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Ultra-Expedited Prepacks Are No Longer an Academic Curiosity

Restructuring professionals in the Southern District of New York take note: Ultra-expedited prepacks should be part of your professional toolkit

By **Eric Chafetz**

And **Myles R. MacDonald**

The fastest prepacks (i.e., a prepackaged Chapter 11 plan of reorganization for which votes were solicited by the debtor prior to the filing of the debtor's Chapter 11 petition) are getting faster—a lot faster. Three years ago, Roust Corporation set a blistering record in the Southern District of New York when it filed for Chapter 11 relief on Sunday, Dec. 30, 2016, and confirmed its prepack only seven days later. See *In re Roust Corp.*, Case No. 16-23786 (RDD) (Bankr. S.D.N.Y.). Roust's time-to-confirmation record in the Southern District held up for only two years. FullBeauty Brands filed for Chapter 11 relief earlier this year on Sunday, Feb. 3, 2019, confirmed its plan the next day, and exited Chapter 11 only three days after that (on February 7). See *In re FullBeauty Brands Holdings Corp.*, Case No. 19-22185 (RDD) (Bankr. S.D.N.Y.).

Barely three months later, on May 1, 2019, Sungard Availability Services filed for Chapter 11 relief—then confirmed its plan and exited Chapter 11 the very next day. See *In re Sungard Availability Servs. Cap.*, Case No. 19-22915 (RDD) (Bankr. S.D.N.Y.).

The speed by which the ultra-expedited prepacks (i.e., prepacks in which at least half of the 28-day period provided for filing objections to confirmation under Rule 2002(b) of the Federal Rules of Bankruptcy Procedure (the Rules) has elapsed prior to the filing of the debtor's petition) in *Roust*, *FullBeauty* and *Sungard* were confirmed continues to be a topic of much academic discussion in the restructuring industry. We, in contrast, believe restructuring professionals in the Southern District should begin thinking of ultra-expedited prepacks practically. First, in *FullBeauty*, the Southern District explicitly confirmed that exigent circumstances are *not required* for confirmation of an ultra-expedited prepack. Second, the Southern District's approval of the ultra-expedited prepacks in *Roust*, *FullBeauty* and *Sungard* has provided a clear picture of the underlying factual circumstances necessary for an ultra-expedited prepack to be a debtor's highest-value restructuring solution.

> At least for restructuring professionals in the Southern District, ultra-expedited prepacks are no longer an item of curiosity or academic discussion, but a viable restructuring alternative for clients that is worth evaluating.

Confirmation of an Ultra-Expedited Prepack in the Southern District Does Not Require Exigent Circumstances. Before *Roust*, *FullBeauty* and *Sungard*, the record holder for fastest filing-to-confirmation was the debtor

ERIC CHAFETZ *is a New York-based counsel at Lowenstein Sandler, advising creditors' committees, trade creditors, and plan/liquidating trustees involved in complex bankruptcies.* MYLES R. MACDONALD *is an associate in the firm's bankruptcy, financial reorganization and creditors' rights department.*

in *In re Blue Bird Body Co.*, Case No. 06-50026 (GWZ) (Bankr. D. Nev.), where the bankruptcy court confirmed a bus manufacturer's plan of reorganization only two days after the debtor's petition was filed. That court, unlike the Southern District, was not certain that it had a statutory basis to confirm a plan of reorganization so quickly. As a result, the court heavily relied on its equitable powers, which are themselves codified in §105(a) of the Bankruptcy Code (the Code), and exigent circumstances. The debtor in *Blue Bird* manufactured school buses and sold them to school districts throughout the United States. It convinced the judge during the confirmation hearing that an extended Chapter 11 stay would force the debtor into liquidation because many of its customers would simply cease dealing with the debtor.

The Southern District, in contrast, made clear in *Roust* three years ago that it believes that ultra-expedited prepacks are statutorily authorized. As the Southern District explained, the Code and Rules set forth very clear procedural requirements for providing parties in interest with sufficient notice of a debtor's plan and sufficient time to object to its confirmation. However, as the Southern District went on to explain, nothing in the Code or the Rules prohibits debtors from fulfilling all of these requirements (other than the confirmation hearing itself) before the debtor actually files for Chapter 11 protection. *Roust*, Case No. 16-23786, Docket No. 39 (the Roust Confirmation Transcript), at p. 36:11-13 (stating "Bankruptcy Rule 2002 provides for twenty-eight days' notice. It doesn't say twenty-eight days after the Petition Date."). See also id. at p. 37:11-16; pp. 44-45.

Nevertheless—and despite its stated belief that ultra-expedited prepacks are authorized by the Code and the Rules and do not require approval under the bankruptcy court's equitable powers—the Southern District emphasized at the confirmation hearing in *Roust* that there were, in fact, exigent circumstances justifying the debtors' short stay in Chapter 11. Namely, the Southern District found that the debtors in *Roust* had a reasonable basis for believing that vendors of certain non-debtor affiliates in Eastern Europe would panic and cease doing business with Roust if the debtors had an extended stay in Chapter 11.

At FullBeauty's recent confirmation hearing in February 2019, however, the Southern District unequivocally rejected the "exigent circumstances" analysis from *Blue Bird*. In response to the objection of the United States Trustee (the component of the U.S. Department of Justice that oversees the bankruptcy system and the only party objecting to confirmation) (the UST) that there were no exigent circumstances warranting confirmation of FullBeauty's ultra-expedited prepack, the court made a very clear statement:

> THE COURT: … where does Congress say in 1126 or 1125 or in the bankruptcy rules that there have to be compelling circumstances for a pre-pack?
>
> UST: Your Honor —
>
> THE COURT: It's a rhetorical question. It doesn't say it anywhere. *That's a completely false standard.*

FullBeauty, Case No. 19-22185 (RDD) (Bankr. S.D.N.Y.), Docket No. 102 at pp. 25:22-26:3 (emphasis added). As such, the Southern District has made clear (1) what the legal standard for approval of an ultra-expedited prepack is, and (2) that exigent circumstances are not part of that standard. Thus, for restructuring professionals, the more important question moving forward is *when* is it practical or beneficial for a debtor to attempt an ultra-expedited prepack.

While Rare, Ultra-Expedited Prepacks Will Sometimes Be the Highest-Value Restructuring Solution for Debtors. The facts of *Roust*, *FullBeauty* and *Sungard* (and their counterexample, *Deluxe Entertainment Services*) demonstrate that from a practical standpoint, the Chapter 11 process need only take a single day (at least in the Southern District), so long as the debtor:

(1) *Clearly gives notice* to every creditor or interest holder "impaired" by the plan (broadly speaking, any creditor whose claims are being discharged by the plan without full payment from the debtor)

(2) Solicits votes and objections from those impaired creditors in accordance with the procedural and substantive requirements of the Code

(3) Secures unanimous approval of the plan by the voting creditors

Obviously, these are not particularly easy requirements to meet, especially the third consideration. The requirement of unanimity is not a legal requirement but a practical one—if there are major parties in interest that pose good faith objections to confirmation of the prepacked plan, then, by necessity, the court will be forced to take confirmation of the plan under advisement, meaning, the court would not rule on confirmation of the prepackaged plan during the confirmation hearing, and would take additional time to consider whether to confirm the prepackaged plan. Even if the court did subsequently decide to approve the prepackaged plan, the intervening delay would, by definition,

derail the ultra-expedited prepack.

By way of counterexample, Deluxe Entertainment Services, a video-services company backed by financier Ronald Perelman, filed a prepackaged Chapter 11 plan on Oct. 3, 2019, and confirmed it a brisk three weeks later on October 24, in part because the plan was very simple. See *In re Deluxe Entm't Servs. Grp.*, Case No. 19-23774 (RDD) (Bankr. S.D.N.Y.). All of the existing equity was wiped out, general unsecured creditors (i.e., vendors and trade creditors) were paid in full, and the debtor's fulcrum class of secured creditors—the term loan lenders—swapped most of their debt for 100% of the equity in the reorganized debtor. But only one-month prior, the debtor had attempted to conduct an exchange offer with 100% participation of those same term loan lenders, cautioning that a Chapter 11 filing would follow unless 100% support was obtained. And while all of the *voting* lenders voted in favor of the Chapter 11 plan, there were still some *non-voting* lenders. We do not know if there was a deliberate holdout, but it certainly looks like even the *risk* of having a secured creditor object to the plan not only prevented a non-Chapter 11 solution, it also prevented the debtors from attempting an ultra-expedited prepack.

Unsurprisingly, by the date the debtors filed their petitions (and plans of reorganization) in *Roust*, *FullBeauty* and *Sungard*, there were no objectors other than the UST. In all three cases, the debtors: (1) proposed to pay general unsecured creditors (i.e., vendors and trade creditors) in full, and (2) had used a pre-filing solicitation process to negotiate with and resolve any objections raised by creditors. Sungard, for example, rejected four leases as part of its plan of reorganization, but by the confirmation date had reached stipulations with three of those lessors and was close to reaching an agreement on the amount of the fourth lessor's claim (and the lessor did not object to the plan). *Sungard*, Case No. 19-22915 (RDD), Docket No. 117 at pp. 15:25-16:15.

It is also unsurprising that each of the debtors in *Roust*, *FullBeauty* and *Sungard* sought approval of plans that did little more than equitize and restructure/deleverage their balance sheets as each debtor continued its going concern operations uninterrupted. Roust, for example, is one of the largest integrated spirit beverages businesses in Central and Eastern Europe. All of its production operations were owned by non-debtor affiliates in Europe, and the three United States-based debtors were holding-level companies that had a grand total of 11 unsecured creditors. *Roust*, Confirmation Transcript at pp. 26:10-27:5. Roust's plan was relatively simple and only impaired its existing 100% equity holder, its senior noteholders, and its junior class of convertible noteholders. The existing equity holder provided substantial new value under the plan by contributing the equity holder's previously unaffiliated vodka-production business to the reorganized Roust. In exchange, the equity holder received 57.04% of the equity in the reorganized Roust. And as a result of the equity holder's contribution of the vodka business, both sets of aforementioned noteholders consented to the plan equitizing large portions of their outstanding notes.

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Ultimately, *Roust*, *FullBeauty*, *Sungard* and *Deluxe* each strongly indicate that a certain set of facts is needed for an ultra-expedited prepack to succeed: (1) a debtor with a healthy underlying business filing solely because of too much debt; (2) a fulcrum class of secured creditors that is both (a) willing to engage in a debt-for-equity swap, and (b) willing to allow general unsecured creditors to be paid in full in the Chapter 11 case; and (3) no holdouts. Thus, while the factual circumstances needed for an ultra-expedited prepack are rare, they do occur: after all, these three cases were all confirmed in the past three years. At least for restructuring professionals in the Southern District, ultra-expedited prepacks are no longer an item of curiosity or academic discussion, but a viable restructuring alternative for clients that is worth evaluating.