



THE ROLE OF A CREDITORS' COMMITTEE AS A COUNTERWEIGHT TO THE DEBTOR AND SECURED LENDER: WHAT YOU NEED TO KNOW

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UNSECURED CREDITORS' COMMITTEE: (“UCC”): STATUTORY GROUNDS

- Section 1102 of the Bankruptcy Code:

...as soon as practicable...the United States trustee shall appoint a committee of creditors holding unsecured claims...

A committee of creditors appointed...shall ordinarily consist of the persons, willing to serve, that hold the seven largest claims against the debtor of the kinds represented on such committee...

UNSECURED CREDITORS' COMMITTEE: POWERS AND DUTIES OF THE UCC

- Section 1103 of the Code outlines specific powers and duties of the UCC:
 - ...consult with the trustee or debtor concerning the administration of the case*
 - ...investigate the acts, conduct, assets, liabilities and financial condition of the debtor, the operation of the debtor's business and the desirability of the continuance of such business*
 - ...participate in the formulation of a plan*
 - ...request the appointment of a trustee or examiner*

UNSECURED CREDITORS' COMMITTEE: WHY IS THERE A UCC?

- Committee members are given a seat at the table to help determine the Debtor's trajectory in Chapter 11 cases
- Committee members are fiduciaries and represent the entire unsecured creditor body
- The Committee acts as a watchdog, consultant and negotiator and has the opportunity to shape progress and outcome of case
 - Evaluates Debtor's decisions and direction
 - Object to actions not in the unsecured creditors' best interests
- Committee's goals
 - Help in restructuring Debtor's business
 - Preserves a healthier customer
 - Maximizes distribution to all general unsecured creditors
 - Minimize or eliminate preference risk to trade creditors

UNSECURED CREDITORS' COMMITTEE: HOW ARE THE MEMBERS OF A UCC SELECTED?

- United States Trustee (“UST”) (an arm of the U.S. Department of Justice) selects the UCC members
 - The UST sends questionnaire to creditors on list of largest creditors filed in the case to solicit interest in forming the UCC
 - Any creditor may request a questionnaire from the UST

UNSECURED CREDITORS' COMMITTEE: UST QUESTIONNAIRE

- Varies by jurisdiction
- Requests amount and nature of unsecured creditor's claim
- Section 503(b)(9) claim amount
- Requests the name and contact information of the unsecured creditor's counsel
- Asks whether the creditor has any affiliation with debtor?
- Asks whether the creditor is a competitor of debtor?
- Asks whether creditor has credit insurance?

UNSECURED CREDITORS' COMMITTEE: TO SERVE OR NOT TO SERVE?

- Do I want to be part of the process?
 - Is this customer important to my business?
 - Is the outstanding debt significant to my business?
- Do I have the time and ability?
- Can I make a difference?

UNSECURED CREDITORS' COMMITTEE: UCC FORMATION

- UST conducts selection process virtually
 - UST may interview creditors submitting questionnaires
- No more in person Formation / Organizational Meeting
- UST appoints a UCC based on creditor responses to UST Questionnaire
- UCC may consist of the following categories of unsecured claimants
 - Trade creditors
 - Bondholders
 - Indenture trustee
 - Landlords
 - Tort claimants
 - Pension Benefit Guarantee Corporation (“PBGC”)

UNSECURED CREDITORS' COMMITTEE: FORMATION MEETING

- UST usually schedules a virtual formation/organizational meeting
 - Introduction by US Trustee
 - Explanation of the role of the UST and the UCC
 - UST then usually turns over the running of the meeting to the Committee

UNSECURED CREDITORS' COMMITTEE: IMMEDIATE DECISIONS

- Selection of chairperson
- Interview and selection of professionals
 - Counsel
 - Financial Advisor
 - Investment banker?
- Consideration and eventual adoption of Committee by-laws – governs committee member conduct

UNSECURED CREDITORS' COMMITTEE: UCC COSTS & CONSIDERATIONS

- Costs
 - Members' time
 - Expenses
 - Section 503 of the Bankruptcy Code allows UCC members to receive court-approved reimbursement of all out-of-pocket expenses incurred due to their participation on the UCC
 - Primarily travel costs (transport, accommodation, meals)
 - Members' legal fees incurred in connection with Committee business?
- Committee professionals paid for by Debtor, not committee members
 - Access to committee professionals is a significant benefit of committee membership



UNSECURED CREDITORS' COMMITTEE: THE ROLE OF THE UCC

- The UCC's involvement and role varies on a case by case basis.
- Immediate priority – First Day Motions
 - DIP Financing
- Use of cash collateral
- Critical vendor motions
- Employee wages and benefits

UNSECURED CREDITORS' COMMITTEE: THE ROLE OF THE UCC (CONT'D)

- Deliberations and investigations will depend on the direction a case is taking:
 - Reorganization
 - Sale of Business
 - Liquidation



UNSECURED CREDITORS' COMMITTEE: THE ROLE OF THE UCC (CONT'D)

- Reorganization
 - Review Debtor's business plan/projections to determine viability and value of Debtor's business
 - Formulate and negotiate plan of reorganization with Debtor and its advisors
 - Focus on core business
 - Shed non-core assets
 - File Committee plan of reorganization?



UNSECURED CREDITORS' COMMITTEE: THE ROLE OF THE UCC (CONT'D)

- Section 363 Sale
 - Evaluate proposed bid procedures and sale process and timing
 - Assist in finding going concern potential buyers
 - Participate in evaluation of offers from interested parties
 - Seek to encourage competitive bidding
 - Attend and participate in auction(s)

UNSECURED CREDITORS' COMMITTEE: THE ROLE OF THE UCC (CONT'D)

- Liquidation
 - Participate in selection of liquidators, if appropriate
 - Attend and participate in auction(s)



UNSECURED CREDITORS' COMMITTEE: THE ROLE OF THE UCC (CONT'D)

- Post plan effective date matters
 - Creation and selection of liquidating trust as part of Chapter 11 plan
 - Committee selects liquidating trustee
 - Funding liquidating trust



UNSECURED CREDITORS' COMMITTEE: THE ROLE OF THE UCC (CONT'D)

- Investigation and possible prosecution of causes of action
 - The extent of the UCC's investigation will often depend on the assets available and likelihood of recovery to unsecured creditors
 - Review of liens, security interests and mortgages
 - Preference, fraudulent transfer and lender liability claims against Debtor's lenders(s)
 - Preference and fraudulent conveyance claims against Debtor's insiders
 - Claims against officers and directors
 - Availability of Directors and Officers Insurance Policy?
 - Coverage amount?
- Waive or seek to bury preference claims against trade creditors

CASE STUDY: VITAL PHARMACEUTICALS, INC. (VPX)



VPX: BACKGROUND AND CHAPTER 11 FILING

- Established in 1993, headquartered in Weston, Florida – frontrunner in sports nutrition and pioneer in performance energy drink industry
- Leading product: Bang energy drink, launched 2012 – fastest growing beverage in U.S. non-alcoholic sector in 2018; third best-selling energy drink
- In 2019: approximately \$1.2 billion in retail sales, ~\$626 million in net revenue, ~\$175 million EBITDA
- As of Petition Date: 1,103 employees
- **October 10, 2022** – VPX and affiliates file Chapter 11 cases in the U.S. Bankruptcy Court for the Southern District of Florida
 - Key headwinds: (i) \$175 million OBI/Monster arbitration judgment, (ii) ~\$293 million Monster false advertising verdict, (iii) default under Prepetition Credit Agreement (~\$344 million outstanding), (iv) failed distribution network transition from Pepsi
 - Sought Chapter 11 to obtain breathing room from litigation, obtain \$100 million DIP financing, and pursue value-maximizing transaction

VPX: THE COMMITTEE'S ROLE IN MAXIMIZING VALUE

- **November 1, 2022** – Official Committee of Unsecured Creditors appointed; reconstituted November 23, 2022
- Committee retained: Lowenstein Sandler LLP and Sequor Law, P.A. as counsel; Lincoln International LLC as financial advisor; Miller Buckfire & Co., LLC and Stifel Nicolaus & Co., Inc. as investment banker
- The Committee launched a robust investigation into potential third-party claims and causes of action, including related-party transactions involving the Debtors' sole equity holder, John H. Owoc, and certain Owoc family non-Debtor real estate entities
 - Committee discovered that in the four years prior to bankruptcy, the Debtors transferred tens of millions of dollars out of the company solely for Mr. Owoc's personal benefit
 - Filed and served 22 subpoenas on third parties and conducted multiple examinations
- Committee negotiated to ensure the Sale, Global Settlement, and Plan preserved claims against the Owoc Parties as Liquidating Trust Assets
- **Matter value:** ~\$500,000,000

| VPX: THE SALE AND GLOBAL SETTLEMENT

- **January 27, 2023** – Debtors filed bidding procedures motion
- Blast Asset Acquisition, LLC (affiliated with Monster Beverage Corporation) identified as successful bidder
 - Purchase price: \$362,000,000 plus assumption of certain liabilities, plus additional \$10,000,000 of conditional consideration
- Global Settlement resolved various disputes among Debtors, Monster, OBI, Committee, and Supporting Lenders:
 - Supporting Lenders and Monster agreed to treat superpriority/administrative claims as unsecured claims
 - Monster and Supporting Lenders subordinated their right to receive distributions from the first dollars distributable to general unsecured creditors
 - All parties agreed to support a Chapter 11 liquidating plan
- **Sale approved July 13, 2023**; consummated July 31, 2023

VPX: THE PLAN AND COMMITTEE RECOMMENDATION

- **September 15, 2023** – Debtors filed Plan and Disclosure Statement; Committee was integrally involved in negotiating and drafting
- Plan is a liquidating Chapter 11 plan implementing the Global Settlement
- Holders of Allowed General Unsecured Claims (Class 3) receive pro rata share of Residual Cash
 - Estimated recovery: 1% or greater depending on results of litigation and monetization of Excluded Assets
- Plan does not release Mr. Owoc or the Owoc Parties – preserved causes of action to be pursued by Liquidating Trust
- Committee strongly urged all unsecured creditors to vote in favor of the Plan
- Post-confirmation, the Liquidating Trustee (with Lowenstein as counsel) filed an adversary complaint against the Owoc Parties asserting fifty claims and seeking more than \$100 million in damages
 - Settlement reached with certain defendants primarily related to fraudulent transfer claims, resulting in up to \$22.8 million in proceeds
 - Remaining adversary proceeding against John H. Owoc and other defendants is ongoing

CASE STUDY: *PROTERRA INC*



I PROTERRA: BACKGROUND AND CHAPTER 11 FILING

- Founded 2004; sold first electric transit bus in North America in 2009; went public via de-SPAC merger in June 2021 with ~\$1.6 billion enterprise value
- Three business lines: (i) Proterra Powered – proprietary battery systems for commercial vehicle OEMs; (ii) Proterra Energy – fleet-scale charging solutions; (iii) Proterra Transit – electric transit buses
- Headquartered in Burlingame, California; approximately 1,186 employees as of Petition Date
- **August 7, 2023** – Proterra Inc and Proterra Operating Company, Inc. file Chapter 11 in the U.S. Bankruptcy Court for the District of Delaware
 - Key headwinds: (i) Proterra Transit’s capital-intensive business and burdensome contracts draining liquidity, (ii) inability to raise capital due to corporate structure commingling Transit’s liabilities, (iii) Second Lien Convertible Notes (~\$177 million) precluding additional secured debt, (iv) supply chain disruptions and inflationary environment
 - Funded debt: ~\$199.1 million (letters of credit + Second Lien Convertible Notes)

I PROTERRA: THE COMMITTEE'S ROLE

- **August 24, 2023** – Official Committee of Unsecured Creditors appointed; reconstituted September 21, 2023
- Committee members: Power Electronics USA, Inc.; Ms. Michele Thorne; TPI, Inc.; Sensata Technologies, Inc; DWFritz Automation LLC
- Committee retained: Lowenstein Sandler LLP and Morris James LLP as counsel; Berkeley Research Group, LLC as financial advisor; Miller Buckfire & Co., LLC and Stifel Nicolaus & Co., Inc. as investment banker
- Committee actively involved in nearly every aspect of the Chapter 11 Cases to maximize recoveries for unsecured creditors
 - Objected to terms of the final cash collateral order and employee retention programs, resulting in material favorable modifications and protections for unsecured creditors
 - Investigated potential third-party claims, validity of Second Lien Agent's liens, and conduct of current and former directors and officers
 - Investigation included extensive document discovery and interviews of directors, officers, and employees
 - After investigation, Committee was unable to identify viable estate claims against insiders but did identify challenges to the Liquidation Premium Claim
- Committee negotiated significant consultation rights in the Debtors' bidding procedures to ensure value-maximizing sales

PROTERRA: THE SALES AND LIQUIDATION PAYMENT SETTLEMENT

- Debtors conducted auctions for all three Business Lines:
 - Proterra Powered sold to Volvo Battery Solutions LLC for ~\$265,000,000 plus assumption of liabilities (approved November 29, 2023)
 - Proterra Transit sold to Phoenix Motor, Inc. for \$3,500,000 plus assumption of liabilities; Battery Leases sold for \$6,500,000 (approved January 8, 2024)
 - Proterra Energy to be reorganized through the Plan with Plan Sponsor (Anthelion entities) via \$10,000,000 credit bid plus Cure Claims
- Second Lien Agent asserted Liquidation Premium Claim of \$88,585,019.23
- Committee and Debtors objected; Global settlement reached:
 - Liquidation Premium Claim allowed in limited amount of \$3,000,000 – a reduction of \$85 million from the asserted claim
 - \$10 million funded into Distribution Trust Expense Reserve to ensure administrative solvency

PROTERRA: THE PLAN AND COMMITTEE RECOMMENDATION

- **January 15, 2024** – Debtors filed Second Amended Plan and Second Amended Disclosure Statement
- Plan is a Chapter 11 plan of reorganization (for Proterra Energy via Plan Sponsor)
- Holders of Allowed General Unsecured Claims (Class 5) receive pro rata share of Second Priority Distribution Trust Beneficiaries interests
- Committee executed Plan Support Agreement and agreed to support the Plan
- Liquidation Payment Settlement resolved any potential objection to the Plan by the Committee
- Committee strongly urged all unsecured creditors to vote in favor of the Plan
- **Plan became effective on March 13, 2024**; Distribution Trust established to liquidate remaining assets, reconcile claims, and fund distributions
- Estimated recoveries for general unsecured creditors: approximately 15.7% – 24.8%
- Distribution Trustee (with Lowenstein as counsel) recently resolved and obtained court approval for a settlement of a multi-million-dollar dispute related to a letter of credit

QUESTIONS





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Education

Fordham University School of Law (J.D. 2013); staff member, *Fordham Intellectual Property, Media & Entertainment Law Journal*

Haverford College (B.A. 2010), cum laude

Admissions

New York

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U.S. District Court for the Southern District of New York

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Lindsay Sklar helps clients navigate financial restructurings with creative strategies designed for maximal recovery. She represents creditors' committees, individual creditors, debtors, liquidating trustees, and other interested parties in complex Chapter 11 cases and related adversarial proceedings.

Lindsay's Chapter 11 representations have included creditors' committees for Royal Paper, Proterra, Vital Pharmaceuticals (dba Bang Energy), Roman Catholic Bishop of Oakland, Century 21, GNC, Maines Paper & Food Service, the Northwest Company, Fred's, and Murray Metallurgical Coal Holdings. She has also represented securities class action plaintiffs' interests in several complex Chapter 11 cases such as Cutera, ModivCare, Tricida, Athenex, Lannett Co., and Genesis Global Holdco.

In addition, Lindsay's experience includes representing plan administrators and liquidating trustees in such cases as Mountain Sports, Lion Ribbon, Proterra Inc, Vital Pharmaceuticals, Century 21 Department Stores, GNC Holdings, Maines Paper & Food Service, and Fred's, as well as individual creditors in the bankruptcy proceedings of Cineworld, Steward, Hornblower Holdings, 24 Hour Fitness, Town Sports, Sears, Centric Brands, Rochester Drug Co-Operative, Gulf Coast Health Care, and Revlon.

She also represented the Ad Hoc Committee of Unsecured Creditors of Zulily, which commenced an assignment for the benefit of creditors in December 2023.

Prior to joining Lowenstein, Lindsay's practice centered on representation of fiduciaries and trustees in Chapter 7 bankruptcy matters across a range of industries including fashion, real estate, and finance. Notably, she represented the SIPA liquidation trustee of Bernard L. Madoff Investment Securities LLC.

Lindsay is a frequent contributor to legal publications and often speaks on bankruptcy issues at creditor group meetings.

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