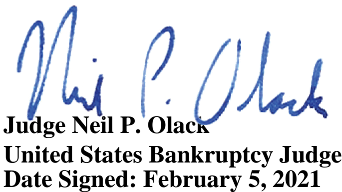
SO ORDERED,



Judge Neil P. Olack
United States Bankruptcy Judge
Date Signed: February 5, 2021

The Order of the Court is set forth below. The docket reflects the date entered.

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF MISSISSIPPI

IN RE:

KEVIN HUDSON KEMP, **CASE NO. 20-00655-NPO**

DEBTOR. **CHAPTER 12**

ORDER DENYING MOTION TO CONVERT CHAPTER 12 CASE TO SUBCHAPTER V CASE UNDER CHAPTER 11

This matter came before the Court for a telephonic hearing on January 27, 2021 (the "Hearing"), on the Motion to Convert Chapter 12 Case to Subchapter V Case Under Chapter 11 (the "Motion") (Dkt. 231) filed by the debtor, Kevin Hudson Kemp (the "Debtor"); the Trustee's Objection to Motion to Convert Chapter 12 Case to Subchapter V Case Under Chapter 11 (the "Trustee's Objection") (Dkt. 236) filed by the chapter 12 trustee, Harold J. Barkley, Jr. (the "Trustee"); and the Helena Agri-Enterprises, LLC's Joinder in Trustee's Objection to Motion to Convert Case from Chapter 12 to Subchapter V Case Under Chapter 11 (the "Helena Joinder") (Dkt. 241) filed by Helena Agri-Enterprises, LLC ("Helena") in the above-referenced bankruptcy case (the "Bankruptcy Case"). At the Hearing, Craig M. Geno represented the Debtor, Justin B. Jones represented the Trustee, and Jim F. Spencer represented Helena. At the conclusion of the Hearing, the Court announced its decision from the bench, denying the Motion. The Court issues this Order memorializing and supplementing its earlier bench ruling.

Jurisdiction

This Court has jurisdiction over the parties to and the subject matter of this proceeding pursuant to 28 U.S.C. § 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A) and (O). Notice of the Hearing was proper under the circumstances.

Facts[1]

1. On February 25, 2020, the Debtor filed a petition for relief under chapter 12 of the United States Bankruptcy Code (the "Code"). (Dkt. 1).

2. On December 4, 2020, the Court entered the Order Denying Confirmation of Chapter 12 Plan (Dkt. 229). The Court denied confirmation of the First Amended Chapter 12 Plan of Reorganization (Dkt. 208) and ordered the Debtor either to file an amended plan, convert the Bankruptcy Case to an appropriate chapter, or dismiss the Bankruptcy Case.

3. On December 9, 2020, the Debtor filed the Motion. The Debtor alleges that continuing with plan confirmation of the Bankruptcy Case under chapter 12 of the Code would not be productive or beneficial because the compensation requested by the Trustee either causes the plan to lack feasibility or is excessive in comparison to the cost, expenses, and fees of a case filed under chapter 11, subchapter V of the Code ("Subchapter V"). *See* 28 U.S.C. § 586(e)(1). Accordingly, the Debtor requests that the Court convert the Bankruptcy Case from a chapter 12 case to a Subchapter V case as "it is in the best interest of the Debtor, all creditors and all parties in interest." (Dkt. 231 at 1).

4. On December 30, 2020, the Trustee filed the Trustee's Objection. The Trustee argues that the Motion should be denied because there is no provision in chapter 12 that allows the

[1] The Court makes the following findings of fact and conclusions of law in accordance with Rule 7052 of the Federal Rules of Bankruptcy Procedure.

requested relief. On January 6, 2021, Helena filed the Helena Joinder, joining the Trustee's Objection.

Discussion

Under 11 U.S.C. § 1208(a),[2] a debtor "may convert a case [under chapter 12] to a case under chapter 7 of this title at any time." 11 U.S.C. § 1208(a). The statute is silent as to whether a debtor may, with a court's permission, convert a chapter 12 case to a case under chapter 11. The Fifth Circuit Court of Appeals has not addressed the issue. A split of authority has developed among those courts that have.

At the Hearing, the Debtor relied upon a line of cases that permit conversion of a chapter 12 case to a chapter 11 case under certain circumstances.[3] *See In re McLawchlin*, 511 B.R. 422 (Bankr. S.D. Tex. 2014); *In re Miller*, 177 B.R. 551 (Bankr. N.D. Ohio 1994). In those cases, the omission in the statute is viewed as an intent by Congress to leave the decision to the discretion of the court. *In re Orr*, 71 B.R. 639, 641 (Bankr. E.D.N.C. 1987). Conversion to chapter 11 is permitted if three criteria are met: the debtor filed the chapter 12 petition in good faith; the conversion would not prejudice creditors; and the conversion would be equitable. *Id.*

In the Trustee's Objection and at the Hearing, the Trustee urged the Court to follow the opposite line of cases that deny conversion of a chapter 12 case to a chapter 11 case regardless of the debtor's good faith on the ground that the legislative history of § 1208 indicates the omission of chapter 11 from the statute was intentional. *See In re Colón*, No. 16-0060 (ESL), 2016 WL

[2] Hereinafter, all references to code sections are to the Code found at title 11 of the U.S. Code.

[3] (Hr'g at 10:01:48-10:02:32 (Jan. 27, 2021)). The Hearing was not transcribed. References to the argument presented at the Hearing are cited by the timestamp of the audio recording.

3548821, at *5 (Bankr. D.P.R. June 21, 2016); *In re Christy*, 80 B.R. 361, 364 (Bankr. E.D. Pa. 1987). In the alternative, the Trustee argued that the Debtor does not satisfy any of the criteria for conversion to a chapter 11 case.

The Fifth Circuit Court of Appeals has instructed that statutory interpretation begins with "the plain language and structure of the statute." *Coserv Ltd. Liab. Corp. v. Sw. Bell Tel. Co.*, 350 F.3d 482, 486 (5th Cir. 2003). The Court thus adheres to this preeminent canon of statutory interpretation that requires it to presume that Congress "says in a statute what it means and means in a statute what it says there." *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992). When the plain meaning of a statute is unambiguous and does not lead to an absurd result, the Court need not consider or search for alternative interpretations. *United States v. Rabanal*, 508 F.3d 741, 743 (5th Cir. 2007); *see also Trout Point Lodge, Ltd. v. Handshoe*, 729 F.3d 481, 486 (5th Cir. 2013).

Looking to the language of § 1208(a), the Court concludes that the statute is clear and unambiguous: "[t]he debtor may convert a case under [chapter 12] to a case under chapter 7 of this title at any time." 11 U.S.C. § 1208(a). The Court cannot discern from the plain language of § 1208(a) any intent by Congress to allow a debtor to convert a chapter 12 case to a case under any chapter other than chapter 7. *See, e.g.*, *In re Lewis*, 607 B.R. 539, 550-51 (Bankr. S.D. Miss. 2019); *In re Nat'l Truck Funding LLC*, 589 B.R. 294, 300 (Bankr. S.D. Miss. 2018) (both looking to the plain language of the statute for congressional intent). The line of cases that have ruled in favor of conversion have implicitly used a court's equitable powers under § 105. This Court, however, follows the holding of the United States Supreme Court in *Law v. Siegel*, 571 U.S. 415 (2014), that specific statutory provisions may not be contravened in exercising those powers. *Id.* at 421. "[I]t is not for courts to alter the balance struck by the statute." *Id.* at 427.

To adopt the Debtor's reasoning would require the Court to modify § 1208(a) by adding language permitting a debtor to convert a case filed under chapter 12 to a case under chapter 11. Supplying that additional language would violate canons of statutory interpretation in addition to the plain-meaning principle. *See* ANTONIN SCALIA & BRYAN A GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 92-100 (2012) (noting that courts may not add omitted text to a perceived "gap" in a statute). Similar conversion provisions found in chapter 7 and chapter 13 specifically mention chapter 11. Section 706(a) permits a chapter 7 debtor to "convert to a case under chapter 11, 12, or 13 . . . at any time." 11 U.S.C. § 706(a). Section 1307(a) authorizes a chapter 13 debtor to "convert . . . to a case under chapter 7 . . . at any time," and § 1307(d) allows a court to "convert a case under [chapter 13] to a case under chapter 11 or 12" as long as the request is made "at any time before the confirmation of a plan." 11 U.S.C. § 1307(a), (d). If Congress had intended to permit a debtor to convert a chapter 12 case to a chapter 11 case, it would have done so in clear language. In addition, the specific inclusion in § 1208 of language permitting conversion to chapter 7 should be read as excluding conversion to any other chapter. *See* ANTONIN SCALIA & BRYAN A GARNER, *supra* at 107-111 (discussing the negative-implication canon that "specification of the one implies exclusion of the other").

Applying traditional canons of statutory interpretation, the Court finds that the Debtor is not permitted to convert his chapter 12 Bankruptcy Case to a Subchapter V case under chapter 11. Having reached this decision, it is unnecessary to address the Trustee's alternative argument that the Debtor has not acted in good faith or met the other criteria for conversion.

Conclusion

For the above and foregoing reasons, the Court finds that the plain language of § 1208 does not permit a chapter 12 debtor to convert to a chapter 11 case. Allowing such a conversion would

require the Court to supply language to § 1208 in violation of traditional canons of statutory interpretation. Accordingly, the Court finds that the Debtor may not convert the Bankruptcy Case to a case under Subchapter V, and the Motion should be denied.

IT IS, THEREFORE, ORDERED that the Trustee's Objection and the Helena Joinder are hereby sustained, and the Motion is hereby denied.

##END OF ORDER##