

United States Bankruptcy Court, Southern District of Alabama
Quarterly Bankruptcy Section Meeting, November 14, 2023

1. Herman Padgett, Section Chair
2. Judge Callaway
 - Motor vehicle titles. Rule 3004: Debtor can file proof of claim if creditor doesn't. Rule 3001(d): Requires evidence of perfection of secured claim. Going forward, the judges will consider means other than title itself if debtor cannot obtain a copy of the title as a practical matter. A borrower can obtain a copy of title records (not the title itself) using the website listed below. DOR will send a replacement title to the lienholder, however.
 - <https://recordsrequest/mvtrip.alabama.gov> (attached) (\$5 charge, VIN and driver's license info required)
 - Attorney stand-ins. The judges question the need for stand-ins for out-of-town attorneys who can participate telephonically. Stand-ins need to be prepared and have relevant client information.
 - Untreated secured or priority claims in chapter 13. Please review and address by objection to claim or amended plan well before confirmation. At the very least, please know what you are going to do at the confirmation hearing.
 - Please respond by Monday prior to Thursday confirmation if your client is OK with a minor plan payment change; the trustee's office will then recommend for confirmation and take the case off the confirmation docket.
 - Tax returns to the chapter 13 trustee – please address with your clients at case onset; don't wait 4 months until confirmation hearing.
 - Holiday party?
 - Send CLE info to Jennifer Morgan.
3. Andrea Redmon, Clerk of Court
 - December 1st rule and miscellaneous fee changes.
4. Mark Zimlich, Bankruptcy Administrator
 - Subchapter V issues (see attachments)
5. Chris Conte, Chapter 13 Trustee
 - Handling of payments received outside the normal course.
6. Consumer committee – Stephen Klimjack
7. Business committee – Danielle Mashburn-Myrick
8. Open the floor
9. Next meeting Tuesday, February 20, 2024 – jury assembly room, second floor of Federal Courthouse, with Microsoft Teams component. To be sponsored by TFS.

Records Request Portal

The federal Driver's Privacy Protection Act of 1994 (DPPA) (Title XXX of Public Law 103-322) as amended by Section 350 of Public Law 106-69 was enacted to protect the interest of individuals and their privacy by prohibiting the disclosure and use of personal information contained in motor vehicle registration and title records, except as authorized by such individuals or by law. Personal information is defined as "information that identifies a person, including an individual's social security number, name, address (but not the 5-digit zip code), telephone number, and medical or disability information. Any violation or misuse of the information obtained may result in civil action as provided under state and federal law.

The provisions of the federal Drivers Privacy Protection Act of 1994 (DPPA) apply to vehicles owned by a person(s); they DO NOT APPLY to vehicles owned by a corporation, proprietorship, partnership, limited liability partnership, association, estate, or trust.

In accordance with the Alabama Department of Revenue Records Disposition Authority, title and registration records are available for ten (10) years from the issue date.



Request Vehicle Records (/Request/New)

Click the link above to electronically request and pay for motor vehicle records.



Check Request Status (/Request/Check)

- Check the status of an existing application
- Resolve payment of an approved request
- Download the requested documentation

For questions please contact the Department of Revenue below:

Contact Us (<https://contact.revenue.alabama.gov:8443/confluence/display/ADR!>)

NOTICE FROM THE U.S. BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF ALABAMA

NEW FEES DECEMBER 1, 2023

Effective December 1, 2023 – Changes to Bankruptcy Miscellaneous Fee Schedule

At its March 2020 session the Judicial Conference approved inflationary adjustments to fees on the bankruptcy court miscellaneous fee schedules.

See below for the new fee schedule.

Description	Current Fee	Approved New Fee Effective December 1, 2023
For exemplification of any document	\$23	\$24
For reproduction of an audio recording of a court proceeding	\$32	\$34
For filing an amendment to the debtor’s schedule of creditors, lists of creditors, or mailing list...	\$32	\$34
For conducting a search of the bankruptcy court records...	\$32	\$34
For filing a document that is not related to a pending case or proceeding...	\$49	\$52
For filing the following motions... <ul style="list-style-type: none"> • To terminate, annul, modify or condition the automatic stay; • To compel the abandonment of property of the estate... • To withdraw the reference of a case or proceeding... • To sell property of the estate free and clear of liens under [11 U.S.C. § 363(f)]. 	\$188	\$199

Claims Transfer	\$26	\$28
Notice of Redaction	\$26	\$28

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF ALABAMA

In re:

«Debtor_name»

CASE NO.

Debtor.

Order Establishing Subchapter V Operating Procedures and Deadline for Filing Plan

The debtor has elected to proceed under Subchapter V of Chapter 11 of the United States Bankruptcy Code (“Subchapter V”). The court thus orders:

A. Meeting with the Bankruptcy Administrator: At the place and time below, unless otherwise agreed to by the Bankruptcy Administrator, the debtor, and its attorney must meet with the Bankruptcy Administrator, or his designee, for the debtor to verify that all provisions of this order required to be done by that date have been done and that all mechanisms are in place to assure future compliance.

DATE: «DIP_date»
TIME: «DIP_time»
PLACE: 113 St. Joseph Street, Room 520, Mobile, AL 36602

B. Operation of Business: The debtor is authorized and allowed to remain in full operation of its business and to manage the same as debtor-in-possession under 11 U.S.C. § 1184. Subject to 11 U.S.C. § 363, the debtor is authorized to pay all necessary and current expenses of running its business, including all taxes and similar charges lawfully incurred in the operation of its business and the preservation and maintenance of its properties since the filing of the petition. Subject to 11 U.S.C. § 364, the debtor is authorized to obtain goods on credit and to borrow funds in the name of the debtor in the ordinary course of business.

C. Status Report: No later than fourteen (14) days before the scheduled status conference under § 1188(a), the debtor must file with the court and serve on the Bankruptcy Administrator, trustee, and all parties in interest a status report using the form found at www.alsb.uscourts.gov/local-forms. The report must include:

- (1) a description of the nature of the debtor’s business;
- (2) a description of the reason(s) for filing the petition;
- (3) a description of the debtor’s strategy for reorganization;

- (4) an estimate of attorney's fees and other professional fees;
- (5) anticipated significant events in the case;
- (6) whether there is a need for future status conferences;
- (7) a discussion of what efforts the debtor has undertaken and will undertake to attain a consensual plan of reorganization; and
- (8) any additional information (if applicable).

D. Communication with the Subchapter V Trustee: The Bankruptcy Administrator has appointed an individual to serve as the subchapter V trustee ("trustee"). Counsel for the debtor, or the debtor if an individual debtor is self-represented, must contact the trustee within five (5) business days of the appointment of the trustee to discuss the trustee's facilitation of the development of a consensual plan of reorganization. The debtor must communicate regularly and share information with the trustee as is appropriate under the facts of the case.

E. Interim Compensation of Subchapter V Trustee: Within thirty (30) days of the petition date and continuing monthly, the debtor must remit to the trustee interim compensation in the amount of \$525.00 to be held in trust until approved by the court. The amount of interim compensation is subject to review by the court under 11 U.S.C. § 330. If the trustee receives interim compensation that exceeds the amount approved, the trustee must hold excess in trust unless the court orders otherwise. The debtor must include the trustee's interim compensation in any proposed cash collateral budget.

F. Schedules and Statement of Financial Affairs: The debtor must file all schedules and statement of financial affairs with the petition or within 14 days after entry of the order for relief unless, after notice and hearing, the court grants an extension.

G. Tax Returns, Balance Sheet, Statement of Operations, and Cash Flow Statement: Under 11 U.S.C. §§ 1187 and 1116(1), the debtor must append to the voluntary petition its most recent balance sheet, statement of operations, cash-flow statement, and federal income tax return; or a statement made under penalty of perjury that no balance sheet, statement of operations, or cash-flow statement has been prepared and no federal tax return has been filed. If the debtor has not complied with this requirement upon the filing of the voluntary petition, the debtor must file the required documents immediately upon receipt of this order.

The debtor must timely file all state and federal tax returns and other required government filings, and, subject to 11 U.S.C. § 363(c)(2), timely pay all taxes entitled to administrative expense priority except those being contested by appropriate proceedings being diligently prosecuted. By the date set out in paragraph A above, the debtor must file with the court copies of federal and state tax returns for the year before the filing of the petition. Within five (5)

business days of the filing of the federal and state tax returns which become due after the filing of the petition, the debtor must file with the court copies of said returns.

H. Proof of Insurance: The debtor must maintain insurance customary and appropriate to the industry, and must file into the record declaration pages for all insurance policies (including property damage, liability, and workers' compensation insurance) showing a general description of the property insured, the name of the insurer, name, and address of the issuing agent, the amount of coverage, type of insurance, date of expiration, policy number, and amount of premium. Proof of insurance must include a cover page with the style of the case. If workers' compensation insurance is required by law, the debtor must maintain said insurance in full force and effect.

Should any of the insurance policies listed be cancelled or not renewed before their expiration dates, the debtor must notify the Bankruptcy Administrator in writing no later than three (3) days after receipt of the notice of cancellation or failure to renew and file a copy of the notification into the record.

I. Motion Seeking Authority to Use Cash Collateral: A motion seeking authority to use cash collateral under 11 U.S.C. § 363 must comply with Bankruptcy Rule 4001(b) or (d) and include:

- (1) Identification of each secured creditor having a security interest in the cash collateral, the basis on which each secured creditor is entitled to a security interest in the cash collateral, and the amount owed to each secured creditor;
- (2) The type of adequate protection the debtor is offering each secured creditor (e.g., replacement lien, insurance);
- (3) The amount and types of cash collateral on the petition date;
- (4) The amount of cash collateral which the debtor seeks authority to use from the date of the preliminary hearing on the motion through the final hearing on the motion, if the debtor seeks the use of cash collateral sooner than fifteen (15) days after service of the motion;
- (5) A budget setting forth the projected cash flow of the debtor for the period of time for which the use of cash collateral is sought; and
- (6) Provisions defining an event of default and consequences of default.

J. Motion for Approval of Post-Petition Financing: A motion seeking approval of post-petition financing under 11 U.S.C. § 364 must comply with Bankruptcy Rule 4001(c) and (d) and include:

- (1) The identity of the proposed lender and its relationship to the parties;
- (2) The terms of the debt to be incurred ("DIP loan"), including:
 - a. The collateral in which the lender is seeking to obtain a security interest and

- whether the lender is seeking to prime existing liens;
 - b. The amount of the loan proposed to be extended by the lender;
 - c. The applicable interest rate and all other charges to be made in connection with the DIP loan; and
 - d. The payment terms and duration of the DIP loan or the proposed credit;
- (3) The amount of credit which debtor seeks authority to obtain from the date of the preliminary hearing on the motion through the final hearing on the motion if debtor seeks authority to obtain credit sooner than fifteen (15) days after service of the motion. The debtor must attach a budget with the projected cash flow of debtor for the period of time for which the credit is sought;
- (4) The efforts made to obtain financing from other lenders;
- (5) The debtor's ability to repay the DIP loan; and
- (6) Any other extraordinary terms.

K. Use, Sale, or Lease of Property; Labor Contracts: The debtor must comply with 11 U.S.C. § 363 on the use, sale, or lease of property; 11 U.S.C. § 365 regarding assuming or rejecting leases or executory agreements; and 11 U.S.C. § 1113 concerning collective bargaining agreements.

L. Inspection of Property or Records: The debtor shall permit the Bankruptcy Administrator or his designee reasonable inspection of its business premises, properties, books, and records.

M. Monthly Operating Reports: The debtor must file monthly operating reports using Form 425C as required by Bankruptcy Rule 2015(a)(6), 11 U.S.C. § 308, and this court's Local Rules.

N. Plan of Reorganization: Under 11 U.S.C. § 1189(b), the debtor must file a plan of reorganization not later than ninety (90) days after the order for relief **using the plan form found at www.alsb.uscourts.gov/local-forms**. **The debtor must provide a copy of the plan to the Bankruptcy Administrator and Trustee at least seven (7) days before it is filed with the court.**

O. Professional Persons: The debtor must file applications in accordance with 11 U.S.C. § 327 for authority to employ any professional persons including, but not limited to, attorneys, accountants, and appraisers.

P. Bankruptcy Administrator's Designee: Any reference in this order to the "Bankruptcy Administrator" includes such designee as the Administrator may select.

Q. Debtors other than Individuals: Any reference to the debtor in this order shall be construed in the appropriate gender. If the debtor is not an individual, the responsible party executing forms shall be designated the “debtor” within the meaning of Bankruptcy Rule 9001(5).

R. Amendment of this Order: After this order becomes effective, it may be amended upon proper motion for good cause shown, with a copy of that motion served on the Bankruptcy Administrator.

S. Failure to Comply: Failure to comply with this order may result in conversion or dismissal of the case, removal of debtor as debtor-in-possession, and/or monetary sanctions against debtor, and if appropriate, debtor’s counsel.

Dated: November 13, 2023

U.S. Bankruptcy Judge



Neutral

As of: November 13, 2023 2:23 PM Z

In re Excellence 2000

United States Bankruptcy Court for the Southern District of Texas, Houston Division

January 18, 2022, Decided; January 18, 2022, Filed

CASE NO: 21-33136, CHAPTER 11

Reporter

636 B.R. 475 *; 2022 Bankr. LEXIS 112 **; 2022 WL 163400

IN RE: EXCELLENCE 2000, INC., Debtor.

Core Terms

deadline, Properties, circumstances, filing deadline, ownership, hold accountable, justly, Emergency, expired, reorganization plan, prescribed, convert, no evidence

Case Summary

Overview

HOLDINGS: [1]-In a subchapter V proceeding, nothing in 11 U.S.C.S. § 1189(b) prevented the debtor from moving to extend the 90-day plan filing deadline after the deadline had expired, allowing the court discretion to consider such a motion and grant retroactive relief if merited; [2]-The debtor failed to meet its evidentiary burden under 11 U.S.C.S. § 1189(b) and the Baker factors to show that the need for the extension was attributable to circumstances for which it should not justly be held accountable, including that it had provided no evidence showing why a property ownership dispute could not be resolved before the plan deadline or why its motion was untimely despite knowing of the dispute well in advance of the deadline, and if the debtor could have filed a plan, as counsel represented, then there really was no deficiency that prevented filing of the plan prior to the deadline.

Outcome

Emergency motion denied.

LexisNexis® Headnotes

Bankruptcy

Law > ... > Reorganizations > Plans > Eligible Plan Proponents

Bankruptcy

Law > ... > Bankruptcy > Debtor Benefits & Duties > Small Business Debtors

HN1 [★] Plans, Eligible Plan Proponents

11 U.S.C.S. § 1189(b) controls when a plan must be filed in a subchapter V case and permits a court to extend the 90-day deadline but § 1189(b) does not prescribe a deadline for a request to extend the deadline. 11 U.S.C.S. § 1121 provides that in a small business case, a court may extend the plan filing deadline only if the order extending time is signed before the existing deadline has expired. § 1121(e)(3)(C) While § 1121 mandates deadlines for motions to extend, § 1189 does not.

Bankruptcy

Law > ... > Bankruptcy > Debtor Benefits & Duties > Small Business Debtors

Governments > Legislation > Interpretation

[HN2](#) **Debtor Benefits & Duties, Small Business Debtors**

11 U.S.C.S. § 1121 was enacted before 11 U.S.C.S. § 1189 and therefore, if Congress intended to impose a deadline on motions to extend under § 1189, it could have added language similar to that of § 1121. Courts generally presume that where Congress includes particular language in one section of a statute but omits it in another section of the same Act Congress acts intentionally and purposely in the disparate inclusion or exclusion. Thus, the United States Bankruptcy Court for the Southern District of Texas concludes that there is no timing requirement governing an extension request under § 1189(b).

Bankruptcy

Law > ... > Reorganizations > Plans > Eligible Plan Proponents

Bankruptcy

Law > ... > Bankruptcy > Debtor Benefits & Duties > Small Business Debtors

Bankruptcy

Law > ... > Bankruptcy > Conversion & Dismissal > Reorganizations

[HN3](#) **Plans, Eligible Plan Proponents**

The 90-day time limit for filing a subchapter V plan may be extended without the requirement of 11 U.S.C.S. § 1121(e)(3)(C) in a small business chapter 11 case that provides that the order extending the time limit must be signed before the existing deadline has expired. Accordingly, there is no requirement in subchapter V that the debtor request the extension before the 90-day limit has expired. However, a motion to extend should be filed with enough time for the court to act upon such

motion before the 90-day time limit expires because failure to file a plan by the deadline constitutes cause to dismiss or convert the case to a chapter 7.

Bankruptcy Law > Conversion & Dismissal > Individuals With Regular Income

Bankruptcy

Law > ... > Bankruptcy > Conversion & Dismissal > Reorganizations

[HN4](#) **Conversion & Dismissal, Individuals With Regular Income**

11 U.S.C.S. § 1112(b), applicable in subchapter V cases, subjects a debtor to the risks of conversion of its case to chapter 7, dismissal, or denial of plan confirmation. 11 U.S.C.S. §§ 1181, 1191 (incorporating § 1129(a)(1)). Section 1112(b) mandates that the court shall convert a case under this chapter to a case under chapter 7 or dismiss a case under this chapter, whichever is in the best interests of creditors and the estate, for cause unless the court determines that the appointment under 11 U.S.C.S. § 1104(a) of a trustee or an examiner is in the best interests of creditors and the estate. Because § 1104 does not apply in a subchapter V case, § 1181(a), the court must convert or dismiss the case under § 1112(b), upon request of the subchapter V trustee, a creditor, or any other party in interest, if the debtor does not timely file a plan as required under 11 U.S.C.S. § 1189(b). § 1112(b)(4)(E), (J).

Bankruptcy

Law > ... > Reorganizations > Plans > Eligible Plan Proponents

Bankruptcy

Law > ... > Bankruptcy > Debtor Benefits &

Duties > Small Business Debtors

HN5 Plans, Eligible Plan Proponents

Ultimately, a debtor's failure to file a motion to extend before 11 U.S.C.S. § 1189(b)'s prescribed deadline renders the debtor essentially defenseless when faced with a motion to convert or dismiss and 11 U.S.C.S. § 1112(b) binds the court to order one or the other in a subchapter V case. Nevertheless, nothing in § 1189(b) prevents a debtor from filing a motion to extend the 90-day plan filing deadline after such deadline has expired and nothing prevents the court from considering such motion after the deadline. Accordingly, the court has discretion to consider such a motion and grant retroactive relief if merited.

Bankruptcy Law > ... > Bankruptcy > Case Administration > Bankruptcy Court Powers

Evidence > Burdens of Proof > Allocation

Bankruptcy

Law > ... > Bankruptcy > Debtor Benefits & Duties > Small Business Debtors

HN6 Case Administration, Bankruptcy Court Powers

The phrase "attributable to circumstances for which the debtor should not justly be held accountable" in 11 U.S.C.S. § 1189(b) evinces a higher standard than the for cause standard set forth in Fed. R. Bankr. P. 9006(b) and 11 U.S.C.S. § 1121(d)(1). A four-factor test is used to determine whether the need for the extension is attributable to circumstances for which the debtor should not justly be held accountable. The factors considered are: (1) whether the circumstances raised by the debtor were within its control, (2) whether the debtor has made progress in drafting a plan, (3) whether the deficiencies preventing that draft from being filed are reasonably related to

the identified circumstances, and (4) whether any party-in-interest has moved to dismiss or convert the debtor's case or otherwise objected to a deadline extension in any way. Debtor, as movant, bears the burden of establishing that the need for the extension is attributable to circumstances for which the debtor should not justly be held accountable.

Bankruptcy

Law > ... > Reorganizations > Plans > Eligible Plan Proponents

Bankruptcy

Law > ... > Bankruptcy > Debtor Benefits & Duties > Small Business Debtors

HN7 Plans, Eligible Plan Proponents

11 U.S.C.S. § 1189(b) mandates that the debtor shall file a plan not later than 90 days after the order for relief under this chapter.

Counsel: **[**1]** For Excellence 2000, Inc., aka Childrens First Academy, aka Childrens First Academy of Houston, aka The Children's First Elementary Academy Dallas, Debtor: Reese W Baker, Baker & Associates, Houston, TX.

For US Trustee, U.S. Trustee: Stephen Douglas Statham, Office of US Trustee, Houston, TX.

Judges: Eduardo Rodriguez, United States Bankruptcy Judge.

Opinion by: Eduardo Rodriguez

Opinion**[*477] MEMORANDUM OPINION**

In this subchapter V proceeding, Excellence 2000, Inc. was ordered to file a plan of reorganization no later than December 27,

2021. Rather than filing a plan, however, Excellence 2000, Inc. filed an emergency motion to extend the deadline on December 28, 2021, one day after the expiration of the statutory 90-day plan filing deadline in subchapter V cases. On January 6, 2022, the Court held a hearing on the motion. For the reasons stated herein, the motion is denied.

I. JURISDICTION AND VENUE

This Court holds jurisdiction pursuant to 28 U.S.C. § 1334, which provides "the district courts shall have original and exclusive jurisdiction of all cases under title 11." Section 157 allows a district court to "refer" all bankruptcy and related cases to the bankruptcy court, wherein the latter court will appropriately preside over the matter.¹ This court [****2**] determines that pursuant to 26 U.S.C. § 157(b)(2)(A) this proceeding contains only core matters.

This Court may only hear a case in which venue is proper.² 28 U.S.C. § 1409(a) provides that "a proceeding arising under title 11 or arising in or related to a case under title 11 may be commenced in the district court in which such case is pending." Debtor's principal place of business is Midway, Madison County, Texas, which is located within the Houston Division of the Southern District of Texas and its chapter 11 case is presently pending in this Court; therefore, venue of this proceeding is proper.

II. BACKGROUND

Excellence 2000, Inc. ("*Debtor*") filed

¹ 28 U.S.C. § 157(a); see also In re: Order of Reference to Bankruptcy Judges, Gen. Order 2012-6 (S.D. Tex. May 24, 2012).

² 28 U.S.C. § 1408.

bankruptcy on September 27, 2021, electing to proceed under subchapter V of chapter 11 of the Code.³ On September 29, 2021, the Court issued its order for an [***478**] initial status conference and scheduled the hearing for November 1, 2021.⁴ Paragraph 4(b) of that order required Debtor to address "[a]ny complications the debtor anticipates in promptly proposing and confirming a plan, including any need for discovery, valuation, motion practice, claim adjudication, or adversary proceeding litigation."⁵ On October 11, 2021, Debtor filed its schedules, summary of assets, and statement of [****3**] financial affairs.⁶ On November 1, 2021, Debtor filed its Chapter 11 Subchapter V Status Report ("*Status Report*").⁷ On the same date, the Court held a hearing and ordered Debtor to, inter alia, file its plan of reorganization not later than December 27, 2021 ("*Initial Status Conference Order*").⁸ On December 28, 2021, Debtor filed its Emergency Motion for Debtor to Extend Date to File Chapter 11 Plan of Reorganization ("*Motion*").⁹ On January 6, 2022, this Court held a hearing on the Motion ("*Hearing*").

III. ANALYSIS

Section 1189 provides, "[t]he debtor shall file a plan not later than 90 days after the order for relief under this chapter, except that the court may extend the period if the need for the

³ Any reference to "Code" or "Bankruptcy Code" is a reference to the United States Bankruptcy Code, 11 U.S.C., or any section (i.e. §) thereof refers to the corresponding section in 11 U.S.C.

⁴ ECF No. 5.

⁵ *Id.* at 1.

⁶ ECF No. 12.

⁷ ECF No. 15.

⁸ ECF No. 16.

⁹ ECF No. 30.

extension is attributable to circumstances for which the debtor should not justly be held accountable."¹⁰ Having filed its petition on September 27, 2021, Debtor was required to file a plan no later than December 27, 2021.¹¹ One day later, on December 28, 2021, Debtor filed the instant Motion, requesting to extend its plan filing deadline to March 11, 2022.¹² This case presents two questions: (1) whether a motion to extend the filing deadline filed one day after the expiration of the deadline prescribed by **[**4]** § 1189 may be considered and (2) whether "the need for the extension is attributable to circumstances for which the debtor should not justly be held accountable."¹³ The Court considers each in turn.

A. Whether a motion to extend can be filed past the 90-day plan filing deadline prescribed by 11 U.S.C. § 1189

HN1^[↑] Section 1189(b) controls when a plan must be filed in a subchapter V case and permits a court to extend the 90-day deadline but § 1189(b) does not prescribe a deadline for a request to extend the deadline. That begs the question: can a motion to extend made after § 1189's prescribed deadline nevertheless be considered by the Court? The answer lies in the contrast between § 1189 and § 1121. Section 1121 provides: ". . . on request of a party in interest made within the respective periods specified in (b) and (c) of this section and after notice and a hearing, the court may for cause reduce or increase the 120-day period or the 180-day period referred

to in this section."¹⁴ Section 1121 also provides that in a small business case, a court may extend the plan filing deadline "only if . . . the order extending time is signed **[*479]** before the existing deadline has expired."¹⁵ While § 1121 mandates deadlines for motions to extend, § 1189 does not. This difference in language is significant.

HN2^[↑] Section 1121 was **[**5]** enacted before § 1189 and therefore, if Congress intended to impose a deadline on motions to extend under § 1189, it could have added language similar to that of § 1121. Courts generally presume that "where Congress includes particular language in one section of a statute but omits it in another section of the same Act . . . Congress acts intentionally and purposely in the disparate inclusion or exclusion."¹⁶ Thus, this Court concludes that there is no timing requirement governing an extension request under § 1189(b).¹⁷

A leading bankruptcy treatise echoes this finding:

HN3^[↑] The 90-day time limit for filing a subchapter V plan may be extended without the requirement of section 1121(e)(3)(C) in a small business chapter 11 case that provides that the order extending the time limit must be signed before the existing deadline has expired. Accordingly, there is no requirement in subchapter V that the debtor request the extension before the 90-day limit has

¹⁰ 11 U.S.C. § 1189(b).

¹¹ See ECF No. 16.

¹² ECF No. 30 at 3.

¹³ 11 U.S.C. § 1189(b).

¹⁴ *Id.* § 1121(d)(1) (emphasis added).

¹⁵ *Id.* § 1121(e)(3)(C) (emphasis added).

¹⁶ Duncan v. Walker, 533 U.S. 167, 173, 121 S. Ct. 2129, 150 L. Ed. 2d 251 (2001) (cleaned up).

¹⁷ See In re Online King LLC, 629 B.R. 349, 347 (Bankr. E.D.N.Y. 2021).

expired.¹⁸

As Collier notes, however, a motion to extend should be filed with enough time for the court to act upon such motion before the 90-day time limit expires because failure to file a plan by the deadline constitutes cause to dismiss or convert the case to a chapter 7.¹⁹ Here, Debtor filed **[**6]** its Motion on the 91st day on an emergency basis.²⁰ While doing so is not statutorily prohibited, it is unnecessarily risky.

HN4^(↑) Section 1112(b), applicable in subchapter V cases, subjects a debtor to the risks of conversion of its case to chapter 7, dismissal, or denial of plan confirmation.²¹ Section 1112(b) mandates that "the court shall convert a case under this chapter to a case under chapter 7 or dismiss a case under this chapter, whichever is in the best interests of creditors and the estate, for cause unless the court determines that the appointment under section 1104(a) of a trustee or an examiner is in the best interests of creditors and the estate." Because § 1104 does not apply in a subchapter V case,²² the court must convert or dismiss the case under § 1112(b), upon request of the subchapter V trustee, a creditor, or any other party in interest, if the debtor does not timely file a plan as required under § 1189(b) and, in this case, as ordered by this Court's Initial Status Conference Order.²³

HN5^(↑) Ultimately, a debtor's failure to file a motion to extend before § 1189(b)'s prescribed

deadline renders the debtor essentially defenseless when faced with a motion to convert or dismiss and § 1112(b) binds the court to order one or the other in a subchapter **[**7]** V case. Nevertheless, nothing in § 1189(b) prevents a debtor from filing a **[*480]** motion to extend the 90-day plan filing deadline after such deadline has expired and nothing prevents this Court from considering such motion after the deadline. Accordingly, this Court finds that it has discretion to consider Debtor's Motion and grant retroactive relief if merited. The Court now turns to the second part of the analysis: whether the need for the extension is attributable to circumstances for which the debtor should not justly be held accountable.²⁴

B. Whether the need for the extension is attributable to circumstances for which the debtor should not justly be held accountable

HN6^(↑) In *Baker*, this Court found that the phrase "attributable to circumstances for which the debtor should not justly be held accountable" evinces a higher standard than the "for cause" standard set forth in *Federal Rule of Bankruptcy Procedure 9006(b)* and *Bankruptcy Code § 1121(d)(1)*.²⁵ This Court then established a four-factor test to determine whether the need for the extension is attributable to circumstances for which the debtor should not justly be held accountable. The factors considered are: (1) whether the circumstances raised by the debtor were within its control, (2) whether the debtor has made progress **[**8]** in drafting a plan, (3) whether the deficiencies preventing that draft from being filed are reasonably related to the identified circumstances, and (4) whether any

¹⁸ *Collier on Bankruptcy* ¶ 1189.03 (Richard Levin & Henry J. Sommer eds., 16th ed.).

¹⁹ *Id.*; see also *In re Online King LLC*, 629 B.R. at 348.

²⁰ ECF No. 30.

²¹ See 11 U.S.C. §§ 1181, 1191 (incorporating § 1129(a)(1)).

²² *Id.* § 1181(a).

²³ *Id.* § 1112(b)(4)(E), (J).

²⁴ *Id.* § 1189(b).

²⁵ 825 B.R. 27, 33 (Bankr. S.D. Tex. 2020).

party-in-interest has moved to dismiss or convert the debtor's case or otherwise objected to a deadline extension in any way.²⁶ Debtor, as movant, bears the burden of establishing that "the need for the extension is attributable to circumstances for which the debtor should not justly be held accountable."²⁷

Debtor is engaged in a dispute with the Texas Education Agency ("TEA") regarding ownership of two properties: 7803 Little York Road, Houston, Texas 77016 and 316 E Wheatland Road, Dallas, Texas 75241 ("Properties"). Debtor's extension request rests on that dispute: "[w]hile the Debtor could file a plan, the plan will depend on ownership. If the State is not ultimately determined to own the Properties, then the plan may not and probably is not necessary."²⁸

Debtor did not offer any evidence or witness testimony at the Hearing regarding the status of the Properties. Instead, Debtor's counsel explained that "if the Court want[ed him] to file a plan, [he] could file a plan," but filing a plan may waste time of the parties [****9**] in interest if this Court later found that Debtor was not the rightful owner of the Properties because the Properties are central to Debtor's plan.²⁹ In closing, Debtor's counsel stated that Dallas County filed a \$1.1 million proof of claim for ad valorem taxes that Debtor would need to address and requested that this Court take judicial notice of that claim.³⁰

1. Whether the circumstances raised by

²⁶ *Id.* at 35.

²⁷ 11 U.S.C. § 1129(b). See also *In re Online King LLC*, 629 B.R. 340, 349 (Bankr. E.D.N.Y. 2021).

²⁸ ECF No. 30 at 4, ¶ 15.

²⁹ January 6, 2022 Hearing at 1:32:40-1:34:50.

³⁰ *Id.* at 1:32:40-1:34:50, 1:37:10-1:38:30.

Debtor were within its control

Debtor's Motion is based on the active dispute between itself and the TEA [***481**] over ownership of the Properties.³¹ An initial hearing on the ownership dispute was held on December 8, 2021, where the parties announced an agreement to continue the hearing to February 9, 2022.³² As the Motion notes, "the date to file the plan was not addressed" at that hearing. What the Motion fails to acknowledge, however, is that it was not addressed because the plan filing deadline was already set by this Court's Initial Status Conference Order and no party raised the issue.

While ownership of the Properties may not be within Debtor's control, circumstances surrounding that matter certainly are within Debtor's control. On November 1, 2021, Debtor filed its Status Report.³³ In compliance [****10**] with paragraph 4(b) of this Court's September 29, 2021 order, Debtor disclosed that the TEA's allegation that the State of Texas is the rightful owner of the Properties and Debtor's objection thereto was an anticipated complication to promptly proposing and confirming a plan.³⁴ The Status Report also noted that the schools located on the Properties were closed by the TEA in August 2016 and that Debtor has not had access since the lockout.³⁵ Thus, Debtor has known at least since August 2016, but

³¹ ECF No. 30 at 3, ¶¶ 7-8.

³² December 8, 2021 Min. Entry. See also ECF No. 25 (Debtor's Unopposed Emergency Motion to Continue Hearing on Ownership and Title).

³³ ECF No. 15.

³⁴ *Id.* at 1, ¶ 2.

³⁵ *Id.* See also ECF No. 30 at 4, ¶ 17 ("The Properties have been held by the State of Texas under a lockout since August of 2016. However, title to the Properties is still in the name of the Debtor.").

certainly since November 1, 2021, that there was an ownership dispute involving the Properties.

Debtor's Motion states that "Debtor has sent discovery request [sic] to the State of Texas and multiple banks" and that "Debtor is actively working on the ownership documents and status of the ownership of the Properties."³⁶ Debtor's counsel represented the same at the Hearing.³⁷ Yet, Debtor provided no evidence of those requests, no evidence demonstrating when those requests were made, and no evidence demonstrating why this matter was unresolvable prior to the December 27, 2021 plan filing deadline.

Moreover, by agreeing to continue the hearing to February 9, 2022, Debtor was aware at the December **[**11]** 8, 2021 hearing that the ownership dispute would not be resolved before the plan filing deadline. Nevertheless, Debtor waited until one day past the deadline to file its Motion on an emergency basis, providing no explanation for its failure to file the Motion before § 1189(b)'s deadline. Instead, Debtor's counsel represented to this Court that while working on the plan, he realized that the ownership of the Properties would determine what happens. Although that may be true, Debtor's counsel never explained why it took him until one day after the 90-day filing deadline to come to that realization when he was aware of the TEA's claim at least 56 days before the plan was due.

Because Debtor failed to provide any evidence demonstrating why the ownership dispute could not be resolved before the plan filing deadline or why its Motion was untimely filed despite knowledge of the dispute well in advance of the plan filing deadline, the Court finds that Debtor has not demonstrated that

the **[*482]** circumstances necessitating an extension were outside its control.

Accordingly, this factor weighs against granting the extension.

2. Whether Debtor has made progress in drafting a plan

Debtor's counsel represented to **[**12]** the Court that he had been working on a plan but produced no evidence of that plan at the evidentiary hearing on Debtor's Motion. Absent any evidence of the draft, this Court cannot determine whether and to what extent progress was made in drafting a plan.

Accordingly, this factor weighs against granting the Motion.

3. Whether the deficiencies preventing that draft from being filed are reasonably related to the identified circumstances

Debtor's Motion states that "a plan may not and probably is not necessary" if it is determined that the State of Texas is the rightful owner of the Properties.³⁸ Yet, Debtor's counsel represented to the Court that he had been working on a plan and could file a plan if the Court wanted him to do so.³⁹ First, this case is governed by 11 U.S.C. §§ 1181-1195. HNT **[¶]** Section 1189(b) mandates that "[t]he debtor shall file a plan not later than 90 days after the order for relief under this chapter" Thus, filing a plan before the 90-day deadline is what the Bankruptcy Code compels, not what "the Court wants" Debtor to do.

Second, if, as stated in the Motion and represented by Debtor's counsel, Debtor could

³⁶ ECF No. 30 at 3, ¶ 12.

³⁷ January 6, 2022 Hearing at 1:32:40-1:34:50.

³⁸ ECF No. 30 at 4, ¶ 15.

³⁹ January 6, 2022 Hearing at 1:32:40-1:34:50.

have filed a plan, then there really were no deficiencies that prevented filing of the plan prior [**13] to the December 27, 2021 deadline. Debtor's own admission that it could have filed a plan prevents this Court from finding that the alleged plan deficiencies related to the ownership dispute over the Properties prevented the plan from being timely filed. Regardless, Debtor offered no evidence at the Hearing of the progress made in drafting a plan or the deficiencies preventing finalization and filing of the plan as prescribed by § 1189(b).

Accordingly, this factor weighs against granting the Motion.

4. Whether any party-in-interest has moved to dismiss or convert the debtor's case or otherwise objected to a deadline extension in any way

Three other parties appeared at the January 6, 2022 hearing on Debtor's Motion: the TEA, the subchapter V trustee, and the United States Trustee.⁴⁰ The subchapter V trustee announced her support for an extension.⁴¹ The TEA initially took no position on an extension, but later noted that if the plan relies on the Properties, then the time to file should be extended.⁴² The United States Trustee also announced its support for an extension.⁴³

Accordingly, this factor weighs in favor of granting the extension.

IV. CONCLUSION

⁴⁰ *Id.* at 1:32:00-1:32:40.

⁴¹ *Id.* at 1:34:53-1:36:50.

⁴² *Id.* at 1:35:21-1:36:50.

⁴³ *Id.* at 1:36:51-1:37:10.

Although this Court finds that it has discretion [**14] to consider Debtor's late filed Motion and grant retroactive relief if merited, Debtor failed to file a properly supported Motion to Extend, resulting in only one of three of the *Baker* factors [*483] being satisfied. Therefore, Debtor has not met its evidentiary burden in demonstrating that the need for the extension is attributable to circumstances for which the debtor should not justly be held accountable.⁴⁴

Accordingly, Debtor's Emergency Motion for Debtor to Extend Date to File Chapter 11 Plan of Reorganization" is denied.⁴⁵ An order consistent with this Memorandum Opinion will be entered on the docket simultaneously herewith.

SIGNED January 18, 2022

/s/ Eduardo Rodriguez

Eduardo Rodriguez

United States Bankruptcy Judge

ORDER DENYING EMERGENCY MOTION TO EXTEND

Resolving ECF No. 30

Pending before the Court is Debtor Excellence 2000, Inc.'s Emergency Motion for Debtor to Extend Date to File Chapter 11 Plan of Reorganization¹ filed on December 28, 2021. On January 6, 2022, this Court held a hearing on the Emergency Motion. For the reasons set forth in the Court's accompanying Memorandum Opinion, it is therefore,

⁴⁴ 11 U.S.C. § 1189(b).

⁴⁵ ECF No. 30.

¹ ECF No. 30.

ORDERED that Excellence 2000, Inc.'s Emergency Motion for Debtor to Extend Date to File Chapter **[**15]** 11 Plan of Reorganization² is DENIED.

SIGNED January 18, 2022

/s/ Eduardo Rodriguez

Eduardo Rodriguez

United States Bankruptcy Judge

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² *Id.*