American Bankruptcy Institute
Rocky Mountain Bankruptcy Conference

Ticking Time Bombs in Plans and Post-Confirmation

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CONCURRENT SESSION
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United States Bankruptcy Court, D. New Mexico.

IN RE: Amavalise F. JARAMILLO, Debtor.

Case no. 21-10306-t11
|
Signed September 22, 2022

Attorneys and Law Firms

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OPINION

David T. Thuma, United States Bankruptcy Judge

***1** Before the Court is whether to confirm Debtor's Second Amended Chapter 11 Plan. While several objections to the plan were filed, Debtor resolved them before confirmation and submitted a proposed confirmation order. The Court took the order under advisement to determine whether, under Tenth Circuit law, a subchapter V plan can be confirmed as a consensual plan if some classes of creditors do not vote. The Court concludes that it can. While reviewing that issue, however, the Court discovered a number of significant problems with Debtor's plan. In this opinion the Court outlines the law on the legal issue presented, identifies the major problems with the plan, and denies confirmation without prejudice.

Facts

The Court finds:[1]
Debtor filed this case on March 15, 2021, under chapter 13 of the Bankruptcy Code. He filed a chapter 13 plan with his schedules and SOFA.

Creditor Cathy Trei filed a nondischargeability proceeding in June 2021, alleging that a $350,000 prepetition judgment she obtained was nondischargeable under §§ 523(a)(2), (4), and/or (6).[2] Debtor thereafter sought to convert the case to subchapter V of chapter 11, alleging he would have difficulty paying his nondischargeable debts in chapter 13. The Court converted the case on February 9, 2022.

Debtor's first subchapter V plan had significant problems. At the final confirmation hearing the Court denied confirmation and ordered Debtor to file a new plan. The order contained a detailed list of issues to address.

Debtor filed the current plan by the Court-ordered deadline. The Court entered an order setting pre-hearing deadlines and a final confirmation hearing for September 19, 2022. The plan drew a number of objections. By the morning of the confirmation hearing, however, all objections had been resolved and Debtor submitted a proposed confirmation order. The proposed order would have confirmed the plan under § 1191(a) as a consensual plan.

Debtor filed a tally of ballots the week before the confirmation hearing. The tally describes "unsecured creditors" as having claims totaling "$80,000-$90,000" and belonging to class 8. The tally states that no ballots were received from Rio Arriba County, United Business Bank, Debtor, Anais Weckert, or the unsecured creditors. The tally misdescribes Ms. Weckert as a Class 7 creditor (she is Class 2); misdescribes Rio Arriba County as a Class 2 creditor (it is not classified); and misdescribes general unsecured creditors as Class 8 creditors (they are not classified).

Despite the failure to classify general unsecured creditors, the plan proposes to treat them as follows:

> After payment of the foregoing claims, the Debtor will pay, on a pro-rata basis, allowed general unsecured claims at fifteen (15) cents on the dollar.

***2** The Debtor owes $80,903.72 in student loans. The plan does not classify, treat, or even mention the student loan debt. It is not clear how Debtor intends to deal with his student loans.

Debtor has not indicated what kind of ballot he sent to the unclassified creditors. The official ballot form requires each ballot to indicate what class of claim is being voted. No unclassified creditors voted on the plan.

Debtor is the buyer under two real estate contracts. The plan states that the contracts are executory and will be assumed. Despite this proposed treatment, the plan classifies the contract counterparties as creditors (classes 3 and 4).

Ms. Trei filed a $395,449.35 proof of claim. She asserted that $150,000 of the claim was secured by judgment liens. Almost a year after she filed her proof of claim, Ms. Trei settled her adversary proceeding against Debtor. Under the settlement, Debtor agreed to pay Ms. Trei $135,000, without interest, in monthly payments of $1,200.

Ms. Trei's is separately classified in the plan and is impaired. The proposed treatment of her claim is consistent with the settlement.

Only three ballots were cast, by Ms. Trei and the real estate contract counterparties. They all voted for the plan.

The plan apparently provides for a discharge upon confirmation.[3]

Discussion

A. If an Impaired Class "Actually Accepts" a Subchapter V Plan, Nonvoting Classes Will be Deemed to Have Accepted the Plan for Confirmation Purposes.

At the confirmation hearing the Court raised the question whether the failure of a class to vote on the plan is a deemed acceptance of the plan for the purposes of §§ 1129(a) and 1191(a). Having reviewed the statute and the case law on the issue, the Court concludes that it is. In the Tenth Circuit the rule is that, to satisfy § 1129(a)(10), a debtor must get the affirmative or "actual" vote of at least one impaired class. *See* *In re Ruti-Sweetwater, Inc.*, 836 F.2d 1263, 1267 (10th Cir. 1988); *In re Akbari-Shahmirzadi*, 2015 WL 8329208, at *8 (D.N.M.). If that requirement is met, classes of creditors that do not vote are deemed to have accepted the plan for the purpose of § 1128(a)(8). *Ruti-Sweetwater*, 836 F.2d at 1267-68; *In re Akbari-Shahmirzadi*, 2015 WL 13650076, at *5 (D.N.M.) (magistrate judge opinion).

Section 1191(a) requires the satisfaction of both §§ 1129(a)(8) and (a)(10) to confirm a consensual plan. Recent cases have held that *Ruti-Sweetwater's* "deemed acceptance" rule for § 1129(a)(8) applies in subchapter V. *See, e.g., In re Robinson*, 632 B.R. 208, 220 (Bankr. D. Kan. 2021) (cited and applied "*Sweetwater's* binding precedent that a nonobjecting and nonvoting creditor is deemed to have accepted a chapter 11 plan under § 1129(a)(8)"); *In re Olson*, 2020 WL 10111637, at *2 (Bankr. Utah) (same); and *In re Desert Lake Group, LLC*, no. 20-22496, doc. 114 (Bankr. D. Utah Sept. 30, 2020) (unpublished) (same). Here, an impaired class (Ms. Trei) voted to accept the plan, satisfying § 1129(a)(10). Under *Ruti-Sweetwater*, any remaining classes that did not vote are deemed to have accepted the plan. The plan therefore can be confirmed as a consensual plan under § 1191(a) if the other plan confirmation requirements are met been met.

***3** It is worth noting that *Robinson* confirmed a subchapter V plan even though no votes had been cast, so there was no actual acceptance by an impaired class. Had *Robinson* been a "regular" chapter 11 case, the plan could not have been confirmed. *Sweetwater*, 836 F.3d at 1267. *Robinson* held that the "distinction between whether a creditor's acceptance is being determined under § 1129(a)(8) or (a)(10) is blurred in subchapter V." 632 B.R. at 219. Because of that, the *Robinson* court did not require the actual acceptance of an impaired class. *Id.* Here, an impaired class voted for the plan, so the Court need not decide whether a subchapter V plan can be confirmed under § 1191(a) if no impaired class actually votes for the plan.

Applying *Ruti-Sweetwater's* deemed acceptance rule to subchapter V cases is consistent with the realities of modern bankruptcy practice for individuals and small businesses, where many general unsecured creditors (e.g., credit card companies) do not vote. There is nothing wrong with not voting, but the confirmation process should not be derailed as a result.

B. The Plan Did not Classify and/or Treat a Number of Claims.

The plan did not classify Debtor's general unsecured creditor claims, the Rio Arriba County secured claim, or the nondischargeable student loan claim. Without classification, these creditors could not vote properly or know what they were voting on. A chapter 11 plan must provide for the classification and treatment of all pre-petition claims. *See, e.g., In re Garlock Sealing Technologies LLC*, 2017 WL 2539412, at *16 (W.D.N.C.) ("[t]he Plan satisfies Section 1123(a)(1) because it adequately and properly identifies and

classifies all claims and interest"); and *In re Regional Bldg. Systems*, 251 B.R. 274, 281 (Bankr. D. Md. 2000) ("Chapter 11 requires that all claims (other than certain unsecured priority claims) be placed in classes"). Because three classes of claims were not classified, the plan cannot be confirmed.

The failure to classify and treat Debtor's student loan debt is particularly troubling. The debt appears to be nondischargeable under § 523(a)(8). Was Debtor attempting to lump the student loan debt with the general unsecured claims and discharge it? That would be highly improper. *See, e.g.*, *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 271-72 (2010). If not, the failure to separately classify and treat the student loan debt is a significant omission. Either way, the plan cannot be confirmed in its current form.

C. The Proposed Treatment of General Unsecured Claims is Vague.

The plan proposes to pay general unsecured claims "on a pro-rata basis ... fifteen (15) cents on the dollar," but only "after payment of the foregoing claims...."[4] The plan does not say when this dividend would be paid or over what period of time. An amended plan should state the proposed timing and amount of each payment to the class.

Further, the plan should list the members of the general unsecured creditor class and the amount of their claims. It is unclear whether Ms. Trei, the IRS, New Mexico Taxation and Revenue, Nusenda, or ECMC are in the general unsecured claims pool, and/or for what amounts. General unsecured creditors need to know this information before they can evaluate feasibility and fairness and decide whether to support the plan.

Finally, if any claim will be objected to, that should be disclosed, and a deadline for filing the objection set.

D. The Proposed Payments to the IRS and NMTRD Should be Clarified.

The plan proposes to pay the IRS $620 per month on its $3,447 priority claim. That seems excessive. For example, if the priority claim were amortized over five years at 5% interest, the monthly payment would be about $58. The third amended plan should specify the monthly payment to the IRS, the priority amount, the interest rate, and the payment term. The plan should do the same for the NMTRD priority claim.

E. The Treatment of Ms. Trei's Claim Should be Clarified.

***4** In their settlement, Debtor agreed to pay Ms. Trei $1200 per month for 112 ½ months, without interest. That is not stated clearly in the plan, and should be. Furthermore, the other settlement terms should be restated in the plan so voting creditors know the terms, and also so there is no ambiguity or inconsistency about the treatment of Ms. Trei's claim.

F. The Treatment of Ms. Weckert's Claim Should be Clarified.

Ms. Weckert appears to have claims for prepetition, postpetition, and postconfirmation child support. The third amended plan should state the amounts of the claims and how each will be treated. If an adjustment in the monthly payment will be made after their child's 18th birthday, the date and amount of the adjustment should be disclosed.

G. The Real Estate Contracts Should Not be Classified.

Section 365 allows a debtor to assume or reject executory contracts. Debtor's real estate contracts with April DeVore and Teresa Marquez were listed on Debtor's schedules as executory contracts. Debtor's plan proposes to assume both contracts and pay them as agreed. The plan states that no cure is necessary. Given this treatment, it is not proper to classify the contract interests of Ms. Devore or Ms. Marquez as prepetition claims and allow them to vote on the plan. *See, e.g.*, *In re Greystone III Joint Venture*, 995 F.2d 1274, 1281 (5th Cir. 1991), cert. denied, 506 U.S. 821 (1992) ("A party to a lease is considered a "creditor" who is allowed to vote, 11 U.S.C. § 1126(c), only when the party has a claim against the estate that arises from *rejection* of a lease") (emphasis in original); *In re Mount Carbon Metropolitan Dist.*, 242 B.R. 18, 38–9 (Bankr. D. Colo. 1999) (executory contract holders whose contracts are to be assumed are not entitled to vote; such holders whose contracts will be rejected are entitled to vote as unsecured creditors); *In re Motel Associates of Cincinnati*, 50 B.R. 196, 200 (Bankr. S.D.N.Y. 1985) (implying that, subject to proper notice to the franchisor, the debtor can disallow the franchisor's plan vote because the debtor proposes to assume the franchise

agreement); *In re Deming Hospitality, LLC*, 2013 WL 1397458, at *7 (Bankr. D.N.M.) (citing *Greystone*, *Mount Carbon*, and *Motel Assoc.*).

H. Other.

1. Plan term. Apparently the plan term is 7 years. That should be stated in an introductory sentence in Article II of the plan.

2. History of debtor's business operations. The discussion of Debtor's history of operations should be moved from Appendix A to the first page or two of the plan. The discussion should include how long Debtor has been an attorney, where he attended law school, the year he graduated, and a history of his practice. The discussion should include a recap of Debtor's annual income for 5 years pre-petition (2016-20) as well as average annual operating expenses of his law practice for those years.

3. Projected Disposable Income Versus Fixed Payments. The plan provides that Debtor shall submit his "projected disposable income necessary for the performance of this plan to the Debtor's creditors and shall pay the sums set forth herein...." This language is confusing. First, Debtor is not able to submit projected disposable income, only actual income. Second, it appears that Debtor proposes to pay creditors fixed amounts, not whatever might be available from his disposable income. At a minimum, the proposed payments to Ms. Trei, the IRS, New Mexico Taxation and Revenue, Rio Arriba County, and United Bank are fixed. The dividend to general unsecured creditors (15%) also appears to be fixed. Perhaps what Debtor means to say is that the fixed payments are equal to or greater than his projected disposable income. The language should be modified to avoid inconsistency or confusion.

***5** In a related matter, the estimated monthly payment of $5,600 likely needs to be updated.

4. Payment of administrative expenses. Debtor should estimate his administrative expenses through plan confirmation, including attorney and trustee fees. Debtor should disclose any agreements he has reached with his counsel or the subchapter V trustee regarding payment of administrative expenses. If monthly payments have been agreed to, they should be disclosed and included in the feasibility calculation. All references to payments "outside the plan" (*see, e.g.*, Appendix B) should be deleted. Language about payment of administrative expenses should be in the body of the plan, not Appendix B.

5. Separate section for claims treatment. The Court's June 28, 2022, order included the requirement that the amended plan not put the treatment of claims in the classification section. Despite this, Appendix B to the Plan (Classification of Claims) has a section entitled "Treatment." In addition, the treatment of priority tax claims is on the back of Appendix B. All language regarding claim treatment should be moved to the plan and separated from the classification of claims. Treatment should be discussed class by class, in numerical order. Also, it is better practice to classify claims in the body of the plan rather than an appendix.

In addition, paragraph 3 of Article V is inconsistent with the treatment of United Bank, Rio Arriba County, and Ms. Trei. To the extent the paragraph is intended to treat unknown secured claims, there should be a class of "other" secured claims. Paragraph 3 could then be modified to treat that class.

Paragraph 4 of Article should be revised to state that it is treating the class of general unsecured claims, whatever class number is assigned to such claims.

6. Feasibility. The third amended plan should amend Appendix E to include a separate line item for Debtor's monthly and annual living expenses; a breakdown of the law office operating expenses; and a discussion whether Debtor's estimated 26% tax burden includes Medicare, Medicaid, Social Security, health insurance, and state taxes.

7. Discharge. Article XV should be modified to make clear whether Debtor seeks a discharge on confirmation or after all plan payments have been made.

8. Definitions. The last portion of Article XVI, paragraph 1 should be deleted, as there are no additional definitions.

9. Non-Standard Provisions. Article XIX should be deleted. It is required only in chapter 13 plans.

Conclusion

Tenth Circuit law provides that, so long as one impaired class actually votes in favor of a chapter 11 plan (as Ms. Trei did here), other classes will be deemed to have accepted the

plan for § 1129(a)(8) purposes if no one in the class voted. The "deemed acceptance" rule applies in subchapter V. In this important respect, Debtor's plan is confirmable under § 1191(a). However, the plan cannot be confirmed for the reasons discussed above. Debtor should file a third amended plan that addresses the deficiencies. A separate order denying confirmation will be entered.

All Citations

Not Reported in B.R. Rptr., 2022 WL 4389292

Footnotes

1 The Court takes judicial notice of the docket in the main case and the related adversary proceeding. *See* *St. Louis Baptist Temple, Inc. v. Fed. Deposit Ins. Corp.*, 605 F.2d 1169, 1172 (10th Cir. 1979) (a court may sua sponte take judicial notice of its docket and of facts that are part of public records).

2 All statutory references are to 11 U.S.C.

3 There is some confusion about this because the plan goes on to say that the discharge would be under § 1192. Section 1192 provides that the discharge order is entered after completion of plan payments, not on confirmation. The section deals with discharge in "cramdown" cases, not consensual cases confirmed under § 1191(a).

4 The "foregoing claims" are priority claims, administrative expenses, and secured claims.

Acceptance Loan Co. v. S. White Transp., Inc. (In re S. White Transp., Inc.)

United States Court of Appeals for the Fifth Circuit

August 5, 2013, Filed

No. 12-60648

Reporter
725 F.3d 494 *; 2013 U.S. App. LEXIS 16181 **; 70 Collier Bankr. Cas. 2d (MB) 309; 58 Bankr. Ct. Dec. 79; Bankr. L. Rep. (CCH) P82,517; 2013 WL 3983343

In the Matter of: S. WHITE TRANSPORTATION, INCORPORATED, Debtor;ACCEPTANCE LOAN COMPANY, INCORPORATED, Appellee v. S. WHITE TRANSPORTATION, INCORPORATED, Appellant

Prior History: [1]** Appeal from the United States District Court for the Southern District of Mississippi.

LexisNexis® Headnotes

Bankruptcy Law > Discharge & Dischargeability > Reorganizations

Business & Corporate Compliance > Bankruptcy > Discharge & Dischargeability > Reorganizations

HN1[] *11 U.S.C.S. § 1141(c)* provides that property dealt with by a confirmation plan is held free and clear of all claims and interests. Although the Fifth Circuit has held that *11 U.S.C.S. § 1141(c)* only voids liens held by a lien holder who participates in the reorganization.

Bankruptcy Law > ... > Judicial Review > Standards of Review > Clear Error Review

Bankruptcy Law > ... > Judicial Review > Standards of Review > De Novo Standard of Review

HN2[] When reviewing appeals taken from a district court's review of an appeal from a bankruptcy court, appellate courts perform the identical task as the district court, reviewing the bankruptcy court's findings of fact under the clearly erroneous standard and its conclusions of law de novo.

Bankruptcy Law > ... > Types of Claims > Secured Claims & Liens > Rights of Secured Creditors

HN3[] It is a longstanding rule in bankruptcy that a secured creditor with a loan secured by a lien on the assets of a debtor who becomes bankrupt before the loan is repaid may ignore the bankruptcy proceeding and look to the lien for satisfaction of the debt. However, this default rule only applies so long as the lien is not invalidated by some provision of the Bankruptcy Code.

Bankruptcy Law > Discharge & Dischargeability > Reorganizations

Business & Corporate Compliance > Bankruptcy > Discharge & Dischargeability > Reorganizations

HN4[] See *11 U.S.C.S. § 1141(c)*.

Bankruptcy Law > Discharge & Dischargeability > Reorganizations

Business & Corporate
Compliance > Bankruptcy > Discharge & Dischargeability > Reorganizations

HN5[] Four conditions must be met for a lien to be voided under *11 U.S.C.S. § 1141(c)*: (1) the plan must be confirmed; (2) the property that is subject to the lien must be dealt with by the plan; (3) the lien holder must participate in the reorganization; and (4) the plan must not preserve the lien.

Bankruptcy Law > Discharge & Dischargeability > Reorganizations

Business & Corporate
Compliance > Bankruptcy > Discharge & Dischargeability > Reorganizations

HN6[] Meeting the participation requirement in the In re Ahern Enterprises test requires more than mere passive receipt of effective notice.

Counsel: For ACCEPTANCE LOAN COMPANY, INCORPORATED, Appellee: Richard A. Montague, Jr., Young, Wells, Williams, Simmons, P.A., Jackson, MS.

For S. WHITE TRANSPORTATION, INCORPORATED, Appellant: William Hall Pettey, Jr., Gulfport, MS.

Judges: Before DENNIS, CLEMENT, and SOUTHWICK, Circuit Judges.

Opinion by: EDITH BROWN CLEMENT

Opinion

[*495] EDITH BROWN CLEMENT, Circuit Judge:

S. White Transportation, Inc. ("SWT") appeals the district court's holding that a lien on its principal asset held by Acceptance Loan Co. ("Acceptance") survived confirmation of a Chapter 11 bankruptcy reorganization plan. We AFFIRM.

FACTS AND PROCEEDINGS

In 2004, Acceptance perfected a security interest in SWT's principal asset, an office building in Saucier, Mississippi. SWT contested the validity of this claimed lien on various grounds, resulting in years of litigation in Mississippi state courts that remains unresolved. After Acceptance's perfection of its putative interest, three other entities perfected security interests in the same building.

SWT filed a voluntary Chapter 11 bankruptcy petition on May 17, 2010. In its accompanying Schedule D list of secured creditors, **[**2]** SWT acknowledged the three later security interests but only listed Acceptance's lien as "disputed." Acceptance received effective notice of the pendency of SWT's bankruptcy on at least several occasions. However, Acceptance never filed a proof-of-claim in the bankruptcy court and otherwise did not involve itself in any way with the ongoing bankruptcy. On September 14, SWT submitted a reorganization plan (the "Plan") to the bankruptcy court. The Plan noted that Acceptance had never filed a proof-of-claim and that SWT contested **[*496]** the validity of Acceptance's lien. It provided for no recovery for Acceptance. The bankruptcy court confirmed the Plan on December 21.

On January 4, 2011, Acceptance moved the bankruptcy court for a declaratory judgment that its lien had survived the Plan's confirmation or, alternatively, for the bankruptcy court to amend its confirmation order to provide for Acceptance's lien. The bankruptcy court denied Acceptance's motion. It held that the Plan's confirmation voided any lien that Acceptance held and refused to modify the confirmation order. It based its decision on *HN1*[] *11 U.S.C. § 1141(c)*, which provides that property dealt with by a confirmation plan is held "free **[**3]** and clear of all claims and interests." Although this court has held that *§ 1141(c)* only voids liens held by a "lien holder [who] participate[s] in the reorganization," *Elixir Indus.*,

Inc. v. City Bank & Trust Co. (In re Ahern Enters., Inc.), 507 F.3d 817, 822 (5th Cir. 2007), the bankruptcy court held that Acceptance had "participated" within the meaning of this standard by having received notice of the bankruptcy.

Acceptance appealed the bankruptcy court's order to the district court, and the district court reversed, holding that mere notice does not constitute participation within the meaning of *In re Ahern Enterprises*. SWT appeals.

STANDARD OF REVIEW

HN2[⬆] When reviewing appeals taken from a district court's review of an appeal from a bankruptcy court, "we perform the identical task as the district court, reviewing the bankruptcy court's findings of fact under the clearly erroneous standard and its conclusions of law *de novo*." *U.S. Abatement Corp. v. Mobil Exploration & Producing U.S. Inc. (In re U.S. Abatement Corp.), 79 F.3d 393, 397 (5th Cir. 1996)* (footnote omitted).

DISCUSSION

HN3[⬆] It is a longstanding rule in bankruptcy that "[a] secured creditor 'with a loan secured by a lien on the assets **[**4]** of a debtor who becomes bankrupt before the loan is repaid may ignore the bankruptcy proceeding and look to the lien for satisfaction of the debt.'" *Sun Fin. Co. v. Howard (In re Howard), 972 F.2d 639, 641 (5th Cir. 1992)* (quoting *Simmons v. J.T. Savell (In re Simmons), 765 F.2d 547, 556 (5th Cir. 1985)*). However, this default rule only applies so long as the lien is not "invalidated by some provision of the Code." *In re Simmons, 765 F.2d at 556*.

11 U.S.C. § 1141(c) provides that: ***HN4***[⬆] "[A]fter confirmation of a plan, the property dealt with by the plan is free and clear of all claims and interests of creditors, equity security holders, and of general partners in the debtor." In *In re Ahern Enterprises*, we held that:

> ***HN5***[⬆] Four conditions must . . . be met for a lien to be voided under *section 1141(c)*: (1) the plan must be confirmed; (2) the property that is subject to the lien must be dealt with by the plan; (3) *the lien holder must participate in the reorganization*; and (4) the plan must not preserve the lien.

507 F.3d at 822 (emphasis added). The parties agree that the first, second, and fourth conditions of the *In re Ahern Enterprises* test are met by the facts of this case; they only dispute **[**5]** whether Acceptance's passive receipt of notice constitutes participation within the meaning of this test. We hold that it does not.

The *In re Ahern Enterprises* court avoided answering the question of what constitutes participation for these purposes. After noting that "the requirement that a secured creditor participate in the **[*497]** reorganization proceeding is a judicial gloss on *section 1141(c)*," it stated that "participation ensures that the secured creditor has notice of the plan and its potential effect on the creditor's lien." *Id. at 823*. It then explained that courts were split on whether active participation was required, *see id.* (citing *In re Penrod, 50 F.3d 459, 462 (7th Cir. 1995)*), or whether "the only participation necessary is that the creditor receive notice of the plan and an opportunity to object," *see id.* (citing *In re Reg'l Bldg. Sys., Inc., 251 B.R. 274, 287 (Bankr. D. Md. 2000)*), before holding that "[i]n the instant case, it is a sufficient level of participation that [the creditor] filed a proof of claim as an unsecured priority creditor," *id.*

At the outset of our analysis, we note that the word "participation" connotes activity, and not mere nonfeasance. *See* BLACK'S **[**6]** LAW DICTIONARY 1229 (9th ed. 2009) ("The *act of taking part in something*, such as a partnership, a crime, or a trial." (emphasis added)); *see also Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2587, 183 L. Ed. 2d 450 (2012)* (distinguishing between "activity" and a "deci[sion] not to do something" or

a "fail[ure] to do it").

We further note that at least two circuit courts addressing similar issues have required more than notice. In *In re Penrod*, the Seventh Circuit stated that a secured creditor seeking to retain the value of a security interest has two options: he "can bypass his debtor's bankruptcy proceeding and enforce his lien in the usual way" outside of bankruptcy, or he can "decide to collect his debt in the bankruptcy proceeding, and to this end may file a proof of claim in that proceeding." *50 F.3d at 461*. It further noted that a secured creditor "participat[es] in the bankruptcy proceeding through filing a claim." *Id. at 462*.

In *In re Be-Mac Transportation Co.*, the Eighth Circuit found a lien not voided by a plan confirmation in the face of far more active involvement in a bankruptcy by a secured creditor. In that case, the FDIC had filed a proof of secured claim and litigated that **[**7]** claim extensively before the bankruptcy court prior to plan confirmation. *FDIC v. Union Entities (In re Be-Mac Transp. Co.), 83 F.3d 1020, 1023 (8th Cir. 1996)*. However, the bankruptcy court denied the FDIC's secured claim as untimely and allowed the FDIC to proceed only as an unsecured creditor. *Id. at 1023-24*. The Eighth Circuit held that, despite the FDIC's receiving effective notice and its engagement throughout the bankruptcy process, that "the FDIC was not permitted to participate as a secured creditor [because of its own untimely filing meant that] its lien was never brought into the bankruptcy proceedings and could therefore not be extinguished by confirmation of the plan." *Id. at 1027*.

Furthermore, although we acknowledge that, contrarily, a Maryland bankruptcy court did state that notice alone satisfies the participation requirement for the extinguishment of liens under *§ 1141(c)*, *see In re Reg'l Bldg. Sys., Inc., 251 B.R. at 286-87*, the opinion of the Fourth Circuit affirming that case makes clear that at issue was a secured creditor that had involved itself extensively in the bankruptcy proceedings, filing a proof of claim, serving on an unsecured creditors' committee, and **[**8]** discussing its putative secured claim with that committee's counsel. *See Universal Suppliers v. Reg'l Bldg. Sys., Inc. (In re Reg'l Bldg. Sys., Inc.), 254 F.3d 528, 530 (4th Cir. 2001)*. We have been unable to find any case voiding a lien in the face of *no involvement* by a secured creditor other than the passive receipt of notice.[1]

[*498] In light of our interpretation of the definition of the word "participate" and in accordance with the above-cited persuasive authority from **[**9]** our sister circuits, we hold that ***HN6***[⬆] meeting the participation requirement in *In re Ahern Enterprises* requires more than mere passive receipt of effective notice.

CONCLUSION

For the foregoing reasons, we AFFIRM the judgment of the district court.

End of Document

[1] SWT argues that the Supreme Court's decision in *United Student Aid Funds, Inc. v. Espinosa, 559 U.S. 260, 130 S. Ct. 1367, 176 L. Ed. 2d 158 (2010)*, militates in favor of notice alone being sufficient. *Espinosa* dealt with a Rule 60(b) motion for relief from a final judgment. *Id. at 271-72*. The Court held that a mere procedural flaw was not a ground to void a judgment under *Rule 60(b)*'s high bar, which requires there to have been either a jurisdictional defect or due process violation underlying the judgment. *Id. at 272*. The Court found no due process violation because effective notice had been given to the moving party at the time of the proceedings. *Id*. This case does not implicate due process under *Rule 60(b)*, and *Espinosa* is therefore wholly inapposite.

Elixir Indus. v. City Bank & Trust Co. (In re Ahern Enters.)

United States Court of Appeals for the Fifth Circuit

November 6, 2007, Filed

No. 06-30986

Reporter
507 F.3d 817 *; 2007 U.S. App. LEXIS 25847 **; Bankr. L. Rep. (CCH) P81,050; 49 Bankr. Ct. Dec. 13

In The Matter Of: AHERN ENTERPRISES INC Debtor; ELIXIR INDUSTRIES INC Appellant v. CITY BANK & TRUST CO Appellee

Prior History: **[**1]** Appeal from the United States District Court for the Western District of Louisiana.

Elixir Indus. v. City Bank & Trust Co., 2006 U.S. Dist. LEXIS 63439 (W.D. La., Aug. 24, 2006)

Disposition: AFFIRMED.

LexisNexis® Headnotes

Bankruptcy Law > ... > Types of Claims > Secured Claims & Liens > Claim Determinations

HN1[] See 11 U.S.C.S. § 506(d).

Bankruptcy Law > ... > Judicial Review > Standards of Review > Clear Error Review

Bankruptcy Law > ... > Judicial Review > Standards of Review > De Novo Standard of Review

HN2[] In reviewing cases originating in bankruptcy, an appellate court performs the same function as the district court: the bankruptcy court's findings of fact are reviewed for clear error, and issues of law are reviewed de novo.

Bankruptcy Law > ... > Plans > Postconfirmation Effects > Effects of Confirmation

Business & Corporate Compliance > ... > Plans > Postconfirmation Effects > Effects of Confirmation

HN3[] Under 11 U.S.C.S. § 1141(c), the confirmation of a Chapter 11 bankruptcy plan voids liens on property dealt with by the plan unless they are specifically preserved, if the lien holder participates in the reorganization.

Bankruptcy Law > ... > Plans > Postconfirmation Effects > Effects of Confirmation

Business & Corporate Compliance > ... > Plans > Postconfirmation Effects > Effects of Confirmation

HN4[] See 11 U.S.C.S. § 1141(c).

Bankruptcy Law > ... > Plans > Postconfirmation Effects > Effects of Confirmation

Business & Corporate Compliance > ... > Plans > Postconfirmation Effects > Effects of Confirmation

HN5[] 11 U.S.C.S. § 1141(c) provides the default rule that a confirmed Chapter 11 bankruptcy plan may void liens not specifically preserved. Confirmation of the Chapter 11 plan voids liens not

preserved by the plan, provided that the plan dealt with the property to which they attach and the lien holder participates in the reorganization.

Bankruptcy Law > ... > Plans > Postconfirmation Effects > Effects of Confirmation

Business & Corporate Compliance > ... > Plans > Postconfirmation Effects > Effects of Confirmation

HN6[] Four conditions must be met for a lien to be voided in bankruptcy under 11 U.S.C.S. § 1141(c): (1) the plan must be confirmed; (2) the property that is subject to the lien must be dealt with by the plan; (3) the lien holder must participate in the reorganization; and (4) the plan must not preserve the lien.

Bankruptcy Law > ... > Plans > Postconfirmation Effects > Effects of Confirmation

Business & Corporate Compliance > ... > Plans > Postconfirmation Effects > Effects of Confirmation

HN7[] In general, a bankruptcy plan of reorganization "provides otherwise" by expressly stating that a lien that is asserted remains on the property to which it is attached.

Bankruptcy Law > ... > Plans > Postconfirmation Effects > Effects of Confirmation

Business & Corporate Compliance > ... > Plans > Postconfirmation Effects > Effects of Confirmation

HN8[] See 11 U.S.C.S. § 1141(d).

Bankruptcy Law > ... > Plans > Postconfirmation Effects > Effects of Confirmation

Business & Corporate Compliance > ... > Plans > Postconfirmation Effects > Effects of Confirmation

HN9[] The language of 11 U.S.C.S. § 1141(c) provides that property dealt with by a bankruptcy reorganization plan is free and clear of liens after confirmation.

Counsel: For ELIXIR INDUSTRIES INC., Appellant: R. Joseph Naus, Michael Allyn Stroud, Amanda Elyce Waddell, Wiener, Weiss & Madison, Shreveport, LA.

For CITY BANK & TRUST CO., Appellee: Mark A. Begnaud, McCoy, Roberts & Begnaud, Natchitoches, LA.

Judges: Before GARWOOD, JOLLY, and STEWART, Circuit Judges.

Opinion by: E. GRADY JOLLY

Opinion

[*818] E. GRADY JOLLY, Circuit Judge:

In this bankruptcy case, Elixir Industries, Inc. ("Elixir") appeals the district court's judgment in favor of mortgage-holder City Bank & Trust Co. ("City Bank"), which held that Elixir's judgment lien was voided during the bankruptcy proceeding. We hold that upon confirmation of the reorganization plan, the lien was voided under 11 U.S.C. § 1141(c), and thus AFFIRM the judgment of the district court.

I.

In May 1996 Elixir properly filed and recorded a judgment lien in the mortgage records of Natchitoches Parish, Louisiana, in the amount of $ 40,961.53 (plus costs and interest) on property owned by the bankrupt, Ahern Enterprises, Inc. ("Ahern"). The property subject to the lien included Ahern's manufacturing facility in Campti, Louisiana. The manufacturing facility property **[**2]** was subject to a prior recorded **[*819]**

mortgage held by City Bank that exceeded the value of the property.

On July 31, 1996, Ahern filed for Chapter 11 protection. On November 21, 1996, Elixir filed a proof of claim in the amount of $ 53,406.02 as an unsecured priority claim. Ahern, as debtor in possession, objected to the proof of claim and argued that Elixir only had a general unsecured debt because there was no unencumbered property to which the lien could attach. A hearing was held on April 7, 1998, after which the bankruptcy court entered an order sustaining Ahern's objection because Elixir's lien was junior to that of City Bank. The bankruptcy court reduced Elixir's claim to a general unsecured claim in the amount of $ 40,961.53, the principal amount of Elixir's judgment.

On September 26, 1997, City Bank filed a motion for Authority to Execute Dation En Paiement and to Cancel Indebtedness, which sought to cancel all judgment liens on two parcels of Ahern property that were pledged to the bank as collateral. The motion, however, did not include the manufacturing facility property. The bankruptcy court granted the motion on October 22 and issued an order requiring the Natchitoches Parish **[**3]** clerk to cancel all judgments affecting these two parcels. No order was issued concerning the manufacturing facility property.

Ahern's Chapter 11 plan was confirmed by the bankruptcy court on May 30, 1997.

On November 10, 1997, Ahern voluntarily converted its Chapter 11 plan into a request for relief under Chapter 7. In February 1998, City Bank and the Chapter 7 trustee filed a joint motion requesting court approval to sell the manufacturing facility property to the bank, as senior lien holder, in satisfaction of a portion of Ahern's debts. The bankruptcy court approved the sale on March 12 and credited $ 693,000 against City Bank's claim, leaving it with an unsecured claim of $ 471,366.58. The Trustee transferred the deed for the property to City Bank on March 22.

City Bank sold the manufacturing facility property to a third party on March 30. No title check was performed to discover that Elixir's judgment lien, as well as three additional liens, remained on the property. The third party later defaulted, and City Bank foreclosed on the property.

In 2005, as it contemplated selling the property again, City Bank determined that Elixir's lien (as well as the three others) had not been **[**4]** cancelled. On April 29, City Bank filed a complaint for declaratory relief in district court, seeking a ruling that the liens had been voided during Ahern's bankruptcy case. Elixir counter-claimed, requesting a declaration that the lien was still valid. After cross-motions for summary judgment, the bankruptcy court found in favor of City Bank. The court concluded that its April 1998 order sustaining Ahern's objection to Elixir's proof of claim had extinguished the lien.

Elixir appealed to the district court, which affirmed, asserting multiple reasons. The court held that: 1) the bankruptcy court's April 1998 order sustaining Ahern's objection voided Elixir's lien; 2) the bankruptcy court's confirmation and the substantial consummation of Ahern's Chapter 11 plan was sufficient to void Elixir's lien; and 3) conversion to Chapter 7 did not reinstate Elixir's lien.

Elixir subsequently filed this appeal.

II.

On appeal, Elixir argues that the bankruptcy court's order sustaining Ahern's objection to its proof of claim did not void its lien on the manufacturing facility property. Although the bankruptcy court reduced Elixir's claim to a general, non-priority claim, Elixir contends that the court **[**5]** merely reclassified its claim for the purposes of **[*820]** distribution in the bankruptcy proceedings, which did not affect its judgment lien. City Bank counters that, because the court found Elixir's claim to be an allowed unsecured claim, it was not an "allowed

secured claim" under *11 U.S.C. § 506(d)*, [1] and the lien was therefore voided.

Elixir also contests the district court's holding that its lien was voided by the confirmation of the Chapter 11 plan. Elixir contends that, because the plan had not reached the "consummation date" necessary for its provisions to take effect, the plan's lien-stripping language did not take effect, leaving its lien on the manufacturing property. City Bank argues that *11 U.S.C. § 1141(c)* operated to void Elixir's lien. City Bank contends that the plan took effect on "substantial **[**6]** consummation" as defined by *11 U.S.C. § 1101*.

III.

A.

HN2[↑] In reviewing cases originating in bankruptcy, we perform the same function as the district court: the bankruptcy court's findings of fact are reviewed for clear error, and issues of law are reviewed *de novo*. *In re Soileau, 488 F.3d 302, 305 (5th Cir. 2007)*.

We do not address the district court's holding that Elixir's lien was voided by the bankruptcy court's April 1998 order reducing Elixir's claim and classifying it as a general unsecured creditor. [2] We conclude instead that the provisions of *11 U.S.C. § 1141(c)* decide this case. In reaching this decision, we hold first that, ***HN3***[↑] under *section 1141(c)*, the confirmation of a Chapter 11 plan voids liens on property dealt with by the plan unless they are specifically preserved, if the lien holder participates in the reorganization. Elixir's judgment lien was voided because Ahern's Chapter 11 plan was confirmed without Elixir's objection; because the property subject to Elixir's lien was dealt with by the plan; because Elixir participated in the reorganization proceedings; and finally because the plan did not preserve Elixir's lien.

B.

Title *11 U.S.C. § 1141(c)* provides, with immaterial exceptions, that ***HN4***[↑] "except as otherwise provided in the plan or in the order confirming the plan, after confirmation of a plan, the property dealt with by the plan is free and clear of all claims and interests of creditors, equity security holders, and of general partners in the debtor."

Other circuits who have considered *§ 1141(c)* in the context of facts similar to those presented here have found that the section operates to extinguish liens that are not preserved in a confirmed Chapter 11 plan. The first court to state this default rule was the Seventh Circuit. *In re Penrod, 50 F.3d 459 (7th Cir. 1995)*. In *Penrod*, the debtor's Chapter 11 plan **[*821]** made provision for payment **[**8]** of a creditor's claim, which was secured by a lien on the debtor's hogs. *Id. at 461*. Neither the plan nor the order confirming it provided whether the lien would be extinguished. *Id.* The Seventh Circuit acknowledged the "old saw" that liens pass through bankruptcy unaffected. *Id.* It reasoned, however, that "when lienholders participate in a bankruptcy proceeding, and especially in a reorganization, they know that their liens are likely to be affected, and indeed altered." *Id. at 462*. The court held that liens are "interests" covered by *section 1141(c)* and that "unless the plan of reorganization, or the order

---

[1] *Section 506(d)* provides:

> ***HN1***[↑] To the extent that a lien secures a claim against the debtor that is not an allowed secured claim, such lien is void, unless--
>
> (1) such claim was disallowed only under section 502(b)(5) or 502(e) of this title; or
>
> (2) such claim is not an allowed secured claim due only to the failure of any entity to file a proof of such claim under section 501 of this title.

[2] Although we do not reach the district court's holding affirming **[**7]** the bankruptcy court's judgment on the basis of the bankruptcy court's April 1998 order, we note that the holding is suspect in the light of the Supreme Court's decision in *Dewsnup v. Timm, 502 U.S. 410, 112 S. Ct. 773, 116 L. Ed. 2d 903 (1992)*. In *Dewsnup*, the Court found that *section 506(d)* only serves to strip liens in cases where "a claim secured by the lien itself has not been allowed." *Id. at 415-16*. Because Elixir's claim was allowed, it is not clear that *section 506(d)* voided Elixir's lien.

confirming the plan says that a lien is preserved, it is extinguished by the confirmation . . . provided, we emphasize, that the holder of the lien participated in the reorganization." *Id. at 463*. The court found that its interpretation of *section 1141(c)* would lower the transaction costs of dealing with a reorganized debtor by allowing prospective creditors or investors to determine from the plan of reorganization itself whether liens of creditors whose interests are defined in the plan survive. *Id*.

The Eighth Circuit acknowledged *Penrod's* rationale when it considered the Federal **[**9]** Deposit Insurance Corporation's appeal of an order confirming a Chapter 11 plan. *FDIC v. Union Entities (In re Be-Mac Transport Co., Inc.), 83 F.3d 1020 (8th Cir. 1996)*. The court noted the rule that "a secured creditor who participates in the reorganization may also lose its lien by confirmation of a reorganization plan which does not expressly preserve the lien." *Id. at 1025*. The *Be-Mac* court found, however, that the FDIC's lien was not voided by the confirmed Chapter 11 plan because the bankruptcy court erroneously disallowed its claim, on account of the FDIC's untimely filed proof of claim. *Id. at 1027*. Had its claim been classified properly as a secured claim, the FDIC would have been entitled to vote and receive distributions as a secured creditor. The court held, citing *Penrod*, that because the FDIC was denied that right, it did not participate in the reorganization sufficiently to allow its lien to be extinguished. *Id*. The court stated that "[the FDIC]'s lien was never brought into the bankruptcy proceedings and could therefore not be extinguished by confirmation of the plan." *Id*.

Citing *Be-Mac*, the Tenth Circuit acknowledged in *In re Barton* that a confirmed Chapter 11 plan **[**10]** may void a lien. *104 F.3d 1241, 1245 (10th Cir. 1997)*. The court there found that the plan at issue did not void a secured creditor's lien because the plan did not specifically refer to the property on which the creditor held a lien, the creditor's interest in the property, or the plan's effect on the property. *Id. at 1246*. The creditor did not receive sufficient notice for the Chapter 11 plan to affect its security interest. *Id*.

Finally, the Fourth Circuit determined in *In re Regional Bldg. Systems, Inc*. that *section 1141(c)* operates to extinguish liens not expressly preserved by a Chapter 11 plan. *254 F.3d 528, 531 (4th Cir. 2001)*. In *Regional*, a creditor held a claim secured by a security interest in certain home construction materials. *Id. at 530*. The claim was allowed only as an unsecured claim, however, because the property had a value of zero at the time of filing. *Id*. The creditor participated in the reorganization as a member of the unsecured creditors committee and filed a proof of claim asserting an unsecured, nonpriority claim. *Id*. Prior to plan confirmation, the debtor settled an unrelated lawsuit, resulting in the payment of about $ 5 million. *Id*. The plan that was confirmed **[**11]** shortly thereafter did not provide for retention of the creditor's lien, even though the settlement funds were then available to satisfy the claim. *Id*. Nevertheless, the Fourth Circuit affirmed the bankruptcy court's holding **[*822]** that the confirmed Chapter 11 plan had extinguished the lien. *Id. at 533*. The court found that all the elements necessary to satisfy *section 1141(c)* were satisfied. *Id. at 530*. The Chapter 11 plan was confirmed without any objection by the creditor. *Id*. The property to which the lien would attach, that is, the settlement funds, was dealt with by the plan. *Id*. Finally, neither the plan nor the order confirming the plan expressly preserved the creditor's lien. *Id*. The court found that the creditor "fell asleep at the switch," by failing to object to confirmation of a Chapter 11 plan that did not preserve its lien, and the lien was therefore extinguished. *Id. at 533*.

Given the sound reasoning and results of these cases, as set forth above, we have no reason not to now join the other circuits that have considered the issue and hold that ***HN5***[↑] *11 U.S.C. § 1141(c)* provides the default rule that a confirmed Chapter 11 plan may void liens not specifically preserved. [3]

[3] The Southern District of Texas applied the *Penrod* rule in *In re*

We hold **[**12]** that confirmation of a Chapter 11 plan voids liens not preserved by the plan, provided that the plan dealt with the property to which they attach and the lien holder participates in the reorganization.

C.

HN6[↑] Four conditions must therefore be met for a lien to be voided under section 1141(c): (1) the plan must be confirmed; (2) the property that is subject to the lien must **[**13]** be dealt with by the plan; (3) the lien holder must participate in the reorganization; and (4) the plan must not preserve the lien. We now apply these criteria to the lien claimed by Elixir.

First, Ahern's Chapter 11 plan was confirmed by order of the bankruptcy court on May 30, 1997. Elixir made no objection to confirmation of the plan.

Second, the property subject to Elixir's lien was dealt with by the plan. The plan states that "City Bank and Trust Company is the senior secured creditor of the Debtor and holds a mortgage and security interest in the Debtor's land, building, inventory and fixtures. . . . City Bank and Trust Company shall retain its liens and encumbrances until paid in full[.]" Elixir's judgment lien was attached to the debtor's manufacturing facility property -- its land and building. The plan mentioned the property subject to Elixir's lien and specifically provided that City Bank's encumbrances would remain on the property following confirmation.

Burton Securities, 202 B.R. 411, 420 (S.D. Tex. 1996). That court held that "confirmation of a chapter 11 plan of reorganization extinguishes a creditor's lien where the plan provides for payment of the creditor's claim, but makes no provision for preservation of the lien, and the creditor participated in the bankruptcy proceedings. Consequently, since Appellant participated in the bankruptcy proceedings and the reorganization plan did not expressly preserve its lien, the Court concludes that the bankruptcy court's confirmation of Debtor's plan of reorganization extinguished [Appellant]'s lien." *Id.* (citation omitted). This court affirmed the district court's judgment in a short unpublished opinion. ***In re Burton Securities, 129 F.3d 607 (5th Cir. 1997)***.

We do note, however, that there is some ambiguity in the cases discussed above concerning exactly what must be "dealt with" by a Chapter 11 plan under section 1141(c). The *Penrod* court suggests that the lien that is to be **[**14]** voided must be dealt with. It states: "[U]nless the plan of reorganization, or the order confirming the plan, says that a lien is preserved, it is extinguished by the confirmation. This is provided, we emphasize, that the holder of the lien participated in the reorganization. If he did not, *his lien*, would not be 'property dealt with by the plan,' and so the section would not apply." *Penrod, 50 F.3d **[*823]** at 463* (emphasis added). *Penrod* has been interpreted to require that the lien itself be dealt with in the plan. *See* 260 Gregory LLC v. Black Hawk/Central City Sanitation Dist., 77 P.3d 841, 845 (Colo. App. 2003) (holding that the lien at issue was not extinguished by silence in the plan as to its survival unless it is dealt with by the plan by a provision for the payment of or securing of the claim); Coffin v. Malvern Fed. Savings Bank, 189 B.R. 323, 326-27 (E.D. Penn. 1995) (holding that, because secured creditor did not attempt to collect its entire debt through the bankruptcy proceeding, "[t]he liens in question were not 'property dealt with by the plan for § 1141(c) purposes").

On the other hand, section 1141(c) has been interpreted to require that the property that is subject to the **[**15]** lien be dealt with in the plan. In *Regional*, the court stated that "the property to which [appellant] now seeks to attach its lien was 'dealt with by the plan.' Specifically, the plan stated that after certain other claims had been paid, [appellant] and the other unsecured creditors would receive a pro rata share of the remainder of the estate, including any amounts left in the $ 5 million settlement fund [to which appellant seeks to attach its lien]." 254 F.3d at 531.

The latter view is the better view, and it is the one that we adopt. We note first that, according to *Penrod,* the condition that the lien itself be "property dealt with by the plan" can be satisfied by the lien holder's participation in the reorganization.

Penrod, 50 F.3d at 463. More importantly, a requirement that the lien itself be dealt with by the plan is not a sensible reading of *section 1141(c)*. *Section 1141(c)* provides that "property dealt with by the plan is free and clear of all claims and interests. . ." If the lien is the property that must be dealt with, then *section 1141(c)* would have to be read to say that "liens dealt with by the plan are free and clear of liens." Because liens constitute one of the interests **[**16]** that *section 1141(c)* extinguishes, it is sensible to interpret "property dealt with by the plan" as the property subject to the lien.

Third, the record indicates that Elixir participated in the reorganization proceeding. Although the requirement that a secured creditor participate in the reorganization proceeding is a judicial gloss on *section 1141(c)*, participation ensures that the secured creditor has notice of the plan and its potential effect on the creditor's lien. *See Penrod, 50 F.3d at 462*; *Be-Mac, 83 F.3d at 1027*. *Penrod* required that the creditor participate by filing a proof of claim. *See 50 F.3d at 462*. At least one bankruptcy court has stated that the only participation necessary is that the creditor receive notice of the plan and an opportunity to object. *In re Regional Building Systems, Inc., 251 B.R. 274, 287 (Bankr. D.Md. 2000)*.

In the instant case, it is a sufficient level of participation that Elixir filed a proof of claim as an unsecured priority creditor. [4] In addition, the plan of reorganization provided for pro-rata payment of all unsecured and undersecured creditors of the debtor, specifically stating that this class of claims included all judgment lien holders. **[**17]** Although the plan did not mention Elixir by name, it gave sufficient notice of the plan's treatment of the property to which Elixir's lien attached and the status of Elixir's claim to satisfy the requirements of due process.

Finally, we come to the consideration of whether the plan of reorganization **[*824]** provided otherwise than that the property subject to Elixir's lien would be "free and clear." *HN7*[↑] In general, a plan of reorganization "provides otherwise" by expressly stating that the lien that is asserted remains on the property to which it is attached. *Regional, 254 F.3d at 531* ("[C]onfirmation of [debtor]'s Chapter 11 plan rendered the $ 5 million settlement fund 'free and clear of all claims' not expressly preserved."); *Penrod, 50 F.3d at 463* ("[U]nless the plan of reorganization, or the order confirming the plan, says that a lien is preserved, it is extinguished **[**18]** by the confirmation."). Ahern's plan did not expressly preserve Elixir's lien. Instead, it stated that City Bank would retain its liens and encumbrances on Ahern's land, building, inventory and fixtures, making no mention of Elixir's lien.

Elixir contends, nevertheless, that the Chapter 11 plan "provides otherwise." The parties have argued this point at length, both parties starting from the premise that this question is resolved by an interpretation of article 8.14 of the plan of reorganization. Their argument is not, however, whether specific terms of the plan "provide otherwise," but whether the plan was in effect at the time the bankrupt Ahern abandoned the plan and converted its bankruptcy to Chapter 7. Elixir's argument assumes that, before the proceeding was converted to Chapter 7, the lien had not been voided and thus remains in effect.

Article 8.14 states, in relevant part:

> *The confirmation* of the Plan (*subject to the occurrence of the Consummation Date*) shall discharge the Debtor from any debt that arose before the Consummation date. . . .
>
> *Upon consummation of the Plan,* its provisions will bind, and inure to the benefit of, the Reorganized Debtor, any Entity affected by the

[4] The court in *Be-Mac* found that confirmation of the plan did not void the FDIC's lien because the FDIC was not allowed to participate as a secured creditor. *83 F.3d at 1027*. In that case, however, the FDIC was entitled to participate as a secured creditor because there was property to which its lien attached, unlike this case. *See id*.

> **[**19]** Plan and its respective predecessors, successors, assigns, agents, officers, and directors. Except as otherwise specifically provided by the Plan, the distributions and rights that are provided in the Plan will be in complete satisfaction, discharge and release of (I) all Claims and Causes of Action against, liabilities of, liens on, obligations of and Interest in the Debtor or the direct or indirect assets and properties of the Debtor whether known or unknown[.]

The main point of controversy between Elixir and City Bank regarding article 8.14 is the interpretation of the phrase "Upon consummation." Elixir contends that "consummation" refers to the "Consummation Date," a term defined by the plan, which both parties concede did not occur before conversion to Chapter 7. Elixir contends that the occurrence of the Consummation Date was a suspensive condition, the occurrence of which was necessary for the remainder of the plan to take effect. City Bank argues instead that "consummation" in article 8.14 should be interpreted as "substantial consummation" as defined by *11 U.S.C. § 1101(2)*, which it contends occurred sometime between confirmation and conversion to Chapter 7. [5]

Upon review of the plan in its entirety, it is difficult to give a consistent meaning **[*825]** to the term "consummation" as it is used in various places throughout the plan. That is no matter, however, because we conclude that regardless of how the term "consummation" is interpreted in article 8.14, Elixir's lien was voided upon confirmation of the plan.

The Eleventh Circuit reached a similar conclusion in considering the application of *11 U.S.C. § 1141(d)* in *United States v. White, 466 F.3d 1241 (11th Cir. 2006)*. *Section 1141(d)* provides: ***HN8***[↑] "(1) Except as otherwise provided in this subsection, in the plan, or in the order confirming the plan, the confirmation of a plan- (A) discharges the debtor from any debt that arose before the date of such confirmation. . . ." The court found in *White* that the debtor was granted a discharge **[**21]** upon confirmation, notwithstanding that the plan provided a post-confirmation effective date. *Id. at 1246*. The court noted that a post-confirmation effective date does not satisfy the "otherwise provided" condition of *section 1141(d)*. *Id*. The court reasoned that a holding that discharge occurs on some effective date of a plan, instead of upon confirmation of the plan, would be contrary to Congressional intent: "If the plan could delay the grant of discharge merely by having a post-confirmation effective date, then Congress' statement that 'the confirmation of a plan. . .discharges the debtor from any debt. . .' would be in error. . . . [T]he triggering event for discharge would not actually be the plan's confirmation but the plan's taking effect. . . . [W]e should assume that had Congress intended to condition discharges on a plan's taking effect, it would have done so explicitly." *Id*.

HN9[↑] The language of *section 1141(c)* similarly provides that the property dealt with by the plan will is free and clear *after confirmation*. Even if Elixir's interpretation of the plan is correct, and the plan did not take effect until the Consummation Date, its lien was void after confirmation of the plan, **[**22]** by operation of *§ 1141(c)*, unless the plan specifically provides otherwise. [6]

---

[5] *11 U.S.C. § 1101(2)* **[**20]** provides:

"substantial consummation" means--

(A) transfer of all or substantially all of the property proposed by the plan to be transferred;

(B) assumption by the debtor or by the successor to the debtor under the plan of the business or of the management of all or substantially all of the property dealt with by the plan; and

(C) commencement of distribution under the plan.

[6] It is difficult to conclude that Elixir's interpretation is correct, in any event, because the plan requires the sale of certain property and the commencement of certain payments immediately on confirmation.

In sum, Elixir chose to participate in the reorganization in hopes of receiving a payout as an unsecured creditor, because there was no equity to which its lien could attach. Elixir could have objected and asserted its position that the lien was preserved by appealing the order confirming the plan of reorganization. *See Penrod, 50 F.3d at 464*. Having participated without objection in a reorganization in which the confirmed plan dealt with the land and building subject to its lien, Elixir cannot now claim that the lien survived. [7]

IV.

For the foregoing reasons, the judgment of the district court is

AFFIRMED.

End of Document

[7] We note that our analysis has been confined to the effect of a confirmed Chapter 11 plan under *11 U.S.C. § 1141(c)*. As the Fourth Circuit noted in *Regional*, there are important differences in Chapter 11 proceedings and Chapter 13 proceedings that may warrant different treatment of liens. *254 F.3d 528, 532-33* ("[It was perfectly sensible for Congress to adopt a rule stating **[**23]** that once property comes within the ambit of a confirmed Chapter 11 plan, it is free and clear of all claims not expressly preserved. And adopting a different rule for Chapter 13 cases also makes sense given the less complex estates at issue, the fact that a Chapter 13 plan need not address all secured debts, and the fact that Chapter 13 creditors do not vote on the debtor's plan.").

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United States Bankruptcy Court, D. Utah, Central Division.

IN RE: John OLSON and Ashley Olson, Debtors.

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Signed September 16, 2020

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FINDINGS AND CONCLUSIONS REGARDING CONFIRMATION OF DEBTORS' PLAN OF REORGANIZATION DATED JULY 14, 2020 UNDER CHAPTER 11 OF THE BANKRUPTCY CODE

R. KIMBALL MOSIER, U.S. Bankruptcy Judge

***1** The matter before the Court is the *Debtors' Amended Motion to Confirm Plan Under 11 U.S.C. § 1191* [Docket No. 42] (the "*Motion*"), filed by John Olson and Ashley Olson, the debtors and debtors-in-possession in the above-captioned case (the "Debtors") whereby the Debtors seek confirmation of the *Debtors' Plan of Reorganization dated July 14, 2020* [Docket No. 31] (as it may be amended by the Confirmation Order, the "Plan").

Based upon the evidence set forth on the Docket in the Case, including the *Declaration of John Olson in Support of Confirmation of Debtors' Plan of Reorganization* [Docket No. 52], the Motion, the *Ballot Tabulation Register* [Docket No. 51], and other papers filed concerning the Plan [*e.g.*, Docket Nos. 8, 12, 13, 19, 32, 38, 43, and 44], having inquired into the legal sufficiency of the evidence adduced, and good cause appearing, the Court hereby

FINDS AND CONCLUDES[1] as follows:

A. Exclusive Jurisdiction; Venue; Core Proceeding. This Court has jurisdiction over the Bankruptcy Case[2] pursuant to 28 U.S.C. §§ 157 and 1334. Venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409. Confirmation of the Plan is a core proceeding under 28 U.S.C. § 157(b)(2), and this Court has exclusive jurisdiction to determine whether the Plan complies with the applicable provisions of the Bankruptcy Code and should be confirmed.

B. Judicial Notice. This Court takes judicial notice of the docket of the Bankruptcy Case maintained by the Bankruptcy Court, including, without limitation, all pleadings, papers and other documents filed, all orders entered, and the transcripts of, and all minute entries, all transcripts of hearings, and all of the evidence received and arguments made at the hearings held before the Court during the pendency of the Bankruptcy Case.

C. Transmittal and Mailing of Materials; Notice. All due, adequate, and sufficient notices of the Plan, the Motion, and the deadlines for voting on and filing objections to the Plan, were given to all known holders of Claims and Interests in accordance with the Bankruptcy Rules. See Certificate of Service, Docket No. 44. The Plan and relevant ballots were transmitted and served in substantial compliance with the Bankruptcy Rules upon Creditors entitled to vote on the Plan, and such transmittal and service were adequate and sufficient. Any modifications of and to the Plan, including any modifications made under the Confirmation Order, are immaterial in that they do not adversely change the treatment under the Plan of any creditor, and under Bankruptcy Rule 3019(a), the modifications are deemed accepted by all creditors who have previously accepted the Plan. No other or further notice of the Plan or Motion is or shall be required.

D. Solicitation. The solicitation of votes for acceptance or rejection of the Plan complied with § 1126,[3] Bankruptcy Rules (including interim rules) 3017.2 and 3018, all other applicable provisions of the Bankruptcy Code, and all other rules, laws, and regulations. Based on the record before the Court in the Bankruptcy Case, the Debtors' solicitation of votes on the Plan was proper and done in good faith.

***2** E. Distribution. All procedures used to distribute the solicitation materials to the applicable holders of Claims and to tabulate the ballots were fair and conducted in accordance with the Bankruptcy Code, the Bankruptcy Rules, the local rules of the Bankruptcy Court, and all other rules, laws, and regulations.

F. Creditors' Acceptance of Plan. The Plan establishes five Classes of Claims. Based on a review of the Debtor's Schedules and the Claims Register maintained by the Court, there are no holders of Class 1 Claims. Classes 2, 3, and 4 are impaired and were entitled to vote on the Plan. Class 2 (General Unsecured Claims) overwhelmingly voted to accept the Plan (5/6 accepting votes, representing 98% of total voting Claims), as reflected by the Ballot Tabulation Register filed in the Case. Class 3 (Allowed Secured Claim of Bank of America) accepted the Plan. Class 4 (Allowed Secured Claim of Sean Kunzler) accepted the Plan. The Debtors did not receive any ballots for Class 5 (Miscellaneous Secured Claims). Under the binding precedent of In re Ruti-Sweetwater, Inc., 836 F.2d 1263, 1267-68 (10th Cir. 1988), holders of unimpaired Claims that did not return ballots are deemed to have accepted the Plan. Those Creditors who are impaired, but did not vote, are bound by the Classes that accepted the Plan. Accordingly, the Court finds the Debtor meets the voting requirements under Bankruptcy Code § 1129(a)(8) and (a)(10). No party-in-interest filed an objection to the Plan.

G. Plan Complies with Bankruptcy Code. The Plan, as supplemented and modified by the Confirmation Order, complies with the applicable provisions of the Bankruptcy Code, thereby satisfying §§ 1129(a)(1) and 1191(a).

i. Proper Classification. As required by § 1123(a)(1),[4] Article 3 of the Plan properly designates classes of Claims, and classifies only substantially similar Claims in the same classes pursuant to § 1122.

ii. Specify Unimpaired Classes. There are no unimpaired classes under the Plan. All classes of claims are impaired.

iii. Specify Treatment of Impaired Classes. Classes 1 through 5 are designated as impaired under the Plan. Article 4 of the Plan specifies the treatment of the impaired Classes of Claims, thereby satisfying § 1123(a)(3).

iv. No Discrimination. The Plan provides for the same treatment for each Claim or Interest in each respective Class, unless the holder(s) of a particular Claim(s) have agreed to less favorable treatment with respect to such Claim, thereby satisfying § 1123(a)(4).

v. Implementation of Plan. The Plan provides adequate and proper means for its implementation, thereby satisfying § 1123(a)(5). Among other things, Articles 5 and 6 of the Plan provide for (a) the vesting of the property of the Debtors and their chapter 11 bankruptcy Estate in the Reorganized Debtors, (b) the Reorganized Debtors' use and retention of property, (c) the continuation of normal business (life) operations by the Reorganized Debtors, and (d) distributions to creditors equal to the Reorganized Debtors' Projected Disposable Income.

vi. Corporate Charter Provision Inapplicable. Section 1123(a)(6) is satisfied in that it is inapplicable to individual debtors.

vii. Selection of Manager(s). Section 1123(a)(7) is satisfied or inapplicable in that the Debtors are individuals, and do not have managers, officers, or directors.

***3** viii. Additional Plan Provisions. The Plan's provisions are appropriate and consistent with the applicable provisions of the Bankruptcy Code, including provisions regarding (a) the assumption and/or rejection of executory contracts and unexpired leases, (b) the retention and enforcement by the Debtors of claims under chapter 5 of the Bankruptcy Code and under applicable non-bankruptcy law, and (c) modification of the rights of holders of secured claims. Thus, § 1123(b) is satisfied.

ix. Bankruptcy Rule 3016(a). The Plan is dated and identifies the Debtors as its proponents, thereby satisfying Bankruptcy Rule 3016(a).

H. The Plan and its Proponent Comply with the Bankruptcy Code. The Plan complies with the applicable provisions of the Bankruptcy Code. Likewise, the Debtors complied with the applicable provisions of the Bankruptcy Code. Thus, §§ 1129(a)(1) and (a)(2) are satisfied.

i. The Debtors are proper proponents of the Plan under § 1121(c).

ii. The Debtors complied with the applicable provisions of the Bankruptcy Code, including §§ 1181 – 1195 (as applicable), the Bankruptcy Rules, and other orders of the Court in transmitting the Plan, the ballots, related documents and notices, and in soliciting and tabulating votes on the Plan.

I. Plan Proposed in Good Faith. The Plan is proposed in good faith and not by any means forbidden by law and, therefore, complies with the requirements of § 1129(a)(3). In

determining that the Plan has been proposed in good faith, the Court has examined the totality of the circumstances surrounding the filing of the Bankruptcy Case and the formulation of the Plan.

i. the Debtors filed this chapter 11 Case, and the Debtors have proposed the Plan for a valid reorganizational purpose;

ii. neither this Case nor the Plan was filed as a litigation tactic or for delay;

iii. the Debtors have been, and are, actively prosecuting this Case;

iv. the Debtors proposed the Plan with the legitimate and honest purpose of, among other things, restructuring the Debtors' financial affairs and providing a meaningful return to all classes of creditors;

v. the Plan is the fruit of arms-length negotiations with creditors, and includes input from the Trustee appointed under § 1183;

vi. the Plan contemplates that the claims of creditors will be satisfied by cash distributions to the holders of Allowed Claims from the continuation of normal business operations, to be paid directly by the Debtors;

vii. the Debtors anticipate having ongoing salary from the operation of Sunplay to fund repayment of creditor claims under the Plan;

viii. the Debtors have a realistic budget, as set forth in the budget attached to the Declaration of John Olson in Support of Confirmation of Debtors' Plan of Reorganization, setting forth their ability to make Plan payments and afford our general living expenses.

J. Payments for Services or Costs and Expenses. Pursuant to section 2.2 of the Plan, all fees and expenses of Professionals incurred through and including the Effective Date will be subject to the Court's approval, and will be paid through the Debtors' Plan Payments, as authorized by § 1191(e) (unless otherwise agreed by the Debtors and the holder of such Claim. Moreover, section 10.1 of the Plan provides that this Court will retain jurisdiction after the Effective Date to hear and determine all applications by Professionals and others for compensation and reimbursement of expenses relating to the period prior to the Effective Date. Accordingly, the Plan complies with § 1129(a)(4).

***4** K. Reorganized Debtors as Successors to Debtors. The Plan states that the Reorganized Debtors shall succeed the Debtors, and shall make the Plan Payments provided for in the Plan. The Reorganized Debtors' service is consistent with the interests of the holders of Claims and with public policy. Therefore, the requirements of § 1129(a)(5) are satisfied.

L. No Rate Changes. The Plan satisfies § 1129(a)(6) because the Confirmed Plan does not provide for any change in rates over which a governmental regulatory commission has jurisdiction.

M. Best Interests of Creditors Test. The Plan was accepted by all Classes of Claims. Further and in any event, the Plan provides that each holder of a Claim will receive or retain under the Plan on account of their Claim property of a value, as of the effective date of the Plan, that is not less than the amount such holder would receive or retain if the Case were converted to chapter 7, and the Estate were liquidated by a chapter 7 trustee. If the case were converted to chapter 7, creditors would be unlikely to receive any payments, as set forth in the liquidation analysis that is included with the Plan. As such, § 1129(a)(7) is satisfied.

N. Acceptance by Classes of Claims. As detailed above, the Plan was accepted by all Classes of Claims or, under In re Ruti-Sweetwater, Inc., 836 F.2d 1263, 1267-68 (10th Cir. 1988), all Classes of Claims are deemed to accept the Plan.

O. Treatment of Administrative Expense Claims and Priority Tax Claims. The Plan provides, in Article 2, for the treatment of administrative and priority claimants in accordance with the requirements of §§ 1129(a)(9) and 1191(e) (except to the extent that a holder agrees otherwise).

P. Acceptance by at Least One Impaired Class. As set forth in the Ballot Tabulation Report, all Classes of impaired Claims accepted (or are deemed to accept) the Plan. Therefore, the Debtors satisfy the requirements of § 1129(a)(10).

Q. Feasibility. The Plan is feasible and complies with § 1129(a)(11) because confirmation is not likely to be followed by a liquidation or the need for further financial reorganization of the Debtors. The Court is satisfied that the Plan offers a reasonable prospect of success and is workable. As such, the requirements of section 1129(a)(11) are satisfied.

R. Payment of Fees. All fees payable under 28 U.S.C. § 1930 have been paid, are not required to be paid, or will be paid on or before the Effective Date, pursuant to Section 2.2 of the Plan, thereby satisfying § 1129(a)(12).

S. Continuation of Retiree Benefits. The Plan complies with § 1129(a)(13) because the Debtors are not obligated to pay any retiree benefits subject to § 1114.

T. No Domestic Support Obligations. The Debtors do not have any domestic support obligations. Therefore, § 1129(a)(14) is not applicable.

U. 1129(a)(15). Bankruptcy Code § 1129(a)(15) is inapplicable in an SBRA Case.

V. Transfers Will Comply with Nonbankruptcy Law. The Plan complies with § 1129(a)(16) because any transfers of assets to be made under the Plan will be made in accordance with applicable nonbankruptcy law that governs the transfer of property by a corporation or trust that is not a moneyed, business, or commercial corporation or trust.

W. Fair and Equitable; No Unfair Discrimination. All Classes of Claims have accepted (or are deemed to have accepted) the Plan. As such, the "cram down" requirements of § 1191(b) are not applicable.

***5** X. Debtors are Proponents of the Plan. The Debtors are the proponents of the Plan. As such, the requirements of § 1189 are satisfied.

Y. Principal Purpose of Plan. The principal purpose of the Plan is not the avoidance of taxes or the avoidance of the application of Section 5 of the Securities Act of 1933 (15 U.S.C. § 77e). Therefore, the Plan satisfies the requirements of § 1129(d).

Z. Debtors are Entitled to Discharge Upon Effective Date. Consistent with Section 12.4 of the Plan and Bankruptcy Code §§ 1181(a) and (c), 1191(a) and 1141(d), the Debtors will be discharged from any debt that arose before entry of the Confirmation Order, to the extent specified in § 1141(d)(1)(A) and the terms of the Plan. Because the Debtors are entitled to a discharge under § 1141(d), Section 12.4 of the Plan of the Plan should be modified by the Confirmation Order such that the following language is stricken: "The Debtor will not be discharged from any debt (i) imposed by this Plan; or (ii) excepted from discharge under § 523(a) of the Code, except as provided in Rule 4007(c) of the Federal Rules of Bankruptcy Procedure." The aforementioned language is inconsistent with Bankruptcy Code § 1141(d)(1)(A).

AA. Trustee to be Discharged from Duties. Consistent with Section 5.3 of the Plan and Bankruptcy Code § 1183(c), the duties of the Trustee shall cease upon substantial consummation of the Plan, which shall occur on the Effective Date.

BB. In summary, the Plan complies with, and the Debtors satisfy, all applicable confirmation requirements, and the Plan will be confirmed under § 1191(a) by entry of the separate Confirmation Order.

This order is SIGNED.

All Citations

Not Reported in B.R. Rptr., 2020 WL 10111637

Footnotes

1 Findings of fact shall be construed as conclusions of law and conclusions of law shall be construed as findings of fact when appropriate. See Fed. R. Bankr. P. 7052.

2 Capitalized terms used but not otherwise defined herein are defined in the Plan.

3 Unless otherwise provided, all references to statutory sections in these Findings and Conclusions using the section symbol "§" are to the relevant sections of the Bankruptcy Code.

4 Unless otherwise provided, all references to statutory sections in this Declaration using the section symbol "§" are to the relevant sections of the Bankruptcy Code.

End of Document

In re Penrod

United States Court of Appeals for the Seventh Circuit

January 12, 1995, Argued ; March 22, 1995, Decided

No. 94-3072

Reporter
50 F.3d 459 *; 1995 U.S. App. LEXIS 5813 **; 33 Collier Bankr. Cas. 2d (MB) 263; Bankr. L. Rep. (CCH) P76,423

IN THE MATTER OF: JOHN PENROD AND ALYCE J. PENROD, Debtors-Appellees. APPEAL OF: FINANCIAL INSTITUTIONS LIQUIDATION CORPORATION, formerly known as MUTUAL GUARANTY CORPORATION, successor in interest to the Clinton County Farm Bureau Cooperative Association Credit Union.

Prior History: [1]** Appeal from the United States District Court for the Northern District of Indiana, South Bend Division. No. 94 C 256. Robert L. Miller, Jr., Judge.

Disposition: AFFIRMED.

LexisNexis® Headnotes

Bankruptcy Law > ... > Types of Claims > Secured Claims & Liens > General Overview

HN1[] **Types of Claims, Secured Claims & Liens**

A secured creditor can bypass his debtor's bankruptcy proceeding and enforce his lien in the usual way, which would normally be by bringing a foreclosure action in a state court. This is the principle that liens pass through bankruptcy unaffected. If the creditor follows this route, the discharge in bankruptcy will not impair his lien. Alternatively, he may decide to collect his debt in the bankruptcy proceeding, and to this end may file a proof of claim in that proceeding.

Bankruptcy Law > Administrative Powers > Automatic Stay > General Overview

Bankruptcy Law > ... > Types of Claims > Secured Claims & Liens > General Overview

HN2[] **Administrative Powers, Automatic Stay**

The secured creditor does not, by participating in the bankruptcy proceeding through filing a claim, surrender his lien.

Business & Corporate Compliance > ... > Plans > Plan Contents > Discretionary Provisions
Bankruptcy Law > ... > Plans > Plan Contents > Discretionary Provisions

Bankruptcy Law > ... > Types of Claims > Secured Claims & Liens > General Overview

HN3[] **Plan Contents, Discretionary Provisions**

A plan of reorganization can expressly preserve

preexisting liens. Conversely, it can expressly abrogate some or all of those liens with the full consent of the lienholders; and this is common. A reorganization alters the capital structure of the bankrupt enterprise.

Bankruptcy Law > ... > Types of Claims > Secured Claims & Liens > General Overview

HN4[] Types of Claims, Secured Claims & Liens

Liens are property rights and the forfeiture of such rights is disfavored.

Bankruptcy Law > ... > Types of Claims > Secured Claims & Liens > General Overview

Contracts Law > ... > Secured Transactions > Default > General Overview

HN5[] Types of Claims, Secured Claims & Liens

The default rule for secured creditors who file claims for which provision is made in the plan of reorganization is extinction of the liens.

Bankruptcy Law > ... > Plans > Postconfirmation Effects > Effects of Confirmation
Business & Corporate Compliance > ... > Plans > Postconfirmation Effects > Effects of Confirmation

Bankruptcy Law > Discharge & Dischargeability > Effect of Discharge > General Overview

Bankruptcy Law > Discharge & Dischargeability > Reorganizations
Business & Corporate Compliance > Bankruptcy > Discharge & Dischargeability > Reorganizations

HN6[] Postconfirmation Effects, Effects of Confirmation

See *11 U.S.C.S. § 1141(c)*.

Bankruptcy Law > ... > Plans > Postconfirmation Effects > Effects of Confirmation
Business & Corporate Compliance > ... > Plans > Postconfirmation Effects > Effects of Confirmation

Bankruptcy Law > Discharge & Dischargeability > Effect of Discharge > General Overview

Bankruptcy Law > Discharge & Dischargeability > Reorganizations
Business & Corporate Compliance > Bankruptcy > Discharge & Dischargeability > Reorganizations

HN7[] Postconfirmation Effects, Effects of Confirmation

11 U.S.C.S. §1141(c) must cover liens, because a lien is defined as an interest in property, *11 U.S.C.S. § 101(37)*, and must mean, therefore, that unless the plan of reorganization, or the order confirming the plan, says that a lien is preserved, it is extinguished by the confirmation.

Counsel: For FINANCIAL INSTITUTIONS LIQUIDATION CORPORATION, successor in interest to the Clinton County Farm Bureau Cooperative Association Credit Union fka Mutual Guaranty Corporation, Appellant: Mark R. Wenzel, Jeffrey E. Ramsey, HOPPER, WENZEL & GALLIHER, Indianapolis, IN, USA.

For JOHN L. PENROD, ALYCE J. PENROD, Debtors - Appellees: Daniel J. Skekloff, Scot T. Skekloff, HOFFMAN, THOMPSON, SKEKLOFF,

ROGERS & MCNAGNY, Fort Wayne, IN, USA.

Judges: Before POSNER, Chief Judge, ROVNER, Circuit Judge, and MORAN, Chief Judge. *

Opinion by: POSNER

Opinion

[*461] POSNER, *Chief Judge*. This appeal raises an issue of bankruptcy law that one might have supposed had been settled long ago. It is whether, when a plan of reorganization makes provision for the payment of a secured creditor's claim but does not say whether the creditor's security interest (lien) is extinguished, the security interest survives, in accordance with the old saw that "liens pass through bankruptcy unaffected."

Hog farmers named Penrod executed a promissory note to Mutual Guaranty Corporation (actually to its predecessor, but we can ignore that detail) for $ 150,000, secured by the Penrods' hogs. A year later, the Penrods filed for bankruptcy under Chapter 11, owing Mutual Guaranty $ 132,000. Mutual Guaranty filed a proof of claim in the bankruptcy proceeding. The Penrods, neither objecting to the claim nor questioning the validity of Mutual Guaranty's **[**2]** lien, filed a plan of reorganization which designated Mutual Guaranty as a "Class 3 creditor"--in fact as the only Class 3 creditor. Class 3 creditors, the plan states, "will be paid in full, with interest at the rate of eleven percent (11 percent) per annum. Payments to this Class shall be paid on a monthly basis commencing sixty (60) days after Confirmation. Furthermore, said payments shall be based upon a seven (7) year amortization." That is all that the plan, or the order confirming it, says about Mutual Guaranty's interest.

Shortly after the plan went into effect, the Penrods' hogs became infected with "pseudo-rabies" virus, a disease of the reproductive system that causes the females infected with it to miscarry. Hogs so stricken cannot be kept for breeding purposes; all they are good for is food (human food, we note with some anxiety). So the Penrods sold their hogs for slaughter--without remitting the proceeds to Mutual Guaranty, as the security agreement accompanying the promissory note had required. Mutual Guaranty brought suit in a state court to enforce a lien in the proceeds. The Penrods responded by asking the bankruptcy court to hold Mutual Guaranty in contempt for **[**3]** violating the order confirming the plan of reorganization, which the Penrods claim extinguished Mutual Guaranty's lien. The bankruptcy court agreed that the lien had been extinguished and enjoined (the court's term was "precluded," but as far as we can tell it meant the same thing) Mutual Guaranty from attempting to enforce it. The district court affirmed.

HN1[↑] A secured creditor can bypass his debtor's bankruptcy proceeding and enforce his lien in the usual way, which would normally be by bringing a foreclosure action in a state court. This is the principle that liens pass through bankruptcy unaffected. *Long v. Bullard, 117 U.S. 617, 620-21, 29 L. Ed. 1004, 6 S. Ct. 917 (1886)*; *Dewsnup v. Timm, 502 U.S. 410, 116 L. Ed. 2d 903, 112 S. Ct. 773 (1992)*; *In re James Wilson Associates, 965 F.2d 160, 167 (7th Cir. 1992)*. If the creditor follows this route, the discharge in bankruptcy will not impair his lien. *Dewsnup v. Timm, supra, 112 S. Ct. at 778*; *In re Tarnow, 749 F.2d 464 (7th Cir. 1984)*. Alternatively, he may decide to collect his debt in the bankruptcy proceeding, and to this end may file a proof of claim in that proceeding. *11 U.S.C. § 501(a)*. He will do this if he is undersecured, for in that case merely enforcing his lien would not enable him **[**4]** to collect the entire **[*462]** debt owed him. His only chance of recovering any part of the amount by which the debt exceeds the value of the lien would be to share in the distribution of the debtor's estate to the unsecured creditors. *11 U.S.C. § 506(a)*; *In re Tarnow, supra, 749 F.2d at 465*.

A secured creditor may be dragged into the

* Hon. James B. Moran of the Northern District of Illinois.

bankruptcy involuntarily, because the trustee or debtor (if there is no trustee), or someone who might be liable to the secured creditor and therefore has an interest in maximizing the creditor's recovery, may file a claim on the creditor's behalf. 11 U.S.C. §§ 501(b), (c); In re Lindsey, 823 F.2d 189, 191 (7th Cir. 1987). He may participate in the bankruptcy in order to try to get the automatic stay (11 U.S.C. § 362(d)) lifted to the extent of allowing him to enforce his lien; for the stay applies to the enforcement of liens. He may want to participate in the bankruptcy proceeding (and so may decide to file a claim) simply because he wants to make sure that the debtor's estate is not administered in a way that will diminish the value, as distinct from threatening the existence, of his lien. In re CMC Heartland Partners, 966 F.2d 1143, 1147 (7th Cir. 1992). **[**5]**

HN2[] The secured creditor does not, by participating in the bankruptcy proceeding through filing a claim, surrender his lien. But this is not to say that the lien is sure to escape unscathed from the bankruptcy. We have mentioned the automatic stay. If the secured creditor's claim is challenged in the bankruptcy proceeding and the court denies the claim, the creditor will lose the lien by operation of the doctrine of collateral estoppel. 11 U.S.C. § 506(d); In re Tarnow, supra, 749 F.2d at 465-66. He may be forced in the plan of reorganization to swap his lien for an interest that is an "indubitable equivalent" of the lien. 11 U.S.C. § 1129(b)(2)(A)(iii); In re James Wilson Associates, supra, 965 F.2d at 172. And in some circumstances he may even be compelled to surrender his lien without receiving *anything* in return. See 11 U.S.C. §§ 1126(d), 1129(a)(10), (b)(1). And, of course, he can consent to its discharge. The right is implicit in 11 U.S.C. § 1126, and is anyway obvious. It is a frequent element of a plan of reorganization, as we are about to see.

Nothing we have said so far is controversial, and we can take one more step without inviting controversy. HN3[] A plan of reorganization **[**6]** can expressly preserve preexisting liens, such as that of Mutual Guaranty in this case. 11 U.S.C. § 1123(b)(1). Conversely, it can expressly abrogate some or all of those liens with the full consent of the lienholders; and this is common. A reorganization alters the capital structure of the bankrupt enterprise. Bondholders and other creditors, along with shareholders, exchange their notes, claims, and shares for new securities in the reorganized firm. For recent examples, see Sullivan & Long v. Scattered Corp., 47 F.3d 857, 1995 U.S. App. LEXIS 2327, *5 (7th Cir. 1995); In re Envirodyne Industries, Inc., 29 F.3d 301 (7th Cir. 1994). Bondholders often give up their bonds and associated security agreements in exchange for common stock in the reorganized corporation, thus exchanging a secured for an unsecured interest. By now it should be clear that like most generalizations about law, the principle that liens pass through bankruptcy unaffected cannot be taken literally.

The question we must decide in this case is whether preexisting liens survive a reorganization when the plan (or the order confirming it) does not mention the liens. What in other words is the default rule when the plan is **[**7]** silent? We acknowledge this to be a difficult question. HN4[] Liens are property rights and the forfeiture of such rights is disfavored. But when lienholders participate in a bankruptcy proceeding, and especially in a reorganization, they know that their liens are likely to be affected, and indeed altered. The issue here, moreover, is what the proper rule for interpreting silence is rather than in what circumstances a lien can be taken away from someone who has expressed his desire to retain it.

We have concluded that HN5[] the default rule for secured creditors who file claims for which provision is made in the plan of reorganization is extinction and is found in the Code itself. Section 1141(c) provides with immaterial exceptions that HN6[] "except as provided **[*463]** in the plan or in the order confirming the plan, after confirmation of a plan, the property dealt with by the plan is free and clear of all claims and interests of creditors,

equity security holders, and of general partners in the debtor." The term "interest" is not defined in the Code, but a lien is defined as an interest in property, *11 U.S.C. § 101(37)*, and there is no doubt that a security interest is an interest, and it is defined as **[**8]** a "lien created by an agreement." *11 U.S.C. § 101(51)*. So *section 1141(c)* ***HN7***[⬆] must cover liens, *In re Arctic Enterprises, Inc., 68 Bankr. 71, 79 (D. Minn. 1986)*, and must mean, therefore, that unless the plan of reorganization, or the order confirming the plan, says that a lien is preserved, it is extinguished by the confirmation. This is provided, we emphasize, that the holder of the lien participated in the reorganization. If he did not, his lien would not be "property dealt with by the plan," and so the section would not apply. One could argue that the quoted phrase should be equated to "property of the estate," defined in section 541 to include "all legal or equitable interests of the debtor in property *as of the commencement of the case*" (emphasis added), and that at the start of the bankruptcy proceeding the liens of the secured creditors are not the debtor's property--which indeed they are not. *Moody v. Amoco Oil Co., 734 F.2d 1200, 1213 (7th Cir. 1984)*; *In re Interstate Motor Freight System, 86 Bankr. 500, 505 (Bankr. W.D. Mich. 1988)*. But the suggested equation is not especially plausible. Property dealt with by the plan is property dealt with by the plan, whether it was part **[**9]** of the debtor's estate when bankruptcy was first declared or was tossed into the pot later. As we have said, secured creditors commonly give up their preexisting liens for other interests in the reorganized firm. A plan of reorganization that does this "deals with" the liens. Or does it? For it could be argued that the plan in this case dealt with the secured creditor's *claim*, but not with its *lien*. But this interpretation would be inconsistent with the rest of *section 1141(c)*--that the property dealt with by the plan is, after confirmation of the plan, to be "free and clear of all claims and interests of creditors" (and others). On the view pressed by Mutual Guaranty, the assets of the reorganized entity would continue to be burdened by secured creditors' claims by virtue of their liens even if the plan made provision for those claims.

Our suggested interpretation reconciles the language of *section 1141(c)* with the principle, which we have pointed out cannot be maintained without careful qualification, that liens pass through bankruptcy unaffected. They do--unless they are brought into the bankruptcy proceeding and dealt with there. The interpretation makes practical sense as well. **[**10]** It lowers the costs of transacting with the reorganized firm, thus boosting the chances that the reorganization will succeed. By studying the plan of reorganization a prospective creditor of or investor in the reorganized firm can tell whether any liens that creditors whose interests in the new entity are defined in the plan may have had against its bankrupt predecessor survive as encumbrances on the assets of the new firm. The cases that support a contrary interpretation are cases in which the courts were, we respectfully suggest, mesmerized by a formula ("liens pass through bankruptcy unaffected"). E.g., *Relihan v. Exchange Bank, 69 Bankr. 122 (S.D. Ga. 1985)*; *United Presidential Life Ins. Co. v. Barker, 31 Bankr. 145 (N.D. Tex. 1983)*; *In re Eakin, 153 Bankr. 59 (Bankr. D. Idaho 1993)*. They are none of them appellate cases, and there are plenty of cases that take our view. E.g., *In re Arctic Enterprises, Inc., supra, 68 Bankr. at 80*; *In re Johnson, 139 Bankr. 208, 216 (Bankr. D. Minn. 1992)*. Oddly, none of the cases on either side is an appellate case, the ones cited by Mutual Guaranty being readily distinguishable. The secured creditor in *In re Tarnow, supra*, did not participate **[**11]** in the reorganization, except to file a late claim against the debtor. The bankruptcy court disallowed the lien because the claim was late--an excessive punishment--not because the plan of reorganization had dealt with the property constituted by the creditor's lien. It had not; in fact no plan had yet been confirmed. Nor had the plan in *Estate of Lellock v. Prudential Ins. Co., 811 F.2d 186, 188-89 (3d Cir. 1987)*, made provision for the secured creditor; the debtor had never even listed the property subject to the lien as an asset of the

estate. In *General Electric Credit Corp. v. [*464] Nardulli & Sons Inc., 836 F.2d 184, 188-89 (3d Cir. 1988)*, the plan denominated the creditor as a "secured creditor" and explicitly recognized its security interest. *In re Simmons, 765 F.2d 547 (5th Cir. 1985)*, not cited by Mutual Guaranty--no doubt because it did not involve a plan of reorganization or cite *section 1141(c)*--is nevertheless its best case. It arose under an analogous provision of the Code, *11 U.S.C. § 1327(c)*, which governs plans under Chapter 13--a counterpart to Chapter 11, only for individuals rather than firms. Simmons relied heavily on our decision in *Tarnow*, but *Tarnow* did not involve **[**12]** the interpretation of a plan of reorganization: there was none. For other grounds of distinction between Simmons and the present case, see *In re Wolf, 162 Bankr. 98, 108 n. 16 (Bankr. D.N.J. 1993)*.

There is nothing to Mutual Guaranty's suggestion that our interpretation raises a question under the due process or *takings clauses of the Fifth Amendment* because a lien is property within the meaning of the clause. It is, *United States v. Security Industrial Bank, 459 U.S. 70, 76-77, 74 L. Ed. 2d 235, 103 S. Ct. 407 (1982)*, but Mutual Guaranty could have protected it by appealing from the order confirming the plan of reorganization. We recognize that since the law was not clear with respect to the survival of the lien of a creditor who is provided for in the plan without mention of his lien, Mutual Guaranty may not have realized when the plan was adopted that its lien was in jeopardy. Conceivably this might give Mutual Guaranty an equitable defense to the complete extinction of the lien, but it has not presented such a defense. It has staked its all **[**13]** on persuading us that its lien survived the bankruptcy proceeding intact.

AFFIRMED.

End of Document

632 B.R. 208
United States Bankruptcy Court, D. Kansas.

IN RE: Randy L. ROBINSON Debtor.

Case No. 20-11471
|
Signed August 20, 2021.

Synopsis

Background: United States Trustee (UST) objected to confirmation of amended Subchapter V plan proposed by individual debtor, the manager of a funeral home business, contending, inter alia, that plan was not proposed in good faith because debtor had "concealed prolific gambling" pre- and postpetition.

Holdings: The Bankruptcy Court, Mitchell L. Herren, J., held that:

[1] debtor's amended plan was proposed in good faith, and

[2] debtor's amended plan could be confirmed as a consensual plan, even though all classes were impaired and no creditor in any class returned a ballot on the amended plan.

Objection overruled; amended plan confirmed as modified.

See also 628 B.R. 168.

Procedural Posture(s): Objection to Confirmation of Plan.

West Headnotes (23)

[1] **Internal Revenue** Amount and items deductible in general

For federal income tax purposes, gambling losses can be deducted as an itemized deduction, but only to the extent of winnings.

[2] **Bankruptcy** Confirmation; Objections

Debtor, as Chapter 11 plan proponent, has burden of proving by preponderance of evidence that his plan satisfies statutory requirements for confirmation. 11 U.S.C.A. § 1129(a).

[3] **Bankruptcy** Good faith and legality

One requirement for confirmation of a Chapter 11 plan, including a Subchapter V plan, is that the plan must be proposed in good faith and not by any means forbidden by law. 11 U.S.C.A. §§ 1129(a)(3), 1191(a).

1 Case that cites this headnote

[4] **Bankruptcy** Confirmation; Objections

Section of the Bankruptcy Code setting forth the requirements for confirmation of plans in Subchapter V cases incorporates all of the confirmation requirements for Chapter 11 plans, except the "projected disposable income" requirement. 11 U.S.C.A. §§ 1129(a), 1129(a)(15), 1191(a).

[5] **Bankruptcy** Good faith and legality

What constitutes "good faith," as required for confirmation of a Chapter 11 plan, is not defined or described by the Bankruptcy Code, but by case law. 11 U.S.C.A. § 1129(a)(3).

[6] **Bankruptcy** Good faith and legality

In context of Chapter 11 plan confirmation, the test of "good faith" is met if there is a reasonable likelihood that the plan will achieve its intended results which are consistent with the purposes of the Bankruptcy Code, that is, the plan is feasible, practical, and would it enable debtor to continue its business and pay its debts in accordance with plan provisions. 11 U.S.C.A. § 1129(a)(3).

[7] **Bankruptcy** Good faith and legality

Individual Chapter 11 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, 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. 11 U.S.C.A. §§ 1129(a)(3), 1191(a).

[8] **Bankruptcy** Effect

Bankruptcy Code normally requires that confirmation of a Subchapter V plan result in the trustee becoming the disbursing agent and making payments to creditors under the plan. 11 U.S.C.A. §§ 1191(b), 1194(b).

[9] **Bankruptcy** Acceptance

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 plan if all other confirmation requirements were satisfied. 11 U.S.C.A. §§ 1129(a), 1129(a)(8), 1191(a).

1 Case that cites this headnote

[10] **Bankruptcy** Acceptance

In a Subchapter V case, confirmation of a plan is considered "consensual" if all impaired classes of creditors have accepted it. 11 U.S.C.A. §§ 1129(a)(8), 1191(a).

[11] **Bankruptcy** Acceptance

In a Chapter 11 Subchapter V case, the Bankruptcy Code contemplates that creditors will vote to accept or reject a proposed plan. 11 U.S.C.A. §§ 1129(a)(8), 1191(a).

1 Case that cites this headnote

[12] **Bankruptcy** "Deemed" acceptance; unimpaired classes

In a Chapter 11 Subchapter V case, a class that is not impaired is conclusively presumed to have accepted the plan, and solicitation of acceptances from such a class is not required. 11 U.S.C.A. §§ 1126(f), 1129(a)(8), 1191(a).

1 Case that cites this headnote

[13] **Bankruptcy** Acceptance

Where all classes are impaired, each class must accept a Chapter 11 Subchapter V plan for it to be confirmed as a consensual plan. 11 U.S.C.A. §§ 1129(a)(8), 1191(a).

1 Case that cites this headnote

[14] **Bankruptcy** By one class

Although the "one impaired accepting class" requirement must be satisfied in a non-Subchapter V Chapter 11 case for cramdown confirmation of a plan, not so in a Subchapter V case. 11 U.S.C.A. §§ 1129(a)(10), 1129(b), 1191(a).

[15] **Bankruptcy** Fairness and Equity; "Cram Down."

Bankruptcy Code's "cramdown" provision does not apply in a nonconsensual Subchapter V Chapter 11 case. 11 U.S.C.A. §§ 1129(b), 1181(a), 1191(b).

[16] **Bankruptcy** By one class

Under the Bankruptcy Code, a debtor in a Subchapter V Chapter 11 case is not required to have at least one impaired accepting class to obtain confirmation of a nonconsensual plan, while a non-Subchapter V Chapter 11 debtor is. 11 U.S.C.A. §§ 1129(b), 1181(a), 1191(b).

1 Case that cites this headnote

[17] **Bankruptcy**🔑By one class

With respect to a consensual Chapter 11 plan, if all impaired classes accept the plan, the Bankruptcy Code's requirement of one impaired accepting class is automatically satisfied so long as one of the accepting classes is determined without including any acceptance by an insider. 11 U.S.C.A. §§ 1129(a)(8), 1129(a)(10).

[18] **Bankruptcy**🔑Acceptance

While the Bankruptcy Code provides that a holder of an allowed claim may vote to accept or reject a plan of reorganization, nothing in the Code requires the holder of an allowed claim to vote. 11 U.S.C.A. § 1126(a).

[19] **Bankruptcy**🔑Confirmation; Objections

Objection to confirmation of Chapter 11 plan does not constitute vote to reject plan, and lack of objection to confirmation does not constitute vote to accept plan. Fed. R. Bankr. P. 3018(c).

[20] **Bankruptcy**🔑"Deemed" acceptance; unimpaired classes

In a non-Subchapter V Chapter 11 case, deemed acceptance by an impaired, non-voting class cannot be used to satisfy the "one impaired accepting class" requirement in order to pursue cramdown confirmation. 11 U.S.C.A. §§ 1129(a)(10), 1129(b).

[21] **Bankruptcy**🔑In general; nature and purpose

Subchapter V of Chapter 11 streamlines the reorganization process and is designed to facilitate the efficient and economical administration of the case and the prompt confirmation of a plan.

[22] **Bankruptcy**🔑Disclosure and Solicitation

A disclosure statement is not required by Subchapter V of Chapter 11. 11 U.S.C.A. §§ 1181(b), 1187(c).

1 Case that cites this headnote

[23] **Bankruptcy**🔑Trustees

Subchapter V cases are excepted from the requirement to pay quarterly fees to the United States Trustee (UST). 28 U.S.C.A. § 1930(a)(6)(A).

Attorneys and Law Firms

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ORDER ON CONFIRMATION OF DEBTOR'S SUBCHAPTER V AMENDED PLAN DATED MARCH 1, 2021

Mitchell L. Herren, United States Bankruptcy Judge

This is the second challenge by the United States Trustee (UST) in debtor's Subchapter V case, both centered on debtor's gambling. Previously, the UST moved to dismiss the case for gross mismanagement of the estate based upon debtor's postpetition, preconfirmation gambling in the first month after filing. The Court denied that motion (*Order I*).[1] Now the Court addresses the UST's objection to confirmation of debtor's amended plan, contending it was not proposed in good faith under § 1129(a)(3) and asserting that debtor "concealed prolific gambling" pre- and post-petition.[2] The Court held an evidentiary hearing on both the gross mismanagement claim and the good faith objection. At that hearing the UST also contended that ***211** the debtor's amended plan could not be confirmed as a consensual plan under § 1191(a) because no creditor in any class returned a ballot on the amended plan.[3]

For the reasons set forth below, the Court overrules the UST's objection to confirmation based on an alleged lack of good faith and finds that the amended plan can be confirmed as a consensual plan under § 1191(a).

Jurisdiction

Confirmation of debtor's amended plan is a core proceeding under 28 U.S.C. § 157(b)(2)(L). The Court has jurisdiction to determine whether the amended plan complies

with the applicable provisions of the Bankruptcy Code and should be confirmed.[4]

Findings of Fact

The Court presented much of the factual background of this case in *Order I*, and it will not be repeated here. Those facts are incorporated by reference. This Order will focus on the facts pertaining to confirmation of debtor's amended plan and the UST's objection that the plan was not proposed in good faith.

Debtor filed his individual Chapter 11 Subchapter V case on December 2, 2020 and remains as the debtor-in-possession managing his funeral home business, Countryside Funeral Home LLC. Robinson derives his monthly income from his Countryside salary. For recreation, debtor frequents a casino in Oklahoma, about an hour away from his home, where he plays slot machines. He has done so for several years up to now. Robinson's bankruptcy filing was prompted by several years' unpaid income taxes, a large portion of which are penalties and interest, and his large personal guaranty of Countryside's loan.

On his initial statement of financial affairs (SOFA), Robinson disclosed on question 4, his 2018 and 2019 income from operating a business as $405,910 and $298,891, respectively.[5] These figures were obtained from his tax returns prepared by his accountant; they represent his adjusted gross income (AGI).[6] AGI includes not only his wages or salary and income from operating Countryside, it also includes other sources of income from Schedule 1—that encompasses Robinson's gambling winnings. The 2018 gambling winnings of $250,234 and 2019 gambling winnings of $185,674 should have been subtracted from AGI and separately disclosed on question 5 (other sources of income) where it is specifically solicited rather than including it in question 4 where only income from employment or operation of a business is sought. Debtor's attorney took responsibility for the manner in which the SOFA was completed, stating that he did not segregate the gambling winnings because with the complete offset by gambling losses there was no taxable income attributable to gambling. The Court finds no evidence that debtor was manipulating the responses to questions 4 and 5 in any attempt to hide his prepetition gambling. The debtor also failed to disclose on question 15 of the SOFA, any gambling losses in the year prior to bankruptcy.[7]

***212** When Robinson revealed his postpetition gambling activity in the December operating report filed January 27, 2001, that prompted the UST to make inquiry of debtor on February 16, 2021 regarding the omission of gambling losses on question 15 of SOFA.[8] Debtor said he didn't see the question on anything he signed, but on February 26 advised his attorney that his 2020 tax return would show a $95,930 gambling loss (and winnings). At trial, Robinson said he "missed" the omission, until brought to his attention by the UST. As noted in *Order I,* debtor did not realize that he was prohibited from gambling while in bankruptcy;[9] he now understands the gravity of the situation after having a stern discussion with his attorney.

Debtor's attorney immediately directed his staff to amend the schedules to disclose the gambling loss. Unfortunately, the amended SOFA was not filed until March 30,[10] the same day that the UST filed its objection to confirmation of the amended plan.[11] The UST did not question debtor's answers to question 4 or 5 of SOFA. The amended SOFA disclosed the 2020 gambling loss on question 15, but did not disclose the same amount of gambling winnings on question 5 or otherwise amend debtor's answers to questions 4 and 5 to segregate and disclose gambling winnings as an "other source of income" in question 5. Although amending the response to question 15 should have also prompted an amendment to the response to question 5, the Court finds that debtor's explanation for not making his responses to questions 15 and 5 consistent did not exhibit any intent to hide information or behave dishonestly.

[1] The debtor delivered his 2018 and 2019 tax returns to the UST in late December 2020 at the time of the § 341 meeting of creditors. Those returns showed significant gambling activity, but the UST raised no questions at that time.[12] Robinson provided to his accountant W-2G Forms substantiating his gambling winnings for each tax year that were reported on Schedule 1 – other income. The accountant offset those winnings each tax year by deducting Robinson's gambling losses as reported on Schedule A of itemized deductions, line 16 of his federal return.[13] On his 2018 federal tax return, Robinson reported gambling income of $250,234 and the same number on itemized deductions for gambling losses.[14] This gambling "wash" left Robinson with $133,556 of taxable income in 2018.[15] On his 2019 federal tax return, he reported gambling income and deducted gambling losses, in the amount of $185,674.[16] Robinson reported taxable income of $92,808 for 2019.[17] Though

Robinson's 2020 tax return had not been filed and was not introduced at the April trial, he had $95,930 gambling ***213** winnings and offset losses in 2020 based on the amended SOFA.

Debtor filed his amended plan on March 1, 2021.[18] He negotiated plan treatment with his creditors and early in the case debtor's counsel advised the Court it would be a consensual plan. All of the classes of claims are impaired. On March 2, debtor mailed to creditors the amended plan, the Court's notice to creditors of the confirmation hearing and pertinent deadlines,[19] and ballots;[20] creditors had until March 31 to object to confirmation and return their ballot accepting or rejecting the amended plan. No creditors filed objections to confirmation or appeared at the confirmation hearing. On April 5, debtor's attorney filed a certificate of voting showing that no creditor in any class voted or returned a ballot.[21]

Class 1 and Class 2 are small secured claims held by Ally Financial for vehicle loans. Robinson's larger debts consist of an unsecured $1.9 million personal guaranty of business loans to Countryside (Class 7) and federal and state income tax claims totaling nearly $246,000.[22]

Class 3	Internal Revenue Service (secured)	$108,351
Class 4	Internal Revenue Service (priority)	$ 63,852
Class 5:	Kansas Dept. of Revenue (priority)	$ 45,792
Class 6:	Oklahoma Dept. of Revenue (priority)	$ 28,000

Classes 1-6 are single creditor classes. Only Class 7, the general unsecured class had multiple creditors. No claims were scheduled or filed for gambling debt and there is no evidence of record that such claims exist.[23]

Debtor proposes to pay Class 7 general unsecured creditors on a pro rata basis from $500 monthly plan payments over thirty-six months, or a total of $18,000. Robinson's $1.9 million loan guarantee comprises the lion's share of the general unsecured claims.[24] The amortized monthly plan payments for the other classes of claims are as follows:[25]

***214**

Class 1	$ 51.69
Class 2	$ 248.41
Class 3	$1,054.11
Class 4	$1,155.97
Class 5	$ 763.20
Class 6	$ 466.67
	$3,740.05

Thus, debtor's proposed monthly plan payments for the classified claims under his plan total $4,240.05 ($3,740.05 + $500).

At trial, in response to the UST's gross mismanagement claim premised on debtor's postpetition, preconfirmation gambling loss of $4,000, debtor offered to increase his payment to the general unsecured creditor class to $22,000.[26] That would increase his monthly payment for Class 7 from $500 to $611.11 over thirty-six months. The debtor also pledged to cease gambling while in Chapter 11. The debtor did not memorialize these changes by amending his plan, but indicated those changes would be incorporated into the confirmation order, if the Court confirmed the amended plan. The Subchapter V trustee supported confirmation of the plan, provided debtor increased the Class 7 payment by $4,000 to cover the postpetition gambling loss.

With those changes, debtor's total monthly plan payments for Classes 1-7 would increase about $111, to $4,351.16. Debtor testified that he believed his total monthly payment upon confirmation would approach $6,000. The difference is an allowance for administrative expenses for attorney's fees and expenses (for which debtor's counsel agreed to be paid over time), accountant fees, and Subchapter V trustee fees, as recognized in the amended plan, that are not included in the monthly plan payments for Classes 1-7.

Analysis

A. Debtor's amended plan is proposed in good faith.

[2] [3] [4] [5] The debtor, as the chapter 11 plan proponent, has the burden of proving by a preponderance of the evidence that his plan satisfies the statutory requirements for confirmation.[27] One such requirement for confirmation of a Chapter 11 plan, including a Subchapter V plan, is that the plan must be proposed in good faith and not by any means forbidden by law.[28] Section 1191(a) applicable in Subchapter V cases, incorporates all of the confirmation requirements of § 1129(a), except (a)(15). It states that "the court *shall* confirm a plan under this subchapter only if all of the requirements of section 1129(a), other than paragraph (15) of that section, of this title are met."[29] The Code does not define or describe what constitutes good faith under § 1129(a)(3), but the case law does.

[6] The Tenth Circuit Court of Appeals reaffirmed the test of good faith in ***215** *In re Paige,* citing to its *Pikes Peak Water* decision in 1985.[30]

> In [*Pikes Peak Water Co.*], we quoted the bankruptcy court's articulation of the standard:
>
> > The test of good faith is met if there is a reasonable likelihood that the plan will achieve its intended results which are consistent with the purposes of the Bankruptcy Code, that is, is the plan feasible, practical, and would it enable the company to continue its business and pay its debts in accordance with the plan provisions.
>
> *Id.* at 1459. We noted that "[i]n finding a lack of good faith, courts have looked to whether the debtor intended to abuse the judicial process and the purposes of the reorganization provisions." *Id.* at 1460. "Not confirming the plan for lack of good faith is appropriate particularly when there is no realistic possibility of an effective reorganization and it is evident that the debtor seeks merely to delay or frustrate the legitimate efforts of secured creditors to enforce their rights." *Id.*[31]

[7] The *Paige* court noted that a plan proponent's actions or relationships may render a plan incapable of achieving goals consistent with the Code, but concluded in that case no conflict of interest was present.[32] Here, the UST's good faith objection is based on debtor's alleged concealment of his gambling activity, pre- and postpetition, insinuating that debtor risks performance of the plan, will divert funds for himself, or is able to pay more to creditors.

The Court previously addressed the debtor's single gambling excursion occurring postpetition that was the basis for the UST's motion to dismiss in *Order I*. Debtor did not conceal his postpetition gambling; he revealed it in detail in the December 2020 operating report and it was that disclosure that led to the UST's motion to dismiss two months later. Thus, the Court will limit its analysis here to debtor's alleged concealment of his prepetition gambling.

[8] The UST presented no evidence that Robinson underreported his gambling winnings or overstated his gambling losses on his tax returns. Nor did the Court hear any evidence that Robinson was secreting gambling winnings that otherwise would be available to pay creditors under his plan. Withdrawals and deposits pertaining to

gambling were made through his checking account. He had no safe deposit box, safe, and did not otherwise "store" cash at his home. Though the SOFA and amended SOFA were not properly completed in questions 4, 5, and 15, the mistakes did not result in the hiding of any taxable income and were not intended to hide debtor's prepetition gambling. Any contention that debtor concealed his gambling is an overreach in these circumstances, especially when considered with the debtor's forthright disclosures in the December operating report, the tax returns, and his ready cooperation regarding all of the UST's questions about his gambling.[33]

***216** Based on the record before it, the Court cannot find that Robinson acted in bad faith. In addition, he has agreed to provide an additional $4,000 to Class 7 to cover the preconfirmation gambling loss and to cease gambling while in bankruptcy. Robinson's intent in filing this case was to address his significant tax liabilities and discharge most of the personal guaranty. The terms of his amended plan does that. He will pay all administrative expenses and allowed priority and secured claims in full. He timely filed his plan. No creditors in any class filed objections to confirmation. The Subchapter V trustee supports confirmation of the amended plan, provided the distribution to Class 7 claims is increased $4,000 to cover the postpetition gambling loss.

Although the trustee expressed concern of a risk of performance of the plan should Robinson revert to gambling, he admitted that the amended plan was feasible, that creditors were better off under the plan, and that debtor deserved a chance to perform the confirmed plan. The Court therefore concludes that debtor has not abused the purposes of reorganization under the Bankruptcy Code and has not attempted to delay or frustrate the legitimate rights of his creditors. Robinson's plan presents a realistic possibility of an effective reorganization, agreed to by everyone except the UST.

B. Debtor's amended plan can be confirmed as a consensual plan.

[9] [10] At trial, the UST asserted that even if its confirmation objection was unsuccessful, Robinson's amended plan could not be confirmed as a consensual plan. In a subchapter V case, confirmation under § 1191(a) is considered "consensual" if all impaired classes of creditors have accepted it pursuant to § 1129(a)(8). The UST argued that there were no accepting ballots and therefore, the plan failed to satisfy both § 1129(a)(8) and (a)(10).[34] Section 1191(a) states that the court "shall confirm a plan" under this subchapter only if all of the requirements of section 1129(a), other than paragraph (15), are met.

[11] [12] [13] In a chapter 11 subchapter V case, the Code contemplates that creditors will vote to accept or reject a proposed plan. Section 1129(a)(8) provides: "With respect to each class of claims or interests—(A) such class has accepted the plan; or (B) such class is not impaired under the plan."[35] Where all classes are impaired as here, each class must accept the plan to be confirmed as a consensual plan.[36]

[14] [15] [16] [17] Section 1129(a)(10) codifies the one impaired accepting class requirement for a chapter 11 plan to be confirmed under the cramdown provision, § 1129(b). Section 1129(a)(10) states: "If a class of claims is impaired under the plan, at least one class of claims that is impaired under ***217** the plan has accepted the plan, determined without including any acceptance of the plan by an insider." Significantly, § 1129(a)(10) must be satisfied in a non-subchapter V chapter 11 case for cramdown confirmation of a plan.[37] Not so in a subchapter V case. Section 1129(b) cramdown does not apply in a nonconsensual subchapter V case.[38] Subchapter V has its own cramdown provision for nonconsensual plans—§ 1191(b), which provides that the court can confirm a plan "if all of the applicable requirements of section 1129(a) of this title, *other than paragraphs (8), (10), and (15) of that section,* are met with respect to a plan ...."[39] In short, a debtor in a subchapter V case is not required to have at least one impaired accepting class to obtain confirmation of a nonconsensual plan while a non-subchapter V chapter 11 debtor does.[40] With respect to a consensual plan, if all impaired classes accept the plan under § 1129(a)(8), § 1129(a)(10)'s requirement of one impaired accepting class is automatically satisfied so long as one of the accepting classes is determined without including any acceptance by an insider.

[18] Section 1126(a) provides that a holder of an allowed claim *may* vote to accept or reject a plan of reorganization. Nothing in the Code requires the holder of an allowed claim to vote. Subsection (c) addresses acceptance of the plan and applies in a subchapter V case.[41] It applies the two-thirds in amount and more than one-half in number of allowed claims criteria for acceptance by a class of claims.

Chapter 11 debtors should be mindful that the IRS has a historical practice of not voting on plans.[42] In Robinson's case, the IRS is the largest secured and largest priority creditor. Nothing in this Court's current review of the Internal Revenue Manual suggests that its policy has recently changed with respect to priority tax claims; for secured and general unsecured claims the IRS recognizes its "opportunity to vote to accept or reject a plan," and that authority is delegated to the Secretary of the Treasury.[43]

[19] Bankruptcy Rule 3018(c) governs the procedure and form for accepting or rejecting a plan. It provides, in relevant part: "An acceptance or rejection shall be in writing, identify the plan or plans accepted or rejected, be signed by the creditor ... or an authorized agent, and conform to the appropriate Official Form."[44] An objection to confirmation is distinct ***218** from casting a ballot to accept or reject the plan.[45] Thus, an objection to confirmation does not constitute a vote to reject the plan and the lack of an objection to confirmation does not constitute a vote to accept the plan. Rule 3018 suggests that the affirmative act of voting to accept or reject the plan (returning a completed ballot) is required in order for the vote to be counted. So, what is the effect if no creditor in any class casts a ballot as in the instant case?

Pre-SBRA case law holds that the failure to return a ballot cannot be deemed an acceptance of the plan.[46] The bankruptcy court in *Trenton Ridge* recognized exceptions to the general rule. One exception is where the plan includes a provision that impaired classes in which no votes are cast are presumed to accept the plan.[47] Thus, *Trenton Ridge* suggests a debtor may protect its plan from nonvoting creditors, by including language in the plan to the effect that failure to vote will be deemed an acceptance of the plan.[48] No such language is included in Robinson's amended plan before the Court.

Unlike most jurisdictions, the Tenth Circuit recognizes "deemed acceptance" of a Chapter 11 plan by nonvoting creditors for purposes of § 1129(a)(8). In *In re Ruti-Sweetwater, Inc.*[49] the Tenth Circuit Court of Appeals held that a nonvoting and nonobjecting judgment lien creditor who was the only member of an impaired subclass was deemed to have accepted debtor's plan of reorganization. The judgment lien creditor was not alone. Twenty of the eighty-three separate classes of secured claims failed to vote in *Sweetwater*. Nor did the judgment lien creditor and other nonvoting classes appear at the confirmation hearings, during which the bankruptcy court ruled the nonvoting creditors were deemed to have accepted the plan. On appeal of the confirmation order, the appellate court rejected the argument that a failure to vote cannot constitute acceptance.

> We hold that the district court correctly affirmed the bankruptcy court's ruling that Heins' inaction constituted an acceptance of the Plan. To hold otherwise would be to endorse the proposition that a creditor may sit idly by, not participate in any manner in the formulation and adoption of a plan in reorganization and thereafter, subsequent to the adoption of the plan, raise a challenge to the plan for the first time. Adoption of the Heins' approach would effectively place all reorganization plans at risk in terms of reliance and finality.
>
> ... We agree with the District Court's finding that creditors are obligated to ***219** take an active role in protecting their claims.[50]

[20] *Sweetwater's* legal proposition that a nonobjecting and nonvoting creditor is deemed to have accepted debtor's plan of reorganization appears to remain the law in the Tenth Circuit and is binding precedent on this Court, at least for purposes of § 1129(a)(8) and avoiding cramdown confirmation under § 1129(b)(1).[51] That meant, in *Sweetwater,* that debtor's plan could be confirmed without showing the plan did not discriminate unfairly or that the plan was fair and equitable as to impaired, nonvoting classes.[52] *Sweetwater* recognized, as other courts have held, that "actual acceptance" of a plan by at least one class of impaired claims under § 1129(a)(10) is necessary for confirmation of a plan.[53] That is a requirement for confirmation of a nonconsensual plan in a non-subchapter V chapter 11 case. In other words, in a non-subchapter V chapter 11 case, deemed acceptance by an impaired, non-voting class cannot be used to satisfy § 1129(a)(10) in order to pursue cramdown confirmation under § 1129(b).

How does *Sweetwater* translate to subchapter V? One bankruptcy court in the Tenth Circuit has applied *Sweetwater* in a subchapter V case.[54] As noted previously, in a subchapter V case § 1129(a)(10)'s one impaired accepting class requirement is not required to confirm a nonconsensual plan by cramdown, and cramdown confirmation is not governed by § 1129(b), but § 1191(b).

Arguably, the distinction between whether a creditor's acceptance is being determined under § 1129(a)(8) or (a)(10) is blurred in subchapter V. Yet, both § 1129(a)(8) and (a)(10) must be satisfied for a consensual plan under the language of § 1191(a).[55] Section 1129(a)(10) would appear to be superfluous if all impaired classes accept a plan under (a)(8), as long as at least one of the accepting classes was determined without including acceptance by an insider. If not all classes accept the plan it cannot be confirmed as a consensual plan and § 1129(a)(10) is wholly irrelevant to cramdown confirmation under § 1191(b), because no impaired accepting class is required in subchapter V. In short, ***220** compliance with § 1129(a)(8) ultimately determines in this case whether the plan can be confirmed as a consensual plan.

Adhering to *Sweetwater's* binding precedent that a nonobjecting and nonvoting creditor is deemed to have accepted a chapter 11 plan under § 1129(a)(8), I conclude that all of Robinson's creditors and all classes of creditors in this subchapter V case, none of whom voted, objected to confirmation, or appeared at the confirmation hearing, have accepted the amended plan. Therefore, all impaired classes have accepted the plan under § 1129(a)(8) and the amended plan can and must be confirmed as a consensual plan under § 1191(a), if all other confirmation requirements are satisfied. The Court views its application of "deemed acceptance" wholly consistent with *Sweetwater.* It permits "deemed acceptance" to be used under § 1129(a)(8) to *avoid* cramdown confirmation. As stated in *Sweetwater*:

> If a class of creditors does not accept the plan, and if that class is impaired under the plan ... the Bankruptcy court may confirm the plan only if it "does not discriminate unfairly, and is fair and equitable, *with respect to each class of claims or interests that is impaired under, and has not accepted the plan.*" 11 U.S.C. § 1129(b). However, if a class of creditors accepts the plan under § 1129(a)(8), the bankruptcy court may confirm the plan without showing that the plan satisfies the "unfair discrimination" and "fair and equitable standards" under § 1129(b) [with respect to each accepting, impaired class].[56]

In short, "[o]nce acceptance was properly presumed, the court was not obligated to inquire as to whether the Plan discriminated unfairly or was not fair and equitable to the Heins under § 1129(b)(1)."[57] By applying *Sweetwater* here, and satisfying § 1129(a)(8), all impaired classes have accepted the plan, thereby avoiding confirmation as a nonconsensual plan under § 1191(b).

The Court notes that classes 1-6 are all impaired classes comprised of a single creditor. Only the general unsecured class consists of multiple creditors; even that class is dominated by Robinson's tax creditors and his funeral business's primary secured lender. Robinson's plan is not a case of apathy on the part of nonvoting creditors, but is the product of negotiated treatment to reach a consensual plan and promptly and effectively reorganize.[58] Ideally, it may have been preferable to also include conspicuous language in the plan providing that a failure to vote to accept or reject the plan will be "deemed acceptance," and that the confirmed plan will be binding on the creditors,[59] particularly given the presence of substantial tax claims. However, the lack of this language in Robinson's plan is not fatal to debtor's position.

[21] The Court's conclusion that the nonobjecting and nonvoting creditors are deemed to have unanimously accepted Robinson's amended plan is buttressed by the policy behind subchapter V. It streamlines the reorganization process and is "designed to facilitate the efficient and economical administration of the case and the prompt confirmation of a plan."[60] Robinson's ***221** situation is precisely the type of small business case subchapter V was intended to address.

Having concluded that Robinson's amended plan is proposed in good faith and not by any means forbidden by law under § 1129(a)(3) and that all impaired classes have accepted the plan under § 1129(a)(8), Robinson's plan can be confirmed as a consensual plan under § 1191(a) if the plan as modified meets the other requirements in § 1129(a) applicable for confirmation enumerated below. Section 1191(a) expressly excludes compliance with § 1129(a)(15) for confirming a consensual plan. The remaining requirements, other than the good faith requirement of § 1129(a)(3), discussed above, will now be addressed.

Section 1129(a)(1)

Under this section, the plan must comply with the applicable provisions of Title 11, including § 1122 regarding classification of claims.[61] Debtor's plan consists of seven classes. All are impaired. Classes 1-6 each consist of a single creditor and claim. Class 7 consists of unsecured creditors

and properly classifies similar claims in this class together. The plan complies with § 1122 and § 1129(a)(1).

Section 1129(a)(2)

[22] This section requires the plan proponent to comply with the applicable provisions of Title 11. The contents of Robinson's amended plan complies with § 1190, including a brief history, liquidation analysis, and projections demonstrating his ability to make payments. A disclosure statement is not required by subchapter V and the Court did not order otherwise.[62] Debtor timely filed his plan under § 1189(b). He properly served and noticed his plan for confirmation hearing, solicited acceptances of the plan by sending ballots to the creditors, and set appropriate deadlines to oppose confirmation and return ballots, all as reflected in the docket report for the case. Debtor has filed monthly operating reports required by § 1187(b). Debtor has complied with § 1129(a)(2).

Section 1129(a)(4)

Debtor's plan discloses proposed payment of court-approved fees and expenses of his counsel, whose employment has been approved and who has filed and noticed periodic fee applications; accountants whose employment has been approved by the court; and the subchapter V trustee. Debtor's plan complies with this section.

Section 1129(a)(5)

Debtor is an individual without directors, officers, or voting trustees. This section is inapplicable in Robinson's case.

Section 1129(a)(6)

Debtor is an individual who is not subject to a governmental regulatory commission over rates of the debtor. This section is inapplicable.

Section 1129(a)(7)

This section requires debtor's plan to meet the best interests of creditors test. Here, all impaired classes of creditors are deemed to have accepted the plan. Debtor's plan also satisfies the hypothetical chapter 7 liquidation test based on the liquidation analysis attached to the plan. The subchapter V trustee indicated that the amended plan pays more than required by the liquidation test. Class 7 claims would receive no distribution in a hypothetical chapter 7 case.

*222 **Section 1129(a)(9)**

This section addresses plan treatment to be provided to certain claims under § 507(a), *except to the extent that the holder of a particular claim has agreed to a different treatment.* Robinson's plan separately classifies secured and priority unsecured tax claims of the IRS (Classes 3 and 4) and priority unsecured tax claims of state taxing authorities (Classes 5 and 6). No party in interest objected to the plan and all creditors accepted the plan. Debtor's plan satisfies this section.

Section 1129(a)(10)

This section requires at least one impaired accepting class, determined without including any acceptance of the plan by an insider. None of the creditors comprising Classes 1-6 are insiders. Acceptance of the plan by all creditors in impaired Classes 1-6 therefore was determined without including the vote of any insider and satisfies this section.

Section 1129(a)(11)

This section requires the plan to be feasible. The Court finds that debtor will be able to implement his amended plan and make plan payments to his creditors from his salary. Confirmation of Robinson's amended plan is not likely to be followed by liquidation or further reorganization. The subchapter V trustee testified the amended plan was feasible.

Section 1129(a)(12)

[23] Subchapter V cases are excepted from the requirement to pay quarterly fees to the United States Trustee under 28 U.S.C. § 1930(a)(6)(A).

Section 1129(a)(13)

Debtor is not obligated to provide and does not pay retiree benefits. This section is inapplicable in Robinson's case.

Section 1129(a)(14)
Debtor has no domestic support obligation. This section is inapplicable.

Section 1129(a)(16)
This section limits the permissible transfers by a nonprofit corporation or trust.[63] Debtor's plan has no transfers within the meaning of this section. This section is inapplicable.

Having satisfied all the applicable confirmation requirements for confirmation as a consensual plan, § 1191(a) requires the Court to confirm Robinson's amended plan.

Conclusion
The UST's objection to confirmation for lack of good faith under § 1129(a)(3) is OVERRULED.

The debtor's amended plan is CONFIRMED AS MODIFIED as a consensual plan under § 1191(a).

The trustee's services are terminated upon substantial consummation of the confirmed plan.[64]

Upon confirmation of debtor's amended plan, the debtor is discharged from any debt that arose before the date of confirmation, and any debt specified in §§ 502(g), (h) and (i), unless otherwise provided in the amended plan,[65] or the order confirming the amended plan.[66]

***223** Counsel for the debtor shall prepare and submit a proposed confirmation order for the Court's approval. The confirmation order shall include: (1) a modification to Class 7 by increasing the distribution to general unsecured creditors from $18,000 to $22,000 as agreed to by debtor; (2) a general provision prohibiting debtor from engaging in any form of gambling until completion of all payments under the plan; and (3) a modification to Article 8, Miscellaneous Provisions, providing that modification of the plan shall be governed by § 1193 applicable in subchapter V cases, not § 1127.[67]

SO ORDERED.

All Citations

632 B.R. 208

Footnotes

1 Doc. 71. *See* *In re Robinson,* 628 B.R. 168 (Bankr. D. Kan. 2021).

2 Doc. 57.

3 The United States Trustee, Ilene J. Lashinsky, appeared by attorney Christopher T. Borniger. The debtor Randy L. Robinson appeared in person and by his attorney Mark J. Lazzo. The Subchapter V trustee Rob Messerli also appeared.

4 28 U.S.C. §§ 157(b)(1), 1334, and Amended Standing Order of Reference, D. Kan. S.O. 13-1 (June 24, 2013).

5 Doc. 1, p. 48.

6 *See* Ex. 1, p. UST000007, line 6; Ex. 2, p. UST000069, line 8b.

7 Doc. 1, p. 50.

8 Ex. A.

9 *Order I,* 628 B.R. 168, 174.

10 Doc. 58.

11 Doc. 57.

12 Ex. 1 and 2.

13 The casino issues a Form W-2G if the gambler receives $1,200 or more in winnings from slot machines. It is reported as "other income" on Schedule 1 (Form 1040). Gambling losses can be deducted as an itemized deduction, but only to the extent of winnings. *See* https://www.irs.gov/forms-pubs/about-form-w-2-g (last viewed April 14, 2021).

14 Trial Ex. 1, p. UST000008, line 21, and p. UST000011, line 16.

15 *Id.* at p. UST000007, line 10.

16 Trial Ex. 2, p. UST000071, line 8, and p. UST000072, line 16.

17 *Id.* at p. UST000069, line 11b.

18 Doc. 44. The amended plan included discharge provisions that were previously omitted from the plan. *Id.,* Art. 9, pp. 9-10.

19 Doc. 45.

20 Doc. 46.

21 Doc. 62.

22 Debtor will pay the Class 3 IRS secured claim over 10 years. The remaining tax claims (Class 4, 5 and 6) will be paid over 5 years, as will the Class 1 and 2 claims. The IRS has an unsecured claim of $18,704 in Class 7. *See* Claim 7-1. The Kansas Department of Revenue also has an unsecured claim of $8,617 in Class 7. *See* Claim 3-1.

23 As noted in *Order I,* debtor did not know what a casino marker was. *In re Robinson,* 628 B.R. 168, 173 n. 23.

[24] Debtor scheduled a total of $2,261,092 nonpriority unsecured debt. Doc. 1, p. 45.

[25] *See* Ex. 2-7 attached to Doc. 44, pp. 12-30.

[26] Note that in *Order I,* the Court concluded that Robinson did not gamble with estate assets. *See In re Robinson,* 628 B.R. 168, 179.

[27] *See* *In re Paige,* 685 F.3d 1160, 1177 (10th Cir. 2012).

[28] § 1129(a)(3).

[29] § 1191(a). Emphasis added.

[30] 685 F. 3d 1160, 1179 (10th Cir. 2012) (test of good faith is whether a plan is likely to achieve its goals and those goals are consistent with the purposes of the Code). *See Travelers Ins. Co. v. Pikes Peak Water Co. (In re Pikes Peak Water Co.),* 779 F.2d 1456, 1459-60 (10th Cir. 1985).

[31] *In re Paige,* 685 F. 3d 1160, 1178-79.

[32] *Id.* at 1179.

[33] Despite arguing Robinson's lack of good faith, the UST had no objection to Robinson, rather than the trustee, acting as disbursing agent and making payments to creditors under the plan if confirmed as a nonconsensual plan. Section 1194(b) normally requires that a § 1191(b) confirmation result in the trustee becoming the disbursing agent.

[34] This position taken by the UST at the evidentiary hearing in Robinson's case seems inconsistent with the position the UST took in the companion subchapter V case of *In re Brock,* No. 20-11470 (Bankr. D. Kan.). The Court held a confirmation hearing on both cases on the same day. Both debtors were represented by the same counsel and the debtors' plans were similar. The UST did not object to Brock's plan being confirmed as a consensual plan even though no creditor in ten of the eleven classes returned a ballot. *See* Doc. 49. Only one general unsecured creditor voted to accept the plan, resulting in only one accepting class under the rationale asserted by the UST in this case.

[35] A class that is not impaired is conclusively presumed to have accepted the plan and solicitation of acceptances from such a class is not required. *See* § 1126(f).

[36] *See* *In re Trenton Ridge,* 461 B.R. 440, 455-56 (Bankr. S.D. Ohio 2011) (noting that chapter 11 plan must be confirmed if the plan is consensual).

[37] Section 1129(b) permits plan confirmation "if all of the applicable requirements of subsection (a) of this section *other than paragraph (8)* are met with respect to a plan ...." (Emphasis added).

[38] *See* § 1181(a). *See also, In re Pearl Resources LLC, et al,* No. 20-31585, Doc. 238, at p. 20 (Bankr. S.D. Tex. Sept. 30, 2020) (noting that § 1191(b) replaces the cramdown requirements of § 1129(b), which doesn't apply in a subchapter V case).

[39] Section 1191(b) (Emphasis added).

[40] *See In re Moore Properties of Person County, LLC*, No. 20-80081, 2020 WL 995544, at *5 (Bankr. M.D.N.C. Feb. 28, 2020).

[41] Section 1126 is not one of the chapter 11 provisions made inapplicable in Subchapter V cases. *See* § 1181(a) and (b).

[42] *See In re Sabbun,* 556 B.R. 383, 390 (Bankr. C.D. Ill. 2016).

[43] *See* Internal Revenue Manual § 5.17.10.9.3(4) and (5) (01-03-2020), https://www.irs.gov/irm/part5/irm_05-017-010#idm139860310224032 (last viewed July 9, 2021).

[44] Fed. R. Bankr. P. 3018(c). *See* Official Form 314, the form of a ballot for accepting or rejecting a plan. The Official Form 314 provides that a ballot not received by the deadline means the creditor's vote will not count as either an acceptance or rejection of the plan.

[45] Rule 3018 provides for acceptance or rejection of chapter 11 plan within the time fixed by the court. Rule 3020(b) provides for objections to confirmation within the time fixed by the court. Rule 3020(c) provides that where no objection is filed, "the court may determine that the plan has been proposed in good faith and not by any means forbidden by law without receiving evidence on such issues."

[46] *See Sabbun, supra* (a stipulation entered into with the IRS after the ballot deadline expired in which the IRS would "affirmatively accept" the plan as modified was not a valid ballot and failure to return a ballot could not be deemed acceptance of the plan); *In re Trenton Ridge Investors, LLC,* 461 B.R. 440, 456 (Bankr. S.D. Ohio 2011) (citing the general rule that "a class cannot be deemed to have accepted a plan if no creditor in the class has voted.").

[47] 461 B.R. 440, 456, citing *In re Adelphia Communications Corp.,* 368 B.R. 140, 260 (Bankr. S.D. N.Y. 2007).

[48] *See also,* § 1141(a) (binding effect of confirmed plan, whether or not the creditor has accepted the plan).

[49] *Heins v. Ruti-Sweetwater Inc. (In re Ruti-Sweetwater),* 836 F.2d 1263, 1267-68 (10th Cir. 1988).

[50] *Id.* at 1266-67.

[51] *Id.* at 1268. *See In re Akbari-Shahmirzadi,* No. CIV 14-0982 JB/WPL, 2015 WL 8329208, at *8 (D. N.M. Nov. 25, 2015) (noting distinction of nonvoting members in § 1129(a)(8) versus (a)(10)), *adopting magistrate judge's proposed findings and recommended disposition* 2015 WL 13650076 (D. N.M. June 30 2015); *In re Sunnyland Farms, Inc.,* No. 14-10231-t11, 2015 WL 1598105, at *5 (Bankr. D. N.M. Apr. 8, 2015);

[52] 836 F.2d 1263, 1265. *See* § 1129(b)(1).

[53] *Id.* at 1267, citing *Hanson v. First Bank of South Dakota, N.A.,* 828 F.2d 1310, 1313 (8th Cir. 1987) (only actual acceptance of plan, not stipulations to agree to accept plan, meets requirement of § 1129(a)(10) for cram down). *See also, SLC, Inc. v. Nollkamper,* 868 F.2d 1273 (9th Cir. 1989) (declining to extend "deemed acceptance" to nonvoting creditors for purposes of § 1129(a)(10)); *Sabbun,* 556 B.R. 383, 388 (failure to return a ballot is not deemed to be acceptance); *First State Operating Co. v. Holbrook, et al (In re Lotspeich),* 328 B.R. 209, 219 (10th Cir. BAP 2005) (cramdown requires at least one class of impaired creditors that has affirmatively accepted the plan).

[54] *See In re Desert Lake Group, LLC,* No. 20-22496, Doc. 114 (Bankr. D. Utah Sept. 30, 2020) (Unpublished) (concluding that all impaired classes of claims and interests had accepted the debtor's plan—either by affirmatively voting to accept the plan or were deemed to have accepted the plan, by not objecting to confirmation and not returning a ballot).

[55] Nothing in § 1191(a) suggests that acceptance of a plan should be determined differently in § 1129(a)(8) versus § 1129(a)(10), other than accepting classes under (a)(10) may not include acceptance by any insider.

[56] 836 F.2d 1263, 1265 (Emphasis added.) (quoting the District Court's order affirming the bankruptcy court).

[57] *Id.* at 1268.

[58] *See* Stephen W. Sather and Barbara M. Barron, Voting and the Apathetic Creditor, 39 AM. BANKR. INST. J. 12 (Dec. 2020).

[59] *See* § 1141(a).

[60] *Pearl Resources, supra* at Doc. 238, p. 5.

[61] Note that § 1121 does not apply in subchapter V, as only the debtor may file a plan. *See* § 1181(a) and § 1189(a).

[62] *See* § 1181(b) and § 1187(c).

[63] Alan N. Resnick & Henry J. Sommer, Editors in Chief, 7 COLLIER ON BANKRUPTCY, ¶ 1129.02[16] (16th ed. 2021).

[64] *See* § 1101(2) (defining substantial consummation) and § 1183(c) (terminating trustee's service).

[65] Debtor's amended plan provides that any debt owed to the IRS shall not be discharged until the federal taxes provided for in the amended plan have been paid in full. *See* Doc. 44, p. 6.

[66] Section 1141(d)(1)(A). Note that § 1141(d)(5) applicable to individual debtors, does not apply in subchapter V cases. *See* § 1181(a).

[67] Section 1127 does not apply in subchapter V cases. *See* § 1181(a).

End of Document

Faculty

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P. Matthew Cox is a partner with Spencer Fane in Salt Lake City and represents financial institutions and other lenders in their efforts to protect their collateral and loan rights in federal and state courts, including bankruptcy courts. He focuses on defending these lenders and other clients against avoidance, preference and fraudulent-transfer claims made by trustees and receivers. He also assists creditors in obtaining relief from the bankruptcy automatic stay and in prosecuting objections to confirmation. Mr. Cox defends clients against claims from borrowers or customers related to the Fair Debt Collection Practices Act, the Fair Credit Reporting Act and the Utah Consumer Sales Practice Act, as well as against claims asserted in bankruptcy court for the return of funds received by creditors. In these matters, he has represented law firms, hospitals, businesses and collection agencies. Mr. Cox works closely with banks and lenders to help create robust loan and loan-modification documents for compliance with federal and state guidelines to forestall litigation. He also works closely with real estate professionals and related parties in negotiating purchase contracts, leases, options and litigation. For nearly a decade, Mr. Cox has devoted much of his time to defending dozens of trustee preference, fraudulent-transfer and other avoidance actions, with total damages in excess of $45 million, revolving around the C.W. Mining Bankruptcy case. He currently represents well-known national auto lenders in numerous consumer bankruptcy cases each month, and he maintains a significant practice assisting the owners of commercial properties in unlawful detainer or eviction proceedings against defaulting tenants. Mr. Cox received his B.S. in 2000 from the University of Utah and his J.D. in 2003 from the University of Utah College of Law.

Hon. Peggy M. Hunt is Chief U.S. Bankruptcy Judge for the District of Utah in Salt Lake City, appointed on March 10, 2023. Previously, she spent approximately 25 years practicing bankruptcy and receivership law, and at the time of her appointment was the co-managing shareholder of the Salt Lake City office of Greenberg Traurig, LLP. Judge Hunt started her career as a law clerk to Justice Robert J. Callahan of the Connecticut Supreme Court. She served two other clerkships, one for Hon. Glen E. Clark, Chief Bankruptcy Judge for the District of Utah, and the other as one of the first law clerks for several judges on the Bankruptcy Appellate Panel for the Tenth Circuit. Judge Hunt is a Fellow in the American College of Bankruptcy and in the American Bar Association. She was appointed to serve on the Utah Securities Commission. Judge Hunt also served as president of numerous profes-

sional and community organizations, including the Utah Bar Foundation, Women Lawyers of Utah, the Utah Chapter of the Federal Bar Association, Utah Women's Forum, and the Board of Advisors for the Utah Museum of Natural History. She received her B.A. in economics and political science from Washington and Jefferson College and her J.D. from the University of Pittsburgh School of Law, where she was also head notes and comments editor of the *University of Pittsburgh Law Review*.

Jeannie Kim is a partner at Golden Goodrich, LLP in Costa Mesa, Calif. She represents corporate debtors in possession, official committees of unsecured creditors, chapter 11 trustees, asset-purchasers and individual creditors in all aspects of complex chapter 11 cases, related litigation, state and federal receivership cases, state insolvency proceedings and out-of-court workouts. She also has represented financial institutions, technology companies, commercial landlords and vendors as secured creditors, contract counterparties and administrative creditors in insolvency proceedings. Ms. Kim has provided general legal counsel to commercial clients in a range of industries, including technology, commercial leasing, entertainment, retail, hospitality, manufacturing and distribution, consumer products, alternative energy, mining, aviation and real estate development. She was featured as a "Southern California Rising Star" in *Super Lawyers* from 2013-16, and in 2017 she was selected for ABI's inaugural class of "40 Under 40." Ms. Kim received her B.A. from Columbia College at Columbia University in 1999 and her J.D. from Harvard Law School in 2002.