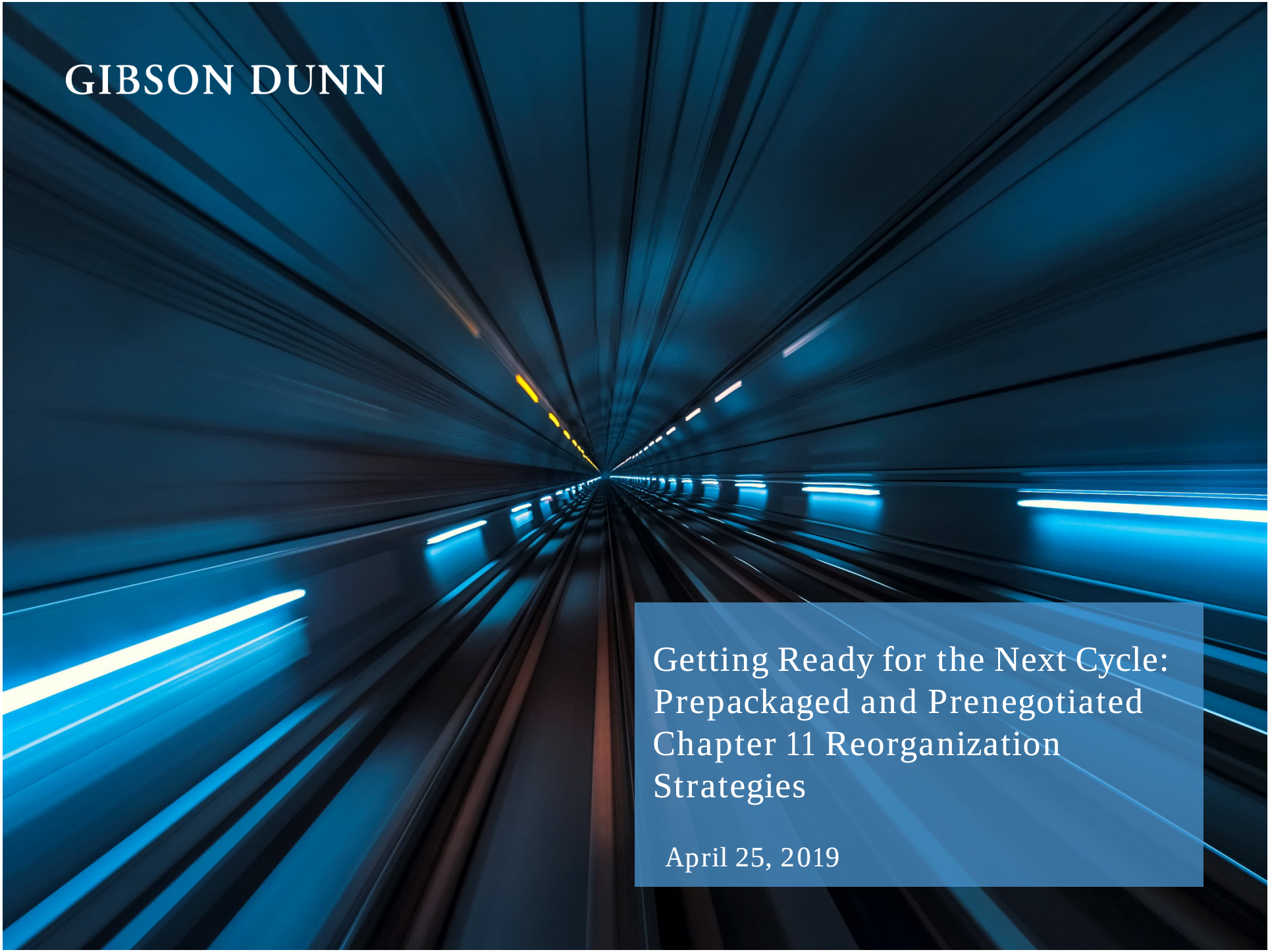


Getting Ready for the Next Cycle: Prepackaged and Prenegotiated Chapter 11 Reorganization Strategies

April 25, 2019

Advantages of Chapter 11 Cases vs. Out-of-Court Restructurings

- Different voting rules and availability of cramdown to bind dissidents and holdouts
- Filing for chapter 11 creates automatic stay of all collection efforts
- Single forum for negotiations
- Debtor can avoid certain prepetition transfers
- Availability of debtor in possession financing
- Debtor can reject unfavorable executory contracts and unexpired leases of nonresidential real property
  - Damages for rejection of leases subject to statutory cap
- Claim resolution process/caps/estimation only available in bankruptcy
- More favorable tax treatment regarding COD income

Disadvantages of Chapter 11 Cases vs. Out-of-Court Restructurings

- Potentially disruptive to debtor's business operations
- Business relationships can be harmed because debtor may not pay prepetition debts
- Company operates in a fishbowl
  - Company requires court approval for any transaction outside the ordinary course
- Any party in interest can object
- Added time to complete a chapter 11 case leads to higher costs, potential diminution of value of the enterprise
- Company's management may lose control over the reorganization process
  - Exclusivity periods
- Examiners and trustees

Different Types of Chapter 11 Cases

- Traditional (including sale/liquidating case)
- Prepackaged chapter 11 case
- Prenegotiated chapter 11 case

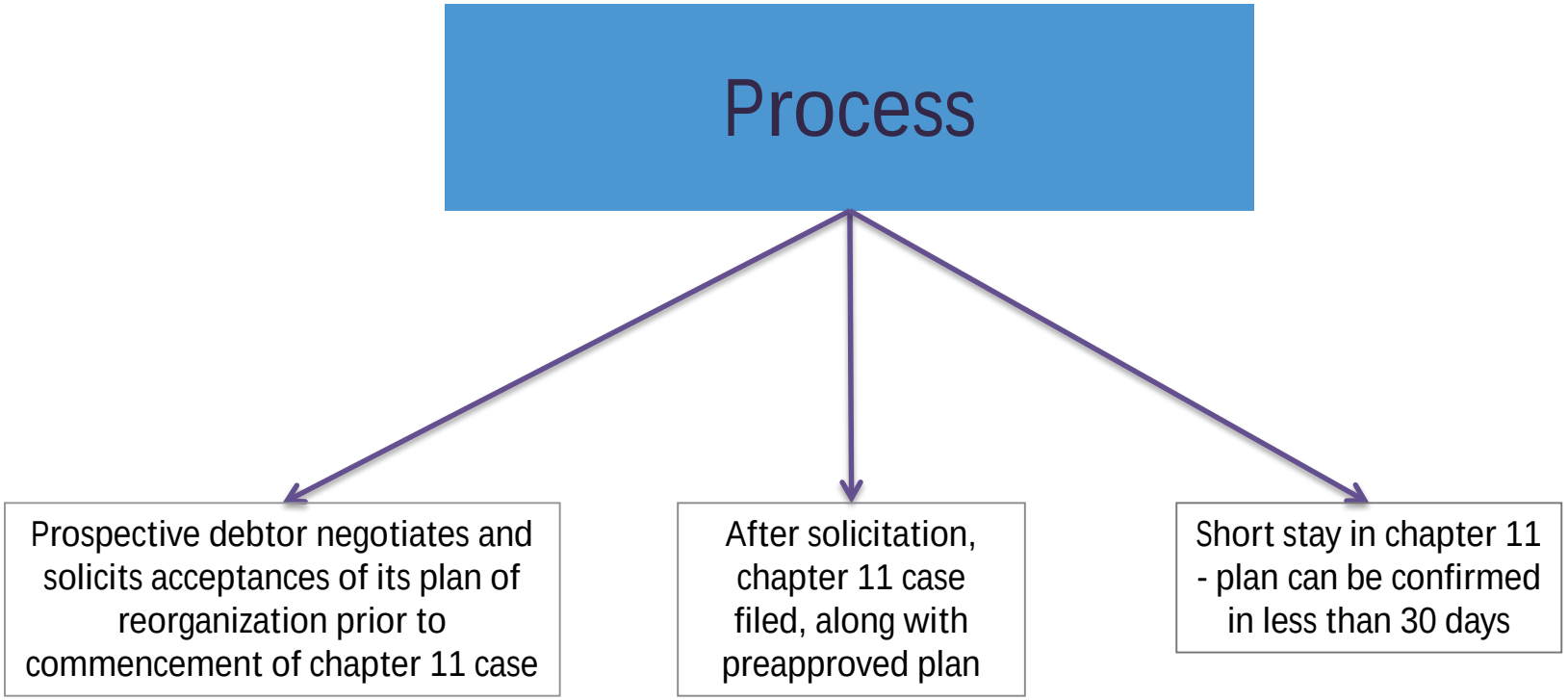
Traditional Chapter 11

- "Free fall": Company is forced to file bankruptcy with no precise game plan and uncertainty as to how the company and capital structure will look upon exit
- Company's bankruptcy process begins with the filing of the chapter 11 petition together with the first day pleadings
- After commencing the case, the debtor then negotiates with its creditor constituencies
- A free fall bankruptcy case can be protracted and expensive

Prepackaged Plan: Initial Stages

- Negotiate with key group of creditors
  - Representatives of different priorities of lenders
  - Bond trustees and agent banks
  - Ad hoc groups representing a majority position or, sometimes, a blocking position
- Execute Nondisclosure/Confidentiality Agreement
  - See slide below regarding key terms
- Execute Restructuring Support Agreement
  - See slide below regarding key terms

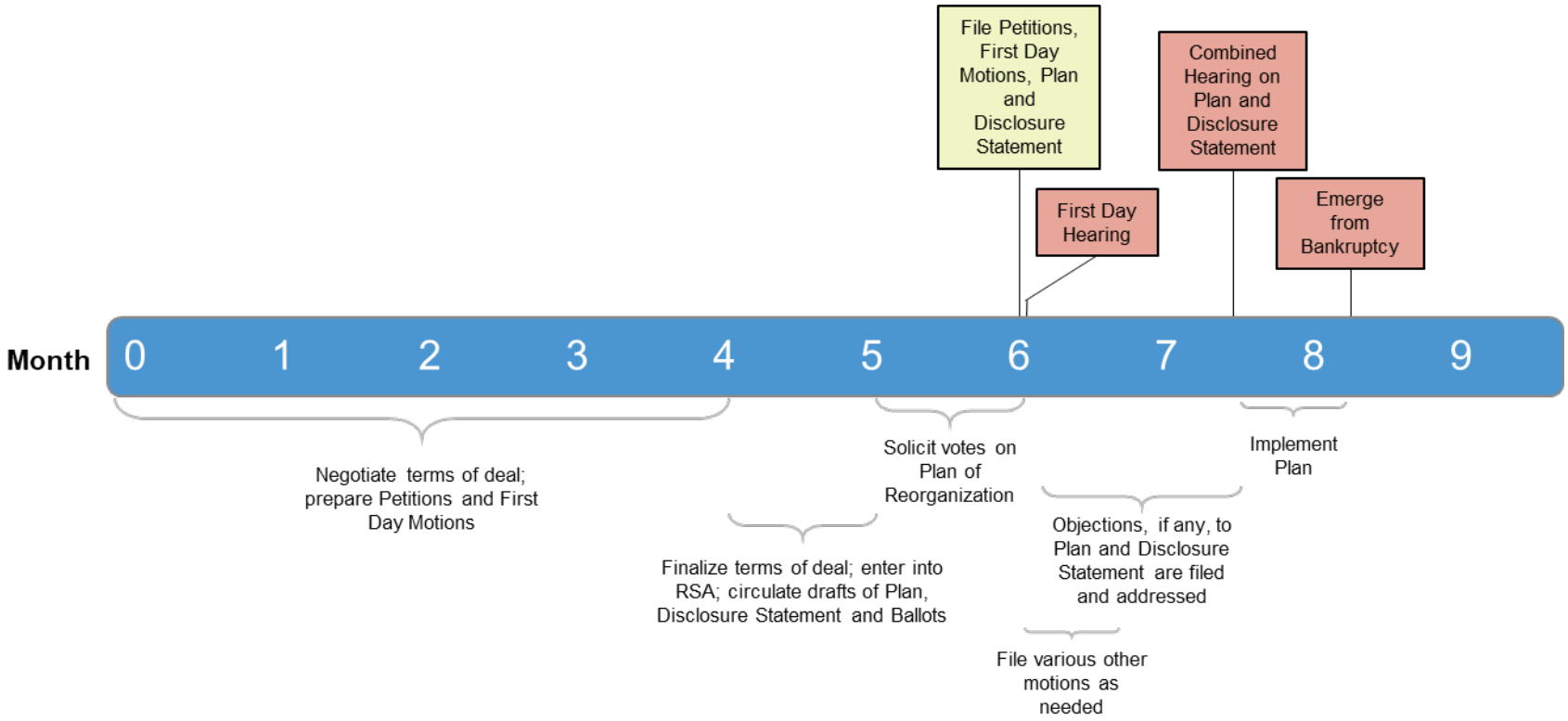
Prepackaged Plans: Overview



Prepackaged Plan: Overview (Cont'd)

- Prior to commencing chapter 11, solicit votes to accept or reject plan
  - Must comply with applicable bankruptcy and non-bankruptcy rules regarding solicitation (e.g., U.S. securities laws)
    - Section 1126(b)(1) of the Bankruptcy Code allows prepetition acceptances and rejections to be used postpetition to seek confirmation of a plan if the solicitation was in compliance with applicable nonbankruptcy rules and laws
    - May require SEC approval
- File chapter 11 petition with votes in hand
    - Section 1126(b)(2) allows prepetition acceptances or rejections to be used postpetition to seek confirmation of a plan if the solicitation was preceded by disclosure of "adequate information"
    - Bankruptcy Rule 3018 provides that prepetition acceptances or rejections cannot be counted if (a) the plan was not transmitted to substantially all creditors and equity holders of the same class, (b) an "unreasonably short time" was prescribed for acceptance or rejection of the plan, or (c) the solicitation was not in compliance with section 1126(b)
    - Several bankruptcy courts have adopted guidelines for prepackaged cases not specified in the Code and Rules (e.g. SDNY Prepack Guidelines)

Prepackaged Plan: Sample Timeline



Prepackaged Plan: Benefits Compared to Traditional Chapter 11 Case

- Shorter duration (generally 30-60 days vs. 9-20 months)
  - Especially important for service business and other companies that may not survive an extended chapter 11 proceeding
  - Avoids lengthy bankruptcy process where business decisions must be authorized by the court
- Minimize disruption to business
  - Avoids customer drain
  - Avoids competitive disadvantage
- More certainty of outcome and less risk of loss of control
- Least expensive chapter 11 alternative
- Greater certainty in outcome
- Generally no litigation and only 2-3 hearings

Prepackaged Plan: Benefits Compared to Traditional Chapter 11 Case (Cont'd)

- No need for an Official Committee of Unsecured Creditors so long as plan leaves unsecured creditors unimpaired (see above)
- Generally no need to file Schedules of Assets and Liabilities and Statement of Financial Affairs
- Typically structured to accommodate tax concerns of the Debtor
- Do not need creditor unanimity to confirm plan (only need 1/2 in number and 2/3 in amount of claims actually voted)
    - Solves the Holdout Problem: Outside of bankruptcy, indentures and credit agreements typically require unanimous written agreement of noteholders or lenders to implement a transaction that affects the fundamental economics of a deal (including, changes in coupons, maturity, principal, and other economically relevant terms outside of bankruptcy)

Prepackaged Plan: Disadvantages/Risks Compared to Traditional Chapter 11 Case

- Not optimal if
  - No concentrated holding of company debt
    - As complexity of the debt increases, the likelihood of successful prepackaged plan diminishes
  - Company must impair general unsecured creditors
  - Company desires to effectuate extensive operational restructure as well
- Risk of creditor action during plan solicitation period (e.g., remedies, involuntary bankruptcy)
- If bankruptcy court finds that pre-bankruptcy disclosure was not adequate, then solicitation will need to be repeated (resulting in increased delay and cost)
- No automatic stay during negotiations

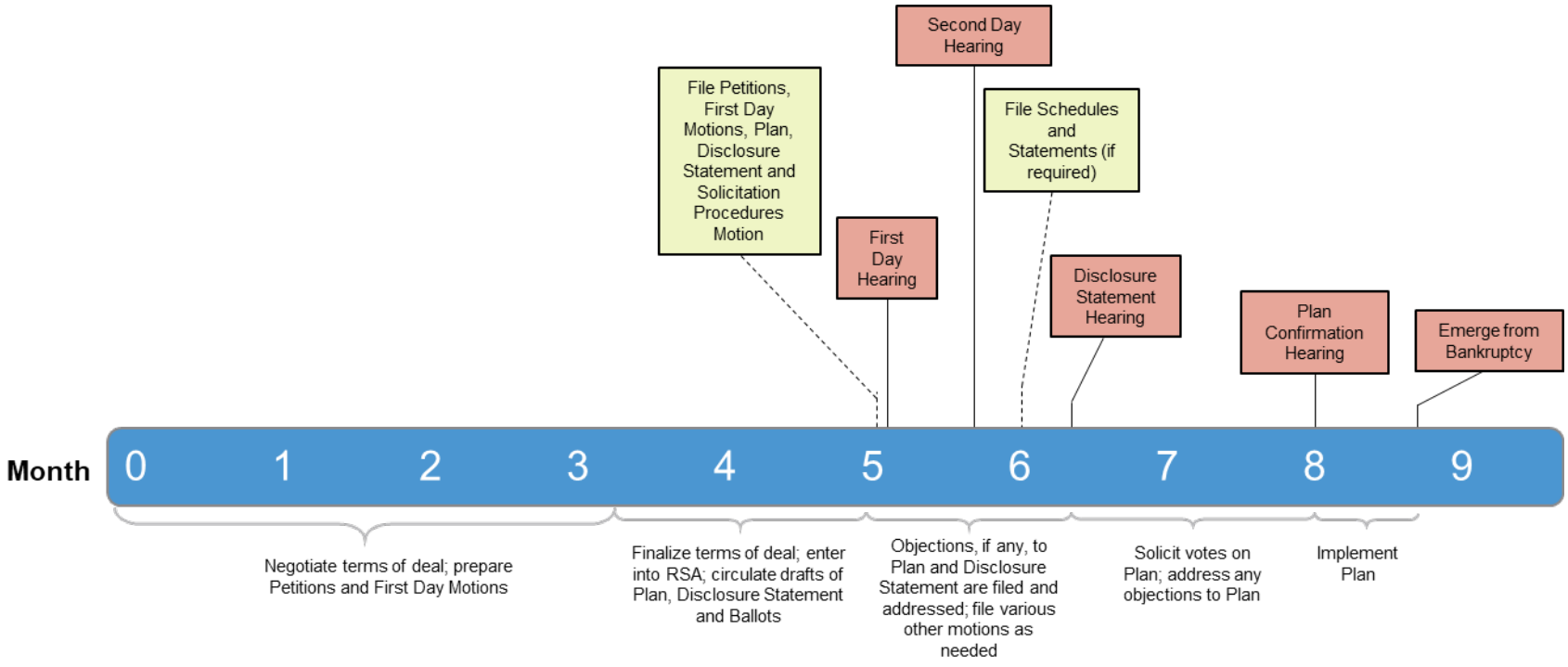
Prepackaged Plan: *In re FullBeauty Brands, Inc.*

- Set record for fastest confirmation of chapter 11 plan
  - On January 4, 2019, the company announced that it had entered into a restructuring agreement with key stakeholders
  - On February 3, 2019, the company filed chapter 11 cases in SDNY
  - On February 5, 2019, *approximately 24 hours after filing bankruptcy*, the Bankruptcy Court confirmed the plan
  - On February 7, 2019, the plan effective date occurred
- This record setting chapter 11 case was possible because:
  - The company had a relatively small capital structure
  - There were no operational issues to fix
    - No stores to rationalize because it only had an online presence
  - Vendors were assured there would be no disruptions
    - All general unsecured claims were reinstated under the plan
  - And support from an overwhelming majority of its capital structure (and ultimately, unanimous support)

Prenegotiated Plan: Overview

- Prior to commencing chapter 11 case:
  - Terms of plan negotiated and agreed to with key group of creditors, but no solicitation of votes
  - RSA with key group of creditors is negotiated and executed
- File plan and disclosure statement upon, or shortly after, filing chapter 11 case
- Company obtains authority to assume RSA (makes RSA enforceable against the debtor if breached)
- Solicit votes to accept or reject plan after filing chapter 11 case
- Official Committee of Unsecured Creditors could be appointed
- Claims Bar Date generally established
- Schedules of Assets and Liabilities and Statement of Financial Affairs generally required

Prenegotiated Plan: Sample Timeline



Prenegotiated Plan: Benefits Compared to Traditional Chapter 11 Case

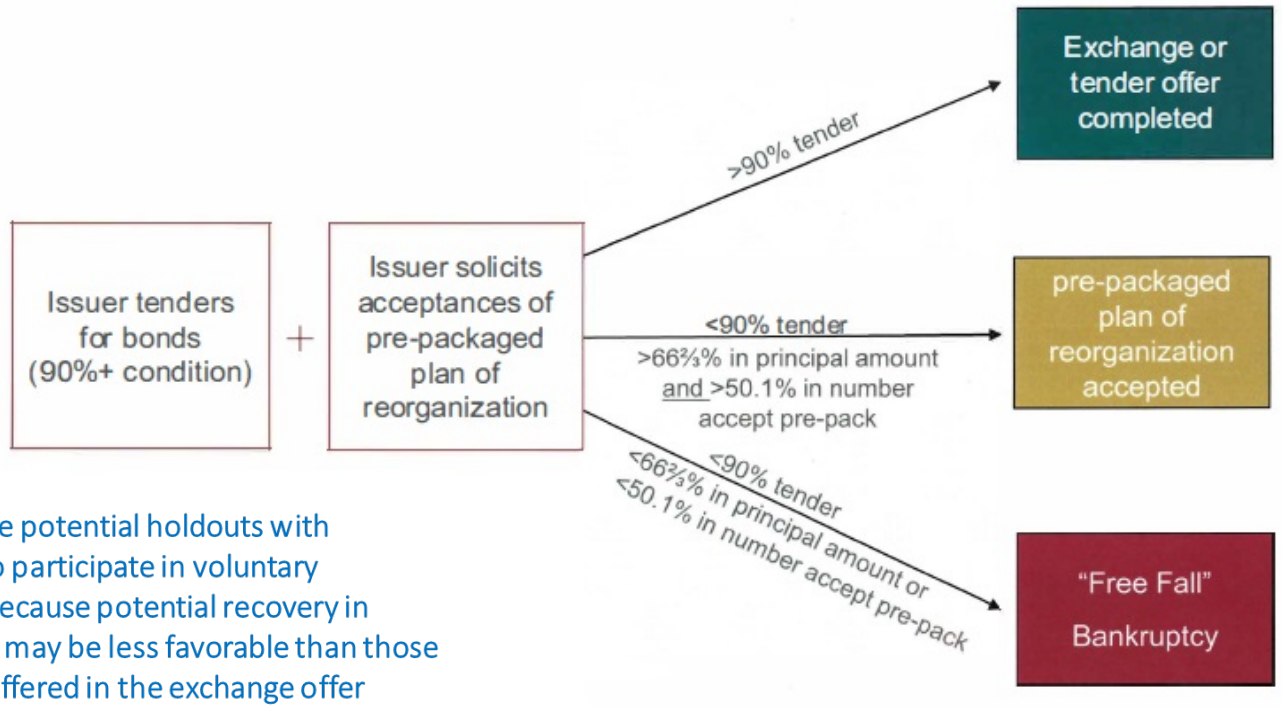
- Relatively short duration (90-120 days)
  - Longer than a prepack because the company must build in additional time for post-bankruptcy approval of disclosure statement and solicitation of votes on a plan
- Substantially less expensive
- More certainty in outcome
  - Critical mass of creditors execute lock-up agreements, but votes are not solicited until after approval of disclosure statement by bankruptcy court
- Avoid pre-bankruptcy disclosure and related impact on business

Prenegotiated Plan: Disadvantages/Risks

- Disadvantage compared to traditional chapter 11 case
  - Not optimal if
    - No concentrated holding of company debt
    - Company must impair general unsecured creditors
    - Company desires to effectuate extensive operational restructure as well
  - No automatic stay during negotiations
- Disadvantages compared to prepackaged chapter 11 case
  - Risk that vote not obtained (unless RSA binds requisite voting numbers for particular class)
  - Greater risk of alternate proposal being considered

Pursuing Exchange Offer/Prepack

- Prepack allows company to implement an "exchange offer" without unanimous consent of bondholders



Provides the potential holdouts with incentive to participate in voluntary exchange because potential recovery in bankruptcy may be less favorable than those securities offered in the exchange offer

Threat of Bankruptcy as Carrot vs. Stick

- Once a company realizes it may be in trouble it should start considering its restructuring options
  - Those include various forms of out-of-court restructuring options as well as in-court options
  - Because a bankruptcy case (including the preparation of the filing thereof) is time consuming and costly, it is often best to start considering a bankruptcy filing earlier in the process but only commence preparations for a filing once negotiations progress
    - Longer runway; avoid burning significant cash pre-filing
- However, even if the company has not yet determined that an in-court option is best, the threat of filing bankruptcy can sometimes be an effective negotiation tool with creditors to try to reach consensus on an out-of-court restructuring or a prepackaged or prearranged chapter 11 case

Nondisclosure Agreements

- When a company is considering a restructuring it will generally negotiate an NDA with holders of substantial indebtedness
- Key provisions:
  - MNPI: Receipt of MNPI restricts the ability of the creditor to trade
    - Big Boy letters
  - Confidentiality restrictions
  - Becoming "restricted"
    - Parties may have their counsel get restricted on their behalf
  - "Blow Out" Provisions: For parties to become "unrestricted," MNPI must either become (i) immaterial/stale or (ii) public
    - Parties will require the company to cleanse or "blow out" the MNPI through a press release or SEC filing by a certain date

Restructuring Support Agreements

- Also referred to as plan support agreements or lock-up agreements
- Key terms:
  - Agreement to support the plan
  - Acknowledgment by creditors of holdings/%
  - Trading restrictions
  - Fiduciary Out
    - Ensures the debtor is able to terminate the RSA and propose a different plan if the debtor determines that the agreement is no longer in the best interests of its estate

Restructuring Support Agreements (Cont'd)

- No solicitation provision
  - To clarify that the RSA does not constitute a solicitation
  - "This Agreement and the Plan and transactions contemplated herein and therein are the product of negotiations among the Parties, together with their respective representatives. Notwithstanding anything herein to the contrary, this Agreement is not, and shall not be deemed to be, a solicitation of votes for the acceptance of the Plan or any chapter 11 plan for the purposes of sections 1125 and 1126 of the Bankruptcy Code or otherwise. Notwithstanding anything herein to the contrary, the Company will not solicit acceptances of the Plan from any Consenting Lender until such Consenting Lender has been provided with information required by section 1125 of the Bankruptcy Code."
- Case milestones

Restructuring Support Agreements (Cont'd)

- Key Issues
  - Prepetition RSAs vs. Postpetition RSAs
- Prepetition RSAs: Debtor will file motion to assume RSA pursuant to section 365 of the Bankruptcy Code
  - Subject to business judgment standard
- Postpetition RSAs: Debtor will file motion to enter into RSA pursuant to section 363 of the Bankruptcy Code
  - Solicitation – Need to be careful to not run afoul of section 1125(b), which prohibits solicitation of votes on a plan before the court approves a disclosure statement
  - Usually set up so that none of the parties have agreed to vote in favor of the plan unless and until the court approves the disclosure statement and their votes have been properly solicited pursuant to section 1125
- Bankruptcy court approval of RSAs is not automatic
- *See In re Innkeepers USA Trust*, 442 B.R. 227 (Bankr. S.D.N.Y. 2010) (court did not approve the prepetition RSA, which only had the support of one creditor among the critical mass of creditors needed to support a successful restructuring)

Messaging and PR

- In connection with either a prepackaged or prenegotiated chapter 11 case, it is important to engage PR firm
- Generally want to get the message out that the bankruptcy filing is a necessary tool for reorganizing but it should not interrupt the business
  - Vendors
  - Customers
  - Employees

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Michael A. Rosenthal is a partner in the New York office of Gibson, Dunn & Crutcher and Co-Chair of Gibson Dunn's Business Restructuring and Reorganization Practice Group. Mr. Rosenthal has extensive experience in reorganizing distressed businesses and related corporate reorganization and debt restructuring matters. He has represented complex, financially distressed companies, acquirors of distressed assets, investors in distressed businesses, financial institutions, creditors' committees, and secured and unsecured creditors. Mr. Rosenthal's representations have spanned a variety of business sectors, including investment banking, mining, private equity, energy, retail, shipping, manufacturing, real estate, engineering, construction, medical, airlines, media, telecommunications and banking. He has been recognized for his ability to build consensus, to mediate disputes, and to bring practical results to complicated business situations.

Mr. Rosenthal also has substantial experience in advising private equity firms and others on distressed and fulcrum security investing strategies. Rosenthal is frequently consulted to analyze the capital structure of companies and to advise on first lien/second liens issues.

Mr. Rosenthal has deep experience in multi-jurisdictional cases, including representation of the debtors in some of the most significant and unique multi-jurisdictional chapter 11 cases filed in the United States. He has been active in representing and providing advice to entities regarding their rights and exposure related to difficulties in the financial services sector, including issues related to loan restructurings, spin-offs, derivative products, securitizations and customer account issues. In the aftermath of the financial crisis, Mr. Rosenthal played an important role in providing input and advice regarding proposed U.S. financial regulatory reform legislation—recently enacted as the Dodd-Frank Financial Reform Regulatory Act— including testifying before the House Judiciary Committee on issues related to the new Orderly Liquidation Authority enacted to facilitate the efficient resolution of systemically significant financial companies.

Mr. Rosenthal is consistently ranked as a leading Bankruptcy and Restructuring lawyer by *Chambers USA: America's Leading Lawyers for Business.* His representation of Arcapita Bank, a Bahrain-based investment bank, won the American Lawyer's Grand Prize for Global Finance Deal of the Year by The American Lawyer and the Financial Times award for Innovation in Finance Law. For this work, Mr. Rosenthal was a finalist for the Financial Times' Legal Innovator of the Year.

Mr. Rosenthal received his Juris Doctor in 1979 from the University of Chicago and his Bachelor of Arts degree *summa cum laude* in 1976 from the University of Virginia. He also studied at the London School of Economics and Political Science.

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Oscar Garza, a partner in Gibson, Dunn & Crutcher's Orange County and Los Angeles offices, joined the firm in 1990. He is a member of the Business Restructuring and Reorganization Practice Group (and was a former co-chair of the restructuring group), Transnational Litigation and Latin America Practice Groups.

Mr. Garza's restructuring practice involves representing debtors, creditors' committees, and secured creditors in chapter 11 cases, advising buyers and sellers of the assets of financially distressed companies, and representing Bankruptcy Trustees in complex cases.

Mr. Garza's transnational litigation practice is currently focused on leading and coordinating the defense against recognition and enforcement of foreign judgments with significant emphasis in defending actions in Latin America. He is also advising on litigation strategy for multinational corporations involved in litigation within Latin America.

Mr. Garza co-authored articles on break-up fees for asset purchasers in chapter 11 cases in *The Daily Deal* and the *California Bankruptcy Journal* as well as an article in the *Los Angeles Daily Journal* on how the Bankruptcy Reform Act of 2005 may change the sale of lease "designation rights." He has been (i) named as one of California's leading lawyers in business and restructuring by *Chambers USA – America's Leading Business Lawyers* (2007 – 2015); (ii) recognized by his peers as one of The Best Lawyers in America® in the area of Bankruptcy and Creditor-Debtor Rights Law from 2006 – 2019 (including being named Orange County Bankruptcy and Creditor Debtor Rights / Insolvency and Reorganization Law Lawyer of the Year in 2015 and Orange County Litigation – Bankruptcy Lawyer of the Year in 2014 and 2016 – 2019); (iii) named as a Southern California Super Lawyer in the area of Bankruptcy & Creditor/Debtor Rights (2007 – 2015); and (iv) in 2000 he was named by *Global Insolvency & Restructuring Review* as one of the "Top 40 Under 40" international restructuring professionals.

Mr. Garza obtained his law degree from the University of Arizona College of Law, where he was a member of the *Arizona Law Review*, and he currently serves on the board of visitors for the law school. He is and has been a frequent lecturer on bankruptcy law and practice.

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Mr. Moskowitz's practice focuses on representing debtors, official committees, secured lenders, ad hoc groups, indenture trustees, debtor-in-possession lenders, distressed debt investors, distressed asset acquirers and other parties-in-interest in complex chapter 11 cases and out-of-court restructurings across various industries. Mr. Moskowitz has also represented major creditors in several major municipal restructurings, both in and out of court.

Mr. Moskowitz earned his Juris Doctor, *cum laude*, in 2009 from Fordham University School of Law, where he served as an associate editor of the *Fordham Urban Law Journal*. He received his Bachelor of Arts degree in Political Science, *magna cum laude*, from Touro College in 2006.

Mr. Moskowitz is admitted to practice in the State of New York and before the United States District Courts for the Southern and Eastern Districts of New York.

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Matthew G. Bouslog is an associate in the Orange County office of Gibson, Dunn & Crutcher LLP where he practices in the firm's Business Restructuring and Reorganization Practice Group. Mr. Bouslog specializes in representing companies in complex restructuring matters. Mr. Bouslog frequently represents debtors, creditors, and other interested parties in out-of-court and in-court restructurings, and distressed acquisitions.

Mr. Bouslog also represents clients in various litigation matters, including claims for fraud, fraudulent transfer, breach of fiduciary duty, license termination disputes, and other bankruptcy-related litigation. A significant number of Mr. Bouslog's matters involve cross-border issues.

Before joining the firm, Mr. Bouslog served as a judicial clerk for the Honorable Robert N. Kwan of the United States Bankruptcy Court for the Central District of California. While in law school, he served as a judicial extern for the Honorable Thomas B. Donovan of the United States Bankruptcy Court for the Central District of California and for the Honorable Stephen V. Wilson of the United States District Court for the Central District of California.

Mr. Bouslog received his Juris Doctor degree in 2011 from the UCLA School of Law, where he was elected to the *Order of the Coif* and was a member of the Moot Court Honors Program. He earned a Bachelor of Science degree *magna cum laude* in Business Management from Brigham Young University in 2007.

Mr. Bouslog is admitted to practice law in the State of California.