Docket #1374 Date Filed: 03/09/2020

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:	)	CHAPTER 11
	)	
CLAYTON GENERAL, INC., f/k/a Southern Regional Health System, Inc., d/b/a/ Southern Regional Medical Center, et al.,	)	Jointly Administered Under CASE NO. 15-64266-wlh
	)	
Debtors.	)	

REPLY BRIEF IN SUPPORT OF REQUEST FOR FINAL DECREE, AND MOTION TO DETERMINE FEES PAYABLE TO THE UNITED STATES TRUSTEE PROGRAM

COMES NOW GGG Partners, LLC, in its capacity as the liquidating trustee of the Clayton General Liquidating Trust (the "**Liquidating Trustee**"), by and through its undersigned counsel, in the above-styled jointly administered case (the "**Case**"), and replies to the *United States Trustee's Response to Debtors' Application for Final Decree* [Dkt. No. 1361] (the "**Response**"), and the *United States Trustee's Supplemental Objection to Debtors' Motion to Determine Fees Payable to the United States Trustee Program* [Dkt. No. 1370] (the "**Objection**"), filed by Nancy J. Gargula, United States Trustee for Region 21 (the "**U.S. Trustee**").

JURISDICTION AND VENUE

On January 31, 2020,[1] the Liquidating Trustee filed its *Final Report of Substantial Consummation, Request for Final Decree, and Motion to Determine Fees Payable to the United States Trustee Program* [Dkt. No. 1360] (the "**Motion**").[2] Neither the Response nor the Objection contest this Court's jurisdiction to decide the Motion and the issues raised therein, nor does either

[1] The U.S. Trustee's Objection incorrectly states that the Motion was filed on January 1, 2020. *See* Objection, ¶ 32. In fact, as a review of the Court's ECF Docket for this case reveals, the Motion was filed on January 31, 2020.

[2] All capitalized terms not otherwise defined herein shall have the meanings ascribed as set forth in the Motion.

pleading contest that venue of the Motion is proper in this Court. Accordingly, the Liquidating Trustee assumes that such issues are waived.

FACTUAL BACKGROUND

With regard to fees payable to the U.S. Trustee, the dispute before the Court concerns the amendment to 28 U.S.C. § 1930(a)(6) adopted by Congress in October 2017 to increase the quarterly fees payable to the U.S. Trustee in certain Chapter 11 cases (the "**2017 Amendment**"). The Motion sets forth a chart showing the amounts Clayton General, Inc.[3] and/or the Liquidating Trustee paid on account of fees accrued during 2018 and 2019, along with a calculation of those fees pursuant to 28 U.S.C. § 1930(a)(6)(A) (the "**Old Schedule**") and a calculation of those fees pursuant to 28 U.S.C. § 1930(a)(6)(B) (the "**New Schedule**"). The dispute at issue concerns the fees payable to the U.S. Trustee for the third quarter of 2018 and the fourth quarter of 2019.[4] There appears to be no dispute that the amount at issue is $37,081.00, nor any other dispute as to the facts laid out in the Motion.

ARGUMENT

As the Motion[5] notes, and the Objection agrees, as of the date of the filing of this reply, there are currently five published decisions[6] regarding the issue of whether the New Schedule is

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[3] The chart does not show payments made on account of the other Debtors in the Case prior to the Effective Date, as the New Schedule does not implicate such Debtors. The U.S. Trustee does not argue to the contrary.

[4] In the Objection, the U.S. Trustee incorrectly states that "Clayton General had disbursements of over $1 million per quarter for the third quarter of 2018 and the ***first*** quarter of 2019." *See* Objection, ¶ 30 (emphasis added). As noted in the chart incorporated into the Motion, the quarters at issue are the third quarter of 2018 and the ***fourth*** quarter of 2019.

[5] The Liquidating Trustee notes that throughout the Objection, the U.S. Trustee refers to the Motion as the "Debtors' Motion," and refers to the "Debtors" seeking certain relief through the Motion. *See, e.g.*, Objection, Cover Page and ¶¶ 1, 2, 33, 35, 36, etc. As should have been clear from a simple review of the Motion, the Motion was filed by the Liquidating Trustee and the arguments set forth in the Motion are the Liquidating Trustee's arguments.

[6] The Liquidating Trustee notes that the issue presented in the Motion continues to be considered by bankruptcy courts across the country, and thus further decisions are likely. For example, in *In re MF Global Holdings*

constitutional on its face, or as applied to cases pending prior to the effective date of same. Three of those decisions favor the Liquidating Trustee's position, and two of them favor the U.S. Trustee's position. All of such cases are on appeal, including the two cases upon which the U.S. Trustee relies heavily in its Objection.

I. As Applied, The 2017 Amendment Exceeds Congress' Article I Powers

Although the Liquidating Trustee believes that the 2017 Amendment does not apply to this case, as discussed further below, if the 2017 Amendment does apply, it exceeds Congress' Article I powers. The New Schedule is non-uniform on its face – requiring the payment of quarterly fees in U.S. Trustee Districts while making those fees subject to the discretion of the Judicial Conference in Bankruptcy Administrator Districts. Due to the Judicial Conference's 2018 decision to impose the New Schedule in Bankruptcy Administrator Districts only to those cases filed on or after October 1, 2018, the Debtors, prior to the Effective Date of the Plan, and the Liquidating Trustee thereafter, would not have to pay the 2017 Amendment's higher fees if the Debtors had filed in Alabama or North Carolina. This case is as simple as that. The U.S. Trustee's arguments to the contrary are not persuasive.

A. The Amendment Was Enacted Pursuant to the Bankruptcy Clause

The U.S. Trustee argues that the 2017 Amendment was not enacted pursuant to the bankruptcy clause of the U.S. Constitution, which provides that Congress "shall have the power . . . [t]o establish . . . uniform Laws on the subject of Bankruptcies throughout the United States." U.S. Const. Art. I, § 8, cl. 4 (the "**Bankruptcy Clause**"), even though 28 U.S.C. § 1930 ("**Section 1930**", or "**Section 1930(a)(6)**" or "**Section 1930(a)(7)**", when in reference to the applicable

Ltd. v. Harrington, et al., Adv. Pro. No. 19-01379 (Bankr. S.D.N.Y.), the Bankruptcy Court for the Southern District of New York is scheduled to hear arguments on this very issue on March 20, 2020.

subsection) is the primary funding mechanism for the federal agency whose sole task is to oversee the bankruptcy system and ensure compliance with federal bankruptcy law.

As an initial matter, the U.S. Trustee's insistence that Section 1930 is not within Congress' powers under either the Bankruptcy Clause or the Tax Uniformity Clause (U.S. Const. Art. I, § 8, cl. 1), coupled with its failure to identify any other source of constitutional authority for the quarterly fees, is an independent basis to rule that the law is unconstitutional. As a matter of first principles, the Federal Government "is acknowledged by all to be one of enumerated powers." *McCulloch v. Maryland*, 17 U.S. 316, 405 (1819). As a result, "[e]very law enacted by Congress must be based on one or more of its powers enumerated in the Constitution." *United States v. Morrison*, 529 U.S. 598, 607 (2000). Accordingly, the Federal Government "must show that a constitutional grant of power authorizes each of its actions." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 535 (2012) ("**NFIB**"). "If no enumerated power authorizes Congress to pass a certain law, that law may not be enacted." *Id.*

When an act of Congress is challenged as having exceeded Congress enumerated powers, the Federal Government responds by identifying one or more grounds in the Constitution that support the law. *See, e.g.*, *Morrison*, 529 U.S. at 607; *NFIB*, 567 U.S. at 547-48. Here, by contrast, the U.S. Trustee argues that the most obvious sources of authority for Section 1930 in the Constitution – the Bankruptcy Clause and Tax Uniformity Clause – do not authorize Congress to enact it. And the U.S. Trustee identifies no other enumerated power that would. The U.S. Trustee's failure to identify any source of constitutional authority to enact Section 1930 is thus an independent basis for granting the Motion.

To the extent this Court concludes Congress does have power to enact a law requiring bankrupt debtors to pay fees to the agency charged with overseeing the federal bankruptcy

system, it would most likely be because the Constitution grants Congress the power pursuant to the Bankruptcy Clause. Indeed, the sponsor of the legislation that included the 2017 Amendment cited the Bankruptcy Clause as the constitutional authority for the bill, and ***all*** courts that have considered the constitutionality of either Section 1930 or the 2017 Amendment have concluded it is a law on the subject of bankruptcies.[7]

For one, contrary to the U.S. Trustee's insistence that the Bankruptcy Clause empowers Congress to enact "only if the action impairs the obligation of contracts in order to adjust a failing debtor's obligations to its creditors," Objection, ¶ 53, the text of the Bankruptcy Clause contains no such limitation. Rather, the Constitution uses expansive language, giving Congress plenary power to enact laws "on the subject of" bankruptcies. *See In re Reiman*, 20 F. Cas. 490, 494 (S.D.N.Y. 1874) (noting that bankruptcies "form a subject of extensive and complicated legislation" and that "[o]f this subject, congress has general jurisdiction"). Indeed, this power is phrased in broader terms than many of the other powers in Article I. For example, Congress' powers under the Commerce Clause would surely be more expansive if the Constitution gave Congress the power to make laws "on the subject of" interstate commerce rather than laws merely "regulat[ing]" it. U.S. Const., Art. I, § 8, cl. 2. *See also NFIB*, 567 U.S. at 555 (noting the significance of the fact that the Constitution "gave Congress the power to *regulate* commerce, not to *compel* it").

The U.S. Trustee's narrow view of Congress' authority under the Bankruptcy Clause also finds no support in case law. To the contrary, the Supreme Court has consistently described the scope of Congress' power under the Bankruptcy Clause in expansive terms. It has said that "as

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[7] *See In re Exide Techs., 2020 Bankr. LEXIS 58, *27-30 (Bankr. D. Del. Jan. 9, 2020); In re Clinton Nurseries, Inc.*, 608 B.R. 96, 111 (Bankr. D. Conn. 2019); *Life Partners*, 606 B.R. 277, 287-88 (Bankr. N.D. Tex. 2019); *St. Angelo v. Victoria Farms, Inc.*, 38 F.3d 1525, 1530 (9th Cir. 1994).

[Congress] is authorized 'to establish uniform laws on the subject of bankruptcies throughout the United States,' *it may embrace within its legislation whatever may be deemed important to a complete and effective bankrupt system*." *United States v. Fox*, 95 U.S. 670, 672 (1878) (emphasis added). It has noted that "[f]rom the beginning, the tendency of legislation and of judicial interpretation has been uniformly in the direction of progressive liberalization in respect of the operation of the bankruptcy power." *Cont'l Ill. Nat'l Bank & Tr. Co. v. Chicago, Rock Island & Pac. Ry. Co.*, 294 U.S. 648, 668 (1935). And it has made clear that, through the Bankruptcy Clause, "'all intermediate legislation, *affecting substance and form*, but tending to further the great end of the subject – distribution and discharge – are in the competency and discretion of Congress.'" *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 588 n.18 (1935) (quoting *In re Klein*, 42 U.S. 265, 281 n.18 (C.C. Mo. 1843)) (emphasis added).[8]

Indeed, the history and operation of Section 1930 and the 2017 Amendment show they were enacted pursuant to Congress' powers under the Bankruptcy Clause. Section 1930 was first adopted in 1978 as part of the law establishing the current Bankruptcy Code, which was fittingly entitled, "An act to establish a uniform Law on the Subject of Bankruptcies." Pub. L No. 95-598, Title II, § 246(a), 92 Stat. 2549, 2671 (1978). Congress added subsection (a)(6) to Section 1930 in a 1986 amendment to the Bankruptcy Code and related laws contained in Title 28. *See* Pub. L. No. 99-554, Title I, § 117, 100 Stat. 3088, 3095 (1986). And the 2017

[8] The U.S. Trustee's narrow view of the Bankruptcy Clause is rooted in quotes from *Ry. Labor Executives' Ass'n v. Gibbons*, 455 U.S. 457 (1982), taken out of context. *Gibbons* does not state that the Bankruptcy Clause extends only to substantive laws affecting the debtor-creditor relationship. *See Gibbons*, 455 U.S. at 465-66. As the cases quoted in *Gibbons* make clear, "[t]he subject of bankruptcies is *nothing less than* 'the subject of the relations between an insolvent or nonpaying or fraudulent debtor, and his creditors, extending to his and their relief.'" *Wright v. Union Cent. Life Ins. Co.*, 304 U.S. 502, 513-14 (1938) (*quoting Reiman*, 20 F. Cas. at 490) (emphasis added). Thus, as the Court in *Clinton Nurseries* observed, "[w]hat is evident, then, is that the Bankruptcy Clause does pertain to the debtor-creditor relationship, but at the very least." *Clinton Nurseries*, 608 B.R. at 112. *See also, Exide*, 2020 Bankr. LEXIS at *29 ("The cases cited by the UST do not support such a constricted definition. On the contrary, these cases describe the Bankruptcy Clause's breadth and counsel against a narrow approach.")

Amendment's sponsor informed Congress that the bill containing the 2017 Amendment – the Bankruptcy Judgeship Act – was being enacted pursuant to the Bankruptcy Clause. *See* Excerpt of Congressional Record Volume 163, Number 74 (Monday, May 1, 2017) at H3003, containing Constitutional Authority Statement for H.R. 2266, available at https://www.congress.gov/115/crec/2017/05/01/CREC-2017-05-01.pdf ("By Mr. CONYERS: H.R. 2266. Congress has the power to enact this legislation pursuant to the following: Article I, Section 8, Clause 4.")

Nor are the quarterly fees merely "a funding mechanism for the administration of bankruptcy matters, including paying for additional bankruptcy judgeships . . . ." Objection, ¶ 54. For one, the fees are not supporting just any "government functions" – they support the activities of a federal agency whose sole responsibilities relate to the administration of the bankruptcy system and enforcement of federal bankruptcy law. *See* 11 U.S.C. § 586; *St. Angelo v. Victoria Farms, Inc.*, 38 F.3d 1525, 1530 (9th Cir. 1994) (holding Section 1930 was a law on the subject of bankruptcies because of the important role played by the U.S. Trustee in bankruptcy cases).

Moreover, the fees themselves have a significant impact on the bankruptcy estate. They are charged against the estate as administrative expenses, are paid before the claims of most creditors, and must be included within a Chapter 11 plan to make it confirmable, thereby directly reducing the recovery of other creditors. *See* 11 U.S.C. §§ 507(a)(2); 1129(a).[9] Given all this, "[i]t, therefore, seems disingenuous for the UST – an office that only exists to administer bankruptcy cases – to claim that 28 U.S.C. § 1930(a)(6) and (7) are not 'Laws on the subject of

[9] The U.S. Trustee's attempt to compare the quarterly fees to local court rules and Bankruptcy Appellate Panels is inapposite. *See* Objection, ¶¶ 59-60. The ability to enact local rules is a traditional power inherent in the administration of the courts. And no uniformity problems are posed by BAPs because participation is only by consent. *See* 28 U.S.C. § 158(c)(1) (any party may elect to have an appeal heard by the District Court).

Bankruptcies.' Given the Supreme Court's stated liberal interpretation of the Bankruptcy Clause and Congress' explicit invocation of the Bankruptcy Clause in passing 28 U.S.C. § 1930, the quarterly fee system, and creating the UST Program, . . . 28 U.S.C. § 1930, particularly subsections (a)(6) and (7), and as amended by the [Amendment], are laws on the subject of bankruptcies." *Clinton Nurseries*, 608 B.R. at 113. *See also Exide*, 2020 Bankr. LEXIS at *30.

Instead of accepting the ***unanimous*** weight of authority that the 2017 Amendment was enacted pursuant to the Bankruptcy Clause, the U.S. Trustee argues that every single court which has considered the issue was wrong. Rather, the U.S. Trustee falls back to the Necessary and Proper Clause, or "the last, best hope of those who defend ultra vires congressional action, the Necessary and Proper Clause." *Printz v. United States*, 521 U.S. 898, 923 (1997). The Necessary and Proper Clause does not override the uniformity requirement of the Bankruptcy Clause, for two reasons. First, the Necessary and Proper Clause is not a font of new and general lawmaking authority. "The power to 'make all Laws which shall be necessary and proper for carrying into Execution' the powers enumerated in the Constitution, Art. I, § 8, cl. 18, vests Congress with authority to enact provisions 'incidental to the enumerated power, and conducive to its beneficial exercise.'" *NFIB*, 567 U.S. at 559 (quoting *McCulloch*, 17 U.S. at 418). "Although the Clause gives Congress authority to 'legislate on that vast mass of incidental powers which must be involved in the constitution,' it does not license the exercise of any 'great substantive and independent powers' beyond those specifically enumerated." *Id.* (quoting *McCulloch*, 17 U.S. at 411, 421). Rather, the Clause is "merely a declaration, for the removal of all uncertainty, that the means of carrying into execution those powers otherwise granted are included in the grant.'" *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234, 247 (1960) (quoting VI Writings of James Madison 383 (G. Hunt ed. 1906)). The Necessary and Proper Clause simply makes

explicit what was already implicit in the Constitution – Congress has the power to do the things necessary to carry out its enumerated powers that are not otherwise inconsistent with the Constitution. *See McCulloch*, 17 U.S. at 421.

The Necessary and Proper Clause thus permits Congress to enact laws that are "derivative of, and in service to, a granted power." *NFIB*, 567 U.S. at 560. Here, it is clear the relevant enumerated power is Congress' authority to enact "uniform Laws on the subject of Bankruptcies." U.S. Const., Art. I, § 8, cl. 4. But it would make little sense if a general grant of incidental lawmaking authority could override specific limitations in the enumerated powers of the Constitution. By analogy, Section 105(a) of the Bankruptcy Code uses language almost identical to the Necessary and Proper Clause to give this Court the incidental power to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C. §105(a) (emphasis added). Yet this incidental power clearly does not permit the Court to take action directly contrary to the more specific provisions of the Bankruptcy Code. *See Law v. Siegel*, 571 U.S. 415, 421 (2014). "That is simply an application of the axiom that a statute's general permission to take actions of a certain type must yield to a specific prohibition found elsewhere." *Id.* The same axiom applies to the Constitution. *See Printz*, 521 U.S. at 923-24 (laws violating separation of powers are not "proper" for carrying into execution Congress' enumerated powers); *Gibbons*, 455 U.S. at 468-69 (rejecting argument that "Congress had the power to enact nonuniform bankruptcy laws pursuant to the Commerce Clause" because this "would eradicate from the Constitution a limitation on the power of Congress to enact bankruptcy laws").

Second, even if Congress could use the Necessary and Proper Clause to enact non-uniform bankruptcy laws in some circumstances, that would at least require some effort on the

part of Congress to explain why the non-uniformity is "necessary." *See, e.g., United States v. Lopez*, 514 U.S. 549, 563 (1995) (relying on lack of congressional findings showing a link to interstate commerce when holding that Commerce Clause did not empower Congress to enact law); *Morrison*, 529 U.S. at 614-15 (striking down law because findings on connection to interstate commerce were too attenuated). Here, however, Congress has not explained why it is necessary to excuse the Bankruptcy Administrator Districts from the U.S. Trustee Program or why it is necessary to charge differential fees to similarly situated debtors depending on whether they filed their Chapter 11 case in a Bankruptcy Administrator District or a U.S. Trustee District. "[W]hen Congress provides no justification for enacting a non-uniform law, its decision can only be considered to be irrational and arbitrary." *St. Angelo*, 38 F.3d at 1532. "In the absence of any evidence that Congress was addressing a geographically isolated problem or some other legitimate concern, . . . its decision to ignore the Uniformity Clause in enacting [Section 1930(a)(6)] renders that section unconstitutional." *Id.*

B. Section 1930 Is Non-Uniform on Its Face

The U.S. Trustee next contends that even if Section 1930 is subject to the uniformity requirement of the Bankruptcy Clause, it nonetheless survives because the fees imposed are uniform. According to the U.S. Trustee, "Section 1930(a)(6) applies throughout all Program districts, imposing the same fee schedule in every district," while "Section 1930(a)(7), in turn, ***mandates*** that quarterly fees in bankruptcy administrator districts 'be equal to those imposed by [section 1930(a)(6).]'" Objection, ¶ 63. (emphasis added). Indeed, throughout its Objection, the U.S. Trustee often avoids quoting the actual statutory language of Section 1930(a)(7), instead variously characterizing that section as "mandating" or "requiring" the Judicial Conference to impose the quarterly fees of Section 1930(a)(6). *See, e.g.*, Objection, ¶¶ 13, 38, 46, 63, 66, 87 ,

(requiring); 63, 64, 98 (mandating). The problem for the U.S. Trustee, however, is that this is not what the law says.

First, the plain text of Section 1930(a)(7) reads as permissive, not mandatory. That Section provides: "In districts that are not part of a United States trustee region as defined in section 581 of this title, the Judicial Conference of the United States ***may*** require the debtor in a case under chapter 11 of title 11 to pay fees equal to those imposed by paragraph (6) of this subsection." 28 U.S.C. § 1930(a)(7) (emphasis added). The word "may" "clearly connotes discretion." *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 136 (2005). Indeed, in a recent case involving the 2017 Amendment, the Seventh Circuit (while declining to reach the issue in this case) observed the obvious – that "[t]he plain language of § 1930(a)(7) is permissive, not mandatory, allowing the Judicial Conference to implement fee increases commensurate with § 1930(a)(6) as it deems appropriate." *Cranberry Growers Coop. v. Layng*, 930 F.3d 844, 856 n.51 (7th Cir. 2019).

Moreover, the permissive nature of Section 1930(a)(7) is made clearer when compared with the language Congress used elsewhere in Section 1930. For example, in the next sentence of Section 1930(a)(7) itself, Congress provided that the fees collected "***shall*** be deposited as offsetting receipts to the fund established under section 1931 of this title and ***shall*** remain available until expended." 28 U.S.C. § 1930(a)(7) (emphasis added). Similarly, when mandating the payment of quarterly fees in U.S. Trustee Districts in Section 1930(a)(6), Congress used unmistakably mandatory language absent from Section 1930(a)(7). Section 1930(a)(6) provides that "a quarterly fee ***shall*** be paid to the United States trustee . . . for each quarter (including any fraction thereof) until the case is converted or dismissed, whichever occurs first" (emphasis added). And even in the one instance where Congress used "may" in a

manner that constrains discretion, it included the critical word "only" to make clear that the normal discretion afforded by the word "may" had been limited: "The clerk of the court may collect ***only*** the fees prescribed under this section." 28 U.S.C. § 1930(e) (emphasis added). "[W]hen the same [statute] uses both 'may' and 'shall,' the normal inference is that each is used in its usual sense – the one act being permissive, the other mandatory." *Anderson v. Yungkau*, 329 U.S. 482, 485 (1947).

Although the U.S. Trustee claims that "[u]se of the word 'may' does not invariably confer discretion," Objection, ¶ 67, and cites a couple of cases for that general proposition, it does not attempt to compare the language in such cases to the language of Section 1930(a)(7). Clearly, the general rule is to the contrary. The Supreme Court has repeatedly stated that "[t]he word 'may' customarily connotes discretion[,] [and] [t]his connotation is particularly apt where . . . 'may' is used in contraposition to the word 'shall.'" *Jama v. I.C.E.*, 543 U.S. 335, 346 (2005) (citation omitted)); *see also Anderson*, 329 U.S. at 485; *Lopez v. Davis*, 531 U.S. 230, 241 (2001) ("Congress' use of the permissive 'may' . . . contrasts with the legislators' use of a mandatory 'shall' in the very same section."); *Murphy v. Smith*, 138 S. Ct. 784, 787-88 (2018) ("[T]he word 'shall' usually creates a mandate, not a liberty," and "[i]f Congress had wished to afford the judge more discretion in this area, it could have easily substituted 'may' for 'shall.'").

The fact is, had Congress intended to ***require*** the Judicial Conference to impose quarterly fees, it could have done so in several ways. It could have used mandatory words like "shall" or "must" as it did in Section 1930(a)(6), or it could have included the word "only" to limit the discretion afforded through the word "may," as it did in Section 1930(e). Congress employed each of these devices in other parts of Section 1930. That it did not do so in Section 1930(a)(7) can only be regarded as intentional. *See Mary Jo C. v. New York State & Local Ret. Sys.*, 707

F.3d 144, 156 (2d Cir. 2013) ("[W]here, as here, Congress uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended."). The Supreme Court has "stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says." *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253-54 (1992). Consistent with the plain language, Section 1930(a)(7) grants the Judicial Conference the authority to impose quarterly fees, but does not mandate that it do so.

Both the legislative history of Section 1930(a)(7) and the consistent understanding of the Judicial Conference confirm that Section 1930(a)(7) authorizes, but does not require, the Judicial Conference to impose quarterly fees. The text that became Section 1930(a)(7) was proposed to Congress by the Judicial Conference following its decision at its March 1996 meeting to take action on a Bankruptcy Committee recommendation "to institute quarterly chapter 11 fees in bankruptcy administrator districts comparable to those in effect in United States trustee districts so that the revenues go to the judiciary." Report of Proceedings of the Judicial Conference of the United States, March 12, 1996, available at https://www.uscourts.gov/sites/default/files/1996-03.pdf, at 10. As might be expected, the Judicial Conference's proposed language preserved its discretion to impose the fees by using the permissive word "may," rather than the mandatory word, "shall." Consistent with this and the plain language of the statute, the only references to Section 1930(a)(7) in the legislative history describe Section 1930(a)(7) in permissive terms. *See, e.g.*, House Judiciary Committee Report on H.R. 2294, Federal Courts Improvement Act of 1998, March 12, 1998 [105-437], available at https://www.congress.gov/105/crpt/hrpt437/CRPT-105hrpt437.pdf at 13-15 (confirming the legislation was "introduced at the request of the Judicial Conference of the United States" and that "[t]his section ***would***

authorize the Judicial Conference to implement fees in the bankruptcy administrator program in the judicial districts in the State of Alabama and North Carolina similar to those currently imposed by 28 U.S.C. § 1930(a)(6)") (emphasis added).

Moreover, from the beginning, the Judicial Conference (both in 2001 and again in 2018) believed it was "authorized" to impose and, after deliberation, decided to impose, the quarterly fees in BA districts. *See* Report of the Proceedings of the Judicial Conference of the United States, Sept./Oct. 2001, available at https://www.uscourts.gov/sites/default/files/2001-09_0.pdf, at 45-46; Report of the Proceedings of the Judicial Conference of the United States, dated September 13, 2018 available at https://www.uscourts.gov/sites/default/files/2018-09_proceedings.pdf, at 11-12. Nothing in the record of the Judicial Conference's actions suggests the Judicial Conference believed it had no choice but to impose the fees. To the contrary, the Judicial Conference expressly decided to take action imposing quarterly fees, and its interpretation of that statute is entitled to great deference. *See Matter of Nickerson & Nickerson, Inc.*, 530 F.2d, 811, 814 n. 5 (8th Cir. 1976); *Mesa Farm Co. v. United States*, 475 F.2d 1004, 1007-08 (9th Cir. 1973). Indeed, until litigation over this issue, no one had ever suggested that Section 1930(a)(7) mandates that the Judicial Conference impose equal fees.

The U.S. Trustee urges the Court to depart from the plain language of Section 1930(a)(7) for three reasons. None are persuasive. First, interpreting Section 1930(a)(7) according to its plain meaning does not render the words "equal to" superfluous. *See* Objection, ¶¶ 68-69. Indeed, there are at least two plausible ways to interpret the statute consistent with its plain meaning, neither of which makes "equal to" superfluous. On the one hand, the statute could mean that the Judicial Conference has discretion to impose fees or not impose fees, but if it does impose fees, the fees must be "equal to" the fees of Section 1930(a)(6). On the other hand, the

statute could mean that the Judicial Conference has discretion to impose fees or not impose fees, and the maximum extent of its authority is to impose fees "equal to" the fees of Section 1930(a)(6). Under either interpretation, the words "equal to" serve the important purpose of bounding the authority granted to the Judicial Conference. Had the statute not included this limit, the Judicial Conference could have imposed fees in any amount it wished, even if its fees would be higher than the fees of Section 1930(a)(6). Because there are multiple ways to interpret the statute that respects its text without rendering any words superfluous, there is no reason to depart from the plain meaning of the word "may." *See Lamie v. U.S. Trustee*, 540 U.S. 526, 536 (2004) (declining to apply surplusage canon to override plain meaning because the Court "prefer[s] the plain meaning since that approach respects the words of Congress").

Second, the fact that Congress enacted Section 1930(a)(7), in part, to address the uniformity problems found by *St. Angelo* is not a basis for ignoring the plain language Congress used. "[I]t is quite mistaken to assume . . . that whatever might appear to further the statute's primary objective must be the law." *Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1725 (2017) (quotation marks and alteration omitted). Congress, at the suggestion of the Judicial Conference, adopted language which, to the extent implemented, would address the uniformity problem while maintaining the Judicial Conference's independence. *See supra* at 19. Because the Judicial Conference imposed equal fees following enactment of Section 1930(a)(7), that approach worked for several years. That the Judicial Conference has now used this discretion to impose different fees for pre-2017 Amendment debtors is not a reason to rewrite the statute.

Finally, the U.S. Trustee's request that the Court apply the canon of constitutional avoidance should be rejected. *See* Objection, ¶ 74. For one, to the extent constitutional avoidance is appropriate, it should be employed on the retroactivity issue, which is both

analytically prior to the uniformity question and does not require the Court to stretch the plain language of the statute. In any event, constitutional avoidance is not appropriate here. Construing the permissive language used by Congress to be mandatory would fundamentally alter the relationship between Congress and the Judicial Branch, mandating that the Judicial Conference take action that Congress sought to leave to its discretion. To the extent a reworking of this relationship is necessary to remedy a constitutional defect, it should be Congress, not the Court, that decides the best way to accomplish this. *See Heckler v. Mathews*, 465 U.S. 728, 741 - 742 (1984) ("The canon favoring constructions of statutes to avoid constitutional questions does not, however, license a court to usurp the policymaking and legislative functions of duly-elected representatives.").

C. Section 1930 Does Not Address a "Geographically Isolated" Problem

The U.S. Trustee argues that even if even if the statutory fees are non-uniform, that "[t]he Bankruptcy Clause's 'uniformity provision does not deny Congress power to take into account differences that exist between different parts of the country, and to fashion legislation to resolve geographically isolated problems.'" Objection, ¶ 76 (citing *Blanchette v. Conn. Gen. Ins. Corps. (Regional Rail Reorganization Act Cases)*, 419 U.S. 102 (1974)). In essence, the U.S. Trustee argues that Section 1930 was designed to address a "geographically isolated" problem, and therefore does not run afoul of the Bankruptcy Clause's uniformity provisions. However, that argument fails for the precise reason that this issue is not "geographically isolated".

The U.S. Trustee program operates in every judicial district in the country and its various territories other than the two states of North Carolina and Alabama. Accordingly, the 2017 Amendment addresses a similar scope. Under any rational definition of the word "isolated", it simply cannot be that 48 states plus the District of Columbia, Puerto Rico, the U.S. Virgin

Islands, etc., can be said to be "isolated" from the rest of the country. Merriam-Webster's Dictionary defines "isolated" as "occurring alone or once," "unique" or "sporadic". *See* Merriam-Webster Dictionary, available at https://www.merriam-webster.com/dictionary/isolated. It is difficult to comprehend how all but two states are "occurring alone" or "sporadic". The cases cited by the U.S. Trustee are inapposite to the case at bar.

In *Blanchette v. Conn. Gen. Ins. Corps. (Regional Rail Reorganization Act Cases)*, 419 U.S. 102 (1974), the Supreme Court addressed the adoption of the Regional Rail Reorganization Act of 1973, 87 Stat. 985, 45 U. S. C. § 701 et seq. (1970 ed., Supp. III) (the "**Rail Act**"). The District Court for the Eastern District of Pennsylvania held that one section of the Rail Act was unconstitutional on the grounds that it violated the uniformity requirement of the Bankruptcy Claus. *Blanchette*, 419 U.S. at 120-21. The Supreme Court reversed. As the Supreme Court noted, the Rail Act was adopted to address a rail transportation crisis that threatened the national welfare when eight major railroads in the northeast and midwest region of the country entered reorganization proceedings under § 77 of the Bankruptcy Act. *Id.* at 108-09. In *Blanchette*, therefore, it was relatively easy to see a geographically isolated problem (located in the northeast/midwest region), and address that problem without violating the uniformity requirement. In fact, "[n]o railroad reorganization proceeding, within the meaning of the Rail Act, was pending outside that defined region on the effective date of the Act or during the 180-day period following the statute's effective date. Thus the Rail Act in fact operates uniformly upon all bankrupt railroads then operating in the United States and uniformly with respect to all creditors of each of these railroads." *Id.* at 159-60. In other words, as a practical matter, ***every*** pending railroad reorganization was covered by the Rail Act, notwithstanding that it was nominally limited only to the region specified. In any event, the Rail Act was limited to a specific region of the country.

By contrast, the 2017 Amendment applies in every Chapter 11 case in every region of the country and in every state in the country except for two. This cannot be the geographic isolation contemplated by the Supreme Court in *Blanchette*. Where the effect of the statute would be to affect cases in every state but two, this seems to be the very antithesis of "geographic isolation".[10]

D. The U.S. Trustee's Proposed Remedy Is Unworkable

Finally, the U.S. Trustee argues that if the 2017 Amendment is held to be unconstitutional, the remedy sought by the Liquidating Trustee – a declaration that the 2017 Amendment cannot be applied to the Debtors – is improper. However, the U.S. Trustee's suggestion that the better remedy for the unconstitutionality "would be to require nationwide adherence to the statute as written—not to compel the U.S. Trustee to disregard the statute," Objection, ¶ 92, is incredibly overreaching. Typically, courts seek to resolve constitutional questions on the narrowest possible grounds for the parties in front of them, rather than issuing broad, nationwide injunctions binding entities (like the Judicial Conference and the Bankruptcy Administrator Districts) that are not in front of the Court. Clearly, if the 2017 Amendment is unconstitutional as applied to the Debtors and the Liquidating Trustee, the remedy is to declare that the 2017 Amendment does not apply to Debtors/Liquidating Trustee.

II. The 2017 Amendment Should Not Apply Retroactively

A "presumption against retroactive legislation is deeply rooted in our jurisprudence." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 (1994). Under *Landgraf*, when analyzing whether this presumption applies, courts conduct a two-step analysis: "The first step is to determine whether Congress expressly provided that a statute should apply retroactively."

[10] The U.S. Trustee also cites to *In re Prines*, 867 F.2d 478 (8th Cir. 1989), but that case does not address in any way the issue of "geographic isolation", and does not even mention such phrase, and thus it is unclear whether the issue was even presented to the Eighth Circuit.

Centurion v. Sessions, 860 F.3d 69, 74-75 (2d Cir. 2017). If the answer is no, the Court next asks "'whether the new provision attaches new legal consequences to events completed before its enactment.'" *Id.* (quoting *Vartelas v. Holder*, 566 U.S. 257, 273 (2012)). Because the 2017 Amendment is silent about whether it applies to cases already pending and dramatically increases the fees owed by the Debtors/Liquidating Trustee, the statutory presumption against retroactivity governs and the 2017 Amendment should be interpreted not to apply to the Debtors.

A. The Amendment Contains No Express Application To Pending Cases

The U.S. Trustee agrees that at the first step of the inquiry, the Court must "first look to 'whether Congress has expressly prescribed the statute's proper reach.'" *Fernandez-Vargas v. Gonzales*, 548 U.S. 30, 37 (2006) (quoting *Landgraf*, 511 U.S. at 280); *see* Objection, ¶ 100. The U.S. Trustee, however, points to nothing in the 2017 Amendment expressly making the law applicable to pending cases. Instead, the U.S. Trustee points to the 2017 Amendment's statement that "[t]he amendments made by this section shall apply to quarterly fees payable under section 1930(a)(6) of title 28, United States Code, as amended by this section, for disbursements made in any calendar quarter that begins on or after the date of enactment of this Act." Pub. L. No. 115-72, § 1004(c), 131 Stat. 1224, 1232 (2017). This is not enough.

Given the "timeless and universal appeal" of the presumption against retroactivity, *Landgraf*, 511 U.S. at 265, "a 'heightened level of clarity' is required to justify the retroactive application of a law that implicates past conduct." *St. Cyr v. I.N.S.*, 229 F.3d 406, 414 (2d Cir. 2000), *aff'd*, 533 U.S. 289 (2001) (quoting *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 950 (1997)). "The standard for finding such unambiguous direction is a demanding one." *St. Cyr*, 533 U.S. at 316. To make a law retroactive, Congress "must have used statutory language that can 'sustain only one interpretation.'" *St. Cyr*, 229 F.3d at 414

(quoting *Lindh v. Murphy*, 521 U.S. 320, 328 n. 4 (1997)); *see also Vartelas*, 566 U.S. at 266 ("[C]ourts read laws as prospective in application unless Congress has unambiguously instructed retroactivity.").

Yet as one court has observed, the language cited by the U.S. Trustee "simply beg[s] the question: Disbursements in which cases?" *In re Life Partners Holdings, Inc.*, 606 B.R. 277, 283 (Bankr. N.D. Tex. 2019). The statute is silent on that issue. For this reason, every court to have considered the question has held that the 2017 Amendment does not expressly prescribe a retroactive reach. *See, e.g.*, *Exide*, 2020 Bankr. LEXIS 58, *12 ("In this case, the 2017 Amendment does not state that it applies retroactively.") The U.S. Trustee does not cite a single case in which similar language was found sufficient to overcome the presumption against retroactivity. Nor could it, as the language cited by the U.S. Trustee does not meet the "heightened" standard of clarity. *See Enter. Mortg. Acceptance Co., LLC, Sec. Litig. v. Enter. Mortg. Acceptance Co.*, 391 F.3d 401, 407 (2d Cir. 2004), as amended (Jan. 7, 2005) (statute without reference to "cases pending" lacked "the unambiguous language that the Supreme Court has asserted would amount to an express retroactivity command"). As in *Landgraf*, the U.S. Trustee's "statutory argument would require us to assume that Congress chose a surprisingly indirect route to convey an important and easily expressed message concerning the [law's] effect on pending cases." *Landgraf*, 511 U.S. at 262.

Without a firm basis in the text of the statute, the U.S. Trustee argues that the legislative history of the 2017 Amendment supports its position, citing to a single document prepared by the Congressional Budget Office (the "**CBO**"). Objection, ¶¶ 112-13. This is too slender a reed to override the presumption against retroactivity. The whole point of the presumption is to ensure that Congress has "carefully considered" the impact of applying new statutes

retroactively, and concluded that it is appropriate. *St. Cyr*, 229 F.3d at 414. "The requirement that Congress 'first make its intention clear helps ensure that Congress itself has determined that the benefits of retroactivity outweigh the potential for disruption or unfairness.'" *Id.* at 416 (quoting *Landgraf*, 511 U.S. at 268).

Here, the ***only*** mention in the legislative history about whether the 2017 Amendment applies to pending cases is in a single document prepared not by Congress, but by the CBO. That document was dated a day after the House voted on the bill, and was simply considering whether the bill triggered certain cost-related regulations. The U.S. Trustee attempts to prop up the CBO Estimate by pointing to the one mention of it in the House Judiciary Committee Report accompanying the bill. *See* Objection, ¶ 112. But the Judiciary Committee's report is most notable for how little it says about the CBO Estimate. That report says simply that the CBO's cost estimate was not yet available; that the Judiciary Committee estimated based on information from the CBO that the bill would increase spending by $20 million over ten years to fund 18 new permanent bankruptcy judgeships; and that raising the quarterly fees would fully offset this $20 million spending increase. *See* H.R. Rep. No. 115-130, at 8-9. The Judiciary Committee report says nothing about the CBO's assumptions or its calculations of the total revenue generated by the quarterly fee increase.

There is simply no evidence that anyone in Congress who voted for the 2017 Amendment – passed as part of a large appropriations bill – even thought about whether it was appropriate to apply the 2017 Amendment retroactively to pending cases, much less that this was "carefully considered" by the majority of the Congress that enacted it. There are no floor debates discussing retroactivity; no House or Senate Reports stating that the fee increase would apply to pending cases; and no evidence that anyone in Congress ever read the CBO Estimate. Certainly, a few

passing references in a CBO document, written and/or finalized after the House had already passed on the 2017 Amendment, cannot demonstrate the "general agreement" necessary to show clear congressional intent to make the law retroactive. *Landgraf*, 511 U.S. at 262; *see also United States v. Awadallah*, 349 F.3d 42, 54 (2d Cir. 2003) ("'[T]he authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill, which represent the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation.'") (quoting *Garcia v. United States*, 469 U.S. 70, 76 (1984)); *Enter. Mortg. Acceptance Co.*, 391 F.3d at 408 (statute not expressly retroactive where legislative history did not show Congress contemplated retroactivity).

Indeed, the statutory silence and isolated statements in the CBO Estimate fall far short of the other available evidence of legislative intent. "Congress knows how to be crystal clear when it wants bankruptcy legislation to apply to all pending cases (as it did in September 1996 concerning U.S. Trustee fees) or to certain pending cases (as it did in 2017 concerning Chapter 12 of the Bankruptcy Code). No such clear language exists for the [2017 Amendment] regarding U.S. Trustee fees. The lack of such clear language is striking." *Life Partners*, 606 B.R. at 285; *see also In re Aquatic Dev. Grp., Inc.*, 352 F.3d 671, 680 (2d Cir. 2003) (Straub, J., concurring) (noting clarity of statute making 1996 amendments expressly retroactive).

Finally, it is notable that the Judicial Conference itself reached a different conclusion about the appropriate reach of the 2017 Amendment, and decided that the increased fees should be applied only prospectively, to cases filed after it imposed them. With all due respect to the U.S. Trustee, the interpretation of a statute adopted by a body made up of the Chief Justice of the United States, the Chief Judges of each regional Circuit and the Court of International Trade, and a District Judge from each Circuit, based upon the recommendation of a committee of

Circuit, District, and Bankruptcy Judges, surely carries great weight. *See, e.g.*, *Nickerson & Nickerson*, 530 F.2d at 814 n.5 ("[T]he views of the [Judicial] Conference are entitled to great deference unless plainly unreasonable or in conflict with the plain intent of Congress.") At the very least, the Judicial Conference's interpretation and the unanimous views of every court to consider the issue makes it impossible for the U.S. Trustee to show that Congress "used statutory language that can sustain only one interpretation." *St. Cyr*, 229 F.3d at 414.

B. The Amendment Operates Retroactively

The second step of the *Landgraf* approach requires the Court to consider whether the law has a retroactive effect. A law has retroactive effect if it "would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Landgraf*, 511 U.S. at 280. The 2017 Amendment operates retroactively because it dramatically increases the quarterly fees payable under Section 1930(a)(6). It therefore increases the Debtors' liability with respect to past events – i.e., the Chapter 11 filing.

In response, the U.S. Trustee argues that the 2017 Amendment does not have a retroactive effect because "the obligation to pay fees is triggered only by conduct that occurs weeks after its enactment." Objection, ¶ 122. The Supreme Court has squarely rejected this method of analysis. In *Vartelas*, the Supreme Court held that a statutory amendment limiting the ability of a lawful permanent resident who had previously pled guilty to a criminal offense to return to the country after a brief trip abroad operated retroactively. 566 U.S. at 269-70. In so doing, it unequivocally rejected the government's argument that the amendment was prospective because it applied only to trips abroad taken after the statute's enactment. *Id.* As the Court explained, although

"Vartelas' return to the United States occasioned his treatment as a new entrant," the "reason for the 'new disability' imposed on him" was his pre-statute guilty plea. *Id.*

The U.S. Trustee's citation *Martin v. Hadix*, 527 U.S. 343, 360-61 (1999), is not to the contrary. The Supreme Court's decision in *Martin* actually directly contradicts the U.S. Trustee's argument. There, the Court held that a new statute prohibiting attorneys' fees for postjudgment monitoring services would operate retroactively if applied to services rendered before the statute was passed, but that it would not operate retroactively if applied to services performed after enactment. *Martin*, 527 U.S. at 360-61. The key distinction, in the Court's view, was the fact that attorneys could modify their conduct in light of the new statute by declining to perform monitoring services. *Id.* at 361. The Court explained that the lawyers' argument "fails because it is based on the assumption that the attorney's initial decision to file a case on behalf of a client is an irrevocable one." *Id.* Because the attorneys could withdraw from the representation or decline to perform monitoring, "[i]t cannot be said that the PLRA changes the legal consequences of the attorneys' pre-PLRA decision to file the case." *Id.* Here, because the Case could not have been "un-filed", the situation is much more like the already performed services in *Martin* than the yet-to-be-performed services.

Finally, the U.S. Trustee's claim that its argument is supported by "the vast weight of authority" from the time of the 1996 amendments to Section 1930(a)(6) is both wrong and irrelevant. Objection, ¶ 123. Most of these cases contain very little analysis. But more importantly, these cases were decided long before *Vartelas* clarified that the critical question is whether the statute increases liability for past events, not whether a future event triggers application of the new law.[11]

[11] Of the cases considering the 2017 Amendment, only one has held that the 2017 Amendment does not operate retroactively. *See In re Circuit City*, 606 B.R. 260, 268-69 (2019). That court, however, appears to have reached this

C. If Applied Retroactively, the 2017 Amendment Violates the Due Process Clause

The U.S. Trustee argues the even if the 2017 Amendment does apply retroactively, it does not violate due process because the Amendment had a "legitimate legislative purpose" and used a "rational means" of achieving that goal. Objection, ¶¶ 123-26. The U.S. Trustee is wrong. For one, the rationales proffered by the U.S. Trustee do not justify retroactive application of the law. Of course, ensuring adequate funding for the U.S. Trustee Program is a legitimate governmental purpose, and imposing quarterly fees on debtors using the U.S. Trustee's services is a rational means of achieving that purpose. But while that justification would support the prospective application of the 2017 Amendment, this does not explain why it is necessary to fund the U.S. Trustee's future activities by imposing an enormous and unanticipated fee increase on the creditors of a debtor where the case was filed 2 years prior to the enactment of the 2017 Amendment. As the Supreme Court has made clear, "a justification sufficient to validate a statute's prospective application under the [Due Process] Clause 'may not suffice' to warrant its retroactive application." *Landgraf*, 511 U.S. at 266 (quoting *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 17 (1976)).

Finally, the U.S. Trustee's heavy reliance on *United States v. Carlton*, 512 U.S. 26 (1994), is misplaced. *Carlton* involved an expressly retroactive amendment to a tax law passed to cure an unforeseen loophole in a law passed only one year before, which, if not fixed, could have cost the government up to $7 billion in revenue. *Id.* at 32-33. Given the expressly retroactive nature of the amendment, the fact that it was designed to fix a mistake, and the fact that it affected only transactions made within the previous year, the Court held that retroactive

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conclusion reluctantly, based on binding precedent from 1998. *Id.* Notably, the impact of the Supreme Court's recent decision in *Vartelas* on this precedent was not mentioned anywhere in the briefing or argument in Circuit City.

application did not violate due process. *Id.* Here, by contrast, the 2017 Amendment is silent about whether it applies to pending cases; is not designed to address a mistake on the part of Congress; and reaches back to affect cases filed years before the law was passed. Given this, the law violates due process.

WHEREFORE, the Liquidating Trustee respectfully requests that the Court:

1) enter an order determining the Liquidating Trustee has paid all fees due and owing to the U.S. Trustee under 28 U.S.C. § 1930, and owes no additional amounts to the U.S. Trustee under such statute;

2) enter a Final Decree closing all of the cases comprising the jointly administered Case; and

3) grant such other and further relief as may be deemed just and proper.

This 9th day of March, 2020.

SCROGGINS & WILLIAMSON, P.C.

By: */s/ Matthew W. Levin*

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CERTIFICATE OF SERVICE

This is to certify that I have on this date electronically filed the foregoing *Reply Brief in Support of Request for Final Decree, and Motion to Determine Fees Payable to the United States Trustee Program* regarding same, using the Bankruptcy Court's Electronic Case Filing program, which sends a notice of these documents and an accompanying link to these documents to the following parties who have appeared in this case under the Bankruptcy Court's Electronic Case Filing program:

Thomas Wayne Dworschak

This 9th day of March, 2020.

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