

In Re:
HORSEHEAD HOLDING CORP., et al.
Case No. 16-10287(CSS)

September 2, 2016

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UNITED STATES BANKRUPTCY COURT

DISTRICT OF DELAWARE

Case No. 16-10287(CSS)

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In the Matter of:

HORSEHEAD HOLDING CORP., et al.,

Debtors.

- - - - -x

United States Bankruptcy Court
824 North Market Street
Wilmington, Delaware

September 2, 2016
11:10 AM

B E F O R E:

HON. CHRISTOPHER S. SONTCHI

U.S. BANKRUPTCY JUDGE

ECR OPERATOR: DANA MOORE

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2 **Ruling on Confirmation Hearing**

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24 **Transcribed by: Penina Wolicki**

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ALSO PRESENT:

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(TELEPHONICALLY)

1 P R O C E E D I N G S

2 THE CLERK: All rise.

3 THE COURT: Please be seated.

4 Good morning.

5 IN UNISON: Good morning, Your Honor.

6 THE COURT: All right. I'm ready to rule on the
7 objections to confirmation and confirmation in general. I am
8 going to be working off an outline which is a little rough, so
9 I'll do my best and I apologize if I jump around a little bit.

10 Let me start by saying that this is one of the most
11 difficult decisions I've had to make in ten years on the bench
12 and one of the closest calls that I've had to make. I'm in
13 sort of an odd situation, because all of my bankruptcy
14 instincts honed over the years tell me that equity is out of
15 the money in this case, but the evidence makes it a much more
16 difficult call, and frankly, a lot of that rests at the feet of
17 the lenders who've insisted on a no-shop here, and have
18 eliminated market evidence as being a factor in the Court
19 making its decision. And as a result, this is going to come
20 down to the Court's decision based on a battle of the experts
21 on valuation.

22 And had the lenders taken what I believe would have
23 been a more reasonable position and actually allowed for a true
24 market check in this case, I think we'd be in a very different
25 situation, good or bad, but we'd actually have some evidence

1 other than expert valuation testimony that the Court could rely
2 on in making this very important and significant decision.

3 They made their own economic decision based on what
4 they felt was appropriate. It's certainly their call and
5 ability to insist on that. But I think at the end of the day,
6 from an evidentiary standpoint, they shot themselves in their
7 own foot. And that's -- it is what it is.

8 To frame the issues that are actually in front of the
9 Court, and holding aside the objection of the two remaining
10 mechanics' lien claimants, there are three disputed issues
11 relevant to confirmation that the Court has to decide. They
12 are whether the good-faith prong of the confirmation standards
13 is met; whether the plan is fair and equitable to equity, who
14 are obviously impaired; and that rests on whether the
15 absolutely priority rule is being satisfied here, and
16 specifically whether creditors are receiving too much, whether
17 they're receiving more than their fair share of value.

18 The sort of corollary of the fact that junior
19 creditors don't get anything until senior creditors are paid in
20 full, is that senior creditors are only entitled to a one
21 hundred percent recovery, before junior creditors. And if
22 they're getting more than that, that's taking money out of
23 junior creditors' pockets.

24 And the third issue is whether the settlement
25 encompassed in the plan meets the legal standards.

1 Starting with the good-faith issue first, I do find
2 that the plan is proposed in good faith, and I will overrule
3 the equity committee's objection on that point. The fiduciary
4 duties of the estate professionals or specifically -- excuse
5 me -- the fiduciary duties of the debtor, the debtor's
6 management, do not require a market check or shopping of the
7 company either through a plan or under 363 of the Code. In a
8 reorganization setup, where we have a debtor with plan
9 exclusivity who's negotiating with creditors, it is -- Mr.
10 French would you put that down, please? Thank you.

11 It is not required that a sort of 363 shopping of the
12 company occur. Debtors are free to negotiate plans of
13 reorganization with their creditors without being required to
14 take whatever deal they reach out to the market to see if it's
15 valid. To the extent that's inconsistent with what state law
16 fiduciary duty would require in a change-of-control
17 transaction, I believe that the Bankruptcy Code alters that or
18 supersedes that in the context of what reorganizations actually
19 require under the Code.

20 So while I believe that a market check here may have
21 been very positive and helpful, it certainly was not required,
22 and it's not inconsistent with management's fiduciary duties or
23 the debtors' fiduciary duties to go forward as they've gone
24 forward in this case. So there is not a good-faith issue.

25 But again, there was no market check here sufficient

1 to establish value, and the no-shop provision creates an
2 evidentiary issue with regard to what the value is. The DIP
3 financing process was rapid. It had to be rapid. The debtors
4 did their best to shop the DIP as quickly as they could. It
5 certainly wasn't sufficient to be a proxy for value evidence or
6 valuation of the debtors. It was a very specific, focused
7 process. I find it not at all surprising that any competing
8 DIP would want to be on a priming basis. I certainly believe,
9 given the time frames involved, any new DIP lender probably was
10 not in a position to come in and do a take-out loan, and any
11 new loan would clearly be a priming loan. And it certainly
12 wasn't inappropriate for the debtors to decide not to do that,
13 but it simply -- I raise it only with regard to whether or not
14 it's evidence of the value here.

15 Also, the debtors' vigorous response after July 7th to
16 inquiries, including engaging fully with all of the potential
17 purchasers identified by the equity committee -- and I think
18 the evidence is solid that the debtors fully engaged and were
19 vigorous -- but the combination of the time frame involved and
20 the fact they are responding to and not actively shopping the
21 company, in this case, is insufficient to establish value.

22 So what we have here, at the end of the day, is a
23 battle of the experts with Lazard versus SSG, with at least, on
24 a rebuttal basis, the participation of FTI.

25 I believe that the Lazard 435-million-dollar ramp-up

1 value is a relevant inquiry here. I don't think it's
2 reasonable to assume under the facts of this case, that
3 management won't take the committed equity contribution to try
4 to fix the plant. I think the basis of the reorganization
5 thesis here is a ramp-up scenario. And I view a non-ramp-up
6 scenario to be really, in effect, a liquidation analysis.

7 These companies, other than Mooresboro, can be sold in
8 pieces. There are obviously parties that have expressed
9 interest in Zochem, in INMETCO, and in the EAF recycling
10 business. The issue here and the reorganization thesis here is
11 how do you fix Mooresboro and expand this business. So I think
12 that's the appropriate inquiry.

13 Talk a little bit about burden of proof. The question
14 here, as I view it, is whether it's more likely than not that
15 equity is out of the money. If I'm going to confirm this plan,
16 I have to make a finding that it's more likely than not equity
17 is out of the money. If I can't figure that out, if it's a
18 tie, or if equity's thesis is more likely, then the plan can't
19 be confirmed.

20 Talking just briefly about Lazard's valuation, since
21 most of the focus really was on the equity committee's
22 valuation, but talking just a second about Lazard, Lazard used
23 a comparable companies methodology in addition to a discounted
24 cash flow methodology, and there was some back-and-forth about
25 whether that was appropriate.

1 I believe that the evidence supports that use of a
2 comparable companies methodology was not required here, but
3 using it was certainly reasonable. Even though this company
4 had no LTM EBITDA, use of a comparable companies methodology
5 based on forward-looking LTM, forward-looking EBITDA
6 projections, is allowable under the literature, supported by
7 the case law, and reasonable.

8 The flip side of that is the equity committee did not
9 use a comparable companies methodology, and of course neither
10 expert used a precedent transaction methodology. But the
11 equity committee used solely a discounted cash flow method.

12 Now, while it is certainly true that there are
13 advantages and preference to using several different
14 methodologies and to triangulate value, that is not necessarily
15 required. Any valuation professional makes his or her judgment
16 under the unique circumstances of each case. And as Lazard --
17 it was reasonable for Lazard not to use a precedent transaction
18 analysis here, I don't think it was at all unreasonable for SSG
19 to just use a DCF methodology.

20 So let's focus -- wait a minute. I am going to say a
21 little something about Lazard's beta, but I'm going to do that
22 in just the context of talking about the equity committee's
23 valuation. All right. So where we are. So the equity
24 committee came in with an amended, updated valuation with a
25 midpoint value of 842 million dollars. So that's where we'll

1 work from.

2 So taking the issues I already addressed, the DCF
3 methodology only being okay, let's turn to zinc prices. I
4 think it was reasonable for SSG to accept all of the business
5 plan other than the zinc price numbers. I think it's important
6 to note that management didn't pick the zinc data that it used,
7 Lazard picked that data. The use of the MB Apex report was
8 just as reasonable as Lazard's only black-box choice of
9 analysts from their London office.

10 I think that the analyst at Desk 7 that we spent a lot
11 of time on is a red herring for a couple reasons. One,
12 importantly, that analyst was not used in predicting zinc
13 prices for the terminal period, and of course, as in any DCF,
14 but particularly in this one, the terminal period is the 800-
15 pound gorilla in the valuation.

16 I would also point out that this idea that they used
17 the mean and not the median, and clearly that was a problem, I
18 don't think has any weight. Professionals use mean and median
19 in different circumstances at different times, and Lazard used
20 the mean in several instances in its own valuation in various
21 places.

22 At the end of the day, the delta on all of that effort
23 about Analyst number 7 is ten million dollars. While not
24 insignificant -- it's real money -- in the context of the
25 broader valuation, I don't believe that it's problematic. So I

1 think the use of the zinc prices under the MB Apex report was
2 reasonable.

3 Now, we also have -- the next issue is the change in
4 capitalization ratio for the perpetuity period. And I do find
5 that that is not reasonable under the facts and circumstances
6 of this case. Now, this is probably -- this is probably the
7 sub-piece closest call, because based on my experience with
8 hedge funds and private equity firms, I think it is certainly
9 possible to assume that if the debtor meets these projections,
10 that the lenders will ratchet up the debt on this company. And
11 as Mr. Victor said, it happens every day in his business.

12 But based on the evidence here and specifically this
13 business, the history of this business, the weight of the
14 comps, the nature of commodity companies, it is too speculative
15 to switch to a fifty-fifty capital structure in the terminal
16 period. The effect of that is to reduce the valuation of SSG
17 by 95 million dollars, which takes us from 842 to 747.

18 Talking about beta. I think that SSG's use of a 0.99
19 beta is reasonable. Averaging the metals and mining database
20 of Damodaran, which is not stale, given its use of both two-
21 and five-year historical beta, and SSG's comps, most of which
22 are Lazard's comps, is an appropriate way to calculate beta.

23 Here, I would also say that I think Lazard's beta
24 strikes me as being way too high for a commodity company like
25 the debtor; and I'm particularly bothered and troubled and

1 question its use of Barra beta based on the case law and some
2 of the academic literature, which is again, a black box and
3 very suspect.

4 Having said all that, I do think that the use of the
5 Chelyabinsk comp was not reasonable. It was too thinly traded
6 to serve as a proper beta. I believe its R-squared was 0.01,
7 if I remember correctly. And this reduces value by 10 million
8 dollars, to a figure of 737.

9 Turning to the perpetuity growth; and this is a big
10 issue. The perpetuity growth of 3.5 percent is based on the
11 ability to go from 155,000 tons to 170,000 tons in the terminal
12 period, and I think that's not reasonable. Basically, it's not
13 supported by the facts. Notwithstanding debtors' previous
14 statements, which they continue to make, I think it's highly
15 speculative whether they'll be able to achieve that increase.
16 I think the costs involved in achieving that increase are
17 unclear. I think the improvements in efficiency are
18 speculative, and importantly, limited by the science.

19 So I think the facts here belie making it reasonable
20 to use as a basis for future projections, this tick up from
21 155,000 to 170 -- it's not at all clear we're going to get to
22 155,000 tons in this case. The debtors have never gotten
23 close.

24 Now, I have no issue with this academic debate on
25 whether the use of perpetuity growth model for a ten-year

1 increase as opposed to a perpetual increase is appropriate. I
2 think the math, if you do the math, makes this a nonissue. The
3 delta here between having done a perpetuity growth and having
4 done a ten-year DCF for the terminal period is miniscule.
5 However, reducing -- correcting the error on the perpetuity
6 growth reduces the valuation by an additional 84 million to a
7 revised number of 653.

8 So 653 million is roughly equivalent to the 650
9 million dollars in claims, which appears to put the equity
10 committee, at the very least, on the cusp of being in the
11 money, although barely. However, that ignores the 85 to 100
12 million dollars of new capital that's going to be required to
13 achieve the ramp-up scenario, which is the entire basis of the
14 equity committee's valuation. You simply cannot get to the
15 equity committee's conclusion without that new money, and it
16 has to come from somewhere.

17 Thus, in order for the equity committee to be in the
18 money and for the plan to violate the absolute priority rule, I
19 believe the value must exceed at least 735 million dollars,
20 which it does not.

21 So for that reason, I'm overruling the equity
22 committee's objection on the absolutely priority rule.

23 So we turn to the global settlement. At this point,
24 given the valuations, this is the creditors' recovery to
25 forego. They've agreed to the releases and doing so is

1 reasonable under the Martin factors.

2 As an aside, I think that the equity (sic) committee
3 in this case settled on the cheap, but that's not the test;
4 that's not my call. The question is whether that settlement
5 meets the lowest range of reasonableness, and it does.

6 Critically, the class action is fully preserved for
7 equity. That may be worth up to possibly fifty-five million
8 dollars, minus, of course, attorneys' fees. I would not
9 approve a settlement that did not preserve the class action.
10 So I'm going to overrule this portion of the equity committee's
11 objection.

12 That leaves us with the objections of the mechanic
13 liens claimants. I'm going to overrule that. The interest is
14 going to be paid if the claim isn't paid on the effective date.
15 Liens are being preserved. Funds are available to pay the
16 claims. Those creditors are unimpaired. And stay relief at
17 this point is both an empty threat, frankly, but would require
18 a motion. So that's an issue for another day.

19 Now, this is not the result that the shareholders were
20 looking for. However, I believe more than ever that the
21 appointment of an equity committee has been fully vindicated in
22 this case. As I mentioned back in May, the issue here is
23 valuation. Now, the lenders refused to allow for a market
24 check, that's their call. And the creditors' committee
25 settled. Someone had to show up and stand up under the facts

1 and history of this case for the shareholders to challenge the
2 valuation proposition; and appointing an estate funded
3 fiduciary to do that was appropriate.

4 I think that the equity committee professionals have
5 acted within the confines of their mandate and didn't go on any
6 frolics or detours. So I am going to lift the limitation on
7 the equity committee's fees and expenses in this case. I will,
8 of course, evaluate any fee applications under the applicable
9 standards, but I am going to reduce the artificial limit -- or
10 eliminate the artificial limit that I had previously put on
11 their fees and expenses.

12 I think, frankly, they brought tremendous value to the
13 process. This was a difficult case for the Court to decide.
14 At the end of the day, I think that we had something where
15 everyone had a full and fair opportunity to present the facts
16 and law in front of the Court. The Court was presented with
17 tremendous professionalism by all parties, and was put in the
18 position of having to make a decision based on the facts and
19 law. I've done that. And frankly, I think at the end of the
20 day, the process was fair and we get to a fair result. The
21 process cost money, and it's appropriate for that money to be
22 spent in this instance.

23 So that's my ruling. I would open it up to any
24 questions or comments. Mr. Stearn?

25 MR. STEARN: For the record, Bob Stearn from Richards,

1 Layton & Finger, on behalf of the equity committee. Your
2 Honor, thank you very much for ruling so promptly and so
3 thoroughly. We really appreciate it.

4 Just one question or point of clarification. As you
5 were discussing the settlement, I think you said words in word
6 or substance, something about the equity committee settling
7 cheaply. Is that what you meant to say?

8 THE COURT: No, I meant the -- if I said that, I meant
9 the creditors' committee.

10 MR. STEARN: Thank you, Your Honor for the
11 clarification.

12 THE COURT: I apologize. That was absolutely not what
13 I meant.

14 MR. DAHL: Your Honor, for the record, Ryan Preston
15 Dahl. Logistically, we're finalizing some changes to the
16 confirmation order. If it please the Court, we could complete
17 that process and either submit it under certification of
18 counsel. I think it may take a little bit of time today to
19 just wrap up those changes.

20 THE COURT: All right. Well, yes, I will confirm the
21 plan, overrule all objections to the plan. And I will do that
22 subject, obviously, to receiving an order under certification
23 of counsel. It's a holiday weekend. I'm not going to be here
24 any later than absolutely necessary. So if you don't get it to
25 me today, rather promptly, it'll be Tuesday before you get your

1 order. I hope that's okay, because that is what it is. That's
2 what's going to be.

3 MR. DAHL: Certainly, Your Honor.

4 THE COURT: All right.

5 MR. DAHL: Your Honor, may I just confer with counsel
6 to the equity committee briefly?

7 THE COURT: Yes.

8 MR. DAHL: Your Honor, sorry, one additional point.
9 We have related to confirmation, the debtors' motion to enter
10 into the unit purchase agreement, which is part and parcel of
11 the plan. After conferring with counsel to the equity
12 committee, we understand that that's now been resolved as a
13 function of the Court's ruling on confirmation, and we --

14 THE COURT: Right.

15 MR. DAHL: -- could also submit that order as well.

16 THE COURT: Yes. Thank you for clarifying that and
17 bringing that to my attention. Yes, I will, for the reasons
18 already stated, overrule that objection and allow and approve
19 the entry into the unit purchase agreement.

20 MR. DAHL: Thank you, Your Honor.

21 THE COURT: You're welcome.

22 Mr. Stearn, I'm going to ask you a question while Mr.
23 Dahl's talking. I think I built that -- I think I built that
24 limit in your retention order or the -- where did I build that
25 limit? Was it in the committee --

1 MR. STEARN: Retention order, I believe, Your Honor.

2 THE COURT: All right. I'm comfortable with my oral
3 ruling, but if you would like a court order changing that, why
4 don't you submit something under certification of counsel.

5 MR. STEARN: I think that's a good idea. We'll do
6 that, Your Honor.

7 THE COURT: Okay.

8 MR. STEARN: Thank you very much.

9 THE COURT: Okay. Very good. And that should cover
10 Mr. Bifferato and SSG as well.

11 MR. STEARN: Right. And I suppose --

12 THE COURT: And --

13 MR. STEARN: -- Nastasi, too?

14 THE COURT: Yes, although they've resigned.

15 MR. STEARN: Right. But --

16 THE COURT: Yeah.

17 MR. STEARN: -- yes.

18 THE COURT: They have money in the case. I
19 understand. Yeah.

20 Mr. Dahl, I was just -- you may not have heard. I was
21 just -- we were having a colloquy about submitting something
22 under certification of counsel with regard to the retention
23 orders that removes the limit that the Court had previously set
24 on the fees.

25 MR. DAHL: Understood, Your Honor.

1 THE COURT: Okay. Anything you want to talk about
2 after that colloquy?

3 MR. DAHL: No, Your Honor.

4 THE COURT: Okay. All right. Very good. Thank you
5 very much. We're adjourned.

6 MR. DAHL: Thank you, Your Honor. Have a good
7 weekend.

8 (Whereupon these proceedings were concluded at 11:39 AM)

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I N D E X

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C E R T I F I C A T I O N

I, Penina Wolicki, certify that the foregoing transcript is a true and accurate record of the proceedings.

Penina Wolicki

September 4, 2016

PENINA WOLICKI

DATE

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