

1 UNITED STATES BANKRUPTCY COURT  
2 SOUTHERN DISTRICT OF CALIFORNIA  
3

4 In re ) Case No. 96-01228-B11  
5 CAMPEINOS UNIDOS, INC., )  
6 Debtor. ) ORDER ON MOTION OF  
7 ) UNITED STATES TRUSTEE  
8 ) TO COMPEL ACCOUNTING

9 Prior to January 26, 1996 a Chapter 11 debtor was obligated  
10 to make quarterly payments to the United States Trustee until the  
11 case was converted or dismissed, or a Chapter 11 plan was  
12 confirmed. That requirement was imposed by statute, 28 U.S.C.  
13 § 1930(a)(6). The statute provided a graduated quarterly fee  
14 schedule which depended on the amount of quarterly disbursements  
15 made by the Chapter 11 debtor-in-possession or trustee. The  
16 issue then was what payments were included in the word  
17 "disbursements" for purpose of calculating the quarterly fee. In  
18 St. Angelo v. Victoria Farms, Inc., 38 F.3d 1525 (9th Cir. 1994),  
19 the court concluded:

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21 [A] plain language reading of the statute  
22 shows that Congress clearly intended  
23 "disbursements" to include all payments from  
24 the bankruptcy estate. (Emphasis in  
25 original.)

26 38 F.3d at 1534. Specifically, the court found that when the  
debtor sold its farm and lien creditors were paid with the  
proceeds, those payments were disbursements within the meaning of  
§ 1930(a)(6) even if paid directly out of escrow.

1           The Congress amended § 1930, effective January 27, 1996, to  
2 provide that quarterly U.S. Trustee fees were due until the case  
3 was converted or dismissed, deleting plan confirmation as an  
4 event triggering cessation of the quarterly fee obligation. Then  
5 the issue became whether those fees were due in cases which had  
6 been confirmed prior to January 26, 1996. To resolve that issue,  
7 the Congress enacted a clarifying provision effective September  
8 30, 1996. It provided that the quarterly fees would accrue and  
9 be payable in all cases pending on or after January 26, 1996,  
10 "regardless of confirmation status of their plans."

11           The general intent underlying the amendments to § 1930 is  
12 reasonably clear--the Congress saw it as a way to generate  
13 additional revenues payable to the U.S. Treasury, with the avowed  
14 expectation of making the U.S. Trustee system more nearly self-  
15 supporting. Certainly the Congress has the authority to do as it  
16 has, but this Court joins others who have questioned the quality  
17 of the information provided to the Congress in support of its  
18 action. In our view, a number of very fundamental premises have  
19 been overlooked.

20           At the threshold is the concept of Chapter 11 bankruptcy  
21 itself. Chapter 11 was intended to afford an opportunity for  
22 financially troubled businesses, and individuals, to reorganize  
23 their financial affairs, submit a plan to their creditors  
24 providing for some measure of repayment, and allowing those  
25 creditors to vote on the plan. The voting provision was  
26 intended, at least in part, to allow creditors to negotiate for

1 the maximum repayment a debtor's operations could afford and  
2 still go forward. One of the requirements for confirmation has  
3 been that the proposed plan is feasible, meaning it is not likely  
4 to be followed by liquidation or the need for further  
5 reorganization. 11 U.S.C. § 1129(a)(11). The latest amendment,  
6 making the quarterly fee obligation applicable to all cases  
7 pending January 27, 1996 regardless of whether they had been  
8 confirmed previously, has the potential for jeopardizing  
9 previously confirmed plans the projections for which did not  
10 provide for such fees.

11 It should be remembered that almost all Chapter 11 debtors  
12 are ill in the economic sense when they file Chapter 11. Of the  
13 Chapter 11 cases which are filed, only a minority result in a  
14 confirmed plan. The rest have been converted or dismissed,  
15 usually because they were too ill to reorganize. Of the minority  
16 that do proceed to plan confirmation, the creditors have usually  
17 squeezed the debtor for as much as the debtor can afford and  
18 still go forward. Reorganized debtors are left with little if  
19 any margin.

20 The reward of confirmation of a Chapter 11 plan is that  
21 generally the debtor's pre-confirmation obligations are  
22 discharged. 11 U.S.C. § 1141(d). In place of the old  
23 obligations is the reorganized debtor's new contract with its  
24 creditors. That contract is the plan, and generally provides  
25 within its four corners, like many contracts, the creditors'  
26 rights and procedures for enforcing its terms. The creditors

1 have voted to accept the plan in most instances, and post-  
2 confirmation there is now a new entity, free to do business with  
3 the world at large. There may be some mop-up to be done on  
4 sorting out certain claims against the assets but those claims  
5 have been provided for in the plan. A cornerstone of Chapter 11  
6 is that upon confirmation a new entity emerges.

7       The imposition of post-petition quarterly fees on a  
8 reorganized debtor is purely a revenue-generating device.  
9 However, it jeopardizes the success of the very entities the  
10 Chapter 11 process was intended to benefit--the creditors receive  
11 less and the reorganized debtor pays out money to the U.S.  
12 Trustee which should go to creditors. Compounding the situation  
13 is the fact that U.S. Trustees are now demanding post-  
14 confirmation reporting and documentation by debtors to justify  
15 their post-confirmation fees. Ironically, if the U.S. Trustee is  
16 correct in its expansive definition of "disbursements", the very  
17 imposition of post-confirmation fees creates the burdensome  
18 accounting and reporting requirement just to calculate the fee  
19 which would be due. So the § 1930 amendments create not only an  
20 economic drag on a struggling reorganized debtor, but also  
21 imposes additional labor demands not related to generating  
22 revenue to pay creditors.

23       This Court is a fan of the U.S. Trustee system and believes  
24 it works quite well in this district. But there is no real role  
25 for the U.S. Trustee post-confirmation in Chapter 11 cases, and  
26 it is an additional burden on a struggling reorganized debtor to

1 have to pay fees for no benefit, and to have to prepare special  
2 documentation the creditors did not seek. It bears repeating  
3 that a confirmed Chapter 11 plan is a new contract between the  
4 debtor and its creditors, and creditors have new mechanisms for  
5 enforcement of that contract not stayed by either the automatic  
6 stay or the discharge injunction of 11 U.S.C. § 524.

7 Some courts have observed that the post-confirmation  
8 quarterly fee requirement of § 1930 is an incentive to  
9 reorganized debtors to substantially consummate the plan  
10 provisions and seek a final decree so the case can be closed.  
11 They theorize that the fee obligation ceases when the case is  
12 closed, although § 1930, as amended provides that the obligation  
13 to pay quarterly fees continues "until the case is converted or  
14 dismissed, whichever occurs first." Presumably, those courts  
15 consider closing a case and dismissing a case to be synonymous,  
16 but the Bankruptcy Code does not support such a construction.  
17 For example, 11 U.S.C. § 362(c)(2) provides that the automatic  
18 stay "continues until the earliest of --(a) the time the case is  
19 closed; (B) the time the case is dismissed; or . . . ." Another  
20 example is found in 11 U.S.C. § 1306(a), defining property of the  
21 Chapter 13 estate to include:

22 (1) all property of the kind specified  
23 in such section that the debtor acquires  
24 after the commencement of the case but before  
the case is closed, dismissed, or converted .  
. . ; and

25 (2) earnings from services performed by  
26 the debtor after the commencement of the case  
but before the case is closed, dismissed, or

1 converted to a case under chapter 7, 11, or  
2 12 of this title, whichever occurs first.

3 The point is that within the Bankruptcy Code, dismissal is not  
4 synonymous with the closing of a case. It remains to be decided  
5 whether case closing cuts off the quarterly fee obligation of  
6 § 1930. See, e.g. In re A.H. Robins Company, Inc., \_\_\_ B.R. \_\_\_,  
7 1998 WL 42210 (Bankr. E.D. Va. 1998); In re Sedro-Woolley Lumber  
8 Co., 209 B.R. 987 (Bankr. W.D. Wa. 1997).

9 The case before the Court presents facts involving the  
10 impact of § 1930 which are much more egregious than most, but  
11 which exemplify the problems the 1996 amendments have created.  
12 The reorganized debtor, CUI, is a non-profit organization, as was  
13 its predecessor. CUI operates two kinds of government-funded  
14 programs--restricted fund programs and unrestricted fund  
15 programs. The restricted fund programs are programs under which  
16 CUI is reimbursed by the public agencies according to a scheme of  
17 allowable expenses. Payment to U.S. Trustees has not been shown  
18 to be an allowable and reimbursable expense. Yet the U.S.  
19 Trustee argues the disbursements made by CUI for its ordinary and  
20 reimbursable operating expenses in its restricted funds programs  
21 must be included in calculating the quarterly fee due, even  
22 though those programs cannot by law either generate a profit or  
23 reimburse CUI for that quarterly fee. So where does the money  
24 for the quarterly fee come from if all "disbursements" are  
25 included in the calculation? They would have to come from the  
26 small pool of unrestricted money generated by the unrestricted

1 programs. But those monies are the only pool to which the  
2 unsecured creditors can look, also. Just as the restricted fund  
3 programs would not allow as a reimbursable expense a quarterly  
4 U.S. Trustee fee, they would not allow payment to pre-petition  
5 unsecured creditors as a reimbursable expense.

6 CUI advises that pre-petition its total quarterly revenues,  
7 and corresponding expense payments, were about \$1 million, much  
8 of it in the restricted fund programs. The debtor projected  
9 surplus earnings from the unrestricted programs to be  
10 approximately \$20,000 per quarter--\$80,000 per year. Section  
11 1930 requires a \$5,000 fee per quarter for each quarter in which  
12 disbursements are between one and two million dollars for the  
13 quarter. If CUI's activity continues at a pace comparable to  
14 pre-petition, CUI would owe to the U.S. Trustee \$5,000 of the  
15 \$20,000 total available funds per quarter, or 25%. That money  
16 should go to unsecured creditors, and they thought it would when  
17 they voted for the plan.

18 In this Court's view, the foregoing facts caricature the  
19 problems for debtors reorganizing under Chapter 11 caused by the  
20 1996 amendments to 28 U.S.C. § 1930(a)(6). But they only set the  
21 stage for the question which the instant motion addresses. That  
22 is, what is to be included within the scope of the term  
23 "disbursements" for purposes of calculating the quarterly fee due  
24 under § 1930(a)(6).

25 CUI has encouraged this Court to follow the decision of our  
26 colleague in In re Maruko, Inc., 206 B.R. 224 (Bankr. S.D. Cal.

1 1997). In that case, the court focused on the phrase "all  
2 payments from the bankruptcy estate" as used in the 1994 decision  
3 of the Ninth Circuit in St. Angelo v. Victoria Farms, Inc.,  
4 38 F.3d 1525, 1534. The court in Maruko reasoned that because  
5 the estate ceases to exist upon confirmation, there were no  
6 payments from the bankruptcy estate, so only the minimum fee of  
7 \$250 per quarter was due. The decision in In re SeaEscape  
8 Cruises, Ltd., 201 B.R. 321 (Bankr. S.D. Fla. 1996) supported  
9 that view.

10 The U.S. Trustee appealed the Maruko decision to the United  
11 States District Court. By order filed February 5, 1998 the  
12 district court reversed the bankruptcy court, and concluded that  
13 "disbursements" meant all payments made by the reorganized  
14 debtor, whether for operating expenses or otherwise. This Court  
15 has been advised that the district court's decision has been  
16 appealed to the Ninth Circuit, but no decision is yet on the  
17 horizon.

18 Some other courts have recognized an intermediate position.  
19 E.g. In re Betwell Oil and Gas Co., 204 B.R. 817 (Bankr. S.D.  
20 Fla. 1997). They argue that disbursements should mean only the  
21 payments made in accordance with the plan, and should not include  
22 the daily, monthly, or annual garden variety operating expenses.  
23 There is some appeal to the argument, since however it is  
24 calculated the quarterly fee will come from funds which otherwise  
25 would have been available to creditors. Since the money comes,  
26 in effect, from the creditors, the fee ought to be in relation to

1 the benefit the creditors otherwise receive, if at all, rather  
2 than on all the debtor's operating expenses. Notwithstanding its  
3 appeal, however, the Court finds no legal basis to so hold.

4 As noted at the outset, the general intent of the Congress  
5 to impose a post-confirmation quarterly tax on reorganizing  
6 Chapter 11 debtors is clear. At the time it amended  
7 § 1930(a)(6), the Congress understood that disbursements, pre-  
8 confirmation, meant all payments by the bankruptcy estate,  
9 including on secured obligations. In simply deleting plan  
10 confirmation as a terminating event, the Congress cannot be  
11 assumed to have redefined the term "disbursements" for post-  
12 confirmation purposes, and to have intended that that term would  
13 mean one thing pre-confirmation and something else post-  
14 confirmation. Accordingly, this Court joins others who have so  
15 held. See In re Corporate Business Products, Inc., 209 B.R. 951  
16 (Bankr. C.D. Cal. 1997); In re Roy Stanley, Inc., \_\_\_ B.R. \_\_\_,  
17 1997 WL 832459 (Bankr. N.D.N.Y. 1997); In re A.H. Robins Company,  
18 Inc., \_\_\_ B.R. \_\_ 1998 WL 42210 (Bankr. E.D.Va. 1998); In re  
19 Sedro-Woolley Lumber Co., Inc., 209 B.R. 987 (Bankr. W.D. Wa.  
20 1997); In re P.J. Keating Co., 205 B.R. 663 (Bankr. D. Mass.  
21 1997).

22 As should be evident, this Court believes that the 1996  
23 amendments to 28 U.S.C. § 1930(a)(6) constitute imposition of a  
24 harsh tax on reorganizing debtors and their creditors which  
25 unfairly burdens the minority of Chapter 11 debtors who obtain  
26 plan confirmation. There is no real role for the U.S. Trustee's

1 office post-confirmation and distributions to creditors should  
2 not be diminished just to fund the office's operations. But this  
3 Court cannot disregard the clear intent of the Congress. If the  
4 Congress knowingly chooses to impose on Chapter 11 reorganized  
5 debtors such an onerous burden, that is the Congress'  
6 prerogative. The courts do not make policy. This Court can only  
7 hope the Congress will reexamine this issue, and correct it.  
8 Accordingly, this Court concludes that the term "disbursements"  
9 in 28 U.S.C. § 1930(a)(6) includes all payments by the post-  
10 confirmation reorganized debtor, not just those expressly  
11 provided for in the plan, and not just the minimum of \$250  
12 because the disbursements were not made by the estate since the  
13 estate ceased to exist upon confirmation.

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21 For the foregoing reasons, the reorganized debtor must  
22 provide to the U.S. Trustee an accounting showing all  
23 disbursements by the reorganized debtor, by quarter. The motion  
24 of the United States Trustee is granted.

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IT IS SO ORDERED.

DATED: March 31, 1998

S/Peter W. Bowie  
PETER W. BOWIE, Judge  
United States Bankruptcy Court