AMERICAN BANKRUPTCY INSTITUTE

VALCON 2022

Case Study in Conjunction with the 2022 Complex Financial Restructuring Program: Hexative

Michael Friedman, Moderator
Chapman and Cutler LLP | New York

Larry G. Halperin
Chapman and Cutler LLP | New York

Prof. C. Randel Lewis
University of Denver Daniels College of Business | Denver

Dr. David C. Smith
University of Virginia McIntire School of Commerce | Charlottesville, Va.

2022

American Bankruptcy Institute Corporate Restructuring Case Study – *Hexative*

Introduction

Today is March 1, 2022. You are a Managing Director with SpitzerPartners, a financial and operational turnaround boutique – one of the best in the business! Hexative Performance Materials ("**HPM**" or the "**Company**") hired you earlier in the year to analyze different operational initiatives that the Company was considering and how best to finance them. Over the last six weeks, however, you've come to learn that the Company has some serious financial challenges in addition to the operational issues that you were originally hired to assess. The Company appears to be in danger of missing operational covenants under its revolving credit facility, and creditors in different parts of HPM's capital structure have begun to form committees to represent their interests. You've also heard rumors that the Board of Directors recently directed the Company to hire bankruptcy counsel.

Despite these realities, the Company's Chairman and CEO, Dagny Taggart, is bullish on the future. At a meeting this morning, she spent most of her time patiently explaining to you that HPM's long-range operational outlook is stable, and can deliver consistent, reliable returns if constituents are willing to engage reasonably. However, she has become increasingly aware of infighting between and amongst creditors in the Company's multi-tiered capital stack, which has diminished her optimism over the course of the last several weeks.

Bill Night, the Company's CFO, is determined to take command of the Company's financial situation. His first action is a good one: he expands the scope of your engagement to advise on all aspects of the Company's operational and financial restructuring. From what you know already, this is going to be a major engagement. In addition to creditors organizing themselves, the Company has large interest payments looming, which threaten to place the Company's liquidity position at further risk. HPM has been stretching payments to vendors, and has significant upcoming interest and principal payments on outstanding indebtedness. Your job is to help the Company understand its current predicament, and guide the management team through this challenging situation.

Business Overview

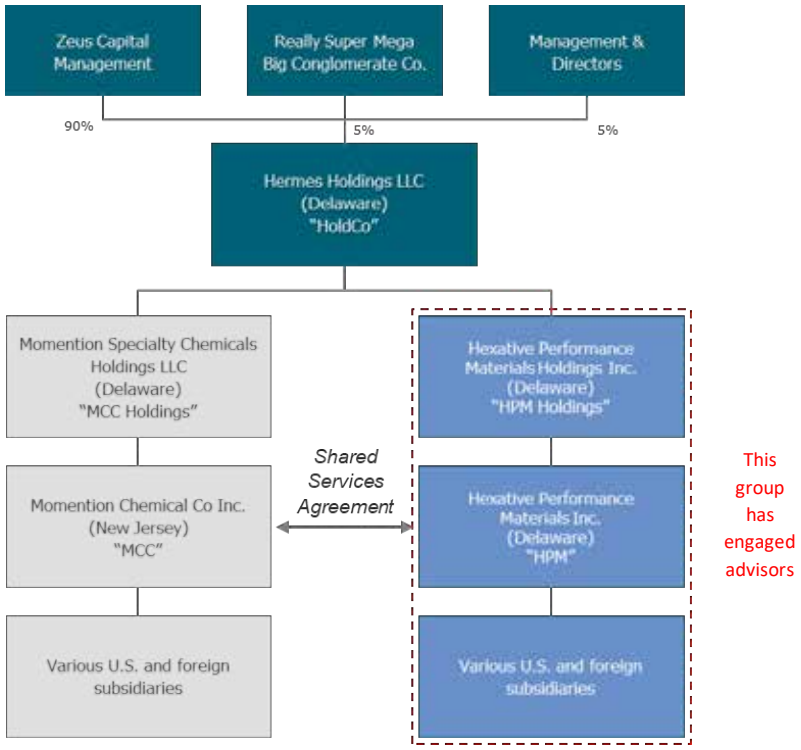
The Company is one of the world's largest producers of silicones and silicone derivatives, and is a global leader in the development and manufacture of products derived from quartz and specialty ceramics.

Corporate History and Organization

The Company has a 70-year history, with HPM's parent company, Hermes Holdings ("**HoldCo**") having been formed in October 2018 through the merger of HPM with Momention Chemical Co Inc. ("MCC").

- HPM was originally acquired by investment funds affiliated with Zeus Capital Management ("**Zeus**") from the Really Super Mega Big Conglomerate Co. in December 2014 in a corporate carve-out transaction.
- MCC was formed in May 2013 through the merger of four other diversified chemical manufacturing companies. Zeus acquired the first of these Companies in November 2007 and the other companies comprising MCC in the subsequent period prior to the MCC merger.

The Company's corporate structure chart is provided below.



The legal and debt capital structures of HPM and MCC remain completely separate and in place following the 2018 merger.

- No cross guarantees or credit support provided between the two companies.
- Both companies report separately and file periodic reports with the SEC.

There is an arms-length shared services agreement in place (the "**Shared Services Agreement**") to govern intercompany operations (e.g. finance / accounting and human resources, among others).

- Total cost synergy program of $64.5 million as of December 31, 2021.

The Company manufactures products that are used in thousands of applications and are sold into diverse markets, such as industrial, building and construction, transportation, agriculture, electronics, healthcare, and personal care, as well as higher growth markets, such as semiconductor and fiber optics. The Company operates two key product lines: i) silicones and ii) quarts and specialty ceramics.

- **Silicone products** are generally used as additives in a wide variety of end products to provide or enhance certain attributes of such products, such as resistance to heat, ultraviolet light or chemicals, or to add or enhance lubrication, adhesion or viscosity. The Company's silicone products are used in applications as varied as in the production of tires, hair care products, foam mattresses and adhesive labels, to name a few. In 2021, the silicones segment accounted for approximately 91.4% of revenues.

- **Quartz and specialty ceramics products** are used in high-technology industries which typically require products made to precise specifications, such as semiconductor manufacturing and in

lamp lenses for video projectors. In 2021, the quartz and specialty ceramics products segment accounted for approximately 8.6% of revenues.

The Company currently maintains twenty-two (22) production sites located around the world, which allows the Company to produce key products in the Americas, Europe and Asia, and efficiently deliver products to more than 4,500 customers in over 100 countries. In 2021, approximately 68% of the Company's net sales originated outside the United States.

A key aspect of the Company's success relies on the continued development of new applications for its existing products and additional technologic advances leading to new products, allowing the Company to provide leading edge technology to their customers. The Company maintains its own research and development facilities, and employees engineers and chemists to develop the Company's products in in-house laboratories.

The Company owns, licenses, or has rights to over 3,600 patents, approximately 100 trademarks and various patent and trademark applications and technology licenses around the world. The Company's current patents will expire between 2022 and 2039. The Company's rights under such patents and licenses are material assets of the Company. The Company also relies on unpatented proprietary manufacturing expertise, continuing technological innovation and other trade secrets to develop and maintain its competitive position.

Industry Highlights

Silicones Industry

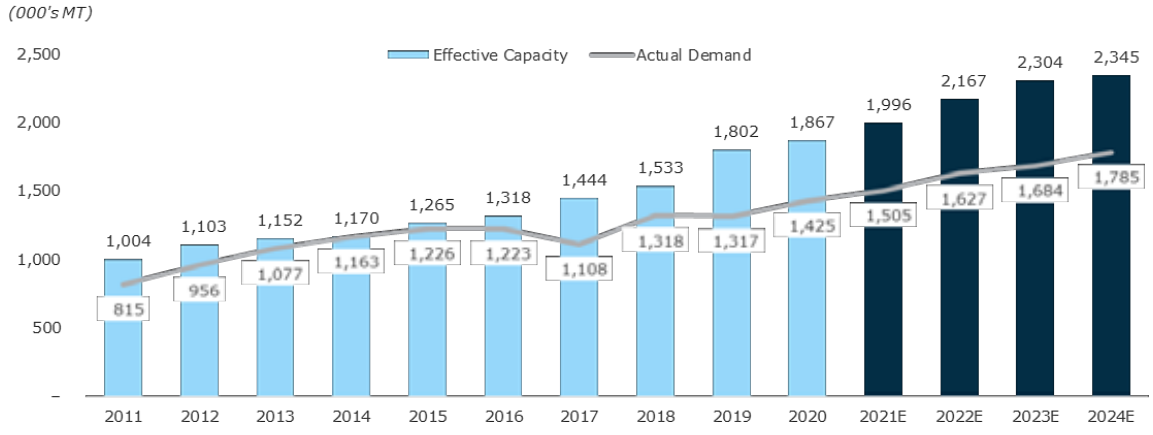
- The management team estimates that the global silicones industry is approximately $16 billion.
- Major end-use product applications include bath and shower caulk, pressure-sensitive adhesive labels, foam products, cosmetics and tires.
- Key raw materials include:
    - Silicon Metal –
        - Silicon metal is an inorganic material that is not derived from petrochemicals.
        - The Company purchases silicon metal from suppliers around the world under multi-year, one-year or short-term contracts and in the spot market.
        - Major suppliers include FerroAtlantica, Elkem and Globe Specialty Metals, among others.
        - Silicon metal prices have moderated slightly from 2020 levels.
    - Siloxane –
        - Siloxane is a key intermediate product which is required to produce the silicones polymer used in the Company's products.
        - The Company satisfies the majority of its siloxane requirements through internal production of siloxane at the Company's production plants located in Waterford, New York; Leverkusen, Germany and Ohta, Japan and from a joint venture in Jiande, China.
        - The Company also sources a portion of its siloxane needs from third parties.
        - Major suppliers include Dow Corning and Wacker Chemie.
        - Siloxane plants are generally large facilities, and difficult to cycle.
    - Methanol –

  - Methanol is a key raw material needed for the production of chlorosilanes, which is purchased by the Company from methanol suppliers pursuant to annual or quarterly contracts.
  - Major suppliers include Methanex, MHTL, Saudi Basic Industries Corporation and - as discussed in more detail herein - MCC.
  - Methanol pricing remains high as a result of global demand and below-average inventories.
- Entirely new applications for silicones continue to emerge as a result of their versatility and broad range of properties.

Silicones Industry Headwinds

- Significant recent capacity additions have led to a structural supply / demand imbalance in the industry with a 20% increase in siloxane capacity since 2019, with additions primarily in Asia.
- Overcapacity has put significant pressure on prices and led to both the commoditization of certain specialty products and increased overall competition. This is driving significant declines in EBITDA margin across the industry.
- Despite uneconomic operating conditions, marginal capacity has not come offline, and a significant number of high-cost Chinese manufacturers, some of which are state-owned, continue to produce below their cash cost of production
  - Meaningful pipeline of capacity additions remains intact, further pressuring the supply / demand imbalance for the medium-term.
  - Near-term capacity additions are low cost and primarily in Asia.
  - Change in industry dynamics and fundamentals has structurally degraded industry profit margins.

Global Siloxane Industry Supply & Demand (Estimated)



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GLOBAL	kMT	% Cap.
Eff. Capacity	2,167	--
Production	1,627	75%
Demand	1,627	75%

Quartz Industry

- The management team estimates that the global quartz industry is approximately $1.2 billion.
- Fused quartz, a man-made glass manufactured principally from quartz sand, is used in processes requiring extreme temperature, high purity and other specific characteristics. Fused quartz and ceramic materials are used in a wide range of industries, including semiconductor, lamp tubing, manufacturing, packaging, cosmetics and fiber optics.
- The Company's quartz products are used as a superior substitute for glass. On a microscopic level, normal glass is filled with impurities, bubbles and other flaws. For this reason, applications that require transparency and a high level of purity or stress-resistance (such as process equipment for semiconductor manufacturing or lamp lenses for video projectors) require the use of quartz.
- Major semiconductor manufacturers include Intel, Samsung, TSMC, Global Foundries, SK Hynix and Toshiba, among others.
- Semiconductor end-markets include PC, communications, handsets, solar and auto/industrial.
- Non-semi products are provided to a diverse customer base.
- Core raw material input is quartz sand which has a concentrated supplier base with only two major providers. However, one major producer controls a significant portion of the market for this key raw material. As a result, such producer exercises significant control over quartz sand prices, which have been steadily increasing by 3-5% per year.
- Other than quartz sand, the majority of raw materials used to manufacture quartz products are readily available in the open market.
- Semiconductor demand correlated to global GDP growth given engrained nature of consumer electronic spending.
- In recent years, the US has played an increasingly large role in semi-conductor capital spend
    - From 2013 to 2020, percentage of capital spending in semi-conductors represented by US manufacturers increased from 29% to 40%.
- Industry trends:
    - Quartz cyclicality driven by large capital expansion in the semi-conductor industry.
    - New product development in mobile computing driving new capacity additions in 2022.
    - Current outlook suggests that near-term volume growth will remain below historical growth rates.

SIC Codes and Competitive Set

HPM's silicone and silicone derivatives business most closely aligns with SIC codes 2821, 2822, and 2869. Their specialty quartz business most closely aligns with SIC code 3679. HPM views each of (i) Dow Corning, (ii) Wacker Chemie, (iii) Shin-Etsu, (iv) Evonik, and (v) China National BlueStar as being members of its competitive set.

Industry / Environmental Regulatory Matters

The Company's operations involve the use, handling, processing, storage, transportation and disposal of hazardous materials, and are therefore subject to extensive environmental regulation at the federal, state and international level. In 2021, the Company incurred capital expenditures of $18 million on an aggregate basis to comply with environmental laws and regulations and to make other environmental improvements. The Company estimates that its capital expenditures in 2022 for environmental controls at its facilities will be approximately $31 million due to a toxic spill that occurred at the Waterford, NY plant. The Company and plant are now under the close watch of NY State and EPA.

Domestic and international laws regulate the production and marketing of chemical substances. Although almost every country has its own legal procedure for registration and import, laws and regulations in the European Union, the United States, and China are the most significant to the Company's business. These laws typically prohibit the import or manufacture of chemical substances unless the substances are registered or are on the country's chemical inventory list, such as the European inventory of existing commercial chemical substances and the U.S. Toxic Substances Control Act inventory. Chemicals that are on one or more of these lists can usually be registered and imported without requiring additional testing in countries that do not have such lists, although additional administrative hurdles may exist.

Under such laws, countries may also require toxicity testing to be conducted on chemicals in order to register them or may place restrictions on the import, manufacture and/or use of a chemical.

Shared Services Agreement

In an effort to minimize costs and take advantage of synergies, HPM entered into a Shared Services Agreement with MCC, as amended and restated on March 17, 2019, pursuant to which HPM provides to MCC and MCC provides to the HPM, certain services, including, but not limited to, (i) executive and senior management, (ii) administrative support, (iii) human resources, (iv) information technology support, (v) accounting, (vi) finance, (vii) technology development, (viii) legal and (ix) procurement services.

HPM has achieved significant cost savings under the Shared Services Agreement, including savings related to shared services and logistics optimization, best-of-source contractual terms, procurement savings, regional site rationalization, administrative and overhead savings. The Shared Services Agreement establishes certain criteria upon which the costs of such services are allocated between the parties and requires that a steering committee formed under the Shared Services Agreement meet no less than annually to evaluate and determine an equitable allocation percentage of costs among HPM and MCC. At the origination of the Shared Services Agreement, the allocation percentage was established at 49% for HPM and 51% for MCC. This allocation percentage was further modified in 2021 to 43% for HPM and 57% for MCC. Pursuant to the terms of the Shared Services Agreement, HPM pays to MCC, on a monthly basis, estimated invoices for HPM's portion of amounts expected to be incurred by MCC on HPM's behalf. On a quarterly basis, HPM pays to MCC a "true-up" payment, if necessary, reconciling the amounts paid pursuant to the estimated monthly invoices for such quarter with the allocation percentages agreed under the Shared Services Agreement. HPM estimates that it owes MCC approximately $10.5 million for amounts due under the Shared Services Agreement. As of December 31, 2021, HPM's total realized savings under the Shared Services Agreement was approximately $64 million.

Certain members of HPM's senior management team who provide substantial services to HPM, act in the same or similar capacities for MCC, and were historically employed by MCC prior to its acquisition by HoldCo. Costs related to employees who provide substantial services to both HPM and MCC are allocated among the parties in accordance with the allocation mechanic described above. The Shared Services Agreement is subject to termination by either party, without cause, on not less than 30 days prior written notice subject to a 180-day transition assistance period, and expires in October 2023 (subject to one-year renewals every year thereafter, absent contrary notice from either party).

As HPM's performance has continued to decline, the Company's creditors – especially those with lower priority in the capital stack – have become concerned about a lack of transparency with respect to how

the agreement is managed and enforced, going so far as to raise questions as to the fairness of the agreement and whether value may be migrating to MCC at the expense of HPM.

HPM's Board denies this, but have also indicated that any restructuring of the Company must also provide for the unwinding and eventual termination of the Shared Services Agreement.

Shares Service True-Up (12/31/2021)

Above the Line Costs	MCC	HPM	Total
Executive + Strategy/Development	$ 3.4	$ 1.0	$ 4.3
Human Resources & Public Relations	16.4	7.5	23.9
Six Sigma	0.7	-	0.7
Technology	-	-	-
Legal (including IP)	3.4	3.9	7.3
EHS (Including PSRC)	7.0	5.2	12.2
Finance + P2P	25.4	6.9	32.3
IT	39.0	16.7	55.7
Planning	3.1	0.5	3.5
Customer Services	6.8	4.9	11.7
Sourcing	12.0	4.6	16.6
Other Costs	4.5	3.9	8.3
Super Structure	2.3	2.2	4.5
Above the line SSC billings	(18.7)	18.7	-
Total Above the Line Costs	**$ 105.3**	**$ 75.8**	**$ 181.1**
Percentage split	57%	43%	

Synergy / Dis-synergy Detail

In $000,000	Total Program Synergies	FTE Synergies	Project Synergies	Headcount	Headcount Dissynergies	Project Dissynergies	Total Dissynergies	Retained Savings
Executive/Board	$ 1.25	$ 1.42	$ (0.17)	$ (1.00)	$ (1.42)	$ 0.17	$ (1.25)	$ -
HR	2.78	1.36	1.42	(8)	(1.36)	(1.42)	(2.78)	-
Finance	8.26	3.76	4.49	(20)	(3.76)	(1.95)	(5.71)	2.55
Legal	0.18	(0.03)	0.21	-	0.03	(0.21)	(0.18)	-
Six Sigma	-	-	-	-	-	-	-	-
Procurement	2.04	1.96	0.09	(12)	(1.96)	(0.09)	(2.04)	-
IT/BPO	11.36	1.88	9.48	(14)	(1.88)	(7.82)	(9.69)	1.67
Planning / Supply Chain	3.70	0.59	3.10	(1)	(0.59)	(3.10)	(3.70)	-
Public Relations	-	-	-	-	-	-	-	-
EHS	1.17	0.17	1.00	-	(0.17)	(1.00)	(1.17)	-
Technology	0.01	-	0.01	-	-	(0.01)	(0.01)	-
P2P	1.01	0.57	0.44	-	(0.57)	(0.44)	(1.01)	-
Commercial	2.37	2.13	0.24	(32)	(2.13)	(0.24)	(2.37)	-
Subtotal SGA	34.11	13.79	20.32	(88)	(13.79)	(16.11)	(29.90)	4.22
Procurement	19.66	-	19.66	-	-	(13.66)	(13.66)	6.00
Logistics	10.71	-	10.71	-	-	(10.71)	(10.71)	-
Total Shared Services Synergies	$ 64.48	$ 13.79	$ 50.69	$ (88.00)	$ (13.79)	$ (40.48)	$ (54.27)	$ 10.21

Retained Savings by Project

Function In $000	Project	Total
Finance	Audit fees	$ 701.0
	Bank and Service fees	77.1
	Controllership	(29.0)
	Cost Optimization 2	462.0
	Cost Optimization 3	150.0
	Insurance complete	1,174.4
	Insurance open	17.3
Finance Total		**2,552.9**
IT/BPO	Contractor Conversions	50.0
	Convert to SQL	500.0
	Cost Opt - Network Optimization	280.0
	Cost Opt - Reduce Travel 10%	38.7
	Eliminate LegacySupport	500.0
	PC Life Cycle	300.0
IT/BPO Total		**1,668.7**
Grand Total		**$4,221.5**

Other HPM / MCC Interactions and Methanol Supply Considerations

In addition to being counterparties under the Shared Services Agreement, MCC is also one of the world's largest suppliers of methanol, one of three critical throughputs used by HPM in their silicone manufacturing processes. Consistent with standard industry practice, MCC supplies methanol to HPM under a combination of quarterly and annual contracts, negotiated on an arms-length basis by MCC and HPM employees who are not part of the Shared Service Agreement.

While MCC has no long-term contractual obligation to supply methanol to HPM - nor any obligation to deliver product at below-market rates - HPM currently procures roughly 60% of their methanol inventories from MCC, at weighted-average prices roughly 15% lower than their other suppliers. HPM's go-forward business plan assumes that it is able to procure methanol volumes from MCC in similar volumes and at similar rates. A material fracture in this supplier-customer relationship presents potentially significant execution risks for HPM and their ability to meet their plan.

Transactions with Foreign Subsidiaries

As discussed above, the Company is a global business with an extensive foreign manufacturing footprint. The Company's foreign operations are conducted by subsidiaries incorporated in a variety of jurisdictions in Canada, Europe, Asia and South America. The Company's foreign and domestic operations are highly interdependent, making the Company's foreign operations essential to the Company's overall strategy. The foreign operations allow the Company to provide products to its customers in many locations globally. Further, certain foreign operations provide vital products to the Company's domestic facilities. In the ordinary course of business, the Company's domestic entities and its foreign entities maintained significant business and financial relationships which result in intercompany trade receivables and payables arising from the purchase and sale of goods among the various entities.

In addition, as part of the Company's global management of cash, the Company maintains a complex system of intercompany loans among entities, allowing the Company to transfer liquidity to where it is needed in the Company's global operations. The Company tracks each transaction and at any point in time can identify every amount due to and due from in connection with such transactions.

In the ordinary course of business, HPM will pool and builds cash in the United States, who on-lends as needed to fund the operations of its European and Asian business units.

Cash burn associated with HPM's European operations can be most directly attributed to a high operating cost environment and ongoing operating losses, which are expected to continue absent significant intervention. The Company's finance team estimates that the European operations will burn approximately $20 million of cash in 2022.

The Company's Asian operations are significantly more cost-efficient than HPM's European operation, and are typically profitable on an income statement basis. However, cash generated by the Company's Asian operations is subject to nuanced repatriation rules, and cannot be reliably counted on to make debt service payments or fund liquidity needs in other parts of the world.

HPM Facilities

HPM maintains twenty-three (23) production facilities and four (4) research and development facilities in the Americas, Europe, and Asia.

Note:
1. Shanghai R&D facility is a joint facility with MCC

Further information regarding the Company's highest-output plants is provided below:

Plant	Description
Waterford I, NY	• Commencement of operations: 1945 • Site Area: 800 acres (150 acres developed) • Number of Employees: ~1,050 – Operations – 890; Other – 150 – Union facility – 2 Locals; 3-year contract expires in June 2023 • Siloxane Capacity: 95kMT • Additional Facilities: – Wastewater Treatment and Utility Plants – Haz Waste Rotary Kiln Incinerator and Fixed Box incinerator – R&D Labs, Warehouse and Distribution • No active hazardous waste landfills – 5 closed • Community Interactions: – Mutual aid responder – Significant community service involvement • Business Units Supported: – Basics, Specialty Fluids, Elastomer, Coatings, Sealants • Primary Specialty Intermediates & Consumer Sealants Production Site
Waterford II, NY (Leased)	• Commencement of operations: 1997 • Site Area: 20 acres • Number of Employees: ~125 (same unions as Waterford I) • Siloxane Capacity: 15kMT • Business Units Supported: – Specialty Fluids, Coatings, Sealants • Secondary Specialty Intermediates & Consumer Sealants Production Site • Monthly Rent: $750k • Current Lease Expires in December 2032
Sistersville, WV	• Commencement of Operations: 1998 • Site Area: 120,000 m2, 4% of overall chemical park • Number of Employees: ~650 – Manufacturing – 290; Maintenance – 70; Other Functions – 290 • Siloxane Capacity: 75kMT • Businesses Supported: – Basics, Specialty Fluids, Elastomers, Coatings, Intermediates • Primary LSR production site • Available Infrastructure: – QC Labs, R&D Labs, Vent incineration – Other Infrastructure provided by the Chempark • Expanding additives specialty capacity with acquisition of on-site Dystar production building
Leverkusen, Germany	• Commencement of Operations: 1971 • Site Area: 190,000 m2 • Number of Employees: ~345 – Manufacturing – 255; Other Functions – 90 • Siloxane Capacity: 45kMT • Businesses Supported: – Basics, Specialty Fluids, Elastomers, Coatings, Electronics, Intermediates

	– Primary Electronics production site • Available Infrastructure: – Utilities, Waste Treatment, QC Labs, R&D Labs
Ohta, Japan	• Commencement of Operations: 1955 • Former Union Carbide site - part of 2003 OSi acquisition • Site Area: Over 1300 acres (10% developed) • Number of Employees: 430 associates (Mfg., EHS, Technology & Product Stewardship) • Mineral rights leased - 12 active oil & gas wells onsite provide 15% of natural gas to plant. – Undeveloped Marcellus shale formation; potential revenue $2-3MM/yr. • OSHA VPP STAR site • Largest employer & taxpayer in Tyler County, WV • Dedicated Additives site; Business Supported: – Specialty Fluids, Urethane Additives, Silanes • Infrastructure Available: – Onsite WWTP, Rotary Kiln, Landfill, Warehousing
Termoli, Italy	• Commencement of Operations: 1981 • Former Union Carbide site • 3 KM from the city of Termoli • Number of Employees: 145 associates • ISO 9001, OHSAS 18001, EMAS certifications • Dedicated Additives site – Predominantly a manufacturing location • Business Supported: – Primarily Silanes, Limited Urethane Additives and Specialty Fluids • Infrastructure Available: – Utilities, Waste Treatment, Incinerator
Nantong, China	• Commencement of Operations: 2006 • Site Area: 205,000 m2 • Number of Employees: ~245 – Manufacturing – 230; Other Functions – 15 • Businesses Supported: – Basics, Specialty Fluids, Elastomers, Coatings, Urethane Additives, Sealants • Available infrastructure: – Utilities, Waste Treatment, QC Labs, Application Development Lab

The Waterford Facility currently consists of two nearby, but separate locations – an owned location (the primary specialty intermediates and consumer sealants production site) and a secondary, leased location (originally opened as an overflow facility but which remains largely utilized today). While the HPM management team would prefer to continue leasing and operating the secondary site, the long-term nature of the lease has caused the terms to fall out-of-sync with the market, in favor of the landlord. HPM would like to leverage any restructuring process to exert pressure on the landlord, with a goal of obtaining a 25-50% reduction in rent. And though it would prefer not to do so, HPM is willing to reject the lease in a formal proceeding and migrate all current Waterford II production to either Waterford I or Sistersville, WV, if the landlord isn't willing to make reasonable concessions.

Management Team

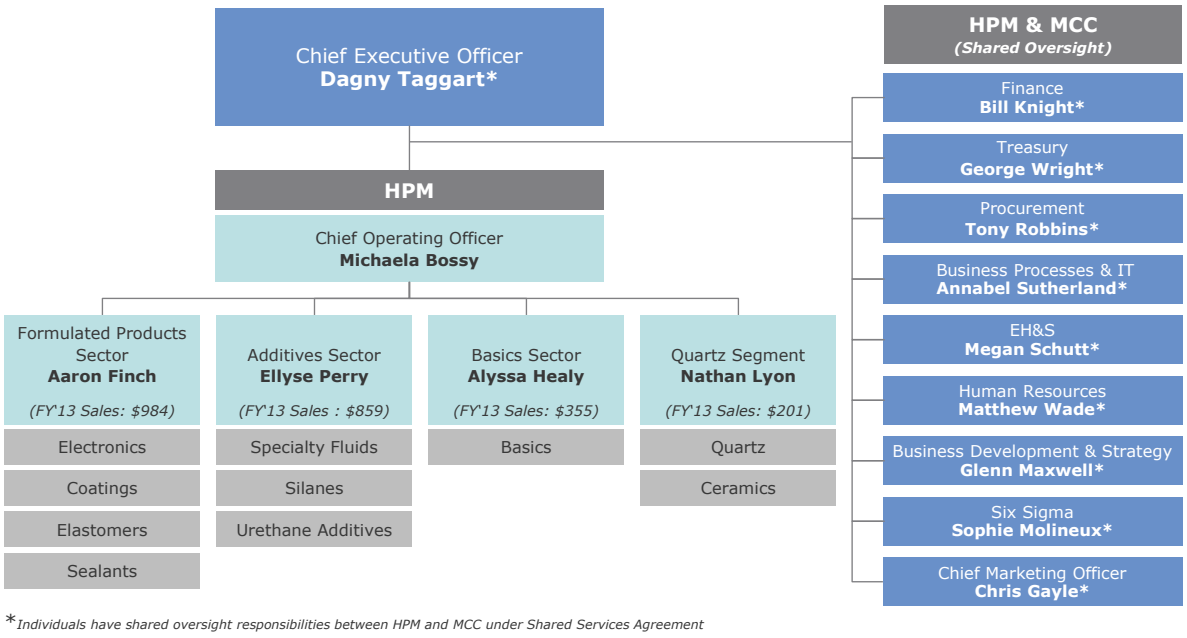
Dagny Taggart – President, Chief Executive Officer & Chairman
- Joined MCC in May 2013 (concurrent with its formation) as CEO
- Previous roles include:
  - President and General Manager of Alcan Packaging *(3 years)*
  - President and General Manager for Van Leer Containers *(5 years)*
- Under Shared Services Agreement, acts in executive role for both HPM & MCC

Bill Night – Executive Vice President & Chief Financial Officer
- Joined MCC in May 2013 (concurrent with its formation) as CFO
- Under Shared Services Agreement, acts in executive role for both HPM & MCC

George Wright – Senior Vice President & Treasurer
- Joined MCC in March 2015 as Director of Financial M&A Activities
- Under Shared Services Agreement, acts in executive role for both HPM & MCC
- Previous roles include:
  - Duracell International (5 years)
  - Deloitte (11 years)

Michaela Bossy – Executive Vice President & Chief Operating Officer
- Joined HPM in early 2022, having previously served on the management teams of two specialty chemicals businesses
- Unlike Taggart, Night, and Wright - Bossy acts in an executive role only for HPM, and was onboarded after certain lenders began raising questions about the underlying terms and day-to-day management of the Shared Services Agreement

Tony Robbins – Vice President & Head of Procurement
- Joined legacy company in January 2015 as Procurement manager
- Robbins is one of Hexative's longest-tenured employees, and has earned the respect of the management team for his ability to maintain operational continuity and help manage the Company's current liquidity situation
- Under Shared Services Agreement, acts in executive role for both HPM & MCC



*Individuals have shared oversight responsibilities between HPM and MCC under Shared Services Agreement

Employees

As of December 31, 2021, the Company had approximately 4,500 employees worldwide, including employees of the Company's foreign subsidiaries. Approximately 46% of the Company's employees are members of one of two labor unions or are represented by workers' councils that have collective bargaining agreements. Further, the Company sponsors various pension and similar benefit plans worldwide for its employees. The Company's U.S. defined benefit pension plans were underfunded in the aggregate by $59 million as of December 31, 2021, and certain pension plans sponsored by the Company's foreign affiliates are also underfunded.

The Company make certain required contributions on a quarterly basis to their U.S. defined benefit pension plans. The Company is required to make contributions of $18.3 million in 2022. In addition to the Company's quarterly contributions to the pension plans, the Company makes, on an annual basis, a "true-up" payment relating to the previous fiscal year. For fiscal year 2021, the Company is required to make a "true-up" payment in the amount of approximately $8 million by September 2022.
The Company also maintains unfunded post-retirement benefit plans for retired employees. As of December 31, 2021, the aggregate post-retirement benefit obligation with respect to these plans was $81 million.

The Company also maintains various other benefit plans and bonus programs for its employees. Bonus programs for the Company's U.S. employees include annual performance bonuses and individual project level bonuses.

The strength of the works council in Germany is palpable. Prior attempts on HPM's part to negotiate plant closures have been met with significant resistance, and the works council representatives have indicated that they will fiercely oppose and/or litigate any process that contemplates layoffs in Germany or the EU.

Customers & Marketing

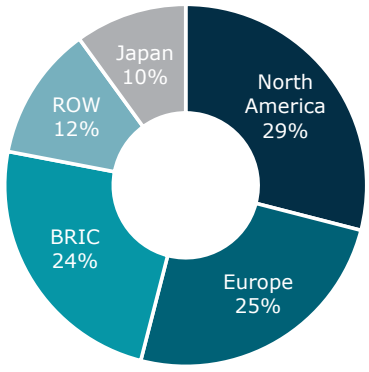
Through the Company's worldwide network of production facilities, it serves more than 4,500 customers in over 100 countries. The Company markets an extensive product line to meet a wide variety of customer needs.

The Company focuses on customers who are, or have the potential to be, leaders in their industries and have growth objectives that support the Company's own growth objectives. Many of the Company's customers are expanding internationally to serve developing areas in Asia, Eastern Europe, Latin America, India and Russia. Maintaining close proximity to international customers allows the Company to serve them more quickly and efficiently and thus build strong relationships.

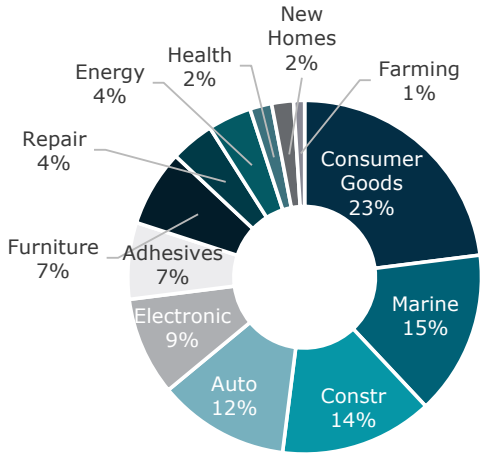
The Company's customers include leading companies in their respective industries, such as Procter & Gamble, Avery, Continental Tire, Goodyear, BMW, Panasonic, Toshiba, Saint Gobain, Unilever, BASF, The Home Depot and Lowe's. The Company takes a service-oriented approach to its customers, providing high quality, reliable products backed by local sales support and technical expertise. An important component of the Company's strategy is to utilize its broad product capabilities to win high-end specialty business from customers, allowing the Company to become a supplier of choice, utilizing its ability to develop solutions to meet its customers precise needs.

In 2021, the Company's largest customer accounted for less than 3% of its net sales, and the Company's top twenty customers accounted for approximately 22% of net sales. As part of agreements with certain customers of the Company, and as a benefit to and at the request of such customers, the Company from time to time enters into accounts receivable sales whereby the Company sell the receivables relating to such customers to certain third-party financial institutions which provide extended payment terms to the Company's customers. These transactions are beneficial both to the Company — because they receive payment on receivables sooner than they otherwise would — and the Company's customers, who receive extended payment terms from the financial institutions.

Customer Revenue by Geography



Customer Revenue by Industry

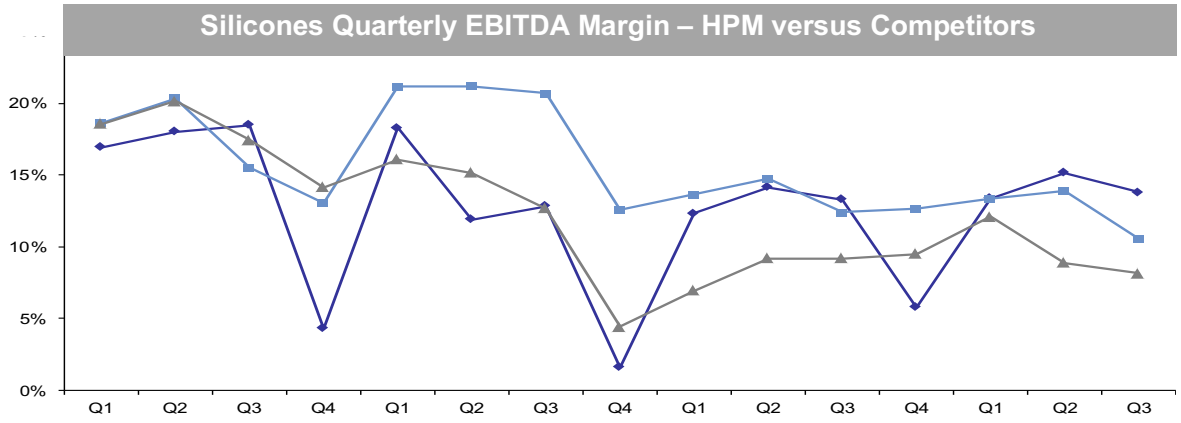


Financial Performance

The below provides a snapshot of the Company's recent consolidated financial performance.

($ in millions)	FY 2018	FY 2019	FY 2020	FY 2021
Revenue				
Silicones	$ 2,286	$ 2,310	$ 2,136	$ 2,197
Quartz	302	327	221	201
Total Revenue	**$ 2,588**	**$ 2,637**	**$ 2,357**	**$ 2,398**
EBITDA				
Silicones	$ 433	$ 291	$ 206	$ 248
Quartz	92	101	44	37
Corporate & Other	(33)	(13)	(36)	(47)
Total EBITDA	**$ 492**	**$ 379**	**$ 214**	**$ 238**
Working Capital Accounts				
Accounts Receivable	$ 340	$ 323	$ 304	$ 316
Inventory	375	394	380	340
Accounts Payable	305	308	284	259
Net Trading Capital Days				
Accounts Receivable	46	50	48	49
Inventory	78	80	83	73
Accounts Payable	50	50	45	41
Capital Expenditure				
Maintenance	$ 33	$ 35	$ 31	$ 39
Environmental, Health & Safety	21	25	18	18
Growth	41	56	42	32
Restructuring	-	-	7	2
Total Capital Expenditure	**$ 95**	**$ 116**	**$ 98**	**$ 91**

Financial performance has declined for the past several years. Cyclical industry downturns in 2017 saw a temporary catch-up in 2018 and 2019, however the industry remains in a slow growth environment. The Quartz segment was heavily dependent on semi-conductor industry improvement, which did not materialize as expected in 2020 and 2021. Significant new capacity brought online in 2018 limited pricing power and contracted margins.



After the cyclical downturn of 2017, the Company saw a sharp rebound in EBITDA due to better demand, pricing power and favorable raw material costs which led to significant margin expansion. With new capacity coming on stream in late 2019 and early 2020, the Company was not able to maintain the high margins achieved in years prior, and cost structure disadvantages compared to larger competitors and the entry of new Asian players compressed margins.

Region	Cost Structure	HPM Capacity Utilization
Americas	R >25% cost disadvantage	68%
Europe	R 15%-25% cost disadvantage	65%
Asia Pacific & Rest of World	G Parity	100%

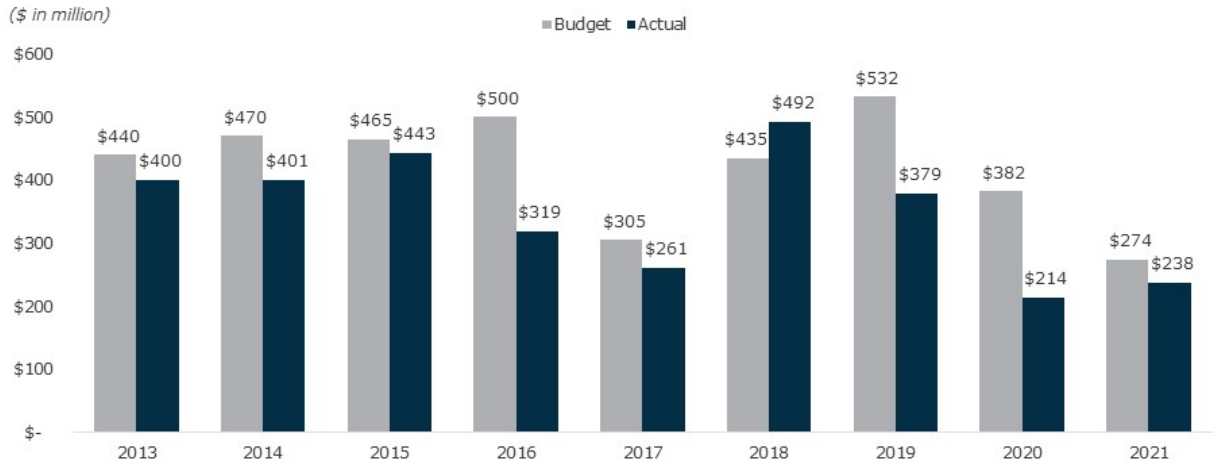
In relation to working capital, days sales outstanding have been generally consistent, showing modest improvement, however inventory levels have historically been high relative to competitors due to lack of robust inventory planning systems and processes. Days payable outstanding have decreased due to tightening of terms with key suppliers given concerns over credit, offset by management actions to preserve cash.

In an effort to bolster near-term liquidity to facilitate discussions with key constituents regarding a potential restructuring, HPM sold approximately $60 million of receivables to MCC in 1Q22 for an equivalent amount of cash. The transaction was formally documented and executed at arms-length, with HPM and MCC each represented by separate counsel.

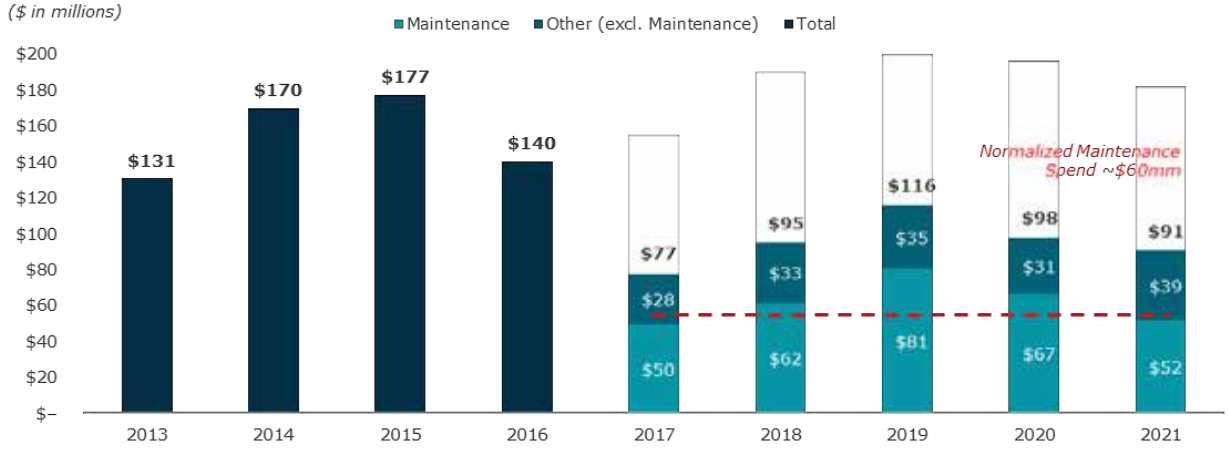
Recent capital expenditures have been well below historical average and the under-investment has resulted in disadvantaged cost position versus competitors. Total investment for 2017-2021 was ~37% less than annual spend for 2013-2016 time period. Cumulative underinvestment in maintenance CapEx of $134 over the 5-year period, based on normalized spend of ~$60 million. Decreased spending on maintenance resulted in significant expenses related to reactor outages in 2020. CapEx to Depreciation ratio in 4 out of the past 5 years has averaged approximately 50% - an unsustainable level of investment for a specialty chemicals company. Most competitors are spending at >100% CapEx to Depreciation ratio.

Historically, the management team have failed to meet their budgeted EBITDA. A summary of historical budget to actuals is provided below.

EBITDA Performance: Actual Versus Budget



Capital Expenditure



Capital Structure and The Intercreditor Agreement

HPM's Capital Structure

($ in millions) Capital Structure as of December 31, 2021	Maturity	Rate	Book Value	Price	Market Value	Leverage	Annual Interest	Rating
First Lien Debt								
$270mm ABL Revolving Credit Facility	Apr-27	L + 225 bps	$ 165.0	-	$ 165.0		$ 7.0	B1 / NR
$75mm Cash Flow Revolver	Dec-27	L + 600 bps	35.0	-	35.0		3.0	B1 / NR
Foreign local Bank Debt	Various	6.93%	46.0	-	46.0		3.0	N/A
8.875% First Lien Senior Secured Notes	Oct-28	8.88%	1,100.0	107.5	1,182.5		98.0	B3 / CCC+
Total First Lien			**$ 1,346.0**		**$ 1,428.5**	**5.7x**	**$ 111.0**	
1.5 Lien Debt								
10.000% 1.5 Lien Senior Secured Notes	Oct-28	10.00%	250.0	107.4	268.5		25.0	Caa1 / CC
Total Through 1.5 Lien			**$ 1,596.0**		**$ 1,697.0**	**6.7x**	**$ 136.0**	
Second Lien Debt								
9.000% Springing Lien USD Notes	Jan-29	9.00%	1,161.0	91.3	1,060.0		104.0	Caa2 / CC
9.500% Second Lien Euro Notes	Jan-29	9.50%	180.0	88.8	159.8		17.0	Caa2 / CC
Total Through Second Lien			**$ 2,937.0**		**$ 2,916.8**	**12.4x**	**$ 257.0**	
Subordinated Debt								
11.500% Senior Subordinated Notes	Dec-27	11.50%	382.0	76.6	293.0		44.0	Caa3 / CC
Total Through Subordinated Debt			**$ 3,319.0**		**$ 3,209.8**	**14.0x**	**$ 301.0**	
PIK Debt								
HoldCo 11% PIK Note	Jun-27	11.00%	854.0	-	854.0		94.0	N/A
Total HPM Debt			**$ 4,173.0**		**$ 4,063.8**	**17.6x**	**$ 395.0**	
Memo: Hermes Holdings Debt (HPM + MCC as Guarantors)								
$500mm Term Loan Facility	*Apr-27*	*L + 800 bps*	*$ 500.0*	*-*	*$ 500.0*		*$ 50.0*	*B1 / B+*
Total Debt Currently Serviced by HPM			***$ 4,673.0***		***$ 4,563.8***	***19.7x***	***$ 445.0***	

Current LIBOR Rate and the Forward Curve

- The current LIBOR rate is 2.0% (200 basis points). Banking contacts whom you consider to be reliable have advised that they expect the curve to remain relatively flat over the next 5 years.

ABL Facility

- The Company borrows under a revolving credit facility with maximum aggregate availability of $270 million pursuant to that certain Asset-Based Revolving Credit Agreement, dated April 24, 2021. Availability under the ABL Facility is subject to a borrowing base based on a specified percentage of eligible accounts receivable and inventory and, in certain foreign jurisdictions, machinery and equipment. The borrowing base reflecting various reserves was determined to be approximately $270 million, and the Company had $71 million of issued and outstanding letters of credit and $135 million of revolver borrowings under the ABL Facility. Additionally, 12.5% of the borrowing base, or $34 million, was unavailable because the Company did not meet the fixed charge coverage ratio required to borrow the full amount of the facility.

Cash Flow Facility

- The Company borrows under a revolving credit facility with maximum aggregate availability of $75 million pursuant to that certain Second Amended and Restated Credit Agreement, dated as of April 24, 2021. Approximately $35.0 million was outstanding under the Cash Flow Facility as of December 31, 2021.
- The Administrative Agent for the Cash Flow Facility is an affiliate of Really Super Mega Big Conglomerate Co., who has held a seat on the HPM board since it sold the Company to Zeus in 2014.

First Lien Notes

- HPM is an issuer of $1.1 billion of 8.875% First-Priority Senior Secured Notes due 2026 issued pursuant to an Indenture dated as of October 25, 2020, with the other subsidiaries, other than Holdings, as guarantors.
- The First Lien Notes contain a "make whole" provision, which provides for the payment of approximately $250 million of interest in the event that that the notes are retired early. However, the question as to whether a bankruptcy would trigger the "make whole" provision is a subject of open debate. (HPM is of the view that a bankruptcy does not trigger the "make whole," whereas the First Lien Noteholders are adamant that it does.)

1.5 Lien Notes

- HPM is an issuer of $250 million of 10% Senior Secured Notes due 2027 issued pursuant to an Indenture dated as of May 25, 2020, with the other subsidiaries, other than Holdings, as guarantors.

Second Lien Notes

- HPM is an issuer of approximately $1.161 billion of 9% Second-Priority Springing Lien Notes due 2029 issued pursuant to an Indenture dated as of November 5, 2018, with the other subsidiaries, other than Holdings, as guarantors.

Senior Subordinated Notes

- HPM is an issuer of $382 million in aggregate principal amount of unsecured 11.5% Senior Subordinated Notes due 2027 issued pursuant to an Indenture dated as of December 4, 2017, with the other subsidiaries, other than Holdings, as guarantors.

Holdings PIK Note

- In connection with the purchase of the Company from Really Super Mega Big Conglomerate Co., on December 4, 2017, HoldCo issued a pay-in-kind unsecured 11% Senior Discount Note, due June 4, 2027, with an original principal amount of $400 million. As of December 31, 2021, the aggregate principal amount outstanding on the Holdings PIK Note was $854 million. No other subsidiary entity is a guarantor on the Holdings PIK Note.

Hermes Holdings Term Loan Facility

- Hermes Holdings LLC is the borrower of a $500 million term loan credit facility pursuant to a Term Loan Credit Agreement, dated April 24, 2021. While the facility is guaranteed by both HPM and MCC, 100% of the interest obligation is currently being serviced by HPM.

Equity Ownership

- Zeus owns 90% of the equity interests in HoldCo, Really Super Mega Big Conglomerate Co. holds 5% of the equity interests in HoldCo, with the remaining 5% held by current or former officers or directors of the Company.

The Intercreditor Agreement

- The holders of the Senior Subordinated Notes are party to an intercreditor agreement with the holders of the First Lien Notes, 1.5 Lien Notes, and Second Lien Notes (the "**Intercreditor Agreement**").
- Among other things, the Intercreditor Agreement contains the following key terms:

- Standard protections for the senior creditors, providing that the senior creditors' liens have complete priority over the junior creditors' liens.
- "Standstill" provision preventing junior creditors from exercising most of their rights and remedies until senior creditors are paid in full.
- "Turnover" provision, which required junior creditors to segregate and turn over collateral or proceeds thereof to the senior creditors, to the extent that they were received in contravention of the terms of the Intercreditor Agreement.

MCC's Capital Structure

($ in millions) Capital Structure as of December 31, 2021	Maturity	Rate	Book Value	Price	Market Value	Annual Interest
First Lien Debt						
$350mm ABL Revolving Credit Facility	Dec-24	4.85%	$ 180.0	-	$ 180.0	$ 8.7
$315mm First Lien Notes	Apr-23	10.00%	315.0	-	315.0	31.5
$560mm First Lien Debt	Feb-25	10.375%	560.0	-	560.0	58.1
$1,550mm First Lien Notes	Apr-23	6.625%	1,550.0	102.1	1,582.6	102.7
Total First Lien			**$ 2,605.0**		**$ 2,637.6**	**$ 201.0**
1.5 Lien Debt						
$225mm 1.5 Lien Debt	Feb-25	13.75%	225.0	98.0	220.5	30.9
Total Through 1.5 Lien			**$ 2,830.0**		**$ 2,858.1**	**$ 232.0**
Total MCC Debt			**$ 2,830.0**		**$ 2,858.1**	**$ 232.0**
Memo: Hermes Holdings Debt (HPM + MCC as Guarantors - Currently Serviced by HPM)						
$500mm Term Loan Facility	*Apr-27*	*L + 800 bps*	*$ 500.0*	*-*	*$ 500.0*	

ABL Facility

- MCC Holdings was a borrower under the Amended and Restated Asset-Based Revolving Credit Agreement dated as of December 21, 2018.
- Availability under the Prepetition ABL was $350 million, subject to a borrowing base which was based on a specified percentage of eligible accounts receivable and inventory. As of December 31, 2021, drawn borrowings under the ABL totaled $180 million.

$315mm First Lien Notes

- In 2018, MCC Holdings issued $315 million aggregate principal amount of 10.000% First Priority Senior Secured Notes due 2023, proceeds of which were used to discharge maturing debenture indebtedness and to repay all amounts then outstanding under the then-existing ABL.

$560mm First Lien Debt

- In 2018, MCC Holdings issued $560 million aggregate principal amount of 10.375% First Priority Senior Secured Notes due 2025, the proceeds of which were used to discharge maturing notes.

$1,550mm First Lien Notes

- In 2018, MCC Holdings issued $1,550 million aggregate principal amount of 6.625% First-Priority Senior Secured Notes due 2023.

$225mm 1.5 Lien Notes

- In 2017, MCC Holdings issued $225 million aggregate principal amount of 13.750% Senior Secured Notes due 2025. The 1.5 Lien Notes are secured by liens on the Notes Collateral that are junior to the liens in such collateral securing the First Lien Notes and the ABL.

Hermes Holdings Term Loan Facility

- Hermes Holdings LLC is the borrower of a $500 million term loan credit facility pursuant to a Term Loan Credit Agreement, dated April 24, 2017. While the facility is guaranteed by both HPM and MCC, 100% of the interest obligation is currently being serviced by HPM.

Creditor Issues

- Preliminary valuation analyses performed by the Company and their advisors imply that value appears to break at the 2nd lien, making them the presumed "fulcrum creditor" in the current scenario.
    - However, the 2nd lien group is meaningfully fragmented. While Zeus owns about 40% of the principal amount of the 2nd lien notes, the remainder is owned by a series of hedge funds who have mobilized against Zeus and formed an ad hoc committee.

- First Lien and 1.5 Lien Noteholders are generally in agreement with current perspectives on valuation, and have espoused that they will support a restructuring or reorganization process so long as (i) they get taken out at par, or (ii) are not impaired by a plan.
    - Importantly, the First Lien Noteholders view "par value" as principal + unpaid interest + the $250 million due pursuant to the "make whole" clause.

- The liens security the Cash Flow Facility sit pari passu with the ABL Facility. The Cash Flow Facility lenders have expressed – in no uncertain terms – that they (i) will object to and/or litigate any attempt to prime their liens, and (ii) that they are not willing to extend any further credit to HPM.
    - The Cash Flow Facility Agent is a related party of Really Super Mega Big Conglomerate Co., who holds a seat on the HPM board.

- Due to the specialized nature of HPM's business, maintenance of strong working relationships with trade creditors is critical. In certain regions, some of the raw inputs required for HPM's products are sold by a single vendor. Certain other suppliers can theoretically be replaced, but the cost of switching and time to switch can be significant due to issues including (but not limited to) new contract negotiation, sometimes significant supplier set-up costs, and testing for minimum quality thresholds.
    - The senior management team has been working hard to corral stakeholders, and have tried to avoid "dictating terms" insofar as what a restructuring might look like. However, Tony Robbins has made a powerful case for full payment of trade creditors, flagging "sole supplier" issues in many instances and significant vendor migration costs in others. The rest of the management team agree with Tony, and are lobbying for this to be part of any in-court restructuring plan, if that route is pursued.
    - HPM counsel initially sought to temper management's expectations on this point, citing potential challenges in structuring plan classes in a way that won't create confirmation issues. Management has remained steadfast, however, and has asked counsel to continue their research on the topic.

- A subgroup of the Senior Subordinated Noteholders has taken the position that the terms of their indenture and the prevailing valuation put them "in the money," and are seeking a seat at the negotiating table.

- While HPM's counsel and attorneys for other key constituents believe that a "turnover provision" in the Intercreditor Agreement render the arguments of the Senior Subordinated Noteholders moot, the Senior Subordinated Noteholders have shown a willingness to litigate.
- Furthermore, case law with respect to the issues raised by the Senior Subordinated Noteholders is basically non-existent.

Management's Financial Projections

The below provides a snapshot of the Company's projected financial performance over the next five (5) years.

($ in millions)	FY 2022	FY 2023	FY 2024	FY 2025	FY 2026
Revenue					
Silicones	$ 2,311	$ 2,414	$ 2,508	$ 2,608	$ 2,711
Quartz	210	241	278	262	252
Total Revenue	**$ 2,521**	**$ 2,655**	**$ 2,786**	**$ 2,870**	**$ 2,963**
EBITDA					
Silicones	$ 255	$ 278	$ 297	$ 319	$ 341
Quartz	40	56	75	63	55
Corporate & Other	(35)	(37)	(38)	(39)	(40)
Total EBITDA	**$ 260**	**$ 297**	**$ 334**	**$ 343**	**$ 356**
Working Capital Accounts					
Accounts Receivable	$ 348	$ 365	$ 384	$ 385	$ 398
Inventory	377	382	387	367	367
Accounts Payable	285	295	307	304	313
Net Trading Capital Days					
Accounts Receivable	49	49	49	49	49
Inventory	71	69	67	65	63
Accounts Payable	41	41	41	41	41
Capital Expenditure					
Maintenance	$ 54	$ 54	$ 57	$ 60	$ 63
Environmental, Health & Safety	31	31	33	35	37
Growth	35	40	45	45	45
Restructuring	-	-	-	-	-
Total Capital Expenditure	**$ 120**	**$ 125**	**$ 135**	**$ 140**	**$ 145**

The Company is projecting improvements over the coming years as excess capacity in the market is absorbed gradually, with growth likely to be more robust in specialty segments. Sealants and elastomers expected to be under pressure as commodity players move downstream, and raw material price increases are expected to be passed through to customers.

Profitability is projected to increase as fixed costs are spread over marginal volume increases. Margins are not projected to reach peak figures observed in prior periods as additional lower cost capacity in Asia is expected to come online as current capacity is absorbed. The semi-conductor cycle is projected to peak in 2024, driving peak profitability in Quartz, with a gradual decline from the peak to 2026.

Days sales outstanding and days payable outstanding are projected to remain consistent with historical levels, with absolute levels increasing as a result of revenue growth. Days inventory outstanding are projected to decrease two (2) days each year due to the implementation of inventory planning systems and processes.

The Company intends to increase capital expenditures to address reliability issues and improve cost position and drive margin expansion. The Management team have identified the following near-term projects:

- Green Tire Expansion (Termoli)
- Extension of LSR & U-Polymers (Leverkusen)
- Specialty Expansion (Leverkusen)
- Facility Expansion - PSA, Resin, UA, Hardcoat (Nantong)

Current Situation

Overcapacity in the silicone market combined with underperformance in the Company's operations have led to underinvestment and a highly unsustainable capital structure.

- As the market recovered from the cyclical industry downturn in 2017, HPM's competitors realized there was not enough capacity in the market to cover future demand. They began to build new manufacturing facilities, and by 2019 new capacity began to come online, pushing down global prices. 20% increase in global capacity during 2H19 created a structural supply / demand imbalance, and China continues to operate at low utilization levels and below cash cost. Large competitors with cost advantages have accepted decreased margins to maintain volume.

- Since 2018, HPM's financial performance has significantly deteriorated and remains under pressure. LTM EBITDA has declined 51% from $492 million (FY2018) to $240 million (FY2021). EBITDA margins have declined ~900 bps from 19.0% (FY2018) to 10.0% (FY2021). Volumes have remained relatively flat (+3%), while price has come under significant pressure (–18%) in the face of meaningful direct material cost inflation (+10% as % of revenue)

- HPM's highly leveraged capital structure requires significant cash to service debt, and therefore the Company could not invest in its infrastructure at the same levels as its competitors. As prices declined for silicone products, the Company experienced a significant decline in EBITDA and badly missed its EBITDA forecasts for the fiscal years 2019-2021. They also have a near-term need for "catch-up" investment to remain competitive in the industry.

- By the end of 2021, the Company's financial condition had deteriorated to the point where its balance sheet was 19.7x levered on a gross debt basis, compared to the industry median of 3.4x. With a pending payment of more than $60 million to its First Lien and 1.5 Lien lenders due in April 2022, the Company is facing a liquidity crisis. The Company currently has $50 million of cash on hand, $20 million of which is trapped in Asia and which cannot reasonably be repatriated in the short-term.

- HPM's accountants have indicated that they will be unable to deliver a "clean opinion" with respect to their 2021 audit. The issuance of an audit without a "clean opinion" would trigger defaults and/or cross-defaults under substantially all of the Company's credit agreements and indentures.

Board of Directors

The Board comprises six (6) members, four (4) of which are affiliated with Zeus:

- Dagny Taggart (Chairman)

- Two board members, Ben Stokes and Heather Jones, are professional acquaintances of Zeus and Dagny Taggart, but don't serve on any other boards that are in any way affiliated with the Company (i.e., although these board members are designees of Zeus, they are technically independent).

- Two board members, Danni Wyatt and Jofra Archer, are Managing Directors at Zeus and also serve as board members on several other Zeus portfolio companies.

- One board member, Maureen Ali, is a member of the management team at Really Super Mega Big Conglomerate Co.

The Board recently hired bankruptcy counsel, Ohman & Notgood ("**OhNo**"), and last week had a very contentious meeting during which the lead attorney gave the board a strong lecture about its duties and obligations as the Company enters the "zone of insolvency."

Role

You and your team need to prepare for three meetings:

- *Round 1:* A meeting with the Company's creditors. Holders of the First Lien Debt, 1.5 Lien Debt, and the Second Lien Debt are all expected to attend.

- *Round 2:* A meeting with a special sub-committee of the Board of Directors. Members of the Board that are expected to attend this meeting are Ben Stokes, Danni Wyatt, and Maureen Ali.

- *Round 3 (the finals – top 3 teams from Rounds 1 and 2):* A mock bankruptcy court plan confirmation hearing. You will represent the Company's interests and present your restructuring plan for the Company. There will be a representative from each of the primary creditor constituencies (First Lien Debt, 1.5 Lien Debt, and the Second Lien Debt) as well as a representative of the unsecured creditors committee (which represents the collective interests of all unsecured creditors). A (mock) bankruptcy judge will preside.

You will need to carefully judge what support materials you will use. Too little detail will fail to convince your audiences. Too much detail runs two risks; (1) you will lose the attention of your audience, and (2) you will run out of time to cover the remainder of your agenda. Also, be very mindful of the audience to whom you are presenting, recognizing the different positions and interests of the different parties.
You should be prepared to address the following issues at each of your meetings (in addition to whatever other questions may be thrown at you by your judging panels!):

Round 1: Creditor Meeting

You will have 40 minutes to present to the creditor constituents. There will also be a 10-minute feedback session at the conclusion.

There will be one holder of First Lien Debt, one holder of 1.5 Lien Debt, and one holder of Second Lien Debt at the meeting. You are worried that this meeting will be contentious and that the different creditor constituents have very different motivations coming into the meeting.
Your goal should be to try to build a consensus around your proposed restructuring solution with the constituents if that is possible. You will need to be especially mindful of what you've come to learn about the various creditors' key priorities and pending disputes, and should be prepared to cover the following points:

- Establish the Company's liquidity position. This portion of the presentation should elaborate on the cash-related challenges that HPM faces in the coming months, including an estimate of the "new-money" financing need and constructive ideas on how to raise this additional capital.

- Discuss your plan for the restructuring of the balance sheet. This portion of the presentation should include a 5-year business plan and forecast. You should also be very specific about the treatment of each constituency and your rationale for the treatment.

- Make specific requests from each of the creditor constituencies for what you want them to support as part of an overall consensual restructuring. Be prepared to answer how you will treat existing equity holders as part of any consensual restructuring.

- Candidly address the strengths and weaknesses of each creditor constituents' position and present your view of what their treatment would be in the absence of a consensual out-of-court transaction (*i.e.*, under a bankruptcy plan).

- Discuss any potential operational initiatives for the Company, and how the Company is going to fund any costs. This portion of the presentation should include analytics supporting your recommendations.

- Discuss any other operational changes that you are going to ask the Company to make.

- Attempt to establish lender support for your recommendations.

Round 2: Board of Directors Meeting

You will have 40 minutes to present to a sub-committee of the Company's board of directors. There will also be a 10-minute feedback session at the conclusion. Ben Stokes, Danni Wyatt, and Maureen Ali are all expected to attend. You understand that the board of directors as a whole is divided in their view of the problem and the solution to address the issues the Company faces. The sub-committee is tasked with proposing the best path forward for the Company in light of their legal obligations. You expect that the meeting may be turbulent. Your role is to try to develop consensus around your proposed approach. Your presentation should include:

- Summarize your overall approach to the restructuring and what you are asking for from each of the creditor constituents as well as equity holders. Update the subcommittee on your meeting

with the creditors and your assessment of the level of support from creditors for your proposed plan.

- Assume that holders of HPM's First Lien Debt have refused to signal any flexibility or willingness to negotiate with respect to the "Make Whole" obligation contemplated by the First Lien Indenture. Come prepared with suggestions regarding a proposed forward path that the Board can seriously consider.

- Update the sub-committee on the Company's liquidity position. This portion of the presentation should include a "DIP Sizing" exercise, during which you explain (i) how much additional financing the Company will need to raise in a chapter 11 scenario, and (ii) what the proceeds of this financing will be used for.

- Discuss any operational initiatives that the Company should consider and your recommendations with respect to those initiatives. Be prepared to identify how the Company will fund your recommended course.

- Discuss any other operational changes you would recommend that the Company consider and the financial costs and benefits of those changes.

- Discuss how you propose to restructure the Company's balance sheet. Be sure to explain the implications to all constituents of your plan and your view as to the perspectives of each of the constituencies. Also, discuss the prospects and structure of new capital that might be available.

- Discuss how you propose to implement your restructuring. Is an out-of-court workout reasonably possible? If not, can your proposal be implemented through the bankruptcy process? Who, if anyone, do you anticipate will oppose your proposal and how do you plan to implement it over their dissent?

- Solicit the support from the sub-committee to implement your proposed restructuring.

Round 3: Mock Bankruptcy Court Confirmation Hearing

The top three teams (based on their performance in Rounds 1 and 2 *and* their performance on the written materials) will be proponents for the Company of a plan of reorganization before a mock bankruptcy court. In addition to a mock bankruptcy judge, there will be one representative holding First Lien Debt, 1.5 Lien Debt, Second Lien Debt, and one that represents the official committee of unsecured creditors (the "**UCC**"). The UCC is appointed to represent the interests of all unsecured creditors generally. For purposes of Round 3, you should assume that they will focus on the interests of trade creditors, landlords, the unions, etc. Your goal in the finals is to build sufficient support to permit the bankruptcy judge to confirm your plan of reorganization for the Company.

Figure out who you need to have to support your plan and be sure to avoid pitfalls that would make your plan unconfirmable! You need to be able to articulate what each constituency is getting under your proposal. And, if your plan *requires* the support of a particular constituency, you will need to identify which constituencies would have a veto. It is not *necessary* to have a confirmed plan to win the competition (and there is precedent for a team with an unconfirmed plan winning the competition), but it will give you a leg up.

Lastly, going into the final round, you'll have to make some assessments about whether to modify your proposed plan based on your morning meetings with creditors and the sub-committee of the board. *The judging panel for the finals will be different from your judging panels in the morning sessions.* However, the morning sessions will give you important feedback on how much support (or lack thereof) there is for your proposals. Don't try to redo your analysis or proposal in any radical way, but you will gain important feedback from the morning rounds and should figure out whether it is appropriate to try to assimilate it in the finals.

In addition to the above, you need to be prepared to address the following:

- Summarize your restructuring plan, including the value of the reorganized enterprise. Identify the treatment of each class of creditors and equity holders under your plan and identify whether that class is entitled to vote under your plan.

- Summarize the Company's liquidity position during the course of the bankruptcy. Explain the key terms of the proposed DIP financing arrangements, including the (i) amount of financing which the Company has raised, (ii) rationale for the size of the DIP facility, and (iii) critical terms or milestones to which HPM and the lenders have agreed.

- Describe the operational changes that you propose to make through the bankruptcy, the financial impact of those changes, as well as the impact on various constituencies of the Company, including, without limitation, the landlords and the unions.

- Respond to questions and challenges to your plan from the various constituencies, one or more of whom may be seeking to defeat your plan.

- Request that the bankruptcy judge permit creditors to vote on your plan, poll the creditor constituents as to whether they support your plan, and then ask the bankruptcy judge to confirm your plan.

Link to Hexative Model spreadsheet: https://abi-materials.s3.amazonaws.com/2022/CFRP2022/Hexative+Model+-+02.16.22+-+2300+Hrs+(Links+Removed).xlsx

Link to Momention Model spreadsheet: https://abi-materials.s3.amazonaws.com/2022/CFRP2022/Momention+Model+-+02.16.22+-+2300+Hrs+(Links+Removed).xlsx

Item A
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Ohman & Notgood LLP

TO: Kane Richardson, General Counsel of Hexative

FROM: Samantha Law, Esq.

DATE: February 18, 2021

RE: Plan Classification and Voting, the Absolute Priority Rule, and Cram Down

Plan Classification and Voting, the Absolute Priority Rule and Cram Down

This is a complex and very important topic for evaluation of the case study. This memo overly simplifies the issues but addresses key attributes to assist you with your analysis.

The objective of a chapter 11 bankruptcy filing is confirmation of a plan of reorganization that allows the debtor to emerge from bankruptcy as a viable company. To confirm a plan of reorganization under chapter 11 a number of substantive and technical requirements must be met. Among the most important of these requirements is that the plan of reorganization be accepted by at least one "impaired class" of creditors and that it complies with the "absolute priority rule." If it satisfies these requirements and if the bankruptcy court otherwise finds that it is "fair and equitable" the plan may be "crammed down" on creditors who oppose the plan.

Classification of creditors

A plan must divide creditors into different classes, generally according to their legal rights of priority and, sometimes, according to other rational business justifications for separate classification. Under the Bankruptcy Code only "substantially similar" claims may be classified with one another. Claims that are not substantially similar may not be classified together. However, not all claims that are substantially similar must be classified together. Substantially similar claims may be classified separately if there is a sound business justification for doing so. Generally, separate classes of claims will be established for each secured creditor. Additionally, separate classes are generally established for "priority claimants" (frequently employees and government taxing authorities) as well as for "general unsecured creditors" (which are generally all creditors that are not priority creditors).

Acceptance by an impaired class

One of the central requirements to confirm a plan of reorganization is that at least one class of creditors that is "impaired" under the plan votes to accept the plan (in bankruptcy, only classes of impaired creditors are entitled to vote on a plan). A class

may be unimpaired in one of two ways. First, if the plan leaves creditors' rights unaltered (for example, if they are paid in full at maturity), then the class will be unimpaired. Second, if a creditor has a contractual right to accelerate payment of its claim, the creditor will be unimpaired (notwithstanding the acceleration right) if the plan reinstates the original maturity and otherwise cures other defaults that may have occurred. This is an oversimplification of the law on this point, but you may rely on this oversimplification for purposes of this competition.

A class will accept a plan when more than 1/2 in number and 2/3 in amount of the creditors in that class vote to accept the plan.

Absolute Priority Rule

In most bankruptcy cases, for the bankruptcy court to confirm a plan of reorganization, the court must find that the plan complies with the "absolute priority rule." The absolute priority rule requires that all senior classes of creditors either (a) be paid in full prior to junior classes of creditors being paid anything (as described above), or (b) the senior class votes to accept a plan that allocates value to a junior class prior to the senior class being paid in full. A senior class will receive "full" payment through (a) cure and reinstatement of the claims of the creditors in that class (which includes paying any arrearages, and complying with the terms of the contract thereafter), (b) cash, or (c) through receipt of securities that the bankruptcy judge determines to be of equal value to the class's pre-bankruptcy securities. (This last option is sometimes referred to as a "cram-up.")

If the debtor does not have sufficient assets to pay a particular class in full, to comply with the absolute priority rule, the creditors in the senior class must divide the remaining assets equally amongst themselves and all junior classes must receive nothing under the plan (unless the class of senior creditors votes for a different treatment). It is not uncommon, however, because of the settlement and negotiation dynamic of chapter 11, that a plan successfully solicit senior classes to accept a plan that pays something to junior classes, rather than strictly following this absolute priority rule. (This last concept is often referred to as "gifting.")

The absolute priority rule (as well as plan classification, voting, and cram down) is tested on a debtor by debtor basis. Absent a contractual provision to the contrary, the creditors of one affiliated debtor are generally not permitted to look to the assets of a different affiliated entity, and creditors of a subsidiary will have no direct recourse to the parent, and vice versa.

Additional issues with respect to secured claims

While secured claims are "claims" under in bankruptcy (and therefore all of the above rules are applicable to secured claims), there are some additional issues to

consider. First, the amount of a secured claim can be no more than the value of the collateral securing the claim. If the claim exceeds the value of the collateral, any excess claim is treated as an unsecured claim. For example, if the debtor has collateral worth $100 million, and there is a first mortgage of $75 million and a second mortgage of $60 million, the first mortgage holder will have a $75 million secured claim while the second mortgage holder will have a $25 million secured claim and a $35 million unsecured deficiency claim. Second, absent extraordinary circumstances, a secured creditor cannot be stripped of its collateral. Until the secured creditor is paid in full, other creditors (including senior unsecured claims, priority claims and the like) may not look to the proceeds or value of the secured creditor's collateral to recover on their claim. Third, if a creditor is "fully secured" (*i.e.*, if the collateral is worth more than the creditor's claim), the creditor is entitled to receive interest on its claim that arises after the bankruptcy ("post-petition interest"), as well as to recover its reasonable fees and expenses. In contrast, unsecured creditors are not entitled to receive post-petition interest and any claim for fees and expenses is only an unsecured claim. Fourth, there is some dispute as to whether a secured creditor can be deemed to be paid "in full" if it receives something other than a secured claim or cash under the plan (for example, if the plan proposes to provide the secured creditor with an unsecured claim in exchange for its secured claim). Many believe that a secured creditor cannot be "forced" to take its recovery in unsecured or equity securities, but this issue has never been fully tested. It is a good practice that, if a debtor wants to provide a secured creditor such treatment, it negotiate and obtain the consent of the secured creditor in advance.

Cram down

If all of the requirements for plan confirmation are met (including consent of at least one impaired class), the bankruptcy court may "cram down" the plan on non-consenting classes of creditors if the plan does not "discriminate unfairly" and is "fair and equitable" to each class of non-accepting creditors. Unfair discrimination and fair and equitable treatment are cornerstone protections for non-consenting classes of creditors in chapter 11.

The prohibition against unfair discrimination protects dissenting classes from disparate treatment among those similarly situated creditors. There is no bright line rule for determining whether a plan discriminates unfairly and courts will generally consider any and all factors before it in making such a determination. Consider the following example. Assume a proposed plan has one class of unsecured "trade" claims (Class I) and one class of "other" unsecured claims (Class II). Assume that both classes are impaired under the plan and that the plan proposes to pay Class I creditors 95% on their claims, but Class II only receives 5% and assume that Class I votes to accept the plan, but Class II rejects the plan. In that instance, the bankruptcy court would first have to determine why the debtor separated the two classes of unsecured claims and whether the disparate treatment was appropriate or unfair. If the court found that the Class I creditors are those that provide unique and essential goods and services whose continuing

relationship with the debtor is vital to the debtor's reorganized business, the court might be more inclined to find that the discrimination is not unfair. Additionally, the court may consider the economic impact on the creditors in the different classes, a court may be able to find that there is no unfair discrimination. While it is possible for a court to find that disparate treatment of creditors with similar legal rights is not unfair discrimination, there is a strong presumption in bankruptcy that creditors with similar legal rights be treated similarly.

The fair and equitable test (the vertical test) for cram down is explicitly set forth in the Bankruptcy Code (unlike the unfair discrimination test). The fair and equitable test is different for secured creditors versus unsecured creditors. For secured creditors, a plan is fair and equitable if:

- the secured creditor retains its security interest in the collateral equal to at least the amount of its claim and the creditor receives deferred cash payments on its claim that are at least as great as the present value of the creditor's collateral; *or*

- the collateral securing the claim is sold free and clear of the lien and the secured creditor's liens attach to the proceeds of the sale; *or*

- the secured creditor otherwise realizes the "indubitable equivalent" of its claims.

Under the first alternative, the retention of liens and receipt of deferred payments, secured creditors must retain the liens securing their claims and must receive deferred cash payments that have a "present value" equal to the amount of the secured claim. Effectively, through cram down, the debtor proposes a modified loan from its secured creditor in an amount equal to the creditor's claim against the debtor, with the loan being secured up to an amount equal to the value of the collateral and any balance being an unsecured claim against the debtor. It is this secured portion that must be paid in deferred payments. The amount of each deferred payment will depend on the amortization of the amount of the debt, the frequency of payments, the interest rate, the length of time over which payments will be made, and the total number of payments made. For example, if the allowed, secured claim amount is $100,000 and the debtor proposes to make monthly payments, with ten percent interest, over ten years, each payment would need to be $1,321.51. If the debtor proposes monthly payments in a lesser amount, the final payment will need to be a "balloon" payment to pay off the balance of the claim; this adds risk to the creditor, but may be accepted if the debtor's prospects for selling or refinancing the collateral are promising.

The second alternative for cram down of a secured claim is to have the debtor sell the collateral securing the creditor's claim. The lien will then attach to any proceeds from the sale of that collateral.

The third alternative for cram down of a secured claim is more flexible (and less well defined) than either of the first two alternatives. Under the third approach, a debtor may cram down a secured creditor if it provides the creditor with the "indubitable equivalent" of its claim. For example, the debtor may propose to simply surrender all or a portion of the collateral to the debtor (or propose some alternative treatment of that creditor). As with "unfair discrimination" in the context of a cram down, there is no bright line rule for determining whether a proposed plan provides a creditor with the indubitable equivalent of its claim. In making such a determination, the court must value the collateral offered by the debtor in comparison with the value of the creditor's existing liens. In a situation where the debtor is offering promissory notes secured by new collateral, the court will consider the debtor's payment history as well as the value of the underlying collateral in valuing the notes.

With respect to unsecured claims, a plan is fair and equitable if: (a) the unsecured creditors in the dissenting class receive at least the amount of their claims, *or* (b) no junior creditor receives or retains any property under the plan.

If a proposed plan meets both the horizontal and vertical tests for cram down (and the other requirements for plan confirmation), the plan may be confirmed over an impaired creditor's objections. After satisfying the requirement that the plan not unfairly discriminate by inappropriately treating similarly situated creditors differently, the battle with respect to whether the plan is "fair and equitable" will be largely dependent on the valuation of the secured creditor's existing collateral whether the debtor is proposing the cram down of a secured claim either through deferred payment and lien retention or by providing the indubitable equivalent.

Item B
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Ohman & Notgood LLP

TO: Kane Richardson, General Counsel of Hexative

FROM: Samantha Law, Esq.

DATE: February 18, 2021

RE: Fiduciary Obligations of Directors and Officers of Financially Troubled Companies

Fiduciary duty law is judicial review of corporate decision making to determine whether a fiduciary should be held liable for poor or incorrect decisions. As discussed further below, courts look to the *process* by which a decision was reached in assessing the decision making. In certain circumstances, a court will also look to the actual *substance* of the decisions that directors and officers of a corporation made. A court will be asked to determine whether the process or, in some cases, the substance of the decision was so poor such that the law should impose financial liability on the directors and officers for those decisions.

A corporation's officers and directors are fiduciaries of and for the corporation. That is, the law imposes upon them an affirmative duty to act in the best interests of the corporation. This is a significantly higher standard of conduct than in other commercial relationships, which may only impose an obligation to deal with counterparties in good faith. When a corporation is financially healthy, the interests of shareholders are paramount and, in the exercise of their fiduciary obligations, directors and officers will generally make decisions intended to maximize the value available for shareholders. However, as a debtor becomes financially distressed, the interests of debtors and creditors usually diverge.[1] Because directors and officers owe fiduciary duties to the corporation, as a debtor becomes financially distressed, the law permits directors and officers to consider the interests of creditors in the discharge of their fiduciary obligations.

Directors and officers owe two principal fiduciary duties to a corporation: they owe a duty of loyalty and a duty of care. The duty of loyalty ordinarily requires that directors and officers be free from conflicting loyalties in the making of decisions for the corporation. When a director or officer has economic or other interests on both (or

[1] Creditors only have a legal interest in being repaid and have a legal priority of payment over shareholders. Therefore, as a company's finances become impaired, creditors may desire that the corporation undertake only conservative financial enterprises intended to ensure creditors' repayment, even if such a course may fully impair the shareholders. In contrast, a shareholder (who may be fully impaired or very close to fully impaired) may have an interest in having the corporation undertaking high-risk /high-return opportunities to avoid shareholder impairment.

multiple) sides of a transaction, the law will deem them to be conflicted and not to have met the duty of loyalty. The duty of care requires that directors and officers have exercised adequate care in reaching a corporate decision. For instance, if directors are deciding whether to incur substantial additional debt financing, a reviewing court may look to evidence of whether the directors adequately informed themselves of the corporation's ability to finance the debt in assessing whether the directors have met their fiduciary duty of care.

In assessing corporate decision-making, courts are conscious of the fact that, in the first instance, directors and officers – and not courts – are charged with operating a corporation's business and making decisions for the corporation. Furthermore, directors and officers are not insurers of the corporation's business. Therefore, in reviewing corporate decision making, courts have developed a rule known as the business judgment rule. The business judgment rule provides that, if a decision was made in good faith and without conflicting loyalties (i.e., if the decision maker satisfies the duty of loyalty), then a court will only impose liability on the decision maker if the decision that was made was so improper that no reasonable decision maker would have reached the decision that was actually made. In practice, the business judgment rule, when invoked, is a powerful protection for corporate decision makers. It helps to ensure that the decision maker will not later be second guessed by a reviewing court other than in the most extreme circumstances. Review by a court under the business judgment rule focuses principally on the *process* by which a decision was made (i.e., was it made without conflicting loyalties) and less on the *substance* of the decision that was made (i.e., liability will only be imposed if the decision was so bad that no rational decision maker would have made a similar decision).

If, on the other hand, a reviewing court finds that the decision maker did not make a decision free from conflicting loyalties (if the decision maker breached the duty of loyalty), then a court will not invoke the business judgment rule and will, instead, impose on the decision maker the obligation of showing that the business decision that was made was "entirely fair." Unlike business judgment review, entire fairness review is a searching inquiry by a court and a court will require that the decision maker establish that the decision was both the product of a fair process and that the decision that was actually reached was substantively fair. In practice, this is frequently a difficult standard to meet and therefore, when a court determines not to apply the business judgment rule, a decision will more frequently be subject to successful attack and a decision maker will more frequently be subject to liability for breach of fiduciary duty.

Decisions made at or near the point of insolvency frequently create the potential for a breach of the duty of loyalty (and, as such, imposition of entire fairness review) that may not exist with a financially healthy entity. For instance, when directors are substantial shareholders, decisions made if the corporation is financially healthy may not be subject to attack because of the directors' substantial shareholdings. However, as the corporation becomes financially weaker, the conflict that emerges between the interests

of shareholders and creditors may lead to a situation where a court later reviewing a decision may not grant the director the benefit of the business judgment rule because of the conflict between shareholders and creditors. In short, as a corporation edges towards insolvency, the fiduciary duty analysis becomes progressively more complicated.

Item C
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Ohman & Notgood LLP

Commented [JL1]: Add section on 502(b)(6)

TO: Kane Richardson, General Counsel of Hexative

FROM: Samantha Law, Esq.

DATE: February 18, 2021

RE: Executory contract and unexpired lease assumption and rejection

When a company files for protection under chapter 11 of the Bankruptcy Code, it may usually "assume" or "reject" its "executory contracts" and "unexpired leases" (hereafter referred to collectively as executory contracts) at any time prior to confirmation of a plan of reorganization pursuant to section 365(a) of the Bankruptcy Code. An executory contract is any contract under which both parties have remaining material unperformed obligations. Courts set a low bar to finding that a contract is executory and therefore, generally favor allowing a debtor to assume or reject its contracts.

The ability to assume or reject executory contracts is a powerful tool for a debtor in bankruptcy. When a debtor "assumes" an executory contract, the debtor agrees, in effect, to continue to honor and perform under the contract both for the balance of the bankruptcy case as well as after the debtor emerges from bankruptcy through the expiration of the contract. When a debtor "rejects" an executory contract, it repudiates its further obligations under the contract. As discussed below, the non-debtor to the contract may file a claim against the debtor for damages in the bankruptcy for damages arising from the rejection (as well as other claims it may have) and that claim is treated similarly to other pre-bankruptcy claims against the debtor.

One important limitation on a debtor's ability to assume or reject an executory contract is that, absent consent of the non-debtor party, the debtor must assume or reject the contract in whole; the debtor may not cherry-pick provisions from a contract that it wants to assume, while seeking to reject other provisions of the same agreement. Absent consent, an executory contract must be assumed or rejected in its entirety, with all of its benefits and burdens.[1]

[1] It is not uncommon, and it is perfectly appropriate, for a debtor to seek to renegotiate some or all of its executory contracts in a bankruptcy proceeding based upon current market and other circumstances. If the non-debtor agrees to modify certain terms of a contract in exchange for an assumption of that contract, that may be done with court approval. However, a debtor (and a bankruptcy court) may not unilaterally rewrite the debtor's contracts without consent of the non-debtor party to the contract.

The Bankruptcy Court must authorize the debtor's proposed assumption or rejection of each of its executory contracts. Bankruptcy courts are generally deferential to a debtor's determination to assume or reject and will generally approve the debtor's determination if it is supported by sound business judgment. Generally, a debtor will assume those executory contracts it believes are prospectively economically advantageous and will reject those contracts it believes are not prospectively economically advantageous. Pending court approval of the debtor's determination to assume or reject, the debtor and the non-debtor party must continue to perform their obligations under the contract. In this regard, the non-debtor party generally remains entitled to be paid in full for its performance under the contract from the date of the bankruptcy filing until the date of rejection of the contract.

When a debtor rejects an executory contract, the non-debtor party to the rejected contract may file a claim against the debtor for damages that arise from the rejection of the executory contract. The calculation of damages is controlled by underlying state law. By way of example, if a debtor has a contract to purchase 100 widgets per year for the next 3 years at $50/widget and the market price for widgets falls, the debtor will ordinarily seek to reject the contract and, after rejection, the non-debtor party may file a claim against the debtor for its damages arising from the contract rejection. In this example, the non-debtor may file a claim arising from the rejection of the contract for as much as $15,000 (100 widgets per year * $50/widget * 3 years). That claim will be treated and paid along with similarly situated creditors that had claims that arose prior to the filing of the bankruptcy case.

State law (which generally governs the calculation of claims against the debtor) ordinarily requires that a party to a breached contract use reasonable efforts to mitigate its damages from the breach. The same is required in bankruptcy and any mitigation achieved by the non-debtor party will reduce that party's claim against the debtor. Consider again the widget example above. If, after rejection, the non-debtor is able to find a different buyer for the same widgets over the same time period, but who will only pay $40/widget rather than the $50/widget the debtor had agreed to pay, the rejection damages claim that the non-debtor can file is based upon the difference in price it can obtain for its widgets – $3000 (100 widgets per year * $10/widget reduction in contract price * 3 years).

The power to assume or reject an executory contract in bankruptcy is significant for a debtor. It permits the debtor to retain (*i.e.*, assume) those contracts that are beneficial to it and walk away from (*i.e.*, reject) those that are not. Furthermore, those contracts that it rejects are treated as pre-bankruptcy claims that may be compromised (or paid less than in full) in a plan of reorganization. The debtor is also given the luxury of time – it may assume or reject its executory contracts at any time prior to confirmation of a plan of reorganization and, pending that determination, it may force the non-debtor to continue to perform under the executory contract. Therefore, a debtor can (and should) "time" its decision to assume or reject. If an executory contract is economically

beneficial on day 1, but becomes non-beneficial by the end of day 120 and thereafter, then the debtor should maintain the executory contract for the first 120 days of its bankruptcy (to extract the benefit) and thereafter reject the executory contract when it becomes non-beneficial on day 120.

One word of caution is appropriate in trying to "time" assumption or rejection of executory contracts. The debtor may only make the decision to assume or reject one time. If the debtor rejects, and its predictions of the future of the market do not turn out to be accurate, the debtor may not later seek to assume the contract. Similarly, if the debtor assumes the contract, it may not later seek to reject that same contract. Rather, it may breach the contract. However, that breach is treated as a post-bankruptcy filing breach (rather than a pre-bankruptcy filing breach) and therefore the damages arising from the breach must be paid in full to confirm a plan of reorganization (and therefore, unlike a rejection, the claim that arises from the post-bankruptcy breach is not subject to compromise in the course of the bankruptcy case).

Item D
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Ohman & Notgood LLP

TO: Kane Richardson, General Counsel of Hexative

FROM: Samantha Law, Esq.

DATE: February 18, 2021

RE: Use of cash collateral and "DIP" financing

Upon filing for bankruptcy, a debtor who has granted liens in any "cash collateral" may not use that cash collateral without approval of the bankruptcy court or the consent of the holder of the lien. Cash collateral includes both cash that a debtor holds when it files for bankruptcy and any subsequent cash that is generated from the proceeds of a lien-holder's collateral (by, for instance, collecting accounts receivable). The limitation on a debtor's ability to use cash collateral is critical and may thwart a debtor's attempts to reorganize. Ideally, a debtor will negotiate with its lien-holders prior to filing for bankruptcy to come to agreeable terms and conditions under which the debtor will be permitted to use its cash collateral. A debtor will often agree to make periodic payments to the cash collateral lien-holder, grant "replacement liens" in newly generated accounts, limit its use of cash in accordance with a an approved budget, and/or only use cash through a certain period in time, among other things.

Absent agreement with a debtor's lien-holders, a debtor must obtain bankruptcy court authority to use cash collateral (usually over the objection of the lien-holder). A bankruptcy court will only permit the debtor to use cash collateral over the objection of the lien-holder if the lien-holder is "adequately protected." That is, in exchange for the continued use of the lien-holder's cash collateral (and the resulting diminution in value of that collateral from its use), the debtor must compensate the lien-holder. The form of compensation is flexible and may include periodic cash payments, replacement liens, or anything else that provides the creditor with the "indubitable equivalent" of its interest in the debtor's property. These restrictions are intended to ensure that the lien-holder is not harmed by the delay caused by the bankruptcy and the debtor's continued use of the lien-holder's collateral during the pendency of the bankruptcy case.

Use of cash collateral is often insufficient to fund a debtor's operations in bankruptcy. The Bankruptcy Code permits a debtor to obtain additional financing to operate its business during the case, if necessary. The Bankruptcy Code permits a debtor to obtain either unsecured financing or secured financing, and permits a debtor to obtain secured financing that is junior to, ratable with, or senior to existing financing. In order to obtain secured financing, the debtor must show that it was unable to obtain unsecured financing. Further, if a debtor wants to obtain financing that is senior to or ratable with existing financing, it must show that it was unable to obtain either unsecured financing or

financing secured by a junior lien. Finally, in order to secure financing that is senior to or ratable with existing financing, the debtor must show that the existing secured creditor will be adequately protected in its interest in the debtor's collateral.

It is common for a debtor's pre-bankruptcy lender to provide post-bankruptcy financing (to the extent financing is needed). There are a number of dynamics that drive this result. First, generally it is difficult for a debtor in bankruptcy to obtain any financing that is not secured (after all, the debtor is in bankruptcy and therefore has shown itself not to be creditworthy). Second, a party providing new financing will ordinarily not agree to lend into a bankruptcy at a junior level to existing creditors. Therefore, frequently the only realistic opportunity to obtain new financing is to grant senior liens in the debtor's property. Most existing lenders will vigorously contest such an effort (this is known as a "priming" fight). Furthermore, it may be difficult for a debtor to establish that the existing lender will continue to be adequately protected if it is placed into a junior position. And finally, throughout these disputes, the debtor may not have access to incremental financing or otherwise be permitted to use cash collateral. For all of these reasons, it is most common for debtors that need incremental bankruptcy financing to obtain that financing from its existing lender or lenders.

Item F
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Ohman & Notgood LLP

TO: Kane Richardson, General Counsel of Hexative

FROM: Samantha Law, Esq.

DATE: February 18, 2021

RE: Treatment of Collective Bargaining Agreements in Bankruptcy

Overview

A collective bargaining agreement (a "CBA") is a form of executory contract. In a bankruptcy proceeding, a company (the "debtor") is given wide latitude to "reject" its executory contracts and unexpired leases (these standards are discussed in the legal primer on section 365 of the Bankruptcy Code). However, unlike most other executory contracts, the Bankruptcy Code imposes additional procedural and substantive hurdles upon a debtor before it can reject a CBA.

The procedure to reject a CBA is set forth in section 1113 of the Bankruptcy Code. Prior to seeking authority to reject a CBA, the debtor must first make a proposal to the union seeking modifications of the CBA "that are necessary to permit the reorganization of the debtor while still allowing all creditors, the debtor and all of the affected parties to be treated fairly and equitably." The proposal must be based upon the most complete and accurate information available to the debtor at the time of the proposal. And, thereafter, the debtor must provide the union with information adequate to permit the union to evaluate the proposal and must meet with the union to engage in negotiations over the proposal.

If a debtor has met these requirements and has not been able to reach an agreeable modification of the CBA with the union, a debtor may seek bankruptcy court approval to reject the CBA. The court must approve the proposed rejection if the debtor fulfilled the procedural requirements outlined above, the union refuses to accept the proposed modification "without good cause," and the balance of the equities "clearly favors rejection" of the agreement.

Prior to a bankruptcy court authorizing rejection of a CBA, the debtor must continue to perform under the CBA.[1] Therefore, a debtor must continue to pay wages

[1] The Bankruptcy Code does permit a bankruptcy court to modify a CBA temporarily in certain limited circumstances. Generally, a bankruptcy court will only permit temporary modification if the modification is essential to the continuation of the debtor's business, or in order to avoid irreparable damage to the debtor's bankruptcy

and benefits in accordance with the CBA as they become due, and, if the debtor fails to do so, it will violate the obligations imposed on the debtor under the Bankruptcy Code. Additionally, any such breach by a debtor may result in denial of any relief under a CBA by a bankruptcy court.

"Necessary Modifications"

As noted above, a debtor's proposal to a union must include only those modifications necessary to permit the reorganization[2] of the debtor. Most courts recognize that a "necessary" modification may be one that goes beyond the bare minimum needed to avoid liquidation. Some courts take a stricter approach and find that "necessary" is synonymous with "essential," and a debtor's proposal may include only those items absolutely necessary for the debtor's reorganization.

To show that a modification is "necessary" a debtor must introduce financial evidence showing that the modifications will have a significant monetary impact on improving the debtor's financial condition. At issue should be the economic items contained in a CBA, not its noneconomic provisions. Economic items include those 'directly susceptible to monetary evaluation, such as wages, vacations, holidays, and pension and welfare contributions.' Noneconomic items include such things as a 'management rights' clause, grievance and arbitration provisions, union security, a no-strike promise, and seniority provisions. Changes in noneconomic items, such as work rules, seniority, and grievance and arbitration procedures, generally do not come within the scope of a "necessary" modification unless a debtor can establish a clear monetary impact on reorganization.

Fair and Equitable Treatment

A proposed modification must treat all affected parties fairly, to ensure that the burden of reorganization will be borne by all groups. "Fair and equitable" does not mean identical or equal treatment as between the union and other constituents. Rather, equity means fairness under the circumstances, not a dollar for dollar concession. The purpose

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estate. Bankruptcy courts will ordinarily only permit temporary modifications of a CBA if, absent such modification, the debtor will be forced to liquidate.

[2] The necessity requirement presumes that the debtor will continue to operate the business which is employing those who work under the CBA. The necessity requirement does not contemplate the liquidation or sale of the business to a new employer. The debtor may sell the business to a new employer as a functioning operation. Under the Supreme Court's labor law successorship doctrines, a buyer of a business concern is not bound by the seller's CBA unless the buyer expressly assumes the contract. If a successor employer continues to employ a majority of the former owner's employees, it may be under a duty to recognize and bargain with the employees' union, but it is not bound by the debtor's CBA.

is to spread the burden of saving the company to every constituency while ensuring all sacrifice to a similar degree. Courts do not look favorably on proposals which fail to require other groups, especially managerial and other non-union employees, to bear their share of concessions. In analyzing whether a proposal satisfies the "fair and equitable" requirement, some courts have focused on whether the proposal includes a "snap-back" provision that provides that benefits will be reinstated if the reorganization succeeds.

The Balance of Equities Must "Clearly Favor" Rejection

Courts look at a number of factors to determine whether the equities favor rejection, including: the extent of the savings to be realized by the debtor and any alternate means of cost reduction; the relative amount of management salaries compared to union wages; the identity of the other creditors and the amounts of their claims; the likelihood and consequences of a strike if rejection is allowed; the possibility of employee claims for breach of contract if rejection is approved; the possibility of liquidation; the impact of the losses suffered by the individual employees in proportion to the losses suffered by the other creditors; and the good faith of the parties.

Other Considerations

If Rejection is Denied

If the bankruptcy court denies the debtor's rejection motion, the CBA continues in effect during the bankruptcy case until it expires by its own terms. The contract rates in the CBA will continue to set the rates for the valuation of any claims filed in the bankruptcy, whether they are administrative expense claims or priority claims. The union will continue to be bound by the CBA and by any agreement not to strike during its term.

If Rejection is Granted

If rejection is granted, the CBA will ordinarily be terminated. After termination, no CBA will be in effect between the parties, and the parties will be subject to normal labor law obligations, which may require bargaining for a new contract. The employer may make unilateral changes in the prevailing status quo, but only after it has bargained to an impasse with the union. If the court has approved interim changes, these interim changes along with the unilateral provisions of the CBA, constitute a new, temporary, status quo in the terms of conditions of employment. Any changes imposed by a debtor must be consistent with the debtor's last offer to union.

As soon as rejection is granted, regardless of whether the debtor is allowed to implement any unilateral changes immediately, the union is free to call a strike because it is as if there is no CBA in place. Once the contract ends, the union is released from any no-strike obligation imposed by the rejected CBA.

Faculty

Michael Friedman is a partner and practice group leader of Chapman and Cutler LLP's Bankruptcy and Restructuring Group in New York, and head of the firm's Israel practice. He focuses his practice on special-situation financings, investments and acquisitions, bankruptcy, and financial restructurings, including the representation of investors and debt-holders in event-driven debt financings, equity investments, acquisitions, financial restructurings and bankruptcy proceedings. Mr. Friedman regularly represents credit funds, hedge funds, private-equity funds, alternative lenders, investment banks and financial institutions. He also advises Israeli financial institutions, investment funds and trustees on U.S.-based special-situation finance and restructuring matters. Mr. Friedman's broad finance, M&A, bankruptcy and restructuring experience allows him to help clients structure event-driven and special-situation financings and investments in a manner that will allow them to achieve their business objectives in the most efficient and cost-effective manner. He regularly speaks at industry conferences on distressed-investing and restructuring topics, and lectures to undergraduate business and M.B.A. students on restructuring topics; he is currently an adjunct professor teaching a class on corporate restructurings at Yeshiva University. In addition, he has co-authored three case studies, one of which has been published, that highlight restructuring concepts in both for-profit and nonprofit entities and have been presented in business schools and at industry conferences. Mr. Friedman received his B.A. in 1988 from Yeshiva University and his J.D. *cum laude* in 1991 from the University of Pennsylvania Law School.

Larry G. Halperin, CPA is a partner in Chapman and Cutler LLP's Bankruptcy and Restructuring Group and co-office leader of the firm's New York office. He focuses his practice on the financial restructuring of distressed companies, high-yield and distressed-debt transactions, commercial lending transactions, and mergers and acquisitions. Mr. Halperin typically represents agents, private funds, investment banks and financial institutions in connection with their investments in, and financing transactions to, mid-cap companies. He also represents special restructuring committees of boards of directors and independent directors of distressed companies in restructuring matters. As part of his M&A practice, Mr. Halperin has counseled clients who desire to acquire portfolio companies in need of restructuring by acquiring such companies' distressed debt. He has advised lenders in connection with an orderly exercise of remedies to achieve a practical, business-oriented restructuring solution for the company and the acquiring fund. He also advises clients participating in the global secondary market for troubled and non-performing loans and claims. Mr. Halperin speaks at industry conferences on distressed investing and restructuring topics, including ABI's VALCON conference, American College of Investment Counsel (ACIC) conferences, and Turnaround Management Association (TMA) conferences and chapter programs. In addition, he teaches a corporate restructuring class as an adjunct professor at the Darden School of Business at the University of Virginia, and he is a popular restructuring class guest lecturer for undergraduate business and M.B.A. students at Columbia University and the University of Michigan, as well as the University of Michigan Maize and Blue Fund and the University of Michigan Entrepreneur & Venture Club. Mr. Halperin received his B.B.A. in 1982 with distinction from the University of Michigan and his J.D. *cum laude* in 1987 from the University of Pennsylvania Law School.

Prof. C. Randel Lewis is a senior adjunct professor at the Daniels College of Business at the University of Denver in Denver. He co-teaches the graduate-level capstone course in strategy and finance, the undergraduate capstone course in corporate financial theory, the one- and three-day executive education courses in strategy and finance, and national-level professional education programs in law and finance, and he is an occasional guest lecturer at the Strum College of Law at the University of Denver. He received the all-university Ruth Murray Underhill Adjunct Teaching Award. Prof. Lewis brings a deep understanding of and insight into business and legal strategy, particularly in financially or operationally difficult situations. He has experience in advising and mentoring clients in developing successful business solutions in highly contested environments. He serves regularly as a mediator, expert witness, consultant and a court-appointed fiduciary for distressed businesses and quasi-governmental entities. Prof. Lewis received his B.A. in economics from Colorado College and his J.D. from the University of Denver Sturm College of Law, and has completed coursework at the Center for Understanding Through Conflict (formerly Center for Mediation in Law), Columbia Business School Certificate of Business Excellence - Advanced Management Program, and the Teachers College at Columbia University Coaching Certification Program.

Dr. David C. Smith is the Virginia Bankers Association Professor of Commerce at the University of Virginia in Charlottesville, Va. His areas of expertise include corporate valuation, restructuring and bankruptcy, leveraged finance and distressed investing. Dr. Smith has presented his research at universities and conferences around the world and published in leading academic journals. He also has worked as a testifying finance expert on cases related to company valuation, bankruptcy, corporate debt instruments, securities violations, pension funding and distressed-debt trading. Dr. Smith currently teaches classes in corporate finance and corporate restructuring and distressed-debt investing. He has also taught courses on valuation and fixed income to undergraduates and M.B.A. students. Prior to joining the University of Virginia, Dr. Smith was an economist in the International Finance Division of the Federal Reserve Board and an assistant professor at the Norwegian Business School. He received his Ph.D. in finance from the Kelley School of Business at Indiana University.