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Salon E“Feasibility: Delphi, Dura and Solutia: The Impact of DIP Loans,
Exit Financing and Emerging from Chapter 11”**

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Presented by: Secured Creditors Subcommittee

Panelists:

Todd R. Snyder, Managing Director
Rothschild, Inc.
New York, NY

Tom Lauria, Partner
White & Case
Miami, FL & New York, NY

Kenneth A. Hiltz, Managing Director
Alix Partners
Southfield, MI

Moderator:

Corinne Ball, Partner
Jones Day
New York, NY

Credit Markets in Flux and Exit Financing: Planning for Confirmation in Uncertain Times

Corinne Ball

A. Introduction

1. Economic conditions in the past year have seriously impacted and tightened credit markets. Standard and readily available financing used by companies to exit chapter 11 has multiplied into an array of terms when available at all.
2. To make the most of the credit situation, debtors and counsel should be aware of the different terms currently available as well as the ramifications during confirmation to each option. As discussed below, each form of exit financing provides debtors with potentially different paths through confirmation.

B. Recent Terms in Exit Financing

1. Exit Financing in General. Obtaining exit finance is one of the final steps before reemergence. It typically hinges on obtaining credit that is used to pay claims and costs of the chapter 11 process and providing liquidity needs for a post-chapter 11 company. This may include payment of the DIP facility, administrative costs, distributions under a plan of reorganization or a line of credit post-chapter 11. Exit financing facilities often include term loans, revolving facilities, swingline loans and multiple tranches.
2. Committed DIP Roll-Over. Perhaps the most secure form of exit finance is a fully committed facility which "rolls-over" from the DIP facility used in chapter 11. Such a roll-over facility simply ties the original DIP lenders to becoming the eventual exit facility lenders as well. By becoming fully committed to the exit facility, the certainty that exit financing will be available is more or less guaranteed - even in the event the lender is unable to syndicate the loan - assuming the terms of the commitment letter are met. The advantage is obvious; with lenders fully committed to exit financing at the time of the DIP financing, fears or concerns about availability will be resolved at a point early in the chapter 11 process. Recently, Calpine Corporation obtained a similar "roll-over" exit facility. *See In re Calpine Corporation*, No. 05-60200 (BRL) (Bankr. S.D.N.Y. Jan. 26, 2007) (Docket No. 3481).
 - a. Calpine's credit facility consisted of a \$5 billion secured DIP facility convertible into a secured exit facility. This included a senior secured first lien term loan of \$4 billion and a senior secured first lien revolving facility of \$1 billion.
 - b. Funds from the exit facility were to be used to refinance the existing DIP facility, repay certain pre-petition secured obligations, refinance subsidiary

Corinne Ball is a partner in the New York City office of Jones Day, practicing in its Business Restructuring and Reorganization Practice. She is a member of the American College of Bankruptcy, the American Bankruptcy Institute, the ABA Business Bankruptcy Committee (formerly chair of the Chapter 11 Subcommittee and the European Insolvency Task Force), and the Advisory Committee on Corporate and Securities Law for the Practising Law Institute. Associates Jason Cover and Meghan Walters contributed to this article.

secured debt, secured lease obligations and preferred securities and fund working capital and corporate expenses.

c. By the terms of the commitment letter, firm commitments of credit were provided by: \$2.2 billion of the term facility and \$550 million of the revolving facility by Credit Suisse, \$1.4 billion of the term facility and \$350 million of the revolving facility by Goldman Sachs and \$400 million of the term facility and \$100 million of the revolving facility by JP Morgan.

d. Although the commitment parties reserved the right to syndicate the loans, aside from a materially adverse effect on the business or other failure of a condition precedent, the commitment letter and offering were irrevocable and binding.

i. The commitment letter provided the commitments were firm "there not having occurred any event, change or condition since December 31st 2005 (it being understood that the commencement of, continuation and prosecution of the Cases does not constitute that change) that, individually or in aggregate, had, or could reasonably be expected to have, a material adverse effect on the business, assets, liabilities, operations, financial operations, financial condition, operating results or Projections of the Company and its subsidiaries, taken as a whole."

3. Fully Committed New Exit Financing. Another option is to obtain new fully committed financing. While the commitment of the lenders remains fully underwritten with a facility of this type, it does not share the advantage of being tied directly to the DIP facility so that it simply "rolls-over." Instead, financing must be sought later in the process, and usually the borrower will pay a higher price up front in order to obtain such a commitment from the lenders. While the price may be higher, the debtor has the advantage of knowing that in all likelihood the financing will be provided upon confirmation and the effective date. Such commitments provide few if any possibilities for lenders to exit and are in effect "locked-in." Recently Dana Corporation obtained exit financing substantially similar to that described above. *See In re Dana Corporation*, No. 06-10534 (BRL) (Bankr. S.D.N.Y. Nov. 11, 2007) (Docket No. 7168).

a. Dana's credit facility consisted of a \$1.35 billion senior secured term facility and a \$650 million senior secured asset-based revolving credit facility.

b. The funds from the facility were to be used for working capital after reemergence, swing line loans, refinancing of pre-petition debt, payment of administrative claims, and other fees and expenses.

c. By the terms of the commitment letter, Citigroup committed to 40% of the facility, Lehman Brothers to 40% and Barclays to 20%.

d. Like the Calpine commitment letter, while the lenders reserved the right to syndicate, they remained fully committed other than the event of a "Company Material Adverse Effect" or failure of a condition precedent.

i. "Company Material Adverse Effect" was defined as, "any change, effect, event or condition that has had or could reasonably be expected to have a material adverse effect (a) on the business, results of operations or financial condition of the company, New Dana and their Subsidiaries, taken as a whole, or (b) that would prevent the Company from timely consummating the transaction contemplated hereby in all material respects."

4. Committed Exit Financing with a Market MAC Clause. At first glance this style of exit financing appears to mirror that obtained by Dana. On paper, the lenders are fully committed for the full amount of exit financing. While they retain the right to syndicate, their commitment is not based on successful syndication, and the lenders appear to be "locked-in" as underwriters in the same fashion as Calpine and Dana. Buyers will often pay a premium for financing of this type in order to have the benefit of having their exit financing secured prior to confirmation. However, one key difference exists. Commitment letters of this type contain a Market Material Adverse Change Clause, commonly referred to as a Market MAC Clause. Both Calpine and Dana contained MAC clauses; however, the MAC event was tied to the company performance. In contrast, the MAC event is tied to credit markets in a Market MAC. A Market MAC Clause gives the lender an escape hatch built into an otherwise tight commitment letter, placing a greater risk of full syndication on a somewhat unwitting debtor. The result could mean the debtor finds itself without exit financing, either pre or post-confirmation. Solutia Inc. recently obtained a commitment letter in this style. *See Solutia Inc. v. Citigroup Global Markets Inc. (In re Solutia Inc.)*, Complaint, Adv. Proc. No. 08-01057 (PCB) (Bankr. S.D.N.Y. February 2, 2008).

a. Solutia's credit facility consisted of a senior secured term facility of \$1.2 billion, a senior secured asset-based revolving facility of \$400 million and a senior secured bridge facility of \$400 million.

b. The credit facility was to be used to consummate a notes sale, provide working capital and general corporate purposes, make distributions on allowed claims and other plan payments, make payments to the company pension plan and pay various transaction costs.

c. Citigroup committed to 40% of the financing, Goldman Sachs to 40% and Deutsche Bank to 20%.

d. The commitment was firm and in no way dependent on completion of syndication. Each commitment party was technically committed to their share.

e. Like Calpine and Dana, the commitment letter contained a company MAC Clause and a series of conditions precedent to be met.

i. The company MAC Clause provided that the commitment was contingent on the "absence of any event or occurrence since December 31, 2006 which has resulted in or could reasonably be expected to result in

any material adverse change in the business, assets operations, properties, prospects of financial condition of the Borrower and its subsidiaries, taken as a whole (a "Material Adverse Effect")."

f. However, the commitment letter also contained a Market MAC Clause, which might allow the lenders to break their commitment upon uncertainty in the credit markets.

i. The Market MAC Clause provided that the commitments were contingent on "the absence of any adverse change since the date of this Commitment Letter in the loan syndication, financial or capital markets generally that, in the reasonable judgment of such Commitment Party, materially impairs syndication of the Facilities."

5. Bests Efforts Exit Financing. Exit financing which is based on the "best efforts" of the lenders to assemble a syndicate to finance the loan. Such financing does not have the benefit of a commitment or underwriter, and therefore can present uncertainty that the engagement will result in a funded credit facility. With funding uncertain, financing based on best efforts may present unique challenges to confirmation and even lack of funding post confirmation. However, best efforts exit financing is less expensive, as lenders do not require the borrower to pay the extra cost associated with their commitment. Both Delphi Corporation and Dura Automotive Systems, Inc. recently obtained best efforts based engagement letters for exit financing. *See In re Delphi Corp.*, No. 05-44481 (RDD) (Bankr. S.D.N.Y. Dec. 6, 2007) (Docket No. 10854); *In re Dura Auto. Sys., Inc.*, No. 06-11202 (KJC) (Bankr. Del. Nov. 8, 2007) (Docket No. 2178).

Delphi

a. Delphi engaged JP Morgan, and Citigroup to structure, arrange, and syndicate \$6.05 billion in debt financing.

b. The financing was to consist of a senior secured first-lien term facility for \$3.7, a senior secured asset based revolving facility for \$1.6 billion, and a senior secured second- lien term facility for \$1.5 billion (partially formed by a note from GM).

c. Both JP Morgan and Citigroup offered to make a commitment of up to \$200 million, but only in the event the facility was subscribed to fully by other participants. Thus no firm commitment existed if syndication failed.

d. JP Morgan and Citigroup agreed only to "use commercially reasonable best efforts to assemble a syndicate of financial institutions identified by [them] in consultation with and reasonably acceptable to you for each Credit Facility."

Dura

e. Dura engaged Goldman Sachs and Barclays Capital to act as joint lead arrangers, bookrunners and syndication agents in order to provide a \$425 million exit facility.

f. The facility was to provide for a \$225 million senior secured first-lien tranche B term facility, a \$125 million senior secured asset-based revolving credit facility and a \$75 million senior secured second-lien term facility.

g. Goldman and Barclays offered no commitment of capital, only to engage in a best efforts attempt to fully subscribe the syndicate.

i. "Each Arranger agrees, severally and not jointly, to use commercially reasonable efforts to arrange a syndicate of banks, financial institutions and other institutional lenders that will participate in the Facilities. The Borrower acknowledges that this Engagement Letter is neither an expressed nor an implied commitment by either Arranger or its respective affiliates to provide any financing or to provide purchase loans in connection with the Facilities.

C. Exit Financing and the Effect on Confirmation

1. Feasibility Standard of 1129(a)(11).

a. In order to confirm a plan of reorganization, the debtor must meet all requirements of 1129(a) of the Bankruptcy Code. Among them, 1129(a)(11) mandates that a plan must be "feasible." The statute provides as follows:

i. A plan cannot be confirmed if "Confirmation of the plan is likely to be followed by the liquidation, or the need of further financial reorganization, of the debtor or any successor to the debtor under the plan, unless such liquidation or reorganization is proposed in the plan." 11 U.S.C. § 1129(a)(11).

b. 1129(a)(11) requires the court itself to "scrutinize carefully the plan to determine whether it offers a reasonable prospect of success and is workable." 7 Collier on Bankruptcy 1129-74 (15th ed. rev. 2008); *see also* In re Cellular Info. Sys., Inc., 171 B.R. 926, 945 (Bankr. S.D.N.Y. 1994); Internal Revenue Service v. Kaplan (In re Kaplan), 104 F.3d. 589, 597 (3rd Cir 1997); In re Johns-Manville Corp., 68 B.R. 618, 635 (Bankr. S.D.N.Y. 1986). This is often referred to as "feasibility" of the plan.

c. A plan does not require absolute certainty of success for a court to find it feasible. Rather, a plan must only demonstrate a "reasonable assurance of success." Kane v. Johns-Mansville Corp. (In re Johns-Manville Corp.), 843 F.2d 636, 649 (Bankr. 2d Cir. 1988); *see also* In re Union Financial Services Group, Inc., 303 B.R. 390, 427 (Bankr. E.D. Mo. 2003); In re Lakeside Global III, Ltd., 116 B.R. 499, 506 (Bankr. S.D. Tex. 1989); In re Texaco Inc., 85 B.R. 893, 910

(Bankr. S.D.N.Y. 1992); In re Prudential Energy Co., 58 B.R. 857, 862 (Bankr. S.D.N.Y. 1986).

d. Stated in another way, some courts have noted that "the purpose of 1129(a)(11) is to prevent confirmation of visionary schemes which promise creditors and equity security holders more under a proposed plan than the debtor can possibly attain after confirmation." Travelers Ins. Co. v. Pikes Peak Water Co. (In re Pikes Peak Water Co.), 779 F.2d 1456, 1460 (10th Cir.1985); Union Financial, 303 B.R. at 427.

e. Additionally, "financial uncertainty" is not a ground alone which makes a plan unconfirmable. In re Leslie Fay Cos., 207 B.R. 764, 789 (Bankr. S.D.N.Y. 1997) (*quoting In re Drexel Burnham Lambert Group Inc.*, 138 B.R. 723, 762 (Bankr. S.D.N.Y. 1992). In general, a relatively low standard of proof is acceptable for the purpose of confirmation under 1129(a)(11) when adequate evidence shows the plan is feasible. Computer Task Group, Inc. v. Brothby (In re Brothby), 303 B.R. 177, 191 (B.A.P. 9th Cir. 2003).

f. When making a determination of feasibility courts generally consider the following:

- i. adequacy of the capital structure;
- ii. earning power of the business;
- iii. management's ability;
- iv. economic conditions;
- v. the probability of the continuation of management; and
- vi. other related matters that would affect implementation of the plan.

7 Collier on Bankruptcy 1129-74.1 (15th ed. rev. 2008); *see also In re WCI Cable, Inc.*, 282 B.R. 457, 486 (Bankr. D. Or. 2002); Texaco, 84 B.R. at 910; Prudential Energy, 58 B.R. at 862-63; Teamsters National Freight Indus. Negotiating Committee v. U.S. Truck Co., Inc. (In re U.S. Truck Co., Inc.), 800 F.2d 581, 589 (6th Cir. 1986); In re Landmark at Plaza Park, Ltd., 7 B.R. 653, 659 (Bankr. D.N.J. 1980).

2. Application of the Feasibility Standards to Different Forms of Exit Financing. With the recent influx of different terms in exit financing, the issue of feasibility has arisen. Specifically, what provisions or types of exit financing commitments are necessary for a plan to be feasible? Each variety will be discussed below.

a. Committed DIP Roll-Over. As noted above, this form of financing presents a very secure package tied to the DIP facility. As such, there are few opportunities to question the feasibility of the plan in relation to the terms of the

exit financing. Debtors using this form will have the capital infusion necessary to exit bankruptcy locked-in with their DIP facility. While no form of exit financing guarantees the capital will be available, as noted above, the code does not require absolute certainty, "only a reasonable assurance of success." Additionally, it is not necessary that all terms of the exit financing be finalized prior to confirmation. Detailed commitment letters or term sheets contingent upon final documentation, plan confirmation and lack of material adverse change clauses are standard practices with required certainty for plan confirmation under 1129(a)(11). In re Global Ocean Carriers Ltd., 251 B.R. 31, 46 (Bankr. D. Del. 2000).

i. Calpine Corporation recently confirmed a plan with roll-over exit financing. In re Calpine Corporation, No. 05-60200 (BRL) (Bankr. S.D.N.Y. Dec. 19, 2007) (Docket No. 7256). No objections were filed relating to the feasibility of term of the exit financing pursuant to 1129(a)(11). In re Calpine Corporation, No. 05-60200 (BRL) (Bankr. S.D.N.Y. Dec. 19, 2007) (Docket No. 7239). The debtors filed both a memorandum of law and declaration of the CFO discussing 1129(a)(11). In re Calpine Corporation, No. 05-60200 (BRL) (Bankr. S.D.N.Y. Dec. 13, 2007) (Docket No. 7037). The memorandum gave a cursory description of the relevant standard; Lisa J. Donahue, CFO of Calpine, offered a description of the exit facilities in her declaration. As noted above, the feasibility of the exit financing terms was not a contested issue, and the plan was readily confirmed.

b. Fully Committed New Exit Financing. After roll-over financing, fully committed exit financing provides the most security for a debtor. Like the roll-over financing, this financing is fully committed and therefore "locked-in." Once again, while financing does not guarantee with absolute certainty that credit will be available, the commitment is extremely strong and generally meets the "reasonable assurance" standard. Likewise, lack of complete finalization or a MAC clause will not impede confirmation where a commitment letter or term sheet is available. Global Ocean Carriers, 251 B.R. at 46.

i. Dana Corporation recently confirmed a plan of reorganization with fully committed exit financing. In re Dana Corporation, No. 06-10534 (BRL) (Bankr. S.D.N.Y. Dec. 26, 2007) (Docket No. 7509). Like Calpine, the terms of the exit financing did not present an issue at confirmation. No objections were filed that addressed feasibility relating to the terms of the exit financing. In re Dana Corporation, No. 06-10534 (BRL) (Bankr. S.D.N.Y. Dec. 16, 2007) (Docket No. 7375). Like Calpine, the debtors filed a memorandum of law in support of confirmation. The document addressed the standard of 1129(a)(11) and described the exit financing, but in depth analysis of the feasibility of the terms was not made. As stated above, the plan was confirmed, and feasibility of the terms of exit financing was not a topic of debate.

c. Committed Exit Financing with a Market MAC Clause. This exit financing is similar to the Fully Committed Financing except for the Market MAC Clause and therefore remains a relatively strong option. While the Market MAC potentially leaves a lender with an escape outlet, the exact term of a Market MAC event is debatable. Such terms would appear to fall under Global Ocean Carriers and create a feasible plan.

i. Solutia Inc. recently confirmed a plan of reorganization after obtaining exit financing with a Market MAC Clause. In re Solutia Inc., No. 03-17949 (PCB) (Bankr. S.D.N.Y. Nov. 29, 2007) (Docket No. 4444). The debtors filed a memorandum of law which, like Calpine and Dana, presented a brief overview of the relevant 1129(a)(11) standard and stated that sufficient capital would be available for exit financing. In re Solutia Inc., No. 03-17949 (PCB) (Bankr. S.D.N.Y. Nov. 21, 2007) (Docket No. 4357). By the time of the confirmation hearing, the debtors had resolved all objections to the plan and proceeded with a smooth and orderly hearing resulting in confirmation. In re Solutia Inc., No. 03-17949 (PCB) (Bankr. S.D.N.Y. Dec. 4, 2007 Hr'g Tr.) (Docket No. 4505), at 13. 1129(a)(11) presented no feasibility concerns with exit financing apparently in place, and Judge Beatty stated that "There is every reason to believe that the debtors' business has been restructured so that they will in fact be able to function indefinitely into the future." Id. at 59.

ii. However, in the midst of recent uncertainty in credit markets, the commitment parties to Solutia's commitment letter were unable to fully subscribe a syndicate. On January 22, 2008, three days before closing, the commitment parties notified Solutia of their intent to withdraw from funding the facility – citing the Market MAC Clause – in lieu of taking the commitment on their own books. Litigation quickly followed. Solutia Inc. v. Citigroup Global Markets Inc. (In re Solutia Inc.), Complaint, Adv. Proc. No. 08-01057 (PCB) (Bankr. S.D.N.Y. Feb. 2, 2008). Ultimately the parties reached a settlement, with the commitment parties agreeing to provide \$2.05 billion in financing. Jeffrey McCracken, Solutia Settles Bankruptcy Suit --- Lenders Agree to Provide Financing After Trying To Back Out of Deal, Wall St. J., Feb. 28, 2008 at C5. While the commitment parties settlement for the original amount plus an additional \$50 million may reflect the lack of strength of their legal position, debtors negotiating exit financing must be aware of the possibility of a loss of funding and legal battles when accepting Market MAC Clauses. It is also possible that courts and other parties will more closely scrutinize agreements in this style after the problems witnessed by Solutia.

d. Bests Efforts Exit Financing. In contrast to the other styles, exit financing based on "best efforts" offers no firm commitment by the lenders to finance the debtor. Without a firm commitment, financing based on best efforts present unique problems for confirmation feasibility pursuant to 1129(a)(11) as they may be categorized as lacking reasonable assurance of success or as a "visionary

scheme." Indeed, many courts would agree that lack of a firm commitment renders a plan non-confirmable.

i. In re Made in Detroit, Inc. featured a plan based on exit financing. In re Made in Detroit, Inc., 299 B.R. 170 (Bankr. E.D. Mich. 2003). However, at the time of confirmation there was no assurance or commitment that the financing would take place, and the conditions precedent had not been completed. As such, the court found that the debtor has not presented sufficient evidence that the plan was reasonably likely to succeed and that it constituted "wishful thinking" and "visionary promises," rendering the plan unfeasible. Id. at 177.

ii. In re Ralph C. Tyler, P.E., P.S., Inc. also contemplated a plan based on exit financing from outside sources. In re Ralph C. Tyler, P.E., P.S., Inc., 156 B.R. 995 (Bankr. N.D. Ohio 1993). However, the plan lacked evidence of firm financing or a commitment. The court stated that at confirmation "funding must be shown to be firm as it goes directly to feasibility." Id. at 997. Without firm financing, the plan was not feasible.

iii. In re Repurchase Corporation examined a plan based on exit financing used to pay \$100,000 to creditors and \$500,000 to restart the business. In re Repurchase Corp., 322 B.R. 336 (Bankr. N.D. Ill. 2005). The debtor's president offered testimony that his wife would fund the needed financing. However, the plan offered no contract, evidence or corroboration of the president's testimony. Confirming a plan without financing was declared a violation of a judge's duties, and the plan was found unfeasible. Id. at 343.

iv. In re Chadda reviewed a plan based on refinancing. In re Chadda, 2007 Bankr. LEXIS 4213. Both the hostile credit markets and the debtor's lack of evidence of a commitment to finance were examined. Without evidence of an actual commitment the plan was speculative and not feasible. Id. at *16-17.

v. Similarly, In re Haardt considered a plan based on refinancing. In re Haardt, 65 B.R. 697 (Bankr. E.D. Pa. 1986). The debtors had unsuccessfully sought refinancing and had no prospective offers at the time of confirmation. Without evidence of future financing the plan was found to be unfeasible. Id. at 702; *see also* In re Kovalchick, 1995 WL 118171, *9 (Bankr. E.D. Pa. 1995) (plan not feasible where refinancing not secured).

vi. In re Stratford Associates involved a plan that financed its exit through the investment of former partners in a new partnership. In re Stratford Assoc's Ltd. P'ship, 145 B.R. 689 (Bankr. D. Kan. 1992). The court first acknowledged the general principle that "without proper funding in place or a firm commitment or such funding, the Court cannot

find the plan feasible." Id. at 699. However, the plan was found feasible with 7 of the required 35 limited partners in place and the president's testimony regarding a check covering the amount to fund the plan from an alternate buyer. Id.

vii. Dura. Dura entered into the confirmation process without a firm committed exit facility in place, instead relying on a "best efforts" engagement letter. Like Calpine, Dana and Solutia, Dura filed a memorandum of law in support of confirmation which laid out the relevant standards applicable to 1129(a)(11). In re Dura Auto. Sys., Inc., No. 06-11202 (KJC) (Bankr. Del. Nov. 21, 2007) (Docket No. 2313). The debtors described their search for funding, the lack of a lender willing to fully underwrite a facility and their ultimate engagement based on "best efforts." Id. While the debtors continued to describe the process of the financing and the plan, they failed to create a legal argument presenting why a "best efforts" exit facility would satisfy 1129(a)(11). Instead the approach was more akin to debtors with solid commitments from lenders; simply state the general facts and assume the financing was feasible. However, Dura's hopes for confirmation were dashed in a confirmation status conference. In re Dura Auto. Sys., Inc., No. 06-11202 (KJC) (Bankr. D. Del. Nov. 28, 2007 Hr'g Tr.) (Docket No. 2387). Debtors expressed a reasonable confidence to have a signed commitment letter in the near future, citing the troubled financial markets for their lack of funding. Id. at 12-15. Despite the debtors requests, Judge Carey dismissed the idea of a confirmation hearing prior to the debtors having received committed exit financing, stating "We're not talking about a couple of bucks. We're talking about an exit facility in excess of \$400 million." Id. at 16-17. Judge Carey's view thus reflected the bright line rule of the case law: a plan without fully committed exit financing is not feasible.

viii. Delphi. In contrast, Delphi succeeded in obtaining confirmation with only "best efforts" financing in place. Faced with an objection to the feasibility of their financing due to lack of a firm commitment, the debtors presented an in depth argument in their memorandum of law. In re Delphi Corp., No. 05-44481 (RDD) (Bankr. S.D.N.Y. Jan. 16, 2008) (Docket No. 12165). The debtors argued that only a preponderance of the evidence must show that the plan would not lead to another financial reorganization or liquidation, and that the evidence provided regarding earnings capacity, ability to obtain financing and sell assets, and the independent review of the business plan by the plan investors met this standard. They distinguished between cited cases in the objection, specifically In re Chadda and In re Repurchase Corp., where the debtors did not present proper evidence of the availability of exit financing or the identity of the investors and the Delphi's "best efforts" engagement with Citigroup and JP Morgan currently assembling a syndicate. Id. at 62. Lastly they discounted the possibility of another reorganization because entry into a

committed exit financing agreement was a condition precedent of the effective date. Id. at 62-63. Therefore, neither a liquidation nor further reorganization could occur because the first plan would never become effective if exit financing was not obtained. At the confirmation hearing the debtors continued their analysis, stating confirmation would aid the procurement of exit financing by creating certainty in uncertain credit markets. In re Delphi Corp., No. 05-44481 (RDD) (Bankr. S.D.N.Y. Jan. 17, 2008 Hr'g Tr.) (Docket No. 12632) at 47. Additionally they pointed to the fact that 80% of participants had voted for the plan, including the objecting parties. Id. at 47 and 60. Judge Drain agreed with the debtors' premise. The debtors' rationale that a plan will not go effective unless exit financing is obtained is accepted. Id. at 41 ("I'm just trying to figure out given that the plan wouldn't go effective unless you had the financing what is the harm of having it be confirmed subject to that condition?"). A possible plan in limbo lacking a sunset clause was not a cause for concern because the plan had termination dates in place if exit financing was not assembled, the debtors were required to act as fiduciaries to push the reorganization along, exclusivity would expire and the option of using 60(b) existed. Id. at 42-45. Any issues regarding the rights offering would be resolved by the fact that if the plan was not effective, the rights offering would be null and void. Id. at 58. Lastly, and perhaps most importantly, Judge Drain was simply of the opinion that a company as inherently strong and worthy of credit as Delphi would eventually obtain financing, despite any market turmoil. He states, "I appreciate that it is conceivable that notwithstanding the abundance of capital in the world that prospective lenders may for reasons unrelated to the debtor for some reason think that normal credit analyses don't apply for the month of January 2008, but that's not anywhere set forth in the record. I have to assume that lenders who are in the business of lending to make money will look at a company like Delphi, look at its ability to repay debt, and look at what it's achieved through its reorganization plan, and conclude that it makes economic sense to provide the exit financing." Id. at 66. In fact, Judge Drain seemed to discount market instability. "It seems to me that issues with regard to exit financings being available are tied less to, if at all to, the debtor's inherent economic strength and ability to repay that financing, but rather nebulous issues related to perhaps irrational lack of confidence on lenders' behalf generally in the marketplace putting a condition now that would limit confirmation's effect into the plan or the confirmation order or delaying entry of that order I think would encourage that what appears to me to be irrational propensity." Id. at 67. Based on this reasoning, the plan was ultimately confirmed. In re Delphi Corp., No. 05-44481 (RDD) (Bankr. S.D.N.Y. Jan. 25, 2008) (Docket No. 12359).

ix. Dura and Delphi offer divergent views on the feasibility of "best efforts" exit financing. Because Dura's confirmation process was cut short, it is difficult to determine whether Judge Carey felt that lack of committed exit financing represents a per se restriction on feasibility or

that the debtors did not fully develop their argument. Based on his statements and actions at the confirmation status conference, the former would seem the more likely. In contrast, Judge Drain was much more open to deliberate over individual fact patterns. When presenting a "best efforts" exit financing, it would certainly seem in the debtor's best interests to fully brief and articulate an argument of feasibility regardless of objections. Note that in their argument, Delphi was able to distinguish themselves from previous cases by essentially showing that they were a company worthy of and inevitably able to obtain exit financing even if they currently had not. In effect, the basic considerations and standards of 1129(a)(11) were used and can be used for this purpose: adequacy of the capital structure; earning power of the business; management's ability; the probability of the continuation of management; and other related matters that would affect implementation of the plan. Interestingly, the one important consideration neglected by both the debtors and Judge Drain was economic conditions. Debtors relying on this type of financing should also note Judge Drain's willingness to accept that the plan would not result in another reorganization. Demonstrating that the plan would never become effective without the financing, that the plan had termination dates reliant on exit financing and that the debtors had general fiduciary obligations seemed to assuage any remaining fears Judge Drain held. However, courts may now be even more unwilling to find "best efforts" exit financing feasible as both Dura and Delphi failed to subscribe syndication.

D. Conclusion

1. Recent conditions in credit markets have resulted in divergent types of exit financing available to a debtor seeking to confirm a plan of reorganization. If at all possible, a debtor should seek committed and underwritten exit financing – even at a premium – as it represents the smoothest path through the confirmation process. However, in the current market, lenders have become increasingly unwilling to offer committed financing making "best efforts" financing the only alternative.

2. As both Dura and Delphi demonstrate, "best efforts" exit financing creates uncertainty in confirmation of a plan and the availability of capital itself. When faced with no alternative, it is vital that a debtor present a rich factual and legal argument to the court regarding feasibility. A debtor must show its inherent creditworthiness using the standards of: adequacy of the capital structure; earning power of the business; management's ability; economic conditions; probability of continuation of management; and any other factors that would affect the plan.