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END-OF-LIFE OPTIONS FOR EX-SPACS

In this article, the authors discuss the challenges faced by ex-SPACs as well as the implications for their future. They explore "end of life" considerations faced by ex-SPACs, including potential delisting from stock exchanges, liquidity constraints, and limited financing options. Next, they provide insights into the growing number of ex-SPACs contemplating going private or seeking bankruptcy protection. They close with reflections on the legal considerations surrounding these choices and the potential surge in distressed M&A activities involving ex-SPACs.

By Jenny Hochenberg, Madlyn Gleich Primoff, and Aashim Usgaonkar *

In a matter of minutes into the trading on December 5, 2022, two major transactions worth approximately $11 billion were canceled, each involving early-stage companies hoping to go public via business combinations (or "de-SPAC transactions") with special purpose acquisition companies (or "SPACs") backed by well-known serial sponsors.[1] The cancellations were par for the course for 2022, a very challenging year for SPACs, during which over 60 de-SPAC transactions worth approximately $76 billion fell apart, and over 140 SPACs liquidated. By contrast, in 2021, only 18 de-SPAC transactions were terminated and only two SPACs were liquidated.[2]

2022 was a difficult year not only for SPACs looking for merger partners but also for the companies that had previously gone public via de-SPAC transactions (or "ex-SPACs") before the markets cooled off. Many of those ex-SPACs are facing liquidity constraints at a time when public market valuations are low and may not have viable financing options to fund their operations outside the context of an M&A transaction. As such, distressed

[1] Bailey Lipschultz, *SPACs Collapse as $11 Billion of Deals Are Called Off Within an Hour* (December 5, 2022), BLOOMBERG, *available at* https://www.bloomberg.com/news/articles/2022-12-05/spacs-collapse-as-11-billion-of-deals-are-called-off-within-an-hour.

[2] *2022 U.S. SPAC Market Review*, (January 2023), STIFEL, *available at* https://www.stifel.com/Newsletters/InvestmentBanking/BAL/Marketing/SPAC/2022/SPAC_Mailer_2022YE.pdf?trk=organization_guest_main-feed-card_feed-article-content.

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M&A — whether inside or outside the purview of the bankruptcy courts — may become the fate of a growing number of ex-SPACs.

The history of Starry Group Holdings, Inc. (or "Starry") encapsulates many of the challenges facing ex-SPACs. Starry, a broadband service provider, went public via a $1.4 billion de-SPAC transaction at the end of March 2022.[3] Less than seven months later, in October 2022, Starry announced that it was facing "an extremely difficult economic climate and capital environment" and, as a result, had "made the very difficult decision to let go approximately half of [its] workforce" and would be exploring "strategic alternatives".[4] Starry hired an investment bank to advise on a merger, sale, or other "balance sheet solution".[5] It was immediately speculated that Starry was on the verge of insolvency and, absent an M&A transaction, would file for bankruptcy within three to six months.[6] That indeed happened in February 2023, less than one year after Starry went public. Unfortunately, Starry is not alone in terms of its struggles during its life as a public company.

EX-SPACS ARE TRADING LOW AND MANY ARE FACING POSSIBLE DE-LISTING

The stock price of many ex-SPACs has declined dramatically after the de-SPAC transaction. Bloomberg estimates that, as of December 5, 2022, the De-SPAC Index, which measures the performance of companies that went public via a de-SPAC transaction, was down 71% in the past year compared with a 13% drop in the S&P 500 Index over the same period.[7] As of the end of 2022, more than one third of the approximately 400 ex-SPACs were trading below $2 per share[8] — a significant decline from their $10 per share IPO price.

As such, many ex-SPAC companies are facing possible de-listing from the national securities exchanges and having to trade "over the counter" instead, which could significantly curtail their (already limited) financing options. Both NYSE and Nasdaq have minimum stock price requirements and market value requirements for continued listing. Generally, under each of their listing standards, if a company's average stock price drops to less than $1 per share over a consecutive 30-day trading period, the company will be subject to de-listing unless it "cures" its non-compliance within six months of receiving notification of failure to meet the listing standards, by bringing its average stock price above $1 per share over a specified trading period.

In 2022, at least 60 ex-SPACs[9] had received notices from NYSE or Nasdaq of non-compliance with the exchange's minimum stock price requirements, and at

[3] Current Report on Form 8-K of Starry Group Holdings, Inc., filed with the SEC on March 28, 2022.

[4] *Starry Announces Strong Third Quarter 2022 Operational Results; Takes Cost-Cutting Measures to Conserve Capital as It Explores Strategic Options*, BUSINESS WIRE (October 20, 2022), *available at* https://www.businesswire.com/news/home/20221020005411/en/Starry-Announces-Strong-Third-Quarter-2022-Operational-Results-Takes-Cost-Cutting-Measures-to-Conserve-Capital-as-It-Explores-Strategic-Options.

[5] *Starry Retains Advisors to Explore Strategic and Balance Sheet Alternatives* BUSINESS WIRE (October 31, 2022), *available at* https://www.businesswire.com/news/home/20221031005260/en/Starry-Retains-Advisors-to-Explore-Strategic-and-Balance-Sheet-Alternatives.

[6] *Starry – Another De-SPAC Deal on the Verge of Bankruptcy*, SEEKING ALPHA (October 20, 2022), *available at* https://seekingalpha.com/article/4547977-starry-stock-another-de-spac-deal-verge-bankruptcy.

[7] Bailey Lipschultz, *SPACs Collapse as $11 Billion of Deals Are Called Off Within an Hour* (December 5, 2022), BLOOMBERG, *available at* https://www.bloomberg.com/news/articles/2022-12-05/spacs-collapse-as-11-billion-of-deals-are-called-off-within-an-hour.

[8] Bailey Lipschultz, *SPAC Euphoria Turns into Painful Reckoning as Liquidity Runs Dry*, BLOOMBERG (December 15, 2022), *available at* https://www.bloomberg.com/news/articles/2022-12-15/spac-euphoria-turns-into-painful-reckoning-as-liquidity-runs-dry.

[9] INTELLIGIZE, *available at* www.intelligize.com (last visited March 10, 2023).

least five[10] ex-SPACs were de-listed for those reasons, including Starry. In December 2022, NYSE suspended the trading of Starry shares and commenced de-listing proceedings.[11] NYSE announced that it had determined the company's securities were no longer suitable for listing based on "abnormally low" price levels.[12] The de-listing became effective on January 9, 2023.

One tactic ex-SPACs have been utilizing to increase their stock prices above the minimum $1 listing threshold has been reverse stock splits, whereby the company effectively combines its shares into fewer, more valuable shares.[13] For example, in a 1-for-2 reverse stock split, a shareholder surrenders two shares in exchange for one share and the aggregate number of the company's outstanding shares is reduced in half. In 2022, more than 15 ex-SPACs[14] implemented reverse stock splits.

Reverse stock splits may not be effective in all circumstances. For one, while they may serve as a temporary solution to a looming de-listing, they are not a cure for the fundamental problems that have caused a company's stock price to decline to sub-dollar territories over a sustained period. Additionally, effecting a reverse stock split often sends a negative signal to the market and may be considered a strategy of last resort — especially when the reverse split is conducted out of a need to remain listed on an exchange. Given where some ex-SPACs are trading, a reverse stock split may need to be very significant to regain minimum share price compliance, which may have implications for the ex-SPAC's public float and the volatility of its stock price. For example, Hippo Holdings, Inc. effected a 1-for-25 reverse stock split in September 2022,[15] and more dramatically, ex-SPAC Kalera Public Limited Company effected a 1-for-100 reverse stock split in December 2022.[16] A reverse stock split, no matter how dramatic, may not help in the case of an ex-SPAC that is also facing potential de-listing on account of the failure to meet a stock exchange's minimum market capitalization requirement.[17]

Reverse stock splits require charter amendments for companies organized in Delaware, which generally are subject to a shareholder vote, which may take a few months to complete. As a result, a company may consider obtaining approval to implement a reverse stock split before getting the notice of potential de-listing from NYSE or Nasdaq to give it sufficient time to go through with the process. For example, at its 2022 annual shareholder meeting, ex-SPAC SoFi Technologies, Inc. obtained shareholder approval for a proposal giving its board of directors discretionary authority to enact a reverse stock split of not less than 1-for-2 and not more than 1-for-10. SoFi specifically noted, though, in its proxy statement for its 2022 annual shareholder meeting that the proposal was not made in order to meet the requirements of any national securities exchange.[18]

Other solutions ex-SPACs have considered to improve their stock price performance have included strategic M&A (including divestitures and acquisitions) and financing arrangements. For example, after receiving a written notice from NYSE in May 2022 that its common stock had fallen below $1 per share over a 30 trading-day consecutive period, in addition to effecting a 1-for-10 reverse stock split, ex-SPAC

[10] *Id.*

[11] *Starry Announces the NYSE Has Commenced Delisting Proceedings*, BUSINESS WIRE (December 15, 2022), *available at* https://www.businesswire.com/news/home/20221215006043/en/Starry-Announces-the-NYSE-Has-Commenced-Delisting-Proceedings.

[12] Exhibit 99.25 ("Notification of the Removal from Listing and Registration of the Stated Securities") to Form 25-NSE, filed by NYSE with the SEC on December 30, 2022.

[13] *Chris Bryant, SPACs Slap Some Lipstick on Their Penny-Stock Pigs*, WASHINGTON POST (November 28, 2022), *available at* https://www.washingtonpost.com/business/spacs-slap-some-lipstick-on-their-penny-stock-pigs/2022/11/28/028f2702-6ee2-11ed-867c-8ec695e4afcd_story.html.

[14] INTELLIGIZE, *available at* www.intelligize.com (last visited March 10, 2023).

[15] *Hippo 1-for-25 Reverse Stock Split to Become Effective at 11:59 p.m. EDT September 29,* 2022, BUSINESS WIRE (September 29, 2022), *available at* https://www.businesswire.com/news/home/20220928006099/en/Hippo-1-for-25-Reverse-Stock-Split-to-Become-Effective-at-1159-p.m.-EDT-September-29-2022.

[16] *Kalera Shareholders Approve Reverse Stock Split*, GLOBE NEWSWIRE (December 23, 2022), *available at* https://www.globenewswire.com/en/news-release/2022/12/23/2579190/0/en/Kalera-Shareholders-Approve-Reverse-Stock-Split.htmlv.

[17] *See, e.g.*, *IronNet Announces Receipt of Continued Listing Standard Notice from NYSE*, BUSINESS WIRE (January 27, 2023), *available at* https://www.businesswire.com/news/home/20230127005096/en.

[18] Definitive Proxy Statement of SoFi Technologies, Inc., filed with the SEC on May 23, 2022.

UpHealth, Inc., a digital health company, announced in August 2022 a convertible debt financing which extended its debt maturity profile[19] and, subsequently, in February 2023 the sale of its pharmacy business.[20]

EX-SPACS ARE FACING TIGHT LIQUIDITY CONDITIONS

Many ex-SPACs, even ones that have traded well, have been grappling with liquidity challenges. According to an analysis by Bedrock AI conducted in the second half of 2022, more than 100 ex-SPACs — approximately 40% — "reported substantial doubts about continuing as a going concern" in their filings with the SEC, which generally indicates an inability to survive a full year.[21]

One explanation for this percentage is that the SPAC IPO and de-SPAC markets were so hot in 2021 that SPAC sponsors were taking public venture-like businesses at a very early stage. In addition, the average redemption rate for de-SPAC transactions in 2022 skyrocketed to above 80%, with the average redemption rate for a de-SPAC transaction reaching 97% in December 2022.[22] High redemptions deplete a SPAC's trust account and reduce the cash proceeds that the de-SPACed company has available for its future operations. As such, a de-SPAC transaction with high redemptions may result in the ex-SPAC having limited cash — especially in the absence of a meaningful PIPE or other source of additional financing.

Given that so many ex-SPACs are facing liquidity constraints, they increasingly have to weigh pursuing very expensive third-party capital (if at all available) versus going back private or restructuring their obligations in bankruptcy. The equity financing markets are not currently hospitable for many ex-SPAC companies. With stock prices as low as they currently are, raising equity financing in the public markets is either not possible, too expensive, or too dilutive for many ex-SPACs. In 2022, only 12 ex-SPACs were able to access public equity capital markets via primary issuances — and, according to data compiled by Bloomberg, the dozen issued their shares at a significant discount.[23] Ex-SPACs are not particularly good candidates for traditional debt financing either because many of them are not generating reliable positive cash flows. Consequently, the "bank" facilities ex-SPACs have been able to obtain are typically from lenders that are not banks at all, but rather private funds that specialize in non-investment grade credit, are expensive, and contain very tight covenants.

Starry, for example, amended its credit facilities in January 2023 to obtain $11 million in incremental term loans, which the company drew in full and used the proceeds for transactions expenses, working capital, and other general corporate purposes.[24] The term loans were expensive and had a short maturity — May 2023 (subject to a six-month extension if necessary for the company to consummate certain strategic transactions). Upon repayment, Starry was required to pay the lenders an "exit fee" of 5% of the aggregate principal amount of the incremental loans. The company also agreed to pay a "contingent value fee" equal to 4.50% of the transaction consideration payable if Starry consummated a business combination transaction in the next five years. The incremental borrowing, unfortunately, did not help Starry avert its ultimate fate of bankruptcy.

As such, ex-SPACs have resorted to less traditional means to raise cash. Many ex-SPACs have established "equity line of credit" facilities at hedge funds or other institutional investors, under which they have the right to sell their stock, subject to an aggregate dollar cap, during the life of the facility (which usually ranges from two to three years). The investors not only collect a fee to set up the facility (often equal to 1%-2% of its dollar cap and payable in shares) but also lock in a discounted purchase price for the stock (usually 3%-5% of its volume weighted average price over the three trading days preceding delivery of the drawdown notice).[25]

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[19] *UpHealth Announces $67.5 Million Convertible Debt Financing*, PRNEWSWIRE (August 15, 2022), *available at* https://www.prnewswire.com/news-releases/uphealth-announces-67-5-million-convertible-debt-financing-301605503.html.

[20] Current Report on Form 8-K of UpHealth, Inc., filed with the SEC on February 27, 2023.

[21] Andre Castillo, *Almost 50% of De-SPAC Filings Reported Material Weaknesses* (Sept. 22, 2022), *available at* https://bedrock.substack.com/p/almost-50-of-de-spac-filings-reported. The analysis reviewed filings under the Exchange Act on Forms 10-K, 10-Q and 20-F for 314 ex-SPACs filed between January 1, 2020 and the date of the study. *Id*.

[22] SPACINSIDER, *available at* https://spacinsider.com/stats (last visited March 15, 2023).

[23] BLOOMBERG DEAL ANALYTICS, *available at* https://www.bloomberglaw.com/product/blaw/deal_term_search (last visited March 14, 2023).

[24] Current Report on Form 8-K of Starry Group Holdings, Inc., filed with the SEC on February 2, 2023.

[25] Jennifer Burrow, Valerie Jacob and Michael Levitt, *Equity*

The aggregate dollar cap on such facilities ranges dramatically, with examples on the low end of $25 million[26] and on the high end of $300 million.[27] However, in addition to a dollar cap, these facilities typically contain percentage caps in terms of what percentage of the company's stock the investor may be forced to take. These percentage caps are often informed by securities law thresholds — 5% of the ex-SPAC's outstanding shares (to avoid becoming subject to the beneficial ownership reporting requirements of Section 13(d) or Section 13(g) of the Securities Exchange Act of 1934); 10% of the ex-SPAC's outstanding shares (to avoid becoming subject to the reporting and short-swing profit recovery rules of Section 16 of the Exchange Act); and/or 20% of the ex-SPAC's pre-issuance outstanding shares (to avoid the need for a stockholder vote necessary to approve such issuance under the rules of both Nasdaq and NYSE). As such, the ownership blockers under equity line of credits can significantly limit the availability under the facility.

Starry, like many other ex-SPACs, had also entered into an equity line of credit with an affiliate of Cantor Fitzgerald & Co. in August 2022. Under the agreement, Starry had the right from time to time, at its option, to sell the investor up to $100 million of its common stock at a 3% discount relative to the volume weighted average price of its stock over a specified reference period. However, any sale by Starry of its shares could not result in Cantor Fitzgerald beneficially owning more than 4.99% of its outstanding shares (thereby limiting the utility of the equity line of credit given how low Starry's stock was trading). As consideration for the equity line of credit, Starry agreed to issue Cantor Fitzgerald $1 million worth of its common shares as commitment fees.[28]

MANY EX-SPACS ARE ON A TRAJECTORY TO GO BACK PRIVATE OR FACE THE POSSIBILITY OF RESTRUCTURING

Facing growing capital needs, difficult financing options, and disappointing stock price performance, many ex-SPACs are considering going back private. According to data compiled by Bloomberg, at least 12 companies that went public via de-SPAC mergers have agreed to buyouts for less than they were worth when they listed.[29] Approximately 30 companies that went public via a de-SPAC have been acquired, or have entered into an agreement to be acquired, by financial or strategic buyers.[30]

Ex-SPACs looking to go back private — especially those trading well below their $10 IPO prices — may need to consider several important issues in the context of transactions facing a heightened risk of deal litigation. Is this the right time for the company to sell? What constitutes fair value for the target's shares? How important is the $10 per share SPAC IPO price as a benchmark? In the current environment, even a bid at a high premium to current trading levels may still be at a steep discount to the de-SPAC acquisition value of the target, potentially making take-private transactions of ex-SPACs potentially subject to increased litigation risk.

Various factors contribute to why acquisitions of ex-SPACs may be faced with more challenges in court, regardless of their actual merit. For one, different shareholder groups may have different views as to whether a transaction is desirable. They may have acquired their shares in the ex-SPAC target at different prices, and they may thus stand to benefit differently from a potential transaction — especially one at a loss relative to the de-SPAC acquisition value — even if they receive the same consideration. So far, different shareholders having bought their shares at different prices — which is the case in virtually every M&A deal

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Lines of Credit Increasingly Being Used to Enhance Company Liquidity, FRESHFIELDS (May 31, 2022), *available at* https://blog.freshfields.us/post/102hpld/equity-lines-of-credit-increasingly-being-used-to-enhance-company-liquidity; *see also* Maria Heeter, When Your SPAC Dreams Fail, a Financing of Last Resort, THE INFORMATION (July 6, 2022), *available at* https://www.theinformation.com/articles/bird-nikola-and-other-cash-hungry-spac-targets-ink-novel-share-sales?rc=8ujdzw.

[26] Current Report on Form 8-K of Clene Inc., filed with the SEC on March 3, 2023 (announcing a 36-month equity line of credit capped at $25 million with Lincoln Park Capital, LLC).

[27] Current Report on Form 8-K of Nikola Corporation, filed with the SEC on June 14, 2021 (announcing a 36-month equity line of credit capped at $300 million with Tumim Stone Capital LLC).

[28] Current Report on Form 8-K of Starry Group Holdings, Inc., filed with the SEC on August 9, 2022.

[29] Bailey Lipschultz & Jeremy Hill, *The SPAC Fad Is Ending in a Pile of Bankruptcies and Fire Sales*, BLOOMBERG (February 28, 2023), *available at* https://www.bloomberg.com/news/articles/2023-02-28/spac-era-ends-as-companies-that-ipo-d-struggle#xj4y7vzkg.

[30] DEAL POINT DATA, *available at* www.dealpointdata.com (last visited March 10, 2023).

— has not been thought to constitute a conflict in and of itself.

In addition, voting power may be concentrated with a few shareholders who may determine whether shareholder approval for a transaction can be obtained. As such, ex-SPACs with controlling shareholders will have to observe the same requirements as any other controlled company under Delaware law, which may lead to heightened litigation risk.

Finally, ex-SPAC directors may face actual or perceived conflicts of interest. Many ex-SPAC directors are nominated by the SPAC sponsor or other significant SPAC shareholders. While some of those directors are truly independent from the nominating shareholders, some may have various ties with them, spanning from personal and professional relationships to service on other boards of companies sponsored by the same investors. As such, in the context of a take-back-private of an ex-SPAC, the ex-SPAC target may need to assess several process issues to effectively manage litigation risk, including the facts and circumstances of the proposed transaction, the need for, or benefits of, creating a special committee, or seeking a "majority of the minority" vote.

BUYERS MAY WANT TO CONSIDER THE PROS AND CONS OF BUYING EX-SPACS BEFORE OR WHILE IN BANKRUPTCY PROCEEDINGS.

As an increasing number of ex-SPACs are getting closer to the end of their liquidity runway, more of these companies will need to consider heading into bankruptcy as a realistic alternative.[31] Several ex-SPACs have filed for relief under the US Bankruptcy Code, not long after their ex-SPAC transaction. At least a dozen de-SPAC companies have filed a petition for bankruptcy since 2020.[32] Of the eight ex-SPACs that made their public debut in 2021 and 2022 and went on to file for bankruptcy, the average number of days between ringing the opening bell and approaching the courts was just under one year.[33]

Distressed ex-SPACS, like other distressed corporate entities, can avail themselves of the protections afforded by Chapter 11. These protections include the imposition of the automatic stay (which shields the entity, referred to as a "debtor," from the immediate exercise of remedies by creditors). The board of directors and the management of the debtor generally remain in place for the duration of the proceeding. In the case of an ex-SPAC, parties should view a Chapter 11 case as a means to implement its "end of life" objectives, which may include a sale of the ex-SPAC's assets pursuant to Section 363 of the Bankruptcy Code, or to convey itself or its assets to its creditors or a third-party investor as part of a plan of reorganization.

The advantages of acquiring assets in the context of a Section 363 sale are that the buyer can specify the assets that it wishes to acquire (subject to court approval) and will get them free and clear of any liens and claims. The buyer can thus acquire desired assets without worrying about inheriting undesired liabilities. A Section 363 sale, by its nature, often lends itself to the acquisition solely of assets, enabling the purchaser to leave the liabilities behind with the debtor. The use of Section 363 to acquire equity interests is less typical because purchasers often do not wish to acquire the liabilities that necessarily come along with an acquisition of equity interests. Where a buyer is seeking to absorb a whole company, that type of acquisition would typically be implemented pursuant to a plan of reorganization. The Chapter 11 plan route enables the buyer to restructure and/or satisfy the liabilities relating to the business that is to be acquired. There are numerous scenarios that may unfold and be deployed — often in combination with each other — depending on the state of the business, the nature and types of assets and collateral involved, the amount of debt, and the relative priorities of the different types of indebtedness.

Ex-SPACs and their sponsors will need to keep in mind that Chapter 11 proceedings require a fair amount of preparation and, if feasible, substantive negotiation of the terms of the desired transaction or outcome with parties in interest. Additionally, Chapter 11 requires funding in a sufficient amount to allow the debtor to fulfill all of its obligations that may arise during the Chapter 11 case (including professional fees). Debtors can avail themselves of debtor-in-possession financing, commonly referred to as DIP, or use, under certain

[31] Stephanie Gleason & Bill Meagher, *SPAC Sector Gives Birth to Bankruptcies*, IFLR (December 19, 2022), *available at* https://www.iflr.com/article/2ayqdh7pw6w80ahx2baio/spac-sector-gives-birth-to-bankruptcies#:~:text=8.-,As%20the%20promise%20of%20recession%20colours%20the%20outlook%20for%202023,liquidations%20dominating%20the%20SPAC%20sector.

[32] INTELLIGIZE, *available at* www.intelligize.com (last visited March 8, 2023).

[33] Lipschultz & Hill, *supra* note 30.

circumstances, a secured lender's cash collateral as a means of funding its Chapter 11 case. Both funding methods have strict statutory hurdles to pass and procuring such financing cannot always be assured.

In the event an ex-SPAC does not have sufficient liquidity or creditor support to continue to operate, sell itself outside of an insolvency proceeding, or even to commence a Chapter 11 proceeding to implement a restructuring, it can commence a liquidation proceeding under Chapter 7 of the Bankruptcy Code. Under Chapter 7, management will be displaced and a third-party trustee will be appointed to liquidate the ex-SPAC's assets and wind down the business.

This brings us back to Starry, which commenced a voluntary Chapter 11 proceeding on February 20, 2023 in the Bankruptcy Court for the District of Delaware. Before filing for bankruptcy protection, Starry entered into a restructuring support agreement with creditors holding, in the aggregate, 100% of the loans under its pre-petition credit agreement. Starry also filed a plan of reorganization, which laid out a dual-track plan in which it pursued both a "restructuring" and a "sale transaction" in parallel. The "sale transaction" track is subject to numerous requirements, including a minimum bid price of $170 million. If those requirements are not met, the bankruptcy would conclude through the consummation of the "restructuring" track.[34]

Buyers will often consider whether to purchase a company or its assets prior to the commencement of bankruptcy or only after the bankruptcy case has commenced. If the buyer purchases the company or its assets prior to a bankruptcy filing, it may run the risk that the acquisition will subsequently be challenged as a fraudulent transfer (more of a risk in the case of the acquisition of select assets, rather than the entire company itself — so long as all liabilities of the acquired company are assumed by the buyer). Therefore, a buyer looking at a target on the brink of insolvency may want to demonstrate that it engaged in a robust and appropriate marketing process outside of bankruptcy in order to establish that what the buyer paid constitutes "reasonably equivalent value" and "fair consideration," which are defenses to a fraudulent transfer claim. The buyer's desire for protection from "fraudulent transfer" claims should be weighed against the extent to which the buyer wants to engage in bilateral negotiations with the target (versus participating in a market check process), and whether the company, as a practical matter given its liquidity situation, has sufficient time to conduct a marketing exercise outside of bankruptcy.

While an auction can be avoided outside of bankruptcy (subject to "fraudulent transfer" risk, as noted above), a bankruptcy sale, on the other hand, is almost always subject to an auction and the solicitation of "higher and better" bids. A company and a buyer can go into bankruptcy with the buyer agreeing to act as a "stalking horse bidder" — i.e., the target and the buyer have a pre-agreed sale arrangement, which essentially establishes the "floor" for the eventual sale of the company or its assets. Going in with a "stalking horse" arrangement has benefits for both the company and the potential buyer. As it relates to the company, having a "stalking horse" bidder prevents a "free fall" scenario and assures that there is an acceptable exit out of bankruptcy. As it relates to the potential bidder, as a stalking horse, it will be entitled to several bid protections, such as expense reimbursement, that are not available to other bidders. Empirical evidence also shows that there is a material advantage to being the stalking horse bidder, as the stalking horse wins the auction as often as 85% of the time.[35]

CONCLUSION

We expect that a growing number of ex-SPACs will need to pursue a restructuring and many of these entities may well find themselves in a bankruptcy proceeding. Investors should focus on the opportunities that may arise and evaluate whether to put themselves in a position of buying such distressed entities or their assets as part of an out-of-court restructuring or pursuant to an insolvency proceeding, both of which have different advantages and challenges. ■

[34] Disclosure Statement for Joint Chapter 11 Plan of Reorganization of Starry Group Holdings, Inc. and its Debtor Affiliates under Chapter 11 of the Bankruptcy Code, *In re: Starry Group Holdings, Inc., et al.*, No. 23-10219-KBO (Bankr. D. Del. Feb. 20, 2023).

[35] Matthew J. LoCasio, *Bankruptcy Sales and the Stalking Horse: Is It a Fit?*, SC&H GROUP (August 19, 2021), *available at* https://www.schgroup.com/resource/blog-post/bankruptcy-sales-and-the-stalking-horse/.