

New York City Bankruptcy Conference

Subchapter V

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AMERICAN BANKRUPTCY INSTITUTE NEW YORK CITY CONFERENCE MAY 24, 2023

ALL YOU WANTED TO KNOW ABOUT SUBCHAPTER V





Presentation Time: May 24, 2023 2:45 PM – 4:00 PM

• Panelists:

- Honorable James L. Garrity, Jr.
- Gerard DiConza, Moderator
- Erica Feynman Aisner
- Charles N. Persing
- Michael S. Weinstein





Presentation Time: May 24, 2023 4:15 PM - 5:30 PM

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- Honorable James L. Garrity, Jr.
- Gerard DiConza, Moderator
- Eric Daucher
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History and overview of Subchapter V

- Small Business Reorganization Act ("SBRA") became effective February 19, 2020 shortly before the onset of the COVID-19 pandemic.
- Added Subchapter V (sections 1181 1195) to Chapter 11 of the Bankruptcy Code to provide small business debtor cases with a more efficient, cost-effective way to reorganize.
- At first, only businesses with up to \$2,725,625 of noncontingent, unliquidated debt owed to nonaffiliates or insiders were eligible.
- In March 2020, the debt limit was increased to \$7.5 million through March 2021.
 March 2021, Congress extend the \$7.5 million debt limit through March 2022.
- June 21 2022, the "Bankruptcy Threshold Adjustment and Technical Corrections Act" enacted ("Bankruptcy Corrections Act"), which, inter alia, extended the \$7.5 million debt limit retroactively through June 2024.
- Will Congress extend \$7.5 million debt limit in 2024?
- Will debt limit be increased to \$10 million?





Eligibility Requirements

- A. Debtors must opt in by checking the appropriate Subchapter V box on voluntary petitions.
- B. "Commercial or business activities". The 50% Rule if less than 50% of Debtor's debts arose from commercial or business activities, not eligible
- C. Debt limits
 - How determined?
 - Contingent and unliquidated debts are excluded from the Subchapter V debt limit.
 - The debt limit also excludes debts owed to an affiliate, parent company or other "insiders," as defined in 11 U.S.C. § 101(31)





Eligibility Requirements (cont.)

- Following not eligible for Subchapter V (See 11 U.S.C. § 1182(1)(B)(i)-(iii)):
 - any member of a group of affiliated debtors having aggregate noncontingent liquidated secured and unsecured debts in excess of \$7,500,000; or
 - any corporation subject to reporting requirements under 15 U.S.C. §§ 78m or 78o(d), or an affiliate of any such corporation
- · Subsidiaries of foreign public companies that are not registered with the SEC may be eligible
 - Bankruptcy Corrections Act of 2022 retroactively amends the definition of "debtor" to block Subchapter V elections for (a) "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 USC 78m, 78o(d))"; or (b) "any debtor that is an affiliate of [such] a corporation" As a result, the court in *In re Phenomenon Mktg. & Ent., LLC*, 2022 WL 3042141, at *3 (Bankr. C.D. Cal. Aug. 1, 2022) court granted the debtor's motion to reinstate its Subchapter V election.





Eligibility Requirements (cont.)

- When is eligibility determined?
 - In re Free Speech Systems, LLC, 2023 WL 2732943 (Bankr. S.D. Tex. Mar. 31, 2023) (eligibility determined as of petition date so that subsequent filing by affiliates with too much debt does not revoke Subchapter V eligibility)
- Converting to Subchapter V/Converting from Subchapter V
 - Limitations on ability to convert?
 - What are the consequences?





Advantages of Subchapter V

- Reduced costs
 - No committee
 - No disclosure statement
 - No U.S. Trustee fees
- Only debtor may file plan; however, plan must be filed within 90 days unless court orders otherwise. 11 U.S.C. § 1189(b)
- No absolute priority rule, but all debtor's projected disposable income must be paid to creditors over 3-5 years





Advantages of Subchapter V (cont.)

- Eliminate need to appoint Patient Care Ombudsman?
- Bankruptcy Code requires bankruptcy court to appoint patient care ombudsman to monitor patient care when debtor is a "health care business".
 - In re Aknouk, 648 B.R. 755 (Bankr. S.D.N.Y. 2023) (in Subchapter V case of full-service general and cosmetic dentistry practice with 1000-2000 patients, denying U.S. Trustee motion to appoint patient care ombudsman, noting that presence of Subchapter V trustee was one of the factors weighing against appointment)





Role of Subchapter V Trustee

- A. Oversee and monitor the case facilitator role
- B. Powers of Subchapter V Trustee
- C. Compensation of Subchapter V Trustee
 - Payment of fees upon dismissal. In re New York Hand & Physical Therapy PLLC, 2023
 WL 2962204 (Bankr. S.D.N.Y. April 14, 2023)
 (conditioning dismissal upon payment of Subchapter V trustee fees)





Role of Subchapter V Trustee (cont.)

- D. Engagement of Professionals
- E. Removal of debtor in possession
 - In re Corinthian Commc'n, Inc., 642 B.R. 224 (Bankr. S.D.N.Y. 2022)
 - Expansion of Subchapter V Trustee's Role once DIP removed





Confirmation Issues

- A. Consensual Confirmation § 1191(a)
- B. Administrative Claims paid over life of plan
- C. Non-consensual Confirmation § 1191(b)
- D. Subchapter V eliminates the requirement that debtor obtain at least one impaired accepting class the 1129(a)(10) "somebody-has-to-like-it" test
- E. Determination of projected disposable income





Confirmation Issues (cont.)

F. Discharge of debts excepted under section 523(a)?

- Cantwell-Cleary Co., Inc. v. Cleary Packaging, LLC (In re Cleary Packaging, LLC), 36 F.4th 509 (4th Cir. 2022) (in nonconsensual confirmation, debts of the kind listed in section 523(a) of individuals and corporate debtors are excepted from discharge)
- But see Avion Funding, LLC v. GFS Indus., LLC (In re GFS Indus., LLC), 2022 WL 16858009 (Bankr. W.D. Tex. Nov. 10, 2022); Jennings v. Lapeer Aviation, Inc. (In re Lapeer Aviation, Inc.), 2022 WL 1110072 (Bankr. E.D. Mich. April 13, 2022); Catt v. RTECH Fabrications, LLC (In re RTECH Fabrications, LLC), 635 B.R. 559 (Bankr. D. Idaho 2021)

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AMERICAN BANKRUPTCY INSTITUTE NEW YORK CITY CONFERENCE – MAY 2023

ALL YOU EVER WANTED TO KNOW ABOUT SUBCHAPTER V

- I. History and Overview of Subchapter V and Small Chapter 11 Cases
 - A. <u>1978 Bankruptcy Code</u>. Unified reorganizations into one chapter created substantial hurdles and costs for smaller businesses seeking to reorganize.
 - B. "Fast Track" for Small Chapter 11s. In 1987, Judge A. Thomas Small (Bankr. E.D.N.C.) initiated "fast track" procedures for "small" business Chapter 11s. See A. Thomas Small, Small Business Bankruptcy Cases, 1 Am. Bankr. Inst. L. Rev. 305, 321 (1993).
 - Judge Small identified cases that were appropriate for expedited process and required those selected to file a plan and disclosure statement within 60 to 90 days from the petition date. Judge Small's fast track provided for no disclosure statement hearing, which was conditionally approved without a hearing. Creditors could file objections to the disclosure statement and be heard at a combined disclosure statement and confirmation hearing. Judge Small's fast track procedures spurred legislative proposals for dealing with small business debtors.
 - C. <u>1994 Amendments</u>. With the 1994 amendments to the Bankruptcy Code, Congress considered adopting Judge Small's fast track process, but instead endorsed the use of status conferences and scheduling orders.
 - The 1994 amendments amended section 105 to provide for setting of status conferences and allow for combined hearing on approval of disclosure statement and plan confirmation. The 1994 amendments also introduced the small business election provisions and defined "small business" as "a person engaged in commercial or business activities (not including a person whose primary activity is the business of owning or operating real property and activities incidental thereto) whose aggregate noncontingent liquidated secured and unsecured debts as of the date of the petition do not exceed \$2,000,000."
 - A person qualifying as a small business could elect a fast-track Chapter 11 plan process that allowed the court, among other things, to conditionally approve the debtor's disclosure statement and to combine the hearing on the disclosure statement and confirmation of the plan. The amendments also allowed the court to order that a committee of unsecured creditors not be appointed in a small business case.
 - The most significant restriction imposed upon a small business debtor under the 1994 amendments was a shortened period of exclusivity for filing a plan: the debtor had a 100 day exclusive period for filing a plan which could only be extended upon a showing that "the need for an increase is caused by circumstances for which the debtor should not be held accountable". Further, all plans had to be filed within 180 days after the petition.
 - Very few debtors elected to be treated as small business debtors under the 1994
 amendments because the costs saved by eliminating a separate hearing on the
 disclosure statement were too small to offset the burden of a 100 day exclusivity
 period and a 180 day deadline for filing all plans.

- D. 2005 BAPCPA Amendments. In 2005, Congress enacted the Bankruptcy Abuse Prevention and Consumer Protection Act ("BAPCPA"). BAPCPA included substantial changes to consumer bankruptcy practice, but also added certain small business provisions.
 - These provisions are mandatory if a Chapter 11 debtor qualifies as a "small business debtor" and must be complied with by any small business debtor.
 - Among other things, BAPCPA provides that small business case debtors have the exclusive right to file a Chapter 11 plan for 180 days (120 days for regular Chapter 11 cases) and court shall confirm a plan no later than 45 days after the plan is filed. This 45 day deadline can only be extended if the bankruptcy court enters an order granting the extension prior to the expiration of the deadline.
 - Prior to enactment of SBRA, small business Chapter 11 cases resulted in confirmation only 25% of the time and mean time to confirmation was 16 months.
- E. 2019 Small Business Reorganization Act ("SBRA"). Through the efforts of the ABI Commission to Study the Reform of Chapter 11 (the "ABI Commission"), the SBRA was enacted and became effective on February 19, 2020 shortly before the onset of the COVID-19 pandemic.
 - SBRA added Subchapter V (sections 1181 1195) to Chapter 11 of the Bankruptcy Code to provide small business debtor cases with a more efficient, cost-effective way to reorganize.
 - At first, only businesses with up to \$2,725,625 of noncontingent, unliquidated debt owed to non-affiliates or non-insiders were eligible.
 - On March 27, 2020, in response to the economic distress related to the pandemic, the "Coronavirus Aid, Relief, and Economic Security Act" (the "Cares Act") was enacted to temporarily increase the Subchapter V debt eligibility limit from \$2,725,625 to \$7.5 million.
 - In March 2021, Congress extended the \$7.5 million debt limit with the enactment of the COVID-19 Bankruptcy Relief Extension Act of 2021, but the higher debt threshold was due to return to \$2,725,625 on March 27, 2022.
 - On June 21 2022, the "Bankruptcy Threshold Adjustment and Technical Corrections Act" was enacted ("Bankruptcy Corrections Act"), which, *inter alia*, extended the \$7.5 million debt limit retroactively through June 2024.
 - Since SBRA, confirmation of Subchapter V debtors is approximately 47.5%. The average time to confirm Subchapter V plans is approximately six months.
- F. Will the debt limit be increased by Congress? The ABI Commission originally recommended a debtor eligibility limit of \$10 million.

II. Eligibility Requirements

A. Pursuant to § 1182(1)(A), to qualify under Subchapter V, a debtor must be a:

- "person engaged in commercial or business activities . . . that has aggregate noncontingent liquidated secured and unsecured debts as of the date of the filing of the petition or the date of the order for relief in an amount of not more than \$7,500,000 (excluding debts owed to 1 or more affiliates or insiders) not less than 50 percent of which arose from the commercial or business activities of the debtor. 11 U.S.C. § 1182(1)(A).
- Single asset real estate debtors are not eligible for Subchapter V. 11 U.S.C. § 1182(1)(A).
- To elect to proceed under Subchapter V, a debtor must state in its petition whether it is a small business debtor and whether it elects to proceed under Subchapter V. Fed. R. Bankr. Proc. 1020(a).

B. "Commercial or business activities"

- Eligibility determined as of the petition date. See In re Free Speech Systems, LLC, 2023 WL 2732943 (Bankr. S.D. Tex. Mar. 31, 2023) (eligibility determined as of petition date so that subsequent filing by affiliates with too much debt does not revoke Subchapter V eligibility).
- Profit motive not necessary to meet the "commercial or business activities" requirement. In re RS Air, LLC, 2022 WL 1288608 (9th Cir. BAP April 26, 2022).
- Courts interpret "commercial or business activities" broadly to mean any private sector actions related to buying, selling, financing, or using goods, property, or services, undertaken for purpose of earning income, including by establishing, managing, or operating incorporated or unincorporated entity to do so. See In re Ikalowych, 628 B.R.261, 276 (Bankr. D. Colo. 2021). Debtors in the process of winding down are eligible for Subchapter V. See id. at 287 (insurance salesman winding down failed company eligible for Subchapter V); In re Offer Space LLC, 629 B.R. 299 (Bankr. D. Utah 2021) (debtor with no employees and having shuttered its business still eligible for Subchapter V since it was maintaining bank accounts and accounts receivable, managing a lawsuit and winding down its business).
- But see In re Thurmon, 625 B.R. 417 (Bankr. W.D. Mo. 2020) (retired owners of closed pharmacies that sold assets were not "engaged" in business at filing and therefore were not eligible to be Subchapter V debtors); In re Johnson, 2021 WL 825156, at *6 (Bankr. N.D. Tex. Mar. 1, 2021) (term "engaged in" inquiry is "inherently contemporary in focus instead of retrospective, requiring the assessment of the debtor's current state of affairs as of the filing of the bankruptcy petition").

C. Date Eligibility is Determined

• Section 1182(1)(B) excludes from Subchapter V eligibility any debtor that is a member of a group of affiliated debtors in bankruptcy that has aggregate debts in excess of \$7.5 million.

- *In re Free Speech Systems, LLC*, 649 B.R. 729 (Bankr. S.D. Tex. 2023) (eligibility determined as of petition date so that subsequent filing by affiliates with too much debt does not revoke Subchapter V eligibility)
 - Debtor, Free Speech Systems, LLC owned by Alex Jones and filed Subchapter V in July 2022 and was eligible for as of that date
 - Alex Jones filed a separate and traditional Chapter 11 case in December 2022
 - Plaintiffs sought to revoke Subchapter V and argued Subchapter V debtor lost eligibility when Alex Jones filed his Chapter 11 case
 - Plaintiffs argued section 1182(1)(B)(i) does not include the phrase "as of the filing of the petition" and is a continuing obligation.
 - Bankruptcy Court disagreed and held that owner's subsequent Chapter 11 case does not render Subchapter V debtor ineligible.
 - Relying on Bankruptcy Rule 1020(b), the Court held that challenge to debtor's Subchapter V designation must be made within 30 days after section 341 meeting of creditors
 - Court also noted that even if objection was timely, the Court would not revoke the designation as Plaintiffs' position contradicts purpose of Subchapter V. "Subchapter V is a streamlined chapter 11 process and a debtor has to work from the outset to try to achieve a consensual plan. For example, the court must hold a status conference 60 days into a Subchapter V case 'to further the expeditious and economical resolution of a case.' A Subchapter V Trustee is also appointed to, among other things, 'facilitate the development of a consensual plan of reorganization.' And only the debtor can file a plan. If postpetition affiliate filings lead to ineligibility and revocation, it means that debtors could float in and out of Subchapter V at any time. That contradicts the text and purpose of Subchapter V." *Id.* at 734.

D. Consumer v. Business Debt – the 50% Rule

- Bankruptcy Code defines a "consumer debt" as one "... incurred by an individual primarily for a personal, family, or household purpose." 11 U.S.C. § 101(8). "[C]ommercial or business activities consist of any activities not of a personal, family, or household nature connected with business operations." *In re Ellingsworth Res. Community Assoc., Inc.*, 619 B.R. 519, 521 (Bankr. M.D. Fla. 2020).
- Was the debt incurred for the purpose of making a profit?
- Mortgage Debt. In re Ventura, 615 B.R. 1 (Bankr. E.D.N.Y. 2020)
 (determining that mortgage debt encumbering property where debtor resided and operated a bed and breakfast inn was business debt and not consumer debt and therefore debtor qualified as small business debtor), order rev'd, appeal

- dismissed sub nom. Gregory Funding v. Ventura, 638 B.R. 499 (E.D.N.Y. 2022).
- Student Loan Debt. In re Reis, 2023 WL 3215833, at *7 (Bankr. D. Idaho May 2, 2023) (student loan debt incurred over ten years prior to opening the medical practice is too far removed for debtor to qualify for Subchapter V relief).

E. Determination of eligibility debt limits

- Contingent and unliquidated debts are excluded from the Subchapter V debt limit. For example, funds distributed pursuant to the Paycheck Protection Program (PPP) and potential future lease obligations may be considered contingent and unliquidated and not count toward the debt limit total. See In re Parking Management, Inc., 620 B.R. 544 (Bankr. D. Md. 2020).
- The debt limit also excludes debts owed to an affiliate, parent company or other "insiders," as defined in 11 U.S.C. § 101(31). See In re 305 Petroleum, Inc., 622 B.R. 209 (Bankr. N.D. Miss. 2020) (debt of ineligible single asset real estate debtor affiliate included in determination of debt eligibility requirements).

F. Publicly Traded Corporations and Affiliates Not Eligible for Subchapter V

- The SBRA originally excluded "any debtor that is a corporation subject to the reporting requirements under section 13 or 15(d) of the Securities Exchange Act of 1934." Thus, publicly traded companies and their affiliates were ineligible for Subchapter V. The CARES Act amended section 1182(1)(B) of the SBRA to also exclude any debtor that is an affiliate of an "issuer" under the Securities Exchange Act. The term "issuer" is broadly defined in the Securities Exchange Act as "any person who issues or proposes to issue any security." As a result of the CARES Act, certain debtors were unable to use Subchapter V due to affiliation with non-publicly traded company that issued securities.
- In *In re Phenomenon Marketing & Entertainment, LLC*, 2022 WL 1262001, at *5-6) (Bankr. C.D. Cal. April 28, 2022), the Bankruptcy Court interpreted the CARES Act amendment and concluded that a debtor did not qualify for Subchapter V relief if the debtor or an affiliate are an "issuer," regardless of whether the debtor or its affiliate is a public company.
- The Bankruptcy Corrections Act retroactively fixes this overly broad exclusion of entities from the SBRA by amending § 1182(1)(B)(iii) to exclude only debtors with an affiliate that is subject to the reporting requirements under sections 13 or 15(d) of the Securities Exchange Act.
- As a result, the *Phenomenon* court granted the debtor's motion to reinstate its Subchapter V election. *In re Phenomenon Mktg. & Ent., LLC*, 2022 WL 3042141, at *3 (Bankr. C.D. Cal. Aug. 1, 2022).

• The Bankruptcy Corrections Act may open the door for use of Subchapter V by subsidiaries of foreign public companies that are not registered with the SEC. Section 1182(1)(B) only relates to companies that are reporting companies under the Securities Exchange Act. However, foreign publicly traded companies and their affiliates may not otherwise qualify as reporting companies under the Securities Exchange Act. In those cases, section 1182(1)(B) does not serve as a bar to limit such companies' eligibility for Subchapter V relief.

G. Converting to Subchapter V/Converting from Subchapter V

- Limitations on ability to convert?
- What are the consequences?

III. Advantages of Subchapter V

A. Reduced costs

- No committee
- No disclosure statement
- No U.S. Trustee fees
- B. <u>Appointment of Patient Care Ombudsman</u>. Bankruptcy Code requires bankruptcy court to appoint patient care ombudsman to monitor patient care when debtor is a "health care business".
 - In re Aknouk, 648 B.R. 755 (Bankr. S.D.N.Y. 2023) (in Subchapter V case of full-service general and cosmetic dentistry practice with 1000-2000 patients, denying U.S. Trustee motion to appoint patient care ombudsman, noting that presence of Subchapter V trustee was one of the factors weighing against appointment).
- C. Exclusivity. Only the debtor may file a plan under Subchapter V. 11 U.S.C. § 1189(a). However, plan must be filed within 90 days unless court orders otherwise. 11 U.S.C. § 1189(b). Pursuant to section 1189(b), the court may extend the debtor's deadline to file a plan only "if the need for the extension is attributable to circumstances for which the debtor should not justly be held accountable." 11 U.S.C. § 1189(b).
 - The burden of proof for an extension is on the debtor and courts apply a stringent and strict standard. *See In re HBL SNF, LLC*, 635 B.R. 725, 729 (Bankr. S.D.N.Y. 2022) (granting the debtor a 60 day extension when litigation with landlord not resolved).
 - The burden is a higher standard than the "for cause" standard that governs traditional chapter 11 cases. *Id.*

D. <u>Absolute Priority Rule Inapplicable</u>. The debtor need not comply with the absolute priority rule to confirm a plan. However, all the debtor's projected disposable income must be paid to creditors over 3-5 years.

IV. Role of Subchapter V Trustee

- A. Oversee and monitor the case facilitator role
 - Honest broker. See In re Corinthian Commc'ns, Inc., 642 B.R. 224, 225 (Bankr. S.D.N.Y. 2022)
 - One of the duties of Subchapter V Trustee is to "facilitate the development of a consensual plan of reorganization." 11 U.S.C. § 1183(b)(7)
- B. Compensation of Subchapter V Trustee
 - Payment of fees upon dismissal. In re New York Hand & Physical Therapy PLLC, 2023 WL 2962204 (Bankr. S.D.N.Y. April 14, 2023) (conditioning dismissal upon payment of Subchapter V trustee fees).
- C. Engagement of Professionals
- D. Termination of Subchapter V Trustee
 - Subchapter V Trustee's services terminate upon substantial consummation of a consensual plan. 11 U.S.C. § 1183(c)(1).
 - For non-consensual plans, Subchapter V Trustee's services terminate upon completion of payments under the plan. 11 U.S.C. § 1194(b).
- E. Removal of debtor in possession and Expanding Powers of Subchapter V Trustee
 - Pursuant to section 1183(b)(2) of the Bankruptcy Code, the Court may "for cause and on request of a party in interest, the trustee, or the United States trustee" order that a Subchapter V Trustee's powers are expanded to include the powers specified in sections 1106(a)(3) and (4). 11 U.S.C. § 1183(b)(2).
 - Sections 1106(a)(3) and (4) provide, in relevant part, that the trustee shall:
 - (3) ... investigate the acts, conduct, assets, liabilities, and financial condition of the debtor, the operation of the debtor's business and the desirability of the continuance of such business, and any other matter relevant to the case or to the formulation of a plan; [and]
 - (4) as soon as practicable—
 - (A) file a statement of any investigation conducted under paragraph (3) of this subsection, including any fact ascertained pertaining to fraud, dishonesty,

incompetence, misconduct, mismanagement, or irregularity in the management of the affairs of the debtor, or to a cause of action available to the estate;

- The Bankruptcy Code does not specify what constitutes "cause" for the Court to expand a Subchapter V Trustee's duties under section 1183(b)(2).
- "Cause" to expand a Subchapter V Trustee's duties is also likely to exist where there are "significant questions such as the debtor's true financial condition, what property is property of the estate, the debtor's management of the estate as debtor in possession, and the accuracy and completeness of the debtor's disclosures and reports." In re Ozcelebi, 639 B.R. 365, 383 (Bankr. S.D. Tex. 2022); see also Corinthian Commc'ns, 642 B.R. at 234 (finding cause to remove debtor in possession and expand Subchapter V Trustee's duties where evidence showed lack of any documentation of intercompany claims, potential significant insider claims against the debtor, and "the Debtor's continued lack of disclosure to the Subchapter V Trustee").

V. <u>Alternative Uses of Subchapter V</u>

A. Section 363 Sales

- Subchapter V designed to encourage restructuring and reorganization of business debts.
- Section 1181 of the Bankruptcy Code lists sections that do not apply in Subchapter V cases and does not exclude section 1123(b)(4) of the Bankruptcy Code, which provides that a chapter 11 plan may "provide for the sale of all or substantially all of the property of the estate and the distribution of proceeds to creditors and equity interest holders."

VI. Confirmation Issues

- A. Consensual Confirmation § 1191(a)
 - Consensual plans provide several benefits to debtors, including:
 - Termination of Subchapter V Trustee upon substantial consummation. 11 U.S.C. § 1183(c)(1)
 - Debtor receives a discharge at confirmation. See 11 U.S.C. § 1181(c)
 - Exclusion of post-petition property from estate. 11 U.S.C. § 1186
- B. Administrative Claims paid over life of plan
- C. Non-consensual Confirmation § 1191(b)

- D. Subchapter V eliminates the requirement that debtor obtain at least one impaired accepting class the 1129(a)(10) "somebody-has-to-like-it" test.
- E. Determination of projected disposable income
- F. Discharge of debts excepted under section 523(a)?
 - Cantwell-Cleary Co., Inc. v. Cleary Packaging, LLC (In re Cleary Packaging, LLC), 36 F.4th 509 (4th Cir. 2022) (in non-consensual confirmation, debts of the kind listed in section 523(a) of individuals and corporate debtors are excepted from discharge).
 - But see Avion Funding, LLC v. GFS Indus., LLC (In re GFS Indus., LLC),
 2022 WL 16858009 (Bankr. W.D. Tex. Nov. 10, 2022); Jennings v. Lapeer Aviation, Inc. (In re Lapeer Aviation, Inc.), 2022 WL 1110072 (Bankr. E.D. Mich. April 13, 2022); Catt v. RTECH Fabrications, LLC (In re RTECH Fabrications, LLC), 635 B.R. 559 (Bankr. D. Idaho 2021).

In re Free Speech Systems, LLC, 649 B.R. 729 (2023)

2023 WL 2732943

649 B.R. 729 United States Bankruptcy Court, S.D. Texas, Houston Division.

IN RE: FREE SPEECH SYSTEMS, LLC, Debtor.

CASE NO. 22-60043 | Signed March 31, 2023

Synopsis

Background: Creditors filed motion seeking to revoke Chapter 11 debtor limited liability company's (LLC) Subchapter V election, after debtor's owner had filed a separate Chapter 11 case.

Holdings: The Bankruptcy Court, Christopher Lopez, J., held that:

- [1] proceeding seeking to revoke debtor's Subchapter V election was "core" proceeding, for purposes of bankruptcy jurisdiction;
- [2] court had constitutional authority to enter a final judgment, based on parties' express and implied consent;
- [3] eligibility for relief under Subchapter V under Chapter 11 petition was limited to debtor's statement of election on its petition date;
- [4] creditors' challenge to debtor's Subchapter V eligibility was not timely;
- [5] excusable neglect did not provide basis to expand period for creditors to challenge debtor's Subchapter V eligibility;
- [6] debtor's Subchapter V eligibility was not impacted by debtor's owner filing, postpetition, a separate Chapter 11 case; and
- [7] even if the court could revoke debtor's Subchapter V election, the court would not do so.

Motion denied.

Procedural Posture(s): Other.

West Headnotes (12)

[1] Bankruptcy Particular proceedings or issues

Proceeding whereby creditors sought to revoke Chapter 11 debtor limited liability company's (LLC) Subchapter V election, after debtor's owner had filed a separate Chapter 11 case, was "core" proceeding, for purposes of bankruptcy jurisdiction.

jurisdiction. 28 U.S.C.A. §§ 157(b)(2)(A)

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

Bankruptcy Court had constitutional authority to enter a final judgment in proceeding whereby creditors sought to revoke Chapter 11 debtor limited liability company's (LLC) Subchapter V election, after debtor's owner had filed a separate Chapter 11 case, was "core" proceeding, based on parties' express and implied consent. U.S. Const. art. 3, § 1.

[3] Statutes 🗪 Language

In matter of statutory interpretation, court begins with the text.

[4] Statutes • Statute as a Whole; Relation of Parts to Whole and to One Another

Statutes Pesign, structure, or scheme

Words and phrases in a statute are considered holistically, including the full text, language as well as punctuation, structure, and subject matter.

[5] Statutes 🗪 Superfluousness

Statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant.

In re Free Speech Systems, LLC, 649 B.R. 729 (2023)

2023 WL 2732943

[6] Statutes 📻 Language

Preeminent canon of statutory interpretation requires the court to presume that the legislature says in a statute what it means and means in a statute what it says there.

[7] Bankruptcy Peorganization cases

Eligibility for relief under Subchapter V under Chapter 11 petition was limited to debtor's statement of election on its petition date; if postpetition affiliate filings lead to ineligibility and revocation, it meant that debtors could float in and out of Subchapter V at any time, which would contradict the text and purpose of Subchapter V. 11 U.S.C.A. § 1182; Fed. R. Bankr. P. 1020.

[8] Bankruptcy Peorganization cases

Creditors' challenge to Chapter 11 debtor limited liability company's (LLC) Subchapter V eligibility based on debtor's owner's postpetition filing of separate Chapter 11 case, over 60 days after owner's petition date, was not timely. 11 U.S.C.A. § 1182; Fed. R. Bankr. P. 1020.

[9] Bankruptcy Peorganization cases

Excusable neglect did not provide basis to expand period for creditors to challenge Chapter 11 debtor limited liability company's (LLC) Subchapter V eligibility; revoking debtor's Subchapter V election would lead to substantial harm to debtor given the length of the delay and current stage of the bankruptcy proceeding.

11 U.S.C.A. § 1182; Fed. R. Bankr. P. 1020.

[10] Bankruptcy Pankruptcy Reorganization cases

Chapter 11 debtor limited liability company's (LLC) Subchapter V eligibility was not impacted by debtor's owner's postpetition of separate Chapter 11 case; following petition date eligibility analysis of Bankruptcy Rules, debtor

had elected to proceed under Subchapter V on its petition date, at which time there was not already an affiliate in bankruptcy with debts exceeding the cap, and thus debtor's statement of election in its petition, and the basis for making it as of that day, remained true. 11 U.S.C.A. § 1182; Fed. R. Bankr. P. 1020.

[11] Bankruptcy Peorganization cases

Decision to proceed under Subchapter V of Chapter 11 is within the exclusive province of the debtor. 11 U.S.C.A. §§ 103(i), 1182; Fed. R. Bankr. P. 1020.

[12] Bankruptcy Peorganization cases

Even if Bankruptcy Court could revoke Chapter 11 debtor limited liability company's (LLC) Subchapter V election, the court would not do so on creditors' motion after debtor's owner had filed a separate Chapter 11 case, because debtor, its owner, and creditors were currently engaged in mediation, debtor had already filed a Subchapter V plan; and several nondischargeability adversary proceedings had started against debtor; the issues that would define the case were quickly coming to a head and the court was ready to address them. 11 U.S.C.A. §§ 103(i), 1182; Fed. R. Bankr. P. 1020.

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Melissa Anne Haselden, Houston, TX, Trustee, pro se.

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Ha Minh Nguyen, Jayson B. Ruff, Office of the United States Trustee, Houston, TX, for U.S. Trustee.

MEMORANDUM ORDER DENYING THE PLAINTIFFS' MOTION TO REVOKE THE DEBTOR'S SUBCHAPTER V ELECTION (RE: Docket No. 468)

Christopher Lopez, United States Bankruptcy Judge

**1 *731 The Debtor filed a voluntary bankruptcy petition in July 2022 and elected to proceed under Subchapter V of the Bankruptcy Code. In December 2022, Alex Jones—who owns the Debtor—filed a separate chapter 11 case. The Connecticut Plaintiffs and the Texas Plaintiffs ¹ acknowledge that the Debtor was eligible as a Subchapter V debtor at the time of filing, but argue it lost eligibility after Jones started his bankruptcy case. So they seek an order revoking the Debtor's Subchapter V election and changing this case to a traditional chapter 11 one. After carefully analyzing the text and structure of the Bankruptcy Code and Bankruptcy Rules, the Court denies the Plaintiffs' motion. The Debtor remains eligible under Subchapter V.

Background

By now it is well known that the Plaintiffs sued the Debtor and Jones in Texas and Connecticut state courts. These lawsuits eventually resulted in default judgments. But before the damages trial in Texas concluded and the damages trial in Connecticut began, the Debtor started this bankruptcy case and elected to proceed under Subchapter V.

Early into this case, the Court entered agreed orders modifying the automatic stay to allow the state court actions to conclude. In October 2022, a jury awarded about \$1.5 billion in damages to the Connecticut Plaintiffs. In December 2022, Jones started his bankruptcy case. About three months later, in February 2023, the Plaintiffs moved to revoke the Debtor's Subchapter V election. They argue the Debtor stopped qualifying as an eligible Subchapter V debtor once Jones filed his chapter 11 case. The Plaintiffs ask the Court to revoke the Debtor's Subchapter V election—rather than dismiss the case or convert it to a chapter 7—because they believe it serves the best interests of the Debtor's estate and

its creditors, reflects the Congressional intent in enacting Subchapter V, and is the most constructive path forward. ⁶ The US Trustee filed a response supporting the Plaintiffs' motion. ⁷

The Debtor disagrees for several reasons. First, it argues the Court lacks authority to revoke a Subchapter V election because no provision of the Bankruptcy *732 Code allows for it. Second, the Debtor maintains its Subchapter V eligibility was not impacted by Jones's case and that the text of the Bankruptcy Code supports its position. And finally, it believes that staying in Subchapter V serves the best interests of all parties given the current stage of this case and the costs involved in a traditional chapter 11. 10

Jurisdiction

[1] [2] This is a core proceeding under 28 U.S.C. § 157(b)(2)(A). The Court has jurisdiction under 28 U.S.C. § 1334. The parties' express and implied consent also provides this Court constitutional authority to enter a final judgment under Wellness Int'l Network, Ltd. v. Sharif, 575 U.S. 665, 678–83, 135 S.Ct. 1932, 191 L.Ed.2d 911 (2015) and Kingdom Fresh Produce, Inc. v. Stokes Law Off., L.L.P. (In re Delta Produce, L.P.), 845 F.3d 609, 617 (5th Cir. 2016).

Analysis

**2 [3] [4] [5] [6] This legal dispute requires an indepth analysis of Subchapter V of the Bankruptcy Code. Thus, as always, the Court begins with the text. See

**Whitlock v. Lowe (In re DeBerry), 945 F.3d 943, 947

(5th Cir. 2019) ("In matters of statutory interpretation, text is always the alpha."). Words and phrases in a statute are considered holistically, including the "full text, language as well as punctuation, structure, and subject matter." **U.S. Nat'l Bank of Or. v. Indep. Ins. Agents of Am., Inc., 508 U.S. 439, 455, 113 S.Ct. 2173, 124 L.Ed.2d 402 (1993). "A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant." **Hibbs v. Winn, 542 U.S. 88, 101, 124 S.Ct. 2276, 159 L.Ed.2d 172 (2004) (internal citation omitted). Finally, "[t]he preeminent canon of statutory interpretation

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requires [the court] to 'presume that [the] legislature says in a statute what it means and means in a statute what it says there.' "BedRoc Ltd. v. United States, 541 U.S. 176, 183, 124 S.Ct. 1587, 158 L.Ed.2d 338 (2004) (quoting Conn. Nat'l Bank v. Germain, 503 U.S. 249, 253–54, 112 S.Ct. 1146, 117 L.Ed.2d 391 (1992)).

A. Jones's Bankruptcy Case Did Not Affect the Debtor's Eligibility Under Subchapter V

Section 1182(1) of the Bankruptcy Code defines a Subchapter V "debtor" and lists the eligibility requirements. ¹¹ Section 1182(1)(A) says, among other things, that subject to Subparagraph B, the debtor may not have more than \$7.5 million in aggregate noncontingent liquidated secured and unsecured debts "as of the date of the filing of the petition." ¹² Subparagraph B says that the term "debtor" does not include any member of a group of affiliated debtors in bankruptcy that has aggregate debts above the \$7.5 million cap. ¹³

The Plaintiffs focus on the fact that Subparagraph B does not include the phrase "as of the date of the filing of the petition." So, according to them, the \$7.5 million cap under Subparagraph A is determined as of the petition date, whereas Subparagraph B is a continuing obligation. Thus, if an affiliate of a debtor later files a bankruptcy case with debts exceeding the cap, it makes the first debtor ineligible under *733 Subchapter V. The Plaintiffs believe that the Debtor lost eligibility under Subchapter V once Jones filed a bankruptcy case because he is an affiliate of the Debtor whose debts exceed the \$7.5 million cap. The Bankruptcy Code and the Bankruptcy Rules, however, provide a different answer.

Bankruptcy Rule 1020(a) requires a debtor to state in a voluntary petition if it elects to proceed under Subchapter V. Question 8 of the voluntary chapter 11 petition (Official Form 201) requires a debtor choosing to proceed under Subchapter V to check a box stating that "[t]he debtor is a debtor as defined in 11 U.S.C. § 1182(1), its aggregate noncontingent liquidated debts (excluding debts owed to insiders or affiliates) are less than \$7,500,000, and it chooses to proceed under Subchapter V of Chapter 11."

Section 1182(1)(A) states that it is "subject to [S]ubparagraph B." So a debtor must satisfy both prongs on

the petition date before it should check the box electing to proceed under Subchapter V. Subparagraph B is a petition date check on the filing debtor to make sure there isn't already an affiliate in bankruptcy with debts exceeding the cap, and a check that the debtor isn't part of a group of affiliated debtors filing on the same day. Subparagraphs A and B must be construed together at the same time, all the time. ¹⁴ No one disputes the Debtor's election to proceed under Subchapter V on its petition date. Jones, on the other hand, is in a traditional chapter 11 case. He did not elect to proceed under Subchapter V. He also could not because the Debtor had started a bankruptcy case and the judgments in the Texas and Connecticut lawsuits were liquidated. In other words, he would have failed both Section 1182(1)(A) and (B).

**3 [7] [8] [9] The Bankruptcy Rules confirm a petition date eligibility analysis for this Debtor. Bankruptcy Rule 1020(a) says a bankruptcy case proceeds in accordance with the debtor's statement of election in the petition "unless and until the court enters an order finding that the debtor's statement is incorrect." Rule 1020(b) allows parties to challenge the debtor's statement of election no later than 30 days after the meeting of creditors held under Section 341(a) of the Bankruptcy Code, or within 30 days after any amendment to the statement, whichever is later. 15 So to recap, the debtor makes the statement of election to proceed under Subchapter V in a bankruptcy petition. That case proceeds in accordance with the statement of election unless the court finds that the statement is incorrect. In this case, the Debtor's statement of election in its voluntary petition—and the basis for making it as of that day—remain true. So the Debtor remains eligible under Subchapter V. And, moreover, the challenge period provided for under Rule 1020(b) has long expired. 16 *734 But even if Plaintiffs timely objected, the relief requested would still be denied for the reasons stated above.

Limiting eligibility challenges to the debtor's statement of election also makes practical sense in a Subchapter V case. Subchapter V is a streamlined chapter 11 process and a debtor has to work from the outset to try to achieve a consensual plan. For example, the court must hold a status conference 60 days into a Subchapter V case "to further the expeditious and economical resolution of a case." ¹⁷ A Subchapter V Trustee is also appointed to, among other things, "facilitate the development of a consensual plan of reorganization." ¹⁸ And only the debtor can file a plan. ¹⁹ If postpetition affiliate

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filings lead to ineligibility and revocation, it means that debtors could float in and out of Subchapter V at any time. That contradicts the text and purpose of Subchapter V. See In re Parking Mgmt., 620 B.R. 544, 554 (Bankr. D. Md. 2020) ("[o]pening up eligibility determinations to postpetition events, even if deemed to apply retroactively, is contrary to the purpose and spirit of Subchapter V, and could nullify the very benefits it is intended to convey.") A roaming eligibility trap could also punish an innocent Subchapter V debtor. For example, a corporate debtor with its own board could decide to file a Subchapter V case and be subject to losing eligibility (presumably even while soliciting a plan) if a parent company with a separate board, and perhaps with unrelated debts, filed a bankruptcy case later on. The better reasoned approach is to allow the first case to proceed under Subchapter V and prohibit the second case from doing so.

[10] In sum, Jones's bankruptcy case did not render the Debtor ineligible as a Subchapter V debtor.

B. No Revoking the Subchapter V Designation

The Bankruptcy Code and the Bankruptcy Rules don't provide a standard for assessing a motion to either amend a bankruptcy petition to revoke a Subchapter V election or for the Court to revoke it outright. There is, however, a decision holding that a court is empowered to de-designate a Subchapter V case and allow it to proceed as a regular chapter 11, under, among other things, Section 105 of the Bankruptcy Code. See In re Nat'l Small Bus. Alliance, Inc., 642 B.R. 345, 349 (Bankr. D.D.C. 2022). But the facts in that case, including a failed attempt to confirm a fifth amended and revised chapter 11 plan, are far from present here.

**4 [11] And as the Bankruptcy Court for the District of Delaware recently explained in *In re ComedyMX, LLC*, 647 B.R. 457, 463–64 (Bankr. D. Del. 2022):

[t]he decision to proceed under subchapter V is within the exclusive province of the debtor (internal citation omitted). There can be no suggestion that a creditor may move a court to amend a petition to designate a case as one under subchapter V over a debtor's objection. So notwithstanding the language of Rule 1009(a), [stating that a petition may be *735 amended "[o]n motion of a party in interest"] it cannot be argued that parties in interest have *carte blanche* to file motions seeking to move debtors in or out of subchapter V as they see fit.

[12] Section 103(i) of the Bankruptcy Code states that Subchapter V only applies when a debtor elects to proceed under it. ²⁰ And the Code expressly provides for dismissal or conversion to a chapter 7 case, not revoking a debtor's election. ²¹ Regardless, even assuming this Court could revoke the Debtor's Subchapter V election, it would not do so here. A primary reason the damages portion of the Texas and Connecticut actions concluded was that the Court entered agreed orders modifying the automatic stay. And the Debtor, the Plaintiffs, and Jones are currently engaged in mediation. The Debtor has also filed a Subchapter V plan, and several nondischargeability adversary proceedings have started against the Debtor. The issues that will define this case are quickly coming to a head. And this Court is ready to address them.

Conclusion

Thus, for the reasons stated above, it is ORDERED that the Plaintiffs' joint motion to revoke the Debtor's Subchapter V election is denied.

All Citations

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Footnotes

- 1 As defined in the Joint Mot. to Revoke the Debtor's Subchapter V Election 1 nn.1–2, Docket No. 468.
- Order Granting Emergency Mot. to Lift Stay, Docket No. 16, and Agreed Order Modifying the Automatic Stay to Allow the Conn. Litig. to Continue to Final J., Docket No. 117.

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- 3 Case No. 22-33553.
- 4 Joint Mot.
- 5 *Id.* ¶¶ 2, 18–31.
- 6 *Id.* ¶¶ 37–43.
- 7 US Trustee Resp., Docket No. 501.
- 8 Debtor Obj. ¶ 15, Docket No. 504.
- 9 *Id.* ¶¶ 16–19.
- 10 Id. ¶¶ 27–30.
- 11 U.S.C. § 1182(1).
- 12 Id. § 1182(1)(A).
- 13 Id. § 1182(1)(B).
- While not an issue here, the Court also rejects Plaintiffs' argument that the requirement under Subparagraph A that a debtor to be "engaged in commercial or business activities" is also a continuing obligation. In addition to the reasons stated in this Memorandum Order, the Court also notes that Subchapter V permits debtors to file liquidating chapter 11 plans.
- 15 FED. R. BANKR. P. 1020(b).
- The Plaintiffs argue that they satisfy the excusable neglect standard to enlarge the challenge period. The Court rejects this argument. Bankruptcy Rule 9006(b) requires a motion, and the first time the Plaintiffs raised excusable neglect was in their reply brief. In any case, challenging the Debtor's eligibility over 60 days after Jones's petition date is not timely. See W. Wilmington Oil Field Claimants v. Nabors Corp. Servs., Inc. (In re CJ Holding Co.), 27 F.4th 1105, 1112 (5th Cir. 2022) (analyzing "the reason for delay, including whether it was within the reasonable control of the movant" as part of an excusable neglect analysis). And revoking the Debtor's Subchapter V election at this time would lead to substantial harm to the Debtor given the length of the delay and current stage of this proceeding. See id. (also considering "the danger of prejudice to the debtor" as well as "the length of the delay and its potential impact on judicial proceedings").
- 17 11 U.S.C. § 1188(a).
- 18 *Id.* § 1183(b)(7).
- 19 Id. § 1189(a).
- 20 11 U.S.C. § 103(i) states, "Subchapter V of chapter 11 of this title applies only in a case under chapter 11 in which a debtor (as defined in section 1182) elects that subchapter V of chapter 11 shall apply."
- 21 Id. § 1112.

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648 B.R. 755 United States Bankruptcy Court, S.D. New York.

> IN RE: Sameh H. AKNOUK, Dental Services, P.C., Debtor.

Case No. 22-11651 (MG)

|
Signed March 3, 2023

Synopsis

Background: United States Trustee (UST) filed motion for appointment of a patient care ombudsman in the Subchapter V, Chapter 11 case of a New York dental practice. Debtor objected.

Holdings: The Bankruptcy Court, Martin Glenn, Chief Judge, held that:

- [1] as a matter of apparent first impression for the court, a debtor need not provide inpatient services in order to qualify as a "health care business" within the meaning of the Bankruptcy Code;
- [2] debtor was a "health care business" under the Code; but
- [3] debtor established that a patient care ombudsman was not necessary for the protection of patients under the specific facts of its case.

Motion denied without prejudice.

Procedural Posture(s): Other.

West Headnotes (14)

[1] Bankruptcy ← Employment of Professional Persons or Debtor's Officers

Bankruptcy Code requires the bankruptcy court to order the appointment of a patient care ombudsman to monitor the quality of patient care where the debtor is a "health care business" filing for Chapter 7, Chapter 9, or Chapter 11 relief, unless the court finds that such appointment is not necessary for the protection of patients. 11 U.S.C.A. § 333(a)(1).

[2] Bankruptcy Professional Persons in General

When the bankruptcy court has ordered appointment of an ombudsman to monitor the quality of patient care and to represent the interests of the patients of a debtor that qualifies as a "health care business," the compensation and reimbursement of the ombudsman is allowable as an administrative expense under the Bankruptcy Code. 11 U.S.C.A. §§ 333(a)(1),

[3] Bankruptcy 🕪 Construction and Operation

Courts determine whether a debtor is a "health care business" under the Bankruptcy Code by applying the four-part *Pinellas* test, 360 B.R. 356, under which: (1) the debtor must be a private or public entity, (2) the debtor must be primarily engaged in offering to the general public facilities and services, (3) the facilities and services must be for the diagnosis or treatment of injury, deformity, or disease, and (4) the facilities must be for surgical care, drug treatment, psychiatric care, or obstetric care.

[4] Bankruptcy Employment of Professional Persons or Debtor's Officers

Under the Valley Health test, 381 B.R. 756, in determining whether, under the Bankruptcy Code, a patient care ombudsman is necessary for a debtor-health care business under the specific facts of a case, courts examine nine non-exclusive factors: (1) the cause of the bankruptcy, (2) the presence and role of licensing or supervising entities, (3) debtor's past history of patient care, (4) the ability of the patients to protect their rights, (5) the level of dependency of the patients on the facility, (6) the likelihood of tension between the interests of the patients

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and the debtor, (7) the potential injury to the patients if the debtor drastically reduced its level of patient care, (8) the presence and sufficiency of internal safeguards to ensure appropriate level of care, and (9) the impact of the cost of an ombudsman on the likelihood of a successful reorganization. 11 U.S.C.A. § 333(a)(1).

[5] Bankruptcy Employment of Professional Persons or Debtor's Officers

In addition to the *Valley Health* factors, 381 B.R. 756, other factors that may be considered by a court in determining whether, under the Bankruptcy Code, a patient care ombudsman is necessary for a debtor-health care business, are: (1) the high quality of the debtor's existing patient care, (2) the debtor's financial ability to maintain high quality patient care, (3) the existence of an internal ombudsman program to protect the rights of patients, and/or (4) the level of monitoring and oversight by federal, state, local, or professional association programs which renders the services of an ombudsman redundant. 11 U.S.C.A. § 333(a)(1).

[6] Bankruptcy Employment of Professional Persons or Debtor's Officers

Debtors found to be health care businesses bear the burden of establishing that the appointment of a patient care ombudsman is not necessary. 11 U.S.C.A. § 333(a)(1).

[7] Bankruptcy 🧽 Construction and Operation

A debtor need not provide inpatient services in order to qualify as a "health care business" within the meaning of the Bankruptcy Code; instead, pursuant to the broader interpretation of the Code's definition, the pertinent analysis requires merely that the debtor meet the definition set forth in subsection (A) of the section, which tracks the original four elements of the *Pinellas* test, 360 B.R. 356, and does not contain the inpatient requirement found in subsection (B), and to read an inpatient services requirement into

the definition would inappropriately curtail the reach of the statute when there is nothing in the text to indicate that the provisions in question should be read conjunctively. 11 U.S.C.A. §§ 101(27A), 101(27A)(A), 101(27A)(B).

[8] Bankruptcy 🌦 Construction and Operation

Under the *Pinellas* test, 360 B.R. 356, Subchapter V, Chapter 11 debtor, a dental practice, was a "health care business" under the Bankruptcy Code; debtor was a private entity, debtor operated a website that advertised various services patients could obtain at debtor's facilities and encouraged interested patients to call to book appointments, debtor provided root canals, tooth extraction, dental implants, and treatment for sleep apnea, and debtor administered local anesthesia to patients for some of those procedures, such that it qualified as a surgical care facility. 11 U.S.C.A. § 101(27A).

[9] Bankruptcy — Construction and Operation

In determining whether a debtor is a "health care business" under the Bankruptcy Code, the first factor of the *Pinellas* test, 360 B.R. 356, namely, that the debtor is a public or private entity, includes almost every conceivable entity, so the inquiry typically focuses on the last three elements of the test. 11 U.S.C.A. § 101(27A).

[10] Bankruptcy — Construction and Operation

In determining whether a debtor is a "health care business" under the Bankruptcy Code, the second factor of the *Pinellas* test, 360 B.R. 356, which requires the debtor to be primarily engaged in offering facilities and services to the general public, is met where patients can make appointments without the assistance of a referring physician. 11 U.S.C.A. § 101(27A).

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[11] Bankruptcy 📻 Construction and Operation

Fact that debtor has website through which prospective patients can make appointments is strong evidence that second factor of the *Pinellas* test, 360 B.R. 356, used in determining whether debtor is a "health care business" under the Bankruptcy Code, which requires debtor to be primarily engaged in offering facilities and services to the general public, has been met. 11 U.S.C.A. § 101(27A).

[12] Bankruptcy 📂 Construction and Operation

In determining whether a debtor is a "health care business" under the Bankruptcy Code, the third factor of the *Pinellas* test, 360 B.R. 356, which requires that debtor's services or facilities be used for treatment of injury, deformity, or disease, is met where debtor provides medically supervised treatment, whether or not it involves pharmacological treatment for patients' conditions, but is not met if debtor provides solely administrative or procurement services for medical care facilities. 11 U.S.C.A. § 101(27A).

[13] Bankruptcy • Employment of Professional Persons or Debtor's Officers

Under the Valley Health test, 381 B.R. 756, Subchapter V, Chapter 11 debtor, a dental practice and "health care business," established that patient care ombudsman was unnecessary to protect its patients; cause of bankruptcy, debtor's alleged failure to remit employer contributions to union, was unrelated to patient care, there was no sign of reduction in patient care due to financial constraints, debtor and its dentists were regulated by state, debtor had been operating for 25 years in good standing, with no history of compromised patient care or rights and no care-related complaints or malpractice lawsuits filed against it, as outpatient facility debtor's patients had low level of dependency on it and faced

low risk if it were to drastically reduce patient care, likelihood of tension between debtor's and patients' interests was low, debtor had sufficient internal mechanisms to monitor patient care, and cost of ombudsman could be difference between positive and negative cash flow. 11 U.S.C.A. § 333(a)(1).

[14] Bankruptcy Employment of Professional Persons or Debtor's Officers

Fact that case was a small business bankruptcy under Subchapter V of Chapter 11, with an appointed Subchapter V trustee, weighed against appointing a patient care ombudsman to monitor the quality of patient care and to represent the interests of debtor's patients; while Subchapter V trustee did not provide the same level of oversight as a patient care ombudsman would, the Subchapter V trustee was an extra safeguard against patient care issues that gave the Bankruptcy Court additional comfort that debtor's operations were being monitored. 11 U.S.C.A. § 333(a)(1).

Attorneys and Law Firms

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OFFICE OF THE UNITED STATES TRUSTEE, U.S. Federal Office Building, 201 Varick Street, Room 1006, New York, NY 10014, By: Shannon Anne Scott, Esq.

MEMORANDUM OPINION AND ORDER DENYING THE UNITED STATES TRUSTEE'S MOTION FOR APPOINTMENT OF A PATIENT CARE OMBUDSMAN UNDER 11 U.S.C. §§ 101(27A) AND 333

MARTIN GLENN, CHIEF UNITED STATES BANKRUPTCY JUDGE

Pending before the Court is the motion of the United States Trustee ("US Trustee") for appointment of a patient

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care ombudsman in this Subchapter V, Chapter 11 case. ("Motion," ECF Doc. # 33.) The debtor, Sameh H. Aknouk Dental Services, P.C. ("Debtor") filed an objection to the Motion. ("Objection," ECF Doc. # 38.) A hearing was held on the Motion on February 16, 2023. The Motion raises the important question whether the Court should deny the Motion for appointment of an ombudsman in an SBRA case where adding administrative expense may make it *758 considerably more difficult for the Debtor successfully to restructure and no issues relating to patient care have arisen.

For the reasons explained below, the Court **SUSTAINS** the Debtor's Objection and **DENIES** the Motion **WITHOUT PREJUDICE**.

I. BACKGROUND

[1] The US Trustee filed the Motion pursuant to section 333(a)(1) of the Bankruptcy Code (the "Code"), which requires the Court to order the appointment of an ombudsman to monitor the quality of patient care (a "Patient Care Ombudsman") where the debtor is a health care business, as defined by section 101(27A), filing for chapter 7, 9, or 11 relief, unless the Court finds that such appointment is not necessary for the protection of patients. See 11 U.S.C. § 333(a)(1). The Debtor did not affirmatively acknowledge that it is a health care business in its voluntary petition. (Motion at 1; see also "Petition," ECF Doc. # 1, at 2.) According to the declaration of Dr. Sameh H. Aknouk annexed to the Debtor's Objection ("Aknouk Declaration," ECF Doc. #38-1) and Dr. Sameh Aknouk's Section 341 Meeting testimony cited in the Declaration of Shannon Anne Scott annexed to the Motion ("Scott Declaration," ECF Doc. # 33-1), the Debtor is a family owned and operated full-service general and cosmetic dentistry practice which has been in operation for approximately twenty-five years and services between 1,000 and 2,000 patients. (Aknouk Declaration ¶ 2; Scott Declaration ¶ 4.) The Debtor currently operates as a debtorin-possession and manages patient record keeping using a software program called "Dentrix." (Motion at 2.)

The Debtor initiated bankruptcy proceedings due to mounting legal costs stemming from a labor dispute in conjunction with declining revenues due to the COVID-19 pandemic. (Aknouk Declaration ¶ 6.) According to the Debtor's declaration filed pursuant to Local Rule 1007-2 ("Rule 1007-2 Declaration," ECF Doc. # 2), the Debtor had a collective bargaining agreement (the "CBA"), now terminated, with Local 553,

International Brotherhood of Teamsters (the "Union") at the time Dr. Aknouk began operating the dental practice, which the Debtor renewed several times over the years. (Rule 1007-2 Declaration ¶ 4.) The Debtor claims it was the Debtor's understanding that only full-time employees were eligible for certain benefits under the CBA. (*Id.*) The Union's audit firm conducted regular audits of the Debtor's payroll records to confirm proper reporting to the Union, and, following the audit firm's 2018 payroll audit, the Union demanded approximately \$98,378.30 for unpaid benefits to part-time employees. (*Id.* ¶¶ 5–7.)

The Union commenced an action in the United States District Court for the Eastern District of New York on August 24, 2018 (the "District Court Action") seeking to recover allegedly delinquent contributions plus 18% interest and attorneys' fees. (Id. ¶ 8.) In February 2021, the National Labor Relations Board investigated the Union's claims and sought recovery from the Debtor of \$232,139 (the "NLRB Action"), which the Debtor believes would need to be paid in addition to any judgment or settlement arising out of the District Court Action. (Id. ¶ 9.) The Debtor failed to file an answer in the NLRB Action by the deadline, which was sometime in November 2022, although Debtor does not provide an exact date. The NLRB subsequently moved for entry of a default judgment. (Id.) The Debtor denies that it has any liability to the Union but seeks Chapter 11 bankruptcy protections in order to restructure its affairs. (*Id.* ¶ 10–11.)

*759 A. The Debtor's Status as a Health Care Business

The US Trustee claims that the Debtor is a health care business within the meaning of section 101(27A) despite the Debtor not identifying itself as such in its voluntary petition. (Motion at 7-9.) The US Trustee relies on information presented on the Debtor's website as well as Dr. Aknouk's testimony to argue that the Debtor offers surgical treatments to the general public at its facilities. (Id.) Specifically, the US Trustee notes that the Debtor's website advertises dental procedures including root canals, crowns, tooth extraction, and dental implants to the general public and that Dr. Aknouk testified to administering local anesthesia to patients for such procedures. (Id. at 8.) The Debtor objects to the US Trustee's claim that it is a health care business within the meaning of section 101(27A) on the grounds that it does not provide inpatient services and is therefore not the type of business described in section 101(27A)(B). (Objection ¶¶ 5–6.)

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B. The Necessity of a Patient Care Ombudsman

The US Trustee states that a Patient Care Ombudsman is necessary because the Debtor's record keeping software, Dentrix, does not provide any oversight or monitoring of the quality of Debtor's patient services. (Motion at 2.) The US Trustee argues that such oversight is required because a decline in the quality of patient care could reduce the Debtor's income, which is essential to funding the Debtor's reorganization efforts. (Id. at 10.) The US Trustee further claims that the cost of appointing an ombudsman would not render it unnecessary because Debtor has sufficient cash on hand and a busy practice and because industry-wide revenues have substantially recovered to pre-pandemic levels. (Id. at 10-11.) The Debtor objects to the US Trustee's claim that a Patient Care Ombudsman is necessary even if it were properly classified as a health care business because, among other reasons, the cause of its bankruptcy is unrelated to patient care quality, it is subject to licensing and supervising authorities, and it has no prior history of deficient patient care. (Objection ¶ 7–16.) At a hearing in this matter on January 4, 2023, counsel for the Debtor indicated that the parties had tried to reach a compromise whereby the subchapter V trustee, Yann Geron, (the "Subchapter V Trustee") would serve as the Patient Care Ombudsman, but Debtor's counsel indicated that proposal had not been acceptable to the US Trustee.

II. LEGAL STANDARD

Section 333(a)(1) of the Code provides:

(a)(1) If the debtor in a case under chapter 7, 9, or 11 is a health care business, the court shall order, not later than 30 days after the commencement of the case, the appointment of an ombudsman to monitor the quality of patient care and to represent the interests of the patients of the health care business unless the court finds that the appointment of such ombudsman is not necessary for the protection of patients under the specific facts of the case.

11 U.S.C. § 333(a)(1) (emphasis added).

[2] Compensation and reimbursement of an ombudsman is allowable as an administrative expense pursuant to section 503(b)(2) of the Code. 11 U.S.C. § 503(b)(2). The last italicized clause permits the Court to deny the motion for appointment of an ombudsman if it is "not necessary for the protection of patients under the specific facts of the case." Thus, the Court must decide whether the facts in this case make the appointment unnecessary.

*760 A. The Debtor's Status as a Health Care Business

The definition of a "health care business" is defined in U.S.C. § 101(27A) as follows:

- (27A) the term 'health care business'
 - (A) means any public or private entity (without regard to whether that entity is organized for profit or not for profit) that is primarily engaged in offering to the general public facilities and services for
 - (i) the diagnosis or treatment of injury, deformity or disease; and
 - (ii) surgical, drug treatment, psychiatric, or obstetric care; and
 - (B) includes-
 - (i) any-
 - (I) general or specialized hospital;
 - (II) ancillary ambulatory, emergency, or surgical treatment facility;
 - (III) hospice;
 - (IV) home health agency; and other health care institution that is similar to an entity referred to in subclause (I), (II),
 - (III), or (IV); and
 - (ii) any long-term care facility, including any-
 - (I) skilled nursing facility;
 - (II) intermediate care facility;
 - (III) assisted living center;

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- (IV) home for the aged;
- (V) domiciliary care facility; and

(VI) health care institution that is related to a facility referred to in subclause (I), (II), (III), (IV), or (V), if that institution is primarily engaged in offering room, board, laundry, or personal assistance with activities of daily living and incidentals to activities of daily living.

11 U.S.C. § 101(27A).

[3] Courts determine whether a debtor is a health care business under section 101(27A) by applying a four-part test (the "Pinellas test" or "Pinellas elements"):

The leading case on \$\ \) 101(27A)

(A) is *\ In re Medical Assc. Of Pinellas, LLC ... [which held that]

(1) the debtor must be a private or public entity; (2) the debtor must be primarily engaged in offering to the general public facilities and services; (3) the facilities and services must be for the diagnosis or treatment of injury, deformity or disease; and (4) the facilities must be for surgical care, drug treatment, psychiatric care or obstetric care.

In re Alternate Family Care, 377 B.R. 754, 757 (Bankr. S.D. Fla. 2007) (citing In re Med. Assocs. of Pinellas, LLC, 360 B.R. 356, 359 (Bank, M.D. Fla. 2007)).

Courts are divided over the existence of an implicit fifth factor—whether a business is an inpatient facility. The debate hinges on whether the statute requires the Debtor to meet the requirements of subsections A and B of section 101(27A), which would require the Debtor to be both a medical provider and an inpatient provider, or only subsection A, which would not require the debtor to be an inpatient provider. Contrast, e.g., In re Anne C. Banes, D.D.S., P.L.L.C., 355 B.R. 532,

534-35 (Bankr. M.D.N.C. 2006) (finding that a debtor's dental practice was not a health care business because it did not "provide patients with shelter and sustenance in addition to medical treatment" or "fit within the categories of health care businesses described in" section 101(27A)(B)) (citing In re 7-Hills Radiology, LLC, 350 B.R. 902, 904 (Bankr. D. Nev. 2006)) with In re Smiley Dental Arlington, P.L.L.C., 503 B.R. 680, 687 (Bankr. N.D. Tex. 2013) ("Requiring this judicially created element ... misconstrues *761 the statute. The language in section 101(27A)(B) is inclusive of the specific entities listed and other similar entities, but not exclusive of other business entities meeting the test under section 101(27A)(A).").

B. The Necessity of a Patient Care Ombudsman

- [4] [5] In determining whether a Patient Care Ombudsman is necessary under the specific facts of a case, courts have examined the following nine non-exclusive factors:
 - 1. The cause of the bankruptcy;
 - The presence and role of licensing or supervising entities:
 - 3. Debtor's past history of patient care;
 - 4. The ability of the patients to protect their rights;
 - 5. The level of dependency of the patients on the facility;
 - 6. The likelihood of tension between the interests of the patients and the debtor;
 - 7. The potential injury to the patients if the debtor drastically reduced its level of patient care;
 - 8. The presence and sufficiency of internal safeguards to ensure appropriate level of care; and
 - 9. The impact of the cost of an ombudsman on the likelihood of a successful reorganization.

In re Valley Health Sys., 381 B.R. 756, 761 (Bankr. C.D. Cal. 2008); Alternate Family Care, 377 B.R. at 758.

"Other factors to be considered by the court include: (1) the high quality of the debtor's existing patient care; (2) the debtor's financial ability to maintain high quality patient care; (3) the existence of an internal ombudsman

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program to protect the rights of patients, and/or (4) the level of monitoring and oversight by federal, state, local, or professional association programs which renders the services of an ombudsman redundant."

Valley Health, 381 B.R. at 761 (citing 3 COLLIER ON BANKRUPTCY P 333.02, at 333-4 (Alan N. Resnick & Henry J. Sommer eds., 15th ed. 2007)).

[6] Section 333 requires the appointment of a Patient Care Ombudsman unless a court finds such appointment is not necessary. 11 U.S.C. § 333. Debtors found to be health care businesses bear the burden of establishing that the appointment of a Patient Care Ombudsman is not necessary. See In re Starmark Clinics, LP, 388 B.R. 729, 734 (Bankr. S.D. Tex. 2008) ("The text of Section 333(a) (1) of the Bankruptcy Code makes clear that the burden of demonstrating that appointment of an ombudsman is not necessary for the protection of patients is on any party opposing the appointment of an ombudsman.").

III. DISCUSSION

In this case, the Court agrees with the US Trustee, and rejects the Debtor's argument—the Debtor qualifies as a health care business under section 333 of the Bankruptcy Code under the more reasonable disjunctive interpretation of section 101(27A). Nevertheless, the Court finds that a patient services ombudsman is not necessary here on the facts.

A. Debtor is a Health Care Business

[7] Debtor qualifies as a health care business under the broader interpretation of section 101(27A), which is the more reasonable reading of the statute. Under the broader (disjunctive) interpretation of section 101(27A), the analysis requires merely that the Debtor meet the definition of subsection A, which tracks the original four *Pinellas* Elements. See, e.g., *762 Smiley Dental, 503 B.R. at 685-86. The narrower (conjunctive) interpretation of subsection B as well, which contains an inpatient requirement. See, e.g., Banes, 355 B.R. at 534-35. For the reasons set forth in section III.A.2, infra, this Court declines to follow the narrower (conjunctive) interpretation of the statute.

1. The Debtor Meets All Four of the Pinellas Elements

[9] [10] [11] The first factor of the Pinellas test, that the debtor is a public or private entity, "'includes almost every conceivable entity,' so the inquiry typically focuses on the last three elements." In re William L. Saber, M.D., P.C., 369 B.R. 631, 636 (Bankr. D. Colo. 2007) (quoting Pinellas, 360 B.R. at 359). This is satisfied because Debtor here is undoubtedly a private entity. (See Rule 1007-2 Declaration ¶ 2.) The second factor, which requires the debtor to be primarily engaged in offering facilities and services to the general public, is met where patients can make appointments without the assistance of a referring physician. Alternate Family Care, 377 B.R. at 757. The fact that a debtor has a website through which prospective patients can make appointments is strong evidence that this second prong is satisfied. "Id. ("[T]he very presence of the website suggests that [the debtor] has a public presence and with [a link to check availability of appointments] it is plausible to suggest that it is offering its services to the general public."). The second factor is satisfied here because Debtor operates a website that advertises various services patients can obtain at Debtor's facilities and encourages interested patients to call to book appointments. (Scott Declaration ¶¶ 2-3.)

[12] The third Pinellas factor requires that a debtor's services or facilities be used for "treatment of injury, deformity or disease." Pinellas, 360 B.R. at 359; 11 U.S.C. § 101(27A). This prong is met where a debtor provides "medically supervised treatment, whether or not it involves pharmacological treatment" for patients' conditions but is not met if a debtor provides solely administrative or procurement services for medical care facilities. Alternate Family Care. 377 B.R. at 758; see also Pinellas, 360 B.R. at 360. The Debtor here meets this prong because it provides root canals, tooth extraction, dental implants, and treatment for sleep apnea, and administers local anesthesia to patients for some of these procedures. (Scott Declaration \P 2, 4.) Finally, the fourth *Pinellas* factor requires that "the services or facilities be used for surgical care, drug treatment, psychiatric care or obstetric care." Alternate Family Care, 377 B.R. at 758. Courts have held that minor surgeries performed with local anesthetics are sufficient to qualify a business

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as a facility providing surgical care because "the statute does not differentiate between minor and major surgeries."

Faber, 369 B.R. at 637. Debtor qualifies as a surgical facility under this factor because "Dr. Aknouk administers local anesthesia to patients for dental procedures such as root canals for the Debtor." (Scott Declaration ¶ 4.) In sum, the Debtor undeniably qualifies as a health care business under section 101(27A) per the Pinellas test.

2. <u>The Court Will Not Read the</u> Inpatient Requirement into the Statute

Courts applying the conjunctive interpretation of section 101(27A) typically require that the debtor offers inpatient services and provides "sustenance and shelter" to patients. See, e.g., Banes, 355 B.R. at 535 (quoting In re 7-Hills Radiology, LLC, 350 B.R. 902, 904 (Bankr. D. Nev. 2006)). The inpatient requirement was first enunciated in *763 In re 7-Hills Radiology, LLC, in which the court held that subsections A and B of section 101(27A) should be read conjunctively and then applied the canon of noscitur a sociis to subsection B to find that only businesses providing "direct and ongoing contact with patients to the point of providing them shelter and sustenance in addition to medical treatment" qualified as health care businesses. 350 B.R. 902, 905 (Bankr. D. Nev. 2006). A later decision by another bankruptcy judge applied this analysis and held that "the types of businesses listed [in subsection B] are all of such a similar nature in that they provide both housing and treatment ... that it is difficult to imagine that the legislature would have intended ... an outpatient dental practice[] to be read into the statute." Banes, 355 B.R. at 535.

Other courts have declined to follow this requirement, mainly disagreeing with the 7-Hills Radiology court's approach to statutory interpretation. See, e.g., Smiley Dental, 503 B.R. at 687-88. In Smiley Dental, the court analyzed the debtor, a dental practice, to determine if it was a health care business as defined by section 101(27A). Id. Although the court ultimately held that a Patient Care Ombudsman was unnecessary regardless whether the debtor was a health care business, it reasoned that the debtor's provision of minor dental surgeries such as "root canals, wisdom tooth removal, and tooth extractions" was likely sufficient to

qualify the debtor as a health care business under both possible constructions of section 101(27A) because it met all of the requirements of section 101(27A)(A) and was specifically enumerated in section 101(27A)(B)(i)(II) as a "surgical treatment facility." Id. The Smiley Dental court declined to read the "sustenance and shelter" requirement into section 101(27A) because it believed such a reading "misconstrue[d] the statute" and because several other courts had determined debtors to be health care businesses despite only providing outpatient services. Id. at 687 (collecting cases). The court further noted that "[t]he language in section 101(27A)(B) is inclusive of the specific entities listed and other similar entities, but not exclusive of other business entities meeting the test under section 101(27A) (A)." See id. (citing 11 U.S.C. § 102(3)) ("In this title ... 'includes' and 'including' are not limiting.").

This Court similarly declines to read an inpatient services requirement into the definition of a health care business in section 101(27A). As Smiley Dental correctly notes, to read in this limitation would inappropriately curtail the reach of the statute, when there is nothing in the text to indicate that the statute should be read conjunctively. Further, there is no need to turn to canons of construction such as noscitur a sociis to interpret the statute when a plain reading of its language reveals that the entity at issue (Debtor) is explicitly enumerated as an example in subsection B. 11 U.S.C. § 101(27A)(B)(i)(II) ("includes ... any ... ancillary ... surgical treatment facility.") Here, as noted above, Debtor is a "surgical treatment facility" because it provides root canals; the Debtor therefore qualifies as a health care business under a plain reading of the statute and the Court need not turn to canons of interpretation to make that finding. See, e.g., Pfizer v. United States Dep't of Health and Human Servs., 42 F.4th 67, 73-77 (2d Cir. 2022) (noting that canons of construction such as noscitur a sociis are only necessary where the meaning of a term is ambiguous according to a plain reading of the statute).

Because the Debtor meets all the required elements of the *Pinellas* test and because a plain reading of section 101(27A) indicates there is no inpatient services requirement, *764 the Debtor here qualifies as a health care business.

B. A Patient Care Ombudsman is Not Necessary

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[13] Even though the Debtor is a health care business, the Debtor has met its burden of establishing that a Patient Care Ombudsman "is not necessary for the protection of patients under the specific facts of the case." 11 U.S.C. § 333(a)

(1). Each of the factors enumerated in *Valley Health*, discussed in turn below, weigh against appointing a Patient Care Ombudsman.

1. Factor 1: Cause of Bankruptcy

This factor weighs against the appointment of a Patient Care Ombudsman because the cause of the bankruptcy was liability related to the Debtor's alleged failure to remit employer contributions to the Union, and not any patient care issues, such as a malpractice. While this triggering event does indicate that the Debtor lacked the funds to satisfy potential liability arising out of the labor dispute, there is no indication that there has been any reduction in patient care or privacy due to financial constraints or any other reason. See Smiley Dental, 503 B.R. at 689 (finding affiliated dental clinic debtors satisfied the burden to show a patient care ombudsman was not necessary in large part because the bankruptcy was caused by "cash flow problems resulting from changes to Medicare reimbursement practices for orthodontics.").

2. Factor 2: The Presence and Role of Licensing

The Debtor, as a dental practice, is monitored by state regulatory and licensing agencies. (See Aknouk Declaration ¶¶ 8–10.) Further, the dentists employed by the Debtor are also subject to state licensing rules and regulations. (Objection ¶ 13.) The Debtor is inspected regularly by New York State and the dentists complete continuing education to ensure that they are up to date on the latest skills, treatments, techniques, and developments in the industry. (Aknouk Declaration ¶¶ 8–10.) The presence and role of these licensing agencies weighs against appointing a Patient Care Ombudsman. See Alternate Family Care,

377 B.R. at 758; *Smiley Dental*, 503 B.R. at 689 (up-to-date licenses and insurance coverage in accordance with state requirements weigh against the appointment of a Patient Care Ombudsman). Thus, this factor weights against appointing a Patient Care Ombudsman.

3. Factors 3 and 4: The Debtor's History of Patient Care; the Ability of Patients to Protect Their Rights

The Debtor has no history of compromised patient care or rights. The Debtor has operated for 25 years in good standing and Dr. Aknouk, its principle, has been in practice for 30 years. (Aknouk Declaration ¶ 4.) There have been no malpractice suits filed against the Debtor or its dentists and no complaints relating to deficient patient care. (Id. ¶¶ 7, 11.) The Debtor's patients are fully informed about their treatment plan and their rights and have avenues both within and outside the Debtor's organization to voice questions or concerns if any exist. (Objection ¶ 15.) At the hearing, the US Trustee argued that because the Debtor operates a large practice, reportedly between 1000 and 2000 patients, the possibility of a future complaint is high and additional oversight is needed. As an initial matter, the US Trustee cites no caselaw for the proposition that the size of the practice is a factor that weighs in favor of appointing a Patient Care Ombudsman. (See Motion at 10.) Nevertheless, the Court agrees that as a practical matter, no party can guarantee that future patient complaints will not arise. Given that the *765 Court here denies the Motion without prejudice, the US Trustee is free to bring a renewed motion should patient care concerns arise in the future. Accordingly, these factors weigh against appointing a Patient Care Ombudsman.

4. <u>Factor 5: The Patients Level</u> of Dependency on the Debtor

Where, as here, a debtor is entirely an outpatient facility, courts have considered patients to be less dependent on the facility than they would be in an inpatient facility. See, e.g., In re Miss. Maternal-Fetal Med., P.A., No. 21-0091-NPO, 2021 WL 1941627, at *3 (Bankr. S.D. Miss., Feb. 18, 2021) ("The risk to patient care is lessened further by the Debtor's role in only providing outpatient care instead of a continuity of day-to-day care."). Courts have also found a low level of dependency, where, as here, a debtor's services are easily found at numerous other dental offices. See, e.g., Smiley Dental, 503 B.R. at 689 (finding a low level of provider dependency where dental patients have access to their medical records and the nature of a dental clinic is such that a patient may "seek alternate dental or orthodontic care" if he or she so chooses). While patients who are under local anesthesia following a dental surgery are certainly dependent on the Debtor, there is no long-term dependency comparable to that

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of a hospital or other inpatient facility because such patients leave shortly after surgery. Accordingly, this factor weighs against appointing a Patient Care Ombudsman.

5. Factors 6 and 7: The Likelihood of Tension
Between the Interests of the Patients and the Debtor;
the Potential Injury to the Patients if the Debtor
Drastically Reduced its Level of Patient Care

There is a low likelihood of tension between the interests of the patients and the Debtor because the Debtor did not file bankruptcy because of deficient patient care or an inability to pay vendors and suppliers who are critical to patient care. See Smiley Dental, 503 B.R. at 689 (stating that "[b]ecause malpractice does not appear to have caused the bankruptcy, no likelihood of tension between the interests of the patients and Debtors appears to exist").

As to the consequences of a drastic reduction in patient care, courts typically find this factor to weigh in favor of appointing a Patient Care Ombudsman where the Debtor is a long-term care facility or hospital that performs a high volume of inpatient procedures. See, e.g., Valley Health, 381 B.R. at 764 (finding that the seventh factor weighed in favor of appointing a Patient Care Ombudsman because the sensitive nature of the debtor's patient services, including inpatient surgery, critical care, and pediatric services, meant that "a drastic reduction in the quality of care [could] create[] a significant risk for patients" and because a "cessation of operations at one of the Debtor's hospitals would require a transfer of patients to another facility") For example, in Alternate Family Care, which involved an inpatient psychiatric facility for children, the court found this factor weighed in favor of appointing a Patient Care Ombudsman because a drastic reduction in the quality of the debtor's patient care services would require children to be moved to another facility, likely causing severe trauma and disruption.

377 B.R. at 760. Here, in contrast, the Debtor provides dental services that involve only local anesthesia on occasion and require little to no recovery time for patients in the clinic. (Objection ¶ 20.) If the level of Debtor's patient care became drastically reduced, it could certainly be harmful to patients, but patients could find another dentist to frequent without the attendant disruption that occurs when one is moved from one inpatient setting to another.

*766 6. Factor 8: The Presence and Sufficiency of Internal Safeguards to Ensure Appropriate Level of Care

As set forth in detail in the Aknouk Declaration, the Debtor has sufficient internal mechanisms in place to monitor patient care and resolve complaints. The Debtor is certified in Emergency Care and Safety and maintains the number of continuing education credits required by New York State. (See Aknouk Declaration ¶¶ 8–10.) The Debtor's x-ray machines are inspected by the Department of Health and Dental Hygiene every three years, and the Debtor provides a lead shield to patients using the x-ray machine. (Id.) To ensure cleanliness, the Debtor uses an air purifier; an ultraviolet light to sterilize the room and dental tools; and dentists and assistants use gloves, masks, shields, and disposable coats. (Id. at ¶¶ 11–13.)

While the US Trustee argues that the Debtor's dental record system, Dentrix, provides no oversight of patient care (Motion at 2), the Debtor has explained that it has numerous checks and balances in place to ensure appropriate patient care. (See Objection ¶¶ 8–10; 14–15.) In addition to oversight from regulatory agencies, the Debtor has systems in place to process complaints or issues with care through its team of dentists and its office manager. (Objection ¶ 23); see also Smiley Dental, 503 B.R. at 689 (stating that internal safeguards were sufficient where the debtor's dentists worked in teams, which "provide[d] a form of internal oversight and safeguard for patient care").

[14] Furthermore, though not articulated in the caselaw, the Court noted at the hearing, and reiterates here, that this case is a small business bankruptcy under Subchapter V of Chapter 11 with the Subchapter V Trustee appointed. The presence of such a trustee weighs against appointing a Patient Care Ombudsman. While a Subchapter V trustee does not provide the same level of oversight as a Patient Care Ombudsman would, and the Court can certainly imagine situations in which a Patient Care Ombudsman would be necessary in addition to a Subchapter V trustee, the Subchapter V trustee is an extra safeguard against patient care issues that gives the Court additional comfort that the Debtor's operations are being monitored. Thus, this factor weighs against appointing a Patient Care Ombudsman.

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7. Factor 9: the impact of the cost of an ombudsman on the likelihood of a successful reorganization

The US Trustee argues that because the Debtor has approximately \$25,000 on hand and does not anticipate needing a loan from the Debtor's principle, the cost of an ombudsman is not an issue here. The Court disagrees. For the reporting month of January, the Debtor's monthly operating report shows that the Debtor was cash negative in the amount of \$7,464.24. ("Operating Report," ECF Doc. # 41, at 3.) The Debtor does project that it will be cash flow positive in the amount of \$9,995.29 next month. (Id.) However, the budget that the Debtor submitted as part of its cash collateral motion indicates that the Debtor will be very narrowly cash positive week to week, sometimes by under \$1000 dollars. (See generally "Budget," ECF Doc. # 24.) In short, the margins here are thin and the Debtor does not have much room for additional administrative expenses, even if it does have a modest amount of cash on hand. The additional cost of a Patient Care Ombudsman could eat into these small margins and be the difference between a cash flow positive

and negative business. Accordingly, this factor weighs against appointing a Patient Care Ombudsman.

IV. CONCLUSION

In sum, even though the Debtor is a health care business under the statute's *767 meaning, because all of the *Valley Health* factors weigh against appointing a Patient Care Ombudsman, the Debtor has met its burden of establishing that a Patient Care Ombudsman is not necessary on the facts. Nevertheless, because the Court is cognizant that further patient care issues could arise and because the Court takes seriously the need to protect patient care during the pendency of the bankruptcy, the Motion is **DENIED WITHOUT PREJUDICE**. Should patient care issues arise in the future, the US Trustee may renew the motion.

All Citations

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In re Corinthian Communications, Inc., 642 B.R. 224 (2022)

642 B.R. 224 United States Bankruptcy Court, S.D. New York.

IN RE: CORINTHIAN COMMUNICATIONS, INC., Debtor.

Case No. 22-10425 (MG)

|
Signed August 3, 2022

Synopsis

Background: United States Trustee filed motion for entry of order removing principal as debtor-in-possession of Subchapter V Chapter 11 debtor S corporation.

[Holding:] The Bankruptcy Court, Martin Glenn, J., held that cause existed to expand duties of Subchapter V trustee to investigate affairs of debtor and to report to bankruptcy court.

Ordered accordingly.

Procedural Posture(s): Other.

West Headnotes (2)

[1] Bankruptcy Proceedings

A court may sua sponte issue an order expanding the duties a Chapter 11 Subchapter V trustee, even though the governing subsection contains the phrase "on request of a party in interest."

11 U.S.C.A. § 1183(b)(2).

1 Case that cites this headnote

[2] Bankruptcy Phase Necessity or grounds

Cause existed to expand duties of Subchapter V trustee for Chapter 11 debtor S corporation to investigate affairs of debtor and to report to bankruptcy court, since lack of any intercompany agreement between debtor and its affiliates regarding shared liabilities or monthly flow of funds from affiliates to debtor, including bookkeeping and payroll, raised substantial issue whether debtor had intercompany claims against

affiliates or vice versa, there was question whether principal would assert claim against debtor and, if so, whether there was any basis for such claim, and debtor's disclosure to Subchapter V Trustee continued to be lacking.

11 U.S.C.A. §§ 1106(a)(3), 1183(b)(2).

2 Cases that cite this headnote

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MEMORANDUM OPINION EXPANDING SUBCHAPTER V TRUSTEE'S DUTIES PURSUANT TO 11 U.S.C. § 1183(b) (2) OF THE BANKRUPTCY CODE

MARTIN GLENN, CHIEF UNITED STATES BANKRUPTCY JUDGE

The Small Business Reorganization Act ("SBRA" or "Subchapter V," codified as new 11 U.S.C. §§ 1181–1195) has been a remarkably successful addition to Chapter 11 of the Bankruptcy Code. It was designed to allow a small business debtor to file bankruptcy in a timely, cost-effective manner, that hopefully allows the debtor to restructure and remain in business, thereby benefiting the owners, employees, suppliers, customers, and others. Subchapter V provides

for the appointment by the United States Trustee ("U.S. Trustee") of a non-operating trustee ("Subchapter V Trustee") who provides oversight of the debtor in possession and helps facilitate negotiation of what will hopefully be a consensual reorganization plan. See 11 U.S.C. § 1183. In this Court's experience, Subchapter V Trustees are the "honest brokers," who through their efforts have provided credibility in evaluating the debtor's business's prospects for a successful reorganization and facilitated negotiation of a plan of reorganization with the debtor's stakeholders, thereby enabling a small business to reorganize.

The success of a Subchapter V case depends in large part on the openness and transparency of the debtor with the Subchapter V Trustee, the U.S. Trustee, creditors, and with the Court. Where the debtor fails to meet its obligations of openness and transparency, the Bankruptcy Code provides the Court with remedies, ranging from dismissal of the case, conversion of the case to a case under Chapter 7, or removal of the debtor as the debtor in possession and substituting the Subchapter V Trustee as the operating trustee. But removing the debtor as debtor in possession of a small business may make it considerably more difficult, if not impossible, for the debtor successfully to reorganize. It is often the debtor's owner who built the business—developing and maintaining relationships with employees, customers and vendors that give the debtor a chance at successfully reorganizing. Remove the owner's authority to manage the business as a debtor in possession, and the debtor is more likely to fail.

As explained below, the debtor's owner in this case has so far failed to meet the standards of openness and transparency *226 imposed by the Bankruptcy Code and expected of him by this Court. While denied by the owner, his derelictions have been obvious to the Court, the U.S. Trustee, and the Subchapter V Trustee. The U.S. Trustee, supported by the Subchapter V Trustee, filed a motion to remove the debtor as debtor in possession. Unless this "ship gets righted" quickly, removal of the debtor as debtor in possession or conversion to Chapter 7 will be required.

Where questions remain about the conduct and affairs of a small business debtor, Subchapter V of the Bankruptcy Code provides the Court another alternative to removing the debtor as debtor in possession, namely expanding the powers of the Subchapter V Trustee to investigate the affairs of the debtor and to report to the Court. Has this debtor properly conducted its business? Were all payments and transfers among the debtor, its affiliates and principal proper and

properly recorded? Is there a business that can and should be given one last chance to reorganize? In short, does the debtor deserve a chance to reorganize after a rocky start to this case?

At a hearing on July 21, 2022, the Court decided, instead of immediately removing the debtor as debtor in possession, to expand the Subchapter V Trustee's powers to investigate and report. The Court made clear that if the debtor's management fails to provide complete cooperation and transparency then, at a minimum, the debtor will be removed as debtor in possession. The Order expanding the Subchapter V Trustee's powers was entered on July 22, 2022. ("Order," ECF Doc. # 68.)

I. BACKGROUND

A. The Motion to Remove the Debtor as Debtor in Possession

The U.S. Trustee filed a motion ("Motion," ECF Doc. # 37) for the entry of an order removing the debtor, Corinthian Communications, Inc. (the "Debtor"), as the debtor in possession pursuant to 11 U.S.C. § 1185(a). The Subchapter V Trustee in this Subchapter V Chapter 11 case, Eric Huebscher, filed a declaration in support of the Motion. ("Huebscher Declaration," ECF Doc. # 37-1.) The Debtor's landlord, 500 Eighth Avenue LLC (the "Landlord"), filed a joinder to the Motion. ("Joinder," ECF Doc. # 44.) The Debtor filed an opposition to the Motion ("Objection," ECF Doc. # 47) supported by the declaration of the Debtor's President and sole owner, Larry Miller ("Mr. Miller") ("Miller Decl.," ECF Doc. # 47-1), and the declaration of the Debtor's accountant, Michael Block (ECF Doc. # 47-2).

On July 18, 2022, the Subchapter V Trustee submitted a status report regarding his efforts to obtain more information about the Debtor. ("Status Report," ECF Doc. # 62.) On the same day, the U.S. Trustee filed a supplemental brief in further support of the Motion ("Supp. Brief," ECF Doc. # 63), and the Debtor filed a supplemental brief in further opposition to the Motion ("Supp. Objection," ECF Doc. # 60).

The Court held hearings on the Motion on July 7, 2022 (the "July 7 Hearing") and on July 21, 2022 (the "July 21 Hearing"). At the conclusion of the July 21 Hearing, the Court stated it would enter an order expanding the Subchapter V

Trustee's *227 duties under section 1183(b)(2) of the Bankruptcy Code and indicated that it would issue a written

opinion explaining the order. ("July 21 Hr'g Tr.," ECF Doc. # 69 at 23:1–3, 16–18.) The Order was entered the following day. As explained in this Opinion, the Court **FINDS** there is cause to expand the Subchapter V Trustee's duties under section 1183(b)(2) to include an investigation of "the acts, conduct, assets, liabilities, and financial condition of the debtor, the operation of the debtor's business and the desirability of the continuation of such business" 11 U.S.C. § 1106(a)(3).

B. The Debtor's Business

The Debtor is an S corporation that was founded in 1974 and is 100% owned by Mr. Miller, who is the Debtor's President and sole director. (See Motion ¶ 3; see also Declaration of Larry Miller Pursuant to Local Bankruptcy Rule 1007-2 ("Miller Rule 1007-2 Decl."), ECF Doc. #5 ¶¶ 1–2, 14.) ² The Debtor provides bookkeeping and payroll for three of its non-debtor affiliates (the "Affiliates"): Corinthian Trading Inc. ("Trading"), Corinthian Media Inc. ("Media"), and Broadcast Buying Services ("Broadcast Buying"). ³ (Motion ¶ 4 (citing Huebscher Decl. ¶ 2).) Each of the Affiliates is 100% owned by Mr. Miller. (Id.)

The Affiliates earn revenue from outside sources, and these funds flow to the Debtor. (Id. ¶ 5 (citing Huebscher Decl. ¶ 5).) However, there is no intercompany agreement in place setting forth shared liabilities or monthly flow of funds from the Affiliates to the Debtor. (Id. (citing Huebscher Decl. ¶ 6).)

C. The Debtor's Bankruptcy Filing

On April 4, 2022 (the "Petition Date"), the Debtor filed a voluntary petition in this Court under Title 11 of the United States Code, 11 U.S.C. §§ 101 et seq. (the "Bankruptcy Code"). (*Id.* ¶ 1.) The Debtor elected to proceed under Subchapter V of Chapter 11 and the U.S. Trustee appointed the Subchapter V Trustee in the Debtor's bankruptcy case pursuant to section 1183(a) of the Bankruptcy Code. (*Id.* ¶¶ 2–3.)

On the Petition Date, the Debtor also filed its Schedules of Assets and Liabilities ("Schedules," ECF Doc. # 1 at 13–23) and Statement of Financial Affairs (ECF Doc. # 1 at 24–30). On Schedule E/F of the Debtor's Schedules, Mr. Miller was listed as having a nonpriority unsecured claim in the amount of \$1,236,350.00 ("Miller Claim," ECF Doc. # 1 at 20). On June 7, 2022, the Debtor filed an amended Schedule

E/F ("Amended Schedule E/F," ECF Doc. # 30) that removed the Miller Claim.

On May 5, 2022, Mr. Miller testified on behalf of the Debtor at the meeting of creditors pursuant to section 341(a) of the Bankruptcy Code (the "Initial 341 Meeting"). (Motion \P 6.) On June 9, 2022, Mr. Miller testified again on behalf of the Debtor at the adjourned meeting of creditors (the "Adjourned 341 Meeting," and collectively with the Initial 341 Meeting, the "341 Meetings"). 4 (*Id.*)

At a hearing held on June 7, 2022, the Debtor's counsel informed the Court for *228 the first time that the Debtor "provides payroll and accounting services" for other entities that have "common ownership with respect to the [D]ebtor's principal." ("June 7 Hr'g Tr.," ECF Doc. #49 at 4:16–19.) The Debtor's counsel also informed the Court that a trust owned by Mr. Miller's children owns 20 percent of the building in which the Debtor leased its office space. (*Id.* at 7:19–25.) The U.S. Trustee informed the Court that it was asking for documentation on the Miller Claim that was reflected in the Schedules. (*Id.* at 9:1–4.)

The Court stated that the Miller Rule 1007-2 Declaration provided no indication that the Debtor was affiliated with the Affiliates and ordered that a supplemental Local Rule 1007-2 declaration be filed. (*Id.* at 11:8–12:3.) The Court also ordered that information on the Miller Claim be added in the supplemental Rule 1007-2 declaration. (*Id.* at 24:6–23.) On June 14, 2022, the Debtor filed the supplemental declaration of Mr. Miller. ("Supp. Miller Rule 1007-2 Decl.," ECF Doc. # 34.)

D. Is There Cause to Remove the Debtor as Debtor in Possession?

1. The Motion

In the Motion, the U.S. Trustee argues that there is cause to remove the Debtor as debtor in possession under section 1185(a) of the Bankruptcy Code for fraud, gross mismanagement, and a lack of transparency. (Motion at 6.)

The U.S. Trustee argues that the Debtor committed fraud by receiving almost one million dollars based on two PPP loan applications that incorrectly stated the Debtor does not have any common management with other businesses when in fact the Debtor should have disclosed the entities in the

Corinthian Enterprise and the 40 other companies owned by Mr. Miller. (*Id.* at 18–19 ("It is highly unlikely that [the Debtor] ... mistakenly failed to disclose the fact that [it] was part of a larger group of entities.").)⁵

The U.S. Trustee asserts that the Debtor engaged in gross mismanagement because the Debtor and its affiliates follow very few, if any, corporate formalities and there is no intercompany agreement that sets forth how much the Debtor should receive from the Affiliates for (i) the Debtor providing payroll and bookkeeping services to the Affiliates, (ii) the Debtor paying for employees who work for the Corinthian Enterprise as a whole, (iii) the Debtor paying rent for office space shared by the Affiliates, (iv) the Debtor paying for general liability insurance for itself and Broadcast Buying, and (v) the Debtor paying for rating services used for the Affiliates. (Motion at 20 (citing Huebscher Decl. ¶¶ 5, 27– 28, 30).) The U.S. Trustee also points out that the Debtor's employees do not have employee agreements, and there is no agreement establishing Mr. Miller's salary or commission from the Debtor. (*Id.* at 21.)

The U.S. Trustee argues that a conflict of interest exists because the Debtor may need to investigate the basis for the Miller Claim, and whether the Affiliates paid the proper amount to the Debtor for the expenses it paid on behalf of the

Corinthian Enterprise. (*Id.* (citing In re Marvel Ent. Grp., 140 F.3d 463, 473 (3d Cir. 1998) *229 (appointing a trustee when the debtor "would be placed in an awkward position of evaluating their own indenture and debt claims")).)

Finally, the U.S. Trustee argues that the Debtor demonstrated a lack of credibility and transparency in its bankruptcy case by failing to disclose the Affiliates in the Miller Rule 1007-2 Declaration, failing to disclose that Mr. Miller's children partially own a trust that controls the Debtor's Landlord, and failing to include copies of its written checks in its April monthly operating report. (Motion at 22.) Additionally, the U.S. Trustee points out that the Debtor "has not been forthright" responding to the U.S. Trustee's and the Subchapter V Trustee's inquiries. (*Id.*)

The Landlord joins in the Motion—subject to the modifications in the June 28 U.S. Trustee Letter—and provides that Mr. Miller "claimed ignorance of basic facts about the operation and history of the Corinthian Enterprise" at least 16 times during the Initial 341 Meeting. (Joinder ¶¶ 1, 5 (citing ECF Doc. # 37-3).) Additionally, the Landlord contends there is still, three months into the bankruptcy

case, "insufficient information to adequately evaluate the relationship between the Debtor and the rest of the Corinthian Enterprise." $(Id. \P 6.)$

2. The Objection

The Debtor argues that the Motion should be denied because the U.S. Trustee fails to establish the "clear and convincing" evidence required to remove the Debtor as debtor in possession. (Objection at 12–13 (citing In re The 1031 Tax Grp., 374 B.R. 78, 85 (Bankr. S.D.N.Y. 2007)).)

First, the Debtor argues the U.S. Trustee fails to show that the Debtor engaged in fraud because the U.S. Trustee "does not allege, let alone prove, that any PPP funds were used for unauthorized purposes or diverted." (Objection at 13 (noting that "[a]ll PPP funds were used to pay the salaries and commissions of the Debtor's employees, except for Mr. Miller") (citing Miller Decl. ¶¶ 9, 18).) ⁶

Second, the Debtor argues the U.S. Trustee's allegations of gross mismanagement are baseless and simply reflect the reality of running a closely held small business. (*Id.* at 21.) The Debtor notes that it maintains a separate bank account from the Affiliates, and that the U.S. Trustee "does not accuse the Debtor of comingling funds." (*Id.*)

Third, the Debtor argues that the U.S. Trustee's conflict of interest argument "rests on pure speculation" and does not provide a reason to remove the Debtor. (*Id.* at 22.) The Debtor points out that it has filed the Amended Schedule E/F which no longer includes the Miller Claim, and states that Mr. Miller is "prepared not to [file the Miller Claim] in order to bring about a successful reorganization." (Objection at 23 (citing Miller Decl. ¶ 23).)

Fourth, the Debtor contests the U.S. Trustee's claim that it has not been transparent during its bankruptcy case. (*Id.* at 23–24.) The Debtor argues that the Miller Rule 1007-2 Declaration properly disclosed that the Debtor was not a freestanding business. (*Id.* at 24 (citing Miller Rule 1007-2 Decl. ¶ 2).) The Debtor contends that its failure to name the Affiliates in the Miller Rule 1007-2 Declaration was harmless because it made the Subchapter V Trustee and the U.S. Trustee aware of the nature of the Debtor's relationship with its Affiliates prior to the June 7 Hearing. (*Id.*) *230 Additionally, the Debtor alleges that the Subchapter V Trustee

and the U.S. Trustee were aware that a trust for Mr. Miller's children has an ownership interest in the Debtor's Landlord, and in any event, the Debtor's failure to disclose that fact was cured with the Supplemental Miller Rule 1007-2 Declaration. (*Id.* at 25.)

The Debtor also argues that the Motion is premature because the U.S. Trustee and Subchapter V Trustee have not yet sought an order under section 1183(b)(2) of the Bankruptcy Code to expand the Subchapter V Trustee's duties to investigate the Debtor. (*Id.* at 12.) Finally, the Debtor argues that replacing it with the Subchapter V Trustee would "undoubtedly" put the Corinthian Enterprise "out of business for good" because the Debtor and the Affiliates "have fostered a large client network within the media industry, who would almost certainly take their business elsewhere if Mr. Miller were no longer at the helm of the company." (*Id.* at 27.)

E. July 7 Hearing

At the July 7 Hearing, the Court expressed its concern that if Mr. Miller is removed as the operating debtor in possession, then the Debtor's business may not survive. ("July 7 Hr'g Tr.," ECF Doc. # 57 at 14:5-13, 47:13-18.) The Court asked the parties if the Debtor can survive if the Subchapter V Trustee becomes the operating trustee. (Id. at 13:15-17, 14:5-13, 24:6-15.) The U.S. Trustee's attorney stated that granting the Motion would not be analogous to conversion of the case to Chapter 7 and there was certainly no guarantee of liquidation. (Id. at 14:14-20.) The Subchapter V Trustee stated that if he is charged with operating the business his goal would be "to preserve the business" and make sure the Debtor's "operation[s] continue to the extent possible uninterrupted." (Id. at 25:2-11.) The Debtor's counsel answered that if the Motion is granted "the most likely outcome is that [the Debtor's] seasoned employees, high valued employees with high valued accounts would leave with their accounts, and that would lead to a downward spiral." (Id at 26:18-20.) Mr. Miller's counsel agreed with the Debtor's counsel, stating he believed the debtor would "certainly" fail if the Motion is granted. (*Id.* at 37:14–21.)

The Landlord's counsel identified a recent bankruptcy court decision, *In re No Rust Rebar, Inc.*, Case No. 21-12188-PDR, 641 B.R. 412 (Bankr. S.D. Fla. May 23, 2022) ("*No Rust*"), and argued that it had similar facts to those present here. (July 7 Hr'g Tr. at 43:12–44:6.) The Court adjourned the July 7 Hearing to July 21, 2022, and allowed for the U.S. Trustee and the Debtor to submit supplemental briefs on the *No Rust*

decision. (*Id.* at 46:21–47:3, 48:22–49:3.) The Court also required the Subchapter V Trustee to submit a status report assessing the likelihood that the Debtor can be reorganized if the Subchapter V Trustee's role is expanded by the removal of the Debtor as debtor-in-possession. (*Id.* at 49:5–13.)

F. Status Report and Supplemental Briefs

1. The Subchapter V Trustee's Status Report

In the Status Report, the Subchapter V Trustee states that since the July 7 Hearing there has been a "continued lack of disclosure" from the Debtor regarding certain outstanding document and information requests. (Status Report at 2.) The Subchapter V Trustee explains that he and the U.S. Trustee jointly requested information from the Debtor on several historical categories of the Debtor's expenses and that the Debtor provided 3,000 pages *231 of invoices. (Id.) However, the Debtor did not provide any information explaining how those invoices reconciled with its financial statements and failed to explain whether the expenses were solely Debtor expenses or also included Mr. Miller's personal expenses. (Id.) Additionally, when the Subchapter V Trustee requested bank documents for the Affiliates, the Debtor's counsel insisted that the Subchapter V Trustee sign a nondisclosure agreement before releasing the documents. (Id.) The Subchapter V Trustee, who is "not currently represented by counsel, determined that this request was not necessary and may have placed unreasonable limitations on the use of this information." (Id.) The Subchapter V Trustee also "requested information regarding unresolved questions surrounding the Debtor's PPP loans," but the Debtor's counsel did not supply any further information. (Id.)

Additionally, the Subchapter V Trustee states that he is "pessimistic at any chance of reorganization under these circumstances" because of the "intertwined dependency of the Debtor to the Affiliates and the lack of any financial contractual obligation of the Affiliates to the Debtor." (*Id.* at 3.) The Subchapter V Trustee believes the unexplained 2,400% increase in the Debtor's cash reserves over a three-month period is an example of the Affiliates' ability to regulate the Debtor's funding. (*Id.* at 1 ("[T]he Schedules reported a total cash balance of \$12,280.00 ... [and] [t]he Plan Supplement ... shows that \$338,120.00 will be available under the plan for the General Unsecured Creditors.").) The Subchapter V Trustee also believes there are potential causes of action against the Affiliates and Mr. Miller, and states that

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the pursuit of such causes of action "may be more appropriate under a Chapter 7 conversion." (Id. at 3.)

2. The Supplemental Briefs ⁷

In its Supplemental Brief, the U.S. Trustee argues that the No Rust decision contains many similarities to the Debtor's bankruptcy case. (Supp. Brief ¶ 2.) For example, like Mr. Miller, the president of No Rust Rebar controlled both the debtor and other affiliated companies which operated from the same property, shared expenses, and failed to follow corporate formalities. (Id. (citing No Rust, 641 B.R. at 414-18, 422–24).) Additionally, the U.S. Trustee states that lack of transparency was a major issue in No Rust and the court in that case also found it "very concerning" that the debtor's assets and non-debtor affiliate's assets were "commingled" such that there "might be" a substantial loss to the estate. (Id. ¶¶ 3–4 (citing *No Rust*, 641 B.R. at 424–25).) Finally, because No Rust Rebar's president had to effectively investigate his own collective enterprise regarding various transfers, the No Rust court found "an incurable conflict of interest" and concluded that there was cause to remove the debtor as debtor in possession. (*Id.* ¶ 4 (citing *No Rust*, 641 B.R. at 424–25).)

In its Supplemental Objection, the Debtor argues that its bankruptcy case is "fundamentally different" than the bankruptcy court's decision in No Rust. (Supp. Objection at 4.) First, the Debtor notes that prior to ordering conversion to a Chapter 7 case, the *No Rust* court ordered an investigation by the Subchapter V Trustee into potential breaches of fiduciary duty by the debtor's principal and held a four-day evidentiary hearing on the removal motions. *232 (Id. at 4–5 (citing No Rust, 641 B.R. at 418–19).) Second, the Debtor notes that a key finding of No Rust was that the debtor's principal had shuffled assets and liabilities between entities "to fit [his] needs or whims." (Id. at 6 (citing No Rust, 614 B.R. at 422– 23).) As a result, evidence at the hearings suggested that the No Rust debtor's assets had been "shielded and hidden from creditors through transfers—including post-petition transfers —to related entities at the debtor's expense." (Id. at 7 (citing No Rust, 614 B.R. at 423–24).) By contrast, the Debtor asserts that the funds only flow from the Affiliates to the Debtor, and that there has been no allegation that Mr. Miller has diverted funds from the Debtor to the Affiliates or any other entity. (Id.) Finally, the Debtor argues that unlike the *No Rust* debtor which was not operating and appeared to have no employees -the Debtor does have a "viable path to reorganization"

because it has an operational business with 26 employees. (*Id.* (citing No Rust, 641 B.R. at 419-20, 424-25).)

G. July 21 Hearing and Order

At the July 21 Hearing, the Court stated that the Debtor's "grudging disclosure of information" to the Subchapter V Trustee was "completely unacceptable" (July 21 Hr'g Tr. at 7:14-16), and reiterated its concern raised at the July 7 Hearing "that the result of removing the debtor as debtorin-possession could very well lead to the failure, collapse of the [Debtor's] business, which I don't think would benefit anyone." (Id. at 7:16–20, 9:1–5, 16:15–21.) The Court then informed the parties that it was considering expanding the

duties of the Subchapter V Trustee under section 1183(b)

(2) to include the power provided in section 1106(a)(3) of the Bankruptcy Code so that the Subchapter V Trustee could investigate the Debtor over the next two weeks and then file a report. (Id. at 7:21-8:6, 8:17-20.) The U.S. Trustee and the Subchapter V Trustee both agreed with the Court's proposed course of action. (Id. at 9:24, 10:6-8, 13:5-6.) The Court stated that the Debtor would either need to provide complete transparency and answer all the Subchapter V Trustee and U.S. Trustee's requests for information or the Court would consider granting the Motion. (Id. at 8:19-25.)

The Court issued a ruling on the record, stating that it would enter an order expanding the scope of the Subchapter V Trustee's duties, with a written opinion to follow, and it will continue the hearing on the Motion. (Id. at 23:1-3.) On July 22, 2022, the Court entered the Order (i) directing the Subchapter V Trustee to investigate the Debtor and file a report, and (ii) directing the U.S. Trustee to file a status report. (See Order at 1–2.)⁸

II. <u>LEGAL STANDARD</u>

A. Removal of Debtor in Possession Under 1185(a)

Under Subchapter V, the term "debtor in possession" refers to "the debtor, unless removed as debtor in possession under section 1185(a)." 11 U.S.C. § 1182(2). Section 1185(a) of the Bankruptcy Code provides the following:

> On request of a party in interest, after notice and a hearing, court shall order that the

debtor shall not be a debtor in possession for cause, including fraud, dishonesty, incompetence, or *233 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.

Id. § 1185(a).

If a debtor is removed as debtor in possession, the Subchapter V Trustee's duties are expanded under section 1183(b)(5) to include, amongst other duties, "operating the business of the debtor." *Id.* § 1183(b)(5).

B. Expanding the Subchapter V Trustee's Duties Under Section 1183(b)(2)

Under Section 1183(b)(2) of the Bankruptcy Code, the Court may "for cause and on request of a party in interest, the trustee, or the United States trustee" order that a Subchapter V Trustee's powers are expanded to include the powers specified in Sections 1106(a)(3) and (4). Id. § 1183(b) (2). Sections 1106(a)(3) and (4) provide, in relevant part,

- (2). Sections 1106(a)(3) and (4) provide, in relevant part that the trustee shall:
 - (3) ... investigate the acts, conduct, assets, liabilities, and financial condition of the debtor, the operation of the debtor's business and the desirability of the continuance of such business, and any other matter relevant to the case or to the formulation of a plan; [and]
 - (4) as soon as practicable—
 - (A) file a statement of any investigation conducted under paragraph (3) of this subsection, including any fact ascertained pertaining to fraud, dishonesty, incompetence, misconduct, mismanagement, or irregularity in the management of the affairs of the debtor, or to a cause of action available to the estate;

Id. § 1106(a).

The Bankruptcy Code does not specify what constitutes "cause" for the Court to expand a Subchapter V Trustee's

duties under section 1183(b)(2). Id. § 1183(b)(2). Collier provides that the standard for cause under section 1183(b) (2) "should not be higher than the standard for cause ... [f]or removing a subchapter V debtor in possession under section 1185[a]." 8 COLLIER ON BANKRUPTCY ¶ 1183.03[3] (16th ed. 2022). The Court located one decision in which a bankruptcy court expanded a Subchapter V Trustee's duties under section 1183(b)(2) where there existed "the potential issue of intercompany claims." See In re AJEM Hosp., LLC, No. 20-80003, 2020 WL 3125276, at *1 (Bankr. M.D.N.C. Mar. 23, 2020); see also Hon. Paul W. Bonapfel, A GUIDE TO THE SMALL BUSINESS REORGANIZATION ACT OF 2019 (Revised June 2022) (the "GUIDE") at 82 n.196 (noting that if there are substantial issues about potential insider claims, the court may consider expanding a Subchapter V Trustee's duties to authorize the Subchapter V Trustee to investigate the potential claims and file a report). "Cause" to expand a Subchapter V Trustee's duties is also likely to exist where there are "significant questions such as the debtor's true financial condition, what property is property of the estate, the debtor's management of the estate as debtor in possession, and the accuracy and completeness of the debtor's disclosures and reports." GUIDE at 57 (citing In re Ozcelebi, 639 B.R. 365, 383 (Bankr. S.D. Tex. 2022)).

[1] A court may *sua sponte* issue an order expanding the Subchapter V Trustee's duties under section 1183(b)(2), even though the subsection contains the phrase "on request of a party in interest." *See In re Pittner*, 638 B.R. 255, 259 (Bankr. D. Mass. 2022) ("Though [section 1185(a)] begins *234 'on request of a party in interest," \$ 105(a) of the Bankruptcy Code makes clear that the Court may raise the issue *sua sponte*."); *see also In re Ozcelebi*, 639 B.R. at 425 (issuing an order providing that the court would *sua sponte* consider whether the debtor should be removed under section 1185(a)).

III. DISCUSSION

[2] As explained at the July 7 and July 21 Hearings, the Court remains concerned that the Debtor's business will fail if the Motion is granted and the Debtor is removed as debtor in possession. (*See* July 7 Hr'g Tr. at 47:13–18; July 21 Hr'g Tr. at 7:17–20 ("[T]he result of removing the debtor as debtorin-possession could very well lead to the failure, collapse of the business, which I don't think would benefit anyone.").)

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The Court believes that the best thing for the Debtor and its estate at this time is for the Court to expand the Subchapter V Trustee's duties so that he has the authority under section 1106(a)(3) to investigate the Debtor's business. 11 U.S.C. §§ 1183(b)(2), 1106(a)(3).

There is ample cause to expand the Subchapter V Trustee's duties under section 1183(b)(2). First, the lack of any intercompany agreement between the Debtor and its Affiliates raises a substantial issue whether the Debtor has intercompany claims against the Affiliates or vice versa. (See Motion at 20–21 (stating there is no intercompany agreement that sets forth how much the Affiliates should pay the Debtor for the Debtor's providing its Affiliates payroll and bookkeeping services, employees, rent for shared office space, and paying for rating services used by the Affiliates) (citing Huebscher Decl. ¶¶ 30, 34–35).) Second, there is still a question whether Mr. Miller will assert the Miller Claim against the Debtor and, if so, whether there is any basis for such claim. (Motion at 21; Objection at 23 (noting that Mr. Miller "is prepared not to" bring the Miller Claim).) GUIDE at 82 n.196 (noting that if there are substantial issues about potential insider claims, the court may consider expanding a Subchapter V Trustee's duties to authorize the Subchapter V Trustee to investigate the potential claims and file a report).

Finally, the Debtor's continued lack of disclosure to the Subchapter V Trustee also constitutes cause to expand the Subchapter V Trustee's duties. (Status Report at 2.) GUIDE at 57 (citing *In re Ozcelebi*, 639 B.R. at 383).

IV. CONCLUSION

For the reasons explained above, the Court **FINDS** there is cause to expand the Subchapter V Trustee's duties under section 1183(b)(2) to include an investigation of "the acts, conduct, assets, liabilities, and financial condition of the debtor, the operation of the debtor's business and the desirability of the continuation of such business" 11 U.S.C. § 1106(a)(3). Depending on the outcome of the investigation, further relief, such as removal of the Debtor as debtor in possession, or dismissal or conversion of the case, may be required.

The Order expanding the Subchapter V Trustee's duties has already been entered.

All Citations

642 B.R. 224

Footnotes

- Attached to the Huebscher Declaration are Exhibits A–K (ECF Doc. ## 37-2–12), which contain transcripts of the section 341(a) meetings of creditors, copies of the Debtor's Paycheck Protection Program ("PPP") loan applications, forgiveness letters, revenue reduction spreadsheets, and the Debtor's tax returns. These exhibits are partially redacted to protect Mr. Miller's home address, social security number, and other private information. Physical unredacted copies the Exhibits A–K were provided to the Court.
- 2 Mr. Miller states that the Debtor is a Delaware limited liability company. (Miller Rule 1007-2 Decl. ¶ 1.) The U.S. Trustee states that, according to the New York Department of State, the Debtor is a New York corporation. (Motion at 8 n.2 (citing Huebscher Decl. ¶ 1).)
- 3 The Debtor, Trading, Media, and Broadcast Buying are collectively referred to as the "Corinthian Enterprise."
- The Motion incorrectly states that the Adjourned Meeting occurred on July 9, 2022. (Motion ¶ 6.)
- The U.S. Trustee also argues that to obtain eligibility for the second PPL loan the Debtor "fraudulently reported the quarterly gross receipts of" the Affiliates instead of the Debtor's quarterly gross receipts. (Motion at 19.) However, in a letter to the Court dated June 28, 2022, the U.S. Trustee explains that it has learned this argument is "incorrect" and that for PPP loan applications, "[g]ross receipts of a borrower with

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In re Corinthian Communications, Inc., 642 B.R. 224 (2022)

- affiliates is calculated by adding the gross receipts of the business concern with the gross receipts of each affiliate." ("June 28 U.S. Trustee Letter," ECF Doc. # 43.)
- The Debtor states that it is "actively and transparently" dialoguing with the U.S. Attorney's Office and the Small Business Administration ("SBA") to "resolve the PPP issue." (Objection at 13.)
- The Court will not consider the Debtor's and U.S. Trustee's arguments that were unrelated to the *No Rust* decision. (See July 7 Hr'g Tr., 46:21–47:3, 48:22–49:3 (limiting additional briefing to the *No Rust* decision).)
- The deadline for the filing of the two reports was August 8, 2022 at 12:00 p.m. (See Order at 1–2.) On August 2, 2022, the Court granted the Subchapter V Trustee and U.S. Trustee's requests to extend the deadlines to August 15, 2022.
- 9 The hearing on the Motion has been continued to August 16, 2022. (ECF Doc. # 70.)

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In re HBL SNF, LLC, 635 B.R. 725 (2022)

635 B.R. 725 United States Bankruptcy Court, S.D. New York.

IN RE: HBL SNF, LLC, d/b/a Epic Rehabilitation and Nursing at White Plains, Debtor.

Case No. 21-22623 (SHL)

|
Signed February 1, 2022

Synopsis

Background: Debtor, a nursing and rehabilitation facility, filed motion to extend time to file plan under Subchapter V of Chapter 11. Creditor filed motion for determination that automatic stay did not apply to litigation it wanted to file, or in the alternative, for relief from stay to pursue such litigation. Debtor's landlord objected to both motions.

Holdings: The Bankruptcy Court, Sean H. Lane, J., held that:

- [1] debtor satisfied its burden to show that an extension of time was appropriate to file its plan under Subchapter V of Chapter 11;
- [2] Bankruptcy Court would grant debtor's motion to extend time to file plan under Subchapter V of Chapter 11 for period of 60 days, rather than the requested 90 days;
- [3] automatic stay did not bar creditor's foreclosure litigation in state court against landlord for alleged breaches of construction loan; and
- [4] even if stay did apply to foreclosure litigation, creditor was entitled to relief from stay to pursue the litigation.

Motions granted.

Procedural Posture(s): Motion for Extension of Time; Motion for Relief from the Automatic Stay.

West Headnotes (18)

[1] Bankruptcy • Who May File, and Time for Filing

Burden of proof rests with debtor to establish basis for extension of time to file plan under Subchapter V of Chapter 11. 11 U.S.C.A. § 1189(b).

[2] Bankruptcy > Who May File, and Time for Filing

Burden to establish basis for extension of time to file plan under Subchapter V of Chapter 11 is stringent, and a higher standard than the "for cause" standard that governs extensions of time to file a plan in a traditional Chapter 11 case. 11 U.S.C.A. §§ 1121(d)(1), 1189(b).

[3] Bankruptcy • Who May File, and Time for Filing

The strict standard to establish basis for extension of time to file plan under Subchapter V of Chapter 11 reflects the goals of Subchapter V to move a case forward expeditiously, to keep expenses down for the debtor, and to provide the debtor with an accelerated path to reorganize. 11 U.S.C.A. § 1189(b).

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

Debtor, a nursing and rehabilitation facility, satisfied its burden to show that an extension of time was appropriate to file its plan under Subchapter V of Chapter 11, where central issue of lease with landlord remained unresolved and needed to be resolved before any reorganization could occur, and extension would not unduly prejudice any party, including landlord, since lease litigation was, in fact, filed by the landlord and thus the landlord could hardly complain that all parties were taking time in the bankruptcy case to resolve it. 11 U.S.C.A. § 1189(b).

[5] Bankruptcy • Who May File, and Time for Filing

Bankruptcy Court would grant debtor's motion to extend time to file plan under Subchapter V of Chapter 11 for period of 60 days, rather than the

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requested 90 days, since 60-day extension would push the deadline past the summary judgment hearing on central issue of lease with landlord, at which time the parties and the court could assess the status of the case and rule on any further extension request, if necessary, and that period of time was consistent with debtor's decision to opt to file its petition under Subchapter V, and its faster timetable, rather than proceeding as a traditional Chapter 11 debtor. 11 U.S.C.A. § 1189(b).

[6] Bankruptcy 🤛 Automatic Stay

Automatic stay affords one of the fundamental debtor protections provided by the bankruptcy laws. 11 U.S.C.A. § 362.

[7] Bankruptcy 🍑 Automatic Stay

Automatic stay is intended to allow the bankruptcy court to centralize all disputes concerning property of the debtor's estate so that reorganization can proceed efficiently, unimpeded by uncoordinated proceedings in other arenas.

[8] Bankruptcy 🕪 Automatic Stay

Automatic stay promotes equal creditor treatment and gives the debtor a breathing spell.

11 U.S.C.A. § 362.

[9] Bankruptcy 🤛 Automatic Stay

Automatic stay allows the bankruptcy court to centralize all disputes concerning property of the debtor's estate in bankruptcy court. 11 U.S.C.A. § 362.

[10] Bankruptcy Packetors and third persons

Automatic stay is generally limited to debtors and does not encompass non-bankrupt codefendants. 11 U.S.C.A. § 362.

[11] **Bankruptcy** • Vacation, continuance, modification, or dissolution in general

If the automatic stay does apply, a party can request that the court lift it. 11 U.S.C.A. § 362.

[12] Bankruptcy Cause; Grounds and Objections

In determining whether "cause" exists to lift stay for prepetition litigation, courts consider the following factors: (1) whether relief would result in partial or complete resolution of issues, (2) lack of any connection with or interference with bankruptcy case, (3) whether other proceeding involves debtor as fiduciary, (4) whether specialized tribunal with necessary expertise has been established to hear cause of action, (5) whether debtor's insurer has assumed full responsibility for defending action, (6) whether action primarily involves third parties, (7) whether litigation in another forum would prejudice interests of other creditors, (8) whether judgment claim arising from other action is subject to equitable subordination, (9) whether movant's success in other proceeding would result in judicial lien avoidable by debtor, (10) interests of judicial economy and expeditious and economical resolution of litigation, (11) whether parties are ready for trial in other proceeding, and (12) impact of stay on parties and balance of harms. 11 U.S.C.A. § 362.

[13] Bankruptcy Seause; Grounds and Objections

Not all of the factors for determining whether "cause" exists to lift stay for prepetition litigation are relevant in every case. 11 U.S.C.A. § 362.

[14] Bankruptcy Cause; Grounds and Objections

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"Cause" for relief from automatic stay is broad and flexible concept that must be determined on case-by-case basis. 11 U.S.C.A. § 362.

[15] Bankruptcy Presumptions and burden of proof

Moving party bears initial burden to demonstrate that "cause" exists to lift automatic stay. 11 U.S.C.A. § 362.

[16] Bankruptcy Presumptions and burden of proof

If movant fails to make initial showing of "cause" for relief from automatic stay, court should deny relief without requiring any showing from debtor that it is entitled to continued protection. 11 U.S.C.A. § 362.

[17] **Bankruptcy** • Co-debtors and third persons

Automatic stay in debtor-tenant's Subchapter V Chapter 11 case did not bar creditor's foreclosure litigation in state court against landlord for alleged breaches of construction loan, since creditor sought to pursue remedies against non-debtor landlord, neither the debtor nor landlord filed a motion asking the court to extend the protection of the stay to landlord, and creditor represented to the court that it would not name debtor as a party to the foreclosure action against landlord and specifically represented that it would not seek to terminate debtor's lease with landlord and that debtor's purchase option would remain intact.

[18] Bankruptcy 🕪 Mortgages; foreclosure

Even if automatic stay in debtor-tenant's Subchapter V Chapter 11 case applied to creditor's foreclosure litigation in state court against landlord for alleged breaches of construction loan, creditor was entitled to relief from stay to pursue the litigation, where litigation would not interfere with the bankruptcy case, as

creditor would not name debtor as a party in that litigation nor would it seek to terminate debtor's lease, state courts had the expertise to handle foreclosure proceeding and state court was an appropriate forum for the foreclosure to be litigated, the litigation would primarily involve third parties, namely, creditor and landlord, and contemplated state court action was the most expeditious and economical way to resolve the dispute between two non-debtors.

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MEMORANDUM OF DECISION

SEAN H. LANE, UNITED STATES BANKRUPTCY JUDGE

Before the Court are two motions. The first is the motion of the Debtor HBL SNF, LLC, d/b/a Epic Rehabilitation and Nursing at White Plains (the "Debtor") seeking to extend the time to file a Subchapter V plan of reorganization (the "Extension Motion") [ECF No. 84]. The second is the motion of Security Benefit Corporation for either a determination that the automatic stay does not apply to litigation it wants to file or in the alternative, for relief from the automatic stay to pursue such litigation (the "Motion for Stay Relief") [ECF No. 92]. The Debtor's landlord, White Plains Healthcare Properties I, LLC (the "Landlord") has

objected to both of these motions. For the reasons explained below, the Court grants each motion. ²

BACKGROUND

The Debtor is a 160-bedroom skilled nursing and rehabilitation facility located *728 at 120 Church Street, White Plains, New York which opened in late 2019. See Declaration of Lizer Jozefovic Pursuant to Local Bankruptcy Rule 1007-2 and in Support of the Chapter 11 Subchapter V Petition and First Day Motions ¶ 7 (the "First Day Declaration") [ECF No. 3]. In and around 2015, the Debtor entered into agreements with the Landlord for the construction and financing of the Debtor's care facility. Id. at ¶ 9. The Debtor and the Landlord entered into the Amended and Restated Operating Lease in November 2015. See Amended and Restated Operating Lease [ECF No. 58-6]. In furtherance of the Landlord's obligation to secure financing, the Landlord entered into a number of agreements with Security Benefit in August 2017, including a Construction Loan Agreement [ECF No. 72-1], a Mortgage, Assignment of Leases and Rents, Security Agreement and Fixture Filing [ECF No. 72-2], and an Assignments of Leases and Rents [ECF No. 72-3]. Also in the summer of 2017, the Debtor, the Landlord, and Security Benefit entered into the Security Agreement, Assignment of Leases and Rents and Fixture Filing [ECF No. 72-4].

Prior to the bankruptcy, the Landlord filed litigation against the Debtor claiming that the Debtor's lease with the Landlord had already been terminated. After this bankruptcy filing, the lease litigation was removed to this Court. See Adv. Pro. No. 21-07096. Additionally, Security Benefit initiated two foreclosure proceedings in 2021 against the Landlord in New York State Supreme Court, Westchester County, both alleging the Landlord had defaulted on its loan obligations to Security Benefit. See Motion for Stay Relief ¶ 15. Both of those foreclosure cases were dismissed because of the foreclosure moratorium in New York State due to the COVID-19 pandemic. See id.

On November 1, 2021, the Debtor filed its petition under Chapter 11, Subchapter V of the Bankruptcy Code [ECF No. 1]. That same day, the Debtor filed the motion to approve debtor-in-possession ("DIP") financing and authorize the Debtor's use of cash collateral [ECF No. 11]. After a first day hearing, the Court granted interim approval of the DIP financing motion and authorized the Debtor to: (1) obtain

post-petition financing and grant security interests and superpriority administrative expense status with respect to the DIP collateral; (2) make use of cash collateral to the extent that it is necessary; (3) modify the automatic stay; and (4) schedule a final hearing on the DIP financing motion. See Order, dated Nov. 8, 2021 [ECF No. 34]. In advance of the final hearing on the DIP financing motion, the Debtor filed the proposed final DIP financing order that provided that all of the Debtor's lease obligations-i.e., the rent-would be paid going forward to Security Benefit based on the Assignment of Leases and Rents Agreement. As the Landlord had understood that it would continue to receive the rent, the Landlord objected to the proposed final DIP financing order, arguing that it was still entitled to the rent. Pending a decision on the rent issue, the Debtor deposited the December rent into an escrow account. Given the Landlord's objection, the Court approved a second interim DIP financing order with the financing necessary for the Debtor's operation through the end of December, while directing the parties to brief the rent issue. See Landlord's Objection to the Proposed Final DIP Order [ECF No. 61], Security Benefit's Response [ECF No. 72], and the Landlord's Reply [ECF No. 75]. The Landlord's objection was the only objection to the Debtor's request for final approval of DIP financing. The Court held a hearing on the Landlord's objection. See Hr'g Tr., dated Dec. 21, 2021 [ECF No. *729 80]. The Court ruled in favor of the Landlord. See Hr'g Tr., dated Dec. 23, 2021 [ECF No. 81]. Finding that Security Benefit had not taken sufficient affirmative steps to perfect an assignment of the rent, the Court directed the Debtor to pay the rent to the Landlord. Id. But the Court's decision was without prejudice to a future application by Security Benefit based on changed circumstances. Id.

DISCUSSION

A. Extension Motion

The Debtor here seeks an additional 90 days until May 2, 2022 to file its plan in the Subchapter V case. *See* Extension Motion ¶ 16. As explained in the Debtor's Extension Motion, the ongoing dispute between the Debtor and the Landlord concerning the Debtor's lease is one of the main reasons that the Debtor filed this bankruptcy. *See* Extension Motion ¶ 8 (citing the First Day Declaration). That litigation has now been removed to this Court, discovery has been conducted, and the Landlord's motion for summary judgment on the lease issue is scheduled to be heard on March 24, 2022. *See* Adv. Pro. No. 21-07096. The Debtor contends that resolution of this litigation is critical to the Debtor's ability to successfully

reorganize as the Debtor intends to assume the lease in this bankruptcy, if possible. See Extension Motion \P 9. Thus, the argument goes, that Debtor cannot file a meaningful plan of reorganization until a final determination is made with regards to the termination of the lease.

The Landlord opposes the Extension Motion [ECF No. 103]. The Landlord contends that: (1) the Debtor has delayed adjudication of the lease termination issue; (2) the Debtor has failed to show under Section 1189 of the Bankruptcy Code that the delay is warranted; and (3) delay in this instance is inconsistent with Subchapter V and harms the Landlord. *See* Objection, at 3, 4, 6. The Debtor filed a Reply, together with a supporting Declaration of Lizer Jozefovic [ECF Nos. 107 and 108].

1. Applicable Legal Standard

[3] In a Subchapter V case, a debtor is required to file a plan within 90 days after the order for relief is entered when the case is first filed. 11 U.S.C. § 1189(b). However, the Court is permitted to extend that period if the need for more time "is attributable to circumstances for which the debtor should not justly be held accountable." Id. The burden of proof rests with the debtor to establish a basis for the extension. In re Online King LLC, 629 B.R. 340, 349 (Bankr. E.D.N.Y. 2021). The burden is stringent and a higher standard than the "for cause" standard in Section 1121(d)(1) that governs extensions of time to file a plan in a traditional Chapter 11 case —that is, a case not under Subchapter V. Id. (citing In re Seven Stars on the Hudson Corp., 618 B.R. 333, 344 (Bankr. S.D. Fla. 2020)). The strict standard reflects the goals of Subchapter V to move a case forward expeditiously, to keep expenses down for the debtor, and to provide the debtor with an accelerated path to reorganize. Id. at 349–350 (noting that—unlike a traditional Chapter

But notwithstanding this strict standard, an extension may nonetheless be permissible under appropriate circumstances. In *In re Baker*, for example, the court granted a Subchapter V debtor a second extension of time to file a plan where: (1) certain government units had yet to file their proofs of claim because the Section 341 notice for government claims lacked a bar date; and (2) the debtor needed more time to determine his projected income due to the death of his brother. *730 *In re Baker*, 625 B.R. 27, 35 (Bankr. S.D. Tex. 2020). While

11 case—only a debtor may file a plan in a Subchapter V

a plan technically could have been filed before the bar date passed, the court concluded that these missing claims would drastically alter the plan. *Id.* at 36. While the debtor could have brought this error to the attention of the court sooner, the court found that the misstep was not the fault of the debtor in the first instance. *Id.* at 37–38. The court granted a 45-day extension, even though 1.5 months had passed between the death of the debtor's brother and the deadline for filing the plan. *Id.* at 39, 41; *see also* In re Trepetin, 617 B.R. 841, 847–48 (Bankr. D. Md. 2020) (granting an extension

the plan. *Id.* at 39, 41; *see also* — *In re Trepetin*, 617 B.R. 841, 847–48 (Bankr. D. Md. 2020) (granting an extension under Section 1189 where the debtor converted the case from Chapter 7 with the court recognizing a need to balance the goals of speed and access to a realistic reorganization scheme).

On the other hand, courts have denied the request for an extension to file a plan where a Subchapter V debtor is relying on "a generalized excuse applicable to any business

bankruptcy case." In re Online King LLC, 629 B.R. at 351.

In *Online King*, the debtor sought an extension because of delay caused by: (1) the work involved in proposing a plan; (2) competing demands upon the debtor; (3) the intervening religious holidays; and 4) the COVID-19 pandemic.

The court found these justifications unpersuasive. Id. at 352–353; see In re 5 Star Prop. Grp., Inc., 2021 WL 247782, at *1 (Bankr. M.D. Fla. Jan. 20, 2021) (setting the extension motion for a hearing but noting the debtor's request cited

motion for a hearing but noting the debtor's request cited only the need for more time to complete certain calculations and finalize its plan, facts that did not appear to satisfy the conditions for an extension under Section 1189(b)); see also

In re Trepetin, 617 B.R. at 848–49 (noting that aspects of Subchapter V are based on Chapter 12 for family farmers and fisherman, which lacks the safeguards for creditors in Chapter 11, and that the time limitations to file a plan protect creditors from a debtor languishing in bankruptcy).

2. An Extension Is Warranted

[4] Applying all these principals here, the Court finds that the Debtor has satisfied its burden to show that an extension is appropriate. All parties agree that the status of the Debtor's lease with the Landlord is a threshold issue that must be resolved before any reorganization can occur. The parties differed as to whether discovery would be needed before deciding the merits of the lease issue and about how long such discovery should take. After hearing the parties' views on these questions, the Court entered a schedule for prompt

case).

litigation of the complex questions about the lease, with a short period of time for discovery and a briefing schedule culminating in a hearing in March 2022. *See* Letter Setting Discovery Schedule, dated Dec. 7, 2021 [Adv. Pro. No. 21-07096, ECF No. 21]. Given that the Court determined the litigation schedule, it is hard to see how the Debtor could be blamed for unduly delaying adjudication of the lease issue. Like *In re Baker*, it does not appear practical, fair, or wise to require the Debtor to file a plan when the central issue of the lease remains unresolved. In sum, the facts justifying the extension are ones for which the Debtor should not be justly held accountable and are not the type of "generalized excuses" rejected by other courts as insufficient under Section 1189.

In reaching its decision, the Court notes that an extension here does not unduly prejudice any party, including the Landlord. The lease litigation was, in fact, filed by the Landlord and thus the Landlord can hardly complain that all parties are taking time in the bankruptcy case to resolve it. While the Landlord would like the schedule for the litigation to be different, the Court has made its ruling as to what *731 an appropriate schedule should be. And to the extent the Landlord's objection reflects a view that an inordinate amount of time has already elapsed in this case, the Court disagrees. This case was filed on November 1, 2021, and a first day hearing was held shortly thereafter. The issue requiring the most time and attention in the case thus far has been the litigation over the Debtor's motion for DIP financing. But the contested issue in that motion was who should receive the rents, a point of contention between Security Benefit and the Landlord. As Debtor's counsel explained at the final hearing on that motion, the Debtor simply needed to know who to pay as between Security Benefit and the Landlord. See Hr'g Tr., dated Dec. 21, 2021, at 48-49 [ECF No. 80]. As that litigation pit the Landlord against Security Benefit-rather than the Debtor—the Court cannot conclude that the Debtor unduly delayed the case to litigate an issue on which the Debtor was essentially agnostic.

[5] While the Court overrules the Landlord's objection, the Court will grant the Debtor's Extension Motion only for a period of 60 days, rather than the requested 90 days. This result is consistent with the posture of the case. A 60-day extension will push the deadline past the summary judgment hearing on the lease issue, at which time the parties and the Court can assess the status of the case and rule on any further extension request, if necessary. Indeed, this incremental "wait and see" approach is sometimes used by bankruptcy courts when confronted with contested requests for an extension

of a debtor's exclusivity period under Section 1121(d) in a tradition Chapter 11 case. *Cf. In re MSR Resort Golf Course, LLC*, Case No. 11-10372 (SHL) Hr'g Tr., dated June 29, 2011, at 236–248 [ECF No. 475] (discussing progress of the case in the context of future motions to extend exclusivity). This approach is also consistent with the Debtor's decision to opt to file its petition under Subchapter V—and its faster timetable—rather than proceeding as a traditional Chapter 11 debtor. But to be clear, the Court's ruling today reflects these practical considerations, and is not a finding that the Debtor has unduly delayed proceedings. As such, the Court's ruling today is without prejudice to a further application by the Debtor for an additional extension, if appropriate.

B. Motion for Stay Relief

The Court turns now to the Motion for Stay Relief filed by Security Benefit. As this Court explained above, Security Benefit and the Landlord entered into a number of agreements beginning in 2017 regarding the construction, financing, and lease of the facility where the Debtor operates. Security Benefit alleges that the Landlord has defaulted under these agreements. See Motion for Stay Relief ¶ 13. Based on that alleged default, Security Benefit now seeks permission to pursue its remedies against the Landlord in state court and requests a ruling from this Court that the automatic stay does not prevent Security Benefit from doing so. Security Benefit argues that the automatic stay does not apply to actions against the Landlord because it is not the Debtor and because Security Benefit does not intend to seek any relief against the Debtor in state court. See Motion for Stay Relief ¶ 25; see also Amended Reply of Security Benefit, at 5–6 [ECF No. 110]. To the extent that the Court concludes the automatic stay does apply to the legal proceedings contemplated by Security Benefit, Security Benefit seeks alternative relief in the form of lifting the stay so that Security Benefit can pursue its remedies against the

Landlord. See Motion for Stay Relief ¶¶ 29–38; see also *732 Sonnax Indus., Inc. v. Tri Component Prods. Corp. (In re Sonnax Indus., Inc.), 907 F.2d 1280, 1286 (2d Cir. 1990) (setting forth the standard for stay relief).

Notably, the Debtor has not opposed Security Benefit's Motion for Stay Relief. But the Landlord has. *See* Objection to the Stay Relief Motion [ECF No. 103]. The Landlord argues that any action taken by Security Benefit against the Landlord will directly impact the Debtor's property and ability to reorganize. *See* Objection ¶ 23–29. More specifically, the Landlord contends that lifting the stay will impact a purchase option that the Debtor has under its lease with the Landlord.

Id. at ¶ 23. The Landlord also argues that Security Benefit is not entitled to stay relief under applicable law. Id. at ¶¶ 32–38. The Landlord argues that, at a minimum, the stay should not be lifted until the lease termination issue is determined in the adversary proceeding. Id. at \P ¶ 39–47.

The parties' arguments on the Stay Relief Motion must be understood in the context of their dispute about the rent. The Debtor planned to pay the rent to Security Benefit, based on language in the relevant agreements that provides for an assignment of rents to Security Benefit. The Landlord disagreed, arguing that it was still entitled to receive the rent because Security Benefit had not taken sufficient affirmative steps to make the assignment effective. Notably, the discussion of affirmative steps centered around whether or not there was a pending foreclosure proceeding in state court by Security Benefit against the Landlord and if Security Benefit had taken steps to appoint a receiver to collect the rents. Ultimately, the Court ruled that Security Benefit had not taken sufficient affirmative steps to affect a successful assignment of rent such that Security Benefit was entitled to the rent. See Hr'g Tr., dated Dec. 23, 2021, at 21 [ECF No. 81]. The Court noted, however, that the ruling was without prejudice to a further application by Security Benefit if there were changed circumstances. By filing this Motion for Stay Relief, Security Benefit is essentially asking for permission to take such affirmative steps now and change the circumstances for any future request.

1. Applicable Legal Standard

Section 362(a)(1) of the Bankruptcy Code provides that the filing of a bankruptcy petition:

operates as a stay, applicable to all entities, of—

(1) the commencement or continuation, including the issuance of employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title.

11 U.S.C. § 362(a)(1).

[6] [7] [8] [9] [10] The automatic stay affords of the fundamental debtor protections provided by the bankruptcy laws." Midlantic Nat'l Bank v. N.J. Dep't of

Env't Protection, 474 U.S. 494, 503, 106 S.Ct. 755, 88 L.Ed.2d 859 (1986); Collier on Bankruptcy ¶ 362.03 (16th ed. rev. 2013). The automatic stay is intended to "allow the bankruptcy court to centralize all disputes concerning property of the debtor's estate so that reorganization can proceed efficiently, unimpeded by uncoordinated proceedings in other arenas." SEC v. Brennan, 230 F.3d 65, 71 (2d Cir. 2000) (internal quotation omitted). Thus, the automatic stay "promot[es] equal creditor treatment and giv[es] the debtor a breathing spell." In re Pioneer Commercial Funding Corp., 114 B.R. 45, 48 (Bankr. S.D.N.Y. 1990); see *733 Lawrence v. Motors Liquidation Co. (In re Motors Liquidation Co.), 2010 WL 4966018, at *5 (S.D.N.Y. Nov. 17, 2010). "[T]he automatic stay allows the bankruptcy court to centralize all disputes concerning property of the debtor's estate in the bankruptcy court so that reorganization can proceed efficiently, unimpeded by uncoordinated proceedings in other arenas." In re Ionosphere Clubs, Inc., 922 F.2d 984, 989 (2d Cir. 1990). But it is well established that the automatic stay is generally "limited to debtors and do[es] not encompass non-bankrupt co-defendants." Teachers Ins. & Annuity Assoc. v. Butler, 803 F.2d 61, 65 (2d Cir. 1986); Queenie, Ltd. v. Nygard Int'l, 321 F.3d 282 (2d Cir. 2003).

- [11] [12] If the automatic stay does apply, a party can request that the court lift it. Section 362(d)(1) of the Bankruptcy Code provides, in relevant part, that "[o]n request of a party in interest and after notice and a hearing, the court shall grant relief from the stay ... (1) for cause " 11 U.S.C. § 362(d)(1). The Bankruptcy Code does not define "cause." In determining whether "cause" exists to lift the stay for prepetition litigation, courts in the Second Circuit consider the following factors (the "Sonnax Factors"):
 - (1) whether relief would result in a partial or complete resolution of the issues,
 - (2) the lack of any connection with or interference with the bankruptcy case,
 - (3) whether the other proceeding involves the debtor as a fiduciary,
- [6] [7] [8] [9] [10] The automatic stay affords "one expertise has been established to hear the cause of action,
 - (5) whether the debtor's insurer has assumed full responsibility for defending the action,

- (6) whether the action primarily involves third parties,
- (7) whether litigation in another forum would prejudice the interests of other creditors,
- (8) whether the judgment claim arising from the other action is subject to equitable subordination,
- (9) whether movant's success in the other proceeding would result in a judicial lien avoidable by the debtor,
- (10) the interests of judicial economy and the expeditious and economical resolution of litigation,
- (11) whether the parties are ready for trial in the other proceeding, and
- (12) the impact of the stay on the parties and the balance

1280, 1286 (2d Cir. 1990); In re N.Y. Med. Grp., PC, 265 B.R. 408, 413 (Bankr, S.D.N.Y. 2001). Not all of the Sonnax Factors are relevant in every case, and "cause" is a broad and flexible concept that must be determined on a case-by-case basis. Spencer v. Bogdanovich (In re Bogdanovich), 292 F.3d 104, 110 (2d Cir. 2002) (citing Mazzeo v. Lenhart (In re Mazzeo), 167 F.3d 139, 143 (2d Cir. 1999)). The moving party bears the initial burden to demonstrate that "cause" exists to lift the stay. See Sonnax, 907 F.2d at 1285; Capital Comm. Fed. Credit Union v. Boodrow (In re Boodrow), 126 F.3d 43, 48 (2d Cir. 1997). "If the movant fails to make an initial showing of cause, however, the court should deny relief without requiring any showing from the debtor that it is entitled to continued protection." In re Sonnax, 907 F.2d at 1285.

2. Security Benefit Is Entitled to the Requested Relief

[17] The Court here looks first to whether the automatic stay bars the litigation contemplated by Security Benefit. Security Benefit seeks to pursue remedies against the Landlord for alleged breaches *734 under the loan documents. The Landlord is not the debtor in this bankruptcy, and the automatic stay is generally "limited to debtors and do[es] not encompass non-bankrupt co-defendants." Feachers Ins. & Annuity Assoc. v. Butler, 803 F.2d at 65; see In re

Calpine Corp., 365 B.R. 401, 408 (S.D.N.Y. 2007). Neither the Debtor, nor the Landlord, has filed a motion asking the Court to extend the protection of the automatic stay to the Landlord. see A.H. Robins Co. v. Piccinin, 788 F.2d 994, 999 (4th Cir. 1986).

While it is true that the Debtor is the tenant on the property in question, Security Benefit argues they are not a necessary party to the foreclosure in New York. See Motion for Stay Relief ¶ 23 (citing KVR Realties, Inc. v. Treasure Star, Inc., 58 N.Y.2d 793, 459 N.Y.S.2d 258, 445 N.E.2d 641, 641-42 (1983)). In fact, Security Benefit has represented to the Court that it will not name the Debtor as a party to the foreclosure action against the Landlord. See Security Benefit's Amended Reply, at $5 \, \P \, 2$. The Landlord nonetheless argues that Security Benefit's proposed course of action will run afoul of the stay. More specifically, the Landlord argues that a foreclosure of the property and subsequent removal of the Landlord will infringe on the Debtor's purchase option the Landlord will infringe on the Debtor's purchase option under the lease, thus impacting property of the bankruptcy

> estate. See Objection ¶¶ 23, 26 (citing Harsh Inv. Corp. v. Bialac (In re Bialac), 712 F.2d 426, 431 (9th Cir. 1983)). But Security Benefit has made it clear that this concern is a hypothetical rather than actual one. Security Benefit has specifically represented in writing and open court that it will not seek to terminate the Debtor's lease with the Landlord, and the purchase option will remain intact. See Security Benefit's Amended Reply, at 5 ¶ 2; see also Motion for Stay Relief, at 2, 4 (referencing the prepetition Subordination, Non-Disturbance and Attornment Agreement (the "SNDA") that protects the Debtor's leasehold even if another party succeeds to the Landlord's interest). Given these facts and the applicable law, Security Benefit agreed at the hearing on this motion that it would need to return to this Court and seek stay relief directly against the Debtor if it intended to terminate the Debtor's lease with the Landlord. So as of today, this motion simply seeks relief against a non-debtor party. It is not surprising, therefore, that the Debtor has not opposed the Stay Relief Motion. The Debtor clearly-and correctly-views this motion as not its fight but rather a dispute between these two non-debtors. Given the record, therefore, the Court agrees that the actions contemplated by Security Benefit would not run afoul of the stay.

[18] Even if the automatic stay somehow would bar the foreclosure action contemplated by Security Benefit, this Court concludes that Security Benefit meets the standard for stay relief under Section 362(d)(1) and the applicable

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Sonnax Factors. As to the first factor, Security Benefit's contemplated litigation against the Landlord would allow Security Benefit to resolve its dispute with the Landlord. As to the second factor, this litigation will not interfere with the bankruptcy case as Security Benefit will not name the Debtor as a party in that litigation, nor will it seek to terminate the Debtor's lease. See Security Benefit's Amended Reply, at 5 ¶ 2. And as explained above, the SNDA entered between *735 the three parties provides that the Debtor's lease would not be affected by the contemplated foreclosure action to be filed by Security Benefit against the Landlord. See Motion for Stay Relief ¶ 33. As to the fourth factor, the state courts have the expertise to handle this type of foreclosure proceeding and, in fact, are the courts that traditionally handle such disputes. As for the sixth factor, this litigation will primarily involve third parties, namely Security Benefit and the Landlord. As to the tenth factor, judicial economy weighs in favor of granting stay relief because the state court is an appropriate forum for the foreclosure to be litigated. Indeed, the contemplated state court action is the most expeditious and economical way to resolve the dispute between these two non-debtors. As to the twelfth factor, a consideration of the harms and the benefits weighs in favor of lifting the stay because the Debtor will not be affected by the litigation, and Security Benefit is harmed by its current inability to exercise its remedies against the Landlord. 4

CONCLUSION

For the reasons set forth above, the Court grants the Debtor's Extension Motion and Security Benefit's Stay Relief Motion. The Court will enter separate orders on each motion consistent with this Decision.

All Citations

635 B.R. 725

Footnotes

- References to the Case Management/Electronic Case Filing ("ECF") docket are to Case No. 21-22623 (SHL) 1 unless otherwise specified.
- 2 This written decision explains in more detail the Court's bench ruling on these motions on January 27, 2022.
- 3 Security Benefit cites Polish Nat'l Alliance v. White Eagle Hall Co., 98 A.D. 2d 400, 406, 470 N.Y.S.2d 642 (N.Y. App. Div. 2d Dep't 1983) for the proposition that "[t]he absence of a necessary party in a foreclosure action simple leaves the party's rights unaffected by the judgment of foreclosure and sale."
- 4 The Court concludes that the other Sonnax Factors either do not apply or do not justify a different result.

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In re Phenomenon Marketing & Entertainment, LLC, Slip Copy (2022)

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2022 WL 3042141 United States Bankruptcy Court, C.D. California, Los Angeles Division.

IN RE: PHENOMENON MARKETING & ENTERTAINMENT, LLC, Debtor and Debtor-in-Possession.

Case No.: 2:22-bk-10132-ER

Attorneys and Law Firms

Michael Jay Berger, Law Offices of Michael Jay Berger, Beverly Hills, CA, for Debtor and Debtor-in-Possession.

Hatty K. Yip, Office of the UST/DOJ, Los Angeles, CA, for U.S. Trustee.

MEMORANDUM OF DECISION REINSTATING DEBTOR'S ELIGIBILITY TO PROCEED UNDER SUBCHAPTER V OF CHAPTER 11

[No hearing required pursuant to Federal Rule of Civil Procedure 78(b) and Local Bankruptcy Rule 9013-1(j)(3)]

Ernest M. Robles, United States Bankruptcy Judge

*1 On April 28, 2022, upon the motion of 5900 Wilshire LLC ("5900 Wilshire"), the Court entered a Memorandum of Decision (the "Memorandum") ¹ and accompanying order (the "Designation Order") ² finding that Phenomenon Marketing & Entertainment, LLC (the "Debtor") was not eligible to proceed either as a Subchapter V debtor or as a small business debtor. The Court ordered that the Debtor's case would proceed under the other applicable provisions of Chapter 11. ³

Before the Court is the Debtor's motion (the "Motion") to reinstate its eligibility to proceed as a small business debtor under Subchapter V in view of the enactment of the *Bankruptcy Threshold Adjustment and Technical Corrections*Act (the "Act"). The Motion is opposed by 5900 Wilshire. 4

Pursuant to Civil Rule 78(b) and LBR 9013-1(j)(3), ⁵ the Court finds the Motion to be suitable for disposition without

oral argument. For the reasons set forth below, the Motion is **GRANTED**, and the hearing on the Motion, set for August 3, 2022 at 11:00 a.m., is **VACATED**.

I. Facts and Summary of Pleadings

The Act alters the definition of "debtor" for purposes of Subchapter V eligibility, and became law on June 21, 2022. The Act provides that the definitional change applies to any case commenced on or after March 27, 2020 that "is pending on the date of enactment of this Act." ⁶

Prior to enactment of the Act, any debtor that was an affiliate of an "issuer," as defined in section 3 of the Securities Exchange Act of 1934 (the "Exchange Act"), was not eligible to proceed under Subchapter V. ⁷ The Exchange Act defines an "issuer" as "any person who issues or proposes to issuer any security." ⁸ The Court found that the Debtor was not eligible to proceed under Subchapter V because it was an affiliate of entities who had issued securities. ⁹

The Act broadens the scope of debtors who are eligible to proceed under Subchapter V. As opposed to excluding from eligibility a debtor who is an affiliate of an issuer, current law excludes only a "debtor that is an affiliate of a corporation" that is "subject to the reporting requirements under section 13 or 15(d)" of the Exchange Act. ¹⁰ Put in plain language, only debtors who are affiliates of publicly-traded corporations are now excluded from proceeding under Subchapter V. Under prior law, debtors could be excluded if they were affiliates of any corporation, even if not publicly-traded, because non-publicly-traded corporations are capable of issuing securities.

*2 As explained in the Memorandum determining that the Debtor was not eligible to proceed under Subchapter V, there is no dispute that the corporations affiliated with the Debtor are *not* publicly-traded. ¹¹

The Debtor moves for an order reinstating its eligibility to proceed under Subchapter V in view of the retroactive changes that the Act made with respect to Subchapter V eligibility. 5900 Wilshire opposes the Motion. Significantly, 5900 Wilshire does not dispute that the Debtor falls within the Act's definition of debtors eligible to proceed under Subchapter V. Instead, 5900 Wilshire argues that the Debtor is barred from seeking to proceed under Subchapter V because it failed to timely appeal the Designation Order. 5900 Wilshire

relies upon Plaut v. Spendthrift Farm, Inc., 514 U.S.

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211 (1995) for the proposition that as applied to the instant case, the Act is unconstitutional, because it requires the Court to revisit the Designation Order, which according to 5900 Wilshire is a final judgment that cannot be modified by retroactive legislation. The Debtor contends that *Plaut* is inapplicable because its request that it be allowed to proceed under Subchapter V does not amount to a request to revisit a final judgment.

II. Findings of Fact and Conclusions of Law

In Plaut v. Spendthrift Farm, 514 U.S. 211 (1995), the Supreme Court considered the constitutionality of the Federal Deposit Insurance Corporation Improvement Act of 1991 (the "FDIC Improvement Act"). The FDIC Improvement Act modified the statute of limitations applicable to certain private civil actions brought under the Exchange Act, such that certain actions that had previously been dismissed with prejudice as time-barred would have to be reopened and litigated. The Supreme Court found that "[b]y retroactively commanding the federal courts to reopen final judgments," the FDIC Improvement Act contravened the Constitution's separation of powers. Plaut, 514 U.S. at 219.

The Court does not agree with 5900 Wilshire's assertion that the Act violates the separation-of-powers principles articulated in Plaut. The Designation Order is not a final judgment of the type considered by the Supreme Court in *Plaut*. The primary effect of the Designation Order, at least as it concerns 5900 Wilshire, is to make it far more difficult for the Debtor to confirm a Chapter 11 Plan over 5900 Wilshire's opposition. If the Debtor were allowed to proceed under Subchapter V, it could confirm a Plan over 5900 Wilshire's opposition as long as the Plan distributed all of the Debtor's projected disposal income to creditors. § 1191(c)(2). By contrast, outside of Subchapter V, the Debtor could confirm a Plan over 5900 Wilshire's opposition only if it satisfied the cram-down provisions specified in § 1129(b). Meeting § 1129(b)'s cram-down provisions is a much higher hurdle for the Debtor to overcome than meeting § 1191(c) (2)'s requirements with respect to the distribution of projected disposal income.

The point is that modifying the Designation Order by allowing the Debtor to proceed under Subchapter V will affect future litigation in this case-specifically, the law that will apply in connection with the confirmation of a Chapter 11 Plan. In this sense the Designation Order differs fundamentally from the final judgments at issue in Plaut.

The retroactive legislation at issue in Plaut would have required the courts to reopen final judgments in cases that had already been dismissed with prejudice. By contrast, modification of the Designation Order will affect future events in this ongoing case that the Court has not yet adjudicated. The Court will be required to determine the law that applies in connection with confirmation of the Debtor's Chapter 11 Plan regardless of what decision it makes on the Debtor's Subchapter V eligibility. Therefore, by retroactively modifying the definition of debtors eligible for Subchapter V, Congress is not commanding the courts to reopen final judgments in violation of the Constitution's separation-ofpowers principles. Congress is instead modifying the law that applies in connection with the Debtor's ongoing attempts to restructure its indebtedness through a Chapter 11 Plan.

*3 5900 Wilshire next argues that the Debtor is precluded from seeking to reinstate its eligibility to proceed under Subchapter V because it failed to timely appeal the Designation Order. In support of this proposition, 5900 Wilshire cites Plotkin v. Pacific Tel. and Tel. Co., 688 F.2d 1291, 1293 (9th Cir. 1982), in which the court held that a plaintiff who had failed to appeal the entry of an order granting summary judgment was not entitled to relief from that order after a decision rendered in connection with a different appeal in the same case cast doubt upon the basis for the entry of summary judgment. The Plotkin court reasoned that "[a]llowing motions to vacate pursuant to Rule 60(b) after a deliberate choice has been made not to appeal, would allow litigants to circumvent the appeals process and would undermine greatly the policies supporting finality of judgments." Plotkin, 688 F.2d at 1293.

Plotkin does not apply because there was no basis for the Debtor to appeal the Designation Order at the time it was entered. The Act, which modified the definition of debtors eligible to proceed under Subchapter V, did not become law until well after the Debtor's period to appeal the Designation Order had expired. Therefore, by failing to appeal the Designation Order, the Debtor was not engaging in an attempt to "circumvent the appeals process" like that engaged in by the plaintiff in *Plotkin*. The Court finds that the concerns motivating the decision in *Plotkin* are inapplicable to the present case, in which the Debtor seeks relief based upon a retroactive change in legislation enacted by Congress.

The only basis for the Court's prior determination that the Debtor was not eligible to proceed under Subchapter V

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was that the Debtor was affiliated with non-publicly-traded corporations. The Act restricts Subchapter V eligibility only to debtors that are affiliates of publicly-traded corporations. There is no dispute that the Debtor is *not* an affiliate of any publicly-traded corporation. 5900 Wilshire has not asserted any reason why the Debtor would not be eligible to proceed under Subchapter V under the broadened definition made applicable by the Act. Because the Court finds that 5900 Wilshire's objections based upon *Plaut* and *Plotkin* are without merit, 5900 Wilshire's opposition to the Motion is **OVERRULED**.

III. Conclusion

Based upon the foregoing, the Motion is **GRANTED**. The Debtor qualifies as a "small business debtor" for purposes of \$101(51D) and is eligible to proceed under Subchapter

V. The Court will enter an order consistent with this Memorandum of Decision.

All Citations

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Footnotes

- 1 Doc. No. 143.
- 2 Doc. No. 144.
- 3 Doc. No. 144.
- 4 The Court reviewed the following pleadings in adjudicating this matter:
 - 1) Motion to Reinstate Debtor's Status as a Subchapter V Debtor [Doc. No. 206] (the "Motion");
 - 2) Objection to Motion to Reinstate Debtor's Status as a Subchapter V Debtor [Doc. No. 209]; and
 - 3) Debtor's Reply to Objection to Motion to Reinstate Debtor's Status as a Subchapter V Debtor [Doc. No. 213].
- Unless otherwise indicated, all "Civil Rule" references are to the Federal Rules of Civil Procedure, Rules 1–86; all "Bankruptcy Rule" references are to the Federal Rules of Bankruptcy Procedure, Rules 1001–9037; all "Evidence Rule" references are to the Federal Rules of Evidence, Rules 101–1103; all "LBR" references are to the Local Bankruptcy Rules of the United States Bankruptcy Court for the Central District of California, Rules 1001-1–9075-1; and all statutory references are to the Bankruptcy Code, 11 U.S.C. §§ 101–1532.
- 6 Act at ¶ 2(h).
- 7 11 U.S.C. § 1182(1)(B)(iii) (version in effect prior to enactment of the Act).
- 8 15 U.S.C. § 78c(a)(8).
- 9 Doc. No. 143 at 4-5.
- 10 11 U.S.C. § 1182(2)(B)(iii) (current version).
- 11 Doc. No. 143 at 7.

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In re Cleary Packaging, LLC, 36 F.4th 509 (2022)

KeyCite Yellow Flag - Negative Treatment
Disagreed With by In re 2 Monkey Trading, LLC, Bankr.M.D.Fla., April 28, 2023

36 F.4th 509

United States Court of Appeals, Fourth Circuit.

IN RE: CLEARY PACKAGING, LLC, Debtor. Cantwell-Cleary Co., Inc., Plaintiff - Appellant,

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

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

Synopsis

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

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

Reversed and remanded with instructions.

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

West Headnotes (16)

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

[2] Bankruptcy Debts and Liabilities Discharged

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

[3] Bankruptcy 🕪 Effect as discharge

Section of Bankruptcy Code governing Subchapter V discharge applies to individual and corporate debtors alike, Code provides for court to grant Subchapter V debtor a discharge of all debts except "any debt" "of the kind specified in" section of Code setting forth the general exceptions to discharge, and although introductory language in that general provision limits its discharge exceptions to "individual" debtors, implying that corporations are not subject to the discharge exceptions, combination of terms "debt" and "of the kind" in Subchapter V discharge provision indicates that Congress intended to reference only the list of nondischargeable debts found in Code's general exception-to-discharge provision, not the class of debtors addressed therein, and to the extent there is tension between the two provisions, Subchapter V provision, as the more specific,

governs. 11 U.S.C.A. §§ 101(41), 523(a), 1182(1), 1192(2).

4 Cases that cite this headnote

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

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

1 Case that cites this headnote

[5] Bankruptcy Preservation of priority

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

[6] Bankruptcy Preservation of priority

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

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

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

1 Case that cites this headnote

[8] Bankruptcy 🕪 Feasibility in general

One of the main features of a proceeding under Subchapter V of Chapter 11 is its authorization of plans that are not consented to by creditors and that depart from the Bankruptcy Code's absolute

priority rule; instead, under the governing rules of a Subchapter V proceeding, the bankruptcy court need only find that such a plan provide that all of the debtor's projected disposable income is paid to creditors for a three-to-five-year period and that it be feasible, thus enabling the owners of a Subchapter V debtor to retain their equity in the bankruptcy estate despite

creditors' objections. 11 U.S.C.A. §§ 1129(b),

1191(c)(2)(A) and (3).

1 Case that cites this headnote

[9] Bankruptcy 🕪 Effect as discharge

Under the specific rules for discharge provided in Subchapter V of Chapter 11, a court is required to grant discharge of all debts after approval of the plan except (1) any debt payable after the three-to-five-year period specified for payment, and (2) any debt "of the kind specified in" the section of the Bankruptcy Code setting forth the general exceptions to discharge. 11 U.S.C.A. §§ 523(a), 1192.

[10] Bankruptcy 🕪 Effect as discharge

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

4 Cases that cite this headnote

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

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

1 Case that cites this headnote

[12] Bankruptcy 🧽 Discharge

In establishing the different Bankruptcy Code chapters, Congress conscientiously defined and distinguished the kinds of debtors covered by each provision; for example, Chapter 7

discharges are explicitly limited to individuals, as are Chapter 13 discharges. 11 U.S.C.A. §§ 109(e), 727(a)(1), 1328.

[13] Bankruptcy 🕪 Effect as discharge

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

2 Cases that cite this headnote

[14] Bankruptcy 🕪 Farmers

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

[15] Bankruptcy • In general; nature and purpose

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

1 Case that cites this headnote

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

Subchapter V proceeding involves a nonconsensual plan, that is, a "cram-down" proceeding, in which stakeholders in the bankruptcy estate are treated differently than they would be in traditional Chapter 11 proceedings under the absolute priority rule.

11 U.S.C.A. §§ 1129(b), 1191(c).

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

Attorneys and Law Firms

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

Before NIEMEYER, MOTZ, and KING, Circuit Judges.

Opinion

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

NIEMEYER, Circuit Judge:

[1] When Cleary Packaging, LLC, filed a petition in bankruptcy under Subchapter V of Chapter 11 as a "small business debtor," seeking to discharge a \$4.7 million judgment that Cantwell-Cleary Co., Inc. had obtained against it for intentional interference with contracts and tortious interference with business relations, Cantwell-Cleary opposed the effort. It argued that 11 U.S.C. § 1192(2), which falls within Subchapter V, provides that small business *512 debtors are not entitled to discharge "any debt ...

of the kind specified in section 523(a) of this title," *id.* § 1192(2), and that § 523(a) in turn lists 21 categories of debt that are non-dischargeable, including debts "for willful and malicious injury by the debtor to another entity or to the property of another entity," *id.* § 523(a)(6). Cleary Packaging argued, however, that because § 523(a)'s list of exceptions to dischargeability is applicable only to "individual debtor[s]," its \$4.7 million debt as the debt of a corporation was not covered by the exception contained in § 1192(2) and therefore was indeed dischargeable. ¹ Cantwell-Cleary responded that because the language of § 1192(2) incorporates *only the list* of debts — debts "*of the kind* specified in section 523(a)" — and *not the class of debtors* addressed by § 523(a), the \$4.7 million debt is non-dischargeable as a debt for willful and malicious injury.

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

Ι

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

judgment in January 2021 against Cleary Packaging and Vincent Cleary Jr. in the aggregate amount of \$4,715,764.98.

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

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

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

Π

[2] In filing its Chapter 11 petition, Cleary Packaging elected to proceed under Subchapter V, and accordingly its discharge of debts is specifically governed by 11 U.S.C. § 1192(2). That section provides: "If the plan of the debtor is confirmed ...

the court shall grant the debtor a discharge of all debts ... except any debt ... of the kind specified in section 523(a) of this title." Section 523(a), which applies to a range of bankruptcy code discharge provisions, including § 1192, provides that discharges in those specified sections "do[] not discharge an *individual debtor* from" a list of 21 types of debt, including a debt "for willful and malicious injury," implying that such exceptions do not apply to corporate debtors. U.S.C. § 523(a) (emphasis added).

The parties do not dispute that Cleary Packaging's \$4.7 million debt created by entry of the state judgment was "for willful and malicious injury" and therefore would qualify as See 11 U.S.C. § 523(a)(6). Rather, the dispute centers on conflicting interpretations of the two relevant provisions — § 1192(2) and $\stackrel{\triangleright}{\sim}$ \$ 523(a) — relating to the *kind of debtor* subject to the discharge exceptions listed in \$\frac{1}{2}\$\§ 523(a). Cleary Packaging, focusing on \$ 523(a), argues that it limits § 1192(2) discharges with respect to the 21 categories of debt only as to individual debtors, and therefore corporate debts of the kind listed remain dischargeable. Cantwell-Cleary, on the other hand, focuses on § 1192(2), which applies to both individual and corporate debtors, and argues that the section excludes from discharge debts of the kind listed in 523(a), regardless of the *class of debtor*, whether individual or corporate. Because § 1192(2) is the specific provision governing discharges in Subchapter V proceedings, Cantwell-Cleary argues that if there is any inconsistency, we should give § 1192(2) precedence over the more general § 523(a) and thereby except Cleary Packaging's \$4.7 million debt from

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

*514 A

in a traditional Chapter 11 proceeding, the debtor submits

and the court approves a plan of reorganization for the distribution of the debtor's estate. And when the creditors withhold their consent, any such plan must be fair and equitable in that it must comply with priority rules that establish a hierarchy of creditor classes for the order in which each class of creditor is to be paid. Thus, higher priority creditors are paid in full before payment is made to lower priority creditors. The rule began with judicial construction and, beginning in 1978, was included in the Bankruptcy Code. See Norwest Bank Worthington v. Ahlers, 485 U.S. 197, 202, 108 S.Ct. 963, 99 L.Ed.2d 169 (1988). Known as the "absolute priority rule," it requires that any plan, to which creditors have not consented, must provide that "a dissenting class of unsecured creditors [be paid] in full before any junior class can receive [payment]." [Id. (citation omitted); In re Maharaj, 681 F.3d 558, 562 (4th Cir. 2012); 11 U.S.C. § 1129(b)(2)(B)(ii). And, as a general matter, any non-consensual plan violating the absolute priority rule may not be approved, nor may a discharge of debts be granted. See 11 U.S.C. § 1129(b)(2)(B)(ii). It can be readily recognized, however, that this strict priority rule could preclude reorganizations in which continuing management of the bankruptcy estate by a business's owners would be essential to a successful reorganization because such owners' retention of estate property would violate the priority rule.

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

[9] Subchapter V also provides specific rules for discharge, [6] First, by way of background, we note that requiring a court to grant discharge of all debts after approval of the plan except (1) any debt payable after the 3- to 5-year

period specified for payment, and (2) any debt "of the kind specified in section 523(a)." 11 U.S.C. § 1192.

В

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

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

To address the question, we begin by focusing on § 1192(2) as the provision specifically governing discharges in a Subchapter V proceeding and on the scope of its incorporation of § 523(a). Section 1192(2) excepts from discharge "any debt ... of the kind specified in section 523(a)." 11 U.S.C. § 1192(2) (emphasis added). The section's use of the word "debt" is, we believe, decisive, as it does not lend itself to encompass the "kind" of debtors discussed in the language of § 523(a). This is confirmed yet more clearly by the phrase modifying "debt"—i.e., "of the kind." Thus, the combination

of the terms "debt" and "of the kind" indicates that Congress intended to reference only the list of non-dischargeable debts notes, this interpretation of "of the kind" is in line "with the ordinary meaning of the word 'kind' as 'category' or 'sort.'" (Citing American Heritage Dictionary of the English Language (online ed.) ("'[a] group of individuals or instances sharing common traits; a category or sort' "); Merriam-Webster Dictionary (online ed.) (" 'a group united by common traits or interests: CATEGORY' ")). In short, while 523(a) does provide that discharges under various sections, including § 1192 discharges, do not "discharge an individual debtor from any debt" of the kind listed, § 1192(2)'s crossreference to \$\frac{1}{2}\$\§ 523(a) does not refer to any kind of debtor addressed by \$\frac{8}{2}\$ \$523(a) but rather to a kind of debt listed in \(\) \(\) \(\) \(\) 523(a). By referring to the kind of debt listed in \(\) \(\) 523(a), Congress used a shorthand to avoid listing all 21 types of debts, which would indeed have expanded the onepage section to add several additional pages to the U.S. Code. Thus, we conclude that the debtors covered by the discharge language of § 1192(2) — i.e., both individual and corporate debtors — remain subject to the 21 kinds of debt listed in 8 523(a).

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

C

[12] [13] The context of § 1192(2) within the Bankruptcy Code and the Bankruptcy Code's structure further support our interpretation. *516 It is readily apparent from a

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

Cleary Packaging's interpretation would also create difficulty in reconciling \$\sqrt{8}\$ \$523(a) with \$\sqrt{1141(d)(6)}\$. Section 523(a) includes in its scope \$\sqrt{1141}\$, just as it includes \$\sqrt{1192}\$ and several other sections, and therefore under Cleary Packaging's interpretation, the list of exceptions to discharge in a traditional Chapter 11 proceeding would govern only individuals by reason of \$\sqrt{8}\$ \$523(a)'s limiting language. Yet, \$\sqrt{1141}\$ incorporates specified debts listed in \$\sqrt{8}\$ \$523(a) to apply to corporate debtors, excluding from discharge debts "of a kind specified in \$\sqrt{9}\$ paragraph (2)(A) or \$\sqrt{2}\$(2)(B) of section 523(a)." 11 U.S.C. \$\sqrt{1141(d)(6)(A)}\$. Cleary Packaging has been unable to reconcile its method for applying \$\sqrt{8}\$ \$523(a) to \$\sqrt{1192}\$ with any consistency as to how it would apply \$\sqrt{8}\$ \$523(a) to \$\sqrt{1141(d)(6)}\$.

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

In addressing the scope of discharge, Chapter 12 provides, in relevant part, that "the court shall grant the debtor a discharge of all debts provided for by the plan ... except any debt ... of a kind specified in section 523(a) of this title." 11 U.S.C. § 1228(a) (emphasis added). This language

in Chapter 12 is virtually identical to the language included in § 1192(2). Moreover, § 523(a) specifically references § 1228(a) discharges, just as it does § 1192 discharges. Yet, the courts construing the scope of § 1228(a) have concluded that § 1228(a)'s discharge exceptions apply to both individual debtors and corporate debtors. See, e.g., Breezy Ridge Farms. 2009 WL 1514671, at *1-2; New Venture P'ship v. JRB Consol., Inc. (In re JRB Consol., Inc.), 188 B.R. 373 (Bankr. W.D. Tex. 1995). Interpreting language virtually identical to that in § 1192(2), the bankruptcy court in \$\frac{1192}{JRB}\$ Consolidated stated that "[t]he wording in § 1228(a)(2) not naturally lend itself to also incorporate the meaning 'for debtors of the kind' referenced in \$523(a)." 188 B.R. at 374. Instead, it stated, "[d]ebts of the kind easily seems to be limited to the subparagraphs of \$\ 523(a)\$ which identify the types of debts which are eligible to be excepted from discharge." Id.; see also Breezy Ridge Farms, 2009 WL 1514671, at *2 (finding that Congress used the define the scope of a Chapter 12 discharge for corporations as well as individuals"). Thus, prior interpretations of § 1228(a) support our interpretation of § 1192(2)'s virtually identical language. See Hall v. United States, 566 U.S. 506, 519, 132 S.Ct. 1882, 182 L.Ed.2d 840 (2012) ("[I]dentical words and phrases within the same statute should normally be given the same meaning" (citations omitted)). To give different interpretations to the same language in the same statute would ignore the rationality of using the same language in describing a different proceeding of the Bankruptcy Code, as was done with the adoption of Subchapter V.

[15] Finally, our interpretation of § 1192(2) in Subchapter V makes particular sense when considering that subchapter's juxtaposition in Chapter 11 with traditional Chapter 11 provisions, reflecting its distinctive purpose within that Chapter. Congress enacted Subchapter V as part of the Small Business Reorganization Act of 2019 with the primary goal of simplifying Chapter 11 reorganizations for small businesses and reducing the administrative costs for those businesses. To do so, Congress deliberately altered the general provisions of traditional Chapter 11 proceedings by, among other things, eliminating the absolute priority rule and limiting the applicability of § 1141(d) to Subchapter V proceedings. Section 1141(d), in particular, sets forth debts

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that are eligible for discharge in a traditional Chapter 11 proceeding, making distinctions between individual debtors and corporate debtors. See Breezy Ridge Farms, 2009 WL 1514671, at *2; cf. JRB Consol., 188 B.R. at 374. In contrast, § 1192 provides benefits to small business debtors, regardless of whether they are individuals or corporations. Thus, an important purpose for Subchapter V would be frustrated were we to adopt Cleary Packaging's interpretation of §§ 1192(2) and 523(a), which would treat individuals and corporations differently.

[16] And as to fairness and equity, it should be recognized that a Subchapter V proceeding involves a non-consensual plan - i.e., a "cram-down" proceeding - in which stakeholders in the bankruptcy estate are treated differently than they would be in traditional Chapter 11 proceedings under the absolute priority rule. Under a Subchapter V plan, owners of a debtor can retain ownership interests to continue conducting the reorganization at the expense of and over the objection of creditors. Given the elimination of the absolute priority rule, Congress understandably applied limitations on the discharge of debts to provide an additional layer of fairness and equity to creditors to balance against the altered order of priority that favors the debtor. To this end, all Subchapter V debtors are textually subject to the discharge limitations described in \$\frac{1}{2}\$\infty\$ 523(a), not just individual Subchapter V debtors. To make a distinction between individuals and corporations for how Subchapter V is applied would not only undermine that balance, but would also make no sense and indeed would create perverse incentives. But most importantly, it would violate the text of § 1192(2).

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

* * *

injury, and the other violations of public policy reflected in

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

REVERSED AND REMANDED

§ 523(a)'s list of exceptions.

All Citations

36 F.4th 509

III

Footnotes

While, for convenience, we use the terms "individual debtor" and "corporate debtor" in a binary fashion, we recognize that Cleary Packaging is a limited liability company under Maryland law. The Bankruptcy Code, however, includes within its definition of "corporation" limited liability companies. See 11 U.S.C. § 101(9) (A).

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

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In re 2 Monkey Trading, LLC, 650 B.R. 521 (2023)

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

IN RE: 2 MONKEY TRADING, LLC, and Lucky Shot USA, LLC, Debtors.

BenShot, LLC, Plaintiff,

2 Monkey Trading, LLC, and Lucky Shot USA, LLC, Defendants.

Case No. 6:22-bk-04099-TPG

| Adversary No. 6:23-ap-00007-TPG

| Signed April 28, 2023

Synopsis

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

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

Motion granted.

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

West Headnotes (3)

[1] Bankruptcy Pleading; dismissal

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

[2] Bankruptcy 🕪 Pleading; dismissal

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

[3] Bankruptcy Debts and Liabilities Discharged

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

Attorneys and Law Firms

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

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

Tiffany P. Geyer, United States Bankruptcy Judge

On February 13, 2023, Plaintiff, BenShot, LLC, filed a Complaint (Doc. No. 1) commencing this adversary proceeding against Defendants, 2 Monkey Trading, LLC and Lucky Shot USA, LLC, which Plaintiff subsequently amended on February 14, 2023 (Doc. No. 3). Defendants filed a motion to dismiss (Doc. No. 5), arguing that both the initial Complaint (and thus the Amended Complaint) are untimely ("the Motion") under Federal Rule of Bankruptcy Procedure 4007(c). (Doc. No. 5.) Plaintiff filed a Response (Doc. No. 6)

to the Motion, Defendants filed a Reply (Doc. No. 12), and a hearing was held on April 19, 2023 (Doc. No. 15). Because a factual issue exists regarding whether Plaintiff reasonably relied upon the deadline for filing a complaint under 11 U.S.C. § 523 as set forth in the Notices of Commencement issued by the Clerk in Defendants' bankruptcy cases when Rule 4007(c) established a different (and earlier) deadline, the Court determined an evidentiary hearing was necessary (Doc. No. 15).

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

[3] A few days prior to the hearing on the Motion, Defendants filed a Notice of Supplemental Authority (Doc. No. 13), citing a recent decision issued by Judge Jason A. Burgess in *Nutrien Ag Solutions, Inc. v. Hall, et al. (In re Hall)*, Ch. 11 Case No. 3:22-bk-01326-BAJ, Ch. 11 Case No. 3:22-bk-01341-BAJ, Adv. No. 3:22-AP-00062-BAJ, 2023 WL 2927164 (Bankr. M.D. Fla. Apr. 13, 2023), in which Judge Burgess squarely addressed the same issue before this Court—whether the

also in Subchapter V cases filed by corporate debtors that receive a discharge under § 1192. Hall, No. 3:22-AP-00062-BAJ, 2023 WL 2927164, at *1. Judge Burgess examined the decisions of the handful of other bankruptcy courts to visit this emerging issue, each of which concluded that the § 523(a) discharge exceptions do *not* apply in Subchapter V cases filed by corporate debtors that receive a discharge under § 1192. 2 Id. at *3. He also examined, and rejected, the reasoning of a decision of the Fourth Circuit Court of Appeals in Cantwell-Cleary Co. v. Cleary Packaging, LLC (In re Cleary Packaging, LLC), 36 F.4th 509, 514 (4th Cir. 2022), apply to corporations receiving a discharge under § 1192. Hall, No. 3:22-AP-00062-BAJ, 2023 WL 2927164, at *3-4. This Court agrees with and adopts Judge Burgess's analysis of the Fourth Circuit's decision in Cleary.

only in Subchapter V cases filed by individual debtors, or

In siding with the bankruptcy courts on this issue, Judge Burgess relied upon the longstanding rules of statutory construction. Id. at *3-4. When Congress created Subchapter 523(a) to incorporate a reference to 1192 and now states, "A discharge under section 727, 1141, 1192[,] 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt" and lists nineteen such exceptions. U.S.C. § 523(a) (emphasis added). "If Congress intended for § 523(a) exceptions to apply to corporations receiving a discharge under § 1192, th[e] addition [of the reference to § 1192] was unnecessary." Hall, No. 3:22-AP-00062-BAJ, 2023 WL 2927164, at *3 (citing GFS Indus., 647 B.R. at 343). Indeed, § 1192(2) compels the reader to examine \(\bigcap_{\subset}^{\infty}\) 523(a), which, as noted above, expressly does not discharge an individual debtor from certain enumerated debts and is silent about corporate debtors.

Based on Judge Burgess's decision in *Hall* and the same conclusions reached by other bankruptcy courts, the Court agrees with Defendants that the Amended Complaint must be dismissed. *See GFS Indus.*, 647 B.R. at 344 ("[T]he statutory language along with the broader Chapter 11 statutory scheme mandate this Court's holding that corporate debtors proceeding under Subchapter V cannot be made defendants in \$523 dischargeability actions."); *Lapeer Aviation*, No. 21-31500-JDA, 2022 WL 1110072, at *2 (holding that

In re 2 Monkey Trading, LLC, 650 B.R. 521 (2023)

because a corporate defendant proceeding under Subchapter V is "not an individual debtor, actions under \$\sim_{\}\$ 523(a) are not applicable to it[]"); *Rtech Fabrications*, 635 B.R. at 566 (finding "that \$\sim_{\}\$ 523(a)'s discharge exceptions only apply to an individual debtor and \$\\$ 1192(2)'s reference to \$\sim_{\}\$ 523(a) does not expand its applicability to entity debtors[]"); *Satellite Rests.*, 626 B.R. at 873 (holding that \$\sim_{\}\$ 523(a) applies only to individuals, and not to corporations proceeding under Subchapter V).

Because Defendants are limited liability corporations, the exceptions to discharge in \(\bigcirc \sqrt{523(a)} \) do not apply. Therefore, the Amended Complaint is dismissed for failure to state a claim, mooting the issue of whether the complaints were untimely. The evidentiary hearing set for July 12, 2023, to determine the factual issue of whether Plaintiff

reasonably relied upon the Clerk's Notices of Commencement to establish the complaint deadline versus Rule 4007(c) is cancelled

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

- 1. The Motion (Doc. No. 5) is **GRANTED**;
- 2. The Amended Complaint is **DISMISSED WITH PREJUDICE**; and
- 3. The evidentiary hearing scheduled for July 12, 2023, is **CANCELLED**.

ORDERED.

All Citations

650 B.R. 521

Footnotes

- 1 Case No. 6:22-bk-04099-TPG, Doc. No. 13 at 2; Case No. 6:22-bk-04100-TPG, Doc. No. 15 at 2.
- Avion Funding, LLC v. GFS Indus., LLC (In re GFS Indus., LLC), 647 B.R. 337, 344 (Bankr. W.D. Tex. 2022), motion to certify appeal granted, No. 22-50403-CAG, 2023 WL 1768414 (Bankr. W.D. Tex. Feb. 3, 2023); Jennings v. Lapeer Aviation, Inc. (In re LaPeer Aviation, Inc.), No. 21-31500-JDA, Adv. No. 22-03002, 2022 WL 1110072 (Bankr. E.D. Mich. Apr. 13, 2022); Catt v. Rtech Fabrications, LLC (In re Rtech Fabrications, LLC), 635 B.R. 559 (Bankr. D. Idaho 2021); Gaske v. Satellite Rests. Inc. (In re Satellite Rests. Inc.), 626 B.R. 871 (Bankr. D. Md. 2021).

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Hon. James L. Garrity is a U.S. Bankruptcy Judge for the Southern District of New York in New York, sworn in on Feb. 17, 2015. Previously, he was a partner in the law firm of Morgan Lewis & Bockius LLP and co-head of its Bankruptcy & Restructuring group, where his practice included the representation of debtors, creditors, and other parties in chapter 11 cases and out-of-court restructurings. Prior to joining Morgan Lewis & Bockius, Judge Garrity was a partner at Shearman & Sterling LLP in its Financial Restructuring & Insolvency Group, and before that he served as a U.S. Bankruptcy Judge in the Southern District of New York from July 1991 to December 1999. Prior to his first term on the bench, he served as an assistant U.S. attorney for the Southern District of New York, inlcuding serving as chief of the office's Tax & Bankruptcy Unit, and was an associate at the New York law firm of Andersen, Russell, Kill & Olick, P.C. Judge Garrity is a Fellow in the American College of Bankruptcy, a member of the American Law Institute and a member of the International Insolvency Institute. He is also an adjunct professor at St. John's University School of Law's LL.M. in Bankruptcy program. Judge Garrity received his B.A. from the College of the Holy Cross in 1977, his J.D. from St. John's University School of Law in 1980 and his LL.M. in Taxation from New York University School of Law in 1986.

Marc E. Hirschfield is a partner with Royer Cooper Cohen Braunfeld LLC in New York and regularly represents parties in bankruptcy proceedings and related litigation throughout the country. He focuses his practice on bankruptcy, business restructuring, creditors' rights, litigation and debt finance. Mr. Hirschfield is also an accomplished debt-finance attorney and regularly represents lenders and borrowers in a variety of debt-finance transactions, including secured, unsecured, unitranche, firstlien/second-lien and senior/mezzanine structures in the forms of term loans, revolving facilities and asset-backed loan facilities. In addition, he is a court-certified mediator and is appointed to mediation panels formed by the U.S. Bankruptcy Courts for the District of Delaware and for the Southern and Eastern Districts of New York. Mr. Hirschfield has been recognized by The Best Lawyers in America for Bankruptcy Litigation for the fifth consecutive year and by New York Super Lawyers since 2011. He is a member of ABI and the Turnaround Management Association, for which he serves on the board of directors for its New York Chapter. Mr. Hirschfield serves as pro bono general counsel to and as captain of the Chappaqua Volunteer Ambulance Corps (CVAC), and he is CVAC's First Lieutenant and a member of its board of directors. He also is a New York State Certified Emergency Medical Technician and is included in the National Registry of Emergency Medical Technicians. Mr. Hirschfield received his B.A. with honors and Phi Beta Kappa in 1989 from the State University of New York at Binghamton, and his J.D. magna cum laude in 1992 from the State University of New York at Buffalo School of Law, where he was editor of the Buffalo Law Review and a member of the Moot Court Board.

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support group, where he specialized in complex litigation cases and valuation matters. Mr. Persing held a senior position with a publicly traded company during its chapter 11 and chapter 7 proceedings, and assisted in many aspects of the bankruptcy proceedings. He provided extensive litigation support in various matters for the chapter 7 trustee, including a successful \$320 million preference and contract dispute adversary action. He also handled corporate development and M&A assignments for a publicly traded telecommunications company, where he dealt extensively with troubled investments and contract dispute resolution. Mr. Persing held a 14-year tenure in the radio and media industry in various financial and operational capacities, providing M&A, financing and post-acquisition restructuring services. He also spent four years with a Philadelphia-based regional public accounting firm, where he provided accounting and management services to numerous companies in the entertainment, media and nonprofit industries. In addition, he has served as a volunteer and director for the Support Center for Child Advocates, which provides legal assistance and social service advocacy for abused and neglected children in Philadelphia County. Mr. Persing received his B.S. in business administration in accounting from Drexel University.

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