

# **In the United States Bankruptcy Court**

## **for the Northern District of Iowa**

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BOCKES BROTHERS FARMS, INC.  
Debtor.

Bankruptcy No. 93-60881KW  
Chapter 11

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### **ORDER RE: MOTION TO DISMISS**

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On April 6, 1995, the above-captioned matter came on for hearing pursuant to assignment. Present at the hearing were: Janet Reasoner for the U.S. Trustee, Dan Childers for Debtors, Ana Maria Martel for the IRS, Tom McCuskey for the Unsecured Creditors Committee, Steve Pace for NBL Life, Ray Terpstra for Conrad Coop, Mike Vestle for Phelps Implement and Sauder Implement, Eric Lam for Ag Services and Richard Morris for Lawrence and Lois Van Heukelom.

Several matters which were set for hearing have now been resolved by stipulated orders. The only pending matter remaining from the hearing is the Motion to Dismiss filed by the U.S. Trustee and joined by Sauder Implement and Phelps Implement. After presentation of evidence and arguments of counsel, the Court took the matter under advisement. The time for filing briefs has now passed and the matter is ready for resolution. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A).

### **STATEMENT OF THE CASE**

The U.S. Trustee moves to dismiss. She asserts that the various Debtors have failed to pay quarterly payments, file monthly reports and provide certificates of insurance. She requests dismissal under 1112(b)(10) for nonpayment of the quarterly fees required under 28 U.S.C. § 1930(a)(6).

Sauder Implement and Phelps Implement join in the Motion to Dismiss. Their joinder asserts that other grounds for dismissal exist, including continuing loss to the estate, inability to effectuate a plan, and unreasonable delay. Debtors objected to these creditors asserting additional grounds for dismissal in their joinder to the U.S. Trustee's motion, which was more narrowly focused. They assert that such grounds should be made in a separate motion to dismiss, giving them notice and opportunity to respond. After some discussion, Sauder and Phelps agreed to withdraw the additional grounds for dismissal asserted in their joinder.

The Unsecured Creditors Committee resists the U.S. Trustee's Motion to Dismiss. It asserts that it is not in the best interests of creditors to dismiss at this time. All of the Debtors object to dismissal. They have now filed all their delinquent reports and have provided the necessary certificates of insurance. They state they have been unable to pay quarterly fees because Ag Services has refused to advance the necessary funds as part of 1994 financing.

Debtors dispute whether the U.S. Trustee has correctly calculated the quarterly fees. They assert that the U.S. Trustee has treated some negative balances incorrectly in computing fees. They also argue that they should not be charged fees for 1) repayments of cash advanced by Ag Services, 2) payments

made on Debtors' behalf by Ag Services or 3) charges for products supplied to Debtors by Ag Services. Debtors argue that only repayments to Ag Services, excluding repayments of cash advances, constitute "disbursements" upon which fees should be calculated under § 1930(a)(6). The U.S. Trustee asserts that disbursements made by third parties as well as disbursements made in repayment of loans should be included in calculating quarterly fees.

The total that the U.S. Trustee claims is now owing from all the Debtors is \$27,500. Exhibits 13 through 17 indicate that calculating the fees according to Debtors' numbers results in a balance of fees owing of \$13,000. Debtors nevertheless assert that it is possible that they may have overpaid previous quarterly fees and would be entitled to a credit. They do admit that they are unable to cure any delinquency in quarterly fees at this time.

The Court takes judicial notice of the entire record in these cases. Debtors filed their Chapter 11 petitions on May 19, 1993, almost two years ago. Competing plans of reorganization were filed by Debtors and by Farmland Bank in early 1994 but neither plan reached the confirmation process. Debtors have no plan currently under consideration. Debtors did reach an agreement with creditors in August 1994 allowing them to continue to operate their farming business. A review of the record also discloses that several creditors have recently gained relief from the stay to repossess collateral because of Debtors' failure to provide adequate protection or to service their debt.

The record indicates that by the time of the hearing Debtors had filed all their delinquent monthly reports. The Court notes, however, that Debtors have been repeatedly late in filing the required monthly reports. The U.S. Trustee's exhibits show that Debtors have failed to make any quarterly payments since the first quarter of 1994. Court costs also remain unpaid.

### CONCLUSIONS OF LAW

Debtors request the Court to rule on whether the three disputed types of transactions between Debtors and Ag Services constitute "disbursements" for purposes of calculating quarterly fees under 28 U.S.C. § 1930(a)(6). Debtors also complain of the U.S. Trustee's treatment of certain negative numbers from their monthly reports. The Court concludes that the U.S. Trustee's treatment of the negative numbers supplied by Debtors is acceptable.

There is a seeming consensus in the courts in favor of the U.S. Trustee's position on what type of payments constitute "disbursements" under 28 U.S.C. § 1930(a)(6). St. Angelo v. Victoria Farms, Inc., 38 F.3d 1525, 1535 (9th Cir. 1994) (defining "disbursement" in § 1930(a)(6) to include all payments made by debtor, including sale proceeds paid to a secured creditor). Courts rely on the plain meaning of the word "disbursement" in § 1930(a)(6) in finding that Congress intended that essentially all payments made by a Chapter 11 debtor-in-possession be included in calculating quarterly fees.

The court in In re HSSI, Inc., 176 B.R. 809, 814 (Bankr. N.D. Ill. 1995), held that quarterly fees are based on expenses paid by the debtor representing real economic activity, such as borrowing money, purchase and sale of inventory, and repayment of loans. Thus, "disbursement" includes payments to a bank on a line of credit and payments through third parties. Id. In In re Hays Builders, Inc., 144 B.R. 778, 780 (W.D. Tenn. 1992), the court concluded that all payments, whether direct or through a third party, are included in the § 1930(a)(6) calculation. See also In re Wernerstruck, Inc., 130 B.R. 86, 89 (D.S.D. 1991) (finding that payment on a revolving line of credit constitutes a "disbursement" under § 1930(a)(6)); In re Ozark Beverage Co., 105 B.R. 510, 512 (Bankr. E.D. Mo. 1989) (holding that the plain meaning of disbursement in § 1930(a)(6) includes payment of all debtor's expenses). Thus,

calculations of quarterly fees under § 1930(a)(6) should be based on all of Debtors' disbursements, including repayments to a bank on a line of credit and payments made on Debtors' behalf by a third party.

Based on the record presented, precise calculation of fees cannot be made. The U.S. Trustee would be correct in including all of Debtors' payments, including payments by Ag Services on Debtors' behalf and Debtors' repayments to Ag Services, as "disbursements" in calculating fees under § 1930(a)(6). However, repayments to Ag Services by Debtors for payments Ag Services made on Debtors' behalf would not constitute real economic activity. In such a situation, Ag Services would merely be acting as a disbursing agent. See HSSI, Inc., 176 B.R. at 814. The Court is unable on this record to determine whether or to what extent such transactions occurred.

The U.S. Trustee argues that acceptance of Debtors' numbers establishes an obligation of at least \$13,000 in unpaid quarterly fees. Debtors have not presented evidence upon which the Court can conclude that they owe no fees. Therefore, the Court must find that Debtors are delinquent in paying fees under § 1930(a)(6) but need not precisely calculate the exact amount owing. The U.S. Trustee shall recalculate fees as necessary to conform with the foregoing.

The Court has broad discretion in deciding whether to dismiss or convert under § 1112(b). In re Lumber Exch. Bldg. Ltd. Partnership, 968 F.2d 647, 648 (8th Cir. 1992) (affirming dismissal for inability to effectuate plan); In re Nugelt, Inc., 142 B.R. 661, 665 (Bankr. D. Del. 1992) (dismissing for failure to file reports, failure to pay fees and inability to effectuate plan). One of the ten listed examples of "cause" for conversion or dismissal under § 1112(b) is "nonpayment of any fees or charges required under chapter 123 of title 28." 11 U.S.C. § 1112(b)(10). Quarterly fees payable to the U.S. Trustee are mandated in that chapter at 28 U.S.C. § 1930(a)(6). In this case, conversion is not an option unless it comes at the request of Debtors as Debtors qualify as farmers under § 1112(c).

A debtor must comply with bankruptcy rules and procedures in order to continue operating under Chapter 11 protection. Nugelt, 142 B.R. at 668. In Nugelt, the court found cause for dismissal under § 1112(b) for the debtor's failure to pay quarterly fees along with its failure to file reports and its inability to effectuate a plan. This Court has stated that complete disregard of monthly report filing requirements can be cause to dismiss. In re Bacon, 52 B.R. 52, 54 (Bankr. N.D. Iowa 1985). Another court found cause to dismiss, in part, because of the debtor's unreasonable delays in complying with administrative requirements and chronic delinquency in filing reports and paying § 1930(a)(6) fees. In re William Steiner, Inc., 139 B.R. 356, 358 (Bankr. D. Md. 1992).

Merely failing to pay quarterly fees or merely failing to file monthly reports may constitute insufficient cause to dismiss a Chapter 11 case. See Nugelt, 142 B.R. at 668. However, such delinquencies joined with other deficiencies by a debtor may, in combination, support dismissal for cause. In William Steiner, Inc., the court considered the whole record of the case including the debtor's schedules to determine that several factors warranted dismissal. 139 B.R. at 357. It found that the debtor was not prejudiced by consideration of the entire record because the debtor was familiar with the record, was aware of the concerns of the U.S. Trustee, and had the opportunity to file a responsive brief. Id. at 357.

Viewing the record as a whole, the Court concludes that cause exists for dismissal pursuant to § 1112(b). Debtors are delinquent in making the quarterly payments mandated by 28 U.S.C. § 1930(a)(6). They are admittedly unable to cure this delinquency. While dismissal on this basis alone may appear harsh, Debtors' inability to pay quarterly fees is indicative of other fundamental problems in these Chapter 11 proceedings. After almost two years, no plan is on file. Debtors have lost control over

much of the machinery, equipment and land needed to continue their farming operations. Their attempts to finance another crop have not been entirely successful. Although Debtors have now filed their delinquent monthly reports, they have been chronically late in their filings. It also appears that Debtors have failed to satisfy court costs. This combination of factors leads to the conclusion that cause exists for dismissal as requested by the U.S. Trustee.

The U.S. Trustee requests that as part of its order of dismissal, the Court include language ordering Debtors to pay "the appropriate sum required pursuant to 28 U.S.C. § 1930(a)(6) within 10 days". The language of § 1930(a)(6) leads to the conclusion that fees are due regardless of whether a Chapter 11 plan is ever confirmed or whether a case is dismissed or converted under § 1112(b). In re Rose Truck Brokers, Inc., 166 B.R. 179, 180 (M.D. Fla. 1992) (holding that § 1930(a)(6) fees have first priority in Chapter 7 after conversion). Language similar to that requested by the U.S. Trustee was used in a ruling which ordered that a debtor who successfully moved for dismissal was to pay the quarterly fees which had accrued during his Chapter 11 case. In re Smith & Son Septic & Sanitation Serv., 1990 Bankr. LEXIS 2777, at \*9 (Bankr. D. Utah 1990). The Court concludes that the requested language regarding payment of the quarterly fees is appropriate.

**WHEREFORE**, the U.S. Trustee's Motion to Dismiss is GRANTED.

**FURTHER**, it is ordered that Debtors pay to the U.S. Trustee the appropriate sum required pursuant to 28 U.S.C. § 1930(a)(6) within 10 days of the entry of this order and simultaneously provide to the U.S. Trustee an appropriate affidavit indicating the cash disbursements for the relevant period.

**SO ORDERED** this 28th day of April, 1995.

Paul J. Kilburg  
U.S. Bankruptcy Judge