RECENT DEVELOPMENTS IN SUBCHAPTER V CASES

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It has been over three years since Subchapter V of Chapter 11 went into effect and it has proven to be effective and timely revision to Chapter 11, providing small businesses an opportunity to reorganize in these very difficult times. Its impact was aided by the CARES Act of 2020 that increased the debt limit from $2,725,625[1] to $7,500,000 effective March 27, 2020, and extended to June 21, 2024.

According to statistical information provided by the U.S. Trustee office, in 2022, 35.7% of the Chapter 11 cases with business debts were Subchapter V cases. Based on statistics provided by the U.S. Courts through the end of February 2023, Subchapter V cases have had approximately double the percentage of confirmed plans and half the percentage of dismissals in comparison to other non-subchapter V small business cases. Also, during 2020-2022, the median months to confirmation of Subchapter V plans has been 6.3 months as compared to 10.4 months for non-subchapter V small business cases and nearly 70% of the confirmed Subchapter V plans have been consensual plans.

A. LEGISLATION

1. ***Small Business Reorganization Act of 2019*, Pub. L. 116-54, 133 Stat. 1079 (Aug. 23, 2019) (effective February 19, 2020).**

2. ***Coronavirus Aid, Relief, and Economic Security (CARES) Act of 2020*, Pub. L. No. 116-136, 134 Stat. 281 (effective March 27, 2020) (increased the debt limits for a Subchapter V debtor to $7,500,000 until March 27, 2022 as extended by COVID-19 Bankruptcy Relief Extension Act of 2021, Pub. L. No. 117-5 (Mar. 27, 2021).**

3. ***Consolidated Appropriations Act*, Pub. L. 116-260 (effective Dec. 27, 2020)(added (i) subsections (B) and (C) to Code § 365(d)(3) to allow courts to temporarily extend the time for performance of lease obligations for Subchapter V debtors relating to unexpired nonresidential real property leases to 120 days, provided the debtor is experiencing material financial hardship due to COVID-19, and (ii) amended Code § 365(d)(4) to extend the initial deadline for any debtor to assume or reject an unexpired lease of nonresidential real property by an additional ninety days to a total**

[1] 11 U.S.C. §101(51D).

of 210 days after the petition date (potentially 300 days total).

4. ***Bankruptcy Threshold Adjustment and Technical Corrections Act, Pub. L.* 117-151 (June 21, 2022)(Amends Code § 1182(1) to reset debt limit for Subchapter V at $7,500,000 to be made retroactive to cases filed after March 27, 2020; Amends Code § 109(e) to combine secured and unsecured debt in Chapter 13 cases to $2,750,000; both to sunset in two years after enactment.)**

B. APPLICATION TO PENDING CASES

1. *In re Seven Stars on Hudson Corp*., 618 B.R. 333 (Bankr. S.D. Fla. 2020)

Issue: Can a debtor in a pending Chapter 11 case amend its petition to make a Subchapter V election?

Holding: Bankr. Rule 1009 does not prevent debtor from amending its petition to elect Subchapter V, but in this case the deadlines for holding a status conference and filing a plan had passed and Code §§ 1188(b) and 1189(b) do not allow extensions unless the need is attributed to circumstances for which the debtor is not "justly accountable." This standard is higher than "cause" and in this case the delay was within the debtor's control.

Accord In re Greater Blessed Assurance Apostolic Temple, Inc., 624 B.R. 742 (Bankr. M.D. Fla. 2020)(debtor's election is too late to file a plan); *In re Double H Transportation*, 614 B.R. 552 (Bankr. W.D. Tex. 2020); *In re Body Transit*, 613 B.R. 400 (Bankr. E.D. Pa. 2020)(debtor could file plan within deadline).

Contra In re Easter, 2020 WL 6009201 (Bankr. N.D. Miss. 2020) ("Debtor's inability to meet the deadlines imposed under SBRA . . .constitutes circumstances for which they should not be held accountable"); *In re Blanchard,* 2020 WL 4032411 (Bankr. E.D. La. 2020)("there are no bases in law or rules to prohibit a resetting or rescheduling of these procedural matters" quoting *Progressive Solutions); In re Bonert*, 619 B.R. 248 (Bankr. C.D. Calif. 2020)(no prejudice to creditors to allow election); *In re Trepetin*, 617 B.R. 814 (Bankr. Md. 2020)(debtor could extend deadlines because new statute was beyond the debtor's control); *In re Progressive Solutions*, 615 B.R. 894 (Bankr. C.D. Calif. 2020)(new statute applied to pending cases); *In re Twin Pines*, LLC, 2020 WL 5576957 (Bankr. N.M. 2020); *In re Deidre Ventura*, 615 B.R. 1 (Bankr. E.D.N.Y. 2020); *In re Bello*, 613 B.R. 894 (Bankr. E.D. Mich. 2020)(ok to amend after plan deadline).

C. CONVERSION AND DISMISSAL

1. *In re Bin Hao*, 644 B.R. 339 (Bankr. E.D. Vir. 2022)

Issue: Whether Debto'r Subchapter V case should be dismissed or converted.

Holding: Debtor's bad faith conduct warranted conversion or dismissal of case under Subchapter V of Chapter 11 for "cause," where (i) debtor did not accurately and timely disclose all of his assets and was on his fourth set of schedules, each amendment being prompted by inquiries from the United States Trustee (UST) or the Subchapter V trustee, (ii) debtor had acknowledged that he needed to amend his schedules again to disclose, inter alia, cryptocurrency accounts, (iii) debtor had stated "none" when asked about transfers to family members when, in fact, he transferred funds to his cousin on two occasions, (iv) debtor's testimony that he understood the term transfers of "property" to be limited to transfers of real property was not credible because debtor was highly financially sophisticated, and (v) debtor had failed to pay post-petition domestic support obligations. Further, debtor's amended plan could not be confirmed on good faith grounds, demonstrating the absence of a reasonable likelihood of rehabilitation that supported conversion or dismissal of case for "cause," as debtor proposed to make a distribution to his unsecured creditors of one and a half cents on the dollar over a five-year period, which was a meaningless distribution, and debtor's amended plan was a liquidating plan, but his domestic support obligations and tax debt were both nondischargeable and would be nondischargeable under Chapter 7 as well. Conversion to Chapter 7 for "cause," rather than dismissal of debtor's case under Subchapter V of Chapter 11, was in the best interests of the creditors, as dismissal without prejudice would only invite debtor to file the same case a second time and there would be no resolution of creditors' claims outside of bankruptcy, whereas Chapter 7 trustee could evaluate the claims objectively and pursue them if they were available for the benefit of the creditors.

2. *In re National Small Business Alliance, Inc.*, 642 B.R. 345 (Bankr. D.C. 2022)

Issue: Whether Court can revoke Subchapter V designation.

Holding: A court cannot order a Subchapter V debtor to convert to a "standard" Chapter 11, but instead must order the debtor's petition to be amended to revoke the election to proceed under Subchapter V. The ability to revoke a Subchapter V election is consistent with the Bankruptcy Code and the Congressional goals of ensuring that Subchapter V cases provide a quicker reorganization process. If a debtor discovers post-petition that it is unable to meet the deadlines of Subchapter V, the option to revoke such designation provides the ability to continue to attempt to reorganize under the rigors and requirements of standard chapter. In this case, post-petition revocation of Chapter 11 debtor's election to proceed under Subchapter V was warranted, with appointment of Chapter 11 trustee immediately upon revocation, since debtor had committed client base with significant potential for growth, debtor's case did not progress with expediency Subchapter V case was expected to achieve, debtor's five attempts to propose confirmable plan were unsuccessful, case was largely dominated by two very active creditors attempting to litigate claims amongst themselves and against debtor without regard to debtor's estate as whole or its clients, and debtor remaining in Chapter 11 rather than liquidating under Chapter 7 or case being

dismissed was best interest of creditors and estate.

3. *In re Outta control Sportfishing, Inc*642 B.R. 180 (Bankr. S.D. Fla. 2022)

Issue: Whether Subchapter V case should be dismissed.

Holding: There is no particular test for determining whether debtor has filed Chapter 11 petition in bad faith, as may warrant dismissal for "cause"; instead, the determination of cause is subject to judicial discretion under the circumstances of each case. In determining bad faith in filing Chapter 11 petition, courts may consider the following factors: (1) debtor has only one asset in which it does not hold legal title; (2) debtor has few unsecured creditors whose claims are small in relation to claims of secured creditors; (3) debtor has few employees; (4) property is subject of foreclosure action as result of arrearages on debt; (5) debtor's financial problems involve essentially dispute between debtor and secured creditors which can be resolved in pending state court action; and (6) timing of debtor's filing evidences intent to delay or frustrate legitimate efforts of debtor's secured creditors to enforce their rights. In this case, corporate debtor that operated sport fishing charter business filed bankruptcy petition under Subchapter V of Chapter 11 in bad faith, warranting dismissal for "cause," where petition was filed as a result of two-party dispute for sole purpose of gaining advantage in foreclosure action for nonpayment of disputed preferred ship mortgage by avoiding posting of bond in order to regain possession of arrested vessel, timing of bankruptcy filing suggested an intent to forum shop, and debtor had very few assets or creditors and had only one employee.

4. *In re Ozcelebi*, 639 B.R. 365 (Bankr. S.D. Tex. 2022)

Issue: Whether Subchapter V case should be converted to Chapter 7.

Holding: (1) United States Trustee (UST) failed to demonstrate "cause" to convert or dismiss debtor's case filed under Subchapter V of Chapter 11 based on substantial or continuing loss to the estate or diminution in value of the estate. Although UST asserted that, inter alia, debtor received distributions from various trusts throughout pendency of bankruptcy case, debtor's schedules identified the trusts as spendthrift trusts, court was unable to conclude that debtor was entitled to receive or received disbursements within 180 days of filing his bankruptcy petition, and UST offered no evidence establishing that the trusts had any net income post-bankruptcy.

(2) UST established "cause" to convert or dismiss debtor's case for gross mismanagement of the estate based on numerous inaccuracies in debtor's monthly operating reports, overdrafts of his debtor-in-possession account, $22,698.58 in unaccounted for cash withdrawals, and $5,000 reported as Subchapter V trustee fees when trustee was never actually paid, which, taken together, left the court and all parties in interest with an inaccurate picture of debtor's financial condition.

(3) Debtor's bad faith established "cause" for conversion or dismissal of case . Debtor's schedules and statement of financial affairs were not true, complete, or correct; debtor failed to disclose several insurance policies in his name; failed to disclose his business connection to limited liability company of which he was a member; withheld information regarding credit cards; failed to disclose his possession and control of vehicle that was owned by his medical clinic; concealed the true value of assets in which he had an interest, including interests in trusts which

debtor denoted as "unknown" when debtor never attempted to value his interest in the trusts; and evidence demonstrated that the trusts were in fact of significant value with debtor averaging about $190,000 in trust distributions per year for recent two-year period; and debtor inflated his liabilities to mislead creditors and avoid the appearance of a two-party dispute.

(4) Conversion of case under Subchapter V of Chapter 11 to Chapter 7, after finding "cause" based on debtor's bad faith, was in the best interests of creditors and the estate, rather than dismissal. Dismissal of the case was unlikely to result in recovery for debtor's unsecured creditors, and given the numerous findings of bad faith and misconduct in the case, a Chapter 7 trustee was in the best position to supervise the estate to ensure the protection of both the estate and the interest of debtor's creditors.

5. ***In re Pittner*, 638 B.R. 255 (Bankr. D. Mass. 2022)**

Issue: Whether case should be converted to Chapter 7 or dismissed.

Holding: Debtor's failure to comply with order to file either a motion to employ a real estate broker or a motion to sell real property, after failing to provide compelling or satisfactory reason for not selling the property during the bankruptcy case, established "cause" to dismiss or convert case under Subchapter V of Chapter 11 to Chapter 7.

6. ***In re Keffer*, 628 B.R. 897 (Bankr. S.D. W.Vir. 2021)**

Issue: Could debtor convert from Chapter 13 to Subchapter V and then extend the Subchapter V deadlines?

Holding: Debtor qualified for conversion under Code § 1307(d) and the amended proof of claim by the IRS was not within the debtor's control and thus the debtor is eligible for Subchapter V because an extension of the deadlines under Code § 1188 and 1189 are appropriate.

D. ELIGIBILITY

1. ***In re Quadruple D Trust*, 639 B.R. 204 (Bankr. D. Colo. 2022)**

Issue: Whether spendthrift trust was eligible for Subchapter V.

Holding: Debtor was a spendthrift trust created under Colorado law and filed for Subchapter V of Chapter 11. The Court held that the debtor was not a "business trust" eligible for Subchapter V. The trust agreement stated that it was created as irrevocable trusts for the primary benefit of the family of settlor, and all the beneficiaries of the trust were family members, which suggested that the trust was a typical family trust, and beneficiaries did not put their capital at risk and trust agreement did not identify the beneficiaries' respective ownership interests in the trust, which suggested the impossibility of any transfer of interests. Additionally, the trust agreement expressly identified its purpose of this trust is to acquire and hold residential real property for the benefit of the beneficiaries, mentioning nothing about conducting any business activities.

2. ***In re RS Air, LLC*, 638 B.R. 403 (9th Cir. BAP 2022)**

Issue: Whether debtor was eligible for Subchapter V.

Holding: A limited liability company is a "person," for purposes of determining debtor's eligibility to proceed under Subchapter V of Chapter 11. Debtor need not be maintaining its core or historical operations on petition date to be eligible to proceed under Subchapter V of Chapter 11, but it must be presently engaged in some type of commercial or business activities. Profit motive was not required for debtor to be eligible to proceed under Subchapter V of Chapter 11.

3. ***In re Ventura*, 638 B.R. 499 (E.D.N.Y. 2022)**

Issue: Whether individual debtor should be allowed to amend her petition to proceed under Subchapter V.

Holding: Bankruptcy Court abused its discretion by overruling mortgagee's objection to motion by individual Chapter 11 debtor to amend her petition, designate herself as a Subchapter V debtor under the Small Business Reorganization Act, which had not been in effect on the petition date, and modify her mortgage. The belated amendment filed nearly 16 months after the case was commenced caused substantial prejudice to mortgagee, which had spent considerable resources to get to point at which it was poised to confirm its competing, unopposed plan and amendment ended mortgagee's right to pass any plan, thereby completely changing its rights as a creditor and resetting "litigation posture" of proceedings. Further the prejudice to debtor did not outweigh prejudice to mortgagee, since, if modification were denied, debtor's interests would still be protected by Chapter 11.

4. ***In re Rickerson*, 636 B.R. 416 (Bankr. W.D. Pa. 2021)**

Issue: Whether medical doctor who was a part time employee of a health care provider qualified for Subchapter V.

Holding: An employee of a business owned by someone else does not qualify the debtor to be a small business debtor under Code § 1182(1)(A). The debtor was a physician who owned a medical practice that had closed some years before the petition date.

5. ***In re Vertical Mac Construction, LLC*, 2021 WL 3668037 (Bankr. M.D. Fla. July 23, 2021)**

Issue: Whether debtor that was no longer operating was eligible to use Subchapter V to liquidate.

Holding: Debtor who had ceased operations in Oct. 2020 was eligible to file Subchapter V in April 2021 to liquidate its assets. At the filing date, the debtor maintained business bank accounts, had accounts receivable, worked with insurance adjusters and insurers to address prepetition insurance claims, and was preparing assets for sale. Subchapter V eligibility is limited to a "person engaged in commercial or business activities." "Commercial or business" means dealings or

transaction of an economic nature. "Activities" requires behavior, actions, or acts. Under these definitions, the debtor's conduct on the petition date included commercial or business activities and is therefore eligible for subchapter V. Operations are not required.

6. ***In re Port Arthur Steam Energy, L.P.*, 2021 WL 277993 (Bankr. S.D. Tex., July 1, 2021)**

Issue: Whether debtor that was no longer operating was eligible for Subchapter V.

Holding: The debtor was still "engaged in commercial or business activities" even though it was no longer involved in the business of producing and selling steam and electricity since it was actively pursuing litigation against a third party. Also, nothing prohibits a Subchapter V debtor from filing a liquidation plan.

7. ***In re Blue*, 630 B.R. 179 (Bankr. M.D.N.C. May 7, 2021)**

Issue: Whether debtor was eligible for Subchapter V.

Holding: Debtor that was no longer operating was "engaged in commercial or business activities" even though most of her debt was from a consulting company that she had owned and was no longer in business. The business debts do not have to be from the current business.

8. ***In re Offer Space, LLC*, 629 B.R. 299 (Bankr. D. Utah Apr. 22, 2021)**

Issue: Whether debtor was engaged in commercial or business activities when primary asset had been sold.

Holding: Debtor's actions in winding down it business constitutes "commercial or business activities." *Accord, In re Ikalowych*, 2021 WL 1433241 (Bankr. D. Colo. Apr. 15, 2021) (Individual debtor's wind-down of pass through LLC that owned 30 percent of a different LLC was eligible for Subchapter V)

9. ***In re Enkogs, LLC*, 626 B.R. 860 (Bankr. M.D. Fla. Apr. 20, 2021)**

Issue: Whether debtor, which operated a 79-room hotel, was a "single asset real estate" debtor and thus not qualified to file under Subchapter V.

Holding: The Debtor's hotel was not a "single asset real estate" because in connection with operating the hotel, the Debtor provided room cleaning and laundry services, internet/wi-fi services, phone, parking and business services, and complimentary breakfast and swimming and fitness center.

10. ***In re McGrath*, 2021 WL 1784079 (Bankr. M.D. Fla. Mar. 16, 2021)**

Issue: Whether debtors, whose primary activity was owning a three parcels of real property, were "single asset real estate" debtor and thus not qualified to file under Subchapter V.

Holding: The debtors were eligible because "single asset real estate" requires substantially all of the gross income of the debtor to be generated from that property, and in this case, there was no common plan regarding the three parcels and the rent generated by the commercial property had been previously seized by the lender and were not property of the estate.

11. ***In re Thurmon*, 625 B.R. 417 (Bankr. W.D. Mo. Dec. 8, 2020)**

Issue: Whether debtors, whose business had closed prior to the petition date, were engaged in commercial or business activities.

Holding: Court held that "engaged in" is present tense and thus "if Congress had intended to make all debtors with business debts below the debt cap eligible for Subchapter V small business relief regardless of whether the business was still operating, it could have done so." Thus, the court sustained the UST's objection to the Debtors' Subchapter V election but overruled the UST's objection to confirmation of the Debtors' chapter 11 plan for failure to file a disclosure statement because the requirement to file a disclosure statement has either been waived or is not applicable under the unusual circumstances of this case. *Accord, In re Johnson*, 2021 WL 825156 (Bankr. N.D. Tex. Mar. 1, 2021) (defunct company went out of business over a year prior to filing and debtor was merely an officer of the company).

12. ***In re Serendipity Labs, Inc.*, 620 B.R. 679 (Bankr. N.D. Ga. 2020)**

Issue: Whether debtor was eligible under Subchapter V when more than 20% of debtor's voting stock was held by a company whose stock was publicly traded on stock exchange.

Holding: Subchapter V excludes from eligibility any debtor that "is an affiliate of an issuer, as defined in section 3 of the Securities Exchange Act of 1934 (15 U.S.C. 78c)." 11 U.S.C. § 1182(1)(B)(iii). Because Steelcase is an "issuer," Debtor is ineligible to proceed under Subchapter V if it is an affiliate of Steelcase. Code § 101(2)(A) defines "affiliate" as an "entity that directly or indirectly owns, controls, or holds with power to vote, 20 percent or more of the outstanding voting securities of the debtor." Steelcase owns more than 27% of Debtor's voting securities and is therefore an affiliate of Debtor.

13. ***In re Ellingsworth Residential Community Assoc*, 619 B.R. 519 (Bankr. M.D. Fla. 2020)**

Issue: Whether non-profit entity is eligible for Subchapter V.

Holding: Non-profit community association was a commercial business activity even though it does not make a profit. "No profit motive is required."

14. ***In re 305 Petroleum, Inc.*, 622 B.R. 209 (Bankr. N.D. Miss. Oct. 27, 2020)**

Issue: Whether debtor must count debts of affiliate in whether debtor is eligible for Subchapter V when affiliate is a single asset real estate and will not be filing Subchapter V.

Holding: Code § 101(51D) requires the debts of "all its affiliates" to be included in the debt threshold, even if the affiliate will not be a Subchapter V debtor.

15. ***In re Parking Management*, 620 B.R. 544 (Bankr. Md. Aug. 28, 2020)**

Issue: Whether debt amount includes rejection damages under lease and PPP loan.

Holding: Lease rejection damages in the amount of $1.7 million for the rejection of twelve parking lots should not be included in calculating the amount of debt for the purposes of eligibility for Subchapter V because the amount is determined as of the petition date and not the date of rejection. Also PPP loan claim for $1.8 million was an unliquidated claim.

16. ***In re Blanchard*, 2020 WL 4032411 (Bankr. E.D. La. July 16, 2020)**

Issue: Whether debtor must be currently engaged in commercial business activities to qualify as a Subchapter V debtor.

Holding: Under the statute for small business under Subchapter V, the debtor does not have to be currently engaged in commercial or business activities. *Accord In re Wright*, 2020 WL 2193240 (Bankr. D.S.C. 2020).

E. EMPLOYMENT ISSUES

1. ***In re Aknouk*, 2023 WL 2344268 (Bankr. S.D.N.Y. Mar. 3, 2023)**

Issue: Whether patient care ombudsman should be appointed in Subchapter V case.

Holding: The fact that this 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.

2. ***In re 218 Jackson LLC*, 631 B.R. 937 (Bankr. M.D. Fla. 2021)**

Issue: Whether cause existed to remove Subchapter V trustee.

Holding: Professionals engaged in conduct of bankruptcy case should be free of slightest personal interest which might be reflected in their decisions concerning matters of debtor's estate or which might impair high degree of impartiality and detached judgment expected of them during the court of administration. It is not the role of a Subchapter V trustee to thwart debtor's efforts to reorganize and to take the side of secured creditors; rather, the trustee is to try to bring the parties together, to

facilitate a consensual plan. Subchapter V trustee in this case was not disinterested for the following reasons: (i) trustee represented creditor in another bankruptcy case that was actively pursuing litigation against owner and manager of debtor, (ii) even if his interest was indirect, and so would be treated as equivalent of equity security holder, creditor was materially adverse to debtor's principal, as he had sued bankrupt airline and debtor's principal, who was chair of airline's board of directors, for misappropriation of trade secrets, it had obtained stay relief to continue its litigation against debtor's principal, and it had substantial claim, seeking over $12 million in its complaint and $25 million in airline's bankruptcy, and (iii) trustee had been openly and actively adverse to debtor since case's inception. Further the court denied Subchapter V trustee's request for compensation totaling $11,870 and ordered disgorgement of all monthly amounts received to date due to trustee's conflict, his requested fees were not reasonable or necessary, as his services had only hindered the process, and his services were not reasonably likely to benefit the estate.

3. ***In re Golden Fleece Beverages, Inc*.**, **2021 WL 6015422 (Bankr. N.D. Ill., Nov. 24, 2021)**

Issue: Whether the post-petition retainer in the amount of $70,000 for the employment of debtor's counsel was permissible under the Bankruptcy Code.

Holding: In overruling the objection of the U.S. Trustee to the debtor's application to employ bankruptcy court with a $70,000 post-petition retainer, the Bankruptcy Court held that Code 363(b) can be used as the basis of a court's authorization to use property of the estate to pay a postpetition retainer to a debtor in possession's chosen professional.

4. ***In re Ozcelebi***, **631 B.R. 629 (Bankr. S.D. Tex. July 20, 2021)**

Issue: Whether first interim fee application of debtor's counsel in the amount of $188,358.11 should be approved.

Holding: In case filed under Subchapter V of Chapter 11 in which bankruptcy counsel's first interim fee application sought, inter alia, to draw down its prepetition retainer in the amount of $69,394.48, including $9,999 in prepetition time, the $9,999 sought by counsel was permissible under Code § 1195, which expressly provides that a person was not disqualified for employment in a Subchapter V case solely because that person held prepetition claim of less than $10,000 against debtor. Further the objecting creditor's unproven accusation that all or part of bankruptcy counsel's retainer consisted of funds that were part of debtor's fraudulent transfer scheme was not basis to deny firm interim reimbursement for its professional fees and expenses. Counsel disclosed the agreed-to compensation prepetition and detailed the services performed in sufficient detail to apprise an interested party and the bankruptcy court of the actual, reasonable, and necessary costs of services rendered, creditor's allegation, though serious, was unsupported, and the court declined to penalize counsel for any alleged misbehavior of its client that was yet to be proven.

5. ***In re Tri-State Roofing***, **2020 WL 7345741 (Bankr. D. Idaho Dec. 7, 2020)**

Issue: Whether fees of Subchapter V Trustee should be approved under Code § 330 and capped at 5%. of disbursements.

Holding: Trustee fees of $1,920 should be determined under Code § 330(a)(1) and were reasonable. The Court concluded that Code § 326(b) does not present a bar to the Trustee to obtain compensation under § 330(a)(1), nor does it place a 5% cap on such compensation.

6. *In re Penland Heating and Air Conditioning, Inc.*, 2020 WL 3124585 (Bankr. E.D.N.C. June 11, 2020)

Issue: Whether trustee appointed in Subchapter V case has right to employ attorney.

Holding: "The Trustee does not need legal assistance to fulfill his basic duties to monitor and facilitate the Debtor's reorganization. If during the case the Trustee identifies a specific need for the employments of an attorney or other professional, then the court will consider another request."

F. PLAN CONFIRMATION

1. *In re Central Florida Civic, LLC*, 2023 WL 2400183 (Bankr. M.D. Fla. Feb. 17, 2023)

Issue: Whether Subchapter V plan granting plan injunction to temporarily enjoin creditors from pursuing their guaranty claims against non-debtors should be approved.

Holding: Chapter 11 debtor and its non-debtor principals shared identity of interests that weighed in favor of granting plan injunction to temporarily enjoin creditors of debtor from pursuing their guaranty claims against non-debtors. The factors supporting the plan provision included the fact that non-debtors would expend substantial time and energy on those creditors' litigation if subject to continued litigation related to those guaranty claims, Subchapter V Trustee recognized debtor's business would suffer absent injunction, as would prospects for successful reorganization, because non-debtors' professional services were vital to debtor's post-confirmation operations, and any judgments resulting from that litigation likely would lead to repossession of five trucks owned by non-debtors, which were used for debtor's business and would diminish resources of debtor.

Also, Non-debtor principals of Chapter 11 debtor were making substantial contribution to debtor's reorganization, weighing in favor of granting plan injunction to temporarily enjoin creditors of debtor from pursuing their guaranty claims against non-debtors. These contributions included requirement that non-debtors contribute $5,000 annually for total of $25,000 over five-year plan term, which nearly doubled projected monthly payments to unsecured creditors, and one non-debtor performed post-petition services without compensation.

Further amended Chapter 11 plan provided non-consenting claimants opportunity to recover in full, weighing in favor of plan injunction to temporarily enjoin creditors of debtor from pursuing their guaranty claims against non-debtor principals of debtor. Court found that recovery in full was not certain even without injunction, injunction essentially maintained status quo between enjoined creditors, including non-consenting claimants and non-debtors, and prejudice to non-consenting claimants was limited because they could proceed with collection once injunction ended because amended plan provided for tolling of all applicable statutes of limitations.

2. ***In re Staples*, 2023 WL 119431 (M.D. Fla. Jan. 6, 2023).**

Issue: Whether Subchapter V plan that required the debtor to pay all of the debtor's "actual disposable income" as opposed to "projected disposable income" was confirmable.

Holding: The debtor appealed a "Corrective Order" issued by the Bankruptcy Court for the Middle District of Florida, Fort Myers Division, that confirmed the debtor's Subchapter V plan but with revisions that required the debtor to prepare quarterly monthly reports and pay all of the debtor's "actual disposable income remaining after payment of senior claims; provided, however, if the Debtor's actual disposable income is less than $150.00 in each quarter, the debtor will still distribute $150.00 pro rata to Class 7 unsecured creditors." The Debtor appealed on the grounds that the Bankruptcy Court abused its discretion in issuing the Corrective Order because Code 1191 only requires the plan payments to be based on the debtor's projected disposable income and there is no requirement under Code 1191 to file monthly reports. On appeal, the District Court affirmed the Corrective Order and found that the Bankruptcy Court has the authority under Code 105 and the All Writs Act to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a). The District Court held that the plan provisions in the Corrective Order "were clearly necessary and appropriate under the facts of this case."

3. **In re HBL SNF LLC, 635 B.R. 725 (Bankr. S.D.N.Y. Feb. 1, 2022)**

Issue: Whether the time to file Subchapter V plan should be extended.

Holding: 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. In this case, debtor, a nursing and rehabilitation facility, satisfied its burden to show that an extension of time was appropriate to file its plan 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.

4. ***In re Orange County Bail Bonds, Inc.*, 638 B.R. 137 (9th Cir. BAP 2022)**

Issue: Whether Subchapter V plan should be confirmed.

Holding: Bankruptcy Court did not clearly err in determining that debtor-bail bond company's plan under Subchapter V of Chapter 11 was fair and equitable, as required for confirmation; even though plan did not provide for payment of debtor's projected disposable income. The effective date payment was greater than debtor's projected disposable income for the minimum three-year period. Perhaps the most compelling grounds for denying a motion to dismiss or convert a Chapter 11 case grounded on bad faith filing is the determination that a reorganization plan qualifies for confirmation, because a debtor's showing that a plan of reorganization is ready for confirmation essentially refutes a contention that the case is filed or prosecuted in bad faith.

5. ***In re Double H Transportation, LLC*, 2022 WL 1916686 (W.D. Tex. May 16, 2022)**

Issue: Whether Subchapter V plan should be confirmed.

Holding: Where Chapter 11 debtor limited liability company's Subchapter V plan proposed paying unsecured creditors nothing, thereby impairing those creditors' rights, those classes rejected the proposed plan by operation of law under Bankruptcy Code, and therefore Bankruptcy Court could not confirm the plan even if creditors' objections were not properly filed. If Subchapter V plan in Chapter 11 case cannot be confirmed as consensual with respect to impaired classes of creditors, it can only be confirmed if it meets statutory "fair and equitable" requirements.

Bankruptcy Court did not abuse its discretion in determining that Chapter 11 debtor limited liability company's Subchapter V plan was not proposed in good faith. Debtor's original plan proposed full payment to its creditors, but mere months later, its amended plan proposed paying unsecured creditors nothing, and it was not until a hearing that debtor explained that the inconsistency came from a major calculation error in the original plan, and two creditors that were involved in debtor's first Chapter 11 case did not receive notice of the second proceeding and the bankruptcy court expressed concern that other creditors similarly might have been left out of the second case. 11 U.S.C.A. § 1129(a)(3).

Bankruptcy Court did not abuse its discretion in finding "cause" to convert limited liability company's Subchapter V case to Chapter 7 case after debtor failed to obtain timely confirmation of proposed plan. Court only converted the case after finding that debtor had failed to confirm a Chapter 11 plan three times, including once in its original Chapter 11 case and twice in the current case, and the court had no duty to grant debtor a fourth bite at the apple. The court's finding that plan was not proposed in good faith was also grounds for conversion.

6. ***In re Excellence 2000, Inc.*, 636 B.R. 475 (Bankr. S.D. Tex. 2022)**

Issue: Whether debtor should be allowed to extend deadline for filing a plan when motion was filed one day after the deadline passed.

Holding*:* Since Code § 1121(e) does not apply in a Subchapter V case, a debtor in a Subchapter V case can seek an extension after the deadline has passed, but in this case the debtor failed to satisfy its burden that the debtor should not justly be held accountable for its failure to meet the deadline as set forth in the following factors established in *In re Baker*, 625 B.R. 27 (Bankr. S.D. Tex. Dec. 21, 2020): (i) whether the circumstances raised by the debtor were within its control, (2) whether the debtor has made progress in drafting a plan, (iii) whether the deficiencies preventing that draft from being filed are reasonable related to the identified circumstances, and (iv) whether any party in interest has moved to dismiss or convert eh debtor's case or otherwise objected to a deadline extension in any way.

7. ***In re HBL SNF, LLC*, 635 B.R. 725 (Bankr. S.D.N.Y. 2022)**

Issue: Whether the debtor's motion to extend the time to file a plan should be extended.

Holding: 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).

8. ***In re Robinson*, 632 B.R. 208 (Bankr. D. Kan. 2021)**

Issue: Whether individual debtor's plan was proposed in good faith.

Holding: (1) Individual debtor's amended Subchapter V plan was proposed in good faith, despite United States Trustee's (UST) objection that debtor had "concealed prolific gambling" pre- and postpetition. Debtor did not conceal his postpetition gambling but revealed it in detail in operating report and agreed to provide additional $4,000 to one class to cover his postpetition gambling loss and to cease gambling while in bankruptcy. Also there was no evidence that debtor underreported his prepetition winnings or overstated his losses on his tax returns or that he secreted winnings that otherwise would have been available to pay creditors under his plan. Debtor's mistakes in reporting gambling winnings and losses on his initial and amended statements of financial affairs (SOFA) did not result in the hiding of any taxable income and were not intended to hide his prepetition gambling, and debtor neither abused the purposes of reorganization nor attempted to frustrate the rights of creditors.
(2) Amended Subchapter V plan of individual Chapter 11 debtor, the manager of a funeral home business, could be confirmed as a consensual plan, even though all classes were impaired and no creditor in any class voted or returned a ballot. Although plan contained no language to the effect that failure to vote would be deemed acceptance of plan, binding circuit precedent recognized that a nonobjecting and nonvoting creditor is deemed to have accepted a Chapter 11 plan, and that precedent applied in this Subchapter V case, such that all of debtor's creditors and all classes of creditors, none of whom voted, objected to confirmation, or appeared at the confirmation hearing, would be deemed to have accepted plan, which would be confirmed as a consensual Subchapter V plan if all other confirmation requirements were satisfied.

9. ***In re Gabbidon Builders, LLC*, 2021 WL 1964544 (Bankr. W.D.N.C. May 14, 2021)**

Issue: Whether debtor's Subchapter V plan that proposed a sale of property was feasible.

Holding: Debtor presented no evidence to support a conclusion that the sale of the Debtor's property that was critical to make the payments to creditors under the plan was imminent, and thus the Court finds that conversion is in the best interest of creditors so that a Chapter 7 trustee can liquidate the property and distribute the proceeds.

10. ***In re U.S.A. Parts Supply, N.D.*, 630 B.R. 487 (Bankr. N.D. W.Vir. April 28, 2021)**

Issue: Whether debtor's Subchapter V plan was feasible.

Holding: Plan proposed by Chapter 11 debtor, a limited partnership in the business of selling used and antique automotive parts, which had elected to proceed under Subchapter V, was not feasible.

The debtor failed to show that its plan, which relied upon the proposed sale and lease-back of its real estate and increased sales expected from upgrading its website, including implementing an online sales portal, was not likely to be followed by liquidation or further reorganization, for the following reasons: (i) debtor used outdated revenue data in projecting its anticipated increased revenue after implementing its new online sales portal, (ii) debtor predicted a 50% increase in sales despite the ongoing COVID-19 pandemic, and (iii) the testimony of debtor's principal regarding the expected increase in sales was anecdotal in nature. Further cause exists to dismiss the case for the following reasons: (i) debtor's principal was unable to explain several ambiguities in debtor's books and records, including an amount itemized in debtor's financial records for "Accounts Receivable" when debtor, which operated on a cash basis, had no accounts receivable, (ii) debtor had paid prepetition unsecured creditors, including one owned by principal's brother, postpetition, without seeking court approval, (iii) debtor had failed postpetition to file necessary tax returns and to remain current on its obligations for sales and use taxes, (iv) debtor's principal had received a $5,000 loan from a company owned by his wife, without seeking court approval, and (v) debtor had suffered continuing losses in the absence of a reasonable likelihood of rehabilitation.

11. *In re Microcurrent Research and Education, LLC*, 626 B.R. 455 (Bankr. M.D. Fla. 2021)

Issue: Whether debtor's plan should be confirmed when the debtor failed to attach a proper liquidation analysis.

Holding: Failure of debtor to attach a liquidation analysis showing roughly $80,000 to $100,000 in unencumbered cash on hand while proposing a total dividend of $750 to be paid over a period of five years was not in "good faith."

12. *In re Walker*, 628 B.R. 9 (Bankr. E.D. Pa. Apr. 30, 2021)

Issue: Whether Subchapter V plan should be confirmed over objection by unsecured creditor.

Holding: Debtor's plan was in "good faith" despite only paying a projected dividend of 7.5% to general unsecured creditors while retaining a large expensive home with carrying costs of roughly $9,000 per month. Plan had overwhelming support of general unsecured creditors of 84.6% of the voting claims.

13. *In re BK Technologies, Inc.*, 2021 WL 1230123 (Bankr. N.D. W.Va. Mar. 30, 2021)

Issue: Whether debtor's Subchapter V plan contains unwarranted releases for non-debtor third parties.

Holding: The Court finds that the Debtor's case was not an honest intent to reorganize or liquidate for the benefit of creditors because the Debtor had prepetition sold its assets and paid creditors and only after being sued by a third party did the Debtor file a plan with nothing to liquidate or reorganize.

14. *In re Adams*, 2021 WL 1783350 (Bankr. M.D. Fla. Mar. 19, 2021)

Issue: Whether debtor should be granted a stay of time to file a third amended plan pending appeal of plan confirmation.

Holding: Motion denied because Subchapter V cases were intended to be an expedited process to allow small business debtors to reorganize quickly, inexpensively, and efficiently and the Debtor's request to extend the case indefinitely pending the outcome of the appeal is not within the spirit of what a Subchapter V case is intended to be.

15. *In re Online King, LLC*, 629 B.R. 340 (Bankr. E.D.N.Y. Jan. 19, 2021)

Issue: Whether debtor should be allowed to extend deadline for filing a plan after that deadline had expired.

Holding: Despite no objections to the extension, Debtor failed to satisfy stringent burden of demonstrating that the debtor was entitled to an extension. Excuses offered by debtor such as Jewish holidays and counsel's inability to work over the holidays were insufficient.

16. *In re Bressler*, 625 B.R. 27 (Bankr. S.D. Tex. Jan. 13, 2021)

Issue: Whether Debtor satisfied the voting requirements for a Subchapter V plan confirmation.

Holding: Uncontested plan was approved when only one member of a class voted in favor of the plan and all others fail to vote in compliance with Bankr. Rule 3018(c). Query why the Court made an issue of satisfying Code § 1126 when Code § 1191(b) excepts the voting requirements under Code § 1129(a)(8) and (10) when the plan does not discriminate unfairly and is fair and equitable.

17. *In re Baker*, 625 B.R. 27 (Bankr. S.D. Tex. Dec. 21, 2020)

Issue: Whether debtor should be allowed to extend deadline for filing a plan.

Holding: Nothing in Code § 1189(b) indicates that Congress intended the 90-day filing deadline to be jurisdictional. The statute does not preclude extending the filing deadline, and in fact is explicitly permissive of such. The plain language of the phrase "attributable to circumstances for which the debtor should not justly be held accountable" evinces a higher standard than the "for cause" standard set forth in both Bankr. Rule 9006(b) (governing extensions of time generally) and Code § 1121(d)(1) (governing extensions of a non-subchapter V debtor's exclusivity period to file a chapter 11 plan). The court finds that the need for an extension for the debtor to file a plan beyond the deadline is attributable to circumstances for which the debtor should not justly be held accountable when the deadline for the filing of government claims had not passed and the death of the debtor's brother and part owner made it difficult for the debtor to propose a plan.

18. *In re Pearl Resources LLC*, 622 B.R. 236 (Bankr. S.D. Tex. Sept. 30, 2020)

Issue: Whether Subchapter V plan should be confirmed.

Holding: While Subchapter V does not affect any change in the unfair discrimination requirement, Code § 1191(c) does provision a new "rule of construction" in Subchapter V cases for the condition that a plan be "fair and equitable," replacing the detailed definition of that term contained in Code § 1129(b). The absolute priority rule has been replaced with the "fair and equitable" requirement to protect dissenting unsecured classes similar to those requirements found in applicable Chapters 12 and 13 cases and individual Chapter 11 cases. The Court finds persuasive testimony supporting the proposition that the development of the Debtor's property will generate income included to determine Disposable Income distributed under the Plan, which will inure for the benefit of the objecting creditors. Further valuation testimony supported Debtors' contention that the Retained Lien, along with the other protections in the Plan, provide the Objecting Creditors with the indubitable equivalent of their claims, even when viewed through a stringent indubitable equivalent standard. In light of the evidence and testimony discussed herein, the Court finds that Debtors' Plan satisfies § 1129(b)(2)(A).

19. *In re VP Williams Trans, LLC*, 2020 WL 5806507 (Bankr. S.D.N.Y. Sept. 29, 2020)

Issue: When must a 1111(b) election be made in a Subchapter V case?

Holding: Bankr Rule 3014 requires that an 1111(b) election be made before conclusion of the disclosure statement hearing, but under Subchapter V, there is no disclosure statement. In this case, an election under 1111(b) made after the filing of a proof of claim, but before the confirmation of a plan, was timely under Subchapter V.

20. *In re Ellingsworth Residential Community Asso., Inc.*, 619 B.R. 519 (Bankr. M.D. Fla. 2020)

Issue: Whether debtor's plan was fair and equitable to unsecured creditor.

Holding: In confirming the plan, the court held that "the "fair and equitable" requirement is met if:
- The plan provides that the debtor's projected disposable income received in a three-year period, or such longer period not to exceed five years, is applied to make payments under the plan;
- There is a reasonable likelihood the debtor can make all plan payments; and
- The plan provides remedies to protect the holder of claims or interests.

In this case, the plan is fair and equitable because Debtor is devoting *more* than its projected disposable income, Debtor is proposing a way to maximize payments to its creditors while still paying its on-going expenses, there is a high likelihood the Debtor will make these payments. And, if the payments are not made, the Plan provides adequate remedies to protect creditors' claims.

G. PLAN MODIFICATION

1. *Samurai Martial Sports, Inc.*, 644 B.R. 667 (Bankr. S.D. Tex. 2022)

Issue: Whether debtor should be allowed to modify nonconsensual plan.

Holding: To modify a plan of reorganization under subchapter V of Chapter 11, the plan, as modified, must (1) be warranted under the circumstances, that is, the debtor must show that the circumstances which gave rise to the modification were the result of an unforeseen circumstance that rendered the confirmed plan to be unworkable, and (2) satisfy the confirmation requirements for Subchapter V plans. In a Subchapter V case, in contrast to a Chapter 11 case, a separate disclosure and solicitation of votes is not required. All that is required in a subchapter V plan is that it contain all of the plan requirements listed in the applicable subsections of the section of the Bankruptcy Code governing contents of subchapter V plans and that debtor solicit ballots for the plan/modification. There is no limitation that a modification take place prior to substantial consummation of the plan. Debtors who undertake, in good faith, reasonable business decisions that ultimately render their Chapter 11 plan unworkable should not automatically be precluded from modification even if the results of their decisions were foreseeable as a possible outcome. In other words, a debtor's good faith and business judgment are relevant when considering if circumstances are unforeseeable.

Although subchapter V offers debtors significant flexibility by eliminating the requirement that at least one creditor approve a plan, such flexibility is not without limits, and a debtor must still solicit ballots even if it is anticipated that all creditors will vote for or against the plan/modification. Also, although a Subchapter V debtor's failure to make a good faith effort to solicit ballots is a ground for denying confirmation of a nonconsensual plan, cramdown confirmation of a plan with balloting that draws no objections or that is modified to resolve them by agreement, creating what is essentially a consensual cramdown plan, is perfectly acceptable in a Subchapter V confirmation proceeding.

In this case, the modification of confirmed nonconsensual plan of reorganization of Subchapter V debtor, the owner of a fitness facility, by temporarily deferring three months of plan payments was not "warranted under the circumstances," that is, on basis that two air conditioning units stopped working and needed to be replaced, which caused decline in business and thus revenue due to the extremely hot facility. Debtor, in anticipation of possible sale of the property, intentionally failed to make the first of the required plan payments that it now sought to cure through plan modification, thus exhibiting bad faith and poor business judgment. Debtor inexplicably failed to escrow for the emergency reserve fund contemplated by its confirmed plan, and debtor did not show that its failure to make second and third plan payments was due to unforeseen circumstances rendering the plan unworkable, given, inter alia, that its actual revenue suggested that it was capable of making those payments in full. Further debtor failed to show that proposed modification satisfied the confirmation requirements for Subchapter V plans, in particular, the requirement that the proponent of the plan comply with the applicable provisions of Title 11. Debtor failed to offer and admit an updated liquidation analysis into evidence at the hearing on its motion to modify. Also debtor's modified projections of future revenue did not include actual revenue streams for months that had already passed or several line-item expenditures necessary to assess payment feasibility, and debtor failed to solicit ballots.

H. POST-CONFIRMATION

1. *In re Gui-Mer-Fe, Inc.*, 2022 WL 1216270 (Bankr. D. Puerto Rico, April 25, 2022)

Issue: Whether a Subchapter V case can be "administratively closed" during the term of the debtor's plan.

Holding: The Court finds that the Debtor's argument for requesting the "administrative closing" of the Chapter 11 subchapter V case which is based on reducing the costs of the administration of the case are unfounded. Subchapter V debtors are specifically exempted under 28 U.S.C. § 1930(a)(6)(A) & (B) from having to pay quarterly fees to the U.S. Trustee. In addition, Subchapter V debtors' obligation to file monthly operating reports terminated on the effective date of the plan pursuant to Bankr. Rule 2015(6). Unlike, individual Chapter 11 cases, in which a final decree is entered, and thereafter the case is administratively closed and subsequently reopened, in Chapter 11 Subchapter V cases that are confirmed under 11 U.S.C. § 1191(b), the services of the Subchapter V trustee do not terminate until the completion of plan payments and the subchapter V trustee files his/her final report and the debtor then requests the entry of final decree and discharge. Thus, the fact that the Subchapter V trustee is not discharged until he or she has filed the final report contravenes the language in 11 U.S.C. § 350(a) which provides that, "[a]fter an estate is fully administered and the court has discharged the trustee, the court shall close the case."

I. DISCHARGE

1. *In re Cleary Packaging, LLC*, 36 F.4th 509 (4th Cir. June 7, 2022)

Issue: Whether the non-dischargeability provisions under §523 apply to Subchapter V debtor corporations.

Holding: Code § 1192(2) provides discharges to small business debtors, whether they are individuals or corporation. This section excepts from discharge "any debt …of the kind specified in section 523(a)" and thus focuses on the kind of debt and not the kind of debtor, such as an individual. Further the context of Code § 1192(2) within the structure of the Bankruptcy Code further supports this interpretation through the elimination of different provisions provided to different kinds of debtors. Congress enacted Subchapter V with the primary goal of simplifying Chapter 11 reorganizations for small businesses, including individuals, and reducing the administrative costs for those businesses. By eliminating the absolute priority rule and the applicability of § 1141(d) to Subchapter V cases, Congress eliminated distinctions in Chapter 11 discharges that exist between individual and corporate debtors. An important purpose of Subchapter V would be frustrated if the court treated individuals and corporation discharges differently for exceptions to discharges under Code § 523(a).

2. *In re GFS Industries, LLC*, 647 B.R. 337 (Bankr. W.D. Tex. 2022)

Issue: Whether the non-dischargeability provisions under §523 apply to Subchapter V debtor corporations.

Holding: Exceptions to discharge in bankruptcy applied to discharge under Subchapter V, but only as to individual debtors. 11 U.S.C.A. §§ 523(a)(2)(A). "In the Court's judgment, however, the preamble to § 523(a) is critical to the analysis. Importantly, § 523(a) contains limiting language, stating that "[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..." (emphasis added). However, conduct that would deny a debtor's discharge under Chapter 7 is incorporated into Chapter 11 cases; therefore, a court may treat a Subchapter V case as if it were a Chapter 7 case and measure the debtor's conduct against the list of nondischargeable actions under Chapter 7.

3. ***In re Rtech Fabrications, LLC*, 635 B.R. 559 (Bankr. D. Idaho 2021)**

Issue: Whether limited liability company in Subchapter V case was subject to section 523 as a non-individual.

Holding: When considering the plain language of § 523(a) and § 1192, as well as the history of the corporate discharge and overall statutory scheme of Chapter 11, the Court found that § 523(a)'s discharge exceptions only apply to an individual debtor and § 1192(2)'s reference to § 523(a) does not expand its applicability to entity debtors.

4. ***In re Satellite Restaurants Inc. Crabcake Factory USA*, 626 B.R. 871 (Bankr. D. Md. 2021)**

Issue: Whether non-dischargeability provisions apply to Subchapter V debtor corporations.

Holding: Despite section 1192, which excepts "any debt that is otherwise nondischargeable", the non-dischargeability provisions do not apply to Subchapter V corporations because the non-dischargeability provisions under Code § 523 only apply to individuals and Congress did not clearly intend to change that result in Subchapter V. The court specifically disagreed with 5 *Norton Bankr. L. & Prac*. § 107:19 (3rd ed. 2021). *Accord In re Cleary Packaging LLC*, 2021 WL 2667735 (Bankr. D. Md. 2021) rev. 36 F.4th 509 (4th Cir. June 7, 2022).

J. REMOVAL OF THE DEBTOR AS DEBTOR IN POSSESSION

1. **In re Comedymx, LLC, 647 B.R. 457 (Bankr. Del. 2022)**

Issue: Whether debtor should be removed as a Subchapter V debtor in possession.

Holding: In a case filed under Subchapter V, a bankruptcy court may remove the debtor from possession on a showing of cause, in which case the Subchapter V trustee is empowered to operate the debtor's business, but, unlike a regular Chapter 11 trustee, this action does not permit any party other than the debtor to propose a plan. Further, a creditor may not circumvent the standards for conversion from one chapter to another by moving to amend the bankruptcy petition. Any authority under Bankruptcy Code to override debtor's judgment to proceed under Subchapter V had to be exercised only as last resort where no other mechanism was available to achieve

objectives of Chapter 11. In this case, the court finds that the owner of debtor-in-possession and its only officer and employee was poorly suited to fulfill statutory obligation of managing Chapter 11 debtor's business as fiduciary to estate and its stakeholders, and therefore cause existed for debtor to not be a Subchapter V debtor-in-possession, since owner threatened to destroy debtor's business for purpose of harming its creditors. There was no way to stop owner from making good on his threats, he boasted that he did not "give a damn about the law," and he was in open defiance of related injunctions entered by state court. Therefore, the motion to change the Subchapter V designation is denied, but the US Trustee's motion to remove the debtor in possession under § 1185 is granted.

2. ***In re Corinthian Communications, Inc.*, 642 B.R. 224 (Bankr. S.D.N.Y. 2022)**

Issue: Whether US Trustee's motion to remove principal as debtor in possession of Subchapter V sub S corporation should be granted.

Holding: Subchapter V of the Bankruptcy Code provides the Court the 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. 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." In this case 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 a 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.

3. ***In re Pittner*, 638 B.R. 255 (Bankr. D. Mass. 2022)**

Issue: Whether "cause" existed under 11 U.S.C. § 1185(a) to remove debtor as debtor in possession.

Holding: Bankruptcy Court would remove debtor from possession, instead of dismissing or converting case under Subchapter V of Chapter 11 to Chapter 7, upon finding "cause". The resulting increase in the powers and duties of the Subchapter V trustee was in the best interests of creditors and the estate and better served those interests than either conversion or dismissal, which would likely provide no recovery to unsecured creditors and would likely result in nothing but another bankruptcy filing by debtor, which would be a sixth case.

4. ***In re Young*, 2021 WL 1191621, at *1 (Bankr. D.N.M. Mar. 26, 2021)**

Issue: Whether "cause" existed under 11 U.S.C. § 1185(a) to remove the debtors from possession.

Holding: The Court concluded that "cause" existed to convert the case or remove the debtors from possession. Given that creditors would be better served by keeping the case in a chapter 11

and removing the debtors from possession, the Court granted the request of the Subchapter V trustee who was advocating removal per § 1185(a).

5. ***In re Neosho Concrete Prod. Co.*, 2021 WL 1821444, at *7 (Bankr. W.D. Mo. May 6, 2021)**

Issue: Whether "cause" existed under 11 U.S.C. § 1185(a) to remove the debtor from possession

Holding: While "cause" existed at the time the UST filed the motion, the debtor had remedied the situation by the time it was heard. The Court found that Neosho had competently managed the bankruptcy estate and adapted to challenges as it encountered them. Moreover, the debtor intended to reimburse the estate for the value of its alleged preferential transfers and prioritized the debtor's interests above individual interests. Ultimately, weighing multiple factors and conducting a costs v. benefits analysis, the Court held that cause no longer exists to remove Neosho as debtor in possession.