



AMERICAN
BANKRUPTCY
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2021 Rocky Mountain Bankruptcy Virtual Conference

Taming a Black Swan: Establishing Feasibility in Uncertain Times

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Davis Graham & Stubbs LLP | Denver

CONCURRENT SESSION

2021



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The Economic
Consequences of COVID-
19

Danny Bachman, US Economic Forecaster

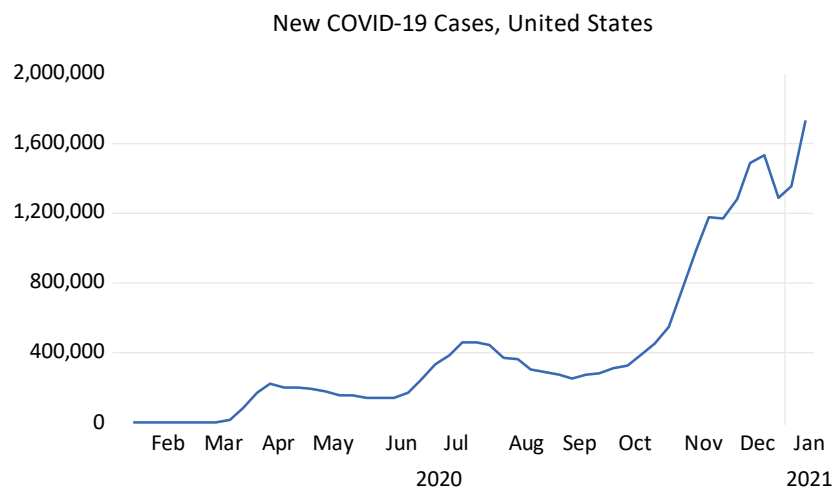




"The path forward for the economy is extraordinarily uncertain and will depend in large part on our success in keeping the virus in check." — Fed Chairman Jerome Powell

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US Economic Outlook 3



Source: Johns Hopkins/Haver Analytics

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US Economic Outlook 4

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Change in economic measures by timing of state closures



Source: New York Times, Raj Chetty, et.al.

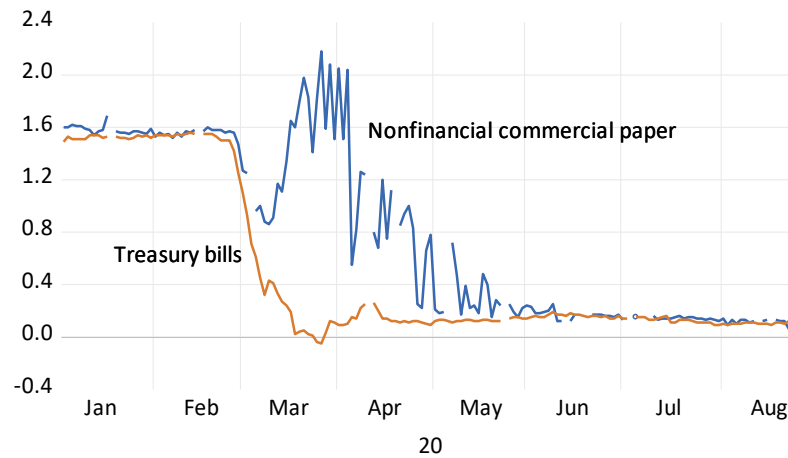
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US Economic Outlook

5

3-month interest rates
Percent



Source: Federal Reserve/Haver Analytics

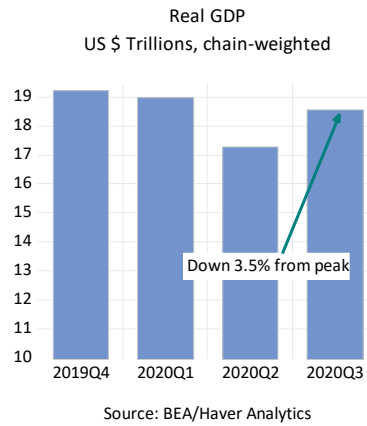
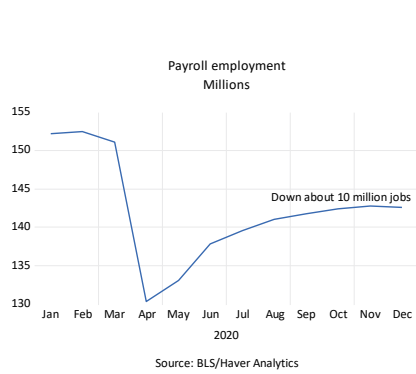
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US Economic Outlook

6

2021 ROCKY MOUNTAIN BANKRUPTCY VIRTUAL CONFERENCE

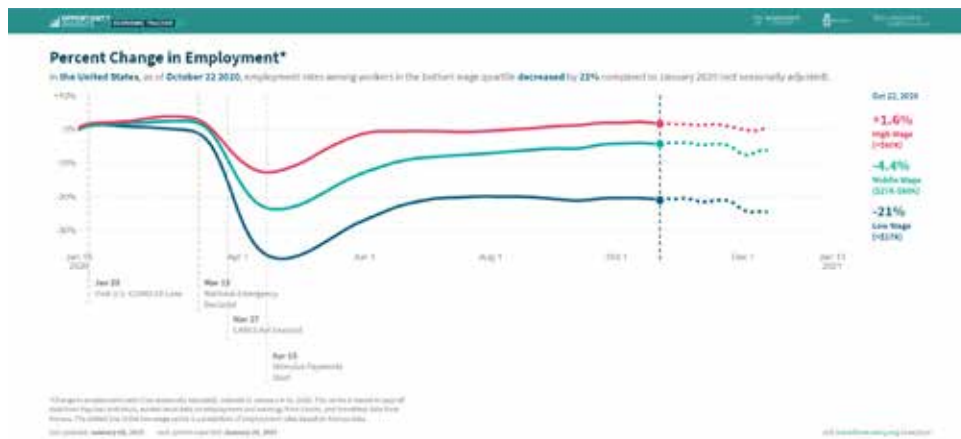


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US Economic Outlook

7



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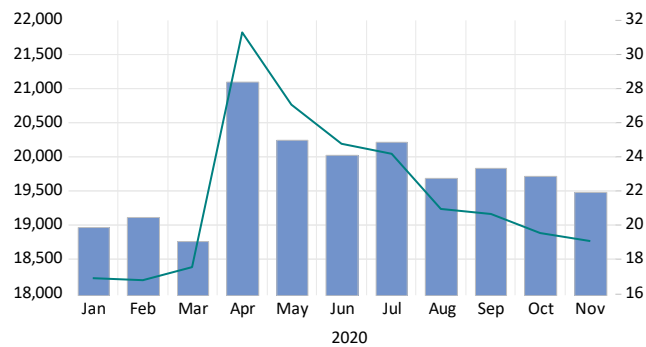
US Economic Outlook

8

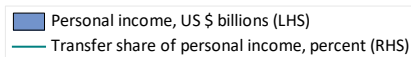
“This is not even a stimulus package. It is emergency relief.” Then Senate majority leader Mitch McConnell on the CARES act.



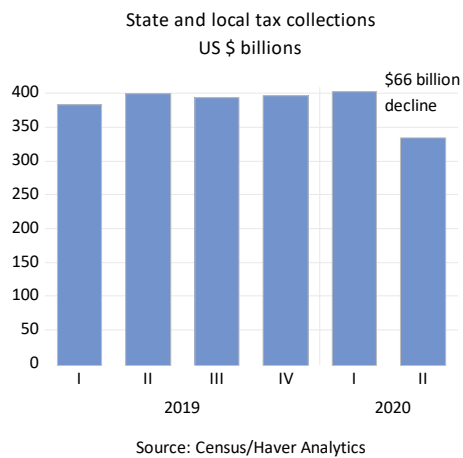
Source: Congressional Record, Wednesday, March 25, pages S2021-22.



Source: BEA/Haver Analytics



There's a hole in state and local tax collections.

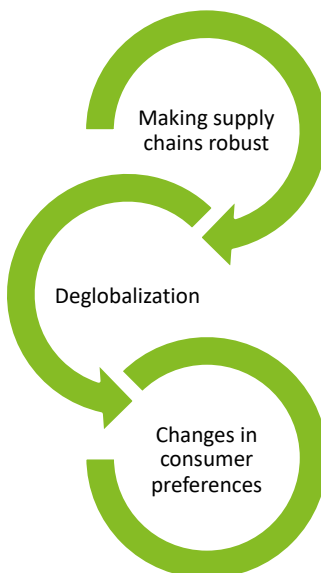


Source: Urban Institute, https://www.urban.org/sites/default/files/2020/07/01/monthlystrh_may2020.pdf

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US Economic Outlook 11

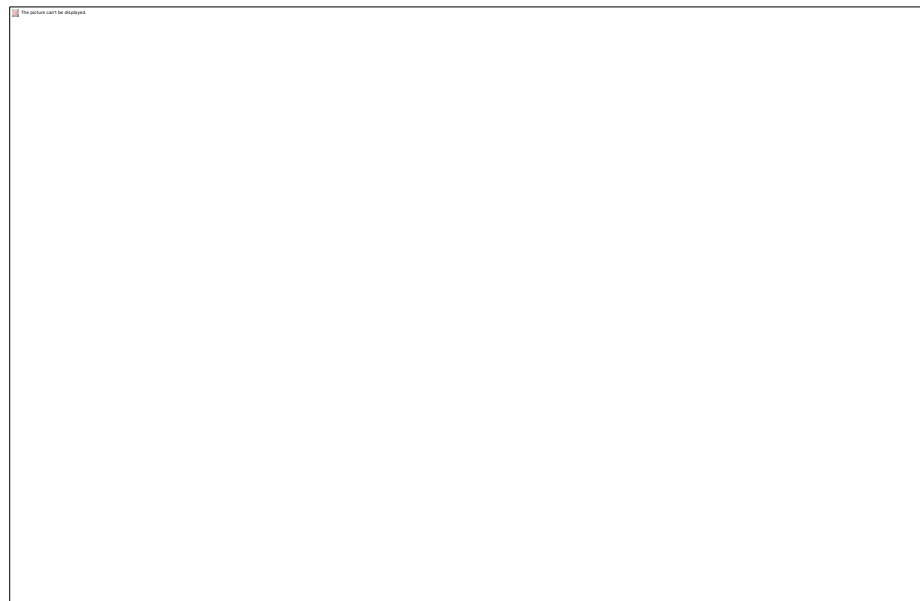
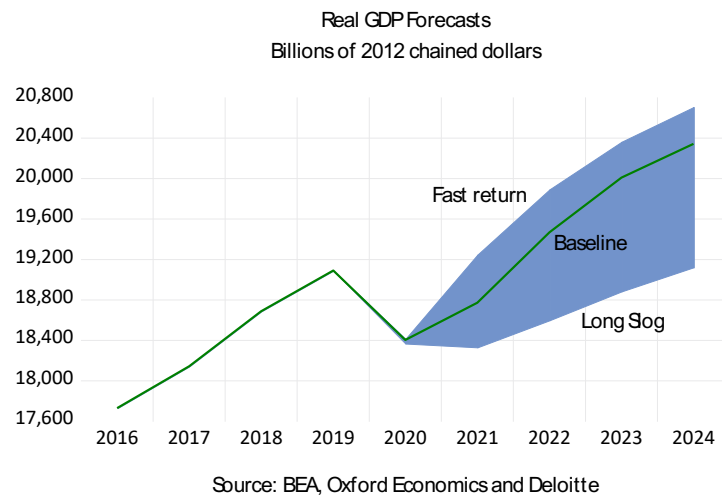
Some things that might raise costs and reduce productivity



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US Economic Outlook 12

Three scenarios



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Reasonable, Data-driven Projections

- Company Data
- Industry Data
- Economic Data



Benchmarks within the company itself:

- What is the company's track record 6 months into the pandemic?
 - How have operations been impacted?
 - Loss in demand for gas and fossil fuel.
 - Increase in demand for at-home broadband.
 - Greenhouse operators ability to pivot demand away from restaurants.
 - How has the company adapted?



Benchmarks within the company itself:

- Analysis of the company itself for benchmark data driving demand.
 - Is there a backlog of demand?
 - Has demand shifted and has the company adapted?
 - Has demand truly declined and has the company adapted its cost structure accordingly?
 - Price increases, price decreases?



What Industry Benchmarks are Available?

- Industry analyst forecasts.
- Guideline public company forecasts.
- Identify industry demand drivers and related metrics.



What is the Forecast for the Broader Economy?

- In conjunction with company and industry demand drivers, what are economists saying about the economy as a whole?
- Economic reports are giving scenarios of recovery and timelines to returning to pre-COVID levels.



What has been the impact on operating costs?

- New costs related to a modified operating environment?
- Changing costs as the environment is still being assessed?
 - Technology costs taking the place of real property leases?
 - What changes to the operating environment need to be considered?

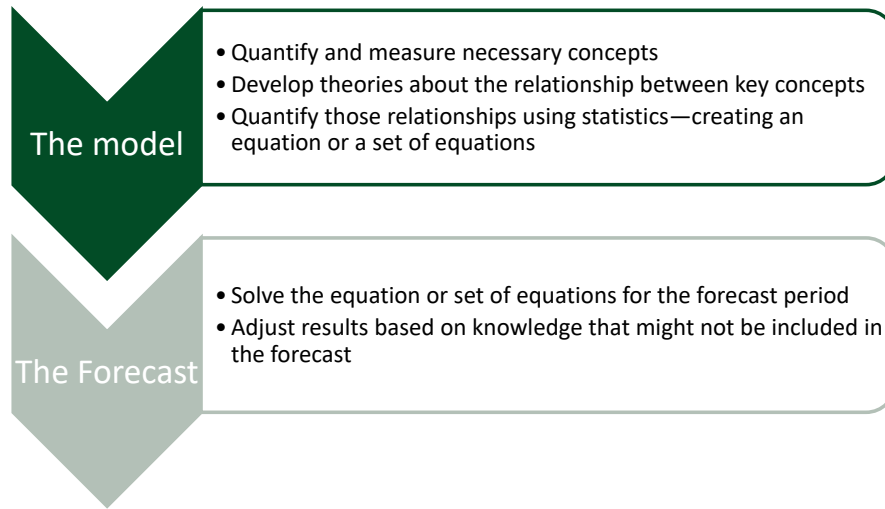
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Where do those numbers come from?



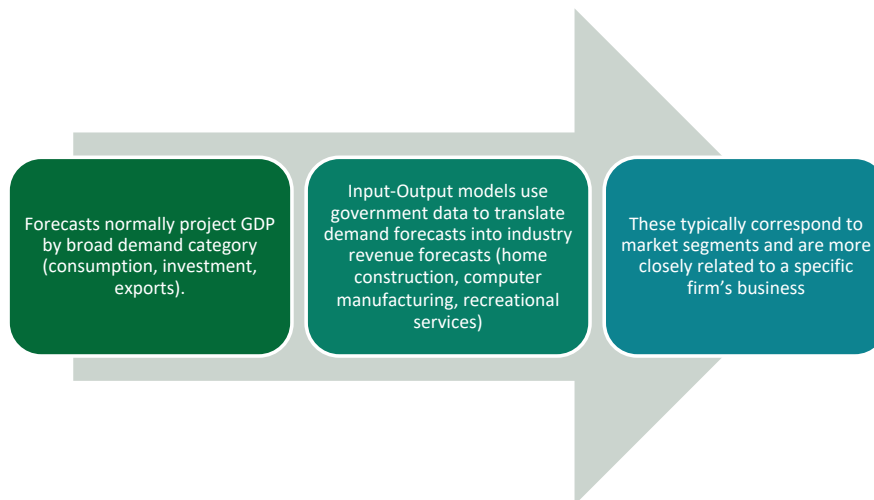
The procedure for creating a forecast



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23

From Macro to Industry



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24

Sources of Economic Forecasts

Government sources	May not have detail you need
	Use case may not fit your need
	Special cases: Energy, agriculture
Forecasting companies	Usually have industry detail
	Expensive
	Will provide support
Wall Street/Consulting companies	Free! But could be biased
	Quantitative industry detail likely not available
Forecast aggregators	Useful picture of “consensus”
	Industry detail not available
	Forecast may not follow logic (because of averaging.)

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25



Feasibility requirement of § 1129(a)(11)

- The court shall confirm a plan only if all of the following requirements are met:
 - (a)(11): “Confirmation of the plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor or any successor to the debtor under the plan, unless such liquidation or reorganization is proposed in the plan.”
 - i.e. Avoid a Chapter 22
- Requires an assessment of Debtor’s ability to **actually make** all of the payments called for under its plan of reorganization
- Works together with “best interests”



Feasibility Standard

Reasonable possibility of a successful reorganization within a reasonable time



Nature of Proof for Feasibility

- Some concrete evidence of actual and realistic reorganization prospects
 - More than vague hopes & dreams
 - Make a legitimate business case, with documentation, financials, market analyses, etc.
 - Akin to sort of evidence business would have to present to bank if were trying to get a business loan
 - Doesn't have to be overwhelmingly conclusive – but it has to at least pass the laugh test!!



PLAN IS NOT FEASIBLE IF:

- Based on “unfounded assumptions and dubious calculations rendered it entirely unreliable”
- “Entirely conjectural”
- A “shot in the dark”



Factors Courts Consider for Feasibility

- Adequacy of the capital structure
- Earning power of the business
- Economic conditions
- Ability of management
- Probability of continuation of the same management
- Any other factor that determines the prospects of a succinct and successful operation to enable performance of the plan



CASE STUDY: Fitness

- 24 Hour Fitness
 - Filed in Delaware on June 15, 2020, citing COVID
 - GLG US, one of the non-RSA minority DIP lenders, filed an objection to the plan based, in part, on feasibility
 - GLG argued that the plan which converts GLG's claim into equity rather than paying it cash is not feasible because GLG will not release its liens on collateral, which is a condition precedent under the plan
 - The Judge agreed with the debtors—that there was never a requirement in the DIP documents for payment in full in cash—non cash treatment was always contemplated, and confirmed the plan.



CASE STUDY: Retail

Art Van Furniture/ Love's Furniture

- Filed on March 6, 2020 in EDMich—pre-COVID
 - Reason for filing: online furniture sales, increased costs from tariffs
- However, the nationwide COVID shutdowns began within 10 days of the filing, causing the proposed sale to fall through and the case to convert to Chapter 7 within 1 month
- One of the buyers of certain stores, Love's Furniture, filed for bankruptcy in early January 2021
- Reason: scaled up too fast; high demand but logistical problems with delivery of furniture (\$7mm in furniture deposits) leading to poor customer reviews
- Feasibility issue: how do you control for factors like logistics over which you have no control?



CASE STUDY: Restaurant

- Punchbowl Social—Eater-Tainment Venue (bar, restaurant, ping pong)
 - COVID forced closure of all locations
 - Cracker Barrel parent refused to sign guaranty after COVID closures
 - Secured creditors moved for an Article 9 sale of the equity interests, debtor filed for bankruptcy in Delaware in December, 2020
 - Likely feasibility strategy--playing a waiting game to buy time for COVID to end
 - Plan is not due until February 2021



Feasibility Post-COVID

- Feasibility rarely challenged post-COVID, likely due to continued uncertainty in all industries
- Feasibility challenge is EXPENSIVE
- Likely it is being challenged behind the scenes by creditors but resolved as part of a settlement
- Trends: since COVID, seeing rapid bankruptcy exits, making feasibility difficult to challenge
- Debtors are using bankruptcy as a true “breathing spell” to play the waiting game until it is safer to emerge



Case Study



Background

- Hotel, LLC is an older hotel located in a highly trafficked region with good airport proximity with competing hotels in the vicinity.
- Hotel, LLC has experienced significant reduction in occupancy and 60% reduction in revenue since the COVID-19 pandemic began.
- While solvent on a balance sheet, Hotel, LLC is unable to continue servicing its debt and other obligations.
- Hotel, LLC entered into a forbearance agreement with its senior secured lender several months into the COVID-19 pandemic, but the senior secured lender will not extend the forbearance period.
- Hotel, LLC has remained current with most vendors, but aging on some accounts is 30-60 days.
- Hotel, LLC understands that credit market is frozen at least until the summer 2021.
- Commercial real estate market is expected to heat up despite COVID-19 disruptions.



Hotel, LLC Balance Sheet

	As of December 31,		
	2018	2019	2020
Assets			
Total Current Assets	1,035,888	1,059,531	477,854
Total Property, Plant & Equipment	26,557,000	27,527,000	26,967,000
Long-Term Notes Receivable	-	285,000	285,000
Net Goodwill	500,000	500,000	500,000
Total Other Assets	27,057,000	28,312,000	27,752,000
Total Assets	\$ 28,092,888	\$ 29,371,531	\$ 28,229,854
Liabilities			
Total Current Liabilities	905,393	1,142,724	2,560,063
Long Term Debt	21,600,000	20,583,000	19,427,000
Total Liabilities	\$ 22,505,393	\$ 21,725,724	\$ 21,987,063
Stockholders' Equity			
Total Stockholders' Equity	5,587,495	7,645,807	6,242,791
Total Liabilities and Equity	\$ 28,092,888	\$ 29,371,531	\$ 28,229,854



Hotel, LLC P&L

	For the Year Ended December 31,		
	2018	2019	2020
Room Revenue	\$10,993,745	\$10,013,882	\$4,005,553
Other Revenue	\$98,944	\$90,125	\$36,050
Total Revenue	\$11,092,689	\$10,104,007	\$4,041,603
Operating Expenses			
Salaries & Wages	\$3,298,124	\$3,004,165	\$1,602,221
Utilities	\$1,649,062	\$1,502,082	\$1,201,666
Repairs & Maintenance	\$879,500	\$801,111	\$600,833
Insurance	\$35,257	\$37,812	\$45,234
Office Supplies	\$18,327	\$18,217	\$15,325
Advertising & Marketing	\$25,000	\$27,000	\$35,000
Bad Debt Expense	\$45,000	\$60,750	\$23,842
Depreciation	\$500,000	\$530,000	\$483,833
Total Operating Expenses	\$6,450,269	\$5,981,136	\$4,007,954
Operating Income	\$4,642,420	\$4,122,870	\$33,649
Other Income/(Expense)			
Interest Income	\$4,574	\$5,676	\$1,823
Interest Expense	(\$1,785,000)	(\$1,680,000)	(\$1,520,000)
Gain/Loss on Sale of Assets	\$34,900	\$0	(\$191,872)
Total Other Income/Expense	(\$1,745,526)	(\$1,674,324)	(\$1,710,049)
Net Income	\$ 2,896,894	\$ 2,448,546	\$ (1,676,400)



Hotel, LLC Projections

	For the Year Ended December 31,			Projected December 31,		
	2018	2019	2020	2021	2022	2023
Room Revenue	\$10,993,745	\$10,013,882	\$4,005,553	\$4,876,756	\$6,062,183	\$7,577,729
Other Revenue	\$98,944	\$90,125	\$36,050	\$4,877	\$6,062	\$7,578
Total Revenue	\$11,092,689	\$10,104,007	\$4,041,603	\$4,881,633	\$6,068,245	\$7,585,306
Operating Expenses						
Salaries & Wages	\$3,298,124	\$3,004,165	\$1,602,221	\$1,950,702	\$2,424,873	\$3,031,092
Utilities	\$1,649,062	\$1,502,082	\$1,201,666	\$1,219,189	\$1,212,437	\$1,515,546
Repairs & Maintenance	\$879,500	\$801,111	\$600,833	\$877,816	\$909,327	\$985,105
Insurance	\$35,257	\$37,812	\$45,234	\$55,072	\$68,459	\$85,574
Office Supplies	\$18,327	\$18,217	\$15,325	\$14,630	\$18,187	\$22,733
Advertising & Marketing	\$25,000	\$27,000	\$35,000	\$48,768	\$60,622	\$75,777
Bad Debt Expense	\$45,000	\$60,750	\$23,842	\$29,027	\$36,777	\$45,971
Depreciation	\$500,000	\$530,000	\$483,833	\$589,067	\$484,975	\$401,063
Total Operating Expenses	\$6,450,269	\$5,981,136	\$4,007,954	\$4,784,272	\$5,215,656	\$6,162,860
Operating Income	\$4,642,420	\$4,122,870	\$33,649	\$97,361	\$852,589	\$1,422,446
Other Income/(Expense)						
Interest Income	\$4,574	\$5,676	\$1,823	\$2,220	\$3,436	\$3,153
Interest Expense	(\$1,785,000)	(\$1,680,000)	(\$1,520,000)	(\$1,275,000)	(\$900,000)	(\$325,000)
Gain/Loss on Sale of Assets	\$34,900	\$0	(\$191,872)	(\$188,035)	\$0	\$0
Total Other Income/Expense	(\$1,745,526)	(\$1,674,324)	(\$1,710,049)	(\$1,460,815)	(\$896,564)	(\$321,847)
Net Income	\$ 2,896,894	\$ 2,448,546	\$ (1,676,400)	\$ (1,363,454)	\$ (43,975)	\$ 1,100,599



Panelists

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Faculty

Dr. Daniel Bachman is a senior manager with Deloitte Services LP in Washington, D.C., and is responsible for Deloitte's quarterly U.S. Economic Forecast. Prior to coming to Deloitte, he worked as a forecaster, economic analyst and model expert at the U.S. Commerce Department and for several economic consulting companies. He also taught economics at Temple University. Dr. Bachman's first professional job was at Israel's Ministry of Finance. He is a participant in the *Wall Street Journal's* Economic Forecasting panel and George Washington University's H.O. Stekler Research Seminar on Forecasting. He is an active member of the National Association for Business Economics and the National Economics Club. Dr. Bachman has published a number of articles in peer-reviewed economics research journals. He received his B.A. from Johns Hopkins University and his Ph.D. from Brown University.

Katherine R. Catanese is a partner and bankruptcy and restructuring attorney with Foley & Lardner LLP in New York, where she focuses her practice on the representation of creditors' committees, post-confirmation trusts and trustees, especially in fraud-based litigation. She also focuses her practice on cross-border fraud and representation of investors and managers in hedge funds both onshore and offshore in bankruptcy litigation including involuntary bankruptcies and chapter 15 bankruptcies. In this regard, she assisted in filing an involuntary petition for a group of hedge fund creditors, then assisted in procuring a settlement in that bankruptcy that resolved over a dozen lawsuits in the U.S. and offshore and is liquidating the remaining hedge fund assets. She also has experience in bankruptcy appeals and successfully persuaded a federal appeals court to affirm the dismissal of a "rogue" bankruptcy petition by the ousted former board of directors of a scandal-plagued Chinese clean energy company. Ms. Catanese focuses on for-profit schools and higher-education restructuring generally, with an emphasis on fraud investigation and intervention. She is building a practice focusing on representing higher-education institutions, lenders and private-equity funds in all forms of litigation related to the business and financial restructuring of these schools. Ms. Catanese is a member of the Bankruptcy and Health Care Restructuring subteam at Foley and the women's retention coordinator for Foley's Women's Network in the New York office, and she was named one of ABI's "40 Under 40" emerging leaders in insolvency practice in 2018. Prior to joining Foley, she was an associate at Allard & Fish, P.C., where she represented a chapter 7 trustee and corporate debtors, secured and unsecured creditors, and trustees in all aspects of bankruptcy litigation. Ms. Catanese is admitted to practice in New York and Michigan. She is also a lifetime member of the Michigan State University alumni association and a member of the MSU Law Alumni Board. Ms. Catanese received her B.A. in psychology *summa cum laude* in 2001 and her J.D. *cum laude* in 2004 from Michigan State University. During law school, she clerked for Hon. David L. Jordon.

Matthew H. Connors, ASA, CPA, ABV, CFE is a managing member at Rocky Mountain Advisory, LLC in Salt Lake City and leads the firm's business and intellectual property valuation practice. His expertise includes expert witness services in complex commercial litigation disputes and valuing equity securities in and outside of litigation disputes. Mr. Connors has testified in federal and state courts multiple times. He is an expert in calculating economic damages, business valuation, intellectual property valuation, intangible asset valuation and damages related to such intangible assets. He also has expertise in preparing and rebutting expert opinions in the above areas and has testified

numerous times. Mr. Connors's practice also includes the valuation of intangible assets, intellectual property, and goodwill for purposes of financial reporting. He has extensive experience investigating fraud schemes of various types and has spent significant time investigating alleged fraud schemes, including Ponzi schemes, misappropriation of assets, Foreign Corrupt Practices Act investigations and evaluating business solvency. Mr. Connors received a B.S. in accounting and a B.S. in information systems, both *magna cum laude*, and his M.B.A. from the University of Utah.

William G. Cross is an associate with Markus Williams Young & Hunsicker LLC in Denver, where he focuses his practice on business bankruptcies and restructurings, creditors' rights and bankruptcy litigation. Prior to joining the firm, he clerked for Chief Judge Michael E. Romero of the U.S. Bankruptcy Court for the District of Colorado. Mr. Cross previously spent several years in private practice in Chicago, where he focused on bankruptcy and commercial litigation practices. He received his B.S. in economics in 2004 from the University of Illinois and his J.D. in 2009 from Loyola University Chicago School of Law.

Adam L. Hirsch is a partner in the Finance & Acquisitions Department of Davis Graham & Stubbs LLP in Denver, where he focuses his practice on representing clients across the U.S. in all aspects of bankruptcy, business restructuring and related transactions. He advises secured and unsecured lenders, DIP lenders, chapter 11 plan sponsors, acquirers of assets in § 363 asset sales, landlords and tenants, equipment lessors and lessees, IP licensors and licensees, and providers of various goods and services. He also represents clients in transactional matters involving financially distressed parties and debtors reorganizing under chapter 11. Mr. Hirsch joined DGS in August 2020 and has experience representing companies in varied economic conditions. He is admitted to practice in Colorado and New York, as well as before the U.S. Court of Appeals for the Tenth Circuit and the U.S. District Courts for the District of Colorado, the Southern District of New York and the Eastern District of New York. Prior to joining DGS, Mr. Hirsch was a partner in Kutak Rock LLP's Denver office and worked for a large New York law firm, where he represented clients in a range of bankruptcy and finance-related matters during the 2008 financial crisis and subsequent economic recession. Mr. Hirsch received his B.A. in 2001 from Northwestern University and his J.D. *magna cum laude* in 2004 from Tulane University Law School, where he was a member of the Order of the Coif.