I. Background

a. ABI Subchapter V Task Force

i. Background of subchapter V: The concept of subchapter V started as one of the centerpiece recommendations of ABI's Commission to Study the Reform of Chapter 11, which published its final report and recommendations in 2014. It was formalized in the Code by the enactment of "The Small Business Reorganization Act of 2019" (SBRA), which went into effect on February 19, 2020, to provide Main Street business debtors with a more streamlined path for restructuring their debts. In the first three years that subchapter V was available, small business and subchapter V cases have comprised nearly one-third of chapter 11 filings. Since the debt-eligibility limits were increased by the CARES Act in March 2020, about 30% of the subchapter V cases filed have been over the original debt limit. Based on the cases completed so far, the higher-liability subchapter V cases are more likely to result in confirmation or conversion (as opposed to dismissal) than the lower-liability cases.

ii. Purpose: The American Bankruptcy Institute Subchapter V Task Force is committed to reviewing the implementation and administration of subchapter V of chapter 11 of the Bankruptcy Code. The Task Force will study and evaluate case law and statistical data under subchapter V from February 19, 2020, through and including the present. This study will consider, among other things, how the subchapter is working in practice and whether it is achieving certain underlying objectives, such as assisting debtors and creditors in resolving the reorganization cases of small- and medium-sized businesses more effectively and efficiently, and what may be needed to improve its effectiveness. The Task Force intends to memorialize the results of its study in a written report.

iii. Members:

Hon. Michelle M. Harner, Co-Chair (U.S. Bankruptcy Court, Baltimore, MD)
Megan W. Murray, Co-Chair (Underwood Murray, Tampa, FL)
Hon. Paul W. Bonapfel (U.S. Bankruptcy Court, Atlanta, GA)
Daniel J. Casamatta (Office of the U.S. Trustee, Kansas City, MO)
Robert J. Keach (Bernstein Shur, Portland, ME)
Elizabeth M. Lally, Reporter (Spencer Fane, Omaha, NE)
Donald L. Swanson (Koley Jessen, Omaha, NE)
Jolene E. Wee (JW Infinity Consulting, New York, NY)
Alexandra Everhart Sickler, Reporter (UND School of Law, Grand Forks, ND)

iv. Schedule of Public Hearings

June 9, 2023, Topic: Kick off/General Experiences with Subchapter V
June 23, 2023, Topic: Eligibility Issues
July 14, 2023, Topic: Role of the Subchapter V Trustee
July 28, 2023, Topic: Operation of the Case
September 8, 2023 (Zoom), Topic: Confirmation Issues
September 22, 2023 (Zoom), Topic: Postconfirmation Issues
October 10-12, 2023 (NCBJ), Topic: Wrap up/General Experiences with Subchapter V

Source: https://subvtaskforce.abi.org/

II. Subchapter V Eligibility

a. Engaged in Commercial or Business Activities

i. For subchapter V eligibility, a "person" must be "engaged in commercial or business activities (including any affiliate of such person that is also a debtor under this title and excluding a person whose primary activity is the business of owning single asset real estate)." 11 U.S.C. § 1182(1)(A).

ii. *In re Hillman*, Case No. 22-10175, 2023 WL 3804195, 2023 Bankr. LEXIS 1448 (Bankr. N.D.N.Y. June 2, 2023) (finding that the debtor's defense of a state court action involving a defaulted commercial lease agreement by an entity in which the debtor had a 50% interest and the debtor's personal guaranty of such agreement was sufficient "winding down activity" for the debtor to satisfy the "engaged in commercial or business activities" requirement).

iii. *In re Robinson*, No. 22-02414-KMS, 2023 WL 2975630, 2023 Bankr. LEXIS 1046 (Bankr. S.D. Miss. Apr. 17, 2023) (finding that the debtor was eligible for subchapter V, because he was engaged in commercial or business activities by winding down his poultry farming business by managing his farm assets, actively seeking buyers for the farm and its assets, and maintaining and inspecting the improvements on his property).

b. Aggregate Noncontingent Liquidated Debts Not More Than $7,500,000

i. As of the petition date, a debtor must have "aggregate *noncontingent liquidated* secured and unsecured debts as of the date of the filing of the petition or the date of the order for relief in an amount not more than $7,500,000 (excluding debts owed to 1 or more affiliates or insiders)." 11 U.S.C. § 1182(1)(A) (emphasis added).

ii. *In re Macedon Consulting, Inc.*, Case No. 23-10300-KHK, 2023 WL 4004484, 2023 Bankr. LEXIS 1551 (Bankr. E.D. Va. June 14, 2023) (finding that the liability under two leases arose prepetition on the dates the leases were executed and therefore that the debts which totaled more than $7.5M were not contingent, making the debtor ineligible for subchapter V).

iii. *In re Hall*, 650 B.R. 595 (Bankr. M.D. Fla. 2023) (holding that "a substantial dispute" over the existence of a debt does not render a debt unliquidated and thus such debt counts toward the debt limit calculation for subchapter V eligibility).

c. 50 Percent of Debt Must Be from Commercial or Business Activities

i. To properly elect to proceed under subchapter V, "not less than 50 percent" of the debtor's debt must have "ar[isen] from the commercial or business activities of the debtor." 11 U.S.C. § 1182(1)(A).

ii. *In re Hillman*, Case No. 22-10175, 2023 WL 3804195, 2023 Bankr. LEXIS 1448 (Bankr. N.D.N.Y. June 2, 2023) (finding that the debtor must satisfy a "nexus requirement" that fifty percent or more of the debtor's aggregate debt has arisen from the same commercial or business activities the debtor is engaged in for subchapter V eligibility).

iii. *In re Reis*, Case No. 22-00517-JMM, 2023 WL 3215833, 2023 Bankr. LEXIS 1169 (Bankr. D. Idaho May 2, 2023) (holding that the debt inquiry does not require a nexus between the debtor's present business engagement and the debt to be counted toward the 50% threshold but finding that the debtor was not eligible for subchapter V because her medical school student loan debt, which comprised most of her debt, did not arise from business or commercial activities).

iv. *In re Bennion*, Case No. 22-00102-NGH, 2022 WL 3021675, 2022 Bankr. LEXIS 2100 (Bankr. D. Idaho July 29, 2022) (holding that the debtors were ineligible for subchapter V because the joint debtor's medical debt, which accounted for approximately 90% of the debts, resulted from an accident while performing work that was found to not be a commercial or business activity although the work was of the nature of the debtors' usual business activity).

d. Exclusion under Section 1182(1)(B)(i)

i. The first explicit exclusion to the definition of a "debtor" under subchapter V is for "any member of a group of affiliated debtors under this title that has aggregate noncontingent liquidated secured and unsecured debts in an amount greater than $7,500,000 (excluding debt owed to 1 or more affiliates or insiders)." 11 U.S.C. § 1182(1)(B)(i).

ii. *In re Dobson*, Case No. 23-60148, 2023 WL 3520546, 2023 Bankr. LEXIS 1311 (Bankr. W.D. Va. Mar. 7, 2023) (holding that subchapter V eligibility under both 1182(1)(A) and (B) is determined as of the petition date and determining that the debtors were eligible for subchapter V).

iii. *In re Free Speech Sys., LLC*, 649 B.R. 729 (Bankr. S.D. Tex. 2023) (rejecting creditors' argument under section 1182(1)(B)(i) that the postpetition filing of an affiliate with debts in excess of the debt limits renders a subchapter V debtor ineligible for subchapter V and holding that "[s]ubparagraphs A and B must be construed together at the same time, all the time").

e. Exclusion under Section 1182(1)(B)(ii)

i. Section 1182(1)(B)(ii) excludes "any debtor that is a corporation subject to the reporting requirements under section 13 or 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78m, 78***o***(d))." 11 U.S.C. § 1182(1)(B)(ii).

1. Simply stated, only *publicly traded* corporations are subject to such reporting requirements.

2. Corporations that voluntarily report to the Securities and Exchange Commission would not fall under this exclusion.

f. Exclusion under Section 1182(1)(B)(iii)

i. Currently, section 1182(1)(B)(iii) excludes "any debtor that is an affiliate of a corporation described in clause (ii)." 11 U.S.C. § 1182(1)(B)(iii); *see also id.* § 101(2) (defining "affiliate").

1. That is, if a debtor is an affiliate of "a corporation subject to the reporting requirements under section 13 or 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78m, 78*o*(d))," *id.* § 1182(1)(B)(ii), such debtor is ineligible to proceed under subchapter V.

ii. *In re Phenomenon Mktg. & Entm't, LLC*, Case No. 2:22-bk-10132-ER, 2022 WL 3042141, 2022 Bankr. LEXIS 2105 (Bankr. C.D. Cal. Aug. 1, 2022) (reinstating debtor's eligibility to proceed under subchapter V, following previous finding of ineligibility, based on an updated holding that, following the enactment of the Bankruptcy Threshold Adjustment and Technical Corrections Act, "only debtors who are affiliates of publicly-traded corporations are now excluded from proceeding under Subchapter V").

1. *See also In re Phenomenon Mktg. & Entm't, LLC*, Case No. 2:22-bk-10132-ER, 2022 WL 1262001, 2022 Bankr. LEXIS 1189 (Bankr.

C.D. Cal. Apr. 28, 2022) (prior to the enactment of the Bankruptcy Threshold Adjustment and Technical Corrections Act, holding that the debtor was ineligible to proceed under subchapter V because it was an affiliate of entities that were "issuers" of securities within the meaning of the Securities Exchange Act of 1934).

g. Debtor Must Consent to Subchapter V

i. In both voluntary and involuntary chapter 11 cases, the debtor is the only entity that may elect that the provisions of subchapter V will apply. *See* Fed. R. Bankr. P. 1020(a).

ii. *In re Roberson Cartridge Co., LLC*, No. 22-20192-rlj7, 2023 WL 2393809, 2023 Bankr, LEXIS 588 (Bankr. N.D Tex. Mar. 7, 2023) (denying creditor's motion to convert case to subchapter V of chapter 11 because the debtor objected to such conversion and noting that "[n]o rule allows conversion from a chapter 7 to a subchapter V case without the debtor's consent").

h. Procedural Considerations on Subchapter V Election and Eligibility

i. The initial election as a subchapter V debtor is made pursuant to Federal Rule of Bankruptcy Procedure 1020(a).

1. "In a voluntary chapter 11 case, the debtor shall state in the petition whether the debtor is a small business debtor and, if so, whether the debtor elects to have subchapter V of chapter 11 apply." Fed. R. Bankr. P. 1020(a).

2. If an involuntary case is filed against a small business debtor, "within 14 days after entry of the order for relief" the debtor may file a statement that the debtor elects to have subchapter V apply. *Id.*

3. Such election controls "unless and until the court enters an order finding that the debtor's statement is incorrect." *Id.*

ii. Objections to the debtor's statement must be filed "no later than 30 days after the conclusion of the meeting of creditors held under § 341(a) of the Code, or within 30 days after any amendment to the statement, whichever is later." Fed. R. Bankr. P. 1020(b).

1. Objections to the subchapter V election are contested matters governed by Federal Rule of Bankruptcy Procedure 9014. *See* Fed. R. Bankr. P. 1020(c).

iii. Burden of Proof on Eligibility

1. The majority of courts to address the issue have held that the burden of proof to establish eligibility in subchapter V rests with debtors. *See, e.g.*, *In re RS Air,* LLC, 638 B.R. 403, 414 (B.A.P. 9th Cir. 2022); *In re Hillman*, Case No. 22-10175, 2023 WL 3804195, 2023 Bankr. LEXIS 1448 (Bankr. N.D.N.Y. June 2, 2023); *In re Reis*, Case No. 22-00517-JMM, 2023 WL 3215833, 2023 Bankr. LEXIS 1169 (Bankr. D. Idaho May 2, 2023).

2. A minority of courts have placed the burden on the objecting party to establish the ineligibility of the debtor. *See, e.g.*, *In re Body Transit, Inc.*, 613 B.R. 400, 409 (Bankr. E.D. Pa. 2020) ("It is appropriate to place the burden of proof on . . . the de facto moving party.").

III. The Role of the Subchapter V Trustee

a. Statutory Duties of Subchapter V Trustee

i. 11 U.S.C. § 1183 provides, in relevant part:

(b) Duties. The trustee shall –

(1) perform the duties specified in paragraphs (2), (5), (6), (7), and (9) of section 704(a) of this title;
(2) perform the duties specified in paragraphs (3), (4), and (7) of section 1106(a) of this title, if the court, for cause and on request of a party in interest, the trustee, or the United States trustee, so orders;
(3) appear and be heard at the status conference under section 1188 of this title and any hearing that concerns-
(A) the value of property subject to a lien; (B) confirmation of a plan filed under this subchapter; (C) modification of the plan after confirmation; or (D) the sale of property of the estate;
. . .
(7) facilitate the development of a consensual plan of reorganization.

ii. 11 U.S.C. §§ 704(a)(2), (5), (6), (7) and (9), in turn, provide:

(a) The trustee shall –
…
(2) be accountable for all property received;
. . .
(5) if a purpose would be served, examine proofs of claims and object to the allowance of any claim that is improper;
(6) if advisable, oppose the discharge of the debtor;
(7) unless the court orders otherwise, furnish such information concerning the estate and the estate's administration as is requested by a party in interest;
. . .

(9) make a final report and file a final account of the administration of the estate with the court and with the United States trustee . . .

iii. 11 U.S.C. §§ 1106(a) (3), (4) and (7) provide:

(a) A trustee shall –
. . .
(3) except to the extent that the court orders otherwise, 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;
(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; and
(B) transmit a copy or a summary of any such statement to any creditors' committee or equity security holders' committee, to any indenture trustee, and to such other entity as the court designates;
. . .
(7) after confirmation of a plan, file such reports as are necessary or as the court orders . . .

iv. *In re Ventura*, 615 B.R. 1, 13 (Bankr. E.D.N.Y. 2020) (finding that the subchapter V trustee owes a fiduciary duty to the bankruptcy estate in addition to the duties mandated by the Bankruptcy Code. The subchapter V trustee acts as a fiduciary for creditors, in lieu of an appointed creditors' committee. The subchapter V trustee is also charged with facilitating the subchapter V debtor's small business reorganization and monitoring the subchapter V debtor's consummation of its plan of reorganization).

v. *In re Major Model Mgmt., Inc.*, 641 B.R. 302, 323 (Bankr. S.D.N.Y. 2022) (finding that the subchapter V trustee has a fiduciary duty to ensure compliance with the Bankruptcy Code).

b. Subchapter V Trustee as Mediator/Facilitator

i. 11 U.S.C. § 1183(b)(7) provides:

(b) Duties. The trustee shall—
. . .
(7) facilitate the development of a consensual plan of reorganization.

ii. *In re Seven Stars on the Hudson Corp.*, 618 B.R. 333, 346 n.81 (Bankr. S.D. Fla. 2020) (discussing the subchapter V trustee's role -- "A Subchapter V trustee is specifically charged with the duty to 'facilitate the development of

a consensual plan of reorganization.' 11 U.S.C. § 1183(b)(7). This role should include working not only with the debtor, but with creditors as well, to facilitate negotiation of a consensual plan. A substantial part of the Subchapter V trustee's pre-confirmation role, therefore, should be to serve as a *de facto* mediator between the debtor and its creditors.").

iii. *In re 218 Jackson LLC*, 631 B.R. 937, 947 (Bankr. M.D. Fla. 2021) (discussing the subchapter V trustee's role: "the subchapter V trustee is the only trustee directed to 'facilitate the development of a consensual plan of reorganization.' 11 U.S.C. § 1183(b)(7). This duty is assigned to no other trustee in bankruptcy. This distinction is significant. Traditionally, trustees tend to be adversarial to the debtor as a result of their duties in protecting the estate and creditors. Chapter 7 trustees take possession of the estate's property and dispose of or administer those assets in order to pay creditors. This role typically puts a trustee in conflict with the debtor and sometimes creditors. A chapter 11 trustee, if one is appointed, similarly takes possession of estate assets for the purpose of liquidation, sale, or less frequently, a reorganization. A chapter 13 trustee similarly is gathering assets, but in the form of plan payments in order to distribute to creditors. A chapter 12 trustee is perhaps the most similar here—not taking possession of estate property and occupying a similar oversight role. But even a chapter 12 trustee is not charged with facilitation of a consensual plan.").

iv. *In re Louis*, Case No. 20-71283, 2022 Bankr. LEXIS 1586, at *1 (Bankr. C.D. Ill. June 7, 2022) (discussing the subchapter V trustee's role: "Subchapter V trustee's role [is] more like that of a mediator than other trustees who have traditionally taken on a more adversarial role.").

c. Replacement of Debtor-in-Possession

i. 11 U.S.C. § 1185(a) provides:

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

ii. 11 U.S.C. § 1183, in turn, provides, in relevant part:

(b) Duties. The trustee shall—
. . .
(5) if the debtor ceases to be a debtor in possession—
(A) perform the duties specified in section 704(a)(8) and paragraphs (1), (2), and (6) of section 1106(a) of this title; and

(B) be authorized to operate the business of the debtor;

iii. 11 U.S.C. § 704(a)(8), in turn, provides:

(a) The trustee shall—
. . .
(8) if the business of the debtor is authorized to be operated, file with the court, with the United States trustee, and with any governmental unit charged with responsibility for collection or determination of any tax arising out of such operation, periodic reports and summaries of the operation of such business, including a statement of receipts and disbursements, and such other information as the United States trustee or the court requires;

iv. 11 U.S.C. §§ 1106(a) (1), (2) and (6) provide:

(a) A trustee shall—
(1) perform the duties of the trustee, as specified in paragraphs (2), (5), (7), (8), (9), (10), (11), and (12) of section 704(a);
(2) if the debtor has not done so, file the list, schedule, and statement required under section 521(a)(1) of this title;
. . .
(6) for any year for which the debtor has not filed a tax return required by law, furnish, without personal liability, such information as may be required by the governmental unit with which such tax return was to be filed, in light of the condition of the debtor's books and records and the availability of such information;

v. *In re Pittner*, 638 B.R. 255, 258 (Bankr. D. Mass. 2022) (removal of the debtor in possession under § 1185(a) "automatically has the effect of expanding the duties of the subchapter V trustee").

vi. *In re Online King LLC*, 629 B.R. 340, 345 (Bankr. E.D.N.Y. 2021) ("Under § 1189(a), only the debtor may file a plan in a subchapter V case; neither the subchapter V trustee nor creditors are permitted to do so"); *see also In re Comedymx LLC*, 647 B.R. 457 (Bankr. D. Del. 2022).

vii. *In re Corinthian Commc'n, Inc.*, 642 B.R. 224, 233 (Bankr. S.D.N.Y. 2022) (finding if a debtor is removed as debtor-in-possession, the subchapter V trustee's duties are expanded under section 1183(b)(5) to include, among other duties, operating the business of the debtor).

viii. *In re ComedyMX, LLC*, 647 B.R. 457, 465 (Bankr. D. Del. 2022) ("Subchapter V also provides a specific means to fill the void when a debtor is dispossessed. Section 1183(b)(5) states that the subchapter V trustee shall, 'if the debtor ceases to be a debtor in possession … be authorized to operate the business of the debtor.'").

d. Special Powers

i. 11 U.S.C. § 1183(b)(2) provides:

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

ii. *In re Corinthian Commc'n, Inc.*, 642 B.R. 224, 234 (Bankr. S.D.N.Y. 2022) (finding 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, for purposes of 11 U.S.C. § 1106(a)(3)).

iii. *In re AJEM Hosp., LLC*, No. 20-80003, 2020 WL 3125276, at *1 (Bankr. M.D.N.C. Mar. 23, 2020) (directing the subchapter V trustee, with the consent of the debtor, to conduct a limited investigation pursuant to 11 U.S.C. § 1106(a)(3) to review and analyze intercompany claims and to file a statement summarizing this review with the court, pursuant to § 1106(a)(4)).

iv. Hon. Paul W. Bonapfel, *A Guide to The Small Business Reorganization Act of 2019* (Revised June 2022) 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." *Id.* at 57 (citing *In re Ozcelebi*, 639 B.R. 365, 383 (Bankr. S.D. Tex. 2022)).

e. Subchapter V Trustee Compensation

i. 11 U.S.C. § 326(b) provides:

> In a case under subchapter V of chapter 11 or chapter 12 or 13 of this title, the court may not allow compensation for services or reimbursement of expenses of the United States trustee or of a standing trustee appointed under section 586(b) of title 28, but may allow reasonable compensation under section 330 of this title of a trustee appointed under section 1202(a) or

1302(a) of this title for the trustee's services, payable after the trustee renders such services, not to exceed five percent upon all payments under the plan.

ii. 11 U.S.C. § 330(a)(1), in turn, provides, in relevant part:

After notice to the parties in interest and the United States Trustee and a hearing, and subject to sections 326, 328, and 329, the court may award to a trustee, a consumer privacy ombudsman appointed under section 332, an examiner, an ombudsman appointed under section 333, or a professional person employed under section 327 or 1103 —
(A) reasonable compensation for actual, necessary services rendered by the trustee, examiner, ombudsman, professional person, or attorney and by any paraprofessional person employed by any such person; and
(B) reimbursement for actual, necessary expenses.

iii. 11 U.S.C. § 330(a)(3) provides:

In determining the amount of reasonable compensation to be awarded to an examiner, trustee under chapter 11 [11 USCS §§ 1101 et seq.], or professional person, the court shall consider the nature, the extent, and the value of such services, taking into account all relevant factors, including—
(A) the time spent on such services;
(B) the rates charged for such services;
(C) whether the services were necessary to the administration of, or beneficial at the time at which the service was rendered toward the completion of, a case under this title;
(D) whether the services were performed within a reasonable amount of time commensurate with the complexity, importance, and nature of the problem, issue, or task addressed;
(E) with respect to a professional person, whether the person is board certified or otherwise has demonstrated skill and experience in the bankruptcy field; and
(F) whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title.

f. Retention of Professionals

i. Under 11 U.S.C. § 327(a), the trustee, with the court's approval, may employ one or more attorneys, accountants, appraisers, auctioneers, or other professional persons, that do not hold or represent an interest adverse to the estate, and that are disinterested persons, to represent or assist the trustee in carrying out the trustee's duties under this title [11 USCS §§ 101 et seq.].

ii. In his article, *A Guide to the Small Business Reorganization Act of 2019*, Judge Bonapfel states that the SBRA "does not modify" section 327(a). *See*

Bonapfel at 70-71. However, Judge Bonapfel cautions subchapter V trustees that "employment of attorneys or other professionals has the potential to substantially increase the administrative expenses of the case. In view of the intent of the SBRA to streamline and simplify chapter 11 cases for small business debtors and reduce administrative expenses, courts may be reluctant to permit a sub V trustee to retain attorneys or other professionals except in unusual circumstances." *Id.* at 71.

iii. The Department of Justice's handbook for subchapter V trustees discourages a subchapter V trustee's retention of professionals, instructing that this is "especially important in cases in which the debtor remains in possession and the debtor already has employed professionals to perform many of the duties that the trustee might seek to employ the professionals to perform. *See* 11 U.S.C. § 1184. The trustee should keep the statutory purpose of SBRA in mind when carefully considering whether employment of the professional is warranted under the specific circumstances of each case." U.S. Dep't of Justice, *Handbook for Small Business Chapter 11 Subchapter V Trustees* 3-17-18 (2020).

iv. *In re Penland Heating & Air Conditioning, Inc.*, Case No. 20-01795-5-DMW, 2020 Bankr. LEXIS 1550, at *4-5 (Bankr. E.D.N.C. June 11, 2020) (denying application to employ counsel because there was no showing that employment of the professional was warranted under the specific circumstances of the case because authorizing a subchapter V trustee to employ professionals, including oneself as counsel, routinely and without specific justification or purpose is contrary to the intent and purpose of the Small Business Reorganization Act of 2019).

IV. Confirmation of the Subchapter V Plan

a. Deemed Acceptance of the Plan

i. In *In re Jaramillo*, Case No. 21-10306-t11, 2022 Bankr. LEXIS 2620 (Bankr. D.N.M. Sept. 22, 2022), the Bankruptcy Court held that, for the purposes of §§ 1129(a) and 1191(a) the failure of a class to vote on the plan is deemed an acceptance of the Plan. The Court noted that in the 10th Circuit, pursuant to § 1129(a)(10), there must be the affirmative (or actual) vote of at least one impaired class and as long as that requirement is met, classes of creditors that did not vote are deemed to have accepted the plan. Recent cases have held that Ruti-Sweetwater's "deemed acceptance" rule for § 1129(a)(8) applies in subchapter V. *See, e.g.*, *In re Robinson*, 632 B.R. 208, 220 (Bankr. D. Kan. 2021) (cited and applied "Sweetwater's binding precedent that a nonobjecting and nonvoting creditor is deemed to have accepted a chapter 11 plan under § 1129(a)(8)"); *In re Olson*, 2020 WL 10111637, at *2 (Bankr. Utah Sept. 16, 2020) (same); *In re Desert Lake Group, LLC*, no. 20-22496, doc. 114 (Bankr. D. Utah Sept. 30, 2020) (unpublished) (same).

ii. Of note, in the *Robinson* case, the Bankruptcy Court confirmed a plan even though there were no votes, which it would not have done in a normal chapter 11 case, because the "distinction between whether a creditor's acceptance is being determined under § 1129(a)(8) or (a)(10) is blurred in subchapter V", so no actual acceptance by an impaired class was required. Additionally, the Bankruptcy Court ruled that § 1129(b) cramdown does not apply in a nonconsensual subchapter V case. Subchapter V has its own cramdown provision for nonconsensual plans — § 1191(b), which provides that the court can confirm a plan if all of the applicable requirements of § 1129(a), other than paragraphs (8), (10), and (15) of that section, are met with respect to a plan. In short, a debtor in a subchapter V case is not required to have at least one impaired accepting class to obtain confirmation of a nonconsensual plan.

b. Voting Requirements for Subchapter V Plans

i. In a subchapter V case, there is no explicit requirement in § 1129(a) that a debtor solicits votes. *In re Samurai Martial Sports, Inc.*, 644 B.R. 667, 690 (Bankr. S.D. Tex. 2022). Sections 1129(8) and (10) are not applicable in a subchapter V case, thereby casting doubt on whether any voting is required. In the case of a consensual plan pursuant to § 1191(a), voting is required, and pursuant to a cramdown under 11 U.S.C. § 1129(b), the Bankruptcy Court in *Samurai* required votes to make an evidentiary finding if the plan is confirmed pursuant to 1191(a) or (b). Accordingly, a 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 acceptable in a subchapter V confirmation proceeding. This is a different requirement than that applied in some other districts. The Delaware Bankruptcy Court ruled that "§ 1191(b) of the Bankruptcy Code eliminates § 1129(a)(2)'s requirement of an impaired accepting class. As a result, so long as the plan is nondiscriminatory and satisfies absolute priority, there is no requirement that creditor votes be solicited in a case under subchapter V." *In re Arsenal Intermediate Holdings, LLC*, 2023 Bankr. LEXIS 752, at *6 (Bankr. D. Del. Mar. 27, 2023).

ii. Another issue that has appeared in subchapter V cases is the treatment of an under-secured creditor's election of 11 U.S.C. § 1111(b). One of the first cases to address this issue was *In re Body Transit, Inc.*, 619 B.R. 816 (Bankr. E.D. Pa. 2020). In that case, the Court held that an under-secured creditor's 1111(b) election would be disallowed because the creditor's interest represented only 8.2% of the creditor's claim, which was inconsequential pursuant to 11 U.S.C. § 1111(b)(1)(B)(i). Accordingly, the creditor's claim was separated to an unsecured and secured claim, so that the secured and unsecured portions of the claim could be treated differently in the Plan based on their value. This ruling is different than the treatment later permitted in

In re S-Tek 1, LLC, which allowed a creditor to treat its entire claim as secured pursuant to 11 U.S.C. § 1111(b), but did not permit that same creditor to also vote as an unsecured creditor. That creditor's right to vote is then based on whether the election subsequently makes them an impaired secured creditor entitled to vote. If the creditor is impaired, pursuant to 11 U.S.C. § 1124, as a result of its § 1111(b) election, then it is entitled to vote. *See In re S-Tek 1, LLC*, 2021 Bankr. LEXIS 3358 (Bankr. D.N.M. Dec. 9, 2021)

c. Projected Disposable Income

i. In May 2023, the Nevada Bankruptcy Court noted that "[t]here is little case law analyzing the disposable income requirement in the context of a subchapter V case." *In re Cesaretti*, 2023 Bankr. LEXIS 1400, at *36 (Bankr. D. Nev. May 10, 2023).

ii. Judge Paul W. Bonapfel noted in <u>A Guide to the Small Business Reorganization Act of 2019</u> (2022) "chapter 12 and below-median chapter 13 cases, and…chapter 13 cases prior to the introduction of the means standards in BAPCPA…should provide guidance in making such determinations."

iii. 11 U.S.C. § 1191(d) defines "disposable income", but not "projected disposable income". Projected disposable income may then be defined by the debtor as part of its plan. This arguably allows for a debtor to use the low-end of its range of disposable income projections for the next 3 to 5 years to cap the quantum of distributions flowing to creditors.

d. Payment of Administrative Expenses

i. The bankruptcy court may dismiss a case for "substantial or continuing loss to or diminution of the estate" pursuant to 11 U.S.C. § 1112(b)(4)(A). When there is negative cash flow, administrative expenses are essentially coming from creditors pockets and effectively create a loss for the estate. *In re Neosho Concrete Prods. Co.*, 2021 Bankr. LEXIS 1198 (Bankr. W.D. Mo. May 6, 2021). In this case, even though the debtor had ceased operations, there was a pending adversary that a chapter 7 trustee was likely to abandon but had the potential to bring value to the estate. The Court found that the administrative expenses incurred by the estate were not substantial, and given the potential value to add to the estate and the trustee's likely abandonment of that asset and a conversion was unlikely to create value to the estate or negatively impact creditors, and the proposed fees were actually intended to generate value to the estate so they therefore were not a substantial or continuing loss to or diminution of the estate. Accordingly, even though the Court reasoned there would be few comparable fact patterns for a non-operating debtor, in this case it was proper for the debtor to remain in bankruptcy.

ii. Another issue that has appeared before courts is how to handle administrative expenses in structured dismissals. In *In re N.Y. Hand & Physical Therapy PLLC*, the Court noted the risk that a subchapter V trustee faces when a case is about to be dismissed or is dismissed, even if their claim is allowed. *In re N.Y. Hand & Physical Therapy PLLC,* 2023 Bankr. LEXIS 1028 (Bankr. S.D.N.Y Apr. 14, 2023). The Debtor sought to dismiss the case without any structured dismissal to provide for the subchapter V fees. When dismissing the case, the Court ordered that the dismissal be conditioned upon the payment of the subchapter V trustee's fees. The Court also noted that the Monthly Operating Reports, when they were filed, indicated the Debtor maintained enough cash to pay the subchapter V trustee fees, and dismissing the case without compensating the trustee would unjustly enrich the debtor and the Court "will not allow the Debtor to avoid paying for the sixteen months of professional services it cashed in on."

iii. In *In re Jaramillo*, Case No. 21-10306-t11, 2022 Bankr. LEXIS 2620 (Bankr. D.N.M. Sept. 22, 2022), the Court held that the Debtor's plan should be amended to include administrative expenses, including payments to counsel and the subchapter V trustee. Additionally, any agreements with retained professionals must also be disclosed. The Plan was allowable pursuant to § 1129(a)(8) because one impaired class voted, so non-voting classes were deemed to have accepted the plan. The Plan's failure to account for the payment of administrative fees, and numerous other deficiencies, resulted in the Court refusing to confirm the plan.

e. Plan Term

i. Again, courts have noted that there is little jurisprudence on the application of a plan-term requirement. *In re Urgent Care Physicians, Ltd.*, 2021 Bankr. LEXIS 34666 (Bankr. E.D. Wis. Dec. 20, 2021). In this case, the Bankruptcy Court looked to a secondary authority which argued that a plan should be allowed to be extended to five years in situations where the debtor can extend the plan to benefit from a capital improvement deduction which would benefit the creditors by increasing the funds available to the debtor. The Bankruptcy Court also looked to the legislative intent behind the subchapter V process which was intended to address the shorter lifespans of debtors which should be reflected in a shorter 3-year plan except in the case of exceptional circumstances. In this case, the Bankruptcy Court found that the Debtor's plan to defer some insider salaries, deferring the full repayment of certain equipment and paying at least the projected disposable income warranted the Court confirming a 3-year plan, and that a 5-year plan may unfairly benefit creditors.

ii. *In re S-Tek 1, LLC*, No. 20-12241-j11, 2023 Bankr. LEXIS 328 (Bankr. D.N.M. Feb. 6, 2023): To confirm a plan, the debtor must prove feasibility

to satisfy § 1129(a)(11); the Debtor could not prove feasibility because the Debtor intended to surrender most of its assets with no plan to replace all the assets required for a successful reorganization. A cramdown requirement under § 1191(b) requires that the plan be "fair and equitable" with respect to each class of claims that is impaired and has not accepted the plan. In this case, the Bankruptcy Court found that the secured class of creditors was impaired because of the delay in the surrender of the tangible collateral (up to 90 days after confirmation) and intangible collateral (more than 100 days from confirmation). The Debtor was unable to prove that a liquidation was not reasonably likely or that there was a reasonable likelihood that the Debtor would be able to make plan payments. The Bankruptcy Court did not reach a conclusion on whether the plan was fair and equitable to the secured creditors. The financial projections did not include loan proceeds and the Debtor was unable to show it would maintain positive cash flow since the projections were done annually.

iii. *In re S-Tek 1, LLC*, No. 20-12241-j11, 2023 Bankr. LEXIS 673 (Bankr. D.N.M. Mar. 15, 2023): Debtor attempted to file a fourth plan to address the replacement of vehicles and reflecting a positive cash flow for monthly projections. The Bankruptcy Court declined to give the Debtor the opportunity to amend its fourth plan, and found that the first confirmation plan was timely filed and the second and third plans were essentially pre-confirmation modifications pursuant to § 1193(a) and allowable. However, the Debtor's fourth plan was distinguishable because the third plan (see above) was denied, so it was not a modification and was filed 2 years after the statutory 90-day deadline to file a plan. Importantly the Debtor did not seek any allowance to file a plan after the 90-day deadline. The Court in *dicta* suggests that it does not agree with the argument that the Debtor just needs to file a plan within the 90 days and the deadline does not limit a debtor's right to file a plan after the denial of confirmation.

f. Practical Considerations

i. Certain jurisdictions have their own form subchapter V plans that debtors can use. For example, Delaware has a semi-mandatory form for subchapter V debtors, but its local rules regarding compliance are still developing. Additionally, in Delaware, there are currently no local rules regarding the development of solicitation procedures. However, best practices currently dictate that solicitation procedures can be approved under certification of counsel after consultation with the subchapter V trustee and the Office of the United States Trustee.

V. Discharge under Subchapter V

a. Generally

i. If the bankruptcy court confirms a consensual plan, section 1141(d) governs the subchapter V debtor's discharge, which is received upon confirmation (even for individual subchapter V debtors as section 1141(d)(5) is inapplicable in subchapter V cases). *See* 11 U.S.C. § 1141(d), 1181(a).

    1. Accordingly, the effect of confirmation of a consensual plan under subchapter V is that the discharge occurs at confirmation, unless otherwise provided in the plan or order confirming the plan.

ii. If the plan is nonconsensual, and thus confirmed under section 1191(b), then section 1192 instead governs discharge. *See* 11 U.S.C. § 1181(c) ("If a plan is confirmed under section 1191(b) of this title, section 1141(d) of this title shall not apply, except as provided in section 1192 of this title."). *See* 11 U.S.C. § 1141(d)(1).

    1. The discharge under a nonconsensual plan will be granted "as soon as practicable after completion by the debtor of all payments due within the first 3 years of the plan, or such longer period not to exceed 5 years as the court may fix." *See* 11 U.S.C. § 1192.

b. Exceptions to Discharge

i. The controversy at the forefront of the subchapter V discharge is whether the exceptions to discharge in section 523(a), as incorporated by section 1192, apply *only* to individuals or whether they apply to both individuals and corporate entities proceeding under subchapter V.

    1. Relevant text of section 1192:

    > If the plan of the debtor is confirmed under section 1191(b) . . . , the court shall grant the debtor a discharge of all debts provided in section 1141(d)(1)(A) . . . and all other debts allowed under section 503 of this title and provided for in the plan, except any debt—
    > . . .
    > (2) of the kind specified in section 523(a) of this title.

    2. The majority of courts to have addressed the issue have found that the exceptions to discharge under section 523(a), as excepted pursuant to section 1192(2), are only applicable to subchapter V debtors who are individuals.

a. *Lafferty v. Off-Spec Sols., LLC (In re Off-Spec Sols, LLC)*, BAP No. ID-23-1020, 2023 WL 4360311 (B.A.P. 9th Cir. July 6, 2023) (affirming the bankruptcy court's decisions, "agree[ing] that the language and context of the relevant statutes indicate Congress's intent to make § 523(a) applicable in subchapter V only to individual debtors")

b. *BenShot, LLC v. 2 Monkey Trading, LLC (In re 2 Monkey Trading, LLC)*, 650 B.R. 521 (Bankr. M.D. Fla. 2023) (dismissing dischargeability complaints against limited liability companies proceeding under subchapter V based on holding that exceptions to discharge under section 523(a) applied only to individuals).

   i. *BenShot, LLC v. 2 Monkey Trading, LLC (In re 2 Monkey Trading, LLC)*, Adv. P. No. 6:23-ap-00007-TPG, 2023 WL 3947494, 2023 Bankr. LEXIS 1528 (Bankr. M.D. Fla. June 12, 2023) (certifying a direct appeal to the Court of Appeals for the Eleventh Circuit of earlier order, *supra*).

c. *Nutrien Ag Sols., Inc. v. Hall (In re Hall)*, 651 B.R. 62 (Bankr. M.D. Fla. 2023) (holding that the exceptions to discharge under section 523(a) do not apply to non-individual debtors in subchapter V and dismissing, in part, the dischargeabilty complaint relating to an alleged fraudulent scheme as to the non-individual entities).

d. *Avion Funding, LLC v. GFS Indus., LLC (In re GFS Indus., LLC)*, 647 B.R. 337 (Bankr. W.D. Tex. 2022), *motion to certify appeal granted*, No. 22-50403-CAG, 2023 WL 1768414 (Bankr. W.D. Tex. 2023) (holding that the exceptions to discharge under section 523(a) apply in subchapter V but only as to individual debtors).

e. Other earlier opinions holding that the section 523(a) exceptions to discharge do *not* apply to non-individual entities in subchapter V include: *Jennings v. Lapeer Aviation, Inc. (In re Lapeer Aviation, Inc.)*, Adv. P. No. 22-3002, 2022 WL 1110072, 2022 Bankr. LEXIS 1032 (Bankr. E.D. Mich. Apr. 13, 2022); *Catt v. Rtech Fabrications, LLC (In re Rtech Fabrications, LLC)*, 635 B.R. 559 (Bankr. D. Idaho 2021); *Cantwell-Cleary Co., Inc., v. Cleary Packaging, LLC (In re Cleary Packaging, LLC)*, 630 B.R. 466 (Bankr. D. Md. 2021), *rev'd* 36 F.4th 509 (4th Cir. 2022); *Gaske v. Satellite Rests.*

Inc. (In re Satellite Rests. Inc.), 626 B.R. 871 (Bankr. D. Md. 2021).

3. The minority view of published decisions is that the exceptions to discharge in section 523(a), made applicable by section 1192(2), apply to *all* debtors in subchapter V (i.e., to both individual and non-individual debtors).

   a. *Cantwell-Cleary Co. v. Cleary Packaging, LLC (In re Cleary Packaging, LLC)*, 36 F.4th 509 (4th Cir. 2022) (reversing and remanding upon holding that the discharge exceptions apply to both individual debtors and corporate debtors).

   b. *Concrete Log Sys. v. Better Than Logs, Inc. (In re Better Than Logs, Inc.)*, 631 B.R. 670 (Bankr. D. Mont. 2021) (excepting debt for willful and malicious injury from subchapter V non-individual debtor's discharge pursuant to section 523(a)(6)).