AMERICAN BANKRUPTCY INSTITUTE

2020 Midwestern Virtual Bankruptcy Institute

Small Business Reorganization Act of 2019/Subchapter V

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2020

Chapter 11, Subchapter V: The Evolution of the Small Business Debtor

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Subchapter V: The Purpose

- Establish an expedited process for small business debtors to reorganize quickly, inexpensively, and efficiently:
  - No creditors' committees;
  - Deadlines are short;
  - "Small Business Debtor" is limited by definition;
  - Trustee Appointed; and
  - Debtor-in-Possession.

Subchapter V: Theme

- Throughout the United States we are seeing small businesses close—not filing bankruptcy, just closing doors.
  - Bankruptcy can offer protection from creditors and give them a chance to reorganize and keep the business running as debtors-in-possession.

Chapter 11, Subchapter V Bankruptcy

- Codified at 11 U.S.C. §§ 1181-1195
- Enacted August 23, 2019
  - Required changes to Federal Rules of Bankruptcy Procedure
    - 3-year process
- Effective Feb. 19, 2020

Subchapter V: Legislative Effect

- Bankruptcy Courts order Adoption of Interim Bankruptcy Rules.
  - Advisory Committee on Bankruptcy Rules drafted, published for comment, and approved interim bankruptcy rules for distribution to the courts.
  - Committee on Rules of Practice and Procedure approved the Interim Rules.

Debt Amount Limitations for Small Business Debtors

- Now, with **CARES Act**, the Small Business Reorganization Act of 2019 has been extended to those with **less than $7,500,000** in noncontingent, liquidated debt**.**
  - As of now, this is **temporary**. However, many of those within the bankruptcy community have acknowledged that there **should be a permanent change to account for the current economy.**

Who Are the Small Business Trustees?

- Small Business Trustees have a role similar to Chapter 13 trustees.
- Disinterested person as defined by 11 U.S.C. § 101(14).
  - Is not a creditor or insider of the debtor;
  - Is not, and was not, within two years before the date of filing of the petition, a director, officer, or employee of the debtor;
  - No materially adverse interest to estate or any creditor; and
  - Continuous review for conflicts – resign if needed

Small Business Trustee Duties & Obligations

- Evaluate viability of prospect for reorganization;
- Facilitate consensual plan – ensuring debtor's payments (11 U.S.C. § 1183(b)(7) and (4)); and
- Communicate with US Trustee.
  - Reporting requirements

Subchapter V: Deadlines

- In effort to expedite, there are short deadlines.
  - Requires the debtor to file a status report 14 days before that status conference. 11 U.S.C. § 1188(c).
  - Requires the Court to conduct a status conference within 60 days of the order for relief. 11 U.S.C § 1188(a).
  - Requires the debtor to file a plan within 90 days of the order for relief. 11 U.S.C. § 1189(b).
  - Might prevent re-designation.

Subchapter V: Deadlines

- Pre-Status Conference Report generally filed 46 days after the date of filing.
  - If there's a Motion that must be heard, time can be used up while waiting for hearing.
  - Issues should be handled as quickly as possible to avoid missing any deadlines (e.g., to employ an appraiser or accountant, etc., or motion to reject an executory contract).

Subchapter V: Deadlines

- Debtor required to file its financial documents. § 1187(a).
- To prevent delay, Debtor should file petition and financial information.
  - Remedying this would take up to 14 days to correct.

Subchapter V: Re-designation

- Can existing Chapter 11 or Chapter 7 debtors re-designate their pending bankruptcy cases to a Subchapter V case?
- The statute does not specify whether SBRA applies to pending cases
  - Re-designation does not constitute an impermissible retroactive application. Court is guided and governed by the obligation to apply the law in effect at the time it has been asked to render its decision. *In re Moore Properties*, 2020 WL 995544 *5 (Bankr. M.D.N.C. Feb. 28, 2020); *In re Body Transit,* 613 B.R. 400, 407-408 (Bankr. E.D.Penn. 2020).

Subchapter V: Re-designation

- Case law test: Redesignation permitted and deadlines can be extended so long as the vested property rights of creditors will not be impaired. *In re Ventura,* 615 B.R. 1 (Bankr. E.D.N.Y. 2020).
  - Courts have not found case events to create vested rights of the kind that have due process implications
  - One court hinted should be looking at rights existing before enactment, not rights arising during case

Role of Rule 1009

- Amendment of Petition
  - Amendment of petition is appropriate procedural mechanism to redesignate
  - Debtor is entitled to do so at any time before the case is closed
  - Improper if in bad faith or would unduly prejudice a party

Objection to re-designation: Missed Deadlines

- Section 1188(a) – mandatory status conference must be held within 60 days
- Section 1189(b) – debtor must file plan within 90 days

Can Deadlines be Extended?

- Statutory test: Court may extend the deadlines if the need for an extension is "attributable to circumstances for which the debtor should not justly be held accountable." §§1188(b) and 1189(b)
  - Same standard is used in Chapter 12
  - Courts have held debtor must prove inability to timely file due to circumstances beyond control

Trend on Re-Designation when Deadlines have been Missed

- The majority of courts have extended deadlines and permitted re-designation.
- *See, e.g., In re Progressive Solutions*, 615 B.R. 894 (Bankr. C.D.Ca. 2020); *In re Bello*, 613 B.R. 894 (Bankr. E.D. Mich. 2020); *In re Moore Properties*, 2020 WL 995544 (Bankr. M.D. N.C. 2020); *In re Body Transit, Inc.,* 613 B.R. 400 (Bankr. E.D. Penn. 2020).

Subchapter V: Redesignation

- But see *In re Seven Stars on the Hudson Corp*., 618 B.R. 333 (Bankr. S.D. Fla. 2020)(case dismissed; debtor's inability to meet statutory deadlines was due solely to its election to amend its petition after they expired, so extension of deadlines was not warranted); *In re Double H Transportation LLC*, 614 B.R. 553 (Bankr. W.D. Tex. 2020)(allowing debtor to amend its petition 116 days after its original petition date would create a procedural quagmire).

Rationale of *Seven Stars on the Hudson*

- Subchapter V intended to be expedited; debtor has additional powers and rights; tradeoff is prompt action
- The court has different view about whether sufficient cause existed for extension
  - Debtor had control over redesignation
  - Cannot try to reorganize under other provisions and then redesignate after failure

A "Small Business Debtor" Defined

- Engaged in commercial or business activities,
  - Excluding primary business of owning single asset real estate.
- Aggregate, noncontingent, liquidated secured and unsecured debts as of the date of the filing not more than $2,725,625.00.
- More than 50% of debts arising from commercial or business activities.
  - Incurred for purpose of making profit (11 U.S.C. § 101(51D)).
  - See amended Section 1182(1) for cases filed on or after March 26, 2020

Small Business Debtors Owning Real Estate

- Prior to the SBRA, the definition of a Small Business Debtor explicitly excluded, "a person whose primary activity is the business of owning or operating real property or activities incidental thereto."
- The SBRA has now broadened the definition to include those who own more than one property. The Act still excludes single asset real estate ("SARE") owners who own only one property. 11 U.S.C. § 101(51B).

Eligibility: The *Wright* Case

- Debtor, Charles Wright designated that he was a small business debtor.
  - Elected to proceed as a subchapter V small business debtor
  - Sole member of Boiling Pot Investments, LLC & 49% owner of Carolinas Custom Clad, Inc.
    - Both are small family business
    - Both entities filed for bankruptcy – Both cases dismissed

In re Wright, Case No. 20-01035-HB, Bankr. Ct. (Dist. S.C. 2020).

Eligibility: The *Wright* Case

- The entities sold their assets, which did not pay off all debts.
  - All of the creditors have liens against Wright's residence.
    - $220,882.42 of $395,816.29 is business debts owed as personal guarantor of the entities.

In re Wright, Case No. 20-01035-HB, Bankr. Ct. (Dist. S.C. 2020).

Eligibility: The *Wright* Case

- "When a debtor's eligibility to file under a particular chapter of the Bankruptcy Code is challenged, **the burden is upon the debtor to establish such eligibility."** *In re Voelker,* 123 B.R. 749, 750 (Bankr. E.D. Mich. 1990) (citing numerous cases). *Emphasis added*.

In re Wright, Case No. 20-01035-HB, Bankr. Ct. (Dist. S.C. 2020).

Eligibility: The *Wright* Case

- Court acknowledged the SBRA and Subchapter V were designed to broaden relief available to address small business debt.
- Determine whether Wright is, **"a person engaged in commercial or business activities."**

In re Wright, Case No. 20-01035-HB, Bankr. Ct. (Dist. S.C. 2020).

Eligibility: The *Wright* Case

- He is "engaged in commercial or business activities" by addressing residual business debt and otherwise meets the remaining requirements under § 101(51D).
- Personal guarantors of business debts are eligible as Small Business Debtors under Subchapter V if their business debt is 51% or more.

In re Wright, Case No. 20-01035-HB, Bankr. Ct. (Dist. S.C. 2020).

Eligibility: The *Wright* Case

- *Watford v. Federal Land Bank of Columbia* (In re Watford), 898 F.2d 1525, 1527 (11th Cir. 1990); see also *In re Paul*, 83 B.R, 709, 712 (Bankr. D. N.D. 1988); *In re Haschke*, 77 B.R. 223, 225 (Bankr. D. Neb. 1987) (same). (§ 101(18)).
- *Hileman v. Pittsburgh & Lake Erie Properties, Inc. (In re Pittsburgh & Lake Erie Properties, Inc.)*, 290 F.3d 516, 519-20 (3d Cir. 2002); see also *McGray Const. Co. v. Director, OWCP*, 181 F.3d 1008, 1015 (9th Cir. 1999). (§ 101(44)).
- *In re Banes*, 355 B.R. 532, 535 (Bankr. E.D.N.C. 2006). (§ 101(27A)).

Subchapter V: Today

- According to the ABI's SBRA Resources website, as of October 4, 2020, 1,129 cases have proceeded under Subchapter V since SBRA became effective in February.
  - They are being filed at a rate of 30+ cases per week.
  - With the Pandemic still in full swing, SBRA allows small business debtors the opportunity to reorganize their small businesses and keep the business running as debtors-in-possession.

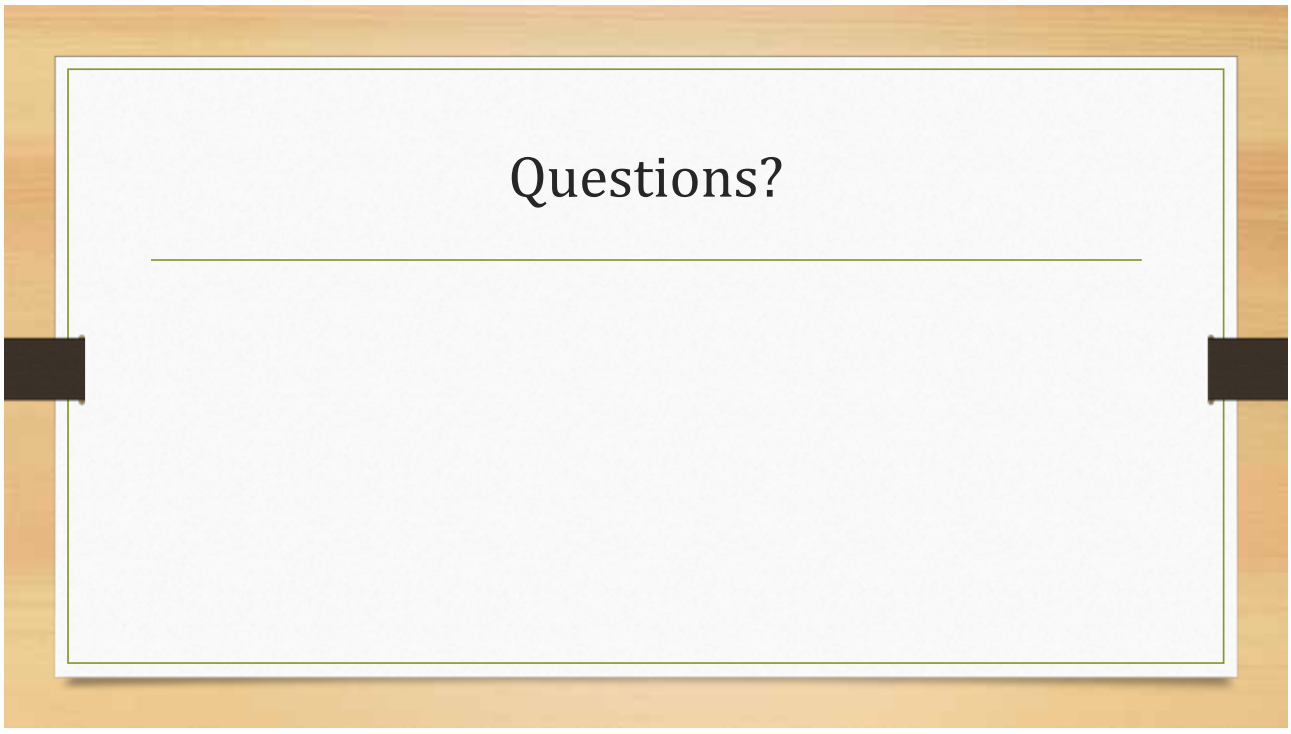
Subchapter V: Today

Link to Judge Bonapfel's updated SBRA Material

- Free resource on a new and evolving topic within bankruptcy.
- https://www.mow.uscourts.gov/sites/mow/files/BK_judge_bonapfels_guide_to_sbra_revision.pdf

Subchapter V: Going Forward

- Going forward, Subchapter V proceedings could continue to evolve and allow for greater access to the expedited process.
- However, much depends on how the Pandemic and economic changes develop in the coming months.


Questions?

Dated: June 30, 2020

The following is ORDERED:

Sarah A Hall
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF OKLAHOMA

In re:	)	
	)	
SAMUEL LEE CRILLY and	)	Case No. 20-11637-SAH
KIMBERLY DEANE CRILLY,	)	Chapter 11
	)	
Debtors.	)	

ORDER DENYING MOTION FOR CONTINUATION OF AUTOMATIC STAY WITH BRIEF COMBINED WITH NOTICE OF OPPORTUNITY FOR HEARING [DOC. 11]

On June 10, 2020, this Court heard the Motion for Continuation of Automatic Stay with Brief Combined with Notice of Opportunity for Hearing [Doc. 11], filed on May 14, 2020 (the "Motion"), by debtors Samuel Lee Crilly and Kimberly Deane Crilly ("Debtors"), in their second chapter 11 case to pend this calendar year (the "Second Case"). Their previous chapter 11 case, Case No. 18-13849 (the "First Case"), was dismissed by agreement of the parties on May 13, 2020, for cause pursuant to 11 U.S.C. § 1112(b). A few hours after the dismissal, Debtors filed the Second Case under the recent amendments to the Bankruptcy Code made by the Small Business Reorganization Act of 2019, which became effective on February 19, 2020 (the "SBRA"). SBRA was designed "to broaden the opportunity for small businesses to successfully

utilize the benefits of chapter 11" and created subchapter V to chapter 11 for "small business debtors." In re Ventura, 615 B.R. 1, 6 (Bankr. E.D. N.Y. 2020).

Because Debtors had a prior bankruptcy case pending during the year preceding the filing of this bankruptcy case that was dismissed, the automatic stay of 11 U.S.C. § 362(a) terminates thirty days after the filing of the Second Case. The automatic stay can be extended by the Court on the motion of a party in interest provided such party establishes the filing of the second case was in good faith as to the creditors to be stayed. 11 U.S.C. § 362(c)(3). Accordingly, Debtors filed the Motion seeking a continuation of the automatic stay, arguing the Second Case was filed in good faith. Both the United States Trustee ("UST") and creditors Rita Jacks and Joe Jacks (the "Jacks") objected to the Motion, claiming the Second Case was filed in bad faith.[1]

Findings of Fact

Having presided over the First Case and an associated adversary proceeding, the Court is more than familiar with the background facts and takes judicial notice[2] of the First Case and matters filed and determined therein.

1. Rita Jacks is the mother of debtor Samuel Crilly.

[1]See Objection of the United States Trustee to Debtors' Motion for Continuation of the Automatic Stay [Doc. 25], filed on May 28, 2020, by UST; Creditors Rita and Joe Jacks' Response and Objection to the Motion for Continuation of Automatic Stay with Brief in Support and Certificate of Service [Doc. 24], filed on May 28, 2020, by the Jacks.

[2]It is well established that a court may take judicial notice of its own records as well as records of other courts, particularly in closely related cases. Hutchinson v. Hahn, 402 F. App'x 391, 394-95 (10th Cir. 2010) (citing St. Louis Baptist Temple, Inc. v. FDIC, 605 F.2d 1169, 1172 (10th Cir. 1979)); Cornforth v. Fidelity Inv., 2017 WL 650132 (W.D. Okla. 2017).

2. The Jacks financed the build-out and completion of the second floor of Debtors' residence (the "Second Floor") for the purpose of providing the Jacks with a home as they aged. The Jacks lived in the Second Floor only briefly until Debtors removed them.

3. Thereafter, the Jacks filed a state court action against Debtors, Case No. CJ-2017-1075, Cleveland County District Court, State of Oklahoma (the "State Court Action").[3]

4. Following the Jacks' departure, debtor Kimberly Crilly's father moved in and lived in the Second Floor. After his death, Debtors did not have renters for the Second Floor until late 2018. After the commencement of the First Case in October 2018, they began to regularly have renters for the Second Floor.

5. The Jacks obtained a judgment against Debtors in the State Court Action for $400,000.00 ($200,000.00 in actual damages and $200,000.00 in punitive damages) plus post-judgment interest, and were later awarded $61,650.00 in attorneys' fees and costs of $3,591.03 in the State Court Action (collectively, the "Judgment"). State Court Action Docket generally; UST Exhibit 16. Debtors subsequently appealed the Judgment.

6. On September 12, 2018, Debtors filed the First Case. Docket in Case No. 18-13849.

7. Debtors did not identify any leases, renters, or rental income for the Second Floor in their Schedules in the First Case.

8. Debtors did not identify themselves as a sole proprietor of any full or part-time business in the First Case nor did they claim to be a small business debtor in the First Case. UST Ex. 7, p. 4, questions 12 and 13.

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[3]Federal courts may take judicial notice of proceedings in other courts if those proceedings have a direct relation to the matters at issue. St. Louis Baptist Temple, Inc. v. FDIC, 605 F.2d 1169, 1172 (10th Cir. 1979).

9. Debtors also did not identify any income from operating a business for calendar years 2016 and 2017 and for January 1 through September 12, 2018. UST Ex. 7, pp. 35-36, question 4.

10. Further, Debtors did not identify any business or connection to any business involving the rental of the Second Floor of their residence in the First Case. UST Exhibit 7, p. 41, question 27.

11. Debtors filed a motion for relief from the automatic stay to continue their appeal of the Judgment (the "Debtors Stay Motion"). First Case Doc. 14.

12. The Jacks also filed a motion for relief from the automatic stay to proceed with their motion for allowance of attorneys' fees and costs in the State Court Action (the "Jacks Stay Motion"). First Case Doc. 25.

13. On October 12, 2018, Debtors filed their plan and disclosure statement in the First Case. First Case Doc. 44 & 45. A first amended plan was filed on October 15, 2018, to correct the absence of Debtors' signatures. First Case Doc. 51.

14. The Court entered orders granting the Debtors Stay Motion and the Jacks Stay Motion on October 22, 2018. First Case Doc. 58 & 59.

15. On November 16, 2018, Debtors filed a second amended plan and first amended disclosure statement. First Case Doc. 72 & 73.

16. On December 13, 2018, an order was entered in the State Court Action requiring Debtors to post a $530,482.00 appeal bond within twenty days after conclusion of the First Case. UST Exhibit 16.

17. The Court held multiple hearings on January 3, 2019, including a hearing on the Jacks' objection to Debtors' claimed exemption in two retirement accounts, which were inherited by joint debtor Kimberly Crilly from her deceased father (the "Inherited IRAs"). The Jacks' objection was sustained, and the exemption in the Inherited IRAs was denied. First Case Doc. 103.

18. The Court also held a hearing on approval of Debtors' first amended disclosure statement on January 3, 2019. However, because the Court's denial of Debtors' claimed exemption with respect to the Inherited IRAs significantly changed the liquidation analysis in the disclosure statement, the first amended disclosure statement and second amended plan required further amendments. Consequently, approval of the disclosure statement was denied. First Case Doc. 103.

19. Debtors filed their third amended plan and second amended disclosure statement on February 25, 2019. First Case Doc. 116 & 117.

20. On February 27, 2019, the Court conducted a status conference and discovered that the second amended disclosure statement lacked important information, the third amended plan lacked feasibility, and the plan was not confirmable on its face based on violations of the absolute priority rule. Debtors were, therefore, directed to file a third amended disclosure statement and a fourth amended plan no later than March 14, 2019. First Case Doc. 118.

21. At Debtors' request, the Court extended the time for the fourth amended plan and third amended disclosure statement to be filed to April 4, 2019. First Case Doc. 120.

22. On April 4, 2019, Debtors filed their third amended disclosure statement and fourth amended plan. First Case Doc. 123 & 124.

23. A hearing was held on May 22, 2019, to consider approval of the third amended disclosure statement. The Court denied approval based on inadequate information regarding feasibility and failure to comply with the absolute priority rule. The Court cautioned Debtors to carefully consider and provide for satisfaction of the absolute priority rule in any future plan and disclosure statement. First Case Doc. 131.

24. Additionally, at the May 22, 2019, hearing, it was brought to the Court's attention that, in the Monthly Operating Report for March 2019 [First Case Doc. 129], filed on May 10, 2019, Debtors identified $37,059.00 received from the Inherited IRAs in their personal cash receipts for March 2019, possibly to pay attorney fees (based on a designation therein). As a consequence, Debtors were directed to immediately remit the $37,059.00 withdrawn from the Inherited IRAs to their counsel to be held in his trust account pending further order of the Court. Debtors were further instructed to take no further voluntary withdrawals from their Inherited IRAs without prior Court approval. Additionally, Debtors were directed to immediately remit all prior and future required minimum distributions received from the Inherited IRAs on account of applicable federal law to their counsel to be held in his trust account pending further order of the Court. First Case Doc. 131.

25. The Court subsequently entered an order setting a July 17, 2019, deadline for Debtors to file their fifth amended plan and fourth disclosure statement complying with the absolute

priority rule and containing adequate financial projections for a feasibility analysis. First Case Doc. 135.

26. Debtors filed their fourth amended disclosure statement and fifth amended plan on July 17, 2019. First Case Doc. 138, 139 & 141.

27. On September 4, 2019, the fourth amended disclosure statement was approved. First Case Doc. 152 & 153.

28. The confirmation hearing on the fifth amended plan was held on October 17, 2019, and confirmation was denied based on lack of feasibility and failure to satisfy the absolute priority rule. First Case Doc. 163 & 165.

29. A status conference was held on December 4, 2019, and the Court set a deadline of December 9, 2019, for Debtors to file a plan demonstrating feasibility and compliance with the absolute priority rule. First Case Doc. 172.

30. Debtors filed their sixth amended plan and fifth amended disclosure statement on December 9, 2019, First Case Doc. 173 & 174.

31. On January 10, 2020, the Court entered an order approving the fifth amended disclosure statement and setting the hearing on confirmation of the sixth amended plan. First Case Doc. 182.

32. On February 19, 2020, the confirmation hearing on the sixth amended plan was held. The Jacks' objection to confirmation was sustained, and confirmation was denied because of the lack of feasibility and good faith based on distributions taken from the Inherited IRAs in violation of this Court's previous orders (as discovered at the confirmation hearing).

The Court ordered the distributions be immediately paid over to Debtors' counsel to be put in trust. First Case Doc. 193.

33. An order denying confirmation was entered on February 21, 2020, and UST filed a motion to dismiss the First Case for cause under 11 U.S.C. § 1112(b) (the "Dismissal Motion") on the same day. First Case Doc. 194 & 195.

34. The Jacks supported the Dismissal Motion, and Debtors objected. A hearing on the Dismissal Motion was scheduled for May 13, 2020. First Case Doc. 194, 201 & 203.

35. The day before the scheduled hearing, Debtors paid their counsel, David Sisson ("Sisson"), $3,000.00 in attorneys' fees and $1,717.00 for the filing fee for the Second Case. Sisson accepted the $4,717.00 payment prior to dismissal of the First Case and without Court authorization. UST Exhibit 4, p. 65, question 16.

36. Just prior to the Dismissal Motion hearing, the parties agreed to dismiss the First Case for cause, and an agreed order was entered on May 13, 2020, at 11:31 a.m. First Case Doc. 218.

37. Debtors then paid Sisson an additional $47,783.63 on May 13, 2020, for attorneys' fees incurred in the First Case, again without Court authorization or allowance. UST Exhibit 4, p. 66, question 16.

38. At 4:49 p.m. on May 13, 2020 (the "Petition Date"), Debtors filed the Second Case under subchapter V of chapter 11 of the Bankruptcy Code. Second Case Doc. 1.

39. On May 14, 2020, Debtors filed the Motion seeking a continuation of the automatic stay pursuant to Section 362(c)(3). Debtors claim their Second Case was filed in good faith to

take advantage of the provisions of subchapter V of chapter 11 and believe that a plan can be confirmed. Second Case Doc. 11.

40. However, at the hearing on the Motion, Debtors testified there was no substantial change in their circumstances between dismissal of the First Case and the filing of the Second Case.

41. Stephen J. Moriarty, the standing subchapter V trustee (the "Trustee") appointed in this case (UST Exhibit 6), also testified that Debtors had no change in their financial circumstances between the dismissal of the First Case and the filing of the Second Case. The Trustee does not have high hopes for achieving a consensual plan in the Second Case.

Pertinent Statutory Provision

11 U.S.C. § 362(c)(3) provides as follows:

> c) Except as provided in subsections (d), (e), (f), and (h) of this section--
>
> (3) if a single or joint case is filed by or against a debtor who is an individual in a case under chapter 7, 11, or 13, and if a single or joint case of the debtor was pending within the preceding 1-year period but was dismissed, other than a case refiled under a chapter other than chapter 7 after dismissal under section 707(b)--
>
> (A) the stay under subsection (a) with respect to any action taken with respect to a debt or property securing such debt or with respect to any lease shall terminate with respect to the debtor on the 30th day after the filing of the later case;
>
> (B) on the motion of a party in interest for continuation of the automatic stay and upon notice and a hearing, the court may extend the stay in particular cases as to any or all creditors (subject to such conditions or limitations as the court may then impose) after notice and a hearing completed before the expiration of the 30-day period **only if the party in interest demonstrates that the filing of the later case is in good faith as to the creditors to be stayed**; and

> (C) for purposes of subparagraph (B), **a case is presumptively filed not in good faith** (but such presumption may be rebutted by clear and convincing evidence to the contrary)--
>
> (i) as to all creditors, if–
>
> . . .
>
> (III) **there has not been a substantial change in the financial or personal affairs of the debtor since the dismissal of the next most previous case under chapter 7, 11, or 13 or any other reason to conclude that the later case will be concluded**–
>
> . . .
>
> (bb) **if a case under chapter 11 or 13, with a confirmed plan that will be fully performed**; and
>
> (ii) **as to any creditor that commenced an action under subsection (d) in a previous case in which the individual was a debtor if, as of the date of dismissal of such case, that action was still pending or had been resolved by terminating, conditioning, or limiting the stay as to actions of such creditor**.

11 U.S.C.A. § 362 (emphasis added).

Legal Conclusions

Debtors ask the Court to extend the stay by finding the Second Case was filed in good faith, or the Second Case was not filed presumptively in bad faith. Debtors Reply, p. 2, paragraph 4. For the reasons set forth below, the Court denies Debtors' request. A presumption of bad faith in filing the Second Case arises, and Debtors have not successfully rebutted such presumption. Thus, the automatic stay will not be extended beyond thirty days after the Petition Date.

I. A PRESUMPTION OF BAD FAITH EXISTS AS TO ALL CREDITORS.

Where a debtor had a prior bankruptcy case pending during the last year that was dismissed prior to the filing of a second bankruptcy case, the automatic stay will be limited to thirty days after the petition date in the second case unless a party files a motion seeking an extension of the stay based on the second case being filed in good faith as to creditors to be stayed. In re Cox, 2017 WL 3447116 (Bankr. E.D. Okla. 2017). To determine whether the Second Case was filed in good faith, the Court first looks at whether a presumption of bad faith arises. If so, Debtors must rebut the presumption by clear and convincing evidence.

Under Section 362(c)(3)(C)(i)(III), a presumption of bad faith arises as to all creditors if there has not been a substantial change in the debtor's financial or personal affairs since dismissal of debtor's previous bankruptcy case or if there is any other reason to assume the new case will not conclude with a confirmed plan that can be fully performed. In re Fisher, 2018 WL 6075611, at *7 (Bankr. D. Vt. 2018) (citing 11 U.S.C. § 362(c)(3)(C)(i)); In re Baker, 2020 WL 290650, at *3 (Bankr. D. Kan. 2020); In re Washington, 443 B.R. 389, 392 (Bankr. D. S.C. 2011); In re Charles, 334 B.R. 207, 215-16 (Bankr. S.D. Tex. 2005) (citing 11 U.S.C. § 362(c)(3)(C)(i)). To avoid this onerous presumption, Debtors must demonstrate the contrary: there has been a substantial change in their financial or personal affairs or the present case will be concluded with a confirmed plan they can perform. On these issues, Debtors bear the burden of proof by a preponderance of evidence. In re Furlong, 426 B.R. 303, 309 (Bankr. C.D. Ill. 2010).

If Debtors do not meet their burden, a presumption of bad faith arises. Debtors then bear the burden of establishing good faith by clear and convincing evidence in order to obtain an extension of the automatic stay. In re Goodrich, 591 B.R. 538, 547 (Bankr. D. Vt. 2018),

amended, 2018 WL 6975201 (Bankr. D. Vt. 2018) (citing Collier on Bankruptcy ¶ 362.06(3)(b) and Fed. R. Evid. 301 ("In a civil case, unless a federal statute or these rules provide otherwise, the party against whom a presumption is directed has the burden of producing evidence to rebut the presumption.")). In contrast, if a presumption of bad faith does not arise, then Debtors "'need only show that the current case was filed in good faith under the less demanding preponderance of the evidence standard.'" Goodrich, 591 B.R. at 547 (citing Collier on Bankruptcy ¶ 362.06(3)(b); In re Pence, 469 B.R. 643, 646 (Bankr. W.D. Va. 2012); In re Thomas, 352 B.R. 751, 754 (Bankr. D. S.C. 2006)). Thus, whether a presumption of bad faith arises is crucial to the ultimate determination of the Motion.

The first way Debtors can avoid the presumption of bad faith is to demonstrate a substantial change in their financial or personal affairs since dismissal of the First Case. With only five hours and eighteen minutes lapsing between the dismissal of the First Case and the filing of the Second Case, the Court cannot fathom any change in circumstances. Debtors were unable to present evidence of a change – much less a substantial change – in their circumstances since the dismissal of the First Case.

Debtors advocate that the enactment of SBRA changed their legal rights under chapter 11 and constitutes the necessary substantial change in their financial or personal affairs. They are mistaken. The plain language of Section 362(c)(3)(C)(i)(III)[4] requires the substantial change take place after dismissal of the First Case, but SBRA was enacted and became effective during the First Case. The change in Debtors' legal rights as a result of SBRA did not take place between

[4]"It is well established that 'when the statute's language is plain, the sole function of the courts - at least where the disposition required by the text is not absurd - is to enforce it according to its terms.'" Lamie v. U.S. Trustee, 540 U.S. 526, 534 (2004).

the dismissal of the First Case and filing of the Second Case; consequently, it cannot satisfy the conditions of Section 362(c)(3)(C)(i)(III).

Debtors' remaining avenue to avoid the presumption of bad faith as to all creditors under Section 362(c)(3)(C)(i)(III) is to provide the Court with reason to conclude the second case will result in a confirmed plan Debtors can perform. Section 362(c)(3)(C)(i)(III)(bb) asks the Court to determine whether the debtor is likely to confirm a plan and perform under that plan. In re Collins, 335 B.R. 646, 652 (Bankr. S.D. Tex. 2005). Three facts cause this Court to conclude it is unlikely a plan will be confirmed in this case that can be fully performed:

1. The Court found in the First Case that the sixth amended plan was blatantly unfeasible based on the costs, penalties, and taxes associated with the liquidation of the Inherited IRAs. Debtors have not established these facts have changed between the First Case and the Second Case.
2. Debtors failed to present any evidence of the terms of a proposed plan in the Second Case from which the Court could conclude it was likely confirmable and performable.
3. Only five hours and eighteen minutes lapsed between the dismissal of the First Case and the filing of the Second Case, and Debtors admitted there had been no substantial change in their circumstances between the two cases which would suggest a plan could be confirmed as a result.

Accordingly, the Court finds that Section 362(c)(3)(C)(i)(III)(bb) remains unsatisfied and a presumption of bad faith arises as to all creditors. Thus, Debtors must prove they filed the Second Case in good faith by clear and convincing evidence.

II. A PRESUMPTION OF BAD FAITH ARISES AS TO THE JACKS.

Under Section 362(c)(3)(C)(ii), a presumption of bad faith in the Second Case filing as to the Jacks may also arise as a result of the Jacks Stay Motion and subsequent relief granted by the Court. Section 362(c)(3)(C)(ii) provides that a presumption of bad faith arises as to a specific creditor if a debtor's prior case was dismissed either while the creditor's motion for relief from the automatic stay was pending or had been resolved by terminating, conditioning, or limiting the stay as to the actions of the creditor. 11 U.S.C. § 362(c)(3)(C)(ii); In re McKinnon, 378 B.R. 405, 412 (Bankr. S.D. Ga. 2007). If the circumstances described in Section 362(c)(3)(C)(ii) are present and give rise to a presumption that the filing is in bad faith, that presumption exists only as to the specific creditor that moved for relief from the automatic stay under Section 362(d) in the prior bankruptcy case. In re Warneck, 336 B.R. 181, 185 (Bankr. S.D. N.Y. 2006); In re Acosta, 540 B.R. 308, 315 (Bankr. S.D. Tex. 2015) (citing 11 U.S.C. § 362(c)(4)(D)(ii)); In re Bronson, 2017 WL 3037449 (Bankr. S.D. N.Y. 2017); In re Benefield, 438 B.R. 709, 714 (Bankr. D. N.M. 2010); In re Baldassaro, 338 B.R. 178, 186 (Bankr. D. N.H. 2006).

The Jacks moved for relief from the automatic stay immediately after the First Case was filed, and the Jacks Stay Motion was granted in October 2018. Accordingly, the presumption of bad faith arises under Section 362(c)(3)(C)(ii) as to the Jacks, and Debtors must prove by clear and convincing evidence that the Second Case was filed in good faith as to the Jacks. McKinnon, 378 B.R. at 410-12.

III. DEBTORS DID NOT OVERCOME THE PRESUMPTIONS OF BAD FAITH BY CLEAR AND CONVINCING EVIDENCE.

The Second Case was "presumptively filed not in good faith" under Section 362(c)(3)(C); therefore, Debtors must rebut the presumption by clear and convincing evidence. In re Kurtzahn, 337 B.R. 356, 363-64 (Bankr. D. Minn. 2006); Collins, 335 B.R. at 651. The Bankruptcy Code "does not explain how the debtor might go about showing good faith in filing a bankruptcy petition." In re Galanis, 334 B.R. 685, 691 (Bankr. D. Utah 2005). Most bankruptcy courts have adopted a totality of the circumstances test to determine if good faith is established. Galanis, 334 B.R. at 692 (citing In re Montoya, 333 B.R. 449 (Bankr. D. Utah 2005)).

The totality of circumstances test includes consideration of the following factors:

1. The timing of the second petition;
2. How the debts in the second case arose;
3. Why the debtor's prior case was dismissed, including the debtor's conduct in that case;
4. How the debtor's actions affected creditors who were stayed;
5. The debtor's motive in filing the later petition and whether the Bankruptcy Code is being unfairly manipulated;
6. Whether the debtor's circumstances have changed since the prior dismissal and what is the likelihood that the debtor will be able to properly fund a plan; and
7. Whether the case trustee or creditors object to the motion to extend the stay.

1 Bankruptcy Law Manual § 7:45 (5th ed.) (citing In re Galanis, 334 B.R. 685 (Bankr. D. Utah 2005) (standard should be totality of circumstances; listing factors and following Gier v. Farmers State Bank of Lucas, Kansas (In re Gier), 986 F.2d 1326 (10th Cir. 1993)); In re Levens, 2007 WL 609844 (Bankr. W.D. Mo. 2007) (listing factors); In re Sarafoglou, 345 B.R. 19 (Bankr. D.

Mass. 2006) (listing factors); In re Montoya, 342 B.R. 312 (Bankr. S.D. Cal. 2006) (listing factors); In re Tomasini, 339 B.R. 773 (Bankr. D. Utah 2006) (the test for good faith under § 362(c)(3) is totality of circumstances); Kurtzahn, 337 B.R. 356 (listing factors)). See also In re Ochoa, 540 B.R. 322, 327-28 (Bankr. S.D. Tex. 2015); In re Wright, 533 B.R. 222, 234-45 (Bankr. S.D. Tex. 2015). These factors are not exhaustive and do not necessarily carry equal weight; the "test remains whether the debtor is attempting to thwart creditors or whether the debtor is making an honest effort to repay them to the best of debtor's ability." 1 Bankruptcy Law Manual § 7:45 (5th ed.). See also In re Goodrich, 591 B.R. 538, 548-49 (Bankr. D. Vt. 2018), amended 2018 WL 6975201 (Bankr. D. Vt. 2018) (citing In re Montoya, 333 B.R. 449, 458, 460 (Bankr. D. Utah 2005)).

Considering these factors in light of Debtors' conduct in the First Case and the Second Case leads to the undeniable conclusion that Debtors have not filed for the legitimate purpose of reorganizing their financial affairs. Instead, the Second Case is nothing but a continuation of their endeavor to thwart the Jacks' legal efforts to collect the Judgment without the cost and expense of posting an appeal bond. The Court's conclusions rest on the following analysis:

The Timing of the Second Case.

The First Case was dismissed on May 13, 2020, at 11:31 a.m. Five hours and eighteen minutes later, Debtors filed the Second Case. The First Case was dismissed by entry of an agreed order stating that "cause" existed under 11 U.S.C. § 1112(b) so as to avoid a hearing scheduled for May 13, 2020, on UST's Dismissal Motion. (The Court had invited the parties in interest to file motions to dismiss following denial of confirmation of Debtors' sixth amended plan in the First Case).

Moreover, neither Debtors nor Debtors' counsel advised counsel for UST or the Jacks that they contemplated filing the Second Case when advising UST and the Jacks that they would agree to a dismissal of the First Case for cause.[5] While there was no obligation to provide such information, the Court considers it a fact that does not pass the "smell test" given the pendency of the "for cause" Dismissal Motion, the agreement immediately preceding the hearing on the Dismissal Motion to avoid the hearing, and the twenty months the Jacks had been stayed from collecting the Judgment in the First Case – a case that resulted in no confirmed plan notwithstanding numerous attempts.

How the Debts in the Second Case Arose.

For the most part, the debts in the Second Case are the same debts that existed in the First Case, with the Jacks' Judgment debt constituting over 90% of the debt in both cases. The only new debts in the Second Case are Debtors' state income taxes ($3,053.00) and federal income taxes ($5,627.00) for 2019. Debtors inexplicably elected not to pay their 2019 tax obligations after dismissing the First Case notwithstanding having over $50,544.32 in their DIP account when the Second Case was filed. Debtors did, however, pay Sisson $47,783.63 for the attorneys' fees and costs incurred in representing Debtors in the First Case. Sisson's compensation effectively wiped out funds distributed from the Inherited IRAs during the First Case that were ordered to be held by Sisson in his trust account to protect the same from dissipation.

[5]The filing of the Second Case was clearly contemplated before the dismissal of the Second Case given the timing of Debtors' payment to Sisson of the filing fee and attorneys' fees for the Second Case on May 12, 2020. UST Exhibit 4, p. 65, question 16.

Why Debtor's First Case Was Dismissed.

The First Case was dismissed for "cause" under Section 1112(b). Although the Court did not have the opportunity to define the cause, the fact that cause existed was not in doubt following the confirmation hearing on the sixth amended plan in the First Case. The sixth amended plan was not feasible under any circumstance proposed by Debtors (whose sole purpose in filing the First Case and the Second Case is to retain the Inherited IRAs and other non-exempt property). Despite proposing six different plans in the First Case, Debtors never came remotely close to obtaining confirmation. Additionally, Debtors violated direct orders of the Court by not placing the required minimum distributions from the Inherited IRAs in their counsel's trust account. It was further discovered during the evidentiary hearing on the Motion that Debtors ignored another of heir obligations as debtors-in-possession in the First Case and paid their counsel in the State Court Action his attorney fees without first obtaining authorization from this Court. Debtors paid him notwithstanding having received and agreed to comply with the UST guidelines for chapter 11 debtors. UST Exhibit 18.

How Debtors' Actions Affected Creditors Who Were Stayed.

The Jacks have been unable to enforce the Judgment for over twenty months while the First Case pended, all without any payment or protections being afforded to them. In fact, Debtors twice ignored a direct order to segregate and not spend the required minimum distributions from the Inherited IRAs. And, upon the First Case being dismissed, Debtors quickly paid Sisson, their attorney in the First Case and the Second Case, without prior Court review and allowance of his fees, in the five hours and eighteen minutes between the dismissal of the First Case and the filing of the Second Case. In doing so, Debtors effectively diminished the value of

their assets available to satisfy the Jacks' claim by nearly $50,000.00 using funds that this Court had ordered to be held in trust.

Debtors' Motive in Filing the Second Case and Whether the Bankruptcy Code Is Being Unfairly Manipulated.

Debtors' desire was to take advantage of the new small business debtor provisions which took effect in February 2020. That course of action, in and of itself, is not objectionable. However, the Court seriously doubts that Debtors qualify as small business debtors. A "small business debtor" is defined as "a person engaged in commercial or business activities . . . that has aggregate noncontingent liquidated secured and unsecured debts as of the date of the filing of the petition or the date of the order for relief in an amount not more than $7,500,000[6] (excluding debts owed to 1 or more affiliates or insiders) not less than 50 percent of which arose from the commercial or business activities of the debtor." 11 U.S.C. § 101(51D). The key to identifying a small business debtor is, thus, whether more than 50% of the debtor's debts arose from commercial or business activities. Ventura, 615 B.R. at 13. In determining whether a debt is a business debt rather than a consumer debt, courts must look at the substance of the transaction and the purpose for incurring the debt to ascertain if it was incurred with the purpose of making profit. Ventura, 615 B.R. at 19 (citing In re Martin,, 2013 WL 5423954 (S.D. Tex. 2013) and In re Booth, 858 F.2d 1051, 1055 (5th Cir. 1988)).

The Jacks' claim, which comprises over 90% of Debtors' debt, does not arise from commercial or business activities of Debtors nor was it incurred for the purpose of making a

[6]The debt limitation in the definition of "small business debtor" was increased from $2,725,625.00 to $7,500,000.00 as part of the Coronavirus Aid, Relief, and Economic Security Act for a one year period

profit. Rather, based on evidence previously presented to the Court in the First Case, the judgment arises from the Jacks' completion of the Second Floor of Debtors' residence for the Jacks to live in for the remainder of their lives. The debt here arises solely from an attempt to provide care and security for aging parents, not from a business activity motivated by profit.[7]

Support for this conclusion can be found in Debtors' Schedules and Statement of Financial Affairs in the First Case which reflect no leases, business income, or rental business. Quite simply, Debtors are improperly labeling themselves as small business debtors in an effort to qualify for the more favorable provisions of subchapter V of chapter 11, specifically the ability to avoid the limitations of the absolute priority rule in order to retain the Inherited IRAs and their other non-exempt assets while continuing to hold the Jacks at bay.

In the First Case, Debtors were repeatedly told to file a plan that complied with the absolute priority rule and repeatedly failed to do so. When they finally filed a plan that appeared to comply with the absolute priority rule, the financial information and analysis contained in the fifth amended disclosure statement was revealed at the confirmation hearing to not be based in reality. Debtors' own financial witness clearly established the lack of feasibility to fund a plan paying the Jacks in full. Moreover, once the Court denied confirmation of the sixth amended plan, Debtors did not file any further plans from February 19, 2020, to the dismissal on May 13, 2020, during the entirety of which the Jacks were "stayed" from collecting their Judgment.

[7] If Debtors' motive was not to support their parents, then the only conceivable alternative motive is fraud as found by the jury in the State Court Action.

Debtors have masterfully manipulated the Bankruptcy Code for twenty months to serve their purpose of staying the Jacks' collection activities without the necessity of posting an appeal bond or being required to pay anything on the Jacks' Judgment debt.

Whether Debtors' Circumstances Have Changed Since the Prior Dismissal and What Is the Likelihood Debtors Will Be Able to Properly Fund a Plan.

Only five hours and eighteen minutes lapsed between the dismissal of the First Case and the filing of the Second Case. Debtors failed to identify any changes in their circumstances during this short time. Certainly, the enactment of SBRA in February 2020 potentially changed their legal footing as chapter 11 debtors assuming they qualified as small business debtors. However, SBRA went into effect on February 19, 2020, three months prior to the dismissal of the First Case and certainly not in the interim period between dismissal of the First Case and the commencement of the Second Case. Further, Debtors utterly failed to present any evidence at the hearing on the Motion that indicated that they would be able to successfully fund a plan in the Second Case.

Whether the Trustee or Creditors Object to the Motion to Extend the Stay.

Both UST and the Jacks, who hold over 90% of the debt, vehemently object to the Motion and to any extension of the automatic stay.

These factors paint a picture of Debtors desperately and greedily holding on to non-exempt assets in the First Case under the guise of reorganizing at the sole expense of the Jacks. Debtors now seek to do the same thing all over again in the Second Case. Debtors fell far short of establishing their good faith by a preponderance of the evidence, much less the higher and more stringent clear and convincing evidence standard applicable herein. The Second Case was

filed in bad faith, and the automatic stay thus terminated thirty days after the Petition Date and will not be extended.

IV. NO CAUSE EXISTS TO EXTEND THE STAY.

Even if Debtors had rebutted the presumption of bad faith by clear and convincing evidence, which they did not, rebutting the presumption under Section 362(c)(3)(C) or establishing good faith under Section 362(C)(3)(B) is only the first step in a two step process. Baldassaro, 338 B.R. at 186-187 (citing In re Charles, 334 B.R. 207, 223 (Bankr.S.D.Tex.2005)) (explaining that a debtor's good faith may authorize an extension of the stay, but the statute does not mandate that the bankruptcy court extend the stay). Once good faith is established, the movant must next establish, by a preponderance of the evidence, why the Court should exercise its discretion to extend the stay. Baldassaro, 338 B.R. at 187.

Here, Debtors did not establish any reason for this Court to exercise its discretion to extend the stay – Debtors presented no evidence of the contents of a ***confirmable*** plan, Debtors appear to not qualify for subchapter V of chapter 11, and the Jacks have been stayed for more than twenty months without the protection of an appeal bond. Thus, even if Debtors established their good faith, which they did not, the Court finds no basis in fact or law to exercise its discretion to extend the automatic stay in this case beyond thirty days after the Petition Date.

CONCLUSION

For the reasons set forth above, the Motion is DENIED, and the automatic stay is not extended beyond thirty days after the Petition Date.

IT IS SO ORDERED.

# # #

ORDERED in the Southern District of Florida on August 7, 2020.

Scott M. Grossman, Judge
United States Bankruptcy Court

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA
www.flsb.uscourts.gov

In re: Chapter 11

Seven Stars on the Hudson Corp., Case No. 19-17544-SMG

Debtor.
_____/

ORDER DISMISSING SUBCHAPTER V CASE

New Subchapter V of Chapter 11 of the Bankruptcy Code – which establishes an expedited process for small business debtors to reorganize quickly, inexpensively, and efficiently – requires the debtor to file a plan within 90 days of the order for relief.[1] This deadline may be extended "if the need for the extension is attributable to circumstances for which the debtor should not be justly held accountable."[2] But what

[1] 11 U.S.C. § 1189(b).

[2] *Id.*

happens when a debtor first elects to proceed under Subchapter V after this deadline has already passed? That is the difficult question the Court must address in this case.

I. BACKGROUND.

Seven Stars on the Hudson Corp. ("Seven Stars") operates a trampoline park located in a larger indoor entertainment facility called Xtreme Action Park, in Broward County, Florida. Seven Stars leases its premises at Xtreme Action Park from MDG Powerline Holdings, LLC ("MDG"). An alleged affiliate of MDG – XBK Management, LLC d/b/a Xtreme Action Park ("Xtreme") – is a co-tenant of the leased premises.[3]

A. Seven Stars Files a Chapter 11 Petition as a "Small Business Debtor."

Seven Stars filed this Chapter 11 case on June 5, 2019, as a "small business debtor," as defined in the version of 11 U.S.C. § 101(51D) then in effect.[4] Shortly after filing the case, Seven Stars commenced an adversary proceeding against its co-tenant, Xtreme and its landlord, MDG.[5] Throughout the Chapter 11 case – which has been pending now for over one year – Seven Stars had to address disputes with its now-former franchisor, Rockin' Jump, LLC ("Rockin' Jump"); with its secured creditor, Wells Fargo Bank, N.A. ("Wells Fargo"); and with MDG and Xtreme.[6] Seven

[3] Although Seven Stars is a party to a lease agreement with MDG, the record in this case does not reveal any contractual relationship between Xtreme and Seven Stars. *See* ECF No. 28.

[4] ECF No. 1.

[5] *Seven Stars on the Hudson Corp. v. MDG Powerline Holdings, LLC and XBK Management, LLC*, Adv. No. 19-01230-SMG.

[6] ECF No. 186 at 1-2. Aside from Rockin' Jump, Wells Fargo, and MDG, Seven Stars has relatively little other debt, with only a few scheduled or filed general unsecured claims.

Stars has since concluded its relationship with Rockin' Jump under a settlement agreement approved by the Court.[7] With respect to Wells Fargo, Seven Stars has agreed on terms for consensual use of cash collateral,[8] and there are not any currently pending disputes of record between Seven Stars and Wells Fargo.

With respect to MDG and Xtreme, however, there remain unresolved disputes. One dispute that was resolved, however, was whether Seven Stars could assume its lease with MDG. Seven Stars timely moved to assume its lease on October 3, 2019.[9] The hearing to consider the assumption motion was consensually continued several times – apparently in deference to resolution first of Seven Stars' dispute with Rockin' Jump under its franchise agreement.[10] The last requested continuance of the lease assumption hearing was on March 3, 2020.[11] The Court granted that request the same day, and rescheduled the assumption hearing for April 29, 2020.[12]

B. The Worldwide COVID-19 Pandemic Hits.

Shortly after granting the continuance, however, everything changed. On March 13, 2020, the President declared a national emergency due to the COVID-19 pandemic.[13] And on March 22, 2020, Broward County, Florida directed the closure of

[7] ECF Nos. 152, 161.

[8] ECF No. 118.

[9] ECF No. 80.

[10] *See, e.g.,* ECF No. 140.

[11] *Id.*

[12] ECF No. 143.

[13] *See, e.g., In re Pier 1 Imports, Inc.*, 615 B.R. 196, 198, n.2 (Bankr. E.D. Va. 2020*); In re Gateway Radiology Consultants, P.A.*, No. 8:19-BK-04971-MGW, 2020 WL 3048197, at *2 n.2 (Bankr. M.D. Fla. June 8, 2020).

"[a]ll nonessential retail and commercial business locations" due to the pandemic.[14] Businesses in Broward County – including Seven Stars' trampoline park and Xtreme Action Park – remained closed well into June 2020.[15]

Against the backdrop of the COVID-19 pandemic, Seven Stars and MDG continued to litigate whether Seven Stars could assume its lease with MDG. MDG argued that Seven Stars could not assume the lease because it terminated its franchise agreement with Rockin' Jump, thereby violating the use clause of the lease, and because Seven Stars was delinquent on post-petition rent that it had not paid for April and May when it was prohibited by law from operating. After extensive briefing and argument, on June 1, 2020, the Court granted Seven Stars' motion to assume, ruling that termination of the Rockin' Jump franchise did not prohibit assumption, and that failure to *timely* pay April and May rent, under the terms of the lease and in light of the COVID-19 pandemic, likewise did not prohibit assumption.[16] Adopting the rationale of *Pier 1 Imports*,[17] and in accordance with the requirements of Bankruptcy Code section 365, the Court did, however, require that "[a]ny accrued but unpaid post-petition rent payments shall be paid to MDG no later than the effective date of any confirmed Chapter 11 [plan] as a Chapter 11 administrative expense

[14] Broward County Administrator's Emergency Order 20-01 (Mar. 22, 2020).

[15] *See* Broward County Administrator's Emergency Order 20-15, § 1(B) (June 5, 2020) (permitting reopening of indoor amusement facilities subject to a 50% maximum capacity, effective as of June 15, 2020).

[16] ECF No. 172.

[17] 615 B.R. at 202.

claim."[18] The result of the Court's ruling on the assumption motion is that Seven Stars must pay approximately $130,000 in unpaid post-petition rent to MDG on the effective date of a Chapter 11 plan.

C. Seven Stars Files an Amended Chapter 11 Petition Electing to Proceed Under Newly-Enacted Subchapter V of Chapter 11.

Due to an apparent inability to make that payment, on June 19, 2020 – over a year after its petition date, four months after the February 19, 2020 effective date of the Small Business Reorganization Act of 2019 (the "SBRA"),[19] and about three weeks after the Court ruled that it must pay MDG $130,000 on the effective date of a Chapter 11 plan – Seven Stars filed an *Amended Petition for Non-Individuals Filing for Bankruptcy*,[20] in which it elected to proceed under new Subchapter V of Chapter 11 of the Bankruptcy Code. Subchapter V, however, requires a debtor to file a plan not later than 90 days after the order for relief,[21] and requires the Court to hold a status conference not later than 60 days after the order for relief.[22] Here, the order for relief was entered on June 5, 2019.[23] Thus, upon amending its petition to elect to proceed under Subchapter V more than a year into its case, Seven Stars immediately put itself in default of the requirements of both Sections 1188(a) and 1189(b).

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[18] ECF No. 172.

[19] Small Business Reorganization Act of 2019, Pub. L. No. 116-54, Aug. 23, 2019, 133 Stat. 1079, 1087 ("This Act and the amendments made by this Act shall take effect 180 days after the date of enactment of this Act.").

[20] ECF No. 178.

[21] 11 U.S.C. § 1189(b).

[22] 11 U.S.C. § 1188(a).

[23] The commencement of a voluntary case constitutes an order for relief. 11 U.S.C. § 301(b).

Further, Bankruptcy Code section 1112(b)(4)(J) provides that a debtor's failure to file a disclosure statement or to file or confirm a plan within the time fixed by the Bankruptcy Code constitutes cause for dismissal of this case.[24] Likewise, to confirm a Chapter 11 plan – even one under new Subchapter V – both the plan and the plan proponent must comply with the applicable provisions of the Bankruptcy Code.[25] Accordingly, because cause facially existed for dismissal of this case under Section 1112(b)(4)(J), on June 24, 2020, the Court issued an *Order to Show Cause Why Case Should Not Be Dismissed*[26] (the "Show Cause Order").

Both Seven Stars[27] and newly-appointed Subchapter V trustee, Linda Leali,[28] filed briefs opposing dismissal of the case, in which they argued that the Court had authority to allow Seven Stars to proceed under new Subchapter V, notwithstanding expiration of the statutory deadlines. MDG filed a brief in support of dismissal, in which it argued that Seven Stars could not use Subchapter V to subvert the Court's ruling on assumption of its lease,[29] and that extension of the expired statutory deadlines was not warranted. [30] MDG also argued that it had vested rights in this

[24] 11 U.S.C. § 1112(b)(4)(J).

[25] 11 U.S.C. §§ 1129(a)(1), (2); 1191(a).

[26] ECF No. 179.

[27] ECF No. 186. Due to rapidly-developing case law with respect to these new statutory provisions, Seven Stars also filed two supplements alerting the Court to new additional authority supporting its position. *See* ECF Nos. 187, 190.

[28] ECF No. 185.

[29] ECF No. 189.

[30] *Id.* at 3-4. While not specifically accusing Seven Stars of lacking good faith, MDG suggests that Seven Stars' election to proceed under Subchapter V is an improper request to reconsider or undo this Court's earlier ruling on assumption. Because Subchapter V is a new statute

case by virtue of this Court's earlier ruling on assumption of its lease, and that retroactive application of the Subchapter V deadlines would impermissibly alter those rights.[31] The Office of the United States Trustee did not file any brief supporting or opposing dismissal, and took no position on dismissal at the hearing on the Show Cause Order.

II. ANALYSIS.

A. Congress Creates New Subchapter V of Chapter 11 to Streamline the Reorganization Process for Small Businesses.

For a small business needing to reorganize its financial affairs, a Chapter 11 bankruptcy case can be prohibitively expensive. Recognizing that small business Chapter 11 cases "continue to encounter difficulty in successfully reorganizing," Congress enacting the SBRA to "streamline the bankruptcy process by which small businesses debtors reorganize and rehabilitate their financial affairs."[32] The SBRA created a new Subchapter V of Chapter 11 of the Bankruptcy Code that permits qualifying small business debtors "'to file bankruptcy in a timely, cost-effective manner, and hopefully allows them to remain in business' which 'not only benefits the owners, but employees, suppliers, customers, and others who rely on that business.'"[33]

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with rapidly-developing caselaw – much of which facially supports Seven Stars' position – the Court does not find Seven Stars' attempt to proceed under Subchapter V as lacking good faith.

[31] *Id.* at 6-7.

[32] H.R. Rep. No. 116-171, at 1 (2019), *available at* https://www.congress.gov/congressional-report/116th-congress/house-report/171/1.

[33] *Id.* (quoting statement of Rep. Ben Cline (R-VA), the bill's sponsor, at a June 25, 2019 hearing held by the Subcommittee on Antitrust, Commercial, and Administrative Law).

Subchapter V by its very nature is intended to be an expedited process. It provides qualifying debtors with some powerful and cost-saving restructuring tools not otherwise available to Chapter 11 debtors. Among these benefits are:

> (1) elimination of the absolute priority rule, which allows equity holders to retain their ownership interests without paying all creditors in full;[34]
>
> (2) no mandatory appointment of a creditors committee;[35]
>
> (3) no mandatory requirement to file a disclosure statement;[36]
>
> (4) appointment of a Subchapter V trustee to assist in developing a consensual plan, while leaving the debtor in possession of its assets and in control of its business;[37]
>
> (5) the exclusive right (which cannot be terminated) to file a plan;[38]
>
> (6) the ability to modify a claim secured only by a security interest in the debtor's principal residence, if new value received in connection with granting the security interest was used primarily in connection with the debtor's business and not primarily to acquire the property;[39]
>
> (7) the ability to confirm a plan even if all classes reject the plan;[40]
>
> (8) the ability to pay administrative expenses over time under a plan;[41]
>
> (9) modification of the disinterestedness requirements of Section 327(a) for a professional that holds a prepetition claim of less than $10,000;[42] and

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[34] 11 U.S.C. §§ 1181(a), 1191(b).

[35] 11 U.S.C. § 1181(b).

[36] *Id.*

[37] 11 U.S.C. § 1183(b)(7).

[38] 11 U.S.C. § 1189(a).

[39] 11 U.S.C. § 1190(3).

[40] 11 U.S.C. § 1191(b).

[41] 11 U.S.C. § 1191(e).

[42] 11 U.S.C. § 1195.

(10) elimination of the requirement to pay quarterly U.S. Trustee fees;[43]

These extraordinary powers and cost-saving provisions granted to small business debtors are certainly laudable and are both helpful and necessary in making Chapter 11 more affordable for small businesses. But "[t]he overall purpose and function of the Bankruptcy Code is to strike a balance between creditor protection and debtor relief."[44] And to balance the special new powers available to small business debtors, Congress granted creditors a very important protection: the requirement that a Subchapter V case proceed expeditiously. In furtherance of that creditor protection, Subchapter V requires the court to conduct a status conference within 60 days of the order for relief;[45] requires the debtor to file a status report 14 days before that status conference;[46] and requires the debtor to file a plan within 90 days of the order for relief.[47] As with many other deadlines in the Bankruptcy Code, these deadlines can be extended. But, for a court to grant an extension, the court must find that the "need for the extension is attributable to circumstances for which the debtor should not justly be held accountable."[48]

B. The SBRA is Silent About Its Application to Pending Cases.

The SBRA – which was enacted on August 23, 2019 – provides that "[t]his Act and the amendments made by this Act shall take effect 180 days after the date of

[43] 28 U.S.C. § 1930(a)(6)(A).

[44] *In re Travel 2000, Inc.*, 264 B.R. 444, 448 (Bankr. W.D. Mich. 2001).

[45] 11 U.S.C. § 1188(a).

[46] 11 U.S.C. § 1188(c).

[47] 11 U.S.C. § 1189(b).

[48] *Id.*; *see also* 11 U.S.C. § 1188(b).

enactment of this Act,"[49] but is silent as to whether it applies to pending cases or only to cases commenced after its February 19, 2020 effective date. Thus, almost immediately after taking effect,[50] courts across the country began wrestling with this issue,[51] along with related issues such as whether application of the SBRA to existing cases amounts to granting retroactive effect to the statute;[52] whether other parties' vested property rights are implicated by retroactive effect of the statute;[53] and

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[49] *See* note 19, *supra*.

[50] The onset of the global COVID-19 pandemic – which started to spread widely throughout the United States about a month later – then created even more urgency to address how small businesses might use these new powerful tools available under Subchapter V to reorganize quickly, inexpensively, and efficiently. Indeed, shortly after the onset of the pandemic, Congress temporarily raised the Subchapter V debt limit from $2,725,625 to $7,500,000. Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, March 27, 2020, 134 Stat 281, 310-311 (the "CARES Act").

[51] *See, e.g., In re Ventura*, 615 B.R. 1 (Bankr. E.D.N.Y. 2020) (holding a debtor may amend her petition in a pending case to designate herself as a small business debtor and proceed under Subchapter V); *In re Progressive Solutions, Inc.*, 615 B.R. 894, 900-01 (Bankr. S.D. Cal. 2020) (finding no legal reason why a debtor with a pending Chapter 11 case could not amend its petition to proceed under new Subchapter V); *In re Twin Pines, LLC*, Case No. 19-10295-j11, 2020 Bankr. LEXIS 1217, *6 (Bankr. D. N.M. Apr. 30, 2020) (permitting debtor to elect Subchapter V status 387 days after petition date); *In re Moore Properties of Person County, LLC*, Case No. 20-80081, 2020 WL 995544, at *7 n.18 (Bankr. M.D. N.C. Feb. 28, 2020) (overruling objection to debtor's small business debtor designation made nine days after petition date, but observing that if "a debtor amends its election at a point in the case in which it creates cause to dismiss or convert the case under § 1112(b)(4)(J) or otherwise, a debtor's case will be in peril.").

[52] *See, e.g., Ventura*, 615 B.R. at 14-18; *Progressive Solutions*, 615 B.R. at 898-99; *In re Body Transit, Inc.*, 613 B.R. 400, 406-08 (Bankr. E.D. Pa. 2020); *In re Double H Transportation LLC*, 614 B.R. 553, 554 (Bankr. W.D. Tex. 2020); *Moore Properties*, 2020 WL 995544, at *2-5.

[53] *See, e.g., Ventura*, 615 B.R. at 15-18; *Progressive Solutions*, 615 B.R. at 899-900; *Body Transit*, 613 B.R. at 405-408; *Moore Properties*, 2020 WL 995544, at *2-5. While issues of retroactive application to pending cases and related due process implications are certainly important, they will, over time, be less important to SBRA jurisprudence as we get further away from the SBRA's effective date. But the issue addressed by the Court here – the effect of amending a petition to elect Subchapter V status after expiration of the Section 1188 and 1189 statutory deadlines – could arise in the future regardless of whether a case was filed before or after the SBRA effective date.

whether (and under what circumstances) a court may extend Subchapter V's statutory deadlines?[54] While these are all difficult questions of first impression with respect to this new statute, the Court finds the answer to the question before it in this case in the plain text of the Bankruptcy Code and Bankruptcy Rules.

C. Rule 1009 and Interim Rule 1020 Permit a Debtor to Elect Application of Subchapter V to an Already-Pending Case.

Interim Federal Rule of Bankruptcy Procedure 1020[55] provides that a debtor must "state in the petition whether the debtor is a small business debtor or a debtor as defined in § 1182(1) of the [Bankruptcy] Code[56] and, if the latter, whether the debtor elects to have Subchapter V of Chapter 11 apply."[57] Thus, under the Interim Rule, the means by which a debtor designates itself as a small business debtor and,

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[54] *See, e.g., Ventura*, 615 B.R. at 13-14; *Twin Pines*, 2020 Bankr. LEXIS 1217, *6; *In re Trepetin*, Case No. 20-11718-MMH, 2020 WL 3833015, at *3-7 (Bankr. D. Md. July 7, 2020).

[55] Interim Rule 1020 was initially adopted in this District by Administrative Order 2020-02, dated February 18, 2020. After enactment of the CARES Act – which necessitated amendments to this interim rule – this Court adopted the current amended version of Interim Rule 1020 by Administrative Order 2020-08, dated April 21, 2020.

[56] Section 1182(1) was added to the Bankruptcy Code as part of the CARES Act, and provided a new definition of "debtor" (which temporarily raised the debt limit to $7,500,000) for purposes of determining eligibility to proceed under Subchapter V. *See* note 50, *supra*.

[57] Interim Fed. R. Bankr. P. 1020(a). Interim Rule 1020(a) then goes on to provide that "[t]he status of the case as a small business case or a case under Subchapter V of chapter 11 shall be in accordance with the debtor's statement under this subdivision, unless and until the court enters an order finding that the debtor's statement is incorrect." Interim Rule 1020(b) provides that "[t]he United States trustee or a party in interest may file an objection to the debtor's statement under subdivision (a) no later than 30 days after the conclusion of the meeting of creditors held under § 341(a) of the Code, or within 30 days after any amendment to the statement, whichever is later." Here, upon Seven Stars amending its petition to elect to proceed under Subchapter V, a new Section 341 meeting was scheduled for July 23, 2020. (ECF No. 183.) Thus, although the issue of whether Seven Stars' case should be dismissed is now properly before the Court, technically the United States Trustee or any party in interest would have had until August 24, 2020 to object to Seven Stars' statement in its amended petition that it elects to proceed under Subchapter V.

if so, whether it elects to proceed under Subchapter V, is by so stating in its petition.[58] Here, when Seven Stars filed its petition on June 5, 2019, it did designate itself as a small business debtor. But of course, Subchapter V had not yet been enacted, and so Seven Stars could not have elected to proceed under Subchapter V at that time. Federal Rule of Bankruptcy Procedure 1009, however, provides that "[a] voluntary petition, list, schedule, or statement may be amended by the debtor as a matter of course at any time before the case is closed."[59] Thus, nothing in the text of Rule 1009 or Interim Rule 1020 prevents a small business debtor from filing an amended petition to elect to have Subchapter V apply to its case, even if it had not previously elected to proceed under Subchapter V (or even if it filed its case before Subchapter V became effective).[60]

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[58] Because a debtor elects to proceed under Subchapter V by amending its petition – as opposed to converting its case from one chapter of the Bankruptcy Code to another chapter – such an election does not change the date of the order for relief. *See generally* 11 U.S.C. § 348; *see also Trepetin*, 2020 WL 3833015, at *3.

[59] Fed. R. Bankr. P. 1009.

[60] *See Ventura*, 615 B.R. at 13-15; *Progressive Solutions*, 615 B.R. at 900; *Body Transit*, 613 B.R. at 405-407; *Moore Properties*, 2020 WL 995544, at *7; *Twin Pines*, 2020 Bankr. LEXIS 1217, at *6; *Trepetin*, 2020 WL 3833015, at *2 (permitting debtor who originally filed a Chapter 7 case to convert to a Subchapter V Chapter 11 case); *In re Blanchard*, Case No. 12440, 2020 WL 4032411, at *3 (Bankr. E.D. La. July 16, 2020) (overruling U.S. Trustee's objection to debtors amending their petition to elect Subchapter V status after U.S. Trustee had filed a motion to convert their case to Chapter 7); *In re Bonert*, Case No. 2:19-bk-20836-ER, 2020 WL 3635869, at *2-3 (Bankr. C.D. Cal. June 3, 2020) (overruling objection of creditors committee to debtors amending their petition to elect to proceed under Subchapter V); *In re Bello*, 613 B.R. at 895-96 (Bankr. E.D. Mich. 2020) (permitting debtor who had originally filed a Chapter 13 case, then converted to Chapter 11, to subsequently amend his petition to elect to proceed under Subchapter V).

It may also very well be that MDG's vested rights in this case (in the form of the Court's earlier ruling on the terms on which Seven Stars could assume its lease) would render application of Subchapter V as offensive to "elementary considerations of fairness" here. *Moore Properties*, 2020 WL 995544, at *5 (quoting *Landgraf v. USI Film Products*, 511

D. What Consequences Flow from the Subchapter V Election?

Having determined that nothing in the Federal Rules of Bankruptcy Procedure prohibited Seven Stars from amending its petition, the Court must now determine what consequences flow from that decision. As noted above, Section 1188(a) requires the Court to hold a status conference within 60 days after the order for relief, and Section 1189(b) requires the debtor to file a plan within 90 days after the order for relief. But, because Seven Stars elected to proceed under Subchapter V more than a year after its order for relief, Seven Stars immediately put itself in default of Sections 1188(a) and 1189(b) upon making that election.[61]

Seven Stars nevertheless argues – citing several recently-reported decisions – that the Court "has the necessary lawful power and authority to allow this case to proceed under new subchapter V."[62] Although Seven Stars did not affirmatively seek to extend the lapsed Section 1188(b) and 1189(b) deadlines, in opposing dismissal it relies on caselaw analyzing whether debtors can elect Subchapter V status after expiration of these deadlines (whether or not an extension was specifically sought).[63] To extend these deadlines, the Court must find that "the need for the extension is

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U.S. 244, 265 (1994)). But, because – as discussed further below – the Court resolves this matter based on a plain reading of the statutes and rules, the Court need not address the questions of retroactivity and vested rights examined in *Ventura*, 615 B.R. at 15-18, *Progressive Solutions*, 615 B.R. at 899-900, and *Moore Properties*, 2020 WL 995544, at *2-5, which necessarily require application of more amorphous concepts of "elementary considerations of fairness."

[61] 11 U.S.C. §§ 1188(b), 1189(b).

[62] ECF No. 186 at 1.

[63] The newly-appointed Subchapter V trustee similarly argued that the Court can extend the Section 1188(b) and 1189(b) deadlines.

attributable to circumstances for which the debtor should not justly be held accountable."[64] Thus, to determine whether this case should be dismissed, the Court must determine whether Seven Stars should be granted an extension of the Section 1189(b) plan filing deadline (as well as the Section 1188 status conference deadline). If an extension is not warranted, then – as set forth in the Show Cause Order – cause exists for dismissal under Section 1112(b)(4)(J) because the debtor has failed to file a plan within the time fixed by the Bankruptcy Code. As further noted in the Show Cause Order, failure to meet these statutory deadlines would also render Seven Stars not in compliance with Sections 1129(a)(1) (a plan must comply with the applicable provisions of the Bankruptcy Code) and 1129(a)(2) (the plan proponent – here the debtor – must comply with the applicable provisions of the Bankruptcy Code),[65] and therefore unable to confirm a Chapter 11 plan.

E. Is the Need for an Extension Attributable to Circumstances for Which the Debtor Should Not Justly Be Held Accountable?

While the phrase "if the need for an extension is attributable to circumstances for which the debtor should not justly be held accountable" is new to Chapter 11, that language is used elsewhere in the Bankruptcy Code. Specifically, Section 1221 of the Bankruptcy Code – which is found in Chapter 12 (applicable to cases for family farmers or family fisherman with regular annual income)[66] – uses the same language. Like Section 1189(b), Section 1221 requires a debtor to file a plan within 90 days after

[64] 11 U.S.C. § 1189(b); *see also* 11 U.S.C. § 1188(b), which contains virtually identical text, except it uses the word "an" before "extension" instead of "the."

[65] 11 U.S.C. §§ 1129(a)(1), (2); 1191(a).

[66] 11 U.S.C. § 109(f).

the order for relief, but provides that the court may extend this deadline "if the need for an extension is attributable to circumstances for which the debtor should not justly be held accountable."[67]

Based on a plain reading of this phrase, it is a clearly higher standard than the mere "for cause" standard set forth in both Federal Rule of Bankruptcy Procedure 9006(b) (governing extensions of time generally) and Bankruptcy Code section 1121(d)(1) (governing extensions of a non-Subchapter V debtor's exclusive period to file a Chapter 11 plan).[68] Courts interpreting this language as used in Section 1221 have held that "it effectively requires the bankruptcy court, before granting an extension request, to find that the delay necessitating the extension was caused by 'circumstances beyond the debtor's control.'"[69] COLLIER ON BANKRUPTCY – a leading bankruptcy law treatise – explains the rationale for this requirement as follows:

> [T]he 90-day limitation was probably included in chapter 12 for the benefit of creditors rather than for the benefit of the debtor. Because chapter 12 lacks the safeguards for creditors that are provided in chapter 11, the 90–day limitation . . . is [one of] the primary protection[s] for creditors against a debtor's languishing in chapter 12 without confirming a plan. Thus, it is appropriate that the debtor should be required to meet a stringent burden if the debtor seeks an extension of the 90-day period.[70]

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[67] 11 U.S.C. § 1221.

[68] In a Subchapter V case, *only* the debtor may file a plan. 11 U.S.C. § 1189(a). In a traditional Chapter 11 case, the debtor initially has the exclusive right to file a plan, but that exclusive right may expire or be terminated; it may also be extended "for cause." *See* 11 U.S.C. § 1121.

[69] *Davis v. U.S. Bank, N.A. (In re Davis)*, BAP No. CC–16–1390–KuLTa, 2017 WL 3298414, at *3 (BAP 9th Cir. Aug. 2, 2017 (unpublished) (quoting *First Sec. Bank & Trust Co. v. Vegt,* 511 B.R. 567, 585 (N.D. Iowa 2014)).

[70] 8 COLLIER ON BANKRUPTCY ¶ 1221.01[2] (16th ed. 2020).

In *Trepetin*,[71] a recently-reported case addressing issues similar to those presented here, the court analyzed – by reference to Section 1221 – whether a Chapter 7 debtor could convert its case to Subchapter V of Chapter 11 and extend the Section 1188(b) and 1189(b) deadlines.[72] The court also undertook a textual analysis of the words "justly" and "accountable," by reference to their dictionary definitions, determining that "justly" means "in accordance with justice, law or fairness," and that "accountable" is best defined as "responsible" or "liable to be called to account or to answer for responsibilities and conduct."[73] From these definitions, the court then concluded that the appropriate inquiry is "whether the Debtor is fairly responsible for his inability to timely submit his status report, attend the status conference, or file a plan in this Subchapter V case."[74]

This Court submits that this is a slightly different question than the inquiry posed by the statute. The statute asks if the need for an extension is due to *circumstances* beyond the debtor's control. *Trepetin*, on the other hand, asks whether *the debtor* was responsible for his inability to meet these deadlines. From that question, *Trepetin* then concludes that the debtor was not responsible for his inability to meet these deadlines, because his previously-filed Chapter 7 case and the

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[71] 2020 WL 3833015.

[72] *Id.* at *5-6.

[73] *Id.* at *6 (quoting *Justly*, OXFORD ENGLISH DICTIONARY ONLINE, oed.com/view/Entry/102238?redirectedFrom=justly#eid (last visited July 7, 2020); *Accountable*, OXFORD ENGLISH DICTIONARY ONLINE, oed.com/view/Entry/1198?redirectedFrom=accountable#eid (last visited July 7, 2020)).

[74] *Id.*

conversion process and its requirements necessarily left him beyond the new deadlines.[75] This Court disagrees with that conclusion as well. The circumstances in *Trepetin* were entirely within the debtor's control: he filed for Chapter 7 and he elected to convert to Chapter 11 and proceed under Subchapter V. No external factors – beyond his control – contributed to his inability to comply with these deadlines. That new Subchapter V became available after he filed his Chapter 7 case is not – in this Court's view – such a circumstance beyond the debtor's control that would justify an extension.

For similar reasons, this Court also disagrees with *Ventura*[76] and *Twin Pines*.[77] In both cases, courts overruled the U.S. Trustee's objections to debtors proceeding under Subchapter V after expiration of these statutory deadlines, and held that the debtors were not required to comply with deadlines that expired before they could have elected to proceed under Subchapter V.[78] Although the U.S. Trustee apparently couched its concerns in *Ventura* in terms of "practicality and scheduling issues,"[79] this Court views the U.S. Trustee's arguments in *Ventura* (and *Twin Pines*) as substantive, textual arguments. Congress purposefully set a short deadline for a debtor to file a plan under Subchapter V, and set a very high standard for an extension of that deadline. To excuse a debtor's compliance with these deadlines

[75] *Id.*

[76] 615 B.R. 1.

[77] 2020 Bankr. LEXIS 1217.

[78] *Ventura*, 615 B.R. at 15; *Twin Pines*, 2020 Bankr. LEXIS 1217 at *7, 11.

[79] *Ventura*, 615 B.R. at 15.

because they did not previously exist is to effectively pick and choose which provisions of Subchapter V should apply to a debtor's case. That could not be what Congress intended; if a debtor elects to proceed under Subchapter V, it must comply with *all* its provisions, including the statutory timelines.

That being said, Congress certainly did contemplate a Subchapter V debtor needing additional time to file a plan (and to conduct the status conference), but set a high standard for a court to grant that request: "circumstances for which the debtor should not justly be held accountable." Where a debtor elects into Subchapter V after expiration of the statutory deadlines, however, the debtor should justly be held accountable for those circumstances, because the debtor created them. It was the debtor that made the decision to elect into Subchapter V after expiration of these deadlines. No circumstances beyond the debtor's control caused the debtor to make that decision.

A comparison of *Trepetin*, *Ventura*, and *Twin Pines*, on the one hand, with a timely hypothetical, on the other hand, illustrates this point. Suppose a debtor filed a Chapter 11 case under Subchapter V on February 20, 2020 – the day after its effective date and about a month before the COVID-19 pandemic began severely affecting commerce throughout the United States. Consistent with the purpose of Subchapter V – "to streamline the process by which small business debtors reorganize and rehabilitate their financial affairs"[80] – the debtor is prepared to meet the

[80] *See* note 32, *supra*.

statutory deadlines and immediately begins working with the Subchapter V trustee[81] to prepare financial projections and negotiate plan terms with creditors. But then, about a month into its case, local government authorities order the debtor's business to be shut down for a period of time to stem the spread of the virus. The effect of this governmental order causes the debtor to have to completely rework its financial projections and renegotiate with its creditors, rendering it unable to meet the Subchapter V statutory deadlines. Such a scenario – in this Court's view – *would* establish that the need for an extension is attributable to circumstances for which the debtor should not justly be held accountable.

And while the debtor's case here – and its difficulties in seeking to reorganize – were clearly impacted by COVID-19, this case is distinguishable from the hypothetical scenario outlined above. Here, while certainly the debtor is not responsible for COVID-19, and its present difficulties *in seeking to reorganize* may be fairly attributable to circumstances for which it should not justly be held accountable, its inability *to meet the statutory deadlines* in this case is *not* due to COVID-19 or the fact that Subchapter V first became available after Seven Stars commenced this case. Seven Stars' inability to meet the statutory deadlines is due solely to Seven Stars' election to amend its petition to proceed under Subchapter V after expiration of those

[81] A Subchapter V trustee is specifically charged with the duty to "facilitate the development of a consensual plan of reorganization." 11 U.S.C. § 1183(b)(7). This role should include working not only with the debtor, but with creditors as well, to facilitate negotiation of a consensual plan. A substantial part of the Subchapter V trustee's pre-confirmation role, therefore, should be to serve as a *de facto* mediator between the debtor and its creditors.

deadlines. Does this create an unfair distinction? Perhaps it does. But does it dictate the right result under the statute? This Court thinks it does.[82]

III. CONCLUSION.

Subchapter V is intended to be an expedited process. The debtor has the opportunity to use new, powerful tools to reorganize and save its business; but it must do so quickly. Thus, the notion that Congress intended to permit a debtor to first try

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[82] Because the Court is basing its ruling on a plain reading of the applicable statutes and rules, the Court need not address MDG's vested rights and retroactivity arguments. *See* note 60, *supra*. The Court does observe, however, that in granting Seven Stars some relief (as permitted, in this Court's view, under its lease) due to COVID-19 from the requirement that it timely pay rent while being legally prohibited from using its leased premises, and ordering that the deferred rent be paid in full as an administrative expense claim on the effective date of a Chapter 11 plan, the Court was ruling consistent with the mandate of 11 U.S.C. § 365 (and the Court's reading of the lease) that administrative rent must be paid in full as a condition of assumption. The Court merely deferred the deadline to comply with this requirement due to COVID-19 and applicable provisions of the lease (including the *force majeure* clause, which did not excuse payment during a *force majeure* event, but which also did not specifically require *timely* payment during such event).

Although new Bankruptcy Code section 1191(e) does permit payment of administrative expense claims under Section 503(b) through a plan (as opposed to the requirement for regular Chapter 11 cases that administrative expense claims be paid in full on the effective date of a plan, 11 U.S.C. § 1129(a)(9)(A)), the unpaid administrative rent here is not the type of administrative expense claim that would qualify for this treatment under Section 1191(e). Section 1191(e) specifically refers to claims of a kind specified in paragraphs (2) or (3) of Section 507(a). Section 507(a)(2) then refers to administrative expenses allowed under Section 503(b) (and Section 507(a)(3) refers to claims arising under Section 502(f) in involuntary cases, which is not applicable here). Nowhere in Section 503(b), however, is any mention of post-petition rent obligations. That is because a debtor's obligation to pay post-petition rent is governed solely by Section 365, not by Section 503(b). As such, even though new Section 1191(e) permits certain administrative expense claims to be paid out over the term of a plan, this provision undoubtedly does not apply to administrative rent. And, but for COVID-19 and the lease provision that does not specifically require timely payment of rent during a *force majeure* event, Section 365(d)(3) requires that post-petition rent be timely paid, with the sole exception that the deadline to pay rent due within the first 60 days of a case may be extended for cause, but not beyond such 60-day period. Accordingly, even if Seven Stars was permitted to proceed under Subchapter V, it could not confirm a plan that did not provide for payment in full of MDG's administrative rent claim on the effective date of the plan.

reorganizing through a traditional Chapter 11 case or a non-Subchapter V small business case (or even that a debtor might first seek to liquidate under Chapter 7), before giving it another try under Subchapter V after expiration of the statutory deadlines, is plainly inconsistent with the statute. This Court therefore disagrees with *Trepetin*,[83] *Ventura*,[84] *Twin Pines*,[85] and the other recently-reported cases that would liberally read Sections 1188(b) and 1189(b) to permit extensions of these deadlines for a debtor who has elected to proceed under Subchapter V after these deadlines had already passed.

Where a debtor elects to proceed under Subchapter V after the statutory deadlines have passed, it cannot be said that the need for an extension of these deadlines is attributable to circumstances for which the debtor should not justly be held accountable. The debtor *should* justly be held accountable for these circumstances; the debtor made this election after the deadlines expired. That decision by a debtor should not foist upon creditors all of the added powers of a Subchapter V debtor without one of the most significant protections afforded to creditors under the SBRA – that the case proceed expeditiously.

Accordingly, it is

ORDERED that:

1. This case is **DISMISSED.**

[83] 2020 WL 3833015.

[84] 615 B.R. 1.

[85] 2020 Bankr. LEXIS 1217.

2. The adversary proceeding, *Seven Stars on the Hudson Corp. v. MDG Powerline Holdings, LLC and XBK Management, LLC*, Adv. No. 19-01230-SMG, however, will remain open pending further order of the Court.

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Copies furnished to:

All interested parties by Clerk of Court

2020 WL 2193240
Only the Westlaw citation is currently available.
United States Bankruptcy
Court, D. South Carolina.

IN RE: Charles Christopher WRIGHT, Debtor(s).

C/A No. 20-01035-HB
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Signed 04/27/2020

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ORDER DENYING MOTION TO STRIKE

Helen E. Burris, Chief US Bankruptcy Judge

***1 THIS MATTER** is before the Court for consideration of the Motion to Strike filed by the United States Trustee ("UST"), asserting Debtor Charles Christopher Wright does not meet the requisite definition of a "small business debtor" pursuant to 11 U.S.C. § 101(51D).[1] Wright filed an Objection[2] and a telephonic hearing was held on April 14, 2020. Participating were Linda Barr on behalf of the UST, Reid Smith, counsel for the debtor, Kershaw Spong, Trustee, and Kevin McCarrell and Harriet Wallace, counsel for South State Bank.[3]

FACTS

The UST and Wright submitted a Joint Stipulation of Facts that states:[4]

1. This Court has jurisdiction of this matter pursuant to 28 U.S.C. §§ 157 and 1334. This matter is a core proceeding.

2. The debtor filed a voluntary petition for relief pursuant to chapter 11 on February 28, 2020, initiating the present bankruptcy case. On his voluntary petition, the debtor designated that he was a small business debtor and elected to proceed as a subchapter V small business debtor.

3. The debtor filed schedules and statements in his case under penalty of perjury on March 20, 2020 (the "Schedules").

4. The debtor is the sole member of Boiling Pot Investments, LLC ("Boiling Pot"). On September 17, 2018, Boiling Pot filed for relief under chapter 11 of the Bankruptcy Code.

5. Boiling Pot's case was dismissed on June 19, 2019. Boiling Pot did not designate that it was a small business debtor. Boiling Pot's bankruptcy schedules reflected that its sole asset was real property.

6. The debtor is the 49% owner of Carolinas Custom Clad, Inc. ("CCC"). His wife is a 51% owner of CCC. On September 17, 2018, CCC filed for relief under chapter 11 of the Bankruptcy Code. CCC's case was dismissed on June 20, 2019. CCC did not designate that it was a small business debtor. CCC's bankruptcy schedules reflected that CCC's assets include a bank account, inventory, office furniture and equipment, a 1992 Freightliner, a semi-trailer, forklifts, and various machinery and equipment. CCC had engaged in the business of providing powder coating services to the public and manufacturers.

7. At the meeting of creditors for CCC and Boiling Pot, the debtor testified that the businesses had ceased operations in 2018.

8. CCC's Schedule E/F lists the following liabilities: IRS $88,698.70, Lorenza Flores $800, SCDOR unknown, SCDEW $51,706.17, York County Treasurer $30,160.62, AT&T $1,408.81, Atlantic Packing $1,500, Atlas Copco $1,290.73, Atotech USA $8,411.37, Blast-It-All $420, Cardinal unknown, Carolina Carrier $1,475, Chemetall $2,987, City of Rock Hill $10,283.52, DuBois $7,779, FedEx $82.47, Forklifts Unlimited $2,147.59, Freeman Gas $254, Gary May unknown, Henkel Chemicals $9,637.28, Hunter Pipe (owned by Dean Allen) $2,000, Intek $554.91, Intuit $363.08, Low Volume Powder $5,153.25, New Electric Charlotte, LLC $1,645.10, Patriot $1,991.80, PPG Powder $9,407.43,

Precision Grinding $2,500, TCI Powder $11,039.24, The Hartford Insurance $18,120.42, The Motor Shop $1,200, Uline $2,240.07, United Rentals $2,304.15, UPS Store $2,691.59, and York County National Gas $18,114.53. None of these liabilities were marked as contingent, unliquidated, or disputed. Sherwin Williams Company filed a proof of claim in the amount of $51,206.55.

***2** 9. In 2019, Boiling Pot and CCC sold all of their assets for $700,000. The only creditors of CCC that were paid from the sale proceeds were South State Bank and York County taxes. The purchaser assumed responsibility for the IRS lien that encumbered the personal property. No other creditors were paid.

10. In the debtor's case, the only creditors included in the debtor's liabilities on his bankruptcy schedules, which liabilities had also been listed as liabilities on CCC's bankruptcy schedules are: IRS, Lorenza Flores, SCDOR, South State Bank, Sherwin Williams Company and Dean Allen. All these creditors have liens against the debtor's residence.

The parties also attached a chart reflecting the debtor's "business debt" versus "consumer debt" as of the date of the document. The chart indicates the amount of the debtor's total scheduled debts is $395,816.29, of which $220,882.42 is for business debts owed to South State, Sherwin Williams, Dean Allen, Lorenza Flores, the IRS, and the SCDOR. The Joint Stipulation acknowledges these debt amounts may change if creditors not listed in the debtor's bankruptcy schedules file proofs of claim or listed creditors file proofs of claim in amounts that vary from those listed on the chart. Nevertheless, as of that date, 56% of the amount was stipulated to be business debt.

DISCUSSION AND CONCLUSIONS

After a debtor elects to proceed as a small business debtor, the United States Trustee or a party in interest may file an objection. *See* Interim Fed. R. Bankr. P. 1020(b). The Bankruptcy Code defines "small business debtor" as:

> a person engaged in commercial or business activities (including any affiliate of such person that is also a debtor under this title and excluding a person whose primary activity is the business of owning single asset real estate) that has aggregate noncontingent liquidated secured and unsecured debts as of the date of the filing of the petition or the date of the order for relief in an amount not more than $2,725,625 (excluding debts owed to 1 or more affiliates or insiders) not less than 50 percent of which arose from the commercial or business activities of the debtor[.]

11 U.S.C. § 101(51D).[5] A "person" includes an individual, partnership, and corporation. 11 U.S.C. § 101(41). "When a debtor's eligibility to file under a particular chapter of the Bankruptcy Code is challenged, the burden is upon the debtor to establish such eligibility." *In re Voelker*, 123 B.R. 749, 750 (Bankr. E.D. Mich. 1990) (citing numerous cases).

In deciding questions of statutory interpretation, the Court's duty is "to ascertain and implement the intent of Congress." *Kumar v. Republic of Sudan*, 880 F.3d 144, 153-54 (4th Cir. 2018), *cert. denied,* 139 S. Ct. 1445, 203 L. Ed. 2d 698 (2019) (quoting *Broughman v. Carver*, 624 F.3d 670, 674 (4th Cir. 2010)). The Court begins with the text of the statute and, absent a different definition, "interpret[s] statutory terms 'in accordance with their ordinary meaning.' " *Moody v. Huntington Ingalls Inc.*, 879 F.3d 96, 98 (4th Cir. 2018) (quoting *PETA v. U.S. Dep't of Agric.*, 861 F.3d 502, 509 (4th Cir. 2017)). "To determine a statute's plain meaning, [the Court] not only look[s] to the language itself, but also the specific context in which that language is used, and the broader context of the statute as a whole." *Othi v. Holder*, 734 F.3d 259, 265 (4th Cir. 2013) (quoting

Country Vintner of N.C., LLC v. E. & J. Gallo Winery, Inc., 718 F.3d 249, 258 (4th Cir. 2013)). "If the plain language is unambiguous, we need look no further." *Lee v. Norfolk S. Ry. Co.*, 802 F.3d 626, 631 (4th Cir. 2015) (citation omitted). "On the other hand, if the text of a statute is ambiguous, [the Court] look[s] to 'other indicia of congressional intent such as the legislative history' to interpret the statute." *Id.* (quoting *CGM, LLC v. BellSouth Telecomms., Inc.*, 664 F.3d 46, 53 (4th Cir.2011)).

***3** The context here is a Bankruptcy Code providing relief from debt in various forms including reorganization of a business, sale of assets, valuation of property, the adjustment of debt, and combinations of those and other remedies. Congress recently enacted the Small Business Reorganization Act of 2019 ("SBRA"), which created Subchapter V. Pub. L. No. 116-54, 133 Stat. 1079 (2019) (temporarily amended by H.R. Rep. No. 116-748H.R. Rep. No. 116-748 (2020)). The SBRA and Subchapter V were designed to broaden relief available to address small business debt. Although the brief legislative history of the SBRA indicates it was intended to improve the ability of small businesses to reorganize and ultimately remain in business,[6] nothing therein, or in the language of the definition of a small business debtor, limits application to debtors **currently** engaged in business or commercial activities.

> The definition of a "small business debtor" is not restricted to a person who at the time of the filing of the petition is presently engaged in commercial or business activities and who expects to continue in those same activities under a plan of reorganization. That person may have incurred $2,725,625 in noncontingent, liquidated, secured and unsecured debts that arose from business activities before the date of the filing of the case, but as of the petition date may have discontinued those business activities. There is nothing in the legislative history to suggest that in this latter instance, the small business amendments should not apply to that person.
>
> 2 *Collier on Bankruptcy* ¶ 101.51D (16th ed. 2020).

Applying the definition to the facts of this case, Wright meets the debt requirements because it is stipulated that 56% of his debts are business debts and his total debt amount is less than the statutory cap. However, the Court must determine if Wright is "a person engaged in commercial or business activities."

To the extent Wright relies on any bankruptcy filing of an affiliate (Boiling Pot and/or CCC's bankruptcies), that reliance is ineffective. The text defines a small business debtor as "a person engaged in commercial or business activities (including any affiliate of such person that ***is*** also a debtor under this title...." 11 U.S.C. § 101(51D) (emphasis added). Coexistent cases for the person and the affiliate are required. However, Wright meets the definition of a small business debtor on these facts without reliance on a coexistent case. He is "engaged in commercial or business activities" by addressing residual business debt and otherwise meets the remaining requirements under § 101(51D).

IT IS, THEREFORE, ORDERED that the UST's Motion to Strike is denied.

All Citations

Slip Copy, 2020 WL 2193240

Footnotes

1 ECF No. 15, filed Mar. 19, 2020.
2 ECF No. 29, filed Apr. 8, 2020.
3 South State Bank did not file a response to the Motion.
4 ECF No. 30, filed Apr. 10, 2020.
5 The Coronavirus Aid, Relief and Economic Security Act ("CARES Act") was enacted on March 27, 2020, and amended § 1182(1) to include a separate definition of "debtor" for Subchapter V purposes that is identical to the definition of "small business debtor" in all respects except the debt limitation is temporarily increased to $7,500,000. (H.R. Rep. No. 116-748H.R. Rep. No. 116-748 (2020)). The CARES Act is applicable only to cases filed after its enactment.
6 The Report from the House Committee on the Judiciary (Report No. 116-54) states that "[n]otwithstanding the 2005 Amendments, small business chapter 11 cases continue to encounter difficulty in successfully reorganizing" and legislation was needed "to improve the reorganization process for small business chapter 11 debtors." The SBRA allows these debtors "to file bankruptcy in a timely, cost-effective manner, and hopefully allows them to remain in business' which 'not only benefits the owners, but employees, suppliers, customers, and other who rely on that business." *Id.*

UNITED STATES BANKRUPTCY COURT FOR THE WESTERN DISTRICT OF MISSOURI WESTERN DIVISION

In re:	)	
	)	
KEVIN LYNN THURMON and SUSAN JANE THURMON,	)	**Case No. 20-41400-can11**
	)	
	)	
Debtors.	)	

UNITED STATES TRUSTEE'S OBJECTION TO DEBTORS' DESIGNATION AS A SUBCHAPTER V SMALL BUSINESS DEBTOR

The United States Trustee respectfully objects to the designation of Kevin and Susan Thurmon as Subchapter V debtors under 11 U.S.C. § 1182 because they are not engaged in any ongoing commercial or business activities. In support of this objection, the United States Trustee states as follows:

FACTUAL ALLEGATIONS

1. On August 3, 2020, the Debtors filed a voluntary Chapter 11 petition. The Debtors elected treatment as a Subchapter V case under the provisions of the recently enacted Small Business Reorganization Act of 2019 ("SBRA").[1]
2. G. Matt Barberich was appointed as Subchapter V trustee (the "Trustee").
3. The Debtors are owners of Dowell, LLC, a Missouri limited liability company. Dowell, LLC, operated a pharmacy in Higginsville, Missouri. Although the Debtors' Statement of Financial Affairs states that the pharmacy is currently operating, the Debtors made clear to the Trustee and a representative of the United States Trustee at the initial debtor interview that the pharmacy ceased operations and sold its assets in April 2020. The Debtors do not own any other businesses.

[1] Pub. L. 116-54, § 5, 133 Stat. 1079, 1087 (effective Feb. 19, 2020), codified primarily at 11 U.S.C. §§ 1181-1195.

4. Schedule I discloses that Mrs. Thurmon is not employed, and that Mr. Thurmon is an employee of Timothy H. Thurmon, Certified Public Accountant, P.C. Mr. Thurmon is not an owner of this business.

5. The Debtors' first meeting of creditors is scheduled for September 10, 2020.

ARGUMENT

6. Under Federal Rule of Bankruptcy Procedure 1020(b), the United States Trustee or any party in interest may object to a debtor's designation as a small business case within 30 days of the conclusion of the debtor's meeting of creditors. Accordingly, this objection is timely filed.

7. The Debtors bear the burden of demonstrating that they are eligible to proceed under Subchapter V. *Montgomery v. Ryan (In re Montgomery),* 37 F.3d 413, 415 (8th Cir. 1994) (holding that party filing petition bears burden of proving eligibility).

8. The SBRA was enacted to "address reorganization of small businesses" by creating a new Subchapter V to Chapter 11 of the Bankruptcy Code. 116 Pub. L. 54, 1133 Stat. 1079 (Aug. 23, 2019). When enacted as part of SBRA, §1182(1) stated, "The term 'debtor' means a small a small business debtor."

9. A "small business debtor" is defined in § 101(51D) as "a person engaged in commercial or business activities … that has aggregate noncontingent liquidated secured and unsecured debts as of the date of the filing of the petition …[of] not more than $2,725,625 … not less than 50 percent of which arose from the commercial or business activities of the debtor."

10. However, on March 27, 2020, the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act") became law. Pub. L. 116-136, 134 Stat. 281 (2020). The

CARES Act amended § 1182(1) to read:

> "The term 'debtor'-
> (A) . . . means a person engaged in commercial or business activities . . .
> that has aggregate noncontingent liquidated secured and unsecured debts as of the date of the filing of the petition . . . [of] not more than $7,500,000 . . . not less than 50 percent of which arose from the commercial or business activities of the debtor . . .

11. The language added to § 1182(1) by the CARES Act mirrors the definition of "small business debtor" under § 101(51D) except that it increases the debt limit to $7,500.[2]

12. The definition has two principal requirements. First, the debtor must be a person "engaged in commercial or business activities." Second, the debtor must meet the debt limit, of which at least 50% the debt must arise "from the commercial or business activities of the debtor." It is the first requirement that is at issue here.

13. The term "engaged" is an active verb and is used in the statute in its plain, ordinary connotation, meaning that a debtor must be actively engaged in commercial or business activities at the time of filing.

14. The Thurmons are not eligible to elect Subchapter V because they are not "engaged in commercial or business activities."

15. In interpreting the definition of debtor under § 1182(1), the Court must construe the statutory definition "so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant." *Hibbs v. Winn*, 542 U.S. 88, 101 (2004) (citations omitted). Therefore, the term "engaged in commercial or business activities" must have meaning separate and apart from the debt-limit language.

16. Moreover, since § 1182(1) duplicates the definition of "small business debtor" found

[2] The CARES Act is a temporary measure set to expire after one year.

in § 101(51D), it is relevant to look at how the term "engaged in" is used in other subsections of § 101. It is presumed that "identical words used in different parts of the same statute carry the same meaning." *E.g., Henson v. Santander Consumer USA Inc.*, ___ U.S. ___, 137 S. Ct. 1718, 1723 (2017) (internal quotation and citation omitted); *see also Ibrahim v. C.I.R.,* 788 F.3d 834, 836-37 (8th Cir. 2015).

17. Section 101(18) defines a family farmer as an "individual … *engaged in* a farming operation. . .." (Emphasis added). In interpreting this section, the Eleventh Circuit held that family farmers must be engaged in farming operations at the time they file for Chapter 12 relief. *Watford v. Federal Land Bank of Columbia (In re Watford)*, 898 F.2d 1525, 1527 (11th Cir. 1990); *see also In re Paul*, 83 B.R, 709, 712 (Bankr. D.N.D. 1988) (noting that word is present tense; debtors must be "currently engaged" in a farming operation); *In re Haschke*, 77 B.R. 223, 225 (Bankr. D. Neb. 1987) (same).

18. Similarly, § 101(44) defines "railroad" as a "common carrier by railroad *engaged in* the transportation of individuals or property or owner of trackage facilities leased by such a common carrier." (Emphasis added). In interpreting this section, the Third Circuit held that the word "engaged" was used by Congress in its plain, ordinary meaning as present tense, and noted that "an entity that has abandoned being engaged in transporting goods and people does not on the most natural reading of this language concern a railroad, it concerns a former railroad." *Hileman v. Pittsburgh & Lake Erie Properties, Inc. (In re Pittsburgh & Lake Erie Properties, Inc.)*, 290 F.3d 516, 519-20 (3d Cir. 2002); s*ee also McGray Const. Co. v. Director, OWCP,* 181

F.3d 1008, 1015 (9th Cir. 1999) (holding that "engaged in maritime employment" under the Longshore and Harbor Workers' Compensation Act is present tense).

19. The term "engaged in" is also found in § 101(27A) defining health care business. Courts interpreting this section have construed this definition as present tense and have not required the appointment of a patient-care ombudsmen where the debtor is no longer providing health care services. *See*, e.g., *In re Banes*, 355 B.R. 532, 535 (Bankr. E.D.N.C. 2006) (debtor not health care business because no longer engaged in the practice of dentistry; "engaged in" is present tense).

20. In spite of the plain language of §§ 101(51D) and 1182(1), the well-established principles of statutory construction, and prior cases interpreting the same language in the other provisions of the same statute, a South Carolina bankruptcy court allowed a debtor not currently engaged in commercial or business activities to remain in Subchapter V. *In re Wright*, 2020 WL 2193240 (Bankr. D.S.C. April 27, 2020).

21. The court in *Wright* appears to have based its decision on two rationales.[3] First, that nothing in the legislative history or the definition itself limits application to persons currently engaged in business. *Id.* at *3.[4] However, this rationale ignores the Supreme Court's admonition that a court should look only to the statute's language when the language is plain. *United States v. Ron Pair Enters, Inc.,* 489 U.S. 235,

[3] The court in *Wright* appears to have been looking at the original, pre-CARES Act language of § 1182(1) although the decision was issued after the enactment the CARES Act. However, since the definitions under § 1182 and § 101(51D) are the same except for the debt limit, this is probably a distinction without difference.

[4] In support of this proposition, the court cites to a passage from the 16th Edition of the treatise *Collier on Bankruptcy* stating that the definition is not restricted to a person "presently engaged" in commercial or business activities. *In re Wright*, 2020 WL *3 (citing 2 Collier on Bankruptcy ¶ 101.51D (16th ed. 2020). Based on a recent review of *Collier on Bankruptcy*, it appears this passage has been deleted. *See* 2 Collier on Bankruptcy ¶ 101.51D (16th ed. 2020).

241 (1989) (where "statute's language is plain, the sole function of the courts is to enforce it according to its terms.") (internal citation omitted). As the Eighth Circuit has emphasized, "[v]ague notions about the statutes' purposes . . . cannot be used to override their actual texts." *Union Pacific Railroad Co. v. United States,* 865 F.3d 1045, 1052 (8th Cir. 2017); *see also Lamie v. United States Trustee*, 540 U.S. 526, 542 (2004) ("If Congress enacted into law something different from what it intended, it should amend the statute to conform it to its intent.").

22. Second, in an alternative holding, the *Wright* court stated that the debtor was engaged in commercial or business activities by "addressing residual business debt." *In re Wright*, at *3. However, this reading of the statute renders the "engaged in" language of both §§ 1182(1) and 101(51D) superfluous. If Congress intended election of Subchapter V to be available to debtors who only have "residual business debt" it need only have included the second requirement of 1182(1)– the 50% of debt provision.

23. In short, *Wright* is wrongly decided.[5] It ignores canons of statutory interpretation by effectively reading the phrase "engaged in commercial or business activities" out of the statute. It should not be viewed as persuasive authority on this issue.

24. The Thurmons are not engaged in any active business. The United States Trustee does not oppose the Debtors proceeding in Chapter 11, only that they may not proceed under Subchapter V, which was intended for the *reorganization* of small

[5]Two subsequent cases relied on *Wright* but offered no additional analysis and are similarly unpersuasive. *In re Bonert*, 2020 WL 3635869 (Bankr. C.D. Cal June 3, 2020); *In re Blanchard*, 2020 WL 4032411 (Bankr. E.D. La. July 16, 2020) (dicta).

businesses. By the plain definition of small business debtor, they are not eligible for Subchapter V relief.

WHEREFORE, the United States Trustee respectfully requests that the Court strike the Debtors' designation as a Subchapter V small business debtor, allow the debtors to continue under Chapter 11, and grant such other and further relief as it deems just and proper.

Dated: August 28, 2020

Respectfully submitted,

DANIEL J. CASAMATTA
ACTING UNITED STATES TRUSTEE

By: ***/s/ Sherri L. Wattenbarger***
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CERTIFICATE OF MAILING

I hereby certify that a copy of the United States Trustee's Objection to Election under Subchapter V was served upon all parties receiving electronic notification, including the following, this 28th day of August 2020:

Bradley McCormack
Neil Sader
2345 Grand Blvd, Ste 2150
Kansas City, MO 64108

By: ***/s/ Sherri L. Wattenbarger***
Sherri L. Wattenbarger

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF MISSOURI

In Re:	)	
	)	
NEOSHO CONCRETE PRODUCTS COMPANY	)	Case No. 20-30314-btf11
	)	
Debtor.	)	

DEBTOR'S PRE-STATUS CONFERENCE REPORT REGARDING EFFORTS UNDERTAKEN OR TO BE UNDERTAKEN TO OBTAIN A CONSENSUAL PLAN OF REORGANIZATION

COMES NOW Debtor, through counsel, and pursuant to Section 1188(c) reports the efforts the Debtor has taken and will undertake to obtain a consensual Plan of Reorganization and states as follows:

EFFORTS UNDERTAKEN

1. Debtor and counsel have analyzed various components of Debtor's assets, liabilities, and current and historical financial conditions and events leading to the filing of the bankruptcy case.

2. Debtor and counsel have pre-classified potential claims of creditors initially into secured claims, undersecured claims, and unsecured claims.

3. Post-petition Debtor filed a Motion for Engagement of Real Estate and Personal Property Appraiser (Doc. No. 27). The Debtor's Motion was granted by the Court on August 13, 2020 (Doc. No. 42). The appraisals are necessary in anticipation of presenting it to claimants holding nonconsensual judicial liens junior to consensual liens held by Community Bank & Trust to determine the extent of the nonconsensual lien claimants secured claims, undersecured claims, and deficiency claims.

4. Post-petition Debtor has negotiated adequate protection terms with first priority secured creditor Community Bank & Trust with the Stipulation filed with the Court on August 4, 2020 (Doc. No. 34).

5. Post-petition Debtor has filed a Motion for Order Authorizing the Accounting Firm of Swift, Cooper, & Graham, P.C. The Motion was filed August 7, 2020 (Doc. No. 38) and any response or objections are due on or before August 21, 2020. The Motion to engage accountant was necessary to complete 2019

fiscal year tax returns and future projections relating to Debtor's operations to include reinitiating manufacturing.

6. Post-petition Debtor has communicated with judgment lien creditor Kunshek Chat & Coal, Inc. in an attempt to resolve an apparent discrepancy between Debtor's records regarding the balance of the judgment lien claim and the records of Kunshek.

7. On August 14, 2020, Debtor filed a Motion to Reject the Lease or Executory Contract with FeHog, LLC (Doc. No. 44) in anticipation of initiating a new supply agreement with Owens Corning to reinitiate manufacturing/production of products to be purchased by Owens Corning which may result in the use of approximately 20,000 tons of raw material shot resting on Debtor's real estate property.

8. Post-petition and for purposes of negotiation, Debtor has attempted communication with FeHog, LLC however to date no response has been received.

EFFORTS TO BE UNDERTAKEN TO OBTAIN CONSENSUAL PLAN

9. After the appraisal report has been completed, Debtor intends to circulate it to all secured parties including the judicial lien claimants and pursue negotiations with the judicial lien claimants with respect to the value of their judicial liens and deficiency claims for purposes of incorporating into a proposed consensual Plan.

10. Subject to judicial lien claimants filing timely Proof of Claims, it may be necessary for Debtor to file a Motion to determine the secured status of secured claims pursuant to Section 506 of the Bankruptcy Code.

11. Subject to favorable ruling upon Debtor's Motion to Reject the Lease or Executory Contract with FeHog, Debtor intends to negotiate a production agreement with Owens Corning which would form the basis for determining the amount of post-petition operating capital which may be necessary to seek Court approval of funding for reinitiating manufacturing.

Respectfully submitted,

DAVID SCHROEDER LAW OFFICES, P.C.

By: */s/ David E. Schroeder*

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CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing document was served electronically to those parties who have entered an appearance in the Court's Electronic Court Filing (ECF) System and conventionally, via first-class mail, postage prepaid, to those parties who have requested notice but are not participating in the ECF System together with the parties listed on the creditor mailing matrix maintained by the Bankruptcy Court by depositing same in U.S. mail via first-class, postage prepaid, pursuant to instructions appearing on the electronic filing receipt received from the U.S. Bankruptcy Court, on this 20th day of August, 2020.

By: */s/ David E. Schroeder*
David E. Schroeder #32724

IN THE UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF MISSOURI

In Re:	)	
	)	
NEOSHO CONCRETE PRODUCTS COMPANY	)	Case No. 20-30314-btf11
	)	
Debtors.	)	

AGREED SCHEDULING ORDER

On this day came before the Court to be considered this Agreed Scheduling Order in the above-captioned case; the Court considered the future events and corresponding dates scheduled below by counsel and the Subchapter V Trustee and based on the agreement of the parties, the Court hereby enters this Agreed Scheduling Order to govern the administration of this case.

IT IS FURTHER ORDERED that all applicable dates and deadlines to be completed prior to the Confirmation Hearing are as set forth below. Any events or corresponding deadlines not explicitly set forth below shall be governed by the United States Bankruptcy Code, the Federal Rules of Bankruptcy Procedure, and the Local Bankruptcy Rules of the U.S. Bankruptcy Court for the Western District of Missouri.

DEADLINE	DATE
Report of Efforts to Reorganize	August 20, 2020
Status Conference	September 3, 2020 at 2:00 p.m.
Claims Bar Date	September 15, 2020
Deadline to file Plan	October 5, 2020
Deadline for secured creditors to make § 1111(b) election	21 days after Plan is filed

IT IS FURTHER ORDERED that this Scheduling Order may be amended by written agreement and authorization by the Court as appropriate under the circumstances.

IT IS SO ORDERED.

Date: 7/22/2020

/s/ Brian T. Fenimore
The Honorable Brian T. Fenimore
United States Bankruptcy Judge

Submitted by:

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