

ORIGINAL

In the
Supreme Court of Ohio

WCI STEEL, INC.,

Appellant,

v.

RICHARD A. LEVIN,
TAX COMMISSIONER OF OHIO,

Appellee.

:
: Case No. 2010-1027
:
:
:
: Appeal from B.T.A.
: Case No. 2005-V-1565
:
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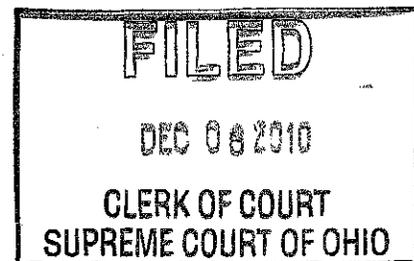
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I. INTRODUCTION/SUMMARY

This Court's recent decision in *Ohio Bell Tel. Co. v. Levin*, 124 Ohio St.3d 211, 2009-Ohio-6189, squarely resolves this factually parallel personal property tax case, as the BTA reasonably and lawfully held in its decision below. In *Ohio Bell*, the Court held that the telephone company failed to confer jurisdiction on the BTA to consider a brand-new valuation challenge to the Tax Commissioner's determination of "true value." Ohio Bell had failed to present that new challenge to the Commissioner and had failed to set it forth in its notice of appeal to the BTA. At the BTA, Ohio Bell abandoned the valuation challenge that it had presented during the Commissioner's administrative proceedings below (a "replacement cost new" cost approach study) and replaced it at the BTA with a different valuation challenge (a "unit value" appraisal that relied primarily on an income approach).

Ohio Bell thereby sought to circumvent the Commissioner's administrative review of the valuation methodologies, analysis, and evidence entailed in the new valuation challenge and to thereby avoid the Commissioner's issuance of findings concerning that new challenge. As this Court long has recognized, the Commissioner has substantial expertise, experience, and discretionary authority as the exclusive assessor of personal property for taxation purposes, and those findings must be upheld unless the one challenging those findings demonstrates them to be "clearly unreasonable or unlawful." *Hatchadorian v. Lindley* (1986), 21 Ohio St.3d 66, 69, paragraph one of the syllabus; *A. Schulman, Inc. v. Levin*, 116 Ohio St.3d 105, 2007-Ohio-5585 at ¶7; *Shiloh Automotive, Inc. v. Levin*, 117 Ohio St.3d 4, 2008-Ohio-68 at ¶16. See also, *Stanton, Pros. Atty., v. Tax Commission* (1926), 114 Ohio St. 658, 667-668; *Bd. of Ed. of Southwestern City Schools v. Kinney* (1986), 24 Ohio St.3d 184, 186; *Ashland County Bd. of Comm'rs v. Ohio Dep't of Taxation* (1992), 63 Ohio St.3d 648, 656. Accordingly, the Commissioner's findings must be upheld unless the one challenging those findings demonstrates them to be

“clearly unreasonable or unlawful.” *Hatchadorian*, paragraph one of the syllabus; *A. Schulman, Inc. v. Levin*, 116 Ohio St.3d 105, 2007-Ohio-5585 at ¶7; *Shiloh Automotive, Inc. v. Levin*, 117 Ohio St.3d 4, 2008-Ohio-68 at ¶16.

The *Ohio Bell* Court held that, regarding the telephone company’s brand-new valuation challenge, Ohio Bell failed to meet the “specification of error” requirement of the BTA notice-of-appeal statute, R.C. 5717.02. , which precluded Ohio Bell from introducing its new evidence. The Court proceeded to dismiss Ohio Bell’s appeal altogether because at the BTA Ohio Bell had abandoned the valuation methodology that it had previously presented to the Commissioner and specified in its BTA notice of appeal, the Court dismissed Ohio Bell’s appeal altogether.

In this case, the appellant herein, WCI Steel, Inc. (“WCI”), has followed a parallel course to that taken by Ohio Bell. At the BTA, WCI presented a new valuation challenge that it had not presented to the Commissioner below and had not set forth in its notice of appeal to the BTA. By contrast, in the Commissioner’s administrative proceedings WCI had presented a specific valuation study based on a “comparative sales” approach.

Under the valuation challenge that WCI presented to the Commissioner, WCI compared sales data concerning the valuations of other steel companies’ overall production assets with those of WCI, adjusting for differences among the production capacities of the various steel companies’ facilities and WCI’s production capacity. After thoroughly reviewing the “comparative sales” valuation methodology, analysis, and evidence presented by WCI, the Commissioner issued his final determinations applying his prescribed “original cost less depreciation” methodology, rather than WCI’s alternative valuation methodology.

In the BTA proceedings, WCI presented a far different valuation challenge from the **comparative sales** approach it had presented to the Commissioner. Under this new claim, WCI

relied primarily on a “**replacement cost new**” cost approach, pursuant to which it determined current replacement costs for WCI’s production property and then reduced those amounts for economic obsolescence and other factors. No such “replacement cost new” estimates of its production property had been presented by WCI in the Commissioner’s administrative proceedings, nor had WCI presented any “economic obsolescence” analysis or similar evidence in those proceedings.

Closely paralleling *Ohio Bell’s* facts, WCI’s notice of appeal to the BTA failed to specify its new “replacement cost new” cost-approach challenge. In fact, WCI’s notice of appeal failed to specify any valuation challenge at all. As detailed in the following Statement of Case and Facts section, WCI’s notice of appeal merely alleged that the Commissioner’s methodology “resulted in an over valuation” of WCI’s taxable production assets and that the true value of those assets should be “not more than \$30 million.” It set forth no basis setting forth why or how the Commissioner’s methodology overvalued WCI’s production assets, alleging only that the Commissioner’s valuation determination was “not based on evidence and is contrary to law.”

This Court uniformly has held that such broad, vague language fails to meet R.C. 5717.02’s specification-of-error requirement. Indeed, WCI’s language mirrors the broad allegations set forth by the appellant taxpayer in this Court’s seminal “specification of error” decision under the BTA notice-of-appeal statute, *Queen City Valves, Inc. v. Peck* (1954), 161 Ohio St. 579. In *Queen City Valves*, this Court dismissed for failure to “specify” error a BTA notice of appeal that asserted that the Commissioner’s final determinations was “contrary to law,” “not sustained by the evidence,” and “against the manifest weight of the evidence.” *Id.* at 580. In its syllabus law of the case, the *Queen City Valves* Court held that such broad and general language is

insufficient to meet the jurisdictional demands of the statute because it fails to “enumerate in definite and specific terms the precise errors claimed.”

In *Ohio Bell*, this Court once again reaffirmed the *Queen City Valves* standard, discussing a substantial body of its previous precedent that uniformly has applied that “stringent” standard. 124 Ohio St.3d at ¶¶ 16, 17. The *Ohio Bell* Court held that to be sufficiently “specific,” the language of the notice of appeal must “‘tie the facts of the case’ to the alleged error by explaining ‘how’ the commissioner erred in valuing the property.” *Id.* at ¶ 17, quoting *Castle Aviation, Inc. v. Wilkins*, 109 Ohio St.3d 290, 2006-Ohio-2420, ¶ 41.

Application of this Court’s established standard shows that WCI failed to “specify” error in its notice of appeal to the BTA. The BTA dismissed WCI’s notice of appeal for failure to “specify error” because WCI failed to make any attempt to explain how the Commissioner erred in general; WCI failed to identify any errors in the Commissioner’s application of his prescribed methodology; and WCI failed to identify any valuation methodologies, analysis, or evidence that the Commissioner should have considered or applied as an alternative to his prescribed methodology. The BTA rightfully was compelled to dismiss the notice of appeal, finding it “to be so broad and vague to be insufficient to invoke this board’s [the BTA’s] jurisdiction.” See *WCI Steel, Inc. v. Wilkins [Levin]* (May 18, 2010), BTA Case No. 2005-V-1565 (“*BTA Decision and Order*”) at 6, reproduced in the appendix to WCI’s opening merit brief at W.Br.Appx. 5-10.

Even if WCI had specified its new valuation challenge in its notice of appeal to the BTA, that challenge properly would be dismissed because WCI failed to present its “replacement cost new” cost-approach methodology and supporting analysis and evidence in the Commissioner’s administrative proceedings. As this Court observed in *Ohio Bell*, “[o]ur cases suggest that such a failure to *present* an issue to the commissioner precludes the BTA from taking jurisdiction over

that issue – even if the issue is *specified* in the notice of appeal” (emphasis in original). *Ohio Bell* at ¶ 33 (citing *CNG Dev. Co. v. Limbach* (1992), 63 Ohio St.3d 28, 32; and *DeWeese v. Zaino*, 100 Ohio St.3d 324, 2003-Ohio-6502, ¶¶ 19-22). The Court just recently applied this principle to affirm the BTA’s partial dismissal of a notice of appeal from the Commissioner’s personal property valuation challenge in *Am. Fiber Sys., Inc. v. Levin*, 125 Ohio St.3d 374, 2010-Ohio-1468, ¶¶ 17, 22 (citing with approval to *CNG Dev. Co.*).

For all these reasons, as further amplified below, the BTA’s dismissal of WCI’s appeal should be affirmed.

II. STATEMENT OF CASE AND FACTS

A. Procedural Posture

The appellant steelmaker, WCI, takes this appeal as of right pursuant to R.C. 5717.04 from a decision and order dismissing its challenge to the appellee Commissioner’s final determinations of the “true value” of WCI’s taxable personal property for the 2001, 2002, and 2003 tax years. See *BTA Decision and Order*, W.Br.Appx. 5-10.

The BTA held that WCI failed to confer jurisdiction on the BTA over the valuation challenge because WCI’s notice of appeal to the BTA failed to “specify” error in the Commissioner’s final determinations of true value of WCI’s taxable property. The Commissioner set forth his valuation determinations in final assessment certificates of personal property tax value for the subject tax years.

Because WCI’s notice of appeal failed to “specify” error in the Commissioner’s final determinations, it failed to meet the mandatory “specification of error” requirement jurisdictionally imposed by the BTA notice-of-appeal statute, R.C. 5717.02. See *BTA Decision and Order* at 6, W.Br.Appx. 10 (holding that, regarding the asserted errors in the Commissioner’s final determinations that were not otherwise waived by WCI, its BTA notice of

appeal was “so broad and vague as to be insufficient to invoke this board’s [the BTA’s] jurisdiction”) (emphasis added).

In granting the Commissioner’s motion to dismiss, the BTA followed a long and uniform line of this Court’s precedent, dating from *Queen City Valves, Inc. v. Peck* (1954), 161 Ohio St. 579, through to the Court’s most recent decision applying R.C. 5717.02’s specification of error requirement in *Ohio Bell Tel. Co. v. Levin*, 124 Ohio St.3d 211, 2009-Ohio-6189 (holding that the appellant taxpayer’s abandonment of the valuation methodology asserted in its notice of appeal to the BTA barred it from asserting an alternative valuation challenge based on new valuation methodologies, analysis, and evidence that were not specified in its BTA notice of appeal). See *BTA Decision and Order* at 2-4, W.Br.Appx. 6-8.

The BTA rejected WCI’s assertion that the content of its notice of appeal to the BTA could be favorably distinguished from the content of the BTA notice of appeal that this Court addressed in *Ohio Bell*. *Id.* at 6, W.Br.Appx. 8. In its opening merit brief filed with this Court, WCI continues to assert that its BTA notice of appeal may be favorably distinguished from the BTA notice of appeal at issue in *Ohio Bell*, but then fails to support that assertion. WCI never even attempts to provide any comparative analysis of the two notices of appeal.¹ Instead, WCI merely claims that the BTA did not provide a cogent explanation for its conclusion that WCI’s notice of appeal suffered from the same lack of specification as did *Ohio Bell*’s. See W.Br. at 3-4 (complaining that the BTA decision “neither explained why *Ohio Bell Tel. Co.* was controlling or why WCI’s specifications of error must be deemed ‘broad and vague [.]’”).

¹ In the Law and Argument Section, *infra*, we compare WCI’s notice of appeal to the BTA with the notice of appeal that was addressed and found jurisdictionally deficient by this Court in its *Ohio Bell* decision. See T.C.Br.Appx. 5-7 (a true and accurate copy of the BTA notice of appeal filed by Ohio Bell Telephone in *Ohio Bell*).

The reasonableness and lawfulness of the BTA's holding that WCI's notice of appeal failed to specify any valuation challenge follows directly from a review of WCI's notice of appeal itself. See the appendix to this brief ("T.C.Br.Appx.") at 1-4 (a true and accurate copy of the BTA notice of appeal filed by WCI, also reproduced at W.Br.Appx.11-14). In the following Section B, we discuss the contents of WCI's notice of appeal to the BTA in the present case and undertake an analysis of the language used therein.

B. WCI failed to "specify" error in the Commissioner's determination by alleging in its BTA notice of appeal merely that the Commissioner's application of his prescribed methodology for determining true value "is not based on evidence and is contrary to law."

The content of WCI's two and a half-page notice of appeal to the BTA is set forth in four separate sections thereof, to wit: (1) an initial introductory paragraph; (2) a two-paragraph "Background" section; (3) an "Assignments of Error" section, consisting of four numbered subparagraphs; and (4) a "Request for Relief" section. T.C.Br.Appx. 1-3. Whether read separately or together, these four sections do not contain any allegations of error specifying how or why the Commissioner's application of his prescribed "true value computation" valuation methodology was unreasonable or unlawful and do not identify any alternative valuation methodologies, analysis, or evidence that the Commissioner erred in failing to consider or apply.

First, the introductory paragraph of WCI's notice of appeal recites that WCI is appealing from "Final Assessment Certificates" issued by the Commissioner for the 2001, 2002, and 2003 tax years, and incorporates those assessment certificates by reference as "Exhibit A" to its notice of appeal. T.C.Br.Appx. 1. This opening paragraph merely identifies the basic subject-matter of the final determinations.

Second, the two-paragraph "Background" section references and briefly describes the non-inventory personal property at WCI's steel making plants that was subject to the Commissioner's

“true value computation” determinations for the subject tax years. The “Background” section then asserts that the actual true value of such fixed asset property for the subject tax years was “substantially less than the value determined using the Commissioner’s prescribed methodology described below (‘302 Computation’)” and that such property “should be valued at not more than \$30 million ***.” T.C.Br.Appx. 1-2. This Background section merely identifies the fixed asset property as having been overvalued by the Commissioner under his prescribed methodology and asserts that the true value should be reduced from the assessed true values to some unspecified amount between \$0.00 and \$30,000,000.

Third, the “Assignments of Error” section asserts that the Commissioner’s final determinations are “erroneous, unreasonable and unlawful,” for the reasons set forth in four numbered sub-paragraphs. In the proceedings at the BTA, WCI abandoned the claims advanced in the first and third enumerated sub-paragraphs and, accordingly, the BTA dismissed those two claims. See *BTA Decision and Order* at 5-6, W.Br.Appx. 9-10. And, in its appeal to this Court from the BTA’s decision and order, WCI does not contest the BTA’s dismissal of these two assignments of error. See WCI’s notice of appeal to this Court, reproduced at W.Br. 1-3. Thus, only the second and fourth sub-paragraphs of the Assignments of Error section possibly could provide a basis for meeting the “specification of error” requirement.

The second and fourth numbered assignments of error do not “specify” any errors in the Commissioner’s final determinations. The second sub-paragraph simply repeats the general allegation set forth in the “Background” section of WCI’s BTA notice of appeal that the Commissioner’s assessed true values resulted in an “over valuation” of WCI’s depreciable fixed asset personal property, and that the actual true value of that property “is not more than the values identified above.” The only content set forth under this second sub-paragraph that was

not previously set forth in the “Background” section of the notice of appeal is a short description of the Commissioner’s prescribed methodology, citing to the applicable Ohio personal property tax statutes and administrative rules (i.e., R.C. 5711.03 and 5711.18, and Ohio Adm. Code 5703-3-10 and 5703-3-11). As for the fourth sub-paragraph of the “Assignment of Error” section, as noted above, it advances only the most general and vague claim of error: that the Commissioner’s “Determination [sic] is not based on evidence and is contrary to law.” W.Br.Appx. 3.

Fourth and finally, the “Request for Relief” section contains no specification of error. As its name describes, it simply requests that the Commissioner’s final determinations “must be canceled,” and reasserts that the Commissioner’s determinations constituted an “overstatement of value for the taxable Property.”

As the foregoing discussion of WCI’s notice of appeal shows, WCI did not set forth any ways in which the Commissioner’s application of his prescribed valuation methodology were erroneous, and did not identify any alternative valuation methodologies, analysis, or evidence that the Commissioner erred in failing to properly consider or apply.

C. The brand-new valuation methodologies, analysis, and evidence that WCI presented at the BTA differed dramatically from the “comparative sales” valuation methodology, analysis, and evidence that WCI had presented to the Commissioner below.

1. *WCI’s presentation of its comparative sales valuation study in the Commissioner’s administrative proceedings*

In the Commissioner’s administrative proceedings for the 2001, 2002 and 2003 tax years at issue, WCI presented a “comparative sales” valuation study prepared by its in-house Treasurer, Thomas Gentile. See specifically the statutory transcript certified by the Commissioner to the BTA (“S.T.”) at S.T. 636-670, reproduced in the Appellee’s Supplement (“A. Supp.”) at A. 1-35 (comprising the materials and analysis that Mr. Gentile submitted in support of his Comparative

Sales valuation study), see also Mr. Gentile's testimony in the transcript of the BTA evidentiary hearing ("H.R.") at H.R. 38, Supp. 5 (identifying Mr. Gentile as WCI's treasurer), and H.R. 63-68, Supp. 5, 30-35 (Mr. Gentile's BTA direct-examination testimony regarding his comparative sales study).

In his comparative sales study, Mr. Gentile estimated the over-all production asset values of five other steelmakers' production facilities, namely, (1) LTV Steel's Cleveland, Ohio plant, (2) Acme Steel's Riverdale, Illinois plant, (3) Wheeling-Pittsburgh Steel's Follansbee, West Virginia plant, (4) Bethlehem Steel's Burn's Harbor, Indiana plant, and (5) National Steel's Great Lakes-Encore, Michigan plant. See, e.g., S.T. 646, 655, and 658-661, A. Supp. 11, 22, 25-28. Then, to determine the over-all value of WCI's taxable production assets at its Warren, Ohio plant at issue, Mr. Gentile compared the quality and size of WCI's facility with the other five companies' plants and on the basis of that comparison determined a "market value" for WCI's production assets. See particularly, S.T. 646, 656-662, A. Supp 11, 21-27.

As a result of his comparative sales approach analysis, Mr. Gentile concluded that the proper true value of WCI's taxable production assets should be in the range of \$31-\$38 million for the three tax years at issue and, accordingly, proposed a settlement that would value those assets at \$35 million for those tax years. S.T. 663-664, A. Supp. 27-28. Mr. Gentile's presentation of his comparative sales approach and his valuation conclusions dovetailed with the amended Ohio personal property tax returns that WCI had filed for the 2001 and 2002 tax years, and with WCI's originally filed 2003 tax year return. Namely, for the 2001 and 2002 tax years, WCI's amended Ohio personal property tax returns claimed true values for WCI's taxable

production assets of \$30,000,000 and \$30,000,021, respectively, and its originally filed Ohio return for the 2003 tax year claimed a true value for those assets of \$29,999,665.²

In its Statement of the Case, WCI acknowledges Mr. Gentile's comparative sales valuation study presented by WCI in the Commissioner's administrative proceedings (see W.Br. at 1 (noting that Mr. Gentile "presented extensive evidence in support of a substantially lower value"). Nonetheless, later in the Statement of the Case and in its Law and Argument section, WCI ignores Mr. Gentile's comparative sales valuation study and refers repeatedly to a "Nationwide" appraisal of WCI's assets as of September 16, 2003. WCI suggests that the Nationwide Consulting appraisal was fully presented to the Commissioner, and that to reach its valuation conclusions Nationwide Consulting relied on various valuation methodologies, analysis, and evidence that was presented to the Commissioner. See W.Br. 2, 8-9. Such suggestions mischaracterize the evidentiary record for several reasons.

First, WCI did not allow the Commissioner's auditing personnel to review the full Nationwide Consulting appraisal, and the agents were allowed to copy only a few pages from the appraisal. Those few pages merely set forth a valuation conclusion and contained no analysis or evidence concerning any valuation methodology relied on by the appraisal firm. See the BTA testimony of Ohio personal property tax administrator John Nolfi at H.R. (Volume II) 54-56, Supp. 199-201; and see the copied pages from the Nationwide Consulting appraisal at S.T. 303-314, A. Supp. 59-70.

² See S.T. 435, A. Supp. 58 (the last page of WCI's amended "true value computation" form for the 2001 tax year showing a claimed total "true value" for its taxable Schedule 2 and 4 (fixed asset) property of "30,000,000"); S.T. 331, A. Supp. 57 (WCI's "claim for deduction from book value" filed with its amended 2002 tax year return showing a claimed total "true value" for its Schedule 2 and 4 property of "30,000,021"); and S.T. 740, A. Supp. 56 (WCI's "claim for deduction from book value" filed with its 2003 tax year return showing a claimed total "true value" for its Schedule 2 and 4 property of \$29,999,665).

Second, the copies of the few excerpted pages of the Nationwide Consulting appraisal that the Commissioner's auditing personnel were able to procure show that the appraisal was very limited and likely did not rely on any approach to value other than some kind of comparative sales approach. In fact, the copied excerpted pages from the preliminary background section of the appraisal disavow any reliance on an "income approach" to value, S.T. 303, A. Supp. 59. Further, the excerpted pages concerning Nationwide Consulting's valuation of WCI's real property show that only a "sales comparison" approach was relied on as an indicator of value. The information under the "cost approach" and "income approach" categories states "Not Applicable." S.T. 305, A. Supp. 61, suggesting that the personal property was valued similarly under some kind of "comparative sales" approach.

Third, even at the BTA evidentiary hearing, WCI failed to provide any testimony concerning the appraisal from the appraisal firm or anyone else. Nor did WCI present any portion of the appraisal that would shed light on the methodologies, analysis, and evidence utilized by Nationwide Consulting to reach its valuation conclusion. Instead, WCI presented and admitted into evidence only very limited excerpts of the appraisal as its Exhibit G, A. Supp. 71-89. Those excerpts merely set forth the conclusion of value of \$83,316,000.00 and the "boilerplate" language thereafter that Nationwide Consulting uses to set forth definitions of terms which is, no doubt, contained generically in all of its appraisals. The entire evidentiary record is devoid of any explanation, analysis, or evidence as to the valuation methodology(ies) relied on by Nationwide Consulting to reach its \$83, 316,000.00 valuation conclusion.

Fourth, because the valuation date of the Nationwide Consulting appraisal is September 16, 2003, it is clear that the valuation, on its face, the appraisal would have little or no probative value as to the proper "true value" of the applicable tax listing dates for the 2001 through 2003

tax years at issue. The applicable valuation dates for the tax years at issue are the fiscal year-ends for the immediately preceding taxable years, i.e., October 31, 2000, October 31, 2001, and October 31, 2002. See Ohio Adm. Code 5703-3-4(B). Reliance on an appraisal valuation as of September 16, 2003 would necessarily include some consideration of whether the relevant facts and circumstances of WCI's business had changed in the interim. Only if no material changes had occurred during the interim period would that appraisal have any potential probative value. Yet, during the Commissioner's administrative proceedings, WCI made no such claim and made no attempt to provide any information concerning whether its facts and circumstances were materially different on September 15, 2003 from the October 31, 2000, October 31, 2001, and October 31, 2002 tax listing dates at issue.

2. *WCI's presentation of valuation methodologies, analysis, and evidence at the BTA*

At the BTA hearing, WCI presented a new "AccuVal" valuation study that relied on entirely different valuation methodologies, analysis, and evidence from the valuation methodology, analysis, and evidence presented to the Commissioner in his administrative proceedings. That valuation study consisted of two volumes, BTA Exs. B and C, and nine (9) accompanying notebook volumes of supporting analysis and workpapers. Additionally, WCI presented the testimony of Richard Schmitt, an employee of AccuVal who was involved in preparing the AccuVal valuation study. H.R. 136-231, Supp. 102-197.

The methodology that AccuVal relied on for valuing the majority of WCI's production assets was a "replacement cost new" cost methodology reduced for economic obsolescence and other factors. See particularly BTA Ex. C. Additionally, for a minority of the production assets, WCI applied a piece-meal "comparative sales" approach pursuant to which individual assets and asset groups were evaluated based on the sales of comparable equipment. See particularly BTA

Ex. B. Both of these methodologies were brand new. Neither the “replacement-cost new” cost-approach methodology nor the piece-meal comparative sales approach methodology had been presented by WCI to the Commissioner in the administrative proceedings below.

Further, the analysis and evidence that accompanied the AccuVal study in support of these new methodologies was entirely new too. This brand-new analysis and evidence included (1) AccuVal’s estimates of the then-current replacement costs of the various production machinery and equipment at WCI’s steel plant, (2) substantial reductions from these “replacement cost new” figures for economic obsolescence, and (3) piece-meal comparative sales data for individual machine items and groups of machinery and equipment.

D. The Commissioner reviewed and made substantial findings regarding the comparative sales study presented by WCI in the Commissioner’s administrative proceedings. By contrast, the Commissioner had no opportunity to consider or make findings concerning the valuation methodologies, analysis, and evidence set forth in the AccuVal study presented for the first time at the BTA.

In the Commissioner’s administrative proceedings, through his auditing personnel, the Commissioner thoroughly reviewed and considered Mr. Gentile’s “comparative sales” valuation study and its supporting analysis and evidence. Likewise, the Commissioner made detailed findings concerning that valuation study pursuant to his auditing agents’ field audit reports for the subject tax years. S.T. 120-129, A. Supp. 46-55 (field audit report for the 2003 tax year, excluding the exhibits attached thereto); and S.T. 438-447, A. Supp. 36-49 (field audit report for the 2001 and 2002 tax years, excluding the exhibits attached thereto).

Most notably, the Commissioner’s findings included that the five steel plants used by Mr. Gentile as “comparable” facilities were not, in fact, comparable to WCI’s Warren, Ohio facility because the other steelmakers were integrated steel producers, not a specialty steel company like WCI. As a “niche” steel company, WCI’s production capacity necessarily would be less than

that of integrated steel companies, with a wholly different product and customer mix. See particularly, S.T. 447 at ¶ 7, A.Supp. 45; and S.T. 128 at ¶ 13, A. Supp. 54. See also, the U.S. Bankruptcy Court's identical findings in *In re WCI Steel, Inc., et al.* (Dec. 15, 2004), Bankr. N.D. Ohio No. 03-44662 at 3, T.C.Br.Appx. 17-74.

Of similar importance, the Commissioner found that WCI's failure to reduce the capitalized book values of its production assets for any of the taxable periods at issue provided strong evidence against its claims to drastically lower-than-book values for Ohio personal property tax purposes. Had WCI's production assets actually had a "true value" as asserted by WCI in its "comparative sales" study, WCI necessarily would have been required under generally accepted accounted principles ("GAAP") to have reduced its book values for those assets. See, e.g., S.T. 128 at ¶¶ 10, 12, and 14, A. Supp. 54; and S.T. 447 at ¶¶ 8 -9, A. Supp. 45.

Because WCI did not present the AccuVal valuation study during the Commissioner's administrative proceedings, the Commissioner could not and did not consider that study or any of the valuation methodologies, analysis, or evidence entailed in that study. Likewise, for that same reason, the Commissioner did not and could not make any findings concerning any of the AccuVal methodologies, analysis, or evidence.

E. Substantively, WCI's valuation claim lacks merit.

In its opening brief, WCI asserts that its production assets for the taxable periods at issue were "functionally obsolete," and "old," citing certain testimony adduced at the BTA hearing. The Commissioner strongly contests that characterization. First, the only issues presented for this Court's consideration are jurisdictional ones. Accordingly, whether and to what extent any or all of WCI's production assets were "functionally obsolete" or "old" during the taxable periods is irrelevant to a resolution of the pertinent jurisdictional issues.

Second, the Commissioner's methodology already takes into consideration the age and the potential obsolescence of the production equipment and machinery as it ages. Under the Commissioner's prescribed methodology, older equipment is valued at substantially lower "true values" than newer equipment. Thus, to the extent that WCI's production equipment was "old," the Commissioner's valuation methodology already factors the vintage of those items into the valuation equation.

Third, WCI's own book values establish that it believed that the true value of its production equipment was not substantially less than the reported net book values set forth on its financial statements for the fiscal year-ends at issue. As the Commissioner's merit brief filed with the BTA noted, WCI emerged from federal bankruptcy in May, 2006 with "fresh start" book values reflecting the then-"fair value" (synonymous with "true value") of its production assets in amounts substantially **greater than** the net book values for its production assets for the fiscal year-ends at issue here. Namely, as of that "fresh start" date, the true value of WCI's production plant assets was a whopping \$196 million, far greater than WCI's book values for the tax years at issue and far greater than the Commissioner's assessed true values. See Amended T.C. BTA Br. at 20-22; BTA Ex. 8, p. 5; and BTA Ex. 12.

If WCI's production assets were "obsolete" and "old" during the October 31, 2000 through October 31, 2002 taxable periods at issue here, they presumably were even more "obsolete" and "old" several years later in May, 2006. Yet, somehow those assets gained substantially in value over the course of that time, despite their alleged "functional obsolescence."

Any further facts will be referenced to the evidentiary record in the Law and Argument section which follows.

III. LAW AND ARGUMENT

Proposition of Law No. 1:

An appellant confers jurisdiction upon the BTA, and subsequently upon this Court, to consider an asserted error in the Commissioner's final determination only if such asserted error is timely specified as error in the notice of appeal to the BTA.

This Court consistently has held that the “specification of error” requirement of R.C. 5717.02 is a mandatory, jurisdictional requirement which must be strictly complied with in order to invoke the jurisdiction of the BTA to consider an asserted error in the Tax Commissioner's final determination. *Queen City Valves, Inc. v. Peck* (1954), 161 Ohio St. 579; *Lenart v. Lindley* (1980), 61 Ohio St.2d 110; *Manfredi Motor Transit Co. v. Limbach* (1988), 35 Ohio St.3d 73; *Dana Corp. v. Limbach* (1991), 60 Ohio St.3d 26; *Cleveland-Cliffs Iron Co. v. Limbach* (1991), 61 Ohio St.3d 349; *Gen. Motors. Corp. v. Wilkins*, 102 Ohio St.3d 33, 2004-Ohio-1869; *Ellwood Engineering Castings Co. v. Zaino*, 98 Ohio St.3d 424, 2003-Ohio-1812; *Castle Aviation, Inc. v. Zaino*, 109 Ohio St.3d 290, 2006-Ohio-2420; *Newman v. Levin*, 120 Ohio St.3d 127, 2008-Ohio-5202, ¶27; *Cousino Constr. Co. v. Wilkins*, 108 Ohio St.3d 90, 2006-Ohio-162, at ¶ 41; *Brown v. Levin*, 119 Ohio St.3d 335, 2008-Ohio-4081, ¶ 18; *Ohio Bell Tel. Co. v. Levin*, 124 Ohio St.3d 211, 2009-Ohio-6189 (reversing the BTA and ordering dismissal of a personal property taxpayer's broad valuation challenge because of the taxpayer's failure to specify error in its notice of appeal to the BTA); *Am. Fiber Sys., Inc. v. Levin*, 124 Ohio St.3d 374, 2010-Ohio-1468, ¶ 15 (“specifications of error must be explicit and precise and tie the facts of the case to the alleged error by explaining how the commissioner erred in valuing the property”).

As detailed in Section B of the Statement of Case and Facts, *supra*, WCI's notice of appeal to the BTA mirrors the faults of the notice of appeal to the BTA in *Ohio Bell*.³ WCI uses the

³ WCI failed to raise any non-valuation issues or present evidence concerning any non-valuation issue in proceedings before the Commissioner and, thus, has failed to confer jurisdiction on the

broadest possible language to challenge the Commissioner's determinations of true value, asserting only that:

- “[t]he *** true value of the Taxpayer’s personal property included in the Determination [the Tax Commissioner’s final determinations for the 2001, 2002, and 2003 tax years] is not more than the values identified above [referring to values of “not more than \$30 million”], as asserted in the Taxpayer’s Applications for Final Assessment (2001 and 2002 tax years) and the 2003 tax return as filed. R.C. 5711.03 and 5711.08; see also, Ohio Administrative Code Rules 5703-3-10 and 5703-3-11”; and
- **“[t]he Determination of the Tax Commissioner is not based on evidence and is contrary to law.”** (Emphasis added.)

See WCI BTA Notice of Appeal “Assignments of Error” at numbered sub-paragraphs 2 and 4, W.Br.Appx. at 2-3.

Not only is the language used in WCI’s notice of appeal fatally general and vague, it ignores the Commissioner’s detailed valuation findings in support of his final determinations. See the Commissioner’s agents’ field audit reports (see ST. 120-129 (2003 tax year) and ST. 438-447 (2001 and 2002 tax years) and T.C. amended merit brief at 12-13, 40-42 (discussing

BTA to consider any such issues. Further, WCI’s presentation of evidence at the BTA and briefing were devoid of evidence in support of any non-valuation claims. As a result, WCI tacitly abandoned the claims in its notice of appeal that unidentified items of its assessed property should be exempted as “real property” (see numbered paragraph “1” of the Assignments of Error section of WCI’s notice of appeal) and that a certain “spare arc transformer” was property “held for disposal” and “not used in business” (see numbered paragraph “3” of the Assignments of Error). WCI is left only with its valuation challenge. Accordingly, the BTA properly dismissed those assignments of error and WCI has not challenged the dismissal of those non-valuation claims. See *BTA Decision and Order* at 5-6, W.Br.Appx. 19-20 and the Statement of Case and Facts of this brief, *supra*.

those findings), and the further discussion in the Statement of Case and Facts of this brief, *supra*. WCI failed to challenge any of the detailed findings of the Commissioner’s audit staff, and failed to set forth or identify any valuation methodology[ies], analysis, assumptions, or evidence that the Commissioner should have applied in lieu of the Commissioner’s application of his prescribed “true value computation” methodology.

Just as in *Ohio Bell*, the assertions of error in WCI’s notice of appeal “are too broad” and “do not specify any error for purposes of R.C. 5717.02.” *Id.* at ¶ 25. In fact, the content of WCI’s notice of appeal to the BTA parallels the general allegation in the BTA notice of appeal in *Ohio Bell* asserted that the Commissioner’s valuation “does not reasonably reflect true value.” See *Ohio Bell* at ¶23 and the Ohio Bell notice of appeal to the BTA at T.C. Br.Appx. 5-7. WCI’s allegations are fatally unspecific and imprecise because they “might be advanced in nearly any case,” *id.* at ¶17 (quoting *Queen City Valves, Inc.*, 161 Ohio St. at 583) and fail to “explicitly and precisely recite the errors contained in the Tax Commissioner’s final determination,” *id.* at ¶ 16 (quoting *Newman*, 120 Ohio St.3d 127, 2008-Ohio-5202, at ¶ 27; and *Cousino Constr. Co.*, 108 Ohio St.3d 90, 2006-Ohio-162, at ¶ 41). To be sufficiently “specific,” the language of the notice of appeal must “‘tie the facts of the case’ to the alleged error by explaining ‘how’ the commissioner erred in valuing the property.” *Id.* at ¶ 17, quoting *Castle Aviation, Inc.*, 109 Ohio St.3d 290, 2006-Ohio-2420, ¶ 41.

Here, just like in *Ohio Bell*, the language used by WCI in its notice of appeal to the BTA provides no notice to the Commissioner or the BTA of the particular valuation methodology(ies), analysis, assumptions, and evidence that WCI would present at the BTA. In fact, through the use of such broad, vague language that could be applied to any tax appeal, WCI’s notice of appeal

manifested WCI's intent to present to the BTA any and all valuation challenges it subsequently might dream up.

WCI even fails to limit the scope of the reduction in assessed value sought, alleging merely that the correct true value should be "no more than" a stated dollar figure, but providing no lower-bound, "floor" amount. In so doing, WCI violated the notice of appeal requirements set forth in the BTA's own rule. See Ohio Adm. Code 5717-1-04(D) (providing that an appellant's notice of appeal to the BTA "shall set forth *** the matter and amount in controversy *** [.]"⁴).

By failing to assert a lower-bound value to the claimed true value of its taxable Ohio personal property, WCI effectively has alleged that the true value of its taxable personal property for each of the three tax years at issue could be any dollar amount ranging from \$0.00 dollars to \$30 million. Yet, WCI's notice of appeal is silent as to how any such lower values possibly could be supported by WCI.

Given the broad, general nature of the allegations in WCI's notice of appeal, its appeal to this Court necessarily seeks to render the "specification of error" requirement a non-jurisdictional one. In other words, WCI (and its amici) seek for this Court not only to overturn this Court's *Ohio Bell* decision, but every one of the Court's previous decisions applying R.C. 5717.02's "specification of error" requirement as a mandatory, jurisdictional requirement.

Notably, however, neither WCI's brief nor the amici briefs undertook to meet this Court's established standard for overturning precedent and disregarding stare decisis. Specifically, in

⁴ In fact, read literally, the actual valuation methodologies, analysis, assumptions, and evidence that WCI presented at the BTA evidentiary hearing directly contradict the allegations set forth in WCI's notice of appeal because the valuation amounts set forth in the AccuVal appraisal, for each of the three tax years, well exceed the "\$30 million" "upper-bound" amount set forth in WCI's notice of appeal. See, e.g., Supp. 222 (AccuVal's valuations setting forth AccuVal true values for the 2001, 2002, and 2003 tax years of \$85.8 million, \$54.9 million, and \$75 million, respectively).

Westfield Ins. Co. v. Galatis, 100 Ohio St.3d 216, 2003-Ohio-5849, paragraph one of the syllabus, the Court set forth a three-part test for overturning its previous precedent, as follows:

In Ohio, a prior decision of the Supreme Court of Ohio may be overruled where (1) the decision was wrongly decided at that time, or changes in circumstances no longer justify continued adherence to the decision, (2) the decision defies practical workability, and (3) abandoning the precedent would not create an undue hardship for those who have relied upon it.

As applied here, WCI and its amici have failed to assert, let alone demonstrate, that any of the three parts of the *Galatis* test can be met. First, no claim is made that this Court's decision in *Ohio Bell*, or any of the other "specification of error" decisions issued by this Court, "was wrongly decided at that time, or that changes in circumstances no longer justify continued adherence to the decision[s]." Second, no claim has been made that *Ohio Bell* and the long line of "specification of error" decisions of this Court beginning with *Queen City Valves* "def[y] practical workability." In fact, the very duration of this body of case law -- over six decades -- refutes that contention. Third, "abandoning the precedent" *would* create an undue hardship on those who have relied on it because the lack of specificity in appeals runs to the very core of procedural efficiency. See *CNG Dev. Co.*, 63 Ohio St.3d 28, 32 (citing *Queen City Valves*).

Further, the undue hardship that would be occasioned by overturning this Court's uniform body of decisional law would not be limited to the Commissioner. It would extend, in many instances, to the very taxpayers represented by private attorney members of the Ohio Bar Association. Two current appeals from BTA decisions pending this Court's consideration demonstrate this point. *Delaney v. Levin and Waste Management of Ohio, Inc.*, S. Ct. Case No. 2010-653; and *Delaney v. Levin and YSI, Inc.*, S. Ct. Case No. 2010-899.

In these two *Delaney* appeals, the BTA granted motions to dismiss on "specification of error" grounds regarding notices of appeal filed by the Greene County Auditor from the Commissioner's final determinations of personal property tax valuations. In both of those cases,

the Commissioner sided with the taxpayers, so that if this Court were to overturn its previous decisional law and suddenly hold that the “specification of error” requirement is no longer a jurisdictional one, those taxpayers would be just as adversely affected as the Commissioner. Nor are such county-auditor appeals isolated instances. See, for example, *Hatchadorian v. Lindley* (1986), 21 Ohio St.3d 66, 69; *Newman*, 120 Ohio St.3d 127, 2008-Ohio-5202; and *DeWeese v. Zaino*, 100 Ohio St.3d 324, 2003-Ohio-6502.

Proposition of Law No. 2:

An appellant’s failure to *present* an issue to the commissioner precludes the BTA from taking jurisdiction over that issue – even if the issue is *specified* in the appellant’s notice of appeal to the BTA.

Even if WCI had specified its wholly new valuation challenge in its BTA notice of appeal, that brand-new valuation challenge would be jurisdictionally barred. As this Court observed in *Ohio Bell*, “[o]ur cases suggest that such a failure to *present* an issue to the commissioner precludes the BTA from taking jurisdiction over that issue – even if the issue is *specified* in the notice of appeal” (emphasis in original). *Ohio Bell* at ¶ 33 (citing *CNG Dev. Co. v. Limbach* (1992), 63 Ohio St.3d 28,32; and *DeWeese*, 100 Ohio St.3d 324, 2003-Ohio-6502, ¶¶ 19-22).

DeWeese is particularly instructive. In that case, the Court dismissed an appeal by county auditors from the Commissioner’s final determinations of personal property tax value issued to Honda of America Mfg., Inc. (“Honda”). The county auditors challenged the Commissioner’s final determination on the basis that his valuations of Honda’s personal property failed to include certain taxable property that Honda allegedly had wrongly claimed to be exempt as “jigs” or “dies.” The jigs and dies exemption issue was not addressed by the Commissioner in his final determination because it was not raised in the Commissioner’s administrative proceedings. Under those facts, this Court affirmed the BTA’s dismissal of the county auditors’ appeal on “specification of error” grounds, holding and reasoning as follows:

[T]he only issues that can be appealed to the BTA from a final determination by the Tax Commissioner are those that were considered by him, as set forth in his final determination.

If the auditors were permitted to go outside the Tax Commissioner's final determination and raise issues on appeal that were not considered by the Tax Commissioner in his final determination, the BTA would no longer be reviewing a determination of the Tax Commissioner. If the auditors could raise issues before the BTA that were not presented to the Tax Commissioner for determination, the auditors would have greater rights on appeal than the General Assembly has given the taxpayer. R.C. 5717.02 does not contain any language that indicates that there is to be any difference between the issues that can be appealed by an auditor and those that can be appealed by the taxpayer. **Both the taxpayer and the auditors are limited under R.C. 5717.02 to the errors that they can specify in the Tax Commissioner's final determination.**

(Emphasis added.), *DeWeese* at ¶¶ 21-22.

In the present case, the Commissioner's final determination did not address or resolve the valuation challenge set forth in the AccuVal valuation study that WCI presented to the BTA. Thus, the foregoing holding and reasoning set forth in *DeWeese* should apply with equal force here. See also, *CNG Dev. Co.*, 63 Ohio St.3d at 32; and *Am. Fiber Sys., Inc.*, 125 Ohio St.3d 374, 2010-Ohio-1468, ¶¶ 17, 22 (citing with approval to *CNG Dev. Co.*) (both holding that a taxpayer's failure to specify an issue in its "petition for reassessment" jurisdictionally bars the taxpayer from raising that issue for the first time in its notice of appeal to the BTA).

Proposition of Law No. 3:

Permitting an appellant to present a new valuation challenge for the first time at the BTA would impermissibly allow the appellant to circumvent the Commissioner's administrative review process so that the BTA could not benefit from the substantial tax expertise and findings of the Commissioner concerning that newly raised challenge.

As this Court repeatedly has acknowledged, the Commissioner is a tax "expert," and his determination of taxable true value involves "the highest degree of official judgment and discretion." *Bd. of Educ. of South-Western City Schools v. Kinney* (1986), 24 Ohio St.3d 184, 186. See also, *Stanton, Pros. Atty., v. Tax Commission* (1926), 114 Ohio St. 658, 667-668;

Ashland County Bd. of Comm'rs v. Ohio Dep't of Taxation (1992), 63 Ohio St.3d 648, 656. Further, the Commissioner is “given the exclusive power [by statute] to value and assess *** property.” *Hatchadorian*, 21 Ohio St.3d at 69 (quoting *Toledo Edison Co. v. Galvin* (1974), 38 Ohio St.2d 210.

In this case, WCI never raised the valuation methodologies, analysis, and evidence set forth in the AccuVal valuation study in the Commissioner’s administrative proceedings. By bypassing the Commissioner, the BTA could not have the benefit of the Commissioner’s “expert” findings concerning the valuation methodologies, valuation analysis, or valuation evidence set forth in the newly presented valuation challenge.

Accordingly, the BTA’s consideration of a brand-new valuation challenge that WCI did not present to the Commissioner would greatly prejudice the Commissioner and the school district and other taxing district recipients of the personal property tax revenues. Given his tax expertise, the Commissioner’s personal property tax valuation findings “are presumptively valid, absent a demonstration that those findings are clearly unreasonable or unlawful.” *Hatchadorian*, 21 Ohio St.3d at paragraph one of the syllabus. In the present case, the BTA could not have accorded any weight to any valuation findings by the Commissioner concerning the AccuVal study because the Commissioner was denied the opportunity to make any such findings.

The substantial deference afforded the findings set forth in the Commissioner’s final determinations is well established. This Court has required that affirmative burden of proof to be met by the one challenging the Commissioner’s findings in approximately thirty Tax Commissioner cases decided post-*Hatchadorian*. The Court has done so most recently in four personal property tax cases, *A. Schulman, Inc.*, 116 Ohio St.3d 105, 2007-Ohio-5585, ¶7; *Shiloh*

Automotive, Inc., 117 Ohio St.3d 4, 2008-Ohio-68, ¶16; and *Columbia Gas Transm. Corp. v. Levin*, 117 Ohio St.3d 122, 2008-Ohio-511, ¶11; and *Am. Fiber Sys.*, 2010-Ohio-1468 at ¶ 42.

In its opening merit brief filed with this Court, WCI simply ignores the foregoing case law of this Court and the underlying policy reasons for the substantial weight the BTA is required to give to the Commissioner's findings under that case law. Instead, WCI tacitly asks the Court to overturn decades of established precedent by now allowing those challenging the Commissioner's final determinations to bypass the Commissioner's administrative review process pursuant to which the Commissioner makes "findings" concerning the matter in controversy.

IV. CONCLUSION

For all the above reasons, the Court should affirm the decision of the BTA dismissing the appellant's notice of appeal to the BTA.

Respectfully submitted,

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RICHARD A. LEVIN
TAX COMMISSIONER OF OHIO

CERTIFICATE OF SERVICE

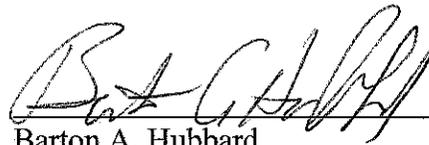
I certify that a copy of the Merit Brief of Appellee was served by e-mail and by U.S. mail

this 6th day of December 2010, upon the following counsel:

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I also sent copies to counsel of record for all known amici curiae on the 6th day of
December, 2010.


Barton A. Hubbard

NOV 15 2005

BOARD OF TAX APPEALS
STATE OF OHIO

OHIO DEPARTMENT OF TAXATION
OFFICE OF THE TAX COMMISSIONER

WCI Steel, Inc.
1040 Pine Ave. SE
Warren, Ohio 44483

Appellant,

vs.

William W. Wilkins
Tax Commissioner of Ohio
Rhodes State Office Tower
30 East Broad Street, 22nd Floor
Columbus, Ohio 43215

Appellee.

Case No. _____

(Personal Property Tax)

NOTICE OF APPEAL

Pursuant to section 5717.02 of the Ohio Revised Code ("R.C."), WCI Steel, Inc. (hereinafter, the "Taxpayer") hereby gives notice of its appeal to the Ohio Board of Tax Appeals from the Final Assessment Certificates of Valuation (hereinafter, collectively the "Determination" or "Determinations") by William W. Wilkins, the Tax Commissioner of the State of Ohio. A true copy of said Determinations for the tax return years 2001, 2002, and 2003, dated September 12, 2005, are attached hereto as Exhibit A and incorporated herein by reference to the same degree as if fully rewritten.

BACKGROUND

The Taxpayer filed Applications for Final Assessment for the 2001 and 2002 return years requesting a refund of personal property tax ("tax") attributable to the over valuation of the Taxpayer's non-inventory property consisting of, and/or associated with, the

identified above, as asserted in the Taxpayer's Applications for Final Assessment (2001 and 2002 tax years) and the 2003 tax return as filed. R.C. 5711.03 and 5711.18; *see also*, Ohio Administrative Code Rules 5703-3-10 and 5703-3-11.

3. The Determination erroneously includes the Taxpayer's spare arc transformer for its Ladle Metallurgical Facility which was held for disposal and was not used in business.
4. The Determination of the Tax Commissioner is not based on evidence and is contrary to law.

REQUEST FOR RELIEF

Based upon the Tax Commissioner's errors, the Tax Commissioner's Determination must be canceled, and the Taxpayer is entitled to a refund of previously paid tax attributable to:

1. The Taxpayer's erroneous inclusion of real property or items and costs not related to taxable personal property.
2. The overstatement of value for the taxable Property.

FILED IN CASE NO. 2004-11-11
FEB 11 PM 3:36

**BOARD OF TAX APPEALS
STATE OF OHIO**

The Ohio Bell Telephone Company)
45 Erieview Plaza)
Cleveland, Ohio 44114)

Appellant

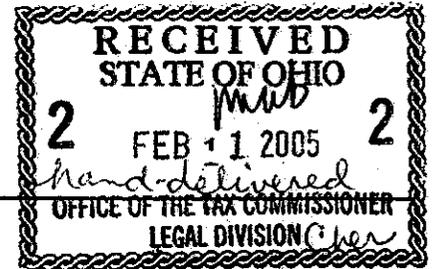
v.

William W. Wilkins, Tax Commissioner)
Ohio Department of Taxation)
30 E. Broad Street, 22nd Floor)
Columbus, Ohio 43215)

Appellee

Case No. _____
(Public Utility Personal Property Tax)

Assessment Amount: \$943,372,990
Amount In Controversy: \$351,611,290



NOTICE OF APPEAL

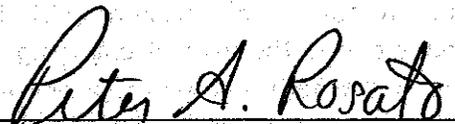
The Ohio Bell Telephone Company, which operates in Ohio as SBC Ohio ("SBC"), hereby timely appeals from a Final Determination issued on December 13, 2004 by the Tax Commissioner of Ohio ("Commissioner") for the 2003 tax year. A true and accurate copy of the Final Determination, which was mailed to SBC on December 13, 2004, is attached hereto and is incorporated herein by reference.

The Final Determination erroneously denied SBC's petition for reassessment concerning tax year 2003. First, in determining the true value of SBC's taxable property, the Commissioner wrongfully and unreasonably included software and associated right-to-use fees, which are intangibles under Ohio law. The Tax Commissioner's determination is thus in conflict with Ohio Revised Code § 5727.06(A)(3), which defines "taxable property" of a telephone company

CERTIFICATE OF FILING AND SERVICE

I hereby certify that a true and accurate copy of the foregoing was filed via hand delivery with William W. Wilkins, Tax Commissioner, Ohio Department of Taxation, Office of the Tax Commissioner, 30 E. Broad Street, 22nd Floor, Columbus, Ohio 43215 on this 11th day of February, 2005, and served via hand delivery upon the following on said date:

William F. Gross, Esq.
Ohio Department of Taxation, Legal Division
30 East Broad Street, 23rd Floor
Columbus, Ohio 43215



One of the Attorneys for
The Ohio Bell Telephone Company

5711.18 Valuation of accounts and personal property - procedure - income yield.

In the case of accounts receivable, the book value thereof less book reserves shall be listed and shall be taken as the true value thereof unless the assessor finds that such net book value is greater or less than the then true value of such accounts receivable in money. In the case of personal property used in business, the book value thereof less book depreciation at such time shall be listed, and such depreciated book value shall be taken as the true value of such property, unless the assessor finds that such depreciated book value is greater or less than the then true value of such property in money. Claim for any deduction from net book value of accounts receivable or depreciated book value of personal property must be made in writing by the taxpayer at the time of making the taxpayer's return; and when such return is made to the county auditor who is required by sections 5711.01 to 5711.36, inclusive, of the Revised Code, to transmit it to the tax commissioner for assessment, the auditor shall, as deputy of the commissioner, investigate such claim and shall enter thereon, or attach thereto, in such form as the commissioner prescribes, the auditor's findings and recommendations with respect thereto; when such return is made to the commissioner, such claim for deduction from depreciated book value of personal property shall be referred to the auditor, as such deputy, of each county in which the property affected thereby is listed for investigation and report.

Any change in the method of determining true value, as prescribed by the tax commissioner on a prospective basis, shall not be admissible in any judicial or administrative action or proceeding as evidence of value with regard to prior years' taxes. Information about the business, property, or transactions of any taxpayer obtained by the commissioner for the purpose of adopting or modifying any such method shall not be subject to discovery or disclosure.

Effective Date: 09-29-2000

The board, upon written demand filed by an appellant, shall within thirty days after the filing of such demand file with the court to which the appeal is being taken a certified transcript of the record of the proceedings of the board pertaining to the decision complained of and the evidence considered by the board in making such decision.

If upon hearing and consideration of such record and evidence the court decides that the decision of the board appealed from is reasonable and lawful it shall affirm the same, but if the court decides that such decision of the board is unreasonable or unlawful, the court shall reverse and vacate the decision or modify it and enter final judgment in accordance with such modification.

The clerk of the court shall certify the judgment of the court to the board, which shall certify such judgment to such public officials or take such other action in connection therewith as is required to give effect to the decision. The "taxpayer" includes any person required to return any property for taxation.

Any party to the appeal shall have the right to appeal from the judgment of the court of appeals on questions of law, as in other cases.

Amended by 128th General Assembly File No. 9, HB 1, § 101.01, eff. 10/16/2009.

Effective Date: 10-05-1987

5703-3-10 Tangible personal property tax; true value of depreciable assets; application of true value or 302 computation.

(A) Tangible personal property used in business in this state must be returned, for purposes of the personal property tax, at its true value in money. The true value of depreciable tangible personal property is its book cost less book depreciation, unless the tax commissioner finds that the depreciated book value is greater or less than the true value of such property.

(B) Application of the composite annual allowance procedure provided for in rule 5703-3-11 of the Administrative Code shall determine the prima facie true value of depreciable tangible personal property used in business. The prima facie valuations can be rebutted by probative evidence of higher or lower valuation.

(1) When an item of tangible personal property is acquired in an arms-length transaction, its true value at the time of purchase is the acquisition cost, including all costs incurred to put the property in place and make it capable of operation, which are normally capitalized in accordance with generally accepted accounting principles.

(2) The true value in money of any tangible personal property may be proved by establishing the amount for which the property would sell in an open market by a willing seller to a willing buyer in an arm's-length transaction. If market value is estimated by an appraisal, the property must be appraised as part of an ongoing business unless the taxpayer can demonstrate that the property is more accurately appraised on the basis of piecemeal liquidation or disposal.

(3) If a taxpayer believes that the composite annual allowance procedure as determined by the commissioner does not accurately reflect the true value in money of the taxpayer's depreciable tangible personal property on hand, the taxpayer may establish more accurate annual allowances by probative evidence.

(a) Such evidence must show that the published composite annual allowance procedures are inappropriate because they cause an unjust or unreasonable result, or must be modified because of special or unusual circumstances.

(b) Such evidence may include, but is not limited to, an aging of disposals study and any other studies, data, or documentation the taxpayer wishes to submit for consideration by the commissioner.

(c) Such evidence must cover a sufficient number of years to demonstrate a pattern in the history of the useful life of the subject property.

(C) A taxpayer must file a claim for deduction from book value for every tax return on which depreciable tangible personal property is returned at a value less than depreciated book value. Such claim must be made in writing at the time of filing the return on form 902, as prescribed by the commissioner, or in a format containing substantially all information as required on form 902.

Eff 2-21-86

Rule promulgated under: RC 5703.14

Rule authorized by: RC 5703.05

Rule amplifies: RC 5711.02, 5711.03, 5711.09, 5711.18

5717-1-04 Notice of appeal.

(A) An appeal shall be commenced with the filing of a signed original notice of appeal within the time and manner prescribed by law.

(B) A caption in the following form should be substantially followed:

"Ohio Board of Tax Appeals

_____ : Case No. _____

Appellant (Type of cause, e.g., Sales and Use Tax)

Address

_____ : Assessment Amount _____

Appellee Amount in Controversy _____ "

Address

(C) The notice of appeal should set forth the name, address, telephone number, and fax number, if available, of all parties together with the name, address, telephone number, fax number, and attorney registration number, if applicable, of appellant's authorized agent or attorney at law who executed such notice.

(D) A notice of appeal from a determination of the tax commissioner shall set forth the full name of the appellant and recite in clear and concise fashion the matter and amount in controversy and the action, or final determination appealed from, the errors complained of, and incorporate or attach a copy of the final order from which the appeal is taken. A copy of the notice of appeal filed with the board of tax appeals must also be filed with the tax commissioner within the time prescribed by law.

(E) An appeal taken from a decision of a county board of revision should be upon the form prescribed by the tax commissioner for such appeals. A copy of the notice of appeal filed with the board of tax appeals must also be filed with the county board of revision within the time prescribed by law.

(F) A notice of appeal from a decision of a municipal board of appeal shall set forth the full name of the appellant and recite in clear and concise fashion the matter and amount in controversy and the decision appealed from, the errors complained of, and incorporate or attach a copy of the decision from which the appeal is taken. A copy of the notice of appeal filed with the board of tax appeals must also be filed with both the municipal board of appeal and the opposing party within the time prescribed by law.

(G) Notices of appeal from a decision of a county board of revision, county budget commission, municipal board of appeal, or the tax commissioner filed by certified or express mail, properly addressed and with sufficient postage prepaid, shall be deemed filed on the date of the United States postmark placed upon the sender's receipt by the postal employee. Notices of appeal filed by an authorized delivery service designated by the tax commissioner shall be deemed filed on the date placed on the sender's receipt by an employee of the authorized delivery service. An appeal filed in person, by regular mail, facsimile, or other delivery method is effective upon receipt in the board office.

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NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

DEC 15 2004

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

IN RE:) CASE NO. 03-44662
)
WCI STEEL, INC., *et al.*,) CHAPTER 11
)
DEBTOR(S)) JUDGE MARILYN SHEA-STONUM
)
)
) OPINION RE: CONFIRMATION OF
) PROPOSED COMPETING PLANS OF
) REORGANIZATION

This matter is before the Court on two proposed competing plans of reorganization, one filed by the Debtors (as hereinafter defined) and one filed by the Secured Noteholders (as hereinafter defined). The hearing to consider confirmation of both plans was held on July 21, 2004, August 30, 2004 through September 3, 2004 and September 10, 2004. Closing arguments were held on October 25 and 26, 2004. For the reasons set forth below, I conclude that, although the economic backdrop of this case provides every reason to believe that a plan can and should be confirmed in this case soon, neither of the two plans now under consideration can be confirmed.

OVERVIEW

A confluence of unusual factors causes this case to present "quality problems." Among those factors are, on the one hand, (1) the determination of existing equity, Renco (as hereinafter defined), to continue its ownership of the debtor entities after reorganization, (2) the exposure of existing equity and affiliates to controlled group liability for unfunded pension

market that has emerged in the worldwide steel commodities markets since the filing of these cases nearly 15 months ago. Determination of enterprise value in a cyclical industry will always present challenges, and those challenges are greater when reorganization plans provide relatively fixed creditor treatment, while directing the balance of what could be a very large upside to the parties who would emerge with equity under either plan.

In short, this company is a small but agile niche player in the U.S. steel industry as evidenced by its relatively strong performance in the worst part of the cycle for the U.S. steel industry and by these two determined suitors, as well as a third would-be plan proponent. In an age when all too many chapter 11 cases appear to require the sale of substantially all of the operating assets in sales pursuant to § 363(b),¹ this case has seen the filing of two competing plans that were set for simultaneous confirmation hearings with a third one waiting in the wings.

This is a company that can and will be reorganized. Over the course of my involvement with this case,² I have held numerous case management conferences. At the end of closing arguments, in two such conferences held pursuant to § 105(a), I shared with counsel for the two competing plan proponents, as well as counsel for the Creditors Committee (as hereinafter defined), the USWA, the PBGC and the United States Trustee, the serious concerns of this Court regarding the failure of the Debtors' proposed plan to incorporate the

¹ Unless otherwise specifically noted, all statutory section references in this Opinion shall be to chapter 11 of title 11 of the United States Code (the "Bankruptcy Code").

² This case was filed in Youngstown and assigned to Judge William Bodoh. Upon his retirement on January 2, 2004, the so-called mega cases on his docket were assigned temporarily by lot to each of the active judges on the bankruptcy court for the Northern District of Ohio. In July 2004 Judge Kay Woods was named to the bankruptcy bench in Youngstown. All of the cases that had been temporarily assigned during the period of vacancy on the bankruptcy bench in Youngstown returned to her docket, including this one. However, since I had significant familiarity with the competing plans in this case and she had an ample amount on her docket, she and I agreed that I should continue to address the plan confirmation issues in this case through the confirmation of a plan.

similar guidance. This Court can do so only in the broadest strokes.

As discussed further below, with respect to the Debtors' proposed plan, among the issues that would have to be addressed before that plan could obtain confirmation are:

- The Debtors' overly conservative reckoning of the enterprise value of the reorganized debtor and aggressive characterization of the new value being provided by existing equity;
- The Debtors' undervaluation of the Secured Noteholders' collateral, *i.e.*, plant, property and equipment;
- The Debtors' invocation of the "business judgment rule" to justify huge disparities in the percentage dividends being afforded various classes of holders of unsecured claims; it is true that even in a nonconsensual plan the business judgment rule may support the creation of a variety of classes of unsecured claims for the purpose of providing different payment features, but particularly in a "cramdown" case any such sorting of holders of general unsecured claims must be examined in light of principles of unfair discrimination; with the possible exception of a class of small claims that are paid promptly to ease administrative burdens, the business judgment rule cannot be used to justify substantial economic disparities in the present value amounts paid to holders of general unsecured claims; as presently drafted the Debtors' proposed plan relies on a gerrymandering of the claims pool, such that their contention of having accepting classes, a requirement to allow them to invoke § 1129(b), is at best a pyrrhic victory because the Debtors' proposed plan fails to survive the necessary scrutiny that must be given under that section with respect to unfair discrimination both as between Class 5 and Class 7 and possible unfair discrimination in the treatment of various holders of claims within Class 7; and
- The Debtors' obligation under § 1129(b) to show that the holder of existing equity is providing fair equivalent new value for the equity that it would receive under the Debtors' proposed plan; the termination of exclusivity does not satisfy the obligation; the Debtors' effort to assign the savings that the reorganized debtor will realize under the new collective bargaining agreement as a component of new value that should be credited to the existing equity holder ignores the record evidence that the Secured Noteholders had reached an agreement in principle with the USWA with substantially similar economic terms.

Because the Secured Noteholders' proposed plan assumes the ability of that group to successfully negotiate a collective bargaining agreement with the USWA and further assumes that the pension obligations of the Debtors can be laid at the doorstep of the PBGC through

with this Court. By Order entered on September 17, 2003, the Debtors' chapter 11 cases have been consolidated for procedural purposes only and are being administered jointly. The Debtors continue to operate their business and manage their properties as debtors in possession pursuant to §§ 1107 and 1108. [Stip. ¶7 - docket #653]. On September 24, 2003, the United States Trustee for Region 9 appointed the Official Committee of Unsecured Creditors (the "Creditors Committee").⁶

Summary of the Debtors' Business: WCI is the primary operating entity among the Debtors. It is a niche oriented integrated producer of value-added, custom steel products. WCI fills a market niche by offering specialized service to its customers, many of whom order in small quantities that might otherwise require them to deal with middlemen. WCI has supplied at least 135 kinds of steel and is willing to accept orders as small as 15 tons for specialty steels. It owns and operates a plant on approximately 1,100 acres in Warren, Ohio. The other Debtors are wholly-owned direct or indirect subsidiaries of WCI. [Stip. ¶3 - docket #653].

Together, the Debtors employ about 1,800 people, approximately 75% of whom are hourly employees and the remainder salaried employees. In addition, there are approximately 686 recipients of pension benefits, including retirees and surviving spouses. Most of the hourly employees are represented by the United Steelworkers of America, AFL-CIO, CLC (the "USWA"). WCI is a party to various collective bargaining agreements (individually a "CBA") with the USWA effective from September 1, 1999 through on or after November 1, 2004 (collectively the "Current CBA"). The Current CBA requires the establishment and

⁶ The Creditors Committee consisted of the following seven members: United States Steel Corporation, the USWA, Cleveland-Cliffs Inc., the PBGC, FirstEnergy Corporation, Ogelbay Norton Company and Carmeuse North America. On March 5, 2004, the United States Trustee reconstituted the Creditors Committee to include all the original committee members except for United States Steel Corporation. In light of subsequent assumptions of certain members' contracts, perhaps the United States Trustee should revisit the constitution of the Creditors Committee.

On April 6, 2004, the Debtors filed a proposed disclosure statement (as amended from time to time thereafter, the "WCI Disclosure Statement") describing and attaching their proposed plan of reorganization (as amended from time to time thereafter, the "Debtors' Plan"). [Stip. ¶18 - docket #653].

The Court held a hearing in connection with the Exclusivity Termination Motion on May 4, 2004. At the conclusion of the presentation of evidence, the Court continued the hearing until May 11, 2004 to allow each party to make a closing argument. Prior to the resumption of the hearing, the Debtors advised the Court and the parties that the Debtors were prepared to consent to the termination of the Exclusive Periods. [Stip. ¶19 - docket #653]. Accordingly, the Court entered a Stipulated and Agreed Order terminating the Exclusive Periods. [Stip. ¶20 - docket #653].

On May 11, 2004 the Secured Noteholders filed a proposed plan (as amended from time to time thereafter, the "Secured Noteholders' Plan") and a Disclosure Statement in support of that plan (as amended from time to time thereafter, the "Secured Noteholders' Disclosure Statement"). [Stip. ¶21 - docket #653]

The Court entered an Order setting June 8, 2004 as the hearing date to consider approval of the disclosure statements and fixing June 3, 2004 as the deadline for objecting to either or both disclosure statements. [Stip. ¶22 - docket #653].

On or about June 3, 2004, the Debtors, Renco and the Creditors Committee filed separate objections to the Secured Noteholders' Disclosure Statement and the Secured Noteholders filed an objection to the WCI Disclosure Statement. [Stip. ¶¶23 and 24 - docket #653].

The Court considered the adequacy of the disclosure in each of the disclosure statements at a hearing held on June 8 and 9, 2004. On June 14, 2004, the Court entered an

CLAIMS/INTERESTS	DEBTORS	SECURED NOTEHOLDERS	DE SHAW
Other Secured Claims			
Convenience Class	85%	100%	100%
Continuing Vendor	50% payable in ten consecutive quarterly payments	N/A	50% payable in ten consecutive quarterly payments
Other Unsecured Creditors	pro-rata share of \$5 mil. -offers option to sell claim to Renco for cash payment -plus potential add'l distribution based on EBITDA in 2006 - 2014	pro-rata share of \$5 mil. (plus proceeds of any avoidance actions)	pro-rata share of \$5 mil.

Plan Voting: The following is a summary of the results of the voting as to the Debtors' Plan and the Secured Noteholders' Plan [Decl. of Laura DiBiase - docket # 589]:

Plan Class	Passing	Ballots Accepted	% Count	Amount Accepted	% Amount
WC1 Plan/Class 2- Secured Noteholders	Fail	17	20.48%	\$1,792,266.66	21.4%
Noteholders' Plan/Class 2 - Secured Noteholders	Pass	79	96.34%	184,849,666.65	99.63%
WC1 Plan/Class 4 - Convenience Class	Pass	273	96.47%	\$793,560.31	97.00%
Noteholders' Plan/Class 4-Convenience Class	Fail	85	36.17%	\$193,730.78	28.50%
WC1 Plan/Class 5 - Continuing Vendor Claims	Pass	56	100.00%	\$4,511,069.20	100.00
Noteholders' Plan/Class 5	N/A	N/A	N/A	N/A	N/A
WC1 Plan/Class 7 - Other Unsecured Claims	Fail	112	62.57%	\$38,173,818.14	15.95%
Noteholders' Plan/Class 7 - Other Unsecured Claims	Fail	89	43.00%	\$119,112,676.43	83.37%

DISCUSSION

The requirements for confirmation are set forth in § 1129. Each plan proponent bears the burden of establishing the plan's compliance with each of the requirements set forth in § 1129(a). If an impaired class does not vote to accept the plan, the plan proponent must also

under the plan on account of such junior claim or interest any property.” *Bank of America National Trust & Savings Associates v. 203 N. LaSalle Street Partnership*, 526 U.S. 434, 441-42 (1999).

The Court’s determination of what the equity of the reorganized debtor is worth begins with an analysis of the enterprise value of the reorganized debtor as of the hypothetical effective date of the Debtors’ Plan.

1. Findings of Fact Re: Enterprise Value

A1. The Debtors and the Secured Noteholders each offered their own experts to testify about WCI’s enterprise value. All of the experts used the same three methodologies for calculating such value: (1) comparable company analysis; (2) precedent transaction analysis (sometimes referred to as mergers and acquisitions); and (3) discounted cash flow.

Those methodologies which rely on cash flow analysis are more persuasive to the Court in light of Renco’s proposal to retain the Debtors’ current equity.

a). Weighting

A2. The Debtors presented the expert testimony and valuation analysis of Timothy O’Connor, a managing director of Jeffries & Company, Inc. (“Jeffries”), and Brett Levy, a senior research analyst, managing director and co-director of high yield research with Jeffries. [See Ex. 96]. Before joining Jeffries, Mr. Levy was a metals industry analyst with RBC Capital Markets (“RBC”). As a part of his work at RBC, he analyzed the Debtors and, based upon publicly available information and consideration of the Debtors in relation to the changing worldwide steel market, made forecasts as to the current and future value of the Debtors and their equity. [Trial Trans. - Levy at 466-67].

A3. Although Mr. Levy now works for Jeffries and has testified in support of Jeffries’ valuation opinion, the Court is more persuaded by the statements concerning the

analysis of Richard Schmitt, the Chief Operating Officer and Executive Vice President of Accuval Associates, Inc. ("Accuval"), as to the value of the Secured Noteholders' security interest in the Debtors' real property, plant and equipment. Accuval approached the valuation of that collateral from the top down, *i.e.*, starting with the enterprise value derived from the income generated by WCI less working capital and amounts purporting to approximate the value of each category of intangible assets associated with that income stream. In doing so, Accuval also selected an even weight for each methodology. The values derived by Accuval for each method are: \$344 million under a Comparable Company Analysis; \$260 million under a Precedent Transaction Analysis and \$245 million under a Discounted Cash Flow Analysis. Accuval's report reflects a total enterprise value of \$285 million. [See Ex. 112 - p. 52].

A6. The Secured Noteholders also presented the expert testimony and valuation analysis of Steven Strom, a managing director in CIBC World Markets ("CIBC") Restructuring Group and Mark Henkels, a managing director and head of CIBC's Industrial Growth Group. [See Exhibit 50]. CIBC opined that the total enterprise value was between \$300 million and \$350 million. [See Ex. 50 - p. 7].

A7. CIBC's ultimate calculations set forth in Exhibit 50 are summarized as follows:

Methodology	Weight	Range (in Millions)	
		Low	High
Comparable Company Analysis	55%	\$325	\$375
Precedent Transaction Analysis	10%	\$215	\$270
Discounted Cash Flow	35%	\$280	\$335
Weighted Average	100%	\$298	\$351
Concluded Enterprise Valuation Range		\$300	\$350

491, 505-06]. That analysis did not distinguish between sales under § 363, often when continued operating funds were in jeopardy, and sales pursuant to reorganization plans.

A12. In addition to these acquisitions, CIBC included some older transactions, such as, Co-Steel, Birmingham Steel, RTI, LTV Corp. and Inland Steel. These older transactions generally took place at higher multiples of revenue, EBITDA and tons capacity than the 2003 transactions focused on by Jeffries. Mr. O'Connor testified that the state of the steel market in 2002 was more similar to present circumstances than the state of the steel market in 2003. [Trial Trans. - O'Connor at 398-400]. Christopher Plummer of Metal Strategies, Inc., a well respected expert in the steel industry, testified that he routinely uses transactions that took place in 2002 in his presentations and calculations if the situations are otherwise factually similar. [See Ex. 95 - p. 32; Trial Trans. - Plummer at 1012-13].

c). Projections

A13. Finally, the experts relied on different sets of projections to calculate enterprise value.

A14. Jeffries relied upon the Projected Financials in Exhibit 3 of the WCI Disclosure Statement and did not rely on or incorporate any subsequent financial information which may have been available from WCI for the enterprise valuation. [Stip. ¶2 - docket #754]. These projections are "conservative" and are not the most reasonable projections in light of the current state of the steel market. [Trial Trans. - Plummer at 995] ("given the magnitude and totally unexpected degree of change in the marketplace, I think it would be obvious that the absolute dollar values of our forecasts were no longer valid.").

A15. In addition, Jeffries' financial projections are not based on a normalized fiscal year. This failure to normalize the financial projections for the calendar year resulted in an "apples to oranges" comparison. [Trial Trans. - Strom at 1053]. Using projections that have

A19. The Court finds that the reorganized debtor's long term debt, as of the effective date of a plan, would include, at a minimum, (1) approximately \$100 million in new notes, with the terms and characteristics of the notes proposed under the Secured Noteholders' Plan, (2) a \$5 million loan from the State of Ohio, (3) approximately \$21 million earmarked for cure payments on executory contracts under the Debtors' Plan, (4) a \$5 million distribution⁹ to Class 7 claimants in the "out years," and (5) the approximately \$35 million balance on the revolving credit agreement,¹⁰ for a total of approximately \$166 million.

A20. Assuming an enterprise value of, say, \$320 million at the time of the effective date of a plan, the implied equity value of the reorganized debtor, prior to the infusion of new value by existing equity, would be approximately \$154 million.

3. Findings of Fact re: Renco's Contribution

a). Cash

A21. The Debtors' Plan provides that Renco would pay, on the effective date of the plan, \$35 million in exchange for all of the equity in the reorganized debtor. The Debtors' Plan proposes that the reorganized debtor will retain the \$35 million rather than distribute any of that money to the Debtors' creditors.

A22. Because the cash is to be retained by the reorganized debtor, the cash contribution by Renco actually increases the equity value of the reorganized debtor. Therefore, the Court finds that to the extent the cash contribution is treated as new value, it

⁹ The Debtors argue that the distribution in the out years is potentially much larger, growing to approximately \$30 million. Even if the Debtors' calculations are correct, it does not change the Court's conclusion that Renco's contribution falls short of being the fair equivalent value of the equity of the reorganized debtors. Indeed since such payments are subject to a cap, it exacerbates it.

¹⁰ The 13 Week Cash Flow projections show that the Debtors' assumption about the projected amount of the revolver was inflated. At the time of eventual confirmation the amount of the revolver will not be \$60 million, but likely will be half of that number, or less.

A26. The reorganized debtor can upstream payments to Renco under certain circumstances in certain amounts. According to the excerpt, the reorganized debtor may upstream payments to Renco in the following amounts:

c. Provided such Upstreamed funds are directly contributed to the Old Pension Plan [as per Union's Pension Proposal] in any given year, the greater of (I)(A) the minimum contribution to the Old Pension Plan required under law [to be defined]; minus (B) the Minimum Renco Contribution (as defined below); minus (C) any Upstreaming that has occurred under d below since the Effective Date; and (ii) 20% of Net Income [to be defined]...

d. Beginning in 2007, provided the Company has made capital expenditures of at least the amount indicated on Attachment C hereto, the lesser of (a) 50% of Net Income after deducting all Upstreaming payments made under a-c above including, in the case of Upstreaming payment made under c, above, all such payments made since the Effective Date; and (b) an amount which, after such Upstreaming, would leave the Company with total liquidity [to be defined] both immediately and on a projected basis over the succeeding twelve months, of at least \$75 Million.

A27. The best that the Court can do is discuss this theoretically because, on the evidence before the Court, there is no means of calculating an actual dollar figure. However, based on the record before it, the Court finds that the value of Renco's new value contributions under the Debtors' Plan totals significantly less than the value of the equity that the existing equity holders would receive under the Debtors' Plan.

4. Conclusions of Law

a). Absolute Priority and New Value

In order for old equity holders to retain the equity of a reorganized entity, a contribution must be (1) in the form of money or money's worth; (2) necessary to the reorganization and (3) reasonably equivalent to the value of the interest being purchased. *In re Beaver Office Prods., Inc.*, 185 B.R. 537, 542 (Bankr. N.D. Ohio 1995). The Debtors have the burden of proving that Renco is not receiving the reorganized debtor's equity "on

marketing process. *In re Union Financial Servs. Group, Inc.* is not controlling authority. Further, it is not analogous factually. In *Union Financial*, the marketing process began prior to the petition date and was an open and independent process. Further, the court in *Union Financial* was not asked to confirm a plan over the objection of an impaired creditor, but rather over the objection of a frustrated bidder. *Id.* at 425. Therefore, the Court finds *Union Financial* inapposite to this case.

It is the burden of the Debtors to prove, by a preponderance of the evidence, that Renco is paying "top dollar" for the reorganized debtor's equity. Renco argues that its contributions should be viewed to include three main components - a cash contribution, all of the projected savings under the Revised WCI CBA and the assumption of pension liabilities.

(1) Cash Contribution

A cash contribution clearly is money or money's worth. However, Renco's cash contribution does not constitute new value because it is not being distributed to creditors. It is being used to increase the equity value of the reorganized debtor. This is impermissible round housing. *See In re One Times Square Assocs. Ltd. Partnership*, 159 B.R. 695, 708 (Bankr. S.D. N.Y. 1993) (finding that proposed new value contribution did not satisfy the absolute priority rule because only the new equity holder would benefit from such repairs); *In re Miami Ctr. Assocs. Ltd.*, 144 B.R. 937, 942 (Bankr. S.D. Fla. 1992); *cf. In re 8315 Fourth Ave. Corp.*, 172 B.R. 725, 739 (Bankr. E.D. N.Y. 1994).

(2) Revised WCI CBA

The Debtors argue that the labor savings under the Revised WCI CBA should be considered value contributed by Renco because Renco closed the final deal with the USWA. The Debtors cite to *In re Union Financial* and *In re Treasure Bay Corp.*, 212 B.R. 520, 545

for which it was already responsible, albeit secondarily, does not constitute new value.

The Court believes that the value appropriately attributable to Renco is the amount of pension liability assumed by Renco for which the Debtors will no longer be primarily liable and for which Renco cannot seek reimbursement from the Debtors. It is arguable that the computation of new value should be limited to what this bankruptcy estate would pay on the claims that are entirely avoided because of this highly unusual treatment of the pension issues.

Because this Court recognizes the importance of a highly motivated work force charged with every incentive to make the reorganized debtor successful, the Court concludes that on the facts and circumstances of this case it is appropriate to give dollar for dollar new value credit to the existing equity to the extent that it will pay such benefits without any ability to be reimbursed by the reorganized debtor.¹³

b.) Fair and Equitable

Separate and apart from satisfaction of the absolute priority rule, a plan must be fair and equitable. *In re Dow Corning*, 244 B.R. 678, 687-95 (Bankr. E.D. Mich. 1999) (discussing the breadth of the "fair and equitable" requirement of § 1129(b)); *203 North LaSalle*, 526 U.S. at 449-50. Treatment of Class 7 is not fair and equitable in light of the retention of 100% of the equity by Renco in exchange for a contribution of \$35 million plus the present value of the portion of future pension payments that equity is obligated to make without any ability to seek reimbursement. The implied equity of the reorganized debtor under the Debtors' Plan is worth one or more multiples of the new value credit to which Renco is entitled. This is further corroborated by the market evidence (even as dampened as it has been by the signals from Debtors' management and thus not a product of truly adequate market exposure) showing another buyer would pay the equivalent of \$85 million.

¹³ See Finding of Fact A27, *infra*.

1. Findings Re: Value of Secured Noteholders's Collateral

B1. The Secured Noteholders' collateral includes substantially all of the Debtors' real property, plant and equipment (the "PP&E"). It does not include any other tangible or intangible assets or the Debtors' goodwill.

B2. The Debtors' audited financial statements at the time these bankruptcy cases were filed listed the value of the PP&E as \$185,433,000.

B3. During the confirmation hearing, the Debtors presented the testimony and valuation analysis of John Connolly, an Executive Vice President and the Chief Operating Officer of Nationwide Consulting Company, Inc. ("NCC"). Mr. Connolly testified that he believed the value of the PP&E to be \$94 million as of the petition date, September 16, 2004. Mr. Connolly also testified that he did not believe the value of the PP&E had changed significantly between the petition date and the time of his testimony.

B4. The Court finds that Mr. Connolly's/NCC's appraisal is not entitled to any weight because neither NCC's report nor its workfile disclose the reasoning, basis, and support purportedly underlying Mr. Connolly's conclusions. Mr. Connolly's testimony revealed several inexcusable departures from required documentation necessary to support a valid appraisal. Second, the values Mr. Connolly attributes to each category of the Secured Noteholders' collateral are inconsistent with the limited documentation that does exist in his workfile. In other words, the documentation that exists provides no basis for the slashing of asset values evident in Mr. Connolly's final report. Finally, Mr. Connolly testified that he used an overall depreciation factor, based on the LTV II transaction, to value the PP&E. The Court finds the testimony and analysis of Mr. Connolly wholly incredible and unreliable.

B5. Accuval approached the valuation of the PP&E from the top down, *i.e.*, starting with the enterprise value derived from the income generated by WCI less working capital and

Indus., Inc., 74 B.R. 738, 742 (Bankr. N.D. N.Y. 1987). The Secured Noteholders cite to *In re LTV Steel*, 285 B.R. 259, 277 (Bankr. N.D. Ohio 2002) for the proposition that with respect to steel mills in particular, courts have valued property, plant and equipment based upon the income generated by the mill, minus the working capital needed to get it up and running. The Court recognizes the incentives, on each side, to either overvalue or undervalue Debtors' enterprise and their constituent assets. *In re Coram Healthcare, Corp.*, 315 B.R. 321, 339 (Bankr. D. Del. 2004) citing *In re Exide Technologies*, 303 B.R. 48, 61 (Bankr. D. Del. 2003). In addition, the Court recognizes that valuation is a mixture of art and science, and therefore, experts often disagree. Nonetheless, the Court does not credit the opinion of NCC and discounts the opinion of Accuval because of its top down approach.

As the record is now developed the only reliable evidence of value of the Secured Noteholders' collateral is measured by the value of what the Secured Noteholders themselves proposed to distribute on account of the old notes, i.e., new notes in the amount of at least \$100,000,000 with terms, conditions and restrictions so that they would trade at par. The Court understands that this treatment was in the context of a plan that directed all of the remaining enterprise value to holders of general unsecured claims. It is notable that one of the few matters on which the Debtors, the Secured Noteholders, the union and existing equity appeared to have a consensus was that the reorganized debtor should not have excessive fixed debt. While not a one to one relationship, the amount of debt that could be reliably serviced from the operation of the PP&E is relevant to its value in use by the reorganized debtor.

services concerning environmental, actuarial and legal matters; eight supply commodities; one, the City of Warren, Ohio, provides water and sewer service; and 11 supply other goods and services. [Stip. ¶1 - docket #765].

C5. In the first few weeks after the bankruptcy filing, the Debtors' strategy "was to do whatever [WCI] needed to do to continue to receive the material or service that was critical.... to [the Debtors'] continued operation." [Stip. ¶12 - docket #765].

C6. In the first few weeks after the bankruptcy filing, some vendors requested or required that WCI agree to tighter payment terms. WCI generally acquiesced to the new terms, in some instances after negotiating over the particular payment terms that would apply during its bankruptcy. [Stip. ¶13 - docket #765].

C7. Of the vendors who requested and obtained tighter payment terms incident to WCI's bankruptcy, some 31 were later placed in Class 5. The other 43 vendors later placed in Class 5 never changed their payment terms. [Stip. ¶14 - docket #765].

C8. Many vendors later placed in Class 4 (*i.e.*, "Convenience Claims") and Class 7 (*i.e.*, "Unsecured Claims") also requested and received tighter payment terms from WCI in the weeks immediately after the bankruptcy. WCI agreed to tighter payment terms with substantially more than 31 Class 4 vendors (of the approximately 300 vendors in that Class) and substantially more than 31 Class 7 vendors (of the approximately 200 vendors in that Class). [Stip. ¶15 - docket #765].

C9. After the "initial shock" of the bankruptcy filing had dissipated, WCI was "able to fend off" the tightening of payment terms requested by other vendors and rather kept vendors on their pre-petition payment terms. [Stip. ¶16 - docket #765].

C10. WCI expected that almost all of its vendors would revert to their normal pre-petition payment terms following WCI's emergence from bankruptcy. None of the vendors

vendors for 15% of the face amount of the claims upon confirmation of the Debtors' Plan.

Renco's offer to purchase the claims is contained in the WCI Disclosure Statement. A Class 7 vendor creditor agreed to sell its claim to Renco by checking a box on its ballot and voting for the Debtors' Plan.

2. Conclusions of Law

Section 1122(a) governs the classification of claims. This section does not demand that all similar claims be placed in the same class; however, a debtor may not classify similar claims differently solely to gerrymander an affirmative vote on a plan. *In re Snyders Drug Stores, Inc.*, 307 B.R. 889, 893 (Bankr. N.D. Ohio 2004). A separate classification of similar claims can be justified if a debtor proves that there is a legitimate business reason supporting the classification. *Id.* In *In re Snyders Drug Stores, Inc.* the debtors created a class ("class 10") made up of primarily but not exclusively trade creditors with whom the reorganized debtor hoped to do business after the reorganization. The court found that the debtors' separate classification was justified by a legitimate business reason: the intention to do business with those creditors in the future. *Id.* at 893-94.

Despite the ability of the debtors in *In re Snyders Drug Stores, Inc.* to meet the requirements of § 1122, the debtors were not able to show that the different treatment afforded to its class 10 claimants was anything other than unfair discrimination prohibited by § 1129(b).

As in the *Snyders Drug Store* case, the Debtors have proposed a separate class made up primarily of trade creditors with whom the reorganized debtor hopes to do business after the reorganization. Even assuming the Debtors have a legitimate business reason for the

Cir. 1998). The distributions approved in *Cajun Electric* were offers to reimburse the legal fees of certain creditors and were separate and apart from the proposed distributions to those creditors on their claims.

b.) Inter Class Discrimination

The question is whether the discrimination is unfair within the meaning of § 1129(b)(1). Courts use a four-part test to determine if the discrimination is unfair: (1) whether the discrimination is supported by a reasonable basis; (2) whether the debtor can confirm and consummate a plan without the discrimination; (3) whether the discrimination is proposed in good faith; and (4) how the class that is being discriminated against is treated. *In re Snyders Drug Stores, Inc.*, 307 B.R. 889, 894-95 (Bankr. N.D. Ohio 2004); *In re Graphic Communications, Inc.*, 200 B.R. 143, 148 (Bankr. E.D. Mich. 1996); *In re Creekstone Apartments Assoc., L.P.*, 168 B.R. 639, 644 (Bankr. M.D. Tenn. 1994).

With respect to the first factor, some courts have allowed a plan to discriminate if the proposed discrimination protects a relationship with specific creditors that the debtor needs to reorganize successfully. *Id.*

In this case, as in *Snyder Drugstore*,

The testimony did not, however, go far enough to prove that the general propositions discussed above justify discrimination in this particular case. Several things weigh against the explanation provided for the proposed discrimination. First, class 10 is not solely made up of trade vendors. Instead, the class of nearly 2569 creditors includes: (1) trade vendors; (2) service providers; and (3) lessors of stores which the reorganized debtor will continue to operate. There was no evidence to support the preferential treatment afforded to the lessors included in class 10. Second, there was no evidence to prove that the trade and service creditors included in class 10 would refuse to deal with the reorganized debtor on acceptable terms going forward absent some preferential payment under the plan. Class 10 is not, therefore, reasonably tailored to foster only those relationships that are critical to the

A. The Lack of a Collective Bargaining Agreement Between the USWA and the Reorganized Debtor under the Secured Noteholders' Plan Renders that Plan Unfeasible.

1. Findings of Fact

D1. The USWA is the collective bargaining representative for over 1,300 employees of WCI and serves as the authorized representative pursuant to § 1114(c) of WCI's bargaining unit retirees and surviving spouses. The USWA has represented bargaining unit employees of WCI and its predecessor companies for many years. [Stip. ¶9 - docket #725].

D2. The Current Pension Plan provides, among other benefits, normal retirement benefits, early retirement benefits and special shut down benefits in the event of a shutdown of WCI. [Joint Ex. 127].

D3. The USWA has entered into many innovative collective bargaining agreements over the years, including the groundbreaking contract reached with International Steel Group in December 2002, which has served as the model for many recent contracts. [Stip. ¶15 - docket #725].

D4. The USWA has also not hesitated to meet forcefully and effectively the challenge of major labor disputes, whether strikes or lockouts, including those with US Steel (1986), LTV I (1987), Ravenswood Aluminum Corp. (1990-92), Bridgestone/Firestone (1994-96), WCI Steel (1995), Wheeling-Pittsburgh Steel (1996-98), Georgetown Steel Corp. (1997-98), GST Steel Co. (Kansas City facility) (1997), Magnetic Specialties, Inc. (Marietta, Ohio) (1997-98), Rocky Mountain Steel (1997-2004), RMI Titanium Co. (Niles, Ohio) (1998-99; 2003-present), Southwire Co. (1998-99), Titan Tire Co. (Des Moines) (1998-2001), Titan Tire Co. of Natchez (Natchez, Miss.) (1998-2001), Kaiser Aluminum and Chemical Corp. (1998-

Director for Ohio. [Stip. ¶12 - docket #653].

D9. On March 9, 2004, representatives of the USWA and the Secured Noteholders reached an agreement in principle, subject to certain conditions, on both the material terms of a plan of reorganization and the overall economic terms of a CBA. On March 11, 2004, the USWA and the Secured Noteholders reconfirmed their agreement in principle and began discussing its implementation. On March 26, 2004, the USWA and the Secured Noteholders reached agreement in principle on documentation permitting the USWA to support the Secured Noteholders' Exclusivity Termination Motion. [Stip. ¶13 - docket #653].

D10. The USWA at all times had reserved the right to continue collective bargaining negotiations with the Debtors and Renco, in their respective capacities as employer of the USWA's members and owner of the employer. During the USWA's negotiations with the Secured Noteholders, the union was also conducting competing negotiations with the Debtors and Renco. [Stip. ¶14 - docket #653].

D11. On April 1, 2004, Ron Bloom informed Joseph O'Leary, the Secured Noteholders' labor counsel, that the USWA had reached an agreement with the Debtors and Renco that it considered to be better for the USWA's members and retirees than the agreement it had reached with the Secured Noteholders. [Stip. ¶15 - docket #653].

D12. The USWA then entered into the Revised WCI CBA and strongly supports confirmation of the Debtors' Plan. The USWA has not entered into a CBA with the Secured Noteholders and opposes confirmation of the Secured Noteholders' Plan. The USWA reached these decisions in good faith after many months of meetings with all relevant parties. The USWA has determined that the Debtors' Plan and the Revised WCI CBA best serve the

The Debtors, and their controlling shareholder, Renco Group, Inc. ("Renco"), will remain liable for earned pension benefits. With respect to pension benefits to be earned in the future, NewCo will provide such benefits through a new pension plan to be negotiated with the [USWA] pursuant to a new collective bargaining agreement. The USWA has not entered into, and its members have not ratified a new collective bargaining agreement with NewCo and there is no assurance that the USWA will do so, but NewCo will offer employment to USWA members on terms and conditions set forth in a 230-page collective bargaining agreement that the Secured Noteholders fully negotiated with the Noteholders over three months ending March 26, 2004 (the "**March 26 Agreement**"). NewCo intends to negotiate a final new collective bargaining agreement no less favorable to the USWA than the March 26 Agreement.

[Secured Noteholders' Plan, Art. 1 - docket #374].

D17. Article 6 of the Secured Noteholders' Plan addresses "Conditions Precedent to Confirmation and to Consummation." [Secured Noteholders' Plan, Art. 6 - docket #374].

As none of those conditions requires the reorganized debtor to have entered into a CBA with the USWA, the Secured Noteholders propose that their plan of reorganization would become effective with or without a CBA in place.

3. Conclusions of Law

The plan of reorganization proposed by the Secured Noteholders provides for the reorganized debtor to continue as an operating steel company which, *inter alia*, requires a skilled workforce to exist. The Secured Noteholders clearly understand the need for a skilled workforce as evidenced by the time, energy and resources expended in attempting to negotiate a new CBA with the USWA. The Secured Noteholders also clearly understand the possible repercussions should it be unable to ultimately negotiate a new CBA:

It is possible that USWA members could refuse to work at NewCo without a final CBA, causing NewCo to cease operations temporarily, or in some instances, even permanently. The Secured Noteholders believe this is unlikely, but no assurances can be given that such work stoppages and

[Wareham Depo. at pp. 45-47 - docket #749].

As set forth in their plan, the Secured Noteholders intend to offer employment to USWA members on the same terms and conditions in the agreement reached with the USWA in March 2004. [See Secured Noteholders' Plan, Art.1 - docket #374]. In support of its contention that the lack of a pre-negotiated CBA does not render its plan unfeasible, the Secured Noteholders rely upon its history of negotiations with the USWA and the fact that the USWA would, if the Secured Noteholders' plan was confirmed, be obligated to negotiate in good faith with the reorganized debtor. The Secured Noteholders also rely upon *Teamsters Nat'l Freight Indus. Negotiating Comm. v. U.S. Truck Co., Inc.*, 800 F.2d 581 (6th Cir. 1986) for the proposition that the unresolved issue of a collective bargaining agreement does not render the Secured Noteholders' Plan unfeasible.

In its *U.S. Truck* decision, the Sixth Circuit was asked to review, *inter alia*, the trial court's finding that a proposed plan of reorganization was feasible despite the absence of a pre-negotiated labor agreement with the union. In determining that the trial court's factual finding was not clearly erroneous, the Sixth Circuit took specific note of the labor union's "sincere willingness" to cooperate with the reorganized debtor to reach a labor contract so as to ensure continued viability of the company. *In re U.S. Truck*, 800 F.2d. 581, 589 (6th Cir. 1986).

In this case, the USWA has not expressed a "sincere willingness" to enter into a new CBA with the Secured Noteholders because of the fact that it has successfully negotiated a new CBA with the Debtors. Although the USWA would be under a duty to negotiate in good faith with the Secured Noteholders if their plan was confirmed, this Court will not discredit

The reorganized debtor under the Secured Noteholders' Plan intends to offer pension benefits through participation in the Steelworkers Pension Trust (the "SPT"), a multi-employer pension plan. However, the Multitemployer SPT Trust Agreement requires, in order for an employer to participate on behalf of bargaining unit employees, a CBA providing for such participation and a decision by the SPT as to what benefits would be provided. [See Joint Ex. 129 and Joint Ex. 130]. See also 29 U.S.C. § 186(c)(5) (which requires a written agreement for participation in a joint-board Multitemployer pension plan).

The Secured Noteholders have also argued that they bear all the risk in the event that they are unable to reach a deal with the USWA subsequent to confirmation of their plan because all other classes of creditors under their plan will receive 100% of their allowed claims through distributions to be made on the effective date of the plan with no contingencies. This argument ignores, however, the impact that potentially lengthy negotiations for a new CBA would have on the future viability of the reorganized debtor as an operating steel producer. Should that viability be jeopardized, there exists a very real possibility that this reorganization would be followed in short order by another bankruptcy filing.

In order to prove feasibility, a plan proponent must demonstrate that its plan has a reasonable prospect of success and is workable. *In re Crosscreek Apartments, Ltd.*, 213 B.R. 521, 539 (Bankr. E.D. Tenn. 1997). Although a plan proponent need not prove certainty, it cannot provide only speculation as to a key component of the proposed plan of reorganization, which in this case is a CBA with the USWA. *In re Crosscreek Apartments, Ltd.*, 213 B.R. 521, 539 (Bankr. E.D. Tenn. 1997). This is especially so when, as here, the Court is presented

pensions. [Stip. ¶1 - docket #756].

E7. About 380 employees covered under the Current Pension Plan have enough service for an immediate unreduced "30 and Out" pension.

E8. About 200 employees covered under the Current Pension Plan have enough age and service to qualify for an immediate unreduced pension ("70/80" or "Rule of 65") if they lose their jobs due to shutdown or layoff.

E9. Approximately 250 active employees are expected to retire under a proposed headcount reduction if either the Debtors' Plan or the Secured Noteholders' Plan is confirmed. [Stip. ¶2 - docket #756].

E10. The PBGC timely filed a proof of claim for, among other things, the unfunded benefit liabilities of the Current Pension Plan in the amount of \$197,300,000 (the "UBL Claim"). The UBL Claim is a contingent general unsecured claim. The PBGC does not believe that any of its other claims are likely to become liquidated in any significant amount. [Stip. ¶5 - docket #756].

E11. In the event of termination of the Current Pension Plan, the PBGC has statutory authority to pursue recovery of the UBL Claim against Renco, as well as certain other entities that are jointly and severally liable under 29 U.S.C. § 1362. The UBL Claim would also become a liquidated general unsecured claim against WCI, which would be classified in Class 7 under the Secured Noteholders' Plan. [Stip. ¶8 - docket #756]

2. Pension Plan Treatment Under the Secured Noteholders' Plan

E12. The Secured Noteholders' Plan sets forth the following with respect to the Current Pension Plan:

Non-Plan Trustee Functions with respect to the Pension Plan, including both implementation and ongoing administration fees for a full year following confirmation of the Secured Noteholders' Plan (the "Maximum Fee Estimate"). The Maximum Fee Estimate is \$500,000. The Secured Noteholders will establish a cash reserve in the amount of \$500,000 upon confirmation of the Secured Noteholders' Plan (the "Pension Plan Administration Reserve") for use by WCI in the event that WCI does not have sufficient cash to pay for performance of the [N]on-Plan Trustee Functions following confirmation. This reserve will continue to be available to WCI (with drawdown subject to Court approval) to defray the cost of employing its own personnel to provide Non-Plan Trustee Functions or hiring a third-party administrator, until such time as (i) Renco assumes sponsorship of the Pension Plan, or (ii) the Pension Plan is terminated, pursuant to Section 4041 or 4042 of ERISA. *The Secured Noteholders expect that one of these two eventualities will occur promptly following confirmation of the Secured Noteholders' Plan.*

[Secured Noteholders' Plan, Art. 5, as amended - docket ##374, 645] (emphasis added).

E13. The Secured Noteholders' Plan provides that "Equity Interests in each Debtor shall not be cancelled but shall remain outstanding" and further provides the following as to the continuance of WCI directors after confirmation

(e) In the unlikely event that all directors of WCI resign or otherwise cease to serve following confirmation of the Secured Noteholders' Plan, the Secured Noteholders shall in that circumstance be empowered, pursuant to the Order confirming the Secured Noteholders' Plan, to appoint a director for WCI, in order to ensure the continued orderly administration of the Pension Plan through use of the Pension Plan Administration Reserve, until such time as (i) Renco assumes sponsorship of the Pension Plan, or (ii) the Pension Plan is terminated, pursuant to §4041 or 4042 of ERISA.

[Secured Noteholders' Plan, Art. 5.8, as amended - docket ##374, 645].

controlled group) and (b) the UBL Claim is larger than Renco's obligation to fund the Current Pension Plan. During the confirmation hearing, the only evidence presented by the Secured Noteholders to support this contention was the expert report of William Daniels:

Based upon my experiences in similar situations, the most likely outcome is that the plan sponsorship will be assumed by a member of the Renco controlled group of companies. This outcome occurs either directly because the controlled group realized that it is responsible or by inducement/agreement with the PBGC, which precipitates the action by threatening an involuntary plan termination that would cause the controlled group to incur higher cost than if they [sic] assumed the plan. For Renco, . . . , the Total Benefit Liability is \$230,714,000 for an assumed plan termination as of October 31, 2003. Plan assets as of that date equaled \$92,900,000 resulting in an immediate claim by the PBGC in the amount of \$137,814,000. This value is substantially greater than the costs of maintaining the plan.

[William Daniels Expert Rpt. at pp. 1-2 - docket #757]. Aside from a stipulation that Renco "has cash substantially in excess of the . . . maximum termination liabilities [of the Current Pension Plan] plus securities and other assets," there was no evidence presented regarding Renco's other liabilities. [Stip. ¶5 - docket #764]. Nor was there any evidence presented to support an assumption that Renco would necessarily act in what appears to be the most economically reasonable manner.¹⁷

¹⁷ Renco is a New York corporation which is solely owned and/or controlled by Ira Rennert. That corporation's balance sheet is not a matter of public record or the record in this case. When asked in his deposition about specifics of that corporation's operations, Mr. Rennert was often times unable to recall basic information.

Q: You are the sole owner of the Renco Group?

A: Myself and trusts for my children.

Q: And do I understand there are five separate trusts that own Renco?

A: I don't know. I don't know.

Rennert Depo. at pg. 14.

Q: Do you have any sort of identified committee that has any

[Current] Pension Plan.” [Secured Noteholders’ Plan, Art. 5.8, as amended - docket ##374, 645]. That plan further provides that “in the unlikely event” that WCI’s directors resign, the Secured Noteholders would be entitled, pursuant to the confirmation order, to appoint a director for WCI “to ensure the continued orderly administration of the [Current] Pension Plan.” [Secured Noteholders’ Second Amend. to Plan, Art. 5.8, as amended - docket ##374, 645].

Ohio Revised Code § 1701.55 provides that the shareholders of the corporation are empowered to elect directors. The Secured Noteholders are not shareholders of WCI and they have set forth no authority to justify preemption of state corporate law by an order confirming a chapter 11 plan. “[F]or proponents to preempt state law . . . they will need to rely on more than just the general policy of Chapter 11 favoring reorganizations. They must show that enforcing such state law would be an ‘obstacle to the accomplishment and execution of the full purposes of the bankruptcy law.’” *In re Pacific Gas & Elec. Co.*, 273 B.R. 795, 813 (Bankr. N.D. Cal. 2002).

Although the Secured Noteholders’ Plan establishes a \$500,000 cash reserve to pay a third-party administrator, there has been no evidence of how long such funds would last nor do the Secured Noteholders address what would happen if those funds were depleted while the fate of the Current Pension Plan was still being decided. The Secured Noteholders have also not addressed whether an assumption of the Current Pension Plan by Renco could give rise to Renco then having a claim against the estate and, if such a claim could arise, how it would be treated under their proposed plan.

Second Possible Outcome: Renco does not assume sponsorship of the Current

Tenn. 1997). However, in order to demonstrate that a plan is feasible, the plan proponent cannot simply leave the fate of one of the largest liabilities in the case to a third party over which the proponent has no control. Such speculation renders the Secured Noteholders' Plan unfeasible.

Finally, these uncertainties play against the backdrop of a competing plan that appears to avoid the need to call upon the PBGC's limited resources, including its presumably overworked legal staff, and further avoids contentious litigation in which it is unclear how this estate's interests would be represented. Thus, this Court is urging the Secured Noteholders to direct their energies toward the negotiation of a consensual plan that resolves all issues, rather than creating unresolved issues for which any reserves that are established would probably prove inadequate.

CONCLUSION

None of the legal requirements discussed in this Opinion should come as any surprise to the sophisticated professionals advising the primary interested parties in this case. It is not unusual for chapter 11 plans that are consensual, *i.e.*, accepted by each class of claims holders entitled to vote, to depart from some of the § 1129 requirements. But absent such consensus, the Court must consider each of the confirmation requirements. In chambers conferences, this Court has reminded the competing plan proponents on innumerable occasions that defeating their opponent's plan would not result in the default confirmation of their own plan.

Since at least May of this year, while scheduling a variety of procedurally mandated hearings on these competing plans, this Court has noted the collision course that the Debtors with their plan funder and the Secured Noteholders have been pursuing. Often in such scenarios the Creditors Committee adopts a moderating role. In this case the opposite has

to be a clear anchor. Maintaining the current control for pension purposes is an obvious starting point. Providing dividends to holders of large general unsecured claims in the form of notes that have features allowing participation in future realization of the enterprise value is a way to get promptly to a confirmable plan; avoiding arbitrary caps on such participation would help to avoid future issues under *203 North LaSalle*.

Because the type of litigation that has marked this case for the last six months literally drains value that could be available for distribution to holders of non priority claims in this case, on its own motion, this Court is directing that, prior to January 17, 2005, no party shall file an amended plan or a new plan in this case, without prior court authorization, unless such plan has the support of the Debtors and their plan funder, the Secured Noteholders, the USWA, the Creditors Committee and the PBGC. On January 14, 2005 this Court will hold a § 105 status conference to consider whether cause exists to extend the moratorium on the filing of unilateral plans. The Court expects that representatives of each of those parties be available to work with maximum efficiency toward the development of a consensual plan. Although the parties are free to identify other approaches to plan development, the Court suggests that they first consider what amendments might be made to the Debtors' Third Amended Plan [docket #514] that could avoid the need for an additional round of balloting on such a plan. See § 1127.

The rulings being announced in this Opinion are interlocutory in nature. Thus, the only appeals that would be appropriate of the orders denying confirmation would be interlocutory appeals. The Court will refrain from entering orders or judgments consistent with this Opinion until, at the earliest January 17, 2005. It is the Court's explicit intention in refraining from the entry of judgment with respect to each of the plans considered hereunder to eliminate questions about the appeal period. Until judgments consistent with this Opinion