Should Valuation Have Such a Material Role in Chapter 11?

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I. Introduction

There can be little doubt that valuation plays a central role in chapter 11 bankruptcy cases. The valuation of a reorganizing debtor's business is critical to determining who will own the reorganized debtor.[1] As a function of the absolute priority rule, creditors generally will receive all of the value of the reorganizing debtor unless there is a surplus available for holders of equity interests.[2] Similarly, if there are senior and junior creditors in a debtor's capital structure, junior creditors will generally not receive a recovery unless there is sufficient value to satisfy in full all senior claims.[3]

Valuation is key to determining whether there is any surplus value. Thus, the valuation of the common stock of the reorganized debtor will determine whether unsecured creditors and equity security holders are entitled to receive any distribution under a proposed chapter 11 plan of reorganization. Moreover, the dollar amount at which the shares of the reorganized entity is valued will also impact the size of the distribution to which the chapter 11 debtor's creditors and equity holders are legally entitled. For these reasons, valuation is often hotly contested in chapter 11 cases.[4]

Not surprisingly, constituents that stand to receive the bulk of a reorganizing debtor's equity often have an incentive to argue for a lower valuation of the debtor, so as

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[1] *See, e.g.*, *Conso. Rock Prods. Co. v. Du Bois*, 312 U.S. 510, 525 (1941) ("Findings as to the earning capacity of an enterprise are essential to a determination of the feasibility as well as the fairness of a plan of reorganization.").

[2] *See* 11 U.S.C. § 1129(b)(2).

[3] *See, e.g.*, *Protective Comm. v. Anderson*, 390 U.S. 414, 441 (1968) ("Since participation by junior interests depends upon the claims of senior interests being fully satisfied, whether a plan of reorganization excluding junior interests is fair and equitable depends upon the value of the reorganized company.").

[4] *Cf. In re Bush Indus., Inc.*, 315 B.R. 292, 297 (Bankr. W.D.N.Y. 2004) ("Both creditors and stockholders share the same interest in the outcome of a favorable valuation. An inappropriately high valuation will deny to creditors the right to assets without allocation for the interest of equity. On the other hand, an inappropriately low valuation will deny to equity the right to assets after allocation for the interest of creditors.")

to prevent junior creditors or shareholders from taking a portion or a substantial portion of a reorganized debtor's stock. Junior creditors and equity security holders that might otherwise recover nothing under a chapter 11 plan, on the other hand, may have an incentive to lobby the bankruptcy court to value the reorganizing debtor at a higher dollar amount. The Bankruptcy Code does not dictate a particular method for valuation that must be used, and thus, bankruptcy courts have to grapple with the issue on a case-by-case basis.

While it may be difficult to dispute that valuation *does* play a significant role in chapter 11, there is certainly room to debate whether valuation *should* play such a significant role. Such a debate should focus on seven considerations. For one, courts have routinely expressed the view that valuation is an inexact science. Important valuation determinations can be impacted by factors that perhaps should not be part of the equation, such as the credibility and skill of expert witnesses. Valuation outcomes also may be vulnerable to the parochial interests and relative bargaining power of quarreling constituents. Against this backdrop, a chapter 11 debtor's senior management may have the incentive to align itself with the faction of creditors or holders of interests that stands to receive the most common stock under a chapter 11 plan or that otherwise has the most to offer senior management. Senior management may use its opportunity and position to influence the valuation process in favor of the creditor group that will be in the best position to offer management incentives. Finally, there is of course the issue of the accuracy of valuation projections. How often does this number actually turn out to be an accurate forecast of the value of the reorganized debtor's equity?

This article explores these issues. Part II of the article discusses how valuation is an imprecise exercise. This view is primarily expressed through a review of the valuation proceedings in the chapter 11 cases of Mirant Corporation and its affiliated debtors and debtors in possession ("Mirant"). Although the valuation hearing in *Mirant* was one of the longest and most thorough valuation hearings in chapter 11 history, the bankruptcy court nevertheless appeared to be uncomfortable making a final ruling on the issue.

Part III of this article examines how politics may be lurking in the background of valuation disputes. This issue is well illustrated by the valuation battle in the chapter 11 cases of National Gypsum and its affiliated debtors and debtors in possession ("National Gypsum"). In *National Gypsum*, management valued the company at between $300 million and $375 million while holders of junior debt valued the company at more than $600 million.[5] The plan approved by the bankruptcy court left the junior debt out of the money. Shortly after National Gypsum emerged from bankruptcy, however, management announced a cost-savings plan that certain of the junior debt holders alleged dramatically increased the value of the reorganized debtors' shares.[6] Both during the chapter 11 cases and in an unsuccessful post-bankruptcy state court action, holders of the junior debt argued that National Gypsum's senior management concealed relevant information and purposely undervalued the company, in part because of certain incentives offered by the holders of the senior debt.[7]

The issue of politics was also featured more recently in the chapter 11 cases of Nellson Nutraceutical, Inc. and its affiliated debtors and debtors in possession

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[5] *See Browning v. Prostok*, 165 S.W.3d 336, 340-42 (Tex. 2005).

[6] *See id.* at 341-42.

[7] *See id.* at 341-42, 348-49.

("Nellson").[8] In *Nellson*, the Bankruptcy Court for the District of Delaware arrived at an initial figure for the projected enterprise value of the debtors based on weighting the corrected valuation projections of three expert witnesses according to each expert's credibility.[9] The court ultimately determined, however, that it was appropriate to revise this initial figure downward because the principal shareholder, with the participation of senior management, had manipulated the preparation of the debtors' long range business plan to enhance the perceived value of Nellson and because all three experts had relied on this plan in reaching their valuation projections.[10]

Part IV of the article attempts to examine the accuracy of valuation projections relating to a reorganizing chapter 11 debtor. We selected twenty of the larger and more recent chapter 11 debtors to emerge as public companies and compared the post-confirmation value of the shares of the reorganized chapter 11 debtors to the projected value of the same shares as expressed in each debtor's respective disclosure statement. Analysis of this data suggests that valuation projections are often inaccurate.

Finally, Part V of this article ponders whether there is a solution to the problems with valuation discussed in Parts II-IV. Specifically, Part V discusses the concept of "volume weighted average price" ("VWAP"), which may provide a mechanism for valuation based on the trading price of an entity's shares after emergence from chapter 11. Part V evaluates the VWAP mechanism as a possible solution to sidestep the

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[8] *See In re Nellson Nutraceutical, Inc.*, No. 06-10072 (CSS), 2007 WL 201134, at *19 (Bankr. D. Del. Jan. 18, 2007).

[9] *See id.* at *41-*42.

[10] *See id.* at *42-*43.

imprecision, inaccuracy and political problems that accompany more traditional methods of valuation.

II. Valuation is an Imprecise Exercise

In *Mirant*, several significant parties in interest disagreed as to the appropriate enterprise valuation of Mirant Corporation and all of its wholly owned or partially owned direct and indirect subsidiaries (the "Mirant Group").[11] The primary parties to the dispute were (i) the debtors, (ii) the official committee of unsecured creditors of Mirant Corporation (the "Corp. Committee"), (iii) the official committee of unsecured creditors of Mirant Corporation's second tier subsidiary, Mirant Americas Generation LLC (the "MAG Committee"), (iv) the equity committee and (v) a group representing the creditor constituency just senior to the subordinated debt ("Phoenix").[12] A court-appointed examiner also participated in the valuation proceedings.[13] The dispute arose when the equity committee filed (i) a motion alleging that the debtors undervalued the Mirant Group in their proposed plan of reorganization and (ii) a complaint asking the court to direct Mirant to call a shareholder meeting.[14]

After a status conference and upon a motion filed by the debtors, the bankruptcy court scheduled a three-day hearing on the issue of valuation.[15] In actuality, the Mirant valuation hearing took approximately twenty-seven court days and spanned nearly three

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[11] *In re Mirant Corp.*, 334 B.R. 800, 804 (Bankr. N.D. Tex. 2005).

[12] *See id*. at 808.

[13] *See id.* at 811.

[14] *Id.* at 807.

[15] *See id.; see also* Second Amended Disclosure Statement Relating to the Debtors' Second Amended Joint Chapter 11 Plan of Reorganization filed in *In re Mirant Corp., et al.*, Case No. 03-46590 (Bankr. N.D. Tex. Sept. 30, 2005) (the "Mirant Disclosure Statement"), at 73.

months.[16] In all, eighteen parties filed notices of intent to participate in the valuation hearing, five parties participated in discovery, more than one million pages of documents were produced, and eighteen witnesses were deposed.[17]

Six parties participated in the valuation hearing and over one thousand exhibits were exchanged among the participating parties.[18] Three fact witnesses and eight expert witnesses testified at the valuation hearing.[19] The testifying experts submitted ten expert reports and hundreds of demonstrative exhibits in support of their position.[20] The bankruptcy court heard twenty-five days of live witness testimony.[21] The bankruptcy court also had the parties submit briefs on certain legal issues relating to valuation, including the impact of recent Supreme Court precedent.[22]

To say that the valuation hearing and the preparations leading up to it were of the most extensive of their kind would be an understatement. Nevertheless, the bankruptcy court responded in a rather non-conventional manner. On June 30, 2005, Judge Lynn issued a preliminary ruling in letter form that directed the debtors and their valuation expert to make certain modifications to the debtors' business plan projections and their valuation methodology (the "June 30th Letter"). Judge Lynn explained in the June 30th Letter that the rulings contained therein were binding and that they would be explained in a memorandum opinion that would be issued prior to the confirmation hearing.[23]

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16 334 B.R. at 809; Mirant Disclosure Statement, at 73-74.

17 334 B.R. at 809; Mirant Disclosure Statement, at 73.

18 *Id.* at 74.

19 *Id.*

20 *Id.*

21 *Id.*

22 334 B.R. at 810; Mirant Disclosure Statement, at 74.

23 June 30th Letter, at 4.

In a second letter ruling dated July 26, 2005 (the "July 26th Letter") that amended the June 30th Letter, the bankruptcy court acknowledged that the method of communicating its decision was informal.[24] The fact that the bankruptcy court responded in such an informal and unorthodox manner after a three month-valuation hearing suggests that the bankruptcy court was hesitant to make a final decision on the evidence before it, and that the court hoped that the parties would settle the issue before confirmation.

The court was clearly uncomfortable to some extent with the valuation calculations submitted by all of the parties.[25] In the initial paragraphs of its published valuation opinion, the court stated that "[i]n the case at bar, the court cannot accept unchanged any of the values for Mirant Group that have been placed in evidence."[26] Indeed, Judge Lynn required a dramatic overhaul of the business plan and the debtors' expert's valuation methodology, even though he adopted both as the basis for valuation.[27] In the decision that Judge Lynn issued in December of 2005 on valuation, he noted that the business plan was "a fair, reasonable projection of future operations of Mirant Group" and that he rejected alternative projections submitted by the equity committee.[28] Yet in the June 30th Letter, he acknowledged that he was requiring a significant overhaul of the debtors' valuation methodology and business plan:

> I recognize that the requirements imposed on Debtors and the Blackstone Group by my ruling are substantial. I also

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[24] *See* July 26th Letter, at 1 ("As in my June 30 letter, I will not provide the reasoning underlying my conclusions in order to limit the legal effect of this relatively informal method of communication.").

[25] *See* 334 B.R. at 824.

[26] *Id.*

[27] *See id.*

[28] *Id.* at 824-25.

> accept as genuine the concern that a ruling requiring recomputation could lead to further disputes among the parties (though I hope and expect this worry will prove unfounded). However, after considering several alternatives to my ruling, I have determined this is the only way to achieve a result supportable under the evidence.[29]

Thus, the bankruptcy court refused to adopt, unchanged what it considered to be the most persuasive of the valuation projections and calculations. Moreover, even though the modifications required by the court were time-consuming and labor-intensive, the bankruptcy judge stated that he did not believe that appropriate alternatives existed:

> Before concluding this letter, I must acknowledge my dismay at the amount of time necessary to complete recalculation of value. The Corp Committee is quite correct: I had expected a result long before mid-September. However, I see no alternative to proceeding as the VIC proposes. Prior to issuing my June 30 ruling, I attempted to calculate a value using "benchmarks" as suggested by Debtors' counsel in closing during the valuation hearing. The result ($10.5 - 11.5 billion) was unsatisfactory in my view because (1) the value would not withstand any sort of careful review (e.g., it accounted for changes in gas prices but not other commodities); and (2) the approximation did not, in my judgment, clearly show that equity was, or was not, in the money. . . .[30]

There is ample additional evidence that Judge Lynn was reluctant to make a definitive ruling after the extensive valuation proceedings. In both letter rulings and the published valuation decision, Judge Lynn took issue with the experts' use of data and assumptions. In the July 26th Letter, the court commented on the experts' use of data in the course of valuation calculations and urged them to use facts currently known to them

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[29] June 30th Letter, at 4.

[30] July 26th Letter, at 3-4.

wherever possible.[31] The court also wanted the business plan to be updated with more recent forecasts of commodities prices.[32] Judge Lynn also addressed the "misperception" that some of the experts seemed to have that "Mirant Group's value [was] properly set by the market place" and emphasized that the market price of Mirant debt preconfirmation was definitely not an accurate measure of Mirant Group's value.[33] The court noted, among other things, that the market does not always correctly account for the benefits of bankruptcy.[34]

In its December 9, 2005 valuation opinion, the bankruptcy court discussed the issue of the motives of certain of the expert witnesses and noted that there was evidence that the equity committee's and Phoenix's expert witnesses were acting as advocates rather than as disinterested experts.[35] Judge Lynn stopped short of saying that an expert would necessarily act improperly if such expert was influenced by the needs of the party that retained such expert.[36] The court nevertheless noted that the potential motives of experts was a reason for courts to be cautious.[37]

Moreover, before giving its actual ruling, the court in *Mirant* detailed several considerations that made it difficult to value the Mirant Group. For instance, the bankruptcy court emphasized that there were many variables and uncertainties present in

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[31] July 26th Letter, at 2 ("Another general guideline in your work is that, where possible without distorting your valuation methodology, you should utilize facts currently known. The limitations on the use of data that is not disputable but was not available during the valuation hearing is that, if use of that data requires making new assumptions that do not automatically flow from the data, the new data should not be used.").

[32] *See* 334 B.R. at 829.

[33] *Id.* at 832.

[34] *See id.* at 834.

[35] *See id.* at 814.

[36] *Id.* at 815.

[37] *Id.*

the valuation estimates.[38] Judge Lynn also observed that there were "peculiar problems" that made it challenging to value a company in the debtors' industry, which, according to testimony, was a cyclical industry that had not gone through a full cycle.[39]

Furthermore, Judge Lynn prefaced his ruling with comments that evidenced a lack of faith in valuation generally. At one point in the opinion he commented on the reliability of valuation methodology generally and cited several cases with language that highlighted the limits and lack of precision of the valuation exercise.[40] He also questioned some of the methodology commonly employed in determining valuation.[41] Among other things, Judge Lynn seemed troubled by the fact that "[c]ash flows are not updated regularly . . . to reflect broken assumptions" and that "[s]tock prices of comparables for just one day are used in calculating multiples."[42] In the closing remarks of his opinion, Judge Lynn again expressed a lack of confidence in the valuation process and highlighted its inherent limitations:

> At best, the valuation of an enterprise like Mirant Group is an exercise in educated guesswork. At worst it is not much more than crystal ball gazing. There are too many variables, too many moving pieces in the calculation of value of Mirant Group for the court to have great confidence that the result of the process will prove accurate in the future. Moreover, the court is constrained by the need to defer to experts and, in proper circumstances, to Debtors' management.[43]

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38 334 B.R. at 818.

39 *Id.* at 818-19.

40 334 B.R. at 818.

41 *See id.* at 819.

42 *Id.*

43 *Id.* at 848.

Judge Lynn was certainly not the first judge to point out that valuation is more of an art than a science.[44] If, however, the *Mirant* bankruptcy court questioned whether a fair result could be reached after an extensive hearing where advocates on both sides were given the opportunity to present evidence and conduct cross examination, how much confidence can other bankruptcy courts have in valuation outcomes derived from less extensive efforts?

III. Politics May Impact the Outcome of Valuation Disputes

Another problem that may plague valuation disputes is the potential for politics to creep into the process and affect the valuation evidence or outcomes. This was a prominent issue in the contentious valuation dispute in the *National Gypsum* bankruptcy proceedings. There, a committee comprised of unsecured bondholders and trade creditors battled with the debtors' management over management's valuation evidence.[45] Later, some of the bondholders brought a post-confirmation state court action against the debtors' management alleging that members of management breached their fiduciary duties by intentionally undervaluing the company during the chapter 11 proceedings.[46]

Under a proposed plan that National Gypsum filed with the bankruptcy court, National Gypsum was valued at $350 million.[47] The debtors' proposed plan also provided that National Gypsum's current officers and directors would stay on as the

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[44] *See, e.g., Union Bank of Switz. v. Deutsche Fin. Servs. Corp.*, No. 98 Civ. 3251(HB), 2000 WL 178278, at *8 (S.D.N.Y. Feb. 16, 2000) ("Put another way, 'the determination of the "fair valuation" of the debtor's assets at a specific time is at best an inexact science, and may often be impossible."' (quoting *Constructora Maza, Inc. v. Banco de Ponce*, 616 F.2d 573, 577 (1st Cir. 1980)); *Boyle v. Wells (In re Gustav Schaeffer Co.)*, 103 F.2d 237, 242 (6th Cir. 1939) ("The valuation of property is an inexact science and whatever method is used will only be an approximation and variance of opinion by two individuals does not establish a mistake in either.")

[45] *See* 165 S.W.3d at 339.

[46] *Id.*

[47] *Id.* at 340.

initial management team for the reorganized debtor, a newly created entity ("New NGC").[48] Under the same proposed plan, the lion's share of the New NGC stock would go to the holders of senior notes and senior debentures (collectively, the "Senior Bondholders"), and holders of junior bonds (the "Junior Bondholders") would only receive warrants to purchase New NGC stock.[49]

Earlier in the cases, an official committee comprised of holders of unsecured bond and trade debt (the "BT Committee") had moved for the appointment of a chapter 11 trustee alleging that "[m]anagement intentionally understated all its forecasts to hide its objective views of the company and to hide the company's value."[50] Moreover, the BT Committee asserted that "this manipulation [was] a weapon [m]anagement has used to try to eliminate the consensual plan forged by the BT Committee and to promote a war between the senior and junior bondholders."[51] The bankruptcy court ultimately denied the BT Committee's motion to appoint a chapter 11 trustee on the basis that the BT Committee did not meet its burden of proof on the issue of whether National Gypsum's management purposely manipulated National Gypsum's business plan.[52]

After National Gypsum filed its proposed plan, the BT Committee filed an objection and proposed a competing plan that valued New NGC at $630 million.[53] In its objection, the BT Committee accused National Gypsum's management of knowingly

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48 *Id.* at 341.

49 *See id.*

50 *Id.* at 348-49 (citation omitted).

51 165 S.W.3d at 349 (citation omitted).

52 *Id.*

53 *Id.* at 341.

misrepresenting National Gypsum's future business prospects and value. Specifically, the BT Committee alleged:

> [i]n exchange for greater than 100% recovery and control of the reorganized company's board of directors, certain post petition acquirors of Senior Notes . . . publicly accepted the [National Gypsum] Plan, including its management-entrenchment and enrichment provisions. Hence, management deceived [National Gypsum's] creditors with a misrepresentation of the value of the company to coax a small creditor faction into supporting its plan and opposing the BT Plan.[54]

Ultimately, the bankruptcy court found that the BT Committee failed to prove its proposed valuation, refused to confirm the BT Committee's plan, and approved the debtors' plan after finding that it had been solicited in good faith.[55] Shortly thereafter, New NGC announced a new cost-savings plan pursuant to which annual expenses would be reduced by $30 to $40 million dollars.[56] This announcement came roughly one month after the expiration of the 180-day period during which an interested party could challenge the bankruptcy confirmation order on the ground that it was procured by fraud.[57]

Following this announcement, certain of the Junior Bondholders brought a state court action against National Gypsum's former officers and directors, their financial advisor and one of the Senior Bondholders.[58] Counts for breach of fiduciary duties, actual fraud, constructive fraud, and civil conspiracy were brought against all of the

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54 *Id.*

55 *Id.* at 341, 349.

56 165 S.W.3d at 341.

57 *Id.*; *see also* 11 U.S.C. § 1144.

58 165 S.W.3d at 341.

defendants.[59] The plaintiffs further sought recovery against the former directors and officers and their financial advisor for gross negligence.[60] Alternative claims were also brought against the financial advisor and the Senior Bondholder defendant for participating, aiding, assisting, and/or inducing breach of fiduciary duties.[61]

According to the plaintiffs, the Senior Bondholders, National Gypsum's former officers and directors, and their financial advisors intentionally undervalued New NGC by hiding their intention to significantly reduce the company's operating expenses.[62] The plaintiffs alleged that even though National Gypsum's former officers and directors were fully aware of the cost-savings plan that would be announced after bankruptcy, they represented that New NGC was worth between $300 million and $375 million based on their purported "best estimate and intention of how the company would operate once out of bankruptcy."[63] According to the plaintiffs, however, the cost-savings plan increased the valuation of New NGC's stock from $350 million to almost $1 billion, and had the cost-savings plan been disclosed, the Junior Bondholders would have received a larger distribution. Thus, the plaintiffs argued, the Senior Bondholders received a windfall.[64]

The plaintiffs further alleged that the officers and directors stayed in their positions in New NGC and received other incentives in exchange for their role in hiding the cost-savings plan.[65] The trial court granted summary judgment in favor of the defendants in the spring of 1999, but the Texas Court of Appeals reversed the summary

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59 *Id.*

60 *Id.*

61 *Id.*

62 *Id.* at 341-42.

63 *Id.* at 342 (citation omitted).

64 165 S.W.3d at 342.

65 *Id.*

judgment order that was granted in favor of certain former officers and directors that had not already settled with the plaintiffs.[66] These former officers and directors appealed arguing, among other things, that the state court claims constituted an impermissible collateral attack on the final judgment of the bankruptcy court.[67]

The Texas Supreme Court agreed with this argument.[68] The court reasoned that the interests of the Junior Bondholders were represented in the chapter 11 proceedings by the BT Committee, which raised the same allegations of intentional undervaluation and fraud against National Gypsum's management as part of its unsuccessful attempts to get a chapter 11 trustee appointed to replace management and to block confirmation of National Gypsum's proposed plan of reorganization.[69] Thus, since the fraudulent conduct at issue was not the kind that prevented the Junior Bondholders from presenting their legal rights in the bankruptcy proceedings, the Texas Supreme Court held that the state court action was an impermissible collateral attack on the bankruptcy court's confirmation order.[70]

Whether or not the management in *National Gypsum* actually did conspire with the Senior Bondholders to manipulate the valuation projections, the case is nonetheless illustrative of how even the perception of political influence can cause participants in chapter 11 proceedings to lose confidence in the valuation process. Because the Bankruptcy Code gives a chapter 11 debtor the exclusive right to file and solicit a chapter

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66 *Id.* at 343.

67 *Id.* at 343.

68 *Id.* at 351.

69 *See* i*d.* at 348-49.

70 *See* 165 S.W.3d at 349.

11 plan early in the case,[71] however, the Bankruptcy Code sets the stage for a debtor's management to control the plan process, a critical component of which is the valuation of the reorganized debtor.

Thus, as a practical matter, a chapter 11 debtor's senior management can have a major impact on experts' estimates with respect to valuation.[72] Indeed, experts may make their estimates as to a company's value based primarily or exclusively on sources that senior management has prepared and discussions with management. In *Mirant*, the debtors' financial adviser, The Blackstone Group, inserted a disclaimer in its expert report providing that "in preparing the Valuation, Blackstone reviewed and discussed the Company's operating and financial projections with senior management" and that Blackstone "neither independently verified nor opined on the Company's underlying business or strategic decisions."[73]

The bankruptcy court in *Mirant* specifically found that the Blackstone report was the most reliable of the expert reports concerning valuation.[74] Moreover, Judge Lynn

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[71] *See* 11 U.S.C. § 1121.

[72] Management's influence and control in the valuation process is illustrated well by certain *dicta* in *Statutory Comm. of Unsecured Creditors v. Motorola, Inc. (In re Iridium Operating LLC)*, 373 B.R. 283 (Bankr. S.D.N.Y. 2007), that suggests that valuation evidence submitted by management might be given greater weight in certain circumstances. The valuation discussion in *Iridium* took place in the context of determining the "fair value" and solvency of the debtors for the purposes of evaluating alleged prepetition preferential transfers. The court found that independent market analysis by investment bankers and accounting firms, among others, supported the reasonableness of the debtors' cash flow projections in their business plan, despite the subsequent demise of the company less than nine months after its launch. *Id.* at 348-49. The creditors' committee, which was seeking recovery of approximately $3.4 billion in alleged preferential transfers, presented evidence that it believed demonstrated the debtors were actually insolvent at the time they made the projections. However, the court determined that the creditors' committee's experts did not adequately explain or rebut the debtors' projections and market valuations that contradicted their opinion. *Id.* at 350-51. The court reasoned that, "[w]here alternative projections 'are no better supported by the evidence than are those in the Business Plan,' the projections in management's business plan should be used in the [Discounted Cash Flow analysis]." *Id.* at 351 (citing *Mirant*, 334 B.R. at 825).

[73] Expert Valuation Report of Timothy R. Coleman dated February 25, 2005 submitted in *In re Mirant Corp., et al.*, Case No. 03-46590 (Bankr. N.D. Tex. 2005), at 7.

[74] 334 B.R. at 830.

found that "Debtors and Debtors' management were not influenced in the valuation process by reason of any commitment to a creditor constituency to the detriment of equity owners; rather Debtors have properly attended to their fiduciary duties to all constituencies."[75] To the extent that the disclaimer in the Blackstone report is typical, however, it highlights that experts giving valuation opinions often need to rely on the work and impressions of a chapter 11 debtor's senior management. Consequently, when politics permeates a valuation dispute, management may be in the position to effectuate the agenda of the party with which it is aligned.

It may be difficult to estimate how often politics actually infiltrates valuation in bankruptcy. The issue arose again, however, in the Nellson bankruptcy.[76] In January of 2007, the Bankruptcy Court for the District of Delaware issued an unpublished decision as to the appropriate enterprise value for Nellson.[77] The court noted that it excluded the valuation report and testimony of the debtors' expert as unreliable under rule 702 of the Federal Rules of Evidence in an earlier order.[78] Thus, the bankruptcy court only focused on the reports and testimony of an expert for the official committee of unsecured creditors, an expert for an agent of first and second lien lenders, and an expert for an ad hoc committee of first lien lenders.

The court made several adjustments to three experts' valuation conclusions based on unsubstantiated judgments and/or errors in methodology, assumptions and/or calculations, and then assigned a weight to the experts' conclusions based on an

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[75] *Id.*

[76] *See Nellson*, 2007 WL 201134, at *19.

[77] *Id.* at *43.

[78] *Id.* at *14, n.3; *see also In re Nellson Nutraceutical, Inc.*, 356 B.R. 364 (Bankr. D. Del. 2006) (memorandum opinion on exclusion of testimony of debtors' expert under Rule 702 of the Federal Rules of Evidence).

assessment, *inter alia*, of each expert's credibility.[79] Importantly, however, the bankruptcy court also determined that it had to make a further downward adjustment of its initial figure for Nellson's enterprise value because all three experts based their analysis on numbers that had been manipulated upward by Nellson's principal shareholder ("Fremont") with the participation of senior management.[80]

The court explained that before the petition date but following the default of financial covenants under its loan agreements, Nellson's management spent months researching and preparing a long range business plan that was ultimately presented to lenders in November of 2005 and revised downward in December of 2005 to reflect the loss of a major customer.[81] Nellson filed for chapter 11 protection on January 28, 2006.[82] The debtors' management prepared a further downwardly revised long range business plan in February of 2006 but was later directed by executives of Fremont who sat on the board at Nellson to abandon this plan and instead to layer transformation and growth concepts into a business plan for Nellson.[83] Around this time, board members that were executives at Fremont raised the issue of increasing the compensation for Nellson's interim president (who at times expressed disagreement with Fremont's directed revisions to the business plan) and his management team and at times issued veiled threats making the interim president feel that his job was in jeopardy if he did not capitulate to Fremont's wishes.[84]

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79 *See Nellson*, 2007 WL 201134, at *19-*42.

80 *See id.* at *19.

81 *See id.* at *6-8.

82 *See Nellson*, 2007 WL 201134, at *2.

83 *See id.* at *11-*12.

84 *See id.* at *11.

Freemont and its executives on the Nellson board were extensively involved in the preparation of the new long range business plan, which was prepared in less than a month's time and finalized in May of 2006.[85] Notwithstanding certain warnings and disagreement from management as to the proposed budget numbers and valuation analyses and the fact the Nellson's financial performance was declining, the May of 2006 plan was far more optimistic, providing substantially higher revenue and EBITDA projections than the earlier plans.[86] The rosier projections were based in large part on the incorporation of transformational and growth ideas that did not appear to be supported by any market research or customer surveys.[87] There were also other questionable features of the plan including a new unsubstantiated "unallocated revenue" category that was apparently created to preserve the higher numbers in the plan, the last minute elimination of tens of millions of dollars in projected capital expenditures and the sudden unexplained inclusion of a fiscal year 2011.[88]

Concluding its analysis, the bankruptcy court stated "**[i]n sum, Fremont utilized its control over Nellson to manipulate both the business planning and valuation processes to come up with an artificially inflated enterprise value in order to claim some residual value for their existing equity position.**"[89] Although members of management seemed reluctant at times to assist with the optimistic forecasts in light of Nellson's poor financial performance, they ultimately seemed to be pressured to participate by Nellson's principal shareholder that had control over their employment and

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85 *See id.* at *12.

86 *See id.* at *12-*14.

87 *See id.* at *15.

88 *See Nellson*, 2007 WL 201134, at *16-*17.

89 *Id.* (emphasis in original).

compensation and had the incentive to inflate projections. Thus, it seems that politics played a significant role in distorting the valuation process in *Nellson* ultimately making the bankruptcy court feel compelled to make adjustments to the conclusions of experts that "*justly relied*" on the "*deliberately inaccurate information provided by the Debtors*."[90]

The vulnerability of valuation to politics and warring parties' parochial interests is another reason why valuation perhaps should not play such a dispositive role in determining the distributions creditors and holders of interests are entitled to receive under a chapter 11 plan. Although valuation is designed to fairly determine how to slice up the pie, it certainly cannot be completely insulated from the self-interest of the participants.

IV. Valuation Projections Are Frequently Inaccurate

As mentioned above, valuation is a threshold determination from which critical decisions in chapter 11 reorganizations are made and it materially affects the substantive rights of creditors and other interested parties. The emphasis placed on valuation outcomes in chapter 11 cases, however, may often be unwarranted as valuation projections are frequently inaccurate. Undoubtedly, because projections are made without the benefit of hindsight, most bankruptcy courts must accept the built in limitations of valuation to some degree. But how much inaccuracy should be tolerated?

In trying to get a sense of how often valuation projections miss the mark, we compared the post-confirmation value of the shares of reorganized chapter 11 debtors that emerged as public companies in some of the larger and more recent cases to the projected

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[90] *See id.* at *1 (emphasis in original).

value of the same shares as expressed in each debtor's respective disclosure statement.[91]

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[91] *In re Worldcom, Inc., et. al.*, Case No. 02-13533, Debtors' Disclosure Statement Pursuant to Section 1125 of the Bankruptcy Code, at 86 [Docket No. 6108], approved by order entered 05/28/2003 [Docket No. 6110]; *In re Global Crossing, Ltd., et. al.*, Case No. 02-40188, Disclosure Statement for Debtors' Joint Plan of Reorganization, at 47 [Docket No. 1991], approved by order entered 10/22/2002 [Docket No. 2030]; *In re UAL Corp., et. al.*, Case No. 02-48191, First Amended Disclosure Statement for Reorganizing Debtors' First Amended Joint Plan of Reorganization Pursuant to Chapter 11 of the United States Bankruptcy Code, at 2, 191 [Docket No. 13279], approved by order entered 10/21/2005 [Docket No. 13285]; *In re Delta Air Lines, Inc., et. al.*, Case No. 05-17923, Disclosure Statement for Debtors' Joint Plan of Reorganization under Chapter 11 of the United States Bankruptcy Code, at 143 [Docket No. 4494, ex. A], approved by order entered 02/07/2007 [Docket No. 4494]; *In re Kmart Corp., et. al.*, Case No. 02-02474, Disclosure Statement with Respect to First Amended Joint Plan of Reorganization of Kmart Corporation and its Affiliated Debtors and Debtors-in-Possession, Appendix D, at 1 [Docket No. 8925], approved by order entered 02/26/2003 [Docket No. 8918]; *In re Northwest Airlines Corp., et. al.*, Case No. 05-17930, Disclosure Statement with Respect to Debtors' First Amended Joint and Consolidated Plan of Reorganization under Chapter 11 of the Bankruptcy Code, at 58 [Docket No. 5742], approved by order entered 03/30/2007 [Docket No. 5736]; *In re NRG Energy, Inc., et. al.*, Case No. 03-13024, Third Amended Disclosure Statement for Debtors' Second Amended Joint Plan of Reorganization Pursuant to Chapter 11 of the Bankruptcy Code, at 86 [Docket No. 510], approved by order entered 10/17/2003 [Docket No. 773]; *In re US Airways Group, Inc., et. al.* (2002), Case No. 02-83984, Disclosure Statement with Respect to First Amended Joint Plan of Reorganization of US Airways Group, Inc. and its Affiliated Debtors and Debtors-in-Possession, ex. D, at 4 [Docket No. 2068, ex. G], approved by order entered 01/17/2003 [Docket No. 2068]; *In re US Airways Group, Inc., et. al.* (2004), Case No. 04-13819, Second Amended Disclosure Statement with Respect to Joint Plan of Reorganization of US Airways, Inc. and its Affiliated Debtors and Debtors-in-Possession, at D-3 [Docket No. 2794, ex. A], approved by order entered 08/09/2005 [Docket No. 2794]; *In re Owens Corning, et. al.*, Case No. 00-03837, Disclosure Statement with Respect to Sixth Amended Joint Plan of Reorganization for Owens Corning and its Affiliated Debtors and Debtors-In-Possession (As Modified), at 293 [Docket No. 18339], approved by order entered 07/11/2006 [Docket No. 18348]; *In re Williams Commc'ns Group, et. al.*, Case No. 02-11957, Second Amended Disclosure Statement with Respect to Second Amended Joint Chapter 11 Plan of Reorganization of Williams Communications Group, Inc. and CG Austria, Inc., at 53, 68 [Docket No. 267], approved by order entered 08/13/2002 [Docket No. 264]; *Loewen Group Int'l, Inc., et. al.*, Case No. 99-1244, Disclosure Statement Pursuant to Section 1125 of the Bankruptcy Code for the Fourth Amended Joint Plan of Reorganization of Loewen Group International, Inc., its Parent Corporation and Certain of their Debtor Subsidiaries, at 112 [Docket No. 7853], approved by order entered 09/04/2001 [Docket No. 7913]; *In re Petroleum Geo-Servs. ASA*, Case No. 03-14786, Disclosure Statement for First Amended Plan of Reorganization for Petroleum Geo-Services ASA, at 11, 12 [Docket No. 104], approved by order entered 09/10/2003 [Docket No. 105]; *In re Armstrong World Indus., Inc., et. al.*, Case No. 00-04471, Disclosure Statement for the Fourth Amended Plan of Reorganization of Armstrong World Industries, Inc., at 102 [Docket No. 4801], approved by order entered 06/02/2003 [Docket No. 4885]; *In re Kaiser Aluminum Corp., et. al.*, Case No. 02-10429, Disclosure Statement Pursuant to Section 1125 of the Bankruptcy Code for the Second Amended Joint Plan of Reorganization, at 158 [Docket No. 7311], approved by order entered 9/8/2005 [Docket No. 7320]; *In re Winn-Dixie Stores, Inc., et. al.*, Case No. 05-03817-3F1, Disclosure Statement With Respect to Joint Plan of Reorganization of Winn-Dixie Stores, Inc. and Affiliated Debtors, at 117 [Docket No. 10057], approved by order entered 08/04/2006 [Docket No. 9917]; *In re Loral Space & Commc'ns Ltd., et. al*., Case No. 03-41710, Disclosure Statement for Debtors' Fourth Amended Joint Plan of Reorganization Under Chapter 11 of the Bankruptcy Code, at 93 [Docket No. 2074], approved by order entered June 3, 2005 [Docket No. 2076]; *In re Northwestern Corp.*, Case No. 03-12872, Second Amended and Restated Disclosure Statement Pursuant to Section 1125 of the Bankruptcy Code for the Plan of Reorganization of the Debtor, at 94 [Docket No. 2021], approved by order entered 9/2/2004 [Docket No. 2033]; *In re RCN Corporation, et. al.*, Case No. 04-13638, Disclosure Statement With Respect To The Joint Plan Of Reorganization Of RCN Corporation And Certain Subsidiaries, at 78 [Docket No. 300], approved by order entered 10/13/2004 [Docket No. 296]; *In re Leap Wireless Int'l, Inc.,*

To select the group of former chapter 11 debtors for which to gather data, we began with a list of large chapter 11 bankruptcy filings from the last 10 years.[92] Debtors were excluded if they: (i) sold substantially all of their assets in a section 363 sale, (ii) were bought by a private company through a chapter 11 plan, or (iii) otherwise did not emerge from their chapter 11 cases. Debtors were also excluded from the list if the data set forth was not reasonably accessible or available. Furthermore, several debtors were excluded because their disclosure statements did not include projected equity valuations. Finally, in order to ensure several quarterly post-emergence trading prices and to avoid having the results skewed by the unorthodox nature of the market as of late, debtors were excluded if they emerged from chapter 11 less than eighteen months ago.

Historical stock prices were obtained using Bloomberg L.P. The 1Q, 2Q, 3Q, and 4Q historical prices in the chart below correspond to the first four quarterly periods that occurred after the effective date of each debtor's plan.[93] Further, certain of the debtors' disclosure statements only contained a total projected equity valuation range. In these cases, we were able to calculate the projected equity value per share by dividing the total projected equity valuation range by the number of shares issued on the effective date.

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et. al., Case No. 03-03470, Disclosure Statement Accompanying Fifth Amended Joint Plan of Reorganization dated as of July 30, 2003, at 63 [Docket No. 479, ex. C], approved by order entered 07/31/2003 [Docket No. 487].

[92] To obtain a representative list of large, recent companies that emerged from chapter 11, we considered the largest 20 non-financial chapter 11 bankruptcy debtors of all time, all debtors that filed for chapter 11 protection between 2000-2002 with over $4 billion dollars in assets, and all debtors that filed for chapter 11 protection between 2003-2006 with over $2 billion dollars in assets.

[93] If the first financial quarter was less than one month from when the company emerged, we used the following financial quarter as the first quarter.

The number of shares issued and outstanding on the effective date was obtained in a subsequent report filed with the Securities and Exchange Commission.[94]

Debtor	Assets in Billions	Emerged	Projected Value	1Q	2Q	3Q	4Q
WorldCom, Inc.[95]	$103	4/20/2004	20.29 - 29.71 (25.00)	14.43	16.75	20.16	24.90
Global Crossing, Ltd.	$30	12/9/2003	10.16	20.00	15.60	16.52	18.14
UAL Corporation	$25	2/1/2006	15.00	39.93	31.02	26.57	44.00
Delta Airlines, Inc.	$21	4/30/2007	38.08 - 48.61	19.70	17.95	14.89	8.60
Kmart Corporation	$14	5/6/2003	8.74 - 17.43	26.90	24.93	23.95	41.48
Northwest Airlines Corporation	$14	5/31/2007	33.04 - 38.68	22.20	17.80	14.51	8.99
NRG Energy, Inc.	$10.8	12/4/2003	21.83 - 26.24	21.90	22.20	24.80	26.94
U.S. Airways Group, Inc. (2002)	$8	3/31/2003	8.30	6.00	6.22	4.48	2.35
U.S. Airways Group (2004)	$8	9/27/2005	18 - 33 (25.5)	37.14	40.00	50.54	44.33
Owens Corning	$6.4	10/31/2006	26.51 - 34.13	29.90	31.86	33.63	25.05
Williams Communications Groups[96]	$6	10/15/2002	7.59 - 12.41 (10.00)	15.79	12.60	14.82	16.05
Loewen Group International, Inc.[97]	$4.6	1/2/2002	17.17	8.90	7.58	6.50	4.74
Petroleum Geo-Services ASA	$4.3	11/5/2003	16.00	3.65	4.52	4.08	4.85
Armstrong World Industries, Inc.	$4.1	10/4/2006	24.66 - 35.30 (30.00)	42.39	50.85	50.15	40.59
Kaiser Aluminum Corporation	$3.3	7/6/2006	17.00 - 20.75 (19.00)	44.34	55.98	78.00	72.88
Winn-Dixie Stores, Inc.	$2.6	11/21/2006	11.39 - 16.30	13.50	17.65	29.30	18.72
Loral Space & Communications Ltd.	$2.6	11/22/2005	19.40 - 30.95	28.28	28.75	28.36	26.32
Northwestern Corporation	$2.6	11/1/2004	17.61 - 22.39 (20.00)	28.00	26.37	31.52	30.19
RCN Corporation	$2.3	12/22/2004	17.22 - 22.76	19.90	23.09	21.22	23.45
Leap Wireless International Inc.	$2.1	8/17/2004	2.22 - 4.27	22.00	27.00	26.05	27.75

This data suggests that valuation projections are frequently off target. While a few debtors accurately projected the equity value of their reorganized companies over the first four quarters after emerging from bankruptcy, most projections missed the mark significantly. In nearly a quarter of the cases, the debtor's projected equity value was off by more than 100 percent. In approximately half of the cases, the actual equity values were closer to the projections, but still off by a significant amount over all four quarters.

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[94] We located the number of outstanding shares on the effective date for certain debtors in the following filings with the Securities and Exchange Commission: Delta Air Lines, Inc., Quarterly Report (Form 10-Q), at 3, 6 (Aug. 2, 2007); Northwest Airlines Corporation, Quarterly Report (Form 10-Q), at 6 (Aug. 9, 2007); NRG Energy, Inc., Quarterly Report (Form 10-Q), at 5 (May 10, 2004); Leap Wireless International, Inc., Quarterly Report (Form 10-Q), at 1 (Nov. 22, 2004); RCN Corporation, Quarterly Report (Form 10-Q), at 1 (Jun. 28, 2005).

[95] WorldCom, Inc. emerged as MCI, Inc.

[96] Williams Communications Group, Inc. emerged as WilTel Communications Corporation, Inc.

[97] Loewen Group International, Inc. emerged as Alderwoods Group Inc.

As this data demonstrates, notwithstanding the time, resources and expense that bankruptcy courts and chapter 11 participants invest to derive valuation outcomes, these projections will often be inaccurate. Yet courts and other participants in chapter 11 cases routinely rely on these estimates as a cornerstone for deciding how to carve up the debtor's assets for distribution. If the historical data from larger studies with more formal controls reveals the same result – that valuation projections are consistently poor proxies for the ultimate value of a reorganized entity – a legitimate argument can be made that a sounder basis for decision making in the chapter 11 process should be developed.

V. Can a Method That Ties Valuation to Post-Effective Date Trading Prices Solve These Problems?

Is there any way to fix the problems associated with valuation? Is there a mechanism that can accomplish the objectives of valuation without the accompanying inaccuracy, imprecision and vulnerability to politics? One possible solution to the pitfalls of traditional valuation methods is to let the market set the value of the debtor's shares after the debtor emerges from bankruptcy.

Volume weighted average price ("VWAP") is generally described as a form of algorithmic trading.[98] VWAP is generally calculated by adding up the dollar value of all of the shares that are traded over a specific period of time, and dividing that sum by the total number of shares traded over the time horizon. If a mechanism modeled after VWAP were used for valuation purposes in bankruptcy, the market would determine what the shares of the reorganized entity are worth, and it may obviate the need for educated guesswork. Using VWAP in this context may also eliminate the inaccuracies,

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[98] Sham M. Kakade, Michael Kearns, Yishay Mansour, and Luis E. Ortiz, *Competitive Algorithms for VWAP and Limit Order Trading*, Abstract for *EC '04*, May 17-20, 2004, at 1 (available at http://www.cis.upenn.edu/~mkearns/papers/vwap.pdf).

expense and investment of time associated with valuation projections and shield the process from politics.

VWAP has been used in the bankruptcy context as a post-confirmation pricing mechanism in two recent cases. VWAP was used in the chapter 11 cases of Adelphia Communications, Inc. and its affiliated debtors and debtors in possession ("Adelphia").[99] Dana Corporation, Inc. and its affiliated debtors and debtors in possession ("Dana") also used VWAP in their chapter 11 cases.[100]

In *Adelphia*, VWAP was used as part of a larger mechanism to value the shares of Time Warner Cable ("TWC") stock that were distributed under the debtors' plan of reorganization.[101] Although shares of TWC stock were distributed to parties on the effective date based on a deemed valuation of the stock, some of the shares were held back and a post-confirmation market test was administered.[102] During the test period, the plan administrator was required to calculate the VWAP daily price for the stock.[103] At the conclusion of the test period, this information could then be used to calculate any

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[99] *See In re Adelphia Commc'ns Corp.*, Case No. 02-41729 (REG), Second Disclosure Statement Supplement Relating to Fifth Amended Joint Chapter 11 Plan for Adelphia Communications Corporation and Certain Affiliated Debtors, at 93-94 [Docket No. 12198, ex. C] (the "Adelphia Disclosure Statement Supplement"), approved by order dated 10/17/2006 [Docket No. 12202]; *In re Adelphia Commc'ns Corp.*, Case No. 02-41729 (REG), Plan Administrator Agreement by and Among Adelphia Communications Corporation and all of its Affiliated Debtors-in-Possession, The Official Committee of Unsecured Creditors and Quest Turnaround Advisors, L.L.C., dated as of February 12, 2007 (the "Adelphia Plan Administrator Agreement") § 2.15.

[100] *See In re Dana Corp., Inc.*, Case No. 06-10354 (BRL), Third Amended Disclosure Statement With Respect to Third Amended Joint Plan of Reorganization of Debtors and Debtors in Possession (the "Dana Disclosure Statement"), dated October 23, 2007, at 55 [Docket No. 6669], approved by order entered 10/23/2007 [Docket No. 6673].

[101] *See* Adelphia Disclosure Statement Supplement, at 93 (noting that the value to be used to calculate the amounts of releases from the holdback of TWC stock would be "the volume weighted average trading price per share of TWC Class A Common Stock during the Test Period.")

[102] *See id.* ("The True-Up Holdback will be funded on the Effective Date by withholding amounts otherwise payable in respect of initial Effective Date distributions . . . .").

[103] *See* Adelphia Plan Administrator Agreement § 2.15.

necessary adjustments with respect to distributions.[104] Thus, if the post confirmation test as measured by the application of VWAP indicated that the original deemed value of the TWC shares was an inaccurate projection, certain recipients under the plan could be "trued up" with the shares that remained in the holdback.[105]

In *Dana*, VWAP was used to determine the value of new shares of stock in the reorganized debtors.[106] Under the terms of the plan, the lead plan investor, Centerbridge Partners, L.P., received preferred stock in exchange for its investment in the debtors. Under certain predefined circumstances, shares of preferred stock were convertible to new common stock.[107] The conversion price for these shares depended upon, *inter alia*, the VWAP of new common stock over a 20-day time window.[108] The Dana Disclosure Statement further provided that if, after such conversion, the holders of the converted stock owned a percentage of the new common shares that exceeded pre-defined

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104 *See* Adelphia Disclosure Statement Supplement, at 93.

105 *Id.* ("The Plan contemplates the creation of a true-up reserve on the Effective Date consisting of TWC Class A Common Stock (or Cash to the extent there is not sufficient stock available) that is intended, subject to certain limitations, to be sufficient to permit the upward or downward adjustment of the total number of shares received by creditors of the Subsidiary Debtors based upon a Market Value of the TWC Class A Common Stock that is up to twenty percent higher or lower than the Deemed Value used for initial Distributions under the Plan.")

106 Dana Disclosure Statement, at 55.

107 *Id.* at 55.

108 *Id.* Specifically, the Dana Disclosure Statement provides as follows:

> Subject to a collar based on a total enterprise value of New Dana Holdco of between $3.15 billion and $3.5 billion as described in subsections (i) and (ii) below, **the price at which each share of New Preferred Stock will be convertible into New Dana Holdco Common Stock will be 83% of its distributable market equity value per share, which is the per share value of the New Dana Holdco Common Stock determined by calculating the 20-day volume weighted average trading price of such common stock on the principal exchange or over-the-counter market on which it trades (using the 22 trading days beginning on and including the first trading day after the Effective Date but disregarding the days with the highest and lowest volume weighted average sale price during such period)**. . . .

Id. at 55 (emphasis added).

limitations, adjustments would be made so that ownership of the reorganized debtors would not shift immediately post-confirmation.[109]

Although VWAP was used in *Adelphia* and *Dana*, bankruptcy judges may not all be comfortable abandoning traditional valuation methods in favor of post-confirmation trading valuation. Moreover, the use of VWAP or a method similar thereto may present its own set of legal and practical problems. For instance, it would likely require more post-confirmation supervision from the bankruptcy court and it may delay the distribution of plan consideration. Using VWAP may also make it difficult for a plan proponent to establish that the standards for confirmation under section 1129 of the Bankruptcy Code (*i.e.,* the fair and equitable test) have been satisfied. Nonetheless, skeptics of the traditional valuation process may want to consider investigating VWAP or alternative methodologies that may be less prone to the weaknesses that undermine the fairness that valuation is designed to achieve.

VI. Final Thoughts

Inevitably, any system that is used to determine whether constituents in a chapter 11 case are entitled to recovery and the size of such recovery will draw criticism. Moreover, any such mechanism will have to balance the need for accuracy, fairness and precision against efficiency and finality. Nevertheless, it is easy to understand how participants in the chapter 11 process may lack confidence in valuation and be concerned over the emphasis and reliance placed on valuation outcomes.

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[109] *Id.*