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SOCIAL MEDIA ACCOUNTS AND SUBCHAPTER S ELECTION — ALL VITAL ASSETS

The use of social media accounts by companies is now commonplace and these social media accounts have themselves become valuable assets. In a recent bankruptcy case, the debtor company sought to sell substantially all of its assets, and the bankruptcy court had to analyze who owned the debtor's social media accounts, the debtor or the debtor's former CEO. The bankruptcy court also had to consider whether the debtor or the former CEO controlled the debtor's S corporation election, and therefore the ability to potentially shift millions of dollars of tax liability to the debtor. This article addresses the bankruptcy court's analysis and rulings as well as the significant impact these rulings may have on the financial services sector.

By Mark A. Salzberg and Michelle N. Saney *

Thirty years ago, John Owoc (“Mr. Owoc”) — a self-professed avid fitness trainer, designer and producer of fitness supplements, weightlifter, motivational speaker, and writer — founded Vital Pharmaceuticals, Inc. (“Vital”).¹ He served as the company’s Chief Executive Officer and Chief Science Officer and his wife Megan served as Senior Vice President of Marketing until they both were terminated in March 2023.² Vital is a pioneer in the performance energy drink industry and is perhaps best known for its flagship product, Bang Energy, one of the top-selling energy drinks in the United States.³ In October 2022, Vital filed for protection under Chapter 11 of the U.S. Bankruptcy Code. Instead of

reorganizing, Vital utilized the bankruptcy process to effectuate a sale of substantially all of its assets to an affiliate of Monster Beverage Corporation (“Monster”).⁴

The Vital bankruptcy case raised two issues of first impression in the Eleventh Circuit, both of which may impact the financial services sector by protecting creditor recoveries, including lender recoveries. *First*, the Vital case addressed who owns the rights to social media accounts created by Vital’s former officers which had been used to promote Vital’s products as well as for personal use.⁵ *Second*, the case addressed whether Vital’s Subchapter S election is property of the

¹ *In re Vital Pharm.*, 652 B.R. 392, 398 (Bankr. S.D. Fla. 2023) (“Vital I”).

² *Id.* at 398-99.

³ *Id.* at 399.

⁴ *In re Vital Pharms.*, No. 22-17842-PDR, 2023 WL 6543190, at *2 (Bankr. S.D. Fla. Oct. 6, 2023) (“Vital II”).

⁵ Vital I at 396.

*MARK A. SALZBERG is a partner at Squire Patton Boggs’s Washington, DC office. MICHELLE N. SANEY is an associate at Squire Patton Boggs’s New York City office. Their e-mail addresses are mark.salzberg@squirepb.com and michelle.saney@squirepb.com.