RECENT DEVELOPMENTS IN SUBCHAPTER V CASES

William L. Norton III
Bradley Arant Boult Cummings LLP
1600 Division Street, Suite 700
Nashville, TN 37203
615-252-2397
bnorton@bradley.com

TABLE OF CONTENTS

Page

It has been over four 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 aggregate secured and unsecured debt limit from $2,725,625[1] to $7,500,000 effective March 27, 2020, and extended to June 21, 2024. This increase has not been extended, however, and thus the debt limit is the same for Small Business Debtors as defined under Code § 101(51D), which as of April 1, 2022 was adjusted up to $3,024,725.

According to statistical information total US Bankruptcy filings surged by 18% in 2023 and Chapter 11 cases increased by 72%. Over sixty percent 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 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 2020-2023, the median months to confirmation of Subchapter V plans has been approximately 6 months as compared to approximately 10 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 of 210 days after the petition date (potentially 300 days total). These temporary provisions expired

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.). According to the sunset provisions of the statute, for the

[1] 11 U.S.C. §101(51D).

purposes of Subchapter V in cases filed after June 21, 2024, the "term 'debtor' means a small business debtor as defined in Code § 101(51D).

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. ELIGIBILITY

1. *In re Burdock and Associates, Inc.*, 2024 WL 3200463 (Bankr. M.D. Fla. June 17, 2024)

Issue: Whether debtor was eligible for Subchapter V case.

Holding: Creditor's claim in contractual dispute, including for lost profits, was unliquidated for purposes of determining corporate debtor's eligibility for relief under Subchapter V of Chapter 11, where consulting agreement between creditor and debtor included no financial terms, not even the rate charged by debtor for its consulting services, and nothing in the agreement that would allow one to calculate a claim for breach or alert debtor of the magnitude of such claim, creditor's contracts with third parties could not be used to easily calculate damages, as those contracts were

not at issue nor were they referenced in the consulting agreement, and lost profits were not capable of simple calculation or computation, but instead, required the exercise of judgment or discretion. Thus debtor was eligible for Subchapter V case because the objecting creditor's claim was unliquidated and thus objection to plan was denied.

2. *In re Karben4 Brewing, LLC*, 661 B.R. 392 (Bankr. W.D. Wis., 2024).

Issue: Whether debtor's noncontingent liquidated debts exceeded the debt limit for Subchapter V.

Holding: Managers of Chapter 11 debtor, a limited liability company formed as a craft brewery, were not authorized to file its Subchapter V petition absent consent of members, requiring dismissal of case. Under Wisconsin law, debtor's operating agreement, which gave managers authority over tasks described as "ordinary course," routine, and day-to-day, was ambiguous and would be interpreted so as to render it a rational business instrument. A reasonable person would have understood scope of managers' authority as limited to "ordinary course" activities, such "ordinary course" activities of entity that manufactured and sold beer included obtaining credit, replacing equipment, executing leases, arranging for distribution, and other normal industry practices, not filing for bankruptcy, which was not a routine or customary business practice and thus was beyond debtor's "ordinary course" operations, and state statutes did not expressly vest authority to file bankruptcy in managers.

3. *In re Zhang Medical P.C.*, 655 B.R. 403 (Bankr. S.D.N.Y. 2023)

Issue: Whether debtor's noncontingent liquidated debts exceeded the debt limit for Subchapter V.

Holding: In assessing a debtor's eligibility for subchapter V of Chapter 11, bankruptcy court may look both to debtor's schedules and to creditors' proofs of claim in determining debtor's total noncontingent liquidated debt. In this case, the noncontingent liquidated debts scheduled by debtor, which operated a Manhattan fertility clinic with a large international clientele, or reflected in proofs of claim as of petition date substantially exceeded statutory $7.5 million debt limit for Subchapter V debtors. Although debtor scheduled $5,797,128 in noncontingent liquidated debts, 27 scheduled creditors asserted proofs of claims in amounts larger than scheduled amounts. If those higher values were counted, resulting total would be $10,468,441 in noncontingent liquidated debts. Debtor challenged only one claim, namely, portion of landlord's claim triggered by filing of mechanic's lien. If the challenged sum of $1,338,757 were deducted from $10,468,441 total, resulting amount of noncontingent liquidated debt, $9,129,684, would exceed debt limit, and Bankruptcy Court's review of landlord's claim confirmed that four of its five components, that is, all but portion challenged by debtor, should be counted toward debt limit. Landlord's claim for unpaid rent was properly counted in determining whether noncontingent liquidated debts scheduled by debtor or reflected in proofs of claim as of the petition date exceeded the statutory $7.5 million debt limit for subchapter V Chapter 11 debtors. The claim was "noncontingent," since it was triggered by prepetition events, and it was "liquidated," since amount of rent was specified in parties' lease and the unpaid amount was easily calculable. Debtor's future payment obligations under its executory contracts and unexpired leases should rarely, if ever, be included in the debt-limit calculation; until debtor elects either to assume or to reject a contract or lease. In

contrast to an executory contract that is assumed by a debtor, which is an estate asset, a rejected contract is generally a pure liability to the estate, with no offsetting benefits; consequently, the debtor's rejection damages liability can fairly be considered a "debt" as the Bankruptcy Code defines that term.

4. *In re Fama*, 2023 WL 6131466 (Bankr. E.D.N.Y., Sept. 15, 2023)

Issue: Whether debtor's designation as Subchapter V should be allowed.

Holding: In order to be eligible to proceed under Subchapter V of Chapter 11, a debtor must be presently engaged in commercial or business activities. Requirement for eligibility to proceed under Subchapter V of Chapter 11 that debtor is "engaged in commercial or business activities" is a broad, encompassing phrase reflecting Congress' intent to provide wide availability for debtors to elect to file under Subchapter V and should be construed inclusively, to encompass any act of a business of a commercial nature under the totality of the circumstances. The debtor's need not be continuing its usual or prior business operations in order for it to be "engaged in business or commercial activities" as required for eligibility to proceed under Subchapter V of Chapter 11; that is, the terms "activities" and "operations" are not interchangeable, as "operations" insinuates a fully functioning business, but "activities" encompasses acts that are business or commercial in nature but fall short of an actual operating business. In this case, Debtor was "engaged in commercial or business activities," as required for eligibility to proceed under Subchapter V of Chapter 11, even though construction and contracting business that debtor had 25 percent interest in and that was the source of debt at issue, namely, personal guarantees of business debt, was not conducting its historical business operation as of petition date, and where debtor was addressing residual business debt in his bankruptcy case, debtor was pursuing a multi-million dollar counterclaim against former business associates for allegedly taking excessive distributions from business, and the court finds that the bankruptcy case was not motivated by gamesmanship.

5. *In re Macedon Consulting, Inc.*, 652 B.R. 480 (Bankr. E.D. Vir. 2023)

Issue: Whether damages from rejection of commercial lease was noncontingent and liquidated for the purposes of Subchapter V eligibility.

Holding: Liability of $14,390,820 under corporate debtor's leases of commercial office space was noncontingent and liquidated, for purposes of assessing debtor's eligibility for relief under Subchapter V of Chapter 11 as small business debtor because the lease liability arose prepetition, on dates the leases were fully executed, and timing of payments was not based on a future extrinsic event that might never occur.

6. *In re Evergreen Site Holdings, Inc.*, 652 B.R. 307 (Bankr. S.D. Ohio 2023)

Issue: Whether debtor's ownership of real property made it ineligible to proceed under Subchapter V.

Holding: In order for Chapter 11 debtor to be considered a "single asset real estate debtor," and thus ineligible for relief under Subchapter V of Chapter 11, three requirements must all be met: (1) debtor must have real property comprising a single property or a single project, other than a residential real property with fewer than four residential units, (2) the single property or project must generate substantially all of the debtor's gross income, and (3) there must be no substantial business conducted on the property other than the business of operating the real property and activities incidental thereto; all three requirements must be met for debtor to be deemed a "single asset real estate debtor." In this case, corporate debtor met the burden of proving by a preponderance of the evidence that its two parcels did not comprise a "single project" because the debtor's two parcels were not being used together in a common scheme. A small mobile home park was situated on one parcel, and the other parcel consisted of vacant land and was not presently being used at all.

7. *In re Free Speech Systems, LLC*, 649 B.R. 729 (Bankr. S.D. Tex. 2023)

Issue: Whether bankruptcy court could revoke Subchapter V election.

Holding: Bankruptcy Court had constitutional authority to enter a final judgment in proceeding whereby creditors sought to revoke Chapter 11 debtor limited liability company's (LLC) Subchapter V election, after debtor's owner had filed a separate Chapter 11 case. However, the decision to proceed under Subchapter V of Chapter 11 is within the exclusive province of the debtor and even if Bankruptcy Court could revoke Chapter 11 debtor limited liability company's (LLC) Subchapter V election, the court would not do so on creditors' motion after debtor's owner had filed a separate Chapter 11 case, because debtor, its owner, and creditors were currently engaged in mediation, debtor had already filed a Subchapter V plan; and several nondischargeability adversary proceedings had started against debtor.

8. *In re Hall*, 650 B.R. 595 (Bankr. M.D. Fla. 2023)

Issue: Whether loans to debtor and owner were liquidated.

Holding: Dispute between purported debtors and purported creditor, in adversary proceeding by purported debtors seeking disallowance of purported creditor's claim, relating to loans made to purported debtors, in its entirety based on fraud in the inducement, intentional misrepresentation, negligent misrepresentation, and equitable subordination, did not render the debt unliquidated, as would exclude amount of debt for purposes of calculating whether purported debtors exceeded $7.5 million debt limit for eligibility for relief under Subchapter V of Chapter 11, even if parties' dispute over claim was asserted by debtors to be "substantial."

9. *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.

10. *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.

11. *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.

12. *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.

13. *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.

14. *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.

15. *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.

16. *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 its 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)

17. *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.

18. *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.

19. *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).

20. *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.

21. *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."

22. *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.

23. *In re Parking Management*, 620 B.R. 544 (Bankr. Md. 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.

24. *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).

D. CONVERSION AND DISMISSAL

1. *In re Brendan Gowing, Inc.*, 661 B.R. 565 (Bankr. S.D. Tex. 2024)

Issue: Whether automatic stay imposed in previously dismissed small business case applied in debtor's subsequent Subchapter V case.

Holding: Automatic stay never came into effect in debtors' voluntary Subchapter V Chapter 11 case where their first small business bankruptcy case had been dismissed less than two years previously, and debtors did not demonstrate that they would confirm a feasible non-liquidating plan within a reasonable period of time.

2. *In re JKW Enterprises, LLC*, 660 B.R. 289 and 660 B.R. 296 (Bankr. N.D. Iowa, June 7, 2024 and June 11, 2024).

Issue: Whether cause existed to dismiss or convert Subchapter V case.

Holding: United States Trustee established that debtors in jointly administered Subchapter V Chapter 11 cases filed their bankruptcy petitions in bad faith, supporting dismissal of bankruptcy cases for cause. While debtors had more than one asset, debtors were unable to meet current expenses and had negative cash flow, debtors had no employees, proceeding was a two-party dispute between debtors and secured creditor that had pending foreclosure actions in state court brought against debtors, debtors filed bankruptcy cases only two days after secured creditor had filed motion for default judgment in state court, and there were only a few unsecured creditors with small claim amounts compared to secured creditor.

3. *In re M.A.R. Designs & Construction, Inc.*, 653 B.R. 843 (Bankr. S.D. Tex. 2023)

Issue: Whether cause existed to dismiss or convert Subchapter V case.

Holding: Although Bankruptcy Code does not specifically enumerate bad-faith conduct as "cause" for conversion or dismissal of Chapter 11 case, bankruptcy courts nevertheless routinely treat conversion or dismissal for bad-faith conduct as implicitly authorized by the words "for cause.". In the context of a debtor who has ceased business operations and liquidated virtually all of its assets, any negative cash flow, including that resulting only from administrative expenses, effectively comes straight from the pockets of creditors and is sufficient to demonstrate best interests of creditors and the estate on motion to convert or dismiss Chapter 11 case for "cause" based on "substantial or continuing loss or diminution" theory. In this case, totality of the circumstances demonstrated "cause" to convert or dismiss debtor's case under Subchapter V of Chapter 11 based on bad faith for the following reasons: debtor was involved in fraudulent real estate transactions executed through its president, who pled guilty in state court to four counts of fraud, debtor intentionally failed to schedule certain liabilities against the estate even though debtor knew about those potential claims, debtor had little to no cash flow, debtor's only employee was its president, and debtor failed to accurately disclose information in its monthly operating reports and failed to timely file the reports, with no excuse provided for failing to provide the reports. Even if the court finds "cause" to convert or dismiss Chapter 11 case, the court must abstain from converting or dismissing the case if the court finds and specifically identifies unusual circumstances establishing that conversion or dismissal is not in the best interests of creditors and the estate. In this case, conversion of debtor's case under Subchapter V of Chapter 11 to one under Chapter 7, rather than dismissal, would be in the best interests of creditors and the estate, upon United States Trustee's (UST) requisite showing of "cause," where greater economic value would be produced in bankruptcy rather than outside of bankruptcy. A Chapter 7 trustee would be better positioned to investigate and effectively liquidate the numerous pieces of real estate owned by debtor, and there was widespread distrust of debtor to effectively liquidate.

4. *In re Macedon Consulting, Inc.*, 652 B.R. 480 (Bankr. E.D. Vir. 2023)

Issue: Whether Subchapter V case should be dismissed for bad faith.

Holding: Where corporate debtor was ineligible for relief under Subchapter V of Chapter 11 as small business debtor because debtor's noncontingent liquidated liabilities exceeded $7.5 million Subchapter V debt limit, Bankruptcy Court would revoke the Subchapter V designation, rather

than dismiss the case, because the only parties who would be better off from a dismissal of the case would be lessors. Further, lessors failed to show that corporate debtor filed its Chapter 11 case in subjective bad faith, as required to warrant dismissal. Instead, there was a landscape of economic uncertainty and debtor was seeking to limit its liabilities and pay its creditors what they were entitled to under the Bankruptcy Code so that it could service its debt, pay and retain its employees, pay trade creditors and turn a profit.

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

Issue: Whether Debtor's 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.

6. *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.

7. *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.

8. *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.

9. *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.

10. *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.

E. EMPLOYMENT ISSUES

1. *In re MFP Infrastructure Solutions, Inc.*, 654 B.R. 922 (Bankr. N.D. Ill. 2023)

Issue: Whether counsel for Subchapter V debtor should be allowed fees and expenses**.**

Holding: Time spent by counsel for Subchapter V Chapter 11 corporate debtor on office conferences and meetings between two lawyers that were necessary and brief did not entail unnecessary duplication of services that would warrant reduction of requested attorney fees.

Because an intraoffice conversation or meeting always requires at least two lawyers, allowing only one to bill the time, pursuant to Code § 330(a)(4)(A)(i) prohibiting court from allowing compensation for a professional's unnecessary duplication of services, is unfair. The lawyer who converses with a second lawyer about a case has spent time on the conversation he could have spent on something else, and if he cannot bill for the conversation, he goes uncompensated. Reduction by $530 of attorney fees requested by counsel for Subchapter V Chapter 11 corporate debtor in amount of $47,556.83 was appropriate to account for four instances when counsel billed different amounts of time for the same conversations. Counsel offered no explanation why amounts of time were inconsistent, and so the court would assume that the shortest time was correct.

2. *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.

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 counsel 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.

F. TRUSTEE ISSUES

1. *In re Turkey Leg Hut & Company, LLC*, 659 B.R. 539 (Bankr. S.D. Tex. 2024)

Issue: Whether Subchapter V trustee has standing to bring a claim on behalf of the debtor.

Holding: Bankruptcy Court's order deciding whether temporary restraining order should issue in adversary proceeding brought by Subchapter V Chapter 11 trustee against spouse of debtor limited liability company's representative was interlocutory in nature, and therefore could be entered without a determination of the Court's constitutional authority to enter a final judgment. The order did not decide everything the trustee asked the Court to decide, namely, whether to grant temporary injunctive relief and impose a preliminary injunction. Debtor in possession had exclusive standing to pursue estate causes of action, and therefore Subchapter V trustee lacked statutory standing to bring claims on behalf of debtor limited liability company against spouse of debtor's representative requesting temporary restraining order to enjoin representative's spouse from interfering with debtor.

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 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."

4. *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.

G. PLAN CONFIRMATION

1. Interim Bankr. Rule 3017.2 was added in 2020 to authorize the applicable bankruptcy court to take the following actions:

(1) fix a time for holders of claims and interests to accept or reject a debtor's plan,
(2) fix a date on which an equity security holder must be the holder of record to be eligible to accept or reject the debtor's plan,
(3) fix a date for the hearing on confirmation, and
(4) fix a date for transmitting a plan and a notice of the time within which the holders of claims and interest may accept or reject a plan.

2. *In re 303 Investments, Inc.*, 2024 WL 3355196 (Bankr. D. Colo. June 24, 2024)

Issue: Whether the debtor's Chapter 11 Subchapter V Plan was proposed in good faith and was fair and equitable.

Holding: Corporate debtor's proposed Subchapter V Chapter 11 Plan provided clear obligations to the debtor, as required for confirmation, by including a brief history of the business operations, a liquidation analysis, and projections with respect to the ability of the debtor to make payments required under the Plan. Further, the court held that the corporate debtor's proposed Subchapter V Chapter 11 Plan (i) met applicable statutory requirements for confirmation of nonconsensual Plan, (ii) Plan classified claims in an appropriate manner, with secured claims separately classified according to respective collateral, (iii) the Plan specified treatment of impaired classes and did not

discriminate between the holders of claims in any particular class, and (iv) the Plan provided for adequate means of the Plan's implementation, and (v) the Plan was proposed in good faith because there can be no bad faith in a Subchapter V Chapter 11 plan that proposes to modify a claim in a way that the Bankruptcy Code allows. In this case, the debtor utilized the bankruptcy process to negotiate a plan that had been accepted by all of its creditors with the exception of one creditor, length of time the case had been in Chapter 11 was due to extensive efforts made by debtor to comprehensively settle litigation and present a consensual plan, and there was a reasonable likelihood the plan would achieve its intended results which were consistent with the purposes of the Bankruptcy Code.

3. *In re Trinity Family Practice & Urgency Care PLLC*, 2024 WL 2704056 (Bankr. W.D. Tex. May 24, 2024).

Issue: Whether the debtor's Chapter 11 Subchapter V Plan was proposed in good faith and was fair and equitable.

Holding: Debtor's plan was proposed in good faith and not by any means forbidden by law. Subchapter V of Chapter 11 gives the Bankruptcy Court the sole authority and discretion to fix a plan payment period longer than the baseline or "default" three-year period, however, the debtor failed to show that its proposed three-year period for plan payments was "fair and equitable."

4. *In re Trimax Medical Management, Inc.*, 659 B.R. 398 (Bankr. M.D. Ga., 2024.

Issue: Whether Subchapter V plan should be confirmed

Holding: Debtor-expense sharing management company's allocation of expenses did not demonstrate bad faith, as might warrant denial of confirmation of proposed Subchapter V Chapter 11 plan. Plus, debtor-expense sharing management company accurately assessed liquidation value of its accounts receivable, including $0 for company that was also owned in part by debtor's sole owner/operator and owed debtor over $2.7 million in unpaid management fees, because debtor determined that company was insolvent and collection against its receivable would not profit the estate's unsecured creditors.

Debtor's proposed Subchapter V Chapter 11 plan was fair and equitable, for purposes of confirmation. Debtor provided a budget for its operations under the plan which applied all of debtor's projected disposable income to payments, and while objecting creditor raised questions as to the reasonableness of certain expenses listed on the budget, removing expenses would reduce the amount by which debtor's profit percentage was calculated, reducing debtor's income and creditor's potential recovery, because debtor planned to charge its customers an additional percentage of debtor's expenses as a profit. Additionally, the Bankruptcy Court approved trustee's and debtor's agreement as to distribution of proposed Subchapter V Chapter 11 plan's proceeds, whereby debtor would continue to directly pay its secured creditors while trustee would manage distributions to unsecured creditors, even though debtor neither affirmed nor denied the agreement on the record.

5. *In re Hal Luftig Co., Inc.*, 655 B.R. 508 (Bankr. S.D.N.Y., 2023)

Issue: Whether Subchapter V plan that contained a release of third parties should be confirmed.

Holding:

Under the Second Circuit's *Purdue Pharma* test, 69 F.4th 45, for evaluating propriety of Chapter 11 plan's proposed nonconsensual third-party release, courts consider whether: (1) there is identity of interests between debtors and released third parties, including indemnification relationships, such that suit against nondebtor is, in essence, suit against debtor or will deplete assets of the estate, (2) claims against debtor and nondebtor are factually and legally intertwined, including whether debtors and released parties share common defenses, insurance coverage, or levels of culpability, (3) scope of releases is appropriate such that its breadth is necessary to the plan, (4) releases are essential to reorganization, (5) nondebtor contributed substantial assets to reorganization, (6) impacted class of creditors "overwhelmingly" voted in support of plan with releases, and (7) plan provides for fair payment of enjoined claims.

In this case, the proposed Subchapter V plan of reorganization of a theater production company, which contained a nonconsensual third-party release purporting to release certain claims against debtor's nondebtor principal, was fair and equitable, as required for confirmation. Although debtor's profitability had apparently been volatile in the past, debtor's principal was proffering a back-stop commitment to contribute up to $100,000 to the extent necessary to satisfy the subsection of the Bankruptcy Code requiring that, for a plan to be "fair and equitable," the value of property to be distributed must not be less than the projected disposable income of the debtor.

Later in *In re Hal Luftig Company, Inc.*, 2024 WL 1197702 (S.D.N.Y. March 19, 2024), the court held that even if nonconsensual third-party releases are permissible in a Subchapter V case (which this opinion does not decide in a case that is not 'rare and exceptional') the fact that a Subchapter V plan can be confirmed without any creditor support does not eliminate the sixth *Purdue Pharma* requirement that "the impacted class of creditors overwhelmingly voted in support of the plan with the releases."

6. *In re Trinity Legacy Consortium*, 656 B.R. 429 (Bankr. N.M. 2023)

Issue: Whether debtor should be allowed extension to file Subchapter V plan.

Holding: The court applied an **e**quitable inquiry as standard for granting extension of time to file plan under Subchapter V of Chapter 11. In determining whether extension of time was needed due to circumstances for which the debtor should not justly be held accountable, term "justly" allowed court to take into account all relevant circumstances surrounding debtor's need for extension of time to file plan and to balance interests of affected parties. In striking balance under equitable inquiry for granting extension of time to file plan under Subchapter V of Chapter 11,

court should be guided by overarching goals of Subchapter V to provide process by which debtors may reorganize and rehabilitate their financial affairs, provide framework for expeditious and economical resolution of case under Subchapter V, and facilitate development of consensual plan. Extension of time for debtor to file plan under Subchapter V of Chapter 11 was appropriate, where debtor was close to concluding its negotiations in mediation with two major creditors in an effort to file a consensual plan, the court had already granted several extensions of time for debtor to file plan without objection by any creditors after notice, there was no evidence that debtor acted in bad faith, and while debtor could have filed a placeholder plan by deadline and then modified the plan before confirmation hearing, the more appropriate course of action would be for debtor to receive the extension so it could file a meaningful plan designed to be taken to confirmation hearing.

7. *In re Hotz Power Wash, Inc.*, 655 B.R. 107 (Bankr. S.D. Tex. 2023)

Issue: Whether fifth amended Subchapter V plan should be approved.

Holding: A nonvoting impaired creditor class should not be treated as having implicitly accepted or rejected a Subchapter V Chapter 11 plan for confirmation purposes but, instead, should not be counted. Bankruptcy Code is silent on correct treatment of a nonvoting class, acceptances and rejections must satisfy formality requirements set forth in bankruptcy rule governing proper form of acceptance or rejection of Chapter 11 plans. Treating nonvoters as rejecters would defeat policy goals of Subchapter V, and calculation mandated by Code subsection setting forth number and amount of votes necessary for plan to be deemed accepted, which requires number of accepting votes to be divided by total votes cast in class, creates a mathematically undefined result that is absurd when applied to a nonvoting class, thus leaving court with one option, namely, to ignore a nonvoting class. In this case, Debtor's proposed fifth amended Subchapter V plan of reorganization satisfied the requirement that a Chapter 11 plan can only be confirmed if, with respect to each impaired class of claims or interests, such class has accepted the plan, where the plan contained three impaired classes, two of the impaired classes voted to accept the plan, and one impaired class did not vote. The nonvoting impaired class would not be counted.

8. *In re Central Florida Civic, LLC*, 649 B.R. 77 (Bankr. M.D. Fla. 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.

9. *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."

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

11. *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.

12. *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.

13. *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.

14. *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).

15. *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.

16. *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.

17. *In re U.S.A. Parts Supply, N.D.*, 630 B.R. 487 (Bankr. N.D. W.Vir. 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.

18. *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."

19. *In re Walker*, 628 B.R. 9 (Bankr. E.D. Pa. 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.

20. *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.

21. *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.

22. *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.

23. *In re Bressler*, 625 B.R. 27 (Bankr. S.D. Tex. 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.

24. *In re Baker*, 625 B.R. 27 (Bankr. S.D. Tex. 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.

25. *In re Pearl Resources LLC*, 622 B.R. 236 (Bankr. S.D. Tex. 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).

26. *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.

27. In re Ellingsworth Residential Community Assoc., 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.

H. 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.

I. 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."

J. DISCHARGE

1. *In re GFS Indus., L.L.C.*, 99 F.4th 223 (5th Cir. 2024).

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

Holding: Because Congress did not add a provision to Code § 1192(2) instructing that the list of nondischargeable debts was limited to only certain types of debtors—entities or individuals—the words of Subchapter V are clear, and therefore there is no need to revert to policy issues or speculation as to what Congress must have meant. The specific language of Code § 1192(2) refers only to types of debts, not types of debtors. "Just like section 1228, section 1192 clearly contains language that lists claims that are not subject to discharge under those portions of the statute. Generally, two sections of the Code with identical language should be interpreted with the same meaning."

2. *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).

3. In re Premier Glass Services, Inc., 2024 WL 3808696 (Bankr. N.D. Ill. August 13, 2024).

Issue: Whether individual debtor was entitled to a discharge upon a liquidation.

Holding: Plaintiff believes that confirmation of a consensual plan is not likely and has filed the adversary case to determine whether the debts of the kind listed in Code § 523(a) apply to a Subchapter V entity debtor. The court denied the motion to dismiss, holding that the complaint states a claim upon which relief can be granted because claims of the kind listed in Code § 523(a) are not dischargeable under Code § 1192(2) for entity and individual debtors.

4. *In re Lucido*, 655 B.R. 355 (Bankr. N.D. Calif. 2023)

Issue: Whether individual debtor was entitled to a discharge upon a liquidation.

Holding: Debtor's proposed Subchapter V Chapter 11 plan provided for liquidation of "substantially all" of the property of the estate and so was a liquidating plan for purposes of Code § 1141(d)(3)(B) providing that confirmation of Chapter 11 liquidation plan does not discharge a debtor if debtor does not engage in business after consummation of plan and debtor would be denied discharge if case were one under Chapter 7. Nevertheless, post-petition tax documents and debtor's Chapter 11 monthly operating reports disclose that his consulting work generated the bulk of his (non-rental) post-petition income, and the Plan proposes that Lucido will expand his consulting business, continue to work out of the union hall, and start to receive social security. Further, there is no strong indication that his consulting business will slacken post-consummation, and the fact that this work will not be the sole source of funds does not prevent this court from determining that he will be "engaging in business." Accordingly, the court finds that the objecting creditor has not met its burden of proof on whether the debtor would be engaged in business post-confirmation and thus the debtor would be entitle to a discharge. The court did not address whether Code § 1141(d)(3) applies in a Subchapter V case when Code §1181(c) states that Code § 1141(d) does not apply when the plan is confirmed under § 1191(b).

Additionally, denial of the discharge of Subchapter V Chapter 11 debtor was not warranted on the ground that he fraudulently transferred, removed, destroyed, mutilated, or concealed estate property postpetition; although claimant argued that debtor concealed evidence concerning operations and finances of his wholly-owned equipment-rental company, including copies of company's checks. While debtor's equity interest in company was property of the estate, claimant failed to show that debtor's alleged use of company's cash for personal expenses eroded company's equity, and claimant also failed to establish that debtor, who produced company's bank statements and general ledgers, acted with the requisite intent to hinder, delay, or defraud.

5. *In re Off-Spec Solutions, LLC*, 651 B.R. 862 (9th Cir. BAP 2023)

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

Holding: Code §1192 renders dischargeable debts that would be nondischargeable for individuals.

6. *In re 2 Monkey Trading, LLC*, 650 B.R. 521 (Bankr. M.D. Fla. 2023)

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

Holding: Discharge exceptions does not apply in Subchapter V cases filed by limited liability companies.

7. *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.

8. *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.

9. *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).

K. REMOVAL OF THE DEBTOR AS DEBTOR IN POSSESSION

1. *In re Duling Sons, Inc.* 650 B.R. 578 (Bankr. S.D. 2023)

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

Holding: "Cause" existed to dismiss or convert corporate debtor's Subchapter V Chapter 11 case to one under Chapter 7, or to remove the debtor-in-possession (DIP), where case had been pending for 16 months, administrative expenses and interest due to an oversecured lender were accruing and posed a threat to the administrative solvency of the case. Notwithstanding the presence of

experienced professionals and extensive legal work in the case, the DIP made scant progress in securing the support of creditors for a plan of reorganization, and every major stakeholder had serious concerns about the existence of conflicts of interest and the DIP's ability to act as a fiduciary for debtor's bankruptcy estate. After finding that "cause" exists for dismissal or conversion of Chapter 11 case or removal of debtor-in-possession, the court must decide what course of action will serve the best interests of creditors and the estate. Removing debtor-in-possession and expanding role of Subchapter V trustee, rather than conversion or dismissal of case, was in best interests of creditors and estate, upon finding "cause". There were many advantages to maintaining debtor's Subchapter V election, including its cost-effectiveness and elimination of absolute priority rule. Because debtor intended to market and sell its assets to fund a liquidating plan, staying in Subchapter V would prevent the estate from incurring substantial fees, and as the case had well over 300 docket entries and the estate had made a significant investment in the professionals who were familiar with the case, the natural learning curve for a new professional, if the case were converted, would require duplicative work and further delay distributions to creditors.

2. *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.

3. *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.

4. *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.

5. *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).

6. *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.

Should Future Liability on a Lease Count for Subchapter V Eligibility

James R. Ahler, Chief Judge
United States Bankruptcy Court
Northern District of Indiana

I. Subchapter V Eligibility under 11 U.S.C. § 1182

1. 11 U.S.C. § 1182(1)(A) defines a debtor for purposes of Subchapter V eligibility as a "person engaged in commercial or business activities . . . that has aggregate noncontigent 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 $7,500,000.00. (The limit has now reverted back to the amount in 11 U.S.C. § 101(51D) which is currently $3,024,725).

2. In the cases for our discussion, the issue is whether liability under a long-term lease is noncontigent and liquidated for purposes of Subchapter V eligibility.

II. *In re Parking Management, Inc.*, 620 B.R. 544 (Bankr. D. Md. 2020)

A. Background

1. Debtor filed a petition under Chapter 11 on May 7, 2020, and elected to proceed under Subchapter V. On the date of the petition, debtor sought authority from the court to reject 12 leases. On May 21, 2020, the court authorized debtor to reject seven of the leases "as of" the petition date. The remaining five leases were allowed to be rejected by the court "as of" May 12, 2020. Debtor's amended schedules, filed after the court allowed the lease rejections, listed debt owed to the lessors as contingent and disputed. One of the lessors objected to debtor's Subchapter V designation and argued that their claim was noncontingent and, therefore, debtor was over the eligibility limit for Subchapter V.

B. Holding

1. As a matter of first impression, the court in *Parking Management* looked to cases involving eligibility debt limits for Chapter 13 and Chapter 12 cases as guidance in determining eligibility for Subchapter V. The Court noted that § 1182's language "as of the date of filing" has no discernable difference from § 109(e)'s language requiring eligibility determinations in Chapter 13 cases "on the date" of filing the petition.

2. Like with eligibility determinations under Chapter 13 and Chapter 12, a debt is noncontingent where all events necessary to give rise to liability have taken place prior to the filing of the petition.

3. 11 U.S.C. § 365(a) requires court approval for the assumption or rejection of an unexpired lease. This is especially important in the context of Subchapter V cases where a leasehold interest is often the most valuable asset a small business has.

4. The court said that similar to § 109(e) eligibility consideration for Chapter 13 cases, Subchapter V eligibility should only consider debts as they existed as of the petition date, irrespective of postpetition events whatsoever.

5. In regard to the five leases that were rejected "as of" May 12, 2020, the court held that because they were rejected after the date of the petition they were contingent as of the date of the filing of the petition and these debts were not counted for Subchapter V eligibility.

6. Likewise for the seven leases that were rejected "as of" the petition date, the court held that it was postpetition actions by the court (approval of the lease rejections) that rendered the debts noncontingent. Therefore, the debts were contingent as of the petition date and would not be counted for Subchapter V eligibility. Debtor is allowed to continue their case in Subchapter V.

C. Takeaway

1. The holding in *Parking Management* suggests that future liability on a lease would rarely, if ever, be counted for Subchapter V eligibility. Even post-petition events that are deemed to have retroactive application would not be considered in the eligibility determination.

III. *In re Macedon Consulting, Inc.*, 652 B.R. 480 (Bankr. E.D. Va. 2023)

A. Background

1. On February 28, 2023, Macedon filed a voluntary petition for relief under Subchapter V of Chapter 11. Prior to filing the petition, debtor entered into two commercial leases for office space. On the same day the petition was filed, debtor filed a motion to reject both the commercial leases. In response to the motion to reject the leases, the lessors filed a motion to dismiss, wherein they argued that debtor is ineligible to be in Subchapter V.

B. Holding

1. The Court in *Macedon* framed its issue slightly different than in *Parking Management.* The court considered whether the full liability under the lease should be included in the Subchapter V eligibility or whether the timing of the lease payments renders the liability contingent.

2. The court looked at *Parking Management* for guidance in its decision and actually agreed with the reasoning and logic in *Parking Management.*

3. The court, however, said that *Parking Management* did not fully analyze the pre-petition liability owed under the leases and that the court needed to consider all events that gave rise to liability prior to the filing of the petition.

4. Here, the court stated that liability under the leases arose pre-petition when the leases were fully executed. Further, the court stated that the timing of payments in the future did not make the debt contingent because, absent the end of the world, the future date would occur.

5. Therefore, the court held that the future liability under the leases is noncontingent and liquidated and debtor was over the eligibility limits for Subchapter V.

C. Takeaway

1. The holding in *Macedon* seemingly relies on the same legal reasoning as *Parking Management* but leads to the opposite conclusion.

2. The court never addressed the fact that debtor filed a motion to reject the leases when the petition was filed. *Parking Management* centers around the rejection of the leases and whether that event, which occurs post-petition, renders the future lease liability contingent. Instead, *Macedon* seems to look at the lease execution which occurred pre-petition. Therefore, the future lease liability is not contingent upon an act of the court to approve the rejection of the lease.

IV. *In re Zhang Medical P.C.*, 655 B.R. 403 (Bankr. S.D.N.Y. 2023)

A. Background

1. Debtor operated medical office fertility clinics in New York. In 2001, debtor entered into amended leases with a landlord wherein it leased additional space to expand its business. The business experienced serious problems when the COVID pandemic started in 2020, and on April 30, 2023, Debtor filed a petition under Chapter 11 Subchapter V. Two months after filing the petition, debtor moved to reject the lease it entered into in 2001. The court granted the motion to reject lease the following month after the motion to reject was filed.

2. The landlord objected to debtor proceeding in Subchapter V because debtor exceeded the debt limit for Subchapter V. The landlord argued that the future lease liability rendered debtor ineligible and, even if the future lease liability was not counted, debtor still exceeded the debt limit. Although the court ultimately held that debtor was ineligible for Subchapter V because its schedules revealed it was over the debt limit, the court went on to discuss the lease liability to address "the enormous—and in the Court's view detrimental—impact" the *Macedon* ruling had on Subchapter V eligibility.

B. Holding

1. Here, the court starts it review of the future lease liability issue by comparing the very similar facts of this case to that of *Macedon* but declining to follow the analysis in *Macedon*.

2. In this court's view, *Macedon* overlooks the distinctive nature of a a debtor's obligations under its unexpired leases, which can be both an asset and a liability. Because these leases can be either an asset or a liability, a debtor is given the option to assume or reject each lease.

3. If the lease is an asset, a debtor can assume the lease and that obligation moving forward is an administrative expense, entitled to high priority. If the lease is a liability, a debtor may reject it and the counterparty is entitled to rejection damages payable as an unsecured claim and subject to the statutory cap under § 502(b)(6).

4. Therefore, until a debtor assumes or rejects the lease, the amount and nature of a debtor's obligations under the lease are contingent and unliquidated. If a debtor assumes the lease, all contractual payment obligations must be met. But if the lease is rejected, the obligations will be based on a pre-petition basis, and the obligation of debtor is usually much smaller. This makes the future lease liability contingent on future events post-petition and the amount to be paid uncertain.

5. The court states, however, that there could be a circumstance in which future lease liability is counted towards eligibility for Subchapter V if a debtor rejects the lease at the time the petition is filed but that was not the case here and, therefore, the court did not reach that issue.

C. Takeaway

1. Like *Parking Management*, the holding in *Zhang Medical* focuses upon the rejection or assumption of the lease(s) at issue. Because assumption or rejection occurred after the petition was filed, the future lease liability was contingent upon a post-petition order by the court. In this case, however, the issue of whether the amount is unliquidated is also discussed by the court for the first time. The court reasons that because the decision to assume or reject will often dictate the payment for the lease liability, the payment amount is uncertain and, therefore, unliquidated as well as contingent.

V. Questions for Discussion

1. None of the foregoing cases discuss state law regarding breach of lease. Would the analysis change depending on the state law? What if the state law, like Indiana, requires a landlord to try and mitigate its damages by re-letting the property? What if a lessee was immediately liable under state law for all rent during the term of the lease? Would that make the lease liability more contingent?

2. What if the debtor is current on the lease up to filing the Subchapter V petition? Is the debtor liable for all remaining rent? Is the amount unliquidated until the lease is assumed or rejected?

3. Was the court in *Parking Management* correct to not include lease liability for the leases rejected "as of" the petition date in the eligibility

determination? Eligibility is set as of the petition date, therefore, shouldn't liability on a lease rejected as of the petition date be included in the eligibility determination?