



AMERICAN  
BANKRUPTCY  
INSTITUTE

# Central States Bankruptcy Workshop

## Mock Sale Hearing

**Paul R. Hage, Moderator**

Taft Stettinius & Hollister LLP | Southfield, Mich.

**Joseph Greenwood**

Livingstone Partners LLC | Chicago

**Hon. John T. Gregg**

U.S. Bankruptcy Court (W.D. Mich.) | Grand Rapids

**Buffey E. Klein**

Husch Blackwell LLP | Dallas

**L. Katie Mason**

Quarles & Brady LLP | Milwaukee, Wis.

**James E. Romey**

Development Specialists, Inc. | Chicago

**Nathan Q. Rugg**

Barack Ferrazzano Kirschbaum & Nagelberg LLP | Chicago

**Laura D. Steele**

U.S. Trustee Program | Milwaukee, Wis.

**Scott A. Wolfson**

Wolfson Bolton Kochis PLLC | Troy, Mich.

2024 ABI CENTRAL STATES BANKRUPTCY WORKSHOP

June 17-20, 2024

Chicago, Illinois

# Mock Section 363 Sale Hearing

*Presented by:*

**Paul R. Hage**

Taft Stettinius & Hollister, LLP  
Southfield, MI

**Joseph Greenwood**

Livingstone Partners, LLC  
Chicago, IL

**Hon. John T. Gregg**

U.S. Bankruptcy Court for the  
Western District of Michigan  
Grand Rapids, MI

**Buffey E. Klein**

Husch Blackwell LLP  
Dallas, TX

**L. Katie Mason**

Quarles & Brady, LLP  
Milwaukee, WI

**James E. Romey**

Development Specialists, Inc.  
Chicago, IL

**Nathan Q. Rugg**

Barack Ferrazzano Kirschbaum  
& Nagelberg, LLP  
Chicago, IL

**Laura D. Steele**

U.S. Trustee Program  
Milwaukee, WI

**Scott A. Wolfson**

Wolfson Bolton Kochis PLLC  
Troy, MI

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF ILLINOIS

In re:

VITALOGY FURNITURE, INC.

Debtor.

Case No. 24-80207

Chapter 11

Hon. John T. Gregg

**BENCH MEMORANDUM RE SECTION 363 SALE HEARING**

Vitalogy Furniture, Inc. (the “Debtor”) is a brick and mortar furniture and mattress retailer headquartered in Evanston, Illinois. Originally founded by the Vedder family in 1922, the Debtor is now owned and managed by its fourth-generation President & CEO, Edward Vedder. The company, which employs approximately 1,200 people, has long been an iconic brand in the Chicagoland area; its advertising campaigns have blanketed regional media outlets for decades. Moreover, the Debtor has always been an important member of the Chicago community. It has supported a number of local charitable organizations and sponsored important community events.

At the time of its bankruptcy filing, the Debtor operated fifteen furniture stores. The real property for all stores was leased. Its first ten stores (the “Ten Stores”) were all located in the City of Chicago and its surrounding suburbs. The Debtor first attempted to expand outside of Illinois with the opening of its Ann Arbor, Michigan retail store in 2014. In 2015-2017, the Debtor opened another four retail stores outside the State of Illinois, with locations in Columbus, Ohio, South Bend, Indiana, Bloomington, Indiana and Madison, Wisconsin. In order to finance this expansion, the Debtor entered into a \$60 million term loan with Yield Bank (the “Bank”). In exchange for the loan, the Bank was purportedly granted a first priority security interest on all of the Debtor’s assets.

Unfortunately, the expansion plan proved disastrous for a number of reasons. First, although the Debtor had established name recognition and a loyal customer base in Chicagoland, it had difficulty breaking into the newer markets. Second, expansion occurred at a time when the company faced significant macro-related revenue headwinds including broad-based declining retail foot traffic and market share losses of brick and mortar furniture outlets to online sellers such as Wayfair and Amazon.com. Third, the business suffered numerous operational challenges, including leadership turnover, in the course of its effort to grow and navigate this challenging retail environment.

Faced with underperforming stores and declining sales, profits and cash flow, the Debtor defaulted on its loan with the Bank in June 2023. The Debtor and the Bank entered into a forbearance agreement in July 2023 pursuant to which the Bank agreed to suspend interest payments for a period of six months to give the Debtor time to raise additional capital and restructure its debt obligations. Under the forbearance agreement, the company was required to implement a cost reduction and profit improvement plan. The Debtor was also required to retain a financial advisor to analyze its store footprint. Finally, the company was required to begin immediate preparation for a “going out of business” liquidation in the event that its efforts to raise capital were not successful.

Against this backdrop, and with the assistance of its investment bank, Betterman Advisors (“Betterman”), the company held discussions with at least 25 potential buyers and investors about potential transactions to recapitalize and/or sell all or parts of the business. Unfortunately, interest in acquiring the stores as a going concern was lukewarm.

The most likely and promising alternative that emerged from these discussions was a refinancing of the business by a consortium of investors that included the Vedder family and key

Chicago-based suppliers to the Debtor's business (the "Vedder Group"). The transaction contemplated that the Vedder Group would invest significant new capital into the company, which would allow the Debtor to refinance the existing facility with the Bank. The Vedder Group had obtained the support of the company's five largest lessors, who agreed to reduce rent obligations at certain of the Debtor's retail stores. The Vedder Group submitted a letter of intent to the company and the Bank outlining the details of its proposal on November 15, 2023.

Unfortunately, sales during the 2023 holiday season were far less than projected. Due to the disappointing sales numbers, the Vedder Group was unable to secure the necessary capital commitments to move forward on its letter of intent. After the company's forbearance with the Bank expired on January 25, 2024, the Bank filed an emergency motion to appoint a receiver over the Debtor for purposes of commencing going out of business sales and an orderly winddown of the company.

The Debtor filed a petition for relief under chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Northern District of Illinois on February 22, 2024 (the "Petition Date"). The indebtedness owing to the Bank on the Petition Date was approximately \$50 million. Another \$50 million was owed to the Debtor's unsecured creditors, many of whom were trade vendors. Of that amount, \$3 million was entitled to priority in payment pursuant to section 503(b)(9) and 507(a) of the Bankruptcy Code.<sup>1</sup> As of the Petition Date, the Debtor was current on all of its lease obligations to its landlords.

Contemporaneous with the filing of its petition, the Debtor issued a press release stating that it had commenced going out of business sales at its five non-Illinois locations. Upon completion of the going out of business sales, employees would be terminated or transferred and

---

<sup>1</sup> The Bankruptcy Code is set forth in 11 U.S.C. §§ 101 *et seq.* Specific sections of the Bankruptcy Code are identified herein as "section \_\_\_\_."

the leases in such locations would be rejected. The Debtor projected that the net proceeds payable to the Bank from the going out of business sales at the five non-Illinois locations would total approximately \$20 million.<sup>2</sup>

The Debtor announced that it planned to commence a going concern sale process for the Ten Stores which, it asserted, could be profitable if freed from the burdens of the bank indebtedness and the non-Illinois locations. The Debtor estimated that it had approximately \$30 million in furniture inventory at the Ten Stores (the “Ten Assets”) and reported that it had reached agreements with its key suppliers to continue to supply such stores with product while the bankruptcy sale process occurred.

In furtherance of that goal, on February 23, 2024, one day after the Petition Date, the Debtor filed a motion for entry of an order approving sale procedures related to the sale of the Ten Assets free and clear of all liens, claims, encumbrances and interests (the “Sale Procedures Motion”).<sup>3</sup> The Sale Procedures Motion provided for, among other things, the following sale procedures:

- Mandatory sale milestones, including:
  - All bids for the purchase of the Ten Assets were due no later than April 8, 2024 (forty-five days after the Petition Date);
  - An auction for the sale of the Ten Assets would be scheduled no later than April 17, 2024 (fifty-five days after the Petition Date);
  - A sale hearing would be held on or before May 2, 2024; and
  - A closing on the sale transaction would occur on or before May 16, 2024;<sup>4</sup>

---

<sup>2</sup> The going out of business sales in the non-Illinois locations were approved pursuant to a separate order of the bankruptcy court. Upon completion of such sales, the net proceeds paid to the Bank were, in fact, approximately \$20 million, thereby leaving an outstanding balance owed to the Bank of approximately \$30 million.

<sup>3</sup> The Sale Procedures Motion indicates that the sale procedures were negotiated with, and approved by, the Bank in advance of the filing.

<sup>4</sup> The Debtor argued that the expedited sale milestones were necessary because the company’s business was a melting ice cube and any delay in the process could result in the loss of support from the Bank, its key suppliers and/or its landlords.

- Any qualified bid for the purchase of the Ten Assets must provide for the repayment of the Bank's indebtedness in full, in cash at closing;
- Any qualified bid for the purchase of the Ten Assets may not contain any financing or diligence contingencies;
- The Bank was automatically deemed to be a qualified bidder in any sale of the Ten Assets and was entitled to credit bid its indebtedness pursuant to section 363(k); and
- The Bank was granted consent rights for actions taken by the Debtor in connection with the sales process.

The Sale Procedures Motion also provided that the Vedder Group, who had continued to have discussions with its investors, would serve as the stalking horse bidder in the sale process for the Ten Assets with a bid of \$30 million (the "Vedder Group Bid").<sup>5</sup> In addition to the \$30 million purchase price, which would pay the balance of the Bank indebtedness in full at closing, the Vedder Group Bid provided for: (i) the assumption of certain liabilities related to customer deposits and employee obligations, (ii) assumption of all real property leases and the continued operation of the Ten Stores, and (iii) the preservation of nearly 800 jobs. The Vedder Group Bid also contemplated that the Vedder Group would acquire, at closing, all of the preference actions held by the estate.<sup>6</sup>

Contemporaneous with the filing of the Sale Procedures Motion, the Debtor filed a motion for approval of a consensual cash collateral order that it had negotiated with the Bank (the "Cash Collateral Motion"). The proposed cash collateral order provided that the failure by the Debtor to meet the sale milestones set forth in the Sale Procedures Motion constituted an event of default that would allow the Bank to automatically terminate the Debtor's ability to use its cash collateral,

---

<sup>5</sup> The Sale Procedures Motion stated that the Vedder Group had been pre-approved as a qualified bidder by the Bank and that it had secured the necessary financing to close the transaction.

<sup>6</sup> No investigation has yet been conducted to determine the value of the preference claims. The Vedder Group's stated rationale for the purchase of the preference actions was that it didn't want its key suppliers to be sued by a trustee for Vitalogy. The continued support of such suppliers, the Vedder Group asserted, was critical to their efforts to reorganize the business. The Debtor's *Statement of Financial Affairs* reported that members of the Vedder Group, among others, received payments during the applicable preference period.

obtain stay relief and foreclose on its collateral. The cash collateral order included a budget satisfactory to the Debtor and the Bank. The budget included a \$50,000 carve-out for committee professional fees, which funds were expressly not to be used to investigate or sue the Bank.

The newly appointed Official Committee of Unsecured Creditors (the “Committee”) informally raised several concerns about the Sale Procedures Motion and the Cash Collateral Motion. First, the Committee asserted that the carve-out in the cash collateral budget was insufficient in amount and must be available at least for the investigation of the Bank’s claims and liens. Second, the Committee objected that the sale milestones in the motions were too ambitious and did not allow sufficient time to adequately market the Ten Stores and the Ten Assets. Third, the Committee argued that the sale procedures chilled bidding by: (i) requiring that qualified bids may not contain financing or diligence contingencies, (ii) requiring that qualified bids must pay the Bank in full, in cash, and (iii) granting the Bank consent rights over the sale and the selection of qualified bids.

After difficult negotiations between the parties, the Committee settled its objections to the Sale Procedures Motion and the Cash Collateral Motion. The Committee obtained a few material concessions. First, the carve-out for committee professionals was increased from \$50,000 to \$100,000. Second, the sale milestones were extended as follows:

- All bids for the purchase of the Ten Assets were now due no later than April 23, 2024 (sixty days after the Petition Date);
- An auction for the sale of the Ten Assets would now be scheduled no later than May 3, 2024 (seventy days after the Petition Date);
- A sale hearing would be held on or before May 17, 2024; and
- A closing on the sale transaction would occur on or before May 31, 2024.

Third, the Committee was given consultation rights, but not consent rights, with respect to the sale process. The settlement with the Committee was placed on the record at a hearing before the



bankruptcy court and stipulated orders approving the Sale Procedures Motion and the Cash Collateral Motion, as revised, were entered.

During the next several weeks, the Debtor marketed the Ten Assets to third parties with the assistance of Betterman. The company and Betterman had discussions with twenty potential buyers about a purchase of the business. Counsel for the Committee likewise engaged in significant discussions with a number of parties regarding the potential acquisition of the Ten Assets. Despite these efforts, no other qualified bids were submitted prior to the bid deadline and, thus, the auction was cancelled. The Debtor filed a notice of the cancellation of the auction on the docket. A sale hearing before the bankruptcy court was scheduled for May 17, 2024.

On May 9, 2024, counsel for the Committee was at a networking reception at the ABI Central States Workshop when she was introduced to Jeremy Spoken, a liquidator from Rearviewmirror Auctioneers (“Rearviewmirror”). Rearviewmirror is a well-known, Minnesota based, liquidation firm that specializes in valuing and liquidating retail inventory. During the conversation, Committee counsel expressed frustration regarding the Vitalogy sale process, opining that the purchase price was not sufficient based on inventory value alone, and noting that the Vedder Group Bid would result in an administratively insolvent estate because it left no funds to pay: (i) approximately \$3 million in allowed section 503(b)(9) administrative expenses, and (ii) approximately \$300,000 in professional fees incurred by the Committee above and beyond the \$100,000 carve-out that was provided for in the order authorizing the use of cash collateral.

On May 13, 2024, after a weekend consumed by phone calls and due diligence, Mr. Spoken advised counsel for the Committee that Rearviewmirror, through a newly created subsidiary, was willing to offer a minimum of \$34 million to purchase the inventory at the Ten Stores (the “Rearviewmirror Bid”). The Rearviewmirror Bid did not contemplate a going concern; rather it

was strictly a liquidation play. The purchase price would not be paid immediately. Instead, it would be paid upon completion of the liquidation sales from sale proceeds. Nevertheless, in the event that the net proceeds from the liquidation sales did not exceed \$34 million, the Rearviewmirror Bid guaranteed a payment to the estate of a minimum of \$34 million.<sup>7</sup>

Unlike the Vedder Group's \$30 million bid, the Rearviewmirror Bid contemplated that all known administrative expenses would be paid in full from the sale proceeds and left approximately \$700,000 in additional funds in the estate to fund the costs associated with preparation and confirmation of a liquidating plan and the funding of "seed money" in a liquidation trust for the benefit of the unsecured creditors. The Rearviewmirror Bid also did not contemplate an acquisition of the estate's preference actions; thus, those causes of action would be transferred to the liquidation trust so that they could be pursued by a trustee for the benefit of the unsecured creditors.

On May 14, 2024, the Committee filed an objection to the proposed sale to the Vedder Group. The Committee asserted that the Rearviewmirror Bid, not the Vedder Group Bid, was the highest and best offer on the table because it was \$4 million greater. *See, e.g., In re Gulf States Steel, Inc. of Ala.*, 285 B.R. 497, 516-17 (Bankr. N.D. Ala. 2002) (highest and best bid should be determined based on benefit to the estate, not factors such as whether bid ensures a going concern or preserves jobs). The Committee further argued that given the amount of the overbid by Rearviewmirror, and Vedder Group's knowledge that its bid was ultimately subject to judicial approval, the bankruptcy court had the authority to re-open the auction to allow the Rearviewmirror Bid. *See, e.g., In re Sunland, Inc.*, 507 B.R. 753 (Bankr. D. N.M. 2014).

---

<sup>7</sup> No collateral was offered to secure the payment.

The Committee colorfully argued that the sale to the Vedder Group could not be approved because it left an administratively insolvent estate and effectively allowed the Bank to “rent out the bankruptcy courthouse” to conduct its foreclosure sale. If the Bank wanted the sale to the Vedder Group to be approved, the Committee continued, it needed to “pay the freight” associated with the chapter 11 case. *See, e.g., In re Gulf Coast Oil Corp.*, 404 B.R. 407 (Bankr. S.D. Tex. 2009). This was particularly true, it opined, because the sale process in this case was run solely for the benefit of the Bank. *See, e.g., Res. Trust Corp. v. Official Unsecured Creds. Comm. (In re Def. Drug Stores, Inc.)*, 145 B.R. 312, 317 (B.A.P. 9th Cir. 1992) (prohibiting “convert[ing] the bankruptcy process from one designed to benefit all creditors to one designed for the unwarranted benefit of the postpetition lender.”).

For the same reason, the Committee argued that some funds needed to remain to fund a trust so that causes of action, including insider causes of action and the preference causes of action, could be investigated and, where appropriate, pursued. Finally, the Committee argued that the proposed sale of the preference actions to the Vedder Group was impermissible because preference actions are not property of the estate within the scope of section 541(a) that can be sold pursuant to section 363(b) but, rather, are statutory powers granted exclusively to bankruptcy trustees. *See* 11 U.S.C. § 547(b) (providing that only a trustee is authorized to avoid preferential transfers); *see also Teras Breakbulk Ocean Nav. Enterprises, LLC v. Angueira (In re Teras Breakbulk Ocean Nav. Enterprises, LLC)*, 658 B.R. 611 (S.D. Fla. 2024).

The U.S. Trustee filed an objection to the sale motion as well. The U.S. Trustee echoed many of the concerns of the Committee. It expressed concern about a lack of disclosure with respect to the marketing process for the Ten Assets particularly where, as here, the proposed sale involves a sale for liquidation value (or worse) to an insider who was heavily involved in that

marketing process. The U.S. Trustee asserted that heightened scrutiny is required where insiders are parties to a bankruptcy sale. *See, e.g., In re Family Christian, LLC*, 533 B.R. 600, 622 (Bankr. W.D. Mich. 2015) (“Where a proposed sale would benefit an insider of a debtor, the court is required to give heightened scrutiny to the fairness of the value provided by the sale and the good faith of the parties in executing the transaction.”). The U.S. Trustee also argued that a sale that only benefits a secured creditor should not be allowed, citing *In the Matter of Golf, LLC*, 322 B.R. 874, 878 (Bankr. D. Neb. 2004) (sale free and clear of liens should not be approved unless the process fully compensates the lien holders and produces equity for the benefit of the estate) and *In re Encore Healthcare Assocs.*, 312 B.R. 52 (Bankr. E.D. Pa. 2004) (finding no business justification for a section 363 sale where the sole purpose of the sale was to liquidate assets for the benefit of a secured creditor). Finally, the U.S. Trustee echoed the Committee’s concerns about the ability of a chapter 11 debtor to sell the estate’s preference avoidance powers, particularly where no substantive analysis of the merits of such claims had yet been conducted.

The Debtor filed a reply brief on May 15, 2024 reaffirming its desire to move forward with the Vedder Group Bid, noting that the sale was conducted in accordance with the Sale Procedures Motion and the marketing process for the Ten Assets was a fulsome and fair one. It would be inappropriate, the Debtor argued, to allow Rearviewmirror to submit its untimely bid at this late stage when others had relied on the pre-approved sale procedures. *See, e.g., In re Bigler, L.P.*, 443 B.R. 101 (Bankr. S.D. Tex. 2010) (“an unimpeachably conducted auction based on clear procedures may not be reopened solely for the reason of a higher bid after the close of the auction.”).

Finally, the Debtor noted that a debtor in possession has a duty to determine the “highest and best” offer for its assets. *See, e.g., M&M Holdings, LLC v. Unsecured Creditors Comm. (In*

*re SpecialtyChem Prod. Corp.*), 372 B.R. 434, 441 (E.D. Wis. 2007) (“[T]he debtor has a fiduciary duty to the creditors to obtain the highest and best offer.”). The Debtor asserted that the Vedder Group Bid was, in fact, the “highest and best” bid because it avoided contingencies in that it provided for a significantly earlier payment to the estate from a party that had established that it had sufficient financing. *See, e.g., G-K Dev. Co. Inc. v. Broadmoor Place Invest., L.P. (In re Broadmoor Place Invest., L.P.)*, 994 F.2d 744, 745 (10th Cir. 1993) (bankruptcy court approved sale to lower bid because lower bid “provided fewer contingencies and facilitated a more immediate closing” than higher bid). Moreover, the Debtor noted, the Vedder Group Bid preserved a going concern, saved jobs, ensured that vendors and landlords would continue to have a partner to do business with and also continued to provide tax revenues and preserve a pillar of the local community.

The Bank concurred in the Debtor’s arguments and expressed a strong preference for the Vedder Group Bid. The Bank noted that, notwithstanding the guaranteed minimum payment, the delayed payment of the purchase price associated with the Rearviewmirror Bid and the fact that the actual purchaser was a newly created entity introduced a level of risk to the transaction that did not exist with the Vedder Group Bid. *See In re Quality Stores, Inc.*, 272 B.R. 643, 647 (Bankr. W.D. Mich. 2002) (uncertainty regarding financial status justified decision to deem lower offer as “best” offer). It urged the bankruptcy court to promptly approve the pending sale and threatened that the failure to do so would result in a default by the Debtor with respect to the approved sale milestones, at which point the stay would be terminated and the Bank would be permitted to liquidate its collateral outside of bankruptcy.

The Bank added that there is no support in the Bankruptcy Code for the proposition that a secured creditor must fund administrative expenses incurred in a chapter 11 case. The Bank noted

that the Debtor, not it, elected to commence the chapter 11 case. Relying on Supreme Court precedent interpreting section 506(c), the Bank argued that there is no basis for parties other than a trustee to surcharge a secured creditor. *See Hartford Underwriters Ins. Co. v. Union Planters Bank NA (In re Hen House Interstate, Inc.)*, 530 U.S. 1 (2000). The Bank noted the general rule that secured claims are entitled to priority in payment over unpaid administrative expenses and professional fees that exceed negotiated carve-outs. *See, e.g., In re Molycorp, Inc.*, 562 B.R. 67, 75 (Bankr. D. Del. 2017) (“As a general rule, administrative expenses must be satisfied from assets of the estate not subject to liens”). This rule is important, the Bank argued, because it ensures that secured creditors will receive the benefit of their bargain.

Lastly, the Vedder Group filed a joinder to the Debtor’s reply brief.<sup>8</sup> In addition to joining the arguments advanced by the Debtor, the Vedder Group noted that two courts of appeals have recently held that chapter five causes of action can be sold as property of the estate. *See, e.g., Pitman Farms v. ARKK Food Co. (In re Simply Essentials, LLC)*, 78 F.4th 1006, 1011 (8th Cir. 2023); *Briar Capital Working Fund Capital, LLC v. Remmert (In re South Coast Supply Co.)*, 91 F.4th 376 (5th Cir. 2024). The Vedder Group noted there was a legitimate business reason for selling the preference actions, thereby ensuring that they do not get pursued. Specifically, the likelihood of a successful reorganization of the Ten Stores under new ownership would be significantly impaired if their critical suppliers were sued by a trustee in bankruptcy.

---

<sup>8</sup> To ensure that it had standing to appear at the sale hearing, the Vedder Group purchased the unsecured claim of Sheets of Empty Canvas, LLC, a trade vendor.

**Offer of Proof for ABI Mock Sale Hearing – Financial Advisor, James Romey**

**MASON:** Your Honor, in the interest of efficiency, I intend to submit the testimony of James Romey, the debtor's financial advisor, via an offer of proof, assuming there are no objections to that approach.

**KLEIN:** Your Honor, the Committee has no objections, so long as we can conduct cross examination of the witness based on the offer of proof.

**STEELE:** The U.S. Trustee's office echoes the Committee's position on this.

**MASON:** That is fine with the bank, Your Honor.

**JUDGE GREGG:** Okay, you may proceed with the offer of proof, and any party that wishes to cross examine Mr. Romey may do so on the basis of the offer of proof.

**MASON:** Thank you, Your Honor. I will present the testimony of Mr. James Romey via this offer of proof:

As a term of the forbearance agreement between the bank and the Debtor, Mr. James Romey was retained by the Debtor as the Debtor's financial advisor. He is present here in court today.

If Mr. Romey were called to testify, he would testify that he was retained by the Debtor as financial advisor for the primary purpose of analyzing the Debtor's store footprint and the assets in each store. Mr. Romey would testify that at the time this case was commenced, the Debtor had 15 retail locations. Ten of these stores are located in the City of Chicago and its surrounding suburbs. The remaining stores were located in Ann Arbor, Michigan, Columbus, Ohio, South Bend, Indiana, Bloomington, Indiana, and Madison, Wisconsin.

Mr. Romey would further testify that he and his team conducted an analysis of each of the store locations, and determined that each of the 5 stores outside the Chicagoland area was underperforming for a variety of reasons, including lack of the level of retail foot traffic found in the Chicago area, disproportionately high rent in some locations – particularly the Madison, WI location – and leadership turnover at these underperforming stores.

Mr. Romey would testify that as a result of his analysis, he recommended that the 5 non-Chicagoland stores be closed and their inventory liquidated immediately, a process which has now been completed.

Mr. Romey would further testify that he estimated that the likely proceeds of these going out of business sales would be approximately \$20 million based on the inventory value at those stores, and that, in fact, this is the approximate amount of proceeds the debtor realized from these completed sales.

Finally, Mr. Romey would testify that his estimate of the value of the inventory located at the remaining 10 Chicagoland stores is approximately \$30 million.

And at this time, I would ask that Mr. Romey be sworn in so that he can confirm the testimony in the offer of proof.

**JUDGE GREGG:** Alright Mr. Romey, please raise your right hand [WITNESS SWORN]

## AMERICAN BANKRUPTCY INSTITUTE

**MASON:** Mr. Romey, did you just hear everything that I just stated on your behalf?

**ROMEY:** Yes, I did.

**MASON:** Is it all true and correct?

**ROMEY:** Yes, it is.

**MASON:** Is there anything additional you would like to add?

**ROMEY:** No, there is not.

**JUDGE GREGG:** Alright, in that case, the Court will accept your offer of proof. Does anyone have any questions for Mr. Romey on cross?

[QUESTIONS re value discrepancy \$30 million in 10 stores vs. \$20 million in 5 stores – why? Other questions?]



**DIRECT EXAMINATION – JOSEPH GREENWOOD**

- **Mr. Greenwood, would you please introduce yourself to the court?**

- **Are you affiliated with Betterman Advisors?**

- **What is your position at Betterman?**

I am a partner at Betterman and the Head of the firm's Special Situations practice.

- **What does Betterman Advisors do?**

Betterman is a full-service, middle-market investment bank with expertise in mergers and acquisitions, capital raising, restructurings and other strategic advisory services.

- **Where does Betterman do this type of work?**

Betterman is a nationally recognized firm; we have offices here in Chicago but also in several other states.

- **What are your duties as Head of the firm's Special Situations practice?**

I am responsible for leading the day-to-day execution of the firm's transactions involving distressed clients and/or restructuring situations.

- **Do you and your firm have retail experience? Yes.**

-----

**I WOULD LIKE TO TURN YOUR ATTENTION TO VITALOGY FURNITURE**

- **Your firm was involved with Vitalogy before it filed for bankruptcy, wasn't it?**

Yes

- **What did Betterman do for Vitalogy before Vitalogy filed for bankruptcy?**

Vitalogy retained us approximately 8 months ago to seek to sell all or parts of the business, which was 15 stores at the time, or to seek a transaction that would allow the recapitalization of the business.

- **What type of outreach to potential purchasers or investors did Betterman do?**

- We initially contacted over 100 parties via direct email
- Interested parties were provided the confidential information presentation after signing an NDA.

- **Did you contact any liquidators at that time?**

No.

- **Why not?**

The company asked us to focus on a recapitalization or a going concern sale. They weren't looking to put 1200 people out of work.

- **Was there any interest in the company?**
    - Yes, we held discussions with at least 25 potential buyers and investors about a potential transaction to recapitalize or sell all or parts of the business. Unfortunately, interest in acquiring the stores as a going concern was lukewarm.
    - The most promising alternative that emerged from these efforts was a potential refinancing of the business by a consortium of investors that included the Vedder family and key Chicago-based Suppliers to Vitalogy.
  - **What happened with that proposed transaction?**
    - The Vedder Group submitted an LOI to the company and the Bank, but 2023 holiday sales were far less than projected and the Vedder Group was unable to secure the necessary capital commitments to move forward.
- 

#### **TURN YOUR ATTENTION TO BETTERMAN'S POST-BANKRUPTCY WORK FOR VITALOGY**

- **Did there come a time when Betterman was re-engaged by Vitalogy?**
  - Yes, after Vitalogy filed for bankruptcy, Betterman was engaged by the Debtor as its investment banker to sell the remaining Ten Stores; the five non-Illinois stores were being liquidated.
- **That sale process is subject to milestones set by the Court isn't it? Yes.**
- **Is one of those milestones that bids are due 60 days from the date of the bankruptcy filing?**
  - **With an auction to be held 10 days later if there are competing Qualified Bids?**

#### **Let's talk about what a Qualified Bid is**

- **Mr. Greenwood, are you generally aware of the Bid Procedures' requirement that a bid must meet certain requirements to be a Qualified Bid [Yes]**
- **What do you understand a Qualified Bid for the Ten Assets to be?**
  - Two main requirements:
    - Must provide for the repayment of the Bank's indebtedness in full, in cash at closing;
    - May not contain any financing or diligence contingencies

- **Are you familiar with the stalking horse bid from the Vedder Group?** [Yes]
- **What are the primary terms of the Vedder Group's bid?**
  - \$30m purchase price, which would pay the balance of the bank debt in full at closing
  - Assumption of customer deposit and employee obligations
  - Assumption of all real property leases
  - Continued operation of the Ten Stores and the preservation of nearly 800 jobs
  - Acquisition of all the preference actions held by the estate
- **Is it common in your experience for a purchaser of a business as a going concern to want to purchase preference actions?** Yes.
  - **Why?** [don't want their vendors sued]

**Let's talk about your recent efforts to market these assets**

- **What post-petition efforts did Betterman take to market these assets?**
  - [describe and how relates to the pre-petition process; ad in the WSJ; committee counsel referred and had significant discussions with a number of parties]
  - **A robust marketing process in your view?**
    - **Especially when combined with the pre-petition process?**
- **There is also a claims agent in this case isn't there Mr. Greenwood?** [Yes]
  - **That claims agent, Even Flow, maintains a website with important case information and the entire docket doesn't it?** [Yes]
    - **That information includes your contact information as the Investment Banker doesn't it?** [It does]
      - **And information about the sale process?** [Yes, a potential purchaser could learn a lot about the sale process on the website, from the Bid Procedures and Qualified Bid requirements to the stalking horse offer]
- **Did your marketing efforts result in any discussions with potential purchasers?**
  - Yes, many; we had extensive discussions with at least twenty potential buyers about the purchase of the business.
- **Did any of those potential purchasers submit a bid by the bid deadline?**
  - They unfortunately did not; [why in your estimation]
- **Given that no other Qualified Bids were received, did an auction take place?**
  - No, it was cancelled.
- **Mr. Greenwood, who is Rearview Mirror Auctioneers?**

- A bottom-feeding liquidation firm out of Minnesota that specializes in valuing and liquidating retail inventory
- **We all know that Betterman did not email any sale information directly to Rearview Mirror, right?**
  - Correct; we were not focused on directly marketing to liquidators
- **Mr. Greenwood, in light of the pre-petition marketing process, the post-petition marketing process, the ad in the WSJ about the sale, and the claims agent's comprehensive website, HOW BIG OF A ROCK WOULD REARVIEW MIRROR HAD TO HAVE BEEN UNDER TO NOT HAVE HEARD ABOUT THIS SALE OF THE DEBTOR'S ASSETS?**
  - **[Judge Gregg scolds and I withdraw the question]**
- **If Rearview Mirror had timely submitted its bid, did you have any concerns with it?**
  - Yes, Rearview Mirror's bid is not a Qualified Bid for a number of reasons. It does not provide for the repayment of the Bank debt in full and in cash at closing. The purchase price would be paid from liquidation sale proceeds. On top of the fact that it does not meet the requirements of a Qualified Bid, a sale to Rearview Mirror would result in the loss of over 800 jobs and the loss of a customer for trade creditors owed over \$50m.

# Faculty

**Joseph Greenwood, CPA, CIRA** is a partner with Livingstone Partners LLC in Chicago. He began his career at Livingstone in 2010 when he was brought on to lead Livingstone's Special Situations practice, which assists clients in developing, evaluating and executing M&A, refinancing and debt-restructuring transactions across various industries. Mr. Greenwood has nearly 25 years of financial advisory experience with extensive transaction expertise, including § 363 sales, UCC Article 9 sales, federal receivership sales, assignments for the benefit of creditors, debt-for-equity swaps, and other negotiated balance-sheet restructurings on behalf of his clients. His clients have included Gissing North America, Aztec Shaffer, Arro Foods, Maurice Sporting Goods, Cardiac Science, IPC International, Hartmarx Corp., Tempel Steel Co., Robbins Bros. Corp., Key Lime Cove Resort, Waterworks Holding Corp., American IronHorse Motorcycles, Inc., Budget Group, Inc., Kmart Corp. and UAL Corp. Prior to Livingstone, Mr. Greenwood was one of three founding members of William Blair's Restructuring Group. He also was a vice president with KPMG's Corporate Recovery practice. Mr. Greenwood received his B.B.A. from the University of Wisconsin and his M.B.A. from Georgetown University.

**Hon. John T. Gregg** is a U.S. Bankruptcy Judge for the Western District of Michigan in Grand Rapids, appointed on July 17, 2014. He was recently appointed to the Bankruptcy Appellate Panel for the Sixth Circuit. Previously, Judge Gregg was a partner with the law firm of Barnes & Thornburg LLP, where he focused on corporate restructuring, bankruptcy and other insolvency matters. Judge Gregg served as chair of the education committee of the National Conference of Bankruptcy Judges for 2022, serves on the ABI's Board of Directors, was recently inducted as a Fellow of the American College of Bankruptcy, and is a member of the American Law Institute. He is a frequent writer and speaker on bankruptcy and other commercial issues, and he has written and co-edited numerous secondary sources, including *Collier Guide to Chapter 11*, published by LexisNexis; *Strategies for Secured Creditors in Workouts and Foreclosures*, published by ALI-ABA; *Issues for Suppliers and Customers of Financially Troubled Auto Suppliers*, published by ABI; *Michigan Security Interests in Personal Property*, published by the Institute of Continuing Legal Education; *Handling Consumer and Small Business Bankruptcies in Michigan*, published by the Institute of Continuing Legal Education; *Interrupted! Understanding Bankruptcy's Effects on Manufacturing Supply Chains*, published by ABI; and *Receiverships in Michigan*, published by the Institute of Continuing Legal Education. Judge Gregg received his B.A. in 1996 from the University of Michigan and his J.D. in 2002 from DePaul University College of Law.

**Paul R. Hage** is co-chair of the Business Restructuring, Bankruptcy and Creditors' Rights Group at Taft, Stettinius & Hollister, LLP in Southfield, Mich. He also is a member of the firm's Diversity, Equity and Inclusion Committee. Mr. Hage is ABI's Secretary on its Board of Directors and is an Executive Editor of the *ABI Journal*. He is a Fellow in the American College of Bankruptcy and serves as the president of Access to Bankruptcy Court, a nonprofit that raises funds to provide experienced bankruptcy counsel, free of charge, to low-income individuals residing in the Eastern District of Michigan. Additionally, he serves as co-director of the Conrad B. Duberstein National Bankruptcy Moot Court Competition, the largest single-site moot court competition in the country. In 2017, Mr. Hage was selected as a member of ABI's inaugural "40 Under 40" class. He received his bachelor's

degree from James Madison College at Michigan State University, his J.D. from Loyola University Chicago School of Law and his LL.M. in bankruptcy from St. John's University School of Law.

**Buffey E. Klein** is a partner with Husch Blackwell LLP in Dallas, where she focuses her practice on complex commercial bankruptcy, insolvency and commercial litigation. She helps clients navigate troubled loans, particularly in real estate and health care. Ms. Klein routinely assists mortgage-holders, developers, landlords, health care operators, senior living markets, manufacturers, airlines, and those in the retail and energy sectors with distressed assets. Her experience is valued by colleagues on high-profile matters, and she regularly handles large nationwide dockets for clients. Ms. Klein handles commercial loan workouts, out-of-court restructurings, loan documentation, creditors' rights, chapter 11, asset sales, receiverships and special assets. Her practice also includes traditional bank financing, corporate transactions and complex commercial litigation. Ms. Klein is admitted to practice in Tennessee, Florida and Texas. She received her B.A. in journalism from Texas Christian University and her J.D. from South Texas College of Law.

**L. Katie Mason** is a partner with Quarles & Brady LLP in Milwaukee, Wis., where she counsels clients in business litigation, commercial litigation and all aspects of bankruptcy proceedings, receiverships and workouts. Clients she advises include manufacturers, trade creditors, landlords and financial institutions. Ms. Mason litigates contested matters and adversary proceedings in bankruptcy court. Her matters include contested chapter 11 plan confirmation, use of cash collateral, claims litigation, fee disputes, preference avoidance, fraudulent-transfer actions, nondischargeability and issues arising in "free and clear" sales under the Bankruptcy Code. Ms. Mason regularly represents clients in the sale and purchase of distressed assets under § 363, chapter 128 of the Wisconsin Statutes and Article 9 of the Uniform Commercial Code. She received her undergraduate degree *summa cum laude* in 2003 from the University of Wisconsin-Green Bay and her J.D. *magna cum laude* in 2006 from the University of Wisconsin Law School.

**James E. Romey** is a managing director with Development Specialists, Inc. in Chicago and has been directly involved in various bankruptcy and distressed corporate matters, advising companies through chapter 11 proceedings and general assignments for the benefit of creditors across multiple industries. He primarily focuses on facilitating sale processes, addressing operational issues, project management, strategic planning, litigation support and claims resolutions. Prior to joining DSI, Mr. Romey was a senior research analyst and senior trader at Franklin Templeton Investments for more than 10 years, where he performed financial analysis, provided recommendations to Portfolio Managers and executed trades. He primarily covered securitized products, REITs and various alternative assets for a team that managed over \$30B in AUM. Mr. Romey received his B.S. from Santa Clara University.

**Nathan Q. Rugg** is a partner with Barack Ferrazzano Kirschbaum & Nagelberg LLP in Chicago and has more than two decades of insolvency and workout experience. He also chairs the firm's Bankruptcy & Creditor Rights Group. Mr. Rugg has experience in all aspects of business reorganizations, workouts and bankruptcies, inside and outside of court restructurings. This includes the representation of creditors, suppliers, equipment lessors, lenders, landlords, OEMs and asset-purchasers in small to large, complex chapter 11 cases. He also counsels parties in business restructuring and liquidation situations outside of bankruptcy, such as assignment for the benefit of creditors and forbearance agreements. Mr. Rugg represents suppliers to bankrupt and other distressed entities, including

counseling on and prosecuting § 503(b)(9) claims, advising on post-petition credit and defending preference claims. He also works with transactional lawyers on distressed deal structures and provides legal opinions that support secured financings. Mr. Rugg is consistently recognized in the areas of Bankruptcy and Reorganization in *Illinois Super Lawyers* and in the Commercial Bankruptcy and Workout Law categories in *Leading Lawyers*, and he is rated AV-Preeminent by Martindale-Hubbell. He also co-chaired the Bankruptcy Court Liaison Committee and serves on the Volunteer Attorney Panel in the Northern District of Illinois. Outside the practice of law, Mr. Rugg has worked with World Bicycle Relief for years to fundraise and raise awareness for its mission to provide large-scale, comprehensive bicycle distribution programs to aid poverty relief in developing countries around the world. He received his B.A. in history in 1997 from Dartmouth College and his J.D. *cum laude* in 2000 from the University of Illinois College of Law.

**Laura D. Steele** is a trial attorney with the U.S. Trustee Program for Region 11 in Milwaukee.

**Scott A. Wolfson** is practice lead of Corporate Bankruptcy & Restructuring and ADR/Facilitation at Wolfson Bolton Kochis in Troy, Mich., where he focuses on bankruptcy and insolvency, commercial litigation, business disputes and counseling, automotive supply chain issues, and ADR/facilitation. His clients have included distressed companies, corporate debtors in bankruptcy, unsecured creditors' committees, preference and fraudulent transfer defendants, hospitals, tier-one and sub-tier suppliers, technology companies, start-ups, directors and officers, trade creditors, trustees, receivers, lenders, landlords, tenants, asset-purchasers and lessors. Mr. Wolfson has experience representing original equipment manufacturers and suppliers, including ensuring the continuity of supply from nonperforming, financially distressed or bankrupt suppliers. His expertise is in representing customers in the enforcement of their contract rights with suppliers in both state and federal courts. Mr. Wolfson also has experience litigating lien disputes under Michigan's Special Tools Lien Act and Molder's Lien Act. He advises secured creditors in all aspects of loan workouts and restructurings, including creditors' rights representation, and represents financially distressed companies restructuring in and out of court. He also represents purchasers of assets in bankruptcy and similar state court proceedings, including litigation of sale procedures and disputes. Mr. Wolfson is a certified mediator and has mediated preference, fraudulent conveyance and commercial disputes, members of boards of directors, and corporate officers in breach-of-fiduciary-duty and derivative litigation. He also has criminal jury trial experience as defense counsel and as a former prosecutor for the Keweenaw Bay Indian Community. Mr. Wolfson has been named one of the top 100 lawyers in Michigan in the 2010-16 *Super Lawyers* survey, and as one of the top 50 Michigan business lawyers from 2013-16, in *Michigan Super Lawyers* from 2009-17, in *Michigan Rising Stars* for 2008, in *The Best Lawyers in America* from 2010-18 (for which he was named Lawyer of the Year) and as one of the *dbusiness* Top Lawyers from 2010-18. He is a Fellow of the Oakland County Bar Foundation and is rated AV-Preeminent by Martindale-Hubbell. Mr. Wolfson received his B.A. from Michigan State University's James Madison College in 1992 and his J.D. *cum laude* from the University of Minnesota Law School in 1995, where he was a managing editor of the *Law and Inequity Journal*.