AMERICAN BANKRUPTCY INSTITUTE

2021 Rocky Mountain Bankruptcy Virtual Conference

CONCURRENT SESSION

SBRA: Subchapter V Strategy and How to Get Your Plan Confirmed

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2021

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General Purpose of Subchapter V

- Streamline the Chapter 11 Process
- Reduce Administrative Costs to the Debtor
- Promote Consensual Plans to Minimize Contested Confirmation
- Quick Path to Plan Solicitation and Confirmation
- Easier Road to Confirmation for Small Businesses

Chapter 11 vs. Subchapter V – Major Plan Differences

- Debtor has exclusive right to file Plan (must be filed in 90 days).
- Plan solicitation and confirmation is now a one-step process – no Disclosure Statement required.
- Plan requires a brief history of Debtor's operations, liquidation analysis, and projections of Debtor's ability to make payments.
- Confirmation in Subchapter V does not require acceptance by creditors but does still have a voting component.
- Court may confirm plan that has not been accepted by creditors that does not "discriminate unfairly" and is "fair and equitable"
- Absolute Priority Rule does not apply.
- Administrative claims are not required to be paid on effective date.

Weighing Plan Content vs. Cost

- Should you use Official Form 425A or modified your own Chapter 11 template?
- How much disclosure and content is enough for Subchapter V?
- How comprehensive and detailed do liquidation analyses and plan projections need to be for Subchapter V - given §1191(c)(3)(B)?

Strategies for Successful Plan Confirmation

- Manage client expectations.
- Start negotiations with creditors early.
- Contemplate Plan elements and issues prior to or upon filing of Petition.
- Have an open dialog with the Subchapter V Trustee.
- Consider utilizing the Subchapter V Trustee to mediate differences between your client and creditors.
- Create check list of Plan content and confirmation requirements.
- Develop, simplify, and organize evidence well in advance of plan confirmation.

What is the Role of the Subchapter V Trustee in Plan Confirmation?

- Facilitate the development of consensual plans.
- Engage and be proactive in the Plan process.
- Fill a mediation role between Debtor and creditors, if necessary.
- To be heard at Plan confirmation hearing.

Consensual has Failed – Now What?
(New §1191(c) Cram Down)

Condition Plan be fair and equitable with respect to each class of claims or interest include:

(1) Secured Claims – Meets requirements of 1129(b)(2)(A).

(2) As of Effective Date of Plan:

- (A) Plan provides all projected disposable income (not to exceed 5 years) will be applied to make payments under the Plan.
- (B) Value of property to be distributed is not less than the projected disposable income.

(3) Debtor will be able to make all payments under the Plan or there is a reasonable likely and Plan provides appropriate remedies to protect claims or interests in the event payments are not made.

Is the Plan Really Feasible?

- Who is post-petition management team?
- What are the abilities of management?
- What are the current economic conditions?
- Have the events leading to the bankruptcy filing been addressed?
- Does the Debtor have adequate capital and cash flow?
- Is there a reasonable likelihood Debtor can make plan payments?
- How much evidence is necessary at Plan confirmation?
- Appropriate default provision?

Cram Down Considerations

- What does “fair and equitable” really mean given the purpose of Subchapter V?
- Market rates in Subchapter V – Does Till v. SCS apply?
- How long can secured creditors be reasonably stretched out in your Plan?
- Does the Plan contribute all of the net revenue?

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SUMMARY & OVERVIEW OF SUBCHAPTER V OF CHAPTER 11 BANKRUPTCY REORGANIZATION FOR THE "SMALL BUSINESS DEBTOR"

The following is a brief summary and overview of subchapter V ("**Sub. V**") of chapter 11 ("**Ch. 11**") of title 11 of the United States Code (the "**Bankruptcy Code**" or the "**Code**").

The American Bankruptcy Institute (ABI) has published a comprehensive analysis of Sub. V, titled *SBRA: A Guide to Subchapter V of the U.S. Bankruptcy Code*, authored by Hon. Paul W. Bonapfel, U.S. Bankruptcy Judge for the Northern District of Georgia in Atlanta, consisting of over eighty pages plus appendices. The reader is encouraged to refer to Judge Bonapfel's "guide" for a more comprehensive discussion.

I. BACKGROUND

The term "small business debtor" originated in 1994 with Congress's first attempt at a streamlined bankruptcy reorganization process for business debtors that, arguably, have insufficient assets to justify and/or to survive the expense of a typical chapter 11 bankruptcy reorganization. A "small business case" allowed a small business debtor to combine the hearing on its disclosure statement with plan confirmation. In theory, a small business debtor could file a bankruptcy under Ch. 11 and immediately begin soliciting votes on a plan, thereby ensuring a swift and less-costly exit from bankruptcy. In 2005, Congress added financial disclosure requirements for small business debtors and strengthened the role and oversight of the United States Trustee. Congress, however, refused to raise the debt limit above $2 million, which would have made more debtors eligible to reorganize as small businesses.

In practice, however, confirming a plan in a small business case was not less difficult or complex than confirming an ordinary Ch. 11 bankruptcy. The option to combine the disclosure statement hearing with the confirmation hearing was great, in theory, and actually worked in some cases. But it added significant risk. (If the disclosure statement was not approved at the confirmation hearing, then it was all for naught.) And the "small business debtor" provisions (which formerly were mandatory vs. optional) did not significantly reduce expense – perhaps not at all. Additionally, the overlay of additional, special rules applicable to small business debtor cases arguably made them more difficult and complex than an ordinary Ch. 11 bankruptcy, not simpler and easier.

Last Updated Dec., 2020

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Summary & Overview of Subchapter V of Chapter 11
Bankruptcy Reorganization for the "Small Business Debtor"

The Small Business Reorganization Act of 2019 (the "Act") goes further to streamlining and simplifying Ch. 11 for the "small business debtor". Small business debtors will now reorganize under Subchapter V of chapter 11. The following is a general overview of the new law, which took effect on February 22, 2020.

II. OPTIONAL – A Small Business Debtor Must Elect that Sub. V Apply

Sub. V is not mandatory. It is optional. Section 103(i) of the Bankruptcy Code provides: "Subchapter V of [Ch. 11] applies only in a case under [Ch. 11] in which a small business debtor elects that subchapter V of chapter 11 shall apply."

If the election is not made, but the debtor otherwise qualifies as a "small business debtor," then the chapter 11 bankruptcy case will be treated as a "small business case." See 11 U.S.C. § 101(51C) (defining "small business case" as "a case filed under [Ch. 11] in which the debtor is a small business debtor and has *not* elected that subchapter V of [Ch. 11] shall apply") (italics added).

III. ELIGIBILITY - Who Can Be a Small Business Debtor?

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 as of the date of the filing of the petition or the order for relief in an amount not more than $2,725,625," but exclusive of (i.e., not counting) debts owed to affiliates and insiders. (When "small business debtor" originally was defined, in 1994, this amount was $2,000,000. But like many of the dollar amounts in the Bankruptcy Code and rules, this amount has been, and continues to be, subject to automatic increases, every three years, based upon changes in the Consumer Price Index. The last increase became effective May 1, 2019. Absent an intervening act of Congress, the next increase will occur in 2022.)[1]

In response to the COVID-19 pandemic, Congress increased the debt limit for Sub. V cases to $7,500,000 for one year, currently ending March 27, 2021. CARES Act, Pub. L. No. 116-136, 134 Stat. 281 (Mar. 27, 2020).

[1] Section 104(a) of title 11, United States Code, provides the mechanism for an automatic three-year adjustment of dollar amounts in certain sections of titles 11 and 28. Public Law 95-598 (1978); Public Law 103-394 (1994); Public Law 109-8 (2005); and Public Law 110-406 (2008). The provision states (with emphasis added):

> (a) *On April 1*, 1998, and *at each 3-year interval* ending April 1 thereafter, each dollar amount in effect under sections 101(3), 101(18), 101(19A), 101(51D), 109(e), 303(b), 507(a), 522(d), 522(f)(3) and 522(f)(4), 522(n), 522(p), 522(q), 523(a)(2)(C), 541(b), 547(c)(9), 707(b), 1322(d), 1325(b), and 1326(b)(3) of this title and section 1409(b) of title 28 immediately before such April 1 shall be adjusted—
>
> (1) to reflect the change in the Consumer Price Index for All Urban Consumers, published by the Department of Labor, for the most recent 3-year period ending immediately before January 1 preceding such April 1, and
>
> (2) to round to the nearest $25 the dollar amount that represents such change.
>
> (b) Not later than March 1, 1998, and at each 3-year interval ending on March 1 thereafter, the Judicial Conference of the United States shall publish in the Federal Register *the dollar amounts* that *will become effective on such April 1* under sections 101(3), 101(18), 101(19A), 101(51D), 109(e), 303(b), 507(a), 522(d), 522(f)(3) and 522(f)(4), 522(n), 522(p), 522(q), 523(a)(2)(C), 541(b), 547(c)(9), 707(b), 1322(d), 1325(b), and 1326(b)(3) of this title and section 1409(b) of title 28.
>
> (c) Adjustments made in accordance with subsection (a) shall not apply with respect to cases commenced before the date of such adjustments.

Although a debtor that owns "single asset real estate" may be engaged in commercial or business activity, such a "single asset real estate" debtor is *not* eligible to be a "small business debtor."

There is *no requirement* that the debtor *remain engaged* in the commercial or business activity post-petition. But to qualify, "not less than 50 percent" of the debt must "ar[i]se from the commercial or business activities of the debtor."

IV. LIMITED TRUSTEE APPOINTED; DEBTOR REMAINS "IN POSSESSION"

After filing, a small business debtor as a debtor-in-possession will continue to control its business and assets. Under Sub. V, "the debtor shall remain in possession of all property of the estate," notwithstanding the appointment of a trustee. 11 U.S.C. § 1186(b).

A Sub. V "trustee" (a "Small Business Trustee") is appointed in every Sub. V case. A Small Business Trustee, however, has much more limited powers and influence than an ordinary trustee appointed under chapter 7 or 11. Indeed, in some Sub. V cases, the Small Business Trustee will have a role similar to (A) a chapter 13 trustee in a consumer bankruptcy case, *i.e.*, that he or she will act as a conduit for plan payments and will have limited authority to investigate the financial affairs of the debtor and object to the allowance of proofs of claim, and/or (B) a trustee appointed in a chapter 12 case filed by an eligible family farmer or family fisherman.

The limited powers and duties of a Small Business Trustee include:

i. to facilitate the development of a consensual plan of reorganization;

ii. to ensure that the debtor commences making timely payments required by a confirmed plan;

iii. to appear and be heard at the status conference and any hearing that concerns (A) the value of property subject to a lien; (B) confirmation of a plan; (C) modification of the plan after confirmation; or (D) the sale of property of the estate;

iv. to "be accountable for all property received" (if any);

v. to "examine proofs of claims and object;"

vi. "if advisable, [to] oppose the discharge of the debtor;"

vii. to "furnish … information concerning the estate and the estate's administration" if requested; and

viii. to "make a final report and file a final account of the administration of the estate."

The court can strip a small business debtor of its "debtor-in-possession" status and rights "for cause," including fraud, dishonesty, incompetence, gross mismanagement of the affairs of the debtor, or for failure to perform its obligations under a confirmed plan.

V. NO COMMITTEE OF UNSECURED CREDITORS

Section 1102(a)(1) provides that: "as soon as practicable after the order for relief under [Ch. 11], the United States Trustee shall appoint a committee of creditors holding unsecured claims and may appoint additional committees of creditors or of equity security holders as the United States trustee deems appropriate." This is the norm in Ch. 11 cases. In short, as a matter of statute, the United States Trustee is required to appoint a committee of unsecured creditors in all cases in which a sufficient number of creditors indicate a desire to form and participate on the committee. If a committee is formed, it can retain counsel. And the committee's counsel has the right to seek payment from the bankruptcy estate, as an administrative claim. This can be a large burden on bankruptcy cases. Indeed, some Committee's and their professionals exert such a large burden on the estate that they unwittingly become a "cure that kills the patient."

As amended by the 2019 legislation, Section 1102(a)(3) of the Bankruptcy Code now provides: "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." In short, the default rule is that a committee will not be formed in a Sub. V case. Of course, the Court could "order otherwise" if it believed sufficient "cause" exists.

VI. STATUS REPORTS AND STATUS CONFERENCE

Within 60 days of the filing, the bankruptcy court is expected to hold a status conference "to further the expeditious and economical resolution" of the case. At least 14 days prior to the conference, the debtor is required to file a report detailing its efforts to attain a consensual plan of reorganization.

VII. THE PLAN AND PLAN CONFIRMATION

The debtor must file a plan within 90 days after the order for relief. The court can only extend this deadline under "circumstances for which the debtor should not justly be held accountable."

One of the most significant changes to the small business debtor reorganization is that only the debtor is allowed to propose a plan. (In an ordinary chapter 11 case, the debtor has an "exclusive period" during which only the debtor may propose a plan, but the exclusive period expires, and can be shortened or set aside.) Indeed, a small business debtor will enjoy the same perpetual plan exclusivity as do family farmers and fishermen under chapter 12, and consumer debtors under chapter 13.

The small business debtor does not need to solicit plan acceptances with a separate disclosure statement. Indeed, unless the court orders otherwise, the debtor is not required to prepare and obtain approval of a disclosures statement at all. Instead, the plan itself must include a brief history of the business operations of the debtor, a liquidation analysis, and projections with respect to the debtor's ability to make payments under the proposed plan.

Confirmation of a small business debtor plan of reorganization tracks the criteria of section 1129(a) of the Bankruptcy Code, with the critical exception that the debtor *does not* need to obtain the acceptance of an impaired class of creditors. The small business debtor also has the flexibility to pay administrative claims over the life of the plan instead of in cash on the effective date.

The Plan may be confirmed even if it is not accepted by any classes of claims. Further, cramdown is much easier in Sub. V than under ordinary Ch. 11. With respect to secured claims,

cramdown is identical to an ordinary chapter 11 case. Under section 1191(c)(1), to confirm a plan over a secured creditor's objection, "the plan [must] meet[] the requirements of section 1129(b)(2)(A) of [the Bankruptcy Code]."

If a class of unsecured creditor votes to reject a Sub. V plan, "the court … shall confirm the plan notwithstanding … if the plan *does not discriminate unfairly, and is fair and equitable*, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan." (Italics added). What this requires (i.e., for the plan to be "fair and equitable") is:

> (A) the plan [must] provides that *all of the projected disposable income of the debtor to be received in the 3-year period*, or such longer period not to exceed 5 years as the court may fix, beginning on the date that the first payment is due under the plan *will be applied to make payments under the plan*; *or*
>
> (B) *the value of the property to be distributed under the plan* in the 3-year period, or such longer period not to exceed 5 years as the court may fix, beginning on the date on which the first distribution is due under the plan *[must be] not less than the projected disposable income of the debtor.*

11 U.S.C. § 1191(c)(2) (underlining and italics added).

The biggest benefit of this for the owner of a corporation or limited liability company is that the "absolute priority rule" will not apply. This means that equity holders can retain their interests in the debtor, notwithstanding the dissent of the unsecured creditors, even if the plan does not pay unsecured claims in full.

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. "Disposable income" means income received by the debtor that is not reasonably necessary to (1) maintain and support the debtor or a dependent, (2) satisfy domestic support obligations that become first payable post-petition, or (3) ensure the continuation, preservation, or operation of the business.

VIII. DISCHARGE

If the plan is confirmed under section 1191(a), then the standard discharge provisions of section 1141(d) will apply to discharge debts at confirmation. If the debtor makes use of the section 1191(b) cramdown provisions, however, then a discharge enters "as soon as practicable" after the debtor completes all payments due within the applicable income commitment period.

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CHAPTER 11 BANKRUPTCY FILING CHECKLIST
CASES UNDER SUBCHAPTER V – SMALL BUSINESS DEBTOR REORGANIZATION

Qualification or Eligibility to File under Subchapter V of Chapter 11.

1. Confirm Eligibility of debtor(s) (collectively, the "**Debtor**") to file under subchapter V ("**SubCh. V**") of chapter 11 ("**Ch. 11**") of title 11 of the United States Code (the "**Bankruptcy Code**").

a. to qualify as a small business debtor, as defined in section 1182(1) of the Bankruptcy Code, the debtor must be "a person engaged in commercial or business activities … that has aggregate *noncontingent liquidated* secured and unsecured debts as of the date of the filing of the petition or the order for relief in an amount not more than" $7,500,000 or $2,725,625,* but exclusive of (*i.e.*, not counting) debts owed to affiliates and insiders.

b. Although a debtor that owns "single asset real estate" may be engaged in commercial or business activities, such a "single asset real estate" debtor is *not* eligible to be a "small business debtor."

c. There is *no requirement* that the debtor *remain engaged* in the commercial or business activity post-petition. But to qualify, "not less than 50 percent" of the debt must "ar[i]se from the commercial or business activities of the debtor."

* In response to the COVID-19 pandemic, Congress temporarily increased the debt limit for Sub. V cases to $7,500,000 for one year, currently ending March 27, 2021. CARES Act, Pub. L. No. 116-136, 134 Stat. 281 (Mar. 27, 2020). If Congress does not extend this change, or make it permanent, the debt limit will return to $2,725,625 effective March 28, 2020.

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Chapter 11 Bankruptcy Filing Checklist
Cases under Subchapter V – Small Business Debtor Reorganization

Bare bones filing (documents that should be obtained or filed on or before the first day):

2. A *signed resolution or unanimous written consent* by the board of directors/members of the Debtor (a) authorizing the Debtor to file a bankruptcy case under Ch. 11 and SubCh. V, (b) authorizing the Debtor to retain general bankruptcy counsel [and other professionals as applicable] and (c) designating and authorizing specific person(s) to sign the bankruptcy petition, to sign other necessary bankruptcy documents, to direct general bankruptcy counsel after the bankruptcy filing, and to act on behalf of the Debtor after the bankruptcy filing.

3. *Voluntary Petition* signed by an authorized representative of the Debtor. To complete the petition, we need the following information:

a. Tax ID number for the Debtor;

b. Estimated dollar amount of assets and liabilities; and

c. estimated total number of creditors.

4. A *list of the Debtor's 20 largest "unsecured creditors"* (excluding insiders), including addresses, phone numbers, e-mail addresses and amounts owed.

5. A *list of Equity Security Holders*, i.e., all owners of the Debtor.

6. *Statement of Corporate ownership*: The Debtor must identify any corporation that owns 10% or more of any class of the Debtor's equity interests.

7. A *list of all creditors* (both secured and unsecured), with names and addresses (we can gather amounts and identify collateral, if any, at a later time).

Filing Requirements Specific to "Small Business Debtors" (Due with Petition):

SubCh. V is not mandatory. It is optional. Section 103(i) of the Bankruptcy Code provides: "Subchapter V of [Ch. 11] applies only in a case under [Ch. 11] in which a small business debtor elects that subchapter V of chapter 11 shall apply." Accordingly, a Debtor that desires to "opt in" to SubCh. V must make the affirmative election. Presently, this may be done by:

8. Electing that SubCh. V apply by checking the sub-box under section 8 of the voluntary petition (Official Form 201), certifying and electing: "The debtor is a debtor as defined in 11 U.S.C. § 1182(1), its aggregate noncontingent liquidated debts (excluding debts owed to insiders or affiliates) are less than $7,500,000 [or other amount then applicable], **and it chooses to proceed under Subchapter V of Chapter 11.**"

Sections 1187(a) and 1116 of the Bankruptcy Code imposes additional requirements on a debtor that is a "small business debtor" that files a "small business case." If the Debtor is filing its case under SubCh. V, the Debtor must –

9. Append to its petition its most recent balance sheet, statement of operations, cash-flow statement and federal income tax return, or a statement made under penalty of perjury that the documents do not exist.

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Chapter 11 Bankruptcy Filing Checklist
Cases under Subchapter V – Small Business Debtor Reorganization

Additional Filing Requirements for Individual Chapter 11 Debtors

10. Individual debtors must make additional filings not required of a corporate debtor, some of which are specified in section 521 of the Bankruptcy Code, Federal Rule of Bankruptcy Procedure 1007 and Local Rule 1007-1. For example, an individual debtor must file a certificate of credit counsel and, if applicable, a copy of the debt repayment plan as required by sections 109(h) and 521(b)(3) of the Bankruptcy Code, Federal Rule of Bankruptcy Procedure 1007(b)(3) and Local Rule 1007-1(d). This memorandum/checklist does not provides a list of the requirements applicable to individual debtors.

Due 7 days after the Petition (See Local Rule 2081-1).

11. Provide to the United States Trustee evidence of any permits, licenses of operations, and any policies of insurance maintained by the debtor. All documents provided as evidence of insurance must clearly indicate the policy expiration date, the types and amounts of coverage, the location(s) covered, the deductible, the named insured, the insurer, and the name, address, and telephone number of the local agent.

Due with the Petition or 14 days thereafter:

12. *Statement of Financial Affairs*.
13. *Schedules of Assets and Liabilities* (Schedules A through F).
14. *Schedule of Executory Contracts and Unexpired Leases* (Schedule G).
15. *Schedule of Codebtors* (Schedule H).
16. *Summary of Schedules*.

Due 21 days after the filing:

17. *Initial Financial Report* (to be prepared by the Debtor or an accountant)
    a. Latest Fiscal Year Financial Statements or Tax Returns;
    b. Balance Sheet as of Month End Immediately Preceding Filing;
    c. Profit and Loss Statement for Month and Year Immediately Preceding Filing;
    d. Insurance & Environmental Risk Questionnaire, including proof of
        i. General Liability Insurance,
        ii. Property (Fire, Theft, etc.) Insurance,
        iii. Workers' Compensation Insurance,
        iv. Vehicle Insurance, and
        v. Other Applicable Insurance.

The proof of insurance must be signed by an authorized representative of the carrier or agent and name the United States Trustee as a party to be notified in the event of cancellation.

e. Projected Revenue, Expenses and Cash Flow for First 180 of Post-Petition Operations;

f. Name and Address of Financial Institution, Account Number and Sample Voided Check for Each "Debtor-in-Possession" Bank Account, including both

i. General Operating Account, and

ii. Tax Account(s); and

g. Collateralization Certificates (to be completed by each bank holding the Debtor's funds). For each participating bank holding the Debtor's funds, obtain a Collateralization Certificate that lists each of the Debtor's accounts at that institution and is signed by a representative of the bank.

Status Conference & Status Report:

18. *Status Conference.* Pursuant to section 1188(a) of the Bankruptcy Code, in each SubCh. V case, "not later than 60 days after the entry of the order for relief under this chapter, the court shall hold a status conference to further the expeditious and economical resolution of [the] case …." The bankruptcy court will set the status conference on a date that is available and convenient on its own calendar. Pursuant to section 1188(b) of the Bankruptcy Code, the period for holding a status conference can be extended "if the need for an extension is attributable to circumstances for which the debtor should not justly be held accountable."

19. *Status Report.* Pursuant to section 1188(c) of the Bankruptcy Code, in each SubCh. V case: "Not later than 14 days before the date of the status conference under subsection (a), 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."

Filing a Plan under Subchapter V of Chapter 11 - Due 90 days after the filing:

20. *The Debtor's Plan*. There is no limited "exclusive period" under SubCh. V. By mandate of Congress, "only the debtor may file a plan" in a bankruptcy case filed and pending under SubCh. V. 11 U.S.C. § 1189(a). The Debtor, however, must "file a plan not later than 90 days after the order for relief," i.e., within ninety days after the petition date. 11 U.S.C. § 1189(b). This strict 90-day period may be extended only "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). Pursuant to section 1190 of the Bankruptcy Code, a plan under SubCh. V –

a. *Disclosure Statement Substitute* – must include: (i) "a brief history of the business operations of the debtor;" (ii) "a liquidation analysis;" and (iii) "projections with

respect to the ability of the debtor to make payments under the proposed plan of reorganization," and

b. *Submission of Future Income* – "shall provide for the submission of all or such portion of the future earnings or other future income of the debtor to the supervision and control of the trustee as is necessary for the execution of the plan."

Continuing Financial Reports:

21. *Monthly Operating Reports*. Not later than 14 days after the end of each month the Debtor must file with the court a monthly operating report – currently Official Form 425C | Monthly Operating Report for Small Business under Chapter 11. The duty to file monthly reports terminates upon confirmation of a plan.

22. *Reports Regarding Entities in Which Debtor Holds a Controlling or Substantial Interest*. Pursuant to Federal Rule of Bankruptcy Procedure 2015.3, not later than 7 days before the first date set for the § 341 meeting of creditors and every 6 months thereafter, the Debtor shall file financial reports of the value, operations, and profitability of each entity in which the debtor holds at least a 20% interest (except any entity that is either publicly traded or in bankruptcy). The duty to file these reports terminates upon the effective date of a confirmed plan.

Employment of Counsel, Accountants, Appraisers, Tax Preparers, Etc.:

23. *Application to Employ General Bankruptcy Counsel*.

24. *Application to Employ Accountant*. The Debtor is required to prepare and file an initial financial report and monthly operating reports (as described above). As part of its plan, the Debtor also is required to provide a liquidation analysis. Many debtors in Ch. 11 lack the expertise and ability to prepare monthly operating reports and/or a liquidation analysis without the assistance of an accounting professional. If the Debtor desires such assistance, it should retain a qualified accountant and/or financial advisor. If this occurs, the Debtor should file an application to employ the accountant and his/her firm as accountants and financial/restructuring advisers.

25. *Application to Employ Appraiser*. In many cases, the value of real estate or other assets may become important. If so, it may be appropriate for the Debtor to retain and to file an application to employ an appraiser as a professional in the case.

26. *Application to Employ Tax Preparers*. The Debtor may need the assistance of tax preparers. Tax preparers cannot be employed or paid without a court order. As such, when the time to prepare and file the Debtor's tax returns comes, it will be necessary to prepare and file an application to employ tax preparers and/or tax advisors.

27. *Applications to Employ Other Professionals*. The Debtor may need the assistance of other professionals in its case. The Debtor cannot employ or pay any "professional" without first obtaining a court order approving their employment.

28. *Applications for Compensation*. The Debtor should be aware, and should advise all professionals working for it, that no professionals can be paid by the Debtor (and cannot apply retainer funds in payment) without both (a) an initial order approving his, her or its employment as a professional, and (b) a subsequent order approving the payment of compensation to the professional, entered after notice and opportunity for hearing.

Continuation of Utility Service and Determination of Deposit Amounts:

29. *Motion for Order Prohibiting Utilities from Altering, Refusing or Discontinuing Service.* Preferably, the Debtor should have negotiated with each and all necessary utilities the amount of the deposit they require to continue service during the Ch. 11 case, and shall have paid the requested deposit. If the Debtor has not or if the utility is unreasonable, the Debtor may wish to file a motion pursuant to section 366 of the Bankruptcy Code for an Order prohibiting the utilities from discontinuing service and determining "adequate assurance of payment, in the form of a deposit or other security."

Payment of Pre-Petition Wages and Employee Benefits:

30. *Motion for Authority to Pay Pre-Petition Wages.* If pre-bankruptcy wages are due and unpaid as of the petition date, the wages cannot be paid without a court order. To pay them, the Debtor will be required to file a Motion for Authority to Pay Pre-Petition Wages (ostensibly up to a maximum of $13,650† per employee – arising from services rendered within 180 days before the petition date).

31. *Motion to Pay Contributions to Employee Benefit Plans.* If applicable, the Debtor may need to file a motion to authorize it to pay contributions to profit-sharing plans, 401 plans, health insurance benefits, etc. (up to a maximum of $13,650‡ multiplied by the number of employees in each plan). Often, this motion is joined in and made part of the motion to pay pre-petition wages.

Use of Cash Collateral and/or Post-Petition Financing:

32. *Motion to Approve Use of Cash Collateral*. One or more of the Debtor's lenders (and potentially taxing authorities) may assert that any cash held by the Debtor on the Petition Date and any cash derived thereafter is its "collateral." In bankruptcy, a debtor cannot use cash which constitutes the "collateral" of any creditor without either (a) consent of the creditor, or (b) an order of the bankruptcy court. Although the Debtor may not have granted a security interest in its cash, the Debtor may have granted liens upon (a) real property and upon the rents and profits (a term of art under the law) deriving from the real property, (b) inventory and/or accounts and their proceeds, and/or (c) other assets which ultimately result in cash. As such, the Debtor may need to file a *Motion to Approve Use of Cash Collateral*.

† This is the dollar amount specified for "priority" claims under section 507(a)(4) of the Bankruptcy Code. This other dollar amounts/limits under the Bankruptcy Code, may increase or change over time.

‡ This is the dollar amount specified for "priority" claims under section 507(a)(5) of the Bankruptcy Code. This other dollar amounts/limits under the Bankruptcy Code, may increase or change over time.

AND/OR

33. *Motion to Approve Post-Petition Financing.* Section 364 of the Bankruptcy Code governs the Debtor's ability to obtain secured and unsecured credit post-petition. Generally, the debtor is authorized to obtain unsecured credit and to incur unsecured debt in the ordinary course of its business. See 11 U.S.C. § 364(a). If, however, the post-petition creditor desires to obtain administrative priority or collateral for the post-petition debt, the financing terms must be approved by order of the bankruptcy court, after notice and opportunity for a hearing. See 11 U.S.C. § 364(b), (c) and (d).

34. *Motion to Approve Cash Management System.* The United States Trustee generally requires closure of all pre-petition bank accounts and opening of one or more new debtor-in-possession bank accounts. If changing accounts would cause disruption in the Debtor's business operations, then the Debtor may need to seek authority to maintain its current accounts and cash management system.

Other Potential First-Day Motions:

35. *Motion to Honor Customer Programs*. If the Debtor desires to honor gift certificates or other pre-payments for goods or services, it may be necessary to file a motion and obtain entry of an order authorizing the Debtor to honor pre-paid contracts and other customer programs.

36. *Motion to Pay Critical Vendors.* Vendors that sold goods to the Debtor within 20 days prior to the petition date and in the ordinary course of the Debtor's business may have the right to be paid as an "administrative expense." See 11 U.S.C. § 503(b)(9). Excepting such amounts, the Debtor generally cannot pay any other pre-petition payables without a court order. If, however, it is "critical" that the Debtor pay some pre-petition amount to ensure continued business operations, the Debtor may be forced to file a Motion to Pay Critical Vendors (being as conservative as possible).

37. *Motion to Assume Leases and Contracts.* Bankruptcy gives the Debtor the right to cure any default existing under leases and executory contracts that did not expire and were not terminated as of the bankruptcy filing.

38. *Motion to Reject Lease and Contracts.* Bankruptcy also gives the Debtor the right to terminate its obligations under leases and executory contracts. "Rejection" of a lease or executory contract cuts off the right of the creditor to assert that it is entitled to be paid amounts that come due post-petition as an administrative expense. Any "rejection" of contracts and leases, however, must be approved by the bankruptcy court; provided that the rejection sometimes may relate back under appropriate circumstances. This could include equipment leases, copier leases, premises leases or other types of contracts where performance remains due on both sides.

39. *Motion to Extend Time to File Schedules and Statement of Financial Affairs*.

40. *Motion for Authority to Pay Pre-Bankruptcy Sales, Use and Franchise Taxes* (collected by the Debtor pre-petition and held in trust).

41. *Motion for Authority to Pay Pre-Petition Shipping Charges*.

42. *Motion to Establish Procedure for Reclamation Claims* (for claims under section 503(b)(9) or 546(c)(1) – goods delivered within 20 days or 45 days, respectively, pre-petition).

43. *Motion to File Certain Disclosures Under Seal* (to limit public access to confidential information or trade secrets).

44. *Motion to Authorize Employee Incentive Programs*.

45. *Motion to Limit Notice* (usually employed only in large cases with a huge mailing matrix).

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CONFIRMING A PLAN UNDER SUBCHAPTER V OF CHAPTER 11

The following is a brief summary of the requirement to confirm a plan under subchapter V ("**Sub. V**") of chapter 11 ("**Ch. 11**") of title 11 of the United States Code (the "**Bankruptcy Code**" or the "**Code**"). A bankruptcy case filed under Sub. V of Ch. 11 may be referred to herein as a "**SBRA Case**".

The American Bankruptcy Institute (ABI) has published a comprehensive analysis of Sub. V, titled *SBRA: A Guide to Subchapter V of the U.S. Bankruptcy Code*, authored by Hon. Paul W. Bonapfel, U.S. Bankruptcy Judge for the Northern District of Georgia in Atlanta, consisting of over eighty pages plus appendices. The reader is encouraged to refer to Judge Bonapfel's "guide" for a more comprehensive discussion.

I. Provisions of Chapter 11 that "do not apply" under Subchapter V

Pursuant to section 1181(a) of the Bankruptcy Code, certain provisions of chapter 11 "do not apply in a case" filed under Sub. V. The "not applicable" provisions that impact the contents, and confirmation, of a plan include:

- 1121 (defining the "exclusive periods" and permitting persons other than the debtor to file a plan);
- 1123(a)(8) (requiring in chapter 11 cases concerning an individual debtor that the plan must "provide for the payment to creditors under the plan of all or such portion of earnings from personal services performed by the debtor after the commencement of the case or other future income of the debtor as is necessary for the execution of the plan");
- 1123(c) (requiring in chapter 11 cases concerning an individual debtor that a plan proposed by someone other than the debtor "may not provide for the use, sale, or lease of [exempt] property … unless the debtor consents");
- 1127 (providing requirements for "modification" of a chapter 11 plan);
- 1129(a)(15) (imposing as a requirement for confirmation of a plan in a case in which the debtor is an individual that the plan must treat each "allowed unsecured claim" that

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actually "objects to confirmation" by (A) providing value "not less than the amount of such claim;" or (B) requiring that the debtor distributes property having a value "not less than the projected disposable income of the debtor (as defined in section 1325(b)(2)) to be received during the 5-year period beginning on the date that the first payment is due under the plan");

- 1129(b) (requirements for confirming a plan by "cram down" over the objection of a dissenting class of creditors);
- 1129(c) (permitting confirmation of "only on plan" and providing considerations when competing plans are proposed simultaneously); and
- 1129(e) (requiring that "[i]n a small business case" the plan must be confirmed within "45 days after the plan is filed").

Pursuant to section 1181(b) of the Bankruptcy Code, certain provisions of chapter 11 "do not apply" in a case under Sub. V "[u]nless the court for cause orders otherwise." The provisions that do not apply unless the bankruptcy court orders "for cause," include:

- 1102(a)(1), 1102(a)(2), 1102(a)(4), 1102(b) and 1103 (providing for the mandatory appointment of a "committee of creditors," the permissive appointment of additional committees of creditors or equity security holders, and governing such committees); and
- 1125 (requiring that "acceptance or rejection of a plan may not be solicited" without transmitting with the plan a court approved "disclosure statement".

II. Deadline for Filing a Plan; No Disclosure Statement Required; Contents of the Plan

There is no limited "exclusive period" under Sub. V. By mandate of Congress, "only the debtor may file a plan" in a bankruptcy case filed and pending under Sub. V. 11 U.S.C. § 1189(a). The debtor, however, must "file a plan not later than 90 days after the order for relief," i.e., within ninety days after the petition date. 11 U.S.C. § 1189(b). This strict 90-day period may be extended only "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).

Unless the bankruptcy court otherwise orders "for cause" the debtor is not required to prepare, obtain court approval of, or disseminate a "disclosure statement." See 11 U.S.C. § 1181(b).

Section 1190 of the Bankruptcy Code imposes specific requirements for the contents of a plan filed in a Sub. V case. These are in addition to the requirements of 1123 and 1129 of the Bankruptcy Code, and in lieu of subsections 1123(a)(8) and 1123(c) (which "do not apply").

Disclosure Statement Substitute – Pursuant to section 1190(1), the plan must include: (A) "a brief history of the business operations of the debtor;" (B) "a liquidation analysis;" and (C) "projections with respect to the ability of the debtor to make payments under the proposed plan of reorganization."

Submission of Future Income – Pursuant to section 1190(2), the plan "shall provide for the submission of all or such portion of the future earnings or other future income of the debtor to the supervision and control of the trustee as is necessary for the execution of the plan."

Modifying Home Mortgages – Pursuant to section 1190(3), the prohibition under section 1123(b)(5) may not apply. In a case under Sub. V, the debtor may be able to modify the rights of the holders or a home mortgage, if the loan proceeds (A) were "not used primarily to acquire the real property;" and (B) were "used primarily in connection with the small business of the debtor."

III. Confirming a Plan under Subchapter V

Most of the requirements to confirm a plan under chapter 11 apply in Sub. V cases, with certain exceptions and certain additions. A summary of the applicable confirmation requirements is as follows:

1. Subchapter V of Chapter 11 of the Bankruptcy Code Must Apply. Pursuant to § 103(i),[1] the debtor (a) must be is a "debtor" as defined in § 1182, and (b) must have elected that subchapter V of chapter 11 shall apply to the case.

   a. The debtor must be a person engaged in commercial or business activities that has aggregate noncontingent liquidated secured and unsecured debts as of the Petition Date in an amount not more than [$7,500,000 or $2,725,625][2] (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.

   b. The debtor must not be a person whose primary activity is the business of owning single asset real estate.

   c. The debtor must not be a corporation subject to the reporting requirements under section 13 or 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. §§ 78m or 78o(d)).

   d. The debtor must not be an affiliate of an issuer as defined in section 3 of the Securities Exchange Act of 1934 (15 U.S.C. §§ 78c).

2. Plan Must Comply with Bankruptcy Code – § 1129(a)(1). The plan must comply with the applicable provisions of the Bankruptcy Code, including, without limitation, as follows:

   a. Proper Classification. As required by § 1123(a)(1), the plan must properly designate classes of claims, and may classify only substantially similar claims in the same classes pursuant to § 1122.

   b. Specify Unimpaired Classes. As required by § 1123(a)(2), the plan must specify any class of claims or interests that is not impaired.

   c. Specify Treatment of Impaired Classes. The plan must specify the treatment of the impaired classes of claims or interests, thereby satisfying § 1123(a)(3).

[1] Unless otherwise provided, all references to statutory sections in this article using the section symbol "§" are to the relevant sections of the Bankruptcy Code.

[2] In response to the COVID-19 pandemic, Congress temporarily increased the debt limit for Sub. V cases to $7,500,000 for one year, currently ending March 27, 2021. CARES Act, Pub. L. No. 116-136, 134 Stat. 281 (Mar. 27, 2020). If Congress does not extend this change, or make it permanent, the debt limit will return to $2,725,625 effective March 28, 2020.

d. No Discrimination. The plan must provide for the same treatment for each claim or interest in each respective class, unless the holder(s) of a particular claim(s) has agreed to less favorable treatment with respect to such claim, thereby satisfying § 1123(a)(4).

e. Implementation of Plan. The plan must provide adequate and proper means for its implementation, thereby satisfying § 1123(a)(5). This might include providing for (a) the vesting of the property of the debtor and its bankruptcy estate in the reorganized debtor, (b) the reorganized debtor's use and retention of property, and (c) distributions to creditors.

f. Corporate Charter Provision. Pursuant to section 1123(a)(6), if the debtor is a corporation, the plan must "provide for the inclusion in the charter of the debtor … of a provision prohibiting the issuance of nonvoting equity securities."

g. Selection of Officers and Manager(s). Pursuant to § 1123(a)(7), the plan must "contain only provisions that are consistent with the interests of creditors and equity security holders and with public policy with respect to the manner of selection of any officer, director, or trustee."

h. Permissive Plan Provisions. The plan may contain any of the provisions permitted under § 1123(b).

i. Bankruptcy Rule 3016(a). The plan must be dated and identify the debtor as its proponent, thereby satisfying Bankruptcy Rule 3016(a).

j. Filing of the Plan – § 1189. Pursuant to § 1189, (i) the plan must be filed by the debtor, and (ii) the debtor must file the plan not later than 90 days after the order for relief, i.e., within 90 days after the Petition Date.

k. Contents of Plan [History of the Debtor; Liquidation Analysis; Projections of Feasibility] – § 1190(1). As required by § 1190(1), the plan must include (A) a brief history of the business operations of the debtor, (B) a liquidation analysis, and (C) projections with respect to the ability of the debtor to make payments under the plan (*i.e.*, feasibility).

l. Contents of Plan [Dedicate Future Earnings; Proper "Distribution Agent"] – § 1190(2) and 1194(b). As required by § 1190(2), the plan must dedicate all future earnings and income of the debtor to be used for distributions under the plan, to be distributed by the "Distribution Agent," but only to the extent necessary for the execution of the plan.

i. If the plan is confirmed by "cram down" under section 1191(b), then (A) the "trustee shall make payments to creditors under the plan," 11 U.S.C. § 1194(b), and (B) the future income of the debtor must be "submi[tted] … to the supervision and control of the trustee".

ii. If, however, the plan is confirmed by consent under section 1191(a), then the service of the trustee may be terminated, and the trustee may be discharged and released, as soon as "the plan has been substantially

consummated." 11 U.S.C. § 1183(c)(1). Accordingly, under such plan, the debtor may act as the "Distribution Agent."

3. Plan and the Proponent Must Comply with the Bankruptcy Code – §§ 1129(a)(1) and (a)(2). To satisfy §§ 1129(a)(1) and (a)(2), the plan and the debtor both must comply with the applicable provisions of the Bankruptcy Code.

a. the plan must comply, and debtor must have complied, generally with applicable provisions of the Bankruptcy Code; and

b. the debtor must comply with the applicable provisions of the Bankruptcy Code, the Bankruptcy Rules and orders of the court in transmitting the plan, ballots, related documents and notices, and in soliciting and tabulating votes on the plan.

4. Good Faith – § 1129(a)(3). Pursuant to § 1129(a)(3), the debtor must have filed the Bankruptcy Case in good faith and for a valid bankruptcy purpose. Additionally, the plan must be proposed in good faith and not by any means forbidden by law.

5. Payments for Services, Costs and Expenses – § 1129(a)(4). To comply with § 1129(a)(4), all fees and expenses of Professionals incurred through and including the Effective Date must be subject to the bankruptcy court's approval, and must be paid through distributions under the plan, as authorized by § 1191(e) (unless otherwise agreed by the debtor and the holder of such administrative expense claim).

6. Manager(s) of the Reorganized Debtor – § 1129(a)(5). To comply with § 1129(a)(5), the plan must identify the identity and affiliations of individuals proposed to serve as director, officer or manager of the reorganized debtor. Further, the appointment, or continuance, of such person(s) must be consistent with the interests of the holders of creditors and equity holders and with public policy.

7. No Rate Changes – § 1129(a)(6). Pursuant to § 1129(a)(6), if a governmental regulatory commission has jurisdiction over the approval of the rates of the debtor, then such commission must approve rate changes under the plan.

8. Best Interests of Creditors Test – § 1129(a)(7); Liquidation Analysis. Preferably (for purposes of both § 1129(a)(7) and 1190(1)), the plan should be accepted by all classes of claims and interests. If, however, a class of claims or interests dissents, to satisfy § 1129(a)(7), the plan must provide that the members of the dissenting class will receive or retain under the plan on account of its claim or interest property of a value, as of the Effective Date of the plan, that is not less than the amount such holder would receive or retain if the Case were converted to chapter 7, and the Estate were liquidated by a chapter 7 trustee.

9. Acceptance of the Plan – § 1129(a)(8). In order for the plan to be confirmed under § 1191(a), the plan must satisfy § 1129(a)(8), *i.e.*, it must be accepted by all classes of claims and interests. Even if a class dissents (or all classes dissent), however, the plan still may be confirmed by "cram down" if it satisfies the alternative requirements of § 1191(b).

10. Administrative Expense Claims and Priority Tax Claims – 1129(a)(9) and 1191(e). To satisfy the requirements of §§ 1129(a)(9) and 1191(e), the plan must (unless "the holder of a particular claim has agreed to a different treatment"):

a. pay allowed[3] administrative expenses and allowed[3] "gap claims" [arising in involuntary cases] either –

i. in full on the "Effective Date" as normally required by § 1129(a)(9)(A), or

ii. as modified by the "Special Rule" for SBRA Cases under § 1191(e), via "payment through the plan;"[4]

b. pay allowed priority claims under sections 507(a)(1), (a)(4), (a)(5), (a)(6) and (a)(7) the full amounts of their claims –

i. if the class has rejected the plan, in full on the Effective Date, see § 1129(a)(9)(B)(ii), or

ii. if the class has accepted the plan, in full in deferred cash payments, see § 1129(a)(9)(B)(i);

c. pay allowed priority tax claims under section 507(a)(8) in "regular installment payments in cash" – (i) the full amount of the claim, (ii) over a period of not more 5 years after the order for relief, and (iii) in a manner not less favorable than nonpriority unsecured creditors, see § 1129(a)(9)(C); and

d. pay secured claims which, but for their lien rights, would qualify as a priority tax claims under section 507(a)(8), in the same manner specified for such claims.

11. Acceptance by at Least One Impaired Class – § 1129(a)(10). In order for the plan to be confirmed under § 1191(a), the plan must satisfy § 1129(a)(10), *i.e.*, "at least one class of claims that is impaired under the plan [shall] ha[ve] accepted the plan, determined without including any acceptance of the plan by any insider." Even if no impaired class of claims has accepted the plan, however, the plan still may be confirmed by "cram down" if it satisfies the alternative requirements of § 1191(b).

12. Feasibility – § 1129(a)(11). To satisfy § 1129(a)(11), the bankruptcy court must find/conclude that "[c]onfirmation of the plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor or any successor to the debtor under the plan, unless such liquidation or reorganization is proposed in the plan."

13. Payment of Fees – § 1129(a)(12). To satisfy § 1129(a)(12), all fees payable under 28 U.S.C. § 1930 (i.e., bankruptcy filing fees) must be paid, or the plan must provide for their payment on the Effective Date.

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[3] Such claims only need be paid if, and after, they are "allowed." Section 1129(a)(9)(A) refers to "a claim of a kind specified in section 507(a)(2) or 507(a)(3)," and § 1191(e) likewise refers to "a claim of a kind specified in paragraph (2) or (3) of section 507(a)." Section 507(a)(2) provides priority in payment to "administrative expenses *allowed* under section 503(b)" (italics added), certain federal reserve bank claims, and court fees payable to the bankruptcy court. Section 507(a)(3) provides priority in payment to "unsecured claims *allowed* under section 502(f)" (italics added).

[4] This language appears to suggest that "allowed" administrative expenses and gap claims may be paid in deferred cash payments over the plan period, from the debtor's "disposable income" or the other "property to be distributed under the plan."

14. Continuation of Retiree Benefits – § 1129(a)(13). To satisfy § 1129(a)(13), the plan must provide for the continuation after its Effective Date of payment of all retiree benefits.

15. No Domestic Support Obligations – § 1129(a)(14). To satisfy the requirements of § 1129(a)(14), the debtor must have paid all post-petition "domestic support obligations" required by a judicial or administrative order, or by statute.

16. § 1129(a)(15) Is Not Applicable. Pursuant to section 1181(a) of the Bankruptcy Code, § 1129(a)(15) "does not apply" to a bankruptcy case filed under Sub. V.

17. Transfers Will Comply with Nonbankruptcy Law – § 1129(a)(16). To satisfy § 1129(a)(16), all transfers property to be made under the plan must be made in accordance with applicable "nonbankruptcy law that governs the transfer of property by a corporation or trust that is not a moneyed, business, or commercial corporation or trust."

18. §§ 1129(b), (c) and (e) Are Not Applicable. Pursuant to section 1181(a) of the Bankruptcy Code, §§ 1129(b), (c) and (e) do not apply to a SBRA Case.

19. Principal Purpose of Plan – § 1129(d). To satisfy § 1129(d), the principal purpose of the plan may not be to avoid taxes or to avoid the application of section 5 of the Securities Act of 1933, as amended.

20. Confirmation Pursuant to § 1191(a) – Confirmation by Consent. If all classes of claims and interest have accepted (or are deemed to have accepted) the plan, and if all of the requirements of § 1129(a), other than paragraph (15) of that section, are met, the plan can, and should, be confirmed pursuant to § 1191(a).

21. Confirmation by "Cram Down" (Fair and Equitable; No Unfair Discrimination) – § 1191(b). Pursuant to § 1191(b), a plan may be confirmed even if it does not satisfy the requirements of "paragraphs (8), (10), and (15) of" § 1129(a). Stated another way, if any (or even all) class(es) of claims or interests dissent(s), and even if no impaired class of claims accepts the plan, the plan still may be confirmed by "cram down." To qualify for confirmation pursuant to § 1191(b), "the plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan."

a. *No Absolute Priority Rule.* § 1191(b) eliminates the absolute priority rule and allows holders of equity interests to retain their interests even if unsecured creditors are not paid in full. Further, for cases filed in the Tenth Circuit, this means that individual debtors are not required to surrender their "exempt property" in order to "cram down" the plan over the dissenting vote of creditors.

b. *New, Different "Cram Down" Standard.* § 1191(c) replaces the "fair and equitable" requirements of § 1129(b) with a new "Rule of Construction."

c. *"Cram Down" of Secured Claims Not Changed.* § 1191(c)(1) adopts "the requirements to section 1129(b)(2)(A)" which governs secured claims. Accordingly, the requirements to confirm a Sub. V plan notwithstanding the dissenting vote of a class of secured claims is the same as in an ordinary Ch. 11 case.

d. *"Cram Down" of Unsecured Claims – Projected Disposable Income.* As defined in § 1191(c)(2) "the condition that a plan be fair and equitable with respect to

each class of claims or interests includes" (underlining added) that as of the Effective Date –

i. "the plan provides that all of the projected disposable income of the debtor to be received in the 3-year period, or such longer period not to exceed 5 years as the court may fix, beginning on the date that the first payment is due under the plan will be applied to make payments under the plan" (underlining added), ***or***

ii. "the value of the property to be distributed under the plan in the 3-year period, or such longer period not to exceed 5 years as the court may fix, beginning on the date on which the first distribution is due under the plan is not less than the projected disposable income of the debtor," (underlining added).

e. *Determining "Disposable Income".* "Disposable income" is defined in § 1191(d), as follows:

> **(d) DISPOSABLE INCOME.—**For purposes of this section, the term "disposable income" means the income that is received by the debtor and that is not reasonably necessary to be expended—
>
> **(1)** for—
>
> **(A)** the maintenance or support of the debtor or a dependent of the debtor; or
>
> **(B)** a domestic support obligation that first becomes payable after the date of the filing of the petition; or
>
> **(2)** for the payment of expenditures necessary for the continuation, preservation, or operation of the business of the debtor.

f. *Feasibility.* Under § 1191(c)(3), in addition to the requirements specified above (or in §§ 1191(c)(2) and (c)(3)) for secured and unsecured claims, a debtor seeking to confirm a plan by "cram down" under section 1191(b) additionally must show:

i. *Ability to Make Payments* – "The debtor will be able to make all payments under the plan; **or** there is a reasonable likelihood that the debtor will be able to make all payments under the plan" (bold and underlining added); **and**

ii. *Default Remedies* – "the plan provides appropriate remedies, which may include the liquidation of nonexempt assets, to protect the holders of claims or interests in the event that the payments are not made."

22. Solicitation. The debtor should be prepared to demonstrate that the plan, appropriate and relevant notices, and appropriate ballots were disseminated to all creditors and interest holders entitled to vote together with appropriate ballots. The debtor also should be prepared to demonstrate that "such notice as is appropriate in the particular circumstances, and such opportunity for a hearing as is appropriate in the particular circumstances" was provided to all parties-in-interest, including the holders of disputed claims or interests not entitled to vote. In short, the debtor must demonstrate to the satisfaction of the bankruptcy court that the plan and Notice(s) were transmitted and served on all parties entitled to notice in substantial compliance with the Bankruptcy Code, Bankruptcy Rules and relevant orders of the court. Further, the debtor must show that the procedures used to distribute solicitation materials for the plan and to

tabulate the ballots were fair and conducted in accordance with the Bankruptcy Code, the Bankruptcy Rules, the local rules of the court, and all other rules, laws, and regulations.

SUBCHAPTER V: GETTING TO CONFIRMATION

Plans and the Fair and Equitable Standard Under New Subchapter V
By: Keri Riley

With the implementation of Chapter 11, Subchapter V in February 2020, the landscape of getting to confirmation of a plan of reorganization has changed dramatically, from the requirements of the plan itself, to how one can approach the confirmation process, and the requirements of the "fair and equitable" standard in the event of a cramdown. In enacting the new statutory scheme, it is evident that the goal in doing so was to make the confirmation process more achievable, allowing more small to mid-size debtors to confirm a plan of reorganization and quickly move on from the bankruptcy process.

From a high-level view, the changes to a standard Chapter 11 process are as follows:

	Standard Chapter 11	Subchapter V
Timing of Filing a Plan	• 120-day exclusive period for filing a plan; 180 days for a small business • No requirement to file a plan in that time; only time limits on filing a plan are for a small business case (debtor cannot file a plan after 300 days) and single asset real estate case (relief from stay granted after 90 days if no plan is filed and no payments are made to the secured creditor) • After filing a plan, small business debtor must confirm the plan in 45 days	• Plan must be filed no later than 90 days after filing • Time for filing can be extended "for circumstances for which the debtor should not reasonably be held accountable" o COVID-19 and the associated shutdowns is a prime example of such circumstances • No time limits on confirmation
Plan & Disclosure Requirements	• Generally required to file a separate Disclosure Statement with Plan • Disclosure Statement must have detailed information on company background, events leading to bankruptcy, events in bankruptcy, comprehensive financial information regarding the	• No separate Disclosure Statement required • Plan must contain additional information that would traditionally be reserved to the Disclosure Statement, including company background, events leading to bankruptcy, information on feasibility,

	assets, liabilities, financial history and transactions, projections, risk analysis, and liquidation analysis • Disclosure Statement must be determined to contain adequate information under the circumstances prior to soliciting acceptance of a Plan • Parties permitted to object to the adequacy of the Disclosure Statement prior to soliciting acceptance on the Plan • Process to have a Disclosure Statement Approved will generally take at least a month, and frequently two to three months with multiple amendments to address all objections • Cannot solicit acceptance until after the Disclosure Statement is approved	projections, etc. (*See* Model Plan) • Court will make a preliminary determination that Plan contains adequate information • No prohibition on solicitation – creditors can be contacted at any point after filing the bankruptcy case to solicit acceptance of a prospective Plan or pre-negotiate a Plan • Only hearing that is set will the hearing on confirmation of the Plan; no separate hearing is required to address adequacy of the Plan and the disclosures therein • Confirmation hearing will generally be set apx. 30 days after the plan is filed o Gives limited time to address any issues creditors may have with the Plan and resolve objections
Confirmation Requirements	• Must all requirements meet with the requirements of 11 U.S.C. § 1129(a)* • To be confirmed, requires acceptance by all classes of creditors • If all classes don't accept the Plan under cramdown, Plan must adhere to the absolute priority rule o Must be "fair and equitable" as to all classes of creditors, and	• Still requires adherence to section 1129(a) • If the parties cannot attain consensual confirmation, can still get a plan confirmed so long as the plan is fair and equitable • Fair and equitable has a different standard for unsecured creditors – now has to commit "disposable income" to the plan for no less than 3 years and not more than 5 years

	junior classes cannot receive anything if prior classes are not paid in full o Put differently, if unsecured creditors object, **ownership interests in the business must be cancelled** • Administrative expense claims must be paid in full upon confirmation	• No longer required to adhere to the absolute priority rule – This means that **ownership gets to retain their interest, even if unsecured creditors object** • If the Plan is a cramdown (confirmed over objection/votes to reject) Sub V Trustee remains in place and will distribute payments to creditors • Plan must also provide "appropriate remedies" in the event of default – can get creative here • Administrative expense claims can be paid over the term of the plan

Among the most beneficial changes for small business owners is the change to the "fair and equitable" standard that debtors are required to meet in the event of a nonconsensual confirmation or "cramdown" of the plan of reorganization. In a standard Chapter 11, a plan was required to comply to 11 U.S.C. § 1129(b) to be confirmed, requiring that the plan "does not discriminate unfairly, and is fair and equitable with respect to each class of creditors that is impaired under, and has not accepted, the plan." In the context of secured creditors, this means that secured creditors must either: 1) retain their liens and receive deferred cash payments for the value of such liens; 2) receive a lien on the proceeds of a sale if property is proposed to be sold under the plan; or 3) receive the indubitable equivalent of their claims. *See RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 643 (2012). This "fair and equitable" standard for secured creditors has been carried forward into Subchapter V as well. 11 U.S.C. § 1191(c)(1) (requiring a plan to meet the requirements of 11 U.S.C. § 1129(b)(2)(A)).

In the context of unsecured claims, the "fair and equitable" standard has been modified in Subchapter V to allow for a more lenient standard that is intended to allow small business owners to retain their interest, even in the event of a cramdown. In a standard Chapter 11, a plan was "fair and equitable" in its treatment of unsecured creditors if:

> (i) the plan provides that each holder of a claim of such class receive or retain on account of such claim property of a value, as of the effective date of the plan, equal to the allowed amount of such claim; or (ii) the holder of any claim or interest that is junior to the claims of such class will not receive or retain under the plan on account of such junior claim or interest any property.

11 U.S.C. § 1129(b)(2)(B). Thus, if an impaired class of unsecured creditors voted to reject the plan or objected to confirmation, the plan could only be confirmed if the unsecured creditors received the present value of their claims, or if existing ownership interests were terminated. 11 U.S.C. § 1129(b)(2)(B)(ii); *In re C.P.M. Constr.*, 124 B.R. 335, 339 (Bankr. D.N.M. 1991); *In re BMW Group I*, 168 B.R. 731, 751 (Bankr. W.D. Okla. 1994). A narrow exception to this rule was created, requiring interest holders to contribute new value to the debtor to retain their equity interest, frequently requiring interest holders to contribute significant funds to retain their equity interest. *See In re SLC, Ltd. V*, 137 B.R. 847, 851-52 (Bankr. D. Utah 1992).

Frequently, the absolute priority rule and new value exception combined to give a creditor with a controlling unsecured claim significant leverage, particularly with a small business. Because small business owners frequently cannot afford to contribute significant amounts to meet the new value exception, the business is left in a situation where either the business agrees to the demands of the controlling creditor, or the business owner is faced with losing his interest in the business, putting business owners in a difficult position and making reorganization significantly more difficult.

Subchapter V gives business owners more flexibility in maintaining their ownership interests, even in situations where an unsecured creditor may have a controlling claim in a class of unsecured creditors. Section 1191 redefines "fair and equitable" with respect to unsecured creditors. Section 1191(c) provides that a plan is "fair and equitable" if the plan:

> (2) As of the effective date of the plan—
>
> > (A) the plan provides that all of the projected disposable income of the debtor to be received in the 3-year period, or such longer period not to exceed 5 years as the court may fix, beginning on the date that the first payment is due under the plan will be applied to make payments under the plan; or
> >
> > (B) the value of the property to be distributed under the plan in the 3-year period, or such longer period not to exceed 5 years as the court may fix, beginning on the date on which the first distribution is due under the plan is not less than the projected disposable income of the debtor.

11 U.S.C. § 1191(c)(2). The debtor must further establish that it will be able to make all payments under the plan, or there is a reasonable likelihood of making all payments under the plan. 11 U.S.C. § 1191(c)(3). Section 1191(d) further defines "disposable income" as "the income received by the debtor that is not reasonably necessary to be expended . . . (2) for the payment of expenditures necessary for the continuation preservation, or operation of the business of the debtor."

With the change to the "fair and equitable" standard, small business can now achieve a nonconsensual confirmation while allowing business owners to maintain their interests so long as it can establish that disposable income is dedicated to payments under the plan for at least a three

year period. To date, only one case has had occasion to fully consider the new "fair and equitable" standard under Subchapter B. In *In re Ellingsworth Residential Community Association*, 2020 Bankr. LEXIS 2897 (Bankr. M.D. Fla. Oct. 16, 2020), the debtor-homeowners association proposed that provided payments to all creditors over a three year period. *Ellingsworth*, 2020 Bankr. LEXIS 2897, at *5. The payments proposed included 25% of all accounts receivables that became older than 90 days past due for a three year period, net proceeds of certain litigation claims, and the net disposable income for a three year period. *Id.* The plan further proposed a special assessment on members of the association to contribute an additional $300,000 to payment of creditors under the plan. *Id.* at *5-6. The court held that because the debtor was contributing more than its required disposable income over the plan term, the plan met the fair and equitable standard and was confirmable over the objections of creditors. *Id.* at *6.

As more cases are filed under Subchapter V, the "fair and equitable" standard will continue to be developed and further refined. With the ability to pre-negotiate a plan before filing, the goal should always be to attempt to achieve a consensual confirmation. However, debtors should also plan for the possibility of a cramdown, and set the plan up to be confirmed even if unsecured creditors reject the plan. In general, any plan must include sufficient projections to establish to allow the court to determine if the debtor is proposing to contribute its disposable income to the plan. Debtors should also consider if additional default remedies are necessary to provide sufficient protections to unsecured creditors in the event that a nonconsensual confirmation must be considered. With proper planning and consideration given to the possibility of a nonconsensual confirmation, small business should be able to have a faster, smoother journey through Subchapter V, resulting in more successful reorganizations for small businesses.

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January 2021

OUTLINE OF NECESSARY/ADVISABLE PLAN PROVISIONS IN A SUBCHAPTER V CASE – SMALL BUSINESS DEBTOR REORGANIZATION

Fill in this information to identify the case:

Debtor Name _____

United States Bankruptcy Court for the:_____ District of _____ (State)

Case number: _____

❑ Check if this is an amended filing

Official Form 425A

Plan of Reorganization for Small Business Under Chapter 11 02/20

[Name of Proponent]**'s Plan of Reorganization, Dated** [Insert Date]

[If this plan is for a small business debtor under Subchapter V, 11 U.S.C. § 1190 requires that it include "(A) a brief history of the business operations of the debtor; (B) a liquidation analysis; and (C) projections with respect to the ability of the debtor to make payments under the proposed plan of reorganization." The Background section below may be used for that purpose. Otherwise, the Background section can be deleted from the form, and the Plan can start with "Article 1: Summary"]

Background for Cases Filed Under Subchapter V

A. Description and History of the Debtor's Business

The Debtor is a [corporation, partnership, etc.]. Since [insert year operations commenced], the Debtor has been in the business of _____. [Describe the Debtor's business].

B. Liquidation Analysis

To confirm the Plan, the Court must find that all creditors and equity interest holders who do not accept the Plan will receive at least as much under the Plan as such claim and equity interest holders would receive in a chapter 7 liquidation. A liquidation analysis is attached to the Plan as Exhibit___.

C. Ability to make future plan payments and operate without further reorganization

The Plan Proponent must also show that it will have enough cash over the life of the Plan to make the required Plan payments and operate the debtor's business.

The Plan Proponent has provided projected financial information as Exhibit ___.

The Plan Proponent's financial projections show that the Debtor will have projected disposable income (as defined by § 1191(d) of the Bankruptcy Code) for the period described in § 1191(c)(2) of $ _____.

The final Plan payment is expected to be paid on _____.

[Summarize the numerical projections, and highlight any assumptions that are not in accord with past experience. Explain why such assumptions should now be made.]
You should consult with your accountant or other financial advisor if you have any questions pertaining to these projections.

Debtor Name _____ Case number_____

Article 1: Summary

This Plan of Reorganization (the *Plan*) under chapter 11 of the Bankruptcy Code (the *Code*) proposes to pay creditors of [insert the name of the Debtor] (the *Debtor*) from [Specify sources of payment, such as an infusion of capital, loan proceeds, sale of assets, cash flow from operations, or future income]**.**

This Plan provides for:
- ☐ classes of priority claims;
- ☐ classes of secured claims;
- ☐ classes of non-priority unsecured clams; and
- ☐ classes of equity security holders.

Non-priority unsecured creditors holding allowed claims will receive distributions, which the proponent of this Plan has valued at approximately ☐ cents on the dollar. This Plan also provides for the payment of administrative and priority claims.

All creditors and equity security holders should refer to Articles 3 through 6 of this Plan for information regarding the precise treatment of their claim. A disclosure statement that provides more detailed information regarding this Plan and the rights of creditors and equity security holders has been circulated with this Plan. **Your rights may be affected. You should read these papers carefully and discuss them with your attorney, if you have one. (If you do not have an attorney, you may wish to consult one.)**

Article 2: Classification of Claims and Interests

2.01	**Class 1**	All allowed claims entitled to priority under § 507(a) of the Code (except administrative expense claims under § 507(a)(2), ["gap" period claims in an involuntary case under § 507(a)(3),] and priority tax claims under § 507(a)(8)). [Add classes of priority claims, if applicable]
2.02	**Class 2**	The claim of ☐, to the extent allowed as a secured claim under § 506 of the Code. [Add other classes of secured creditors, if any. *Note*: Section 1129(a)(9)(D) of the Code provides that a secured tax claim which would otherwise meet the description of a priority tax claim under § 507(a)(8) of the Code is to be paid in the same manner and over the same period as prescribed in § 507(a)(8).]
2.03	**Class 3**	All non-priority unsecured claims allowed under § 502 of the Code. [Add other classes of unsecured claims, if any.]
2.04	**Class 4**	Equity interests of the Debtor. [If the Debtor is an individual, change this heading *to The interests of the individual Debtor in property of the estate*.]

Article 3: Treatment of Administrative Expense Claims, Priority Tax Claims, and Quarterly and Court Fees

3.01	**Unclassified claims**	Under section § 1123(a)(1), administrative expense claims, ["gap" period claims in an involuntary case allowed under § 502(f) of the Code,] and priority tax claims are not in classes.
3.02	**Administrative expense claims**	Each holder of an administrative expense claim allowed under § 503 of the Code, [and a "gap" claim in an involuntary case allowed under § 502(f) of the Code,] will be paid in full on the effective date of this Plan, in cash, or upon such other terms as may be agreed upon by the holder of the claim and the Debtor. Or Each holder of an administrative expense claim allowed under § 503 of the Code, [and a "gap" claim in an involuntary case allowed under § 502(f) of the Code,] will be paid [specify terms of treatment, including the form, amount, and timing of distribution, consistent with section 1191(e) of the

Debtor Name _____ Case number_____

Code].

[Note: the second provision is appropriate only in a subchapter V plan that is confirmed non-consensually under section 1191(b).]

3.03	**Priority tax claims**	Each holder of a priority tax claim will be paid [Specify terms of treatment consistent with § 1129(a)(9)(C) of the Code].
3.04	**Statutory fees**	All fees required to be paid under 28 U.S.C. § 1930 that are owed on or before the effective date of this Plan have been paid or will be paid on the effective date.
3.05	**Prospective quarterly fees**	All quarterly fees required to be paid under 28 U.S.C. § 1930(a)(6) or (a)(7) will accrue and be timely paid until the case is closed, dismissed, or converted to another chapter of the Code.

Article 4: Treatment of Claims and Interests Under the Plan

4.01 **Claims and interests shall be treated as follows under this Plan:**

Class	Impairment	Treatment
Class 1 - **Priority claims** excluding those in Article 3	❑ Impaired ❑ Unimpaired	[Insert treatment of priority claims in this Class, including the form, amount and timing of distribution, if any. For example: "Class 1 is unimpaired by this Plan, and each holder of a Class 1 Priority Claim will be paid in full, in cash, upon the later of the effective date of this Plan, or the date on which such claim is allowed by a final non-appealable order. Except: [ ]."] [Add classes of priority claims if applicable]
Class 2 – **Secured claim** of [*Insert name of secured creditor*.]	❑ Impaired ❑ Unimpaired	[Insert treatment of secured claim in this Class, including the form, amount and timing of distribution, if any.] [Add classes of secured claims if applicable]
Class 3 – **Non-priority unsecured creditors**	❑ Impaired ❑ Unimpaired	[Insert treatment of unsecured creditors in this Class, including the form, amount and timing of distribution, if any.] [Add administrative convenience class if applicable]
Class 4 - **Equity security holders of the Debtor**	❑ Impaired ❑ Unimpaired	[Insert treatment of equity security holders in this Class, including the form, amount and timing of distribution, if any.]

Article 5: Allowance and Disallowance of Claims

5.01 **Disputed claim**

A *disputed claim* is a claim that has not been allowed or disallowed [by a final non-appealable order], and as to which either:

(i) a proof of claim has been filed or deemed filed, and the Debtor or another party in interest has filed an objection; or

(ii) no proof of claim has been filed, and the Debtor has scheduled such claim as disputed, contingent, or unliquidated.

5.02 **Delay of distribution on a disputed claim**

No distribution will be made on account of a disputed claim unless such claim is allowed [by a final non-appealable order].

5.03 **Settlement of disputed claims**

The Debtor will have the power and authority to settle and compromise a disputed claim with court approval and compliance with Rule 9019 of the Federal Rules of Bankruptcy Procedure.

Article 6: Provisions for Executory Contracts and Unexpired Leases

Debtor Name _____ Case number_____

6.01	**Assumed executory contracts and unexpired leases**	(a) The Debtor assumes, and if applicable assigns, the following executory contracts and unexpired leases as of the effective date: [List assumed, or if applicable assigned, executory contracts and unexpired leases.]
		(b) Except for executory contracts and unexpired leases that have been assumed, and if applicable assigned, before the effective date or under section 6.01(a) of this Plan, or that are the subject of a pending motion to assume, and if applicable assign, the Debtor will be conclusively deemed to have rejected all executory contracts and unexpired leases as of the effective date. A proof of a claim arising from the rejection of an executory contract or unexpired lease under this section must be filed no later than [ ] days after the date of the order confirming this Plan.

Article 7: Means for Implementation of the Plan

[Insert here provisions regarding how the plan will be implemented as required under § 1123(a)(5) of the Code. For example, provisions may include those that set out how the plan will be funded, including any claims reserve to be established in connection with the plan, as well as who will be serving as directors, officers or voting trustees of the reorganized Debtor.]

Article 8: General Provisions

8.01	**Definitions and rules of construction**	The definitions and rules of construction set forth in §§ 101 and 102 of the Code shall apply when terms defined or construed in the Code are used in this Plan, and they are supplemented by the following definitions: [Insert additional definitions if necessary].
8.02	**Effective date**	The effective date of this Plan is the first business day following the date that is 14 days after the entry of the confirmation order. If, however, a stay of the confirmation order is in effect on that date, the effective date will be the first business day after the date on which the stay expires or is otherwise terminated.
8.03	**Severability**	If any provision in this Plan is determined to be unenforceable, the determination will in no way limit or affect the enforceability and operative effect of any other provision of this Plan.
8.04	**Binding effect**	The rights and obligations of any entity named or referred to in this Plan will be binding upon, and will inure to the benefit of the successors or assigns of such entity.
8.05	**Captions**	The headings contained in this Plan are for convenience of reference only and do not affect the meaning or interpretation of this Plan.
[8.06	**Controlling effect**	Unless a rule of law or procedure is supplied by federal law (including the Code or the Federal Rules of Bankruptcy Procedure), the laws of the State of [ ] govern this Plan and any agreements, documents, and instruments executed in connection with this Plan, except as otherwise provided in this Plan.]
[8.07	**Corporate governance**	[If the Debtor is a corporation include provisions required by § 1123(a)(6) of the Code.]

Debtor Name _____ Case number_____

[8.08 **Retention of Jurisdiction** Language addressing the extent and the scope of the bankruptcy court's jurisdiction after the effective date of the plan.]

Article 9: Discharge

[Include the appropriate provision in the Plan]

[No Discharge -- Section 1141(d)(3) IS applicable.]

In accordance with § 1141(d)(3) of the Code, the Debtor will not receive any discharge of debt in this bankruptcy case.

[Discharge -- Section 1141(d)(3) IS NOT applicable; use one of the alternatives below]

*[The following 3 alternatives apply to cases in which a discharge is applicable and the Debtor **DID NOT** elect to proceed under Subchapter V of Chapter 11.]*

[Discharge if the Debtor is an individual and did not proceed under Subchapter V]

Confirmation of this Plan does not discharge any debt provided for in this Plan until the court grants a discharge on completion of all payments under this Plan, or as otherwise provided in § 1141(d)(5) of the Code. The Debtor will not be discharged from any debt excepted from discharge under § 523 of the Code, except as provided in Rule 4007(c) of the Federal Rules of Bankruptcy Procedure.

[Discharge if the Debtor is a partnership and did not proceed under Subchapter V]

On the effective date of this Plan, the Debtor will be discharged from any debt that arose before confirmation of this Plan, to the extent specified in § 1141(d)(1)(A) of the Code. The Debtor will not be discharged from any debt imposed by this Plan.

[Discharge if the Debtor is a corporation and did not proceed under Subchapter V]

On the effective date of this Plan, the Debtor will be discharged from any debt that arose before confirmation of this Plan, to the extent specified in § 1141(d)(1)(A) of the Code, except that the Debtor will not be discharged of any debt:

(i) imposed by this Plan; or
(ii) to the extent provided in § 1141(d)(6).

*[The following 3 alternatives apply to cases in which the Debtor **DID** elect to proceed under Subchapter V of Chapter 11.]*

[Discharge if the Debtor is an individual under Subchapter V]

If the Debtor's Plan is confirmed under § 1191(a), on the effective date of the Plan, the Debtor will be discharged from any debt that arose before confirmation of this Plan, to the extent specified in § 1141(d)(1)(A) of the Code. The Debtor will not be discharged from any debt:

(i) imposed by this Plan; or
(ii) excepted from discharge under § 523(a) of the Code, except as provided in Rule 4007(c) of the Federal Rules of Bankruptcy Procedure.

Debtor Name _____ Case number_____

If the Debtor's Plan is confirmed under § 1191(b), confirmation of the Plan does not discharge any debt provided for in this Plan until the court grants a discharge on completion of all payments due within the first 3 years of this Plan, or as otherwise provided in § 1192 of the Code. The Debtor will not be discharged from any debt:

(i) on which the last payment is due after the first 3 years of the plan, or as otherwise provided in § 1192; or

(ii) excepted from discharge under § 523(a) of the Code, except as provided in Rule 4007(c) of the Federal Rules of Bankruptcy Procedure.

[Discharge if the Debtor is a partnership under Subchapter V]

If the Debtor's Plan is confirmed under § 1191(a), on the effective date of the Plan, the Debtor will be discharged from any debt that arose before confirmation of this Plan, to the extent specified in § 1141(d)(1)(A) of the Code. The Debtor will not be discharged from any debt imposed by this Plan.

If the Debtor's Plan is confirmed under § 1191(b), confirmation of the Plan does not discharge any debt provided for in this Plan until the court grants a discharge on completion of all payments due within the first 3 years of this Plan, or as otherwise provided in § 1192 of the Code. The Debtor will not be discharged from any debt:

(i) on which the last payment is due after the first 3 years of the plan, or as otherwise provided in § 1192; or

(ii) excepted from discharge under § 523(a) of the Code, except as provided in Rule 4007(c) of the Federal Rules of Bankruptcy Procedure.

[Discharge if the Debtor is a corporation under Subchapter V]

If the Debtor's Plan is confirmed under § 1191(a), on the effective date of the Plan, the Debtor will be discharged from any debt that arose before confirmation of this Plan, to the extent specified in § 1141(d)(1)(A) of the Code, except that the Debtor will not be discharged of any debt:

(i) imposed by this Plan; or

(ii) to the extent provided in § 1141(d)(6).

If the Debtor's Plan is confirmed under § 1191(b), confirmation of this Plan does not discharge any debt provided for in this Plan until the court grants a discharge on completion of all payments due within the first 3 years of this Plan, or as otherwise provided in § 1192 of the Code. The Debtor will not be discharged from any debt:

(i) on which the last payment is due after the first 3 years of the plan, or as otherwise provided in § 1192; or

(ii) excepted from discharge under § 523(a) of the Code, except as provided in Rule 4007(c) of the Federal Rules of Bankruptcy Procedure.

Article 10: Other Provisions

[Insert other provisions, as applicable.]

Respectfully submitted,

Debtor Name _____ Case number_____

✘ _____ _____

[Signature of the Plan Proponent] [Printed Name]

✘ _____ _____

[Signature of the Attorney for the Plan Proponent] [Printed Name]

Faculty

Matthew M. Boley is a shareholder with Cohne Kinghorn, P.C. in Salt Lake City. He serves on the firm's board of directors and is a former member of the firm's Executive Committee. He focuses on the areas of bankruptcy, real estate, business/commercial litigation and creditors' rights. Mr. Boley's practice has focused on bankruptcy, receivership and insolvency law for his entire legal career. He has represented all potential constituencies in bankruptcy and insolvency cases, including debtors, trustees, receivers, secured creditors, unsecured creditors and creditor committees. Mr. Boley has represented clients involved in litigation and/or arbitration in many different types of disputes, from real estate and contract disputes to intellectual property litigation. He also has extensive experience in all areas of creditors' rights and debtor/creditor relations. Mr. Boley has experience handling "real estate" transactions and litigation. He previously chaired the Bankruptcy Section of the Utah State Bar, and is active in several insolvency-related legal organizations. Mr. Boley has received several perennial honors and recognitions, including *pro bono* awards from the Utah State Bar, an AV-Preeminent rating, and recognitions *The Best Lawyers in America*, *Utah Legal Elite* and *Super Lawyers*. He received his B.S. *cum laude* from Westminster College in 1994 and his J.D. from the University of Utah, College of Law in 1999, where he was inducted as a member of the Order of the Coif and served as a note and comment editor for the *Utah Law Review*.

Keri L. Riley is an attorney at KutnerBrinen, PC in Denver and focuses primarily in the areas of bankruptcy and insolvency law. She has a represented debtors and creditors in all aspects of bankruptcy cases, including complex chapter 11 reorganizations and liquidations, chapter 7 cases, adversary proceedings, and appeals to the Tenth Circuit Bankruptcy Appellate Panel and Tenth Circuit Court of Appeals. A continuing contributor to the *Norton Journal of Bankruptcy Law and Practice*, Ms. Riley previously clerked at the Colorado Attorney General's Office and was a member of the University of Denver Sturm College of Law National Trial Team and the National Appellate Advocacy Team. She received her J.D. in 2014 from the University of Denver Sturm College of Law.

D. Ray Strong, CPA, CIRA, CFE, CFF is a director at Berkeley Research Group, LLC in its Salt Lake City office. He has provided expert, advisory and fiduciary services for more than 25 years involving investigative and forensic accounting, internal investigations, bankruptcy, federal and state court receiverships, corporate restructuring, and litigation support in local, national and international matters. Mr. Strong has been appointed in various fiduciary capacities, including as a chapter V trustee, chapter 11 trustee, liquidating trustee, estate manager, examiner and receiver. He regularly serves as an accountant and financial advisor to bankruptcy trustees, creditors' committees and court-appointed receivers. His experience includes operating and restructuring distressed companies to maximize going-concern value, the liquidation of assets, investigation of debtor activities and alleged insider dealings, liquidation and substantive-consolidation analyses, plan-development and feasibility, investigation and prosecution of avoidance actions, solvency analyses and claims resolution. Mr. Strong has taught graduate-level accounting courses at the University of Utah and Westminster College of Salt Lake City, and frequently presents on various fraud, insolvency and accounting-related topics. He received his B.S. from Westminster College and his M.P.A. from the University of Utah.

Hon. William T. Thurman is a U.S. Bankruptcy Judge for the District of Utah in Salt Lake City and served as its chief judge, and he is a prior member and chief judge of the Tenth Circuit Bankruptcy Appellate Panel. He is a current member of the U.S. Judicial Conference Code of Conduct Committee and a former member of the Conference's Financial Disclosure Committee. Judge Thurman has also served as a board member for the National Conference of Bankruptcy Judges and has chaired several of its committees. He is a Fellow with the American College of Bankruptcy. Judge Thurman received the Distinguished Service Award from the Utah Chapter of the Federal Bar Association in 2012. Previously, he was in private practice in Salt Lake City and practiced with McKay, Burton & Thurman for 27 years, where he focused his practice on bankruptcy law and served as a panel chapter 7 bankruptcy trustee. Judge Thurman received both his B.A. and J.D. from the University of Utah.