AMERICAN BANKRUPTCY INSTITUTE

2020 Northeast Virtual Bankruptcy Conference and Consumer Forum

Consumer Breakout

The Small Business Reorganization Act of 2019

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CONCURRENT SESSION

2020

NORTHEAST VIRTUAL BANKRUPTCY CONFERENCE & CONSUMER FORUM
AMERICAN BANKRUPTCY INSTITUTE
JULY 29-30, 2020

Small Business Reorganization Act of 2019

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Commission Testimony/Findings:

SME's avoiding chapter 11 because:

- risk of loss of ownership
- cost
  - time
  - procedural/reporting burdens
  - committee counsel/advisor costs
  - tactical fights driven by §1129(a)(10), APR, new value elements

SBRA attempts to address all of these concerns.

- Intended to give more small businesses a chance at reorganization instead of simply liquidating.

Core Provisions of SBRA:

- To qualify as a small business debtor, the debtor must be a person or entity engaged in commercial or business activity with aggregate noncontingent liquidated secured and unsecured debts of $2,725,625 or less (excluding debt owed to affiliates or insiders). [INCREASED TO $7.5 MILLION BY CARES ACT-1YR]

- SARE debtors excluded: debtor who derives substantially all of its gross income from the operation of a single real property cannot elect under Subchapter V.

- No requirement that the debtor remain engaged in the commercial or business activity post-petition, but the debtor must show that at least 50 percent of its pre-petition debts arose from such activities. (Nonetheless, difficult to confirm if not operating post-petition).

First CLE Code: 89263

Please record this on your CLE Tracker or in your notes.

Core Provisions (cont'd):

- Small business debtor operates in chapter 11 as a debtor-in-possession.
- Therefore, still need to file first-day motions typical of chapter 11 DIP case, etc.
- The court can remove a small business debtor from debtor-in-possession status only for cause, including fraud, dishonesty, incompetence, or gross mismanagement of the affairs of the debtor, either before or after the commencement of the bankruptcy case or for failure to perform its obligations under a confirmed plan. If that happens, the standing trustee takes over the operation of the debtor's business.

Core Provisions (cont'd):

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- Creditor's Committees: unless the court orders otherwise, no creditors committee; creditors committees will be the exception – not the rule – in SBRA reorganizations.

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The Standing Trustee: A "Helpful Trustee" (Estate Neutral?)

- Subchapter V cases will have a "standing trustee" appointed by the U.S. Trustee.
- Standing trustee will appear and be heard at plan confirmation; *general obligation to "facilitate the development of a consensual plan of reorganization".*
- Standing trustee will act as a conduit for plan payments in the case of nonconsensual plans or consensual plans providing for that role.
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- Debtor must file plan 90 days after the order for relief.
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- If plan is fully consensual, the debtor can get an immediate discharge upon confirmation and effectiveness of the plan, and trustee's services are terminated (unless plan or confirmation order provides otherwise).

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- The debtor must demonstrate a "reasonable likelihood" that it will be able to make all payments under the plan, and the plan must provide "appropriate remedies, which may include the liquidation of nonexempt assets" to protect creditors if the debtor fails to make plan payments ("Toggle to sale" provision).
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Key Takeaways:

- Elective/Optional; not required to elect Subchapter V.
- The cramdown option is a default (as cramdown was always intended to be)—drives negotiated result. (Possible use of short-form RSA's?)
- Efficiency/Speed/Simplicity/Low Cost.
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Implementation Issues:

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- Test to Extend 90-day Plan Filing Period
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- Pro-restructuring interpretation expected
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Key Takeaways:

[§547(b) amended as follows:]

Except as provided in subsections (c) and (i) of this section, the trustee may,
based on reasonable due diligence in the circumstances of the case and taking into account a party's known or reasonably knowable affirmative defenses under subsection (c), avoid any transfer of an interest of the debtor in property---

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Fourth CLE Code: 89658
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SBRA: Small Business Reorganization Act

(*aka* Subchapter V)

1

Purpose of the New Legislation

- Seek the speedy proposal and implementation of a consensual plan
- Reduce cost to debtors
- Quicker return to creditors

2

HIGHLIGHTS OF THE SBRA

3

Only Certain Debtors may Elect to be a Subchapter V Small Business Debtor

- Must fit the "small business debtor" definition of 11 U.S.C. § 101(51D).
  - "Person engaged in commercial or business activities."
  - Total noncontingent liquidated debt less than $2,725,625.
  - At least 50% of the debt must have arisen "from the commercial or business activities of the debtor."
  - May be an affiliate of a small business debtor so long as aggregated debt remains below $2.7M.
  - Not a single asset real estate debtor.

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Subchapter V is a Choice for Small Business Debtors

- Debtors that fit within the "small business debtor" definition of 11 U.S.C. § 101(51D) have the option of continuing as a small business case under the small business provisions OR continuing under subchapter V.
- Debtors must affirmatively elect subchapter V treatment or their case will proceed under the small business provisions. 11 U.S.C. § 103(i)
- Subchapter V debtors must file the small business case documents (tax return, balance sheet, statement of operations & cash-flow statement) with their petition. 11 U.S.C. § 1187(a)

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Key Elements of the SBRA

- Streamlined requirements
- Additional benefits for debtors
- Tighter timeline (with limited extensions)
- Assistance of a subchapter V trustee

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Streamlined Requirements

- No creditor committee unless the court orders otherwise for cause. 11 U.S.C. § 1102 (as revised by SBRA)
- No disclosure statement required, BUT, pursuant to 11 U.S.C. § 1190(1), the plan must include:
  - A brief history of the business operations of the debtor;
  - A liquidation analysis; and
  - Projections with respect to the ability of the debtor to make payments under the proposed plan of reorganization.
- Administrative expenses (including trustee fees) may be paid over time through the plan. 11 U.S.C. § 1191(e)
- Debtors do not pay quarterly fees to the UST.

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Additional Provisions

- Only the debtor may file a subchapter V plan. 11 U.S.C. § 1189(a)
- Individual debtors may cramdown a mortgage on their principal residence if the loan proceeds were used "primarily in connection with the small business of the debtor" and not to purchase the residence. 11 U.S.C. § 1190(3)
- The debtor may hire a professional even if that professional is a creditor.
  - Professional is "not disqualified for employment . . . solely because [the professional] holds a [prepetition] claim of less than $10,000 . . ." 11 U.S.C. § 1195
- Section 1141(d)(5) does not apply to individuals who elect to be subchapter V debtors. 11 U.S.C. § 1181(a)
  - Debtors who confirm consensual plans receive a discharge upon confirmation.
  - Debtors who confirm cramdown plans receive a discharge after 3 to 5 years of payments. 11 U.S.C. § 1192

8

SBRA Cases Work on a Tight Schedule

- UST appoints subchapter V trustee and sets 341 meeting within 24 to 48 hours of filing.
- UST conducts initial debtor interview (IDI) about 10 days after case filing.
- 341 meeting held as close as possible to 21 days after filing, depending on the location of the meeting.
- The court holds a status conference not later than 60 days after the case is filed "to further the expeditious and economical resolution of a case under this subchapter." 11 U.S.C. § 1188(a)
  - The court may extend the 60 day period only "if the need for an extension is attributable to circumstances for which the debtor should not justly be held accountable." 11 U.S.C. § 1188(b)

9

SBRA Cases Work on a Tight Schedule *Continued*

- Not later than 14 days before the status conference, "the debtor shall file with the court and serve on the trustee and all parties in interest a report that details the efforts the debtor has undertaken and will undertake to attain a consensual plan of reorganization." 11 U.S.C. § 1188(c)
- The debtor shall file a plan not later than 90 days after the petition date, except that the court may extend the period "if the need for the extension is attributable to circumstances for which the debtor should not justly be held accountable." 11 U.S.C. § 1189(b)

10

SBRA's Two Confirmation Tracks

- A **consensual** plan may be confirmed under 11 U.S.C. § 1191(a) if all the requirements of 1129(a) are met—other than paragraph 15 (imposing chapter 13 means test to define disposable income).
- A **cramdown** plan may be confirmed under 11 U.S.C. § 1191(b) if all the requirements of 1129(a) are met—other than paragraphs 8 (requiring acceptance by each impaired class), 10 (requiring acceptance by at least one impaired non-insider class), and 15—and the plan "does not discriminate unfairly, and is fair and equitable" with respect to each impaired class that has not accepted the plan.
  - The absolute priority rule does not apply.
  - "Fair and equitable" as defined in 11 U.S.C. § 1191(c) requires that in addition to secured creditors retaining liens and being paid at least the value of the secured creditor's interest in property, the debtor must pay at least projected disposable income over 3 to 5 years towards the plan.
- The confirmation track affects discharge timing, payment options, trustee duties, and modification options.

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SBRA Cases Have Both a Trustee and a DIP

- Subchapter V trustee is appointed at the beginning of the case.
  - Primary pre-confirmation task is to "facilitate the development of a consensual plan of reorganization." 11 U.S.C. § 1183(b)(7)
  - Services generally terminate upon substantial consummation of a consensual plan.
  - Trustee remains in place to distribute plan payments if a cramdown plan is confirmed.
- DIP may be removed for cause. 11 U.S.C. § 1185
  - If DIP is removed, the trustee will operate the business. 11 U.S.C. § 1183(b)(5)

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Subchapter V Trustees

- SBRA allows for either standing or case-by-case trustees. 11 U.S.C. § 1183(a)
- Both standing and case-by-case trustees have the same duties.

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Subchapter V Trustee Compensation — Generally

- Standing and case-by-case trustees are compensated under different statutes.
- Initially, the UST will appoint case-by-case trustees to administer cases rather than standing trustees.

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Subchapter V Standing Trustee Compensation

Compensation for SBRA standing trustees will be based on a percentage fee determined by the UST, much like the percentage fees set for other standing trustees under 28 USC § 586(e).

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Subchapter V Case-by-Case Trustee Compensation

- Subchapter V case-by-case trustees will be paid under 11 U.S.C. § 330.
- Unlike compensation for chapter 7 trustees, subchapter V case-by-case trustees' compensation is not based on disbursements.
  - SBRA conforming amendments specifically make section 326(a) inapplicable to subchapter V cases, which precludes determining compensation based on disbursements.
- Instead, case-by-case trustees must apply for fees and expenses under section 330 and establish that fees are reasonable (likely based on time spent and a reasonable hourly rate) and expenses are actual and necessary.

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Subchapter V Trustee Duties

- In general, the subchapter V trustee will evaluate the viability of the business and prospects for reorganization.
- Upon appointment, under 11 U.S.C. § 1183(b)(1), the trustee shall perform the duties specified in section 704(a)(2), (5)-(7), and (9):
  - Be accountable for all property received;
  - Examine proofs of claim and object as needed; oppose the debtor's discharge, if advisable;
  - Furnish information concerning the estate requested by a party in interest, unless the court orders otherwise;
  - Make a final report; and
  - File an account of the administration of the estate with the court and the UST.

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Subchapter V Trustee Duties *Continued*

- The trustee will take part in the IDI conducted by the UST and in the status conference and other hearings scheduled by the court. 11 U.S.C. § 1183(b)(3)
- The UST generally will preside at the creditors' meeting, but the trustee will be expected to attend and participate.
- The trustee is charged with facilitating the development of a consensual plan of reorganization and ensuring that the debtor commences making timely payments under any confirmed plan. 11 U.S.C. § 1183(b)(7) and (4)

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Subchapter V Trustee Duties *Continued*

- If there is a claim for a domestic support obligation with respect to the debtor, the trustee must furnish the required notices. 11 U.S.C. § 1183(b)(6)
- For cause, and upon request of a party in interest, the court may require the trustee to also perform the duties specified in section 1106(a)(3), (4), and (7):
  - Investigate the conduct and financial condition of debtor, and any other matter relevant to the case;
  - File a report of any investigation conducted; and,
  - After confirmation, file any such reports that are necessary or as the court orders. 11 U.S.C. § 1183(b)(2)

19

Court May Authorize the Subchapter V Trustee to Operate the Debtor's Business

- If the court orders pursuant to section 1185 that the debtor shall no longer be a debtor in possession, the subchapter V trustee shall operate the debtor's business. 11 U.S.C. § 1183(b)(5)
- Section 1183(b)(5) requires the trustee to:
  - File any required schedules and statements;
  - File periodic operating reports;
  - Serve as the administrator of any employee benefit plan;
  - Make reasonable efforts to transfer patients from a closing health care business to a new provider offering similar services; and,
  - For any year in which a tax return has not been filed, furnish such information as may be required by the applicable governmental entity.

20

Handling Funds and Making Distributions

- The subchapter V trustee might (or might not) handle funds and make distributions.
- Pre-confirmation:
  - Section 1194 permits, but does not require, a debtor to make adequate protection payments through the subchapter V trustee, with the permission of the bankruptcy court. 11 U.S.C. § 1194(c)
  - If the subchapter V trustee holds funds pre-confirmation, then upon confirmation, section 1194 directs that the trustee either distribute those funds in accordance with a confirmed plan or return those funds to the debtor after deducting any (1) unpaid administrative expenses, (2) adequate protection payments due to a secured lender, and (3) fees owing to the trustee. 11 U.S.C. § 1194(a)

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Handling Funds and Making Distributions *Continued*

- Post-confirmation
  - If a consensual plan is confirmed, the trustee's services will terminate upon substantial consummation of the plan. 11 U.S.C. § 1183(c)(1)
  - If a cramdown plan is confirmed, the trustee shall make payments to creditors under the plan, except as otherwise provided in the plan or confirmation order. 11 U.S.C. § 1194(b)

22

Subchapter V Trustee Recruitment

- The UST will appoint case-by-case trustees to administer cases, rather than standing trustees.
  - Subchapter V trustees will become part of "pools" of trustees from which the UST can appoint a trustee in a given case.
- Expect to recruit over 200 case-by-case trustees before February 19, 2020.
  - Recruitment advertisements ran from October 24 to November 15, 2019.
- Will learn from actual experience and adjust as appropriate.

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Qualifications for Appointment

- To be eligible for inclusion in a subchapter V trustee pool, an applicant must possess strong administrative, financial, and interpersonal skills.
- Fiduciary and bankruptcy experience is desirable, but not required.
- Individuals with business, managerial, consulting, mediation, and operational experience encouraged to apply.
- Expect to cut a wide swath when deciding on case-by-case trustees.
- The intent behind SBRA is to allow confirmation of a plan at a reasonable cost. As such, subchapter V trustees may not need to employ professionals in many cases.

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Appointing Trustees

- Before appointing a subchapter V trustee, the UST will have the trustee run a conflicts check in the case to ensure the trustee is disinterested.
- The UST will file a notice of appointment and include a verified statement from the trustee establishing the trustee's disinterestedness and also disclosing the trustee's proposed arrangement for compensation.
- The trustee will discuss the proposed arrangement for compensation with the debtor at the initial debtor interview conducted by the UST's office.

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United States Trustee Program is Dedicated to Making SBRA Work

- The intent of Congress is to provide small business debtors a heightened opportunity to effectuate a consensual plan and offer a new type of trustee to assist in this effort.
- The USTP will move promptly to select and train individuals who will be available to perform the new subchapter V trustee functions on February 19, 2020.
- The USTP will endeavor to provide training to bankruptcy constituencies before the effective date of the law.
- The USTP will carry out its oversight responsibilities in SBRA cases in close coordination with the subchapter V trustees.

26

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UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF LOUISIANA

	§	
	§	CASE NO: 19-12440
IN RE:	§	
	§	CHAPTER 11
ANDREW BLANCHARD and	§	
CHRISTINE BLANCHARD,	§	SECTION A
Debtors.	§	

ORDER AND REASONS

Andrew and Christine Blanchard (the "Debtors"), filed for bankruptcy relief under chapter 11 of the Bankruptcy Code on September 10, 2019. [ECF Doc. 1]. On April 21, 2020, the United States Trustee ("UST") filed a motion pursuant to § 1112(b) of the Bankruptcy Code to convert the case to chapter 7 or, alternatively, to dismiss the case (the "Motion To Convert"). [ECF Doc. 87]. On April 29, 2020, the Debtors amended their voluntary petition and elected to proceed under The Small Business Reorganization Act (the "SBRA"), 11 U.S.C. §§ 1181–1195, a law effective as of February 19, 2020, which created a new subchapter V to chapter 11 and "offers small business debtors, including individuals, a streamlined process and tailored tools for confirming a plan." *In re Trepetin*, No. 20-11718, 2020 WL 3833015, at *1 (Bankr. D. Md. July 7, 2020). The UST filed a *Supplemental Memorandum and Objection to Debtors' Election To Proceed as a Subchapter V Debtor*, arguing that allowing the Debtors to proceed under the SBRA after existing in chapter 11 for eight months with no real progress toward reorganization would "permit[] them to bypass deadlines applicable in their existing case and those which would now be long overdue in a subchapter V small business debtor case." [ECF Doc. 102].

The Debtors filed a response to the Motion To Convert and the UST's supplemental memorandum, citing the court's reasoning in *In re Progressive Solutions, Inc*., No. 8:18-BK-

14277, 2020 WL 975464 (Bankr. C.D. Cal. Feb. 21, 2020), that would allow them to proceed under the SBRA. [ECF Doc. 104]. A creditor, WBL SPO I, LLC ("WBL"), filed for joinder in the Trustee's Motion To Convert (the "Joinder"), [ECF Doc. 110], as well as a *Memorandum on Debtors' Claimed Status as Small Business Debtors, in Support of the United States Trustee's Motion To Convert, and in Support of the United States Trustees' Objection to Debtors' Election To Proceed as a Subchapter V Debtor*. [ECF Doc. 111]. WBL asserted that the Debtors, could not proceed under the SBRA as they are not "engaged in commercial or business activities," as required by the statute. *See id*. at 4–5. WBL argued that an individual debtor with debt resulting from the individual debtor's guarantee of commercial or business loans to a separate entity in which the individual debtor has a controlling interest does not qualify the individual debtor to be a debtor under the SBRA. Rather, for such an individual debtor to qualify under the SBRA, the separate legal entity must also be a debtor, of which the individual debtor may be an affiliate under § 1182(1)(A). *See id.* at 8–10. The Debtor filed a response to those arguments, [ECF Doc. 113], and also moved to dismiss the case in order to re-file the case under the SBRA, a move to which the UST agreed it would not object, (the "Motion To Dismiss"). [ECF Doc. 115].

This Court held oral argument on the Motion To Convert on June 11, 2020; afterward, the Debtors filed a brief and affidavit on the issue of whether they, as individuals, are eligible to be small business debtors under the SBRA, [ECF Docs. 119 & 122], and WBL filed a response on the same, [ECF Doc. 124]. This Court held oral argument on that issue on June 24, 2020, and continued the Motion To Convert and Motion To Dismiss, granting parties in interest leave to file supplemental briefs by July 1, 2020. On July 1, 2020, Dwayne M. Murray, appointed subchapter V trustee, filed a memorandum on the issue of whether these Debtors could qualify as debtors under the SBRA. [ECF Doc. 132].

Based upon the pleadings, the record, and the arguments of counsel, and applicable law, for the reasons that follow, this Court DENIES the Trustee's Motion To Convert and WBL's Joinder, DENIES AS MOOT the Debtor's Motion To Dismiss, and will allow the Debtors to proceed under the SBRA.

JURISDICTION AND VENUE

This Court has jurisdiction to grant the relief provided for herein pursuant to 28 U.S.C. § 1334. The matter presently before the Court constitutes a core proceeding that this Court may hear and determine on a final basis under 28 U.S.C. § 157(b). The venue of the Debtors' chapter 11 case is proper under 28 U.S.C. §§ 1408 and 1409(a).

DISCUSSION

"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 Wright*, No. 20-1035, 2020 WL 2193240, at * 2 (Bankr. D.S.C. Apr. 27, 2020) (quoting *In re Voelker*, 123 B.R. 749, 750 (Bankr E.D. Mich. 1990)). In pertinent part, under the SBRA, a debtor:

> (A) subject to subparagraph (B), means 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 assets 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 relieve in an amount not more than $7,500,000 (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; and
>
> (B) does not include—
>
> > (i) any member of a group of affiliated debtors that has aggregate noncontingent liquidated secured and unsecured debts in an amount greater than $7,500,000 (excluding debt owed to 1 or more affiliates or insiders) . . . .

11 U.S.C. § 1182(1).

The Debtors here do not seek affiliate status and are not affiliates as defined in the Code; rather, Debtors contend that they have independent status as small business debtors "engaged in commercial or business activities." [ECF Doc. 119, at 7]. Citing unrefuted affidavits and schedules they filed into the record, as well as proofs of claim filed by creditors in this case, the Debtors declare that:

1. They are sole owners of Pearl Inc. d/b/a Indian Ridge Shrimp Company ("Pearl"), a shrimp-processing company, [ECF Docs. 122 & 129];

2. They are sole members of A & C Cajun Distributors, LLC, ("Cajun Distributors"), a snack-vending operation, *see id.*;

3. They own Lagniappe Cajun Farms, LLC, ("Lagniappe"), a company that produces commercially sold pickled quail eggs, *see id.*;

4. Co-debtor Andrew Blanchard holds 49% of the membership interests in Bayou Blue Hemp, LLC, a farming operation, *see id.*;

5. They own and rent two properties from which they receive rental income, *see id.*;

6. Their business debts stem from personal guarantees of Pearl's debt and nine other businesses, and from mortgages on their rental properties, [ECF. Doc. 122]; and

7. The Claims Register as of June 17, 2020, reflects debts associated with commercial or business activities in the amount of $1,110,714.04 and consumer debts in the amount of $290,712.73. [ECF Doc. 119].

WBL interprets the language in the statute that defines a "debtor" as "a person engaged in commercial or business activities" to require a debtor to be currently engaged in commercial or business activities. [ECF Doc. 124, at 1–2 (citing 11 U.S.C. § 1182(a)(A))]. As the Subchapter V Trustee observes, however, the statute neither qualifies "engaged in" as currently nor formerly "engaged in." [ECF Doc. 132, at 4]. This Court adopts here the reasoning of the *Wright* court, finding that "[a]lthough 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, 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." *In re Wright*, 2020 WL 2193240, *3 (emphasis added); *see also In re Bonert*, No. 2:19-BK-20836, 2020 WL 3635869, at *5 (Bankr. C.D. Cal. June 3, 2020). As is evidenced in the record, a majority of the Debtors' debts stem from operation of both currently operating businesses and non-operating businesses, and those debts do not exceed the SBRA's debt limit. [ECF Docs. 122 & 129]. Therefore, this Court finds that the Debtors qualify as small business debtors under the SBRA. *See In re Bonert*, 2020 WL 3635869, at *5 (finding proper a debtor's election to proceed under the SBRA to address the debtors' liabilities stemming from their prior operation of a bakery); *In re Wright*, 2020 WL 2193240, at *3 (finding that debtor who sought to address residual business debt he incurred from non-operating companies to be "engaged in commercial or business activities" without reliance on a coexistent case).

The UST's primary objections to allowing the Debtors to proceed now under the SBRA after filing their initial petition approximately ten months ago are procedural in nature. The UST made good arguments regarding the practicality and scheduling issues associated with an SBRA designation of a pending case. But "there are no bases in law or rules to prohibit a resetting or rescheduling of these procedural matters." *In re Progressive Solutions, Inc.*, No. 8:18-BK-14277, 2020 WL 975464, at *5 (Bankr. C.D. Cal. Feb. 21, 2020). The UST also advanced a legitimate due process argument that advocated for the vested rights of any creditors whose interests would be jeopardized by a SBRA conversion. This Court allowed the opportunity for any such creditors to come forward; however, none did so. As observed by the *Progressive Solutions* court, "the whole, the entire whole, of the legislative history and statements of Congress teaches the Court

that the primary purpose of the SBRA is to promote successful reorganizations using the tools that are now available under current law." *Id.* Therefore, this Court will allow the Debtors to proceed in reorganizing under the SBRA.

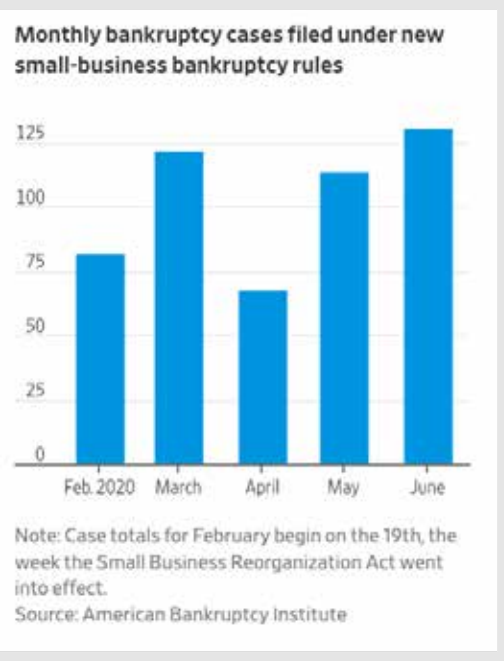
CONCLUSION

Based on the foregoing, this Court (1) **DENIES** the UST's Motion To Convert and WBL's Joinder and (2) **DENIES AS MOOT** the Debtor's Motion To Dismiss.

New Orleans, Louisiana, July 16, 2020.

MEREDITH S. GRABILL
UNITED STATES BANKRUPTCY JUDGE

Monthly Bankruptcy Cases Filed under SBRA



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SO ORDERED.

SIGNED this 28th day of February, 2020.

BENJAMIN A. KAHN
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF NORTH CAROLINA
DURHAM DIVISION

In re:	)	
	)	
Moore Properties of Person County, LLC,	)	Case No. 20-80081
	)	
	)	Chapter 11
Debtor.		

MEMORANDUM ORDER OVERRULING OBJECTION OF BANKRUPTCY ADMINISTRATOR TO DEBTOR'S SMALL BUSINESS DESIGNATION UNDER RULE 1020

This case came before the Court for hearing on February 25, 2020, on the Objection of Bankruptcy Administrator to Debtor's Designation as Small Business Debtor (the "Objection"), ECF No. 14. At the hearing, James White appeared on behalf of Moore Properties of Person County, LLC ("Debtor"), and William P. Miller appeared as the Bankruptcy Administrator ("BA").[1] ECF No. 31. For the reasons set forth herein, the Court will overrule the Objection.

[1] After the hearing, the BA filed a Notice of Appointment of Subchapter V Trustee, ECF No. 30, appointing Richard M. Hutson, II as the Subchapter V Trustee in this case. Mr. Hutson attended the hearing on February 25, 2020, telephonically.

Jurisdiction

The Court has jurisdiction over the subject matter of this proceeding pursuant to 28 U.S.C. § 1334. Under 28 U.S.C. § 157(a), the United States District Court for the Middle District of North Carolina has referred this case and this proceeding to this Court by its Local Rule 83.11. This is a statutorily core proceeding under 28 U.S.C. § 157(b)(1), (b)(2)(A), and (b)(2)(O). The Court has constitutional authority to enter this Order.

Findings of Fact

On February 10, 2020, Debtor filed a voluntary petition for relief under chapter 11. Debtor owns three separate parcels of real property, which it leases to third parties who engage in farming operations.[2] ECF No. 1 at 9. Debtor has no business operations outside of its leasing of the real properties and matters incidental thereto.[3] ECF Nos. 27 and 31.

The petition was precipitated by two pending foreclosure actions, one against each of Debtor's properties. ECF No. 1 at 23, Official Form 207 Statement of Financial Affairs for Non-

[2] At the Hearing, the BA and Debtor's counsel stated that at least two of the parcels are not continuous, and secure separate obligations owed by Debtor to Carolina Farm Credit, ACA.

[3] In the petition, Debtor described its business under the North American Industry Classification System four digit code, 5311, which is classified as "Lessors of Real Estate." According to the schedules, Debtor owns three plots of land valued at a total of $292,394, but owns no other assets, such as machinery, inventory, or investments, to indicate any other operations aside from real estate.

Individuals Filing for Bankruptcy. In its statement filed with the petition under Fed. R. Bankr. P. 1020(a), Debtor stated that it is a small business debtor as defined in 11 U.S.C. § 101(51D).[4]

Local Rule 3003-1(a) provides that proofs of claims for non-governmental units in a chapter 11 case shall be filed within 90 days of the first date set for the meeting of creditors under 11 U.S.C. § 341(a). On February 11, 2020, the Clerk of Court issued a notice (the "Claims Notice") consistent with this rule, directing non-governmental creditors to file proofs of claims on or before June 11, 2020. ECF No. 10. The Bankruptcy Noticing Center served the Claims Notice on all creditors on February 13, 2020. ECF No. 16.[5]

On February 13, 2020, the BA objected under Fed. R. Bankr. P. 1020(b) and 11 U.S.C. § 101(51D) to Debtor's designation of itself as a small business debtor on its petition. ECF No. 14. In the Objection, the BA asserted that Debtor failed to meet the

[4] The Bankruptcy Administrator filed a memo on the docket stating that no unsecured creditors committee would be formed due to the insufficient number of creditors who had filed claims. ECF No. 9. Debtor has remained a debtor in possession throughout the case.

[5] The proof of claim deadline in cases under subchapter V of chapter 11 is different. Local Rule 3003-1(b) provides, "except as otherwise specified by order of the court," the bar date for non-governmental proofs of claim in a case under subchapter V case is 70 days after the order for relief. Because the Clerk has issued a notice in this case setting the proof of claim deadline consistent with Local Rule 3003-1(a), the Court finds that there is cause to issue an order setting the deadline as noticed, and will enter a separate order to that effect.

definition of a small business debtor on the petition date because it primarily owned and managed real property.

On August 23, 2019, the President signed the Small Business Reorganization Act of 2019 (the "SBRA" or the "Act"), thereby effectuating its enactment. Pub. L. No. 116-54, 133 Stat. 1079 (2019). Section 5 of the SBRA provides in full: "This Act and the amendments made by this Act shall take effect 180 days after the date of enactment of this Act." § 5, 133 Stat. 1079, 1087. Therefore, the SBRA became effective on February 19, 2020. In its central purpose, the SBRA added a new subchapter V to chapter 11 as an elective chapter for small business debtors for whom the existing provisions of chapter 11 were not providing effective relief.[6]

Five days after the SBRA became effective, Debtor filed an amended petition (the "Amended Petition") under Fed. R. Bankr. P. 1009(a), ECF No. 24, amending its statement under Fed. R. of Bankr. P. 1020(a), still designating itself as a small business, but electing to proceed under the newly effective subchapter V of chapter 11. Id. at 2. At the hearing on February 25, 2020, no

[6] See Oversight of Bankruptcy Law and Legislative Proposals: Hearing Before the Subcomm. on Antitrust, Commercial, & Admin. Law of the H. Comm. on the Judiciary, 116th Cong. (2019) (Revised Testimony of A. Thomas Small on Behalf of the National Bankruptcy Conference in support of H.R. 3311); American Bankruptcy Institute Commission To Study the Reform Of Chapter 11, 2012-2014 Final Report And Recommendations 275-78 (2014); Could Bankruptcy Reform Help Preserve Small Business Jobs: Hearing Before the Subcomm. on Admin. Oversight and the Courts of the S. Comm. on the Judiciary, 108th Cong. (2010) (Testimony of A. Thomas Small on behalf of the National Bankruptcy Conference).

party objected to Debtor's amended election to proceed under subchapter V, and according to the BA, Debtor's only secured creditor, Carolina Farm Credit, does not object either to Debtor's designation as a small business or to Debtor's election to proceed under subchapter V. With the exception of the Claims Notice, no procedural or substantive rights have vested in this nascent case in a manner that will prejudice any party in interest, and no creditor will be prejudiced by the application of the provisions of the SBRA to this case or by the change in Debtor's statement electing to proceed under subchapter V.

Discussion

The parties in this case present two issues: (1) may Debtor, whose case was pending on the effective date of the SBRA, elect to proceed under subchapter V of chapter 11; and (2) is Debtor, who did not meet the definition of a small business debtor on the petition date, eligible to proceed under subchapter V when it now meets that definition under the SBRA? Because Debtor only meets the definition of a small business debtor to the extent that the SBRA applies, these issues bleed into one another, and the Court will consider the general applicability of the SBRA to this case first.

As it is stated above, the first issue presented to the Court does not accurately reflect the legal considerations before the Court in considering the applicability of the SBRA to existing

cases, and therefore may perpetuate confusion. Commentators have discussed this issue as whether subchapter V of chapter 11 will apply to cases pending before the February 19, 2020 effective date.[7] This is not the correct formulation of the issue, and therefore creates confusion about what might or might not constitute retroactive application of new law. To assume that subchapter V applies to all aspects of pre-existing debtor-creditor relationships so long as the case is commenced after that date overlooks the parties' contractual and property rights and expectations in place on the effective date of the SBRA. With the exception of debtor-creditor relationships formed on or after February 19, 2020, for the reasons set forth below, the issue is whether newly created subchapter V may properly be applied to affect those pre-existing rights. If so, the Court should apply the law as it currently exists.

The Supreme Court has articulated the canons of statutory construction that courts should consider when determining whether

[7] This confusion likely stems from the distinction in the effective date language for the SBRA as compared to the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. Pub. L. 109-8, (Apr. 20, 2005) ("BAPCPA"). Under § 1501(b) of BAPCPA, and unlike the SBRA, Congress specifically limited its application to cases commenced after its effective date by providing that it would not apply "with respect to cases commenced under title 11, United States Code, before the effective date of this Act." Although Congress specifically prohibited BAPCPA from applying to existing cases, the provisions of § 1501 do not affect the rubric required by the Supreme Court in determining whether amendments apply to pre-existing contractual relations or property rights as set forth herein. Nothing in the SBRA prevents its application in existing cases.

to apply new law, or newly amended law, to prior conduct. In Landgraf v. USI Film Products, 511 U.S. 244, 114 S. Ct. 1483 (1994), the Court considered whether amended provisions of Title VII of the Civil Rights Act of 1964,[8] as implemented by the Civil Rights Act of 1991 (the "1991 Amendments"),[9] applied to claims based on conduct occurring prior to the enactment of the amendments. The enactment of the 1991 Amendments became effective after the conclusion of a bench trial in which the district court dismissed the plaintiff's claims, and during the pendency of plaintiff's appeal. Id. at 248-49, 114 S. Ct. at 1488-89. These amendments would have entitled the plaintiff to a jury trial and expanded the scope of the Act and the remedies available thereunder. Id. at 250-52, 114 S. Ct. at 1489-90. The plaintiff demanded that the matter be remanded for a jury trial and to consider the award of additional damages under the amendments. Id. The Court granted certiorari to determine "whether the Court of Appeals should have applied the law in effect at the time the discriminatory conduct occurred, or at the time of its decision in July 1992." Id. at 250, 114 S. Ct. 1489.

Similar to the effective language of the SBRA, the 1991 Amendments in Landgraf did not expressly provide whether the

[8] Rev. Stat. § 1977A(a), 42 U.S.C. § 1981a(a) (1988 ed., Supp. IV).

[9] Pub. L. 102-166, 105 Stat. 1072 § 102 (1991).

amendments would apply to prior conduct. The 1991 Amendments provided that "this Act and the amendments made by this Act shall take effect upon enactment." Id. at 257, 114 S. Ct. 1493. The Court found that "[a] statement that a statute will become effective on a certain date does not even arguably suggest that it has any application to conduct that occurred at an earlier date." Id.

Concluding that the statutory language did not dictate an answer, the Court cited two potentially conflicting canons that guide courts when determining the effect of intervening changes in the law governing prior conduct. First, "a court is to apply the law in effect at the time it renders its decision." Id. at 264 (quoting Bradley v. School Bd. Of Richmond, 416 U.S. 696, 711 (1974)). Second, "[r]etroactivity is not favored in the law," and "congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result." Landgraf, 511 U.S. at 264 (quoting Bowen v. Georgetown Univ. Hospital, 488 U.S. 204, 208 (1988)). The presumption against retroactivity stems from "[e]lementary considerations of fairness . . . that individuals should have an opportunity to know what the law is and to conform their conduct accordingly," and the principle that "settled expectations should not be lightly disrupted." Landgraf, 511 U.S. at 265. Accordingly, the presumption against retroactivity particularly

applies to "new provisions affecting contractual or property rights, matters in which predictability and stability are of prime importance." Id. at 271 (citing, inter alia, United States v. Sec. Indus. Bank, 459 U.S. 70, 79-82, 103 S. Ct. 407, 413-14 (1982)).

In Security Industrial Bank, the Court gave more specific guidance for courts considering the application of newly minted bankruptcy provisions that may affect pre-existing contractual or property rights. In that case, the Court considered whether a debtor could utilize the newly enacted Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (the "1978 Act"), to entirely avoid a non-possessory, purchase-money lien that could not have been avoided under the provisions of prior bankruptcy law where the underlying obligation arose prior to the effective date of the 1978 Act. 459 U.S. at 71-72, 103 S. Ct. 409. The Court began by recognizing that the constitutional bankruptcy power under Article I Section 8, Clause 4 "has been regularly construed to authorize the retrospective impairment of contractual obligations," but recognized the "additional difficulty that arises when that power is sought to be used to defeat traditional property interests." Id. at 410, 103 S. Ct. 74-75 (citing Hanover Nat. Bank v. Moyses 186 U.S. 181, 22 S. Ct. 857 (1902)). The Court therefore drew a distinction between the permissibility of applying new bankruptcy provisions to modify existing contractual

rights, and the impermissibility of applying that power to defeat vested "traditional property interests." Id. (observing that the latter implicated the Fifth Amendment's prohibition against taking private property without just compensation, and rejecting the government's argument that property rights were no more protected than contractual rights in the bankruptcy context because contract rights are merely a form of property rights). The Court further illustrated this distinction in the context of secured creditors: "[T]he contractual right of a secured creditor to obtain repayment of his debt may be quite different in legal contemplation from the property right of the same creditor in the collateral." Id. at 75, 103 S. Ct. at 411. The Court concluded that the avoidance of the lien under the new law crossed this line into impermissibly creating a retroactive taking of a vested property interest because the avoidance "would result in a complete destruction of the property right of the secured party." Id.

The application of subchapter V in this case creates none of the taking or retroactivity concerns expressed by the Court in Landgraf and Security Industrial Bank. Subchapter V incorporates most of existing chapter 11, and, with two main exceptions of no effect here, does not alter the rubric under which debtors may affect pre-petition contractual rights of creditors, much less vested property rights.

The central vehicle for modifying pre-petition contractual relationships in chapter 11 is through the provisions of a confirmed plan.[10] The required and permissible provisions of a chapter 11 plan are contained in existing 11 U.S.C. § 1123, which applies unaltered under subchapter V with three exceptions. Section 1181(a) excludes § 1123(a)(8)[11] from the provisions which may be included in a plan, and excludes the requirements of § 1123(c).[12] Section 1190(3) further creates an exception to the anti-modification provision in § 1123(b)(5) by permitting the modification of the rights of the holder of a secured claim secured solely by a security interest in the principal residence of the debtor if the obligation is not purchase money and the new value received was used primarily in connection with the debtor's small business. Even if the bankruptcy power could not be used to alter pre-existing contractual rights, these exclusions do not alter

[10] Subchapter V largely incorporates the general provisions already applicable under chapters 1, 3, and 5 of the Bankruptcy Code, and any exceptions are inapplicable here. As set forth above, the SBRA amended the definition of "small business debtor" under chapter 1, but that revision does not affect contractual or vested property rights any more than the general availability of subchapter V.

[11] Section 1123(a)(8) requires an individual debtor to contribute post-petition earnings as necessary for execution of the plan.

[12] Section 1123(c) prohibits a third-party plan from providing for the use of exempt property in an individual case.

such rights,[13] and the exception to the anti-modification provision in § 1123(b)(5) is inapposite here.[14]

Subchapter V also modifies the requirements for a chapter 11 small business debtor that elects its application to obtain a confirmed plan. The existing requirements for confirmation are set forth under § 1129. Under § 1191(a), the debtor must meet all the existing requirements for confirmation under § 1129(a) with the exception of § 1129(a)(15) that is inapposite.[15] Under § 1191(b), a subchapter V debtor may confirm a plan without acceptance by at least one accepting impaired class as otherwise required by § 1129(a)(10) so long as the plan does not discriminate unfairly and is fair and equitable to the dissenting class. With

[13] Section 1123(a)(8) is rendered superfluous by newly effective § 1190(2), which requires any debtor to contribute earnings as necessary for execution of the plan. Section 1123(c) is inapplicable because only the debtor may propose a plan under subchapter V. 11 U.S.C. § 1189(a). Neither of these provisions alters pre-existing contractual rights, and even if either did, such alteration is permissible under the bankruptcy power. Sec. Indus. Bank, 459 U.S. 74-75.

[14] The exception to the anti-modification provision does not prohibit the availability of subchapter V to Debtor in this case for at least two reasons. First, it will be the rare case in which the exception applies, but it does not apply here in any event. There is only one secured creditor, and the debtor is an artificial entity without a principal residence. Second, even if there were such a lien in this case, the issue would be whether the application of 1190(3) constitutes and impermissible taking, and, if so, the court would not apply that provision, rather than declaring the entirety of subchapter V inapplicable. Cf. Sec. Indus. Bank, 459 U.S. 70 (declaring the application of § 522(f) to pre-existing liens to constitute an impermissible taking, but not dismissing the entire underlying bankruptcy case under the 1978 Act). Nevertheless, for the first reason, the Court need not consider the effect of § 1190(3) in this case.

[15] Section 1129(a)(15) applies only in individual cases. Debtor is not an individual. With respect to plans confirmed without acceptance by all impaired classes, even in individual cases, § 1191(c) renders this section largely superfluous in cases under subchapter V.

the exception of the removal of the requirement of an accepting impaired class, this is the same standard for confirmation under existing § 1129(b), but subchapter V amends the definition of "fair and equitable" for classes of unsecured creditors and interests by substituting the disposable income requirement in lieu of the absolute priority rule under § 1129(b)(2)(B) and (C), respectively.

The alteration of the definition of fair and equitable in an existing case does not, standing alone, amount to an impermissible retroactive taking. To the extent that a case were pending for an extended period of time on the effective date of the SBRA, it is possible that a case could be sufficiently advanced that the substantive alterations in the requirements for plan confirmation arise to a taking of a vested property rights. This is not such a case and the Court need not consider here the extent to which parties in interest may have so invested in such a case or the court may have entered orders that created sufficient vested property interests or post-petition expectations to prevent the application of subchapter V to those rights or make its application offend "[e]lementary considerations of fairness" such that the parties "have an opportunity to know what the law is and to conform their conduct accordingly." Landgraf, 511 U.S. at 265, 114 S. Ct. at 1497. Nothing of that sort has occurred in this case. See In re Progressive Solutions, Inc., Case No. 8:18-bk-14277-SC, p. 8

(Bankr. C.D.Cal. Feb. 21, 2020) (finding that debtor could amend its election to proceed under subchapter V where no creditor "had rights that were vested by rulings of the Court, [and where no] other events [had occurred] . . . that would be disturbed by the designation of the case as a Subchapter V case").

For these reasons, the Court concludes that this is not a case in which the Court is asked to apply new law retroactively in violation of the mandates of Landgraf or Security Industrial Bank. Therefore, the 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.

Is the Debtor a Small Business Debtor?

On the petition date, the term "small business debtor" was defined as follows:

> **(51D)** The term "small business debtor"--
> **(A)** subject to subparagraph (B), means 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 or operating real property or activities incidental thereto) 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 $2,000,000 (excluding debts owed to 1 or more affiliates or insiders) for a case in which the United States trustee has not appointed under section 1102(a)(1) a committee of unsecured creditors or where the court has determined that the committee of unsecured creditors is not sufficiently active and representative to provide effective oversight of the debtor;

11 U.S.C. § 101(51D) (emphasis added). Debtor did not constitute a small business under this definition on the petition date because its primary operation was the business of owning and leasing real property.[16]

Under Fed. R. Bankr. P. 1020(a), a debtor must state in its bankruptcy petition "whether the debtor is a small business debtor and, if so, whether the debtor elects to have subchapter V of chapter 11 apply." See Interim Rule of Bankruptcy Procedure No. 1020(a), implementing the Small Business Reorganization Act of 2019 (collectively the "Interim Rules," and individually "Interim Rule #"). Despite failing to meet the definition of a small business on the petition date, Debtor stated that it is a small business on its petition. "[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."[17] Id. (emphasis added). After

[16] At the hearing, no party contested that Debtor was incorrect in designating itself as a small business debtor, or that it now would qualify as one under the SBRA.

[17] At the time Debtor filed the petition, the language of Rule 1020(a) was as follows:

> In a voluntary chapter 11 case, the debtor shall state in the petition whether the debtor is a small business debtor. In an involuntary chapter 11 case, the debtor shall file within 14 days after entry of the order for relief a statement as to whether the debtor is a small business debtor. Except as provided in subdivision (c), the status of the case as a small business case shall be in accordance with the debtor's statement under this subdivision,

a Debtor elects to be a small business debtor, "[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." Id. at (b). Put simply, the original designation controls unless and until the court enters an order finding that a debtor's election is incorrect, and such "review is triggered by an objection to the designation." See In re Angel Fire Water Co., LLC, 2015 Bankr. LEXIS 170, at *14 (Bankr. D. N.M. Jan. 20, 2015) (citing Fed. R. Bankr. P. 1020(a) and finding that because Debtor never elected to be a small business debtor and no party objected to its status, it would be "[in]appropriate in [the] case to alter Debtor's statement sua sponte"); In re Maxx Towing, Inc., 2011 Bankr. LEXIS 2826 (Bankr. E.D. Mich. July 27, 2011)(finding Debtor to be a small business debtor and administering the case as such because (1) no objections were raised by the United States Trustee or any interested party, and (2) Debtor never sought to amend the designation); In re Castle Horizon Real Estate, LLC, 2010 Bankr. LEXIS 2900, *5-6 (Bankr.

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unless and until the court enters an order finding that the debtor's statement is incorrect.

(emphasis added). This language is the same language provided in Interim Rule 1020(a) and has the same corresponding effect. Debtor's initial designation as a small business debtor, under either Rule 1020(a) or Interim Rule 1020(a), governs unless and until the Court orders otherwise.

E.D.N.C. Sept. 10, 2010) (nothing in the rule suggests that a change to the designation either by the debtor or by the court is retroactive); See 9 Collier on Bankruptcy ("Collier") ¶ 1020.03 (16th ed. 2019). Therefore, through the date of the hearing on the BA's objection, Debtor was a small business debtor.

Among other amendments, the SBRA changed the definition of "small business debtor." Under the SBRA, the definition of small business now only excludes those owners of real property that constitute "single asset real estate." As defined under 11 U.S.C. § 101(51B) and as relevant to this case, single asset real estate ("SARE") is limited to real property constituting a single property . . .." Debtor's property consists of at least two separate parcels, each generating Debtor's revenue. Therefore, Debtor's property is not SARE, and Debtor meets the definition of a small business debtor as of the date of the hearing on the BA's objection, and is entitled to elect application of subchapter V.

Under Fed. R. Bankr. P. 1009,

> [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. The debtor shall give notice of the amendment to the trustee and to any entity affected thereby. On motion of a party in interest, after notice and a hearing, the court may order any voluntary petition, list, schedule, or statement to be amended and the clerk shall give notice of the amendment to entities designated by the court.

As such, "an amendment to a Bankruptcy Petition can be made at any time as a matter of course at any time before the case is closed."

In re Progressive Solutions, Inc., Case No. 18-14277, ECF No. 157, p. 11 (Bankr. C.D. Cal. Feb. 21, 2020). Therefore, Debtor was entitled to amend its statement to elect subchapter V.[18]

For the reasons set forth above, Debtor designated itself as a small business debtor on the petition date, and that designation controls unless and until the Court determines that it is incorrect. As of the date of the hearing in this case, the designation was not incorrect, and the Debtor is a small business debtor. As a small business debtor, Debtor was entitled to make the election to have subchapter V apply. See 11 U.S.C. § 103(i). The BA's objection therefore is overruled.

[END OF DOCUMENT]

[18] In a case that is further along, such an amendment to elect subchapter V might carry serious consequences for a debtor. For example, § 1189(a) requires a debtor to file a plan within 90 days of the order for relief, and the court only may extend this deadline if the need for the extension is attributable to circumstances for which the debtor should not justly be held accountable. 11 U.S.C. § 1189(b). To the extent that 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. Late amendments, even if permissible under the standards and prohibitions against retroactivity discussed above, may also create discord with creditors or other parties in interest, including without limitation, a subchapter V trustee, the Bankruptcy Administrator, or United States Trustee, that may adversely affect the advancement of the case or the ability of the debtor to effectuate a plan.

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UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH CAROLINA

IN RE:	C/A No. 20-01035-HB
Charles Christopher Wright,	Chapter 11
Debtor(s).	**ORDER DENYING MOTION TO STRIKE**

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").

[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.

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.

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).

[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. 116-748 (2020)). The CARES Act is applicable only to cases filed after its enactment.

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)).

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. 116-748 (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

[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.*

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.

FILED BY THE COURT
04/27/2020

Chief US Bankruptcy Judge
District of South Carolina

Entered: 04/27/2020

2020 WL 3635869
Only the Westlaw citation is currently available.
United States Bankruptcy Court, C.D. California.

In re: Michael **Bonert** and Vivien **Bonert**, Debtors.

Case No.: 2:19-bk-20836-ER
|
Date: June 3, 2020

Chapter: 11

MEMORANDUM OF DECISION AUTHORIZING DEBTORS TO PROCEED UNDER SUBCHAPTER V OF CHAPTER 11

[RELATES TO DOC. NOS. 186 AND 246]

Ernest M. Robles United States Bankruptcy Judge

***1** At issue is whether the Debtors should be permitted to amend their Chapter 11 petition to elect treatment under the newly-enacted Subchapter V of Chapter 11. The Official Committee of Unsecured Creditors (the "Committee") opposes the Debtors' Subchapter V election. No other opposition to the Subchapter V election is on file. [1]

For the reasons set forth below, the Committee's opposition is **OVERRULED**, and the Debtors are authorized to proceed under Subchapter V.

I. Procedural Background

Michael **Bonert** ("Michael") and Vivien **Bonert** ("Vivien," and together with Michael, the "Debtors") [2] filed a voluntary Chapter 11 petition on September 12, 2019 (the "Petition Date"). Doc. No. 1 (the "Petition"). The Debtors stated that they were not "**small business** debtors" within the meaning of § 101(51D). Petition at ¶ 13.

On March 3, 2020, the Debtors filed an Amended Voluntary Petition [Doc. No. 136] (the "Amended Petition"), which made two changes to the Petition. First, the Debtors stated that they were "**small business** debtors" as defined in § 101(51D). Amended Petition at ¶ 13. Second, the Debtors elected treatment under the newly-enacted Subchapter V of Chapter 11. *Id.*

On March 12, 2020, the Court entered an *Order Establishing Procedures Governing the Determination of Whether this Case Will Proceed Under Subchapter V of Chapter 11 of the Bankruptcy Code* [Doc. No. 186] (the "Subchapter V Procedures Order"). The Subchapter V Procedures Order fixed March 26, 2020 as the deadline for interested parties to object to the Debtors' election to proceed under Subchapter V, and stated that if an objection was filed, the Court would determine whether a hearing was required and would notify the parties accordingly.

On February 20, 2020, the United States Trustee (the "UST") appointed the Committee, which is comprised of five creditors. Doc. Nos. 128 and 131. On February 28, 2020, the Committee filed an application requesting authorization to employ Blakely LLP ("Blakely") as the its counsel. Doc. No. 133 (the "Employment Application"). On March 12, 2020, the UST objected to the Employment Application, arguing among other things that Blakeley had failed to make the disclosures required under Bankruptcy Rule 2014. Doc. No. 187. On March 13, 2020, the Debtors objected to the Employment Application, arguing among other things that the Employment Application would be moot if the Court authorized the Debtors to proceed under Subchapter V, since under Subchapter V a creditor's committee may not be appointed "[u]nless the court for cause orders otherwise," § 1102(a)(3). Doc. No. 189. A hearing on the Employment Application was initially set for April 22, 2020 at 10:00 a.m. Doc. No. 241.

***2** On March 16, 2020, the UST appointed Gregory K. Jones to serve as the Subchapter V Trustee, pursuant to § 1183(a). Doc. No. 206. On March 24, 2020, the Debtors, the UST, and the Subchapter V Trustee executed a *Stipulation to Continue Deadline to Object to Case Proceeding Under Subchapter V* [Doc. Nos. 234 and 238] (the "Stipulation"). The Stipulation noted that under Bankruptcy Rule 1020(b), parties in interest have thirty days from the conclusion of the § 341(a) meeting of creditors to object to a debtor's statement that it is a "**small business** debtor" as defined by § 101(51D). Based upon the fact that a debtor cannot elect treatment under Subchapter V unless the debtor is also a "**small business** debtor," the Stipulation requested that the deadline for interested parties to object to the Debtors' Subchapter V election be extended to thirty days after the conclusion of the meeting of creditors.

On April 6, 2020, the Court entered an order (1) approving the Stipulation, (2) extending the deadline for interested

parties to object to the Debtors' Subchapter V election to and including May 20, 2020, and (3) adjourning the hearing on the Employment Application pending further order of the Court. Doc. No. 246. The Court explained that the Employment Application could not be adjudicated until after determination of whether the case would proceed under Subchapter V, given that Subchapter V does not contemplate the appointment of a Committee "[u]nless the court for cause orders otherwise," § 1102(a)(3). *Id.*

The Committee is the only party that has objected to the Debtors' Subchapter V election. In opposition to such election, the Committee argues that it would be prejudiced if the case were to proceed under Subchapter V; that the Debtors should be judicially estopped from re-designating as "**small business** debtors" in order to become eligible for treatment under Subchapter V; and that the Debtors may exceed the **small business** debt limit under § 101(51D). The Debtors dispute each of these contentions.

II. Findings and Conclusions

The **Small Business** Reorganization Act of 2019 (the "SBRA") became effective on February 19, 2020. The purpose of SBRA is "to streamline the reorganization process for **small business** debtors because **small businesses** have often struggled to reorganize under chapter 11." *In re Ventura*, --- B.R. ---, No. 8-18-77193-REG, 2020 WL 1867898, at *6 (Bankr. E.D.N.Y. Apr. 10, 2020) (publication forthcoming). Nothing in SBRA addresses whether the act applies to pending cases or only to cases commenced after the effective date of the legislation.

The majority of courts that have addressed the issue have found that a debtor who filed a Chapter 11 petition prior to the effective date of SBRA may amend the petition to elect treatment under Subchapter V. In *In re Ventura*, the court allowed the debtor to proceed under Subchapter V, even though the debtor's petition had been filed fifteen months prior to the effective date of SBRA and both the debtor and a creditor had filed competing plans of reorganization. *Id.* at *2–4. The *Ventura* court held that "any practicality and scheduling issues arising from a SBRA designation in a case commenced prior to the effective date of the SBRA" could be resolved by an extension of any SBRA-specific deadlines. *Id.* at *8. The court authorized re-designation to Subchapter V over the objection of the creditor who had filed a competing plan, reasoning that "in general, the new subchapter V provisions do not impair the vested property interests of creditors and, therefore, the concerns supporting application of the canon of statutory construction disfavoring the retroactive application of new law are absent." *Id.* at *9.

Re-designation to Subchapter V in cases filed prior to the effective date of SBRA was also permitted in *In re Body Transit, Inc.*, 613 B.R. 400 (Bankr. E.D. Pa. 2020), *In re Bello*, --- B.R. ---, No. 19-46824, 2020 WL 1503460 (Bankr. E.D. Mich. Mar. 27, 2020) (publication forthcoming), and *In re Moore Properties of Pers. Cty., LLC,* No. 20-80081, 2020 WL 995544 (Bankr. M.D.N.C. Feb. 28, 2020). In *In re Progressive Sols., Inc.,* --- B.R. ---, No. 8:18-BK-14277-SC, 2020 WL 975464 (Bankr. C.D. Cal. Feb. 21, 2020) (publication forthcoming), the court found as a matter of law that there was no reason why re-designation could not be approved, but found that the request for re-designation before it was procedurally improper. The only case of which the Court is aware in which re-designation was not authorized is *In Re Double H Trans. LLC*, --- B.R. ---, 2020 WL 2549850 (Bankr. W.D. Tex. Mar. 5, 2020) (publication forthcoming).

***3** The Court finds re-designation to Subchapter V to be appropriate on the specific facts of this case. However, it is important for the Court to emphasize that re-designation will not necessarily be proper in all Chapter 11 petitions commenced prior to the effective date of SBRA.

Applying the standard set forth in *Body Transit*, the Court finds that re-designation is warranted if not sought in bad faith and provided that no party will be unduly prejudiced. *Body Transit*, 613 B.R. at 408. The Debtors have satisfied this standard.

A. The Committee Will Not Be Unduly Prejudiced By Re-Designation

The Court finds that the Committee will not be unduly prejudiced by re-designation. The Committee had been in existence for only a short period of time before the Debtors elected treatment under Subchapter V. The Committee was appointed on February 20, 2020; the Debtors filed their Amended Petition electing treatment under Subchapter V on March 3, 2020. The Court has not yet ruled upon the Committee's application to employ Blakely as its counsel. [3]

In addition, the Court will provide the Committee an opportunity to show cause why it should be permitted to continue in existence after the Debtors' Subchapter V election takes effect. *See* § 1102(a)(3)("Unless the Court for cause orders otherwise, a committee of creditors may not be

appointed in a **small business** case or a case under subchapter V of this chapter"). The Committee will not be disbanded if it can demonstrate that its continued existence will improve recoveries to creditors, will assist in the prompt resolution of this case, and is necessary to provide effective oversight of the Debtors.

The Committee asserts that allowing the case to proceed under Subchapter V would be prejudicial because it has already expended significant resources opposing numerous claim objections filed by the Debtors (the "Claim Objections"). This argument suffers from two problems. First, at the time the Committee opposed the Claim Objections, the Court had already entered the Subchapter V Procedures Order, which made clear to all parties the possibility that the Court might permit the Debtors to elect treatment under Subchapter V. The Committee made its decision to oppose the Claim Objections with full awareness that its future role in this case was uncertain. In fact, at the time the Committee opposed the Claim Objections, its application to employ Blakely LLP as its counsel had not been ruled upon.

Second, in opposing the Claim Objections, the Committee defended the interests of particular creditors in their individual capacity, as opposed to representing the interests of the general unsecured creditor body as a whole. The Committee lacks standing to assert rights on behalf of specific creditors in their individual capacity. The responsibilities of a creditor's committee are enumerated in § 1103(c). A creditor's committee may:

1) [C]onsult with the trustee or debtor in possession concerning the administration of the case;

2) [I]nvestigate the acts, conduct, assets, liabilities, and financial condition of the debtor, the operation of the debtor's business and the desirability of the continuance of such business, and any other matter relevant to the case or to the formulation of a plan;

***4** 3) [P]articipate in the formulation of a plan, advise those represented by such committee of such committee's determination as to any plan formulated, and collect and file with the court acceptances or rejections of a plan;

4) [R]equest the appointment of a trustee or examiner under section 1104 of this title; and

5) [P]erform such other services as are in the interest of those represented.

§ 1103(c).

In *In re Anderson*, 349 B.R. 448 (E.D. Va. 2006), the court examined the extent to which a creditor's committee was entitled to participate in a claim objection proceeding. The *Anderson* court found that in connection with the claim objection proceeding, it was appropriate to permit the committee to participate in discovery regarding the debtor in possession's alleged fraud, a matter common to every creditor's claim. *Id.* at 464. The court took care to emphasize that through such participation, "the Committee did not seek, or purport, to assert the rights or claims of any particular Committee member." *Id.* The court noted that the rights of the individual committee members had been asserted by the claimants' counsel, not the committee's counsel. *Id.*

In contrast to *Anderson*, the Committee's opposition to the Claim Objections asserted rights on behalf of particular creditors. That is, the Committee asserted that the claims of particular creditors should be allowed based on the Committee's contention that the Debtors are alter egos of **Bonerts**. The issue of the Debtors' status as alter egos of **Bonerts** is not common to all creditors who have filed proofs of claim. The following creditors have filed proofs of claim on account of indebtedness incurred directly by the Debtors:

1) Discover Bank (Claim No. 4);

2) Southern California Edison Company (Claim No. 8);

3) KeyPoint Credit Union (Claim No. 15);

4) Arvest Bank (Claim No. 20); and

5) JH Rose Logistics, LLC (Claim No. 33).

The Committee's advocacy on behalf of specific alter ego creditors was not in the interests of the creditor body as a whole, because allowance of the claims of the alter ego creditors would reduce the recovery of creditors asserting claims directly against the Debtors. Therefore, in electing to oppose the Claim Objections, the Committee was not "fulfilling its primary responsibility to represent the interests" of *all* of its members. *Id.* at 465. *See also In re Drexel Burnham Lambert Grp., Inc.*, 138 B.R. 717, 722 (Bankr. S.D.N.Y.), *aff'd*, 140 B.R. 347 (S.D.N.Y. 1992) ("Counsel for the ... committee do not represent any individual creditor's interest in [a] case; they were retained to represent the entire ... class. Therefore, counsel for the creditors' committee do not owe a duty to [one creditor] to maximize its interest

at the expense of the remaining creditors in the represented class."). Where the work performed by the Committee in connection with the Claim Objections was not appropriate, the Committee cannot rely upon having performed that work to support its assertion that it would be prejudiced by the Debtors' Subchapter V election.

B. The Debtors Sought Re-Designation in Good Faith

The Court finds that the Debtors sought re-designation in good faith. In making this finding, the Court rejects the Committee's contention that the Debtors' Subchapter V election was motivated primarily by a desire to divest the Committee of its role in this case. In support of its argument, the Committee emphasizes that the Debtors did not indicate that they were "**small business** debtors" (a pre-requisite to electing treatment under Subchapter V) until March 3, 2020, approximately six months subsequent to the Petition Date.

***5** The Debtors have offered a plausible explanation for why they did not initially designate themselves as "**small business** debtors." As of the Petition Date, the Debtors were not operating a business, and therefore did not believe that the "**small business**" designation applied. However, a case decided subsequent to SBRA's enactment made clear that the "**small business**" designation is not limited to a debtor currently engaged in business or commercial activities:

> 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 debtor] is "engaged in commercial or business activities" by addressing residual business debt ....

In re Charles Christopher Wright, No. CA 20-01035-HB, 2020 WL 2193240, at *3 (Bankr. D.S.C. Apr. 27, 2020).

The Court finds that the Debtors' initial decision not to seek a "**small business**" designation was reasonable given that the Debtors were no longer operating a business and received the majority of their income from Vivien's salary, Michael's Social Security, and passive investments. The Debtors' subsequent re-designation, made in reliance upon subsequent authority clarifying that the "**small business**" designation is not limited to debtors currently engaged in business operations, was likewise reasonable. The re-designation is appropriate since the majority of the Debtors' liabilities are business debts stemming from their prior operation of **Bonert**'s Inc., a bakery. The Debtors' decisions with respect to the "**small business**" designation were not motivated by gamesmanship, but rather by the Debtors' understanding of the facts and the law as they existed at the time of each designation.

C. The Debtors Are Not Judicially Estopped From Re-Designating As "Small Business Debtors"

The Committee asserts that the Debtors should be judicially estopped from taking the position that they are "**small business** debtors." The Court disagrees. Under the doctrine of judicial estoppel, "[w]here a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him." *New Hampshire v. Maine*, 532 U.S. 742, 749, 121 S. Ct. 1808, 1814, 149 L. Ed. 2d 968 (2001). Judicial estoppel "is an equitable doctrine invoked by a court at its discretion." *Id.* at 750. Invocation of the doctrine is appropriate where "the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped." *Id.* at 751.

***6** Judicial estoppel does not apply because the Debtors have not gained an unfair advantage or imposed an unfair detriment upon the Committee by designating themselves as "**small business** debtors" on March 3, 2020. As discussed, when the Debtors filed their Amended Petition containing the "**small business**" designation, the Committee had been in existence for fewer than two weeks and had not obtained employment of counsel. Therefore, the Committee did not undertake any significant activities in reliance upon the absence of a "**small business**" designation.

D. The Debtors' "Small Business" Re-Designation is Not Barred by the Pre-SBRA Provisions of the Bankruptcy Code

The Committee argues that the pre-SBRA version of § 101(51D)(A) bars the Debtors from re-designating as "**small business** debtors." Under the pre-SBRA version of § 101(51D)(A), a debtor in a case in which a creditor's committee had been appointed could not qualify as a "**small business** debtor," unless the court "determined that the committee of unsecured creditors is not sufficiently active and representative to provide effective oversight of the debtor."

SBRA removed this limitation on which debtors could qualify as "small business debtors."

In determining whether re-designation is authorized, the Court applies the law in effect at the time the Debtors sought re-designation. This is consistent with the approach of courts that have held that debtors who sought bankruptcy protection prior to SBRA's enactment could take advantage of Subchapter V. *See, e.g.*, *In re Moore Properties of Pers. Cty., LLC, Debtor.*, No. 20-80081, 2020 WL 995544, at *5 (Bankr. M.D.N.C. Feb. 28, 2020) (court applied "the law in effect at the time it has been asked to render its decision" to determine whether the debtor was a "small business debtor"); *In re Charles Christopher Wright,* No. CA 20-01035-HB, 2020 WL 2193240 (Bankr. D.S.C. Apr. 27, 2020) (same).

The current version of § 101(51D)(A) does not bar debtors in cases in which a creditor's committee has been appointed from designating themselves as "small business debtors." The fact that the pre-SBRA version of § 101(51D)(A) contained such a bar is not relevant.

E. The Debtors Do Not Exceed the Debt Limit Under § 101(51D)

The Committee contends that the Debtors may not qualify as "small business debtors" because it is possible that their non-contingent debts exceed § 101(51D)'s limit of $2,725,625. The Committee points to a claim asserted by Key Point Credit Union ("Key Point") in the amount of $1,836,000 and a claim asserted by Arvest Bank ("Arvest") in the amount of $2,950,000.

In its proof of claim, Key Point states that its claim against the Debtors is based upon the Debtors' personal guaranty of loans to Beefam LLC and Bonerts MV LLC and is "contingent." Arvest's proof of claim is also based upon the Debtors' personal guaranty of loans to Beefam LLC and Bonerts MV LLC. Arvest states in its proof of claim that its loan was not in default as of the Petition Date.

The Committee argues that the Key Point and Arvest claims may not have been contingent as of the Petition Date, and therefore may count toward the § 101(51D) debt limit, because the Debtors stated in their Schedules that the Key Point and Arvest loans were "presently in nonmonetary default" as a result of litigation and the Debtors' Chapter 11 filing. *See* Doc. No. 32 at p. 13. The Committee asserts that it is entitled to discovery regarding the loan documents to ascertain whether the Key Point and Arvest claims were contingent as of the Petition Date.

The Committee's argument overlooks the fact that the § 101(51D) debt limit was raised to $7.5 million by the Coronavirus Aid, Relief, and Economic Security Act (the "CARES Act"), 134 Stat. 281 (enacted March 27, 2020). Even if the Key Point and Arvest claims were non-contingent, the Debtors would not exceed the debt limit.

***7** In addition, on the record before it, the Court finds that the Key Point and Arvest claims were contingent as of the Petition Date. The creditors themselves indicate on their proofs of claim that the claims are contingent. Key Point expressly states that its claim is "contingent," Proof of Claim 15-1 at ¶ 8; Arvest states that the loan guaranteed by the Debtors "was current" as of the Petition Date, Proof of Claim 20-1 at ¶ 9. Michael testifies that the loans giving rise to both claims were "not in default prior to the filing of the instant case" and that Beefam LLC and Bonerts MV LLC "remain current" on the loans. Declaration of Michael Bonert [Doc. No. 264] at ¶ 2. The Committee's speculation that the claims might be non-contingent cannot overcome this clear evidence to the contrary.

F. The Passage of Certain Deadlines Does Not Prevent this Case from Proceeding Under Subchapter V

The Committee maintains that this case cannot proceed under Subchapter V because it is not possible for the Debtors to comply with certain deadlines, such as filing a plan within 90 days of the order for relief as required by § 1189(b) or attending a status conference to be held within 60 days of the order for relief as required by § 1188(a).

The passage of these deadlines does not prevent the case from proceeding under Subchapter V. As noted previously, in *In re Ventura*, the court allowed the debtor to proceed under Subchapter V, even though the debtor's petition had been filed fifteen months prior to the effective date of SBRA and both the debtor and a creditor had filed competing plans of reorganization. *Ventura*, 2020 WL 1867898, at *2–4. Relying upon §§ 1188(b) and 1189(b), which provide that the status conference and plan filing deadlines may be extended "if the need for an extension is attributable to circumstances for which the debtor should not justly be held accountable," the *Ventura* court found it appropriate to extend the deadlines that were impossible for the debtor to meet. *Id.* at *8.

For the same reason, the Court finds extension of the status conference and plan filing deadlines to be warranted here. As held in *Ventura*, the Debtors are "not required to comply with deadlines that clearly expired before the Debtor[s] could have elected to proceed" under Subchapter V. *Id.*

III. Conclusion

Based upon the foregoing, the Committee's opposition to the Debtors' Subchapter V election is **OVERRULED**. The Court will enter an order consistent with this Memorandum of Decision.

All Citations

Slip Copy, 2020 WL 3635869

Footnotes

1 The Court considered the following papers in adjudicating this matter:
1) [Amended] Voluntary Petition for Individuals Filing for Bankruptcy [Doc. No. 136];
2) Official Committee of Creditors Objection to Debtors' Election of **Small Business** Designation Chapter 11, Subchapter V [Doc. No. 242];
3) Debtors' Response to the Creditors' Committee's Objection to Debtors' Election of **Small Business** Designation Under Subchapter V of Chapter 11 [Doc. No. 264];
a) Request for Judicial Notice in Support of Debtors' Response to the Creditors' Committee's Objection to Debtors' Election of **Small Business** Designation Under Subchapter V of Chapter 11 [Doc. No. 265]; and
4) Supplemental Brief in Support of the Official Committee of Creditors' Objection to Debtors' Election of **Small Business** Designation Under Chapter 11, Subchapter V [Doc. No. 267].

2 Given names are used to distinguish Michael from Vivien. No disrespect is intended.

3 As noted above, the Committee's Employment Application is opposed by the Debtors and the UST.

SO ORDERED.

SIGNED this 11 day of June, 2020.

David M. Warren
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF NORTH CAROLINA
NEW BERN DIVISION

IN RE:	**CASE NO. 20-01795-5-DMW**
PENLAND HEATING AND AIR CONDITIONING, INC.	**CHAPTER 11**
DEBTOR	

ORDER DENYING APPLICATION TO EMPLOY ATTORNEY

This matter comes before the court upon the Trustee's Application to Employ Attorney ("Application") filed on May 15, 2020 by John G. Rhyne, Esq. ("Trustee"), Subchapter V trustee for Penland Heating and Air Conditioning, Inc. ("Debtor"). The court conducted a video hearing on June 10, 2020. The Trustee appeared on his own behalf, Clayton W. Cheek, Esq. ("Mr. Cheek") appeared for the Debtor, and Parker W. Rumley, Esq. appeared for the United States Bankruptcy Administrator ("BA"). Based upon the case record and representations of counsel, the court makes the following findings of fact and conclusions of law:

Background

On May 1, 2020, the Debtor filed a voluntary petition for relief under Subchapter V of Chapter 11 of the United States Bankruptcy Code ("Subchapter V") and is operating as a debtor-

in-possession pursuant to 11 U.S.C. § 1184. On May 4, 2020, the BA appointed the Trustee to serve as trustee in the case pursuant to 11 U.S.C. § 1183.

The Debtor operates a heating and air conditioning business that performs services throughout the state of North Carolina. The Debtor is currently winding down its business and intends to file a plan to provide for the liquidation of its assets after completion of jobs in progress.

On May 27, 2020, the court entered an Order Authorizing Employment of Attorney for Debtor, allowing the Debtor's employment of Mr. Cheek and the Law Offices of Oliver & Cheek, PLLC as attorney to advise and represent the Debtor throughout the case. In the Application, the Trustee seeks similarly to employ the law firm of John G. Rhyne, Attorney at Law to serve as attorney for the Trustee pursuant to 11 U.S.C. § 327(a).

Discussion

Subchapter V was created as part of the Small Business Reorganization Act of 2019 ("SBRA"), enacted on August 23, 2019 and taking effect on February 19, 2020. With the SBRA, "Congress intended to streamline the reorganization process for small business debtors because small businesses have often struggled to reorganize under chapter 11." *In re Ventura*, ___ B.R. ___, 2020 WL 1867898, at *7 (Bankr. E.D.N.Y. Apr. 10, 2020) (citing H.R. REP. NO. 116-171, at 1-2 (2019)).

Unlike in a traditional Chapter 11 case, the BA shall appoint a trustee in every Subchapter V case. *See* 11 U.S.C. § 1183(a). The *Ventura* court summarized the Subchapter V trustee's duties enumerated in 11 U.S.C. § 1183(b) as follows:

> The subchapter V trustee will act as a fiduciary for creditors, in lieu of an appointed creditors' committee. The subchapter V trustee is also charged with facilitating the subchapter V debtor's small business reorganization and monitoring the subchapter V debtor's consummation of its plan of reorganization.

Ventura, 2020 WL 1867898, at *7. The role of a Subchapter V trustee is like that of a trustee in Chapters 12 and 13, and a Subchapter V debtor remains in possession of assets and operates the business. Paul W. Bonapfel, *A Guide to the Small Business Reorganization Act of 2019*, 93 Am. Bankr. L.J. 571, 582-83 (2019).

In his article, Judge Bonapfel recognizes that the SBRA does not restrict a Subchapter V trustee from employing attorneys and other professionals under 11 U.S.C. § 327(a); however, he cautions that—

> employment of attorneys or other professionals has the potential to substantially increase the administrative expenses of the case. In view of the intent of the SBRA to streamline and simplify chapter 11 cases for small business debtors and reduce administrative expenses, courts may be reluctant to permit a sub V trustee to retain attorneys or other professionals except in unusual circumstances.

Id. at 591. The Department of Justice's handbook for Subchapter V trustees instructs that a limitation of employment of professionals—

> is especially important in cases in which the debtor remains in possession and the debtor already has employed professionals to perform many of the duties that the trustee might seek to employ the professionals to perform. The trustee should keep the statutory purpose of SBRA in mind when carefully considering whether employment of the professional is warranted under the specific circumstances of each case.

U.S. Dep't of Justice, *Handbook for Small Business Chapter 11 Subchapter V Trustees* 3-17–18 (2020).

At the hearing, the Trustee stated that he filed the Application as a matter of course but did not have any current need for legal representation in the Debtor's case.[1] The court understands the desire to have professional employment secured, because this procedure is a prerequisite for compensation under 11 U.S.C. § 330(a); however, authorizing a Subchapter V trustee to employ

[1] The court routinely allows Chapter 7 panel trustees and Chapter 11 trustees to hire themselves and their law firms to provide legal services that are outside the scope of the administrative trustee duties. The court has found allowing trustees to employ themselves or their firms provides an economical efficiency to case administration.

professionals, including oneself as counsel, routinely and without specific justification or purpose is contrary to the intent and purpose of the SBRA.[2] In this case, the Debtor is operating in possession of its assets and has employed counsel to represent it in legal matters. At this time and without further evidence, the Trustee does not need legal assistance to fulfill his basic duties to monitor and facilitate the Debtor's reorganization. If during the case the Trustee identifies a specific need for the employment of an attorney or other professional, then the court will consider another request; now therefore,

It is ORDERED, ADJUDGED, and DECREED that the Application be, and hereby is, denied without prejudice.

END OF DOCUMENT

[2] The court cautions overzealous and ambitious Subchapter V trustees that unnecessary or duplicative services may not be compensated, and other fees incurred outside of the scope and purpose of the SBRA may not be approved. The court absolutely does not imply that the Trustee in this case had even a remote thought of performing services outside the scope of the SBRA. The Application was filed out of an abundance of caution and as a standard of practice like in Chapter 7 cases, and the court appreciates this opportunity to provide some guidance for this new legislation.

2020 WL 3816290
Only the Westlaw citation is currently available.
NOT FOR PUBLICATION
United States Bankruptcy Court, E.D. California.

In re: **SLIDEBELTS**, INC., Debtor.

Case No. 2019-25064-A-11
|
Submitted on July 2, 2020 at Sacramento, California
|
July 06, 2020

Attorneys and Law Firms

Appearances: Brian M. Rothschild, Parsons Behle & Latimer for **Slidebelts**, Inc.

MEMORANDUM

Fredrick E. Clement United States Bankruptcy Judge

***1** Unless otherwise ordered, dismissal of a chapter 11 case results in revesting of property in the estate. 11 U.S.C. § 349(b). **Slidebelts**, Inc. filed chapter 11, incurring professional fees to its counsel and to committee counsel. It wishes to dismiss the case, pay its counsel, and then immediately re-file the case under Subchapter V of chapter 11. As a condition of dismissal may the court require payment on the same terms to committee counsel?

I. FACTS

Slibebelts, Inc. manufacturers and sells belts used as articles of clothing. Unlike traditional belts, which employ a hole and tongue method of size adjustments, **Slidebelts**' products adjust the size of the belt by a slide mechanism. Doing so allows a near infinite number of size adjustments and flatter, i.e., less obtrusive, look. Facing financial headwinds, **Slidebelts** filed Chapter 11. Its filing did not avail itself of the "**small business** debtor," 11 U.S.C. § 101(51D), or "Subchapter V" **small business** debtor, 11 U.S.C. § 101(51(C) protections. [1]

Slidebelts, Inc. is represented by Parsons Behle & Latimer ("PBL"). This court has approved compensation for PBL in the amount of $192,000, some of which remains unpaid.

The U.S. Trustee appointed an Official Committee of Unsecured Creditors. The committee promptly employed Daren R. Brinkman, attorney at law, and Dundon Advisors, LLC, as its counsel and its financial advisor, respectively. Both Brinkman and Dundon's employment was approved by this court. Each of the committee's professionals have been working approximately three months but have neither made application for fees, nor have been paid for services rendered.

Planning to avail itself of the Paycheck Protection Funding Program of the CARES Act [2] and then to re-file its Chapter 11 case under Subchapter V of Chapter 11, **Slidebelts** moved to dismiss its chapter 11 case. The Official Committee of Unsecured Creditors opposed, citing *Czyzewski v. Jevic Holding Corp.*, 137 S. Ct. 973 (2017), and arguing that the failure of the debtor to propose a mechanism for payment of its professional fees amounted to an unlawful defacto structured settlement. The *Jevic* argument advances in three steps. First, as of the date of the debtor's request to dismiss the case committee professionals are unpaid for serves rendered. Second, absent dismissal committee professionals would receive egalitarian treatment vis-à-vis other professionals of its fees. For example, if the case continued in chapter 11, committee professionals would be entitled to be paid in full on the effective date of the plan. 11 U.S.C. § 1129(a)(9)(A). In contrast, if the case converted to Chapter 7, committee professionals would hold priority claim and be entitled to be paid in full or, if the case was administratively insolvent, pro-rata payment of its priority claim, 11 U.S.C. §§ 503(b), 507(a)(2), 726(a)(1). Third, if the chapter 11 case is dismissed and then refiled (as now contemplated), committee professionals will lose their priority status and be paid with general unsecured creditors, notwithstanding full payment to the debtor's own professionals.

***2** At the hearing, the court granted the motion to dismiss without requiring **Slidebelts** Inc. to make provision for unpaid professional fees incurred by the committee.

After the hearing, the court reconsidered its ruling and gave all unpaid professionals approximately 40 days to file fee applications and enjoined payment of professional fees until all such applications had been resolved and all professionals paid in full or, if payment in full was not possible, on a pro-rata basis.

II. PROCEDURE

Slibebelts, Inc. now moves for relief under Rule 60(b) to eliminate those portions of the court's order the dictate when and how much, *e.g.*, in full or pro-rata, professionals will be paid. It contends that "This additional relief was not discussed by the parties at the hearing, and the Debtor did not have the opportunity to inform the Court of the detrimental effect of the language in the Modified Order will have." Motion for Rule 60(b) Relief 2:18-20, July 2, 2020.[3] In Slidebelt's view, the prejudice arises from the approximate 40 day delay necessary to sort out professional fees and will force it to delay its re-filing or to retain new counsel. *Id.* at 2:22-28.

III. DISCUSSION

As the Supreme Court in *Czyzewski v. Jevic Holding Corp.*, 137 S. Ct. 973 (2017), noted a Chapter 11 "foresees three possible outcomes."

> The first is a bankruptcy-court-confirmed plan. Such a plan may keep the business operating but, at the same time, help creditors by providing for payments, perhaps over time. See §§ 1123, 1129, 1141. The second possible outcome is conversion of the case to a Chapter 7 proceeding for liquidation of the business and a distribution of its remaining assets. §§ 1112(a), (b), 726. That conversion in effect confesses an inability to find a plan. **The third possible outcome is dismissal of the Chapter 11 case. § 1112(b). A dismissal typically "revests the property of the estate in the entity in which such property was vested immediately before the commencement of the case"—in other words, it aims to return to the prepetition financial status quo. § 349(b)(3).**

Jevic, 137 S.C.t at 979 (emphasis added).

Section 349(b)(3) provides:

> **Unless the court, for cause, orders otherwise,** a dismissal of a case other than under section 742 of this title ... (3) revests the property of the estate in the entity in which such property was vested immediately before the commencement of the case under this title.

11 U.S.C. § 349 (emphasis added).

Jevic explained that as a rule dismissal revests property in the debtor and reinstates the status quo but that "for cause," 11 U.S.C. § 349(b), the court may make "appropriate order" to avoid prejudice. Referring to such orders as "structured dismissals" the court commented:

> ***3** Nonetheless, recognizing that conditions may have changed in ways that make a perfect restoration of the status quo difficult or impossible, the Code permits the bankruptcy court, "for cause," to alter a Chapter 11 dismissal's ordinary restorative consequences. § 349(b). A dismissal that does so (or which has other special conditions attached) is often referred to as a "structured dismissal," defined by the American Bankruptcy Institute as a
>
> > "hybrid dismissal and confirmation order ... that ... typically dismisses the case while, among other things, approving certain distributions to creditors, granting certain third-party releases, enjoining certain conduct by creditors, and not necessarily vacating orders or unwinding transactions undertaken during the case." American Bankruptcy Institute Commission To Study the Reform of Chapter 11, 2012–2014 Final Report and Recommendations 270 (2014).

Jevic, 137 S.C.t at 979.

Reliance by a party in interest "on the bankruptcy case" presents a textbook example of § 349(b) cause. HR. Rep No. 95-595 at 338; *Wiese v. Community Bank of Central Wis.*, 552 F.3d 584, 590 (7th Cir. 2009) ("upholding, under § 349(b), a Bankruptcy Court's decision not to reinstate a debtor's claim against a bank that gave up its lien in reliance on the claim being released in the debtor's reorganization plan"), cited by *Jevic*, 137 S. Ct. 984.

Slidebelts Inc.'s dismissal presents such a case of reliance by committee professionals, i.e., Daren R. Brinkman, attorney at law, and Dundon Advisors, LLC, which have rendered services that would ordinarily be paid in chapter 7 or chapter 11, at least to the extent of administrative solvency. 11 U.S.C. § 1129(a)(9) (chapter 11 professional fees paid in full on the effective date of the plan); 11 U.S.C. §§ 503(b), 507(a)(2), 726(a)(1) (professionals entitled to a first order priority in chapter 7); *In re Cochise College Park, Inc.*, 703 F.2d 1339, 1356 fn. 22 (9th Cir. 1983) (insolvent estates pay administrative claims pro-rata); *In re Lazar*, 83 F.3d 306, 308-09 (9th Cir. 1996). Moreover, payment administrative professionals fall in neatly within the realm of structured dismissals.

Any prejudice to the debtor is outweighed by the need to protect professionals who have rendered services in reliance on the bankruptcy case. Here, prejudice occasioned by delay is minimal, i.e., approximately 40 days. Moreover, the decision to dismiss and re-file belonged to Slidebelts, Inc. Any prejudice occasioned by its course of action is the result of its own making.

Without the order made by the court after the hearing, Slidebelts Inc.'s second Chapter 11 filing will relegate them to the fate of general unsecured creditors. As a result, the court finds the cause, i.e., reliance by attorney Brinkman and financial advisor Dundon, exists.

IV. CONCLUSION

For each of these reasons, the debtor's motion will be denied. The court will issue an order from chambers.

Instructions to Clerk of Court

Service List - Not Part of Order/Judgment

The Clerk of Court is instructed to send the Order/Judgment or other court generated document transmitted herewith *to the parties below*. The Clerk of Court will send the document via the BNC or, if checked ____, via the U.S. mail.

Debtor(s) **Attorney for the Debtor**(s) (if any) **Bankruptcy Trustee** (if appointed in the case) Office of the U.S. Trustee Robert T. Matsui United States Courthouse 501 I Street, Room 7-500 Sacramento, CA 95814 **All Creditors**

All Citations

Slip Copy, 2020 WL 3816290

Footnotes

1 Slidebelts, Inc. only became entitled to Subchapter V protections after the CARES Act increased applicable debt limits.

2 The Small Business Administration, who administers those loans, takes the position that persons under protection of the bankruptcy court are not eligible for the Paycheck Protection Funding Program. Armed with the decisions of some bankruptcy courts, the debtor believes that the Small Business Administration may not deny an application for funds under the Paycheck Protection Program Funding simply because the debtor is under the protection of the bankruptcy court. *Roman Catholic Church of The Archdiocese of Santa Fe v. United States (In re Roman Catholic Church of The Archdiocese of Santa Fe),* 2020 WL 2096113 (Bankr. D. NM May 1, 2020); *Alpha Visions Learning Academy, Inv. v. Carranza (In re James Skefos)*, 2020 WL 2893413 (Bankr. W.D. Tenn June 2, 2020). In an effort to shortcut that dispute, the debtor planned to dismiss the bankruptcy, obtain the Paycheck Protection Program Funding Loan and then refile its bankruptcy.

3 Slidebelts brought this motion under the expedited notice provisions of the Eastern District of California local rules. LBR 9014-1(f)(2) (not requiring written opposition). Apparently, it did so because the date of the hearing was the last date under which it could make an application for Paycheck Protection Payment Funds. Even though written opposition was not required, the committee did so. *Czyzewski v. Jevic Holding Corp.*, 137 S. Ct. 973 (2017) was not cited in the committee opposition but was discussed by committee counsel during oral argument.

End of Document

Entered: July 7th, 2020
Signed: July 7th, 2020

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MARYLAND
at Baltimore

In re:	*	
	*	
Gregory Trepetin,	*	Case No. 20-11718-MMH
	*	
Debtor.	*	Chapter 11 (Subchapter V)
	*	

* * * * * * * * * * * * *

MEMORANDUM OPINION

Chapter 11 of the U.S. Bankruptcy Code[1] offers businesses and individuals an opportunity to reorganize their financial affairs, including their business operations. The process allows the debtor to stay in possession of its assets while working with its creditors to develop a plan that achieves a beneficial result for all, or as many stakeholders as possible. The process can, however, be lengthy and expensive; in fact, it may be cost-prohibitive for some debtors that would otherwise benefit from a chapter 11 case. Congress recognized this dilemma, which often impacts smaller entities and individual business owners more significantly than others, and enacted the Small Business Reorganization Act of 2019 ("SBRA").

SBRA creates a new subchapter of chapter 11 of the Code ("Subchapter V"). Subchapter V in turn offers small business debtors, including individuals, a streamlined process and tailored tools for confirming a plan. To help facilitate the process, Subchapter V establishes certain deadlines that a debtor must meet to keep its case on track. These deadlines run from the date of the order for relief in the bankruptcy case but neither Subchapter V nor section 348(b) of the Code

[1] 11 U.S.C. §§ 101 et seq. (the "Code").

specifically adjust these deadlines when a case is converted to chapter 11 from another chapter of the Code. That is the procedural posture of this case.

The Debtor's motion seeking extensions of the SBRA deadlines requires the Court to grapple with a simple but important question: Is SBRA available to a debtor who first files a bankruptcy case under a chapter other than chapter 11 of the Code, but then determines that it is eligible for, and could benefit from, Subchapter V? For the reasons set forth below, the Court answers this question in the affirmative and sets extended deadlines for the Debtor under sections 1188 and 1189 of the Code. To hold otherwise would preclude a debtor, who has not engaged in any dilatory or wrongful conduct, from utilizing provisions of the Code specifically designed to help small businesses and their creditors.

I. Relevant Background

The Debtor is an individual who operates a small business. The Debtor filed a chapter 7 case on February 10, 2020. ECF 1. The Debtor appears to have complied with his obligations under chapter 7 of the Code and to have been eligible for a discharge under section 727 of the Code.[2] The Chapter 7 Trustee entered a Report of No Distribution to Creditors, suggesting that the Debtor's chapter 7 case was a no asset case, on June 2, 2020. ECF 43. The only event of note in the Debtor's chapter 7 case was a motion for relief from stay filed by a creditor, which remains pending. ECF 22, 26, 62.

The Debtor filed a Motion to Convert Chapter 7 Case to Chapter 11 Subchapter V, and Request to Extend Deadlines (the "Conversion Motion") on June 11, 2020. ECF 46. By the Conversion Motion, the Debtor asked the Court to convert his chapter 7 case to one under

[2] The original deadline to object to the Debtor's discharge under Bankruptcy Rule 4004 was May 15, 2020, but that deadline was extended by Standing Order 2020-07, *In re: Covid-19 Pandemic Procedures*, Misc. No. 00-308 (D. Md. 2020); Standing Order 2020-05, *In re: Covid-19 Pandemic Procedures*, Misc. No. 00-308 (D. Md. 2020); *see also* Standing Order 2020-04, *In re: Covid-19 Pandemic Procedures*, Misc. No. 00-308 (D. Md. 2020) (providing guidance relating to procedural orders entered to facilitate Court operations during the COVID-19 pandemic).

Subchapter V, pursuant to section 706 of the Code. The Debtor also requested an extension of (i) the 60-day deadline for the Court to hold a status conference under section 1188 of the Code, and (ii) the 90-day deadline for the Debtor to file his plan under section 1189 of the Code. The Court granted the Debtor's request to convert his case to one under chapter 11, and the Debtor thereafter filed an amended petition electing to proceed under Subchapter V. ECF 48, 52. The Court deferred its decision on the requested deadline extensions to provide an opportunity for notice and hearing and supplemental briefing by the Debtor. ECF 48, 51. The Court has reviewed all of the relevant papers in this case, and the matter is now ripe for resolution.

II. Jurisdiction and Legal Standards

The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334. Under 28 U.S.C. § 157(a) and its Local Rule 402, the United States District Court for the District of Maryland has referred this case to the Court. This matter is a statutorily core proceeding under 28 U.S.C. §§ 157(b)(1) and (b)(2). The Court has constitutional authority to enter final orders in this matter.

Various sections of the Code allow a debtor to convert a pending bankruptcy case from one chapter to another chapter of the Code, provided that the debtor is eligible to be a debtor under the new chapter. The Debtor made his conversion request under section 706 of the Code, which provides that "[t]he debtor may convert a case under this chapter to a case under chapter 11, 12, or 13 of this title at any time, if the case has not been converted under section 1112, 1208, or 1307 of this title." 11 U.S.C. § 706. The Court entered an order granting the Debtor's request to convert his case to one under chapter 11. That action raises issues concerning the impact of the conversion on matters decided prior to conversion, pending, and to take place in this chapter 11 case.

Section 348 of the Code generally provides that the order for relief in the original case continues, with the same date, as an order for relief under the new chapter. 11 U.S.C. § 348(a). The order for relief does not take on the date of the conversion order, except in a few specific

instances. For example, section 348(b) states that "[u]nless the court for cause orders otherwise, in sections 701(a), 727(a)(10), 727(b), 1102(a), 1110(a)(1), 1121(b), 1121(c), 1141(d)(4), 1201(a), 1221, 1228(a), 1301(a), and 1305(a) of this title, 'the order for relief under this chapter' in a chapter to which a case has been converted under section 706, 1112, 1208, or 1307 of this title means the conversion of such case to such chapter." 11 U.S.C. § 348(b). Notably, section 1121 of the Code, identified in section 348(b), speaks to the time period for the filing of a plan in a standard chapter 11 case. Section 1121 is not applicable in a Subchapter V case. 11 U.S.C. § 1181(a). Rather, the filing of a plan in a Subchapter V case is governed by, among other things, section 1189 of the Code.

The Court considers the Debtor's requested extension of the section 1188 and 1189 deadlines against this backdrop.

III. Analysis

The filing of a bankruptcy petition, which constitutes the order for relief in a voluntary bankruptcy case, triggers a number of events and deadlines in a bankruptcy case. For example, the petition triggers an automatic stay of most actions and proceedings against the debtor, the debtor's property, and property of the estate. 11 U.S.C. § 362(a). It also creates the bankruptcy estate, which is augmented with certain postpetition property in chapter 11 cases. 11 U.S.C. §§ 541, 1115, 1186. Moreover, the debtor must take certain actions, such as assuming or rejecting executory contracts and unexpired leases or filing a plan within a certain number of days from the date of the petition or order for relief. *See, e.g.,* 11 U.S.C. §§ 365, 1121, 1189. Consequently, the date of the order for relief in any bankruptcy case, including a converted case, is important in determining the rights and duties of the debtor and its creditors.

This statement is particularly true in a Subchapter V case, as the debtor is the only party who may file a plan and has only a limited amount of time to do so. Indeed, in a conversion

situation as that before the Court, the Subchapter V case may be over before it even begins if certain deadlines cannot be extended.[3] The Court considers the impact of a conversion order on a Subchapter V case and the Court's ability to extend the relevant Subchapter V deadlines in turn below.

A. The Statutory Deadlines and Conversion

Two statutory deadlines under Subchapter V are relevant to this case and the Debtor's pending extension request. First, section 1188(a) of the Code requires the Court to hold a status conference in the Debtor's case "not later than 60 days after the entry of the order for relief under this chapter." 11 U.S.C. § 1188(a). Second, section 1189(b) of the Code mandates that the Debtor file its plan "not later than 90 days after the order for relief under this chapter." 11 U.S.C. § 1189(b).

Each of the statutory deadlines at issue may be extended under certain circumstances. For example, section 1188(b) provides that "[t]he court may extend the period of time for holding a status conference under subsection (a) if the need for an extension is attributable to circumstances for which the debtor should not justly be held accountable." 11 U.S.C. § 1188(b). Likewise, section 1189 states, in relevant part, that "the court may extend the [90-day deadline] if the need for the extension is attributable to circumstances for which the debtor should not justly be held accountable." 11 U.S.C. § 1189. The Debtor posits that the conversion of his bankruptcy case from a chapter 7 to a chapter 11 case makes it impracticable for him to comply with these deadlines. He states, among other things, that he "should not be justly held accountable for needing an extension of the deadline[s]." ECF 46, at 2.

[3] The failure of a debtor under Subchapter V to timely file the status report required by section 1188(c) and the failure of the debtor to timely file the plan under section 1189(b), may constitute cause to dismiss or convert the case under sections 1112(b)(4)(F) and (b)(4)(J), respectively.

As an initial matter, the Court observes that the question before it would be resolved easily if the Debtor had converted his case to chapter 11 and was not a small business debtor. As noted above, section 348(b) resets a debtor's exclusive period for filing a plan in a standard chapter 11 case. Congress did not, however, make that same exception for chapter 11 plans under either section 1121(e) (in a small business case) or section 1189 (in a Subchapter V case). Although the omission of section 1121(e) might be understandable given the 300-day overall deadline imposed on small business cases under section 1121(e)(2),[4] it arguably is less aligned with the overarching purpose of SBRA and facilitating the reorganization of small businesses.[5] *See, e.g., In re Ventura*, 615 B.R. 1, 6 (Bankr. E.D.N.Y. 2020) ("These amendments, commonly referred to as the SBRA, were instituted to broaden the opportunity for small businesses to successfully utilize the benefits of chapter 11 of the Bankruptcy Code."). Nevertheless, the Court must implement the Code as written and cannot ignore the mandate of section 348(a) and the omission of any Subchapter V deadlines from section 348(b).

In so doing, the Court will scrutinize the statutory language and consider the context in which the issues arise. Indeed, the Court cannot interpret any one statutory provision in a vacuum. *See Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989) ("[S]tatutory language cannot

[4] Congress enacted section 1121(e)(2) as part of the Bankruptcy Abuse and Consumer Protection Act of 2005. Many courts and commentators have interpreted the deadlines set forth therein as absolute, drop dead deadlines. *See, e.g., In re Castle Horizon Real Estate, LLC*, No. 09-05992-8-JRL, 2010 WL 3636160, at *2 (Bankr. E.D.N.C. Sept. 10, 2010) (rejecting argument that the 300-day deadline in section 1121(e) addresses only the debtor's failure to file a plan and stating that "Congressional intent supports the opposite—that the 300–day deadline is a 'drop dead' provision to limit the amount of time for filing plans. The timing requirements of § 1121(e) reflect 'Congressional intent that plan filing time limits be strictly followed,' ... and are 'a clear example of Congress' attempt to keep small business cases on a short leash.' ...") (citations omitted); *see also* Robert M. Lawless, *Small Business and the 2005 Bankruptcy Law: Should Mom and Apple Pie Be Worried?*, 31 S. Ill. U. L.J. 585, 586–87 (2007) ("Although the [National Bankruptcy Review Commission] did not have all the facts at the time it acted and later studies suggested it may have had the wrong facts, a majority voted for strong recommendations to restrict small business debtors in bankruptcy, to allow for easier dismissal, to require more disclosure, and to get small business debtors out of bankruptcy court more quickly. These NBRC recommendation largely formed the basis for the small business provisions in the 2005 bankruptcy law.").

[5] In addition, section 348(b) resets the 90-day deadline for filing a plan in a chapter 12 case. As explained below, the language of section 1189 at issue here follows that in section 1221, which sets the 90-day deadline in chapter 12 cases.

be construed in a vacuum. It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme."); *see also Ransom v. FIA Card Servs., N.A.*, 562 U.S. 61, 70–71 (2011) ("This reading of 'applicable' also draws support from the statutory context.").[6] The Court acknowledges that Congress contemplated an accelerated process for Subchapter V cases, likely as a means to facilitate quicker and cheaper reorganizations.[7] Congress also expressed, however, significant concern for small business debtors, wanting to provide them with a realistic option for reorganizing and saving their business operations.[8] Evidence of this intent is found not only in public commentary but also, more importantly, in the language of Subchapter V itself. For example, Subchapter V allows only the debtor to file a plan and permits the debtor to retain its prepetition ownership structure even if creditors are not paid in full. *See* 11 U.S.C. § 1184; ALAN N. RESNICK & HENRY J. SOMMER, 7 COLLIER ON BANKRUPTCY ¶ 1129.04[3][d] (16th ed. 2020). The Court thus

[6] *See also United States v. Morton*, 467 U.S. 822, 828 (1984). "In determining whether Congress has specifically addressed the question at issue, a reviewing court should not confine itself to examining a particular statutory provision in isolation. The meaning or ambiguity of certain words or phrases may only become evident when placed in context." *In re Sours*, 350 B.R. 261, 266 (Bankr. E.D. Va. 2006) (quoting *Food and Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000)) (citations omitted).

[7] For example, in his public comments describing the purpose of the act, one legislator noted:

> "The Small Business Reorganization Act is a tremendous step forward in streamlining bankruptcy procedures. By reducing unnecessary procedural burdens, enhancing oversight and increasing the debtors' ability to negotiate, we will ensure quick and successful reorganization and provide small businesses the ability to restructure in a way that meets their needs. I thank my colleagues for their work on the introduction of this bill and urge for its timely consideration in both the House and Senate," Rep. Marino said.

Small Business Reorganization Act, Am. Bankr. Inst. J., January 2019, at 8, 8.

[8] Again, although not formal legislative history, legislators who worked on SBRA stated at the time of the bill's passage:

> "We've worked with the National Bankruptcy Conference, ABI and National Conference of Bankruptcy Judges to develop this legislation and have incorporated feedback from numerous stakeholders, ranging from commercial lenders to the U.S. Trustee," Sen. Grassley said. "A well-functioning bankruptcy system, specifically for small businesses, allows businesses to reorganize, preserve jobs, maximize the value of assets and ensure the proper allocation of resources. To that end, I've been working to improve the Bankruptcy Code for decades and will continue that effort."
>
> …
>
> "Small businesses are some of the best innovators in our local economies, and this bill would bring much-needed improvements to the Bankruptcy Code so that owner-operated businesses can recover from financial hardship and continue creating jobs," Rep. Collins said.

Small Business Reorganization Act, Am. Bankr. Inst. J., January 2019, at 8, 8.

will strive to balance these goals of speed and access to a realistic reorganization scheme in applying the language of the Code to the facts of this case.

B. The Statutory Deadlines in This Case

At the time of conversion of this case, both the 60-day deadline under section 1188(a) and the 90-day deadline under section 1189(b) had expired. The Debtor filed his original chapter 7 case on February 10, 2020, theoretically setting the section 1188(a) deadline as April 10, 2020, and the section 1189(b) deadline as May 11, 2020. The Debtor requested an extension of the relevant deadlines simultaneously with seeking a conversion of his case to one under chapter 11 and expressing his intention to make a Subchapter V election. The Debtor's extension request was arguably timely from that standpoint but certainly was sought after the expiration of the original deadlines.

Neither section 1188 nor section 1189 speak to the mechanics or timing of an extension request.[9] Both sections do, however, limit the permissibility of extensions "to circumstances for which the debtor should not justly be held accountable." 11 U.S.C. §§ 1188(b), 1189(b). The legislative history to Subchapter V does not explain the purpose of this language or the scope of permissible extensions.[10] Likewise, at this point, only a few courts have had an opportunity to

[9] Similarly, no provision of Subchapter V or the Code required the Debtor to seek an extension of the applicable deadlines prior to their expiration.

[10] The legislative history to SBRA is not extensive. The Congressional Record appears to include only statements made from the Senate floor by the Senate Majority Leader, Mitch McConnell, related only to the lack of public debate and ultimate passage of the bill. *See* 165 CONG. REC. S5321 (daily ed. Aug. 1, 2019).

address the issue.[11] The Court finds these decisions, as well as those discussing similar language in section 1221, helpful in resolving the present matter.[12]

Section 1221 provides that "[t]he debtor shall file a plan not later than 90 days after the order for relief under this chapter, except that the court may extend such period if the need for an extension is attributable to circumstances for which the debtor should not justly be held accountable." 11 U.S.C. § 1221. Several aspects of Subchapter V are premised on the provisions of chapter 12 of the Code for family farmers and fishermen, including the deadline for filing the proposed plan. Courts and commentators generally have interpreted the language in section 1221 to require that "the debtor 'clearly demonstrates that the debtor's inability to file a plan is due to circumstances [ ] beyond the debtor's control.' COLLIER, *supra*, at ¶ 1221.01[2]." *In re Gullicksrud*, No. 16-11860-12, 2016 WL 5496569, at *2 (Bankr. W.D. Wis. Sept. 29, 2016);[13] *see also In re Marek*, No. 11-21158-TLM, 2012 WL 2153648, at *8 (Bankr. D. Idaho June 13, 2012); *In re Raylyn AG, Inc.*, 72 B.R. 523, 524 (Bankr. S.D. Iowa 1987). As observed in *Collier*, "[b]ecause chapter 12 lacks the safeguards for creditors that are provided in chapter 11, the 90-day

[11] *In re Progressive Sols., Inc.*, No. 8:18-BK-14277-SC, 2020 WL 975464 (Bankr. C.D. Cal. Feb. 21, 2020) (extension of statutory deadline was permissible to allow debtor to amend chapter 11 petition to one under SBRA as the delay in filing was not attributed to the debtor); *In re Ventura*, 615 B.R. 1 (Bankr. E.D.N.Y. 2020) (absent an explicit prohibition by Congress, a bankruptcy court may extend or reset deadlines under SBRA); *see also In re Moore Properties of Pers. Cty., LLC*, No. 20-80081, 2020 WL 995544, at *1 (Bankr. M.D.N.C. Feb. 28, 2020) (the revised definition of a small business debtor under SBRA is broader and excludes only those cases identified to include single asset real estate).

[12] *See, e.g.,* Charissa Potts, *Key Facts About the SBRA*, Am. Bankr. Inst. J., December 2019, at 8, 8 ("The phrase 'circumstances for which the debtor should not justly be held accountable' can be found in 11 U.S.C. §§ 1221 and 1228, the plan-filing and discharge provisions under chapter 12, and 11 U.S.C. § 1328, the discharge provision under chapter 13."). Section 1328(b) provides that the Court may grant a chapter 13 debtor a hardship discharge only if, among other things, "the debtor's failure to complete such payments is due to circumstances for which the debtor should not justly be held accountable." 11 U.S.C. § 1328(b)(1). Courts generally hold that this section requires a fact-intensive analysis and focuses on the foreseeability and materiality of the debtor's change in circumstances, as well as whether it was within the debtor's control. *See In re Quintyne*, 610 B.R. 462, 469 (Bankr. S.D.N.Y. 2020); *see also In re Bandilli*, 231 B.R. 836, 840 (B.A.P. 1st Cir. 1999).

[13] The Court in *Gullicksrud* noted that Congress changed the language of section 1221 to its current form in 1993 to make it a more stringent standard. *Id*.

limitation . . . is the primary protection for creditors against a debtor's languishing in chapter 12 without confirming a plan." COLLIER, *supra* at ¶ 1221.01[2].[14]

The Court finds it appropriate to apply a standard similar to that articulated in *Gullicksrud* to sections 1188(b) and 1189(b) and the facts before it. Not only does that standard align with the Court's understanding of the Subchapter V deadlines but it also reflects the plain meaning of the words of the statute. Indeed, "justly" in this context is commonly defined as "in accordance with justice, law, or fairness" and "accountable" as "responsible" or "liable to be called to account or to answer for responsibilities and conduct." *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). The question thus becomes 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.

As a procedural matter, the Debtor appears to have done all he could to act timely in this Subchapter V case. He filed his requested extensions and Subchapter V election timely in connection with the conversion of his chapter 7 case to one under chapter 11. Similarly, since a chapter 7 debtor is not required or permitted to file a plan, the Debtor has not been dilatory in the plan process itself and appears to have complied with all his obligations under chapter 7 of the

[14] Subchapter V and chapter 12 are not identical, and invoking chapter 12 standards may not be warranted in every instance. Subchapter V starts with chapter 11 as its base and then draws on the structure of chapter 12, certain elements of chapter 13, and the recommendations of the American Bankruptcy Institute's Commission to Study the Reform of Chapter 11 and the National Bankruptcy Conference. *See* Michael C. Blackmon, *Revising the Debt Limit for "Small Business Debtors": The Legislative Half-Measure of the Small Business Reorganization Act*, 14 Brook. J. Corp. Fin. & Com. L. 339, 344–45 (2020) (summarizing the history of SBRA and some of the work of the American Bankruptcy Institute and the National Bankruptcy Conference that underlies the act). Subchapter V is designed to reduce identified barriers to small business reorganizations. *See id*. (including the reports cited therein); *see also supra* notes 7 and 8. Nevertheless, with respect to the 90-day filing deadline, not only does the same language appear in sections 1189(b) and 1221 but both processes also remove the absolute priority rule as a confirmation standard. *See* COLLIER, *supra* at ¶ 1221.01[2] n. 10. This additional similarity between Subchapter V and chapter 12 further supports applying a consistent standard to a requested extension of the 90-day deadline for filing a Subchapter V or a chapter 12 plan.

Code.[15] No party has alleged that the Debtor is acting in bad faith or engaging in wrongful or dilatory conduct in either his chapter 7 case or in the process of conversion. As such, upon initial inquiry, the Debtor's need for an extension appears fairly attributable to factors outside of his control, namely the conversion process and requirements of chapter 7 versus chapter 11 of the Code.

Before definitely reaching that conclusion, however, the Court needs to consider the Debtor's decision initially to file a chapter 7 case and the timing of his requested conversion to chapter 11. The Debtor commenced his chapter 7 case in early February 2020, before the effective date of Subchapter V.[16] The Debtor did not move to convert his case after the effective date and, in fact, waited over four months to seek conversion. At the time of the requested conversion, a contested motion for relief from stay was pending and remains outstanding.

The Court can envision a case in which the circumstances surrounding conversion could weigh against any extension of the deadlines under Subchapter V. For example, if the Debtor were manipulating the timing of his original bankruptcy filing and his requested conversion in a manner that unfairly prejudiced some or all of his creditors, an extension would not be warranted. Likewise, if the Debtor failed to comply with his obligations under the Code in his original bankruptcy case or commenced his case after the effective date of SBRA and had missed a plan

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[15] As previously noted, certain deadlines in the Debtor's chapter 7 case were extended by the District Court's Standing Orders because of the novel COVID-19 pandemic. *See supra* note 2. It is not clear whether these circumstances impacted the general administration of the Debtor's chapter 7 case or his conversion of the case to one under chapter 11. The Court does not need to consider this potential, however, given the facts of this case and the existing grounds to grant the Debtor's requested extension of the section 1188 and 1189 deadlines.

[16] Although the Debtor commenced his bankruptcy case before the effective date of SBRA, the Debtor is still eligible to invoke its provisions. As the court explained in *Moore Properties*,

> The application of subchapter V in this case creates none of the taking or retroactivity concerns expressed by the Court in *Landgraf* and *Security Industrial Bank*. Subchapter V incorporates most of existing chapter 11, and, with two main exceptions of no effect here, does not alter the rubric under which debtors may affect pre-petition contractual rights of creditors, much less vested property rights.

In re Moore Properties of Pers. Cty., LLC, No. 20-80081, 2020 WL 995544, at *4 (Bankr. M.D.N.C. Feb. 28, 2020); *see also In re Bello*, 613 B.R. 894 (Bankr. E.D. Mich. 2020) (a debtor may elect to proceed under SBRA even if the case was pending before the effective date of the act).

deadline prior to requesting conversion or making a Subchapter V election, then perhaps an extension would not be warranted. Again, the analysis must be fact-intensive and focused on the Debtor's conduct and potential prejudice to creditors.

Here, the Debtor has attributed his requested extension to the timing of the case conversion, and no party has disputed that justification. The Court also observes that the party who filed the relief from stay motion in the Debtor's chapter 7 case had notice of the requested deadline extensions and has not raised any opposition to the request. The Court thus concludes on balance that the Debtor should have access to Subchapter V of the Code and has established adequate grounds to extend the deadlines imposed by sections 1188 and 1189 of the Code in this case.

IV. Conclusion

Based on the record before the Court, the Debtor timely sought an extension of the section 1188 and 1189 deadlines and should not be held justly accountable for his inability to meet those deadlines. The Court will set extended deadlines for the Debtor, based on the date of the conversion of his chapter 7 case to one under chapter 11 of the Code. The Court will enter a separate order consistent with this Memorandum Opinion.

cc: Debtor
Debtor's Counsel
U.S. Trustee
All Creditors

END OF MEMORANDUM OPINION

AMERICAN BANKRUPTCY INSTITUTE

Rochelle's DAILY WIRE

July 13, 2020

Three Judges Permit Redesignation under the SBRA, But with Qualifications

> The SBRA can be used to extinguish a creditors' committee previously appointed in a 'traditional' chapter 11 case.

With qualifications, three more bankruptcy judges have allowed debtors to redesignate their pending cases as small business reorganizations under the Small Business Reorganization Act, or SBRA.

One court allowed redesignation when a creditors' committee had already been formed in a "traditional" chapter 11 case, and another allowed debtor to convert his chapter 7 case to a case under the SBRA after the chapter 7 trustee had issued a no-asset report. The third evidently would permit refiling under the SBRA, but without shortchanging the chapter 11 creditors' committee in the process.

Effective in February, the SBRA is codified primarily in subchapter V of chapter 11, 11 U.S.C. §§ 1181 – 1195.

Converting from Chapter 7 to Subchapter V Is Ok

Bankruptcy Judge Michelle M. Harner of Baltimore ruled in a case where the debtor had filed his chapter 7 petition nine days before the SBRA came into effect. The debtor had operated a small business; the case went smoothly; the trustee issued a report of no distribution, and the debtor "appeared" eligible for a discharge, the judge said.

The debtor filed a motion for conversion of his chapter 7 case to subchapter V of chapter 11, along with a motion to reset the deadlines under subchapter V. Section 1188(b) requires a status conference within 60 days of the order for relief, and Section 1189 requires the filing of a plan within 90 days of the order for relief. Because redesignation under subchapter V does not reset the order for relief, both deadlines had passed before the debtor filed the conversion motion.

In her July 7 opinion, Judge Harner cited three decisions permitting redesignation under subchapter V. To read ABI's reports of those cases, click here, here, and here. She noted how both Sections 1188 and 1189 allow extensions of the deadlines under circumstances "for which the debtor should not justly be held accountable."

Examining the facts of the case, Judge Harner said the debtor acted as quickly as he could under subchapter V and had complied with his obligations in chapter 7. She allowed conversion and set new deadlines because the debtor was not acting in bad faith and the need for extension of the deadlines was "fairly attributable to factors outside of his control."

In *dicta*, Judge Harner said that redesignation might not be allowed if the debtor had not complied with its obligations or missed a deadline to file a plan.

Redesignation Can Extinguish an Existing Committee

Bankruptcy Judge Ernest M. Robles of Los Angeles presided over a case where a couple had filed a traditional chapter 11 petition last year without designating themselves as a small business. An official creditors' committee had been formed and selected counsel, but Judge Robles had not ruled on the committee's retention application when the debtors amended the petition to seek redesignation under subchapter V.

The committee opposed redesignation, but to no avail.

In his June 3 opinion, Judge Robles said the committee would not be "unduly prejudiced" by redesignation, even though the committee might come to an end because there ordinarily are no committees in SBRA cases. He said the committee could demonstrate "cause" for continuation of the committee under Section 1102(a)(3).

To show "cause," Judge Robles said the committee would need to "demonstrate that its continued existence will improve recoveries to creditors, will assist in the prompt resolution of this case, and is necessary to provide effective oversight of the Debtors."

Judge Robles permitted the debtors to proceed in subchapter V, rejecting the idea that "the Debtors' Subchapter V election was motivated primarily by a desire to divest the Committee of its role in this case."

Redesignation Is Ok, but the Committee Must Be Paid

Bankruptcy Judge Frederick E. Clement of Sacramento, Calif., barred a corporate chapter 11 debtor from redesignating under subchapter V if it meant shortchanging counsel for the creditors' committee.

The committee had retained counsel with court approval, but the committee's counsel had not been paid. The debtor wanted Judge Clement to permit dismissal with an immediate refiling under subchapter V.

Based on the notion that estate assets revest in the debtor on dismissal, the debtor intended to pay its counsel after dismissal but not committee counsel.

Judge Clement said "no" in his July 6 opinion.

The committee argued that the strategy was akin to an impermissible structured dismissal precluded by *Czyzewski v. Jevic Holding Corp.*, 137 S. Ct. 973 (2017). To read ABI's report on *Jevic*, click here. Judge Clement agreed, to the extent of observing that the committee would lose its priority claim, even though the debtor's counsel would be paid.

Judge Clement dismissed the case but retained jurisdiction to approve fee applications. He gave the committee's counsel a deadline for filing a fee application and barred the debtor from paying any professionals, including its own, until all fee applications had been resolved and paid in full.

The opinions are:

- *In re Trepetin*, 20-11718 (Bankr. D. Md. July 7, 2020)

- *In re Bonert*, 19-20836 (Bankr. C.D. Calif. June 3, 2020)

- *In re Slidebelts Inc.*, 19-25064 (Bankr. E.D. Calif. July 6, 2020)

Case Details

Case Citation	The opinions are In re Trepetin, 20-11718 (Bankr. D. Md. July 7, 2020); In re Bonert, 19-20836 (Bankr. C.D. Calif. June 3, 2020); and In re Slidebelts Inc., 19-25064 (Bankr. E.D. Calif. July 6, 2020).
Case Name	In re Trepetin, 20-11718 (Bankr. D. Md. July 7, 2020);
Case Type	Business

Court
4th Circuit
Maryland

Bankruptcy Tags
Creditors' Committee
Plan Confirmation
Practice and Procedure
Business Reorganization
Small Business

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