UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW MEXICO

In re: TOTAL OILFIELD SOLUTIONS, LLC, Debtor.	No. 20-11198-j11 (jointly administered)
and	
In re: DENNIS C. RANDALL HOLMAN and DONA K. HOLMAN, Debtor.	No. 20-11199-j11 (jointly administered)

MEMORANDUM OPINION AND ORDER

Before the Court is Debtors' Motion to Continue Chapter 11 Plan Confirmation Hearings Pursuant to Rule 3017 (the "Motion to Continue") (Doc. 231). The Subchapter V Trustee (the "Subchapter V Trustee") objected to the Motion to Continue. Doc. 240. The Court held a final evidentiary hearing[1] on the Motion to Continue and the Subchapter V Trustee's objection on March 11, 2021 and a status conference on the Motion to Continue on March 18, 2021. Having considered the evidence, the parties' arguments, and the purposes of subchapter V of chapter 11 of the Bankruptcy Code[2], the Court will overrule the Subchapter V Trustee's objection and grant the Motion to Continue.

[1] At the final hearing, with the consent of the parties, the Court took judicial notice of the dockets and documents filed therein in the TOS and Holman bankruptcy cases and the dockets and all documents filed therein in related adversary proceedings numbered 20-1040, 20-1051, 20-1052, 20-1072, and 20-1075.

[2] All future references to "Code," "Section," and "§" are to the Bankruptcy Code, Title 11 of the United States Code, unless otherwise indicated.

FINDINGS OF FACT[3]

I. Total Oilfield Solutions

Debtor Total Oilfield Solutions, LLC ("TOS") provides services related to the oilfields in New Mexico. TOS was formed in 2019 by Dennis Randy Holman, TOS's president. Mr. Holman has been working in the oil and gas industry for over fifteen years and has experience with a variety of aspects of the industry. As president, he is responsible for selling TOS's services and procuring contracts, as well as overseeing payroll, staff, accounting, and other operations. When TOS began operating in April 2020, it had lined up almost $2 million in contracts for environmental clean-up and fabrication work, but public health orders issued in March 2020 related to the COVID-19 pandemic forced TOS to stop its primary revenue generating operations, namely oilfield and government projects. TOS continues to operate its business as a debtor-in-possession, performing truck hauling and environmental clean-up work. TOS currently has thirteen employees, down from 70 at its height. On March 24, 2021, the New Mexico Department of Health designated Eddy County, where TOS is based, at "medium risk" (the third of four COVID risk designations ranging from "very high risk" to "low risk") due to the declining incidence of COVID cases in the county.[4]

II. The Bankruptcy Cases

Debtors commenced these jointly administered bankruptcy cases on June 15, 2020. The following history leading to Debtors' bankruptcy cases and other information is taken in part from the Debtors' Amended Plans, operating reports filed of record, and other documents filed

[3] *See* Fed. R. Civ.P. 52(a), made applicable by Fed. R. Bankr. P. 9014 and 7052. Any facts recited in the Discussion section of this opinion also constitute findings of fact by the Court.

[4] *See* New Mexico Department of Health, Coronavirus Disease 2019 in New Mexico, https://cv.nmhealth.org/public-health-orders-and-executive-orders/red-to-green/ (last visited March 30, 2021). The Court may sua sponte take judicial notice of facts that can accurately and readily be determined from sources whose accuracy cannot reasonably be questioned. Fed. R. Evid. 201(b), (c).

by one or more of the Debtors. The Court makes no findings regarding whether this recitation of the history leading to Debtors' bankruptcy cases is accurate.

Before forming TOS, Mr. Holman was the chief executive officer of MSI, Inc. ("MSI"), which provided services to oilfield operations. In June 2019, Mr. Holman signed a promissory note (the "Promissory Note") to MSI's major stockholder, Philip Madron, in exchange for stock in MSI. After forming TOS, Mr. Holman caused some vehicles, which he believed to be owned by MSI, to be titled in TOS's name. The transfer of title to the vehicles to TOS became the subject of several disputes involving TOS and Mr. Holman. Due in part to pending litigation against them, discussed below, TOS and Mr. Holman, together with Dana Holman, his wife, filed petitions for bankruptcy relief under subchapter V of chapter 11 of the Bankruptcy Code on June 15, 2020 (the "Petition Date").[5]

TOS's monthly operating reports show current accounts receivable of $47,669, $42,339, and $42,690 for December 2020, January 2021, and February 2021, respectively. In the January 2021 monthly operating report, TOS projected sales of $150,000 per month from January 2021 to June 2021 based on activity while the COVID-related restrictions were in effect. As COVID restrictions ease, TOS anticipates that its sales revenue will increase substantially. The oil and gas industry in southern New Mexico started to resume operations in early 2021 and work in the oilfields has increased gradually as people have slowly resumed car and air travel. With increased oil consumption due to travel, oil prices had risen to around $63 dollars per barrel as of the date of the final hearing.

[5] The Court will refer to TOS and the Holmans collectively as "Debtors."

Since the Petition Date, TOS has accumulated approximately $250,000 in post-petition payables and has lost money every month. The Holmans' ability to fund their plan is wholly dependent on TOS's ability to continue to pay Mr. Holman's $15,625 monthly salary.

A. Proofs of Claims and Adversary Proceedings

The New Mexico Tax and Revenue Department (NMTRD) filed a proof of claim for $434,527, of which $348,879 is listed as a priority tax claim against the Holman estate. This claim rests on NMTRD's allegation that MSI failed to pay withholding taxes while Mr. Holman was its president. NMTRD also notified the other shareholders of MSI that they are liable for the unpaid taxes. NMTRD also filed a proof of claim for $20,515 in the TOS bankruptcy case.

In May 2020, Philip Madron and Madron Services, Inc. ("Madron Services")[6], filed suit (the "Madron Action") against TOS, MSI, and Mr. Holman in the Fifth Judicial District Court, alleging, among other things, that Mr. Holman breached the Promissory Note and that Mr. Holman fraudulently transferred assets of Madron Services to TOS. TOS removed the Madron Action to this Court. Mr. Madron and Madron Services also filed a complaint against the Holmans asserting that their claims against the Holmans are nondischargeable in bankruptcy.

Madron Services also filed a proof of claim in both the TOS and Holman bankruptcy cases for $500,000 based largely on the same allegations as were asserted in the Madron Action. In the Holman bankruptcy case, Mr. Madron filed a proof of claim for $5,999,835 based on the Promissory Note and a proof of claim for $538,693 based on 1) Mr. Holman's guaranty of loans to MSI before Mr. Holman purchased Mr. Madron's shares and 2) NMTRD's assessment of taxes owed based on state withholding taxes unpaid by MSI while Mr. Holman was president.

[6] MSI, Inc. and Madron Services, Inc. are distinct corporations.

After the Court approved a settlement among the parties to the Madron Action, the Court dismissed the complaints in both adversary proceedings with prejudice and Mr. Madron and Madron Services withdrew their proofs of claims against the TOS and Holman estates. Under the settlement, Madron Services will not have an allowed claim in the bankruptcy case but will retain certain equipment.

Doctors Murugan Athigaman and Shila Ramakrishna (the "Doctors") filed proofs of claim totaling approximately $900,000 arising from 1) Mr. Holman's purchase of MSI shares from Mr. Madron and 2) MSI's failure to pay state withholding taxes. In the first set of claims, the Doctors assert that they purchased 25% of MSI's stock in 2018 and that Mr. Holman acted fraudulently when he, among other things, caused some or all of MSI's vehicles to be titled in TOS's name. In their proofs of claims, they asked the Court to impose a constructive trust including all such assets and/or award 1) compensatory damages in the amount of "25% of the purchase price of the MSI stock purchased from Madron . . . OR return of their $450,000 investment" in MSI and lost earnings of MSI to which the Doctors would have been entitled had the assets not been transferred to TOS, and 2) punitive damages. The Doctors also filed adversary proceedings against Debtors, arguing that their claims arising from Mr. Holman's conduct are nondischargeable under § 523(a). Debtors moved to dismiss both complaints.

The Doctors' second set of claims assert a contingent claim based on the NMTRD's Notice of Assessment of Taxes against each of them for the state withholding taxes that were allegedly not paid by MSI. The Doctors maintain that Mr. Holman was solely responsible for payment of taxes by MSI and that they have timely protested the NMTRD's assessment. The Doctors seek allowance of their claim against Debtors in the event the Doctors are found to be liable for the taxes. Debtors objected to the Doctors' proofs of claims.

The Doctors moved for estimation of their claims for distribution purposes under § 502(c) (the "Motion for Claims Estimation"). Debtors objected to the Motion for Claims Estimation and the Court set a final hearing on the Motion for Claims Estimation on June 2, 2021. However, on April 14, 2021, Debtors and the Doctors moved for approval of a settlement (the "Motion to Approve Settlement"). Under the settlement, if approved by the Court, the Doctors will withdraw the Motion for Claims Estimation, their claims will be allowed in a total amount of $225,000 as nonpriority, unsecured claims, and the Doctors will move for dismissal of their complaints in the adversary proceedings. Pursuant to the shortened deadline ordered by the Court, objections to the Motion to Approve Settlement are due on April 28, 2021.

B. Procedural History

The Debtors have been reasonably diligent in pursuit of their bankruptcy cases. After filing their petitions for relief on June 15, 2020, Debtors filed motions to set a bar date within fifteen days and the bar date was fixed as August 10, 2020 (TOS) and September 8, 2020 (Holman). By operation of § 1189(b), Debtors' plans of reorganization were due on September 14, 2020. After the Court granted an extension, Debtors timely filed their plans of reorganization on October 27, 2020. A plan confirmation hearing set for January 12, 2021 was vacated on Debtors' timely motion to permit the parties to conclude settlement negotiations with Mr. Madron and Madron Services. Debtors then filed First Amended Plans of Reorganization (the "Amended Plans") on January 25, 2021. A hearing on confirmation of the Amended Plans was set for April 1, 2021 and then continued to April 21, 2021.

Debtors are responsible for some delay in this case. Despite Debtors' position that the Doctors' claims must be estimated before a plan confirmation hearing, Debtors did not object to the Doctors' claims for over two months after the proofs of claim were filed and did not move

for estimation of the Doctors' claims. Instead, the Doctors themselves moved for estimation of their claims.

DISCUSSION

Debtors concede that the Amended Plans are not confirmable and seek a continuance of the final confirmation hearing so that they may file further amended plans that include revenue projections and a liquidation analysis after the oil and gas industry has a reasonable time to recover from the COVID-related restrictions. In the Motion to Continue, Debtors also requested that the Court continue the final confirmation hearing to a date after the Court enters a decision on the Motion for Claims Estimation filed by the Doctors. If the Court approves the settlement agreement between Debtors and the Doctors, the Doctors will withdraw the Motion for Claims Estimation. However, the Motion for Claims Estimation will not be withdrawn until after the settlement is approved by the Court, which will occur, at the earliest, on April 29, 2021 if there are no objections to the settlement. Debtors asked the Court at a status conference on April 5, 2021 to allow them two weeks after approval of the settlement to file second amended plans.

The Subchapter V Trustee argues that, if the final confirmation hearings are postponed until May 2021, Debtors' cases will have been pending for over eleven months, a duration contrary to Congress's intent that subchapter V cases proceed to confirmation quickly. He also maintains that the confirmation hearing should not be continued because the TOS's administrative claims—over $250,000 as of the date of the final hearing—will continue to accrue as time goes on. He points to the fact that TOS has lost money every month since the Petition Date and argues that the amount owed in administrative claims will render any TOS plan infeasible, barring confirmation. Since the feasibility of the Holman Plan is dependent on TOS's ability to pay Mr. Holman's salary, the Subchapter V Trustee argues, the Holman Plan is also

infeasible. The Subchapter V Trustee contends that there is, therefore, no need to continue the confirmation hearing because Debtors' plans will never be confirmable.

The Subchapter V Trustee's objection is consistent with his obligations under subchapter V to monitor the progress of the case, facilitate a consensual plan, and comment on confirmation of Debtors' Amended Plans. *See* § 1183(b). The Subchapter V Trustee appropriately expressed his concerns about the amount of time these subchapter V cases have been pending, the Debtors' inability to pay post-petition expenses when due, and the risk that Debtors will have insufficient profits to fund a plan.

In enacting the Small Business Reorganization Act (the "SBRA"), Congress intended to enable struggling small businesses "'to file bankruptcy in a timely, cost-effective manner, and hopefully [to] allow[] them to remain in business,' which 'not only benefits the owners, but employees, suppliers, customers, and others who rely on that business.'"[7] *In re Seven Stars on the Hudson Corp.*, 618 B.R. 333, 339-40 (Bankr. S.D. Fla. 2020) (stating that the purpose of the SBRA was to "'streamline the bankruptcy process by which small businesses debtors reorganize and rehabilitate their financial affairs.'" (quoting H.R. Rep. No. 116-171, at 1 (2019))).

The SBRA, as codified in subchapter V of chapter 11, is designed to create a quicker and more efficient process by requiring a plan to be filed within 90 days of the petition, permitting only the debtor to file a plan, and appointing a subchapter V trustee to assist with development of a consensual plan. *See* §§ 1183, 1189, 1191(b); *In re Seven Stars on the Hudson Corp.*, 618 B.R. at 340. To promote speedy progress toward a confirmable plan or other resolution of the case, the

[7] H.R. REP. No. 116-171, at 1-2 (2019) *available at* https://www.congress.gov/congressional-report/116th-congress/house-report/171/1) (emphasis added) (quoting the Unofficial Transcript of Oversight of Bankruptcy Law and Legislative Proposals: Hearing Before the Subcomm. on Antitrust, Commercial, & Admin. Law of the H. Comm. on the Judiciary, 116th Cong. 27 (2019) (on file with H. Comm. on the Judiciary staff)).

Court must hold a status conference within 60 days of the petition date and the debtor must file a report that "details the efforts the debtor has undertaken or will undertake to attain a consensual plan . . ." §§ 1188(a), (c). Neither a creditors committee nor disclosure statement are required in subchapter V cases. § 1181(b).

The accelerated pace of subchapter V cases benefits creditors by shortening the time from the petition date to distributions to creditors. *In re Seven Stars on the Hudson Corp.*, 618 B.R. at 340 (stating that the expeditious progress of subchapter V cases is "a very important protection" for creditors). It also benefits debtors by reducing professional fees and other administrative expenses.

But other subchapter V provisions evince Congress's "significant concern for small business debtors" and its desire to "provide [debtors] with a realistic option for reorganizing and saving their business operations." *In re Trepetin*, 617 B.R. 841, 846–47 (Bankr. D. Md. 2020) For example, subchapter V is designed to facilitate consensual plans, most notably by requiring the subchapter V trustee to help debtors develop a consensual plan. The debtor benefits from a consensual plan not only by avoiding the risks and expense of litigating a nonconsensual plan but also because the subchapter V debtor receives a discharge when the plan becomes effective. *See* §§ 1191(a), 1129(a), 1141(d)(1)(A), 1181(a) (2019). Subchapter V also provides the debtor with an enhanced ability to confirm a contested plan when a class of unsecured creditors votes to reject the plan by eliminating the absolute priority rule with respect to dissenting classes of unsecured creditors and allowing the debtor to limit payment to unsecured creditors based on projected disposable income, subject to a floor calculated under what is known as the "best interests of creditors test." *See* §§ 1129(a)(7), 1181(a); *In re Wetter*, 620 B.R. 243, 255 (Bankr. W.D. Va. 2020) (discussing the best interests of the creditors test in the subchapter V context).

The enhanced ability under subchapter V to develop a consensual plan or confirm a feasible contested plan, the cost savings of subchapter V procedures, and the right to pay administrative expenses through the plan instead of on the plan effective date (*compare* § 1129(a)(9)(A) *with* § 1191(e)) also further the subchapter V goal of enabling struggling small businesses to reorganize successfully. *In re Seven Stars on the Hudson Corp.*, 618 B.R. at 340 (stating that "[t]hese extraordinary powers and cost-saving provisions . . . are certainly laudable and are both helpful and necessary in making [c]hapter 11 more affordable for small businesses").[8]

Subchapter V is particularly important for small businesses struggling due to the COVID pandemic, like TOS. "The onset of the global COVID-19 pandemic [has] created even more urgency to address how small businesses might use these new powerful tools available under [s]ubchapter V to reorganize quickly, inexpensively, and efficiently." *In re Seven Stars on the Hudson Corp.*, 618 B.R. at 342. In recognition of the impact of the COVID pandemic on small businesses, "shortly after the onset of the pandemic, Congress temporarily raised the [s]ubchapter V debt limit from $2,725,625 to $7,500,000" to permit more small businesses to use subchapter V to stay afloat. *Id.*; *see* the Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, 134 Stat 281, 310-311 (the "CARES Act")).[9]

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[8] At the time of its passage, sponsors of the SBRA emphasized its effect on small business debtors. For example, Representative Doug Collins stated, "this bill would bring much needed improvements to the Bankruptcy Code so that owner-operated businesses can recover from financial hardship and continue creating jobs." Senator Sheldon Whitehouse stated, "Small businesses form the backbone of the American economy. When these businesses are struggling, the bankruptcy process should give them a chance to reorganize to preserve jobs and boost local communities." *Small Business Reorganization Act*, Am. Bankr. Inst. J., January 2019, at 8, 8.

9 In March 2021, Congress passed the COVID-19 Bankruptcy Relief Extension Act of 2021, which extends certain bankruptcy-related provisions of the CARES Act, including the temporary increase of the debt limit for small business debtors to March 2022. Pub. L. No. 117–5 (H.R. 1651). *See also* Amber N. Morris, Small Business Debt in the Age of Covid-19, 29 Am. Bankr. Inst. L. Rev. 131, 142 (2021) (discussing the effect of COVID-related restrictions on small businesses and stating that subchapter V "may be a saving grace of these concerns.").

Predicting the course of the COVID pandemic and related public health orders—"a once in a century occurrence"—presents a significant challenge. *In re Sanam Conyers Lodging, LLC*, 619 B.R. 784, 789 (Bankr. N.D. Ga. 2020). "[T]here is no consensus of scientific or political leaders as to when it is 'reasonably probable' the pandemic will subside, and life will return to 'pre pandemic normal.'" *Id.* That uncertainty, however, "cannot spell the end of attempts to reorganize during a pandemic. The Bankruptcy Code is meant to provide an opportunity for businesses to reorganize due to unforeseen circumstances . . . and during this pandemic it is especially important that debtors be given the opportunity to reorganize if they can find ways to adapt to our current circumstances." *Id.*

Considering the purposes of and policies underlying subchapter V as a whole, in deciding whether to give the debtor more time to confirm a subchapter V plan and, if so, how long, the Court must strike an appropriate balance that considers (a) the need for rapid progress toward plan confirmation, including prejudice to creditors from delay, (b) the risk of nonpayment of administrative claims, (c) the likelihood that a plan will be confirmed and whether delaying the confirmation hearing will increase the prospect of confirmation, (d) whether the debtor has proceeded diligently, (e) special challenges presented by the COVID-19 pandemic, (f) the debtor's progress in reaching agreements with its creditors, and (g) the complexities of the case. *Cf. In re Seven Stars on the Hudson Corp.*, 618 B.R. at 340 (stating that "[t]he overall purpose and function of the Bankruptcy Code is to strike a balance between creditor protection and debtor relief" (quoting *In re Travel 2000, Inc.*, 264 B.R. 444, 448 (Bankr. W.D. Mich. 2001))). The fact that subchapter V, unlike small business debtor chapter 11 cases, does not require confirmation of a plan within 45 days after it is filed gives the Court flexibility to strike the appropriate balance. *Compare* § 1121(e)(2) *with* § 1191.

The Subchapter V Trustee's concern about the duration of Debtors' cases and the accumulation of unpaid administrative expenses is warranted. Nine months passed between the Petition Date and the date of the final hearing on the Motion to Continue. Nevertheless, balanced against the other considerations, the Court concludes that continuing the confirmation hearing for a reasonable period is appropriate in this case.

For the most part, Debtors have proceeded diligently in these cases. These jointly administered subchapter V cases, filed in the midst of the COVID pandemic, have presented significant challenges for Debtors. Restrictions on business and travel due to COVID-19 have complicated Debtors' bankruptcy cases, as they have many other business endeavors. But those restrictions are now easing as more individuals are vaccinated against COVID-19. These cases, which were initially assigned to different judges, are also particularly complex as compared with many subchapter V cases. They have involved six adversary proceedings as well as disputed claims by two principal creditors involving amounts of nearly $6 million and $1 million. Given time, Debtors reached settlements with both major creditors and settled several of the adversary proceedings through mediation.

While Debtors concede that their Amended Plans are not confirmable, Debtors have shown a reasonable possibility of confirming plans under subchapter V if given some additional time and breathing room to operate as COVID-related restrictions are eased and if they are allowed to amend their plans further. *Cf. In re Premier Auto. Servs., Inc.*, 492 F.3d 274, 284 (4th Cir. 2007) ("The purpose of [c]hapter 11 reorganization is to assist financially distressed business enterprises by providing them with breathing space in which to return to a viable state." (quoting *In re Little Creek Dev. Co.,* 779 F.2d 1068, 1073 (5th Cir. 1986)).

Based on his fifteen-year history in the oil and gas industry and his experience selling oilfield services and procuring contracts, Mr. Holman testified credibly that the oil and gas industry in southern New Mexico started to resume operations in early 2021 and work in the oilfields has increased gradually as people have slowly resumed car and air travel. With increased oil consumption due to travel, oil prices have risen to around $63 dollars per barrel; when the price of oil is near $70 per barrel, work in the oilfields is steady. When the oilfields and other businesses resume operating, there will be a corresponding demand for TOS's trucks and equipment, as well as personnel. To meet the demand without incurring additional debt, TOS will have to ramp up its operations slowly due to the lead time and expenses necessary to prepare for hauling and fabrication jobs and the delay in being paid for such work. TOS was just beginning to conduct business when COVID-19 restrictions stopped all work and, consequently, TOS has not earned a profit since the Petition Date. That history, together with limited operations during the pandemic, has hindered or delayed Debtors' efforts to earn a profit and project disposable income, as well as to develop confirmable reorganization plans.

CONCLUSION

Under the circumstances here, continuation of the final confirmation hearing and allowing Debtors to amend their plans one final time best effectuate the purposes and policies underlying subchapter V and the SBRA. The Subchapter V Trustee's objection to Debtors' Motion to Continue will be overruled and the Motion to Continue will be granted.

WHEREFORE, IT IS ORDERED:

1. The Subchapter V Trustee's objection to Debtors' Motion to Continue is overruled.

2. Debtors' Motion to Continue is granted. By a separate order, the Court will fix a deadline for Debtors to amend their plans one final time, set a final confirmation hearing, and fix preconfirmation deadlines.

3. The final hearing on confirmation of Debtors' Amended Plans set for April 21, 2021 is vacated.

Robert H. Jacobvitz
United States Bankruptcy Judge

Date Entered on Docket: April 16, 2021

COPY TO:

Michael T Newell
Attorney for Creditors Athigaman and Ramkrishna
Newell Law Firm
10 W Adams Ave, STE E
Lovington, NM 88260

W.T. Martin
Attorney for Creditors Athigaman and Ramkrishna
509 W. Pierce
Carlsbad, NM 88220

Marcus A Sedillo
Attorney for Holman Debtors
Giddens & Gatton Law, P.C.
10400 Academy Rd. NE
Suite 350
Albuquerque, NM 87111

Stephen J. Moriarty
Subchapter V Trustee
100 N Broadway Avenue
Suite 1700
Oklahoma City, OK 73102

Jaime A. Pena
Office of the U.S. Trustee
P.O. Box 608
Albuquerque, NM 87103-0608

Daniel A. White
Attorney for CNB Bank
1122 Central Ave. S.W., Suite 1
Albuquerque, NM 87102

Manuel Lucero
Attorney for IRS
Assistant US Attorney
PO Box 607
Albuquerque, NM 87103-0607

Richard Olson
Attorney for Madron Services, Inc. and Phillip P. Madron
Hinkle Shanor LLP
P.O. Box 10
Roswell, NM 88202-0010

Westley Logan
Attorney for NM Workforce Solutions
P.O. Box 1928
Albuquerque, NM 87103