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For the Future: Hot Topics in Commercial Bankruptcy

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CONCURRENT SESSION

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FOR THE FUTURE – HOT TOPICS IN COMMERCIAL BANKRUPTCY

Speakers

Hon. Kimberley H. Tyson was sworn in May 2017 to the U.S. Bankruptcy Court for the District of Colorado. Prior to that, she was in private practice where her practice was concentrated in workouts, bankruptcy, and related commercial litigation. In March 2011, she was appointed to the panel of Chapter 7 trustees in Colorado by the United States Trustee. She is a member of the Colorado Bar Association's Bankruptcy Subcommittee and is a past chair of the Subcommittee. She is an active member of the American Bankruptcy Institute, serving for many years on the Advisory Board of the annual Rocky Mountain Conference. She is a co-author of several publications and a frequent lecturer on bankruptcy issues. She received her law degree from the University of Kansas School of Law in 1987. She is a former law clerk to the Honorable John K. Pearson of the U.S. Bankruptcy Court for the District of Kansas and the Honorable Jerry G. Elliott of the Kansas Court of Appeals.

Keri Riley, Esq., is an associate attorney at Kutner Brinen P.C., where she focuses on primarily on representing debtors and creditors in Chapter 7 and Chapter 11 bankruptcy cases and related litigation. She graduated from the University of Denver, Sturm College of Law with honors in 2014. She is a continuing contributors to the Norton Journal of Bankruptcy Law and Policy, and her publications include "Standard for Dismissal and Stay Relief in Single Asset Real Estate Chapter 11 Cases", July 2014, and "Why Filing Tax Returns by April 15th Matter More Than Ever: Recent Developments in the Dischargeability of Late Filed Taxes," June 2015. Prior to graduating law school, Ms. Riley was a member of the National Trial Team, the National Appellate Advocacy Team, and worked for the Colorado State Attorney General's Office.

Gabrielle Palmer is an attorney at ONSAGER | FLETCHER | JOHNSON, where she focuses her practice on advising trustees, creditors, and debtors in commercial bankruptcy and insolvency related matters. Gabrielle has represented clients on a variety of insolvency related issues, including asset sales pursuant to 11 U.S.C. § 363 and prosecution and defense of claims under 11 U.S.C. § 544, 547, 548, and 549. Gabrielle has also represented clients in commercial litigation cases involving claims for alter ego, breach of fiduciary duty, and misappropriation of trade secrets. Gabrielle is the Chair of the Mountain Desert Network of the International Women's Restructuring and Insolvency Confederation and a continuing contributor to the Norton Journal of Bankruptcy Law and Practice and the Norton Annual Survey of Bankruptcy Law.

Andy Roth-Moore is a senior associate in the Brownstein Hyatt's corporate bankruptcy group. His practice focuses on corporate bankruptcy and restructuring. He represents corporations, investors, lenders, directors and officers in bankruptcy and state court litigation and related financing and sales transactions. Prior to joining Brownstein Hyatt, Andy was a corporate bankruptcy associate at Morris, Nichols, Arsht & Tunnell LLP. He has also served as a judicial clerk for the Honorable Laurie S. Silverstein at the United States Bankruptcy Court for the District of Delaware. He graduated from the University of Denver, Sturm College of law in 2012 and is admitted to practice in Colorado, New York, Delaware, and Pennsylvania.

Dan Garfield represents individuals and businesses in all types of matters and transactions from the start-up stage to exit. He represents stores and cultivation facilities, investors, landlords, lenders, trimmers, oil extractors, edibles manufacturers, testing laboratories, hemp farmers, CBD manufacturers, and ancillary businesses such as social media companies, consultants, and suppliers. His experience includes entity formation and restructuring, mergers and acquisitions, debt and equity financing, private placements, licensing, contract negotiation and drafting, corporate governance, and joint ventures, among other legal matters involving cannabis businesses. Dan also acts as outside general counsel for a number of businesses in the industry.

CURRENT STATE OF CANNABIS AND BANKRUPTCY

BY: DAN GARFIELD

Not surprisingly, cannabis businesses, owners, and employees remain barred (mostly) from filing for bankruptcy protection, but as more states legalize and as more "ancillary" businesses seek to file, courts are grappling with new issues such as otherwise legal businesses that do business with the marijuana industry.

It remains the case that businesses and individuals which "touch the plant," that is, which grow or sell marijuana (aka marijuana regulated businesses, or "MRBs"), are unable to seek bankruptcy protection, whether or not such businesses or owners are in compliance with state marijuana laws. Until Congress legalizes marijuana or takes some other action to make marijuana legitimate federally (for example, the proposed STATES Act, where marijuana would be legal federally to the extent legalized under state law), the position of federal courts and the United States Trustee's Office seems unlikely to change.

Given that the cannabis industry continues to have economic difficulties despite growing revenues for various reasons (e.g., the retrenchment of Canadian cannabis companies from acquisitions in the United States; Section 280E of the Internal Revenue Code; high excise and other state taxes bolstering the black market), legal practitioners looking to restructure will be forced to do under the various state debtor-creditor laws.

Almost every bankruptcy court that has considered the matter has dismissed a bankruptcy case where it could not proceed without the MRB debtor or the trustee having to administer an estate with assets consisting of marijuana or the proceeds of marijuana. See, e.g., In re Arenas, 535 B.R. 845, ___ (B.A.P. 10th Cir. 2015); In re Rent-Rite Super Kegs West Ltd., 484 B.R. 799 (Bankr. D. Colo. 2012); In re Johnson, 532 B.R. 53 (Bankr. W.D. Mich. 2015); In re Medpoint Mgmt., 528 B.R. 178 (Bankr. D. Ariz. 2015). In a handful of cases, the court delayed dismissal until the debtor proceeded with a "marijuana-less" estate. **Cites**. Additionally, the United States Trustee's Office has a policy to dismiss marijuana-related cases. Letter from Clifford J. White, Executive Office for the United States Trustee, dated April 26,2017 ("It is the policy of the U.S. trustee program that the U.S. trustees shall move to dismiss or object in all cases involving marijuana assets on grounds that such assets may not be administered under the Bankruptcy Code . . . .").

However, courts have also from time to time provided MRB debtor's the option to discontinue their marijuana operations rather than simply dismiss the bankruptcy case. For example, in In re Johnson, a Chapter 13 case, the court stated:

> Under these unusual circumstances, the Debtor must make a choice. He can either continue his medical marijuana business or avail himself of the benefits of the Bankruptcy Code, but not both. If he chooses the latter, the court will require him to discontinue growing, selling and transferring marijuana to any and all patients and dispensaries immediately and to cease using property of the estate to further this activity.

> With respect to the marijuana plants themselves (and any products or inventory derived therefrom) included within the estate pursuant to §§ 541(a) and 1306(a), because their contraband nature renders them of inconsequential value and burdensome to the estate as a matter of law, the court will order abandonment of the marijuana plants and any products or inventory derived therefrom without further notice or opportunity for hearing. *See* 11 U.S.C. § § 102(1) and 554. Furthermore, the court will order the Debtor to destroy the marijuana plants and any product or inventory derived therefrom forthwith. Eliminating the contraband from the estate by way of immediate abandonment, and ordering its destruction as a condition of the Debtor's eligibility to proceed further, will remove the shadow that the contraband casts on this proceeding, the Standing Trustee, and the court.
>
> . . .
>
> In the court's view, the Debtor cannot conduct an enterprise that admittedly violates federal criminal law while enjoying the federal benefits the Bankruptcy Code affords him. " There is no constitutional right to obtain a discharge of one's debts in bankruptcy," *United States v. Kras*, 409 U.S. 434, 446, 93 S.Ct. 631, 34 L.Ed.2d 626 (1973), and it is not asking too much of debtors to obey federal laws, including criminal laws, as a condition of obtaining relief under the Bankruptcy Code.
>
> At the same time, the Debtor filed his case in good faith, and it is quite obvious from his credible testimony that he is in dire need of bankruptcy relief and the court's assistance. The court is willing to assist, provided, however, the Debtor discontinues the medical marijuana business.
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> To balance the court's (and the Debtor's) obligations under federal law, including federal criminal law, the Debtor's legitimate need for relief under chapter 13, and Michigan's policy choices reflected in the MMMA, the court will refrain from dismissing the Debtor's case at this time, but will enjoin him from conducting his medical marijuana business (and violating the CSA), while his case is pending.
>
> If, however, the Debtor prefers to continue his illicit business activity (albeit subject to the possibility of federal criminal prosecution), he need only file a motion to dismiss this case under § 1307(b), and the court's injunction will cease upon dismissal.

In re Johnson, 532 B.R. at 58-59; see also In re Arm Ventures, LLC, 564 B.R. 77, 86-87 (Bankr. S.D. Fla. 2017) (creditor granted relief from stay due to MRB debtor's bad faith, but dismissal stayed to give debtor time to provide a plan that "does not depend on the sale of marijuana as an income source.").

More recently, courts have started to grapple with non-MRB's which knowingly do substantial business with MRBs. The case that has received the most "notoriety" is In re Way to Grow, Inc., 597 B.R. 111 (Bankr. D. Colo. 2018). This opinion provides a detailed discussion of the current state of case law concerning MRB debtors.

Citing In re Arenas, In re Rent Rite, and an unpublished opinion from In re B Fischer Indus., LLC (included as Appendix A), Judge Romero noted that the three cases set forth three basic propositions:

> First, a party cannot seek equitable bankruptcy relief from a federal court while in continuing violation of federal law. Second, a bankruptcy case cannot proceed where the court, the trustee or the debtor-in-possession will necessarily be required to possess and administer assets which are either illegal under the CSA or constitute proceeds of activity criminalized by the CSA. And third, the focus of this inquiry should be on debtor's marijuana-related activities during the bankruptcy case, not necessarily before the bankruptcy case is filed.

Id. at 120. The court cited to a number of other bankruptcy decisions from other courts that came to similar conclusions. Id. at 120-23.

In In re Way to Grow, Inc., the court considered whether an otherwise legal business, a retail hydroponics business, could proceed with a bankruptcy plan where the debtors "have actual knowledge they are selling equipment which will be used to manufacture a controlled substance." Id. at 129. Citing a wide range of evidence, the court found:

> Considering this abundant evidence, Debtors' efforts to distance themselves from knowledge of their customers' use of their products is simply not credible. Even though the Court concludes Debtors do not share their customers' specific intent to violate the CSA, Debtors certainly know they are selling products to customers who will, and do, use those products to manufacture a controlled substance in violation of the CSA. Debtors tailor their business to cater to those needs, tout their expertise in doing so, and market themselves consistent with their knowledge. There is no evidence this business model has materially changed post-petition.
>
> The Court concludes Debtors' business model and execution thereof fundamentally violates § 843(a)(7). These violations continue post-petition, placing this case squarely within the rule adopted by Judge Tallman in *Rent-Rite Super Kegs* . To use Judge Tallman's words, even if the Debtors "are never charged or prosecuted under the CSA, [they] are conducting operations in the normal course of [their] business that violate federal criminal law." This Court cannot enforce federal law in aid of the Debtors because Debtors' ordinary course activities constitute a continuing federal crime. The Court finds this is, inescapably, cause to dismiss this bankruptcy case under 11 U.S.C. § 1112(b).
>
> Having reached this conclusion, the Court nevertheless considered whether any alternative to outright dismissal, or other post-petition changes to Debtors' business, could cure the ongoing violations of federal law in this case. However, unlike *In re Johnson* [166] and *In re ARM Ventures, LLC,* the evidence demonstrates extreme improbability the Debtors could survive if they were to sever all ties to their marijuana customers. Debtors' business activities constituting violations of the CSA are a major part of Debtors' ordinary course of business. Whether marijuana-related customers account for 65% or 95% of Debtors' revenue, eliminating all such revenue would be devastating to the Debtors. It is

> inconceivable Debtors could terminate any sales to known marijuana cultivators and still operate profitably.
>
> In any event, the Court does not believe such an order, or the remediation it would require, would be effective in this case. The Court cannot simply order Debtors to cease all sales to customers known to be involved in marijuana cultivation, because the usefulness of Debtors' products in illegal grow operations will continue to attract marijuana horticulturalists to Debtors' business, including those growing marijuana solely for personal use. Debtors have already acquired a venerable reputation for expertise in hydroponic marijuana growing, and it is difficult to imagine how Debtors could prevent customers from continuing to patronize Debtors' stores because of this reputation. Indeed, the evidence does not show Debtors' essential business model has changed post-petition, which, of course, is the relevant time to determine whether Debtors may remain in bankruptcy. In any event, any such order would require the Court, and interested parties, to monitor the Debtors' sales and customers, which would be very difficult and inefficient. Further, in light of the acrimonious nature of Inniss's relationship with the Debtors, the Court can be reasonably certain such an order would lead to costly and time-consuming future litigation over the Debtors' compliance.
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> To prevent this Court from violating its oath to uphold federal law, under the specific facts of this case, the Court sees no practical alternative to dismissal.

Id. at 131-33.

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLORADO
The Honorable Michael E. Romero

In re:	
B FISCHER INDUSTRIES, LLC,	Case No. 16-20863 MER
Debtor.	Chapter 11

ORDER

THIS MATTER comes before the Court on a discovery dispute among parties in connection with the motion for sanctions ("Sanctions Motion") against B. Fischer Industries, LLC ("B Fischer") filed by creditor Marcy Branham ("Branham") following dismissal of this bankruptcy case. The specific issue presently before the Court is the applicability of the crime-fraud exception to the attorney-client privilege.

JURISDICTION

The Court's Order dismissing the case states the Court will keep the bankruptcy case open and retain jurisdiction over it for the sole purpose of permitting Branham to file her Sanctions Motion against B Fischer for bad faith and/or abuse of the bankruptcy process.[1]

BACKGROUND

B Fischer's bankruptcy case was dismissed by the Court on March 8, 2017.[2] Fourteen days following dismissal, Branham, through her counsel, filed her motion for sanctions against B Fischer, seeking attorneys' fees and costs associated with her participation in the bankruptcy case.[3] Branham's sanctions motion seeks the payment of approximately $26,000 in attorneys' fees and costs from B Fischer and any counsel who represented it in the case.[4]

B Fischer's counsel at the time of the bankruptcy filing, Lindquist-Kleissler, LLC ("Lindquist-Kleissler"), was withdrawn as counsel by order of

[1] Docket No. 98

[2] Id.

[3] Docket No. 101.

[4] Id.

the Court on January 26, 2017.[5] B Fischer's subsequent counsel, the law firm of McCallister Garfield, P.C. ("McCallister Garfield"), was withdrawn as counsel by order of the Court on July 6, 2017.[6] Both law firms, on behalf of themselves, challenge the sanctions sought against them by Branham.

As would be expected from the palpable animosity among the parties and their counsel in this case, a discovery dispute erupted necessitating the Court's involvement. In connection with her Sanctions Motion, Branham sought discovery from both Lindquist-Kleisser and McCallister Garfield into certain documentation and communications between them and B Fischer and its principals. Both Lindquist-Kleissler and McCallister Garfield objected, asserting the material was protected by the attorney-client privilege. Branham asserts, due to B Fischer's alleged involvement in the marijuana industry, all communications purportedly subject to the attorney-client privilege are discoverable under the crime-fraud exception to the attorney-client privilege. Both Lindquist-Kleissler and McCallister Garfield are asserting the attorney-client privilege on behalf of their former client.

On September 15, 2017, Mark Driver, CEO of B Fischer, through counsel, filed a Notice of Assertion of Attorney-Client Privilege on behalf of himself individually and on behalf of B Fischer.[7] Driver and B Fischer expressly invoke the attorney-client privilege with respect to the documentation and communication sought by Branham in connection with the Sanctions Motion.[8]

Having reviewed the written briefs submitted by the parties on the applicability of the crime-fraud exception to the attorney-client privilege in this case, and the law relevant to this issue, the Court finds and orders as follows:

DISCUSSION

The United States Court of Appeals for the Tenth Circuit has construed the crime-fraud exception to the attorney-client privilege as providing "[t]he attorney-client privilege does not apply where the client consults an attorney

[5] Docket No. 69.

[6] Docket No. 137.

[7] Docket No. 144.

[8] Id. In her briefing, Branham suggests the Court should waive the attorney-client privilege in this instance because, at that time, B Fischer had not expressly asserted the attorney-client privilege or opposed the application of the crime fraud exception. See Docket No. 141, p. 20. However, as B Fischer has now expressly asserted the privilege with respect to the communications sought by Branham, this argument appears moot.

to further a crime or fraud."[9] The exception does not apply to tortious conduct generally, but is limited to attorney advice in furtherance of a crime or fraud.[10] Nor does the exception apply if the assistance of the attorney is sought only to disclose past wrongdoing – the exception applies if the assistance was used to cover up and perpetuate the crime or fraud.[11] Additionally, the crime-fraud exception applies to both the attorney-client privilege and the work-product doctrine.[12]

The party claiming the crime-fraud exception applies must present prima facie evidence the allegation of attorney participation in crime or fraud has some foundation in fact.[13] The Tenth Circuit has not articulated the precise requirements for establishing a prima facie showing.[14] However, the party seeking disclosure must provide evidence the privileged communication "is reasonably related to and in furtherance of the crime . . . the evidence must demonstrate that the client was engaged in or was planning the criminal conduct when it sought the assistance of counsel and that the assistance was obtained in furtherance of the conduct or was closely

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[9] In re Grand Jury Proceedings, 857 F.2d 710, 712 (10th Cir.1988), cert. denied, 492 U.S. 905, 109 S.Ct. 3214, 106 L.Ed.2d 565 (1989); accord, In re Vargas, 723 F.2d 1461, 1467 (10th Cir.1983); see also Motley v. Marathon Oil Co., 71 F.3d 1547, 1551 (10th Cir. 1995)

[10] Motley, 71 F.3d at 1551.

[11] In re Grand Jury Subpoenas, 144 F.3d 653, 660 (10th Cir. 1998).

[12] In re Vargas, 723 F.2d at 1467.

[13] Motley, 71 F.3d at 1551.

[14] Martensen v. Koch, 301 F.R.D. 562, 573 (D. Colo. 2014). Several other circuits have attempted to define what the standard requires. See, e.g., In re Richard Roe, Inc., 68 F.3d 38, 40 (2nd Cir.1995) (probable cause to believe a crime or fraud has been committed); Haines v. Liggett Group Inc., 975 F.2d 81, 95–96 (3rd Cir.1992) (evidence that if believed by the fact finder would be sufficient to support a finding that the elements of the crime-fraud exception were met); In re International Sys. & Controls Corp. Sec. Litig., 693 F.2d 1235, 1242 (5th Cir.1982) (evidence such as will suffice until contradicted and overcome by other evidence); United States v. Davis, 1 F.3d 606, 609 (7th Cir.1993) (evidence presented by the party seeking application of the exception is sufficient to require the party asserting the privilege to come forward with its own evidence to support the privilege); In re Grand Jury Proceedings (Appeal of Corporation), 87 F.3d 377, 381 (9th Cir.1996) (reasonable cause to believe attorney was used in furtherance of ongoing scheme); In re Grand Jury Investigation (Schroeder), 842 F.2d 1223, 1226 (11th Cir.1987) (evidence that if believed by the trier of fact would establish the elements of some violation that was ongoing or about to be committed); In re Sealed Case, 107 F.3d 46, 50 (D.C. Cir.1997) (evidence that if believed by the trier of fact would establish the elements of an ongoing or imminent crime or fraud).

related to it."[15] The prima facie showing does not require evidence the attorney from whom the client received the advice was a knowing participant in the crime or was otherwise culpable.[16] When a movant has presented competent evidence, the party seeking to protect the privilege must then come forward with rebuttal evidence.[17] The determination of whether such a prima facie showing has been made is left to the sound discretion of the court.[18]

In United States v. Zolin, the Supreme Court held a court may conduct an in camera review to determine the applicability of the crime-fraud exception, but only if the party requesting such a review makes a showing of a factual basis adequate to support a good faith belief by a reasonable person that an in camera review of the documents may reveal evidence to establish the applicability of the crime-fraud exception.[19] Whether to conduct an in camera review is also left to the sound discretion of the court.[20]

In this case, Branham asserts the crime-fraud exception applies for two reasons: 1) B Fischer intended to, and did, operate a business both pre- and post-petition selling butane to producers in the marijuana industry thus aiding and abetting violations of the Controlled Substances Act, 21 U.S.C. § 841, et seq. ("CSA"), and 2) B Fischer committed a fraud upon the Court and a crime under 18 U.S.C. § 157 by intentionally omitting from the Court its involvement in the marijuana industry in order to obtain relief under the Bankruptcy Code otherwise unavailable to such businesses.[21] The Court will address whether Branham has met her prima facie burden of establishing the applicability of the crime-fraud exception based on these arguments in turn.

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[15] Martensen, 301 F.R.D. at 574.

[16] Id.

[17] Id. (citing United States v. Davis, 1 F.3d 606, 609 (7th Cir.1993) (holding a party has established a prima facie case under the crime-fraud exception "whenever it presents evidence sufficient 'to require the adverse party, the one with superior access to the evidence and in the best position to explain things, to come forward with that explanation'")).

[18] Motley, 71 F.3d at 1551.

[19] United States v. Zolin, 491 U.S. 554, 572, 575-76 109 S.Ct. 2619, 2361-62, 105 L.Ed.2d 469 (1989).

[20] Id. at 572, 109 S.Ct. at 2631.

[21] Docket No. 131.

1. Branham's Allegation B Fischer Aided and Abetted Violations of the Controlled Substances Act, 21 U.S.C. § 841, et seq., in its Sale of Butane to Producers in the Marijuana Industry.

The crux of Branham's first argument is B Fischer's knowing sale of butane to marijuana processors, who used the butane as a solvent to produce "controlled substances" under the CSA, thus aiding and abetting the processors' own criminal violations of the CSA.[22] According to Branham, the crime-fraud exemption should apply because, at the time B Fischer sought counsel from both Lindquist-Kleissler and McCallister Garfield, B Fischer intended to, and actually continued to, aid and abet those violations of the CSA.[23]

As evidence of B Fischer's allegedly criminal acts, Branham submits several documents to the Court, including an affidavit by Branham herself,[24] a "Business Development Plan" purportedly created by B Fischer,[25] an "untitled document created by [B Fischer] to induce investors to invest" in it,[26] internet screen shots of Gas West records from the Colorado Secretary of State website,[27] and an incomplete transcript of B Fischer's § 341 meeting in this case.[28]

According to the materials offered by Branham and the arguments in her brief, prior to the Petition Date, B Fischer obtained wholesale butane and knowingly resold that butane to customers for use as a solvent to extract THC resin from marijuana plants.[29] Branham also alleges the principals of B Fischer, Braden Fischer and Mark Driver, admitted B Fischer's pre-petition involvement in the marijuana industry at the § 341 meeting.[30]

As for post-petition business, Branham alleges B Fischer knowingly continued to make "flow-through" sales to its pre-petition customers through

[22] Docket No. 131, pp. 8-12.

[23] Id. at p. 12.

[24] Id., Affidavit of Marcy Branham.

[25] Id. at Ex. A.

[26] Id. at Ex. B.

[27] Id. at Ex. E.

[28] Id. at Ex. H.

[29] Docket No. 131, p. 3.

[30] Id. at pp. 4-6.

Gas West, Inc. ("Gas West"). Branham contends B Fischer's CEO, Mark Driver, formed Gas West with the intention of using Gas West as a "pass-through entity" to permit B Fischer to continue to make post-petition sales of butane to its pre-petition customer base. According to testimony at B Fischer's § 341 meeting, Gas West is the only customer of B Fischer and Gas West's customers are "the butane consuming industry." Mr. Driver and Mr. Fischer additionally testified at the § 341 meeting Gas West made "limited sales" to the marijuana industry as late as December 2016. Branham also contends, through her affidavit, Mr. Fischer admitted B Fischer made direct sales post-petition to its pre-petition marijuana processor customer base.[31]

Branham argues B Fischer's scheme of selling butane to the marijuana industry through Gas West post-petition shows B Fischer intended to, and actually did, aid and abet violations of the CSA at the time it sought counsel from both Lindquist-Kleissler and McCallister Garfield and, as a result, the crime-fraud exception to the attorney-client privilege applies in this case.

Lindquist-Kleissler and McCallister Garfield have both questioned the factual bases of and admissibility of Branham's "evidence."[32] The Court must admit it also has serious concerns about the admissibility of those documents, even at trial. However, even if the offered materials are admissible in full, the Court cannot find Branham has met her prima facie burden of demonstrating the applicability of the crime-fraud exception to this case.

First, the Court is obligated to note none of the conduct complained of by Branham is illegal under the laws of the state of Colorado. The Court must also note the parties' disagreements over whether the sale of butane to marijuana processors is itself an illegal act under federal criminal law, either as a direct violation of the CSA or as aiding and abetting others' violations of the CSA. With respect to the former, the Court agrees Branham has failed to point to any specific provision within the CSA making the sale of butane a violation of that act. Sections 841, 842 and 843 of the CSA set forth what constitutes unlawful acts. Section 841(a) makes it unlawful for any person knowingly or intentionally:

> (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

[31] Docket No. 131, pp. 7-8.

[32] Docket No. 139, pp. 18-20; Docket No. 140, pp. 7-10.

> (2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.[33]

Branham makes no allegation B Fischer itself manufactured or produced any controlled substances in violation of the CSA or was itself engaged in any of the actions deemed illegal under Sections 841(a)(1) or (2). Nor do Branham's allegations resemble any of the unlawful acts enumerated by Section 843 of the CSA.

Instead, Branham alleges B Fischer "knowingly sold its butane to marijuana processors who used the butane as a solvent to extract THC resin for use in marijuana-infused products, i.e. 'controlled substances.' . . . Selling THC resin and marijuana-infused products is a federal crime [under the CSA]."[34] Although it is not specifically cited by Branham in her pleadings, the section of the CSA which most closely resembles her allegations is Section 842(a), which, in relevant part, makes it unlawful for any person:

> (11) to distribute a laboratory supply to a person who uses, or attempts to use, that laboratory supply to manufacture a controlled substance or a listed chemical, in violation of this subchapter or subchapter II of this chapter, with reckless disregard for the illegal uses to which such a laboratory supply will be put.[35]

The term "laboratory supply" is defined by that section to mean: "a listed chemical or any chemical, substance, or item on a special surveillance list published by the Attorney General, which contains chemicals, products, materials, or equipment used in the manufacture of controlled substances and listed chemicals."[36] The "Special Surveillance List of Chemicals, Products, Materials and Equipment Used in the Clandestine Production of Controlled Substances or Listed Chemicals" ("Special Surveillance List"), published pursuant to Section 842(a)(11) of the CSA, enumerates the "laboratory supplies" used in the manufacture of controlled substances and listed chemicals.[37] The Court's review of the Special Surveillance List does not reveal butane as among those "laboratories supplies" it is unlawful to

[33] 21 U.S.C. § 842(a)(1), (2).

[34] Docket No. 131, p. 9.

[35] 21 U.S.C.A. § 842(a)(11).

[36] 21 U.S.C.A. § 842.

[37] See 63 FR 66199-03.

distribute to a person who uses, or attempts to use, that laboratory supply to manufacture a controlled substance or a listed chemical.[38]

By repeatedly making the argument, in response to Lindquist-Kleissler's and McCallister Garfield's briefs, B Fischer's aiding and abetting the production and sale of marijuana and THC through the sale of butane is still a crime under federal law, but repeatedly omitting any specific statute making sales of butane unlawful, Branham appears to concede there is no specific provision in the CSA making the sale itself of butane illegal.[39] Rather, Branham appears to rely on 18 U.S.C. § 2(a), which provides: "[w]hoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal."[40] Branham's reasoning must be if B Fischer, through its sale of butane to marijuana processors directly or through Gas West, aids and abets an offense against the United States, B Fischer is punishable as though it principally committed the offense of knowingly and intentionally manufacturing, distributing, or dispensing, or possessing with intent to manufacture, distribute, or dispense, a controlled substance under Section 841(a) of the CSA.

Aiding and abetting contains four elements: 1) the accused had the specific intent to facilitate the commission of a crime by another; 2) the accused had the requisite intent of the underlying substantive offense, 3) the accused assisted or participated in the commission of the underlying substantive offense; and 4) someone committed the underlying substantive offense.[41] As stated above, Section 841(a) of the CSA prohibits "knowingly or intentionally" manufacturing a controlled substance.[42] The knowledge one is manufacturing a controlled substance is a required element. Therefore, a charge of aiding and abetting the manufacture of a controlled substance "requires a belief that the chemicals will be used to manufacture a controlled

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[38] If, in fact, the sale of butane to marijuana processors is made illegal by some provision in the deep recesses of the CSA not identified by the Court, it is incumbent upon Branham, not the Court, to satisfy her prima facie burden by locating it.

[39] See Docket No. 141, pp. 11-12 ("it is common knowledge that selling marijuana and aiding and abetting the sale of marijuana is still a crime at the federal level . . . . Knowingly selling butane to an entity that sells to a marijuana distributor or processor is still aiding and abetting the sale of a Schedule 1 Controlled Substance with the intent to distribute no matter how many layers are created.").

[40] 18 U.S.C. § 2(a).

[41] U.S. v. Ching Tang Lo, 447 F.3d 1212, 1227 (9th Cir. 2006) (quoting U.S. v. Garcia, 400 F.3d 816, 818 n. 2 (9th Cir. 2005)).

[42] 21 U.S.C. § 841(a).

substance, not just reasonable cause to believe that the chemical will be used to manufacture controlled substances."[43]

Even if B Fischer's pre-petition sales of butane to individuals and entities in the marijuana industry may have constituted aiding and abetting violations of the CSA, the Court is not strictly concerned with B Fischer's pre-petition activities. The Court must determine whether, at the time B Fischer sought the assistance of counsel to file for bankruptcy relief, it was engaged in or planning the alleged criminal conduct and the assistance of counsel was obtained in furtherance of that conduct.

According to the limited excerpts of the transcript from B Fischer's § 341 meeting offered by Branham, Mr. Fischer stated B Fischer's pre-petition business of selling butane to customers in the marijuana industry was not the future of B Fischer's business. Fischer and Driver stated B Fischer made sales of butane post-petition, but only to Gas West, the sole customer of B Fischer. The Court has not been shown competent factual evidence of B Fischer's intention to engage directly in sales to marijuana customers post-petition. It is not clear to the Court B Fischer even could have been so directly engaged post-petition, as the undated "Development Plan" offered by Branham reveals the butane supply tank may have been contaminated and sales would not resume for several weeks.[44]

Even if Gas West made sales of butane, sold to it post-petition by B Fischer, to individuals or entities involved in the marijuana industry, this alone is insufficient for the Court to find B Fischer aided and abetted violations of the CSA. While Branham has made allegations Gas West is nearly identical to B Fischer's unregistered trade name, Gas West is merely a "pass through entity," Mr. Driver is the sole owner and officer of Gas West, and Gas West is the only customer of B Fischer, these remain mere allegations in the absence of a legal finding Gas West is the alter ego of B Fischer. The Court is not aware of any such findings to date. Accordingly, the Court is obligated to respect the legal distinctions between the two entities, and sales by one cannot be considered sales by the other.[45] Therefore, the Court cannot find Gas West's post-petition sales of butane sold to it by B Fischer constitute the kind of criminal conduct alleged by Branham to support application of the crime-fraud exception in this case.

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[43] Ching Tang Lo, 447 F.3d at 1227.

[44] Docket No. 131, p. 11, Ex. A.

[45] In re Loughnane, 28 B.R. 940, 942 (Bankr. D. Colo. 1983). ("bankruptcy courts will respect the technical and legal distinctions between individuals, partnerships and corporations").

In sum, the Court cannot find Branham has met her prima facie burden of showing at the time B Fischer sought the assistance of either Lindquist-Kleissler or McCallister Garfield it was engaged in or planning to violate the CSA or aid and abet violations of the CSA or the assistance of counsel was obtained by B Fischer in furtherance of any such activities.

2. Branham's Allegation the Former Debtor Perpetuated a Bankruptcy Fraud Under 18 U.S.C. § 157 by Intentionally Omitting its Operation of an Illegal Business.

Next, Branham argues for application of the crime-fraud exception because B Fischer committed a fraud on the Court under the meaning of 18 U.S.C. § 157 by omitting its participation in the marijuana processing industry from its bankruptcy petition and schedules.[46] 18 U.S.C. § 157 provides:

> A person who, having devised or intending to devise a scheme or artifice to defraud and for the purpose of executing or concealing such a scheme or artifice or attempting to do so--
>
> > (1) files a petition under title 11, including a fraudulent involuntary petition under section 303 of such title;
> >
> > (2) files a document in a proceeding under title 11; or
> >
> > (3) makes a false or fraudulent representation, claim, or promise concerning or in relation to a proceeding under title 11, at any time before or after the filing of the petition, or in relation to a proceeding falsely asserted to be pending under such title,
>
> shall be fined under this title, imprisoned not more than 5 years, or both.[47]

According to Branham, B Fischer intentionally omitted from its petition, schedules, and statement of financial affairs its pre-petition sales of butane to marijuana processors, "presumably because [B Fischer] knew that revealing such information would make it ineligible for bankruptcy relief."[48] The record in this case shows in its Status Report filed in this case, B Fischer described the nature of its business as being "to purchase, repackage and

[46] Docket No. 131, pp. 15-18.

[47] 18 U.S.C. § 157.

[48] Docket No. 131, p. 15.

sell instrument grade butane to wholesale gas re-sellers."[49] Branham argues this language was crafted to avoid any reference to the marijuana industry.[50] B Fischer's statement of financial affairs describes its business as "Wholesale butane sales; lease income."[51] These actions, along with the creation of Gas West, Branham argues, constituted "a thinly veiled scheme to circumvent federal drug laws and federal case law prohibiting Bankruptcy relief to marijuana businesses" falling "squarely within those contemplated under 18 U.S.C. § 157."[52]

First, the Court must agree a debtor's pre-petition involvement in the marijuana industry is not a per se bar to relief under the Bankruptcy Code. In this case, whether B Fischer was selling butane directly to marijuana processors or through Gas West, as discussed above it has not been established that the sale of butane is in and of itself a violation of the CSA. For example, In re Arenas involved a joint bankruptcy filing by two individuals who grew and sold marijuana at wholesale and leased a part of their real property to a marijuana dispensary.[53] While the debtors' cultivation and sale of marijuana and lease of space to a dispensary were lawful under Colorado law, those activities violated the CSA.[54] Not only would a reorganization in that case have been funded from profits of an ongoing criminal activity under federal law but a Chapter 13 trustee would be required to administer and distribute funds derived from debtors' violation of the CSA.[55] Moreover, under facts such as those in Arenas, a Chapter 7 trustee would be required to take possession of, sell and distribute marijuana assets in violation of federal criminal law.[56] Unlike the debtors in Arenas, and unlike the debtor in In re Rent-Rite Super Kegs West, Ltd., at the time of the filing, and until the time of dismissal, it is not clear B Fischer

[49] Docket No. 35, ¶ 3.

[50] Docket No. 131, p. 16.

[51] Docket No. 25. This description was removed in a subsequent amendment. See Docket No. 47.

[52] Docket No. 131, p. 16.

[53] In re Arenas, 535 B.R. 845, 847 (10th Cir. BAP (Colo.) 2015).

[54] Id.

[55] Id. at 851.

[56] Id. at 852.

was engaged in an ongoing violation of the CSA thus precluding the availability of any relief under the Bankruptcy Code.[57]

Further, this Court believes a reorganization may be permissible under either Chapter 11 or Chapter 13 where the debtor is able to sufficiently fund a plan from sources other than ongoing criminal enterprises. In In re Arm Ventures, LLC, the United States Bankruptcy Court for the Southern District of Florida succinctly gave the current state of the law: "a bankruptcy plan that proposes to be funded through income generated by the sale of marijuana products cannot be confirmed unless the business generating the income is legal under both state law and federal law."[58] Indeed, among the other bases for dismissal of the debtors' case in In re Arenas was the debtor's inability to propose a feasible plan, in part, because their monthly income from sources other than marijuana was not enough to fund their plan.[59] Additionally, in In re Jerry L. Johnson, the debtor's income was derived partially from the cultivation and sale of marijuana to three patients to whom he also provided caregiver services.[60] The debtor also had social security income, which he testified was the source of his chapter 13 payments to the chapter 13 trustee.[61] The court held, notwithstanding that the debtor's payments were from an "untainted" source, the debtor's continuing operation of a marijuana business, even if the income were segregated, would require the court, the trustee, and even the debtor to violate federal law, which they could not.[62] Because the debtor had legitimate reasons to be in bankruptcy, the court said rather than dismiss the case the debtor could stop operating the marijuana business; otherwise, the case would have to be dismissed.[63] Thus, pre-petition involvement in the marijuana industry does not automatically prohibit bankruptcy relief to those debtors. Therefore, that B Fischer may have been involved in the

[57] See In re Rent-Rite Super Kegs W. Ltd., 484 B.R. 799, 803–05 (Bankr. D. Colo. 2012) ("Debtor freely admits that it leases Warehouse space to tenants who use the space for the cultivation of marijuana. The Court, therefore, finds that the Debtor is engaged in an ongoing criminal violation of the federal Controlled Substances Act . . . and a federal court cannot be asked to enforce the protections of the Bankruptcy Code in aid of a Debtor whose activities constitute a continuing federal crime.").

[58] In re Arm Ventures, LLC, 564 B.R. 77, 84 (Bankr. S.D. Fla. 2017)

[59] In re Arenas, 535 B.R. at 852.

[60] In re Jerry L. Johnson, 532 B.R. 53, 55-56 (Bankr. W.D. Mich. 2015).

[61] Id.

[62] Id. at 56-59.

[63] Id.

direct and/or indirect sales of butane to marijuana processors prior to filing its bankruptcy filing does not, by itself, slam the Court's doors shut.

Nothing presently before the Court leads it to conclude the stated nature of B Fischer's post-petition business plans of selling butane gas on a wholesale basis to Gas West is the kind of ongoing criminal violation prohibited of debtors under either In re Arenas or In re Rent-Rite Super Kegs West, Ltd. Nor can the Court find B Fischer's post-petition business plans and any income generated therefrom would have been illegal under both state and federal law, nor find B Fischer could not have generated sufficient untainted income to fund a Chapter 11 plan of reorganization through its post-petition business operations.

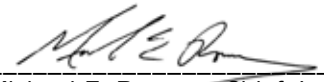
While it may have been an error in judgment to not disclose B Fischer's pre-petition involvement in the marijuana industry, the Court cannot find its failure to do so or the stated nature of B Fischer's intended post-petition business plans should have barred it from seeking bankruptcy relief. Therefore, the Court finds Branham has failed to satisfy her prima facie burden of showing B Fischer's alleged bankruptcy fraud necessitates application of the crime-fraud exception in this case.

CONCLUSION

For the foregoing reasons, the Court finds Branham has failed to satisfy her burden of showing the applicability of the crime-fraud exception to the attorney-client privilege asserted in this case by Lindquist-Kleissler and McCallister Garfield. In accordance with this ruling, the parties are directed to proceed with discovery in connection with Branham's Motion for Sanctions. The Court will contact the parties to set a new date for an evidentiary hearing on Branham's Motion for Sanctions.

Dated September 27, 2017

BY THE COURT:



Michael E. Romero, Chief Judge
United States Bankruptcy Court

Testing the Limits of Receiverships

BY: ANDREW ROTH-MOORE

A potential turf war is brewing between bankruptcy courts and district courts that oversee receiverships. Proceedings under both bankruptcy and receivership law provide a mechanism to liquidate or reorganize financially distressed companies. A core difference is that bankruptcy law and jurisdiction derives primarily from federal statute; whereas receivership law derives primarily from state and federal common law. Additionally, the rules of each receivership may be different, and depend on what is included in the order appointing the receiver. If a creditor wishes to reorganize or liquidate a debtor, but does not like the rules and procedures offered by bankruptcy, the creditor can move for the appointment of a receiver, and seek rules and procedures that better fits its interests. The question is, can such a creditor force its preferred rules and procedures of that receivership on other parties in interest? More specifically, can the creditor obtain an order from the receivership court enjoining all other parties from filing a bankruptcy petition? This is the question now heading up to the Seventh Circuit in *Big Shoulders Capital LLC v. San Luis & Rio Grande Railroad, Inc., et. al.*, Case No. 19-3428 (7th Cir.).

Comparison of receivership vs bankruptcy

While the relief available in a receivership and bankruptcy may be similar, the two proceedings differ in many meaningful respects, including procedurally. A bankruptcy proceeding can be initiated when a debtor files a voluntary petition or a group of creditors files an involuntary petition. During a case under chapter 11 of the Bankruptcy Code, a debtor's prepetition management may remain in place. Otherwise a chapter 7 or 11 trustee is put in place to manage the business and assets. The procedures and rights afforded to parties in a bankruptcy proceeding are governed by the Bankruptcy Code and the Federal Rules of Bankruptcy Procedure.

Alternatively, a receivership proceeding is initiated by a motion filed in a lawsuit pending in state or federal court. If the motion is granted, a receiver is appointed. A receiver acts as an arm of the court and oversees the debtor's assets and operations. The procedures and rights afforded to parties in a receivership proceeding are governed, in large part, by the terms of the order appointing a receiver. Such orders are very often drafted in agreement between a debtor (the defendant) and a major creditor (the plaintiff), and are entered with little or no notice to creditors and other parties that may be impacted by the order.

Injunctions Against Bankruptcy

Receivership orders often contain provisions prohibiting or enjoining a debtor or its creditors from filing a petition for bankruptcy relief. The question of whether such an injunction is enforceable does not have a clear answer. There is no circuit level decision that universally answers the question. However, it appears that the answer depends, in part, on whether a receivership is proceeding in front of a state or federal court and whether the action underlying the receivership is based on state or federal law.

On one end of the spectrum, it appears to be well-settled that a state court presiding over receivership *cannot* enjoin or otherwise prohibit a bankruptcy filing because such an order would violate the Supremacy Clause. *In re Corp. & Leisure Event Prods., Inc.*, 351 B.R. 724, 729 (Bankr. D. Ariz. 2006), *abrogated on other grounds by In re Sino Clean Energy, Inc.*, 901 F.3d 1139 (9th Cir. 2018) ("all courts to have addressed the precise issue after 1867—a creditor's argument that a receivership order removes authority for a debtor or its corporate constituents to file a bankruptcy case—have concluded that state court receivership orders cannot bar debtors from resorting to the exclusive bankruptcy court jurisdiction); *In re Westlake Prop. Holdings, LLC*, No. 19-22878, 2019 WL 4667534, at *4 (Bankr. N.D. Ill. Sept. 24, 2019); *Prosser v. Betty Brooks, Inc*, No. 7938, 1985 WL 11577, at *2 (Del. Ch. July 25, 1985). On the other end of the spectrum, there is strong case law supporting a district court's authority to enjoin a bankruptcy filing where the court is presiding over a federal question—this commonly comes up when the SEC prosecutes a securities violation, and, as part of the lawsuit, seeks the appointment of a receiver. In that instance, district court's draw authority from federal common law powers of equity to protect the assets subject to the receivership. *See S.E.C. v. Byers*, 609 F.3d 87 (2d Cir. 2010); *S.E.C. v. Wencke*, 622 F.2d 1363 (9th Cir. 1980); *Liberte Capital Grp., LLC v. Capwill*, 462 F.3d 543, 551 (6th Cir. 2006).

Big Shoulders Capital LLC v. San Luis & Rio Grande Railroad, Inc.

The remaining question is whether a federal court sitting in diversity jurisdiction—in a case based on state law—is able to enjoin the filing of voluntary of involuntary bankruptcy petitions. This issue is now moving before the Seventh Circuit in *Big Shoulders Capital LLC v. San Luis & Rio Grande Railroad, Inc., et. al.*, Case No. 19-3428 (7th Cir.).

In that case, Big Shoulder, a secured lender, file a complaint to recover unpaid amounts under a loan. The complaint also sought the appointment of a receiver. The debtor/defendants consented to the appointment. Three days after the complaint was filed, the District Court entered an order appointing a receiver. The receivership order, among other things, enjoined all persons from taking a broad scope of actions against the receivership assets. (Notably, filing a petition for bankruptcy relief was not expressly enumerated in the injunction provision.)

A month later, creditors of San Luis & Rio Grande Railroad, Inc.—on of the defendants in the receivership action—filed an involuntary petition for bankruptcy relief in the United States Bankruptcy Court for the District of Colorado. In response, the receiver filed a motion in the District Court, requesting guidance on the impact of the involuntary petition. After a series of hearings and briefing, the District Court ultimately determined that the injunction barred non-parties, including the petitioning creditors, from filing an involuntary bankruptcy petition. The District Court found that it had authority to so enjoin third parties based on the All Writs Act, 28 U.S.C. § 1651, which the District Court determined, grants authority to protect a district court's jurisdiction over a receivership estate.

Potential Conflicts with Bankruptcy

This decision arguably is in conflict with provisions of the Bankruptcy Code and allows a party to enhance its state law rights by removing its case to federal court.

At least two provisions in the Bankruptcy Code support a creditor's right to file an involuntary bankruptcy petition notwithstanding a pending receivership. The first is section 543 which generally bars a "custodian[1]" who has knowledge of the commencement of a bankruptcy case from taking any further action in the administration of the debtor's property and requires him to turnover any assets of the estate in his possession. 11 U.S.C. § 543(a) and (b); *In re Lizeric Realty Corp.*, 188 B.R. 499, 506–507 (Bankr. S.D.N.Y. 1995).

The second is section 303(h), which provides bases for entering an order for relief after an involuntary petition is filed.

> (h) If the petition is not timely controverted, the court shall order relief against the debtor in an involuntary case under the chapter under which the petition was filed. Otherwise, after trial, the court shall order relief against the debtor in an involuntary case under the chapter under which the petition was filed, only if—
>
> . . .
>
> (2) within 120 days before the date of the filing of the petition, a custodian, other than a trustee, receiver, or agent appointed or authorized to take charge of less than substantially all of the property of the debtor for the purpose of enforcing a lien against such property, was appointed or took possession.

Under this section, the appointment of a receiver over substantially all of a debtor's assets is affirmative grounds entering an order for relief. *In re EB Holdings II, Inc.*, 589 B.R. 704, 721 n.54 (Bankr. D. Nev. 2017). The legislative history of section 303 includes the observation that "once a proceeding to liquidate assets has been commenced, the debtor's creditors have an absolute right to have the liquidation (or reorganization) proceed in the bankruptcy court and under bankruptcy laws with all of the appropriate creditor and debtor protections that those laws provide." H.R.Rep. No. 95–595.

Section 543 and 303(h) appear to provide a clear directive that bankruptcy trumps receiverships.

Moreover, enjoining bankruptcies as part of a federal diversity receivership case increases a parties' state court rights. A plaintiff cannot increase its substantive rights by forum shopping. Federal courts sitting in diversity jurisdiction must apply substantive state law. *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 428 (1996). "[W]here a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court." *Guaranty Trust Co. v. York*, 326 U.S. 99, 109 (1994). The implementation of an injunction is substantive relief. *See E.I. DuPont de Nemours*

[1] The Bankruptcy Code defines "custodian" to include a receiver.

& Co. v. Kolon Indus., Inc., 894 F. Supp. 2d 691, 706 (E.D. Va. 2012), *vacated and remanded on other grounds*, 564 F. App'x 710 (4th Cir. 2014); *Sullivan By & Through Sullivan v. Vallejo City Unified Sch. Dist.*, 731 F. Supp. 947, 956 (E.D. Cal. 1990). A diversity plaintiff's access to an injunction is therefore limited to what it could receive in a state court. State courts, in turn, are not permitted to enjoin federal *in personam* proceedings. *Gen. Atomic Co. v. Felter*, 434 U.S. 12, 17, 98 S. Ct. 76, 78, 54 L. Ed. 2d 199 (1977) ("the rights conferred by Congress to bring *in personam* actions in federal courts are not subject to abridgment by state-court injunctions, regardless of whether the federal litigation is pending or prospective"). "A bankruptcy action . . . is inherently an *in personam* proceeding because it resolves the personal obligations of the debtor." *In re Jones*, 122 B.R. 246, 250 (W.D. Pa. 1990); *Green Tree Consumer Disc. Co. v. Newton*, 81 Pa. D. & C.4th 209, 213 (Com. Pl.), *rev'd on other grounds*, 2006 PA Super 284, 909 A.2d 811 (2006); *In re Woolaghan*, 140 B.R. 377, 381 (Bankr. W.D. Pa. 1992). Therefore, a district court sitting in diversity should not have the authority to enjoin bankruptcy proceedings.

The outcome of the *Big Shoulders* case may have a substantial impact on the choice between receiverships and bankruptcy. Under the District Court decision, a creditor that files a diversity complaint can establish receivership proceedings that are friendly to its position and obtain an injunction against any proceeding that would threaten the receivership. Potentially more concerning, such an order can be entered without notice to non-parties.

RECENT SUPREME COURT DECISIONS

BY: GABRIELLE PALMER

***Mission Product Holdings Inc. v. Tempnology, LLC*, 139 S.Ct. 1652 (U.S. 2019)**

Tempnology, LLC manufactured clothing and accessories marketed under the name "Coolcore." Mission Product Holdings, Inc. contracted with Tempnology for the exclusive right to distribute certain Coolcore products in the United States and a non-exclusive license to use the Coolcore trademarks around the world. Before the agreement expired, Tempnology filed for Chapter 11 bankruptcy in the United States Bankruptcy Court for the District of New Hampshire (Case No. 15-11400 JMD).

An executory contract, i.e. a contract for which performance remains due on both sides, is both an asset and a liability of the estate. The Bankruptcy Code gives debtors and trustees authority to determine, in their business judgment, whether the contract is beneficial to the estate on a going forward basis. If it is not, they can "assume or reject any executory contract" with court approval. Pursuant to 11 U.S.C. § 365(g), rejection constitutes breach of the executory contract and gives the non-debtor a pre-petition claim for damages.

The Bankruptcy Court allowed Tempnology to reject the licensing agreement pursuant to 11 U.S.C. § 365(a). As a result, Tempnology was no longer obligated to perform under the license agreement, and Mission held a pre-petition claim for damages resulting from Tempnology's nonperformance. Tempnology subsequently sought a declaratory judgment that its rejection of the license agreement also terminated Mission's right to use the Coolcore trademark.

A number of provisions in § 365 specifically authorize parties to specific types of rejected contracts to continue exercising their contractual rights regardless of whether the contract has been rejected. *See* 11 U.S.C. §§ 365(h)(1) (real property leases), (h)(2) (timeshare interests), (i) (real property sales), and (n) (intellectual property other than trademarks). Because there is no provision in § 365 that covers trademark licenses, Tempnology argued that the Court should infer that a debtor's rejection of a licensing agreement extinguishes the licensee's rights to continue using the trademark. The Bankruptcy Court agreed, but the Bankruptcy Appellate Panel for the First Circuit reversed. On subsequent appeal, the First Circuit Court of Appeals reinstated the Bankruptcy Court's opinion.

Because there was a split among the circuits, the Supreme Court granted certiorari. *See generally Mission Product Holdings, Inc. v. Tempnology, LLC*, 879 F.3d 389 (1st Cir. 2018) (rejection of a trademark license agreement terminates the licensee's rights to continued use of the mark); *Sunbeam Products, Inc. v. Chicago American Manufacturing, LLC*, 686 F.3d 372 (7th Cir. 2012) (rejection of a trademark license agreement constitutes breach, but does not terminate the licensee's rights to continued use of the mark).

The Supreme Court first discussed the concept of "rejection as breach." Because "breach" is not defined in the Bankruptcy Code, it means in bankruptcy what it means outside of it: a party's breach of its contractual obligations does not restore the parties to their pre-contract positions.

Instead, the non-breaching party retains its contractual rights. The policy behind the application of this rule in bankruptcy is that the estate has no greater rights than the debtor itself.

Next, the Supreme Court addressed Tempnology's argument that the lack of a specific provision in § 365 providing that rejection of a trademark license agreement authorizes the licensee to continue to use the mark mandated a different result, i.e., that rejection extinguishes the licensee's rights to use the mark. According to the Court, Tempnology's argument ignored the plain language of § 365(g) which states that rejection "constitutes a breach" which the Court previously held is not the same as rescission.

Finally, the Court discussed the intersection of the policy underlying trademark law and bankruptcy law. Trademark licensors have a continuing duty to monitor and exercise quality control over the goods and services sold under a trademark license or they risk the trademark becoming obsolete. According to Tempnology, allowing the licensee of a rejected trademark license agreement to continue using the mark requires the debtor to choose between expending its resources on quality control and risking loss of the utility of the trademark. This argument, according to the Court, was trademark specific. In contrast, Tempnology's reading of § 365 was that rejection *always* terminates the other party's contractual rights *unless* the contract is subject to an express statutory exception. In addition, Tempnology's argument was an attempt to ignore what §§ 365(a) and (g) direct.

Based on the foregoing, the Court held that a debtor's rejection of an executory contract in bankruptcy does not extinguish rights granted under the contract. As a result, Tempnology's rejection of the agreement with Mission did not extinguish Mission's right to use the Coolcore trademark.

***Taggart v. Lorenzen*, 139 S.Ct. 1795 (U.S. 2019)**

Bradley Taggert formerly owned a company known as Sherwood Park Business Center ("Sherwood"). Sherwood and two of its owners filed suit against Taggart in state court, claiming that Taggart breached the operating agreement. Before trial, Taggart filed for Chapter 7 bankruptcy in the United States Bankruptcy Court for the District of Oregon and received a discharge pursuant to 11 U.S.C. § 727. As a result of the discharge order, creditors were barred from collecting any discharged debt. 11 U.S.C. § 524(a)(2).

After entry of the discharge order, the state court entered judgment against Taggert in the prepetition lawsuit filed by Sherwood and its owners. Sherwood subsequently sought attorney's fees incurred after Taggart filed for bankruptcy.

Taggart and Sherwood agreed that discharge orders generally apply to attorney's fees stemming from pre-petition litigation unless the discharged debtor "returned to the fray" after filing for bankruptcy. *See generally North American, Inc. v. Ybarra*, 424 F.3d 1018 (9th Cir. 2016). Sherwood argued it was entitled to postpetition fees because Taggart had "returned to the fray" post-petition. The state court agreed.

Taggart subsequently filed a motion seeking to hold Sherwood in contempt. According to Taggart, he had not "returned to the fray," that the discharge order barred Sherwood's attempt to collect post-petition attorney's fees, and that Sherwood violated the discharge order. The Bankruptcy Court disagreed, finding that Taggart did return to the fray and that Sherwood did not violate the discharge order. On appeal, the Ninth Circuit Court of Appeals reversed and remanded to the Bankruptcy Court.

On remand, the Bankruptcy Court held Sherwood in civil contempt under a standard it compared to "strict liability." According the Bankruptcy Court, civil contempt was appropriate because Sherwood was aware of the discharge order and intended the actions which violated the discharge order. The Bankruptcy Court awarded Taggart $112,000 in fees, costs, damages for emotion distress, and punitive damages.

Sherwood appealed. The Bankruptcy Appellate vacated the sanctions, and the Ninth Circuit affirmed. According to the Ninth Circuit, a creditor's good faith belief that the discharge order does not apply prohibits a finding of contempt even if that belief is unreasonable. Because Taggart had a good faith belief that the discharge order was inapplicable, the Ninth Circuit held that sanctions were inappropriate.

On further appeal, the Supreme Court was asked to decide the proper legal standard for holding a creditor in civil contempt when the creditor attempts to collect a discharged debt. Two Code sections aided the Court's analysis: 11 U.S.C. §§ 524(a)(2) and 105(a). Under Section 524(a)(2), a discharge order "operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover, or offset" a discharged debt. Section 105(a) authorizes a court to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of" the Bankruptcy Code.

Read together, Sections 524 and 105 incorporate "traditional standards in equity practice" for determining whether civil contempt is appropriate. Outside of the bankruptcy context, civil contempt is appropriate "where there is [a] fair ground of doubt as to the wrongfulness of the defendant's conduct." This standard is objective, but subjective intent may be considered (i.e., if the party acted in bad faith). In bankruptcy, the same standards apply. Accordingly, civil contempt may be appropriate "when the creditor violates a discharge order based on an objectively unreasonable understanding of the discharge order or the statutes that govern its scope."

THE AUTOMATIC STAY HEADS TO THE SUPREME COURT

By Keri Riley

In the coming term, the Supreme Court is expected to decide two issues related to the automatic stay, both of which, though dealing with narrow issues, could have far reaching consequences on future bankruptcy cases. The first, *Ritzen Group, Inc. v. Jackson Masonry, LLC*, 906 F.3d 494 (6th Cir. 2018), asks the Supreme Court to determine whether an order denying a motion for relief from the automatic stay is a final, appealable order under 28 U.S.C. § 158(a)(1). The second, *City of Chicago, Illinois v. Fulton*, 926 F.3d 916 (7th Cir. 2019) asks the Supreme Court to determine whether passive retention of property is a violation of 11 U.S.C. § 362(a).

In *Ritzen Group, Inc. v. Jackson Masonry, LLC*, the debtor, Jackson Masonry, LLC, was engaged in litigation on a pre-petition basis with the Ritzen Group, Inc. ("Ritzen") over a contract to sell real property that fell through. Shortly before a hearing in the state court litigation, the debtor filed its Chapter 11 bankruptcy case, staying the pending state court litigation. After the bankruptcy case was filed, Ritzen filed a motion for relief from stay, seeking relief for cause to proceed with the stay court litigation, including seeking sanctions against the debtor for failing to produce documents, asserting that the debtor had filed the bankruptcy case for the sole purpose of avoiding further litigation in the state court case. The debtor objected and, following an evidentiary hearing, the bankruptcy court denied the motion ("Denial Order"). Ritzen did not immediately appeal the Denial Order. Instead, Ritzen asserted a claim against the bankruptcy estate, which was subsequently disallowed on the basis that Ritzen, not the debtor, breached the sale contract. Following the disallowance of the claim, Ritzen filed two appeals, one asserting that the Denial Order was improper, and a second on the breach of contract determination. The district court denied the first appeal as untimely, and rejected the second on the merits. Ritzen then appealed to the Sixth Circuit Court of Appeals.

The Sixth Circuit affirmed the decision of the district court in holding that Ritzen's appeal of the Denial Order was untimely. In affirming the decision, the Sixth Circuit recognized that whether an order is final for the purposes of appeal can be difficult to determine in a bankruptcy case, as bankruptcy is "an aggregation of individual disputes, many of which would be entire cases on their own." Looking to the language of 28 U.S.C. § 158, the Sixth Circuit held that the language

was clear, and unambiguous, and allowed for an appeal of a bankruptcy court decision if it concludes a "proceeding" as opposed to an overall conclusion of the case or the issues between the parties. Applying the statute to Rtizen's motion, the Sixth Circuit held that the motion for relief from stay was a "proceeding" for the purposes of 28 U.S.C. § 158, as it is a discrete set of procedural steps that begins with the request of a party, and concludes with an order entered by the bankruptcy court that terminates further action with respect to the motion, and the consequences are significant and irreparable. As a result, because Ritzen did not timely file the appeal with respect to the Denial Order, the Sixth Circuit dismissed the first appeal as untimely.

Ritzen then filed a Writ of Certiorari to the Supreme Court. The only issue raised in its Writ is the issue of when an order denying a motion for relief from stay is final for the purposed of appeal. Ritzen asserted that the Sixth Circuit departed from other circuits in its decision, and further argued that the Supreme Court's case of *Bullard v. Blue Hills Bank*, 135 S. Ct. 1686 (2015), addressed the issue of finality in the context of an order denying confirmation of a Chapter 13 Plan. Ritzen further argued that the Denial Order was not a final and appealable order as it did not resolve the underlying issues between the parties.

Oral argument on Ritzen's appeal occurred on November 13, 2019, and the Supreme Court is anticipated to rule on it in the coming term. If the Supreme Court accepts Ritzen's position, it could result in significant appeals following the conclusion of the bankruptcy case, causing disruption in those instances where a Chapter 11 plan has been confirmed and the rights of the parties have been further decided. If the Supreme Court rejects their position, it will force creditors to be proactive about appeals during the bankruptcy case to ensure that they do not lose their right to appeal. In either event, the Supreme Court will certainly provide some guidance on how to determine whether orders entered by the bankruptcy court are final and appealable.

City of Chicago, Illinois v. Fulton addresses the question that has become more prevalent in recent years: whether passive retention of property owned by the debtor is a violation of the automatic stay. The case is aggregates four separate appeals brought by four debtors in Chapter 13 bankruptcy cases. In each of the cases, the City of Chicago impounded the debtors' vehicles as a result of unpaid fines or violations. In the lead case, the debtor, Robbin Fulton, had her car impounded as a result of an unpaid citation for driving on a suspended license. The debtor filed her chapter 13 bankruptcy case and while the City of Chicago filed a proof of claim, it did not

return her vehicle. Fulton subsequently filed a motion for sanctions against the city, arguing that passive retention of the debtor's vehicle is a violation of the automatic stay. The City disagreed, asserting that it was perfecting its possessory lien, and that it was not stayed pursuant to 11 U.S.C. § 362(b)(4). Similar circumstances occurred in the other three cases, and in each case, the bankruptcy court ordered the City to return the vehicle.

On appeal to the Seventh Circuit Court of Appeals, the City argued that passive retention did not violate the automatic stay, as there was no "act" after the bankruptcy filing, merely preservation of the status quo. The Seventh Circuit disagreed, holding that the City's arguments "ignore the purpose of bankruptcy – to allow the debtor to regain his financial footholds and repay his creditors." The Seventh Circuit affirmed, and the City of Chicago filed its Writ of Certiorari.

The Supreme Court granted certiorari on December 18, 2019. Given that the Seventh Circuit's decision runs directly contrary to the Tenth Circuits' decision in *In re Cowen*, which was issued in 2017 and held that passive retention was not a violation of the automatic stay, the Supreme Court will have to resolve this circuit split and provide guidance as to the meaning of "act" for the purposes of section 362(a)(3). Whichever way this case is decided, it will have huge implications for bankruptcy cases, particularly in the case of individual debtors who have had property foreclosed upon or repossessed, but not sold, on the date of filing.

Summary of Major Changes to the Bankruptcy Code

by Keri Riley

HONORING AMERICAN VETERANS IN EXTREME NEED ("HAVEN") ACT OF 2019 (H.R. 2938)

- Enacted into Law on August 23, 2019 and became effective immediately
- Intended to expand bankruptcy protection to military veterans through amendments to the definition of "current monthly income" which is used in completing the "means test" under section 707(b)
- Prior to HAVEN Act, 11 U.S.C. § 101(10A) provides:

  (10A) The term "current monthly income"—

  (A) means the average monthly income from all sources that the debtor receives (or in a joint case the debtor and the debtor's spouse receive) without regard to whether such income is taxable income, derived during the 6-month period ending on—

  (i) the last day of the calendar month immediately preceding the date of the commencement of the case if the debtor files the schedule of current income required by section 521(a)(1)(B)(ii); or

  (ii) the date on which current income is determined by the court for purposes of this title if the debtor does not file the schedule of current income required by section 521(a)(1)(B)(ii); and

  (B) includes any amount paid by any entity other than the debtor (or in a joint case the debtor and the debtor's spouse), on a regular basis for the household expenses of the debtor or the debtor's dependents (and in a joint case the debtor's spouse if not otherwise a dependent), but excludes benefits received under the Social Security Act, payments to victims of war crimes or crimes against humanity on account of their status as victims of such crimes, and payments to victims of international terrorism (as defined in section 2331 of title 18) or domestic terrorism (as defined in section 2331 of title 18) on account of their status as victims of such terrorism.

- Amends to add section (B)(IV) which expressly excludes:

  (IV) any monthly compensation, pension, pay, annuity, or allowance paid under title 10, 37, or 38 in connection with a disability, combat-related injury or disability, or death of a member of the uniformed services, except that any retired pay excluded under this subclause shall include retired pay paid under chapter 61 of title 10 only to the extent that such retired pay exceeds the amount of retired pay to which the debtor would otherwise be entitled if retired under any provision of title 10 other than chapter 61 of that title

FAMILY FARMER RELIEF ACT OF 2019 (H.R. 2336)

- Signed into law on August 23, 2019 and effective immediately
- Amends the definition of "family farmer" in 11 U.S.C. § 101(18)(A) to:

The term "family farmer" means—

(A) individual or individual and spouse engaged in a farming operation whose aggregate debts do not exceed $10,000,000 and not less than 50 percent of whose aggregate noncontingent, liquidated debts (excluding a debt for the principal residence of such individual or such individual and spouse unless such debt arises out of a farming operation), on the date the case is filed, arise out of a farming operation owned or operated by such individual or such individual and spouse, and such individual or such individual and spouse receive from such farming operation more than 50 percent of such individual's or such individual and spouse's gross income for—

(i) the taxable year preceding; or

(ii) each of the 2d and 3d taxable years preceding;

the taxable year in which the case concerning such individual or such individual and spouse was filed; or

(B) corporation or partnership in which more than 50 percent of the outstanding stock or equity is held by one family, or by one family and the relatives of the members of such family, and such family or such relatives conduct the farming operation, and

(i) more than 80 percent of the value of its assets consists of assets related to the farming operation;

(ii) its aggregate debts do not exceed $10,000,000 and not less than 50 percent of its aggregate noncontingent, liquidated debts (excluding a debt for one dwelling which is owned by such corporation or partnership and which a shareholder or partner maintains as a principal residence, unless such debt arises out of a farming operation), on the date the case is filed, arise out of the farming operation owned or operated by such corporation or such partnership; and

(iii) if such corporation issues stock, such stock is not publicly traded.

- Effectively raises the debt limit to qualify for Chapter 12 from $3,237,000 to $10,000,000
- Will expand protections for family farmers instead of forcing them into a Chapter 11
- Amendments effective immediately.

SMALL BUSINESS REORGANIZATION ACT OF 2019 (H.R. 3311)

- Signed into law on August 23, 2019, and becomes effective on February 19, 2020

Changes to Adversary Proceedings

- Changes to preference actions
    - 11 U.S.C. § 547(b) now requires that the trustee/debtor-in-possession must conduct reasonable due diligence into the circumstances of the preference action, including "known or reasonably knowable affirmative defenses"
    - The amendment will require more investigation prior to commencing preference claims and details of the reasonable due diligence will likely have to be included in the pleadings or presented at trial
    - This will likely result in more preference demand letters instead of filing a lot of Adversary Proceedings.
    - Question remains of whether the due diligence requirement will become the subject of motions to dismiss, or affirmative defenses
- Venue threshold in 28 U.S.C. § 1409(b) for suing non-insider defendants outside the districts in which they reside increased from $10,000 to $25,000.
    - This means that in large cases, attorneys can no longer bring preference actions in New York or Delaware for small dollar value amounts
    - Good for local companies as the threat of preference actions from large Delaware firms and New York firms has decreased some
    - May make bringing preference cases more expensive if outside counsel is require, and may result in more litigation and less quick settlement

Addition of Subchapter V to Chapter 11 of the Bankruptcy Code:

- Biggest change to the Bankruptcy Code
- Intended to make Chapter 11 easier for small businesses; to a certain extent, acts kind of like a hybrid Chapter 13 and Chapter 11 for a business
- Must still qualify as a "small business debtor" with less than $2,725,625 in aggregate liquidated, noncontingent debt (secured and unsecured)
    - Applies to individuals if more than 50% of the debt arises from business activity
- Not automatic; ***if*** the debtor qualifies as a small business, ***then*** the debtor may elect subchapter 5 on the voluntary petition. There are several proposed versions of the new voluntary petition that could be approved that allow for the election.
- Adds new sections to Chapter 11
- Major Changes:
    - Debtor still a debtor-in-possession, but a trustee is appointed automatically to facilitate the reorganization
        - New panel of trustees selected by the Dept. of Justice. It is unclear who the trustees will be, but they are not required to be attorneys. Could be receivers, accountants, or other professionals
        - Payment structure for the Trustee could be hourly like attorneys, or could be a flat percentage like Chapter 13s

        - Trustee also retains plan payments until confirmation, and makes distributions in accordance with the Plan on such date
        - Trustee is terminated on confirmation date unless UST requests otherwise
    - Only the Debtor can file a plan, and it must be filed within 90 days
        - A disclosure statement is not required, but the plan must contain sufficient information necessary to allow creditors to evaluate the plan
    - No more absolute priority rule
        - Plan must be fair and equitable, and must commit all projected disposable income for a 3-5 year period to the plan
        - Plan must contain sufficient remedies under the plan to protect the rights of creditors
        - Debtor must be able to make the plan payments
        - Also eliminates the "new value" requirement
    - (Individuals) Plan can modify the rights of a creditor secured by a security interest in the debtor's residence so long as the loan was not used to acquire the home, but was incurred in connection with the debtor's business operations
    - Court will hold a status conference within the first 60 days of the case to detail reorganization efforts already untaken and that will be undertaken to reach consensual confirmation
    - Professionals are not disqualified from employment if they have a pre-petition claim that is larger than $10,000
        - Likely won't apply to attorneys, but may be useful for other professionals, accountants, auctioneers, etc.
    - Administrative expense claims can be stretched over the term of the plan, and are not required to be paid upon confirmation
    - No creditors committee may be appointed
- Presents a great option for small businesses that are closely held by individuals and who may not the full Chapter 11 process
- Guarantees that the bankruptcy case will be faster than the typical case in our district
- Lots of unanswered questions including:
    - Who will the trustees be?
    - How much with the trustee be paid?
    - What are the reporting requirements going to look like for these debtors, and how involved will the trustee be in completing these reports?
    - What will the new plans look like?
- Forms recently published for comment don't necessarily shed any light on what a Subchapter V case will ultimately look like.

PRELIMINARY DRAFT

Proposed Amendments to the Federal Rules of Bankruptcy Procedure

Request For Comment

Comments are Sought on Amendments to:

Interim Bankruptcy Rules	1007(b), 1007(h), 1020, 2009, 2012(a), 2015, 3010(b), 3011, and 3016
Bankruptcy Forms	101, 201, 309E, 309E2, 309F, 309F2, 314, 315, and 425A

All Written Comments are Due by November 13, 2019

THE UNITED STATES COURTS

Prepared by the
Committee on Rules of Practice and Procedure of the
Judicial Conference of the United States

OCTOBER 2019

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COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, DC 20544

October 16, 2019

MEMORANDUM

TO: Chief Judges, United States District Courts
Judges, United States Bankruptcy Courts

FROM: Honorable David G. Campbell
Chair, Committee on Rules of Practice and Procedure

Honorable Dennis R. Dow
Chair, Advisory Committee on Bankruptcy Rules

RE: PROPOSED INTERIM RULE AND OFFICIAL FORM AMENDMENTS FOR PUBLIC COMMENT IN RESPONSE TO THE SMALL BUSINESS REORGANIZATION ACT OF 2019 **(IMPORTANT INFORMATION)**

On August 23, 2019, the Small Business Reorganization Act of 2019, P.L. 116-54 (SBRA) was enacted into law (see https://www.congress.gov/116/bills/hr3311/BILLS-116hr3311enr.pdf). The SBRA creates a new subchapter V of chapter 11 for the reorganization of small business debtors. It does not repeal existing chapter 11 provisions regarding small business debtors, but instead creates an alternative procedure that small business debtors may elect to use. The effective date of the SBRA is February 19, 2020.

When it became clear that the SBRA would likely become law, the Advisory Committee on Bankruptcy Rules began an intensive effort to review the SBRA's provisions and determine changes to the bankruptcy rules and official bankruptcy forms necessary to implement the

legislation by its effective date. Although changes to the official forms can be approved in time for the SBRA effective date, changes to the bankruptcy rules take three years or more under the process established by the Rules Enabling Act, 28 U.S.C. §§ 2071-77, and will not be completed by that time. As a result, our committees will issue interim SBRA rules for adoption as local rules or by general order in each judicial district. Because it is important that the new SBRA procedures be uniform, we hope that all courts will adopt the interim rules.

Our committees will publish the proposed SBRA form changes and interim rules for public comment for a period of four weeks, starting on October 16, 2019. Information on how to submit comments can be found on the "Proposed Amendments for Public Comment" page of the Courts' public website at: https://www.uscourts.gov/rules-policies/proposed-amendments-published-public-comment. **The public comment period will close on November 13, 2019.**

The committees will make any adjustments called for by the public comments and will then seek approval from the Executive Committee of the Judicial Conference, acting on an expedited basis on behalf of the Judicial Conference, to distribute the interim rules to judicial districts. If there are no delays in the approval process, distribution should occur in mid-to-late December. This will provide time for the interim rules to be adopted by general order or as local rules by the SBRA effective date of February 19, 2020. The revised forms will be distributed to courts the same time as the interim rules. The committees will then move forward with regular promulgation of the SBRA rules under the Rules enabling Act.[1] Those rules, when finally approved, will replace the interim rules. Thank you for your cooperation in accepting these interim changes needed to conform to the SBRA.

cc: District Court Executives
Clerks, United States District Courts
Clerks, United States Bankruptcy Courts
Bankruptcy Administrators
Circuit Librarians

[1] Although changes to the Official Forms will be officially promulgated by February 2020 pursuant to the Advisory Committee's delegated authority from the Judicial Conference to issue conforming Official Form amendments, the committees intend to publish them again under the regular procedure to ensure that the public has a thorough opportunity to review them.

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, DC 20544

October 3, 2019

MEMORANDUM

TO: Honorable David G. Campbell
Chair, Standing Committee on Rules of Practice and Procedure

FROM: Honorable Dennis R. Dow
Chair, Advisory Committee on Bankruptcy Rules

RE: REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

On August 1, Congress passed the Small Business Reorganization Act of 2019 ("SBRA") (https://www.congress.gov/116/bills/hr3311/BILLS-116hr3311eh.pdf), which creates a new subchapter of chapter 11 for the reorganization of small business debtors. The President signed the legislation on August 23. It will go into effect 180 days after that date, which will be February 19, 2020.

SBRA does not repeal existing chapter 11 provisions regarding small business debtors, but instead it creates an alternative procedure that small business debtors may elect to use. Proceedings using the current chapter 11 provisions will continue to be called "small business cases," while cases for which the new procedure is elected will be called "cases under subchapter V of chapter 11."

The enactment of SBRA requires amendments to be made to a number of bankruptcy rules and forms, in some cases excepting subchapter V cases from provisions that apply generally to chapter 11 and in other cases making provisions expressly applicable to subchapter V cases. Because SBRA will take effect long before the rulemaking process can run its course, the Advisory Committee seeks to have the amended rules issued initially as interim rules for

adoption by each judicial district, and amended and new forms to be issued by the Advisory Committee subject to later approval by the Standing Committee and notice to the Judicial Conference.

At its meeting on September 26, the Advisory Committee voted unanimously to seek approval for publication for public comment of the proposed amended rules and forms and new forms for a period of four weeks beginning the week of October 21. The package for publication consists of eight rules and nine Official Forms. They are included in the appendix to this report. The Advisory Committee approved these rules for publication at its September 26 meeting, subject to revisions that were approved by means of a post-meeting email vote.

Following the publication period, the Advisory Committee anticipates that in November it will consider the rules and forms, with any revisions proposed in response to comments, and that it will vote on the issuance of the rules as interim rules and approval of the forms as Official Forms. Thereafter, the Advisory Committee will seek the Standing Committee's approval of the interim rules and the forms, followed by approval by the Executive Committee of the Judicial Conference of the interim rules and notice to it of the forms amendments. The Advisory Committee intends to proceed on a schedule that will allow distribution of the rules to the judicial districts in time for them to be adopted as local rules or by general order by February 19, 2020. At its spring 2020 meeting, the Advisory Committee will begin the process for the issuance of permanent rules, and it anticipates seeking the Standing Committee's approval at the June meeting for publication of the rules and forms in August 2020.[1]

Action Item. The Advisory Committee recommends that the following rule and form amendments and new forms be published for public comment in October 2019:

- Rule 1007(b) and (h),
- Rule 1020,
- Rule 2009,
- Rule 2012(a),
- Rule 2015,
- Rule 3010(b),
- Rule 3011,
- Rule 3016,
- Official Form 101,
- Official Form 201,
- Official Form 309E,
- Official Form 309F,
- Official Form 314,
- Official Form 315,
- Official Form 425A,
- new Official Form 309E2, and
- new Official Form 309F2.

[1] Although the Official Forms will be officially promulgated by February 2020 pursuant to the Advisory Committee's authority to issue conforming Official Form amendments, it intends to seek publication of them under the regular procedure in order to ensure that the public has a thorough opportunity to review them.

Fill in this information to identify your case:

United States Bankruptcy Court for the:

_____ District of _____
(State)

Case number (*If known*): _____ Chapter you are filing under:

- ❑ Chapter 7
- ❑ Chapter 11
- ❑ Chapter 12
- ❑ Chapter 13

❑ Check if this is an amended filing

Official Form 101

Voluntary Petition for Individuals Filing for Bankruptcy 02/20

The bankruptcy forms use *you* and *Debtor 1* to refer to a debtor filing alone. A married couple may file a bankruptcy case together—called a *joint case*—and in joint cases, these forms use *you* to ask for information from both debtors. For example, if a form asks, "Do you own a car," the answer would be *yes* if either debtor owns a car. When information is needed about the spouses separately, the form uses *Debtor 1* and *Debtor 2* to distinguish between them. In joint cases, one of the spouses must report information as *Debtor 1* and the other as *Debtor 2*. The same person must be *Debtor 1* in all of the forms.

Be as complete and accurate as possible. If two married people are filing together, both are equally responsible for supplying correct information. If more space is needed, attach a separate sheet to this form. On the top of any additional pages, write your name and case number (if known). Answer every question.

Part 1: Identify Yourself

	About Debtor 1:	About Debtor 2 (Spouse Only in a Joint Case):
1. Your full name Write the name that is on your government-issued picture identification (for example, your driver's license or passport). Bring your picture identification to your meeting with the trustee.	_____ First name _____ Middle name _____ Last name _____ Suffix (Sr., Jr., II, III)	_____ First name _____ Middle name _____ Last name _____ Suffix (Sr., Jr., II, III)
2. All other names you have used in the last 8 years Include your married or maiden names.	_____ First name _____ Middle name _____ Last name _____ First name _____ Middle name _____ Last name	_____ First name _____ Middle name _____ Last name _____ First name _____ Middle name _____ Last name
3. Only the last 4 digits of your Social Security number or federal Individual Taxpayer Identification number (ITIN)	xxx – xx – ____ ____ ____ ____ OR **9** xx – xx – ____ ____ ____ ____	xxx – xx – ____ ____ ____ ____ OR **9** xx – xx – ____ ____ ____ ____

Debtor 1 _____ Case number (*if known*)_____
First Name Middle Name Last Name

Part 3: Report About Any Businesses You Own as a Sole Proprietor

12. Are you a sole proprietor of any full- or part-time business?

A sole proprietorship is a business you operate as an individual, and is not a separate legal entity such as a corporation, partnership, or LLC.

If you have more than one sole proprietorship, use a separate sheet and attach it to this petition.

❑ No. Go to Part 4.

❑ Yes. Name and location of business

_____
Name of business, if any

_____
Number Street

_____

_____ _____ _____
City State ZIP Code

Check the appropriate box to describe your business:

❑ Health Care Business (as defined in 11 U.S.C. § 101(27A))

❑ Single Asset Real Estate (as defined in 11 U.S.C. § 101(51B))

❑ Stockbroker (as defined in 11 U.S.C. § 101(53A))

❑ Commodity Broker (as defined in 11 U.S.C. § 101(6))

❑ None of the above

13. Are you filing under Chapter 11 of the Bankruptcy Code and are you a *small business debtor*?

For a definition of *small business debtor*, see 11 U.S.C. § 101(51D).

If you are filing under Chapter 11, the court must know whether you are a small business debtor so that it can set appropriate deadlines. If you indicate that you are a small business debtor, you must attach your most recent balance sheet, statement of operations, cash-flow statement, and federal income tax return or if any of these documents do not exist, follow the procedure in 11 U.S.C. § 1116(1)(B).

❑ No. I am not filing under Chapter 11.

❑ No. I am filing under Chapter 11, but I am NOT a small business debtor according to the definition in the Bankruptcy Code.

❑ Yes. I am filing under Chapter 11, I am a small business according to the definition in the Bankruptcy Code, and I do not choose to proceed under Subchapter V of Chapter 11.

❑ Yes. I am filing under Chapter 11, I am a small business debtor according to the definition in the Bankruptcy Code, and I choose to proceed under Subchapter V of Chapter 11.

Part 4: Report if You Own or Have Any Hazardous Property or Any Property That Needs Immediate Attention

14. Do you own or have any property that poses or is alleged to pose a threat of imminent and identifiable hazard to public health or safety? Or do you own any property that needs immediate attention?

For example, do you own perishable goods, or livestock that must be fed, or a building that needs urgent repairs?

❑ No

❑ Yes. What is the hazard? _____

_____

If immediate attention is needed, why is it needed? _____

_____

Where is the property? _____
Number Street

_____

_____ _____ _____
City State ZIP Code

Committee Note

Part 2, line 13 is amended in response to the enactment of the Small Business Reorganization Act of 2019, Pub. L. No. 116-54, 133 Stat. 1079. That law gives a small business debtor the option of electing to be a debtor under subchapter V of chapter 11. Line 13 is amended to add a check box for a small business debtor to indicate that it is making that choice, and the existing check box for small business debtors is amended to allow the debtor to indicate that it is not electing to proceed under subchapter V.

Fill in this information to identify the case:

United States Bankruptcy Court for the:

_____ District of _____
(State)

Case number (*If known*): _____ Chapter _____

❑ Check if this is an amended filing

Official Form 201

Voluntary Petition for Non-Individuals Filing for Bankruptcy 02/20

If more space is needed, attach a separate sheet to this form. On the top of any additional pages, write the debtor's name and the case number (if known). For more information, a separate document, *Instructions for Bankruptcy Forms for Non-Individuals,* is available.

1. **Debtor's name** _____

2. **All other names debtor used in the last 8 years**
   Include any assumed names, trade names, and *doing business as* names
   _____
   _____
   _____
   _____
   _____

3. **Debtor's federal Employer Identification Number** (EIN) __ __ – __ __ __ __ __ __ __

4. **Debtor's address**

Principal place of business

_____
Number Street

_____

_____
City State ZIP Code

_____
County

Mailing address, if different from principal place of business

_____
Number Street

_____
P.O. Box

_____
City State ZIP Code

Location of principal assets, if different from principal place of business

_____
Number Street

_____

_____
City State ZIP Code

5. **Debtor's website** (URL) _____

Debtor _____ Case number (*if known*)_____
Name

6. Type of debtor

- ❑ Corporation (including Limited Liability Company (LLC) and Limited Liability Partnership (LLP))
- ❑ Partnership (excluding LLP)
- ❑ Other. Specify: _____

7. Describe debtor's business

A. *Check one:*

- ❑ Health Care Business (as defined in 11 U.S.C. § 101(27A))
- ❑ Single Asset Real Estate (as defined in 11 U.S.C. § 101(51B))
- ❑ Railroad (as defined in 11 U.S.C. § 101(44))
- ❑ Stockbroker (as defined in 11 U.S.C. § 101(53A))
- ❑ Commodity Broker (as defined in 11 U.S.C. § 101(6))
- ❑ Clearing Bank (as defined in 11 U.S.C. § 781(3))
- ❑ None of the above

B. *Check all that apply:*

- ❑ Tax-exempt entity (as described in 26 U.S.C. § 501)
- ❑ Investment company, including hedge fund or pooled investment vehicle (as defined in 15 U.S.C. § 80a-3)
- ❑ Investment advisor (as defined in 15 U.S.C. § 80b-2(a)(11))

C. NAICS (North American Industry Classification System) 4-digit code that best describes debtor. See http://www.uscourts.gov/four-digit-national-association-naics-codes .

___ ___ ___ ___

8. Under which chapter of the Bankruptcy Code is the debtor filing?

Check one:

- ❑ Chapter 7
- ❑ Chapter 9
- ❑ Chapter 11. *Check all that apply*:
  - ❑ Debtor's aggregate noncontingent liquidated debts (excluding debts owed to insiders or affiliates) are less than $2,725,625 (amount subject to adjustment on 4/01/22 and every 3 years after that).
  - ❑ The debtor is a small business debtor as defined in 11 U.S.C. § 101(51D). If the debtor is a small business debtor, attach the most recent balance sheet, statement of operations, cash-flow statement, and federal income tax return or if all of these documents do not exist, follow the procedure in 11 U.S.C. § 1116(1)(B).
  - ❑ The debtor is a small business debtor as defined in 11 U.S.C. § 101(51D), and it chooses to proceed under Subchapter V of Chapter 11.
  - ❑ A plan is being filed with this petition.
  - ❑ Acceptances of the plan were solicited prepetition from one or more classes of creditors, in accordance with 11 U.S.C. § 1126(b).
  - ❑ The debtor is required to file periodic reports (for example, 10K and 10Q) with the Securities and Exchange Commission according to § 13 or 15(d) of the Securities Exchange Act of 1934. File the *Attachment to Voluntary Petition for Non-Individuals Filing for Bankruptcy under Chapter 11* (Official Form 201A) with this form.
  - ❑ The debtor is a shell company as defined in the Securities Exchange Act of 1934 Rule 12b-2.
- ❑ Chapter 12

9. Were prior bankruptcy cases filed by or against the debtor within the last 8 years?

If more than 2 cases, attach a separate list.

- ❑ No
- ❑ Yes. District _____ When _____ Case number _____
  MM / DD / YYYY
  District _____ When _____ Case number _____
  MM / DD / YYYY

Committee Note

Line 8 of the form is amended in response to the enactment of the Small Business Reorganization Act of 2019, Pub. L. No. 116-54, 133 Stat. 1079. That law gives a small business debtor the option of electing to be a debtor under subchapter V of chapter 11. Line 8 is amended to provide a check box for a small business debtor to indicate that it is making that choice.

Information to identify the case:	
Debtor 1 First Name Middle Name Last Name	Last 4 digits of Social Security number or ITIN ___ ___ ___ ___ EIN __ __ - __ __ __ __ __ __ __
Debtor 2 (Spouse, if filing) First Name Middle Name Last Name	Last 4 digits of Social Security number or ITIN ___ ___ ___ ___ EIN __ __ - __ __ __ __ __ __ __
United States Bankruptcy Court for the: _____ District of _____ (State)	[Date case filed for chapter 11 _____ MM / DD / YYYY] OR
Case number: _____	[Date case filed in chapter _____ _____ MM / DD / YYYY Date case converted to chapter 11 _____] MM / DD / YYYY

Official Form 309E2 (For Individuals or Joint Debtors under Subchapter V)

Notice of Chapter 11 Bankruptcy Case 02/20

For the debtors listed above, a case has been filed under chapter 11 of the Bankruptcy Code. An order for relief has been entered.

This notice has important information about the case for creditors and debtors, including information about the meeting of creditors and deadlines. Read both pages carefully.

The filing of the case imposed an automatic stay against most collection activities. This means that creditors generally may not take action to collect debts from the debtors or the debtors' property. For example, while the stay is in effect, creditors cannot sue, garnish wages, assert a deficiency, repossess property, or otherwise try to collect from the debtors. Creditors cannot demand repayment from debtors by mail, phone, or otherwise. Creditors who violate the stay can be required to pay actual and punitive damages and attorney's fees. Under certain circumstances, the stay may be limited to 30 days or not exist at all, although debtors can ask the court to extend or impose a stay.

Confirmation of a chapter 11 plan may result in a discharge of debt. Creditors who assert that the debtors are not entitled to a discharge of any debts or who want to have a particular debt excepted from discharge may be required to file a complaint in the bankruptcy clerk's office within the deadlines specified in this notice. (See line 10 below for more information.)

To protect your rights, consult an attorney. All documents filed in the case may be inspected at the bankruptcy clerk's office at the address listed below or through PACER (Public Access to Court Electronic Records at www.pacer.gov).

The staff of the bankruptcy clerk's office cannot give legal advice.

To help creditors correctly identify debtors, debtors submit full Social Security or Individual Taxpayer Identification Numbers, which may appear on a version of this notice. However, the full numbers must not appear on any document filed with the court.

Do not file this notice with any proof of claim or other filing in the case. Do not include more than the last four digits of a Social Security or Individual Taxpayer Identification Number in any document, including attachments, that you file with the court.

	About Debtor 1:	About Debtor 2:
1. **Debtor's full name**		
2. **All other names used in the last 8 years**		
3. **Address**		**If Debtor 2 lives at a different address:**
4. **Debtor's attorney** Name and address		Contact phone _____ Email _____
5. **Bankruptcy Trustee**		Contact phone _____ Email _____

For more information, see page 2 ▶

6. Bankruptcy clerk's office

Documents in this case may be filed at this address.

You may inspect all records filed in this case at this office or online at www.pacer.gov.

Hours open _____

Contact phone _____

7. Meeting of creditors Meeting of creditors

Debtors must attend the meeting to be questioned under oath. In a joint case, both spouses must attend.

Creditors may attend, but are not required to do so.

_____ at _____ Location:
Date Time

The meeting may be continued or adjourned to a later date. If so, the date will be on the court docket.

8. Deadlines

The bankruptcy clerk's office must receive these documents and any required filing fee by the following deadlines.

File by the deadline to object to discharge or to challenge whether certain debts are dischargeable:

You must file a complaint:

- if you assert that the debtor is not entitled to receive a discharge of any debts under 11 U.S.C. § 1141(d)(3) or
- if you want to have a debt excepted from discharge under 11 U.S.C. § 523(a)(2), (4), or (6).

First date set for hearing on confirmation of plan. The court will send you a notice of that date later.

Filing deadline for dischargeability complaints: _____

Deadline for filing proof of claim:

[Not yet set. If a deadline is set, the court will send you another notice.] or

[date, if set by the court)]

A proof of claim is a signed statement describing a creditor's claim. A proof of claim form may be obtained at www.uscourts.gov or any bankruptcy clerk's office.

Your claim will be allowed in the amount scheduled unless:

- your claim is designated as *disputed*, *contingent*, or *unliquidated*;
- you file a proof of claim in a different amount; or
- you receive another notice.

If your claim is not scheduled or if your claim is designated as *disputed*, *contingent*, or *unliquidated*, you must file a proof of claim or you might not be paid on your claim and you might be unable to vote on a plan. You may file a proof of claim even if your claim is scheduled.

You may review the schedules at the bankruptcy clerk's office or online at www.pacer.gov.

Secured creditors retain rights in their collateral regardless of whether they file a proof of claim. Filing a proof of claim submits a creditor to the jurisdiction of the bankruptcy court, with consequences a lawyer can explain. For example, a secured creditor who files a proof of claim may surrender important nonmonetary rights, including the right to a jury trial.

Deadline to object to exemptions:

The law permits debtors to keep certain property as exempt.

If you believe that the law does not authorize an exemption claimed, you may file an objection.

Filing deadline: 30 days after the *conclusion* of the meeting of creditors

9. Creditors with a foreign address

If you are a creditor receiving mailed notice at a foreign address, you may file a motion asking the court to extend the deadlines in this notice. Consult an attorney familiar with United States bankruptcy law if you have any questions about your rights in this case.

10. Filing a Chapter 11 bankruptcy case

Chapter 11 allows debtors to reorganize or liquidate according to a plan. A plan is not effective unless the court confirms it. You may receive a copy of the plan and a disclosure statement telling you about the plan, and you may have the opportunity to vote on the plan. You will receive notice of the date of the confirmation hearing, and you may object to confirmation of the plan and attend the confirmation hearing. The debtor will generally remain in possession of the property and may continue to operate the debtor's business.

For more information, see page 3 ▶

11. Discharge of debts	Confirmation of a chapter 11 plan may result in a discharge of debts, which may include all or part of a debt. See 11 U.S.C. § 1141(d). However, in some cases the debts will not be discharged until all or a substantial portion of payments under the plan are made. See 11 U.S.C. § 1192. A discharge means that creditors may never try to collect the debt from the debtors personally except as provided in the plan. If you believe that a particular debt owed to you should be excepted from the discharge under 11 U.S.C. § 523 (a)(2), (4), or (6), you must file a complaint and pay the filing fee in the bankruptcy clerk's office by the deadline. If you believe that the debtors are not entitled to a discharge of any of their debts under 11 U.S.C. § 1141 (d)(3), you must file a complaint and pay the filing fee in the clerk's office by the first date set for the hearing on confirmation of the plan. The court will send you another notice telling you of that date.
12. Exempt property	The law allows debtors to keep certain property as exempt. Fully exempt property will not be sold and distributed to creditors, even if the case is converted to chapter 7. Debtors must file a list of property claimed as exempt. You may inspect that list at the bankruptcy clerk's office or online at www.pacer.gov. If you believe that the law does not authorize an exemption that the debtors claim, you may file an objection. The bankruptcy clerk's office must receive the objection by the deadline to object to exemptions in line 7.

Information to identify the case:	
Debtor _____ Name	EIN __ __ - __ __ __ __ __ __ __
United States Bankruptcy Court for the: _____ District of _____ (State)	[Date case filed for chapter 11 _____ MM / DD / YYYY OR
Case number: _____	[Date case filed in chapter _____ _____ MM / DD / YYYY
	Date case converted to chapter 11 _____] MM / DD / YYYY

Official Form 309F2 (For Corporations or Partnerships under Subchapter V)

Notice of Chapter 11 Bankruptcy Case

02/20

For the debtor listed above, a case has been filed under chapter 11 of the Bankruptcy Code. An order for relief has been entered.

This notice has important information about the case for creditors, debtors, and trustees, including information about the meeting of creditors and deadlines. Read both pages carefully.

The filing of the case imposed an automatic stay against most collection activities. This means that creditors generally may not take action to collect debts from the debtor or the debtor's property. For example, while the stay is in effect, creditors cannot sue, assert a deficiency, repossess property, or otherwise try to collect from the debtor. Creditors cannot demand repayment from the debtor by mail, phone, or otherwise. Creditors who violate the stay can be required to pay actual and punitive damages and attorney's fees.

Confirmation of a chapter 11 plan may result in a discharge of debt. A creditor who wants to have a particular debt excepted from discharge may be required to file a complaint in the bankruptcy clerk's office within the deadline specified in this notice. (See line 11 below for more information.)

To protect your rights, consult an attorney. All documents filed in the case may be inspected at the bankruptcy clerk's office at the address listed below or through PACER (Public Access to Court Electronic Records at www.pacer.gov).

The staff of the bankruptcy clerk's office cannot give legal advice.

Do not file this notice with any proof of claim or other filing in the case.

1.	**Debtor's full name**	
2.	**All other names used in the last 8 years**	
3.	**Address**	
4.	**Debtor's attorney** Name and address	Contact phone _____ Email _____
5.	**Bankruptcy Trustee**	Contact phone _____ Email _____
6.	**Bankruptcy clerk's office** Documents in this case may be filed at this address. You may inspect all records filed in this case at this office or online at www.pacer.gov.	Hours open _____ Contact phone _____

For more information, see page 2 ▶

Debtor _____ Case number (*if known*)_____
Name

7. **Meeting of creditors** The debtor's representative must attend the meeting to be questioned under oath. Creditors may attend, but are not required to do so.	_____ at _____ Date Time The meeting may be continued or adjourned to a later date. If so, the date will be on the court docket.	Location:
8. **Proof of claim deadline**	**Deadline for filing proof of claim:**	[Not yet set. If a deadline is set, the court will send you another notice.] or [date, if set by the court)]
	A proof of claim is a signed statement describing a creditor's claim. A proof of claim form may be obtained at www.uscourts.gov or any bankruptcy clerk's office. Your claim will be allowed in the amount scheduled unless: ▪ your claim is designated as *disputed*, *contingent*, or *unliquidated*; ▪ you file a proof of claim in a different amount; or ▪ you receive another notice. If your claim is not scheduled or if your claim is designated as *disputed*, *contingent*, or *unliquidated*, you must file a proof of claim or you might not be paid on your claim and you might be unable to vote on a plan. You may file a proof of claim even if your claim is scheduled. You may review the schedules at the bankruptcy clerk's office or online at www.pacer.gov. Secured creditors retain rights in their collateral regardless of whether they file a proof of claim. Filing a proof of claim submits a creditor to the jurisdiction of the bankruptcy court, with consequences a lawyer can explain. For example, a secured creditor who files a proof of claim may surrender important nonmonetary rights, including the right to a jury trial.	
9. **Exception to discharge deadline** The bankruptcy clerk's office must receive a complaint and any required filing fee by the following deadline.	If § 523(c) applies to your claim and you seek to have it excepted from discharge, you must start a judicial proceeding by filing a complaint by the deadline stated below. **Deadline for filing the complaint:** _____	
10. **Creditors with a foreign address**	If you are a creditor receiving notice mailed to a foreign address, you may file a motion asking the court to extend the deadlines in this notice. Consult an attorney familiar with United States bankruptcy law if you have any questions about your rights in this case.	
11. **Filing a Chapter 11 bankruptcy case**	Chapter 11 allows debtors to reorganize or liquidate according to a plan. A plan is not effective unless the court confirms it. You may receive a copy of the plan and a disclosure statement telling you about the plan, and you may have the opportunity to vote on the plan. You will receive notice of the date of the confirmation hearing, and you may object to confirmation of the plan and attend the confirmation hearing. The debtor will generally remain in possession of the property and may continue to operate the debtor's business.	
12. **Discharge of debts**	Confirmation of a chapter 11 plan may result in a discharge of debts, which may include all or part of your debt. See 11 U.S.C. § 1141(d). However, in some cases a discharge may not be granted until a substantial portion of payments due under the plan have been made. See 11 U.S.C. § 1192. A discharge means that creditors may never try to collect the debt from the debtor except as provided in the plan. If you want to have a particular debt owed to you excepted from the discharge and § 523(c) applies to your claim, you must start a judicial proceeding by filing a complaint and paying the filing fee in the bankruptcy clerk's office by the deadline.	

COMMITTEE NOTE

Official Forms 309E2 and 309F2 are new. They are promulgated in response to the enactment of the Small Business Reorganization Act of 2019, Pub. L. No. 116-54, 133 Stat. 1079. That law gives a small business debtor the option of electing to be a debtor under subchapter V of chapter 11.

Because a trustee is always appointed in a subchapter V case, both forms require the name and contact information of the trustee to be provided. The forms also reflect that in subchapter V cases there will generally be both a debtor in possession and a trustee and that a discharge may be granted either upon confirmation or after the payments due during the first three to five years of the plan have been made.

Previously existing Official Forms 309E and 309F have been renumbered 309E1 and 309F1, respectively.

Official Form 314 (02/20)

[Caption as in 416A]

Class [ ] Ballot for Accepting or Rejecting Plan of Reorganization

[Proponent] filed a plan of reorganization dated [Date] (the Plan) for the Debtor in this case. {The Court has [conditionally] approved a disclosure statement with respect to the Plan (the Disclosure Statement). The Disclosure Statement provides information to assist you in deciding how to vote your ballot. If you do not have a Disclosure Statement, you may obtain a copy from [name, address, telephone number and telecopy number of proponent/proponent's attorney.]}

{Court approval of the disclosure statement does not indicate approval of the Plan by the Court.}

You should review {the Disclosure Statement and} the Plan before you vote. You may wish to seek legal advice concerning the Plan and your classification and treatment under the Plan. Your [claim] [equity interest] has been placed in class [ ] under the Plan. If you hold claims or equity interests in more than one class, you will receive a ballot for each class in which you are entitled to vote.

If your ballot is not received by [name and address of proponent's attorney or other appropriate address] on or before [date], and such deadline is not extended, your vote will not count as either an acceptance or rejection of the Plan.

If the Plan is confirmed by the Bankruptcy Court, it will be binding on you whether or not you vote.

Acceptance or Rejection of the Plan

[At this point the ballot should provide for voting by the particular class of creditors or equity holders receiving the ballot using one of the following alternatives;]

[If the voter is the holder of a secured, priority, or unsecured nonpriority claim:]

The undersigned, the holder of a Class [ ] claim against the Debtor in the unpaid amount of Dollars ($)

[or, if the voter is the holder of a bond, debenture, or other debt security:]

The undersigned, the holder of a Class [ ] claim against the Debtor, consisting of Dollars ($) principal amount of [describe bond, debenture, or other debt security] of the Debtor (For purposes of this Ballot, it is not necessary and you should not adjust the principal amount for any accrued or unmatured interest.)

[or, if the voter is the holder of an equity interest:]

The undersigned, the holder of Class [ ] equity interest in the Debtor, consisting of _____ shares or other interests of [describe equity interest] in the Debtor

[In each case, the following language should be included:]

Check one box only

☐ **Accepts the plan**

☐ **Rejects the plan**

Dated: _____

Print or type name: _____

Signature: _____ Title (if corporation or partnership) _____

Address: _____

_____

_____

Return this ballot to:

[Name and address of proponent's attorney or other appropriate address]

Committee Note

This form is amended in response to the enactment of the Small Business Reorganization Act of 2019, Pub. L. No. 116-54, 133 Stat. 1079. That law gives a small business debtor the option of electing to be a debtor under subchapter V of chapter 11. The first three paragraphs of the form are amended to place braces around all references to a disclosure statement. Section 1125 of the Code does not apply to subchapter V cases unless the court for cause orders otherwise. See Code § 1181(b). Thus, in most chapter V cases there will not be a disclosure statement, and the language in braces on the form should not be included on the ballot.

Fill in this information to identify the case:

Debtor Name _____

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

Case number: _____

❑ Check if this is an amended filing

Official Form 425A

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

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

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

Background for Cases Filed Under Subchapter V

A. Description and History of the Debtor's Business

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

B. Liquidation Analysis

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

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

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

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

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

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

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

Debtor Name _____ Case number_____

Article 1: Summary

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

This Plan provides for:

☐ classes of priority claims;
☐ classes of secured claims;
☐ classes of non-priority unsecured clams; and
☐ classes of equity security holders.

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

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

Article 2: Classification of Claims and Interests

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

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

3.01	**Unclassified claims**	Under section § 1123(a)(1), administrative expense claims, ["gap" period claims in an involuntary case allowed under § 502(f) of the Code,] and priority tax claims are not in classes.
3.02	**Administrative expense claims**	Each holder of an administrative expense claim allowed under § 503 of the Code, [and a "gap" claim in an involuntary case allowed under § 502(f) of the Code,] will be paid in full on the effective date of this Plan, in cash, or upon such other terms as may be agreed upon by the holder of the claim and the Debtor.
3.03	**Priority tax claims**	Each holder of a priority tax claim will be paid [Specify terms of treatment consistent with § 1129(a)(9)(C) of the Code].
3.04	**Statutory fees**	All fees required to be paid under 28 U.S.C. § 1930 that are owed on or before the

Debtor Name _____ Case number_____

effective date of this Plan have been paid or will be paid on the effective date.

3.05 **Prospective quarterly fees** — All quarterly fees required to be paid under 28 U.S.C. § 1930(a)(6) or (a)(7) will accrue and be timely paid until the case is closed, dismissed, or converted to another chapter of the Code.

Article 4: Treatment of Claims and Interests Under the Plan

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

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

Article 5: Allowance and Disallowance of Claims

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

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

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

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

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

Article 6: Provisions for Executory Contracts and Unexpired Leases

6.01 **Assumed executory contracts and unexpired leases** — (a) The Debtor assumes, and if applicable assigns, the following executory contracts and unexpired leases as of the effective date:

[List assumed, or if applicable assigned, executory contracts and unexpired leases.]

Debtor Name _____ Case number_____

(b) Except for executory contracts and unexpired leases that have been assumed, and if applicable assigned, before the effective date or under section 6.01(a) of this Plan, or that are the subject of a pending motion to assume, and if applicable assign, the Debtor will be conclusively deemed to have rejected all executory contracts and unexpired leases as of the effective date.

A proof of a claim arising from the rejection of an executory contract or unexpired lease under this section must be filed no later than [ ] days after the date of the order confirming this Plan.

Article 7: Means for Implementation of the Plan

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

Article 8: General Provisions

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

Debtor Name _____ Case number_____

after the effective date of the plan.]

Article 9: Discharge

[Include the appropriate provision in the Plan]

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

In accordance with § 11(41(d)(3) of the Code, the Debtor will not receive any discharge of debt in this bankruptcy case.

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

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

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

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

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

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

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

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

(i) imposed by this Plan; or

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

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

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

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

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

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

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

Debtor Name _____ Case number_____

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

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

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

If the Debtor's Plan is confirmed under § 1191(b), confirmation of the Plan does not discharge any debt provided for in this Plan until the court grants a discharge on completion of all payments due within the first 3 years of this Plan, or as otherwise provided in § 1192 of the Code. The Debtor will not be discharged from any debt:
(i) on which the last payment is due after the first 3 years of the plan, or as otherwise provided in § 1192; or
(ii) excepted from discharge under § 523(a) of the Code, except as provided in Rule 4007(c) of the Federal Rules of Bankruptcy Procedure.

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

If the Debtor's Plan is confirmed under § 1191(a), on the effective date of the Plan, the Debtor will be discharged from any debt that arose before confirmation of this Plan, to the extent specified in § 1141(d)(1)(A) of the Code, except that the Debtor will not be discharged of any debt:
(i) imposed by this Plan; or
(ii) to the extent provided in § 1141(d)(6).

If the Debtor's Plan is confirmed under § 1191(b), confirmation of this Plan does not discharge any debt provided for in this Plan until the court grants a discharge on completion of all payments due within the first 3 years of this Plan, or as otherwise provided in § 1192 of the Code. The Debtor will not be discharged from any debt:
(i) on which the last payment is due after the first 3 years of the plan, or as otherwise provided in § 1192; or
(ii) excepted from discharge under § 523(a) of the Code, except as provided in Rule 4007(c) of the Federal Rules of Bankruptcy Procedure.

Article 10: Other Provisions

[Insert other provisions, as applicable.]

Respectfully submitted,

✘ _____ _____
[Signature of the Plan Proponent] [Printed Name]

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

Committee Note

This form is amended in response to the enactment of the Small Business Reorganization Act of 2019, Pub. L. No. 116-54, 133 Stat. 1079. That law gives a small business debtor the option of electing to be a debtor under subchapter V of chapter 11. Because there will generally not be a disclosure statement in subchapter V cases, § 1190 of the Code provides that plans in those cases must include a brief history of the debtor's business operations, a liquidation analysis, and projections of the debtor's ability to make payments under the plan. Those provisions are added to a new Background section of the form with an indication that they are to be included in plans only in subchapter V cases.

Article 9 of the form is amended to include descriptions of the effect of a discharge in a case under subchapter V. The plan proponent is directed to include in the plan the particular provision that is appropriate for the case.

Committee on Rules of Practice and Procedure
Thurgood Marshall Federal Judiciary Building
Washington, DC 20544
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H. R. 3311

One Hundred Sixteenth Congress of the United States of America

AT THE FIRST SESSION

Begun and held at the City of Washington on Thursday, the third day of January, two thousand and nineteen

An Act

To amend chapter 11 of title 11, United States Code, to address reorganization of small businesses, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Small Business Reorganization Act of 2019".

SEC. 2. REORGANIZATION OF SMALL BUSINESS DEBTORS.

(a) IN GENERAL.—Chapter 11 of title 11, United States Code, is amended by adding at the end the following:

"SUBCHAPTER V—SMALL BUSINESS DEBTOR REORGANIZATION

"§ 1181. Inapplicability of other sections

"(a) IN GENERAL.—Sections 105(d), 1101(1), 1104, 1105, 1106, 1107, 1108, 1115, 1116, 1121, 1123(a)(8), 1123(c), 1127, 1129(a)(15), 1129(b), 1129(c), 1129(e), and 1141(d)(5) of this title do not apply in a case under this subchapter.

"(b) COURT AUTHORITY.—Unless the court for cause orders otherwise, paragraphs (1), (2), and (4) of section 1102(a) and sections 1102(b), 1103, and 1125 of this title do not apply in a case under this subchapter.

"(c) SPECIAL RULE FOR DISCHARGE.—If a plan is confirmed under section 1191(b) of this title, section 1141(d) of this title shall not apply, except as provided in section 1192 of this title.

"§ 1182. Definitions

"In this subchapter:

"(1) DEBTOR.—The term 'debtor' means a small business debtor.

"(2) DEBTOR IN POSSESSION.—The term 'debtor in possession' means the debtor, unless removed as debtor in possession under section 1185(a) of this title.

"§ 1183. Trustee

"(a) IN GENERAL.—If the United States trustee has appointed an individual under section 586(b) of title 28 to serve as standing trustee in cases under this subchapter, and if such individual qualifies as a trustee under section 322 of this title, then that individual shall serve as trustee in any case under this subchapter. Otherwise, the United States trustee shall appoint one disinterested person

to serve as trustee in the case or the United States trustee may serve as trustee in the case, as necessary.

"(b) DUTIES.—The trustee shall—

"(1) perform the duties specified in paragraphs (2), (5), (6), (7), and (9) of section 704(a) of this title;

"(2) perform the duties specified in paragraphs (3), (4), and (7) of section 1106(a) of this title, if the court, for cause and on request of a party in interest, the trustee, or the United States trustee, so orders;

"(3) appear and be heard at the status conference under section 1188 of this title and any hearing that concerns—

"(A) the value of property subject to a lien;

"(B) confirmation of a plan filed under this subchapter;

"(C) modification of the plan after confirmation; or

"(D) the sale of property of the estate;

"(4) ensure that the debtor commences making timely payments required by a plan confirmed under this subchapter;

"(5) if the debtor ceases to be a debtor in possession, perform the duties specified in section 704(a)(8) and paragraphs (1), (2), and (6) of section 1106(a) of this title, including operating the business of the debtor;

"(6) if there is a claim for a domestic support obligation with respect to the debtor, perform the duties specified in section 704(c) of this title; and

"(7) facilitate the development of a consensual plan of reorganization.

"(c) TERMINATION OF TRUSTEE SERVICE.—

"(1) IN GENERAL.—If the plan of the debtor is confirmed under section 1191(a) of this title, the service of the trustee in the case shall terminate when the plan has been substantially consummated, except that the United States trustee may reappoint a trustee as needed for performance of duties under subsection (b)(3)(C) of this section and section 1185(a) of this title.

"(2) SERVICE OF NOTICE OF SUBSTANTIAL CONSUMMATION.—Not later than 14 days after the plan of the debtor is substantially consummated, the debtor shall file with the court and serve on the trustee, the United States trustee, and all parties in interest notice of such substantial consummation.

"§ 1184. Rights and powers of a debtor in possession

"Subject to such limitations or conditions as the court may prescribe, a debtor in possession shall have all the rights, other than the right to compensation under section 330 of this title, and powers, and shall perform all functions and duties, except the duties specified in paragraphs (2), (3), and (4) of section 1106(a) of this title, of a trustee serving in a case under this chapter, including operating the business of the debtor.

"§ 1185. Removal of debtor in possession

"(a) IN GENERAL.—On request of a party in interest, and after notice and a hearing, the court shall order that the debtor shall not be a debtor in possession for cause, including fraud, dishonesty, incompetence, or gross mismanagement of the affairs of the debtor, either before or after the date of commencement of the case, or for failure to perform the obligations of the debtor under a plan confirmed under this subchapter.

"(b) REINSTATEMENT.—On request of a party in interest, and after notice and a hearing, the court may reinstate the debtor in possession.

"§ 1186. Property of the estate

"(a) INCLUSIONS.—If a plan is confirmed under section 1191(b) of this title, property of the estate includes, in addition to the property specified in section 541 of this title—

"(1) all property of the kind specified in that section that the debtor acquires after the date of commencement of the case but before the case is closed, dismissed, or converted to a case under chapter 7, 12, or 13 of this title, whichever occurs first; and

"(2) earnings from services performed by the debtor after the date of commencement of the case but before the case is closed, dismissed, or converted to a case under chapter 7, 12, or 13 of this title, whichever occurs first.

"(b) DEBTOR REMAINING IN POSSESSION.—Except as provided in section 1185 of this title, a plan confirmed under this subchapter, or an order confirming a plan under this subchapter, the debtor shall remain in possession of all property of the estate.

"§ 1187. Duties and reporting requirements of debtors

"(a) FILING REQUIREMENTS.—Upon electing to be a debtor under this subchapter, the debtor shall file the documents required by subparagraphs (A) and (B) of section 1116(1) of this title.

"(b) OTHER APPLICABLE PROVISIONS.—A debtor, in addition to the duties provided in this title and as otherwise required by law, shall comply with the requirements of section 308 and paragraphs (2), (3), (4), (5), (6), and (7) of section 1116 of this title.

"(c) SEPARATE DISCLOSURE STATEMENT EXEMPTION.—If the court orders under section 1181(b) of this title that section 1125 of this title applies, section 1125(f) of this title shall apply.

"§ 1188. Status conference

"(a) IN GENERAL.—Except as provided in subsection (b), not later than 60 days after the entry of the order for relief under this chapter, the court shall hold a status conference to further the expeditious and economical resolution of a case under this subchapter.

"(b) EXCEPTION.—The court may extend the period of time for holding a status conference under subsection (a) if the need for an extension is attributable to circumstances for which the debtor should not justly be held accountable.

"(c) REPORT.—Not later than 14 days before the date of the status conference under subsection (a), the debtor shall file with the court and serve on the trustee and all parties in interest a report that details the efforts the debtor has undertaken and will undertake to attain a consensual plan of reorganization.

"§ 1189. Filing of the plan

"(a) WHO MAY FILE A PLAN.—Only the debtor may file a plan under this subchapter.

"(b) DEADLINE.—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.

"§ 1190. Contents of plan

"A plan filed under this subchapter—

"(1) shall include—

"(A) a brief history of the business operations of the debtor;

"(B) a liquidation analysis; and

"(C) projections with respect to the ability of the debtor to make payments under the proposed plan of reorganization;

"(2) shall provide for the submission of all or such portion of the future earnings or other future income of the debtor to the supervision and control of the trustee as is necessary for the execution of the plan; and

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

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

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

"§ 1191. Confirmation of plan

"(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)(i) The debtor will be able to make all payments under the plan; or

"(ii) there is a reasonable likelihood that the debtor will be able to make all payments under the plan; and

"(B) 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.

"(e) SPECIAL RULE.—Notwithstanding section 1129(a)(9)(A) of this title, a plan that provides for the payment through the plan of a claim of a kind specified in paragraph (2) or (3) of section 507(a) of this title may be confirmed under subsection (b) of this section.

"§ 1192. Discharge

"If the plan of the debtor is confirmed under section 1191(b) of this title, as soon as practicable after completion by the debtor of all payments due within the first 3 years of the plan, or such longer period not to exceed 5 years as the court may fix, unless the court approves a written waiver of discharge executed by the debtor after the order for relief under this chapter, the court shall grant the debtor a discharge of all debts provided in section 1141(d)(1)(A) of this title, and all other debts allowed under section 503 of this title and provided for in the plan, except any debt—

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

"(2) of the kind specified in section 523(a) of this title.

"§ 1193. Modification of plan

"(a) MODIFICATION BEFORE CONFIRMATION.—The debtor may modify a plan at any time before confirmation, but may not modify the plan so that the plan as modified fails to meet the requirements of sections 1122 and 1123 of this title, with the exception of subsection (a)(8) of such section 1123. After the modification is filed with the court, the plan as modified becomes the plan.

"(b) MODIFICATION AFTER CONFIRMATION.—If a plan has been confirmed under section 1191(a) of this title, the debtor may modify the plan at any time after confirmation of the plan and before substantial consummation of the plan, but may not modify the plan so that the plan as modified fails to meet the requirements of sections 1122 and 1123 of this title, with the exception of subsection (a)(8) of such section 1123. The plan, as modified under this subsection, becomes the plan only if circumstances warrant the modification and the court, after notice and a hearing, confirms the plan as modified under section 1191(a) of this title.

"(c) CERTAIN OTHER MODIFICATIONS.—If a plan has been confirmed under section 1191(b) of this title, the debtor may modify the plan at any time within 3 years, or such longer time not to exceed 5 years, as fixed by the court, but may not modify the plan so that the plan as modified fails to meet the requirements of section 1191(b) of this title. The plan as modified under this subsection becomes the plan only if circumstances warrant such modification and the court, after notice and a hearing, confirms such plan, as modified, under section 1191(b) of this title.

"(d) HOLDERS OF A CLAIM OR INTEREST.—If a plan has been confirmed under section 1191(a) of this title, any holder of a claim or interest that has accepted or rejected the plan is deemed to have accepted or rejected, as the case may be, the plan as modified, unless, within the time fixed by the court, such holder changes the previous acceptance or rejection of the holder.

"§ 1194. Payments

"(a) RETENTION AND DISTRIBUTION BY TRUSTEE.—Payments and funds received by the trustee shall be retained by the trustee until confirmation or denial of confirmation of a plan. If a plan is confirmed, the trustee shall distribute any such payment in accordance with the plan. If a plan is not confirmed, the trustee shall return any such payments to the debtor after deducting—

"(1) any unpaid claim allowed under section 503(b) of this title;

"(2) any payment made for the purpose of providing adequate protection of an interest in property due to the holder of a secured claim; and

"(3) any fee owing to the trustee.

"(b) OTHER PLANS.—If a plan is confirmed under section 1191(b) of this title, except as otherwise provided in the plan or in the order confirming the plan, the trustee shall make payments to creditors under the plan.

"(c) PAYMENTS PRIOR TO CONFIRMATION.—Prior to confirmation of a plan, the court, after notice and a hearing, may authorize the trustee to make payments to the holder of a secured claim for the purpose of providing adequate protection of an interest in property.

"§ 1195. Transactions with professionals

"Notwithstanding section 327(a) of this title, a person is not disqualified for employment under section 327 of this title, by a debtor solely because that person holds a claim of less than $10,000 that arose prior to commencement of the case.".

(b) CLERICAL AMENDMENT.—The table of subchapters at the beginning of chapter 11 of title 11, United States Code, is amended by adding at the end the following:

"SUBCHAPTER V—SMALL BUSINESS DEBTOR REORGANIZATION

"1181. Inapplicability of other sections.
"1182. Definitions.
"1183. Trustee.
"1184. Rights and powers of a debtor in possession.
"1185. Removal of debtor in possession.
"1186. Property of the estate.
"1187. Duties and reporting requirements of debtors.
"1188. Status conference.
"1189. Filing of the plan.
"1190. Contents of plan.
"1191. Confirmation of plan.

"1192. Discharge.
"1193. Modification of plan.
"1194. Payments.
"1195. Transactions with professionals.".

SEC. 3. PREFERENCES; VENUE OF CERTAIN PROCEEDINGS.

(a) PREFERENCES.—Section 547(b) of title 11, United States Code, is amended by inserting ", based on reasonable due diligence in the circumstances of the case and taking into account a party's known or reasonably knowable affirmative defenses under subsection (c)," after "may".

(b) VENUE OF CERTAIN PROCEEDINGS.—Section 1409(b) of title 28, United States Code, is amended by striking "$10,000" and inserting "$25,000".

SEC. 4. CONFORMING AMENDMENTS.

(a) TITLE 11.—Title 11, United States Code, is amended—

(1) in section 101—

(A) in paragraph (51C), by inserting "and has not elected that subchapter V of chapter 11 of this title shall apply" after "is a small business debtor"; and

(B) in paragraph (51D)—

(i) in subparagraph (A)—

(I) by striking "or operating real property or activities incidental thereto" and inserting "single asset real estate"; and

(II) by striking "for a case in which" and all that follows and inserting "not less than 50 percent of which arose from the commercial or business activities of the debtor; and"; and

(ii) in subparagraph (B)—

(I) by striking the period at the end and inserting a semicolon;

(II) by striking "does not include any member" and inserting the following: "does not include—
"(i) any member"; and

(III) by adding at the end the following:
"(ii) any debtor that is a corporation subject to the reporting requirements under section 13 or 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78m, 78o(d)); or
"(iii) any corporation that—
"(I) is subject to the reporting requirements under section 13 or 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78m, 78o(d)); and
"(II) is an affiliate of a debtor.";

(2) in section 103—

(A) by redesignating subsections (i) through (k) as subsections (j) through (l), respectively; and

(B) by inserting after subsection (h) the following:

"(i) Subchapter V of chapter 11 of this title applies only in a case under chapter 11 in which a small business debtor elects that subchapter V of chapter 11 shall apply.";

(3) in section 322(a), by inserting "1183," after "1163,";

(4) in section 326—

(A) in subsection (a), by inserting ", other than a case under subchapter V of chapter 11" after "7 or 11"; and

(B) in subsection (b), by inserting "subchapter V of chapter 11 or" after "In a case under";

(5) in section 347—

(A) in subsection (a)—

(i) by inserting "1194," after "726,"; and

(ii) by inserting "subchapter V of chapter 11," after "chapter 7,"; and

(B) in subsection (b), by inserting "1194," after "1173,";

(6) in section 363(c)(1), by inserting "1183, 1184," after "1108,";

(7) in section 364(a), by inserting "1183, 1184," after "1108,";

(8) in section 523(a), in the matter preceding paragraph (1), by inserting "1192" after "1141,";

(9) in section 524—

(A) in subsection (a)—

(i) in paragraph (1), by inserting "1192," after "1141,"; and

(ii) in paragraph (3), by inserting "1192," after "523,";

(B) in subsection (c)(1), by inserting "1192," after "1141,"; and

(C) in subsection (d), by inserting "1192," after "1141,";

(10) in section 557(d)(3), by inserting "1183," after "1104,";

(11) in section 1102(a), by striking paragraph (3) and inserting the following:

"(3) Unless the court for cause orders otherwise, a committee of creditors may not be appointed in a small business case or a case under subchapter V of this chapter."; and

(12) in section 1146(a), by inserting "or 1191" after "1129".

(b) TITLE 28.—Title 28 United States Code, is amended—

(1) in section 586—

(A) in subsection (a)(3), by inserting "(including subchapter V of chapter 11)" after "7, 11";

(B) in subsection (b), by inserting "subchapter V of chapter 11 or" after "cases under" the first place it appears;

(C) in subsection (d)(1), by inserting "subchapter V of chapter 11 or" after "cases under" each place that term appears; and

(D) in subsection (e)—

(i) in paragraph (1), by inserting "subchapter V of chapter 11 or" after "cases under";

(ii) in paragraph (2), by inserting "subchapter V of chapter 11 or" after "cases under" each place that term appears; and

(iii) by adding at the end the following:

"(5) In the event that the services of the trustee in a case under subchapter V of chapter 11 of title 11 are terminated by dismissal or conversion of the case, or upon substantial consummation of a plan under section 1183(c)(1) of that title, the court shall award compensation to the trustee consistent with services performed by the trustee and the limits on the compensation of the trustee established pursuant to paragraph (1) of this subsection.";

(2) in section 589b—

(A) in subsection (a)(1), by inserting "subchapter V of chapter 11 and" after "cases under"; and

(B) in subsection (d)—

(i) in the matter preceding paragraph (1), by inserting "subchapter V of chapter 11 and" after "trustees under"; and

(ii) in the undesignated matter following paragraph (8), by inserting "subchapter V of chapter 11 and" after "cases under"; and

(3) in section 1930(a)(6)(A), by inserting ", other than under subchapter V," after "chapter 11 of title 11".

SEC. 5. EFFECTIVE DATE.

This Act and the amendments made by this Act shall take effect 180 days after the date of enactment of this Act.

SEC. 6. DETERMINATION OF BUDGETARY EFFECTS.

The budgetary effects of this Act, for the purpose of complying with the Statutory Pay-As-You-Go Act of 2010, shall be determined by reference to the latest statement titled "Budgetary Effects of PAYGO Legislation" for this Act, submitted for printing in the Congressional Record by the Chairman of the House Budget Committee, provided that such statement has been submitted prior to the vote on passage.

Speaker of the House of Representatives.

Vice President of the United States and
President of the Senate.