



AMERICAN
BANKRUPTCY
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Southwest Bankruptcy Conference 2021

First Look at Small Business Reorganization Act Cases

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CONCURRENT SESSION

2021

FIRST LOOK AT SMALL BUSINESS REORGANIZATION ACT CASES

PRESENTERS:

Honorable Scott C. Clarkson

U.S. Bankruptcy Court (C.D. Cal); Santa Ana, California

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Eligibility

- Noncontingent and liquidated debts (secured and unsecured) must be within debt limit
 - \$ 7.5 million until March 26, 2022 (unless extended)
 - After sunset, limit reverts back to \$ 2,725,625
 - Excluded debts:
 - Affiliates
 - PPP forgivable loans – *In re Parking Mgmt., Inc.*, 2020 WL 6146476 (Bankr. D. Md. Aug. 28, 2020).
 - Lease rejection damages – *Id.*
- Most of the time, Debtor must be engaged in business. *In re Johnson*, Case No. 19-42063-ALM (Bankr. N. D. Tex. March. 1, 2021); *In re Thurmon*, 2020 WL 7249555 (Bankr. W.D. Mo. Dec. 8, 2020); *But see In re Offer Space, LLC*, 629 B.R. 299 (Bankr. D. Utah); *In re Wright*, 2020 WL 2193240 (Bankr. D. S.C. April 27, 2020).
- Public companies and affiliates excluded. *Hall L.A. WTS, LLC v. Serendipity Labs, Inc.* (*In re Serendipity Labs, Inc.*), 620 B.R. 679 (Bankr. N.D. Ga. 2020)



Trustee in
every case

- Trustee has duty to facilitate consensual plan
 - Debtor remains in possession as debtor in possession unless removed for cause
- 



No
Committee
of Unsecured
Creditors

Court may order otherwise



Mandatory Status Conference

- Must be held within 60 days from date of filing unless court orders otherwise
- Debtor must file report showing efforts to obtain consensual plan 14 days in advance of status conference



Filing of plan

Only the debtor may file a plan

Plan must be filed within 90 days unless extended. *See e.g., In re Baker*, 2020 WL 7501941 (Bankr. S.D. Tex. Dec. 21, 2020).

No deadline for confirmation

Cramdown Confirmation

Not necessary for impaired class to accept. *See e.g., In re Pearl Res., LLC*, 622 B.R. 236 (Bankr. S.D. Tex. 2020)

Absolute priority rule does not apply

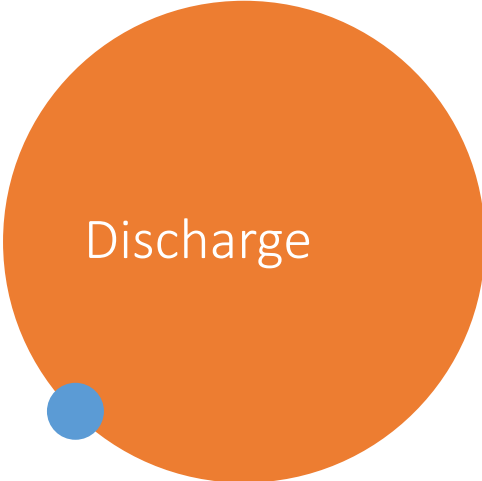
Same rules govern cramdown of secured claim

Projected Disposable Income Rule

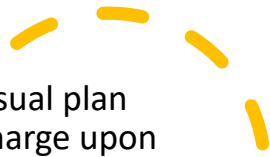
Does not apply when confirmation is consensual

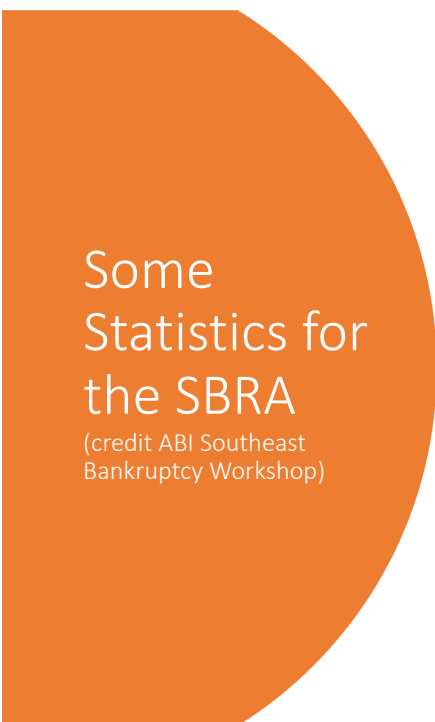
Cramdown confirmation requires debtor to pay projected disposable income for three to five years, as court determines. *See generally In re Ellingsworth Residential Cmty. Ass'n., Inc.*, Case No. 20-01346-KSJ (Bankr. M.D. Fla. Oct. 16, 2020)

Debtor may "cash out" projected disposable income with cash payment



Discharge

- 
- Confirmation of consensual plan results in standard discharge upon confirmation
 - If cramdown confirmation occurs –
 - Discharge is deferred until debtor completes payments over 3-5 years
 - Exceptions to discharge in Section 523(a) apply?



Some Statistics for the SBRA

(credit ABI Southeast Bankruptcy Workshop)

- 
- As of June 30, 2021, 2,481 Subchapter V cases had been filed.
 - Over 70% of small business ch. 11 debtors chose Subchapter V.
 - Since mid-2020, filings have been broadly stable, 400-450 a quarter.
 - Top two Districts are the CD Cal. and MD Fla.
 - In 2018 and 2019, 20% of ch. 11 filings were small business. By the last quarter of 2020, 30% of ch. 11 filings were small business.

More SBRA Statistics

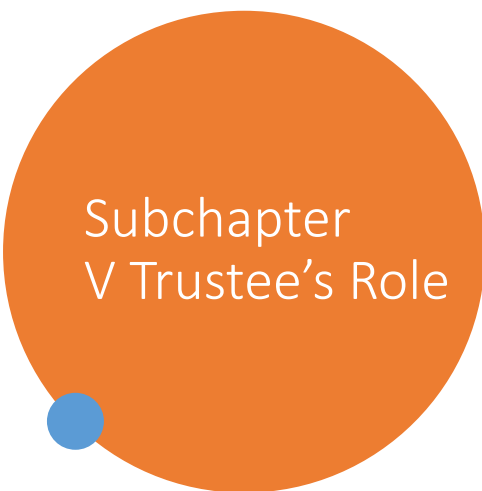
(credit ABI Southeast Bankruptcy Workshop)

- Of roughly 1,100 subchapter V cases filed by 9/30/20 (as of 1/31/21):
 - Nearly 100 amended out of subchapter V;
 - Of the remainder: 34% have a confirmed plan;
 - 23% either converted or dismissed;
 - 43% were pending (35% w/plan; 8% w/o plan).
- For the same dates, nearly 70% of confirmed plans have been consensual.

More SBRA Statistics

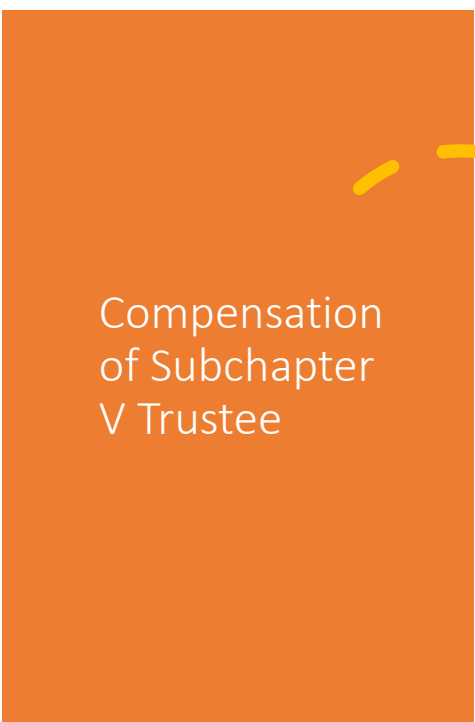
(credit ABI Southeast Bankruptcy Workshop)

- Subchapter V cases are being confirmed more quickly than small business cases.
- Average confirmation time for chapter 11 small business filings from FY17 to FY19 was approximately 11 months.
- So far, average confirmation time for FY20 subchapter V cases has been approximately five months.
- There have already been about 75 subchapter V cases that have had plans confirmed within 120 days. In comparison, only 10 chapter 11 small business cases on average confirmed that quickly from FY17 to FY19.



Subchapter V Trustee's Role

A Subchapter V Trustee's statutory duty under § 1183(b)(7) is to "facilitate the development of a consensual plan of reorganization"



Compensation of Subchapter V Trustee

Sub V Trustees will be "case-by-case" trustees and not standing trustees. This decision is left to the United States Trustee

Sub V Trustees are compensated under Section 330

Sub V Trustees are discouraged from hiring professionals

Removal of Debtor

- The Standard for Removal of the Debtor in Possession
- “Shall” order that the debtor shall not be a debtor in possession for “cause,” including:
 - Fraud
 - Dishonesty
 - Incompetence
 - Gross mismanagement of the debtor’s affairs
 - For failure to perform the obligations of the debtor under a plan
- The court may reinstate the debtor

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620 B.R. 679
United States Bankruptcy Court,
N.D. Georgia, Atlanta Division.

IN RE: **SERENDIPITY LABS, INC.**, Debtor.
Hall Los Angeles WTS, LLC, Movant,
v.
Serendipity Labs, Inc., Respondent.

Case No. 20-68124-sms
|
Signed October 19, 2020

Synopsis

Background: Corporate debtor filed for Chapter 11 relief and elected to proceed as small business debtor under Subchapter V. Creditor objected to debtor's election on ground that it was allegedly ineligible for relief under Subchapter V.

[Holding:] The Bankruptcy Court, **Sage M. Sigler, J.**, held that debtor was ineligible for relief under Subchapter V, given that more than 20% of debtor's voting stock was held by company whose stock was publicly traded on stock exchange, and which therefore qualified as "issuer" under the Securities Exchange Act.

Objection sustained.

Procedural Posture(s): Other.

West Headnotes (7)

[1] **Bankruptcy** Reorganization cases

In assessing Chapter 11 debtor's eligibility to proceed as Subchapter V debtor, court does not evaluate debtor's motives for seeking to proceed as a Subchapter V debtor, or what outcomes may be afforded to various interest holders as result.

11 U.S.C.A. § 1182.

[2] **Bankruptcy** Reorganization cases

Chapter 11 debtor's origin as an entrepreneurial startup did not affect its eligibility for relief under Subchapter V. 11 U.S.C.A. § 1182.

[3] **Bankruptcy** Reorganization cases

There are specific eligibility requirements that Chapter 11 debtors must satisfy to proceed under Subchapter V, regardless of the potential effects of denying a Subchapter V election on the bankruptcy estate; the benefits of Subchapter V are available to debtors who qualify and are not available to those who do not. 11 U.S.C.A. § 1182.

[4] **Bankruptcy** Reorganization cases

To determine whether a publicly traded company whose shares were traded on stock exchange, and which therefore qualified as "issuer" under the Securities Exchange Act, was an "affiliate" of Chapter 11 debtor and thus rendered the debtor ineligible for Subchapter V relief, bankruptcy court had to consider merely whether this publicly traded company owned, controlled, or held 20% or more of the debtor's voting stock and did not have to consider whether it actually had the power to vote this stock. 11 U.S.C.A. §§ 101(2)(A), 1182(1)(B) (iii); Securities Exchange Act of 1934 § 3, 15 U.S.C.A. § 78c.

[5] **Bankruptcy** Reorganization cases

Corporate Chapter 11 debtor was ineligible for relief under Subchapter V, given that more than 20% of debtor's voting stock, or 27% to be precise, was held by company whose stock was publicly traded on stock exchange, and which therefore qualified as "issuer" under the Securities Exchange Act. 11 U.S.C.A. §§ 101(2)(A), 1182(1)(B) (iii); Securities Exchange Act of 1934 § 3, 15 U.S.C.A. § 78c.

[6] **Bankruptcy** 📁 **Construction and Operation**

“Voting securities,” as that term was used in bankruptcy statute defining, as “affiliate” of debtor, any entity with the power to vote 20 percent or more of debtor's voting securities, had to be understood as meaning securities the holders of which are presently entitled to vote for the election of corporate debtor's directors. 📁 11 U.S.C.A. § 101(2)(A); 📁 17 C.F.R. § 230.405.

[7] **Bankruptcy** 📁 **Construction and Operation**

Any entity that owns 20% or more of the voting securities of Chapter 11 debtor is an “affiliate” of the debtor, as that term is used in the Bankruptcy Code, whether or not it has the power to vote those securities. 📁 11 U.S.C.A. § 101(2)(A).

Attorneys and Law Firms

*680 Lee B. Hart, Joshua H. Stein, Nelson Mullins Riley & Scarborough, LLP, Atlanta, GA, for Debtor.

Shawna Staton, Office of the United States Trustee, Atlanta, GA, for Office of the United States Trustee.

CONTESTED MATTER

MEMORANDUM OPINION

Sage M. Sigler, U.S. Bankruptcy Court Judge

Serendipity Labs, Inc. (“Debtor”) filed its bankruptcy petition electing to proceed under Subchapter V. ¹ Debtor's disputed secured lender, Hall Los Angeles WTS, LLC (“Hall”), objects to Debtor's Subchapter V election on the ground that it is not eligible for Subchapter V. ² The Court concludes that, because a publicly traded company holds more than 20% of Debtor's voting shares, 📁 11 U.S.C. § 1182(1)(B)(iii) renders Debtor ineligible for Subchapter V. ³

I. Summary of the Parties' Arguments

Hall argues that Debtor is ineligible to proceed under Subchapter V because *681 Debtor is an affiliate of Steelcase, Inc. (“Steelcase”), an issuer under the Securities Exchange Act of 1934, which precludes eligibility under 📁 11 U.S.C. § 1182(1)(B)(iii). ⁴ Debtor argues that Steelcase is not an affiliate as defined by § 101(2)(A) because it owned only 6.51% of the shares authorized to vote on Debtor's bankruptcy filing, which Debtor submits are the only relevant “voting securities.” Neither the United States Trustee nor the Subchapter V Trustee took a position on Debtor's Subchapter V eligibility at the Hearing.

II. Jurisdiction and Venue

The Court has jurisdiction pursuant to 📁 28 U.S.C. §§ 1334(a) and 157(a). This matter is a statutory core proceeding under 📁 28 U.S.C. § 157(b)(2)(A) and a constitutionally core proceeding under the standards of 📁 *Stern v. Marshall*, 564 U.S. 462, 131 S. Ct. 2594, 180 L.Ed.2d 475 (2011). Venue is proper under 📁 28 U.S.C. §§ 1408 and 📁 1409. ⁵

III. Findings of Fact

At the Hearing, Debtor and Hall introduced exhibits that were admitted into evidence ⁶ and elicited testimony from John Arenas, Debtor's Chief Executive Officer; Roger Stone, Debtor's Chief Financial Officer; and Bryan Tolbert, Hall's Vice President of Finance.

Debtor filed its petition for relief on July 15, 2020, electing to proceed under Subchapter V of Chapter 11 of the Bankruptcy Code. Debtor is the parent company of a group of affiliated entities that franchise, manage, and in some cases own, 35 co-working spaces nationally branded as “Serendipity Labs.” Debtor's co-working spaces were forced to shut down due to the COVID-19 pandemic and various stay-at-home orders. The combination of COVID-related closures and decreases in revenue, and Debtor's need to refinance its debt with Hall, which matured in August 2020, prompted Debtor to file the instant bankruptcy case. Debtor's bankruptcy filing was approved by its board of directors as well as the majority of its Series C Group shareholders.

Debtor currently has 33 stockholders, the largest of which is Steelcase owning 21.1799% of Debtor's fully diluted

ownership.⁷ When all non-voting options, restricted *682 stock units, and common warrants are excluded, Debtor has 3,303,690 outstanding shares with voting rights. Steelcase owns 27.7% (904,148) of those voting shares.

Debtor's charter grants the holders of Common Stock and each of the various types of preferred stock one vote per share. See Hall Ex. 11. The Series C Group stock has exclusive voting rights with respect to certain enumerated tasks, including actions to reorganize or liquidate the business.⁸

IV. Analysis and Conclusions of Law

For the reasons set forth below, the Court concludes that pursuant to § 1182(1)(B)(iii), Debtor is ineligible to be a Subchapter V debtor because it is an affiliate of Steelcase, which is an issuer under the Securities Exchange Act of 1934 (the "Securities Act").

Section 1182 of the Bankruptcy Code governs Subchapter V eligibility and provides that:

(1) Debtor.—The term “debtor”—

(A) subject to subparagraph (B), means a person engaged in commercial or business activities (including any affiliate of such person that is also a debtor under this title and excluding a person whose primary activity is the business of owning single asset real estate) that has aggregate noncontingent liquidated secured and unsecured debts as of the date of the filing of the petition or the date of the order for relief in an amount not more than \$7,500,000 (excluding debts owed to 1 or more affiliates or insiders) not less than 50 percent of which arose from the commercial or business activities of the debtor; and

(B) does not include--

(i) any member of a group of affiliated debtors that has aggregate noncontingent liquidated secured and unsecured debts in an amount greater than \$7,500,000 (excluding debt owed to 1 or more affiliates or insiders);

(ii) any debtor that is 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, 78o(d)); or

(iii) any debtor that is an affiliate of an issuer, as defined in section 3 of the Securities Exchange Act of 1934 (15 U.S.C. 78c).

11 U.S.C. § 1182.

[1] [2] [3] In arguing that Debtor is gaming the Subchapter V process, abusing bankruptcy provisions intended for small businesses, and twisting the law to protect the equity of its directors and officers, Hall reads elements into § 1182 that are not there. The statute does not require the Court to evaluate Debtor's motives for seeking to proceed as a Subchapter V debtor, or what outcomes may be afforded to various interest holders as a result. Likewise, Debtor's origin as an “entrepreneurial startup” does not shield it from the eligibility requirements set forth in the Subchapter V. Debtor urges that finding it *683 ineligible for Subchapter V will complicate the administration of the case, increase costs, and destroy value for all stakeholders. While that may be true, Congress enumerated specific eligibility requirements under § 1182 without affording courts discretion to consider the potential effect of the election on the bankruptcy estate. The benefits of Subchapter V are available to debtors who qualify and are not available to those who do not.

A. Steelcase is an “Issuer”

Subchapter V excludes from eligibility any debtor that “is an affiliate of an issuer, as defined in section 3 of the Securities Exchange Act of 1934 (15 U.S.C. 78c).” 11 U.S.C. § 1182(1)(B)(iii). With certain inapplicable exceptions, the Securities Act defines “issuer” as “any person who issues or proposes to issue any security,” and defines “security” to include stock. 15 U.S.C. §§ 78c(a)(8), (10).

The testimony at the Hearing established that Steelcase is a publicly traded company whose shares are traded on a stock exchange. Hall introduced into evidence a copy of Steelcase's most recent form 10-K, which the Securities Act requires issuers to file with the SEC.⁹ See 15 U.S.C. § 78m.

Because Steelcase is a company publicly traded on a stock exchange, it necessarily issues stock. Steelcase would not file a form 10-K with the SEC were it not an issuer. The evidence therefore establishes that Steelcase is an “issuer” as defined in

§ 78c(a)(8) of the Securities Act and for purposes of analyzing Debtor's eligibility under § 1182(1)(B)(iii).¹⁰

B. Steelcase is an Affiliate of Debtor

[4] [5] Because Steelcase is an “issuer,” Debtor is ineligible to proceed under Subchapter V if it is an affiliate of Steelcase. With exceptions not applicable here, the Bankruptcy Code defines “affiliate” as an “entity that directly or indirectly owns, controls, or holds *with power to vote*, 20 percent or more of the *outstanding voting securities* of the debtor.” 11 U.S.C. § 101(2)(A) (emphasis added). Steelcase owns more than 27% of Debtor's voting securities and is therefore an affiliate of Debtor.

1. Steelcase's Shares of Debtor Are Voting Securities

[6] “Voting securities” is not defined in the Bankruptcy Code or the Securities Act. The SEC has defined “voting securities” to mean “securities the holders of which are presently entitled to vote for the election of directors.” 17 C.F.R. § 230.405. The SEC definition is unambiguous, and the appropriate one to use in the context of § 101(2)(A). See *In re Piece Goods Shops Co.*, 188 B.R. 778, 797 (Bankr. M.D.N.C. 1995). Each class of Debtor's securities held by Steelcase (Series A, Series B, and Series C Group) is entitled to vote on the election of Debtor's directors. All of Steelcase's shares of Debtor, therefore, *684 constitute “voting securities” for purposes of § 101(2)(A).

2. All Voting Securities Owned by Steelcase Must be Included in the § 101(2)(A) Calculation

Steelcase owns more than 27% of Debtor's voting securities. Hall argues this makes Steelcase an affiliate and the inquiry ends there. Debtor argues, however, that only those shares “with power to vote” on the matter before the Court—Debtor's bankruptcy filing—count, and Steelcase owns less than 20% of those shares. The question then is whether mere 20% ownership of voting securities mandates affiliate status, or whether the owner must also have the power to vote those securities specifically with respect to the matter before the Court.

The Court concludes that it must simply consider whether Steelcase (1) owns 20% or more of Debtor's voting securities; (2) controls 20% or more of Debtor's voting securities; or (3) holds 20% or more of Debtor's voting securities with the power to vote those securities. Steelcase owns 27.36% of Debtor's voting securities and is therefore an affiliate of Debtor. It is irrelevant what percentage of the voting securities held by Steelcase were authorized to vote on Debtor's bankruptcy filing or Subchapter V election.

This Court is unaware of any decisions on this issue in a Subchapter V context, but there is a split of authority—and no controlling authority—from courts analyzing affiliate status in the context of insider status and venue.

i. The “Opportunity to Control” Approach

Some courts have characterized the relevant inquiry as whether the alleged affiliate had the opportunity to exert control over the debtor through its voting securities. See, e.g., *UVAS Farming Corp. v. Laviana Investments, N.V. (In re UVAS Farming Corp.)*, 89 B.R. 889, 891–94 (Bankr. D.N.M. 1988); see also *Roost v. Timber Components, Inc. (In re Tyee Timbers, Inc.)*, 139 B.R. 520, 524–25 (Bankr. D. Ore. 1992) (citing *UVAS Farming* and holding that “[t]his court agrees that the concept of voting power is the appropriate measure to determine whether or not [debtor's president] was an affiliate of the debtor”); see also *In re Piece Goods Shops Co.*, 188 B.R. at 796–97 (noting that Congress did not redefine “voting securities” for bankruptcy purposes and that the legislative history of § 101(2) indicates that “affiliate” is “intended to cover situations where there is an opportunity to control” a debtor).

If an alleged affiliate does not have an “opportunity to control” with respect to at least 20% of the stock of the debtor, then that entity is not an affiliate under § 101(2). See *In re UVAS Farming Corp.*, 89 B.R. at 892 (holding that certain shareholders were not affiliates because, although they “own 34.2% of the stock of the debtor, they have an ‘opportunity to control’ with only 13.5% of the stock, their voting power”). But “opportunity to control” is subsumed within the definition of “voting securities”—it is not a separate element of §

101(2)(A), nor do [UVAS Farming](#) or [Piece Goods](#) hold that it is.¹¹

*685 Debtor, however, conflates the “opportunity to control” concept with the “power to vote” language in [§ 101\(2\)\(A\)](#) and argues that only those shares eligible to vote on Debtor’s bankruptcy filing, of which Steelcase owns 6.5%, count for purposes of [§ 101\(2\)\(A\)](#). See [In re Tyee Timbers, Inc.](#), 139 B.R. at 524–25 (calculating debtor’s president’s percentage of ownership for purposes of affiliate status in a preference action as including only those shares with power to control “the right to direct payment of corporate debts” and not including other shares despite their right to vote on other matters).

Debtor asks the Court to limit the calculation of “voting securities” for purposes of [§ 101\(2\)\(A\)](#) to those with the “power to vote” on the matter before the Court. But this limitation does not exist within the language of [§ 101\(2\)\(A\)](#) and this Court declines to follow the rationale set forth in [Tyee Timbers](#). See [In re Tyee Timbers, Inc.](#), 139 B.R. 520.

ii. The Plain Meaning Approach

Hall advocates a second approach that dissects the language of [§ 101\(2\)\(A\)](#) without reading an additional “opportunity to control” element into the statute. See, e.g., [Agresti v. EBAR East, Inc. \(In re Elephant Bar Restaurant, Inc.\)](#), 196 B.R. 747, 751 (Bankr. W.D. Penn. 1996); [In re Interlink Home Health Care, Inc.](#), 283 B.R. 429 (Bankr. N.D. Tex. 2002). This is the better-reasoned approach.

These cases hold that “power to vote” modifies only the holding of securities—not their ownership or control. The [Interlink](#) Court carefully analyzed the grammatical structure of [§ 101\(2\)\(A\)](#), observing that:

[T]he Court considers it significant that there is a comma following the word “controls”, but none preceding the words “with the power to vote.” Had Congress intended the latter clause to apply to an entity that owned or controlled voting securities, such a comma would have been inserted. The Supreme Court, interpreting an identical grammatical

construction in [11 U.S.C. § 506\(b\)](#), concluded that the initial comma demonstrated a clear intent to separate the first noun clause (in that case “interest on such claim”) from the modifier (“provided for under the agreement”). The absence of a comma between the second noun clause (“any reasonable fees, costs, or charges”) required that the latter be read together with the modifier. In [§ 101\(2\)\(A\)](#), comparable punctuation dictates that the clause “with power to vote” applies only to the verb “holds.”

[In re Interlink Home Health Care, Inc.](#), 283 B.R. at 437.

The [Interlink](#) Court examined the origins of [§ 101\(2\)\(A\)](#), but more importantly, considered the implications of reading [§ 101\(2\)\(A\)](#) to couple the “power to vote” with ownership or control. Beyond “render[ing] the words ‘directly or indirectly’ in [§ 101\(2\)\(A\)](#) a virtual nullity,” the Court found that this alternative reading of [§ 101\(2\)\(A\)](#) would yield absurd results:

An owner whose stock is subject to a voting trust or which is the parent of a parent ... would not satisfy the definition of an affiliate. Yet it is certain that the term “affiliate” was intended to be broad enough to include a parent of a parent, even though its immediate subsidiary, not it, would have the legal power to vote the debtor’s stock.

Moreover, that the entity that owns a debtor’s stock happens to lose or surrender the power to vote the stock (while retaining ownership) should not change that entity’s status as an affiliate. Besides excluding from the definition of affiliate the beneficial owner of 20% of a debtor’s voting stock, ascribing such a *686 result to the transfer of voting power would invite manipulation of bankruptcy powers, not only in the area of venue, but also in other contexts, such as recovery of insider preferences.

[Id.](#) at 438-39.

[7] Looking to the plain language of [§ 101\(2\)\(A\)](#), the [Interlink](#) Court found three conditions upon which affiliation to a debtor exists:

- (1) ownership of 20% or more of debtor’s voting securities;
- (2) control of 20% or more of debtor’s voting securities; or

- (3) the holding of 20% or more of debtor's voting securities if the holder has the power to vote the securities.

Id. at 436. If either of the first two conditions are met, “the power to vote the securities is unnecessary to establish an affiliate relationship.” *Id.* “An entity that owns 20% or more of the voting securities of a chapter 11 debtor is an affiliate of the debtor, whether or not it has the power to vote those securities.” *Id.* at 439.

Steelcase owns more than 20% of Debtor's voting securities, and the Court's inquiry ends there.

V. Conclusion

Steelcase is an issuer as defined by the Securities Act and is an affiliate of Debtor because it owns more than 20% of Debtor's

voting securities. Debtor is therefore ineligible to proceed under Subchapter V of the Bankruptcy Code. Because Debtor is not eligible to be a Subchapter V debtor under [11 U.S.C. § 1182\(1\)\(B\)\(iii\)](#), it is unnecessary for the Court to determine whether Debtor's debts exceed the limits set forth in [§ 1182\(1\)\(A\)](#). Accordingly, it is

ORDERED that the Objection is **SUSTAINED**, Debtor's Subchapter V election is **REVOKED**, and this case shall proceed under the other applicable provisions of Chapter 11.

IT IS ORDERED as set forth below: October 19, 2020

All Citations

620 B.R. 679

Footnotes

- 1 Subchapter V was enacted through the Small Business Reorganization Act of 2019 (the “SBRA”), [Pub. L. No. 116-54, 133 Stat. 1079](#), and amended by the Coronavirus Aid, Relief, and Economic Security Act (the “CARES Act”), [Pub. L. No. 116-136, 134 Stat. 281](#). It is codified as new [11 U.S.C. §§ 1181-1195](#) and amends scattered sections of Title 11 (the “Bankruptcy Code”) and Title 28 of the U.S. Code.
- 2 Pursuant to Interim [Rule 1020 of the Federal Rules of Bankruptcy Procedure](#) (the “Bankruptcy Rules”), Hall timely filed its *Objection to Serendipity Labs, Inc.'s Subchapter V Election* on August 3, 2020 (Doc. 61, the “Objection”), and Debtor filed its *Brief in Opposition to Hall's Objection* on September 9, 2020 (Doc. 114, the “Response”). On October 2, 2020, Debtor filed its *Supplemental Brief in Opposition to Hall Los Angeles WTS, LLC's Objection to Subchapter V Election* (Doc. 146, the “Supplemental Response”) and Hall filed its *Brief in Support of Hall Los Angeles WTS, LLC's Objection to Serendipity Labs, Inc.'s Subchapter V Election* (Doc. 147, the “Supplemental Objection”). The Court held an evidentiary hearing on October 7, 2020 (the “Hearing”).
- 3 Debtor argued that Hall, as the objecting party, bears the burden of proof on the issues before the Court. Hall did not state its position regarding the burden either at the Hearing or in its papers. The Bankruptcy Code and Bankruptcy Rules are silent regarding the burden of proof as to a debtor's eligibility to proceed under Subchapter V. The limited caselaw on this issue is generally consistent in placing the burden on the moving party. See [In re Body Transit, Inc.](#), 613 B.R. 400, 409 n. 15 (Bankr. E.D. Pa. 2020) (objecting party bears the burden of establishing a debtor's ineligibility); see also [In re Roots Rents, Inc.](#), 420 B.R. 28, 40 (Bankr. D. Idaho 2009) (the party seeking to change the (pre-SBRA) small business designation bears the burden). Even if the moving party has the burden of proof, Hall has carried that burden.
- 4 Hall also argues that Debtor's debts exceed \$7,500,000, which would make Debtor ineligible under [§ 1182\(1\)\(A\)](#). Because Debtor is ineligible under [§ 1182\(1\)\(B\)\(iii\)](#), the Court need not consider this argument.
- 5 Hall previously filed a *Motion to Transfer Venue* (Doc. 60, the “Venue Motion”) challenging the appropriateness of this venue. The Venue Motion was denied by the Court on September 2, 2020 (Doc. 107).

- Hall appealed the Court's ruling on the Venue Motion but did not seek a stay pending appeal and the District Court has not yet issued its ruling. *See* Case No. 20-cv-03872-LMM (N.D. Ga.).
- 6 The parties filed their exhibits in advance of the Hearing. (Docs. 118–119, 144–145). At the hearing, the Court admitted into evidence Hall's exhibits 1–3, 5, 9–11, 19, 20, 23–30, 40–46 and Debtor's exhibits 8, 15, 22, 23–28, 35, 40, 46–55, 57, 58, 60–62.
- 7 Debtor has one common stock class and four series of preferred stock. The total outstanding shares of each stock class are as follows: 750,000 shares of Series A Preferred, 588,315 Series B Preferred, 143,021 Series C-1 Preferred, 822,354 of Series C Preferred (the Series C-1 and Series C Preferred together the “Series C Group”), and 1,000,000 Common Shares. On a percentage basis, Steelcase holds 100% of Debtor's outstanding Series A Preferred stock, 15.52% of Debtor's outstanding Series B Preferred stock, 6.51% of Debtor's outstanding Series C Group shares, and 4.3% Debtor's outstanding common warrants. *See* Hall Ex. 9.
- 8 It is this stock that Debtor argues exercises true control over the company, and in particular, the ability to file bankruptcy. Hall contests this argument and points to Debtor's board, which includes a Steelcase representative, as controlling Debtor and issuing the resolution to file the bankruptcy case. The Court need not resolve this dispute because, as explained below, the Court concludes that *all* voting securities owned by Steelcase must be considered for purposes of § 101(2)(A).
- 9 *See* Hall Ex. 10. Debtor objected to the introduction of the form 10-K to the extent Hall was introducing it to establish the truth of statements made therein but did not challenge the authenticity of the exhibit. The Court admitted the exhibit over Debtor's objection, allowing it for the purpose of establishing that Steelcase filed the 10-K with the Securities and Exchange Commission (the “SEC”).
- 10 Hall asserts that Steelcase is an issuer. Debtor did not present argument or evidence that Steelcase is not an issuer but argued it did not concede Steelcase's issuer status.
- 11 The  *UVAS Farming* Court appears to have recalculated the percentage of voting securities held by the alleged affiliates based upon the votes per share afforded to the different classes of stock, not to have limited the definition of “voting securities” to only shares entitled to vote on the specific matter before the court. *See*  *In re UVAS Farming Corp.*, 89 B.R. at 891–92. Here, Debtor's shares are afforded equal votes regardless of class. Steelcase holds more than 27% of Debtor's voting securities and each class of those securities has the opportunity to control Debtor through the ability to elect of board members. Indeed, a Steelcase representative sits on the board.



KeyCite Yellow Flag - Negative Treatment

Disagreed With by [In re Seven Stars on the Hudson Corp.](#), Bankr.S.D.Fla., August 7, 2020

615 B.R. 1

United States Bankruptcy Court, E.D. New York.

IN RE: Deirdre VENTURA, Debtor.

Case No. 8-18-77193-reg

|

Signed April 10, 2020

Synopsis

Background: Individual Chapter 11 debtor, the operator of a bed and breakfast, amended her petition to designate herself as a “small business debtor” and to proceed as such under subchapter V of Chapter 11, newly amended provisions which were added to the Bankruptcy Code pursuant to the Small Business Reorganization Act of 2019 (SBRA). Mortgagee and United States Trustee (UST) filed objections.

Holdings: The Bankruptcy Court, [Robert E. Grossman, J.](#), held that:

[1] as matters of first impression, procedural and timing issues did not bar debtor from amending her petition to take advantage of the benefits of the SBRA;

[2] debtor could amend her petition to designate herself as a “small business debtor” notwithstanding prior court orders allowing mortgagee to file its own proposed plan of reorganization, scheduling a confirmation hearing, and approving mortgagee's disclosure statement;

[3] debtor qualified as a “small business debtor,” even though the majority of her debt consisted of a mortgage encumbering the property where she both resided and operated a bed and breakfast;

[4] debtor was not judicially estopped from claiming that her mortgage debt arose from commercial or business activities; and

[5] debtor was not barred from utilizing subchapter V solely on the basis that the mortgage she sought to modify was a purchase money mortgage secured by her residence.

Objections overruled.

Procedural Posture(s): Motion to Amend.

West Headnotes (34)

[1] Bankruptcy Purpose

Amendments to the Bankruptcy Code pursuant to the Small Business Reorganization Act of 2019 (SBRA), which added subchapter V to Chapter 11 of the Code, were instituted to broaden the opportunity for small businesses to successfully utilize the benefits of Chapter 11. [11 U.S.C.A. § 1181 et seq.](#)

3 Cases that cite this headnote

[2] Bankruptcy Secured creditors, protection of

Subsection of the Bankruptcy Code generally permitting Chapter 11 debtors to propose a plan that modifies the rights of holders of secured claims specifically excludes modification of claims secured by liens on a debtor's residence.

[11 U.S.C.A. § 1123\(b\)\(5\).](#)**[3] Bankruptcy** Purpose

Changes to the Bankruptcy Code set forth in the Small Business Reorganization Act of 2019 (SBRA) were intended to allow small businesses and individuals to take advantage of a Chapter 11 process that would be less costly and time consuming than the current process. [11 U.S.C.A. § 1181 et seq.](#)

[4] Bankruptcy Purpose

By enacting the Small Business Reorganization Act of 2019 (SBRA), which added subchapter V to Chapter 11 of the Bankruptcy Code, Congress intended to streamline the reorganization process for small business debtors because small businesses have often struggled to reorganize under Chapter 11. [11 U.S.C.A. § 1181 et seq.](#)

7 Cases that cite this headnote

[5] **Bankruptcy** 🗝️ Appointment of Trustee or Examiner

Under the Bankruptcy Code, as amended by the Small Business Reorganization Act of 2019 (SBRA), a trustee will be appointed in every case under subchapter V of Chapter 11. 📄 11 U.S.C.A. § 1183.

4 Cases that cite this headnote

[6] **Bankruptcy** 🗝️ Examiner's functions and duties

Under the Bankruptcy Code, as amended by the Small Business Reorganization Act of 2019 (SBRA), the trustee appointed in every case under subchapter V of Chapter 11 acts as a fiduciary for creditors, in lieu of an appointed creditors committee, and is also charged with facilitating the subchapter V debtor's small business reorganization and monitoring the debtor's consummation of its plan of reorganization. 📄 11 U.S.C.A. §§ 1183(a), 1183(b).

4 Cases that cite this headnote

[7] **Bankruptcy** 🗝️ Who May File, and Time for Filing

Bankruptcy 🗝️ Creditors; loss of debtor's exclusive right

Prior to enactment of the Small Business Reorganization Act of 2019 (SBRA), which added subchapter V to Chapter 11 of the Bankruptcy Code, small business debtors were required to file a plan of reorganization within 120 days after the order for relief, and "any party in interest" could file a plan at certain times and under certain circumstances; the newly enacted law gives subchapter V debtors the exclusive right to file a plan of reorganization, which generally must be filed within 90 days after entry of the order for relief. 📄 11 U.S.C.A. §§ 1121(b), 1121(c), 1189(a), 1189(b).

[8] **Bankruptcy** 🗝️ Petition

Procedural and timing issues did not bar individual Chapter 11 debtor from amending her petition to take advantage of the benefits of the Small Business Reorganization Act of 2019 (SBRA), which added subchapter V to Chapter 11 of the Bankruptcy Code, even though she had not designated herself as a "small business debtor" on petition, which was filed more than 15 months prior to Act's effective date; SBRA was silent as to its applicability to pending cases, both 90-day plan-filing and 60-day status-conference deadlines had expired but could be extended if the need for extension was attributable for circumstances for which debtor should not be justly held accountable, debtor was not required to comply with the procedural requirements of a law that did not then exist, and there was no statutory prohibition against the court exercising its discretion to reset timelines to allow debtor to avail herself of the newly enacted law. 📄 11 U.S.C.A. §§ 1183, 1188(a), 1189(b); Fed. R. Bankr. P. 1009(a), 1020(a).

4 Cases that cite this headnote

[9] **Bankruptcy** 🗝️ Objections and determination thereof

Under the Bankruptcy Code, as amended by the Small Business Reorganization Act of 2019 (SBRA), the bankruptcy court's finding of incorrect designation of a "small business debtor" is triggered by an objection to the designation. 📄 11 U.S.C.A. § 1183 et seq.; Fed. R. Bankr. P. 1020(a).

[10] **Bankruptcy** 🗝️ Petition

Bankruptcy 🗝️ Amendment

Although, under the bankruptcy rules, a voluntary petition, list, schedule, or statement may be amended by a debtor as a matter of course at any time before the case is closed, such amendment by the debtor is not necessarily controlling; the designation by the debtor in the

original petition still retains evidentiary effect as it is signed under penalty of perjury. [Fed. R. Bankr. P. 1009\(a\)](#).

[11] Bankruptcy 📁 Who May File, and Time for Filing

Under the Bankruptcy Code, both the 90-day deadline for a subchapter V debtor to file a Chapter 11 plan and the 60-day deadline to hold a status conference may be extended if the need for an extension is attributable to circumstances for which the debtor should not be justly held accountable. [11 U.S.C.A. §§ 1188\(a\), 1189\(b\)](#).

[6 Cases that cite this headnote](#)

[12] Bankruptcy 📁 Retrospective operation
Bankruptcy 📁 Petition

Debtor who operated bed and breakfast could amend her petition to designate herself as “small business debtor” under subchapter V of Chapter 11, which was added to Bankruptcy Code by the Small Business Reorganization Act of 2019 (SBRA) while her case was pending, despite prior court orders allowing mortgagee to file its own proposed plan and scheduling a confirmation hearing; though mortgagee argued that Act’s retroactive application would prejudice its “vested” rights, there was no statutory bar to such application, amendment of Code’s “small business debtor” definition did not impair existing creditor rights and so did not amount to a “taking,” applying Act’s anti-modification exception to modify the mortgage would not deprive mortgagee of any state-law rights as, due to debtor’s discharge in prior case, it could look solely to value of property to satisfy her obligation, and, until plan was confirmed, no property rights could be said to have vested in mortgagee. [U.S. Const. Amend. 5](#); [11 U.S.C.A. §§ 101\(51D\)\(A\), 1190\(3\)](#).

[1 Cases that cite this headnote](#)

[13] Mortgages and Deeds of Trust 📁 Lender or Mortgagee, Remedies of and Enforcement by

Under New York law, a mortgagee is granted a bundle of rights when it becomes such with respect to a mortgagor’s property: the note and mortgage afford in personam rights against the mortgagor, including a right to proceed against her to collect the amount due and owing under the note, as well as in rem rights to proceed against the property and seek a sale of the property, with the sale proceeds applied against the amount due and owing, and, to the extent the sale leaves a deficiency, the right to proceed against the mortgagor for the deficiency.

[14] Bankruptcy 📁 Secured creditors, protection of

Exception to the Bankruptcy Code’s anti-modification provision added to subchapter V of Chapter 11 by the Small Business Reorganization Act of 2019 (SBRA) permits a subchapter V debtor to modify the rights of certain mortgagees by allowing the debtor to bifurcate a claim into a secured and unsecured claim based on the value of the underlying collateral. [11 U.S.C.A. § 1190\(3\)](#).

[1 Cases that cite this headnote](#)

[15] Bankruptcy 📁 Effect as to Securities and Liens

Although the Bankruptcy Code works to abrogate contractual rights, it does not affect the vested property rights of mortgagees.

[16] Bankruptcy 📁 Reorganization cases

Bankruptcy Code’s definition of “small business debtor,” as amended by the Small Business Reorganization Act of 2019 (SBRA), excludes debtors whose primary business is owning “single asset real estate.” [11 U.S.C.A. § 101\(51D\)\(A\)](#).

[2 Cases that cite this headnote](#)

[17] Bankruptcy 📁 Reorganization cases

Debtor qualified as a “small business debtor” under newly amended definition added to the Bankruptcy Code by the Small Business Reorganization Act of 2019 (SBRA), even though the majority of her debt consisted of a mortgage encumbering the property where she both resided and operated a bed and breakfast; debtor's total secured and unsecured debts fell within statutory threshold, and more than 50% of debtor's debts rose from her “commercial or business activities,” as, though the subject property, a six-bedroom historic mansion, was clearly debtor's primary residence, the primary purpose of purchasing the property appeared to have been to own and operate a bed and breakfast, given goal of debtor, who had long history in hotel business, to combine her business with the needs of her life as a single parent, and there was evidence that town would not have granted debtor a permit to run bed and breakfast unless she lived there.  11 U.S.C.A. § 101(51D)(A).

2 Cases that cite this headnote

[18] **Bankruptcy** Claim inconsistent with previous claim or position in general

Fact that a debtor incurs mortgage debt to buy a residence does not automatically mean that the debt is “consumer debt,” within the meaning of the Bankruptcy Code.  11 U.S.C.A. § 101(8).

[19] **Bankruptcy** Claim inconsistent with previous claim or position in general

Under the Bankruptcy Code, test for determining whether debt should be classified as business debt, rather than as “consumer debt,” is whether it was incurred with an eye toward profit; courts must look at substance of transaction and borrower's purpose in obtaining loan, rather than merely looking at form of transaction.  11 U.S.C.A. § 101(8).

1 Cases that cite this headnote

[20] **Estoppel** Claim inconsistent with previous claim or position in general

A debtor may be judicially estopped from changing its legal position when a court has adopted and relied on it and the party claiming judicial estoppel suffers an unfair detriment as a result, unless mistake or inadvertence is an applicable defense.

[21] **Estoppel** Claim inconsistent with previous claim or position in general

General test for determining when judicial estoppel may be invoked considers whether: (1) a party's later position is clearly inconsistent with its earlier position, (2) the party's former position has been accepted in some way by the court in the earlier proceeding, such that judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled, and (3) the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.

[22] **Estoppel** Claim inconsistent with previous claim or position in general

Judicial estoppel may be applied in the bankruptcy context when a debtor changes its designation on the petition.

[23] **Estoppel** Claim inconsistent with previous claim or position in general

Debtor who operated bed and breakfast was not judicially estopped from claiming that mortgage debt arose from commercial or business activities, so as to establish that she qualified as “small business debtor” under subchapter V of Chapter 11, despite contention that she stated in original schedules and in prior bankruptcy filings that she had primarily consumer debt; given hybrid nature of property, it was not clear that debtor's change of description of mortgage debt as business debt was inconsistent with prior description, as she repeatedly referred to property as bed and breakfast in current case, property was integral to business, and debtor was attempting to be clear

and forthright in her representations, court took no specific action in either current or prior case based on description of mortgage as consumer debt, and debtor did not take unfair advantage of mortgagee by changing description of debt, but acted to take advantage of new definition, to attempt to save business.  11 U.S.C.A. § 101(51D)(A).

[24] Statutes Plain Language; Plain, Ordinary, or Common Meaning

Bankruptcy court is charged with interpreting all federal and state statutes according to their plain meaning.

[25] Statutes What constitutes ambiguity; how determined

In determining the degree of ambiguity or clarity of statutory language, courts cannot examine the language in isolation.

[26] Statutes Context

Statutes Statutory scheme in general

In construing statutory language, the court must determine the specific context in which the language appears, and the statutory scheme's broader framework in order to preserve the coherence and consistency of the statutory scheme.

[27] Statutes Construction based on multiple factors

In matters of statutory interpretation, the plain meaning of statutory language may be illuminated by considering not only the particular statutory language at issue, but also the structure of the section in which the key language is found, and the design of the statute as a whole and its object.

[28] Bankruptcy Secured creditors, protection of

Individual Chapter 11 debtor, the operator of a bed and breakfast at which she resided, was not barred from utilizing subchapter V of Chapter 11 solely on the basis that the mortgage she sought to modify was a purchase money mortgage secured by her residence; debtor's property fell squarely within section of the Bankruptcy Code governing modification of secured creditors' claims by subchapter V debtors, which specifically permits modification of certain claims secured by mortgages on a debtor's principal residence, and primary purpose of the mortgage was not to provide debtor with a place to live, but to benefit debtor's business activities, as she did not purchase a residence and use one room as office space but rather used the mortgage proceeds to purchase the historic building that housed her business, renting rooms and spending considerable time and resources on obtaining the proper permits to run the property as a bed and breakfast. 11 U.S.C.A. § 1190(3).

[29] Bankruptcy Secured creditors, protection of

Unlike the section of the Bankruptcy Code generally permitting Chapter 11 debtors to propose plans that modify the rights of holders of secured claims, which precludes modifications of claims secured by mortgages on the debtor's principal residence, the section of the Code governing debtors who designate themselves as subchapter V debtors specifically permits the modification of claims secured by mortgages on the debtor's principal residence.  11 U.S.C.A. §§ 1123(b)(5), 1190(3).

[30] Bankruptcy Secured creditors, protection of

Unlike the section of the Bankruptcy Code generally permitting Chapter 11 debtors to propose plans that modify the rights of holders of secured claims, except with respect to claims secured by mortgages on the debtor's principal residence, which takes an all-or-nothing approach to loans securing the debtor's residence, the section of the Code permitting

debtors who designate themselves as subchapter V debtors to modify claims secured by mortgages on the debtor's principal residence asks the court to determine whether the primary purpose of the mortgage was to acquire the debtor's residence.  11 U.S.C.A. §§ 1123(b)(5), 1190(3).

[31] Bankruptcy Secured creditors, protection of

Subparagraphs of the section of the Bankruptcy Code permitting Chapter 11 debtors who designate themselves as subchapter V debtors to modify certain claims secured by mortgages on the debtor's principal residence direct the court to conduct a qualitative analysis to determine whether the principal purpose of the debt was not to provide the debtor with a place to live, and whether the mortgage proceeds were primarily for the benefit of the debtor's business activities. 11 U.S.C.A. § 1190(3).

[32] Bankruptcy Purpose

Purpose and intent of the Small Business Reorganization Act of 2019 (SBRA), which added subchapter V to Chapter 11 of the Bankruptcy Code, is to assist small business owners in whatever form they take, and to give them speedy access to relief via the bankruptcy process so as to keep them in business and to benefit the employees, suppliers, customers and others who rely on that business. 11 U.S.C.A. § 1181 et seq.

1 Cases that cite this headnote

[33] Bankruptcy Secured creditors, protection of

Under the section of the Bankruptcy Code permitting Chapter 11 debtors who designate themselves as subchapter V debtors to modify certain claims secured by mortgages on their principal residences so long as the principal purpose of the debt was not to provide the debtor with a place to live, but was primarily for the benefit of the debtor's business activities,

some business owners, such as business owners who took out a second mortgage and used the proceeds to buy farm equipment or a taxi medallion, easily fall into that classification. 11 U.S.C.A. § 1190(3).

[34] Bankruptcy Secured creditors, protection of

Factors to be considered in determining whether a mortgage is subject to modification under the section of the Bankruptcy Code permitting Chapter 11 debtors who designate themselves as subchapter V debtors to modify certain claims secured by mortgages on their principal residences include: (1) whether the mortgage proceeds were used primarily to further the debtor's business interests, (2) whether the property is an integral part of the debtor's business, (3) the degree to which the specific property is necessary to run the business, (4) whether customers need to enter the property to utilize the business, and (5) whether the business utilizes employees and other businesses in the area to run its operations. 11 U.S.C.A. § 1190(3).

Attorneys and Law Firms

*6 Sarah M. Keenan, Sferrazza & Keenan, Melville, NY, for Debtor.

MEMORANDUM DECISION OVERRULING OBJECTIONS TO THE DEBTOR'S ELECTION AS A SUBCHAPTER V DEBTOR

Robert E. Grossman, United States Bankruptcy Judge

Introduction

[1] The matter before the Court presents a series of legal issues that are for the most part issues of first impression. The Court is being asked to rule on questions of law resulting from amendments to the Bankruptcy Code pursuant to the Small Business Reorganization Act of 2019 which became effective on February 19, 2020. These amendments,

commonly referred to as the SBRA, were instituted to broaden the opportunity for small businesses to successfully utilize the benefits of chapter 11 of the Bankruptcy Code. Congress recognized that many of the benefits afforded to large corporate debtors under chapter 11 were for all practical purposes out of the reach of smaller businesses. Chapter 11 is often an expensive and highly complicated proposition. Many small businesses have neither the money nor the time to navigate the process, even with the considerations given to small businesses prior to the enactment of the SBRA. Had Congress been given a crystal ball with the power to see what the world is facing today, including the severe disruption to our Nation's economy and its impact on small businesses, Congress likely could not have drafted a more effective set of mechanisms to help these businesses reorganize and hopefully survive. These amendments will be analyzed and challenged over the coming months and years, as are all new significant changes to the law. While this case may be one of the first to require a court to rule on the applicability and interpret complex issues, courts in this country have ^{*7} been called upon since the founding of our Republic to respond to similar challenges.

In the case of Deirdre Ventura (the “Debtor”), these issues arise in the context of objections to the Debtor's recent amendments to her petition to designate herself as a small business debtor and to proceed as a subchapter V debtor. The objections require the Court to answer the following questions:

- 1) Can the Debtor amend her petition to take advantage of the benefits of the SBRA where the Debtor's case has been pending for over fifteen months and a creditor's proposed plan of reorganization has been scheduled for a hearing on confirmation?
- 2) Assuming the SBRA applies to the Debtor's case, does the Debtor qualify as a “small business debtor” within the newly amended definition of  11 U.S.C. § 101(51D)(A) where the majority of her debt consists of a mortgage encumbering the property where she both resides and operates a bed and breakfast?
- 3) Assuming the Debtor fits within the definition of a small business debtor, is the Debtor barred from utilizing provisions applicable to subchapter V debtors to modify the mortgage encumbering the property where she both resides and operates a bed and breakfast?

For the reasons set forth below, the Court answers the first two questions in the affirmative and finds that under its interpretation of 11 U.S.C. § 1190(3), the Debtor is not barred from utilizing this SBRA provision solely on the basis that the mortgage she seeks to modify is a purchase money mortgage secured by her residence. Based on the Court's answers to these questions, the objections to the Debtor's amended petition are overruled.

While these conclusions do not mean that the Debtor will succeed as a subchapter V debtor, the Debtor will be given a chance to proceed under this subchapter. The Debtor must still fulfill her obligations under subchapter V, including proposing a feasible plan and coordinating with the newly appointed subchapter V trustee.

Procedural History and Facts

In 1981, the Debtor began working in the real estate brokerage business specializing in the sales and development of hotels and lodges. Ultimately, she became the sole owner of Innvest Hotel Brokers, LLC which she used to conduct a lodging property brokerage business. (Debtor's Objection to Mot. of Gregory Funding for Order Denying & Voiding Debtor's Election as a Sub-Chapter V Debtor, 1:2, Mar. 24, 2020, ECF No. 97.).

The Debtor, along with another individual, purchased the Harbor Rose Property (the “Property”) in December 2007. The acquisition of the Property was financed in part by a \$1 million dollar loan (“Note”) secured by a mortgage (“Mortgage”) on the Property from Wells Fargo Bank, N.A. (“Wells Fargo”). (Emergency Mot. to Prohibit Use of Cash Collateral. & for Relief from Auto. Stay, Exh. A, Nov. 12, 2018, ECF No. 17.). The Note and the Mortgage were eventually assigned in 2015 to Gregory Funding, as servicer for U.S. Bank National Association, as Indentured Trustee on Behalf of and with Respect to Ajax Mortgage Loan Trust 2015-B Mortgage-Backed Notes Series 2015-B (“Gregory”). *Id.* Exh. B. According to the proof of claim filed in this case, Gregory is owed \$1,678,664.80. (Claim No. 3-1, Dec. 21, 2018.).

The Property is not a typical Long Island residence. The original structure was built in the mid-1800's and is located in Cold Spring Harbor, a small waterfront ^{*8} village on Long Island's North Shore. (Ventura Aff. ¶ 7.). The Property is registered on The National Registry of Historic Places.

Id. It is also recognized as a significant historic structure by the Town of Huntington Historic Preservation Society. *Id.* Rooms at the property from the time the Debtor acquired it were made available for rent by the Debtor as advertised on Craigslist, Facebook and Wimdu (a European version of Airbnb). (Ventura Aff. ¶ 5.). The Debtor has included as exhibits to her submission copies of emails from potential guests from 2009 through 2011. (Debtor's Objection to Mot. of Gregory Funding for Order Denying & Voiding Debtor's Election as a Sub-Chapter V Debtor, Exh. A, Mar. 24, 2020, ECF No. 97.). The documentary evidence supports a finding that paying guests were staying at the Property within the first year that the Debtor purchased the Property. At the time the Debtor purchased the Property, the Huntington Town Code only permitted individuals to rent two guest rooms out of their property. (Ventura Aff. ¶ 11.).

As with many local businesses, the Great Recession of 2008 had a drastic impact on the Debtor's hotel brokerage business. (Debtor's Objection to Mot. of Gregory Funding for Order Denying & Voiding Debtor's Election as a Sub-Chapter V Debtor, 3:3, Mar. 24, 2020, ECF No. 97.). Eventually, the Debtor defaulted on the Mortgage. *Id.* On January 18, 2013, Debtor filed a voluntary petition for relief from her creditors under chapter 7. (Case No. 8-13-70280-reg, ECF No. 1.) ("First Case"). The First Case was filed as a no-asset chapter 7 case, and the majority of the Debtor's debts were listed as consumer debts. *Id.* ECF 11. On May 1, 2013, the Debtor received a discharge and the case was closed shortly thereafter. *Id.* ECF No. 16. On May 3, 2013, the Debtor formed Harbor Rose LLC ("Harbor Rose") as a New York State limited liability company. (Ventura Aff. ¶ 3 n.1.).

On February 6, 2014 the Debtor filed a voluntary petition for relief under chapter 13 ("Second Case"). (Case No. 8-14-70473-reg, ECF No. 1.). The Second Case was dismissed for the failure to file necessary documents. *Id.* ECF No. 33. Despite the fact that the Debtor described her debts as primarily consumer debts, the Debtor included in Schedule I a breakdown of income and expenses from the operations of Harbor Rose. *Id.* ECF No. 10. From the information set forth in the Second Case, it is clear that the Debtor's sole source of income was derived from Harbor Rose, which was operating at the Property. Based on the information provided by the Debtor in the Second Case, there does not appear to be an attempt by the Debtor to mislead her creditors or to create a false impression regarding her use of the Property, notwithstanding her description of her debts as primarily consumer debts.

On February 18, 2015, the Debtor executed a loan modification with respect to the Note and Mortgage (the "Loan Modification"). (Emergency Mot. to Prohibit Use of Cash Collateral. & for Relief from Auto. Stay, 8:4, Nov. 12, 2018, ECF No. 17.). As part of the modification the co-owner of the Property transferred his interest to the Debtor. *Id.* Although the Loan Modification gave the Debtor more favorable terms, the Debtor defaulted on her obligations under the Loan Modification. *Id.* 9:4. In February of 2016, Gregory commenced a foreclosure action against the Debtor in the Supreme Court for the State of New York, Suffolk County. *Id.* 10:5.

Despite the Debtor's financial setbacks, the Debtor took steps to increase her ability to rent rooms to guests at the Property. The Debtor obtained a permit to operate as a bed and breakfast on May 4, 2016. (Ventura Aff. ¶ 11.). The Debtor urged one *9 of the Town Councilpersons to sponsor an amendment to allow bed and breakfasts to provide up to four guest rooms and permit a maximum stay of 29 days. (Ventura Aff. ¶ 12.). The Debtor was successful in her endeavors and on November 16, 2017, the Debtor obtained a Certificate of Permitted Use for four guest rooms. (Ventura Aff. ¶ 13.). By June, 2018, the Debtor upgraded the Property to provide four guestrooms. *Id.* The Debtor also obtained the proper permits to add an additional bathroom for guests, replaced the HVAC for a portion of the Property, upgraded the electric service, and built an enclosed porch with heat for year-round use. *Id.*

It appears there is no other such bed and breakfast in the Town of Huntington, and according to the Debtor's affidavit, there is no other similar bed and breakfast on Long Island as of March 24, 2020. (Ventura Aff. ¶ 10.). The Town of Huntington requires as a condition to receiving the bed and breakfast permit that the owner operator reside at the bed and breakfast premises. *Id.* In addition to its lodgings, Harbor Rose offers health and wellness package, including yoga classes, acupuncture treatments, massage treatments. (Emergency Mot. to Prohibit Use of Cash Collateral. & for Relief from Auto. Stay, 19:6, Nov. 12, 2018, ECF No. 17.).

On August 8, 2018, a judgment of foreclosure and sale was granted in favor of Gregory, with a sale date scheduled for October 25, 2018 (the "Foreclosure Sale"). *Id.* at 14-15:5-6. Pursuant to Gregory's Broker's Price Opinion dated October 02, 2018, the Property was valued at \$1,200,000.00. *Id.* Exh. H. On October 24, 2018 (the Petition Date), the Debtor filed a voluntary petition under chapter 11 (the "Current Case").

As of the Petition Date, Gregory was owed a total amount of \$1,678,664.80. *Id.* at 17:6. The current value of the Property is unknown.

In the Current Case, the Debtor again described her debts as primarily consumer debts. (Case No. 8-18-77193-reg, ECF No. 1.). The Debtor also stated that she was an individual chapter 11 debtor and did not designate herself as a small business debtor. *Id.* The Debtor's description of the Property in the Current Case accurately set forth that it was being used as a place of business. For example, when the Debtor was asked "What is the property?" she checked the box "Other" and wrote "B&B Inn" on Schedule A/B instead of checking the box for "Single-family" home. *Id.* In Schedule C, the Debtor claimed an exemption for the Property pursuant to  11 U.S.C. § 522(b)(2) wherein she described it as "Bed & Breakfast." *Id.* Again, on Schedule D, the Debtor described the Property as a "Bed and Breakfast." *Id.* The Debtor also lists her income and expenses from the operations of Harbor Rose in her Statement of Current Monthly Income. *Id.* ECF No. 26.

On November 12, 2018, Gregory moved this Court for an Order: (1) directing the Debtor to establish a Debtor in possession account, directing immediate turnover of cash collateral to the Debtor in possession account, and prohibiting the Debtor's use of cash collateral until the motion and request for adequate protection payments to Gregory could be heard, pursuant to  11 U.S.C. § 363(C)(2)(B); (2) granting Gregory relief from the automatic stay pursuant to  11 U.S.C. § 362(d)(1); or alternatively (3) adequate protection payments pursuant to  11 U.S.C. § 363(e). (Emergency Mot. to Prohibit Use of Cash Collateral. & for Relief from Auto. Stay, at 3, Nov. 12, 2018, ECF No. 17.). In December 2018, the Debtor agreed to pay monthly adequate protection payments to Gregory in the amount of \$3,5000, to maintain proper insurance on the Property, and to timely remit taxes due subsequent to January 1, *10 2019. (Agreed Order Resolving Mot. for Adequate Protection Payments, at 1-2, Dec. 13, 2018, ECF No. 32.).

With the consent of the parties, the Court entered an order directing the Debtor and Gregory to participate in the Loss Mitigation Program with respect to the Property. (Order Directing the Debtor and Creditor Gregory Funding, as servicer for US Bank as Indentured Trustee to Ajax Mortgage Loan to participate in the Loss Mitigation Program, Dec. 20, 2018, ECF No. 35.). In June of 2019, the parties agreed to

terminate loss mitigation, to increase the adequate protection payment to Gregory to \$4,800 monthly, and to require that by September 30, 2019, the Debtor file a proposed disclosure statement and chapter 11 plan of reorganization acceptable to Gregory in its sole and absolute discretion. (Further Agreed Order Concerning Adequate Protection Payments, *Inter Alia*, June. 11, 2019, ECF No. 53.). In the event the Debtor's proposed disclosure statement and plan were deemed unsatisfactory to Gregory, Gregory would be permitted to file a competing plan which would provide for the sale of the Property to satisfy the Mortgage. *Id.* The Debtor failed to file a proposed disclosure statement and plan by the September 30, 2019 deadline, which effectively terminated the Debtor's exclusivity as an individual chapter 11 debtor.

At the November 19, 2019 status conference, the Court directed the Debtor and Gregory to each file a proposed plan of reorganization and disclosure statement by December 13, 2019. As expected, Gregory's proposed plan provided for an auction sale of the Property subject to higher and better offers. (Chapter 11 Plan of Liquidation, Dec. 13, 2019, ECF No. 60.). Gregory's proposed plan also provided for a carve out from the sale proceeds to pay all the other classes in full. *Id.* The Debtor's proposed plan sought to modify the Mortgage by reducing the secured portion of Gregory's claim to \$1,050,00, which the Debtor represented was the value of the Property at that time, and repaying the secured portion of the claim over 30 years at 4.25 percent interest per annum. (Debtor's First Amended Plan of Reorganization, Dec. 20, 2019, ECF No. 67.). According to the Debtor's proposed plan, Gregory would receive no payment on account of the unsecured portion of its claim because the Debtor had previously received a discharge in the First Case. *Id.*

[2] The viability of the Debtor's plan hinged on her ability to utilize  11 U.S.C. § 1123(b)(5) to bifurcate the Mortgage into a secured and unsecured claim, and to pay only the secured portion in full. However, because the Debtor resided at the Property, and  11 U.S.C. § 1123(b)(5) specifically excluded modification of claims secured by liens on a debtor's residence, the Court determined that the Debtor's proposed plan was unconfirmable on its face. So long as any portion of the Property constituted the Debtor's residence,  11 U.S.C. § 1123(b)(5) could not be used to modify the Mortgage. This conclusion was consistent with  *In re Macaluso*, 254 B.R. 799 (Bankr. W.D.N.Y. 2000), *In re Addams*, 564 B.R. 458 (Bankr. E.D.N.Y. 2017) and  *In re Wages*, 508 B.R. 161

(9th Cir. BAP 2014). For these reasons, on January 13, 2020, the Court did not approve the Debtor's disclosure statement. (Order Approving Disclosure Statement Relating to Chapter 11 Plan of Gregory Funding as Plan Sponsor, *Inter Alia*, Jan. 13, 2020, ECF No. 79.). At the same hearing, the Court approved Gregory's Disclosure Statement and authorized Gregory to solicit votes. *Id.* The Court also set February 26, 2020 as the date for a hearing on the confirmation of Gregory's proposed plan (the "Confirmation Hearing"). *Id.*

*11 [3] In preparation for the Confirmation Hearing, Gregory solicited the necessary votes and filed the certification of ballots on February 20, 2020. (Certificate as to Balloting Accepting and Rejecting the Chapter 11 Plan, Feb. 20, 2020, ECF No. 81.). One day prior to the date the certification of ballots was filed, and seven days prior to the Confirmation Hearing, the SBRA became effective. [Pub. L. No. 116-54 § 5, 133 Stat. 1079, 1087](#). Congress made clear that the changes to the Code set forth in the SBRA were intended to allow small businesses and individuals to take advantage of a chapter 11 process that would be less costly and time consuming than the current process. H.R. REP. NO. 116-171, at 2 (2019).

At the Confirmation Hearing, the Court advised the parties of the SBRA and offered the Debtor the opportunity to proceed with the hearing as scheduled or the Court would adjourn the hearing for a short time to allow the Debtor to determine whether she wished to amend her petition. The Debtor opted to have the Confirmation Hearing adjourned. On March 3, 2020, the Debtor filed a letter with the Court advising that she intended to amend her petition. (Letter to Court regarding Debtor's Intention to Amend Her Petition, Mar. 3, 2020, ECF No. 85.).

On March 6, 2020, the Debtor amended her petition to designate herself as a small business debtor under the newly amended definition, and to elect to proceed as a subchapter V debtor. (Aff. Pursuant to E.D.N.Y. LBR 1009-1(a), Mar. 6, 2020, ECF No. 87.). On March 6, 2020, the United States Trustee (the "U.S. Trustee") appointed Salvatore LaMonica, Esq., as the subchapter V trustee (the "Trustee") pursuant to [11 U.S.C. § 1183\(a\)](#). (Notice of Appointment of Subchapter V Trustee, Mar. 6, 2020, ECF No. 88.). On March 10, 2020, the Court entered a scheduling order setting a status conference for April 1, 2020 and setting the Debtor's deadline to file a plan for June 8, 2020. (Order Scheduling Status Conference Under [11 U.S.C. § 1188](#), Mar. 9, 2020, ECF No. 91.).

On March 9, 2020, Gregory filed a motion objecting to the Debtor's designation as a subchapter V debtor (the "Motion"), raising a wide range of objections to the Debtor's designation, including objections based on prejudice to Gregory's vested rights in this case, as the Court was at the point of holding a hearing to confirm Gregory's proposed plan. (Mot. to Object to Debtor's Designation as a Sub-Chapter V, 16:6, Mar. 10, 2020, ECF No. 92.).¹ In addition, Gregory asserts that the Debtor is not eligible for subchapter V relief because she does not fit within the definition of "small business debtor" as set forth in newly amended [11 U.S.C. § 101\(51D\)\(A\)](#). *Id.* 18-19:7-8. Even if she fits within the definition, Gregory asserts that the Debtor should be judicially estopped from amending her designation based on her prior representations to Gregory as well as her prior statements in the prior bankruptcy filings and the Current Case. (Reply in Connection with Objection to Debtor's Designation as a Sub-Chapter V Debtor, 8:4, Mar. 26, 2020, ECF No. 99.). Gregory also argues that the Debtor cannot modify the Mortgage pursuant to [11 U.S.C. § 1190\(3\)](#) because the Debtor used the Mortgage proceeds to purchase a residence, not to invest in Harbor Rose. (Mot. to Object to Debtor's Designation as a Sub-Chapter V, 32:13, Mar. 10, 2020, ECF No. 92.).

*12 On March 19, 2020 the U.S. Trustee filed an Objection ("U.S. Trustee Objection") to the Debtor's election to be treated as a subchapter V case, raising timing and technical issues. (United States Trustee's Objection to Debtor's Election to Be Treated as a Subchapter V Case, Mar. 19, 2020, ECF No. 96.). On March 24, 2020, the Debtor filed her opposition to the Motion (Debtor's Objection to Mot. of Gregory Funding for Order Denying & Voiding Debtor's Election as a Sub-Chapter V Debtor, Mar. 24, 2020, ECF No. 97.), and Response to the U.S. Trustee Objection. (Resp. to United States Trustee's Objection to Debtor's Election to Be Treated as a Subchapter V Case, Mar. 24, 2020, ECF No. 98.). In her submissions, the Debtor pointed to her professional experience in the hotel business, the unique characteristics of the Property, her consistent use of the Property as a bed and breakfast, and the improvements the Debtor made to the Property as sufficient grounds for finding that the Debtor is a small business debtor within the definition of [11 U.S.C. § 101\(51D\)\(A\)](#), and that she qualified to proceed as a subchapter V debtor.

On March 30, 2020, the Debtor filed a letter indicating that since the Debtor filed her amended petition to make a retroactive election under subchapter V, the Debtor has been unable to have any meaningful negotiations with Gregory. (Letter Pursuant to [11 U.S.C. § 1188\(c\)](#) Outlining Efforts by the Debtor to Attain Consensual Plan of Reorganization, Mar. 30, 2020, ECF No. 101.). The Debtor further notes that the Trustee has attempted to persuade Gregory to negotiate with the Debtor, to no avail. *Id.* On April 1, 2020, the Court held a telephonic hearing on the Motion and the U.S. Trustee's Objection, which was attended by the Debtor's counsel, Gregory's counsel, the U.S. Trustee and the subchapter V Trustee. Thereafter, the matter was marked submitted.

Discussion

[4] On August 23, 2019, the President signed the SBRA into law, which became effective on February 19, 2020. [Pub. L. No. 116-54 § 5, 133 Stat. 1079](#), 1087. The SBRA is codified in [11 U.S.C. §§ 1181-1195](#), and certain Bankruptcy Code sections that existed prior to the SBRA have been modified as well. *Id.* By enacting this law, Congress intended to streamline the reorganization process for small business debtors because small businesses have often struggled to reorganize under chapter 11. H.R. REP. NO. 116-171, at 1-2 (2019).

Of pertinence, the Report from the House Committee on the Judiciary contains, *inter alia*, the following statement:

Small businesses--typically family-owned businesses, startups, and other entrepreneurial ventures—“form the backbone of the American economy.” By their very nature, however, the longevity of these businesses is limited. According to the Small Business Administration Office of Advocacy, approximately 20 percent of small businesses survive the first year, but by the five-year mark only 50 percent are still in business and by the ten-year mark only one-third survive. Notwithstanding the 2005 Amendments, small business chapter 11 cases continue to encounter difficulty in successfully reorganizing...the legislation allows these debtors “to file bankruptcy in a timely, cost-effective manner, and hopefully allows them to remain in business” which “not only benefits the owners, but employees, suppliers, customers, and others who rely on that business.”

Id. at 2. (Citing the Unofficial Transcript of Oversight of Bankruptcy Law and Legislative Proposals: Hearing Before the Subcomm. on Antitrust, Commercial, & Admin. Law of

the H. Comm. on the Judiciary, 116th Cong. 27 (2019) (on file with H. Comm. on the Judiciary staff)).

*13 Newly amended [11 U.S.C. § 101\(51D\)\(A\)](#) of the Bankruptcy Code defines a “small business debtor”, in part, as “...a person engaged in commercial or business activities ... that has aggregate noncontingent liquidated secured and unsecured debts as of the date of the filing of the petition ... in an amount not more than \$2,725,625... not less than 50 percent of which arose from the commercial or business activities of the debtor.” [11 U.S.C. § 101\(51D\)\(A\)](#).² The definition of “small business” excludes debtors whose primary business is owning “single asset real estate.” *Id.*

Prior to enactment of the SBRA, the only statutory provision the Debtor could have considered to modify the Mortgage was

[11 U.S.C. § 1123\(b\)\(5\)](#). This section permits chapter 11 debtors to propose a plan that modifies the rights of holders of secured claims “...other than a claim secured only by a security interest in real property that is the debtor's principal residence.” [11 U.S.C. § 1123\(b\)\(5\)](#).³

The SBRA has given small business debtors who designate themselves as subchapter V debtors another tool to be used when proposing a plan. [Section 1190\(3\)](#) provides as follows:

A plan filed under this subchapter—

(3) notwithstanding [section 1123\(b\)\(5\)](#) of this title, may modify the rights of the holder of a claim secured only by a security interest in real property that is the principal residence of the debtor if the new value received in connection with the granting of the security interest was

(A) not used primarily to acquire the real property; and

(B) used primarily in connection with the small business of the debtor.

[11 U.S.C. § 1190\(3\)](#).

[5] [6] Furthermore, a trustee will be appointed in every subchapter V case. The subchapter V trustee will act as a fiduciary for creditors, in lieu of an appointed creditors' committee. The subchapter V trustee is also charged with facilitating the subchapter V debtor's small business reorganization and monitoring the subchapter V debtor's

consummation of its plan of reorganization.  11 U.S.C. § 1183 (a),  (b).

[7] Prior to enactment of the SBRA, small business debtors were required to file a plan of reorganization within 120 days after the order for relief, and “any party in interest” could file a plan at certain times and under certain circumstances.

 11 U.S.C. §§ 1121(b),  (c). The newly enacted law gives subchapter V debtors the exclusive right to file a plan of reorganization, which must be filed within 90 days after entry of the order for relief. 11 U.S.C. § 1189(a), (b). This plan deadline may be extended by the Court “...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).

1. Does the SBRA apply to the Debtor's case?

a. Procedural and timing issues

[8] The SBRA is silent as to whether it applies to pending cases, or only to cases *14 commenced after the effective date. In the Current Case, the Debtor did not designate herself as a small business debtor on her petition, which was filed over fifteen months prior to the effective date of the SBRA. The Debtor has since amended the petition to reflect 1) that she is a small business debtor and 2) that she seeks to proceed as a subchapter V debtor. The sole reason for filing the amended petition is to take advantage of the changes to the Bankruptcy Code and Rules pursuant to the SBRA. While the U.S. Trustee does not specifically urge the Court to find that the SBRA should only apply to cases filed after February 19, 2020, the U.S. Trustee does argue that procedural issues prevent the Debtor from electing to proceed as a subchapter V small business debtor. In the Motion, Gregory raises a wide range of objections to the Debtor's designation, including due process objections based on prejudice to Gregory's vested rights in this case, estoppel arguments, and objections based on whether the Mortgage is subject to modification under § 1190(3).

[9] According to Fed. R. Bankr. P. 1020(a), once a small business debtor designates itself in the petition, “...the status of the case as a small business case shall be in accordance with the debtor's statement under this subdivision, unless and until the court enters an order finding that the debtor's statement is incorrect.” Fed. R. Bank. P. 1020(a). The Court's finding

of incorrect designation is triggered by an objection to the designation. See *In re Angel Fire Water Co., LLC*, No. 13–10868 ta11, 2015 WL 251570, at *6 (Bankr. D. N.M. Jan. 20, 2015) (finding that because the debtor never elected to be a small business debtor and no party objected to its status, it would be inappropriate for the court to alter the debtor's statement *sua sponte*).

[10] Pursuant to Fed. R. Bankr. P. 1009(a), “[a] voluntary petition, list, schedule or statement may be amended by a debtor as a matter of course at any time before the case is closed.” However, such amendment by the debtor is not necessarily controlling. The designation by the debtor in the original petition still retains evidentiary effect as it is signed under penalty of perjury.  *In re Roots Rents, Inc.*, 420 B.R. 28, 39–40 (Bankr. D. Idaho. 2009).

As the U.S. Trustee points out, the SBRA imposes several requirements in subchapter V cases. First, a “SBRA trustee” is appointed by the U.S. Trustee, who is charged with development of a consensual plan.  11 U.S.C. § 1183(b)(7). Within 60 days of entry of the order for relief, the Court must hold a status conference with the SBRA trustee. 11 U.S.C. § 1188(a). Subsection (b) provides that the court may extend the 60-day deadline if “...the need for an extension is attributable to circumstances for which the debtor should not justly be held accountable.” 11 U.S.C. § 1188(a). Pursuant to 11 U.S.C. § 1189(b), the subchapter V debtor shall file a plan within 90 days of entry of the order for relief, “...except that the court may extend the period if the need for the extension is attributable to circumstances for which the debtor should not be justly held accountable.” 11 U.S.C. § 1189(b). In addition, the subchapter V debtor must submit a status report 14 days prior to the status conference detailing efforts to reach a consensual plan. 11 U.S.C. § 1188(c).

[11] According to the U.S. Trustee, there is no bar to applying the SBRA retroactively to cases commenced prior to February 19, 2020. However, because the order for relief in the Debtor's case was entered on October 24, 2018, the Debtor's 90-day deadline to file a plan has expired, and it does not appear that the SBRA trustee can effectively function as the facilitator *15 of a consensual plan. Furthermore, many status hearings have already taken place in this case without the participation of a subchapter V trustee. First, the Court notes that both the 90 day deadline to file a plan and the 60 day deadline to hold a status conference may be extended if the need for an extension is attributable to circumstances for which the

debtor should not be justly held accountable. Given that the Debtor's case was filed over fifteen months ago, the Court finds that to argue the Debtor should have complied with the procedural requirements of a law that did not exist is the height of absurdity. The Debtor is not required to comply with deadlines that clearly expired before the Debtor could have elected to proceed as a subchapter V debtor.

In one of the very few written decisions regarding the SBRA, the Bankruptcy Court found that any practicality and scheduling issues arising from an SBRA designation in a case commenced prior to the effective date of the SBRA, while they might result in redundant hearings or the “procedurally awkward” process of resetting deadlines, did not pose an absolute bar to retroactive application of the SBRA. *See*

In re Progressive Solutions, Inc., No. 8:18-bk-14277-SC, 2020 WL 975464, at *4 (Bankr. C.D. Cal. February 21, 2020) (The United States Trustee raised objections on several grounds related to practicality and scheduling issues which the court overruled. The court ultimately permitted the resetting or rescheduling of these procedural matters “...in order to provide due process to all parties involved, unless vested rights of parties would be abridged or otherwise prejudiced.”).

Armed with this case law and since there is no prohibition provided by Congress, the Court finds that it is within the Court's discretion to reset the timelines to allow the Debtor to avail herself of the newly enacted law that was not at her disposal when she filed the Current Case. Therefore, the Court overrules any objections raised by the U.S. Trustee or Gregory based on procedural or timing issues imposed by the SBRA.

b. Gregory's substantive rights

[12] Gregory also argues that retroactive application of the SBRA to the Debtor's case is impermissible because it would be prejudicial to Gregory with respect to its “vested rights.” Gregory interprets vested rights to mean prior orders issued by this Court permitting Gregory to file its own plan and approving Gregory's disclosure statement, along with the Court's finding that the Debtor's proposed disclosure statement was patently unconfirmable. However, an analysis of Gregory's argument and applicable case law leads the Court to a different conclusion.

Both Gregory and the U.S. Trustee acknowledge that there is no statutory prohibition to applying the SBRA to cases that

were pending prior to the effective date of this legislation. The few cases that discuss this issue agree that while there is a presumption against retroactivity, this presumption applies to “ ‘new provisions affecting contractual or property rights, matters in which predictability and stability are of prime importance.’ ” *In re Moore Props. of Person Cty., LLC*, No. 20-80081, 2020 WL 995544, at *3 (Bankr. M.D.N.C.

February 28, 2020) (citing *Landgraf v. USI Film Products*, 511 U.S. 244, 271, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994) (other citations omitted)). As Judge Kahn noted, and this Court agrees, subchapter V incorporates many of the provisions already applicable to small business debtors. *In re Moore Props. of Person Cty., LLC*, 2020 WL 995544, at *4, n.10. At least one other court considering this issue has

drawn the same conclusion. **16 In re Body Transit, Inc. d/b/a Rascals Fitness*, 613 B.R. 400, 407–08, 2020 WL 1486784, at *6 (Bankr. E.D. Pa. 2020) (holding that “...in general, the new subchapter V provisions do not impair the vested property interests of creditors and, therefore, the concerns supporting application of the canon of statutory construction disfavoring the retroactive application of new law are absent.”). In addition, the amendment of the definition

of “small business debtor” in 11 U.S.C. § 101(51D)(A) of the Bankruptcy Code did not appear to affect the contractual or vested property rights of parties that existed prior to the effective date of the SBRA. *In re Moore Props. of Person Cty., LLC*, 2020 WL 995544, at *4, n.10.

In discussing the applicability of the SBRA to a pending bankruptcy case, Judge Kahn in *In re Moore Props. of Person Cty., LLC* relied on guidance from the Supreme Court, which considered the issue of retroactivity in the context of a newly

enacted bankruptcy statute. *Id.* at *3. (citing *United States v. Sec. Indus. Bank*, 459 U.S. 70, 103 S.Ct. 407, 74 L.Ed.2d 235 (1982)). The Court in *Sec. Indus. Bank* was called on to determine whether § 522(f) of the 1978 Bankruptcy Act, which provided debtors with a vehicle to remove certain liens that attached to property of the debtor's estate prepetition,

violated the Fifth Amendment. *United States v. Sec. Indus. Bank*, 459 U.S. 70, 103 S.Ct. 407, 74 L.Ed.2d 235 (1982). Instead of dealing with this Constitutional clash head-on, the Supreme Court held that this provision was not intended to apply to property interests created before the enactment of the 1978 Bankruptcy Act. *Id.* The Court acknowledged that the Congressional authority to enact legislation “...has been regularly construed to authorize the retrospective impairment

of contractual obligations.” *Id.* at 74, 103 S.Ct. 407. (citing *Hanover National Bank v. Moyses*, 186 U.S. 181, 188, 22 S.Ct. 857, 46 L.Ed. 1113 (1902)). However, the Supreme Court distinguished between using that authority to modify existing contractual obligations and using it to “defeat traditional property interests.” *Id.* at 75, 103 S.Ct. 407. The Court in *Landgraf v. USI Film Products* further taught that “[t]he presumption against statutory retroactivity is founded upon elementary considerations of fairness dictating that individuals should have an opportunity to know what the law is and to conform their conduct accordingly,” and the principle that “settled expectations should not be lightly disrupted.” *Landgraf v. USI Film Products*, 511 U.S. 244, 245, 265, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994). After analyzing the Supreme Court’s rulings, Judge Kahn concluded that in the case before him, there were no taking or retroactivity concerns which were the focus of the Supreme Court in *Landgraf* and *Security Indus. Bank. In re Moore Props. of Person Cty., LLC*, 2020 WL 995544, at *4.

Judge Kahn did single out 11 U.S.C. § 1190(3) as a potential area of concern if it were to be retroactively applied to affect a property right existing prior to the enactment of the SBRA, but he did not make a ruling as to whether this provision violated the Fifth Amendment prohibition against taking property without compensation. *Id.* at *4, n.14.

While Gregory speaks in terms of damage to its vested rights resulting from the progress made in the Debtor’s bankruptcy case, Gregory is focused on the wrong question. The correct question to ask is whether designation of the Debtor as a subchapter V debtor will impair Gregory’s rights as they existed prior to the effective date of the SBRA. Clearly, the amendment to the definition of “small business debtor” does not amount to a taking of property. The SBRA merely amends the definition of small business debtor to ensure that certain debtors can avail themselves of a *17 less costly and time-consuming path to reorganization that befits the family – owned businesses and other “Main Street” businesses that are currently in such dire need of relief. See *In re Moore Props. of Person Cty., LLC*, 2020 WL 995544, at *5 n.10 (Bankr. M.D.N.C. February 28, 2020) (“...the SBRA [amends] the definition of ‘small business debtor’ under chapter 1, but that revision does not affect contractual or vested property rights any more than the general availability of subchapter V.”).

[13] The more difficult question is whether 11 U.S.C. § 1190(3) should apply to property rights which vested prior to the effective date of the SBRA, such as Gregory’s rights as mortgagee. In order to answer this question, the nature of Gregory’s rights must be defined. At the time Gregory became the mortgagee with respect to the Property, Gregory was granted a bundle of rights under New York State law.

Butner v. U.S., 440 U.S. 48, 55, 99 S.Ct. 914, 59 L.Ed.2d 136 (1979). The Note and Mortgage afforded *in personam* rights against the Debtor including a right to proceed against the Debtor to collect the amount due and owing under the Note. In addition, Gregory was granted *in rem* rights to proceed against the Property and seek a sale of the Property. The proceeds of the sale would then be applied against the amount due and owing. The right to sell the Property would generate only an amount of money that reflects the value of the Property as established at a free and fair auction sale. To the extent the sale left a deficiency, Gregory would have been entitled to proceed against the Debtor for the deficiency. However, because the Debtor previously received a discharge of her personal obligations, Gregory is left with only its rights against the Property under New York State law. In this unique case, Gregory can no longer seek entry of a judgment against the Debtor personally because of the discharge entered in the First Case. It should also be noted that Gregory may still avail itself of all rights granted to a secured creditor under the Code that have not been amended by the SBRA.

[14] [15] The exception to the anti-modification provision permits a debtor to modify the rights of certain mortgagees by allowing the debtor to bifurcate a claim into a secured and unsecured claim based on the value of the underlying collateral. 11 U.S.C. § 1190(3). Since Gregory can look solely to the value of the Property to satisfy the Debtors obligation as a result of the discharge the Debtor received in the First Case, application of 11 U.S.C. § 1190(3) will not deprive Gregory of any rights Gregory retained under state law. Even if the Note had not been discharged in the First Case, the Court is not convinced that 11 U.S.C. § 1190(3) would raise sufficient Constitutional doubts to warrant only prospective application. The Bankruptcy Code works to abrogate contractual rights, but does not affect the vested property rights of mortgagees. As the Supreme Court stated in *Security Indus. Bank*, “our cases recognize, as did the common law, that the contractual right of a secured creditor to obtain repayment of his debt may be quite different in legal contemplation from the property right of the same creditor in the collateral. Compare *Hanover National Bank*

v. Moyses, supra, with  *Louisville Joint Stock Land Bank v. Radford*, [295 U.S. 555, 55 S.Ct. 854, 79 L.Ed.2d 1593 (1935)] *supra*, and  *Kaiser Aetna v. United States*, 444 U.S. 164, 100 S. Ct. 383, 62 L. Ed.2d 332 (1979).”  459 U.S. 70, 75, 103 S.Ct. 407. Consequently, applying § 1190(3) to the modify the Mortgage would not violate Gregory's Fifth Amendment rights.

This still leaves the Court to consider whether applying the SBRA to the Debtor's *18 case is prejudicial based on the history of this case, including the fact that the Court had previously rejected the Debtor's proposed plan and was poised to rule on whether to confirm Gregory's proposed plan. To this Court, this question does not raise Constitutional issues, nor does it require the Court to treat the rulings in the Debtor's case as “vested” rights. Until a plan is confirmed no property rights can be said to have vested in either the Debtor or Gregory. What Gregory is alluding to is whether by permitting the Debtor to elect treatment as a subchapter V debtor would cause prejudice to Gregory.

As Judge Clarkson stated in  *Progressive Solutions*, he would consider whether “...other events occurring during the pendency of the present case ... would be disturbed by the designation of the case as a Subchapter V case.”

 *In re Progressive Solutions, Inc.*, 2020 WL 975464, at *4.

Similarly, in  *In re Body Transit, Inc. d/b/a Rascals Fitness*, Judge Frank took into consideration whether permitting the debtor to elect treatment as a subchapter V debtor would unduly prejudice the objecting party.  *In re Body Transit, Inc. d/b/a Rascals Fitness*, 613 B.R. at 408–09. Given that subchapter V was not available to the Debtor on the Petition Date and the Debtor has made very clear from the outset the nature of Property as a business, the Court will not penalize the Debtor because after careful analysis by Congress the law has been amended to address the needs of debtors that engage in the type of business she operates. These types of debtors who are willing to risk everything to start and maintain their own businesses should not be penalized, rather, they should be applauded. Gregory will retain many of the rights it had at the inception of the case, any delay caused by this ruling is not sufficiently prejudicial to Gregory, given the current economic conditions. For these reasons, the Court finds that the SBRA applies to the Debtor's case in its totality.

2. Does the Debtor fit within the definition of a “small business debtor”?

[16] As previously stated, the SBRA amended the definition of “small business debtor”, in part, to provide that it is “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 ... in an amount not more than \$2,725,625... not less than 50 percent of which arose from the commercial or business activities of the debtor.”  11 U.S.C. § 101(51D)(A). The definition of “small business debtor” excludes debtors whose primary business is owning “single asset real estate.” *Id.*

[17] The Debtor listed on Schedule D filed on the Petition Date the Mortgage in the amount of \$1,5000.000.00. This debt combined with the other secured and unsecured debts totals \$1,562.182.00 which is within the threshold statutory threshold of  § 101(51D). What remains to be determined is whether more than 50% of the Debtor's debts rose from her commercial or business activities, which was not part of the calculation when determining whether a debtor was a small business debtor prior to the effective date of the SBRA.

Since there is no statutory definition of what constitutes “commercial or business activities,” Gregory looks to the definition of “consumer debt” to assist in determining what types of debt fit within this new description. A consumer debt is a debt “...incurred by an individual primarily for a personal, family, or household purpose.”  11 U.S.C. § 101(8). “Debt” means “liability on a claim,”  11 U.S.C. § 101(11) (1982), and “claim,” in turn, is broadly defined as any “right to payment, whether or not such *19 right is ... secured, or unsecured.”  11 U.S.C. § 101(4)(A).

Gregory correctly points out that this Court has previously held that a residential mortgage fell within the definition of “consumer debt.”  *In re Lemma*, 393 B.R. 299 (Bankr. E.D.N.Y. 2008). For the parties' understanding, there was no allegation in the  *Lemma* case that the debtors used their residence for anything other than their personal residence.

Other courts have drawn the same conclusion.  *In re Kelly*, 841 F.2d 908, 912 (9th Cir. 1988) (recognizing that “[t]he statutory scheme so clearly contemplates that consumer debt include debt secured by real property that there is no room

left for any other conclusion.”); and *In re Hall*, 258 B.R. 45, 50 (Bankr. M.D. Fla. 2001) (a purchase money mortgage on a residence is a consumer debt). The same could be true of HELOCs, depending upon the use of the mortgage proceeds.

See *In re Naut*, No. 07-20280 (REF), 2008 WL 191297, at *6 (E.D. Pa. Jan. 22, 2008) (holding that the debt was consumer debt because virtually all the proceeds from the refinancing and second mortgage debts were used to purchase and improve the property, not for any business purpose.);

Cox v. Fokkena (In re Cox), 315 B.R. 850, 8-9 (8th Cir. BAP 2004) (despite the debtor's contention that they bought their home for investment purposes, the record revealed that the debt fit squarely within the definition of a consumer debt because the proceeds were used to complete the construction of and furnish the family's home.).

[18] [19] However, the fact that a debtor incurs mortgage debt to buy a residence does not automatically mean that the debt is consumer debt. “The test for determining whether a debt should be classified as a business debt, rather than as a consumer debt, is whether it was incurred with an eye toward profit...[c]ourts must look at the substance of the transaction and the borrower's purpose in obtaining the loan, rather than merely looking at the form of the transaction.” *In re Martin*, No. 12-38024, 2013 WL 5423954, at *6 (S.D. Tex. Sept. 26, 2013). See also *In re Booth*, 858 F.2d 1051, 1055 (5th Cir. 1988) (a debt incurred with an eye toward profit is a business debt, rather than consumer debt.).

Gregory asserts that the form of the transaction was solely a residential loan for the purposes of purchasing a primary residence, not operating a business. Gregory points to the Mortgage whereby the Debtor declared, “I will occupy the Property and use the Property as my principal residence within 60 days after I sign this Security Instrument.” (Emergency Mot. to Prohibit Use of Cash Collateral. & for Relief from Auto. Stay, Exh. A, 8:6, Nov. 12, 2018, ECF No. 17.). Gregory also directs the Court's attention to the fact that Harbor Rose was not formed until six years after the Mortgage was originally granted, and any subsequent change in the Debtor's use of the Property does not change the nature of the debt. Gregory asserts that none of the Debtor's debts, let alone 50% of the debts, are derived from the operation of Harbor Rose and none of the Mortgage proceeds were used to renovate the Property for the benefit of the business. Finally, Gregory emphasizes the Debtor's previous characterization of the Mortgage debt as consumer debt in her prior bankruptcy filings and the Current Case as

grounds for finding that the Debtor is not a small business debtor within the definition of 11 U.S.C. § 101(51D)(A).

In response, the Debtor points to her long history in the hotel business, her stated need to create a business that would keep her close to her adopted daughter, and the very unique characteristics of the Property to support a finding that the *20 Mortgage debt was indeed incurred for commercial purposes. The Debtor purchased a six-bedroom historic mansion with the intention of converting this large house into a guest house. From the outset, the Debtor asserts she rented the guest rooms by advertising on various websites. The Debtor also invested in the Property by installing a new septic system to accommodate her business. Six year after purchasing the Property, she decided to register the Property as the first legal bed and breakfast in the Town of Huntington.

While the Property is clearly the Debtor's primary residence, the primary purpose of purchasing the Property appears to have been to own and operate a bed and breakfast. The Debtor's goal was to combine her business with the needs of her life as a single parent. The fact that the Debtor resides at the Property does not control whether the Mortgage is in the nature of a debt which arose from the commercial or business activities of the Debtor. In fact, the Debtor's affidavit in support of her opposition to the Motion indicates that the Town of Huntington will not grant a permit to run a bed and breakfast if the owner/ operator does not live inside the facility itself.

Case law supports this finding. See *In re Martin*, No. 12-38024, 2013 WL 5423954, at *6 (Bankr. S.D. Tex. Sept. 26, 2013) (“[c]ourts must look at the substance of the transaction and the borrower's purpose in obtaining the loan, rather than merely looking at the form of the transaction...”). Based on the case law and the relevant facts, the Court finds that the Debtor fits within the definition of a small business debtor under the SBRA.

3. Does judicial estoppel apply to preclude the Debtor from claiming that the Mortgage debt arose from commercial or business activities?

As an alternative argument, Gregory asserts that the Debtor is judicially estopped from asserting that the Mortgage debt arose from her commercial or business activities. Gregory points out that the Debtor's current position that her debts are not primarily consumer debts is clearly inconsistent with her

earlier position that those same debts are primarily consumer debts in her prior bankruptcy filings and in the original schedules filed in the current case.

[20] A debtor may be judicially estopped from changing its legal position when a court has adopted and relied on it and the party claiming judicial estoppel suffers an unfair detriment as a result, unless mistake or inadvertence is an applicable defense. See *New Hampshire v. Maine*, 532 U.S. 742, 742-743, 121 S.Ct. 1808, 149 L.Ed.2d 968 (2001) (“[W]here a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him.”) (citing *Davis v. Wakelee*, 156 U.S. 680, 689, 15 S.Ct. 555, 39 L.Ed. 578 (1895)). See also *Ahrens v. Perot Sys. Corp.*, 205 F.3d 831, 833 (5th Cir. 2000) (“Judicial estoppel applies to protect the integrity of the courts--preventing a litigant from contradicting its previous, inconsistent position when a court has adopted and relied on it.”) (other citations omitted)). Inadvertence can be shown where the party in question either lacks sufficient knowledge of the undisclosed claims or would have no motive for their concealment. *Superior Crewboats, Inc. v. Primary P & I Underwriters (In re Superior Crewboats, Inc.)*, 374 F.3d 330, 335 (5th Cir. 2004) (citing *In re Coastal Plains, Inc.*, 179 F.3d 197, 210 (5th Cir. 1999)).

*21 [21] The Supreme Court in *New Hampshire v. Maine* recognized that “[t]he circumstances under which judicial estoppel may appropriately be invoked are probably not reducible to any general formulation of principle.” *New Hampshire v. Maine*, 532 U.S. at 750, 121 S.Ct. 1808. However, a general test for determining when judicial estoppel may be invoked has been developed, as follows: (i) a party's later position is clearly inconsistent with its earlier position, (ii) the party's former position has been accepted in some way by the court in the earlier proceeding, such that “judicial acceptance of an inconsistent position in a later proceeding would create ‘the perception that either the first or the second court was misled,’ ” and (iii) the “party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.” *New Hampshire v. Maine*, 532 U.S. at 750-51, 121 S.Ct. 1808.

[22] Judicial estoppel has been applied in the bankruptcy context where a debtor changes its designation on the petition. See *In re Save Our Springs (S.O.S.) Alliance, Inc.*, 393 B.R. 452 (Bankr. W.D. Tex. 2008) (judicial estoppel prevented the debtor from amending its petition to designate itself as a non-small business debtor because it was inconsistent with its original designation and the debtor had already enjoyed the benefits of expedited proceedings as a small business debtor.).

Relying on *In re Jones*, 556 B.R. 327 (Bankr. E.D. Mich. 2016) and *In re Orlando*, No. 17-41616 (CJP), 2018 WL 3637231 (Bankr. D. Mass. July 30, 2018), Gregory asserts that bankruptcy courts have adopted judicial estoppel to bar debtors from changing the description of their debts from consumer debts to non-consumer debts. In *In re Jones*, after the U.S. Trustee moved to dismiss the chapter 7 debtor's case under *section 707(b) of the Bankruptcy Code*, the debtor changed her response and indicated that her debts were “not primarily consumer debts, but were not primarily business debts either.” *In re Jones*, 556 B.R. 327 at 330.

The court in *In re Jones* noted that the timing of the debtor's change was indicative of “gamesmanship” on the part of the debtor in order to render *section 707(b)* inapplicable and escape possible dismissal of the case. *Id.* at 335. Similarly, in *In re Orlando*, the bankruptcy court found that the debtor's change in his position regarding the nature of his debts from consumer debts to business debts after the U.S. Trustee filed a motion to dismiss the debtor's case under *11 U.S.C. § 707(b)* was a “late strategy change” instead of a mistake or inadvertence. *In re Orlando*, 2018 WL 3637231, at *4.

[23] In applying the above factors to the Debtor's case, the Court finds that judicial estoppel does not bar the Debtor's change in description of the nature of her debts. First, it is not clear that her change of description of her Mortgage debt as a business debt is inconsistent with the Debtor's prior description of her debts. The Debtor referred to the Property as a bed and breakfast in the Current Case. By way of example, when the Debtor was asked “What is the property?” she checked the box “Other” and wrote “B&B Inn” on Schedule A/B instead of checking the box for “Single-family”

home. (Case No. 8-18-77193-reg, ECF No.1.). In Schedule C, the Debtor claimed an exemption for the Property pursuant to 11 U.S.C. § 522(b)(2) wherein she described it as “Bed & Breakfast.” *Id.* Again, on Schedule D, the Debtor described the Property as a “Bed and Breakfast.” *Id.* The Debtor also lists her income and expenses from the operations of Harbor Rose in her Statement of Current Monthly Income. *Id.* ECF No. 26. *22 These representations by the Debtor reflect the hybrid nature of the Property, which is rare. The Property is integral to the business operations, and the Court finds that the Debtor was attempting to be clear and forthright in her representations regarding the Property and the Mortgage.

Second, the Court took no specific action in the Current Case or in the prior bankruptcy filings based on a description of the Mortgage debt as consumer debt. This Court was not misled about the nature of the Mortgage which encumbered the Property. Third, the Debtor cannot be said to have taken unfair advantage over Gregory by changing the description of her debts to fit within a statute that did not exist at the time of the Petition Date. It is more akin to an innocent choice by the Debtor than gamesmanship. The Debtor's change in status was not made in response to a 11 U.S.C. § 707(b) motion to dismiss by the U.S. Trustee, nor was it done with “the obvious motive” to make a certain law inapplicable. In fact, the law was not applicable at the time of the Petition Date because it did not exist. The SBRA was designed to protect small business debtors by affording them the right to reorganize in a timely, cost-effective manner. The Court also takes into consideration whether the Debtor's change in description of her debt, if permitted, would be unfairly detrimental to Gregory. Gregory points to the unfair burden and delay imposed, as Gregory was poised to confirm its proposed plan of liquidation that would have resulted in a sale of the Property and payment to Gregory from the sale proceeds. While the Court recognizes that there will be some prejudice to Gregory if the Debtor is permitted to recharacterize her debt, the Debtor must still satisfy the requirements of subchapter V in order to confirm a plan. There is no guarantee that the Debtor will be successful in this attempt, but given the current economic climate, it is doubtful that a sale of the Property could take place any time in the near future. Given the unique circumstances of this case, the prejudice to Gregory is minimized.

Finally, Gregory relies on case law where courts have judicially estopped debtors from changing their representations in petitions and schedules, made under

penalties of perjury, when those changes were made because of changed circumstances in their bankruptcy cases. *See In re Osborne*, 490 B.R. 75 (Bankr. S.D.N.Y. 2013) (Court applied judicial estoppel where the debtors moved to vacate the discharge and dismiss their chapter 7 case following the discovery of a previously undisclosed asset.). Here, the Debtor is not reacting to the discovery of some wrongdoing she may have committed, nor did the Debtor make false claims in her petition. The Debtor is merely amending her petition and avail herself of the right created by a statute that did not exist as of the time of Petition Date. The cases cited by Gregory have a common denominator that is inapposite to the present case; they did not concern a newly enacted law that is designed to protect debtors like the Debtor in the Current Case, who are small business owners.

For all the reasons stated herein, this Court finds that the instant case comes within the purview of 11 U.S.C. § 101(51D)(A) because the primary use of the Property was, and remains, for the operation of a bed and breakfast, rather than as a principal residence. The fact that the Harbor Rose entwines the Debtor's personal and business life does not control whether the Mortgage is a business debt or a consumer debt. In essence, the Debtor is not changing her position; the significant changes to the Bankruptcy law enable the Debtor to take advantage of a new *23 definition of “small business debtor” in order to attempt to save her business.

4. Is the Debtor entitled to utilize 11 U.S.C. § 1190(3)?

Both the Debtor and Gregory agree that in order to propose a plan and successfully exit bankruptcy, the Debtor must be permitted to modify the Mortgage. Prior to the effective date of the SBRA, the only statutory provision the Debtor could rely on to modify the Mortgage was 11 U.S.C. § 1123(b)(5). This section permits chapter 11 debtors to propose a plan that modifies the rights of holders of secured claims “...other than a claim secured only by a security interest in real property that is the debtor's principal residence...” 11 U.S.C. § 1123(b)(5). The Debtor's proposed plan sought to utilize this provision to modify the Mortgage, but this Court found that because the Debtor uses the Property for both business and residential purposes, the Property is the Debtor's principal residence. *See In re Harriman*, 2014 WL 1312103 at *3 (Bankr. N.D. Cal.) (citing *In re Wages*, 508 B.R. 161, 168 (9th Cir. BAP 2014)). Therefore, the Debtor was

prohibited from modifying the Mortgage under the law as it existed at the time.

The SBRA has given small business debtors who designate themselves as subchapter V debtors another tool to be used when proposing a plan. § 1190(3) provides as follows:

A plan filed under this subchapter—

(3) notwithstanding section 1123(b)(5) of this title, may modify the rights of the holder of a claim secured only by a security interest in real property that is the principal residence of the debtor if the new value received in connection with the granting of the security interest was

- (A) not used primarily to acquire the real property; and
- (B) used primarily in connection with the small business of the debtor.

11 U.S.C. § 1190(3).

Although there are three decisions of record regarding application of the SBRA, only *In re Moore Props. of Person Cty., LLC* mentioned this particular provision. The *In re Moore Props. of Person Cty., LLC* court found that it did not apply in the case before it because the debtor was not an individual. *In re Moore Props. of Person Cty., LLC*, 2020 WL 995544, at *4 n.14. In dicta, the court did state that if this section did apply, the court would consider whether the application of 11 U.S.C. § 1190(3) constituted an impermissible taking. *Id.* Therefore, the Court cannot look to prior case law to interpret this section.

[24] [25] [26] [27] This Court shall commence its analysis by employing the applicable rules of statutory construction. The Court is charged with interpreting all federal and state statutes according to their plain meaning.

Tyler v. Douglas, 280 F.3d 116, 123 (2d Cir. 2001), cert. denied, 536 U.S. 906, 122 S.Ct. 2361, 153 L.Ed.2d 182 (2002). In determining its degree of ambiguity or clarity, courts cannot examine statutory language in isolation.

Robinson v. Shell Oil Co., 519 U.S. 337, 341, 117 S.Ct. 843, 136 L.Ed.2d 808 (1997). The Court must determine the specific context in which the language appears, and the statutory scheme's broader framework in order to preserve the coherence and consistency of the statutory scheme. *U.S. v. Ron Pair Enters., Inc.*, 489 U.S. 235, 240-41, 109 S.Ct.

1026, 103 L.Ed.2d 290 (1989) (citing *Northern Pipeline Construc. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 52-53, 102 S.Ct. 2858, 73 L.Ed.2d 598 (1982)). “[I]n matters of statutory interpretation, the plain meaning of statutory language is often illuminated by considering not only *24 the particular statutory language at issue, but also the structure of the section in which the key language is found, and the design of the statute as a whole and its object.” *Pellegrino v. United States Transp. Sec. Admin.*, 896 F.3d 207, 216 n.10 (3d Cir. 2018) *reh'g en banc granted*, 904 F.3d 329 (3d Cir. 2018).

[28] [29] Armed with these principles, the Court will undertake its interpretation of this section. First, unlike 11 U.S.C. § 1123(b)(5), which precluded modifications of claims secured by mortgages on the debtor's principal residence, 11 U.S.C. § 1190(3) specifically permits the modification of claims secured by mortgages on the debtor's principal residence. Therefore, the plain language of the first paragraph of 11 U.S.C. § 1190(3) does not act as an impediment to the Debtor's attempt to modify the Mortgage. Indeed, the Property falls squarely within this paragraph.

Second, subparagraphs (A) and (B) do not bar the Debtor outright from using this provision to modify the Mortgage. Subparagraphs (A) and (B) further limit the application of this provision to mortgage proceeds that were:

- (A) not used primarily to acquire the real property; and
- (B) used primarily in connection with the small business of the debtor.

[30] Starting with subparagraph (A), the statute reads that the mortgage proceeds cannot have been used “primarily to acquire the real property.” As a matter of common usage, the word “primarily” means “for the most part.” *Primarily*, Merriam-Webster's Law Dictionary, (last visited Apr. 9, 2020). In the context of the 1954 Internal Revenue Code, the Supreme Court held that “primarily” means “of first importance” or “principally” rather than meaning “substantial.” *Malat v. Riddell*, 383 U.S. 569, 572, 86 S.Ct. 1030, 16 L.Ed.2d 102 (1966). The phrase “real property” refers back to the real property that is the debtor's residence. In this case, the question for the Court to answer is whether the Mortgage proceeds were used primarily to purchase the Debtor's residence. Unlike 11 U.S.C. § 1123(b)(5) which took an all-or-nothing approach to loans securing the debtor's

residence, [11 U.S.C. § 1190\(3\)](#) asks the Court to determine whether the primary purpose of the mortgage was to acquire the debtor's residence.

[31] [32] Subparagraph (B) requires the Court to determine whether the mortgage proceeds were used primarily in connection with the debtor's business. Both of these subparagraphs direct the Court to conduct a qualitative analysis to determine whether the principal purpose of the debt was not to provide the debtor with a place to live, and whether the mortgage proceeds were primarily for the benefit of the debtor's business activities. This interpretation is consistent with the purpose and intent of the SBRA, which is to assist small business owners in whatever form they take, and to give them speedy access to relief via the bankruptcy process. As stated above, the Congressional intent of the SBRA was to keep small business owners in business, and to benefit the employees, suppliers, customers and others who rely on that business. A reading of this provision which takes into account the primary purpose of the mortgage debt instead of a bright-line test that would reject any business owner in the Debtor's unique position is consistent with the intent of the legislation.

[33] Clearly, some business owners, such as business owners who took out a second mortgage and used the proceeds to buy farm equipment or a taxi medallion, easily fall into this classification. However, an inflexible reading of this statute would bar legitimate business owners such as the *25 Debtor from obtaining relief under the SBRA. The Court does not find that this interpretation would be consistent with the goals of the SBRA.

[34] The Court proposes that the following factors be considered to determine whether the mortgage in question is subject to modification under this section:

1. Were the mortgage proceeds used primarily to further the debtor's business interests;
2. Is the property an integral part of the debtor's business;
3. The degree to which the specific property is necessary to run the business;
4. Do customers need to enter the property to utilize the business; and

5. Does the business utilize employees and other businesses in the area to run its operations.

In the Debtor's case, she did not purchase a residence and use one room as an office space. The Debtor bought real property and commenced using the rooms to rent and spent considerable time and resources on obtaining the proper permits to run the Property as a bed and breakfast. The primary purpose of the Property is to offer rooms for nightly fees. Harbor Rose serves a variety of guests, including guests visiting the nearby Cold Spring Harbor labs. Harbor Rose also provides holistic services to the guests staying at the Property with package services offered for additional fees. Although the Mortgage proceeds were not used to refurbish the Property or to obtain the proper zoning changes and permits, the Mortgage proceeds were used to purchase the building that houses the business run by the Debtor.

Based on its interpretation of [11 U.S.C. § 1190\(3\)](#), the Court finds that there is sufficient evidence to hold a full evidentiary hearing to determine whether the Debtor may use this statute to modify the Mortgage. Therefore, if the Debtor proposes a plan which provides for bifurcation of the Mortgage, the Court shall schedule a hearing to determine whether she may take advantage of this provision using the factors listed above, along with any additional evidence produced by the parties.

Conclusion

For all the reasons stated herein, the Court finds that the Debtor is a "small business debtor" within the purview of [11 U.S.C. § 101\(51D\)\(A\)](#) and is eligible to proceed as a subchapter V debtor in this case. Therefore, the Court overrules the U.S. Trustee Objection and overrules the objections raised by Gregory in the Motion. An order consistent with this Memorandum Decision will be entered forthwith.

All Citations

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Footnotes

- 1 Gregory has filed an Objection to Debtor's Designation as a Sub-Chapter V. ECF No. 89 and a motion seeking the same relief, ECF No. 92. The Court will refer to both filings as the Motion, ECF No. 92.
- 2 Late on the evening of March 25, 2020, the U.S. Senate unanimously passed the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) (S.3548) to combat the U.S. spread of coronavirus, which threatens to plunge U.S. into a global recession. For one year, the Act increases the eligibility threshold to file under subchapter V of chapter 11 of the Bankruptcy Code to businesses with less than \$7.5 million of debt.
- 3 As set forth in the facts, the Court ruled that because the Debtor resided at the Property, she could not modify the Mortgage under this provision.

2020 WL 7249555

United States Bankruptcy Court, W.D. Missouri.

IN RE: Kevin Lynn THURMON
and Susan Jane Thurmon, Debtors.

Case No. 20-41400-can11

Signed 12/8/2020

Synopsis

Background: Married individuals whose limited liability company (LLC) had operated two pharmacies but who had ceased operating their business, sold its assets, and retired before seeking bankruptcy relief some three months later, elected to file as subchapter V small business debtors. The United States Trustee (UST) objected to the designation and filed limited objection to confirmation of debtors' consensual plan.

Holdings: The Bankruptcy Court, [Cynthia A. Norton](#), Chief Judge, held that:

[1] as a matter of first impression for the court, debtors were not "engaged" in commercial or business activities and so were not eligible to be subchapter V small business debtors under the Small Business Reorganization Act of 2019 (SBRA), even if their LLC was still an entity in good standing under Missouri law and still owned some outstanding accounts receivable and two cars;

[2] UST effectively waived its right to request that debtors file a disclosure statement; and

[3] the proposed plan contained adequate information and so substantially complied with the section of the Bankruptcy Code governing postpetition disclosure and solicitation, even though it was not filed with a disclosure statement.

Designation objection sustained; confirmation objection overruled.

Procedural Posture(s): Objection to Confirmation of Plan; Other.

West Headnotes (12)

[1] Bankruptcy **Reorganization cases**

For purposes of the Small Business Reorganization Act of 2019 (SBRA), a "person" is defined to include individuals, partnerships, and corporations.  11 U.S.C.A. § 101(41); Pub. L. No. 116-54, 133 Stat. 1079.

[2] Bankruptcy **Reorganization cases**

Under the Small Business Reorganization Act of 2019 (SBRA), a subchapter V small business debtor is a person "engaged" in commercial or business activities, subject to certain debt limits and exclusions.  11 U.S.C.A. § 101(51D)(A); Pub. L. No. 116-54, 133 Stat. 1079.

[3] Bankruptcy **Reorganization cases**

The Coronavirus Aid, Relief, and Economic Security Act (CARES Act) temporarily increases the debt limit for "small business debtors" under the Small Business Reorganization Act of 2019 (SBRA) to \$7,500,000.  11 U.S.C.A. § 1182(1)(A); Pub. L. No. 116-54, 133 Stat. 1079; Pub. L. No. 116-136, 134 Stat. 281.

[4] Bankruptcy **Particular proceedings or issues**

Objections to debtor's designation as small business debtor under the Small Business Reorganization Act of 2019 (SBRA) is core proceeding. Pub. L. No. 116-54, 133 Stat. 1079.

[5] Bankruptcy **Evidence and fact questions**

Parties who filed Chapter 11 petition and elected small business debtor designation pursuant to the Small Business Reorganization Act of 2019 (SBRA) bore burden to prove their eligibility for such relief. Pub. L. No. 116-54, 133 Stat. 1079.

[6] **Bankruptcy** 🗝️ **Reorganization cases**

Chapter 11 debtors, married individuals whose limited liability company (LLC) had operated two pharmacies but who had ceased operating their business, sold its assets, and retired prepetition, were not “engaged” in commercial or business activities and so were not eligible to be subchapter V “small business debtors” under the Small Business Reorganization Act of 2019 (SBRA); even if debtors' LLC was still entity in good standing under Missouri law and still owned some outstanding accounts receivable and two cars, debtors were not actively and currently involved in business, as implicitly required to fall within statutory definition, because they had sold their business with no intent to return to it and were otherwise not active or involved in any commercial or business activities. 📄 11 U.S.C.A. §§ 101(51D), 1182(1)(A).

[7] **Statutes** 🗝️ **Undefined terms**

When Congress does not define a statutory term, courts rely on the word or phrase's plain meaning or common understanding.

[8] **Bankruptcy** 🗝️ **Reorganization cases**

Congress knew how to restrict recourse to the avenues of bankruptcy relief; it did not place Chapter 11 reorganization beyond the reach of a nonbusiness individual debtor.

[9] **Bankruptcy** 🗝️ **Reorganization cases**

Where bankruptcy court granted United States Trustee's (UST) objection to Chapter 11 debtors' designation as subchapter V “small business debtors,” effective as of that date, debtors would proceed as regular Chapter 11 debtors. [Fed. R. Bankr. P. 1020\(a\)](#).

[10] **Bankruptcy** 🗝️ **Confirmation; Objections**

United States Trustee (UST), in its late-filed objection to Chapter 11 debtors' consensual plan, effectively waived its right to request that they file a disclosure statement; debtors were subchapter V small business debtors when they filed the plan without a disclosure statement, as such debtors were not required to file a disclosure statement and their plan was compliant with the Bankruptcy Code and rules when filed, and UST, despite having raised a “subchapter V” eligibility objection months earlier, which the bankruptcy court ultimately sustained, never requested that the court require debtors to file a disclosure statement. [11 U.S.C.A. §§ 1125, 1181\(b\); Fed. R. Bankr. P. 1020](#).

[11] **Bankruptcy** 🗝️ **Proceedings for approval; objections**

Consensual Chapter 11 plan filed by debtors when they initially sought bankruptcy relief as subchapter V small business debtors substantially complied with the requirements of the section of the Bankruptcy Code governing postpetition disclosure and solicitation, even though it was not filed with a disclosure statement, and so the plan could be confirmed without further delay when the bankruptcy court later granted United States Trustee's (UST) objection to debtors' designation as subchapter V small business debtors, with the result that they would be proceeding as regular Chapter 11 debtors, where no party requested that the court make that section of the Code applicable, the only “adequate information” that the plan lacked related to feasibility, and the court accepted a proffer at the hearing related to feasibility. [11 U.S.C.A. §§ 1125, 1181\(b\); Fed. R. Bankr. P. 1020](#).

[12] **Bankruptcy** 🗝️ **Trustees**

Where bankruptcy court granted United States Trustee's (UST) objection to Chapter 11 debtors' designation as subchapter V “small business debtors,” with the result that, effective as of that date, debtors would proceed as regular Chapter 11 debtors, debtors were required to comply

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with the requirement to pay UST quarterly fees, and would have to include appropriate language modifying their consensual plan in their proposed order of confirmation.  11 U.S.C.A. § 1129(a)(12); Fed. R. Bankr. P. 1020.

Attorneys and Law Firms

Bradley D. McCormack, The Sader Law Firm, LLC, Kansas City, MO, for Debtors.

MEMORANDUM OPINION AND ORDER SUSTAINING THE UNITED STATES TRUSTEE'S OBJECTION TO DEBTORS' DESIGNATION AS A SUBCHAPTER V SMALL BUSINESS DEBTOR AND OVERRULING THE UNITED STATES TRUSTEE'S LIMITED OBJECTION TO CONFIRMATION

Cynthia A. Norton, U.S. Bankruptcy Judge

*1 [1] [2] [3] Under the Small Business Reorganization Act of 2019,¹ Congress authorized eligible persons² to avail themselves of streamlined chapter 11 bankruptcy relief designed to help small businesses. Subject to certain debt limits and exclusions not pertinent here,³ a subchapter V small business debtor is a person “engaged in commercial or business activities.” The United States Trustee (“UST”) objects to these individual debtors’ designation as subchapter V small business debtors because they ceased operating their business, sold the assets several months before they filed this case, and are now retired. The UST argues that the debtors therefore are not “engaged” in commercial or business activities. The debtors respond that they nonetheless qualify because the definition does not require them to be “currently engaged” in commercial or business activities. The court agrees with the UST.

Findings of Fact

[4] [5] The parties agreed to submit the issue to the court based on briefing, stipulated facts, and oral argument.⁴ The court incorporates herein the *Joint Stipulation of Facts* filed by the UST; the debtors Kevin and Susan Thurmon; the

subchapter V trustee, Matt Barberich, Jr.; and the primary secured creditor, Dollar Signs, Inc (“DSI”).⁵

Events Pre-Bankruptcy

Without repeating in whole cloth what is in the *Joint Stipulation*, the short story is that the Thurmons are married residents of Missouri. Together they own 70% of Dowel, LLC, a Missouri limited liability company. For almost four years, Dowel, LLC operated two pharmacies in Higginsville, Missouri. In April 2020, Dowel, LLC closed the pharmacies and sold almost all the business assets, leaving a substantial deficiency to DSI along with some other business debts.

*2 When the Thurmons filed a voluntary petition for chapter 11 relief some three months later, in early August 2020, Dowel, LLC had no employees, no customers, no vendors, and no intent to resume business activities. Dowel, LLC still owns some outstanding accounts receivable and two cars. DSI retains its liens on those assets. Although Dowel, LLC is not operating, it is still an entity in good standing under Missouri law.

Events Post-Bankruptcy

The Thurmons elected to file chapter 11 as subchapter V small business debtors by so designating on their petition. Their debts do not exceed \$7,500,000. Since the filing they have complied with the provisions of subchapter V by timely filing their § 1116(1) documents,⁶ the subchapter V status report,⁷ all monthly operating reports,⁸ and a plan,⁹ and by attending the subchapter V status conference.¹⁰ The plan is a consensual plan that all voting classes of impaired claims, including DSI’s, have voted to accept.

In the meantime, the UST timely objected to the Thurmons’ subchapter V small business debtor designation. DSI originally joined the UST’s objection, but has now withdrawn its joinder. The UST has also filed a limited objection to confirmation of the plan to preserve his eligibility argument. He also asserts that if the court strikes the subchapter V designation, the plan as filed cannot be confirmed since it lacks a disclosure statement and does not provide for payment of the UST quarterly fees, as would be required in a nonsubchapter V chapter 11 case.¹¹

Discussion

[6] The parties agree that the only issue regarding eligibility in this case is whether the Thurmons “are engaged in commercial or business activities” within the meaning of the Bankruptcy Code.¹² The Thurmons make three arguments: (1) the statutory definition of a small business debtor does not say that debtors must be “currently” engaged in business; (2) even if construed that way, they are engaged in business activity since Dowel, LLC is still an entity in good standing; and (3) all the cases thus far unanimously agree that debtors does not have to be “currently” engaged in business to qualify for subchapter V small business relief.

*3 The Thurmons are correct that since February 19, 2020 when subchapter V relief first became available, the only cases to decide the issue have agreed with their interpretation.¹³ The court declines to follow those cases, however. The problem with the Thurmons' position is that Congress was not writing on a blank slate when it unveiled subchapter V small business debtor relief in 2020. Several long existing provisions of the Bankruptcy Code use similar “engaged in” language, as do numerous other federal statutes.¹⁴

Under title 11, for example, § 101(18)(A), which defines persons eligible to file for streamlined and advantageous chapter 12 relief, requires a “family farmer” to be “engaged in a farming operation.”¹⁵ A “health care provider” under § 101(27A)(A) must be “primarily engaged” in offered certain facilities and services.¹⁶ Section 101(44) defines a railroad to include a common carrier “engaged in the transportation of individuals or property.”¹⁷

When Congress enacted chapter 12 in 1986, numerous courts struggled with what it meant to be “engaged in” farming. How involved in conduct of the farm operations did you have to be?¹⁸ What about passive activities like accepting rent from leased farmland?¹⁹ What if you were no longer farming?²⁰ Before these sections were added to the Bankruptcy Code, the U.S. Supreme Court in *Toibb v. Radloff*²¹ in 1991 grappled with whether to read into § 109 – eligibility for chapter 11 – whether a chapter 7 debtor had to be “engaged in business” to convert to chapter 11. (The short answer: No.) And so on.

*4 [7] In none of these cases, including *Toibb*, could this court find a precise definition of what the phrase “engaged in” – standing alone – means.²² And that makes sense. We know that when Congress does not define a term, we rely on the word or phrase's plain meaning or common understanding.²³ The plain meaning of “engaged in” means to be actively and currently involved. In § 1182(1)(A) of the Bankruptcy Code, “engaged in” is written not in the past or future but in the present tense. To add the word “currently” to the phrase “engaged in” would be redundant, because the currency of the involvement or activeness is inherent in the idea of being “engaged in” something.

This sense of “engaged in” as incorporating currency is supported by early chapter 12 cases in this circuit. In *In re Tim Wargo & Sons, Inc.*,²⁴ the Eighth Circuit examined whether a corporation qualified as a “family farmer” under (then) § 101(17)(B) (now § 101(18)(B)). That subsection analogously requires that the family members or relatives who own the corporate entity must “conduct” the farming operation. The Eighth Circuit observed that to “conduct” farming, some member of the family at a minimum had to play “an active role in the farming operating taking place on the land.”²⁵ The court compared the active role required to “conduct” a farming operation with being “engaged in” a farming operation, observing that both phrases require “an active role in the operation.”²⁶ Similarly, in discussing whether certain income and debts qualified as arising out of a farming operation, the Eighth Circuit in *In re Easton*,²⁷ reversed and remanded for the bankruptcy court to examine the nature of the income and debts, stating:

Those sums cannot be counted as § 101(17)(A) income unless debtors show that they had *some significant degree of engagement in*, played some significant operational role in, or had an ownership interest in the crop production which took place on the [rented] acreage.

(emphasis added).

*5 [8] In sum, as the Supreme Court in  *Toibb* pointed out, “Congress knew how to restrict recourse to the avenues of bankruptcy relief; it did not place Chapter 11 reorganization beyond the reach of a nonbusiness individual debtor.”²⁸ Conversely, if Congress had intended to make all debtors with business debts below the debt cap eligible for subchapter V small business relief regardless of whether the business was still operating, it could have done so. But to read  § 1182(1)(A) the way the Thurmons do renders the phrase “engaged in commercial or business activities” superfluous. The Thurmons were not as a matter of fact or law “engaged in commercial or business activities” on the day they filed bankruptcy because they had in fact sold the business with no intent to return to it and were otherwise not active or involved in any commercial or business activities.²⁹ For the same reason, keeping the empty shell of the former business entity open with the Missouri Secretary of State’s office does not render them “engaged” in business activities, either.

[9] The court is therefore compelled to grant the UST’s objection to the Thurmons’ subchapter V small business debtor designation, which means that, effective as of this date, the Thurmons now proceed as regular chapter 11 debtors.³⁰

[10] That takes us to the UST’s late-filed objection to confirmation. The UST is the only party objecting to the Thurmons’ consensual plan, which would otherwise be ready to confirm. The UST objects that the plan is not confirmable because it is not accompanied by a disclosure statement and does not provide for payment of UST fees, as would be required in a nonsubchapter V chapter 11 case. The court overrules the UST’s objection.

First, [Rule 1020](#) says a debtor is entitled to proceed as a subchapter V small business debtor “unless and until” the court enters an order finding that debtor’s statement is incorrect. The Thurmons were subchapter V small business debtors when they filed the plan without a disclosure statement, since § 1125 is expressly not applicable to subchapter V small business debtors unless the court for cause orders otherwise.³¹ The plan the Thurmons filed was compliant with the Code and Rules when the plan was filed. Despite having raised an eligibility objection months ago,³² the UST never requested that the court require the Thurmons to file a disclosure statement.³³ The court finds that the UST has in essence waived the right to request a disclosure statement at this late date.

[11] Second, the plan itself substantially complies with § 1125 by containing adequate information. The only “adequate information” within the meaning of § 1125 that the Thurmons’ plan lacks relates to feasibility and the court accepted a proffer at the hearing related to feasibility. It would make no sense for confirmation of the plan to be delayed for the filing of a separate disclosure statement when all voting impaired creditors voted in favor of the plan and no party requested the court make § 1125 applicable,³⁴ suggesting that the information in the plan was adequate for the creditors to determine how to vote. Even if the court required a disclosure statement at this late date, that would not necessarily cause the plan to be rebaloted. And there is some limited authority for the proposition that when acceptances or rejections are not required and are not solicited, a disclosure statement likewise should not be required.³⁵

*6 [12] Accordingly, given the unusual circumstances of this case, the court will not require the Thurmons to file a disclosure statement for their consensual plan to be confirmed. The court does agree with the UST, however, that effective as of the date of this opinion, the Thurmons must comply with the requirement to pay the UST quarterly fees. To satisfy  § 1129(a)(12), the Thurmons are ordered to include appropriate language modifying the plan in their proposed order of confirmation, due within 14 days.

Order

The court hereby sustains the UST’s objection to the Thurmons’ subchapter V election and finds that the Thurmons’ statement in the petition as subchapter V small business debtors is incorrect under [Rule 1020\(a\)](#). The court overrules the UST’s objection to confirmation of the Thurmons’ chapter 11 plan; finds that the requirement to file a disclosure statement has either been waived or is not applicable under the unusual circumstances of this case; and with the agreement of the parties to immediately proceed to confirmation, finds that the applicable requirements of  § 1129(a) are otherwise met, subject to the requirement that the Thurmons include language in the order of confirmation to make the plan compliant with  § 1129(a)(12). Proposed order due within 14 days.

IT IS SO ORDERED.

All Citations

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Footnotes

- 1 Small Business Reorganization Act of 2019, [Pub. L. No. 116-54, 133 Stat. 1079 \(2019\)](#), or “SBRA” for short. SBRA became effective February 19, 2020.
- 2 A “person” is defined to include individuals, partnerships, and corporations. [11 U.S.C. § 101\(41\)](#).
- 3 Under SBRA, a “small business debtor” is defined as a person engaged in commercial or business activities “that has aggregate noncontingent liquidated secured and unsecured debts ... of not more than \$2,725,625,” with certain other requirements and exceptions not relevant here. [11 U.S.C. § 101\(51D\)\(A\)](#). The Coronavirus Aid, Relief, and Economic Security Act, or CARES Act, [Pub. L. No. 116-136, 134 Stat. 281 \(2020\)](#) enacted on March 27, 2020, temporarily increases the debt limit to \$7,500,000. [11 U.S.C. § 1182\(1\)\(A\)](#).
- 4 No party disputes that the court has jurisdiction to hear and determine this matter and that objections to a debtor's designation as a small business debtor is a core proceeding. See [In re Blanchard, No. 19-12440, 2020 WL 4032411, at *2 \(Bankr. E.D. La. July 16, 2020\)](#). As the parties who filed the petition and elected the subchapter V small business debtor election, the Thurmons bear the burden to prove their eligibility under applicable Eighth Circuit authority. [Montgomery v. Ryan \(In re Montgomery\)](#), 37 F.3d 413, 415 (8th Cir. 1994).
Contra [In re Body Transit, Inc.](#), 613 B.R. 400, 409, n. 15 (Bankr. E.D. Pa. 2020) (objecting party is the de facto moving party bearing the burden to prove debtor not entitled to subchapter V small business debtor relief).
- 5 ECF No. 74.
- 6 ECF Nos. 30, 31; see [11 U.S.C. § 1187\(a\)](#) (“Upon electing to be a debtor under this subchapter, the debtor shall file the documents required by subparagraphs (A) and (B) of section 1116(1) of this title.”).
- 7 ECF No. 53; see [11 U.S.C. § 1188\(c\)](#) (“Not later than 14 days before the date of the status conference under subsection (c), the debtor shall file with the court and serve on the trustee and all the parties in interest a report that details the efforts the debtor has undertaken and will undertake to attain a consensual plan of reorganization.”).
- 8 ECF Nos. 44, 62, and 82; see [11 U.S.C. § 1187\(b\)](#) (“A debtor, in addition to the duties provided in this title and as otherwise required by law, shall comply with the requirements of section 308 and paragraphs (2), (3), (4), (5), (6) and (7) of section 1116 of this title.”). See also [11 U.S.C. § 308\(b\)](#) (specifying the reports a debtor in a small business case must file).
- 9 ECF No. 76; see [11 U.S.C. § 1189\(b\)](#) (“The debtor shall file a plan not later than 90 days after the order for relief.”).
- 10 ECF Nos. 19, 65; see [11 U.S.C. § 1188\(a\)](#) (“[N]ot later than 60 days after the order for relief under this chapter, the court shall hold a status conference to further expeditious and economical resolution of a case under this subchapter.”)
- 11 See [11 U.S.C. §§ 1129\(a\)\(1\)](#) (as it incorporates § 1125) and (a)(12).
- 12 The definition of small business debtor with the increased debt limit is currently found in [§ 1182\(1\)\(A\)](#), enacted as part of the CARES Act; prior to the CARES Act, the definition was in [§ 101\(51D\)](#). The CARES Act provisions relating to the increased debt limit are currently set to sunset one year after enactment, or by March 27, 2021.

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- 13 See [In re Wright](#), No. 20-01035, 2020 WL 2193240 (Bankr. D.S.C. April 27, 2020); [In re Bonert](#), 619 B.R. 248 (Bankr. C.D. Cal. 2020) (following [Wright](#)); [In re Blanchard](#), No. 19-12440, 2020 WL 4032411 (Bankr. E.D. La. July 16, 2020) (same).
- 14 See, e.g., [33 U.S.C. § 902\(3\)](#), for employee to be covered by the Longshore and Harbor Workers' Compensation Act, the person must be "engaged in maritime employment." [McGray Construction Co. v. Director, Office of Workers Compensation Programs](#), 181 F.3d 1008, 1014 (9th Cir. 1999) (holding that the statutory term "person engaged in maritime employment" means "engaged" on "this job").
- 15 See [In re Watford](#), 898 F.2d 1525, 1528 (11th Cir. 1990) (adopting the totality of the circumstances test to decide whether a debtor intends to continue to engage in a farming operation for purposes of eligibility for chapter 12 even though not engaged in the physical activity of farming at the time the petition was filed); *contra* [In re Armstrong](#), 812 F.2d 1024, 1028 (7th Cir. 1987).
- 16 [In re Banes](#), 355 B.R. 532, 535 (Bankr. M.D.N.C. 2006) (in determining whether a patient ombudsman should be appointed for a defunct dental practice, the court noted the definition of "health care business" in [§ 101\(27A\)](#) as an entity that is "primarily engaged in offering" health care services was written in the present tense, indicating that Congress was concerned with appointing patient care ombudsmen "in cases where health care businesses seeking bankruptcy protection *are currently engaged in the ongoing care of patients*" (emphasis added).
- 17 [In re Pittsburgh & Lake Erie Properties, Inc.](#), 290 F.3d 516, 519-520 (3d Cir. 2002) (natural reading of definition of railroad is not for debtor to be a former railroad; the term "engaged in" is in present tense).
- 18 E.g., [Cottonport Bank v. Dichiaro](#), 193 B.R. 798, 802 (W.D. La. 1996) (bankruptcy court did not err in finding that debtors who were actively involved in the planting and cultivation of sugar cane crop and who were entirely responsible for planting, cultivating, and harvesting of soybean crops were engaged in farming operations for purposes of chapter 12 eligibility).
- 19 E.g., [In re Morgan Strawberry Farm](#), 98 B.R. 584 (Bankr. M.D. Fla. 1989) (individual debtors who leased one farm for cash and suspended operations on another were not "engaged in" farming operation).
- 20 E.g., [In re Tart](#), 73 B.R. 78 (Bankr. E.D.N.C. 1987) (people who had sold all their farmland prior to filing and who did not intend to resume any farming operations were not "engaged in" farm activities and did not qualify for chapter 12 relief); [In re Haschke](#), 77 B.R. 223, 225 (Bankr. D. Neb. 1987) (same).
- 21 [501 U.S. 157](#), 111 S.Ct. 2197, 2199, 115 L.Ed.2d 145 (1991).
- 22 *Black's Law Dictionary* (11th ed. 2019) defines "engage" as "[t]o employ or involve one's self; to take part in; to embark on." In a similar sense, *Black's* defines "engaged in commerce" for purposes of the "Fair Labor Standards Act and Federal Employers' Liability Act" to require the employee to be "actually engaged" in the movement of commerce (case authorities omitted). Likewise, an earlier *Black's* edition (5th ed. 1979) stated that "engaged in employment" means "[t]o be rendering service for employer under terms of employment," although that definition is absent in the most current edition.
- 23 E.g., [United States v. Belmont](#), 831 F.3d 1098, 1100 (8th Cir. 2016) (interpreting the phrase "to engage in the business of importing, manufacturing, or dealing in explosive materials without a license" under [18 U.S.C. § 842\(a\)\(1\)](#) in defendant's appeal of criminal conviction).
- 24 [In re Tim Wargo & Sons, Inc.](#), 869 F.2d 1128 (8th Cir. 1989).
- 25 869 F.2d at 1130 (citing [In re Burke](#), 81 B.R. 971, 976 (Bankr. S.D. Iowa 1987)).
- 26 *Id.*
- 27 [In re Easton](#), 883 F.2d 630, 636 (8th Cir. 1989). See also [In re Fenske](#), 96 B.R. 244, 247 (Bankr. D.N.D. 1988) (holding farmers who enrolled in CRP programs could still qualify as family farmers, noting "[t]hose individuals who while actively engaging in farming, avail themselves of such programs and thereby maximize

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the profitability of their operations are no less engaged in a farming operation.”) (emphasis added); *In re Paul*, 83 B.R. 709, 713 (Bankr. D.N.D. 1988) (recognizing that chapter 12 allows a debtor to scale down their core farming operation, but this “would not be applied to bring debtors who have abandoned their farming operation and have no intention of returning to traditional agricultural production under the protection of Chapter 12”).

Cf. *In re Johnson*, 230 B.R. 608, 609 (B.A.P. 8th Cir. 1999) (discussing test for exempting farm tools of trade for purposes of lien avoidance under § 522(f); to be a farmer there must be evidence that the debtor legitimately engaged in a trade which *currently and regularly* uses the specific implements to be exempted) (citing *Production Credit Assoc. of St. Cloud v. La Fond (In re LaFond)*, 791 F.2d 623, 625 (8th Cir. 1986)) (emphasis added).

28 *In re Johnson*, 230 B.R. 608, 609 (B.A.P. 8th Cir. 1999).

29 The UST also makes the point that merely paying off residual business debt cannot constitute being engaged in business or commercial activities under the definition of small business debtor in § 1182(1)(A). Although not discussed in this opinion because the nature and amount of the Thurmons' debts are not at issue, § 1182(1)(A) also requires that a small business debtor have debts “not less than 50 percent of which arose from the commercial or business activities of the debtor.” See *In re Wright*, No. 20-01035, 2020 WL 2193240, at *3 (Bankr. D.S.C. April 27, 2020) (holding that the restructuring of residual business debt constitutes being engaged in commercial or business activities). The reasoning in *Wright* renders the debt requirements in § 1182(1)(A) superfluous.

30 Fed. R. Bankr. Proc. 1020(a).

31 11 U.S.C. § 1181(b).

32 The UST's objection to the designation was filed on August 20, 2020. ECF No. 40.

33 See 28 U.S.C. § 586(a)(3)(B).

34 See 11 U.S.C. § 1181(b): Section 1125 is not applicable, unless the court for cause orders otherwise.

35 See *Collier on Bankruptcy* ¶ 1125.02 (Richard Levin & Henry J. Sommer eds., 16th ed.), citing *In re Colony Properties Int'l, LLC*, 2011 WL 4443319, at *1–2, 2011 Bankr. LEXIS 3658, at *4 (Bankr. S.D. Cal. Sept. 19, 2011); *In re Union County Wholesale Tobacco & Candy Co.*, 3 C.B.C. 2d 844, 8 B.R. 442, 443 (Bankr. D.N.J. 1981). But see *In re Transload & Transport*, 61 B.R. 379, 380 (Bankr. M.D. La. 1986).

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United States Bankruptcy Court,
N.D. Texas, Fort Worth Division,
Fort Worth Division.

IN RE: Cord David JOHNSON
and Sunny Lea Johnson, Debtors.

Case No. 19-42063-ELM

Signed March 1, 2021

Attorneys and Law Firms

Alice Bower, Law Office of Alice Bower, Fort Worth, TX,
for Debtors.

MEMORANDUM OPINION AND ORDER

Edward L. Morris, United States Bankruptcy Judge

*1 Before the Court is the request of the debtors Cord David Johnson (“**Cord**”) and Sunny Lea Johnson (“**Sunny**” and together with Cord, the “**Debtors**”) for conversion of their pending chapter 7 bankruptcy case to a case under chapter 11 of the Bankruptcy Code, conditioned, however, on the case being authorized to proceed as a joint case under subchapter V of chapter 11.

The United States Trustee and the Hill Creditors (as hereafter defined) oppose the request, asserting, among other things, that the Debtors are ineligible for relief under subchapter V of chapter 11.

Thus, the dispute presents the Court with two pivotal questions: first, whether an individual who previously owned and managed certain now-defunct businesses and who, on account of such ownership and involvement, has mostly business-related debts, is “*engaged in*” commercial or business activities for purposes of eligibility under subchapter V of chapter 11 of the Bankruptcy Code; and second, whether an employed officer of a non-debtor business entity, having no ownership in or ultimate control over the non-debtor business entity, is engaged in “*commercial or business activities*” for purposes of eligibility under subchapter V of chapter 11 of the Bankruptcy Code. Concluding in each instance under the facts and circumstances of this case that such an individual is

not engaged in commercial or business activities for purposes of eligibility under subchapter V of chapter 11, the Court will deny the request for conversion.

PROCEDURAL BACKGROUND

On May 22, 2019 (the “**Petition Date**”), the Debtors, a married couple, filed their joint voluntary petition for relief under chapter 7 of the Bankruptcy Code. Following several months of informal and formal discovery with respect to the Debtors’ assets and financial affairs,¹ William T. Neary, the United States Trustee for Region 6 (the “**U.S. Trustee**”), initiated an adversary proceeding against the Debtors to object to their chapter 7 discharge.² In response, the Debtors, among other things, filed the current *Motion to Convert Their Chapter 7 Case to a Case Under Chapter 11, and For Authority to Elect Treatment Under Subchapter 5, as a Small Business Case* [Docket No. 57] (the “**Motion**”). As bluntly acknowledged by the Debtors, they filed the Motion to avoid the U.S. Trustee’s discharge objection.

Both the U.S. Trustee and creditors John Hill, Armadillo Exploration, LLC and Esperanza Energy Corp. (collectively, the “**Hill Creditors**” and together with the U.S. Trustee, the “**Objectors**”) have timely objected to the Motion.³ The U.S. Trustee opposes conversion for the following three reasons: *first*, the Debtors are ineligible for relief under subchapter V of chapter 11; *second*, the Debtors have filed and prosecuted the bankruptcy case in bad faith;⁴ and *third*, the Debtors will not have sufficient income to fund a plan of reorganization, arguing in connection therewith that the Debtors should be barred by the doctrine of quasi-estoppel from claiming that Cord earns more than he previously disclosed in filings with the Court (the second and third grounds of objection collectively referred to as the “**Secondary Objections**”). The Hill Creditors, in their objection, simply adopt each of the grounds of objection lodged by the U.S. Trustee. The Debtors have filed a reply in response to the U.S. Trustee’s objections.⁵ On August 5 and 13, 2020, the Court conducted an evidentiary hearing on the Motion.

JURISDICTION

*2 The Court has jurisdiction of the proceeding involving the Motion pursuant to 28 U.S.C. §§ 1334 and 157 and

the *Order of Reference of Bankruptcy Cases and Proceedings Nunc Pro Tunc* (Miscellaneous Rule No. 33) of the United States District Court for the Northern District of Texas. Venue of the proceeding in the Northern District of Texas is proper under 28 U.S.C. § 1409. The proceeding constitutes a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A) and (O).

FACTUAL BACKGROUND

A. Cord's Prepetition Involvement in the Oil and Gas Industry

Prior to the Petition Date, Cord owned and managed several different oil and gas companies. Specifically, as disclosed in the Debtors' bankruptcy schedules and statement of financial affairs, between 2006 and 2018 Cord owned the following companies having the following disclosed periods of existence noted parenthetically (collectively, the "**Defunct Companies**"): ⁶

Crooked Oak, LLC (5/30/2006 - 6/1/2018)

Santa Rita Holdings, LLC (4/16/2008 - 2/28/2017)

Jacie Oil Company, LLC (1/31/2014 - 1/27/2017)

R1CDF LLC (7/28/2014 - 1/26/2018)

Comanche Cove Resource Management LLC (9/3/2014 - 1/26/2018)

S. Johnson Family LP (9/8/2014 - 1/26/2018)

JCS Oil and Gas, LLC (3/22/2017 - 1/25/2019)

Each of the Defunct Companies was previously involved in the exploration and production of oil and gas. To fund the drilling costs of wells targeted for development by Cord, Cord successfully raised investment capital through a variety of private placements. Among the investors were the Hill Creditors. While certain of the drilling projects led to the development of commercially viable wells, many others resulted in dry holes or non-commercial wells. According to Cord, the lack of sufficient drilling successes combined with the suppressed oil and gas market ultimately led to the failure of each of the Defunct Companies and none of the Defunct Companies remains in business.

B. Cord's Prepetition Transition to El Reno

On June 9, 2017, Lloyd Johnson ("**Lloyd**"), Cord's father, organized El Reno Energy, LLC ("**El Reno**"), a member-managed Texas limited liability company. ⁷ El Reno was to conduct business in both the oil and gas industry and the trucking industry. At all times prior to Lloyd's death, Lloyd was the sole owner and managing member of El Reno. ⁸

Shortly after organizing El Reno, Lloyd was diagnosed with **pulmonary fibrosis**. In the latter part of 2017, as Lloyd's health began to decline and the remainder of Cord's companies collapsed, Cord began to focus his attention on El Reno, initially assisting his father with El Reno's oil and gas operations. In 2018, as Cord's involvement with El Reno increased, Lloyd added Cord to El Reno's regular payroll. Thereafter, as Lloyd's health continued to decline, Cord's level of involvement in all aspects of El Reno's business increased.

On November 7, 2018, Lloyd passed away. ⁹ Pursuant to the terms of Lloyd's Last Will and Testament, Lloyd's 100% ownership interest in El Reno was bequeathed to Haven Johnson ("**Haven**"), Lloyd's wife and Cord's mother. ¹⁰ Upon transfer of the ownership, Haven became the new sole managing member of El Reno. ¹¹ In such capacity, Haven obtained (and continues to have) ultimate control of El Reno and its operations, including the ability to hire and fire officers and employees at will. Following Lloyd's death, Haven maintained Cord's employment by El Reno.

C. The Debtors' Bankruptcy Filing and Postpetition Employment

***3** Despite Cord's effort to obtain renewed financial stability in his new role with El Reno, Cord was unable to escape the trail of damage caused by the failure of the Defunct Companies. Many creditors of the Defunct Companies remained unpaid and, among other things, certain drilling project investors, including the Hill Creditors, initiated litigation against Cord (and others) to pursue claims for fraudulent investment solicitation. ¹² Facing a June 2019 trial in the investor litigation and believing that their assets remained exposed to certain outstanding debts of the Defunct Companies, on May 22, 2019, the Debtors filed for protection under chapter 7 of the Bankruptcy Code.

As disclosed by the Debtors in their bankruptcy filings, and as acknowledged at the hearing, as of the Petition Date neither of the Debtors owned an interest in any operating businesses and neither of the Debtors was engaged in any business of his/

her own. This remains the case to this date. The Debtors do not sell any goods or services of their own, they do not have any employees, and they do not have any personal business expenses outside of the possible residual liability related to the Defunct Companies. Since before the Petition Date, the Debtors' sole source of income has come from their status as W-2 employees.

In Cord's case, Cord has remained a full-time employee of El Reno. At the time of the bankruptcy filing, Cord held the position of Drilling Manager.¹³ However, shortly after the Petition Date, on June 14, 2019, Haven appointed him to the position of President.¹⁴ In such capacity, Cord has been managing the day-to-day business affairs of El Reno. As recognized by

In Sunny's case, Sunny has been employed throughout the entirety of the bankruptcy proceeding as a full-time medical/surgical nurse at Harris Methodist Southwest Hospital in Fort Worth, Texas.¹⁵ She has had zero involvement with the business of El Reno.

D. The Discharge Objection and Request for Conversion

On March 13, 2020, the U.S. Trustee filed a complaint against the Debtors to object to their chapter 7 discharge pursuant to 11 U.S.C. §§ 727(a)(2)(A) (fraudulent prepetition transfer of property and concealment), 727(a)(2)(B) (unauthorized post-petition transfer of estate property and concealment), and 727(a)(4)(A) (false oath or account in connection with the case).¹⁶ As previously indicated, on May 4, 2020, the Debtors filed the Motion with the objective of avoiding the discharge objection.

Importantly, the Debtors' request for conversion to chapter 11 is expressly conditioned on the Court's simultaneous authorization for the chapter 11 case to proceed under subchapter V of chapter 11. And as expressly reaffirmed by counsel for the Debtors at the hearing, should the Court determine that either of the Debtors is not eligible for subchapter V relief, then the Debtors no longer wish to convert the case to chapter 11.

DISCUSSION

A. Statutory Basis for Conversion to Chapter 11

Pursuant to 11 U.S.C. § 706 of the Bankruptcy Code, a chapter 7 debtor may convert its chapter 7 case to a case under chapter 11 of the Bankruptcy Code at any time if the debtor may be a debtor under chapter 11 and the bankruptcy case was not previously converted under 11 U.S.C. § 1112, 11 U.S.C. § 1208 or 11 U.S.C. § 1307 of the Bankruptcy Code.¹⁷ Pursuant to 11 U.S.C. § 109 of the Bankruptcy Code, with the exception of a stockbroker and commodity broker, a person that may be a debtor under chapter 7 of the Bankruptcy Code may also be a debtor under chapter 11 of the Bankruptcy Code.¹⁸

*4 With that in mind, here, it is undisputed that the Debtors were eligible for chapter 7 relief, that their chapter 7 case was not previously converted from another chapter, and that neither of the Debtors is a stockbroker or commodity broker. Thus, putting aside for the moment the Objectors' Secondary Objections, from a statutory standpoint the Debtors appear to be eligible for relief under chapter 11 of the Bankruptcy Code.

B. Statutory Basis for Relief Under Subchapter V of Chapter 11

Given the conditional nature of the Debtors' conversion request, however, it is also necessary to consider the Debtors' eligibility for relief under subchapter V of chapter 11. Because the Objectors have timely challenged the Debtors' asserted eligibility for relief under subchapter V, the Debtors bear the burden of establishing such eligibility.¹⁹

Subchapter V was added to the Bankruptcy Code by the Small Business Reorganization Act of 2019, effective February 19, 2020 (the "SBRA").²⁰ With the addition of 11 U.S.C. § 541 of the Bankruptcy Code now provides that subchapter V of chapter 11 "applies only in a case under chapter 11 in which a debtor (as defined in section 1182) elects that subchapter V of chapter 11 shall apply."²¹ Section 1182, in turn, provides that a "debtor" means a "small business debtor"²² and 11 U.S.C. § 101(51D) of the Bankruptcy Code defines a "small business debtor" as follows:

The term "small business debtor" -

(A) subject to subparagraph (B), means a person engaged in commercial or business activities (including any affiliate of such person that is also a debtor under this title and excluding a person whose primary activity is the business of owning single asset real estate) that has

aggregate noncontingent liquidated secured and unsecured debts as of the date of the filing of the petition or the date of the order for relief in an amount not more than \$2,725,625 (excluding debts owed to 1 or more affiliates or insiders) not less than 50 percent of which arose from the commercial or business activities of the debtor;

(B) does not include -

(i) any member of a group of affiliated debtors that has aggregate noncontingent liquidated secured and unsecured debts in an amount greater than \$2,725,625 (excluding debt owed to 1 or more affiliates or insiders);

(ii) any debtor that is 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, 78o\(d\)](#)); or

(iii) any debtor that is an affiliate of an issuer (as defined in section 3 of the Securities Exchange Act of 1934 ([15 U.S.C. 78c](#))).

[11 U.S.C. § 101\(51D\)](#).

*5 Thus, based upon the foregoing statutory definition, to qualify as a “small business debtor” eligible for relief under subchapter V of chapter 11, one must, among other things, be “engaged in commercial or business activities” or be an affiliate of such a debtor (subject to an exception that is inapplicable to this case).

C. The Meaning of “Engaged in Commercial or Business Activities”

The dispute in this case revolves around the meaning of “engaged in commercial or business activities.” In particular, the parties have differing views on the meaning of the words “engaged in” and “commercial or business activities,” neither of which are separately defined in the Bankruptcy Code.

The task of resolving statutory disputes begins where all such disputes must begin - with the language of the statute itself.²³ This is because courts are to presume that Congress has said in a statutory provision what it means, and means in the statutory provision what it says there.²⁴ In applying the plain language of a statute, it is also helpful to note that “Congress intends the

words in its enactments to carry their ordinary, contemporary, common meaning.”²⁵

Accordingly, here, if the words “engaged in” and “commercial or business activities” can be given their respective plain and unambiguous meanings in the context of [section 101\(51D\)](#), then the interpretative inquiry ends and the Court must apply those plain and unambiguous meanings in resolving the dispute.²⁶ “The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.”²⁷

1. “Engaged In”

With the foregoing in mind, the first interpretative dispute between the parties involves the temporal scope of the words “engaged in” in [section 101\(51D\)](#). According to the Debtors, the words have no temporal limitation and, thus, in relation to commercial or business activities, may refer to both current and former commercial or business activities. As such, the Debtors argue that, based upon Cord’s *prior* ownership and management of the Defunct Companies, Cord qualifies as a person “engaged in” commercial or business activities for purposes of [section 101\(51D\)](#), emphasizing that a majority of the debt that they face has a connection to Cord’s prior involvement with the Defunct Companies.

The Objectors disagree. They argue that a debtor must instead be “*actively carrying out*” commercial or business activities “*at the time of the filing of the petition*” to be deemed “engaged in” commercial or business activities for purposes of [section 101\(51D\)](#). Thus, according to the Objectors, because Cord was no longer actively carrying out any activity with respect to any of the Defunct Companies as of the Petition Date, he fails to qualify as a person “engaged in” commercial or business activities for purposes of [section 101\(51D\)](#).

*6 While the Court finds the Objectors’ proposed “actively carrying out” test to be too narrowly fashioned,²⁸ for the reasons set forth below the Court nevertheless ultimately agrees with the Objectors’ assessment that the “engaged in” inquiry is inherently contemporary in focus instead of retrospective, requiring the assessment of the debtor’s current state of affairs as of the filing of the bankruptcy petition.

In particular, starting first with the statutory language itself, “engaged” in the context of [section 101\(51D\)](#) is commonly defined as “involved in activity: occupied, busy.”²⁹ Thus, applying the ordinary meaning of “engaged” to the language of [section 101\(51D\)](#), a person “engaged in” commercial or business activities is a person occupied with or busy in commercial or business activities - not a person who at some point in the past had such involvement.³⁰

Second, application of this interpretation is also consistent with the specific context in which the language is used.

In this regard, [section 101\(51D\)](#) is designed to identify those debtors who are in particular need of the benefits of small business debtor treatment, benefits that are largely designed to facilitate expediency and minimize cost.³¹ Such benefits are essential to the ability of a small business that is currently occupied with/busy in commercial or business activities to successfully reorganize as a going concern. They are not essential to a small business that is no longer occupied with/busy in any commercial or business activities. Indeed, relevant legislative history associated with the SBRA highlights this very point:

Notwithstanding the 2005 Amendments [to the Bankruptcy Code that first introduced the small business debtor chapter 11 provisions], small business chapter 11 cases continue to encounter difficulty in successfully *reorganizing*....[T]he [SBRA] legislation allows these debtors “to file bankruptcy in a timely, cost-effective manner, and hopefully allows them to *remain in business*” which “not only benefits the owners, but employees, suppliers, customers, and others who rely on that business.”

H.R. Rep. No. 116-171, 116th Cong., 1st Sess. (2019) (emphasis added), *reprinted at* [2019 WL 3401849 \(Jul. 23, 2019\)](#) (quoting comments of Rep. Ben Cline).³²

*7 Third, in the broader context of the Bankruptcy Code as a whole, it is also significant to note that Congress did not write on a blank slate when utilizing the language “engaged in” in the definition of “small business debtor.”³³ Congress previously used the same language in the eligibility provisions applicable to subchapter IV of chapter 11 and chapter 12 of the Bankruptcy Code. As such, Congress had the benefit of how the language had been interpreted by courts in the past in drafting the “small business debtor” definition

of [section 101\(51D\)](#) and could have elaborated upon such language or used different language if it had concern with respect to such judicial interpretation.

In the case of subchapter IV of chapter 11, which involves railroad debtors,³⁴ for example, [section 101\(44\) of the Bankruptcy Code](#) defines a “railroad” as a common carrier “engaged in” the transportation by railroad of individuals or property or the owner of trackage facilities leased by such a common carrier.³⁵ When confronted with the question of whether the provisions of subchapter IV applied in a case involving a debtor that had ceased all operations as a rail carrier prior to its bankruptcy filing, the Court of Appeals for the Third Circuit found the “engaged in” inquiry to be inherently contemporary instead of retrospective in focus, explaining that, contrary to the language “spin” efforts of the appellants to apply subchapter IV to *former* railroads, the definition of “railroad” “us[es] the present-tense ‘engaged’ ” such that subchapter IV is confined to “bankruptcy petitioners who are railroads at the time of petition or thereafter.”³⁶

In the case of chapter 12, which is applicable to family farmers,³⁷ [section 101\(18\) of the Bankruptcy Code](#) defines a “family farmer” as an individual or individual and spouse “engaged in” a farming operation (subject to debt limits and requirements).³⁸ Here, again, courts have applied a contemporary analysis to the “engaged in” terminology, limiting eligibility to those currently occupied with/busy in a farming operation.³⁹ However, inasmuch as farming is inherently seasonal and farming operations are susceptible to periodic interruption, courts have occasionally been faced with the question of how to interpret “engaged in” where the debtor is not occupied with/busy in the actual *physical activity* of farming at the time of the filing of the petition. Even in this situation, a majority of courts, continuing to focus on the debtor's current state of affairs, has framed the analysis as “whether, in view of the totality of the circumstances, the debtor *intends to continue to engage in a ‘farming operation’* even though he or she was not engaged in the physical activity of farming at the time the petition was filed.”⁴⁰

Applying the foregoing principles to the case at hand, the evidence is clear that each of the Defunct Companies had ceased all commercial and business activities prior to the Petition Date and that Cord was not occupied with or otherwise busy in - *i.e.* “engaged in” - any commercial or business activities with respect to the Defunct Companies.

Additionally, no evidence was introduced to suggest that the cessation of such commercial and business activities was in any way only temporary in nature, or that Cord intended to cause any of the Defunct Companies to resume operations. Consequently, under the facts and circumstances of this case, the Debtors have failed to establish that Cord qualifies as a small business debtor for purposes of subchapter V of chapter 11 based upon his prior ownership and management of the Defunct Companies.

2. “Commercial or Business Activities”

*8 The second interpretative dispute between the parties involves the scope of the words “commercial or business activities” in  [section 101\(51D\)](#). While the Debtors appear to acknowledge that an individual is not deemed to be engaged in “commercial or business activities” based solely upon an individual's employment by an operating company, they argue that Cord's day-to-day management of El Reno as its officer (currently its President) results in Cord's engagement in “commercial or business activities.”

Here, again, the Objectors disagree. They argue that the Debtors' focus on Cord's title with El Reno and the managerial authority that it wields is still insufficient under the facts and circumstances of this case to equate to Cord's individual engagement in commercial or business activities. The Court agrees.

Beginning with the statutory language itself, “commercial” in the context of  [section 101\(51D\)](#) is commonly defined as “of or relating to commerce,” “commerce” is commonly defined as “the exchange or buying and selling of commodities on a large scale involving transportation from place to place,” and “commodity” is commonly defined as “an economic good.”⁴¹ “Business” in the context of  [section 101\(51D\)](#) is commonly defined as being “commercial or mercantile” in nature, “mercantile” is commonly defined as “of or relating to merchants or trading,” and “merchant” is commonly defined as “a buyer and seller of commodities for profit.”⁴² Thus, applying the ordinary meaning of “commercial or business activities” to the language of  [section 101\(51D\)](#), a person engaged in “commercial or business activities” is a person engaged in the exchange or buying and selling of economic goods or services for profit.

Here, the Debtors have acknowledged that neither of them is engaged in the exchange or buying and selling of any

economic goods or services of their own for profit. And in relation to El Reno, inasmuch as the Debtors do not have an ownership interest in the company, it also cannot be said that Cord is engaged in the exchange or buying and selling of any economic goods or services for the Debtors' indirect profit. Put simply, Cord is nothing more than an employee of El Reno with heightened obligations to the company on account of his role as an officer. As such, Cord does not qualify as a small business debtor under  [section 101\(51D\)](#).

Application of the foregoing interpretation of “commercial or business activities” to the facts and circumstances of this case is also consistent with the specific context in which the language is used and with the broader context of the Bankruptcy Code as a whole. As previously indicated, the small business debtor provisions of the Bankruptcy Code are designed to confer benefits that will facilitate the expedient and cost-efficient reorganization of an eligible debtor's business. Authorizing a W-2 employee of a non-debtor company, even one having the title of President, to access such benefits would do nothing to advance the reorganizational interests of the non-debtor company or to otherwise maintain the ongoing operations of the non-debtor company.

D. Small Business Debtor Affiliate Status

*9 Finally, even if Cord had qualified as a small business debtor, contrary to the Debtors' position, Sunny fails to qualify as an affiliate of Cord for purposes of  [section 101\(51D\)](#).  [Section 101\(2\) of the Bankruptcy Code](#) defines an “affiliate” as follows:

The term “affiliate” means -

(A) entity that directly or indirectly owns, controls, or holds with power to vote, 20 percent or more of the outstanding securities of the debtor, other than an entity that holds such securities -

(i) in a fiduciary or agency capacity without sole discretionary power to vote such securities; or

(ii) solely to secure a debt, if such entity has not in fact exercised such power to vote;

(B) corporation 20 percent or more of whose outstanding voting securities are directly or indirectly owned, controlled, or held with power to vote, by the debtor, or by an entity that directly or indirectly owns, controls, or holds

with power to vote, 20 percent or more of the outstanding voting securities of the debtor, other than an entity that holds such securities -

(i) in a fiduciary or agency capacity without sole discretionary power to vote such securities; or

(ii) solely to secure a debt, if such entity has not in fact exercised such power to vote;

(C) person whose business is operated under a lease or operating agreement by a debtor, or person substantially all of whose property is operated under an operating agreement with the debtor; or

(D) entity that operates the business or substantially all of the property of the debtor under a lease or operating agreement.

 11 U.S.C. § 101(2). In applying such definition to the determination of whether Sunny qualifies as an affiliate of Cord for Bankruptcy Code purposes, obviously the Debtors do not have an ownership interest in one another and, in addition to acknowledging that neither of them has any business of his/her own, the Debtors have not provided any evidence of a lease or operating agreement between the two of them. In fact, it appears that the Debtors just simply erroneously conflated the definitions of “affiliate” and “insider” in arguing for Sunny’s affiliate status.⁴³

In any event, because Sunny fails to qualify as an affiliate of Cord for purposes of the “small business debtor” definition of  section 101(51D) and because the Debtors have

conditioned their conversion request on the Court authorizing the case to proceed as a joint case under subchapter V of chapter 11, Sunny’s ineligibility for subchapter V relief is also an independent basis upon which to deny the Debtors’ conversion request.

CONCLUSION

For the reasons set forth above, under the facts and circumstances of this case, neither of the Debtors qualifies as a small business debtor under the provisions of  section 101(51D) of the Bankruptcy Code and, thus, neither of the Debtors is eligible for relief under subchapter V of chapter 11 of the Bankruptcy Code. Consequently, because the Debtors’ request for conversion of their chapter 7 case to a case under chapter 11 is expressly conditioned on the simultaneous authorization of the case to proceed under subchapter V, the Motion will be denied, it being unnecessary to consider the Secondary Objections of the Objectors.

ORDER

*10 Accordingly, it is hereby:

ORDERED that the Motion be and is hereby DENIED.

All Citations

Slip Copy, 2021 WL 825156

Footnotes

¹ See, e.g., Docket Nos. 17, 20, 24-25, 27-29, 30, 32-37, 41 and 43-45.

² See Adversary No. 20-04017 (objecting to discharge pursuant to  11 U.S.C. §§ 727(a)(2)(A),  727(a)(2)(B) and  727(a)(4)(A)).

³ See Docket Nos. 61 and 64.

⁴ Citing  *Marrama v. Citizens Bank of Mass.*, 549 U.S. 365 (2007) (affirming denial of debtor’s request to convert chapter 7 case to chapter 13 case on the basis of the debtor’s bad faith conduct).

⁵ See Docket No. 71.

⁶ See Debtors’ Exh. 3 (Amended Schedule A/B, Response to Question 19); Debtors’ Exh. 5 (Amended Statement of Financial Affairs, Response to Question 27).

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- 7 See Debtors' Exh. 8 (organizational documents of El Reno); Debtors' Exh. 10 (Company Agreement of El Reno, § 4.1.A. - providing for member management).
- 8 See Debtors' Exh. 10.
- 9 See Debtors' Exh. 8.
- 10 See Debtors' Exh. 7 (Last Will and Testament of Lloyd Johnson, art. II.C.).
- 11 See Debtors' Exh. 11.
- 12 See, e.g., Debtors' Exh. 5 (Amended Statement of Financial Affairs, Response to Question 9 - listing the pending litigation of *E6 Resources LLC, et al. v. Crooked Oak LLC, et al*, 342nd Judicial District Court, Tarrant County, Texas); Debtors' Exh. 4 (Amended Schedule E/F, Line 4.11 - listing disputed claim of \$500,000 in the name of Armadillo Exploration LLC - and Part 3 - listing the remaining Investor Creditors and E6 Resources LLC as parties associated with the listed disputed claim).
- 13 See Debtors' Exh. 2 (Schedule I).
- 14 See Debtors' Exh. 12.
- 15 See Debtors' Exh. 2 (Schedule I).
- 16 See Debtors' Exh. 1 (copy of complaint).
- 17 See  11 U.S.C. § 706(a),  (d).
- 18 See *id.* § 109(d).
- 19 See, e.g.,  *In re City of Bridgeport*, 129 B.R. 332, 334 (Bankr. D. Conn. 1991) (burden of proof with respect to eligibility under a particular chapter of the Bankruptcy Code rests with the party claiming the existence of such eligibility).
- 20 See Pub. L. No. 116-54, 133 Stat. 1079 (2019).
- 21  11 U.S.C. § 103(i).
- 22 *Id.* § 1182(1). Of note, while section 1182 was amended by the Coronavirus Aid, Relief, and Economic Security Act (the "CARES Act") to provide for a new, temporarily-effective definition of "debtor," the provision of the CARES Act within which section 1182 was modified only applies to bankruptcy cases commenced on or after the date of enactment of the CARES Act - March 27, 2020. See Pub. L. No. 116-136, § 1113(a)(1), (a)(3), 134 Stat. 281, 310-11 (2020). Consequently, because the Debtors' case was commenced prior to such date, the amended definition is inapplicable to this case.
- 23  *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989).
- 24  *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992).
- 25  *Boyce v. Greenway (In re Greenway)*, 71 F.3d 1177, 1179 (5th Cir.) (quoting  *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 388 (1993)), *cert. denied*, 517 U.S. 1244 (1996).
- 26  *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997) (citing  *Ron Pair Enters., Inc.*, 489 U.S. at 240)).
- 27  *Robinson*, 519 U.S. at 341.
- 28 Consider, for example, the situation where a debtor has been forced to temporarily cease operations for unexpected non-financial reasons, such as weather, a natural disaster, or to comply with regulatory requirements. Many small businesses have recently experienced this very situation, having been ordered to temporarily cease operations on account of the COVID-19 pandemic. While these very same businesses planned to (and most often did) reopen once permitted, had they filed for bankruptcy protection while temporarily shut down, the Objectors' proposed test would have precluded them from being eligible for subchapter V relief because they were not *actively carrying out* commercial or business activity as of the date of the bankruptcy filing.
- 29 See "engaged", *Merriam-Webster Online Dictionary* (2021) (www.merriam-webster.com/dictionary/engaged).
- 30 See also *In re Thurman*, Case No. 20-41400-can11, 2020 WL 7249555, at *4 (Bankr. W.D. Mo. Dec. 8, 2020) ("The plain meaning of 'engaged in' means to be actively and currently involved").

- 31 See, e.g.,  11 U.S.C. §§ 1102(a)(3) (eliminating appointment of creditors' committee in subchapter V case unless ordered otherwise), 1125(f) (minimizing disclosure statement requirements), 1129(e) (requiring court to confirm plan that complies with § 1129 and is filed in accordance with § 1121(e) by no later than 45 days after the plan is filed), 1181(b) (eliminating requirement of disclosure statement in subchapter V case unless ordered otherwise), 1189(a) (providing that only the debtor may file a plan in subchapter V case), 1191(b)-(c) (enabling cramdown confirmation of fully nonconsensual plan that commits disposable income over period of 3 to 5 years without the necessity of complying with the "absolute priority rule" of § 1129(b)(2)(B)).
- 32 The Debtors rely heavily upon a recent bankruptcy opinion out of the District of South Carolina to the contrary -  *In re Wright*, C/A No. 20-01035-HB, 2020 WL 2193240 (Bankr. D.S.C. Apr. 27, 2020). In *Wright*, despite referring to the same legislative history and noting that it "indicates [the SBRA] was intended to improve the ability of small businesses to reorganize and ultimately remain in business," the court curiously then wholly disregards such legislative history in opining that a debtor is not required to be currently engaged in any commercial or business activities and may, instead, qualify as a small business debtor based upon its intent to "address[] residual business debt" in the case. *See id.* at *3.
- 33 *Thurman*, 2020 WL 7249555, at *3.
- 34 See  11 U.S.C. § 103(h).
- 35 *See id.* § 101(44).
- 36 See *Hileman v. Pittsburgh & Lake Erie Props., Inc. (In re Pittsburgh & Lake Erie Props., Inc.)*, 290 F.3d 516, 519 (3rd Cir. 2002).
- 37 See  11 U.S.C. § 109(f).
- 38 *See id.* § 101(18).
- 39 See, e.g., *Thurman*, 2020 WL 7249555, at *3-4.
- 40 *Watford v. Federal Land Bank of Columbia (In re Watford)*, 898 F.2d 1525, 1528 (11th Cir. 1990) (emphasis added); see also *In re McLawchlin*, 511 B.R. 422, 427-28 (Bankr. S.D. Tex. 2014).
- 41 See "commercial", "commerce" and "commodity", *Merriam-Webster Online Dictionary* (2021) (www.merriamwebster.com/dictionary/commercial, www.merriam-webster.com/dictionary/commerce and www.merriamwebster.com/dictionary/commodity).
- 42 See "business", "mercantile" and "merchant", *Merriam-Webster Online Dictionary* (2021) (www.merriamwebster.com/dictionary/business, www.merriam-webster.com/dictionary/mercantile and webster.com/dictionary/merchant). www.merriam-
- 43 See  11 U.S.C. § 101(31)(A)(i) (defining "insider" as including a relative of the debtor).



KeyCite Yellow Flag - Negative Treatment

Declined to Follow by [In re Thurmon](#), Bankr.W.D.Mo., December 8, 2020

2020 WL 2193240

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

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

C/A No. 20-01035-HB

Signed 04/27/2020

Attorneys and Law Firms

[Reid B. Smith](#), Bird and Smith, PA, Columbia, SC, for Debtor.

ORDER DENYING MOTION TO STRIKE

Helen E. Burris, Chief US Bankruptcy Judge

*1 **THIS MATTER** is before the Court for consideration of the Motion to Strike filed by the United States Trustee ("UST"), asserting Debtor Charles Christopher Wright does not meet the requisite definition of a "small business debtor"

pursuant to [11 U.S.C. § 101\(51D\)](#).¹ Wright filed an Objection² and a telephonic hearing was held on April 14, 2020. Participating were Linda Barr on behalf of the UST, Reid Smith, counsel for the debtor, Kershaw Spong, Trustee, and Kevin McCarrell and Harriet Wallace, counsel for South State Bank.³

FACTS

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

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

2. The debtor filed a voluntary petition for relief pursuant to chapter 11 on February 28, 2020, initiating the present bankruptcy case. On his voluntary petition, the debtor

designated that he was a small business debtor and elected to proceed as a subchapter V small business debtor.

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

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

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

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

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

8. CCC's Schedule E/F lists the following liabilities: IRS \$88,698.70, Lorenza Flores \$800, SCDOR unknown, SCDEW \$51,706.17, York County Treasurer \$30,160.62, AT&T \$1,408.81, Atlantic Packing \$1,500, Atlas Copco \$1,290.73, Atotech USA \$8,411.37, Blast-It-All \$420, Cardinal unknown, Carolina Carrier \$1,475, Chemetall \$2,987, City of Rock Hill \$10,283.52, DuBois \$7,779, FedEx \$82.47, Forklifts Unlimited \$2,147.59, Freeman Gas \$254, Gary May unknown, Henkel Chemicals \$9,637.28, Hunter Pipe (owned by Dean Allen) \$2,000, Intek \$554.91, Intuit \$363.08, Low Volume Powder \$5,153.25, New Electric Charlotte, LLC \$1,645.10, Patriot \$1,991.80, PPG Powder \$9,407.43, Precision Grinding \$2,500, TCI Powder \$11,039.24, The Hartford Insurance \$18,120.42, The Motor Shop \$1,200, Uline \$2,240.07, United Rentals \$2,304.15, UPS Store \$2,691.59, and York County National Gas \$18,114.53. None of these liabilities were marked as

contingent, unliquidated, or disputed. Sherwin Williams Company filed a proof of claim in the amount of \$51,206.55.

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

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

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

DISCUSSION AND CONCLUSIONS

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

a person engaged in commercial or business activities (including any affiliate of such person that is also a debtor under this title and excluding a person whose primary activity is the business of owning single asset real estate) that has aggregate noncontingent liquidated secured and unsecured debts as of the date of

the filing of the petition or the date of the order for relief in an amount not more than \$2,725,625 (excluding debts owed to 1 or more affiliates or insiders) not less than 50 percent of which arose from the commercial or business activities of the debtor[.]

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

In deciding questions of statutory interpretation, the Court's duty is "to ascertain and implement the intent of Congress." *Kumar v. Republic of Sudan*, 880 F.3d 144, 153-54 (4th Cir. 2018), *cert. denied*, 139 S. Ct. 1445, 203 L. Ed. 2d 698 (2019) (quoting *Broughman v. Carver*, 624 F.3d 670, 674 (4th Cir. 2010)). The Court begins with the text of the statute and, absent a different definition, "interpret[s] statutory terms

'in accordance with their ordinary meaning.' " *Moody v. Huntington Ingalls Inc.*, 879 F.3d 96, 98 (4th Cir. 2018) (quoting *PETA v. U.S. Dep't of Agric.*, 861 F.3d 502, 509 (4th Cir. 2017)). "To determine a statute's plain meaning, [the Court] not only look[s] to the language itself, but also the specific context in which that language is used, and the broader context of the statute as a whole." *Othi v. Holder*, 734

F.3d 259, 265 (4th Cir. 2013) (quoting *Country Vintner of N.C., LLC v. E. & J. Gallo Winery, Inc.*, 718 F.3d 249, 258 (4th Cir. 2013)). "If the plain language is unambiguous, we need

look no further." *Lee v. Norfolk S. Ry. Co.*, 802 F.3d 626, 631 (4th Cir. 2015) (citation omitted). "On the other hand, if the text of a statute is ambiguous, [the Court] look[s] to 'other indicia of congressional intent such as the legislative history' to interpret the statute." *Id.* (quoting *CGM, LLC v. BellSouth Telecomms., Inc.*, 664 F.3d 46, 53 (4th Cir. 2011)).

*3 The context here is a Bankruptcy Code providing relief from debt in various forms including reorganization of a business, sale of assets, valuation of property, the adjustment of debt, and combinations of those and other remedies. Congress recently enacted the Small Business Reorganization

Act of 2019 (“SBRA”), which created Subchapter V. [Pub. L. No. 116-54, 133 Stat. 1079 \(2019\)](#) (temporarily amended by H.R. Rep. No. 116-748 H.R. Rep. No. 116-748 (2020)). The SBRA and Subchapter V were designed to broaden relief available to address small business debt. Although the brief legislative history of the SBRA indicates it was intended to improve the ability of small businesses to reorganize and ultimately remain in business,⁶ nothing therein, or in the language of the definition of a small business debtor, limits application to debtors **currently** engaged in business or commercial activities.

The definition of a “small business debtor” is not restricted to a person who at the time of the filing of the petition is presently engaged in commercial or business activities and who expects to continue in those same activities under a plan of reorganization. That person may have incurred \$2,725,625 in noncontingent, liquidated, secured and unsecured debts that arose from business activities before the date of the filing of the case, but as of the petition date may have discontinued those business activities. There is nothing in the legislative history to suggest that in this latter instance, the small business

amendments should not apply to that person.

2 *Collier on Bankruptcy* ¶ 101.51D (16th ed. 2020).

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

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

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

All Citations

Slip Copy, 2020 WL 2193240

Footnotes

- 1 ECF No. 15, filed Mar. 19, 2020.
- 2 ECF No. 29, filed Apr. 8, 2020.
- 3 South State Bank did not file a response to the Motion.
- 4 ECF No. 30, filed Apr. 10, 2020.
- 5 The Coronavirus Aid, Relief and Economic Security Act (“CARES Act”) was enacted on March 27, 2020, and amended § 1182(1) to include a separate definition of “debtor” for Subchapter V purposes that is identical to the definition of “small business debtor” in all respects except the debt limitation is temporarily increased to \$7,500,000. (H.R. Rep. No. 116-748 H.R. Rep. No. 116-748 (2020)). The CARES Act is applicable only to cases filed after its enactment.

- 6 The Report from the House Committee on the Judiciary (Report No. 116-54) states that “[n]otwithstanding the 2005 Amendments, small business chapter 11 cases continue to encounter difficulty in successfully reorganizing” and legislation was needed “to improve the reorganization process for small business chapter 11 debtors.” The SBRA allows these debtors “to file bankruptcy in a timely, cost-effective manner, and hopefully allows them to remain in business’ which ‘not only benefits the owners, but employees, suppliers, customers, and other who rely on that business.” *Id.*

620 B.R. 544

United States Bankruptcy Court, D. Maryland,
at Greenbelt.

IN RE: PARKING MANAGEMENT, INC., Debtor

Case No. 20-15026

|

Signed August 28, 2020

Synopsis

Background: Dispute arose as to Chapter 11 debtor's eligibility to proceed on expedited basis under Subchapter V as small business debtor, or whether amount of its debt rendered it ineligible for such relief.

Holdings: The Bankruptcy Court, [Thomas J. Catliota, J.](#), held that:

[1] lease rejection damages claims were contingent as of petition date and thus did not have to be included with debtor's other debt in assessing its eligibility for relief under Subchapter V, and

[2] debtor's obligation on Paycheck Protection Program (PPP) funds that it had obtained was unliquidated on petition date, and thus did not have to be included with debtor's other debt in assessing its eligibility for relief under Subchapter V.

Ordered accordingly.

Procedural Posture(s): Other.

West Headnotes (17)

[1] **Bankruptcy** Particular proceedings or issues

Debtor's eligibility for a particular type of relief under the Bankruptcy Code is "core" question, which the bankruptcy court has both statutory and constitutional authority to finally decide.

 28 U.S.C.A. § 157(b)(2)(A).

[2] **Bankruptcy** In general; nature and purpose

Subchapter V of Chapter 11 was enacted to provide an expedited process for small business debtors to reorganize quickly, inexpensively, and efficiently. 11 U.S.C.A. § 1181 et seq.

[3] **Bankruptcy** Reorganization cases

In deciding whether amount of Chapter 11 debtor's liquidated, noncontingent debt was such as to render it ineligible for relief under Subchapter V as small business debtor, court did not have to find any lack of good faith or candor in order to look beyond the schedules filed by debtor and review the claims that had been filed in the case; in was enough that there was reasonable ground to doubt debtor's characterization of lease rejection damages and other claims as contingent and/or unliquidated as of petition date.  11 U.S.C.A. § 1182(1)(A).

[4] **Bankruptcy** Reorganization cases

In deciding whether amount of Chapter 11 debtor's liquidated, noncontingent debt was such as to render it ineligible for relief under Subchapter V as small business debtor, court had to assess debtor's secured and unsecured debt as of petition date.  11 U.S.C.A. § 1182(1)(A).

[5] **Bankruptcy** Construction and Operation

"Noncontingent debts," as that term is used in the Bankruptcy Code, are those where all events necessary to give rise to liability take place prepetition.

[6] **Bankruptcy** Reorganization cases

Debt is deemed "contingent," and is thus not considered when assessing a Chapter 11 debtor's eligibility for relief under Subchapter V as small business debtor, if liability depends on a future

extrinsic event which may never occur.  11 U.S.C.A. § 1182(1)(A).

[7] **Bankruptcy** Construction and Operation

“Contingent debts,” as that term is used in the Bankruptcy Code, are a class of liabilities in which obligation to pay does not arise until the occurrence of a triggering event or occurrence reasonably contemplated by the debtor and creditor at time of occurrence of the event giving rise to the claim.

[8] **Bankruptcy** Assumption, Rejection, or Assignment

Authority to reject an executory contract or unexpired lease is vital to the basic purpose of Chapter 11 reorganization, because rejection can release the estate from burdensome obligations that can impede a successful reorganization; similarly, the power to assume and/or assign an unexpired lease gives trustee significant flexibility in managing estate.  11 U.S.C.A. § 365(a).

[9] **Bankruptcy** “Business judgment” test in general

Debtor’s decision to reject an executory contract or unexpired lease is to be accorded the deference mandated by the “sound business judgment” rule as generally applied by courts to discretionary actions or decisions of corporate directors.  11 U.S.C.A. § 365(a).

[10] **Bankruptcy** Necessity for court approval

Rejection of an executory contract or unexpired lease requires court approval, and is not a unilateral, independent process that can be accomplished by debtor alone.  11 U.S.C.A. § 365(a).

[11] **Bankruptcy** Necessity for court approval

Requirement for court approval of debtor’s decision to reject executory contract or unexpired lease is particularly important in the rejection of unexpired commercial leases.  11 U.S.C.A. § 365(a).

[12] **Bankruptcy** Effect of Acceptance or Rejection

Rejection or assumption of executory contract or unexpired lease by debtor does not determine whether the nondebtor party holds a claim; rather, it merely establishes the nature of any claim as either a prepetition obligation of debtor or as an administrative expense entitled to the highest priority.  11 U.S.C.A. §§ 365(g),  503(b).

[13] **Bankruptcy** Reorganization cases

Bankruptcy Effect of Acceptance or Rejection

Lease rejection damages claims were contingent as of petition date and remained so until the issuance of bankruptcy court’s order approving the rejections, and thus did not have to be included with Chapter 11 debtor’s liquidated, noncontingent debts in assessing its eligibility for relief under Subchapter V as small business debtor; all of the events necessary to give rise to lease rejection damages claims had not occurred as of petition date.  11 U.S.C.A. §§ 365,  1182(1)(A).

[14] **Bankruptcy** Reorganization cases

While some of Chapter 11 debtor’s unexpired leases were ultimately rejected “as of petition date,” once debtor’s decision to reject leases was approved by bankruptcy court, this did not mean that bankruptcy court could consider lease rejection damages claim, which became noncontingent upon entry of bankruptcy court’s order, when assessing debtor’s eligibility for relief under Subchapter V as small business debtor; eligibility determination had to be made

based on events existing on petition date, without regard to postpetition events.  11 U.S.C.A. § 1182(1)(A).

[15] Bankruptcy Reorganization cases

Chapter 11 debtor's obligation on Paycheck Protection Program (PPP) funds that it had obtained under program created by the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) was unliquidated on petition date, and thus did not have to be included with debtor's other liquidated, noncontingent debt in assessing its eligibility for relief under Subchapter V as small business debtor; on petition date, it was not known whether debtor would ultimately have any obligation to repay these PPP funds.  11 U.S.C.A. § 1182(1)(A).

1 Cases that cite this headnote

[16] Bankruptcy Contingent or Unliquidated Claims

Concept of a "liquidated debt," as that term is used in the Bankruptcy Code, relates to the amount of liability, not the existence of liability.

[17] Bankruptcy Contingent or Unliquidated Claims

Key factor in distinguishing "liquidated debts" from "unliquidated debts," as those terms are used in the Bankruptcy Code, is not the extent of the dispute nor the amount of evidence required to establish the debt, but whether the process for determining the debt is fixed, certain, or otherwise determined by a specific standard.

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MEMORANDUM OF DECISION

THOMAS J. CATLIOTA, U.S. BANKRUPTCY JUDGE

****1 *547** The new Subchapter V of Chapter 11 offers small business debtors a streamlined Chapter 11 procedure that is intended to be less costly and time-consuming than a traditional case. To be eligible for Subchapter V, a debtor must have "noncontingent liquidated secured and unsecured debts as of the date of the filing of the petition ... in an amount not more than \$7,500,000."  11 U.S.C. § 1182(1)(A). The dispute before the court is whether the debtor Parking Management Inc. meets this eligibility test.

On the petition date, May 7, 2020, the debtor sought authority to reject 12 leases as of that date. The court approved the lease rejections by orders entered on May 21, 2020, authorizing the rejection of seven leases as of the petition date and five leases as of May 12, 2020. Creditor JBGS Management OP, L.P., ("JBGS") and John P. Fitzgerald, III, the Acting United States Trustee for Region 4 (the "UST"), joined by Union Investment Real Estate GmbH and 2201 Limited Partnership II and Connecticut/DeSales, LLC, contend the resulting lease rejection damages should be included in the eligibility determination.

Further, prior to the petition, the debtor obtained approximately \$1.8 million in funds under the Paycheck Protection Program (the "PPP") created by the Coronavirus

Aid, Relief, and Economic Security Act (“CARES Act”), Pub. L. No. 116-136, 134 Stat. 281 (2020). JBGS, but not the UST, contends the PPP obligation should be included in the debt limit determination.

If either the lease rejection claims or the PPP claim is included in the debt limit determination, the debtor would exceed the limit in  § 1182. For the reasons stated below, the court concludes that the lease rejection claims were contingent as of the date of filing, and the PPP claim was contingent and unliquidated as of that date. Therefore, neither is included in the debt limit determination and the debtor is eligible to proceed under Subchapter V.

Jurisdiction

[1] The court has jurisdiction pursuant to  28 U.S.C. § 1334(a),  § 157(a), and Local Rule 402 of the United States District Court for the District of Maryland. The resolution of the debtor's eligibility to qualify for a particular type of relief under the Bankruptcy Code is a statutorily core proceeding under  28 U.S.C. § 157(b)(2)(A), and a constitutionally core proceeding under the standards of  *Stern v. Marshall*, 564 U.S. 462, 131 S. Ct. 2594, 180 L.Ed.2d 475 (2011).

Findings of Fact

Debtor filed for relief on May 7, 2020. On the petition, it designated itself a debtor “as defined in  11 U.S.C. § 1182(1),¹ its aggregate noncontingent liquidated debts (excluding debts owed to insiders or affiliates) are less than \$7,500,000” and “it chooses to proceed under Subchapter V of Chapter 11.” ECF 1 at p. 2 (emphasis eliminated).

The debtor is one of the largest parking operators in the Mid-Atlantic area. As of April 30, 2020, it leased or managed approximately *548 100 parking facilities throughout the Northern Virginia, Washington D.C., and Baltimore, Maryland metropolitan areas, and employs 191 people. The debtor uses two basic structures for its parking operations. Under the first structure, the debtor leases a parking lot from a property owner, operates the parking facility, and pays rent to the owner. Under the second structure the debtor manages a parking facility for the property owner pursuant to

a management agreement and receives a management fee as compensation for doing so. ECF 7 at ¶¶7-8.

**2 Prior to the petition, the debtor determined it should reject twelve parking leases. On the petition date, it filed a motion to reject the leases as of that date. ECF 14. In the motion, the debtor stated it closed the facilities before the petition due to diminished revenues resulting from the COVID-19 pandemic and asked that it be allowed to reject the leases as of the petition date. After notice, no party objected to the rejection of the leases, but several landlords objected to the request to reject the leases as of the petition date. On May 21, 2020, the court issued two orders resolving the motion. Without objection by the pertinent landlords, the court authorized the rejection of seven of the leases “as of” the petition date. ECF 77. By agreement with landlords for five of the leases, the court authorized the rejection of the remaining leases as of May 12, 2020. ECF 75. Landlords representing five of the seven leases that were rejected as of the petition date have filed proofs of claim for the rejection damages in the aggregate amount of \$1,765,542.63. *See* Claim 27-1, Part 2 at p. 3; Claim 31-1, Part 2 at p. 3; Claim 32-1, Part 2 at p. 3.

Prior to the petition the debtor applied for small business funding under the PPP, and received \$1,862,723.84 on April 30, 2020, from Truist Bank. To evidence the PPP loan the debtor executed a Paycheck Protection Program Promissory Note in that amount. Proof of Claim 1-1, Part 2. The terms of the note are addressed further below.

The debtor and JBGS have been involved in an ongoing dispute during the case that is the subject of *JBGS Management OP, L.P. v. Parking Management, Inc.*, Adversary Proceeding No. 20-00195. There, it was established that the debtor and JBGS entered into a parking management agreement dated January 1, 2006, as subsequently amended, under which the debtor manages and operates 42 parking facilities on behalf of JBGS. The debtor collects parking revenue, pays certain authorized expenses, pays itself a management fee, and remits the net parking revenues to JBGS. JBGS contends that on the petition date, the debtor held \$2,803,376 of its net monthly parking revenues that the debtor failed to pay to it. In the adversary proceeding, it seeks the imposition of a constructive trust over the funds. As pertinent here, JBGS contends it holds a noncontingent, liquidated claim in that amount until its claim is satisfied.

The debtor filed its original schedules on May 20, 2020. ECF 69. It listed no secured claims on Schedule D, and \$6,169,500.01 of priority and unsecured claims on Schedule E/F. *Id.* at pp. 11-30. The debtor listed the JBGS claim as contingent in an “unknown” amount. *Id.* at p. 20. It included a claim of \$1,862,723.84 in favor of Truist Bank for “Paycheck Protection Program” that was not designated as contingent or unliquidated. *Id.* at p. 27. The debtor also listed unpaid prepetition rent claims due on its leases as of the petition date.

JBGS timely objected to the debtor's designation as a small business under Subchapter V, arguing that its claim was neither unknown nor contingent. ECF 114. It argued that if the debtor listed its claim on *549 the schedules as noncontingent and liquidated, the debtor would exceed the debt limits.

On July 8, 2020, the debtor filed amended schedules, again showing it was below the debt limits of § 1182. On Schedule D, it listed noncontingent liquidated secured claims of \$50,997.39. ECF 148 at pp. 6-8. On Schedule E/F, it listed total priority and unsecured claims of \$8,871,931.56, but that amount included the JBGS claim in the amount of \$2,655,942.11, which the debtor designated as contingent and disputed. *Id.* at p. 18. The amount also included the \$1,862,723.84 claim of Truist Bank, describing it as “Paycheck Protection Program (Grant),” also designated as contingent, unliquidated and disputed. *Id.* at p. 25. The debtor again included unpaid prepetition rent claims due on its leases as of the petition date and did not list lease rejection claims. The amended schedules led to further filings by the parties, ECF 161, 192, 193, 194, and 198, and the court held hearings on July 29, 2020, and August 12, 2020.

Conclusions of Law

**3 The Small Business Reorganization Act, Pub. L. 116-54, 133 Stat. 1079 (Aug. 23, 2019) (“SBRA”) “streamline[s] the bankruptcy process by which small business debtors reorganize and rehabilitate their financial affairs.” H.R. Rep. No. 116-171, at p. 1 (2019), available at <https://www.congress.gov/116/crpt/hrpt171/CRPT-116hrpt171.pdf>. The SBRA created Subchapter V under Chapter 11 of the Bankruptcy Code to permit eligible small business debtors “to file bankruptcy in a timely, cost-effective manner.” *Id.* at p. 4 (quoting statement of Rep. Ben Cline, the bill's sponsor, at a June 25, 2019 hearing).

The SBRA became effective on February 19, 2020. When enacted, Subchapter V was limited to debtors with no more than \$2,725,625 in noncontingent liquidated debts as of the date of the filing of the petition. In response to the COVID-19 pandemic, the President signed into law the CARES Act, which temporarily increased, until March 27, 2021, the Subchapter V debt limit to \$7,500,000.

The debtor filed this case after the enactment of the CARES Act. To be eligible for Subchapter V relief, the debtor's “aggregate noncontingent liquidated secured and unsecured debts as of the date of the filing of the petition” can be “in an amount not more than \$7,500,000.” § 1182(1)(A).² The debtor's amended Schedules D and E/F list total secured and unsecured debts of \$8,922,928.95. The amended schedules designated the \$1,862,723.84 of PPP funds as contingent and unliquidated, thus reducing the potential noncontingent and liquidated debts to below the debt limit. ECF 148. The amended schedules also do not list lease rejection claims. *Id.* Both the PPP funds and the lease rejection claims must be contingent and unliquidated as of the date of filing for the debtor to be eligible for Subchapter V.³

*550 The court is not aware of any decisions addressing the eligibility requirements of § 1182. Many cases, however, have addressed similar eligibility debt limitation language under Chapters 12 and 13.⁴ The court begins by looking at these decisions for guidance.

**4 Although the Fourth Circuit has not addressed the question, many courts have recognized the need for an efficient, expedient resolution of the debt eligibility determination in Chapter 13 cases. *In Comprehensive Accounting Corp. v. Pearson (In re Pearson)*, 773 F.2d 751 (6th Cir. 1985), the court analogized the debt eligibility requirements of Chapter 13 to the amounts required for diversity jurisdiction under 28 U.S.C. § 1332:

[I]t is necessary that the procedures for determining initial jurisdiction cannot be allowed to dominate the proceedings themselves nor to delay them unduly. As important as this may be in the ordinary diversity litigation in a district court, it is even more important with respect to Chapter 13

proceedings for time is of the essence.

The resources of the debtor are almost by definition limited and the means of determining eligibility must be efficient and inexpensive. To allow an extensive inquiry in each case would do much toward defeating the very object of the statute.

 *Pearson*, 773 F.2d at 757. The Bankruptcy Appellate Panel of the Sixth Circuit expanded on this comparison in *In re Perkins*, 581 B.R. 822, 832 (B.A.P. 6th Cir. 2018) noting that, in the similar context of Chapter 12, eligibility is based on debts as of the petition date and not based on “computing eligibility after a hearing on the merits of the claims.” *Id.* at 832. The court looked to whether “from the face of the schedules it is apparent to a legal certainty that the debtor is beyond the debt limit” and also considered “if evidence shows that the amounts were inaccurately scheduled in bad faith for the purpose of making the debtor eligible for Chapter 13.” *Id.* at 834; cf.  *Scovis v. Henrichsen (In re Scovis)*, 249 F.3d 975, 982 (9th Cir. 2001) (“We now simply and explicitly state the rule for determining Chapter 13 eligibility under § 109(e) to be that eligibility should normally be determined by the debtor’s originally filed schedules, checking only to see if the schedules were made in good faith.”).

In making the determination, however, the court:

should neither place total reliance upon a debtor’s characterization of a debt nor rely unquestionably on a creditor’s proof of claim, for to do so would place eligibility in control of either the debtor or the creditor. *In re Madison*, 168 B.R. [986] at 989 [(D.Hawai’i 1994)]. At a hearing on eligibility, the court should thus, canvass and review the debtor’s schedules and proofs of claim, as well as other evidence offered by a debtor or the creditor to decide only whether the good faith, facial amount of the debtor’s liquidated and non-contingent debts exceed statutory limits.

*551  *Barcal v. Laughlin (In re Barcal)*, 213 B.R. 1008, 1015 (B.A.P. 8th Cir. 1997). Further, a bankruptcy court can “scrutinize and redesignate the characterization by a debtor of any given debt when that characterization is the subject of a case or controversy.” *In re Stern*, 266 B.R. 322, 326 (Bankr. D. Md. 2001); see also *In re Kelly*, No. 18-13244-WIL, 2018 WL 4354653, at *5 (Bankr. D. Md. Sept. 11, 2018) (Bankruptcy court can review a debt scheduled as “unknown” or “unliquidated” when it appears to a legal certainty to be owed in an amount other than what the debtor maintains.);  *In re De Jounghe*, 334 B.R. 760, 768 (B.A.P. 1st Cir. 2005).

[2] Subchapter V presents a similar statutory urgency to resolve eligibility determinations as Chapters 12 and 13. Subchapter V was established to provide “an expedited process for small business debtors to reorganize quickly, inexpensively, and efficiently.”  *In re Seven Stars on the Hudson Corp.*, 618 B.R. 333, 336 (Bankr. S.D. Fla. 2020); see *supra* H.R. Rep. No. 116-171. The debtor is required to file a plan within 90 days of the petition, unless extended if the court finds the “need for the extension is attributable to circumstances for which the debtor should not justly be held accountable.” § 1189(b). A debtor must state in the petition whether it is a debtor as defined in  § 1182(1) and whether it elects to proceed under Subchapter V. *Federal Rule of Bankruptcy Procedure 1020(b)* requires that the United States Trustee or a party in interest object to the debtor’s election “no later than 30 days after the conclusion of the meeting of creditors held under § 341(a) of the Code, or within 30 days after any amendment to the statement whichever is later.” *Fed. R. Bankr. P. 1020.*⁵

**5 The standards developed by the courts for Chapters 12 and 13 eligibility determinations provide useful guidance for  § 1182. However, when Congress expanded the reach of Subchapter V to debtors who have up to \$7.5 million in debts, it made Subchapter V available to entities having more complex creditor relationships than a debtor in a typical Chapter 12 or 13 case. This case is an example. Few, if any, Chapter 13 debtors or Chapter 12 family farmers will have claims arising from their management of 42 operating facilities, or have received substantial PPP funds, or seek to reject numerous real estate leases in so-called first day motions. These more complex creditor relationships may well lead to bona fide disputes over the proper characterization of creditor claims.

[3] The court need not find a lack of good faith or candor to conclude it should review the claims in this case. There is reasonable ground to dispute whether the lease rejection claims and the PPP funds were contingent and/or unliquidated as of the petition date—they present a valid “case or controversy.” *In re Stern*, 266 B.R. at 326. Further, the debtor amended its schedules after the deadline expired for challenging its eligibility under Subchapter V and, indeed, after its eligibility was challenged. Therefore, the debtor's characterization of the claims is appropriate for court review.

[4] In doing so, the court notes that § 1182 requires the consideration of debts “as of” the date of the filing of the petition, while the Chapter 13 eligibility determination looks to debts “on the date” of filing the petition. *See* § 109(e). The court finds no discernible difference in this language, considering how the phrase “as of” as used *552 in the Bankruptcy Code is interpreted by the courts. Most notably, § 541 includes as property of the estate all legal and equitable interest of the debtor “as of” the commencement of the case. The phrase “as of” places a temporal limitation on the reach of the bankruptcy estate. *In re Chernushin*, 911 F.3d 1265, 1269 (10th Cir. 2018), *cert. denied sub nom. Cohen v. Chernushin*, — U.S. —, 139 S. Ct. 2649, 204 L. Ed. 2d 284 (2019). It “establishes a clear-cut date after which property acquired by the debtor will normally not become property of the bankruptcy estate.” *Id.*; *see Am. Bankers Ins. Co. of Fla. v. Maness*, 101 F.3d 358, 362 (4th Cir. 1996) (other than limited statutory exceptions, property not owned at the time of the petition but only subsequently acquired by the debtor does not become property of the bankruptcy estate). “The normal rule of statutory construction” is that “identical words used in different parts of the same Act are intended to have the same meaning.” *Gustafson v. Alloyd Co., Inc.*, 513 U.S. 561, 562, 115 S. Ct. 1061, 131 L.Ed.2d 1 (1995).

The Lease Rejection Claims.

As set forth in the Findings of Fact, on May 21, 2020, the court authorized the rejection of five parking leases as of May 12, 2020, and without objection by the landlords, seven leases as of May 7, 2020, the petition date. ECF 75, 77. The debtor did not include the lease rejection claims on its schedules. The parties dispute whether the lease rejection claims were contingent as of the petition date.

[5] [6] [7] Noncontingent debts are those where “all events necessary to give rise to liability take place prior

to filing the petition.” *In re Green*, 574 B.R. 570, 576–77 (Bankr. E.D.N.C. 2017) (cleaned up); *see In re Aparicio*, 589 B.R. 667, 674–75 (Bankr. E.D. Cal. 2018) (all events that triggered liability occurred prepetition). A debt is deemed contingent if liability relies on a future extrinsic event which may never occur. *Id.* at 577 (quoting *In re Hanson*, 275 B.R. 593, 596 (Bankr. D. Colo. 2002)) (quoting *In re Nesbit*, No. 99-28414JKF, 2000 WL 294834 at *2 (Bankr. W.D. Pa. March 16, 2000)). Contingent liabilities therefore are a class of liabilities in which the obligation to pay does not arise until the occurrence of a “triggering event or occurrence ... reasonably contemplated by the debtor and creditor at the time the event giving rise to the claim occurred.” *In re Barcal*, 213 B.R. at 1013 (cleaned up).

*6 [8] Section 365(a) provides that a trustee or debtor in possession, “may assume or reject any ... unexpired lease of the debtor.” § 365(a). “The authority to reject an executory contract [or unexpired lease] is vital to the basic purpose of a Chapter 11 reorganization, because rejection can release the debtor's estate from burdensome obligations that can impede a successful reorganization.” *In re Shangra-La, Inc.*, 167 F.3d 843, 849 (4th Cir. 1999) (quoting *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 528, 104 S. Ct. 1188, 79 L.Ed.2d 482 (1984)). Similarly, the power to assume and/or assign an unexpired lease “gives the trustee significant flexibility in managing the estate.” *In re Shangra-La, Inc.*, 167 F.3d at 849.

[9] Section 365(a) expressly makes the assumption or rejection of an executory contract or unexpired lease “subject to the court's approval.” § 365(a). A motion to assume, reject, or assign an executory contract or unexpired lease is governed by Fed. R. of Bankr. P. 9014. Fed. R. Bankr. P. 6006(a). Notice must be given to the nondebtor party to the contract or lease, the United States Trustee, and any other parties in interest as the court may direct. *Id.* 6006(c). A debtor's decision to reject an executory contract or unexpired lease “is to be accorded the deference mandated by *553 the sound business judgment rule as generally applied by courts to discretionary actions or decisions of corporate directors.” *Lubrizol Enterprises, Inc. v. Richmond Metal Finishers, Inc.*, 756 F.2d 1043, 1046–47 (4th Cir. 1985).

[10] [11] Because the rejection of an executory contract or unexpired lease requires court approval, rejection is not a

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unilateral, independent process that can be accomplished by the debtor alone:

[A] debtor may not agree to assume or reject an executory contract until after the bankruptcy case is commenced and the debtor is acting in the capacity of debtor-in-possession. Even then, the Bankruptcy Code prevents the debtor-in-possession from making a unilateral decision to assume or reject a contract. Section 365(a) requires court approval of the decision and § 1109 states that a “party in interest, including ... a creditors’ committee, an equity security holders’ committee, a creditor, an equity security holder, or any indenture trustee, may raise and may appear and be heard on *any issue* in a case under [chapter 11].” 11 U.S.C. § 1109 (emphasis added).

 *In re Trans World Airlines, Inc.*, 261 B.R. 103, 115 (Bankr. D. Del. 2001). The requirement for court approval is particularly important in the rejection of unexpired commercial leases. As the Fourth Circuit has recognized, a “leasehold interest often proves to be the most valuable asset in a small business bankruptcy.”  *In re Shangra-La, Inc.*, 167 F.3d at 849.

[12] The rejection or assumption of an executory contract or unexpired lease does not determine whether the nondebtor party holds a claim; it establishes the nature of the claim as either “a pre-petition obligation of the debtor or as an administrative expense entitled to the highest priority.”  *In re Stewart Foods, Inc.*, 64 F.3d 141, 144 (4th Cir. 1995) (citing  *Leasing Serv. Corp. v. First Tenn. Bank Nat’l Assoc.*, 826 F.2d 434, 437 (6th Cir. 1987)).

The rejection of an executory contract constitutes a breach of the contract, and a party’s damages resulting from that rejection are treated as a pre-petition claim and receive the priority provided to general unsecured creditors. Where the debtor-in-possession assumes an executory contract, the expenses and liabilities incurred may be treated as administrative expenses and receive

the highest priority on the debtor’s estate.

****7**  *Id.*; see § 365(g). Until an executory contract is assumed or rejected, the debtor’s obligations under the contract are an administrative expense claim of the estate. See e.g., § 365(d)(5).

[13] Here, the rejection of leases was not approved until May 21, 2020; any resulting lease rejection claims thus were contingent obligations until that time. Five of the leases were rejected as of May 12, 2020. The debtor’s request to reject these leases was pending, and any lease rejection claims were contingent, until the court resolved the debtor’s rejection motion. The prerequisites to the debtor’s rejection of the leases, and any resulting lease rejection claims, were necessarily post-petition events. Consequently, the lease rejection claims were contingent as of the petition date and remained so until the issuance of the Court’s order approving the rejections. “[A]ll events necessary to give rise” to the lease rejection claims did not occur as of the petition date. *In re Green*, 574 B.R. at 576.

[14] Seven of the leases were rejected “as of” the petition date. The rejection of these leases was also approved by the court on May 21, 2020. Superficially, at least, the deemed effective date of the rejection—“as of” the petition date—appears to match  § 1182’s statutory requirement ***554** to consider debts as they exist “as of” the date of filing. But this question gives the court pause.

Resolution of this question requires the court to delve into the extent to which courts take into account post-petition events when making an eligibility determination, at least in Chapters 12 and 13. Many post-petition actions could result in contingent claims becoming noncontingent after the case is filed. As one court succinctly stated:

Numerous events may occur postpetition to affect a debtor’s total secured or unsecured debt. Collateral may be liquidated, converting a secured claim to an unsecured deficiency claim. Contingent personal guaranties may be liquidated after the creditor pursues a co-debtor, surety, or principal. A creditor may file a postpetition claim treated under the Code as prepetition, such as a lease rejection claim under § 365(g) or a § 1305 claim. Or, as was the case

here, a judgment might be modified or vacated by the trial court that issued the judgment or later on appeal.

The majority of courts that have considered the effect of a postpetition event on eligibility to file (or be converted) to Chapter 13 have concluded that postpetition events should not be considered in determining eligibility. To hold otherwise would mean that a debtor could float in and out of Chapter 13 eligibility during the course of a case, depending on what happens, which of course makes no legal or practical sense.

The ... plain language of § 109(e) requires consideration of the debts as they exist as of the petition date, irrespective of postpetition events. *E.g.*, *In re Wiencko*, 275 B.R. 772 (Bankr. W.D. Va. 2002);  *In re Slack*, 187 F.3d 1070 (9th Cir. 1999);  *In re Snell*, 227 B.R. 127 (Bankr. S.D. Ohio 1998); *In re Harwood*, 519 B.R. 535, 539–40 (Bankr. N.D. Cal. 2014);  *In re Pearson*, 773 F.2d 751, 758 (6th Cir. 1985) (“[T]he fact that some later resolution of the conflict might render more certain the precise nature of the debt itself ... is relatively immaterial in determining the debtors' financial condition and Chapter 13 eligibility on the date the petition is filed.... We do not believe that the statute requires any more” than a realistic look at “the state of the debtors' affairs” on the petition date).

****8**  *In re West*, No. 16-40358-CAN7, 2017 WL 746250, at *16 (Bankr. W.D. Mo. Feb. 24, 2017).

The court agrees with the foregoing analysis, even for the leases rejected “as of” the petition date. As with the leases rejected as of May 12, 2020, the prerequisites to the debtor's rejection of the leases, and any resulting lease rejection claims, were necessarily post-petition events. The lease rejection claims were contingent on the petition date and for two weeks following that date, and could only become noncontingent when the court approved the rejection. “All of the events necessary to give rise” to the lease rejection claims did not occur until two weeks after the petition date.

Not only does this approach meet the statutory directive to determine debt limits as they exist as of the date of filing, but it has the very real benefit of providing certainty to the process. As stated above, Subchapter V is designed to provide “an expedited process for small business debtors to reorganize quickly, inexpensively, and efficiently.”  *In re Seven Stars on the Hudson Corp.*, 618 B.R. at 336. Opening up eligibility

determinations to post-petition events, even if deemed to apply retroactively, is contrary to the purpose and spirit of Subchapter V, and could nullify the very benefits it is intended to convey.

***555** Finally, the objecting parties point to § 365(g), which makes the rejection of an unexpired lease that has not been assumed a “breach of such contract or lease ... immediately before the date of the filing of the petition.” § 365(g). They argue that § 365(g) establishes that the rejection claims are prepetition debts, and therefore must be included in the debt limit determination upon rejection. The argument is unavailing. The question is not whether lease rejection claims are treated as prepetition debts once the leases are rejected—that point is not disputable—but whether the lease rejection claims were noncontingent debts as of the date of filing. The claims were contingent until the court approved the lease rejections.

The court therefore concludes that the lease rejection claims were contingent as of the date of filing and are not considered in the debt limitation determination.

The PPP Funds.

[15] Prior to the petition, the debtor received \$1,862,723.84 of PPP funds from Truist Bank. ECF 198. On May 13, 2020, the court entered an order requiring the debtor “to abide by the certifications the debtor has made as to the limited use of PPP funds in a manner and for purposes permitted by the CARES Act and other laws governing the use of such funds.” ECF 37. In connection with the dispute over the debtor's eligibility, it submitted a declaration by its Director of Human Resources stating that, since the bankruptcy filing, the debtor has used all of the loan proceeds in accordance with the PPP requirements and intends to seek forgiveness of the entire balance in accordance with the PPP requirements. ECF 198.

The debtor contends any obligation to repay the PPP funds was both contingent and unliquidated as of the date of filing. It argues the PPP funds are a government grant and it only must repay them if it does not comply with PPP requirements. JBGS contends the obligation to repay the PPP funds is evidenced by a promissory note in a fixed amount, and therefore the funds were a noncontingent liquidated debt as of that date. Notably, neither the UST, nor Truist Bank, which advanced the PPP funds, joins JBGS's contention that the PPP funds should be included in the debt limit determination as a noncontingent liquidated debt. The court concludes that the debtor's obligation to repay the PPP funds was contingent

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and unliquidated as of the date of filing, and the PPP debt is therefore excluded from the eligibility determination.

****9** The PPP was created by the CARES Act and intended to provide emergency economic assistance to help individuals and businesses cope with the economic and public health crises triggered by the worldwide COVID-19 pandemic. *See* SBA, Interim Final Rule, 85 Fed. Reg. 20,811 (April 15, 2020) (the “First Interim Final Rule”). “The intent of the CARES Act is that SBA provide relief to America’s small businesses expeditiously” with a “focus on keeping workers paid and employed.” *Id.*

Section 1102 of the CARES Act, codified at  15 U.S.C. § 636(a)(36), temporarily permits the SBA to guarantee loans under a new program titled the “Paycheck Protection Program.” Section 1106 of the CARES Act, codified at  15 U.S.C. § 9005, provides for forgiveness of up to the full principal amount of qualifying loans guaranteed under the PPP. *See id.*

The PPP is a unique government financial accommodation created to provide businesses with necessary financial relief to withstand the devastating economic effects of the COVID-19 pandemic. Due to its unique nature, courts have not agreed on the proper characterization of the nature of the PPP. The issue has arisen most often in bankruptcy proceeding when debtors ***556** contend the Administrator of the United States Small Business Administration (“SBA”) violated the anti-discrimination provisions of § 525(a) by excluding debtors in bankruptcy from participating in the PPP.

In *iThrive Health, LLC v. Carranza*, this court addressed the issue. For purposes of § 525, this court characterized the PPP as a loan accompanied by a government guaranty that will result in forgiveness of the loan. *iThrive Health, LLC v. Carranza*, No. 20-00151, ECF 24 at 8 (Bankr. D. Md. June 8, 2020). It applied the rationale of the Fourth Circuit in  *Ayes v. U.S. Dep’t of Veterans Affairs*, 473 F.3d 104 (4th Cir. 2006), and concluded that, although the PPP is akin to a grant, the PPP did not meet the specific standards in  *Ayes* to be a “license, permit, charter, franchise or other similar grant” so as to fall within the ambit of § 525(a).  *Id.*

In so holding, however, the court recognized that:

The central characteristic of the PPP is that the recipient fully anticipates the SBA will satisfy its guaranty by paying the loan to the issuing financial institution *PPP funds, in essence, are a distribution of government funds to be used by businesses to survive the devastating economic consequences of the COVID-19 pandemic.* They are intended to enable businesses to pay employees and certain other critical expenses that they likely would not otherwise be able to pay.

Id. (emphasis added).

Here, the court is being called upon to address a different question: whether the PPP is a noncontingent and liquidated debt as of the petition date. It might seem apparent that a financial accommodation intended to provide “a distribution of government funds to be used by businesses to survive the devastating economic consequences of the COVID-19 pandemic” would be a contingent and unliquidated debt, but that is the question the court must resolve. The parties have not cited to any case that has addressed this question.

In considering whether the PPP is contingent, the court considers whether “all of the events necessary to give rise to liability [took] place prior to filing the petition,” or whether “liability relies on some future extrinsic event which may never occur.” *In re Green*, 574 B.R. at 577-580. The obligation to pay a contingent liability does not arise until the occurrence of a “triggering event or occurrence ... reasonably contemplated by the debtor and creditor at the time the event giving rise to the claim occurred.”  *In re Barcal*, 213 B.R. at 1013.

****10** To resolve the dispute, the court must determine the nature of the PPP debt and the debtor’s obligation to repay it. Under the PPP, an applicant submits a PPP Borrower Application Form to a SBA approved lending institution. The loan forgiveness is recognized and acknowledged in the application. As the application existed when the debtor applied, it provided:

I understand that loan forgiveness will be provided for the sum of documented payroll costs, covered mortgage interest payments, covered rent payments, and covered utilities, and not more than 25% of the forgiven amount may be for non-payroll costs. (SBA Form 2483 (04/20)).⁶

The lending institution reviews the application and decides whether it meets the SBA requirements for funding. Significantly, “lenders are subject to relatively few *557 underwriting obligations before issuing loans ... neither lenders nor SBA are conducting typical analysis of the characteristics of PPP applicants” SBA, [Interim Final Rule](#), 85 Fed. Reg. 38,303 (June 26, 2020). Further, the CARES Act waives regular SBA fees, suspends the requirement that small businesses be unable to obtain credit elsewhere and waives any requirement for a personal guarantee or collateral for the covered loans. See [15 U.S.C. § 636\(a\)\(36\)\(H\), \(I\) and \(J\)](#).

Upon approval, the applicant executes a PPP form of promissory note and funds are disbursed. The note itself expressly incorporates the PPP requirements and provides for the forgiveness. Here, the debtor executed, in favor of Truist Bank, a Paycheck Protection Program Promissory Note (the “PPP Note”). In the PPP Note, the debtor represents and warrants that “the loan evidenced by this Note is being made solely for the permitted use of proceeds specified by the CARES Act and related regulations, rules and guidance.” Proof of Claim 1-1, Part 2, p. 3. The PPP Note further provides:

Borrower acknowledges that (a) loan forgiveness will be provided by the SBA for the sum of documented payroll costs, covered mortgage interest payments, covered rent payments, and covered utilities, and not more than 25% of the Forgivable Amount may be for on-payroll costs and (b) the forgiveness

amount is subject to reduction based on employee headcount and compensation reductions during the 8-week loan period as compared to the prior periods in accordance with the CARES Act.

Id. at p. 2 (emphasis added). In the PPP Note:

Borrower acknowledges and agrees that all proceeds of the Loan shall be used solely to fund the uses specified in the Paycheck Protection Program Rule (“Allowable Costs”); provided that, for the avoidance of doubt, in no event shall more than twenty-five percent (25%) of the total Allowable Costs paid by Borrower using proceeds of the Loan be attributable to non-payroll costs.

At the conclusion of the Forgiveness Period, Borrower shall promptly but in no event more than thirty (30) days following the conclusion of the Forgiveness Period submit to Bank all documentation, accompanying certifications and other relevant disclosures required by the SBA under the CARES Act or otherwise requested by Bank on the worksheet provided by Bank for calculation of loan forgiveness amounts, a copy of which will be provided to Borrower after the date hereof.

****11** *Id.* at p. 3. The PPP Note contains numerous provisions tying the obligation to the PPP rules and regulations. As examples:

Borrower has read the statements included in the application related to this loan (the “Application”) including the Statements Required by Law and Executive Orders, and Borrower understands them.

Borrower was and remains eligible to receive a loan under the rules in effect at the time the Application was submitted that have been issued by the Small Business Administration (“SBA”) implementing the Paycheck Protection Program under Division A, Title I of the Coronavirus Aid, Relief, and Economic Security Act (“CARES Act”) (the “Paycheck Protection Program Rule”).

All proceeds of the Loan will be used only for business-related purposes as specified in the Application and consistent with the Paycheck Protection Program Rule.

The current economic uncertainty makes the request for the Loan necessary to *558 support the ongoing operations of Borrower.

All proceeds of the Loan will be used to retain workers and maintain payroll or make mortgage interest payments, lease payments, and utility payments, as specified under the Paycheck Protection Program Rule and Borrower acknowledges that if the funds are knowingly used for unauthorized purposes, the federal government may hold Borrower and/or Borrower's authorized representative legally liable, such as for charges of fraud.

Borrower has reviewed the SBA's affiliation rules and standards, including the application of such affiliation standards to eligibility requirements for the Paycheck Protection Program, and, after due and careful consideration, represents and warrants that Borrower satisfies all requirements for eligibility for the Paycheck Protection Program.

Borrower acknowledges that it has calculated the eligible Loan amount using the supporting documents which it has submitted to Bank. Borrower further acknowledges that execution of this Note constitutes Borrower's certification that it is in agreement with the Principal Amount of the Loan as set forth herein and that such Principal Amount is not in excess of the maximum principal amount permitted accordance with the CARES Act.

Id. at p. 1-2.

The nature of the debtor's obligation to repay the PPP loan must be determined by reference to the PPP Note, as amplified by the CARES Act itself, the SBA Rules, and the PPP application. Section 1106 of the CARES Act provides for forgiveness of up to the full principal amount of PPP qualifying loans. This is the essential purpose of the PPP. The SBA confirms this essential purpose in unequivocal terms:

SBA will forgive loans if all employee retention criteria are met, and the funds are used for eligible expenses.

U.S. Small Business Administration, Paycheck Protection Program, <https://www.sba.gov/funding-programs/loans/>

[coronavirus-relief-options/paycheck-protection-program](#) (last visited Aug. 13, 2020).

The PPP application establishes at the very inception of the borrower's involvement the nature of the financial accommodation which the applicant seeks: a loan for which "forgiveness *will be provided* for the sum of documented payroll costs, covered mortgage interest payments, covered rent payments, and covered utilities, and not more than 25% of the forgiven amount may be for non-payroll costs." SBA Form 2483 (04/20) (emphasis added). In applying for PPP funds, the applicant need not provide much, if any, financial information, or offer any collateral or guaranty.

****12** The PPP Note incorporates the SBA rules governing the PPP and obligates the borrower to use the funds in accordance with the PPP. More significantly, it also expressly provides that "loan forgiveness *will be provided* by the SBA for the sum of documented payroll costs, covered mortgage interest payments, covered rent payments, and covered utilities" Proof of Claim 1-1, Part 2 at p.2 (emphasis added).

The foregoing establishes that forgiveness is the essential characteristic of the debtor's obligation under the PPP Note and the PPP requirements. But for forgiveness, there is no PPP. Accordingly, as of the petition date, the debtor's liability to repay the PPP is dependent on it using the funds for ineligible expenses or failing to meet employee retention criteria. The debtor's liability to repay the PPP "relies on some future extrinsic event which may never occur." *In re Green*, 574 B.R. at 577. Additionally, it is subject to a "triggering event or occurrence ... reasonably contemplated *559 by the debtor and creditor at the time" the debtor applied for and obtained the PPP funds. *In re Barcal*, 213 B.R. at 1013. Therefore, the debtor's obligation was contingent as of the date of filing.

[16] [17] The court also concludes that the debtor's obligation under the PPP was unliquidated as of the petition date. The Bankruptcy Code does not define the term "liquidated." Again, borrowing from Chapter 13 cases, the concept of a liquidated debt relates to the amount of liability, not the existence of liability. *United States v. Verdunn*, 89 F.3d 799 (11th Cir. 1996). Courts generally hold that "the key factor in distinguishing liquidated from unliquidated claims is not the extent of the dispute nor the amount of evidence required to establish the claim, but whether the process

for determining the claim is fixed, certain, or otherwise determined by a specific standard.”  *In re Barcal*, 213 B.R. at 1014. See *In re Adams*, 373 B.R. 116, 119-120 (B.A.P. 10th Cir. 2007) (a “debt is readily determinable only if the process of determining the claim is fixed, certain, or otherwise determinable by a specific standard”). See  *In re Slack*, 187 F.3d at 1073 (“debt is liquidated for the purposes of calculating eligibility for relief under § 109(e) if the amount of the debt is readily determinable.”); *In re Stern*, 266 B.R. 322 (quoting and adopting  *In re Barcal*, 213 B.R. at 1014, to determine that debts were fixed amounts due pursuant to a contract).

As explained above, the debtor will have no obligation to repay the PPP funds if all employee retention criteria are met, and the funds are used for eligible expenses. As of the petition date, the debtor had certified it intended to meet the employee retention criteria and use the funds for eligible expenses. Further, early in the case, the court entered an order requiring the debtor to do so. ECF 37. In connection with this dispute, the debtor submitted a declaration stating that, in fact, it has used all of the loan proceeds in accordance with the PPP requirements and will seek forgiveness of the entire loan balance in accordance with the PPP requirements. ECF 198.

The PPP obligation was not liquidated as of the petition date because it was not then known, and could not be determined, whether the debtor would use the PPP funds for ineligible expenses or would fail to maintain employee staffing levels in accordance with the PPP. Thus, it could not be determined what amount, if any, of the PPP funds the debtor would be obligated to repay.

****13** Further, the loss of forgiveness is not an all or nothing proposition. Where a borrower fails to meet the SBA rules and CARES Act regulations, the borrower may still be granted forgiveness for the portion of the loan used in compliance with the rules and regulations. The extent to which a borrower will

be obligated to repay the PPP loan depends on the amount of PPP funds it uses for ineligible purposes and the extent of its failure to maintain staffing levels. In these events, the amount of the loan forgiveness is based on amounts spent by borrower on payroll costs including taxes, insurance, salary, wages, and tips;⁷ owner compensation replacement; and non-payroll costs including interest payments on business mortgage of real or ***560** personal property; payment on business rent obligations of real or personal property; business utility payments for electric, gas, water, transportation, telephone or internet.⁸

Again, as of the petition date, it could not be determined the extent to which the debtor might use the PPP funds for ineligible expenses or might fail to maintain employee staffing levels. It turns out the debtor complied with these requirements and anticipates complete forgiveness. See ECF 198. But considering the question as of the petition date, there was no way to determine what amount, if any, the debtor might be obligated to repay. Therefore, the debtor's obligation under the PPP was unliquidated as of the date of the filing, and is excluded from the debt limitation determination under

 § 1182.

Conclusion

****14** For the foregoing reasons, the court concludes the lease rejection claims and PPP obligation were contingent as of the date of filing, and the debtor's obligation to repay the PPP was unliquidated as of that date. Therefore, these claims are not included in the debt limitation determination of  § 1182 and the debtor is eligible to proceed under Subchapter V.

All Citations

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Footnotes

¹ Unless otherwise noted, all statutory references herein are to the Bankruptcy Code,  11 U.S.C. §§ 101 *et seq.*, as currently in effect.

²  Section 1182 provides:

In this subchapter:

(1) Debtor.--The term "debtor"--

(A) subject to subparagraph (B) ... a person engaged in commercial or business activities (including any affiliate of such person that is also a debtor under this title and excluding a person whose primary activity is the business of owning single asset real estate) that has aggregate noncontingent liquidated secured and unsecured debts as of the date of the filing of the petition or the date of the order for relief in an amount not more than \$7,500,000 (excluding debts owed to 1 or more affiliates or insiders) not less than 50 percent of which arose from the commercial or business activities of the debtor[.]

 § 1182(1)(A).

3 The debtor and JBGS dispute whether the JBGS claim is noncontingent and liquidated. Because the court concludes that the lease rejection claims and the PPP funds are contingent and unliquidated, it need not address this issue.

4 Section 109(e) provides:

(e) Only an individual with regular income that owes, on the date of the filing of the petition, noncontingent, liquidated, unsecured debts of less than \$250,000² and noncontingent, liquidated, secured debts of less than \$750,000², or an individual with regular income and such individual's spouse, except a stockbroker or a commodity broker, that owe, on the date of the filing of the petition, noncontingent, liquidated, unsecured debts that aggregate less than \$250,000² and noncontingent, liquidated, secured debts of less than \$750,000² may be a debtor under chapter 13 of this title.

§ 109(e).

5 In contrast, there is no deadline for challenging the debtor's eligibility under Chapter 13.

6 This form has been amended on at least two occasions, the provisions referenced herein are also found in the most recent borrower application form, SBA Form 2483, revised June 24, 2020.

7 For example, payroll costs are computed as follows (with additional exceptions not substantively relevant hereto): Under 1106(d)(5) of the CARES Act, at least 75% of the loan forgiveness amount must be for payroll costs. This amount was reduced to 60% in section 3(b) of the Flexibility Act.  15 U.S.C. § 9005(d)(8). Payroll costs include salary, wages, commissions or similar compensation, including salary, wages or commissions to furloughed employees.  15 U.S.C. § 9005(a)(8). For loans disbursed before June 5, 2020 and for borrowers electing to use an 8-week "covered period" (a defined term in the CARES Act) covered payroll costs for owner-employees and self-employed individuals is capped at 8 weeks' worth of 2019 compensation or \$15,385 per individual, whichever is less. For loans eligible for or electing a 24-week "covered period," covered payroll costs are capped at 2.5 months' worth of 2019 compensation or \$20,833 per individual, whichever is less. SBA, *Interim Final Rule 85 Fed. Reg. 38,304 (June 26, 2020)*.

If borrower reduces its full-time equivalent employees during the "covered period," loan forgiveness is reduced by the same percentage as the percentage reduction in full-time equivalent employees.  15 U.S.C. § 9005(d)(2). The term full-time equivalent employee is not defined in the CARES Act, the Administrator has defined the term as any employee who works 40 hours or more, on average, each week. A borrower's loan forgiveness will also be reduced if borrower has reduced an employee's salary or wages in excess of 25%.

 15 U.S.C. § 9005(d)(3). In general, forgiveness is reduced by the total dollar amount of the salary or wage reductions that are in excess of 25% of base salary or wages, subject to exceptions for borrowers who restore reduced wages or salaries.

8 The complexity of the PPP lies within the many interim rules adopted to implement the CARES Act, addressing the employee retention criteria, eligible costs and expenses, and other matters that can result in the recipient's obligation to repay the loan if all employee retention criteria are not met, and the funds are not used for eligible expenses. The SBA has published, as of the date of this opinion, at least twenty-four interim final rules, covering everything from affiliation, eligibility, promissory notes, seasonal employers, lender requirements, loan increases, cooperatives, loan forgiveness and lender/borrower responsibilities—just to name a few. All

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interim final rules are published in the Federal Register and are most easily accessed on the U.S. Department of Treasury website: <https://home.treasury.gov/policy-issues/cares/assistance-for-small-businesses>.

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2020 WL 3124585

United States Bankruptcy Court, E.D. North Carolina,
New Bern Division.IN RE: [PENLAND HEATING AND
AIR CONDITIONING, INC.](#), Debtor

CASE NO. 20-01795-5-DMW

Signed June 11, 2020

Attorneys and Law Firms[Clayton W. Cheek](#), The Law Offices of Oliver & Cheek,
PLLC, New Bern, NC, for Debtor.**ORDER DENYING APPLICATION
TO EMPLOY ATTORNEY**[David M. Warren](#), United States Bankruptcy Judge

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

Background

On May 1, 2020, the Debtor filed a voluntary petition for relief under Subchapter V of Chapter 11 of the United States Bankruptcy Code ("Subchapter V") and is operating as a debtor-in-possession pursuant to [11 U.S.C. § 1184](#). On May 4, 2020, the BA appointed the Trustee to serve as trustee in the case pursuant to [11 U.S.C. § 1183](#).

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

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

Discussion

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

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

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

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

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

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

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

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

employment of the professional is warranted under the specific circumstances of each case.

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

At the hearing, the Trustee stated that he filed the Application as a matter of course but did not have any current need for legal representation in the Debtor's case.¹ The court understands the desire to have professional employment secured, because this procedure is a prerequisite for compensation under 11 U.S.C. § 330(a); however, authorizing a Subchapter V trustee to employ professionals, including oneself as counsel, routinely and without specific justification or purpose is contrary to the intent and purpose of the SBRA.² In this case, the Debtor is operating in possession of its assets and has employed counsel to represent it in legal matters. At this time and without further evidence, the Trustee does not need legal assistance to fulfill his basic duties to monitor and facilitate the Debtor's reorganization. If during the case the Trustee identifies a specific need for the employment of an attorney or other professional, then the court will consider another request; now therefore,

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

SO ORDERED.

All Citations

Slip Copy, 2020 WL 3124585, 68 Bankr.Ct.Dec. 228

Footnotes

- 1 The court routinely allows Chapter 7 panel trustees and Chapter 11 trustees to hire themselves and their law firms to provide legal services that are outside the scope of the administrative trustee duties. The court has found allowing trustees to employ themselves or their firms provides an economical efficiency to case administration.
- 2 The court cautions overzealous and ambitious Subchapter V trustees that unnecessary or duplicative services may not be compensated, and other fees incurred outside of the scope and purpose of the SBRA may not be approved. The court absolutely does not imply that the Trustee in this case had even a remote thought of performing services outside the scope of the SBRA. The Application was filed out of an abundance of caution

In re Penland Heating and Air Conditioning, Inc., Slip Copy (2020)

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and as a standard of practice like in Chapter 7 cases, and the court appreciates this opportunity to provide some guidance for this new legislation.

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2020 WL 7345741

Only the Westlaw citation is currently available.
United States Bankruptcy Court, D. Idaho.

IN RE: TRI-STATE ROOFING, Debtor.

Bankruptcy Case No. 20-40188-JMM

Signed December 7, 2020

Attorneys and Law Firms

Aaron J. Tolson, Ammon, ID, for Debtor.

Gary L. Rainsdon, Twin Falls, ID, for Trustee.

**MEMORANDUM DECISION ON
APPLICATION FOR SUBCHAPTER
V TRUSTEE'S FEES AND EXPENSES**

JOSEPH M. MEIER, CHIEF U. S. BANKRUPTCY JUDGE

*1 Before the Court is the Amended Application for Compensation and Reimbursement of Expenses (Dkt. No. 81) ("Application") submitted by Gary L. Rainsdon, the trustee appointed in this Chapter 11, Subchapter V case ("Trustee"). No party in interest has objected to the Application and the Trustee submitted a proposed order to this Court to grant it. This Memorandum Decision addresses issues the Court observed based on specific provisions of the Bankruptcy Code.

Discussion

This Chapter 11 case was dismissed on November 12, 2020 (Dkt. No. 83) after the Trustee filed a motion to dismiss (Dkt. No. 70), which was supported by the United States Trustee (Dkt. No. 74) and then joined by the Debtor (Dkt. No. 79). No plan was ever confirmed in the case.

The Trustee is not a standing trustee and thus was not appointed pursuant to  28 U.S.C. § 586(b). Rather, the Trustee was appointed as a disinterested person to serve as trustee in this case by the United States Trustee under  11 U.S.C. § 1183(a). Notice of that appointment was filed with the Court on March 10, 2020 (Dkt. No. 13). As stated above,

the case was dismissed prior to the confirmation of a plan. In the event no plan is confirmed, 11 U.S.C. § 1194 authorizes the Trustee to deduct and pay certain sums before returning any funds collected from the Debtor. Pursuant to 11 U.S.C. §§ 1194(a)(1) and (3), these certain claims include any unpaid claim allowed under  11 U.S.C. § 503(b) and any fee that is owed to the Trustee.¹

 Section 503(b) addresses the allowance of administrative claims and subsection (b)(2) of that section specifically includes any compensation or reimbursement awarded under  11 U.S.C. § 330(a). Here, the Application filed by the Trustee seeks compensation under  §§ 330(a) and  503(a) (Dkt. No. 81 at page 1). Notice was properly given in accordance with Fed. R. Bankr. P. 2002(a)(6) and the Trustee itemized \$1,920.00 in fees incurred between April 20, 2020 and October 26, 2020. The Trustee did not seek reimbursement of any expenses in the Application. *Id.* Upon a review of the itemized fees and consideration of the factors under  11 U.S.C. § 330(a)(3), the Court concludes the compensation sought is reasonable. Despite that conclusion, however, there is a legal issue that must also be examined.

***2 Subsection 330(a)(1) states:**

After notice to the parties in interest and the United States Trustee and a hearing, **and subject to sections 326, 328, and 329**, the court may award to a trustee, a consumer privacy ombudsman appointed under section 332, an examiner, an ombudsman appointed under section 333, or a professional person employed under section 327 or 1103—

(A) reasonable compensation for actual, necessary services rendered by the trustee, examiner, ombudsman, professional person, or attorney and by any paraprofessional person employed by any such person; and

(B) reimbursement for actual, necessary expenses.

Id. (emphasis added).

Thus, to determine if an award of compensation can be made under  § 330(a)(1), the Court must review  §§ 326, 328, and  329 of the Bankruptcy Code. Starting in

reverse order, § 329 is not applicable as it addresses transactions between a debtor and attorneys representing the debtor. Similarly, § 328 is not applicable as it addresses limitations on the compensation of professionals the trustee or a committee may employ or situations where a bankruptcy court has allowed the trustee to be employed as an attorney or accountant. But § 326 is applicable to trustees appointed in cases under subchapter V of chapter 11 (“hereinafter referred to as “subchapter V”) as it imposes limitations on the compensation of that trustee.

Two subsections of § 326 must be examined. Subsection (a) specifically excludes payment for trustee services in subchapter V. Thus, the percentage payments authorized for a chapter 7 trustee or a trustee in other chapter 11 cases does not apply in subchapter V, rendering those percentages inapplicable here.

Subsection (b), however, is not so easily eliminated. That subsection states:

(b) In a case under *subchapter V of chapter 11* or chapter 12 or 13 of this title, the court may not allow compensation for services or reimbursement of expenses of the United States trustee or of a standing trustee appointed under **section 586(b) of title 28, but may allow reasonable compensation under section 330 of this title of a trustee appointed under section 1202(a) or 1302(a) of this title** for the trustee's services, payable after the trustee renders such services, not to exceed five percent upon all payments under the plan.

Id. (emphasis added: the italicized words were added as part of the amendments made by the Small Business Reorganization Act of 2019, Pub. L. No. 116-54, 133 Stat. 1079; the bold font is added by the Court).

The portion of the statutory language preceding the second comma is easily addressed. As stated above, the Trustee was

not appointed under 28 U.S.C. § 586(b) and therefore is not a standing trustee. Thus, that portion of the statute is not applicable to the case at bar. But what about the text following the second comma, emphasized in bold font above? At first blush, this language appears to only allow reasonable compensation under § 330 if a trustee is appointed in a case filed under chapter 12 or chapter 13. There is not a reference to a trustee in subchapter V in this portion of the statute. The language quoted above following the bold font also caps compensation for a trustee at five percent in chapter 12 and chapter 13 cases. As such, this subsection concerning non-standing trustees in subchapter V may be subject to three interpretations.

*3 The first interpretation is that no compensation should be allowed under subsection 330 to subchapter V trustees, and only chapter 12 and chapter 13 trustees may qualify. The Court concludes that this is not a plausible reading of the statute. It is a well-established canon of statutory construction that “the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.”

Util. Air Regulatory Grp. v. E.P.A., 573 U.S. 302, 320, 134 S. Ct. 2427, 2442, 189 L. Ed. 2d 372 (2014). Moreover, a court is to infer that Congress did not intend to make any portion of a statute superfluous, and therefore “we must give effect to every word of a statute wherever possible.” *In re Pangang Grp. Co., LTD.*, 901 F.3d 1046, 1056 (9th Cir. 2018) (quoting *Leocal v. Ashcroft*, 543 U.S. 1, 12, 125 S.Ct. 377, 160 L.Ed.2d 271 (2004)).

To interpret § 326 as permitting no compensation to subchapter V trustees would eliminate not only the language in subsection 330(a)(1), quoted above, but other subsections of the Code for subchapter V trustees as well. For example, it would make § 1194(c), which authorizes a trustee to pay fees owed to the subchapter V trustee, inapplicable to non-standing trustees. Thus, the Court concludes this reading of § 326(b) does not present a bar to the Trustee to obtain compensation under § 330(a)(1).

The second reading of the bolded portion of § 326(b) is that Congress only intended to place a percentage limitation on compensation to trustees who are not standing trustees in chapter 12 and chapter 13 and not to impose that cap on trustees in subchapter V. One could argue that, by adding the italicized words “subchapter V of chapter 11,” Congress

modified § 326(b) in such a way as to both preclude the compensation of standing trustees under § 330(a)(1), and to impose limitations on compensation for non-standing chapter 12 and 13 trustees only, leaving a non-standing subchapter V trustee's compensation without limit. The addition of the italicized words in the 2019 amendments has meaning if Congress wanted to limit the compensation of standing subchapter V trustees only.

The third reading of the language in subsection 326(b) emphasized above is that Congress intended not only to limit compensation under § 330 for all standing trustees in chapter 12, 13, and subchapter V, but also intended to cap the fees of trustees that are not standing trustees in chapter 12, 13 and subchapter V. To reach this result, however, requires the Court to insert words into the statute that Congress did not include. This reading would require the Court to write in the words “section 1183(a)” or something similar to effectuate it. The Court agrees that the inclusion of those words would not only be logical, but also would make subchapter V trustee compensation the same as that in chapter 12 and 13. It seems likely that the intent of Congress was to make trustee compensation in subchapter V mirror that in chapters 12 and 13. However, there is a “difference between filling a gap left by Congress' silence and rewriting rules that Congress has affirmatively and specifically enacted.” *Lamie v. U.S. Tr.*, 540 U.S. 526, 538, 124 S. Ct. 1023, 1032, 157 L. Ed. 2d 1024 (2004) (quoting *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625, 98 S.Ct. 2010, 56 L.Ed.2d 581 (1978)). This Court believes legislative drafting is the province of Congress and not the courts, and “the Court is not free to rewrite the statute that Congress has enacted.” *Dodd v. United States*,

545 U.S. 353, 354, 125 S. Ct. 2478, 2479–80, 162 L. Ed. 2d 343 (2005). “It is well established that ‘when the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms.’ ” *Lamie*, 540 U.S. at 534, 124 S. Ct. at 1030 (quoting *Hartford Underwriters Ins. Co. v. Union Planters Bank, N. A.*, 530 U.S. 1, 6, 120 S.Ct. 1942, 147 L.Ed.2d 1 (2000)).

*4 As such, because the language of the statute can be enforced as written and does not make the amendment absurd, the Court concludes that § 326(b) does not prevent an award of compensation to the Trustee under § 330(a)(1), nor does it place a cap such compensation.

Conclusion

The Trustee's Application is approved, and he shall be awarded compensation in the amount of \$1,920.00 under 11 U.S.C. § 330(a)(1). This is an allowed administrative expense under 11 U.S.C. § 503(b)(2) and the Trustee may pay the claim pursuant to 11 U.S.C. §§ 1194(a) and (c). The Court also concludes that 11 U.S.C. § 326(b) does not impose a 5% cap on this compensation under these facts.

A separate order will be entered.

All Citations

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Footnotes

- 1 The Trustee has not represented that there are any funds held by him to distribute. The Court presumes that because the Trustee is pursuing this award of compensation under § 330 to be allowed as an administrative expense, there is property of the estate still held by the Trustee to permit the distributions described in § 1194. Judge Terry L. Myers has previously held that administrative expense claims are not monetary judgments but rather entitle the claimant to receive a distribution from the bankruptcy estate. *In re Soelberg*, Case No 15-01355-TLM (Bankr. D. Idaho August 13, 2019) (citing *In re 3109, LLC*, 2014 WL 1655415 (Bankr. D.C. Apr. 25, 2014)). If there are no funds currently held by the Trustee, it is difficult to understand how this claim would be paid.

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625 B.R. 27
United States Bankruptcy Court,
S.D. Texas, Houston Division.

IN RE: Arnold B BAKER; dba [Abbaker Enterprises, LLC](#); dba Arnoldbbaker, LLC Debtor.

Case No: 20-33465

Signed 12/21/2020.

Synopsis

Background: Subchapter V debtor requested an extension of time for him to file a proposed plan.

[Holding:] The Bankruptcy Court, [Eduardo V. Rodriguez, J.](#), held that debtor was entitled to second extension of deadline for filing a proposed plan.

Request granted.

Procedural Posture(s): Motion to Extend Exclusive Period to File Plan.

West Headnotes (12)

[1] **Bankruptcy** Determination of jurisdictional questions

Bankruptcy Bankruptcy judges

Bankruptcy court has independent duty to evaluate whether, as non-Article-III court, it has constitutional authority to sign a final order resolving a dispute. [U.S. Const. art. 3, § 1](#) et seq.

[2] **Bankruptcy** Particular proceedings or issues

Bankruptcy Bankruptcy judges

Bankruptcy court, even as non-Article-III court, had constitutional authority to enter an order resolving Subchapter V debtor's request for an extension of deadline to file a plan of reorganization. [U.S. Const. art. 3, § 1](#) et seq.; [11 U.S.C.A. §§ 1181 et seq., 1189\(b\)](#).

[3] **Bankruptcy** Reorganization cases

Debtor's eligibility for Subchapter V relief must be determined based upon the debt amounts contained in debtor's schedules on petition date.

[11 U.S.C.A. § 101\(51D\)](#).

[4] **Bankruptcy** Who May File, and Time for Filing

Ninety-day time limit for filing a plan in Subchapter V case is not jurisdictional, meaning that court is not stripped of jurisdiction over debtor's case 91 days after order for relief if debtor has not yet filed a plan. [11 U.S.C.A. § 1189](#).

[5] **Bankruptcy** Limitations and time to sue; computation

Statutory filing deadlines are generally claims-processing rules and should not be treated as jurisdictional unless Congress has clearly stated that a deadline is jurisdictional.

[6] **Bankruptcy** Who May File, and Time for Filing

Like Subchapter V cases, Chapter 12 bankruptcies are intended to proceed on what can be characterized as a fast track, and thus cases discussing the extension of deadline for filing Chapter 12 plan provide guidance in determining under what circumstances a court should extend plan filing deadline in Subchapter V case. [11 U.S.C.A. §§ 1189\(b\), 1221](#).

[7] **Bankruptcy** Who May File, and Time for Filing

Standard that Subchapter V debtor must satisfy in order to obtain an extension of time for filing a proposed plan, by demonstrating that the need for an extension is attributable to "circumstances for which the debtor should not justly be held accountable," is a higher and

more demanding standard than the “for cause” standard for obtaining an extension of deadline under Bankruptcy Rule. 11 U.S.C.A. § 1189(b); Fed. R. Bankr. P. 9006(b).

[8] **Bankruptcy** — Who May File, and Time for Filing

Bankruptcy court may grant a Subchapter V debtor an extension of time to file a proposed plan only if the debtor's inability to file a timely plan is due to circumstances for which Debtor is not fairly responsible, in other words, due to circumstances beyond the debtor's control. 11 U.S.C.A. § 1189(b).

[9] **Bankruptcy** — Who May File, and Time for Filing

Whether Subchapter V debtor is entitled to extension of time to file a proposed plan, on the ground that debtor's need for an extension is due to circumstances for which he should not justly be held accountable, requires a fact-driven inquiry. 11 U.S.C.A. § 1189(b).

[10] **Bankruptcy** — Who May File, and Time for Filing

In deciding whether Subchapter V debtor was entitled to extension of time to file a proposed plan, upon ground that debtor's need for extension was due to circumstances for which he should not justly be held accountable, bankruptcy court would consider whether: (1) the circumstances raised by debtor were within his control, (2) debtor has made progress in drafting a plan, (3) the deficiencies preventing that draft from being filed are reasonably related to the identified circumstances, and (4) any party-in-interest has moved to dismiss or convert debtor's case or otherwise objected to a deadline extension in any way. 11 U.S.C.A. § 1189(b).

[11] **Bankruptcy** — Who May File, and Time for Filing

Subchapter V debtor was entitled to second extension of deadline for filing a proposed plan, where debtor's failure to meet extended deadline was due to circumstances outside his control, involving death of his brother and technological error that resulted in no express deadline being established, other than that which could be derived from rules, for governmental entities to file proofs of claim, where debtor had made significant progress toward drafting a plan, and where no party-in-interest had objected to further extension. 11 U.S.C.A. § 1189(b).

[12] **Bankruptcy** — Who May File, and Time for Filing

Filing of “placeholder” plans in Subchapter V cases is disfavored; rather, debtors are expected to file substantive, confirmable plans prior to expiration of filing deadline, unless situations arise such that an extension is warranted because of circumstances for which the debtor should not justly be held accountable. 11 U.S.C.A. § 1189.

Attorneys and Law Firms

*29 H. Gray Burks IV, Shapiroschwartz LLP, Houston, TX, for Debtor.

MEMORANDUM OPINION

Eduardo V. Rodriguez, United States Bankruptcy Judge

**1 There are limited instances where courts afford debtors a metaphorical “get out of jail free” card. This Memorandum Opinion determines whether circumstances exist in which the instant debtor should not justly be held accountable for failure to file a plan of reorganization within an established deadline where under chapter 11, subchapter V, only the debtor may file a plan. On December 8, 2020, the Court conducted a hearing on debtor's second request to extend the deadline to file a plan of reorganization.

For the reasons set forth herein, this Court finds that the need for an extension to file a plan beyond the November 23, 2020 deadline is attributable to circumstances for which the

debtor should not justly be held accountable. The debtor shall have until December 28, 2020 to file corrective Schedules D and E/F, properly setting forth the amount of debt for each creditor. This Court previously issued an order establishing the deadline for the filing of governmental proofs of claim as January 4, 2021.¹ Thus, the debtor shall have until January 18, 2021 to file a plan of reorganization.

I. FINDINGS OF FACT

This Court makes the following findings of fact and conclusions of law pursuant to [Federal Rule of Bankruptcy Procedure 9014](#) and [Rule 7052](#), which incorporates [Federal Rule of Civil Procedure 52](#). To the extent that any finding of fact constitutes a conclusion of law, it is adopted as such. To the extent that any conclusion of law constitutes a finding of fact, it is adopted as such. This Court made certain oral findings and conclusions on the record. This Memorandum Opinion supplements those findings and conclusions. If there is an inconsistency, this Memorandum Opinion controls.

On July 7, 2020, Arnold B. Baker (“Debtor”) filed his initial petition under chapter 11, subchapter V, title 11 of the Code.² More than half the amount of Debtor’s secured debt is comprised of a single governmental tax obligation.³ On July 8, 2020, the notice of the First Meeting of Creditors was filed on the Court’s docket setting November 9, 2020 as the deadline for the filing of all non-governmental proofs of claim (“341 Notice”).⁴ Conspicuously missing, however, was the deadline for the filing of governmental proofs of claim that is routinely contained within a 341 Notice.

On August 12, 2020, and pursuant to [11 U.S.C. § 1188\(a\)](#), this Court held a status conference and ordered Debtor to file a plan of reorganization, no later than October 5, 2020.⁵ On September 15, 2020, Debtor filed an expedited motion to extend the October 5, 2020 deadline to November 23, 2020, several days past the November 9, 2020 non-governmental proofs of claim bar date.⁶ Debtor requested an extension because of the \$4,092,944.50 scheduled general unsecured debt, most of the amounts were listed as contingent, unliquidated, and disputed while other scheduled debt was listed as unknown. For example, the City of New Orleans was listed as “Unknown.”⁷ The amount for David White was listed as \$0, but Debtor checked the box labeled “Other” and noted that the amount could

be \$1,000,000 based on an arbitration claim.⁸ Southern Aggregates, LLC was listed as \$0, but just like David White’s claim, the “Other” box was checked listing an amount of \$300,000 based on a litigation claim.⁹ WDD Investments, Inc. was listed as \$0 based on a litigation claim.¹⁰ Wells Fargo Bank was scheduled twice and both claims were listed as “Unknown” noting that one claim could be for \$45,000 and the other for \$72,500.¹¹ Finally, approximately \$3,228,328.50 of the remaining debt was listed as contingent, unliquidated, and disputed.¹² Counting the debt listed as “Other”, but excluding the “Unknown” amount for the City of New Orleans, Debtor scheduled a total of \$6,333,764.91 in debt.¹³

****2** To promote an efficient and orderly administration of bankruptcy cases, it is important for debtors to be aware of all claims asserted against them. As Rule 3003(c)(2) states, only creditors who were not scheduled or scheduled as disputed, contingent, or unliquidated must file claims.¹⁴ Here, Debtor scheduled over \$4 million of general unsecured debt as either unknown or contingent, unliquidated, and disputed. The time for claimants to file these claims is set by the Court.¹⁵ The bar date in any bankruptcy case not only allows claimants to benefit by participating in the plan, but also benefits all parties-in-interest. Finally, a bar date fixed before confirmation not only makes it easier for everyone to calculate the relative recovery one can expect to receive under a given plan, it provides the debtor an opportunity to propose a feasible plan based on allowed claim amounts.

Accordingly, the September 15, 2020 motion was granted, giving Debtor until November 23, 2020, to file his plan.¹⁶ The bar date for the filing of non-governmental unit claims was November 9, 2020,¹⁷ and as of that date, \$6.2 million in proofs of claim have been timely filed. However, instead of filing a plan on November 23, 2020, as ordered by this Court, Debtor filed a single matter self-styled as “Expedited Motion for Entry of Order Fixing Claims Filing Date for Governmental Units as December 28, 2020 and Motion to Extend Time to File Subchapter V Chapter 11 Plan January 25, 2021” (“Motion”).¹⁸

*31 II. CONCLUSIONS OF LAW

A. Jurisdiction and Venue

This Court holds jurisdiction pursuant to 28 U.S.C. § 1334, which provides “the district courts shall have original and exclusive jurisdiction of all cases under title 11.” Section 157 allows a district court to “refer” all bankruptcy and related cases to the bankruptcy court, wherein the latter court will appropriately preside over the matter.¹⁹ This court determines that pursuant to 28 U.S.C. § 157(b)(2)(A) and (O), this proceeding contains only core matters.

This Court may only hear a case in which venue is proper.²⁰

28 U.S.C. § 1409(a) provides that “a proceeding arising under title 11 or arising in or related to a case under title 11 may be commenced in the district court in which such case is pending.” Debtor’s principal residence is Houston, Texas, and his chapter 11 case is presently pending in this Court; therefore, venue of this proceeding is proper.

B. Constitutional Authority to Enter a Final Order

[1] [2] This Court has an independent duty to evaluate whether it has the constitutional authority to sign a final order.²¹ In *Stern*, which involved a core proceeding brought by the debtor under 28 U.S.C. § 157(b)(2)(C), the Supreme Court held that a bankruptcy court “lacked the constitutional authority to enter a final judgment on a state law counterclaim that is not resolved in the process of ruling on a creditor’s proof of claim.”²² As indicated above, the pending matter before this Court is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A) and (O). The ruling in *Stern* was limited to the one specific type of core proceeding involved in that dispute, which is not implicated here. Additionally, in *Stern*, the debtor filed a counterclaim based solely on state law. Here, Debtor’s Motion is based on 11 U.S.C. § 1189(b) of the United States Bankruptcy Code. A similar provision does not exist under state law. Accordingly, the narrow limitation imposed by *Stern* does not prohibit this Court from entering a final order here.²³

III. ANALYSIS

A. Debtor’s Bankruptcy Schedules

****3** As a preliminary matter, the aggregate noncontingent liquidated secured and unsecured debt limit of \$2,725,625 as of the date of filing applies to the instant subchapter V

case.²⁴ However, under the Coronavirus Aid, Relief And Economic Securities Act, the aggregate debt limit is currently \$7,500,000.00 effective as of March 25, 2020.²⁵ Debtor scheduled \$3,228,328.50 in debt as either disputed, contingent, or unliquidated out of a total debt load of \$6,333,764.91. But, Debtor incorrectly filled out Schedules D and E/F by listing debt as \$0 or “Unknown,” but identifying a dollar amount under “Other.”

[3] A debtor’s eligibility for Subchapter V relief must be determined based on the information contained within debtor’s schedules on the petition date.²⁶ The “Other” box that Debtor improperly utilized is solely intended to describe the type—not the amount—of scheduled debt if that debt does not match one of the itemized descriptions. Debtor must file corrective Schedules D and E/F to properly reflect the amount of debt and utilize the check boxes as they were designed to be used.

B. Plan Filing Deadline Pursuant to U.S.C. § 1189(b)

[4] Section 1189 provides, “[t]he debtor shall file a plan not later than 90 days after the order for relief under this chapter, except that the court may extend the period if the need for the extension is attributable to circumstances for which the debtor should not justly be held accountable.”²⁷ As a preliminary matter, the 90-day statutory limit is not jurisdictional, meaning a court is not stripped of jurisdiction over the debtor’s case on day 91 post-order for relief if the debtor has not yet filed a plan.²⁸ The Supreme Court has held that “[a] rule should not be referred to as jurisdictional unless it governs a court’s adjudicatory capacity, that is, its subject-matter or personal jurisdiction. Other rules, even if important and mandatory, should not be given the jurisdictional band.”²⁹

[5] Statutory filing deadlines are generally labeled as “quintessential claim-processing rules” and should not be treated as jurisdictional “[u]nless Congress has ‘clearly state[d]’ that a statutory limitation is jurisdictional.”³⁰ Nothing in § 1189(b) indicates that Congress intended the 90-day filing deadline to be jurisdictional. The statute does not preclude extending the filing deadline, and in fact is explicitly permissive of such.³¹ If a debtor requires more than 90 days to file a plan, § 1189 grants courts the authority to extend that time period, so long as the debtor is not justly accountable for failing to meet the 90-day deadline.³² And, extending

a subchapter V debtor's deadline to file a plan is likely not the type of exceptional case where "a century's worth of precedent and practice in American courts rank a time limit as jurisdictional."³³

***33** [6] Although subchapter V falls under the umbrella of chapter 11, the language governing an extension under § 1189 is unlike § 1121,³⁴ but identical to § 1221 in chapter 12.³⁵ Like subchapter V, chapter 12 bankruptcies are "intended to proceed on what can be characterized as a fast track."³⁶ Therefore, cases discussing § 1221 provide guidance in determining under what circumstances a court should extend a plan filing deadline.³⁷ Additionally, because neither the Small Business Reorganization Act of 2019 ("SBRRA")³⁸ or its legislative history set out when a subchapter V debtor should not justly be held accountable for failing to file a plan of reorganization within the prescribed deadline or the purpose or scope of § 1189(b),³⁹ the Court relies on the plain language of § 1189(b) and considers sources discussing or applying § 1221.

****4** [7] The plain language of the phrase "attributable to circumstances for which the debtor should not justly be held accountable" evinces a higher standard than the "for cause" standard set forth in both [Federal Rule of Bankruptcy Procedure 9006\(b\)](#) (governing extensions of time generally) and [Bankruptcy Code § 1121\(d\)\(1\)](#) (governing extensions of a non-subchapter V debtor's exclusivity period to file a chapter 11 plan).⁴⁰ The legislative history of § 1221 confirms that finding.⁴¹ Moreover, ***34** the rationale behind the stricter standard is logical. COLLIER's summarizes it this way: "the 90-day limitation was probably included in chapter 12 for the benefit of creditors rather than for the benefit of the debtor. Because chapter 12 lacks the safeguards for creditors that are provided in chapter 11, the 90-day limitation ... is [one of] the primary protection[s] for creditors against a debtor's languishing in chapter 12 without confirming a plan. Thus, it is appropriate that the debtor should be required to meet a stringent burden if the debtor seeks an extension of the 90-day period."⁴²

The novelty of subchapter V means very few courts have analyzed and applied § 1189(b). Courts that have, have done so in the context of conversion from chapter 7 to chapter 11, subchapter V⁴³ or cases where debtors seek to take advantage of subchapter V even though their cases were filed

prior to its effective date.⁴⁴ Neither scenario applies here. In this case, Debtor, who has always proceeded under subchapter V, seeks an extension of the plan filing deadline under § 1189(b).⁴⁵

[8] Courts interpreting the language used in §§ 1189 and 1221 have held that "the bankruptcy court may grant an extension only if the debtor's inability to file a timely plan is due to circumstances beyond the debtor's control."⁴⁶ This Court also looks to the dictionary definitions of "justly" and "accountable" to assess the plain meaning of § 1189. "Justly" is defined as "[a]ccording to what is morally right or fair; fairly".⁴⁷ "Accountable" is defined as ***35** "required or expected to justify actions or decisions; responsible".⁴⁸ Thus, in determining whether to grant the extension, this Court considers whether the need for an extension is attributable to circumstances for which Debtor is not fairly responsible or, to borrow from COLLIER, whether Debtor can "clearly demonstrate that the inability to file a plan of reorganization was due to circumstances beyond [his] control."⁴⁹

C. Whether Debtor should not justly be held accountable for failing to file a plan by November 23, 2020.

****5** Debtor states that he should not justly be held accountable for failure to file a plan of reorganization by November 23, 2020 and requests a second extension of the filing deadline.⁵⁰ Debtor asserts that "in retrospect, the November 23, 2020 date was always insufficient to allow Debtor to file a meaningful substantive plan"⁵¹ because (1) since no bar date for governmental units to file claims was reflected in the 341 Notice, Debtor cannot "meaningfully determine how to provide for" the claims of the State of Louisiana and City of New Orleans where those claims have not been filed⁵² and (2) due to the death of his brother, Debtor requires additional time to determine his projected income from his current employer, BRM Concrete, LLC, of which his brother was part owner, and to determine how to utilize or dispose of his 51% ownership in Baker Ready Mix, LLC.⁵³ Debtor alleges that the recent passing of his brother caused Debtor's time to be consumed by his personal duties at BRM Concrete, LLC, and the operational duties of his brother, interfering with the amount of time he had to dedicate to his bankruptcy case.⁵⁴

[9] [10] Whether a debtor should not justly be held accountable in any given situation is a factdriven inquiry. If a debtor fails to demonstrate circumstances beyond his control or file a plan by the filing deadline, then cause exists to convert or dismiss the debtor's bankruptcy case.⁵⁵ But because no test exists within the Fifth Circuit or elsewhere that this Court can apply in determining whether the circumstances under which Debtor makes his request meet the stringent "attributable to circumstances for which the debtor should not justly be held accountable" standard, this Court will consider (1) whether the circumstances raised by Debtor were within his control, (2) whether Debtor has made progress in drafting a plan, (3) whether the deficiencies preventing that draft from being filed are reasonably related to the identified circumstances, and (4) whether any party-in-interest has moved to dismiss or convert Debtor's case or otherwise objected to a deadline extension in any way. These considerations are based on the plain language of § 1189(b) and the discretion that provision confers on courts.⁵⁶

***36 1. Whether the circumstances raised by Debtor were within his control.**

a. Governmental Claims Bar Date

[11] Debtor's counsel argued at the December 8, 2020 hearing, ("*Hearing*"), that in his best legal interpretation of subchapter V and as a procedural matter, he advised Debtor that it did not make sense to file a plan where the City of New Orleans and State of Louisiana had not yet filed proofs of claim and the bar date for timely filing had not passed. Debtor listed three claims from governmental units in his schedules: (1) an unliquidated secured claim by the state of Louisiana in the amount of \$381,655; (2) an undisputed unsecured claim by the City of New Orleans with the amount listed as "unknown"; and (3) an undisputed unsecured claim by the state of Louisiana in the amount of \$100,000.⁵⁷ Debtor's counsel argued that a plan could have been filed before the governmental unit claim bar date passed, but any filing of a claim after submission of the plan would drastically alter the plan for unsecured creditors.

Although the 341 Notice lacked a deadline for the filling of governmental proofs of claim, Bankruptcy Local Rule 3003-1(a) provides that "[i]n ... chapter 11 cases, unless otherwise ordered by the court or governed by BLR 3003-1(b), proofs of claim and proofs of interest must be

filed within 90 days after the first date set for the meeting of creditors under section 341(a), except that a proof of claim filed by a governmental unit must be filed within 180 days after the order for relief."⁵⁸ This case was filed July 7, 2020; therefore, the bar date for the filing of governmental proofs of claim is January 4, 2021.

****6** Debtor's counsel should have realized that the 341 Notice was missing a bar date for governmental unit claims when Debtor's first motion to extend the plan filing deadline was filed on September 15, 2020.⁵⁹ In that motion, Debtor asked to extend the plan filing deadline 14 days beyond the claims bar date that was set for November 9, 2020⁶⁰ and even makes explicit reference to the potential claims of the City of New Orleans and the State of Louisiana.⁶¹ But Debtor's counsel states that he did not notice that the bar date for governmental unit claims was missing from the 341 Notice until he realized that neither the City of New Orleans or the State of Louisiana filed proofs of claim.

Nevertheless, Debtor should not justly be held accountable for the missing bar date that should have been contained in the 341 Notice for governmental claims. Upon learning that a bar date was not reflected in the 341 Notice for government units, this Court discovered that due to a technological error, the event code used by the United States Trustee to set the 341 Meeting of Creditors did not trigger a bar date for governmental claims for individuals filing under subchapter V. National Form B309E2 did not provision for the entry of a governmental claims bar date, one had to be created to initiate that process. The error is in no way attributable to the United States Trustee, Debtor, or his counsel. This Court acknowledges that where a bar date is customarily reflected in a 341 Notice but was lacking due to an internal technological error, such as occurred in the instant case, even a well-versed bankruptcy attorney could easily ***37** overlook the missing date. This error has now been remedied.

Moreover, although a plan could have been filed before the governmental unit claims bar date passed, Debtor's argument that the missing governmental proofs of claim would drastically change the plan, if one were filed before those proofs were submitted or the bar date passed, is well founded. The State of Louisiana has a substantial, unliquidated claim in the amount of \$381,655 and the City of New Orleans's claim is unknown. Debtor's counsel explained that the City of New Orleans's claim is unknown because Debtor is aware that he owes some amount in trust fund taxes

but has not received an assessment from the City of New Orleans for 2019 or 2020.⁶² Debtor's counsel also explained that Debtor could not estimate the amount of taxes owed based on prior years' assessments because there was a dispute over the taxes owed between Debtor and the City of New Orleans in the past.⁶³

Debtor testified that at one point, the City of New Orleans owed him \$400,000 in over-paid trust fund taxes and a dispute ensued regarding the City's repayment of that overage.⁶⁴ Thereafter, the City claimed that the statutory period for claiming the overpayment had run and Debtor owed the City \$200,000 in trust fund taxes.⁶⁵ Currently, the City claims that Debtor owes it money and Debtor claims that the City of New Orleans still owes him a couple thousand dollars.⁶⁶ Therefore, Debtor is unsure exactly what the City of New Orleans will claim.⁶⁷

Ultimately, both the City of New Orleans and the State of Louisiana claims will not only impact the construction of Debtor's plan, but its feasibility as well. Although Debtor could have filed a "placeholder plan," such a plan is a skeletal document filed to satisfy a filing deadline, with the intent to file a completed, substantive document later.⁶⁸ There is no legally valid reason to file a placeholder plan in this case. As the Court explains above, the 90-day plan filing deadline under § 1189 is not jurisdictional and this Court may grant Debtor an extension under the appropriate circumstances; thus, failure to file a plan by the deadline will not mandatorily result in dismissal or conversion.

****7 [12]** A placeholder plan is a waste of time and resources for all parties-in-interest and does not represent Congress's intent in enacting the SBRA. Congress enacted the SBRA to "streamline the bankruptcy process by which small businesses debtors reorganize and rehabilitate their financial affairs."⁶⁹ The purpose of subchapter V is to reduce the barriers and associated costs that prevent small business debtors from successful reorganization, in part by reducing the length of time those debtors spend in bankruptcy. ***38**⁷⁰ The intentionally expedited nature of subchapter V cases dictates an abbreviated deadline under § 1189 that is not intended to be manipulated by placeholder plans. While § 1193 permits a debtor to modify a plan "at any time before confirmation,"⁷¹ or a consensual plan confirmed under § 1191(a) "at any time after confirmation of the plan and before substantial consummation of the plan,"⁷² and a non-

consensual plan confirmed under § 1191(b) "at any time within 3 years, or such longer time not to exceed 5 years,"⁷³ filing a placeholder plan merely to satisfy the statutory plan filing deadline serves no justiciable purpose, contributes to increased costs, and subverts the intent underlying subchapter V. Thus, this Court disfavors placeholder plans and expects debtors to file substantive, confirmable plans unless situations arise such that an extension is warranted because of circumstances for which the debtor should not justly be held accountable.⁷⁴

As explained above, Debtor could and should have brought the missing governmental bar date deadline to the Court's attention earlier so that a second extension request could be avoided. However, Debtor had no control over the technological error itself. Filing a placeholder plan would not have mitigated the effect of the missing bar date because Debtor would still not have the governmental proofs of claim yet and the plan, along with appropriate financial projections, would require dramatic modification. Accordingly, this Court finds that because Debtor had no control over the missing governmental bar date that should have been contained within the 341 Notice, other than discovering and reporting it earlier, this factor weighs in favor of granting Debtor's request for additional time to file a plan of reorganization.

b. Death of a Sibling

The second intervening event Debtor claims caused him to miss the filing deadline was the passing of his brother. Debtor testified that his brother passed rather unexpectedly on October 11, 2020, and that in addition to increased duties resulting from the passing, which restricted the amount of time Debtor could dedicate to his bankruptcy case, he was unable to file a plan on November 23, 2020 because he was still considering ways to maximize the value of his 51% interest in Baker Ready Mix, LLC.⁷⁵

Although the Court is mindful of Debtor's loss, Debtor's testimony at the Hearing and his filed bankruptcy schedules conflict. Debtor's schedules reflect that he has interest in seven different limited liability companies and Debtor valued each of those interests at \$0.⁷⁶ Thus, Debtor's testimony that the delay in plan filing was due in part to consideration of ways to maximize the value of his interest in Baker Ready Mix LLC, when those interests were valued at \$0 is concerning. Debtor also testified that the interests were only

scheduled at \$0 because that was a bank's valuation of the interests, offset by the debt assessed against Debtor. Since Debtor *39 filed his schedules, Debtor claims that several parties have expressed interest in purchasing certain of his shares, indicating his interest in Baker Ready Mix, LLC is not valueless. According to Debtor's counsel, right now, the best course of action is to auction those shares, but that could change depending on conversations with interested parties.

Debtor's plan was not due until a month a half after his brother passed and Debtor could have been more diligent in determining the best way to maximize the value of his interest in Baker Ready Mix, LLC, particularly in light of Debtor's counsel's acknowledgment that interested parties have been contacting Debtor and his counsel since August. Nonetheless, this Court recognizes the tremendous familial and business responsibilities placed on Debtor due to the passing of his brother and understands how those responsibilities impacted Debtor's ability to sort out the best way to dispose of his shares and file a plan by the November 23, 2020 deadline. Importantly, it is in the best interest of Debtor's creditors that the value of his 51% interest in Baker Ready Mix, LLC, be maximized.

**8 Debtor certainly had no control over the death of his brother and how that impacted his responsibilities not only with BRM Concrete, LLC, but his statutory duties under 11 U.S.C. § 1189, as well. Accordingly, this Court finds that due to the death of his brother and the influx of responsibilities hoisted on him as a result, this factor weighs in favor granting Debtor's request for additional time to file a plan of reorganization.

2. Whether Debtor made progress toward drafting a plan of reorganization.

To further determine whether Debtor should not be held justly accountable for failing to file his plan by the deadline, this Court considers whether Debtor demonstrated that substantial progress was made in drafting the plan and whether the missing pieces of Debtor's plan are reasonably related to the missing governmental claim bar date and the passing of Debtor's brother. At the Hearing, Debtor's counsel informed the Court that a plan had already been drafted. Debtor's counsel disclosed to the Court that the Hancock Whitney Bank claim⁷⁷ in terms of allowance and treatment of that claim was "taken care of,"⁷⁸ that the domestic support

claim held by Tracy Dundas⁷⁹ was settled by agreement,⁸⁰ that Debtor's 2016 BMW X5⁸¹ will be surrendered,⁸² that Debtor analyzed all the proofs of claims on file and intends to file four objections,⁸³ that Debtor analyzed the claims related to Baker Ready Mix, LLC,⁸⁴ and that Debtor decided, for now, the "best course of action to confirm a plan" is to conduct an auction utilizing this Court to obtain the best bid for Debtor's interest in Baker Ready Mix, LLC and provision for those proceeds to be paid to Debtor's creditors.⁸⁵ Debtor's counsel indicated that the only two issues not yet dealt with in the plan are: (1) the City of New Orleans's trust fund tax claim and the State of Louisiana's tax claim⁸⁶ and (2) the best method for disposing of Debtor's interest in Baker Ready Mix, LLC.⁸⁷

The Court is satisfied that Debtor made substantial progress toward the drafting of a plan prior to the Hearing. The only remaining deficiencies are inextricably linked to the intervening events. Accordingly, this Court finds that this factor weighs in favor of granting Debtor additional time to file a plan of reorganization.

3. Whether any party-in-interest has filed a motion to dismiss or convert the case or opposed the motion to extend in any other way.

As a final matter, because § 1189 confers discretion on courts to extend a debtor's deadline to file a plan,⁸⁸ this Court considers whether any party-in-interest has filed any motion to dismiss Debtor's bankruptcy case or convert that case to a chapter 7 bankruptcy or opposed Debtor's request for an extension in any other way. The Court makes this consideration because unlike in a small business bankruptcy under chapter 11, only the debtor may file a plan in a subchapter V case;⁸⁹ thus, the sole method for non-debtor parties to protect their interests when a subchapter V debtor fails to file a plan by the deadline is to ask for dismissal, conversion, or object to a deadline extension.⁹⁰ Here, no party-in-interest has filed a motion to dismiss or convert Debtor's case. Likewise, no party-in-interest has raised any objection to permitting a second extension for Debtor to file a plan of reorganization. At the Hearing, only one of Debtor's creditors, Southern Aggregates, LLC, made an appearance. Southern Aggregates, LLC, did not make any objections or raise any concerns to the potential extension of Debtor's plan filing deadline.

****9** The Subchapter V Trustee, when asked by the Court, indicated that she could not think of any “adverse reaction” an extension of Debtor’s plan filing deadline would have on any party-in-interest. More importantly, the Subchapter V Trustee said that certainty as to what is available and therefore not needing to modify the plan later would be best. On behalf of herself, and the United States Trustee, the Subchapter V Trustee raised only one concern regarding Debtor’s failure to file any operating reports, but those reports were filed the night before the Hearing.⁹¹ Accordingly, the Court finds that this factor also weighs in favor of granting Debtor additional time to file a plan of reorganization because no party-in-interest has filed a motion to dismiss or convert the case or otherwise opposed Debtor’s motion requesting additional time to file a plan of reorganization.

***41 III. CONCLUSION**

The uncertainty as to the City of New Orleans and State of Louisiana claims created a substantial barrier to Debtor’s ability to file an appropriately constructed, feasible plan, given that the plan may be provisioned for payments to creditors over a period not to exceed five years.⁹² Additionally, the increase in Debtor’s responsibilities

resulting from the unexpected passing of his brother stripped Debtor of the time necessary to determine the best way to dispose of his 51% interest in Baker Ready Mix, LLC for the benefit of his creditors and provide his counsel the information needed to complete an appropriate plan. Finally, Debtor has already made substantial progress in drafting a substantive plan of reorganization and no party-in-interest has filed any motion opposing the relief requested.

Therefore, after careful analysis, this Court finds that the need for an extension to file a plan beyond the November 23, 2020 deadline is attributable to circumstances for which Debtor should not justly be held accountable.⁹³ Debtor shall have until December 28, 2020 to file corrective Schedules D and E/F, properly setting forth the amount of debt for each creditor. A separate order establishing the deadline for the filing of governmental proofs of claim as January 4, 2021 was previously issued by this Court. Debtor shall have until January 18, 2021 to file a plan of reorganization.

An order consistent with this Memorandum Opinion will be entered on the docket simultaneously herewith.

All Citations

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Footnotes

- 1 ECF No. 50.
- 2 Any reference to “Code” or “Bankruptcy Code” is a reference to the United States Bankruptcy Code, 11 U.S.C., or any section (§) thereof refers to the corresponding section in 11 U.S.C.
- 3 ECF No. 1.
- 4 ECF No. 4.
- 5 ECF No. 25.
- 6 ECF No. 37.
- 7 ECF No. 1 at 24.
- 8 *Id.* at 27.
- 9 *Id.* at 30.
- 10 *Id.* at 31.
- 11 *Id.*
- 12 *Id.*
- 13 *Id.*
- 14 [FED. R. BANKR. P. 3003\(c\)](#).
- 15 *Id.*
- 16 ECF No. 38.

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- 17 ECF No. 4.
- 18 ECF No. 44.
- 19 28 U.S.C. § 157(a); see also In re: Order of Reference to Bankruptcy Judges, Gen. Order 2012-6 (S.D. Tex. May 24, 2012).
- 20 28 U.S.C. § 1408.
- 21 *Stern v. Marshall*, 564 U.S. 462, 131 S.Ct. 2594, 180 L.Ed.2d 475 (2011). But see *Wellness Int'l Network v. Sharif*, 575 U.S. 665, 135 S.Ct. 1932, 1938-39, 191 L.Ed.2d 911 (2015) (holding that parties may consent to jurisdiction on non-core matters).
- 22 564 U.S. at 503, 131 S.Ct. 2594.
- 23 See, e.g., *Badami v. Sears (In re AFY, Inc.)*, 461 B.R. 541, 547–48 (8th Cir. BAP 2012) (“Unless and until the Supreme Court visits other provisions of Section 157(b)(2), we take the Supreme Court at its word and hold that the balance of the authority granted to bankruptcy judges by Congress in 28 U.S.C. § 157(b)(2) is constitutional.”); see also *Tanguy v. West (In re Davis)*, 538 F. App'x 440, 443 (5th Cir. 2013) (“[W]hile it is true that *Stern* invalidated 28 U.S.C. § 157(b)(2)(C) with respect to ‘counterclaims by the estate against persons filing claims against the estate,’ *Stern* expressly provides that its limited holding applies only in that ‘one isolated respect’ We decline to extend *Stern's* limited holding herein.”) (citing *Stern*, 564 U.S. at 475, 503, 131 S.Ct. 2594).
- 24 11 U.S.C. § 101(51D).
- 25 *In re Pearl Resources LLC*, 622 B. R. 236 (Bankr. S.D. Tex. 2020). The increased debt limit sunsets on March 25, 2021.
- 26 11 U.S.C. § 101(51D).
- 27 11 U.S.C. § 1189(b).
- 28 See *id.*; see also *In re Raylyn AG, Inc.*, 72 B.R. 523, 524 (Bankr. S.D. Iowa 1987) (“The Court concludes that [failure to file within 90 days under § 1221] is not jurisdictional”).
- 29 *Henderson v. Shinseki*, 562 U.S. 428, 435, 131 S.Ct. 1197, 179 L.Ed.2d 159 (2011).
- 30 *Sebelius v. Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 146, 154, 133 S.Ct. 817, 184 L.Ed.2d 627 (2013) (internal citations omitted).
- 31 11 U.S.C. § 1189(b) (“... except that the court *may* extend the period”).
- 32 See *id.*
- 33 *Sebelius*, 568 U.S. at 155, 133 S.Ct. 817 (citing *Bowles v. Russell*, 551 U.S. 205, 217, 127 S.Ct. 2360, 168 L.Ed.2d 96 (2007)).
- 34 See, e.g., 11 U.S.C. § 1121(e) (“In a small business case only the debtor may file a plan until 180 days after the date of the order for relief, unless that period is extended as provided by this subsection or the court, for cause, orders otherwise; In a small business case the plan and disclosure statement (if any) shall be filed not later than 300 days after the date of the order for relief”); *In re Shea, Ltd.*, 545 B.R. 529, 536–37 (Bankr. S.D. Tex. 2016) (holding that under § 1121(e), “in a small business case, the small business debtor has 180 days of exclusivity and 300 days before which to hit the ‘drop dead date,’ after which ‘the’ plan may no longer be filed.”); *In re Express One Int'l*, 194 B.R. 98, 101 (Bankr. E.D. Tex. 1996) (finding that the exclusivity period pursuant to § 1121 should be filed, extending the time period for debtor exclusively to file a plan); *In re Simbaki, Ltd.*, 522 B.R. 917, 921 (Bankr. S.D. Tex. 2014) (holding that only a debtor is bound by the 300-day drop dead deadline and therefore, “only the debtor needs the ability to obtain an extension”).

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- 35 See 11 U.S.C. § 1221 (“The debtor shall file a plan not later than 90 days after the order for relief under this chapter, except that the court may extend the period if the need for the extension is attributable to circumstances for which the debtor should not justly be held accountable.”).
- 36 In re Henderson, 352 B.R. 439, 443 (Bankr. N.D. Tex. 2006).
- 37 See  In re Trepetin, 617 B.R. 841, 848 n.14 (Bankr. D. Md. 2020) (“Subchapter V and chapter 12 are not identical, and invoking chapter 12 standards may not be warranted in every instance Nevertheless, with respect to the 90-day filing deadline, not only does the same language appear in sections 1189(b) and 1221 but both processes also remove the absolute priority rule as a confirmation standard. This additional similarity between Subchapter V and chapter 12 further supports applying a consistent standard to a requested extension of the 90-day deadline for filing a Subchapter V or a chapter 12 plan.”) (citation omitted).
- 38 11 U.S.C. §§ 1181–1195.
- 39 H.R. REP. NO. 116-171 (2019).
- 40 In a Subchapter V case, *only* the debtor may file a plan. 11 U.S.C. § 1189(a). In a traditional Chapter 11 case, the debtor initially has the exclusive right to file a plan, but that exclusive right may expire or be terminated; it may also be extended “for cause.” See  11 U.S.C. § 1121.
- 41 139 CONG. REC. H1252 (daily ed. Mar. 16, 1993) (statement of Rep. Fish) (explaining that the replacement of “substantially justified” in § 1221 with “the need for an extension is attributable to circumstances for which the debtor should not justly be held accountable” was a “tightening of the current requirement that an extension by [sic] substantially justified [and] should prove helpful to creditors.”); see also 8 COLLIER ON BANKRUPTCY ¶ 1221.01[2] (16th ed. 2020) (“The phrase ‘substantially justified’ was not explained in the legislative history, and so there was no guidance on how the phrase was to be interpreted. Presumably, Congress intended that the debtor be required to make a greater showing than was necessary to meet the ‘cause’ standard for extension of the debtor’s exclusivity period in chapter 11 cases. In 1993, ... Congress amended section 1221 by deleting the ‘substantially justified’ language and providing instead that an extension should be granted only if the need for an extension is ‘attributable to circumstances for which the debtor should not justly be held accountable.’ The legislative history makes clear that Congress intended by this change to make it more difficult for debtors to obtain extensions.”).
- 42 8 COLLIER ON BANKRUPTCY ¶ 1221.01[2] (16th ed. 2020).
- 43 See  In re Trepetin, 617 B.R. 841 (Bankr. D. Md. 2020).
- 44 See, e.g.,  In re Seven Stars on the Hudson Corp., 618 B.R. 333 (Bankr. S.D. Fla. 2020);  In re Ventura, 615 B.R. 1 (Bankr. E.D.N.Y. 2020); In re Twin Pines, LLC, 2020 Bankr. LEXIS 1217, 2020 WL 5576957 (Bankr. D. N.M. Apr. 30, 2020).
- 45 ECF No. 44 at 3.
- 46 First Sec. Bank & Trust Co. v. Vander Vegt, 511 B.R. 567, 585 (N.D. Iowa 2014); see also, e.g.,  In re Seven Stars on the Hudson Corp., 618 B.R. at 345 (“[Section 1189(b)] asks if the need for an extension is due to *circumstances* beyond the debtor’s control.”) (alteration in original);  In re Trepetin, 617 B.R. at 848 (analyzing whether a motion to extend the time for filing should be granted under § 1189) (“Courts and commentators generally have interpreted the language in section 1221 to require that ‘the debtor clearly demonstrates that the debtor’s inability to file a plan is due to circumstances beyond the debtor’s control.’”) (internal quotation marks and citations omitted); In re Gullicksrud, 2016 Bankr. LEXIS 3546 at *3, 2016 WL 5496569 at *2 (Bankr. W.D. Wis. Sept. 29, 2016) (“An extension [pursuant to § 1221] should be granted only if the debtor ‘clearly demonstrates that the debtor’s inability to file a plan is due to circumstances beyond the debtor’s control.’ ”); Stock v. Harbicht Research (In re Stock), 1994 U.S. App. LEXIS 23896 at *5, 1994 WL 465833 at * (9th Cir. Aug. 29, 1994).
- 47 Justly, OXFORD ENGLISH DICTIONARY ONLINE, https://premium.oxforddictionaries.com/us/definition/american_english/justly (last visited Dec. 11, 2020).

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- 48 *Accountable*, OXFORD ENGLISH DICTIONARY ONLINE, https://premium.oxforddictionaries.com/us/definition/american_english/accountable (last visited Dec. 11, 2020).
- 49 COLLIER ¶ 1221.01[2].
- 50 ECF No. 44.
- 51 *Id.* at 2.
- 52 *Id.*
- 53 *Id.* at 3.
- 54 *Id.*
- 55  11 U.S.C. § 1112(b)(4)(F).
- 56 See 11 U.S.C. § 1189(b) (“The debtor shall file a plan not later than 90 days after the order for relief under this chapter, except that the court *may* extend the period if the need for the extension is attributable to circumstances for which the debtor should not justly be held accountable.”) (emphasis added).
- 57 ECF No. 1.
- 58 Bankr. S.D. Tex. R. 3003-1(a).
- 59 ECF No. 37.
- 60 *Id.* at 3.
- 61 *Id.* at 2.
- 62 December 8, 2020 Hearing at 1:52:00–1:53:28.
- 63 *Id.*
- 64 *Id.* at 1:55:00–1:59:10.
- 65 *Id.*
- 66 *Id.*
- 67 *Id.*
- 68 See *United States v. Callen*, 2015 WL 1034245, at *12, 2015 U.S. Dist. LEXIS 28861, at *34 (S.D. Tex. Mar. 10, 2015) (quoting *United States v. Jackson*, 2006 WL 5083826, at *2, 2006 U.S. Dist. LEXIS 97072, at *4 (D.S.C. Dec. 8, 2006)) (“A placeholder motion is a skeletal document filed to satisfy the period of limitations, with the intent of filing a real or completed petition at a later date.”) (internal quotation marks omitted).
- 69 H.R. REP. NO. 116-171 (2019).
- 70 *Id.* (“[T]he legislation allows these debtors ‘to file bankruptcy in a timely, cost-effective manner, and hopefully allows them to remain in business’ which ‘not only benefits the owners, but employees, suppliers, customers, and others who rely on that business.’”).
- 71 11 U.S.C. § 1193(a).
- 72 11 U.S.C. § 1193(b).
- 73 11 U.S.C. § 1193(c); see also SBRA LEGAL MANUAL § 3-17.11.2 (2020).
- 74 11 U.S.C. § 1189(b).
- 75 September 8, 2020 Hearing at 2:11:35–2:15:35.
- 76 ECF No. 1 at 12.
- 77 ECF No. 1 at 22.
- 78 December 8, 2020 Hearing at 1:49:00–1:49:22. See ECF No. 42.
- 79 ECF No. 1 at 25.
- 80 December 8, 2020 Hearing at 1:49:23–1:49:27.
- 81 ECF No. 1 at 66.
- 82 December 8, 2020 Hearing at 1:49:27–1:49:29.
- 83 *Id.* at 1:49:30–1:49:53.
- 84 *Id.* at 1:49:58–1:50:05.
- 85 *Id.* at 1:50:06–1:50:25.
- 86 *Id.* at 1:50:26–1:50:31

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- 87 *Id.* at 1:50:32–1:50:39, 2:11:35–2:15:35, 2:21:20–2:23:20. Debtor's counsel stated that Debtor is currently planning to dispose of his interest in Baker Ready Mix, LLC by auctioning those shares, but Debtor testified that he is currently entertaining other ways to maximize the value of those interests, as well.
- 88 See 11 U.S.C. § 1189(b) (“... except that the court *may* extend the period”) (emphasis added).
- 89 Compare  11 U.S.C. § 1121(e) (establishing a period of exclusivity for small business debtors to file a plan between 0 and 180 days after the date of the order for relief and allowing any party-in-interest to file a plan after that exclusivity period has run, unless that period is extended), with 11 U.S.C. § 1189(a) (“Only the debtor may file a plan under this subchapter.”).
- 90 See 11 U.S.C. § 1181 (excluding 11 U.S.C. § 1104 (Appointment of trustee or examiner) but not excluding  11 U.S.C. § 1112 (Conversion or dismissal)).
- 91 ECF Nos. 48, 49.
- 92  11 U.S.C. § 1191(c)(2).
- 93 11 U.S.C. § 1189(b).

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United States Bankruptcy Court, M.D. Florida,
Orlando Division.

IN RE ELLINGSWORTH RESIDENTIAL
COMMUNITY ASSOCIATION, INC., Debtor.

Case No. 6:20-bk-01346-KSJ

Signed October 16, 2020

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**MEMORANDUM OPINION CONFIRMING
DEBTOR'S PLAN OF REORGANIZATION**

Karen S. Jennemann, United States Bankruptcy Judge

*1 Debtor, Ellingsworth Residential Community Association, Inc., seeks confirmation¹ of its Plan of Reorganization, as modified (collectively the "Plan").² Under the Order Scheduling Hearing on Confirmation of Plan and Establishing Deadlines, the Debtor timely filed its Ballot Tabulation³ and Confirmation Affidavit ("Confirmation Affidavit").⁴ After considering the evidence, testimony, and legal argument, the Court will confirm the Plan.

Debtor is a homeowner's association representing 80 homes in three developments. They have a gate, common area property, and a fountain but no other amenities, such as a pool, community center, or playground. All 80 homeowners pay the same quarterly assessment of \$420.

In 2016, the developer, Meritage Homes, managed the Debtor and, acting on behalf of the Debtor, sued Alice Guan in Florida State Court.⁵ Guan owns a home in one of the managed developments and allegedly had violated

association rules relating to landscaping on her property. In 2019, after years of extensive litigation, the Florida State Court dismissed the Debtor's lawsuit directing the Debtor to pay Guan's attorneys' fees and costs. Before the Florida State Court could assess these fees or resolve Guan's multi-count counterclaim (collectively the "Claims"),⁶ the Debtor filed this Chapter 11 bankruptcy case under the Small Business Reorganization Act on March 3, 2020.⁷

The Small Business Reorganization Act ("SBRA"), enacted in August 2019, became effective on February 19, 2020.⁸ It is commonly called Subchapter V because all of its provisions are contained in Subchapter V of Chapter 11 of the Bankruptcy Code.⁹ The new law was designed to help small businesses reorganize by streamlining the cumbersome and often expensive process of a typical Chapter 11 reorganization case.¹⁰ The statutory hope is that by encouraging small business reorganizations more creditors will receive greater distributions, debtors will pay less in attorneys' fees, and more small businesses will survive and prosper.¹¹

*2 Many of the new procedures allow for a quick confirmation of a plan of reorganization. No disclosure statement is required.¹² Strict timelines require parties to quickly move the case forward. And, by abrogating the "absolute priority rule"¹³ on *unsecured* creditors, debtors may confirm a plan without creditor support and still retain property, even though unsecured creditors, such as Guan, potentially are not paid in full.¹⁴

Guan opposes confirmation of the Plan. Under Subchapter V, a small business debtor may confirm a plan of reorganization even if *all* creditors reject the proposed plan treatment provided the debtor meets certain requirements under § 1129(a) and § 1191 of the Bankruptcy Code. Section 1191(b) governs confirmation of a non-consensual plan under Subchapter V. It provides the court *shall* confirm a non-consensual plan, if it is "fair and equitable" to each class or interests that is impaired or has not accepted the plan, does not discriminate unfairly, and except for the acceptance by each class or interests (including acceptance by one class of impaired claims), meets the requirements of § 1129(a).¹⁵

Section 1191(c) defines the "fair and equitable" prong for non-consensual plans under Subchapter V. Because

Guan holds an unsecured claim,¹⁶ the “fair and equitable” requirement is met if:

- The plan provides that the debtor's projected disposable income¹⁷ received in a three-year period, or such longer period not to exceed five years, is applied to make payments under the plan;¹⁸
- There is a reasonable likelihood the debtor can make all plan payments;¹⁹ and
- The plan provides remedies to protect the holder of claims or interests if payments are not made.²⁰

To determine whether the Debtor's plan is fair and equitable, the term “disposable income” here means the income received by the debtor not reasonably necessary to be expended “for the payment of expenditures necessary for the continuation, preservation or operation” of the debtor's business.²¹

Debtor has proposed a plan of reorganization.²² The Plan is simple—it provides for the payment of allowed administrative, priority claims and unsecured claims over three years. The Debtor has no secured creditors. Article IV, paragraph B of the Plan, which describes payments to the Debtor's unsecured creditors, provides a Creditors' Trust will be created from which unsecured creditors will receive payment, *pro rata*, of their allowed claims. On the effective date, the Creditors' Trust shall consist of (i) 25% of all accounts received that become older than 90 days past due for three years, (ii) net proceeds received from all Causes of Action, and (iii) net disposable income for three years, including a special assessment of \$300,000, to make these payments. Attached to the Plan is the Debtor's Projected Disposable Income, which projects \$16,000 of funds available to the Creditors' Trust over three years, not including the \$300,000 special assessment. If a default occurs, the Plan provides for a ten day cure period, and should the Debtor fail to cure, the claimholder may seek relief from this Court to enforce the Plan or seek relief available under federal or applicable state law.²³

*3 The Court specifically finds that the Plan is fair and equitable under  § 1191 of the Bankruptcy Code. Debtor is devoting *more* than its projected disposable income by agreeing to the \$300,000 special assessment on its members. Debtor is proposing a way to maximize payments to its creditors while still paying its on-going expenses. There is a

high likelihood the Debtor will make these payments. And, if the payments are not made, the Plan provides adequate remedies to protect creditors' claims. And the Subchapter V Trustee will monitor the Debtor's operations for three years, receive the Debtor's net disposable income, and then distribute payments to creditors as required by the Plan. The Plan is in the best interests of all creditors, including Guan.

During this case, Guan, who is representing herself and has no legal experience, filed numerous papers, some of which object to confirmation of the Debtor's Plan.²⁴ The papers are lengthy and sometimes difficult to understand but raise three primary objections to confirmation of the Plan, which I overrule.

First, Guan alleges the Debtor has not provided sufficient financial information to justify confirmation of its Plan. As opposed to the traditional Chapter 11 case, no formal disclosure statement is required in a SBRA case. Under § 1190 of the Bankruptcy Code,²⁵ SBRA plans must include “a brief history of the business operations of the debtor,” a “liquidation analysis,” “projections with respect to the ability of the debtor to make payments under the proposed plan of reorganization” and “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 execution of the plan.”²⁶ The Debtor's Plan complies with all these requirements. A disclosure statement with the detailed information Guan requests is not required.²⁷ Nor is the Debtor or its professionals required to provide the detailed financial information Guan seeks.

Second, Ms. Guan argues the Debtor's members—the 80 homeowners—must provide her with their *personal* financial information to demonstrate what income the Debtor can contribute to the Plan Payment. This objection has no merit. Debtor is a corporation. Courts generally uphold the corporate form to maintain its limited liability purpose because “[e]very corporation is organized as a business organization to create a legal entity that can do business in its own right and on its own credit as distinguished from the credit and assets of its individual stockholders.”²⁸ Ms. Guan has not demonstrated the corporate veil should be pierced,²⁹ or the Debtor's corporate form disregarded. By extension, Guan's argument would require shareholders in every corporate bankruptcy to provide personal financial information before the corporation could confirm a Chapter 11 plan. Such is not the case. The

personal financial circumstances of the Debtor's 80 members do not affect the confirmation of the Plan.

*4 Third, Guan objects to confirmation of the Plan because it is not feasible insofar as the 80 members have not yet approved the promised \$300,000 special assessment. To be fair and equitable under  § 1191(b), the Court must determine there is a *reasonable likelihood* the debtor can make all plan payments. And under  § 1129(a)(11), also made applicable by  § 1191(b),³⁰ the Court must find that 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.” In sum, I must find that the Debtor can live up to its promises made in its Plan.

Debtor has proven through its papers and the testimony of its President, Mike Panke, that the Plan is feasible. Debtor's members previously have approved large special assessments. Debtor's President says he can get the votes for the \$300,000 special assessment. The Court believes he can procure the funds to pay the allowed unsecured claims. Nothing requires the Debtor to schedule that vote before confirmation. The Court therefore will overrule all of Guan's objections to confirmation.

However, the Court will require the Debtor and its members to do what it promised under Article IV, paragraph B. 1. of the Plan, which provides for the \$300,000 special assessment, “if approved.” To find the Plan “fair and equitable” under  § 1191 of the Bankruptcy Code, the Court will require more than just a “promise” to pay. Debtor must approve the promised special assessment of \$300,000 within a reasonable

time after confirmation. If the Debtor does *not* obtain the approval by the post-confirmation status conference, scheduled for February 25, 2021, the Court will find the Debtor in breach of the Plan.

So, if the members want to forever and finally resolve these outstanding disputes with Guan and their other creditors and to stop this endless litigation, they must approve and then pay the promised special assessment of \$300,000. Failure to approve the special assessment will constitute a material default of the Plan.

Upon consideration of the Confirmation Affidavit, the Ballot Tabulation, Liquidation Analysis, and the Plan, as modified, the testimony of the Debtor's President, Michael Panke, Debtor's admitted Exhibits 1 through 8, the testimony of Guan and her admitted exhibits, and the parties' arguments at the Confirmation Hearing, the Court finds that the modifications to the Plan are nonmaterial or do not adversely change the treatment of the claim of any creditor or equity interest holder, that the Debtor has proposed the Plan in good faith having utilized multiple methods of payment to unsecured creditors, that no further solicitation of the Plan is required, and all

the requirements of  § 1191 of the Bankruptcy Code are satisfied.

The Plan is confirmed. Guan's objections are overruled. A separate order confirming the Plan consistent with this Memorandum Opinion shall be entered.

All Citations

Slip Copy, 2020 WL 6122645

Footnotes

- 1 The trial occurred on August 21 and September 10, 2020. (The trial originally was scheduled to start on August 19, 2020 and was reset to August 21, 2020.)
- 2 The Debtor filed the Plan on June 1, 2020 (Doc. No. 54), which was modified on August 13, 2020 (Doc. No. 250), and August 20, 2020 (Doc. No. 270). The Debtor's Final Plan of Reorganization which incorporates the modifications is Doc. No. 294.
- 3 Doc. No. 266.
- 4 Doc. No. 267.
- 5 The Florida State Court action is *Ellingsworth Residential Community Association, Inc. v. Alice Guan*, Case No. 2017-CA-002697 pending before the Circuit Court for Seminole County, Florida.

6 Guan's alleges she has counterclaims against the Debtor for (I) Abuse of Process, (II) RICO, (III) Intentional
 7 Infliction of Emotional Distress, (IV) Negligence, (V) Breach of Contract and (VI) Declaratory Judgment.
 8 Doc. No. 1.

Small Business Reorganization Act of 2019, [Pub. L. No. 116-54, 133 Stat. 1079 \(2019\)](#).

9 §§ 1181 – 1195 of the Bankruptcy Code. All references to the Bankruptcy Code refer to [11 U.S.C. §§
 101 et seq.](#)

10 [In re Ventura](#), 615 B.R. 1, 12 (Bankr. E.D. N.Y. 2020).

11 The Court previously has determined that the Debtor is eligible to file this case under SBRA. Doc. No. 142.
 12 See [11 U.S.C. § 1181\(b\)](#).

13 [11 U.S.C. § 1129\(b\)\(2\)\(B\)](#).

14 [11 U.S.C. § 1191\(b\)](#), [\(c\)](#).

15 [11 U.S.C. § 1191\(b\)](#). [Section 1191\(b\)](#) provides:

(b) **Exception.**—Notwithstanding section 510(a) of this title, if all of the applicable requirements of
[section 1129\(a\)](#) of this title, other than paragraphs (8), (10), and (15) of that section, are met with respect
 to a plan, the court, on request of the debtor, shall confirm the plan notwithstanding the requirements of
 such paragraphs 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.

16 With respect to secured claims, the plan must also meet the requirements of [§ 1129\(b\)\(2\)\(A\)](#) to be fair
 and equitable. See [11 U.S.C. § 1191\(c\)\(1\)](#).

17 Here, the Debtor's disposable income includes the Debtor's income received from all sources.

18 [11 U.S.C. § 1191\(c\)\(2\)](#). A non-consensual plan is also “fair and equitable” if it provides the value of property
 to be disbursed under the plan in a three year period, or such longer period not to exceed five years, is not
 less than the projected disposable income.

19 [11 U.S.C. § 1191\(c\)\(3\)\(A\)](#).

20 [11 U.S.C. § 1191\(c\)\(3\)\(B\)](#).

21 [11 U.S.C. § 1191\(d\)\(2\)](#).

22 Doc. No. 294.

23 Doc. No. 294, Article VII, Par. R.

24 Guan's objections to confirmation are contained in Doc. Nos. 147, 149, 167, 180, 182, 253, 257, 260, 268,
 272, 297, and 304.

25 All references to the Bankruptcy Code refer to [11 U.S.C. S 101 et seq.](#)

26 [11 U.S.C. § 1190 \(1\),\(2\)](#).

27 See [11 U.S.C. § 1181 \(b\)](#). Unless the court for cause orders otherwise, section 1125 does not apply to a
 case filed under Subchapter V.

28 [Dania Jai-Alai Palace, Inc. v. Sykes](#), 450 So.2d 1114, 1120 (Fla.1984)). See also [Anderson v. Abbott](#),
 321 U.S. 349, 362 (1944).

29 To pierce the corporate veil under Florida law, the claimant has the heavy burden to prove, by a
 preponderance of the evidence, that: (1) the shareholder dominated and controlled the corporation to such
 an extent that the [corporation's] independent existence, was in fact non-existent and the ... shareholders
 were in fact alter egos of the corporation; (2) the corporate form must have been used fraudulently or for an
 improper purpose; and (3) the fraudulent or improper use of the corporate form caused injury to the claimant.

[In re Hillsborough Holdings Corp.](#), 166 B.R. 461, 469-69 (Bankr. M.D. Fla.1994) (citing [Dania Jai-Alai](#)

In re Ellingsworth Residential Community Association, Inc., Slip Copy (2020)

Palace, Inc. v. Sykes, 450 So.2d 1114 (Fla.1984);  *Mobil Oil Corp. v. Linear Films, Inc.*, 718 F.Supp. 260 (D. Del. 1989)).

30  11 U.S.C. § 1191(b), *supra* note 15.

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622 B.R. 236
United States Bankruptcy Court,
S.D. Texas, Houston Division.

IN RE: PEARL RESOURCES LLC, et al,
Pearl Resources Operating Co. LLC, Debtors.

Case No: 20-31585, Case No: 20-31586

|
Signed 09/30/2020

Synopsis

Background: Contested confirmation hearing was held on small business debtors' proposed subchapter V plan.

Holdings: The Bankruptcy Court, [Eduardo V. Rodriguez, J.](#), held that:

[1] subchapter V plan proposed by small business debtors in oil and gas production industry was proposed in “good faith,” as required for the plan to be confirmed;

[2] subchapter V plan proposed by small business debtors in oil and gas production industry was “feasible”;

[3] “disposable income” test for whether a proposed subchapter V was “fair and equitable” to an impaired, dissenting class was satisfied;

[4] as matter of first impression, proposed subchapter V plan satisfied the enhanced “feasibility” requirement for “cramdown”; and

[5] proposed subchapter V plan provided secured creditors in impaired, dissenting class with the “indubitable equivalent” of their claims, and could be “crammed down” over objection of that class.

Plan confirmed.

Procedural Posture(s): Objection to Confirmation of Plan.

West Headnotes (26)

[1] **Bankruptcy** Particular proceedings or issues

Hearing on confirmation of proposed reorganization plan is a “core” proceeding, in which bankruptcy court has both statutory and constitutional authority to enter a final order and judgment. 28 U.S.C.A. § 157(b)(2)(A, L).

[2] **Bankruptcy** Classification of claims

Proposed subchapter V plan properly classified claims and interests, as required for the plan to be confirmed, where the claims and interests placed in each class were substantially similar to other claims and interests in that class, where debtors had valid business, factual, and legal reasons for separately classifying certain claims and interests, and where the plan did not unfairly discriminate between holders of claims or interests in each class. 11 U.S.C.A. §§ 1122, 1123(a)(1), 1129(a)(1), 1191(a).

[3] **Bankruptcy** Good faith and legality

In deciding whether Chapter 11 plan has been proposed in “good faith,” as required for it to be confirmed, court must consider totality of the circumstances surrounding establishment of plan, keeping in mind that purpose of the Bankruptcy Code is to provide debtors with reasonable opportunity for fresh start. 11 U.S.C.A. §§ 1129(a)(3).

[4] **Bankruptcy** Good faith and legality

“Good faith” requirement for confirmation of proposed Chapter 11 plan is met where the plan is proposed with legitimate and honest purpose of reorganizing and has a reasonable hope of success. 11 U.S.C.A. § 1129(a)(3).

[5] Bankruptcy **Good faith and legality**

Proposed Chapter 11 plan may satisfy the “good faith” confirmation requirement even though the plan may not be one which creditors would themselves design and indeed may not be confirmable.  11 U.S.C.A. § 1129(a)(3).

[6] Bankruptcy **Confirmation; Objections**

To obtain confirmation of proposed Chapter 11 plan, debtor must prove that the plan was proposed in “good faith” by a preponderance of the evidence.  11 U.S.C.A. § 1129(a)(3).

[7] Bankruptcy **Good faith and legality**

Subchapter V plan proposed by small business debtors in oil and gas production industry was proposed in “good faith,” as required for the plan to be confirmed, where credible testimony was presented that debtors' Chapter 11 petitions were motivated by the strong competition which they faced from another producer with significantly stronger financial wherewithal, which had drilled over 40 nearby horizontal wells in adjacent tract, and that debtors' bankruptcy filings were part of efforts to reorganize and to preserve debtors' businesses as going concerns.  11 U.S.C.A. §§ 1129(a)(3),  1191(a).

[8] Bankruptcy **Requisites of Confirmable Plan**

Pre-confirmation payments for fees and expenses incurred in Chapter 11 case are within scope of Chapter 11 plan confirmation requirement specifying that “any payment” made or to be made by the plan proponent or by debtor for services “in or in connection with” the plan or the bankruptcy case must be approved by the court.  11 U.S.C.A. § 1129(a)(4).

[9] Bankruptcy **Disclosure and Solicitation****Bankruptcy** **Requisites of Confirmable Plan**

In order to comply with Chapter 11 plan confirmation requirement specifying that “any payment” made or to be made by the plan proponent or by debtor for services “in or in connection with” the plan or the bankruptcy case must be approved by court, plan proponent must make disclosure and also obtain approval of reasonableness of the payments.  11 U.S.C.A. § 1129(a)(4).

[10] Bankruptcy **Requisites of Confirmable Plan**

Chapter 11 plan confirmation requirement specifying that “any payment” made or to be made by the plan proponent or by debtor for services “in or in connection with” the plan or the bankruptcy case must be approved by court is designed to ensure compliance with the Bankruptcy Code policy that the court police the awarding of fees in bankruptcy cases, so that holders of claims and interests derive the benefit of such information as it might affect their decision to accept or reject a proposed plan.  11 U.S.C.A. § 1129(a)(4).

[11] Bankruptcy **Requisites of Confirmable Plan**

Proposed subchapter V plan that would reinstate the prepetition management structure of Chapter 11 debtors was “consistent with the interests of creditors and equity security holders,” as required for it to be confirmed, given current management's expertise in managing bankrupt oil and gas producers.  11 U.S.C.A. §§ 1129(a)(5),  1191(a).

[12] Bankruptcy **Provisions for satisfaction of claims; relation to recovery in liquidation**

Proposed subchapter V plan under which all creditors would be paid in full, with interest, provided creditors with more than what

they would receive in hypothetical Chapter 7 liquidation and satisfied the “best interests of creditors” test.  11 U.S.C.A. §§ 1129(a)(7),  1191(a).

[13] Bankruptcy Classification of claims

Debtor possesses considerable, but not complete, discretion in classifying claims and interests in its proposed Chapter 11 plan of reorganization.

11 U.S.C.A. §§ 1122,  1123(a)(1),  1129(a)(9).

[14] Bankruptcy Fairness and Equity; “Cram Down.”

Bankruptcy statute barring “cramdown” of Chapter 11 plan over the objection of an impaired dissenting class unless there is at least one impaired class that has accepted the plan operates as a statutory gatekeeper, pursuant to Congressional policy that, before debtor embarks upon the tortuous path of cramdown and compels the target of cramdown to shoulder risks of error necessarily associated with a forced confirmation, there must be some other properly classified group that is also hurt and nonetheless favors the plan.  11 U.S.C.A. § 1129(a)(10).

[15] Bankruptcy Feasibility in general

To demonstrate that its proposed Chapter 11 plan is “feasible,” as required for it to be confirmed, debtor must establish that its plan offers a reasonable possibility of success.  11 U.S.C.A. § 1129(a)(11).

[16] Bankruptcy Confirmation; Objections

Plan proponent must demonstrate the feasibility of proposed Chapter 11 plan by a preponderance of the evidence.  11 U.S.C.A. § 1129(a)(11).

[17] Bankruptcy Feasibility in general

To demonstrate that proposed Chapter 11 plan is “feasible,” as required for it to be confirmed, debtor need not provide a guarantee of success, but must be able to show that it can accomplish what it proposes to do, in the time period allowed, and on the terms set forth in the plan.

 11 U.S.C.A. § 1129(a)(11).

[18] Bankruptcy Feasibility in general

To confirm a proposed Chapter 11 plan, bankruptcy court must make a specific finding as to its feasibility after engaging in a peculiarly fact-intensive inquiry that involves a case-by-case analysis, using as a backdrop the relatively low parameters articulated in confirmation provision.  11 U.S.C.A. § 1129(a)(11).

[19] Bankruptcy Feasibility in general

Subchapter V plan proposed by small business debtors in oil and gas production industry was “feasible,” as required for it to be confirmed, given that debtors would be able to service their debt through operations and with an infusion of capital by their principal as stated in the plan, given debtors' earning power after reorganizing, given the past performance of debtors' business operations and ability of debtors' management, and given the economic outlook for the oil industry in general.  11 U.S.C.A. §§ 1129(a)(11),  1191(a).

[20] Bankruptcy Preservation of priority

“Absolute priority” rule for “cramdown” of Chapter 11 plan over objection of an impaired dissenting class of creditors does not apply when “cramdown” is sought by small business debtor of subchapter V plan; instead, unsecured creditors are protected by the “fair and equitable” requirement.  11 U.S.C.A. §§ 1129(b)(2)(B),  1191(b, c).

[21] Bankruptcy Fairness and Equity; "Cram Down."

Whether a proposed subchapter V plan is fair and equitable and does not discriminate unfairly, as required for it to be "crammed down," should be evaluated in light of creditors' objections.  11 U.S.C.A. §§ 1129(b)(2)(A),  1191(b).

[22] Bankruptcy Fairness and Equity; "Cram Down."

"Disposable income" test for whether a proposed subchapter V was "fair and equitable" to an impaired, dissenting class, based upon whether the plan proposed to commit all of debtor's disposable income for the entire term of plan to making plan payments, was satisfied, as required to permit "cramdown" of plan over the objection of that class, where testimony was presented that development of oil field would generate income included to determine disposable income distributed under the plan, which would inure for the benefit of objecting creditors, and where the plan provided for distribution of debtors' disposable income to holders of allowed claims, including the objecting creditors, if and when objecting creditor was determined to hold an allowed claim.  11 U.S.C.A. § 1191(c).

[23] Bankruptcy Feasibility in general

Enhanced "feasibility" requirement for "cramdown" of subchapter V plan over the objection of an impaired, dissenting class requires a showing that debtor can realistically carry out its plan; while a guarantee of success is not required, bankruptcy court should be satisfied that the reorganized debtor can stand on its own two feet.  11 U.S.C.A. §§ 1129(a)(11),  1191(c)(3)(A).

[24] Bankruptcy Feasibility in general

Proposed subchapter V plan satisfied the enhanced "feasibility" requirement for

"cramdown" of plan over objection of impaired, dissenting class, given uncontroverted testimony that there was reasonable likelihood that debtors could successfully develop certain acreage and generate sufficient revenue to permit payment of any allowed claims in impaired, dissenting class out of their disposable income within two years, and where value of property subject to retained liens of creditors in this impaired, dissenting class, roughly \$7.4 million, was significantly greater than the absolute highest amount that the allowed claims could total, roughly \$1.2 million, so that if the claims were not paid in full through distribution of disposable income, it was likely that debtors could generate sufficient funds from sale of their assets to pay the allowed claims in full.  11 U.S.C.A. § 1191(c)(3)(A).

[25] Bankruptcy Secured creditors, protection of

Analysis of whether a proposed Chapter 11 plan provides dissenting secured creditors with the "indubitable equivalent" of their allowed secured claims, for "cramdown" purposes, is tied to creditors' "claims," not the property securing them.  11 U.S.C.A. § 1129(b)(2)(A)(iii).

[26] Bankruptcy Secured creditors, protection of

Proposed subchapter V plan provided secured creditors in impaired, dissenting class with the "indubitable equivalent" of their claims, and could be "crammed down" over objection of that class, where the value of real property securing the retained liens of creditors in this impaired, dissenting class, roughly \$7.4 million, was significantly greater, by factor of roughly 6 to 1, than the absolute highest amount that the allowed secured claims in this class could total, roughly \$1.2 million, and thus the plan provided sufficient assurance that allowed claims in this class would be paid and paid in full.  11 U.S.C.A. §§ 1129(b)(2)(A)(iii),  1191(b).

Attorneys and Law Firms

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MEMORANDUM OPINION

[Eduardo V. Rodriguez](#), United States Bankruptcy Judge

Effective February 19, 2020, the Small Business Reorganization Act of 2019 (“*SBRA*”) added new subchapter V provisions (11 U.S.C. §§ 1181–1195) designed to streamline the reorganization process for small business debtors. While the definition of a small business debtor under § 101(51D) has some conforming changes, the aggregate debt limit of \$2,725,625 does not change. However, the Coronavirus Aid, Relief, and Economic Security Act has temporarily raised the aggregate debt limit to \$7,500,000, effective March 25, 2020 and which sunsets on March 25, 2021. Thus, under the SBRA, a § 101(51D) “small business debtor” that files Chapter 11 has two options: (1) proceed as a subchapter V case by electing subchapter V, or (2) proceed as a BAPCPA “small business case” by not electing subchapter V. Pearl Resources LLC and Pearl Resources Operating Co. LLC both elected to proceed under subchapter V of Title 11 of the United States Bankruptcy Code.

As a matter of first impression, the Court conducted a contested confirmation hearing on the jointly administered subchapter V Debtors’ plan of reorganization on August 13, 2020. At the conclusion, the Court ordered that a modified plan consistent with the Court’s oral ruling be filed no later than August 20, 2020, took the matter under advisement and ordered briefing. All briefs have now been submitted and the matter is ripe for determination. For the reasons set forth below, Debtors’ jointly administered subchapter V Plan dated August 21, 2020 is confirmed pursuant to  11 U.S.C. § 1191(b).

I. FINDINGS OF FACT

This Court makes the following findings of fact and conclusions of law pursuant to [Federal Rule of Civil](#)

[Procedure 52](#), which is made applicable to contested matters pursuant to [Federal Rules of Bankruptcy Procedure 7052](#) and [9014](#). To the extent that any finding of fact constitutes a conclusion of law, it is adopted as such. To the extent that any conclusion of law constitutes a finding of fact, it is adopted as such. This Court made certain oral findings and conclusions on the record. This Memorandum Opinion supplements those findings and conclusions. If there is an inconsistency, this Memorandum Opinion controls.

***241 A. Procedural History**

On March 3, 2020, Pearl Resources LLC (“*Pearl Resources*”) and Pearl Resources Operating Co. LLC (“*Pearl Operating*”) (each a “*Debtor*”; collectively “*Debtors*”) each filed their separate Chapter 11 petitions under Title 11, Chapter 11, subchapter V of the United States Bankruptcy Code.¹ On March 10, 2020, the Court granted Debtors’ motion to jointly administer the two cases.² On April 13, 2020, a status conference concerning the jointly administered Debtors was held at which time the Court entered an order which provisioned, inter alia, that a plan of reorganization be filed no later than June 1, 2020.³ On April 14, 2020, the First Meeting of Creditors was held, both Debtors appeared, by and through its managing member Dr. Dria, and the meeting was concluded.⁴ By order of the Court, the bar date for non-governmental interests and proofs of claim in these cases was May 1, 2020.⁵ On May 22, 2020, Debtors filed an emergency motion to extend the time to file a plan.⁶ On May 28, 2020, the Court held a hearing on the emergency motion and after considering the pleadings on file and evidence taken at the hearing, the motion was granted providing Debtors until July 1, 2020, to file a plan of reorganization.⁷

On July 1, 2020, Debtors timely filed their subchapter V plan of reorganization.⁸ On July 2, 2020, the Court (i) fixed the time for filing acceptances or rejections of the Plan; (ii) fixed the time for filing objections to confirmation of the Plan; and (iii) scheduled a hearing to consider confirmation of the Plan for August 13, 2020.⁹ On July 8, 2020, Debtors served on all creditors, parties-in-interest, and others requesting notice, the Plan Solicitation Package that included: (i) the Debtors’ plan;¹⁰ (ii) the Court’s Order fixing deadlines for voting and objections; and (iii) the approved Ballot for Accepting or Rejecting Debtors’ Plan.¹¹

On August 6, 2020, the following creditors timely filed their objections to confirmation of Debtors' Plan: Pilot Thomas Logistics, LLC ("*Pilot Thomas*");¹² TransCon Capital, LLC ("*TransCon*");¹³ Nabors Drilling Technologies USA, Inc. ("*Nabors*");¹⁴ and Terrell CAD, Harris County, Pecos County ("*Terrell CAD*").¹⁵ The Terrell CAD objection was subsequently withdrawn, leaving only Pilot Thomas, TransCon, and Nabors (collectively "*Objecting Creditors*"). On August 10, 2020, Debtors filed Docket No. 210 evidencing the ballot tabulation in which four Classes of claims held by non-insiders (three of which are impaired) voted to accept the Plan and *242 three impaired Classes of claims held by non-insiders voted not to accept the Plan.¹⁶ Thereafter, on August 12, 2020, Debtors uploaded a proposed order confirming Debtors' plan that included language purporting to modify language contained in the plan as it pertained to treatment of the Objecting Creditors' claims.¹⁷ However, pursuant to the Court's order at the August 13, 2020 hearing, Debtors filed a modified plan on August 21, 2020, which is currently the live pleading before the Court ("*Plan*").¹⁸

II. CONCLUSIONS OF LAW

A. Jurisdiction, Venue, and the Court's Constitutional Authority to Enter a Final Order

[1] This Court holds jurisdiction pursuant to 28 U.S.C. § 1334 and now exercises its jurisdiction in accordance with Southern District of Texas General Order 2012-6.¹⁹ Confirmation of a plan of reorganization constitutes a core proceeding under 28 U.S.C. § 157(b)(2)(A) & (L). Therefore, the Court holds constitutional authority to enter a final order and judgment.²⁰ Finally, venue is governed by 28 U.S.C. §§ 1408, 1409. Venue is proper because Debtors' principal place of business has been in the Southern District of Texas for the 180 days immediately preceding the Petition Date. The Court will next turn its attention to the statutorily required contents of a subchapter V plan of reorganization.

B. Requisite Contents of a Subchapter V Plan of Reorganization

Section 1125 of the Bankruptcy Code normally requires a disclosure statement that provides adequate information

regarding the debtor's plan of reorganization and implementation of the plan of reorganization.²¹ However, subchapter V includes several features designed to facilitate the efficient and economical administration of the case and the prompt confirmation of a plan. These features include elimination of, inter alia, a separate disclosure statement unless the court orders otherwise.²²

Although no disclosure statement is required, the subchapter V plan must, at a minimum, contain the following: (a) a brief history of the subchapter V debtor's business operations;²³ (b) a liquidation analysis;²⁴ (c) projections with respect to the ability of the subchapter V debtor to make payments under the proposed plan;²⁵ (d) the submission of all or a portion of the subchapter V debtor's post-petition income from future earnings or (other future income) to the supervision and control of the trustee "as is necessary for the execution of the plan";²⁶ and (e) in a nonconsensual *243 subchapter V plan, such as the case here, appropriate remedies that may include liquidation of nonexempt assets to protect the holders of claims or interests in the event plan payments are not made.²⁷ Apart from the mandatory provisions, a subchapter V debtor's plan may contain any additional provisions that are consistent with the Bankruptcy Code but which are not applicable in the instant case.²⁸ The Court will take each one in turn.

1. Debtors' Plan of Reorganization

a. History of Debtors' Business Operations

Section 1190(1)(A) requires that a debtor include in its plan "a brief history of the business operations of the debtor." Here, Debtors included the following business history in their Plan filed on August 21, 2020.²⁹ Debtors are Texas limited liability companies with their corporate offices in Houston, Texas. Debtors have outsourced to third parties all of the operational aspects of their business, except for their finance and administrative functions. Myra A. Dria ("*Dr. Dria*") manages Debtors' finances, administrative functions, and directs operations of their third-party contractors. The primary asset of Debtors are oil and gas leases located in Pecos County, Texas. Dr. Dria is the founder and Managing Member of Pearl Resources and through Pearl Resources, the Managing Member of Pearl Operating. Dr. Dria graduated

from the University of Texas with a Ph.D. in Petroleum Engineering with Honors in 1988.

Debtors have under lease 2,240 acres in Pecos County, Texas. In addition, Debtors are in a dispute concerning an additional 320 acres located in the south half of Section 22. Adjacent operators are Jagged Peak Energy Inc. and Parsley Energy LLC, both publicly owned entities. Debtors' primary business has been to develop, design and build infrastructure to support drilling operations, and drill and manage new oil and gas wells with production batteries on their lease acreage in Pecos County. Debtors also operate two wells located in Pecos County: Brandenburg Well No.1 and the Garnet State No. 3.

i. Description of Debtors' Main Assets

The Garnet State Lease legal description/location is H&GN RR Survey, Pecos County Block 8 Section S/2 20 (320 acres) and Debtors hold this S/2 of Section 20 under a Relinquishment Lease with the State of Texas for the development of the oil and gas interests. Debtors also believe they are entitled to hold the S/2 of Section 22 (320 acres) also under that same Relinquishment Lease but this acreage is under dispute with the Texas General Land Office.

There is one Phantom (Wolfcamp) field oil and gas well, the Garnet State #3, which was drilled vertically to 11,000 ft. in 2017 and completed with a one stage hydraulic frack. Although the well has an installed pumping unit (American 456-320-120, 3 25 KVA transformer and 50 hp electric motor) with controller and new rods awaiting installation the well, according to Debtors, is currently producing naturally, flowing, under natural gas pressure.

*244 A production battery for Garnet State Lease exists on Section 20 with two 300 bbl production tanks, catwalks, and new vertical gun barrel tank. A meter run with a total flow gauge was installed and upgraded. One separator exists at the well, and another separator exists at the battery flare to optimize liquid recovery from the gas stream.³⁰ A 4-acre pad was built for the first smaller battery, and an 8-acre pad was built for the battery expansion for the horizontal well production and gas treatment facilities. The battery extension is where the flare is located for safety purposes.

For drilling and completion purposes, two water wells at either end of the S/2 of Section 20 lease were drilled and outfitted with downhole water well pumps and three (3)

owned 45 KW portable Magnum Diesel Generators. Both water wells produce freshwater at 200+ GPM. There are three plastic-lined permanent frack pits and one unlined mega frack pit capable of holding an additional 1.5 MM bbls of fresh water. Located at the north end of the S/2 of Section 20 two storage connex buildings are located for equipment storage. Additional casing and equipment are also stored at this location. Power poles and wire are installed extending the length of the section.

The South half of Section 22, a 320-acre tract under the State Lease (in dispute), holds an owned water well equipped with downhole pump capable of delivering 200+ bbls of freshwater per day. Another generator is placed at this location together with a 40,000 bbl freshwater lined frack pit. A third horizontal well, 5000 ft. lateral, is permitted and was drilled to 2000 ft. with surface case set and cemented to this depth. The well pad and lined reserve pit have been built, together with rat hole, cellar, and 2000 ft. of cemented 13 3/8" J55 casing. Intentions are to continue to drill the well to 10,000 ft. and add a 5,000 ft. lateral to this well. A 5-acre auxiliary battery pad has been built which would offer initial gas, oil, and water separation before transport across Section 21 easement to final processing on section 20 for delivery to pipelines. A 72-acre development area has been fenced in with an 8-ft. game fence and two 30-ft. cantilevered gates. A six well 10-acre drilling pad has also been built on the southeast corner of the section. A 100-ft. wide half-mile pipeline, power, and road easement extends between Section 20 across Section 21 to Section 22.

The Brandenburg Lease legal description is H&GN RR Survey, Pecos County Block 8 Section 40:E/2 containing 320 acres more or less; H&GN Railway Company Survey, Block 8, Section 41: W/2, Pecos County, Texas and containing 320 acres more or less; H&GN Railway Company Survey, Block 8, Section 42: All, Pecos County, Texas and containing 640 acres more or less; H&GN Railway Company Survey, Block 8, Section 44: All, Pecos County, Texas and containing 640 acres more or less; comprising a total of 1,920 acres, more or less.

These are more or less adjacent sections with a majority of common mineral ownership across several hundred mineral owners. The depths of the position were severed to some extent when the Yates interval at 2600 ft. was first exploited in the 1930's and the original family ownership started selling portions of the other depths. The Yates was developed on large spacing so remaining infill locations remain as "Proven,"

but Debtors leased the *245 interests of all of the original family members and subsequently added other interests which delivered a majority interest in all depths to Debtors. The ownership is extremely complicated, with many owners and transfers back and forth between various individuals and selling other interests in a royalty trust making this leasehold title work extremely challenging and an expensive endeavor to decipher and obtain.

Subsequent to the Yates development was the Cherry Canyon at 5,000 ft. and the Ellenburger at 20,000 ft. depth. In 1979, AG Hill drilled the Brandenburg #1 well on Section 44 to the Ellenburger. The well was poorly tested and completed, with final testing and production occurring from the Fusselman followed by an Atoka completion. Production facilities were never installed, and gas produced from these deep horizons were sent directly to pipeline. Debtors acquired new leases when the well had been abandoned and non-producing for over 6 years and the well was part of the leasehold.

ii. Statutory Mineral Property Liens

In October 2016, a wild well incident occurred during the drilling of the Garnet State #4 well by PDS Drilling, LLC (“PDS”) pursuant to a Turnkey Drilling Contract with Debtor, Pearl Operating (the “*Turnkey Contract*”). Under the Turnkey Contract, Debtor Pearl Operating required PDS to provide its services on a fully turnkey basis which meant PDS was responsible to furnish equipment, labor, and perform services as described in the contract for a total specified sum. After the wild well incident, PDS failed to pay amounts due to numerous subcontractors. Many of these subcontractors asserted various claims against Debtors in an effort to hold them responsible for PDS's obligations. Additionally, many of these claimants filed statutory mineral property liens against Debtors' oil and gas properties and sued Debtors to foreclose those liens.

iii. Texas General Land Office (“GLO”) Issues and Status

State Lease M-113155 (the “*State Lease*”) consists of dozens of undivided interest leases obtained under the Relinquishment Act that covers all of Section 20, Blk. 8, H&GN Ry Co. Survey, A-5206 and the S/2 of Section 22, Blk. 8, H&GN Ry Co. Survey, A-5208. Many of the earliest undivided interest leases were dated in September and

October of 2011 and had primary terms of 5 years. Debtors acquired those leases in late 2012. Additional leases were taken in 2014 with 5-year primary terms, and then others were taken in 2016 with one-year primary terms. The two sections covered by the State Lease are not contiguous, and neither section had access to a public road. The nearest public road to Section 20 is FM 1776, about 1.5 miles to the west. The nearest public roads to Section 22 are FM 1450, about 4 miles to the south, and FM 1776, about 2.5 miles to the west. In early 2013, Debtors contracted with Total Field Services to construct a road across Section 44 into Section 22. However, due to some delay as more fully described in Debtors' Plan of reorganization, access to Section 20 has been delayed.

The Court finds that Debtors' Plan provides more than an adequate history of Debtors' business operations and therefore satisfies § 1190(1)(A).³¹

b. Liquidation Analysis

Section 1190(1)(B) requires that a debtor include a liquidation analysis in its plan of reorganization.³² Here, Debtors' plan of *246 reorganization states that “[t]he total amount of unpaid and unresolved non-insider claims asserted against Debtors is approximately \$1,200,000.”³³ Dr. Dria's uncontroverted testimony was that the Wolfcamp development on S/2 of Section 20 has a NPV10 value of \$22,420,000, the Garnet State Mineral Leasehold – Undeveloped, Proven, Acreage is valued at \$35,390,000, the Garnet State Lease Collateral³⁴ is valued at \$7,440,000; the Brandenburg Mineral Leasehold – Undeveloped, Proven, Acreage is valued at \$13,602,648 and the Brandenburg Leasehold, Undeveloped, Proven, Acreage is valued at \$50,782,770.³⁵ Even including Dr. Dria's DIP Loan, the value of Debtors' assets far exceed the total amount of claims that would be required to be paid if Debtors were liquidated.³⁶ Exhibit C attached to Debtors' Plan provides a more detailed presentation of the value of Debtors' assets.³⁷ The Plan provides for full and complete satisfaction of all allowed claims with interest. The Court, therefore, finds that Debtors' liquidation analysis satisfies § 1190(1)(B).

c. Financial Projections

Section 1190(1)(C) requires that a debtor's plan contain “projections with respect to the ability of the debtor to make

payments under the proposed plan of reorganization.”³⁸ As demonstrated by Debtors' Exhibit D attached to their Plan, Debtors project that for the execution of a nominally 5,000 foot lateral, with appropriate expenses, taxes, and a \$4 million capital investment for drilling and completion, this well can generate a reasonable return at July 2020 WTI/HH strip prices which range within the \$39 – \$49 per barrel of oil range through 2028 and for this rich gas (1130 – 1280 mmbtu/mcf) a price which averages \$2.50/mcf, yields a net cash flow of approximately \$150,000 per month.³⁹ Debtors believe that the financial projections can be achieved if the 160 acres on the west half of the south half of Section 20 are freed from any lien claims. Debtors further project that by September 2022, Debtors can generate as much as \$5 million in oil and gas revenues. Alternatively, if Debtors are unable to successfully drill a well within a reasonable time period after confirmation, Debtors will sell an approximate 20 percent working interest in the Garnet State Lease Collateral to raise sufficient capital to pay all allowed claims in full (“*Allowed Claim(s)*”).⁴⁰

Debtors' performance under this Plan is not dependent upon the generation of disposable income (“*Disposable Income*”) to pay Allowed Claims because Debtors are committing to sell assets sufficient to pay Allowed Claims in full if they are not successful in paying Allowed Claims in full from Disposable Income within two (2) years.⁴¹ Nevertheless, Debtors' financial projections demonstrate that there is a reasonable likelihood that Debtors will have projected Disposable Income for the period described in  § 1191(c)(2) sufficient to pay all Allowed Claims in full, with *247 interest. Accordingly, the Court finds that Debtors' financial projections satisfy § 1190(1)(C).

d. Submission of All or a Portion of the Subchapter V Debtors' Post-Petition Income to the Supervision and Control of the Trustee

Section 1190(2) requires the plan to 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.”⁴² In an individual case, this provision replaces the similar rule in § 1123(a)(8). In non-individual cases, as in the case sub judice, it imposes a new requirement. Because a plan ordinarily must provide for payment of creditors from the debtor's income, the requirement for the submission

to the trustee of income as necessary for the execution of the plan constitutes a feasibility prerequisite. Moreover, § 1183(c)(1) provides for termination of the trustee's service upon substantial consummation of a consensual plan under  § 1191(a). Under § 1101(2), “substantial consummation” occurs upon, inter alia, “commencement of distribution under the plan.”

Conversely, in a non-consensual plan such as the one before the Court, § 1194(b) provides for the subchapter V trustee to make payments to creditors under the plan, after confirmation, unless the plan or the order confirming it provides otherwise.⁴³ Because the subchapter V trustee must make payments under a non-consensual plan, the trustee's service does not terminate upon its substantial consummation but continues, at a minimum, until the trustee has made the required disbursements. Although Debtors' original Plan contemplated Debtors making payments to creditors, the Court, given the objections raised by creditors discussed more fully infra, found it appropriate to require Debtors to submit all or such portion of the future earnings or other future income of Debtors to the supervision and control of the subchapter V trustee as is necessary for the execution of the plan.⁴⁴

Section 5.06 of Debtors' modified Plan provisions, inter alia, for Drew McManigle (“*SBRA Trustee*”) to act as the Plan disbursing agent.⁴⁵ It further provides for Debtors to remit quarterly all Disposable Income generated by Debtors for the previous quarter to the SBRA Trustee, along with an accounting of how Debtors calculated Disposable Income.⁴⁶ Section 5.06 then directs the SBRA Trustee to pay the Allowed Claims under Classes 2, 4, 5, 6, 7, and 8 from Disposable Income until such time as Allowed Claims under 2, 4, 5, 6, 7, and 8 are paid in full.⁴⁷ Accordingly, the Court finds that Debtors' Plan meets the requirements of § 1190(2).

e. Default and Remedies After Confirmation

Because the provisions of a confirmed plan are binding on the debtor and creditors under § 1141(a), the plan's provisions for default and remedies control. In a consensual plan, the provisions governing default and remedies ordinarily have their source in negotiations with the various creditors that lead to terms that result in acceptance of the plan. When one or more classes of impaired creditors do not

accept the plan, such as the case here, the requirements for nonconsensual plan confirmation *248 in § 1191(c) provide the source of remedies for default which may include liquidation of nonexempt assets to protect the holders of claims or interests in the event plan payments are not made.⁴⁸

The only explicitly named remedy in § 1191(c)(3)(B) is “the liquidation of nonexempt assets,” which must be evaluated in this case.⁴⁹

As discussed more fully infra, Debtors have objected to the claims of the following classes of secured creditors: Class 4 – Nabors in the amount of \$745,209.45; Class 5 – Pilot Thomas in the amount of \$95,749.17; Class 6 – Maverick Oil Tools, Inc. (“Maverick”) in the amount of \$133,635.28; Class 7 – TransCon in the amount of \$90,223.87; and Class 8 – Charger Services, LLC (“Charger”) in the amount of \$86,470.02, for a combined \$1,151,287.79 in disputed claims.⁵⁰

In their Plan, Debtors proclaim that by leaving the west 160 acres of the south ½ of Section 20 unencumbered, it will increase significantly the opportunity to attract a drilling partner, which in turn will help facilitate the payment of Allowed Claims in Classes 4, 5, 6, 7, and 8.⁵¹ This requires that the Objecting Creditors' liens on this west 160 acres be released, which forms the basis of their objections. The Objecting Creditors' claims, however, are disputed and subject to final resolution by this Court in the pending adversary complaints.⁵²

First, Nabors's claim is the subject of an adversary proceeding case number 20-3125 in which Debtors allege, inter alia, that Nabors overbilled and breached its contract with Debtors on a drilling projected located on the Garnet State Lease and Debtors contest the validity of Nabors's mineral property lien filed of record in Pecos County Texas. Second, Pilot Thomas is the subject of an adversary proceeding filed by Debtors in case number 20-3077. In that case, Debtors allege that Pilot Thomas's claim is not the obligation of Debtors, but rather of PDS, whom Debtors hired to bring under control a wild well in 2016. As part of the wild well project, Debtors allege, PDS contracted with and was obligated to pay Pilot Thomas as its subcontractor. Third, TransCon's claim is the subject of an objection filed by Debtors in which Debtors raise similar complaints to that of the Pilot Thomas claim, in that the TransCon claim is not the obligation of Debtors but the same third-party contractor, PDS, hired by Debtors to bring under control a wild well in 2016.⁵³ As part of the wild well

project, Debtors allege, PDS also contracted with and was obligated to pay TransCon as its subcontractor. For each of the disputed claims, the Plan provides that:

1. upon confirmation of the Plan, [Disputed Creditor's] Pre-Petition Lien shall be released except as to the Garnet State Collateral and a release of lien instrument issued by the Court shall be recorded in the appropriate property records of Pecos County, Texas.

2. to the extent of the amount of [Disputed Creditor's] Allowed Claim, [Disputed Creditor] shall be entitled to retain its lien and security interest in the Garnet State Lease Collateral (“Disputed Creditor's Retained Lien”).

*249 3. if the [Disputed] claim is not allowed. [Disputed Claimant's] Retained Lien in the Garnet State Lease Collateral shall be released and within ten (10) days of the Court's order, [Disputed Claimant] shall execute and deliver to the Reorganized Debtors an instrument releasing its Retained Lien in full and for all purposes in a form as required to record in the Pecos County Real Property Records.

4. [Disputed Claimant's] Allowed Claim shall accrue interest at the rate of four percent (4%) per annum from and after the Petition Date until it is paid in full. The [Disputed Claimant's] Retained Lien shall have a first priority lien and security interest against the Garnet State Lease Collateral on a *pari-pasu* basis with the Allowed Claims under Classes 5, 6, 7 and/or 8. On a quarterly basis until paid in full, [Disputed Claimant's] Allowed Claim shall be paid its pro-rata share (with Class 2 and the Allowed Claims under Classes 5, 6, 7, and/or 8) of Disposable Income from and after the Effective Date (“Effective Date”)⁵⁴ subject to Section 5.03 of the Plan.

5. the [Disputed] Allowed Claim shall be paid in full on the second-year anniversary of the Effective Date (the “[Disputed] Payment Deadline”). If the Debtors fail to pay the [Disputed] Allowed Claim on or before the [Disputed] Payment Deadline, the Debtors will be required to sell sufficient Garnet State Lease Collateral to pay the [Disputed] Allowed Claim in full. If the Debtors fail to pay the [Disputed] Allowed Claim in full on or before one year from the [Disputed] Payment Deadline, [Disputed Claimant] shall be free to pursue any and all remedies it may have under Texas state law, including foreclosure of its Retained Lien. Upon full payment of [Disputed Claimant's] Allowed

Claim, [Disputed Claimant] shall execute and deliver to the Reorganized Debtors an instrument releasing its Retained Lien in full and for all purposes in a form as required to record in the Pecos County Real Property Records.

Additionally, Section 7.06 of Debtors' Plan titled "Retained Collateral & Extra Protection" provides that Classes 4, 5, 6, 7, and 8 retain their pre-petition liens in the Garnet State Lease Collateral to the extent of the amounts of their Allowed Claims, if any.⁵⁵ Debtors value the Garnet State Lease Collateral at \$7,440,000.⁵⁶ The total amount of the claims filed by holders of claims in Classes 4, 5, 6, 7, and 8 is approximately \$1,151,287 in the aggregate which translates to approximately a 6 to 1 collateral to debt ratio. As further protection of the Allowed Claims in Classes 4, 5, 6, 7, and 8, Debtors agree that should any Allowed Claim remain unpaid as of the 34th month after the Effective Date, Debtors will at such time grant any unpaid Allowed Claims in Classes 4, 5, 6, 7, and/or 8 a lien in Debtors' interest at the time in the west 160 acres of the south half of Section 20 to secure Debtors' obligation to pay any such Allowed Claim in full on or before the 36th month anniversary of the Effective Date.⁵⁷

*250 Accordingly, the Court finds that the Plan meets the requirements of  § 1191(c)(3)(B) because it details remedies necessary to protect claim holders if Plan payments are not made, including the liquidation of Debtors' nonexempt assets.

Now that the Court has determined that Debtors' Plan meets the requisite requirements of a subchapter V plan under § 1190, the Court must address whether Debtors' Plan may be confirmed in light of creditors' objections to the Plan.⁵⁸

C. Whether Debtors' Plan Should be Confirmed Considering Creditors' Objections

1. Classification and Treatment of Claims

Debtors' Plan provides for two classes of priority claims (classes 1 and 2); eight classes of secured claims (classes 3–10); two classes of non-priority unsecured claims (classes 11 and 12); one class of pre-petition insider unsecured claims (class 13); and one class of equity security holders (class 14) as follows:

Class 1: All allowed claims entitled to priority under § 507(a) of the Code.

Class 2: The post-petition debtor-in-possession loan made by Dr. Dria to Debtors.

Class 3: The agreed Allowed Claim of Allied OFS LLC ("Allied").

Class 4: The claim of Nabors to the extent allowed.

Class 5: The claim of Pilot Thomas to the extent allowed.

Class 6: The claim of Maverick to the extent allowed.

Class 7: The claim of TransCon to the extent allowed.

Class 8: The claim of Charger to the extent allowed.

Class 9: The pre-petition statutory mineral property lien filed under Texas Property Code Section 56 by Von Directional Services, LLC ("Von Directional") and any related claim against either of Debtors.

Class 10: The pre-petition statutory mineral property lien filed under Texas Property Code Section 56 by RH Trucking, LLC (and Ricardo & Adelaida Huitron) and any related claim against either of Debtors.

Class 11: All non-priority unsecured claims under § 502 of the Code.

Class 12: Potential creditors listed in Debtors' schedules as disputed, but who did not file a proof of claim on or before the bar date of May 1, 2020.

Class 13: Pre-petition loans made by Dr. Dria to Debtors.

Class 14: The Equity Interests of Dr. Dria in Pearl Resources, and Pearl Resources in Pearl Operating.

2. Votes, Objections, and Resolutions

The Plan separates claims and equity interests into 14 classes, 11 of which are impaired.⁵⁹ Classes 2, 13, and 14 are claims and interests held by insiders and those Classes voted to accept the Plan.⁶⁰ There are no claims asserted under Classes 1, 11, and 12 and no votes were cast by members of those classes.⁶¹ Class 10 did not submit a ballot.⁶² Classes 3, 6,

8, and 9 voted to accept the Plan.⁶³ Classes 4, 5, and 7 voted *251 against the Plan.⁶⁴

Debtors lodged objections to the claims of members of Classes 4, 5, and 7 and such objections remain pending.⁶⁵ Class 4, 5, and 7 filed objections to the Plan arguing, inter alia, that the Plan does not provide the holders of claims in Classes 4, 5, and 7 the realization of the indubitable equivalent of their respective claims. The objection to the Plan filed by Harris County, Pecos County, and Terrell's CAD has been withdrawn in exchange for Debtors' agreement to treat the claims of such taxing authorities as provided in the Plan.

3. Confirmation of Debtors' Jointly Administered Subchapter V Plan of Reorganization

In a non-subchapter V case, the court must confirm a Chapter 11 plan if all the requirements of § 1129(a) are met.⁶⁶ Additionally, when all of the requirements of § 1129(a) are met, except the requirement in paragraph (a)(8) requiring that all impaired classes accept the plan, § 1129(b)(1) permits “cramdown” confirmation “if the plan does not discriminate unfairly, and is fair and equitable” with regard to each impaired class that has not accepted it.⁶⁷ Finally, § 1129(b)(2) states the rules for the “fair and equitable” requirement for classes of secured claims, unsecured claims, and interests.⁶⁸ The effects of confirmation are the same even if cramdown confirmation occurs under § 1129(b).

Pursuant to § 101(51D), however, Debtors are small business debtors and subchapter V of Chapter 11 applies to Debtors in these jointly administered bankruptcy cases.⁶⁹ The Court already found that the Plan adequately provides the information required by § 1190(1).⁷⁰ Section 1191 states the rules for confirmation in a subchapter V case.⁷⁰ The starting point is that § 1129(b) does not apply.⁷¹ Section 1129(a), however, remains applicable in a subchapter V case except for paragraph (a)(15), which imposes a projected disposable income requirement in the case of an individual, if an unsecured creditor invokes it.⁷² If all the applicable requirements in § 1129(a) are met, except for the projected disposable income rule of paragraph (a)(15), § 1191(a) requires the court to confirm the plan.⁷³ Because § 1129(a)(8) requires acceptance of the plan by all impaired

classes, confirmation under § 1191(a) can occur only if all impaired classes have accepted it.⁷⁴ This, of course, is more colloquially referred to as a consensual plan.

Where the subchapter V debtor cannot obtain full consent for the plan (i.e. one or more impaired classes of claims or interests rejects the plan), § 1191(b) sets forth the rules for cramdown and replaces the requirements of § 1129(b), which do not apply in a subchapter V case.⁷⁵ Instead, under § 1191(b), the court shall confirm a subchapter V plan that satisfies the confirmation requirements, other than the requirements of § 1129(a)(8) (providing that all classes vote to accept the plan or not be impaired by the plan), § 1129(a)(10) (requiring *252 at least one impaired class to accept the plan), and § 1129(a)(15) (requiring payment of unsecured creditors in full or devoting allocated projected disposable income to the plan), so long as the plan does not discriminate unfairly against any impaired, non-consenting class and is fair and equitable regarding each class of impaired claims or interests that has rejected the plan.⁷⁶ As such, the Court must first determine whether, other than paragraphs 8, 10, and 15 of § 1129(a), the requirements of § 1129(a) have been met. The Court will review each one in turn.

a. Requirements of § 1129(a)

i. Section 1129(a)(1)

[2] The first requirement of § 1129(a) is that the plan must comply with “the applicable provisions of this title.”⁷⁷ The legislative history reflects that “the applicable provisions of chapter 11 include such sections as 1122 and 1123, governing classification and contents of a plan.”⁷⁸ Debtors' Plan sets forth the following claims and interests:

Class 1 – All allowed claims entitled to priority under § 507(a) of the Code. Priority claims are unimpaired. No claims entitled to priority under § 507(a) of the Code have been filed or asserted.

Class 2 – The post-petition debtor-in-possession loan made by Dria to the Debtors. Myra Dria has made a debtor-in-possession loan (the “*DIP Loan*”) to the Debtors pursuant to the Court’s order (the “*DIP Loan Order*”) dated March 31, 2020.⁷⁹ Dr. Dria committed up to \$500,000 under the DIP Loan. Pursuant to the DIP Loan Order, Dr. Dria was granted super priority administrative expense status under § 364(c)(1) of the Code and the DIP Loan is entitled to the protections of § 364(e) of the Code. As of the date of this Memorandum Opinion, the amount due and owing under the DIP Loan is approximately \$252,000. On a quarterly basis until such time as Allowed Claims under Classes 4, 5, 6, 7, and/or 8 are paid in full, Class 2 shall be paid its pro-rata share (with the Allowed Claims under Classes 4, 5, 6, 7 and/or 8) of Disposable Income from and after the Effective Date.

Class 3 – The agreed Allowed Claim of Allied OFS LLC (“*Allied*”). The Debtors and Allied have reached a settlement with respect to Allied’s claim against both Debtors in the amount of \$3,346,349.53. Allied voted in favor of the Plan. Allied’s Allowed Claim is \$150,000 and shall be paid as follows: (i) \$100,000 on the Effective Date; and (ii) \$50,000 on or before nine (9) months from the date of this Order. Allied shall release the statutory mineral property lien it filed pre-petition against the Debtors’ properties in Pecos County, Texas, within ten (10) days of its receipt of \$100,000. Debtors shall supply Allied with the appropriate form of release.

The Plan provides for a joint and mutual release between the Debtors and Allied in which Allied shall be released by the Debtors and their bankruptcy estates, and the Debtors and their bankruptcy estates shall be released by Allied, from any and all claims, obligations, debts, rights, suits, damages, causes of action, remedies and liabilities whatsoever, whether known or unknown, foreseen or *253 unforeseen, existing or hereinafter arising, in law, equity, or otherwise, that the Debtors or their bankruptcy estates, on the one hand, and Allied, on the other hand, have asserted or could have asserted, based on or relating to, or in any manner arising from, in whole or in part, the claims asserted in any litigation prior to the confirmation of this Plan, the Debtor’s business dealings with Allied, and/or the pre-petition mineral lien recorded by Allied, and any matters related to the foregoing; provided however, such release does not include any of the Debtors’ obligations to Allied under this Plan.

Entry of this Court’s Confirmation Order shall constitute the Court’s approval, pursuant to Bankruptcy Rule 9019, of the release of Allied’s claims against the Debtors and the bankruptcy estates and the reciprocal release of the Debtors and the bankruptcy estates against Allied, and further, shall constitute the Court’s finding that the joint and mutual releases of the Debtors and the bankruptcy estates, on one hand, and Allied, on the other hand, is (a) in exchange for good and valuable consideration, (b) a good faith settlement and compromise, (c) in the best interests of the Debtors and their estates, (d) fair, equitable, and reasonable, (e) given and made after due notice and opportunity for hearing, and (f) a bar to the Debtors and the bankruptcy estates asserting any claims or causes of action released herein and a bar to Allied asserting any claims or causes of action released herein.

Class 4 – The claim of Nabors to the extent allowed. The claim filed by Nabors is disputed. Nabors voted to reject the Plan. Prior to the bankruptcy filing, Nabors filed a statutory mineral property lien under Texas law that attached to certain of the Debtors’ assets (“*Nabors’ Pre-Petition Lien*”). The Plan provides for Nabors’ Pre-Petition Lien to be released except as to the Garnet State Lease Collateral and a release of lien instrument issued by the Court shall be recorded in the appropriate property records of Pecos County. The form of such release will be provided by the Debtors. The Plan further provides that to the extent of the amount of Nabors’ Allowed Claim, Nabors shall be entitled to retain its lien and security interest in the Garnet State Lease Collateral (“*Nabors’ Retained Lien*”). If the Nabors’ claim is not allowed, Nabors’ Retained Lien in the Garnet State Lease Collateral shall be released, and within ten (10) days of the Court’s order, Nabors shall execute and deliver to the Reorganized Debtors an instrument releasing its Retained Lien in full and for all purposes in a form as required to record in the Pecos County Real Property Records.

Nabors’ Allowed Claim shall accrue interest at the rate of four percent (4%) per annum from and after the Petition Date until it is paid in full. The Nabors’ Retained Lien shall have a first priority lien and security interest against the Garnet State Lease Collateral on a *pari-pasu* basis with the Allowed Claims under Classes 5, 6, 7 and/or 8. On a quarterly basis until paid in full, Nabors’ Allowed Claim shall be paid its pro-rata share (with Class 2 and the Allowed Claims under Classes 5, 6, 7, and/or 8) of Disposable Income from and after the Effective Date

subject to Section 5.03 of the Plan. Nabors' Allowed Claim shall be paid in full on the second-year anniversary of the Effective Date (the "Nabors Payment Deadline"). If the Debtors fail to pay Nabors' Allowed Claim on or before the Nabors Payment Deadline, the Debtors are required to sell sufficient Garnet State Lease Collateral to pay Nabors' Allowed Claim in full. If the *254 Debtors fail to pay the Nabors' Allowed Claim in full on or before one year from the Nabors Payment Deadline, Nabors shall be free to pursue any and all remedies it may have under Texas state law, including foreclosure of its Retained Lien. Upon full payment of Nabors' Allowed Claim, Nabors shall execute and deliver to the Reorganized Debtors an instrument releasing its Retained Lien in full and for all purposes in a form as required to record in the Pecos County Real Property Records.

Class 5 – The claim of Pilot Thomas to the extent allowed. The claim filed by Pilot Thomas is disputed. Pilot Thomas voted to reject the Plan. Prior to the bankruptcy filing, Pilot Thomas filed a statutory mineral property lien under Texas law that attached to certain of the Debtors' assets ("*Pilot's Pre-Petition Lien*"). The Plan provides for Pilot Thomas's Pre-Petition Lien to be released except as to the Garnet State Lease Collateral and a release of lien instrument issued by the Court shall be recorded in the appropriate property records of Pecos County, Texas. The form of such release shall be provided by the Debtors. To the extent of the amount of Pilot Thomas's Allowed Claim, Pilot Thomas shall be entitled to retain its lien and security interest in the Garnet State Lease Collateral ("*Pilot's Retained Lien*"). If Pilot Thomas's claim is not allowed, Pilot Thomas's Retained Lien in the Garnet State Lease Collateral shall be released, and within ten (10) days of the Court's order, Pilot Thomas shall execute and deliver to the Reorganized Debtors an instrument releasing its Retained Lien in full and for all purposes in a form as required to record in the Pecos County Real Property Records.

Pilot Thomas's Allowed Claim shall accrue interest at the rate of four percent (4%) per annum from and after the Petition Date until it is paid in full. Pilot Thomas's Retained Lien shall have a first priority lien and security interest against the Garnet State Lease Collateral on a *pari-pasu* basis with the Allowed Claims under Classes 4, 6, 7, and/or 8. On a quarterly basis until paid in full, Pilot Thomas's Allowed Claim shall be paid its pro-rata share (with Class 2 and the Allowed Claims under Classes 4, 6, 7, and/or 8) of Disposable Income from and after the Effective Date subject to Section 5.03 of the Plan. Pilot's Allowed Claim

shall be paid in full on the second-year anniversary of the Effective Date (the "*Pilot Payment Deadline*"). If the Debtors fail to pay Pilot Thomas's Allowed Claim on or before the Pilot Payment Deadline, the Debtors are required to sell sufficient Garnet State Lease Collateral to pay Pilot Thomas's Allowed Claim in full. If the Debtors fail to pay Pilot Thomas's Allowed Claim in full on or before one year from the Pilot Payment Deadline, Pilot Thomas shall be free to pursue any and all remedies it may have under Texas state law, including foreclosure of its Retained Lien. Upon full payment of Pilot's Allowed Claim, Pilot Thomas shall execute and deliver to the Reorganized Debtors an instrument releasing its Retained Lien in full and for all purposes in a form as required to record in the Pecos County Real Property Records.

Class 6 – The claim of Maverick to the extent allowed. The claim filed by Maverick is disputed. Maverick voted to accept the Plan. Prior to the bankruptcy filing, Maverick filed a statutory mineral property lien under Texas law that attached to certain of the Debtors' assets ("*Maverick's Pre-Petition Lien*"). The Plan provides for Maverick's Pre-Petition Lien to be released except as to the *255 Garnet State Lease Collateral and a release of lien instrument issued by the Court shall be recorded in the appropriate property records of Pecos County, Texas. The form of such release shall be provided by the Debtors. To the extent of the amount of Maverick's Allowed Claim, Maverick shall be entitled to retain its lien and security interest in the Garnet State Lease Collateral ("*Maverick's Retained Lien*"). If Maverick's claim is not allowed, Maverick's Retained Lien in the Garnet State Lease Collateral shall be released, and within ten (10) days of the Court's order, Maverick shall execute and deliver to the Reorganized Debtors an instrument releasing its Retained Lien in full and for all purposes in a form as required to record in the Pecos County Real Property Records. Maverick's Allowed Claim shall accrue interest at the rate of four percent (4%) per annum from and after the Petition Date until it is paid in full. Maverick's Retained Lien shall have a first priority lien and security interest against the Garnet State Lease Collateral on a *pari-pasu* basis with the Allowed Claims under Classes 4, 5, 7, and/or 8. On a quarterly basis until paid in full, Maverick's Allowed Claim shall be paid its pro-rata share (with Class 2 and the Allowed Claims under Class 4, 5, 7, and/or 8) of Disposable Income from and after the Effective Date subject to Section 5.03 of the Plan. Maverick's Allowed Claim shall be paid in full on the second-year anniversary of the Effective Date (the "*Maverick Payment Deadline*").

If the Debtors fail to pay Maverick's Allowed Claim on or before the Maverick Payment Deadline, the Debtors are required to sell sufficient Garnet State Lease Collateral to pay Maverick's Allowed Claim in full. If the Debtors fail to pay Maverick's Allowed Claim in full on or before one year from the Maverick Payment Deadline, Maverick shall be free to pursue any and all remedies it may have under Texas state law, including foreclosure of its Retained Lien. Upon full payment of Maverick's Allowed Claim, Maverick shall execute and deliver to the Reorganized Debtors an instrument releasing its Retained Lien in full and for all purposes in a form as required to record in the Pecos County Real Property Records.

Class 7 – The claim of TransCon the extent allowed. The claim filed by TransCon is disputed. TransCon voted to reject the Plan. Prior to the bankruptcy filing, TransCon filed a statutory mineral property lien under Texas law and a statutory judgment lien that attached to certain of the Debtors' assets ("*TransCon's Pre-Petition Lien*"). The Plan provides for TransCon's Pre-Petition Lien to be released except as to the Garnet State Lease Collateral and a release of lien instrument issued by the Court shall be recorded in the appropriate property records of Pecos and Harris Counties, Texas. The form of such releases shall be provided by the Debtors. To the extent of the amount of TransCon's Allowed Claim, TransCon shall be entitled to retain its lien in the Garnet State Lease Collateral ("*TransCon's Retained Lien*"). If TransCon's claim is not allowed, TransCon's Retained Lien in the Garnet State Lease Collateral shall be released, and within ten (10) days of the Court's order, TransCon shall execute and deliver to the Reorganized Debtors an instrument releasing its Retained Lien in full and for all purposes in a form as required to record in the Pecos County Real Property Records.

TransCon's Allowed Claim shall accrue interest at the rate of four percent (4%) per annum from and after the Petition Date until it is paid in full. TransCon's *256 Retained Lien shall have a first priority lien and security interest against the Garnet State Lease Collateral on a *pari-pasu* basis with the Allowed Claims under Classes 4, 5, 6, and/or 8. On a quarterly basis until paid in full, TransCon's Allowed Claim shall be paid its pro-rata share (with Class 2 and Allowed Claims under Classes 4, 5, 6, and/or 8) of Disposable Income from and after the Effective Date subject to Section 5.03 of the Plan. TransCon's Allowed Claim shall be paid in full on the second-year anniversary of the Effective Date (the "*TransCon Payment Deadline*").

If the Debtors fail to pay TransCon's Allowed Claim on or before the TransCon's Payment Deadline, the Debtors are required to sell sufficient Garnet State Lease Collateral to pay TransCon's Allowed Claim in full. If the Debtors fail to pay TransCon's Allowed Claim in full on or before one year from the TransCon Payment Deadline, TransCon shall be free to pursue any and all remedies it may have under Texas state law, including foreclosure of its Retained Lien. Upon full payment of TransCon's Allowed Claim, TransCon shall execute and deliver to the Reorganized Debtors an instrument releasing its Retained Lien in full and for all purposes in a form as required to record in the Pecos County Real Property Records.

Class 8 – The claim of Charger to the extent allowed. The claim filed by Charger is disputed. Prior to the bankruptcy filing, Charger filed a statutory judgment lien under Texas law that attached to certain of the Debtors' assets ("*Charger's Pre-Petition Lien*"). The Plan provides for Charger's Pre-Petition Lien to be released except as to the Garnet State Lease Collateral and a release of lien instrument issued by the Court shall be recorded in the appropriate property records of Pecos County, Texas. The form of such release shall be provided by Debtors. To the extent of the amount of Charger's Allowed Claim, Charger shall be entitled to retain its lien and security interest in the Garnet State Lease Collateral ("*Charger's Retained Lien*"). If Charger's claim is not allowed, Charger's Retained Lien in the Garnet State Lease Collateral shall be released, and within ten (10) days of the Court's order, Charger shall execute and deliver to the Reorganized Debtors an instrument releasing its Retained Lien in full and for all purposes in a form as required to record in the Pecos County Real Property Records.

Charger's Allowed Claim shall accrue interest at the rate of four percent (4%) per annum from and after the Petition Date until it is paid in full. Charger's Retained Lien shall have a first priority lien and security interest against the Garnet State Lease Collateral on a *pari-pasu* basis with the Allowed Claims under Classes 4, 5, 6, and/or 7. On a quarterly basis until paid in full, Charger's Allowed Claim shall be paid its pro-rata share (with Class 2 and the Allowed Claims under Classes 4, 5, 6, and/or 7) of Disposable Income from and after the Effective Date subject to Section 5.03 of the Plan. Charger's Allowed Claim shall be paid in full on the second-year anniversary of the Effective Date (the "*Charger Payment Deadline*"). If the Debtors fail to pay Charger's Allowed Claim on or before the Charger Payment Deadline, the Debtors are

required to sell sufficient Garnet State Lease Collateral to pay Charger's Allowed Claim in full. If the Debtors fail to pay Charger's Allowed Claim in full on or before one year from the Charger Payment Deadline, Charger shall be free to pursue any and all remedies it may have under Texas state law, including foreclosure *257 of its Retained Lien. Upon full payment of Charger's Allowed Claim, Charger shall execute and deliver to the Reorganized Debtors an instrument releasing its Retained Lien in full and for all purposes in a form as required to record in the Pecos County Real Property Records.

Class 9 – The pre-petition statutory mineral property lien filed under Texas Property Code Section 56 by Von Directional and any related claim against either of the Debtors. The Plan provides for the statutory mineral property lien claim of Von Directional recorded pre-petition to be released and a release of lien instrument issued by the Court shall be recorded in the appropriate property records of Pecos County, Texas. The form of such release shall be provided by the Debtors. Additionally, the Plan provides for Von Directional to not receive any recovery under the Plan and any pre-petition claim Von Directional has against the Debtors to be released and the Debtors are to release any claim they may have against Von Directional. Von Directional voted to accept the Plan. The Plan provides for a joint and mutual release between the Debtors and Von Directional in which Von Directional shall be released by the Debtors and their bankruptcy estates, and the Debtors and their bankruptcy estates shall be released by Von Directional, from any and all claims, obligations, debts, rights, suits, damages, causes of action, remedies and liabilities whatsoever, whether known or unknown, foreseen or unforeseen, existing or hereinafter arising, in law, equity, or otherwise, that the Debtors or their bankruptcy estates, on the one hand, and Von Directional, on the other hand, have asserted or could have asserted, based on or relating to, or in any manner arising from, in whole or in part, the claims asserted in any litigation prior to the confirmation of this Plan, the Debtor's business dealings with Von Directional, and/or the pre-petition mineral liens asserted by Von Directional, and any matters related to the foregoing.

Entry of the Court's Confirmation Order shall constitute the Court's approval, pursuant to Bankruptcy Rule 9019, of the release of Von Directional's claims against the Debtors and the bankruptcy estates and the reciprocal release of the Debtors and the bankruptcy estates of their claims against Von Directional, and further, shall constitute the Court's

finding that the joint and mutual releases of the Debtors and the Bankruptcy estates, on one hand, and Von Directional, on the other hand, are (a) in exchange for good and valuable consideration, (b) a good faith settlement and compromise, (c) in the best interests of the Debtors and their estates, (d) fair, equitable, and reasonable, (e) given and made after due notice and opportunity for hearing, and (f) a bar to the Debtors and the bankruptcy estates asserting any claims or causes of action released herein and a bar to Von Directional asserting any claims or causes of action released herein.

Class 10 – The pre-petition statutory mineral property lien filed under Texas Property Code Section 56 by RH Trucking, LLC (and Ricardo & Adelaida Huitron) and any related claim against either of the Debtors. The Plan provides for the statutory mineral property lien claim of RH Trucking, LLC (and Ricardo & Adelaida Huitron) to be released and a release of lien instrument issued by the Court shall be recorded in the appropriate property records of Pecos County, Texas. The form of release shall be provided by the Debtors. RH Trucking, LLC (and Ricardo & Adelaida Huitron) *258 shall not receive any recovery under this Plan. Class 10 is disputed. Class 10 is impaired. Class 10 did not submit a vote on the Plan.

Class 11 – All non-priority unsecured claims under § 502 of the Code. There are no class 11 claims.

Class 12 – Potential creditors listed in Debtors' schedules as disputed but who did not file a proof of claim on or before the bar date of May 1, 2020. There are no class 12 claims.

Class 13 – Pre-petition loans made by Dr. Dria to Debtors. Prior to the Debtors' bankruptcy filings, the Debtors' principal, Dr. Myra Dria, had loaned to the Debtors approximately \$19,000,000. Dr. Dria has agreed to subordinate these loans to any Allowed Claims and she will not receive any payments on account of these pre-petition loans unless and until all Allowed Claims are paid in full.

Class 14 – The Equity Interests of Dr. Dria in Pearl Resources, and Pearl Resources in Pearl Operating. The equity holder in Pearl Resources, Dr. Dria, shall retain her 100% ownership interest in Pearl Resources. The equity holder in Pearl Operating, Pearl Resources, shall retain its 100% ownership interest in Pearl Operating.

Taxing Authorities. Harris County and Pecos County (herein "*Texas Taxing Authorities*") assert that they are Holders of pre-petition Claims for unpaid *ad valorem* real

and business personal property taxes (the “*Ad Valorem Tax Claims*”). The Plan provides that the Debtors or Reorganized Debtors, as applicable, pay all Ad Valorem Tax Claims on the later of: (a) twenty Business Days after (i) the Effective Date or (ii) the date on which such Ad Valorem Tax Claims become Allowed Claims, with regard to delinquent taxes, if any, and (b) the date when such Ad Valorem Tax Claims become due and payable in the ordinary course of business; *provided, however*, that any Ad Valorem Tax Claims for the 2020 taxable year are not required to be paid prior to January 31, 2021. Year 2019 and prior ad valorem taxes, if any, shall accrue statutory interest from the petition date until paid in full and in the event any Ad Valorem Tax Claims of the Texas Taxing Authorities for year 2020 are paid after the date they become due and payable in the ordinary course of business, the applicable Texas Taxing Authority shall receive interest on such Ad Valorem Tax Claim (a) from the Petition Date through the Effective Date and (b) from the Effective Date until the date of payment in full at the state statutory rate pursuant to Code  Sections 506(b),  511, and  1129, as applicable. Each Texas Taxing Authority shall retain the liens that secure the Ad Valorem Tax Claims, and the relative priority of such liens shall continue until the Ad Valorem Tax Claims are paid in full and said tax liens shall not be primed or subordinated by any Exit Financing. In the event that the Debtors or Reorganized Debtors sell any property which secures the ad valorem tax liens, said taxes shall be paid in full prior to disbursement to any other person or entity.

In the event that the Debtor or Reorganized Debtor abandons any property upon which the Texas Taxing Authorities have liens securing any Ad Valorem Tax Claims, the Debtors or Reorganized Debtors, as applicable, shall provide notice of such abandonment and of the occurrence of the effective date to the affected Texas Taxing Authority. The Ad Valorem Tax liens for the 2020 and prior taxable years (if any) shall not be discharged until such time as the amounts owed are paid in full. In the ***259** event of a default in the payment of the Ad Valorem Tax Claims as provided herein, the Texas Taxing Authorities shall provide notice to counsel for the Reorganized Debtors regarding such default, and the Reorganized Debtors shall have twenty (20) days from the date of receipt such notice to cure the default. If the default is not cured within such period, the Texas Taxing Authorities shall be entitled to pursue collection of all amounts owed pursuant to applicable non-bankruptcy law. Failure to pay the 2020 Ad

Valorem Tax Claims prior to the state law delinquency date shall constitute an event of default only as to the relevant Texas Taxing Authority. The Debtors' and/or Reorganized Debtors' rights and defenses under Texas state law and the Code with respect to this paragraph, including their right to dispute or object to the Ad Valorem Tax Claims and liens, are fully preserved.

Upon review, the Plan properly classifies claims and interests in accordance with §§ 1122 and 1123(a)(1).⁸⁰ The claims and interests placed in each class are substantially similar to other claims and interests in each such class. Valid business, factual, and legal reasons exist for separately classifying the various classes of claims and interests created under the Plan, and such classes, and the Plan's treatment thereof, do not unfairly discriminate between holders of claims or interests in each class. The Plan also provides for the same treatment by Debtors of each claim or interest in each respective class, thereby satisfying § 1123(a)(4).⁸¹ Thus, the Plan satisfies §§ 1122 and 1123(a). Accordingly, Debtors' Plan satisfies  § 1129(a)(1).

ii. Section 1129(a)(2)

 Section 1129(a)(2) requires that “[t]he proponent of the plan comply with the applicable provisions of this title.”⁸² Among those provisions are the compliance with the disclosure and solicitation requirements, which is the paradigmatic example of what Congress had in mind when it enacted  § 1129(a)(2).⁸³ Nevertheless, in a subchapter V case, a separate disclosure and solicitation of votes is not required, nor did this Court order that Debtors file a separate disclosure statement.⁸⁴ All that is required in a subchapter V plan is that the debtor include a brief history of its business operations, a liquidation analysis, and projections with respect to the ability of the debtor to make payments under the proposed plan of reorganization.⁸⁵ As discussed more fully *supra*, this Court accordingly concludes that Debtors established by a preponderance of the evidence that they have complied with the applicable provisions of the Bankruptcy Code, including the provisions regarding the contents of a subchapter V plan of reorganization, thereby satisfying  § 1129(a)(2).

iii. Section 1129(a)(3)

[3] [4] [5] [6] Under  § 1129(a)(3), a plan must have “been proposed in good faith and not *260 by any means forbidden by law.”⁸⁶ As an initial matter, the Court concludes that the Plan has not been proposed by any means forbidden by law.⁸⁷ No party-in-interest has suggested otherwise, and leaving that aspect of  § 1129(a)(3) aside, the Court focuses on the requirement of good faith. The Bankruptcy Code does not define the term “good faith,” but the Fifth Circuit has stated that the requirement of good faith must be viewed in light of the totality of the circumstances surrounding establishment of a Chapter 11 plan, keeping in mind that the purpose of the Bankruptcy Code is to give debtors a reasonable opportunity to make a fresh start.⁸⁸ “Where the plan is proposed with the legitimate and honest purpose to reorganize and has a reasonable hope of success, the good faith requirement of  § 1129(a)(3) is satisfied.”⁸⁹ A debtor’s plan may satisfy the good faith requirement even though the plan may not be one which the creditors would themselves design and indeed may not be confirmable.⁹⁰ The standard of proof required by the debtor to prove that a Chapter 11 plan was proposed in good faith is by a preponderance of the evidence.⁹¹

[7] Debtors have explained their reasons for filing the Plan as follows: “The Debtors operate in a highly competitive business, with competitors who have significantly stronger financial wherewithal. Adjacent operator, Parsley, recently acquired Jagged Peak’s adjacent 78,000-acre position for \$2.3 billion. Over the past 5 years, Parsley and Jagged Peak have drilled over 40 nearby horizontal wells. These wells have established the existence of high-quality oil assets first identified by Debtors in the area through Dr. Dria’s efforts. Given the amount of production from each well, the price of the commodities and the extant litigation involving subcontractors and continual interference by Parsley and/or its agents, the Debtors have been losing money for some period of time. In addition to her initial equity investment of more than \$8,000,000 into the Debtors, Dr. Dria has loaned the Debtors over the last 10 years over \$19,000,000 to develop production infrastructure to support drilling and completion operations, oil and gas gathering and processing facilities and to drill on the Debtors’ oil and gas properties. The Debtors’ business has encountered numerous challenges in the last

two years: low commodity prices and high service prices continued over an extended period.”⁹²

In light of Debtors’ explanation set forth above and the supporting evidence, and considering the provisions of the Plan, the Court concludes that Debtors established by a preponderance of the evidence that they filed the Plan as part of efforts to reorganize and to preserve Debtors’ businesses as going concerns, and thus have proposed the Plan in good faith.

Accordingly, the Court finds that  § 1129(a)(3) is satisfied.

iv. Section 1129(a)(4)

[8] [9] [10]  Section 1129(a)(4) provides that “any payment” made or to be made by the plan proponent or the debtor for services “in or in connection with” the plan or the case must be approved by or “subject to *261 the approval of” the bankruptcy court as “reasonable.”⁹³ Pre-confirmation payments for fees and expenses incurred in a bankruptcy case have been held to be within the scope of  § 1129(a)(4).⁹⁴ The requirements under  § 1129(a)(4) are two-fold. First, there must be disclosure. Second, the court must approve the reasonableness of payments.⁹⁵  Section 1129(a)(4) is designed to ensure compliance with the Code policy that the bankruptcy court police the awarding of fees in title 11 cases, so that holders of claims and interests derive the benefit of such information as it might affect their decision to accept or reject the plan. Here, no party-in-interest has filed an objection to the Plan regarding this provision. Additionally, the Court has reviewed the Plan and finds that it complies with the requirements of  § 1129(a)(4).⁹⁶ Accordingly the Plan satisfies  § 1129(a)(4).

v. Section 1129(a)(5)

[11]  Section 1129(a)(5) imposes as a requirement for confirmation that the plan proponent disclose any individual proposed to serve, after confirmation, “as a director, officer, or voting trustee of the debtor,” and that the holding of such office by each individual “is consistent with the interests of creditors and equity security holders and with public policy.”⁹⁷ Here, the Court notes that no party-in-interest

has filed an objection to the Plan regarding this provision. Nevertheless, § 1129(a) obligates this Court to make a finding under § 1129(a)(5), whether or not any party has objected to the plan on § 1129(a)(5) grounds.⁹⁸ In this case, Debtors' Plan proposes to reinstate the pre-petition management structure of Debtors.⁹⁹ Thus, if Debtors' Plan is confirmed, Dr. Dria once again will be in full control of Debtors, due to her current ownership and control of Debtors. Considering Dr. Dria's expertise in managing Debtors, this Court views that result as acceptable and in compliance with § 1129(a)(5). Accordingly, Debtors' Plan satisfies § 1129(a)(5).

vi. Section 1129(a)(6)

Section 1129(a)(6) requires that “any governmental regulatory commission with jurisdiction, after confirmation of the plan, over the rates of the debtor has approved any rate change provided for in the plan, or such rate change is expressly conditioned on such approval.”¹⁰⁰ Such provision is not applicable to Debtors.¹⁰¹ Accordingly, Debtors' Plan satisfies § 1129(a)(6).

vii. Section 1129(a)(7)

[12] Section 1129(a)(7) provides:

(a) The court shall confirm a plan only if all of the following requirements are met:

...

(7) With respect to each impaired class of claims or interests—

(A) each holder of a claim or interest of such class—

(i) has accepted the plan; or

(ii) will receive or retain under the plan on account of such claim or *262 interest property of a value, as of the effective date of the plan, that is not less than the amount that such holder would so receive or retain if

the debtor were liquidated under Chapter 7 of this title on such date

Section 1129(a)(7) requires a plan of reorganization meet the “best interests” test, which requires that each dissenting creditor receive at least as much as they would in a hypothetical Chapter 7 liquidation of the debtor.¹⁰² Here, no party-in-interest objected to Plan confirmation on this ground. Nevertheless, the Court finds that under a hypothetical Chapter 7 liquidation of Debtors, all creditors would be paid in full, with interest, which is clearly more than they would receive in a hypothetical liquidation. Debtors also provided a hypothetical liquidation analysis, which the Court finds credible.¹⁰³ The Court concludes that the requirement of § 1129(a)(7) of the Bankruptcy Code has been satisfied with respect to Debtors' Plan.

viii. Section 1129(a)(8)

Section 1129(a)(8) provides that “[w]ith respect to each class of claims or interests (A) such class has accepted the plan; or (B) such class is not impaired under the plan.”¹⁰⁴

Section 1129(a)(8) is satisfied only if each class under a proposed plan has either accepted the plan or is not impaired under the plan. Debtors' Plan does not satisfy § 1129(a)(8) as there are eight impaired classes and of the eight impaired classes, only five have accepted the Plan.¹⁰⁵ However, as set forth above, § 1129(a)(8) is one of three subsections of § 1129(a) that does not have to be satisfied for a subchapter V plan to be confirmed.¹⁰⁶ A plan that does not satisfy § 1129(a)(8) nonetheless can be confirmed if the plan satisfies the cram down requirements contained in § 1191(b).

Section 1191(b) permits a plan proponent to “cramdown” a plan over a dissenting class if the plan does not “discriminate unfairly” and provides “fair and equitable” treatment to the dissenting classes that are impaired under the plan. Before a plan proponent may cramdown a plan, it must establish that all of the other requirements of § 1129(a) are met. Accordingly, the Court will address the remaining

requirements of § 1129(a) before discussing the cramdown requirements of § 1191(b).

ix. **Section 1129(a)(9)**

[13] As discussed supra, classification of claims is covered in § 1122, which provides that “a plan may place a claim or an interest in a particular class only if such claim or interest is substantially similar to the other claims or interests in such class.”¹⁰⁷ A debtor possesses considerable, but not complete, discretion to classify claims and interests in its Chapter 11 plan of reorganization. While considerable, that discretion is tempered at least with respect to unsecured priority tax claims.  Section 1123(a)(1) provides that a plan shall “designate, subject to section 1122 of this title, classes of claims, other than claims of a kind specified in section 507(a)(2), 507(a)(3), or 507(a)(8) of this title, and classes of interests.”¹⁰⁸ Here, no objection to Plan confirmation on this ground was asserted by any party-in-interest. Additionally, there are no unsecured priority *263 tax claims.¹⁰⁹ The Court therefore concludes that Debtors have demonstrated by a preponderance of the evidence that the Plan complies with  § 1129(a)(9).

x. **Section 1129(a)(10)**

[14] Under  § 1129(a)(10), “[i]f a class of claims is impaired under the plan,” then it must be the case that “at least one class of claims that is impaired under the plan has accepted the plan, determined without including any acceptance of the plan by any insider.”¹¹⁰ As one court stated, “[s]ection 1129(a)(10) operates as a statutory gatekeeper barring access to cramdown where there is absent even one impaired class accepting the plan. Cramdown is a powerful remedy available to plan proponents under which dissenting classes are compelled to rely on difficult judicial valuations, judgments, and determinations. The policy underlying  Section 1129(a)(10) is that before embarking upon the tortuous path of cramdown and compelling the target of cramdown to shoulder the risks of error necessarily associated with a forced confirmation, there must be some other properly classified group that is also hurt and nonetheless favors the plan.”¹¹¹

As outlined above,  § 1129(a)(10) does not have to be satisfied for a subchapter V plan to be confirmed.¹¹² Nonetheless, in this case, Class 6 – Maverick, Class 8 – Charger, and Class 9 – Von Directional, are all non-insider, impaired classes, that voted in favor of Debtors' Plan.¹¹³ Accordingly, the Court finds that Debtors' Plan meets the requirement of  § 1129(a)(10).

xi. **Section 1129(a)(11)**

[15] [16] [17] [18]  Section 1129(a)(11) is commonly referred to as the “feasibility” requirement of confirmation. A debtor's plan is feasible if “[c]onfirmation of the plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor ... unless such liquidation or reorganization is proposed in the plan.”¹¹⁴ Under the feasibility standard, a debtor must demonstrate that its plan offers a reasonable possibility of success by a preponderance of the evidence.¹¹⁵ The court need not require a guarantee of success.¹¹⁶ Essentially, a debtor must be able to show that it can accomplish what it proposes to do, in the time period allowed, and on the terms set forth in the plan. The bankruptcy court must make a specific finding as to feasibility after engaging in a peculiarly fact intensive inquiry that involves a case-by-case analysis, using as a backdrop the relatively low parameters articulated in the statute.¹¹⁷ To confirm a plan, the bankruptcy court must make a specific finding that the plan as proposed is feasible.¹¹⁸

[19] Here, this Court specifically finds that the Plan is feasible and has a reasonable assurance of commercial viability based on the following: (1) that Debtors will be able to service the debt through operations and with an infusion of capital *264 by the principal as stated in the Plan; (2) the earning power of Debtors after the reorganization; (3) the past performance of Debtors' business operations; (4) the ability of Debtors' management; and (5) the economic outlook for the oil industry in general.¹¹⁹ Accordingly, Debtors' Plan satisfies  § 1129(a)(11).

xii. Section 1129(a)(12)

 Section 1129(a)(12) requires the payment of “[a]ll fees payable under section 1930 of title 28, as determined by the court at the hearing on confirmation of the plan[.]”¹²⁰ Under § 507, such fees are afforded priority as administrative expenses.¹²¹ The Plan provides for the payment of such fees on the effective date and thereafter, as may be required.¹²² Accordingly, the Court finds that Debtors’ Plan complies with  § 1129(a)(12).

xiii. Section 1129(a)(13)

 Section 1129(a)(13) requires that a plan provide for “the continuation of payment of all retiree benefits, at the level established pursuant to  § 1114 of the Bankruptcy Code at any time prior to confirmation of the plan, for the duration of the period the debtor has obligated itself to provide such benefits.” Pursuant to the Plan, this section is inapplicable to the instant Debtors.¹²³ Accordingly, the Plan satisfies the requirements of  § 1129(a)(13).

xiv. Section 1129(a)(14)

 Section 1129(a)(14) of the Bankruptcy Code requires that if the debtor is mandated by a judicial or administrative order, or by statute, to pay a domestic support obligation, the debtor must have paid all amounts payable under such order or such statute for such obligation that first become payable after the date of the filing of the petition.¹²⁴ Here, Debtors are not required by a judicial or administrative order, or by statute, to pay any domestic support obligation; accordingly, the Plan satisfies the requirements of  § 1129(a)(14).

xv. Section 1129(a)(15)

 Section 1129(a)(15) requires that if the debtor is an individual, and the holder of an allowed unsecured claim

has objected to confirmation of the plan, the property to be distributed to the holder must be not less than the value required by  § 1129(a)(15).¹²⁵ Here,  § 1129(a)(15) does not apply because Debtors are not individuals; accordingly, the Plan satisfies the requirements of  § 1129(a)(15).

xvi. Section 1129(a)(16)

 Section 1129(a)(16) requires that all transfers of property under the plan shall be made in accordance with any applicable provisions of non-bankruptcy law that govern the transfer of property by a corporation or trust that is not a moneyed, business, or commercial corporation of trust.¹²⁶ Here, upon review, all transfers of property under the Plan will be made in accordance with any applicable provisions of non-bankruptcy law that govern the transfer of property by a corporation or trust that is not a moneyed, business, or commercial corporation of trust; accordingly, the Plan satisfies the requirements with  § 1129(a)(16).¹²⁷

*265 Now that the Court has determined that Debtors’ Plan meets the applicable requirements under  § 1129(a), other than  § 1129(a)(8), the Court will turn its attention to confirmation of Debtors’ Plan pursuant to  § 1191(b).

b. Confirmation Pursuant to § 1191(b) and “Cramdown”

For a subchapter V plan,  § 1191(b) states the rules for confirmation of a non-consensual or “cramdown” plan and replaces the cramdown requirements of  § 1129(b), which do not apply in a subchapter V case.¹²⁸ As discussed at length herein,  § 1191(b) permits confirmation even if the requirements of  paragraphs (8),  (10), and  (15) of § 1129(a) are not met.

Under the cramdown rules in  § 1191(b), if all other confirmation standards are met, the court must confirm a plan on request of the debtor, if, with respect to each impaired class

that has not accepted it, the plan does not (1) discriminate unfairly and (2) is fair and equitable.¹²⁹ These two general standards are the same as the ones that govern in a cramdown under § 1129(b). While subchapter V does not affect any change in the unfair discrimination requirement, § 1191(c) does provision a new “rule of construction” in subchapter V cases for the condition that a plan be “fair and equitable,” replacing the detailed definition of that term contained in § 1129(b). Subchapter V does not change existing law about permissible cramdown treatment of secured claims because with regard to a class of secured claims, a subchapter V plan is “fair and equitable” if it meets the existing rules for secured claims stated in § 1129(b)(2)(A).¹³⁰ Section 1129(b)(2)(A) states:

(2) For the purpose of this subsection, the condition that a plan be fair and equitable with respect to a class includes the following requirements:

(A) With respect to a class of secured claims, the plan provides—

(i) (I) that the holders of such claims retain the liens securing such claims, whether the property subject to such liens is retained by the debtor or transferred to another entity, to the extent of the allowed amount of such claims; and

(II) that each holder of a claim of such class receive on account of such claim deferred cash payments totaling at least the allowed amount of such claim, of a value, as of the effective date of the plan, of at least the value of such holder's interest in the estate's interest in such property;

(ii) for the sale, subject to section 363(k) of this title, of any property that is subject to the liens securing such claims, free and clear of such liens, with such liens to attach to the proceeds of such sale, and the treatment of such liens on proceeds under clause (i) or (iii) of this subparagraph; or

(iii) for the realization by such holders of the indubitable equivalent of such claims.

[20] [21] Nevertheless, § 1191(c) does not state a “fair and equitable” rule specifically for unsecured claims. Instead, it imposes a projected disposable income requirement (“best efforts” test), which requires a feasibility finding, and requires

that the plan provide appropriate remedies if payments are not made.¹³¹ Notably, *266 in a subchapter V case, the absolute priority rule under § 1129(b)(2)(B) is eliminated for cramdown, which will allow existing owners to retain their full ownership without giving any new value, but only if the plan provides for the debtor to distribute all of its projected disposable income over at least three years from the date the first payment is due under the plan (or property having a value of at least that amount).¹³² The absolute priority rule has been replaced with the “fair and equitable” requirement to protect dissenting unsecured classes similar to those requirements found in applicable Chapters 12 and 13 cases and individual Chapter 11 cases. The general standards for confirmation (i.e. that the subchapter V plan does not discriminate unfairly against any impaired, non-consenting class and is fair and equitable) shall be evaluated in light of creditors' objections.

i. Objections to Confirmation

The Objecting Creditors each filed separate objections to confirmation; however, substantively each objection raises similar arguments.¹³³

First, Objecting Creditors assert that the Plan fails to meet the requirements for a cramdown plan under § 1129(b)(2)(A), made applicable here under § 1191(c)(1), because the Plan as proposed is not fair and equitable as to each creditor's claim because it does not provide for the Objecting Creditors to either retain their existing, pre-petition liens, or the indubitable equivalent of their respective claims.¹³⁴ Each Objecting Creditor holds a statutory lien claim against Debtors' assets in Pecos County, Texas, and the Plan proposes to release each of the Objecting Creditors' pre-petition statutory lien and provide a smaller replacement lien on only a portion of Debtors' assets in Pecos County.¹³⁵ The “replacement lien,” argues each Objecting Creditor, is not adequately defined in the proposed Plan as it does not state what kind of lien each Objecting Creditor would be granted nor to what property the lien would attach, which fails to meet the cramdown requirements of § 1129(b)(2)(A).¹³⁶

Second, Objecting Creditors assert that “the Plan provides absolutely no specifics on the anticipated amount of Disposable Income, the dates when Disposable Income will

be available, or even how Debtors will calculate or report Disposable Income.”¹³⁷ Specifically, both Pilot Thomas and TransCon assert that (i) Debtors have admitted both in the Plan and at the prior hearing that there may not be any Disposable Income and that the Plan does not rely upon Disposable Income, (ii) the “financial projections” in the Plan are speculative, subject to market conditions and fluctuations, and entirely dependent on major upfront capital financing that is non-existent, (iii) Debtors' monthly operating reports indicate no income during the course of their Chapter 11 cases and potentially no currently operating assets, (iv) Disposable Income inexplicably excludes “monies received by the Debtors from any recovery or settlement under the Debtors' insurance policies issued by Travelers,” and (v) Debtors indicated no plan of development under the proposed plan or under oath.¹³⁸ Additionally, Nabors argues that the Plan is overly speculative and is not *267 feasible because “the Plan states that it will pay Nabors from Disposable Income from future development for which the Debtors have not provided evidence.”¹³⁹ Since all three creditors' objections are substantively similar, the Court will consider them simultaneously.

Here, § 1129(a)(10) was met, although not required to be under § 1191(b), § 1129(a)(15) is not applicable to this case as it only applies to individuals, and this Court has already found that § 1129(a)(8) has not been met. Accordingly, in order to be confirmed, the Court will need to determine whether Debtors' jointly administered non-consensual subchapter V Plan meets the requirements of § 1191(b).

As stated supra, § 1191(c) states a new “rule of construction” for the requirement that a plan be “fair and equitable.”¹⁴⁰ The plan is fair and equitable if (i) it proposes to commit all of the debtor's disposable income for the entire term of the plan to making plan payments (or the equivalent thereof); (ii) the debtor is able to make the payments under the plan or there is a reasonable likelihood that the debtor will be able to make the payments; and (iii) the plan provides appropriate remedies, which could include the liquidation of nonexempt assets, to protect creditors if the payments are not made.¹⁴¹ Thus, it allows a debtor's equity holders to retain their equity or individual debtors to retain their assets, even if unsecured creditors are not paid in full.¹⁴² The Court will take each one in turn.

ii. The Plan Satisfies the Disposable Income (or “Best Efforts”) Test

[22] Cramdown confirmation under the fair and equitable standard first imposes a modified projected disposable income rule, expanded to include all debtors, not just individuals.¹⁴³ The plan must provide that all of the projected disposable income of the debtor received in the three-year period after the first payment under the plan is due, or in such longer period not to exceed five years as the court may fix, will be applied to make payments under the plan.¹⁴⁴ Alternatively, the plan may provide that the value of property to be distributed under the plan within the three-year or longer period, as fixed by the court, is not less than the projected disposable income of the debtor.¹⁴⁵ The Bankruptcy Code does not define “projected disposable income,” but it defines “disposable income” in Chapters 12¹⁴⁶ and 13.¹⁴⁷ In Chapter 11 cases, § 1129(a)(15) incorporates the Chapter 13 definition.¹⁴⁸ Section 1191(d) defines disposable income as “income that is received by the debtor and that is not reasonably necessary to be expended for” these specified purposes:

- *268 i. the maintenance or support of the debtor or a dependent of the debtor;¹⁴⁹ or
- ii. a domestic support obligation that first becomes payable after the date of the filing of the petition;¹⁵⁰ or
- iii. payment of expenditures necessary for the continuation, preservation, or operation of the business of the debtor.¹⁵¹

The definition of disposable income in § 1191(d) is substantially the same as the definition of disposable income in § 1225(b)(2). It is also substantially the same definition as in § 1325(b)(2), except that § 1325(b)(2) permits a deduction for charitable contributions. The Chapter 11 provision incorporates the Chapter 13 definition.¹⁵² Unlike Chapter 13, however, § 1191(d) does not incorporate the means test in the calculation of disposable income. The test for determining what maintenance and support expenditures are “reasonably necessary to be expended” for

“maintenance or support” in § 1191(d)(1) in subchapter V cases is the same as it is in Chapter 12 and below-median Chapter 13 cases, and as it was in Chapter 13 cases prior to the introduction of the means test standards in BAPCPA.¹⁵³ Additionally, for subchapter V cases, § 1191(c)(2) provides for a commitment period of three years or such longer time, not to exceed five years, that the court fixes.¹⁵⁴ The five-year maximum commitment period in a subchapter V case is the same as the longest minimum commitment period under the Chapter 11 and above-median Chapter 13 tests.¹⁵⁵ Section 1191(c)(2), however, contains no standards for fixing the commitment period. The involvement of the Court in choosing the commitment period is unique to subchapter V cases.

Here, the Court finds persuasive Dr. Dria's testimony supporting the proposition that the development of the West Acreage will generate income included to determine Disposable Income distributed under the Plan, which will inure for the benefit of the Objecting Creditors.¹⁵⁶ Additionally, the Plan provides for the distribution of Debtors' Disposable Income to holders of Allowed Claims, including the Objecting Creditors, if and when an Objecting Creditor is determined to hold an Allowed Claim.¹⁵⁷ Until the Objecting Creditors' claims are fully adjudicated, their pro-rata share of Disposable Income (calculated based on the amount of each respective proof of claim) will be set aside in a claim reserve account held by the SBRA Trustee, as previously directed by this Court.¹⁵⁸ Moreover, the SBRA Trustee will act as the disbursing agent and monitor Debtors' compliance with the requirements of the Plan.¹⁵⁹

The Plan provides for the Objecting Creditors to be paid in the relatively short *269 time period of two (2) years, with interest, if their claims are allowed.¹⁶⁰ If an Allowed Claim is not paid in two years from Disposable Income, then Debtors have the affirmative obligation to sell assets sufficient to pay Allowed Claims in full.¹⁶¹ If Allowed Claims are not paid on or before the 34th month after the Effective Date of the Plan, then the holder of any unpaid Allowed Claim secured by the Retained Lien will also be provided a lien in whatever interest Debtors then have in the West Acreage (“*Springing Lien*”).¹⁶² If Allowed Claims are not paid on or before the third-year anniversary of the Effective Date of the Plan, the holders of unpaid Allowed Claims may foreclose on the Garnet State Lease Collateral covered by the Retained Lien

as well as the property covered by the Springing Lien.¹⁶³ Finally, Debtors will continue to have full recourse and all of their assets will be available to satisfy unpaid Allowed Claims.¹⁶⁴ Accordingly, the Court finds that Debtors' Plan satisfies the disposable income test under § 1191(c)(2)(A).

iii. The Plan is Feasible and Provides Remedies for Default

[23] Section 1191(c)(3) adds two additional factors to the “fair and equitable” analysis. First, § 1191(c)(3)(A) requires that the debtor be able to make all payments under the plan,¹⁶⁵ or that there is a reasonable likelihood that the debtor will be able to make all payments under the plan.¹⁶⁶ The new requirement fortifies the more relaxed feasibility test that § 1129(a)(11) contains. Section 1129(a)(11) requires only that confirmation is not likely to be followed by liquidation or the need for further reorganization unless the plan proposes it.¹⁶⁷ Second, § 1191(c)(3)(B) requires that the plan provide appropriate remedies to protect the holders of claims or interests if the debtor does not make the required plan payments.¹⁶⁸ The feasibility requirement for confirmation requires a showing that the debtor can realistically carry out its plan.¹⁶⁹ Though a guarantee of success is not required, the bankruptcy court should be satisfied that the reorganized debtor can stand on its own two feet.¹⁷⁰

[24] Here, the Court gives great weight to Dr. Dria's uncontroverted testimony and finds that there is a reasonable likelihood that Debtors will successfully develop the West Acreage and generate sufficient revenue so that their Disposable Income will be sufficient to pay Allowed Claims within two years.¹⁷¹ The value of the Garnet State Lease Collateral covered by the Retained Lien (approximately \$7.4 million) is significantly greater than the absolute highest amount that the Allowed Claims could total in the aggregate (approximately \$1.2 million), so that if the Allowed Claims are not paid in full through the distribution of Disposable Income within two years, it is likely that Debtors will be in a position to generate *270 sufficient funds from the sale of their assets to pay the Allowed Claims in full prior to the time the Springing Lien is triggered.¹⁷²

Moreover, Dr. Dria testified, and the Plan provides, that Debtors will sell property to satisfy Allowed Claims if they are not otherwise paid from Disposable Income by the end of the second-year anniversary of the Effective Date of the Plan.¹⁷³ Dr. Dria also testified, without objection, as to the value of Debtors' assets and her opinion that Debtors will have no difficulty in selling sufficient assets to pay unpaid Allowed Claims, if such becomes necessary.¹⁷⁴ The Court finds that in light of the evidence, Debtors will be able to realistically carry out their Plan. Accordingly, Debtors' Plan meets the requirements of  § 1191(c)(3).

iv. The Plan Meets the Requirements of § 1129(b)(2)(A)

Lastly, under the fair and equitable standard in a subchapter V case, the requirements in  § 1129(b)(2)(A) for cramdown confirmation regarding a class of secured claims remain applicable.¹⁷⁵ As an initial matter, each of the Objecting Creditors hold claims that have not yet been allowed, as they are subject to pending adversary complaints contesting the validity of their claims.¹⁷⁶ Currently, however, the Objecting Creditors are secured by mineral interests in Debtors' property.¹⁷⁷ There is no dissenting unsecured class of creditors. A full discussion regarding the fair and equitable requirement for a dissenting unsecured class of creditors therefore is reserved for another day.

[25]  Section 1129(b)(2)(A)(iii) provides that the condition for a plan to be fair and equitable with respect to a class of secured claims may be satisfied if it provides “for the realization by such holders of the indubitable equivalent of such claims.”¹⁷⁸ First, the indubitable equivalent is tied to a “claim,” not the property securing the claim. This is an important distinction because the Objecting Creditors vehemently argue that Debtors cannot modify their lien rights in any fashion and still satisfy the indubitable equivalent standard.¹⁷⁹ The Objecting Creditors focus their attention on the pre-petition collateral, as opposed to their claims.

[26] In considering whether the Plan provides for the realization of the indubitable equivalent of the claims, it is important to keep in mind that the aggregate amount of remaining disputed claims that have asserted liens against Debtors' assets are approximately \$1.2 million. Thus, if all of

the disputed claims are adjudicated 100 percent in favor of the Objecting Creditors, the total amount of allowed secured claims will be approximately \$1.2 million. Assuming this worst-case scenario for Debtors becomes a reality, the value of Debtors' property subject to the disputed pre-petition liens is valued at approximately \$35 million, meaning there would be a 29 to 1 value-to-debt equity cushion. The Objecting Creditors argue that this cushion must be maintained for Debtors to satisfy the indubitable equivalent standard. The Court finds this argument without merit as the Plan satisfies the indubitable ^{*271} equivalent standard found under  § 1129(b)(2)(A)(iii).

The Fifth Circuit has expressly recognized that one accepted method of providing indubitable equivalence is the exchange of collateral.¹⁸⁰ Whether the indubitable equivalent offered is equivalent is a matter left to the discretion of the bankruptcy court in its careful reliance upon sufficient facts.¹⁸¹ Courts should not accept offers of indubitable equivalence lightly and should insist on a high degree of certainty.¹⁸² Moreover, indubitable equivalence is a flexible standard.¹⁸³ The indubitable equivalent standard requires a showing that the objecting secured creditor will receive the payments to which it is entitled, and that the changes forced upon the objecting creditor are completely compensatory, meaning that the objecting creditor is fully compensated for the rights it is giving up.¹⁸⁴ For example, the Fifth Circuit has stated that the “[a]bandonment of the collateral to the class would satisfy indubitable equivalent, as would a replacement lien on similar collateral.”¹⁸⁵

In  *Investment Company of The Southwest*, the court recognized that a debtor may be permitted to use some portion of the equity cushion in collateral to help implement a plan without violating the indubitable equivalent standard, as long as the secured creditor remains over-secured beyond a reasonable doubt and has sufficient protection.¹⁸⁶ Courts have approved plans that did not pay a secured lienholder all of its collateral sale proceeds, as long as the court is satisfied that there will always be more value in the remaining collateral than the lender's lien amount.¹⁸⁷ Courts also have routinely held that a partial surrender of collateral to an over-secured creditor provides such creditor with the indubitable equivalent of its claim.¹⁸⁸ A sister Court approved a plan over the objection of a secured creditor finding the debtor had provided the indubitable equivalent because the secured

creditor remained over-secured beyond a reasonable doubt and had sufficient payment protection over the life of the plan.¹⁸⁹ In essence, in the *272 bankruptcy context, the indubitable equivalent means that the treatment afforded the secured creditor must be adequate to both compensate the secured creditor for the value of its secured claim, and also insure the integrity of the creditor's collateral position.¹⁹⁰

Here, the Objecting Creditors argue that the Plan does not insure the safety of the principal (i.e., the amount of their Allowed Claims, if and when allowed) because under the Plan they no longer enjoy a 29 to 1 value-to-debt cushion.¹⁹¹ However, the Plan provides virtual certainty that Allowed Claims will be paid in full.¹⁹² The overwhelming evidence demonstrates that the property on which the Objecting Creditors retain a lien, (the Garnet State Lease Collateral,) is valued at \$7.4 million. That provides a 6 to 1 value-to-debt equity cushion. Despite the fact that Objecting Creditors are adequately protected by an equity cushion in excess of \$6 million (i.e., \$7.4 million v. \$1.2 million), the Objecting Creditors nevertheless launch a failed attempt at persuading this Court of two alternative arguments – first, that a Texas mineral lien is sacrosanct and may not be modified in a plan under any circumstances, and second, that lien-stripping may not be accomplished under any circumstances.¹⁹³ Both of these arguments are without merit.

The Objecting Creditors argue that a Texas statutory mineral lien must be treated differently than any other lien. The Objecting Creditors, however, offer no authority whatsoever to support their assertion. Under § 1123(a)(5)(E), a plan may modify any lien.¹⁹⁴ This includes even an IRS lien for unpaid taxes.¹⁹⁵ Just like IRS liens, or any other liens, statutory mineral liens may be modified over objection under § 1123(a)(5)(E), as long as § 1129(b)(2)(A) is satisfied. Neither the Bankruptcy Code nor case law provide statutory mineral liens extra protection. Recently, the Fourth Circuit approved a “partial dirt for debt” plan treatment over the objection of the secured creditor because the plan provided the secured creditor with the indubitable equivalent of its claim.¹⁹⁶ The secured claim was \$14.6 million and the plan provided for the payment of \$1 million and property valued at \$13.7 million in exchange for the release of the secured creditor's pre-petition collateral.¹⁹⁷ The Fourth Circuit rejected any notion that a partial dirt for debt plan is *per se* not confirmable.¹⁹⁸ The key is whether the

treatment in the plan provides the objecting secured creditor the indubitable equivalent of its claim.

In essence, the Objecting Creditors complain that all they are receiving under the Plan is a Retained Lien in the Garnet State Lease Collateral and then are left to fend for themselves. This contention misreads the Plan. This Court already found that the Garnet State Lease Collateral is very valuable and Debtors do not plan to surrender it to the holders of Allowed Claims, even if all of the disputed claims are allowed in full. Debtors' plan is to *273 redevelop the east 160 acres, but at this time their resources are best utilized in developing the West Acreage. Dr. Dria testified as such and further testified that the prospects of developing the West Acreage with liens in place are not good and that the pre-petition liens of the Objecting Creditors would chill Debtors' ability to attract an investor to assist in the development of the West Acreage.¹⁹⁹ But, with the West Acreage unencumbered, Debtors will, in all reasonable certainty, be successful in developing such property. The Objecting Creditors stand to benefit from the development, and they will retain their liens in the Garnet State Lease Collateral should the development not go as planned. Moreover, the Objecting Creditors will be provided the Springing Lien if their Allowed Claims are not paid on a timely basis and Debtors will continue to remain fully liable on a recourse basis for the entire unpaid amount of Allowed Claims.²⁰⁰

Further, the cases relied on by the Objecting Creditors are inapposite because those cases simply hold that the debtors did not satisfy the indubitable equivalent standard.²⁰¹ In *CRB Partners*, the court recognized that a plan may be confirmed over a secured creditor's objection when the debtor proposes to surrender only a portion of the collateral as long as there is a sufficient equity cushion in the property surrendered to protect the creditor and assure payment.²⁰² The court did not confirm the plan because it determined that the equity cushion for a claim of approximately \$1,340,000 was only \$2.73.²⁰³ Here, the Plan does not propose to surrender the Garnet State Lease Collateral to the Objecting Creditors. Unlike that case, Debtors' Plan provisions for the Objecting Creditors to retain a lien in such property and offer other protections to assure payment if their claims are allowed, not the least of which is an equity cushion in excess of \$6 million to cover disputed claims with the aggregate face value of approximately \$1.2 million.

In  *Swiftco*, the court again recognized that under the Fifth Circuit holding in  *Sun Country*, a plan may be confirmed under the indubitable equivalent standard if there is no reasonable doubt that the creditor will realize the full value of its allowed claim.²⁰⁴ The court in  *Swiftco* determined that there was a reasonable doubt of payment because there was little to no equity cushion and the payout was too long.²⁰⁵

The plan proposed in  *Swiftco* was much different than the instant Plan and the objecting creditor was a third-priority lien holder with little or no equity cushion, being asked to wait six (6) years for full payment.²⁰⁶ Here, and under the instant Plan, the Objecting Creditors have a first lien in the Garnet State Lease Collateral with a substantial equity cushion. Moreover, the Objecting Creditors will be paid their pro rata share of Disposable Income, and if they are not paid in full in two *274 years, it is incumbent upon Debtors to sell property of a sufficient value to pay the Objecting Creditors' Allowed Claims in full. Additionally, the West Acreage development will inure to the benefit of the Objecting Creditors.

The common thread through all of the cases evaluating whether the objecting secured creditor has been provided the indubitable equivalent of its claim is certainty of payment beyond a reasonable doubt and adequate plan protections. When assessing these requirements, the Court finds that the Plan more than satisfies the stringent indubitable equivalent standard. The Plan provides 6 to 1 value-to-debt equity cushion. Debtors' liability remains recourse and Debtors commit to use their best efforts to develop the West Acreage, which will inure to the benefit of the Objecting Creditors,

as well as all creditors. Debtors remain responsible to sell sufficient assets to pay Allowed Claims that are not paid within two years. And, if Debtors are unable to perform, the Objecting Creditors have their Retained Lien (on property valued at \$7.4 million), as well as the Springing Lien. Dr. Dria's valuation testimony supports Debtors' contention that the Retained Lien, along with the other protections in the Plan, provide the Objecting Creditors with the indubitable equivalent of their claims, even when viewed through a stringent indubitable equivalent standard. In light of the evidence and testimony discussed herein, the Court finds that Debtors' Plan satisfies  § 1129(b)(2)(A).

Accordingly, when all other confirmation standards are met, except those set out in paragraphs (8), (10), and (15), the cramdown rules under  § 1191(b) provide that the court shall confirm a nonconsensual plan, on request of the debtor, if (with respect to each impaired class that has not accepted it) the plan (1) does not discriminate unfairly and (2) is fair and equitable. Therefore, for the reasons discussed herein, and pursuant to  § 1191(b), Debtors' Plan²⁰⁷ is confirmed.

III. CONCLUSION

An Order consistent with this Memorandum Opinion will be entered on the docket simultaneously herewith.

All Citations

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Footnotes

- 1 Any reference to "Code" or "Bankruptcy Code" is a reference to the United States Bankruptcy Code, 11 U.S.C., or any section (i.e. §) thereof refers to the corresponding section in 11 U.S.C.
- 2 ECF No. 27.
- 3 ECF No. 85.
- 4 Min. Entry (04/14/2020).
- 5 ECF No. 47.
- 6 ECF No. 122.
- 7 ECF No. 133.
- 8 ECF No. 179.
- 9 ECF No. 182.
- 10 ECF No. 179.

- 11 ECF No. 182.
 12 ECF No. 205.
 13 ECF No. 206.
 14 ECF No. 208.
 15 ECF No. 209.
 16 ECF No. 210.
 17 ECF No. 216.
 18 ECF No. 226; ECF No. 224 is a redlined version of the modified plan which was timely filed. ECF No. 226 is a clean version of the same modified plan, which the Court will treat as the modified plan.
 19 *In re: Order of Reference to Bankruptcy Judges*, Gen. Order 2012–6 (S.D. Tex. May 24, 2012).
 20 See  *Wellness Intern. Network, Ltd. v. Sharif*, 575 U.S. 665, 135 S. Ct. 1932, 1938–40, 191 L.Ed.2d 911 (2015);  *Stern v. Marshall*, 564 U.S. 462, 131 S.Ct. 2594, 180 L.Ed.2d 475 (2011).
 21 11 U.S.C. § 1125.
 22 11 U.S.C. § 1187(C).
 23 11 U.S.C. § 1190(1)(A).
 24 11 USC § 1190(1)(B).
 25 11 USC § 1190(1)(C).
 26 11 USC § 1190(2).
 27  11 USC § 1191(c)(3)(A).
 28 See e.g. 11 USC § 1190(3) (a new provision promulgated by the statute which provides for modification of the rights of a holder of a claim secured only by a security interest in real property that is the principal residence of the debtor if the new value received in connection with the granting of the security interest was not used primarily to acquire the real property, but was used primarily in connection with the small business of the debtor).
 29 ECF No. 226 at 2–18.
 30 See Case 20-31585 ECF No. 54 on Schedule 46 for full equipment listing – “the *Garnet State Lease Equipment*”.
 31 ECF No. 226 at 2–18.
 32 11 U.S.C. § 1190(1)(B).
 33 ECF No. 226-2.
 34 As stated by Debtors, “Garnet State Lease Collateral” includes 160 acres on the east side of the south half of Section 20 (out of the 320 acres not in dispute with the Texas General Land Office) and the four (4) wells and equipment located on such 160 east side acres.
 35 Min. Entry (8/13/2020); See ECF No. 226-3.
 36 ECF No. 226-2.
 37 ECF No. 226-3, Ex. C.
 38 11 U.S.C. § 1190(1)(C).
 39 ECF No. 226, Ex. D.
 40 *Id.*
 41 ECF No. 226.
 42 11 U.S.C. § 1190(2).
 43 11 U.S.C. § 1194(b).
 44 11 U.S.C. § 1190(2).
 45 ECF No. 226 at 30.
 46 *Id.*
 47 *Id.*
 48  11 U.S.C. § 1191(c)(3)(B).
 49 *Id.*

- 50 ECF Nos. 116–120.
 51 ECF No. 226.
 52 See ECF Nos. 81, 105, 132.
 53 ECF No. 120.
 54 The defined term “Effective Date” shall have the meaning set forth in Debtor’s Plan at ECF No. 226.
 55 ECF No. 226 at 33.
 56 *Id.*
 57 *Id.*
 58 ECF Nos. 205–208.
 59 ECF No. 226
 60 ECF No. 210.
 61 *Id.*
 62 *Id.*
 63 *Id.*
 64 *Id.*
 65 See ECF No. 115–120.
 66 11 U.S.C. § 1129(a).
 67 11 U.S.C. § 1129(b)(1).
 68 11 U.S.C. § 1129(b)(2).
 69 See also ECF No. 32.
 70 11 U.S.C. § 1191.
 71 11 U.S.C § 1181(a).
 72 *Id.*
 73 11 U.S.C. § 1191(a).
 74 *Id.*
 75 11 U.S.C. § 1181(a).
 76 11 USC § 1191(b).
 77 11 U.S.C. § 1129(a)(1).
 78 H.R. Rep. No. 595, 95th Cong., 1st Sess. 412 (1977); S. Rep. No. 989, 95th Cong., 2d Sess. 126 (1978), U.S. Code Cong. & Admin. News 1978, pp. 5963, 6368, 5787, 5912.
 79 ECF No. 72.
 80 11 U.S.C. §§ 1122 and 1123(a)(1).
 81 See, e.g., *In re U.S. Brass Corp.*, 169 F.3d 957, 958 (5th Cir.1999) (“ 11 U.S.C. § 1123(a)(4) ... requires all creditors within a class be treated the same, unless the creditor who is being treated less favorably agrees to less favorable treatment.”).
 82 11 U.S.C. § 1129(a)(2).
 83 See *In re Trans World Airlines, Inc.*, 185 B.R. 302, 313 (Bankr. E.D. Mo. 1995) (“The principal purpose of section 1129(a)(2) of the Bankruptcy Code is to assure that the plan proponents have complied with the disclosure requirements of section 1125 of the Bankruptcy Code in connection with the solicitation of acceptances of the plan.”); *In re Texaco Inc.*, 84 B.R. 893, 906–07 (Bankr. S.D. N.Y. 1988) (same).
 84 11 U.S.C. § 1187(c).
 85 11 U.S.C. § 1190(1).
 86 11 U.S.C. § 1129(a)(3).
 87 ECF No. 226.

- 88  *In re Sun Country Dev., Inc.*, 764 F.2d 406, 408 (5th Cir.1985).
- 89  *Id.*
- 90  *In re Briscoe Enter., Ltd., II*, 994 F.2d 1160, 1167 (5th Cir.1993).
- 91  *Id.* at 1165.
- 92 ECF No. 226 at 7.
- 93  11 U.S.C. § 1129(a)(4).
- 94  *In re Cajun Elec. Power Co.*, 150 F.3d 503, 513–14 (5th Cir.1998).
- 95 7 Collier on Bankruptcy ¶ 1129.03[4] (16th ed. 2015).
- 96 ECF No. 226.
- 97  11 U.S.C. § 1129(a)(5)(A).
- 98 See  11 U.S.C. § 1129(a) (court “shall confirm a plan only if all of the following requirements are met”).
- 99 ECF No. 226.
- 100  11 U.S.C. § 1129(a)(6)
- 101 ECF No. 226 at 18
- 102  11 U.S.C. § 1129(a)(7)(A).
- 103 See ECF No. 226-2.
- 104  11 U.S.C. § 1129(a)(8).
- 105 ECF No. 210.
- 106  11 U.S.C. § 1191(b).
- 107 11 U.S.C. § 1122(a).
- 108  11 U.S.C. § 1123(a)(1).
- 109 See ECF No. 226.
- 110  11 U.S.C. § 1129(a)(10).
- 111  *In re One Times Square Assocs. Ltd. P'ship*, 165 B.R. 773 (S.D.N.Y. 1994).
- 112  11 U.S.C. § 1191(b).
- 113 ECF No. 210.
- 114  11 U.S.C. § 1129(a)(11).
- 115 See  *Matter of T-H New Orleans Ltd. P'ship*, 116 F.3d 790, 801 (5th Cir. 1997).
- 116  *In re Lakeside Glob. II, Ltd.*, 116 B.R. 499, 507 (Bankr. S.D. Tex. 1989).
- 117  *Id.*; *In re Star Ambulance Serv., LLC*, 540 B.R. 251, 266 (Bankr. S.D. Tex. 2015).
- 118  *In re M & S Assoc., Ltd.*, 138 B.R. 845, 848 (Bankr. W.D. Tex. 1992).
- 119 ECF No. 226.
- 120  11 U.S.C. § 1129(a)(12).
- 121 See  11 U.S.C. § 507(a)(2).
- 122 ECF No. 226.
- 123 *Id.*
- 124 See  11 U.S.C. § 1129(a)(14).
- 125 See  11 U.S.C. § 1129(a)(15).
- 126 See  11 U.S.C. § 1129(a)(16).

- 127 ECF No. 226.
- 128 11 U.S.C. § 1181(a).
- 129  11 U.S.C. § 1191(b).
- 130  11 U.S.C. § 1191(c)(1).
- 131  11 U.S.C. § 1191(c).
- 132 11 U.S.C. § 1181(a).
- 133 See ECF Nos. 205–209.
- 134 *Id.*
- 135 See ECF No. 226.
- 136 ECF Nos. 120, 205 at 2, and 208 at 1.
- 137 ECF Nos. 229 at 8–9, and 231 at 8–9.
- 138 *Id.*
- 139 ECF No. 230 at 9.
- 140  11 U.S.C. § 1191(c).
- 141  11 U.S.C. § 1191(c)(2) and (3).
- 142  11 U.S.C. § 1191(c).
- 143 *Id.*
- 144  11 U.S.C. § 1191(c)(2)(A) (The projected disposable income test in Chapter 11 and 12 cases likewise requires the use of projected disposable income to make payments under the plan.  §§ 1129(a)(15),  1225(b)(1). This was the rule for Chapter 13 cases until the enactment of Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA) of 2005. BAPCPA in 2005, which amended 1325(b)(1) to require the use of projected disposable income to make payments to unsecured creditors.).
- 145 *Id.*
- 146  11 U.S.C. § 1225(b)(2).
- 147  11 U.S.C. § 1325(b)(2).
- 148  11 U.S.C. § 1129(a)(15).
- 149  11 U.S.C. § 1191(d)(1)(A).
- 150  11 U.S.C. § 1191(d)(1)(B).
- 151  11 U.S.C. § 1191(d)(2).
- 152  11 U.S.C. § 1129(a)(15).
- 153 See  11 U.S.C. § 1191(d)(1).
- 154  11 U.S.C. § 1191(c)(2).
- 155 The maximum commitment period in a Chapter 12 case is five years.  § 1225(b)(1)(B). Chapter 13 sets specific commitment periods of three years for below-median debtors,  § 1325(b)(4)(A), and five years for above-median debtors,  § 1325(b)(4)(B). The commitment period in a Chapter 11 case is the longer of five years or the period for which the plan provides for payments.  § 1129(a)(15).
- 156 ECF No. 226.
- 157 *Id.*
- 158 *Id.*
- 159 *Id.*

- 160 *Id.*
- 161 *Id.*
- 162 *Id.*
- 163 *Id.*
- 164 *Id.*
- 165  11 U.S.C. § 1191(c)(3)(A)(i).
- 166  11 U.S.C. § 1191(c)(3)(A)(ii).
- 167  11 U.S.C. § 1129(a)(11).
- 168  11 U.S.C. § 1191(c)(3)(B).
- 169  *In re Lakeside Global, II, Ltd.*, 116 B.R. at 506.
- 170  *Id.*
- 171  *Id.*
- 172 ECF No. 226.
- 173 *Id.*
- 174 Min. Entry (08/13/2020).
- 175  11 U.S.C. § 1191 (c)(1).
- 176 See ECF Nos. 81, 105, 132.
- 177 Min. Entry (08/13/2020).
- 178  11 U.S.C. § 1129.
- 179 See ECF Nos. 229–231.
- 180  *In re Sun Country Dev., Inc.*, 764 F.2d at 408.
- 181  *Id.*; *In re Walat Farms, Inc.*, 70 B.R. 330, 336 (Bankr. E.D. Mich. 1987) (“a bankruptcy court is permitted, indeed required, to make these determinations on a case by case basis and to order confirmation of a plan which indubitably protects and pays the claim of an objecting creditor”).
- 182  *In re Swiftco, Inc.*, 1988 WL 143714 (Bankr. S.D. Tex. Oct. 5, 1988).
- 183 *In re Philadelphia Newspapers, LLC*, 418 B.R. 548, 568 (E.D. Pa. 2009).
- 184  *In re Inv. Co. of The Sw., Inc.*, 341 B.R. 298 (B.A.P. 10th Cir. 2006) (“Substitute collateral with a value projected to be equal to, or even more than, original collateral securing creditor’s claim is not “completely compensatory,” and does not provide secured creditor with “indubitable equivalent” of its secured claim, if new collateral is so much riskier than original collateral that there is substantially greater likelihood that secured creditor will not ultimately be paid.”).
- 185  *In re Pac. Lumber Co.*, 584 F.3d 229, 246 (5th Cir. 2009).
- 186  *In re Inv. Co. of The Southwest, Inc.*, 341 B.R. 298, 325 (B.A.P. 10th Cir. 2006).
- 187 See  *In re Pine Mountain, Ltd.*, 80 B.R. 171 (B.A.P. 9th Cir. 1987) (“it was unlikely that creditor’s claim would ever become even partially unsecured, and plan provided secured creditor with variety of safeguards and fair interest rates”); see also  *Affiliated Nat’l Bank-Englewood v. TMA Assocs., Ltd. (In re TMA Associates, Ltd.)*, 160 B.R. 172, 174 (D. Colo. 1993).
- 188  *In re May*, 174 B.R. 832, 838–839 (Bankr. S.D. Ga. 1994).
- 189 *In re SCC Kyle Partners, Ltd.*, 2013 WL 2903453 (Bankr. W.D. Tex. June 14, 2013).
- 190 4 Collier on Bankruptcy ¶ 506.03 (16th 2020).
- 191 See ECF Nos. 205–209.
- 192 ECF No. 226.

193 Min. Entry (08/13/2020).

194  11 U.S.C. § 1123.

195  *In re Johnson*, 386 B.R. 171, 175–176 (Bankr. W.D. Pa. 2008).

196 *In re Bate Land & Timber, LLC*, 877 F.3d 188 (4th Cir. 2017).

197 *Id.*

198 *Id.*

199 Min. Entry (08/13/2020).

200 ECF No. 226.

201 See  *In re CRB Partners, LLC*, 11-11915, 2013 WL 796566 (Bankr. W.D. Tex. March 4, 2013); *see also*
 *In re Swiftco, Inc.*, 1988 WL 143714; and  *Inv. Co. of The Southwest*, 341 B.R. 298.

202  *CRB Partners*, 2013 WL 796566 at *5-6.

203  *Id.*

204  *In re Swiftco*, 1988 WL 143714 at *11-14.

205  *Id.*

206  *Id.* (The court stated that “the debtor has not shown that there is or will be a buyer who will probably buy the property in the next few years at any price and especially not at \$5,000,000. The debtor has failed to persuade the court that any lender will refinance the existing indebtedness.”)

207 ECF No. 226.

A GUIDE TO THE SMALL BUSINESS REORGANIZATION ACT OF 2019

Revised July 2021

**Paul W. Bonapfel
U.S. Bankruptcy Judge, N.D. Ga.**

Earlier versions of this paper were distributed in February 2020, May 2020, and July 2020. Supplements were added (effectively as “pocket parts”) as Chapter XIV (November 2020) and Chapter XV (April 2021).

This revision merges the material in the “pocket parts” into the body of the text and includes other editorial revisions that do not materially change the substance of the paper as supplemented in April 2021.

This revision also contains revised or new material dealing with the following subjects:

Eligibility requirements regarding “engaged in commercial or business activities” and debts arising from commercial or business activities – §§ III(C), (D), (E)

Eligibility of reporting company or affiliate of issuer – § III(G)

Removal of debtor in possession – § VI(C)

Temporary amendments to § 365(d) dealing with postpetition lease obligations – §§ VI(K), VII(C), VIII(D)(4).

Relationship of good faith requirement of § 1129(a)(3) and disposable income in consensual plan – § VIII(D)(8)

Property of the estate in subchapter V case of individual – § XI(B)(2)

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<https://store.abi.org/sbra-a-guide-to-subchapter-v-of-the-u-s-bankruptcy-code.html>

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A Guide to the Small Business Reorganization Act of 2019

Paul W. Bonapfel
U.S. Bankruptcy Judge, N.D. Ga.

I. Introduction

The Small Business Reorganization Act of 2019 (the “SBRA”)¹ enacted a new subchapter V of chapter 11 of the Bankruptcy Code, codified as new 11 U.S.C. §§ 1181 – 1195, and made conforming amendments to several sections of the Bankruptcy Code and statutes dealing with appointment and compensation of trustees in title 28.² SBRA also revised the definitions of “small business case” and “small business debtor” in § 101(51C) and § 101(51D), respectively.³ It took effect on February 19, 2020, 180 days after its enactment on August 23, 2019.

New subchapter V applies in cases in which a qualifying debtor elects its application. In the absence of an election, the pre-SBRA provisions of chapter 11 that govern a small business debtor apply with one change. SBRA amended § 1102(a)(3) to provide that no committee of

¹ Small Business Reorganization Act (SBRA) of 2019, Pub. L. No. 116-54, 133 Stat. 1079 (codified in 11 U.S.C. §§ 1181-1195 and scattered sections of 11 U.S.C. and 28 U.S.C.).

² Unless otherwise noted, references to sections are to sections of the Bankruptcy Code, title 11 of the United States Code. Sections of the Bankruptcy Code added by the SBRA are referred to as “new § ____” in the text of this paper.

Section 3 of SBRA also enacts changes relating to prosecution of preference actions under 11 U.S.C. § 547 and to venue for certain proceedings brought by a trustee. These amendments apply in all bankruptcy cases.

SBRA § 3(a) amends § 547(b) to require that a trustee seeking to avoid a preferential transfer must exercise “reasonable due diligence in the circumstances of the case” and must take into account a party’s “known or reasonably knowable” affirmative defenses under § 547(c). SBRA § 3(a).

SBRA § 3(b) amends 28 U.S.C. § 1409(b) to provide that a trustee may sue to recover a debt of less than \$ 25,000 only in the district where the defendant resides. Prior to the amendment, the amount (as adjusted under 11 U.S.C. § 104 as of April 1, 2019) was \$ 13,650.

³ SBRA § 4(1)(A)-(B).

unsecured creditors is appointed in any case of a small business debtor unless the court orders otherwise.⁴

Under the SBRA, a debtor could not elect subchapter V if its debts (with some exceptions) exceeded \$ 2,725,625. The Coronavirus Aid, Relief, and Economic Security Act (the “CARES Act”),⁵ enacted and effective March 27, 2020, amended the SBRA to increase the debt limit to \$ 7.5 million for purposes of subchapter V for one year and made certain technical corrections. The Covid-19 Bankruptcy Relief Extension Act of 2021⁶ amended the CARES Act to extend the increased debt limit for an additional year. The later legislation did not increase the debt limits in a small business case.

The Consolidated Appropriations Act, 2021 (the “CAA”) temporarily amended § 365(d) to permit the court to extend the time for a debtor in a sub V case in certain circumstances to comply with its postpetition obligations under a lease of nonresidential real property and to permit deferred payment of such obligations under a nonconsensual, “cramdown” plan.⁷ Section VI(K) discusses this amendment.

Appendix A is a chart that lists sections of the Bankruptcy Code that SBRA affected and summarizes the changes, as affected by the CARES Act.

The purpose of SBRA is “to streamline the process by which small business debtors reorganize and rehabilitate their financial affairs.”⁸ A sponsor of the legislation stated that it

⁴ SBRA, § 4(a)(11), 133 Stat. 1079, 1086.

⁵ Coronavirus Aid, Relief, and Economic Security Act § 1113(a), Pub. L. No. 116-136, 134 Stat. 281 (Mar. 27, 2020).

⁶ Covid-19 Bankruptcy Relief Extension Act of 2021 § 2(a)(1), Pub. L. No. 117-5, 135 Stat. 249 (Mar. 27, 2021).

⁷ Consolidated Appropriations Act, 2021 (the “CAA”), Pub. L. No. 116-260, Title X, § 1001(f), 134 Stat. 1182, 3219 (December 27, 2020).

⁸ H.R. REP. NO. 116-171, at 1 (2019), available at <https://www.govinfo.gov/content/pkg/CRPT-116hrpt171/pdf/CRPT-116hrpt171.pdf>.

For a summary of small business reorganizations under the Bankruptcy Code, see Ralph Brubaker, *The Small Business Reorganization Act of 2019*, 39 BANKRUPTCY LAW LETTER, no. 10, Oct. 2019, at 1-4.

allows small business debtors “to file bankruptcy in a timely, cost-effective manner, and hopefully allows them to remain in business,” which “not only benefits the owners, but employees, suppliers, customers, and others who rely on that business.”⁹ Courts have taken the legislative purpose of SBRA into account in their application of the new law.¹⁰

SBRA has had a significant impact. A preliminary estimate was that approximately 40 percent of chapter 11 debtors in chapter 11 cases filed after October 1, 2007, would have qualified as a subchapter V debtor and that about 25 percent of individuals in chapter 11 cases

Amendments to the Bankruptcy Code in 1994 permitted a qualifying small business debtor to elect small business treatment. As amended, § 1121(e) provided that, in a small business case, only the debtor could file a plan for 100 days after the order for relief and that all plans had to be filed within 160 days. In addition, amended § 1125(f) permitted parties to solicit acceptances or rejections of a plan based on a conditionally approved disclosure statement and permitted a final hearing on the disclosure statement to be combined with the hearing on confirmation.

The Bankruptcy Abuse Protection and Consumer Protection Act of 2005 (“BAPCPA”) significantly changed the small business provisions. Importantly, it eliminated the debtor’s option to choose small business treatment. As such, a business that qualifies as a small business debtor became subject to all of the provisions governing small business cases.

BAPCPA replaced both § 1121(e) and § 1125(f).

BAPCPA’s § 1121(e)(1) extended the exclusive time for the debtor to file a plan to 180 days and imposed a new 300-day deadline for the filing of a plan. BAPCPA also added § 1129(c) to require confirmation of a plan in a small business case within 45 days of its filing, unless the court extended the time.

BAPCPA’s § 1125(f) added a provision that permitted the court to determine that the plan provided adequate information such that a separate disclosure statement was not required.

BAPCPA also added § 1116 to prescribe additional filing, reporting, disclosure, and operating duties applicable only to small business debtors.

Although some of BAPCPA’s small business provisions facilitated chapter 11 reorganization for a small business debtor, others appeared to reflect skepticism about the prospects for success of a small business debtor in a chapter 11 case and specific, more intensive supervision of the administration of their cases. In practice, reporting and confirmation requirements applicable to small business debtors remained burdensome or unworkable for many small businesses. *See, e.g., Amer. Bankr. Inst. Comm’n to Study the Reform of Chapter 11: 2012-14 Final Report & Recommendations*, 23 AMER. BANKR. INST. L. REV. 1, 324 (2015) (For many small or medium-sized businesses, “the common result of plan confirmation extinguishing pre-petition equity interests in their entirety [are] unsatisfactory or completely unworkable.”).

Because SBRA did not repeal SBRA’s provisions relating to a “small business debtor,” a small business debtor that does not elect subchapter V is in a small business case and subject to the provisions that BAPCPA added.⁹ H.R. REP. NO. 116-171, at 4 (statement of Rep. Ben Cline). The court in *In re Progressive Solutions, Inc.*, 615 B.R. 894, 896-98 (Bankr. C.D. Cal. 2020), reviewed the legislative progress of SBRA and included public statements from several cosponsors of the law, including Senators Charles Grassley, Sheldon Whitehouse, Amy Klobuchar, Joni Ernst, and Richard Blumenthal. *See also* Michael C. Blackmon, *Revising the Debt Limit for “Small Business Debtors”: The Legislative Half-Measure of the Small Business Reorganization Act*, 14 BROOK. J. CORP. FIN. & COM. L. 339, 344-45 (2020).

¹⁰ *E.g., In re Ventura*, 615 B.R. 1, 6, 12-13 (Bankr. E.D.N.Y. 2020); *In re Progressive Solutions, Inc.*, 615 B.R. 894, 896-98 (Bankr. C.D. Cal. 2020).

would qualify.¹¹ The economic circumstances arising from the Covid-19 pandemic and the temporary increase of the debt limit under the CARES Act most likely increased the number of subchapter V cases.¹²

Subchapter V resembles chapter 12 in some aspects.¹³ It provides for a trustee in the case while leaving the debtor in possession of assets and control of the business. The trustee has oversight and monitoring duties and the right to be heard on certain matters. In some cases, the trustee may make disbursements to creditors.

But subchapter V differs from chapter 12 in significant ways. For example, whereas chapter 12 confirmation standards (§ 1225) are similar to those in chapter 13 (§ 1325), subchapter V confirmation requirements incorporate most of the existing confirmation requirements in § 1129(a). Unlike chapter 12, subchapter V does not provide for a codebtor stay.

Enactment of SBRA required revisions to the Federal Rules of Bankruptcy Procedure and the Official Forms. The Committee on Rules of Practice and Procedure of the Judicial Conference of the United States (the “Rules Committee”) had authority to make changes in the Official Forms to take effect on SBRA’s effective date. Changes to the Bankruptcy Rules,

¹¹ Ralph Brubaker, *The Small Business Reorganization Act of 2019*, 39 Bankruptcy Law Letter, no. 10, Oct. 2019, at 5-6 (discussing Bob Lawless, *How Many New Small Business Chapter 11s?*, CREDIT SLIPS (Sept. 14, 2019), <http://www.creditslips.org/creditslips/2019/09/how-many-new-small-business-chapter-11s.html>). Professor Brubaker points out that the percentage may ultimately be higher because pre-SBRA law provided incentives for a debtor to avoid qualification as a small business debtor and because debtors who might not have filed under pre-SBRA law because of its obstacles might now do so. The estimate does not take into account the increase in the debt limit that the CARES Act temporarily made.

¹² For a discussion of strategies for creditors in view of the enactment of subchapter V, see Christopher G. Bradley, *The New Small Business Bankruptcy Game: Strategies for Creditors Under the Small Business Reorganization Act*, 28 AMER. BANKR. INST. L. REV. 251 (2020).

¹³ As the court observed in *In re Trepetin*, 617 B.R. 841, 848, n. 14 (Bankr. D. Md. 2020):

Subchapter V and chapter 12 are not identical, and invoking chapter 12 standards may not be warranted in every instance. Subchapter V starts with chapter 11 as its base and then draws on the structure of chapter 12, certain elements of chapter 13, and the recommendations of the American Bankruptcy Institute's Commission to Study the Reform of Chapter 11 and the National Bankruptcy Conference.

however, take three years or more under procedures that the Rules Enabling Act, 28 U.S.C. §§ 2071-77, require.

To take account of the new law, the Rules Committee made changes to the Official Forms and promulgated interim rules (the “Interim Rules”) that amend the Federal Rules of Bankruptcy Procedure.¹⁴ The changes to the Official Forms became effective as of the effective date of SBRA. The Rules Committee recommended that each judicial district adopt the Interim Rules as local rules or by general order. Enactment of the CARES Act required technical revisions in Interim Rule 1020 in and the Official Forms for voluntary petitions.¹⁵ Appendix B summarizes the changes that the Interim Rules made.

If a small business debtor does not elect subchapter V, the provisions that govern small business cases apply.¹⁶ The existence of two sets of provisions in chapter 11 for small business debtors requires terminology to distinguish them. The Rules Committee refers to “small business cases” and to “cases under subchapter V of chapter 11.”

¹⁴ On December 5, 2019, the Advisory Committee on Bankruptcy Rules proposed Interim Amendments to the Federal Rules of Bankruptcy Procedure (“Interim Rules”) to address provisions of SBRA for adoption in each judicial district by local rule or general order and new Official Forms. The proposed Interim Rules and Official Forms reflected changes in response to comments received. ADVISORY COMMITTEE ON BANKRUPTCY RULES, REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES (Dec. 5, 2019), https://www.uscourts.gov/sites/default/files/december_5_2019_bankruptcy_rules_advisory_committee_report_0.pdf

On December 19, 2019, the Committee on Rules of Practice and Procedure approved the Interim Rules, recommended their local adoption, and approved the new Official Forms. The Executive Committee of the Judicial Conference, acting on an expedited basis on behalf of the Judicial Conference, approved the Interim Rules for distribution to the courts.

The Interim Rules are located on the *Current Rules of Practice & Procedure* page of the U.S. Courts public website (USCOURTS.GOV). The new Official Forms are posted on the *Forms* page of the website, under the *Bankruptcy Forms* table.

¹⁵ On April 6, 2020, the Advisory Committee on Bankruptcy Rules proposed one-year technical amendments to Interim Rule 1020 to take account of the revised definition of “debtor” under the CARES Act, which Sections III(A) and (B) discuss. The Advisory Committee also proposed conforming technical changes to official forms, including Official Forms 101 and 202, which are the forms for the filing of a voluntary petition by an individual and a non-individual, respectively.

On April 20, 2020, the Committee on Rules of Practice and Procedure approved the amendments and recommended their local adoption. It also approved the one-year technical change to the Official Forms.

¹⁶ For a summary of key features of a non-sub V small business case governed by the provisions for small business cases, see *supra* footnote 8.

This terminology is technically accurate. Under the SBRA amendments, a “small business debtor” is not necessarily a debtor in a “small business case.” Rather, a “small business case” is only a case under chapter 11 in which a small business debtor has not elected application of subchapter V. In other words, a small business debtor that has elected application of subchapter V is *not* in a small business case. Moreover, under the temporary extension of the debt limits under the CARES Act, a debtor can be a subchapter V debtor, but not a small business debtor, if its debts are less than \$ 7.5 million but more than the limit for a small business debtor.

The distinction is important for at least one reason. Section 362(n) makes the automatic stay inapplicable in certain circumstances when the debtor in the current case is or was a debtor in a pending or previous small business *case*. Because a subchapter V debtor is not in a small business *case*, § 362(n) will not apply in a later case of the subchapter V debtor.¹⁷

Three types of cases are now possible under chapter 11: (1) a non-small business case under traditional chapter 11 for a debtor who is not a small business debtor and either (a) has debts in excess of the sub V debt limit or (b) has debts below the limit but does not elect subchapter V; (2) a small business case for a small business debtor that does not elect subchapter

¹⁷ In *In re Abundant Life Worship Center of Hinesville, GA., Inc.*, 2020 WL 7635272 (Bankr. S.D. Ga. 2020), a debtor whose earlier small business case had been dismissed seven months earlier filed a new chapter 11 case and amended the petition to elect subchapter V. The debtor contended that § 362(n)(1) did not apply because, upon its subchapter V election, it ceased being a debtor in a “small business case.” *Id.* at *8. The court ruled that the status of the debtor in the current case made no difference: “The statute plainly requires only that the prior case was a small business case, not the subsequent case.” *Id.* at * 18.

The debtor also contended that the exception in paragraph (n)(2) of § 362 to the operation of paragraph (n)(1) applied. Section 362(n)(2)(B) provides that paragraph (n)(1) does not apply if the debtor establishes “that the filing of the petition resulted from circumstances beyond the control of the debtor not foreseeable at the time *the case then pending* was filed” (emphasis added) and that “it is more likely than not that the court will confirm a feasible plan, but not a liquidating plan, within a reasonable time.”

The court rejected this argument, concluding that the language, “the case then pending” refers to a separate case pending at the time of the filing of the second case. Because the debtor’s previous case was not a “case then pending,” the court ruled, the exception did not apply. *Id.* at *11-12. The court thus followed *Palmer v. Bank of the West*, 438 B.R. 167 (E.D. Wis. 2010).

V; and (3) a subchapter V case for a qualifying debtor who elects it. This paper generally uses “traditional” to describe a chapter 11 case (including a small business case) that is not a subchapter V case.

II. Overview of Subchapter V

For electing debtors who qualify, subchapter V: (1) modifies confirmation requirements; (2) provides for the participation of a trustee (the “sub V trustee”) while the debtor remains in possession of assets and operates the business as a debtor in possession; (3) changes several administrative and procedural rules; and (4) alters the rules for the debtor’s discharge and the definition of property of the estate with regard to property an individual debtor acquires postpetition and postpetition earnings (which has implications for operation of the automatic stay of § 362(a)). Only the sub V debtor may file a plan or a modification of it.

This Part provides an overview of these provisions. Later Parts discuss these and other provisions in more detail. Appendix C is a chart that compares provisions of subchapter V with those that govern traditional chapter 11, chapter 12, and chapter 13 cases.

A. Changes in Confirmation Requirements

The court may confirm a sub V plan even if all classes reject it. Moreover, the “fair and equitable” requirement for “cramdown” confirmation does not include the absolute priority rule. Instead, the plan must comply with a new projected disposable income requirement (applicable in cases of entities as well as those of individuals). The cramdown requirements for a secured claim are unchanged. (Part VIII).

A sub V plan may modify a claim secured only by a security interest in the debtor’s principal residence if the new value received in connection with the granting of the security interest was not used primarily to acquire the property and was used primarily in connection with

the small business of the debtor. Such modification is not permitted in traditional chapter 11 cases or in chapter 12 or 13 cases. (Section VII(B)).

B. Subchapter V Trustee and the Debtor in Possession

Subchapter V provides for the debtor to remain in possession of assets and operate the business with the rights and powers of a trustee unless the court removes the debtor as debtor in possession. (Part V).

The United States Trustee appoints the sub V trustee. The role of the sub V trustee is to oversee and monitor the case, to appear and be heard on specified matters, to facilitate a consensual plan, and to make distributions under a nonconsensual plan confirmed under the cramdown provisions. (Part IV).

C. Case Administration and Procedures

Subchapter V modifies the usual procedures in chapter 11 cases in several respects. Appendix D summarizes the key events in a subchapter V case and the timeline for them.

No committee of unsecured creditors. A committee of unsecured creditors is not appointed unless the court orders otherwise. (SBRA also makes this the rule in a non-sub V small business case.) (Section VI(A)).

Required status conference and report from debtor. The court must hold a status conference within 60 days of the filing “to further the expeditious and economical resolution” of the case. Not later than 14 days before the status conference, the debtor must file a report that details the efforts the debtor has undertaken and will undertake to achieve a consensual plan of reorganization. (Section VI(C)).

Time for filing of plan. The debtor must file a plan within 90 days of the date of entry of the order for relief, unless the court extends the time based on circumstances for which the

debtor should not justly be held accountable. The requirements in a non-sub V small business case that a plan be filed within 300 days of the filing date (§ 1121(e)) and that confirmation occur within 45 days of the filing of the plan (§ 1129(e)) do not apply in a sub V case. (Section VI(D)).

No disclosure statement. Section 1125, which states the requirements for a disclosure statement in connection with a plan and regulates the solicitation of acceptances of a plan, does not apply in a sub V case, unless the court orders otherwise. Although no disclosure statement is required, the plan must include: (1) a brief history of the business operations of the debtor; (2) a liquidation analysis; and (3) projections with respect to the ability of the debtor to make payments under the proposed plan. (Sections VI(B), VII(B)).

No U.S. Trustee fees. A sub V debtor does not pay U.S. Trustee fees. (Section VI(E)).

D. Discharge and Property of the Estate

1. Discharge – consensual plan

If the court confirms a consensual plan, a sub V debtor (including an individual debtor) receives a discharge under § 1141(d)(1)(A) upon confirmation. The provision in § 1141(d)(5) for delay of discharge in individual cases until completion of payments does not apply in a sub V case. In the case of an individual, the § 1141(d)(1)(A) discharge does not discharge debts excepted under § 523(a).¹⁸ One effect of the grant of the discharge is that the automatic stay terminates under § 362(c)(2)(C). (Section X(A)).

¹⁸ § 1141(d)(2).

2. Discharge – cramdown plan

When cramdown confirmation occurs in a sub V case, § 1141(d) does not apply, and confirmation does not result in a discharge. Instead, new § 1192 provides for a discharge, which does not occur until the debtor completes plan payments for a period of at least three years or such longer time not to exceed five years as the court fixes. (Section X(B)).

Under new § 1192, the discharge in a cramdown case discharges the debtor from all debts specified in § 1141(d)(1)(A) and all other debts allowed under § 503 (administrative expenses), with the exception of: (1) debts on which the last payment is due after the first three years of the plan or such other time not exceeding five years as the court fixes; and (2) debts excepted under § 523(a). (Section X(B)). Under § 362(c)(2), the automatic stay remains in effect after confirmation of a cramdown plan until the case is closed or dismissed, or the debtor receives a discharge.

3. Property of the estate

Section 1115 provides that, in an individual chapter 11 case, property of the estate includes assets that the debtor acquires postpetition and earnings from postpetition services. Section 1115 does not apply in a subchapter V case.¹⁹ If the court confirms a plan under the cramdown provisions of new § 1191(b), however, property of the estate includes (in cases of both individuals and entities) postpetition assets and earnings.²⁰ (Section XI(B)).

¹⁹ New § 1181(a).

²⁰ New § 1186(a).

III. Debtor's Election of Subchapter V and Revised Definition of "Small Business Debtor"

A. Debtor's Election of Subchapter V

The provisions of subchapter V apply in cases in which an eligible debtor elects them.²¹

If a small business debtor does not make the election, the provisions of Chapter 11 governing small business cases apply.

The operative statutory provision is new § 103(i). As amended by the CARES Act, it provides:

Subchapter V of chapter 11 of this title applies only in a case under chapter 11 in which a debtor (as defined in section 1182) elects that subchapter V of title 11 shall apply.²²

As originally enacted by SBRA, new § 1182(1) defined "debtor" as meaning a "small business debtor,"²³ a term defined in § 101(51D). As the next Section discusses, SBRA also revised the § 101(51D) definition of "small business debtor," but did not change the debt limit of \$ 2,725,625.

The CARES Act increased the debt limit to \$ 7.5 million through amendments to these sections. The CARES Act amended § 1182(1) so that its definition of "debtor" is the same as the definition of "small business debtor" in revised §101(51D), with a

²¹ One commentator has suggested that a creditor may want to attempt to limit the availability of subchapter V by including in the credit agreement a commitment from the debtor not to make the election or to waive it, noting that such a contractual provision may not be enforceable. Christopher G. Bradley, *The New Small Business Bankruptcy Game: Strategies for Creditors Under the Small Business Reorganization Act*, 28 AMER. BANKR. INST. L. REV. 251, 264 (2020). Professor Bradley suggests alternatively that a creditor could require a "springing" (sometimes referred to as a "bad boy") guarantee from a debtor's insider that would arise if the debtor elected subchapter V. *Id.* at 264-65.

²² SBRA inserted new subsection (i) in § 103 and renumbered existing subsections (i) through (k) as (j) through (l). SBRA § 4(a)(2). Before enactment of the CARES Act, new § 103(i) provided:

Subchapter V of chapter 11 of this title applies only in a case under chapter 11 in which a small business debtor elects that subchapter V of title 11 shall apply.

²³ SBRA § 2(a).

technical correction that it also made,²⁴ except that the debt limit in § 1182(1) is \$ 7.5 million.²⁵ The debt limit in revised § 101(51D) is unchanged. The CARES Act made a conforming change in § 103(i) to replace “small business debtor” with “debtor (as defined in section 1182).”

The CARES Act provided for the increased debt limit to be effective for only one year after its enactment on March 27, 2020.²⁶ The Covid-19 Bankruptcy Relief Extension Act of 2021²⁷ amended the CARES Act to extend the amended provision for an additional year. On March 27, 2022, §§ 1182(1) and 103(i) will return to their original language in the SBRA. Thus, § 1182(a) will define “debtor” as “a small business debtor,” and § 103(i) will limit application of subchapter V to a small business debtor who has elected it.

The effect of the CARES Act is that until March 27, 2022, new (and amended) § 1182(1) states the definition of a debtor eligible to be a sub V debtor. After that, revised § 101(51D) will state the definition. The only difference in the language of the two statutes is the higher debt limit in the temporary CARES Act version of § 1182(1). (Because the CARES Act does not change the definition of “small business debtor,” a debtor with debts in excess of the § 101(51D) limit but below \$ 7.5 million that does not elect subchapter V cannot be a small business debtor.)

The statute does not state when or how the debtor makes the election. Bankruptcy Rule 1020(a) requires a debtor to state in the petition whether it is a small business debtor.²⁸ In an involuntary case, the Rule requires the debtor to file the statement within 14 days after the order

²⁴ The technical correction involves the exclusion of public companies. See text accompanying note 45 *infra*.

²⁵ CARES Act § 1113(a)(1).

²⁶ CARES Act § 113(a)(5).

²⁷ Covid-19 Bankruptcy Relief Extension Act of 2021 § 2(a)(1), Pub. L. No. 117-5, 135 Stat. 249 (Mar. 27, 2021).

²⁸ FED. R. BANK. P. 1020(a).

for relief. The case proceeds in accordance with the debtor's statement unless and until the court enters an order finding that the statement is incorrect.

Interim Rule 1020(a) as originally promulgated added the requirement that the debtor state in the petition whether the debtor elects application of subchapter V and provided that the case proceed in accordance with the election unless the court determined that it is incorrect. In an involuntary case, the Interim Rule required the debtor to state whether it is a small business debtor and to make the election within 14 days after the order for relief.²⁹ In response to the CARES Act amendment of new § 1182(1), the revised Interim Rule provides in both instances for the debtor to state whether the debtor is a small business debtor or a debtor as defined in § 1182(1) and, if the latter, whether the debtor elects application of subchapter V.

Revisions to the Official Forms for voluntary chapter 11 cases require the debtor to state whether it is a small business debtor or a § 1182(1) debtor and whether it does or does not make the election.³⁰ Revised Official Forms also provide for creditors to receive notice of the debtor's statement of its status and the election that it makes.³¹

Parties in interest may object to a debtor's statement of whether it is a small business debtor. Bankruptcy Rule 1020(b) requires an objection to a debtor's statement of its small business status within 30 days after the later of the conclusion of the § 341(a) meeting or

²⁹ INTERIM RULE 1020.

³⁰ OFFICIAL FORM B101 ¶ 13 (Voluntary Petition for Individuals Filing for Bankruptcy); OFFICIAL FORM B102 ¶ 8 (Voluntary Petition for Non-Individuals Filing for Bankruptcy).

³¹ OFFICIAL FORM B309E2 is the form for individuals or joint debtors under subchapter V, and OFFICIAL FORM B309F2 is the form for corporations or partnerships under subchapter V. Existing OFFICIAL FORMS B309E (individuals or joint debtors) and B309F (corporations or partnerships) were renumbered as B309E1 and B309F1. Both new forms contain the same information as the existing notices but provide additional information applicable in subchapter V cases.

The new forms require inclusion of the trustee and the trustee's phone number and email address. The new notices state that the debtor will generally remain in possession of property and may continue to operate the business and advise that, in some cases, debts will not be discharged until all or a substantial portion of payments under the plan are made.

amendment of the statement. Interim Rule 1020(b) makes the same requirement applicable to the statement regarding the sub V election. Courts have concluded that the debtor has the burden of proving eligibility for subchapter V relief.³²

Bankruptcy Rule 1009(a) gives a debtor the right to amend a voluntary petition, list, schedule, or statement “as a matter of course at any time before the case is closed.” A question is whether a debtor may amend the small business designation or the subchapter V election that the voluntary petition includes. Current Bankruptcy Rule 1020 does not address whether a debtor can amend the small business designation, and Interim Rule 1020 likewise does not address the issue of whether a delayed sub V election should be allowed and, if so, under what circumstances.³³ Part XIII discusses whether a debtor who does not make the subchapter V election in the original petition (such as in a case pending before enactment of SBRA) may later amend the petition to elect application of Subchapter V.

One problem with permitting a debtor to change the election is that deadlines for conducting a status conference³⁴ and for filing a plan³⁵ run from the date of the order for relief. The Advisory Committee in its Report observed, “Should a court exercise authority to allow a delayed election, it is likely that one of the court’s prime considerations in ruling on a request to

³² *E.g.*, *In re Port Arthur Steam Energy, L.P.*, 2021 WL 2777993 at *2 (Bankr. S.D. Tex. 2021); *In re Blue*, 2021 WL 1964085 at *4 (Bankr. M.D.N.C. 2021); *In re Offer Space, LLC*, 2021 WL 1582625 at *2 (Bankr. D. Utah 2021); *In re Ikalowych*, 2021 WL 1433241 at *7 (Bankr. D. Colo. 2021); *In re Johnson*, 2021 WL 825156 at *4 (Bankr. N.D. Tex. 2021); *In re Thurmon*, 625 B.R. 417, 419 n. 4 (Bankr. W.D. Mo. 2020); *In re Blanchard*, 2020 WL 4032411 at *1-2 (Bankr. E.D. La. 2020). *But see In re Body Transit, Inc.*, 613 B.R. 400, 409 n. 15 (Bankr. E.D. Pa. 2020) (“It is appropriate to place the burden of proof on [the objecting party], as it is the *de facto* moving party.”).

The issue seems academic in most cases dealing with eligibility. For the most part, the outcomes do not appear to turn on the resolution of factual disputes but on the legal conclusions to be drawn from the facts.

³³ The Advisory Committee Note to Interim Rule 1020 states, “The rule does not address whether the court, on a case-by-case basis, may allow a debtor to make an election to proceed under subchapter V after the times specified in subdivision (a) or, if it can, under what conditions.”

³⁴ See Section VI(C).

³⁵ See Section VI(D).

make a delayed election would be the time restriction imposed by subchapter V. . . .”³⁶ Section VI(J) and Part XIII discuss extension of the time limits and their effect on the ability of a debtor to amend the petition to make an election after their expiration.

B. Eligibility for Subchapter V; Revised Definitions of “Small Business Debtor” and “Small Business Case”

In general, a debtor is eligible to elect subchapter V if the debtor: (1) is a “person;” (2) is engaged in “commercial or business activities;” (3) does not have aggregate debts in excess of the debt limit; and (4) at least 50 percent of the debts arise from the debtor’s commercial or business activities,³⁷ subject to certain exceptions. (“Person” under § 101(41) includes an individual, corporation, or partnership but does not generally include a governmental unit. A limited liability company is a “person.”³⁸)

A debtor is ineligible for sub V if: (1) its primary activity is the business of owning single asset real estate; (2) it is a member of a group of affiliated debtors that has aggregate debts in excess of the debt limit; (3) it is a corporation subject to reporting requirements under the Securities Exchange Act of 1934; or (4) it is an affiliate of an issuer as defined in section 3 of the Securities Exchange Act of 1934.

Until March 27, 2022, the statutory basis for the definition is new § 1182(1), and the debt limit is \$ 7.5 million. On March 28, 2022, the debt limit reverts to \$ 2,725,625, and an eligible debtor must be a “small business debtor” as defined in § 101(51D).

³⁶ Advisory Committee on Bankruptcy Rules, REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES (Dec. 5, 2019), at 3,

https://www.uscourts.gov/sites/default/files/december_5_2019_bankruptcy_rules_advisory_committee_report_0.pdf.

³⁷ See generally, e.g., *In re Blue*, 2021 WL 1964085 at * 5 (Bankr. M.D.N.C. 2021); *In re Offer Space*, 2021 WL 1582624 (Bankr. D. Utah 2021).

³⁸ E.g., *In re QDN, LLC*, 363 Fed. Appx. 873, 876 n. 4 (3d Cir. 2010); *In re CWNevada, LLC*, 602 B.R. 717 (Bankr. D. Nev. 2019); *In re 4 Whip, LLC*, 332 B.R. 670, 672 (Bankr. D. Conn. 2005); *In re ICLNDS Acquisition, LLC*, 259 B.R. 289, 292-93 (Bankr. N.D. Ohio (2001); see *In re Asociación de Titulares de Condominio Castillo*, 581 B.R. 346, 358-60 (B.A.P. 1st Cir. 2018) (collecting cases).

This Section explains how SBRA revised the definition of “small business debtor” in connection with its enactment of subchapter V that a small business debtor could elect and how the CARES Act temporarily increased the debt limit of eligibility for subchapter V.

Later sections discuss: the requirement that the debtor be “engaged in commercial or business activities” (Section III(C)); what debts “arose from” such activities (Section III(D)); whether the commercial or business debts must be connected to the debtor’s current commercial or business activities (Section III(E)); what debts are included in determination of the debt limit (Section III(F)); and the exclusion of reporting companies and affiliates of an issuer (Section III(G)).

Under pre-SBRA law, paragraph (A) of § 101(51D) defined a “small business debtor” as a person (1) engaged in commercial or business activities, (2) excluding a debtor whose principal activity is the business of owning or operating real property, (3) that has aggregate noncontingent liquidated secured and unsecured debts³⁹ as of the date of the filing of the petition or the date of the order for relief in an amount not more than \$ 2,725,625,⁴⁰ (4) in a case in which the U.S. Trustee has not appointed a committee of unsecured creditors or the court has determined that the committee is not sufficiently active and representative to provide effective oversight of the debtor. Paragraph (B) of former § 101(51D) excluded any member of a group of affiliated debtors that had aggregate debts in excess of the debt limit (excluding debts to affiliates and insiders).

³⁹ § 101(51D)(A). Debts owed to one or more affiliates or insiders are excluded from the debt limit. *Id.* See Section III(F).

⁴⁰ The amount is revised every three years. § 104. The current amount became effective to cases filed on or after April 1, 2019.

As the previous Section discusses, SBRA amended the § 101(51D) definition of “small business debtor,” and the CARES Act temporarily increased the debt limit for a sub V debtor to \$ 7.5 million. Section III(F) discusses what is included in the debt limit.

The CARES Act effected the debt limit change through an amendment to new § 1182(1) that lasted only one year. The Covid-19 Bankruptcy Relief Extension Act of 2021⁴¹ amended the CARES Act to extend the increased debt limit for an additional year. The language of revised § 1182(1) is identical to the language of § 101(51D). Specifically, subparagraphs (A) and (B) of new § 1182(1) are exactly the same as subparagraphs (A) and (B) of § 101(51D), as amended by both SBRA and the CARES Act.

SBRA did not change the eligibility rule that a “small business debtor” does not include a debtor that is “a member of a group of affiliated debtors” that has aggregate debts in excess of the debt limit. § 101(51D)(B)(i). The temporary CARES Act amendment to § 1182(1) retains the exclusion in the same language. Section III(F) discusses this issue.

SBRA did not change the requirement in § 101(51D) that the debtor be “engaged in commercial or business activities.” Revised paragraph (A), however, adds a requirement that 50 percent or more of the debtor’s debt must arise from the debtor’s commercial or business activities. The same requirements are temporarily in § 1182(1). Section III(C) discusses eligibility issues that have arisen as to whether the debtor is “engaged in commercial or business activities,” and Section III(D) considers what constitutes a debt arising from commercial or business activity. Section III(E) addresses whether the debts arising from the debtor’s commercial or business activities must arise from the debtor’s current commercial or business activities.

⁴¹ Covid-19 Bankruptcy Relief Extension Act of 2021 § 2(a)(1), Pub. L. No. 117-5, 135 Stat. 249 (Mar. 27, 2021).

SBRA made three other definitional changes in § 101(51D). The Cares Act made a technical correction to one of them and temporarily enacted the revised provisions in § 1182(1) to govern subchapter V eligibility. Both contain identical paragraphs (A) and (B).

First, amended paragraph (A) excludes a debtor engaged in owning or operating real property from being a small business debtor only if the debtor owns or operates single asset real estate.⁴² Pre-SBRA § 101(51D) excluded a debtor whose principal activity was the business of owning or operating real property.

Second, the requirement that no committee exist (or that it not provide effective oversight) is eliminated. (Recall that SBRA provides that no committee will be appointed in a non-sub V small business case unless the court orders otherwise.)

Finally, SBRA added subparagraphs (B)(ii) and (B)(iii) to exclude two additional types of debtors to those that paragraph (B) excludes from being a small business debtor.

The first new exclusion, in (B)(ii), is for a corporate debtor subject to reporting requirements under § 13 or § 15(d) of the Securities Exchange Act of 1934.⁴³ The second new exclusion, in (B)(iii), was for a corporate debtor subject to the reporting requirements of those sections that is an affiliate of a debtor.⁴⁴

The CARES Act made a technical correction⁴⁵ to (B)(iii). The revised (B)(iii) excludes “any debtor that is an affiliate of an issuer (as defined in section 3 of the Securities Exchange Act

⁴² Section 101(51B) defines “single asset real estate” as “real property constituting a single property of project, other than residential real property with fewer than 4 residential units, which generates substantially all of the gross income of a debtor who is not a family farmer and on which no substantial business is being conducted by a debtor other than the business of operating the real property and activities incidental thereto.” § 101(51B). For a discussion of case law relating to the definition of “single asset real estate” in the sub V context, see *In re NKOGS1, LLC*, 626 B.R. 860 (Bankr. M.D. Fla. 2021) (Debtor is qualified for subchapter V because the hotel that it owns and operates is not a “single asset real estate” project.).

⁴³ § 101(51D)(B)(ii).

⁴⁴ SBRA § 4(a)(1)(B)(i)(III), amending § 101(51D)(B)(iii).

⁴⁵ For a discussion of the issues relating to this provision, see Ralph Brubaker, *The Small Business Reorganization Act of 2019*, 39 Bankruptcy Law Letter, no. 10, Oct. 2019, at 7. .

of 1934 (15 U.S.C. 78c)).”⁴⁶ The temporary § 1182(1)(B) that the CARES Act enacted contains identical exclusions in its (B)(ii) and (iii). Section III(G) discusses these exclusions.

An individual who does not have regular income may be a chapter 13 debtor in a joint case with the individual’s spouse who does have regular income,⁴⁷ and an individual who is not a family farmer or fisherman may be a chapter 12 debtor in a joint case with the individual’s spouse who is engaged in a farming operation or a commercial fishing operation.⁴⁸

Subchapter V has no such provision. Although an affiliate of an eligible subchapter V debtor may be a subchapter V debtor even if the affiliate is not otherwise eligible, a spouse is not an affiliate as defined in § 101(2).⁴⁹

SBRA amended the definition of “small business case” in § 101(51C) to exclude a subchapter V debtor. Thus, a “small business case” is a case in which a small business debtor has *not* elected application of subchapter V. In other words, the case of a sub V debtor is *not* a “small business case,” even if the sub V debtor is a “small business debtor.” And as a result of the CARES Act amendments increasing the debt limits, a debtor may be a sub V debtor under § 1182(1) (until its expiration), but not a “small business debtor.”

A bankruptcy court’s determination of a debtor’s eligibility to proceed under subchapter V may be the proper subject of an interlocutory appeal under 28 U.S.C. § 158(a)(3).⁵⁰

⁴⁶ CARES Act § 1113(a)(4)(A).

⁴⁷ 11 U.S.C. § 109(e).

⁴⁸ 11 U.S.C. § 109(f) (only a family farmer or family fisherman may be a chapter 12 debtor); 11 U.S.C. § 101(18)(A) (definition of family farmer includes spouse); 11 U.S.C. § 101(19A) (definition of family fisherman includes spouse).

⁴⁹ *In re Johnson*, 2021 WL 825156 (Bankr. N.D. Tex. 2021).

⁵⁰ *In re Parkinson*, 2021 WL 1554068 at * 2 (D. Idaho 2021). (“[R]eviewing and resolving any questions concerning Subchapter V will not waste litigation resources, but will conserve them. In like manner, taking up Appellants’ appeal at the current juncture will advance the ultimate termination of the underlying bankruptcy litigation.”).

C. Debtor Must Be “Engaged in Commercial or Business Activities”

An individual who is the principal of an entity such as a corporation or limited liability company may want to file a subchapter V case to deal with personal liabilities arising out of guarantees or other obligations when the entity fails and is no longer operating. The entity that is out of business may itself want to deal with its assets and debts under subchapter V.

Courts have dealt with two eligibility issues when the business is no longer operating. The first is whether eligibility depends on the debtor being engaged in commercial or business activities at the time of the filing of the petition. If so, the second question is what types of activities satisfy the requirement that the debtor be engaged in commercial or business activities.

1. Whether debtor must be engaged in commercial or business activities on the petition date

In *In re Wright*, 2020 WL 2193240 (Bankr. D. S.C. 2020), the court held that nothing in the definition limits it to a debtor currently engaged in business and ruled that an individual who had guaranteed debts of two limited liability companies that were no longer in business could proceed in a subchapter V case. *Accord*, *In re Bonert*, 619 B.R. 248, 255 (Bankr. C.D. Cal. 2020); *see In re Blanchard*, 2020 WL 4032411 (Bankr. E.D. La., 2020).

Other courts have concluded that a debtor must be currently engaged in business to be eligible for subchapter V. Thus, in *In re Thurmon*, 625 B.R. 417 (Bankr. W.D. Mo. 2020), The court reasoned, “The plain meaning of ‘engaged in’ means to be actively and currently involved. In § 1182(a)(1)(A) of the Bankruptcy Code, ‘engaged in’ is written not in the past or future but in the present tense.”⁵¹ *Accord*, *e.g.*, *In re Blue*, 2021 WL 1964085 at * 6 (Bankr. M.D.N.C.

⁵¹ *In re Thurmon*, 625 B.R. 417, 422 (Bankr. W.D. Mo. 2020), Although the U.S. Trustee timely raised the issue of eligibility by objecting to the sub V election, the U.S. Trustee did not request a hearing on it. Accordingly, the ruling on eligibility occurred in connection with the hearing on confirmation of the plan, which all impaired classes of creditors had accepted. *Id.* at 423-24.

2021) (collecting and discussing cases); *In re Offer Space*, 2021 WL 1582625 at * 4 (Bankr. D. Utah 2021); *In re Ikalowych*, 2021 WL 1433241 at * 12-14 (Bankr. D. Colo. 2021), *In re Johnson*, 2021 WL 825156 (N.D. Tex. 2021).

In *In re Johnson*, 2021 WL 825156 (N.D. Tex. 2021), the debtor and the debtor’s spouse had filed a chapter 7 petition, before enactment of subchapter V, to deal with business debts arising from the debtor’s ownership of several limited liability companies.

After the U.S. Trustee filed a complaint objecting to their discharge, and after subchapter V’s effective date, the debtor and the spouse filed a motion to convert their case to chapter 11, conditioned on the court’s authorization for the case to proceed under subchapter V.

The U.S. Trustee and a number of creditors objected, asserting that a debtor must be “actively carrying out” commercial or business activities at the time of the filing of the petition to be “engaged in” commercial or business activities for purposes of subchapter V eligibility.

The court rejected the “actively carrying out” test as too narrow because it would preclude subchapter V relief for debtors with businesses temporarily closed for unexpected non-financial reasons such as weather, natural disaster, regulatory requirements, or a pandemic. But the court concluded that the inquiry is “inherently contemporary in focus instead of retrospective, requiring the assessment of the debtor’s current state of affairs as of the filing of the bankruptcy petition.” *Johnson*, 2021 WL 825156 at *6.

Because nothing indicated that the debtor’s companies were only temporarily out of business or that the debtor intended to cause any of them to resume operations, the court

The only party objecting to the plan was the U.S. Trustee, who contended that the court could not confirm the plan of a debtor ineligible for subchapter V because it was not accompanied by a disclosure statement. The court overruled the objection and confirmed the plan in the unusual circumstances of the case. The court reasoned that (1) the U.S. Trustee had in essence waived the right to request a disclosure statement by not requesting that the court require a disclosure statement while the eligibility objection was pending; and (2) the plan substantially complied with disclosure statement requirements by containing “adequate information.” *Id.* at 424.

concluded that the debtor’s prior ownership and management of them did not qualify the debtor for subchapter V. *Id.* at *7.

The *Johnson* court advanced three reasons for this conclusion.

First, applying the dictionary definition of “engaged” as “involved in activity: occupied, busy” to the statutory language, the court determined that a person “engaged in business or commercial activities” is a person “occupied with or busy in commercial or business activities – not a person who at some point in the past had such involvement.” *Id.* at * 6.

Second, the *Johnson* court noted that the purpose of subchapter V is to facilitate expedience and minimize cost for the reorganization of a small business. Such benefits are essential to the successful the reorganization of a small business that is “currently occupied with/busy in commercial or business activities” but not to a small business no longer so occupied. *Id.* at *6.

Finally, the court relied on interpretations of “engaged in” in eligibility provisions applicable to railroads under subchapter IV of chapter 11 and to chapter 12 debtors that apply a contemporary analysis to eligibility. *Id.* at *7. Thus, a former railroad did not qualify for subchapter IV,⁵² and a family farmer must be currently engaged in a farming operation or intend to continue to engage in a farming operation at the time of the filing of the petition.⁵³

In *In re Two Wheels Properties, LLC*, 625 B.R. 869 (Bankr. S.D. Tex. 2020),⁵⁴ a corporation’s charter had been forfeited under state law for tax reasons, state law did not permit

⁵² *Hileman v. Pittsburgh & Lake Erie Props., Inc. (In re Pittsburgh & Lake Erie Props., Inc.)*, 290 F.3d 516, 519 (3rd Cir. 2002).

⁵³ *Watford v. Federal Land Bank of Columbia (In re Watford)*, 898 F.2d 1525, 1528 (11th Cir. 1990). *See also In re McLawchlin*, 511 B.R. 422, 427-28 (Bankr. S.D. Tex. 2014).

⁵⁴ *Cf. In re BK Technologies, Inc.*, 2021 WL 1230123 (Bankr. N.D. W.Va. 2021) (Dismissing sub V case based on bad faith because, among other things, the debtor had liquidated its assets prior to filing the petition and, therefore, was not engaged in business).

its reinstatement in that circumstance, and state law permitted only the liquidation of its assets. The court ruled that, because the corporation could not be “engaged in commercial or business activities” under state law, it was ineligible to be a sub V debtor.

2. What activities are sufficient to establish that the debtor is “engaged in commercial or business activities” when the business is no longer operating

When an entity has gone out of business at the time of the filing of the bankruptcy case, courts concluding that sub V eligibility requires current commercial or business activities have considered whether the principal of the entity or the entity itself is nevertheless eligible based on current activities other than operating it, such as winding down its affairs or dealing with assets or creditors.

In *In re Johnson*, 2021 WL 825156 (N.D. Tex. 2021), just discussed, the individual debtor and the debtor’s spouse sought to proceed under subchapter V to deal with the debtor’s personal liabilities arising out of his ownership and operation of defunct limited liability companies.

After the court concluded that that eligibility required that the debtor be engaged in commercial or business activities at the time of the filing of the petition, the court considered the debtor’s argument that he was currently engaged in commercial or business activities because, as an employee, he managed the business of a limited liability company owned by the debtor’s mother. The mother had acquired her interest by inheritance upon the death of her husband, who had originally organized and owned it. The debtor and spouse had no ownership interest in the mother’s company.

The *Johnson* court rejected the debtor’s argument. Applying dictionary definitions of “commerce” and “business” to the eligibility statute’s language, the court concluded that a

person engaged in “commercial or business activities” is “a person engaged in the exchange or buying and selling of economic goods or services for profit.” *Id.* at *8.

Neither the debtor nor the spouse was engaged in the exchange or buying and selling of goods or services for their own profit. Because they had no ownership in the mother’s company, the debtor’s management of the company could not be for their indirect profit. Accordingly, the debtor’s management of the mother’s company as an employee and officer did not meet the requirement that the debtor be engaged in commercial or business activities. *Id.* at *8.

The court in *In re Ikalowych*, 2021 WL 1433241 (Bankr. D. Colo. 2021), agreed with the rulings in *Thurmon* and *Johnson* that whether a debtor is engaged in commercial or business activities must be determined as of the petition date. *Id.* at *12-14.⁵⁵ The *Ikalowych* court, however, held that an individual was eligible for subchapter V when the limited liability company that the debtor managed and in which the debtor held an indirect 30 percent ownership interest had surrendered its assets to the secured lender immediately before filing, but the individual was still engaged in wind down work relating to the company. *Id.* at *15-16.

Based on the text of the statute, dictionary definitions of “commercial”, “business”, and “activities”, and phrases analogous to “commercial or business activities” in other federal statutes, *id.* at *8-11, the *Ikalowych* court reasoned that the phrase “commercial or business activities” is “exceptionally broad.” *Id.* at *8.

Thus, the *Ikalowych* court interpreted “commercial or business activities” to mean, *id.* at *8:

⁵⁵ The *Ikalowych* court qualified its ruling, *id.* at *14:

[F]ocusing only on the exact nanosecond the Petition was filed is a bit too narrow. For example, perhaps the Debtor did no work on the Petition Date itself. So, in considering whether the Debtor was engaged in “commercial or business activity” as of the Petition Date, the Court deems relevant the circumstances immediately preceding and subsequent to the Petition Date as well as the Debtor’s conduct and intent.

[A]ny private sector actions related to buying, selling, financing, or using goods, property, or services, undertaken for the purpose of earning income (including by establishing, managing, or operating an incorporated or unincorporated entity to do so).

In determining whether a debtor is engaged in “commercial or business activity,” the court employed a “totality of the circumstances” test, which includes consideration of the circumstances immediately before and after the date of the sub V filing as well as the debtor’s conduct and intent. *Id.* at *14.⁵⁶

The *Ikalowych* court acknowledged that the facts in *Thurmon* (discussed in the previous section) and *Johnson* were similar to, but not the same as, the facts in the case before it. *Id.* at *15, *16. The distinguishing factor was the wind down work, which included interactions with the lender and a landlord, cleanup and turnover of leased premises, assisting with payroll, dealing with tax accountants and tax issues, and organization and storage of business records. *Id.* at *15. The court reasoned, “Each category of Wind Down Work itself constitutes ‘commercial or business activities’ in the broad sense.” *Id.* at *16.

The *Ikalowych* court also considered whether the debtor was “engaged in commercial or business activities” based on two other activities.

First, the debtor was the sole owner of a limited liability company that he formed and managed as a mechanism to obtain income through investments and the provision services. This limited liability company owned 30 percent of the operating company just discussed and also received income from the debtor’s services as a board member of a cemetery company and as a

⁵⁶ The court cited *Watford v. Fed. Lank Bank of Columbia (In re Watford)*, 898 F.2d 1525, 1528 (11th Cir. 1990), which adopted a “totality of the circumstances” test to decide whether the debtor in a chapter 12 case was “engaged in a farming operation.”

consultant for other companies. The court concluded, “Managing or directing the operations of a limited liability company is a ‘commercial or business activity.’” *Id.* at *14.

Second, the court considered the debtor’s employment by an insurance brokerage company (in which the debtor had no ownership interest) to sell its commercial insurance products, which had begun shortly before filing, qualified as “commercial or business activities.” Under the broad scope of the definition, the court ruled, *id.* at *16 (citations to dictionary definitions omitted):

[T]he Debtor’s work as a wage earner with [the insurance company] constitutes “commercial or business activities.” After all, his role is selling a product in the private marketplace in order to make money for himself and his employer. That is what “commercial activity” and “business activity” means.

The court realized that its conclusion “suggests that virtually all private sector wage earners may be considered as ‘engaged in commercial or business activities.’ So be it.” *Id.* at *17. But the court continued, this does not mean that every private sector wage earner is eligible for subchapter V because most such individuals will rarely meet the requirement that 50 percent of the debt arise from such activity. *Id.* at *17. Section III(E) discusses this aspect of the court’s ruling.

The court in *In re Offer Space*, 2021 WL 1582625 (Bankr. D. Utah), likewise concluded that a debtor no longer operating its business was nevertheless “engaged in commercial or business activities” in the circumstances of the case.

About three months before the subchapter V filing, after several months of difficulties due to legal claims and chargebacks, the debtor began informing its customers that it would be unable to continue to provide vendor marketing services, which included customer relations

management, merchant account management, and marketing campaign management using proprietary software. One of its customers purchased the software in exchange for shares of its publicly traded stock. *Id.* at *1.

At the time of filing, the debtor was no longer conducting business, had no employees, and did not intend to reorganize. It had been marshaling its assets and taking steps to realize value from its assets and pay its creditors. Its assets consisted of a bank account, accounts receivable, counterclaims in a lawsuit, and the stock. *Id.* at * 1.

The U.S. Trustee objected to eligibility because the debtor was not an operational business on the petition date. *Id.* at *2.

Like the *Ikalowych* court, the *Offer Space* court looked to the dictionary definitions of relevant terms (“engaged,” “commercial,” “business,” and “activity”), *Offer Space*, 2021 WL 1582625 at *3, and noted that Congress had chosen “very broad language.” *Id.* at *4. The court observed that, in contrast to the definition of a family farmer in § 101(18A), which refers to a debtor engaged in a farming *operation*, the subchapter V definition uses the broader and more inclusive term, *activities*. *Id.* at *5.

Considering the “totality of the circumstances,” the *Offer Space* court concluded that the debtor was “engaged in commercial or business activities” because it had active bank accounts, had accounts receivable, was analyzing and exploring counterclaims in a lawsuit, was managing the publicly traded stock in acquired from the earlier sale of its main operational asset, and was winding down its business, including steps to pay creditors and realize value from its assets. *Offer Space*, 2021 WL 1582625 at *4.

The *Offer Space* court rejected the U.S. Trustee’s contention that the legislative history of SBRA demonstrated that subchapter V is not available for a debtor seeking to liquidate its shutdown operations.

After concluding that the plain language of the statute made it unnecessary to consider legislative history, the court concluded that, although successful reorganizations might be the primary purpose of SBRA, noting indicated that it did not have other purposes, including “relief for small business debtors who intend to liquidate their businesses without the cumbersome structure that otherwise exists in Chapter 11.” *Id.* at *5. Moreover, the court observed, chapter 11 permits confirmation of liquidation plans under § 1129(a)(11),⁵⁷ and Congress did not include this section in the list of those that it made inapplicable in subchapter V cases. *Id.*

The debtor in *in re Port Arthur Steam Energy, L.P.*, 2021 WL 2777993 (Bankr. S.D. Tex. 2021), similarly had terminated its historical business operations before it filed its subchapter V case but was engaged in other activities that the court concluded were sufficient for it to be “engaged in commercial and business activities.”

Two principals of the debtor’s limited partner and an independent contractor managed the debtor and maintained its facility and vehicles to preserve the value of the assets, including running technical parts of the facilities, maintaining utilities like power and water, making repairs after severe storms, and filing reports and tax returns that state and federal agencies required. The managers worked on a plan to sell assets and pay creditors in the chapter 11 case

⁵⁷ Section 1129(a)(11) conditions confirmation of a plan on a determination that confirmation “is not likely to be followed by the liquidation . . . of the debtor or any successor to the debtor, unless such liquidation . . . is proposed in the plan.”

The court in *In re Port Arthur Steam Energy, L.P.*, 2021 WL 2777993 at *3 (Bankr. S.D. Tex. 2021), also noted that a subchapter V debtor may propose a plan that includes selling all assets to pay creditors. The court observed that § 1123(b)(4) permits a chapter 11 plan to provide for the sale of all or substantially all of its assets and that it is not one of the sections that is inapplicable in a subchapter V case.

and sold one asset in the months preceding the bankruptcy filing. The debtor was also litigating a multi-million dollar lawsuit and pursuing collection remedies on an account receivable, both arising out of its prepetition transactions with a party who claimed to be a creditor in the case and objected to the subchapter V election. *Id.* at *3.

The court concluded that, because all of these activities were “commercial or business activities,” the debtor was eligible for subchapter V relief. *Id.* at *3.

The *Port Arthur Steam Energy* court addressed the argument that eligibility for subchapter V required current operation of a business because SBRA’s legislative history demonstrated that the Congressional purpose of subchapter V was to promote reorganizations. The court rejected the argument, concluding that, because the eligibility statute is not ambiguous, consideration of legislative history was not properly a part of the analysis. In any event, the court continued, a subchapter V debtor may propose a plan that includes selling all assets to pay creditors. *Id.* at *3.

The court in *In re Blue*, 2021 WL 1964085 (Bankr. M.D.N.C. 2021), held that a salaried employee who received a material contribution to her income from part-time consulting work as an independent contractor was “engaged in commercial or business activities.” Agreeing with the *Offer Space* reasoning that “activities” is a much broader term than “operations,” the court concluded, “[N]othing in the Bankruptcy Code or legislative history of subchapter V mandates that commercial or business activities must be full-time to qualify, and Debtor’s activities in this case are substantial and material.” *Id.* at *7.

The *Blue* court also concluded that the debtor’s rental of her former residence to tenants was within the broad scope of commercial or business activities. *Id.* at 10.

The *Blue* court ruled that more than 50 percent of the debtor’s debts arose from commercial or business activities and that such debts did not have to arise from the debtor’s current commercial or business activities for purposes of sub V eligibility. Sections III(D) and (III(E)), respectively, discuss these aspects of the court’s decision.

D. What Debts Arise From Debtor’s Commercial or Business Activities

Eligibility for subchapter V requires that not less than 50 percent of the debtor’s debts arise from the commercial or business activities of the debtor.⁵⁸ Chapter 12 similarly conditions eligibility on a specified percentage of debt arising from a farming or fishing operation.⁵⁹ The court in *In re Ikalowych*, 2021 WL 1433241 at *18 (Bankr. D. Colo. 2021), applying chapter 12 case law, concluded that qualifying business debts “must be directly and substantially connected to the ‘commercial or business activities’ of the debtor.”⁶⁰

The *Ikalowych* court determined that the individual debtor’s liability on guarantees of certain debts of a limited liability company that he managed and was winding down and of his wholly-owned operating company that provided his services and that owned 30 percent of the limited liability company met this standard.⁶¹ Because these debts were 86 percent of his total

⁵⁸ The requirement is in paragraph (A) of new § 1182(1), which governs subchapter V eligibility under the CARES Act, which increased the debt limit for subchapter V eligibility. When the increased debt limit sunsets on March 27, 2022, § 101(51D) will govern sub V eligibility. See Section III(B). Paragraph (A) is the same in both statutes. See Section III(B).

⁵⁹ For a family farmer, 50 percent of the debts must arise from a farming operation. § 101(18)(A). In addition, 50 percent of the debtor’s income must be received from the farming operation. *Id.* The same percentages apply in the definition of a family fisherman who is an individual. § 101(19A)(A). For a family fisherman that is a corporation or partnership, the debt relating to the fishing operation must be 80 percent, and more than 80 percent of the value of its assets must be related to the fishing operation. § 101(19A)(B).

⁶⁰ The court quoted *In re Woods*, 743 F.3d 689, 698 (10th Cir. 2014), which in the chapter 12 context stated, “a debt ‘for’ a principal residence ‘arises out of’ a farming operation only if the debt is directly and substantially connected to the farming operation.”

⁶¹ Section (III)(C)(2) discusses the *Ikalowch* court’s ruling that the debtor was “engaged in commercial or business activities.” The court also determined that the debtor was engaged in commercial or business activities as a salaried employee, but the court concluded that those activities did not make the debtor eligible for subchapter V because none of the debts arose from that activity.

debts, the court concluded he was eligible for subchapter V. *Ikalowych*, 2021 WL 1433241 at *18.

In *In re Blue*, 2021 WL 1964085 (Bankr. M.D. N.C. 2021), the debtor had retained her former residence when she bought a new one and rented it until she evicted a tenant approximately three years before filing. Because the tenant had substantially damaged the property, the debtor owed \$ 38,271.31 for partial repairs but had not been able to complete them and had not rented it in the meantime.

After determining that her rental of the property fell within the “broad scope of commercial or business activities,” *id.* at 10, the court considered the question of whether the mortgage debt on the property and the repair debts arose from such activities.

The court concluded that the debtor had originally incurred mortgage debt when she purchased it for her residence and that she did not intend to lease it at that time. The court ruled, therefore, that the mortgage debt did not arise from commercial or business activities. *Id.* at *9-10.

The court found that the debtor had continuously rented the property until the damage to the property occurred and that she had not rented it since then because of her inability to finance and complete necessary repairs. Because the damage occurred when she was actively renting the property, the court concluded, the debts arose from commercial or business activities. *Id.* at 11.

In re Sullivan, 626 B.R. 326 (Bankr. D. Colo. 2021), examined the question of how to determine whether debts “arose from the commercial or business activities of the debtor” in detail.⁶²

⁶² The definition in effect under the CARES Act is in § 1182(a)(1). See Section III(B). The *Sullivan* court discussed the definition in § 101(51D)(A), which has the same language, because the case was filed before enactment of the CARES Act, and the CARES Act applies only to cases filed after its enactment.

The debt in question was the debtor's obligation imposed in a divorce proceeding to pay the former spouse an "equalization payment" for the former spouse's share of the value of the debtor's business that the debtor retained. Shortly after the filing of the case, the COVID-19 pandemic hit and resulted in the liquidation of the business.

Proper characterization of the equalization payment was critical because, if it were not a business debt, the debtor's business debts would be less than 50 percent of the total, and the debtor would be ineligible to be a sub V debtor. Because the court concluded that the equalization debt did not arise from a business or commercial purpose, the court ruled that the debtor was ineligible and denied confirmation of the sub V plan. *Sullivan*, 626 B.R. at 333.⁶³

The *Sullivan* court began its analysis by noting that, although the Bankruptcy Code does not define when a debt arises from "commercial or business activities," it defines "consumer debts" in § 101(18) as "debts incurred by an individual primarily for a personal, family, or household purpose." In determining whether a debt is for a "personal, family, or household purpose," the court continued, courts have focused on the debtor's purpose in incurring the debt,⁶⁴ reasoning that a debt incurred with a "profit motive" or an "eye toward profit" is not a

⁶³ The situation in *Sullivan* suggests two questions.

The first is whether the former spouse or any other party in interest timely objected to the debtor's sub V election as Interim Bankruptcy Rule 1020(b) requires. The court did not address whether a court may consider an out-of-time objection to the subchapter V election or whether the court may raise the issue *sua sponte* after the time for an objection has expired.

A second, more practical, question is what benefit the debtor expected to gain from a successful subchapter V case. Any debt arising from a separation agreement or divorce decree that is not a domestic support obligation is excepted from discharge under § 523(a)(15), and the sub V discharge of an individual is subject to all exceptions in § 523(a). See Part IX. A plan could not have eliminated the debtor's liability for the equalization payment.

⁶⁴ The court cited *In re Garcia*, 606 B.R. 9, 106 (Bankr. D. N.M. 2019).

consumer debt. *Id.* at 330-31.⁶⁵ The court noted rulings that student loans,⁶⁶ alimony obligations,⁶⁷ and divorce-related debts are consumer debts.⁶⁸

The debtor argued that the equalization debt arose from business or commercial activities because it represented a transfer of the value of the business, akin to one partner's buy-out of another's interest in a business. The court acknowledged, "[I]t is possible to characterize this debt as a business debt and it is possible to treat many otherwise personal or family debts as debts incurred with an eye toward profit," but noted that the profit motive inquiry raised difficulties: "Probably all courts would agree that the home mortgage debt is a consumer debt and yet the family home is the asset that most families view as their greatest investment – the one that they purchase with an eye toward appreciation in value." *Sullivan*, 626 B.R. at 331.

Because the legislative history of the definition of "consumer debt" in § 101(8) indicated that it was adapted from consumer protection laws and because the § 101(8) definition mirrors the definition of consumer debt in the Truth in Lending Act ("TILA"), the court sought further guidance from cases interpreting the TILA. *Id.* at 331-32.

Cases under the TILA, the court explained, focus on the purpose of the loan transaction. The *Sullivan* court quoted a five-factor test that another court employed in *Sundby v. Marquee Funding Group, Inc.*, 2020 WL 5535357 at * 8-9 (S.D. Ca. 2000) (internal quotations and citations omitted):

1. The relationship of the borrower's primary occupation to the acquisition. The more closely related, the more likely it is to be a business purpose.

⁶⁵ The court cited *Stewart v. U.S. Trustee (In re Stewart)*, 175 F.3d 769, 806 (10th Cir. 1999) and *In re Booth*, 858 F.2d 1051, 1055 (5th Cir. 1988).

⁶⁶ The court cited *Stewart v. U.S. Trustee (In re Stewart)*, 175 F.3d 769, 807 (10th Cir. 1999).

⁶⁷ The court cited *Stewart v. U.S. Trustee (In re Stewart)*, 175 F.3d 769, 807 (10th Cir. 1999).

⁶⁸ The court cited *Kestell v. Kestell (In re Kestell)*, 99 F.3d 146, 149 (4th Cir. 1996); *In re Garcia*, 606 B.R. 98, 105 (Bankr. D. N. M. 2019), and *In re Traub*, 140 B.R. 286 (Bankr. D. N.M. 1992).

2. The degree to which the borrower will personally manage the acquisition. The more personal involvement there is, the more likely it is to be business purpose.

3. The ratio of income from the acquisition to the total income of the borrower. The higher the ratio, the more likely it is to be business purpose.

4. The size of the transaction. The larger the transaction, the more likely it is to be business purpose.

5. The borrower's statement of purpose for the loan.

The *Sullivan* court concluded that the first four of these factors favored characterization of the equalization debt as a business debt. But the court questioned whether it had a business purpose. "While the debtor characterizes the equalization payment as payment for the [debtor's business], the separation agreement does not describe it in that fashion. Rather, it states that it was a payment 'to equalize the division of marital property . . .', and [the business] was only one asset of their marital property." *Sullivan*, 626 B.R. at 332.

The *Sullivan* court next looked to federal tax law as a source for distinguishing between "business" and "personal" payments in that it generally permits a deduction for "ordinary and necessary business expenses," but not for most personal expenses. *Id.* at 332-33.

The court analyzed the Supreme Court's decision in *United States v. Gilmore*, 372 U.S. 39 (1963), which held that a taxpayer could not deduct legal fees incurred in connection with the division of business interests in a divorce proceeding as a business expense. Rejecting the taxpayer's argument that the legal fees were a business expense because they were incurred to protect interests in various corporations, the Supreme Court held that the focus should be on "the original character of the claim with respect to which an expense was incurred, rather than its potential consequences on the fortunes of the taxpayer." 372 U.S. at 49. Because the spouse's

claims stemmed entirely from the marital relationship, and not from income-producing activity, the Supreme Court concluded that the legal fees were not business expenses and denied the deduction. *Id.* at 52. The *Sullivan* court noted that the Supreme Court stated, “[T]he marriage relationship can hardly be deemed an income-producing activity.” *Sullivan*, 626 B.R. at 333, quoting *Gilmore*, 372 U.S. at 52 n. 22.

After analyzing marriage dissolution under state law as an equitable proceeding including the division of marital property to each spouse of what equitably belongs to each spouse, the *Sullivan* court concluded, 626 B.R. at 333 (citations omitted):

[T]he equalization payment debt is rooted and grounded in the equitable termination of their marriage. The equitable distribution of their marital property was not a business or commercial transaction – it did not stem from a profit motive. Instead, it was a method of ensuring that each spouse received their fair share of marital property. This is inherently a personal and family-related purpose. The fact that the parties’ marital property included a business does not alter the underlying purpose of the property division.

E. Whether Debts Must Arise From Current Commercial or Business Activities

Eligibility for subchapter V requires that the debtor be “engaged in commercial or business activities” and that not less than 50 percent of the debtor’s debts arise from “the commercial or business activities of the debtor.” § 101(51D)(A); New § 1182(1)(A).

In *In re Ikalowych*, 2021 WL 1433241 (Bankr. D. Colo. 2021), the court concluded that an individual working as a salaried employee was engaged in commercial or business activities. *Id.* at 16. The court observed that, although this ruling suggested “that virtually all private sector wage earners may be considered as ‘engaged in commercial or business activities,’” *id.* at 16,

this did not mean that every private sector wage earner is eligible for subchapter V relief because most such individuals will rarely meet the requirement that 50 percent of the debt arise from such activity. *Id.* at 17. Thus, the court concluded that debtor’s employment did not make him eligible for subchapter V because none of the debts arose from that activity. *Id.* at *17.

The court’s conclusion was not necessary for the decision; the court determined that most of the debtor’s debts arose from other commercial or business activities. Nevertheless, the implication may be that eligibility requires that more than 50 percent of the debtor’s debts must be connected to current commercial or business activities.

The court in *In re Blue*, 2021 WL 1964085 (Bankr. M.D. N.C. 2021), addressed this issue and ruled that no connection is necessary. There, the debtor filed a subchapter V case to deal with debts arising from her ownership and operation of a corporation that had discontinued its operations about 21 months earlier, as well as other debts. At the time of filing, the debtor was a salaried, full-time, W-2 employee. In addition to her income, the debtor worked part-time for two different companies as an independent contractor.

As section III(C)(2) discusses, the *Blue* court determined that the debtor’s work as an independent contractor constituted “commercial or business activities.” The Bankruptcy Administrator, however, argued that the debtor was not eligible for subchapter V because no nexus existed between the debtor’s current activities as an independent contractor and the debts arising from her previous activities. *Id.* at *7.

The premise of the argument is based on the language of the eligibility requirement, which states that not less than 50 percent of the debtor’s debt must arise from “*the* commercial or business activities of the debtor.” § 101(51D)(A); § 1182(1)(A) (emphasis added). Use of the word “the” at the end of paragraph (A), the argument continues, implies a reference to the same

“commercial or business activities” in which the debtor must be engaged under the language at the beginning of paragraph (A).

The *Blue* court rejected the argument, concluding, “Such an implication is not required by the language of the statute, and would be far too limiting for the remedial purposes of subchapter V.” *Id.* at 7. The court reasoned that courts have interpreted and applied the eligibility statute broadly, citing cases noting that the purposes of SBRA include providing relief for debtors that intend to liquidate their businesses without the cumbersome structure that otherwise exists in chapter 11⁶⁹ and that debtors may proceed under subchapter V even though their debts stem from both currently operating and non-operating businesses.⁷⁰ *Id.* at 8.

The *Blue* court concluded, *id.* at 8:

[D]ebtor intends to use subchapter V to address both defunct and non-defunct commercial and business activities, and the more straightforward interpretation of § 1182(1)(A) does not require a connection of debts to current business activities. Nothing in the statute requires that there be a nexus between the qualifying debts and the Debtor's current business or commercial activities. Moreover, such an interpretation could, for example, disqualify meritorious small businesses from the remedial purposes of subchapter V simply by having significant debts from former operations. The Court will not interpret subchapter V as narrowly as suggested by the BA.

F. What Debts Are Included in Determination of Debt Limit

A debtor is not eligible for subchapter V if the “aggregate noncontingent liquidated secured and unsecured debts as of the date of the filing of the petition or the date of the order for

⁶⁹ The court cited *In re Offer Space, LLC*, 2021 WL 1582625 at *2 (Bankr. D. Utah 2021).

⁷⁰ The court cited *In re Blanchard*, 2020 WL 4032411 at *2 (Bankr. E.D. La. 2020).

relief” exceed the applicable debt limit. Debts owed to affiliates or insiders are excluded from the calculation. § 101(51D)(A); New § 1182(1)(A).

But a debtor is ineligible if the debtor is a member of a group of affiliated debtors when the aggregate of all such debts of all of the affiliates exceeds the debt limit. § 101(51D)(B)(i); New § 1182(1)(B)(ii).

The requirement that debts be “liquidated” and “noncontingent” for inclusion in the debt limit also appears in the eligibility requirements for relief under chapters 12⁷¹ and 13.⁷²

The court in *In re Parking Management, Inc.*, 620 B.R. 544 (Bankr. D. Md. 2020), considered subchapter V’s eligibility debt limits, noting that courts had addressed similar language governing debt limitations in chapter 12 and 13 cases. The court observed that the standards in those cases provide useful guidance but that subchapter V cases involve more complex creditor relationships. *Id.* at *5.

The court concluded that claims for damages arising from the rejection of unexpired leases were contingent, *id.* at *5-7, and that the debtor’s obligations under a note pursuant to the Paycheck Protection Funding Program of the CARES Act were both contingent and unliquidated, *id.* at 9-12. Because these debts were not included in the debt eligibility calculation, the court ruled that the debtor was eligible for subchapter V.

In re 305 Petroleum, Inc., 622 B.R. 209 (Bankr. S.D. Miss. 2020), considered the exclusion of debts of debtors in an affiliated group. Four affiliated debtors filed chapter 11 cases. Each of them had elected subchapter V, but one was a single asset real estate debtor that

⁷¹ Chapter 12 is available only to a “family farmer” or “family fisherman” under § 109(f). Definitions of the terms include the debt limit requirement. §§ 101(18)(A); 101(19A)(A)(i).

⁷² § 109(e). For a discussion of what debts are “liquidated” and “noncontingent” for purposes of the debt limitation in chapter 13 cases, *see generally* W. Homer Drake, Jr., Paul W. Bonapfel, & Adam M. Goodman, CHAPTER 13 PRACTICE AND PROCEDURE §§ 12:8, 12:9.

was ineligible for subchapter V. In this opinion, the court considered whether the three debtors were also ineligible because the debt of all of the affiliates exceeded \$ 7.5 million. Without including the SARE debtor, the debt of all of the affiliates was less than \$ 7.5 million.

The court concluded that the debts of all filing affiliates were included in the debt limit and that, therefore, none of them were eligible because their collective debts exceeded \$ 7.5 million.

The court analyzed the issue under the definition of small business debtor in § 101(51D) and reached the correct result under its provisions. Paragraph (B) of § 101(51D) excludes “any member of a group of affiliated *debtors*” (emphasis added) if the group’s debts collectively exceed the limit. “Debtor” is defined in § 101(13) as a person “concerning which a case under [title 11] has been commenced.” Because all of entities had filed and they were affiliates, each was a member of a group of affiliated debtors with aggregate debts in excess of the limit. Therefore, none of them were eligible.

But because the case arose after the CARES Act, the applicable statute is § 1182(1), as section III(A) discusses. Although § 1182(1) uses the same language as § 101(51D), the outcome is potentially different.

As amended by the CARES Act, § 1182(1)(A) defines “debtor” for purposes of subchapter V, and it is part of subchapter V. Because § 1182(1)(A) defines “debtor,” the definition of “debtor” in § 101(13) arguably does not apply. Because § 1182(1)(A) excludes an SARE debtor, it is not a member of the group of “affiliated debtors” for purposes of the exclusion in § 1182(1)(B)(i), and its debts are not included in determining eligibility. In other words, “debtors” in § 1182(1)(B)(i) means “debtors” under (1)(A), which does not include an SARE.

An argument in favor of this reading is that, if Congress had intended otherwise, it would have used “persons” in (B)(i), or more simply, “affiliates”, so that § 1182(1)(B)(i) would read as follows:

(B)(1) Debtor. -- The term “debtor” —

(B) does not include –

(i) any member of a group of [*affiliates or affiliated persons*] that has
[debts greater than \$7.5 million].

Under this analysis, the non-SARE debtors in *350 Petroleum* would be eligible for subchapter V because the SARE entity is excluded.

The argument in favor of including the debts of the SARE debtor is that Congress in the CARES Act amendments did not intend to change the eligibility requirements of § 101(51D) other than to increase the debt limit. Moreover, the contrary interpretation involves a circular definition of “debtor.” It requires use of the § 1182(1) definition of “debtor” to determine the meaning of “debtors” in one part of the definition. This creates an ambiguity that leads to an interpretation that uses the general definition of debtor in § 101(13) as the proper definition of the term in (1)(B). The ineligibility of all of the debtors in *350 Petroleum* then follows.

G. Ineligibility of Corporation Subject to SEC Reporting Requirements and of Affiliate of Issuer

The SBRA added two exclusions from the definition of “small business debtor” that did not previously exist. The CARES Act made a technical correction to the SBRA language.⁷³

As amended by SBRA and the CARES Act, the definition of “small business debtor” does not include a debtor that “is a corporation subject to the reporting requirements under

⁷³ See Section III(B).

section 13 or 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78m, 78o(d)).”

§ 101(51D)(B)(ii). Under § 1182(1), which governs sub V eligibility until March 27, 2022,⁷⁴ identical language makes such a debtor ineligible for subchapter V. § 1182(1)(B)(ii). In general, the provisions of the Securities Exchange Act require reporting by any public company.

Subparagraph (B)(iii) of both § 101(51D) and § 1182(1) also exclude “an affiliate of an issuer (as defined in section 3 of the Securities Exchange Act of 1934 (15 U.S.C. 78c).” Section 3(8) of the Securities Exchange Act defines “issuer” as “any person who issues or proposes to issue any security.” 15 U.S.C. § 78(c)(8). Section 3(10) broadly defines “security” as including, among other things, any “stock,” “certificate of interest or participation in any profit-sharing agreement,” or “investment contract.” 15 U.S.C. § 78(c)(10).

Read broadly, the (B)(iii) exclusion for the affiliate of an issuer would render ineligible any debtor that is an affiliate of any corporation or other limited liability entity. By definition, stock in a corporation or an interest in a limited liability entity is a “security.” Thus, for example, if an individual has a sufficient equity interest in two or more such entities to qualify as an “affiliate” under § 101(2), all of the affiliates would be disqualified. Similarly, if one entity is an affiliate of another, neither could be a small business or sub V debtor.

Congress could not have intended such results. The appropriate interpretation of (B)(iii) is to limit its application to an affiliate of an issuer that is subject to the reporting requirements specified in (B)(ii).

In re Serendipity Labs, Inc., 620 B.R. 679 (Bankr. N.D. Ga. 2020), considered whether the corporate debtor was an affiliate of a publicly traded company. The public company owned more than 27 percent of the voting shares of the debtor but only 6.51 percent of the voting shares

⁷⁴ See Section III(A).

of the debtor entitled to vote on the debtor's bankruptcy filing. The debtor argued that, in determining whether the public company was an "affiliate" within the definition of § 101(2)(a), the court should count only the shares with power to vote on the matter before the court, *i.e.*, the bankruptcy filing.

Section 101(2)(a) defines "affiliate" to include "an entity that directly or indirectly owns, controls, or holds with power to vote, 20 percent or more of the outstanding voting securities of the debtor." The *Serendipity Labs* court noted that the Bankruptcy Code does not define "voting securities" but that the Securities Exchange Commission in 17 C.F.R. § 230.405 defined "voting securities" as "securities the holders of which are presently entitled to vote for the election of directors." The court concluded that this unambiguous definition is the appropriate one to use for purposes of § 101(2)(a). 620 B.R. at 683. All of shares held by the public company met this requirement.

Analyzing a split of authority on the issue in other contexts, the *Serendipity Labs* court ruled that the language of § 101(2)(a) did not limit the meaning of "voting securities" to those entitled to vote on the matter before the court. The court reasoned that "power to vote" in § 101(2)(a) modifies only the holding of securities, not their ownership or control. Because the public company owned more than 20 percent of the debtor's voting securities, it was an affiliate. Accordingly, the debtor, as an affiliate of an issuer, was ineligible for subchapter V. 620 B.R. at 685.

IV. The Subchapter V Trustee

A. Appointment of Subchapter V Trustee

Subchapter V provides for a trustee in all cases.⁷⁵ The trustee is a standing trustee, if the U.S. Trustee has appointed one, or a disinterested person that the U.S. Trustee appoints. SBRA § 4(b) amends 28 U.S.C. § 586 to make its provisions for the appointment of standing chapter 12 and 13 trustees applicable to the appointment of standing sub V trustees. The court has no role in the appointment of the trustee.⁷⁶

The United States Trustee Program has selected a pool of persons who may be appointed on a case-by-case basis in sub V cases rather than appointing standing trustees.⁷⁷ The appointment of a sub V trustee in each case instead of a standing trustee appears to be contrary to the expectations of proponents of the SBRA. In his testimony in support of the legislation on behalf of the National Bankruptcy Conference, retired bankruptcy judge A. Thomas Small stated, “There will be a standing trustee in every subchapter V case who will perform duties similar to those performed by a chapter 12 or chapter 13 trustee.”⁷⁸

B. Role and Duties of the Subchapter V Trustee

The role of the sub V trustee is similar to that of the trustee in a chapter 12 or 13 case. But as later text discusses, a sub V trustee has the specific duty to “facilitate the development of

⁷⁵ § 1183(a). SBRA § 4(a)(3) amends § 322(a) to provide for a sub V trustee to qualify by filing a bond in the same manner as other trustees.

⁷⁶ New § 1181(a). Section 1104, which governs the appointment of a trustee in a traditional chapter 11 case, does not apply in sub V cases. In a sub V case, the U.S. Trustee’s appointment of the trustee is not subject to the court’s approval as it is under § 1104(d).

⁷⁷ See Adam D. Herring and Walter Theus, *New Laws, New Duties; USTP’s Implementation of the HAVEN Act and the SBRA*, 38 AMER. BANKR. INST. J. 12 (Oct. 2019).

⁷⁸ *Hearing on Oversight of Bankruptcy Law & Legislative Proposals Before the Subcomm. On Antitrust, Commercial and Admin. Law of the H. Comm. On the Judiciary*, 116th Cong. 2 (Revised Testimony of A. Thomas Small on Behalf of the National Bankruptcy Conference), available at https://www.fjc.gov/sites/default/files/REVISED_TESTIMONY_OF_A_THOMAS_SMALL.pdf.

a consensual plan of reorganization.” New § 1183(b)(7). Sub V trustees may, therefore, confront issues that are quite different from those that trustees in other cases deal with.⁷⁹

New § 1183 enumerates the trustee’s duties. Section 1106, which specifies the duties of the trustee in a traditional chapter 11 case, does not apply in sub V cases.⁸⁰ New § 1183, however, makes many of its provisions applicable in some circumstances. As in chapter 12 and 13 cases, the debtor remains in possession of assets and operates the business. If the court removes the debtor as debtor in possession under new § 1185(a), the trustee operates the business of the debtor.⁸¹

1. Trustee’s duties to supervise and monitor the case and to facilitate confirmation of a consensual plan

In general, the role of the trustee is to supervise and monitor the case and to participate in the development and confirmation of a plan.⁸² This role arises from several provisions that are the same as those in chapter 12 cases, with some significant additions.

⁷⁹ The United States Trustee Program has promulgated its expectations with regard to the duties of the sub V trustee and the trustee’s role in the case. U.S. DEP’T OF JUSTICE, HANDBOOK FOR SMALL BUSINESS CHAPTER 11 SUBCHAPTER V TRUSTEES (Feb. 2020), <https://www.justice.gov/ust/private-trustee-handbooks-reference-materials/chapter-11-subchapter-v-handbooks-reference-materials> [hereinafter SUBCHAPTER V TRUSTEE HANDBOOK]. For a discussion of the sub V trustee’s duties and role in the case, and strategic considerations for creditors, see Christopher G. Bradley, *The New Small Business Bankruptcy Game: Strategies for Creditors Under the Small Business Reorganization Act*, 28 AMER. BANKR. INST. L. REV. 251, 260-62, 267-71 (2020).

⁸⁰ New § 1181(a).

⁸¹ New § 1183(b)(5).

⁸² The SUBCHAPTER V TRUSTEE HANDBOOK, *supra* note 79, at 1-1, provides an overview of the sub V trustee’s duties:

In general, among the most important subchapter V trustee duties are assessing the financial viability of the small business debtor, facilitating a consensual plan of reorganization, and helping ensure that the debtor files or submits complete and accurate financial reports. The subchapter V trustee also may be required to act as a disbursing agent for the debtor’s payments under the confirmed plan of reorganization. In certain instances, the subchapter V trustee may be required to administer property of the debtor’s bankruptcy estate for the benefit of creditors.

The Handbook notes, “The subchapter V trustee is an independent third party and a fiduciary who must be fair and impartial to all parties in the case.” *Id.* at 2-2. For a summary of the U.S. Trustee Program’s views of the sub V trustee’s duties, see *id.* at 1-5 to 1-7.

First, the sub V trustee has the duty to “facilitate the development of a consensual plan of reorganization.”⁸³ No other trustee has this duty, although a chapter 13 trustee has the duty to “advise, other than on legal matters, and assist the debtor in performance under the plan.”⁸⁴ One practitioner has suggested that the sub V trustee should be a “financial wizard” who can work with all parties on cash flows, interest rates, payment requirements, and “all the numbers puzzles that comprise a plan,” and that the statutory goal of a consensual plan suggests that the trustee also fill a mediation role.⁸⁵ The United States Trustee Program expects sub V trustees to be proactive in the plan process.⁸⁶

Second, the trustee must appear and be heard at the status conference that new § 1188(a) requires.⁸⁷ Although § 105(d) (which does not apply in a sub V case under new § 1181(a)) provides for a status conference in any case on the court’s own motion or on the request of a party in interest, it does not require one. Thus, a status conference is not required in any other type of case. Section VI(C) discusses the status conference.

⁸³ New § 1183(b)(7).

⁸⁴ § 1302(b)(4).

⁸⁵ Donald L. Swanson, *SBRA: Frequently Asked Questions and Some Answers*, 38 AMER. BANKR. INST. J. 8 (Nov. 2019). See also Christopher G. Bradley, *The New Small Business Bankruptcy Game: Strategies for Creditors Under the Small Business Reorganization Act*, 28 AMER. BANKR. INST. L. REV. 251, 261 (2020) (“Trustees seem likely to play the role of mediator.”).

⁸⁶ The SUBCHAPTER V TRUSTEE HANDBOOK, *supra* note 79, at 3-9, states:

As soon as possible, the trustee should begin discussions with the debtor and principal creditors about the plan the debtor will propose, and the trustee should encourage communication between all parties in interest as the plan is developed. The trustee should be proactive in communicating with the debtor and debtor’s counsel and with creditors, and in promoting and facilitating plan negotiations. Depending upon the circumstances, the trustee also may participate in the plan negotiations between the debtor and creditors and should carefully review the plan and any plan amendments that are filed.

When the plan is filed, the Handbook advises the sub V trustee to “review the plan and communicate any concerns to the debtor about the plan prior to the confirmation hearing.” *Id.*

⁸⁷ New § 1183(b)(3). See SUBCHAPTER V TRUSTEE HANDBOOK, *supra* note 79, at 3-8 (“The trustee should review the debtor’s report carefully. . .” and “should be prepared to discuss the debtor’s report, to respond to any questions by the court, and to discuss any other related matters that may be raised at the status conference.”).

Finally, the trustee must appear and be heard at any hearing concerning: (1) the value of property subject to a lien; (2) confirmation of the plan; (3) modification of the plan after confirmation; and (4) the sale of property of the estate.⁸⁸

The responsibility of the sub V trustee to participate in the plan process and to be heard on plan and other matters implies a right to obtain information about the debtor's property, business, and financial condition. Like a chapter 12 trustee, however, a sub V trustee does not have the duty to investigate the financial affairs of the debtor. Section 704(a)(4) imposes such a duty on a chapter 7 trustee, and it is a duty of a chapter 13 trustee under § 1302(b)(1). A trustee in a traditional chapter 11 case has a broad duty of investigation under § 1106(a)(3) unless the court orders otherwise.

The court may impose the investigative duties that § 1106(a)(3) specifies for a chapter 11 trustee in a traditional case on the sub V trustee. Under new § 1183(b)(2), the court (for cause and on request of a party in interest, the sub V trustee, or the U.S. Trustee) may order that the sub V trustee perform certain duties of a chapter 11 trustee under § 1106(a).

The specified duties are: (1) to investigate the acts, conduct, assets, liabilities, and financial condition of the debtor, the operation of the debtor's business, the desirability of its continuance, and any other matter relevant to the case of formulation of a plan (§ 1106(a)(3)); (2) to file a statement of the investigation, including any fact ascertained pertaining to fraud, dishonesty, incompetence, misconduct, mismanagement, or irregularity in the management of the affairs of the debtor or to a cause of action available to the estate, and to transmit a copy or

⁸⁸ New § 1183(b)(3). A chapter 12 trustee must also appear at hearings on all of these matters. § 1202(b)(3). A chapter 13 trustee must appear and be heard on all of them except the sale of property of the estate. § 1302(B)(2).

summary of it to entities that the court directs (§ 1106(a)(4)⁸⁹); and (3) to file postconfirmation reports as the court directs (§ 1106(a)(7)).⁹⁰ The same procedures apply to a chapter 12 trustee's duty to investigate under § 1202(b)(2).

2. Other duties of the trustee

Like chapter 12 and 13 trustees under §§ 1201(b)(1) and 1302(b)(1),⁹¹ a sub V trustee under new § 1183(b)(1) has the duties of a trustee under § 704(a): (1) to be accountable for all property received (§ 704(a)(2)); (2) to examine proofs of claim and object to allowance of any claim that is improper, if a purpose would be served (§ 704(a)(5)); (3) to oppose the discharge of the debtor, if advisable (§ 704(a)(6)); (4) to furnish information concerning the estate and the estate's administration that a party in interest requests, unless the court orders otherwise (§ 704(a)(7)); and (5) to make a final report and to file it (§ 704(a)(9)).⁹² Under new § 1183(b)(4), the sub V trustee also has the same duty as chapter 12 and 13 trustees to ensure that the debtor commences timely payments under a confirmed plan (§§ 1202(b)(4), 1302(b)(5)).⁹³

⁸⁹ Section 1106(a)(4)(B) directs a chapter 11 trustee to transmit the copy or summary to any creditors' committee, equity security holders' committee, and indenture trustee. Committees do not exist in a small business case unless the court orders otherwise under § 1102(a)(3) as amended, and a small business debtor is unlikely to have an indenture trustee as a creditor.

⁹⁰ New § 1183(b)(2). In *In re AJEM Hospitality, LLC*, 2020 WL 3125276 (M.D.N.C. 2020), the court on motion of the bankruptcy administrator, and with the consent of the debtor and sub V trustee, authorized the trustee to conduct an investigation limited to the investigation of potential intercompany claims. The court noted, "The language of [§ 1106(a)(3)] specifically allows the Court to limit the scope of an investigation 'to the extent that the court orders . . .'" *Id.* at *2.

⁹¹ Chapter 12 (§ 1202(b)(1)) and chapter 13 (§ 1302(b)(1)) trustees also have the duty of a chapter 7 trustee under § 704(a)(3) to ensure that the debtor performs the debtor's intentions under § 521(a)(2)(B) to surrender, redeem, or reaffirm debts secured by property of the estate. The imposition of this duty in chapter 12 and 13 cases is curious in that § 521(b)(2)(B) applies only in chapter 7 cases. SBRA does not impose this anomalous duty on the sub V trustee.

⁹² New § 1183(b)(1).

⁹³ New § 1183(b)(4).

The U.S. Trustee has the duty to monitor and supervise subchapter V cases and trustees.⁹⁴

The U.S. Trustee Program has developed procedures for reporting by sub V trustees to enable U.S. Trustees to evaluate and monitor their performance.⁹⁵

3. Trustee's duties upon removal of debtor as debtor in possession

Under new § 1185(a), the court may remove the debtor as debtor in possession. If the court does so, the sub V trustee has the duties of a trustee specified in paragraphs (1), (2), and (6) of § 1106.⁹⁶ New § 1183(b)(5) specifically directs the sub V trustee to operate the debtor's business when the debtor is not in possession. Similar provisions apply in chapter 12 cases.⁹⁷

Under paragraph (1) of § 1106(a), the trustee must perform the duties of a trustee under paragraphs (2), (5), (7), (8), (9), (10), (11) and (12) of § 704(a). These duties are: (1) to be accountable for all property received (§ 704(a)(2)); (2) to examine and object to proofs of claim if a purpose would be served (§ 704(a)(5)); (3) to furnish information concerning the estate and its administration as requested by a party in interest, unless the court orders otherwise (§ 704(a)(7)); (4) to file reports (§ 704(a)(8)); (5) to make a report and file a final account of the administration of the estate with the court and the U.S. Trustee (§ 704(a)(9)); (6) to provide required notices with regard to domestic support obligations (§ 704(a)(10)); (7) to perform any

⁹⁴ 28 U.S.C. § 586(a)(3). SBRA § 4(b)(1)(A) amended 28 U.S.C. § 586(a)(3) to include sub V cases within the types of cases that the U.S. Trustee supervises.

⁹⁵ SUBCHAPTER V TRUSTEE HANDBOOK, *supra* note 79, ch. 8. See also U.S. DEP'T OF JUSTICE, 3 UNITED STATES TRUSTEE PROGRAM POLICY AND PRACTICES MANUAL: CHAPTER 11 CASE ADMINISTRATION (Feb. 2020) §§ 3-17.16, 3-17.16.1, 3.17.1.2, 3.17.16.3, 3.17.16.5, 3.17.16.6, https://www.justice.gov/ust/file/volume_3_chapter_11_case_administration.pdf/download.

The SUBCHAPTER V TRUSTEE HANDBOOK, *supra*, directs sub V trustees to consult with the U.S. Trustee before filing an objection to confirmation (*id.* at 3-9, 3-10, 3-12), objecting to a claim (*id.* at 3-15), or filing a motion to dismiss or convert (*id.* at 3-17).

⁹⁶ New § 1183(b)(5). New § 1183(b)(5) also requires the sub V trustee to perform duties specified in § 704(a)(8). The specification of the duty is duplicative because the § 704(a)(8) duty is one of the duties listed in § 1106(a)(1) that the sub V trustee must perform.

⁹⁷ The court may remove a chapter 12 debtor from possession under § 1204. Under § 1202(b)(5), the chapter 12 trustee then has the duties of a trustee under § 1106(a)(1), (2), and (6). §§ 1106(a), 1202(b).

obligations as the administrator of an employee benefit plan (§ 704(a)(11)); and (8) to use reasonable and best efforts to transfer patients from a health care business that is being closed (§ 704(a)(12)).⁹⁸

Paragraph (2) of § 1106(a) requires the trustee to file any list, schedule, or statement that § 521(a)(1) requires if the debtor has not done so. Paragraph (6) requires the trustee to file tax returns for any year for which the debtor has not filed a tax return.

The trustee's duties do not, however, include the filing of a plan, which only the debtor can do under new § 1189(a). Section V(C) discusses issues arising from the trustee's lack of authority to file a plan.

C. Trustee's Disbursement of Payments to Creditors

1. Disbursement of preconfirmation payments and funds received by the trustee

Paragraphs (a) and (c) of new § 1194 contain provisions dealing with the trustee's disbursement of money prior to confirmation. It is not clear, however, how they can have any operative effect. Nothing in subchapter V requires preconfirmation payments to the trustee or authorizes the court to require them.

New § 1194(a) states that the trustee shall retain any "payments and funds" received by the trustee until confirmation or denial of a plan.⁹⁹ Although the statute by its terms is not limited to preconfirmation payments and funds, the paragraph's direction for their disbursement

⁹⁸ § 1106(a)(1).

⁹⁹ New § 1194(a).

based on whether the court confirms a plan or denies confirmation indicates that it deals only with money the trustee receives prior to confirmation.

If a plan is confirmed, new § 1194(a) directs the trustee to disburse the funds in accordance with the plan. If a plan is not confirmed, the trustee must return the payments to the debtor after deducting administrative expenses allowed under § 503(b), any adequate protection payments, and any fee owing to the trustee. The provision is effectively the same as the provisions that govern disbursement of preconfirmation payments in chapter 12 and 13 cases.¹⁰⁰

Provisions for a trustee's disbursement of preconfirmation funds make sense in a chapter 13 case because a chapter 13 debtor must begin making preconfirmation payments to the trustee, adequate protection payments to creditors with a purchase-money security interest in personal property, and postpetition rent to lessors of personal property within 30 days of the filing of the chapter 13 case.¹⁰¹ If the court denies confirmation in a chapter 13 case, therefore, it is possible that the chapter 13 trustee will be holding money that the debtor paid.

No such provisions for preconfirmation payments exist in a sub V case. Subchapter V contains no requirement for the debtor to make preconfirmation payments to the trustee, secured creditors, or lessors, and nothing in subchapter V authorizes the court to require the debtor to make preconfirmation payments to the trustee.

¹⁰⁰ New §§ 1194(a), 1226(a), 1326(a)(2). The chapter 12 provision, § 1226(a), does not specifically provide for fees of a trustee who is not a standing trustee and does not permit a deduction for adequate protection payments. The fees of a non-standing chapter 12 trustee are allowable as an administrative expense and as such are within the scope of the deduction.

The chapter 13 provision, § 1326(b)(2), does not specifically provide for fees of the chapter 13 trustee. It does provide for the trustee to deduct adequate protection payments.

A standing chapter 13 trustee collects a percentage fee as the debtor makes payments. 28 U.S.C. § 586(e)(2) (2018); *see* W. Homer Drake, Jr., Paul W. Bonapfel, & Adam M. Goodman, CHAPTER 13 PRACTICE AND PROCEDURE § 17:5. Thus, the funds a standing chapter 13 trustee has upon denial of confirmation are net of the trustee's fee that has already been paid. A non-standing chapter 13 trustee's fee is included in the deduction because it is an administrative expense.

¹⁰¹ § 1326(a).

Nevertheless, paragraph (c) of new § 1194 authorizes the court, prior to confirmation and after notice and a hearing, to authorize the trustee to make payments to provide adequate protection payments to a holder of a secured claim.¹⁰² But a court can hardly require a sub V trustee to make adequate protection payments as new § 1194(c) contemplates if the trustee has no money to make them.

It is perhaps arguable that the new § 1194(a) and (c) provisions impliedly authorize the court to require a debtor to make preconfirmation payments to the trustee, particularly if the court orders the trustee to make adequate protection payments. But the concept of the sub V debtor remaining in possession of its assets and operating its business includes the debtor retaining control of its funds. It is more appropriate (and simpler) for a court to require the debtor, not the trustee, to make whatever adequate protection or other payments the court orders.

2. Disbursement of plan payments by the trustee

Whether the sub V trustee makes disbursements to creditors under a confirmed plan depends on the type of confirmation that occurs. Under new § 1194(b), the trustee makes payments under a plan confirmed under the cramdown provisions of new § 1191(b), unless the plan or confirmation order provides otherwise.¹⁰³ If a consensual plan is confirmed under new § 1191(a), however, the trustee's service terminates under new § 1183(c) upon "substantial consummation," and the debtor makes plan payments.¹⁰⁴ Part IX discusses payments under the plan.

¹⁰² New § 1194(c).

¹⁰³ New § 1194(b).

¹⁰⁴ New § 1191(a).

D. Termination of Service of the Trustee and Reappointment

1. Termination of service of the trustee

When termination of the trustee's service occurs depends on whether the court confirms a consensual plan under new § 1191(a) or confirms a plan that one or more impaired classes of creditors have not accepted under the cramdown provisions of new § 1191(b).

When the court confirms a consensual plan under new § 1191(a), the trustee's service terminates upon substantial consummation,¹⁰⁵ which ordinarily occurs when distribution commences.¹⁰⁶ Confirmation of a plan under the cramdown provisions of new § 1191(b) does not terminate the trustee's service. As just discussed, the trustee continues to serve and makes payments under the plan as new § 1194 requires.

Part IX further discusses these provisions.

Termination of the service of the sub V trustee also occurs, of course, upon dismissal of the case or its conversion to another chapter.¹⁰⁷

2. Reappointment of trustee

New § 1183(c)(1) provides for the reappointment of a trustee after termination of the trustee's service in two circumstances.

First, new § 1183(c)(1) permits reappointment of the trustee if necessary to permit the trustee to perform the trustee's duty under new § 1183(b)(3)(C) to appear and be heard at a hearing on modification of a plan after confirmation.¹⁰⁸ The reason for this provision is unclear.

¹⁰⁵ Section IX(A) discusses substantial consummation in the context of payments under a consensual plan.

¹⁰⁶ New § 1183(c).

¹⁰⁷ Section 701(a) directs the U.S. Trustee to appoint an interim trustee promptly after entry of an order for relief under chapter 7. In a converted case, the U.S. Trustee may appoint the trustee serving in the case immediately before entry of the order for relief.

Sections 1202 and 1302 provide for a standing trustee to serve in cases under those chapters, if one has been appointed, or for the U.S. Trustee to appoint a disinterested person to serve as trustee.

¹⁰⁸ New § 1183(c)(1).

Cramdown confirmation does not terminate the service of the sub V trustee. Therefore, if a debtor seeks modification after cramdown confirmation, the trustee is in place, so reappointment is unnecessary. When confirmation of a consensual plan has occurred, the trustee's service terminates upon substantial consummation, after which new § 1193(b) prohibits modification. Perhaps the purpose of the reappointment provision is to make sure that someone appears at the hearing to point this out to the court if a debtor attempts to modify a confirmed consensual plan after its substantial consummation.

Second, new § 1183(c) permits reappointment of the trustee if necessary to perform the trustee's duties under new § 1185(a). New § 1185(a) provides for the removal of the debtor in possession, among other things, for "failure to perform the obligations of the debtor under a plan confirmed under this chapter."¹⁰⁹ Because new § 1185(a) contemplates the postconfirmation removal of the debtor in possession, a trustee must be available to take charge of the assets and the business. Section XII(B) further discusses the postconfirmation removal of the debtor in possession.

E. Compensation of Subchapter V Trustee

If the trustee in a sub V case is a standing trustee, the trustee's fees are a percentage of payments the trustee makes to creditors under the same provisions that govern compensation of standing chapter 12 and chapter 13 trustees.

If the sub V trustee is not a standing trustee, the trustee is entitled to fees and reimbursement of expenses under the provisions of § 330(a), without regard to the limitation in § 326(a) on compensation of a chapter 11 trustee based on money the trustee disburses in the case. As Section IV(E)(2) discusses, some observers expected that technical amendments would

¹⁰⁹ New § 1185(a).

impose a limit on compensation of five percent of payments under the plan, which is the rule for a non-standing chapter 12 or 13 trustee.¹¹⁰ Some of them, however, have indicated that it is unlikely that this will occur in the foreseeable future.

1. Compensation of standing subchapter V trustee

For a standing trustee, amendments to § 326 require compensation under 28 U.S.C. § 586.¹¹¹ As amended, § 326(a) excludes a subchapter V trustee from its provisions governing compensation of a chapter 11 trustee, and § 326(b) provides that the court may not allow compensation of a standing trustee in a subchapter V case under § 330.

Under SBRA's amendments to 28 U.S.C. § 586(e),¹¹² the U.S. Trustee Program establishes the compensation for a standing sub V trustee in the same manner it does for standing chapter 12 and 13 trustees.¹¹³ Existing provisions of 28 U.S.C. § 586(e) that apply in chapter 12 and 13 cases are extended to cover subchapter V standing trustees. Thus, the standing subchapter V trustee receives a percentage fee (as fixed by the U.S. Trustee Program) from all payments the trustee disburses under the plan.

If the service of a standing trustee is terminated by dismissal or conversion of the case or upon substantial consummation of a consensual plan under new § 1181(a) (as Section IX(A) discusses, the trustee does not make payments under a consensual plan), new 28 U.S.C. § 586(e)(5) provides that the court "shall award compensation to the trustee consistent with the services performed by the trustee and the limits on the compensation of the trustee established pursuant to [28 U.S.C. § 586(e)(1)]."¹¹⁴ The limits require reference to the standing trustee's

¹¹⁰ The observers are bankruptcy judges, lawyers, and professors who have followed and supported enactment of SBRA with whom the author has discussed the issue.

¹¹¹ SBRA § 4(a)(4).

¹¹² SBRA § 4(b)(1)(D).

¹¹³ 28 U.S.C. § 586(e).

¹¹⁴ 28 U.S.C. § 586(e)(5).

maximum annual compensation, 28 U.S.C. § 586(e)(1)(A), and to the maximum percentage fee, 28 U.S.C. § 586(e)(1)(B).

2. Compensation of non-standing subchapter V trustee

Questions have arisen concerning the provisions of the new statute for compensation of a subchapter V trustee who is not a standing trustee.

Section 330(a) permits the court to award compensation to trustees. Sections 326(a) and (b) impose limits on compensation of trustees. SBRA does not amend § 330(a), but it does amend §§ 326(a) and (b). Under a “plain meaning” interpretation of these provisions as amended, a non-standing sub V trustee is entitled to “reasonable compensation for actual, necessary services rendered” and “reimbursement for actual, necessary expenses” under § 330(a), and §§ 326(a) and (b) do not impose any limits on compensation.

In *In re Tri-State Roofing*, 2020 WL 7345741 (Bankr. D. Idaho 2020), the court ruled that § 326(b) does not prevent an award of compensation to a sub V trustee under § 330(a)(1) and that it does not place a cap on such compensation.

Some observers who participated in the drafting of SBRA and the legislative process leading to its enactment attribute this result to a drafting error.¹¹⁵ The drafters of subchapter V intended that provisions for compensation of non-standing sub V trustees be the same as those for non-standing chapter 12 and 13 trustees.

Specifically, § 326(b) limits compensation of a non-standing chapter 12 or chapter 13 trustee to “five percent upon all payments under the plan.” Although it appears the drafters intended this limitation to apply to compensation of sub V trustees, the language of the SBRA amendments to § 326(b) do not make this limitation applicable to a non-standing sub V

¹¹⁵ See *supra* note 110.

trustee.¹¹⁶ Observers close to the legislative process expected a technical amendment to resolve this issue by making the five percent limitation also applicable to sub V trustees.¹¹⁷ Technical corrections in the CARES Act, however, did not address this issue.¹¹⁸ Some of the observers have indicated that it is unlikely that this will occur in the foreseeable future.

Although SBRA addresses compensation of a standing trustee upon conversion or dismissal of a sub V case prior to confirmation in its amendment of 28 U.S.C. § 586(e)(5), it

¹¹⁶ A full understanding of the issue requires further elaboration.

Section 330(a) provides for the allowance of compensation to “trustees,” subject to § 326 (and other sections). SBRA does not amend § 330(a).

SBRA did not change the provisions of subsections (a) and (b) of § 326(a) with regard to compensation of trustees other than sub V trustees. Thus, § 326(a) limits the compensation of a chapter 11 (and chapter 7) trustee to a percentage of moneys disbursed or turned over in the case by the trustee to parties in interest, excluding the debtor.

Section 326(b) deals with compensation of trustees in chapter 12 and 13 cases in two ways. First, it provides that a standing chapter 12 or 13 trustee is not entitled to compensation under § 330(a); instead, a standing chapter 12 or 13 trustee receives compensation, and collects percentage fees, under 28 U.S.C. § 586(e). Second, § 326(b) limits the compensation of a non-standing chapter 12 or 13 trustee to “five percent upon all payments under the plan.” § 326(b). The exact language of § 326(b) is that the limitation applies to a “trustee appointed under section 1202(a) or 1302(a) of this title.” *Id.*

Generally, then, pre-SBRA § 326(a) dealt with chapter 7 and 11 cases and § 326(b) dealt with chapter 12 and 13 trustees. Without an amendment, a sub V trustee would be a chapter 11 trustee, and § 326(a) would apply. Similarly, unamended § 326(b) would not apply because it is for chapter 12 and 13 cases.

SBRA § 4(a)(4)(A) amended § 326(a) by excluding sub V trustees from its application. SBRA § 4(a)(4)(B) amended § 326(b) to prohibit a standing sub V trustee from receiving compensation under § 330. SBRA’s amendments to 28 U.S.C. § 586(e) provide for compensation of a standing sub V trustee under its provisions, so the same provisions that govern compensation of standing chapter 12 and 13 trustees apply. SBRA § 4(b)(1).

What the SBRA amendments did not do was add “§ 1183” (the new subchapter V section that calls for the appointment of a sub V trustee) before “§ 1202(a) and 1302(a)” (the sections under which chapter 12 and 13 trustees are appointed) in the language quoted above. Without this insertion, amended § 326(b) does not limit the compensation of a non-standing sub V trustee. As the next footnote discusses, one reading of amended § 326(b) is that nothing authorizes compensation of a non-standing sub-V trustee.

¹¹⁷ Such an amendment would also clarify that a non-standing trustee is entitled to compensation. As amended, § 326(b) applies to cases under subchapter V, chapter 12, and chapter 13. Before and after the amendment, § 326(b) states that the court “may allow reasonable compensation under section 330 of this title to a trustee appointed under section 1202(a) or 1302(a) of this title,” but it does not state that the court may allow compensation under § 330 of a trustee appointed under new § 1183. § 326(b). Because § 330(a) is subject to § 326, and § 326(b) does not provide for compensation of a non-standing sub V trustee, it may be arguable that a sub V trustee is not entitled to compensation. The position of the United States Trustee Program is, “Case-by-case trustees are compensated through § 330(a)(1) which allows for ‘reasonable compensation for actual, necessary services rendered by the trustee . . . and by any paraprofessional person employed by such person.’” SUBCHAPTER V TRUSTEE HANDBOOK, *supra* note 79, at 3-21.

¹¹⁸ The technical corrections in the CARES Act involved the exclusion of public companies from the definition of a small business debtor and unclaimed funds in subchapter V cases. CARES Act § 1113(a)(4).

does not address allowance or payment of compensation of a non-standing trustee in those circumstances.

If the case is converted, the sub V trustee may file an application for compensation, and the allowed amount will be entitled to administrative expense priority under § 503(b)(1), subject in priority to administrative expenses in the chapter 7 case. § 726(b).

Dismissal of the case raises the prospects that the sub V trustee may find the compensation disputed if the trustee seeks payment under applicable nonbankruptcy law and that the trustee will not be paid, given the debtor's distressed financial circumstances.

A trustee may seek to avoid the former issue by filing an application for compensation in response to a motion to dismiss and requesting that the court rule on it, preferably before dismissal of the case.

Allowance of an administrative expense claim in a dismissed case, however, may still leave the sub V trustee without compensation. In allowing compensation to the sub V trustee after dismissal of the case, the court in *In re Tri-State Roofing*, 2020 WL 7345741 at *1, n. 1 (Bankr. D. Idaho 2020), observed, “[A]dministrative expense claims are not monetary judgments but rather entitle the claimant to receive a distribution from the bankruptcy estate. If there are no funds currently held by the Trustee, it is difficult to understand how this claim would be paid.” (Citation omitted).

A potential solution to all of these problems is to request that the court condition dismissal on allowance and payment of the trustee's compensation.

In re Slidebelts, Inc., 2020 WL 3816290 (Bankr. E.D. Cal. 2020), supports this proposition. There, the debtor in a traditional chapter 11 case sought its dismissal for the purpose of obtaining a loan under the Paycheck Protection Funding Program of the CARES Act

of the case and then re-filing a case under subchapter V. Professionals employed by the committee of unsecured creditors requested that the court condition dismissal on allowance and payment of their fees.

The court observed that § 349(b)(3) ordinarily reverts the property of the estate in the debtor, but that, as the Supreme Court recognized in *Czyzewski v. Jevic Holding Corp.*, 137 S.Ct. 973, 979 (2017), the court may order otherwise “for cause.” The court reasoned that committee professionals had rendered services in reliance on provisions of the Bankruptcy Code for payment of their compensation in the case. This reliance, the court concluded, constituted “cause” under § 349(b) for conditioning dismissal on allowance and payment of the committee professionals. *Id.* at * 3.

In *In re Hunts Point Enterprises, LLC*, 2021 WL 1536389 (Bankr. E.D.N.Y. 2021), a debtor requested dismissal of its case after a creditor filed a motion to disallow its sub V election or, alternatively, to dismiss the case. Because the case revolved around a two-party dispute and the debtor’s request for dismissal demonstrated that it no longer wanted to file a plan of reorganization, the court concluded that cause existed for dismissal of the case, conditioned on the debtor’s payment of the sub V trustee’s compensation.

In traditional chapter 11 cases, cash collateral or debtor in possession financing orders often provide for a so-called “carve-out” to provide money to pay professionals employed by the debtor and the committee of unsecured creditors. It seems appropriate to include the sub V trustee in any carve-out in a subchapter V case.

Even if the case does not involve cash collateral or debtor in possession financing – or if the cash collateral or financing order does not provide for a carve-out – it may be advisable for

the sub V trustee, the debtor, or both to request that the court require the debtor to make regular payments to a fund dedicated to the payment of professional fees.

Judges in the Middle District of Florida have included a provision for interim trustee compensation in subchapter V cases in an “Order Prescribing Procedures in Chapter 11 Subchapter V Case, Setting Deadline for Filing Plan, and Setting Status Conference.”¹¹⁹ The orders require the debtor to pay \$ 1,000 as interim compensation to the sub V trustee within 30 days of the petition date and monthly thereafter. The amount is subject to adjustment upon request of any interested party and to the court’s approval of the trustee’s compensation under § 330. The debtor must include the interim compensation in any cash collateral budget.

3. Deferral of non-standing subchapter V trustee’s compensation

A standing sub V trustee receives compensation as a percentage of payments the trustee makes from funds paid by the debtor under a plan. The percentage fees of a standing trustee are necessarily deferred until payments are made.

A non-standing trustee’s compensation is allowable as an administrative expense, which has priority under § 507(a)(2) subject only to claims for domestic support obligations. Under § 1129(a)(9)(A), a plan must provide for payment of administrative expenses in full on or before the effective date of the plan.¹²⁰ This requirement applies in subchapter V cases to confirmation of a consensual plan under new § 1191(a).¹²¹

¹¹⁹ *E.g., In re Nostalgia Family Medicine P.A.*, Case No. 6:21-bk-00274-LVV, Doc. No. 22, at ¶ 3 (Mar. 26, 2021).

¹²⁰ § 1129(a)(9)(A).

¹²¹ New § 1191(a).

New § 1191(e) permits payment of administrative expense claims through the plan if the court confirms it under the cramdown provisions of new § 1191(b).¹²² Accordingly, a non-standing sub V trustee faces deferral of payment of compensation for services in the case.

As Section IV(E)(2) discusses, it is possible that a technical amendment to § 326(b) will impose a limitation on a non-standing trustee's compensation to five percent of payments under the plan. If this occurs, a non-standing trustee's compensation may arguably be limited to five percent of payments as they are made.

F. Trustee's Employment of Attorneys and Other Professionals

Section 327(a) permits a bankruptcy trustee to employ attorneys and other professionals "to represent or assist the trustee in carrying out the trustee's duties." SBRA does not modify this provision for subchapter V cases. If a standing sub V trustee is appointed, the standing trustee presumably would follow the practice of standing trustees in chapter 12 and 13 cases and not retain counsel or other professionals except in exceptional circumstances.

A non-standing sub V trustee's employment of attorneys or other professionals has the potential to substantially increase the administrative expenses of the case. In view of the intent of SBRA to streamline and simplify chapter 11 cases for small business debtors and reduce administrative expenses, courts may be reluctant to permit a sub V trustee to retain attorneys or other professionals except in unusual circumstances.¹²³ In this regard, a person serving as a sub

¹²² New § 1191(e).

¹²³ See *In re Penland Heating and Air Conditioning, Inc.*, 2020 WL 3124585 (E.D.N.C. 2020). The court declined to approve the sub V trustee's application to approve the employment of the trustee's law firm, stating, "[A]uthorizing a Subchapter V trustee to employ professionals, including oneself as counsel, routinely and without specific justification or purpose is contrary to the intent and purpose of the SBRA." *Id.* at *2. In a footnote, the court cautioned that "overzealous and ambitious Subchapter V trustees that unnecessary or duplicative services may not be compensated, and other fees incurred outside of the scope and purpose of the SBRA may not be approved." *Id.* at *2 n. 2.

The SUBCHAPTER V TRUSTEE HANDBOOK, *supra* note 79, at 3-17 to 3-18, states:

V trustee should have a sufficient understanding of applicable legal principles to perform the trustee's monitoring and supervisory duties, and appear and be heard on specified issues, without the necessity of separate legal advice.

A question exists whether a trustee who is not an attorney may appear and be heard in a bankruptcy case. Section 1654 of title 28 provides as follows:

In all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein.¹²⁴

The statute applies only to natural persons; it does not permit a corporation or other entity to appear in federal court except through licensed counsel.¹²⁵

Courts have applied the rule to prohibit an individual who serves as the trustee for a trust or as the personal representative of an estate from representing the trust or estate unless the trust or estate has no creditors and the individual is the sole beneficiary.¹²⁶ Because a bankruptcy trustee acts as the representative of the estate¹²⁷ and creditors have an interest in the estate, the

Although the trustee may employ professionals under section 327(a), SBRA is intended to be a quick and low cost process to enable debtors to confirm consensual plans in a short period with less expense while returning appropriate dividends to creditors. Therefore, the services required of outside professionals, if any, will be limited in many cases. This is especially important in cases in which the debtor remains in possession and the debtor already has employed professionals to perform many of the duties that the trustee might seek to employ the professionals to perform. See 11 U.S.C. § 1184. The trustee should keep the statutory purpose of SBRA in mind when carefully considering whether the employment of the professional is warranted under the specific circumstances of each case.

¹²⁴ 28 U.S.C. § 1654.

¹²⁵ *E.g.*, *Rowland v. California Men's Colony*, 506 U.S. 194, 202 (1993) ("[T]he lower courts have uniformly held that 28 U.S.C. § 1654, providing that 'parties may plead and conduct their own cases personally or by counsel,' does not allow corporations, partnerships, or associations to appear in federal court otherwise than through a licensed attorney.").

¹²⁶ *E.g.*, *J. J. Rissell, Allentown, P.A. Trust v. Marchelos*, 976 F.3d 1233 (11th Cir. 2020) (trust); *Guest v. Hansen*, 603 F.3d 15 (2d Cir. 2010) (estate); *Knoefler v. United Bank of Bismarck*, 20 F.3d 347 (8th Cir. 1994) (trust); *C.E. Pope Equity Trust v. United States*, 818 F.2d 696 (9th Cir. 1987) (trust).

¹²⁷ § 323(a).

same rule would appear to require a non-attorney trustee to retain a lawyer in order to appear and be heard in a bankruptcy court.

In *In re McConnell*, 2021 WL 203331 at * 16-18 (Bankr. N.D. Ga. 2021), however, the court determined that 28 U.S.C. § 1654 did not apply to require a nonlawyer panel trustee in a chapter 7 case to retain a lawyer to file an application for the retention of a real estate broker.

The *McConnell* court reasoned, “The nature of proceedings in bankruptcy courts for the administration of estate assets in Chapter 7 cases suggests that the rule of 28 U.S.C. § 1654 applicable in a federal lawsuit between discrete parties should not be extended to apply to a chapter 7 trustee’s filing of routine papers that the Bankruptcy Code and Bankruptcy Rules require in connection with the sale of property.” *Id.* at 17. The court observed that, without discussing § 1654, bankruptcy courts have recognized that a trustee may file papers in a bankruptcy court without a lawyer in the course of performing the trustee’s duties, such as the filing of applications to retain professionals¹²⁸ and routine objections to claims.¹²⁹ *Id.* at 18 & nn. 59-60.

The nature of reorganization proceedings in bankruptcy courts and the facilitative, advisory, and monitoring role that subchapter V specifically contemplates for the trustee suggest

¹²⁸ The court cited: *In re Garcia*, 335 B.R. 717, 726 (B.A.P. 9th Cir. 2005); *In re Jay*, 2018 WL 2176082 at *12 (Bankr. D. Utah 2018), *aff’d* 2019 WL 4645385 (D. Utah 2019) (“[I]n simple cases, trustees should prepare applications to employ realtors or accountants as they are seldom contested and routinely granted.”); *In re McLean Wine Co., Inc.*, 463 B.R. 838, 848-49 (Bankr. E.D. Mich. 2011) (application to employ other professionals is trustee work); *In re Peterson*, 566 B.R. 179, 195, 207-08 (Bankr. M.D. Tenn. 2017) (application for employment of professionals, including accountant and special counsel, is trustee duty). *Contra, e.g., In re Yovtcheva*, 590 B.R. 307 (Bankr. E.D. Pa. 2018); *In re Hambrick*, 2012 WL 10739279, at * 5 (Bankr. N.D. Ga. 2012); *In re Holub*, 129 B.R. 293, 296 (Bankr. M.D. Fla. 1991).

¹²⁹ The court cited: *In re King*, 546 B.R. 682, 699 (Bankr. S.D. Tex. 2016) (Routine objection to claim that is unopposed and does not require legal analysis or a brief falls within trustee’s duty); *In re Lexington Hearth Lamp and Leisure, LLC*, 402 B.R. 135 (Bankr. M.D.N.C. 2009) (Although the court concluded that compensation is allowed for services that require a law license, *id.* at 142, the court ruled that the filing of objections to claims that require no legal analysis is a trustee duty. *Id.* at 144-45.) *In re Perkins*, 244 B.R. 835 (Bankr. D. Montana 2000); *In re Holub*, 129 B.R. 293, 296 (Bankr. M.D. Fla. 1991). *Contra, e.g., In re Howard Love Pipeline Supply Co.*, 253 B.R. 790 (Bankr. E.D. Tex. 2000) (“[T]he express duty of the trustee to object to improper claims does not authorize a non-attorney trustee to engage in the unauthorized practice of law.”).

that 28 U.S.C. § 1654 likewise should not apply to a nonlawyer subchapter V trustee unless the trustee is a party to a discrete controversy in an adversary proceeding or contested matter.

In this regard, 28 U.S.C. § 1654 and the case law establishing the rule have their roots in 18th and 19th century practice in federal courts¹³⁰ when the availability of bankruptcy relief was either nonexistent or short-lived.¹³¹ The statute could not have contemplated a reorganization case involving many parties and many inter-related moving parts that involve business issues and often require negotiations and compromise to achieve a successful outcome for all the parties. In other words, a bankruptcy reorganization is quite different from a lawsuit that involves discrete parties asserting claims and defenses to establish their rights and obligations.

This distinction is particularly important in a subchapter V case. Specific duties of the sub V trustee are to facilitate the development of a consensual plan of reorganization,¹³² and to appear and be heard on confirmation and other significant issues that relate to confirmation.¹³³ The statute makes it clear that the trustee's primary role is to work with the parties and then to *report* to the court, not to engage in litigation with them.

A nonlawyer trustee does not need an attorney to work with the parties on business issues, to investigate and obtain information about the debtor and its business, to facilitate confirmation, and to report to the court. When the time comes to report to the court, the trustee should be permitted to perform the reporting function without a lawyer.

¹³⁰ Section 35 of the Judiciary Act of 1789 is the statutory predecessor to 28 U.S.C. § 1654 (2018) and contained substantially the same language. *See* *United States v. Dougherty*, 473 F.2d 1113, 1123 n. 10 (D.C. Cir. 1972).

Section 35 of the Judiciary Act of 1789, 1 Stat. 73, 92 (1789), provided “that in all the courts of the United States, the parties may plead and manage their own causes personally or by the assistance of such counsel or attorneys at law as by the rules of the said courts respectively shall be permitted to manage and conduct causes therein.”

¹³¹ *See* Charles Jordan Tabb, *The History of the Bankruptcy Laws in the United States*, 3 AMER. BANKR. INST. L. REV. 5, 12-23 (1995). *See also* W. Homer Drake, Jr., Paul W. Bonapfel, & Adam M. Goodman, CHAPTER 13 PRACTICE AND PROCEDURE § 1:2.

¹³² New § 1183(b)(7).

¹³³ New § 1183(b)(3).

Assuming that the nonlawyer trustee is knowledgeable about reorganization law and practice (and a sub V trustee who is not knowledgeable should not be a sub V trustee), neither the debtor, creditors, nor the court need a lawyer to present the trustee's reports and views to the court. In short, unless a sub V trustee needs to *litigate* something, the trustee does not need counsel. The statute and case law governing federal *litigation* should not be extended to the trustee's appearance in court to *report*.

The subchapter V trustee's primary role is analogous to the role of an examiner in a traditional chapter 11 case,¹³⁴ or an expert witness that a court appoints.¹³⁵ Such parties provide information to the court and the parties and may do so without counsel. A sub V trustee with similar advisory duties should similarly be permitted to provide information to the court without the necessity of having to do so through a lawyer.¹³⁶

Finally, the trustee is an officer of the court. The court need not insist that its officer hire a lawyer to hear what the officer has to say.

If a nonlawyer is the sub V trustee, the trustee's ability to appear in court without a lawyer is critical to accomplishment of the objective of subchapter V of providing debtors – and creditors – with the opportunity to accomplish an expeditious and economic reorganization, hopefully on a consensual basis. A requirement for employment of counsel adds an additional layer of expense that should not ordinarily be necessary and that threatens accomplishment of

¹³⁴ § 1106(b). Although bankruptcy courts often authorize an examiner to employ counsel or other professionals, § 327(a) does not provide authority for an examiner to employ a professional person. *See generally* 5 NORTON BANKRUPTCY LAW AND PRACTICE § 99:29. *See also In re W.R. Grace & Co.*, 285 B.R. 148, 156 (Bankr. D. Del. 2002) (“[T]he basic job of an examiner is to examine, not to act as a protagonist in the proceedings. The Bankruptcy Code does not authorize the retention by an examiner of attorneys or other professionals.” (citation omitted)).

¹³⁵ FED. R. EVID. 706.

¹³⁶ In some jurisdictions, some chapter 7 panel trustees are not lawyers. The author's informal discussions with bankruptcy judges indicate that in some courts nonlawyer trustees appear without counsel when the matter does not require actual litigation.

subchapter V's primary objective.¹³⁷ Moreover, if a nonlawyer trustee must have a lawyer, the additional expense may as a practical matter preclude the appointment of a nonlawyer trustee.

If a court determines that the rule prohibiting a nonlawyer trustee from appearing in federal court requires the trustee to retain counsel in order to be heard, economic considerations may lead the court to limit the services that will be compensated to those for which a lawyer is legally required. Non-compensable services might include, for example, work in connection with the investigation of the debtor and its business or negotiations or development of business information to facilitate a consensual plan. And because it is the trustee, not the lawyer, who is to be heard, any written report concerning confirmation and other matters would seem to be the responsibility of the trustee, not the lawyer.

V. Debtor as Debtor in Possession and Duties of Debtor

A. Debtor as Debtor in Possession

The debtor, as debtor in possession, remains in possession of assets of the estate.¹³⁸ A sub V debtor in possession has the rights, powers, and duties of a trustee that a traditional chapter 11 debtor in possession has, including the operation of the debtor's business.¹³⁹ The court may

¹³⁷ This consideration suggests that a court may invoke § 105(a) to permit a nonlawyer to appear without counsel as being "necessary or appropriate" to carry out the provisions of the Bankruptcy Code.

¹³⁸ New § 1186(b).

¹³⁹ New § 1184. Section 1107(a), which provides for the debtor to remain in possession with the rights, powers, and duties of a trustee, is inapplicable in a sub V case. New § 1181(a). New § 1184 replaces § 1107(a) in sub V cases.

remove the debtor as debtor in possession under new § 1185(a). The court may reinstate the debtor in possession.¹⁴⁰

B. Duties of Debtor in Possession

Upon the filing of a voluntary case, a small business debtor must file documents required of a small business debtor in a non-sub V case under §§ 1116(1)(A) and (B).¹⁴¹ In a sub V case, §1116 is inapplicable, but new § 1187(a) requires the sub V debtor to comply with §§ 1116(1)(A) and (B) upon making the election.¹⁴²

The timing of the election does not change the time for a debtor who qualifies as a small business debtor to file the required documents. In a voluntary case, it is the date of the filing of the petition. If a small business debtor makes the election in the petition (as Interim Rule 1020(a) requires), § 1187(a) requires the debtor to file the documents at that time. If the debtor does not make the election in the petition, § 1116(1) is applicable and requires the debtor to append the documents to the petition. In an involuntary case, the debtor must file the documents within seven days after the order for relief.¹⁴³

The timing requirements operate differently in the case of a debtor who is not a small business debtor because its debts exceed \$ 2,725,625. In this situation, § 1116 does not apply

¹⁴⁰ New § 1185(b).

¹⁴¹ New. § 1187(a).

¹⁴² Section 1116 does not apply in a sub V case, § 1181(a), but new § 1187 incorporates all its requirements. In view of this, it is unclear why SBRA made § 1116 inapplicable in subchapter V cases. Perhaps it is because § 1116 also applies to a trustee. This statutory scheme is important in the case of a debtor who is not a small business debtor because its debts exceed \$2,725,625 but qualifies for subchapter V because its debts are less than \$ 7.5 million. Because § 1116 applies only in a small business case, it would not apply to such a debtor, but new § 1187 requires such a debtor to comply with its requirements.

¹⁴³ Section 1116(1) requires a small business debtor in an involuntary case to file the required documents within seven days after the order for relief. Interim Rule 1020(a) permits a debtor to make the subchapter V election within 14 days after entry of the order for relief in an involuntary case. New § 1187(a) requires compliance with the requirements of § 1116(1) upon the debtor's election to be a subchapter V debtor.

Unless and until the debtor makes the election, § 1116 applies. Accordingly, the debtor must comply with § 1116(1) and file the required documents within seven days after the order for relief, regardless of when the debtor makes the election.

because the case is not a small business case. In a voluntary or involuntary case, new § 1187(a) requires the debtor to comply with § 1116 upon making the sub V election, which could occur after the filing of a voluntary petition or entry of an order for relief in an involuntary case.

The documents that § 1116(1) requires are: the debtor's most recent balance sheet, statement of operations, cash-flow statement, and federal income tax return, or a statement under penalty of perjury that no balance sheet, statement of operations or cash-flow statement has been prepared and no federal tax return has been filed.¹⁴⁴

SBRA also requires a sub V debtor to file periodic reports under § 308, which continues to apply in a non-sub V small business case.¹⁴⁵ Section 308(b) requires periodic reports that must contain information including: (1) the debtor's profitability; (2) reasonable approximations of the debtor's projected case receipts and cash disbursements; (3) comparisons of actual case receipts and disbursements with projections in earlier reports; (4) whether the debtor is in compliance with postpetition requirements of the Bankruptcy Code and the Bankruptcy Rules and whether the debtor is timely filing tax returns and paying taxes and administrative expenses when due; and (5) if the debtor has not complied with the foregoing duties, how, when, and at what cost the debtor intends to remedy any failures.¹⁴⁶

The debtor must also comply with the duties of a debtor in possession in small business cases specified in § 1116(2) – (7).¹⁴⁷ Thus, the debtor's senior management personnel and counsel must: (1) attend meetings scheduled by the court or the U.S. Trustee (including initial debtor interviews, scheduling conferences, and § 341 meetings, unless waived for extraordinary

¹⁴⁴ § 1116(1).

¹⁴⁵ New § 1187(b). Although § 308 applies only in a small business case, new § 1187(b) requires all sub V debtors to comply with it.

¹⁴⁶ § 308.

¹⁴⁷ New § 1187(b).

and compelling circumstances¹⁴⁸); (2) timely file all schedules and statements of financial affairs (unless the court after notice and a hearing grants an extension not to exceed 30 days after the order for relief, absent extraordinary and compelling circumstances); (3) file all postpetition financial and other reports required by the Bankruptcy Rules or local rule of the district court;¹⁴⁹ (4) maintain customary and appropriate insurance; (5) timely file required tax returns and other government filings and pay all taxes entitled to administrative expense priority; and (6) allow the U.S. trustee to inspect the debtor's business premises, books, and records.¹⁵⁰

A sub V debtor in possession has the duties of a trustee under § 1106(a), except those specified in paragraphs (a)(2) (file required lists, schedules, and statements), (a)(3) (conduct investigations), and (a)(4) (report on investigations).¹⁵¹

The duties under § 1106(a)(1) include the duties of a trustee under paragraphs (2), (5), (7), (8), (9), (10), (11) and (12) of § 704(a).¹⁵² These provisions include duties: to be accountable for all property received; to examine and object to proofs of claim if a purpose would be served; to furnish information concerning the estate and its administration as requested by a party in interest, unless the court orders otherwise; to file reports; to make a report and file a final account of the administration of the estate with the court and the U.S. Trustee; to provide required notices with regard to domestic support obligations; to perform any obligations as the administrator of an employee benefit plan; and to use reasonable and best efforts to transfer patients from a health care business that is being closed.

¹⁴⁸ As in non-sub V small business cases, the debtor and counsel must attend the initial debtor interview scheduled by the U.S. Trustee and must attend the § 341 meeting of creditors, at which the U.S. Trustee presides. *See* SUBCHAPTER V TRUSTEE HANDBOOK, *supra* note 79, at 3-3, 3-5. The U.S. Trustee expects the sub V trustee to participate in both. *Id.*

¹⁴⁹ That is not a typo. The statute specifies local rule of the district court.

¹⁵⁰ § 1118.

¹⁵¹ New § 1184.

¹⁵² § 1106(a)(1).

Other § 1106(a) duties applicable to the sub V debtor under new § 1184 are the duties under § 1106(a)(5) through (a)(8): to file a plan;¹⁵³ to file tax returns for any year for which the debtor has not filed a tax return; to file postconfirmation reports as are necessary or as the court orders; and to provide required notices with regard to any domestic support obligations.¹⁵⁴

Subchapter V does not expressly impose on a sub V debtor the duties to communicate and cooperate with the sub V trustee and to negotiate with creditors in an effort to obtain consensual confirmation, but at least one court has noted the debtor's failure to do so, despite encouragement from the court, in connection with dismissal of the case and denial of confirmation.¹⁵⁵

C. Removal of Debtor in Possession

New § 1185(a) provides for removal of a debtor in possession, for cause, on request of a party in interest and after notice and hearing.¹⁵⁶ "Cause" includes "fraud, dishonesty,

¹⁵³ The duty under § 1106(a)(5), applicable to the sub V debtor under new § 1184, is to "as soon as practicable, file a plan under section 1121 of this title, file a report of why the trustee will not file a plan, or recommend conversion of the case to a case under chapter 7, 12, or 13 of this title or dismissal of the case." New § 1184.

The § 1106(a)(5) language is somewhat problematical in a sub V case. First, § 1121 (dealing with who may file a plan) does not apply in a sub V case because only the debtor may file a plan. Second, the statutory deadline of 90 days for the debtor to file a plan, new § 1189(b), is inconsistent with the "as soon as practicable" direction in § 1106(a)(5). § 1106(a)(5).

Nevertheless, the clear import of the statutory scheme is that the sub V debtor has a duty to file a plan.

¹⁵⁴ § 1106(a)(5-8).

¹⁵⁵ *In re* U.S.A. Parts Supply, Cadillac U.S.A. Oldsmobile U.S.A. Limited Partnership, 2021 WL 1679062 at *2 n. 4, *5 (Bankr. N.D. W. Va. 2021). The court concluded its Memorandum Opinion dismissing the debtor's case, in which it also determined that the debtor's plan was not feasible, as follows, *id.* at * 5:

The Debtor had ample opportunities as it meandered through this case to negotiate with interested parties and propose a confirmable plan of reorganization. Specifically, the court encouraged the Debtor to engage with the Subchapter V Trustee and negotiate with the Creditors. By all accounts, however, the Debtor lacked motivation in those regards while evading certain of its responsibilities to the bankruptcy estate. Cause undoubtedly exists to dismiss this case, and the Debtor has been in bankruptcy for over a year without putting forth a feasible, confirmable plan. The court will therefore enter a separate order dismissing the Debtor's case.

¹⁵⁶ New § 1181(a). Sections 1104 and 1105, which deal with appointment of a trustee and termination of the trustee's appointment, are inapplicable in a sub V case.

Section 1104 also permits appointment of a trustee if it is "in the interests of creditors, any equity security holders, and other interests of the estate." New § 1185(a) does not include this reason as "cause" for removing a debtor in possession.

incompetence, or gross mismanagement of the affairs of the debtor, either before or after the date of commencement of the case.” This language is identical to § 1104(a),¹⁵⁷ which governs appointment of a trustee in a traditional chapter 11 case, and to § 1204(a), which provides for removal of the debtor in possession in a chapter 12 case. Although § 1185(a) does not list the debtor’s bad faith as a ground for removal of the debtor from possession, the specified grounds are not exhaustive, and a court may consider it.¹⁵⁸

In *In re Neosho Concrete Products Co.*, 2021 WL 1821444 at * 8 (Bankr. W.D. Mo. 2021), the court found guidance for the standards a court should consider in determining whether to remove a sub V debtor from possession under § 1185(a) in case law construing the provisions of § 1104(a) for appointment of a trustee in a traditional chapter 11 case.

Applying rulings in § 1104(a) cases, the court concluded that it had discretion to determine whether “cause” exists to remove a sub V debtor in possession. The court determined that the party seeking removal of the sub V debtor bears the burden of establishing cause by a preponderance of the evidence. The court noted, “Because removal of a debtor in possession is an “extraordinary remedy,’ the movant’s burden is high.” *Id.* at *8.¹⁵⁹

The court adopted a “flexible” approach to determining whether cause exists for removal of a sub V debtor from possession and identified the following factors that a court may consider, among others: (1) the materiality of any misconduct; (2) the debtor’s evenhandedness or lack thereof in dealing with insiders and affiliated entities in relation to other creditors; (3) the

Section 1104 also permits the appointment of an examiner. Subchapter V has no provision for appointment of an examiner. As Section IV(B)(1) notes, the court may authorize a trustee to investigate for cause shown under new § 1183(b)(2).

¹⁵⁷ Section 1104 does not apply in a sub V case. New § 1181(a).

¹⁵⁸ *In re Young*, 2021 WL 1191621 at * 6-7 (Bankr. D. N.M. 2021).

¹⁵⁹ The court cited *Keeley and Grabanski Land Partnership v. Keeley (In re Keeley and Grabanski Land Partnership)*, 455 B.R. 153, 162 (B.A.P. 8th Cir. 2011) (construing § 1104).

existence of prepetition avoidable transfers; (4) whether any conflicts of interest on the part of the debtor are interfering with its ability to fulfill its fiduciary duties; and (5) whether any self-dealing or squandering of estate assets had occurred. *Id.* at 8.¹⁶⁰

The court concluded that cause did not exist to remove the debtor from possession because its principal had “competently managed the estate and adapted to challenges as it encountered them,” had agreed to reimburse the estate for the value of preferential transfers he had received, had retained separate counsel, and had prioritized the interests of the debtor above his own. *Id.* at 9.¹⁶¹

New § 1185(a) also provides for removal of the debtor in possession “for failure to perform the obligations of the debtor” under a confirmed plan, as Sections V(C) and XII(B) discuss. Sections 1104(a) and 1204(a) do not contain this ground for removal of a debtor in possession in traditional chapter 11 cases and in chapter 12 cases.¹⁶²

New § 1185(b) permits the court to reinstate the debtor in possession on request of a party in interest and after notice and a hearing.¹⁶³ Section 1202(b) contains identical language in chapter 12 cases, and § 1105 similarly permits the court to terminate the appointment of a chapter 11 trustee and restore the debtor to possession and management of the estate and operation of the debtor’s business.

Like §§ 1104(a) and 1204(a), new § 1185(a) states that the court *shall* remove the debtor in possession if a specified ground exists.¹⁶⁴ A potential issue is whether removal of the debtor for failure to perform under a confirmed plan is mandatory if the failure is not material or if the

¹⁶⁰ The court cited *Keeley and Grabanski Land Partnership v. Keeley (In re Keeley and Grabanski Land Partnership)*, 455 B.R. 153, 162 (B.A.P. 8th Cir. 2011) (construing § 1104).

¹⁶¹ The court also denied a motion to convert the case to chapter 7.

¹⁶² New § 1185(a).

¹⁶³ New § 1185(b).

¹⁶⁴ New § 1185(a).

debtor has cured or can cure defaults. If a debtor establishes that reinstatement is appropriate at the same time that removal is sought, a court might find sufficient reason not to remove the debtor.

If the court removes the debtor in possession, the trustee has the duty to operate the business of the debtor¹⁶⁵ and other duties that Section IV(B)(3) discusses.

The removal of a sub V debtor from possession has one significant legal difference from appointment of a trustee in a traditional chapter 11 case.

In a traditional case, § 1121(c)(1) provides that appointment of a trustee terminates the debtor's exclusivity period to file a plan under § 1121(b) and permits the trustee to file a plan. One of the duties of a trustee in a chapter 11 case under § 1106(a)(5) is to file a plan, to file a report of why the trustee will not file a plan, or to recommend conversion or dismissal of the case.

In a subchapter V case, however, § 1121 does not apply, new § 1181(a), and the debtor thus remains the only party who can file a plan under new § 1189(a). Moreover, the duties of a sub V trustee upon removal of the debtor in possession do not include the duty to file a plan or report or to recommend conversion or dismissal. New § 1183(b)(5)

When a sub V trustee after removal of the debtor's possession thinks that confirmation of a reorganization plan is possible, therefore, the trustee will have to convince the debtor to file a satisfactory plan or to amend the petition to eliminate the sub V election so that the case becomes a traditional chapter 11 case in which the trustee may file a plan.

Unless the debtor files a plan that the court confirms or amends the election, or unless the court reinstates the debtor's possession, the case must conclude through either dismissal or

¹⁶⁵ § 1183(b)(5).

conversion. One possibility is for the trustee to liquidate the debtor's assets and then seek their distribution through conversion to chapter 7 or a structured dismissal of the case.¹⁶⁶

In re Young, 2021 WL 1191621 at *7 (Bankr. D. N.M. 2021), suggested such an alternative. There, the court removed the debtor from possession due to gross mismanagement, bad faith, and dishonesty instead of converting the case on those grounds. The court reasoned that, because the sub V trustee was familiar with the case and might be able to liquidate the estate's assets and make distributions to creditors for a lower fee than a chapter 7 trustee would charge, removal of the debtor in possession was a better option than conversion. *Id.* at 7. The court reserved for a later day the possibility that eventual conversion to chapter 7 might be necessary.

If the debtor is removed from possession, a question arises whether the debtor's attorney (or any other professional employed by the debtor) is entitled to compensation for services rendered to the debtor after the removal.

The Supreme Court in *Lamie v. United States Trustee*, 540 U.S. 526, 124 S. Ct. 1023 (2004), ruled that an attorney for a former chapter 11 debtor in possession who provides services after conversion to chapter 7 is not entitled to compensation under § 330(a) for postconversion

¹⁶⁶ A so-called "structured dismissal" involves payment of allowed administrative expenses and distributions on allowed claims, followed by dismissal of the case. *See generally*, *Czyzewski v. Jevic Holding Corp.*, 137 S.Ct. 973 (2017). The Supreme Court observed in *Jevic Holding Corp.*, *id.* at 979:

[T]he [Bankruptcy] Code permits the bankruptcy court, "for cause," to alter a Chapter 11 dismissal's ordinary restorative consequences. § 349(b). A dismissal that does so (or which has other special conditions attached) is often referred to as a "structured dismissal," defined by the American Bankruptcy Institute as a

"hybrid dismissal and confirmation order ... that ... typically dismisses the case while, among other things, approving certain distributions to creditors, granting certain third-party releases, enjoining certain conduct by creditors, and not necessarily vacating orders or unwinding transactions undertaken during the case." American Bankruptcy Institute Commission To Study the Reform of Chapter 11, 2012–2014 Final Report and Recommendations 270 (2014).

Although the Code does not expressly mention structured dismissals, they "appear to be increasingly common." *Ibid.*, n. 973.

services because § 330(a) does not authorize compensation for a debtor's attorney. The same principle applies when a trustee is appointed in a chapter 11 case, thus removing the debtor as debtor in possession.

Subchapter V does not address this issue. If the *Lamie* ruling precludes compensation of a sub V debtor's attorney after removal and the debtor cannot find an attorney to provide counsel without compensation, the debtor will not have a realistic chance of obtaining reinstatement or filing a plan and may not be able to participate effectively in the case.

VI. Administrative and Procedural Features of Subchapter V

Subchapter V includes several features designed to facilitate the efficient and economical administration of the case and the prompt confirmation of a plan. This Part discusses: the elimination of the committee of unsecured creditors (Section VI(A)) and the § 1125(b) disclosure statement (Section VI(B)), unless the court orders otherwise; the mandatory status conference (Section VI(C)); the 90-day deadline for the debtor to file a plan (Section VI(D)), unless the court extends it (Section VI(J)); elimination of U.S. Trustee fees (Section VI(E)); and the modification of the disinterestedness requirement applicable to the retention of professionals by the debtor under § 327(a) (Section VI(F)).

This Part also discusses: procedures relating to a creditor's § 1111(b) election (Section VI(G)); voting on the plan and confirmation procedures (Section VI(H)); the filing of claims and the fixing of a bar date for the filing of proofs of claim (Section VI(I)); and the debtor's performance of postpetition obligations as lessee under an unexpired lease under § 365(d). (Section VI(K)).

A. Elimination of Committee of Unsecured Creditors

SBRA amended § 1102(a)(3) to provide that a committee of unsecured creditors will not be appointed in the case of a small business debtor unless the court for cause orders otherwise.¹⁶⁷ Prior to the amendment, § 1102(a)(3) provided for the U.S. Trustee to appoint a committee in a small business case unless the court, for cause, ordered that a committee not be appointed.

The same rule applies in a subchapter V case. The provisions of § 1102,¹⁶⁸ which require the appointment of a committee of unsecured creditors and permit the appointment of other committees, and of § 1103, which states the powers and duties of committees, do not apply in a sub V case unless the court orders otherwise. New § 1181(b).

Although SBRA eliminates the appointment of a committee of unsecured creditors in both sub V and non-sub V small business cases unless the court orders otherwise, the Interim Rules did not change the requirement of Bankruptcy Rule 1007(d) that a debtor in a voluntary chapter 11 case file a list of its 20 largest unsecured creditors, excluding insiders.

The requirement of the list serves two purposes. First, an objection to the debtor's designation of itself as a small business debtor or to its election of subchapter V¹⁶⁹ must be served on the creditors on the Rule 1007(d) list under Interim Rule 1020(c). Second, if the court directs the appointment of a committee, the list provides the information that the U.S. Trustee needs to identify the largest unsecured creditors for purposes of selecting committee members from the holders of the largest claims willing to serve under § 1102(b)(1).

¹⁶⁷ SBRA § 4(a)(11).

¹⁶⁸ The provisions are paragraphs (1), (2), and (4) of § 1102(a) and § 1102(b).

¹⁶⁹ See Section III(A).

B. Elimination of Requirement of Disclosure Statement

Section 1125 regulates postpetition solicitation of acceptances or rejections of a plan. It requires that creditors receive “adequate information”¹⁷⁰ about the debtor and the plan before solicitation occurs in the form of a written disclosure statement that the court approves.¹⁷¹ The court must hold a hearing on approval of the disclosure statement after at least 28 days’ notice before solicitation of votes on the plan may occur.¹⁷²

In a small business case, § 1125(f)(3) permits the court to conditionally approve a disclosure statement, subject to objection after notice and hearing,¹⁷³ so that solicitation may occur without prior notice and hearing on the disclosure statement.¹⁷⁴ The hearing on approval of the disclosure statement may be combined with the hearing on confirmation.¹⁷⁵ In addition, the court in a small business case may determine that the plan itself provides adequate information and that a separate disclosure statement is not necessary,¹⁷⁶ and may approve a disclosure statement submitted on a standard form approved by the court or on Official Form B425B.¹⁷⁷

In a sub V case, § 1125 is inapplicable unless the court orders otherwise.¹⁷⁸ Thus, the debtor need not file a disclosure statement in connection with its plan unless the court requires it. If the court orders that § 1125 apply, the provisions of § 1125(f) apply.

¹⁷⁰ Section 1125(a)(1) defines “adequate information” as information that would enable “a hypothetical investor of the relevant class to make an informed judgment about the plan.” § 1125(a)(1).

¹⁷¹ § 1125(b).

¹⁷² FED. R. BANKR. P. 3017(a).

¹⁷³ § 1125(f)(3)(A).

¹⁷⁴ § 1125(f)(3)(B).

¹⁷⁵ § 1125(f)(3)(C).

¹⁷⁶ § 1125(f)(1).

¹⁷⁷ § 1125(f)(2).

¹⁷⁸ New § 1181(b).

A sub V debtor’s plan must contain certain information that a disclosure statement typically contains, including: (1) a brief history of the business operations of the debtor; (2) a liquidation analysis; and (3) projections with respect to the ability of the debtor to make payments under the proposed plan of reorganization. New § 1181(a)(1).

Subchapter V does not require that the plan contain “adequate information,” and it does not provide for prior judicial review of the required information before solicitation of acceptances of the plan. Nevertheless, confirmation of a sub V plan requires that a plan comply with the applicable provisions of § 1129(a),¹⁷⁹ among which are the requirements that a plan¹⁸⁰ and its proponent¹⁸¹ comply with applicable provisions of chapter 11 and that the plan be proposed in good faith.¹⁸² These provisions provide the basis for a court to consider whether a debtor’s plan contains the information that new § 1181(a) requires. Material or intentional errors or omissions could provide a basis for denial of confirmation.¹⁸³

C. Required Status Conference and Debtor Report

Section 105(d) permits, but does not require, the court to convene a status conference in a case under any chapter, on its own motion or on request of a party in interest.¹⁸⁴ Section 105(d) does not apply in a sub V case.¹⁸⁵ Instead, new § 1188(a) makes a status conference mandatory and requires the court to hold it not later than 60 days after the entry of the order for relief in the case.¹⁸⁶ The court may extend the time for holding the status conference if the need for an

¹⁷⁹ New § 1191(a), (b). See Section VIII(A).

¹⁸⁰ § 1129(a)(1).

¹⁸¹ § 1129(a)(2).

¹⁸² § 1129(a)(3).

¹⁸³ See generally Ralph Brubaker, *The Small Business Reorganization Act of 2019*, 39 Bankruptcy Law Letter, no. 10, Oct. 2019, at 10.

¹⁸⁴ § 105(d).

¹⁸⁵ New § 1181(a).

¹⁸⁶ Section VI(J) discusses the date of the order for relief in a subchapter V case converted from another chapter.

extension is “attributable to circumstances for which the debtor should not justly be held accountable.”¹⁸⁷ Section VI(J) discusses extension of the deadline. The statutory purpose of the status conference is “to further the expeditious and economical resolution” of the case.

Not later than 14 days prior to the status conference, the debtor must file, 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.”¹⁸⁸ The trustee has the duty to appear and be heard at the status conference.¹⁸⁹

Subchapter V does not specify any consequences if the status conference does not timely occur or if the debtor fails to file a report. Courts have noted that the deadline for the status conference is a deadline for the court, not the debtor, and that a debtor is not in default until the status conference has been set and the debtor fails to file the report at least 14 days before that date.¹⁹⁰

A debtor’s unexcused failure to file the report timely or to attend the status conference could be cause for dismissal or conversion of the case under § 1112(b) or denial of confirmation. “Cause” for dismissal includes unexcused failure to satisfy timely any filing or reporting requirement under the Bankruptcy Code, § 1112(b)(4)(F), and the failure to comply with an order of the court, § 1112(b)(4)(E). Confirmation of a subchapter V plan requires compliance by the proponent with applicable provisions of the Bankruptcy Code. § 1129(a)(2). Section VI(D) considers these issues further in the context of a debtor’s failure to file a plan within the 90-day deadline of new § 1189(a).

¹⁸⁷ New § 1188(b).

¹⁸⁸ New § 1188(c).

¹⁸⁹ New § 1183(b)(3).

¹⁹⁰ *In re Tibbens*, 2021 WL 1087260 at * 8 (Bankr. M.D. N.C. 2021); *In re Wetter*, 620 B.R. 243, 252 (Bankr. W.D. Va. 2020).

Neither subchapter V nor the Interim Rules specify how the court schedules the status conference, the agenda for the status conference, or the contents of the debtor's report. The practitioner must consult local rules, orders, and procedures to determine how the bankruptcy judge will address these matters and the judge's expectations about the report and the status conference.¹⁹¹

Some courts include the time for the status conference in the Notice of Chapter 11 Bankruptcy Case that the clerk sends at the outset of the case. Others schedule it in a separate notice, or include it in a scheduling order, that the clerk or debtor's counsel mails to parties in interest.

New § 1188(a) states only that the purpose of the status conference is "to further the expeditious and economical resolution" of the subchapter V case, and new § 1188(c) requires only that the report detail "the efforts the debtor has undertaken and will undertake to attain a consensual plan of reorganization." While some courts are scheduling the status conference without further direction, others have provided more specific instructions.

For example, a scheduling order for the status conference may remind counsel that senior management must attend the conference, that the report will be covered, and that the debtor should be prepared to discuss any anticipated complications in the case (such as adversary proceedings, discovery, or valuation disputes), the timing of the confirmation hearing and related procedures and deadlines, and monthly operating reports.

A scheduling order may also outline specific items to be included in the report, which may include one or more of the following: (1) the efforts the debtor has undertaken or will

¹⁹¹ For example, the New Jersey bankruptcy court has promulgated a mandatory form for the debtor's report, http://www.njb.uscourts.gov/forms/all-forms/mandatory_forms. Bankruptcy courts in the District of Maryland, <https://www.mdb.uscourts.gov/content/local-bankruptcy-forms>, and in the Central District of California, http://www.njb.uscourts.gov/forms/all-forms/mandatory_forms, have published suggested forms.

undertake to obtain a consensual plan of reorganization, as new § 1188(c) requires; (2) the goals of the reorganization plan; (3) any complications the debtor anticipates in promptly proposing and confirming a plan, including any need for discovery, valuation, motion practice, claim adjudication, or adversary proceeding litigation; (4) a description of the nature of the debtor's business or occupation, the primary place of business, the number of locations from which it operates, and the number of employees or independent contractors it utilizes in its normal business operations; and the goals of the reorganization plan; (5) any motions the debtor contemplates filing or expects to file before confirmation; (6) any objections to any claims or interests the debtor expects to file before confirmation and any potential need to estimate claims for voting purposes; (7) the estimated time by which the debtor expects to file its plan; (8) whether the debtor is current on all required tax returns; (9) other matters or issues that the debtor expects the court will need to address before confirmation or that could have an effect on the efficient administration of the case.

Regardless of whether the court specifies its requirements with regard to the debtor's report or sets an agenda for the scheduling conference, counsel for the parties should anticipate that the court will be interested in any of these matters that the case involves and that debtor's counsel must ultimately address in connection with plan confirmation. Creditors may use the status conference as an opportunity to obtain information about the financial affairs of the debtor and to articulate their views and concerns about the debtor's operations, prospects for a feasible plan, and other matters.¹⁹²

¹⁹² See Christopher G. Bradley, *The New Small Business Bankruptcy Game: Strategies for Creditors Under the Small Business Reorganization Act*, 28 AMER. BANKR. INST. L. REV. 251, 256, 272-72, 281 (2020).

D. Time for Filing of Plan

Only the debtor may file a plan.¹⁹³ The debtor has a duty to do so.¹⁹⁴

The deadline for the sub V debtor to file the plan is 90 days after the order for relief.¹⁹⁵ The court may extend the deadline if the need for extension is attributable to circumstances for which the debtor should not justly be held accountable,¹⁹⁶ the same standard that governs extension of the 90-day deadline to file a chapter 12 plan under § 1221.¹⁹⁷ New § 1193(a) permits preconfirmation modification of a plan.¹⁹⁸ Section VI(J) discusses extension of the deadline.

Section 1121(e) requires that a debtor in a small business case file a plan within 300 days of the filing date,¹⁹⁹ and § 1129(e) requires that confirmation occur within 45 days of the filing of the plan.²⁰⁰ These requirements do not apply in a subchapter V case.²⁰¹ They continue to apply in the case of a small business debtor who does not elect subchapter V.

The schedule for the filing of the plan in a sub V case thus differs from the schedule in a non-sub V small business case in two ways. First, a sub V debtor must file a plan much more promptly than a non-sub V debtor – 90 days instead of 300.²⁰² Second, the sub V debtor faces no deadline for obtaining confirmation after the filing of the plan.

¹⁹³ New § 1189(a).

¹⁹⁴ New § 1184. The debtor has the duty to file a plan. See *supra* note 153.

¹⁹⁵ New § 1189(b). Section VI(J) discusses the date of the order for relief in a subchapter V case converted from another chapter.

¹⁹⁶ *Id.*

¹⁹⁷ The court in *In re Trepetin*, 617 B.R. 841, 848-49 (Bankr. D. Md. 2020), found guidance for determining whether to extend the deadline in a chapter 12 case that addressed the issue under § 1221, *In re Gullicksrud*, 2016 WL 5496569, at *2 (Bankr. W.D. Wis. 2016).

¹⁹⁸ New § 1193(a).

¹⁹⁹ § 1121(e).

²⁰⁰ § 1129(e).

²⁰¹ New § 1181(a).

²⁰² Because of the short time to file a plan, counsel for a sub V debtor should promptly request the court to issue a bar order establishing a deadline for the filing of proofs of claim if the court by local rule or general order has not fixed a deadline for filing proofs of claim in sub V cases.

Subchapter V does not provide any consequences when a debtor does not timely file a plan. Under other provisions of chapter 11, however, a debtor's failure to comply with a plan deadline subjects the debtor to the risks of dismissal of the case, its conversion to chapter 7, or denial of confirmation of a plan.

As in all chapter 11 cases, a debtor's failure to file a plan within the time the Bankruptcy Code requires (or the court orders) is cause for conversion or dismissal under § 1112(b)(4)(J). When cause exists, § 1112(b)(1) states that the court, on request of a party in interest, *shall* dismiss or convert a chapter 11 case for cause, whichever is in the best interests of creditors and the estate, unless the court determines that the appointment of a trustee or examiner *under § 1104* is in the best interests of the estate. Because § 1104 does not apply in a subchapter V case,²⁰³ § 1112(b)(1) requires the court to convert or dismiss the case if the debtor does not timely file a plan upon request of the sub V trustee, a creditor, or other party in interest.

Section 1112(b)(2), however, provides an exception to this requirement. It prohibits dismissal or conversion if: (1) the court “finds and specifically identifies unusual circumstances” establishing that conversion or dismissal is not in the best interests of creditors; and (2) the debtor (or other party in interest) satisfies two other requirements, unless the ground for conversion or dismissal is (1) substantial or (2) continuing loss to or diminution of the estate and the absence of a reasonable likelihood of rehabilitation.

The first requirement for application of the exception is a reasonable likelihood that a plan will be confirmed within a reasonable time. § 1112(b)(4)(A). The second is that a reasonable justification for the act or omission constituting cause exist and that it be fixed within a reasonable time fixed by the court. § 1112(b)(4)(B).

²⁰³ New § 1181(a).

Under these provisions, a debtor can overcome a motion for dismissal or conversion based on failure to timely file a plan by establishing (1) that conversion or dismissal is not in the best interest of creditors; (2) a reasonable justification for missing the deadline; (3) an ability to cure the omission (preferably by pointing to a plan already filed or a well-founded motion for an extension of the time to do so); and (4) the likelihood of confirmation of a plan within a reasonable time.

Confirmation of a subchapter plan requires compliance with §§ 1129(a)(1) and (a)(2).²⁰⁴ Paragraph (a)(1) requires that the plan comply with the applicable provisions of the Bankruptcy Code, and paragraph (a)(2) requires that the proponent of the plan comply with the applicable provisions of the Bankruptcy Code.

In *In re Seven Stars on the Hudson Corp.*, 618 B.R. 333, 343-44 (Bankr. S.D. Fla. 2020), the court concluded that the failure to comply with the § 1189(a) deadline for the filing of a plan would preclude confirmation of a plan under §§ 1129(a)(1) and (2). The debtor had elected application of subchapter V in a case filed before subchapter V's effective date, and the plan deadline had already expired. After the court refused to extend the deadline based on the determination that the election to proceed under subchapter V in these circumstances was within the debtor's control, the court dismissed the case because the debtor could not possibly confirm a plan in view of the default.²⁰⁵

The court in *In re Tibbens*, 2021 WL 1087260 at *6 (Bankr. M.D.N.C. 2021), reached a contrary conclusion: "Although the failure to timely file a plan constitutes cause for dismissal

²⁰⁴ New § 1191(a) (confirmation of a consensual plan); New § 1191(b) (cramdown confirmation). See Section VIII(A).

²⁰⁵ Other courts have concluded that the court may extend the deadline for filing a plan (and for the status conference) in these circumstances. See Part XIII.

under § 1112(b)(4)(J), nothing in the Bankruptcy Code suggests that this failure alone is fatal to confirmation.”

The *Tibbens* court noted that the provisions of § 1112(b)(2) that prohibit dismissal or conversion under the circumstances just discussed apply, among other things, when the debtor can establish the likelihood of confirmation. Because Congress permitted a debtor to avoid conversion or dismissal by establishing an ability to confirm a plan, the court reasoned, a failure to comply with plan-filing deadlines does not prevent confirmation. *Tibbens*, 2021 WL 1087260 at *6. The court also concluded that legislative history and cases interpreting §§ 1129(a)(1) and (2) focused on contents of the plan and compliance with disclosure and solicitation requirements, not matters such as failure to comply with a deadline. *Id.* at 7.²⁰⁶

The *Tibbens* court permitted a debtor to convert a chapter 13 case, filed after enactment of subchapter V but before its effective date, to chapter 11 after the plan-filing deadline had expired but declined to extend the deadline because delays the debtor caused in the chapter 13 case and failures to comply with directives of the court were within the debtor’s control and were circumstances for which the debtor justly should be held accountable. The issue of dismissal or conversion of the case was not before the court, and the court did not address it.

²⁰⁶ The *Tibbens* court cited *Kane v. Johns-Manville Corp.*, 843 F.2d 636 (2d Cir. 1988) (§ 1129(a)(1)); *In re Multiut Corp.*, 449 B.R. 323 (Bankr. N.D. Ill. 2011) (§ 1129(a)(1)); *In re Cypresswood Land Partners, I*, 409 B.R. 396, 423-24 (Bankr. S.D. Tex. 2009) (§ 1129(a)(2)) (“Bankruptcy courts limit their inquiry under § 1129(a)(2) to ensuring that the plan proponent has complied with the solicitation and disclosure requirements of § 1125.”); and 7 COLLIER ON BANKRUPTCY ¶ 1129.02[1] (§ 1129(a)(1)) (“[T]he courts have recognized that the complexity of plan confirmation permits notions of ‘harmless error,’ so that technical noncompliance with a provision that does not significantly affect creditor rights will not block confirmation.”);

E. No U.S. Trustee Fees

28 U.S.C. § 1930(a)(6)(A) requires the quarterly payment of U.S. Trustee fees in chapter 11 cases based on disbursements in the case. SBRA amended this subparagraph to except cases under subchapter V from this requirement.²⁰⁷

F. Modification of Disinterestedness Requirement for Debtor's Professionals

Section 327(a) permits employment of professionals by a debtor in possession in a chapter 11 case only if, among other things, the professional is a “disinterested person.” A person who holds a claim against the debtor is not a disinterested person under the term’s definition in § 101(14)(A).²⁰⁸ A disinterested person cannot not have an interest “materially adverse to the interest of the estate.”²⁰⁹

These provisions disqualify an attorney or other professional to whom the debtor owes money at the time of filing because the professional is a creditor. Moreover, because payment of amounts owed to the professional prior to filing would in most instances be a voidable preference under § 547 and result in the professional having a material adverse interest to the estate in a preference action, the debtor’s professionals must either waive any unpaid fees or forego representation of the debtor.

New § 1195 addresses this issue in part. It provides that a person is not disqualified from employment under § 327(a) solely because the professional holds a prepetition claim of less than \$ 10,000.²¹⁰

²⁰⁷ SBRA § 4(b)(3).

²⁰⁸ § 327(a).

²⁰⁹ § 101(14)(C).

²¹⁰ New § 1195.

Depending on what the debtor's plan will propose to pay to unsecured creditors, the economic impact of the new provision may be limited. An important practical implication is that debtor's counsel will no longer have to explain to accountants and other professionals who are not familiar with bankruptcy practice that they must waive their fees to provide services to the debtor in the case – something that may be contrary to their standard practice of declining to provide services if the client fails to pay fees in a timely manner.

G. Time For Secured Creditor to Make § 1111(b) Election

Section 1111(b) permits a secured creditor to make an election under certain circumstances for allowance or disallowance of its claim the same as if it had recourse against the debtor on account of such claim, whether or not it has recourse.²¹¹ If the election is made, the claim is allowed as secured to the extent it is allowed. The election may be made at any time prior to the conclusion of the hearing on the disclosure statement.²¹² Alternatively, if the disclosure statement is conditionally approved under Bankruptcy Rule 3017.1 and a final hearing on the disclosure statement is not held, the election must be made within the date fixed for objections to the disclosure statement under Bankruptcy Rule 3017.1(a)(2) or another date fixed by the court.²¹³

Interim Rule 3017 takes account of the fact that subchapter V does not contain a requirement for a disclosure statement unless the court orders otherwise. It provides that, in a subchapter V case, the § 1111(b) election may be made not later than a date the court may fix.²¹⁴

²¹¹ § 1111(b). For a discussion of strategic considerations for creditors regarding the § 1111(b) election, see Christopher G. Bradley, *The New Small Business Bankruptcy Game: Strategies for Creditors Under the Small Business Reorganization Act*, 28 AMER. BANKR. INST. L. REV. 25, 275-76 (2020). Section VIII(E) discusses the operation and effect of the § 1111(b) election and how courts have applied it in subchapter V cases.

²¹² FED. R. BANKR. P. 3014.

²¹³ FED. R. BANKR. P. 3017.1.

²¹⁴ INTERIM RULE 3017.

Courts have taken varied approaches to scheduling the date for the § 1111(b) election. Many do not address it unless a party requests it. Others fix the date by reference to the date the plan is filed (such as 14 or 30 days after the plan's filing) in a scheduling or other order or notice. When the court on its own does not set a date and a party anticipates that a creditor will make the election, the party should request that the court establish a deadline.

If the court does not establish a deadline for making the § 1111(b) election, a creditor may nevertheless decide to make the election in response to the filing of the debtor's plan. In *In re VP Williams Trans, LLC*, 2020 WL 5806507 (Bankr. S.D.N.Y. 2020), the court overruled the debtor's objection to the § 1111(b) election in this situation.

The court rejected the debtor's argument that the creditor had to file the election before the filing of the plan, concluding that Bankruptcy Rule 3014 provides for the court to set the deadline. Because no one had asked the court to set a deadline, the court permitted the election, noting that the creditor had filed it before any actions to solicit votes or any steps in contemplation of confirmation had occurred. The court also rejected the debtor's arguments that the creditor had waived its right to make the election by filing a proof of claim that did not invoke § 1111(b). *Id.* at 6.

H. Times For Voting on Plan, Determination of Record Date for Holders of Equity Securities, Hearing on Confirmation, Transmission of Plan, and Related Notices

Bankruptcy Rule 3017: (1) requires the court to fix the time for holders of claims or interests to vote to accept or reject a plan on or before approval of the disclosure statement; (2) provides that the record date for creditors and holders of equity securities is the date that the order approving the disclosure statement is entered or another date fixed by the court; (3) permits the court to set the date for the hearing on confirmation in connection with approval of the disclosure statement; and (4) requires that, upon approval of the disclosure statement, the court

must fix the date for transmission of the plan, notice of the time for filing acceptances or rejections, and notice of the hearing on confirmation.²¹⁵

New Interim Rule 3017.2 provides for the court to establish all these times in a subchapter V case in which the disclosure statement requirements of § 1125 do not apply.²¹⁶

I. Filing of Proof of Claim; Bar Date

Bankruptcy Rule 3003 governs the filing of proofs of claim or interest in a chapter 11 case. The Interim Rules made no change in its provisions.

Rule 3003 does not establish a deadline for filing a proof of claim in any chapter 11 case. Instead, Rule 3003(c) provides that the court “shall fix and may extend the time within which proofs of claim or interest may be filed.”

Many courts have adopted procedures for fixing the bar date for the filing of proofs of claim at the outset of a sub V case. Some include the bar date in the Notice of Chapter 11 Bankruptcy Case that the clerk sends. Others establish the deadline in a separate document, such as a scheduling order or other notice. Lawyers representing creditors in subchapter V cases who are accustomed to the usual practice in chapter 11 cases – the issuance of a separate bar date order – must check local practice to make sure that they know the deadline.

Some courts have set the bar date as 70 days after the filing of the petition. This is the same time that Bankruptcy Rule 3002(c) establishes in chapter 12 and 13 cases. Others have set the date as 90 days after the § 341(a) meeting of creditors.

An advantage of fixing the bar date as 70 days after the filing date is that it expires before the deadline under new § 1189(b) for the debtor to file a plan, which is 90 days after the order for

²¹⁵ FED. R. BANKR. P. 3017.1.

²¹⁶ INTERIM RULE 3017.2.

relief. If a debtor must know with certainty what the claims in the case are before it can file its plan, the debtor will need to ask the court to extend the time until the bar date has expired. The debtor will have to establish that the need for the extension is “attributable to circumstances for which the debtor should not justly be held accountable” under new § 1189(b).

The court cannot shorten the time for a governmental unit to file a proof of claim, which is 180 days after the order for relief under § 502(b)(9). Although it would be helpful for tax claims to be filed before the debtor files a plan, this should rarely be an obstacle. Most taxes are self-assessed by the debtor upon filing a return. If the debtor does not know its tax liability, it is unlikely that the taxing authority does either. A debtor might not be able to accurately calculate the exact amount of interest and penalties, but it should know the principal amount.²¹⁷

In *In re Wildwood Villages, LLC*, 2021 WL 1784408 (Bankr. M.D. Fla. 2021), plaintiffs in a state court class action sought to file a proof of claim on behalf of the class under Rule 7023 of the Federal Rules of Civil Procedure in the sub V case. The court explained that most courts conclude that class proofs of claim are permissible and that the determination of whether to allow and certify a class claim is within the court’s discretion. *Id.* at *2 & n. 8 (collecting cases). The court rejected the debtor’s argument that class claims should not be permitted in subchapter V cases because it would circumvent Congress’ intent that creditors’ committees should not exist in them. Instead, the court addressed the issue under the traditional analysis of the exercise of the court’s discretion. *Id.* at *4.

²¹⁷ But see *In re Baker*, 625 B.R. 27, 37 (Bankr. S.D. Tex. 2020) (The court noted that the expiration of the time for governmental claims is important because the amount of the claims will affect the drafting of the plan and consideration of its feasibility; this supported granting the debtor an extension of time to file the plan until the bar date had passed.).

Under those principles, the court declined to allow a class claim. *Id.* at *4-7. The court directed the debtor to send a proof of claim form to all of the class members identified in the motion for allowance of a class claim, with notice of the bar date. *Id.* at *7.

J. Extension of deadlines for status conference and debtor report and for filing of plan

New § 1188 requires a status conference within 60 days after entry of the order for relief and the filing by the debtor of a report that details the efforts the debtor has undertaken and will undertake to attain a consensual plan of reorganization at least 14 days before the status conference. New § 1189(b) requires the debtor to file a plan within 90 days after the order for relief.

Both provisions state that the times run from the date of the order for relief “*under this chapter.*” Under this language, if a debtor in a chapter 7 or 13 case seeks to convert the case to chapter 11 and elect sub V status, it is arguable that the time periods begin on the date of conversion.

Section 348(a), however, provides that conversion of a case from one chapter to another “does not effect a change in the date of the . . . order for relief.” Courts have therefore ruled that the deadlines are measured from the date of the order for relief in the original case.²¹⁸ Part XIII considers extensions of the deadlines in the context of the availability of subchapter V in cases pending before enactment of subchapter V.

The court may extend the deadlines if the need for an extension is “attributable to circumstances for which the debtor should not justly be held accountable.” New §§ 1188(b), 1189(b). Courts have noted that the requirement for an extension is more stringent than the “for

²¹⁸ *In re Tibbens*, 2021 WL 1087260 at * 8 (Bankr. M.D. N.C. 2021); *In re Trepetin*, 617 B.R. 841, 844 (Bankr. D. Md. 2020).

cause” standard of Bankruptcy Rule 9006(b), which governs extensions generally, and § 1121(d)(1), which permits extension of the exclusivity period for the debtor to file and obtain confirmation of a plan in a traditional chapter 11 case.²¹⁹

Sections 1188(b) and 1189(b) use the same language to provide for extension of their deadlines as § 1221, which governs extension of the 90-day period for the debtor to file a plan in a chapter 12 case. Courts have, therefore, looked to chapter 12 cases applying § 1221 for guidance in interpreting the identical language in subchapter V.²²⁰

The court in *In re Trepetin*, 617 B.R. 841 (Bankr. D. Md. 2020), noted that courts and commentators had interpreted § 1221 to permit an extension if the debtor “clearly demonstrates that the debtor’s inability to file a plan is due to circumstances beyond the debtor’s control.”²²¹ The court reasoned that it was appropriate to apply a similar standard to requests for extensions under §§ 1188(b) and 1189(b). *Id.* at 848-49. Other courts have done the same.²²²

Courts have taken different approaches to the determination of whether circumstances are “beyond the debtor’s control.” The *Trepetin* court formulated the inquiry as whether the debtor is “fairly responsible” for the inability to comply with the deadline.²²³ In *In re Seven Stars on the Hudson Corp.*, 618 B.R. 333, 345 (Bankr. S.D. Fla. 2020), however, the court concluded that

²¹⁹ E.g., *In re Online King, LLC*, 2021 WL 1536415 at *6 (Bankr. E.D.N.Y. 2021); *In re Northwest Child Development Centers, Inc.*, 2020 WL 8813586 at * 2 (Bankr. M.D.N.C. 2020); *In re Seven Stars on the Hudson Corp.*, 618 B.R. 333, 344 (Bankr. S.D. Fla. 2020).

²²⁰ E.g., *In re Tibbens*, 2021 WL 1087260 (Bankr. M.D.N.C. 2021); *In re Baker*, 625 B.R. 27, 33 (Bankr. S.D. Tex. 2020); *In re Northwest Child Development Centers, Inc.*, 2020 WL 8813586 at * 2 (Bankr. M.D.N.C. 2020); *In re Seven Stars on the Hudson Corp.*, 618 B.R. 333, 344 (Bankr. S.D. Fla. 2020); *In re Trepetin*, 617 B.R. 841, 847-48 (Bankr. D. Md. 2020).

²²¹ *In re Trepetin*, 617 B.R. 841, 848 (Bankr. D. Md. 2020) (quotations and punctuation omitted), quoting *In re Gullicksrud*, 2016 WL 5496569, at *2 (Bankr. W.D. Wis. 2016) (quoting 7 COLLIER ON BANKRUPTCY ¶ 221.012[2]), and also citing *In re Marek*, 2012 WL 2153648, at *8 (Bankr. D. Idaho 2012), and *In re Raylyn AG, Inc.*, 72 B.R. 523, 524 (Bankr. S.D. Iowa 1987).

²²² E.g., *In re Tibbens*, 2021 WL 1087260 (Bankr. M.D.N.C. 2021); *In re Baker*, 625 B.R. 27, 33 (Bankr. S.D. Tex. 2020); *In re Northwest Child Development Centers, Inc.*, 2020 WL 8813586 at * 2 (Bankr. M.D.N.C. 2020); *In re Seven Stars on the Hudson Corp.*, 618 B.R. 333, 344 (Bankr. S.D. Fla. 2020).

²²³ *Accord, In re Wetter*, 620 B.R. 243 (Bankr. W.D. Va. 2020).

the language asks whether the need for an extension is due to *circumstances* beyond the debtor's control, not whether *the debtor* was responsible for the inability to meet the deadlines.

Trepetin and *Seven Stars* involved a debtor's request to proceed under subchapter V in a case pending prior to its enactment when the deadlines had already expired. The *Trepetin* court concluded that the deadlines could be extended because the debtor was not responsible for the inability to meet the deadlines that had not previously existed. The *Seven Stars* court concluded that the circumstances were entirely within the debtor's control and that no external factors beyond the debtor's control contributed to the inability to meet the deadlines.

In *In re Tibbens*, 2021 WL 1087260 (Bankr. M.D.N.C. 2021), a chapter 13 debtor, in a case filed after enactment of subchapter V but a month before its effective date, sought to convert it to chapter 11 and proceed under subchapter V five months after the effective date. The court concluded that an extension of the already expired deadline for filing a plan was not justified under either the *Trepetin* or *Seven Stars* approach because of numerous delays in the chapter 13 case that were within the debtor's control and for which the debtor should justly be held accountable. *Id.* at *9.

In *re Keffer*, 2021 WL 1523167 (Bankr. S.D. W.Va. 2021), also considered a chapter 13 debtor's request to convert to chapter 11 and elect sub V after the deadlines for the status conference and the filing of a plan had expired. The need for chapter 11 relief arose, the court explained, after the Internal Revenue Service filed a proof of claim for substantially more than the debtor anticipated, increasing his liabilities above the chapter 13 debt limit and making the debtor ineligible for chapter 13.²²⁴

²²⁴ The court did not address whether chapter 13 eligibility should be determined as of the petition date based on the debtor's schedules, which showed that he was eligible. See W. Homer Drake, Jr., Paul W. Bonapfel, & Adam M. Goodman, CHAPTER 13 PRACTICE AND PROCEDURE §§ 12:8.

The propriety of conversion, the court explained, turned on whether to extend the deadlines. Without an extension, the debtor's chapter 11 case would be subject to dismissal or conversion to chapter 7 for cause for failure to file a plan timely. *Id.* at *9.

The *Keffer* court concluded that *Trepetin* provided a superior approach to the extension issue and rejected the *Seven Stars* view. *Id.* at *9. Because the debtor had proceeded appropriately in the chapter 13 case, and because the debtor was not aware of the large amount of his tax liability until the IRS filed its proof of claim and therefore did not know that chapter 13 would be unavailable, the court ruled that the debtor was not justly accountable for the circumstances necessitating an extension of the deadlines. *Id.* at *9. The court directed that the deadlines run from the date of its order. *Id.* at *10.

The court in *In re Baker*, 625 B.R. 27 (Bankr. S.D. Tex. 2020), identified four factors to consider in determining whether to extend the deadline for the filing of a plan: (1) whether the circumstances raised by the debtor were within the debtor's control; (2) whether the debtor had made progress in drafting a plan; (3) whether the deficiencies preventing that draft from being filed were reasonably related to the identified circumstances; and (4) whether any party-in-interest had moved to dismiss or convert the case or otherwise objected to a deadline extension in any way.

Regardless of the standard for extending the deadlines, the debtor must describe the circumstances beyond its control and explain why they preclude the timely filing of a plan. For example, although circumstances such as the Covid-19 pandemic, inclement weather, and the Jewish holidays may constitute acceptable reasons for an extension, they do not warrant an extension when the debtor does not demonstrate how they affected the debtor's ability to meet

the deadline.²²⁵ Circumstances such as the amount of work required to negotiate and propose a plan and competing demands on the debtors – common to any bankruptcy case – are insufficient to justify an extension.²²⁶

The court may grant an extension even if the deadline has expired at the time the debtor requests it.²²⁷ Nevertheless, the better practice is for the debtor to file a motion for an extension in time to permit the court to schedule a hearing on it before the deadline terminates because the failure to timely file a plan constitutes “cause” for dismissal or conversion of the case under § 1112(b)(4)(J).²²⁸

Because subchapter V does not contain a deadline for confirmation of a plan and new § 1193 permits preconfirmation modification of a plan at any time, a debtor may consider the timely filing of a “placeholder” plan with the expectation of a later modification instead of seeking an extension.²²⁹

The court in *In re Baker*, 625 B.R. 27, 38 (Bankr. S.D. Tex. 2020), criticized the strategy as “a waste of time and resources for all parties-in-interest” that “does not represent Congress’s intent” in enacting subchapter V. . . . The intentionally expedited nature of subchapter V cases dictates an abbreviated deadline under § 1189 that is not intended to be manipulated by placeholder plans.”

²²⁵ *In re Online King, LLC*, 2021 WL 1536415 at *8 (Bankr. E.D. Tex. 2021) (pandemic and Jewish holidays); *In re Northwest Child Development Centers, Inc.*, 2020 WL 8813586 at *2 (Bankr. M.D. N.C. 2020) (pandemic and inclement weather preventing inspection of business premises for appraisal).

²²⁶ *In re Online King, LLC*, 2021 WL 1536415 at *9 (Bankr. E.D. Tex. 2021).

²²⁷ *E.g.*, *In re Tibbens*, 2021 WL 1087260 at *8 (Bankr. M.D.N.C. 2021); *In re Online King LLC*, 2021 WL 1536415 at *4-5 (Bankr. E.D.N.Y. 2021); 8 COLLIER ON BANKRUPTCY ¶ 1189.03.

²²⁸ *In re Online King LLC*, 2021 WL 1536415 at *4-5 (Bankr. E.D.N.Y. 2021); 8 COLLIER ON BANKRUPTCY ¶ 1189.03. See Section VI(D).

²²⁹ *In re Baker*, 625 B.R. 27, 37 (Bankr. S.D. Tex. 2020), the court described a “placeholder plan” as “a skeletal document filed to satisfy a filing deadline, with the intent to file a completed, substantive document later.”

Stating that “filing a placeholder plan merely to satisfy the statutory plan deadline serves no justiciable purpose, contributes to increased costs, and subverts the intent underlying subchapter V, the *Baker* court announced, *id.* at 38:

[T]his Court disfavors placeholder plans and expects debtors to file substantive, confirmable plans unless situations arise such that an extension is warranted because of circumstances for which the debtor should not justly be held accountable.

K. Debtor’s postpetition performance of obligations under lease of nonresidential real property-- § 365(d)

Section 365(d)(3) requires the timely performance of all obligations of a debtor that is the lessee under an unexpired lease of nonresidential real property, unless the court for cause extends the time for performance. SBRA did not change § 365(d)(3), but the Consolidated Appropriations Act, 2021 (the “CAA”) enacted a temporary amendment that permits the court to extend the time for performance in subchapter V cases that is effective until December 28, 2022.²³⁰

Pre-CAA § 365(d)(3), which remains in effect, redesignated as § 365(d)(3)(A),²³¹ permits the court to extend the time for performance of postpetition obligations arising within 60 days after the order for relief, but not beyond such 60-day period.

The CAA temporarily adds subparagraph (B) to § 365(d)(3) to permit an extension of the time for performance in a subchapter V case if the debtor “is experiencing or has experienced a

²³⁰ Consolidated Appropriations Act, 2021 (the “CAA”), Pub. L. No. 116-260, Title X, § 1001(f), 134 Stat. 1182, 3219 (December 27, 2020). The CAA also temporarily amended § 365(d)(4). Pre-CAA § 365(d)(4) provided that, if assumption of a lease of nonresidential real property under which the debtor is the lessee did not occur by the earlier of confirmation of a plan or 120 days after the order for relief, the lease was deemed rejected and the trustee (or debtor in possession) must surrender the property to the lessor. The court for cause could extend the time by 90 days, for a maximum time of 210 days. The CAA extended the 120-day period to 210 days and permits extension to a maximum of 300 days. CAA § 1010(f)(1)(B). The extended period sunsets two years after enactment of CAA, or December 28, 2022. CAA § 1001(f)(2)(A)(ii).

²³¹ CAA § 1001(f)(1)(A)(i).

material financial hardship due, directly or indirectly, to the coronavirus disease 2019 (COVID-19) pandemic.”²³² Subparagraph (B) permits extension of the time for performance to the earlier of 60 days after the order for relief or the date of assumption or rejection of the lease.²³³ In addition, subparagraph (B) permits the court to extend the time for an additional 60 days if the debtor is continuing to experience a material financial hardship due to the COVID-19 pandemic.

CAA also temporarily added subparagraph (C) to § 365(d)(3). It provides that, if the court extends the time for performance of an obligation under subparagraph (B), the obligation will be treated “as an administrative expense described in section 507(a)(2) for the purpose of section 1191(e).”²³⁴ Section VII(C) considers this provision in its discussion of new § 1191(e), which permits deferral of administrative expenses under a cramdown plan.

The amended provisions expire on December 28, 2022.²³⁵ They continue to apply, however, in any subchapter V case filed before the sunset date.²³⁶

It is unclear whether a sub V debtor who has not experienced financial hardship due to COVID-19 may seek relief under subparagraph (A). Although subparagraph (B) arguably states the rule for all sub V cases, its apparent purpose is to relax the rule in a subchapter V case for a debtor whose problems arise from the COVID-19 pandemic. A sub V debtor who cannot establish that it has experienced Covid-related financial distress, therefore, should be able to proceed under subparagraph (A).

²³² CAA § 1001(f)(1)(A)(iii).

²³³ This provision in subparagraph (B) differs from subparagraph (A) (the pre-CAA rule in § 365(d)(3)). Subparagraph (A) permits extension of the time for performance for 60 days without regard to whether the lease is assumed or rejected. Subparagraph (B) does not permit extension of time beyond the date of assumption or rejection. Arguably, the purpose of subparagraph (B) is to relax the rules for postpetition performance in a subchapter V case so that a sub V debtor could still seek an extension of time for 60 days to perform postpetition obligations notwithstanding the earlier rejection of a lease.

²³⁴ CAA § 101(f)(1)(A)(iii).

²³⁵ CAA § 101(f)(2)(A)(i).

²³⁶ CAA § 101(f)(2)(B).

VII. Contents of Subchapter V Plan

The requirements for the contents of a sub V plan are contained in §§ 1122 and 1123 (with two exceptions) and in new § 1190. An important provision is that new § 1190(3) permits modification of a claim secured only by a security interest in real property that is the principal residence of the debtor if the loan arises from new value provided to the debtor's business.²³⁷

Section 1122 states rules for classification of claims in a chapter 11 plan, and § 1123 states what provisions a plan must and may have. Two provisions in § 1123 – (a)(8) and (c) – are not applicable in sub V cases.²³⁸ A subchapter V plan must comply with the other requirements of §§ 1122 and 1123.

Official Form 425A, which is a permissible, but not required, form for a chapter 11 plan, has been modified and may be used in a subchapter V case. Courts may adopt local forms for subchapter V plans²³⁹ or make the use of Official Form 425A mandatory and provide guidance on its preparation.²⁴⁰

A. Inapplicability of §§ 1123(a)(8) and 1123(c)

Section 1123(a)(8) requires the plan for an individual debtor to provide for payment to creditors of all or such portion of earnings from postpetition services or other future income as is necessary for the execution of the plan.²⁴¹ Section 1123(c) prohibits a plan filed by an entity

²³⁷ New § 1190(3).

²³⁸ New § 1181(a).

²³⁹ E.g., *Debtor's Chapter 11, Subchapter V Plan* (D. Md.) (suggested), available at <https://www.mdb.uscourts.gov/content/local-bankruptcy-forms>; *Chapter 11 Subchapter V Small Business Debtor's Plan of Reorganization [or Liquidation]* (D. New Jersey) (mandatory), available at http://www.njb.uscourts.gov/forms/all-forms/mandatory_forms; *Plan of Reorganization* (W.D. Wisconsin) (suggested), available at <https://www.wiwb.uscourts.gov/forms>.

²⁴⁰ E.g., *SBRA Plan Instructions*, available at <http://www.canb.uscourts.gov/forms/district>.

²⁴¹ § 1123(a)(8).

other than the debtor from providing for the use, sale, or lease of exempt property, unless the debtor consents.²⁴²

SBRA replaced § 1123(a)(8) with a disposable income provision applicable to all debtors in new § 1190, which contains additional provisions for the content of a plan. Section 1123(c) is superfluous in a subchapter V case because only the debtor can propose a plan.²⁴³

B. Requirements of New § 1190 for Contents of Subchapter V Plan; Modification of Residential Mortgage

New § 1190 contains three provisions governing the content of a sub V plan.

First, new § 1190(1)²⁴⁴ requires information that would otherwise be included in a disclosure statement. The plan must include: (1) a brief history of the operations of the debtor; (2) a liquidation analysis; and (3) projections regarding the ability of the debtor to make payments under the proposed plan.

Second, new § 1190(2) requires the plan to 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.” In an individual case, this provision replaces the similar rule in the inapplicable § 1123(a)(8). In non-individual cases, it imposes a new requirement.

Because a plan ordinarily must provide for payment of creditors from the debtor’s income, the requirement for the submission to the trustee of income as necessary for the execution of the plan states nothing more than a feasibility requirement.

²⁴² § 1123(c).

²⁴³ New § 1189(a).

²⁴⁴ No apparent reason exists for using numbers for the subsections of this section instead of the customary lower-case letters.

New § 1190(2) raises interpretive issues regarding the requirement that future income be submitted to the “supervision and control” of the trustee.

If a consensual plan is confirmed under new § 1191(a), new § 1194 does not contemplate that the trustee make the payments. Moreover, new § 1183(c)(1) provides for termination of the trustee’s service upon substantial consummation of a consensual plan under new § 1191(a).

Under § 1101(2), “substantial consummation” occurs upon (among other things²⁴⁵) “commencement of distribution under the plan.”²⁴⁶ An issue is whether a consensual plan must provide for submission of future income to the trustee’s supervision and control when the trustee’s service will terminate once the first plan payment is made.²⁴⁷

The third content provision in new § 1190(3) changes the rule of § 1123(b)(5) that a plan may not modify the rights of a claim secured only by a security interest in real property that is the debtor’s principal residence. The same antimodification rule applies in chapter 13 cases under § 1322(b)(2).

New § 1190(3) permits modification of such a claim if the two circumstances specified in subparagraphs (A) and (B) exist. The requirement of subparagraph (A) is that the new value received in connection with the granting of the security interest was “not used primarily to acquire the real property.” Subparagraph (B) requires that the new value have been “used primarily in connection with the small business of the debtor.”²⁴⁸ (Query whether an individual

²⁴⁵ Substantial consummation also requires transfer of all or substantially all of the property proposed by the plan to be transferred, § 1101(2)(A) (2018), and assumption by the debtor or by the successor to the debtor of the business or of the management of all or substantially all of the property dealt with by the plan, § 1101(2)(B).

²⁴⁶ § 1101(2)(C).

²⁴⁷ See Section IX(A).

²⁴⁸ New § 1190(3). For a discussion of strategies for lenders to consider to preclude application of the subchapter V exception to the anti-modification rule, see Christopher G. Bradley, *The New Small Business Bankruptcy Game: Strategies for Creditors Under the Small Business Reorganization Act*, 28 AMER. BANKR. INST. L. REV. 251, 282-83 (2020). Professor Bradley suggests lenders might require more than half of the loan proceeds to be used for personal expenses or that, in the case of a proposed loan secured by a second mortgage, the lender instead pay off the first mortgage and refinance that amount so that most of the loan is not for the business. *Id.*

whose debts exceed the limits for qualification as a “small business debtor” under § 101(51D)(A) but who qualifies for subchapter V under the temporary \$ 7.5 million debt limit under the CARES Act meets the requirement in (B) for use of loan proceeds for the debtor’s “small business.”)

Courts have considered whether the prohibition on modification of a residential mortgage applies when the property in which the debtor resides has nonresidential characteristics or uses, usually in chapter 13 cases.²⁴⁹ For example, the property may be a multi-family dwelling that does or can generate rental income or a farm. The debtor may use it for business purposes, or it may include additional tracts or acreage beyond a residential lot.

The issue in such cases is whether the claim is secured by property other than the debtor’s residence. Some courts have ruled that antimodification protection extends to a mortgage secured by any real property that the debtor uses, at least in part, as a residence. Other courts, however, have concluded that the debtor’s use of real property as a residence does not alone mean that the debt is secured only by the debtor’s principal residence, and that a mortgage on property the debtor uses as a residence is subject to modification if the property has sufficient nonresidential characteristics or uses.²⁵⁰

The court in *In re Ventura*²⁵¹ concluded that application of new § 1190(3) requires a different analysis. There, an individual operated a bread and breakfast business in her residence through a limited liability company she owned. In her chapter 11 case filed prior to SBRA’s enactment, the court had ruled that she could not modify the mortgage on the property, applying

²⁴⁹ See W. Homer Drake, Jr., Paul W. Bonapfel, & Adam M. Goodman, CHAPTER 13 PRACTICE AND PROCEDURE § 5:42.

²⁵⁰ *Id.*

²⁵¹ *In re Ventura*, 615 B.R. 1 (Bankr. E.D.N.Y. 2020).

the cases holding that a debtor may not modify a mortgage on property in which she resides even if she uses it for other purposes.

After SBRA's effective date, the debtor amended her petition to elect application of subchapter V. In addition to permitting her to proceed under subchapter V,²⁵² the court addressed the lender's contention that she could not invoke § 1190(3) because the proceeds from the mortgage had been used to acquire the property.²⁵³

The *Ventura* court concluded that § 1190(3) specifically permits the modification of a residential mortgage if the conditions of subparagraphs (A) and (B) exist. The questions, therefore, were whether the mortgage proceeds were “not used primarily to acquire the real property” (new § 1190(3)(A)) and were “used primarily in connection with the small business of the debtor” (new § 1190(3)(B)).²⁵⁴

The court focused on two terms in subparagraph (A). “Primarily,” the court said, means “for the most part,” “of first importance,” or “principally,” rather than “substantial.” The phrase “real property,” the court continued, refers back to the real property that is the debtor's residence.²⁵⁵

Based on these definitions, the court phrased the question of subparagraph (A)'s application in the case before it as “whether the Mortgage proceeds were used primarily to purchase the Debtor's Residence.”²⁵⁶ The inquiry thus differs from the issue under § 1123(b)(5) (and § 1322(b)(2) in chapter 13 cases) that, under the court's prior ruling, prohibited modification of the mortgage because the debtor resided in the property, regardless of its other

²⁵² *Id.* at 7-14. Part XIII discusses the court's ruling on the availability of subchapter V in the case.

²⁵³ The lender also argued that § 1190(3) could not be applied to a transaction arising prior to its effective date. Part XIII discusses the court's ruling rejecting this contention.

²⁵⁴ *In re Ventura*, 615 B.R. 1, 23 (Bankr. E.D.N.Y. 2020).

²⁵⁵ *Id.* at 24.

²⁵⁶ *Id.*

uses. New § 1190(3), the court explained, “asks the court to determine whether the primary purpose of the mortgage was to acquire the debtor’s residence.”²⁵⁷

Subparagraph (B), the court stated, required it to determine “whether the mortgage proceeds were used primarily in connection with the debtor’s business.”

The *Ventura* court concluded that subparagraphs (A) and (B) directed it “to conduct a qualitative analysis to determine whether the principal purpose of the debt was not to provide the debtor with a place to live, and whether the mortgage proceeds were primarily for the benefit of the debtor’s business activities.”²⁵⁸

The court proposed five factors to consider in this analysis: “(1) Were the mortgage proceeds used primarily to further the debtor’s business interests; (2) Is the property an integral part of the debtor’s business; (3) The degree to which the specific property is necessary to run the business; (4) Do customers need to enter the property to utilize the business; and (5) Does the business utilize employees and other businesses in the area to run its operations.”²⁵⁹

The court found that the debtor bought the property to operate it as a bed and breakfast, that its primary purpose was the offering of rooms for nightly fees, that the debtor’s LLC provided additional services to guests for additional fees, and that the mortgage proceeds were used to purchase the building that houses the business. The court ruled that the evidence was sufficient to hold a full evidentiary hearing to determine whether the debtor could use § 1190(3) to modify the mortgage.²⁶⁰

A business debtor may grant a security interest in a principal residence as additional collateral without receiving new value, perhaps in connection with a workout involving

²⁵⁷ *Id.*

²⁵⁸ *Id.*

²⁵⁹ *Id.* at 25.

²⁶⁰ *Id.*

forbearance or restructuring of the debt. A potential issue is whether the new § 1190(3) exception to the antimodification rule applies in this situation when the debtor receives no additional loan proceeds.

C. Payment of Administrative Expenses Under the Plan

If the court confirms a plan under the cramdown provisions of new § 1191(b), new § 1191(e) permits the plan to provide for the payment through the plan of claims specified in §§ 507(a)(2) and (3), notwithstanding the confirmation requirement in § 1129(a)(9) that such claims be paid in full on the plan's effective date.²⁶¹ Section 507(a)(2) includes administrative expense claims allowable under § 503(b), and § 507(a)(3) gives priority to involuntary gap claims allowable under § 502(f).

Administrative expenses include claims under § 503(b)(2) for fees and expenses of the trustee and of professionals employed by the debtor and the trustee under § 330(a) and claims under § 503(b)(9) for goods received by the debtor in the ordinary course of business within 20 days before the filing of the petition.²⁶²

In *In re Seven Stars on the Hudson Corp.*, 618 B.R. 333, 347 n. 82 (Bankr. S.D. Fla. 2020), the court observed that a sub V plan cannot provide for the deferred payment of postpetition rent obligations under a lease of nonresidential real property.

The *Seven Stars* court agreed that § 1191(e) permits deferred payment of administrative expense claims allowed under § 503(b). It concluded, however, that § 365(d)(3), not § 503(b), governs postpetition rent obligations. The court ruled, “As such, even though new Section

²⁶¹ New § 1191(e).

²⁶² The permission to pay these priority claims “through the plan” without requiring payment in full raises questions of whether a plan may provide for less than full payment and whether interest is required. Presumably, Congressional intent is to change the timing requirement for payment of the claims and not to permit partial payment. See Ralph Brubaker, *The Small Business Reorganization Act of 2019*, 39 Bankruptcy Law Letter, no. 10, Oct. 2019, at 15-16.

1191(e) permits certain administrative expense claims to be paid out over the term of a plan, this provision undoubtedly does not apply to administrative rent.” *Id.* Even if the court permitted the debtor to proceed under subchapter V in its case that began prior to its enactment, the court ruled, it could not confirm a plan that did not provide for full payment of postpetition rent on the effective date of the plan in accordance with earlier orders of the court.

The Consolidated Appropriations Act, 2021 (the “CAA”)²⁶³ made temporary changes to § 365(d) dealing with the timely performance of the debtor’s postpetition obligations as lessee under an unexpired lease of nonresidential real property. As Section VI(K) discusses, the temporary amendment added subparagraph (B) to § 365(d)(3) to permit the court to extend the time for the performance of such obligations for up to 120 days in a sub V case if it determines that the debtor “is experiencing or has experienced a material financial hardship due, directly or indirectly, to the coronavirus disease 2019 (COVID-19) pandemic.”²⁶⁴

Importantly, CAA also added subparagraph (C) to § 365(d)(3) to provide that, if the court grants such an extension, the obligation “shall be treated as an administrative expense described in section 507(a)(2) for the purpose of section 1191(e).”²⁶⁵

The provisions expire on December 28, 2022²⁶⁶ but continue to apply in any subchapter V case filed before then.²⁶⁷

Because temporary § 365(d)(3)(C) requires treatment of a deferred postpetition lease obligation as an administrative expense for purposes of new § 1191(e), it seems that, notwithstanding the *Seven Stars* analysis, a cramdown plan may provide for the deferral of

²⁶³ Consolidated Appropriations Act, 2021 (the “CAA”), Pub. L. No. 116-260, Title X, § 1001(f), 134 Stat.1182, 3219 (December 27, 2020).

²⁶⁴ § 365(d)(3)(B), as enacted by CAA § 1001(f)(1)(A)(iii).

²⁶⁵ § 365(d)(3)(C), as enacted by CAA § 1001(f)(1)(A)(iii).

²⁶⁶ CAA § 1001(f)(2)(A).

²⁶⁷ CAA § 1001(f)(2)(B).

payment of obligations that the court extends. The difficulty with the conclusion is that subparagraph (B) still requires that the court order performance of postpetition obligations within no more than 120 days after the order for relief.

Arguably, a debtor who has not complied with the mandatory requirement of § 365(d)(3)(B) has not satisfied the confirmation requirement of § 1129(a)(2) that the plan proponent comply with all applicable provisions of the Bankruptcy Code. Courts will have to determine whether temporary § 365(d)(3)(C) grants permission to defer payments that the debtor had the obligation to make within the time that § 365(d)(3)(B) requires.

VIII. Confirmation of the Plan

A. Consensual and Cramdown Confirmation in General

Under pre-SBRA law, the court must confirm a chapter 11 plan if all the requirements of § 1129(a) are met.

When all of the requirements of § 1129(a) are met except the requirement in paragraph (a)(8) that all impaired classes accept the plan, § 1129(b)(1) permits so-called “cramdown” confirmation “if the plan does not discriminate unfairly, and is fair and equitable” with regard to each impaired class that has not accepted it.²⁶⁸ Section 1129(b)(2) states the rules for the “fair and equitable” requirement for classes of secured claims (§ 1129(b)(2)(A)), unsecured claims (§ 1129(b)(2)(B)), and interests (§ 1129(b)(2)(C)).²⁶⁹ The effects of confirmation are not different depending on whether cramdown confirmation under § 1129(b) occurs.

New § 1191 states the rules for confirmation in a sub V case. Section 1129(a) remains applicable in a sub V case, except for paragraph (a)(15), which imposes a projected disposable

²⁶⁸ § 1129(b)(1).

²⁶⁹ § 1129(b)(2).

income requirement in the case of an individual if an unsecured creditor invokes it.²⁷⁰ Because § 1129(a)(15) no longer applies, Interim Rule 1007(b) makes the requirement that an individual debtor in a chapter 11 case file a statement of current monthly income inapplicable to an individual in a subchapter V case.²⁷¹

If all the applicable requirements in § 1129(a) are met except for the projected disposable income rule of paragraph (a)(15), new § 1191(a) requires the court to confirm the plan. Because § 1129(a)(8) requires acceptance of the plan by all impaired classes, confirmation under § 1191(a) can occur only if all impaired classes have accepted it.²⁷² This paper refers to it as a “consensual plan.”

New § 1191(b) states the rules for cramdown confirmation. It replaces the cramdown provisions of § 1129(b), which do not apply in a sub V case.²⁷³ In general, new § 1191(b) permits confirmation even if the requirements of paragraphs (8), (10), and (15) of § 1129(a) are not met. Thus, cramdown confirmation does not require (1) that all impaired classes accept the plan (§ 1129(a)(8)) or (2) that at least one impaired class of creditors accept it (§ 1129(a)(10)). The requirements in § 1129(b)(2)(A) for cramdown confirmation with regard to a class of secured claims remain applicable in a sub V case.²⁷⁴

Importantly, both consensual confirmation and cramdown confirmation require compliance with all of the requirements of § 1129(a) except those specifically mentioned above. Sections VIII(D) and (E) discuss confirmation issues that have arisen in subchapter V cases under provisions that SBRA did not change.

²⁷⁰ New § 1181(a). For cases applying the applicable § 1129(a) standards, see *In re Fall Line Tree Service, Inc.*, 2020 WL 7082416 (Bankr. E.D. Cal. 2020); *In re Pearl Resources, LLC*, 622 B.R. 236 (Bankr. S.D. Tex. 2020).

²⁷¹ INTERIM RULE 1007(b).

²⁷² New § 1191.

²⁷³ § 1181(a).

²⁷⁴ New § 1191(c)(1).

Cramdown confirmation under new § 1191(b) does not require that the plan meet the projected disposable income requirement of § 1129(a)(15), applicable only in the case of an individual if any unsecured creditor invokes it. Cramdown confirmation does, however, impose a modified projected disposable income rule, expanded to include all debtors, not just individuals, as the next Section discusses.

For an individual, it is significant that the projected disposable income rule comes into play only if one or more *classes* do not accept the plan. Unless a class consists of only one creditor, a single creditor cannot invoke the projected disposable income requirement, which a single creditor can do in a traditional case even if all impaired classes accept the plan.²⁷⁵ Section VIII(D)(8) discusses application of the good faith requirement of § 1129(a)(3) in the context of confirmation of a consensual plan when an unsecured creditor objects because the debtor is not paying enough disposable income to creditors.

Importantly, the effects of confirmation differ depending on whether confirmation occurs under new § 1191(a) (where all classes have accepted it) or under new § 1191(b) (where one or more – or even all – classes have not accepted it).²⁷⁶

²⁷⁵ § 1129(a)(15). One may view the projected disposable income requirement for cramdown confirmation as protection for a dissenting class of unsecured creditors that substitutes for the inapplicable absolute priority rule. *See In re Moore Properties of Person County, LLC*, 2020 WL 995544, at *5 (Bankr. M.D.N.C. 2020). In absolute priority rule theoretical terms, it recognizes “sweat equity” (i.e., future income) as “new value” that permits equity owners to retain their interests. The inability of a single creditor to invoke the projected disposable income rule is consistent with the inability of a single creditor to invoke the absolute priority rule under § 1129(b); both apply only if a class does not accept.

²⁷⁶ Other text explains the consequences of the type of confirmation relating to: payments under the plan by the trustee and termination of the service of the trustee (Part IX); compensation of the trustee (Section IV(E)); deferral of administrative expenses (Section VII(C)); postconfirmation modification of the plan (Section VIII(C)); discharge (Part X); contents of property of the estate (Part XI); and postconfirmation default and remedies (Part XII).

B. Cramdown Confirmation Under New § 1191(b)

1. Changes in the cramdown rules and the “fair and equitable” test

Discussion of the revised cramdown rules in a sub V case begins with a summary of the key provisions that govern cramdown confirmation under pre-SBRA law.

Section 1129(a) contains two important requirements for confirmation with regard to acceptances of a plan. First, paragraph (a)(8) requires that all impaired classes accept the plan.²⁷⁷ Second, paragraph (a)(10) requires that at least one class of impaired creditors accept the plan.²⁷⁸

Section 1129(b) permits cramdown confirmation if all the requirements for confirmation in § 1129(a) are met except the requirement of paragraph (a)(8) that all impaired classes accept it. Section 1129(b), however, does not affect the confirmation requirement of § 1129(a)(10) that at least one impaired class of creditors accept the plan. Cramdown confirmation under § 1129(b) is not available if no impaired class of creditors has accepted the plan.

In addition, if the nonaccepting class is the class of unsecured creditors, the absolute priority rule of § 1129(b)(2)(B) prohibits holders of equity interests from retaining their interests unless unsecured creditors receive full payment (subject to the new value exception).²⁷⁹ In an individual case, many courts conclude that the absolute priority rule prohibits the debtor from retaining property without payment in full to unsecured creditors.²⁸⁰

²⁷⁷ § 1129(a)(8).

²⁷⁸ § 1129(a)(10).

²⁷⁹ § 1129(b)(2)(B).

²⁸⁰ See 7 COLLIER ON BANKRUPTCY ¶ 1129.04[3][d]. For competing views of whether the absolute priority rule should apply in a traditional case of an individual, see Brett Weiss, *Absolute-Priority Rule Should Not Apply in Individual Cases*, 40 AMER. BANKR. INST. J. 20 (May 2021), and Emily C. Eggmann and Robert E. Eggmann, *Absolute-Priority Rule Should Apply in Individual Chapter 11 Cases*, 40 AMER. BANKR. INST. J. 21 (May 2021),

Subchapter V changes these rules. The starting point is that § 1129(b) does not apply.²⁸¹ Instead, new § 1191(b) states revised cramdown rules that (1) permit cramdown confirmation even if all impaired classes do not accept the plan and (2) eliminate the absolute priority rule.²⁸² New § 1191(c) states a new “rule of construction” for the requirement that a plan be “fair and equitable.”²⁸³ It replaces the “fair and equitable” requirements of § 1129(b), which do not apply in a subchapter V case.

The debtor may invoke new § 1191(b) when all confirmation requirements of § 1129(a) are met except those in paragraphs (8), (10), and (15). Thus, in addition to eliminating the (a)(8) requirement that all impaired classes accept the plan, new § 1191(b) eliminates the requirement of § 1129(a)(10) that at least one impaired class accept the plan. The projected disposable income test of § 1129(a)(15), applicable only in the case of an individual, is replaced by a revised projected disposable income test applicable to all debtors.²⁸⁴

Under the cramdown rules in new § 1191(b), if all other confirmation standards are met, the court must confirm a plan, on request of the debtor, if, with respect to each impaired class that has not accepted it, the plan (1) does not discriminate unfairly and (2) is fair and equitable. These two general standards are the same as the ones that govern cramdown confirmation under § 1129(b).

It does not appear that the new statute effects any change in the unfair discrimination requirement.²⁸⁵ New § 1191(c) does, however, provide a new “rule of construction” in

²⁸¹ New § 1181(a).

²⁸² New § 1191(b).

²⁸³ New § 1191(c).

²⁸⁴ New § 1191(d).

²⁸⁵ See Section VIII(D)(1).

subchapter V cases for the condition that a plan be “fair and equitable,” to replace the detailed definition of that term that § 1129(b) contains.

The following text explains the requirements of the “fair and equitable” test in sub V cases.

2. Cramdown requirements for secured claims

Subchapter V does not change existing law about permissible cramdown treatment of secured claims. With regard to a class of secured claims, a subchapter V plan is “fair and equitable” if it complies with the standards for secured claims stated in § 1129(b)(2)(A).

Subchapter V does limit the ability of a partially secured creditor with an unsecured deficiency claim to block cramdown confirmation. In a traditional chapter 11 case, an undersecured creditor with a large deficiency claim often controls the vote of the unsecured class. If no other impaired class of creditors accepts the plan, cramdown confirmation is not possible in a traditional case because of the absence of an accepting impaired class of claims, which § 1129(a)(10) requires.²⁸⁶ This requirement is inapplicable for cramdown confirmation in a sub V case under new § 1191(b).

In addition, the creditor in a sub V case cannot invoke the absolute priority rule with regard to the unsecured portion of its claim.

Section 1129(b) states different requirements for cramdown confirmation for secured and unsecured claims. Compliance with the absolute priority rule, for example, is not a requirement for confirmation of a plan over a secured creditor’s objection if the unsecured class accepts the plan. The absolute priority rule arises from cramdown requirements relating to unsecured claims

²⁸⁶ § 1129(a)(10).

in § 1129(b)(2)(B), but it is not in the requirements for cramdown of a secured claim in § 1129(b)(2)(A).

In a sub V case, paragraph (1) of § 1191(c) makes the § 1129(b)(2)(A) cramdown requirements applicable to secured claims, and paragraphs (2) and (3) impose additional requirements, the commitment of disposable income and a finding of feasibility.

It is unclear whether the additional requirements apply when only the secured creditor rejects the plan. Without discussing the issue, the court in *In re Pearl Resources, LLC*, 622 B.R. 236, 267-70 (Bankr. S.D. Tex. 2020), concluded that the plan, accepted by unsecured creditors, complied with the additional requirements in confirming the plan over the objections of secured creditors.

3. Components of the “fair and equitable” requirement in subchapter V cases; no absolute priority rule

New § 1191(c) does not state a “fair and equitable” rule specifically for unsecured claims. Instead, it imposes a projected disposable income requirement (sometimes called the “best efforts” test), requires a feasibility finding, and requires that the plan provide appropriate remedies if payments are not made. Notably absent is the absolute priority rule.²⁸⁷

4. The projected disposable income (or “best efforts”) test

The projected disposable income (or “best efforts”) requirement is in new § 1191(c)(2).²⁸⁸

²⁸⁷ The court in *In re Moore Properties of Person County, LLC*, 2020 WL 995544, at *5 (Bankr. M.D.N.C. 2020), reasoned that the projected disposable income is a substitute for the absolute priority rule. See also *supra* note 275.

²⁸⁸ New § 1191(c)(2). Compliance with the projected disposable income requirement is a mandatory condition for cramdown confirmation under new § 1191(b). In chapter 11, 12, and 13 cases, it applies only if a holder of an allowed unsecured claim or, in a chapter 12 or 13 case, the trustee, invokes it. §§ 1129(a)(15), 1225(b), 1325(b).

Cramdown confirmation under new § 1191(b) requires that the plan provide that all of the projected disposable income of the debtor to be received in the three-year period after the first payment under the plan is due, or in such longer period not to exceed five years as the court may fix, will be applied to make payments under the plan.²⁸⁹ Alternatively, the plan may provide that the value of property to be distributed under the plan within the three-year or longer period that the court fixes is not less than the projected disposable income of the debtor.²⁹⁰ The court in *In re Young*, 2021 WL 1191621 at *5 (Bankr. D. N.M. 2021), ruled that individuals who claimed that they had no disposable income could not obtain confirmation of their sub V plan.²⁹¹

The language is substantially the same as the projected disposable income test applicable in chapter 12 cases.²⁹² Like the chapter 12 requirement (and unlike the requirement in traditional chapter 11 cases), it applies to entities as well as individuals.

²⁸⁹ New § 1191(c)(2)(A). The projected disposable income test in chapter 11 and 12 cases likewise requires the use of projected disposable income to make payments under the plan. §§ 1129(a)(15), 1225(b)(1).

This was the chapter 13 rule until the enactment of Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA) of 2005. BAPCPA in 2005, which amended 1325(b)(1) to require the use of projected disposable income to make payments to unsecured creditors.

Presumably, the amended chapter 13 provision takes account of the fact that the “means test” standards that govern the reasonably necessary expenses that an above-median debtor may deduct from current monthly income in calculating disposable income permit deductions for payments on secured and priority claims. *See* W. Homer Drake, Jr., Paul W. Bonapfel, & Adam M. Goodman, CHAPTER 13 PRACTICE AND PROCEDURE §§ 8:29, 8:44, 8:60. Although the definition of disposable income does not specifically permit a below-median debtor to deduct payments on secured and priority claims in calculating disposable income, the statute of necessity must be interpreted to include them. *See id.* § 8:29.

The difference in how the debtor must use projected disposable income may affect the timing of payments to unsecured creditors but appears to have no material effect on the amount of money that must be paid under the plan or how much of it goes to unsecured creditors. *See id.* § 8:68.

²⁹⁰ The projected disposable income tests in chapters 11 and 12 also contain this alternative, but the chapter 13 one does not.

²⁹¹ The *Young* court reasoned, “Debtors who elect not to make plan payments should not get the benefit of subchapter V. If making reasonable plan payments while working is unpalatable to the Debtors, they should have filed a chapter 7 case.” *In re Young*, 2021 WL 1191621 at *5 (Bankr. D. N.M. 2021).

²⁹² *See* § 1225(b). Section 1225(b)(1)(A) provides that the debtor need not commit projected disposable income if the plan provides for full payment. New § 1191(c)(2) does not contain this provision, raising the possibility that a creditor could insist on commitment of disposable income to pay more than the allowed amount of the claim. *See* Brubaker, Ralph Brubaker, *The Small Business Reorganization Act of 2019*, 39 Bankruptcy Law Letter, no. 10, Oct. 2019, at 13. It seems unlikely that Congress could have intended such a result that is inconsistent with the common-sense principle, even if unstated, that payment of the full amount of the claim (perhaps with interest) resolves it.

Key confirmation issues are: (1) How is projected disposable income determined?
(2) How does the court determine whether the required period should be longer than three years;
and (3) If so, how does the court determine how much longer the period must be?

i. Determination of projected disposable income

The Bankruptcy Code does not define “projected disposable income,” but it defines “disposable income” in chapters 12²⁹³ and 13.²⁹⁴ In chapter 11 cases, § 1129(a)(15) incorporates the chapter 13 definition.²⁹⁵

New § 1191(d) defines disposable income as income that is received by the debtor and that is not “reasonably necessary to be expended” for these specified purposes:

- the maintenance or support of the debtor or a dependent of the debtor;²⁹⁶ or
- a domestic support obligation that first becomes payable after the date of the filing of the petition;²⁹⁷ or
- payment of expenditures necessary for the continuation, preservation, or operation of the business of the debtor.²⁹⁸

The definition of disposable income in new § 1191(d) is substantially the same as the definition of disposable income in § 1225(b)(2). It is also substantially the same definition as in § 1325(b)(2), except that § 1325(b)(2) defines the income component as “current monthly income” (defined in § 101(10A)) and permits a deduction for charitable contributions. The chapter 11 provision incorporates the chapter 13 definition.²⁹⁹

²⁹³ § 1225(b)(2).

²⁹⁴ § 1325(b)(2).

²⁹⁵ § 1129(a)(15).

²⁹⁶ New § 1191(d)(1)(A).

²⁹⁷ New § 1191(d)(1)(B).

²⁹⁸ § 1191(d)(2).

²⁹⁹ § 1129(a)(15).

Although the definition of disposable income in all cases is substantially the same, the manner of determining permissible deductions in calculating disposable income differs materially with regard to expenditures for the “maintenance or support” of the debtor and the debtor’s dependents.

In chapter 13 cases, the so-called “means test” standards govern the deductions that an “above-median”³⁰⁰ debtor may take in calculating disposable income.³⁰¹ The means test rules do not apply in a chapter 12 case or in the case of a below-median chapter 13 debtor. It is not clear whether the means test applies in chapter 11 cases.³⁰²

New § 1191(d) does not incorporate the means test in the calculation of disposable income. The test for determining what maintenance and support expenditures are “reasonably necessary to be expended” for “maintenance or support” in new § 1191(d)(1) in sub V cases is the same as it is in chapter 12 and below-median chapter 13 cases, and as it was in chapter 13

³⁰⁰ Generally, an “above-median” debtor is a debtor whose income is above the median income of the state in which the debtor resides, and a “below-median” debtor is one whose income is below the median. *See* W. Homer Drake, Jr., Paul W. Bonapfel, & Adam M. Goodman, CHAPTER 13 PRACTICE AND PROCEDURE § 8:12. The rules for determining the debtor’s status are set forth in § 1322(d), which governs the permissible term of a plan; § 1325(b)(3), which requires an above-median debtor to use the “means test” rules for determination of disposable income; and § 1325(b)(4), which defines “applicable commitment period” for purposes of determining the period for which the debtor must commit disposable income to pay unsecured creditors. Generally, an “above-median” debtor must use the means test rules and pay projected disposable income for five years. A “below-median” debtor does not use the means test rules and must pay projected disposable income for only three years. A below-median debtor’s plan cannot provide for payments longer than three years unless the court, for cause, approves a longer period not to exceed three years. *See id.* §§ 4:9, 8:12.

³⁰¹ § 1325(b)(3).

³⁰² In chapter 11 cases, § 1129(a)(15) states that projected disposable income is “as defined in [§ 1325(b)(2)].” § 1129(a)(15) (2018). Section 1325(b)(2) does not refer to the means test standards. Instead, they become applicable to an above-median debtor because § 1325(b)(3) states that they govern determination of “amounts reasonably necessary to be expended” under § 1325(b)(2) for an above-median debtor. § 1325(b)(3). The argument against application of the means test standards in a chapter 11 case is that § 1129(a)(15) incorporates only the definition in § 1325(b)(2) and does not incorporate § 1325(b)(3). The contrary argument is that determination of projected disposable income under § 1325(b)(2) necessarily includes reference to § 1325(b)(3) to calculate reasonably necessary expenses and that congressional intent in enacting § 1129(a)(15) was to make the chapter 13 rules applicable in chapter 11 cases.

cases prior to the introduction of the means test standards in BAPCPA.³⁰³ The case law on disposable income in such cases should provide guidance in making such determinations.

With regard to expenditures for the business, income is not “disposable income” under new § 1191(d)(2) if it is “reasonably necessary to be expended” for expenditures “necessary for the continuation, preservation, or operation” of the business.³⁰⁴ The rule contemplates the payment of items such as payroll, utilities, rent, insurance, taxes, acquisition of inventory or raw materials, and other expenses ordinarily incurred in the course of running the business.

Questions may arise when the debtor wants to establish a reserve for various purposes, such as capital expenditures that are anticipated (*e.g.*, the need to repair or replace existing equipment), or when the debtor needs to use income to grow the business (*e.g.*, increasing inventory levels, marketing expenses, or payroll) to improve its profitability. Creditors may reasonably argue that the disposable income they must receive should not be depleted when the debtor will gain the benefit of the investment of income in the business.

Chapter 12 cases have indicated that a reserve is permissible in appropriate circumstances.³⁰⁵ As later text discusses, an extension of the period that the debtor must make

³⁰³ Prior to the amendment of the projected disposable income test by BAPCPA in 2005, the standard in all chapter 13 cases was whether expenditures were reasonably necessary for the support of the debtor and the debtor’s dependents. No distinction between above-median and below-median debtors existed under pre-BAPCPA law. Accordingly, the pre-BAPCPA case law deals with the same standard that new § 1191(d)(1) states. For a discussion of application of the “reasonably necessary” standard for expenditures for maintenance and support in chapter 13 cases, see W. Homer Drake, Jr., Paul W. Bonapfel, & Adam M. Goodman, CHAPTER 13 PRACTICE AND PROCEDURE § 8:28.

³⁰⁴ New § 1191(d)(2).

³⁰⁵ See, *e.g.*, *Hammrich v. Lovald* (*In re Hammrich*), 98 F.3d 388 (8th Cir. 1996) (affirming confirmation of a plan including a reserve); *In re Schmidt*, 145 B.R. 983 (Bankr. D.S.D. 1991) (capital reserve permissible only if debtor demonstrates that obtaining financing is not feasible); *In re Kuhlman*, 118 B.R. 731 (Bankr. D.S.D. 1990) (debtor has burden of proving expenditures reasonably necessary for farming operation and living expenses); *In re Janssen Charolais Ranch, Inc.*, 73 B.R. 125 (Bankr. D. Mont. 1987) (*dicta*) (reserve is allowable). *But see* *Broken Bow Ranch, Inc. v. Farmers Home Admin.* (*In re Broken Bow Ranch, Inc.*), 33 F.3d 1005 (8th Cir. 1994).

payments of projected disposable income may be appropriate if the court permits its reduction for a reserve or for expenditures to grow the business.

Another question arises if a debtor is a “pass-through” entity for income tax purposes (*e.g.*, a subchapter S corporation or an entity taxed as a partnership, including a limited liability company). Such a business does not pay tax on its income. Rather, its income is “passed through” to its owners, who must pay tax on it regardless of whether the income is distributed to them. Payment of profits to owners of a business does not easily fit within the concept of an expenditure reasonably necessary for its continuation, preservation, or operation.

If the debtor’s disposable income cannot take account of distributions to owners for at least the amount of tax that they owe based on its income, the owners will owe a tax on the business income³⁰⁶ but will receive no money to pay it. When the generation of income by a business gives rise to taxation, it seems appropriate to determine disposable income on an after-tax basis, regardless of the tax status of the business. Moreover, in most cases the owners of the business are also its managers, and their financial difficulties arising from inability to meet tax obligations could adversely affect the business.

Courts will have to decide whether distributions to owners to pay taxes the owners incur are an appropriate expenditure that is “reasonably necessary for the continuation, preservation, or operation of the business” when the debtor is not obligated to pay the tax.

The projected disposable income test has its genesis in chapter 13, which contemplates periodic, usually monthly, payments to the trustee for disbursement to creditors in accordance with the plan. In some cases, the amount of the monthly payment may increase by a specified

³⁰⁶ Payments to creditors under the plan are not necessarily allowable as a deduction in determining taxable income. No deduction is permissible to the extent that the debtor is repaying principal on a loan. With regard to trade debt, no deduction will be allowed if the debtor calculates taxable income on an accrual basis (as the IRS requires for many businesses) and has already deducted the amount due as an expense.

amount at one or more specified times.³⁰⁷ In any event, chapter 13 plans typically provide for the debtor to pay a regular fixed amount.

While fixed payment plans are the standard in individual cases where material variations in income are not expected, debtors in business cases may be concerned that unpredictable changes in the economy may depress earnings or increase expenses and make it difficult or impossible to pay a fixed amount. Creditors, on the other hand, may expect that, if conditions improve, the debtor should pay more.

Thus, a debtor might propose, or creditors might insist on, the payment of *actual* disposable income over the required period rather than a fixed monthly amount. Variations could include minimum or maximum requirements or some percentage of disposable income in excess of specified amounts.

Such provisions are clearly permissible in a consensual plan that arises from negotiations between the debtors and creditors. The statutory requirements seem flexible enough that a debtor's plan that included them would satisfy the PDI test. Whether a court could impose such provisions is a more difficult question, in part because of difficulties in defining how to calculate projected disposable income when the payment is not fixed and in specifying how the debtor accounts for and reports it.

A debtor must also pay careful attention to the drafting of such a provision. *In re Patel*, 621 B.R. 245 (Bankr. E.D. Cal. 2020), illustrates the issues that arise when a plan provides for payment other than fixed amounts.

³⁰⁷ Such plans are commonly referred to as “step” plans. See W. Homer Drake, Jr., Paul W. Bonapfel, & Adam M. Goodman, CHAPTER 13 PRACTICE AND PROCEDURE § 8:23.

In *Patel*, the chapter 11 plan of the individual debtors, confirmed in 2011, provided for payment to creditors of all of the debtor’s “disposable income as defined in § 1129(a)(15)(B)” in quarterly payments over seven years. The plan required reports every 120 days, but the debtor stopped making them after 24 months.

The debtor never made any payments, and an unsecured creditor filed a motion to convert the case to chapter 7 based on the default. The debtor contended that no default existed because there had been no disposable income.

Construing the plan as a contract and applying state contract law, the court concluded that disposable income included income from all sources, not just income from the business, as the debtor argued, and that the debtor had fiduciary or contractual duties under the plan to account for disposable income. Accordingly, although state law ordinarily places the burden on the creditor to show a default, the court concluded that the debtor must show the completion of payments to receive a discharge.

The court concluded that the debtor had not shown that he had not had any disposable income and converted the case to chapter 7.

ii. Determination of period for commitment of projected disposable income for more than three years

A projected disposable income test applies in cases under chapter 12³⁰⁸ and 13³⁰⁹ and in traditional chapter 11 cases of individuals.³¹⁰ Each section prescribes the period of time for which the debtor must commit projected disposable income to make payments under the plan. The required time is colloquially referred to as the “commitment period,” but only chapter 13

³⁰⁸ § 1225(b).

³⁰⁹ § 1325(b).

³¹⁰ § 1129(a)(15). The requirement applies only if an unsecured creditor invokes it.

specifically uses the term by defining the “applicable commitment period” – the period for which the debtor must use projected disposable income to pay unsecured creditors – as three years for “below-median” debtors and five years for “above-median” debtors.³¹¹

For sub V cases, new § 1191(c)(2) provides for a commitment period of three years or such longer time, not to exceed five years, that the court fixes.³¹² The five-year *maximum* commitment period in a sub V case is the same as the longest *minimum* commitment period under the chapter 11 and above-median chapter 13 tests.³¹³

New § 1191(c)(2) contains no standards for fixing the commitment period. And because the involvement of the court in *choosing* the commitment period is unique to subchapter V, practice and precedent under the tests in other chapters may not provide guidance.

In chapters 12 and 13 and in traditional chapter 11 cases of individuals, the court has no role in determining the commitment period for projected disposable income. The court in a chapter 12 case and in the case of a below-median chapter 13 debtor must *approve* the term of a plan in excess of three years if the debtor proposes it, but whether to approve a longer plan term that the debtor wants is different than whether to require the debtor to pay more than the debtor

³¹¹ § 1125(b)(4).

³¹² New § 1191(c)(2).

³¹³ The maximum commitment period in a chapter 12 case is five years. § 1225(b)(1)(B). Chapter 13 sets specific commitment periods of three years for below-median debtors, § 1325(b)(4)(A), and five years for above-median debtors, § 1325(b)(4)(B). The commitment period in a chapter 11 case is the longer of five years or the period for which the plan provides for payments. § 1129(a)(15).

wants.³¹⁴ Case law dealing with the length of a plan under the other tests does not deal with the issue that new § 1191(c)(2) presents.³¹⁵

Courts will have to determine what facts and circumstances justify a longer commitment period and, if so, how much longer the period should be.

³¹⁴ In a chapter 12 case, a plan may not provide for payments in excess of three years unless the court, for cause, *approves* a longer period, not to exceed five years. § 1222(c). Approval of a longer period in a chapter 12 case extends the commitment period for the period that the court approves, § 1225(b)(1)(B), but only the debtor may file a plan, § 1221, so it is the debtor who chooses the commitment period.

In chapter 13 cases, the court has no choice to make. The statute fixes the “applicable commitment period” as three years for a below-median debtor and five years for an above-median debtor. The only dispute for the court is whether the debtor is below-median or above-median.

In chapter 11 cases, § 1129(a)(15) specifies the commitment period as the longer of five years or the period for payments under the plan. The court neither approves nor fixes the commitment period.

³¹⁵ The court in chapter 12 cases and in chapter 13 cases of below-median debtors must *approve* a plan that has a term exceeding three years. §§ 1222(c), 1322(d).

In chapter 13 cases, the fact that the plan of a below-median debtor extends beyond three years does not affect the applicable commitment period or how much projected disposable income the debtor must pay.

In a traditional chapter 11 case of an individual, § 1129(a)(15) sets the commitment period as the longer of five years or the period for which the plan provides payments. Thus, the terms of the plan, not a separate determination by the court, govern the length of time that the debtor must use projected disposable income to make payments.

Until enactment of BAPCPA in 2005, which increased the minimum commitment period in chapter 13 cases for above-median debtors to five years, a chapter 13 plan of any debtor could not provide for payments for more than three years unless the court, for cause, approved a longer period, up to five years. § 1322(c) (2000) (current version at § 1322(d) (2018)) (BAPCPA renumbered subsection (c) as subsection (d)); *see* W. Homer Drake, Jr., Paul W. Bonapfel, & Adam M. Goodman, CHAPTER 13 PRACTICE AND PROCEDURE § 4:9. And the pre-BAPCPA projected disposable income test required use of projected disposable income for only three years, regardless of the length of the plan. 11 U.S.C. § 1325(b)(1)(B) (2000) (current version at 11 U.S.C. § 1325(b)(4) (2018)).

The pre-BAPCPA rules for chapter 12 cases were different, and BAPCPA did not change them. As in pre-BAPCPA chapter 13 cases (and as in cases of below-median chapter 13 debtors under current law), the maximum duration of a plan under § 1222(c) is three years unless the court approves a longer period for cause. But unlike pre-BAPCPA chapter 13, the chapter 12 projected disposable income test in § 1225(b)(1) requires use of projected disposable income during any longer period that the court approves.

Some pre-BAPCPA case law concerning the maximum period for a chapter 13 plan suggests that the pre-BAPCPA limitation to three years absent a showing of cause was to protect the debtor from being bound for a lengthy period. Under this reasoning, a three-year limitation on the plan period for a below-median chapter 13 debtor is mandatory unless a longer period is in the interest of the *debtor*. *See* CHAPTER 13 PRACTICE AND PROCEDURE § 4:9 (citing cases). This conclusion is consistent with the facts that (1) only the debtor may file a chapter 13 plan under § 1321 (although an unsecured creditor or trustee may request modification of a confirmed plan under § 1329(a)); and (2) the court must *approve* a period longer than three years for cause under § 1322(d)). The issue is moot for an above-median chapter 13 debtor because the BAPCPA amendment to the projected disposable income rule makes a five-year period mandatory if the trustee or an unsecured creditor invokes the projected disposable income rule (and someone always does).

Although the case law deals with the question of how long a plan should be, it does so in the context of a debtor’s proposal of a longer period. The case law does not consider the different question of whether the court should require the debtor to make payments for a longer period than the plan proposes.

One reason to extend the period could be a debtor's deduction from projected disposable income of amounts required for anticipated capital needs or expenses to grow the business, as earlier text discusses. If the court permits such deductions, existing creditors are effectively funding the business for the future benefit of the debtor. An extension of the commitment period could be an appropriate way for creditors to share in the debtor's success that depends in part on their involuntary contributions in the form of reduced projected disposable income.³¹⁶

Courts will also have to decide how to proceed when a creditor or trustee asks to fix the commitment period for a longer time than proposed in the debtor's plan.³¹⁷ The authority of the court to fix the commitment period implies authority to order more payments than the debtor's plan proposes. The contrary position is that the court may only deny confirmation unless the debtor modifies the plan to conform with the court's determination. As a practical matter, it may make no difference to a debtor who wants a confirmed plan.

The court's authority to fix the commitment period implies that the court may raise the issue *sua sponte*.

5. Requirements for feasibility and remedies for default

New § 1191(c)(3) adds two additional factors to the "fair and equitable" analysis.

First, new § 1191(c)(3)(A) requires that the debtor will be able to make all payments under the plan,³¹⁸ or that there is a reasonable likelihood that the debtor will be able to make all

³¹⁶ See 8 COLLIER ON BANKRUPTCY ¶ 1225.04 (stating that in a chapter 12 case, if reserves for capital or other discretionary expenditures are necessary, commitment period is properly extended).

³¹⁷ Subchapter V does not expressly give the trustee standing to object to confirmation. The trustee's duty to appear and be heard at the confirmation hearing, new § 1183(b)(3)(B), at a minimum contemplates that the trustee may express the trustee's views on any confirmation issue to the court.

If the trustee is not a lawyer, a trustee's "objection" may initiate a dispute that requires legal representation, whereas a trustee's report bringing potential issues to the attention of the court may not. See Section IV(F). Unless the court concludes as a legal matter that it has no independent duty to determine compliance with confirmation requirements, it makes no practical difference, unless the trustee plans to appeal an adverse determination. Failure to object might be a waiver of it for appellate purposes.

³¹⁸ New § 1191(c)(3)(A)(i).

payments under the plan.³¹⁹ The requirement strengthens the more relaxed feasibility test that § 1129(a)(11) contains. Section 1129(a)(11) requires only that confirmation is not likely to be followed by liquidation or the need for further reorganization unless the plan proposes it.³²⁰

Second, new § 1191(c)(3)(B) requires that the plan provide appropriate remedies to protect the holders of claims or interests if the debtor does not make the required plan payments.³²¹ Section XII(B) discusses remedies for default in the plan.

Courts in sub V cases have addressed objections based on feasibility in the context of the facts in the case.

In *In re Ellingsworth Residential Community Association, Inc.*, 2020 WL 6122645 (Bankr. M.D. Fla. 2020), the court confirmed the plan of a homeowners association over the

³¹⁹ § 1191(c)(3)(A)(ii).

³²⁰ § 1129(a)(11).

³²¹ New § 1191(c)(3)(B). It is arguable that § 1191(c)(3) does not require that the plan provide appropriate remedies if the court concludes that the debtor will be able to make all plan payments.

Paragraph (3) has three parts. Subparagraph (3)(A) contains two of them, stated in the alternative. Clause (3)(A)(i) requires that the debtor *will* be able to make all payments under the plan, while clause (3)(A)(ii) requires only a *reasonable likelihood* that the debtor will be able to make the plan payments. The two alternative provisions make no sense because the first necessarily incorporates the second. (If the debtor will be able to make all payments it must be true that there is a reasonable likelihood that it will.) The first provision is superfluous as a practical matter because the court never has to make a distinction and decide that a debtor will be able to make payments; finding a reasonable likelihood is always sufficient.

The third part of paragraph (3) is subparagraph (B), which requires that the plan contain appropriate remedies. It makes sense as an independent directive. Moreover, it is connected to subparagraph (A) with “and”; such a connection between two requirements normally means that both must be satisfied.

The puzzling language in subparagraph (A), however, provides the basis for an argument that a drafting error occurred.

The three parts make more sense if the remedies requirement applies only when the court concludes there is a reasonable likelihood that the debtor will make payments, not that it will be able to. Under such an interpretation, the alternative requirements are: (1) a finding that the debtor will be able to make payments; or (2) a finding that there is a reasonable likelihood that the debtor will make payments *and* the plan provides appropriate remedies. This reading gives meaning to both parts of subparagraph (A).

The issue may be of immense academic and theoretical interest, but it is unlikely ever to arise. A debtor might argue that its prospects are so certain that the court should conclude that it will make payments such that it does not matter whether the plan contains appropriate remedies. But a debtor may not want to propose a plan that does not propose appropriate remedies because doing so subjects the plan to a more stringent feasibility requirement. Moreover, it seems risky to let confirmation depend on a bankruptcy judge’s willingness to make a fine distinction between the two feasibility standards and, more critically, a determination that the debtor satisfies the higher one.

objection of a creditor that it was not feasible because its funding depended on a proposed assessment of owners that the owners had not yet been approved.

Based on testimony from the president of the association that the plan was feasible and that the homeowners would approve the assessment, the court found that the assessment would be approved and that the debtor would therefore be able to make payments as proposed. As part of its ruling, the court imposed a requirement that the homeowners approve the assessment within four months, in default of which the court would find the debtor in breach of the plan.

In *In re Pearl Resources, LLC*, 622 B.R. 236 (Bankr. S.D. Tex. 2020), the court confirmed the plan of the jointly administered debtors over the objections of several creditors that the plan was not feasible because its projections with regard to disposable income were speculative and subject to market conditions.

The court observed, *id.* at 269 (footnotes omitted):

The new requirement [of § 1191(C)(3)(A)] fortifies the more relaxed feasibility test that § 1129(a)(11) contains. Section 1129(a)(11) requires only that confirmation is not likely to be followed by liquidation or the need for further reorganization unless the plan proposed it. . . . The feasibility requirement for confirmation requires a showing that the debtor can realistically carry out its plan. Though a guarantee of success is not required, the bankruptcy court should be satisfied that the reorganized debtor can stand on its own two feet.

The court found that expert testimony with regard to the plan's feasibility was credible and confirmed the plan. In addition, the court found that the plan's provision for the liquidation

of assets in the event of default satisfied the requirement of § 1191(c)(3)(B) that the plan contain appropriate remedies.

In *In re Gabbidon Builders, LLC*, 2021 WL 1964544 (Bankr. W.D. N.C. 2021), the court denied confirmation of the debtor's plan and converted the case to chapter 7. The debtor planned to sell a parcel of real property, to use the proceeds to make some payments to creditors and to purchase a new lot, to construct a house on the new lot and sell it, and to use those proceeds to pay creditors. The plan also proposed monthly payments to creditors from operating income.

The court found that the principal's testimony in support of confirmation was unreliable and conflicting. The court concluded that the evidence did not establish that sale of the property was imminent, that the proposed construction of a new house could occur as proposed, or what the debtor would receive upon its sale. *Id.* at *2-3. Similarly, the court concluded that no evidence supported the debtor's predictions of future income. *Id.* at *4.

Testimony from a debtor's principal was likewise insufficient to establish feasibility in *In re U.S.A. Parts Supply, Cadillac U.S.A. Oldsmobile, U.S.A. Limited Partnership*, 2021 WL 1679062 (Bankr. N.D. W. Va. 2021). The court questioned the debtor's revenue projections, noting the absence of testimony as to how it would achieve a 50 percent increase over declining historical results. *Id.* at *4.³²²

³²² The court addressed the feasibility issue after it had decided to dismiss the case for cause, including the failure to explain ambiguities in monthly reports, postpetition payment of unsecured creditors without court approval, failure to file postpetition sales tax returns and pay the taxes, and receipt of a postpetition loan from a company owned by the principal's spouse without court approval. 2021 WL 1679062 at *3.

6. Payment of administrative expenses under the plan

New § 1191(e) permits confirmation of a plan under new § 1191(b) that provides for payment through the plan of administrative expense claims and involuntary gap claims. Section VII(C) discusses this provision.

C. Postconfirmation Modification of Plan

The rules for postconfirmation modification in new § 1193 differ depending on whether the court has confirmed a consensual plan under new § 1191(a) or a cramdown plan under new § 1191(b). The provisions in § 1127 for modification of a plan do not apply in a sub V case.³²³

1. Postconfirmation modification of consensual plan confirmed under new § 1191(a)

If the court has confirmed a consensual plan under new § 1191(a), new § 1193(b) does not permit modification after substantial consummation. The modification must comply with applicable plan content requirements.

The modified plan becomes the plan only if circumstances warrant the modification and the court confirms it under new § 1191(a).³²⁴ The holder of any claim or interest who voted to accept or reject the confirmed plan is deemed to have voted the same way unless, within the time fixed by the court, the holder changes the vote.³²⁵ These are the same rules that govern postconfirmation modification in traditional chapter 11 cases under § 1127(b).

³²³ New § 1181(a).

³²⁴ § 1193(b).

³²⁵ § 1193(d).

2. Postconfirmation modification of cramdown plan confirmed under new § 1191(b)

If the plan has been confirmed under new § 1191(b), new § 1193(c) permits the debtor to modify the plan at any time within three years, or such longer time not to exceed five years as the court fixes.³²⁶ The modified plan becomes the plan only if circumstances warrant the modification and the court confirms it under the requirements of new § 1191(b).³²⁷

The postconfirmation modification rules for a cramdown plan are similar to the postconfirmation modification provisions in chapters 12 and 13. In these chapters, postconfirmation modification is permitted at any time prior to the completion of payments under the plan; the modified plan must meet confirmation requirements.³²⁸ Unlike the provisions in the other chapters, new § 1193(c) does not permit modification at the request of creditors or the trustee.³²⁹

D. § 1129(a) Confirmation Issues Arising in Subchapter V Cases

As Sections VIII(A) and (B) explain, both consensual and cramdown confirmation require that the plan meet all of the requirements of § 1129(a) except those noted. This Section discusses confirmation issues under § 1129(a) that do not involve subchapter V provisions but that have arisen in subchapter V cases.³³⁰ Section VIII(E) discusses confirmation and related issues involving secured claims that have arisen in subchapter V cases.

³²⁶ § 1193(c).

³²⁷ The provisions of new § 1192(d) with regard to acceptances or rejections of the original plan do not apply to postconfirmation modification of a cramdown plan, presumably because such a plan is confirmed without regard to acceptances.

³²⁸ §§ 1229, 1329.

³²⁹ New § 1193(c).

³³⁰ For a review and application of requirements for confirmation in a subchapter V case, see *In re Pearl Resources, LLC*, 622 B.R. 236 (Bankr. S.D. Tex. 2020). See also *In re Fall Line Tree Service, Inc.*, 2020 WL 7082416 (Bankr. E.D. Cal. 2020).

1. Classification of claims; unfair discrimination

A plan must designate classes of claims, with some exceptions such as priority tax claims, and interests, § 1123(a), and specify any class that is not impaired, § 1123(b). Classification is particularly critical if the debtor wants consensual confirmation because consensual confirmation requires that all classes of claims and interests accept the plan or not be impaired. § 1129(a)(8).³³¹ The classification rule in § 1122(a) is that the claims or interests in a class must be “substantially similar.” An issue related to classification is that cramdown confirmation of a subchapter V plan requires, among other things, that the plan not “discriminate unfairly.” New § 1191(b).

Two cases have considered the classification of secured claims in subchapter V plans.

In *In re New Hope Hardware, LLC*, 2020 WL 6588615 (Bankr. N.D. Ga. 2020), the debtor sought confirmation of a consensual plan that put two creditors, each secured by a separate vehicle, in the same class. Only one of them accepted the plan. The court concluded that, because each creditor had rights in different collateral, the claims were not substantially similar, and the classification therefore violated § 1122(a). *Id.* at * 3.

In *In re Olson*, 2020 Bankr. Lexis 2439 at * 3 (Bankr. D. Utah 2020), however, the court confirmed a plan that provided for a class of “miscellaneous secured claims.”

In *re Fall Line Tree Service, Inc.*, 2020 WL 7082416 (Bankr. E.D. Cal. 2020), involved cramdown confirmation of a sub V plan that provided different treatment for two classes of unsecured claims. One class consisted of disputed unsecured claims of a group of creditors that

³³¹ It is also important in the cramdown context because cramdown confirmation still requires that the plan comply with the provisions of the Bankruptcy Code. § 1329(a)(1). But a court in the cramdown situation might overlook the issue if the treatment of all members of the class complies with the cramdown requirements anyway.

totaled approximately \$ 360,000; the other class included all other unsecured claims of approximately \$ 50,000.

The plan provided for creditors in each class to receive payments of 59 percent of their claims from disposable income over five years, but the method of payments differed. The undisputed creditors were to receive equal monthly payments. The payments for the disputed creditors, however, were adjusted to reflect the seasonal nature of the debtor's business, which was the sale of retail outdoor sporting goods in South Lake Tahoe, California.³³² Further, the plan provided for the payments on the disputed claims to be made into a reserve account pending determination of the objections to the claims. *Id.* at 6.

The *Fall Line Tree Service* court concluded that the differences in treatment were “rationally related to the rights of the parties and to seasonal cash flow realities of the Lake Tahoe recreation market” and ruled that the plan did not discriminate unfairly. *Id.* at 6.

2. Acceptance by all classes and effect of failure to vote

Consensual confirmation requires acceptance by all impaired classes of claims and interests. § 1129(a)(8). This includes holders of equity interests if the plan impairs them. *In re New Hope Hardware, LLC*, 2020 WL 6588615 at * 3 (Bankr. N.D. Ga. 2020).

If a creditor does not vote on the plan, the question is whether the creditor is deemed to have accepted the plan.

In *In re Olson*, 2020 Bankr. Lexis 2439 at * 3 (Bankr. D. Utah 2020), the court concluded that holders of impaired claims that did not vote were bound by the classes that accepted the plan

³³² Payments for the months of April through June and September through November were twice as much as payments for the months off January through March and July, August, and December.

and confirmed it in the absence of any accepting vote in one class. The court relied on *In re Ruti-Sweetwater, Inc.*, 836 F.2d 1263, 1267-68 (10th Cir. 1988).

The court in *In re New Hope Hardware, LLC*, 2020 WL 6588615 at * 3 (Bankr. N.D. Ga. 2020), reached the opposite conclusion. The court reasoned that, in the absence of acceptance by the impaired class of equity interests, the plan did not comply with the mandate of § 1129(a)(8) that the class either accept the plan or not be impaired.³³³

3. Classification and voting issues relating to priority tax claims

A debtor often owes taxes to the Internal Revenue Service as well as to state and local tax authorities that are entitled to priority under § 507(a)(8). Section 1129(a)(9)(C) requires that a plan pay the claims over a period ending not later than five years after the entry of the order for relief in a manner not less favorable than the most favored nonpriority unsecured claim provided for by the plan (other than “convenience class” creditors paid in cash as § 1122(b) permits). A priority tax claim must be paid with interest at the rate that applicable nonbankruptcy law requires. § 511.

Holders of priority tax claims often do not vote on chapter 11 plans that comply with § 1129(a)(9)(C). It does not appear that acceptance by a priority tax claimant is an additional requirement for confirmation under § 1129(a). Section 1123(a)(1) expressly excludes priority tax claims from its requirement that the plan designate classes of claims, thus recognizing that voting by such creditors is not required. The court in *In re New Hope Hardware, LLC*, 2020 WL 6588615 at * 3 (Bankr. N.D. Ga. 2020), confirmed a plan that provided for treatment of a

³³³ The court nevertheless confirmed the plan based on acceptances by all of the holders of equity interests that occurred at the confirmation hearing.

priority tax claim in compliance with § 1129(a)(9)(C) even though the tax claimant did not accept the plan.

Although § 1123(a)(1) does not require classification of a priority tax claim, chapter 11 plans often provide for them in a class. Better practice is to place each taxing authority in its own class or to state the treatment for each one separately.

4. Timely assumption of lease of nonresidential real estate

Section 365(d)(4)(A) provides for the automatic rejection of a lease of nonresidential real property unless it is assumed within the time it specifies. The court may, prior to the expiration of the deadline, extend it for 90 days, for cause. § 365(d)(4)(B). If the lease is rejected, the debtor must immediately surrender the leased property to the lessor. § 365(d)(4)(A).

The Consolidated Appropriations Act, 2021 (the “CAA”) temporarily amended § 365(d) to change the deadline for assumption from 120 days to 210 days after the order for relief and to permit an extension of the time for an additional 90 days.³³⁴ On December 28, 2022, the deadline reverts to 120 days, which may be extended for up to 90 days.³³⁵

In *In re Motif Designs, Inc.*, 2020 WL 7212713 (Bankr. S.D. Mich., 2020), the sub V debtor obtained an extension of time to file its plan but had not sought to assume the lease. The plan, however, provided for the debtor to continue to occupy the property for about four months after the confirmation hearing. Because the plan provided for occupancy of the property in violation of § 365(d)(4), the court denied confirmation because the plan did not meet the requirement of § 1129(a)(1) that the plan comply with the applicable provisions of the Bankruptcy Code.

³³⁴ Consolidated Appropriations Act, 2021 (the “CAA”), Pub. L. No. 116-260, Title X, § 1001(f)(1)(B), 134 Stat. 1182, 3219 (December 27, 2020).

³³⁵ *Id.* § 1001(f)(2)(A).

5. The “best interests” or “liquidation” test of § 1129(a)(7)

Section 1129(a)(7)(A)(ii) requires that a creditor who has not accepted the plan must receive under the plan property with a value that is not less than what the creditor would receive if the debtor were liquidated under chapter 7.

In re Young, 2021 WL 1191621 (Bankr. D. N.M. 2021), determined that a plan did not comply with this requirement based on its finding that the fees of a chapter 7 trustee would be less than the anticipated costs of liquidating property under a plan.

In re Fall Line Tree Service, Inc., 2020 WL 7082416 (Bankr. E.D. Cal. 2020), discusses evidentiary issues in connection relating to the liquidation analysis.

The *Fall Line Tree Service* court rejected an objecting creditor’s argument that purchased goodwill, arising from the debtor’s earlier acquisition of its business from the creditor, should be included in the liquidation analysis under Generally Accepted Accounting Principles. The court concluded, “[P]urchased goodwill in the original sale of the going concern that has since devolved into this chapter 11 case is not an asset for purposes of hypothetical chapter 7 liquidation analysis.” *Id.* at 4.

The court also rejected the creditor’s assertion that the debtor’s monthly operating reports showed that the value of its inventory was understated, ruling that such reports are not probative of inventory value. The admissible evidence, the court continued, showed that the debtor had used book value at actual wholesale cost in its liquidation analysis, which the court thought was actually more than a chapter 7 liquidation would produce. *Id.* at *4.

6. Voting by holder of disputed claim

In re Fall Line Tree Service, Inc., 2020 WL 7082416 at *2 (Bankr. E.D. Cal. 2020), serves as a reminder that only the holder of an *allowed* claim is entitled to vote on a chapter 11

plan under § 1126(a).³³⁶ Bankruptcy Rule 3018(a) permits the court, after notice and a hearing, to allow a claim temporarily in an amount that the court deems proper for the purpose of accepting or rejecting a plan, but the creditor had not sought that relief.³³⁷

7. Individual must be current on postpetition domestic support obligations

The confirmation requirement of § 1129(a)(14) is that an individual debtor have paid all amounts payable on a domestic support obligation (“DSO”) “that first became payable” after the petition date. It makes no exception when a debtor’s inability to pay a postpetition DSO is due to circumstances beyond the debtor’s control. *In re Sullivan*, 626 B.R. 326, 334 (Bankr. D. Colo., 2021).³³⁸

8. Application of § 1129(a)(3) good faith requirement in context of consensual plan when creditor objects because debtor is not paying enough disposable income

In a traditional chapter 11 case of an individual, § 1129(a)(15) requires a plan to provide for the debtor to pay projected disposable income, or its value, for the longer of five years or for the term of the plan, if an unsecured creditor objects. The requirement applies even if the class of unsecured creditors has accepted the plan.

³³⁶ Section 1126(a) states, “The holder of a claim or interest allowed under section 502 of [the Bankruptcy Code] may accept or reject a plan.”

³³⁷ The creditor in *Fall Line Tree Service* was the only creditor in the class, rejected the plan, and objected to its confirmation. The fact that the court disregarded its claim for voting purposes, therefore, did not affect the result in the case.

³³⁸ The problem for the debtor in *Sullivan* was that his monthly obligations for alimony and child support were \$ 16,835 and his gross monthly income was \$ 7,600. The debtor was seeking to modify those obligations in the divorce case and proposed to modify his plan at a later time to accommodate a future ruling by the divorce court. In the meantime, he proposed to pay what he hoped the modified amounts would be. *Sullivan*, 626 B.R. 326, 334. In addition to ruling that § 1129(a)(14) prevented confirmation, the court noted, “Nor was the chapter 11 process meant to create a long-term shelter for debtors while they await the outcome of contested divorce litigation.” *Id.* at 6.

This rule does not apply in a sub V case. Section 1129(a)(15) is inapplicable, new § 1181(a), and neither consensual confirmation under new § 1191(a) nor cramdown confirmation under new § 1191(b) requires that the plan comply with § 1129(a)(15).

Consensual confirmation under new § 1191(a) requires compliance only with the applicable provisions of § 1129(a). Accordingly, consensual confirmation requirements do not include a projected disposable income test.

Cramdown confirmation in a sub V case similarly does not require compliance with § 1129(a)(15), but new § 1191(c)(2) does require payment of projected disposable income for a minimum of three, and a maximum of five, years, as the court determines.³³⁹

The issue is how the good faith requirement of § 1129(a)(3) applies to an objection to confirmation of a consensual plan when the debtor could pay more than the plan provides. A similar issue arises in chapter 13 cases when the debtor could pay more than the projected disposable income test of § 1325(b) requires.

Objections based on good faith arise in chapter 13 cases, for example, when the debtor proposes to retain an expensive home, car, or other luxury item (and use income to pay the debts they secure instead of paying unsecured creditors) or if the debtor receives social security benefits.³⁴⁰ The chapter 13 projected disposable income rules permit a deduction for payments on secured claims³⁴¹ and exclude social security benefits. The argument is that good faith requires a debtor to surrender expensive luxury items rather than pay for them or that the debtor's social security benefits permit the debtor to pay more, even though the proposed

³³⁹ See Section VIII(B)(4).

³⁴⁰ See W. Homer Drake, Jr., Paul W. Bonapfel, & Adam M. Goodman, CHAPTER 13 PRACTICE AND PROCEDURE §§ 4:34, 8:59.

³⁴¹ See *id.* §§ 8:29, 8:56, 8:59.

payments comply with the projected disposable income test.³⁴² The same “good faith” objection exists in the context of a consensual plan in a sub V case, when the projected income test similarly does not apply.

Courts have taken various approaches in chapter 13 cases.³⁴³ Appellate courts have rejected a “best efforts” approach to good faith (under which good faith requires that a debtor use “best efforts” to pay creditors).³⁴⁴ Instead, courts use a “totality of the circumstances” test in which ability to pay is one of many factors.³⁴⁵

In re Walker, 628 B.R. 9 (Bankr. E.D. Pa. 2021), examined the issue in a subchapter V case. There, the debtor’s plan provided for the debtor to make payments for three years, resulting in a distribution to general unsecured creditors of approximately 7.5 percent. All classes of creditors accepted the plan,³⁴⁶ but one creditor objected to its confirmation on the ground that it did not meet the good faith requirement of § 1129(a)(3) because the distribution to unsecured creditors was inadequate.

The debtor, with estimated pre-tax annual income over the three-year period ranging from \$ 360,000 to \$ 525,000, projected monthly expenses of \$ 16,000, including \$ 9,000 to pay the mortgage on his residence (in which he alone would reside), and related taxes, maintenance, and utilities. The plan provided for payments of \$ 488,061.82 over three years, of which \$ 159,500 would be available for distribution to unsecured creditors after payment of administrative expenses, priority tax claims, a priority domestic support obligation claim, and prepetition mortgage arrearages.

³⁴² See *id.* § 4:34.

³⁴³ See *id.* § 8:26.

³⁴⁴ See *id.* § 4:31.

³⁴⁵ See *id.* § 4:32.

³⁴⁶ Six creditors, holding claims totaling \$ 1,871,481.51 (84.6%), accepted the plan. Two creditors, holding claims totaling \$ 340,035.15 (15.4%) rejected it.

The creditor asserted that good faith in an individual chapter 11 case required the debtor's "best effort" to repay creditors. In view of the debtor's luxurious lifestyle, the creditor argued that the debtor should be required to add two years of payments from income for the benefit of unsecured creditors, which would add \$ 144,000 to the amount unsecured creditors would receive.

The court noted that courts analyze the good faith requirement of § 1129(a)(3) based on the "totality of the circumstances." In addition, the court observed, the good faith requirement "should be construed narrowly, particularly when raised by a dissenting creditor whose class has voted to accept the plan." *Walker*, 628 B.R. 9, 16.

The court expressed its concerns that "a robust application of the good faith doctrine creates a risk that the court's analysis will lapse into an inquiry that 'may clothe subjective moral judgments with the force of law'"³⁴⁷ and that "a broad application of the good faith requirement also would 'create an undue risk of judicial usurpation of the legislative power to determine the scope of and eligibility for [bankruptcy] relief.'"³⁴⁸

The *Walker* court thus rejected the suggestion that good faith under § 1129(a)(3) inflexibly requires a debtor's "best effort" to make every possible resource available to repay creditors. The court reasoned that the rejection of such a rule in a sub V case involving consensual confirmation under new § 1191(a) is especially relevant because § 1129(a)(15) is not applicable. The court stated, 629 B.R. at 17-18 (citation omitted):

³⁴⁷ *In re Walker*, 628 B.R. 9, 17 (Bankr. E.D. Pa. 2021), *quoting In re Glunk*, 342 B.R. 717, 731 (Bankr. E.D. Pa. 2006) (*quoting* *Sarasota, Inc. v. Weaver*, 2004 WL 2514290, at *3 (E.D. Pa. Nov. 5, 2004) (*quoting In re Woodman*, 287 B.R. 589, 592 (Bankr. D. Me. 2003), *aff'd* 2003 WL 23709465 (D. Me. Sept. 19, 2003), *aff'd* 379 F.3d 1 (1st Cir. 2004)).

³⁴⁸ *Id.* at 17, *quoting In re Glunk*, 342 B.R. 717, 732 (Bankr. E.D. Pa. 2006).

The omission of § 1129(a)(15) from the confirmation requirements under § 1191(a) sends a clear legislative message that decision whether a plan's funding justifies confirmation should be resolved by the creditor voting process and chapter 11's fundamental policy of "creditor democracy." When the affected creditors support confirmation of a plan, the court generally should be circumspect about overriding the expressed will of the voting creditors based on the good faith requirement of 11 U.S.C. § 1129(a)(3). This narrow application of 11 U.S.C. § 1129(a)(3) is especially apt in a case under subchapter V.

The court agreed that the debtor could pay more to creditors and noted, "Any court should have serious concerns about approving an individual's reorganization plan in which the debtor proposed to live alone in a large residence, while paying arguably unnecessary carrying costs – roughly \$ 9,000 per month – thereby reducing the available distribution to creditors." *Walker*, 628 B.R. 9, 18.

If it were a creditor, the court continued, it might reject the plan "absent more evidence that the Debtor is making some tangible sacrifices in order to repay his debts." *Id.* at 18. But the court emphasized, "[T]he subjective reaction of a bankruptcy judge to a debtor's proposed plan is not the test by which good faith is measured under 11 U.S.C. § 1129(a)(3)." *Id.* at 18.

Instead, the court explained, "[T]he good faith determination requires objective consideration of the totality of the circumstances. In the end, the critical issue is whether a plan adheres sufficiently to Bankruptcy Code policy and is sufficiently fair to warrant a finding that it was proposed in good faith." *Id.* at 18.

The court found it "extremely significant" that the unsecured class of creditors had voted overwhelmingly in support of the plan. The court reasoned, "Presumably, these creditors made a business judgment that any misgivings they may have regarding the Debtor's lifestyle and the

likely accompanying reduction in their potential distribution under the Plan were outweighed by the benefits conferred by the Plan.” *Id.* at 18.

The *Walker* court also took into account the fact that the debtor had voluntarily put additional money into the plan that the projected disposable income test applicable to cramdown confirmation would not necessarily require. The additional funding arose from the fact that the debtor’s payments included the commitment of preconfirmation earnings and that disposable income as predicted did not account for the full postpetition income tax liability on anticipated future earnings. 629 B.R. at 15.

In effect, these two adjustments resulted in \$ 170,000 more in projected disposable income than the amount than the statute required. Accordingly, the debtor argued, the plan provided for more money to be paid to unsecured creditors than they would receive if the debtor paid adjusted disposable income for five years.

The court agreed that reference to the amount that a debtor would have to pay under the projected disposable income test of § 1191(c)(2) in the cramdown situation was helpful in evaluating good faith in connection with confirmation of a consensual plan, even though the test does not apply. *Id.* at 15. The court concluded that the debtor’s voluntary commitment of additional money, which the strict statutory requirements would not require, supported a finding of good faith. *Id.* at 18.

The court overruled the good faith objection, *id.* at 19:

[W]hile it may be true that the Debtor could provide a greater distribution to creditors . . . the plan is neither so unfair or offensive to basic notions of justice nor so inconsistent with bankruptcy policy as to warrant court intervention to overrule the will of voting creditors.

E. § 1129(b)(2)(A) Cramdown Confirmation and Related Issues Dealing With Secured Claims Arising in Subchapter V Cases

Although the cramdown requirements in § 1129(b) do not apply in subchapter V cases, § 1181(a), the provisions of § 1129(b)(2)(A) govern determination of what is “fair and equitable” with regard to secured claims for purposes of cramdown confirmation under § 1191(c)(1). This Section discusses issues relating to cramdown treatment of secured claims in subchapter V cases that involve the cramdown standards in § 1129(b)(2)(A) that apply to secured claims in subchapter V cases and other sections of the Bankruptcy Code that SBRA did not affect.

1. The § 1111(b)(2) election

The § 1111(b)(2) election comes into play when a secured creditor is undersecured in that its claim exceeds the value of the property in which it has a lien. Before discussing its operation and effects, it is useful to review the general rule for allowance of secured claims in a bankruptcy case under § 506(a).

Section 506(a) provides that an allowed claim of a creditor secured by a lien on property in which the estate has an interest is secured “to the extent of the value of such creditor’s interest in the estate’s interest in such property . . . and is an unsecured claim to the extent that the value of such creditor’s interest . . . is less than the amount of such allowed claim.” Simply put, § 506(a) gives the secured creditor a secured claim equal to the value of the encumbered property and an unsecured claim for the deficiency. Bankruptcy professionals colloquially refer to this result as the “bifurcation” of the claim into a secured claim and an unsecured claim.³⁴⁹ If the secured obligation is “nonrecourse” – *i.e.*, the debtor is not personally liable and the creditor can

³⁴⁹ See generally *see* W. Homer Drake, Jr., Paul W. Bonapfel, & Adam M. Goodman, CHAPTER 13 PRACTICE AND PROCEDURE § 5:5.

collect its debt only from the encumbered property – the creditor does not have an unsecured claim in the case.

Assume, for example,³⁵⁰ that a secured creditor has a claim of \$ 100,000 secured by property worth \$ 30,000. Under § 506(a), bifurcation results in the creditor having two claims: a secured one for \$ 30,000 and an unsecured one for \$ 70,000. If the claim is non-recourse, the creditor has no unsecured claim.

Section 1111(b) modifies the treatment of secured claims in chapter 11 cases in two ways.

First, § 1111(b)(1) provides that a secured claim will be allowed or disallowed under § 506(a) regardless of whether the creditor has recourse against the debtor. The effect is that a nonrecourse secured creditor has an allowed unsecured claim against the debtor.

Second, § 1111(b)(2) permits a secured creditor to elect to have its entire claim treated as a secured claim, with two exceptions discussed later. In the example, therefore, the electing secured creditor has a secured claim of \$ 100,000 and no unsecured claim.

Whether the undersecured creditor makes the election may make a significant difference in how much it must receive for the plan to comply with cramdown requirements.

Section 1129(b)(2)(A) states three alternative ways to satisfy the “fair and equitable” requirement for cramdown confirmation with regard to a secured claim. They apply in a sub V case under § 1191(c)(1).³⁵¹

The most common alternative, in clause (i) of § 1129(b)(2)(A), is for the secured creditor to retain its liens and receive deferred cash payments. Alternatively, a plan is “fair and

³⁵⁰ The example is taken from the excellent explanation of § 1111(b) in *In re Body Transit, Inc.*, 619 B.R. 816, 831-33 (Bankr. E.D. Pa. 2020).

³⁵¹ See Section VIII(B)(2).

equitable” if it provides for sale of the encumbered property and attachment of liens to the proceeds, § 1129(b)(2)(A)(ii), or for the realization by the creditor of the “indubitable equivalent” of the claim, § 1129(b)(2)(A)(iii).

The specific statutory language with regard to permissible cramdown treatment of a secured claim through deferred cash payments is that the creditor must receive “deferred cash payments totaling at least the allowed amount of such claim, of a value, as of the effective date of the plan, of at least the value of [the creditor’s] interest in the estate’s interest in such property.” § 1129(b)(2)(A)(i)(II).

The somewhat complicated language effectively states two requirements. First, the deferred cash payments must total at least the amount of the allowed secured claim. Second, the *value* of the stream of payments must be equal of the value of the encumbered property. The second requirement requires application of an appropriate present value interest or discount rate. For purposes of the example, we assume it is six percent.

If the creditor in the example does not make the § 1111(b)(2) election, application of the cramdown rules is straightforward: the plan must propose to pay the entire amount of the secured claim, \$ 30,000, with interest at six percent. Payment of the claim in full satisfies the first part of the test, and the provision for interest satisfies the second one. Thus, a plan could amortize \$ 30,000 over, say, five years at six percent interest, in monthly payments of \$ 580, a total of \$ 34,800. The plan must treat the deficiency claim of \$ 70,000 as an unsecured claim, usually included in the class of general unsecured claims.

Such a provision would not, however, satisfy the first cramdown requirement if the creditor elected § 1111(b)(2). The total of payments is only \$ 34,800, \$ 65,200 short of the amount of the allowed secured claim, \$ 100,000.³⁵²

Payment of the claim over five years would require an additional \$ 1,087 per month, a total monthly payment of \$ 1,667.

A longer amortization period would lower the monthly payment because there is more time to pay the claim and because more interest is paid. The following chart shows payment schedules that would satisfy both § 1129(b)(2)(A)(II) requirements (amounts rounded except monthly payment on last line). Whether a court would conclude that the longer lengths of time are “fair and equitable” is, of course, another question.

Payment Schedules Providing for Payments Totaling \$ 100,000 With a Value of \$ 30,000						
Amortization Period	Payment On \$30,000	Interest Paid at 6%	Total of Payments (\$ 30,000 + Interest payments)	Remaining Balance (\$ 100,000 – (d))	Monthly Payment on Remaining Balance ((e)/months)	Total Monthly Payment (b) + (f)
(a)	(b)	(c)	(d)	(e)	(f)	(g)
5 years	\$ 580	\$ 4,800	\$ 34,800	\$ 65,200	\$ 1,067	\$ 1,667
10 years	\$ 333	\$ 9,968	\$ 39,968	\$ 60,032	\$ 500	\$ 883
15 years	\$ 253	\$ 15,568	\$ 45,568	\$ 54,432	\$ 302	\$ 555
20 years	\$ 215	\$ 21,583	\$ 51,583	\$ 48,417	\$ 202	\$ 417
25 years	\$ 193	\$ 27,987	\$ 57,987	\$ 42,013	\$ 140	\$ 333
30 years	\$ 180	\$ 34,751	\$ 64,751	\$ 35,249	\$ 98	\$ 278
53 yrs, 4 mos	\$ 156.43	\$ 70,113	\$ 100,113	\$ 0.00	\$ 0.00	\$ 156.43

Section 1111(b)(1)(B) states two exceptions to the availability of the § 1111(b)(2) election.

³⁵² This assumes that the interest payments of \$ 4,800 count in satisfying the total of payments requirements. It is not clear that they do. See *In re Body Transit, Inc.*, 619 B.R. 816, 833, n. 25 (Bankr. E.D. Pa. 2020), citing 7 COLLIER ON BANKRUPTCY ¶ 1111.03[5][b].

One of the exceptions applies when the encumbered property is sold under § 363 or is to be sold under the plan. If the creditor has recourse against the debtor, the § 1111(b)(2) election is not available when the property is being sold. § 1111(b)(1)(B)(ii).

The other exception applies when the undersecured creditor's interest in the encumbered property is of "inconsequential value." § 1111(b)(1)(B)(ii).

In a traditional chapter 11 case, a secured creditor for strategic purposes may want to retain a large unsecured deficiency claim so that it controls the vote of the unsecured class. This may give the secured creditor a "blocking position" to prevent confirmation because, unless other classes exist, a debtor cannot meet the requirement of § 1129(a)(10) that at least one impaired class of claims accept the plan.

Because subchapter V permits confirmation even if no class accepts, a secured creditor does not have a blocking position regardless of whether it makes the § 1111(b) election. Especially if a nominal distribution to unsecured creditors is likely, a secured creditor in a sub V case may conclude that making the § 1111(b) election will enhance its recovery and negotiating position.

Two courts have considered a creditor's § 1111(b) election in a subchapter V case. In both, the issue was whether the creditor could not invoke the election because its interest was "inconsequential." The cases are required reading for judges and practitioners dealing with § 1111(b) elections in subchapter V cases.³⁵³

In re VP Williams Trans, LLC, 2020 WL 5806507 (Bankr. S.D. N.Y. 2020), involved a taxi business that owned a single taxi medallion in which its only creditor held a security interest

³⁵³ See generally Thomas C. Scherer and Whitney L. Mosby, *The Applicability of the § 1111(b) Election in a Small Business Case*, 40 AMER. BANKR. INST. J. 12 (May 2021).

to secure a debt of \$ 576,927. The debtor contended that the value of the medallion was \$ 90,000; the creditor claimed it was worth \$ 200,000.

The court noted that courts have taken different approaches to determining whether property is of inconsequential value, but concluded that, under any approach, it was impossible to conclude that the medallion's value was inconsequential, whether it was worth \$ 90,000 or \$ 200,000. *Id.* at * 3. The court then reviewed the different approaches.

The “most obvious approach,” the court said, it to determine and apply the plain meaning of the word “inconsequential.” Nothing that various dictionaries defined the word as “irrelevant,” “of no significance,” “unimportant”, and “able to be ignored,” the court concluded as “an abstract matter” that neither value was inconsequential. 2020 WL 5806507 at *3.

The court acknowledged that “some context is required,” and that “[a]n item of a certain value might be relatively ‘inconsequential’ to a multi-billion dollar company.” 2020 WL 5806507 at *3. But the court could not conclude that the value of the medallion was “irrelevant,” “of no significance,” or something that is “able to be ignored” when it was the debtor's most important and valuable asset, essential to its reorganization, regardless of its value. *Id.*

The court noted that, if the debtor owned the medallion outright and proposed to abandon it under § 554 (which permits abandonment of an asset that is “of inconsequential value or benefit to the estate”), it could not conceivably be treated as having inconsequential value. The court found no justification for giving the term a different meaning in § 1111(b) than it has in § 554. 2020 WL 5806507 at *3.

The *VP Williams Trans* court then considered the view that the value of the asserted security interest should be compared to the value of the collateralized asset. Under this

approach, a junior security interest that is “almost completely out-of-the-money” has inconsequential value. 2020 WL 5806507 at *4.³⁵⁴ The court saw no difference between this view and valuation in the abstract but concluded that it did not matter in the current case because the creditor held the only security interest in the collateral and, therefore, the value of its lien equaled the value of the collateral.

Next, the *VP Williams Trans* court discussed the view that the court should compare the value of the security interest to the amount of the debt.³⁵⁵ Under this approach, the court explained, a secured claim might have inconsequential value if the collateral is worth only a small fraction of the total claim. The court questioned application of this view when the value of the collateral is not small by itself but is significantly less than the debt. 2020 WL 5806507 at *4.

To illustrate, the court assumed that only one secured creditor with a \$ 200,000 debt holds a security interest in collateral worth \$ 100,000, which would not be “inconsequential.” The result should not be different, the court reasoned, when the claim is \$ 2,000,000 because the value of the collateral, and therefore the value of the secured claim, is the same. The court observed that denying the § 1111(b)(2) election to the \$ 2 million claimant would result in a debtor having greater rights to retain and use collateral “against the secured creditor’s will” when the debtor’s economic interests are actually far more out-of-the-money. 2020 WL 5806507 at *4.

Under yet another approach, the *VP Williams Trans* court continued, a secured claim may be deemed inconsequential if the § 1111(b)(2) election would give rise to a claim that could not

³⁵⁴ The court cited *McGarey v. MidFirst Bank (In re McGarey)*, 529 B.R. 777 (D. Ariz. 2015).

³⁵⁵ The court cited *In re Wandler*, 77 B.R. 728, 733 (Bankr. N.D. 1987).

as a practical matter be amortized fully under the cramdown confirmation standards in § 1129(b)(2)(A)(i), discussed above.³⁵⁶ The court reasoned that this view conditioned a creditor’s right to the § 1111(b)(2) election on the debtor having a feasible way to deal with it. The court found nothing in the statute to suggest that “‘feasibility’ from the debtor’s perspective was intended to be a limit on a creditor’s right to invoke section 1111(b).” 2020 WL 5806507 at *4.

Finally, the *VP Williams Trans* court considered and rejected the analysis of the *Body Transit* court, discussed below, that took policy considerations into account in making the “inconsequential value” determination. Later text discusses the court’s reasoning, following discussion of *Body Transit*.

After its discussion of the various approaches to the determination of “inconsequential value,” the *VP Williams Trans* court concluded that the case before it was not difficult because the creditor’s interest was not inconsequential under any of them. 2020 WL 5806507 at *6.

In *In re Body Transit, Inc.*, 619 B.R.816, 835 (Bankr. E.D. Pa. 2020), the court ruled that the correct methodology is to compare the value of the lien position to the total amount of the claim.

The court reasoned that the statutory text of § 1111(b)(1)(B)(ii) “explains how to value [the creditor’s interest in the collateral] and then directs the court to determine whether the value is inconsequential. The statutory text does not state how to make that second determination of ‘inconsequentiality.’” 619 B.R. at 835. To make the second determination, the court continued,

³⁵⁶ The court cited *In re Wandler*, 77 B.R. 728, 733 (Bankr. N.D. 1987) (Holding that collateral worth \$ 15,000 was “inconsequential” in context of claim of \$ 390,000 and reasoning that payments having a nominal amount of \$ 390,000 but an actual current value \$ 15,000 would not be realistic).

the court must “compare the value of the collateral to something else, and the statutory text offers no guidance there.” *Id.*

The court concluded that the proper comparison is between the value of the collateral to the total amount of the claim. The court stated, *id.* at 835, *quoting* 7 COLLIER ON BANKRUPTCY ¶ 1111.03[3][a] (footnotes omitted):

Section 1111(b) is intended to preserve creditors' nonbankruptcy rights, not enhance them.... Since “inconsequential” is not synonymous with “zero,” plain meaning would suggest that “inconsequential value” has to include something more than zero value. This leads to the view that a creditor whose lien is almost, but not quite, out-of-the-money should be treated as if [it] were wholly unsecured, which is for practical purposes the status the creditor would likely ascribe to itself outside of bankruptcy with collateral of little or inconsequential value. Put another way, it [sic] if the collateral's value is inconsequential when compared to the total debt owed to the creditor, the creditor should be treated as unsecured, not secured [for purposes of § 1111(b)(1)(B)].

The court then turned to consideration of whether the creditor’s interest was of “inconsequential value” when the value of the collateral was \$ 80,000, 8.2 percent of the amount of the secured debt, \$ 970,233. The court stated, 619 B.R. at 836:

[T]he “inconsequential value” determination is not a bean counting exercise; the determination cannot be based solely on a mechanical, numerical calculation. Some consideration must be given to the policies underlying both the right to make the § 1111(b) election and the exception to that statutory right. In other words, while “the numbers” provide an important starting point in deciding how much value is “inconsequential,” the court also must consider other relevant circumstances presented in

the case and make a holistic determination that takes into account the purpose and policy of the statutory provisions that govern the reorganization case.

Under this analysis, the court concluded that the value of the creditor's interest was inconsequential and that it could not make the § 1111(b)(2) election.

In the *Body Transit* court's view, the purpose of the § 1111(b)(2) election is to protect the creditor from determination of its secured claim at a time when the value of its collateral is temporarily depressed, which could permit the debtor to realize a considerable gain upon its sale when the market rebounds. 619 B.R. at 833. The court reasoned that the case before it involving a fitness club and exercise equipment as collateral "does not resemble the classic fact pattern that Congress designed § 1111(b) to prevent. [The creditor] is not a secured creditor being cashed out during a temporary decline in the value of its collateral, with the Debtor seeking to retain such collateral and obtain the windfall benefit of a market correction in the foreseeable appreciation that restores value to the collateral." 619 B.R. at 836.

Rather, the court found, any increase in the value of the debtor's enterprise would most likely be "attributable to some combination of market forces, the entrepreneurial efforts and acumen of the Debtor's principal and, perhaps, the investment of additional capital." *Id.* at 836.

These circumstances, the *Body Transit* court reasoned, supported the conclusion that the collateral was of "inconsequential value" within the meaning of § 1111(b)(1)(B)(i). The court also found support for its conclusion in the purposes and policies underlying subchapter V. *Id.* at 837.

In re VP Williams Trans, LLC, 2020 WL 5806507 (Bankr. S.D. N.Y. 2020), discussed earlier, rejected consideration of the policies that *Body Transit* invokes.

With regard to the intended purpose of the § 1111(b)(2) election, the court reasoned, “Section 1111(b) is not conditioned on a temporary decline in collateral value; it is available to secured creditors who are not happy with a value that a debtor has proposed, and who are not happy with the prospect of having to live with a judge’s decision as to what the value of the collateral is.” *Id.* at 5.

The *VP Williams Trans* court reasoned that the desire of Congress to foster small business reorganization had no bearing on the interpretation of § 1111(b). “Congress also desire to foster other forms of chapter 11 reorganizations,” the court said, “but section 1111(b) applies in all chapter 11 cases, including subchapter V. If Section 1111(b) was supposed to give way in a subchapter V case, or to have a different application in such a case, that was for Congress to say, and Congress did not do so.” 2020 WL 5806507 at *6.

**2. Realization of the “indubitable equivalent” of a secured claim --
§ 1129(b)(2)(A)(iii)**

One of the ways for a plan to meet the “fair and equitable” requirement for cramdown treatment of a secured claim under § 1129(b)(2)(A) (applicable in subchapter V under § 1191(c)(1)) is to provide for the creditor to realize the “indubitable equivalent” of its claim. The court in *In re Pearl Resources, LLC*, 622 B.R. 236 (Bankr. S.D. Tex. 2020), examined and applied this provision in confirming a subchapter V plan of jointly administered debtors over the objection of creditors holding statutory mineral property liens under Texas law.

The total of the creditors’ claims was \$ 1,151,287 million. Their statutory liens extended to all of the debtors’ gas and oil properties, valued at approximately \$ 35 million. The plan provided that the creditors: (1) would retain their liens on one property, valued at \$ 7,440,000; (2) would release their liens on all other properties; and (3) would receive pro rata payments from disposable income on a quarterly basis for two years. The plan further provided that, if the

claims were not paid in full, with interest, in two years, the debtors would sell portions of the retained collateral to pay the claims in full. In addition, the plan provided that, if the debtors did not pay the claims in full within 34 months, the creditors would receive a lien in the debtor's interest at that time in another property. *Id.* at 248-49.

The creditors rejected the plan and objected to its confirmation. Among other things, they argued that the plan was not fair and equitable because it did not provide for them to retain their existing liens and did not provide the indubitable equivalent of their claims. 622 B.R. at 266-67.³⁵⁷ The court overruled their objections and confirmed the plan.

The court explained that the indubitable equivalent requirement is tied to a "claim," not to the property securing the claim. Thus, the court rejected the argument that the plan could not modify their lien rights in any fashion and still meet the indubitable equivalent standard 622 B.R. at 270.

The court then addressed the creditors' argument that the plan did not meet the indubitable equivalent requirement because it reduced their 29 to 1 value-to-debt equity cushion to a 6 to 1 cushion. The court provided the following review of case law, 622 B.R. at 271-72 (original footnotes omitted):³⁵⁸

³⁵⁷ The creditors also objected on the grounds that the plan did not meet the disposable income requirement of § 1191(c)(2) and the feasibility requirements of § 1191(c)(3). 262 B.R. at 266. The court concluded that the plan met these requirements and that it provided adequate remedies for default. *Id.* at 267-70.

³⁵⁸ In footnotes to the first paragraph of the quoted text, the court cited: *In re Sun Country Dev, Inc.*, 764 F.2d 406, 408 (5th Cir. 1985); *In re Walat Farms, Inc.*, 70 B.R. 330, 336 (Bankr. E.D. Mich. 1987) ("a bankruptcy court is permitted, indeed required, to make these determinations on a case by case basis and to order confirmation of a plan which indubitably protects and pays the claim of an objecting creditor"); *In re Swiftco, Inc.*, 1988 WL 143714 (Bankr. S.D. Tex. 1988); and *In re Philadelphia Newspapers, LLC*, 418 B.R. 548, 568 (E.D. Pa. 2009), *aff'd* 599 F.3d 298 (3d Cir. 2009).

In re Philadelphia Newspapers ruled that a plan providing for the sale of the creditor's collateral without permitting the creditor to credit bid satisfied the indubitable equivalent requirement. The Supreme Court later ruled to the contrary in *Radlax Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 132 S.Ct. 2065 (2012). The Supreme Court concluded that the specific requirement for credit bidding in § 1129(b)(2)(A)(ii), which permits cramdown when a plan provides for the sale of collateral, precluded an interpretation of the indubitable equivalent standard that permitted sale without credit bidding.

The Fifth Circuit has expressly recognized that one accepted method of providing indubitable equivalence is the exchange of collateral. Whether the indubitable equivalent offered is equivalent is a matter left to the discretion of the bankruptcy court in its careful reliance upon sufficient facts. Courts should not accept offers of indubitable equivalence lightly and should insist on a high degree of certainty. Moreover, indubitable equivalence is a flexible standard. The indubitable equivalent standard requires a showing that the objecting secured creditor will receive the payments to which it is entitled, and that the changes forced upon the objecting creditor are completely compensatory, meaning that the objecting creditor is fully compensated for the rights it is giving up. For example, the Fifth Circuit has stated that the “[a]bandonment of the collateral to the class would satisfy indubitable equivalent, as would a replacement lien on similar collateral.”

In *Investment Company of The Southwest*, [341 B.R. 298, 325 (B.A.P. 10th Cir. 2006)], the court recognized that a debtor may be permitted to use some portion of the equity cushion in collateral to help implement a plan without violating the indubitable equivalent standard, as long as the secured creditor remains over-secured beyond a reasonable doubt and has sufficient protection. Courts have approved plans that did not pay a secured lienholder all of its collateral sale proceeds, as long as the court is satisfied that there will always be more value in the remaining collateral than the lender's lien amount.³⁵⁹ Courts also have routinely held that a partial surrender of collateral to an over-secured creditor provides such creditor with the indubitable equivalent of its claim.³⁶⁰ A sister Court approved a plan over the objection of a secured creditor finding the debtor had provided the indubitable equivalent because the secured creditor remained over-secured beyond a reasonable doubt and had sufficient payment protection over the life of the plan.³⁶¹ In essence, in the bankruptcy context, the indubitable equivalent means that the treatment afforded the secured creditor must be adequate to both compensate the secured creditor for the value of its secured claim, and also insure the integrity of the creditor's collateral position.³⁶²

Applying these standards, the court concluded that the plan provided “virtual certainty” that the claims would be paid in full and that the 6 to 1 value-to-debt ratio provided an equity cushion that was sufficient adequate protection. 622 B.R. at 272.

The court rejected the creditors’ arguments that a plan could not modify a Texas statutory mineral lien under any circumstances and that lien-stripping may not be accomplished under any

³⁵⁹ The court cited: *In re Pine Mountain, Ltd.*, 80 B.R. 171 (B.A.P. 9th Cir. 1987) (Concluding that it was unlikely that creditor's claim would ever become even partially unsecured and that plan provided secured creditor with variety of safeguards and fair interest rates); and *Affiliated Nat'l Bank-Englewood v. TMA Assocs., Ltd. (In re TMA Associates, Ltd.)*, 160 B.R. 172, 174 (D. Colo. 1993).

³⁶⁰ The court cited *In re May*, 174 B.R. 832, 838–839 (Bankr. S.D. Ga. 1994).

³⁶¹ The court cited *In re SCC Kyle Partners, Ltd.*, 2013 WL 2903453 (Bankr. W.D. Tex. 2013).

³⁶² The court cited 4 COLLIER ON BANKRUPTCY ¶ 506.03.

circumstances, concluding that § 1123(a)(5)(E) permits a plan to modify any lien as long as it complies with § 1129(b)(2)(A).³⁶³

IX. Payments Under Confirmed Plan; Role of Trustee After Confirmation

Subchapter V has different provisions for the disbursement of payments to creditors and the role of the trustee depending on whether the court confirms a consensual plan or a cramdown plan.

A. Debtor Makes Plan Payments and Trustee's Service Is Terminated Upon Substantial Consummation When Confirmation of Consensual Plan Occurs Under New § 1191(a)

If all impaired classes accept the plan and it meets the confirmation requirements of § 1129(a) other than § 1129(a)(15),³⁶⁴ the court must confirm the plan.³⁶⁵ Confirmation of a consensual plan under new § 1191(a) leads to the termination of the trustee's service under new § 1183(c)(1) when the plan has been "substantially consummated."³⁶⁶ The debtor must file a notice of substantial consummation within 14 days after it occurs and serve it on the sub V trustee, the U.S. trustee, and all parties in interest.³⁶⁷

³⁶³ The court cited *In re Bates Land & Timber, LLC*, 877 F.3d 188 (4th Cir. 2017), which permitted cramdown confirmation of a plan providing for a secured creditor to receive property valued at \$ 13.7 million and cash of \$ 1 million on its \$ 14.6 million claim in exchange for the release of prepetition collateral.

The *Pearl Resources* court distinguished two cases on which the creditors relied, *In re CRB Partners, LLC*, 2013 WL 796566 (Bankr. W.D. Tex. 2013), and *In re Swiftco, Inc.*, 1988 WL 143714 (Bankr. S.D. Tex. 1988). The court noted that these cases ruled that the plans did not provide the indubitable equivalent of the creditors' claims because of an insufficient equity cushion or reasonable doubt as to payment but recognized that liens could be modified.

³⁶⁴ Section 1129(a)(15) states chapter 11's projected disposable income requirement, which applies only in the case of an individual. See Section VIII(B)(4).

³⁶⁵ New § 1191(a).

³⁶⁶ § 1183(c)(1).

³⁶⁷ § 1183(c)(2).

Under § 1101(2), “substantial consummation” generally occurs upon “commencement of distribution under the plan.”³⁶⁸ Unless the plan implicates other requirements for substantial consummation, the sub V trustee’s service terminates under new § 1183(c)(1) when the first payment under the plan occurs.

Arguably, a sub V trustee could make the first payment under the plan, although the statute does not appear to require this. But it is clear that, at least after the first payment, the sub V trustee no longer exists and cannot make payments thereafter.

B. Trustee Makes Plan Payments and Continues to Serve After Confirmation of Plan Confirmed Under Cramdown Provisions of New § 1191(b)

When the court confirms a cramdown plan, new § 1194(b) provides for the sub V trustee to make payments to creditors under the plan unless the plan or the order confirming it provides otherwise.³⁶⁹ Chapters 12 and 13 contain identical provisions for the trustee to make plan payments.³⁷⁰

Because the sub V trustee must make payments under a cramdown plan, the trustee’s service does not terminate upon its substantial consummation. The trustee’s service continues, at a minimum, until the trustee has made the required disbursements. Subchapter V does not specify when the trustee’s service is terminated under a cramdown plan. If the trustee makes all payments that the trustee is to make under the plan, the debtor is entitled to receive a discharge, as Section X(B) discusses. That seems to be the appropriate time for the trustee or the debtor to

³⁶⁸ § 1101(2)(C). “Substantial consummation” under § 1101(2) also requires: (1) transfer of all or substantially all of the property proposed to be transferred, § 1101(2)(A) and (2) assumption by the debtor or the successor to the debtor under the plan of the business or of the management of all or substantially all of the property dealt with by the plan. § 1101(2)(B).

³⁶⁹ New § 1194(b). Curiously, paragraph (b) of new § 1194 is titled “Other Plans,” even though it applies exclusively to plans confirmed under the cramdown provisions of new § 1191(b) and no other provisions of new § 1194 deal specifically with payments under a consensual plan confirmed under new § 1191(a).

³⁷⁰ § 1226(c), 1326(c).

request that the court terminate the trustee's service and discharge the trustee from any further obligations in the case.³⁷¹

New § 1194 provides for the trustee to make payments under the plan unless the plan or the order confirming the plan provides otherwise.³⁷² The statute contains no standards for the court to determine under what circumstances a plan or confirmation order may provide that the trustee will not make payments. For example, may a nonconsensual plan provide for the debtor to make postpetition installment payments on a mortgage or other long-term debt that is being cured and reinstated, or regular payments on an unexpired lease of real or personal property that is being assumed?

Because new § 1194(b) is identical to the chapter 12 and 13 provisions for disbursements to creditors, courts may look to the case law and practice in chapter 12 and 13 cases for guidance in determining the extent to which a plan may provide for the debtor to make payments instead of the trustee. In chapter 13 cases, courts universally require a plan to provide for the trustee to make disbursements to priority and unsecured creditors and to holders of secured claims that the plan modifies.³⁷³ Courts vary as to whether the debtor may make direct payments to other types of creditors.

Typical exceptions to payments by the trustee in chapter 13 cases are for postpetition installment payments on real estate or other long-term debts that are being cured and reinstated and postpetition payments due on leases or executory contracts that are being assumed. In such

³⁷¹ See SUBCHAPTER V TRUSTEE HANDBOOK, *supra* note 79, at 3-16 ("Upon completion of all plan payments [pursuant to a cramdown plan], trustees should submit their final report and account of their administration of the estate in accordance with § 1183(b)(1), which incorporates § 704(a)(9). . . . The trustee's final report will certify that the trustee has completed all trustee duties in administering the case and request that the trustee be discharged from any further duties as trustee.").

³⁷² New § 1194.

³⁷³ W. Homer Drake, Jr., Paul W. Bonapfel, & Adam M. Goodman, CHAPTER 13 PRACTICE AND PROCEDURE § 4:10.

instances, the trustee usually disburses the amounts required to cure prepetition defaults. Courts have also permitted a debtor to make direct payments on a secured claim that the plan does not modify.³⁷⁴

Some courts require that all postpetition payments, including postpetition payments on a mortgage or other long-term debt or an assumed lease or other executory contract, be made by the trustee during the term of the plan.³⁷⁵ In a sub V case, the trustee under this approach would make those payments during the three- to five-year period during which the debtor must commit projected disposable income to the plan, as Section VIII(B)(4) discusses.

The court in *In re Spindler*, 623 B.R. 543 (Bankr. W.D. Wis. 2020), permitted a chapter 12 debtor to make direct payments to a mortgage lender under a plan that provided for the re-amortization of the debt in monthly payments over 30 years.

The court reviewed three approaches to direct payments that courts have taken in chapter 12 cases. One view is that the Bankruptcy Code prohibits direct payments on impaired or modified claims,³⁷⁶ while a second allows debtors to pay secured creditors directly, regardless of their impaired status.³⁷⁷ *Id.* at 546-47.

Most courts adopt a third approach that permits direct payments depending on the circumstances of the case.³⁷⁸ *Id.* at 547. In deciding whether to permit direct payments, the *Spindler* court explained, these courts consider some or all of the factors that *In re Pianowski*, 92

³⁷⁴ *Id.*

³⁷⁵ *Id.*

³⁷⁶ The court cited *Fulkrod v. Savage (In re Fulkrod)*, 973 F.2d 801 (9th Cir. 1992) and *In re Marriott*, 161 B.R. 816 (Bankr. S.D. Ill. 1993).

³⁷⁷ The court cited *Wagner v. Armstrong (In re Wagner)*, 36 F.3d 723 (8th Cir. 1994) and *In re Crum*, 85 B.R. 878 (Bankr. N.D. Fla. 1988).

³⁷⁸ The court cited *In re Martens*, 98 B.R. 530 (Bankr. D. Colo. 1989); *In re Seamons*, 131 B.R. 459 (Bankr. D. Idaho 1991); *In re Speir*, 2018 WL 3814276 (Bankr. N.D. Miss. Aug. 8, 2018); *Westpfahl v. Clark (In re Westpfahl)*, 168 B.R. 337 (Bankr. C.D. Ill. 1994); *In re Golden*, 131 B.R. 201 (Bankr. N.D. Fla. 1991); *In re Seamons*, 131 B.R. 459 (Bankr. D. Idaho 1991); *In re Martens*, 98 B.R. 530 (Bankr. D. Colo. 1989); and *In re Pianowski*, 92 B.R. 225 (Bankr. W.D. Mich. 1988).

B.R. 225 (Bankr. W.D. Mich. 1988) identified: (1) the past history of the debtor; (2) the business acumen of the debtor; (3) the debtor's post-filing compliance with statutory and court-imposed duties; (4) the good faith of the debtor; (5) the ability of the debtor to achieve meaningful reorganization absent direct payments; (6) the plan treatment of each creditor to which a direct payment is proposed to be made; (7) the consent, or lack thereof, by the affected creditor to the proposed plan treatment; (8) the legal sophistication, incentive and ability of the affected creditor to monitor compliance; (9) the ability of the trustee and the court to monitor future direct payments; (10) the potential burden on the chapter 12 trustee; (11) the possible effect on the trustee's salary or funding of the U.S. Trustee system; (12) the potential for abuse of the bankruptcy system; and (13) the existence of other unique or special circumstances.

The *Spindler* court noted that *In re Aberegg*, 961 F.2d 1307 (7th Cir. 1992), concluded that chapter 13 debtors could make direct payments in some cases and that *Aberegg* took a pragmatic approach to direct payment of mortgages that extend beyond the term of the plan, finding that it would be counterproductive to require debtors to make payments through the trustee until completion of plan payments and then to arrange for direct payments thereafter. *Spindler*, 623 B.R. at 547.

The *Spindler* court adopted the majority approach and, based on the circumstances of the case, permitted the direct mortgage payments.³⁷⁹ Among other things, the court noted that the debtor had negotiated payment terms with the lender and that it did not make sense to require the payment method to change at the end of the plan. *Id.* at 548-49.

³⁷⁹ The court also permitted, without objection, direct payment of a student loan.

X. Discharge

The discharge that a debtor receives in a sub V case and its timing depend on whether consensual or cramdown confirmation occurs.

A. Discharge Upon Confirmation of Consensual Plan Under New § 1191(a)

Section 1141(d) governs discharge in a chapter 11 case. Except for paragraph (d)(5), all of it remains applicable in a sub V case when the court confirms a consensual plan. It does not apply when the court confirms a cramdown plan.³⁸⁰

Section 1141(d)(5) does not apply in a sub V case.³⁸¹ The omission is material only in an individual case because (d)(5) applies only when the chapter 11 debtor is an individual. Section 1141(d)(5) has two primary effects in an individual case.³⁸²

First, § 1141(d)(5) prohibits entry of a discharge order until the individual has completed payments under the plan unless the court orders otherwise for cause.³⁸³

³⁸⁰ New § 1181(c).

³⁸¹ New § 1181(a).

³⁸² Subparagraph (A) of § 1141(d)(5) defers entry of the discharge in an individual case until the debtor has completed all payments under the plan unless the court orders otherwise for cause. Alternatively, subparagraph (B) of § 1141(d)(5) permits a discharge if the debtor has not completed payments if (1) creditors have received payments under the plan with a value of the amount they would have received if the debtor's estate had been liquidated on the effective date; and (2) modification of the plan under § 1127 is not practicable. The subparagraph (B) provision is similar to the so-called "hardship" discharge that exists in chapter 12 and 13 cases, §§ 1228(b), 1328(b), except that a chapter 12 or 13 debtor must also establish that the failure to complete payments is due to circumstances for which the debtor should not justly be held accountable.

Subparagraph C of § 1141(d)(5) provides the court may not grant a discharge under either subparagraph (A) or (B) if the court finds that § 522(q)(1) is applicable, certain criminal proceedings are pending, or the debtor is liable for a debt described in § 522(q)(1). The same grounds for discharge are in § 727(a)(12). Section 522(q)(1) denies a debtor an exemption of assets in excess of an aggregate amount of \$ 170,350 (as of April 1, 2019; it is subject to adjustment every three years) under circumstances described in subparagraphs (A) or (B) of § 522(q)(1) unless the court finds under § 522(q)(2) that certain exempt property is reasonably necessary for the support of the debtor or any dependent.

Subparagraph (A) denies the exemption if the debtor has been convicted of a felony that under the circumstances demonstrates that the filing of the case was an abuse of the Bankruptcy Code. Subparagraph (B) denies the exemption if the debtor owes a debt arising from (1) violation of state or federal securities laws; (2) fraud, deceit, or manipulation in a fiduciary capacity or in connection with the purchase or sale of any security registered under the federal securities laws; (3) any civil remedy under 18 U.S.C. § 1964; or (4) any criminal act, intentional tort, or willful or reckless misconduct that caused serious physical injury or death to another individual in the preceding five years.

³⁸³ § 1141(d)(5)(A).

Second, it permits discharge without completion of payments if creditors have received what they would have gotten in a chapter 7 case and modification of the plan is not practicable.³⁸⁴

Because § 1141(d)(5) does not apply in a sub V case, an individual debtor receives a discharge immediately upon confirmation of a consensual plan under new § 1191(a).³⁸⁵ Because the debtor receives an immediate discharge, there is no need for a provision permitting discharge if the debtor does not complete payments.

Under § 1141(d)(1)(A), confirmation of a plan results in the discharge, with some exceptions, of any debt that arose before the date of confirmation and any debt specified in § 502(g) (claims from the rejection of an executory contract or unexpired lease), § 502(h) (claims arising from the exercise of avoidance powers), and § 502(i) (claims for taxes arising after the commencement of the case entitled to priority under § 507(a)(8)). The discharge applies whether or not a proof of claim was filed or deemed filed, the claim is allowed, or its holder has accepted the plan.³⁸⁶

A debtor does not receive a § 1141(d)(1)(A) discharge, however, if the plan provides for the liquidation of all or substantially all of the property of the estate, the debtor does not engage in business after consummation of the plan, and the debtor would be denied a discharge under § 727(a) if the case were a chapter 7 case.³⁸⁷ Only an individual is entitled to a discharge in a

³⁸⁴ § 1141(d)(5)(B).

³⁸⁵ The individual debtor also does not have to deal with the § 522(q) issues discussed in footnote 258, although they rarely arise.

³⁸⁶ § 1141(d)(1)(A).

³⁸⁷ § 1141(d)(3).

chapter 7 case.³⁸⁸ An individual debtor is entitled to a chapter 7 discharge unless one of the reasons for its denial in § 727(a)(2) – (12) exists.³⁸⁹

The § 1141(d)(1)(A) discharge is effective except as otherwise provided in § 1141(d), the plan, or the confirmation order. Section 1141(d) has two exceptions applicable in a sub V case.

First, in the case of an individual debtor, a § 1141(d)(1)(A) discharge does not discharge the individual from any debt that is excepted under § 523(a).³⁹⁰ No such exceptions to the § 1141(d)(1)(A) discharge exist for a debtor that is not an individual.

Second, the § 1141(d)(1)(A) discharge does not discharge any debtor from any debt (1) specified in § 523(a)(2)(A) or (B) that is owed to a governmental unit or to a person as the result of an action filed under subchapter III of chapter 37 of title 31 of the United States Code; or (2) that is for a tax or customs duty with respect to which the debtor made a fraudulent return or willfully attempted to evade or avoid.³⁹¹

B. Discharge Upon Confirmation of a Cramdown Plan Under § 1191(b)

When the court confirms a cramdown plan, § 1141(d) does not apply, except as provided in new § 1192.³⁹² Instead, the debtor receives a discharge under new § 1192.

New § 1192 provides for discharge to occur “as soon as practicable” after the debtor completes all payments due within the first three years of the plan, “or such longer period not to exceed five years as the court may fix.”³⁹³ Presumably, any longer period will be the same length as the court fixes for the commitment of projected disposable income in connection with

³⁸⁸ § 727(a)(1).

³⁸⁹ § 727(a).

³⁹⁰ § 1141(d)(1)(A).

³⁹¹ § 1141(d)(6).

³⁹² New § 1181(c).

³⁹³ New § 1192. Section 1141(d)(5)(A), which defers the discharge of an individual in a chapter 11 plan until the debtor completes payments, permits the court to order otherwise, for cause, after notice and a hearing. New § 1192 contains no provision for an earlier discharge.

cramdown confirmation under new § 1191(b), but the statute does not expressly so state. Section VIII(B)(4)(ii) discusses determination of the commitment period.

The cramdown discharge under new § 1192 discharges the debtor from all debts discharged under § 1141(d)(1)(A), with certain exceptions discussed below, unless § 1141(d), the plan, or the confirmation order provides otherwise.

The new § 1192 discharge also applies to “all other debts allowed under [§ 503] and provided for in the plan.”³⁹⁴ Section 503 provides for the allowance of administrative expenses, including postpetition operating expenses;³⁹⁵ compensation of the trustee and professionals employed by the trustee and the debtor;³⁹⁶ and claims for goods the debtor received within 20 days of the filing.³⁹⁷ The discharge provision recognizes that a plan confirmed under new § 1191(b) may provide for the payment of administrative expenses through the plan.³⁹⁸

New § 1192 excepts certain debts from discharge. First, new § 1192 does not discharge any debt on which the last payment is due after the first three years of the plan, or such other time not to exceed five years fixed by the court.³⁹⁹ Again, any longer period fixed by the court will presumably be the same period that the court fixes for the commitment of projected disposable income in connection with cramdown confirmation. Second, new § 1192(2) excepts any debt “of the kind specified in [§ 523(a)].”⁴⁰⁰ The same exceptions apply to the § 1141(d)(1)(A) discharge of an individual under § 1141(d)(2).

³⁹⁴ New § 1192.

³⁹⁵ § 503(b)(1).

³⁹⁶ § 503(b)(2).

³⁹⁷ § 503(b)(9).

³⁹⁸ New § 1191(c). Administrative expenses allowed under § 503(b) are entitled to priority under § 507(a)(2). New § 1191(e) permits the payment of a claim specified under § 507(a)(2) through a plan confirmed under new § 1191(b). See Section VI(C).

New § 1191(e) also permits payment of claims specified in § 507(a)(3) through the plan. Section 507(a)(3) provides a priority for “involuntary gap claims” allowed under § 502(f).

³⁹⁹ New § 1192(1).

⁴⁰⁰ New § 1192(2).

It is unclear whether the § 523(a) exceptions apply when a debtor that is not an individual receives a discharge under § 1192. In the case of a non-individual, the § 1141(d) discharge is not subject to the exceptions in § 523(a). Section 1141(d)(2) makes the § 523(a) exceptions applicable, but expressly limits application of § 523(a) to a debtor who is an individual.

New § 1192(2), in contrast, states, without qualification, that debts “of the kind specified” in § 523(a) are excepted from discharge. Because § 523(a) specifies various debts, the conclusion is that a debt listed in § 523(a) is excepted from the § 1192 discharge.⁴⁰¹

The language of § 523(a) permits a different conclusion. As amended, § 523(a) begins as follows:

A discharge under section 727, 1141, 1192, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt – [defined in paragraphs (1) through (19) of § 523(a)].⁴⁰²

(The other listed sections are sections under which a discharge is granted in chapter 7, 11, 12, and 13 cases.)

As amended, therefore, § 523(a) states that a discharge under new § 1192 does not discharge an *individual* debtor from the listed types of debts. This amendment would be superfluous if Congress did not intend to limit the § 523(a) exceptions to individuals. Without the amendment to § 523(a), new § 1192 alone would except the types of debts listed from any § 1192 discharge, regardless of whether the debtor is an individual.

In other words, although new § 1192 states discharge rules for all debtors without regard to whether they are individuals or not, its reference to § 523(a) in the case of a non-individual has no operative effect. Section 523(a), as amended, applies only to individuals.

⁴⁰¹ Some commentators have concluded that the exceptions in § 523(a) apply to the discharge of an entity in a sub V case. 5 NORTON BANKRUPTCY LAW AND PRACTICE § 107:19; James B. Bailey and Andrew J. Shaver, *The Small Business Reorganization Act of 2019*, NORTON BANKR. L. ADVISER, Oct. 2019, Part IX.

⁴⁰² § 523(a) (language inserted by amendment in *italics*).

Legislative history supports the conclusion that Congress did not intend to make the § 523(a) exceptions applicable to a new § 1192 discharge of a non-individual. The Report of the Judiciary Committee of the House of Representatives states that the new § 1192 discharge excepts debts on which the last payment is due after the commitment period under the plan and “any debt that is otherwise nondischargeable.”⁴⁰³ The use of the words “otherwise nondischargeable” logically refers to § 523(a), which applies only to individuals.

Moreover, if the drafters had intended to expand § 523(a) to permit exceptions to the discharge of non-individuals – a significant change in existing chapter 11 law – one would expect the House Judiciary Committee Report to point that out. It does not.⁴⁰⁴ To the contrary, the Report’s explanation that the exceptions are for “any debt that is otherwise nondischargeable” demonstrates an intent to apply existing exceptions to discharge in chapter 11 cases in subchapter V, not to expand them.

Limited case law under chapter 12 supports the conclusion that the § 523(a) exceptions may apply to a new § 1192 discharge of a non-individual debtor. The chapter 12 discharge provision, § 1228(a)(2),⁴⁰⁵ has the same language as new § 1192, and the prefatory language of § 523(a) as amended refers to § 1228 and new § 1192 in the same way.

In two corporate chapter 12 cases, the corporate debtors contended that the § 523(a) exceptions to the chapter 12 discharge did not apply to them because § 523(a) states that it only

⁴⁰³ H.R. REP. NO. 116-171, at 8.

⁴⁰⁴ Retired Bankruptcy Judge A. Thomas Small, Jr., submitted testimony in support of the legislation. Judge Small’s explanation of the new § 1192 discharge similarly made no reference to the § 523(a) exceptions to the discharges of non-individuals. *Hearing on Oversight of Bankruptcy Law & Legislative Proposals Before the Subcomm. On Antitrust, Commercial and Admin. Law of the H. Comm. On the Judiciary*, 116th Cong. 2 (Revised Testimony of A. Thomas Small on Behalf of the National Bankruptcy Conference), available at https://www.fjc.gov/sites/default/files/REVISED_TESTIMONY_OF_A_THOMAS_SMALL.pdf.

⁴⁰⁵ The chapter 12 discharge provision, § 1228(a)(2), excepts from discharge any debt “of a kind specified” in § 523(a). The language also appears in § 1228(c)(2), which governs the so-called “hardship” discharge that a debtor who cannot complete plan payments may receive under § 1228(b).

excepts debts of an individual.⁴⁰⁶ Both courts ruled that the § 523(a) exceptions applied to the chapter 12 discharge of a corporation.

In *In re JRB Consolidated, Inc.*,⁴⁰⁷ the court reasoned that the operative language in § 1228(a)(2) (“debts of the kind” specified in § 523(a)) “does not naturally lend itself to also incorporate the meaning ‘for debtors of the kind’ referenced in § 523(a).”⁴⁰⁸ Instead, the court concluded, “debts of the kind” is limited to the types of debts that the subparagraphs of § 523(a) identify.⁴⁰⁹ Moreover, the court explained, § 1228(a), unlike § 1141(d), does not expressly provide a broader discharge for corporations than for individuals.⁴¹⁰

The court in *In re Breezy Ridge Farms, Inc.*,⁴¹¹ adopted the same reasoning. In addition, the court noted that the exceptions to discharge for a corporation in § 1141(d)(6)⁴¹² apply to debts “of a kind specified in paragraph (2)(A) or (2)(B) of section 523(a)” that meet certain other requirements even though corporate debtors are excluded from § 523(a) by its terms.⁴¹³ The *Breezy Ridge Farms* court explained that its interpretation harmonized the provisions of § 1228 and § 523(a):

Although § 523(a) applies only to individuals, Congress has used it as shorthand to define the scope of a Chapter 12 discharge for corporations as well as individuals. Thus, it is appropriate to rely on § 523(a) to determine whether a debt is included in the discharge, even when the debtor is a corporation. Even if the two provisions could not be harmonized, § 1228 would control because it is more specific, applicable only in Chapter 12, than § 523(a), which applies regardless of chapter.⁴¹⁴

⁴⁰⁶ *In re Breezy Ridge Farms, Inc.*, 2009 WL 1514671 (Bankr. M.D. Ga. May 29, 2009); *In re JRB Consol., Inc.*, 188 B.R. 373 (Bankr. W.D. Tex. 1995).

⁴⁰⁷ *In re JRB Consol.*, 188 B.R. at 373.

⁴⁰⁸ *Id.* at 374.

⁴⁰⁹ *Id.*

⁴¹⁰ *Id.*

⁴¹¹ *In re Breezy Ridge Farms*, 2009 WL 1514671, at *1.

⁴¹² Section 1141(d)(6) states an exception to the § 1141(d)(1)(A) discharge. See Section X(A).

⁴¹³ *In re Breezy Ridge Farms*, 2009 WL 1514671, at *2.

⁴¹⁴ *Id.*

Under § 523(c)(1), a debtor is discharged from a debt excepted from discharge under subparagraphs (2), (4), or (6) of § 523(a) unless, upon request of the creditor, the court determines that the debt is nondischargeable.⁴¹⁵ Bankruptcy Rule 4007(c) requires the filing of a complaint to determine the dischargeability of such a debt no later than 60 days after the date first set for the § 341(a) meeting.⁴¹⁶ If the debtor does not list the creditor, § 523(a)(3) provides for such a debt to be excepted if the creditor did not have enough notice to permit the timely filing of a proof of claim and a timely request for the determination, unless the creditor had actual notice of the deadlines in time to do so.⁴¹⁷ The clerk’s office must give at least 30 days’ notice of the deadline.⁴¹⁸

The court in *Gaske v. Satellite Restaurants, Inc. Crabcake Factory USA (In re Satellite Restaurants, Inc. Crabcake Factory USA)*, 626 B.R. 871 (Bankr. D. Md. 2021), ruled that the exceptions to discharge in § 523(a) do not apply to a cramdown discharge of an entity in a subchapter V case under § 1191(b). The court noted that it had to give meaning to the reference to § 1192 in the preamble to § 523(a) that the SBRA added in connection with enactment of subchapter V and that “the only reasonable meaning is that Congress intended to continue to limit application of the Section 523(a) exceptions in a Subchapter V case to individuals.” *Id.* at 876. Legislative history explaining the intent of Congress in enacting subchapter V, the court noted, supported its interpretation. *Id.* at 876, 878. Another judge in the same district reached this conclusion in *Cantwell-Cleary Co., Inc., v. Cleary Packaging, LLC (In re Cleary Packaging LLC)*, 2021 WL 2667735 (Bankr. D. Md. 2021).

⁴¹⁵ § 523(c)(1).

⁴¹⁶ FED. R. BANKR. P. 4007(c).

⁴¹⁷ § 523(a)(3).

⁴¹⁸ The new Official Forms for the notice of the filing of a sub V case (Form B309E2 for cases of individuals and Form B309F2 for cases of corporations or partnerships) provide a space for the clerk to state the deadline.

XI. Changes to Property of the Estate in Subchapter V Cases

SBRA makes two changes with regard to property that a debtor acquires postpetition and earnings from postpetition services. First, SBRA makes § 1115(a) inapplicable in a sub V case.⁴¹⁹ Section 1115(a), applicable only in the case of an individual, includes postpetition property and earnings as property of the estate. Second, new § 1186 provides that, if the court confirms a plan under the cramdown provisions of new § 1191(b), property of the estate consists of property of the estate under § 541(a) and postpetition property and earnings until the case is closed, dismissed, or converted to another chapter.⁴²⁰ New § 1186 applies to debtors that are entities as well as individuals.

Discussion of the effects of these changes begins with a summary of postpetition property and earnings under pre-SBRA law.

A. Property Acquired Postpetition and Earnings from Services Performed Postpetition as Property of the Estate in Traditional Chapter 11 Cases

Property of the estate in a chapter 11 case (including the case of any small business debtor) consists of the same property that is property of the estate under § 541. Under § 541, property of the estate includes, among other things, all legal or equitable interests in property that the debtor has in property as of the commencement of the case, § 541(a)(1), subject to certain exceptions stated in § 541(b).⁴²¹

Section 541(a)(7) provides that any interest in property that the *estate* acquires after the commencement of the case is property of the estate.

⁴¹⁹ New § 1181(a).

⁴²⁰ § 1186.

⁴²¹ § 541.

In the case of an entity, the debtor in possession (or trustee) controls the entity and all its property and acts on behalf of the estate. Bankruptcy does not recognize any distinction between the property interests of an entity debtor and those of the estate. Any interest in property that an entity acquires after the commencement of the case (including any postpetition earnings) must be property that the estate acquires and is property of the estate under § 541(a)(7).

In the case of an individual, a distinction exists under § 541 between property of the debtor and property of the estate. In general, any property that a debtor acquires postpetition belongs to the debtor, with limited exceptions,⁴²² unless the postpetition property represents proceeds, product, offspring, rents, or property of or from property of the estate (for example, rental income or interest or dividends on an investment).⁴²³ Moreover, an individual's chapter 7 estate does not include earnings from postpetition services.⁴²⁴ In cases under chapters 12 and 13, property of the estate includes postpetition property and earnings.⁴²⁵

The rules in chapter 11 cases of individuals were the same as in chapter 7 cases before enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (“BAPCPA.”) Thus, property that an individual chapter 11 debtor acquired after the filing of the case and earnings from postpetition services were not property of the estate (with limited exceptions as noted above).

BAPCPA added §1115 to make property of the estate of an individual in a chapter 11 case the same as property of the estate in a chapter 12 or 13 case. In language that tracks the

⁴²² Under § 541(a)(5), property that a debtor acquires, or becomes entitled to acquire, within 180 days after the petition date is property of the estate if the debtor acquires or becomes entitled to acquire it either: (A) by bequest, devise, or inheritance; (B) as the result of a property settlement agreement or divorce decree; or (C) as a beneficiary of a life insurance policy or death benefit plan.

⁴²³ § 541(a)(6).

⁴²⁴ *Id.*

⁴²⁵ §§ 1207(a), 1306(a).

chapter 12 and 13 provisions, § 1115 provides that, in a chapter 11 case in which the debtor is an individual, property of the estate includes property that the debtor acquires after the commencement of the case,⁴²⁶ and earnings from postpetition services,⁴²⁷ both before the case is closed, dismissed, or converted to a case under chapter 7, 12, or 13.

B. Postpetition Property and Earnings in Subchapter V Cases

Section 1115 does not apply in subchapter V cases.⁴²⁸ New § 1186(a), however, includes postpetition assets and earnings as property of the estate if the court confirms a plan under the cramdown provisions of § 1191(b).⁴²⁹ New § 1186(a) uses substantially the same language as § 1115 and the chapter 12 and 13 provisions on which § 1115 is based, §§ 1206 and 1307.

The effects of these changes differ depending on (1) whether the debtor is an individual or an entity and (2) whether the court confirms a consensual plan (which all impaired classes of creditors must accept) under § 1191(a) or confirms a plan under the cramdown provisions of § 1191(b).

1. Property of the estate in subchapter V cases of an entity

Section 1115(a) does not apply to an entity, so its inapplicability in a sub V case has no effect on the property of the estate in a sub V case of an entity.

New § 1186 deals with property of the estate when cramdown confirmation occurs under new § 1191(b). It provides that property of the estate consists of property of the estate under § 541 and postpetition property and earnings before the case is closed, dismissed, or converted to another chapter.

⁴²⁶ § 1115(a)(1).

⁴²⁷ § 1115(a)(2).

⁴²⁸ New § 1181(a).

⁴²⁹ New § 1186(a).

Discussion of the effects of new § 1186 when it applies begins with an explanation of what happens when it does not, *i.e.*, when the court confirms a consensual plan under §1191(a). Section 1141(b) provides that the confirmation of a plan vests all property of the estate in the debtor unless the plan or confirmation order provides otherwise. The same rule governs cases under chapters 12 and 13.⁴³⁰

The vesting of property of the estate in the debtor means that the automatic stay with regard to acts against property terminates. Section 362(c)(1) provides, “[t]he stay of an act against property of the estate under [§ 362(a)] continues until such property is no longer property of the estate.”⁴³¹ Confirmation of a consensual plan does not necessarily result in termination of the stay under § 362(c)(1), because the plan or the confirmation order may provide for vesting to occur at some later time.⁴³²

In the cramdown situation, new § 1186 provides that property of the estate consists of property of the estate under § 541 (which covers all the debtor’s property at the time of confirmation, as earlier text explains) and any postpetition assets and earnings. This means that the automatic stay does not terminate at confirmation under § 362(c)(1) because all property of the debtor and all its earnings remain property of the estate.

New § 1186 conflicts with the vesting provisions of § 1141(b), which SBRA does not amend. Recall that § 1141(b) provides for vesting of property of the estate in the debtor upon confirmation. New § 1186, however, keeps the property in the estate when cramdown confirmation occurs.

⁴³⁰ §§ 1227(b), 1327(b).

⁴³¹ § 362(c)(1).

⁴³² § 1141(b).

The purpose seems to be to maintain judicial supervision of a debtor's assets and earnings after cramdown confirmation. This objective is consistent with other provisions of subchapter V that apply in the cramdown situation. For example, the trustee continues to serve after confirmation⁴³³ and makes payments under the plan,⁴³⁴ and discharge does not occur until the debtor has completed payments for the specified period.⁴³⁵

When statutes conflict, principles of statutory construction favor application of the newer statute or the more specific one.⁴³⁶ New § 1186 is newer and more specific. Moreover, its application carries out the purpose of the statutory scheme of which it is a part. Under these concepts, the provisions of new § 1186 defining property of the estate appear to control over the conflicting vesting provisions in § 1141(b).

2. Property of the estate in subchapter V cases of an individual

SBRA's new rules governing property of the estate just discussed apply in the case of an individual sub V debtor.

Because § 1115(a) does not apply, postpetition assets and earnings of an individual are not property of the estate. The pre-BAPCPA rule recognizing the distinction between property of the estate and property of the debtor comes back into play.

The change is important if the sub V case is converted prior to confirmation. Most courts conclude that, upon conversion of the chapter 11 case of an individual to chapter 7,

⁴³³ See Section IV(D)(1).

⁴³⁴ See Section IX(B).

⁴³⁵ See Section X(B).

⁴³⁶ “[S]tatutes relating to the same subject matter should be construed harmoniously if possible, and if not, the more recent or specific statutes should prevail over older or more general ones.” *United States v. Lara*, 181 F.3d 183, 198 (1st Cir. 1999) (citing *HCSC-Laundry v. United States*, 450 U.S. 1, 6 (1981) and *Morton v. Mancari*, 417 U.S. 535, 550-51 (1974)); accord, e.g., *In re Southern Scrap Material Co., LLC*, 541 F.3d 584, 593 n. 14 (5th Cir. 2008); *Tug Allie-B, Inc., v. United States*, 273 F.3d 936, 941, 948 (11th Cir. 2001); *Southern Natural Gas Co. v. Land, Cullman County*, 197 F.3d 1368, 1373 (11th Cir. 1999); *In re Southern Scrap Material Co., LLC*, 541 F.3d 584, 593 n. 14 (5th Cir. 2008); see 2B Sutherland Statutory Construction § 51:2 (7th ed. 2019-20 Supp.).

property of the chapter 7 estate includes assets acquired and income earned after the filing of the case and until it is converted.⁴³⁷ The result upon preconfirmation conversion will be different for an individual who is a sub V debtor.

The exclusion of postpetition assets and income from property of the estate of an individual in a sub V case raises questions. In a chapter 7 case, an individual is free to use postpetition assets and earnings without restriction or judicial approval. That is the same rule that governed pre-BAPCPA chapter 11 cases of individuals, and it now applies in a sub V case. Does this mean, for example, that an individual who acquires assets postpetition, or has earnings from postpetition services, may use or dispose of them without supervision by the trustee or approval by the court?

In re Robinson, 628 B.R. 168 (Bankr. D. Kan. 2021), answered this question affirmatively. There, the U.S. Trustee sought dismissal of the individual's sub V case because the debtor lost \$ 4,000 playing slot machines during the first month after he filed the case. At the time of the hearing, the debtor had filed a plan that all classes of creditors had accepted. The debtor testified that he would no longer be gambling while he was in bankruptcy because, once his plan payments began, he would have no disposable income to do so.

The court concluded that the postpetition gambling did not constitute gross mismanagement of the estate that would provide cause for dismissal under § 1112(b)(4)(B)

⁴³⁷ *E.g.*, *In re Copeland*, 609 B.R. 834 (D. Ariz. 2019); *In re Meier*, 550 B.R. 384 (N.D. Ill. 2016); *In re Freeman*, 527 B.R. 780 (Bankr. N.D. Ga. 2015); *In re Hoyle*, 2013 WL 3294273 (Bankr. D. Idaho June 28, 2013); *In re Tolkin*, 2011 WL 1302191 (Bankr. E.D.N.Y. Apr. 5, 2011), *aff'd sub nom.* *Pagano v. Pergament*, 2012 WL 1828854 (E.D.N.Y. May 16, 2012); *accord, e.g.*, *In re Lincoln*, 2017 WL 535259 (Bankr. E.D. La. Feb. 8, 2017); *In re Gorniak*, 549 B.R. 721 (Bankr. W.D. Wisc. 2016); *In re Vilaro Colón*, 2016 WL 5819783 (Bankr. D.P.R. Oct. 5, 2016). *Contra, e.g.*, *In re Markosian*, 506 B.R. 273, 275-77 (9th Cir. BAP 2014); *In re Evans*, 464 B.R. 429, 438-41 (Bankr. D. Colo. 2011).

because the debtor had disclosed it in his monthly report and because nothing showed that the loss was material or had an adverse impact on the estate or its creditors. *Id.* at *7-8.

The court then observed that the gambling loss could not be gross management of the estate because, in a subchapter V case, the debtor's postpetition earnings were not property of the estate. *Id.*

The fact that postpetition assets and earnings of an individual in a sub V case are not property of the estate also affects operation of the automatic stay. Because the individual's postpetition assets and earnings are not property of the estate, is the automatic stay applicable to a postpetition creditor's collection of a postpetition debt through garnishment of wages?⁴³⁸ Section 362(b)(2)(B) excepts collection of a domestic support obligation from property that is not property of the estate. May the holder of a domestic support obligation seek to enforce the claim against postpetition property and earnings?

The nature of postpetition assets and earnings changes if cramdown confirmation occurs. In the cramdown situation, new § 1186 provides that property of the estate at the time of confirmation includes both property of the estate that the debtor had at the time of the filing of the petition under § 541 and postpetition assets and earnings.⁴³⁹

One consequence of the addition of postpetition assets and earnings to the estate is that, if conversion to chapter 7 occurs after cramdown confirmation, postconfirmation property and earnings will be property of the chapter 7 estate. If the court confirms a consensual plan, such

⁴³⁸ Paragraph (1) of § 362(a) does not stay acts with regard to postpetition claims; paragraph (a)(2) precludes enforcement of a prepetition judgment; paragraphs (a)(3) and (a)(4) prevent acts against property of the estate; paragraph (a)(5) precludes enforcement of a prepetition lien; paragraphs (a)(6) and (a)(7) do not apply to postpetition claims; and paragraph (a)(8) deals with tax claims for taxable periods ending before the date of the petition. *See generally* W. Homer Drake, Jr., Paul W. Bonapfel, & Adam M. Goodman, CHAPTER 13 PRACTICE AND PROCEDURE § 19:6 (discussing the automatic stay with regard to postpetition claims in a chapter 13 case when property of the estate vests in the debtor upon confirmation).

⁴³⁹ New § 1186.

property may not be property of the estate because neither § 1115(a) nor new § 1186 applies. Sections XII(C) and (D) further discuss this issue.

Issues may arise because of the retroactive nature of the operation of new § 1186: Property that was not property of the estate becomes property of the estate upon cramdown confirmation. For example, what happens if, at the time of the confirmation hearing, an individual debtor has disposed of postpetition assets or earnings, which the debtor had the right to do when the property was not property of the estate? A creditor opposing confirmation could argue that the court cannot confirm the plan because the estate will not have all the property that new § 1186 requires it to have.

XII. Default and Remedies After Confirmation

If a debtor defaults after confirmation of a plan, creditors must decide what remedies are available and how to invoke them. If the court confirmed the plan under the cramdown provisions of new § 1191(b), the sub V trustee must also decide what to do if a default occurs.

A. Remedies for Default in the Confirmed Plan

Because the provisions of a confirmed plan are binding on the debtor and creditors under § 1141(a), the plan's provisions for default and remedies control. In a consensual plan, the provisions governing default and remedies ordinarily have their source in negotiations with the various creditors that lead to terms that result in acceptance of the plan. Secured creditors and lessors are unlikely to accept a plan unless it includes acceptable remedies in the plan that allow them to exercise their remedies if the debtor defaults. Unsecured creditors and tax claimants

often do not participate actively in the case of a small business debtor, but if they do, they likewise have the opportunity to negotiate acceptable terms to deal with defaults.

When one or more classes of impaired creditors do not accept the plan, the requirements for cramdown confirmation in new § 1191(c) provide the source of remedies for default. Cramdown confirmation requires that the plan provide “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.”⁴⁴⁰ The only specific remedy in new § 1191(c)(3)(B) is “the liquidation of nonexempt assets.”⁴⁴¹

When creditors are actively participating in the case, they will presumably advise the court as to what remedies are appropriate to protect them. Active creditors usually include secured creditors and landlords, but often do not include tax claimants or unsecured creditors. The sub V trustee is the logical party to propose remedies to protect creditors who do not appear.

Whether the source of the terms governing default and remedies is negotiation between the debtor and creditors or the requirements of new § 1191(c)(3)(B), creditors will want remedies that will protect their rights to recover.

For secured creditors and lessors who have property rights in specific assets, the primary objective is to recover possession of the encumbered or leased property and to exercise their rights promptly upon the debtor’s default. Secured creditors and lessors will want provisions in the plan that recognize their rights to proceed against the debtor’s property and that confirm that neither the automatic stay nor the discharge injunction will apply to their efforts to do so.

⁴⁴⁰ New § 1191(c)(3)(B).

⁴⁴¹ *Id.*

An unsecured creditor can subject the debtor's assets to its debt only through judicial process, a somewhat cumbersome and potentially lengthy process with uncertain results and expense that may not justify the effort. An effective remedy for unsecured creditors might include conversion to chapter 7 to permit a trustee to liquidate the assets. Later text in Section XII(C) discusses issues that arise upon postconfirmation conversion to chapter 7 that the plan might appropriately address to protect unsecured creditors.

B. Removal of Debtor in Possession for Default Under Confirmed Plan

New Section 1185(a) provides that, on request of a party in interest, and after notice and a hearing, the court *shall* order that the debtor not be a debtor in possession for cause or “for failure to perform the obligations of the debtor under a plan confirmed under this subchapter.”⁴⁴² If removal of the debtor in possession occurs after the trustee's service has been terminated upon substantial consummation of a consensual plan confirmed under new § 1191(a), new § 1183(c)(1) provides for reappointment of the trustee.

New § 1183(c)(5) specifies the duties of a trustee when the debtor ceases to be a debtor in possession. A specific duty is operation of the business of the debtor. The duties do not include liquidation of the debtor's assets. Nothing in subchapter V appears to authorize the trustee to do so.

The trustee's operation of the business will be difficult, if not impossible, if secured creditors or lessors take possession of assets on account of the debtor's defaults. Even if the trustee can operate the business, its future is unclear. Perhaps the plan will have provisions for the cure of defaults and the trustee can manage the business to cure defaults so that the plan can go forward. If not, the plan will remain in default, and the trustee will do nothing more than

⁴⁴² New § 1185(a). Section V(C) discusses removal for cause.

observe as creditors exercise their remedies under the plan unless the plan is modified or the case is converted to chapter 7.

Property of the estate issues arise when reappointment of the trustee based on the debtor's default occurs after confirmation of a consensual plan under new § 1191(a). Under § 1141(b), property of the estate vests in the debtor upon confirmation of a consensual plan unless the plan or confirmation order provides otherwise.⁴⁴³ If property of the estate vested in the debtor upon confirmation, the debtor is in possession of its own assets, not property of the estate. Arguably, this means that there is no property of the estate that the trustee can manage and no "debtor in possession" to be removed.

Under this view, new § 1185(a) operates only when property of the estate does not vest in the debtor at confirmation, either because cramdown confirmation occurs (and property of the estate remains property of the estate under new § 1186⁴⁴⁴) or because the plan or confirmation order so provides.

It is arguable that Congress did not intend to limit the operation of new § 1185(a) based on how property vests at confirmation. One possible interpretation of new § 1185(a), therefore, is that it impliedly authorizes the trustee to take possession of property of the debtor. Another potential interpretation is that it impliedly revests the debtor's assets into the estate.

In many cases, postconfirmation modification may not be a realistic possibility. First, only the debtor may modify a plan.⁴⁴⁵ Moreover, if the plan was a consensual one confirmed under new § 1191(a), postconfirmation modification under new § 1193(b) is not permissible after substantial consummation (which presumably occurred unless the debtor made no payments

⁴⁴³ See Section XI(B).

⁴⁴⁴ See Section XI(B).

⁴⁴⁵ New § 1193(b).

under the plan). Finally, if cramdown confirmation occurred such that modification is permissible, the fact that the debtor did not seek to modify it to deal with defaults does not generate confidence that it can effectively do so once the trustee has taken over.

Given these considerations, it seems likely that the eventual effect in most cases of postconfirmation removal of the debtor in possession will be dismissal or conversion to chapter 7. If so, a more effective remedy than removal of the debtor in possession may be dismissal or conversion. If continuation of the debtor's business is advisable (perhaps, for example, to liquidate it as a going concern), the court may authorize a chapter 7 trustee to do so.⁴⁴⁶

C. Postconfirmation Dismissal or Conversion to Chapter 7

Section 1112(b)(1) provides that the court, upon request of a party in interest, shall dismiss a chapter 11 case or convert it to a case under chapter 7 for "cause." "Cause" includes "material default by the debtor with respect to a confirmed plan."⁴⁴⁷ Section 1112 remains applicable in a subchapter V case.

If the court converts the case to chapter 7, the U.S. Trustee appoints an interim trustee under § 701(a)(1). The interim trustee may be a panel trustee or the sub V trustee. The interim trustee becomes the trustee in the case unless creditors elect a different trustee at the § 341(a) meeting.⁴⁴⁸

1. Postconfirmation dismissal

The effects of postconfirmation dismissal differ depending on whether the debtor has received a discharge. The timing of the discharge under subchapter V depends on the type of confirmation that occurs.

⁴⁴⁶ § 721.

⁴⁴⁷ § 1112(b)(4)(N).

⁴⁴⁸ § 702(d).

The debtor receives a discharge under § 1141(d) upon confirmation of a consensual plan under new § 1191(a).⁴⁴⁹ Courts have ruled that the postconfirmation dismissal of a chapter 11 case does not affect the discharge that the debtor has received or the binding effect of the plan.⁴⁵⁰

If cramdown confirmation occurs, the debtor does not receive a discharge until the completion of payments.⁴⁵¹ Courts dealing with similar provisions for the delay of discharge in cases under chapters 11, 12, and 13 have concluded that a plan cannot have binding effect if the case is dismissed prior to the entry of discharge.⁴⁵² Thus, dismissal after confirmation without a discharge will generally restore the parties to their pre-bankruptcy status.

⁴⁴⁹ See Section X(A).

⁴⁵⁰ *E.g.*, National City Bank v. Troutman Enterprises, Inc. (*In re Troutman Enterprises, Inc.*), 253 B.R. 8, 13 (B.A.P. 6th Cir. 2002) (“[C]onversion does not disturb confirmation or revoke the discharge of preconfirmation debt.”); *In re T&A Holdings, LLC*, 2016 WL 7105903, at *5 (Bankr. N.D. Ill. Nov. 2, 2016) (“[T]he terms of a confirmed Chapter 11 plan remain binding post-dismissal as does the discharge granted through or in connection with such plan.”); *In re Potts*, 188 B.R. 575, 581-82 (Bankr. N.D. Ind. 1995).

⁴⁵¹ New § 1192.

⁴⁵² Chapters 12 and 13 have always delayed discharge until the completion of plan payments or grant of a “hardship” discharge, §§ 1228, 1328. Chapter 11 has done so in the cases of individuals since the addition of § 1141(d)(5) by BAPCPA. In chapter 12 and 13 cases, courts have concluded that a confirmed plan is not binding upon dismissal of the case without a discharge. See *First National Bank of Oneida, N.A. v. Brandt*, 597 B.R. 663, 668-69 (M.D. Fla. 2018) (Collecting cases holding that chapter 12 or 13 confirmed plan is no longer binding upon dismissal). But see *Weise v. Community Bank of Central Wisconsin (In re Weise)*, 552 F.3d 584 (7th Cir. 2009).

The district court in *First National Bank of Oneida, N.A. v. Brandt*, 597 B.R. 663 (M.D. Fla. 2018) addressed the binding effect of a confirmed plan upon dismissal of an individual’s chapter 11 case on remand from the Eleventh Circuit. *First National Bank of Oneida, N.A. v. Brandt*, 887 F.3d 1255 (11th Cir. 2018). The Eleventh Circuit noted that case law in chapter 13 cases dealing with dismissal without a discharge “could perhaps become relevant to a determination of whether and how the dismissal of Brandt’s Chapter 11 case without a discharge affects the enforceability of his confirmed Chapter 11 plan.” *Id.* at 1261. The district court determined that it was, 597 B.R. at 669, and ruled that the confirmed plan was not binding upon dismissal prior to confirmation based on that case law, the provisions of § 349(b), and public policy. *Id.* at 671.

In *Community Bank of Central Wisconsin (In re Weise)*, 552 F.3d 584 (7th Cir. 2009), the bankruptcy court, on the debtors’ motion, dismissed their chapter 12 case after confirmation of their plan that incorporated a settlement between debtors and bank that, among other things, released lender liability claims against the bank. In connection with dismissal, the bankruptcy court determined that, under U.S.C. § 349(b), cause existed for the plan’s terms with regard to the settlement to remain binding on the parties. The Seventh Circuit ruled that the bankruptcy court did not abuse its discretion and that cause existed under § 349(b) to keep some terms of the plan binding on the parties. The Seventh Circuit stated that § 349(b) “explicitly contemplates that the court can choose to keep some terms binding on the parties where there is cause.” *Weise, supra*, 552 F.3d at 591. The court observed, “[N]egotiation alone would not be an acceptable standard for ‘cause,’ since every confirmed plan that required the consent of the creditor would involve some degree of negotiation.” *Id.* at 589.

The district court in *Brandt, supra*, 597 B.R. 663, distinguished *Weise* because the bankruptcy court in dismissing Brandt’s chapter 11 case made no mention of binding the parties to plan provisions and “chose not to keep specified plan terms binding.” *Id.* at 670.

Section 349, which deals with the effect of dismissal of a case, remains applicable in a subchapter V case. Unless the court orders otherwise for cause: (1) § 349(b)(1) provides for the reinstatement of any receivership proceeding; any transfer avoided under §§ 522, 544, 545, 547, 548, 549, or 724(a); and any lien avoided under § 506(d); and (2) § 349(c) reverts property of the estate in the entity in which such property was before the filing of the case.⁴⁵³

2. Postconfirmation conversion

When conversion of a subchapter V case to chapter 7 after confirmation occurs, the question is, what property is property of the estate? The answer depends on whether property of the estate vested in the debtor upon confirmation and, if it did, the court's view of the effect of such vesting.

The general rule of § 1141(b) is that confirmation of a plan results in the vesting of property of the estate in the debtor unless the plan or the confirmation order provides otherwise. In a sub V case, the general rule applies when the court confirms a consensual plan under new § 1191(a), but not when cramdown confirmation occurs under new § 1191(b) because new § 1186 keeps property in the estate.⁴⁵⁴

Some courts have concluded that conversion of a chapter 11 case to chapter 7 does not reconvert property in the estate that vested in the reorganized debtor at confirmation unless the plan or confirmation order provides otherwise.⁴⁵⁵ Other courts have ruled that property of the estate

⁴⁵³ § 349.

⁴⁵⁴ See Section XI(B).

⁴⁵⁵ E.g., *Bell v. Bell* (*In re Bell*), 225 F.3d 203, 216 (2d Cir. 2000); *National City Bank v. Troutman Enterprises, Inc.* (*In re Troutman Enterprises, Inc.*), 253 B.R. 8, 13 (B.A.P. 6th Cir. 2002) ("Property which reverted in a reorganized debtor at confirmation remains property of that entity; conversion does not bring that property into the converted case."); *Lacy v. Stinky Love, Inc.* (*In re Lacy*), 304 B.R. 439, 444-46 (D. Col. 2004) (discussing cases); *In re Freeman*, 527 B.R. 780 (Bankr. N.D. Ga. 2015) (In chapter 11 case of individual, holding that preconfirmation assets vested in debtor but income earned postconfirmation and prior to conversion did not, and discussing cases); *In re L & T Machining, Inc.*, 2013 WL 3368984 (Bankr. D. Kan. July 3, 2013); *In re Sundale, Ltd.*, 471 B.R. 300 (Bankr. S.D. Fla. 2012); *In re Canal Street Limited Partnership*, 260 B.R. 460, 462 (Bankr. D. Minn. 2001); *In re K*

upon conversion consists of property owned by the debtor at the time of commencement of the case,⁴⁵⁶ on the confirmation date,⁴⁵⁷ or on the date of conversion.⁴⁵⁸

Under these principles, property of the estate in a sub V case converted to chapter 7 after *cramdown* confirmation includes all the debtor's property. The result is the same if a consensual plan or the order confirming it provides that property of the estate not vest in the debtor until the occurrence of some later event that has not occurred at the time of conversion.

If property of the estate vested in the debtor at the time of confirmation of a *consensual* plan, however, what constitutes property of the estate at conversion is uncertain. In the first instance, it depends on whether the court applies the vesting principles in existing case law noted above and, if so, which view it adopts.

An alternative argument is that the provision in new § 1185(a) for removal of the debtor in possession for postconfirmation default under a plan requires a different analysis of property of the estate upon conversion. As the previous Section discusses, it is arguable that new § 1185(a) requires the revesting of property of the estate upon removal of the debtor in

& M Printing, Inc., 210 B.R. 583 (Bankr. D. Ariz. 1997); *Carter v. Peoples Bank and Trust Co. (In re BNW, Inc.)*, 201 B.R. 838, 848-49 (Bankr. S.D. Ala. 1996); *In re T.S. Note Co.*, 140 B.R. 812, 813-14 (Bankr. D. Kan. 1992) (The court granted a motion to convert but noted that property of the chapter 7 estate would consist only of non-administered assets remaining in the preconfirmation estate, such as possible causes of action. “[W]hat is being converted . . . are the cases and the assets, if any, whether tangible or intangible, remaining in the debtor’s preconfirmation estate. . . .”); *In re TSP Indus., Inc.*, 117 B.R. 375 (Bankr. N.D. Ill. 1990). See also *Pioneer Liquidating Corp. v. United States Trustee (In re Consol. Pioneer Mortgage Entities)*, 264 F.3d 803 (9th Cir. 2001) (holding that “language and purpose” of liquidating plan demonstrated that assets vested in debtor upon confirmation revested in estate upon conversion); 6 NORTON BANKRUPTCY LAW AND PRACTICE § 114:13 (discussing different approaches to revesting of assets upon conversion after confirmation).

Property of the estate that vests in a chapter 11 debtor at confirmation may not include avoidance actions. See *Still v. Rossville Bank (In re Wholesale Antiques, Inc.)*, 930 F.2d 458 (6th Cir. 1991) (Trustee in case converted to chapter 7 may recover unauthorized postpetition transfers under § 549 that occurred prior to confirmation.); *In re Sundale, Ltd.*, 471 B.R. 300, 307 n. 15 (Bankr. S.D. Fla. 2012); *In re T. S. Note Co.*, 140 B.R. 812, 813 (Bankr. D. Kan. 1992).

⁴⁵⁶ *Smith v. Lee (In re Smith)*, 201 B.R. 267 (D. Nev. 1996), *aff’d* 141 F.3d 1179 (9th Cir. 1998).

⁴⁵⁷ *Carey v. Flintridge Lumber Sales, Inc. (In re RJW Lumber Co.)*, 262 B.R. 91 (Bankr. N.D. Ca. 2001).

⁴⁵⁸ *In re Midway, Inc.*, 166 B.R. 585, 590 (Bankr. D.N.J. 1994).

possession after default under a consensual plan; otherwise, § 1185(a) has no effective operation in that circumstance. If so, the same result follows if conversion occurs.

To avoid these potential issues and to ensure that the estate has property at the time of conversion, creditors negotiating a consensual plan may want to insist on a provision in the plan that will keep assets as property of the estate until the debtor completes payments or meets some other milestone.

XIII. Effective Date and Retroactive Application of Subchapter V

Section 5 of SBRA provides:

This Act and the amendments made by this Act shall take effect 180 days after the date of enactment of this Act.

This language does not restrict application of subchapter V to cases filed on or after the effective date of February 19, 2020. It thus differs from the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, which provided that most of its provisions did not apply “with respect to cases commenced [under the Bankruptcy Code] before the effective date of this Act.”⁴⁵⁹

Debtors in pending chapter 11 cases have sought to amend their petitions after SBRA’s effective date to elect application of subchapter V. They argue that Bankruptcy Rule 1009(a) permits amendment of a petition “as a matter of course at any time before the case is closed” and that SBRA does not restrict application of subchapter V to cases filed after its enactment.

One court rejected the debtor’s argument, concluding, “Nothing in the SBRA enabling statute indicates that the SBRA was intended to have retroactive effect.”⁴⁶⁰ The court observed

⁴⁵⁹ Pub. L. 109-8, 119 Stat. 23, § 1501(b) (2005).

⁴⁶⁰ *In re Double H Transportation, LLC*, 614 B.R. 553 (Bankr. W.D. Tex. 2020).

that to rule otherwise would create a “procedural quagmire” in that the debtor would be unable to comply with the statute’s requirement for a status conference within 60 days after the order for relief and the 90-day deadline for the filing of a plan, both of which expired before SBRA’s effective date. The debtor’s failure to timely file a plan, the court explained, would require dismissal under § 1112(b)(4)(J) for failure to file a plan within the time fixed by the Bankruptcy Code.⁴⁶¹

Other courts, however, have permitted debtors in pending cases to amend their petitions to proceed under subchapter V.⁴⁶² Procedurally, they have ruled that, under Interim Rule 1020(a), a debtor’s amendment to the petition to elect subchapter V in an existing case means that the case proceeds under subchapter V unless and until the court orders otherwise;⁴⁶³ the court need not approve the election.⁴⁶⁴

As an initial matter, courts permitting the debtor to make the election when it occurs after expiration of the timing requirements for a status conference (60 days after the order for relief) and the filing of a plan (90 days) have concluded that the expiration of those times at the time of the election does not bar the election. They observe that the court has the authority to extend

⁴⁶¹ *Id.* at 554.

⁴⁶² *In re Ventura*, 615 B.R. 1 (Bankr. E.D.N.Y. 2020); *In re Body Transit, Inc.*, 613 B.R. 400 (Bankr. E.D. Pa. 2020); *In re Moore Properties of Person County, LLC*, 2020 WL 995544 (Bankr. M.D.N.C. 2020); *In re Progressive Solutions, Inc.*, 615 B.R. 894 (Bankr. C.D. Cal. 2020). *Accord*, *In re Easter*, 623 B.R. 294 (Bankr. N.D. Miss. 2020) (subchapter V election made after denial of confirmation in pending chapter 11 case); *In re Twin Pines, LLC*, 2020 WL 5576957 (Bankr. D. N.M. 2020) (subchapter V election made in existing small business case after failure to obtain confirmation within 45 days of filing of plan); *In re Blanchard*, 2020 WL 4032411 (Bankr. E.D. La. 2020); *In re Trepetin*, 617 B.R. 841 (Bankr. D. Md. 2020) (Permitting conversion from chapter 7 case filed 10 days before effective date of SBRA); *In re Bonert*, 619 B.R. 248 (Bankr. C.D. Cal. 2020); *In re Bello*, 613 B.R. 894 (Bankr. E.D. Mich. 2020) (Chapter 13 case filed May 3, 2019, and converted to chapter 11 on January 15, 2020; amendment to petition to elect sub V treatment filed March 2, 2020).

⁴⁶³ *See* Section III(A).

⁴⁶⁴ *In re Body Transit, Inc.*, 613 B.R. 400, 407 (Bankr. E.D. Pa. 2020) (treating objection to debtor’s motion for authority to proceed under subchapter V as an objection to amendment of the petition to make the election); *In re Progressive Solutions, Inc.*, 615 B.R. 894, 900-01 (Bankr. C.D. Cal. 2020).

those times for cause, as long as the delay is due to circumstances not justly attributed to the debtor, and that the debtor cannot comply with procedural requirements that did not exist.⁴⁶⁵

The opposite view is that the inability of a debtor to meet the statutory deadlines when it elects subchapter V after they have expired is not due to a circumstance beyond its control.

Because the debtor makes the election after the deadlines expired, the circumstances are within

⁴⁶⁵ *In re Ventura*, 615 B.R. 1, 15 (Bankr. E.D.N.Y. 2020) (“Given that the Debtor’s case was filed over 15 months ago, the Court finds that to argue the Debtor should have complied with the procedural requirements of a law that did not exist is the height of absurdity. The Debtor is not required to comply with deadlines that clearly expired before the Debtor could have elected to proceed as a subchapter V debtor.”); *In re Progressive Solutions, Inc.*, 615 B.R. 894, 899-900 (Bankr. C.D. Cal. 2020) (addressing timing of status conference). *Accord*, *In re Easter*, 623 B.R. 294 (Bankr. N.D. Miss. 2020) (subchapter V election made after denial of confirmation in pending chapter 11 case); *In re Twin Pines, LLC*, 2020 WL 5576957 (Bankr. D. N.M. 2020) (subchapter V election made in existing small business case after failure to obtain confirmation within 45 days of filing of plan); *In re Trepetin*, 617 B.R. 841 (Bankr. D. Md. 2020).

In *In re Trepetin*, 617 B.R. 841 (Bankr. D. Md. 2020), the court considered whether to extend the statutory deadlines for the debtor’s report, status conference, and filing of a plan after it had granted the debtor’s motion to convert his pre-SBRA chapter 7 case to chapter 11. In permitting the debtor to proceed under subchapter V and extending the deadlines, the court reasoned, *id.* at *6-7:

The Debtor commenced his chapter 7 case in early February 2020, before the effective date of Subchapter V. The Debtor did not move to convert his case after the effective date and, in fact, waited over four months to seek conversion. At the time of the requested conversion, a contested motion for relief from stay was pending and remains outstanding.

The Court can envision a case in which the circumstances surrounding conversion could weigh against any extension of the deadlines under Subchapter V. For example, if the Debtor were manipulating the timing of his original bankruptcy filing and his requested conversion in a manner that unfairly prejudiced some or all of his creditors, an extension would not be warranted. Likewise, if the Debtor failed to comply with his obligations under the Code in his original bankruptcy case or commenced his case after the effective date of SBRA and had missed a plan deadline prior to requesting conversion or making a Subchapter V election, then perhaps an extension would not be warranted. Again, the analysis must be fact-intensive and focused on the Debtor’s conduct and potential prejudice to creditors.

Here, the Debtor has attributed his requested extension to the timing of the case conversion, and no party has disputed that justification. The Court also observes that the party who filed the relief from stay motion in the Debtor’s chapter 7 case had notice of the requested deadline extensions and has not raised any opposition to the request. The Court thus concludes on balance that the Debtor should have access to Subchapter V of the Code and has established adequate grounds to extend the deadlines imposed by sections 1188 and 1189 of the Code in this case. The court in *In re Wetter*, 620 B.R. 243 (Bankr. W.D. Va. 2020), concluded that the *Trepetin* approach to extension of the deadlines in a case converted from chapter 7 to chapter 11 was the proper one. The court denied the debtor’s motion to convert to chapter 11, however, because under that approach the court would decline to extend the time to file a plan. In *In re Tibbens*, 2021 WL 1087260 (Bankr. M.D.N.C. 2021), a chapter 13 debtor, in a case filed after enactment of subchapter V but a month before its effective date, sought to convert it to chapter 11 and proceed under subchapter V five months after the effective date. The court concluded that an extension of the already expired deadline for filing a plan was not justified under either the *Trepetin* or *Seven Stars* approach because of numerous delays in the chapter 13 case that were within the debtor’s control and for which the debtor should be held accountable. *Id.* at *9.

the debtor's control.⁴⁶⁶ If the debtor makes the election after expiration of the deadlines and the court does not extend them, the election is nevertheless effective, and the debtor is in default of the deadlines. Thus, the court may dismiss the case under § 1112(b)(4)(J) for failure to file a plan within the time fixed by the Bankruptcy Code.⁴⁶⁷

Consideration of whether a debtor may amend its petition in a case filed before SBRA's effective date begins with the threshold issue of whether a new bankruptcy law can retroactively apply to affect existing debtor-creditor rights, as the bankruptcy court observed in *In re Moore Properties of Person County, LLC*.⁴⁶⁸ The *Moore Properties* court and others⁴⁶⁹ have noted two conflicting canons of statutory construction that the Supreme Court considered in *Landgraf v. USI Film Products*⁴⁷⁰ in determining whether to apply new statutory provisions to prior conduct in the absence of statutory direction.

One canon, said the *Landgraf* Court, is that “a court is to apply the law in effect at the time it renders its decision.”⁴⁷¹ The conflicting one is that “[r]etroactivity is not favored in the law,” and “congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result.”⁴⁷²

The *Landgraf* Court explained that the presumption against retroactive application arises from “[e]lementary considerations of fairness . . . that individuals should have an opportunity to know what the law is and to conform their conduct accordingly,” and from the principle that

⁴⁶⁶ *In re Seven Stars on the Hudson Corp.*, 618 B.R. 333 (Bankr. S.D. Fla. 2020).

⁴⁶⁷ *In re Seven Stars on the Hudson Corp.*, 618 B.R. 333, 343-44 (Bankr. S.D. Fla. 2020). Query whether a debtor may amend the petition to withdraw the election in this situation.

⁴⁶⁸ *In re Moore Properties of Person County, LLC*, 2020 WL 995544, at *2-5 (Bankr. M.D.N.C. 2020).

⁴⁶⁹ *In re Ventura*, 615 B.R. 1, 15-17 (Bankr. E.D.N.Y. 2020); *In re Body Transit, Inc.*, 613 B.R. 400, 406 (Bankr. E.D. Pa. 2020).

⁴⁷⁰ *Landgraf v. USI Film Products*, 511 U.S. 244, 264-71 (1994).

⁴⁷¹ *Id.* at 264, quoting *Bradley v. School Board of Richmond*, 416 U.S. 696, 711 (1974).

⁴⁷² *Id.* at 264, quoting *Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204, 208 (1988).

“settled expectations should not be lightly disrupted.”⁴⁷³ The presumption against retroactivity particularly applies, the Court reasoned, to “new provisions affecting contractual or property rights, matters in which predictability and stability are of prime importance.”⁴⁷⁴ The Court ruled that amendments to Title VII of the Civil Rights Act of 1964 providing for a jury trial of claims for certain damages, enacted while an employee’s appeal after a bench trial was pending, did not apply to the employee’s action.

In its opinion, the *Landgraf* Court cited *United States v. Security Industrial Bank*.⁴⁷⁵ At issue in *Security Industrial Bank* was a provision of the Bankruptcy Code (which comprehensively revised bankruptcy law) that, in a change from existing law, permitted a chapter 7 debtor to avoid a nonpossessory, non-purchase money security interest in exempt personal property.⁴⁷⁶ The Court ruled that the provision could not apply to a security interest arising from a transaction that occurred prior to the enactment of the new law.

The Court in *Security Industrial Bank* recognized that the Constitution’s bankruptcy clause⁴⁷⁷ “has been regularly construed to authorize the retrospective impairment of contractual obligations”⁴⁷⁸ but that the bankruptcy power could not be exercised “to defeat traditional property interests” because the bankruptcy power is subject to the Fifth Amendment’s prohibition against taking private property without compensation.⁴⁷⁹ The Court thus recognized

⁴⁷³ *Id.* at 265.

⁴⁷⁴ *Id.* at 271. Among other cases, the Court cited *United States v. Security Industrial Bank*, 459 U.S. 70, 79-82 (1982), which the text discusses next.

⁴⁷⁵ *United States v. Security Industrial Bank*, 459 U.S. 70 (1982).

⁴⁷⁶ 11 U.S.C. § 522(f)(1)(B).

⁴⁷⁷ U.S. Const. Art. I, § 8, cl. 4.

⁴⁷⁸ *United States v. Security Industrial Bank*, 459 U.S. 70, 74 (1982), *citing* *Hanover National Bank v. Moyses*, 186 U.S. 181 (1902).

⁴⁷⁹ *Id.* at 75, *citing* *Louisville Joint Stock Bank v. Radford*, 295 U.S. 555 (1935).

a distinction between the contractual right of a secured creditor to obtain repayment of its debt and its property right in the collateral.⁴⁸⁰

The Court avoided the question of the constitutional validity of the provision, choosing instead to construe it as being inapplicable to pre-enactment security interests under the principle it deduced from its case law that “[n]o bankruptcy law shall be construed to eliminate property rights which existed before the law was enacted in the absence of an explicit command from Congress.”⁴⁸¹

The bankruptcy court in *Moore Properties* concluded that the application of subchapter V in a chapter 11 case filed by an LLC prior to its effective date created “none of the taking or retroactivity concerns” that the Supreme Court expressed in *Landgraf* and *Security Industrial Bank*.⁴⁸² With two exceptions inapplicable in the case before it, the court continued, the provisions of subchapter V incorporated most of existing chapter 11 and did not “alter the rubric under which debtors may affect pre-petition contractual rights of creditors, much less vested property rights.”⁴⁸³

The *Moore Properties* court explained that the modification of prepetition contractual relationships in a chapter 11 case occurs through a plan. The court then set out the changes that subchapter V made to existing requirements for the contents of the plan and for its confirmation and concluded that none of them amounted to an impermissible retroactive taking.

The *Moore Properties* court noted that subchapter V changes the requirements of § 1123 for the content of a plan in only three ways. New § 1181(a) makes inapplicable (1) the requirement in § 1123(a)(8) that the plan of an individual provide for payment of earnings from

⁴⁸⁰ *Id.*

⁴⁸¹ *Id.* at 81, citing *Holt v. Henley*, 232 U.S. 637 (1913) and *Auffm’ordt v. Rasin*, 102 U.S. 620 (1881).

⁴⁸² *In re Moore Properties of Person County, LLC*, 2020 WL 995544, at *4 (Bankr. M.D. N.C. 2020).

⁴⁸³ *Id.*

personal services as is necessary for execution of the plan and (2) the prohibition in § 1123(c), in an individual case, of the use, sale, or exempt property when an entity other than the debtor proposes the plan.⁴⁸⁴ The third change is that new § 1190(3) creates an exception to the provisions in § 1123(b)(5) that prohibit the modification of a residential mortgage for a non-purchase money mortgage when the loan proceeds were used primarily in the debtor's small business.⁴⁸⁵

The *Moore Properties* court concluded that, even if the bankruptcy power could not be used to alter pre-existing contractual rights, the exclusion of paragraph (a)(8) and subsection (c) from plan content requirements did not alter such rights, and the exception to the antimodification provision in § 1123(b)(5) had no bearing in the case.⁴⁸⁶

The court next considered the changes that subchapter V makes in the requirements for plan confirmation. When confirmation occurs under new § 1191(a) because all creditors accept the plan, the court explained, the plan must meet all the existing requirements of § 1129(a), except for paragraph (a)(15), which the court concluded was inapposite.⁴⁸⁷

New § 11191(b) changes the existing cramdown requirements of § 1129(b) to permit confirmation without acceptance by any impaired class (as § 1129(a)(1) requires) if the plan does

⁴⁸⁴ See Section VII(A).

⁴⁸⁵ See Section VII(B).

⁴⁸⁶ *In re Moore Properties of Person County, LLC*, 2020 WL 995444, at *4 (Bankr. M.D.N.C. 2020).

In a footnote, the court observed that new § 1190(2), which requires any debtor to contribute earnings as necessary for execution of the plan, rendered § 1123(a)(8) superfluous and that § 1123(c) is inapplicable because only the debtor can propose a plan. *Id.* at *4 n. 13.

In another footnote, the court explained that the exception to the antimodification provision did not prohibit the availability of subchapter V in the case before it for two reasons. First, the exception could not apply because the debtor was an artificial entity with no principal residence. Second, even if it did apply, the question would be whether its application would constitute an impermissible taking. If it did, the court said, it would not apply the exception rather than declare the entirety of subchapter V inapplicable, citing *United States v. Security Industrial Bank*, 459 U.S. 70 (1982). *Id.* at *4, n. 14.

⁴⁸⁷ *Id.* at *5. The court noted that § 1129(a)(15) applies only in individual cases and that, even in individual cases confirmed without acceptance by all classes, the disposable income requirement of new § 1191(c) makes the (a)(15) requirement for commitment of disposable income superfluous.

not discriminate unfairly and is fair and equitable to the dissenting class. Thus, except for removal of the requirement of an accepting impaired class, subchapter V has the same standard for confirmation as existing § 1129(b), but it alters the definition of “fair and equitable” for classes of unsecured creditors and interests by substituting the disposable income requirement for the absolute priority rule in §§ 1129(b)(2)(B) and (C), respectively.⁴⁸⁸

The court concluded, “The alteration of the definition of fair and equitable in an existing case does not, standing alone, amount to an impermissible retroactive taking.”⁴⁸⁹

The court acknowledged that, if a case were pending for an extended period of time on SBRA’s effective date, the case “could be sufficiently advanced that the substantive alterations in the requirements for plan confirmation arise to a taking of vested property rights.”⁴⁹⁰ In the case before it pending for only nine days before the effective date, however, the court reasoned that it did not have to consider “the extent to which parties in interest may have so invested in such a case or the court may have entered orders that created sufficient vested property interests or post-petition expectations to prevent the application of subchapter V to those rights or make its application offend ‘[e]lementary considerations of fairness’ such that the parties ‘have an opportunity to know what the law is and to conform their conduct accordingly.’”⁴⁹¹

Because the application of new subchapter V in the existing case did not violate the Supreme Court’s rulings in *Landgraf* or *Security Industrial Bank*, the *Moore Properties* court concluded, it had the obligation to apply the law in effect at the time of its decision.⁴⁹²

⁴⁸⁸ *Id.* See Section VIII(B)(3), (4).

⁴⁸⁹ *Id.*

⁴⁹⁰ *Id.*

⁴⁹¹ *Id.*, quoting *Landgraf v. USI Film Products*, 511 U.S. 244, 265 (1994), and citing *In re Progressive Solutions, Inc.*, 615 B.R. 894 (Bankr. E.D. Cal. 2020).

⁴⁹² *Id.*

The bankruptcy court in *In re Body Transit*⁴⁹³ applied the *Moore Properties* analysis in a small business case that had been pending for a month before SBRA's effective date to reject the secured creditor's contention that the court should follow the presumption against retroactive application of statutes. The court went on to consider the creditor's argument that permitting the debtor to proceed under subchapter V would infringe on its rights to obtain a chapter 11 trustee who, in addition to taking control of the debtor's assets and business, would also have the right to file a plan.⁴⁹⁴

The *Body Transit* court agreed with the *Moore Properties* court that, in ruling on a belated objection to a subchapter V election, the court properly considers the extent to which parties have invested in the case and whether the court has entered orders that create sufficient vested postpetition expectations such that application of subchapter V would offend elementary considerations of fairness.⁴⁹⁵ In addition, the court noted that a debtor's ability to amend under Bankruptcy Rule 1009 is subject to objection if the amendment is made in bad faith or would unduly prejudice a party.⁴⁹⁶ The court concluded that this Rule 1009 standard stated the same principle as the *Moore Properties* formulation and is appropriate in evaluating an objection to a belated subchapter V election.⁴⁹⁷

The *Body Transit* court ruled that whether a subchapter V trustee's inability to file a plan unduly prejudices creditors turns on the facts of each case and that the creditor had not met its

⁴⁹³ *In re Body Transit, Inc.*, 613 B.R. 400 (Bankr. E.D. Pa. 2020).

⁴⁹⁴ The court had scheduled a hearing on the creditor's motion for appointment of a trustee. The creditor asserted that debtor had failed to pay postpetition rent, has used its cash collateral without authority, and had failed to file reports and provide accurate financial information. *Id.* at 404.

⁴⁹⁵ *Id.* at 408.

⁴⁹⁶ *Id.* at 408-09, citing *In re Cudeyo*, 213 B.R. 910, 918 (Bankr. E.D. Pa. 1997); *In re Brooks*, 393 B.R. 80, 88 (Bankr. M.D. Pa. 2008); *In re Romano*, 378 B.R. 454, 467-68 (Bankr. E.D. Pa. 2007); and *In re Bendi, Inc.*, 1994 WL 11704, at *2 (Bankr. W.D. Pa. 1994).

⁴⁹⁷ 213 B.R. at 409.

burden of showing prejudice in the case before it.⁴⁹⁸ The court summarized, “[I]n the absence of a particularized showing, and based on the present circumstances of this case, [the creditor] has not met its burden of showing the level of prejudice required to override the Debtor’s right to amend its petition under [Bankruptcy Rule] 1009.”⁴⁹⁹

In *In re Ventura*,⁵⁰⁰ an individual operating a bed and breakfast business in her residence through a limited liability company filed a chapter 11 case four months before SBRA’s effective date, the date before a scheduled foreclosure sale in a judicial foreclosure action. She had discharged her personal liability on the mortgage in a chapter 7 bankruptcy case filed some six years earlier.

The debtor proposed a plan to bifurcate the mortgage claim, notwithstanding the anti-modification provision of § 1123(b)(5), on the theory that the property did not qualify as a “residence” based on her use of it as a bed and breakfast. After the court had ruled that the exception applied as long as the debtor used any part of the property for her residence,⁵⁰¹ the court scheduled a hearing on confirmation of the lender’s plan, which provided for the sale of the property and a carve-out from the proceeds to pay all other classes in full, for February 26, 2020 – one week after SBRA’s effective date.⁵⁰²

The court adjourned the confirmation hearing to give the debtor the opportunity to determine whether to amend her petition to elect application of subchapter V, which she did nine days later. The lender objected to the amendment, asserting among other things that it had

⁴⁹⁸ *Id.* at 409.

⁴⁹⁹ *Id.* at 410.

⁵⁰⁰ *In re Ventura*, 615 B.R. 1 (Bankr. E.D.N.Y. 2020).

⁵⁰¹ Other courts have accepted the debtor’s position. *See generally* W. Homer Drake, Jr., Paul W. Bonapfel, and Adam M. Goodman, CHAPTER 13 PRACTICE AND PROCEDURE, § 5:42 (2d ed. 2019).

⁵⁰² *In re Ventura*, 615 B.R. 1, 10 (Bankr. E.D.N.Y. 2020).

vested rights at the time of the amendment in that its plan was ripe for confirmation.⁵⁰³ The lender also asserted that the debtor could not modify the mortgage in a subchapter V case under § 1190(3) because the debtor used the mortgage proceeds to purchase the property, not to invest in the limited liability company that operated the bed and breakfast.

The *Ventura* court first noted that subchapter V properly applies retroactively, agreeing with the analysis in *Moore Properties* and *Body Transit*. In addition, the court concluded that the revision of the definition of “small business debtor” does not appear to affect contractual or vested property rights.⁵⁰⁴

The court then addressed whether the exception in new § 1190(3) to the anti-modification provision of § 123(b)(5) could apply to the lender’s property rights that vested prior to SBRA’s effective date. The court held that, because the debtor had discharged her personal liability in

⁵⁰³ *Id.* at 11. The debtor in the current case and in two previous bankruptcy cases had asserted that her debts were “primarily consumer debts.” *Id.* at 8. The debtor owed \$ 1,678,664.80 on the mortgage, and the property was worth no more than \$ 1,200,000. *Id.* at 9. Although the opinion does not reflect what other debts the debtor has, the context indicates that she had other unsecured debt that were relatively small.

The lender asserted that, in these circumstances, the debtor did not qualify as a small business debtor, and that, even if she did, she should be judicially estopped from amending her petition to designate herself as a small business debtor based on her representations in the previous and current cases.

The court acknowledged that a purchase money mortgage on a residence is generally a consumer debt, but ruled that “the fact that a debtor incurs mortgage debt to buy a residence does not automatically mean that the debt is a consumer debt.” *Id.* at 19. The test, the court explained, is whether a debt is incurred with an eye toward profit. “Courts must look at the substance of the transaction and the borrower’s purpose in obtaining the loan, rather than merely looking at the form of the transaction,” the court stated. *Id.*, quoting *In re Martin*, 2013 WL 54233954, at *6 (S.D. Tex. 2013) and citing *In re Booth*, 858 F.2d 1051, 1055 (5th Cir. 1988) (debt incurred with an eye toward profit is a business debt, rather than a consumer debt).

The court found that the property was the debtor’s residence but that the primary purpose of purchasing it was to own and operate a bed and breakfast. The court concluded that the mortgage was a business debt and that she qualified as a small business debtor. *Id.* at 20.

The court declined to apply judicial estoppel to bar her amendment to designate herself as a small business debtor. The court ruled that her amendment to describe the mortgage as a business debt was not necessarily with her prior descriptions of the debt. She had referred to it as a bed and breakfast and described it on her Schedule A/B as a “B & B Inn” rather than as a “single-family” home. Moreover, the court had taken no action in any of the cases based on the description of the mortgage debt as a consumer debt, so it was not misled. Nor had the debtor taken unfair advantage of the lender by changing the description of her debt to fit within a statute that did not exist when she filed her cases. *Id.* at 20-22.

⁵⁰⁴ *Id.* at 16-17, citing *Moore Properties of Person County, LLC*, 2020 WL 995544, at *4, n. 10 (Bankr. M.D.N.C. 2020).

her previous chapter 7 case, application of new § 1190(3) would not deprive the lender of its right under state law to receive the value of the property.

Moreover, the court observed, even if the debt had not been discharged, new § 1190(3) might not “raise significant Constitutional doubts to warrant only prospective application.”⁵⁰⁵ Invoking the principle of *Security National Bank* that bankruptcy law may abrogate contractual rights, but not vested property rights, of mortgagees, the court stated that the contractual right of a secured creditor to obtain repayment of the debt may be quite different in legal contemplation from property rights in the collateral. Consequently, the court concluded, application of new § 1190(3) to modify the mortgage would not violate the lender’s Fifth Amendment rights.⁵⁰⁶ The court in a later part of its opinion ruled that whether the mortgage qualified for bifurcation involved factual issues that required an evidentiary hearing.⁵⁰⁷

The *Ventura* court found no prejudice to the lender based on the history of the case, including the fact that the lender’s plan was before the court for confirmation. The court saw no Constitutional issues and declined to treat its prior rulings as creating “vested” rights. The court reasoned, “Until a plan is confirmed no property rights can be said to have vested in either [the debtor or the lender].”⁵⁰⁸

To summarize, under the analysis of the cases permitting an election in a pending case, a debtor in an existing chapter 11 case who qualifies as a subchapter V debtor under SBRA’s revised definition may amend the petition to elect application of subchapter V, and the case will proceed under subchapter V unless the court orders otherwise. Courts will consider, on a case-

⁵⁰⁵ *Id.* at 17.

⁵⁰⁶ *Id.* at 17.

⁵⁰⁷ *Id.* at 24-25. Section VII(B) discusses this aspect of the court’s ruling in connection with consideration of new § 1190(3).

⁵⁰⁸ *Id.* at 18.

by-case basis, whether the amendment should not be allowed because the amendment is in bad faith, will cause undue prejudice to other parties, or offends elementary considerations of fairness.

Courts may also consider the timing of the amendment. One court observed that the doctrine of laches may apply to a belated amendment to a petition to elect application of subchapter V.⁵⁰⁹ Another court refused to permit a debtor to proceed under subchapter V in a case filed a month before its effective date. The court determined that the debtor had waited too long to make the sub V election and had amended its petition to do so only after two attempts to confirm a traditional chapter 11 plan had failed.⁵¹⁰

The Coronavirus Aid, Relief, and Economic Security Act (the “CARES Act”), enacted March 27, 2020, raised the debt limit for a debtor to be eligible to elect subchapter V to \$ 7.5 million.⁵¹¹ Because the statute specifically states that the amendment applies only to cases commenced on or after the date of its enactment, a debtor in an existing case with debts over the debt limit in § 101(51D) but less than \$ 7.5 million cannot amend its petition to elect application of subchapter V.⁵¹² Although the CARES Act provided for the increased debt limit to expire on year after its enactment, the Covid-19 Bankruptcy Relief Extension Act of 2021⁵¹³ amended the CARES Act to extend the increased debt limit for an additional year.

⁵⁰⁹ *In re Body Transit, Inc.*, 613 B.R. 400, 407, n. 11 (Bankr. E.D. Pa. 2020).

⁵¹⁰ *In re Greater Blessed Assurance Apostolic Temple, Inc.*, 624 B.R. 742 (Bankr. M.D. Fla. 2020). *Cf. In re Tibbens*, 2021 WL 1087260 at * 9 (Bankr. M.D.N.C. 2021) (After denial of confirmation of two chapter 13 plans, the debtor sought to convert to chapter 11 and elect subchapter V after the deadline for the filing of a plan had expired; the court converted the case to chapter 11 but declined to extend the deadline because of numerous delays in the chapter 13 case that were within the debtor’s control and for which the debtor should be held accountable.).

⁵¹¹ Coronavirus Aid, Relief, and Economic Security Act § 1113(a), Pub. L. No. 116-136, 134 Stat. 281 (Mar. 27, 2020). *See* Section III(B).

⁵¹² *See In re Peak Serum*, 623 B.R. 609 (Bankr. D. Col. 2020) (Debtors in pending chapter 11 cases may not elect application of subchapter V upon becoming eligible for subchapter V under the increase in the debt limit upon enactment of the CARES Act; increased debt limit applies only in cases filed after enactment.)

⁵¹³ Covid-19 Bankruptcy Relief Extension Act of 2021 § 2(a)(1), Pub. L. No. 117-5, 135 Stat. 249 (Mar. 27, 2021).

A possible alternative for a debtor in a pre-subchapter V case who wants to be in a subchapter V case is to obtain dismissal of the pending case and then file a new one in which it elects subchapter V. In *In re Slidebelts, Inc.*, 2020 WL 3816290 (Bankr. E.D. Cal. 2020), the court permitted dismissal of a chapter 11 case for this purpose. The court in *In re Twin Pines, LLC*, 2020 WL 5576957 at * 6 (Bankr. D. N.M. 2020), noted that a debtor could, upon dismissal of the pending case, file a new one and elect subchapter V in exercising its discretion to extend the deadlines for the status conference and filing of a plan so that the debtor could proceed under subchapter V.

In *In re Peak Serum*, 623 B.R. 609 (Bankr. D. Col. 2020), a corporation and its principal, in response to a creditor's motion to appoint a trustee in their jointly administered cases, moved to dismiss them to permit their re-filing as subchapter V cases after the CARES Act increased the debt limit so that they became eligible to proceed under subchapter V. The court found cause to appoint a trustee in the corporate case and concluded that the facts warranted appointment of a trustee. Because the creditor failed to establish cause for appointment of a trustee in the individual case, however, the court dismissed it, observing that subchapter V contained sufficient protections for creditors such that a re-filed case under subchapter V would not unduly prejudice creditors.

The strategy did not work well for the individual debtors in *In re Crilly*, 2020 WL 3549848 (Bankr. W.D. Okla. 2020). A few hours after dismissal of their chapter 11 case filed in 2018 for cause, the individual debtors filed a new case and elected subchapter V. The debtors filed a motion to extend the automatic stay, which under § 362(c)(3) would expire 30 days after filing the second case unless extended based on a showing that the second case was filed in good

faith. Under § 362(c)(3)(C)(i)(III), a filing is presumptively not in good faith if there has not been a substantial change in the financial or personal affairs of the debtor since the dismissal of the previous case.

The court concluded that no change of circumstances had occurred between the filing of their two cases that would permit them to avoid the presumption. The availability of subchapter V in the new case, the court explained, could not supply such a change because it was in effect at the time of the dismissal and filing of the cases. The court for a variety of reasons refused to extend the automatic stay beyond 30 days.

In *In re Hunts Point Enterprises, LLC*, 2021 WL 1536389 (Bankr. E.D.N.Y. 2021), a debtor requested dismissal of its case after a creditor filed a motion to disallow its sub V election or, alternatively, to dismiss it. The court ruled that the debtor's debts did not exceed the eligibility limit but concluded that allowing the case to proceed under subchapter V would be an abuse of its provisions because only the debtor could file a plan, and its request for dismissal demonstrated that it no longer wanted to do so. The court concluded that cause existed for its dismissal and prohibited the debtor from filing another bankruptcy petition for a year unless the debtor sought and obtained relief from that prohibition based on changed circumstances or good cause shown.

**Lists of Sections of Bankruptcy Code
and Title 28 Affected or Amended By
The Small Business Reorganization Act of 2019**

Enacted August 23, 2019, Effective February 19, 2020

(As Amended By The CARES Act, Enacted and Effective March 27, 2020; The COVID-19 Bankruptcy Relief Act of 2021 § 2(a), Pub. L. No. 117-5, 135 Stat. 249 (Mar. 27, 2021) extended the sunset provisions of the CARES Act for an additional year.)

May 2020

	Sections of The Small Business Reorganization Act of 2019	
SBRA § 1	Short Title – “The Small Business Reorganization Act of 2019”	
SBRA § 2	Enacts Subchapter V of Chapter 11 of the Bankruptcy Code, new §§ 1181–1195.	
SBRA § 3(a)	Amends 11 U.S.C. § 547(b) to provide that trustee’s avoidance of preferential transfer must be “based on reasonable due diligence in the circumstances of the case and taking into account a party’s known or reasonably knowable affirmative defenses” under § 547(c). Applicable in all bankruptcy cases.	
SBRA § 3(b)	Amends 28 U.S.C. § 1409(b) to provide for venue only in the district of the defendant, for a proceeding brought by a trustee to recover a debt from a noninsider when the debt is less than \$ 25,000. Applicable in all bankruptcy cases.	
SBRA § 4(a)	Conforming amendments to the Bankruptcy Code.	
SBRA § 4(b)	Conforming amendments to Title 28.	
SBRA § 5	Effective date.	
SBRA § 6	Determination of budgetary effects.	
11 U.S.C.	Amendments Relating to Cases of All Small Business Debtors	SBRA
§ 101(51C)	New definition of “small business case” as a case in which a small business debtor (defined in § 101(51D)) does not elect application of subchapter V	§ 4(a)(1)(A)
§ 101(51D)	Revised definition of “small business debtor”; CARES Act makes technical correction dealing with exclusion of public companies	§ 4(a)(1)(B); CARES Act § 1113(a)(4)(A)

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§ 103(i)	New subsection (i) provides that subchapter V applies only to a case in which a small business debtor elects its application CARES Act amendment provides that subchapter V applies only to a case in which a “debtor (as defined in section 1182)” elects its application.	§ 4(a)(2); CARES Act § 1113(a)(2)
§1102(a)(3)	No committee of unsecured creditors will be appointed in the case of a small business debtor (regardless of election), unless the court orders otherwise	§ 4(a)(11)

11 U.S.C.	Sections of Bankruptcy Code Inapplicable or Modified in Subchapter V Cases	New Subchapter V Section
§ 105(d)	§ 105(d) provisions for status conference are inapplicable. New § 1188 requires status conference and filing of report by debtor 14 days before it.	New § 1181(a)
§ 327(a)	New § 1195(a) states that person is not disqualified for employment under § 327 solely because the person holds a prepetition claim of less than \$ 10,000.	New § 1195(a)
§ 365(d)(3)	The Consolidated Appropriations Act, 2021, temporarily added provisions to extend time for debtor as lessee under a nonresidential lease of real property to comply with its obligations under the lease based on financial hardship arising from COVID-19.	
§ 1101(1)	§ 1101(1) definition of debtor in possession is inapplicable. Replaced by new § 1182(2).	New § 1181(a)
§ 1102(a) § 1102(b) § 1103	Paragraphs (1), (2), and (4) of § 1102(a) and paragraphs (1) and (2) of § 1102(b) deal with the appointment of committees. § 1102(b)(3) governs provision of information to, and communications with, creditors. Section 1103 describes the powers and duties of committees. These provisions are not applicable unless the court orders otherwise. Under amended § 1102(a)(3), no committee is appointed in a case of a small business debtor unless the court orders otherwise.	New § 1181(b)
§ 1104 § 1105	Provisions for appointment of trustee (§ 1104) and termination of trustee’s appointment (§ 1105) are inapplicable. Replaced by § 1183 (appointment of trustee in all subchapter V cases) and § 1185 (removal of debtor in possession and reinstatement of debtor in possession)	New § 1181(a)
§ 1106	§ 1106 specification of duties of trustee and examiner is inapplicable. New § 1183(b) states the trustee’s duties. The court may order the trustee to perform certain § 1106 duties (new § 1183(b)(2)), and several are applicable if the debtor in possession is removed (new	New § 1181(a)

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	§ 1183(b)(5)). The subchapter V trustee has the same duties regarding domestic support obligations (new § 1183(b)(6)) that a chapter 11 trustee has under § 1106(c).	
§ 1107	§ 1107 is inapplicable. § 1107(a) gives the debtor most of the rights, powers, and duties of a trustee. It is replaced by new § 1184, which gives the subchapter V debtor the same rights, powers, and duties. § 1107(b) states that a professional is not disqualified under § 327(a) from employment by the debtor in possession solely because of the professional's representation of the debtor prior to the case. No comparable provision exists in subchapter V, but the provision in new § 1195 that a professional is not disqualified solely because the professional holds a claim of less than \$ 10,000 impliedly has the same effect.	New § 1181(a)
§ 1108	§ 1108 authorizes trustee (or debtor in possession) to operate the debtor's business. It is inapplicable and replaced by new § 1184 (authorizing debtor to operate business) and new § 1183(b)(5) (trustee's duties upon removal of debtor in possession include operating debtor's business)	New § 1181(a)
§ 1115	§ 1115 provisions for property of the estate in the chapter 11 case of an individual do not apply. If a plan is confirmed under the cramdown provisions of new § 1191(b), language similar to § 1115 provides that such property is property of the estate of any subchapter V debtor.	New § 1181(a)
§ 1116	§ 1116, which states the duties of trustee or debtor in possession in a small business case, is inapplicable. New §§ 1187(a) and (b) require the debtor to perform the specified duties.	New § 1181(a)
§ 1121	Provisions governing who may file a plan are inapplicable. Only the debtor may file a plan under new § 1189(a).	New § 1181(a)
§ 1123(a)(8)	Requirement that plan provide for payment of earnings or other income of debtor who is an individual as is necessary for the execution of the plan is inapplicable. New § 1191(c)(2) requires, as a condition to confirmation of a cramdown plan under new § 1191(b), that a plan provide for all disposable income for a three- to five-year period (or its value) be applied to make payments under the plan.	New § 1181(a)
§ 1123(c)	Prohibition on use, sale, or lease of exempt property of individual in a plan without consent of the debtor is inapplicable. It is unnecessary because only the debtor may file a plan under new § 1189(a).	New § 1181(a)
§ 1125	Provisions in § 1125 for disclosure statement and solicitation of acceptances or rejections of plan do not apply unless the court orders otherwise. A plan must include some of the information that a disclosure statement must have. New § 1190(1). If the court requires a disclosure statement, the provisions of § 1125(f) apply under new § 1187(c).	New § 1181(b)

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§ 1127	Provisions dealing with modification of plan are inapplicable and are replaced by new § 1193.	New § 1181(a)
§ 1129(a)(9)(A)	Confirmation requirement of § 1129(a)(9)(A) is that plan must provide for cash payment of priority claims specified in § 507(a)(2) (administrative expenses (including professional fees and trustee fees) and court fees) and § 507(a)(3) (involuntary gap claims), unless the claimant agrees otherwise. The court may confirm a plan that provides for payment of these claims through the plan under the cramdown provisions of new § 1191(b).	New § 1191(e)
§ 1129(a)(15)	Projected disposable income requirement for confirmation in case of individual is inapplicable. New § 1191(c)(2) requires, as a condition to confirmation of a cramdown plan under new § 1191(b), that a plan provide for all disposable income for a three- to five-year period (or its value) be applied to make payments under the plan.	New § 1181(a)
§ 1129(b)	“Cramdown” provisions are not applicable. New § 1191(b) states cramdown requirements when the requirements of § 1129(a)(8) (that all impaired classes accept the plan) and § 1129(a)(10) (that at least one impaired class of creditors accept the plan) have not been met. New § 1191(b) permits cramdown confirmation if the plan does not discriminate unfairly and if it is “fair and equitable with respect to” each impaired, nonaccepting class. The “fair and equitable” requirement in subchapter V does not include the absolute priority rule. For a secured creditor, the “fair and equitable” requirements of § 1129(b)(2)(A) govern. New § 1191(c)(1). To be fair and equitable, (1) the plan must provide for all disposable income for a three to five year period (or its value) be applied to make payments under the plan, new § 1191(c)(2); and (2) there must be a reasonable likelihood that the debtor will be able to make all payments under the plan, and the plan must provide appropriate remedies to protect creditors if payments are not made, new § 1191(c)(3).	New § 1181(a)
§ 1129(c)	Provisions for confirmation when more than one plan meets confirmation requirements is inapplicable. It is unnecessary because only the debtor may file a plan under new § 1189(a).	New § 1181(a)
§ 1129(e)	Provision requiring confirmation of plan in small business case within 45 days of its filing is inapplicable in subchapter V case. New § 1189(b) requires filing of plan within 90 days after the order for relief (unless the court extends the time) but does not contain a deadline for confirmation.	New § 1181(a)

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§ 1141(d)	Provisions for chapter 11 discharge do not apply when the court confirms a cramdown plan under § 1191(b). New § 1192 states discharge provisions when cramdown confirmation occurs. In the cramdown context, discharge does not occur under new § 1192 until the debtor has completed payments under the plan for three years, or such longer period not to exceed five years as the court determines. The new § 1192 discharge applies to (1) debts listed in § 1141(d)(1)(A) and (2) all other debts allowed under § 503 and provided for in the plan, except for debts (x) on which the last payment is due after the applicable three to five year period and (y) of the kind specified in § 523(a).	New § 1181(c)
	Conforming Amendments to Other Sections of the Bankruptcy Code and to Title 28 to Take Account of New Subchapter V	
11 U.S.C.		SBRA
§ 322(a)	Amended to make its provisions for qualification of trustee in a case applicable to a subchapter V trustee appointed under new § 1183.	§ 4(a)(3)
§ 326(a)	Excepts subchapter V trustee appointed under new § 1183 from percentage limitations on compensation applicable to trustees in chapter 11 (and chapter 7) cases.	§ 4(a)(4)(A)
§ 326(b)	Provides that standing subchapter V trustee (like standing chapter 12 and 13 trustees) cannot receive compensation under § 330. (Standing trustees receive compensation under 28 U.S.C. § 586(e), as amended to include standing subchapter V trustees.)	§ 4(a)(4)(B)
§ 347	Current § 347(a) provides for a chapter 7, 12, or 13 trustee to pay into the court, for disposition under chapter 129 of title 28, funds that remain unclaimed 90 days after final distribution under § 726, § 1226, or § 1326. It thus does not apply in chapter 11 cases. SBRA § 4(a)(5)(a) adds subchapter V to the list of trustees and adds new § 1194 to the list of sections providing for distributions. New § 1194 provides for the subchapter V trustee to make distributions under a plan confirmed under the cramdown provisions of new § 1191(b). Current § 347(b) provides that unclaimed property in a case under chapter 9, 11, or 12 at the expiration of the time for presentation of a security or performance of any other act as a condition to participate under any plan confirmed under § 1129, § 1173, or § 1225 becomes property of the debtor or any entity acquiring the debtor's assets under the plan. SBRA § 4(a)(5)(B) added new § 1194 to the list of plans confirmed, but the CARES Act made a technical correction to change this to § 1191. Accordingly, § 347(b) as amended and corrected provides for property that is distributed	§ 4(a)(5); CARES Act § 1113(a)(4)(B)

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	under a confirmed plan and that is unclaimed to become property of the debtor. It is unclear under these amendments what happens to funds that a trustee disburses under a confirmed plan that a creditor does not claim. Amended § 347(a) directs the trustee to pay them into court, but amended § 347(b) makes them property of the debtor. Perhaps the intended result is that unclaimed disbursements that a trustee makes become unclaimed funds subject to § 347(a) whereas unclaimed disbursements that a debtor makes become the debtor's property under § 347(b).	
§ 363(c)(1)	Extends provisions authorizing trustee who is authorized to conduct business to enter into transactions in the ordinary course of business without notice and hearing to subchapter V debtor and subchapter V trustee. (Other provisions in § 363 are applicable to a trustee, which includes a subchapter V debtor in possession, new § 1184.)	§ 4(a)(6)
§ 364(a)	Extends provisions authorizing trustee who is authorized to conduct business to obtain unsecured credit and incur unsecured debt without notice and hearing to subchapter V debtor and subchapter V trustee. (Other provisions in § 364 are applicable to a trustee, which includes a subchapter V debtor in possession, new § 1184.)	§ 4(a)(7)
§ 523(a)	Applies exceptions to discharge to discharge of individual subchapter V debtor under new § 1192 (which is the discharge that a debtor receives when a plan is confirmed under the cramdown provisions of new § 1191(b)). It is unclear whether under new § 1192 the exceptions apply to the discharge of a debtor that is not an individual. If the court confirms a consensual plan under new § 1191(a), the debtor receives a discharge under § 1141(d)(1)-(4), under which the § 523(a) discharge exceptions apply only in cases of individuals.	§ 4(a)(8)
§ 524(a)(1)	Makes discharge injunction applicable to discharge granted under new § 1192.	§ 4(a)(9)(A)(i)
§ 524(a)(3)	Makes discharge provisions relating to community claims applicable to discharge under new § 1192.	§ 4(a)(9)(A)(ii)
§ 524(c)(1) § 524(d)	Extends provisions governing reaffirmation of debt and for hearing on proposed reaffirmation (which apply to a discharge under § 1141(d)) to discharge granted under new § 1192.	§ 4(a)(9)
§ 557(d)(3)	Makes provisions for expedited consideration of appointment of trustee and for retention and compensation of professionals subject to § 1183 in cases of debtors that own or operate grain storage facilities	§ 4(a)(10)
§ 1146(a)	Prohibition on taxation of issuance, transfer, or exchange, or of the making or delivery of an instrument of transfer, under a plan confirmed under § 1129 is extended to a plan confirmed under § 1191.	§ 4(a)(12)

	Conforming Amendments to Other Sections of the Bankruptcy Code and to Title 28 to Take Account of New Subchapter	SBRA
28 U.S.C. § 586(a)(3), (b), (d)(1), (e)	Provisions applicable to U.S. Trustees duties to supervise the administration of cases and trustees, (a)(3), appoint standing trustees (b), prescribe qualifications of trustees, (d)(1), and fix compensation of standing trustees, (e), extended to include cases and trustees under subchapter V. Adds new 28 U.S.C. § 586(e)(5), which provides for compensation of standing trustee in subchapter V case when trustee's services are terminated due to dismissal or conversion of the case or substantial consummation of a plan under new § 1183(c)(1). In these circumstances, the standing trustee does not make disbursements on which a percentage fee would be due. The court is to award compensation "consistent with services performed by the trustee and the limits on compensation of the trustee established pursuant to [28 U.S.C. § 586(e)(1)]."	§ 4(b)(1)
28 U.S.C. § 589b	Provisions relating to reports of trustees and debtors in possession made applicable in subchapter V cases.	§ 4(b)(2)
28 U.S.C. § 1930(a)(6)(A)	Subchapter V cases excluded from requirement of payment of quarterly U.S. Trustee fees	§ 4(b)(3)
	Amendments Applicable in All Cases	
11 U.S.C. § 547(b)	As amended, 11 U.S.C. § 547(b) provides that a trustee may avoid a preferential transfer "based on reasonable due diligence in the circumstances of the case and taking into account a party's known or reasonably knowable affirmative defenses" under § 547(c).	SBRA § 3(a)
28 U.S.C. § 1409(b)	As amended, 28 U.S.C. § 1409(b) provides for venue only in the district of the defendant of a proceeding brought by a trustee to recover a debt from a noninsider when the debt is less than \$ 25,000.	SBRA § 3(b)

**Summary of SBRA Interim Amendments to
The Federal Rules of Bankruptcy Procedure
To Implement SBRA**

Rule 1007(b)(5) – Eliminates requirement for filing statement of current monthly income for individual in a subchapter V case.

Rule 1007(h) – Modifies exceptions to requirement for filing supplemental schedule of property the debtor acquires after the filing of the case, as provided in § 541(a)(5), after the closing of the case. The exception does not apply to a chapter 11 plan confirmed under § 1191(b) (cramdown) and does apply after the discharge of a debtor in a plan confirmed under § 1191(b).

Rules 1015(c), (d), and (e) are renumbered as (d), (e), and (f).

Rule 1020(a) – Provides for election of subchapter V to be included in voluntary petition.

Rule 1020(c) – Eliminates provisions for case to proceed as small business case depending on whether committee of unsecured creditors has been appointed or whether an appointed committee has been sufficiently active.

Rule 1020(d) – Renumbered as Rule 1020(c) and eliminates requirement for service of objection to debtor's classification as a small business (or not) or election of subchapter V (unless committee has been appointed) and instead requires service on 20 largest.

Rule 2009 – permits single trustee in jointly administered case under subchapter V as well as in cases under chapter 7.

Rule 2011—Amends title of rule dealing with unclaimed funds to include cases under Subchapter V.

Rule 2012 – makes automatic substitution of trustee in chapter 11 case for debtor in possession in any pending action, proceeding, or matter in applicable to subchapter V trustee, unless debtor is removed from possession. (Same rule as Chapter 12).

Rule 2015(a)(1) – Makes requirement for chapter 11 trustee to file complete inventory of property of debtor (if court directs) inapplicable to subchapter V trustee.

Rule 2015(a)(5) – Makes requirement for payment of UST fees inapplicable in subchapter V case.

Rule 2015(b) – Rule 2015(b) renumbered as Rule 2015(c). New Rule 2015(b) requires debtor in possession in subchapter V case to perform duties of trustee described in Rule 2015(a)(2) through (4) and to file inventory if the court directs. Requires trustee to perform these duties if debtor is removed from possession.

Rule 3014 – Provides for court to determine the date for making of § 1111(b) election by secured creditor in case under subchapter V in which § 1125 provisions for disclosure statement do not apply. (General rule is that election must be made before conclusion of hearing on disclosure statement.)

Rule 3016(b) – Makes provisions for disclosure statement applicable only if a disclosure statement is required.

Rule 3016(d) – Makes provisions for use of standard form in “small business case” also applicable to a case under subchapter V case. (Note: under SBRA, a subchapter V case is not a “small business case,” although a subchapter V debtor is a “small business debtor.”)

Rule 3017.1(a) – Permits conditional approval of disclosure statement in subchapter V case in which court has ordered that disclosure statement requirements of § 1125 apply.

Rule 3017.2 – New rule requires court to fix, in a subchapter case in which § 1125 does not apply: (a) the time for accepting or rejecting a plan; (b) the record date for holders of equity security interests; (c) the date for the hearing on confirmation; (d) the date for transmission of the plan and notice of the (1) the time to accept or reject and (2) the confirmation hearing.

Rule 3018 – Conforming amendment to take account of new Rule 3017.2 and change in Rule 3017.1.

Rule 3019(c) – New rule 3019(c) provides that request to modify plan after confirmation in subchapter V case is governed by Rule 9014 and that provisions of Rule 3019(b) (procedures for postconfirmation modification of plan in individual chapter 11 case) apply.

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Note: The COVID-19 Bankruptcy Relief Act of 2021 § 2(a), Pub. L. No. 117-5, 135 Stat. 249 (Mar. 27, 2021) extended the sunset provisions of the CARES Act referenced herein for an additional year.

Summary Comparison of U.S. Bankruptcy Code Chapters 11, 12, & 13 Prepared by Mary Jo Heston's Chambers (Updated July 6, 2020)

SUBSTANTIVE Categories	Ch. 11	Subchapter V of Ch. 11 (effective 2/19/2020) (amended by the CARES Act on 3/27/2020)	Ch. 12	Ch. 13
Eligibility Requirements	Ch. 11: Anyone or any entity that can file for ch. 7 relief, except a stockbroker, commodity broker, or an insured depository institution, may be a debtor. § 109(d).¹ No debt limit or income requirement. Small Business Debtors: Person engaged in commercial or business activities (includes any affiliate that is also a debtor and excludes a person whose primary activity is the business of owning single asset real estate or operating real property or	At least 50% of small business debtor's debt is from commercial or business activities. Aggregate noncontingent, liquidated, secured and unsecured debts of not more than \$7,500,000 (will return to \$2,725,625 on 3/28/2021). § 101(51D); § 104; § 1113, CARES Act. Small business debtors must opt in to subchapter V by checking appropriate box in Item 13 of voluntary petition. § 1182(1) and (2); amended	For individuals: 1) family farmer with regular income and aggregate, noncontingent liquidated debts below \$10,000,000 of which 50% of the debt arises from farming activities, § 101(18); or 2) family fisherman with regular income and aggregate debts below \$2,044,225 of which 80% constitutes debt from commercial fishing activities, § 101(19A)(i). § 109(f). For corporations or partnerships, 50% of stock or equity is held by one family and/relatives who conduct the	Individual (or individual and spouse) with regular income that owes noncontingent, liquidated, unsecured debts of less than \$419,275 and noncontingent, liquidated, secured debts of less than \$1,257,850. Determined as of the petition date. Excludes stockbrokers and commodity brokers. A corporation or partnership may not be a debtor under ch. 13. § 109(e). CARES Act excludes coronavirus-related payments from the definition of income; this provision sunsets 3/28/2021. § 101(10A)(B)(ii); §

¹ Unless otherwise indicated, all chapter, section and rule references are to the Federal Bankruptcy Code, 11 U.S.C. §§ 101- 1532, and to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037.

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	conducting services incidental to the real property) person whose primary activity is business of owning or operating real property). § 101(51D). The CARES Act permanently excludes a debtor from small business eligibility if it is “an affiliate of an issuer” under § 3 of the Securities Exchange Act of 1934 (15 U.S.C. § 78c). § 101(51D)(B)(iii); § 1182; § 1113, CARES Act. Aggregate noncontingent, liquidated, secured and unsecured debts of \$2,725,625 or less. No member of a group of affiliated debtors has aggregate noncontingent, liquidated secured and unsecured debts over \$2,725,625. § 101(51D). No unsecured creditors committee (or committee is sufficiently inactive). Status as a “small business debtor” hinges, at least in part, upon whether a creditor’s committee is appointed, and on how much that creditor’s committee participates in the bankruptcy. A party in interest under § 1102(a)(2) may compel the appointment of a creditor’s committee thereby extinguishing	§ 101(51D)(A); new § 103(i); BR 1020(a). No committee of creditors unless the court orders for cause. § 1102(a)(3).	farming operation, more than 80% of asset value relates to farming operations, and aggregate noncontingent, liquidated debts are below \$10,000,000 with at least 50% of the debt arises from farming activities. § 101(18)(B). Family farmer must be engaged in a farming operation, including “farming, tillage of the soil, dairy farming, ranching, production of raising of crops, poultry, or livestock, and production of poultry or livestock products in an unmanufactured state.” § 101(21).	1113, CARES Act.

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	debtor's small business status. The UST appoints any such committee. <i>Id.</i> Debtor must indicate it is a small business debtor by checking appropriate box in Item 13 of voluntary petition. FRBP 1020.			
Filing Fees	\$1,717 paid when petition is filed. 28 U.S.C. § 1930.	Ch. 11 filing fee is paid when petition is filed. No separate fee is due for electing subchapter V.	\$275. Individual filers may pay the fee in installments. Fee must be paid in full no later than 120 days after the petition is filed.	\$310. Fee may be paid in installments within 120 days after the petition is filed.
UST Quarterly Fees	UST quarterly fees are based on a sliding scale formula in 28 U.S.C. § 1930(a)(6). Minimum amount is \$325 for disbursements up to \$15,000. Code does not define "disbursements." Failure to pay UST quarterly fees is "cause" for dismissal. § 1112(b)(4)(K).	None. Subchapter V debtors are exempt from paying UST quarterly fees. 28 U.S.C. § 1930(a)(6)(A).	UST Fees for ch. 12 debtors shall not exceed 10% of the first \$450,000 paid under the plan, and 3% of any payments in excess of \$450,000. 28 U.S.C. § 586(e)(1)(B). 28 U.S.C. § 586(e)(2) further curtails the standing trustee's salary and estimated expenses. Excess funds are to be deposited in the U.S. Trustee System Fund.	No UST fees.
Reports	Must file monthly/quarterly operating reports. Must file all reports and summaries required of a trustee under § 704(a)(8). Duty ends when duty to pay fees ends, usually when	No separate rule.	Must file monthly/quarterly operating reports. Duty ends only when case is completed. BR 2015(b).	No monthly operating reports required by ch. 13 debtors not engaged in business.

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	final decree is entered. BR 2015(a). Small Business Debtors: Must file reports dealing with profitability, projections, receipts, disbursements, etc. § 308, BR 2015(a)(6). Duty ends on effective date of confirmed plan. Additional reporting requirement under § 1116.			
Automatic Stay & Co-Debtors	Unlike chs. 12 and 13, ch. 11 does not provide an explicit co-debtor stay and guarantors are only protected if the court grants § 105 relief.	No separate rule.	Same co-debtor stay as in ch. 13. Upon filing, the automatic stay extends only to co-debtors on consumer debts and not to debts incurred in the ordinary course of business. § 1201. Section 1201 is identical to the co-debtor provision applicable to ch. 13. <i>See</i> § 1301. Cases from either chapter are thus instructive. Courts have held that certain debts from farming operations are not consumer debt. <i>See In re SFW, Inc.</i> 83 B.R. 27 (Bankr. S.D. Cal. 1988) (guarantees given by ch. 12 debtor's shareholders for commercial loans for family farm were not related to consumer debt so co-debtor stay did not apply).	Upon filing, the automatic stay extends only to co-debtors on consumer debts and not to debts incurred in the ordinary course of business. § 1301. The term "consumer debt" is defined in § 101(8).
Trustees	Generally, a trustee is only appointed under § 1104(a) for cause or if the appointment is in the best interest of creditors; this is done if the Debtor in	A disinterested trustee is appointed in every subchapter V case. § 1183(a). The trustee has a role similar to a ch. 13	A disinterested trustee is appointed in every ch. 12 case. § 1202. Ch. 12 cases are more supervised than ch. 11	A disinterested trustee is appointed in every ch. 13 case. § 1302.

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	Possession (DIP) falters. Creditors may seek to elect a trustee by requesting an election be convened within 30 days after the court orders the appointment of a trustee. § 1104(b)(1). Unless a court appoints a trustee, there is no disbursement agent for a ch. 11 case. DIP: under § 1107, the DIP retains many of the powers of the trustee; under § 1108, the DIP retains the power to operate the business.	trustee. The trustee is also authorized to operate the debtor's business if the debtor is removed as a DIP. § 1183(b)(5). The trustee makes all payments to creditors under the confirmed plan. Trustee may make adequate protection payments to secured creditors prior to confirmation. § 1194. The trustee must appear at mandatory status conference; facilitate development of a consensual plan; and perform duties generally consistent with § 1302. § 1183(b). If confirmation is consensual, the trustee's role is terminated upon "substantial consummation" of the confirmed plan. § 1183(c). If confirmation is contested, the trustee serves until completion of payments under the plan confirmed under § 1191(b), unless plan or confirmation order provide otherwise.	cases. This provides additional oversight of the debtor but it comes at a cost of usually 10% in most jurisdictions. A ch. 12 trustee has all the reporting and supervisory duties of a ch. 7 trustee set out by § 704(a). The trustee also shall appear and be heard on confirmation of the plan, matters affecting estate property, and sales. If the court directs for cause, the trustee shall also exercise some ch. 11 trustee powers, like investigating the acts and assets of the debtor. § 1202(b)(1)-(3). The trustee conducts any asset sales of farmland and farm equipment. § 1206. If the debtor is removed as DIP, the trustee assumes operation of the business and succeeds to other ch. 11 trustee powers. § 1202(b)(5). Post-confirmation, the trustee must ensure plan payments are made timely. § 1202(b)(4). Debtor must submit all future income to the supervision and control of the trustee, § 1222(a)(1), guaranteeing the trustee is in the game until the	A ch. 13 trustee has all the reporting and supervisory duties of a ch. 7 trustee set out by § 704(a). The trustee shall appear and be heard on plan confirmation and modification, and property values. The trustee must ensure plan payments are made timely. § 1302(b). If the debtor is engaged in business, the trustee also shall perform the ch. 11 trustee duties in § 1106(a)(3) and (4). § 1302(c). The ch. 13 trustee may seek dismissal under § 1307(c) for "cause."

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Trustee Fees	No rule.	Standing trustee is paid like current ch. 12/13 trustees under 28 U.S.C. § 586(e)(1); if no standing trustee, then the trustee is paid under 11 U.S.C. § 330.	plan is completed. The ch. 12 trustee may seek dismissal under § 1208(c) for “cause.” Plan payments bear a trustee’s fee; nominally 10% in most jurisdictions. § 1226(a)(2), 28 U.S.C. § 586(e)(1). This may be a large fee load in farm cases.	Plan payments bear a trustee’s fee. Fee cannot exceed 10% of all payments under the plan. 28 U.S.C. § 586(e)(1).
Estate Property	Section 541 defines estate property except as to individuals. For individuals, § 1115 augments § 541 to add all property held by debtor on the filing date, all property acquired after commencement and before closing of the case, and all earnings for services performed post-petition and prior to closing. Section 1115 parallels property of estate defined in ch. 13 cases, § 1306.	Section 1186 augments § 541 and parallels § 1115 in ch. 11.	Section 1207 augments § 541 and parallels § 1115 in ch. 11.	Section 1306 augments § 541, and parallels § 1115 in ch. 11.
Estate Property Post-confirmation	Post-confirmation, except as provided in the plan or confirmation order, all the estate’s property reverts in the debtor free and clear of all liens. § 1141(b) & (c).	No separate rule.	Post-confirmation, except as provided in the plan or confirmation order, all the estate’s property reverts in the debtor free and clear of all liens. § 1227 (b) & (c).	Post-confirmation, except as provided in the plan or confirmation order, all the estate’s property reverts in the debtor free and clear of all liens. § 1327(b) & (c).

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Adequate Protection	Section 361 applies. Adequate protection may be provided by 1) cash or periodic cash payments for diminution in the value of the entity's interest in the property; 2) replacement liens; or 3) "such other relief" as will result in the realization of the indubitable equivalent of the entity's interest in the property. § 361.	Section 361 applies. After notice and a hearing, the court may authorize the trustee to make preconfirmation adequate payments to the holder of a secured claim. § 1194(c).	Section 361's general definition of adequate protection does NOT apply to a ch. 12 case. § 1205(a). Adequate protection may be provided by 1) cash or periodic cash payments for diminution of the value of the collateral; 2) replacement liens; 3) reasonable rental value for the use of farmland; 4) "such other relief" to adequately protect the value of property securing the claim (like the indubitable equivalent test). § 1205(b).	Section 361 applies. The debtor is required to make preconfirmation adequate protection payments to holders of claims secured by a purchase money security interest in personal property. § 1326(a)(1)(C). The amount of periodic payments on a secured claim under a plan must also provide adequate protection payments to the holder of a claim secured by personal property. § 1325(a)(5)(B)(iii)(II).
Avoidance Powers	Pursuant to § 1107, the ch. 11 DIP is the proper party to assert ch. 5 avoidance actions unless removed as DIP, and a trustee is appointed pursuant to § 1104. There is some disagreement as to whether examiners appointed under § 1104 also have the authority to pursue avoidance actions under § 1106. Many courts have also ruled that bankruptcy courts have the power to authorize a creditors committee to bring an avoidance action on behalf of the estate. A ch. 11 plan may also provide for the transfer of avoidance powers to a representative of the estate appointed in the confirmation order.	Subject to certain limitations, the debtor has all rights of a trustee under § 1184, and therefore presumably has standing to bring ch. 5 avoidance actions unless removed as a DIP pursuant to § 1185.	The ch. 12 DIP has exclusive standing to bring ch. 5 avoidance actions unless removed as a DIP pursuant to § 1204. § 1203.	The ch. 13 standing trustee is authorized to pursue avoidance actions. § 554(a). Courts are divided over whether a ch. 13 debtor also has standing to assert the estate's avoiding powers. Unlike chs. 11 and 12, there is no provision in ch. 13 expressly conferring on debtors the powers of a trustee.

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	§ 1123(b)(3)(B).			
Plan Exclusivity	Regular ch. 11 debtors and Small Business Debtors have a 120-day exclusivity period to file a plan.	Only the debtor can file a plan. § 1189(a).	Only the debtor can file a plan. § 1221.	Only the debtor can file a plan. § 1321.
Plan Deadlines	Ch. 11: No deadline for filing the plan per se, but ch. 11 debtors have 120 days to exclusively file a plan. This period may be extended up to 18 months from the date the order for relief is entered. § 1121(b) & (d). Small Business Debtors: Debtors have 180 days to exclusively file a plan. This period may be extended up to 20 months from the date the order for relief is entered. § 1121(d)(2)(B) & (e). The plan must be confirmed 45 days after filed unless the time period has been extended. §§ 1121(e)(3), 1129(e).	Similar to ch. 12, the plan must be filed within 90 days of the order for relief, but this period may be extended if it is shown that the need for the extension is due to circumstances for which the debtor should not justly be held accountable. § 1189(b).	The debtor must file a plan within 90 days of the order for relief. To extend the 90-day period, debtor must clearly demonstrate that the inability to file a plan was due to circumstances beyond the debtor's control. § 1221.	The debtor must file a plan within 14 days after the petition is filed, and such time can only extend for cause shown and on notice as the court may direct. BR 3015(b).
Disclosure Statement	Ch. 11: The debtor must file a disclosure statement that provides adequate information to creditors. § 1125. The court must approve the disclosure statement prior to the debtor's ability to solicit votes.	None required unless otherwise ordered by the court. § 1181(b).	None required.	None required.

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Status Conference	Small Business Debtors: A Small Business Debtor does not need to file a separate disclosure statement if the court deems the plan to contain adequate information. § 1125(f). Acceptances/rejections of a plan may be solicited based on conditionally approved disclosure statements. § 1125(f). None required.			
Commencement of Plan Payments		Subchapter V adds a new requirement unique to this subchapter requiring the court to hold a status conference no later than 60 days after the order for relief. § 1188(a). This period may be extended for circumstances for which the debtor should not justly be held accountable. § 1188(b). No later than 14 days prior to such conference the debtor is to file a report detailing its efforts to attain a consensual plan. § 1188(c).	None required.	None required.
Plan Content	Ch. 11 debtor commences making plan payments on the date the first payment is due under the confirmed plan. Plans <i>must</i>: 1) designate classes of	Plans <i>must</i>: 1) provide a brief history of the business operations of the debtor; 2)	Ch. 12 debtor has no obligation to make payments to the trustee before confirmation. § 1226; 8 Collier on Bankruptcy P 1226.01 (16th 2019). Mirrors those of ch. 13. ch. 12 plans <i>must</i>: 1) provide future earnings or future income to	Ch. 13 debtor must commence making payments no later than 30 days after the date of filing the plan or order for relief, whichever is earlier. § 1326(a)(1). Plans <i>must</i>: 1) provide future earnings or future income to the trustee; 2) provide all

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	claims/interests; 2) specify impaired/unimpaired claims; 3) specify treatment for each unimpaired claim; 4) provide the same treatment for each claim/interest; 5) provide sufficient means of implementing the plan; 6) if applicable, include provision barring the issuance of nonvoting equity securities; 7) contain provisions consistent with the public interest; and 8) in an individual case, provide for debtor's future income to fund plan payments. § 1123. Plans <i>may</i>: 1) impair or leave unimpaired secured/unsecured claims; 2) assume/reject leases & executory contracts; 3) settle/adjust any claim/interest of debtor or the estate; 4) designate a convenience class of claims; 5) sell estate property; 6) modify secured claims except secured interests in a principal residence; and, 7) "include any other provision consistent with § 1123." Cannot modify consensual liens on a principal residence.	provide a liquidation analysis; 3) provide projections with respect to the ability of the debtor to make payments under the proposed plan; and 4) provide for the submission of all or such portion of the future earnings of other future income of the debtor as is necessary for the execution of the plan. § 1190(1) & (2). Plans <i>may</i>: 1) modify the rights of the holder of a claim secured only by a security interest in real property that is the principal residence of the debtor if the new value received in connection with granting the security was i) not used primarily to acquire real property; and (ii) used primarily in connection with the small business of the debtor. § 1190(3).	the trustee; 2) provide all priority claims under § 507 are paid in full; 3) provide the same treatment of all claims if the plan classifies claims and interests; and, 4) if all the debtor's projected disposable income for a 5-year period is committed to the plan, then the plan may provide for less than full payment of amounts owed under § 507(a)(1)(B). § 1222. Under § 1222(b)(1)-(12), the plan <i>may</i> designate classes, modify rights of secured claims, cure defaults, pay unsecured creditors, assume leases and executory contracts, and provide for the sale or distribution of property. Ch. 12 allows modification of home mortgages, § 1222(b)(2), and discharge of taxes arising from sale of farming assets, § 1232.	priority claims under § 507 are paid in full; 3) provide the same treatment for each claim within a particular class; and 4) if all the debtor's projected disposable income for a 5-year period is committed to the plan, then the plan may provide for less than full payment of amounts owed under § 507(a)(1)(B). § 1322. Under § 1322(b)(1)-(11), the plan <i>may</i> designate classes, modify rights of secured claims, cure defaults, pay unsecured creditors, and assume leases and executory contracts. Unlike ch. 12, § 1322 does not contain a provision authorizing the sale of property in the plan. Cannot modify consensual liens on a principal residence.
Sales Free and Clear of Liens	Ch. 11 <i>debtors in possession</i> may sell assets, other than in the ordinary course of business, free and clear of liens under § 363(f) after notice and a hearing. § 1107(a). Sales free and clear of liens require satisfying one of the following grounds: 1) applicable		Ch. 12 debtors in possession <i>and</i> trustees retain the right to sell property free and clear of liens under § 363(f). §§ 1203, 1206. In addition, § 1206, which	Ch. 13 <i>debtors</i> may sell assets, other than in the ordinary course of business, free and clear of liens under § 363(f) after notice and hearing. § 1303. Sales free and clear of liens require satisfying one of

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	nonbankruptcy law permits sale of such property free and clear of such interest; 2) the interest holder consents; 3) the property's sale price is greater than the aggregate value of all liens on the property; 4) the interest is in bona fide dispute; or 5) the interest holder could be compelled in a legal or equitable proceeding to accept a money satisfaction for the claim. § 363(f)(1)-(5).		applies only in ch. 12, allows <i>trustees</i> under § 363(b) and (c) after notice and hearing to sell farmland, farm equipment, or any property used to carry out a commercial fishing operation (including a commercial fishing vessel) free and clear of third-party interests even if none of the grounds in § 363(f) are satisfied. Section 1206 “modifies [§] 363(f) to allow family farmers or fishermen to sell assets not needed for the reorganization prior to confirmation without the consent of the secured creditors, subject to approval of the court.” 8 Collier on Bankruptcy P 1206.01 (16th 2019). But proceeds of such sales are still subject to those third-party interests. § 1206.	the following grounds: 1) applicable nonbankruptcy law permits sale of such property free and clear of such interest; 2) the interest holder consents; 3) the property's sale price is greater than the aggregate value of all liens on the property; 4) the interest is in bona fide dispute; or 5) the interest holder could be compelled in a legal or equitable proceeding to accept a money satisfaction for the claim. § 363(f)(1)-(5).
Special Tax Provisions for Chapter 12			Because ch. 12 plans typically sell property to reorganize, to avoid hard tax consequences, § 1232(a) “reclassifies” these government claims as unsecured claims arising before the petition date that shall not be entitled to § 507 priority status and discharged under § 1228. Section 1232 was signed into law on October 26, 2017.	

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			Public Law 115-72 provides that the amendments apply to any bankruptcy case pending, but not confirmed, on the effective date of the act. Ch. 12 debtors must include § 1232(a) unsecured claims in their plans. If there is a post-confirmation sale, transfer, exchange, or other disposition on farm property, and a subsequent government unit claim arises, then it will be necessary for the trustee to adjust payments accordingly. Possible plan language: The ch. 12 plan should include language to the effect that any potential claim within the scope of § 1232(a) arising post-petition, but before discharge, shall be included in the class of general unsecured claims. 8 Collier 1232.03. The plan language should account for the trustee's need to include tax claims in the unsecured creditor pool and should time any disbursements to the unsecured creditors only after the tax claims have been filed to avoid a potentially unequal (i.e., not <i>pro rata</i>) distribution amongst unsecured claimants.	

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Plan Confirmation Requirements	Ch. 11: After notice, the court shall hold a hearing on confirmation. 28-days' notice required. BR 2002(b). To be confirmed, plans must satisfy 16 requirements of § 1129(a). Chief among the requirements are feasibility and the best interest of the creditors tests. If all other requirements under § 1129(a) are met but for (a)(8), the debtor may seek to "cram down" the plan over the objections of its creditors. § 1129(b). Absolute priority rule applies. As a component of a § 1129(b) cram down, plans must satisfy the absolute priority rule. At least one court has found the absolute priority rule applies in individual ch. 11s. <i>In re Rogers</i>, 2016 WL 3583299 (Bankr. S.D. Ga. June 24, 2016). Creditors must object to the plan or risk forfeiting their objection. BR 3015(f). Small Business Debtors: Section 1129(e) directs the court to confirm a plan not later than 45 days after the date it was filed. Small business plans follow the same confirmation requirements	To be confirmed, plan must satisfy the requirements of § 1129(a). § 1191. No consenting impaired class needed for confirmation if 1) plan satisfies § 1129(a) [other than (a)(8), (a)(10), and (a)(15)]; 2) plan does not discriminate unfairly; and 3) plan is fair and equitable, as to each impaired, nonconsenting class. §§ 1181(a), 1191(b). A plan is "fair and equitable" if 1) § 1129(b)(2)(A) is satisfied; 2) it provides for application of all debtor's projected disposable income for 3 years beginning on date first payment is due (or up to 5 years, as ordered) to plan payments; and 3) debtor will be able to make all plan payments or there is a reasonable likelihood debtor will be able to make all plan payments. § 1191(c). The absolute priority rule does not apply. § 1181(a).	Except for cause, confirmation hearing shall be concluded not later than 45 days after the filing of the plan. 21-days' notice required. BR 2002(a)(8). Plans must satisfy all Code requirements, be proposed in good faith, and pay all admin fees. In addition, the court must find that the debtor's plan is feasible and in the best interest of creditors. With respect to secured claims, § 1225(a)(5) provides three avenues of treatment: 1) the creditor has accepted the plan; 2) the secured creditor retains its lien and receives property having a value, as of the effective date, not less than the allowed amount of the secured claim, i.e., "cramdown;" and 3) debtor surrenders the property. Cramdown for ch. 12 purposes depends on the amount of the claim. § 506(a) and (b). Permissible plan duration is up to 5 years. No "means test" for disposable income.	Confirmation hearing must be scheduled not earlier than 21 days but not later than 45 days after the 341 meeting of creditors. 28-days' notice required. BR 2002(b). Plans must satisfy all Code requirements, be proposed in good faith, and pay all admin fees. In addition, the court must find that the debtor's plan is feasible and in the best interest of creditors. With respect to secured claims, § 1325(a)(5) provides three avenues of treatment: 1) the creditor has accepted the plan; 2) the secured creditor retains its lien and receives property having a value, as of the effective date, not less than the allowed amount of the secured claim, i.e., "cramdown;" and 3) debtor surrenders the property. Creditors do not have an opportunity to vote on ch. 13 plans but may object to the plan or risk forfeiting their objection. BR 3015(f).

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	as their larger ch. 11 counterparts.		Creditors do not have an opportunity to vote on ch. 12 plans but may object to the plan or risk forfeiting their objection. BR 3015(f).	
Plan Modifications	The plan proponent may modify a plan any time before confirmation. § 1127(a), (c). After confirmation, the plan proponent or reorganized debtor may modify the plan prior to substantial consummation of the plan. Plan modifications must comply with § 1125. § 1127(b), (c).	The debtor may modify the plan at any time prior to confirmation. §1193(a). After confirmation and before substantial consummation, the debtor may modify the plan as long as it complies with §§ 1122 and 1123, confirms the modified plan, <i>and</i> finds that circumstances warrant the modification. § 1193(b). After confirmation and substantial consummation, the debtor may modify the plan at any time within 3 years, or up to 5 years as fixed by the court, but the modified plan must comply with § 1121(b), <i>and</i> the court must find that circumstances warrant the modification. § 1193(c). A consensually confirmed plan may only be modified by consent. § 1193(b).	Debtor may modify the plan at any time before confirmation. § 1223. Plans may be modified after confirmation but only before debtor has completed payments under such plan. Plans may be modified by the debtor, trustee, or holder of an allowed unsecured claim. § 1229. Plans may be modified only to: 1) increase/decrease payments; 2) extend/reduce the time for payments; 3) alter the amount of distribution; or 4) provide payment on a § 1232(a) claim. § 1229. Plan may NOT be modified by anyone except the debtor in the last year of the plan to require payments leaving the debtor with insufficient funds to operate the farm. § 1229(d)(3).	Debtor may modify the plan at any time before confirmation. § 1323. Plans may be modified after confirmation but only before debtor has completed payments under such plan. Plans may be modified by the debtor, trustee, or holder of an allowed unsecured claim. § 1329. Plans may be modified only to: 1) increase/decrease payments; 2) extend/reduce the time for payments; 3) alter the amount of distribution; or 4) reduce amounts paid under plan by the actual amount expended by debtor to purchase healthcare. § 1329. The CARES Act allows a debtor to modify a plan confirmed prior to 3/27/2020 and extend payments up to seven years from the time of the first payment if a debtor is experiencing or has

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				experienced a material financial hardship directly or indirectly related to COVID-19. § 1329(d)(1); § 1113, CARES Act. This provision sunsets 3/28/2021. § 1113, CARES Act.
Conversion	A ch. 7 debtor may convert to ch. 11 if the case has not been converted under §§ 1112, 1208, or 1307. § 706(a). A party cannot waive the right to convert. <i>Id.</i> A ch. 11 debtor may convert a case to ch. 7 unless: 1) the debtor is not a DIP; 2) the case was commenced as an involuntary case; or 3) the case was converted to a ch. 11 case other than on the debtor's request. § 1112(a). The court may only convert to ch. 7 on the request of a party in interest, after notice and a hearing, and for cause. The court will convert or dismiss, whichever is in the best interest of creditors. § 1112(b). The court may not convert to ch. 7 if the debtor is a farmer or a corporation that is not a moneyed, business or commercial operation unless the debtor requests the conversion. § 1112(c). A ch. 11 case may be converted to ch. 12 or ch. 13 only if: 1) the debtor	No separate rule.	A ch. 7 debtor may convert to ch. 12 if the case has not been converted under §§ 1112, 1208, or 1307. § 706(a). A party cannot waive the right to convert. <i>Id.</i> A ch. 12 debtor may convert a case to ch. 7 any time. § 1208(a). The court may only convert to ch. 7 on the request of a party in interest, after notice and a hearing, upon a showing the debtor committed fraud. § 1208(d). The applicable law and debtor's eligibility for ch. 12 on the petition date, not the conversion date, governs conversion to ch. 12. <i>See In re Campbell</i>, 313 B.R. 871 (B.A.P. 10th Cir. 2004), and <i>see In re Ridgely</i>, 93 B.R. 683 (Bankr. E.D. Mo. 1988); <i>but cf. In re Feely</i>, 93 B.R. 744 (Bankr. S.D. Ala. 1988) (determining eligibility for conversion to ch.	A ch. 7 debtor may convert to ch. 13 if the case has not been converted under §§ 1112, 1208, or 1307. § 706(a). A party cannot waive the right to convert. <i>Id.</i> A ch. 13 debtor may convert a case to ch. 7 at any time. § 1307(a). The court may only convert to ch. 7 on the request of a party in interest, after notice and a hearing, and for cause. The court will convert or dismiss, whichever is in the best interest of creditors. § 1307(c). At any time before confirmation, the court may convert a case to ch. 11 or ch. 12, on the request of a party in interest or the U.S. Trustee. § 1307(d). The court may not convert a ch. 13 case to ch. 7, 11 or 12 if the debtor is a family farmer unless the debtor requests the

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	requests it; 2) the debtor has not been discharged under § 1141(d); and 3) conversion is equitable. § 1112(d).		12 based on the motion date, not the petition date). There is no specific provision permitting or prohibiting the conversion of a ch. 12 case to ch. 11 or ch. 13.	conversion. § 1307(f).
Debtor Discharge	A confirmed plan binds: 1) the debtor; 2) any entity acquiring property under the plan; and 3) any creditors, among others, whether or not the entities have accepted the plan. § 1141(a). For a non-individual ch. 11 debtor, discharge occurs at confirmation, except as otherwise provided in the plan or confirmation order. This discharges the debtor from any debt that arose prior to the date of confirmation and eliminates all equity interests in the debtor that are provided for in the plan. Debts set forth in § 1141(d)(6) are not discharged (certain debts owed to government units). For an individual ch. 11 debtor, unless ordered otherwise, confirmation does not discharge any debt provided for in the plan until the court grants a discharge upon completion of all payments under the plan. An individual debtor is not discharged from any debt excepted under § 523.	If a plan is consensually confirmed, then the general discharge provisions under §1141(d)(1) – (4) shall apply. Thus, in a non-liquidating subchapter V case, discharge will occur on confirmation. If a plan is non-consensually confirmed, then the timing provision for discharge under § 1141(d) shall not apply. Rather, discharge will be entered after completion of all payments due within the first 3 years of the plan, or such longer period not to exceed 5 years as the court may fix. § 1192. Because § 1141(d)(5) does not apply to a case under subchapter V, there is no provision for a hardship discharge in an individual case.	Two types of discharge available: 1) debtor completes all plan payments, other than payments to long-term secured creditors; and 2) debtor qualifies for a “hardship discharge” whether or not debtor has completed all payments. § 1228. To receive a hardship discharge, the debtor’s failure to complete plan payments must be due to circumstances beyond the debtor’s control, creditors must have received at least as much under the plan as they would in a ch. 7 liquidation, and modification of the plan under § 1229 is not practicable. § 1228(b). Ch. 12 allows discharge of taxes arising from the sale of farming assets. § 1232.	Two types of discharge available: 1) full compliance discharge; and 2) hardship discharge. § 1328. To receive a hardship discharge, the debtor’s failure to complete plan payments must be due to circumstances beyond the debtor’s control, creditors must have received at least as much under the plan as they would in a ch. 7 liquidation, and modification of the plan under § 1329 is not practicable. § 1328(b). With some exceptions, the “full compliance” discharge under § 1328(a) discharges a wider swath of debts than its sister chapters. For example: 1) some willful and malicious torts; 2) fines and penalties; 3) marital property settlement debts; 4) debts that were denied discharge in an earlier bankruptcy. Debts excepted from

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	Section 1141(d)(3) applies to non-individual and individual debtors, barring a discharge if the plan liquidates all of debtor's assets, the debtor suspends business, and the debtor would be denied a discharge under § 727(a). A claim is discharged regardless of whether the creditor filed a proof of claim. § 1141(d)(1)(A). But the plan may supersede § 1141(d) and pay creditors that have not filed a proof of claim. § 1141(d)(1). An individual debtor who has not completed payments under the plan may receive a hardship discharge if the requirements of § 1141(5)(B) are met.			discharge include: debts provided for under § 1322(b)(5); tax claims under § 507(a)(8)(C); tax claims under § 523(a)(1)(B); debts incurred under false pretenses or misrepresentation; unscheduled debts; debts for fraud or defalcation while in a fiduciary capacity, embezzlement or larceny; domestic support obligations; student loans unless undue hardship; or debts incurred by debtor's operation of a motor vehicle while under the influence. § 1328.

Key Events in the Timeline of Subchapter V Cases¹

Benjamin A. Kahn²
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- Election to Have Subchapter V Apply
 - Petition date. In a voluntary case, the debtor must indicate on its petition whether it is a small business debtor, and if so, whether it elects to have subchapter V apply. Rule 1020(a).⁴
 - 14 days after the order for relief in an involuntary case. Within 14 days after entry of the order for relief in an involuntary case, the debtor shall file a statement indicating whether it is a small business debtor or a debtor as defined under § 1182(1), and if so, whether it elects to have subchapter V apply. Interim Rule 1020(a).⁵

¹ A chart containing more detailed subchapter V deadlines follows.

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⁴ All references to rules herein are to the Federal Rules of Bankruptcy Procedure, unless otherwise indicated. On December 5, 2019, Advisory Committee on Bankruptcy Rules of the United States Judicial Conference (“Rules Committee”) distributed Interim Amendments to the Rules of Federal Bankruptcy Procedure interim rules applicable for subchapter V for adoption locally to facilitate uniform implementation of the changes mandated by the Small Business Reorganization Act of 2019 (“SBRA”). Rule-based deadlines and citations to specific rules set forth herein presume adoption of the interim rules, and therefore are consistent with the provisions therein.

⁵ There is no deadline in the rules for a debtor to amend its statement or election, and Rule 1009 permits a debtor to amend any statement as a matter of course at any time before the case is closed. Nevertheless, § 1188 of subchapter V requires the court to hold a status conference no later than 60 days after the order for relief, and requires the debtor to serve and file a report detailing efforts to attain a consensual plan no later than 14 days prior to the status conference. The court may extend the period of time for holding the status conference only “if the need for an extension is attributable to circumstances for which the debtor should not justly be held accountable.” Similarly, § 1189(b) requires a debtor under subchapter V to file a plan no later than 90 days after the order for relief, and permits the court to extend this period only “if the need for the extension is attributable to circumstances for which the debtor should not justly be held accountable.” If the debtor does not elect subchapter V, but seeks to amend its statement to elect subchapter V more than 30 days after the order for relief, the court and the debtor will not be able to comply with the time requirements under §§ 1188 and 1189, unless the court extends these periods, and the court only may do so if the need to do so is attributable to circumstances for which the debtor should not justly be held accountable.

- Status Conference
 - Not later than 60 days after the order for relief the court shall hold a status conference “to further the expeditious and economical resolution of a case under this subchapter.” 11 U.S.C. § 1188(a).
 - 14 days BEFORE the status conference under 11 U.S.C. § 1188(a), the debtor shall file and serve on all parties in interest “a report that details the efforts the debtor has undertaken and will undertake to attain a consensual plan of reorganization.” 11 U.S.C. § 1188(c).
- Filing Plan of Reorganization
 - Not later than 90 days after the order for relief, the debtor shall file a plan. The court may extend this period if the need for an extension “is attributable to circumstances for which the debtor should not justly be held accountable.” 11 U.S.C. § 1189(b).
- Confirmation Hearing⁶
 - 28 days’ notice must be given for the deadline to accept or reject and file objections to a proposed plan, and for the hearing to consider confirmation of the proposed plan.⁷ Rule 2002(b). The court fixes the date for the confirmation hearing. Rule 3017.2(c).
- Appointment and Termination of Service of Trustee
 - The United States Trustee shall appoint a standing trustee for subchapter V cases, appoint one disinterested person to serve as trustee, or may serve as trustee. 11 U.S.C. § 1183(a).
 - If the plan is consensually confirmed under 11 U.S.C. § 1191(a), the service of the trustee is terminated when the plan is substantially consummated. However, the United

⁶ No disclosure statement will be required unless otherwise ordered by the court. 11 U.S.C. § 1181(b) (providing that § 1125 does not apply in subchapter V cases unless the court orders otherwise for cause). Section 1190 contemplates that a plan shall include a brief history of the business operations of the debtor, a liquidation analysis, and feasibility projections. If the court orders that § 1125 applies, then § 1125(f), which permits conditional approval of the disclosure statement similarly will apply to the case. 11 U.S.C. § 1187(c). In the proposed rules, Rule 3016 has been revised to provide that, if a disclosure statement is required under § 1125, the debtor must file with the plan or within a time fixed by the court either the disclosure statement or evidence of pre-petition acceptance in compliance with § 1126. The rule further provides an exception to this requirement if the plan is intended to provide adequate information under § 1125(f)(1). If so, the plan must so designate and the Rule 3017.1, which governs the procedure for conditional approval of the disclosure statement shall apply. Rule 3017.1 similarly has been made applicable to cases under subchapter V in which the court has ordered that § 1125 applies.

⁷ Section 1129(e), which requires that the court confirm a plan in a small business case within 45 days after the plan is filed, does not apply to cases under subchapter V. See 11 U.S.C. § 1181(a); see also 11 U.S.C. 101(51C) (excluding any case in which a debtor elects to have subchapter V apply from the definition of “small business case”).

States Trustee may reappoint the trustee for modification of the plan or if the debtor is removed from possession. 11 U.S.C. § 1183(c)(1).

- If the plan is non-consensually confirmed, the trustee will make all payments under the plan, unless the plan or the order confirming the plan provides otherwise. 11 U.S.C. § 1194(b).

- Discharge

- Consensually Confirmed Plans Under 11 U.S.C. § 1191(a). If a plan is consensually confirmed under 11 U.S.C. § 1191(a), then the general discharge provisions under 11 U.S.C. § 1141(d)(1)-(4) shall apply. See 11 U.S.C. § 1181(a), (c). Therefore, in a non-liquidating subchapter V case, discharge will occur on confirmation of a consensual plan. See 11 U.S.C. § 1141(d)(1).⁸
- Non-consensually Confirmed Plans Under 11 U.S.C. § 1191(b). If a plan is confirmed under 11 U.S.C. § 1191(b), then the timing provisions for entry of discharge under 11 U.S.C. § 1141(d) shall not apply. See 11 U.S.C. § 1181(c). In such a case, discharge will be entered after completion of all payments due “within the first 3 years of the plan, or such longer period not to exceed 5 years as the court may fix” 11 U.S.C. § 1192.⁹

- Modification of a Plan

- The debtor may modify a plan at any time prior to confirmation. 11 U.S.C. § 1193(a).
- After confirmation, the debtor may modify a plan consensually confirmed under § 1191(a) prior to substantial consummation of the plan. 11 U.S.C. § 1193(b).¹⁰
- After confirmation, the debtor may modify a plan confirmed under § 1191(b) at any time within 3 years, or such longer period not to exceed 5 years, as fixed by the court. 11 U.S.C. § 1193(c).

- Plan Term

- Several sections of subchapter V affect plan timeframes. Section 1191(c) provides that, in order for a plan to be fair and equitable for purposes of non-consensual confirmation under § 1191(b), the debtor must contribute its projected disposable income (or the value thereof) to be received in the 3-year period, or such longer period not to exceed 5 years as the court may fix. In addition, the discharge generally will be entered in a

⁸ Section 1141(d)(5), which delays discharge until the completion of payments under a plan in an individual case unless otherwise ordered by the court, does not apply in subchapter V cases. 11 U.S.C. 1181(a).

⁹ Because § 1141(d)(5) does not apply to a case under subchapter V, there is no provision for a hardship discharge in an individual case.

¹⁰ A consensually confirmed plan only may be modified by consent. 11 U.S.C. § 1193(b).

non-consensual plan after the same time period; however, section 1192 excepts from the discharge any debt on which the last payment is due after such period. See 11 U.S.C. § 1192. Nevertheless, unlike in a case under chapter 13, there is no express prohibition against a plan providing for payments beyond this period. See 11 U.S.C. 1322(d).

- Timing of Payments
 - The court may authorize the trustee to make payments to the holder of a secured claim prior to confirmation for purposes of providing adequate protection. 11 U.S.C. § 1194(c).

Subchapter V Deadlines¹¹

DEADLINES IN CONNECTION WITH COMMENCEMENT OF THE CASE

Entity	Deadline	Act to Be Performed	Code or Rule¹²
Voluntary debtor	Petition Date	State whether the debtor is a small business debtor or a debtor as defined under § 1182(1) and, if so, whether the debtor elects to have subchapter V apply	Interim Federal Rule of Bankruptcy Procedure 1020(a)
Subchapter V DIP, or Trustee if debtor removed from possession	As soon as possible after the commencement of the case	Give notice of the case to every entity known to be holding money or property subject to withdrawal or order of the debtor	Federal Rule of Bankruptcy Procedure (“Rule”) 2015(a)(4)
Subchapter V debtor	Upon electing to proceed under subchapter V	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 no balance sheet, statement of operations, or cash-flow statement has been prepared and no federal tax return has been filed	11 U.S.C.A § 1187(a); 11 U.S.C. § 1116(1)(A), (B) ¹³
Involuntary debtor	14 days after the entry of the order for relief	File a statement indicating whether the debtor is a small business debtor and, if so,	Rule 1020(a)

¹¹ On December 5, 2019, Advisory Committee on Bankruptcy Rules of the United States Judicial Conference (“Rules Committee”) distributed Interim Amendments to the Rules of Federal Bankruptcy Procedure interim rules applicable for subchapter V for adoption locally to facilitate uniform implementation of the changes mandated by the Small Business Reorganization Act of 2019 (“SBRA”). Rule-based deadlines and citations to specific rules set forth herein presume adoption of the interim rules, and therefore are consistent with the provisions therein. Deadlines and notations set forth herein that existed under the Federal Rules of Bankruptcy Procedure prior to enactment of subchapter V and that have not been modified by the proposed interim rules have been excerpted from COLLIER PAMPHLET EDITION 2018 Supplement, Time Periods Prescribed by the Bankruptcy Rules (Richard Levin & Henry Sommer eds., Matthew Bender) (the “Collier Supplement”).

¹² With respect to deadlines under title 11, only those time periods and deadlines arising under subchapter V of title 11 are included herein. Time periods relating to adversary proceedings, appeals, and claims are not included. For comprehensive deadlines generally applicable to all cases, including subchapter V, see the Collier Supplement.

¹³ Section 1181(a) provides that 1116 is inapplicable to cases under subchapter V. These sections apply by specific reference under § 1187(a).

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		whether the debtor elects to have subchapter V apply	
Chapter 11 parties in interest	30 days after the conclusion of the meeting of creditors or 30 days after any amendment to the debtor's statement under Rule 1020(a), whichever is later	File objection to the chapter 11 debtor's designation as a small business debtor	Rule 1020(b) ¹⁴
Involuntary debtor	7 days after entry of the order for relief	File a list containing the name and address of each entity included or to be included on Schedules D, E/F, G, and H	Rule 1007(a)(2)
Chapter 11 debtor	14 days after entry of the order for relief	File a list of the debtor's equity security holders, with the number and kind of interests, and the last known address or place of business of each holder	Rule 1007(a)(3)
Voluntary debtor	14 days after filing petition	File the schedules, statements and other documents required by 1007(b)(1)	Rule 1007(c)
Individual chapter 11 debtor	14 days after filing the petition	File a statement of current monthly income	Rule 1007(c)
Voluntary individual debtor	14 days after entry of the order for relief	File a certificate of credit counseling if debtor filed a statement that debtor received counseling but did not have the certificate on the filing date	Rule 1007(c)
Petitioning creditor(s) in an involuntary case	7 days after issuance of the summons	Serve the summons and a copy of the petition on the debtor	Rule 1010(a); Rule 7004(e)
Involuntary debtor	14 days after entry of the order for relief	File the schedules, statements, and other documents required by Rule 1007(b)(1)	1007(c)
Involuntary chapter 11 reorganization on debtor	2 days after entry of the order for relief	File a list of creditors holding the 20 largest unsecured claims	Rule 1007(d)

¹⁴ Any objection is governed by Rule 9014. See F.R.B.P 1020(c).

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Involuntary debtor	21 days after service of the summons, unless made by publication on a party not residing or found within the state in which the court sits	File and serve defenses and objections to an involuntary petition	Rule 1011(b)
U.S. Trustee in a chapter 11 health care business case	21 days after the commencement of the case	File motion to appoint a patient care ombudsman	Rule 2007.2(a)
Debtor's attorney	14 days after the order for relief	File statement whether the attorney has shared or agreed to share the compensation with any other entity	Rule 2016(b)
The court	60 days after entry of the order for relief	Hold a status conference to further the expeditious and economical resolution of a case under subchapter V ¹⁵	11 U.S.C. § 1188(a)
Subchapter V debtor	14 days before the date of the § 1188(a) status conference	Debtor file and serve on the trustee and all parties in interest a report that details the efforts debtor has undertaken and will undertake to attain a consensual plan of reorganization	11 U.S.C. § 1188(c)

TIME PERIODS RELATED TO PLANS

Entity	Deadline	Act to Be Performed	Code or Rule
Subchapter V debtor	90 days after the order for relief	File a chapter 11 plan ¹⁶	11 U.S.C. § 1189
Chapter 11 plan proponent	With the plan or within a time fixed by the court	File a disclosure statement or evidence of prepetition acceptance of a plan <u>if</u> the court has ordered that 11 U.S.C. 1125 will apply ¹⁷	Rule 3016(b)

¹⁵ Under §1188(b), the court may extend the time for holding a status conference if the need for an extension is attributable to circumstances for which the debtor should not justly be held accountable.

¹⁶ The court may extend the 90-day period if the need for extension is attributable to circumstances for which the debtor should not justly be held accountable.

¹⁷ No disclosure statement will be required unless otherwise ordered by the court. 11 U.S.C. § 1181(b) (providing that § 1125 does not apply in subchapter V cases unless the court orders otherwise for cause). Section 1190 contemplates that a plan shall include a brief history of the business operations of the debtor, a liquidation analysis, and feasibility

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Class Including Secured Creditor	Date fixed by the court	Make the election under § 1111(b)	Rule 3014
Clerk, or some other person as the court may direct	28 days	Provide notice by mail of time fixed for filing objections and the hearing to consider approval of a disclosure statement, if applicable. <u>See note 17, <i>infra</i>.</u>	Rule 2002(b)
Clerk, or some other person as the court may direct	28 days	Provide notice of hearing on disclosure statement and objections in a chapter 11 case, if applicable. <u>See note 17, <i>infra</i>.</u>	Rule 3017(a)
Clerk, or some other person as the court may direct	28 days	Provide notice by mail of time for filing objections and the hearing to consider confirmation of a chapter 11 plan	Rule 2002(b)
Clerk, or some other person as the court may direct	28 days	Provide notice of time for filing objections to an injunction provided in a chapter 11 plan	Rule 3017(f)(1)
The court	No deadline	Fix a date for the hearing on confirmation.	Rule 3017.2(c)
Holders of claims or interests	Time fixed by the court	Accept or reject the plan	Rule 3017.2(a)
Equity security holder	Time fixed by the court	Record date for eligibility to accept or reject the plan	Rule 3017.2(b)

projections. If the court orders that § 1125 applies, then § 1125(f), which permits conditional approval of the disclosure statement similarly will apply to the case. 11 U.S.C. § 1187(c). In the proposed rules, Rule 3016 has been revised to provide that, if a disclosure statement is required under § 1125, the debtor must file with the plan or within a time fixed by the court either the disclosure statement or evidence of pre-petition acceptance in compliance with § 1126. The rule further provides an exception to this requirement if the plan is intended to provide adequate information under § 1125(f)(1). If so, the plan must so designate and the Rule 3017.1, which governs the procedure for conditional approval of the disclosure statement shall apply. Rule 3017.1 similarly has been made applicable to cases under subchapter V in which the court has ordered that § 1125 applies.

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Subchapter V debtor in possession, trustee, or clerk, as directed by the court	Times fixed by the court	Transmit the plan, provide notice of the time to accept or reject the plan, and provide notice of hearing on confirmation ¹⁸	Rule 3017.2(d)
Chapter 11 parties in interest	14 days after entry of the order	Stay of order confirming a chapter 11 plan	Rule 3020(e)
Subchapter V debtor	Any time prior to confirmation	Modify the plan. After the modification is filed with the court, the plan as modified becomes the plan.	11 U.S.C. § 1193(a)
Subchapter V debtor	Any time after confirmation of the plan and before substantial consummation of the plan	May seek to modify a plan that was consensually confirmed under section 1191(a). The plan, as modified under this subsection, becomes the plan only if the court confirms the plan as modified by consent under section 1191(a) of this title. ¹⁹	11 U.S.C. § 1193(b)
Subchapter V debtor	Any time within 3 years, or such longer time not to exceed 5 years, as fixed by the court	May seek to modify the plan if the plan was confirmed under section 1191(b).	11 U.S.C. § 1193(c)
Clerk, or some other person as the court may direct	21 days	Provide notice by mail of time for filing objections to modification of an individual's chapter 11 plan and of hearing on objections	Rule 3019(b), (c)

¹⁸ In traditional chapter 11 cases under chapter 11, Rule 3017(c) requires that, on or before approval of the disclosure statement, the court shall fix a time within which holders of claims and interests may accept or reject a plan and may fix the date for notice of the confirmation hearing. Rule 3017(d) requires transmission of the plan and the notice of the times so fixed in traditional chapter 11 cases “in accordance with Rule 2002(b).” Despite the lack of any similar reference to Rule 2002(b) in Rule 3017.2(d), nothing in the interim rule purports to affect the minimum 28 days’ notice required of the time fixed for acceptance or rejection of the plan and the hearing to consider confirmation under Rule 2002(b).

¹⁹ Subchapter V does not provide for a contested modification of a consensually confirmed plan.

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Any holder of a claim or interest that has accepted or rejected the plan	Within a time fixed by the court	Change the previous acceptance or rejection of the plan if the plan is later modified	11 U.S.C. § 1193(d)
The subchapter V trustee	Until confirmation or denial of confirmation of a plan	Retain payments and funds received pending confirmation or denial of confirmation of a plan. If a plan is confirmed, the trustee shall distribute any such payment in accordance with the plan. If a plan is not confirmed, the trustee shall return any such payments to the debtor after deductions under 11 U.S.C. § 1194(a)(1)-(3).	11 U.S.C. § 1194(a)
The court	After notice and a hearing, and prior to confirmation of a plan	May authorize the trustee to make payments to the holder of a secured claim to provide adequate protection of an interest in property	11 U.S.C. § 1194(c)

DEADLINES THROUGHOUT THE CASE

Entity	Deadline	Act to Be Performed	Code or Rule
Subchapter V debtor	Periodically throughout the case	Comply with the requirements of 11 U.S.C. §§ 308 and 1116(2), (3), (4), (5), (6), and (7)	11 U.S.C. § 1187(b) ²⁰

²⁰ Section 1181(a) provides that § 1116 is inapplicable to cases under subchapter V. These sections apply by specific reference under § 1187(b).

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Subchapter V debtor	14 days after the information comes to the debtor's knowledge	File supplemental schedule disclosing acquisition of property by bequest, devise, inheritance, property settlement agreement, or as a beneficiary of a life insurance policy or death benefit plan. ²¹	Rule 1007(h)
Subchapter V debtor	At any time before the case is closed	File an amendment of any voluntary petition, list, schedule, or statement	Rule 1009(a)
Chapter 11 DIP or trustee in case converted from chapter 7	14 days after conversion of the case	File a schedule of unpaid debts incurred after the filing of the petition and before conversion of the case, including the name and address of each holder of a claim	Rule 1019(5)(A)(i)
Chapter 11 DIP or trustee in case converted to chapter 7	30 days after conversion of the case	File and transmit to the U.S. Trustee a final report and account	Rule 1019(5)(A)(ii)
Clerk, or some other person as the court may direct	21 days	Provide notice by mail of meeting of creditors under § 341	Rule 2002(a)(1)
Clerk, or some other person as the court may direct	21 days	Provide notice by mail of proposed use, sale, or lease of property of the estate other than in the ordinary course of business	Rule 2002(a)(2)
Clerk, or some other person as the court may direct	21 days	Provide notice by mail of hearing on approval of a compromise or controversy other than pursuant to Rule 4001(d)	Rule 2002(a)(3)
Clerk, or some other person as the court may direct	21 days	Provide notice by mail of hearing on any entity's request for compensation or reimbursement of expenses in excess of \$1000	Rule 2002(a)(6)

²¹ The obligation to supplement continues post-confirmation for plans confirmed under 11 U.S.C. § 1191(b).

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U.S. Trustee in a chapter 11 reorganization case	Between 21 and 40 days after the order for relief	Call a meeting of creditors, except where a prepetition plan has been accepted	Rule 2003(a)
U.S. Trustee	2 years after the conclusion of the meeting of creditors	Preserve recording of § 341 meeting for public access	Rule 2003(c)
Subchapter V debtor	14 days after the plan is substantially consummated	File notice of substantial consummation with the court and serve on the trustee, the U.S. Trustee, and all parties in interest	11 U.S.C. § 1183(c)(2)
Subchapter V trustee	Periodically	File reports and summaries of the operation of the debtor's business, including a statement of receipts and disbursements, if the debtor ceases to be a DIP	11 U.S.C. § 1183(b)(5); 11 U.S.C. §§ 1106(a)(1), (2), (6); 11 U.S.C. § 704(a)(8)
The court	On request and after notice and a hearing	Order that the debtor not be a DIP for cause, including fraud, dishonesty, incompetence, or gross mismanagement of the affairs of the debtor, either before or after the date of commencement of the case, or for failure to perform the obligations of the debtor under a plan confirmed under this subchapter	11 U.S.C. § 1185(a)
The court	On request and after notice and a hearing	Reinstate the DIP.	11 U.S.C. § 1185(b)
Subchapter V debtor	Periodically	File periodic financial and other reports as required by 11 U.S.C. § 308(b)	11 U.S.C. § 1187(b); 11 U.S.C. § 308(b)
Subchapter V debtor	25 days before the date of the hearing on confirmation of the plan	Mail a conditionally approved disclosure statement if the court directs application of 11 U.S.C. § 1125	11 U.S.C. § 1187(c); 11 U.S.C. § 1125(f)
Subchapter V DIP, or trustee if debtor removed from possession	Periodically	Keep records of receipts and dispositions of money, file reports required by 11 U.S.C. § 704(a)(8)	Rule 2015(b)

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Subchapter V DIP, or trustee if debtor removed from possession	Within the time fixed by the court, if so directed	File and transmit to the United States trustee a complete inventory of the property of the debtor	Rule 2015(b)
Subchapter V debtor	No later than 21 days after the last day of each calendar month	File monthly reports as contemplated by 11 U.S.C. § 308	Rule 2015(b) ²²
Chapter 11 trustee or DIP	7 days before the first date set for the § 341 meeting of creditors	File first periodic report of the value, operations, and profitability of each entity that is not a publicly traded corporation or chapter 11 debtor and in which the estate holds a substantial or controlling interest	Rule 2015.3(b)
Chapter 11 trustee or DIP	No less frequently than every six months thereafter, until the effective date of a plan or the case is dismissed or converted	File subsequent periodic reports of the value, operations, and profitability of each entity that is not a publicly traded corporation or a chapter 11 debtor in which the estate holds a substantial or controlling interest	Rule 2015.3(b)
Chapter 11 trustee or DIP	14 days before filing the first periodic financial report required by this rule	Send notice to each entity in which the estate has a substantial or controlling interest, and to all holders of an interest in that entity, that it expects to file and serve financial information relating to that entity	Rule 2015.3(e)

²² The proposed interim rule contemplates that the debtor shall be required to file monthly reports under § 308 and Rule 2015(a)(6) even if removed from possession.

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TIME PERIODS IN CONNECTION WITH DISMISSAL OR DISCHARGE

Entity	Deadline	Act to Be Performed	Rule
Clerk of court, or some other person as the court may direct	21 days	Provide notice by mail of time for hearing on the dismissal or conversion of a chapter 7, 11, or 12 case, unless the hearing is under § 707(a)(3) or (b) or is on dismissal of the case for failure to pay the filing fee	Rule 2002(a)(4)
The court	As soon as practicable after completion by the debtor of all payments due within the first three years of the plan, or such longer period not to exceed five years as the court may fix	Grant the debtor a discharge ²³	11 U.S.C. § 1192
Chapter 11 party in interest	No later than the first date set for the hearing on confirmation	File complaint objecting to discharge ²⁴	Rule 4004(a)
Creditor	Any time	File complaint under § 523(a)(2), (4), or (6)	Rule 4007(b)
Creditor in a chapter 11 case	No later than 60 days after the first date set for the § 341 meeting of creditors, with 30 days' notice	File complaint under § 523(a)(2) or (4)	Rule 4007(c)

²³ Such discharge pertains to debts as provided under the plan except any debt (1) on which the last payment is due after the first 3 years of the plan, or such other time not to exceed 5 years fixed by the court; or (2) of the kind specified in section 523(a).

²⁴ A complaint seeking revocation of a chapter 11 discharge as procured by fraud may be filed any time before 180 days after the date of the entry of the order of confirmation. 11 U.S.C. § 1144.

Faculty

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Hon. Scott C. Clarkson is a U.S. Bankruptcy Judge for the Central District of California in Santa Ana and Riverside, appointed on Jan. 20, 2011, and has also sat on the Ninth Circuit Bankruptcy Appellate Panel. Prior to his appointment, Judge Clarkson practiced bankruptcy law and bankruptcy litigation for more than 20 years in Los Angeles, and he served as chair of the Los Angeles County Bar Association's Commercial Law and Bankruptcy Section from 2008-09. He is a board member of the Orange County Federal Bar Association, and has lectured on ethics and civility for the annual Los Angeles Federal Bar Association Ethics Program. He was a member of the Virginia, District of Columbia and California bars. From 1977-82, Judge Clarkson was a legislative assistant to U.S. Congressman Harold L. Volkmer in Washington, D.C., and was assigned to the U.S. House of Representatives Judiciary Committee, where he was a direct observer of and participant in the creation of the 1978 Bankruptcy Code in the House. He later clerked for Hon. William L. Hungate, U.S. District Judge for the Eastern District of Missouri. Judge Clarkson has also been an established documentary photographer in the U.S., Southeast and Central Asia, and South America for more than 20 years. He also traveled to Afghanistan, Pakistan and Kashmir in 2008-09, and Jordan and Israel in 2014, covering recent events in these regions of the world. Judge Clarkson received his undergraduate degree from Indiana University in Bloomington in 1979 and his J.D. from George Mason University School of Law in 1982.

Caroline R. Djang is a partner in Best Best & Krieger LLP's Business practice group in Irvine, Calif. She is the chief bankruptcy counsel and leads the firm's Bankruptcy practice. Ms. Djang practices in the areas of insolvency, bankruptcy and litigation. She represents debtors, creditors and trustees on contested matters and in adversary proceedings. Ms. Djang is a certified mediator and is serving by appointment to the Bankruptcy Mediation Program Panel for the U.S. Central District of California Bankruptcy Court. She is also an at-large member of the Ninth Circuit Conference Executive Committee and the president-elect of the Orange County Bar Association Commercial Law and Bankruptcy Section. Prior to joining BB&K, Ms. Djang was a partner at Rutan & Tucker, LLP. Before entering private practice, she was a judicial law clerk at the U.S. Bankruptcy Court for seven years, clerking for U.S. Bankruptcy Judges Ellen Carroll, Vincent P. Zurzolo, Sheri Bluebond and Richard M. Neiter. She is admitted to practice in all of the U.S. District Courts in California. Ms. Djang received her B.A. in English and history from the University of Pennsylvania and her J.D. from Loyola Law School.

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