AMERICAN BANKRUPTCY INSTITUTE

Southeast Bankruptcy Workshop

Subchapter V Update

Hon. Benjamin A. Kahn, Moderator
U.S. Bankruptcy Court (M.D.N.C.) | Greensboro

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Fixing Length of Nonconsensual Subchapter V Plans
ABI Southeast Bankruptcy Workshop

Sanjiv Sarma, Law Clerk to
The Honorable Benjamin A. Kahn
United States Bankruptcy Court for the Middle District of North Carolina

This article will address the issue presented in *In re Trinity Family Practice & Urgent Care PLLC*, 2024 WL 2704056 (Bankr. W.D. Tex. May 24, 2024) – that is, what does a bankruptcy court consider when fixing the three to five-year period under § 1191(c)(2)?

In *Trinity*, the debtor, a small family health urgent care clinic business, filed a voluntary petition under chapter 11 and elected to proceed under subchapter V. The debtor requested that the court confirm its Plan as a nonconsensual plan under § 1191(b), and proposed to pay into the plan its projected disposable income for three years. American Momentum Bank, whose claim the plan proposed to treat as a bifurcated secured and unsecured claim, voted against the plan and objected to confirmation of the plan in part because it contended that the three-year period of payments proposed under the plan was not "fair and equitable" as required under § 1191(b). The bank argued that a longer plan payment period would result in a larger distribution to unsecured creditors.

In determining the applicable period of plan payments in a nonconsensual plan under § 1191(c)(2)(A), Judge Robinson analyzed the only other case in which the court had considered this specific issue, *In re Urgent Care Physicians, Ltd.*, 2021 WL 6090985 (Bankr. E.D. Wis. Dec. 20, 2021). In *Urgent Care*, Judge Hanan confirmed a nonconsensual subchapter V plan with a plan payment period of three years, and determined that "a plan term of three years is more reasonable, generally speaking (or as a default) than a five-year term, absent unusual circumstances." Judge Robinson agreed that § 1191(c)(2)(A) provides a baseline plan payment period of three years, but disagreed that a three-year term would generally apply "absent unusual circumstances." He criticized the presumption that a three-year term is presumed as "impermissibly shift[ing]" the burden of proof under § 1191(c)(2)(A) from the debtor to the creditor. Instead, the *Trinity* court held that the context of the SBRA and the unique language of § 1191(c) suggests that the bankruptcy court must determine on a case-by-case basis whether a the plan is "fair and equitable." In making this determination, the burden of proof with respect to all prerequisites for confirmation, including whether the plan is fair and equitable to a non-accepting impaired class, lies with the debtor. *Trinity*, 2024 WL 2704056, at *6.

At the outset of the discussion of the issue, the court in *Trinity* noted that Congress has provided no guidance or standards on how the bankruptcy court should fix the three to five-year period. *Id.* at *15. Further, it found that relevant statutes governing the applicable plan payment period under other sections of the Bankruptcy Code were unhelpful because of those sections' dissimilarity to subchapter V. As such, the court began with the language of subchapter V, holding that §§ 1189 and 1191(c)(2)(A), when read together, demonstrate that the bankruptcy court should give appropriate deference to the debtor's business judgment and proposed period of payments in

its subchapter V plan. However, as was the case before the court, once an objection to confirmation of the plan is filed, the debtor's proposed payment period is no longer given the same deference and the court is tasked with fixing a period that is fair and equitable under the facts of the particular case.[1] At the conclusion of a confirmation hearing, the court has several options. It may: (1) find that a proposed period is fair and equitable and confirm the plan, (2) find that the proposed period is not fair and equitable and deny confirmation of the plan, (3) fix a longer period not to exceed five years and confirm the plan, or (4) determine it has insufficient evidence to fix the plan period and deny confirmation. *Id.* at *17. Judge Robinson, after considering several factors and the totality of circumstances, determined that the debtor had not satisfied its burden to show by a preponderance of the evidence that the proposed three-year period was fair and equitable under § 1191(b) and (c)(2)(A). *Id.* at *19. Because the record was insufficient for the court to determine that a longer period would be fair and equitable, Judge Robinson denied confirmation. *Id.*

Judge Robinson set forth five factors for courts to consider when fixing the three to five-year period: (1) capital reserves or capital expenditures during the period of plan payments; (2) reasonableness of projected income and expenses the plan payment period as compared to historical operations and operations during the post-petition, pre-confirmation period; (3) salary or other payments to insiders during the payment period as compared to historical; (4) risks and consequences of a longer period; and (5) any other unique or extraordinary facts specific to the case. *Id*. at *18.

The first factor the court considered was whether the budget contemplated a reduction in projected disposable income due to capital reserves or capital expenditures during the proposed period. Although the debtor's plan projections included a "miscellaneous expense" line item in the amount of $31,816.05 over the three-year period, the debtor offered no evidence of the basis for such reserve and how it was calculated, whether it historically had a capital reserve, or any other explanation of why the debtor would not be gaining the benefit of a capital reserve and potential future growth of the business at the expense of the unsecured creditor class. Given the lack of evidence offered, the court found that the debtor had not met its burden of demonstrating that the capital reserve was reasonable in the context of the proposed three-year plan period under § 1191(c)(2)(A). It further held that there was insufficient evidence of this factor for the court to fix a longer plan payment period. *Id*. at *19.

The court then considered the reasonableness of projected income and expenses during the plan payment period as compared to historical operations and operations during the post-petition, preconfirmation period. The plan's projections included increases in expenses due to increased advertising and expanding services without a corresponding increase in revenue. Because the debtor had offered no evidence of historical income and expenses as compared to the plan's projections, the court was unable to determine the necessity of the projected increases in expenses without a corresponding benefit to the debtor's creditors. The debtor also did not offer any

[1] The court noted, however, that regardless of whether there is an objection or the bankruptcy court raises the proposed period of plan payments *sua sponte*, the burden remains on the debtor to show that the proposed payment period is fair and equitable.

evidence of the basis or methodology it utilized in calculating projected income and expenses. Therefore, the court again held that it could not determine whether the three-year plan payment period was fair and equitable under § 1191(b) and (c)(2)(A) and that there was insufficient evidence of this factor to fix a longer plan payment period. *Id.*

The third factor the court considered was the compensation of insiders during the plan payment period. In *Urgent Care*, the debtor's president testified that the salary he drew from the debtor was substantially below market value, that he deferred $30,000 in post-petition wages until completion of the three-year plan, and that the family members on his payroll would take reduced salaries as well. By contrast, no such "belt-tightening" behavior was present before the *Trinity* court. In fact, the record indicated that the debtor's principal was *increasing* his salary as part of the plan. The court noted that while this increase may be reasonable, it had insufficient evidence to make such a determination because no evidence was offered to establish that the principal's salary was a fair market salary for a person of the principal's experience and qualifications. As such, it again concluded that there was insufficient evidence both to find that the three-year plan payment period was fair and equitable and to fix a longer plan payment period. *Id.* at *20.

Finally, Judge Robinson considered the potential risks and consequences of a longer period of plan payments, and again distinguished this case from *Urgent Care*. While the *Urgent Care* debtor was able to provide actual, substantiated facts that weighed against a longer period of plan payments, the *Trinity* debtor could not provide the court with evidence that significant increases in both the principal's salary and payments to employees and contractors were justified. As such, unlike in *Urgent Care*, the *Trinity* court had no basis to conclude that business failure would be more likely if a three-year plan payment period was not approved. The lack of evidence prevented the court from fixing a longer payment period, as well. *Id.* at 22.

Both cases illustrate the factors that a bankruptcy court should consider when determining whether a three-year plan payment period for a nonconsensual subchapter V plan is "fair and equitable" under § 1191(c), and, relatedly, whether to fix a longer period of plan payments. While both agree that a three-year period is the baseline under § 1191(c)(2)(A), the court in *Urgent Care* presumed that a three-year period is reasonable and required the objecting party to establish that a longer period was required. The court in *Trinity* held that the burden to establish that any particular period is fair and equitable remains at all times squarely on the debtor.

Subchapter V Trustee's Duties, Rights and Powers
ABI Southeast Bankruptcy Workshop

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This article will focus on two cases which are irreconcilable with respect to the rights, duties (and perhaps) obligations of Subchapter V trustees. The first case is *In re Roe*, 2024 WL 206678 (Bankr. D. Or. 2024), in which Judge Teresa H. Pearson found that the Subchapter V trustee had the authority to request funds used outside the ordinary course of business. Initially, she noted the Subchapter V trustee's duties under 11 U.S.C. § 1183, generally, and, specifically, § 1183(b)(4). As a result, under 11 U.S.C. § 363(b), since a trustee may use property of the estate other than in the ordinary course of business, she ruled that by its plain and express language, § 363(b) of the Bankruptcy Code was available to "trustees" and the Subchapter V trustee is a trustee under the Bankruptcy Code. She noted that there is an argument that § 1184 of the Bankruptcy Code limits the Subchapter V trustee from the power to use various sections of the Bankruptcy Code, including § 363(b). However, her ruling was that § 1184 does not say that the debtor-in-possession has exclusive access to the rights and powers under the Bankruptcy Code and that, as a general matter, the court cannot add language to the Bankruptcy Code that Congress did not include, reasoning:

> First, it would be absurd to believe that Congress meant in section 1184 that a debtor in possession in a subchapter V case, and only the debtor in possession, would be charged with fulfilling the duties of a subchapter V trustee under section 1183(b). There would be no point for Congress to give duties to a subchapter V trustee in section 1183(b), only immediately to take all those duties away and give them to a debtor in possession in section 1184. That would occur in every case, because subchapter V trustees are appointed in all subchapter V cases. There would be no purpose to appoint subchapter V trustees, or assign them any duties in section 1183(b), if those trustees would never have the obligation to perform any duties in any case.
>
> Second, it would be absurd to believe that Congress meant to impose duties on subchapter V trustees without giving subchapter V trustees the means to fulfill those

> duties. There would be no point for Congress to create subchapter V trustees and give them duties, but not let subchapter V trustees use the rights and powers given to trustees under the Bankruptcy Code to perform their duties.
>
> Instead, this court concludes that a better reading of sections 1183 and 1184 is that a subchapter V trustee may use the trustee's rights and powers under the Bankruptcy Code to the extent it is necessary for a subchapter V trustee to fulfill the statutory duties given to subchapter V trustees in section 1183. Such authority is concurrent with the debtor's authority to use those same trustee's rights and powers under the Bankruptcy Code to fulfill the debtor's duties as a debtor in possession, including those duties under section 1184.

In *Roe*, the court did not "fully" grant the request of the Subchapter V trustee because she required notice and a hearing to be provided to all creditors, by separate notice, which presumably occurred.

By contrast, Judge Eduardo V. Rodriguez, in *Singh v. Price* (*In re Turkey Leg Hut & Co.,LLC*), 659 B.R. 539 (Bankr. S.D. Tex. 2024), reached a diametrically opposed and irreconcilable position.

Initially, the court noted the rights and powers of a debtor-in-possession that are enumerated in § 1184, and that statutory authority grants the debtor-in-possession with independent standing to pursue Chapter 5 avoidance causes of action and other estate causes of action. The court next observed that § 1183 sets forth the general duties of a Subchapter V trustee. In *Turkey Leg Hut*, however, the Subchapter V trustee initiated an adversary proceeding for a temporary restraining order and preliminary injunctive relief on behalf of the debtor against the "soon to be ex-spouse of the debtor's representative." Judge Rodriguez noted that none of the Subchapter V trustee's "general" duties authorizes him or her to pursue claims belonging to the estate, on behalf of the estate. The court found that the debtor-in-possession has exclusive standing to pursue causes of action pursuant to § 1184 and the Subchapter V trustee lacked statutory standing to bring such claims on behalf of the debtor.

While the relief sought in *Roe* and *Turkey Leg Hut* is factually different, presumably the diametrically opposed rulings of those two judges would apply across the board.

The panel will discuss an unreported case from Mississippi that is more extreme than either of the cited cases.

Subchapter-V Claims Bar Date Analysis:

Local Bankruptcy Rule or Standing Order

Subchapter-V Claims Bar Date Survey By Judicial District			
State	**Local Rule**	**Standing Order**	**Timing**
Alabama, Northern District	No	No	
Alabama, Middle District	No	No	
Alabama, Southern District	No	No	
Florida, Northern	No	No	
Florida, Middle	No	No	
Florida, Southern	No	No	
Georgia, Northern	No	No	
Georgia, Middle	Yes	No	70 days after docketing of the date of the order for relief
Georgia, Southern	No	No	
Kentucky, Eastern	No	No	
Kentucky, Western	No	No	
Louisiana, Eastern	No	No	
Louisiana, Western	No	No	
Mississippi, Northern	No	No	
Mississippi, Southern	No	No	
North Carolina, Eastern	No	No	
North Carolina, Middle	Yes	No	70 days after the date of the order for relief
North Carolina, Western	Yes	No	70 days after the order for relief
South Carolina	No	No	
Tennessee, Eastern	No	Yes	70 days after the order for relief; 180 days for governmental units
Tennessee, Middle	No	Yes	70 days after the date of the order for relief in each subchapter V case; governmental units 180 dyas after the date of the order for relief
Tennessee, Western	No	No	
Virginia, Eastern	No	Yes	70 days after the entry of the order for relief
Virginia, Western	No	No	
Texas, Northern	No	Yes	70 days after the date of the order for relief in each case; 180 days for governmental units
Delaware	No	Yes	60 days after the date of the order for relief; 180 days for governmental units

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF GEORGIA

LOCAL RULES AS OF JANUARY 6, 2023

SUMMARY OF CHANGES
SINCE SEPTEMBER 6, 2022 VERSION

1. The Court has decided to remove the form notices found in LBR 3015-2 and LBR 9004-1 to the Clerk's Instructions to better facilitate any modifications that may arise from time to time.

Back to TOC

PART III. CLAIMS AND DISTRIBUTION TO CREDITORS AND EQUITY INTEREST HOLDERS; PLANS

LBR 3001-1. Claims and Equity Security Interests (amended February 24, 2020)

(a) Interest in Proofs of Claim. For all claims filed, creditors who calculate interest by using the "add on interest" method shall rebate interest from their claims by using the "pro rata" method.

(b) Electronic Filing of Claims. Entities that file 15 or more proofs of claim during any 12-month period shall file the claims electronically or obtain a Judicial Waiver. Attorneys who file claims for themselves, their firms, or on behalf of any other entity shall file all claims electronically regardless of number. If paper claims are filed in violation of this Rule without a Judicial Waiver, the Court shall consider striking the documents.

(c) Extension of Time to File. Creditors added to a bankruptcy case by amendment later than 60 days before the original bar date shall be allowed 60 days from the date of the filing of the amendment to file a proof of claim.

(d) Bar Date for Filing Claims in non-Subchapter V Chapter 11 Reorganization Cases. For all bankruptcy petitions filed under Chapter 11, the bar date for filing of proofs of claim or interest shall be 90 days from the first scheduled 11 U.S.C. § 341(a) Meeting of Creditors. For cause shown, the Court shall consider extending the time to file proofs of claim upon the filing of an appropriate motion or request within the 90-day period.

(e) Bar Date for Filing Claims in Subchapter V Chapter 11 Reorganization Cases. For all bankruptcy petitions filed under Subchapter V of Chapter 11, the bar date for filing proofs of claim or interest shall be 70 days after docketing of the order for relief of the Subchapter V Chapter 11 case. For cause shown, the Court shall consider extending the time to file proofs of claim upon the filing of an appropriate motion or request within the 70-day period.

LBR 3002.1-1. Claims Secured by Security interest in the Debtor's Principal Residence (updated December 1, 2018)

When a creditor files a supplemental claim for fees, expenses, and charges pursuant to FRBP 3002.1(c)and (d) prior to the payment of the last payment under the plan by the debtor, the claim may be paid through the plan by the Chapter 13 Trustee as if it arose pre-petition unless within 60 days from the filing of the claim any party in interest objects to its allowance.

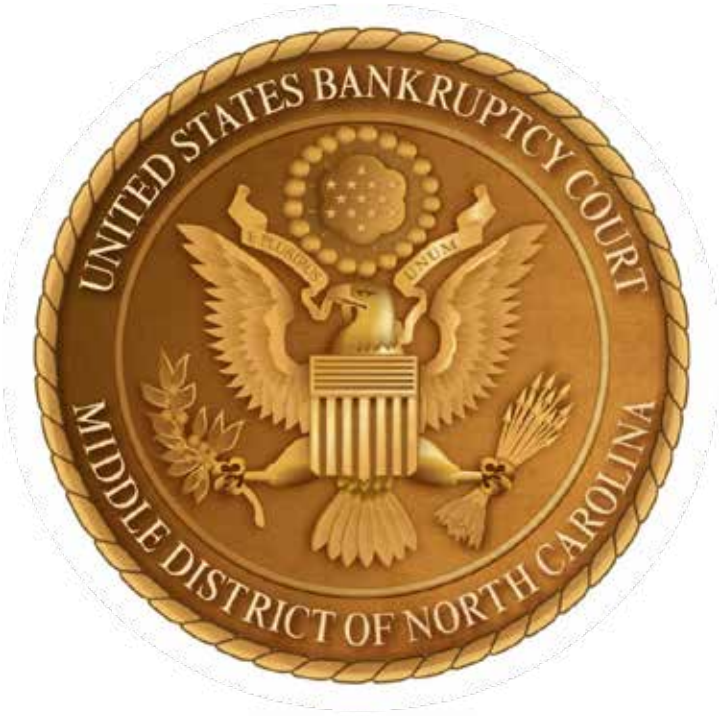
LBR 3002.1-2. Notice for Final Cure - Response

If a creditor agrees with the information contained in the Notice of Final Cure Payment filed by the debtor or the Trustee, the response by the creditor indicating agreement may be filed pro se.

UNITED STATES BANKRUPTCY COURT

MIDDLE DISTRICT OF NORTH CAROLINA

LOCAL BANKRUPTCY RULES



These rules are current as of: June 13, 2024

LOCAL RULE 3001-1

CLAIMS & EQUITY SECURITY INTERESTS – GENERAL; ELECTRONIC FILING OF CLAIMS

(a) Filing of Proofs of Claim and Transfers of Claims.

In all cases, proofs of claim must be filed electronically according to the guidelines established and published from time to time by the clerk. Those guidelines are maintained on the court's website, www.ncmb.uscourts.gov. To correctly file a transfer of claim, the filer must attach and complete Director's Form B2100A. Supporting documentation may be attached within the same filing.

(b) Effect of Electronic Filing.

(1) Signature. The electronic filing of a proof of claim or a transfer of claim constitutes the filing claimant's approved signature by law. Without limitation, the provisions of 18 U.S.C. § 152 apply to such filing.

(2) Claims Register. The electronic filing of a proof of claim or a transfer of claim constitutes entry of the document in the records maintained by the clerk under Rule 5003 of the Federal Rules of Bankruptcy Procedure.

LOCAL RULE 3003-1

CHAPTER 11 CLAIMS

(a) Period for Filing Chapter 11 Claims in a Case Other than under Subchapter V.

In a chapter 11 case other than under subchapter V, non-governmental units must file proofs of claim (if required to be filed) within 90 days after the date first set for the meeting of creditors under 11 U.S.C. § 341, unless the court orders otherwise prior to the expiration of such period.

(b) Period for Filing Chapter 11 Claims in a Case under Subchapter V.

In a chapter 11 case under subchapter V, non-governmental units must file proofs of claim (if required to be filed) within 70 days after the order for relief, unless the court orders otherwise prior to expiration of such period.

(c) Debtor Notification of Disputed, Contingent, or Unliquidated Claim.

In a chapter 11 case, the debtor must notify each creditor whose claim is listed on the schedules as contingent, disputed, or unliquidated of that fact on or before: (1) 14 days after filing the schedules; (2) 14 days after the addition of such creditor to the schedules; or (3) 14 days after an amendment to the schedules which designates the creditor's claim as contingent, disputed, or unliquidated for the first time. The debtor must file a certificate of service within 3 business days after service of the notification. Failure to timely notify a creditor that its claim is listed as disputed, contingent, or unliquidated will result in the creditor's claim being deemed filed in the amount listed as disputed, contingent, or unliquidated, as though a proof of claim had been filed by the creditor.

Rules of

Practice and Procedure

of the

United States Bankruptcy Court

for the

Western District of North Carolina

Revised effective September 1, 2021

PART III

CLAIMS AND DISTRIBUTION TO CREDITORS AND EQUITY INTEREST HOLDERS; PLANS

Local Rule 3001-1
Claims and Equity Security Interests

(a) **Where to File a Claim**.

(1) In all cases, proofs of claim shall be filed by electronic means directly with the Clerk of Court according to those guidelines established and published by the court. A creditor may file a proof of claim electronically at the court's website (www.ncwb.uscourts.gov).

(2) When filing proofs of claim, the claimant shall comply with the requirements of Federal Rule of Bankruptcy Procedure 3001(c) and (d) regarding the attachment of documentation in electronic format sufficient to establish the validity and status of the claim asserted, pursuant to the Clerk's guidelines.

(3) The filing of a proof of claim by electronic means directly with the Clerk shall constitute the filing claimant's approved signature by law, and the provisions of 18 U.S.C. § 152(4) shall apply to the filing of a proof of claim under this procedure.

(4) The filing of a proof of claim by electronic means in accordance with the Clerk's procedures shall constitute entry of the proof of claim in the claims register maintained by the Clerk pursuant to Federal Rule of Bankruptcy Procedure 5003(b).

(b) **Filing of Claims by Debtor or Chapter 13 Trustee**. In Chapter 13 cases, if a creditor fails to file a proof of claim on or before the first date set for the § 341 meeting of creditors, the debtor or the Chapter 13 trustee may do so in the name of the creditor. If the debtor or the trustee files a proof of claim on behalf of a creditor, the creditor may file an amended proof of claim pursuant to Federal Rules of Bankruptcy Procedure 3002 or 3003(c) that will supersede the proof of claim filed by the debtor or the trustee.

(c) **Time for Filing Proof of Claim or Interest in a Chapter 11 Case.** Pursuant to Federal Rule of Bankruptcy Procedure 3003(c)(3) and unless otherwise ordered by the court, a proof of claim or interest shall be timely if filed:

(1) In a case filed under Subchapter V of Chapter 11, within 70 days after the order for relief;

(2) For entities other than a governmental unit in a standard (non-Subchapter V) Chapter 11 case, within 90 days after the order for relief; or

(3) For governmental units in a standard (non-Subchapter V) Chapter 11 case, within 180 days after the order for relief.

(d) **Electronic Filing of Transfers of Claim.** Creditors shall adhere to the following procedures when filing transfers of claim:

(1) In all cases filed under all chapters of the Bankruptcy Code, transfers of claim shall be filed by electronic means directly with the Clerk of Court according to those guidelines established and published by the Clerk.

(2) The filing of a transfer of claim by electronic means directly with the Clerk shall constitute the filing claimant's approved signature by law, and the provisions of 18 U.S.C. § 152(4) shall apply to the filing of a transfer of claim under this procedure. A creditor may file a transfer of claim electronically at the court's website (www.ncwb.uscourts.gov).

(3) The filing of a transfer of claim shall require the attachment of Official Bankruptcy Form B 2100A. Supporting documentation may be attached within the same filing.

(4) The filing of a transfer of claim by electronic means in accordance with the Clerk's procedures shall constitute entry of the transfer of claim pursuant to Federal Rule of Bankruptcy Procedure 5003(b).

(5) Any paper "hard copy" transfer of claim filed with the Clerk that has subsequently been scanned and docketed in CM/ECF may be destroyed at any time thereafter.

IN THE UNITED STATES BANKRUPTCY COURT FOR THE EASTERN DISTRICT OF TENNESSEE

IN RE **TIME FOR FILING PROOFS OF CLAIM IN CHAPTER 11 CASES**	**No. 2020-03**

GENERAL ORDER

Pursuant to Rule 3003(c)(3) of the Federal Rules of Bankruptcy Procedure, the court fixes the time for filing proofs of claim in chapter 11 cases commenced on and after February 19, 2020, as follows:

- Except as provided for governmental units and for cases commenced under Subchapter V—Small Business Debtor Reorganization, a proof of claim is timely filed if it is filed not later than 120 days after the order for relief.
- A proof of claim filed by a governmental unit is timely filed if it is filed not later than 180 days after the date of the order for relief.
- Other than for a governmental unit, a proof of claim in a case commenced under Subchapter V—Small Business Debtor Reorganization is timely filed if it is filed not later than 70 days after the order for relief.

ENTERED: February 14, 2020

/s/ Marcia Phillips Parsons
MARCIA PHILLIPS PARSONS
Chief United States Bankruptcy Judge

/s/ Shelley D. Rucker
SHELLEY D. RUCKER
United States Bankruptcy Judge

/s/ Suzanne H. Bauknight
SUZANNE H. BAUKNIGHT
United States Bankruptcy Judge

/s/ Nicholas W. Whittenburg
NICHOLAS W. WHITTENBURG
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF TENNESSEE

IN RE:

ORDER SETTING PROOF OF CLAIM BAR DATES IN SUBCHAPTER V CASES FILED UNDER CHAPTER 11.

ADMINISTRATIVE ORDER 23-2

This Administrative Order governs all chapter 11 reorganization cases where the debtor elects to have subchapter V of chapter 11 apply. Unless otherwise ordered by the Court, pursuant to Fed. R. Bankr. P. ("FRBP") 3003(c)(3), and subject to FRBP 3003(b), an unsecured creditor or an equity security holder whose claim or interest is not scheduled or scheduled as disputed, contingent, for unliquidated, has a proof of claim timely filed if it is filed not later than 70 days after the date of the order for relief in each subchapter V case, except that a proof of claim filed by a governmental unit is timely filed if it is filed not later than 180 days after the date of the order for relief.

In an involuntary case if, after the order for relief, the debtor files a timely statement indicating it elects to have subchapter V apply as provided for in FRBP 1020(a), the debtor or trustee-in-possession (if applicable) shall file a motion to set a proof of claim bar date in a subchapter V case.

SO ORDERED.

MARIAN F. HARRISON
CHIEF U.S. BANKRUPTCY JUDGE

RANDAL S. MASHBURN
U.S. BANKRUPTCY JUDGE

CHARLES M. WALKER
U.S. BANKRUPTCY JUDGE

EXHIBIT 13

UNITED STATES BANKRUPTCY COURT

for the

EASTERN DISTRICT OF VIRGINIA

INTERIM PROCEDURES GOVERNING PRACTICE AND PROCEDURE UNDER THE SMALL BUSINESS REORGANIZATION ACT OF 2019

EXHIBIT TO STANDING ORDER NO. 20-3

Effective February 19, 2020

(Ver. 02/05/20)

EXHIBIT 13

INTERIM PROCEDURES

1. INTERIM PROCEDURE 1017-1: CONVERSION

(C) ***Filing of Official Form 122A-1, 122B or 122C-1 Upon Conversion of Case***: Unless otherwise ordered by the Court, in a case converted from chapter 11, 12 or 13 to chapter 7, the debtor shall file Official Form 122A-1 "**Chapter 7 Statement of Your Current Monthly Income**," within 14 days after conversion. In a case of an individual debtor converted to chapter 11 (unless under subchapter V of chapter 11), the debtor shall file Official Form 122, "**Chapter 11 Statement of Your Current Monthly Income**," within 14 days after entry of the conversion order. In a case of an individual debtor converted to chapter 13, the debtor shall file Official Form 122C-1, "**Chapter 13 Statement of Your Current Monthly Income and Calculation of Commitment Period**," within 14 days after entry of the conversion order.

2. INTERIM PROCEDURE 2014-1: SERVICE OF MOTION FOR AN ORDER AUTHORIZING EMPLOYMENT IN A CHAPTER 11 CASE

The motion, declaration and any proposed order shall be served on the parties listed below. Any party moving for an order authorizing employment in a proceeding under chapter 11 of the Bankruptcy Code shall, in plain language, inform all such parties of the filing of the motion, disclosing in full and complete detail any actual or potential conflicts of interest, and shall specify the method for objecting to the proposed order. Any objections to the proposed employment shall be made in writing, filed with the Court, with a copy served on the movant and the parties listed below, within 14 days from the date of service of the motion.

The motion, declaration and proposed order shall be served on:

1. the United States trustee;
2. any trustee appointed under 11 U.S.C. §1104 or 11 U.S.C. §1183;
3. any committee of unsecured creditors appointed pursuant to 11 U.S.C. §1102 or, if no committee is appointed, the creditors included on the list filed under FRBP 1007(d);
4. all secured creditors; and
5. any other entity as the Court may direct.

3. INTERIM PROCEDURE 3003-1: CLAIMS IN CHAPTER 11 CASES

(A) ***Claims Bar Date***: The last date for the filing of claims, other than a claim of a governmental unit in a chapter 11 case, shall be 90 days after the first date set for the meeting of creditors. The last date for a governmental unit to file a proof of claim shall be 180 days after the petition is filed in a voluntary chapter 11 case or an order for relief is entered in an involuntary chapter 11 case. In a chapter 11 case under subchapter V of chapter 11, other than a claim of a governmental

unit, a proof of claim is timely if filed not later than 70 days after the date of the entry of the order for relief, unless a different date is fixed by the Court. The Clerk shall give notice of the date in a separate notice of bar date mailed with the notice for the meeting of creditors.

4. INTERIM PROCEDURE 3014-1: ELECTION UNDER 11 U.S.C. § 1111(B) BY SECURED CREDITOR IN SUBCHAPTER V CHAPTER 11 CASE

In a case under subchapter V of chapter 11 in which 11 U.S.C. § 1125 does not apply, an election of 11 U.S.C. § 1111(b)(2) by a class of secured creditors shall be made not later than 10 days following the filing of the plan, or such other date as the Court may direct.

5. INTERIM PROCEDURE 3016-1: CHAPTER 11 PLAN REQUIREMENTS

(A) ***Chapter 11 Plan Filed in a Subchapter V Case***: In a case under subchapter V of chapter 11, the debtor may file a plan with the petition. If a plan is not filed with the petition, it shall be filed within 90 days thereafter unless the Court, pursuant to 11 U.S.C. § 1189, extends the time for filing. Any motion for extension of time to file a plan shall be filed prior to the expiration of the deadline for which the debtor seeks an extension. Unless otherwise ordered in specific cases, the only acceptable form for such a plan shall be Official Form 425A, Plan of Reorganization for Small Business Under Chapter 11, which is available from the Clerk upon request or from the Court's Internet web site, www.vaeb.uscourts.gov.

(1) ***Service of Chapter 11 Plan in a Subchapter V Case in Which There Is No Disclosure Statement***: In a case under subchapter V of chapter 11 in which 11 U.S.C. § 1125 does not apply, the debtor shall serve the plan and notice of the confirmation hearing date on the trustee, all creditors, equity security holders, indentured trustees, parties in interest and the United States trustee not later than 35 days prior to the confirmation hearing date.

(2) ***Acceptance or Rejection of Chapter 11 Plan in a Subchapter V Case in Which There Is No Disclosure Statement***: In a case under subchapter V of chapter 11 in which 11 U.S.C. § 1125 does not apply, the debtor shall serve notice of the time within which holders of claims or interests may accept or reject the plan not later than 35 days prior to the confirmation hearing date. Ballots accepting or rejecting the plan shall be cast not later than 7 days prior to the date set for the initial hearing on confirmation. An equity security holder or creditor whose claim is based on a security must be the holder of record on the date the ballot is cast.

(3) ***Possible Dismissal of Case; Order***: In cases under subchapter V of chapter 11, the Clerk shall monitor the filing of the plan. If the debtor does not timely file a

CLERK, U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS
ENTERED
THE DATE OF ENTRY IS ON
THE COURT'S DOCKET

The following constitutes the ruling of the court and has the force and effect therein described.

Signed February 13, 2020

Barbara J. Houser
United States Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS

IN RE:	§	
	§	
STANDING ORDER SETTING PROOF OF	§	
CLAIM BAR DATE IN ALL CASES UNDER	§	**GENERAL ORDER**
SUBCHAPTER V OF CHAPTER 11	§	**2020-02**

This Standing Order governs all chapter 11 reorganization cases where the debtor elects to have subchapter V of chapter 11 apply and no bar date has otherwise been specifically set by the Court.

Under Federal Rule of Bankruptcy Procedure ("FRBP") 3003(c)(3), and subject to FRBP 3003(b), an unsecured creditor or an equity security holder whose claim or interest is not scheduled or is scheduled as disputed, contingent, or unliquidated, has a proof of claim timely filed if it is filed not later than 70 days after the date of the order for relief in each case, except that a proof of claim filed by a governmental unit is timely filed if it is filed not later than 180 days after the date of the order for relief.

IT IS SO ORDERED.

###END OF ORDER###

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

GENERAL ORDER – Order Setting Proof Of	)
Claim Bar Dates in All Cases Under	)
Subchapter V of Chapter 11	)

AND NOW, this 14th day of September 2020, it is hereby

ORDERED, that this Standing Order governs all chapter 11 reorganization cases where the debtor elects to have subchapter V of Chapter 11 apply and no bar date has otherwise been specifically set by the Court; and it is further

ORDERED, that under Federal Rule of Bankruptcy Procedure ("FRBP") 3003(c)(3), and subject to FRBP 3003(b), an unsecured creditor or an equity security holder whose claim or interest is not scheduled or is scheduled as disputed, contingent, or unliquidated, has a proof of claim timely filed if it is filed not later than sixty (60) days after the date of the order for relief in each case, except that a proof of claim filed by a governmental unit is timely filed if it is filed not later than one-hundred eighty (180) days after the date of the order for relief.

Dated: September 14, 2020

Chief Judge Christopher S. Sontchi

Corporate Discharge in Subchapter V Cases
ABI Southeast Bankruptcy Workshop

Craig M. Geno, Esq.
Law Offices of Craig M. Geno, PLLC

There is no doubt that the discharge provisions of 11 U.S.C. § 523(a) do not apply to corporate - as opposed to individual - "legacy" Chapter 11 debtors.

Substantially all of the lower courts considering this issue in Subchapter V cases have ruled that Subchapter V corporate cases are in the same category as legacy Chapter 11 corporate cases - that is, § 523(a) does not apply to Subchapter V corporate debtors.

However, the Fourth and Fifth Circuits have now disagreed. The Fourth Circuit's opinion in *Cantwell-Cleary Co., Inc. v. Cleary Packaging, LLC* (*In re Cleary Packaging, LLC*), 36 F.4th 509 (4th Cir. 2022), notes, initially, that discharge of debts in Subchapter V is governed by 11 U.S.C. § 1192(2) which provides:

> If the plan of the debtor is confirmed . . . the court shall grant the debtor a discharge of all debts . . . except any debt . . . (2) of the kind specified in section 523(a) of this title.

The Fourth Circuit noted that § 523(a) provides that discharges in those certain specified Bankruptcy Code sections do not discharge an individual debtor from a list of twenty-one specific types of debts including a debt "for willful and malicious injury" (such as that in *Cleary*).

The court outlined the arguments:

> . . . [t]he 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).

The debtor argued that § 523(a) limits § 1192(2) discharges only as to individual debtors and, thus, corporate debts are dischargeable, or, at least, not "covered" by § 523(a). The creditor, in its argument, focused on § 1192(2), which applies to the debtor, and argued that the section excludes

from discharge debts of the kind listed in § 523(a), no matter if the debtor is an individual or a corporate debtor. The Fourth Circuit then engaged in a statutory, line by line, word for word, analysis and concluded:

> 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).

The court went on to add that if there is "tension" between the language of § 523(a) and § 1192(2), the more specific provisions should govern the more general and § 1192(2) has the more specific provision, as compared to the more general provisions of § 523(a).

In addition, the court found that the result was equitable since Subchapter V does not contain the absolute priority rule provision found in § 1129 with respect to plan confirmation in legacy corporate Chapter 11 cases. The "trade off" for no absolute priority rule is corporations in Subchapter V cases are subject to the discharge provisions of § 523(a).

The Fifth Circuit found the reasoning of *Cleary Packaging* persuasive in *Avion Funding, L.L.C. v. GFS Indus., L.L.C.* (*In the Matter of GFS Indus., L.L.C.*), 99 F.4th 223 (5th Cir. 2024). In *Avion*, the Fifth Circuit noted the statutory problem:

> 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).

The court next noted that § 1192 governs discharge of debts of a "debtor," but does not distinguish between individual and corporate debtors. The court also noted that § 1192 excepts from discharge "any *debt . . . of the kind* specified in section 523(a)," so that, in the Fifth Circuit's view, the most "natural" reading of § 1192(2) is that it subjects both corporate and individual Subchapter V debtors to the categories of debt discharged in § 523(a). The Fifth Circuit again pointed out that § 1192(2) does not say "kind of debtor," but simply says debtor so that the text could not be read to incorporate a distinction between individual and corporate debtors.

The Fifth Circuit also agreed with the *Cleary Packaging* court that § 1192(2) governs over § 523(a) as the more specific provision since it dealt directly with Subchapter V discharges. The Fifth Circuit also found some supporting rationale in those cases determining that Chapter 12 discharge provisions (that are very close to those in Subchapter V) have been construed to rule that those discharge exceptions apply to both individual and corporate debtors in the Chapter 12 context.

Lastly, the Fifth Circuit, as did the Fourth Circuit in *Cleary Packaging*, found that the compromise in the confirmation provisions of Subchapter V that eliminated the absolute priority rule was a compromise that afforded small business debtors unique benefits (and an easier path to confirmation) while subjecting corporate Subchapter V debtors to § 523(a)'s dischargeability exceptions.

At least one bankruptcy court (in Oregon) has agreed with the *Cleary*/*Avion* rationale, despite the opinion of a bankruptcy appellate panel in the Ninth Circuit ruling that Subchapter V corporate debtors are not subject to the dischargeability provisions of § 523(a).

UNITED STATES BANKRUPTCY COURT

NORTHERN DISTRICT OF MISSISSIPPI

Case No. 23-12021-JDW

- x

In the Matter of:

DOBBS TRUCKING LLC,

Debtor.

- x

United States Bankruptcy Court

Thad Cochran U.S. Bankruptcy Courthouse

703 Highway 145 North

Aberdeen, MS 39730

June 6, 2024

10:38 AM

B E F O R E :

HON. JASON D. WOODARD

U.S. BANKRUPTCY JUDGE

ECRO: UNKNOWN

HEARING re Document #286 First Application for Compensation for Craig M. Geno, Trustee Chapter 11, Fee: $32,746.25, Expenses $586.33. Filed by Craig M. Geno.

Transcribed by: Sonya Ledanski Hyde

A P P E A R A N C E S :

LAW OFFICES OF CRAIG M. GENO, PLLC
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BY: CRAIG M. GENO

UNITED STATES DEPARTMENT OF JUSTICE
Attorney for U.S. Trustee
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Jackson, MS 39201

BY: SAMMYE S. THARP

I N D E X

P R O C E E D I N G S

THE COURT: All right. Let's take care of Dobbs Trucking LLC. All right. I have reviewed the fee application, Mr. Geno, as Chapter 11 Trustee -- just for clarity of the record, not as debtor's counsel in this case -- and I also reviewed the objection filed by the U.S. Trustee.

As I understand it, Ms. Tharp, the objection is not as to the fee application in its entirety. It's about $11,149 worth of time entries, time or fees requested. I assume there's no objection to the remaining.

MS. THARP: Correct, Your Honor. And I do have some marked copies on the specific service entries that are --

THE COURT: Okay.

MS. THARP: -- of concern.

THE COURT: Okay.

MS. THARP: So, if the Court wants those.

THE COURT: Okay. All right. That would be helpful. All right. Mr. Geno, it is your application, so I'll let you go first.

MR. GENO: Is it okay to do this from here, or do you want us at the back counsel table?

THE COURT: You know, it's actually probably better if you do it from there, if you will move that little

handheld device, because then it's closer to me and to you and it'll pick up better. I mean, bring it to -- if you'll bring it to the podium.

MR. GENO: Oh, I'm sorry.

THE COURT: And then if anyone from behind, speak up please (indiscernible).

MR. GENO: Good morning again, Your Honor. Craig Geno, in support of my application for compensation. Do you want some opening statements, Your Honor, or are you wanting me to call my witness?

THE COURT: You can call your witness.

MR. GENO: Call Ron Dobbs.

CLERK: Do you solemnly swear or affirm the testimony you're about to give me in this trial shall be the truth, the whole truth, and nothing but the truth, so help you God?

THE WITNESS: I do.

MR. GENO: May I proceed, Your Honor?

THE COURT: Please.

MR. GENO: Do you want me to move this closer to him?

THE COURT: Why don't we put it right there on that rail?

CLERK: Would you like me to (indiscernible)?

THE COURT: Yeah, why don't you call them to come

check it out?

CLERK: It's okay if we keep --

THE COURT: But we're not going to call.

CLERK: Okay.

THE COURT: We'll keep going in the meantime.

CLERK: Okay. It's okay for them to come here now though.

THE COURT: Yeah.

MR. GENO: May I proceed, Your Honor?

THE COURT: Please.

DIRECT EXAMINATION OF RONALD DOBBS

BY MR. GENO:

Q Mr. Dobbs, state your full name for the record, sir?

A Ronald Eugene Dobbs.

Q What is your business address?

A 1413 County Road 86, New Albany, Mississippi.

Q What is your relationship to Dobbs Trucking LLC, the former debtor-in-possession in this case?

A I am owner and managing member.

Q Mr. Dodd, when you first filed this case, or Dobbs Trucking did, did you have a different lawyer representing the corporation than the lawyer who ended up representing the corporation?

A Yes.

Q Is Walter Newman current lawyer for Dobbs Trucking?

A Yes.
Q He got the plan confirmed?
A Yes.
Q Let's refer to your first lawyer then as your first lawyer. Is that okay with you?
A Yes.
Q After the case was filed, Mr. Dobbs, did you have some communication problems and issues with your first lawyer?
A Yes.
Q Could you get him to call you back?
A Hardly ever.
Q Do you remember that there came to pass in the corporate case fairly early on that there was an issue with your insurance coverage?
A Yes.
Q Was the insurance coverage about the lapse by the terms of the policy? In other words, going to expire by some of the terms?
A Yes.
Q Did you need to get premium financing in order to finance the premium for the policy?
A Yes.
Q Was your lawyer helpful in that regard?
A No.
Q In fact, when he found out that you needed premium

financing, did he react by filing a motion to dismiss your whole case?

A Yes.

Q Did you authorize that motion?

A No.

Q Look on the screen in front of you, Mr. Dobbs. Is that the motion to dismiss Dobbs Trucking your first lawyer filed?

A There's not anything showing up.

Q It's not on your screen?

A No, sir.

THE COURT: It's on, but it's not showing up. Why don't you just show him the paper copy?

MR. GENO: I'm getting a copy (indiscernible).

THE COURT: Thank you. I apologize to everyone for the technological difficulties.

BY MR. GENO:

Q Mr. Dobbs, is that the motion to dismiss that your first lawyer order filed without your authorization?

A Yes.

Q Look in that second full paragraph on the very first page. It's a paragraph that begins "Cause exists to dismiss". Do you see that?

A Yes.

Q And does the second sentence read, "Here, the debtor

has no unencumbered assets and is unable to afford its" -- "unable to afford its trucking insurance renewal." Do you see that?

A Yes.

Q When you ran into a problem with the insurance renewals, did you contact me for help?

A Yes.

Q And did I agree that we would try to go back to court and see if we couldn't get your premium financing approved and your insurance coverage continued?

A Yes.

Q And did you and I, before we actually got into court, convince the premium financing folks in your insurance company to renew the coverage with the promise we would get it approved after the fact?

A Yes.

MR. GENO: Your Honor, I would ask that the motion to dismiss be marked and entered as my Exhibit 1.

THE COURT: Any objection?

MS. THARP: No, Your Honor.

THE COURT: It's admitted as Debtor's 1.

(Applicant's Exhibit 1 marked for identification and entered into evidence)

BY MR. GENO:

Q Mr. Dobbs, on the screen before you is an order that

the Court entered on November 6th, 2023 at Docket 151, that set a hearing on your first lawyer's motion to dismiss. Do you see that?

A Yes.

Q And that hearing was set for November 8th, 2023. Is that right?

A Yes.

Q Prior to that hearing, had you and I agreed that Dobbs Trucking would relinquish its debtor-in-possession status and turn operations over to the Sub V Trustee?

A Yes.

Q Did you come to court on November 8th?

A Yes.

Q Did I come to court November 8th?

A Yes.

Q Did the Judge come to court November 8th?

A Yes.

Q Did your first lawyer show up that day?

A No.

Q On the screen before you now at Docket 153 is your first lawyer's motion to withdraw the motion to dismiss. Do you see that?

A Yes.

Q Did he file that at my request and your request?

A Yes.

Q And did the Court on November 8th enter an order withdrawing the motion to dismiss, pursuant to the order that's on the screen in front of you?

A Yes.

Q Prior to the hearing on November 8th, did I file as Sub V Trustee a motion in Dobbs Trucking for authority for debtor to enter into insurance premium finance agreement and to provide adequate protection?

A Yes.

Q Was that done pursuant to an agreement you and I reached?

A Yes.

MR. GENO: Your Honor, I would ask that motion be marked and entered as Applicant's Exhibit 2.

THE COURT: Any objection?

MS. THARP: No, Your Honor.

THE COURT: All right. It's Applicant's 2. I think I referred to the first exhibit as Debtor's 1 out of habit. It's actually Applicant's 1. This will be Applicant's 2.

(Applicant's Exhibit 2 marked for identification and entered into evidence)

MR. GENO: Thank you, Your Honor.

BY MR. GENO:

Q And Mr. Dobbs, did Judge order on November 9th of last

year, enter this agreed order authorizing Dobbs Trucking to enter into the insurance premium finance agreement and to provide adequate protection?

A Yes.

MR. GENO: I would ask that it be marked and entered as Applicant's 3, Your Honor.

THE COURT: Any objection to 3?

MS. THARP: No, Your Honor.

THE COURT: All right. Applicant's 3 is admitted.

(Applicant's Exhibit 3 marked for identification and entered into evidence)

BY MR. GENO:

Q Could Dobbs Trucking have continued operating without insurance?

A No.

Q Mr. Dobbs, prior to the filing of your bankruptcy case, had Dobbs Trucking factored its account receivable to the third party?

A Yes.

Q And did that third party, according to your position, continue to take account receivable after the bankruptcy was filed it was not entitled to?

A Yes.

Q Was your first lawyer effective in stopping that?

A No.

Q Did you and I working together stop that?
A Yes.
Q Did it come to a time after these November hearings and orders that Dobbs Trucking needed additional financing by way of factoring?
A Yes.
Q On the screen before you at Docket Number 194 is a copy of the motion for Dobbs Trucking to enter into the factoring agreement we mentioned that I filed as Subchapter V Trustee. Do you see that?
A Yes.
Q Is that the emergency motion we agreed to file?
A Yes.
MR. GENO: Your Honor, we ask that it be marked as Applicant's 4.
MR. GENO: Any objection to 4?
MS. THARP: No, Your Honor.
THE COURT: Applicant's 4 is admitted.
(Applicant's Exhibit 4 marked for identification and entered into evidence)
BY MR. GENO:
Q Mr. Dobbs, did the Court on December 19th of last year, at Docket 215, enter an order that approved the emergency motion for Dobbs to enter into the factoring agreement that we just talked about?

A Yes.
Q And by this time, had Dobbs Trucking obtained new counsel that's Mr. Walter Newman?
A Yes.
MR. GENO: We would ask that agreed order be marked as Applicant's 5, Your Honor.
THE COURT: 5 is admitted.
(Applicant's Exhibit 5 marked for identification and entered into evidence)
BY MR. GENO:
Q Mr. Dobbs, on the screen before you is an agreed order confirming amended Subchapter V plan of reorganization in the Dobbs Trucking case. Do you see that?
A Yes.
Q Is that the order that Judge Woodard entered back in April confirming the plan of reorganization for Dobbs Trucking as it was filed by Mr. Newman?
A Yes.
MR. GENO: Ask that that be marked as Applicant's 6, Your Honor.
MS. THARP: No objection, Your Honor.
THE COURT: Hearing no objection, I'll admit it as 6, Applicant's 6.
(Applicant's Exhibit 6 marked for identification and entered into evidence)

BY MR. GENO:

Q Mr. Dobbs, as a result of the entry of the order of confirmation that we just talked about, how many folks are still employed at Dobbs Trucking?

A I think it's approximately 72.

Q And without trying to sound too self-important, I need to ask you this question. Could you have gotten the confirmation without the aid and assistance that I gave you in November and December of last year?

A No.

MR. GENO: No further questions, Your Honor.

THE COURT: All right. Any cross-examination?

MS. THARP: Yes, Your Honor, briefly.

CROSS-EXAMINATION OF RONALD DOBBS

BY MS. THARP:

Q Mr. Dobbs, Sammye Tharp, from the U.S. Trustee's office. You may remember me from your 341?

A Yes, ma'am.

Q It's a few hearings we've had. Anyway, I want to ask you, now, you've attested via your direct testimony that you, in effect, had ineffective assistance of counsel from the time of the filing through about January the 3rd of this year --

A Yes, ma'am.

Q -- when Mr. Newman was hired?

A Yes.
Q So, at the time that you communicated with Mr. Geno the Sub V Chapter Trustee, you were -- would you say at those times you technically probably didn't have an attorney --
A Yeah.
Q -- representing you. Would that be fair to say?
A Yes.
Q So, for -- let me refer to Dobbs Trucking, the debtor did not have an attorney --
A Yes.
Q -- basically, due to your testimony?
A Yes.
Q Okay. Now, did you understand at the time when you were giving Mr. Geno authorization to do these various things, file the various pleadings that you have attested to --
A Yes.
Q -- did you understand legally the implications of what you were authorizing?
A Yes.
Q On behalf of the debtor?
A Yes.
Q You understood them legally, as far as the legal implications and what they may bring about?
A Yes.

Q Okay. At what point in the case did you realize that you were having problems with Mr. Saxton, your -- the initial debtor's attorney?

A Probably after the initial filing. I would call to ask questions because I had no guidance. I knew what -- didn't know what was going on. And I would call and make a call --

Q And not to interrupt, but you're not an attorney --

A Yes, ma'am.

Q -- that's correct (indiscernible)?

A Exactly.

Q Okay. Go right ahead.

A So, I would make -- set up phone call appointments. Sometimes he would call me, sometimes he wouldn't. I never really got any kind of answers that I was looking for. If we did make contact, it was quick, and that's pretty much it. I mean, I was pretty much in the dark the whole time as to how things operated.

Q And you do realize that the debtor, as a limited liability company, is required through bankruptcy case to be represented by counsel?

A Yes, ma'am.

Q Do you realize that?

A Yes.

Q Okay. And would it be fair to say that technically, as you've already said, and I'll just ask you again, they were

-- the debtor was unrepresented probably from pretty much the date of filing through the time that Mr. Newman was hired for the debtor?

A Yes.

Q Okay.

MS. THARP: I think that's all I have, Your Honor.

THE COURT: Okay. Any redirect?

MR. GENO: No, Your Honor. May the witness be excused?

THE COURT: Yes, sir. You may step down.

THE WITNESS: Okay.

MR. GENO: That concludes my presentation.

THE COURT: Okay. Ms. Tharp, any witnesses? Any witnesses, Ms. Tharp?

MS. THARP: No, Your Honor.

THE COURT: Okay. All right. Anything you want to say in closing, Mr. Geno?

MS. THARP: I'm sorry. Excuse me. I thought it was -- forgive me. I (indiscernible), go right ahead.

THE COURT: Did you have evidence to be marked up?

MS. THARP: Well, are we -- well, where are we right now?

THE COURT: We're still (indiscernible). (indiscernible) if you have something you want put in.

MS. THARP: Oh, no. I need to (indiscernible).

I'm sorry. I didn't understand you, Your Honor.

THE COURT: Okay. You (indiscernible).

MS. THARP: Well, just -- well, I can -- you know, it'll be closing, I guess, (indiscernible)

THE COURT: Do you have something you want in evidence?

MS. THARP: Well, yes, I do. I wanted to put the marked up application from Mr. Geno into evidence.

THE COURT: Okay. All right. So, you don't have a witness that (indiscernible) --

MS. THARP: No.

THE COURT: -- or (indiscernible)? Are you in agreement?

MR. GENO: I'll agree. She sent it to you before, Your Honor. I don't have any objection to it being entered.

THE COURT: Okay. All right. So, what do you have, marked up, the fee application?

MS. THARP: I have the -- Mr. Geno's application --

THE COURT: Okay.

MS. THARP: -- just marked, and the areas of concern --

THE COURT: Okay.

MS. THARP: -- from the U.S. Trustee.

THE COURT: That's fine. We'll admit that as U.S.

Trustee's -- we need to be clear, this is the U.S. Trustee's Exhibit 1, as opposed to the Sub V Trustee.

MS. THARP: May I approach, Your Honor?

THE COURT: Yeah, go ahead.

MS. THARP: Okay.

THE COURT: And tell me what this is. This is -- you just don't approve of their marks --

MS. THARP: Right. Those are just --

THE COURT: -- illegible (indiscernible)?

MS. THARP: Exactly, Your Honor. Those are just highlighted items through his itemized list of services that --

THE COURT: Okay.

MS. THARP: -- the U.S. Trustee believes were outside of the realm of his Subchapter V Trustee duties.

THE COURT: Okay. All right. We'll show that as U.S. Trustee's 1. It's admitted.

(U.S. Trustee's Exhibit 1 marked for identification and entered into evidence).

MS. THARP: Thank you, Your Honor.

THE COURT: Any others?

MS. THARP: No, Your Honor.

THE COURT: Anything other?

MS. THARP: Thank you.

THE COURT: All right. All right. Go ahead, Mr.

Geno.

MR. GENO: Please the Court, Craig Geno for the applicant. Just a couple of disclaimers. First, Your Honor, this really is not about the money. It's just not that much money. It's not about the money, but it is about some guidance because this situation is likely to occur at some point in the future, although I hope it does not.

Sometimes you run into -- I think we've used the word incompetent too much -- debtor's counsel in Sub V cases who are just inappropriate to serve in that role. And so, that's why I stepped into this case, knowing full well that Ms. Tharp's objection probably was going to be forthcoming. And I understand that.

Sometimes I don't understand the U.S. Trustee's objections to fees; sometimes I do. But I certainly understand it in this particular case because we all know the primary function has been written about and statutory for the Sub V Trustee is to develop a consensual plan of reorganization.

But if the case fails because counsel is just not up to the task for the debtor, then the Sub V Trustee can't even participate in a consensual plan process or moving the case forward, and I certainly can't fulfill one of my statutory duties of ensuring that planned payment commencements or payments are commenced and are continued

throughout the case.

And I think we all have a tendency, Your Honor -- I know that I do -- to confuse the duties of the Sub V Trustee, which are set forth in the statute, with the powers of the Sub V Trustee, especially in an unusual case where the debtor and its 72 jobs are about to fail because of lack of insurance, and then out of the blue a motion to dismiss that was not authorized, that I caught when it came along and realized that was not where the case needed to be.

There's not a lot that's been written on this topic, Your Honor, of a Sub V Trustee without being the operating trustee and removing the debtor-in-possession steps into these shoes. But I do think I have a fiduciary obligation. And to tell you the truth, if I had known in November that I was not going to get paid, I would have done it anyway. And if it comes up again and you say I can't get paid, I'll do it again. No disrespect to the Court, but that's just to fulfill what I think is my fiduciary duty and a moral duty to try to get the employees to continue to be employed and creditors paid.

The best case that I found -- and there is recent contrary authority that I'll tell you about in a second -- is a case called In re Roe that was decided by Judge Pearson back in January of this year. It's factually distinguishable. But in that case the Subchapter V Trustee

filed a motion to use property of the estate. I don't -- I'm sure it's on Westlaw. I don't have the cite, but the Docket Number in that court is 23-32077.

THE COURT: Who's the judge?

MR. GENO: In re Roe. It's Western District of Oklahoma. Judge Teresa Pearson.

And in that case, the court goes through some of the statutory predicates for under 1183 and otherwise, and then says, "some may question whether Section 1184 divests a Sub V Trustee from the power to use Section 363(b)." And that was -- she was trying to use -- the trustee was trying to use the property of the estate under 363(b). "It does not. Section 1184 provides the debtor-in-possession shall have the rights and powers, and shall perform all functions and duties, except the duties specified in Paragraphs 2, 3 and 4 of Section 1106 of the title of a trustee serving in a case under this chapter."

"However," Judge Pearson goes on to say, "Section 1184 does not say that the debtor-in-possession has exclusive access to the rights and powers under the Bankruptcy Code. As a general matter, the Court cannot add language to the Bankruptcy Code that Congress did not include." It goes on to say, "Although a Bankruptcy Court may interpret a statute to support the conclusion that exclusivity is intended by the language of the statute, it

cannot do so if the result would be absurd. It would be absurd to read Section 1184 as providing" debtors in possession -- "as providing in Subchapter V with all the duties and rights of a trustee under the Bankruptcy Code to the exclusion of the Subchapter V Trustee. To do so would prevent the Subchapter V Trustee from performing his own duties under the Bankruptcy Code and exercising necessary rights and powers to fulfill those duties."

Judge Pearson goes on to say -- and I won't belabor this -- "Some of the reasons why it would be absurd to read the statute any other way other than to authorizing in certain circumstances a Subchapter V Trustee to use property of the estate," and then she has a subheading of, "Subchapter V Trustee has the right to use property outside the ordinary course of business in this case."

But that needs to be contracted with a case that's just a few days old from the Southern District of Texas. It's a decision from Judge Rodriguez, who is a certainly well-respected bankruptcy judge and a frequent author and writer on the subject. And I'm obligated to point out this contrary authority to the Court, of course.

In a case styled, In re Turk, T-U-R-K, Leg Hut & Company -- interesting case name at least -- in which the Subchapter V Trustee wanted to initiate some litigation and the Subchapter V Trustee, sort of on behalf of the debtor-

in-possession. But Judge Rodriguez went exactly opposite of Judge Pearson and pretty much said the duties and powers of the trustee are the same thing. And unless Congress has said a non-operating Sub V Trustee can use property of the estate or can litigate on behalf of the estate in a complaint for injunctive relief that is exclusive to the debtor, and the Subchapter V Trustee lacks standing or authority.

So, he has combined, as opposed to Judge Pearson, duties and powers into limits on what the Subchapter V Trustee could do. And he ended up saying that that's a -- I don't even think there's a Westlaw cite yet, but it's Southern District of Texas and the Docket Number in the case is 24-31275, decision rendered just a few days ago, May 31st of this year. And he goes through the statutes, just like Judge Pearson did, and they reached diametrically opposed and unreconcilable or irreconcilable conclusions.

And neither one of those cases, Your Honor, are factually what we have here. What we have here is inappropriate debtor's counsel who couldn't get the job done in a case that was about to be dismissed, and a case in which the debtor had actually agreed to relinquish possession to turn it over to the Sub V Trustee as operator. And if the Court may recall at that November hearing you said, there's an easier way here folks, and that's to get

replacement counsel for the debtor, which is exactly what we did.

But in the meantime, the wrongful grabbing of money post-petition by the pre-petition factor was stopped. The insurance was reinstated or was extended even without a court order based on discussions Mr. Dobbs and I had with the lender and the insurance company. And then we filed the emergency motion that the Court granted on short notice authorizing entering into the premium financing agreement, getting the insurance, and then later, sort of in the middle of Mr. Newman's application process, the factoring agreement, and then Mr. Newman got the plan confirmed.

So, this is an important case, Your Honor, and it's certainly a case, I think of first impression here. There's not much authority on the subject, mainly because this situation shouldn't come up, and rarely comes up. But in this case, I did what I thought was right. I think it was a fulfillment of my fiduciary duty.

If you agree with Judge Pearson, that's good. If you agree with Judge Rodriguez, I certainly understand that. I read the statute to say Subchapter V is flexible if it's anything. And so, we tried to be creative and use the flexibility of Sub V to fit within the statutory parameters.

We did get orders entered. We were successful, and as a result, 72 jobs were saved thanks to Mr. Newman's

good work after he came on board.

Thank you, Your Honor.

THE COURT: Thank you. Ms. Tharp?

MS. THARP: Your Honor, the U.S. Trustee has not had an opportunity to look at the cases that Mr. Geno has provided to the Court. So, cannot really argue the application of the law of -- in those cases to the actual facts and whether they are anywhere even relevant to the facts of this case that we have in front of us.

But what I -- what little I did see, Mr. Geno had over the projector there, is that it looked like it appeared just some -- maybe -- and I'm referring to Judge Pearson's case, the first case he brought up -- maybe about post-petition payments by this. I'm not sure. I don't even want to go there because I don't really know but did want to let the Court know that.

The U.S. Trustee's concern, based on the testimony that was presented here, is the fact -- and just the facts of the case -- is that the debtor was essentially unrepresented due to ineffective assistance of counsel. debtor's attorney was never employed. I think he filed three applications to employ, none of which were ever approved and granted, and essentially returned his -- refunded the debtor for fees paid. So, I don't think he even argued that he probably didn't do a very good job.

Nonetheless, these trans -- and U.S. Trustee is not arguing that Mr. Geno didn't do a spectacular job in this case as Subchapter V Trustee and understands the dilemma here. Clearly, he's a very good debtors' attorney. Nobody would argue that. He clearly saw that there were things that needed to be done in the case, that the debtor was capable of effectively reorganizing.

But the question is -- I mean, the fact is the debtor was essentially unrepresented, had no counsel, and had no independent legal -- although, Mr. Dobbs said he understood the legal implications of what he had authorized the Subchapter V Trustee to do, he's not a lawyer. The debtor was -- did not effectively have a lawyer at the time. No independent source of counsel to determine what Mr. Geno was proposing as the Subchapter V Trustee to file on behalf of the debtor was in fact legally advantageous for the debtor.

I think in hindsight now we can look and see that it probably was advantageous at this point. But the fact of the matter is he did not -- the debtor did not have separate legal counsel at the time he entered into these agreements with the Subchapter V Trustee.

THE COURT: Help me understand that point. That when -- he didn't have separate counsel. What's the import of that? What we have done differently? What should not

have been done? What -- how does that impact Mr. Geno's fee? I'm struggling to understand --

MR. GENO: Well, it --

THE COURT: -- the connection.

MS. THARP: Well, I think the ultimate question for the Court is, can Mr. Geno as the Subchapter V Trustee be paid for services rendered, technically on behalf of the debtor, in his role as the Subchapter V Trustee, when under the statute, he doesn't have standing. He has standing on those matters that are outlined -- or those duties as outlined under 1183. That's his authority to operate under the Bankruptcy Code, under 1183. If he's operating --

THE COURT: So, those would have been -- your argument sounds like it's -- those were his duties, or either he lacked the authority to do those things. Was there any objection by the U.S. Trustee when any of those things was done -- any of those things were done?

MS. THARP: Yes, Your Honor.

THE COURT: Okay. And what was that objection?

MS. THARP: Standing.

THE COURT: Standing, that --

MS. THARP: The Subchapter V Trustee's --

THE COURT: Okay. All right --

MS. THARP: -- standing to bring those, both the --

THE COURT: But -- and so those objections would have been overruled we know because all of those things in fact were done and they were approved, right?

MS. THARP: Well, Your Honor, I might add that the Court at the hearing -- and I believe in both -- made mention of the fact that it was concerned --

THE COURT: (Indiscernible) certainly --

MS. THARP: -- of standing of --

THE COURT: It's certainly --

MS. THARP: -- the Subchapter V Trustee bringing --

THE COURT: -- an unorthodox situation.

MS. THARP: And in fact, the Court, you know, was -- had the debtor's representative was present, debtor's representative did testify to alleviate some of those concerns. So that happened.

So, now that the Subchapter V Trustee is seeking compensation, and the U.S. Trustee's concerns that although he put on test- -- although Mr. Geno has put on testimony from debtor's rep, technically the debtor was unrepresented by its own counsel at the time to determine, you know, independently, were those -- because the --

THE COURT: Well, of course --

MS. THARP: -- (indiscernible)

THE COURT: -- had the debtor effectively

represented that the actions wouldn't have been even necessary.

MS. THARP: Well, the concern --

THE COURT: Or (inaudible) the debtor's counsel would know that.

MS. THARP: I'm sorry.

THE COURT: Debtor's counsel would have known that had they had proper counseling.

MS. THARP: Well, we don't --

THE COURT: Well, it would have been delegated to the trustee, right?

MS. THARP: Delegated to the trustee? I'm --

THE COURT: In any of these things that had to be done to save the case, there wouldn't have been -- you wouldn't have gone to debtor's counsel and said, explain this to me, is this a good idea. Okay, Subchapter V Trustee you're authorized to go do it. Debtor's counsel would have just (indiscernible) --

MS. THARP: Exactly.

THE COURT: -- as they do in 99 percent of cases.

MS. THARP: Exactly.

THE COURT: Okay.

MS. THARP: But as I understood it, through Mr. Dobbs' testimony, Mr. Geno was trying to establish that Mr. Dobbs, on behalf of the debtor, provided him the authority

to file these things. And the U.S. Trustee's point is, well, technically, the debtor was unrepresented, did not have counsel, so was at somewhat of a disadvantage. And I guess it raises the question, is the Subchapter V Trustee's agenda or role in the case the same as the debtor. Does that raise questions on whether, you know, what the Subchapter V Trustee may think is necessary? Is that technically advantageous for the debtor throughout the litigation?

THE COURT: It certainly was here.

MS. THARP: I understand. And the U.S. Trustee doesn't want to say that the services weren't actual -- they -- maybe they were. Maybe they were necessary. The question is though whether or not the Subchapter V Trustee can be compensated for services rendered that are outside his statutory duties. No question the debtor clearly did not have effective counsel at the time the services were rendered. And it's, you know, there's no question about that.

But as U.S. Trustee would state, it was -- the matters that were filed were clearly outside the Subchapter V Trustee duties. And that being the case, the U.S. Trustee would move that those services, as high -- as of concern with the U.S. Trustee, would be disallowed.

THE COURT: (Indiscernible). All right.

MS. THARP: Thank you.

THE COURT: Thank you. Anything in rebuttal, Mr. Geno?

MR. GENO: I just want to say, Your Honor, I appreciate the way Ms. Tharp, as always, has handled a professional sticky issue. I frankly think the Court has, from the Roe case and that Turk Leg, whatever the name of the case is, authority to go either way on this. I would just ask the Court to look at the emergency situation that happened. You know, we've got Section 105, and I think there's plenty of flexibility under the Bankruptcy Code.

But I'll tell you the truth. If you said what I did was okay, but I don't get paid for it, I take that as a win.

THE COURT: All right. I've reviewed the application. I've reviewed the objection. I've reviewed the evidence. I've heard the testimony today. I'm also cognizant of everything that went on in the case because I was not (indiscernible) this case from start to finish and was well aware of the trials and tribulations and everything that's happened with putative counsel, first counsel, because the same issues were coming up on the Court side because we couldn't get the application to employ every (indiscernible). So, I was aware there were issues as well.

I am very mindful that the U.S. Trustee has a

duty. I'm mindful that your role is basically the watchdog of the system and has some duty to bring these objections, and they're not unfounded. I understand the objections.

I'll note from the outset there's an absence of Fifth Circuit or Supreme Court guidance on these issues because the cases, frankly, just haven't bubbled up that far yet. It's still a new enough issue, there's nothing there.

I have great respect for both of the judges who were cited this morning, who've come in on different sides of this. My view is that neither is obviously controlling. My view is this case is a little different from all of those, from both of those cases.

I think it goes without saying almost that the Subchapter V Trustee saved this case, that a viable business within 72 employees and their families, that business was doing well, from a business standpoint. But it was automatically a disaster because of the failure to attend to minimal but crucial matters by putative first counsel.

Had that counsel performed those duties, he would have been compensated for them. He did not perform those duties and he was not compensated for them. So, there's no double dipping here. Debtors are often faced with matters outside their control, like price fluctuations, equipment failures, employment issues. Things like that are common. And the trustee's interference in a case and substitution of

strategy preferences would not be appropriate there.

This was a very different case. We had, basically, ineffective debtor's counsel. The very person who was hired to help the debtor navigate Chapter 11 was in fact not only ineffective but was doing harm in some cases -- filing motions to dismiss, the cases should not have been dismissed, things of that nature.

This case was highly unusual. And trustee compensation of this magnitude is not and it cannot be the norm. But it would be an unfair windfall to the debtor to disallow compensation to the trustee, who saved the case and likely the company. The trustee's actions were somewhat unorthodox but illustrate the judgment and abilities we should expect from our Sub V Trustees, namely, to remain behind the scenes and facilitate rather than to direct unless circumstances dictate a different strategy in extremely rare instances. And I think this is one of those instances.

Under the very unique facts and circumstances of this case, the trustee's actions, I believe, were actually in fulfillment of his duty under 1183(b)(7), facilitating consensual claim; under 1183(b)(2), which incorporates 1106(a)(3), to investigate the case and the desirability of the continuance of the business. I want to be very clear that I'm in no way expanding the powers or compensable

actions or tasks that might be undertaken by a trustee. But again, under the very unique facts as represented in this case, I think these trustee's actions actually fell within those duties, especially when no creditor is objecting to the compensation, and neither is the debtor. It is, after all, their money. And in fact, the debtor has actually testified in favor of and in support of the application as I heard it today.

Addressing the trustee's concern about whether the debtor knew whether the actions can be undertaken were actually in the best interests of the debtor, the debtor did testify in those circumstances, in those hearings, and in my view, appeared to have a very good command of exactly what was being done and why going, and thought it was in the best interest of the debtor. And you know, as an ancillary matter, I agree.

Given all of that, given the very unique facts and circumstances of this case, I'm going to approve the application as filed. I do not expect this really has any precedential impact on any future cases because it would take something highly unusual like this. And given the (indiscernible) nuance that would have to be involved in something like that, it would be hard for one case to control another with regard to this sort of compensation.

Given that time entries are by their very nature

unique in the absence of the items from someone up the chain from me, the Fifth Circuit, or the Supreme Court, I think there is sufficient flexibility in the Code to allow for compensation in this very rare and unique case. Therefore, I'm going to approve the application as written.

Mr. Geno, if you'll prepare that order and make clear that my bench opinion is incorporated in the terms of that order, I will sign the order. Again, given the very unique facts and circumstances of this case and the fact that I don't think it really should have any precedential impact, I do not want to publish something along those lines. So, I don't think it's helpful to everyone else, and frankly, to the greater future.

And so, I'm going to order that from the bench. But for purposes of the record, I want to incorporate what I've said here today into the order.

MR. GENO: All right, Your Honor. I'll run it by Ms. Tharp for approval.

THE COURT: Okay. Very good.

MS. THARP: Thank you.

THE COURT: Thank you.

(Whereupon these proceedings were concluded at 11:24 AM)

I N D E X

RULINGS

C E R T I F I C A T I O N

I, Sonya Ledanski Hyde, certified that the foregoing transcript is a true and accurate record of the proceedings.

Sonya Ledanski Hyde

Veritext Legal Solutions

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Date: July 17, 2024

Whether Section 1191 Requires a "True Up" of Disposable Income

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Subchapter v requires that a debtor's plan provides that all of the Debtor will make distributions under the Plan of either (i) all of the Debtor's "projected disposable income" for a three to five year period or (ii) the value of the property to be distributed under the plan in the three to five period is not less than the "projected disposable income" of the debtor.

The relevant provision of the Bankruptcy Code is Section 1191, titled "Confirmation of the Plan," which provides, in relevant part, as follows:

> (a) TERMS.-The court shall confirm a plan under this subchapter only if all of the requirements of section 1129(a), other than paragraph (15) of that section, of this title are met.
>
> (b) EXCEPTION.-Notwithstanding section 510(a) of this title, if all of the applicable requirements of section 1129(a) of this title, other than paragraphs (8), (10), and (15) of that section, are met with respect to a plan, the court, on request of the debtor, shall confirm the plan notwithstanding the requirements of such paragraphs if the plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan.
>
> (c) RULE OF CONSTRUCTION.-For purposes of this section, the condition that a plan be fair and equitable with respect to each class of claims or interests includes the following requirements:
>
> (1) With respect to a class of secured claims, the plan meets the requirements of section 1129(b)(2)(A) of this title.
>
> (2) As of the effective date of the plan-
>
> (A) the plan provides that all of the projected disposable income of the debtor to be received in the 3-year period, or such longer period not to exceed 5 years as the court may fix, beginning on the date that the first payment is due under the plan will be applied to make payments under the plan; or
>
> (B) the value of the property to be distributed under the plan in the 3-year period, or such longer period not to exceed 5 years as the court may fix, beginning on the date on which the first distribution is due under the plan is not less than the projected disposable income of the debtor.
>
> (3) (A) The debtor will be able to make all payments under the plan; or
>
> (B) (i) there is a reasonable likelihood that the debtor will be able to make all payments under the plan; and
>
> (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.

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

The questions is what happens if the plan projections are incorrect and the debtor's disposable income is greater than the Plan projections. Two courts recently addressed the issue and came to different conclusions. Compare In re Staples, 2023 WL 119431 (M.D. Fl., Jan. 6, 2023) with In re Packet Constr., LLC, 2024 WL 1926345 (Bankr. W.D. Texas, April 30, 2024).

A. In re Staples

In the Staples case, an individual debtor, acting pro se, proposed a subchapter v plan. Among other things, the Plan projected that the debtor would have disposable income of $150 per quarter for distribution to unsecured creditors. The Bankruptcy Court entered an Order approving the Plan, but the debtor file quarterly postconfirmation monthly operating reports on or before the twenty-first day of the month after the end of each calendar quarter and the distributions to unsecured creditors would be based upon the debtor's actual disposable income as reflected on the quarterly operating reports, however, if the Debtor's actual disposable income is less than $150.00 in each quarter, the Debtor will still distribute $150.00 pro rata to unsecured creditors. The debtor appealed the entry of the confirmation order challenging specific language that required him to make quarterly payments based on his actual income (instead of projected income) and prepare/file quarterly postconfirmation monthly operating reports which will be the basis for the distributions to unsecured creditors.

On appeal, the District Court affirmed the confirmation order, holding that the Court's requirement that the Debtor pay a fluctuating amount of based upon the actual disposable income does not conflict with § 1191(d) "because that statutory section is simply a definition of 'disposable income.'" Further the District Court found that the Rules of Construction set forth in Section 1191(c) "simply requires that a plan provide that all projected disposable income be applied to make the distribution payments under the law, while

Paragraph (2)(B) requires that the value of the property to be distributed is not less than the projected disposable income." Further, requiring all the actual disposable income to be reported and distributed does not violation the statutory rules of construction. Finally, the District Court found that the requirements in the confirmation order well within the authority of the Bankruptcy Court under the All Writs Act.

B. In re Packet Constr., LLC

In Packet, the Debtor filed a subchapter v plan and the subchapter v trustee objected on numerous grounds, including that the plan should require the planned payments be adjusted upwards if the projections prove too low. Specifically, the subchapter v trustee argued in favor a reading § 1191(c)'s disposable income language to include a "true up" requirement, so that if disposable income exceeded the plan projections, the Debtor would need to report the additional amounts and make such surplus available for distribution to creditors.

The Court concluded that there is no general requirement for a subchapter V debtor to "true up" its payments to its creditors when its actual income exceeds its projected disposable income, and there are no circumstances present here that might warrant consideration of a departure from the general rule. Specifically, the Court reviewed the statute and concluded that to require a true up would read the word "projected" out of the Code by eliminating the future-looking element indicated by the word 'projected.' In so doing, the Packet Courts reviewed and rejected the Staples analysis, finding instead that case law and analogous provisions in the Bankruptcy Code weigh against a true up requirement (e.g., the definition of "disposable income" in subchapter V is substantially the same as in chapter 12 and chapter 13, and Courts interpreting the similar language in chapter 13 have overwhelmingly ratified a prospective interpretation, that is, an interpretation requiring debtors to devote their projected income to plan payments, but not to "true it up" if their actual income proves to be higher").

Further the Packet Court found that the alternative "value" test, laid out in 11 U.S.C. § 1191(c)(2)(b), allows debtors to make lump-sum payments with the value of the projected disposable income that would be due over the relevant payment period, and holding that *actual* disposable income,

which can only be calculated *retroactively*, must be paid into the plan would make the alternative test superfluous or ineffective: the appropriate lump-sum payment amount must be calculated at the time of confirmation, but the lump-sum amount cannot be calculated if the disposable income, to which the lump-sum payment's value must be compared, remains unknown

Additionally, the Court found that the test to determine projected income by the Supreme Court in Hamilton v. Lanning supports the arguments against requiring a true up. The Lanning test states projected disposable income must be assessed prospectively, on a forward-looking basis, sweeping in income that at the time of confirmation is "known or virtually certain" to be received during the plan period. Put plainly, it requires projected not actual income to be paid.

Finally, the Court found that there could be special circumstances that could justify imposition of a true up provision. Specifically, the Court found that, although subchapter V does not include any general rule imposing a true-up requirement on debtors confirming cramdown plans, it does not rule out the possibility that circumstances could arise under which a court would have the power to impose a true up. section 1191 states that the "fair and equitable" test "includes" the requirement of meeting one of the alternative "project disposable income" tests, and because "includes" is expressly non-limiting in the Bankruptcy Code, other elements could be added to the test, as circumstances warrant. The Court found no such facts or circumstances in the Packet case.

Accordingly, the Court held that there is no general requirement for a subchapter V debtor to "true up" its payments to its creditors when its actual income exceeds its projected disposable income, and there are no circumstances present here that might warrant consideration of a departure from the general rule. Accordingly, the Court found that no true up would be required or imposed.

2023 WL 119431
Only the Westlaw citation is currently available.
United States District Court, M.D. Florida,
Fort Myers Division.

IN RE: Hamilton STAPLES.
Hamilton Staples, Appellant,
v.
Kimberly Wood-Staples, Chrysler Capital, Merrick Bank, Debtor, Pinnacle Credit Services, LLC, Quantum3 Group, LLC, Sysco West Coast, Prefab City, USA, Project Exit, LLC, Internal Revenue Service, U.S. Bank Trust National Association, as trustee, Sysco West Coast Florida, Inc., Cavalry SPV I, LLC, and United States Trustee-FTM, Appellees.

Case No: 2:22-cv-157-JES
|
Signed January 6, 2023

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OPINION AND ORDER

JOHN E. STEELE, SENIOR UNITED STATES DISTRICT JUDGE

***1** This matter comes before the Court on an appeal from the Bankruptcy Court's Corrective Order Confirming Debtor's Fourth Amended Plan of Reorganization for Small Business Under Chapter 11 and Scheduling Post-Confirmation Conference (Doc. #2-2) (the Corrective Order), issued on February 3, 2022. Appellant filed his *pro se* Brief (Doc. #8) on May 27, 2022. No responsive briefs or appearances have been filed.

I.

The district courts have jurisdiction to hear appeals "from final judgments, orders, and decrees" of the U.S. Bankruptcy Court. 28 U.S.C. § 158(a). "District courts sit in an appellate capacity when reviewing bankruptcy court judgments; they accept the bankruptcy court's factual findings unless they are clearly erroneous and review legal conclusions *de novo*." In re NRP Lease Holdings, LLC, 50 F.4th 979, 982 (11th Cir. 2022) (citing In re JLJ Inc., 988 F.2d 1112, 1116 (11th Cir. 1993). A finding of fact is clearly erroneous when, "although there is evidence to support it, the reviewing court on the entire record is left with a definite and firm conviction that a mistake has been committed." Crawford v. W. Electric Co., Inc., 745 F.2d 1373, 1378 (11th Cir. 1984) (citing United States v. U.S. Gypsum Co., 333 U.S. 364, 395 (1948)). See also In re Walker, 515 F.3d 1204, 1212 (11th

Cir. 2008). Where a matter is committed to the discretion of the bankruptcy court, the district court must affirm unless it finds that the bankruptcy court abused its discretion. Amlong & Amlong, P.A. v. Denny's, Inc., 500 F.3d 1230, 1238 (11th Cir. 2006). A court abuses its discretion "if it applies an incorrect legal standard, follows improper procedures in making the determination", makes findings of fact that are clearly erroneous, or applies the law in an unreasonable or incorrect manner. Collegiate Licensing Co. v. Am. Cas. Co. of Reading, Pa., 713 F.3d 71, 77 (11th Cir. 2013). "The abuse of discretion standard allows a range of choices for the [bankruptcy] court, so long as any choice made by the court does not constitute a clear error of judgment." Id. (citation omitted). An appellate court reads briefs filed by a *pro se* litigant liberally. Lorisme v. I.N.S., 129 F.3d 1441, 1444 n.4 (11th Cir. 1997).

II.

On November 15, 2020, *pro se* debtor Hamilton Staples (Debtor or Staples) filed a Voluntary Petition for Chapter 11 relief, choosing to proceed as a small business debtor under Subchapter V of Chapter 11. A Fourth Amended Chapter 11 Plan (Bankr. #313) (the Plan) was filed on September 7, 2021. On February 3, 2022, the Bankruptcy Court entered the Corrective Order (Doc. #2-2) confirming Debtor's Plan of reorganization. Among other things, the Corrective Order found that Debtor's Plan complied with the requirements of § 1190 of the Bankruptcy Code and was confirmed as modified by the Corrective Order. Objections to the Plan where overruled, and Debtor was authorized and directed to take all steps necessary to effectuate and implement the Plan. Debtor was required to make the payments to creditors under the Plan, rather than have the Trustee do so. On appeal Debtor challenges the highlighted portions of Paragraph 9 of the Corrective Order:

> ***2 The distributions to Class 7 unsecured creditors shall fluctuate based upon the Debtor's actual disposable income** remaining after payment of senior claims during the twenty (20) quarter plan term. Currently, the Debtor predicts that he will have $150.00 per quarter to distribute to Class 7 unsecured creditors. **The Debtor shall file quarterly postconfirmation monthly operating reports on or before the twenty-first day of the month after the end of each calendar quarter. The distributions to Class 7 unsecured creditors will be based upon the Debtor's actual disposable income as reflected on the quarterly operating reports;** provided, however, if the Debtor's actual disposable income is less than $150.00 in each quarter, the Debtor will still distribute $150.00 *pro rata* to Class 7 unsecured creditors. The proposed schedule of *pro rata* distributions to Class 7 unsecured creditors is set forth on Exhibit A attached hereto.

(Doc. #2-2, ¶ 9.) Exhibit A, attached to the Corrective Order, reflects $143.96 of the $150 quarterly payments will go to Pre Fab City, Inc., but "distributions to unsecured creditors will fluctuate each quarter based upon the Debtor's actual disposable income remaining after payment of senior claims; provided, however, if the Debtor's actual disposable income is less than $150.00 in each quarter, the debtor will still distribute $150.00 *pro rata* to Class 7 unsecured creditors." (Doc. #2-2, Exh. A).

Debtor argues that the Bankruptcy Court erred by (1) directing that all payments to Class 7 unsecured creditors shall be based on actual disposable income, instead of projected disposable income, and (2) directing the preparation and quarterly filing of monthly reports. Debtor argues that these requirements conflict with 11 U.S.C. §§ 1191(d), 1191(c)(2)(a), and 1191(c)(2)(b), and that the Bankruptcy Court had no legal authority to impose the requirements.

III.

Chapter 11 of the Bankruptcy Code allows a debtor to seek reorganization under the protection of the Bankruptcy Court. As outlined in Auriga Polymers Inc. v. PMCM2, LLC as Tr. for Beaulieu Liquidating Tr., 40 F.4th 1273, 1277–78 (11th Cir. 2022) (citing 11 U.S.C. § 362(a)), filing a Chapter 11 petition triggers an automatic stay, during which all collection activities are suspended. "The automatic stay provides breathing room for the debtor to negotiate with its creditors and craft a plan of reorganization." Id. at 1278. "These plans categorize claims against the debtor in order of priority." Id. (citing 11 U.S.C. § 507). Filing a Chapter 11 petition also automatically creates an "estate," which is used to pay out the debtor's obligations. "The estate consists of essentially all the debtor's property and rights to property." Id. (citing 11 U.S.C. § 541(a)).

The Small Business Reorganization Act of 2019 ("SBRA") became effective on February 19, 2020 and added Subchapter V to Chapter 11 of the Bankruptcy Code "to streamline reorganizations for small business debtors." In re Cleary Packaging, LLC, 36 F.4th 509, 514 (4th Cir. 2022). "The new law was enacted to help small businesses reorganize by streamlining the cumbersome

and often expensive process of a typical Chapter 11 reorganization case. The statutory hope is that by encouraging small business reorganizations more creditors will receive greater distributions and more small businesses will survive and prosper." In re Greater Blessed Assurance Apostolic Temple, Inc., 624 B.R. 742, 744 (Bankr. M.D. Fla. 2020) (footnotes omitted). See also In re 218 Jackson LLC, 631 B.R. 937, 946 (Bankr. M.D. Fla. 2021).

***3** A bankruptcy court can confirm a Chapter V plan if it "does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interest that is impair under, and has not accepted, the plan." 11 U.S.C. § 1191(b). The statute also provides some "rule[s] of construction" for the condition that a plan be fair and equitable:

> (c) Rule of construction.--For purposes of this section, the condition that a plan be fair and equitable with respect to each class of claims or interests includes the following requirements:
>
> (1) With respect to a class of secured claims, the plan meets the requirements of section 1129(b)(2)(A) of this title.
>
> (2) As of the effective date of the plan--
>
> (A) the plan provides that all of the projected disposable income of the debtor to be received in the 3-year period, or such longer period not to exceed 5 years as the court may fix, beginning on the date that the first payment is due under the plan will be applied to make payments under the plan; or
>
> (B) the value of the property to be distributed under the plan in the 3-year period, or such longer period not to exceed 5 years as the court may fix, beginning on the date on which the first distribution is due under the plan is not less than the projected disposable income of the debtor.
>
> (3)(A) The debtor will be able to make all payments under the plan; or
>
> (B)(i) there is a reasonable likelihood that the debtor will be able to make all payments under the plan; and
>
> (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.

11 U.S.C.A. § 1191(c). Additionally, the statute provides a definition of 'disposable income:"

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

11 U.S.C.A. § 1191(d). Finally, "[i]n a small business case, a trustee or the debtor in possession, in addition to the duties provided in this title and as otherwise required by law, shall", among other duties, "file all postpetition financial and other reports required by the Federal Rules of Bankruptcy Procedure or by local rule of the district court." 11 U.S.C. § 1116(4). See also 11 U.S.C. § 1187(b) (requiring compliance with 1116(4) and (7)).

IV.

Debtor argues that the highlighted portions of paragraph 9 of the Corrective Order conflict with 11 U.S.C. §§ 1191(d), 1191(c)(2)(a), and 1191(c)(2)(b), the Bankruptcy Court had no legal authority to impose the requirements, and therefore the Bankruptcy Court abused its discretion in doing so. The Court finds that these arguments are without merit.

Initially, paragraph 9 of the Corrective Order does not conflict with § 1191(d) because that statutory section is simply a definition of "disposable income." Paragraph (2)(A) of the Rules of Construction, 11 U.S.C. § 1191(c), simply requires that a plan provide that all projected disposable income be applied to make the distribution payments under the law, while Paragraph (2)(B) requires that the value of the property to be distributed is not less than the projected disposable income. 11 U.S.C. § 1191(c)(2)(A), 1191(c)(2)(B). Requiring all the actual disposable income to be reported and distributed does not violation these statutory rules of construction.

***4** Additionally, these requirements of paragraph 9 of the Corrective Order are well within the authority of the Bankruptcy Court. The All Writs Act provides: "The Supreme Court and all courts established by Act of

Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a). Additionally, a bankruptcy-specific statute provides that the Bankruptcy Court "may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C. § 105(a). "Under § 105(a), a bankruptcy court can enter 'any order' necessary or appropriate to carry out the provisions of the Bankruptcy Code." In re Le Ctr. on Fourth, LLC, 17 F.4th 1326, 1337 (11th Cir. 2021) (internal quotation marks and citation omitted). "[T]he bankruptcy court can exercise authority provided by both the All Writs Act, see In re Fundamental Long Term Care, Inc., 873 F.3d 1325, 1338-41 (11th Cir. 2017), and 11 U.S.C. § 105(a), which provides that the court 'may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.' " Rohe v. Wells Fargo Bank, N.A., 988 F.3d 1256, 1268 (11th Cir. 2021). The challenged provisions of paragraph 9 were clearly necessary and appropriate under the facts of this case.

Accordingly, it is hereby

ORDERED:

The Bankruptcy Court's Corrective Order Confirming Debtor's Fourth Amended Plan of Reorganization for Small Business Under Chapter 11 and Scheduling Post-Confirmation Conference is **affirmed.** The Clerk shall transmit a copy of this Opinion and Order to the Clerk of the Bankruptcy Court and close the appellate file.

DONE and ORDERED at Fort Myers, Florida, this 6th day of January 2023.

All Citations

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End of Document

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United States Bankruptcy Court, W.D. Texas, Austin Division.

IN RE: PACKET CONSTRUCTION, LLC DEBTOR

Case No. 23-10860
|
Filed 04/30/2024

(Chapter 11; Subchapter V)

OPINION ON DISPOSABLE INCOME TRUE UPS IN A SUBCHAPTER V CASE

CHRISTOPHER G. BRADLEY UNITED STATES BANKRUPTCY JUDGE

Introduction

***1** In this subchapter V case, the trustee objected to the debtor's proposed plan because, while the plan provided for the debtor to pay its projected disposable income to its creditors for five years, the plan did not provide for a "true up"—that is, it did not provide that the debtor had to pay more if actual disposable income exceeded projections.

But subchapter V does not include a requirement that debtors true up their plan payments if actual income exceeds projected income. There may be circumstances under which a court could determine that the failure to provide actual disposable income, rather than projected disposable income, was not fair and equitable to a non-accepting impaired class of unsecured creditors. But in general, the Court does not believe that a true-up requirement can be imposed on subchapter V debtors. For that reason, the objection was overruled.

Background

Packet Construction, LLC (the "Debtor") filed its plan on January 10, 2024.[1] The subchapter V trustee objected on several bases,[2] most of which were resolved prior to or at the confirmation hearing. The trustee did not object to the Debtor's projected disposable income calculation, which required payments to unsecured creditors of $36,000 in year 1 up to $216,000 in year 5, but he argued that the plan should also require that those payments be adjusted upwards if the projections prove too pessimistic.[3]

The Court held a further hearing after receiving a draft confirmation order that left several matters incomplete or unclear. After receiving a revised order, the Court confirmed the plan.[4]

Analysis

The subchapter V trustee in this case has been conscientious and helpful and, in the Court's view, his efforts improved the plan and the confirmation order. But the Court issues this opinion to explain why it overruled one of the trustee's objections: the objection that the plan did not include a "true up." In this context, a true up means that, in addition to requiring the Debtor to pay its *projected* disposable income, the plan would require that if the Debtor's *actual* disposable income exceeds the projected income, the Debtor must report that surplus and pay it to creditors.[5]

***2** The issue of whether a court should or could require a true-up provision arises only in cases in which there is a non-accepting, impaired class of unsecured creditors, thereby permitting the court to confirm the plan, if at all, under section 1191(b). Such "cram down" plans require that, for a plan to be determined fair and equitable with respect to a non-accepting, impaired class, the debtor, at a minimum, must devote its "projected disposable income" for a period of three to five years, as set by the court, to its plan payments. The Court does not see any reason why a debtor could not include some sort of true up in a consensual plan if it wishes, for instance as a result of negotiations with creditors in order to win their support of the plan.[6] But here we are concerned with whether true ups can be imposed by a court, and that issue arises only

in the context of plans confirmed under section 1191(b).

This Debtor seeks to confirm its plan under section 1191(b) and therefore is required to devote its "projected" disposable income to its plan payments. So the Court turns now to analyze whether section 1191(b) authorizes the court to require true-up payments if actual disposable income exceeds projected disposable income.

A. The Code requires a cram down subchapter V plan to provide for payment of "projected" disposable income; to require a true up is to read the word "projected" out of the Code.

Subchapter V requires that projected disposable income must be included in a plan confirmed under section 1191(b) but makes no mention of a true up of any potential gap between actual and projected income.[7] In specific, subchapter V cram down plans must be "fair and equitable," with that term defined to mean that projected disposable income be devoted to plan payments:

> [T]he condition that a plan be fair and equitable with respect to each class of claims or interests includes the following requirements ...
>
> (2) As of the effective date of the plan—
>
> > (A) the plan provides that all of the projected disposable income of the debtor to be received in the 3-year period, or such longer period not to exceed 5 years as the court may fix, beginning on the date that the first payment is due under the plan will be applied to make payments under the plan; or
> >
> > (B) the value of the property to be distributed under the plan in the 3-year period, or such longer period not to exceed 5 years as the court may fix, beginning on the date on which the first distribution is due under the plan is not less than the projected disposable income of the debtor.[8]

Section 1191(d) then defines "disposable income" to mean the debtor's income less its necessary expenses:

> Disposable Income.—For purposes of this section, the term "disposable income" means the income that is received by the debtor and that is not reasonably necessary to be expended—
>
> (1) for—
>
> > (A) the maintenance or support of the debtor or a dependent of the debtor; or
> >
> > (B) a domestic support obligation that first becomes payable after the date of the filing of the petition; or
>
> (2) for the payment of expenditures necessary for the continuation, preservation, or operation of the business of the debtor.[9]

So, then, the statute requires the debtor to devote its *projected* disposable income (or the value of it) to plan payments for three to five years. The Bankruptcy Code does not define "projected." But its normal meaning is: "Estimated or forecast on the basis of current trends or data."[10] This accords with the "forward-looking approach" that the Supreme Court has endorsed when interpreting that term in the context of chapter 13 of the Code.[11]

***3** To require a "true up" is to eliminate the future-looking element indicated by the word "projected." Plan payments would be adjusted based on actual income, which would be assessed on an ongoing or retrospective basis,[12] rather than prospectively as the Code plainly instructs. To require that actual income be paid into the plan is to read the word "projected" out of the statute.

It appears that the only reported subchapter V case in which a true up has been required is *In re Staples*.[13] In *Staples*, the bankruptcy court apparently forced a true up into a subchapter V plan by a "Corrective Order" that effectively modified the plan to include a true up, over the debtor's objection.[14] The *Staples* opinion is from the district court that approved this action on appeal. The opinion finds that the bankruptcy court had sufficient authority to impose the true up under section 105 of the Bankruptcy Code, which provides that a Bankruptcy Court "may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title."[15] Additionally, the district court found that the bankruptcy court had authority under the All Writs Act.[16] The *Staples* court held that these sources of law gave the bankruptcy court authority to enter the Corrective Order and that the true-up provisions in the Order "were clearly necessary and appropriate under the facts of this case."[17] The opinion does not describe "the facts of this case" with any specificity.

The *Staples* opinion does not support imposition of a true up either as a general rule or in this case. First, the *Staples* opinion does not purport to announce a general rule requiring true ups, nor, in this Court's view, would the authorities it cites provide sufficient support for such a general rule. Second, the *Staples* opinion simply does not provide enough factual detail about that case to assess its similarities or differences with this Debtor's situation. For

these reasons, the Court, respectfully, does not think that the *Staples* opinion provides any persuasive weight in favor of imposition of a true up.

B. Case law on analogous provisions in other chapters of the Code strongly—though not uniformly—weighs against a true-up requirement.

***4** The projected disposable income tests in both chapter 12 and chapter 13 are very similar to that in subchapter V. The approaches taken in the Supreme Court and other courts favor a prospective interpretation of "projected disposable income" and weigh against imposing a true-up requirement.

The definition of "disposable income" in subchapter V is substantially the same as in chapter 12 and chapter 13.[18] Those chapters also provide for similar requirements when that projected income must be devoted to plan payments. In chapter 13 cases, the court may not approve a nonconsensual plan unless "the plan provides that all of the debtor's projected disposable income to be received in the applicable commitment period ... will be applied to make payments to unsecured creditors under the plan."[19] Substantially the same language was included in the chapter 12 projected disposable income test when the chapter was first enacted in 1986.[20] It is essentially identical to the first projected disposable income test in subchapter V—the "payments" approach of section 1191(c)(2)(A) of the Code.[21]

Additionally, subchapter V's alternative projected disposable income test—the "value" approach contained in section 1191(c)(2)(B)—is the same as the analogous alternative test in chapter 12 of the Code.[22] Recall from above that the alternative subchapter V test states that a plan can be "fair and equitable" if "the value of the property to be distributed under the plan" is at least as much as the projected disposable income.[23] The value test essentially gives flexibility on the timing of payment. Under it, a plan can be approved as long as the proposed plan payment or payments, whenever they are made, are equal not in amount but in *value*—that is, *as adjusted based on the time value of money*—to the projected disposable income over the relevant plan period. For example, a debtor could presumably satisfy the test by making a lump-sum cash payment to unsecured creditors, so long as it is greater than or equal to the total projected disposable income over the relevant plan period, after both of those amounts are adjusted to their present values to allow their comparison.[24]

***5** Due to these similarities of subchapter V with chapter 12 and chapter 13, the case law on those chapters is instructive. Because far more debtors file for relief under chapter 13 than chapter 12, there is much more case law about chapter 13. Courts interpreting the similar language in chapter 13 have overwhelmingly ratified a prospective interpretation, that is, an interpretation requiring debtors to devote their projected income to plan payments, but not to "true it up" if their actual income proves to be higher.[25] While not speaking on this exact question, the Fifth Circuit has also repeatedly indicated support for a forward-looking interpretation of chapter 13's disposable income test.[26]

Against this view, some courts have required chapter 12 debtors to true up their payments before receiving a discharge at the end of their plan. The leading case is the Eighth Circuit case of *Rowley v. Yarnall* from 1994, where the Court of Appeals held that the chapter 12 debtors had to pay unsecured creditors all actual disposable income during the plan period.[27] In that case, the appellate court affirmed the bankruptcy court's holding that chapter 12 debtors had to devote actual disposable income to the plan. It distinguished this requirement from chapter 11 and 13 confirmation requirements, based on the provision's legislative history.[28]

The *Rowley* court admitted that its result was contrary to the text's plain meaning.[29] It defended its decision on grounds that the textual result would be absurd and "would essentially direct farmers to put forth a reorganization plan, which ... would be confirmed over such objections if they simply 'predict' that disposable income will be zero."[30]

But as numerous courts and commentators have noted, *Rowley*'s reasoning rests on an unsteady foundation.[31] The prospective assessment of projected disposable income is based on objective factors and thus provides a meaningful check. If projected income or expense figures are not well supported, a court should deny confirmation. The *Rowley* court's decision to disregard the text on grounds of absurdity is not convincing. This Court does not believe that the Fifth Circuit would follow it, particularly as it relies on legislative history and policy argument over clear statutory text based only on a questionable finding of absurdity.

***6** In addition, after *Rowley* was decided, the statute was amended. The 2005 BAPCPA amendments added the alternative, "value" approach, as described above, to chapter 12.[32] As noted, this same alternative test was later incorporated into subchapter V.[33] The alternative test

makes a true-up requirement functionally unworkable. As mentioned, the alternative test allows debtors to make lump-sum payments with the value of the projected disposable income that would be due over the relevant payment period. To hold that *actual* disposable income, which can only be calculated *retroactively*, must be paid into the plan would make the alternative test superfluous or ineffective: the appropriate lump-sum payment amount must be calculated at the time of confirmation, but the lump-sum amount cannot be calculated if the disposable income, to which the lump-sum payment's value must be compared, remains unknown. Recognizing this problem, some contemporary commentators suggested that the alternative test was directly intended to overturn *Rowley* and similar cases.[34] The post-*Rowley* addition by Congress of the value approach further speaks against *Rowley*'s persuasiveness.

Recent courts in the chapter 13 context continue to cast more doubt on *Rowley*. One bankruptcy court persuasively argued against the true-up approach both as a matter of statutory analysis[35] and as a matter of policy. Drawing on retired Judge Lundin's treatise, the court explained that applying a true-up approach in each of the thousands of chapter 13 cases pending at any given time would result in "an administrative nightmare" for trustees and an expensive monitoring problem for creditors.[36]

Another bankruptcy court persuasively argued that *Rowley*'s reasoning runs contrary to the Supreme Court's 2010 decision in *Hamilton v. Lanning*.[37] The test adopted by the Supreme Court in *Hamilton* for calculating "projected" disposable income shows that it is not equivalent to income actually received during the plan period. Instead, projected disposable income must be assessed prospectively, on a forward-looking basis, sweeping in income that at the time of confirmation is "known or virtually certain" to be received during the plan period. In other words, it requires projected—not actual—income to be paid. As such, the holding from *Rowley* adopting the "actual income received" approach runs contrary to the approach taken by the Supreme Court in analyzing a closely analogous statutory framework.[38]

***7** One final point about a way in which subchapter V contrasts with chapter 12 and chapter 13. Unlike subchapter V, in which only the debtor may seek a modification of the plan, in chapters 12 and 13, the statute may provide a mechanism for payments to be adjusted if projections do not meet reality, one way or the other. The debtor, the trustee, or the holder of an allowed unsecured claim may also seek to modify the plan to provide for higher or lower payments.[39] The statute is not completely clear on the relevant standards for modification, and accordingly, courts have differed somewhat in the standards they apply.[40] But in any case, this is the statutory mechanism for how a "true up," if one is merited, can be accomplished under those chapters, but not in subchapter V, except at the request of the debtor and under the conditions provided in section 1193.

Against this backdrop, it is telling that subchapter V provides no opportunity for any party other than the debtor to seek to modify the plan.[41] The implication appears to be that unless the debtor so chooses, no other party can force it to increase the projected payments to meet the actual income. The debtor may be able to modify the plan to decrease the payments if reality falls short of expectations, but the projected income may be the ceiling for creditors in subchapter V cases.

This result is not absurd. As noted above, determining projected disposable income is not a fanciful exercise; it must be established based on objective evidence, and it sets out a demanding standard for many debtors to meet. Vigilant creditors can and should evaluate and, if necessary, challenge projections before plans are confirmed. But construed properly, this aspect of subchapter V also provides incentive for debtors to exceed projections, because they get to keep the surplus.[42] Perhaps Congress structured the statute this way precisely to induce small business growth and to provide yet another incentive for parties to bargain on consensual plans.

In any case, whether it is ideal policy is not for courts to say. Congress has spoken and, in this Court's view, it has done so clearly. The result is not absurd, and the Court has no hesitation enforcing it.

C. If there are special circumstance under which a true up can be required, they are not present here.

The analysis above explains why subchapter V includes no general rule imposing a true-up requirement on debtors confirming cramdown plans. It does not necessarily rule out the possibility that circumstances could arise under which a court would have the power to impose a true up. After all, section 1191 states that the "fair and equitable" test "includes" the requirement of meeting one of the alternative "project disposable income" tests; because "includes" is expressly non-limiting in the Bankruptcy Code,[43] other elements could be added to the test, as circumstances warrant, beyond those actually present in the statute.[44]

***8** The Court is skeptical that circumstances exist in which it is appropriate to require a true up. It appears that Congress has spoken squarely on this issue, ordaining that it is future-looking projections and not subsequent realities that determine the income to be contributed to a plan. Courts should be very wary of altering this policy choice in a significant way by requiring the devotion of not just projected but also actual disposable income, as determined retrospectively, to the plan.

But this question need not be determined here. No special circumstances have been alleged, and therefore no true up is warranted.

Conclusion

For these reasons, the Court holds that there is no general requirement for a subchapter V debtor to "true up" its payments to its creditors when its actual income exceeds its projected disposable income, and there are no circumstances present here that might warrant consideration of a departure from the general rule. Accordingly, no true up will be required or imposed.

All Citations

Slip Copy, 2024 WL 1926345

Footnotes

1 Chapter 11 Sub V Plan, ECF No. 69.

2 Sub V Trustee's Limited Obj., ECF No. 87.

3 *Id*. at 10–11.

4 Order Confirming Chapter 11 Sub V Plan, ECF No. 98.

5 The objection was stated as follows:

> Projections v. Actual Disposable Income: Debtor should be directed to pay actual income to creditors to the extent projected disposable income as stated in the Plan exceeds projected income. *See, In re Staples*, 2023 W.L. 11943 (M.D. Fla. Jan. 6, 2023). Upon confirmation, the Court should require Debtor to "true up" actual disposable income – to reflect any increase above the projected disposable income and make actual net disposable income available to creditors. Debtor should be required to provide semi-annual or annual financials to the Sub V Trustee if the Plan is confirmed under § 1191(b), whereupon the Sub V Trustee will recommend increase of disposable income payments if financials reflect an increase in disposable income over Projections. If Debtor disagrees, the issue can then be presented to the Court for resolution.

Sub V Trustee's Limited Obj. 10–11, ECF No. 87.

6 Subchapter V contains various incentives to confirm plans consensually. *See, e.g.*, 11 U.S.C. § 1191(a) (directing courts to confirm consensual plans that do not satisfy additional requirements applicable to nonconsensual plans, such as the projected disposable income requirement under § 1191(c)(2) and the feasibility components of the fair and equitable rule under § 1191(b)).

7 *See* 11 U.S.C. § 1191.

8 11 U.S.C. § 1191(c).

9 11 U.S.C. § 1191(d).

10 *Projected*, Oxford Dictionaries, https://premium.oxforddictionaries.com/us/definition/american_english/projected (last visited April 29, 2024).

11 *Hamilton v. Lanning*, 560 U.S. 505, 519 (2010) (establishing "projected disposable income" requires calculating "current monthly income" as prescribed by statute, and then, where circumstances warrant, "go[ing] further and tak[ing] into account other known or virtually certain information about the debtor's future income or expenses" to adjust that income in order to make the projection more accurate).

12 The trustee's objection, for instance, proposes "[d]ebtor should be required to provide semi-annual or annual financials to the Sub V Trustee if the Plan is confirmed under § 1191(b), whereupon the Sub V Trustee will recommend increase of disposable income payments if financials reflect an increase in disposable income over Projections." Sub V Trustee's Limited Obj. 10–11, ECF. No. 87.

13 *In re Staples*, No. 2:22-cv-157, 2023 WL 119431 (M.D. Fla. Jan. 6, 2023).

14 The Corrective Order contained the following provision:

> The distributions to Class 7 unsecured creditors shall fluctuate based upon the Debtor's actual disposable income remaining after payment of senior claims .... The distributions to Class 7 unsecured creditors will be based upon the Debtor's actual disposable income as reflected on the quarterly operating reports; provided, however, if the Debtor's actual disposable income is less than $150.00 in each quarter, the Debtor will still distribute $150.00 pro rata to Class 7 unsecured creditors.

Id. at *2.

15 11 U.S.C. § 105(a).

16 28 U.S.C. § 1651(a) ("The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.").

17 *Staples*, 2023 WL 119431, at *4.

18 *Compare* 11 U.S.C. § 1191(d) *with* § 1225(b)(2) *and* § 1325(b)(2). The subchapter V definition of disposable income differs from the chapter 13 definition in that a chapter 13 debtor may deduct charitable contributions from amounts "reasonably necessary" for maintenance and support. 11 U.S.C. § 1325(b)(2)(A)(ii). Additionally, an above-median-income debtor in chapter 13 is subject to the means test to calculate amounts "reasonably necessary" for maintenance and support, whereas a subchapter V debtor's

disposable income is not subject to means test at all when calculating amounts "reasonably necessary to be expended." 11 U.S.C. § 1325(b)(3). Instead, under the subchapter V disposable income definition, the "reasonably necessary to be expended" calculation is the same as the relevant calculation for chapter 12 cases, chapter 13 below-median-income cases, and all chapter 13 cases prior to BAPCPA's introduction of the means test in 2005. *See* 11 U.S.C. §§ 1191(d), 1225(b)(2); 11 U.S.C. § 1325 (2004).

19 11 U.S.C. § 1325(b)(1)(B).

20 11 U.S.C. § 1225(b)(1)(B).

21 I am grateful to Hon. Paul W. Bonapfel (N.D. Ga.) for help with both my terminology and my understanding of the "payments" approach and "value" approach, although he should not be held responsible for any of my conclusions.

22 *Compare* 11 U.S.C. § 1191(c)(2)(B) *with* § 1225(b)(1)(C).

23 11 U.S.C. § 1191(c)(2)(B) (providing that a plan can be fair and equitable so long as "the value of the property to be distributed under the plan in a 3-year period, or such long period not to exceed 5 years as the court may fix, beginning on the date on which the first distribution is due under the plan is not less than the projected disposable income of the debtor").

24 *Id.*; *Legal Serv. Bureau Inc. v. Orange Cty. Bail Bonds, Inc. (In re Orange County Bail Bonds, Inc.)*, 638 B.R. 137, 146–47 (B.A.P. 9th Cir. 2022) (holding that a plan using liquidated asset proceeds to make payments in excess of the present value of the projected disposable income over the applicable plan period satisfies section 1191(c)(2)(B)); *In re Lost Cajun Enters., LLC*, 634 B.R. 1063, 1068 (Bankr. D. Colo. 2021) (confirming a subchapter V plan where debtor's CEO made an equity contribution equal to the three-year disposable income projection to pay unsecured creditors in cash on the effective date of the plan).

To be more specific, because projected disposable income will often be a stream of (usually monthly) payments, each of those payments would have to be reduced by present value using an appropriate interest rate. The proposed plan payment or payments would similarly have to be reduced using the same method. In order to pass the test, the present value of the plan payments would have to meet or exceed the present value of the projected disposable income: present value (plan payment(s)) ≥ present value (projected disposable income over plan term).

25 *See, e.g.*, *Anderson v. Satterlee (In re Anderson)*, 21 F.3d 355, 357–58 (9th Cir. 1994) (holding that section 1325(b)(1)(B) does not require debtors to pay actual disposable income but only projected disposable income as calculated at confirmation); *Toso v. Bank of Scotland (In re Toso)*, No. EC-05-1290, 2007 WL 7540985, at *11–12 (B.A.P. 9th Cir. Jan. 10, 2007) (affirming that a chapter 12 debtor must only devote projected disposable income rather than actual disposable income as a prerequisite for plan confirmation); *Haynes v. Heath (In re Heath)*, 182 B.R. 557, 559–60 (B.A.P. 9th Cir. 1995) (holding that debtors are not required to include future tax refunds in projected disposable income absent a showing that the refunds are projected as the effective date of the plan); *In re Styerwalt*, 610 B.R. 356, 371 (Bankr. D. Colo. 2019) (quoting *Hamilton*, 560 U.S. at 519) (holding that there was not enough evidence to demonstrate that the debtor's future bonus income was "known or virtually certain" to require debtor to include potential future bonuses under the plan); *In re Ridenhour*, No. 3:14-bk-13339, 2016 WL 1688734, at *2–3 (Bankr. D. Ariz. Apr. 25, 2016) (holding that the objecting trustee had met its "projectability" burden in showing that debtor's future tax returns should be included in projected disposable income but failed to demonstrate that the (unemployed) debtor-spouse's potential post-petition income should be included).

26 *In re Nowlin*, 576 F.3d 258, 263–66 (5th Cir. 2009) (affirming a forward-looking interpretation of "projected disposable income"); *In re Killough*, 900 F.2d 61, 65–66 (5th Cir. 1990) (confirming a chapter 13 plan over creditor objection that the plan did not include prospective overtime income into the projected disposable income calculation because the debtor's future opportunities to work overtime were not definite enough).

27 22 F.3d 190 (8th Cir. 1994).

28 *Id.* at 193.

29 *Id.* at 192.

30 *Id.*

31 *See, e.g.*, *In re Bass*, 267 B.R. 812, 817–18 (Bankr. S.D. Ohio 2001) (stating that the *Rowley* court's fears of inaccurately determined projected disposable income are lessened by debtor's duty to file accurate schedules and that plan modification process may allow recapture of actual, unprojected income); 8 COLLIER ON BANKRUPTCY ¶ 1191.04[2][e] (16th ed. 2023); Susan A. Schneider, *Bankruptcy Reform and Family Farmers: Correcting the Disposable Income Problem*, 38 Tex. Tech. L. Rev. 309, 329–31 (2006); Paul W. Bonapfel, *Subchapter V Update* § VI (March 2024) https://www.ganb.uscourts.gov/sites/default/files/sub_v_update_march_2024_331-24.pdf.

32 11 U.S.C. § 1225(b)(1)(C). *See, e.g.*, COLLIER ON BANKRUPTCY ¶ 1191.04[2][e]; Schneider, *supra* note 31, at 341–42; Bonapfel, *supra* note 31.

33 U.S.C. § 1191(c)(2)(B).

34 Schneider, *supra* note 31, at 341–42.

35 *In re Bass*, 267 B.R. at 817–19.

36 The *Bass* court quotes the following excerpt from retired Judge Lundin's treatise on this issue:

> Any such [actual disposable income] requirement, to be meaningful, must include that all Chapter 13 debtors file periodic reports of income and expenses after confirmation. ... Multiply the variety of forms, the range of content and the varying quality of information by the number of pending Chapter 13 cases in the district. The volume of paper would be staggering. ...
>
> With each reporting period, the trustee would be obligated to review every pending Chapter 13 case to determine whether income and expenses have adjusted to require a change in contributions to the plan. In jurisdictions with large Chapter 13 programs, this would require hundreds or thousands of additional staff hours in the office of the Chapter 13 trustee. Any creditor that undertakes to monitor the periodic filings of income and expense statements would quickly realize that it is an

> expensive search for a needle in a haystack: future wage increases for most Chapter 13 debtors will be offset by reasonable increases in expenses; many Chapter 13 debtors will actually experience reductions in disposable income during the life of the plan. There is no good evidence that monitoring income and expenses after confirmation on a program-wide basis is cost effective or will improve the average outcome for creditors in Chapter 13 cases.

Id. at 818 (quoting 2 Keith M. Lundin, Chapter 13 Bankruptcy § 164.1 (3rd ed. 2000)).

37 560 U.S. 505. *In re Grier*, 464 B.R. 839, 847 (Bankr. N.D. Iowa 2011) ("[T]he holding from *Rowley* adopting the 'actual income received' appears to have been effectively overruled by *Hamilton v. Lanning*.").

38 *Id.* Few cases appear to follow *Rowley* after both *Hamilton* and BAPCPA. *See, e.g.*, *In re Loganbill*, 554 B.R. 871, 887 (Bankr. W.D. Mo. 2016) (seemingly applying the *Rowley* actual disposable income test, with no mention of *Hamilton v. Lanning* or of the BAPCPA amendments). The case law otherwise runs strongly in the other direction. *See, e.g.*, *Grier*, 464 B.R. at 847 (stating that the actual disposable income test aspect of *Rowley* has been overruled).

39 11 U.S.C. §§ 1229(a), 1329(a).

40 Among other modification-related issues, there is a split on when modification can be pursued at all. The Fifth and Seventh Circuits have held that there is no threshold requirement to modify a plan. *In re Wilson,* 555 B.R. 547, 553–54 (Bankr. W.D. La. 2016) (citing *In re Meza*, 467 F.3d 874, 877–78 (5th Cir. 2006)); *In re Witkowski*, 16 F.3d 739, 744–46 (7th Cir. 1994). In contrast, the Fourth Circuit has imposed threshold requirements to modify a plan, holding that res judicata must apply to ensure finality of the case and prevent minor changes in the debtor's financial condition to prompt parties to unnecessarily modify the plan. *Murphy v. O'Donnell (In re Murphy)*, 474 F.3d 143, 149 (4th Cir. 2007).

41 11 U.S.C. § 1193(c) (allowing the debtor—and implicitly, no other party—to seek to modify a plan at any time before confirmation or any time after conformation and before substantial consummation of the plan).

42 This aspect of the statute also appears to encourage creditors to negotiate with debtors to reach consensual plans, which is again a facet of subchapter V that is evident throughout. *See* 11 U.S.C. § 1191(a) and discussion *supra* note 6.

43 11 U.S.C. § 102(3).

44 *See, e.g.*, *Sandy Ridge Dev. Corp. v. La. Nat'l Bank (In re Sandy Ridge Dev. Corp.)*, 881 F.2d 346, 352 (5th Cir. 1989).

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Consensual or Non-Consensual Confirmation:

11 U.S.C. § 1191(a) or (b)

81 B.R. 707
United States Bankruptcy Court,
S.D. Florida.

In re TOWNCO REALTY, INC., Debtor.

Bankruptcy No. 87–00324–BKC–TCB.
|
Dec. 16, 1987.

Synopsis

On debtor's motions for confirmation of Chapter 11 plan and consideration of ballot, or, alternatively, for cram down, the Bankruptcy Court, Thomas C. Britton, Chief Judge, held that: (1) failure of creditor to vote on confirmation of reorganization plan is not acceptance of plan; (2) unsecured creditor's ballot accepting reorganization plan, tendered more than a month after balloting deadline, could not be counted in determining whether reorganization plan was accepted; and (3) Bankruptcy Court could not find that confirmation of proposed reorganization plan was not likely to be followed by liquidation or need for further reorganization of debtor, thus precluding confirmation.

Confirmation denied.

West Headnotes (10)

[1] **Bankruptcy** "Deemed" acceptance; unimpaired classes

Failure of creditor to vote on confirmation of reorganization plan is not acceptance of plan. Rules Bankr.Proc.Rule 3018(c), 11 U.S.C.A.; Bankr.Code, 11 U.S.C.A. §§ 1111(a), 1126(c).

14 Cases that cite this headnote

[2] **Bankruptcy** Acceptance

Unsecured creditor's ballot accepting reorganization plan, tendered more than a month after balloting deadline, could not be counted in determining whether reorganization plan was accepted, absent any suggestion that creditor had no notice of election or had been prevented from voting before deadline or that timely ballot had been misplaced. Bankr.Code, 11 U.S.C.A. § 1101 et seq.

1 Case that cites this headnote

[3] **Bankruptcy** Acceptance

A secured creditor's vote accepting reorganization plan would be accepted, for purposes of order denying confirmation, even though it was filed after balloting deadline, where accepting vote was announced at confirmation hearing before deadline. Bankr.Code, 11 U.S.C.A. § 1129(a)(10).

2 Cases that cite this headnote

[4] **Bankruptcy** Impairment of Claims or Interests

Impairment of unsecured creditors under proposed reorganization plan precluded confirmation of plan, where no unsecured creditor accepted plan within ballot deadline. Bankr.Code, 11 U.S.C.A. § 1129(a)(8).

2 Cases that cite this headnote

[5] **Bankruptcy** Feasibility in general

Bankruptcy court could not find that confirmation of proposed reorganization plan was not likely to be followed by liquidation or need for further reorganization of debtor, thus precluding confirmation of plan; debtor's debts exceeded assets by 19% by its own projections, debtor failed to meet its projected cash flow in three of past four months, debtor did not file reorganization plan until ordered by court, and then did so only one day before deadline, and debtor failed to get single timely vote for confirmation of plan. Bankr.Code, 11 U.S.C.A. §§ 1106(a)(5), 1123(a)(5), 1129(a)(11).

2 Cases that cite this headnote

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

Request for cram down of proposed reorganization plan must be made before or at confirmation hearing. Bankr.Code, 11 U.S.C.A. § 1129(b).

1 Case that cites this headnote

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

If resort to local rule were required to determine whether request for cram down of postreorganization plan was timely, event precipitating request for cram down was rejection of plan by unsecured creditors occurring when no creditor in class accepted plan by voting deadline, thus commencing running of ten-day period for filing request for cram down. Bankr.Code, 11 U.S.C.A. § 1129(b); U.S.Bankr.Ct.Rules S.D.Fla., Rule 10.

7 Cases that cite this headnote

[8] **Bankruptcy** Feasibility in general

Bankruptcy court's failure to find that confirmation of proposed reorganization plan was not likely to be followed by liquidation or need for further reorganization precluded cram down of proposed reorganization plan. Bankr.Code, 11 U.S.C.A. § 1129(a), (a)(8), (b)(1).

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

Debtor was not entitled to additional time to file another proposed reorganization plan upon denial of confirmation of proposed plan, thus warranting sua sponte dismissal of plan, where debtor had ample opportunity to cope with six creditors and failed to do so. Bankr.Code, 11 U.S.C.A. §§ 105(a), 1112(b)(5), 1129(a, b).

2 Cases that cite this headnote

[10] **Bankruptcy** Items and Services Compensable

Application for attorney fees by counsel for Chapter 11 debtor in anticipation of confirmation of plan would be denied without prejudice, where confirmation was denied and claimed fees and expenses anticipated additional duties and expenses resulting from confirmation of plan. Bankr.Code, 11 U.S.C.A. § 1101 et seq.

Attorneys and Law Firms

***708** Blackwell, Walker, Fascell and Hoehl, Patrick S. Scott, Ft. Lauderdale, Fla., for debtor.

ORDER DENYING CONFIRMATION AND DISMISSING CASE

THOMAS C. BRITTON, Chief Judge.

Thirty-four days after the hearing held October 20 to consider confirmation of this debtor's modified chapter 11 plan, filed October 15 (C.P. No. 31a) and while the matter was under advisement, the debtor moved (C.P. No. 39a) for consideration of a ballot tendered with the motion or, alternatively, for cram down under 11 U.S.C. § 1129(b). The voting deadline, which had been set 74 days before the hearing, was October 20. The debtor's motion was heard December 15.

For the reasons detailed below, the motion is denied; confirmation is denied; the fee applications are denied without prejudice; and this case is dismissed with prejudice to the filing of any bankruptcy petition by this debtor earlier than two years after this Order becomes final.

The debtor's only asset is a shopping center in Manchester, Georgia, and its only activity is the management of that property. It has six creditors.

Its mortgagee, to whom it owes over $2.2 million (C.P. No. 31b, p. 5), which is 99.9% of its total debt (C.P. No. 38), orally accepted the modified plan at the confirmation hearing. None of the remaining five unsecured creditors voted on the plan.

Failure To Vote Is Not Acceptance

[1] The debtor assumes (C.P. No. 37) that the failure to vote constitutes acceptance of the plan. That is not the case. There is no predicate in the statute or the rules for this conclusion. Bankruptcy Rule 3018(c) provides to the contrary:

> "An acceptance or rejection shall be in writing, identify the plan or plans accepted or rejected, be signed by the creditor or equity security holder or an authorized agent, and conform to Official Form No. 30."

As contrasted with § 1111(a) which provides that claims are "deemed filed" if scheduled by the debtor unless disputed, contingent or unliquidated, there is no provision deeming a failure to vote as constituting acceptance.

Section 1126(c) provides that a class has accepted a plan if the plan "has been accepted" by the requisite number and amount of the claims in the class. The Senate Committee note to this subsection included the following explanation:

> "Subsection (c) specifies the required amount and number of acceptances for a class of creditors. A class of creditors has accepted a plan if at least two-thirds in amount and more than one-half in number of the allowed claims of the class *that are voted are cast in favor of the plan.* The amount and number are computed on the *basis of claims actually voted for or against the plan,* not as under chapter X [former section 501 et seq. of this title] on the basis of the allowed claims in the class." (Emphasis added.) S.Rep. No. 95–989, 95th Cong.2d Sess. 123 (1978), U.S.Code Cong. & Admin.News 1978, pp. 5787, 5909.

***709** *Ballot Filed After Voting Deadline Cannot Be Counted*

[2] The ballot accepting the plan, tendered more than a month after the balloting deadline, is by an unsecured creditor, a management company controlled by this debtor's principal (C.P. No. 31b, p. 2), with a claim of $536. It is not suggested that this creditor had no notice of the election, that it had been prevented from voting before the deadline, or that a timely ballot has been misplaced. In addition, under § 1129(a)(10), the acceptance by an impaired class is determined *without* including an insider acceptance. § 101(30)(C).

The consideration of ballots cast *after* an election is the very antithesis of a democratic election. It is no more permissible here than in any other election.

[3] The debtor argues that the ballot of the secured creditor was accepted by the U.S. Trustee as a valid acceptance (C.P. No. 39) though it, too, was filed after the balloting deadline (C.P. No. 37). That creditor's vote, however, was announced at the confirmation hearing *before* the deadline (C.P. No. 37) and, therefore, for the purposes of this order I accept the U.S. Trustee's certificate. If, however, that vote is indistinguishable from the vote now tendered by the debtor, that vote is also invalid and *no* class has accepted the debtor's plan, itself a fatal flaw. § 1129(a)(10).

Confirmation Denied Under § 1129(a)(8)

[4] This subsection requires that each class impaired under the plan must have accepted the plan. The debtor concedes that class 4, the unsecured creditors, is impaired under the plan. (C.P. No. 39a, ¶ 3). Since, as has already been noted, no class 4 creditor accepted the plan, confirmation must be denied under this subsection.

Confirmation Denied Under § 1129(a)(11)

[5] This subsection requires a finding by this court that:

> "Confirmation of the plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor...."

Such a finding is not justified here.

Section 1123(a)(5) requires that a plan "shall provide adequate means for the plan's implementation." The only means provided in this plan are future earnings. By its own valuation, this debtor's debts exceed its assets by $359,574 or 19%.

The debtor has operated its shopping center since July 1982. It was unable to carry its existing debt and in 1986 defaulted on its mortgage. (C.P. No. 31b). It filed for bankruptcy on February 3 of this year to stay a pending foreclosure. It proposes to continue its operations under the same management. There is no plausible reason to conclude that its future operations will be more successful than its past failure to meet its debt.

Its projected cash flow (C.P. No. 31b) estimates monthly income from all sources of $17,154 with a net cash surplus of $440 (2.6%) as of July 1, 1987. Its bi-weekly reports to this court show, however, that for the four months ending October 31, it failed to meet this projection in three months and has averaged 5% under its projection for the entire first four months.

This pro forma projection allocates only $720 ($^{3}/_{10}$ths of 1%) of its revenue for general repairs, an unrealistic estimate. It allocates 21% of its revenue for its other administrative expenses. I believe that the debtor's principal is directly or indirectly benefiting unreasonably from this continued operation.

The debtor's principal, Harry Schreiber, is also the principal in at least 12 other similar bankruptcies filed about the same time in this court. Of course, each case must be judged on its individual merits and I am not personally responsible for or familiar with all these cases, but this record certainly does not vouch for management's judgment, skill or probable success.

Management's projections depend in the last analysis on management's reliability. One indication of a debtor's reliability is its willingness and ability to meet its procedural ***710** obligations in this court. This debtor did not file its schedules until 16 days after the 15–day grace period permitted by B.R. 1007(c).

It did not comply with the requirement in § 1106(a)(5):

> "as soon as practicable, file a plan under section 1121 ... [or] file a report why ... [it] will not file a plan." (The debtor is required by § 1107(a) to perform the foregoing duty.)

No plan was filed until this court ordered the debtor to do so (C.P. No. 20). It then did so one day before the deadline, six months after it filed for bankruptcy.

As has been noted, this debtor failed to get one single timely vote for its plan.

Though several of the foregoing considerations standing alone might not necessarily destroy confidence in this debtor's prospects under its existing management, taken collectively and in the absence of any overriding considerations, it would be irresponsible for me in this case to make the finding required by § 1129(a)(11).

Denial of Cram Down

[6] In possible recognition that its plan is not entitled to confirmation, this debtor has requested cram down under § 1129(b). It first made this request over a month after the confirmation hearing. Neither the statute nor the rules provide a deadline for such a request, but both due process considerations and common sense suggest that such a request must be made before or at the confirmation hearing.

[7] Local Bankruptcy Rule 10 provides:

> "Whenever a party is authorized by statute or rule to file a

> motion, application or other pleading in or in connection with a bankruptcy case or proceeding and no time is specified for the pleading to be filed, it shall be filed within 10 days after the event that precipitated the pleading."

If resort to this Local Rule is necessary, the event that precipitated the request for cram down was the rejection of the plan by class 4, which occurred when no creditor in that class accepted the plan by the voting deadline, 34 days before this request was first made.

[8] If the debtor's request for cram down is timely, cram down is only applicable where the debtor's plan meets all the requirements of § 1129(a) except subparagraph (8). § 1129(b)(1). However, this plan also fails to meet the requirement of subparagraph (11). Therefore, cram down is simply not available here.

Dismissal

[9] If the debtor's motion may be construed to be an application for additional time to file another plan in the event of the failure of this revised plan, that application is denied. Chapter 11 does not guarantee a debtor's survival, merely an opportunity to attempt resolution of its financial problems. This debtor has had an ample opportunity to cope with its six creditors and has failed to do so.

This case is dismissed under § 1112(b)(5). Section 105(a) as amended last year now permits sua sponte dismissal.

It should be noted that the debtor has represented to the U.S. Trustee that this is a "consensual plan". (C.P. No. 43). I do not believe this to be so. Only two of the six creditors appear to have consented to this plan. But if counsel is to be believed and if *all* creditors now agree to the plan, there is no reason for this case to stay here and the continuing expense of this case alone is a compelling argument for its immediate dismissal.

Fee Application

[10] The application (C.P. No. 29) of the debtor's attorney for approval of its fee was before the court at the confirmation hearing. Counsel, who received a $3,000 retainer, request approval of a total fee of $8,000 and $1,000 for expenses, less the $500 deposit it received. Both the fee and expenses anticipate confirmation of the plan and resulting additional duties and expenses. Under the circumstances and in view of the dismissal of this case, the application need not be considered here and is denied without prejudice to this counsel receiving any additional compensation it is ***711** entitled to from its client. This court no longer need concern itself with the reasonableness of the request and any questions can be readily resolved in the State court.

As is frequently the case in this court, no adverse party has incurred (or could reasonably afford to incur) the expense to oppose the debtor. This court cannot let that fact excuse it from reaching the same result it should reach had this case been defended by the affected non-assenting creditors. In doing so, I have frustrated the debtor's wishes. An appeal by the debtor could be completely unopposed. [1] A reviewing court is always entitled to an explanation of this court's decisions. This Order has been unduly extended for that reason alone, though time is woefully short in this court (as it is, unfortunately, in most courts).

All Citations

81 B.R. 707, 18 Collier Bankr.Cas.2d 13

Footnotes

1 The U.S. Trustee shares the court's duty and responsibility and, I hope, would discharge that duty. However, the U.S. Trustee was first installed in this District three months ago and is still coping with myriad organizational problems of staffing and training. It would neither be fair nor reasonable for me to rely completely upon his office at this time.

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836 F.2d 1263
United States Court of Appeals,
Tenth Circuit.

In re RUTI–SWEETWATER, INC.; Sweetwater; Resort Systems; Sweetwater Properties; Timeshare Realty, Inc.; First Western Security; Sweetwater Park; Sweetwater Condoshare Exchange, Debtors.
Allan HEINS; Janet Heins; and Hildegard Heins, Appellants,
v.
RUTI–SWEETWATER, INC.; Sweetwater; Resort Systems; Sweetwater Properties; Timeshare Realty, Inc.; First Western Security; Sweetwater Park; Sweetwater Condoshare Exchange, Appellees.

No. 85–1390.
|
Jan. 8, 1988.

Synopsis
Judgment lien creditors appealed order of the United States Bankruptcy Court for the District of Utah confirming debtors' plan of reorganization. The United States District Court for the District of Utah, Bruce S. Jenkins, Chief Judge, 57 B.R. 748, affirmed. Creditors appealed. The Court of Appeals, Barrett, Senior Circuit Judge, held that nonvoting, nonobjecting judgment lien creditor who was only member of class was deemed to have accepted plan of reorganization.

Affirmed.

Procedural Posture(s): On Appeal.

West Headnotes (4)

[1] **Bankruptcy** Questions of Law or Fact

Whether nonvoting and nonobjecting members of class could be deemed to have accepted debtors' plan of reorganization was mixed question of fact and law to be considered de novo. Bankr.Code, 11 U.S.C.A. § 1129.

114 Cases that cite this headnote

[2] **Bankruptcy** "Deemed" Acceptance; Unimpaired Classes

Nonvoting, nonobjecting judgment lien creditor, who was the only member of a class, was deemed to have accepted plan of reorganization, so as to enable bankruptcy court to confirm plan without showing that plan did not discriminate unfairly or that plan was fair and equitable. Bankr.Code, 11 U.S.C.A. § 1129(a)(8), (b)(1).

71 Cases that cite this headnote

[3] **Bankruptcy** "Deemed" Acceptance; Unimpaired Classes

Creditors in a Chapter 11 proceeding are obligated to take active role in protecting their claims. Rules Bankr.Proc.Rules 3017, 3020(b), 11 U.S.C.A.

35 Cases that cite this headnote

[4] **Bankruptcy** By One Class

Although actual acceptance of plan by at least one class of impaired claims is necessary for bankruptcy court's confirmation of plan, not every creditor is obligated to vote on plan. Bankr.Code, 11 U.S.C.A. §§ 1126(a), 1129(a)(10).

61 Cases that cite this headnote

Attorneys and Law Firms

***1263** Richard F. Bojanowski (Peter J. Kuhn with him on the brief), Salt Lake City, Utah, for appellants.

Jeffrey C. Swinton and Ronald L. Dunn of Woodbury, Bettilyon, Jensen, Kesler & Swinton, Salt Lake City, Utah, Michael Z. Hayes, Mazuran, Verhaaren & Hayes, Salt Lake City, Utah, (on the brief), for appellees.

Before HOLLOWAY, Chief Judge, BALDOCK, Circuit Judge, and BARRETT, Senior Circuit Judge.

Opinion

BARRETT, Senior Circuit Judge.

Allan Heins, Janet Heins and Hildegard Heins, hereinafter collectively referred to as "Heins" or appellants, seek reversal of an order of the district court affirming a bankruptcy ruling.

During the early 1980s, Ruti–Sweetwater and seven related entities, hereinafter referred to as "debtors" or "reorganized debtors," were actively engaged in the business of vacation time sharing. As structured, the debtors provided thousands of customers with time use at various resorts. In late 1983 and early 1984, debtors filed petitions for relief under Chapter 11 of the Bankruptcy Code. Their eight cases were procedurally consolidated for purposes of administration.

At the time of their filings, the debtors faced demands from secured and unsecured ***1264** creditors holding claims of millions of dollars in addition to the obligations owed to thousands of timeshare owners. Following their filings, the debtors prepared a complicated (120 pages) Plan of Reorganization which included treatment of eighty-three separate classes of secured creditors and forty separate classes of time share owners.

The Heins are judgment lien creditors of debtors in the amount of $30,000 plus $8,000 in interest. The Heins secured a lien by filing a transcript of their judgment prior to ninety days before debtors' petition date. The Heins' lien attached to a parcel of real estate known as the Ferrell Spencer property. Under the Plan of Reorganization, the Heins were treated as a separate subclass and entitled to vote as a separate subclass. The Plan provided that Heins' lien was to be transferred to unsold timeshare intervals, whereby the Heins would realize a small portion of their claim when each interval was sold. The Plan also provided, however, that the Heins would receive the entire amount of their claim, with interest, within the first forty-eight months following confirmation of the Plan.

In accordance with Bankruptcy Rules 3017(c) [1] and 3020(b)(1) [2], the bankruptcy court set May 28, 1984, as the final date for filing written objections to confirmation of the Plan and May 30, 1984, as the final date for voting on the Plan. The Heins did not file written objections to the Plan nor did they exercise their right under 11 U.S.C. § 1126 [3] to vote on the Plan. Twenty separate classes of secured claims, including the Heins, failed to vote.

The bankruptcy court held confirmation hearings on debtors' Plan on June 1, 2, and 5, 1984. The Heins did not appear at the hearings, either in person or through counsel. On June 5, the bankruptcy court approved the sale of the Ferrell Spencer property, free and clear of all liens, including the Heins' lien. On June 8, 1984, the bankruptcy court entered an order confirming debtors' Plan. During the confirmation hearings, the bankruptcy court ruled that the non-voting creditors were deemed to have accepted the Plan for purposes of 11 U.S.C. § 1129(b)(1) [4]. This ruling was made after *none* of the creditors at the hearing objected thereto:

> *Mr. Mabey* [Counsel for Debtor]: We believe that it is the law that those parties in interest who have failed to vote are deemed, under Section 1129(a) 8 to have voted in favor of the plan in order to avoid the requirement of having to affect [sic—effect] a cram-down.
>
> *The Court:* Your statement is they are deemed to have accepted rather than they wouldn't be counted or otherwise it would be the same thing without it?
>
> *Mr. Mabey:* Yes, your Honor. We argue only that they should be deemed to have accepted for purposes of relieving the plan proponent of the cram-down requirements. That is the only avenue which we believe must be perceived at this hearing.

> *The Court:* Thank you. It appears that those—there is no challenge to the leval [legal] concept that those non-voted creditors will be deemed to have accepted [sic] for the purpose of cram-down provisions. That

> will be the Court's ruling on all of the claims that you enumerated, Mr. Mabey.

R. Tr. June 8, 1984, Appellees' Brief, Exhibit C.

On June 12, 1984, the bankruptcy court held a hearing on the distribution of the proceeds of the June 5, 1984, sale of the ***1265** Farrell Spencer property, during which the Heins, represented by counsel, appeared for the first time and challenged the Plan. They attacked those provisions of the Plan under which the Heins' secured interest in the Ferrell Spencer property was removed:

> *Mr. Bojanowski* (Counsel for Heins): Now, the problem arises, when, as debtor's counsel indicated, that the Heins family would be treated under section 4.28; namely, the secured interest that they would have in this property would be removed by virtue of the confirmed plan which would go into effect on June 19th, '84. However, it is the creditor's position that the sale was consummated prior to the effective date of the plan. An offer was made, an acceptance was received, submitted to the Court for approval. That approval was obtained I believe that was obtained on June 5th, '84, that the effective date of the plan would remove their lien would not take place until June 19th.... [t]he distribution of the funds, therefore, should be based upon the creditor's legal position as a judgment lien creditor not affected by any provisions in a plan. That will not take effect until June 19th....
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>
> *Mr. Mabey* (Counsel for Debtors): Your Honor, the argument of the Heins claimants is that even though they did not object to confirmation of a plan which removed their lien, even though the sale under section 363 was an inherent and integral part of that plan, even though the Court, therefore, went ahead and confirmed the plan, nevertheless, they are entitled to ignore the plan and take under the sale under other circumstances. This cannot be a [sic—should be "the"] law. In the first instance, the sale itself is an integral part of the plan of reorganization. In the second instance, section 363(f) under which the sale occurred was carefully designed for a purpose of allowing sales to go forward free and clear of liens and then later determining the value itself of the liens....
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> ---
>
> *The Court:* I'm going to backtrack a little, Mr. Bojanowski. I don't think I fully comprehended what you were trying to do in your argument. I think I'm going to have to rule that the rights of your client, the Heinses, are governed by the plan notwithstanding the fact that the sale took place, as you argue, on the 5th. If I were to rule in your favor, I would have to say that no creditor whatsoever is going to be bound by the plan if their transaction took place before the effective date of the plan. So I'm going to rule right now that the Heins claimants are treated properly in the plan and governed by the plan.

R., Tr. June 12, 1984, pp. 3–8.

The Heins appealed the order of the bankruptcy court confirming debtors' Plan of Reorganization. The district court entered its order affirming the ruling of the bankruptcy court confirming the Plan of Reorganization, 57 B.R. 748. The court found/held:

> Whether a secured creditor accepts a plan of reorganization is important in determining whether the plan must comply with the so-called "cram down" provisions of section 1129(b). If a class of creditors does not accept the plan, and if that class is impaired under the plan (it is undisputed that the Heins are impaired under the Plan), the Bankruptcy court may confirm the plan only if it "does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted the plan." 11 U.S.C. § 1129(b). However, if a class of creditors accepts the plan under section 1129(a)(8), the bankruptcy court may confirm the plan without showing that the plan satisfies the "unfair discrimination" and "fair and equitable" standards of section 1129(b).
>
> ---
>
> Accordingly, if any creditor in a class votes, any other creditors in that class who fail to vote are entirely disregarded for the purpose of determining whether the class has accepted or rejected the plan.

> The presumption under the prior ***1266** law that non-voting creditors rejected the plan has been removed. Non-voting creditors are deemed neither to have accepted the plan nor rejected it; they are simply bound by the result produced by those who vote. The necessity of deeming a failure to vote as either an acceptance or a rejection of a plan arises only when [as here] no members of a class cast a vote.

R., Vol. II at pp. 460–61, 462.

The court upheld the bankruptcy court's ruling that a non-voting, non-objecting creditor who is the only member of a class, such as the Heins, is deemed to have accepted the plan for purposes of § 1129(b). On appeal, the Heins contend that the district court erred in affirming the bankruptcy court's ruling that non-voting, non-objecting creditors who are the only members of a class are deemed to have accepted the Plan of Reorganization for purposes of § 1129(a)(8) [5] and § 1129(b). [6]

Heins argue that: under § 1129(a)(8), the bankruptcy court shall confirm a plan only if each class has affirmatively or actually accepted the plan or each class is not impaired under the Plan; they did not accept the Plan and their lien was impaired under the plan; Congress has stated that § 1129(b) is "triggered only when an impaired creditor has not accepted the debtor's plan"; and, since they had not voted to accept or reject the Plan, the court erred in finding that their failure to vote constituted an acceptance of the Plan for purposes of § 1129.

In response, the debtors argue that the Heins, as non-voting, non-objecting creditors, should be deemed to have accepted the Plan for purposes of § 1129; it is reasonable to presume the acceptance of a plan by parties who do not vote on the plan after receiving the court's approved disclosure statement; and that non-voting, non-objecting creditors who fail to object during the plan confirmation hearings should not be heard to later complain if the plan is not to their liking.

[1] We observe at the outset that our review of factual findings by a district court is not *de novo;* rather, it is guided by the clearly erroneous standard. *Thompson v. Rockwell International Corporation,* 811 F.2d 1345 (10th Cir.1987). Questions of law, however, such as here, are considered *de novo. Allis Chalmers Credit Corp., et al. v. Tri–State Equipment, Inc.,* 792 F.2d 967 (10th Cir.1986); *Vibra–Tech Engineers, Inc. v. United States,* 787 F.2d 1416 (10th Cir.1986). Furthermore, mixed questions of fact and law which involve "primarily a consideration of legal principles" are considered *de novo. Mullan v. Quickie Aircraft Corporation,* 797 F.2d 845, 850 (10th Cir.1986), quoting *Allis Chalmers Credit Corp., et al v. Tri–State Equipment, Inc., supra.* The question of whether the Heins, as non-voting and non-objecting members of a class, should be deemed to have accepted debtors' Plan of Reorganization for purposes of § 1129 is a mixed question of fact and law to be considered *de novo.* It is also a case of first impression for this Court.

[2] We hold that the district court correctly affirmed the bankruptcy court's ruling that Heins' inaction constituted an acceptance of the Plan. To hold otherwise would be to endorse the proposition that a creditor may sit idly by, not participate in any manner in the formulation and adoption of a plan in reorganization and thereafter, subsequent to the adoption of the plan, raise a challenge to the plan for the first time. Adoption of the Heins' approach would effectively place all reorganization ***1267** plans at risk in terms of reliance and finality.

[3] Adoption of the Heins' approach would relieve creditors from taking an active role in protecting their claims. We agree with the District Court's finding that creditors are obligated to take an active role in protecting their claims:

> The Code contemplates that concerned creditors will take an active role in protecting their claims. Otherwise, Bankruptcy Rule 3017, which provides for fixing a deadline for filing rejections of a plan, and Bankruptcy Rule 3020(b), which provides for fixing a deadline for filing objections to confirmation, would have no substance. *See In re Record Club of America,* 38 B.R.

> 691, 696 (M.D.Penn.1983). Moreover, if non-voting, non-objecting creditors are not deemed to have accepted the plan, the debtor would be placed in the unique position of anticipating these creditors' objections to the plan and presenting evidence and arguments to refute those hypothetical objections in the confirmation hearing.

R., Vol. II at pp. 462–63.

The ruling that the Heins' inaction constituted an acceptance of debtors' Plan of Reorganization for purposes of § 1129(b)(1) is also supported by general provisions in the Bankruptcy Act.

[4] Although actual acceptance of a plan by at least one class of impaired claims is necessary for a bankruptcy court's confirmation of a plan under § 1129(a)(10), *Hanson v. First Bank of South Dakota, N.A.,* 828 F.2d 1310, 1313 (8th Cir.1987), not every creditor is obligated to vote on a plan. Nothing in the Bankruptcy Act requires that each creditor votes on a plan prior to its confirmation; rather, § 1126(a) provides only that a creditor "may accept or reject a plan." Furthermore, whereas the former Bankruptcy Act (*see* H.R.Rep. No. 95–595, 95th Cong. 1st Sess. 410 (1977)) provided that a failure to vote was considered a rejection of the plan, the present Bankruptcy Act does not indicate whether a failure to vote, such as here, is deemed to be an acceptance or rejection of the plan. The present Bankruptcy Act has, however, retained various other presumptions supportive of the bankruptcy court's ruling.

For purposes of acceptance of a plan, § 1126(f) provides that a class that is not impaired under the plan is "conclusively presumed" to have accepted the plan. Section 1126(g) provides that "a class is deemed not to have accepted a plan" if the plan does not entitle the members of the class to receive or retain any property based on their claims or interests. Similar "presumptions" also exist under § 1129, Confirmation of Plan.

Section 1129(a)(10) provides for confirmation where "one class of claims that is impaired under the plan has accepted the plan." Under this section, only one class of impaired claims need vote for acceptance of the plan for purposes of confirmation under § 1129(a) and § 1129(b). Once a class of impaired claims has accepted a plan, a plan may be "crammed down" over the objections of every other class of creditors pursuant to § 1129(b). *See In Re Powell Brothers Ice Company,* 37 B.R. 104, 10 CBC 2nd 328, 331 (D.Kan.1984). Furthermore, a plan may be confirmed even if no secured creditors accept a plan if the provisions of §§ 1129(a)(10) and 1129(b) are met. *Id.* As such, under the present Bankruptcy Act, a plan is not only "presumed" confirmable, but is confirmable under § 1129(a) or 1129(b) where only one class of impaired claims has accepted the plan and the other elements of § 1129(a) or § 1129(b) are met.

The Heins were one of eighty-three separate classes of secured creditors and one of twenty separate classes of secured creditors who opted not to vote during the confirmation hearings. None of the secured creditors who appeared at the June 8, 1984, confirmation hearings voiced an objection to the bankruptcy court's finding that the "non-voted creditors will be deemed to have accepted [the plan] for the purpose of the cram down provisions." Since the Heins did not object to the Plan at any time prior to its confirmation and because the Heins unilaterally opted not to vote on the confirmation of the Plan, the bankruptcy court ***1268** did not err in presuming their acceptance of the Plan for purposes of § 1129(b).

Once acceptance was properly presumed, the court was not obligated to inquire as to whether the Plan discriminated unfairly or was not fair and equitable to the Heins under § 1129(b)(1). When the Heins failed to object to the Plan, they waived their right to challenge the Plan or to assert, after the fact, that the Plan discriminated unfairly and was not fair and equitable.

AFFIRMED.

All Citations

836 F.2d 1263, 17 Collier Bankr.Cas.2d 1459, 17 Bankr.Ct.Dec. 155, Bankr. L. Rep. P 72,156

Footnotes

1 Rule 3017(c) provides in part: "The court shall fix a time within which the holders of claims and interests may accept or reject the plan and may fix a date for hearing on the confirmation."

2 Rule 3020(b)(1) provides in part: "Objections to confirmation of the plan shall be filed with the court and served on the debtor—and on any other entity designated by the court within a time fixed by the court."

3 § 1126 provides in part: "The holder of a claim or interest ... may accept or reject a plan."

4 All United States Code citations hereinafter will be to 11 U.S.C. unless otherwise indicated.

5 § 1129(a)(8) provides:

> With respect to each class of claims or interests—
>
> (A) such class has accepted the plan; or
>
> (B) such class is not impaired under the plan.

6 § 1129(b)(1) provides in part:

> Notwithstanding section 510(a) of this title if all of the applicable requirements of subsection (a) of this section other than paragraph (8) are met with respect to a plan, the court, on request of the proponent of the plan, shall confirm the plan notwithstanding the requirements of such paragraph if the plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan.

End of Document

654 B.R. 107
United States Bankruptcy Court,
S.D. Texas, Corpus Christi Division.

IN RE: FRANCO'S PAVING LLC, Debtor.

Case No: 23-20069
|
Signed October 5, 2023

Synopsis
Background: United States Trustee objected to confirmation of debtor's proposed plan in Subchapter V Chapter 11 case.

[Holding:] The Bankruptcy Court, David R. Jones, J., held that creditor class in which no votes were cast on proposed plan would not be considered in determining whether plan could be confirmed as consensual.

Objection overruled; plan confirmed.

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

West Headnotes (6)

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

Proceeding whereby United States Trustee objected to confirmation of debtor's proposed plan in Subchapter V Chapter 11 case, based on failure of all creditor classes to affirmatively accept the plan, was "core" matter, for purposes of bankruptcy jurisdiction. 28 U.S.C.A. § 157(b)(2)(A, L, O).

1 Case that cites this headnote

[2] **Bankruptcy** Consent to or Waiver of Objections to Jurisdiction or Venue

Bankruptcy Court had constitutional authority to enter a final order in proceeding whereby United States Trustee objected to confirmation of debtor's proposed plan in Subchapter V Chapter 11 case, based on failure of all creditor classes to affirmatively accept the plan, since parties had impliedly consented to the entry of a final order. U.S. Const. art. 3, § 1.

[3] **Bankruptcy** Construction and Operation

When faced with an unusual case, certainly not contemplated in the Bankruptcy Code, a court should read the statute to align with congressional intent and the statute's design.

[4] **Bankruptcy** Equitable powers and principles

Bankruptcy court is a court of equity, seeing to administer the law according to its spirit, and not merely by its letter.

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

Subchapter V is intended to encourage consensual plans confirmed under Chapter 11. 11 U.S.C.A. § 1191(a).

[6] **Bankruptcy** Acceptance

Creditor class in which no votes were cast on proposed plan in Subchapter V Chapter 11 case would not be considered in determining whether that plan could be confirmed as consensual. 11 U.S.C.A. §§ 1129(a)(8), 1191(a).

2 Cases that cite this headnote

Attorneys and Law Firms

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MEMORANDUM OPINION

(Docket No. 72)

DAVID R. JONES, UNITED STATES BANKRUPTCY JUDGE

This case presents the question of how a court should view a class of creditors that fails to vote on a proposed plan in a subchapter V chapter 11 case for purposes of determining whether that plan may be confirmed under 11 U.S.C. § 1191(a). For the reasons set forth below, the Court finds that a creditor class in which no votes are cast will not be considered for purposes of 11 U.S.C. § 1129(a)(8). The ***108** objection advanced by the United States Trustee is overruled, and the Debtor's plan is confirmed under 11 U.S.C. § 1191(a).

Relevant Factual Background

The Debtor filed a subchapter V chapter 11 case on March 17, 2023. [Docket No. 1]. The Debtor filed its proposed plan on June 15, 2023. [Docket No. 48]. The plan was subsequently amended on August 8, 2023, to address certain objections raised by creditors. [Docket No. 55].

The Debtor's plan contains six classes. [Docket No. 55]. Votes were cast in Classes 1, 3 and 4. [Docket No. 63]. All creditors that cast a ballot voted in favor of the Debtor's plan. [Docket No. 63]. No votes were cast in Classes 2, 4 and 5. [Docket No. 63]. Class 2 consists of the secured claim of the U.S. Small Business Administration ("SBA"). [Docket No. 55]. Class 5 consists of the priority unsecured claim of the Internal Revenue Service ("IRS"). [Docket No. 55]. Class 6 consists of the general unsecured claim of the IRS, the deficiency claim of the SBA and other unknown unsecured claims. [Docket No. 55].

The United States Trustee filed its objection on September 8, 2023. [Docket No. 61]. In his objection, the United States Trustee objected to confirmation of the plan (i) due to outstanding Monthly Operating Reports; (ii) on grounds of feasibility; and (iii) based on a perceived ambiguity in how distributions would be made. [Docket No. 61]. These objections were either satisfied or abandoned at confirmation. In his closing argument, however, the United States Trustee asserted that the Debtor's plan could not be confirmed under 11 U.S.C. § 1191(a) due to the failure of all classes to affirmatively accept the plan under 11 U.S.C. § 1129(a)(8) as required by 11 U.S.C. § 1191(a). In support of his position, the United States Trustee relied on the decision rendered in *In re Bressler*, No. 20-31024, 2021 WL 126184 (Bankr. S.D. Tex. Jan. 13, 2021).

Jurisdiction and Authority

[1] **[2]** The Court has jurisdiction over this contested matter pursuant to 28 U.S.C. § 1334(b). This contested matter is a core proceeding under 28 U.S.C. §§ 157(b)(2)(A), (L) and (O). The Court has constitutional authority to enter a final order in this contested matter. *Stern v. Marshall*, 564 U.S. 462, 486–87, 131 S.Ct. 2594, 180 L.Ed.2d 475 (2011). To the extent necessary, the parties have impliedly consented to the entry of a final order by the Court. *See Wellness Int'l Network, Ltd. v. Sharif*, 575 U.S. 665, 683–85, 135 S.Ct. 1932, 191 L.Ed.2d 911 (2015) (holding that a party impliedly consents to adjudication when the party "voluntarily appear[s] to try the case" with knowledge of the need for consent and without affirmatively refusing to provide it (quoting *Roell v. Withrow*, 538 U.S. 580, 590, 123 S.Ct. 1696, 155 L.Ed.2d 775 (2003))).

Analysis

Confirmation of a subchapter V chapter 11 plan is governed by 11 U.S.C. § 1191. Section 1191(a) provides that:

> [t]he court shall confirm a plan under this subchapter only if all of the requirements of section 1129(a), other than paragraph (15) of that section, of this title are met.

11 U.S.C. § 1191(a). Section 1191(b) provides an exception to the requirements for confirmation under § 1191(a):

> [I]f all of the applicable requirements of section 1129(a) of this title, other than paragraphs (8), (10), and (15) of that section, are met with respect to a plan, the court, on request of the debtor, shall confirm the plan notwithstanding the requirements of such paragraphs if the plan does not discriminate unfairly, and ***109** is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan.

11 U.S.C. § 1191(b). Confirming a plan under § 1191(b) has certain implications for the debtor. Confirmation under § 1191(b) requires additional proof regarding the effects of the plan. 11 U.S.C. § 1191(b), (c) and (d). Other provisions of Subchapter V are likewise affected by confirmation under § 1191(b). *See* 11 U.S.C. § 1186 (expansion of property of the estate); 11 U.S.C. § 1192 (timing of discharge); 11 U.S.C. § 1194(b) (designation of trustee as the default issuer of payments to creditors under a plan); 11 U.S.C. § 1193 (plan modification).

[3] **[4]** Section 1129(a)(8) provides, in part, that "[w]ith respect to each class of claims or interests ... such class has accepted the plan." Section 1126 governs the acceptance of a plan by a creditor. The section provides that the holder of a claim "may accept or reject a plan." 11 U.S.C. § 1126(a). A "class of claims has accepted a plan if such plan has been accepted by creditors ... that hold at least two-thirds in amount and more than one-half in number of the allowed claims of such class held by creditors ... that have accepted or rejected such plan." 11 U.S.C. § 1126(c). Therefore, the determination of acceptance or rejection requires the following mathematical computations [1]:

$$^{A}/_{B} > 50.00\%$$

where A = Number of claims in the class that vote for the plan

B = Number of claims in the class that vote

and

$$^{C}/_{D} \geq 66.67\%$$

where C = Dollar amount of claims in the class that vote for the plan

D = Dollar amount of claims in the class that vote

The instant case raises the question of what occurs when no creditors in a class vote either to accept or to reject a plan. Mathematically, both computations become $^{0}/_{0} = E$ (where E is simply the quotient). Applying basic mathematical principles, one must calculate E such that $0 \times E = 0$. The obvious answer is that E can be any number and is therefore indeterminate or undefined. [2] In practical terms, the equation cannot be solved. Thus, the calculation required by § 1126(c) cannot be performed. When faced with an "unusual case, certainly not contemplated in the statute," a court should read the statute to align with congressional intent and "the statute's design." *Truvillion v. King's Daughters Hosp.*, 614 F.2d 520, 527 (5th Cir. 1980). "A court of bankruptcy is a court of equity, seeing to administer the law according to its spirit, and not merely by its letter." *Johnson v. Norris*, 190 F. 459, 463 (5th Cir. 1911) (quoting *In re Kane*, 127 F. 552, 553 (7th Cir. 1904)). The Court finds that attempting to do what the laws of mathematics ***110** prohibit is an absurd proposition and could not have been intended

when Congress enacted the current version of § 1126. By implementing a denominator that includes only votes actually cast in § 1126, it logically follows that Congress presumed that at least one vote was cast.

The only circuit court to address this situation is the Tenth Circuit in *In re Ruti-Sweetwater, Inc.*, 836 F.2d 1263 (10th Cir. 1988). In *Ruti-Sweetwater*, the Court noted the change from prior law that non-voting creditors were presumed to reject to the current law that deems such creditors bound by the decision of those creditors that vote. *Id.* at 1265–66. The Court concluded that in situations where no votes were cast in a class, it was required to determine whether "a failure to vote" is either an acceptance or a rejection. *Id.* at 1266. With this self-imposed limitation on the available choices, the Court held that by failing to cast a ballot, the non-voting creditors had consented to the debtor's plan and that their inaction amounted to a deemed acceptance. *Id*. at 1267–68. The Court noted that the Bankruptcy Code requires that creditors take an active role in protecting their claims. *Id.* at 1267. The *Ruti-Sweetwater* decision has been both adopted and criticized by courts in this circuit. *See e.g., In re Cypresswood Land Partners, I*, 409 B.R. 396, 430 (Bankr. S.D. Tex. 2009) (adopting the logic of *Ruti-Sweetwater*); *In re Castaneda*, No. 09-50101, 2009 WL 3756569, at *2 (Bankr. S.D. Tex. Nov. 2, 2009) (rejecting the logic of *Ruti-Sweetwater*).

[5] **[6]** The Court finds the policy underlying *Ruti-Sweetwater* compelling. The Court does not, however, believe that it is limited to the binary choice between a "deemed acceptance" and a "deemed rejection." Subchapter V is intended to encourage consensual plans confirmed under § 1191(a). *In re Free Speech Sys., LLC*, 649 B.R. 729, 734 (Bankr. S.D. Tex. 2023) ("Subchapter V is a streamlined chapter 11 process and a debtor has to work from the outset to try to achieve a consensual plan."). One of the subchapter V trustee's enumerated duties under § 1183 is to "facilitate the development of a consensual plan." 11 U.S.C. § 1183(b)(7); *In re Ozcelebi*, 639 B.R. 365, 381 (Bankr. S.D. Tex. 2022) (this duty is "unique" to a subchapter V trustee). From a practical perspective, a creditor that agrees to a debtor's plan may express its consent by affirmatively voting for a plan or by simply choosing not to file an objection. The outcome should be no different, as the overarching policy of Subchapter V is satisfied. The Court finds that in making the change to § 1126 when enacting the Bankruptcy Code, Congress presumed the existence of at least one vote in each class. In a situation where no votes are cast, the Court holds that the class should not be counted for purposes of § 1129(a)(8). [3]

The Court therefore overrules the U.S. Trustee's objection and confirms the Debtor's plan pursuant to 11 U.S.C. § 1191(a).

All Citations

654 B.R. 107, 72 Bankr.Ct.Dec. 249

Footnotes

1 The legislative history of § 1126 specifies that "[a] class of creditors has accepted a plan if at least two-thirds in amount and more than one-half in number of the allowed claims of the class that are voted are cast in favor of the plan. The amount and number are computed on the basis of claims actually voted for or against the plan, not as under Chapter X on the basis of the allowed claims in the class." S. REP. NO. 95-989 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 5787, 5909. Expressed slightly differently, the two-thirds and one-half requirements are based on a denominator that equals the number or amount of claims that have actually been voted either for or against the plan, rather than the total number and amount of claims in the class.

2 For a general discussion, see "Division by Zero," WIKIMEDIA FOUND., https://en.wikipedia.org/wiki/Division_by_zero (last modified Sept. 27, 2023, 06:12).

3 To the extent that *In re Bressler*, No. 20-31024, 2021 WL 126184 (Bankr. S.D. Tex. Jan. 13, 2021) holds to the contrary, the Court respectfully disagrees and rejects its holding.

End of Document

655 B.R. 107
United States Bankruptcy Court,
S.D. Texas, Houston Division.

IN RE: HOT'Z POWER WASH, INC., Debtor.

CASE NO: 23-30749
|
Signed November 7, 2023

Synopsis

Background: Chapter 11 debtor sought confirmation of its proposed fifth amended Subchapter V plan of reorganization. United States Trustee (UST) objected to consensual confirmation.

Holdings: The Bankruptcy Court, Eduardo V. Rodriguez, Chief Judge, held that:

[1] the bankruptcy rule governing the proper form of acceptance or rejection of a Chapter 11 plan applies in Subchapter V proceedings;

[2] debtor's use of notice on face of plan to deem nonvoting creditors as having accepted the plan violated the subject rule;

[3] debtor's treatment of nonvoting impaired creditor class as having implicitly accepted the plan violated the subsection of the Bankruptcy Code providing that a Chapter 11 plan can only be confirmed if, with respect to each class of claims or interests, such class has accepted the plan;

[4] a nonvoting impaired creditor class should not be counted, for purposes of determining acceptance of a Subchapter V plan; and

[5] because both voting impaired classes voted to accept the plan, debtor's proposed plan could be confirmed.

Objections sustained in part and overruled in part; plan confirmed.

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

West Headnotes (11)

[1] **Bankruptcy** In General; The Case

Bankruptcy court may only hear a case in which venue is proper. 28 U.S.C.A. § 1408.

[2] **Bankruptcy** Consent to or Waiver of Objections to Jurisdiction or Venue

Bankruptcy Submission to district court for judgment

While bankruptcy judges can issue final orders and judgments for core proceedings, absent consent, they can only issue reports and recommendations on non-core matters. 28 U.S.C.A. §§ 157(b)(1), 157(c)(1).

[3] **Bankruptcy** Consent to or Waiver of Objections to Jurisdiction or Venue

Bankruptcy court has constitutional authority to enter a final order where the parties have consented, impliedly if not explicitly, to adjudication of matter by the court. 28 U.S.C.A. § 157.

[4] **Bankruptcy** Consent to or Waiver of Objections to Jurisdiction or Venue

Bankruptcy Court had constitutional authority to enter a final order where the parties had engaged in motion practice in front of the Court and had never objected to the Court's constitutional authority to enter a final order or judgment in the case, thereby impliedly consenting to adjudication of the matter by the Court. 28 U.S.C.A. § 157.

[5] **Bankruptcy** Acceptance

Bankruptcy rule governing the proper form of acceptance or rejection of a Chapter 11 plan applies in proceedings under Subchapter V of Chapter 11; the rule is one of general applicability. Fed. R. Bankr. P. 3018(c).

[6] **Bankruptcy** "Deemed" acceptance; unimpaired classes

Use by Subchapter V Chapter 11 debtor of notice on face of its plan to deem nonvoting creditors as having accepted the plan violated the bankruptcy rule governing the proper form of acceptance or rejection of a Chapter 11 plan; under the Bankruptcy Code, impaired class's failure to cast a written vote did not constitute acceptance of the plan. 11 U.S.C.A. § 1126(c); Fed. R. Bankr. P. 3018(c).

[7] **Bankruptcy** "Deemed" acceptance; unimpaired classes

Subchapter V Chapter 11 debtor's treatment of nonvoting impaired creditor class as having implicitly accepted its plan violated the subsection of the Bankruptcy Code providing that a Chapter 11 plan can only be confirmed if, with respect to each impaired class of claims or interests, such class has accepted the plan; under the Code, impaired class's failure to cast a written vote did not constitute acceptance of the plan. 11 U.S.C.A. §§ 1126, 1129(a)(8), 1191(a); Fed. R. Bankr. P. 3018(c).

1 Case that cites this headnote

[8] **Bankruptcy** "Deemed" acceptance; unimpaired classes

Under the Bankruptcy Code, a nonvote by an impaired creditor class cannot be construed as acceptance of a Chapter 11 plan. 11 U.S.C.A. § 1126(c).

1 Case that cites this headnote

[9] **Bankruptcy** "Deemed" acceptance; unimpaired classes

A nonvoting impaired creditor class should not be treated as having implicitly accepted or rejected a Subchapter V Chapter 11 plan for confirmation purposes but, instead, should not be counted; Bankruptcy Code is silent on correct treatment of a nonvoting class, acceptances and rejections must satisfy formality requirements set forth in bankruptcy rule governing proper form of acceptance or rejection of Chapter 11 plans, treating nonvoters as rejecters would defeat policy goals of Subchapter V, and calculation mandated by Code subsection setting forth number and amount of votes necessary for plan to be deemed accepted, which requires number of accepting votes to be divided by total votes cast in class, creates a mathematically undefined result that is absurd when applied to a nonvoting class, thus leaving court with one option, namely, to ignore a nonvoting class, which contravenes neither Code nor rules and is supported by legislative history of subsection. 11 U.S.C.A. §§ 1126, 1126(c), 1129(a)(8), 1191(a); Fed. R. Bankr. P. 3018(c).

[10] **Bankruptcy** Acceptance

To be counted, acceptances and rejections of a proposed Chapter 11 plan must satisfy the formality requirements set forth in the bankruptcy rule governing the proper form of acceptance or rejection of Chapter 11 plans. 11 U.S.C.A. §§ 1126(c), 1129(a)(8); Fed. R. Bankr. P. 3018(c).

[11] **Bankruptcy** Eligibility to vote; impairment

Debtor's proposed fifth amended Subchapter V plan of reorganization satisfied the requirement that a Chapter 11 plan can only be confirmed if, with

respect to each impaired class of claims or interests, such class has accepted the plan, where the plan contained three impaired classes, two of the impaired classes voted to accept the plan, and one impaired class did not vote; the nonvoting impaired class would not be counted. 11 U.S.C.A. §§ 1129(a)(8), 1191(a).

1 Case that cites this headnote

Attorneys and Law Firms

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Christopher Ross Travis, Office of the United States Trustee, Houston, TX, for U.S. Trustee.

MEMORANDUM OPINION

Eduardo V. Rodriguez, Chief United States Bankruptcy Judge

In this subchapter V proceeding, Hot'z Power Wash, Inc. seeks confirmation of its proposed Subchapter V plan pursuant to 11 U.S.C. § 1191(a). Hot'z Power Wash, Inc.'s proposed subchapter V plan contains three impaired classes. Two impaired classes voted to accept the plan and one class did not vote. The United States Trustee raised two objections to consensual confirmation under § 1191(a), to wit: (1) Hot'z Power Wash, Inc.'s attempt to use a notice on the face of the plan to deem non-voting creditors as having accepted the plan violates Fed. R. Bankr. P. 3018(c) and (2) Hot'z Power Wash, Inc.'s alternative argument that the non-voting impaired class has implicitly accepted the plan contravenes § 1129(a)(8). On October 20, 2023, the Court held a final hearing on confirmation. For the reasons set forth *infra*, the Court finds that (1) the use of a notice on the face of the plan to deem non-voting creditors as having accepted the plan violates ***110** Fed. R. Bankr. P. 3018(c), and (2) while treating a non-voting impaired creditor class as having implicitly accepted the plan does violate § 1129(a)(8), the Court nonetheless holds that non-voting impaired creditor classes will not be counted for purposes of whether § 1129(a)(8) is satisfied. As such, the United States Trustee's objections are sustained in part and overruled in part, and Hot'z Power Wash, Inc.'s plan is confirmed under 11 U.S.C. § 1191(a).

I. BACKGROUND

1. On March 5, 2023, ("*Petition Date*") Hot'z Power Wash, Inc. ("*Debtor*") filed for bankruptcy protection under Chapter 11 of the Bankruptcy Code [1] initiating the bankruptcy case [2] ("*Bankruptcy case*").

2. On March 7, 2023, Jarrod B. Martin was appointed as the Subchapter V trustee [3] ("*Subchapter V Trustee*").

3. On June 5, 2023, Debtor timely filed its, "Plan of Reorganization for Small Business under Subpart V Chapter 11" [4] ("*Plan*").

4. On July 3, 2023, the Internal Revenue Service ("*IRS*"), objected to confirmation of Debtor's plan. [5]

5. On July 3, 2023, Debtor filed its, "Debtor's First Amended Plan of Reorganization for Small Business Under Subpart V Chapter 11" [6] ("*First Amended Plan*") and "Debtor's Second Amended Plan of Reorganization for Small Business Under Subpart V Chapter 11" [7] ("*Second Amended Plan*").

6. On July 7, 2023, the IRS filed its "Amended Objection to Confirmation of Plan" to Debtor's Second Amended Plan. [8]

7. On August 1, 2023, Debtor filed its, "Debtor's Third Amended Plan of Reorganization for Small Business Under Subpart V Chapter 11" [9] ("*Third Amended Plan*").

8. On September 12, 2023, Debtor filed its, "Debtor's Fourth Amended Plan of Reorganization for Small Business Under Subpart V Chapter 11" [10] ("*Fourth Amended Plan*").

9. On September 18, 2023, IRS filed its, "Objection to Confirmation of Plan" [11] ("*IRS Objection*") to Debtor's Fourth Amended Plan.

10. On October 2, 2023, Debtor filed its, "Fifth Amended Plan of Reorganization for Small Business Under Subpart V Chapter 11" [12] ("*Fifth Amended Plan*").

11. On October 3, 2023, the IRS withdrew its IRS Objection. [13]

12. On October 13, 2023, the United States Trustee ("*UST*") filed its, "United States Trustee's Objections ***111** to Debtor's Plan of Reorganization Dated October 2, 2023" [14] ("*UST's Objection*").

13. On October 19, 2023, Debtor filed its "Debtor's Response to United States Trustee's Objections to Debtor's Plan of Reorganization Dated October 2, 2023." [15]

14. On October 19, 2023, the Subchapter V Trustee filed his, "Statement Regarding Plan Confirmation," [16] and "Amended Statement Regarding Plan Confirmation." [17]

15. On October 20, 2023, the Court held a hearing ("*Hearing*") on UST's Objections and confirmation of Debtor's Fifth Amended Plan. [18]

II. JURISDICTION, VENUE, AND CONSTITUTIONAL AUTHORITY

This Court holds jurisdiction pursuant to 28 U.S.C. § 1334, which provides "the district courts shall have original and exclusive jurisdiction of all cases under title 11," and exercises its jurisdiction in accordance with Southern District of Texas General Order 2012–6. [19] Section 157 allows a district court to "refer" all bankruptcy and related cases to the bankruptcy court, wherein the latter court will appropriately preside over the matter. [20] This Court determines that pursuant to 28 U.S.C. § 157(b)(2)(A) and (L), this proceeding contains core matters, as it primarily involves proceedings concerning the administration of Debtor's estate and plan confirmation. [21] This proceeding is also core under the general "catch-all" language because a confirmation hearing can only arise in the context of a bankruptcy case. [22]

[1] This Court may only hear a case in which venue is proper. [23] 28 U.S.C. § 1408 provides that "a case under title 11 may be commenced in the district court for the district— in which the domicile, residence, [or] principal place of business...have been located for one hundred and eighty days immediately preceding such commencement." [24] Debtor's principal place of business was in Pasadena, Texas within Harris County, [25] 180 days immediately preceding the Petition Date, and therefore, venue of this proceeding is proper. [26]

[2] **[3]** **[4]** While bankruptcy judges can issue final orders and judgments for core proceedings, absent consent, they can only issue reports and recommendations on non-core matters. [27] Here, the confirmation ***112** of a plan is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A) and (L). As such, this Court concludes that the narrow limitation imposed by *Stern* does not prohibit this Court from entering a final order here. [28] Furthermore, this Court has constitutional authority to enter a final order because the parties have consented, impliedly if not explicitly, to adjudication of this matter by this Court. [29] The parties have engaged in motion practice in front of this Court and have never objected to this Court's constitutional authority to enter a final order or judgment in this case. These circumstances constitute implied consent. Thus, this Court wields the constitutional authority to enter a final order here.

III. ANALYSIS

Pending before the Court are two matters: (A) UST's Objection to Debtor's Fifth Amended Plan [30] and (B) confirmation of Debtor's Fifth Amended Plan. [31] Debtor seeks confirmation of its proposed Subchapter V plan pursuant to 11 U.S.C. § 1191(a). [32] Debtor's proposed subchapter V plan contains three impaired classes. [33] Class 1 is a secured claim of SOS Capital,

class 2 is a secured claim of the IRS, and class 3 consists of unsecured creditors.[34] Classes 1 and 3 voted to accept the plan, and class two did not vote.[35] The Court will address each matter in turn.

A. UST's Objections to Debtor's Fifth Amended Plan

The UST raises two objections to consensual confirmation of Debtor's Fifth Amended Plan, to wit: (1) Debtor's attempt to use a notice on the face of the plan to deem non-voting creditors as having accepted the plan violates Federal Rule of Bankruptcy Procedure ("*Bankruptcy Rule*") 3018(c) and (2) Debtor's alternative argument that the non-voting impaired class has implicitly accepted the plan contravenes § 1129(a)(8).[36] The UST also objected, in the alternative, that Debtor's Fifth Amended Plan was not fair and equitable pursuant to § 1191(b) were the plan to be confirmed as a nonconsensual plan.[37] However, this objection was withdrawn at ***113** the Hearing.[38] The Court will consider each of UST's remaining objections in turn.

1. Whether Debtor can use a notice on the face of the Fifth Amended Plan to deem non-voting creditors as having accepted the plan

UST contends that Debtor's use of a bolded disclaimer on the face of the plan to deem non-voting creditors as having accepted the plan contravenes Bankruptcy Rule 3018(c).[39] Debtor contends that Bankruptcy Rule 3018(c) is inapplicable in Subchapter V because in a Subchapter V case only the debtor may file a plan and the language of Bankruptcy Rule 3018(c) contemplates non-debtor entities also filing plans, thus making it only applicable in traditional Chapter 11.[40]

Bankruptcy Rule 3018(c) provides:

> An acceptance or rejection shall be in writing, identify the plan or plans accepted or rejected, be signed by the creditor or equity security holder or an authorized agent, and conform to the appropriate Official Form. If more than one plan is transmitted pursuant to Rule 3017, an acceptance or rejection may be filed by each creditor or equity security holder for any number of plans transmitted and if acceptances are filed for more than one plan, the creditor or equity security holder may indicate a preference or preferences among the plans so accepted.[41]

[5] First, the Court quickly dispenses with Debtor's argument that Bankruptcy Rule 3018(c) is inapplicable to Subchapter V proceedings. Bankruptcy Rule 3018 is a rule of general applicability and Debtor cites no authority for the proposition that it is inapplicable in Subchapter V.[42] Furthermore, the plain language of the rule merely provides that an acceptance or rejection may be filed for each plan transmitted.[43] Multiple plans may be filed in Subchapter V even though only the Debtor may file a plan.[44] Thus, Debtor's argument is without merit.

[6] Next, the Court agrees with the UST that Bankruptcy Rule 3018(c) precludes the use of plan language to deem non-voting creditors as having accepted the plan.[45]

In *In re Bressler*, this Court concluded when analyzing the interplay between Bankruptcy Rule 3018(c) and § 1126(c) that failure to cast a written vote constitutes neither acceptance nor rejection of the plan, and "nonvotes do not satisfy the language of § 1126(c) and thus, do not count toward the numerosity requirements."[46] Debtor's attempt to treat non-votes as having accepted the plan directly contravenes this holding.[47]

***114** Accordingly, the UST's objection that Debtor's attempt to use a notice on the face of the plan to deem non-voting creditors as having accepted the plan violates Bankruptcy Rule 3018(c) is sustained. The following language found on the first page of Debtor's

Fifth Amended Plan, "If you do not vote, you will be deemed to have accepted the Plan," [48] is struck.

The Court will next consider UST's objection that Debtor's alternative argument, that the non-voting impaired class has implicitly accepted the plan, contravenes § 1129(a)(8).

2. Whether treating a non-voting impaired class as having implicitly accepted the plan contravenes § 1129(a)(8)

[7] Next, UST asserts that Debtor's alternative argument, that the non-voting impaired class has implicitly accepted the plan, contravenes § 1129(a)(8). [49] Specifically, UST argues that the plain language of § 1129(a)(8) requires that every impaired class affirmatively vote to accept the plan. [50] Debtor argues that a non-voting class should be deemed an implicit acceptance by that class. [51] Debtor further contends that UST's argument is untenable because it entirely precludes the possibility of consensual confirmation pursuant to § 1191(a) in situations where an impaired creditor class fails to cast a ballot. [52] Debtor further notes that UST's argument is even more inequitable in a situation such as here where Debtor was informed by the IRS that it has an internal policy of not voting on Chapter 11 plans. [53]

Subchapter V plans may only be confirmed pursuant to § 1191(a) if all the requirements of § 1129(a), other than paragraph (15) are met. [54] Section 1129(a)(8) provides, *inter alia*, that a plan can only be confirmed if "[w]ith respect to each class of claims or interests ... such class has accepted the plan." [55] Section 1126 governs acceptance of a plan by a creditor, providing that the holder of a claim "may accept or reject a plan" [56] and Rule 3018(c) requires such acceptances or rejections to be in writing. [57] Section 1126 also enumerates who may vote on a plan and the numerosity and debt thresholds that must be met for a class to accept a plan for purposes of § 1129(a)(8). [58]

[8] As discussed *supra*, this Court held in *In re Bressler* that failure to cast a written vote constitutes neither acceptance nor rejection of the plan, and "nonvotes do not satisfy the language of § 1126(c) and thus, do not count toward the numerosity requirements." [59] As such, Debtor's attempt to treat a non-voting class as having implicitly accepted the plan similarly also ***115** contravenes this holding. [60] However, while a nonvote cannot be construed as an acceptance, the Code is also silent on the correct treatment of a nonvoting class and this issue was not directly addressed in this Court's *Bressler* opinion. [61]

[9] The treatment of a non-voting creditor class is an issue of significant disagreement amongst bankruptcy courts, even amongst those in this district. [62] Courts have generally followed one of three approaches when presented with a plan in which there is a non-voting impaired creditor class: (a) a nonvoting class is deemed to have accepted the plan for purposes of § 1129(a)(8); [63] (b) a nonvoting class is deemed to have rejected the plan for purposes § 1129(a)(8); [64] and (c) a nonvoting class is not counted for purposes of § 1129(a)(8). [65] The Court will consider each approach in turn.

a. Whether a nonvoting class should be treated as having accepted the plan

The Tenth Circuit in *In re Ruti-Sweetwater, Inc.* concluded that when no vote is cast in an impaired class that the class should be deemed to have implicitly accepted the plan. [66] Largely looking to congressional history, the court in *Ruti-Sweetwater* noted that the pre-1978 bankruptcy act expressly provided that a failure to vote was deemed a rejection of the plan. [67] This provision was removed when the Code was passed in 1978. [68] Thus, the court in *Ruti-Sweetwater* held that non-voting, non-objecting creditors will be deemed to have implicitly accepted the plan. [69] The court further reasoned that if it were to hold otherwise the debtor would be placed in the position of refuting hypothetical objections and both the debtor and bankruptcy court should not be burdened with hypothetical objections that apathetic or careless creditors do not advance themselves. [70]

In *In re Cypresswood Land Partners*, a Southern District of Texas Bankruptcy Court adopted the Tenth Circuit's reasoning, finding that:

> regarding non-voters as rejecters runs contrary to the Code's fundamental principle, and the language of section 1126(c), that only those actually voting be counted in determining whether a class has met the requirements, in number and amount, for acceptance or rejection of a plan, and subjects those who ***116** care about the case to burdens (or worse) based on the inaction and disinterest of others. [71]

Although some courts have agreed with *Ruti-Sweetwater*, including a court in this district, most agree that a nonvote cannot be construed as an implicit acceptance. [72] As discussed *supra*, and as discussed in greater detail in this Court's *Bressler* opinion, this Court also agrees that a nonvoting creditor class cannot be deemed to have implicitly accepted the plan. [73] Notwithstanding the change in the law when the Code was enacted in 1978 as highlighted by the *Ruti-Sweetwater* court, the interplay between the language of § 1126, Bankruptcy Rule 3018(c), and the applicable congressional history as discussed in *Bressler* clearly prohibits treating a nonvoting class as accepting the plan. [74]

The Court will next consider if a nonvoting class should be treated as having rejected the plan.

b. Whether a nonvoting class should be treated as having rejected the plan

Among the courts that have rejected the holding of *Ruti-Sweetwater* and its progeny, the unanimous conclusion is that a Debtor is then unable to satisfy § 1129(a)(8) and must proceed with a cramdown pursuant to § 1129(b) or § 1191(b) as applicable. [75] The UST agrees with this approach. [76] In reaching this conclusion, courts frequently, without providing critical analysis, assume that a nonvote should be treated as a rejection for purposes of § 1126(c) thus resulting in a rejecting class for purposes of § 1129(a)(8). [77]

[10] This Court disagrees. As discussed *supra*, acceptances *and rejections* must satisfy the formality requirements in Bankruptcy Rule 3018(c) to be counted. [78] Furthermore, as discussed in greater detail *infra*, the calculation mandated by § 1126(c) as applied to a nonvoting class creates a mathematically undefined result that cannot be construed as a rejection of the class. [79] As such, the Court rejects the ***117** argument that a nonvoting class should be deemed to have rejected the plan.

The Court next considers whether a nonvoting class should not be counted for purposes of § 1129(a)(8).

c. Whether a nonvoting class can be ignored for purposes of § 1129(a)(8)

Recently, a Southern District of Texas Bankruptcy Court in *In re Franco's Paving LLC* concluded that a nonvoting class should not be counted for purposes of § 1126 and plan confirmation. [80] Specifically, the court found that a nonvoting class renders the mathematical calculation required by § 1126(c) as impossible to calculate. [81] The court held that the indeterminate result obtained by dividing zero by zero was absurd and could not have been intended by Congress. [82] Analyzing the congressional history, the court concluded that when § 1126 was passed Congress presumed the existence of at least one vote in each class. [83] The UST asserted in closing argument that the computation used in *Franco's Paving* is incorrect and § 1126(c) is determinate when no votes are cast in a class because the second prong of § 1126(c) fails, and therefore a rejection of the class can be inferred. [84]

The Court rejects the equation offered by the UST.[85] The mathematical calculation required by § 1126(c) requires that the number of accepting votes be divided by total votes cast in a class.[86] As discussed, nonvotes are not counted pursuant to Bankruptcy Rule 3018(c).[87] Because nonvotes are not counted, a class of nonvotes results in the mathematical calculation of 0/0, an unsolvable and undefined quotient.[88]

Furthermore, as discussed in *Bressler*, the legislative history of § 1126 provides:

> A class of creditors has accepted a plan if at least two-thirds in amount and more than one-half in number of the allowed claims of the class that are voted are cast in favor of the plan. The two-thirds and one-half requirements are *based on a denominator* that equals the amount or number of claims that have actually been voted for or against the plan, rather than the total number and amount of claims in the class, as under current chapter X.[89]

***118** The equation utilized in *Franco's Paving* is derived from the same legislative history and supports this Court's prior holding in *Bressler*.[90] The Supreme Court has routinely held that the plain meaning of legislation should be conclusive unless literal application of a statute "is so bizarre that Congress could not have intended it."[91] However, the Fifth Circuit has cautioned that courts must distinguish between "a result that is actually 'absurd' " and one that "is simply personally disagreeable."[92]

This Court concludes, similar to the court in *In re Franco's Paving LLC*, that the result of a § 1126(c) computation for a nonvoting class is absurd, unsolvable, and was not contemplated by Congress.[93] Furthermore, as discussed *supra*, treating a nonvoting class as having implicitly accepted or rejected the plan is prohibited by the Code and applicable rules.[94] Thus, since the application of the mathematical calculation in § 1126(c) is absurd as applied to a nonvoting class, and because the Code is silent on the correct treatment of a nonvoting class, this Court is left with only one option: when an impaired class of creditors fails to cast a ballot, that class will not be counted for purposes of whether § 1129(a)(8) is satisfied.[95]

Furthermore, were this Court to alternatively hold, as the UST suggests, that nonvoting classes of impaired creditors should be treated as having rejected the plan, not only would it contravene Bankruptcy Rule 3018(c) and § 1126(c) as discussed *supra*, it would run contrary to the policy goals behind Subchapter V.[96] Debtors and creditors alike would be forced to shoulder the additional administrative burdens and expenses associated with cramdown merely because a creditor class was negligent or apathetic about asserting their rights.[97] However, Congress clearly ***119** articulated a preference for consensual plans confirmed under § 1191(a).[98] Allowing creditors' silence to force nonconsensual plans, especially as is the case here where a non-voting class is willfully withholding its vote, defeats the overarching policy preferences of Subchapter V.[99]

Accordingly, UST's objection to Debtor's alternative argument that a non-voting impaired class has implicitly accepted the plan contravenes § 1129(a)(8) is sustained, but UST's overarching objection that Debtor's Fifth Amended Plan cannot be confirmed pursuant to § 1191(a) is overruled.

B. Confirmation of Debtor's Fifth Amended Plan

[11] On October 5, 2023, Debtor filed its Fifth Amended Plan and now seeks confirmation from this Court.[100] Under § 1191(a), a debtor must satisfy all of the requirements of § 1129(a) other than paragraph (15) of that section.[101] In accordance with the discussion *supra*, Class 2 did not vote, and as such will not be counted for purposes of § 1129(a)(8).[102] All other impaired classes voted to accept the plan.[103] Therefore § 1129(a)(8) is satisfied.[104] Furthermore,

the Court finds that all other requirements pursuant to § 1191(a) have been satisfied.

Accordingly, the Court confirms the Debtor's plan pursuant to § 1191(a).

IV. CONCLUSION

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

All Citations

655 B.R. 107

Footnotes

1 Any reference to "Code" or "Bankruptcy Code" is a reference to the United States Bankruptcy Code, 11 U.S.C., or any section (i.e.§) thereof refers to the corresponding section in 11 U.S.C.

2 ECF No. 1.

3 ECF No. 5.

4 ECF No. 56.

5 ECF No. 68.

6 ECF No. 70.

7 ECF No. 71.

8 ECF No. 73.

9 ECF No. 87.

10 ECF No. 92.

11 ECF No. 104.

12 ECF No. 110.

13 ECF No. 111.

14 ECF No. 115.

15 ECF No. 124.

16 ECF No. 125.

17 ECF No. 126.

18 October 20, 2023 Min. Entry.

19 *In re: Order of Reference to Bankruptcy Judges*, Gen. Order 2012–6 (S.D. Tex. May 24, 2012).

20 28 U.S.C. § 157(a); *see also In re: Order of Reference to Bankruptcy Judges*, Gen. Order 2012-6 (S.D. Tex. May 24, 2012).

21 *See* 11 U.S.C. § 157(b)(2)(A), (L).

22 *See Southmark Corp. v. Coopers & Lybrand (In re Southmark Corp.)*, 163 F.3d 925, 930 (5th Cir. 1999) ("[A] proceeding is core under § 157 if it invokes a substantive right provided by title 11 or if it is a proceeding that, by its nature, could arise only in the context of a bankruptcy case.") (quoting *Wood v. Wood (In re Wood)*, 825 F.2d 90, 97 (5th Cir. 1987)).

23 28 U.S.C. § 1408.

24 *Id.*

25 ECF No. 1.

26 28 U.S.C. § 1408.

27 *See* 28 U.S.C. §§ 157(b)(1), (c)(1); *see also Stern v. Marshall*, 564 U.S. 462, 480, 131 S.Ct. 2594, 180 L.Ed.2d 475 (2011); *Wellness Int'l Network, Ltd. v. Sharif*, 575 U.S. 665, 135 S. Ct. 1932, 1938–40, 191 L.Ed.2d 911 (2015).

28 *See, e.g., Badami v. Sears (In re AFY, Inc.)*, 461 B.R. 541, 547-48 (8th Cir. BAP 2012) ("Unless and until the Supreme Court visits other provisions of Section 157(b)(2), we take the Supreme Court at its word and hold that the balance of the authority granted to bankruptcy judges by Congress in 28 U.S.C. § 157(b)(2) is constitutional."); *see also Tanguy v. West (In re Davis)*, 538 F. App'x 440, 443 (5th Cir. 2013) ("[W]hile it is true that *Stern* invalidated 28 U.S.C. § 157(b)(2)(C) with respect to 'counterclaims by the estate against persons filing claims against the estate,' Stern expressly provides that its limited holding applies only in that 'one isolated respect' .... We decline to extend Stern's limited holding herein.") (citing *Stern*, 564 U.S. at 475, 503, 131 S.Ct. 2594).

29 *Wellness Int'l Network, Ltd. v. Sharif*, 575 U.S. 665, 684, 135 S.Ct. 1932, 191 L.Ed.2d 911 (2015) ("Sharif contends that to the extent litigants may validly consent to adjudication by a bankruptcy court, such consent must be expressed. We disagree. Nothing in the Constitution requires that consent to adjudication by a bankruptcy court be express. Nor does the relevant statute, 28 U.S.C. § 157, mandate express consent ....").

30 ECF No. 115.

31 ECF No. 110.

32 ECF No. 110; ECF No. 124.

33 ECF No. 110 at 5-6.

34 *Id.*

35 ECF No. 110 at 3.

36 ECF No. 115.

37 ECF No. 115.

38 October 20, 2023 – Courtroom Hearing (Closing Argument).

39 ECF No. 115 at 2.

40 ECF No. 124 at 3.

41 FED. R. BANKR. P. 3018(c).

42 *See* ECF No. 124 at 3.

43 FED. R. BANKR. P. 3018(c) ("If more than one plan is transmitted pursuant to Rule 3017....").

44 *See* 11 U.S.C. 1193(a) ("The debtor may modify a plan at any time before confirmation....").

45 ECF No. 115 at 2.

46 *Bressler*, 2021 WL 126184, at *3, 2021 Bankr. LEXIS 64 at *7; *In re Dernick*, 624 B.R. 799 (Bankr. S.D. Tex. 2020).

47 *Bressler*, 2021 WL 126184, at *3, 2021 Bankr. LEXIS 64 at *7; *see also* 11 U.S.C. § 1126(c).

48 ECF No. 110 at p. 1.

49 ECF No. 115 at 1-2.

50 ECF No. 115 at 1-2.

51 ECF No. 124 at 3.

52 October 20, 2023 – Courtroom Hearing (Closing Argument).

53 October 20, 2023 – Courtroom Hearing (Closing Argument).

54 11 U.S.C. § 1191(a).

55 11 U.S.C. § 1129(a)(8).

56 11 U.S.C. § 1126(a).

57 *In re Bressler*, 2021 WL 126184, at *2–3, 2023 Bankr. LEXIS 64, at *6 (Bankr. S.D. Tex. 2021).

58 *Bressler*, 2021 WL 126184, at *2–3, 2021 Bankr. LEXIS 64 at *6.

59 *Id.* at *2-3, 2021 Bankr. LEXIS 64 at *6-7.

60 *Id.*

61 *Id.* at *2–3, 2021 Bankr. LEXIS 64 at *6.

62 *See e.g. In re Cypresswood Land Partners, I*, 409 B.R. 396, 430 (Bankr. S.D. Tex. 2009) (adopting the logic that non-voting creditors had consented to the debtor's plan and that their inaction amounted to a deemed acceptance); *In re Castaneda*, No. 09-50101, 2009 Bankr. LEXIS 3591, 2009 WL 3756569, at *2 (Bankr. S.D. Tex. Nov. 2, 2009) (adopting the logic that non-voting creditors were presumed to reject a debtor's plan).

63 *In re Cypresswood Land Partners, I*, 409 B.R. 396, 430 (Bankr. S.D. Tex. 2009).

64 *In re Castaneda*, No. 09-50101, 2009 Bankr. LEXIS 3591, 2009 WL 3756569, at *2 (Bankr. S.D. Tex. Nov. 2, 2009).

65 *In re Franco's Paving LLC*, 654 B.R. 107, 110 (Bankr. S.D. Tex. 2023).

66 836 F.2d 1263 (10th Cir. 1988).

67 *Id.* at 1267.

68 *Id.* at 1267; (citing H.R. Rep. No. 95-595, 95th Cong. 1st Sess. 410 (1977)).

69 *Id.*

70 *Heins v. Ruti-Sweetwater (In re Sweetwater)*, 57 B.R. 748, 750 (D. Utah 1985).

71 409 B.R. at 430; (quoting *In re Adelphia Comm. Corp.*, 368 B.R. 140, 161-62 (Bankr. S.D.N.Y. 2007)).

72 *See e.g.*, *In re M. Long Arabians*, 103 B.R. 211 (B.A.P. 9th Cir. 1989); *see also In re Vita Corp.*, 358 B.R. 749, 751-52 (Bankr. C.D. Ill. 2007), *aff'd*, 380 B.R. 525, 528 (C.D. Ill. 2008); *In re 7th Street and Beardsley P'ship*, 181 B.R. 426 (Bankr. D. Ariz. 1994); *In re Townco Realty, Inc.*, 18 C.B.C.2d 13, 81 B.R. 707 (Bankr. S.D. Fla. 1987) (section 1126(c) and Bankruptcy Rule 3018 require express acceptance).

73 *In re Bressler*, 2021 WL 126184, at *2–3, 2021 Bankr. LEXIS 64 at *6-7.

74 *See id.*; (citing S. Rep. No. 95-989 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5909).

75 *See e.g. In re M. Long Arabians*, 103 B.R. 211 (B.A.P. 9th Cir. 1989); *In re Higgins Slacks Co.*, 178 B.R. 853, 857 (Bankr. N.D. Ala. 1995); *In re Townco Realty, Inc.*, 18 C.B.C.2d 13, 81 B.R. 707, 708 (Bankr. S.D. Fla. 1987).

76 October 20, 2023 – Courtroom Hearing (Closing Argument).

77 *See e.g.*, *In re Friese*, 103 B.R. 90, 92 (Bankr. S.D.N.Y. 1989); *Bell Road Inv. Co. v. M. Long Arabians (In re M. Long Arabians)*, 103 B.R. 211, 216 (B.A.P. 9th Cir. 1989); *In re Trenton Ridge Investors, LLC*, 461 B.R. 440, 456–58 (Bankr. S.D. Ohio 2011); *In re Vita Corp.*, 380 B.R. 525, 528 (C.D. Ill. 2008); *In re Castaneda*, 2009 WL 3756569, 2009 Bankr. LEXIS 3591 (Bankr. S.D. Tex. Nov. 2, 2009); *In re 7th Street and Beardsley P'ship,* 181 B.R. 426 (Bankr. D. Ariz. 1994); *In re Townco Realty, Inc.*, 18 C.B.C.2d 13, 81 B.R. 707, 708 (Bankr. S.D. Fla. 1987); *see also Castaneda*, 2009 WL 3756569, at *3, 2009 Bankr. LEXIS 3591 at *7 ("an impaired creditor who does not vote is not deemed to have accepted a plan").

78 FED. R. BANKR. P. 3018(c).

79 *See In re Franco's Paving LLC*, 654 B.R. at 108–09.

80 *Id.*

81 *Id.* ("the computation required under § 1126(c) is represented as follows: A/B > 50.00% where A = Number of claims in the class that vote for the plan B = Number of claims in the class that vote and C/D # 66.67% where C = Dollar amount of claims in the class that vote for the plan

D = Dollar amount of claims in the class that vote...when no creditor votes, both computations become 0/0 = E (where E is simply the quotient) and when applying mathematical principles, E can be any number and is therefore indeterminate or undefined. Thus, the calculation cannot be performed...attempting to do what the laws of mathematics prohibit is an absurd proposition and could not have been intended when Congress enacted the current version of § 1126.").

82 *Id.*

83 *Id.* at 110.

84 Specifically, UST compared $0 accepting with 1/2 of 0+0 and concluded that 0 accepting is not greater than a total of 0.

85 UST's equation assumes that 0/0 becomes 0, however the result of that computation cannot be completed.

86 *See e.g. In re Dernick*, 624 B.R. 799, 814 (Bankr. S.D. Tex. 2020) (calculating a traditional voting class pursuant to § 1126(c)).

87 *In re Bressler*, 2021 WL 126184, at *3, 2021 Bankr. LEXIS 64 at *7.

88 *See id.*; *In re Franco's Paving LLC,* 654 B.R. at 109 n.2.

89 2021 WL 126184, at *3, 2021 Bankr. LEXIS 64 at *7; (citing S. Rep. No. 95-989 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5909 (emphasis added)).

90 654 B.R. at 109 n.1.

91 *Demarest v. Manspeaker*, 498 U.S. 184, 190, 111 S.Ct. 599, 112 L.Ed.2d 608 (1991) (quoting *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571, 102 S.Ct. 3245, 73 L.Ed.2d 973 (1982)) (citations omitted); *see also United States v. Rodriguez-Rios*, 14 F.3d 1040, 1044 (5th Cir. 1994) (en banc) ("We are authorized to deviate from the literal language of a statute only if the plain language would lead to absurd results, or if such an interpretation would defeat the intent of Congress.").

92 *Johnson v. Sawyer*, 120 F.3d 1307, 1319 (5th Cir. 1997).

93 654 B.R. at 110.

94 11 U.S.C. § 1126(a); Fed. R. Bankr. P. 3018(c).

95 While the Code does allow for a nonconsensual plan to be confirmed if creditor classes reject the plan, the Court cannot presume a rejection any more than it can presume an acceptance by a nonvoting class. Both outcomes directly contradict Bankruptcy Rule 3018(c) and § 1126(a) whereas alternatively, not counting a nonvoting creditor class does not contravene Bankruptcy Rule 3018(c) and is supported by the legislative history of § 1126(c).

96 *In re Free Speech Sys., LLC*, 649 B.R. 729, 734 (Bankr. S.D. Tex. 2023) ("Subchapter V is a streamlined chapter 11 process and a debtor has to work from the outset to try to achieve a consensual plan.").

97 *In re Adelphia Communs. Corp.*, 368 B.R. 140, 261 (Bankr. S.D.N.Y. 2007) ("Regarding non-voters as rejecters runs contrary to the Code's fundamental principle, and the language of section 1126(c), that only those actually voting be counted in determining whether a class has met the

requirements, in number and amount, for acceptance or rejection of a plan and subjects those who care about the case to burdens (or worse) based on the inaction and disinterest of others. A holding to the contrary would mean that a failure to vote isn't relevant in a case where anyone else in that class votes, but is enough to force cramdown if the lack of interest in that class is so extreme that nobody at all chooses to vote, one way or the other...a principle upon which the bankruptcy community often relies, as creditor democracy could otherwise be frozen as a consequence of the disinterest of others.").

98 *See* 11 U.S.C. § 1183(b)(7) ("facilitate the development of a consensual plan"); *In re Ozcelebi*, 639 B.R. 365, 381 (Bankr. S.D. Tex. 2022) (this duty is "unique" to a subchapter V trustee).

99 *See* 8 COLLIER ON BANKRUPTCY P 1180.01 ("Small business enterprises historically have had difficulty reorganizing in chapter 11 for a number of reasons, including chapter 11's exorbitant administrative costs, hard to achieve confirmation requirements, and excessive creditor influence over the confirmation process. The Small Business Reorganization Act of 2019 enacted subchapter V of chapter 11 to govern reorganizations of eligible smaller businesses that elect its application to eliminate those obstacles .... [s]everal subchapter V provisions encourage consensual plans of reorganization."); *but see* § 1129(a)(10) (The Code contemplates at least one impaired vote must accept under § 1129(a)(10). If no class voted, § 1129(a)(10) could not be satisfied).

100 ECF No. 110.

101 11 U.S.C. § 1191(a).

102 *See e.g.*, *In re Franco's Paving LLC*, 654 B.R. at 110.

103 ECF No. 120.

104 *In re Franco's Paving LLC*, 654 B.R. at 110.

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2024 WL 3153327
Only the Westlaw citation is currently available.
United States Bankruptcy Court, S.D. Florida, Miami Division.

IN RE: M.V.J. AUTO WORLD, INC., Debtor.

Case No.: 23-16612-LMI
|
Signed June 21, 2024
|
Filed June 24, 2024

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Subchapter V

MEMORANDUM OPINION ON ORDER CONFIRMING NON-CONSENSUAL SUBCHAPTER V PLAN OF REORGANIZATION UNDER 11 U.S.C. § 1191(b)

Laurel M. Isicoff, Judge

***1** This matter came before the Court on May 1, 2024 at 1:30 p.m. (the "Confirmation Hearing"), to consider confirmation of the *First Amended Plan of Reorganization of M.V.J. Auto World, Inc.* (ECF #79) (the "Plan") filed on February 20, 2024 by the Debtor, M.V.J. Auto World, Inc. (the "Debtor"). The issue before the Court is whether a subchapter V plan can be consensually confirmed under 11 U.S.C. § 1191(a) when an impaired class of creditors fails to vote. For the reasons stated on the record and outlined below, the Court holds that when an impaired class of creditors fails to accept a subchapter V plan, that plan cannot be consensually confirmed under section 1191(a). [1]

FACTUAL BACKGROUND

On August 21, 2023, the Debtor filed a voluntary petition for relief under subchapter V of chapter 11 of Title 11 of the United States Code (the "Bankruptcy Code") (ECF #1). On February 20, 2024, the Debtor filed the Plan, which was set for Confirmation Hearing on May 1, 2024.

The Debtor's Plan contains two impaired classes: class 2 is a secured claim of Ocean Bank and class 3 is a secured claim of the U.S. Small Business Administration ("SBA"). Class 2 voted to accept the plan, but class 3 did not vote.

The Debtor seeks confirmation of the Plan pursuant to section 1191(a). No party filed an objection to the Plan. However, at the Confirmation Hearing, the United States Trustee, Subchapter V Trustee, and secured creditor Ocean Bank all argued that the Plan cannot be confirmed under section 1191(a) because less than all impaired classes affirmatively accepted the Plan under 11 U.S.C. § 1129(a)(8), and, therefore under a strict reading of the relevant Bankruptcy Code sections, the Plan can only be confirmed under 11 U.S.C. § 1191(b).

ANALYSIS

Confirmation of a plan under subchapter V of chapter 11 is governed by 11 U.S.C. § 1191. Section 1191(a) provides:

> [t]he court **shall** confirm a plan under this subchapter **only if all** of the requirements of section 1129(a), other than paragraph (15) of that section, of this title are met.

11 U.S.C. § 1191(a) (emphasis added). Confirmation of a plan under this section is referred to as a "consensual" plan. However, a debtor may also obtain a "non-consensual" cramdown of a plan pursuant to section 1191(b). Section 1191(b) provides:

> if all of the applicable requirements of section 1129(a)

> of this title, other than paragraphs (8), (10), and (15) of that section, are met with respect to a plan, the court, on request of the debtor, shall confirm the plan notwithstanding the requirements of such paragraphs if the plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan.

11 U.S.C. § 1191(b).

Section 1129(a)(8) provides: "[w]ith respect to **each class** of claims or interests— (A) such class has **accepted** the plan; **or** (B) such class is **not impaired** under the plan." 11 U.S.C. § 1129(a)(8) (emphasis added). Because each class of impaired claims did not accept the Debtor's Plan, section 1129(a)(8) was not met.

***2** The Debtor argues that, in a subchapter V case, when an impaired class of creditors fails to cast a ballot at all, that class should not be counted at all for purposes of section 1129(a)(8), citing two cases from the Southern District of Texas - *In re Franco's Paving LLC*, 654 B.R. 107 (Bankr. S.D. Tex. 2023) and *In re Hot'z Power Wash, Inc.,* 655 B.R. 107 (Bankr. S.D. Tex. 2023). The Debtor argues that because the non-voting class 3 (SBA) doesn't count, and because the only other impaired class (class 2) did vote to accept the Plan, section 1129(a)(8) is satisfied and the Plan can be consensually confirmed under section 1191(a).

Both courts in the *Franco's Paving* case and the *Hot'z Power Wash* case held that a non-voting class can be ignored for purposes of whether section 1129(a)(8) is satisfied. To support these conclusions, both courts looked to the policy goals and Congressional intent behind subchapter V, which each court concludes was to create a streamlined chapter 11 process for small business debtors. Both courts reasoned that by creating subchapter V, it was Congress' clear articulation of a preference for consensual plans confirmed under section 1191(a).

In order to get to Congressional intent, each court held that when the Bankruptcy Code was enacted, and the voting requirements for confirmation modified, Congress clearly never contemplated that there would be a class of impaired creditors where no creditor voted. Thus, according to these courts, there is essentially a void in the statute. The *Franco's Paving* court created a mathematical equation to demonstrate that to have a non-voting impaired class creates a mathematical absurdity when attempting to apply the dictates of 11 U.S.C. § 1126(c). Section 1126(c) states "[a] class of claims has accepted a plan if such plan has been accepted by creditors ... that hold at least two-thirds in amount and more than one-half in number of the allowed claims of such class held by creditors ... that have accepted or rejected such plan." Noting, and rejecting the analysis of other courts that deem a non-vote as either a deemed acceptance or rejection of a plan[2], the *Franco's Paving* court stated that neither Fed. R. Bankr. P. 3018 nor section 1129(a)(8) can be read to allow such interpretation, and so the only remedy is to disregard the existence of the class for confirmation purposes. *Franco's Paving,* 654 B.R. at 109-10.

Adopting and expanding on the *Franco's Paving* reasoning, the *Hot'z Power Wash* court concluded:

> the application of the mathematical calculation in § 1126(c) is absurd as applied to nonvoting class, and because the Code is silent on the correct treatment of a nonvoting class, this Court is left with only one option: when an impaired class of creditor fails to cast a ballot, that class will not be counted for purposes of whether § 1129(a)(8) is satisfied.

655 B.R. at 118.

The Court disagrees with the reasoning of the courts in *Hot'z Power Wash* and *Franco's Paving* as the Bankruptcy Code on this point is neither silent nor absurd, but, rather, unambiguous and consistent with the purposes of the Bankruptcy Code. When a statute is unambiguous the court must the interpret statute "according to its terms." *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.,* 530 U.S. 1, 6, 120 S.Ct. 1942, 147 L.Ed.2d 1 (2000). "We begin our construction of a statutory provision where courts should always begin the process of legislative interpretation, and where they often should end it as well, which is with the words of the statutory provision." *See CBS Inc. v. PrimeTime 24 Joint Venture*, 245 F.3d 1217, 1222 (11th Cir. 2001). "When the import of words Congress has used is clear ... we need not resort to legislative history, and we certainly should not do so to undermine the plain meaning of the statutory language." *Harris v. Garner,* 216 F.3d 970, 976 (11th Cir. 2000) (en banc). So, "[w]hen the words of a statute are unambiguous, then, this first canon [of statutory construction] is also the last: judicial inquiry is complete." *Id.* at 973. Moreover, "[t]he Supreme Court and this Court have warned on countless occasions against judges 'improving' plain statutory language in order to better carry out what they perceive to be the legislative purposes." *Bracewell v. Kelley (In re Bracewell),* 454 F.3d 1234, 1240 (11th Cir. 2006).

***3** The *Franco's Paving* and *Hot'z Power Wash* courts reasoned that, when enacting section 1126, Congress did not contemplate that a class of creditors might not vote for a plan; that is incorrect. First, section 1126(a) states that the holder of a claim *may* accept or reject a plan, not *shall* accept or reject a plan. Second, section 1126(c) itself recognizes that some creditors may not vote on a plan; that is why, in determining acceptance, the mathematical formula that the *Franco's Paving* court takes such pains to construct, does not include creditors who have not voted.

That reasoning is strained at best. The analysis in this case is quite simple. In order to be consensually confirmed under section 1191(a), the Plan must satisfy section 1129(a)(8). Section 1129(a)(8) requires that each impaired class accept the plan. Section 1126(c) provides that acceptance is calculated based on how many holders of allowed claims in the class have voted to accept the plan, not, as was required pre-Bankruptcy Code, based on the number of allowed claims.[3] It is not absurd that no creditors in a class voting on a plan should be treated any differently than a situation where there is not a sufficient number of creditors voting in favor of a plan to satisfy section 1129(a)(8). Moreover, section 1129(a)(8) does not compel acceptance or rejection; section 1129(a)(8) looks to whether a class has accepted a plan, not whether a class has rejected a plan or stood silent.

In this case, section 1129(a)(8) is not satisfied because class 3, an impaired class, did not accept the Plan. Therefore the Plan cannot be consensually confirmed under section 1191(a).

Notwithstanding, because the Plan satisfies all of the other applicable provisions of section 1129(a), the Plan is confirmed as a non-consensual plan under section 1191(b).[4]

ORDERED in the Southern District of Florida on June 21, 2024.

All Citations

--- B.R. ----, 2024 WL 3153327

Footnotes

1 This Memorandum Opinion reduces the Court's oral ruling at the Confirmation Hearing to writing.

2 *Compare In re Ruti-Sweetwater, Inc.,* 836 F.2d 1263 (10th Cir. 1988) (no vote is deemed acceptance), *with In re Townco Realty, Inc.,* 81 B.R. 707 (Bankr. S.D. Fla. 1987) (failure to vote is not acceptance).

3 "[W]hereas the former Bankruptcy Act (*see* H.R.Rep. No. 95–595, 95th Cong. 1st Sess. 410 (1977)) provided that a failure to vote was considered a rejection of the plan, the present Bankruptcy Act does not indicate whether a failure to vote, such as here, is deemed to be an acceptance or rejection of the plan." *Ruti-Sweetwater,* 836 F.2d at 1267.

4 *See Order Confirming Non-Consensual Subchapter V Plan of Reorganization Under 11 U.S.C. § 1191(b)* (ECF #121).

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618 B.R. 333
United States Bankruptcy Court, S.D. Florida.

IN RE: SEVEN STARS ON THE HUDSON CORP., Debtor.

Case No. 19-17544-SMG
|
Signed August 7, 2020.

Synopsis

Background: More than a year after debtor, the operator of a trampoline park, initially filed its Chapter 11 petition as a "small business debtor," debtor filed amended petition in which it elected to proceed under new Subchapter V of Chapter 11 of the Bankruptcy Code. Order to show cause was issued as to whether case should be dismissed for debtor's failure to comply with statutory deadlines for holding status conference and for filing plan.

Holdings: As matters of apparent first impression for the court, the Bankruptcy Court, Scott M. Grossman, J., held that:

[1] a Chapter 11 small business debtor is permitted to elect application of Subchapter V to an already-pending case, but

[2] a small business debtor may not amend a Chapter 11 petition to elect Subchapter V status after expiration of the statutory plan-filing and status conference deadlines.

Case dismissed.

West Headnotes (20)

[1]	**Bankruptcy**In general; nature and purpose
	Subchapter V of Chapter 11 of the Bankruptcy Code establishes an expedited process for small business debtors to reorganize quickly, inexpensively, and efficiently. 12 Cases that cite this headnote

[2]	**Bankruptcy**Who May File, and Time for Filing **Bankruptcy**Confirmation; Objections

	Subchapter V of Chapter 11 of the Bankruptcy Code requires a debtor to file a plan not later than 90 days after the order for relief, and requires the bankruptcy court to hold a status conference not later than 60 days after the order for relief. 11 U.S.C.A. §§ 1188(a), 1189(b).

[3]	**Bankruptcy**Dismissal or suspension **Bankruptcy**Want or inadequacy of plan
	Chapter 11 debtor's failure to file a disclosure statement or to file or confirm a plan within the time fixed by the Bankruptcy Code constitutes "cause" for dismissal of the case. 11 U.S.C.A. § 1112(b)(4)(J).

[4]	**Bankruptcy**Requisites of Confirmable Plan
	To confirm a Chapter 11 plan, even one under new Subchapter V, both the plan and the plan proponent must comply with the applicable provisions of the Bankruptcy Code. 11 U.S.C.A. § 1129(a)(1), (2), 1191(a). 1 Case that cites this headnote

[5]	**Bankruptcy**Purpose
	Congress enacted the Small Business Reorganization Act (SBRA), which created a new Subchapter V of Chapter 11 of the Bankruptcy Code, to streamline the bankruptcy process by which small businesses debtors reorganize and rehabilitate their financial affairs. Pub. L. No. 116-54. 9 Cases that cite this headnote

[6]	**Bankruptcy**Purpose

	Subchapter V of Chapter 11 of the Bankruptcy Code is intended to be an expedited process. 4 Cases that cite this headnote

[7]	**Bankruptcy**The Plan
	Subchapter V of Chapter 11 of the Bankruptcy Code provides qualifying debtors with powerful and cost-saving restructuring tools not otherwise available to Chapter 11 debtors, including: (1) elimination of the absolute priority rule, which allows equity holders to retain their ownership interests without paying all creditors in full, (2) no mandatory appointment of a creditors committee, (3) no mandatory requirement to file a disclosure statement, (4) appointment of a Subchapter V trustee to assist in developing a consensual plan, while leaving debtor in possession of its assets and in control of its business, (5) exclusive right, which cannot be terminated, to file a plan, (6) ability to modify a claim secured only by a security interest in debtor's principal residence, if new value received in connection with granting security interest was used primarily in connection with debtor's business and not primarily to acquire the property, (7) ability to confirm a plan even if all classes reject the plan, (8) ability to pay administrative expenses over time under a plan, (9) modification of the disinterestedness requirements for a professional that holds a prepetition claim of less than $10,000, and (10) elimination of requirement to pay quarterly United States Trustee (UST) fees. 11 U.S.C.A. §§ 1181(a), 1181(b), 1183(b)(7), 1189(a), 1190(3), 1191(b), 1191(e), 1195. 1 Case that cites this headnote

[8]	**Bankruptcy**Purpose
	Overall purpose and function of the Bankruptcy Code is to strike a balance between creditor protection and debtor relief. 1 Case that cites this headnote

[9]	**Bankruptcy**Who May File, and Time for Filing
	To balance the special new powers available to small business debtors under Subchapter V of Chapter 11 of the Bankruptcy Code, Congress granted creditors a very important protection: the requirement that a Subchapter V case proceed expeditiously. 11 U.S.C.A. §§ 1188(a), 1188(c), 1189(b). 8 Cases that cite this headnote

[10]	**Bankruptcy**Who May File, and Time for Filing
	Statutory deadlines for a debtor proceeding under Subchapter V of Chapter 11 of the Bankruptcy Code to file a status report, conduct a status conference, and file a plan may be extended if the bankruptcy court finds that need for extension is attributable to circumstances for which debtor should not justly be held accountable. 11 U.S.C.A. §§ 1188(a), 1188(b), 1188(c), 1189(b). 12 Cases that cite this headnote

[11]	**Bankruptcy**Reorganization cases
	After the onset of the global COVID-19 pandemic, Congress temporarily raised the Subchapter V debt limit from $2,725,625 to $7,500,000 in the Coronavirus Aid, Relief, and Economic Security Act (CARES Act). Pub. L. No. 116-136.

[12]	**Bankruptcy**Reorganization cases
	A Chapter 11 small business debtor is permitted to elect application of Subchapter V to an already-pending case. Fed. R. Bankr. P. 1009, 1020. 1 Case that cites this headnote

[13]	**Bankruptcy**Petition
	Because a small business debtor elects to proceed under Subchapter V of Chapter 11 by amending its petition, as opposed to converting its case from one chapter of the Bankruptcy Code to another chapter, such an election does not change the date of the order for relief. 11 U.S.C.A. § 348; Fed. R. Bankr. P. 1009, 1020. 3 Cases that cite this headnote

[14]	**Bankruptcy**Extension of time **Bankruptcy**Petition
	Under a plain reading of the Bankruptcy Code and rules, a small business debtor may not amend a Chapter 11 petition to elect Subchapter V status after expiration of the statutory plan-filing and status conference deadlines; in this situation, such deadlines may not be extended by the bankruptcy court because the need for an extension is not attributable to circumstances for which debtor should not justly be held accountable, given that debtor created the circumstances by making the decision to elect into Subchapter V after expiration of the deadlines and no circumstances beyond debtor's control caused debtor to make that decision. 11 U.S.C.A. §§ 1188(b), 1189(b). 11 Cases that cite this headnote

[15]	**Bankruptcy**Extension of time **Bankruptcy**Who May File, and Time for Filing

	Phrase "if the need for an extension is attributable to circumstances for which the debtor should not justly be held accountable," as used in the section of the Bankruptcy Code permitting the bankruptcy court to extend the Subchapter V plan-filing and status conference deadlines if the need for extension is attributable to circumstances for which the debtor should not justly be held accountable, is a clearly higher standard than the mere "for cause" standard set forth in both the Federal Rule of Bankruptcy Procedure governing extensions of time generally and the section of the Code governing extensions of a non-Subchapter V debtor's exclusive period to file a Chapter 11 plan. 11 U.S.C.A. §§ 1121(d)(1), 1188(b), 1189(b); Fed. R. Bankr. P. 9006(b). 11 Cases that cite this headnote

[16]	**Bankruptcy**Who May File, and Time for Filing **Bankruptcy**Creditors; loss of debtor's exclusive right
	In a case under Subchapter V of Chapter 11 of the Bankruptcy Code, only the debtor may file a plan; in contrast, in a traditional Chapter 11 case, the debtor initially has the exclusive right to file a plan, but that exclusive right may expire or be terminated, and it may also be extended "for cause." 11 U.S.C.A. §§ 1121, 1189(a). 3 Cases that cite this headnote

[17]	**Bankruptcy**Who May File, and Time for Filing
	If a small business debtor elects to proceed under Subchapter V of Chapter 11 of the Bankruptcy Code, it must comply with all its provisions, including the statutory timelines. 11 U.S.C.A. §§ 1188(b), 1189(b). 3 Cases that cite this headnote

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

	If a small business debtor filed a Chapter 11 petition the day after the effective date of new Subchapter V of the Bankruptcy Code, and, about a month before the COVID-19 pandemic began severely affecting commerce throughout the United States, immediately began working with the Subchapter V trustee to prepare financial projections and negotiate plan terms with creditors, but local government authorities subsequently ordered debtor's business to be shut down for a period of time to stem the spread of the coronavirus, resulting in the need for debtor to completely rework its financial projections and renegotiate with its creditors and rendering it unable to meet the Subchapter V statutory deadlines, such scenario would establish that the need for extension of the plan-filing and status conference deadlines was attributable to circumstances for which debtor should not justly be held accountable, as required for the bankruptcy court to extend the deadlines. 11 U.S.C.A. §§ 1188(b), 1189(b).

[19]	**Bankruptcy**Examiner's functions and duties
	Role of the Subchapter V trustee, who is specifically charged with the duty to facilitate the development of a consensual plan of reorganization, should include working not only with the debtor, but with creditors as well, to facilitate negotiation of a consensual plan, and so a substantial part of the Subchapter V trustee's pre-confirmation role should be to serve as a de facto mediator between the debtor and its creditors. 11 U.S.C.A. § 1183(b)(7). 1 Case that cites this headnote

[20]	**Bankruptcy**Provisions for satisfaction of claims; relation to recovery in liquidation

	Although new Subchapter V of Chapter 11 of the Bankruptcy Code permits certain administrative expense claims to be paid out over the term of a plan, as opposed to the requirement for regular Chapter 11 cases that administrative expense claims be paid in full on the effective date of a plan, this new provision does not apply to administrative rent. 11 U.S.C.A. §§ 365, 503(b), 1191(e), 1129(a)(9)(A). 1 Case that cites this headnote

Attorneys and Law Firms

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Linda Marie Leali, Ft Lauderdale, FL, for Trustee

ORDER DISMISSING SUBCHAPTER V CASE

Scott M. Grossman, Judge United States Bankruptcy Court

[1]New Subchapter V of Chapter 11 of the Bankruptcy Code – which establishes an expedited process for small business debtors to reorganize quickly, inexpensively, and efficiently – requires the debtor to file a plan within 90 days of the order for relief.[1] This deadline may be extended "if the need for the extension is attributable to circumstances for which the debtor should not be justly held accountable."[2] But what happens when a debtor first elects to proceed under Subchapter V ***337** after this deadline has already passed? That is the difficult question the Court must address in this case.

I. BACKGROUND.

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

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

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

Wells Fargo Bank, N.A. ("Wells Fargo"); and with MDG and Xtreme.[6] Seven Stars has since concluded its relationship with Rockin' Jump under a settlement agreement approved by the Court.[7] With respect to Wells Fargo, Seven Stars has agreed on terms for consensual use of cash collateral,[8] and there are not any currently pending disputes of record between Seven Stars and Wells Fargo.

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

B. The Worldwide COVID-19 Pandemic Hits.

Shortly after granting the continuance, however, everything changed. On March 13, 2020, the President declared a national emergency due to the COVID-19 pandemic.[13] And on March 22, 2020, Broward ***338** County, Florida directed the closure of "[a]ll nonessential retail and commercial business locations" due to the pandemic.[14] Businesses in Broward County – including Seven Stars' trampoline park and Xtreme Action Park – remained closed well into June 2020.[15]

Against the backdrop of the COVID-19 pandemic, Seven Stars and MDG continued to litigate whether Seven Stars could assume its lease with MDG. MDG argued that Seven Stars could not assume the lease because it terminated its franchise agreement with Rockin' Jump, thereby violating the use clause of the lease, and because Seven Stars was delinquent on post-petition rent that it had not paid for April and May when it was prohibited by law from operating. After extensive briefing and argument, on June 1, 2020, the Court granted Seven Stars' motion to assume, ruling that termination of the Rockin' Jump franchise did not prohibit assumption, and that failure to *timely* pay April and May rent, under the terms of the lease and in light of the COVID-19 pandemic, likewise did not prohibit assumption.[16] Adopting the rationale of *Pier 1 Imports*,[17] and in accordance with the requirements of Bankruptcy Code section 365, the Court did, however, require that "[a]ny accrued but unpaid post-petition rent payments shall be paid to MDG no later than the effective date of any confirmed Chapter 11 [plan] as a Chapter 11 administrative expense claim."[18] The result of the Court's ruling on the assumption motion is that Seven Stars must pay approximately $130,000 in unpaid post-petition rent to MDG on the effective date of a Chapter 11 plan.

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

[2] Due to an apparent inability to make that payment, on June 19, 2020 – over a year after its petition date, four months after the February 19, 2020 effective date of the Small Business Reorganization Act of 2019 (the "SBRA"),[19] and about three weeks after the Court ruled that it must pay MDG $130,000 on the effective date of a Chapter 11 plan – Seven Stars filed an *Amended Petition for Non-Individuals Filing for Bankruptcy*,[20] in which it elected to proceed under new Subchapter V of Chapter 11 of the Bankruptcy Code. Subchapter V, however, requires a debtor to file a plan not later than 90 days after the order for relief,[21] and requires the Court to hold a status conference not later than 60 days after the order for relief.[22] Here, the order for relief was ***339** entered on June 5, 2019.[23] Thus, upon amending its petition to elect to proceed under Subchapter V more than a year into its case, Seven Stars immediately put itself in default of the requirements of both Sections 1188(a) and 1189(b).

[3] **[4]** Further, Bankruptcy Code section 1112(b)(4)(J) provides that a debtor's failure to file a disclosure statement or to file or confirm a plan within the time fixed by the Bankruptcy Code constitutes cause for dismissal of this case.[24] Likewise, to confirm a Chapter 11 plan – even one under new Subchapter V – both the plan and the plan proponent must comply with the applicable provisions of the Bankruptcy Code.[25] Accordingly, because cause facially existed for dismissal of this case under Section 1112(b)(4)(J), on June 24, 2020, the Court issued an *Order to Show Cause Why Case Should Not Be Dismissed*[26] (the "Show Cause Order").

Both Seven Stars[27] and newly-appointed Subchapter V trustee, Linda Leali,[28] filed briefs opposing dismissal of the case, in which they argued that the Court had authority to allow Seven Stars to proceed under new Subchapter V, notwithstanding expiration of the statutory deadlines. MDG filed a brief in support of dismissal, in which it argued that Seven Stars could not use Subchapter V to subvert the Court's ruling on assumption of its lease,[29] and that extension of the expired statutory deadlines was not warranted.[30] MDG also argued that it had vested rights in this case by virtue of this Court's earlier ruling on assumption of its lease, and that retroactive application of the Subchapter V deadlines would impermissibly alter those rights.[31] The Office of the United States Trustee did not file any brief supporting or opposing dismissal, and took no position on dismissal at the hearing on the Show Cause Order.

II. ANALYSIS.

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

[5]For a small business needing to reorganize its financial affairs, a Chapter 11 bankruptcy case can be prohibitively expensive. Recognizing that small business Chapter 11 cases "continue to encounter difficulty in successfully reorganizing," Congress enacting the SBRA to "streamline the bankruptcy process by which small businesses debtors reorganize and rehabilitate their financial affairs."[32] The SBRA ***340** created a new Subchapter V of Chapter 11 of the Bankruptcy Code that permits qualifying small business debtors " 'to file bankruptcy in a timely, cost-effective manner, and hopefully allows them to remain in business' which 'not only benefits the owners, but employees, suppliers, customers, and others who rely on that business.' "[33]

[6] [7]Subchapter V by its very nature is intended to be an expedited process. It provides qualifying debtors with some powerful and cost-saving restructuring tools not otherwise available to Chapter 11 debtors. Among these benefits are:

(1) elimination of the absolute priority rule, which allows equity holders to retain their ownership interests without paying all creditors in full;[34]

(2) no mandatory appointment of a creditors committee;[35]

(3) no mandatory requirement to file a disclosure statement;[36]

(4) appointment of a Subchapter V trustee to assist in developing a consensual plan, while leaving the debtor in possession of its assets and in control of its business;[37]

(5) the exclusive right (which cannot be terminated) to file a plan;[38]

(6) the ability to modify a claim secured only by a security interest in the debtor's principal residence, if new value received in connection with granting the security interest was used primarily in connection with the debtor's business and not primarily to acquire the property;[39]

(7) the ability to confirm a plan even if all classes reject the plan;[40]

(8) the ability to pay administrative expenses over time under a plan;[41]

(9) modification of the disinterestedness requirements of Section 327(a) for a professional that holds a prepetition claim of less than $10,000;[42] and

[8] [9] [10](10) elimination of the requirement to pay quarterly U.S. Trustee fees;[43] These extraordinary powers and cost-saving provisions granted to small business debtors are certainly laudable and are both helpful and necessary in making Chapter 11 more affordable for small businesses. But "[t]he overall purpose and function of the Bankruptcy Code is to strike a balance between creditor protection and debtor relief."[44] And to balance the special new powers available to small business debtors, Congress granted creditors a very important protection: the requirement that a Subchapter V case proceed expeditiously. In furtherance of that creditor protection, Subchapter V requires the court to conduct a status conference within 60 days of the order for relief;[45] requires the debtor to file a status report ***341** 14 days before that status conference;[46] and requires the debtor to file a plan within 90 days of the order for relief.[47] As with many other deadlines in the Bankruptcy Code, these deadlines can be extended. But, for a court to grant an extension, the court must find that the "need for the extension is attributable to circumstances for which the debtor should not justly be held accountable."[48]

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

[11]The SBRA – which was enacted on August 23, 2019 – provides that "[t]his Act and the amendments made by this Act shall take effect 180 days after the date of enactment of this Act,"[49] but is silent as to whether it applies to pending cases or only to cases commenced after its February 19, 2020 effective date. Thus, almost immediately after taking effect,[50] courts across the country began wrestling with this issue,[51] along with related issues such as whether application of the SBRA to existing cases amounts to granting retroactive effect to the statute;[52] whether other parties' vested property rights are implicated by retroactive effect of the statute;[53] and whether (and under what circumstances) a court may extend Subchapter V's statutory deadlines?[54] While these are all difficult ***342** questions of first impression with respect to this new statute, the Court finds the answer to the question before it in this case in the plain text of the Bankruptcy Code and Bankruptcy Rules.

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

[12] [13]Interim Federal Rule of Bankruptcy Procedure 1020[55] provides that a debtor must "state in the petition whether the debtor is a small business debtor or a debtor as defined in § 1182(1) of the [Bankruptcy] Code[56] and, if the latter, whether the debtor elects to have Subchapter V of Chapter 11 apply."[57] Thus, under the Interim Rule, the means by which a debtor designates itself as a small business debtor and, if so, whether it elects to proceed under Subchapter V, is by so stating in its petition.[58] Here, when Seven Stars filed its petition on June 5, 2019, it did designate itself as a small business debtor. But of course, Subchapter V had not yet been enacted, and so Seven Stars could not have elected to proceed under Subchapter V at that time. Federal Rule of Bankruptcy Procedure 1009, however, provides that "[a] voluntary petition, list, schedule, or statement may be amended by the debtor as a matter of course at any time before the case is closed."[59] Thus, nothing in the text of Rule 1009 or Interim Rule 1020 prevents a small business debtor from filing an amended petition to elect to have Subchapter V apply to its case, even if it had not previously elected to proceed under Subchapter V (or even if it filed its case before Subchapter V became effective).[60]

***343** D. What Consequences Flow from the Subchapter V Election?

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

Seven Stars nevertheless argues – citing several recently-reported decisions – that the Court "has the necessary lawful power and authority to allow this case to proceed under new subchapter V."[62] Although Seven Stars did not affirmatively seek to extend the lapsed Section 1188(b) and 1189(b) deadlines, in opposing dismissal it relies on caselaw analyzing whether debtors can elect Subchapter V status after expiration of these deadlines (whether or not an extension was specifically sought).[63] To extend these deadlines, the Court must find that "the need for the extension is attributable to circumstances for which the debtor should not justly be held accountable."[64] Thus, to determine whether this case should be dismissed, the Court must determine whether Seven Stars should be granted an extension of the Section 1189(b) plan filing deadline (as well as the Section 1188 status conference deadline). If an extension is not warranted, then – as set forth in the Show Cause Order – cause exists for dismissal under Section 1112(b)(4)(J) because the debtor has failed to file a plan within the time fixed by the Bankruptcy Code. As further noted in the Show Cause Order, failure to meet these ***344** statutory deadlines would also render Seven Stars not in compliance with Sections 1129(a)(1) (a plan must comply with the applicable provisions of the Bankruptcy Code) and 1129(a)(2) (the plan proponent – here the debtor – must comply with the applicable provisions of the Bankruptcy Code),[65] and therefore unable to confirm a Chapter 11 plan.

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

While the phrase "if the need for an extension is attributable to circumstances for which the debtor should not justly be held accountable" is new to Chapter 11, that language is used elsewhere in the Bankruptcy Code. Specifically, Section 1221 of the Bankruptcy Code – which is found in Chapter 12 (applicable to cases for family farmers or family fisherman with regular annual income)[66] – uses the same language. Like Section 1189(b), Section 1221 requires a debtor to file a plan within 90 days after the order for relief, but provides that the court may extend this deadline "if the need for an extension is attributable to circumstances for which the debtor should not justly be held accountable."[67]

[15] [16]Based on a plain reading of this phrase, it is a clearly higher standard than the mere "for cause" standard set forth in both Federal Rule of Bankruptcy Procedure 9006(b) (governing extensions of time generally) and Bankruptcy Code section 1121(d)(1) (governing extensions of a non-Subchapter V debtor's exclusive period to file a Chapter 11 plan).[68] Courts interpreting this language as used in Section 1221 have held that "it effectively requires the bankruptcy court, before granting an extension request, to find that the delay necessitating the extension was caused by 'circumstances beyond the debtor's control.' "[69] Collier on Bankruptcy – a leading bankruptcy law treatise – explains the rationale for this requirement as follows:

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

In *Trepetin*,[71] a recently-reported case addressing issues similar to those presented here, the court analyzed – by reference to Section 1221 – whether a Chapter 7 debtor could convert its case to Subchapter V of Chapter 11 and extend the ***345** Section 1188(b) and 1189(b) deadlines.[72] The court also undertook a textual analysis of the words "justly" and "accountable," by reference to their dictionary definitions, determining that "justly" means "in accordance with justice, law or fairness," and that "accountable" is best defined as "responsible" or "liable to be called to account or to answer for responsibilities and conduct."[73] From these definitions, the court then concluded that the appropriate inquiry is "whether the Debtor is fairly responsible for his inability to timely submit his status report, attend the status conference, or file a plan in this Subchapter V case."[74]

This Court submits that this is a slightly different question than the inquiry posed by the statute. The statute asks if the need for an extension is due to *circumstances* beyond the debtor's control. *Trepetin*, on the other hand, asks whether *the debtor* was responsible for his inability to meet these deadlines. From that question, *Trepetin* then concludes that the debtor was not responsible for his inability to meet these deadlines, because his previously-filed Chapter 7 case and the conversion process and its requirements necessarily left him beyond the new deadlines.[75] This Court disagrees with that conclusion as well. The circumstances in *Trepetin* were entirely within the debtor's control: he filed for Chapter 7 and he elected to convert to Chapter 11 and proceed under Subchapter V. No external factors – beyond his control – contributed to his inability to comply with these deadlines. That new Subchapter V became available after he filed his Chapter 7 case is not – in this Court's view – such a circumstance beyond the debtor's control that would justify an extension.

[17]For similar reasons, this Court also disagrees with *Ventura*[76] and *Twin Pines*.[77] In both cases, courts overruled the U.S. Trustee's objections to debtors proceeding under Subchapter V after expiration of these statutory deadlines, and held that the debtors were not required to comply with deadlines that expired before they could have elected to proceed under Subchapter V.[78] Although the U.S. Trustee apparently couched its concerns in *Ventura* in terms of "practicality and scheduling issues,"[79] this Court views the U.S. Trustee's arguments in *Ventura* (and *Twin Pines*) as substantive, textual arguments. Congress purposefully set a short deadline for a debtor to file a plan under Subchapter V, and set a very high standard for an extension of that deadline. To excuse a debtor's compliance with these deadlines because they did not previously exist is to effectively pick and choose which provisions of Subchapter V should apply to a debtor's case. That could not be what Congress intended; if a debtor elects to proceed under Subchapter V, it must comply with *all* its provisions, including the statutory timelines.

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

[18] [19]A comparison of *Trepetin*, *Ventura*, and *Twin Pines*, on the one hand, with a timely hypothetical, on the other hand, illustrates this point. Suppose a debtor filed a Chapter 11 case under Subchapter V on February 20, 2020 – the day after its effective date and about a month before the COVID-19 pandemic began severely affecting commerce throughout the United States. Consistent with the purpose of Subchapter V – "to streamline the process by which small business debtors reorganize and rehabilitate their financial affairs"[80] – the debtor is prepared to meet the statutory deadlines and immediately begins working with the Subchapter V trustee[81] to prepare financial projections and negotiate plan terms with creditors. But then, about a month into its case, local government authorities order the debtor's business to be shut down for a period of time to stem the spread of the virus. The effect of this governmental order causes the debtor to have to completely rework its financial projections and renegotiate with its creditors, rendering it unable to meet the Subchapter V statutory deadlines. Such a scenario – in this Court's view – *would* establish that the need for an extension is attributable to circumstances for which the debtor should not justly be held accountable.

[20]And while the debtor's case here – and its difficulties in seeking to reorganize – were clearly impacted by COVID-19, this case is distinguishable from the hypothetical scenario outlined above. Here, while certainly the debtor is not responsible for COVID-19, and its present difficulties *in seeking to reorganize* may be fairly attributable to circumstances for which it should not justly be held accountable, its inability *to meet the statutory deadlines* in this case is *not* due to COVID-19 or the fact that Subchapter V first became available after Seven Stars commenced this case. Seven Stars' inability to meet the statutory deadlines is due solely to Seven Stars' election to amend its petition to proceed under Subchapter V after expiration of those deadlines. Does this create an unfair distinction? Perhaps it does. But does it dictate the right result under the statute? This Court thinks it does.[82]

***347 III. CONCLUSION.**

Subchapter V is intended to be an expedited process. The debtor has the opportunity to use new, powerful tools to reorganize and save its business; but it must do so quickly. Thus, the notion that Congress intended to permit a debtor to first try reorganizing through a traditional Chapter 11 case or a non-Subchapter V small business case (or even that a debtor might first seek to liquidate under Chapter 7), before giving it another try under Subchapter V after expiration of the statutory deadlines, is plainly inconsistent with the statute. This Court therefore disagrees with *Trepetin*,[83] *Ventura*,[84] *Twin Pines*,[85] and the other recently-reported cases that would liberally read Sections 1188(b) and 1189(b) to permit extensions of these deadlines for a debtor who has elected to proceed under Subchapter V after these deadlines had already passed.

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

Accordingly, it is

***348 ORDERED** that:

1. This case is **DISMISSED.**

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

All Citations

618 B.R. 333, 69 Bankr.Ct.Dec. 47

Footnotes	
1	11 U.S.C. § 1189(b).
2	*Id.*
3	Although Seven Stars is a party to a lease agreement with MDG, the record in this case does not reveal any contractual relationship between Xtreme and Seven Stars. *See* ECF No. 28.
4	ECF No. 1.
5	*Seven Stars on the Hudson Corp. v. MDG Powerline Holdings, LLC and XBK Management, LLC*, Adv. No. 19-01230-SMG.
6	ECF No. 186 at 1-2. Aside from Rockin' Jump, Wells Fargo, and MDG, Seven Stars has relatively little other debt, with only a few scheduled or filed general unsecured claims.
7	ECF Nos. 152, 161.
8	ECF No. 118.
9	ECF No. 80.
10	*See, e.g.,* ECF No. 140.
11	*Id.*
12	ECF No. 143.
13	*See, e.g., In re Pier 1 Imports, Inc.*, 615 B.R. 196, 198, n.2 (Bankr. E.D. Va. 2020); *In re Gateway Radiology Consultants, P.A.*, No. 8:19-BK-04971-MGW, 616 B.R. 833, 837 n.2 (Bankr. M.D. Fla. June 8, 2020).
14	Broward County Administrator's Emergency Order 20-01 (Mar. 22, 2020).
15	*See* Broward County Administrator's Emergency Order 20-15, § 1(B) (June 5, 2020) (permitting reopening of indoor amusement facilities subject to a 50% maximum capacity, effective as of June 15, 2020).

16	ECF No. 172.
17	615 B.R. at 202.
18	ECF No. 172.
19	Small Business Reorganization Act of 2019, Pub. L. No. 116-54, Aug. 23, 2019, 133 Stat. 1079, 1087 ("This Act and the amendments made by this Act shall take effect 180 days after the date of enactment of this Act.").
20	ECF No. 178.
21	11 U.S.C. § 1189(b).
22	11 U.S.C. § 1188(a).
23	The commencement of a voluntary case constitutes an order for relief. 11 U.S.C. § 301(b).
24	11 U.S.C. § 1112(b)(4)(J).
25	11 U.S.C. §§ 1129(a)(1), (2); 1191(a).
26	ECF No. 179.
27	ECF No. 186. Due to rapidly-developing case law with respect to these new statutory provisions, Seven Stars also filed two supplements alerting the Court to new additional authority supporting its position. *See* ECF Nos. 187, 190.
28	ECF No. 185.
29	ECF No. 189.
30	*Id.* at 3-4. While not specifically accusing Seven Stars of lacking good faith, MDG suggests that Seven Stars' election to proceed under Subchapter V is an improper request to reconsider or undo this Court's earlier ruling on assumption. Because Subchapter V is a new statute with rapidly-developing caselaw – much of which facially supports Seven Stars' position – the Court does not find Seven Stars' attempt to proceed under Subchapter V as lacking good faith.
31	*Id.* at 6-7.

32	H.R. Rep. No. 116-171, at 1 (2019), *available at* https://www.congress.gov/congressionalreport/116th-congress/house-report/171/1.
33	*Id.* (quoting statement of Rep. Ben Cline (R-VA), the bill's sponsor, at a June 25, 2019 hearing held by the Subcommittee on Antitrust, Commercial, and Administrative Law).
34	11 U.S.C. §§ 1181(a), 1191(b).
35	11 U.S.C. § 1181(b).
36	*Id.*
37	11 U.S.C. § 1183(b)(7).
38	11 U.S.C. § 1189(a).
39	11 U.S.C. § 1190(3).
40	11 U.S.C. § 1191(b).
41	11 U.S.C. § 1191(e).
42	11 U.S.C. § 1195.
43	28 U.S.C. § 1930(a)(6)(A).
44	*In re Travel 2000, Inc.*, 264 B.R. 444, 448 (Bankr. W.D. Mich. 2001).
45	11 U.S.C. § 1188(a).
46	11 U.S.C. § 1188(c).
47	11 U.S.C. § 1189(b).
48	*Id.*; *see also* 11 U.S.C. § 1188(b).
49	*See* note 19, *supra*.

50	The onset of the global COVID-19 pandemic – which started to spread widely throughout the United States about a month later – then created even more urgency to address how small businesses might use these new powerful tools available under Subchapter V to reorganize quickly, inexpensively, and efficiently. Indeed, shortly after the onset of the pandemic, Congress temporarily raised the Subchapter V debt limit from $2,725,625 to $7,500,000. Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, March 27, 2020, 134 Stat 281, 310-311 (the "CARES Act").
51	*See, e.g., In re Ventura*, 615 B.R. 1 (Bankr. E.D.N.Y. 2020) (holding a debtor may amend her petition in a pending case to designate herself as a small business debtor and proceed under Subchapter V); *In re Progressive Solutions, Inc.*, 615 B.R. 894, 900-01 (Bankr. S.D. Cal. 2020) (finding no legal reason why a debtor with a pending Chapter 11 case could not amend its petition to proceed under new Subchapter V); *In re Twin Pines, LLC*, Case No. 19-10295-j11, 2020 Bankr. LEXIS 1217, *6 (Bankr. D. N.M. Apr. 30, 2020) (permitting debtor to elect Subchapter V status 387 days after petition date); *In re Moore Properties of Person County, LLC*, Case No. 20-80081, 2020 WL 995544, at *7 n.18 (Bankr. M.D. N.C. Feb. 28, 2020) (overruling objection to debtor's small business debtor designation made nine days after petition date, but observing that if "a debtor amends its election at a point in the case in which it creates cause to dismiss or convert the case under § 1112(b)(4)(J) or otherwise, a debtor's case will be in peril.").
52	*See, e.g., Ventura*, 615 B.R. at 14-18; *Progressive Solutions*, 615 B.R. at 898-99; *In re Body Transit, Inc.*, 613 B.R. 400, 406-08 (Bankr. E.D. Pa. 2020); *In re Double H Transportation LLC*, 614 B.R. 553, 554 (Bankr. W.D. Tex. 2020); *Moore Properties*, 2020 WL 995544, at *2-5.
53	*See, e.g., Ventura*, 615 B.R. at 15-18; *Progressive Solutions*, 615 B.R. at 899-900; *Body Transit*, 613 B.R. at 405-408; *Moore Properties*, 2020 WL 995544, at *2-5. While issues of retroactive application to pending cases and related due process implications are certainly important, they will, over time, be less important to SBRA jurisprudence as we get further away from the SBRA's effective date. But the issue addressed by the Court here – the effect of amending a petition to elect Subchapter V status after expiration of the Section 1188 and 1189 statutory deadlines – could arise in the future regardless of whether a case was filed before or after the SBRA effective date.
54	*See, e.g., Ventura*, 615 B.R. at 13-14; *Twin Pines*, 2020 Bankr. LEXIS 1217, *6; *In re Trepetin*, Case No. 20-11718-MMH, 617 B.R. 841, 845–51 (Bankr. D. Md. July 7, 2020).
55	Interim Rule 1020 was initially adopted in this District by Administrative Order 2020-02, dated February 18, 2020. After enactment of the CARES Act – which necessitated amendments to this interim rule – this Court adopted the current amended version of Interim Rule 1020 by Administrative Order 2020-08, dated April 21, 2020.
56	Section 1182(1) was added to the Bankruptcy Code as part of the CARES Act, and provided a new definition of "debtor" (which temporarily raised the debt limit to $7,500,000) for purposes of determining eligibility to proceed under Subchapter V. *See* note 50, *supra*.
57	Interim Fed. R. Bankr. P. 1020(a). Interim Rule 1020(a) then goes on to provide that "[t]he status of the case as a small business case or a case under Subchapter V of chapter 11 shall be in accordance with the debtor's statement under this subdivision, unless and until the court enters an order finding that the debtor's statement is incorrect." Interim Rule 1020(b) provides that "[t]he United States trustee or a party in interest may file an objection to the debtor's statement under subdivision (a) no later than 30 days after the conclusion of the meeting of creditors held under § 341(a) of the Code, or within 30 days after any amendment to the statement, whichever is later." Here, upon Seven Stars amending its petition to elect to proceed under Subchapter V, a new Section 341 meeting was scheduled for July 23, 2020. (ECF No. 183.) Thus, although the issue of whether Seven Stars' case should be dismissed is now properly before the Court, technically the United States Trustee or any party in interest would have had until August 24, 2020 to object to Seven Stars' statement in its amended petition that it elects to proceed under Subchapter V.

58	Because a debtor elects to proceed under Subchapter V by amending its petition – as opposed to converting its case from one chapter of the Bankruptcy Code to another chapter – such an election does not change the date of the order for relief. *See generally* 11 U.S.C. § 348; *see also Trepetin*, 617 B.R. at 845–46.
59	Fed. R. Bankr. P. 1009.
60	*See Ventura*, 615 B.R. at 13-15; *Progressive Solutions*, 615 B.R. at 900; *Body Transit*, 613 B.R. at 405-407; *Moore Properties*, 2020 WL 995544, at *7; *Twin Pines*, 2020 Bankr. LEXIS 1217, at *6; *Trepetin*, 617 B.R. at 843–45 (permitting debtor who originally filed a Chapter 7 case to convert to a Subchapter V Chapter 11 case); *In re Blanchard*, Case No. 12440, 2020 WL 4032411, at *3 (Bankr. E.D. La. July 16, 2020) (overruling U.S. Trustee's objection to debtors amending their petition to elect Subchapter V status after U.S. Trustee had filed a motion to convert their case to Chapter 7); *In re Bonert*, Case No. 2:19-bk-20836-ER, 2020 WL 3635869, at *2-3 (Bankr. C.D. Cal. June 3, 2020) (overruling objection of creditors committee to debtors amending their petition to elect to proceed under Subchapter V); *In re Bello*, 613 B.R. at 895-96 (Bankr. E.D. Mich. 2020) (permitting debtor who had originally filed a Chapter 13 case, then converted to Chapter 11, to subsequently amend his petition to elect to proceed under Subchapter V). It may also very well be that MDG's vested rights in this case (in the form of the Court's earlier ruling on the terms on which Seven Stars could assume its lease) would render application of Subchapter V as offensive to "elementary considerations of fairness" here. *Moore Properties*, 2020 WL 995544, at *5 (quoting *Landgraf v. USI Film Products*, 511 U.S. 244, 265, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994)). But, because – as discussed further below – the Court resolves this matter based on a plain reading of the statutes and rules, the Court need not address the questions of retroactivity and vested rights examined in *Ventura*, 615 B.R. at 15-18, *Progressive Solutions*, 615 B.R. at 899-900, and *Moore Properties*, 2020 WL 995544, at *2-5, which necessarily require application of more amorphous concepts of "elementary considerations of fairness."
61	11 U.S.C. §§ 1188(b), 1189(b).
62	ECF No. 186 at 1.
63	The newly-appointed Subchapter V trustee similarly argued that the Court can extend the Section 1188(b) and 1189(b) deadlines.
64	11 U.S.C. § 1189(b); *see also* 11 U.S.C. § 1188(b), which contains virtually identical text, except it uses the word "an" before "extension" instead of "the."
65	11 U.S.C. §§ 1129(a)(1), (2); 1191(a).
66	11 U.S.C. § 109(f).
67	11 U.S.C. § 1221.
68	In a Subchapter V case, *only* the debtor may file a plan. 11 U.S.C. § 1189(a). In a traditional Chapter 11 case, the debtor initially has the exclusive right to file a plan, but that exclusive right may expire or be terminated; it may also be extended "for cause." *See* 11 U.S.C. § 1121.

69	*Davis v. U.S. Bank, N.A. (In re Davis)*, BAP No. CC–16–1390–KuLTa, 2017 WL 3298414, at *3 (BAP 9th Cir. Aug. 2, 2017 (unpublished) (quoting *First Sec. Bank & Trust Co. v. Vegt,* 511 B.R. 567, 585 (N.D. Iowa 2014))).
70	8 Collier on Bankruptcy ¶ 1221.01[2] (16th ed. 2020).
71	617 B.R. 841.
72	*Id.* at 847–50.
73	*Id.* at 849–50 (quoting *Justly*, OXFORD ENGLISH DICTIONARY ONLINE, oed.com/view/Entry/102238?redirectedFrom=justly#eid (last visited July 7, 2020); *Accountable*, OXFORD ENGLISH DICTIONARY ONLINE, oed.com/view/Entry/1198?redirectedFrom=accountable#eid (last visited July 7, 2020)).
74	*Id.*
75	*Id.*
76	615 B.R. 1.
77	2020 Bankr. LEXIS 1217.
78	*Ventura*, 615 B.R. at 15; *Twin Pines*, 2020 Bankr. LEXIS 1217 at *7, 11.
79	*Ventura*, 615 B.R. at 15.
80	*See* note 32, *supra*.
81	A Subchapter V trustee is specifically charged with the duty to "facilitate the development of a consensual plan of reorganization." 11 U.S.C. § 1183(b)(7). This role should include working not only with the debtor, but with creditors as well, to facilitate negotiation of a consensual plan. A substantial part of the Subchapter V trustee's pre-confirmation role, therefore, should be to serve as a *de facto* mediator between the debtor and its creditors.

82	Because the Court is basing its ruling on a plain reading of the applicable statutes and rules, the Court need not address MDG's vested rights and retroactivity arguments. *See* note 60, *supra.* The Court does observe, however, that in granting Seven Stars some relief (as permitted, in this Court's view, under its lease) due to COVID-19 from the requirement that it timely pay rent while being legally prohibited from using its leased premises, and ordering that the deferred rent be paid in full as an administrative expense claim on the effective date of a Chapter 11 plan, the Court was ruling consistent with the mandate of 11 U.S.C. § 365 (and the Court's reading of the lease) that administrative rent must be paid in full as a condition of assumption. The Court merely deferred the deadline to comply with this requirement due to COVID-19 and applicable provisions of the lease (including the *force majeure* clause, which did not excuse payment during a *force majeure* event, but which also did not specifically require *timely* payment during such event). Although new Bankruptcy Code section 1191(e) does permit payment of administrative expense claims under Section 503(b) through a plan (as opposed to the requirement for regular Chapter 11 cases that administrative expense claims be paid in full on the effective date of a plan, 11 U.S.C. § 1129(a)(9)(A)), the unpaid administrative rent here is not the type of administrative expense claim that would qualify for this treatment under Section 1191(e). Section 1191(e) specifically refers to claims of a kind specified in paragraphs (2) or (3) of Section 507(a). Section 507(a)(2) then refers to administrative expenses allowed under Section 503(b) (and Section 507(a)(3) refers to claims arising under Section 502(f) in involuntary cases, which is not applicable here). Nowhere in Section 503(b), however, is any mention of post-petition rent obligations. That is because a debtor's obligation to pay post-petition rent is governed solely by Section 365, not by Section 503(b). As such, even though new Section 1191(e) permits certain administrative expense claims to be paid out over the term of a plan, this provision undoubtedly does not apply to administrative rent. And, but for COVID-19 and the lease provision that does not specifically require timely payment of rent during a *force majeure* event, Section 365(d)(3) requires that post-petition rent be timely paid, with the sole exception that the deadline to pay rent due within the first 60 days of a case may be extended for cause, but not beyond such 60-day period. Accordingly, even if Seven Stars was permitted to proceed under Subchapter V, it could not confirm a plan that did not provide for payment in full of MDG's administrative rent claim on the effective date of the plan.
83	617 B.R. 841.
84	615 B.R. 1.
85	2020 Bankr. LEXIS 1217.

End of Document	

2021 WL 3668037
Only the Westlaw citation is currently available.
United States Bankruptcy Court, M.D. Florida,
Orlando Division.

IN RE: VERTICAL MAC CONSTRUCTION, LLC, Debtor.

Case No. 6:21-bk-01520-LVV
|
Signed July 23, 2021

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ORDER OVERRULING UNITED STATES TRUSTEE'S OBJECTION TO DEBTOR'S SUBCHAPTER V ELECTION

Lori V. Vaughan, United States Bankruptcy Judge

***1** THIS CASE came before the Court on June 28, 2021, on the Objection to Debtor's Subchapter V Election (Doc. No. 51) ("Objection") filed by the United States Trustee ("UST"). The UST contends that Vertical Mac Construction, LLC (the "Debtor") is not "engaged in commercial or business activities" and therefore not eligible to be a debtor under Subchapter V of Chapter 11. The issue before the Court is whether a debtor that ceased operating its business prepetition may still be eligible under Subchapter V. Having considered the undisputed facts and argument of counsel, the Court overrules the Objection. The Debtor is engaged in commercial or business activities as required under 11 U.S.C. § 1182 and may proceed with this Subchapter V Chapter 11 case.

Factual Background

The Debtor, a Florida limited liability company formed in 2007, is a contractor that specialized in stucco installations for residential homes.[1] In 2017, residential homeowners started alleging construction defect claims against the Debtor and others for improper stucco installation ("Construction Claims").[2] The Debtor's liability insurance covered the defense, however, as claims against the Debtor continued to increase, the Debtor could not renew its insurance or obtain replacement coverage.[3] As a result, the Debtor ceased operations in late October 2020.[4]

On April 6, 2021 (the "Petition Date"), the Debtor filed this Chapter 11 case electing to proceed under Subchapter V.[5] The Debtor sought bankruptcy protection to liquidate its assets and disburse the sale proceeds to creditors.[6] Debtor's bankruptcy Schedule A/B disclosed assets valued at approximately $300,000, consisting of bank accounts valued at approximately $13,000, accounts receivable with a face value of $200,000, vehicles and equipment valued at approximately $75,000, and a $20,000 stockholder receivable.[7] Debtor's bankruptcy Schedule E/F disclosed unsecured claims of about $800,000 and over

200 contingent, unliquidated and disputed Construction Claims.[8] Shortly after the Petition Date, the Debtor sought Court approval to sell assets free and clear of liens under 11 U.S.C. § 363, subject to higher and better offers,[9] which the Court granted after sufficient notice and hearing.[10] Prior to the Court's approval of the sale, the UST filed the Objection to Debtor's Subchapter V Election and the Debtor responded.[11]

Debtor's Subchapter V Eligibility Under § 1182

The Small Business Reorganization Act of 2019 ("SBRA") added Subchapter V to Chapter 11 of the Bankruptcy Code, which provides small business debtors a new streamlined process to reorganize outside of the more costly traditional Chapter 11. Debtors electing to proceed under Subchapter V must qualify as:

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

***2** 11 U.S.C. § 1182(1)(A) (emphasis added). If a party challenges the debtor's Subchapter V election, the debtor has the burden of proving eligibility. *In re Blue*, Case No. 21-80059, 2021 WL 1964085, *4 (Bankr. M.D. N.C. May 7, 2021); *In re Offer Space*, Case No. 20-27480, 2021 WL 1582625, *2 (Bankr. D. Utah Apr. 22, 2021); *In re Ikalowych*, Case No. 20-17547 TMB, 2021 WL 1433241, *7 (Bankr. D. Colo. Apr. 15, 2021). Here, the limited issue is whether the Debtor engaged in "commercial or business activities" as required under § 1182(1)(A).

The UST contends the Debtor is not eligible under Subchapter V because it no longer operated a business on the Petition Date. To support its Objection, the UST argues the Debtor ceased operations in October 2020, had not actively collected account receivables or pursued any lawsuits against third parties, had no intent to resume operations and had planned to sell substantially all its assets. In sum, the UST argues the Debtor is merely using Subchapter V to liquidate assets and not reorganize a business.

The Debtor responds that § 1182(1)(A) only requires the Debtor to be engaged in commercial or business "activities" and not operations. Although the Debtor no longer performs stucco installation services, the Debtor argues it still maintains a bank account, has accounts receivable, works with insurance adjusters and insurance defense counsel to resolve the Construction Claims, and has been preparing for the sale of its assets. The Debtor contends these activities which occurred both prior to and after the Petition Date satisfy the inclusive "commercial or business activities" requirement of § 1182(1)(A) and render the Debtor eligible to proceed under Subchapter V. The Debtor further argues that "commercial or business activities" under § 1182(1)(A) need not be as of the Petition Date.

The Bankruptcy Code does not define the terms "engaged" or "commercial or business activities." The Court looks first to the plain language of the statute to determine the meaning of "engaged in commercial or business activities" as contemplated under § 1182(1)(A). *Blue*, 2021 WL 1964085 at *5; *Offer Space*, 2021 WL 1582625 at *3; *Ellingsworth Residential Cmty. Ass'n*, 619 B.R. 519, 521 (Bankr. M.D. Fla. 2020). A statute's undefined terms should be given their "ordinary, contemporary, common meaning" *Offer Space*, 2021 WL 1582625 at *3 (quoting *In re Morreale*, 959 F.3d 1002, 1007 (10th Cir. 2020)), with courts presuming the legislature "says in a statute what it means and means in a statute what it says there." *Ellingsworth*, 619 B.R. at 521 (quoting *Connecticut National Bank v. Germain*, 503 U.S. 249, 253-54 (1992)). And if the statute's plain language is unambiguous, the court's inquiry is then complete. *Id.* The Court holds that the statute's language is unambiguous.

The Court first takes up the term "engaged." The Debtor argues that it encompasses activities prepetition and does not require commercial or business activities on the Petition Date. Engaged means "involved in activity: occupied, busy." *Engaged*, Merriam-Webster.com Dictionary (www.merriam-webster.com/dictionary/engaged) (last updated July 8, 2021). Engaged is an active term, referring to the present and not the past. Had the drafters intended to refer to past activities, they would have written "was engaged" or "had engaged." This Court agrees with *Port Arthur Steam Energy* and other cases which hold "engaged" in commercial or business activities means the debtor actively had commercial or business activities on the petition date. *In re Port Arthur Steam Energy, L.P.* Case No. 21-60034, 2021 WL 2777993, *2 (Bankr. S.D. Tex. July 1, 2021) (citing *Blue*, 2021 WL 1964085 at *6; *Offer Space*, 2021 WL 1582625 at *3; *In re Johnson*, Case No. 19-42063, 2021 WL 825156, at *6 (Bankr. N.D. Tex. Mar. 1, 2021)). The Court now considers whether the Debtor was engaged in "commercial or business activities" as of the Petition Date.

***3** The terms that make up "commercial or business activities" likewise have long-standing common meanings. *Port Arthur Steam Energy,* 2021 WL 2777993, at *2. The term "commercial" is commonly understood to involve commerce. It includes

"occupied with or engaged in commerce or work intended for commerce," "of or relating to commerce," and "viewed with regard to profit." *Commercial*, Merriam-Webster.com Dictionary (www.merriam-webster.com/dictionary/commercial) (last updated July 8, 2021). Commerce is defined as "the exchange or buying and selling of commodities on a large scale involving transportation from place to place." *Commerce*, Merriam-Webster.com Dictionary (www.merriam-webster.com/dictionary/commerce) (last updated July 8, 2021).

The term "business" has a similar meaning. Business is defined as "a usually commercial or mercantile activity engaged in as a means of livelihood," or "dealings or transactions especially of an economic nature." *Business*, Merriam-Webster.com Dictionary (www.merriam-webster.com/dictionary/business) (last updated July 11, 2021).

There is no dispute that the Debtor at one point, prepetition, was engaged in commercial or business activities. The UST agrees this was true when the Debtor operated its construction business. But when the business stopped operating, this activity ceased, according to the UST. The crux of the dispute then focuses on the word "activities."

Activity is defined as "the quality or state of being active: behavior or actions of a particular kind." *Activity*, Merriam-Webster.com Dictionary (www.merriam-webster.com/dictionary/activity) (last updated July 1, 2021). The clue is embedded in the word itself—an act or actions. Activities is understood then to reference one or more acts. Taken together, the phrase is a broad one intending to encompass any act of a business or commercial nature. Indeed, other courts have concluded the plain meaning of engaged in "commercial or business activities" is broad with a very inclusive range of commercial or business activity. *Ellingsworth*, 619 B.R at 521. *See also Offer Space*, 2021 WL 1582625 at *4; *In re Ikalowych*, 2021 WL 1433241 at *14. The question then is was the debtor engaged in acts of a business or commercial nature.

On the Petition Date, the Debtor's business was not operating. Still, there is no dispute that the Debtor maintained bank accounts, was working with insurance adjusters and defense counsel to resolve the Construction Claims and was engaged in efforts to sell its assets, which resulted in a sale of assets during the bankruptcy.[12] These are all acts or actions. These acts were commercial or business in nature. They were economic in nature and the Debtor engaged in these acts with a view toward profit, or at least minimizing loss. Accordingly, these acts qualify as "commercial or business activities."

The Court rejects the UST's argument that the Debtor must have business operations to qualify as a debtor under § 1182(1)(A). The terms "activities" and "operations" are not interchangeable. *See Offer Space*, 2021 WL 1582625 at *4; *Port Arthur Steam Energy,* 2021 WL 2777993 at *4. "Operations" insinuates a fully functioning business, but "activities" encompasses acts that are business or commercial in nature but fall short of an actual operating business. This case resembles the facts in *Offer Space*. Even though the debtor no longer operated as it once had, by maintaining bank accounts, having accounts receivable, analyzing claims and winding down its business, the court in *Offer Space* held the debtor was engaged in commercial or business activities and could proceed under Subchapter V. *Offer Space*, 2021 WL 1582625 at *4.

***4** For the reasons stated above, the Court finds the Debtor engaged in commercial or business activities as required under § 1182(1)(A) on the Petition Date by maintaining bank accounts, working with insurance adjusters and insurance defense counsel to resolve the Construction Claims and preparing for the sale of its assets. The Court further finds that the Debtor has met its burden and is eligible to be a debtor under Subchapter V Chapter 11. Accordingly, it is,

ORDERED:

1. The Objection (Doc. No. 51) is **OVERRULED**.

2. The Debtor is eligible to proceed in this Subchapter V Chapter 11 case.

ORDERED.

All Citations

Not Reported in B.R. Rptr., 2021 WL 3668037

Footnotes	
1	Doc. No. 12.

2	*Id.*
3	*Id.*
4	Doc. No. 51, ¶ 3; Doc. No. 61, ¶ 4.
5	Doc. No. 1.
6	Doc. No. 12.
7	Doc. No. 25, Schedule A/B.
8	Doc. No. 25, Schedule E/F.
9	Doc. No. 17.
10	Doc. No. 79.
11	The Objection is Doc. No. 51. Debtor's response is Doc. No. 61.
12	At the hearing, the parties disputed whether the Debtor was actively collecting its accounts receivable on the Petition Date. The Court did not take evidence of this issue and its determination is not necessary for the Court's ruling.

End of Document	

655 B.R. 403
United States Bankruptcy Court, S.D. New York.

IN RE: ZHANG MEDICAL P.C. d/b/a New Hope Fertility Clinic, Debtor.

Case No. 23-10678 (PB)
|
Signed November 30, 2023

Synopsis
Background: Debtor's landlord filed objection to designation of debtor, which operated a fertility clinic in Manhattan with an international clientele, as a small business debtor under **subchapter** V of Chapter 11 of the Bankruptcy Code.

Holdings: The Bankruptcy Court, Philip Bentley, J., held that:

[1] debtor's noncontingent liquidated **debts** as of the petition date exceeded the $7.5 million **debt limit** for **subchapter** V debtors set forth in the Bankruptcy Code, and

[2] a debtor's future payment obligations under its unexpired leases and executory contracts should rarely, if ever, be counted toward the **subchapter** V **debt limit**.

Objection sustained.

West Headnotes (22)

[1]	**Bankruptcy**In general; nature and purpose
	Congress enacted the Small Business Reorganization Act (SBRA), which, in turn, created a new **subchapter**, **subchapter** V, within Chapter 11 of the Bankruptcy Code, in order to help small businesses navigate bankruptcy more effectively. 11 U.S.C.A. §§ 1181-1195.

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

	Subchapter V of Chapter 11 simplifies and streamlines the reorganization process for small business in a host of ways designed to reduce the cost and length of Chapter 11 cases and to increase the prospects for a successful reorganization. 11 U.S.C.A. §§ 1181-1195.

[3]	**Bankruptcy**Preservation of priority **Bankruptcy**Unsecured creditors and equity holders, protection of
	Subchapter V of Chapter 11 makes it easier for a debtor's owners to retain ownership of the company, by eliminating the absolute priority rule in cramdown cases and, in its place, requiring the debtor to pay off its secured **debt** and to pay its "disposable income" to unsecured creditors for three to five years. 11 U.S.C.A. § 1191.

[4]	**Bankruptcy**Reorganization cases
	To be eligible for **subchapter** V of Chapter 11, the debtor must have "noncontingent liquidated" **debts** as of the petition date that do not exceed $7.5 million. 11 U.S.C.A. § 1182(1)(A).

[5]	**Bankruptcy**Reorganization cases **Bankruptcy**Amount of indebtedness
	Eligibility for Chapter 13, like **subchapter** V of Chapter 11, is subject to a **debt** cap. 11 U.S.C.A. §§ 109(e), 1182(1)(A).

[6]	**Bankruptcy**Reorganization cases

	Term "noncontingent," as used in the section of the Bankruptcy Code providing that, to be eligible for **subchapter** V of Chapter 11, the debtor must have "noncontingent liquidated" **debts** as of the petition date that do not exceed $7.5 million, means that all of the events giving rise to liability for the **debt** occurred prior to the debtor's filing for bankruptcy, in contrast to a "contingent" **debt**, which does not become an obligation until the occurrence of a future event. 11 U.S.C.A. § 1182(1)(A).

[7]	**Bankruptcy**Reorganization cases
	Term "liquidated," as used in the section of the Bankruptcy Code providing that, to be eligible for **subchapter** V of Chapter 11, the debtor must have "noncontingent liquidated" **debts** as of the petition date that do not exceed $7.5 million, means that amount of the **debt** is easily ascertainable; in contrast, if value of claim depends on future exercise of discretion, not restricted by specific criteria, claim is "unliquidated." 11 U.S.C.A. § 1182(1)(A).

[8]	**Bankruptcy**Reorganization cases
	In assessing a debtor's eligibility for **subchapter** V of Chapter 11, bankruptcy court may look both to debtor's schedules and to creditors' proofs of claim in determining debtor's total noncontingent liquidated **debt**. 11 U.S.C.A. § 1182(1)(A).

[9]	**Bankruptcy**Effect of proof of claim
	Proofs of claim are prima facie valid. Fed. R. Bankr. P. 3001(f).

[10]	**Bankruptcy**Reorganization cases
	Because debtor bears ultimate burden of proving its eligibility for **subchapter** V of Chapter 11, proofs of claim that debtor does not challenge may be deemed valid for **subchapter** V eligibility purposes. 11 U.S.C.A. § 1182(1)(A); Fed. R. Bankr. P. 3001(f).

[11]	**Bankruptcy**Reorganization cases
	Noncontingent liquidated **debts** scheduled by debtor, which operated a Manhattan fertility clinic with a large international clientele, or reflected in proofs of claim as of petition date substantially exceeded statutory $7.5 million **debt limit** for **subchapter** V debtors; although debtor scheduled $5,797,128 in noncontingent liquidated **debts**, 27 scheduled creditors asserted proofs of claims in amounts larger than scheduled amounts, if those higher values were counted, resulting total would be $10,468,441 in noncontingent liquidated **debts**, debtor challenged only one claim, namely, portion of landlord's claim triggered by filing of mechanic's lien, if challenged sum of $1,338,757 were deducted from $10,468,441 total, resulting amount of noncontingent liquidated **debt**, $9,129,684, would exceed **debt limit**, and Bankruptcy Court's review of landlord's claim confirmed that four of its five components, that is, all but portion challenged by debtor, should be counted toward **debt limit**. 11 U.S.C.A. § 1182(1)(A).

[12]	**Bankruptcy**Reorganization cases

	Landlord's claim for unpaid rent was properly counted in determining whether noncontingent liquidated **debts** scheduled by debtor or reflected in proofs of claim as of the petition date exceeded the statutory $7.5 million **debt limit** for **subchapter** V Chapter 11 debtors; claim was "noncontingent," since it was triggered by prepetition events, and it was "liquidated," since amount of rent was specified in parties' lease and the unpaid amount was easily **calculable**. 11 U.S.C.A. § 1182(1)(A).

[13]	**Bankruptcy**Reorganization cases
	Landlord's "rent credit clawback" claim was properly counted in determining whether noncontingent liquidated **debts** scheduled by debtor or reflected in proofs of claim as of the petition date exceeded the statutory $7.5 million **debt limit** for **subchapter** V Chapter 11 debtors; claim, which arose from amendment to parties' lease abating debtor's obligation to pay certain rent if debtor committed no monetary default, which it later did, was "noncontingent" because it was based entirely on prepetition events, and it was "liquidated" because it was easily **calculable** under the lease. 11 U.S.C.A. § 1182(1)(A).

[14]	**Bankruptcy**Reorganization cases
	Landlord's claim attributable to debtor's failure to replenish security deposit was properly counted in determining whether noncontingent liquidated **debts** scheduled by debtor or reflected in proofs of claim as of the petition date exceeded the statutory $7.5 million **debt limit** for **subchapter** V Chapter 11 debtors; claim was "noncontingent" because event triggering debtor's duty to replenish deposit, namely, landlord's application of deposit to rent arrearages, occurred prepetition, and claim was "liquidated" because amount of security deposit was provided for in the lease. 11 U.S.C.A. § 1182(1)(A).

[15]	**Bankruptcy**Reorganization cases
	Portion of landlord's claim attributable to mechanic's lien, for breach of debtor's obligation to keep the leased premises free of liens, was properly excluded in determining whether noncontingent liquidated **debts** scheduled by debtor or reflected in proofs of claim as of the petition date exceeded the statutory $7.5 million **debt limit** for **subchapter** V Chapter 11 debtors; Bankruptcy Court's **calculation** of debtor's noncontingent liquidated **debts** included full amount of mechanic's lienholder's claim, the portion of landlord's claim in question duplicated that amount, and so to include that portion of landlord's claim in the **subchapter** V **debt calculation** would "double count" the same **debt**. 11 U.S.C.A. § 1182(1)(A).

[16]	**Bankruptcy**Reorganization cases
	Landlord's claim for "other charges," including late fees, attorney fees, and interest, was properly counted in determining whether noncontingent liquidated **debts** scheduled by debtor or reflected in proofs of claim as of the petition date exceeded the statutory $7.5 million **debt limit** for **subchapter** V Chapter 11 debtors; the claims were "noncontingent" and "liquidated," as each arose entirely from prepetition events, and each was readily **calculable**. 11 U.S.C.A. § 1182(1)(A).

[17]	**Bankruptcy**Reorganization cases

	In determining the amount of a debtor's noncontingent liquidated **debts** as of the petition date for purposes of eligibility under **subchapter** V of Chapter 11, debtor's future payment obligations under its executory contracts and unexpired leases should rarely, if ever, be included in the **debt-limit calculation**; until debtor elects either to assume or to reject a contract or lease, amount and nature of its obligations under that contract or lease are contingent and unliquidated, when debtor assumes a contract or lease it is doubtful, at best, whether debtor's future payment obligations should be considered "**debts**" for **subchapter** V-eligibility purposes, since contract as a whole is likely a net asset, not a liability, and even when debtor rejects a contract or lease on the petition date, it may well have strong arguments that its rejection liability is contingent and/or unliquidated, such as if amount of liability is subject to factual disputes or other uncertainties. 11 U.S.C.A. §§ 365, 1182(1)(A).

[18]	**Bankruptcy**Executory nature in general
	Under the Bankruptcy Code, an executory contract represents both an asset, namely, the debtor's right to the performance, and a liability, the debtor's own obligations to perform. 11 U.S.C.A. § 365.

[19]	**Bankruptcy**Executory nature in general
	Unlike other debtor obligations, debtor's obligations under an executory contract or unexpired lease are part and parcel of a reciprocal agreement that involves benefits as well as burdens; in many instances, the benefits exceed the burdens, making the contract or lease a net asset, rather than a net liability, for the debtor. 11 U.S.C.A. § 365.

[20]	**Bankruptcy**Assumption, Rejection, or Assignment
	Because some executory contracts or unexpired leases on balance are beneficial and others are detrimental to estate, the Bankruptcy Code gives debtor the option either to assume or to reject each such contract or lease. 11 U.S.C.A. § 365.

[21]	**Bankruptcy**Effect of Acceptance or Rejection
	If debtor assumes an executory contract or unexpired lease, its obligations going forward are treated on an administrative-expense basis, entitled to highest priority; if debtor rejects, counterparty's future performance obligations are excused, and counterparty is given "rejection damages" claim against debtor, that is, prepetition breach-of-contract claim, payable at same cents on dollar as other unsecured claims. 11 U.S.C.A. § 365.

[22]	**Bankruptcy**Effect of Acceptance or Rejection
	In contrast to an executory contract that is assumed by a debtor, which is an estate asset, a rejected contract is generally a pure liability to the estate, with no offsetting benefits; consequently, the debtor's rejection damages liability can fairly be considered a "**debt**" as the Bankruptcy Code defines that term. 26 U.S.C.A. §§ 365, 101(5)(A), 101(12).

Attorneys and Law Firms

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MODIFIED BENCH RULING GRANTING LANDLORD'S OBJECTION TO DEBTOR'S SUBCHAPTER V DESIGNATION

Hon. Philip Bentley, U.S. Bankruptcy Judge

Introduction [1]

Zhang Medical P.C. (the "Debtor") is not a typical **subchapter** V debtor. The Debtor operates a fertility clinic in Manhattan with an international clientele and a reputation for employing cutting-edge techniques. The Debtor has over 90 employees and generated gross revenues of over $27 million during the last fiscal year.

Before the Court is the objection of the Debtor's landlord, GLL BVK Columbus Circle LLC (the "Landlord"), to the Debtor's designation as a small business debtor under **subchapter** V of Chapter 11 of the Bankruptcy Code. The Landlord contends that the **debts** scheduled by the Debtor or reflected in filed proofs of claim exceed the $7.5 million **debt limit** for **subchapter** V debtors set forth in Bankruptcy Code § 1182(1)(A). The Landlord also contends that, even if those **debts** did not exceed $7.5 million, the Debtor would still be ineligible for **subchapter** V because the future payments it owes over the term of its lease greatly exceed $7.5 million. For the latter argument, the Landlord relies on a recent bankruptcy court decision, *In re Macedon Consulting, Inc.*, 652 B.R. 480 (Bankr. E.D. Va. 2023), holding that future payments owed under unexpired leases and executory contracts count toward the **subchapter** V **debt limit**.[2]

***407** The Court rules for the Landlord on the first of these two contentions, finding that the **debts** scheduled by the Debtor or reflected in proofs of claim exceed $7.5 million. While this finding obviates the need for the Court to reach the *Macedon Consulting* issue, the Court addresses that issue nevertheless, because of the enormous—and in the Court's view detrimental—impact that ruling, if followed, would have in **limiting** eligibility for **subchapter** V relief. The Court concludes that, contrary to *Macedon Consulting*, a debtor's future payment obligations under its unexpired leases and executory contracts should rarely, if ever, be counted toward the **subchapter** V **debt** cap.

Factual Background

For more than two decades, the Debtor has operated a medical office in Manhattan, providing fertility services under the name New Hope Fertility Clinic. Its medical director and founder, Dr. John Zhang, is a recognized researcher and innovator in the field of *in vitro* fertilization and other forms of assisted reproductive technology.[3] With more than 90 employees, the Debtor serves an international clientele and claims to enjoy a worldwide reputation. In the fiscal year preceding the bankruptcy, the Debtor generated gross revenues of over $27 million.

Since 2001, the Debtor has operated out of medical offices located on Columbus Circle, which it leases from the Landlord. In 2018, anticipating the potential expansion of its business, the Debtor entered into an amended lease (the "Lease") with the Landlord, under which it leased an additional two floors in the building, doubling the amount of its leased space. The Debtor planned to sublet these two additional floors until it needed to use them, but following the onset of the COVID-19 pandemic, it was unable to do so. As a result of its inability to sublet these two floors, coupled with other pandemic-related business strains, the Debtor fell far behind on its rent. On April 30, 2023, the Debtor commenced this case under **subchapter** V of chapter 11 of the Bankruptcy Code. The Debtor moved to reject the Lease two months later, and the Court granted that motion the following month.

On August 15, 2023, the Landlord filed its objection, pursuant to Rule 1020(b) of the Federal Rules of Bankruptcy Procedure, to the Debtor's designation as a **subchapter** V debtor (the "Objection").[4] The Court heard oral argument on September 7, 2023, after the completion of briefing. The facts at issue were undisputed, and the parties relied solely on the paper record. On September 8, the Court issued a bench ruling sustaining the Objection.

Discussion

I. General Standards Governing Eligibility for Subchapter V

[1]In 2019, to help small businesses navigate bankruptcy more effectively, Congress ***408** enacted the Small Business Reorganization Act (the "SBRA"). The SBRA created a new **subchapter—subchapter** V—within chapter 11 of the Bankruptcy Code to address the hurdles small businesses had been facing in attempting to reorganize. *See* 11 U.S.C. §§ 1181-1195.

[2] [3]**Subchapter** V simplifies and streamlines the reorganization process in a host of ways designed to reduce the cost and length of chapter 11 cases and to increase the prospects for a successful reorganization. *See generally* Christopher D. Hampson & Jeffrey A. Katz, *The Small Business Prepack: How **Subchapter** V Paves the Way for Bankruptcy's Fastest Cases*, 92 GEO. WASH. L. REV. __ (forthcoming 2024); Christopher G. Bradley, *The New Small Business Bankruptcy Game: Strategies for Creditors Under the Small Business Reorganization Act*, 28 AM. BANKR. INST. L.R. 251 (2020). The **subchapter** also makes it easier for the debtor's owners to retain ownership of the company, by eliminating the absolute priority rule in cramdown cases and, in its place, requiring the debtor to pay off its secured **debt** and to pay its "disposable income" to unsecured creditors for three to five years. *See* 11 U.S.C. § 1191.

[4]To be eligible for **subchapter** V, the debtor must have "noncontingent liquidated" **debts** as of the petition date that do not exceed $7.5 million. Specifically, Bankruptcy Code § 1182 defines an eligible debtor as "a person engaged in commercial or business activities ... that has aggregate noncontingent liquidated secured and unsecured **debts**, as of the date of the filing of the petition or the date of the order for relief, in an amount not more than $7,500,000 (excluding **debts** owed to 1 or more affiliates or insiders) ...." 11 U.S.C. § 1182(1)(A).

[5] [6] [7]The Second Circuit Court of Appeals addressed the meaning of the terms "noncontingent" and "liquidated" at some length in *Mazzeo v. United States (In re Mazzeo)*, 131 F.3d 295 (2d Cir. 1997). That case was not a **subchapter** V case; instead, it arose in the analogous context of the **debt limit** for chapter 13 eligibility.[5] *Id.* at 298. Mazzeo was a corporate officer, whose eligibility for chapter 13 hinged on the characterization of his liability, under New York State's "responsible person" statute, for having failed to remit employee withholding taxes to the state. *Id.* at 298-99. The bankruptcy court held that Mazzeo's resulting liability was both noncontingent and liquidated, causing his total noncontingent, liquidated, unsecured **debts** to exceed the chapter 13 **debt** cap. *Id.* at 300.

The Second Circuit affirmed, based on a careful review of the statutory terms "noncontingent" and "liquidated." *Id.* at 301. Starting with the first of these, the court held that the debtor's responsible-person liability was noncontingent because, under the governing statute, his obligation to pay had arisen when he failed to remit the taxes collected from the company's employees:

> It is generally agreed that a **debt** is contingent if it does not become an obligation until the occurrence of a future event, but is noncontingent when all of the events giving rise to liability for the ***409 debt** occurred prior to the debtor's filing for bankruptcy.

Id. at 303 (2d Cir. 1997); *see also id.* ("A taxpayer's duty to pay taxes ... arises upon his nonpayment of the taxes when due.").

Turning to the second requirement—"liquidated"—the Second Circuit held that the debtor's statutory liability was liquidated because the amount could be easily ascertained by reference to the statute and the company's tax returns:

> If the value of the claim is easily ascertainable, it is generally viewed as liquidated. If that value depends instead on a future exercise of discretion, not restricted by specific criteria, the claim is unliquidated.

Id. at 304 (internal citations and quotations omitted); *see also id.* (" 'courts have generally held that a **debt** is "liquidated" ... where the claim is determinable by reference to an agreement or by a simple computation.' ") (quoting 2 L. King, *Collier on Bankruptcy* ¶ 109.06[2][c] (15th ed. rev. 1997)).

[8] [9] [10]The procedural requirements for determining a debtor's total noncontingent liquidated **debt** are also well established. The court may look both to the debtor's schedules and to creditors' proofs of claim. *See In re Hall*, 650 B.R. 595, 600 (Bankr. M.D. Fla. 2023); *In re Stebbins*, Case No. 15-CV-1196, 2016 WL 1069077, at *4 (E.D.N.Y. Mar. 17, 2016). Proofs of claim are *prima facie* valid. *See* Fed. R. Bankr. P. 3001(f). Because the debtor bears the ultimate burden of proving

its eligibility for **subchapter** V, proofs of claim that the debtor does not challenge may be deemed valid for **subchapter** V eligibility purposes. *See In re Port Arthur Steam Energy, L.P.*, 629 B.R. 233, 235 (Bankr. S.D. Tex. 2021).

II. The Debtor's Noncontingent Liquidated Debts as of the Petition Date Exceed $7.5 Million

[11]Applying these principles, it is clear that the noncontingent liquidated **debts** scheduled by the Debtor or reflected in proofs of claim substantially exceeded $7.5 million as of the petition date.

The Debtor scheduled $5,797,128 in noncontingent liquidated **debts** as of the petition date. In addition, 27 of the scheduled creditors filed proofs of claim asserting claims in larger amounts than the Debtor had scheduled. If one adds up all the claims scheduled by the Debtor as noncontingent and liquidated and, for each claim, takes the higher of the scheduled amount or the amount stated in the proof of claim, the resulting total is $10,468,441 in noncontingent liquidated **debts**.

At the hearing on the Landlord's Objection, the Debtor challenged only one of the filed proofs of claim—the Landlord's claim—and, in addition, objected to only one portion of that claim, namely, a $1,338,757 charge triggered by the filing of a mechanic's lien. The Debtor did not contest the remainder of the Landlord's claim or any other proofs of claim. As a result, it is undisputed that the Debtor had at least $9,129,684 in noncontingent liquidated **debts** as of the petition date (*i.e.*, $10,468,441 minus $1,338,757). This alone is a sufficient basis to sustain the Landlord's objection.

As a double-check on the validity of this conclusion, the Court conducted its own review of the Landlord's proof of claim, which totals $7,007,487 and is by far the largest claim filed against the Debtor. The Landlord's claim has five components:

1. Unpaid rent ($1,628.745);

2. A rent credit clawback ($1,418,147);

3. Replenishment of the security deposit ($2,458,665);

***410** 4. A claim arising from the filing of a mechanic's lien securing the Debtor's unpaid obligations for materials and services ($1,338,757); and

5. Other charges, including interest ($152,344), legal fees ($56,646), and late fees ($3,500).

A review of these components confirms that four of the five—all but the claim relating to the mechanic's lien—should be counted toward the **subchapter** V **debt limit**.

[12]A. Unpaid rent. The Landlord's claim for unpaid rent is noncontingent, under the Second Circuit's definition of that term, since it was triggered by prepetition events. *See Mazzeo,* 131 F.3d at 303. It is also liquidated, since the amount of rent is specified in the Lease and the unpaid amount is easily **calculable**. *See id.* at 304.

[13]B. Rent credit clawback. The Landlord's rent credit clawback claim is also noncontingent and liquidated. This claim arose from the Second Amendment to the Lease, which abated the Debtor's obligation to pay rent for two of the leased floors for a seven-month period (January to July 2022), contingent on there being no monetary default under the Lease prior to December 31, 2024. There is no dispute that the Debtor committed a monetary default under the Lease between the execution of the Second Amendment and the petition date. Thus, the rent credit clawback is a noncontingent claim because it is based entirely on pre-petition events. It is also liquidated because it is easily **calculable** under the Lease.

[14]C. Replenishment of security deposit. Similarly, the Landlord's claim attributable to the Debtor's failure to replenish the security deposit is noncontingent, because the event triggering the Debtor's duty to replenish that deposit (the Landlord's application of the deposit to rent arrearages) occurred prepetition. And the claim is liquidated, because the amount of the security deposit is provided for in the Lease.

[15]D. Mechanic's lien. The Debtor is correct that the portion of the Landlord's claim attributable to the mechanic's lien, for breach of the Debtor's obligation to keep the leased premises free of liens, should be excluded from the **debt calculation**. The Court's **calculation** of the Debtor's noncontingent liquidated **debts**, discussed above, includes the full amount of the mechanic's lienholder's claim, and this portion of the Landlord's claim duplicates that amount. Consequently, to include this

portion of the Landlord's claim in the **subchapter** V **debt calculation** would "double count" the same **debt**.

[16]E. Other charges. The Landlord's claims for other charges—late fees, attorneys' fees and interest—are also noncontingent and liquidated. Each of these claims arose entirely from pre-petition events, and each is readily **calculable**.

For these reasons, the Debtor's noncontingent liquidated **debts** as of the petition date exceed the $7.5 million **debt limit** set forth in Bankruptcy Code § 1182(1)(A), and the Debtor is ineligible to proceed under **subchapter** V.

III. A Debtor's Future Payment Obligations Under Executory Contracts and Unexpired Leases Should Rarely, if Ever, Be Included in the Subchapter V Debt Limit Calculation

[17]As an alternate basis for its objection to the Debtor's **subchapter** V designation, the Landlord asks the Court to follow a recent decision by a bankruptcy court in Virginia, holding that, in determining the amount of a debtor's noncontingent liquidated ***411 debts** for **subchapter** V eligibility purposes, courts should include the debtor's future payment obligations under its executory contracts and unexpired leases. *In re Macedon Consulting, Inc.*, 652 B.R. 480, 485-86 (Bankr. E.D. Va. 2023).

The debtor in *Macedon Consulting* was a software developer that, like the Debtor here, had fallen on hard times and, as a result of the COVID-19 pandemic, needed less office space than it had previously leased. *Id.* at 482. Unlike the Debtor here, Macedon Consulting moved on the petition date to reject its unexpired office leases. *Id.* at 484. The debtor's two landlords moved to dismiss the bankruptcy, and alternatively asked the court to revoke the debtor's **subchapter** V designation on the ground that its future rent under the leases exceeded $14 million. *Id.* Applying essentially the same definition of noncontingent **debt** that the Second Circuit applied in *Mazzeo,* the court held that the debtor's future rent obligations were noncontingent, because the debtor's liability for all rent over the term of the leases "arose pre-petition, on the dates the Leases were fully executed." *Id.* at 485 (quoting *In re Parking Mgmt.*, 620 B.R. 544, 556 (Bankr. D. Md. 2020)).[6]

If this ruling were followed, it would greatly restrict **subchapter** V eligibility, since many debtors otherwise eligible for that **subchapter** are parties to long-term leases or contracts with future payment obligations well in excess of $7.5 million. In this case, for example, the Debtor's future base rent payments under the Lease exceed $60 million.

[18] [19]The Court declines to follow *Macedon Consulting.* In the Court's view, that decision overlooks the distinctive nature of a debtor's obligations under its executory contracts and unexpired leases, which differ in key respects from other debtor obligations. As the Supreme Court has observed, an executory contract "represents both an asset (the debtor's right to the performance) and a liability (the debtor's own obligations to perform)." *Mission Product Holdings, Inc. v. Tempnology, LLC*, —— U.S. ——, 139 S. Ct. 1652, 1658, 203 L.Ed.2d 876 (2019). That is, a debtor's obligations under an executory contract or unexpired lease are part and parcel of a reciprocal agreement that involves benefits as well as burdens. In many instances, the benefits exceed the burdens, making the contract or lease a net asset, rather than a net liability, for the debtor.

[20] [21]Because some executory contracts or unexpired leases on balance are beneficial and others are detrimental to the estate, the Bankruptcy Code gives the debtor the option either to assume or to reject each such contract or lease. *See* Code § 365(a); *see generally In re Orion Pictures Corp.*, 4 F.3d 1095, 1098-99 (2d Cir. 1993) (court should approve assumption or rejection if debtor, in its reasonable business judgment, has determined that to be in the estate's best interest). If the debtor assumes a contract or lease, its obligations going forward are treated on an administrative expense basis, entitled to the highest priority. If the debtor rejects, the counterparty's future performance obligations are excused, and the counterparty is given a "rejection damages" claim against the debtor—that is, a pre-petition breach of contract claim, payable at the same cents on the dollar as other unsecured claims. *See id.* at 1098. For rejected leases, the debtor's liability is further **limited *412** by the statutory cap provided by Bankruptcy Code § 502(b)(6).

Several conclusions follow from this. First, when a debtor assumes an executory contract or unexpired lease, it is doubtful, at best, whether the debtor's future payment obligations under that contract or lease should even be considered "**debts**" for purposes of **subchapter** V's eligibility formula. As just noted, a debtor may not assume a contract or lease unless it reasonably determines this is in the estate's best interest—that is, that the contract or lease is a net asset. *Id.* at 1098-99. To consider the assumed obligations in isolation and treat them as **debts** would ignore that the contract as a whole is an asset, not a liability.

Second, until the debtor elects either to assume or to reject an executory contract or unexpired lease, the amount and nature of its obligations under that contract or lease are contingent and unliquidated. If it assumes, it will be responsible to pay all

contractual obligations in hundred-cent dollars. But if it rejects, its obligations will be payable on a pre-petition basis, and the amount of those obligations will usually be much smaller—for contracts, the amount of damages caused by the debtor's breach, and for leases, the capped amount set by Code § 502(b)(6). Because the amount and nature of the debtor's obligations, as well as whether these are even "**debts**," depend on an uncertain future event—the debtor's election to either assume or reject—any eventual **debt** is both contingent and unliquidated prior to that election. *See Mazzeo*, 131 F.3d at 303; *see also* 11 U.S.C. § 1182(1)(A) (only **debts** that are noncontingent and liquidated "as of the date of the filing of the petition" are counted toward the **subchapter** V **debt** cap).

[22]If a debtor were to reject a contract or lease on the petition date, it could be argued that the debtor's rejection damages liability is a noncontingent **debt** as of that date for purposes of the **subchapter** V **debt limit**.[7] However, such a circumstance is relatively rare, since the decision to assume or reject often turns on post-petition developments, such as negotiations with the landlord or contract counterparty, the development of a plan of reorganization, or (if the business is sold) the buyer's plans. And even a debtor that rejects a contract or lease on the petition date may well have strong arguments that its rejection liability is contingent and/or unliquidated. For example, at least one court has held that a debtor's rejection liability is contingent, for **subchapter** V eligibility purposes, until the court approves the debtor's decision to reject rather than assume. *See Parking Management,* 620 B.R. at 553-54. In addition, a debtor's rejection liability may be unliquidated, if the amount of liability is subject to factual disputes or other uncertainties that make it not readily **calculable**.[8]

***413** In the present case, the Debtor did not reject the Lease on the petition date, but instead spent several months in post-petition negotiations with the Landlord before finally moving to reject. Consequently, the Court need not reach the issues just discussed, and the Court expresses no view on those issues. Because the Debtor did not move to reject the Lease until after the petition date, its eventual liability under the Lease was contingent and unliquidated as of that date. That liability therefore is not properly counted toward the **subchapter** V **debt** cap.

Conclusion

The Debtor's noncontingent liquidated **debts** as of the petition date exceed the $7.5 million **debt limit** set forth in Bankruptcy Code § 1182(1)(A), and the Debtor therefore is ineligible to proceed under **subchapter** V.

All Citations

655 B.R. 403, 73 Bankr.Ct.Dec. 33

Footnotes

1 On September 8, 2023, the Court read into the record its bench ruling granting the Landlord's objection to the Debtor's **subchapter** V designation. This decision formalizes and expands upon the Court's bench ruling.

2 The Landlord advances a third argument as well: that the Court should strip the Debtor of **subchapter** V eligibility because of its post-petition failure to comply with multiple deadlines required of **subchapter** V debtors. Given its ruling on the Landlord's principal arguments, the Court need not and does not reach this issue. The Court notes that this issue has generated thoughtful but conflicting decisions by well-regarded bankruptcy judges across the country. *Compare In re Free Speech Sys., LLC*, 649 B.R. 729, 735 (Bankr. S.D. Tex. 2023) (Lopez, J.), and *In re ComedyMX, LLC*, 647 B.R. 457, 462–64 (Bankr. D. Del. 2022) (Goldblatt, J.), *with In re Nat'l Small Bus. All., Inc.,* 642 B.R. 345, 348–49 (Bankr. D.C. 2022) (Gunn, J.).

3 Dr. Zhang gained international attention in 2016, when he employed a novel technique to create the world's first "three-parent baby." Working with a Jordanian couple who had lost six babies to a heritable neurological disorder, Dr. Zhang extracted the portion of the woman's DNA not linked to the disorder and inserted it into a healthy donor egg, which the woman's husband fertilized. The apparent success of this technique was widely noted.

4	The Objection was filed prior to the completion of the Debtor's meeting of creditors under Bankruptcy Code § 341 and was therefore timely. *See* Fed. R. Bankr. P. 1020(b) (objection to **subchapter** V designation must be filed within 30 days after completion of § 341 meeting).
5	Eligibility for chapter 13, like **subchapter** V, is subject to a **debt** cap. For a debtor to be eligible to proceed under chapter 13, his or her "noncontingent, liquidated, unsecured **debts**" may not exceed a specified amount ($250,000 at the time *Mazzeo* was decided, but subsequently increased to $ 2,750,000). *See* 11 U.S.C. § 109(e). The Court is aware of no reason why the Second Circuit's construction of the terms "noncontingent" and "liquidated" as used in § 109(e) should be any less applicable to those terms as used in § 1182(1)(A).
6	The court did not base its decision on the unusual fact that the debtor had moved on the petition date, rather than on a later date, to reject its leases, even though this fact arguably could have provided a sounder basis for the court's conclusion that the debtor's lease liability was noncontingent on the petition date. *See infra,* fn. 8.
7	In contrast to an assumed contract, which is an estate asset, a rejected contract is generally a pure liability to the estate, with no offsetting benefits. Consequently, the debtor's rejection damages liability can fairly be considered a "**debt**," as the Bankruptcy Code defines that term. *See* Code § 101(12) (" '**debt**' means liability on a claim"); § 101(5)(A) (" 'claim' means right to payment, whether or not such right is ... liquidated, unliquidated, fixed [or] contingent ...").
8	In *Macedon Consulting*, the debtor moved to reject its leases on the petition date, *see* 652 B.R. at 484, but the court did not base its decision on this fact and, as a result, did not address these issues. Curiously, the court did not hold that the debtor's petition-date motion made its rejection damages liability noncontingent by eliminating any uncertainty as to whether it would reject. Instead, the court treated the debtor's rejection as a contingent post-petition event that it should not consider. *See id.* at 485 ("post-petition events should not be used to determine eligibility for **subchapter** V.") On this ground, the court computed the debtor's **debt** under its rejected leases as the total amount of all future rent, rather than the capped rent amount specified by Bankruptcy Code § 502(b)(6). *Id.* at 485-486.

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

IN RE: Arnold B BAKER; dba Abbaker Enterprises, LLC; dba Arnoldbbaker, LLC Debtor.

Case No: 20-33465
|
Signed 12/21/2020.

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

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

Request granted.

West Headnotes (12)

[1]	**Bankruptcy**Determination of jurisdictional questions **Bankruptcy**Bankruptcy judges
	Bankruptcy court has independent duty to evaluate whether, as non-Article-III court, it has constitutional authority to sign a final order resolving a dispute. U.S. Const. art. 3, § 1 et seq.

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

[3]	**Bankruptcy**Reorganization cases
	Debtor's eligibility for Subchapter V relief must be determined based upon the debt amounts contained in debtor's schedules on petition date. 11 U.S.C.A. § 101(51D).

[4]	**Bankruptcy**Who May File, and Time for Filing
	Ninety-day time limit for filing a plan in Subchapter V case is not jurisdictional, meaning that court is not stripped of jurisdiction over debtor's case 91 days after order for relief if debtor has not yet filed a plan. 11 U.S.C.A. § 1189.

[5]	**Bankruptcy**Limitations and time to sue; computation
	Statutory filing deadlines are generally claims-processing rules and should not be treated as jurisdictional unless Congress has clearly stated that a deadline is jurisdictional.

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

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

	Standard that Subchapter V debtor must satisfy in order to obtain an extension of time for filing a proposed plan, by demonstrating that the need for an extension is attributable to "circumstances for which the debtor should not justly be held accountable," is a higher and more demanding standard than the "for cause" standard for obtaining an extension of deadline under Bankruptcy Rule. 11 U.S.C.A. § 1189(b); Fed. R. Bankr. P. 9006(b). 3 Cases that cite this headnote

[8]	**Bankruptcy**Who May File, and Time for Filing
	Bankruptcy court may grant a Subchapter V debtor an extension of time to file a proposed plan only if the debtor's inability to file a timely plan is due to circumstances for which Debtor is not fairly responsible, in other words, due to circumstances beyond the debtor's control. 11 U.S.C.A. § 1189(b). 3 Cases that cite this headnote

[9]	**Bankruptcy**Who May File, and Time for Filing
	Whether Subchapter V debtor is entitled to extension of time to file a proposed plan, on the ground that debtor's need for an extension is due to circumstances for which he should not justly be held accountable, requires a fact-driven inquiry. 11 U.S.C.A. § 1189(b). 3 Cases that cite this headnote

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

	In deciding whether Subchapter V debtor was entitled to extension of time to file a proposed plan, upon ground that debtor's need for extension was due to circumstances for which he should not justly be held accountable, bankruptcy court would consider whether: (1) the circumstances raised by debtor were within his control, (2) debtor has made progress in drafting a plan, (3) the deficiencies preventing that draft from being filed are reasonably related to the identified circumstances, and (4) any party-in-interest has moved to dismiss or convert debtor's case or otherwise objected to a deadline extension in any way. 11 U.S.C.A. § 1189(b). 5 Cases that cite this headnote

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

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

Attorneys and Law Firms

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

MEMORANDUM OPINION

Eduardo V. Rodriguez, United States Bankruptcy Judge

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

For the reasons set forth herein, this Court finds that the need for an extension to file a plan beyond the November 23, 2020 deadline is attributable to circumstances for which the debtor should not justly be held accountable. The debtor shall have until December 28, 2020 to file corrective Schedules D and E/F, properly setting forth the amount of debt for each creditor. This Court previously issued an order establishing the deadline for the filing of governmental proofs of claim as January 4, 2021.[1] Thus, the debtor shall have until January 18, 2021 to file a plan of reorganization.

I. FINDINGS OF FACT

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

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

On August 12, 2020, and pursuant to 11 U.S.C. § 1188(a), this Court held a status conference and ordered Debtor to file a plan of reorganization, no later than October ***30** 5, 2020.[5] On September 15, 2020, Debtor filed an expedited motion to extend the October 5, 2020 deadline to November 23, 2020, several days past the November 9, 2020 non-governmental proofs of claim bar date.[6] Debtor requested an extension because of the $4,092,944.50 scheduled general unsecured debt, most of the amounts were listed as contingent, unliquidated, and disputed while other scheduled debt was listed as unknown. For example, the City of New Orleans was listed as "Unknown."[7] The amount for David White was listed as $0, but Debtor checked the box labeled "Other" and noted that the amount could be $1,000,000 based on an arbitration claim.[8] Southern Aggregates, LLC was listed as $0, but just like David White's claim, the "Other" box was checked listing an amount of $300,000 based on a litigation claim.[9] WDD Investments, Inc. was listed as $0 based on a litigation claim.[10] Wells Fargo Bank was scheduled twice and both claims were listed as "Unknown" noting that one claim could be for $45,000 and the other for $72,500.[11] Finally, approximately $3,228,328.50 of the remaining debt was listed as contingent, unliquidated, and disputed.[12] Counting the debt listed as "Other", but excluding the "Unknown" amount for the City of New Orleans, Debtor scheduled a total of $6,333,764.91 in debt.[13]

To promote an efficient and orderly administration of bankruptcy cases, it is important for debtors to be aware of all claims asserted against them. As Rule 3003(c)(2) states, only creditors who were not scheduled or scheduled as disputed, contingent, or unliquidated must file claims.[14] Here, Debtor scheduled over $4 million of general unsecured debt as either unknown or

contingent, unliquidated, and disputed. The time for claimants to file these claims is set by the Court.[15] The bar date in any bankruptcy case not only allows claimants to benefit by participating in the plan, but also benefits all parties-in-interest. Finally, a bar date fixed before confirmation not only makes it easier for everyone to calculate the relative recovery one can expect to receive under a given plan, it provides the debtor an opportunity to propose a feasible plan based on allowed claim amounts.

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

***31 II. CONCLUSIONS OF LAW**

A. Jurisdiction and Venue

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

This Court may only hear a case in which venue is proper.[20] 28 U.S.C. § 1409(a) provides that "a proceeding arising under title 11 or arising in or related to a case under title 11 may be commenced in the district court in which such case is pending." Debtor's principal residence is Houston, Texas, and his chapter 11 case is presently pending in this Court; therefore, venue of this proceeding is proper.

B. Constitutional Authority to Enter a Final Order

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

III. ANALYSIS

A. Debtor's Bankruptcy Schedules

As a preliminary matter, the aggregate noncontingent liquidated secured and unsecured debt limit of $2,725,625 as of the date of filing applies to the instant subchapter V case.[24] However, under the Coronavirus Aid, Relief And Economic Securities ***32** Act, the aggregate debt limit is currently $7,500,000.00 effective as of March 25, 2020.[25] Debtor scheduled $3,228,328.50 in debt as either disputed, contingent, or unliquidated out of a total debt load of $6,333,764.91. But, Debtor

incorrectly filled out Schedules D and E/F by listing debt as $0 or "Unknown," but identifying a dollar amount under "Other."

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

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

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

[5]Statutory filing deadlines are generally labeled as "quintessential claim-processing rules" and should not be treated as jurisdictional "[u]nless Congress has 'clearly state[d]' that a statutory limitation is jurisdictional."[30] Nothing in § 1189(b) indicates that Congress intended the 90-day filing deadline to be jurisdictional. The statute does not preclude extending the filing deadline, and in fact is explicitly permissive of such.[31] If a debtor requires more than 90 days to file a plan, § 1189 grants courts the authority to extend that time period, so long as the debtor is not justly accountable for failing to meet the 90-day deadline.[32] And, extending a subchapter V debtor's deadline to file a plan is likely not the type of exceptional case where "a century's worth of precedent and practice in American courts rank a time limit as jurisdictional."[33]

***33** [6]Although subchapter V falls under the umbrella of chapter 11, the language governing an extension under § 1189 is unlike § 1121,[34] but identical to § 1221 in chapter 12.[35] Like subchapter V, chapter 12 bankruptcies are "intended to proceed on what can be characterized as a fast track."[36] Therefore, cases discussing § 1221 provide guidance in determining under what circumstances a court should extend a plan filing deadline.[37] Additionally, because neither the Small Business Reorganization Act of 2019 ("*SBRA*")[38] or its legislative history set out when a subchapter V debtor should not justly be held accountable for failing to file a plan of reorganization within the prescribed deadline or the purpose or scope of § 1189(b),[39] the Court relies on the plain language of § 1189(b) and considers sources discussing or applying § 1221.

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

The novelty of subchapter V means very few courts have analyzed and applied § 1189(b). Courts that have, have done so in the context of conversion from chapter 7 to chapter 11, subchapter V[43] or cases where debtors seek to take advantage of subchapter V even though their cases were filed prior to its effective date.[44] Neither scenario applies here. In this case, Debtor, who has always proceeded under subchapter V, seeks an extension of the plan filing deadline under § 1189(b).[45]

[8]Courts interpreting the language used in §§ 1189 and 1221 have held that "the bankruptcy court may grant an extension only if the debtor's inability to file a timely plan is due to circumstances beyond the debtor's control."[46] This Court also

looks to the dictionary definitions of "justly" and "accountable" to assess the plain meaning of § 1189. "Justly" is defined as "[a]ccording to what is morally right or fair; fairly".[47] "Accountable" is defined as ***35** "required or expected to justify actions or decisions; responsible".[48] Thus, in determining whether to grant the extension, this Court considers whether the need for an extension is attributable to circumstances for which Debtor is not fairly responsible or, to borrow from COLLIER, whether Debtor can "clearly demonstrate that the inability to file a plan of reorganization was due to circumstances beyond [his] control."[49]

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

Debtor states that he should not justly be held accountable for failure to file a plan of reorganization by November 23, 2020 and requests a second extension of the filing deadline.[50] Debtor asserts that "in retrospect, the November 23, 2020 date was always insufficient to allow Debtor to file a meaningful substantive plan"[51] because (1) since no bar date for governmental units to file claims was reflected in the 341 Notice, Debtor cannot "meaningfully determine how to provide for" the claims of the State of Louisiana and City of New Orleans where those claims have not been filed[52] and (2) due to the death of his brother, Debtor requires additional time to determine his projected income from his current employer, BRM Concrete, LLC, of which his brother was part owner, and to determine how to utilize or dispose of his 51% ownership in Baker Ready Mix, LLC.[53] Debtor alleges that the recent passing of his brother caused Debtor's time to be consumed by his personal duties at BRM Concrete, LLC, and the operational duties of his brother, interfering with the amount of time he had to dedicate to his bankruptcy case.[54]

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

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

a. Governmental Claims Bar Date

[11]Debtor's counsel argued at the December 8, 2020 hearing, ("*Hearing*"), that in his best legal interpretation of subchapter V and as a procedural matter, he advised Debtor that it did not make sense to file a plan where the City of New Orleans and State of Louisiana had not yet filed proofs of claim and the bar date for timely filing had not passed. Debtor listed three claims from governmental units in his schedules: (1) an unliquidated secured claim by the state of Louisiana in the amount of $381,655; (2) an undisputed unsecured claim by the City of New Orleans with the amount listed as "unknown"; and (3) an undisputed unsecured claim by the state of Louisiana in the amount of $100,000.[57] Debtor's counsel argued that a plan could have been filed before the governmental unit claim bar date passed, but any filing of a claim after submission of the plan would drastically alter the plan for unsecured creditors.

Although the 341 Notice lacked a deadline for the filling of governmental proofs of claim, Bankruptcy Local Rule 3003-1(a) provides that "[i]n ... chapter 11 cases, unless otherwise ordered by the court or governed by BLR 3003-1(b), proofs of claim and proofs of interest must be filed within 90 days after the first date set for the meeting of creditors under section 341(a), except that a proof of claim filed by a governmental unit must be filed within 180 days after the order for relief."[58] This case was filed July 7, 2020; therefore, the bar date for the filing of governmental proofs of claim is January 4, 2021.

Debtor's counsel should have realized that the 341 Notice was missing a bar date for governmental unit claims when

Debtor's first motion to extend the plan filing deadline was filed on September 15, 2020.[59] In that motion, Debtor asked to extend the plan filing deadline 14 days beyond the claims bar date that was set for November 9, 2020[60] and even makes explicit reference to the potential claims of the City of New Orleans and the State of Louisiana.[61] But Debtor's counsel states that he did not notice that the bar date for governmental unit claims was missing from the 341 Notice until he realized that neither the City of New Orleans or the State of Louisiana filed proofs of claim.

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

Moreover, although a plan could have been filed before the governmental unit claims bar date passed, Debtor's argument that the missing governmental proofs of claim would drastically change the plan, if one were filed before those proofs were submitted or the bar date passed, is well founded. The State of Louisiana has a substantial, unliquidated claim in the amount of $381,655 and the City of New Orleans's claim is unknown. Debtor's counsel explained that the City of New Orleans's claim is unknown because Debtor is aware that he owes some amount in trust fund taxes but has not received an assessment from the City of New Orleans for 2019 or 2020.[62] Debtor's counsel also explained that Debtor could not estimate the amount of taxes owed based on prior years' assessments because there was a dispute over the taxes owed between Debtor and the City of New Orleans in the past.[63]

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

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

[12]A placeholder plan is a waste of time and resources for all parties-in-interest and does not represent Congress's intent in enacting the SBRA. Congress enacted the SBRA to "streamline the bankruptcy process by which small businesses debtors reorganize and rehabilitate their financial affairs."[69] The purpose of subchapter V is to reduce the barriers and associated costs that prevent small business debtors from successful reorganization, in part by reducing the length of time those debtors spend in bankruptcy. ***38** [70] The intentionally expedited nature of subchapter V cases dictates an abbreviated deadline under § 1189 that is not intended to be manipulated by placeholder plans. While § 1193 permits a debtor to modify a plan "at any time before confirmation,"[71] or a consensual plan confirmed under § 1191(a) "at any time after confirmation of the plan and before substantial consummation of the plan,"[72] and a non-consensual plan confirmed under § 1191(b) "at any time within 3 years, or such longer time not to exceed 5 years,"[73] filing a placeholder plan merely to satisfy the statutory plan filing deadline serves no justiciable purpose, contributes to increased costs, and subverts the intent underlying subchapter V. Thus, this Court disfavors placeholder plans and expects debtors to file substantive, confirmable plans unless situations arise such that an extension is warranted because of circumstances for which the debtor should not justly be held accountable.[74]

As explained above, Debtor could and should have brought the missing governmental bar date deadline to the Court's attention earlier so that a second extension request could be avoided. However, Debtor had no control over the technological error itself. Filing a placeholder plan would not have mitigated the effect of the missing bar date because Debtor would still not have the governmental proofs of claim yet and the plan, along with appropriate financial projections, would require dramatic modification. Accordingly, this Court finds that because Debtor had no control over the missing governmental bar

date that should have been contained within the 341 Notice, other than discovering and reporting it earlier, this factor weighs in favor of granting Debtor's request for additional time to file a plan of reorganization.

b. Death of a Sibling

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

Although the Court is mindful of Debtor's loss, Debtor's testimony at the Hearing and his filed bankruptcy schedules conflict. Debtor's schedules reflect that he has interest in seven different limited liability companies and Debtor valued each of those interests at $0.[76] Thus, Debtor's testimony that the delay in plan filing was due in part to consideration of ways to maximize the value of his interest in Baker Ready Mix LLC, when those interests were valued at $0 is concerning. Debtor also testified that the interests were only scheduled at $0 because that was a bank's valuation of the interests, offset by the debt assessed against Debtor. Since Debtor ***39** filed his schedules, Debtor claims that several parties have expressed interest in purchasing certain of his shares, indicating his interest in Baker Ready Mix, LLC is not valueless. According to Debtor's counsel, right now, the best course of action is to auction those shares, but that could change depending on conversations with interested parties.

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

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

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

To further determine whether Debtor should not be held justly accountable for failing to file his plan by the deadline, this Court considers whether Debtor demonstrated that substantial progress was made in drafting the plan and whether the missing pieces of Debtor's plan are reasonably related to the missing governmental claim bar date and the passing of Debtor's brother. At the Hearing, Debtor's counsel informed the Court that a plan had already been drafted. Debtor's counsel disclosed to the Court that the Hancock Whitney Bank claim[77] in terms of allowance and treatment of that claim was "taken care of,"[78] that the domestic support claim held by Tracy Dundas[79] was settled by agreement,[80] that Debtor's 2016 BMW X5[81] will be surrendered,[82] that Debtor analyzed all the proofs of claims on file and intends to file four objections,[83] that Debtor analyzed the claims related to Baker Ready Mix, LLC,[84] and that Debtor decided, for now, the "best course of action to confirm a plan" is to conduct an auction utilizing this Court to obtain the best bid for Debtor's interest in Baker Ready Mix, LLC and provision for those proceeds to be paid to Debtor's creditors.[85] Debtor's counsel indicated that the only two issues not yet dealt with in the plan are: (1) the City of New ***40** Orleans's trust fund tax claim and the State of Louisiana's tax claim[86] and (2) the best method for disposing of Debtor's interest in Baker Ready Mix, LLC.[87]

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

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

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

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

***41 III. CONCLUSION**

The uncertainty as to the City of New Orleans and State of Louisiana claims created a substantial barrier to Debtor's ability to file an appropriately constructed, feasible plan, given that the plan may be provisioned for payments to creditors over a period not to exceed five years.[92] Additionally, the increase in Debtor's responsibilities resulting from the unexpected passing of his brother stripped Debtor of the time necessary to determine the best way to dispose of his 51% interest in Baker Ready Mix, LLC for the benefit of his creditors and provide his counsel the information needed to complete an appropriate plan. Finally, Debtor has already made substantial progress in drafting a substantive plan of reorganization and no party-in-interest has filed any motion opposing the relief requested.

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

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

All Citations

625 B.R. 27, 69 Bankr.Ct.Dec. 164

Footnotes	
1	ECF No. 50.

2	Any reference to "Code" or "Bankruptcy Code" is a reference to the United States Bankruptcy Code, 11 U.S.C., or any section (§) thereof refers to the corresponding section in 11 U.S.C.
3	ECF No. 1.
4	ECF No. 4.
5	ECF No. 25.
6	ECF No. 37.
7	ECF No. 1 at 24.
8	*Id.* at 27.
9	*Id.* at 30.
10	*Id.* at 31.
11	*Id.*
12	*Id.*
13	*Id.*
14	Fed. R. Bankr. P. 3003(c).
15	*Id.*
16	ECF No. 38.
17	ECF No. 4.
18	ECF No. 44.
19	28 U.S.C. § 157(a); *see also* In re: Order of Reference to Bankruptcy Judges, Gen. Order 2012-6 (S.D. Tex. May 24, 2012).

20	28 U.S.C. § 1408.
21	*Stern v. Marshall*, 564 U.S. 462, 131 S.Ct. 2594, 180 L.Ed.2d 475 (2011). *But see Wellness Int'l Network v. Sharif*, 575 U.S. 665, 135 S. Ct. 1932, 1938-39, 191 L.Ed.2d 911 (2015) (holding that parties may consent to jurisdiction on non-core matters).
22	564 U.S. at 503, 131 S.Ct. 2594.
23	*See, e.g.*, *Badami v. Sears (In re AFY, Inc.),* 461 B.R. 541, 547–48 (8th Cir. BAP 2012) ("Unless and until the Supreme Court visits other provisions of Section 157(b)(2), we take the Supreme Court at its word and hold that the balance of the authority granted to bankruptcy judges by Congress in 28 U.S.C. § 157(b)(2) is constitutional."); *see also Tanguy v. West (In re Davis)*, 538 F. App'x 440, 443 (5th Cir. 2013) ("[W]hile it is true that *Stern* invalidated 28 U.S.C. § 157(b)(2)(C) with respect to 'counterclaims by the estate against persons filing claims against the estate,' *Stern* expressly provides that its limited holding applies only in that 'one isolated respect' .... We decline to extend *Stern's* limited holding herein.") (citing *Stern*, 564 U.S. at 475, 503, 131 S.Ct. 2594).
24	11 U.S.C. § 101(51D).
25	*In re Pearl Resources LLC*, 622 B. R. 236 (Bankr. S.D. Tex. 2020). The increased debt limit sunsets on March 25, 2021.
26	11 U.S.C. § 101(51D).
27	11 U.S.C. § 1189(b).
28	*See id.*; *see also In re Raylyn AG, Inc.*, 72 B.R. 523, 524 (Bankr. S.D. Iowa 1987) ("The Court concludes that [failure to file within 90 days under § 1221] is not jurisdictional ....").
29	*Henderson v. Shinseki*, 562 U.S. 428, 435, 131 S.Ct. 1197, 179 L.Ed.2d 159 (2011).
30	*Sebelius v. Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 146, 154, 133 S.Ct. 817, 184 L.Ed.2d 627 (2013) (internal citations omitted).
31	11 U.S.C. § 1189(b) ("... except that the court *may* extend the period ....").
32	*See id.*
33	*Sebelius*, 568 U.S. at 155, 133 S.Ct. 817 (citing *Bowles v. Russell*, 551 U.S. 205, 217, 127 S.Ct. 2360, 168 L.Ed.2d 96 (2007)).

34	*See, e.g.*, 11 U.S.C. § 1121(e) ("In a small business case only the debtor may file a plan until 180 days after the date of the order for relief, unless that period is extended as provided by this subsection .... or the court, for cause, orders otherwise; .... In a small business case the plan and disclosure statement (if any) shall be filed not later than 300 days after the date of the order for relief ...."); *In re Shea, Ltd.*, 545 B.R. 529, 536–37 (Bankr. S.D. Tex. 2016) (holding that under § 1121(e), "in a small business case, the small business debtor has 180 days of exclusivity and 300 days before which to hit the 'drop dead date,' after which 'the' plan may no longer be filed."); *In re Express One Int'l*, 194 B.R. 98, 101 (Bankr. E.D. Tex. 1996) (finding that the exclusivity period pursuant to § 1121 should be filed, extending the time period for debtor exclusively to file a plan); *In re Simbaki, Ltd.*, 522 B.R. 917, 921 (Bankr. S.D. Tex. 2014) (holding that only a debtor is bound by the 300-day drop dead deadline and therefore, "only the debtor needs the ability to obtain an extension").
35	*See* 11 U.S.C. § 1221 ("The debtor shall file a plan not later than 90 days after the order for relief under this chapter, except that the court may extend the period if the need for the extension is attributable to circumstances for which the debtor should not justly be held accountable.").
36	*In re Henderson*, 352 B.R. 439, 443 (Bankr. N.D. Tex. 2006).
37	*See In re Trepetin*, 617 B.R. 841, 848 n.14 (Bankr. D. Md. 2020) ("Subchapter V and chapter 12 are not identical, and invoking chapter 12 standards may not be warranted in every instance .... Nevertheless, with respect to the 90-day filing deadline, not only does the same language appear in sections 1189(b) and 1221 but both processes also remove the absolute priority rule as a confirmation standard. This additional similarity between Subchapter V and chapter 12 further supports applying a consistent standard to a requested extension of the 90-day deadline for filing a Subchapter V or a chapter 12 plan.") (citation omitted).
38	11 U.S.C. §§ 1181–1195.
39	H.R. Rep. NO. 116-171 (2019).
40	In a Subchapter V case, *only* the debtor may file a plan. 11 U.S.C. § 1189(a). In a traditional Chapter 11 case, the debtor initially has the exclusive right to file a plan, but that exclusive right may expire or be terminated; it may also be extended "for cause." *See* 11 U.S.C. § 1121.
41	139 Cong. Rec. H1252 (daily ed. Mar. 16, 1993) (statement of Rep. Fish) (explaining that the replacement of "substantially justified" in § 1221 with "the need for an extension is attributable to circumstances for which the debtor should not justly be held accountable" was a "tightening of the current requirement that an extension by [sic] substantially justified [and] should prove helpful to creditors."); *see also* 8 Collier on Bankruptcy ¶ 1221.01[2] (16th ed. 2020) ("The phrase 'substantially justified' was not explained in the legislative history, and so there was no guidance on how the phrase was to be interpreted. Presumably, Congress intended that the debtor be required to make a greater showing than was necessary to meet the 'cause' standard for extension of the debtor's exclusivity period in chapter 11 cases. In 1993, ... Congress amended section 1221 by deleting the 'substantially justified' language and providing instead that an extension should be granted only if the need for an extension is 'attributable to circumstances for which the debtor should not justly be held accountable.' The legislative history makes clear that Congress intended by this change to make it more difficult for debtors to obtain extensions.").
42	8 Collier on Bankruptcy ¶ 1221.01[2] (16th ed. 2020).
43	*See In re Trepetin*, 617 B.R. 841 (Bankr. D. Md. 2020).

44	*See, e.g.*, *In re Seven Stars on the Hudson Corp.*, 618 B.R. 333 (Bankr. S.D. Fla. 2020); *In re Ventura*, 615 B.R. 1 (Bankr. E.D.N.Y 2020); *In re Twin Pines, LLC*, 2020 Bankr. LEXIS 1217, 2020 WL 5576957 (Bankr. D. N.M. Apr. 30, 2020).
45	ECF No. 44 at 3.
46	*First Sec. Bank & Trust Co. v. Vander Vegt*, 511 B.R. 567, 585 (N.D. Iowa 2014); *see also, e.g.*, *In re Seven Stars on the Hudson Corp.*, 618 B.R. at 345 ("[Section 1189(b)] asks if the need for an extension is due to *circumstances* beyond the debtor's control.") (alteration in original); *In re Trepetin*, 617 B.R. at 848 (analyzing whether a motion to extend the time for filing should be granted under § 1189) ("Courts and commentators generally have interpreted the language in section 1221 to require that 'the debtor clearly demonstrates that the debtor's inability to file a plan is due to circumstances beyond the debtor's control.' ") (internal quotation marks and citations omitted); *In re Gullicksrud*, 2016 Bankr. LEXIS 3546 at *3, 2016 WL 5496569 at *2 (Bankr. W.D. Wis. Sept. 29, 2016) ("An extension [pursuant to § 1221] should be granted only if the debtor 'clearly demonstrates that the debtor's inability to file a plan is due to circumstances beyond the debtor's control.' "); *Stock v. Harbicht Research (In re Stock)*, 1994 U.S. App. LEXIS 23896 at *5, 1994 WL 465833 at * (9th Cir. Aug. 29, 1994).
47	*Justly*, Oxford English Dictionary Online, https://premium.oxforddictionaries.com/us/definition/american_english/justly (last visited Dec. 11, 2020).
48	*Accountable*, Oxford English Dictionary Online, https://premium.oxforddictionaries.com/us/definition/american_english/accountable (last visited Dec. 11, 2020).
49	Collier ¶ 1221.01[2].
50	ECF No. 44.
51	*Id.* at 2.
52	*Id.*
53	*Id.* at 3.
54	*Id.*
55	11 U.S.C. § 1112(b)(4)(F).
56	*See* 11 U.S.C. § 1189(b) ("The debtor shall file a plan not later than 90 days after the order for relief under this chapter, except that the court *may* extend the period if the need for the extension is attributable to circumstances for which the debtor should not justly be held accountable.") (emphasis added).
57	ECF No. 1.

58	Bankr. S.D. Tex. R. 3003-1(a).
59	ECF No. 37.
60	*Id.* at 3.
61	*Id.* at 2.
62	December 8, 2020 Hearing at 1:52:00–1:53:28.
63	*Id.*
64	*Id.* at 1:55:00–1:59:10.
65	*Id.*
66	*Id.*
67	*Id.*
68	*See United States v. Callen*, 2015 WL 1034245, at *12, 2015 U.S. Dist. LEXIS 28861, at *34 (S.D. Tex. Mar. 10, 2015) (quoting *United States v. Jackson*, 2006 WL 5083826, at *2, 2006 U.S. Dist. LEXIS 97072, at *4 (D.S.C. Dec. 8, 2006)) ("A placeholder motion is a skeletal document filed to satisfy the period of limitations, with the intent of filing a real or completed petition at a later date.") (internal quotation marks omitted).
69	H.R. Rep. NO. 116-171 (2019).
70	*Id.* ("[T]he legislation allows these debtors 'to file bankruptcy in a timely, cost-effective manner, and hopefully allows them to remain in business' which 'not only benefits the owners, but employees, suppliers, customers, and others who rely on that business.' ").
71	11 U.S.C. § 1193(a).
72	11 U.S.C. § 1193(b).
73	11 U.S.C. § 1193(c); *see also* SBRA Legal Manual § 3-17.11.2 (2020).
74	11 U.S.C. § 1189(b).

75	September 8, 2020 Hearing at 2:11:35–2:15:35.
76	ECF No. 1 at 12.
77	ECF No. 1 at 22.
78	December 8, 2020 Hearing at 1:49:00–1:49:22. See ECF No. 42.
79	ECF No. 1 at 25.
80	December 8, 2020 Hearing at 1:49:23–1:49:27.
81	ECF No. 1 at 66.
82	December 8, 2020 Hearing at 1:49:27-1:49:29.
83	*Id.* at 1:49:30–1:49:53.
84	*Id.* at 1:49:58–1:50:05.
85	*Id.* at 1:50:06–1:50:25.
86	*Id.* at 1:50:26–1:50:31
87	*Id.* at 1:50:32–1:50:39, 2:11:35–2:15:35, 2:21:20–2:23:20. Debtor's counsel stated that Debtor is currently planning to dispose of his interest in Baker Ready Mix, LLC by auctioning those shares, but Debtor testified that he is currently entertaining other ways to maximize the value of those interests, as well.
88	*See* 11 U.S.C. § 1189(b) ("... except that the court *may* extend the period ....") (emphasis added).
89	*Compare* 11 U.S.C. § 1121(e) (establishing a period of exclusivity for small business debtors to file a plan between 0 and 180 days after the date of the order for relief and allowing any party-in-interest to file a plan after that exclusivity period has run, unless that period is extended), *with* 11 U.S.C. § 1189(a) ("Only the debtor may file a plan under this subchapter.").
90	*See* 11 U.S.C. § 1181 (excluding 11 U.S.C. § 1104 (Appointment of trustee or examiner) but not excluding 11 U.S.C. § 1112 (Conversion or dismissal)).
91	ECF Nos. 48, 49.

92	11 U.S.C. § 1191(c)(2).
93	11 U.S.C. § 1189(b).

End of Document	

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

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

Case No. 19-42063-ELM
|
Signed March 1, 2021

Attorneys and Law Firms

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

MEMORANDUM OPINION AND ORDER

Edward L. Morris, United States Bankruptcy Judge

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

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

Thus, the dispute presents the Court with two pivotal questions: first, whether an individual who previously owned and managed certain now-defunct businesses and who, on account of such ownership and involvement, has mostly business-related debts, is "*engaged in*" commercial or business activities for purposes of eligibility under subchapter V of chapter 11 of the Bankruptcy Code; and second, whether an employed officer of a non-debtor business entity, having no ownership in or ultimate control over the non-debtor business entity, is engaged in "*commercial or business activities*' " for purposes of eligibility under subchapter V of chapter 11 of the Bankruptcy Code. Concluding in each instance under the facts and circumstances of this case that such an individual is not engaged in commercial or business activities for purposes of eligibility under subchapter V of chapter 11, the Court will deny the request for conversion.

PROCEDURAL BACKGROUND

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

Debtors, they filed the Motion to avoid the U.S. Trustee's discharge objection.

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

JURISDICTION

***2** The Court has jurisdiction of the proceeding involving the Motion pursuant to 28 U.S.C. §§ 1334 and 157 and the *Order of Reference of Bankruptcy Cases and Proceedings Nunc Pro Tunc (Miscellaneous Rule No. 33)* of the United States District Court for the Northern District of Texas. Venue of the proceeding in the Northern District of Texas is proper under 28 U.S.C. § 1409. The proceeding constitutes a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A) and (O).

FACTUAL BACKGROUND

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

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

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

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

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

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

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

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

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

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

B. Cord's Prepetition Transition to El Reno

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

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

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

C. The Debtors' Bankruptcy Filing and Postpetition Employment

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

As disclosed by the Debtors in their bankruptcy filings, and as acknowledged at the hearing, as of the Petition Date neither of the Debtors owned an interest in any operating businesses and neither of the Debtors was engaged in any business of his/her own. This remains the case to this date. The Debtors do not sell any goods or services of their own, they do not have any employees, and they do not have any personal business expenses outside of the possible residual liability related to the Defunct Companies. Since before the Petition Date, the Debtors' sole source of income has come from their status as W-2 employees.

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

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

D. The Discharge Objection and Request for Conversion

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

Importantly, the Debtors' request for conversion to chapter 11 is expressly conditioned on the Court's simultaneous authorization for the chapter 11 case to proceed under subchapter V of chapter 11. And as expressly reaffirmed by counsel for the Debtors at the hearing, should the Court determine that either of the Debtors is not eligible for subchapter V relief, then

the Debtors no longer wish to convert the case to chapter 11.

DISCUSSION

A. Statutory Basis for Conversion to Chapter 11

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

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

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

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

Subchapter V was added to the Bankruptcy Code by the Small Business Reorganization Act of 2019, effective February 19, 2020 (the "**SBRA**").[20] With the addition of subchapter V, section 103(i) of the Bankruptcy Code now provides that subchapter V of chapter 11 "applies only in a case under chapter 11 in which a debtor (as defined in section 1182) elects that subchapter V of chapter 11 shall apply."[21] Section 1182, in turn, provides that a "debtor" means a "small business debtor"[22] and section 101(51D) of the Bankruptcy Code defines a "small business debtor" as follows:

> The term "small business debtor" -
>
> (A) subject to subparagraph (B), means a person engaged in commercial or business activities (including any affiliate of such person that is also a debtor under this title and excluding a person whose primary activity is the business of owning single asset real estate) that has aggregate noncontingent liquidated secured and unsecured debts as of the date of the filing of the petition or the date of the order for relief in an amount not more than $2,725,625 (excluding debts owed to 1 or more affiliates or insiders) not less than 50 percent of which arose from the commercial or business activities of the debtor;
>
> (B) does not include -
>
> (i) any member of a group of affiliated debtors that has aggregate noncontingent liquidated secured and unsecured debts in an amount greater than $2,725,625 (excluding debt owed to 1 or more affiliates or insiders);
>
> (ii) any debtor that is a corporation subject to the reporting requirements under section 13 or 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78m, 78*o*(d)); or
>
> (iii) any debtor that is an affiliate of an issuer (as defined in section 3 of the Securities Exchange Act of 1934 (15 U.S.C. 78c)).

11 U.S.C. § 101(51D).

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

C. The Meaning of "Engaged in Commercial or Business Activities"

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

The task of resolving statutory disputes begins where all such disputes must begin - with the language of the statute itself.[23] This is because courts are to presume that Congress has said in a statutory provision what it means, and means in the statutory provision what it says there.[24] In applying the plain language of a statute, it is also helpful to note that "Congress intends the words in its enactments to carry their ordinary, contemporary, common meaning."[25]

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

1. "Engaged In"

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

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

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

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

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

> Notwithstanding the 2005 Amendments [to the Bankruptcy Code that first introduced the small business debtor chapter 11 provisions], small business chapter 11 cases continue to encounter difficulty in successfully *reorganizing*....[T]he [SBRA] legislation allows these debtors "to file bankruptcy in a timely, cost-effective manner, and hopefully allows them to *remain*

in business" which "not only benefits the owners, but employees, suppliers, customers, and others who rely on that business."

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

***7** Third, in the broader context of the Bankruptcy Code as a whole, it is also significant to note that Congress did not write on a blank slate when utilizing the language "engaged in" in the definition of "small business debtor."[33] Congress previously used the same language in the eligibility provisions applicable to subchapter IV of chapter 11 and chapter 12 of the Bankruptcy Code. As such, Congress had the benefit of how the language had been interpreted by courts in the past in drafting the "small business debtor" definition of section 101(51D) and could have elaborated upon such language or used different language if it had concern with respect to such judicial interpretation.

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

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

Applying the foregoing principles to the case at hand, the evidence is clear that each of the Defunct Companies had ceased all commercial and business activities prior to the Petition Date and that Cord was not occupied with or otherwise busy in - *i.e.* "engaged in" - any commercial or business activities with respect to the Defunct Companies. Additionally, no evidence was introduced to suggest that the cessation of such commercial and business activities was in any way only temporary in nature, or that Cord intended to cause any of the Defunct Companies to resume operations. Consequently, under the facts and circumstances of this case, the Debtors have failed to establish that Cord qualifies as a small business debtor for purposes of subchapter V of chapter 11 based upon his prior ownership and management of the Defunct Companies.

2. "Commercial or Business Activities"

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

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

Beginning with the statutory language itself, "commercial" in the context of section 101(51D) is commonly defined as "of or relating to commerce," "commerce" is commonly defined as "the exchange or buying and selling of commodities on a large scale involving transportation from place to place," and "commodity" is commonly defined as "an economic good."[41]

"Business" in the context of section 101(51D) is commonly defined as being "commercial or mercantile" in nature, "mercantile" is commonly defined as "of or relating to merchants or trading," and "merchant" is commonly defined as "a buyer and seller of commodities for profit."[42] Thus, applying the ordinary meaning of "commercial or business activities" to the language of section 101(51D), a person engaged in "commercial or business activities" is a person engaged in the exchange or buying and selling of economic goods or services for profit.

Here, the Debtors have acknowledged that neither of them is engaged in the exchange or buying and selling of any economic goods or services of their own for profit. And in relation to El Reno, inasmuch as the Debtors do not have an ownership interest in the company, it also cannot be said that Cord is engaged in the exchange or buying and selling of any economic goods or services for the Debtors' indirect profit. Put simply, Cord is nothing more than an employee of El Reno with heightened obligations to the company on account of his role as an officer. As such, Cord does not qualify as a small business debtor under section 101(51D).

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

D. Small Business Debtor Affiliate Status

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

> The term "affiliate" means -
>
> (A) entity that directly or indirectly owns, controls, or holds with power to vote, 20 percent or more of the outstanding securities of the debtor, other than an entity that holds such securities -
>
> (i) in a fiduciary or agency capacity without sole discretionary power to vote such securities; or
>
> (ii) solely to secure a debt, if such entity has not in fact exercised such power to vote;
>
> (B) corporation 20 percent or more of whose outstanding voting securities are directly or indirectly owned, controlled, or held with power to vote, by the debtor, or by an entity that directly or indirectly owns, controls, or holds with power to vote, 20 percent or more of the outstanding voting securities of the debtor, other than an entity that holds such securities -
>
> (i) in a fiduciary or agency capacity without sole discretionary power to vote such securities; or
>
> (ii) solely to secure a debt, if such entity has not in fact exercised such power to vote;
>
> (C) person whose business is operated under a lease or operating agreement by a debtor, or person substantially all of whose property is operated under an operating agreement with the debtor; or
>
> (D) entity that operates the business or substantially all of the property of the debtor under a lease or operating agreement.

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

In any event, because Sunny fails to qualify as an affiliate of Cord for purposes of the "small business debtor" definition of section 101(51D) and because the Debtors have conditioned their conversion request on the Court authorizing the case to proceed as a joint case under subchapter V of chapter 11, Sunny's ineligibility for subchapter V relief is also an independent basis upon which to deny the Debtors' conversion request.

CONCLUSION

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

ORDER

***10** Accordingly, it is hereby:

ORDERED that the Motion be and is hereby DENIED.

All Citations

Not Reported in B.R. Rptr., 2021 WL 825156

Footnotes	
1	*See, e.g,* Docket Nos. 17, 20, 24-25, 27-29, 30, 32-37, 41 and 43-45.
2	*See* Adversary No. 20-04017 (objecting to discharge pursuant to 11 U.S.C. §§ 727(a)(2)(A), 727(a)(2)(B) and 727(a)(4)(A)).
3	*See* Docket Nos. 61 and 64.
4	Citing *Marrama v. Citizens Bank of Mass.,* 549 U.S. 365 (2007) (affirming denial of debtor's request to convert chapter 7 case to chapter 13 case on the basis of the debtor's bad faith conduct).
5	*See* Docket No. 71.
6	*See* Debtors' Exh. 3 (Amended Schedule A/B, Response to Question 19); Debtors' Exh. 5 (Amended Statement of Financial Affairs, Response to Question 27).
7	*See* Debtors' Exh. 8 (organizational documents of El Reno); Debtors' Exh. 10 (Company Agreement of El Reno, § 4.1.A. - providing for member management).
8	*See* Debtors' Exh. 10.
9	*See* Debtors' Exh. 8.

10	*See* Debtors' Exh. 7 (Last Will and Testament of Lloyd Johnson, art. II.C.).
11	*See* Debtors' Exh. 11.
12	*See, e.g.,* Debtors' Exh. 5 (Amended Statement of Financial Affairs, Response to Question 9 - listing the pending litigation of *E6 Resources LLC, et al. v. Crooked Oak LLC, et al,* 342nd Judicial District Court, Tarrant County, Texas); Debtors' Exh. 4 (Amended Schedule E/F, Line 4.11 - listing disputed claim of $500,000 in the name of Armadillo Exploration LLC - and Part 3 - listing the remaining Investor Creditors and E6 Resources LLC as parties associated with the listed disputed claim).
13	*See* Debtors' Exh. 2 (Schedule I).
14	*See* Debtors' Exh. 12.
15	*See* Debtors' Exh. 2 (Schedule I).
16	*See* Debtors' Exh. 1 (copy of complaint).
17	*See*11 U.S.C. § 706(a), (d).
18	*Seeid.* § 109(d).
19	*See, e.g.,In re City of Bridgeport,* 129 B.R. 332, 334 (Bankr. D. Conn. 1991) (burden of proof with respect to eligibility under a particular chapter of the Bankruptcy Code rests with the party claiming the existence of such eligibility).
20	*See*Pub. L. No. 116-54, 133 Stat. 1079 (2019).
21	11 U.S.C. § 103(i).
22	*Id.* § 1182(1). Of note, while section 1182 was amended by the Coronavirus Aid, Relief, and Economic Security Act (the "CARES Act") to provide for a new, temporarily-effective definition of "debtor," the provision of the CARES Act within which section 1182 was modified only applies to bankruptcy cases commenced on or after the date of enactment of the CARES Act - March 27, 2020. *See*Pub. L. No. 116-136, § 1113(a)(1), (a)(3), 134 Stat. 281, 310-11 (2020). Consequently, because the Debtors' case was commenced prior to such date, the amended definition is inapplicable to this case.
23	*United States v. Ron Pair Enters., Inc.,* 489 U.S. 235, 241 (1989).
24	*Connecticut Nat'l Bank v. Germain,* 503 U.S. 249, 253-54 (1992).

25	*Boyce v. Greenway (In re Greenway),* 71 F.3d 1177, 1179 (5th Cir.) (quoting *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship,* 507 U.S. 380, 388 (1993)), *cert. denied*, 517 U.S. 1244 (1996).
26	*Robinson v. Shell Oil Co.,* 519 U.S. 337, 340 (1997) (citing *Ron Pair Enters., Inc.,* 489 U.S. at 240)).
27	*Robinson,* 519 U.S. at 341.
28	Consider, for example, the situation where a debtor has been forced to temporarily cease operations for unexpected non-financial reasons, such as weather, a natural disaster, or to comply with regulatory requirements. Many small businesses have recently experienced this very situation, having been ordered to temporarily cease operations on account of the COVID-19 pandemic. While these very same businesses planned to (and most often did) reopen once permitted, had they filed for bankruptcy protection while temporarily shut down, the Objectors' proposed test would have precluded them from being eligible for subchapter V relief because they were not *actively carrying out* commercial or business activity as of the date of the bankruptcy filing.
29	*See* "engaged", *Merriam-Webster Online Dictionary* (2021) (www.merriam-webster.com/dictionary/engaged).
30	*See also In re Thurman*, Case No. 20-41400-can11, 2020 WL 7249555, at *4 (Bankr. W.D. Mo. Dec. 8, 2020) ("The plain meaning of 'engaged in' means to be actively and currently involved").
31	*See, e.g,*11 U.S.C. §§ 1102(a)(3) (eliminating appointment of creditors' committee in subchapter V case unless ordered otherwise), 1125(f) (minimizing disclosure statement requirements), 1129(e) (requiring court to confirm plan that complies with § 1129 and is filed in accordance with § 1121(e) by no later than 45 days after the plan is filed), 1181(b) (eliminating requirement of disclosure statement in subchapter V case unless ordered otherwise), 1189(a) (providing that only the debtor may file a plan in subchapter V case), 1191(b)-(c) (enabling cramdown confirmation of fully nonconsensual plan that commits disposable income over period of 3 to 5 years without the necessity of complying with the "absolute priority rule" of § 1129(b)(2)(B)).
32	The Debtors rely heavily upon a recent bankruptcy opinion out of the District of South Carolina to the contrary - *In re Wright,* C/A No. 20-01035-HB, 2020 WL 2193240 (Bankr. D.S.C. Apr. 27, 2020). In *Wright*, despite referring to the same legislative history and noting that it "indicates [the SBRA] was intended to improve the ability of small businesses to reorganize and ultimately remain in business," the court curiously then wholly disregards such legislative history in opining that a debtor is not required to be currently engaged in any commercial or business activities and may, instead, qualify as a small business debtor based upon its intent to "address[ ] residual business debt" in the case. *Seeid.* at *3.
33	*Thurman*, 2020 WL 7249555, at *3.
34	*See*11 U.S.C. § 103(h).
35	*Seeid.* § 101(44).
36	*See**Hileman v. Pittsburgh & Lake Erie Props., Inc. (In re Pittsburgh & Lake Erie Props., Inc.),* 290 F.3d 516, 519 (3rd Cir. 2002).
37	*See*11 U.S.C. § 109(f).

38	*Seeid.* § 101(18).
39	*See, e.g.,Thurman*, 2020 WL 7249555, at *3-4.
40	*Watford v. Federal Land Bank of Columbia (In re Watford),* 898 F.2d 1525, 1528 (11th Cir. 1990) (emphasis added); *see also**In re McLawchlin,* 511 B.R. 422, 427-28 (Bankr. S.D. Tex. 2014).
41	*See* "commercial", "commerce" and "commodity", *Merriam-Webster Online Dictionary* (2021) (www.merriamwebster.com/dictionarv/commercial. www.meriam-webster.com/dictionary/commerce and www.meriamwebster.com/dictionary/commodity).
42	See "business", "mercantile" and "merchant", *Merriam-Webster Online Dictionary* (2021) (www.meriamwebster.com/dictionary/business, www.meriam-webster.com/dictionary/mercantile and webster.com/dictionary/merchant). www.meriam-
43	*See*11 U.S.C. § 101(31)(A)(i) (defining "insider" as including a relative of the debtor).

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Faculty

Craig M. Geno is a member of the Law Offices of Craig M. Geno, PLLC in Ridgeland, Miss., and his bankruptcy practice consists representing secured and unsecured creditors, unsecured creditors' committees, chapter 11 debtors-in-possession and bankruptcy trustees in chapter 7 and 11 cases. Additionally, he has served as a trustee in chapter 11 cases and is a subchapter V trustee in the Northern and Southern Districts of Mississippi and the Western District of Tennessee. His practice areas also include commercial and corporate litigation. Mr. Geno is a frequent writer and lecturer on various bankruptcy topics. He is a member of the American Bar Association, Mississippi State Bar Association (for which he served as president of its Law Office Economics Section from 1993-94), Mississippi Bar Foundation, Federal Bar Association (for which he served as the Southern District Vice President of the Mississippi chapter from 1989-90), and the Mississippi Bankruptcy Conference (for which he served as president in 2001). In addition, he is a member of ABI, the Business Bankruptcy Subcommittee of the Section of Business Law of the American Bar Association, and the Turnaround Management Association, and he participated in ABI's Subchapter V Task Force. Mr. Geno is a Fellow in the American College of Bankruptcy, the Mississippi Bar Foundation and the American Bar Foundation. He is listed in *The Best Attorneys of America* and as a "Top Fifty Attorney" in *Super Lawyers*, and his firm is listed in *U.S. News & Best Lawyers* "Best Law Firms." Mr. Geno is Board Certified in Business Bankruptcy Law by the American Board of Certification, served on its board of directors for eight years, and served as its president and chairman. He also served on the Mississippi State Bar as special counsel for the Committee on Character and Fitness from 1984-87, and as a member of the Committee on Character and Fitness from 1987-2013. Mr. Geno received his undergraduate degree in 1975 and his J.D. in 1978 from the University of Mississippi, during which time he served on the law school's Moot Court Board.

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Ciara L. Rogers is a partner with Waldrep Wall Babcock & Bailey PLLC in Winston-Salem, N.C., where her practice focuses on business bankruptcy, mass tort bankruptcy, mediation and municipal law. She has experience in debtors' and creditors' rights, chapter 11 bankruptcy, representing chapter 11 and chapter 7 bankruptcy trustees, serving as a subchapter V trustee, and litigating adversary proceedings. Previously, Ms. Rogers was an attorney with the Law Offices of Oliver & Cheek and clerked for Hon. J. Rich Leonard and Hon. Randy D. Doub of the Eastern District of North Carolina Bankruptcy Court. During law school, she interned with the Bankruptcy Administrator's Office in the Eastern District of North Carolina. In 2018, Ms. Rogers was selected as the director of the Stubbs Bankruptcy Clinic at Campbell University School of Law. In that capacity, she supervises second- and third-year law students in providing *pro bono* bankruptcy representation to low-wealth individuals in the Eastern District of North Carolina. She has also taught the foundations of bankruptcy law course at Campbell University School of Law and speaks at conferences on various bankruptcy related topics. Ms. Rogers is a member of the North Carolina and Virginia State Bars and the North Carolina Bar Association. She also is certified as a specialist in business bankruptcy by the North Carolina State Bar, and has been listed in the 2024 edition of *The Best Lawyers in America*, the 2021-23 editions of *Super Lawyers* as a "Rising Star," and the 2021-22 editions of *Business North Carolina* magazine's "Legal Elite in Bankruptcy Law." In 2014, Ms. Rogers was recognized by the National Conference of Bankruptcy Judges (NCBJ) as an Honorable Cornelius Blackshear Fellow, and in 2019, she was selected as a participant in the NCBJ's NextGen program. In 2023, Ms. Rogers was honored as one of ABI's 40 Under 40. She received dual B.S degrees in history and political science from Averett University and her J.D. from North Carolina Central University School of Law.

Bradley S. Shraiberg is a founding partner of Shraiberg Page P.A. in Boca Raton, Fla., where he focuses on advising companies experiencing financial difficulties, purchasers of and investors in distressed companies, and lenders to and creditors of such companies. He also regularly advises officers and directors of companies involved in debt restructuring on matters relating to corporate governance and fiduciary duty. During his career, Mr. Shraiberg has represented retail, manufacturing, construction, aerospace and other companies requiring financial and operational restructuring. He has experience with complex reorganizations, and some of the companies that he has recently confirmed plans of reorganization for, or negotiated a structured, consensual dismissal, include Enclave at Hillsboro, LLC, Atlantic Coast Refining, Inc., Jade Winds Association, Inc., Tuscany Energy, LLC, Auburn Trace, Ltd. and Mile Marker, Inc. Mr. Shraiberg also represents national retailers, landlords and developers in their capacity as creditors within various insolvency proceedings, as well as their litigation associated with complex commercial matters, such as Office Depot, MillerCoors, B/E Aerospace, KLX, Inc., Fiserv Securities, Ansca Homes, BBX Capital, Duffy's Sports Group and Sterling Development Corp. Due to the current economic conditions, a large portion of Mr. Shraiberg's clients are development companies and/or their principals. He has experience restructuring developers' financing and finding alternative financing and/or angel investors. He also has negotiated with all of the major financial institutions, and has amassed a network of investors that are interested in investing in or purchasing distressed assets. Mr. Shraiberg is a member of the Florida Bar and is licensed to practice in the U.S. District Courts for the Southern and Middle Districts of Florida. He is an active member of the Palm Beach County Bar Association, ABI and the Bankruptcy Bar Association for the Southern District of Florida, for which he is a past director and the past chairman of the local

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