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Annual Spring Meeting

Addressing SBA Loans in and Outside of Bankruptcy

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*The
Practitioner's
SBA Playbook -
Addressing SBA
Related
Obligations
Inside and
Outside of
Bankruptcy*

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I. Introduction and Overview

- ▶ Purpose of Presentation
- ▶ Growth and Importance of Subchapter V of Chapter 11
- ▶ Role of the U.S. Small Business Administration ("SBA") in Small Business Financing
- ▶ Types of SBA Loans:
 - ▶ 7(a) Loans
 - ▶ Private lender (bank)
 - ▶ SBA provides a guaranty
 - ▶ Blanket all assets lien
 - ▶ Principal guaranty
 - ▶ Sometimes personal residence lien (in part)
 - ▶ 504 Loans
 - ▶ Real estate loans (typically)
 - ▶ Fixed asset financing
 - ▶ Specific collateral
 - ▶ Principal guaranty
 - ▶ Disaster Loans (EIDL)
 - ▶ Direct loan from SBA
 - ▶ COVID-era terms: 3.75%, up to 30 years
 - ▶ Principal guaranty, over \$200K
 - ▶ Blanket liens on all assets (depending on amount of loan)

II. Structure of SBA Lending Relationships

Key Parties in Lending Structure

- SBA direct loans
 - Borrower (business or individual debtor)
 - Individual Guarantor, if any
- SBA guaranteed loans
 - Private Lender (bank)
 - Borrower (business or individual debtor)
 - Individual Guarantor, if any

Control of the Loan

- Distinction Between:
- SBA direct loans
 - SBA guaranteed loans
 - Whether loan has been “purchased” by SBA
- Importance of Identifying:
- SBA district counsel
 - Liquidation/workout officer

Legal Representation

- SBA direct loans or Purchased Guaranty Loans
 - U.S. Attorney’s Office
 - District Counsel
- SBA guaranteed loans
 - Counsel to private lender

II. Structure of SBA Lending Relationships cont.

Treasury Referral

- SBA may refer loans to U.S. Treasury for collection
- Consequences:
 - Administrative offset
 - Garnishment
 - Seizure of bank accounts/AR capture
- Timing of filing can be critical to avoid Treasury escalation

SBA Guaranty Mechanics (for 7(a) loans)

- Partial Guaranty (typically 50-85%)
- Servicing Responsibilities of Private Lender vs. SBA
- SOP (Standard Operating Procedures) Constraints

III. Pre-Bankruptcy Workout and Restructuring Options

Engaging with SBA and Private Lenders

- Who to Contact (Lender vs. SBA Servicing Center)

For questions directed to SBA:

- 7(a) Loan Program Questions: 7aQuestions@sba.gov or 877-475-2435
- 504 Loan Program Questions: 504Questions@sba.gov
- Regular Disaster Loan Questions: disastercustomerservice@sba.gov
- Covid EIDL Disaster Loan Questions: covideidlservicing@sba.gov
- MySBA Loan Portal: <https://lending.sba.gov>
 - set up by borrower to make payments and obtain loan information

Importance of Early Communication

III. Pre-Bankruptcy Workout and Restructuring Options cont.

Common Non-Bankruptcy Options

1. Loan Modifications
2. Deferments/Forbearance
3. Offers in Compromise (OIC)
4. Liquidation Outside Bankruptcy

Practical Considerations

1. SBA Approvals
2. Timing Issues

IV. SBA in the Bankruptcy Context - Especially Subchapter V

SBA as a Creditor

- ▶ Direct Lender
- ▶ Guarantor

Governmental Unit Issues

- ▶ Administrative Claims
- ▶ Priority Claims
- ▶ Plan Filing Nuances - Pursuant to 11 U.S.C. § 1189, in a Subchapter V case, the plan must be filed within 90 days of order for relief, which date is often before the governmental unit bar date.

IV. SBA in the Bankruptcy Context - Especially Subchapter V cont.

Cash Collateral Issues Involving SBA Loans - Noticing

Notice Requirements; Service Issues - The rule in relevant part:

7004(b) Service by Mail as an Alternative. Except as provided in subdivision (h), in addition to the methods of service authorized by Fed. R. Civ. P. 4(e)-(j), a copy of a summons and complaint may be served by first-class mail, postage prepaid, within the United States on:

...

(4) the United States, with these requirements:

(A) a copy of the summons and complaint must be mailed to:

(i) the civil-process clerk in the United States attorney's office in the district where the action is filed;

(ii) the Attorney General of the United States in Washington, D.C.; and

(iii) in an action attacking the validity of an order of a United States officer or agency that is not a party, also to that officer or agency; and

(B) if the plaintiff has mailed a copy of the summons and complaint to a person specified in either (A)(i) or (ii), the court must allow a reasonable time to serve the others that must be served under (A);

(5) an officer or agency of the United States, with these requirements:

(A) the summons and complaint must be mailed not only to the officer or the agency—as prescribed in (3) if the agency is a corporation—but also to the United States, as prescribed in (4);

(B) if the plaintiff has mailed a copy of the summons and complaint to a person specified in either (4)(A)(i) or (ii), the court must allow a reasonable time to serve the others that must be served under (A); and (C) if a United States trustee is the trustee in the case, service may be made on the United States trustee solely as trustee, as prescribed in (10);

Written materials contain specific examples

IV. SBA in the Bankruptcy Context - Especially Subchapter V cont.

<p>Cash Collateral Issues Involving SBA Loans</p>	<ul style="list-style-type: none"> - Budgets - Adequate protection - cash payment and/or replacement liens - Reporting requirements
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IV. SBA in the Bankruptcy Context - Especially Subchapter V cont.

Plan Confirmation Issues with SBA Obligations

Treatment of SBA-related Claims	Cramdown in Subchapter V	Section 1190(3) - Potential Modification of Claim Secured by Residence
<ol style="list-style-type: none"> 1. Secured vs. unsecured deficiency claims 2. Bifurcation under § 506 	<ol style="list-style-type: none"> 1. Fair and equitable” standard under § 1191 2. Projected disposable income requirement 3. Feasibility concerns 	<p>(3) notwithstanding section 1123(b)(5) of this title [11 USCS § 1123(b)(5)], may modify rights of holder of claim secured only by security interest in real property that is principal residence of debtor if new value received in connection with granting of security interest was—</p> <p>(A) not used primarily to acquire real property; and</p> <p>(B) used primarily in connection with small business of debtor.</p>

IV. SBA in the Bankruptcy Context - Especially Subchapter V cont.

Plan Confirmation Issues with SBA Obligations

Feasibility

- ▶ “The feasibility requirement is about whether the plan can be completed as laid out, not about the long-term future of the business after bankruptcy” *In re Edgewood Food Mart, Inc.*, 666 B.R. 418, 437 (Bankr. N.D. Ga. 2024).
- ▶ Credible evidence is needed to explain how amounts for certain expense line items are calculated and why the expenditures are needed. Furthermore, there must be a relationship between expenses and income. *See In re Premier Glass Servs., LLC*, 664 B.R. 465, 475 (Bankr. N.D. Ill. 2024) (“[w]ithout testimony or evidence to show that there was a relationship between the projected numbers and what Premier Glass expected to have in income, the court could infer only that the numbers were placeholders intended to create a reserve for reimbursements to equity holders”).
- ▶ Past performance can be a factor when reviewing projections. *In re Nelkin & Nelkin P.C.*, 662 B.R. 550, 563 (Bankr. S.D. Tex. 2024).

IV. SBA in the Bankruptcy Context - Especially Subchapter V cont.

Plan Confirmation Issues with SBA Obligations

Valuation Disputes

- Fed. R. Evid. 701. Opinion Testimony by Lay Witness
- Fed. R. 702. Testimony by Expert Witnesses
- Owner or officer of business may testify to value of business’ projected profits without necessity of qualifying as accountant, appraiser, or similar expert. Such testimony is admissible under Fed. R. Evid. 701 because it is based not on expert experience or training, but on particularized knowledge that witness has by virtue of position in business. Fed. R. Evid. 701 Advisory Committee’s note to 2000 amendment; *Lord & Taylor, LLC v. White Flint, L.P.*, 849 F.3d 567, 576 (4th Cir. 2017).
- Owner may testify as to value of property. *Gray v. Bank of Am., N.A. (In re Gray)*, No. 09-14445-RGM, 2010 Bankr. LEXIS 181, at *12 (Bankr. E.D. Va. Jan. 15, 2010); *see also U.S. v. 10,031.98 Acres of Land, More or Less, Situate in Las Animas County, Colo.*, 850 F.2d 634, 639 n. 4 (10th Cir. 1988) (concluding an owner has a “right to testify as to the value of the property at issue even when the owner is a corporation and the valuation testimony comes from a designated corporate officer”).

IV. SBA in the Bankruptcy Context - Especially Subchapter V cont.

Plan Confirmation Issues with SBA Obligations

Best Interest

- Liquidation analysis is necessary in order to meet best interests of creditors test in 11 U.S.C. § 1129(a)(7) which states that “[w]ith respect to each impaired class of claims or interests each holder of a claim or interest of such class—(i) has accepted the plan; or (ii) will receive or retain under the plan on account of such claim or interest property of a value, as of the effective date of the plan, that is not less than the amount that such holder would so receive or retain if the debtor were liquidated under chapter 7 of this title on such date...”
- *In re Pearl Res. LLC*, 622 B.R. 236, 262 (Bankr. S.D. Tex. 2020) (approving plan as meeting “best interest of the creditors test” when creditors would be paid in full w disposable income).
- *In re SSA Retail Mgmt. LLC*, No. 20-32025, 2021 WL 813832, (Bankr. N.D. Tex. Mar. 2, 2021) (Subchapter V submitted plan met requirements for Section 1129(a)(7) by paying all classes entitled to vote but not accepting the plan at least as much as they would receive under submitted liquidation analysis).
- *In re Fall Tree Line Service, Inc.*, Case No. 20-21548-C-11, 2020 WL 7082416 (Bankr. E.D. Cal. 2020) (liquidation analysis should not include purchased goodwill as an asset for evaluation of total value in Subchapter V debtor company).
- *In re Microcurrent Rsch. & Educ., LLC*, 626 B.R. 455 (Bankr. M.D. Fla. 2021) (Subchapter V business debtor required to include cash on hand for distribution to creditors in its liquidation analysis submitted in connection with plan).

IV. SBA in the Bankruptcy Context - Especially Subchapter V cont.

Plan Confirmation Issues with SBA Obligations

Fair and Equitable and Good Faith Considerations

- To be confirmed under § 1191(c)(2)(B), plan must distribute property which has value equal to, or greater than, debtor's projected disposable income over at least three years, or such longer period as Court determines is appropriate.
- For a discussion of the 3-year v 5-year debate, see *In re Edgewood Food Mart, Inc.*, 666 B.R. 418 (Bankr. N.D. Ga. 2024); *In re Trinity Family Practice & Urgent Care PLLC*, 661 B.R. 793 (Bankr. W.D. Tex. 2024).
- A plan is not filed in good faith (Section 1129(a)(3)) if it proposes favorable treatment for insider claimants while protecting the same insiders from potential litigation. *Legacy Pools LLC*, No. 6:22-bk-03123-LVV, 2024 Bankr. LEXIS 2169, at *13 (Bankr. M.D. Fla. Sep. 13, 2024).
- Good faith found when (1) plan was legitimate attempt to reorganize and preserve going concern business, (2) debtor did not engage in misconduct in proposing plan or propose it with ulterior motives, and (3) debtor did not deal or negotiate inappropriately with creditors or engage in other conduct that was fundamentally unfair. In particular, court noted that three-year plan payment period (which is expressly permitted under Section 1191(c)(2)(A)) was not by itself bad faith solely because debtor could pay more over five years. *In re Legacy Pools LLC*, No. 6:22-bk-03123-LVV, 2024 Bankr. LEXIS 2169, at *14 (Bankr. M.D. Fla. Sep. 13, 2024). *But see In re Who Dat?, Inc.*, No. 21-10292, 2024 Bankr. LEXIS 743, at *26 (Bankr. E.D. La. Mar. 27, 2024) (finding lack of good faith when plan sole purpose was for equity to retain ownership of the debtor (and its valuable assets) and pay the legal fees of counsel).
- Good faith only pertains to whether it is reasonably likely that plan will achieve result consistent with objectives of Bankruptcy Code (which, in this case, the court interpreted as likelihood of successful reorganization). Small payout to unsecured creditors is not in and of itself bad faith for purposes of § 1129(a)(3). *In re Trimax Med. Management*, 659 B.R. 398, 403 (Bankr. M.D. Ga. 2024).

IV. SBA in the Bankruptcy Context - Especially Subchapter V cont.

Confirmation Issues Associated with Lack of SBA Vote - Risk of failing § 1129(a)(10) (accepting impaired class)

Nonvoting classes should not be considered in § 1129 (a)(8) analysis

Holders of impaired claims that did not vote were bound by classes that accepted plan; Court confirmed plan despite absence of accepting votes in one class (*In re The Lost Cajun Enterprises, LLC*, 2021 WL 6340185 (Bankr. D. Col. 2021); *In re Roundy*, 2021 WL 5428891 (Bankr. D. Utah 2021); *In re Robinson*, 632 B.R. 208, 218 (Bankr. D. Kansas 2021))

Non-voting class can be ignored for purposes of determining whether section 1129(a)(8) is satisfied (*In re Franco's Paving LLC*, 654 B.R. 107 (Bankr. S.D. Tex. 2023), and *In re Hot 'z Power Wash, Inc.*, 655 B.R. 107 (Bankr. S.D. Tex. 2023))

Nonvoting class matters in § 1129 (a)(8) analysis

§ 1129(a)(8) requires affirmative acceptance; if SBA class did not vote, plans could not be consensually confirmed under § 1191(a) (*In re M.V.J. Auto World Inc.*, 661 B.R. 186 (Bankr. S.D. Fla. 2024); *In re Florist Atlanta Inc.*, No. 24-51980-pwb, 2024 WL 3714512 (Bankr. N.D. Ga. Aug. 7, 2024))

Nonvoting class is equivalent to class that rejects plan; confirmation as consensual plan denied and instead confirmed as nonconsensual (*In re Sushi Zushi of Tex.*, Nos. 24-51147-MMP, 24-51373-MMP, 24-51372-MMP, 24-51371-MMP, 2025 Bankr. LEXIS 787, at *13 (Bankr. W.D. Tex. Mar. 28, 2025))

IV. SBA in the Bankruptcy Context - Especially Subchapter V cont.

Confirmation Issues Associated with Lack of SBA Vote - Risk of failing § 1129(a)(10) (accepting impaired class)

Consider treatment to render SBA claim "unimpaired"

11 U.S.C. § 1124

Consider classification strategies

For example, is it possible to place all secured creditors in a single class?

V. Guarantors, Third Parties, and Discharge Nuances

Personal Guarantee

- SBA may require a personal guaranty prior to offering SBA Loan.
 - Owner of 20%+ of the business must provide an unlimited full guaranty by signing SBA Form 148.
 - SBA lender may also require a personal guarantee if the person has little stake but is deemed critical to the operation of the business.
- Exposure Pre-Bankruptcy



V. Guarantors, Third Parties, and Discharge Nuances - cont.

Post-Bankruptcy Exposure

- Personal guarantee obligations generally survive business bankruptcy unless guarantor also files personal bankruptcy or negotiates a settlement or Offer In Compromise.



V. Guarantors, Third Parties, and Discharge Nuances - cont.

SBA Enforcement Rights

Impairment: Even if business debt is reinstated, guarantor exposure may remain unchanged

- Consider parallel negotiations for guarantors while plan proceeds



V. Guarantors, Third Parties, and Discharge Nuances - cont.

Offers in Compromise (OIC) for Guarantors

- The SBA has an established Offer in Compromise (OIC) program that allows borrowers to settle debt (but not EIDL loans) for less than the full amount owed.
 - Option when a small business has ceased operations, and all its assets have been liquidated.
 - The key is demonstrating genuine financial hardship and presenting a reasonable settlement offer.
- Bankruptcy can aid the OIC process because it demonstrates financial hardship.
- Disclosure statement and plan provide a clear picture of what creditors—including the SBA—can expect to recover.

V. Guarantors, Third Parties, and Discharge Nuances - cont.

Offers in Compromise (OIC) for Guarantors

- Elements of a Workable Compromise Offer (Per SBA OIC Form):
 1. Amount offered bears a reasonable relationship to the net amount recoverable through enforced collection.
 2. No fraud or misrepresentation.
 3. Full disclosure of financial capacity of obligor(s) has been made (SBA Form 770, etc.).
 4. Borrower has ceased operations and all business collateral (assets) has been liquidated.
 5. Participating bank, if any, concurs in the action.
 6. Valuations provided for realty mortgaged to SBA or subject to judgment by SBA are supported.
 7. Source of funds for payment of the offer clearly identified.

See Small Business Administration, *Offer in Compromise Form*, https://www.sba.gov/sites/default/files/files/sba_elending_clc_forms1150_4.pdf

V. Guarantors, Third Parties, and Discharge Nuances - cont.

Timing Issues for Successful Resolution

FIGURE 5: Keys to Successful Guarantee Resolution

WHAT MAKES GUARANTEE RESOLUTION WORK		
TIMING Act before default cascades Preserve negotiating leverage Control the narrative	COORDINATION Business + personal strategy All creditors in one plan Tax implications mapped	DOCUMENTATION Full financial disclosure Hardship documentation Clear settlement terms

V. Guarantors, Third Parties, and Discharge Nuances - cont.

Bankruptcy/Dischargeability

- SBA debts are treated like other commercial obligations in bankruptcy.
- SBA loans are generally dischargeable.
- If only the corporate borrower files bankruptcy, any guaranty will survive discharge or bankruptcy restructuring.

V. Guarantors, Third Parties, and Discharge Nuances - cont.

Bankruptcy/Dischargeability

- SBA discharge may be subject to § 523(a) non-dischargeability exceptions (e.g., if debt is obtained by fraud or misrepresentation).
 - Individual debtors are always subject to the § 523(a) exceptions. See 11 U.S.C. § 523(a).
 - Corporate debtors are not subject to the § 523(a) exceptions, except in subchapter V cases. See 11 U.S.C. §§ 727(a)(1), 1141(d)(2).
- Potential SBA dischargeability challenges:
 - Misrepresentations or omissions on SBA application. See *In re Foust*, 52 F.3d 766 (8th Cir. 1995); *In re Sellers*, 295 F.Supp. 1354 (S.D. Tex. 1968)
 - Misrepresenting financial condition of guarantor's and/or borrower's financial condition. See *In re Perea*, 89 B.R. 128 (Bankr. D. Colo. 1988)
 - Misuse of SBA proceeds. *In re Klein*, 648 B.R. 228 (Bankr. D. Neb. 2022)

V. Guarantors, Third Parties, and Discharge Nuances - cont.

Other Fraud Considerations (Outside of Bankruptcy)

- If it is determined a borrower was ineligible to receive a loan, SBA may ask that the borrower repay the loan amount by a certain date.
- SBA could also seek administrative remedies to force repayment of the loan with penalties.
- If an SBA audit turns into a criminal investigation, the potential penalties become much more severe, such as prison sentences or restitution.
 - Federal prosecutors can charge someone accused of lying on their PPP loan application in a number of ways, including making false statements, wire fraud, and bank fraud. All of these offenses can carry lengthy prison sentences.

VI. Critical Strategic Considerations and Practice Tips

Pre-Filing Strategy	Case Administration	Plan Strategy
<ol style="list-style-type: none"> 1. Evaluate SBA loan structure early 2. Engage lender and SBA before filing, if possible 3. Consider dual-track (workout + bankruptcy) but recognize risks of obtaining a structured dismissal 	<ol style="list-style-type: none"> 1. Maintain strong communication with lender counsel 2. With private lenders, anticipate SBA approval delays 3. Build realistic budgets and projections 	<ol style="list-style-type: none"> 1. Address SBA concerns proactively 2. Provide detailed feasibility support 3. Consider phased payments or restructuring 4. Remember voting issues when structuring plan

*The Practitioner's SBA Playbook –
Addressing SBA Related Obligations Inside and Outside of Bankruptcy*

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 - e. Sometimes personal residence lien (in part)
 - 2. 504 Loans

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- a. Real estate loans (typically)
 - b. Fixed asset financing
 - c. Specific collateral
 - d. Principal guaranty
3. Disaster Loans (EIDL)
- a. Direct loan from SBA
 - b. COVID-era terms: 3.75%, up to 30 years
 - c. Principal guaranty, over \$200K
 - d. Blanket liens on all assets (depending on amount of loan)

II. Structure of SBA Lending Relationships

A. Key Parties in Lending Structure

1. Borrower (small business debtor)
2. Individual Guarantor
3. Private Lender (bank)
4. SBA (guarantor / direct lender in some cases)
5. Lender Legal Representation
 - a. U.S. Attorney's Office
 - b. District Counsel
 - c. Counsel to private lender

B. Control of the Loan

1. Distinction Between:
 - a. Servicing lender authority
 - b. SBA approval authority
2. Importance of Identifying:
 - a. SBA district counsel
 - b. Liquidation/workout officer
 - c. Whether loan has been "purchased" by SBA

C. Treasury Referral

1. SBA may refer loans to U.S. Treasury for collection
2. Consequences:

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- a. Administrative offset
 - b. Seizure of bank accounts
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3. Timing of filing can be critical to avoid Treasury escalation.
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 2. Servicing Responsibilities of Private Lender vs. SBA
 3. SOP (Standard Operating Procedures) Constraints

III. Pre-Bankruptcy Workout and Restructuring Options

- A. Engaging with SBA and Private Lenders
1. Who to Contact (lender vs. SBA workout officers)
 - 7(a) Loan Program Questions: 7aQuestions@sba.gov or 877-475-2435
 - 504 Loan Program Questions: 504Questions@sba.gov
 - E-Tran & CAFS: cls@sba.gov or 833-572-0502
 - E-Tran (Electronic Loan Processing / Authorization System) – in other words, where you get the loan documents.
 - CAFS (Capital Access Financial System) -- the SBA's loan servicing portal – in other words, where you get pay histories, loan balances, charge off information.
 2. Importance of Early Communication
- B. Common Non-Bankruptcy Options
1. Loan Modifications
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 3. Offers in Compromise (OIC)
 4. Liquidation Outside Bankruptcy
- C. Practical Considerations
1. SBA Approvals
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A. SBA as a Creditor

1. Direct Lender
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B. Governmental Unit Issues

1. Administrative Claims
2. Priority Claims
3. Plan Filing Nuances - Pursuant to 11 U.S.C. § 1189, in a Subchapter V case, the plan must be filed within 90 days of order for relief, which date is often before the governmental unit bar date.

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and

(iii) in an action attacking the validity of an order of a United States officer or agency that is not a party, also to that officer or agency; and

(B) if the plaintiff has mailed a copy of the summons and complaint to a person specified in either (A)(i) or (ii), the court must allow a reasonable time to serve the others that must be served under (A);

(5) an officer or agency of the United States, with these requirements:

(A) the summons and complaint must be mailed not only to the officer or the agency—as prescribed in (3) if the agency is a corporation—but also to the United States, as prescribed in (4);

(B) if the plaintiff has mailed a copy of the summons and complaint to a person specified in either (4)(A)(i) or (ii), the court

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must allow a reasonable time to serve the others that must be served under (A); and
(C) if a United States trustee is the trustee in the case, service may be made on the United States trustee solely as trustee, as prescribed in (10);

b. Suggest serving four separate recipients by U.S. Mail, First Class:

i. U.S. Small Business Administration
c/o Civil Process Clerk, Office of the U.S. Attorney
_____ District of _____
(address)
(Must serve the US Atty in the district where the case is pending)

ii. U.S. Small Business Administration
409 3rd Street, SW
Washington, DC 20416

iii. U.S. Small Business Administration
c/o Todd Blanche, Acting U.S. Attorney General
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

iv. U.S. Small Business Administration
Attn: Office of General Counsel
409 3rd Street, SW
Washington, DC 20416

2. SBA-Guaranteed Lender's Lien Rights

3. Assignment of Rents, Accounts, Proceeds

4. Role of Private Lender vs. SBA Approval

5. Use of Cash Collateral

a. Budgets

b. Adequate protection – cash payment and/or replacement liens

c. Reporting requirements

D. Plan Confirmation Issues with SBA Obligations

1. Treatment of SBA-related Claims

a. Secured vs. unsecured deficiency claims

b. Bifurcation under § 506

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2. Cramdown in Subchapter V
 - a. “Fair and equitable” standard under § 1191
 - b. Projected disposable income requirement
 - c. Feasibility concerns
3. Section 1190(3) - Potential Modification of Claim Secured by Residence

➤ Statutory Framework - § 1190. Contents of plan

A plan filed under this subchapter [11 USCS §§ 1181 et seq.]—

(1) shall include—

(A) a brief history of the business operations of the debtor;

(B) a liquidation analysis; and

(C) projections with respect to the ability of the debtor to make payments under the proposed plan of reorganization;

(2) shall provide for the submission of all or such portion of the future earnings or other future income of the debtor to the supervision and control of the trustee as is necessary for the execution of the plan; and

(3) notwithstanding section 1123(b)(5) of this title [11 USCS § 1123(b)(5)], may modify the rights of the holder of a claim secured only by a security interest in real property that is the principal residence of the debtor if the new value received in connection with the granting of the security interest was—

(A) not used primarily to acquire the real property; and

(B) used primarily in connection with the small business of the debtor.

4. SBA-Specific Considerations
 - a. SBA consent requirements for modifications
 - b. Restrictions under SBA SOPs
 - c. Treatment of guarantees and non-debtor collateral

5. Potential Objections by SBA or Lenders

- a. Feasibility

➤ “The feasibility requirement is about whether the plan can be completed as laid out, not about the long-term future of the business after bankruptcy” *In re Edgewood Food Mart, Inc.*, 666 B.R. 418, 437 (Bankr. N.D. Ga. 2024).

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needed. Furthermore, there must be a relationship between expenses and income. *See In re Premier Glass Servs., LLC*, 664 B.R. 465, 475 (Bankr. N.D. Ill. 2024) (“[w]ithout testimony or evidence to show that there was a relationship between the projected numbers and what Premier Glass expected to have in income, the court could infer only that the numbers were placeholders intended to create a reserve for reimbursements to equity holders”).

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- Fed. R. Evid. 701. Opinion Testimony by Lay Witness
- Fed. R. 702. Testimony by Expert Witnesses.
- Owner or officer of business may testify to value of business’ projected profits without necessity of qualifying as accountant, appraiser, or similar expert. Such testimony is admissible under Fed. R. Evid. 701 because it is based not on expert experience or training, but on particularized knowledge that witness has by virtue of his or her position in business. Fed. R. Evid. 701 Advisory Committee’s note to 2000 amendment; *Lord & Taylor, LLC v. White Flint, L.P.*, 849 F.3d 567, 576 (4th Cir. 2017).
- Owner may testify as to value of property. *Gray v. Bank of Am., N.A. (In re Gray)*, No. 09-14445-RGM, 2010 Bankr. LEXIS 181, at *12 (Bankr. E.D. Va. Jan. 15, 2010); *see also U.S. v. 10,031.98 Acres of Land, More or Less, Situate in Las Animas County, Colo.*, 850 F.2d 634, 639 n. 4 (10th Cir. 1988) (concluding an owner has a "right to testify as to the value of the property at issue even when the owner is a corporation and the valuation testimony comes from a designated corporate officer").

c. Best Interest

- A liquidation analysis is necessary in order to meet the best interests of creditors test in 11 U.S.C. § 1129(a)(7) which states that “[w]ith respect to each impaired class of claims or interests each holder of a claim or interest of such class—(i)

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has accepted the plan; or (ii) will receive or retain under the plan on account of such claim or interest property of a value, as of the effective date of the plan, that is not less than the amount that such holder would so receive or retain if the debtor were liquidated under chapter 7 of this title on such date...”

- *In re Pearl Res. LLC*, 622 B.R. 236, 262 (Bankr. S.D. Tex. 2020) (approving plan as meeting “best interest of the creditors test” when creditors would be paid in full from disposable income).
- *In re SSA Retail Mgmt. LLC*, No. 20-32025, 2021 WL 813832, (Bankr. N.D. Tex. Mar. 2, 2021) (Subchapter V submitted plan met requirements for Section 1129(a)(7) by paying all classes entitled to vote but not accepting the plan at least as much as they would receive under submitted liquidation analysis).
- *In re Fall Tree Line Service, Inc.*, Case No. 20-21548-C-11, 2020 WL 7082416 (Bankr. E.D. Cal. 2020) (liquidation analysis should not include purchased goodwill as an asset for evaluation of total value in Subchapter V debtor company).
- *In re Microcurrent Rsch. & Educ., LLC*, 626 B.R. 455 (Bankr. M.D. Fla. 2021) (Subchapter V business debtor required to include cash on hand for distribution to creditors in its liquidation analysis submitted in connection with plan).

d. Fair and Equitable and Good Faith Considerations

- To be confirmed under § 1191(c)(2)(B), plan must distribute property which has value equal to, or greater than, debtor's projected disposable income over at least three years, or such longer period as the Court determines is appropriate.
- For a discussion of the 3-year v 5-year debate, see *In re Edgewood Food Mart, Inc.*, 666 B.R. 418 (Bankr. N.D. Ga. 2024); *In re Trinity Family Practice & Urgent Care PLLC*, 661 B.R. 793 (Bankr. W.D. Tex. 2024).
- A plan is not filed in good faith (Section 1129(a)(3)) if it proposes favorable treatment for insider claimants while protecting the same insiders from potential litigation. *Legacy*

Pools LLC, No. 6:22-bk-03123-LVV, 2024 Bankr. LEXIS 2169, at *13 (Bankr. M.D. Fla. Sep. 13, 2024).

- Good faith found when (1) the plan was a legitimate attempt to reorganize and preserve a going concern business, (2) the debtor did not engage in any misconduct in proposing the plan or propose it with ulterior motives, and (3) the debtor did not deal or negotiate inappropriately with creditors or engage in any other conduct that was fundamentally unfair. In particular, the court noted that a three year plan payment period (which is expressly permitted under Section 1191(c)(2)(A)) was not by itself bad faith solely because a debtor could pay more over five years. *In re Legacy Pools LLC*, No. 6:22-bk-03123-LVV, 2024 Bankr. LEXIS 2169, at *14 (Bankr. M.D. Fla. Sep. 13, 2024). *But see In re Who Dat?, Inc.*, No. 21-10292, 2024 Bankr. LEXIS 743, at *26 (Bankr. E.D. La. Mar. 27, 2024) (finding lack of good faith when plan sole purpose was for equity to retain ownership of the debtor (and its valuable assets) and pay the legal fees of counsel.
 - Good faith only pertains to whether it is reasonably likely that the plan will achieve a result consistent with the objectives of the Bankruptcy Code (which, in this case, the court interpreted as a likelihood of a successful reorganization). Small payout to unsecured creditors is not in and of itself bad faith for purposes of § 1129(a)(3). *In re Trimax Med. Management*, 659 B.R. 398, 403 (Bankr. M.D. Ga. 2024).
6. Confirmation Issues Associated with Lack of SBA Vote - Risk of failing § 1129(a)(10) (accepting impaired class) – For a further discussion of the issue, see attached *You're Killing Me, Smalls!": The Problem of the Nonparticipating Class in Subchapter V*.
- a. Nonvoting classes should not be considered in a § 1129 (a)(8) analysis. *In re The Lost Cajun Enterprises, LLC*, 2021 WL 6340185 (Bankr. D. Col. 2021) (holders of impaired claims that did not vote were bound by the classes that accepted the plan and court confirmed the plan despite the absence of any accepting votes in one class); *In re Roundy*, 2021 WL 5428891 (Bankr. D. Utah 2021) (same); *In re Robinson*, 632 B.R. 208, 218 (Bankr. D. Kansas 2021) (same); *In re Franco's Paving LLC*, 654 B.R. 107 (Bankr. S.D. Tex. 2023), and *In re Hot'z Power Wash, Inc.*, 655 B.R. 107 (Bankr. S.D. Tex. 2023) (non-voting class can be ignored for purposes of determining whether section 1129(a)(8) is satisfied).

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- b. Nonvoting class matters in a § 1129 (a)(8) analysis
In re M.V.J. Auto World Inc., 661 B.R. 186 (Bankr. S.D. Fla. 2024);
In re Florist Atlanta Inc., No. 24-51980-pwb, 2024 WL 3714512 (Bankr. N.D. Ga. Aug. 7, 2024) (concluding § 1129(a)(8) requires affirmative acceptance, and if SBA class did not vote, plans could not be consensually confirmed under § 1191(a)); *In re Sushi Zushi of Tex.*, Nos. 24-51147-MMP, 24-51373-MMP, 24-51372-MMP, 24-51371-MMP, 2025 Bankr. LEXIS 787, at *13 (Bankr. W.D. Tex. Mar. 28, 2025) (nonvoting class is equivalent to a class that rejects the plan; confirmation as a consensual plan was denied and plan was confirmed as nonconsensual).
- c. Consider treatment to render SBA claim “unimpaired”

➤ Statutory Framework – 11 U.S.C. § 1124

Except as provided in section 1123(a)(4) of this title [11 USCS § 1123(a)(4)], a class of claims or interests is impaired under a plan unless, with respect to each claim or interest of such class, the plan—

(1) leaves unaltered the legal, equitable, and contractual rights to which such claim or interest entitles the holder of such claim or interest; or

(2) notwithstanding any contractual provision or applicable law that entitles the holder of such claim or interest to demand or receive accelerated payment of such claim or interest after the occurrence of a default—

(A) cures any such default that occurred before or after the commencement of the case under this title, other than a default of a kind specified in section 365(b)(2) of this title [11 USCS § 365(b)(2)] or of a kind that section 365(b)(2) [11 USCS § 365(b)(2)] expressly does not require to be cured;

(B) reinstates the maturity of such claim or interest as such maturity existed before such default;

(C) compensates the holder of such claim or interest for any damages incurred as a result of any reasonable reliance by such holder on such contractual provision or such applicable law;

(D) if such claim or such interest arises from any failure to perform a nonmonetary obligation, other than a default arising from failure to operate a

nonresidential real property lease subject to section 365(b)(1)(A) [11 USCS § 365(b)(1)(A)], compensates the holder of such claim or such interest (other than the debtor or an insider) for any actual pecuniary loss incurred by such holder as a result of such failure; and (E) does not otherwise alter the legal, equitable, or contractual rights to which such claim or interest entitles the holder of such claim or interest.

For a further discussion on “unimpairment” issues, see attached *Risky Reinstatement - Understanding the Interplay Among §§ 1124, 1123 and 365, and What It Means to Cure a Default*

- d. Consider classification strategies – For example, is it possible to place all secured creditors in a single class?

V. Guarantors, Third Parties, and Discharge Nuances

A. Personal Guarantors

1. Exposure Post-Bankruptcy
2. SBA Enforcement rights
3. Impairment: even if business debt is reinstated, guarantor exposure may remain unchanged
4. Consider parallel negotiations for guarantors while plan proceeds

B. Offers in Compromise (OIC) for Guarantors

1. Eligibility and Process
2. Timing Relative to Bankruptcy

C. Discharge Limitations

1. Corporate vs. Individual Debtor Distinctions
2. Non-Debtor Guarantor Liability Remains

D. Plan Injunctions

1. Ability to Protect Guarantor through Plan – Certain courts have approved a temporary, plan-based injunction to support a feasible reorganization without running afoul of § 524(e). *See, e.g., In re Miracle Rest. Grp.*, No. 24-11158, 2025 Bankr. LEXIS 1188, at *22 (Bankr. E.D. La. May 13, 2025) (approving temporary non-debtor injunction under §§ 105(a) and 1123(b)(6) where guaranty enforcement would jeopardize plan performance).
2. Jurisdictional Differences

E. Dischargeability / Fraud Challenges

1. SBA loans are generally dischargeable
2. SBA loans are subject to § 523(a) allegations.
3. Section 523(a) Not Necessarily Limited to Individuals. Corporate debtors in Subchapter V are subject to the same exceptions to dischargeability as individual debtors for the types of debts listed in 11 USCS § 523(a). *In re Cleary Packaging, LLC*, 36 F.4th 509, 514 (4th Cir. 2022). For a further discussion of dischargeability issues, see attached *Applying § 523 to Corporate Sub V Debtors: A Conscious Policy Decision, or a Drafting Oversight?*
4. Potential SBA dischargeability challenges:
 - a. Misrepresentation in application
 - b. Misuse of proceeds
 - c. No intent to repay
5. Obtain by Fraud Consideration - *Bartenwerfer v. Buckley*, 598 U.S. 69,83 (2023). The Supreme Court held that a debt obtained by fraud is nondischargeable under 11 U.S.C. § 523(a)(2)(A) even if the debtor did not personally commit or know of the fraud, so long as the debtor is liable for it under applicable law. The Court emphasized that the statute focuses on how the debt was obtained (by fraud), not who committed the fraud, allowing imputation of a partner's or agent's fraud to the debtor.
 - a. Fraud is imputed
 - b. Debtor does NOT need to personally commit fraud
 - c. Business partner misuses EIDL funds = guarantor still exposed
6. Questionable Transactions and Use of Proceeds - *United States Small Business Administration v. Vereen (In re Vereen)*, No. 21-09001, 2022 Bankr. LEXIS 884 (Bankr. M.D.N.C. Apr. 4, 2022). Although a § 727 denial of chapter 7 discharge case, the facts are relevant to any chapter. Where a debtor purchased trucks with \$36,000 in SBA loan proceeds, claimed they were transported and repaired by a company that could not be contacted or verified to exist, provided no documentation of the alleged transactions, and admitted uncertainty about the trucks' ultimate disposition, the debtor failed to satisfactorily explain the loss of assets under § 727(a)(5), justifying denial of discharge in a Chapter 7 bankruptcy proceeding.

VI. Critical Strategic Considerations and Practice Tips

A. Pre-Filing Strategy

1. Evaluate SBA loan structure early

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2. Engage lender and SBA before filing, if possible
3. Consider dual-track (workout + bankruptcy) but recognize risks of obtaining a structured dismissal

B. Case Administration

1. Maintain strong communication with lender counsel
2. With private lenders, anticipate SBA approval delays
3. Build realistic budgets and projections

C. Plan Strategy

1. Address SBA concerns proactively
2. Provide detailed feasibility support
3. Consider phased payments or restructuring
4. Remember voting issues when structuring plan

Faculty

Paula S. Beran is a member of Tavenner & Beran, PLC in Richmond, Va., and has focused on bankruptcy and insolvency matters throughout her career. Her experience includes representing chapter 11 debtors, official unsecured creditors' committees, stalking-horse purchasers, and chapter 7 and liquidation trustees. She also has represented entities in out-of-court reorganizations and liquidations, and served as a corporate receiver in a matter pending in a Virginia circuit court. Prior to entering private practice, Ms. Beran clerked for Hon. Douglas O. Tice Jr. in the U.S. Bankruptcy Court for the Eastern District of Virginia and for the Fourth Circuit U.S. Court of Appeals Office of Staff Counsel from 1992-94. She is a regular speaker at continuing legal education seminars for local and state bar associations and business organizations. In addition, she has served as a faculty member for ABI's Bankruptcy Litigation Skills Program and has lectured on bankruptcy at the University of Richmond Law School. An AV-Rated attorney by Martindale-Hubbell, Ms. Beran was selected as one of the Top 25 Female Attorneys by *Virginia Super Lawyers* and has been recognized in the bankruptcy/creditors' rights field in numerous editions of *The Best Lawyers in America*, *Virginia Super Lawyers* and *Virginia Business* magazine. She is a member of ABI and the Virginia Bar Association, and she is a past chair of the The Bar Association for in the City of Richmond's Bankruptcy Section, past member of the Virginia State Bar's Bar Council and past chair of its Mandatory Legal Education Board. Ms. Beran received her B.A. *cum laude* from Randolph-Macon College in 1988, where she was a member of Phi Beta Kappa and Omicron Delta Kappa, and her M.B.A. and J.D. *cum laude* from Wake Forest University in 1992, where she was articles editor of the *Wake Forest Law Review*.

Hon. Elizabeth L. Gunn is a U.S. Bankruptcy Judge for the District of Columbia in Washington, D.C., appointed on Sept. 4, 2020. A COVID-era selection and appointment, she was sworn in by Zoom from her living room. Prior to her appointment, Judge Gunn served as an Assistant Attorney General for the Commonwealth of Virginia as the bankruptcy specialist for the Division of Child Support Enforcement. She also practiced law in Richmond, Va., at Sands Anderson PC and McGuire-Woods LLP. In 2017, Judge Gunn was honored as a member of ABI's inaugural class of "40 Under 40." In 2022, she was recognized by the Bar Association of the District of Columbia as its Judicial Honoree and recipient of the BADC's Suzanne V. Richards Foundation Grant. Judge Gunn serves on the advisory board of the *American Bankruptcy Law Journal* and is a coordinating and associate editor of the *ABI Journal*. In addition, she sits on the boards of the Federal Bar Association's Bankruptcy Section, International Women's Insolvency & Restructuring Confederation, American Bar Association, National Conference of Federal Trial Judges and the Chesapeake Chapter of the Turnaround Management Association, and she hosts the popular American Bar Association Business Law Section Podcast "Bad Boys of Bankruptcy." She also is a member of the Walter Chandler Bankruptcy Inn of Court and is Board Certified in Consumer Bankruptcy Law by the American Board of Certification. Judge Gunn received her B.A. *cum laude* from Willamette University and her J.D. *cum laude* from Boston College Law School.

Lisa S. Still is senior field bankruptcy counsel with the U.S. Small Business Administration in Jacksonville, Fla., in the North Florida District. She received her B.S. in accounting from the University of West Florida and her J.D. from the University of Florida Fredric G. Levin College of Law.

Ann Marie Uetz is a partner and vice chair of Foley & Lardner LLP's national Litigation Department in Detroit, where she works with an extensive network of business leaders and professionals across the country. She is a member of the firm's Manufacturing Sector, including its Automotive Industry Team, as well as a member of its Finance & Financial Institutions and Transactions practices. Ms. Uetz has more than 30 years of experience as a trial attorney representing manufacturers in all aspects of the supply chain, and has extensive knowledge of the manufacturing supply chains of a variety of industries. She has become a go-to lawyer nationally for manufacturers facing complex issues related to supply contract negotiations, breach, surcharge and capacity issues, stop-ship situations and pricing disputes. Her work is integral to the firm's focus on the manufacturing sector. Ms. Uetz is one of the authors of Foley's *Automotive Update*, published biweekly, which analyzes trends and future developments in the automotive supply chain. She is recognized by *The National Law Review* as a Go-To Thought Leader in the areas of "Transportation Law" and "COVID-19: Manufacturing Impact," and was recognized by *JS Supra* as "No. 1 Top Author: Transportation." She has also been a sought-after interview source on such topics as the United Auto Workers strike and its impact on the automotive supply chain. In addition to her focus on the manufacturing industry, Ms. Uetz represents debtors, creditors and lenders in all facets of workouts and formal restructurings and bankruptcies. Much of her work focuses on distressed-debt workouts, representing debtors, creditors, lenders and receivers and CROs in all phases of workouts. Her team has led debtor and creditors' committee interests in multiple industry sectors, including manufacturing, energy and health care. Ms. Uetz received her B.A. in 1989 with distinction in political science from the University of Michigan and her J.D. magna cum laude in 1993 from Wayne State University Law School, where she received the Eugene Driker Award for achieving the highest grade point average (4.0) in her class, was admitted to the Order of the Coif, and served as associate editor of the *Wayne Law Review*.