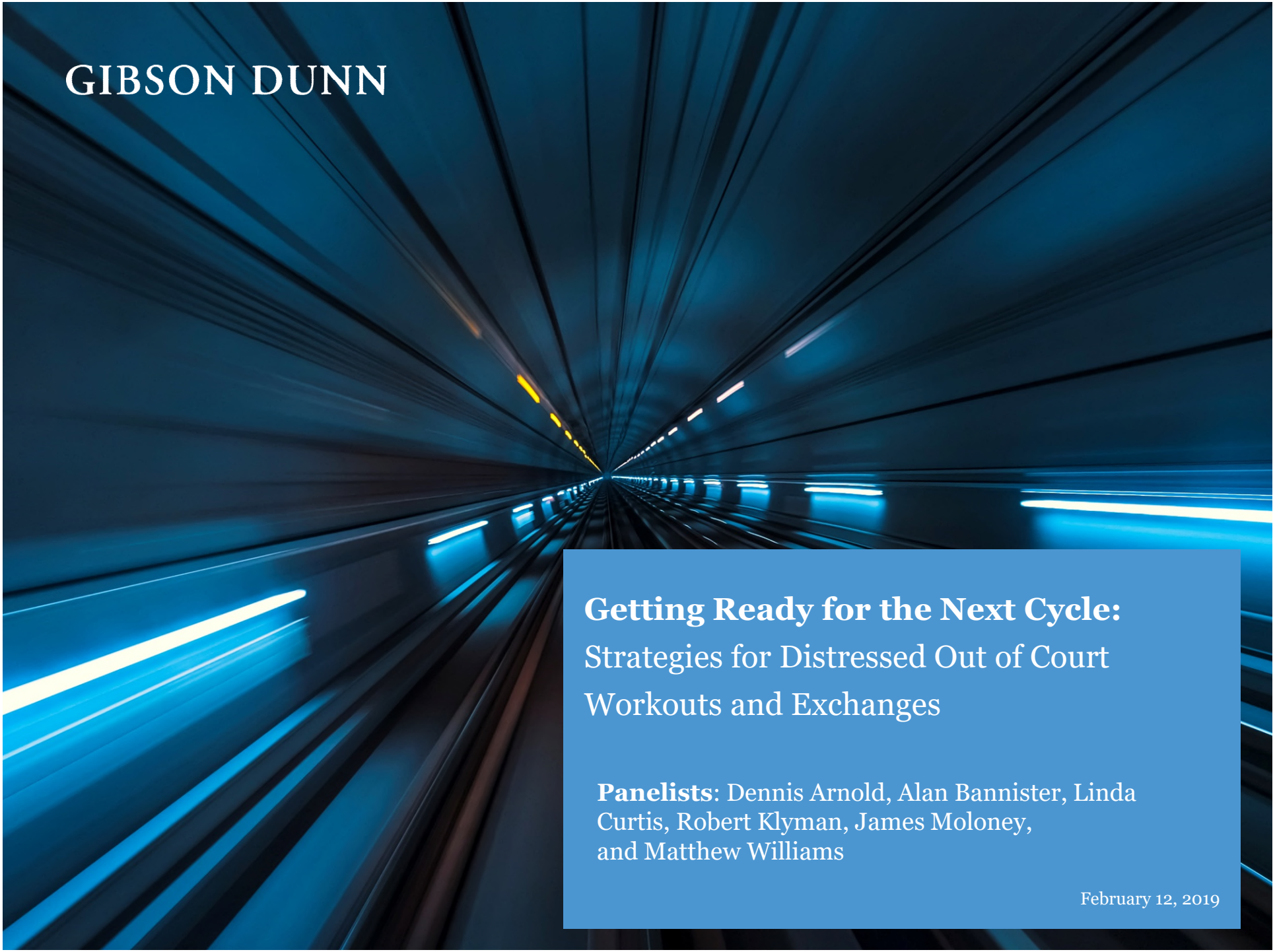

Getting Ready for the Next Cycle:

Strategies for Distressed Out of Court Workouts and Exchanges

Panelists: Dennis Arnold, Alan Bannister, Linda Curtis, Robert Klyman, James Moloney, and Matthew Williams

February 12, 2019

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Purchase and Assignment of Debt Claims

Purchase and Assignment of Debt Claims

Impact of form of instrument to be restructured (bank debt vs. security) – possibility of application of tender offer rules to issuer repurchases or exchanges of its securities (more below)

A. Federal bankruptcy law governs the treatment and allowance of claims but not the ownership or assignability of claims.

i. The Bankruptcy Code and Bankruptcy Rules create a process to determine the treatment of claims.
- Bankruptcy Code Section 502 determines the allowance and amount of a claim
- Bankruptcy Rule 3001(e) sets forth rules for filing transfer notices and proofs of claim for a transferred claim.
- Bankruptcy Rule 3003
- The Bankruptcy Rules contemplate application of nonbankruptcy law to transfers
- Courts have noted a limited role for Bankruptcy Courts in disputes regarding transfers of claims

B. Limitations on the right and/or capacity to assign a claim under nonbankruptcy law

i. Article 9 of the UCC overrides many, but not all, restrictions upon the transfer or assignment of a security interest in personal property
- Promissory Notes and Payment Intangibles
  - Section 9406 overrides restrictions on the grant of a security interest in (but not on a sale of) a promissory note or payment intangible
  - Section 9408 overrides restrictions on a sale of a payment intangible or promissory note but does not allow for enforcement

ii. State law can also impact the validity or effectiveness of contractual provisions restricting assignment.
- Such restrictions can impose limits upon the efficacy of anti- assignment clauses.
  - California Civil Code Section 711.
- Conditions restraining alienation, when repugnant to the interest created, are void.
  - *In re Woodbridge Group of Companies, LLC*

Purchase and Assignment of Debt Claims

- Eligible assignee cases
  - *In re LightSquared Inc.*, 511 B.R. 253 (2014)
  - *In re Meridian Sunrise Village, LLC*, No. 13-5503, 2014 WL 909219 (W.D. Wash. Mar. 7, 2014)
  - *In re Allied System Holdings Inc*, 556 B.R. 581 (D. Del. 2016), aff'd by In re ASHINC Corporation, 683 Fed. Appx. 131 (3d Cir 2017)
  - *Practice Takeaways*
    - Buyers: carefully review assignment restrictions; restrictions can be varied by negotiation and tailored to the specific circumstances of the borrower
    - Borrowers: use precise and exact wording to limit or qualify lenders' assignment rights; include language that assignments that violate eligible assignee restrictions will be void; conduct in protecting rights may be taken into account
    - Lenders: courts may consider extrinsic evidence, including a lender's conduct, when interpreting provisions in a loan agreement

iii. Claims may be disallowed if transferee does not comply with Rule 3001 notice provisions

- *In re Wilson*, 96 B.R. 257 (B.A.P. 9th Cir. 1988): The court found that equitable considerations mandated that wife's claim be disallowed as amendment to husband's timely filed claim and wife would not be allowed to participate in distribution of surplus after payment of other claims based on her tardily filed claim.
- *In re Sanchez*, 372 B.R. 289 (Bankr. S.D. Tex. 2007): Failure to comply with Rule 3001 is a fatal defect. The defendant's purchase of a tax claim is therefore invalid.
- *In re Ellington*, 151 B.R. 90 (Bankr. W.D. Tex. 1993): NCNB's failure to file a timely proof of claim or a notice of transfer of claim was not beyond its control. Despite NCNB's active participation in this case, NCNB failed to make the most basic effort to protect its claim. Substantial hardship and prejudice would result to creditors by allowing the NCNB claim at this late date.
- *In re Kreisler*, 331 B.R. 364 (Bankr. N.D. Ill. 2005), aff'd, 352 B.R. 671 (N.D. Ill. 2006), rev'd and remanded, 546 F.3d 863 (7th Cir. 2008): Garlin's failure to file evidence of the transfer of Community Bank's claims constituted cause to equitably subordinate Garlin's claims to the claims of all other unsecured creditors.

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Negotiated Repurchases or Exchanges of Securities

Negotiated Repurchases or Exchanges of Securities

A. Unsolicited and/or limited repurchases or exchanges

i. in-bound inquiries vs. select outreach to security holders
ii. "privately negotiated" transactions vs. formal "fixed-term" offers
iii. sophistication of offeree (QIB / accredited investor / retail)
iv. Wellman factors re: what amounts to a tender offer

B. Potential for issuer to be deemed to have launched a tender offer and implications on timing and process

i. privately-negotiated vs. broadly disseminated offer w/ fixed terms

ii. "street sweep" accumulation in the open market
- Wall St. bank "rule-of-thumb" on magnitude and pace:
- not > 25% of the class in any one quarter
- not > 50% of the class in any one year

Negotiated Repurchases or Exchanges of Securities

iii. *Wellman v. Dickinson* case (8 factors):

- public announcement of repurchase program
- precede or accompany rapid accumulation of large amounts of securities
- active and wide-spread solicitation
  - substantial number of offerees
- premium offered to prevailing market prices
- fixed ("take-it-or-leave-it") terms
  - not negotiable
- deadline to respond
  - offer open for a limited time (< 20 days)
  - offeree subject to pressure to sell
- conditions (fixed minimum or maximum)
- solicitation for a substantial percentage of class
- purchase of a substantial amount of securities

iv. Implications for a repurchasing program rising to the level of a tender offer

- Regulation 14E (applies to all "tender offers")
  - basic anti-fraud provisions
  - minimum offer period
  - prompt payment
  - withdrawal rights not required
  - no all-holders; best-price provisions

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Issuer (or Affiliate) Tender Offers for Outstanding Securities

Issuer (or Affiliate) Tender Offers for Outstanding Securities

A. Regulation 14D (third party) / Rule 13e-4 (issuer) / Regulation 14E (all)

i. Initial Steps to Analysis of Applicable Regulatory Regime:

- straight debt (notes / bonds / bank loans)
- convertible into a class of equity securities?
- does issuer have a class of equity securities registered with the SEC?
- are debt securities registered / listed for trading on an exchange?
- Issuer / affiliate / third party making offer?

B. Foreign Private Issuers

i. Tier I and Tier II exemptions:

- < 10% U.S. ownership (Tier I)
  - broad exemption from U.S. rules
- between 10% and 40% U.S. ownership (Tier II)
  - limited exemptions from U.S. rules

ii. Specific rules and procedures for determining level of U.S. ownership

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Potential Issues under Debt Covenants

Potential Issues under Debt Covenants

A. General perspectives

i. Issuer
- Factors in choosing which tranche of debt to repurchase or exchange:
  - Economics (including prepayment premiums)
  - Maturity, covenants and other terms
  - Event of default or impending event of default
  - Other factors
- Ability to repurchase or exchange debt without triggering any default under other tranches of debt

ii. New lenders or investors
- Economic and other terms, including priority
- No violation of existing debt

iii. Existing lenders or investors
- Improvement in position or at worst no change in position
- Major focus on avoiding subordination
- "Seat at the table"

Potential Issues under Debt Covenants

B. Specific covenants

i. Covenants directly restricting or limiting prepayments of other debt

- Subordinated debt
  - Payment subordination
  - Lien subordination
- Pari passu debt
- In bond indentures, will often be part of restricted payments covenant
- See examples (Appendix 4-A)

ii. Debt covenants

- Covenants prohibiting or restricting incurrence or maintenance of debt
- Debt definition may include debt-like preferred stock
- Generally structured as blanket prohibition with specific exceptions
- Applicable to any exchange offer with same issuer – new debt must be permitted under one or more of the exceptions
- Key exception in most credit agreements and indentures: refinancing debt/baskets
  - Amount, maturity, weighted average life, priority/subordination, liens, obligors, other factors
  - See examples (Appendix 4-B)
- Potential applicability of other debt covenant baskets

Potential Issues under Debt Covenants

iii. Lien covenants
- Covenants prohibiting or restricting incurrence or maintenance of liens
- Generally structured as blanket prohibition with specific exceptions
- Applicable to any exchange offer with same issuer – new secured debt must be permitted under one or more of the exceptions
- Ability to exchange new secured debt for existing unsecured debt will be limited
- Potential applicability of other lien covenant baskets

iv. Financial covenants
- Leverage and secured leverage ratios
- Interest coverage ratios
- Other financial covenants
- Pro forma and other considerations

v. Procedural covenants
- Requirements to offer payment for amendments to all holders
- Covenants regarding securities laws compliance
- Compliance with existing intercreditor agreements (including potential joinder)

vi. Other covenants
- Anti-layering covenants
- Affiliate transaction covenants
- Burdensome agreement covenants

Potential Issues under Debt Covenants

C. Workarounds, other considerations and practical takeaways

i. Exchange debt -- possible issuer workarounds
   - Unrestricted subsidiaries
     - Designation requirements including investment capacity
     - Not typically subject to covenants
     - Litigation: iHeart, J. Crew, PetSmart, Neiman Marcus
     - Market reactions: "J. Crew blocker"
   - Holdco debt (structural subordination)
   - Preferred stock

ii. Covenant baskets/exceptions
   - Many exceptions are formula based
   - Role of pro forma calculations
   - Complexity and ambiguity – "reasonableness" and "materiality"

iii. Other provisions in existing debt – e.g., representations, events of default

iv. Preferred stock may have similar covenants

v. Navigating covenant issues requires careful review of all existing agreements for all tranches of debt -- including indentures, credit agreements, intercreditor agreements, security documents and guarantees

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Exchange Offers

Exchange Offers

If a new security is to be offered in exchange for an existing security or bank debt, need for registration of offer or exemption under Securities Act:

A. Registration process and time implications;

B. Possible exemptions for out-of-court transaction:

i. Private Placement – Section 4(a)(2)/Regulation D under Securities Act
   - Sophisticated investors/Accredited Investors
   - Disclosure requirements under Reg D; Form D
   - Restricted securities and impact on secondary market trading (more on the liquidity issues later in this presentation)
   - Common to negotiate registration rights agreement in connection with any such transaction

ii. Regulation S offering in compliance with Regulation S under Securities Act to investors outside the United States

iii. Section 3(a)(9) of Securities Act, which is applicable only outside the context of a Chapter 11 proceeding, exempts securities exchanged by the issuer with its existing security holders.

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Trust Indenture Act

Trust Indenture Act

Trust Indenture Act requires any indenture under which debt securities are to be issued in an exchange offer be qualified under that Act or exempt from qualification

A. Must be qualified in connection with registered offering

B. Indentures relating to debt securities offered and sold in private placements exempt from Securities Act registration pursuant to Section 4(a)(2) or Regulation D are exempt from the Trust Indenture Act qualification requirements

C. However, if the debt securities are issued in reliance on Section 3(a)(9), the Indenture will need to be qualified

D. Marblegate and progeny – 100% consent requirement for "restructuring"

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Equity Securities Under the Exchange Act

Equity Securities Under the Exchange Act

If equity securities (including convertible securities or warrants) issued in exchange offer are registered under Section 12 of the Exchange Act, investors receiving those shares may be subject to '34 act disclosure obligations under:

A. Section 13(d) – 5% threshold

i. 13(d) beneficial ownership includes:
   - Sole or shared:
     - Voting and/or
     - Dispositive powers

ii. Schedule 13D vs. 13G
   - Schedule 13G "short-form" for passive investors
   - Schedule 13D "long-form" for non-passive investors

iii. Potential for formation of 13(d) group
   - Agreements on voting, holding, disposing of securities

B. Section 16 – 10% threshold

i. Calculation of percentage held
   - Based on Section 13(d) beneficial ownership concepts
   - Forms 3, 4 and 5
     - Shorting filing deadlines
     - Form 3 (ten days); Form 4 (two days); Form 5 (year-end)
     - Potential for short-swing trading profits and disgorgement

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Secondary Market Liquidity Issues

Secondary Market Liquidity Issues

A. New securities that are offered and sold by the issuer in the restructuring pursuant to an effective registration statement will be freely transferable (except in the hands of an affiliate);

B. New securities that are offered and sold in a private placement under Section 4(a)(2) or Regulation D under the Securities Act will be restricted securities, and can only be resold in a limited number of ways, including to other Accredited Investors in the US in private resales or pursuant to Rule 144 (which imposes a 6 month/1 year holding period, after which non-affiliates are generally free under this Rule to resell the securities within the United States) or outside the United States in reliance on Regulation S.

   i. Similarly, equity securities of non-foreign private issuers that are sold in reliance on Regulation S, and securities which are issued in reliance on Section 3(a)(9) in exchange for existing securities which were, themselves, restricted securities, will be subject to such transfer restrictions
   ii. Registration Rights Agreement is commonly used to give investors the right to demand that the issuer prepare and files as resale registration stakes under which the principal investors may sell the securities freely

C. Rule 144

D. Stock exchange listing vs. OTC

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Issues for Ad Hoc Groups

Issues for Ad Hoc Groups

A. Potential for conflicts of interests among group must be considered and monitored

   i. Impact of members holding other positions in issuer capital structure

B. Where security to be restructured is an "equity security" registered under Section 12 of the Exchange Act, and thus investors are subject to reporting requirements of Sections 13(d) and 16 of Exchange Act

   i. If part of a group, or potentially part of a group, 13D/G should reflect this reality or potential (and where appropriate may disclaim the conclusion)

   ii. Depending on the size of the "group", it could result in each member being deemed an "affiliate" of the issuer
      - Impact on liquidity for affiliates in any new security issued in the restructuring (more below);
      - Potential Section 16 implications;
      - Increased risk of potential liability for trading on the basis of material non-public information

   iii. Managing activities to reduce chances of creating a "group"

C. Blocking tender offers via "no support" agreements

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Solicitation of Tender Offers

Solicitation of Tender Offers

Solicitation of tender offers simultaneously with Chapter 11 prepackaged plan and mechanics

A. Typical Language: "This solicitation is being conducted to obtain sufficient acceptances of a consensual out-of-court restructuring and simultaneously for a chapter 11 reorganization plan prior to the filing of chapter 11. Because no chapter 11 cases have yet been filed, this disclosure statement has not been approved by the court as containing "adequate information" the debtor expects to promptly seek an order of the Bankruptcy Court that, among other things, approves the Disclosure Statement as containing adequate information, approves the solicitation of votes and confirms the prepackaged plan described herein.

B. Dual Track Approach

i. Combines exchange offer and solicitation of prepackaged plan into one document.
- If debtor receives sufficient support for exchange offer no bankruptcy filed and exchange is consummated.
- If debtor does not receive sufficient support for exchange offer, but receives requisite consent under Bankruptcy Code, chapter 11 petition is filed along with plan and acceptances of exchange are treated as votes in favor of the plan and disclosure statement.
- Can be used as leverage to force creditors to vote in favor of exchange if they think chapter 11 will not inure to their benefit.

Solicitation of Tender Offers

C. Benefits of Prepackaged Case v. Out of Court Restructuring

i. Plan binding on dissenting creditors if threshold vote met (1/2 number and 2/3 amount of claims in each class vote in favor).
ii. Cram Down available over dissenting classes of creditors so long as if plan is "fair and equitable" and meets "best interests" test
iii. Caps on certain claims (employees, lease rejections)
iv. Assume beneficial contracts and reject burdensome contracts

D. Risks / Issues with Approach

i. If requisite votes for exchange are not met, but bankruptcy thresholds are met, Bankruptcy Court must still find that plan meets all requirements of Bankruptcy Code (good faith, best interests, fair and equitable etc.…)
ii. Bankruptcy Court must rule that previously solicited disclosure statement contained "adequate information"
iii. Potential involuntary filing by creditors during solicitation period and/or unilateral collection actions due to unavailability of automatic stay.
iv. 1129(d) of Bankruptcy Code prohibits confirmation of plan if "primary purpose" of plan is to avoid application of Section 5 of Securities Act.
    - Section 1145 exemption applies to offer or sale of securities that occurs after confirmation of a Chapter 11 plan. Because prepackaged plan votes are solicited prior to bankruptcy filing, the exemptions under Section 1145 may not apply

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Appendix

Appendix 1

New York Uniform Commercial Code Section 1-201

(35) "Security interest" means an interest in personal property or fixtures which secures payment or performance of an obligation. "Security interest" includes any interest of a consignor and a buyer of accounts, chattel paper, a payment intangible, or a promissory note in a transaction that is subject to Article 9. "Security interest" does not include the special property interest of a buyer of goods on identification of those goods to a contract for sale under Section 2-505, the right of a seller or lessor of goods under Article 2 or 2A to retain or acquire possession of the goods is not a "security interest", but a seller or lessor may also acquire a "security interest" by complying with Article 9. The retention or reservation of title by a seller of goods notwithstanding shipment or delivery to the buyer under Section 2-401 is limited in effect to a reservation of a "security interest." Whether a transaction in the form of a lease creates a "security interest" is determined pursuant to Section 1-203.

New York Uniform Commercial Code Section 9-102

(2) "Account", except as used in "account for", means a right to payment of a monetary obligation, whether or not earned by performance, (i) for property that has been or is to be sold, leased, licensed, assigned, or otherwise disposed of, (ii) for services rendered or to be rendered,
(iii) for a policy of insurance issued or to be issued, (iv) for a secondary obligation incurred or to be incurred, (v) for energy provided or to be provided, (vi) for the use or hire of a vessel under a charter or other contract, (vii) arising out of the use of a credit or charge card or information contained on or for use with the card, or (viii) as winnings in a lottery or other game of chance operated or sponsored by a State, governmental unit of a State, or person licensed or authorized
to operate the game by a State or governmental unit of a State. The term includes health-care- insurance receivables. The term does not include (i) rights to payment evidenced by chattel paper or an instrument, (ii) commercial tort claims, (iii) deposit accounts, (iv) investment property, (v) letter-of-credit rights or letters of credit, or (vi) rights to payment for money or funds advanced or sold, other than rights arising out of the use of a credit or charge card or information contained on or for use with the card.

(11) "Chattel paper" means a record or records that evidence both a monetary obligation and a security interest in specific goods, a security interest in specific goods and software used in the goods, a security interest in specific goods and license of software used in the goods, a lease of specific goods, or a lease of specific goods and license of software used in the goods. In this paragraph, "monetary obligation" means a monetary obligation secured by the goods or owed under a lease of the goods and includes a monetary obligation with respect to software used in the goods. The term does not include (i) charters or other contracts involving the use or hire of a vessel or (ii) records that evidence a right to payment arising out of the use of a credit or charge card or information contained on or for use with the card. If a transaction is evidenced by records that include an instrument or series of instruments, the group of records taken together constitutes chattel paper.

(42) "General intangible" means any personal property, including things in action, other than accounts, chattel paper, commercial tort claims, deposit accounts, documents, goods, instruments, investment property, letter-of-credit rights, letters of credit, money, and oil, gas, or other minerals before extraction. The term includes payment intangibles and software.

(46) "Health-care-insurance receivable" means an interest in or claim under a policy of insurance which is a right to payment of a monetary obligation for health-care goods or services provided.

(61) "Payment intangible" means a general intangible under which the account debtor's principal obligation is a monetary obligation.

(65) "Promissory note" means an instrument that evidences a promise to pay a monetary obligation, does not evidence an order to pay, and does not contain an acknowledgment by a bank that the bank has received for deposit a sum of money or funds.

Appendix 2

New York Uniform Commercial Code - UCC § 9-406. Discharge of Account Debtor; Notification of Assignment; Identification and Proof of Assignment; Restrictions on Assignment of Accounts, Chattel Paper, Payment Intangibles, and Promissory Notes Ineffective

a) Discharge of account debtor; effect of notification. Subject to subsections (b) through (h), an account debtor on an account, chattel paper, or a payment intangible may discharge its obligation by paying the assignor until, but not after, the account debtor receives a notification, authenticated by the assignor or the assignee, that the amount due or to become due has been assigned and that payment is to be made to the assignee. After receipt of the notification, the account debtor may discharge its obligation by paying the assignee and may not discharge the obligation by paying the assignor.

b) When notification ineffective. Subject to subsection (g), notification is ineffective under subsection (a):
   1) if it does not reasonably identify the rights assigned;
   2) to the extent that an agreement between an account debtor and a seller of a payment intangible limits the account debtor's duty to pay a person other than the seller and the limitation is effective under law other than this article; or
   3) at the option of an account debtor, if the notification notifies the account debtor to make less than the full amount of any installment or other periodic payment to the assignee, even if:
      A. on of the account, chattel paper, or payment intangible has been assigned to that assignee;
      B. a portion has been assigned to another assignee; or
      C. the account debtor knows that the assignment to that assignee is limited.

c) Proof of assignment. Subject to subsection (g), if requested by the account debtor, an assignee shall seasonably furnish reasonable proof that the assignment has been made. Unless the assignee complies, the account debtor may discharge its obligation by paying the assignor, even if the account debtor has received a notification under subsection (a).

d) Term restricting assignment generally ineffective. Except as otherwise provided in subsection (e) and Sections 2-A-303 and 9-407 , and subject to subsection (g), a term in an agreement between an account debtor and an assignor or in a promissory note is ineffective to the extent that it:
   1) prohibits, restricts, or requires the consent of the account debtor or person obligated on the promissory note to the assignment or transfer of, or the creation, attachment, perfection, or enforcement of a security interest in, the account, chattel paper, payment intangible, or promissory note; or
   2) provides that the assignment or transfer or the creation, attachment, perfection, or enforcement of the security interest may give rise to a default, breach, right of recoupment, claim, defense, termination, right of termination, or remedy under the account, chattel paper, payment intangible, or promissory note.

e) Subsection (b)(3) not waivable. Subject to subsection (g), an account debtor may not waive or vary its option under subsection (b)(3).

f) Rule for individual under other law. This section is subject to a rule of law, statute, rule or regulation other than this article which establishes a different rule for an account debtor who is an individual and who incurred the obligation primarily for personal, family, or household purposes.

g) Inapplicability. This section does not apply to:
   1) an assignment of a health care insurance receivable to the extent such assignment conflicts with other law or the parties have otherwise agreed in writing that such receivable is non-assignable,
   2) a claim or right to receive compensation for injuries or sickness as described in 26 U.S.C. § 104(a)(1) and (2) , as amended from time to time, or
   3) a claim or right to receive benefits under a special needs trust as described in 42 U.S.C. § 1396p (d)(4) , as amended from time to time.

Appendix 3

New York Uniform Commercial Code - UCC § 9-408. Restrictions on Assignment of Promissory Notes, Health-care-insurance Receivables, and Certain General Intangibles Ineffective

a) Term restricting assignment generally ineffective. Except as otherwise provided in subsection (b), a term in a promissory note or in an agreement between an account debtor and a debtor which relates to a health-care-insurance receivable or a general intangible, including a contract, permit, license, or franchise, and which term prohibits, restricts, or requires the consent of the person obligated on the promissory note or the account debtor to, the assignment or transfer of, or creation, attachment, or perfection of a security interest in, the promissory note, health-care-insurance receivable, or general intangible, is ineffective to the extent that the term:
   1) would impair the creation, attachment, or perfection of a security interest; or
   2) provides that the assignment or transfer or the creation, attachment, or perfection of the security interest may give rise to a default, breach, right of recoupment, claim, defense, termination, right of termination, or remedy under the promissory note, health-care-insurance receivable, or general intangible.

a) Applicability of subsection (a) to sales of certain rights to payment. Subsection (c) applies to a security interest in a payment intangible or promissory note only if the security interest arises out of a sale of the payment intangible or promissory note.

b) Limitation on ineffectiveness under subsection (a). To the extent that a term in a promissory note or in an agreement between an account debtor and a debtor which relates to a health-care-insurance receivable or general intangible would be effective under law other than this article but is ineffective under subsection (a), the creation, attachment, or perfection of a security interest in the promissory note, health-care-insurance receivable, or general intangible:
   1) is not enforceable against the person obligated on the promissory note or the account debtor;
   2) does not impose a duty or obligation on the person obligated on the promissory note or the account debtor;
   3) does not require the person obligated on the promissory note or the account debtor to recognize the security interest, pay or render performance to the secured party, or accept payment or performance from the secured party;
   4) does not entitle the secured party to use or assign the debtor's rights under the promissory note, health-care-insurance receivable, or general intangible, including any related information or materials furnished to the debtor in the transaction giving rise to the promissory note, health-care-insurance receivable, or general intangible;
   5) does not entitle the secured party to use, assign, possess, or have access to any trade secrets or confidential information of the person obligated on the promissory note or the account debtor; and
   6) does not entitle the secured party to enforce the security interest in the promissory note, health-care-insurance receivable, or general intangible.

c) Inapplicability. This section does not apply to:
   1) a claim or right to receive compensation for injuries or sickness as described in 26 U.S.C. § 104(a)(1) and (2) , as amended from time to time, or
   2) a claim or right to receive benefits under a special needs trust as described in 42 U.S.C. § 1396p (d)(4) , as amended from time to time.

Appendix 4-A

Example 1:

Section 8.10 Prepayment of Debt. No Borrower shall, nor shall any Borrower permit any Subsidiary to, directly or indirectly, make any optional or voluntary payment, prepayment, repurchase or redemption of any Debt, except (a) the Obligations under the Loan Documents, (b) Debt secured by a Permitted Lien if the asset securing such Debt has been sold or otherwise disposed of in a transaction permitted hereunder, (c) a Permitted Refinancing of Debt permitted under Sections 8.1(b) and 8.1(c), (d) prepayments of other Debt so long as the amounts prepaid do not exceed $250,000 in the aggregate during any period between determinations of the Borrowing Base, and (e) prepayment of intercompany Debt to Obligated Parties.

Example 2:

Section 4.05 Limitation on Restricted Payments.

(a) The Issuer will not, and will not permit any of its Restricted Subsidiaries to, directly or indirectly:

* * *

(3) make any principal payment on, or purchase, repurchase, redeem, defease or otherwise acquire or retire for value, prior to scheduled maturity, scheduled repayment or scheduled sinking fund payment, any Subordinated Indebtedness (other than (a) any such payment, purchase, repurchase, redemption, defeasance or other acquisition or retirement or in anticipation of satisfying a sinking fund obligation, principal installment or final maturity, in each case, due within one year of the date of payment, purchase, repurchase, redemption, defeasance or other acquisition or retirement, and (b) any Indebtedness Incurred pursuant to Section 4.04(b)(3));

* * *

"Subordinated Indebtedness" means, in the case of the Issuer, any Indebtedness (whether outstanding on the Issue Date or thereafter Incurred) which is expressly subordinated or junior in right of payment to the Notes pursuant to a written agreement and, in the case of a Guarantor, any Indebtedness (whether outstanding on the Issue Date or thereafter Incurred) which is expressly subordinated or junior in right of payment pursuant to a written agreement to the Note Guarantee of such Guarantor.

Appendix 4-B

Sample 1:

"Permitted Refinancing" means Debt constituting a refinancing or extension of Debt permitted under Sections 8.1(b) and 8.1(c) that (a) has an aggregate outstanding principal amount not greater than the aggregate principal amount of the Debt being refinanced or extended plus an amount equal to the fees and expenses reasonably incurred in connection with such refinancing or extension, (b) is not entered into as part of a sale leaseback transaction, (c) is not secured by a Lien on any assets other than the collateral securing the Debt being refinanced or extended, (d) the obligors of which are the same as the obligors of the Debt being refinanced or extended and (e) is otherwise on terms no less favorable to the Obligated Parties, taken as a whole, than those of the Debt being refinanced or extended.

Sample 2:

"Refinancing Indebtedness" means Indebtedness of a Borrower or a Restricted Subsidiary incurred in exchange for, or the proceeds of which are used to redeem or refinance in whole or in part, any Indebtedness of such Borrower or any of its Restricted Subsidiaries (the " Refinanced Indebtedness "); provided that: (a) the principal amount of the Refinancing Indebtedness does not exceed the principal amount of the Refinanced Indebtedness (or, if less, the portion of the principal amount required to be paid in connection with the refinancing) plus the amount of accrued and unpaid interest on the Refinanced Indebtedness, any reasonable premium paid to the holders of the Refinanced Indebtedness and reasonable expenses incurred in connection with the incurrence of the Refinancing Indebtedness; (b) the obligor of Refinancing Indebtedness does not include any Person (other than such Borrower or any of its Restricted Subsidiaries) that is not an obligor of the Loans; (c) if the Refinanced Indebtedness was subordinated in right of payment to the Loans or either Subsidiary Guarantee, as the case may be, then such Refinancing Indebtedness, by its terms, is subordinate in right of payment to the Loans or such Subsidiary Guarantee, as the case may be, at least to the same extent as the Refinanced Indebtedness; (d) the Refinancing Indebtedness has a final stated maturity either (a) no earlier than the Refinanced Indebtedness being repaid or amended or (b) after the date that is six months after the last maturity date applicable to the Loans at the time the Refinancing Indebtedness is incurred; and (e) the portion, if any, of the Refinancing Indebtedness that is scheduled to mature on or prior to the last maturity date applicable to the Loans at the time the Refinancing Indebtedness is incurred has a Weighted Average Life to Maturity at the time such Refinancing Indebtedness is incurred that is equal to or greater than the Weighted Average Life to Maturity of the portion of the Refinanced Indebtedness being repaid that is scheduled to mature on or prior to the last maturity date applicable to the Loans at the time the Refinancing Indebtedness is incurred (provided that Refinancing Indebtedness in respect of Refinanced Indebtedness that has no amortization may provide for amortization installments, sinking fund payments, serial maturity dates or other required payments of principal of up to 1% of the aggregate principal amount per annum).

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Professional Profiles

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Dennis B. Arnold is a partner in the Los Angeles office of Gibson, Dunn & Crutcher. A member of the firm's Real Estate Department, Global Finance Group, and Business Restructuring and Reorganization Group, he has had extensive experience in all aspects of commercial and residential real estate and finance, as well as workouts, bankruptcies and debt restructurings. Mr. Arnold is a nationally recognized expert in real estate, finance, insolvency and commercial law, including significant expertise in Uniform Commercial Code remedies and mezzanine loan foreclosures and unparalleled expertise in mortgage remedies and foreclosures. Mr. Arnold's primary areas of concentration include real estate, banking, workouts, bankruptcy, debt restructure and finance (especially Articles 3, 5 and 9 of the Uniform Commercial Code). He is also a noted authority on California's "one action" and "anti-deficiency" laws and successfully briefed and argued the seminal Wozab, Western Security Bank and Union Bank v. Dreyfuss cases before the California Supreme Court. Mr. Arnold is also a recognized authority on secured transactions, the law of guaranties and letters of credit.

Mr. Arnold has been ranked in the first tier of real estate lawyers by *Chambers USA* for many years. In 2016 and 2017, he was featured in the *Who's Who Legal* listing for Real Estate Law, which recognizes outstanding practitioners in various practice areas. In 2013, he was named by The Real Property Law Section of the State Bar of California as the first ever "Real Property Person of the Year". For decades, Mr. Arnold has been recognized in *Best Lawyers in America* for Banking and Finance Law, Bankruptcy and Creditor Debtor Rights, Insolvency and Reorganization Law, and Real Estate Law. *Best Lawyers* also named Mr. Arnold as "Lawyer of the Year" in Los Angeles for Real Estate in 2010 and for Banking and Finance in 2018. The Los Angeles County Bar Association's Real Property Section honored him with its Outstanding Real Estate Lawyer Award in 2009.

Mr. Arnold received his J.D. degree from Yale Law School in 1975. He has lectured extensively for many organizations, including the American College of Real Estate Lawyers, the American Bar Association, the American Bankruptcy Institute, the Practicing Law Institute, California CEB, the Real Property Section and the Commercial Law and Bankruptcy Section of the Los Angeles County Bar Association, the California Bankers Association, the Banking Law Institute and The Financial Lawyers Conference. Mr. Arnold is a member of The American Law Institute, the American College of Real Estate Lawyers, the American College of Commercial Finance Lawyers, the American Bankruptcy Institute, and the Board of Governors of The Financial Lawyers Conference and a former member of the Executive Committees of both the Commercial Law and Bankruptcy Section and the Real Property Section of the Los Angeles County Bar Association.

Mr. Arnold is the author of "Guaranties of Indebtedness under California Law: Issues in Drafting and Enforcement" (*California Real Property Journal*, Spring, 1983), "Anti-Deficiency in the Eighties: The Sanction Aspect, Fair Value and Where The Action Is (And Isn't)" (*California Real Property Journal*, Spring, 1987), co-author of "The U.C.C. Mixed Collateral Statute - Has Paradise Really Been Lost" (36 U.C.L.A. Rev. 1, 1988), co-author of "Western Security Bank Case Clouds Use of Letters of Credit As Security Enhancement" (*California Real Property Journal*, Summer, 1993) and author of "Western Security Bank, Part Deux: The Empire Strikes Out" (*California Real Property Journal*, Winter, 1994). Mr. Arnold also acted as an Advisor to The American Law Institute on the Restatement of the Law Third, Suretyship and Guaranty (ALI 1996) published by The American Law Institute, and drafted California Civil Code Section 2856, which authorizes waivers of defenses by guarantors.

Alan Bannister

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Alan Bannister is a partner in the New York office of Gibson, Dunn & Crutcher and a member of the Firm's Capital Markets, Global Finance and Securities Regulation and Corporate Governance Practice Groups.

Mr. Bannister concentrates his practice on securities and other corporate transactions, acting for underwriters and issuers (including foreign private issuers), as well as strategic or other investors, in high yield, equity (including ADRs and GDRs), and other securities offerings, including U.S. public offerings, Rule 144A offerings, other private placements and Regulation S offerings, as well as re-capitalizations, NYSE and NASDAQ listings, shareholder rights offerings, spin-offs, PIPEs, exchange offers, other general corporate transactions and other advice regarding compliance with U.S. securities laws, as well as general corporate advice. Mr. Bannister also advises issuers and underwriters on dual listings in the U.S. and on various exchanges across Europe, Latin America and Asia.

Mr. Bannister also regularly advises companies in connection with cross-border equity tender offers. In addition, he also advises companies and dealer-managers on liability management transactions (including debt tenders, exchange offers and consent solicitations). Further, he has extensive corporate and securities experience in connection with corporate restructuring, routinely advising companies, creditors and hedge funds in connection with debt exchange offers, high yield refinancing, rescue rights offerings and other capital infusions (and the related liquidity issues for such investments).

Mr. Bannister regularly advises U.S. and non-U.S. registrants on their reporting obligations under the U.S. Securities Exchange Act of 1934, their obligations under the Sarbanes-Oxley Act, the Dodd Frank Act and stock exchange corporate governance requirements, as well as (for U.S. registrants) advising on other Exchange Act issues relating to Regulation FD, Section 16 and the proxy statement requirements of Regulation 14A.

Mr. Bannister received his Juris Doctor, *summa cum laude*, from the University of Alabama in 1988, where he was a member of the Order of the Coif, articles editor for the *Alabama Law Review* and a Hugo Black Scholar. He received a B.S. (Accounting) from Auburn University in 1984. Alan is a member of the Board of Trustees for the University of Alabama School of Law Foundation, and is a frequent writer and speaker on securities laws matters.

Linda Curtis

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Linda L. Curtis is a partner in Gibson, Dunn & Crutcher's Los Angeles office and a Co-Chair of the firm's Global Finance Practice Group. Her practice focuses on all aspects of corporate finance, including leveraged financings, with a specific focus in recent years on acquisition financings. She also represents clients in debt capital markets transactions and other secured and unsecured senior, mezzanine and subordinated financings, and has experience in securitization transactions, debt restructurings and workouts. Ms. Curtis' clients include private equity firms, commercial lending institutions and public and private companies in a variety of industries.

Ms. Curtis has for a number of years been selected as one of Southern California's "Super Lawyers" by *Law and Politics* and *Los Angeles* magazines. Most recently, the *IFLR1000* named her to its "2018 Women Leaders" list which recognizes 300 female lawyers considered to be among the best transactional specialists in their markets and practice areas. In 2018, Ms. Curtis was ranked by *Chambers and Partners* as a Tier 1 Banking and Finance lawyer in California. Ms. Curtis also was recognized in the 2013-2019 editions of *The Best Lawyers in America*© in the category of Banking and Finance Law. The *Daily Journal* named Linda to its 2015 list of Top Women Lawyers for being at the helm of industry-shaping deals. She was named to the 2014 BTI Client Service All-Stars list, which features an "elite group of standout attorneys" identified by corporate counsel as those who provide "the absolute best client service." In October 2011, Ms. Curtis was named by the *Los Angeles Business Journal* as one of Los Angeles' top corporate attorneys on its annual list of Who's Who in Law.

Ms. Curtis was the 2014 – 2015 President of the Los Angeles County Bar Association (LACBA), which with over 20,000 members is one of the nation's largest local bar associations. She served previously as chair of LACBA's Business and Corporations Law Section Executive Committee and LACBA's Commercial Law and Bankruptcy Section Executive Committee. Recent publications include *Financing Provisions in Acquisition Agreements*, California Business Law Practitioner, Summer 2011 (with Melissa Barshop).

Ms. Curtis received in 1987 her Juris Doctor from Stanford Law School and her Master of Business Administration degree from Stanford Business School. At Stanford Law School, she was an Articles Editor of the *Law Review*. Prior to her graduate work at Stanford, Ms. Curtis received a Bachelor of Arts in Jurisprudence from Oxford University, where she was a Newton-Tatum scholar, and an A.B. in public affairs/economics from Princeton University, where she graduated *summa cum laude* and was a member of the Phi Beta Kappa honor society. After graduating from Stanford, Ms. Curtis clerked for one year for the Honorable Robert F. Peckham, who was then Chief Judge of the U.S. District Court for the Northern District of California.

Robert Klyman

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Robert A. Klyman is a partner in the Los Angeles office of Gibson, Dunn & Crutcher and Co-Chair of Gibson Dunn's Business Restructuring and Reorganization Practice Group. Mr. Klyman represents debtors, acquirers, lenders, ad hoc groups of bondholders and boards of directors in all phases of restructurings and workouts. His experience includes advising debtors in connection with traditional, prepackaged and "pre-negotiated" bankruptcies; representing lenders and bondholders in complex workouts; counseling strategic and financial players who acquire debt or provide financing as a path to take control of companies in bankruptcy; structuring and implementing numerous asset sales through Section 363 of the Bankruptcy Code; and litigating complex bankruptcy and commercial matters arising in chapter 11 cases, both at trial and on appeal.

Turnarounds & Workouts named Robert Klyman to its 2016 list of Outstanding Restructuring Lawyers, honoring 12 attorneys as leaders in the bankruptcy field. In addition, Mr. Klyman has been widely and regularly recognized for both his debtor and creditor work as a leading bankruptcy and restructuring attorney by *Chambers USA*; named as one of the world's leading Insolvency and Restructuring Lawyers by *Euromoney*; listed in the K&A Restructuring Register, a leading peer review listing, as one of the top 100 restructuring professionals in the United States; named as a "Top Bankruptcy M&A Lawyer" by *The Deal's Bankruptcy Insider*; named as one of the 12 outstanding bankruptcy lawyers in the nation under the age of 40 (in 1999, 2000, 2002 and 2004) by *Turnarounds & Workouts*; and one of "20 lawyers under 40" to watch in California by the *Daily Journal*. Mr. Klyman also has been selected regularly by his peers for inclusion in *The Best Lawyers in America©* in the field of Bankruptcy and Creditor Debtor Rights.

Mr. Klyman developed, and for the past 19 years co-taught, a case study for the Harvard Business School on prepackaged bankruptcies and bankruptcy valuation issues. He has also taught classes on dealmaking in the bankruptcy courts at the University of Michigan Business School and UCLA Law School. Mr. Klyman is also a member of the ABA Subcommittee that drafted the recently released ABA Model Bankruptcy Asset Purchase Agreement.

Mr. Klyman received both his J.D. from the University of Michigan Law School in 1989 and his B.A. degree from the University of Michigan in 1986.

Mr. Klyman is admitted to the California Bar. Prior to joining Gibson Dunn, Mr. Klyman was a partner at the firm of Latham & Watkins for more than 17 years.

James Moloney

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James J. Moloney is a corporate partner resident in the Orange County office of Gibson Dunn and serves as Co-Chair of the firm's Securities Regulation and Corporate Governance Practice Group. He is also a member of the firm's Corporate Transactions Practice Group, focusing primarily on securities offerings, mergers & acquisitions, friendly and hostile tender offers, proxy contests, going-private transactions and other corporate matters.

Mr. Moloney was with the Securities & Exchange Commission in Washington, D.C. for six years before joining Gibson Dunn in June 2000. He served his last three years at the Commission as Special Counsel in the Office of Mergers & Acquisitions in the Division of Corporation Finance. In addition to reviewing merger transactions, Mr. Moloney was the principal draftsman of *Regulation M-A*, a comprehensive set of rules relating to takeovers and shareholder communications, that was adopted by the Commission in October 1999. Mr. Moloney advises a wide range of listed public companies on reporting and other obligations under the securities laws, the establishment of corporate compliance programs, and continued compliance with corporate governance standards under the securities laws and stock exchange rules. He advises public company boards and committees of independent directors in connection with mergers, stock exchange proceedings, as well as SEC and other regulatory investigations. In addition, he works closely with partners in the firm's Litigation Practice Group on securities litigation matters, including both internal and external reviews and investigations.

Representative clients include advice to: Depomed, Inc. in responding to Horizon Pharmaceutical's unsolicited exchange offer and consent solicitation to remove the board and acquire the company; a committee of independent directors at B/E Aerospace in connection with the company's sale to Rockwell-Collins; St. Jude Medical in its merger with Abbott Laboratories; Kraft Foods in its acquisition of Cadbury Plc.; Ryland Homes in its merger with Standard Pacific (renamed CalAtlantic); Hewlett-Packard in its acquisition of Aruba Networks; TRI Pointe Homes in its "Reverse Morris Trust" transaction involving the acquisition of Weyerhaeuser Co.'s home-building business; Third Point in its successful proxy contest at Sotheby's; Emulex in staving off Broadcom's hostile bid; PeopleSoft Inc. in its sale to Oracle; as well as numerous other public companies in high profile proxy contests, hostile tender offers and other change of control transactions.

Mr. Moloney has authored a number of no-action requests to the SEC. He oversees the preparation of firm memoranda on securities law and corporate governance issues. Mr. Moloney is a frequent contributor to professional journals and other publications, is listed in the International Who's Who of Corporate Governance Lawyers by *Who's Who Legal*, and regularly serves as a speaker at conferences around the country on a wide range of corporate governance and securities law topics. In 1998, Mr. Moloney received his LL.M. degree in securities regulation with distinction from the Georgetown University Law Center. He received his J.D. degree *cum laude* from Pepperdine University in 1994 where he was an editor of *The Pepperdine Law Review*. In 1992, Mr. Moloney served as a judicial extern for Justice Armand Arabian at the California Supreme Court in San Francisco. He received his B.S. degree in business administration with a major in accounting from Boston University in 1989. Mr. Moloney has been a member of the California Bar since 1994. Until recently, he served as the Chair of the Proxy Statements and Business Combinations Subcommittee of the Federal Regulation of Securities Section of the American Bar Association. He also serves on the advisory board of the Center for Corporate Reporting and Governance at the Mihaylo College of Business and Economics at Cal State Fullerton.

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Matthew J. Williams is a partner in the New York office of Gibson, Dunn & Crutcher and is a member of Gibson Dunn's Business Restructuring and Reorganization Practice Group.

Since 2008, *Chambers USA: America's Leading Lawyers for Business* has consistently ranked Mr. Williams as a top bankruptcy and restructuring lawyer, noting his "exemplary legal skills, superb intelligence and exceptional forward-thinking," his "winning combination of business acumen and legal expertise," and his ability "to give an opinion as opposed to just spotting issues" and his "detail-oriented approach." He is praised by creditor and bondholder clients as a "fantastic young partner who gets the issues, is great at working with hedge funds, and understands the way we think about the world" and someone who "gives good commercial and practical advice." Mr. Williams was named a *Law360* "MVP" in Bankruptcy for 2015 – one of ten "elite attorneys" in the country – for his "successes in record-breaking deals and complex global matters." In 2010, he was recognized as one of 12 "Outstanding Young Restructuring Lawyers" in the nation by *Turnaround & Workouts Magazine*. That same year, *Law360* called him one of the "Rising Stars" in restructuring and "one of the 10 bankruptcy attorneys under 40 to watch."

Mr. Williams has taken a lead role in numerous high-profile restructurings and cross-border proceedings. Recent notable matters led by him include Triangle USA Petroleum Corporation (representation of bondholder group and backstop new money providers through chapter 11 plan); iHeart Communications (representation of bondholder group and indenture trustee); Puerto Rico (representation of substantial bondholder in connection with successful Supreme Court of United States challenge related to Puerto Rico's restructuring statute); The Sports Authority (representation of chapter 11 debtor in connection with DIP financing and sale of assets); Brookstone Holdings Corp. (representation of Chinese consortium of investors purchasing 100% of equity of reorganized company through chapter 11 auction process); Arcapita Bank (representation of chapter 11 debtor in connection with first ever Sharia compliant DIP financing); General Motors (representation of indenture trustee for $23 billion in bonds and of liquidating trustee charged with administering wind down of General Motors bankruptcy estate); Dynegy (representation of subordinated noteholders); Nortel (representation of bidder in chapter 11 auction); Trident Resources (representation of secured lender group and backstop new money providers); CIT Group (representation of indenture trustee for $2 billion in bonds); Ambassadors' Cruise Group (representation of secured lenders and stalking horse purchaser in chapter 11); Loehmann's Department Stores (representation of secured lender and plan sponsor); General Growth Properties (representation of DIP lender); Vitesse Semiconductor (representation of convertible bondholder group in out of court restructuring); Dana Corporation (representation of official creditors' committee); Footstar Corporation (representation of official equity committee); and Leap Wireless (representation of official creditors' committee). In addition, a significant component of his practice consists of his representation of numerous hedge funds in connection with their analyses of complex capital structures and their investments in distressed situations.

Mr. Williams received his Juris Doctor, with high honors, from Rutgers University School of Law. He obtained his Bachelor of Arts degree from the College of New Jersey, *cum laude*. Mr. Williams clerked for the Honorable Francis G. Conrad, in the U.S. Bankruptcy Court, District of Vermont, following law school and is currently head coach of the Peninsula Wild Eagles, a competitive U-12 boys soccer team. He is admitted to practice law in New York.

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