



AMERICAN
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Winter Leadership Conference

The Brave New World of Asset Sales and the Increased Role of Unsecured Creditors

Hosted by the Asset Sales & Unsecured Trade Creditors
Committees

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The Brave New World of Asset Sales and the Enhanced Role of Unsecured Creditors

American Bankruptcy Institute
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Introduction



Moderator: Melissa Kibler
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Panelist: Nicholas Rubin
Force 10 Partners



Panelist: Richelle Kalnit
Hilco Streambank



Panelist: Mark Salzberg
Squire Patton Boggs

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Learning Objectives



- Participants will learn about developments in asset sales under Bankruptcy Code section 363 and the enhanced influence unsecured creditors are exerting over those sales through intellectual property rights, the scope of property of the estate, and otherwise
- Participants will learn about drivers of success and failure in section 363 sales in recent cases
- Participants will also learn about litigation strategies relating to challenging 363 sales

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Committee Dynamics in Auctions and Sale Processes

Richelle Kalnit
Hilco Streambank

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Committee Impact in Selection of Stalking Horse Bidder



- Case 1 – committee opposed insider stalking horse bidder as likely to chill bidding
 - Forced an auction; it was well known that the insider would show up to the auction
- Case 2 – Debtor picked the “obvious” bidder as its stalking horse, who effectively asserted a blocking position.

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Committee Involvement in Auctions



- Unsecured creditors’ committees impact auction dynamics in a way not found in cases in which creditors’ committees are not appointed
 - Bid procedures
 - Consultation party
 - Impact of lender credit bid; committee investigation into liens and claims of lender / possible credit bidder
 - Committee members as key partners / vendors for the buyer

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Gut Check on Sale Processes



- Motions to have unsecured creditors' committee run a parallel process are increasingly rare
- But committees may be able to insist that debtor hire third party where none was previously engaged as part of an asset sale

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Impact of Increasingly Leveraged Balance Sheets



- Interesting dynamic between increasingly levered companies and committee involvement in asset sales
 - 15 years ago - general unsecured creditors were often the fulcrum security
 - Now unsecured creditors' committees often need to look to causes of action to recover as all assets are fully lien'd up
 - UCC takes more active role in case, including in asset sales, when causes of action can be leveraged/pursued

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In re Vital Pharmaceuticals, Inc., et al.

Mark Salzberg
Squire Patton Boggs, LLP

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Vital Pharmaceuticals, Inc., et al. – Arbitration Award

- Performance energy drink industry
- Founded by John Owoc (CEO)
- Trademark infringement litigation filed in C.D. Cal. in 2009 by Orange Bang
- Settlement reached August 2010, allowing Vital limited rights to use the “Bang” trademark
- Agreement breached by Vital
- Orange Bang and Monster Energy initiated arbitration in June 2020
 - Trademark infringement
 - Breach of settlement agreement



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Arbitration Award (continued)



- Arbitration award issued January 2022 in favor of Orange Bang and Monster
- In lieu of permanent injunction and at election of Vital, Arbitrator ordered a 5% continuing royalty on sales of Bang-branded products
 - If Vital defaulted on quarterly royalty payments, permanent injunction would be imposed
- Arbitrator also awarded \$175 Million in damages, plus fees/costs
- Arbitration award did not give Vital right to transfer or assign rights under the royalty
- Award confirmed by C.D. Cal. on October 28, 2022
- Vital appealed

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Bankruptcy Filing



- Bankruptcy filed by Vital and six affiliates in S.D. Fla. on October 10, 2022
- Sale motion filed on January 27, 2023, seeking authorization to sell substantially all of the Debtors' assets
- Debtors filed adversary proceeding on February 17, 2023, seeking declaration that they could "sell, assign or otherwise transfer" their interest in the Bang trademark under the arbitration award

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Opposition to Sale Motion



- Orange Bang and Monster opposed sale motion.
 - Federal trademark law prohibits assignment of license to use trademark without express authorization (see *In re Wellington Vision, Inc.*, 364 B.R. 129 (S.D. Fla. 2007))
 - Alternatively, if the Court allows the transfer of the license, the transfer should include all of the Debtors' rights and obligations under the arbitration award, and all amounts due under the award must be paid as cure

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Settlement Reached Allowing Sale



- One qualified bid received for substantially all of the Debtors' assets submitted by acquisition vehicle formed by Monster Energy
 - \$362 Million purchase price
 - Plus contingent consideration up to \$10 Million
- Settlement reached between the Debtors, the Committee, the Agent and Lenders, Orange Bang and Monster Energy

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Settlement Terms



- Monster Energy given two allowed claims:
 - A \$292 Million allowed unsecured, non-administrative claim arising from California district court litigation concerning use of “Super Creatine” in labeling of certain products; and
 - A \$216 Million allowed, non-administrative claim in satisfaction of all other claims
 - Monster Energy released administrative claim for alleged post-petition false advertising
- Orange Bang limited to 50% interest in the \$216 Million claim awarded to Monster Energy

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Settlement Terms



- Lenders agreed to support a plan where:
 - DIP claims not satisfied by sale proceeds are recharacterized as non-superpriority, non-administrative claims not secured by Debtors’ assets; and
 - Prepetition claims not satisfied by sale proceeds are treated as unsecured, non-superpriority, non-administrative claims
- \$5 Million carve out for unsecured creditors (not including Monster Energy or Lenders)
 - Carve out subject to \$10 Million upward adjustment depending upon inclusion of certain IP in sale

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Interesting Elements of Settlement



- \$5-15 Million set aside for distribution/pursuing litigation claims
 - Unsecureds were looking at potential conversion and no recovery
- DIP Claim only partially satisfied
 - \$48 Million deficiency claim
- Settlement reached in the midst of FTC objection to sale
- Monster Energy/Orange leverage over sale
 - “Bang” trademark represented overwhelming percentage of sales
 - Indications from Court that arbitration award would be considered a license
 - Section 365(c)(1) provided Monster Energy/Orange will “blocking rights” on sale

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Other Interesting Aspects of Sale – Social Media Accounts



- Dispute over ownership of three social media accounts (Instagram, TikTok and Twitter)
- Owoc claimed to own these in his personal capacity
- Debtors contended that sale of the accounts were necessary to maximize value of their assets
- Memorandum Opinion issued June 16, 2023 (*In re Vital Pharmaceuticals, Inc., et al.*, 652 B.R. 392 (Bankr. S.D. Fla. 2023)) holding that the Debtors owned the accounts
- In so doing, Court rejected approach to ownership of social media accounts set forth in *In re CTLI, LLC*, 528 B.R. 359 (Bankr. S.D. Tex. 2015)

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Other Interesting Aspects of Sale – Social Media Accounts (continued)



- Court announced new framework
- **First**, is there a documented property interest (e.g., underlying agreement with platform; company policy)? If so, there is a rebuttable presumption that the party with the documented interest owns the account rights
- **Second**, that rebuttable presumption can be overcome by evidence that the other party has control over the account (e.g., has exclusive power to access the account; has exclusive power to prevent others from accessing the account; the account identifies the party as having that power)
- If a party has both control over access and documented property interest, that ends inquiry
- Control over access will rarely overcome rebuttable presumption created by documented property interest
- But, if no documented property interest exists, control over access creates its own rebuttable presumption

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Other Interesting Aspects of Sale – Social Media Accounts (continued)



- **Third**, rebuttable presumption by either documented property interest or control over access, but not both, can be overcome by evidence of use of the social media account. Use includes:
 - Name used for the account;
 - Who created the account;
 - Whether the account is used for marketing products from single or multiple businesses;
 - Whether the account is used to promote a persona (i.e., social influencer);
 - Would the account have to be changed based on determination of ownership (e.g., removal of company logo/trademark); and
 - Would changes to the account change the nature of the account (e.g., alter the followers' expectation of whose account they were following)

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Other Interesting Aspects of Sale – Subchapter S Election



- Vital Pharmaceuticals formed as S corporation
- As S corporation, tax liability from sale would flow to Owoc, its sole shareholder
- Owoc's expert estimated his tax liability from sale between \$95.6 Million and \$197 Million
- Owoc wanted to terminate the Subchapter S election, which would shift tax liability to the company
- Owoc sought determination that the Subchapter S election is not property of the estate and that the automatic stay does not prevent him from terminating
 - Alternatively, Owoc sought relief from the automatic stay to terminate the election

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Other Interesting Aspects of Sale – Subchapter S Election



- Enormous potential impact on unsecured creditors since Debtors would be administratively insolvent with conversion to Chapter 7 likely
- Memorandum Opinion issued October 6, 2023 (*In re Vital Pharmaceuticals, Inc., et al.*, 2023 WL 6543190 (Bankr. S.D. Fla.))
- Court held that the Subchapter S election is property of the estate and that Owoc had not demonstrated entitlement to stay relief
- Court rejected the Third Circuit's holding in *In re Majestic Stay Casino*, 716 F.3d 736 (2013) that a debtor's Subchapter S election is not property of the estate
- Instead, Court held that "property" as used in Section 541 is extremely broad and includes a Subchapter S election

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Other Interesting Aspects of Sale – Subchapter S Election (continued)



- It did not matter to the Court that the right to a Subchapter S election is contingent upon a shareholder not taking an action that could render company ineligible, or that a Subchapter S election cannot be transferred:
 - “Section 541 ... says nothing about property having to be noncontingent or transferrable to qualify as property of the estate. This Court declines to read into § 541 limitations that do not exist in the text.”
- Court also keyed upon value of election – since debtor is not taxed itself, only shareholders
 - “Thus, until terminated or revoked, a S corporation has the valued right of not having to pay taxes. There is no basis to suggest that the statutory right to avoid an expense, including taxes, is any less a property right than property that produces income
 - In other words, a corporation has a property interest in its right to avoid the tax expense otherwise known as the S election or status.”



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Appendix – Intellectual Property

Richelle Kalnit
Hilco Streambank



IP - Social Media Assets



- Social media assets allow a company to increase brand visibility, engage in targeted marketing efforts to reach specific demographics or customers with certain interests or behaviors, promote a company's brand voice and personality, enable real-time content sharing and obtain unique insights into customers and followers:
 - **Followers / Likes:** The number of followers and level of engagement are the primary value drivers for social media
 - **Content:** Content libraries shared on social media can be valuable assets of companies such as media companies
 - **Monetization:** Many social media accounts generate revenue through advertising, sponsored posts, affiliate marketing, or selling products or services directly
 - **Data and Analytics:** The account owner has access to data on user demographics, behaviors and preferences, which can be utilized in conjunction with purchase history and related data to enhance data sets and better target potential and current customers
 - **Strategic Partnerships:** Partnerships with influencers can be valuable relationships, as they contribute to the account's overall influence and reach
 - **Digital Real Estate:** The account's handle can be a valuable piece of digital property and brand extension

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IP - Brands



- Brands play a pivotal role in the marketplace, as they not only differentiate products and services but also foster brand loyalty and trust among consumers, driving customer retention and revenue growth
- They offer businesses a means to convey their values, unique selling propositions, and create a lasting emotional connection with their target audience
- Key: reason to exist
- Importance of branding, particularly in the consumer and retail space
- Consumer behavior influences brand choice
- Elements of a strong brand identity
 - Includes assets which contribute to brand value, such as customer data and the extent to which the data set is robust

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IP - Brands (continued)



- Trust and loyalty
- Online presence
 - Ecommerce
 - Social media
- Diversity of sales channels (i.e., wholesale, retail, ecommerce)
- Connection to the customer (i.e., DTC vs. marketplace (Amazon) sales)
- Association with public figures / celebrities and rights associated therewith

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IP - Domain Names



- Domain names can be valuable intellectual property due to their role in:
 - Promotion of brand identity
 - Online presence
 - Marketing
 - Income generation
 - Legal protections
 - Investment potential
 - Online reputation management
 - Niche-specific value

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IP - Copyrights



- Copyrights grant the creator or owner exclusive rights to reproduce, distribute, perform and display their work
 - This exclusivity allows the copyright holder to control how their work is used, which can be monetized in various ways
- The potential uses of copyrights are ever-expanding as new forms of digital assets are adopted, such as non-fungible tokens (NFTs)
- Copyrights can contribute to building and strengthening a brand's identity
- Unique and copyrighted content can set a brand apart from competitors, creating a distinct market position and value

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IP - Copyrights (continued)



- Copyright holders can earn money through licensing their work for use in various media such as books, film, music, photography, NFTs, software and more
- It is important to understand the circumstances under which the copyright arose
 - For example, if the copyright relates to a physical work such as a piece of art, it is necessary to confirm ownership of the copyright separate and apart from ownership of the physical work
- If the copyright relates to a right created under a “work for hire” arrangement, which is an exception to the general rule that the creator of a work is the legally-recognized author, then the employer, and not the employee, is considered the legal author
- In contrast, work produced by freelancers is generally not work created as work for hire; if a copyright transfer is not executed by the freelancer, the creator typically retains copyrights in the work

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IP - Data



- Considerations in understanding a company's data include:
 - What data is collected by the company and how / where is it collected?
 - What data is maintained by the company?
 - Where is the data maintained (cloud-based server, in house data center, hybrid)?
 - How is it maintained, and what systems and other supports are required to maintain and access the data?
 - This typically involves working with a company's marketing and IT professionals, both to gather the information and, just as importantly, transfer the information at closing

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IP - Data (continued)



- Methods of data collection
 - Increase in collection resulting from purchases through social platforms
- "Active" vs. "inactive" customers, and definitions of each term
- Ways the company uses the data (i.e., emailing, SMS, direct mail, social media ecommerce/ targeting, list rentals) and frequency of use
- Nature of any segmented data (i.e., loyalty program, private label card program, registry list)
- Investments in technology designed to maximize utilization of the data
 - Proprietary software and internally developed customer management systems
- Privacy policy at each point of collection (i.e., website, point-of-sale, SMS, app, social media)
- Data breaches and remediation obligations

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IP - Generative AI and its Potential to Enrich Consumer Data Sets



- Generative AI models can be used to create synthetic data that augments existing datasets and entirely new data that is similar to existing data sets
 - This can help companies test data utilizing larger data sets and then apply the learnings from those tests to the underlying data
- Predictive and generative AI can be used to fill in missing data points by generating plausible values for missing entries in a data set
- Generative models can create personalized content or recommendations by generating content tailored to individual users based on their past interactions and preferences, enriching the user experience
- Generative AI can help individuals create realistic synthetic data for privacy protection. This synthetic data can be used for testing and development without revealing sensitive or private information

The logo for Accordion, featuring the word "ACCORDION" in a bold, sans-serif font.

The logo for Hilco Streambank, featuring a stylized blue and green circular icon to the left of the text "Hilco Streambank" in a sans-serif font.

The logo for Force 10 Partners, featuring a stylized circular icon with a globe-like pattern to the left of the text "FORCE 10 PARTNERS" in a sans-serif font.

The logo for Squire Patton Boggs, featuring the word "SQUIRE" in a bold, sans-serif font above the words "PATTON BOGGS" in a smaller, sans-serif font.

Faculty

Richelle Kalnit is a senior vice president with Hilco Streambank in New York, where she manages intellectual property disposition engagements for the firm. She has experience in the sale of intangible assets in bankruptcy, Article 9 foreclosure transactions, out-of-court sale processes, receiverships and assignments for the benefit of creditors. Having managed sale processes for assets including brands, software, patent portfolios, digital assets and marketplace accounts, Ms. Kalnit is well-versed in structuring sale processes and bringing those processes to value maximizing conclusions, whether through creative auction techniques or private transactions. A frequent panelist and contributor on topics related to asset sales and intangible assets, she joined Hilco Streambank after having practiced restructuring law for more than a decade. Ms. Kalnit is a founding member and co-chair of the Hilco Global Women's Business Resource Group. Prior to joining Hilco Streambank, she was a member of the bankruptcy and restructuring group of Cooley LLP. During her tenure at the firm, she managed the sale, reorganization and/or liquidation of several of the nation's most prominent retailers, consumer product companies, hotels and restaurants. She began her career at the law firm of King & Spalding LLP. Ms. Kalnit is a member of the University of Pennsylvania Professional Women's Alliance, ABI, the Turnaround Management Association, the International Women's Insolvency & Restructuring Confederation and the National Association of Bankruptcy Trustees. She received her undergraduate degree *cum laude* from the University of Pennsylvania and her J.D. *cum laude* from the Benjamin N. Cardozo School of Law at Yeshiva University, where she was in the top 10% of her class.

Melissa S. Kibler, CPA, CIRA, CTP, CFF and CDBV is a senior managing director in the Chicago office of Accordion Partners, which acquired Mackinac Partners, her previous firm, in May 2021. She has more than 30 years of experience providing financial advisory, restructuring and turnaround management services to Fortune 500 and mid-sized companies and their stakeholders. Ms. Kibler recently served as an expert on feasibility in the Boy Scouts of America matter; CRO in the bankruptcies of Rubio's Restaurants, a 170-unit Mexican coastal grill, and Juno, previously the third-largest ride-hailing company in New York; and as the CFO of Edmentum, a leading provider of K-12 online learning solutions. She also has extensive investigative, litigation and valuation experience, including insolvency-related litigation, avoidance actions, fraud investigations, merger and acquisition disputes, director and officer claims, and other commercial litigation support. Ms. Kibler was previously a senior managing director in the Chicago office and an executive committee member of Mesirow Financial Consulting following its 2004 acquisition of the corporate recovery practice of KPMG LLP, where she had served as partner-in-charge of the Midwest Corporate Recovery practice and the Pacific Northwest Corporate Recovery and Forensic & Litigation Services practices since 1999 after starting her career at PricewaterhouseCoopers. Ms. Kibler currently chairs the American College of Bankruptcy, and her prior leadership roles in professional associations include ABI President and Chair, director of INSOL International and chair of the AICPA Bankruptcy Task Force. She received the 2022 Global M&A Network USA Women Dealmakers DEI Award and the 2021 Global M&A Network's Women's Leadership Award, and she was named the Chicago Chapter Turnaround Management Association's 2021 CTP of the Year, *Consulting Magazine's* 2013 Women Leader in Consulting, Illinois CPA Society's 2011 Women to Watch, the IWIRC 2010 Woman of the Year in Restructuring, *Crain's Chicago Business's* 2004 40 Under 40, and the 2003 CIRA Gold Medal Win-

ner. Ms. Kibler received her B.A. in accounting *summa cum laude* from Texas A&M University and her M.B.A. from Southern Methodist University, graduating first in her class.

Nicholas Rubin is a co-founder of Force 10 Partners in Newport Beach, Calif., and has more than 20 years of combined leadership experience in capital markets, financial planning, commercial real estate and corporate finance. Previously, he was a senior managing director with GlassRatner. Mr. Rubin began his career at a leading international public accounting and auditing firm, where he worked with clients providing accounting, management accounting and auditing services. In addition to his experience in accounting, he has served in many executive interim leadership roles, as well as team leader in many business-consulting assignments with a specialization in dispute resolution. Mr. Rubin has experience developing and leading teams that implement solutions designed to ensure optimal performance through financial planning, budgeting, profitability and needs analysis. His experience includes restructuring and corporate finance, including roles as a financial advisor and investment banker. Mr. Rubin works closely with clients to build comprehensive and strategic plans incorporating financial planning, consolidation, infrastructure, management reporting and business intelligence to support growth. He has managed clients and businesses in the U.S., China, Hong Kong, Israel and South Africa, and his clients include corporations, banks, lenders and other secured and unsecured creditors, buyers, sellers, bankruptcy counsel and litigators. Mr. Rubin received his bachelor of commerce in financial and management accounting, auditing, business management, marketing and finance from the University of Port Elizabeth, South Africa.

Mark A. Salzberg is a partner in the Washington, D.C., office of Squire Patton Boggs and a member of the firm's Restructuring & Insolvency practice group. He focuses his practice on bankruptcy litigation, creditors' rights, debtor reorganizations and complex commercial litigation. Mr. Salzberg has experience representing debtors, creditors' committees, financial institutions, secured and unsecured creditors, franchisors and distributors in bankruptcy matters throughout the U.S. He has served as the lead appellate counsel in multiple bankruptcy appeals at both the district court and bankruptcy appellate panel levels, and he regularly counsels clients on intellectual property matters arising under the Bankruptcy Code. In addition to his bankruptcy work, Ms. Salzberg has represented parties in a wide variety of complex commercial litigation cases in both state and federal courts, including lender-liability suits and other business tort actions, breach of contract, trade secret and noncompete actions. He is currently treasurer-elect of the DC Bar and a member of the DC Bar Board of Governors. Mr. Salzberg is the editor of the firm's Restructuring GlobalView blog. Before joining Squire Patton Boggs, he was a partner at Foley & Lardner LLP. Mr. Salzberg was a member of the DC Bar Attorney/Client Arbitration Board from 2008-14. He received his B.A. in 1987 from Swarthmore College and his J.D. in 1992 from the University of Virginia School of Law.