IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 18-3289

CRANBERRY GROWERS COOPERATIVE,
Debtor – Appellee,

v.

PATRICK S. LAYNG, UNITED STATES TRUSTEE FOR THE WESTERN DISTRICT OF WISCONSIN,
Trustee – Appellant.

ON APPEAL FROM THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

BRIEF OF AMICUS CURIAE COMMERCIAL FINANCE ASSOCIATION

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DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

Pursuant to Federal Rule of Appellate Procedure 26.1, Commercial Finance Association states that it is a [_________] organized under [__________].[1] It has no parent corporation and no stock owned by a publicly owned company. Commercial Finance Association represents no parties in this matter and has no pecuniary interest in its outcome. Commercial Finance Association, however, has an institutional interest in the correct interpretation of the United States Trustee fee schedule under 28 U.S.C. § 1930.

[1] NTD – Richard is providing.

I. STATEMENT OF IDENTITY, INTEREST AND AUTHORITY OF AMICUS CURIAE[2]

This *amicus curiae* brief is filed by Commercial Finance Association ("CFA") in support of the Brief filed by Debtor-Appellee Cranberry Growers Cooperative ("CranGrow").

CFA is the principal U.S. trade association for financial institutions that provide asset-based financing, factoring services, supply chain finance, equipment finance and leasing, leveraged and cash-flow loans, and asset-backed securities to commercial borrowers (collectively referred to as "asset-based lending"). Its approximately [300] members include substantially all of the major money-center banks, regional banks, and other large and small commercial lenders engaged in asset-based lending in the United States. Financing by CFA members comprises a substantial portion of the United States credit market, with aggregate outstanding loan commitments totaling hundreds of billions of dollars.[3] Much of this financing goes to the small- and medium-sized businesses that are so important to the U.S. economy, providing them with vital working capital to run their businesses, create jobs, and grow. For many of these borrowers, asset-based lending is the only form

[2] Pursuant to F.R.A.P. 29, CFA confirms that no party's counsel has authored this brief in whole or in part. CFA further confirms that no party or party's counsel contributed money that was specifically intended to fund the preparation or submission of this brief.

[3] CFA members generated nearly $300 billion of the $4 trillion secured commercial financing that took place in 2018.

of financing available to them. CFA represents its members' interests by, among other things, filing briefs in cases involving issues of significant concern to the nation's commercial lending community.[4]

1. Overview of the ABL Lending Market and Its Role in Bankruptcy

In an asset-based loan, a lender extends credit to a borrower based on the value of, and secured by, the borrower's assets, principally receivables and inventory. Often, in order to provide low-cost financing to small- and middle-market borrowers, loans are structured as revolving loans with automatic sweeps of payments by the borrower's customers of outstanding receivables to pay down the outstanding loan balance. Through this mechanism, which occurs automatically for most loans, the balance of the loan is immediately reduced as customers pay the borrower on outstanding invoices. This automatic repayment reduces the interest costs of borrowers, since the revolving loan balance is limited to a borrower's liquidity shortfall at any given moment. Compare this to a term loan, where borrowers receive a large lump sum that accrues interest on the entire loan amount as soon as it is disbursed, and revolving loans (and related factoring agreements) offer borrowers a unique, cost-efficient financing option.

As noted in the bankruptcy court's opinion, in bankruptcy cases, it is common for revolving lenders to "roll up" their prepetition debt by combining

[4] Additional information about CFA may be found at www.cfa.com.

prepetition and postpetition lending facilities into a single borrowing formula. *See* 592 B.R. 325, 330 (Bankr. W.D. Wis. 2018). As receivables are remitted to the revolving lender, the prepetition debt is reduced, creating borrowing availability under the postpetition facility. Throughout the case, incoming accounts receivable continue to reduce the prepetition debt, which is then replaced with postpetition debt advanced to the debtor for general operating expenses. The net result is a gradual replacement of the prepetition debt with postposition debt. In this way, borrowers continue to enjoy the reduced interest costs associated with revolving loans while lenders gradually get the benefit of having their claims treated as postpetition debt, which is typically immune from cramdown under 11 U.S.C. § 1129(b). *See In re Capmark Fin. Group, Inc.*, Case No. 09-13684 (CSS), Bankr. D. Del., Nov. 1, 2010, p. 73-74 (explaining the mechanics of a roll-up and noting that "actual money rarely changes hands").[5]

The availability of roll-ups play a critical role in the US debt market. Without the ability to protect prepetition debt from cramdown and otherwise negotiate adequate protection terms for prepetition debt, many lenders would be unwilling to provide postpetition financing; in fact, around 60% of postpetition loans are tied to protecting prepetition debt facilities. David L. Eades and Glenn

[5] CFA disagrees with the statement in the United States Trustee's ("UST's) brief, Trustee-Appellant Br. 7 fn.3, that roll-ups protect prepetition debt from avoidance actions or other challenges; most courts require that order authorizing roll-ups include the right of the Official Committee of Unsecured Creditors to challenge the lien validity and priority of the prepetition debt that is being rolled up. *See* Jordan Myers, *Retail DIP Financing: Market Trends & Recent Deal Terms*, ABF Journal (July/August 2018) *available at* https://www.abfjournal.com/%3Fpost_type%3Darticles%26p%3D74920.

Huether, *DIP Financing: A Review of Best Practices and Recent Developments – or – the Skinny on DIPs*, Seminar on Bankruptcy Law and Rules (March 30-April 1, 2017). The desire of lenders to obtain the protections of a roll-up in turn gives debtors leverage to negotiate favorable postpetition financing terms and, perhaps more importantly, gain access to the liquidity necessary to pursue a reorganization instead of liquidating assets. Absent the protections of a roll-up, fewer lenders would be willing to work with troubled borrowers towards reorganization, leading to increased liquidations and increased borrowing costs.

2. This Case is Important Because the Court Can Resolve the Ongoing Uncertainty Regarding the Quarterly Fees that Risks Destroying the Postpetition Financing Market.

The UST's position in this case has the potential to decimate the DIP lending market by materially increasing the cost of ABL roll-ups and other postpetition revolving loans. By claiming that the automatic application of incoming customer payments to the revolving facility are disbursements, the UST's position would result in a 1% tax on all rolled up debt. In addition, even after all prepetition debt has been converted to postpetition debt, the debtor would still be subject to an ongoing 1% tax on all receivables applied against its revolving loan facility, dramatically increasing its borrowing costs.

For context, the UST position on revolving loan payments in this case would result in a $110,000 fee increase for a single quarter. *See* Debtor-Appellee Br. 15. In Texas, a debtor with prepetition liabilities of less than $10 million incurred $200,000 in fees in a single quarter. Roger Cox, *United States Trustee Fees Increase, Dramatically Impacting Viability of Mid-Size Chapter 11 Cases*, Jul. 5, 2018, *available at* https://www.uwlaw.com/insights/united-states-trustee-fees-increasedramatically-impacting-viability-mid-size-chapter-11-cases/. It is possible that a mid-sized debtor with a low-margin, high cash flow business could be assessed a quarterly fee of $250,000 (the same amount paid by the largest debtors). It seems unlikely that result reflects Congressional intent.

This increase in costs for postpetition revolving loan facilities would not only increase the borrowing costs for debtors, but it introduces unexpected incentives in the lending market. For example, high cash flow borrowers would likely be better served by obtaining term loans to finance their postpetition operations, since there is often no requirement for automatic cash sweeps under a term loan facility (thus allowing debtors to avoid the recurring 1% fee on incoming receivables). The cost inefficiency of revolving loans created by the UST quarterly fee would result in (i) revolving lenders[6] being disadvantaged when competing for postpetition loans; (ii) term lenders being able to charge higher interest rates to

[6] It should be noted that many revolving loan and ABL lenders are unable to offer standalone term loans due to their underwriting standards and capital requirements.

debtors, essentially capturing the economic value of the UST quarterly fee (because the term loan would still be advantageous so long as it was $1 less expensive than the cost of a comparable revolving loan plus the estimated quarterly fee on the required revolving loan sweeps); and (iii) revolving lenders faced with a lessened ability to negotiate for roll-ups would increase interest rate to compensate for the increased bankruptcy risk or would pursue out-of-court liquidations instead of working with borrowers towards a consensual reorganization. In short, the application of the UST quarterly fee to ordinary course revolving loan repayments dramatically distorts the lending market. That distortion means more liquidations, lost jobs, and lower recoveries for unsecured creditors.

In addition to hopefully clarifying the definition of disbursement in a way that better ties the UST quarterly fee to the economic realities of the postpetition financing market (such that revolving loans are not arbitrarily disadvantaged), CFA hopes this Court can provide greater predictability in how the UST fee is applied: because the existing case law regarding 28 U.S.C. § 1930(a) has defined disbursements so broadly as to capture nearly any asset transfer by a debtor, it is nearly impossible to accurately budget for the quarterly fee. Given the potential size of the UST quarterly fee—$250,000 per debtor—the viability of a small or mid-sized business can turn on how the quarterly fee is calculated. Already, one major case was forced into liquidation due to the increased UST quarterly fee. *See*

Katy Stech Ferek, *Companies Grapple with Rise in Bankruptcy Fees*, Wall Street J. (Sept. 6, 2018) (detailing how PenAir's reorganization efforts were derailed by UST quarterly fees that equaled the cost of two aircraft leases). As lenders try to devise workout strategies with troubled borrowers, they need certainty over what will be considered a disbursement and thus subject to the 1% tax of the quarterly fee.

In addition to a 1% fee on revolving loan repayments, there is the possibility that intercompany transfers between affiliated debtors are subject to being taxed as disbursements. *See Michel v. HSSI, Inc. (In re HSSI Inc.)*, 193 B.R. 851 (N.D. Ill. 1996) (addressing the flow of funds through a centralized cash management system). If such transfers are disbursements subject to the UST quarterly fee, then borrowers with multiple subsidiaries or affiliated entities are greater credit risks than a borrower that operates via a single legal entity. This is particularly true because the fee cap under 28 U.S.C. § 1930(a)(6)(B) is on a per debtor basis. Although the maximum quarterly fee is $250,000 per quarter, cases with multiple jointly administered debtors can have quarterly fees in excess of $1,000,000.

Again, this issue is exacerbated by the broad definition of disbursements. Imagine a national grocery chain that has multiple operating entities operating with a centralized cash management system. Pretend Entity A has subsidiaries 1, 2, and 3, with Entity A being the borrower under a revolving line of credit. As funds are received by Entities 1, 2, and 3, funds would need to be remitted either to Entity A (for subsequent application to the revolving loan) or directly to the lender for application to the revolving loan. Such transfers would appear to be disbursements under the UST's proposed definition of that term. Then, as loans are advanced to Entity A, Entity A would then pay its expenses and transfer funds to Entities 1, 2, and 3 so that they could pay their expenses. Under the UST's definition of disbursement, the transfers to Entities 1, 2, and 3 would be subject to a 1% fee, as would the payments made by Entities 1, 2, and 3 to their vendors. Given enough cash churn in a given quarter, these entities could be subject to a $1,000,000 quarterly fee (i.e., the $250,000 maximum for each of Entities A, 1, 2, and 3). The fee could be that large in nearly every quarter of the case.

Now imagine the exact same business, except all operations are consolidated into a single legal entity. Already, the quarterly fee is reduced to, at most, $250,000 per quarter simply because the debtor is organized as a single entity. Moreover, if the debtor was financed via a term loan, disbursements would be reduced to only the ongoing payments to the debtor's vendors, eliminating the 1% fee on the automatic revolving loan sweeps. This could be particularly advantageous for the debtor if it timed the majority of its payments on prepetition debts to the same quarter it finally repaid its term loan, since any disbursements over $25,000,000 in a given quarter are essentially fee-free due to the $250,000 fee cap. *See* Jacob H.

Marshall, *Defusing the UST Tax Bomb*, The Bankruptcy Strategist (Oct. 2018) (explaining how debtors can time payments to take advantage of the $250,000 cap).

The UST may argue that these situations seem farfetched, but the cases relied on by the UST, when read together, already sets forth a definition of disbursements that would enable the UST to seek and receive fees on these transfers. Indeed, the definition of disbursements proposed by the UST in this case—"all things of value that are 'expended' or 'paid out,'" regardless of whether such expenditure is on account of a debt—appears to capture the scenario described above. *See* Trustee-Appellant Br. 25, 37. Yet this kind of arbitrary, absurd result cannot be correct.

As described below, the courts that have previously analyzed this issue have, through a series of small steps, led the definition of disbursements far from its common meaning. CFA hopes that this Court will provide a definition of disbursements that is predictable, objective, and tied to the economic realities of how debtors financing their cases.

II. STATEMENT OF THE CASE

The scope of this brief is focused on whether automatic payments to a revolving loan facility are considered "disbursements" for purposes of determining the amount of quarterly fees payable to the UST. Therefore, consistent with the narrow scope of its *amicus* brief, CFA provides a brief overview of the pertinent facts.

As noted above, debtors under chapter 11 of title 11 of the United States Code (the "Bankruptcy Code") are required to pay a quarterly fee to the UST pursuant to 28 U.S.C. § 1930(a)(6). The statute requires payments based on "disbursements" in each quarter. The key issue in this case is how "disbursements" are defined under the statute. CFA believes that it should be limited to actual, final repayments of debt. The UST appears to take the position that "disbursement" includes "all things of value that are 'expended' or 'paid out.'" Trustee-Appellant Br. 25.

The quarterly fee originated in 1986. Although the legislative history is fairly sparse, there is a general consensus that the goal of the fee was to ensure that the UST program would be self-funding. *See In re Quality Truck & Diesel Injection Service, Inc.*, 251 B.R. 682, 684-85 (S.D. W.Va. 2000). The choice of assessing the fee based on disbursements was to make the fee akin to a "user tax," with smaller debtors paying less than larger debtors that use more resources of the UST. *See Walton v. Jamko, Inc. (In re Jamko)*, 240 F.3d 1312, 1315 (11th Cir. 2001).

Originally, the quarterly fee only applied to cases until (i) confirmation of a plan; (ii) conversation of the case to a chapter 7 case; or (iii) dismissal of the case.

Id. at 1314. Due to a reduction in the number of chapter 11 cases, however, in 1996, § 1930(a)(6) was amended to delete reference to confirmation of plan.

Beyond the 1996 amendment, the general substantive terms of § 1930(a)(6) remained relatively static for several years, with occasional updates to the tiered fee structure. Prior to January 1, 2018, quarterly fees were capped at $30,000 per quarter. 28 U.S.C. § 1930(a)(6)(A). However, based on a shortfall in the United States Trustee System Fund, beginning in January 1, 2018, the fee schedule drastically changed for debtors with $1,000,000 in quarterly disbursements: the fee cap was raised to $250,000 per debtor per quarter and the calculation of the fee was changed from a tiered system to 1% of all disbursements. *See* 28 U.S.C. § 1930(a)(6)(B). As an example, a debtor with $1,999,999 in disbursements in the quarter ending December 31, 2017 would have paid $6,500; in the quarter ending March 31, 2018, that same debtor with identical disbursements would pay $19,999.99, a 307% increase. For CranGrow, the increase in the quarter ending March 31, 2018 was 454%. *See* Debtor-Appellee Br. 15 ($59,085.79 is 307% of $13,000).

Like the original act creating the quarterly fee, the legislative history regarding the fee increase is relatively sparse. However, there is one clear message contained in the legislative history: Congress believed that the increased fee would only affect "the largest [C]hapter 11 debtors (*i.e.*, excluding small businesses)". House Rep. No. 115-130 at 8 (2017).

The dramatic increase in the magnitude of the quarterly fees exacerbated an issue that had been developing in the background of bankruptcy jurisprudence: the definition of disbursement has slowly been expanded, case by case, until, despite the idea that the quarterly fee is supposed to act as a user tax imposed based on the complexity and size of a case, courts have held that evaluating the fees under § 1930(a) "by the level of 'real economic activity' finds no support in the text of the statute nor in any legislative history." *HSSI, Inc.*, 193 B.R. at 853. CFA believes the legislative history makes clear that (i) as a user tax, the quarterly fee should reflect the complexity of the underlying bankruptcy case and (ii) the increased fees were intended by Congress not to materially affect the bankruptcy process for small and mid-size debtors. Therefore, a definition of disbursements that ignores the economic realities of the bankruptcy case must be incorrect, particularly in situations where an expansive definition threatens the foundation of the small and mid-sized debtor financing market. This Court should define disbursements as actual, permanent repayments of debt with cash or cash equivalents. That definition best reflects Congressional intent, avoids absurd, arbitrary outcomes, and provide a predictable, objective standard for debtors, lenders, and the UST.

III. ARGUMENT

A. "Disbursement" Should be Limited to Real, Permanent Reductions in Debt.

This case turns on the meaning of the word "disbursement" under 28 U.S.C. § 1930. As discussed above, the majority of courts have determined that disbursements should be defined broadly, resulting in a definition of disbursements that can (and has) lead to arbitrary and absurd results. The problem with those cases is that they strayed from the basic tenets of statutory interpretation by relying on tertiary dictionary definitions to expand the definition of "disbursement" beyond its common, colloquial meaning. Given the context of the UST fee as a "user tax," *see Jamko*, 240 F.3d at 1315, the definition of disbursement is properly linked to the real economic activity of a debtor and should be defined as actual and permanent repayments of debt. *See also In re HSSI, Inc.*, 176 B.R. 809 (Bankr. N.D. Ill. 1995) ("If all that was required to determine the number of disbursements made was to count the transfers from a debtor's account, without regard to the nature of the transfer, then the rehabilitative purposes of chapter 11 would be undermined because the UST would be able to collect multiple fees for a single economic transaction, placing a greater burden on a debtor, and making reorganization more difficult.") *rev. and remanded for additional factual findings*, *HSSI*, 193 B.R. 851.

Courts interpreting statutes are to give effect to Congressional intent. *See Hartford Underwriters Ins. Co. v. Union Planter Bank, N.A.*, 530 U.S. 1, 6 (2000).

"[W]hen 'the statute's language is plain, "the sole function of the courts"'—at least where the disposition required by the text is not absurd—'"is to enforce it according to its terms."' *Id.* (quoting *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989)). The plain meaning is found by taking the "ordinary, contemporary, common meaning" of undefined words. *Perrin v. United States*, 444 U.S. 37 (1979).

While dictionaries may be useful tools to find the plain meaning of a word, they "must be used as sources of statutory meaning only with great caution." *United States v. Costello*, 666 F.3d 1040, 1043 (7th Cir. 2012) ("'But it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning.'”) (quoting *Cabell v. Markham*, 148 F.2d 737, 739 (2d Cir.1945) (L. Hand, J.)). Indeed, since "'[t]here are a wide variety of dictionaries from which to choose, and all of them usually provide several entries for each word[,]'" there is a risk that using a dictionary may disconnect a statue from the common meaning of a word. *Id.* at 1044.

Only when a statute is ambiguous or the plain meaning results in an absurd result may courts leverage other tools of statutory interpretation. *Lamie v. United States Trustee*, 540 U.S. 526, 527 (2004). At that point, courts may look at legislative history to determine the scope of a statute or definition of an ambiguous word. *Id.* Courts may also look at how the same word is used in the same act but should not assume that the same word used in different statutes and different contexts has the same meaning. *United States v. Cleveland Indians Baseball Co.*, 532 U.S. 200, 213 (2001) ("Although we generally presume that 'identical words used in different parts of the same act are intended to have the same meaning" . . . the presumption 'is not rigid,' and 'the meaning [of the same words] well may vary to meet the purposes of the law'") (internal citations omitted).

Here, the statute does not define disbursements, and the plain meaning is not readily apparent. However, courts looking at the legislative history can see two things: first, the magnitude of the fee should be linked to the complexity of the bankruptcy case and second, that the effect of the fee increase should be minimized for all but the largest of chapter 11 debtors. This legislative history, along with the general need to have predictable, objective standards for the quarterly fee, suggests that the correct definition of "disbursements" should be tied to actual repayments of debt with cash or cash equivalents, thus tying the fee to the effect a payment has on the debtor's balance sheet.

1. **The Circuit Court Cases Cited by the United States Trustee are not Persuasive**

The United States Trustee argues that, because nearly every court that has addressed this issue has defined "disbursement" expansively, this court should simply follow suit. *See* Trustee-Appellant Br. 26. However, a close review of the analysis in the circuit court cases show that they are either not on point or have very little analysis on the definition of disbursement.

The Trustee points to several circuit court cases for the proposition that "disbursements" should be interpreted broadly. *See, e.g., Tighe v. Celebrity Home Ent., Inc. (In re Celebrity Home Ent., Inc.)*, 210 F.3d 995 (9th Cir. 2000); *Cash Cow Services of Florida LLC v. United States Trustee (In re Cash Cow Services of Florida LLC)*, 296 F.3d 1261 (11th Cir. 2002); *Robiner v. Danny's Markets, Inc. (In re Danny's Markets, Inc.)*, 266 F.3d 523 (6th Cir. 2001). However, these cases either directly deal with whether the UST fee applies to post-confirmation disbursements or rely heavily on precedent dealing with that issue.

For example, *Danny's Market* dealt with the effect of the 1996 amendment that extended the UST fee to disbursements made after a chapter 11 plan was confirmed. 266 F.3d at 524. The question facing the court was not the breadth of the term "disbursement," but whether it mattered under § 1930 that the reorganized debtor, which is a legal entity separate from the bankruptcy estate, was the entity making the disbursements post-confirmation. *Id.* Based on legislative history noting that "[UST] fees will apply to all pending Chapter 11 cases with confirmed reorganization plans," the court held that the payments made by a reorganized debtor were to be treated the same as payments made by the bankruptcy estate for purposes of calculating the fee. *Id.* In fact, the court noted that the Ninth Circuit in *Tighe* and the Eleventh Circuit in *Jamko* (both cases cited by the UST) relied on this analysis and that particular passage of legislative history in deciding those cases. *Id.* Those cases dealt strictly with the 1996 amendment. Nowhere in those cases do the courts discuss what constitutes a disbursement in the context necessary to decide this case.

Similarly, the other circuit decisions related to the definition of disbursements lack persuasive analysis. In *St. Angelo v. Victoria Farms, Inc.*, the Ninth Circuit determined that payments of sale proceeds of a fully encumbered parcel of real property (such that the debtor had no equity in the asset) to secured creditors was a "disbursement." 38 F.3d 1525 (9th Cir. 1994). However, its analysis appears to be based on a dictionary definition linking "disbursements" to "payments" and then determining, based on the legislative history regarding the definition of "claim" under the Bankruptcy Reform Act of 1978, that disbursement should be defined expansively. 38 F.3d at 1534 fn.10. Perplexingly, 28 U.S.C. § 1930(a)(6) was enacted in 1986 and was not part of a bill amending Title 11, so it is unclear how the definition of "claim" under the Bankruptcy Code is relevant to analyzing 28 U.S.C. § 1930(a)(6). Despite the fact that *St. Angelo* only stands for the proposition that permanent repayments of secured creditors are included in the definition of disbursements, and even though the court's logic strays from traditional statutory tenets by relying on legislative history from an unrelated act defining an unrelated term, the case has been cited by other courts and the UST as standing for the proposition that disbursements should generally be interpreted expansively. *See Tighe*, 210 F.3d at 998; *Cash Cow*, 296 F.3d at 1263 (citing *Jamko*, *St. Angelo*, and noting several other cases that rely on those cases).

Likewise, the Eleventh Circuit's analysis in *Cash Cow* strains common sense by determining that loans made by a payday loan company in the ordinary operation of its business should be assessed fees as disbursements. 296 F.3d at 1263. The court first looks to nine (9) dictionaries to determine that disbursement could include any act where the debtor were "to distribute" or "to pay for or on account of some thing."[7] *Id.* Then, the court notes that the phrase "loan disbursement" is not an uncommon phrase. *Id.* (noting that the UST's position is that "any flow of money from the bankruptcy estate is a "'disbursement'"). Based on that, and its review of the existing case law—including summarizing *St. Angelo* as finding that disbursement includes "all funds paid out"—the court found that the making of payday loans would count as disbursements.

[7] NTD – Assumed inclusion of a "[sic]" here is not helpful.

The result in *Cash Cow* is simply not consistent with Congressional intent. The court relies too heavily on dictionary definitions and faulty precedent instead of examining the purpose of the statute: the only legislative history existing at the time *Cash Cow* was decided is that the UST fee should be instituted as a "user tax" and reflect the general complexity of the underlying bankruptcy case. Instead, the court defined disbursements so that payday loan companies—and other debtors that issue cash or cash equivalents to their customers—must pay more in quarterly UST fees than similarly situated companies that do not issue cash or cash equivalents to their customers.

In short, the circuit court cases addressing this issue are either limited to analysis of the 1996 amendment (which deals with pre- vs. post-confirmation application of the UST quarterly fee) or present analyses that do not align with the generally understood purpose of the statute. They should be persuasive authority for this Court.

2. **The Remaining Cases Cited by the UST Do Not Consider the Economic Realities of Debtor Financing**

A number of lower courts have also analyzed the scope of disbursements under 28 U.S.C. § 1930. In particular, *In re Wernerstruck*, 130 B.R. 86 (D.S.D. 1991) and *In re Fabricators*, 292 B.R. 531 (Bankr. D.N.J. 2003) both deal with repayments of revolving loan facilities. However, although those cases determined that such repayments should be subject to the UST fee, each case was decided before courts had the benefit of the 2017 legislative history and overly rely on dictionary definitions. A better reading, now that courts have the benefit of the 2017 legislative history, is to define disbursements in a way that does not create a major disruption in the existing bankruptcy practice for small and mid-sized debtors. CFA's proposed definition of permanent repayment of debts serves that goal. The UST's definition does not.

In *Wernerstruck*, the debtor had "created a revolving line of credit" and objected to repayments of the revolving loan being subject to the UST quarterly fee. 130 B.R. at 89. Relying on Black's Law Dictionary ("a disbursement is a payment") and citing *In re Ozark Beverage Co, Inc.*,[8] the court determined that the revolving nature of loan was irrelevant. *Id.*

The *Fabricators* court came to a similar conclusion by relying heavily on the analysis in *Cash Cow* and *St. Angelo* cases. 292 B.R. at 534 ("Based on the breadth of the everyday meaning of the term disbursement and the application of that definition in both *St. Angelo* and *Cash Cow* it is readily apparent that [the payments are disbursements.]").

Neither case addresses the concern that, by adding significant costs to a relatively common form of debtor financing, the UST quarterly fee disrupts the debtor-in-financing market. As noted above, by taxing automatic sweeps into a

[8] *In re Ozark Beverage Co., Inc.* was decided based on the plain meaning of disbursement

revolving loan facility, the UST quarterly fee essentially assesses a fee on each expense twice: once when accounts receivable come into the estate to create availability under the loan and another when funds are advanced to actually pay an operating expense of the estate.

This double-fee structure creates an extra cost for debtors without necessarily serving § 1930(a)'s purpose of generating revenue for the UST: debtors can avoid the additional cost by instead obtaining a term loan. So long as term lenders keep the increased interest expense of DIP term loans below the cost of available revolving loans (which include the cost of UST fees on daily revolver sweeps), term lenders can capture the estimated cost of the UST fees attributable to revolving loan sweeps. There is no statutory basis to assume that Congress intended to create an incentive for debtors to prefer term loans over revolving loans, yet that is the effect of counting revolving loan sweeps as disbursements under § 1930(a). *See* Jacob H. Marshall & Randall Klein, *How the New UST Fee Schedule is a Ticking Tax-Bomb for Middle Market Debtors*, Bankruptcy Strategist, [___].

Likewise, there is no statutory basis to suggest that Congress intended for the UST quarterly fee to discourage debtors from seeking postpetition financing or roll-ups, yet that appears to be the position taken by the UST: its brief mentions several times the that UST disapproved of CranGrow's financing structure and that the solution for CranGrow was to seek use of cash collateral instead of financing. Trustee-Appellant Br. 7 fn.3, 42; *see also* [Handbook showing official policy to oppose rollups via fees]. This position appears to deviate from the idea that a debtor-in-possession is the decision-maker regarding how to administer the estate. Moreover, relying on the use of cash collateral presents many challenges for debtors, not the least including (i) the objection of prepetition lenders and (i) the risk that any delayed payment or unexpected expense could implode a case where the debtor has no alternative source of financing.

The legislative history suggests Congress intended for the increased fee schedule to have minimal effects on small and mid-sized debtors. Given this context, it seems abusrd to think that the UST should be able to use quarterly fees to influence how debtors structure their cases or that the application of the quarterly fee should create an advantage for terms loans over revolving loans. In order to preserve the goal of basing the quarterly fee on the size and complexity of a case, disbursements should be defined in order to exclude transfers (that often are merely accounting entries) that are simply part of a financing facility's cash management system should be excluded from the fees.

3. **CFA's Proposed Definiiton Servies the Statutory Purpose While the UST's Proposed Definition is Unpredictable, Does Not Fit with the Commonly Understood Meaning of Disbursement and Results in Absurd Results.**

As noted above, the plain, common meaning of a statute is not necessarily found in dictionary definitions but rather through the context of the statute and the regular meaning of a word. *See Costello*, 666 F.3d at 1043. In the context of § 1930(a)—as statute that focuses on disbursements made in a bankruptcy case—the contextual meaning would seem to be permanent repayments of debt made with cash or cash equivalents. By tying the definition to the clear effect of a payment on a debtor's balance sheet, this definition is predictable, consistent, and serves to accurately tie the cost of UST quarterly fees to the complexity of a case.

The UST instead proposes a definition that is unwieldy and unpredictable. As best CFA can tell, the UST's position is that disbursements are "all things of value that are 'expended' or 'paid out.'" Trustee-Appellant Br. 25. These expenditures or payments do not need to be on account of debt. Trustee-Appellant Br. 37. The UST's definition would be absurd and completely divorced from the common meaning of disbursement. It is also hard to predict.

Given the breadth of the UST's proposed definition, it is not surprising that CranGrow was given incorrect guidance from the UST's office in the beginning of this case. *See* App. 307. It appears this confusion is not limited to this case. *See In re Pars Leasing, Inc.*, 217 B.R. 218 (Bankr. W.D. Tex. 1997) (determining that the initial guidance provided by the UST to the debtor on how to calculate the fee did not have an estoppel effect on the UST when it eventually took the opposite position). The fact that employees of the UST are unclear on how to apply the definition suggests that the definition is not particularly good; in any event, how are debtors and lenders supposed to accurately budget for the UST quarterly fees if the UST's guidance cannot be relied upon?

Likewise, the UST's definition would result in absurd results. Under the definition as proposed, it appears that any transfer of valuable assets would result in a disbursement. That means the delivery of inventory to customers in the ordinary course of business would be captured by the quarterly fee. In fact, this result appears to be the effect of reading *Cash Cow* (the distribution of funds to customers was a disbursement because disbursement is not limited by the fact that the payment is being made to a customer) alongside *In re WM Six Forks, LLC* (disbursement is not limited to cash or cash equivalents), 502 B.R. 88 (Bankr. E.D.N.C.). Currently, it does not appear the UST plans on seeking fees on such "disbursements," but that would be the result of adoption of UST's proposed definition and the effect of the trend of the current case law.

Would intercompany transfers be counted as disbursements, thereby placing a burden on debtors organized as multiple sister subsidiaries? What about simply depositing a check into a deposit account, which, technically speaking, pays out the cash of the estate to the bank and generates a claim of the estate against the depository bank? Under the UST's definition and existing case law, that would appear to be a disbursement. So would debt-for-equity conversions, refunds paid to customers, and issuance of new equity and notes upon the confirmation of a plan. There is simply no statutory support for such a broad definition of disbursements.

Instead, Congress has made clear that (i) quarterly fees are to reflect the complexity of the case as "user tax" and (ii) the increased fee schedule should not materially impact small and mid-sized debtors. Given that legislative history, disbursements should be defined by actual, permanent reductions to a debtor's balance sheet. This would provide a clear, objective standard and provide necessary predictability to the UST quarterly fee. It would also minimize disruption to the debtor financing market by not taxing repayments incidental to roll-ups or cash management sweeps while still ensuring that permanent repayments of the revolving facility are counted towards the quarterly fee, placing revolving loans in the same position as term loans. It also aligns with how disbursements are typically viewed, which are payments of cash that are actually sent out by an entity (thus excluding revolving loan repayments and intercompany transfers). CFA's proposed definition also fits with how disbursement is used in other sections of title 28: under 28 U.S.C. 589b(d), the Attorney General is required to create uniform reports that show all "disbursements of the estate." That form is Form B2700, which, at least in the UST Region 11, does not appear to require that trustees report repayments of revolving loans in the disbursement line. *See [________].*

Application of the CFA's definition in this case would require the debtor to determine the greatest amount of revolving loan debt that was ever outstanding at any time. Upon the repayment of the revolving loan and termination of the related loan commitments, that debt would be considered permanently repaid. To the extent that an amount was repaid but never reborrowed, that repayment would be attributable to the quarter in which the repayment occurred. For example, imagine a situation where the debtor's revolving loan balances peaked at $20MM in February 2018. On March 31, 2018, the revolving loan balance was $17MM. In the second quarter of 2018, the loan balance peaked at $18MM and was fully repaid by June 30, 2018. In that case, disbursements would be (i) $2MM in the first quarter of 2018 (since the difference between $20MM and $18MM was functionally permanently repaid in that quarter) and (ii) $18MM in the second quarter. This result accurately reflects the economic reality of the case, ensures that the debtor pays the full amount of fees attributable to its revolving facility, and is predictable.

IV. CONCLUSION

Dated: Respectfully submitted,

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1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains [______] words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

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