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# Unbundling Business Bankruptcy Law

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# UNBUNDLING BUSINESS BANKRUPTCY LAW*

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*Every contract in America contains an invisible exception: different enforcement rules apply if a party files for bankruptcy. Overriding state contract law, chapter 11 of the Bankruptcy Code gives companies enormous flexibility to decide what to do with their pending contracts. Congress provided this controversial tool to chapter 11 debtors to increase the odds that a company can reorganize. To promote this objective while also preventing abuse and protecting stakeholders, Congress embedded this tool and others in an integrated package deal, including creditor voting. The tool was not meant as a standalone benefit for solvent private parties to pluck from the process for their own benefit, like an apple from a tree.*

*In recent decades, the chapter 11 package deal has been unbundled in practice, typically on grounds of economic urgency. While scholars and policymakers have attended to the quick going-concern sales of companies featured in unbundled bankruptcies, they have not sufficiently explored the challenges associated with a contract-intensive business.*

*To help fill that gap, this Article illustrates how the ad hoc procedures used to manage quick sales of contract-intensive businesses can undercut two oft-mentioned chapter 11 objectives: maximizing economic value and fair distribution. The procedures result in a wholesale delegation of a substantial federal bankruptcy entitlement to a solvent third party. In addition to the impact on economic value and distribution, this Article also explores a constitutional*



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*problem with this practice: it arguably exceeds the scope of the federal bankruptcy power.*



## INTRODUCTION

Every contract in America contains an invisible exception: different enforcement rules apply if one of the parties files for bankruptcy. Chapter 11 of the Bankruptcy Code not only gives financially distressed companies a chance to stay in business without unanimous support of their creditors but also allows bankrupt companies considerable discretion over what to do with pending contracts.[1] Putting aside whether chapter 11 reorganization should exist at all—a once-robust topic of debate among academics—Congress offers these types of tools in chapter 11 to *increase* the feasibility of a business restructuring.[2]

Bankruptcy's extraordinary legal tools, such as the override of state contract law, were not meant to be standalone benefits for solvent private parties to pluck from the process like an apple from a tree. To achieve the system's objectives and prevent abuse, chapter 11 embeds the perks in a package deal designed to protect the wide range of stakeholders affected when an enterprise experiences financial distress. As a centerpiece of the package in chapter 11, creditors have the right to vote on what happens to a bankrupt business.[3] If a company is too unwell to pursue even a plan of liquidation on which creditors vote, Congress anticipated that the winding-down process would shift to one overseen by a trustee appointed by the U.S. Department of Justice.[4]

The bankruptcy system operates much differently in real life than the Bankruptcy Code prescribes, and that divergence affects the allocation of winners and losers.[5] In the last two decades or so, the chapter 11 package deal has been unbundled.[6] Private equity firms and big institutional lenders have extracted and repurposed chapter 11's extraordinary tools for their own benefit––without creditor voting or a trustee to ensure adherence to the rules.

1. 11 U.S.C. § 365 (governing treatment of contracts in bankruptcy cases); *see infra* Section I.B.3.

2. *See* Elizabeth Warren, *Bankruptcy Policy*, 54 U. CHI. L. REV. 775, 787 (1987).

3. *See* 11 U.S.C. § 1126 (articulating voting rules); *id.* § 1129 (outlining consequences of levels of creditor support for confirmation of a plan).

4. *See* 11 U.S.C. §§ 704, 1104, 1112(b)(4) (setting forth the duties of the trustee in chapters 7 and 11 and the grounds for conversion from chapter 11 to chapter 7). *See generally* Lynn M. LoPucki & William C. Whitford, *Corporate Governance in the Bankruptcy Reorganization of Large, Publicly Held Companies*, 141 U. PA. L. REV. 669, 673 (1993) (finding that "creditor and shareholder influence over management frequently prevents companies from maximizing their value").

5. *See* Vincent S.J. Buccola, *Unwritten Law and the Odd Ones Out*, 131 YALE L.J. 1559, 1582 (2022) [hereinafter Buccola, *Unwritten Law*].

6. A substantial portion of chapter 11 cases feature going-concern sales although the precise figure is contested. Vincent S.J. Buccola, *Bankruptcy's Cathedral: Property Rules, Liability Rules, and Distress*, 114 NW. U. L. REV. 705, 733 n.119 (2019) [hereinafter Buccola, *Cathedral*] (collecting studies primarily of large public company bankruptcies); Jay Lawrence Westbrook, *Secured Creditor Control and Bankruptcy Sales: An Empirical View*, 2015 U. ILL. L. REV. 831, 845 (describing the outcome of a study of cases from 2006).

Unbundling bankruptcy's package deal and transforming it into *bankruptcy à la carte* is the result.[7] That is the subject of this Article.

The quick sale of a company, without creditor voting, is the centerpiece of this unbundled bankruptcy process. Such sales have received significant scholarly and professional attention.[8] The role of a distressed company's lenders in directing the unbundling and its consequences is also well documented.[9] These practices persist in the face of empirical research that is mixed at best on whether quick sales maximize the bankruptcy estate's economic value and distribute it fairly; even a commission established by the nation's largest bankruptcy-related professional association has expressed concerns and proposed reforms.[10]

To round out the focus on sales and loans in unbundled bankruptcies, the treatment of contracts requires more scrutiny. A bankrupt company may have few synergies or other contributors to going-concern value that chapter 11 was supposed to preserve.[11] This is particularly likely if a distressed company waits too long to seek bankruptcy relief.[12] The company may, however, have hundreds, thousands, or even tens of thousands of contract relationships. The

7. The term bankruptcy à la carte comes from Melissa B. Jacoby, *Shocking Business Bankruptcy Law*, 131 YALE L.J. F. 409, 416 (2021) [hereinafter Jacoby, *Shocking*]. This Article will use "bankruptcy à la carte" and "unbundled bankruptcy" interchangeably.

8. *See generally* Douglas G. Baird & Robert K. Rasmussen, *The End of Bankruptcy*, 55 STAN. L. REV. 751 (2002) [hereinafter Baird & Ramussen, *End of Bankruptcy*] (analyzing the decline in Chapter 11 reorganizations in favor of quick sales); Lynn M. LoPucki & Joseph W. Doherty, *Bankruptcy Fire Sales*, 106 MICH. L. REV. 1 (2007) [hereinafter LoPucki & Doherty, *Fire Sales*] (reporting results of an empirical study comparing recovered value in reorganization and going-concern sales); Melissa B. Jacoby & Edward J. Janger, *Ice Cube Bonds: Allocating the Price of Process in Chapter 11 Bankruptcy*, 123 YALE L.J. 862 (2014) [hereinafter Jacoby & Janger, *Ice Cube Bonds*] (proposing implementing a reserve to preserve valuation disputes and maximize value in expedited 363 sales).

9. *See* Kenneth Ayotte & Jared A. Ellias, *Bankruptcy Process for Sale*, 39 YALE J. REGUL. 1, 9–13 (2022); Kenneth M. Ayotte & Edward R. Morrison, *Creditor Control and Conflict in Chapter 11*, 1 J. LEGAL ANALYSIS 511, 514 (2009); David A. Skeel, Jr., *Creditors' Ball: The "New" New Corporate Governance in Chapter 11*, 152 U. PA. L. REV. 917, 923–26 (2003); Jay Lawrence Westbrook, *The Control of Wealth in Bankruptcy*, 82 TEX. L. REV. 795, 857–60 (2004).

10. *See* MICHELLE M. HARNER, FINAL REPORT OF THE ABI COMMISSION TO STUDY THE REFORM OF CHAPTER 11, at 87, 201, 204, 206 (2014) [hereinafter ABI FINAL REPORT] (collecting studies and proposing reforms of Chapter 11 bankruptcies); *see also* Jordan B. Neyland & Kathryn A. St. John, *Hidden Wealth Transfers in Bankruptcy Asset Sales: A Real Option Analysis*, 19 BERKELEY BUS. L.J. 46, 80–82 (2022).

11. Baird & Rasmussen, *End of Bankruptcy*, *supra* note 8, at 773–77 (discussing lack of synergy in modern companies being sold quickly as going concerns in chapter 11).

12. For a discussion of delayed bankruptcies and their consequences, see A. Mechele Dickerson, *A Behavioral Approach to Analyzing Corporate Failures*, 38 WAKE FOREST L. REV. 1, 53–54 (2003) (proposing corporate board duty to timely file); Stephen J. Lubben, *The Board's Duty To Keep Its Options Open*, 2015 U. ILL. L. REV. 817, 826–27 (considering how corporate duties apply to delegating control to lenders while in financial distress).

status of contracts may be disputed in ways that could affect their validity as well as the cost of curing defaults. It is hard for third parties with limited information to assess the value of the company's contract rights, whether alone or in various configurations, on a fast track, let alone to anticipate what disputes might arise. Meanwhile, the clock is ticking; the lender can threaten to pull the funding if the sale is delayed.[13] This Article will show how real-world methods of managing these tensions in a contract-intensive company can compromise two critical goals of the bankruptcy system: maximizing the value of the bankruptcy estate[14] and fair distribution to creditors.[15]

These practices raise a second and underappreciated issue: lawyers and parties ask federal courts to bless and enforce transactions that become hard to justify under the federal bankruptcy power. The Constitution authorizes Congress to enact uniform laws on bankruptcy, but that power is not unlimited.[16] The U.S. Supreme Court has not had occasion to directly consider whether the practices in unbundled bankruptcy discussed here exceed the scope of the federal bankruptcy power, but it is a question worth asking.[17] Unbundled bankruptcies repurpose the system's perks in ways unrelated to, and sometimes at odds with, the goals of the federal bankruptcy system. They hinge on federal courts approving and enforcing deals that allow solvent private parties with no duties to the bankruptcy estate to extract the benefits for themselves.

This Article takes a case study approach to exploring these dimensions of chapter 11 practice. It examines the unbundling of a particular bankruptcy from the bottom up, in a case famous for a nonbankruptcy reason. The Weinstein Company ("TWC"), an entertainment firm founded by Harvey and Robert Weinstein, filed for bankruptcy in Wilmington, Delaware, about six months after *The New York Times* published investigations of sexual harassment and

13. *See infra* Sections I.B.2, II.B.2.

14. *E.g.*, Douglas G. Baird & Robert K. Rasmussen, *Chapter 11 at Twilight*, 56 STAN. L. REV. 673, 691–92 (2003) [hereinafter Baird & Rasmussen, *Twilight*].

15. *See* 11 U.S.C. §§ 507, 1129(b)(1); Ralph Brubaker & Charles Jordan Tabb, *Bankruptcy Reorganizations and the Troubling Legacy of* Chrysler *and* GM, 2010 U. ILL. L. REV. 1375, 1379 (emphasizing the importance of distributional norms, whether a bankrupt company is sold or reorganized); *id.* at 1406 ("[O]pportunities to conflate distribution and deployment for strategic gain know no bounds."); Mark J. Roe & Frederick Tung, *Breaking Bankruptcy Priority: How Rent-Seeking Upends the Creditors' Bargain*, 99 VA. L. REV. 1235, 1243 (2013); Douglas G. Baird, *Loss Distribution, Forum Shopping, and Bankruptcy: A Reply to Warren*, 54 U. CHI. L. REV. 815, 820 (1987); Elizabeth Warren, *The Untenable Case for Repeal of Chapter 11*, 102 YALE L.J. 437, 468 (1992).

16. U.S. CONST. art. I, § 8, cl. 4; *see infra* Section III.B.

17. *See infra* Section III.B. For an earlier rethinking of the assumption that federal law should govern business bankruptcy, see David A. Skeel, Jr., *Rethinking the Line Between Corporate Law and Corporate Bankruptcy*, 72 TEX. L. REV. 471, 477–82 (1994).

other wrongdoing in October 2017.[18] Whereas other well-known enterprises such as Purdue Pharma and the Boy Scouts of America have sought to restructure in chapter 11 after allegations of widespread wrongdoing,[19] TWC pursued a bankruptcy à la carte. In other words, TWC entered bankruptcy to sell itself quickly without giving creditors a chance to vote on the key transactions. TWC was a party to nearly 30,000 contracts.[20] The contracts were in various states of disarray, but many were also closely tethered to the enterprise's intellectual property assets.[21]

This Article proceeds as follows. Part I offers a brief conceptual framework for chapter 11, including emphasis on chapter 11's design as a package deal, the popular components of bankruptcy à la carte, and the important but not exclusive objective of maximizing economic value in business bankruptcy law.

Part II focuses on TWC. It first lays groundwork to understand the state of the company when it filed for chapter 11. Then, it explores the transactional documents and court processes relating to the quick sale and the loan keeping TWC afloat until that sale. The case study pays special attention to the treatment of TWC's contracts, most notably the flexibility and long timeline afforded to the buyer to shop among tens of thousands of contracts in ways unavailable to competing bidders.

Part III presents implications from this study of TWC's bankruptcy. First, it articulates elements of TWC's bankruptcy à la carte that structurally undercut the assertion of maximizing economic value for the bankruptcy estate and ensuring its fair distribution. Second, it starts a conversation about how unbundling chapter 11's legal tools in the fashion seen in TWC may exceed the boundaries of the Constitution's Bankruptcy Clause, particularly the wholesale delegation of bankruptcy's contract decision-making perks to a solvent third party.

18. *See infra* Part II.

19. Andrew Scurria, Joseph De Avila & Peg Brickley, *Boy Scouts Seek Chapter 11 Protection from Sex-Abuse Lawsuits*, WALL ST. J. (Feb. 18, 2020), https://www.wsj.com/articles/boy-scouts-seek-chapter-11-protection-from-sex-abuse-lawsuits-11582003432 [https://perma.cc/8UNN-5S9V (staff-uploaded, dark archive)]; Jan Hoffman & Mary Williams Walsh, *Purdue Pharma, Maker of OxyContin, Files for Bankruptcy*, N.Y. TIMES, https://www.nytimes.com/2019/09/15/health/purdue-pharma-bankruptcy-opioids-settlement.html [https://perma.cc/K5CH-N65V (dark archive)] (last updated Nov. 24, 2020).

20. An early list of contracts that TWC's buyer wanted to acquire (and thus is underinclusive) exceeded 26,000 contracts. *See* Notice of Filing of Final List of Potentially Assumed Contracts and Leases at 2058, *In re* The Weinstein Co. Holdings, No. 18-10601 (Bankr. D. Del. May 10, 2018), Doc. 860 [hereinafter Assumed Contracts & Leases].

21. *See infra* Sections II.B.1, II.B.6.

# I. CONCEPTUAL FRAMEWORK

## A. *Package Deal*

Bankruptcy is old, but chapter 11 is relatively new.[22] In the 1930s, building on equity receivership practice in federal courts, Congress started experimenting with allowing companies to reorganize, but that version of the law was deemed difficult and inflexible.[23] The business reorganization concept got its big push in 1978 with a bipartisan overhaul that created modern chapter 11.[24]

Chapter 11 provides companies a potent legal option to restructure debts with majority but not universal creditor support.[25] At least on paper, the law reflects a careful balance of considerations and a combination of public and private money, oversight, and standard setting.[26] Company management typically remains in charge of the company rather than requiring the installation of a government-appointed trustee.[27] Still, creditors are supposed to be able to directly participate in company governance and vote on a restructuring plan, although the majority would be able to bind the minority of creditors as long as due process rights are respected.[28] Dispersed creditors are represented at the negotiating table through the appointment of an official committee.[29] Informational disclosures are required, both at the outset of the case and for voting on a plan.[30] Fiduciaries for the bankruptcy estate have the authority to investigate wrongdoing and pursue valuable and integrity-promoting causes of action.[31] Creditors of many kinds have standing to object to and litigate all sorts

22. Michelle M. Harner, *The Search for an Unbiased Fiduciary in Corporate Reorganizations*, 86 NOTRE DAME L. REV. 469, 479–85 (2011) (presenting history of corporate reorganization law).

23. A. Mechele Dickerson, *Privatizing Ethics in Corporate Reorganizations*, 93 MINN. L. REV. 875, 889–90 (2009) (describing criticism of pre-1978 law, including ouster of managers).

24. Bankruptcy Reform Act of 1978, Pub L. No. 95-598, 92 Stat. 2549 (1978) (codified as amended in scattered sections of 11 U.S.C.).

25. *See* 11 U.S.C. §§ 1126, 1129.

26. *See* Melissa B. Jacoby, *Corporate Bankruptcy Hybridity*, 166 U. PA. L. REV. 1715, 1730 (2018) [hereinafter Jacoby, *Hybridity*].

27. 11 U.S.C. § 1107 (providing the debtor-in-possession concept).

28. 11 U.S.C. §§ 1126, 1129.

29. Michelle M. Harner & Jamie Marincic, *Committee Capture? An Empirical Analysis of the Role of Creditors' Committees in Business Reorganizations*, 64 VAND. L. REV. 749, 763–64 (2011) (discussing potential for significant committee influence); 11 U.S.C. §§ 1102, 1103 (outlining the appointment of official committees and committee duties).

30. 11 U.S.C. §§ 521(a), 1125.

31. *See, e.g.*, 11 U.S.C. §§ 510, 544, 547, 548, 1104.

of things in a bankruptcy; the threat and reality of such advocacy contributes to making the system operate fairly and efficiently.[32]

The most natural reading of chapter 11 is as a package deal of obligations and rights, including perks that aid reorganization of a company.[33] This package restrains particularly aggressive creditors from undoing the rules and the balance Congress created and on which credit markets rely. The package deal does not inherently require a long stay in chapter 11. Executing the package can lawfully happen on a fast track; the Bankruptcy Code recognizes prepackaged bankruptcies in which affected creditors vote prior to the bankruptcy filing.[34] For companies unable to pursue a plan of any kind, Congress offered exit strategies. They can be sold in chapter 7, subject to oversight of a trustee appointed by the U.S. Department of Justice; liquidated in chapter 11, ideally under trustee oversight; or dismissed from the bankruptcy system altogether.[35]

The package deal especially makes sense because allowing a company to do things under federal bankruptcy law that would otherwise be impossible is rightly controversial. An artificial legal person (like a corporation, limited liability company, or other entity to which business associations law gives independent life) does not have an inherent right to exist or to be reorganized.[36] It does not need debt forgiveness the way living individuals do.[37] Its access to such extraordinary relief is conditioned.

Although federal law is not the natural home of corporate or commercial law, Congress enacted business reorganization law to serve instrumental functions. In 1978, the members of Congress highlighted concepts like saving jobs, relationships, and communities.[38] Today, maximizing economic value of the bankruptcy estate is recognized as a key (although not the only) chapter 11

32. *See* Jared A. Ellias, *Do Activist Investors Constrain Managerial Moral Hazard in Chapter 11? Evidence from Junior Activist Investing*, 8 J. LEGAL ANALYSIS 493, 494–96 (2016); Harner & Marincic, *supra* note 29, at 789–93.

33. Harner, *supra* note 22, at 498 (discussing process goals as well as substantive objectives); Jacoby, *Shocking*, *supra* note 7, at 416.

34. 11 U.S.C. § 1125(g); *id.* § 1126(b) (authorizing prebankruptcy vote); Harner, *supra* note 22, at 516–17 (describing prepackaged process).

35. 11 U.S.C. § 1112 (outlining grounds for dismissal or conversion); *id.* § 1141(d)(3)(A) (describing that plan confirmation does not discharge a nonindividual debtor if debtor is liquidating); *id.* § 1129(a)(11) (authorizing court to confirm a plan only if confirmation of the plan is not likely to be followed by liquidation "unless such liquidation . . . is proposed in the plan").

36. For more in depth discussion on these issues, see Melissa B. Jacoby, *Fake and Real People in Bankruptcy*, 39 EMORY BANKR. DEV. J. 497, 498–502 (2023).

37. *Id.* at 6.

38. H.R. REP. NO. 95-595, pt. 1, at 220 (1977).

goal.[39] Yet value maximization has less of a rigorous common understanding than one might expect; too often it is equated with a proposal to put some money into some, or any, creditors' pockets.[40] The fact that a decision is profitable for particular parties does not mean it maximized the value of the enterprise. However large one can make the estate, bankruptcy law also cares about how the estate's value is allocated.[41] You can bargain away your own priority but not the rights of others.[42]

In addition to making reorganization possible, the Bankruptcy Code includes various boosters to increase reorganization's odds.[43] As detailed in the next subpart, these federal law perks include incentives to offer a bankrupt company new financing with protections that subordinate the priority of other existing creditors, and the right of a company to make decisions about its ongoing contracts that would be unavailable at state law. Whatever virtues these perks might have when a company takes on a traditional reorganization, they cast a different light used outside of the package deal.

## B. *Unbundling*

### 1. Sales

The centerpiece of the unbundled chapter 11 is a going-concern sale of all or most of an operational company. The Bankruptcy Code expressly endorses the concept of a going-concern sale *through a plan* on which creditors have voted after adequate disclosures.[44] Nonetheless, lawyers have persuaded courts that it

39. Toibb v. Radloff, 501 U.S. 157, 163 (1991) (emphasizing that it is wrong to "assume[] that Congress had a single purpose in enacting Chapter 11" and that Chapter 11 "embodies the general Code policy of maximizing the value of the bankruptcy estate"); Jacoby, *Hybridity*, *supra* note 26, at 1721–23 (describing chapter 11 as public-private partnership that navigates competing objectives); Jacoby, *Shocking*, *supra* note 7, at 416 (normative pluralism of bankruptcy system).

40. Congress knew how to write provisions requiring certain creditor recoveries. *See* 11 U.S.C. § 1129(a)(7) (requiring that a Chapter 11 plan must pay a creditor at least as much as it would receive if a Chapter 7 trustee liquidated assets); § 1129(b) (laying out the absolute priority rule and bar against unfair discrimination protections for a dissenting class).

41. *See supra* note 15 and accompanying text.

42. Czyzewski v. Jevic Holding Corp., 137 S. Ct. 973, 986 (2017); Jonathan C. Lipson, *The Secret Life of Priority: Corporate Reorganization After Jevic*, 93 WASH. L. REV. 631, 635–36 (2018).

43. NLRB v. Bildisco, 465 U.S. 513, 527 (1984) (tying powers regarding executory contracts with the policy of Chapter 11 to permit successful reorganization and concluding this policy goal must be considered when courts decide whether to approve a debtor's decision); Jacoby & Janger, *Ice Cube Bonds*, *supra* note 8, at 919–20 (examples of contributors to bankruptcy "premium"); Melissa B. Jacoby & Edward J. Janger, *Tracing Equity: Realizing and Allocating Value in Chapter 11*, 96 TEX. L. REV. 673, 707 (2018) [hereinafter Jacoby & Janger, *Tracing Equity*].

44. Jacoby & Janger, *Ice Cube Bonds*, *supra* note 8, at 906, 910.

is preferable to sell entire companies in bankruptcy quickly.[45] *Ideally*, a well-run auction simply swaps assets for cash at a fair market price. *Ideally*, bidders have adequate access to information and an understanding of the assets. *Ideally*, proceeds are allocated according to priority rules. Although the conceivable benefits of a quick going-concern sale are many, one should not forget the loss of the checks and balances unbundling chapter 11 leaves behind. In other words, those concerned about sales are not necessarily lamenting the lack of a traditional reorganization but worrying that the risks of the unbundled process will fall short on maximizing value and distributing it fairly.[46]

The empirical evidence that quick bankruptcy sales match the ideal has been mixed at best.[47] Involvement of and negotiation among market actors is not sufficient to establish that value is being maximized.[48] Although courts have adopted local rules to create structures for quick sales and have adopted rules of thumb, they do not and cannot replicate the calibrated procedures of chapter 11 plans or the guardrails of chapter 7 liquidation overseen by a trustee rather than debtor management.[49] The common assertion that a quick sale saves jobs likewise warrants scrutiny.[50]

45. Baird & Rasmussen, *End of Bankruptcy*, *supra* note 8, at 787. *See generally* LoPucki & Doherty, *Fire Sales*, *supra* note 8 (describing rise of going-concern sales in chapter 11 aligned with law and economics arguments).

46. *See* Jacoby & Janger, *Ice Cube Bonds*, *supra* note 8, at 895–910 (discussing both value-maximizing and distributional risks of quick all-asset sales that lack creditor voting and the plan process).

47. For collected studies on this issue, see Jacoby & Janger, *Ice Cube Bonds*, *supra* note 8, at 895–910; ABI FINAL REPORT, *supra* note 10, at 87, 201, 204, 206 (collecting studies and proposing reforms). For new insights, see Neyland & St. John, *supra* note 10, at 80–87 (using option theory to conclude that case law overestimates benefits of speedy sales and that downsides of speed can be significant).

48. Diane Lourdes Dick, *The Chapter 11 Efficiency Fallacy*, 2013 BYU L. REV. 759, 763 (2013) (critiquing the "flawed assumption that negotiations naturally lead to efficient restructuring outcomes"); *id.* at 765 ("[S]elf-dealing, conflicts of interest, opportunism, information asymmetries, and collective action obstacles . . . bolster the bargaining power of some stakeholders while limiting the influence of others.").

49. Hence, experts propose to import plan-related restrictions. *See generally* ABI FINAL REPORT, *supra* note 10 (presenting reform proposals to 363 sales); George W. Kuney, *Let's Make It Official: Adding an Explicit Preplan Sale Process as an Alternative Exit from Bankruptcy*, 40 HOUS. L. REV. 1265 (2004) (proposing amendments to create a uniform sale process without a Chapter 11 plan).

50. For an analysis of when job saving justifies traditional reorganizations, see Zachary Liscow, *Counter-Cyclical Bankruptcy Law: An Efficiency Argument for Employment-Preserving Bankruptcy Rules*, 116 COLUM. L. REV. 1461, 1462–66 (2016) (defending job saving during periods of high unemployment, but not when the unemployment rate is low or workers have good alternative prospects). For analysis of job-saving and quick 363 sales, see generally George W. Kuney, *Misinterpreting Bankruptcy Code Section 363(f) and Undermining the Chapter 11 Process*, 76 AM. BANKR. L.J. 235, 281 (2002) [hereinafter Kuney, *Misinterpreting*] (expressing skepticism on a quick sale's ability to save jobs because once new management in place, the workforce is often downsized, particularly when the purchaser is in the same

These sales typically feature a lead bidder known as a "stalking horse" that has entered an asset purchase agreement with the debtor.[51] One feature of that contract is a "break-up" fee that the stalking horse bidder will demand from the bankruptcy estate if a competing bidder prevails.[52] In theory, that fee reflects several factors, including priming the pump for others to bid in an auction and preventing other bidders from free-riding on the stalking horse's due diligence. But that does not mean stalking horses and breakup fees always help maximize value.[53] Among other things, negotiations are affected by auction design; a less rigorous process leaves the stalking horse with more power.[54] Yet challenging any auction, inside or outside of bankruptcy, takes money, time, and knowledge.[55]

Standalone going-concern sales are especially popular for buyers of distressed companies because some courts have allowed buyers to obtain the company free and clear of obligations like employment discrimination claims and retiree health benefits. Although section 363 is silent on the matter, courts

business as seller); Russell C. Silberglied, *Can a Lower Bid for a Debtor's Assets Be Approved as "Better" Because It Saves More Jobs than the Higher Bid*?, 76 BUS. LAW. 817 (2021) (noting that job saving may be a consideration consistent with fiduciary duties); Chrystin Ondersma, *Employment Patterns in Relation to Bankruptcy*, 83 AM. BANKR. L.J. 237 (2009) (studying employment patterns in public companies that filed for chapter 11).

51. *See* Stephen Sather, *Shakespeare for Lawyers: Stalking Horse*, AM. BANKR. INST. J., May 1996, at 37, 37.

52. *See* Calpine Corp. v. O'Brien Env't Energy, Inc. (*In re* O'Brien Env't Energy, Inc.), 181 F.3d 527, 535 (3d Cir. 1999) (explaining when a party can collect a break-up fee from bankruptcy estate).

53. The role of "stalking horse" bidders and "breakup fees" in maximizing or chilling value-maximizing sales continues to be questioned in finance literature. Higher breakup fees may be justified when the company is particularly opaque. *See* Kartik Raman, Lakshmanan Shivakumar & Ane Tamayo, *Target's Earnings Quality and Bidders' Takeover Decisions*, 18 REV. ACCT. STUDS. 1050, 1051 (2013). If other bidders are not given enough time to respond, the odds of a competing bid are reduced. *See* Nihat Aktas, Eric de Bodt & Richard Roll, *Negotiations Under the Threat of an Auction*, 98 J. FIN. ECON. 241, 243 (2010) ("Our results suggest also that the bid premium can be used by acquirers to deter competitors . . . ."). *See generally* Albert H. Choi, *Deal Protection Devices*, 88 U. CHI. L. REV. 757, 765–67, 827 (2021) (summarizing circumstances under which protection devices result in higher prices).

54. B. Espen Eckbo, *Bidding Strategies and Takeover Premiums: A Review*, 15 J. CORP. FIN. 149, 151 (2009) ("In a very real sense, merger negotiations occur in the shadow of an auction, so the expected auction outcome affects the bargaining power of the negotiating parties."); Aktas et al., *supra* note 53, at 242, 253.

55. *See generally* Guhan Subramanian & Annie Zhao, *Go-Shops Revisited*, 133 HARV. L. REV. 1215 (2020) (presenting new evidence suggesting frustrated competing buyers are unlikely to be willing to spend money or time contesting even flawed processes). For an exceptional story of people who chartered a bus overnight to Delaware bankruptcy court to save their community hospital in Ohio, see Martin D. Gelfand, *How a Community Saved Their Hospitals from Unnecessary Liquidation*, 75 AM. BANKR. L.J. 3, 15–33 (2001) (detailing how a court ordered new bidding process and hospitals sold to buyers willing to keep them open).

have reached this conclusion even when applicable nonbankruptcy law provides that those obligations follow the company.[56]

2. Loans

Bankruptcy à la carte marries a speedy march to a sale with just enough financing to get the sale closed. In general, the Bankruptcy Code provides incentives to lend money via debtor-in-possession financing ("DIP loan") to a bankrupt company.[57] The Code's protections of these loans dramatically reduce the likelihood of default and increase profitability.[58] Once a court enters an order approving a DIP loan and it goes into effect, a reviewing court cannot reverse the loan deal, even if it uncovers a legal flaw.[59] Because these transactions effectively subordinate the collection rights of existing creditors, these privileged transactions are supposed to be approved only if they are likely

56. *In re* Trans World Airlines, Inc., 322 F.3d 283, 285 (3d Cir. 2003) (describing asset sale to American Airlines free of employment discrimination claims); United Mine Workers of Am. Combined Benefit Fund v. Leckie Smokeless Coal Co. (*In re* Leckie Smokeless Oil Co.), 99 F.3d 573, 576–77, 585 (4th Cir. 1996) (upholding extinguishment of Coal Act successor liability); Vincent S.J. Buccola & Joshua C. Macey, *Claim Durability and Bankruptcy's Tort Problem*, 38 YALE J. REG. 766, 767, 803 (2001) (discussing impact of cutting off successor liability on incentives to abide by environmental laws and others, expressing concern that quick sales transfer wealth from tort claimants to financial creditors); Buccola, *Cathedral*, *supra* note 6, at 735–38. For other discrimination contexts, see Maguire v. Capmark Fin., Inc., No. 09-0692, 2010 WL 5067672, at *1 (E.D. Pa. Dec. 6, 2010) (holding that an age discrimination case could not be pursued against the company's buyer because the section 363 sale court order "decreed that 'under no circumstances' shall [buyer] be deemed a successor of Capmark" and buyer would have no successor or vicarious liabilities of any kind); Dunope v. Weirton Steel Corp., C.A. No. 01-2017, 2012 WL 366595 at *1–2 (W.D. Pa. Feb. 2, 2012) (holding that a disability discrimination claim cannot be brought against buyer of debtor's assets, including claims "otherwise arising under doctrines of successor liability"); *In re* NE Opco, Inc., 513 B.R. 871, 877 (Bankr. D. Del. 2014) (precluding former employee from alleging disability discrimination against asset purchaser, even if allegations are directed in part to purchaser). *See generally* Rachel P. Corcoran, *Why Successor Liability Claims Are Not "Interests in Property" Under Section 363(f)*, 18 AM. BANKR. INST. L. REV. 697, 756 (2010) (concluding that claims should not be interpreted to be included in interests in property under section 363(f)); Kuney, *Misinterpreting*, *supra* note 50 (highlighting how court interpretations of section 363(f) undermine the plan proposal and confirmation process, as well as applicable nonbankruptcy law). The sale's impact on "future claims" is a separate and thornier issue. *See* Frederick Tung, *Taking Future Claims Seriously: Future Claims and Successor Liability in Bankruptcy*, 49 CASE W. RSRV. L. REV. 435, 436–43 (1999).

57. 11 U.S.C. § 364.

58. B. Espen Eckbo, Kai Li & Wei Wang, Do Lenders Extract Rents When Financing Bankrupt Firms? 2, 4 (Oct. 2021) (unpublished manuscript) (on file with the North Carolina Law Review); George W. Kuney, *Hijacking Chapter 11*, 21 EMORY BANKR. DEVS. J. 19, 57 (2004) ("[N]early every DIP loan is paid back in full, regardless of whether the chapter 11 debtor reorganizes or liquidates."); ABI FINAL REPORT, *supra* note 10, at 75; *see also* Lynn M. LoPucki & Joseph W. Doherty, *Bankruptcy Survival*, 62 UCLA L. REV. 969, 1003 (2015) (characterizing DIP lending as essentially risk free).

59. 11 U.S.C. § 363(m).

to expand the bankruptcy estate for the benefit of all. The lender is entitled to a profit, but that is not the objective of this bankruptcy perk's existence.

In bankruptcy à la carte, a lender offers to finance the company until the sale, while also exercising power to determine what will or will not happen in the bankruptcy case, and who will be in charge, at a time when information available to other creditors is sparse.[60] The new loan typically will provide the funds to pay the professional fees of the official committee of unsecured creditors, although the scope of what the committee can do is shaped by the DIP lending agreement.[61]

Studies continue to accumulate on the domination of these deals by lenders who have a preexisting relationship with the debtor; they profit from the perks in the Bankruptcy Code in part by deterring competition, but also from using their leverage to control how much or little of bankruptcy law actually operates.[62] Because lenders generally have no duties to maximize the value of the debtor's bankruptcy estate or to act in its best interest, we should not be shocked when their incentives, oriented toward their own stakeholders, do not coincide with those of other creditors or the estate.[63]

### 3. Contracts

Although much has been written about the treatment of contracts in bankruptcy, relatively little of that writing focuses on the unbundled bankruptcy scenario, particularly when it involves a company with value coming mostly from contract rights. Congress erred on the side of establishing expansive national contract law, available only to those who go bankrupt, to

60. Ayotte & Ellias, *supra* note 9, at 4; Eckbo et al., *supra* note 58, at 11–12 (citing common features of DIP loans).

61. *See* Jared A. Ellias & Robert J. Stark, *Bankruptcy Hardball*, 108 CALIF. L. REV. 745, 781 (2020) (discussing how restrictions on spending hindered the official creditors' committee's ability to investigate a leveraged buyout).

62. Frederick Tung, *Financing Failure: Bankruptcy Lending, Credit Market Conditions, and the Financial Crisis*, 37 YALE J. ON REGUL. 651, 654 (2020) ("DIP financing is most commonly provided by the debtor's major pre-bankruptcy secured lender."); Ayotte & Ellias, *supra* note 9, at 7 (discussing efforts to ensure the lender's preferred outcome and full compensation for pre-bankruptcy debts); *id.* at 5 ("[P]rocess sales . . . are problematic because they occur at the very beginning of a bankruptcy case, when both information and competition—the best antidotes for value-destroying transactions—are in short supply."); Eckbo et al., *supra* note 58, at 2, 30 (noting that prior lenders dominate DIP lending, suggesting terms do not get tested by competition).

63. Ayotte & Morrison, *supra* note 9, at 528–30; Kenneth Ayotte, *Leases and Executory Contracts in Chapter 11*, at 12 J. EMPIRICAL LEGAL STUDS. 637, 637–38 (2015) [hereinafter Ayotte, *Leases*] (noting that senior claimants are incentivized to push for fire sale or quick resolution).

promote business reorganization.[64] Those contract rights available only in bankruptcy are rightly controversial among academics even in a traditional business reorganization. It is an express license to discriminate among counterparties,[65] and a significant override of state contract law rights beyond the amount strictly necessary to alter debtor-creditor relations.[66]

The Bankruptcy Code authorizes debtor management to make decisions about contracts that are "executory" (a term not defined in the statute but typically understood to mean substantial performance remaining on both sides) and offers a menu of options accordingly.[67] The estate fiduciary is supposed to decide what contract treatment is in the best interest of the bankruptcy estate, often put in terms of the debtor's business judgment.[68]

Rejection of the contract is equivalent to breach. The counterparty can submit a claim that includes both past-due pre-petition payments as well as other damages for breach. Rejection claims get added to a large huddled mass of other claims without any special status: unlikely to get paid in full, if at all.[69] Rejection is the least surprising option for a bankruptcy law; inherent in bankruptcy is a discharge from debts, which often flow from the failure to adhere to contractual obligations.[70] Yet, because damages on a rejected contract

64. According to the Supreme Court, the special treatment of contracts in bankruptcy law is justified by the goal of giving companies a greater chance of reorganizing by lowering the costs and increasing and redistributing the benefits of contract decisions. NLRB v. Bildisco, 465 U.S. 513, 528 (1984).

65. *E.g.*, David A. Skeel Jr., *The Empty Idea of "Equality of Creditors*,*"* 166 U. PA. L. REV. 699, 716, 721, 732 (2018) [hereinafter Skeel, *Empty Idea*] (discussing how executory contract law generates disparate creditor recoveries); Kristin Schroeder Simpson, *Fifth Circuit's Executory Contract Standards Deconstructed*, 26 MISS. COLL. L. REV. 225, 230 (2006).

66. Thomas E. Plank, *Bankruptcy and Federalism*, 71 FORDHAM L. REV. 1063, 1117–22 (2002) [hereinafter Plank, *Bankruptcy and Federalism*] (arguing that abrogating restrictions on assignment of contracts enforceable under state law is impermissible appropriation of property rights of noncreditors for the benefit of creditors and the debtor). For the assertion that anti-assignment clauses of some types of contracts tend not to preclude bulk assignment, see Kenneth Ayotte & Henry Hansmann, *Legal Entities as Transferrable Bundles of Contracts*, 111 MICH. L. REV. 715, 717–18 (2013); *see also* Ayotte, *Leases*, *supra* note 63, at 649, 660 (finding in a study of large chapter 11 filings that the great majority of assignments are bundled).

67. 11 U.S.C. § 365; *see also* Spyglass Media Grp. v. Bruce Cohen Prods. (*In re* The Weinstein Co. Holdings LLC), 997 F.3d 497, 504 (3d Cir. 2021) (using the material breach test for executory contracts proposed by Professor Vern Countryman).

68. Sharon Steel Corp. v. Nat. Fuel Gas Distrib. Corp., 872 F.2d 36, 39–40 (3d Cir. 1989); COR Route 5 Co. v. Penn Traffic Co. (*In re* The Penn Traffic Co.), 524 F.3d 373, 383 (2d Cir. 2008).

69. Simpson, *supra* note 65, at 227.

70. *Id.* at 226 ("Section 365 is, in essence, a privilege. In exchange for full public disclosure of assets and liabilities, and in compliance with the provisions of the Code, a debtor can be discharged of certain debts and start over in the financial world."); Plank, *Bankruptcy and Federalism*, *supra* note 66, at 1115.

are calculated retroactively as of the date of the bankruptcy filing, bankruptcy law gives more power to the decisionmaker to play the market in a one-sided way.[71]

Assumption of a contract means the debtor wants to perform the agreement. The company will be obligated to pay damages for breach as well as all future obligations.[72] The obligation to pay in full does not sound like a perk, but it is. Maybe the cost of performance has increased substantially since this contract was executed. Maybe the counterparty would have had the right to walk away because the debtor had already defaulted. Maybe the counterparty prefers to make a new arrangement with someone else. Like forcing someone to stay married, bankruptcy law can force a counterparty to stay in the deal.[73] This is a federal override of state contract law and the counterparty's ability to walk away.[74]

Most controversially, perhaps, bankruptcy law allows a company in chapter 11 to assign valuable contract rights to third parties without the counterparty's permission.[75] This arrangement puts counterparties into relations with parties it did not select.[76] Governed differently from the sale of assets generally, the bankruptcy law of contract assignment requires the debtor to show adequate assurance of the assignee's future performance.[77] One is not even supposed to get to that step unless this assignment is in the best interest of the bankruptcy estate, with the estate capturing at least some of the economic benefits.[78]

71. 11 U.S.C. §§ 365(g), 502(g)(1). *See generally* Thomas E. Plank, *Custodian or Not: Scrivener's Error in a Bankruptcy Code Safe Harbor*, 38 EMORY BANKR. DEVS. J. 51, 62 (2022) [hereinafter Plank, *Custodian or Not*] (discussing the impact of the timing rule).

72. 11 U.S.C. § 365(b).

73. *Id.* (authorizing assumption of contract without counterparty permission).

74. Charles W. Mooney, Jr., *A Normative Theory of Bankruptcy Law: Bankruptcy as (Is) Civil Procedure*, 61 WASH. & LEE L. REV. 931, 1043 (2004); Plank, *Bankruptcy and Federalism*, *supra* note 66, at 1122–24, 1126–28 (noting that a counterparty should be obligated to continue to perform a contract only if the bankruptcy trustee or debtor-in-possession "provides adequate assurance of due performance" and that the Bankruptcy Code may require such continued performance only to prevent the counterparty from obtaining a benefit from the debtor's bankruptcy filing—the ability to walk away from a losing contract—that it could not obtain absent the debtor's bankruptcy).

75. 11 U.S.C. § 365(f). There are some extra restrictions in such contracts for personal services. *Id.* § 365(c).

76. 11 U.S.C. § 365(f).

77. *Id.*

78. 3 COLLIER ON BANKRUPTCY ¶ 365.09 (16th ed.) ("[T]he trustee may assign a contract or lease, provided first that the trustee assume the contract or lease . . . ."); *id.* ¶ 365.03 (describing how the debtor-in-possession's decision whether to assume or reject is supposed to be based on benefit to bankruptcy estate and courts are to use business judgment standard in overseeing requests).

As this discussion suggests, the Bankruptcy Code anticipates the debtor-in-possession or a trustee determining the optimal resolution for each contract. The feasibility of this exercise is challenging in contract-intensive companies, particularly if powerful parties insist on a quick resolution for their own benefit. It may not be immediately clear whether contracts were terminated prior to the bankruptcy filing, whether contracts are technically not "executory" for some other reason and thus outside of this set of rules, nor how to calculate damages.

In districts like Delaware, it apparently is not uncommon for buyers to be permitted to close a sale and then finalize contract selections and resolve disputes thereafter. Taken to an extreme, such a process risks becoming a wholesale delegation of the Bankruptcy Code's extraordinary executory contract power from a party with a duty to the bankruptcy estate (the debtor-in-possession) to a party with no such duties (the buyer) after other potential buyers have been shut out of the competition and may not have been offered the same flexibility. With many legal disputes yet to be decided, the winning bidder has an incentive to discount its bid notwithstanding this exclusive option. The TWC case study illustrates this dynamic.

## II. CASE STUDY

The factors that drew me into studying TWC included scholarly interest in, and concern about, the use of bankruptcy in response to allegations of wrongdoing. TWC's bankruptcy turned out to illustrate a far more common phenomenon: powerful nondebtor parties unbundling bankruptcy law for their own ends.

This part first takes a quick tour of the company's path to bankruptcy, which is more complicated than TWC and some written accounts suggest. While the #MeToo allegations triggered an acute financial problem, it was layered on top of a history of instability. The case study continues by looking at how the parties in TWC unbundled chapter 11 bankruptcy law.

### A. *The Weinstein Company's Long History of Financial Trouble*

On March 19, 2018, TWC filed a chapter 11 petition,[79] about six months after publication of allegations of employment discrimination and assault. As the case study below will show, TWC did not file chapter 11 to reorganize. TWC's bankruptcy also did not prioritize investigations of assault and

79. Voluntary Petition for Non-Individuals Filing for Bankruptcy at 1–31, *In re* The Weinstein Co. Holdings, No. 18-10601 (Bankr. D. Del. Mar. 19, 2018), Doc. 1. TWC is comprised of over fifty legally discrete entities. For simplicity this Article will refer to them as a single enterprise.

employment discrimination on which it blamed its bankruptcy.[80] Like nearly all chapter 11 filers, TWC had no plans to hand over control to a government-appointed trustee to sort out the mess. Instead, under the leadership of Robert Weinstein, TWC went bankrupt to sell itself quickly to a private equity firm.

Once the bankruptcy started, I listened to all court hearings in real time and tracked the docket, which contained court pleadings as well as key transactional documents. I also studied the dockets of sexual misconduct lawsuits filed against TWC in late 2017 and early 2018, two California state court lawsuits arising out of the bankruptcy sale,[81] insurance lawsuits in Wisconsin, business association lawsuits in Delaware,[82] and Securities and Exchange Commission filings relating to other companies.[83] TWC was a collection of limited liability companies and not publicly traded.[84] That translated into fewer disclosure obligations, requiring a scrappier research approach.

Although this Article reflects feedback from people involved in the case, it is not a behind-the-scenes look at this bankruptcy, nor could it be. It is an

80. *See* Declaration of Robert Del Genio in Support of First Day Relief at 27–28, *In re* The Weinstein Co. Holdings, No. 18-10601 (Bankr. D. Del. Mar. 20, 2018), Doc. 7. After approving the sale of the company, the presiding judge did grant plaintiffs' requests to let certain assault and employment discrimination lawsuits against TWC and its board members proceed in other courts. Order Granting Motion of Movants for Relief from Automatic Stay and Related Relief at 2, *In re* The Weinstein Co. Holdings, No. 18-10601 (Bankr. D. Del. June 18, 2018), Doc. 1060 (authorizing plaintiffs to proceed with claims against The Weinstein Company Holdings and all other defendants in putative class action litigation); Order Approving Stipulation Modifying the Automatic Stay as to Wedil David, *In re* The Weinstein Co. Holdings, No. 18-10601 (Bankr. D. Del. June 10, 2019), Doc. 2411.

81. *See generally* Complaint, Peart v. Lantern Ent., LLC, No. BC712504, 2018 WL 3306456 (Cal. Super. Ct. July 2, 2018) (claiming that Lantern needed his connections to meet key players and that Peart facilitated these relationships expecting an executive role and suggesting that Peart being African American played a role in how Lantern treated him); Complaint, The Yucaipa Cos. v. Lantern Asset Mgmt. Grp., No. BC713894 (Cal. Super. Ct. July 16, 2018) (alleging that, after Lantern approached Yucaipa and offered to be a part of a different deal, Yucaipa and Lantern signed a written agreement governing the parties' relationship, regardless of the conclusion).

82. Verified Complaint Under 6 *Del. C.* § 18-305, Weinstein v. The Weinstein Co. Holdings, No. 2017-0765 (Del. Ch. Oct. 26, 2017); Amended Interpleader Complaint at 1–3, HSBC Bank USA v. Ambac Assurance Corp. (*In re* Segregated Acct. Ambac Assurance Corp.), No. 10-CV-1-1576 (Wis. Cir. Ct. June 10, 2010).

83. *E.g.*, Weinstein Co. Holdings, Initial Statement of Beneficial Ownership of Securities (Form 3) (Oct. 23, 2008); Weinstein Co. Holdings (Schedule 13D) (Oct. 23, 2008).

84. *See* Exhibit A to Declaration of Robert Del Genio in Support of First Day Relief at 40, *In re* The Weinstein Co. Holdings, No. 18-10601 (Bankr. D. Del. Mar. 20, 2018), Doc. 7 (showing a map of structure of TWC enterprise, including an identification of the LLCs owned by the holding company and which ones filed for bankruptcy); Voluntary Petition for Non-Individuals Filing for Bankruptcy, *supra* note 79, at 26.

outsider account, documented with publicly available sources, with some benefit of hindsight.

TWC's representatives characterized its slide into bankruptcy as starting in the fall of 2017 due to the publication of sexual harassment allegations.[85] As the following discussion suggests, however, TWC arguably was never a stable and healthy company. Indeed, the *New York Times* story debatably got published, unlike many prior investigations, precisely *because* the company was flagging, and H. Weinstein's influence was waning.[86]

In 2005, Harvey and Robert Weinstein parted ways with their prior company, Miramax,[87] and started The Weinstein Company with $1.2 billion raised by Goldman Sachs.[88] The Weinstein brothers held all the authority as co-chairs of the board and all of the "W" shares of stock (originally 50% of

85. Declaration of Robert Del Genio in Support of First-Day Relief, *supra* note 80, at 14 (identifying the *New York Times* story as beginning of events leading up to filing in declaration by chief restructuring officer); Notice of Blackline Comparison of Amended Tort Claims Bar Date Motion Against Initial Tort Claims Bar Date Motion at 4, *In re* The Weinstein Co. Holdings, No. 18-10601 (Bankr. D. Del. July 31, 2020), Doc. 2897 ("Debtors filed their voluntary petition for relief *because* . . . multiple lawsuits were filed . . . alleging . . . that Harvey Weinstein . . . engaged in sexual and other harassment and abuse and that certain companies . . . and their respective current and former officers, directors, and board representatives failed to stop such harassments and abuse . . . .") (emphasis added).

86. *See* Jim Rutenberg, *Harvey Weinstein's Media Enablers*, N.Y. TIMES (Oct. 6, 2017), https://www.nytimes.com/2017/10/06/business/media/harvey-weinsteins-media-enablers.html [https://perma.cc/M98H-8HLG (dark archive)] ("[Kim Masters] wondered aloud whether trouble had finally found Mr. Weinstein because he was no longer the rainmaker and hitmaker he had once been.").

87. Miramax was owned by Disney at this point. David Carr, *Placing Bets on Miramax the Sequel*, N.Y. TIMES (Oct. 31, 2005), https://www.nytimes.com/2005/10/31/business/placing-bets-on-miramax-the-sequel.html [https://perma.cc/ME46-HLDR (dark archive)] ("Disney . . . kept the library and the Miramax name, and dumped the two brothers who had built it . . . ."); Tim Arango, *Meet the New Harvey Weinstein*, FORTUNE (June 25, 2007, 5:47 AM), https://money.cnn.com/magazines/fortune/fortune_archive/2007/07/09/100121736/index.htm [https://perma.cc/8X2B-KDD9 (staff-uploaded archive)] (referring to the "nasty divorce" between Weinstein brothers and Disney); *cf.* Sharon Waxman, *Harvey Weinstein Grilled: "I'm Loving Playing Inside the Box*," THEWRAP (Jan. 4, 2011, 7:07 PM), https://www.thewrap.com/harvey-weinstein-grilled-im-loving-playing-inside-box-23432/ [https://perma.cc/T9X5-VXER] (quoting H. Weinstein: "Disney offered Bob and I $9 million each to stay in 2005, and we said no. We were never let go.").

88. Eugene Hernandez, *Weinsteins Announce Completion of $490 Million Equity Investment*, INDIEWIRE (Oct. 24, 2005, 11:49 AM), https://www.indiewire.com/news/general/weinsteins-announce-completion-of-490-million-equity-investment-77765/ [https://perma.cc/RZF2-4M9C]. The rest was debt. Carr, *supra* note 87; *see also* David Segal, *Weinsteins Struggle to Regain Their Touch*, N.Y. TIMES (Aug. 15, 2009), https://www.nytimes.com/2009/08/16/business/media/16wein.html [https://perma.cc/M9AX-KH2M (dark archive)] [hereinafter Segal, *Weinsteins Struggle*] (referencing Goldman Sachs' 142-page initial offering, which warned that the company "expects to be highly leveraged," and predicted more than $160 million in profit by the end of 2009). By the investment bank's analysis, margins on Miramax and Dimension films exceeded Hollywood averages. Arango, *supra* note 87 ("According to Goldman Sachs, Harvey's movies averaged margins of 12% to 13%, and Bob's averaged in the 22% to 24% range. The Hollywood average is close to 8% . . . .").

TWC, diluted thereafter) that provided management rights.[89] With ambitions beyond film, TWC aimed to spend its startup money on things like fashion, vodka, and cable television.[90] TWC also entered a video-on-demand venture with Genius Products, Inc., a public company being revived by Stephen Bannon (later President Donald Trump's Chief Strategist).[91]

As early as 2007, entertainment industry watchers wondered if TWC could stay alive.[92] By 2009, reports documented the failure of some TWC deals and a "buying spree" of other investments.[93] *The New York Times* described the first eight months of 2009 as "particularly dreadful," with a problematic "flop-to-jackpot ratio."[94] Even H. Weinstein quipped that he might flip hamburgers for a living if things at TWC did not improve.[95] TWC's relationship with the video-on-demand business fell apart.[96] TWC downsized by 11% and lost

89. Shawn Tully, *How a Handful of Billionaires Kept Their Friend Harvey Weinstein in Power*, FORTUNE (Nov. 19, 2017, 6:00 PM), https://fortune.com/2017/11/19/weinstein-scandal-board-battles/ [https://perma.cc/UX4Q-QFJ4 (staff-uploaded, dark archive)] ("The equity holders fell into two categories. Bob and Harvey Weinstein initially held 50% of the shares in a class called the 'W series.'").

90. The Weinstein Co. Holdings, Notice of Sale of Securities (Form D) (Oct. 28, 2005) (describing the business as including music, publishing, and live entertainment); *see* Segal, *Weinsteins Struggle*, *supra* note 88; Arango, *supra* note 87; Sharon Waxman, *Weinstein Co. To Lay Off Dozens Starting This Week*, THEWRAP (Sept. 23, 2009), https://www.thewrap.com/weinstein-co-lay-dozens-starting-week-7634/ [https://perma.cc/US88-LBB5].

91. Richard Siklos, *A Genius Plan for Miramax Founders*, FORTUNE (Nov. 26, 2007, 9:22 AM), https://money.cnn.com/2007/11/21/magazines/fortune/siklos_Weinstein1121.fortune/ [https://perma.cc/8H74-3HNN]; *Using Genius, Are the Weinsteins Plotting an IPO?* N.Y. TIMES: DEALBOOK (Nov. 26, 2007, 7:24 AM), https://archive.nytimes.com/dealbook.nytimes.com/2007/11/26/using-genius-are-the-weinsteins-plotting-an-ipo/ [https://perma.cc/4UTH-ZXJB].

92. *See* Arango, *supra* note 87 ("[The Weinsteins have] yet to replicate their past success at wringing large profits from small movies, in part because Harvey had ambitions of conquering worlds beyond film."); Siklos, *supra* note 91 (noting TWC's "bumpy time" in its first year); Gregg Goldstein, *Whither the Weinsteins*, HOLLYWOOD REP. (July 21, 2008, 5:00 AM), https://www.hollywoodreporter.com/business/business-news/whither-weinsteins-116007/ [https://perma.cc/YY5M-ZWDK] (noting failed investment in Genius Products).

93. Segal, *Weinsteins Struggle*, *supra* note 88 (discussing 2007 investment in fashion label Halston).

94. *Id.*

95. *Id.*

96. Michael Cieply, *The Weinstein Brothers Have Oscar Gold. Now They Need Cash*, N.Y. TIMES (Dec. 19, 2015), https://www.nytimes.com/2015/12/20/business/media/the-weinstein-brothers-have-oscar-gold-now-they-need-some-cash.html [https://perma.cc/PU2S-CC6A (dark archive)]. In 2009, TWC transferred its ownership of Genius Products LLC to a restructuring investment firm. Genius was sold to another company, stopped operating, and its creditors put Genius into bankruptcy involuntarily in 2011. Eriq Gardner, *Weinstein Co. Hit with $130 Million Fraud Lawsuit over Bankrupt Company*, HOLLYWOOD REP. (May 15, 2015, 11:13 AM), https://www.hollywoodreporter.com/business/business-news/weinstein-hit-130-million-fraud-795903/ [https://perma.cc/EBM4-WUE4].

significant senior staff.[97] Without some blockbuster films, some predicted TWC would be "goners."[98]

In 2010, TWC did a major debt restructuring: it transferred rights in 200 films and other assets, including hundreds of millions in accounts receivable, on terms that would affect creditors for many years.[99] State court documents illustrate quite a bit of self-dealing between TWC and the Weinstein brothers, including contracting in their individual capacities with TWC, seemingly with few controls.[100] The year 2010 also brought in more financing (and debt).[101] In 2012, TWC announced a $225 million refinancing deal with Union Bank.[102]

As 2013 rolled around, several media outlets reported on TWC's new $370 million line of credit led by Union Bank.[103] Two TWC films, *The King's Speech* and *The Artist*, won best picture at the Academy Awards, and TWC was making

97. Segal, *supra* note 88 (noting that, in addition to issues affecting all entertainment companies, blame was placed on how the brothers used "their lush, Goldman-fueled pile of start-up money").

98. *Id.*

99. Lauren A.E. Schuker & Serena Ng, *Weinsteins End Debt Cliffhanger, Goldman Gets Film Library Stake*, WALL ST. J. (June 24, 2010, 12:01 AM), https://www.wsj.com/articles/SB100014240527487046 29804575325270578772024 [https://perma.cc/F8C5-ZZG5 (staff-uploaded, dark archive)] (reporting the transfer of rights in almost 200 films); Sharon Waxman, *Weinstein Debt Wiped Clean in Deal with Goldman, Ambac*, THEWRAP (Dec. 23, 2013, 9:52 AM), https://www.thewrap.com/weinstein-debt-wiped-clean-deal-goldman-ambac-18716/ [https://perma.cc/YXD7-VELP]; Declaration of Robert Del Genio in Support of First Day Relief, *supra* note 80, at 6 (explaining impact of 2010 restructuring on operations).

100. *See* Exhibit A to Amended Interpleader Complaint at 31, HSBC Bank USA v. Ambac Assurance Corp. (*In re* Segregated Acct. Ambac Assurance Corp.), No. 10-CV-1-1576 (Wis. Cir. Ct. June 10, 2010) (listing oral agreements that could be cancelled by either party at any time).

101. Sharon Waxman, *Blavatnik & Till's Icon To Co-Finance Movies with Weinstein*, THEWRAP (Oct. 11, 2010, 5:39 PM), https://www.thewrap.com/blavatnik-tills-icon-makes-deal-weinstein-21623/ [https://perma.cc/4FVJ-B59V] (reporting credit extended to TWC from Len Blavatnik's company, Access Industries, providing "up to $100 million over . . . two years").

102. Alex Ben Block, *Weinsteins Improve Financial Footing on Eve of Oscars*, HOLLYWOOD REP. (Feb. 24, 2012, 7:28 PM), https://www.hollywoodreporter.com/business/business-news/oscars-weinstein-co-loans-the-artist-294935/ [https://perma.cc/6PDL-SZXB]; Sharon Waxman, *Weinstein Company Secures $225M Credit Facilities with UBS, Union Bank*, THEWRAP (June 20, 2012, 6:05 PM), https://www.thewrap.com/weinstein-company-closes-225-m-credit-facility-ubs-ubc-44846/ [https://perma.cc/XM3K-W4ML] (reporting financing of $150 million led by Union Bank, $75 million from UBS Investment Bank, with banks being quoted as pleased to continue business with TWC).

103. Ben Fritz, *Weinstein Co. Lines Up New Credit Facility*, WALL ST. J. (Sept. 20, 2013), https://www.wsj.com/articles/weinstein-co-raising-new-credit-facility-1379622494 [https://perma.cc /UG2G-5SAU (staff-uploaded, dark archive)] (quoting a bank representative: "The Weinstein Co. has instilled the highest confidence level in the banking market since its inception.").

deals with the streaming disrupter, Netflix.[104] But 2013 would be the last year TWC had a mainstream hit.[105]

Lots went wrong for TWC in 2015. A British company backed out of a deal to buy TWC's television division.[106] TWC apparently was losing money on an operating basis.[107] The bankruptcy estate of the video-on-demand venture sued TWC for $130 million.[108] Talent agencies publicly complained TWC was slow to pay bills.[109] TWC's film units had significant layoffs.[110] Also, 2015 was a year of fraught contract renewal renegotiations for both Weinstein brothers.[111] By 2014 and 2015, "danger to women had become much more visible within the company's top ranks, with problems surfacing with disturbing regularity,"[112]

104. Natalie Robehmed, *Why the Weinsteins Aren't Among Hollywood's Richest Power Brokers*, FORBES (Aug. 19, 2015, 10:01 AM), https://www.forbes.com/sites/natalierobehmed/2015/08/19/why-the-weinsteins-arent-among-hollywoods-richest-power-brokers/ [https://perma.cc/UWE4-UVYK (staff-uploaded, dark archive)] (mentioning that these were TWC films and won Academy Awards, as well as discussing Netflix projects).

105. Brooks Barnes, *Weinstein Co. Will File for Bankruptcy After Deal Talks Collapse*, N.Y. TIMES (Feb. 26, 2018), https://www.nytimes.com/2018/02/26/business/weinstein-bankruptcy-deal.html [https://perma.cc/G2AJ-YJ8F (dark archive)] (referencing films *The Artist* and *The Butler*); *cf.* Transcript of Mar. 20, 2018, Hearing on First-Day Motions at 8, *In re* The Weinstein Co. Holdings, No. 18-10601 (Bankr. D. Del. Mar. 22, 2018), Doc. 86 (statement of TWC's lead bankruptcy lawyer in court) ("Given the company's success at the box office, Your Honor, the obvious question is: What are we doing here today?"); Transcript of Sept. 12, 2018, Oral Argument at 35, Geiss v. The Weinstein Co. Holdings, No. 1:17-cv-09554 (S.D.N.Y. Sept. 28, 2018), Doc. 128 (transcribing Judge Hellerstein's description of H. Weinstein's ability to attract talent that made movies "great successes").

106. Matt Pressberg & Tony Maglio, *What Does the Harvey Weinstein Scandal Mean for The Weinstein Co.?*, THEWRAP (Oct. 6, 2017), https://www.thewrap.com/what-does-the-harvey-weinstein-scandal-mean-for-the-weinstein-co/ [https://perma.cc/KWK8-GSLE] (reporting valuation of TV division at $950 million).

107. Tully, *supra* note 89 (reporting H. Weinstein's attorney disputing that company consistently lost money by arguing that TWC was creating wealth through its film library and television).

108. Complaint at 12, Siegel v. Weinstein Co. (*In re* Genius Products, LLC), No. 11-62283 (Bankr. C.D. Cal. May 8, 2015), Doc. 120; Gardner, *supra* note 96 (reporting lawsuit and allegation that TWC used Genius as a "piggy bank").

109. Tatiana Siegel, *Layoffs, Defections: Is The Weinstein Co. for Sale?*, HOLLYWOOD REP. (Nov. 18, 2015, 6:25 AM), https://www.hollywoodreporter.com/news/general-news/layoffs-defections-is-weinstein-sale-841474/ [https://perma.cc/BK9X-SQYS] [hereinafter Siegel, *Layoffs*]; Cieply, *supra* note 96 (noting imminent loss of 50 out of about 250 jobs).

110. Todd Cunningham, *Weinstein Company To Cut 40–50 Staffers from Film Units*, THEWRAP (Nov. 15, 2015, 1:00 PM), https://www.thewrap.com/weinstein-company-to-cut-40-50-staffers-from-film-units/ [https://perma.cc/Y3F8-SCKY].

111. Unsealed Exhibit A to Reply of Louisette Geiss et al. at 5, *In re* The Weinstein Co. Holdings, No. 18-10601 (Bankr. D. Del. June 5, 2018), Doc. 979 (containing the 2015 employment contract between TWC and H. Weinstein); *see also* Tully, *supra* note 89.

112. JODI KANTOR & MEGAN TWOHEY, SHE SAID: BREAKING THE SEXUAL HARASSMENT STORY THAT HELPED IGNITE A MOVEMENT 109 (2019).

during a year that authorities in New York pursued a credible allegation of assault of Ambra Gutierrez.[113]

In 2016, as rumors of TWC's financial trouble and heavy debt load continued, H. Weinstein told the press, "[w]hile people are saying, '[t]hey're in trouble,' I could just write a check myself and [cover all of this]. So could Bob."[114] This message of stability was undercut by board turnover, an exodus of key executives, layoff of another 40 to 50 employees, and questions about the profitability of TWC projects.[115] In addition, in 2017, H. Weinstein *borrowed* hundreds of thousands of dollars from the company, rather than vice versa.[116]

Events of 2017 undercut assertions of financial wellbeing for both TWC and H. Weinstein, well before publication of harassment cover-ups. H. Weinstein liquidated six residences.[117] TWC was delinquent in paying ongoing obligations, including profit participation and residuals to actors, directors, and producers, and invoices for advertisements in media outlets, like *The New York*

113. RONAN FARROW, CATCH AND KILL 63–64, 68 (2019) (describing an audio recording of Weinstein and a settlement agreement between Weinstein and Gutierrez).

114. Mike Fleming, Jr., *Weinstein Company To Deal Pic Library or TV in 2016: Harvey Weinstein & David Glasser Q&A*, DEADLINE (Feb. 25, 2016, 12:21 PM), https://deadline.com/2016/02/weinstein-company-sale-library-or-tv-division-harvey-weinstein-david-glasser-q-and-a-1201708350/ [https://perma.cc/K5TR-4RRK] (alteration in original).

115. *See* Tatiana Siegel, *Weinstein Board Shake-Up: James Dolan Resigns, Billionaire Marc Lasry Joins*, HOLLYWOOD REP. (June 21, 2016, 2:50 PM), https://www.hollywoodreporter.com/movies/movie-news/weinstein-board-shake-up-james-870002/ [https://perma.cc/E9FL-D4GZ]; Tatiana Siegel, *Harvey Weinstein Reacts to Exec's Move to Annapurna: "We Don't See Them as Rivals*," HOLLYWOOD REP. (Mar. 16, 2016, 5:00 AM), https://www.hollywoodreporter.com/movies/movie-news/harvey-weinstein-reacts-execs-move-875458/ [https://perma.cc/S83T-5JR5] (describing a "string of high-ranking TWC exits"). This generated another round of interviews. *See* Gregg Kilday, *Harvey Weinstein Explains Recent Movie Release Shifts, TV Growth and Oscar Prospects, Q&A*, HOLLYWOOD REP. (July 21, 2016, 6:00 AM), https://www.hollywoodreporter.com/movies/movie-news/harvey-weinstein-explains-movie-release-913142/ [https://perma.cc/B2RZ-EXP3] (quoting H. Weinstein: "The end game for a company like ours is the library. . . . We have 515 films."). President David Glasser described the nonfilm divisions of the company as "profitable and healthy," while H. Weinstein characterized TV division as worth $400–500 million and debt-free. *Id.*

116. Peg Brickley & Jonathan Randles, *As Weinstein Scandal Brewed, Studio Executives Cashed In*, WALL ST. J. (Apr. 24, 2018, 7:49 PM), https://www.wsj.com/articles/as-weinstein-scandal-brewed-studio-executives-cashed-in-1524599965 [https://perma.cc/XV8N-PE2D (staff-uploaded, dark archive)] (reporting loans from TWC to Weinstein of $150,000 on August 14, 2017; $350,000 on August 31, 2017; and $500,000 on Sept. 6, 2017).

117. Candace Taylor, *Harvey Weinstein Started Selling His Real Estate About Six Months Before His Downfall*, WALL ST. J., https://www.wsj.com/articles/harvey-weinstein-began-selling-property-before-october-2017-articles-detailed-flood-of-sexual-misconduct-allegations-11565291715 [https://perma.cc/8HD7-4KBX (staff-uploaded, dark archive)] (last updated Aug. 8, 2019, 10:51 PM).

*Times*.[118] By the fall of 2017, TWC lacked cash and was weighted by debt exceeding a half a billion dollars.[119]

In explaining why TWC's bankruptcy was such an emergency, it served the company to argue that TWC's value coalesced around the human capital of H. Weinstein.[120] Although TWC lacked tracts of land, factories, or valuable machinery, that does not mean its value boiled down to one famous (or infamous) person.[121] As one source said to *The Guardian*, "[i]n a year from now when what has been the greatest abuses of power has dissipated from the memories of the majority of the public those movies will live on, especially with The Weinstein Company excised from credits. Investors know this."[122]

Heading into bankruptcy, TWC was a movie studio with a few projects in the pipeline, a television arm, and a library of approximately 275 completed films through acquisition or production.[123] Its primary assets were intellectual property, licensing, and a variety of other contract rights.[124] The television and

118. Spyglass Media Grp. v. Bruce Cohen Prods. (*In re* The Weinstein Co. Holdings), 997 F.3d 497, 501–03 (3d Cir. 2021) (holding production services contracts not executory); Gene Maddaus, *Brad Pitt, Meryl Streep, Quentin Tarantino, Others Raise Objections to Weinstein Co. Sale Provisions*, VARIETY (July 9, 2018, 5:21 PM), https://variety.com/2018/biz/news/brad-pitt-meryl-streep-quentin-tarantino-weinstein-sale-objections-1202869043/ [https://perma.cc/PT7G-QMMH] ("Each claims that he or she is owed profit participation payments from various films."); Sydney Ember & Tiffany Hsu, *New York Times Co. Sues Weinstein Company over Unpaid Bills*, N.Y. TIMES (Dec. 6, 2017), https://www.nytimes.com/2017/12/06/business/media/new-york-times-weinstein.html [https://perma.cc/NES9-XMEW (staff-uploaded, dark archive)].

119. Brent Lang, *Weinstein Co. Debt Tops $500 Million*, VARIETY (Nov. 8, 2017, 5:16 PM), https://variety.com/2017/film/news/harvey-weinstein-scandal-2-1202610386/ [https://perma.cc/632Z-ECJC].

120. *See, e.g.*, Ryan Boysen, *Bankruptcy Group of the Year: Cravath*, LAW360 (Jan. 28, 2020, 4:57 PM) ("Zumbro said the entire production company was practically a 'cult of personality' held together solely by Harvey Weinstein, a fact that quickly made it synonymous with the lurid accusations against him."). Almost three years into the bankruptcy, TWC's lead bankruptcy lawyer professed he was unaware of any other case where the "actions of a single person, a single man, brought down an entire company." Transcript of Jan. 25, 2021, Telephonic Hearing Re: Fifth Amended Joint Chapter 11 Plan of Liquidation at 10–11, *In re* The Weinstein Co. Holdings, No. 18-10601 (Bankr. D. Del. Jan. 27, 2021), Doc. 3207; *see also* SYLVIA ANN HEWLETT, #METOO IN THE CORPORATE WORLD 98–99 (2020) (characterizing TWC bankruptcy as necessary to halt lawsuits, and attributing company value to H. Weinstein rather than intellectual property); Claire A. Hill, *#MeToo and the Convergence of CSR and Profit Maximization*, 69 CASE W. RSRV. L. REV. 895, 901–02 (2019) ("[T]he company was so closely associated with Weinstein that, once he was terminated, there was virtually nothing left.").

121. Buccola & Macey, *supra* note 56, at 805 ("The fact that Harvey Weinstein's actions generated massive tort liabilities does not mean that his film rights have a negative value.").

122. Mark Sweney, *Rich Pickings: How Hollywood Rivals Will Profit from Weinstein's Downfall*, GUARDIAN (Oct. 20, 2017, 9:20 AM), https://www.theguardian.com/film/2017/oct/20/hollywood-rivals-circle-weinstein-film-studios-cinema-gems [https://perma.cc/A9TA-UYF3] ("It is about the library.").

123. Declaration of Robert Del Genio in Support of First Day Relief, *supra* note 80, at 4–5.

124. *Id.* at 5–6.

film assets of TWC in that period, such as the *Paddington Bear* and *Project Runway* franchises, had weaker associations with H. Weinstein than films associated with H. Weinstein that TWC never even owned, such as *Pulp Fiction* and *Shakespeare in Love*.

Still, the emphasis on H. Weinstein helped those who sought to acquire TWC's assets at fire-sale prices. In October 2017, in the direct wake of the *New York Times* story, experts estimated that a private equity firm could buy the company at a 40 percent discount given the timing.[125] Between October 5, 2017, and the March 2018 bankruptcy filing, TWC lost value, talent, and relationships; the company experienced a drop in average weekly receipts from $2 million to $150,000.[126] To stay afloat, TWC borrowed money from R. Weinstein and sold unreleased films while seeking to sell itself.[127]

Had the company filed for bankruptcy in the fall of 2017, some counterparties may have been required to continue performance unless they could demonstrate their contract had already terminated.[128] Perhaps heavyweights, like Apple and Amazon,[129] would not have so easily relied on the TWC chaos to wriggle free of commitments; director Quentin Tarantino, long

125. Ben Fritz, Cara Lombardo & Erich Schwartzel, *Weinstein Co. Negotiating Possible Sale*, WALL ST. J. (Oct. 16, 2017, 3:21 PM), https://www.wsj.com/articles/weinstein-co-negotiating-possible-sale-1508162396 [https://perma.cc/9NAT-EU7S (staff-uploaded, dark archive)].

126. Transcript of Mar. 20, 2018, Hearing on First-Day Motions, *supra* note 105, at 11.

127. The films included *Paddington 2*, *The War with Grandpa*, and *Six Billion Dollar Man*. Thom Geier, *Inside the Weinstein Company's Bloody Bankruptcy—and What Happens Next*, THEWRAP, https://www.thewrap.com/inside-weinstein-companys-bloody-bankruptcy-happens-next/ [https://perma.cc/X3PD-BLR2] (last updated Mar. 20, 2018, 7:55 PM). R. Weinstein denied rumors that TWC was for sale, but in the fall of 2017 and winter of 2018, the TWC board signaled its interest in selling in the midst of turmoil. Fritz et al., *supra* note 125 (chronicling how R. Weinstein stated that "it is untrue that that the company or board is exploring a sale," but three days later the journal had evidence that TWC had given an exclusive period to negotiate to Colony Capital, a private equity firm run by Thomas Barrack, who said his company "will help return the company to its rightful iconic position in the independent film and television industry").

128. *See* 11 U.S.C. §§ 365(a)–(c), 365(e), 541(a)(1). A contract with Netflix had a "key man" clause: no H. Weinstein, no streaming. Objection & Reservation of Rights of Netflix at 6, *In re* The Weinstein Co. Holdings, No. 18-10601 (Bankr. D. Del. Apr. 30, 2018), Doc. 517 (notice delivered Feb. 23, 2018). But others had more complicated arguments that would have required litigation, such as fraudulent inducement, complaining about the company's failure to disclose "the ongoing Harvey Weinstein sexual scandal, a ticking time bomb." Complaint at 6, Hotel Mumbai PTY Ltd. v. Weinstein Co. (*In re* The Weinstein Co. Holdings), No. 18-10601 (Bankr. D. Del. Apr. 16, 2018), Doc. 227; Exhibit 3 to Complaint at 2–4, Hotel Mumbai PTY Ltd. v. Weinstein Co. (*In re* The Weinstein Co. Holdings), No. 18-10601 (Bankr. D. Del. Apr. 16, 2018), Doc. 227-3.

129. Declaration of Robert Del Genio in Support of First Day Relief, *supra* note 80, at 16–17.

aware of TWC's toxic environment,[130] may not have been able to jump ship and start a bidding war among studios for his next film so easily.[131]

The potential nonbankruptcy sale that got the most media attention involved a consortium led by Maria Contreras-Sweet, former Director of the Small Business Administration, among other roles.[132] Contreras-Sweet

130. Jodi Kantor, *Of Weinstein Scandal, Tarantino Says, 'I Knew Enough To Do More,'* N.Y. TIMES (Oct. 20, 2017), https://www.nytimes.com/2017/10/19/movies/tarantino-weinstein.html [https://perma.cc/P5CY-W7ZW (dark archive)] ("There was more to it than just the normal rumors, the normal gossip. It wasn't secondhand. I knew he did a couple of these things."). Although he had knowledge since the early 1990s, Tarantino shifted or sought to expand the complicit parties: "'Everyone who was close to Harvey had heard of at least one of those incidents' chronicled in the first few articles, he said. 'It was impossible they didn't.'" *Id.*

131. Nicole Sperling, *Quentin Tarantino Is Ditching Weinstein for Sony*, VANITY FAIR (Nov. 17, 2018), https://www.vanityfair.com/hollywood/2017/11/quentin-tarantino-harvey-weinstein-sony-manson-movie [https://perma.cc/7XHK-SU5C (dark archive)]; Borys Kit, *How Sony Nabbed Quentin Tarantino's Manson Movie*, HOLLYWOOD REP. (Nov. 18, 2017, 6:45 AM), https://www.hollywoodreporter.com/news/general-news/how-sony-nabbed-quentin-tarantinos-manson-movie-1059742/ [https://perma.cc/GC45-4N3V] ("In the wake of the sexual assault allegations against Harvey Weinstein, his career-long collaborator Quentin Tarantino's next movie became one of the hottest projects in years on Hollywood's auction block."). It is unclear whether TWC had a legally enforceable right to the film. *See, e.g.*, Mike Fleming Jr, *Quentin Tarantino Seeking New Movie Home: Studios Reading #9 This Week*, DEADLINE (Nov. 1, 2017, 5:02 PM), https://deadline.com /2017/11/quentin-tarantino-new-home-studios-reading-number-9-harvey-weinstein-1202199806/ [https://perma.cc/EQ8K-F627] ("[Tarantino's] plans [with TWC] imploded with the scandalous removal of Harvey Weinstein after the revelation of a litany of nightmarish stories about forced sexual encounters with dozens of actresses and women who worked for the company . . . . [D]espite Tarantino's loyalty to the 170 or so staff there that helped make his movies successful, he has officially left the building."); Matt Donnelly, *Quentin Tarantino To Write, Direct Film About Manson Murders*, THEWRAP, https://www.thewrap.com/quentin-tarantino-write-direct-film-manson-murders/ [https://perma.cc/LY5M-QBRX (dark archive)] (last updated July 12, 2017, 8:38 AM) ("Harvey and Bob Weinstein are involved in the process, though its [sic] unclear if the eponymous production company is on board to finance and release.").

132. Lisa Richwine & Karen Freifeld, *Female-Led Investor Group To Buy Weinstein Co. Assets*, REUTERS, https://www.reuters.com/article/us-people-harveyweinstein-contrerassweet/female-led-investor-group-to-buy-weinstein-co-assets-idUSKCN1GD6N7 [https://perma.cc/238U-AUBX] (last updated Mar. 1, 2018, 6:42 PM); Mike Fleming Jr, *Read Weinstein Bidder Maria Contreras-Sweet's Pitch: $275 Million and Female-Centric Leadership*, DEADLINE (Nov. 19, 2017, 6:18 PM), https://deadline.com/2017/11/harvey-weinstein-company-275-million-bid-maria-contreras-sweet-female-leadership-bid-1202212035/ [https://perma.cc/VD4K-FUEC]. Another potential buyer was Killer Content, a company with a social justice subsidiary, which worked with Abigail Disney (an actual Disney with outspoken progressive values) and the New York Women's Foundation to formulate a bid. Jonathan Randles & Peg Brickley, *Potential Weinstein Co. Sale Structure Stokes Concerns of Accuser Advocates*, WALL ST. J. (Jan. 16, 2018, 8:44 AM), https://www.wsj.com/articles/potential-weinstein-co -sale-structure-stokes-victim-concerns-1516110260 [https://perma.cc/QT9T-WWTV (staff-uploaded, dark archive)] (quote from Adrienne Becker, chief executive of Killer Content) ("[T]he sale should not be an optical rebranding of management or name. Only a true dismantling of pernicious practices can advance the healing for our industry and beyond.").

proposed to make TWC female majority-owned and run.[133] Investors would contribute $500 million, set up a victims' fund of at least $80 million, and assume $225 million in debt.[134] However, the deal died in March 2018, apparently due to TWC's failure to disclose significant liabilities, as did the promised financing necessary to keep the company afloat until the sale closed.[135]

This series of events charted a path for a new round of negotiations for the acquisition of TWC. Lantern Capital, a Dallas private equity firm, had no entertainment industry experience but gained familiarity with TWC because it had sought to invest in the Contreras-Sweet deal.[136] Unlike Contreras-Sweet, Lantern insisted on buying the company in a quick standalone sale in bankruptcy.[137] In other words, it demanded bankruptcy à la carte.

### B. *Unbundling in Action*

At the time TWC filed for bankruptcy to request a quick sale, it had relatively few employees and little infrastructure, but it had a lot of intellectual property and related contracts (although less than it owned just a few months before). The discussion below starts with the key agreements between TWC, the stalking horse bidder, and its DIP lender. It then reviews how the transactions unfolded in the bankruptcy case itself.

133. Pamela McClintock & Gregg Kilday, *Weinstein Co. Sale Deal to Maria Contreras-Sweet, Ron Burkle-Led Bid Reached*, HOLLYWOOD REP. (Mar. 1, 2018, 3:20 PM), https://www.hollywoodreporter.com/movies/movie-news/weinstein-sale-deal-reached-maria-contreras-sweet-says-1090059/ [https://perma.cc/W49P-XBS8] [hereinafter McClintock & Kilday, *Bid Reached*]; *see also* OFF. N.Y. STATE ATT'Y GEN., STATEMENT FROM ATTORNEY GENERAL ERIC T. SCHNEIDERMAN ON AGREEMENT TO SELL THE WEINSTEIN COMPANY'S ASSETS (2018), https://ag.ny.gov/press-release/2018/statement-attorney-general-eric-t-schneiderman-agreement-sell-weinstein-companys [https://perma.cc/8PR3-TAPL] ("[W]e are pleased to have received express commitments from the parties that the new company will create a real, well-funded victims compensation fund, implement HR policies that will protect all employees, and will not unjustly reward bad actors.").

134. McClintock & Kilday, *Bid Reached*, *supra* note 133; Ryan Faughnder, *David Glasser Was The Weinstein Co.'s 'Third Brother.' Will His Firing Be Enough To Save the Business?*, L.A. TIMES (Feb. 18, 2018, 4:00 PM), https://www.latimes.com/business/hollywood/la-fi-ct-david-glasser-weinstein-20180218-story.html [https://perma.cc/LH93-EZSJ].

135. Gregg Kilday & Pamela McClintock, *Weinstein Co. Sale Deal Collapses*, HOLLYWOOD REP. (Mar. 6, 2018, 1:28 PM), https://www.hollywoodreporter.com/movies/movie-news/weinstein-sale-deal-collapses-1092451/ [https://perma.cc/E3K6-PJD6].

136. Ben Fritz, *Weinstein Co. Advances Toward Sale*, WALL ST. J., https://www.wsj.com/articles/weinstein-co-advances-toward-sale-1516742753 [https://perma.cc/9R2A-2AVE (staff-uploaded, dark archive)] (last updated Jan. 23, 2018, 6:37 PM).

137. Transcript of Mar. 20, 2018, Hearing on First-Day Motions, *supra* note 105, at 14 (quoting TWC counsel) ("[P]otential purchasers overwhelmingly indicated that they would only purchase the company's assets through an in-court process, where they could obtain free and clear protection under Section 363 of the Bankruptcy Code.").

1. Private inputs unbundle bankruptcy: the Asset Purchase Agreement

Before TWC initiated the bankruptcy, TWC and Lantern wrote an asset purchase agreement ("APA"), naming Lantern as the stalking horse bidder.[138] Lantern would be entitled to a $9.3 million breakup fee and escalating expense reimbursement if TWC were sold to someone else.[139] Lantern would buy substantially all of TWC for $310 million plus additional amounts to cure defaults in contracts.[140] Although it was necessary to offer the company to other competing bidders, Lantern demanded a quick process.[141]

Several elements of the APA and the nature of TWC made this speed especially challenging. Lantern would be required to allocate its purchase price among various asset classes and entities for tax purposes only *after* the sale closed.[142] Putting aside the tax consequences, Lantern could keep close to the vest how much it valued the individual pieces of the deal, making the bid more opaque to potential competitors. The impact of this right was complicated by the structure of the company. TWC was comprised of more than fifty discrete entities, often created for specific creative projects or financings.[143] These entities borrowed money and held themselves out as separate from each other.[144] These circumstances made it much harder for other bidders and the creditor body to evaluate the bid on the fast timeline TWC, Lantern, and TWC's lender demanded.[145] Qualified bids to compete with Lantern could not include conditions precedent or due diligence or financing contingencies.[146] A bid had

138. Exhibit B to Debtors' Motion for Entry of Orders at 84–85, *In re* The Weinstein Co. Holdings, No. 18-10601 (Bankr. D. Del. Mar. 20, 2018), Doc. 8 [hereinafter APA1].

139. *Id.* at 123–24; Exhibit 1 to Order Approving Bidding Procedures at 9, *In re* The Weinstein Co. Holdings, No. 18-10601 (Bankr. D. Del. Apr. 6, 2018), Doc. 190-1 [hereinafter Bidding Procedures].

140. APA1, *supra* note 138, at 94; *id.* at 241–54 (describing the existing film library, the "covered titles," listing 68 "top pictures," four "top unreleased pictures," and 25 "top [television] programs," along with 497 "other titles").

141. Debtors' Motion for Entry of Orders at 11, *In re* The Weinstein Co. Holdings, No. 18-10601 (Bankr. D. Del. Mar. 20, 2018), Doc. 8 (asking for waiver of typical timeline in part because Lantern demanded speed).

142. APA1, *supra* note 138, at 115–16 (outlining tax matters and purchase price allocation).

143. Exhibit A to Declaration of Robert Del Genio in Support of First Day Relief, *supra* note 80, at 40.

144. *See* Declaration of Robert Del Genio in Support of First Day Relief, *supra* note 80, at 7–14.

145. These concerns were highlighted by the creditors' committee appointed in the bankruptcy at the second hearing in the case. The creditors' committee flagged Lantern's refusal to allocate its bid among silos of assets and the debtor entities as an issue of concern. Given the web of security interests and the fact that TWC included discrete bundles of assets partitioned by many LLCs, creditors had a difficult time evaluating the impact of Lantern's bid. Transcript of Apr. 6, 2018, Hearing at 18–19, *In re* The Weinstein Co. Holdings, No. 18-10601 (Bankr. D. Del. Apr. 9, 2018), Doc. 192.

146. Bidding Procedures, *supra* note 139, at 4.

to specify the liabilities to be assumed or paid and allocate cash consideration among various asset groups (particularly if they sought to buy only a subset of the assets).[147]

The contract-intensive nature of TWC further complicated the bidding process that the APA anticipated. Qualified bids of competitors would have to identify "with particularity" which among the tens of thousands of contracts the buyer would assume and the treatment of cure amounts.[148] LLCs within the TWC family were parties to over 26,000 contracts.[149] Many contracts were interrelated and affected TWC's rights to specific films. They included production contracts giving royalty rights to actors, directors, and the like, and distribution contracts allowing others to stream or otherwise use the films.[150] Exploiting TWC's intellectual property without resolving licensing issues would be messy, particularly if counterparties alleged that TWC had defaulted pre-bankruptcy. In addition, due to the operation of executory contract law, Lantern's decisions about whether or not it wanted these contracts, such that TWC would be directed to assume and assign them to Lantern or reject them, would affect the size of the estate as well as claims against it.[151] The APA gave Lantern "sole discretion" to indicate which contracts it wanted, and thus what contracts TWC would need to assume and assign.[152]

Significantly, in terms of timing, the initial TWC-Lantern APA said contract disputes would be resolved by the time the sale closed and that any amounts required to cure TWC's prior breaches of contract would be paid.[153] TWC would have to transfer and assign to Lantern any contracts Lantern wanted *as of the sale closing date*.[154] A related motion assured counterparties that

147. *Id.* Competing bidders were held to an especially high standard if they wanted to buy only a portion of the company, but even if they were bidding on the entire company, they had to allocate their bid among the key asset segments and illustrate that they were sufficient to cover debts secured by those particular assets. Debtors' Motion for Entry of Orders, *supra* note 138, at 18–19 (qualified bid chart); Bidding Procedures, *supra* note 139, at 4–5. In addition, as discussed below, the procedures required bidders of any scope to identify which contracts and leases the bidder wished to assume and the provision of adequate assurance of future performance. Debtors' Motion for Entry of Orders, *supra* note 138, at 19.

148. Bidding Procedures, *supra* note 139, at 5. For an example of debtor management favoring a sale to secured creditors and blocking outside bids in another case, see Ellias & Stark, *supra* note 61, at 774–78.

149. Assumed Contracts & Leases, *supra* note 20, at 2059.

150. *See generally* Exhibit 1 to Assumed Contracts & Leases, *supra* note 20 (listing the 26,013 contracts).

151. *See supra* Section I.B.3.

152. APA1, *supra* note 138, at 91, 94–95.

153. *Id.* at 95.

154. *Id.* at 95, 109 (preventing TWC from assuming, rejecting, or assigning any contract in a way contrary to what Lantern selected through a negative covenant).

they "[would] have a meaningful opportunity to raise any objections to the proposed assumption of their respective Contracts and Leases *in advance of* the Sale hearing."[155]

TWC and Lantern later drafted and sought entry of a court order that, by its terms, overrode this foundational understanding of the timeline, allowing Lantern to indicate a range of contracts it might want to acquire but not committing itself by the closing of the sale.[156] By contrast, any competing bidders had to specify exactly which contracts they wanted and the adequate assurance of future performance they would provide in a compressed time period.[157] Whereas Lantern had been circling around TWC and had access to information as a potential investor in an earlier sale proposal, potential bidders newer to studying the company would have greater informational hurdles to overcome.

As discussed earlier, one of the perks of going-concern sales in bankruptcy is a court order insulating the buyer from obligations other than the ones the buyer expressly elects.[158] The APA disavowed any successor liability for TWC's alleged employment discrimination and tortious behavior that other state or federal law otherwise might have imposed.[159]

155. Debtors' Motion for Entry of Orders, *supra* note 141, at 42–43.

156. Transcript of May 8, 2018, Hearing Before Honorable Mary F. Walrath United States Bankruptcy Judge at 60–61, Hotel Mumbai PTY Ltd. v. Weinstein Co. (*In re* The Weinstein Co. Holdings), No. 18-10601 (Bankr. D. Del. May 9, 2018), Doc. 839 [hereinafter Transcript of May 8, 2018, Hearing].

157. Exhibit E to Debtors' Motion for Entry of Orders at 4, *In re* The Weinstein Co. Holdings, No. 18-10601 (Bankr. D. Del. Mar. 20, 2018), Doc. 8.

158. *See supra* note 56 and accompanying text.

159. APA1, *supra* note 138, at 92. Lantern disclaimed liability "to the fullest extent permitted by Section 363 of the Bankruptcy Code." *Id.* at 119. The contract curiously defines "lien" to include unsecured claims, such as harassment claims. *Id.* at 148. This contract defines harassment claim to include claims for rape, gender violence, false imprisonment, discrimination, predatory conduct, negligent infliction of emotional distress, failure to remedy or prevent these conditions. *Id.* at 113, 146–47. Any agreement with the Guilds would be contingent on a release of all claims of successorship. *Id.* at 113–14; Order Authorizing the Sale at 10–12, 29–31, *In re* The Weinstein Co. Holdings, No. 18-10601 (Bankr. D. Del. May 9, 2018), Doc. 846 (providing a nonexhaustive list of federal statutes under which Lantern would not be deemed a successor). Those who did not object or withdrew objections are "deemed to have consented" for purposes of section 363(f)(2). *Id.* The order later hedges, as TWC's original motion for sale did, to say that the sale was free and clear under 363(f) and 105(a), referencing cases that identified that latter section as the source of authority for stripping successor liability. *Id.* at 24.

> Neither the Purchaser nor any of its affiliates is a mere continuation of the Debtors or their estates, there is no continuity or common identity between the Purchaser, any of its affiliates and any of the Debtors, and there is no continuity of enterprise between the Purchaser, any

2. Private inputs unbundle bankruptcy: the Bridge Loan

Also setting the dynamics is the syndicate of lenders from which TWC's subsidiaries borrowed money before and during the case. Going into the bankruptcy, TWC owed a MUFG Union Bank syndicate more than $150 million[160] and proposed borrowing an additional $25 million to tide it over until the sale.[161] In addition to recovering all of that and more, Union Bank could delegate payment of its own professionals to TWC's bankruptcy estate, including for pre-bankruptcy lending work.[162]

Union Bank's new DIP loan agreement discouraged governance changes to TWC management and leadership; they would constitute a default on the loan agreement.[163] The loan agreement also required that the sale close no later than four months after the bankruptcy filing.[164] As Union Bank's lawyer would later say at the third hearing in the bankruptcy, it was "absolutely critical that

> of its affiliates and any of the Debtors. Neither the Purchaser nor any of its affiliates are holding themselves out to the public as a continuation of any of the Debtors.

*Id.* at 14–15. The APA said the sale could not be considered a *de facto* merger. *Id.* at 15.

160. Declaration of Robert Del Genio in Support of First Day Relief, *supra* note 80, at 7–8.

161. APA1, *supra* note 138, at 203. The loan has other participating lenders, but for brevity I will refer to Union Bank, the agent for the loan, as the DIP lender.

162. Final Order Authorizing the Debtors To Obtain Postpetition Financing, Utilize Cash Collateral of Pre-Petition Secured Entities, Granting Adequate Protection to Pre-Petition Secured Entities, and Granting Related Relief at 24, *In re* The Weinstein Co. Holdings, No. 18-10601 (Bankr. D. Del. Apr. 19, 2018), Doc. 267 [hereinafter Final DIP Order] ("The Debtors are authorized and directed to pay . . . all costs, expenses and any other fees . . . including, without limitation, the reasonable, out-of-pocket fees, costs and expenses of [restructuring professionals] and any other legal counsel, financial advisors and third-party appraisers, advisors and consultants advising the DIP Secured Parties[], whether incurred before or after the Petition Date."). The contract authorized payment from the proceeds of the sale to Lantern. *Id.* at 32 ("Debtors are authorized and directed to pay, from the proceeds of the DIP Loans, and in accordance with the Pre-Petition Loan Documents, the reasonable, documented, pre-petition and post-petition fees, costs and expenses incurred or accrued by the Pre-Petition Secured Parties in connection with any and all aspects of the Chapter 11 Cases, including without limitation (i) the fees and disbursements of counsel, appraisers, financial advisors and other professionals hired by or on behalf of the Pre-Petition Agent or the Pre-Petition Lenders . . . .").

163. Exhibit G to Debtors' Motion for Entry of Orders Approving Bidding Procedures at 208–09, *In re* The Weinstein Co. Holdings, No. 18-10601 (Bankr. D. Del. Mar. 20, 2018), Doc. 8 [hereinafter Exhibit G to Debtors' Motion] (listing conditions precedent, including requiring Union Bank permission for any replacement). The proposed loan deal nonetheless disclaimed liability for decisions gone wrong. Final DIP Order, *supra* note 162, at 58 (instructing that order and DIP loan documents shall not be construed to permit lender liability for the debtor's activities in the bankruptcy); *id.* at 59 (providing same for pre-petition lenders).

164. Exhibit G to Debtors' Motion, *supra* note 163, at 10 (showing that the bidding procedures order was approved no later than 35 days after petition date, the auction no later than 60 days after petition date, the approval of sale no later than 10 business days after completion of the auction, and the sale consummated no later than 125 days after the petition date).

the [going-concern] sale [of the company] remain on track for early May, as the DIP funding really does constitute the proverbial melting ice cube, and summer is coming."[165] Note the ice cube metaphor use for the *financing* rather than the company; the company had already melted, as later acknowledged by TWC's lead restructuring lawyer.[166]

The loan deal restricted how the money could be spent: for example, it could not be spent on litigation that might bring more resources into the bankruptcy estate for other creditors.[167] Union Bank's money was strictly earmarked for moving the sale forward as quickly as possible so the loans could be repaid and the lender could move on.

In the loan agreement, TWC had to stipulate it had no potential claims against Union Bank as a pre-petition lender, thus precluding TWC from suing the bank for various causes of action such as preferences, fraudulent transfer, or equitable subordination.[168] As is common practice, a committee of unsecured creditors, which would be selected by the U.S. Department of Justice's bankruptcy watchdog, would be allotted just a brief window in which to conduct its own investigation.

3. How a planned unbundled bankruptcy undercuts checks and balances: the Unsecured Creditors' Committee

The governance of chapter 11 cases is supposed to be shaped by an active committee representing unsecured creditors.[169] In bankruptcy à la carte, key decisions about the company have been made before the filing. Yet, the watchdog does not have authority to appoint a committee until there is an actual chapter 11 case.[170] When TWC filed, the watchdog moved quickly to solicit

165. Transcript of Apr. 20, 2018, Second-Day Hearing at 15, *In re* The Weinstein Co. Holdings, No. 18-10601 (Bankr. D. Del. Apr. 20, 2018), Doc. 273.

166. Boysen, *supra* note 120 (quoting lead lawyer Paul Zumbro's acknowledgement that ice cube had already melted: "In this case the ice cube fell off a cliff and shattered before we even filed.").

167. For example, although they are hard to win, so-called *Caremark* claims against the board were possible. *See, e.g.*, Daniel Hemel & Dorothy S. Lund, *Sexual Harassment and Corporate Law*, 118 COLUM. L. REV. 1583, 1643–44 (2018); Elizabeth Pollman, *Corporate Disobedience*, 68 DUKE L.J. 709, 723 n.70 (2019); Jessica Fink, *Disgorging Harvey Weinstein's Salary*, 41 BERKELEY J. EMP. & LAB. L. 285, 329–30 (2020).

168. Final DIP Order, *supra* note 162, at 10.

169. Harner & Marincic, *supra* note 29, at 761–62 (explaining that Bankruptcy Code contemplates committee serving as "statutory watchdog" as counterbalance to debtor-in-possession authority, intended by Congress "to give the general creditor body a stronger voice in the reorganization process").

170. 11 U.S.C. § 1102(a)(1) (authorizing appointment of committee "as soon as practicable after the order for relief under chapter 11 of this title"); *id.* § 301(b) (instructing that order for relief is commencement of case in voluntary bankruptcy).

applications, interview potential members, and make the appointments.[171] Still, the committee and its professionals had little time to get up to speed to fulfill its fiduciary role given the case's fast track.

Two of five committee members were natural persons and plaintiffs in lawsuits against the company. Sandeep Rehal was the only former TWC employee on the committee. She had been a personal assistant to H. Weinstein between 2013 and 2015. In late February 2018, Rehal sued TWC and both Weinstein brothers for violations of New York City's human rights law arising from a "pervasive and severe sexually hostile work environment."[172] Rehal's employment discrimination claim against R. Weinstein survived a motion to dismiss in New York state court.[173] By contrast, Louisette Geiss, chair of the committee, was the lead plaintiff in a putative class action against TWC and its board that a New York federal court later dismissed in large measure.[174]

Other official committee members were businesses holding commercial claims against TWC. William Morris Endeavor Entertainment ("Endeavor"), with "one of the largest cultural footprints on Earth,"[175] and facing its own reckoning over inequality in the entertainment industry,[176] filed a claim for over $2 million in the TWC bankruptcy.[177] Another commercial committee member,

171. The announcement was released 10 days after TWC filed its bankruptcy. *See* Notice of Appointment at 1, *In re* The Weinstein Co. Holdings, No. 18-10601 (Bankr. D. Del. Mar. 28, 2018), Doc. 122.

172. Complaint at 1, Rehal v. Weinstein, No. 151738 (N.Y. Sup. Ct. Feb. 27, 2018), Doc. 1. Among other things, Rehal was required to "be involved in and aware of the preparations for, and clean up after, Harvey Weinstein's extremely prolific sexual encounters" and was required to work with a naked H. Weinstein on almost a weekly basis, subjected to unwanted touching. *Id.* at 4.

173. Decision & Order at 6–11, Rehal v. Weinstein, No. 151738 (N.Y. Sup. Ct. May 13, 2019), Doc. 38 (rejecting, among other things, R. Weinstein's arguments that *Canosa* should be dispositive for Rehal's case, and that R. and H. Weinstein had separate professional domains and worked from separate offices). *But see* Notice of Appeal at 1, Rehal v. Weinstein, No. 151738 (N.Y. Sup. Ct. July 19, 2019), Doc. 43.

174. *See* Geiss v. Weinstein Co. Holdings, 383 F. Supp. 3d 156, 176 (S.D.N.Y. 2019) (retaining only sex trafficking claim against H. Weinstein).

175. *Endeavor Impact*, WME, https://www.wmeagency.com/responsibility/ [https://perma.cc/8PZL-AVX9].

176. Endeavor represented two clients who agreed to refilm scenes to remove actor Kevin Spacey; Mark Wahlberg received $1.5 million for the re-shoot and Michelle Williams received less than $1,000. Andrea Mandell, *Exclusive: Wahlberg Got $1.5M for 'All the Money' Reshoot, Williams Paid Less than $1,000*, USA TODAY (Jan. 10, 2018, 11:18 PM), https://www.usatoday.com/story/life/people/2018/01/09/exclusive-wahlberg-paid-1-5-m-all-money-reshoot-williams-got-less-than-1-000/1018351001/ [https://perma.cc/ET6C-WAD7].

177. Alphabetical Claims Register for The Weinstein Co. at 65, *In re* The Weinstein Co. Holdings, No. 18-10601 (Bankr. D. Del. Oct. 11, 2019), Doc. 2605 [hereinafter Claims Register] (showing TWC claim #20180 by Endeavor). The claim provides no explanation of the goods or services provided. *See id.*

Light Chaser, reached a settlement with TWC's acquirer that resulted in full payment of at least part of its claim long before distributions to unsecured creditors were otherwise resolved.[178] That settlement put Light Chaser on a different footing from other creditors of TWC, but I can find no public indication that Light Chaser withdrew, or was removed, from the committee. The final committee member was Cinedigm, which asserted a claim against TWC for "distribution and related services."[179]

As noted above, one of the first things a committee does in modern chapter 11 practice is race against the clock, imposed less by the Bankruptcy Code and more by pressure of the lender and the company's acquirer. Among the committee's obligations is to examine whether the bankruptcy estate might have causes of action against the lender financing the bankruptcy (here, the Union Bank syndicate). The need to move swiftly on that evaluation comes from the financing agreement, not from Congress. Given the timeline, and other extreme demands on the committee when a fast sale is pending, that investigation inevitably is limited to checking the most basic requirements of state secured transactions law rather than exploring other more fact-intensive legal issues.

While too late to alter the unbundled approach to the case, the committee had enough power to secure from TWC a commitment that the committee could take the lead on investigations and litigation of wrongdoing.[180] That delegation ultimately faced two big hurdles. First, TWC largely lacked funds to pay for investigations.[181] Second, derivative standing under Delaware law

178. Under the settlement entered February 12, 2019, Lantern would pay Light Chaser $1,125,000, Light Chaser would be entitled to assert a claim of the same amount in TWC's bankruptcy estate, and the existing agreements would continue with Lantern. *See* Exhibit 1 to Order Approving Stipulation at 6, *In re* The Weinstein Co. Holdings, No. 18-10601 (Bankr. D. Del. Feb. 12, 2019), Doc. 2083-1 (Lantern agreeing to accept assignment). Light Chaser, based in Beijing, made animated movies. Light Chaser and TWC had multiple ongoing contracts relating to dubbed films. *See generally* Light Chaser Animation Motion to Compel Assumption and Assignment, *In re* The Weinstein Co. Holdings, No. 18-10601 (Bankr. D. Del. Nov. 29, 2018), Doc. 1794 (referencing contracts between Light Chaser and TWC).

179. Cinedigm Digital Funding I, LLC, Proof of Claim, *In re* The Weinstein Co. Holdings, No. 18-10601 (Bankr. D. Del. Jan. 18, 2019) (including list of eight invoices from 2017); Claims Register, *supra* note 177, at 124. (showing Cinedigm as TWC claim #153); Jointly Administered Notice of Appointment of Committee of Unsecured Creditors, *In re* The Weinstein Co. Holdings, No. 18-10601 (Bankr. D. Del. Mar. 28, 2018), Doc. 122.

180. Joint Motion to Approve Stipulation at 4, *In re* The Weinstein Co. Holdings, No. 18-10601 (Bankr. D. Del. Nov. 6, 2018), Doc. 1668.

181. Transcript of Sept. 5, 2018, Hearing Before the Honorable Mary F. Walrath United States Bankruptcy Judge at 35, AI Int'l Holdings v. MUFG Union Bank (*In re* The Weinstein Co. Holdings), No. 18-10601 (Bankr. D. Del. Sept. 6, 2018), Doc. 1438 [hereinafter Transcript of Sept. 5, 2018, Hearing] ("[G]iven the massive purchase price reduction, the estate is in the zone of administrative insolvency. I can't say that it is or it isn't, but it's a close call, depending upon a number of disputes with secured creditors about how the purchase price is to be allocated.").

operates differently for LLCs than for corporations.[182] Deep into the case, TWC announced it would reverse course because it did not have the authority to give the committee that responsibility.[183] The committee appeared to play a crucial role in securing compensation for sexual misconduct and employment discrimination claimants through a settlement with multiple insurance companies, the details of which are confidential.[184] However, that is separate from the committee's capacity to ensure that TWC's bankruptcy à la carte maximized value.

#### 4. R. Weinstein in charge

Shaped by these privately negotiated agreements, the TWC bankruptcy got underway. As noted earlier, the presumption in chapter 11 is that management stays in charge ("debtor in possession") rather than a trustee. In this instance, Robert Weinstein was at the helm, as the lending agreement prescribed.[185]

No party filed a motion for appointment of a trustee. Nonetheless, using a debtor-in-possession model in a case like TWC is far from ideal. TWC's own descriptions of its path to bankruptcy reflected chaos: a large number of vacant positions, lack of internal legal counsel, refusal of others in the industry to engage with the company, and loss of half of the board.[186] Creditors expressed

182. Beskrone v. OpenGate Cap. Grp. (*In re* Pennysaver USA Publ'g, LLC), 587 B.R. 445, 464 (Bankr. D. Del. 2018) ("The extension of fiduciary duties to non-directors, non-managers, and non-members is seemingly in conflict with Delaware LLC policy."); Off. Comm. of Unsecured Creditors of HH Liquidation, LLC v. Comvest Grp. Holdings (*In re* HH Liquidation, LLC), 590 B.R. 211, 283–85 (Bankr. D. Del. 2018) ("[T]he committee has no standing to pursue the breach of fiduciary duty claims against the LLC Debtors.").

183. Transcript of May 23, 2019, Emergency Motion to Adjourn Application to Retain Bernstein Litowitz Berger & Grossman LLP at 34, *In re* The Weinstein Co. Holdings, No. 18-10601 (Bankr. D. Del. May 28, 2019), Doc. 2387.

184. *See* Transcript of Jan. 27, 2021, Telephonic Hearing Re: Fifth Amended Joint Chapter 11 Plan of Liquidation, *supra* note 120, at 32–37.

185. *See* Debtors' Motion for Orders Approving Postpetition Financing at 21, *In re* The Weinstein Co. Holdings, No. 18-10601 (Bankr. D. Del. Mar. 20, 2018), Doc. 11 (making it an event of default for a trustee to be appointed, citing section 8.01 of the credit agreement); Exhibit A to Interim Order Authorizing the Debtors to Obtain Postpetition Financing at 73, *In re* The Weinstein Co. Holdings, No. 18-10601 (Bankr. D. Del. Mar. 20, 2018), Doc. 76 (obligating TWC to retain professional advisors and investment bank selected by R. Weinstein and the board); *id.* at 79 (making violation of many specific covenants an event of default); *id.* at 81 (making filing of any motion seeking appointment of trustee or examiner an event of default).

186. Declaration of Robert Del Genio in Support of First Day Relief, *supra* note 80, at 18. It is no response to point to the chief restructuring officer TWC's board hired (as is common). *See generally* Exhibit A to Certification of Counsel Regarding Application to Retain & Employ FTI Consulting at 2, *In re* The Weinstein Co. Holdings, No. 18-10601 (Bankr. D. Del. Apr. 23, 2018), Doc. 296-1 (updated terms of engagement).

considerable frustration with the company. For example, at the first hearing, Portfolio Funding Corporation ("PFC"), an entity that grew out of TWC's 2010 financial restructuring, told the court that "the debtors have been flagrantly breaching its agreements with PFC" in terms of misdirecting payments, and that probably was "just the tip of the iceberg."[187] A lawyer for entertainment unions known as the "Guilds" complained that TWC needed "adult supervision" due to a breakdown in communication and defaults on various agreements.[188] Many other parties filed papers complaining about how TWC failed them in the months and years leading up to the bankruptcy and how they could not even get their calls returned (stay tuned for such a story about Lin-Manuel Miranda).

All of this is in addition to the sexual harassment and assault allegations that preceded the filing. Just weeks before the bankruptcy, the New York Attorney General announced detailed findings of its employment discrimination investigation and initiated a lawsuit against the company.[189] Apparently, TWC was unable to even locate H. Weinstein's personnel file.[190]

#### 5. Consequential decisions without disclosure statements or voting: the fast-track going-concern sale

The key part of TWC's unbundled bankruptcy took place between March and July of 2018. The process encountered some hiccups but resulted in Lantern becoming the owner of the company and Union Bank being repaid in full.

From the first day onward, TWC's representatives repeatedly noted the complexity of the company's capital structure.[191] Yet, that did not prevent TWC

187. Transcript of Mar. 20, 2018, Hearing on First-Day Motions, *supra* note 105, at 28–29.

188. *See id.* at 61 (statement of Guilds' lawyer) ("We've had a lot of difficulty with this debtor on the prepetition phase . . . . [I]t is sort of a childish way of looking at it in some ways, but this case calls out for adult supervision and we have confidence in Union Bank's crew in terms of seeing this through over this next period so that things get made right there."). The Guilds' vote of confidence made sense primarily to the extent they asserted security interests in assets that overlapped with Union Bank's collateral. However, the lender's disciplining force would end when the sale closed and the loan was repaid, while the Guilds' challenges might persist for longer.

189. *See generally* Verified Petition, People v. Weinstein Co., No. 450293 (N.Y. Sup. Ct. Feb. 11, 2018), Doc. 1 (articulating TWC's responsibility for unlawful conduct, including sexual harassment and unlawful sexual contact, and TWC board awareness of unlawful activity and failure to take investigative and corrective steps).

190. Tatiana Siegel, *New York's Attorney General Opens Up on Suing Weinstein, Beating Trump and Poking Facebook*, HOLLYWOOD REP. (Apr. 13, 2018, 6:30 AM), https://www.hollywoodreporter.com/news/general-news/eric-schneiderman-talks-beating-trump-court-suing-weinstein-more-1100948/ [https://perma.cc/DEL7-2AVD].

191. *E.g.*, Transcript of Mar. 20, 2018, Hearing on First-Day Motions, *supra* note 105, at 8, 38, 45, 50, 58, 64.

from seeking to override ordinarily applicable procedural rules and information disclosure deadlines so it could forge ahead with the sale extra quickly, as promised to Lantern and Union Bank.[192]

Loan agreements typically get approved in two segments: interim approval for a portion of the loan to prevent irreparable harm, and then permanent approval thereafter.[193] When TWC sought court approval for interim funding at its first bankruptcy hearing, a competing lender showed up to challenge the deal.[194] That lender complained TWC had cut off negotiations even though its proposed loan was less expensive and less controlling than Union Bank's offer.[195] A live objection and potential alternative enabled the court to ask questions about the fees on the interim loan.[196] Union Bank's lead lawyer called its loan "market" rate, but the court questioned this assertion in light of the competing lender.[197] After a short recess and a huddle in the hallway, TWC and Union Bank returned with an agreement to lower the fees on the

192. *See* Debtors' Motion for Entry of Order Extending Time To File Schedules at 4–5, *In re* The Weinstein Co. Holdings, No. 18-10601 (Bankr. D. Del. Apr. 16, 2018), Doc. 231 (citing strained resources and insufficient time to file the information, especially given the extensive number of contracts at issue in the case). For patterns among public companies in delayed filings or excused filings of schedules, as well as issues in Belk's super-speedy prepackaged bankruptcy, see Lynn M. LoPucki, *Chapter 11's Descent into Lawlessness*, 96 AM. BANKR. L.J. 247, 248–53 (2022).

193. *See* Fed. R. Bankr. P. 4001(c)(2) ("The court may commence a final hearing on a motion for authority to obtain credit no earlier than 14 days after service of the motion. If the motion so requests, the court may conduct a hearing before such 14-day period expires, but the court may authorize the obtaining of credit only to the extent necessary to avoid immediate and irreparable harm to the estate pending a final hearing.").

194. *See* Transcript of Mar. 20, 2018, Hearing on First-Day Motions, *supra* note 105, at 45 ("Union lenders were familiar with the complex collateral package."); *id.* at 50 (debtor's lawyer arguing competing lender was unfamiliar, asking due diligence type questions that would take too long to address); *id.* at 54 (statement of Union Bank) ("We don't believe that the [competing] lender has nearly the diligence access that we do," and "a junior lender is going to have no interest in the tempo or pace of the case.").

195. *See id.* at 68; *id.* at 46 (showing competing lender characterizing offer as better economic terms and exerting less control). The competing lender noted the Union Bank deal required $2 million in fees on an already well-protected $7.5 million loan. *Id.* at 47. TWC's responses included that the alternative lender lacked standing to speak on the issue, and that adding a new lender might generate litigation. *Id.* at 56–57.

196. Transcript of Mar. 20, 2018, Hearing on First-Day Motions, *supra* note 105, at 52 ("Well, let's talk about the fees"); *id.* at 56 (quoting the court: "I do have some concerns about approving today fees that will adversely affect the debtor in the event a better DIP is offered."); *id.* at 59 ("I'm concerned about approving something today that precludes the debtor from considering an offer for a DIP that is truly a better deal."). When TWC noted that the short duration of the loan, the court asked, "Doesn't that make the amount of the fees even worse?" *Id.* at 58.

197. *Id.* at 56 ("Well, I'm not sure yours is market if somebody else is willing to offer less."); *see* Eckbo et al., *supra* note 58, at 7 ("Debtors routinely argue that the terms are indeed competitive or 'fair, reasonable, and adequate.'").

interim loan.[198] The court approved TWC borrowing an initial $7.5 million in interim financing at a somewhat reduced cost to the bankruptcy estate.[199]

As for the quick sale, when explaining to the bankruptcy court why it selected a Texas private equity firm as the stalking horse, TWC's lawyer said, "perhaps most importantly, [the bid] preserves jobs."[200] Yet, TWC's number of employees already had declined substantially before it filed for bankruptcy.[201] Moreover, the APA did not legally commit Lantern to take any employees in the sale agreement; Lantern "currently anticipates hiring most of the employees of the [b]usiness" and had the right to offer work to each person, or not.[202] Seemingly at Lantern's request, TWC laid off more employees during the bankruptcy before the sale closed.[203] A joint venture after the sale closed would terminate another fifteen TWC employees.[204]

At the second hearing, on April 6, 2018, TWC characterized the proposed bidding procedures, amended slightly through negotiations with the government watchdog and the newly created creditors' committee, as being presented on a "fully consensual basis," and the court approved the procedures.[205] Soon thereafter, on April 19, 2018, TWC told the court of robust

198. Transcript of Mar. 20, 2018, Hearing on First-Day Motions, *supra* note 105, at 94 (walking through modifications to interim agreement).

199. Interim Order Authorizing the Debtors to Obtain Postpetition Financing at 17–18, *In re* The Weinstein Co. Holdings, No. 18-10601 (Bankr. D. Del. Mar. 20, 2018), Doc. 76.

200. Debtors' Motion for Entry of Orders, *supra* note 141, at 11.

201. Siegel, *Layoffs*, *supra* note 109; Declaration of Robert Del Genio in Support of First Day Relief, *supra* note 80, at 18.

202. APA1, *supra* note 138, at 1, 25 ("Buyer anticipates offering employment to most Seller Party Employees and such offers are anticipated to include substantially similar, in the aggregate, wages and benefits . . . Buyer shall have sole discretion to determine which Seller Party Employees to offer employment to, and on what terms."). To continue working there, employees would have to waive certain claims. *Id.*

203. *See* Tatiana Siegel, *Weinstein Co. Lays Off 20-Plus Employees*, HOLLYWOOD REP. (July 11, 2018, 2:18 PM), https://www.hollywoodreporter.com/movies/movie-news/weinstein-lays-20-employees-1126398/ [https://perma.cc/J7FG-XBQF]; *see also* Proof of Claim at 5, *In re* The Weinstein Co. Holdings, No. 18-10601 (Bankr. D. Del. July 23, 2018) (attaching correspondence from Lantern Entertainment's human resources department indicating that Lantern would not be needing his services: "We are grateful for your time and patience throughout the acquisition process of certain assets of The Weinstein Company. We are equally appreciative of your interest in Lantern Entertainment. We are unfortunately not able to offer you a position with Lantern Entertainment.").

204. Gregg Kilday, *Spyglass Media Group Closes Former Weinstein Co. NY Office, Lays Off 15*, HOLLYWOOD REP. (Mar. 20, 2019, 1:39 PM), https://www.hollywoodreporter.com/movies/movie-news/spyglass-media-group-closes-weinstein-ny-office-lays-15-1196044/ [https://perma.cc/U9C8-BUUU].

205. Transcript of Apr. 6, 2018, Hearing at 5, *In re* The Weinstein Co. Holdings, No. 18-10601 (Bankr. D. Del. Apr. 9, 2018), Doc. 192; Order Approving Bidding Procedures & Stalking Horse Bid Protections at 1, *In re* The Weinstein Co. Holdings, No. 18-10601 (Bankr. D. Del. Apr. 6, 2018),

interest in acquiring TWC in part or in whole, mentioning dozens of potential bidders.[206] These assurances were well timed with the requested final approval of the Union Bank loan deal. TWC said no competing loan offer materialized, and unlike at the first hearing, no other lender showed up to say otherwise.[207] No one else pursued objections at the hearing (again, parties had agreed to defer their reservations to future hearings).[208] The court gave final approval for the Union Bank loan during that hearing.[209] Union Bank's right to be paid for both its pre-bankruptcy loan and its post-bankruptcy loan at the very top of the creditor pile and its access to assets as collateral now was more fully assured.[210] Cemented into a federal court order, the loan deal required that the sale of TWC close no later than July 17, 2018.[211] The order also limited challenges the creditors' committee could make to the sale.[212]

Around the same time, when the bankruptcy was about a month old and the bidding procedures were in place, TWC filed three lists with the court that were supposed to shed light on the status of the company's many contracts.[213]

Doc. 190. The definition of "fully consensual" in a fast-track sale can be elusive. It is true that no one stood up in court trying to block the bidding procedures. Perhaps fearing that if they pushed too hard they would get nothing, various creditors with questions about the impact of the sale process on their claims agreed to reserve those fights for another day.

206. Transcript of May 8, 2018, Hearing, *supra* note 156, at 7 ("The last time the debtors updated the Court, on April 6 . . . there were 23 potential bidders, buyers. Today, there are 60 potential buyers; 48 of which have currently got access to the data room . . . . The debtors are hopeful that we will receive a number of qualified bids by the April 30th deadline . . . . At the same time the debtors are, of course, continuing to work closely and cooperatively with our stalking horse bidder to ensure as smooth a transition as possible, if the stalking horse is, ultimately, the prevailing bidder.").

207. *Id.* at 8.

208. Final DIP Order, *supra* note 162, at 27. The creditors' committee had resolved its objections prior to the hearing through revisions to the collateral package for the new loan, to exclude "claims arising out of or related to sexual misconduct or harassment or employment practices." *Id.*

209. Transcript of May 8, 2018, Hearing, *supra* note 156, at 45.

210. Exhibit A to Final DIP Order at 65–66, *In re* The Weinstein Co. Holdings, No. 18-10601 (Bankr. D. Del. Apr. 19, 2018), Doc. 267. The Guilds later sued Union Bank, which prevented Union Bank from fully exiting the case. The court approved their settlement in July 2019. Order Granting Debtors' Motion Pursuant to Fed. R. Bankr. P. 9019 for Approval of Settlement at 2–3, Dirs. Guild v. MUFG Bank (*In re* The Weinstein Co. Holdings), No. 18-50487 (Bankr. D. Del. Jan. 8, 2019), Doc. 15.

211. *Id.* at 65.

212. Final DIP Order, *supra* note 162, at 54.

213. Notice of Potential Assumption & Assignment of Executory Contracts or Unexpired Leases and Cure Amounts at 1, *In re* The Weinstein Co. Holdings, No. 18-10601 (Bankr. D. Del. Apr. 13, 2018), Doc. 216 [hereinafter Notice of Potential Assumption April 13, 2018]; Notice of Supplemental Potential Assumption & Assignment of Executory Contracts or Unexpired Leases & Cure Amounts at 1–2, *In re* The Weinstein Co. Holdings, No. 18-10601 (Bankr. D. Del. Apr. 20, 2018), Doc. 282; Notice of Second Supplemental Potential Assumption & Assignment of Executory Contracts or Unexpired Leases & Cure Amounts at 2, *In re* The Weinstein Co. Holdings, No. 18-10601 (Bankr. D. Del. Apr. 27, 2018), Doc. 482.

These lists were as tentative as they were lengthy. Among other things, TWC and Lantern reserved the right to argue that the contracts they identified were not capable of being assumed and assigned, which would alter the legal and financial consequences.[214] Many listings identified the amount required to cure contract breaches as zero—an amount some counterparties surely would dispute—or were ambiguous on which contract was at issue if counterparties and TWC had more than one.[215] These filings also purported to shift the burden to the counterparties to complain about proposed cure amounts or anything else regarding the contracts.[216] Nearly one hundred counterparties would object to these lists, while also permitting their objections to be deferred to a later time––an accommodation they might later regret.

On May 1, 2018, TWC announced the results of the bidding: no other bidder met the standards to be "qualified," solidifying Lantern's right to buy the company.[217] This outcome ruffled the feathers of theater industry veteran Howard Kagan, who complained to the press about barriers he experienced to participation.[218] Kagan, whose proposal to buy TWC included a $30 million fund for sexual misconduct survivors, said TWC's withholding of information, such as the amount necessary to cure defaults on contracts, made it impossible to submit a qualified bid by the deadline.[219] TWC not only contested this claim but also mounted an aggressive litigation stance, including toward the creditors'

214. *E.g.*, Notice of Potential Assumption Apr. 13, 2018, *supra* note 213, at 2.

215. Exhibit 1 to Notice of Potential Assumption April 13, 2018 at 1–71, *In re* The Weinstein Co. Holdings, No. 18-10601 (Bankr. D. Del. Apr. 13, 2018), Doc. 216.

216. *See* Notice of Potential Assumption April 13, 2018, *supra* note 213, at 2.

217. Notice of Cancellation of Auction and Designation of the Stalking Horse Bidder as the Successful Bidder at 2, *In re* The Weinstein Co. Holdings, No. 18-10601 (Bankr. D. Del. May 1, 2018), Doc. 653.

218. Gene Maddaus, *Howard Kagan on Weinstein Bid: 'We Were Shut Down and the Victims Were Shut Down*,' VARIETY (May 1, 2018, 6:57 PM), https://variety.com/2018/biz/news/howard-kagan-weinstein-bid-we-were-shut-out-1202794698/ [https://perma.cc/A6WQ-H698].

219. *Id.* (noting that the company "came up with a hundred reasons why they didn't want a second bid"); Dawn C. Chmielewski, *Weinstein Company Declares Lantern Capital the Winner of Bankruptcy Auction, Rival Bidder Responds*, DEADLINE (May 1, 2018, 6:44 PM), https://deadline.com/2018/05/weinstein-company-lantern-capital-winner-bankruptcy-auction-1202380875/ [https://perma.cc/VV6A-A7QU] (calling TWC an impediment to the bidding process by failing to provide necessary documents to submit a completed offer and saying "[i]t strains credulity in a normal, capitalistic world that they wouldn't want to have two people bidding on their assets"). For similar allegations from the *Remington Outdoor* bankruptcy, see Rich Archer, *Remington Looking at Breakup After Chapter 11 Auction*, LAW360 (Sept. 28, 2020), https://plus.lexis.com/api/permalink/af223230-d1a6-41b4-8e21-94d25bf7494f/?context=1530671 [https://perma.cc/RV94-DL2C (staff-uploaded, dark archive)] ("We had only 12–8 hours to return a [letter of intent] with strategy and info about our firm and we did."). For a warning about bidding complaints from competitors who try to offer late-breaking bids, see Vincent S.J. Buccola, Jeffrey R. Dutson & W. Auston Jowers, *Untimely Bidding in Bankruptcy Auctions*, 26 NORTON J. BANKR. L. & PRAC. 281, 281 (2017).

committee for communicating with Kagan.[220] TWC responded to allegations with a press release plus declarations from its investment banker and a recently added board member to further bolster its choice of Lantern as the winner.[221]

The lack of a back-up bid, coupled with the ticking clock from the Union Bank financing order, increased the pressure to ensure that the Lantern deal closed. TWC made clear it had no time to spare. If the court did not bless the deal imminently, Lantern could walk away.[222] If Lantern walked away, the Union Bank loan would default, and neither creditors nor professionals would get paid. Although plenty of parties had expressed concerns about the sale and its impact on their rights, they seemed to grit their teeth, agreeing to reserve their objections for a later time. The bankruptcy court approved the sale to Lantern.[223]

The lengthy sale order that the court entered, drafted by TWC and Lantern, included detailed factual findings that had never been formally presented to the court and seemed literally untrue. For example, the order said, "the Purchaser has demonstrated adequate assurance of future performance under the Assumed Contracts and Leases."[224] Yet, those issues had not been addressed.[225] Counterparties did not know for sure which contracts Lantern would ultimately acquire, let alone whether a newly created company shell, Lantern Entertainment, having no track record in the industry,[226] could provide the adequate assurance required by the Bankruptcy Code and asserted in the

220. Amended Notice of Deposition upon Oral Examination of Designated Representative(s) at 2–3, *In re* The Weinstein Co. Holdings, No. 18-10601 (Bankr. D. Del. May 3, 2018), Doc. 743 (seeking deposition for information on all of committee's communications with Howard Kagan's firm, etc.); Transcript of May 8, 2018, Hearing, *supra* note 156, at 60–61 (transcribing committee lawyer Debra Grassgreen's remarks: "a first in my career to have one of my partners be deposed in connection with a matter like this").

221. Declaration of Ivona Smith in Support of Debtors' Sale Motion at 4–5, *In re* The Weinstein Co. Holdings, No. 18-10601 (Bankr. D. Del. May 7, 2018), Doc. 794 (identifying six reasons Kagan's bid was not qualified or highest and best); Declaration of Carlos Jimenez in Support of Debtors' Sale Motion at 4, *In re* The Weinstein Co. Holdings, No. 18-10601 (Bankr. D. Del. May 7, 2018), Doc. 806 (documenting numerous communications between TWC's investment bank and Kagan).

222. Transcript of May 8, 2018, Hearing, *supra* note 156, at 10.

223. The court gave oral approval on May 8, during TWC's fourth bankruptcy hearing, and then entered the written order. Order Authorizing the Sale, *supra* note 159, at 1. *Cf.* Ellias & Stark, *supra* note 61, at 776–78 (critiquing use of time-of-the-essence arguments to shape bidding procedures in American Safety Razor bankruptcy).

224. Order Authorizing the Sale, *supra* note 159, at 38.

225. *See* Transcript of May 8, 2018, Hearing, *supra* note 156, at 10, 49.

226. Gregg Kilday, *New Owners Look to Warm Up Weinstein Co's Film Leftovers*, HOLLYWOOD REP. (Jan. 11, 2019, 8:59 AM), https://www.hollywoodreporter.com/news/general-news/new-owners-look-warm-up-weinstein-cos-film-leftovers-1174729/ [https://perma.cc/W995-D8JG] (describing Lantern as "show business novices" and "not movie people").

sale order.[227] The sale order also introduced a consequential loophole relating to the promised resolution of contract disputes: the sale could close without litigating and resolving contract objections.[228]

In late June 2018, more than six weeks after the court approved the sale, TWC's lawyers came to court with a confession: TWC and Lantern could not close the deal.[229] They had written the APA and court order themselves but could not agree on a central element: who would pay to cure defaults on the executory contracts Lantern ultimately wanted? TWC and Lantern traded threats to sue over the terms and remedies in the agreement.[230]

To settle the dispute, TWC agreed to sell itself to Lantern for $23 million less; otherwise, the Union Bank loan would go into default, and everyone would lose.[231] In exchange for the sale price reduction, Lantern committed to close by a certain date and to assume responsibility for curing certain defaults.[232] This was again an emergency, as the timetable in Union Bank's DIP loan contract was drawing to a close. TWC told the court it needed a signed order approving the modified deal in early July.[233] Re-opening the auction was not even mentioned as a possibility.

Characterizing itself as being "kind of thrown under the bus," the creditors' committee opposed the motion, at least at first.[234] Lantern's arguments for refusing to close were "downright frivolous," the committee said.[235] Given the lack of progress on allocation of sale proceeds and debtor entities, the reduction's impact on general unsecured creditors was far from clear.[236]

227. Order Authorizing the Sale, *supra* note 159, at 38.

228. *Id.* at 25–26; *see also* APA1, *supra* note 138, at 29.

229. *See* Debtors' Motion for an Order Approving Amendment to Asset Purchase Agreement at 3–5, 10–11, *In re* The Weinstein Co. Holdings, No. 18-10601 (Bankr. D. Del. June 27, 2018), Doc. 1115 [hereinafter Motion for Amendment to APA].

230. *Id.* Later, Lantern would blame the dispute at least partly on TWC's former president and chief operating officer, who allegedly interfered with the sale closing in an effort to channel business contacts and agreements to his new business, 101 Studios. Transcript of July 11, 2018, Hearing at 24, *In re* The Weinstein Co. Holdings, No. 18-10601 (Bankr. D. Del. July 11, 2018), Doc. 1232.

231. Motion for Amendment to APA, *supra* note 229, at 12 (stating that failure to close sale by July 17, 2018, is event of default under ¶ 25(e) of DIP Order).

232. *Id.* at 17 (amending sections 2.5 and 11.1(b) of the APA); *id.* at 24.

233. Transcript of June 22, 2018, Hearing at 11, Hotel Mumbai PTY Ltd v. Weinstein Co. (*In re* The Weinstein Co. Holdings), No. 18-50418 (Bankr. D. Del. June 25, 2018), Doc. 1105 ("[U]nfortunately, there were some dates that are driven by contracts that I'm not sure we have the right to unilaterally [change] or even the court may not have the power to extend.").

234. *Id.* at 10.

235. *Id.* at 9.

236. *Id.* at 13–14.

The presiding judge, the Honorable Mary Walrath, would be unavailable on the dates TWC and Lantern insisted were essential. Chief Bankruptcy Judge Christopher Sontchi volunteered to preside in her absence.[237]

So it was that the seventh public court hearing in the TWC bankruptcy, held on July 11, 2018, enabled Lantern to buy the company for a lower price. By the time of the hearing, the creditors' committee had again settled its own objections behind the scenes,[238] as courts generally encourage parties to do. Pragmatism probably played a role yet again. If the deal died, and the Union Bank loan expired, the committee probably would lose access to its lawyers before an investigation of estate claims against board members and executives could get going.

Contract counterparties were done being conciliatory at the July 11 hearing, but Chief Judge Sontchi said their complaints were too late.[239] He viewed their objections to the revised deal as impermissible collateral attacks on the earlier sale order.[240] That order was now the controlling document,[241] and the changes bothering objectors in the revised deal made no material difference, the court said.[242] For its own part, TWC assured the courtroom of an imminent hearing, on July 18, on these contract issues (which did not happen).[243] Judge Sontchi signed an order approving the amended deal.[244] On July 13, 2018,

237. Judge Sontchi held a telephonic status conference on June 25, 2018. *See* Notice of Telephonic Status Conference Scheduled for June 25, 2018 at 2 P.M. (E.T.) at 1, *In re* The Weinstein Co. Holdings, No. 18-10601 (Bankr. D. Del. June 25, 2018), Doc. 1106; U.S. Bankruptcy Court-District of Delaware Confirmed Telephonic Appearance Schedule Honorable Christopher S. Sontchi at 1, *In re* The Weinstein Co. Holdings, No. 18-10601 (Bankr. D. Del. June 25, 2018), Doc. 1107. The court docket contains no recordings or transcripts.

238. The terms were not clear to the public at the time, but apparently TWC promised a reconstituted board, with the committee able to select two new directors. TWC also promised not to seek an extension of the period during which the debtor has the exclusive right to file a plan, with the understanding that the committee would take the lead to draft a plan for distributing remaining estate assets. Joint Motion of Debtors & Committee of Unsecured Creditors To Approve Stipulation at 4, *In re* The Weinstein Co. Holdings, No. 18-10601 (Bankr. D. Del. Nov. 6, 2018), Doc. 1668.

239. Transcript of July 11, 2018, Hearing, *supra* note 230, at 10–11 ("Sounds like we're finished. You can keep going. I'm just sending a message.").

240. *Id.* at 32–33.

241. *Id.* at 10–11.

242. *Id.* at 38. TWC characterized the amendments as technical. *Id.* at 40.

243. *Id.* at 7.

244. Order Approving Amendment to Asset Purchase Agreement Entered Into By & Between the Debtors & Lantern Entertainment LLC at 2–3, *In re* The Weinstein Co. Holdings, No. 18-10601 (Bankr. D. Del. July 11, 2018), Doc. 1220.

Lantern Entertainment transformed from a shell to a going concern, now comprised of substantially all of TWC's assets.[245]

#### 6. An Exclusive Contract Shopping Opportunity

Finality is a known benefit of bankruptcy sales.[246] Some loose ends are inevitable when a large company is sold on a tight timeline, but the Lantern deal was materially far from final.

After the sale to Lantern closed, TWC remained the official counterparty on tens of thousands of contracts. There was no common understanding of which contract rights Lantern had acquired and on what conditions. This unfinished business was a valuable option for Lantern. TWC delegated to Lantern the task of taking the lead on litigation over contract disputes.[247] But Lantern had no duty to the bankruptcy estate and its interests sometimes ran directly counter. The less responsibility to cure defaults for Lantern, the more obligations the bankruptcy estate would bear. TWC had previously postponed what was supposed to be a consequential May 22 hearing on contract objections without public explanation, deferring the matters to future dates that would then be postponed further.[248]

245. Notice of Closing of Sale to Lantern Entertainment LLC at 2, *In re* The Weinstein Co. Holdings, No. 18-10601 (Bankr. D. Del. July 17, 2018), Doc. 1247 (reporting that sale closed under the terms of the revised APA on July 13, 2018).

246. 11 U.S.C. § 363(m) (stating that final orders cannot be reversed on appeal); Contrarian Funds LLC v. Aretex LLC (*In re* Westpoint Stevens, Inc.), 600 F.3d 231, 248 (2d Cir. 2010) (noting importance of sale finality in interpreting section 363(m)).

247. TWC also largely took the position with counterparties Endemol Shine and others that it had given all documents to Lantern, and parties familiar with the matters were now employed by Lantern. Parties seeking discovery should go to Lantern rather than TWC. Transcript of Sept. 21, 2018, Telephonic Hearing Before the Honorable Mary F. Walrath United States Bankruptcy Judge at 6–7, *In re* The Weinstein Co. Holdings, No. 18-10601 (Bankr. D. Del. Sept. 24, 2018), Doc. 1525.

248. Notice of Agenda of Matters Scheduled for Hearing on May 22, 2018, at 11:30 A.M. (E.T.) at 1, *In re* The Weinstein Co. Holdings, No. 18-10601 (Bankr. D. Del. May 18, 2018), Doc. 907. A July 18 hearing did not include discussion of these objections and matters. Transcript of July 18, 2018, Hearing, *In re* The Weinstein Co. Holdings, No. 18-10601 (Bankr. D. Del. July 19, 2018), Doc. 1250. A hearing on allocation of value among secured creditors similarly had been adjourned to a May 31, 2018, status conference and then postponed again, seemingly indefinitely. Amended Notice of Agenda of Matters Scheduled for Hearing on May 31, 2018, at 2:00 P.M. (E.T.) at 1, *In re* The Weinstein Co. Holdings, No. 18-10601 (Bankr. D. Del. May 31, 2018), Doc. 955. At the June 5 hearing, TWC stated that the parties were in ongoing discussions. Transcript of June 5, 2018, Hearing at 57–58, Hotel Mumbai PTY Ltd v. Weinstein Co. (*In re* The Weinstein Co. Holdings), No. 18-10601 (Bankr. D. Del. June 6, 2018), Doc. 980. A secured creditor expressed hope allocation issues would be resolved before the sale closing. *Id.* at 61.

On June 8, 2018, after the court entered the sale order but before the sale closed, TWC filed a pleading that shifted expectations further.[249] For the first time, TWC characterized 147 contracts as "non-executory."[250] By using this label, TWC essentially claimed that Lantern had bought certain film and television rights and did not have to cure defaults.[251] The result would be that Lantern could use intellectual property rights associated with, say, the film *Silver Linings Playbook*, without paying past-due amounts owed to the likes of actor Bradley Cooper. Similar claims were held by Meryl Streep, George Clooney, Brad Pitt, and Julia Roberts, to name a few.[252] If these contracts were not executory, obligations from breach of contract would be additional unsecured debts against the TWC bankruptcy estate, further reducing the amount available to other unsecured creditors in an already depleted asset pool.

As noted earlier, contract counterparties were ready to fight back on such matters at the July 11 hearing before Chief Judge Sontchi. They (unsuccessfully) argued that they had expected most objections would be resolved *prior* to the sale closing.[253] Then, in August 2018, as Lantern's counsel reported about ninety contract-related objections to work through, counterparties complained to the

249. Debtors' Statement Regarding Contracts To Be Transferred Pursuant to the Asset Purchase Agreement with Lantern Entertainment LLC at 1, *In re* The Weinstein Co. Holdings, No. 18-10601 (Bankr. D. Del. June 8, 2018), Doc. 1003.

250. *Id.*

251. *Id.* at 2 ("[I]n consultation with Lantern, the Debtors have determined that the contracts set forth on Exhibit A hereto are not executory contracts under applicable law . . . ."); *id.* at 3 ("[T]he Asset Purchase agreement provides for the purchase, by Lantern, of any rights or assets transferred to the Debtors pursuant to such contracts.").

252. Jonathan Randles, *Randles's Take: Actors Defend Contracts in Weinstein Co. Bankruptcy*, WALL ST. J. PRO: BANKR. (June 19, 2018), https://www.wsj.com/articles/randless-take-actors-defend-contracts-in-weinstein-co-bankruptcy-1529441968 [https://perma.cc/TC6Z-WYRL (dark archive)] ("Meryl Streep, George Clooney, Julia Roberts and Brad Pitt are among a group of actors who have sought to defend their financial and artistic interests in films distributed or produced by Harvey Weinstein's former studio as the business is sold in bankruptcy to a private-equity firm.").

253. For example, Quentin Tarantino envisioned from the sale agreement knowing where he stood prior to closing. Transcript of July 11, 2018, Hearing, *supra* note 230, at 33. Tarantino noted that the hearing on assumption and assignment had been postponed for more than two months. *Id.* at 34 ("We have an issue with the fact that they're now altering this in a pretty significant way."). Tarantino noted Lantern had been looking at the assets since fall 2017. *Id.* at 35. He complained that the last-minute revisions to the settlement agreement were significant. *Id.* at 37 (referring to language change as well as alteration of cure costs Lantern would cover); *id.* at 38 (noting that only two days' notice on change to contract language was given, without explanation); *id.* at 39 ("[W]e're entitled to what was approved in the sale order. They are trying to walk that back . . . ."). Other counterparties received a similar court response from the judge: "We already had this argument. That was trumped by the sale order that said they didn't have to do it on the closing date. Nobody objected to it and it's a final order." *Id.* at 48.

court that they had been trying to resolve these disagreements for months.[254] For example, Lin-Manuel Miranda, creator of *Hamilton* and *In the Heights*, complained that his pre-bankruptcy letters about dealings with TWC had gone unanswered, as had his objections in the bankruptcy, to which he received no response over about sixteen weeks. By Miranda's count, TWC had postponed a court hearing on his objection eight times.[255] When the parties returned to court later in August to discuss how to resolve the contract matters, the court characterized the state of affairs as a "procedural mess."[256]

In early September, TWC filed a list of contracts spanning more than three hundred pages reflecting contracts Lantern *may* want, again with nothing guaranteed.[257] Although the number of contracts at issue was small relative to TWC's total inventory of 30,000 contracts, counterparties faced a tight turnaround to object to Lantern's listed proposed cure amounts.[258] Lantern filed its "final" list of contracts on November 8, 2018, which identified disputed contracts it wanted to acquire subject to resolving objections, added previously omitted contracts to be assumed, and included a list of excluded contracts.[259]

Well into 2019, TWC had not yet officially assumed even the uncontested contracts that would need to be assigned to Lantern.[260] Nearly a year after the sale closed, uncertainty about the contracts triggered disputes about the scope of the Lantern acquisition, as a party challenged whether TWC had sold things it did not own. PFC held intellectual rights in more than two hundred motion pictures arising from TWC's 2010 restructuring.[261] As Lantern released lists of

254. Transcript of Aug. 6, 2018, Telephonic Hearing Re: Lantern Motion to Expedite Hearing to Expedite Streamlined Procedures at 12, *In re* The Weinstein Co. Holdings, No. 18-10601 (Bankr. D. Del. Aug. 7, 2018), Doc. 1318.

255. Objection of the In the Heights Owners to Motion for Order Establishing Streamlined Procedures To Resolve Objections at 3–4, *In re* The Weinstein Co. Holdings, No. 18-10601 (Bankr. D. Del. Aug. 20, 2018), Doc. 1389 (describing letters sent prior to bankruptcy declaring reversion and requesting accounting, with no response); Amended Objection of the In the Heights Owners at 6–7, *In re* The Weinstein Co. Holdings, No. 18-10601 (Bankr. D. Del. May 10, 2018), Doc. 856.

256. Transcript of Aug. 23, 2018, Hearing at 54, *In re* The Weinstein Co. Holdings, No. 18-10601 (Bankr. D. Del. Aug. 24, 2018), Doc. 1406.

257. *See* Notice of Filing of List of Assumed Contracts Pursuant to Sale Order at 1–4, *In re* The Weinstein Co. Holdings, No. 18-10601 (Bankr. D. Del. Sept. 5, 2018), Doc. 1457.

258. *Id.* at 3 (giving counterparties until September 17, 2018, to object to updated list).

259. Supplemental Notice of Filing of List of Assumed Contracts Pursuant to Sale Order at 2–3, *In re* The Weinstein Co. Holdings, No. 18-10601 (Bankr. D. Del. Nov. 8, 2018), Doc. 1695 (adding contracts to acquisition list, and designating other contracts as "excluded assets").

260. Telephonic Hearing, *In re* The Weinstein Co. Holdings (Bankr. D. Del. Feb. 12, 2019) (notes on file with the North Carolina Law Review) (no hearing transcript available).

261. Debtors' Motion for Entry of Orders, *supra* note 141, at 241–54. Those films include *The Band's Visit*, *Clerks 2*, *The Nutty Professor*, and *Zack and Miri*. *Id.* PFC apparently got specific language added to the sale order. *Id.* at 38.

contracts that it planned to take over, it named contracts associated with films that, PFC claimed, were never property of TWC's bankruptcy estate in the first place.[262]

Nearly two years after Lantern closed its acquisition of TWC, the record was still not clear exactly which contracts TWC had sold to Lantern. For example, in March 2020, the parties told the court that the "final" supplemental schedule, filed all the way back in November 2018, was inadvertently missing some important Disney contracts that Lantern wanted.[263] Might those contracts have been valuable to the dwindling bankruptcy estate? TWC gave the contracts to Lantern at the latter's request and told the court it continued to deserve business judgment deference for such decisions.[264] Over a year later, in August 2021, R. Weinstein prevailed in securing a ruling from the bankruptcy court that Lantern's acquisition of *Scream 4* was subject to payment obligations to Robert and Harvey Weinstein, and thus Lantern owed several million dollars to the Weinstein brothers.[265]

In 2022, Lantern lamented it still was dealing with contract objections.[266] Yet, some of this dynamic surely was of the buyer's own making. The flexibility to make consequential decisions about contracts after a supposedly final sale closes creates confusion, particularly because of the connection between the sale of assets and related contracts in limbo. Contract matters seemed to be finally

262. Objection & Reservation of Rights of Portfolio Funding Co. LLC I to the Assumed Contracts Schedules at 3, *In re* The Weinstein Co. Holdings, No. 18-10601 (Bankr. D. Del. June 17, 2019), Doc. 2421 ("[I]t is ambiguous at best whether the Debtors intend to assume and assign to Spyglass any contractual rights that belong to PFC."); *id.* at 10 ("Assumed Contracts Schedules also list multiple agreements that purport to license rights to PFC Pictures as agreements that the Debtors will assume and assign to Spyglass.").

263. Joint Motion of the Debtors & Spyglass for Entry of an Order Approving Stipulation Resolving Disney's Limited Objections at 4–5, *In re* The Weinstein Co. Holdings, No. 18-10601 (Bankr. D. Del. Mar. 12, 2020), Doc. 2735.

264. *Id.* at 6–7.

265. Memorandum Opinion in Support of Oral Ruling at 5–11, *In re* The Weinstein Co. Holdings, No. 18-10601 (Bankr. D. Del. Aug. 12, 2021), Doc. 3413. A year later, the district court affirmed this ruling. Memorandum Opinion at 15, Spyglass Media Grp. v. Weinstein (*In re* The Weinstein Co. Holdings), No. 21-1151 (D. Del. Aug. 10, 2022), Doc. 13. Spyglass appealed to the Third Circuit but sought dismissal of the appeal. Appellant's Unopposed Motion To Voluntarily Dismiss Appeal at 2, Spyglass Media Grp. v. Weinstein (*In re* The Weinstein Co. Holdings), No. 22-2481 (3d Cir. Oct. 25, 2022) (dismissing appeal).

266. Response of Spyglass Media Group to Objection of Arclight Films at 1, *In re* TWC Liquidation Tr., LLC, No. 18-10601 (Bankr. D. Del. Feb. 23, 2022), Doc. 3450 ("[C]losed on its purchase of substantially all of the assets of [TWC] . . . over three and a half years ago. Since then, Spyglass has endeavored to resolve the myriad objections and contested matters arising therefrom, all with an eye toward finally achieving the 'free and clear' sale it sought back in 2018.").

resolved in March 2022.[267] Yet, in October 2022, various collective bargaining representatives for actors and other industry actors complained that the buyer never delivered executed assumption agreements, leaving the representatives unable to verify accurate reporting and payments or to enforce their various other rights.[268]

To summarize, TWC made a wholesale delegation of contract decisions to Lantern as part of the sale of the company. Those rights were exercised not by the debtor as anticipated in the Bankruptcy Code but by the stalking horse bidder, a party with no fiduciary duties to the bankruptcy estate, to pick and choose among legal rights and obligations. That shift turned the traditional contract analysis into a circular exercise. If the buyer wanted the contract after buying the company, then assigning it to the buyer would be considered in the best interest of the estate. If the buyer preferred to buy the underlying rights without curing defaults, Lantern could argue *after* the sale had closed that the contract was not executory, which would shift the cost of the default to the depleted bankruptcy estate.

*a. Example: Silver Linings Playbook*

A prominent example of this point involves the film *Silver Linings Playbook*. Under the contracts associated with that film, actors like Bradley Cooper and Jennifer Lawrence, as well as directors and others who worked on the film, were entitled to profit participation. Prior to the bankruptcy, TWC had not made all the payments.[269] Only after the court had approved the sale did Lantern allege it had acquired the film rights and related contract rights without having to pay those overdue obligations. Lantern waited to file a lawsuit until after the sale to prove that it should get the intellectual property rights without paying the full freight of the contract because the contracts were not executory.[270]

267. Omnibus Order Denying & Overruling the Remaining Contract Counterparty Objections to the Sale of the Debtors' Assets at 1, *In re* TWC Liquidation Tr., LLC, No. 18-10601 (Bankr. D. Del. Mar. 23, 2022), Doc. 3458.

268. Motion & Memorandum of Law To Enforce Provisions of the Order at 4, 11, *In re* TWC Liquidation Tr., LLC, No. 18-10601 (Bankr. D. Del. Oct. 6, 2022), Doc. 3544 (seeking delivery of assumption agreements on all guild-covered films).

269. Appellants' Opening Brief at 1, Cooper v. Lantern Ent. LLC (*In re* The Weinstein Co. Holdings), No. 19-243 (D. Del. July 12, 2019), Doc. 18 ("Appellants are parties to various talent agreements with the Debtors or affiliates of the Debtors under which the Appellants are owed millions of dollars resulting from the financial performance of the Picture.").

270. A factor in the official committee dropping its opposition to the sale to Lantern was the belief that the buyer would pay contract cure costs, reserving the limited resources for payment of unsecured

Lantern won its executory contract arguments, not only in bankruptcy court[271] but also in the U.S. Court of Appeals for the Third Circuit.[272] The legal basis was longstanding executory contract doctrine, albeit developed largely in the context of more traditional reorganization or liquidation cases. As a consequence of these rulings, Lantern would have to pay the actors and director if it exploited the film rights in the future (through streaming, for example), but it would *not* have to pay millions of dollars in TWC's past-due obligations.[273] Those would be debts of TWC's bankruptcy estate.

As the stalking horse bidder that deferred contract decision-making until after the sale had been approved and closed, Lantern transformed a benefit meant for the TWC bankruptcy estate into a benefit for its own stakeholders. Did Lantern pay the TWC bankruptcy estate enough for these options on which it gambled?

*b. Example: Project Runway*

A second example of consequential decisions about contracts after the sale involved the television show *Project Runway*. The sale included the *Project Runway* trademark.[274] TWC had a licensing agreement with JCPenney for *Project Runway* merchandise that Lantern did not want.[275] Under basic bankruptcy law, JCPenney had to continue to perform on its contract with TWC until the court approved rejection of the contract, which would generate a damage claim against the bankruptcy estate.[276] That meant JCPenney, itself a

claims held by sexual misconduct survivors, among others. Transcript of Jan. 14, 2019, Hearing at 34–35, Lantern Ent. v. Bruce Cohen Prods. (*In re* The Weinstein Co. Holdings), No. 18-10601 (Bankr. D. Del. Jan. 18, 2019), Doc. 2005 (noting that Lantern having fought paying cure costs at every turn was "nothing short of an outrage").

271. Order Granting Lantern Entertainment LLC's Motion for Summary Judgment at 3, Lantern Ent. v. Bruce Cohen Prods. (*In re* The Weinstein Co. Holdings LLC), No. 18-10601 (Bankr. D. Del., Jan. 23, 2019), Doc. 2013; *see also* Transcript of Jan. 14, 2019, Hearing, *supra* note 270, at 36.

272. Spyglass Media Grp. v. Bruce Cohen Prods. (*In re* The Weinstein Co. Holdings), 997 F.3d 497, 511 (3d Cir. 2021) (holding production services contracts not executory).

273. Order Granting Lantern Entertainment LLC's Motion for Summary Judgment, *supra* note 271, at 3–4; Transcript of Jan. 14, 2019, Hearing, *supra* note 270, at 34–35 (noting the creditors' committee's complaint: "We negotiated for finality. It cost us $21 million"). Additionally, Mr. Feinstein stated, "come November 8th . . . they no longer had the ability to gain the system to litigate the cure amount and then decide whether or not they liked the result . . . . [I]f those contracts continue to be executory after Your Honor rules on the executoriness, they got to take those contracts." *Id.*

274. Objection of the Official Committee of Unsecured Creditors to Claims at 2, *In re* The Weinstein Co. Holdings, No. 18-10601 (Bankr. D. Del. Apr. 8, 2020), Doc. 2772 ("Pursuant to the terms of the [Asset Purchase Agreement], the Debtors' interests in the *Project Runway* television program were transferred [to Lantern/Spyglass].").

275. *See id.* at 3.

276. *See* 11 U.S.C. § 365.

financially troubled company,[277] continued to owe guaranteed minimum royalty payments. But if it tried to sell the merchandise, it risked infringing on the trademark rights acquired by Lantern, with whom it had no relationship.[278] The court declined JCPenney's request to force earlier rejection.[279] The court was following the law. Yet, that law was largely built on traditional restructuring and liquidation cases, not bankruptcy à la carte where actual performance on the contract could create new liabilities for a counterparty.[280]

*c. Example: Netflix*

A final example of how more flexible timing in an unbundled bankruptcy affects a stalking horse bidder's ability to extract bankruptcy's benefits comes from the settlement of a dispute with the streaming service Netflix. Prior to TWC's bankruptcy, Netflix claimed it had the legal right to terminate agreements to stream TWC content because H. Weinstein's departure triggered a "key man" clause.[281] Lantern could not close the deal to buy TWC without resolving this Netflix dispute because its financiers would not release the funds. Lantern and Netflix negotiated a resolution, Lantern's funder released the money, and the sale closed in July 2018. But there was a catch: that settlement required court approval. The sale of TWC closed without such approval.[282]

277. *See* Nathaniel Meyersohn, *JCPenney Was Once a Shopping Giant. Can It Make a Comeback?*, CNN BUS. (Nov. 27, 2022, 9:52 AM), https://www.cnn.com/2022/11/27/business/jcpenney-stores-ceo-marc-rosen/index.html [https://perma.cc/7CHK-EAYC].

278. *See* Skeel, *Empty Idea*, *supra* note 65, at 732 (discussing literature on spillover effects of rejection). *See generally* Jesse M. Fried, *Executory Contracts and Performance Decisions in Bankruptcy*, 46 DUKE L.J. 517 (1996) (providing overview of incentives for bankruptcy trustees to reject value-creating contracts).

279. Transcript of Nov. 29, 2018, Hearing at 24–25, Lantern Ent. v. Bruce Cohen Prods. (*In re* The Weinstein Co. Holdings), No. 18-10601 (Bankr. D. Del. Dec. 4, 2018), Doc. 1809. JCPenney appealed, but the company later went bankrupt itself and the matters recently settled. Stipulation & Agreed Order of Dismissal with Prejudice at 3–7, J.C. Penney Corp. v. Bank Hapoalim B.M. (*In re* TWC Liquidation Tr., LLC), No. 18-10601 (D. Del. Mar. 25, 2022), Doc. 24; Order Approving Stipulation, *In re* TWC Liquidation Tr., LLC, No. 18-10601 (Bankr. D. Del. Sept. 29, 2022), Doc. 3542.

280. *E.g.*, Dan McQuade, *How 'Project Runway All Stars' Became an Ad for Nothing*, N.Y. TIMES (Mar. 27, 2019), https://www.nytimes.com/2019/03/27/arts/television/project-runway-all-stars-jc-penney.html [https://perma.cc/L7DN-B22P (dark archive)] (discussing consequences of lack of resolution of branding partnership with JCPenney after Lantern bought rights to *Project Runway*).

281. *See supra* note 128 and accompanying text.

282. These facts came to light publicly at a later court hearing. Transcript of Nov. 6, 2018, Hearing Before Honorable Mary F. Walrath United States Bankruptcy Judge at 34–41, AI Int'l Holdings v. MUFG Union Bank (*In re* The Weinstein Co. Holdings), No. 18-10601 (Bankr. D. Del. Nov. 7, 2018), Doc. 1682 [hereinafter Transcript of Nov. 6, 2018, Hearing].

The settlement did not reach the bankruptcy court until November 2018, at which point another party (Viacom), with its own interests at stake, objected.[283] Viacom argued that Lantern should have disclosed much earlier that it needed court approval, as this was the kind of financial contingency for the sale that bidders were required to share.[284] Viacom also argued that TWC had not shown the settlement was in the best interest of the bankruptcy estate, given that TWC essentially was rubberstamping what Lantern wanted.[285] Viacom lost. The court approved the settlement.[286]

The outcome is not a surprise. Courts value settlements and take seriously the risk of protracted and expensive litigation in the absence of a settlement.[287] But if the settlement falls short of the legal standards for approval, what then?

#### 7. Ending the case

Although the sale of TWC to Lantern and recovery for the bank lender happened quickly, full resolution of the bankruptcy did not. The case continued for several years due to difficulties in determining how to exit the case and in resolving disputes over misconduct. In January 2021, the court confirmed a plan of liquidation that provided full legal releases of liability for members of the TWC board and insurers (claimants could opt out and retain their rights against H. Weinstein).[288] The bankruptcy estate would pay over $27 million in fees to

283. Objection & Reservation of Rights of Viacom International, Inc. & Its Controlled Affiliates to Supplemental Notice of Filing of List of Assumed Contracts, at 1, *In re* The Weinstein Co. Holdings, No. 18-10601 (Bankr. D. Del. Nov. 7, 2018), Doc. 1813. Viacom had a security interest in international distribution rights in revenue from streaming a show on Netflix. Transcript of Nov. 6, 2018, Hearing, *supra* note 282, at 58.

284. Transcript of Nov. 6, 2018, Hearing, *supra* note 282, at 56.

285. *Id.* at 50–53. Viacom noted that Lantern could negotiate its own deal with Netflix and TWC would have enhanced the bankruptcy estate by disputing that the contract was breached in the first place. *Id.* at 65.

286. *Id.* at 63–66.

287. *See* FED. R. BANKR. P. 9019; Motion for Amendment to APA, *supra* note 230, at 2, 6, 22–23 (citing case law that favors settlements, considering probability of success in litigation, difficulties in collection, complexity involved, and expense, inconvenience, and delay, and interest of the creditors).

288. Order Confirming Plan Proponents' Fifth Amended Joint Chapter 11 Plan of Liquidation at 7–9, *In re* The Weinstein Co. Holdings, No. 18-10601 (Bankr. D. Del. Jan. 26, 2021), Doc. 3203. A small number of objectors unsuccessfully tried to prevent the plan from going into effect, with a district court finding, among other things, that they "failed to carry their burden of demonstrating they have a 'significantly better than negligible' chance of success on the merits." David v. Weinstein Co. Holdings, No. 21-171, 2021 WL 979603, at *4 (D. Del. Mar. 16, 2021). Objector Wedil David decided to pursue her full rights against the TWC insurance fund rather than opting out partially to pursue a sex trafficking claim against H. Weinstein. Rick Archer, *Actress Drops Weinstein Claims for Ch. 11 Settlement Funds*, LAW360 (Apr. 2, 2021, 6:49 PM), https://www.law360.com/articles/1371726/actress-drops-weinstein-claims-for-ch-11-settlement-funds [https://perma.cc/386V-HTK2 (staff-uploaded, dark archive)].

restructuring professionals.[289] About $17 million in funds were made available for sexual misconduct claimants; because the information about these claims is not public, it is impossible to say what percentage of their asserted claims they are recovering.[290] These funds came from insurance companies rather than from the sale of TWC.[291] General unsecured creditors of TWC were predicted to recover about 2% of their claims.[292]

8. TWC's new life

There were no guarantees of good fortune for Lantern's acquisition of TWC, however favorable the terms might have been. Lantern had no entertainment experience; its closest brush with celebrity prior to buying TWC was owning a Tiger Woods-branded golf course.[293] But TWC's unbundled bankruptcy arguably gave it a powerful head start.

While TWC's depleted estate remained in bankruptcy for over two years, Lantern flipped certain assets quickly and pocketed the profit.[294] Replicating an

289. Exhibit 1 to Omnibus Order Awarding Final Allowance of Compensation for Services Rendered & Reimbursement of Expenses at 2–3, *In re* The Weinstein Co. Holdings, No. 18-10601 (Bankr. D. Del. May 5, 2021), Doc. 3346.

290. Eighty-two percent of sexual misconduct claimants voted to support the plan. Exhibit A to Declaration of Stephanie Kjontvedt *ex rel.* Epiq Corp. Restructuring, LLC Regarding Voting & Tabulation of Ballots Cast on the Fourth Amended Joint Chapter 11 Plan of Liquidation, *In re* The Weinstein Co. Holdings, No. 18-10601 (Bankr. D. Del. Jan. 7, 2021), Doc. 3160. Eight tort claimants voted against the plan, four of whom pursued objections. Transcript of Telephonic Hearing Re: Fifth Amended Joint Chapter 11 Plan of Liquidation, *supra* note 120, at 45–46. Sandeep Rehal, the plaintiff whose employment discrimination suit had survived a motion to dismiss in state court and who served on the creditors' committee, supported this settlement and plan, as did the committee as a whole. *Id.* at 32–34.

291. Fourth Amended Disclosure Statement in Support of the Fourth Amended Joint Chapter 11 Plan of Liquidation Proposed by the Debtors & Official Committee of Unsecured Creditors at 39–40, 113, *In re* The Weinstein Co. Holdings, No. 18-10601 (Bankr. D. Del. Nov. 17, 2020), Doc. 3098 [hereinafter Fourth Amended Disclosure Statement]. In addition to other relevant policies, TWC had employment practice insurance ("EPLI") since its inception in 2005. *See* Third-Party Complaint at 11, Fed. Ins. Co. v. Weinstein, No. 1:18-cv-02526 (S.D.N.Y. May 8, 2018), Doc. 25. For example, a National Union policy seemed to offer coverage from 2005 onward. *Id.*

292. Fourth Amended Disclosure Statement, *supra* note 291, at 14.

293. *See Tiger Woods To Design New Golf Course at Bluejack National*, BUSINESSWIRE (Apr. 30, 2014, 1:17 PM), https://www.businesswire.com/news/home/20140430006504/en/Tiger-Woods-to-Design-New-Golf-Course-at-Bluejack-National [https://perma.cc/7XHJ-HQMY (staff-uploaded archive)]. Two lawsuits pending in California state court allege that Lantern cut them out of investing in and profiting from the TWC acquisition after the plaintiffs got Lantern up to speed on the industry and made the key introductions. *See supra* note 81 and accompanying text.

294. Bill Higgins, *Hollywood Flashback: 'Project Runway' Ramped Up the Reality-Show Drama in 2004*, HOLLYWOOD REP. (Mar. 14, 2019, 11:00 AM), https://www.hollywoodreporter.com/news/general-news/project-runway-ramped-up-reality-show-drama-2004-1193917/ [https://perma.cc/6LBK-SBPC] ("Bravo picked up the show from . . . Lantern in the wake of Harvey Weinstein's downfall.").

H. Weinstein move, Lantern recut the film *The Upside*, changed the content to get a PG-13 rating, and ended up with a "surprise windfall."[295] In March 2019 came a joint venture with a company overseen by Gary Barber, a longtime entertainment executive whom MGM recently had fired.[296] Moelis, the investment bank that selected Lantern as the stalking horse bidder to acquire TWC, handled the Lantern-Barber deal.[297] The company became Spyglass Media Group.[298] Warner Brothers Pictures was a "strategic investor," providing an equity investment and receiving the contractual right to consider Spyglass entertainment projects.[299] In July 2021, Lionsgate entered a "strategic alliance

295. Pamela McClintock, *Box Office: 'The Upside' Crosses $100M in Surprise Windfall for Lantern, STX*, HOLLYWOOD REP. (Feb. 27, 2019, 6:40 AM), https://www.hollywoodreporter.com/movies/movie-news/box-office-upside-crosses-100m-surprise-windfall-lantern-stx-1190831/ [https://perma.cc/6ZVF-4K34]; Ryan Faughnder, *Former MGM Chief Gary Barber and Lantern Entertainment Launch Spyglass Media*, L.A. TIMES (Mar. 13, 2019, 12:45 PM), https://www.latimes.com/business/hollywood/la-fi-ct-gary-barber-lantern-spyglass-20190313-story.html [https://perma.cc/FC7N-44L8 (dark archive)] (noting that *The Upside* grossed $104 million in US and Canada).

296. Sharon Waxman & Matt Donnelly, *Inside Gary Barber's Ouster: MGM Board Clashes, Planting Sale Rumors*, THEWRAP (Mar. 21, 2018, 3:18 PM), https://www.thewrap.com/gary-barber-ousted-mgm-board-kevin-ulrich-clashes-fear-of-impending-sale-talk/ [https://perma.cc/DR9F-4CYG]. MGM agreed to pay Barber $260 million over eight years to buy his equity. Anita Busch & Dawn C. Chmielewski, *Big $260M Payout for MGM's Former Chariman/CEO Gary Barber in Official Resolution with Company*, DEADLINE (June 14, 2018, 2:06 PM), https://deadline.com/2018/06/mgm-gary-barber-settlement-agreement-1202408686/ [https://perma.cc/5A82-XAMZ]. A different combined effort—Lantern and MGM, without Barber—was predicted in an industry publication a year earlier. *See* Dade Hayes & Andreas Wiseman, *As the Weinstein World Turns, Industry Asks: Who Is Lantern Asset Management?*, DEADLINE (Mar. 20, 2018, 8:34 PM), https://deadline.com/2018/03/as-weinstein-co-world-turns-industry-asks-who-is-lantern-asset-management-1202350286/ [https://perma.cc/H7EL-F83L].

297. Gregg Kilday, *Gary Barber's Spyglass Media Group Takes Control of Former Weinstein Co. Assets*, HOLLYWOOD REP. (Mar. 13, 2019, 12:00 PM), https://www.hollywoodreporter.com/news/general-news/gary-barbers-spyglass-media-group-takes-control-weinstein-assets-1194492/ [https://perma.cc/MQD4-YJ8X]. M&A experts have pointed to repeat play business as shaping bankers' incentives to get the best price for the target company. Guhan Subramanian & Annie Zhao, *Go-Shops Revisited*, 133 HARV. L. REV. 1215, 1253–54 (2020) (describing ways in which investment bankers may be better off favoring buyers, particularly private equity buyers, than getting higher prices for sellers). *See generally* Jay B. Kesten, *Adjudicating Corporate Auctions*, 32 YALE J. REGUL. 45 (2015) (discussing lower prices resulting from investment bank incentives to please buyers); Andrew F. Tuch, *Banker Loyalty in Mergers and Acquisitions*, 94 TEX. L. REV. 1079 (2016) (exploring structural factors that create conflicts of interest between investment banks and their M&A clients).

298. SPYGLASS MEDIA GRP., https://spyglassmediagroup.com [https://perma.cc/DAC3-6ZFU].

299. Press Release, Warner Bros., Spyglass Media Group Secures Warner Bros. Pictures as a Strategic Investor (Apr. 16, 2019), https://www.warnerbros.com/news/press-releases/spyglass-media-group-secures-warner-bros-pictures-strategic-investor [https://perma.cc/V3Y9-CWRB]. Other known equity contributors to Spyglass included Eagle Pictures, an Italian distributor, and Cineworld Group, an international theater chain. Press Release, Spyglass Media Group Launches in Partnership with

with Spyglass" under which Lionsgate acquired two hundred film and television titles, adding to Lionsgate's 17,000 library.[300] The "exclusive financial advisor" handling the transaction was, again, Moelis.[301]

Given that the companies at issue are privately held, it is particularly hard to measure results from the outside. The question is what gains came at the expense of other stakeholders due to the details of the unbundled bankruptcy.

## III. IMPLICATIONS

### A. *Unbundled Bankruptcies and Estate Value*

Characterizing a proposed transaction and departure from chapter 11's package deal as value-maximizing has become the business bankruptcy equivalent of "have a nice day": can it possibly be accurate all the time, or even most of the time? Whether unbundling chapter 11 maximizes economic value in TWC or any given case, and how that value is distributed, are empirical questions that unbundled bankruptcies make especially complicated to address.[302] Given the alleged urgency of unbundled cases, typically there is time only to assert the impracticability of chapter 11's package deal, not to show why the particular transactions are value maximizing.

A deep dive into TWC shows how powerful parties shuffle the chapter 11 deck of cards into a different game altogether. Earlier scholarship casts doubt that every chapter 11 innovation touted as economically efficient lives up to that billing.[303] This case study bolsters those concerns. It illustrates a substantial delegation of power to third parties with no duty to the bankruptcy estate, regarding a relatively opaque company, and a timeline that is hard to square with value maximizing principles, let alone the Bankruptcy Code. The process

Lantern Entertainment and Gary Barber: Eagle Pictures and Cineworld Group Invest as Strategic Partners (Mar. 13, 2019), https://www.prweb.com/releases/spyglass_media_group_launches_in_partnership_with_lantern_entertainment_and_gary_barber_eagle_pictures_and_cineworld_group_invest_as_strategic_partners/prweb16166360.htm [https://perma.cc/EZS5-JTN4].

300. Press Release, Lionsgate, Lionsgate Enters into Strategic Alliance with Spyglass Media Group (July 15, 2021), https://investors.lionsgate.com/news-and-events/press-releases/2021/07-15-2021-210556940 [https://perma.cc/7DHC-NSAS].

301. *Id.*

302. For example, entrepreneurs overestimate their likelihood of success even if they understand the overall rate of business failure. *See* Dale Griffin & Amos Tversky, *The Weighing of Evidence and the Determinants of Confidence*, *in* HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT 230, 235, 247 (Thomas Gilovich, Dale Griffin & Daniel Kahneman eds., 2002) (discussing overconfidence in expert securities analyses). Corporate managers make systematic cognitive errors on matters squarely in their professional expertise. Jeffrey J. Rachlinski, *The Uncertain Psychological Case for Paternalism*, 97 NW. U. L. REV. 1165, 1185 (2003).

303. *E.g.*, Dick, *supra* note 48, at 763; LoPucki & Doherty, *Fire Sales*, *supra* note 8, at 1.

also made it difficult to assess, at least from the outside, the extent to which these steps skewed the distribution to creditors.

In theory, a buyer in bankruptcy pays more to get expansive legal protection otherwise unavailable in a private transaction. That protection includes a court order deeming the sale final.[304] That sale cuts off potential future upside for TWC's stakeholders with less process than in a traditional chapter 11. In other words, relatively early in the case they lose the right to benefit from further development under new ownership. Was Lantern incentivized to pay a sufficient price? Concerning features include barriers for submission of timely competing bids; the delay of the bankruptcy filing until things were truly dire; the risk that the creditors' committee would lose funding to actively engage in the case if they unduly held up the deal; and fears that secured creditors would leave other creditors (including sexual misconduct claimants) with nothing if they declined to fund the company while it sold itself.

The justifications for procedural shortcuts should have been less pressing in TWC compared to other cases. The value in this bankruptcy came largely from intellectual property assets and less from the synergies of an operating business.[305] The payment of employment discrimination and sexual misconduct claims came from insurance proceeds due to intense negotiation led by claimants and the creditors' committee, not from the quick sale.[306]

Despite DIP loan contracts commonly restricting spending, such restrictions disable core features of the chapter 11 package deal, including investigations of wrongdoing.[307] Indeed, the loan essentially required TWC to keep R. Weinstein in charge through the sale closing, notwithstanding serious allegations of wrongdoing. By insisting on a fast-track sale, insulated by extraordinary protections available only in bankruptcy court, the bank client recovered all it was owed, nearing $200 million, and then some. The lender of

304. *See* 11 U.S.C. § 363(m).

305. *See* Declaration of Robert Del Genio in Support of First Day Relief, *supra* note 80, at 5–6 (describing primary assets of debtor); *id.* at 16–19 (stating business largely has been unable to operate in the aftermath of the publication of sexual assault and harassment allegations).

306. Order Confirming Plan Proponents' Fifth Amended Joint Chapter 11 Plan of Liquidation at 6–7, *In re* The Weinstein Co. Holdings, No. 18-10601 (Bankr. D. Del. Jan. 26, 2021), Doc. 3203 (documenting the funding of the recovery of sexual abuse claimants from a settlement with insurance companies). The sale proceeds were claimed largely by the DIP lender that claimed a security interest in the assets of the business that were sold plus administrative expenses. Indeed, the creditors' committee worried that TWC's bankruptcy estate was administratively insolvent shortly after the sale closed. Transcript of Sept. 5, 2018, Hearing, *supra* note 181, at 35 ("[G]iven the massive purchase price reduction, the estate is in the zone of administrative insolvency. I can't say that it is or it isn't, but it's a close call, depending upon a number of disputes with secured creditors about how the purchase price is to be allocated.").

307. *See* Jacoby, *Hybridity*, *supra* note 26, at 1730–31.

course has every right to seek those advantages under existing law and to hire great lawyers who know how to advocate for their clients. But for bankruptcy purposes, the question is whether these practices grow the estate and distribute it fairly.

Executory contract law is controversial even when a debtor exercises the options in pursuit of reorganization and fresh start within the chapter 11 package.[308] It should be even more so in a case like TWC. TWC is far from the only company seeking to sell itself quickly notwithstanding complicated contractual relations.[309] Here, with R. Weinstein at the helm, TWC delegated decisions about a large number of contracts to a third party without fiduciary duties to the estate, to be exercised over time. Third-party bidders had to be more specific and certain about contracts than Lantern to submit a qualified bid. Did Lantern pay more for this flexibility? Or did it pay less because of uncertainty about which way inevitable disputes would cut?

In a perfect world, a quick sale in bankruptcy could be a well-run auction that trades a bundle of assets for cash, with bidders having adequate access to information and an understanding of the assets, and with the proceeds allocated according to bankruptcy's priority rules. Perhaps unbundled bankruptcies are fixable and can move closer to this ideal. A universe of finance literature exists on optimal design of auctions, after all. Which parties, though, are in a position to insist on such fixes, absent more significant structural changes to the current chapter 11 system?

### B. *Boundaries of the Constitution's Bankruptcy Power?*

TWC's bankruptcy provokes a more fundamental question: If perks designed to boost chapter 11's package deal are unbundled and divorced from the objectives of the standard justifications for bankruptcy, do they veer outside the boundaries of the Constitution's bankruptcy power?[310]

308. *See* Simpson, *supra* note 65, at 231.

309. For recent entertainment industry examples, see Andrew Scurria, *Film Studio STX May Join Movie-Deal Units in Bankruptcy if Sale Falters*, WALL ST. J. PRO: BANKR. (Apr. 6, 2022, 6:10 PM), https://www.wsj.com/articles/film-studio-stx-may-join-movie-deal-units-in-bankruptcy-if-sale-falters-11649283043 [https://perma.cc/FD7J-LFV7 (staff-uploaded, dark archive)]; Etan Vlessing, *STX Places Rights to Chris Pine Thriller 'The Contractor' in Bankruptcy as Studio Sale Proceeds*, HOLLYWOOD REP. (Mar. 22, 2022, 3:08 PM), https://www.hollywoodreporter.com/business/business-news/stx-places-rights-to-chris-pine-thriller-the-contractor-in-bankruptcy-as-studio-sale-proceeds-1235116787/ [https://perma.cc/4A9T-7KF6].

310. Reorganization itself is within the bankruptcy power. Cont'l Ill. Nat'l Bank & Tr. Co. v. Chicago, Rock Island & Pac. Ry. Co., 294 U.S. 648, 671 (1935). But that does not justify any innovation that happens within reorganization. *See, e.g.*, Adam J. Levitin, *The Constitutional Problem of Nondebtor*

The U.S. Constitution gives Congress the green light to write uniform laws on bankruptcy. The authorization is brief if nothing else—not even a full sentence—in Article I, Section 8, Clause 4. The U.S. Supreme Court has rarely heard cases challenging the *substantive* scope of the Bankruptcy Clause, and none have been recent.[311] The uniformity element of the Bankruptcy Clause has received only slightly greater airtime.[312] The Court issues reminders from time to time that the property rights of voluntary lenders must be respected. But the Supreme Court has never invalidated a bankruptcy law for going beyond the power of Congress under the Constitution.

Given expansive uses of chapter 11 bankruptcy in modern times, the scope question should be resurrected. Although the Supreme Court quipped in 1938 that the Bankruptcy Clause is "incapable of final definition,"[313] that characterization should not be read in a vacuum or to mean that anything goes in a big business bankruptcy case. The Bankruptcy Clause may not cover a legal process if the debtor is both balance sheet solvent and able to pay her debts as they become due.[314] Although the Bankruptcy Clause is not limited to

*Releases in Bankruptcy*, 91 FORDHAM L. REV. 429, 435 (2022) (arguing that the Supreme Court tends to focus on the original meaning of the Bankruptcy Clause, and concluding that "[a]n original understanding of the Bankruptcy Clause necessarily precludes nonconsensual nondebtor releases"); *id.* at 438 ("Any reading of the Bankruptcy Clause that does not limit the scope of Congress's power to provide relief to the debtor risks transforming the Bankruptcy Clause from a narrow and particular power of Congress into the equivalent of a second Necessary and Proper or Commerce Clause that would allow Congress the free-ranging power to restructure all manner of economic and property relationships as it sees fit. Given the scant discussion of bankruptcy in the constitutional debates, it is hard to believe that the Framers hid a general power of economic regulation within the modest trappings of the Bankruptcy Clause.").

311. James Steven Rogers, *The Impairment of Secured Creditors' Rights in Reorganization: A Study of the Relationship Between the Fifth Amendment and the Bankruptcy Clause*, 96 HARV. L. REV. 973, 1031 (1983) ("No longer does one find challenges to the constitutionality of bankruptcy legislation phrased as contentions that the measure in question is not 'a law on the subject of bankruptcy.'"); Stephen J. Lubben, *A New Understanding of the Bankruptcy Clause*, 64 CASE W. RSRV. L. REV. 319, 410–11 (2013) (questioning whether this is a "fleeting high tide" and the impact of the Supreme Court narrowing the construction of Commerce Clause). The Supreme Court characterized bankruptcy law as including an "insolvent *or* nonpaying *or* fraudulent debtor and his creditors, extending to his and their relief." Wright v. Union Cent. Life Ins. Co., 304 U.S. 502, 513–14 (1938) (emphasis added).

312. *See* Ry. Lab. Execs.' Ass'n v. Gibbons, 455 U.S. 457, 469–73 (1982) (invalidating bankruptcy law applicable to one railroad); Siegel v. Fitzgerald, 142 S. Ct. 1770, 1772 (2022) (holding that the uniformity requirement was violated by a temporary increase in chapter 11 fees inapplicable to two districts that opted out of U.S. Trustee program).

313. *Wright*, 304 U.S. at 513. Although this decision also refers to the Necessary and Proper Clause, that clause has not been used to justify a particular bankruptcy law. KENNETH N. KLEE & WHITMAN L. HOLT, BANKRUPTCY AND THE SUPREME COURT: 1801-2014, at 93 n.665 (2015).

314. Thomas E. Plank, *The Constitutional Limits of Bankruptcy*, 63 TENN. L. REV. 487, 492 (1996) [hereinafter Plank, *Constitutional Limits*]; *see also* First Nat'l Bank of Cincinnati v. Flershem, 290 U.S. 504, 519 (1934).

understandings of bankruptcy from English law,[315] the clause nonetheless is premised on debtor-creditor relations.[316] Distribution to creditors and discharge are what bankruptcy is about.[317] Ralph Brubaker calls these elements the heart of the bankruptcy power.[318] After articulating four elements of the bankruptcy power, Jonathan Lipson noted: "Congress cannot use the bankruptcy power to advance the largely private agenda of a group of select individuals or interests. Bankruptcy relief—or at least the discharge—must have some meaningfully public interest to come within the bankruptcy power. Otherwise, it is ultra vires."[319]

In a 1996 article, Thomas Plank observed significant limits on the use of the bankruptcy power to benefit third parties.[320] Although the third parties at issue were employees and communities, the analysis applies to, say, a solvent private equity firm seeking to buy a company under protective conditions not available elsewhere. In 2002, Plank continued to argue that Congress overrides state law using the bankruptcy power "only to adjust the relationship between an insolvent debtor and . . . creditors. . . . Congress may not do more."[321] Analogous to diversity jurisdiction, the bankruptcy power, said Charles Mooney, only collectivizes the rights parties already held.[322]

Elements of bankruptcy à la carte venture far afield from anything the Supreme Court has ruled on when parsing the bankruptcy power. The sale itself is not the issue.[323] Even the lending arrangement, while problematic as a matter

315. *See* Hanover Nat'l Bank v. Moyses, 186 U.S. 181, 187 (1902).

316. *Gibbons*, 445 U.S. at 466 (noting prior cases referring to bankruptcy as "relations between an insolvent or nonpaying or fraudulent debtor and his creditors" and recognizing the Bankruptcy Clause "contemplate[s] an adjustment of a failing debtor's obligations" (alteration in original) (quoting *Wright*, 304 U.S. at 513–14)).

317. *Hanover*, 186 U.S. at 188 ("The subject of 'bankruptcies' includes the power to discharge the debtor from his contracts and legal liabilities, as well as to distribute his property."); Rogers, *supra* note 311, at 999; Ralph Brubaker, *Mandatory Aggregation of Mass Tort Litigation in Bankruptcy*, 131 YALE L.J. F. 960, 977 (2022).

318. Brubaker, *supra* note 317, at 978.

319. Jonathan C. Lipson, *Debt and Democracy: Towards a Constitutional Theory of Bankruptcy*, 83 NOTRE DAME L. REV. 605, 613, 685 (2008) (claiming that the four elements are: the power to halt intercreditor disputes; the power to collect and distribute assets; the power punish misconduct by those who harm creditors; and the power to reward honest and unfortunate debtors with discharge).

320. Plank, *Constitutional Limits*, *supra* note 314, at 545, 559 ("[B]ankruptcy laws must be for the benefit of insolvent debtors and their creditors. They may not create benefits for third parties to the detriment of those debtors and creditors or impair the rights of third parties for the benefit of these debtors and creditors.").

321. Plank, *Bankruptcy and Federalism*, *supra* note 66, at 1064.

322. Mooney, *supra* note 74, at 978 (articulating procedure theory); Aziz Z. Huq & Jon D. Michaels, *The Cycles of Separation-of-Powers Jurisprudence*, 126 YALE L.J. 346, 413 (2016) (articulating bankruptcy as largely procedural in character).

323. *See* Van Huffel v. Harkelrode, 284 U.S. 225, 227–29 (1931).

of doctrine and policy (and possibly economics), is probably within the constitutional bounds to the extent it was a bridge to a sale alleged to be value-maximizing.[324] The most vulnerable element is the wholesale transfer of rights to a solvent third party, without consent of counterparties, to pick and choose among executory contracts over a protracted timeline, with no duty to the bankruptcy estate.

The Bankruptcy Clause necessarily includes some impairment of contracts; that is inherent in the power to discharge debts. But delegating to a nonfiduciary assumption and assignment decisions that override state law may go too far. In traditional chapter 11 contexts, Plank found some, but by no means all, executory contract rights to be consistent with the bankruptcy power.[325] For example, Plank was concerned about forcing a contract counterparty to wait until confirmation of a chapter 11 plan to learn the fate of the agreement, requiring the counterparty to perform all the while.[326] Arguably the process in TWC is more constitutionally problematic, involving wholesale handover federal contract options to a third party outside of the protections and objectives of the chapter 11 package. Overcoming the constitutional question requires more than asserting that the transactions were value-maximizing.[327] If the bankruptcy power covered everything that restructuring professionals asserted maximized value, the bankruptcy power would swallow the legal world.[328]

324. While not framed as a constitutional issue, other scholars have questioned how bankruptcy policy is served when lenders extract super-compensatory returns from debtor-in-possession financing. *See* Barry E. Adler, *A Reassessment of Bankruptcy Reorganization After Chrysler and General Motors*, 18 AM. BANKR. INST. L. REV. 305, 314 (2010) ("Bankruptcy policy is not served when a DIP lender uses a monopoly position as financier to capture the benefits of the bankruptcy process' value-enhancing provisions such as the automatic stay and the authority to sell assets free and clear of liens. A DIP lender should be afforded an ordinary return on its post-petition investment, but there is no apparent reason it should receive more.").

325. Plank, *Bankruptcy and Federalism*, *supra* note 66, at 1093 (defending ipso facto override, but raising concerns about other elements). *Cf.* Mooney, *supra* note 74, at 1043 ("If not offended, procedure theory is at least annoyed that Section 365 overrides ipso facto provisions."). I have found one court decision addressing section 365 generally that offers no analysis. *See* Bruder v. Peaches Recs. & Tapes, Inc. (*In re* Peaches Recs. & Tapes, Inc.), 51 B.R. 583, 590–91 (B.A.P. 9th Cir. 1985). The Supreme Court upheld a statutory provision limiting claims from lease rejection. *See* Kuehner v. Irving Tr. Co., 299 U.S. 445, 455–56 (1937).

326. Plank, *Bankruptcy and Federalism*, *supra* note 66, at 1124–25.

327. Marshall v. Marshall (*In re* Marshall), 403 B.R. 668, 684 (C.D. Cal. 2009) ("[T]he Bankruptcy Clause does not provide Congress power to enact general commercial legislation."). For an argument about federalism limits that arise from the constitutional authority of the judge rather than the substantive source of authority, see generally F. Andrew Hessick, *Federalism Limits on Non-Article III Adjudication*, 46 PEPP. L. REV. 725 (2019).

328. Levitin, *supra* note 310, at 438 ("Any reading of the Bankruptcy Clause that does not limit the scope of Congress's power to provide relief to the debtor risks transforming the Bankruptcy Clause

Defenders of these practices may argue that other sources of constitutional authority, such as the Commerce Clause, justify these activities. Perhaps they could defend that claim. I do not take up that question here. These issues are ripe for exploration in future scholarly work, if not litigation. The point now is this: the bankruptcy power should not be a license to override state contract law to benefit solvent third parties. When provisions of the Bankruptcy Code are contorted to benefit third parties to the detriment of creditors, they may become unconstitutional as applied.

## CONCLUSION

Day in and day out, bankruptcy lawyers in big cases ask courts for permission to depart from chapter 11's package deal and proclaim they have good reasons for doing so. For years, academics have debated the costs and benefits of quick going-concern sales and control by dominant lenders.

A close look at The Weinstein Company bankruptcy offers a more comprehensive account and critique of the unbundled chapter 11 bankruptcy. It illustrates the difficulty of the short timeline when tens of thousands of contracts are at issue if the objectives are to maximize economic value and to carefully distribute that value in accordance with priority rules. Whatever the virtues or vices of traditional reorganization, the case suggests real costs to allowing stalking horse bidders to extract the perks of chapter 11 without the full package. This case study shows that unbundling chapter 11 bankruptcy has costs that the existing scholarship and case law insufficiently takes into account.

A close look at the treatment of contracts should prompt questions of first principles. The U.S. Constitution allows Congress to restructure debtor-creditor relations. It does not require that chapter 11 exist and cannot justify transactions that benefit solvent third parties. The existing Bankruptcy Code is a maximalist interpretation of the Constitution's bankruptcy power. Current practices in big cases that unbundle chapter 11 take things even farther, arguably exceeding the permissible boundaries of the federal bankruptcy system.

from a narrow and particular power of Congress into the equivalent of a second Necessary and Proper or Commerce Clause that would allow Congress the free-ranging power to restructure all manner of economic and property relationships as it sees fit. Given the scant discussion of bankruptcy in the constitutional debates, it is hard to believe that the framers hid a general power of economic regulation within the modest trappings of the Bankruptcy Clause.").