IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

IN RE:	§	
	§	**CASE NO: 23-20069**
FRANCO'S PAVING LLC,	§	**CHAPTER 11**
	§	**David R. Jones**
Debtor.	§	

MEMORANDUM OPINION
(Docket No. 72)

This case presents the question of how a court should view a class of creditors that fails to vote on a proposed plan in a subchapter V chapter 11 case for purposes of determining whether that plan may be confirmed under 11 U.S.C. § 1191(a). For the reasons set forth below, the Court finds that a creditor class in which no votes are cast will not be considered for purposes of 11 U.S.C. § 1129(a)(8). The objection advanced by the United States Trustee is overruled, and the Debtor's plan is confirmed under 11 U.S.C. § 1191(a).

Relevant Factual Background

The Debtor filed a subchapter V chapter 11 case on March 17, 2023. [Docket No. 1]. The Debtor filed its proposed plan on June 15, 2023. [Docket No. 48]. The plan was subsequently amended on August 8, 2023, to address certain objections raised by creditors. [Docket No. 55].

The Debtor's plan contains six classes. [Docket No. 55]. Votes were cast in Classes 1, 3 and 4. [Docket No. 63]. All creditors that cast a ballot voted in favor of the Debtor's plan. [Docket No. 63]. No votes were cast in Classes 2, 4 and 5. [Docket No. 63]. Class 2 consists of the secured claim of the U.S. Small Business Administration ("SBA"). [Docket No. 55]. Class 5 consists of the priority unsecured claim of the Internal Revenue Service ("IRS"). [Docket No. 55]. Class 6 consists of the general unsecured claim of the IRS, the deficiency claim of the SBA and other unknown unsecured claims. [Docket No. 55].

The United States Trustee filed its objection on September 8, 2023. [Docket No. 61]. In his objection, the United States Trustee objected to confirmation of the plan (i) due to outstanding Monthly Operating Reports; (ii) on grounds of feasibility; and (iii) based on a perceived ambiguity in how distributions would be made. [Docket No. 61]. These objections were either satisfied or abandoned at confirmation. In his closing argument, however, the United States Trustee asserted that the Debtor's plan could not be confirmed under 11 U.S.C. § 1191(a) due to the failure of all classes to affirmatively accept the plan under 11 U.S.C. § 1129(a)(8) as required by 11 U.S.C. § 1191(a). In support of his position, the United States Trustee relied on the decision rendered in *In re Bressler*, No. 20-31024, 2021 WL 126184 (Bankr. S.D. Tex. Jan. 13, 2021).

Jurisdiction and Authority

The Court has jurisdiction over this contested matter pursuant to 28 U.S.C. § 1334(b). This contested matter is a core proceeding under 28 U.S.C. §§ 157(b)(2)(A), (L) and (O). The Court has constitutional authority to enter a final order in this contested matter. *Stern v. Marshall*, 564 U.S. 462, 486–87 (2011). To the extent necessary, the parties have impliedly consented to the entry of a final order by the Court. *See Wellness Int'l Network, Ltd. v. Sharif*, 575 U.S. 665, 683–85 (2015) (holding that a party impliedly consents to adjudication when the party "voluntarily appear[s] to try the case" with knowledge of the need for consent and without affirmatively refusing to provide it (quoting *Roell v. Withrow*, 538 U.S. 580, 590 (2003))).

Analysis

Confirmation of a subchapter V chapter 11 plan is governed by 11 U.S.C. § 1191. Section 1191(a) provides that:

> [t]he 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.

11 U.S.C. § 1191(a). Section 1191(b) provides an exception to the requirements for confirmation under § 1191(a):

> [I]f 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, the court, on request of the debtor, shall confirm the plan notwithstanding the requirements of such paragraphs if the plan 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. § 1191(b). Confirming a plan under § 1191(b) has certain implications for the debtor. Confirmation under § 1191(b) requires additional proof regarding the effects of the plan. 11 U.S.C. § 1191(b), (c) and (d). Other provisions of Subchapter V are likewise affected by confirmation under § 1191(b). *See* 11 U.S.C. § 1186 (expansion of property of the estate); 11 U.S.C. § 1192 (timing of discharge); 11 U.S.C. § 1194(b) (designation of trustee as the default issuer of payments to creditors under a plan); 11 U.S.C. § 1193 (plan modification).

Section 1129(a)(8) provides, in part, that "[w]ith respect to each class of claims or interests . . . such class has accepted the plan." Section 1126 governs the acceptance of a plan by a creditor. The section provides that the holder of a claim "may accept or reject a plan." 11 U.S.C. § 1126(a). A "class of claims has accepted a plan if such plan has been accepted by creditors . . . that hold at least two-thirds in amount and more than one-half in number of the allowed claims of such class held by creditors . . . that have accepted or rejected such plan." 11 U.S.C. § 1126(c). Therefore, the determination of acceptance or rejection requires the following mathematical computations[1]:

[1] The legislative history of § 1126 specifies that "[a] class of creditors has accepted a plan if at least two-thirds in amount and more than one-half in number of the allowed claims of the class that are voted are cast in favor of the plan. The amount and number are computed on the basis of claims actually voted for or against the plan, not as under Chapter X on the basis of the allowed claims in the class." S. REP. NO. 95-989 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 5787, 5909. Expressed slightly differently, the two-thirds and one-half requirements are based on a denominator that equals the number or amount of claims that have actually been voted either for or against the plan, rather than the total number and amount of claims in the class.

$$\frac{A}{B} > 50.00\%$$

where A = Number of claims in the class that vote for the plan
B = Number of claims in the class that vote

and

$$\frac{C}{D} \geq 66.67\%$$

where C = Dollar amount of claims in the class that vote for the plan
D = Dollar amount of claims in the class that vote

The instant case raises the question of what occurs when no creditors in a class vote either to accept or to reject a plan. Mathematically, both computations become $\frac{0}{0} = E$ (where E is simply the quotient). Applying basic mathematical principles, one must calculate E such that $0 \times E = 0$. The obvious answer is that E can be any number and is therefore indeterminate or undefined.[2] In practical terms, the equation cannot be solved. Thus, the calculation required by § 1126(c) cannot be performed. When faced with an "unusual case, certainly not contemplated in the statute," a court should read the statute to align with congressional intent and "the statute's design." *Truvillion v. King's Daughters Hosp.*, 614 F.2d 520, 527 (5th Cir. 1980). "A court of bankruptcy is a court of equity, seeing to administer the law according to its spirit, and not merely by its letter." *Johnson v. Norris*, 190 F. 459, 463 (5th Cir. 1911) (quoting *In re Kane*, 127 F. 552, 553 (7th Cir. 1904)). The Court finds that attempting to do what the laws of mathematics prohibit is an absurd proposition and could not have been intended when Congress enacted the current version of § 1126. By implementing a denominator that includes only votes actually cast in § 1126, it logically follows that Congress presumed that at least one vote was cast.

The only circuit court to address this situation is the Tenth Circuit in *In re Ruti-Sweetwater, Inc.*, 836 F.2d 1263 (10th Cir. 1988). In *Ruti-Sweetwater*, the Court noted the change from prior law that non-voting creditors were presumed to reject to the current law that deems such creditors bound by the decision of those creditors that vote. *Id.* at 1265–66. The Court concluded that in situations where no votes were cast in a class, it was required to determine whether "a failure to vote" is either an acceptance or a rejection. *Id.* at 1266. With this self-imposed limitation on the available choices, the Court held that by failing to cast a ballot, the non-voting creditors had consented to the debtor's plan and that their inaction amounted to a deemed acceptance. *Id*. at 1267–68. The Court noted that the Bankruptcy Code requires that creditors take an active role in protecting their claims. *Id.* at 1267. The *Ruti-Sweetwater* decision has been both adopted and criticized by courts in this circuit. *See e.g., In re Cypresswood Land Partners, I*, 409 B.R. 396, 430 (Bankr. S.D. Tex. 2009) (adopting the logic of *Ruti-Sweetwater*); *In re Castaneda*, No. 09-50101, 2009 WL 3756569, at *2 (Bankr. S.D. Tex. Nov. 2, 2009) (rejecting the logic of *Ruti-Sweetwater*).

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[2] For a general discussion, see "Division by Zero," WIKIMEDIA FOUND., https://en.wikipedia.org/wiki/Division_by_zero (last modified Sept. 27, 2023, 06:12).

The Court finds the policy underlying *Ruti-Sweetwater* compelling. The Court does not, however, believe that it is limited to the binary choice between a "deemed acceptance" and a "deemed rejection." Subchapter V is intended to encourage consensual plans confirmed under § 1191(a). *In re Free Speech Sys., LLC*, 649 B.R. 729, 734 (Bankr. S.D. Tex. 2023) ("Subchapter V is a streamlined chapter 11 process and a debtor has to work from the outset to try to achieve a consensual plan."). One of the subchapter V trustee's enumerated duties under § 1183 is to "facilitate the development of a consensual plan." 11 U.S.C. § 1183(b)(7); *In re Ozcelebi*, 639 B.R. 365, 381 (Bankr. S.D. Tex. 2022) (this duty is "unique" to a subchapter V trustee). From a practical perspective, a creditor that agrees to a debtor's plan may express its consent by affirmatively voting for a plan or by simply choosing not to file an objection. The outcome should be no different, as the overarching policy of Subchapter V is satisfied. The Court finds that in making the change to § 1126 when enacting the Bankruptcy Code, Congress presumed the existence of at least one vote in each class. In a situation where no votes are cast, the Court holds that the class should not be counted for purposes of § 1129(a)(8).[3]

The Court therefore overrules the U.S. Trustee's objection and confirms the Debtor's plan pursuant to 11 U.S.C. § 1191(a).

Signed: October 05, 2023.

DAVID R. JONES
UNITED STATES BANKRUPTCY JUDGE

[3] To the extent that *In re Bressler*, No. 20-31024, 2021 WL 126184 (Bankr. S.D. Tex. Jan. 13, 2021) holds to the contrary, the Court respectfully disagrees and rejects its holding.