their treatment under the Plan deprives them of anything to which they have any provable entitlement.

Nor does the Plan's CII Settlement violate the absolute priority rule. Case law makes clear that the absolute priority rule is violated when an equity interest holder "leapfrogs" unsecured creditors and receives property on account of a junior interest. *See Bank of America Nat'l Trust & Savings Assoc. v. 203 N. LaSalle St. P'ship,* 526 U.S. 434, 119 S.Ct. 1411, 143 L.Ed.2d 607 (1999) (denying confirmation when proposed plan would have compensated debtor's pre-bankruptcy equity holders without paying its pre-petition lender's unsecured deficiency claim).

Contrary to the CCI Noteholders' repeated insistence and despite the misperceptions of many equity holders[44] whose interests are being cancelled under the Plan, Mr. Allen is not obtaining a recovery "on account of" his equity interest in CCI. *See* Law Debenture Trust Br. Opp'n at 80 ("Mr. Allen's wholly owned subsidiary, CII, is retaining a direct equity interest in Holdco (although on a diluted basis) while CCI is receiving a mere 3.9% recovery on its Holdco Note Claims"); at p. 50 ("The CCI settlement compensates Paul Allen for his equity interests and, thus, violates the absolute priority rule").

As discussed earlier in this opinion, the CII Settlement grants consideration to Mr. Allen on account of his cooperation with respect to maintaining requisite voting power within CCI, his transferring of valuable interests in solvent Debtor CC VIII, LLC, and his compromising of certain contract claims. *See also* 7/22/09 Tr. at 2 66:21–267:16 (Merritt); 8/17/09 Tr. At 33:23–34:18, 281:3–17, 283:14–284:2 (Doody); 8/14/09 Tr. at 14:25–16:5 (Goldstein); 9/2/09 Tr. at 78:16–22, 148:21–23 (Conn). Courts have not prohibited parties such as Mr. Allen who happen to hold equity from recovering other consideration. *See In re PWS Holding Corp.,* 228 F.3d 224, 242 (3d Cir.2000) (equity holder's recovery cannot be deemed to be "on account of" the equity interest "without some evidence of a causal relationship"). Accordingly, the objection of the CCI Noteholders based on the absolute priority rule mischaracterizes the settlement with Mr. Allen and is without merit.

Remaining CCI Noteholder Objections

The CCI Noteholders' other objections are equally lacking in substance and are all overruled.[45] First, the CCI Noteholders attempt to undermine the Plan by labeling it as the functional equivalent of substantive consolidation, in that "[although] the Debtors ignored the value of assets held directly by CCI and/or Holdco on a stand-alone basis ... the Debtors adhere to corporate separateness when determining how to and in what priority value is to be distributed." Law Debenture Trust Br. Opp'n at 81–2. These chapter 11 cases, however, have not been substantively consolidated ***270** [46] and such consolidation may not be inferred. The CCI Noteholders are unable to rely on their expert in light of his refusal to recommend (or otherwise opine on) substantive consolidation of these cases. 9/1/09 Tr. at 178:22–179:7 (McDonough) ("Q: So you do not have an opinion that the Court should actually treat the debt in this consolidated fashion, correct? A: I have no opinion ... I've provided no testimony as to substantive consolidation").

Moreover, the votes in favor of the Plan by CCI and Holdco with respect to the Mirror Note and the CCH Notes (i.e., all series of notes issued by CCH and Charter Communications Holdings Capital Corp.), respectively, should not be voided as actions taken outside the ordinary course of the Debtors' business without proper court approval. In their objection to confirmation, the CCI Noteholders argue that these votes constituted "compromises of valid intercompany claims" outside the ordinary course of business that should properly have been submitted to the Court for prior approval. *See* Law Debenture Trust Br. Opp'n at 74–75; 11 U.S.C. § 363(b) ("The trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate ..."). But the cases relied on by the CCI Noteholders are inapposite because they involved post-petition agreements entered into by debtors outside of the context of a reorganization plan. *See In re Remsen Partners, Ltd.,* 294 B.R. 557 (Bankr.S.D.N.Y.2003) (denying chapter 7 trustee's motion for approval of settlement of state court litigation when proposed settlement did not serve "the paramount interest of creditors" when settlement proceeds would be paid entirely to chapter 7 professionals); *In re Leslie Fay Cos.,* 168 B.R. 294 (Bankr.S.D.N.Y.1994) (granting debtors' motion to vacate arbitration award compelling debtors to comply with post-petition collective bargaining agreement when agreement was "outside the ordinary course" of debtor's business and should have been submitted to notice and a hearing).

The Debtors' votes on the Mirror Note and the Holdco Notes, on the other hand, are essential components of a proposed plan of reorganization and are thus substantially different from private agreements between a debtor and a third-party. This fundamental difference is not altered by the practical result that these votes, when viewed in the context of the entire Plan, will resolve claims belonging to the Debtors in a way similar to a court-approved private agreement.

Nor are the votes by CCI and Holdco *ultra vires* acts outside "the interests of the corporation." Law Debenture Trust Br. Opp'n at 74 n. 323 ("Void acts include ultra vires acts," including "acts contrary to basic principles of fiduciary duty law"); *Solomon v. Armstrong,* 747 A.2d 1098, 1114 (Del.Ch.1999). The decision by the Debtors' board of directors to vote in favor of the Plan without considering each Debtor's individual interests does not suffice to establish an *ultra vires* act. Law Debenture Trust Br. Opp'n at 75–77. The Debtors' board of directors appropriately evaluated the Plan on a company-wide basis rather than a debtor by debtor basis. *See In re Enron Corp.,* No. 01–16034 (Bankr.S.D.N.Y. July 15, 2004) (confirming joint chapter 11 plan where each ***271** debtor did not have an impaired accepting class).

The various and sundry objections by the CCI Noteholders reflect a conscientious attempt to extract greater value for these creditors. But these creditors are unable to escape the fact that they are members of a structurally subordinated constituency that is receiving significant consideration under the Plan that is greater than what such creditors would receive if Charter were liquidated. These efforts, while diligent and determined, have failed to persuade the Court that the Plan is anything other than fair as this class. All of their objections are overruled.

Conclusion

This opinion supplements and expands on the Court's bench ruling of October 15, 2009. Charter has overcome robust, forcefully presented objections and has succeeded in convincing the Court that its Plan satisfies all of the confirmation requirements of section 1129 of the Bankruptcy Code and is confirmable. This represents a major achievement for the Debtors and its stakeholders that should enable a deleveraged Charter to flourish as a restructured and recapitalized enterprise.

In addition to this opinion, the Court promptly will enter a separate confirmation order setting forth in greater detail findings of fact and conclusions of law that are consistent with and should be read in conjunction with this opinion. This opinion and the confirmation order constitute the Court's findings and conclusions with respect to confirmation of Charter's Plan and JPMorgan's adversary proceeding. As stated on the record of the hearing held on October 15, all objections to confirmation are overruled.

SO ORDERED.

All Citations

419 B.R. 221, 52 Bankr.Ct.Dec. 114

Footnotes

1 JPMorgan is supported in its objections by a group of separately represented senior lenders from the bank syndicate and by second and third lien lenders that also oppose reinstatement.

2 Mr. Allen is to receive aggregate compensation that totals approximately $375 million. Charter will benefit to the extent of interest savings and preserved tax attributes estimated to be in the billions of dollars.

3 The trial consisted of Charter's contested confirmation hearing and JPMorgan's adversary proceeding seeking a determination that reinstatement is not permitted due to prepetition defaults under the senior credit agreement. This opinion relates to both the adversary proceeding and to plan confirmation.

4 The Court notes that global economic conditions have improved and stabilized greatly in the last year. In the quarter just ended, the Dow and S & P 500 experienced their best gains in a decade. The credit markets also are in better shape than they were last year, but reportedly are still not functioning normally. Thus, timing of the negotiations is a factor that cannot be ignored. The crisis mentality of last fall spawned this restructuring, but it is being evaluated from the perspective of a now more stable and stronger financial sector. The Court recognizes that given the positive turn in the markets, the valuation of Charter by Lazard for purposes of this restructuring may have been performed at a trough in the market for peer companies in the cable industry. That does not alter the facts, however. No expert has given a credible opinion as to value that contradicts the Plan value, and the expert called by JPMorgan with regard to surplus calculations indicated that the absence of a competing transaction at a higher value tends to confirm the reliability of the value of the transaction described in Charter's Plan.

5 It is unknown whether the credit markets have improved to the point that a financing of this size could be replaced today (and, if so, on what terms), and the relative difficulty or ease of obtaining such replacement financing has played no part in this decision.

6 This is the term used to describe those debt securities within a given capital structure that, based on the assumed enterprise value, would not be entitled to receive a full recovery in cash, thereby making it rational for holders to consider other forms of consideration such as a debt for equity exchange. In effect, holders of fulcrum securities are at the tipping point of the capital structure (neither entirely in nor entirely out of the money) and given their impairment and entitlement to vote for or against a chapter 11 plan are in a position to have considerable influence over the outcome of a restructuring.

7 An ad hoc committee was formed shortly thereafter consisting of unaffiliated holders of 11 % senior secured notes due 2015 issued by CCHI, LLC and CCH I Capital Corporation and the 10.25% Senior Notes due 2010 of CCH II, LLC and CCH II Capital Corporation. This ad hoc committee calls itself the “Crossover Committee.”

8 The Designated Holding Companies are CCO Holdings, LLC (“CCOH”), CCH II, LLC (CCH II), CCH I, LLC (“CCH I”), CCH I Holdings, LLC (“CIH”) and Charter Communications Holdings, LLC (“CCH”).

9 The $3.3 billion negative variance in enterprise value is hard to ignore. The Court considers the Plan valuation to be credible but understands that valuation judgments include multiple subjective elements and that opinions as to value are given for particular purposes, are highly dependent on assumptions and speak only as of specified dates. The lower Plan value when compared to the number needed for surplus, however, does lead the Court to question the reliability of higher values ascribed to the business during the period leading up the restructuring negotiations.

10 Charter called witnesses from Lazard and from Alix Partners. The Lazard witnesses supported the $15.4 billion Plan value while the witness from Alix Partners testified that Charter was worth in excess of the $18.7 billion needed for a finding of surplus.

11 The Court's decision in *Iridium* recognized the importance of unbiased data derived from the public markets and commented on the tendency of valuation litigation to become a battle of the experts in which the “hired guns” for each side function as advocates for a parochial value proposition. *See Statutory Comm. of Unsecured Creditors v. Motorola, Inc. (In re Iridium Operating LLC),* 373 B.R. 283 (Bankr.S.D.N.Y.2007).

12 JPMorgan cites cases prospectively construing similar language in the context of chapter 9 of the Bankruptcy Code. These cases are inapposite to the present situation but do demonstrate that the words are capable of being read in the manner urged by JPMorgan.

13 The term “group” is defined in § 13(d) as having members who “agree to act together for the purpose of acquiring, holding, or disposing of securities.” 15 U.S.C. § 78m(d)(3).

14 JPMorgan includes Franklin Advisers, Inc. (“Franklin”), another member of the Crossover Committee, as a “supporting player” in its alleged 13(d) group. The Court finds that there is no 13(d) group with or without the support of Franklin.

15 The argument of the CCI Noteholders that the CII Settlement is on account of his equity in CCI and, therefore, the Plan impermissibly diverts value from CCI to Mr. Allen is unfounded. The Court is convinced, based on the evidence in the record, that the consideration to be paid to Mr. Allen is to be paid entirely on account of his concessions under the CII Settlement, including his agreements to cooperate to enable the senior debt to be reinstated and to enable the Debtors' NOLs (defined below) to be preserved, his transfer of his interests in CC VIII, LLC and his compromise of various contract claims.

16 Pleadings to which the Court cites herein which are designated with the prefix “Adv. Proc.” refer to pleadings filed in Adversary Proceeding No. 09–01132(JMP).

17 The Court notes that each of the First Lien Lender Group, Wilmington Trust Company, as Indenture Trustee for the Second Lien Notes and Wells Fargo Bank, N.A. as Successor Administrative Agent and Successor Collateral Agent for

the Third Lien Lenders has objected to confirmation of the Plan pursuant to section 8(k)(ii) of the credit agreement. For the reasons set forth herein, each such objection is overruled.

18 The argument concerning the inability to pay debts as they become due under section 8(g)(v) of the credit agreement further demonstrates the relationship between JPMorgan's borrower and affiliates within Charter's capital structure.

19 The *Iridium* factors are: "(1) the balance between the litigation's possibility of success and the settlement's future benefits; (2) the likelihood of complex and protracted litigation, 'with its attendant expense, inconvenience, and delay,' including the difficulty in collecting on the judgment; (3) 'the paramount interests of the creditors,' including each affected class's relative benefits 'and the degree to which creditors either do not object to or affirmatively support the proposed settlement'; (4) whether other parties in interest support the settlement; (5) the 'competency and experience of counsel' supporting, and '[t]he experience and knowledge of the bankruptcy court judge' reviewing, the settlement; (6) 'the nature and breadth of releases to be obtained by officers and directors'; and (7) 'the extent to which the settlement is the product of arm's length bargaining.' " *Id.* (quoting *In re WorldCom, Inc.,* 347 B.R. 123, 137 (Bankr.S.D.N.Y.2006)).

20 Even without the CII Settlement, the Debtors would have been obligated to pay the $25 million Allen Management Receivable, and, to the extent they wished to purchase the remainder of Mr. Allen's CC VIII preferred units, approximately $150 million. CX 211, Debtors' Disclosure Statement at 27; Goldstein Decl. ¶ 26.

Terms of CII Settlement[21]			
Key Settlement Benefits		**Key Settlement Costs**	
• $1.14 billion cash tax savings associated with preservation of $2.8 billion of NOLs • Hundreds of millions of dollars for preservation of reinstatement ability[22]		*Claim and Sale Consideration* • $150 million to sell the CC VIII Preferred Units • $25 million Allen Management Receivable[23]	
		Total Claim and Sale:	**$175 mm**
• $135–165 million to purchase the CC VIII Preferred Units • $1.6 billion infusion of new capital through the rights offering[24] • Step-up in tax basis		*Settlement Consideration* • $85 million New CCH II Notes • $60 million 3% Common Equity • $35 million 4% Warrants • $20 million capped fee reimbursement	
		Total Settlement:	**$180 mm**
Grand Total:	**$3.5 billion +**	**Grand Total:**	**$375 million**

21 This chart is based on VDX 3 (CII Settlement: "Gives" and "Gets") and accurately summarizes the CII Settlement; *See also* Debtors' Disclosure Statement at 27–28.

22 "On the preservation of the ability to reinstate the debt, this—I think we've been conservative in putting hundreds of millions of dollars, frankly at the time we were negotiating this when there was even more severe dislocation of the credit markets, that was up to billions of dollars. Every hundred basis points of increase in the debt would be a 500 million dollar expense to the company. And so once you start talking about potentially several hundred basis points, you very quickly get into the billions of dollars." 8/24/09 Tr. 16:18–17:3 (Goldstein).

23 The "Allen Management Receivable" is a "$25 million [payment] for amounts owing to CII under the Management Agreement and predecessor agreements." CX 407, Plan at Article I.A.6; *see also id.* at Article VI.A.2(a), (d).

24 "[W]ithout the CII Settlement, this plan would not be possible at all and therefore the rights offering couldn't happen .... the CII Settlement is one of the bases for the plan and which allows the rights offering to happen, allows the debtors to raise this money." 8/17/09 Tr. 34:7–34:12 (Doody).

25 The CII Settlement does not compensate Mr. Allen for his equity interests in the Debtors. The settlement compensation is for the prospective duties and obligations Mr. Allen agreed to assume in exchange for consideration.

26 The Debtor Releasees include (a) the Debtors; (b) the parties who signed Plan Support Agreements with a Debtor; (c) any statutory committees appointed in the chapter 11 Cases ((a)-(c), collectively, the "*Releasing Parties* "); and (d) for each

of the Releasing Parties, their respective members, officers, directors, agents, financial advisors, attorneys, employees, partners, Affiliates, and representatives. Plan at X.D at 60.

27 *See* CCI Noteholder Objection at 98–100 [Docket No. 581]; JP Morgan Objection at 32–34 [Docket No. 600] (Filed Under Seal); Objection of Wells Fargo Bank, N.A., as Successor Administrative Agent and Collateral Agent, to Confirmation of the Debtors' Joint Plan of Reorganization Pursuant to Chapter 11 of the United States Bankruptcy Code (Filed Under Seal) [Docket No. 584] at 41–46; Objection of Key Colony Fund, LP to Joint Plan of Reorganization [Docket No. 574] at 1–10; Objection of the United States Trustee to the Debtors' Joint Plan of Reorganization [Docket No. 475] at 1–15; Objection of the U.S. Securities and Exchange Commission to the Confirmation of the Debtors' Joint Plan of Reorganization [Docket No. 576] at 1–12.

28 These include "whether the estate received substantial consideration; the enjoined claims were 'channeled' to a settlement fund rather than extinguished; the enjoined claims would indirectly impact the debtor's reorganization 'by way of indemnity or contribution'; and the plan otherwise provided for the full payment of the enjoined claims. Nondebtor releases may also be tolerated if the affected creditors consent." *In re Metromedia,* 416 F.3d at 142 (citations omitted).

29 A "CII Settlement Claim Party" is defined as "(a) Mr. Allen; (b) his estate, spouse, immediate family members and heirs; (c) any trust in which Mr. Allen is the grantor or which is created as a result of his death; (d) CII; and (e) any other Allen Entity which Mr. Allen or any of the other persons or Entities identified in clauses (a) through (d) of this definition, unilaterally or together with any other Allen Entity (directly or through agents), can legally bind to a settlement, compromise and release of Claims and Interests against the applicable Debtors under the Plan without authorization, consent or approval of any other person or Entity; provided, however, that in no event shall "CII Settlement Claim Party" include any public company, including without limitation, any Entity that has securities listed, quoted or traded on any securities exchange." CX 407, Plan at Article X.E.

30 No parties dispute that the Plan satisfies the following applicable confirmation requirements: Bankruptcy Code sections 1129(a)(2), 1129(a)(4)-(5), 1129(a)(8)-(9), 1129(a)(11)-(13). To the extent the Plan's satisfaction of 11 U.S.C. § 1129(a)(5) remains at issue, the Court concludes that this confirmation standard is satisfied. It is undisputed that two out of the eleven seats on the Debtors' board of directors remain vacant. *See* JP Morgan Post–Trial Brief at pp. 57–61. Although section 1129(a)(5) requires the plan to identify all directors of the reorganized entity, that provision is satisfied by the Debtors' disclosure at this time of the identities of the *known* directors. *See In re Am. Solar King Corp.,* 90 B.R. 808, 815 (Bankr.W.D.Tex.1988) ("The debtor's inability to specifically identify future board members does not mean that the debtor has fallen short of the requirement imposed by [1129(a)(5)] because the debtor *at this point* " disclosed all known directors). The testimony of Ms. Villaluz of Franklin also explained the ongoing internal process for identifying the director to be selected by Franklin and made clear that this director would be independent and have no connection to Franklin.

31 The confirmation requirements set forth in subsections (a)(6), (14), (15), and (16) of section 1129 are not applicable to the Plan. 11 U.S.C. § 1129(a)(6) concerns the need for government approval of rate changes subject to government regulatory jurisdiction; § 1129(a)(14) concerns debtors required by order or statute to pay domestic support obligations; § 1129(a)(15) applies to individual debtors; and § 1129(a)(16) is only relevant to the mechanism by which certain property is transferred.

32 Moreover, as discussed herein, the CII Settlement embedded in the Plan was proposed in good faith.

33 For the sake of brevity, the Court does not delve into the flaws of each of the purported "add-on" recoveries discussed in the McDonough Report. For example, the McDonough Report suggested that the Debtors' liquidation analysis underestimated the value to be recovered from preference actions by $25.8 million. The Debtors' projected recovery of zero is more persuasive, however, given the fact that in a distressed sale scenario a purchaser likely would insist on a waiver of preference actions against trade vendors and employees to protect the ongoing value of the business going forward. The Debtors' expert, Mr. Folse, testified that these assumptions are reasonable. 8/18/09 Tr. at 35:7–36:2 (Folse). But even if preference recoveries were to be included, the Debtors' post-trial brief and testimony from Folse shows that the size of preference recoveries from insiders and non-insiders would be *de minimis. See* Debtors' Br. Supp. at 50–51; 8/18/09 Tr. at 63:18–20, 65:3–10 (Folse).

34 Excluding insider votes, 9 impaired classes (A–3, B–3, B–4, C–3, F–4, G–4, H–4, J–2, and J–6) voted to accept the Plan. *See* Schepper Decl. at ¶¶ 15, 16.

35 The Debtors enjoy considerable discretion when classifying similar claims in different classes. *See In re Drexel Burnham Lambert Group, Inc.,* 138 B.R. 714, 715 (Bankr.S.D.N.Y.1992) (separate classification of similar classes was rational where members of each class "own[ed] distinct securities and possess[ed] different legal rights").

36 *See* Law Debenture Trust Br. Opp'n at 37 ("The Second Circuit, however, has held that the existence of different origins or different rights outside of bankruptcy is not a legitimate reason to classify non-priority unsecured claims separately").

Boston Post Road, 21 F.3d at 483 (holding that the different origins of "unsecured deficiency claim[s] and general unsecured trade claims ... which enjoy similar rights and privileges within the Bankruptcy Code, do not alone justify separate segregation").

37 Moreover, although not dispositive to the Court's analysis of this issue, the debtors in *Boston Post Road,* unlike the Debtors in these cases, apparently admitted that the unsecured deficiency claim and the unsecured trade claims were "substantially similar." *Boston Post Road,* 21 F.3d at 481 ("Debtor first cites two recent opinions by bankruptcy judges holding that separate classification of similar claims is in fact mandated ... Debtor contends that [the wording of section 1122] reflects Congress' intent to dispense with the requirement that similar claims be classified together").

38 The CCI Noteholders' argument that the classes of general unsecured claims are not legitimately impaired appears to rest in significant part on the Debtors' May 1, 2009 revisions to the Plan four days prior to the Disclosure Statement hearing. *See* Law Debenture Trust Br. Opp'n at 42–43 ("The Debtors' prior filings reflect their understanding that CCI General Unsecured Claims are not truly impaired under the Plan"). Prior to the disclosure statement hearing the Debtors revised the Plan to reflect that these classes were impaired rather than unimpaired. But the Debtors' correction of the legal description of the treatment of these classes is not a basis to infer any intent to artificially impair a class.

39 The CCI Noteholders' interpretation of the Management Agreement to provide for the reimbursement of interest costs is not persuasive in light of the testimony of Mr. Doody to the contrary. *Compare* 8/17/09 Tr. at 194:14–195:17 (Doody) (noting that Management Agreement only provides for payment at cost without interest), *with* Law Debenture Br. Opp'n at 44–45 ("The Management Agreement provides for CCI to be reimbursed for all costs, including interest obligations ... CCI is therefore clearly entitled to reimbursement for any liability CCI incurs as Manager ... including any interest ...").

40 *See* *In re Worldcom, Inc.,* 2003 WL 23861928 at *59 (Bankr.S.D.N.Y. Oct.31, 2003).

41 Even if the CCI Noteholders and the CCI General Unsecured Creditors are similarly situated, the Debtors have nonetheless proven that any discrimination was justified. The disparate legal rights of each class, including the Management Agreement's provision which requires CCO to reimburse certain CCI general unsecured claims, constitute reasonable bases for awarding the CCI General Unsecured Creditors a higher recovery than the CCI Noteholders. The Debtors also have demonstrated that they cannot confirm and consummate the Plan without the purported discrimination. Debtors' Br. Supp. at 76 n. 112 (claiming to be "unable to consummate the plan if it provided for a par recovery to the CCI Noteholders"); *In re Lernout & Hauspie Speech Prods., N.V.,* 301 B.R. 651, 660 (Bankr.D.Del.2003) ("The hallmarks of the various tests have been whether there is a reasonable basis for the discrimination, and whether the debtor can confirm and consummate a plan without the proposed discrimination"), *order aff'd* 308 B.R. 672 (D.Del.2004); *Buttonwood Partners,* 111 B.R. at 63 (Bankr.S.D.N.Y.1990).

42 *See* Law Debenture Trust Br. Opp'n at 49 ("[A] debtor must show that its plan does not unfairly discriminate whenever a dissenting class is receiving a materially less favorable recovery than another class of creditors that is entitled to the ***same priority level*** under the Bankruptcy Code") (emphasis added); *In re Dow Corning Corp.,* 244 B.R. 696, 702 (Bankr.E.D.Mich.1999) (confirming plan because it did not discriminate, but noting that the test for discrimination examines whether the plan "provides for equal treatment for all creditors holding the ***same priority level*** ") (emphasis added);

43 In any event, regardless of which Charter entity "owns" the NOLs, there is no evidence in the record that establishes CCI's right to independently exploit them.

44 A number of individual equity holders, acting *pro se,* improperly communicated with the Court during the trial by e-mail complaining about what appeared to them to be favorable treatment of Mr. Allen at their expense. This e-mail campaign did not influence the Court's deliberations or decision in any respect and appears to have been based on a fundamental misunderstanding of the settlement with Mr. Allen.

45 Similarly, as discussed herein, the releases proposed by the Plan are valid under Second Circuit law.

46 Indeed, no motion seeking substantive consolidation of these chapter 11 cases was ever presented to this Court.

End of Document