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Confirmation of a Plan of Reorganization
Under Subchapter V, 11 U.S.C. § 1191 Case Law

1. **Extension of time to file a Plan.** *In re: Arnold Baker,* 625 B.R. 27 (Bankr. S.D. TX 2020): Due to circumstances beyond Debtor's control; to wit, 341(a) Notice did not set forth a bar date for governmental claims, Court granted Debtor's second request for an extension of time pursuant to § 1189(b) to file a Subchapter V Plan. Debtor argued that he should not be held accountable for the deficient 341(a) Notice. The various governmental units were scheduled as "unknown" and therefore a proof of claim was required so Debtor could determine how to treat them in his Plan. Court discovered that due to a technological glitch, for cases filed as a Subchapter V case, the event code used by the UST to set the 341 meeting date did not trigger a bar date for governmental units. While recognizing that Debtor "could and should have brought the missing governmental bar date deadline to the court's attention," because Debtor had no control over the missing information weighed in favor of Debtor and the second extension was granted.

2. **Objections to Plan.** *In Re: Moore Properties of Person County, LLC*, Case. No. 20-80081 2020 WL 995544 (M.D. North Carolina February 28, 2020): Bankruptcy Administrator objected to Debtor's proposed Subchapter V Plan that Debtor did not qualify as a small business debtor. Court determined that a small business debtor that filed a Chapter 11 Petition prior to the enactment of SBRA was entitled to amend its election to Subchapter V because the application of Subchapter V does not create a taking or retroactivity concerns as expressed in *Landgraf v. U.S.I Film Products,* 511 U.S. 244 (1994). Specifically, the Court found that the required and permissible provisions of a Chapter 11 plan which are contained in 11 U.S.C. § 1123 applies unaltered under Subchapter V with three (3) exceptions.

1) Section 1181(a) excludes Section 1123(a)(8) which requires an individual debtor to contribute post-petition earnings as necessary for execution of the Plan.
2) Excludes the requirements of 1123(c) which prohibits a third-party plan providing for the use of exempt property in an individual case; and
3) Section 1190(3) creates an exception to the anti-modification provision in 1123(b)(5) by permitting the modification of the rights of a holder of a secured claim secured solely by a security interest in the principal residence of the debtor if the obligation is not a purchase money mortgage and the new value received was used primarily in connection with the debtor's small business.

2. The Court went on to find that Subchapter V modifies the requirements for a Chapter 11 small business debtor to obtain a confirmed plan. Existing requirements for confirmation are set forth in Section 1129. Under Section 1191(a), the debtor must meet all the existing requirements for confirmation under 1129(a) except under Subchapter V, a debtor may confirm a plan without acceptance by at least one accepting impaired class as otherwise required by 1129(a)(10) so long as the plan does not discriminate unfairly and is fair and equitable to the dissenting class. This is the same standard for confirmation under existing 1129(b), however, Subchapter V amends the definition of "fair and reasonable" for classes of unsecured creditors and interest by substituting the disposable income requirement in lieu of the absolute priority rule under 1129(b) and (c).

3. *In Re: Louis John Sullivan*, Case No. 20-11876, 2021 WL 1250805 (D. CO March 30, 2021). This case adjudicated a combined trial and confirmation hearing of debtor's Second Amended Subchapter V Plan of Reorganization and his ex-wife's motion to convert the case to one under Chapter 7. The United States Trustee objected to the Plan asserting that the debtor did

not meet the definition of a "small business debtor." The reason for the debtor's bankruptcy filing was the dramatic declining in income due to Covid-19. Debtor had operated a chain of Spanish language theaters and earned a significant yearly income. The business also had significant value. Based on these circumstances, the divorce court awarded debtor's former spouse a sizable maintenance award and an equalization payment to compensate for her share of the business. Once the pandemic hit, debtor lost his only source of income. Debtor ultimately obtained a job earning $90,000.00/year which was significantly less than the income earned while operating the theaters. The dramatic reduction in income made it virtually impossible for him to pay his former spouse $15,500.00/month in court ordered maintenance, let alone the equalization payment. In addition to debtor's debt to his former spouse, debtor had substantial business and consumer debt.

To determine whether debtor qualified as a small business debtor, the Court analyzed the definition of small business debtor and the characterization of debt as business vs. consumer. The debtor raised a novel argument that the equalization payment awarded by the matrimonial court arose from his business or commercial activity because it represents a transfer of a portion of the business and is akin to one partner buying out another partner's interest in the business. After a lengthy analysis of the definition of business debt, the Court ultimately determined that the equalization payment debt is rooted and grounded in the equitable termination of the parties' marriage and did not stem from a profit motive. Therefore, the equalization debt did not rise from a business or commercial purpose. As a result, the debtor did not qualify for a Subchapter V and his plan was not confirmed for those reasons.

Interestingly, to decide the former spouse's motion to convert the case to Chapter 7, the Court again analyzed the considerations necessary under 11 U.S.C. § 1112(b)(2) and determined that the Court, as an exercise of its broad discretion, weighed the best interest of the creditors in

the Estate and not the debtor and determined that conversion of the case to one under Chapter 7 is better for the former spouse.

4. **Cram down confirmation road map.** *In Re: Pearl Resources, LLC*, 622 B.R. 236 (Bankr. S.D. Tx 2020). This decision sets forth the considerations to be made in a contested confirmation hearing for a cram-down plan of reorganization under a Subchapter V. Here, over the creditor's objection, the Court determined that the cram-down plan for this debtor engaged in the oil and gas production industry was proposed in good faith, was feasible, past the disposable income test for whether a Subchapter V was "fair and equitable" to an impaired dissenting class, satisfied the enhanced "feasibility" requirement for cram-down and the cram-down plan provided secured creditors in the impaired dissenting class with the "indubitable equivalent" of their claims and could be "crammed down" over the objection of that class.

This decision is a roadmap for confirmation of a cram down plan.

5. *In Re: Fall Line Tree Service, Inc.*, Case No. 20-21548 2020 WL 7082416 (E.D. CA. December 3, 2020). A Subchapter V Plan was confirmed over the objection of a holder of a disputed unsecured claim. Under the Plan, which was supported by the Subchapter V Trustee, each holder of an unsecured claim would receive or retain under the Plan, property of a value as of the effective date of the Plan that is not less than the amount that such holder would receive or retain if the debtor were liquidated under Chapter 7. The objecting creditor was the seller of the retail sporting goods store to the debtor that financed the purchase with an unsecured note. The debtor had objected to the objector's Proof of Claim however, at the time of confirmation, the unsecured creditor's claim had not been resolved and therefore the unsecured creditor lacked standing to vote on the Plan. Moreover, the unsecured creditor had not filed an application with the Court to have its claim allowed for purposes of voting. Nevertheless, the objector asserted that

the liquidation analysis failed to account for the $300,000.00 of good will purchased by the debtor and that the liquidation value understated the inventory value. At the confirmation hearing, the objector's counsel, a certified public accountant, argued why the value of the business and the liquidation analysis was inaccurate. The Court rejected counsel's argument/testimony: "Statements by counsel about substantive matters made during argument to the Court are not evidence. Such statements are not based on personal knowledge…Anything that the attorney asserts in favor of the client is worthless as a matter of evidence, but anything that the attorney says that does not help the client may become admissible in evidence as an evidentiary admission by a party opponent." Further, the objector's counsel was not determined to be an expert with specialized knowledge. Therefore, the Court rejected the objection as to the value of good will and the liquidation analysis. Similarly, the objection as to the value of the inventory was also rejected as there was no admissible evidence offered. The Court then went on to make all the necessary determinations under 11 U.S.C. § 1191(c) and confirmed the plan.

6. *In re: Thomas Young and Connie Young*, Case No. 20-11844, 2021 WL 1191621, (D.NM. March 26, 2021. Pro se Debtors filed a fifth chapter 11 case in ten years. Debtors' Plan did not include any payments from Debtors because Mrs. Young planned to retire leaving Debtors with no disposable income. The Plan drew objections from UST and every class of creditors and the IRS. The Plan was not confirmable under section 1191. Of particular interest is the Court's application of the requirement that all disposable income be used to implement the Plan to Debtors statements that Mrs. Young will retire therefore they do not have any disposable income. Specifically, the Court found that Mrs. Young's testimony about retirement was belied by the MORs which disclose income sufficient to set aside for an anticipated blood treatment. Second, in Subchapter V, if debtors cannot or choose to not make plan payments, creditors lose the quid pro

quo for eliminating the absolute priority rule. Third, if Mrs. Young does retire, debtors would no longer be engaged in commercial or business activity thereby disqualifying them from Subchapter V. For those reasons along with a finding that the Plan was not filed in good faith, the Plan was not confirmed, and the case was converted to one under chapter 7.