AMERICAN BANKRUPTCY INSTITUTE

Central States Bankruptcy Workshop

Subchapter V Creditor Issues

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CONCURRENT SESSION

2024

Fast & Furious: Creditor Issues in Sub-V Chapter 11 Cases

ABI Central States Bankruptcy Workshop 2024

June 18, 2024

ELIGIBILITY ISSUES IN SUBCHAPTER V

1. Debt Limit

    a. Less than $7,500,000.00 in noncontingent, liquidated secured and unsecured debts. 11 U.S.C. § 1182(1)(A).

        i. In re Heart Heating & Cooling, LLC, No. BR 23-13019 TBM, 2024 WL 1228370, at *1 (Bankr. D. Colo. Mar. 21, 2024) ("[N]oncontingent liquidated secured and unsecured debts as of the date of the filing of the petition or the order for relief in an amount not more than $7,500,000").

        ii. "A debt is noncontingent when all events giving rise to liability occurred prior to the debtor's filing for bankruptcy." Id.

        iii. "[A] debt is deemed liquidated if ... the amount due is capable of ascertainment by reference to an agreement or by a single computation . . . Importantly, just because a debt is 'disputed' does not make it 'contingent' or 'unliquidated.'" Id.

        iv. Manufactured Contingencies.

    b. Does not include a group of affiliated debtors owing more than $7,500,000, arguably, even including an individual debtor. 11 U.S.C. 1182(1)(B)(i).

        i. In re Carter, No. 23-54816-JWC, 2023 WL 9103614, at *9 (Bankr. N.D. Ga. Dec. 13, 2023) ("[I]f the Court considers only the IRS proof of claim in the D&N case, or alternatively considers only the IRS proof of claim in Carter's case and the scheduled debts in D&N, the total exceeds $7.5 million. This analysis ignores numerous other proofs of claim in D&N for millions of dollars. Therefore, without considering the additional debt of CBSS, the Court concludes that Carter failed to carry his burden of establishing that the combined debt of Carter and his affiliates do not exceed the $7,500,000 debt limit, rendering him ineligible for Subchapter V").

c. Calculation Issues – 502(b)(6) Cap

i. There is currently a court split over whether section 502(b)(6)'s cap on rejection damages applies to the $7.5 million debt limit for Subchapter V eligibility.

ii. Compare In re Macedon Consulting, Inc., 652 B.R. 480, 486 (Bankr. E.D. Va. 2023) (holding that the 502(b)(6) cap does not apply to Subchapter V eligibility) and In re Zhang Med. P.C., 655 B.R. 403, 411 (Bankr. S.D.N.Y. 2023) (holding that the 502(b)(6) calculation applies to Subchapter V eligibility).

2. Debtor must be "engaged in commercial or business activities."

a. In re: Offer Space, LLC, No. BR 20-27480, 2021 WL 1582625 (Bankr. D. Utah Apr. 22, 2021). U.S. Trustee objected to subchapter V eligibility of non-operating debtor on the grounds that the debtor was not engaged in commercial or business activities. Debtor argued that while it was not operating, the plain language of section 1182 (subchapter V debtor must be "engaged in commercial or business *activities*") did not require that the debtor operate to be eligible for subchapter V, only that it engaged in business activities. The bankruptcy court held that the debtor was eligible for subchapter V and engaged in business activities by: (1) having active bank accounts; (2) having accounts receivable; (3) analyzing and exploring counterclaims in a lawsuit; and (4) winding down its business and taking reasonable steps to pay its creditors and realize value for its assets.

b. In re Thurmon, 625 B.R. 417 (Bankr. W.D. Mo. 2020). UST objected to debtor husband and wife's subchapter V designation on the grounds that they were not engaged in commercial or business activities. Debtors argued that they owned a shell company (in good standing) that previously operated two pharmacies. However, the pharmacies had not operated in two years and their operations were sold to an unrelated third-party. Analyzing primarily precedent from the chapter 12 definition of "engaging" in a farming operation, the bankruptcy court held that the lack of actual commercial activity precluded the debtors from remaining in subchapter V.

c. In re Johnson, No. 19-42063-ELM, 2021 WL 825156 (Bankr. N.D. Tex. Mar. 1, 2021). Individual debtors sought to convert their chapter 7 bankruptcy case to a case under subchapter V of chapter 11. The UST and certain creditors objected to the motion, on the grounds that the debtors were not engaged in commercial or business activities. The debtors, on the other hand, argued that they were the owners of seven (now defunct) corporations involved in the exploration and production of oil and gas. Because the seven corporations no longer operated, the court ruled that the debtors were not "engaged in" commercial or business activities simply because they were equity holders in non-operational entities. Moreover, the debtors argued that because Mr. Johnson had managerial authority for a separate corporation, the debtors were engaged in commercial or business

activities. The bankruptcy court, however, held that a W-2 employee, with no equity ownership was not sufficiently engaged in commercial or business activities.

d. Individual Guaranty Issues – Most cases taking up the issue have held that an individual is "engaged in commercial or business activities," based on a guaranty of business debts. In re Fama, 655 B.R. 648, 669 (Bankr. E.D.N.Y. 2023) ("[Debtor] was engaged in activities including addressing the residual business debt of [his company], in the form of the August 2014 Note, of which he was a co-maker, and the [judgment]"); In re Wright, No. CV 20-01035-HB, 2020 WL 2193240, at *3 (Bankr. D.S.C. Apr. 27, 2020) (noting that Debtor "is 'engaged in commercial or business activities'" by addressing residual business debt and otherwise meets the remaining requirements under § 101(51D)"); In re Hillman, No. 22-10175, 2023 WL 3804195, at *4 (Bankr. N.D.N.Y. June 2, 2023) ("The Court finds the Debtor's defense of the State Court Action which involves a defaulted commercial lease agreement by CHC and the Debtor's personal guaranty of same is sufficient winding down activity for the Debtor to satisfy the 'engaged in commercial or business activities' requirement of § 1182(1)(A)"); In re Ikalowych, 629 B.R. 261, 288 (Bankr. D. Colo. 2021) ("And, of course, the Debtor (as a manager of both JMI and Hailco and a former employee of Hailco) was engaged in all the other types of 'commercial or business activities' pertaining to JMI and Hailco noted above, plus more, because the guarantees were given by the Debtor when Hailco was still operating"); In re Blue, 630 B.R. 179, 191 (Bankr. M.D.N.C. 2021) (holding that debtor was eligible for subchapter V where "Debtor 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").

OBJECTIONS TO DISCHARGEABILITY OF A CORPORATE DEBTOR: When "A" and "The" Really Matter

I. Where It All Begins: 11 U.S.C. §§ 523(a) and 1192(2)

A. 11 U.S.C. § 523(a)

> (a) 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— . . . (6) for willful and malicious injury by the debtor to another entity or to the property of another entity.

11 U.S.C. § 523(a)(6) (emphasis added). Section 523, by its plain language, incorporates 1192 and is limited to "individual" debtors.

A "corporate debtor is not an individual debtor for purposes of Section 523." *In re Spring Valley Farms, Inc.*, 863 F.2d 832, 834 (11th Cir. 1989) (citation omitted). This limitation of Section 523(a) has been universally accepted by courts. *See, e.g., Yamaha Motor Corp., U.S.A. v. Shadco, Inc.*, 762 F.2d 668, 670 (8th Cir. 1985) ("exemptions embodied in 11 U.S.C. § 523(a) do not apply to corporate debtors"); *In re Grouthes*, 226 F.3d 334, 337 (5th Cir. 2000) (Section 523(a)'s "discharge exceptions … do not apply to corporate debtors"); *Southern Illinois Railcar Co. v. Nashville & Eastern Ry. Corp.*, 2006 WL 2413671, * (Bankr. S.D. Ill. 2006) ("§ 523 exemptions from discharge apply only to individual debtors") (citing *Yamaha* and *Grouthes)*; *In re Push & Pull Enter., Inc.*, 84 B.R. 546, 548 (Bankr. N.D. Ind. 1988) ("It is almost undebatable and universally held that a corporate Chapter 11 debtor is not subject to the dischargeability provisions of U.S.C.A. § 523.") (citations omitted); *Adam Glass Serv., Inc. v. Federated Dep't Stores, Inc.*, 173 B.R. 840, 842 (E.D.N.Y. 1994) (Section 523(a) "is not applicable to corporate debtors")

B. 11 U.S.C. § 1192(2)

If a Subchapter V plan is confirmed non-consensually, discharge is governed by Section 1192 of the Bankruptcy Code, which provides as follows:

> If the plan of the debtor is confirmed under section 1191(b) of this title, as soon as practicable after completion by the debtor 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, unless the court approves a written waiver of discharge executed by the debtor after the order for relief under this chapter, the court shall grant the debtor a discharge of all debts provided in section 1141(d)(1)(A) of this title, and all other debts allowed under section 503 of this title and provided for in 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) of this title.

11 U.S.C. § 1192 (emphasis added)

II. Two Schools of Thought Emerge

A. Majority Holdings[1]

The analysis begins "with a plain language analysis of the language of the statute itself." *R&W Clark*, 656 B.R. at 635 (citation omitted). "[W]hen the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." *Lamie v. U.S. Tr.*, 540 U.S. 526, 534 (2004).

"Section 523(a) unambiguously applies only to individual debtors." *Off-Spec Sols.*, 651 B.R. at 867. "The reference in § 1192 to debts 'of the kind specified in section 523(a)' can reasonably be construed to mean the list of debts, but nothing in § 1192 obviates the express limitation in the preamble of § 523(a) or otherwise expands its scope to corporate debtors." *Id.* (citing, *inter alia*, *Pac. Gas & Elec. Co. v. California*, 350 F.3d 932, 943 (9th Cir. 2003) ("We presume, absent clear indication to the contrary, that Congress did not intend to change preexisting bankruptcy law or practice in adopting [or amending] the Bankruptcy Code. . . .").

Further, "Congress amended § 523(a) to add § 1192 to the list of discharge provisions to which it applies." *Off-Spec Sols.*, 651 B.R. at 867. "Interpreting § 1192 to extract from § 523(a) only the list of nondischargeable debts, without its limitation to individuals, would render the amendment surplusage." *Id.* (citing, *inter alia*, *Marx v. Gen. Revenue Corp.*, 568 U.S. 371, 386, 133 S.Ct. 1166, 185 L.Ed.2d 242 (2013). "If § 1192 makes the debts specified in § 523(a) nondischargeable to all debtors, the concurrent amendment to § 523(a) has no meaning." *Id.*

This construction "harmonizes the statutes," as "Section 1192 incorporates the types of debts that are nondischargeable under a nonconsensual subchapter V plan, and § 523 (a) limits the scope of nondischargeability to individual debtors." *Off-Spec Sols.*, 65 B.R at 868. Ambiguity is only "created when trying to read section 1192(2) as obviating 'the express limitation in the preamble of § 523(a) or otherwise expand[ing] its scope to corporate debtors.'" *Id.* at 867.

With the statutes reconciled, analysis under the general/specific canon of interpretation is unnecessary. *Off-Spec Sols.*, 651 B.R. at 868. But even that analysis leads to the same conclusion. "[Section] 523(a) specifically references 'individuals,' while § 1192(2) does not reference individuals or corporations. Thus, the specific language in § 523(a) controls over the general language in § 1192." *Hall*, 651 B.R. at 68 (citations omitted).

"[S]ubchapter V remains a part of chapter 11, and its discharge provisions should be interpreted consistent with the overall statutory scheme in chapter 11." *Off-Spec Sols.*, 651 B.R.

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[1] The majority holdings include the following: *See In re R&W Clark Construction, Inc.*, 656 B.R. 628 (Bankr. N.D. Ill. 2024) (Attached); *In re Off-Spec Sols.*, 651 B.R. 862 (B.A.P. 9th Cir. July 6, 2023); *In re RA Custom Design, Inc.*, 2024 WL 607716, No. 23-584494-SMS (Bankr. N.D. Ga. Feb. 13, 2024); *In re 2 Monkey Trading, LLC*, 650 B.R. 521 (Bankr. M.D. Fla. 2023) (Attached); *In re Hall*, 651 B.R. 62 (Bankr. M.D. Fla. 2023); *In re GFS Industries, LLC*, 647 B.R. 337 (Bankr. W.D. Tex. 2022) *rev'd*, 2024 WL 1644229 (5th Cir. April 17, 2024); *In re RTECH Fabrications, LLC*, 635 B.R. 559 (Bankr. D. Idaho 2021); *In re Cleary Packaging LLC*, 630 B.R. 466 (Bankr. D. Md. 2021), *rev'd*, 36 F.4th 509 (4th Cir. 2022); *In re Satellite Rests. Inc.*, 626 B.R. 871 (Bankr. D. Md. 2021).

at 868. "Congress has limited the corporate discharge in chapter 11 once, by enacting § 1141(d)(6), and it did so by expressly stating that certain debts are excepted from discharge for corporate debtors." *Id.* "This narrow limitation to the corporate discharge took eight years to become law," and "the suggestion that Congress incorporated 19 new exceptions to discharge for small corporations in a bill that was introduced in April 2019, and signed into law by the President in April 2019, seems not only improbable but also contradicts years of bankruptcy law and policy." *Id.* (internal quotations omitted).[2] As the court in *R&W Clark* concluded, "[t]here is, quite frankly, no ambiguity in the language," and "section 523(a) simply does not apply to corporate debtors in chapter 11, whether they be in Subchapter V or otherwise." *R&W Clark*, 656 B.R. at 637.

B. The Minority Holdings.

Two courts and the Fourth and Fifth Circuits have ruled that section 523(a) applies both to individuals and corporations receiving a discharge under section 1192. *Matter of GFS Industries, LLC*, 2024 WL 1644229, No. 23-50237 (5th Cir. April 17, 2024) (attached); *Cantwell-Cleary Co. v. Cleary Packaging, LLC (In re Cleary Packaging, LLC),* 36 F.4th 509, 517-18 (4th Cir. 2022) (attached); *In re Duntov Motor Co., LLC,* No. 21-40348, ECF No. 27 (Bankr. N.D. Tex. Aug. 26, 2021) (ruling that section 1192(2) applies to except from discharge debts of the kind specified in section 523(a) for a Subchapter V debtor that is a limited liability corporation); *In re Tonka International Corporation,* Case No. 20-40731, 2020 WL 13881422, at *5 (Bank E.D. Tex. Sept. 16, 2020) These courts examine the text of sections 1192(2) and 523(a) along with their context, chapter 11 policy, and legislative history to reach their contrasting conclusions.

In *Cantwell-Cleary Co., Inc., v. Cleary Packaging, LLC* (*In re Cleary Packaging LLC),*293 the Fourth Circuit examined the text of the two statutes and concluded that the text of section 1192 refers to the types of debts, not the types of debtors, and consequently, makes those types of debts nondischargeable to all debtors under § 1192. *Id.* at 515. The Fourth Circuit explained:

> [W]hile § 523(a) does provide that discharges under various sections, including § 1192 discharges, do not "discharge *an individual debtor* from any debt" of the kind listed, § 1192(2)'s cross-reference to § 523(a) does not refer to any *kind of debtor* addressed by § 523(a) but rather to a *kind of debt* listed in § 523(a). By referring to the *kind of debt* listed in § 523(a), Congress used a shorthand to avoid listing all 21 types of debts, which would indeed have expanded the one-page section to add several additional pages to the U.S. Code. Thus, we conclude that the *debtors* covered by the discharge language of § 1192(2) – i.e., both individual and corporate debtors – remain subject to the 21 *kinds of debt* listed in § 523(a).

Id. The Fourth Circuit held that any tension between the language of section 523(a) addressing individual debtors and the language of section 1192(2) addressing both individual and corporate debtor could be resolved by explaining that the more specific language of section 1192(2)—

[2] On April 19, 2024, the American Bankruptcy Institute issued its *Final Report of the American Bankruptcy Institute Subchapter V Task Force* (the "ABI Report"). The ABI Report agreed with the majority decisions"that a corporation's (or other entity's) discharge after nonconsensual confirmation should not be subject to the section 523(a) exceptions for the same reasons that Congress chose to provide for an exceptionless discharge of a corporation when it enacted Chapter 11 in 1978." ABI Report at p. 64.

dealing only with Subchapter V discharges—should govern over the more general provisions of section 523(a) that reference other discharges under the Bankruptcy Code. *Id.*

The minority decisions subject corporate debtors to the "21 *kinds of debt* listed in § 523(a)." *Cleary*, 36 F.4th at 515 (emphasis in original). However, many of the debts identified in Section 523(a) cannot apply to corporate debtors. *See, e.g.,* 11 U.S.C. §§ 523(a)(5) (domestic support obligations), (a)(8) (student loans), (a)(9) (death or personal injury caused by a debtor's drunk driving), (a)(15) (alimony or child support), and (a)(17) (fees imposed on a prisoner). The minority ignores this incompatibility. They also do not address Congress' clear ability to make Section 523(a) applicable to corporate debtors. *See* 11 U.S.C. § 1141(d)(6) (excepting a corporate debtor from discharge of debts specified in 523(a)(2)(A)-(B)).

III. The Difference Between "A" and "The" Matters

Section 1192(2) excepts from discharge debts "of ***the*** kind specified in section 523(a) of this title." 11 U.S.C § 1192(2). In its comparison to Section 1228(a), the Fourth Circuit noted this distinction but dismissed it as an "inconsequential difference." *Cleary*, 36 F.4th at 516, n. 2.

The difference between "a kind" and "the kind" is consequential and controlling. "Words are to be given the meaning that proper grammar and usage would assign them." *Nielsen v. Preap*, 139 S. Ct. 954, 965 (2019) (quotations omitted). When the definite article "the" is utilized, as opposed to "an" or "a," the object or class referred to is singular and definitive. *See e.g.*, *Evanto v. Fannie Mae*, 814 F.3d 1295, 1298 (11th Cir. 2016) (citation omitted). An indefinite article such as "a" or "an," however, refers to "[s]ome undetermined or unspecified particular." *McFadden v. United States*, 576 U.S. 186, 191 (2015) (quotations omitted). For example, while Section 1141(d)(6) refers to "a kind" of debt under Section 523(a)(2)(A) and (a)(2)(B), Section 1192(2) refers to "the kind" of debts under Section 523(a). "[W]hen the legislature uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 711 n.9 (2004) (citation omitted).

Thus, Section 1192(2)'s use of "the kind" refers to the specific kind of debt under Section 523(a); namely, debts that only apply to individuals. *See e.g., Nielsen v. Preap*, 139 S.Ct. 954, 965 (2019) ("Here grammar and usage establish that 'the' is 'a function word … indicat[ing] that a following noun or noun equivalent is definite or has been previously specified in context.") (internal quotations omitted). Each subparagraph under Section 523(a) is qualified by the type of debt set forth in the preamble—debts of individuals—and "the kind" of debt referenced in Section 1192(2) can therefore only be referring to debts of individuals under Section 523(a).

CREDITOR SUBCHAPTER V REMEDIES

(1) Post-Confirmation Default Remedies

11 USC 1191(c)(3)(B)(ii):
the plan provides appropriate remedies, which may include the liquidation of nonexempt assets, to protect the holders of claims or interests in the event that the payments are not made.

(a) Default Judgment

Require an uncured post-confirmation default to allow any unsecured creditor that files an affidavit of an uncured default to obtain a final money judgment from either the bankruptcy court or any court with concurrent jurisdiction over the debtor and creditor.

(b) Springing Claim

Require an uncured post-confirmation default to revive and fully allow the pre-petition claim asserted by the holder of an allowed claim irrespective of the proposed treatment of the claim under the confirmed plan.

(c) Post-confirmation Conversion to Chapter 7 or Liquidating Trust

Upon an uncured post-confirmation default, require all assets of the reorganized debtor to revest in the bankruptcy estate and have the Chapter 11 case convert to Chapter 7. Alternatively, require that all assets of the reorganized debtor shall automatically vest in a liquidating trust with the Subchapter V Trustee acting as the Liquidating Trustee to administer any assets of claims of the reorganized debtor.

(d) Appointment of Receiver

Upon an uncured post-confirmation default, require the appointment of a consensual pre-identified receiver through the commencement of a judicial dissolution case commenced by any holder of an allowed claim.

(e) Conversion to Actual Disposable Income

Upon an uncured post-confirmation default, require the reorganized debtor to fund its actual disposable income as confirmed by the Subchapter V Trustee (or any alternate individual acceptable to creditors).

(f) Liquidation Sale of Assets

Upon an uncured post-confirmation default, require the reorganized debtor to liquidate all non-exempt assets through a public auction held within 60 days of default with a pre-approved auctioneer.

(2) Plan Protections

(a) Financial Disclosures (11 USC 1190(2))

Require the reorganized debtor to provide: (i) copies of post-confirmation tax returns; (ii) annual profit and loss statements; (iii) annual balance sheet; (iv) quarterly aged A/R and inventory reports; (v) quarterly accounts payable reports; (v) quarterly plan distribution reports; (vi) quarterly monthly operating reports.

(b) Distribution of non-projected income

Require the reorganized debtor to distribute any income obtained by the reorganized debtor from a non-recurring event that is not included in the debtor's plan projections (e.g. recovery on insurance claim, disposition of material assets not in the ordinary course of debtor's business, new IP generated by reorganized debtor).

(c) Limitation on post-confirmation loans

Require the reorganized debtor to cap the amount of post-confirmation indebtedness the reorganized debtor can solicit until all plan payments are completed. Use the Subchapter V Trustee (or a consensual alternative) to approve any post-confirmation financing.

(3) Pre-confirmation Protections

(a) Valuation of Collateral (11 USC 506)

Holders of general unsecured claims should consider whether to have the debtor obtain a valuation determination for collateral that maybe overvalued as of the petition date.

(b) 1111(b) Election

Holders of secured claims should evaluate whether to exercise an 1111(b) election for collateral that projects to considerably appreciate over the projected timeframe of the debtor's plan.

(c) Administrative Claims Bar Date

Holders of claims should require the entry of an administrative claims bar date to obtain certainty as to the amount of allowed administrative claims treated under the plan.

(d) Compelling rejection of burdensome executory contracts (11 USC 365)

Holders of claims should evaluate the executory contracts assumed under the plan and inquire as to whether the debtor should be compelled to reject executory contracts that do not provide a material economic benefit to the debtor's estate.

(e) Compelling the abandonment of burdensome collateral or claims (11 USC 554)

Holders of claims should evaluate whether the debtor should retain collateral not necessary to the debtor's reorganization or causes of action that do not provide economic value to the reorganized debtor.

(f) Reconciliation of material claims (11 USC 502)

Holders of claims should consider seeking the disallowance pre-confirmation of any material claims that significantly alter the proposed distributions under the debtor's plan.

Majority Holding
Examples

656 B.R. 628
United States Bankruptcy Court, N.D. Illinois, Eastern Division.

IN RE: R&W CLARK CONSTRUCTION, INC., Debtor.
Chicago & Vicinity Laborers' District Council Pension Plan, Chicago & Vicinity District Council Laborers' Welfare Plan, Chicago & Vicinity District Council Retiree Welfare Plan and Catherine Wenskus, not individually but as Administrator of the Funds, Plaintiffs,
v.
R&W Clark Construction, Inc., Defendant.

Case No. 23bk03279
|
Adv. No. 23ap00127
|
Signed February 8, 2024

Synopsis
Background: Pension and welfare plans as well as administrator of funds brought adversary proceeding against Chapter 11 debtor corporation, seeking judgment of nondischargeability for unpaid fringe benefit contributions, dues, interest, liquidated damages, and audit costs. Debtor moved to dismiss for failure to state a claim.

Holdings: The Bankruptcy Court, Timothy A. Barnes, J., held that:

[1] debtor's motion to dismiss nondischargeability causes of action was "core" proceeding;

[2] Bankruptcy Court had statutory and constitutional authority to hear and determine both adversary complaint and debtor's motion to dismiss;

[3] Bankruptcy Code's nondischargeability provisions were not applicable to corporate debtor, whether proceeding in Subchapter V or otherwise; and

[4] dismissal of adversary complaint with prejudice was appropriate, since complaint sounded entirely in causes of action under nondischargeability provisions.

Motion granted.

Procedural Posture(s): Motion to Dismiss for Failure to State a Claim.

West Headnotes (15)

[1] **Bankruptcy** Bankruptcy judges

Bankruptcy court must have constitutional authority to hear and determine a matter. U.S. Const. art. 3, § 1 et seq.

[2] **Bankruptcy** Bankruptcy Jurisdiction
Bankruptcy Core, Non-Core, or Related Proceedings in General; Nexus
Bankruptcy Consent to or Waiver of Objections to Jurisdiction or Venue

Bankruptcy court has constitutional authority when matter originates under the Bankruptcy Code or, in noncore matters, where the matter is either one that falls within "public rights" exception, or where the parties have consented, either expressly or impliedly, to the bankruptcy court hearing and determining the matter. U.S. Const. art. 3, § 1 et seq.

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

Action under Bankruptcy Code provision governing exceptions to discharge is unequivocally a bankruptcy cause of action, for purposes of determining bankruptcy court's constitutional authority to hear and determine matter, as it arises in a case under title 11 and the Code specifies it as a core proceeding, and while such actions may turn on state law, determining the scope of a debtor's discharge is

a fundamental part of the bankruptcy process. U.S. Const. art. 3, § 1 et seq.; 11 U.S.C.A. § 523; 28 U.S.C.A. § 157(b)(2)(I).

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

Chapter 11 debtor corporation's motion to dismiss adversary proceeding brought by pension and welfare plans as well as administrator of funds, which sought judgment of nondischargeability for unpaid fringe benefit contributions, dues, interest, liquidated damages, and audit costs, was "core" proceeding within Bankruptcy Court's jurisdiction to determine. 28 U.S.C.A. § 157(b)(2)(I).

[5] **Bankruptcy** Particular proceedings or issues
Bankruptcy Assertion of claim against estate

Bankruptcy Court had statutory and constitutional authority to hear and determine both adversary complaint brought by pension and welfare plans and administrator of funds, which sought judgment of nondischargeability for unpaid fringe benefit contributions, dues, interest, liquidated damages, and audit costs, and Chapter 11 debtor corporation's motion to dismiss the complaint for failure to state a claim; by commencing the adversary proceeding and filing claims in the main case, plaintiffs unequivocally submitted themselves to the jurisdiction and authority of the Court on those matters, and no party objected to the Court entering final orders on the motion to dismiss and thus all parties impliedly consented to the Court's authority. U.S. Const. art. 3, § 1 et seq.; Fed. R. Civ. P. 12(b)(6); Fed. R. Bankr. P. 7012.

[6] **Bankruptcy** Debts and Liabilities Discharged

Bankruptcy Code's exceptions to dischargeability apply only to individuals. 11 U.S.C.A. § 523(a).

[7] **Statutes** Statutory Alteration or Abrogation of Common Law
Statutes Common or civil law

When statute might be interpreted to vary from accumulated settled meaning in common law, Congress must be unmistakably clear of its intent to do so; such intent must be made with specificity and cannot be done through implication.

[8] **Bankruptcy** Debts and Liabilities Discharged

Bankruptcy Code's nondischargeability provisions were not applicable to corporate debtor, whether proceeding in Subchapter V or otherwise. 11 U.S.C.A. §§ 523(a), 1192(2).

[9] **Bankruptcy** Pleading; dismissal

Motion to dismiss for failure to state a claim challenges the sufficiency of the complaint to state a claim upon which relief may be granted. Fed. R. Civ. P. 12(b)(6); Fed. R. Bankr. P. 7012.

[10] **Bankruptcy** Pleading; dismissal

To survive a motion to dismiss for failure to state a claim, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. Fed. R. Civ. P. 12(b)(6); Fed. R. Bankr. P. 7012.

[11] **Bankruptcy** Pleading; dismissal

In assessing sufficiency of complaint on motion to dismiss for failure to state a claim, court views the complaint in the light most favorable to the plaintiff, taking as true all well-pleaded factual allegations and making all possible inferences from the allegations in the plaintiff's favor. Fed. R. Civ. P. 12(b)(6); Fed. R. Bankr. P. 7012.

[12] **Bankruptcy** Pleading; dismissal

To survive motion to dismiss for failure to state claim, allegations of complaint must raise plaintiff's right to relief above speculative level. Fed. R. Civ. P. 12(b)(6); Fed. R. Bankr. P. 7012.

[13] **Bankruptcy** Pleading; dismissal

Standard for evaluating sufficiency of complaint on motion to dismiss for failure to state a claim is not whether plaintiff will ultimately prevail, but whether plaintiff is entitled to offer evidence to support claims. Fed. R. Civ. P. 12(b)(6); Fed. R. Bankr. P. 7012.

[14] **Bankruptcy** Pleading; dismissal

When complaint pleads for relief under inapplicable statute and makes no other claims, no set of facts even if well pled could allow such matter to proceed to discovery; such complaint fails to state claim upon which relief can be granted and must be dismissed, and dismissal with prejudice is appropriate. Fed. R. Civ. P. 12(b)(6); Fed. R. Bankr. P. 7012.

[15] **Bankruptcy** Hearing and Determination; Default

Dismissal of adversary complaint with prejudice was appropriate upon granting Chapter 11 debtor corporation's motion to dismiss pension plan's nondischargeability claim, since Bankruptcy Code's nondischargeability provisions did not apply to corporate debtor. 11 U.S.C.A. § 523(a); Fed. R. Civ. P. 12(b)(6); Fed. R. Bankr. P. 7012.

Attorneys and Law Firms

***630** Attorneys for Plaintiffs: Karen I. Engelhardt and Patrick Foote, Allison, Slutsky & Kennedy P.C., Chicago, IL.

Attorneys for Defendant: Gregory K. Stern, Monica C. O'Brien, Dennis E. Quaid and Rachel S. Sandler, Gregory K. Stern, P.C., Chicago, IL.

MEMORANDUM DECISION

TIMOTHY A. BARNES, Judge.

This matter comes on for consideration on the Motion to Dimsiss [sic] Adversary Complaint [Adv. Dkt. No. 12] (the "Motion to Dismiss"), filed by R&W Clark Construction Inc. ("R&W"), the defendant in the above-captioned adversary proceeding (the "Adversary Proceeding") and debtor in the above-captioned chapter 11 bankruptcy case (the "Main Case").[1]

The Motion to Dismiss seeks dismissal of the Adversary Complaint [Adv. Dkt. No. 1] (the "Complaint") brought by the Chicago & Vicinity Laborers' District Council Pension Plan, the Chicago & Vicinity District Council Laborers' Welfare Plan, the Chicago & Vicinity Laborers' District Council Retiree Welfare Plan (collectively "Funds"), and Catherine Wenskus, as Administrator of the Funds (together with the Funds, the "Plaintiffs"). In the Complaint, the Plaintiffs seek a judgment of nondischargeability against R&W for all unpaid fringe benefit contributions, dues, interest, liquidated damages and audit costs due and owing on the audit for the period of October 1, 2014, to and including December 31, 2018, including Plaintiffs' reasonable attorneys' fees and costs incurred, as follows (the "Counts" and as to each, "Count __"):

> Count I: For money, property, services or an extension, renewal or refinancing of credit that was obtained by false pretenses, false representation or actual fraud pursuant to 11 U.S.C. § 523(a)(2)(A);
>
> Count II: For money, property, services or an extension, renewal or refinancing of credit that was obtained by ***631** materially false statements pursuant to 11 U.S.C. § 523(a)(2)(B); and
>
> Count III: For willful and malicious injury by R&W to another entity or to the property of another entity pursuant to 11 U.S.C. § 523(a)(6).

The Motion to Dismiss advocates for dismissal on two grounds: That the Plaintiffs are unentitled to relief under these Counts as R&W is not an individual debtor and that the Complaint insufficiently pleads relief in Count II.

For the reasons more fully set forth below, upon review of the parties' respective filings and after conducting a hearing on the matter, the Court finds that the Motion to Dismiss is well taken. As a result, by separate order entered concurrent herewith, the Motion to Dismiss with be GRANTED and the Complaint will be DISMISSED.

JURISDICTION

The federal district courts have "original and exclusive jurisdiction" of all cases under title 11 of the United States Code, 11 U.S.C. §§ 101, *et seq.* (the "Bankruptcy Code"). 28 U.S.C. § 1334(a). The federal district courts also have "original but not exclusive jurisdiction" of all civil proceedings arising under the Bankruptcy Code or arising in or related to cases under the Bankruptcy Code. 28 U.S.C. § 1334(b). District courts may refer these cases to the bankruptcy courts for their districts. 28 U.S.C. § 157(a). In accordance with section 157(a), the District Court for the Northern District of Illinois has referred all of its bankruptcy cases to the Bankruptcy Court for the Northern District of Illinois. N.D. Ill. Internal Operating Procedure 15(a).

A bankruptcy court judge to whom a case has been referred has statutory authority to enter final judgment on any core proceeding arising under the Bankruptcy Code or arising in a case under the Bankruptcy Code. 28 U.S.C. § 157(b)(1). Bankruptcy court judges must therefore determine, on motion or *sua sponte*, whether a proceeding is a core proceeding or is otherwise related to a case under the Bankruptcy Code. 28 U.S.C. § 157(b)(3). As to the former, the bankruptcy court judge may hear and determine such matters. 28 U.S.C. § 157(b)(1). As to the latter, the bankruptcy court judge may hear the matters, but may not decide them without the consent of the parties. 28 U.S.C. §§ 157(b)(1) & (c). Absent consent, the bankruptcy court judge must "submit proposed findings of fact and conclusions of law to the district court, and any final order or judgment shall be entered by the district judge after considering the bankruptcy judge's proposed findings and conclusions and after reviewing *de novo* those matters to which any party has timely and specifically objected." 28 U.S.C. § 157(c)(1).

[1] [2]In addition to the foregoing considerations, a bankruptcy court judge must also have constitutional authority to hear and determine a matter. *Stern v. Marshall*, 564 U.S. 462, 131 S.Ct. 2594, 180 L.Ed.2d 475 (2011). Constitutional authority exists when a matter originates under the Bankruptcy Code or, in noncore matters, where the matter is either one that falls within the public rights exception, *id.*, or where the parties have consented, either expressly or impliedly, to the bankruptcy court judge hearing and determining the matter. *See, e.g., Wellness Int'l Network, Ltd. v. Sharif*, 575 U.S. 665, 669, 135 S.Ct. 1932, 191 L.Ed.2d 911 (2015) (parties may consent to a bankruptcy court judge's jurisdiction); *Richer v. Morehead*, 798 F.3d 487, 490 (7th Cir. 2015) (noting that "implied consent is good enough").

[13]"[A]n action under section 523 of the Bankruptcy Code is unequivocally a ***632** bankruptcy cause of action. *In re Glenn*, 502 B.R. 516, 522 (Bankr. N.D. Ill. 2013) (Barnes, J.), *aff'd sub nom. Sullivan v. Glenn*, 526 B.R. 731 (N.D. Ill. 2014), *aff'd,* 782 F.3d 378 (7th Cir. 2015). It arises in a case under title 11 and the code specifies it as a core proceeding. 28 U.S.C. § 157(b)(2)(I). While such actions may turn on state law, determining the scope of a debtor's discharge is a fundamental part of the bankruptcy process. *See Deitz v. Ford* (*In re Deitz*), 469 B.R. 11, 20 (B.A.P. 9th Cir. 2012). As observed by one bankruptcy court, "there can be little doubt that [a bankruptcy court], as an Article I tribunal, has the constitutional authority to hear and finally determine what claims are nondischargeable in a bankruptcy case." *Farooqi v. Carroll* (*In re Carroll*), 464 B.R. 293, 312 (Bankr. N.D. Tex. 2011); *see also Deitz*, 469 B.R. at 20; *In re Boricich*, 464 B.R. [335] at 337 [(Bkrtcy.N.D.Ill. 2011)].

Handler v. Moore (*In re Moore*), 625 B.R. 896, 900 (Bankr. N.D. Ill. 2021) (Barnes, J.).

[14] [15]It follows that a Motion to Dismiss such an action is also a core proceeding within this court's jurisdiction to determine. By commencing the Adversary Proceeding and filing claims in the Main Case, the Plaintiffs have unequivocally submitted themselves to the jurisdiction and authority of the court on these matters. *Langenkamp v. Culp*, 498 U.S. 42, 43, 111 S.Ct. 330, 112 L.Ed.2d 343 (1990). Further, no party has objected to the Court entering final orders on the Motion to Dismiss and thus all parties have impliedly consented to this Court's jurisdiction and authority. *See Wellness*, 575 U.S. at 669, 135 S.Ct. 1932; *Richer*, 798 F.3d at 490; *Moore*, 625 B.R. at 900.

Accordingly, the Court has the jurisdiction, statutory authority and constitutional authority to hear and determine both the Complaint and the Motion to Dismiss.

PROCEDURAL HISTORY

In taking up the Motion to Dismiss, the Court has considered the Complaint, the Motion to Dismiss, and the arguments of the parties at the hearing on December 6, 2023, and has reviewed and considered the following filed documents relating to the Motion to Dismiss:

(1) [Scheduling] Order [Adv. Dkt. No. 17];

(2) Plaintiffs' Response to Defendant's Motion to Dismiss Adversary Complaint [Adv. Dkt. No. 31]; and

(3) Reply in Support of Dismissal of Adversary Proceeding [Adv. Dkt. No. 35].

The court has also taken into consideration any and all exhibits submitted in conjunction with the foregoing. Though these items do not constitute an exhaustive list of the filings in the Adversary Proceeding or Main Case, the court has taken judicial notice of the contents of the dockets in this matter. *See Levine v. Egidi*, Case No. 93C188, 1993 WL 69146, at *2 (N.D. Ill. Mar. 8, 1993) (authorizing a bankruptcy court to take judicial notice of its own docket); *In re Brent*, 458 B.R. 444, 455 n.5 (Bankr. N.D. Ill. 2011) (Goldgar, J.) (recognizing same).

SUMMARY OF ISSUES PRESENTED

The matter before the court presents somewhat of a *cause célèbre* in the bankruptcy world in recent years.[2] On August ***633** 23, 2019, Congress enacted the Small Business Reorganization Act of 2019, Public Law No. 116-54 (August 23, 2019) (the "SBRA"). In the SBRA, Congress created a somewhat simpler path for business reorganizations under chapter 11 of the Bankruptcy Code. This simpler path has been codified into chapter 11 of the Bankruptcy Code as Subchapter V (Small Business Reorganization), 11 U.S.C. §§ 1181–95 ("Subchapter V").

As with any change to an existing statute, the way in which the change is integrated with what comes before is crucial to understanding how the change will operate. Subchapter V is no different. What is, perhaps, different, is that Congress gave the courts little or no guidance as to what it intended in making its changes, leaving it to the courts to divine Congress's intent on issues such as that at bar.

The issue is a simple one, best asked in the form of questions: Did Congress, in enacting the SBRA and codifying Subchapter V intend to upset the existing scheme of discharge of debts for business entities? Further, regardless of Congress's intent, does the plain language of what was enacted have that effect? If the latter answer is no, then the Motion to Dismiss is well taken. The Complaint must be dismissed because an action for nondischargeability under section 523 of the Bankruptcy Code does not sound against business entities. If it is yes, then the Motion to Dismiss fails at least on this theory.

DISCUSSION

The Plaintiffs here seek a judgment of nondischargeability under section 523(a) of the Bankruptcy Code against R&W, a business entity. Plaintiffs are aware of R&W's status as an Illinois corporation and have pled the same in the Complaint. Compl., at ¶ 5.

[6]But nondischargeability under section 523(a) applies only to individuals. 11 U.S.C. § 532(a) ("A discharge under section ... 1141 ... does not discharge *an individual debtor* from any debt ....") (emphasis added). Congress, perhaps thinking it tautological, did not see fit to define what an individual means in the context of the Bankruptcy Code. But in other definitions, Congress made clear that corporations are not individuals. For example, in defining "person," Congress makes clear that a person can include an individual, a partnership and a corporation. 11 U.S.C. § 101(41).

So a corporation is not an individual and thus section 523(a) does not apply. *Yamaha Motor Corp. v. Shadco, Inc.*, 762 F.2d 668, 670 (8th Cir. 1985) (Affirming a bankruptcy court's dismissal of a section 523(a) action against a corporate debtor, as "Congress clearly did not intend the term 'corporate debtor' to be used interchangeably with the term 'individual debtor,' as such a construction would 'render meaningless employment by Congress of the term 'individual'.' ") (citation omitted); *see also Spring Valley Farms, Inc. v. Crow (In re Spring Valley Farms, Inc.)*, 863 F.2d 832, 834 (11th Cir. 1989) (same); *Boyle v. PMA Med. Specialists, LLC*, 754 F. App'x 93, 96 (3d Cir. 2019) (same). End of story.

Not so fast. While section 523 seems to speak for itself, Congress also addressed this issue in section 1141, the discharge provisions for chapter 11. In section 1141, Congress stated what should perhaps have been obvious from the plain language of section 523(a), that "[a] discharge under this chapter does not discharge a debtor who is an individual from any debt excepted from discharge under section 523 of this title." 11 U.S.C. § 1141(d)(2). Now that statement was indeed tautological, as section 523 applies to all later chapters of the Bankruptcy Code, *see* 11 U.S.C. § 103(a) ("chapters 1, 3, and 5 of this title apply in a ***634** case under chapter ... 11"), and already, as discussed above, excludes individuals. So once again, end of story, right?

Once again, not so fast. In enacting the SBRA and codifying Subchapter V, Congress once again chose not to let the existing language speak for itself. In section 1192, Congress stated that "the court shall grant the debtor a discharge ... except any debt ... *of the kind* specified in section 523(a) of this title." 11 U.S.C. § 1192(2) (emphasis added). At the same time, the SBRA amended the text of section 523(a) to make clear that it applied to discharges under section 1192. 11 U.S.C. § 523(a).

What are courts supposed to do with this new "of the kind" language? Did Congress intend, by including this phrase and once again qualifying the discharge under chapter 11, to undo the express language of sections 523(a) and 1141(d)(2) and to subject corporate debtors to nondischargeability actions simply because they chose to proceed under Subchapter V?

That is certainly one possibility and has led some courts to conclude that Congress did so intend. *See, e.g.*, *Cantwell-Cleary Co., Inc. v. Cleary Packaging, LLC (In re Cleary Packaging, LLC)*, 36 F.4th 509, 515 (4th Cir. 2022).

But other courts take, what this court believes to be, a more conservative approach. *See, e.g.*, *Lafferty v. Off-Spec Sols., LLC (In re Off-Spec Sols., LLC)*, 651 B.R. 862 (B.A.P. 9th Cir. 2023), *appeal dismissed,* Case No. 23-60034, 2023 WL 9291577 (9th Cir. Nov. 2, 2023).

With this in mind, the court considers the positions taken in each of the above-cited leading cases on the issue.

A. *Cleary Packaging* – Section 523 Applies to Corporate Subchapter V Debtors

In *Cleary Packaging*, the Fourth Circuit considered the issue on direct appeal from the bankruptcy court's dismissal for failure to state a claim in a section 523(a) adversary proceeding against a corporate Subchapter V debtor. *Cleary Packaging*, 36 F.4th at 512.

The Fourth Circuit first focused on the language of section 1192, that a discharge thereunder does not apply to "any debt ... of the kind specified in section 523(a) of this title." 11 U.S.C. § 1192(2). The Fourth Circuit found the reference to debt telling, concluding that this phrase was a shortcut to applying the subsections of section 523(a) without the limiting language of section 523(a) itself. As it stated, "[b]y referring to the *kind of debt* listed in § 523(a), Congress used a shorthand to avoid listing all 21 types of debts [sic], which would indeed have

expanded the one-page section to add several additional pages to the U.S. Code. Thus, we conclude that *the debtors* covered by the discharge language of § 1192(2) — *i.e.*, both individual and corporate debtors — remain subject to the 21 *kinds of debt* listed in § 523(a)." *Cleary Packaging*, 36 F.4th at 515 (emphasis in original).

Further, the Fourth Circuit wrote that the more specific provisions of section 1192(2) should govern the more general provisions of section 523(a). *Id.*; *see also, e.g.*, *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384, 112 S.Ct. 2031, 119 L.Ed.2d 157 (1992) ("it is a commonplace of statutory construction that the specific governs the general"); *Busic v. United States*, 446 U.S. 398, 406, 100 S.Ct. 1747, 64 L.Ed.2d 381 (1980) ("[A] more specific statute will be given precedence over a more general one, regardless of their temporal sequence."); *In re Concepts America, Inc.*, 625 B.R. 881, 887 (Bankr. N.D. Ill. 2021) (Cleary, J.) ("The general/specific canon is perhaps the most frequently applied ***635** to statutes in which a general permission or prohibition is contradicted by a specific prohibition or permission.") (*quoting RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645, 132 S.Ct. 2065, 182 L.Ed.2d 967 (2012)).

Going further, the Fourth Circuit appeared to find that Congress's restating in each individual chapter of the Bankruptcy Code whether the discharge therein applies to individuals, corporations, or both, *see, e.g.*, 11 U.S.C. §§ 727(a)(1), 1141(d)(2), (5) & 1328, was evidence of Congress's intent to not rely on the scheme set forth in section 523(a). *Cleary Packaging*, 36 F.4th at 516.

The Fourth Circuit appeared also to conclude that the use of the phrase "of a kind" was an intentional choice of Congress to "import" similar language from chapter 12. *Id.*; *see* 11 U.S.C. § 1228(a). As the Fourth Circuit observed, courts that had construed that phrase in section 1228 had concluded that it overrode the express language of section 523(a). *Cleary Packaging*, 36 F.4th at 516; *S.W. Ga. Farm Credit, Aca v. Breezy Ridge Farms, Inc.* (*In re Breezy Ridge Farms, Inc.*), Adv. Case No. 09-1011, 2009 WL 1514671, at *2 (Bankr. M.D. Ga. May 29, 2009); *New Venture P'ship v. JRB Consol., Inc.* (*In re JRB Consol., Inc.*), 188 B.R. 373, 374 (Bankr. W.D. Tex. 1995).

Finally, projecting what Congress's intent might have been on this point in the SBRA, the Fourth Circuit hypothesized that Congress might have added "an additional layer of fairness to balance against the altered order of priority [by eliminating the absolute priority rule in Subchapter V cases] that favors the debtor." *Cleary Packaging*, 36 F.4th at 517.

As is clear from the foregoing, many of the conclusions—especially those that appear to project Congress's intentions—are suspect. Not surprisingly, the Plaintiffs cite no decision on this issue adopting the reasoning of *Cleary Packaging*. The court's own review of the case law has found none either, published or unpublished.

B. *Off-Spec Solutions* – Section 523 Does Not Apply to Corporate Subchapter V Debtors

The better position is that espoused in *Off-Spec Solutions*. *Off-Spec Sols.*, 651 B.R. at 867. In *Off-Spec Solutions*, the Ninth Circuit Bankruptcy Appellate Panel considered these same issues, but began by pointing out that every court other than the one in *Cleary Packaging* that has considered this issue has concluded the opposite of *Cleary Packaging*. *Id.* at 865 (*citing to BenShot, LLC v. 2 Monkey Trading, LLC* (*In re 2 Monkey Trading, LLC*), 650 B.R. 521 (Bankr. M.D. Fla. 2023); *Nutrien Ag Sols., Inc. v. Hall* (*In re Hall*), 651 B.R. 62 (Bankr. M.D. Fla. 2023); *Avion Funding, LLC v. GFS Indus., LLC* (*In re GFS Indus., LLC*), 647 B.R. 337 (Bankr. W.D. Tex. 2022); *Jennings v. Lapeer Aviation, Inc.* (*In re Lapeer Aviation, Inc.*), Adv. Case No. 22-3002, Case No. 21-31500-jda, 2022 WL 1110072 (Bankr. E.D. Mich. Apr. 13, 2022); *Catt v. Rtech Fabrications, LLC* (*In re Rtech Fabrications, LLC*), 635 B.R. 559 (Bankr. D. Idaho 2021); *Cantwell-Cleary Co. v. Cleary Packaging LLC* (*In re Cleary Packaging LLC*), 630 B.R. 466 (Bankr. D. Md. 2021), *rev'd*, 36 F.4th 509 (4th Cir. 2022); *Gaske v. Satellite Rests. Inc. Crabcake Factory USA* (*In re Satellite Rests. Inc. Crabcake Factory USA*), 626 B.R. 871 (Bankr. D. Md. 2021)).

The Panel in *Off-Spec Solutions* began where such inquiries should begin, with a plain language analysis of the language of the statute itself. *Off-Spec Sols.*, 651 B.R. at 866 (*citing to United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241, 109 S.Ct. 1026, 103 L.Ed.2d 290 (1989)). As it stated, ***636** "[s]ection 523(a) unambiguously applies only to individual debtors."). *Id.* at 867. It found that section 1192(2) created no ambiguity when viewed in the light that "§ 1192 reiterates § 523(a)'s application to debtors under subchapter V, and § 523(a) limits its applicability to individuals." *Id.* Ambiguity, it observed, was created when trying to read section 1192(2) as obviating "the express limitation in the preamble of § 523(a) or otherwise expand[ing] its scope to corporate debtors." *Id.*

It also considered the amendment to section 523(a)'s preamble in the SBRA as telling. If, it reasoned, section 1192(2) was there to change the operation of section 1141, then there was no need to add section 1192 to section 523(a). The existing reference to section 1141 would have sufficed. *Id.* Further, the addition of section 1192 to section 523(a)'s preamble, the very preamble that the Fourth Circuit believed did not apply to section 1192, would be nonsensical. The Fourth Circuit's reading would render the addition to section 523(a) meaningless, which in turn would violate the canon against surplusage. *Id.* at 867–68 (*citing to Marx v. Gen. Revenue Corp.*, 568 U.S. 371, 386, 133 S.Ct. 1166, 185 L.Ed.2d 242 (2013) ("[T]he canon against surplusage is strongest when an interpretation would render superfluous another part of the same statutory scheme.")).

The Ninth Circuit also rejected the Fourth Circuit's reading of the general/specific canon. In addition to taking issue with the scope of the Fourth Circuit's application of the canon, as the Panel pointed out, the canon is only applicable when two statutes cannot be reconciled. *Id.* at 868. Only the Fourth Circuit's reading of section 1192(2) creates an irreconcilable difference. Without such a conflict, the canon simply does not apply. *Id.*

The Panel next took up the issue of section 1192 in the context of chapter 11 itself as well as within the Bankruptcy Code as a whole. *Id.* at 868–69. As to the former, there is no question that corporate debtors are not subject to section 523(a) actions in chapter 11 as a whole. Section 1141 makes that clear. But even without section 1141, the context of the Bankruptcy Code makes clear that this would be the case. The preamble of section 523(a) would achieve that same result, and section 103 of the Bankruptcy Code makes section 523(a) applicable to all subsequent chapters. *Id.* While Congress's inclusion of references to section 523 in subsequent chapters is redundant, *id.* at 868, "redundancies are common in statutory drafting—sometimes in a congressional effort to be doubly sure, sometimes because of congressional inadvertence or lack of foresight, or sometimes simply because of the shortcomings of human communication." *Barton v. Barr*, 590 U.S. ——, 140 S. Ct. 1442, 1453, 206 L.Ed.2d 682 (2020). "Redundancy in one portion of a statute is not a license to rewrite or eviscerate another portion of the statute contrary to its text ...." *Id.*

As to chapter 12, the Ninth Circuit found that the cases relied on by *Cleary Packaging* were inapplicable as they too attempted to apply the general/specific canon which, unless a court were to adopt the *Cleary Packaging* reading to create ambiguity, would not apply. *Id.* at 870. Further and more compelling, the Panel found that the phrase in question—"of a kind"—in chapter 12 existed in chapter 13 prior to its incorporation in chapter 12. *Id.*; *see* 11 U.S.C. § 1328(c). As the Ninth Circuit Panel observed, to read the "of a kind" language in chapter 12 as an intentional workaround to the preamble of section 523(a) makes no sense in the context of chapter 13, which applies only to individual debtors. What, exactly, would Congress have been working around in section 1328(c)? *Id.* at 871.

***637** Finally, the Ninth Circuit rightfully questioned the Fourth Circuit's projection of Congress's intent. *Id.* at 872. Rather than attempt to substitute a separate, projected rationale, the Panel questioned the Fourth Circuit's conclusion that the application of section 523 to Subchapter V corporate debtors was a true *quid pro quo* for the elimination of the absolute priority rule. *Id.* As it stated, "[r]endering certain debts nondischargeable is more likely to harm most general unsecured creditors by steering small businesses with nondischargeable debts toward liquidation." *Id.* "Construing § 1192 to make debts nondischargeable for corporate debtors offers little benefit to unsecured creditors in small business cases and poses serious obstacles to the stated purpose of the SBRA to make reorganization efficient and expeditious for small business debtors." *Id.* at 873.

C. Reconciling the Positions

As is no doubt clear from the foregoing descriptions, the court is not swayed by the reasoning of *Cleary Packaging*. Not only does it project rationales for Congress without evidence of the same, but it creates more problems for the statutes in question than it solves. Further, there can be no question that had Congress the intent projected on it by the Fourth Circuit, there were countless clearer and simpler ways to achieve that end. The reasoning of *Off-Spec Solutions* is much more compelling. Not only does it point out the preceding flaws, but it makes a compelling case that the conclusions drawn from the same language in chapter 12 are fundamentally flawed.

There is, quite frankly, no ambiguity in the language. Imprecision is not ambiguity. *In re Spiegel*, 638 B.R. 606, 614 (Bankr. N.D. Ill. 2022) (Barnes, J.). There is no reasonable reading of the language that results in the conclusion that its intent is anything other than to reiterate what Congress had already written in section 523(a)—something Congress has done throughout the

Bankruptcy Code. The courts should be very hesitant to substitute their legislative intent for Congress's in mere cases of statutory imprecision.

[7]Recently this court observed that when a statute might be interpreted to vary from an "accumulated settled meaning" in common law, Congress must be "unmistakably clear" of its intent to do so. *In re Hicks*, 653 B.R. 562, 567–68 (Bankr. N.D. Ill. 2023) (Barnes, J.) (*citing to N.L.R.B. v. Amax Coal Co.*, 453 U.S. 322, 329, 101 S.Ct. 2789, 69 L.Ed.2d 672 (1981)). "[S]uch intent must be made with specificity and cannot be done through implication." *Id.* at 568 (*citing to BFP v. Resol. Tr. Corp.*, 511 U.S. 531, 546, 114 S.Ct. 1757, 128 L.Ed.2d 556 (1994); *Pac. Gas & Elec. Co. v. Ad Hoc Comm. of Holders of Trade Claims (In re PG&E Corp.)*, 46 F.4th 1047, 1058 (9th Cir. 2022), *cert. denied Pac. Gas & Elec. Co. v. Ad Hoc Comm. of Holders of Trade Claims*, ——U.S. ——, 143 S. Ct. 2492, 216 L.Ed.2d 454 (2023)).

While these rules may not directly apply to a statutory change that upsets the existing scheme of the statute, they should. There is nothing other than implication to support the *Cleary Packaging* reading of the sections. The better reading of sections 1192(2) and 523(a) is that Congress did not through inartful language attempt to upset the existing, fundamental nature of either chapter 11 or the Bankruptcy Code as a whole.

[8]As a result, section 523(a) simply does not apply to corporate debtors in chapter 11, whether they be in Subchapter V or otherwise. As a result, the court must take up the Motion to Dismiss's request for dismissal under the Federal Rules of ***638** Civil Procedure (the "Civil Rules" and as to each, "Civil Rule __").

Civil Rule 12 provides, in pertinent part, that a party may seek dismissal of a complaint for the "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6) (made applicable to this adversary proceeding by Rule 7012 of the Federal Rules of Bankruptcy Procedure). As this court has stated:

> [9] [10] [11]A motion to dismiss under Rule 12(b)(6) challenges the sufficiency of the complaint to state a claim upon which relief may be granted. "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' " *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L.Ed. 2d 868 (2009) (*citing Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L.Ed. 2d 929 (2007)). In assessing sufficiency, the [c]ourt views the complaint "in the light most favorable to the plaintiff, taking as true all well-pleaded factual allegations and making all possible inferences from the allegations in the plaintiff's favor." *Anchorbank, FSB v. Hofer*, 649 F.3d 610, 614 (7th Cir. 2011).
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> *Muhammad v. Reed (In re Reed)*, 532 B.R. 82, 87–88 (Bankr. N.D. Ill. 2015) (Barnes, J.).

[12] [13]The allegations of the Complaint must raise the Plaintiffs' right to relief above a "speculative level." *Brandt v. PlainsCapital Leasing, LLC (In re Equip. Acquisition Res., Inc.)*, 502 B.R. 784, 791 (Bankr. N.D. Ill. 2013) (Barnes, J.) (*citing to Twombly*, 550 U.S. at 570, 127 S.Ct. 1955). Thus the standard for evaluating the sufficiency of the Complaint "is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." *Anchorbank*, 649 F.3d at 614 (citation omitted); *see also Doe v. Smith*, 429 F.3d 706, 708 (7th Cir. 2005).

[14]When a complaint pleads for relief under an inapplicable statute and makes no other claims, no set of facts even if well plead could allow such a matter to proceed to discovery. Such a complaint fails to state a claim upon which relief can be granted, Fed. R. Civ. P. 12(b)(6), and must be dismissed. *Beezley v. Fremont Indem. Co.*, 804 F.2d 530, 531 (9th Cir. 1986); *see also Jackson v. Michigan State Democratic Party*, 593 F. Supp. 1033, 1045 (E.D. Mich. 1984). Further, dismissal with prejudice is appropriate. *Beezley*, 804 F.2d at 531.

CONCLUSION

[15]Given that section 523(a) does not apply to the Debtor here and the Complaint sounds entirely in causes of action under section 523(a), the Complaint fails to state a claim upon which relief can be granted. As result, the Motion to Dismiss must be GRANTED and the Complaint DISMISSED, with prejudice. The court need not reach the Plaintiffs' alternative arguments under section 523(a).

A separate order will be entered concurrently with this Memorandum Decision to that effect.

ORDER GRANTING MOTION TO DISMISS [DKT. NO. 12] AND DISMISSING WITH PREJUDICE ADVERSARY PROCEEDING

On R&W Clark Construction Inc.'s Motion to Dismiss Adversary Complaint [Adv. Dkt. No. 12] (the "Motion to Dismiss") filed in the above-captioned adversary proceeding; the court having jurisdiction, statutory authority and constitutional authority over the subject matter and the parties; ***639** the court having considered the Motion to Dismiss and all filings relating thereto; the court further having considered the arguments of the parties at the hearings thereon; and the court having issued a Memorandum Decision on this same date and for the reasons set forth in detail therein;

NOW, THEREFORE, IT IS HEREBY ORDERED THAT:

1. The Motion to Dismiss is GRANTED; and

2. The above-captioned adversary proceeding is DISMISSED, with prejudice.

All Citations

656 B.R. 628, 73 Bankr.Ct.Dec. 75

Footnotes

[1] References to docket entries in Adversary Proceeding will be denoted as "Adv. Dkt. No. ___." References to docket entries in the Main Case will be denoted as "Dkt. No. ___."

[2] *See* 31st Annual Duberstein Moot Court Competition Problem (2023) [available at https://www.stjohns.edu/sites/default/files/2023-01/2023 % 20Duberstein % 20Problem % 20Updated.pdf] [last visited February 5, 2024].

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650 B.R. 521
United States Bankruptcy Court, M.D. Florida, Orlando Division.

IN RE: 2 MONKEY TRADING, LLC, and Lucky Shot USA, LLC, Debtors.
BenShot, LLC, Plaintiff,
v.
2 Monkey Trading, LLC, and Lucky Shot USA, LLC, Defendants.

Case No. 6:22-bk-04099-TPG
|
Adversary No. 6:23-ap-00007-TPG
|
Signed April 28, 2023

Synopsis
Background: Creditor filed adversary proceeding against Subchapter V Chapter 11 debtor-limited liability companies (LLC), seeking to determine nondischargeability of debt for willful and malicious injury. Debtors moved to dismiss for failure to state a claim.

[Holding:] The Bankruptcy Court, Tiffany P. Geyer, J., held that discharge exceptions did not apply in Subchapter V Chapter 11 case filed by limited liability companies.

Motion granted.

Procedural Posture(s): Motion to Dismiss for Failure to State a Claim.

West Headnotes (3)

[1] **Bankruptcy** Pleading; dismissal

In reviewing a motion to dismiss for failure to state a claim, the court reviews only the allegations in the complaint, which the court must accept as true and construe in the light most favorable to the plaintiff. Fed. R. Civ. P. 12(b)(6); Fed. R. Bankr. P. 7012.

[2] **Bankruptcy** Pleading; dismissal

On motion to dismiss for failure to state a claim, the complaint can be dismissed without leave to amend if an amended complaint would still be properly dismissed or immediately subject to summary judgment for the defendant. Fed. R. Civ. P. 12(b)(6), 15, 56; Fed. R. Bankr. P. 7012, 7015, 7056.

[3] **Bankruptcy** Debts and Liabilities Discharged

Discharge exceptions did not apply in Subchapter V Chapter 11 case filed by debtor-limited liability companies (LLC); instead, discharge exceptions applied only in Subchapter V cases filed by individual debtors receiving discharge under Chapter 11. 11 U.S.C.A. §§ 523(a), 1192.

Attorneys and Law Firms

L. William Porter, III, Law Offices of L. William Porter III, Orlando, FL, for Plaintiff.

Jonathan Sykes, Nardella & Nardella, PLLC, Orlando, FL, for Defendants.

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS AMENDED COMPLAINT FOR FAILURE TO STATE A CLAIM PURSUANT TO FED. R. CIV. P. 12(b)(6)

Tiffany P. Geyer, United States Bankruptcy Judge

On February 13, 2023, Plaintiff, BenShot, LLC, filed a Complaint (Doc. No. 1) commencing this adversary proceeding against Defendants, 2 Monkey Trading, LLC and Lucky Shot USA, LLC, which Plaintiff subsequently amended on February 14, 2023 (Doc. No. 3). Defendants filed a motion to dismiss (Doc. No. 5), arguing that both the initial Complaint (and thus the Amended Complaint) are untimely ("the Motion") under Federal Rule of Bankruptcy Procedure 4007(c). (Doc. No. 5.) Plaintiff filed a Response (Doc. No. 6) to the Motion, Defendants filed a Reply (Doc. No. 12), and a hearing was held on April 19, 2023 (Doc. No. 15). Because a factual issue exists regarding whether ***522** Plaintiff reasonably relied upon the deadline for filing a complaint under 11 U.S.C. § 523 as set forth in the Notices of Commencement issued by the Clerk in Defendants' bankruptcy cases[1] when Rule 4007(c) established a different (and earlier) deadline, the Court determined an evidentiary hearing was necessary (Doc. No. 15).

[1] [2]In addition to untimeliness, however, Defendants argue that the Amended Complaint must be dismissed for failing to state a claim upon which relief can be granted pursuant to Federal Rule of Civil Procedure 12(b)(6) as made applicable here by Federal Rule of Bankruptcy Procedure 7012. (Doc. No. 5 at 4-9.) Specifically, Defendants argue that because the only count Plaintiff asserts is pursuant to 11 U.S.C. § 523(a)(6), the Amended Complaint is due to be dismissed because such a cause of action can only be maintained against an individual debtor/defendant, and here both Debtors/Defendants are limited liability companies. (*Id.*) "Rule 12(b)(6) provides that before an answer is filed a defendant may seek dismissal of a complaint if the complaint fails to state a claim." Fed. R. Civ. P. 12(b)(6); *MacQuarrie v. JPMorgan Chase Bankr, N.A., et al. (In re MacQuarrie)*, Ch. 7 Case No. 6:14-BK-13112-KSJ, Adv. No. 6:16–ap–00114–KSJ, 2017 WL 3172807, at *1 (Bankr. M.D. Fla. July 26, 2017). In reviewing a motion to dismiss under Rule 12(b)(6), the court reviews only the allegations in the complaint, which the court must accept as true and construe in the light most favorable to the plaintiff. *Brophy v. Jiangbo Pharm., Inc.*, 781 F.3d 1296, 1301 (11th Cir. 2015). A complaint can be dismissed without leave to amend if an amended complaint would still be properly dismissed or immediately subject to summary judgment for the defendant. *Cockrell v. Sparks*, 510 F.3d 1307, 1310 (11th Cir. 2007) (citing *Hall v. United Ins. Co. Of Am.*, 367 F.3d 1255, 1263 (11th Cir. 2004)).

[3]A few days prior to the hearing on the Motion, Defendants filed a Notice of Supplemental Authority (Doc. No. 13), citing a recent decision issued by Judge Jason A. Burgess in *Nutrien Ag Solutions, Inc. v. Hall, et al. (In re Hall)*, Ch. 11 Case No. 3:22-bk-01326-BAJ, Ch. 11 Case No. 3:22-bk-01341-BAJ, Adv. No. 3:22-AP-00062-BAJ, 2023 WL 2927164 (Bankr. M.D. Fla. Apr. 13, 2023), in which Judge Burgess squarely addressed the same issue before this Court—whether the § 523(a) discharge exceptions apply only in Subchapter V cases filed by individual debtors, or also in Subchapter V cases filed by corporate debtors that receive a discharge under § 1192. *Hall*, No. 3:22-AP-00062-BAJ, 2023 WL 2927164, at *1. Judge Burgess examined the decisions of the handful of other bankruptcy courts to visit this emerging issue, each of which concluded that the § 523(a) discharge exceptions do *not* apply in Subchapter V cases filed by corporate debtors that receive a discharge under § 1192.[2] *Id.* at *3. He also examined, and rejected, the reasoning of a decision of the Fourth Circuit Court of Appeals in ***523** *Cantwell-Cleary Co. v. Cleary Packaging, LLC (In re Cleary Packaging, LLC)*, 36 F.4th 509, 514 (4th Cir. 2022), which ruled that the § 523(a) exceptions to discharge *do* apply to corporations receiving a discharge under § 1192. *Hall*, No. 3:22-AP-00062-BAJ, 2023 WL 2927164, at *3-4. This Court agrees with and adopts Judge Burgess's analysis of the Fourth Circuit's decision in *Cleary*.

In siding with the bankruptcy courts on this issue, Judge Burgess relied upon the longstanding rules of statutory construction. *Id.* at *3-4. When Congress created Subchapter V through the Small Business Act of 2019, it amended § 523(a) to incorporate a reference to 1192 and now states, "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" and lists nineteen such exceptions. 11 U.S.C. § 523(a) (emphasis added). "If Congress intended for § 523(a) exceptions to apply to corporations receiving a discharge under § 1192, th[e] addition [of the reference to § 1192] was unnecessary." *Hall*, No. 3:22-AP-00062-BAJ, 2023 WL 2927164, at *3 (citing *GFS Indus.*, 647 B.R. at 343). Indeed, § 1192(2) compels the reader to examine § 523(a), which, as noted above, expressly does not discharge an *individual* debtor from certain enumerated debts and is silent about corporate debtors.

Based on Judge Burgess's decision in *Hall* and the same conclusions reached by other bankruptcy courts, the Court agrees with Defendants that the Amended Complaint must be dismissed. *See GFS Indus.*, 647 B.R. at 344 ("[T]he statutory language along with the broader Chapter 11 statutory scheme mandate this Court's holding that corporate debtors proceeding under Subchapter V cannot be made defendants in § 523 dischargeability actions.");

Lapeer Aviation, No. 21-31500-JDA, 2022 WL 1110072, at *2 (holding that because a corporate defendant proceeding under Subchapter V is "not an individual debtor, actions under § 523(a) are not applicable to it[ ]"); *Rtech Fabrications*, 635 B.R. at 566 (finding "that § 523(a)'s discharge exceptions only apply to an individual debtor and § 1192(2)'s reference to § 523(a) does not expand its applicability to entity debtors[ ]"); *Satellite Rests.*, 626 B.R. at 873 (holding that § 523(a) applies only to individuals, and not to corporations proceeding under Subchapter V).

Because Defendants are limited liability corporations, the exceptions to discharge in § 523(a) do not apply. Therefore, the Amended Complaint is dismissed for failure to state a claim, mooting the issue of whether the complaints were untimely. The evidentiary hearing set for July 12, 2023, to determine the factual issue of whether Plaintiff reasonably relied upon the Clerk's Notices of Commencement to establish the complaint deadline versus Rule 4007(c) is cancelled.

Accordingly, it is **ORDERED** as follows:

1. The Motion (Doc. No. 5) is **GRANTED**;

2. The Amended Complaint is **DISMISSED WITH PREJUDICE**; and

3. The evidentiary hearing scheduled for July 12, 2023, is **CANCELLED**.

ORDERED.

All Citations

650 B.R. 521, 72 Bankr.Ct.Dec. 132

Footnotes

1 Case No. 6:22-bk-04099-TPG, Doc. No. 13 at 2; Case No. 6:22-bk-04100-TPG, Doc. No. 15 at 2.

2 *Avion Funding, LLC v. GFS Indus., LLC (In re GFS Indus., LLC)*, 647 B.R. 337, 344 (Bankr. W.D. Tex. 2022), motion to certify appeal granted, No. 22-50403-CAG, 2023 WL 1768414 (Bankr. W.D. Tex. Feb. 3, 2023); *Jennings v. Lapeer Aviation, Inc. (In re LaPeer Aviation, Inc.)*, No. 21-31500-JDA, Adv. No. 22-03002, 2022 WL 1110072 (Bankr. E.D. Mich. Apr. 13, 2022); *Catt v. Rtech Fabrications, LLC (In re Rtech Fabrications, LLC)*, 635 B.R. 559 (Bankr. D. Idaho 2021); *Gaske v. Satellite Rests. Inc. (In re Satellite Rests. Inc.)*, 626 B.R. 871 (Bankr. D. Md. 2021).

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Minority Holding
Examples

KeyCite Yellow Flag - Negative Treatment
Disagreed With by In re Off-Spec Solutions, LLC, 9th Cir.BAP (Idaho), July 6, 2023

36 F.4th 509
United States Court of Appeals, Fourth Circuit.

IN RE: CLEARY PACKAGING, LLC, Debtor.
Cantwell-Cleary Co., Inc., Plaintiff - Appellant,
v.
Cleary Packaging, LLC, Defendant - Appellee.
Public Justice Center; Legal Aid Justice Center; Mountain State Justice; North Carolina Justice Center; Casa; Centro de los Derechos del Migrante; National Black Worker Center; National Employment Law Project; Farm Labor Organizing Committee, AFL-CIO; United States of America, Amici Supporting Appellant.

No. 21-1981
|
Argued: March 10, 2022
|
Decided: June 7, 2022

Synopsis

Background: Judgment creditor filed adversary complaint against debtor, a limited liability company (LLC) that had elected to proceed under Subchapter V of Chapter 11 as a "small business debtor," seeking declaration that $4.7 million debt arising from its state-court judgment for intentional interference with contracts and tortious interference with business relations was nondischargeable as a debt for "willful and malicious injury." Debtor moved to dismiss for failure to state a claim. The United States Bankruptcy Court for the District of Maryland, Michelle M. Harner, J., 630 B.R. 466, granted motion. Judgment creditor appealed, and its appeal was certified for direct appeal to the Fourth Circuit.

[Holding:] Addressing a matter of apparent first impression for the court, the Court of Appeals, Niemeyer, Circuit Judge, held that the discharge exceptions in Subchapter V of Chapter 11 apply to both individual debtors and corporate debtors.

Reversed and remanded with instructions.

Procedural Posture(s): On Appeal; Motion to Dismiss for Failure to State a Claim; Motion for Summary Judgment; Request for Declaratory Judgment.

West Headnotes (16)

[1] **Bankruptcy** Construction and Operation

A limited liability company (LLC) is a "corporation" within the meaning of the Bankruptcy Code. 11 U.S.C.A. § 101(9)(A).

[2] **Bankruptcy** Debts and Liabilities Discharged

Section of the Bankruptcy Code setting forth the general exceptions to discharge applies to a range of Code discharge provisions and provides that discharges in those specified provisions do not discharge an "individual debtor" from a list of 21 types of debt. 11 U.S.C.A. § 523(a).

1 Case that cites this headnote

[3] **Bankruptcy** Effect as discharge

Section of Bankruptcy Code governing Subchapter V discharge applies to individual and corporate debtors alike, Code provides for court to grant Subchapter V debtor a discharge of all debts except "any debt" "of the kind specified in" section of Code setting forth the general exceptions to discharge, and although introductory language in that general provision limits its discharge exceptions to "individual" debtors, implying that corporations are not subject to the discharge exceptions, combination of terms "debt" and "of the kind" in Subchapter V discharge provision indicates that Congress intended to reference only the list of

nondischargeable debts found in Code's general exception-to-discharge provision, not the class of debtors addressed therein, and to the extent there is tension between the two provisions, Subchapter V provision, as the more specific, governs. 11 U.S.C.A. §§ 101(41), 523(a), 1182(1), 1192(2).

7 Cases that cite this headnote

[4] **Bankruptcy** Fairness and Equity; "Cram Down."

In a traditional Chapter 11 proceeding, debtor submits and the court approves a plan of reorganization for distribution of debtor's estate; if creditors withhold their consent, any such plan must be fair and equitable in that it must comply with priority rules that establish a hierarchy of creditor classes for the order in which each class of creditor is to be paid.

1 Case that cites this headnote

[5] **Bankruptcy** Preservation of priority

Pursuant to the absolute priority rule, under any Chapter 11 plan to which creditors have not consented, higher priority creditors are to be paid in full before payment is made to lower priority creditors. 11 U.S.C.A. § 1129(b)(2)(B)(ii).

[6] **Bankruptcy** Preservation of priority

As a general matter, any non-consensual Chapter 11 plan violating the absolute priority rule may not be approved, nor may a discharge of debts be granted. 11 U.S.C.A. § 1129(b)(2)(B)(ii).

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

Congress enacted Subchapter V of Chapter 11 in the Small Business Reorganization Act of 2019 in order to streamline reorganizations for small business debtors. Pub. L. No. 116-54, 133 Stat. 1079.

1 Case that cites this headnote

[8] **Bankruptcy** Feasibility in general

One of the main features of a proceeding under Subchapter V of Chapter 11 is its authorization of plans that are not consented to by creditors and that depart from the Bankruptcy Code's absolute priority rule; instead, under the governing rules of a Subchapter V proceeding, the bankruptcy court need only find that such a plan provide that all of the debtor's projected disposable income is paid to creditors for a three-to-five-year period and that it be feasible, thus enabling the owners of a Subchapter V debtor to retain their equity in the bankruptcy estate despite creditors' objections. 11 U.S.C.A. §§ 1129(b), 1191(c)(2)(A) and (3).

2 Cases that cite this headnote

[9] **Bankruptcy** Effect as discharge

Under the specific rules for discharge provided in Subchapter V of Chapter 11, a court is required to grant discharge of all debts after approval of the plan except (1) any debt payable after the three-to-five-year period specified for payment, and (2) any debt "of the kind specified in" the section of the Bankruptcy Code setting

forth the general exceptions to discharge. 11 U.S.C.A. §§ 523(a), 1192.

[10] **Bankruptcy** Effect as discharge

Subchapter V of Chapter 11 of the Bankruptcy Code provides for the discharge of debts for both individual and corporate debtors. 11 U.S.C.A. § 1192(2).

6 Cases that cite this headnote

[11] **Statutes** General and specific terms and provisions; ejusdem generis

To the extent that tension exists between two statutory provisions, the more specific provision should govern over the more general.

[12] **Bankruptcy** Discharge

In establishing the different Bankruptcy Code chapters, Congress conscientiously defined and distinguished the kinds of debtors covered by each provision; for example, Chapter 7 discharges are explicitly limited to individuals, as are Chapter 13 discharges. 11 U.S.C.A. §§ 109(e), 727(a)(1), 1328.

[13] **Bankruptcy** Effect as discharge

With respect to traditional Chapter 11 proceedings, Congress explicitly distinguished the discharges of individual debtors from the discharges of corporate debtors, excluding a different array of debts from discharge for each. 11 U.S.C.A. § 1141(d).

3 Cases that cite this headnote

[14] **Bankruptcy** Farmers

Under the Bankruptcy Code, Chapter 12 proceedings are limited to family farmers and family fishermen, whether they be individuals or corporations. 11 U.S.C.A. §§ 101(18), 101(19A).

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

Congress enacted Subchapter V of the Bankruptcy Code with the primary goal of simplifying Chapter 11 reorganizations for small businesses and reducing the administrative costs for those businesses. Pub. L. No. 116-54, 133 Stat. 1079.

1 Case that cites this headnote

[16] **Bankruptcy** Preservation of priority
Bankruptcy Fairness and Equity; "Cram Down."

Subchapter V proceeding involves a non-consensual plan, that is, a "cram-down" proceeding, in which stakeholders in the bankruptcy estate are treated differently than they would be in traditional Chapter 11 proceedings under the absolute priority rule. 11 U.S.C.A. §§ 1129(b), 1191(c).

***511** Appeal from the United States Bankruptcy Court for the District of Maryland, at Baltimore. Michelle W. Harner, Bankruptcy Judge. (21-10765; 21-00056)

Attorneys and Law Firms

ARGUED: Justin Philip Fasano, MCNAMEE HOSEA, P.A., Greenbelt, Maryland, for Appellant. Robert Joel Branman, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Amicus United States. Paul Sweeney, YUMKAS, VIDMAR, SWEENEY & MULRENIN, LLC, Columbia, Maryland, for Appellee. ON BRIEF: Steven L. Goldberg, MCNAMEE HOSEA, P.A., Greenbelt, Maryland, for Appellant. James R. Schraf, YUMKAS, VIDMAR, SWEENEY & MULRENIN, LLC, Columbia, Maryland, for Appellee. Michael R. Abrams, Murnaghan Appellate Advocacy Fellow, PUBLIC JUSTICE CENTER, Baltimore, Maryland, for Amici The Public Justice Center; The Legal Aid Justice Center; Mountain State Justice; The North Carolina Justice Center; CASA; Centro de los Derechos del Migrante; The Farm Labor Organizing Committee, AFL-CIO; The National Black Worker Center; and The National Employment Law Project. David A. Hubbert, Deputy Assistant Attorney General, Joan I. Oppenheimer, Tax Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C.; Erek L. Barron, United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Baltimore, Maryland, for Amicus United States.

Before NIEMEYER, MOTZ, and KING, Circuit Judges.

Opinion

Reversed and remanded with instructions by published opinion. Judge Niemeyer wrote the opinion, in which Judge Motz and Judge King joined.

NIEMEYER, Circuit Judge:

[1]When Cleary Packaging, LLC, filed a petition in bankruptcy under Subchapter V of Chapter 11 as a "small business debtor," seeking to discharge a $4.7 million judgment that Cantwell-Cleary Co., Inc. had obtained against it for intentional interference with contracts and tortious interference with business relations, Cantwell-Cleary opposed the effort. It argued that 11 U.S.C. § 1192(2), which falls within Subchapter V, provides that small business ***512** debtors are not entitled to discharge "any debt ... of the kind specified in section 523(a) of this title," *id.* § 1192(2), and that § 523(a) in turn lists 21 categories of debt that are non-dischargeable, including debts "for willful and malicious injury by the debtor to another entity or to the property of another entity," *id.* § 523(a)(6). Cleary Packaging argued, however, that because § 523(a)'s list of exceptions to dischargeability is applicable only to "individual debtor[s]," its $4.7 million debt as the debt of a corporation was not covered by the exception contained in § 1192(2) and therefore was indeed dischargeable.[1] Cantwell-Cleary responded that because the language of § 1192(2) incorporates *only the list* of debts — debts "*of the kind* specified in section 523(a)" — and *not the class of debtors* addressed by § 523(a), the $4.7 million debt is non-dischargeable as a debt for willful and malicious injury.

The bankruptcy court, in a nicely crafted opinion, agreed with Cleary Packaging and concluded that its $4.7 million debt was indeed dischargeable, reasoning that the exceptions to dischargeability that were incorporated into § 1192(2) from § 523(a) applied only to *individual* debtors. The court relied heavily on the reasoning of *Gaske v. Satellite Restaurants Inc. Crabcake Factory USA (In re Satellite Restaurants Inc. Crabcake Factory USA)*, 626 B.R. 871 (Bankr. D. Md. 2021), which was dismissed on appeal. While the question is a close one, we nonetheless disagree with the bankruptcy court, as explained herein. Accordingly, we reverse the court's ruling and remand.

I

Cantwell-Cleary is a Maryland corporation engaged as a wholesaler of office-related products, particularly packaging supplies, janitorial and sanitation supplies, and paper products. Vincent Cleary Jr., who was on the board of directors of Cantwell-Cleary and its former president and CEO, left the company in June 2018 following a long-running family dispute involving divorce proceedings and internal disagreements over control of the company. He thereafter formed Cleary Packaging, LLC. He took with him numerous employees covered by noncompetition agreements and sensitive customer information and began the new business in competition with Cantwell-Cleary. Shortly thereafter, Cantwell-Cleary commenced an action in the Circuit Court for Anne Arundel County, Maryland, for intentional interference with contracts, tortious interference with business relations, and related claims. On the jury's verdict in

favor of Cantwell-Cleary, the state court entered judgment in January 2021 against Cleary Packaging and Vincent Cleary Jr. in the aggregate amount of $4,715,764.98.

Cleary Packaging thereafter filed a petition under Chapter 11 of the Bankruptcy Code, electing to proceed under Subchapter V as a small business enterprise. In its plan for reorganization, it proposed to pay Cantwell-Cleary 2.98 percent of its judgment in biannual installments over a period of five years, for a total of $140,489.77. If the plan were to be approved, the remainder of Cleary Packaging's debt to Cantwell-Cleary would be discharged.

Cantwell-Cleary filed a complaint in the bankruptcy court, seeking a declaratory judgment that the $4.7 million judgment is not dischargeable under ***513** 11 U.S.C. §§ 1192(2) and 523(a). It also sought, by motion for summary judgment, a judgment giving preclusive effect in the bankruptcy court to its state judgment. On Cleary Packaging's motion, the bankruptcy court dismissed Cantwell-Cleary's declaratory judgment action, finding that the discharge exceptions in § 1192(2) and § 523(a) do not apply to *corporate* debtors because of limiting language in § 523(a). Specifically, it held that the § 523(a) list of exceptions to dischargeability applies only to *individual* debtors. Because Cleary Packaging was not an individual, but rather a corporation (in this case, a limited liability company), its debt was therefore not excepted from discharge under § 523(a). Consequently, the court also dismissed Cantwell-Cleary's motion for summary judgment as moot.

On Cantwell-Cleary's motion, the bankruptcy court certified a direct appeal to this court of its "Section 523 Opinion and Order," pursuant to 28 U.S.C. § 158(d)(2)(A)(i), and we authorized the appeal by order dated September 8, 2021. The sole question on appeal, therefore, is whether Cleary Packaging, as a Subchapter V corporate debtor, can discharge its $4.7 million debt to Cantwell-Cleary "for willful and malicious injury."

II

[2]In filing its Chapter 11 petition, Cleary Packaging elected to proceed under Subchapter V, and accordingly its discharge of debts is specifically governed by 11 U.S.C. § 1192(2). That section provides: "If the plan of the debtor is confirmed ... the court shall grant the debtor a discharge of all debts ... except any debt ... of the kind specified in section 523(a) of this title." Section 523(a), which applies to a range of bankruptcy code discharge provisions, including § 1192, provides that discharges in those specified sections "do[ ] not discharge an *individual debtor* from" a list of 21 types of debt, including a debt "for willful and malicious injury," *implying* that such exceptions do not apply to corporate debtors. 11 U.S.C. § 523(a) (emphasis added).

The parties do not dispute that Cleary Packaging's $4.7 million debt created by entry of the state judgment was "for willful and malicious injury" and therefore would qualify as the type of debt that § 523(a) makes non-dischargeable. *See* 11 U.S.C. § 523(a)(6). Rather, the dispute centers on conflicting interpretations of the two relevant provisions — § 1192(2) and § 523(a) — relating to the *kind of debtor* subject to the discharge exceptions listed in § 523(a). Cleary Packaging, focusing on § 523(a), argues that it limits § 1192(2) discharges with respect to the 21 categories of debt only as to *individual debtors*, and therefore corporate debts of the kind listed remain dischargeable. Cantwell-Cleary, on the other hand, focuses on § 1192(2), which applies to both individual and corporate debtors, and argues that the section excludes from discharge *debts of the kind* listed in § 523(a), regardless of the *class of debtor*, whether individual or corporate. Because § 1192(2) is the specific provision governing discharges in Subchapter V proceedings, Cantwell-Cleary argues that if there is any inconsistency, we should give § 1192(2) precedence over the more general § 523(a) and thereby except Cleary Packaging's $4.7 million debt from a discharge, as it is a type of debt listed in § 523(a).

[3]While we recognize a certain lack of clarity in the relationship between § 1192(2) and § 523(a), we conclude, based on our textual review, the provisions' context in the Bankruptcy Code, and practical and equitable considerations, that Cantwell-Cleary makes the more persuasive argument.

***514** A

[4] [5] [6]First, by way of background, we note that in a traditional Chapter 11 proceeding, the debtor submits and the court approves a plan of reorganization for the distribution of the debtor's estate. And when the creditors withhold their consent, any such plan must be fair and equitable in that it must comply with priority rules that establish a hierarchy of creditor classes for the order in which each class of creditor is to be paid. Thus, higher priority creditors are paid in full before payment is made to lower priority creditors. The rule began with judicial construction and, beginning in 1978, was included in the

Bankruptcy Code. *See Norwest Bank Worthington v. Ahlers*, 485 U.S. 197, 202, 108 S.Ct. 963, 99 L.Ed.2d 169 (1988). Known as the "absolute priority rule," it requires that any plan, to which creditors have not consented, must provide that "a dissenting class of unsecured creditors [be paid] in full before any junior class can receive [payment]." *Id.* (citation omitted); *In re Maharaj*, 681 F.3d 558, 562 (4th Cir. 2012); 11 U.S.C. § 1129(b)(2)(B)(ii). And, as a general matter, any non-consensual plan violating the absolute priority rule may not be approved, nor may a discharge of debts be granted. *See* 11 U.S.C. § 1129(b)(2)(B)(ii). It can be readily recognized, however, that this strict priority rule could preclude reorganizations in which continuing management of the bankruptcy estate by a business's owners would be essential to a successful reorganization because such owners' retention of estate property would violate the priority rule.

[7] [8]Apparently in response to the problem, at least in part, Congress enacted Subchapter V in the Small Business Reorganization Act of 2019, Pub. L. No. 116–54, 133 Stat. 1079, to streamline reorganizations for small business debtors — defined during the relevant time period as those debtors whose debt is not more than $7.5 million, *see* 11 U.S.C. § 1182(1) (2020). One of the main features of a Subchapter V proceeding is its authorization of plans that are not consented to by creditors and that depart from the absolute priority rule of § 1129(b). Under the governing rules of a Subchapter V proceeding, the bankruptcy court need only find that such a plan provide that all of the debtor's projected disposable income is paid to creditors for a 3-to 5-year period and that it be feasible. 11 U.S.C. § 1191(c)(2)(A) and (3). Thus, the owners of a Subchapter V debtor are able to retain their equity in the bankruptcy estate despite creditors' objections.

[9]Subchapter V also provides specific rules for discharge, requiring a court to grant discharge of all debts after approval of the plan except (1) any debt payable *after* the 3- to 5-year period specified for payment, and (2) any debt "of the kind specified in section 523(a)." 11 U.S.C. § 1192.

B

[10]We now turn to the text of § 1192(2), which specifically governs Cleary Packaging's discharge, to determine the debts dischargeable under Subchapter V. First, we point out that § 1192(2) provides for granting *debtors* a discharge of all debts, subject to stated exceptions. For the purpose of Subchapter V, the term "debtor" was defined during the relevant time period to mean "a *person* engaged in commercial or business activities" that has debt of not more than $7.5 million. 11 U.S.C. § 1182(1) (2020) (emphasis added). "[P]erson" is in turn defined to include both individuals and corporations, *see id.* § 101(41), and "corporation[s]" include limited liability companies, *id.* § 101(9)(A). We thus conclude that § 1192(2) provides for the discharge of ***515** debts for *both* individual and corporate debtors.

Still, even though § 1192(2) applies to both individual and corporate debtors, the question remains whether the exception to such discharges — based on § 1192(2)'s reference to § 523(a) — applies to both individuals and corporations or to only individuals. And that question arises because the introductory language in § 523(a) limits its discharge exceptions to *individual* debtors. Specifically, § 523(a) provides that § 1192, along with five other discharge sections of the Bankruptcy Code, "does not discharge *an individual debtor*" from a list of 21 specified debts, including "any debt ... for willful and malicious injury,"11 U.S.C. § 523(a)(6) (emphasis added), implying that corporations are not subject to the discharge exceptions.

To address the question, we begin by focusing on § 1192(2) as the provision specifically governing discharges in a Subchapter V proceeding and on the scope of its incorporation of § 523(a). Section 1192(2) excepts from discharge "any *debt ... of the kind* specified in section 523(a)." 11 U.S.C. § 1192(2) (emphasis added). The section's use of the word "debt" is, we believe, decisive, as it does not lend itself to encompass the "kind" of *debtors* discussed in the language of § 523(a). This is confirmed yet more clearly by the phrase modifying "debt"— i.e., "of the kind." Thus, the combination of the terms "debt" and "of the kind" indicates that Congress intended to reference only the *list of non-dischargeable debts* found in § 523(a). As the U.S. Government's amicus brief notes, this interpretation of "of the kind" is in line "with the ordinary meaning of the word 'kind' as 'category' or 'sort. ' " (Citing American Heritage Dictionary of the English Language (online ed.) (" '[a] group of individuals or instances sharing common traits; a category or sort' "); Merriam-Webster Dictionary (online ed.) (" 'a group united by common traits or interests: CATEGORY' ")). In short, while § 523(a) does provide that discharges under various sections, including § 1192 discharges, do not "discharge *an individual debtor* from any debt" of the kind listed, § 1192(2)'s cross-reference to § 523(a) does not refer to any *kind of debtor* addressed by § 523(a) but rather to a *kind of debt* listed in § 523(a). By referring to the *kind of debt* listed in § 523(a), Congress used a shorthand to avoid listing all 21 types of debts,

which would indeed have expanded the one-page section to add several additional pages to the U.S. Code. Thus, we conclude that *the debtors* covered by the discharge language of § 1192(2) — i.e., both individual and corporate debtors — remain subject to the 21 *kinds of debt* listed in § 523(a).

[11]We add — to the extent that one might find tension between the language of § 523(a) addressing individual debtors and the language of § 1192(2) addressing both individual and corporate debtors — that the more specific provision should govern over the more general. *See, e.g., S.W. Ga. Farm Credit, Aca v. Breezy Ridge Farms, Inc. (In re Breezy Ridge Farms, Inc.)*, No. 09-1011, 2009 WL 1514671, at *2 (Bankr. M.D. Ga. May 29, 2009) ("If the two provisions may not be harmonized, then the more specific will control over the general" (quoting *Universal Am. Mortg. Co. v. Bateman (In re Bateman)*, 331 F.3d 821, 825 (11th Cir. 2003))). Thus, while § 523(a) references numerous discharge provisions of the Bankruptcy Code, § 1192(2) is the more specific, addressing only Subchapter V discharges.

C

[12] [13]The context of § 1192(2) within the Bankruptcy Code and the Bankruptcy Code's structure further support our interpretation. ***516** It is readily apparent from a review of different Bankruptcy Code chapters that Congress conscientiously defined and distinguished the kinds of debtors covered by each provision. For example, Chapter 7 discharges are explicitly limited to individuals, *see* 11 U.S.C. § 727(a)(1), as are Chapter 13 discharges, *see id.* §§ 109(e), 1328. More tellingly, as to traditional Chapter 11 proceedings, Congress explicitly distinguished the discharges of individual debtors from the discharges of corporate debtors in § 1141(d), excluding a different array of debts from discharge for each. *Compare id.* § 1141(d)(2), (5) (addressing the scope of discharge for individuals) *with id.* § 1141(d)(6) (addressing the scope of discharge for corporations). Yet Congress purposefully addressed both individual and corporate debtors when defining the right of discharge in Subchapter V proceedings. *Id.* § 1192.

Cleary Packaging's interpretation would also create difficulty in reconciling § 523(a) with § 1141(d)(6). Section 523(a) includes in its scope § 1141, just as it includes § 1192 and several other sections, and therefore under Cleary Packaging's interpretation, the list of exceptions to discharge in a traditional Chapter 11 proceeding would govern only individuals by reason of § 523(a)'s limiting language. Yet, § 1141 incorporates specified debts listed in § 523(a) to apply *to corporate debtors*, excluding from discharge debts "of a kind specified in paragraph (2)(A) or (2)(B) of section 523(a)." 11 U.S.C. § 1141(d)(6)(A). Cleary Packaging has been unable to reconcile its method for applying § 523(a) to § 1192 with any consistency as to how it would apply § 523(a) to § 1141(d)(6).

[14]Yet more telling is Congress's importation of language into Subchapter V from the conceptually similar Chapter 12 proceedings, which are limited to family farmers and family fishermen, whether they be individuals or corporations. *See* 11 U.S.C. § 101(18), (19A); *see also, e.g., In re Trepetin*, 617 B.R. 841, 848 (Bankr. D. Md. 2020) (recognizing that "[s]everal aspects of Subchapter V are premised on the provisions of chapter 12 of the Code for family farmers and fishermen").

In addressing the scope of discharge, Chapter 12 provides, in relevant part, that "the court shall grant the debtor a discharge of all debts provided for by the plan ... except any debt ... *of a kind specified in section 523(a)* of this title." 11 U.S.C. § 1228(a) (emphasis added). This language in Chapter 12 is virtually identical to the language included in § 1192(2).[2] Moreover, § 523(a) specifically references § 1228(a) discharges, just as it does § 1192 discharges. Yet, the courts construing the scope of § 1228(a) have concluded that § 1228(a)'s discharge exceptions apply *to both individual debtors and corporate debtors. See, e.g., Breezy Ridge Farms*, 2009 WL 1514671, at *1–2; *New Venture P'ship v. JRB Consol., Inc. (In re JRB Consol., Inc.)*, 188 B.R. 373 (Bankr. W.D. Tex. 1995). Interpreting language virtually identical to that in § 1192(2), the bankruptcy court in *JRB Consolidated* stated that "[t]he wording in § 1228(a)(2) describing '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)." 188 B.R. at 374. Instead, it stated, "[d]ebts of the kind easily seems to be limited to the subparagraphs of § 523(a) which identify the types of debts which are eligible to be excepted from discharge." *Id.*; *see also Breezy Ridge Farms*, 2009 WL 1514671, at *2 (finding that Congress used the reference to ***517** § 523(a) in § 1228 "as shorthand to define the scope of a Chapter 12 discharge for corporations as well as individuals"). Thus, prior interpretations of § 1228(a) support our interpretation of § 1192(2)'s virtually identical language. *See Hall v. United States*, 566 U.S. 506, 519, 132 S.Ct. 1882, 182 L.Ed.2d 840 (2012) ("[I]dentical words and phrases within the same statute should normally be given the same meaning" (citations omitted)). To give different interpretations to the same language in the same statute would ignore the

rationality of using the same language in describing a different proceeding of the Bankruptcy Code, as was done with the adoption of Subchapter V.

[15]Finally, our interpretation of § 1192(2) in Subchapter V makes particular sense when considering that subchapter's juxtaposition in Chapter 11 with traditional Chapter 11 provisions, reflecting its distinctive purpose within that Chapter. Congress enacted Subchapter V as part of the Small Business Reorganization Act of 2019 with the primary goal of simplifying Chapter 11 reorganizations for small businesses and reducing the administrative costs for those businesses. To do so, Congress deliberately altered the general provisions of traditional Chapter 11 proceedings by, among other things, eliminating the absolute priority rule and limiting the applicability of § 1141(d) to Subchapter V proceedings. Section 1141(d), in particular, sets forth debts that are eligible for discharge in a traditional Chapter 11 proceeding, making distinctions between individual debtors and corporate debtors. *See Breezy Ridge Farms*, 2009 WL 1514671, at *2; *cf. JRB Consol.*, 188 B.R. at 374. In contrast, § 1192 provides benefits to small business debtors, regardless of whether they are individuals or corporations. Thus, an important purpose for Subchapter V would be frustrated were we to adopt Cleary Packaging's interpretation of §§ 1192(2) and 523(a), which would treat individuals and corporations differently.

[16]And as to fairness and equity, it should be recognized that a Subchapter V proceeding involves a non-consensual plan — i.e., a "cram-down" proceeding — in which stakeholders in the bankruptcy estate are treated differently than they would be in traditional Chapter 11 proceedings under the absolute priority rule. Under a Subchapter V plan, owners of a debtor can retain ownership interests to continue conducting the reorganization at the expense of and over the objection of creditors. Given the elimination of the absolute priority rule, Congress understandably applied limitations on the discharge of debts to provide an additional layer of fairness and equity to creditors to balance against the altered order of priority that favors the debtor. To this end, *all Subchapter V debtors* are textually subject to the discharge limitations described in § 523(a), not just *individual* Subchapter V debtors. To make a distinction between individuals and corporations for how Subchapter V is applied would not only undermine that balance, but would also make no sense and indeed would create perverse incentives. But most importantly, it would violate the text of § 1192(2).

III

At bottom, while we recognize that the relationship between § 523(a) and § 1192 might be a bit discordant — or perhaps more accurately, clumsy — we find more harmony from following a close textual analysis and contextual review of § 1192(2) and thus conclude that it provides discharges to small business debtors, *whether they are individuals or corporations*, except with respect to the 21 kinds of debts listed in § 523(a). We would find it difficult to conceive of giving § 523(a) the additional ***518** role of defining *the debtors* covered by § 1192(2) in conflict with § 1192(2)'s own language. That function is actually and better carried out by § 1192, which is the specific provision governing discharges in Subchapter V proceedings and which applies to individual and corporate debtors alike. Finally, we conclude that our interpretation serves fairness and equity in circumstances where *a small business corporate debtor* in particular is given greater priority over creditors than would ordinarily apply and thus should not especially benefit from the discharge of debts incurred in circumstances of fraud, willful and malicious injury, and the other violations of public policy reflected in § 523(a)'s list of exceptions.

* * *

Accordingly, we reverse the bankruptcy court's certified order and remand the case for further proceedings, including consideration of Cantwell-Cleary's motion for summary judgment.

REVERSED AND REMANDED

All Citations

36 F.4th 509

Footnotes

1 While, for convenience, we use the terms "individual debtor" and "corporate debtor" in a binary fashion, we recognize that Cleary Packaging is a limited liability company under Maryland law. The Bankruptcy Code, however,

includes within its definition of "corporation" limited liability companies. *See* 11 U.S.C. § 101(9)(A).

[2] There is one inconsequential difference — § 1228(a) refers to debt "of *a* kind specified," while § 1192(2) refers to debt "of *the* kind specified."

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2024 WL 1644229
Only the Westlaw citation is currently available.
United States Court of Appeals, Fifth Circuit.

In the MATTER OF GFS INDUSTRIES, L.L.C.
Debtor,
Avion Funding, L.L.C., Appellant,
v.
GFS Industries, L.L.C., Appellee.

No. 23-50237
|
FILED April 17, 2024

Appeal from the United States District Court for the Western District of Texas, USDC No. 22-05052, Craig A. Gargotta, Chief Judge

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Before Higginbotham, Higginson, and Duncan, Circuit Judges.

Opinion

Stuart Kyle Duncan, Circuit Judge:

***1** In this appeal, we consider a 2019 addition to the Bankruptcy Code known as "Subchapter V," which seeks to streamline the Chapter 11 reorganization process for certain small business debtors. *See* 11 U.S.C. § 1181 *et seq.* Subchapter V relieves small business debtors from the absolute priority rule for repaying creditors, which was thought to unduly complicate their reorganization. *Compare id.* § 1129(b)(2) *with id.* § 1191(c). In exchange for that benefit, however, those debtors cannot discharge certain "kinds" of debt listed in § 523(a) of the Code. *See id.* §§ 1192(2), 523(a). The issue we address here is whether those discharge exceptions apply to both corporate and individual Subchapter V debtors (as the Fourth Circuit has ruled) or only to individual debtors (as some bankruptcy courts have ruled). *See generally Cantwell-Cleary Co. v. Cleary Packaging, LLC (In re Cleary Packaging, LLC)*, 36 F.4th 509 (4th Cir. 2022). Although the question is complicated by a certain textual awkwardness in the Bankruptcy Code, we ultimately side with the Fourth Circuit and rule that, in Subchapter V proceedings, both corporate and individual debtors are subject to the list of § 523(a) discharge exceptions.[1]

Accordingly, we REVERSE and REMAND.

I.

GFS Industries is a Texas limited liability corporation that provides commercial cleaning services. Seeking financing to expand operations, GFS entered into an agreement with Avion Funding on April 6, 2022. Avion would give GFS $190,000 in exchange for $299,800 of GFS's future receivables.[2] GFS represented it had not filed, nor did it anticipate filing, any Chapter 11 bankruptcy petition. Nonetheless, on April 21, 2022, two weeks after signing the agreement, GFS petitioned for voluntary Chapter 11 bankruptcy in the Western District of Texas. GFS elected to proceed under Subchapter V, which Congress enacted in 2019 as part of the Small Business Reorganization Act ("SBRA"), Pub. L. No. 116–54, 133 Stat. 1079 (2019).

On July 25, 2022, Avion filed an adversary complaint in GFS's bankruptcy. As relevant here, Avion claimed GFS obtained Avion's financing by misrepresenting whether it anticipated filing for bankruptcy. Avion sought a declaration that GFS's debt to Avion was therefore nondischargeable. In response, GFS moved to dismiss Avion's complaint, arguing that the Bankruptcy Code section on which Avion relied, 11 U.S.C. § 523(a), applies only to individual debtors and that, as a result, GFS's debt was dischargeable.

The bankruptcy court agreed with GFS. It reasoned that

"in the Subchapter V context, only individuals, not corporations, can be subject to § 523(a) dischargeability actions." *Avion Funding, LLC v. GFS Indus., LLC (In re GFS Indus., LLC)*, 647 B.R. 337, 342 (Bankr. W.D. Tex. 2022). In doing so, the court followed the reasoning of four bankruptcy courts.[3] It declined to follow the Fourth Circuit's recent decision in *Cantwell-Cleary Co. v. Cleary Packaging, LLC (In re Cleary Packaging, LLC)*, 36 F.4th 509, 517–18 (4th Cir. 2022) [*Cleary*], which held that the Subchapter V discharge exceptions apply to both individual and corporate debtors. Accordingly, the bankruptcy court ruled GFS's debt to Avion was dischargeable and dismissed Avion's complaint. Avion timely appealed to the district court. The bankruptcy court subsequently granted Avion's motion to certify a direct appeal to our court under 28 U.S.C. § 158(d)(2). *Avion Funding, LLC v. GFS Indus., LLC (In re GFS Indus., LLC)*, 2023 WL 1768414, at *4 (Bankr. W.D. Tex. Feb. 3, 2023).

II.

***2** "When directly reviewing an order of the bankruptcy court, we apply the same standard of review that would have been used by the district court." *Drive Fin. Servs., L.P. v. Jordan*, 521 F.3d 343, 346 (5th Cir. 2008). Dismissals under Rule 12(b)(6) for failure to state a claim are reviewed *de novo*. *See Norsworthy v. Hous. Indep. Sch. Dist.*, 70 F.4th 332, 336 (5th Cir. 2023).

III.

GFS proceeds under Subchapter V, enacted in 2019 to streamline Chapter 11 reorganizations for small business debtors whose debt does not exceed $7.5 million. *See* 11 U.S.C. § 1181 *et seq.*; *id.* § 1182(1); *see also In re Free Speech Sys., LLC*, 649 B.R. 729, 735 (Bankr. S.D. Tex. 2023) ("Subchapter V only applies when a debtor elects to proceed under it." (citing 11 U.S.C. § 103(i))). If a debtor's bankruptcy plan is confirmed as a consensual plan under § 1191(a), the dischargeability of its debts is governed by § 1141(d). *See* 11 U.S.C. § 1181(a) (only § 1141(d)(5) concerning individual debtors is inapplicable to Subchapter V consensual plan discharge provisions). By contrast, GFS's plan was confirmed as a nonconsensual plan under § 1191(b), so the dischargeability of its debts is governed by § 1192. *See id.* § 1181(c) ("If a plan is confirmed under section 1191(b) of this title, section 1141(d) of this title shall not apply, except as provided in section 1192 of this title.").

As § 1192 provides, after the debtor completes the required payments, the bankruptcy court

> shall grant the debtor a discharge of all debts provided in section 1141(d)(1)(A)[4] of this title, and all other debts allowed under section 503 of this title and provided for in 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) of this title.*

Id. § 1192 (emphasis added). The cross-referenced § 523(a) lists various types of non-dischargeable debts—for instance, debts for certain "tax or customs [ ] dut[ies]," for "domestic support obligation[s]," or for failing "to pay fines or penalties imposed under Federal election law." *See id.* § 523(a)(1), (5), (14B). The category relevant here is a debt for money obtained by a "materially false" written statement "respecting the debtor's ... financial condition." *Id.* § 523(a)(2)(B)(i)–(ii).

The textual conundrum in this case arises from § 523(a)'s preamble: "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 ...." *Id.* § 523(a) (emphasis added). In ruling for GFS, the bankruptcy court deemed this preamble "critical to the analysis." Specifically, the court reasoned that § 523(a)'s "limiting language" means that, in a Subchapter V proceeding, the listed non-dischargeability exceptions apply only to an "individual debtor." But they do not apply to a limited liability company like GFS—meaning its debt to Avion, even if procured by misrepresenting its financial condition, could still be dischargeable. On appeal, Avion contests the bankruptcy court's understanding of the interplay between § 523(a) and § 1192(2). We consider each of its arguments in turn.

A.

***3** Avion argues that placing controlling weight on the word "individual" in § 523(a) disregards the plain language of § 1192(2). We agree.

To begin with, § 1192 governs discharging debts of a "debtor," plain and simple. *See* 11 U.S.C. § 1192 (requiring court to "grant *the debtor* a discharge" of all

specified debts (emphasis added)). A Subchapter V "debtor" means "a person engaged in commercial or business activities" with debts not exceeding $7.5 million. *Id.* § 1182(1)(A). " '[P]erson' is in turn defined to include both individuals and corporations, *see id.* § 101(41), and 'corporation[s]' include limited liability companies, *id.* § 101(9)(A)." *Cleary*, 36 F.4th at 514 (citations omitted). So, putting all this together, § 1192 applies to both individual and corporate debtors. *Id.* at 514–15. It does not distinguish one from the other.

Next, § 1192 excepts from discharge "any *debt ... of the kind* specified in section 523(a)." 11 U.S.C. § 1192(2) (emphasis added). We must apply this precise language as written. *See Ransom v. FIA Card Servs., N.A.*, 562 U.S. 61, 69, 131 S.Ct. 716, 178 L.Ed.2d 603 (2011) ("[I]nterpretation of the Bankruptcy Code starts ... with the language of the statute itself." (quotation marks and citation omitted)). Section 523(a) enumerates 21 categories or "kinds"[5] of non-dischargeable debts. *See* § 523(a)(1)–(20) (including (14), (14A), and (14B)). So, the most natural reading of § 1192(2) is that it subjects both corporate and individual Subchapter V debtors to the categories of debt discharge exceptions listed in § 523(a). *See Cleary*, 36 F.4th at 515 ("[T]he combination of the terms 'debt' and 'of the kind' indicates that Congress intended to reference only the *list of non-dischargeable debts* found in § 523(a).").

Consider, moreover, what § 1192(2) does not say: "kind of *debtor*." Congress could have enacted those words in § 1192 but instead chose "kind of *debt*." That text cannot be read to incorporate a distinction between "individual" and "corporate" debtors. Rather, as the Fourth Circuit correctly reasoned, the reference to "kind[s]" of debt in § 1192 serves as "a shorthand to avoid listing all 21 types of debts" in § 523(a), "which would indeed have expanded the one-page section to add several additional pages to the U.S. Code." *Cleary*, 36 F.4th at 515.

In addition, to the extent §§ 523(a) and 1192(2) clash, § 1192(2) governs as the more specific provision. Section 1192 deals directly with Subchapter V discharges, whereas § 523(a) cuts across various Bankruptcy Code provisions. *See* § 523(a) (listing "section 727, 1141, 1192, 1228(a), 1228(b), or 1328(b) of this title"). As the Fourth Circuit observed, "to the extent that one might find tension" between the two sections, "the more specific provision should govern over the more general." *Cleary*, 36 F.4th at 515; *see also, e.g., RadLAX Gateway Hotel, L.L.C. v. Amalgamated Bank*, 566 U.S. 639, 645, 132 S.Ct. 2065, 182 L.Ed.2d 967 (2012) (observing "[i]t is a commonplace of statutory construction that the specific governs the general" and applying the canon to the Bankruptcy Code (quoting *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384, 112 S.Ct. 2031, 119 L.Ed.2d 157 (1992))). The specific/general canon is especially applicable where "Congress has enacted a comprehensive scheme and has deliberately targeted specific problems with specific solutions." *RadLAX*, 566 U.S. at 645, 132 S.Ct. 2065 (citation omitted); *see also* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 185 (2012) ("The specific provision does not negate the general one entirely, but only in its application to the situation that the specific provision covers."). Subchapter V fits that bill: it legislates specific reorganization options for small business debtors.

***4** GFS counters (echoing the bankruptcy court) that this interpretation of § 1192(2) makes the word "individual" in § 523(a) superfluous. *See* 11 U.S.C. § 523(a) ("A discharge under section ... 1192 ... of this title does not discharge an *individual* debtor ...") emphasis added)). This argument has some force because, "[i]f possible, every word and every provision [of a statute] is to be given effect," and "none should be ignored." Scalia & Garner, *supra*, at 174. At the same time, though, the "preference for avoiding surplusage constructions is not absolute." *Lamie v. U.S. Tr.*, 540 U.S. 526, 536, 124 S.Ct. 1023, 157 L.Ed.2d 1024 (2004); *see also Chickasaw Nation v. United States*, 534 U.S. 84, 94, 122 S.Ct. 528, 151 L.Ed.2d 474 (2001) (noting "[t]he canon requiring a court to give effect to each word '*if possible*' is sometimes offset by the canon that permits a court to reject words 'as surplusage' if 'inadvertently inserted or if repugnant to the rest of the statute' " (citation omitted)).

We agree with *amicus curiae* United States that the anti-surplusage canon does not win the day here. To begin with, the reference to § 1192 was added to § 523(a) via a "conforming amendment." *See* Br. of *Amicus Curiae* United States at 21 (citing H.R. Rep. No. 116-171, at 9 (2019)); *see also* Pub. L. No. 116–54, 133 Stat. 1079, 1085–86 (2019). That would be an awkward way of modifying § 1192(2)'s straightforward "kind of debt" language. *See Cyan, Inc. v. Beaver Cnty. Emps. Ret. Fund*, 583 U.S. 416, 431, 138 S.Ct. 1061, 200 L.Ed.2d 332 (2018) ("Congress does not make 'radical—but entirely implicit—change[s]' through 'technical and conforming amendments.' " (quoting *Dir. of Revenue of Mo. v. CoBank ACB*, 531 U.S. 316, 324 (2001))). In other words, it would be no "minor tweak" to § 1192(2), *id.* at 430, 138 S.Ct. 1061, to change "kind of debt" to "kind of debtor." It is unlikely Congress would have done such a thing through a cross-reference in a "mere conforming amendment." *Ibid.* (cleaned up).

This interpretation gains traction when we examine other statutory cross-references in § 523(a)'s preamble. Some are themselves superfluous. For example, § 523(a) refers to § 727 even though Chapter 7 discharges are already available only to individual debtors. *See* 11 U.S.C. § 727(a)(1). So, the term "individual" as applied to § 727 is entirely redundant. *See id.* § 727(b). The same applies to § 523(a)'s reference to § 1328(b): Chapter 13 discharges are also available only to individual debtors. *See id.* §§ 109(e), 1328(b).

Other problems emerge when we consider § 523(a)'s cross-reference to § 1141. Part of that section, § 1141(d)(6), provides that traditional Chapter 11 discharges will not discharge a *corporate* debtor from certain kinds of debts in § 523(a). *See id.* § 1141(d)(6)(A) (providing "a debtor that is a corporation" is not discharged from debts "of a kind specified in paragraph (2)(A) or (2)(B) of section 523(a)"). But if we read "individual" in § 523(a)'s preface to control all the cross-referenced statutes, that would erase the corporate debtor discharge exceptions in § 1141(d)(6). *See Cleary*, 36 F.4th at 516 (observing that this interpretation "would ... create difficulty in reconciling § 523(a) with § 1141(d)(6)"). This is yet another reason not to read the word "individual" in § 523(a) to implicitly modify § 1192(2).

B.

Avion's argument gains greater force when we situate § 1192 in the larger context of the Bankruptcy Code. *See, e.g., In re Lively*, 717 F.3d 406, 409 (5th Cir. 2013) (reading "the language of the statute taken in the context of the Bankruptcy Code of which it is a part" (citing *RadLAX*, 132 S. Ct. at 2070–71)). Other Code provisions explicitly limit discharges to "individual" debtors.[6] Even traditional Chapter 11 proceedings distinguish discharges for individual and corporate debtors.[7]

***5** By contrast, § 1192 provides dischargeability simply for "the debtor"—which, as noted, the Code defines as encompassing both individual and corporate debtors. *See also Cleary*, 36 F.4th at 515–16 (distinguishing § 1192 from other provisions that "conscientiously defined and distinguished the kinds of debtors covered"). We cannot add words to § 1192 that Congress did not enact. *See Russello v. United States*, 464 U.S. 16, 23, 104 S.Ct. 296, 78 L.Ed.2d 17 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." (quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972))).

Avion also draws our attention to the Chapter 12 discharge provision, covering family farmers or fishermen, which is virtually identical to § 1192. *See* 11 U.S.C. § 1228(a). Chapter 12 allows "the debtor" a discharge of all specified debts "except any debt ... *of a kind specified in section 523(a) of this title*." *Ibid.* (emphasis added). As the Fourth Circuit recognized, "courts construing the scope of § 1228(a) have concluded that [its] discharge exceptions apply *to both individual debtors and corporate debtors*." *Cleary*, 36 F.4th at 516 (citing *Sw. Ga. Farm Credit, Aca v. Breezy Ridge Farms, Inc. (In re Breezy Ridge Farms, Inc.)*, 2009 WL 1514671, at *1–2 (Bankr. M.D. Ga. May 29, 2009); *New Venture P'ship v. JRB Consol., Inc. (In re JRB Consol., Inc.)*, 188 B.R. 373, 374 (Bankr. W.D. Tex. 1995)).

In particular, the *JRB Consolidated* bankruptcy court reasoned that "[t]he wording in § 1228(a)(2) describing '*debts* of the kind' specified in § 523(a) does not naturally lend itself to incorporate the meaning 'for *debtors* of the kind' referenced in § 523(a)." 188 B.R. at 374 (emphasis added).[8] We see no reason why this sound analysis of § 1228(a)'s text would not apply equally to the substantively identical phrase in § 1192(2). *Accord Cleary*, 36 F.4th at 517 ("[I]dentical words and phrases within the same statute should normally be given the same meaning." (quoting *Hall v. United States*, 566 U.S. 506, 519, 132 S.Ct. 1882, 182 L.Ed.2d 840 (2012))). Moreover, § 1228(a) is also referenced in § 523(a)'s preamble along with § 1192. *See* § 523(a) (referencing "[a] discharge under section ... 1192 [and] 1228(a)"). So, if we adopted the restrictive reading of § 1192 urged by GFS, it would undermine bankruptcy courts' interpretation of § 1228(a). *Accord Cleary*, 36 F.4th at 516. We decline to do so.[9]

C.

Finally, GFS contends that our interpretation of § 1192 will frustrate Congress's purposes in enacting Subchapter V. We disagree.

***6** First of all, GFS's argument relies on vague assertions in the SBRA's legislative history. But the history GFS cites does not speak to, or even mention, the individual-vs-corporate debtor issue before us. GFS merely quotes a committee report's statement that Subchapter V sought to "streamline the bankruptcy

process" for "small business debtors."[10] Even if one were inclined to consult legislative history, such generalities are no help in resolving the concrete interpretive issue we address today. *See Food Mktg. Inst. v. Argus Leader Media*, 588 U.S. 427, 139 S. Ct. 2356, 2364, 204 L.Ed.2d 742 (2019) (noting the Supreme Court "has repeatedly refused to alter" statute's "plain terms on the strength only of arguments from legislative history"); *Hubbard v. United States*, 514 U.S. 695, 708, 115 S.Ct. 1754, 131 L.Ed.2d 779 (1995) ("Courts should not rely on inconclusive statutory history as a basis for refusing to give effect to the plain language of an Act of Congress[.]").

Second, and more importantly, GFS misunderstands the compromises Congress made in Subchapter V. In a traditional Chapter 11 case, a nonconsensual plan is subject to the "absolute priority rule," under which classes of unsecured creditors are fully paid before any junior class. *See In re Lively*, 717 F.3d 406, 410 (5th Cir. 2013); *see also In re Pac. Lumber Co.*, 584 F.3d 229, 244 (5th Cir. 2009); 11 U.S.C. § 1129(b)(1), (2)(B)(ii). Because "the Code places equity holders at the bottom of the priority list," *Czyzewski v. Jevic Holding Corp.*, 580 U.S. 451, 457, 137 S.Ct. 973, 197 L.Ed.2d 398 (2017), however, the absolute priority rule "could preclude reorganizations in which continuing management of the bankruptcy estate by a business's owners would be essential to a successful reorganization because such owners' retention of estate property would violate the priority rule." *Cleary*, 36 F.4th at 514.

In the SBRA, Congress sought to help small business debtors by abrogating the absolute priority rule, allowing equity owners to retain their interests even though junior creditors are not paid in full. *See* 11 U.S.C. § 1191(c). The plan needs only ensure that the debtor's disposable income be paid to creditors for three to five years. *Cleary*, 36 F.4th at 514 (citing *id.* § 1191(c)(2)(A) and (3)). Congress did not stop there, though. To counterbalance that benefit to debtors, Congress excepted from discharge "any debt ... of the kind specified in section 523(a)." *Id.* § 1192(2). In other words, like most legislation, Subchapter V is a compromise: affording small business debtors unique benefits while subjecting them to § 523(a)'s dischargeability exceptions. *See Cleary*, 36 F.4th at 517 ("Given the elimination of the absolute priority rule, Congress understandably applied limitations on the discharge of debts to provide an additional layer of fairness and equity to creditors to balance against the altered order of priority that favors the debtor.").

To agree with GFS's argument here would be to rewrite that compromise—at least insofar as small business corporate debtors are concerned—in the face of § 1192(2)'s plain language and context. We have no authority to do so, especially based on statements in legislative history that Congress never enacted in the statute.[11]

IV.

***7** In sum, we agree with the Fourth Circuit that 11 U.S.C. § 1192(2) subjects both corporate and individual Subchapter V debtors to the categories of debt discharge exceptions listed in § 523(a). Accordingly, the judgment of the bankruptcy court is REVERSED and REMANDED for further proceedings consistent with this opinion.

All Citations

--- F.4th ----, 2024 WL 1644229

Footnotes

1 To be sure, the issue is a close and interesting one—as shown by the fact that it was recently the subject of a national bankruptcy moot court competition. *See* Paul R. Hage & G. Ray Warner, *31st Annual Conrad B. Duberstein National Bankruptcy Moot Court Competition*, 32 NORTON J. BANKR. L. & PRAC. art. 1 (Feb. 2023).

2 Such an agreement is known as a "Merchant Cash Advance."

3 *See Jennings v. Lapeer Aviation, Inc. (In re Lapeer Aviation, Inc.)*, 2022 WL 1110072 (Bankr. E.D. Mich. Apr. 13, 2022)

(ruling that corporate debtors proceeding under Subchapter V are not subject to § 523(a) actions); *Catt v. Rtech Fabrications, LLC (In re Rtech Fabrications, LLC)*, 635 B.R. 559, 568 (Bankr. D. Idaho 2021) (same); *Cantwell-Cleary Co. v. Cleary Packaging, LLC (In re Cleary Packaging, LLC)*, 630 B.R. 466, 468 (Bankr. D. Md. 2021), *rev'd* 36 F.4th 509 (4th Cir. 2022) (same); *In re Satellite Rests. Inc. Crabcake Factory USA*, 626 B.R. 871, 873 (Bankr. D. Md. 2021) (same). In July 2023, a bankruptcy appellate panel of the Ninth Circuit arrived at the same conclusion. *See generally Lafferty v. Off-Spec Sols., LLC (In re Off-Spec Sols., LLC)*, 651 B.R. 862 (B.A.P. 9th Cir. 2023). In addition, some leading bankruptcy scholars agree with these authorities. *See generally* Paul W. Bonapfel & Robert Schaaf, *Do § 523(a) Exceptions to Discharge Apply to the Discharge of a Corporation in a Subchapter V Case After "Cramdown" Confirmation Under § 1191(b)?*, 32 NORTON J. BANKR. L. & PRAC. art. 1 (Dec. 2023); Richard P. Cook, *Discharges in Subchapter V*, 41 AM. BANKR. INST. J. 24 (2022).

[4] This subpart refers, as relevant here, to "any debt that arose before the date of such [plan] confirmation." 11 U.S.C. § 1141(d)(1)(A).

[5] *See, e.g., Kind*, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/kind [https://perma.cc/QBX6-ZB94] (last visited Mar. 19, 2024) ("[A] group united by common traits or interests: CATEGORY."); *Kind*, CAMBRIDGE DICTIONARY (4th ed. 2013) ("[A] group with similar characteristics, or a particular type.").

[6] *See* 11 U.S.C. § 727(a)(1) (in Chapter 7 proceedings, "[t]he court shall grant the debtor a discharge, unless ... the debtor is not an individual"); *id.* § 109(e) ("Only an individual with regular income ... may be a debtor under chapter 13 of this title.").

[7] *Id.* § 1141(d)(2) (denying § 523 dischargeability for a "debtor who is an individual"); *id.* § 1141(d)(5) (limiting dischargeability when "the debtor is an individual"); *id.* § 1141(d)(6) (same for "a debtor that is a corporation").

[8] *See also Breezy Ridge Farms*, 2009 WL 1514671, at *2 (explaining that, "[a]lthough 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").

[9] Like the bankruptcy court, GFS would distinguish *JRB Consolidated* on the ground that Chapter 11's discharge provisions are "narrower" than Chapter 12's. That may have been an accurate statement in 1995, when *JRB Consolidated* was decided. But in 2005 Congress broadened Chapter 11's discharge exception provisions such that corporate debtors are now subject to dischargeability complaints under § 1141(d)(6). *See* Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, S. 256, 109th Cong. § 708 (2005); Pub. L. No. 109-8, 119 Stat. 23, 126–27 (2005) (adding 11 U.S.C. § 1141(d)(6)). Accordingly, like the Fourth Circuit, we fail to see any relevant difference in scope between the Chapter 11 and 12 discharge provisions. *See Cleary*, 36 F.4th at 516–17.

[10] *Amicus curiae* National Association of Bankruptcy Trustees ("NABT") similarly relies on one vague assertion from the legislative history that § 1192(2) pertains only to debt "that is otherwise nondischargeable." *See* H.R. Rep. No.

116-171, at 8 (2019). At the same time, NABT concedes that in 72 pages of legislative history, discussion of § 523(a) "appears only once." Accordingly, this one isolated reference does not outweigh the evidence from the statutory texts enacted by Congress. *See Azar v. Allina Health Servs.*, 587 U.S. 566, 139 S. Ct. 1804, 1814, 204 L.Ed.2d 139 (2019) (explaining that "legislative history is not the law").

11 *Amicus* NABT worries that subjecting corporate debtors to § 523(a)'s exceptions will frustrate Subchapter V's efficiency goals by, for instance, incentivizing creditors to promiscuously file § 523(a) complaints against debtors. But these arguments are grounded in policy considerations, not statutory text or structure. And, in any event, the Bankruptcy Code already provides remedies for abusive complaints. *See* FED. R. BANKR. P. 9011(c) (sanctions).

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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA
Fort Lauderdale Division

In re: Chapter 11 (Subchapter V)

ADVANCE CASE PARTS, INC. Case No. 20-22320-PDR

Debtor.
_____/

DEBTOR'S PLAN OF REORGANIZATION

This Plan of Reorganization (the "Plan") in this bankruptcy case under subchapter V of chapter 11 ("Chapter 11 Case") of the Bankruptcy Code (the "Code" or "title 11") proposes to pay creditors of Advance Case Parts, Inc. (the "Debtor").

To creditors: Your rights may be affected by this plan. Your claim may be reduced, modified, or eliminated. You may wish to consult an attorney about your rights and your treatment under the Plan. **THE PLAN INCLUDES RELEASES TO PAUL PODHURST, PAUL VAIL, AND GEORGE E. HUDE JR. IN EXCHANGE FOR THEIR CONTRIBUTION TO THE PLAN OF THEIR DISPOSABLE INCOME OVER THE PLAN TERM OF FIVE YEARS, RESTRICTIVE EMPLOYMENT AGREEMENTS WITH NON-COMPETITION PROVISIONS (AS TO PODHURST AND VAIL), AND THE USE OF THEIR LICENSES (AS TO HUDE).**

PLAN

A. Brief History of the Debtor's Business Operations

The Debtor is a subchapter S corporation organized under the laws of the State of Florida. Debtor is the successor-by-merger of Advance Case Parts, Inc., a Florida corporation, and its former parent company, Advance Food Service Equipment, LLC, a Maine limited liability company. The merger was completed on November 9, 2020, prior to filing of the Debtor's petition, to reduce the administrative costs of bankruptcy, and Debtor anticipates the merger will result in future cost savings in the operations of the entity. The Debtor has operated in Florida since 2007, and specializes in providing service and replacement parts for refrigeration units, refrigeration case units, and oven units in commercial businesses. The Debtor's primary operations are located at 3285 SW 11 Ave, Ft. Lauderdale, FL 33315, and the Debtor also has business premises at 16 Danielle Dr., Windham ME 04602, and services customers in Maine.

The Chapter 11 bankruptcy was precipitated by the business difficulties caused by COVID-19, which decreased business from Debtor's customers, which are primarily supermarkets, schools and restaurants. Due to financial difficulties, Debtor took on a high-interest loan with significant debt service requirements. Additionally, the Debtor's largest creditor, a factoring company, reduced the funding percentage of the Debtor's receivables, which

has contributed to the Debtor's inability to timely satisfy all of the Debtor's secured and unsecured obligations. Moreover, Debtor's existing employment contract with one of its employees is no longer necessary to the operation of the Debtor's business. The Debtor anticipates that this Plan will enable it to successfully reorganize by restructuring repayment of debt, discontinuing factoring of its receivables, and rejecting the employment contract that the Debtor does not require to continue operating, which will result in significant cost savings.

B. Liquidation Analysis/Best Interests of Creditor Test Satisfied

To confirm the Plan, the Court must find that all creditors and equity interest holders who do not accept the Plan will receive at least as much under the Plan as such claim and equity interest holders would receive in a liquidation under chapter 7 of the Bankruptcy Code. The liquidation analysis attached to this Disclosure Statement as **Exhibit A** demonstrates that the Plan meets this requirement.

C. Feasibility / Ability to Fund Plan

The Debtor has provided a projection attached as **Exhibit B** to analyze its ability to meet the obligations under the Plan. The Debtor believes the confirmation of the plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the Debtor.

The Debtor proposes to pay creditors from the sale of assets and future disposable cash flow from operations, as well as by the contribution of disposable income of Paul Podhurst, President and Chief Executive Officer of Debtor, George E. Hude, Jr, Former Treasurer of Debtor, and Paul Vail, Chief Operating Officer and Vice President of Debtor ("Released Parties"), which is given by the Released Parties, in addition to restrictive employment agreements with non-competition provisions (as to Podhurst and Vail), and the use of their licenses (as to Hude), in exchange for releases of those individuals from all creditors' claims against them.

D. Plan Length and Funding by Disposable Income

The Plan, and the Debtor's financial projections, provides that all of the projected disposable income, as defined by section 1191(d) of the Code, of the Debtor to be received in the 5-year period, beginning on the date that the first payment is due under the plan, will be applied to make payments under the Plan. Disposable income is the total income projected to be received by the Debtor that is not reasonably necessary to be expended for the payment of expenditures necessary for the continuation, preservation, or operation of the business of the debtor. Pursuant to the financial projections attached hereto as **Exhibit B**, the minimum amount of disposable income payments is $60,000 total over the 5-year period. Debtor will make the payments of disposable income on a quarterly basis as provided in the financial projections, with the final payment expected to be paid at the conclusion of the plan, approximately 60 months from the Effective Date.

At the end of each year, the Debtor will reconcile the projections and will pay out any excess disposable income ("Excess Disposable Income") received beyond projections, after the

Debtor funds a project financing reserve account necessary to finance future projects in the amount of $500,000, which is approximately three months' worth funding of parts and independent contractor payments. The project financing reserve account is necessary due to the *ad hoc* components of Debtor's business that are difficult to project, and the lack of a factoring agreement, which was terminated as part of this bankruptcy, and any credit facilities. The determination of the amount, if any, of Excess Disposable Income will be made within 30 days of each year end, and any Excess Disposable Income will be distributed in the next scheduled quarterly payment, *pro rata* to the unsecured creditors who have opted to receive disposable income under the Plan. The financial projections attached as **Exhibit B** project that estimated Excess Disposable Income could be $908,188, but the actual amount of Excess Disposable Income will vary based on the actual income and expenses of Debtor, will be subject to reconciliation at the end of each plan year, and could be greater or less than this amount, subject to no maximum and no minimum.

The Plan also provides that the disposable income, as defined by section 1191(d) of the Code, of the Released Parties, in the 5-year period shall be contributed to the Plan in exchange for releases of those individuals from all creditors' claims against them. Pursuant to the analysis attached hereto as **Exhibit B**, this amount is $45,000 total over the 5-year period. The Released Parties shall make these payments to Debtor, who shall distribute them on a quarterly basis *pro rata* to the unsecured creditors who have opted to receive disposable income under the Plan, over the 5-year period.

E. Treatment of Claims and Equity Interests

1. Summary.

This Plan provides for:
_6_ classes of secured claims
_0_ classes of priority claims
_2_ classes of non-priority unsecured claim
_1_ class of equity security holders

2. Secured Claims.

Allowed Secured Claims are claims secured by property of the Debtor's bankruptcy estate (or that are subject to setoff) to the extent allowed as secured claims under § 506 of the Code. If the value of the collateral or setoffs securing the creditor's claim is less than the amount of the creditor's allowed claim, the deficiency will be classified as a general unsecured claim.

With respect to the Allowed Secured Claims, the Plan provides that:

> [X] 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 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;

[X] for the sale, subject to section 363(k) of the Code, 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 subparagraphs (i) or (iii) of 11 U.S.C. § 1129 (b)(2)(A); or

[____] for the realization by such holders of the indubitable equivalent of such claims.

Secured Claim	Class	Allowed Amount	Proposed Treatment of Allowed Claims	Voting Rights	Projected Plan Recovery
Newtek Business Credit, Inc. f/k/a CDS Business Services Collateral: Advance Case Parts, Inc. bank accounts,[1] deposits, accounts receivable, inventory, equipment, and machinery	1	$750,000	Payment at 5.55% interest over sixty months by a combination of monthly payments and the net proceeds from inventory sold in the ordinary course of business. Monthly payments shall be $7,500 in year 1, $10,000 in year 2, and $12,500 monthly in years 3 through 5, with the final payment in month 60 including payment of all remaining amounts of the claim and interest. Non-operational inventory will be sold in the ordinary course of business to a third party person or entity not associated with or who do not hold an interest in the debtor or is a principal, officer, or director. All net proceeds of inventory liquidation shall be paid to Newtek and applied to principal of Newtek's secured claim, with reporting to Newtek on the liquidation of such inventory, on a bimonthly basis. Costs to sell inventory shall be subject to Newtek's approval and deducted from gross proceeds.	Impaired/ Entitled to Vote	100%

[1] The Debtor notes that of the bank accounts listed on the Schedules (ECF 40), all but TD Bank Acct 3037 were accounts owned by Advance Case Parts, Inc. Additionally, the balances in Acct. 2659 and 9693 were switched due to a scrivener's error. All balances post-petition were deposited in the DIP account.

1st Source Bank Collateral description: 2016 Dodge Ram 2500 Promaster Van VIN: 3C6TRVDGXGE122431	2	$9,771	Payments under vehicle finance contract continue until paid in full.	Unimpaired/ Deemed to accept	100%
Sheffield Financial Collateral description: Sure-Trac trailer Model ST8220CHWT-B-100	3	$1,715	Payments under trailer finance contract continue until paid in full.	Unimpaired/ Deemed to accept	100%
GM Financial Collateral description: 2017 Chevy Silverado VIN 1GC2KUEG3HZ406510	4	$30,044	Payments under vehicle finance contract continue until paid in full.	Unimpaired/ Deemed to accept	100%
National Funding, Inc. Collateral description: Advance Food Service Equipment LLC bank accounts and accounts receivable	5	$46,333.36	Payment of secured claim at 0% interest over 5 years	Impaired/ Entitled to Vote	100%
U.S. Small Business Administration Collateral description: Advance Food Service Equipment LLC bank accounts and accounts receivable	6	$30,603.06	Payment of secured claim at 0% interest over 5 years.	Impaired/ Entitled to Vote	100% (secured portion)

3. Priority Claims. There are no anticipated holders of any allowed claims entitled to priority under section 507(a) of the Code (except administrative expense claims under section 507(a)(2) and priority tax claims under section 507(a)(8)).

4. Unsecured Claims. General unsecured claims are not secured by property of the estate and are not entitled to priority under § 507(a) of the Code. The following chart identifies the Plan's proposed treatment of classes 7 and 8 which contain allowed general unsecured claims against the Debtor. All allowed general unsecured claims allowed under § 502 of the Code shall be entitled to receive 20% of their allowed claim, up to a maximum of $500, on the sixth month after the Effective Date, unless the holder of an unsecured claim opts in no later than the ballot deadline to receive their *pro rata* share of the disposable income of Debtor, and the Released Parties for a period of 5 years from the Effective Date, which is to be paid on a quarterly basis, as provided in the financial projections in **Exhibit B**. The ballot for confirmation shall present the option to each unsecured creditor on whether they choose to opt in to receive disposable income,

and in default of submitting any ballot, or selecting such option on the ballot, the holders of an allowed unsecured claim shall be entitled to receive 20% of their allowed claim, up to a maximum of $500.

a. Paycheck Protection Loan Claim. The claim of Synovus Bank is a loan made under the Paycheck Protection Loan program ("PPP Loan") that is subject to potential forgiveness, and only to the extent the PPP Loan is not forgiven will the claim be paid as part of the general unsecured class.

b. Critical Vendor Claims. Partstown and Giles have been determined to be critical vendors (ECF 52, 71), and the remainder of their critical vendor claims shall be fully paid under the plan per the budget attached as **Exhibit B**. The filed claims of Partstown and Giles shall not be treated as part of the general unsecured class.

Class	Description	Allowed Amount	Proposed Plan Treatment	Voting Rights
7	Synovus Bank	$428,875.39 (the "PPP Claim")	Pre-petition, the Debtor received a Paycheck Protection Loan from Synovus Bank ("PPP Loan") in the amount of $426,747.50 ("PPP Funds"). Debtor shall submit an application for forgiveness to Synovus Bank in compliance with the PPP program ("Forgiveness Application"). Prior to any determination on the Forgiveness Application, the PPP Claim shall be included as part of the general unsecured creditors class, and Debtor shall set aside as a reserve (in sum, the "PPP Claim Distribution Reserve") the amount to which Synovus Bank would be entitled to as part of the general unsecured creditors' class if the PPP Funds were allowed as a general unsecured claim. To the extent all or part of the PPP Claim is not forgiven for any reason by TD Bank (the "Non-Forgiven Funds"), Synovus Bank shall be allowed a general unsecured claim for the Non-Forgiven Funds, and such claim shall be paid as part of the general unsecured creditors class in accordance with the opt-in provisions and deadlines applicable to the general unsecured creditor class. If Debtor's obligation to repay is forgiven, the PPP Claim shall no longer be considered part of the	Impaired/ Entitled to Vote

			general unsecured class, and either: (a) if Synovus Bank did not "opt-in" to receive disposable income over the life of the plan, the Debtor shall have no further obligation to pay any amounts on account of the PPP Loan claim, or (b) if Synovus Bank opted to receive future disposable income over the life of the plan, the Debtor shall distribute the PPP Claim Distribution Reserve *pro rata* to all other unsecured creditors who opted to receive future disposable income, on the succeeding quarter after the final determination on the Forgiveness Application.	
8	General unsecured class	Estimated amount: $1,400,000[2]	Each holder will be entitled to receive 20% of their allowed claim, up to a maximum of $500, on the sixth month after the Effective Date, unless the holder of the unsecured claim opts in no later than the ballot deadline to receive their *pro rata* share of disposable income of Debtor and the Released Parties, to be paid on a quarterly basis over a term of 5 years as provided in the financial projections in Exhibit B.	Impaired / Entitled to Vote

5. Equity interest holders. Equity interest holders will retain their equity under the Plan.

Class	Description	Proposed Plan Treatment	Voting Rights
9	Equity interest holders: Paul Podhurst: 50% Paul Vail: 50%	Each holder will be entitled to retain their equity interest.	Unimpaired/deemed to accept

6. Unclassified claims. Under section 1123(a)(1), administrative expense claims and priority tax claims are not in classes.

a. Administrative expense claims. Each holder of an administrative expense claim allowed under section 503 of the Code will be paid in full on the Effective Date of this Plan, in cash, or upon such other terms as may be agreed upon by the holder of the claim and the Debtor, or as provided in the Plan.

[2] A claim summary will be filed prior to the confirmation hearing.

Below are the anticipated administrative expense claims and their treatment:

Claim	Allowed Amount	Proposed Treatment of Allowed Claims
Subchapter V Trustee Fees	$7,500	[X] cash equal to the allowed amount of such claim on the effective date of the plan [____]other treatment:
Akerman LLP – Debtor's attorneys' fees and costs	$100,000 estimated	[ ] cash equal to the allowed amount of such claim on the effective date of the plan [X]other treatment as agreed: Payment over first six months of plan in equal installments
Ordinary course of business administrative expense claims	$15,804 estimated	[ ] cash equal to the allowed amount of such claim on the effective date of the plan [X] other treatment: Payment over first year of plan *pro rata* in equal installments – see Exhibit 2 to **Exhibit B**

b. Priority tax claims. Each holder of a priority tax claim will be paid:

[X] regular installment payments in cash either

(X) of a total value, as of the effective date of the plan, equal to the allowed amount of such claim, or

(____) over a period ending not later than 5 years after the date of the order for relief under section 301, 302, or 303,

and in a manner not less favorable than the most favored nonpriority unsecured claim provided for by the plan (other than cash payments made to a class of creditors under section 1122(b)).

Below are the anticipated priority tax claims and their treatment:

Claim	Allowed Amount	Proposed Treatment of Allowed Claims
Broward County Tax Collector (Claim No. 8-1)	$270.42	Cash equal to the allowed amount of such claim on the Effective Date of the Plan.

7. Statutory Fees. All fees required to be paid under section 1930 of title 28 that are owed on or before the Effective Date of this Plan have been paid or will be paid on the Effective Date.

F. Allowance and Disallowance of Claims

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

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

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

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

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

G. Executory Contracts and Unexpired Leases

A list of the contracts and unexpired leases that the Debtor will assume and reject is attached as **Exhibit C**. Assumption means that the Debtor has elected to continue to perform the obligations under such contracts and unexpired leases, and to cure defaults of the type that must be cured under the Code, if any. Any counterparty or lessee that has a scheduled or filed claim that Debtor proposes to cure shall not be treated in their respective class but shall receive cure payments as specified under the budget attached as Exhibit 1 to **Exhibit B**.

If you object to the assumption, and if applicable the assignment, of your unexpired lease or executory contract under the Plan, the proposed cure of any defaults, the adequacy of assurance of performance, you must file and serve your objection to the Plan within the deadline for objecting to the confirmation of the Plan, unless the Court has set an earlier time.

Except for executory contracts that have been assumed, and if applicable assigned, before the effective date or under this section of the Plan, or that are the subject of a pending motion to assume, and if applicable assign, the Debtor will be conclusively deemed to have rejected all executory contracts and unexpired leases as of the effective date. If you object to the rejection of your contract or lease, you must file and serve your objection to the Plan within the deadline for objecting to the confirmation of the Plan. The deadline for filing a Proof of Claim based on a claim arising from the rejection of a lease or contract is 30 days after the date of the order confirming this Plan, or within 30 days of the rejection of the contract or lease, whichever is earlier. Any claim based on the rejection of a contract or lease will be barred if the proof of claim is not timely filed, unless the Court orders otherwise.

H. Post-Confirmation Management and Employment/Retention of Insiders

The Debtor's post-confirmation management will include Paul Podhurst, President and Chief Executive Officer, Paul Vail, Vice President and Chief Operating Officer, and Michael Picardi Sr., Chief Financial Officer.

Paul Podhurst and Paul Vail, both key officers, employees, and owners of the Debtor, have each agreed to be bound by the terms of a five-year employment agreement with Reorganized Debtor, and subject to a non-compete provision for 18 months following the end of employment with the Reorganized Debtor. Under the employment agreements, Podhurst will earn a base salary of $133,101.28, and Vail will earn a base salary of $132,588.82, which are subject to a maximum annual increase of 3% conditioned upon all Plan payments being current and the Debtor having sufficient free cash flow to fund the increase. The base salaries of Podhurst and Vail are reduced in comparison to their salaries prior to the coronavirus pandemic. The individuals are also eligible for a discretionary bonus conditional upon all Plan payments being made, which would be made on the first quarter after the fifth anniversary of the confirmed Plan. True and correct copies of the employment agreements are attached as **Exhibit D**.

The appointment to, or continuance in, such office of such individual, is consistent with the interests of creditors and equity security holders and with public policy. In particular, the retention of Paul Podhurst and Paul Vail is crucial to the Reorganized Debtor maintaining its business relationships, as these executives have customer and vendor relationships and operational knowledge, which is vital to the success of the Reorganized Debtor. The Reorganized Debtor could not likely sustain its projected operations without their continued employment. In consideration of both the value of the restrictive employment agreements, non-competition agreement, and their continued employment, and in consideration of their contribution to the Plan of their disposable income – which will result in doubling the projected recovery to other unsecured creditors – Paul Podhurst and Paul Vail will receive releases from all creditors under the Plan. George E. Hude, Jr., the former Treasurer of Debtor, will also receive a release under the Plan in consideration of his contribution to the Plan of his disposable income and the use of his A/C refrigeration license by Debtor. The Declarations of Paul Podhurst, Paul Vail, and George E. Hude, Jr. are attached as **Exhibits E, F,** and **G** respectively. Each of the Declarations attests as to the value of non-exempt assets does not exceed the amount of disposable income under the plan, and attaches schedules evidencing that the 5-year projected disposable income does not exceed $250/month (or $750/quarter), which is each individual's contribution under the Plan.

The following insiders will be employed or retained by the reorganized debtor, and identified is their compensation for such insider:

Individual	**Role/Compensation**
Paul Podhurst	CEO, President - $133,101.28 annual salary
Paul Vail	COO, Vice President - $132,588.82 annual salary
Michael Picardi, Sr.	CFO - $107.432.00 annual salary
Michael Picardi, Jr.	Hourly employee - $20.00 per hour
Cayla Hope Podhurst	Hourly employee - $15.00 per hour

I. Subchapter V Trustee

1. Consensual Plan. If the Plan of the Debtor is confirmed under section 1191(a) of title 11, the service of the trustee appointed under Subchapter V of Chapter 11 (the "Subchapter V Trustee" or "Trustee") in the case shall terminate when the plan has been substantially consummated.

2. Non-Consensual or Cramdown Plan. If the Plan is confirmed under section 1191(b) of title 11, except as otherwise provided in the Plan or in the order confirming the plan, the Subchapter V Trustee shall confirm that the Debtor and other plan funders make all payments to creditors under the plan. As such the following provisions shall apply to all claims and disbursements made by the Subchapter V Trustee under the Plan:

a. The Debtor shall file with the Court as a supplement to the Plan and provide notice to all creditors at or before confirmation, a list of all the creditors who will be receiving payments under the Plan, the total amount to be paid to each creditor under the Plan (inclusive of all allowed interest and fees) and the payment terms and schedule for each creditor under the plan.

b. The Debtor shall timely pay the payments to creditors under the Plan, and provide proof of same to the Subchapter V Trustee on a quarterly basis. If the Debtor fails to timely make any plan payment to the Subchapter V Trustee, the Subchapter V Trustee may file and serve a notice of delinquency upon the Debtor and the Debtor's attorney. The Debtor shall have 45 days from the date of the notice of delinquency to make all payments due under the Plan, including any payments that become due within the 45-day period. If the Debtor is seeking to cure the delinquency in a modified plan the Debtor must file a motion to modify the confirmed plan within 45 days of the notice of delinquency. If the Debtor is not current with plan payments on the 45th day after the date of the notice of delinquency or has not filed a motion to modify within that time period, the Trustee will file and serve a report of non-compliance and may thereafter seek the dismissal or conversion of the case to Chapter 7.

i. All payments under the Plan will be made by the Debtor to the holder of each allowed claim at the address of such holder as listed on the Schedules and/or Proof of Claim, unless the Debtor has been notified in writing of a change of address.

ii. Any payment required to be made under the plan on a day other than a business day shall be made on the next succeeding business day.

iii. Any distributions of cash or other property under the plan that is unclaimed for a period of six (6) months after such distribution was made shall constitute unclaimed property and any entitlement of any holder of any claim to such distribution shall be extinguished, forever barred, and shall be returned to the Debtor.

iv. Claimants shall not be permitted to amend or otherwise modify any claim after the later of the claims bar date or the confirmation date without leave of the Bankruptcy Court. Any amendment to a claim filed after the later of the claims bar date or the confirmation date shall be deemed disallowed in full and expunged without any action by the Trustee or Debtor unless the claimholder has obtained prior Court authorization for the filing of such amendment. The Subchapter V Trustee and Debtor shall have no obligation to recognize any transfer of any claim after distributions have started.

v. Unless expressly provided in the Plan, or confirmation order, post-petition interest and fees shall not accrue on or after the Petition Date on account of any claim.

c. During the pendency of this case, the Debtor shall provide copies of yearly income tax returns to the Subchapter V Trustee (but not file with the Court) no later than 30 days after the due date to the underlying taxing authority.

3. Compensation. Under section 330 of the Bankruptcy Code, the case-by-case Subchapter V Trustee shall be compensated for services and reimbursed for expenses. However, the method of payment of the Subchapter V Trustee compensation depends on the provision under which the Plan is confirmed and the method of disbursement to creditors under the Plan:

a. The Subchapter V Trustee compensation is estimated to be $7,500 through confirmation. The Subchapter V Trustee will apply to the Court for an award of compensation through the application process that is used by professionals. The Subchapter V Trustee will file a final fee application for compensation to be heard with the other final fee applications in the case.

b. If the plan is confirmed on a consensual basis under section 1191(a) of the Bankruptcy Code, then the Subchapter V Trustee's services ends with substantial consummation of the Plan under section 1183(c)(1), and the Subchapter V Trustee may collect approved compensation for all services. The Subchapter V Trustee's allowed compensation, as with any other administrative expenses, is payable on the effective date of the Plan, unless the Subchapter V Trustee agrees to different treatment.

c. If the plan is confirmed on a non-consensual basis under section 1191(b) of title 11, then the Subchapter V Trustee will remain in place throughout the life of the Plan, and the Subchapter V Trustee may be entitled to additional compensation for services provided after confirmation. The fee for the Subchapter V Trustee to monitor the plan payments made by Debtor shall be $250 per quarter. As such, the Subchapter V Trustee may file additional or supplemental fee applications throughout the life of the Plan. Upon approval of the Subchapter V Trustee's fee applications in a non-consensual case, as long as all professional administrative claims are similarly treated in the Plan, the Debtor shall pay all fee amounts due to the Subchapter V Trustee on the effective date of the Plan, over the remaining life of the Plan, or forthwith.

J. Additional Provisions

1. Definitions and rules of construction. The definition and rules of construction set forth in sections 101 and 102 of the Code shall apply when terms are defined or construed in the Code are used in this Plan.

2. Effective Date. The Effective Date of this Plan is the first business day following the date that is 14 days after the entry of the confirmation order. If, however, a stay of the confirmation order is in effect on that date, the Effective Date will be the first business day after the date on which the stay expires or is otherwise terminated.

3. Severability. If any provision in this Plan is determined to be unenforceable, the determination will in no way limit or affect the enforceability and operative effect of any other provision of this Plan.

4. Binding effect. The rights and obligations of any entity named or referred to in this Plan will be binding upon, and will inure to the benefit of the successors or assigns of such entity.

5. Captions. The headings contained in this Plan are for convenience of reference only and do not affect the meaning or interpretation of this Plan.

6. Corporate Governance. The issuance of non-voting securities will be prohibited in the charter of Reorganized Debtor to the extent required to comply with §1123(a)(6) of the Code.

7. Default Remedies. If the Debtor does not make the payments provided for under the Plan as and when due, the Debtor will be in default under the Plan ("Default"). After the occurrence of a Default, any creditor may send written notice to the Debtor, with a copy to Debtor's attorney and the Subchapter V Trustee, that the Debtor is in Default under the Plan ("Default Notice"). The Debtor will be entitled to a 45-day grace period after the transmission of the Default Notice ("Grace Period") to cure the default. If the Debtor has not cured the Default within the Grace Period, the creditor is entitled to commence a lawsuit to liquidate its claim in the Circuit Court of Broward County, Florida. This provision survives the confirmation of the Plan, and creditors are entitled to enforce this provision post-confirmation. The bankruptcy court with jurisdiction over this Plan retains jurisdiction to enforce this provision of the Plan.

8. Vesting of Assets. Pursuant to section 1141(c), as of the Effective Date, all property of the Debtor's estate will vest in the Reorganized Debtor, free and clear of any and all liens, debts, obligations, claims, liabilities, and all other interests of every kind and nature, except for the Plan Obligations and as otherwise provided under the Plan.

9. Discharge.

a. Consensual Plan. If the Debtor's plan is confirmed under section 1191(a), then pursuant to section 1141(d) of the Bankruptcy Code, the distributions, rights, and treatment that are provided in the Plan shall be in complete satisfaction, discharge, and release, effective as of the Effective Date, of claims, interests, and causes of action against Debtor of any nature whatsoever, including any interest accrued on claims from

and after the Petition Date, whether known or unknown, against, liabilities of, liens on, obligations of, rights against, and interests in, the Debtor's or any of its assets or properties, regardless of whether any property shall have been distributed or retained pursuant to the Plan on account of such claims and interests, including demands, liabilities, and causes of action that arose before the Effective Date, and any liability to the extent such claims or causes of action accrued before Effective Date. On the confirmation date of this Plan, the Debtor as it exists post-Effective Date ("Reorganized Debtor") will be discharged from any debt that arose before confirmation of this Plan, subject to the occurrence of the Effective Date, to the extent specified in section 1141(d)(1)(A) of the Code, except that the Debtor will not be discharged of any debt: (i) imposed by this Plan; (ii) of a kind specified in section 1141(d)(6)(A) if a timely complaint was filed in accordance with Rule 4007(c) of the Federal Rules of Bankruptcy Procedure; or (iii) of a kind specified in section 1141(d)(6)(B).

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

i. on which the last payment is due after the first 3 years of the plan, or such other time not to exceed 5 years fixed by the court; or

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

10. **Releases. On the confirmation date of this Plan, without the need for execution or delivery of any additional documentation or orders of the Bankruptcy Court, and in exchange for valuable consideration of their contribution of their disposable income under this Plan, Paul Podhurst, President and Chief Executive Officer of Debtor, George E. Hude, Jr, Former Treasurer of Debtor, and Paul Vail, Chief Operating Officer and Vice President of Debtor ("Released Parties") will be fully and finally released and forever discharged from any and all claims, actions, causes of action, liabilities, obligations, rights, suits, accounts, covenants, contracts, controversies, agreements, promises, damages, judgments, debts, encumbrances, liens, remedies, and demands, of every kind and nature whatsoever, in law or in equity, relating to the obligations of Debtor to any other person or entity, including but not limited to (i) any explicit or implicit guarantees of the Released Parties for the obligations of Debtor, (ii) any debts where the Released Parties are co-obligors with Debtor, (iii) pre-petition claims, interests, or rights which were, or could have been asserted, against the Debtor, and (iv) post-petition claims that could have been asserted against Debtor prior to the confirmation of this Plan (collectively, "Released Claims").**

11. **Conditional Release and Forbearance as to Newtek Business Credit, Inc. f/k/a CDS Business Services. Only as to creditor Newtek Business Credit, Inc. f/k/a CDS Business Services ("Newtek Business Credit"), paragraph 10 is inapplicable and instead Newtek Business Credit, Inc. shall forbear from exercising any collection remedies against**

the Released Parties so long as all payments owed to Newtek Business Credit under the Plan are current. In the event of a default in plan payments to Newtek Business Credit, Newtek Business Credit shall be entitled to exercise collection remedies against Debtor and any guarantors of the debt, and to seek the amount of the obligation still owed under the Plan, less the payments already received by Newtek Business Credit.

12. **Exculpation.** **Except as specifically provided in the Plan, neither the Debtor, nor its employees, representatives, members, advisors, attorneys, accountants, financial advisors, or agents, or any of such parties' successors or assigns, shall have or incur, and are hereby released from, any claim, obligation, cause of action or liability to one another or to any holder of a claim or interest, or any other party in interest, or any of their respective officers, directors, shareholders, members, employees, representatives, advisors, attorneys, accountants, financial advisors, agents, or affiliates, or any of their successors or assigns, for any act or omission in connection with, relating to, or arising out of the Chapter 11 Case, the negotiation and pursuit of confirmation of this Plan, the consummation of this Plan, or the administration of this Plan, or the property to be distributed under the Plan, except for their gross negligence, willful misconduct, or actual fraud, and in all respects shall be entitled to reasonably rely upon the advice of counsel with respect to their duties and responsibilities (if any) under this Plan.**

13. **Discharge Injunction.** **Except as otherwise specifically provided in the Plan or the Confirmation Order, all entities and persons, and any successor, assigns or representatives of such entities and persons, who have held, hold, or may hold claims, rights, causes of action, liabilities, equity interests, or any other interests based on any act or omission, transaction, or other activity of any kind or nature related to the Debtor, Debtor in Possession, or the Chapter 11 Case that occurred prior to the Effective Date ("Enjoined Claim"), regardless of the filing, lack of filing, allowance or disallowance of such claim or interest, and regardless of whether such entity or person has voted to accept the Plan, shall be precluded and permanently enjoined on and after the Effective Date from (a) the commencement or continuation in any manner of any claim, action or other proceeding of any kind with respect to any Enjoined Claim, against (i) any assets of the Debtor or the Released Parties, (ii) any assets re-vested in the Reorganized Debtor, (iii) the Debtor, Reorganized Debtor, or the Released Parties; (b) the enforcement, attachment, collection, or recovery by any manner or means of any judgment, award, decree or order with respect to any Enjoined Claim, against (i) any assets of the Debtor or the Released Parties, (ii) any assets re-vested in the Reorganized Debtor, (iii) the Debtor, Reorganized Debtor, or the Released Parties; (c) the creation, perfection, or enforcement of any encumbrance or lien of any kind with respect to any Enjoined Claim, against (i) any assets of the Debtor or the Released Parties, (ii) any assets re-vested in the Reorganized Debtor, (iii) the Debtor, Reorganized Debtor, or the Released Parties; and (d) taking any action whatsoever with respect to any Released Claims against (i) any assets of the Debtor or the Released Parties, (ii) any assets re-vested in the Reorganized Debtor, (iii) the Debtor, Reorganized Debtor, or the Released Parties.**

14. Request for "Cram Down" of Non-Accepting Classes. The Debtor requests that the Court confirm the Plan notwithstanding the failure of classes to vote to accept the Plan. Even if one or more impaired classes reject the Plan, the Court may nonetheless confirm the Plan if the

nonaccepting classes are treated in a manner prescribed by section 1191 of the Code. A Plan that binds nonaccepting classes is commonly referred to as a "cram down" Plan. The Code allows the Plan to bind non-accepting classes of claims or equity interests if it meets all the requirements for consensual confirmation except the requirements of sections 1129(a)(8), 1129 (a)(10), or 1129 (a)(15) of the Code, does not "discriminate unfairly," and is "fair and equitable" toward each impaired class that has not voted to accept the Plan under the standard of section 1191(c) of the Code. **Creditors and Equity Interest Holders concerned with how the cram down provisions will affect your claim or equity interest should seek independent counsel, as the variations on this general rule are numerous and complex.** The Debtor is not required to file a motion or other pleading to seek and obtain cram down of a Plan. As a result, the Debtor will seek the Court's confirmation of this Plan in accordance with the cram down provisions of the Bankruptcy Code by *ore tenus* motion at the date and time of the Confirmation Hearing without further notice to creditors or other parties in interest.

15. Retention of Jurisdiction. Until the case is closed, the Court shall retain jurisdiction to insure that the purpose and intent of the Plan are carried out. The Court shall retain jurisdiction to hear and determine the following:

a. the classification of the claim of any creditor and the re-examination of claims which have been allowed for purposes of voting and the determination of such objections as may be filed against creditor's claims;

b. the determination of all questions and disputes regarding title to the assets of the estate and the determination of all causes of action, controversies, disputes or conflicts whether or not subject to action pending as of the date of confirmation between the Debtor and any other party included but not limited to any rights of parties in interest to recover assets pursuant to the provisions of Title 11 of the United States Code;

c. the correction of any defect, the curing of any omission or the reconciliation of any inconsistency in the Plan or the Order of Confirmation as may be necessary to carry out the purposes and intent of the Plan;

d. the modification of this Plan after confirmation pursuant to the Bankruptcy Rules and Title 11 of the United States Code;

e. the enforcement and interpretation of the terms and conditions of this Plan, including but not limited to questions relating to the scope of the releases and the enforcement of the releases, and the entry of an Order necessary to interpret and enforce the releases;

f. the entry of an Order including injunctions necessary to enforce the title rights and powers of parties in interest and to impose such limitations, restrictions, terms and conditions of such title rights and powers as this Court may deem necessary; and

g. the entry of an order concluding and terminating this case.

Respectfully submitted,

DocuSigned by:

Paul Podhurst, President, CEO of Advance Case Parts, Inc.

DocuSigned by:

Paul Vail, Vice President, COO of Advance Case Parts, Inc.

DocuSigned by:

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ORDERED in the Southern District of Florida on March 17, 2021.

Peter D. Russin

Peter D. Russin, Judge
United States Bankruptcy Court

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA
FORT LAUDERDALE DIVISION

In re:	Case No. 20-22320-PDR
Advance Case Parts, Inc.,	Chapter 11
Debtor. _____/	

ORDER CONFIRMING THE DEBTOR'S
SUBCHAPTER V PLAN FOR REORGANIZATION

This matter came before the Court on March 11, 2021, at 1:30 p.m. ("Confirmation Hearing"), to consider confirmation of the Plan of Reorganization (the "Plan") (Doc. 99) filed on February 1, 2021, by the Debtor, Advance Case Parts, Inc. (the "Debtor"). In connection with the confirmation of the Plan, the Court has considered the evidence presented and the record, including: (i) the confirmation affidavit of Paul Podhurst (Doc. 175), (ii) the Plan Supplement (Doc. 179), (iii) the certificate of proponent of plan (Doc. 174), (iv) the testimony of Paul Podhurst, as CEO and President of the Debtor, Paul Vail, as COO of the Debtor, proffered by the

debtor, and the proffered testimony of George E. Hude Jr., (v) the declarations of Paul Podhurst, Paul Vail, and George E. Hude Jr. (Doc. 99), (vi) the prior Confirmation Order entered in Debtor's prior Chapter 11 bankruptcy in Case No. 19-14930-SMG, (vii) the Exhibit Register and Exhibits introduced by Debtor and admitted by the Court at the conclusion of the Confirmation Hearing, and (viii) all other evidence presented at the Confirmation Hearing, and the statements, arguments, and representations of counsel. The Court, having considered that all classes of creditors that were required to vote on the Plan have accepted the Plan, and all objections to the Plan have been consensually resolved by the Plan Supplement or expressly overruled by the Court, after notice and a hearing, the Court finds and concludes as follows:

FINDINGS OF FACTS & CONCLUSIONS OF LAW

A. **Jurisdiction**. The Court has jurisdiction over this matter under 28 U.S.C. §§ 157 and 1334, the United States District Court's general order of reference, and other various applicable provisions of the Bankruptcy Code[1] and the Federal Rules of Bankruptcy Procedure ("FRBP").

B. **Venue**. Venue before the Court is proper under 28 U.S.C. §§ 1408 and 1409.

C. **Notice**. Due, adequate, and sufficient notice of the Plan and the order setting a hearing on confirmation (Doc. 112) (the "Confirmation Hearing Order") were served upon all creditors, interest holders, and parties requesting notice.

[1] The term "Bankruptcy Code" refers to the applicable section(s) of 11 U.S.C. § 101, *et. seq.* unless otherwise indicated.

Accordingly, the method of service and solicitation of acceptance of the Plan, notice of the hearing to consider confirmation of the Plan, and notices of all other deadlines or requirements relating thereto (collectively, the "Confirmation Deadlines") were in compliance with the FRBP, were adequate and reasonable under the circumstances of this case, and no further or additional notice of the confirmation hearing or the confirmation deadlines was necessary or required.

D. **Hearing Attendance**. Present at the hearing were Eyal Berger and Amanda Klopp, as counsel for the Debtor, Paul Podhurst, Paul Vail, and Howard Toland, as counsel for Newtek Business Credit, Raymond Robin, as counsel for Newtek Small Business Finance, LLC, and Adisley Cortez-Rodriguez from the Office of the United States Trustee.

E. **Objections to Confirmation**. Prior to the Confirmation Hearing, objections to confirmation were filed by Newtek Small Business Finance, LLC (Doc. 131) and the Office of the United States Trustee (Doc. 169). No other objections to confirmation were filed. Any objection that could have been asserted to the Plan prior to the Confirmation Hearing is waived and expressly overruled.

F. ***Ore Tenus* Modifications**. At the Confirmation Hearing, the Court also considered the *Ore Tenus* Modifications which were announced by Debtor's counsel. Specifically, the *Ore Tenus* Modifications, as announced on the record were:

1. The inclusion in the Plan of additional payments to Newtek Business Credit of $2,500 each, to be made on May 15, 2021, May 30, 2021, June 15, 2021, June 30, 2021, July 15, 2021, and July 30, 2021. Additionally,

to the extent that the Debtor's adequate protection payment to Newtek Business Credit made on March 10, 2021 is not received by Newtek Business Credit, Debtor shall make an additional $2,500 payment to Newtek Business Credit on August 15, 2021, and August 30, 2021.

2. The payment of all fees and costs awarded to Subchapter V Small Business Trustee pursuant to the supplemental application filed by the Subchapter V Small Business Trustee (Doc. 180) in Quarter 3 of the Plan.

3. The payment of $6,000.00 of fees and costs awarded to Akerman LLP pursuant to the supplemental application filed by Akerman (Doc. 183) in Quarter 3 of the Plan.

G. **Requirements for Releases**. The Plan's inclusion of non-debtor releases and injunctive relief of insiders – Paul Podhurst, Paul Vail, and George E. Hude, Jr. (collectively, "Released Parties"), satisfies the relevant factors set forth by *In re Seaside Engineering & Surveying, Inc.*, 780 F.3d 1070 (11th Cir. 2015) (citing *In re Dow Corning Corp.*, 280 F.3d 648, 658 (6th Cir. 2002)). Specifically, with respect to the releases and in addition to the findings stated on the record the Court finds as follows:

1. *Factor One: An identity of interests between the debtor and the third party, usually an indemnity relationship, such that a suit against the non-debtor is, in essence, a suit against the debtor or will deplete the assets of the estate.* The releases and injunctions under the Plan satisfy this factor. In *Seaside*, the Court held that this factor was satisfied as to the releases of Debtor's principals and key employees because the Debtor was dependent on the skilled labor of the releasees, and absent the release the key employees would have to expend time in litigation in the defense of claims against them instead of focusing on their professional duties for the reorganized debtor. *Id.* at 1079-80. Because

the key employees' preoccupation with lawsuits would interrupt their work for the reorganized entity, and a loss of valuable relationship-based work contracts, the *Seaside* court found this factor was satisfied. The circumstances under the Plan are similar to those in *Seaside*. Podhurst and Vail are key employees to the daily operations of the Debtor, as the President and COO, respectively, and due to the relationship-based nature of the Debtor's work for its customers, their continued employment and efforts will be vital to the retention of customers by the re-organized debtor. Similarly, because both Podhurst and Vail are the sole members and principals of Debtor, litigation against this entity would have the same effect on interruption of their work for the reorganized entity as would lawsuits against them individually. At least one creditor, National Funding, who is being paid in full under the Plan, has already filed a lawsuit against Debtor and the guarantor, Paul Vail, to recover on the guaranty claim, so the threat of potential suit is apparent. Therefore, the releases and injunctive relief under the Plan satisfies Factor One.

2. *Factor Two: The non-debtor has contributed substantial assets to the reorganization.* The releases under the Plan satisfy this factor. In *Seaside*, the contribution of the releasees' services to the reorganized debtor satisfied this factor, as the Court noted that such contribution was the "very life blood of the reorganized debtor." The circumstances under the Plan are even more compelling to satisfy this factor than *Seaside* because (1) all of the Released Parties are contributing their disposable income to the Plan, (2) both Podhurst and Vail will contribute their services to the reorganized debtor under a restrictive and lengthy employment agreement, attached to the Plan as Exhibit D, that includes significant 18-month non-competition agreement, limits their compensation to below-market amounts, and places below-market caps and conditions upon raises, and (3) Hude will contribute his A/C refrigeration license to the operations of the Debtor. The disposable income payments by the Key Executives are based on their salaries and raises under the employment agreements. The Key Executives have also agreed to defer their raises under the employment agreements until after an Excess Disposable Income payment has been made to general unsecured creditors each year under the Plan. The Released Parties are making concrete, tangible contributions to the Debtor, in terms of disposable income, continued employment and below-market salary and raises, and the use of licenses, on an immediate basis to allow Debtor to fulfill the terms of the Plan and pay the unsecured creditors more over the life of the Plan. The potential converse, allowing the Key Executives to receive their market-rate compensation, raises, and bonuses over the life of plan would exceed the projected post-plan bonus, and may impair

the ultimate disposable income the Debtor could pay under the Plan. The structure of the current compensation and bonuses provides an immediate, not illusory, benefit to the Debtor and the general unsecured creditors. Therefore, significant new value and substantial assets to the reorganization have been provided by the Released Parties. Therefore, the releases and injunctive relief under the Plan satisfies Factor Two.

3. *Factor Three: The injunction is essential to reorganization, namely, the reorganization hinges on the debtor being free from indirect suits against parties who would have indemnity or contribution claims against the debtor*. The releases and injunction under the Plan satisfy this factor. In *Seaside*, the court determined that the likely litigation that would continue absent the releases would have made it doubtful for the released employees to be able to perform their work, complete contracts, and create receivables necessary for the lifeblood of the reorganized debtor. The releases under the Plan are essential to the reorganization as in *Seaside*. The litigation by Debtor's creditors against Podhurst and Vail for obligations of Debtor would make it impossible for Podhurst and Vail to continue to perform their services. At least one creditor, National Funding, who is being paid in full under the Plan, has already filed a lawsuit against Debtor and the guarantor, Paul Vail, to recover on the guaranty claim, so the threat of potential suit is apparent. Additionally, the releases and injunctions are an essential part of the consideration received by Vail and Podhurst to execute the above-referenced employment agreements, and for Hude to contribute his license. Therefore, the releases and injunctive relief under the Plan satisfies Factor Three.

4. *Factor Four: The impacted class, or classes, has overwhelmingly voted to accept the plan*. The Plan satisfies this factor. Based on the ballot tabulation, every impaired class has voted overwhelmingly to accept the Plan, or as to the SBA, indicated their acceptance to Debtor's counsel subject to the anticipated modifications in the Plan Supplement. Not only have impaired classes voted to accept the Plan, numerous creditors with guaranties have voted to accept the Plan, including the Factor, Newtek SBA, and National Funding. The provision for releases and injunction in the Plan was explicitly disclosed in bold at the top of the Plan, at the top of the ballot, and in the solicitation correspondence and every creditor with a potential claim against the Released Parties had an opportunity to participate or raise objections. To the extent that one creditor, Newtek SBA, did raise an objection to the releases, the Debtor tailored the Plan Supplement to address these objections which primarily related to the SBA-guaranteed nature of the obligation. Therefore, the Plan satisfies Factor Four.

5. *Factor Five: The plan provides a mechanism to pay for all, or substantially all, of the class or classes affected by the injunction.* This Plan satisfies this factor. Based on the projected disposable income of the Debtor and the Released Parties being contributed to the Plan, and the amount of claims of unsecured creditors who have opted, or could opt, to receive disposable income, the Plan is projected to pay 100% of the claims electing the disposable income option. Additionally, no creditors affected by the release or injunction have objected to the Plan, except Newtek SBA whose concerns have been addressed in the Plan Supplement. Also, the Plan Supplement provides a mechanism for creditors to seek to liquidate and obtain allowance of their claim, so they are able to receive the disposable income of Debtor and Released Parties over the life of the Plan. In the event such claims were liquidated and allowed in full, estimated to be $261,333, and the creditors elected to be paid disposable income, the Plan would still be projected to pay 100% of their claims. *See Seaside*, 780 F.3d at 1081 (noting that the fact that the rejecting creditor would be paid in full "weighs heavily in favor of the releases.") Therefore, Debtor submits that the circumstances of the Plan favor granting relief because the Plan provides a mechanism for all of the affected classes to be paid in full.

6. *Factor Six: The plan provides an opportunity for those claimants who choose not to settle to recover in full.* This Plan satisfies this factor. Based on the projected disposable income of the Debtor and the Released Parties being contributed to the Plan, and the number of creditors who have opted to receive disposable income, the Plan is projected to pay 100% of the claims. Additionally, the revisions in the Plan Supplement further satisfy this factor by providing a six-month period for creditors with contractual guarantees to liquidate or prove enforceability of their claim or judgment, and if the creditor succeeds in establishing same, to receive treatment as an unsecured creditor under the Plan (projected to be 100% recovery based on the disposable income projections in the Plan), and in any event, to proceed on their claim against the guarantor to the extent unpaid at the conclusion of the Plan. Debtor has made extensive efforts to consensually negotiate with the creditors for the proposed treatment under the Plan, including the release and injunction provision and has specifically negotiated with both Newtek SBA and the Factor – the two largest creditors of the estate[2] – who have accepted the proposed release and injunction, as modified by the Plan Supplement, and filed a ballot accepting the plan. Therefore, the plan treatment has

[2] Synovus Bank would be the second largest creditor of the estate but the debt is a loan made under the Paycheck Protection Program ("PPP") and Debtor has submitted a forgiveness application and anticipates the loan will be forgiven. Synovus Bank has also filed a ballot accepting the plan, and its claim is not subject to any guaranty.

effectively permitted an opportunity to those creditors who have chosen not to settle to recover in full. Therefore, the Plan satisfies Factor Six.

H. **Proper Classification of Claims – 11 U.S.C. §§ 1122 and 1123**. The Plan adequately and properly identifies and classifies all claims. Pursuant to 11 U.S.C. § 1122(a), the claims placed in each class are substantially similar to other claims in each such class. Pursuant to 11 U.S.C. § 1123(a)(1), valid legal and business reasons exist for the various classes of claims created under the Plan and such classification does not unfairly discriminate among holders of claims. The classification of claims in the Plan is reasonable.

I. **Specified Unimpaired Classes – 11 U.S.C. § 1123(a)(2)**. The Plan specifies all classes or claims or interests that are not impaired under the plan.

J. **Specified Treatment of Impaired Classes – 11 U.S.C. § 1123(a)(3)**. The Plan specifies the treatment of all classes of claims or interests that are impaired under the Plan.

K. **No Discrimination – 11 U.S.C. § 1123(a)(4)**. The Plan provides for the same treatment of claims or interests in each respective class unless the holder of a particular claim or interest has agreed to a less favorable treatment of such claim or interest.

L. **Implementation of the Plan – 11 U.S.C. § 1123(a)(5)**. Section C of the Plan provides adequate means for the Plan's implementation through the sale of assets and future disposable cash flow from operations of Debtor, as well as by the combination of disposable income of Paul Podhurst, Paul Vail, and George E. Hude, Jr.

M. **Non-Voting Equity Securities/Allocation of Voting Power – 11 U.S.C. § 1123(a)(6)**. The issuance of non-voting securities will be prohibited in the charter of the Re-Organized Debtor.

N. **Interests of the Creditors, Equity Security Holders, & Public Policy – 11 U.S.C. § 1123(a)(7)**. The Plan contains only provisions that are consistent with the interests of creditors and equity security holders and with public policy with respect to the manner of selection of any officer, director, or trustee under the Plan and any successor to such officer, director, or trustee.

O. **Assumption & Rejection – 11 U.S.C. § 1123(b)(2)**. Section G of the Plan, pursuant to § 365 of the Bankruptcy Code, provides for the assumption, rejection, or assignment of any executory contract or unexpired lease of the Debtor not previously rejected under such section.

P. **Additional Plan Provisions – 11 U.S.C. § 1123(b)(6)**. Each of the provisions of the Plan is appropriate and not inconsistent with the applicable provisions of the Bankruptcy Code.

Q. **Cure Amounts – 11 U.S.C. § 1123(d)**. The Plan provides for the cure of certain executory contracts and unexpired leases, and the amounts to cure the default. The cure amounts for the lease between Debtor and Enterprise FM Trust & Enterprise Fleet Management have been revised by stipulation (Doc. 164). The Debtor has also consented to a revised cure amount for Sutton Leasing in the amount of $3,979.93, to be paid on or before the Effective Date. There have been no objections

filed as to the proposed cure amounts of any other executory contracts and unexpired leases.

R. **Principal Purpose of the Plan – 11 U.S.C. § 1129(d)**. The principal purpose of the plan is not the avoidance of taxes or the avoidance of the application of section 5 of the Securities Act of 1933.

S. **Subchapter V Plan Requirements – 11 U.S.C. § 1189**. The Plan complies with § 1189 because it was filed by the Debtor within 90 days of the entry of the order for relief under Chapter 11.

T. **Contents of a Subchapter V Plan – 11 U.S.C. § 1190**. In compliance with § 1190, the Plan includes: (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 for reorganization. The Plan provides for the submission of all or such portions of the future earnings or other future income of the Debtor as is necessary for the execution of the Plan.

U. **Satisfaction of Conditions – 11 U.S.C. § 1191(a)**. The Court finds that the Plan satisfies the relevant provisions of 11 U.S.C. § 1129(a) and, as a result, is a consensual Subchapter V plan under § 1191(a). With respect to the relevant provisions of § 1129(a), the Court finds and concludes as follows:

1. **11 U.S.C. § 1129(a)(1) and (a)(2)**. The Plan and the Plan proponent comply with the applicable provisions of the Bankruptcy Code.

2. **11 U.S.C. § 1129(a)(3)**. The Plan was proposed in good faith and not by any means forbidden by law.

3. **11 U.S.C. § 1129(a)(4)**. Any payment made or to be made by the Debtor, for services or for costs and expenses in or in connection with the case, or in connection with the Plan and incident to the case, has been approved by, or is subject to the approval of, the Court as reasonable.

4. **11 U.S.C. § 1129(a)(5)**. The Plan has disclosed the identity and affiliations of any individual proposed to serve, after confirmation of the plan, as a director, officer, or voting trustee of the Debtor; and the appointment to, or continuance in, such office of such individuals, is consistent with the interests of creditors and equity security holders, and with public policy; and the Plan proponent has disclosed the identity of any insider that will be employed or retained by the reorganized debtor, and the nature of any compensation for such insider.

5. **11 U.S.C. § 1123(a)(6)**. The issuance of non-voting securities will be prohibited in the charter of the Re-Organized Debtor.

6. **11 U.S.C. § 1129(a)(7)**. The Plan provides that, with respect to each impaired class of claims or interests, each holder of a claim or interest of such class has accepted the plan, or will receive or retain under the plan on account of such claim or 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.

7. **11 U.S.C. § 1129(a)(8)**. With respect to each class of claims or interests, such class has accepted the Plan, or such class is not impaired under the plan.

8. **11 U.S.C. § 1129(a)(9)**. Except to the extent that the holder of a particular claim has agreed to a different treatment of such claim, the Plan provides that with respect to a claim of a kind specified in section 507(a)(2) or 507(a)(3) of this title, on the effective date of the plan, the holder of such claim will receive on account of such claim cash equal to the allowed amount of such claim. Specifically, the Subchapter V trustee will receive $9,578.70 in fees and costs on the Effective Date and has agreed to receive the remaining $2,112.20 in month 7 of the Plan. Akerman LLP has agreed to receive the balance of its fees and costs over the first seven months of the Plan.

9. **11 U.S.C. § 1129(a)(10)**. If a class of claims is impaired under the Plan, 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.

10. **11 U.S.C. § 1129(a)(11)**. Confirmation of the Plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor or any successor to the debtor under the Plan, unless such liquidation or reorganization is proposed in the Plan.

11. **11 U.S.C. § 1129(a)(12)**. All fees payable under 28 U.S.C. § 1930, as determined by the Court at the hearing on confirmation of the plan, have

been paid or the plan provides for the payment of all such fees on the effective date of the Plan.

12. **11 U.S.C. § 1129(a)(16)**. All transfers of property under the Plan shall be made in accordance with any applicable provisions of nonbankruptcy law that govern the transfer of property by a corporation or trust that is not a moneyed, business, or commercial corporation or trust.

Accordingly, the Court **ORDERS**:

1. **Confirmation**. The Plan (Doc. 99), as modified by the Plan Supplement (Doc. 179) and the *Ore Tenus* Modifications (referred to hereafter as collectively, the "Plan"), is confirmed under 11 U.S.C. § 1191(a).

2. **Effective Date**. The Effective Date of the Plan is April 1, 2021.

3. **Binding Effect of Plan**. Pursuant 11 U.S.C. § 1141(a), except as provided in §§ 1141(d)(2) and (3), the provisions of the Plan as of the Effective Date, bind the debtor, and any creditor, the equity security holders Paul Podhurst and Paul Vail, whether or not the claim or interest of such creditor, or equity security holder, is impaired under the plan and whether or not such creditor, or equity security holder, has accepted the Plan.

4. **Re-vesting of Property**. Pursuant to 11 U.S.C. § 1141(b), except as otherwise provided in the Plan or in this Confirmation Order, as of the Effective Date, all of the property of the estate vests in the Debtor. Except as provided in §§ 1141(d)(2) and (3) and except as otherwise provided in the Plan or in this Order,

after confirmation of the Plan, the property dealt with by the Plan is free and clear of all claims and interests of creditors.

5. **Post-Confirmation Operation of Business**. Except as otherwise provided in the Plan or in this Confirmation Order, on and after the Effective Date, the Debtor may operate its business and may use, acquire, and dispose of property free of any restrictions of the Bankruptcy Code and Bankruptcy Rules and in all respects as if there were no pending case under any chapter or provisions of the Bankruptcy Code. The Debtor is entitled to retain and compensate professionals without the necessity of further approval of this Court. Except as set forth in the Plan concerning objections to claims, the Debtor may also settle or compromise any claims without Court approval. The Debtor may make any and all payments necessary to renew its insurance upon the entry of this Confirmation Order in accordance with the Budget attached to the Plan.

6. **Releases. Except as set forth in (a) below and subject thereto, on the confirmation date of this Plan, without the need for execution or delivery of any additional documentation or orders of the Bankruptcy Court, and in exchange for valuable consideration of their contribution of their disposable income under this Plan, Paul Podhurst, President and Chief Executive Officer of Debtor, George E. Hude, Jr, Former Treasurer of Debtor, and Paul Vail, Chief Operating Officer and Vice President of Debtor ("Released Parties") will be fully and finally released and forever discharged from any and all claims, actions, causes of action, liabilities,**

obligations, rights, suits, accounts, covenants, contracts, controversies, agreements, promises, damages, judgments, debts, encumbrances, liens, remedies, and demands, of every kind and nature whatsoever, in law or in equity, relating to the obligations of Debtor to any other person or entity, that were subject to the releases granted in Confirmation Order (Doc. 207) in Case No. 19-14930-SMG but excluding any claims arising from gross negligence, willful misconduct, or actual fraud of the Released Parties (collectively, "Released Claims").

a. **Conditional Release and Forbearance**. Any and all claims of U.S. Small Business Administration ("SBA") against Debtor and any SBA contingent contractual claims against Paul Podhurst, George E. Hude, Jr., and Paul Vail are carved out and excluded from the release provided in the preceding paragraph. As to the claim of creditor Newtek Small Business Finance, LLC ("Newtek SBA"), the releases of Paul Podhurst and George E. Hude, Jr. provided for in the preceding paragraph are conditional upon: (1) the successful completion of the Offer in Compromise program of the SBA [which would include full payment of the obligations set forth in any compromise agreed to by the SBA]; (2) within sixty (60) days of the Confirmation Order, the submission by Paul Podhurst and George E. Hude, Jr. of all updated documents requested by Newtek SBA and the SBA and the updated SBA Offer in Compromise forms for the SBA's review and consideration. The Offer in Compromise

form and documents must be reviewed and approved by Newtek SBA before being submitted to the SBA. Newtek SBA and the U.S. Small Business Administration shall forbear from exercising any collection remedies against Paul Podhurst and George E. Hude Jr. until the unsuccessful completion of the SBA Offer in Compromise process by the parties.

b. **Indemnification on Alleged Contractual Guaranties**. The Debtor shall be obligated to indemnify the Released Parties on any alleged liability relating to or concerning any obligation of the Debtor.

7. **Injunction and Discharge**. Except as otherwise expressly provided in the Plan or in this Confirmation Order, as of the Effective Date: (i) the Debtor shall be discharged from any debt to the fullest extent provided by 11 U.S.C. § 1141(d) and (ii) all holders of any discharged claims against the Debtor are enjoined from enforcing any such claim to the fullest extent provided by 11 U.S.C. § 524(a). To the extent the Plan discharge provisions are inconsistent with this Confirmation Order or the Bankruptcy Code, this Order and the Bankruptcy Code, including 11 U.S.C. § 1141(d), control.

8. **Disbursing Agent**. Debtor is named as Disbursing Agent and must make all payments to holders of allowed claims as required by the Plan.

9. **United States Trustee Guidelines**. The Debtor must comply with the guidelines set forth by the Office of the United States Trustee until the closing of this case through the issuance of a Final Decree by the Bankruptcy Court.

10. **Effect of Confirmation Order on Plan**. The failure to reference or address all or part of any particular provision of the Plan herein has no effect on the validity, binding effect, or enforceability of such provision and such provision has the same validity, binding effect, and enforceability as every other provision of the Plan. To the extent that any inconsistencies exist between the terms of the Plan and this Confirmation Order, the terms of this Confirmation Order shall control.

11. **Executory Contracts and Leases**. Except as otherwise provided in a separate order of the Court, all executory contracts and unexpired leases not otherwise assumed are deemed rejected as of the Effective Date. **ANY CLAIM ARISING FROM THE REJECTION OF AN EXECUTORY CONTRACT OR UNEXPIRED LEASE OF THE DEBTOR SHALL BE FILED WITH THE COURT NO LATER THAN THIRTY (30) DAYS AFTER THE ENTRY OF THIS CONFIRMATION ORDER. ABSENT THE TIMELY FILING OF SUCH CLAIMS, SUCH CLAIMS SHALL BE FOREVER BARRED AND DISALLOWED WITHOUT FURTHER ORDER OF THIS COURT.**

12. **Service of Confirmation Order**. Debtor's counsel is directed to serve a copy of this Order on all parties and file a certificate of service within five (5) days of the entry of this Order.

13. **Documents Required to Effectuate Plan**. The Debtor is authorized to execute any and all documents reasonably required to effectuate the provisions of the Plan or prior Orders of this Court.

14. **Discharge of the Subchapter V Trustee**. Pursuant to 11 U.S.C. § 1183, the service of the Subchapter V Trustee in the case shall terminate when the Plan has been substantially consummated, except that the United States trustee may reappoint a trustee as needed for performance of duties under § 1183(b)(3)(C) and § 1185(a). Not later than 14 days after the Plan is substantially consummated, the Debtor shall file with the Court and serve on the Subchapter V Trustee, the United States trustee, and all parties in interest notice of such substantial consummation. The Debtor must file the Local Form "Final Report and Motion for Entry of Final Decree" on the later of: (a) substantial consummation of the Plan, or (b) entry of a final order resolving all disputed claims. Prior to the discharge of the Subchapter V Trustee, the Subchapter V Trustee shall comply with 11 U.S.C. § 1194 and distribute any applicable payments in accordance with the Plan.

15. **Payment of Fees and Reports**. No later than thirty (30) days of the entry of this Order, the Debtor shall complete the monthly operating reports for pre-confirmation periods. The Reorganized Debtor shall file with the Bankruptcy Court post-confirmation affidavits of disbursements for each quarter (or portion thereof) that the Debtor's Chapter 11 case remains open, in the format prescribed by the United States Trustee, until the case is closed, converted or dismissed.

16. **Jurisdiction**. The Bankruptcy Court retains jurisdiction to:

a. Resolve issues with respect to the Debtor's substantial consummation of the Plan and to the extent the Debtor seeks to amend or modify the plan;

b. Resolve any motions, adversary proceedings, or contested matters, that are pending as of the date of substantial consummation;

c. Adjudicate objections to claims;

d. **Additional Claim Liquidation Period for Creditors with Contractual Guaranties**. As several creditors with known contractual guaranty claims have failed to file any claim in this bankruptcy case, and will not be entitled to payment of same during the life of the Plan, within six months of the Effective Date, creditors holding contractual guaranty claims against Paul Podhurst, Paul Vail, or George E. Hude, Jr. – specifically, Snap Advances, Kabbage Funding, and Headway Capital LLC, and American Express – may seek relief from the injunction in Paragraph 7 by filing an action in this Bankruptcy Court to liquidate their claim on the obligation and guaranty, subject to the objections and defenses of Debtor and Paul Podhurst, Paul Vail, or George E. Hude, Jr. as to the enforceability of the obligation or guaranty. If such creditors succeed in liquidating their claim, such creditors will be entitled to treatment of their claim under the Plan as part of Class 8. The failure of the specific creditors to file a POC does not eliminate the respective rights under the alleged direct contractual guaranty or co-obligor claims.

e. Resolve disputes with respect to any and all injunctions created as a result of confirmation of the Plan;

f. Enforce the releases and injunctions granted pursuant to this Order to the Debtor and Released Parties;

g. Adjudicate modifications of the plan under 11 U.S.C. § 1193;

h. Review and consider issues associated with the Debtor's final report and entry of final decree, and to enter a final decree; and

i. Enter such orders as the Court deems necessary or appropriate with respect to enforcement of the Plan.

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Submitted by:

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(Attorney Berger is hereby directed to mail a conformed copy of this order immediately upon receipt to all parties of interest).

Faculty

Eyal Berger is a partner with Akerman LLP in its Bankruptcy and Reorganization Department in Fort Lauderdale, Fla., where he focuses his practice on complex business reorganizations, out-of-court debt restructuring, the representation of creditors' committees, assignments for the benefit of creditors, corporate dissolutions, Article 9 transactions and the enforcement of creditors' rights. He also protects the interests of financial institutions and lessors as secured and unsecured creditors in myriad insolvency proceedings by assisting them in preserving, liquidating or repossessing their collateral. He has nearly 20 years of experience as an insolvency professional representing debtors-in-possession, trustees, assignees and receivers. Previously, Mr. Berger served as judicial clerk extern to Bankruptcy Judge Michael G. Williamson and Chief Bankruptcy Judge Paul M. Glenn in the Middle District of Florida. In addition, he was a member of NCBJ-NextGeneration, for which he served on its Organizing Committee from 2014-19, and is a member of NCBJ's NextGeneration Class of 2012. Mr. Berger recently assisted a subchapter V debtor client in confirming a prepackaged subchapter V plan in 33 days. He is admitted to practice in all bankruptcy and district courts in Florida, as well as the Eleventh Circuit Court of Appeals. He also is listed in *Chambers USA* for 2020-24, ranked in Florida (South Florida) for Bankruptcy/Restructuring in *The Best Lawyers in America* for 2020-24, listed in Florida for Bankruptcy and Creditor/Debtor Rights/Insolvency and Reorganization Law, and Litigation – Bankruptcy, listed in *The Best Lawyers in America* in 2022 as "Lawyer of the Year" for Litigation - Bankruptcy in Fort Lauderdale, named a "Top Lawyer in Broward County" for Bankruptcy and Creditor/Debtor Rights/Insolvency and Reorganization Law in 2022 in *Fort Lauderdale Illustrated*, listed in *Super Lawyers* magazine from 2009-19 as a Florida "Rising Star" for Bankruptcy & Creditor/Debtor Rights, and named an "Up & Comer" in 2013 in *Florida Trend*'s Legal Elite. In addition, he received a book award in civil procedure, and he contributed testimony to ABI's Subchapter V Task Force, culminating in the release of its Final Report in 2024. Mr. Berger received his B.A. in criminology and his B.S. in psychology, both *cum laude*, in 1999 from the University of Florida, and his J.D. *magna cum laude* in 2004 from the University of Florida Levin College of Law, where he was admitted to the Order of the Coif.

Kevin H. Morse is member-in-charge of Clark Hill PLC's Chicago office and a member of its Bankruptcy and Restructuring business unit. He supports businesses and their owners in a wide variety of industries afflicted with financial distress through out-of-court restructuring, bankruptcy and litigation. Mr. Morse has nearly two decades of experience handling insolvency matters, including chapter 11 debtor representation, assignments for the benefit of creditors, fiduciary representations, committee representations, creditors' rights and other insolvency issues. He also has served as counsel for Sub-V debtors-in-possession in California, Delaware, and Illinois. Mr. Morse's clients include publicly traded companies, privately held corporations, REITs, start-ups, nonprofits, traditional and non-traditional financial entities, and individuals. He has been listed in *Illinois Super Lawyers*' "Rising Stars" list for 2018-19, as an "Emerging Lawyer" in *Law Bulletin*'s Leading Lawyers Division from 2015-19, and as a 2022 "Emerging Lawyer in Illinois" by *Leading Lawyers*. Mr. Morse is co-chair of the Turnaround Management Association's Communication Committee and a member of TMA's Chicago Chapter Membership Committee. He previously served on the Young Lawyers Editorial Board of *American Lawyers Magazine*, in the National Conference of Bankruptcy Judges NextGen Class in 2015, and on the Bankruptcy Court Liaison Committee in 2015. He is licensed to practice in

California and Illinois. Mr. Morse received his B.A. *cum laude* in 2003 from the University of Colorado at Boulder and his J.D. in 2007 from Pepperdine University School of Law.

Hon. Kesha L. Tanabe is a U.S. Bankruptcy Judge for the District of Minnesota in St. Paul, appointed on Jan. 7, 2022, and the first Asian-American woman on the federal bench in Minnesota. She previously was a bankruptcy attorney with Tanabe Law in Minneapolis and is licensed in North Dakota, Minnesota and New York. Judge Tanabe started her career as an assistant attorney general in New York. Prior to starting her own firm, she was a partner at ASK LLP, Maslon LLP and Faegre Baker Daniels. Additionally, she was a subchapter V trustee in Region 12 and taught bankruptcy law at the University of St. Thomas School of Law. Judge Tanabe is a board-certified business bankruptcy specialist, a former member of the Bankruptcy Practice Committee for the District of Minnesota and a former co-editor in chief of the *MSBA Bankruptcy Bulletin*. She is a frequent lecturer on bankruptcy topics nationwide, and she is a member of several legal and community organizations, including the Japanese American Citizens League, International Women's Insolvency & Restructuring Confederation, Minnesota Asian Pacific American Bar Association and Minnesota Lavender Bar Association. She also served as a Special Projects Leader for ABI's Bankruptcy Litigation Committee. Judge Tanabe is a graduate of the University of St. Thomas and the London School of Economics, and she received her J.D. in 2005 from Cardozo School of Law.

Sean P. Williams is a partner in the Financial Services and Restructuring Group of Levenfeld Pearlstein, LLC in Chicago, where he assists debtors, creditors, creditors' committees and purchasers of assets in bankruptcy courts throughout the nation. He represents purchasers and sellers in out-of-court restructurings and distressed-asset sales. He also has experience in general commercial litigation matters, with substantial experience prosecuting and defending large preference and fraudulent transfer actions in bankruptcy cases. Mr. Williams has represented debtors in courts nationwide and confirmed plans in the U.S. Bankruptcy Courts for the Central and Northern Districts of Illinois, and the Central District of California. He also has represented creditors' committees in more than 15 cases throughout the country. His committee experience includes a regional seed company located near Des Moines, Iowa, in the U.S. Bankruptcy Court for the Southern District of Iowa; a manufacturer located near Peoria, Ill., in the U.S. Bankruptcy Court for the Central District of Illinois; a well-known fashion retailer in the U.S. Bankruptcy Court for the District of Delaware; and a Chicago-based printing company in the U.S. Bankruptcy Court for the Southern District of New York. His creditor practice also includes the regular representation of landlords, condominium associations, individuals and other unsecured creditors in large chapter 11 bankruptcies. Since joining LP, Mr. Williams has participated in numerous ESOP transactions, representing both trustees and sellers. He previously externed for Hon. Bruce W. Black (at the time, the Chief Judge of the U.S. Bankruptcy Court for the Northern District of Illinois). He is a member of ABI and the Turnaround Management Association, and he chairs the Chicago Bar Association's Young Lawyers Section Bankruptcy Committee, and he has been listed as a "Rising Star" in *Illinois Super Lawyers* since 2019 and as one of *The Best Lawyers in America*'s "Ones to Watch" for 2024. Mr. Williams received his B.A. *cum laude* from Augustana College and his J.D. *cum laude* from The John Marshall Law School, where he finished in the top 10 percent of his class and was the candidacy editor of its law review.