The below described is SIGNED.

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Dated: December 13, 2010

WILLIAM T. THURMAN
U.S. Bankruptcy Chief Judge

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

In re: **Eddie DeVon Childs and** **Glenda Jo Childs,** Debtors.	**Bankruptcy No. 09-33970** **Chapter 11**

MEMORANDUM DECISION

The matter before the Court is the Court's consideration of Debtors' Disclosure Statement Describing the Plan of Reorganization of the Debtors ("Disclosure Statement"). Hearings were held on the Disclosure Statement on November 23 and December 2, 2010. Debtors were represented by Andrew Smith; Southwest Community Credit Union ("Southwest"), by Jenny Jones and Steven Beckstrom; and the U.S. Trustee, by John Morgan. The U.S. Trustee filed an objection to the approval of the Disclosure Statement on various issues and Southwest filed an objection to confirmation of the plan that included an objection that was relevant to approval of the Disclosure Statement and was heard by the Court.

The Court has carefully reviewed and considered the parties' arguments and submissions

and has conducted its own independent research of the relevant case law. The Court issues the following Memorandum Decision, which constitutes the Court's findings of fact and conclusions of law under Federal Rule of Civil Procedure 52, made applicable to this proceeding by Federal Rules of Bankruptcy Procedure ("Rules") 9014 and 7052.

I. JURISDICTION AND VENUE

The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334. This matter is a core proceeding under 28 U.S.C. § 157(a)(2)(A) and (L). Venue is properly laid in this Court under 28 U.S.C. § 1408.

II. BACKGROUND AND FINDINGS OF FACT

This case is the consolidated case of Eddie and Glenda Childs (jointly the "Childs") and their business Lazy C Enterprises, LLC ("Lazy C") (formerly case number 09-33971). The Childs' chapter 11 petition[1] was filed on December 15, 2009, and Lazy C's chapter 11 petition was filed on December 16, 2009. The two cases were consolidated by an order entered on May 12, 2010. The Childs did not check either box on their petition to indicate that they were or were not a small business debtor, although they did file as an exhibit "Debtor's Statement Regarding Small Business Documents," which stated that Eddie Childs was "still in the process of collecting the necessary documents" and he "will have [his] attorney amend the voluntary petition with these documents as soon as possible."[2] Lazy C did check the box on its petition

[1] All chapter and section references herein are contained in Title 11 of the United States Code (2006) unless otherwise identified.

[2] (Voluntary Pet. App. 1.) The documents referenced in the "Debtor's Statement Regarding Small Business Documents" were a balance sheet, a statement of operations, a cash flow statement, and a 2008 federal income tax return. (Id.)

indicating it was a small business debtor. On February 25, 2010, the Childs filed a document entitled "Small Business Election," which stated the Childs "hereby elect to proceed in [c]hapter 11 proceedings as a small business debtor . . . ."[3]

The Childs listed $1,763,904 of debt on their schedules, principally from a mortgage on their home. Lazy C listed $455,073 of total debt on its schedules. After consolidation, the combined total debt load is $2,218,977, however, it appears some of the debt may be included on each schedule as a primary debt of Lazy C and a guaranty of the Childs. No argument or analysis has been made by any of the parties as to the total debts of the consolidated case and it would only be a guess by the Court as to such and none is made. Hereafter, "Debtors" shall refer to the consolidated case debtors.

Debtors filed a plan of reorganization on June 7, 2010, but, as represented by their counsel, it was not noticed to creditors and was never confirmed. Counsel referred to this plan as a "rogue plan" and indicated he anticipated withdrawing it. The plan filed in conjunction with the disclosure statement currently before the Court was filed on October 20, 2010. That plan has not yet been confirmed. On December 1, 2010, the Debtors filed a document entitled "Notice of Withdrawal of Small Business Election."

Eddie Childs has testified in several previous hearings before the Court involving Southwest that Debtors through their business are engaged in the purchase, remodeling, and sale of real estate. They currently own various properties in southern Utah and anticipate purchasing new real estate to renew their business in northern Utah. Based on this testimony and the schedules on file, the Court finds Debtors' primary business is owning or operating real property.

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[3] (Small Bus. Election 1:18–19.)

III. DISCUSSION

A. Small Business Debtor Status

Prior to the passage of BAPCPA[4], a debtor could elect to proceed as a small business debtor.[5] Since that time, however, the status is not voluntary, but mandatory if the debtor fits within the enumerated qualifications.[6] Those qualifications include (1) not having more than $2,190,000 in aggregate noncontingent liquidated secured and unsecured debt and (2) being engaged in commercial or business activities that are not primarily the owning or operating of real property.[7]

To indicate its qualification as a small business debtor, a debtor must state such "in the petition."[8] That designation shall govern unless a court enters an order indicating that the designation is incorrect.[9] A party in interest or the U.S. Trustee may object to the debtor's designation within 30 days of the latter of the 341 meeting or the latest amendment of the small business statement.[10] The deadline for objection is, however, subject to enlargement, even after the original time limit has passed, upon a finding by a court of excusable neglect.[11] Additionally,

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[4] Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23.

[5] See In re Roots Rents, Inc., 420 B.R. 28, 34–35 (Bankr. D. Idaho 2009).

[6] See id. at 35.

[7] See § 101(51D)(A); see also § 101(51C).

[8] See Fed. R. Bankr. P. 1020(a).

[9] Id.

[10] Fed. R. Bankr. P. 1020(b).

[11] Fed. R. Bankr. P. 9006(b)(1).

debtors may amend their petitions and other filings as a matter of course at any time prior to the closing of the case.[12] A subsequent alteration of a debtor's designation as a small business debtor must be established by a preponderance of the evidence, with the burden on the party seeking the alteration.[13]

When a debtor qualifies as a small business entity under chapter 11, certain special provisions apply. Most of those provisions are designed to make the process faster and less costly for a small business. Two such provisions are §§ 1121(e) and 1129(e). Taken together, these provisions require a plan to be filed within 300 days of the date of the order of relief[14]—in this case, the petition date.[15] Once a plan is filed, it must be confirmed within 45 days.[16] Either of these deadlines can be extended if (1) the debtor, providing notice to creditors, can show by a preponderance of the evidence that it is likely the court will confirm a plan within a reasonable time, (2) a new deadline is established at the time of extension, and (3) the order granting the extension is entered prior to the expiration of the deadline.[17]

The Court recognizes that if this case is a small business case, Debtors cannot survive in chapter 11 as Debtors have not complied with the applicable time frames. Three hundred days

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[12] Fed. R. Bankr. P. 1009(a).

[13] See In re Roots Rents, Inc., 420 B.R. 28, 40–41 (Bankr. D. Idaho 2009); In re Fisher, 2008 Bankr. LEXIS 1247, *23 (Bankr. D. Mont. Apr. 15, 2008).

[14] § 1121(e)(2).

[15] See § 301(b).

[16] § 1129(e).

[17] § 1121(e)(3).

from the petition dates was October 11 and 12, 2010.[18] The first plan was filed within that time frame, but it was not confirmed within 45 days. The current plan, having been filed on October 20, 2010, was past the deadline and cannot be considered under the small business designation. Although Debtors made an oral motion during the hearing on November 23, 2010, to extend the 300-day deadline, that motion was made outside the deadline as well and thus cannot extend the deadline.

If Debtors are not required to proceed as small business debtors in chapter 11, however, no such strict deadlines exist and thus Debtors may proceed in their case.

A threshold question, then, is whether Debtors are subject to the deadlines of small business debtors. The Court will treat Debtors' "Notice of Withdrawal of Small Business Election" as an objection to the small business designation under Rule 1020(b). During the November 23 hearing, Debtors' counsel moved the Court to extend the deadline for filing such a document. To grant Debtors' motion to extend the deadline and entertain the small business designation objection, the Court must find excusable neglect. In this case, Southwest filed a motion for relief from the automatic stay shortly after Debtors filed their first plan. The subsequent hearings on that motion lasted until well after the 45-day deadline. Those prolonged proceedings in addition to the deadlines set in that matter appear to have given Debtors the impression that they had additional time to file their plan. In addition, the consolidation of the cases apparently caused some confusion for Debtors. The Court finds these circumstances, combined with the diversity of interpretation of the applicable statutes and rules from other

[18] The difference in date is a result of the Childs filing their petition one day prior to Lazy C.

courts suggest some flexibility here. Thus the time limit under Rule 1020(b) is enlarged to permit consideration of Debtors' objection.

To decide on Debtors' objection, then, involves two separate questions: First, whether Debtors actually qualify to be small business debtors. If not, whether their designation in their petitions as small business debtors subjects them to the small business case provisions regardless. The first question still relates to this heading and will be answered in this subsection; the second does not relate to their status per se, but only the applicability of the provisions, and will be addressed in the next subsection of this Memorandum Decision.

Based on the Court's earlier finding that Debtors are engaged primarily in the owning or operating of real estate, Debtors do not qualify to be small business debtors as they do not fit the definition found in § 101(51D)(A). The Court thus concludes that Debtors' designation in their petitions and election was incorrect and should be extinguished. Debtors shall not be considered small business debtors for purposes of this case.

This determination is consistent with the rules governing amendments to pleadings.[19] Although the present matter would be a contested matter under Rule 9014, Rule 9014 does not adopt Rule 7015. However, Rule 9014 allows courts to otherwise provide for the application of rules and the Court elects to give some deference to Rule 7015 (a) and (b). Therein, courts are given guidance as to allowing amendments to pleadings "freely . . . when justice so requires"[20] and to "freely permit an amendment when doing so will aid in presenting the merits [in this case, on the issue of confirmation,] and the objecting party fails to satisfy the court that the evidence

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[19] Fed. R. Bankr. P. 7015.

[20] Fed. R. Civ. P. 15(a)(2).

would prejudice that party's action or defense on the merits."[21] With this guidance, the Court finds cause to ameliorate the impact of the Debtors' erroneous designation and finds that Debtors do not qualify as a small business within the definition of the bankruptcy code. Further, the Court finds there is little or immaterial prejudice to Southwest and that receiving evidence at the confirmation hearing will aid the Court in determining the merits of Debtors' request.

B. Applicability of Small Business Provisions

Not only have few cases addressed a change in a debtor's designation as a small business debtor, but also those that do exist disagree as to the effect of that change.[22] One camp argues that the election is only effective going forward. The other, that it is retroactive.

The three cases the Court has found that apply the change in designation only prospectively are In re Castle Horizon Real Estate, LLC,[23] In re WIN Trucking, Inc.,[24] and In re Western Steel & Metals, Inc.[25] In Castle Horizon, the court stated in a well-reasoned decision,

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[21] Fed. R. Civ. P. 7015(b)(1).

[22] Another potential option is the denial of a change of the designation based on grounds of judicial estoppel if there has been detrimental reliance on the part of creditors or extra effort by the court. See In re CCT Commc'ns, Inc., 420 B.R. 160 (Bankr. S.D.N.Y. 2009); In re Save Our Springs (S.O.S.) Alliance, Inc., 393 B.R. 452 (Bankr. W.D. Tex. 2008), aff'd, 2009 U.S. Dist. LEXIS 121177 (W.D. Tex. Sept. 29, 2009). In the present case, the Court finds—in particular based on the representations of the U.S. Trustee—that no creditors have relied to their detriment nor are they prejudiced and the Court is willing to accept its own lost time based on the Court's view that Debtors are not proceeding in bad faith in requesting this change. Thus, the Court will not apply judicial estoppel to prevent Debtors from designating themselves no longer small business debtors.

[23] 2010 Bankr. LEXIS 2900 (Bankr. E.D.N.C. Sept. 10, 2010).

[24] 236 B.R. 774 (Bankr. D. Utah 1999).

[25] 200 B.R. 873 (Bankr. S.D. Cal. 1996). In this case, however, the effect of the change in designation was not specifically argued before the court, (but apparently was simply assumed it would not be retroactive) and the court did not consider that argument. See id. at 875.

"[A] small business debtor remains as such 'unless and until the court enters an order finding that the debtor's statement is incorrect.' Rescinding the designation at this point would serve no purpose, as the Rule clearly does not make such a rescission retroactive. Under [Rule] 1020(a), the debtor was a small business debtor at the time the 300-day deadline was missed, and changing the designation at this point would not alter the result."[26] This case is distinguishable, however, as the court there also stated, relating to an argument of the debtor that the time for proceeding should be extended, "[D]ebtor has not demonstrated . . . circumstances warranting additional time for a new plan."[27] Here, though, the Court does find that circumstances exist, as listed above, that permit the Court to grant additional time in which to file a new plan.

The court in WIN Trucking stated it was "arguable that a small business election once made may be withdrawn if the withdrawal is accomplished within the time frames fixed in § 1121(e)."[28] Thus, by requiring the changing document to be filed prior to the deadlines imposed by the document which is sought to be changed, the WIN Trucking court imposed some prohibition on retroactivity, although not as completely as the Castle Horizon court. WIN Trucking is also distinguishable from the facts in the present case, however, because the debtors in that case did not properly bring the withdrawal of their election before the court.[29] They did

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This case is therefore not particularly relevant to the discussion and will not be addressed. It is mentioned only for sake of completeness.

[26] 2010 Bankr. LEXIS 2900 at *6.

[27] Id. at *4–5.

[28] 236 B.R. at 780.

[29] Id. at 780, 782 (noting debtor did not amend petition and did not obtain a final judgment from which to seek relief).

not file a motion or otherwise request an order to change the designation and the court found that the equities of the case did not encourage the court to provide relief.[30] In this case, however, the Court has found it justifiable to grant equitable relief sufficient to consider Debtors' submissions as properly bringing this issue before the Court. Further, the WIN Trucking court commented that permitting the debtor to withdraw its election would promote abuse of debtors moving in and out of small business status[31]—an issue that is no longer a concern based on the required nature of the small business designation after BAPCPA.

The courts who have given retroactivity to a change in designation are Coleman Enterprises, Inc. v. QAI, Inc. (In re Coleman Enterprises, Inc.)[32] and In re Barnes[33]. The court in Roots Rents also appears to come to a similar conclusion, but prohibits the change in designation on other grounds.[34] The Eighth Circuit BAP in Coleman declared that if a debtor is found to not qualify as a small business debtor under the definition, the election to be a small business debtor

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[30] Id. at 782.

[31] Id.

[32] 275 B.R. 533 (8th Cir. B.A.P. 2002). Despite being a pre-BAPCPA case, the reasoning is still applicable because in that case the debtor elected to be a small business debtor despite not qualifying under the statute. See id. at 537. The court determined that if a debtor did not qualify as a small business debtor, any attempt to be treated as one was a nullity. Id.

[33] 310 B.R. 209 (Bankr. D. Colo. 2004). Although also a pre-BAPCPA case, because § 105(a) was not altered by BAPCPA, the reasoning is still persuasive.

[34] In re Roots Rents, Inc., 420 B.R. 28, 39–41 (Bankr. D. Idaho 2009) (stating that the right to amend the petition any time prior to the case closing would appear to give a debtor the right to amend its designation as a small business debtor even after the deadlines have passed, but refusing to accept the amended designation as no evidence had been provided upon which the court could base its decision).

is void ab initio.[35] The Barnes court determined that § 105(a) permitted it to grant a withdrawal of the small business debtor election as none of the creditors in the case would be prejudiced by a withdrawal and the debtor did not appear to be abusing the system by requesting the withdrawal.[36] The court determined it was preferable for the debtor to "be given the opportunity to succeed or fail on his own, without finding himself in liquidation or out from under bankruptcy protection because of the inability to meet the deadlines under the more restrictive 'small business' process."[37]

The Court finds the second line of cases more persuasive as it believes cases would be better served to "succeed or fail on [their] own" and as the Court determines the other line of cases are distinguishable from the present case. In particular, considering that a debtor's status as a small business debtor is no longer an election, the Court does not find it prudent to require a debtor to be bound by rules that by definition are not applicable to that debtor. The Court's ruling is buttressed by the fact that the equities lie in favor of Debtors' objection to their small business status—were it otherwise, the applicability of judicial estoppel would appear to be a significant obstacle for Debtors to overcome. Further, as stated by the U.S. Trustee at the December 2 hearing, there is no evidence of prejudice to any party and no evidence Debtors are proceeding in bad faith.

While the Castle Horizon court accurately finds nothing in the Rules to make the change in designation retroactive, this Court finds nothing in the Rules to prohibit retroactivity. This

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[35] 275 B.R. at 535, 537 (describing such an election as a nullity).

[36] 310 B.R. at 212–13.

[37] Id. at 213.

conclusion is based particularly on the equities of this case; the guidance from Rule 7015, freely allowing amendments; and the persuasive positions set forth in Coleman and Barnes; which persuade the Court to determine that these Debtors may be excused from the strict filing deadlines imposed by the small business requirements of the Bankruptcy Code. Further, the Court is persuaded that the use of "until" in Rule 1020(a) means simply that the designation controls up to the point that a court determines the correct status of the debtor, at which point the court's determination controls, both prospectively and retroactively.

IV. CONCLUSION

Based upon the excusable neglect of Debtors, the Court will enlarge the time in which to file an objection to Debtors' designation as a small business debtor and will accept their "Notice of Withdrawal of Election" as an objection. Based upon Debtors' lack of qualifications to be considered a small business debtor, the Court finds the original designation as small business debtors incorrect and a nullity as the Coleman court found. This determination makes Debtors' election void ab initio and thus the small business provisions are inapplicable to Debtors.

Based upon the objections to the Disclosure Statement, the Court will continue the hearing on Debtors' Motion for Approval of the Disclosure Statement. Debtors will not, however, be permitted to engage in further delay without consequences. A separate order establishing dates for confirmation will be issued.

_____END OF DOCUMENT_____

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SERVICE LIST

Service of the foregoing **MEMORANDUM DECISION** will be effected through the Bankruptcy Noticing Center to each party listed below:

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