


What Not to Do: Lessons Learned from Sales that Went Wrong

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A photograph of Warren Buffett, an elderly man with white hair, wearing a dark suit and a light-colored shirt. He is holding a clear glass of water in his right hand, and the water is splashing out of the top. The background is a warm, orange-brown color. The quote is overlaid on a dark rectangular box in the center of the image.

It's good to learn from your
mistakes. It's better to learn
from other people's mistakes.

Warren Buffett

OVERVIEW

- The Bidding Process
- The Auction
- The Sale and Closing the Sale



The Bidding Process

- Bid Procedures
- Due Diligence
 - Challenges in a virtual world
 - Diligence reflects the deal does not work
- Good Faith Deposit
 - Lots of assets
 - Logistical challenges of bidder increasing deposit
- Damage Clause



The Auction

- Rules for the Auction
- Collusion
- Preserving Bidding Protections
- Closing the Auction/Re-Opening the Auction
 - When to keep the auction open

The Sale and Closing the Sale

- Inconsistent sale order v. APA
- Extending the deadline to close
- Failure to Close
 - Post-closing adjustment disputes
 - Logistical problems
 - Material adverse change
- Termination rights

Expect the Best, Prepare for the Worst, Capitalize on What Comes



Faculty: What Not to Do: Lessons Learned from Sales that Went Wrong

Jane Kim is a partner with Keller & Benvenuti LLP in San Francisco, where she represents debtors in possession, distressed companies and other parties in both in-court and out-of-court situations. She has represented debtors in possession, secured lenders and creditors, including members of official committees, prospective investors, and directors and officers of corporations. Ms. Kim's recent representations include representing In-Shape Health Clubs, LLC, a premium regional fitness club chain in California, and Ravn Air Group, Inc., a regional airline in Alaska, in each of their chapter 11 cases filed in Delaware. She also serves as bankruptcy co-counsel for Pacific Gas & Electric Co. in its chapter 11 case, the largest chapter 11 filing in the Northern District of California in over a decade, which emerged from bankruptcy in July 2020 through a confirmed, largely-consensual plan of reorganization. Before joining Keller & Benvenuti in 2014, she practiced with Cleary Gottlieb in New York. Ms. Kim is a Fellow in the American College of Bankruptcy and has been recognized as a leading lawyer by Chambers USA, Super Lawyers, Benchmark Litigation California and Lawdragon's inaugural list of the 500 Leading U.S. Bankruptcy and Restructuring Lawyers. She also was selected to serve as a lawyer representative for the Northern District of California. Ms. Kim received her B.A. cum laude from Columbia College at Columbia University in 1999 and her J.D. cum laude from Harvard Law School in 2002.

Evelyn J. Meltzer is a partner with Troutman Pepper Hamilton Sanders LLP in Wilmington, Del., where she focuses her practice on distressed M&A, corporate bankruptcy and creditors' rights. She has more than 20 years of experience representing sellers and purchasers in distressed M&A transactions, including Article 9 sales, asset sales conducted as part of assignments for the benefit of creditors (ABC), and § 363 sales. Ms. Meltzer has experience guiding corporate debtors, creditors' committees, secured and unsecured creditors, and others through all aspects of complex chapter 11 and 7 proceedings. She also represents companies and assignees in connection with Delaware assignment for the benefit

of creditors (ABC) proceedings in the Delaware Chancery Court. Ms. Meltzer's clients include both plaintiffs and defendants in bankruptcy-related litigation matters, including avoidance actions. Ms. Meltzer frequently lectures at national conferences on distressed M&A, as well as various bankruptcy and restructuring topics. She is active in numerous professional organizations, including serving as the finance director for the International Women's Insolvency & Restructuring Confederation (IWIRC), and she co-chairs ABI's Asset Sales Committee and the Delaware State Bar Association's Bankruptcy Section Legislative Committee. Her bankruptcy practice has been recognized in Chambers USA: America's Leading Lawyers for Business and Lawdragon 500 Leading U.S. Bankruptcy & Restructuring Lawyers. Ms. Meltzer is AV-Rated by Martindale-Hubbell. In addition, she received the 2016 Melnik Award for an Exceptional IWIRC Member and is admitted to practice in Pennsylvania and Delaware. Ms. Meltzer received her B.A. in political science from Drew University in 1998 and her J.D. in 2001 from Northwestern University School of Law.

Philip J. von Kahle is president of Michael Moecker & Associates, Inc. in Fort Lauderdale, Fla., and is responsible for overseeing every aspect of its operations. He serves as the assignee in Assignment for the Benefit of Creditors (ABC) cases, executes workout agreements, and is a court-appointed receiver, chapter 11 trustee, liquidating trustee, court examiner, curator and conservator. Mr. von Kahle is former turnaround management expert with emphasis in operations and marketing, and he has been engaged as a successor fiduciary in a number of federal and state court cases throughout Florida involving unique issues. A member of the Bankruptcy Bar Association of South Florida and an associate member of the Florida Bar's Business Law Section, he received his undergraduate degree in marine technology from the Florida Institute of Technology in 1984.

Henry "Hank" E. Waida is a principal with SC&H Capital in Ellicott City, Md., where he provides distressed and sell-side merger and acquisitions (M&A) advisory services. With more than 20 years of experience, he has worked on more than 100 engagements in a variety of industries, including manufacturing and distribution, health care, biofuel, mining, quick-serve restaurant franchises and pharmaceuticals. Mr. Waida's specialties include business analysis, marketing,

complex deal structure, contract negotiations, creditor interfacing, § 363 sale facilitation, Article 9 sales, DIP financing, court testimony and joint-venture partnerships. He is an active member, author and speaker for ABI, and an active member of the Turnaround Management Association (TMA). Mr. Waida received his undergraduate degree from Edinboro University of Pennsylvania and studied business at the University of Pittsburgh.