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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 22-1314

[Filed December 16, 2022]

IN RE: ALEXANDER V. BROWN, DEBTOR.	)
ALEXANDER V. BROWN, Appellant,	)
v.	)
WILLIAM K. HARRINGTON, United States Trustee for Region 1, Appellee.	)

APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

[Hon. George A. O'Toole, U.S. District Judge]

Before

Barron, Chief Judge,
Selya and Lipez, Circuit Judges.

David G. Baker for appellant.

Andrew W. Beyer, Trial Attorney, United States Department of Justice, with whom Ramona D. Elliott, Deputy Director/General Counsel, P. Matthew Sutko, Associate General Counsel, William K. Harrington, United States Trustee for Region 1, John P. Fitzgerald, III, Assistant United States Trustee, and Eric K. Bradford, Trial Attorney, were on brief, for appellee.

December 16, 2022

BARRON, **Chief Judge**. This second-tier bankruptcy appeal challenges a judgment by the United States District Court for the District of Massachusetts that affirmed the dismissal of Alexander V. Brown's voluntary petition for relief under title 11 of the United States Code (the "Bankruptcy Code"). The United States Bankruptcy Court for the District of Massachusetts dismissed Brown's case on two independent grounds: that Brown failed to pay certain fees to the United States Trustee (the "U.S. Trustee") pursuant to 28 U.S.C. § 1930(a)(6) and that he failed to serve certain quarterly reports on the U.S. Trustee pursuant to the Bankruptcy Court's confirmation order. We affirm based on the second of those two grounds because that ground fully suffices to support the District Court's judgment. We emphasize that, in pursuing this more economical approach, we do not in any way mean to suggest that the first ground is not sound in its own right.

I.

The material facts are not in dispute. On March 17, 2011, Brown filed a voluntary petition for relief under chapter 13 of the Bankruptcy Code. After objections from the chapter 13 trustee and two mortgagees prevented Brown from confirming his plan of reorganization (the "Plan"), Brown converted his case from chapter 13 to chapter 11 on July 20, 2012.

On September 9, 2014, the Bankruptcy Court entered an order that confirmed Brown's Sixth Amended Plan as further modified by the same court order. The confirmation order provided, in relevant part, that:

> The Debtor will be responsible for timely payment of quarterly fees incurred pursuant to 28 U.S.C. 1930(a)(6) until its case is closed or dismissed. After confirmation, the Debtor will serve the United States Trustee with a quarterly disbursement report for each quarter (or portion thereof) so long as the case is open. The quarterly report shall be due fifteen days after the end of the calendar quarter.

The confirmation order further explained that Brown's case could be administratively closed "pending completion of plan payments" and that "[d]uring the period that the case is administratively closed, the Debtor shall not be required to file monthly or quarterly reports and shall not be required to pay quarterly fees to the United States Trustee." The statutory provision referenced in the confirmation order, 28 U.S.C. § 1930(a)(6), required debtors to pay

quarterly fees "in each case under chapter 11 of title 11 for each quarter (including any fraction thereof) until the case is converted or dismissed, whichever occurs first." 28 U.S.C. § 1930(a)(6) (2014).

The Bankruptcy Court administratively closed Brown's case on August 12, 2016 because he had "made his initial distribution under the Plan, and there [was] no cause for the case to remain open during the Plan payment period." However, the Bankruptcy Court reopened Brown's case twice thereafter. The Bankruptcy Court first reopened Brown's case on August 8, 2017, at Brown's behest, to facilitate a sale of estate property whose proceeds would be used "to complete all of the payments required by the plan." The Bankruptcy Court then administratively closed the reopened case on May 9, 2018, when the proposed sale did not go through. The Bankruptcy Court next reopened the case on September 17, 2018, after granting Brown's second motion to reopen to file an adversary complaint against a mortgagee.

During the four calendar quarters that Brown's case was reopened from August 8, 2017 through May 9, 2018, Brown did not serve the U.S. Trustee with any quarterly reports or pay the quarterly fees to the U.S. Trustee that § 1930(a)(6) required. Brown also did not serve quarterly reports on the U.S. Trustee or pay the U.S. Trustee the quarterly fees that § 1930(a)(6) required during any of the quarters after the Bankruptcy Court reopened Brown's case on September 17, 2018.

Brown filed an emergency motion on December 30, 2020 to administratively close his case "before the end

of the year, thus avoiding additional fees to the United States Trustee." Brown did so prior to the enactment of the Bankruptcy Administration Improvement Act of 2020. That measure amended § 1930(a)(6) by striking the former subsection (B),[1] and replacing it, in relevant part, with the following:

> During the 5-year period beginning on January 1, 2021, in addition to the filing fee paid to the clerk, a quarterly fee shall be paid to the United States trustee, for deposit in the Treasury, in each open and reopened case under chapter 11 of title 11, other than under subchapter V, for each quarter (including any fraction thereof) until the case is closed, converted, or dismissed, whichever occurs first.

Bankruptcy Administration Improvement Act of 2020, Pub. L. No. 116-325, § 3, 134 Stat. 5086, 5088 (2021) (codified at 28 U.S.C. § 1930(a)(6)(B)(I)).

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[1] The Supreme Court declared the former version of 28 U.S.C. § 1930(a)(6)(B) unconstitutional for violating the uniformity requirement of the Bankruptcy Clause, U.S. Const. art. I, § 8, cl. 4. Siegel v. Fitzgerald, 142 S. Ct. 1770 (2022). That unconstitutional version read:

> During each of fiscal years 2018 through 2022, if the balance in the United States Trustee System Fund as of September 30 of the most recent full fiscal year is less than $200,000,000, the quarterly fee payable for a quarter in which disbursements equal or exceed $1,000,000 shall be the lesser of 1 percent of such disbursements or $250,000.

28 U.S.C. § 1930(a)(6)(B) (2017).

Concerned with the "revolving door" nature of the case more than six years after confirmation, the Bankruptcy Court denied Brown's emergency motion and ordered an accounting of all Plan payments made on certain secured, administrative, and priority claims. Brown admitted in response to that order that, between the third quarter of 2012 and the first quarter of 2021, he had not paid quarterly fees to the U.S. Trustee pursuant to § 1930(a)(6) for eighteen quarters nor served quarterly reports on the U.S. Trustee for twenty-one quarters.

The U.S. Trustee moved to dismiss Brown's chapter 11 case "for cause" pursuant to 11 U.S.C. § 1112(b)(1). First, the U.S. Trustee alleged that, by not serving the quarterly reports for twenty-one quarters between 2012 and 2021, Brown had violated § 1112(b)(4)(E) ("failure to comply with an order of the court") and (H) ("failure timely to provide information . . . reasonably requested by the United States trustee"). 11 U.S.C. § 1112(b)(4)(E), (H). The U.S. Trustee also alleged that, by failing to pay the quarterly fees required by § 1930(a)(6) during the same period, Brown had violated § 1112(b)(4)(K) ("failure to pay any fees or charges required under chapter 123 of title 28"). 11 U.S.C. § 1112(b)(4)(K). The Massachusetts Department of Revenue, one of Brown's creditors, filed a statement in support of the U.S. Trustee's motion to dismiss the case for cause.

Brown opposed the U.S. Trustee's motion. Brown first argued that the confirmation order's requirement to serve the quarterly reports on the U.S. Trustee required Brown to serve the reports only "so long as the

case is open" and thus did not require him to serve those reports during the periods in which the case had been "reopened." Brown also contended that the version of § 1930(a)(6) in place when he allegedly failed to pay the required fees to the U.S. Trustee did not require that such fees be so paid during periods in which a case had been reopened.

The Bankruptcy Court granted the U.S. Trustee's motion to dismiss Brown's chapter 11 case for cause. In re Brown, No. 11-12265, 2021 WL 2656686, at *6 (Bankr. D. Mass. June 28, 2021). First, the Bankruptcy Court explained that Brown was required by the confirmation order to serve the quarterly reports on the U.S. Trustee "even after reopening, because a reopened case is, until closed again, open," but that Brown had "failed to produce reports for twenty-one quarters in which the case was open: the third quarter of 2012, the fourth quarter of 2015, and the third quarter of 2016 through the first quarter of 2021." Id. at *4. Thus, the Bankruptcy Court concluded that Brown had "twenty-one times failed to obey an order of the Court. These failures constitute[d] cause for dismissal under § 1121(b)(1) [sic] and (b)(4)(E)." Id. Second, the Bankruptcy Court explained that Brown was required to pay quarterly fees pursuant to § 1930(a)(6) while his case had been reopened because that requirement to pay the fees "applied to any quarter in which the case was open, whether because it had never been closed or because it had been reopened." Id. at *3. Thus, the Bankruptcy Court concluded that dismissal for cause of

Brown's chapter 11 case was also warranted under § 1112(b)(1) and (b)(4)(K).[2] Id.

The Bankruptcy Court then determined that Brown had "offered no unusual circumstances establishing that conversion or dismissal is not in the best interest of creditors or the estate" under § 1112(b)(2), id. at *5, and granted the U.S. Trustee's motion to dismiss Brown's chapter 11 case, id. at *6. Brown thereafter sought post-judgment relief, which the Bankruptcy Court denied.

At that point, Brown appealed to the District Court. In that appeal, Brown largely reprised the arguments that he had made to the Bankruptcy Court, with one twist. Brown contended, for the first time, that the absence of the words "and reopened" in the pre-2021 version of § 1930(a)(6) showed that "open" and "reopened" cases were not one and the same. Thus, Brown contended, when his confirmation order was entered in 2014, Congress intended for debtors to pay quarterly fees to the U.S. Trustee pursuant to § 1930(a)(6) only in cases that had not been administratively closed, and not in cases that had been so closed but then reopened. He further contended that "open" as used in the confirmation order's reporting requirement must be read in that same restricted way, and thus to require that he serve quarterly reports on the U.S. Trustee only until his case was

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[2] The Bankruptcy Court held that the U.S. Trustee had failed to show that dismissal of Brown's chapter 11 case was warranted under § 1112(b)(4)(H) because the U.S. Trustee had not actually "requested" the reports from Brown. In re Brown, 2021 WL 2656686, at *4.

administratively closed, and not when his case had been so closed but then reopened.

The District Court affirmed the Bankruptcy Court's dismissal of Brown's case for cause under both § 1112(b)(4)(E) and (K), while explaining that Brown could not "support his proposed distinction between 'open' and 'reopened' cases." In re Brown, No. 21-11284, 2022 WL 1200783, at *4 (D. Mass. Apr. 22, 2022). This appeal followed.

II.

"Litigants in a bankruptcy proceeding ordinarily 'must first appeal to the district court' and then 'courts of appeals are . . . available as a second tier of appellate review,' but, '[d]espite this sequencing, we cede no special deference to the determinations made by the first-tier tribunal . . . [and] assess the bankruptcy court's decision directly.'" Oriental Bank v. Builders Holding Co. (In re Builders Holding Co.), 43 F.4th 1, 7 (1st Cir. 2022) (alterations in original) (quoting City Sanitation, LLC v. Allied Waste Servs. Mass., LLC (In re Am. Cartage, Inc.), 656 F.3d 82, 87 (1st Cir. 2011)). We review the Bankruptcy Court's legal conclusions de novo and the Bankruptcy Court's discretionary rulings -- including whether cause exists to convert or dismiss a chapter 11 case pursuant to 11 U.S.C. § 1112(b) -- for abuse of discretion. See Hoover v. Harrington (In re Hoover), 828 F.3d 5, 8 (1st Cir. 2016).

We begin and end our analysis with Brown's challenge to the dismissal of his chapter 11 case for failure to comply with a court order pursuant to

§ 1112(b)(1) and (b)(4)(E).[3] Brown relies on appeal, as he did below, chiefly on his contention that there is a difference between "open" and "reopened" cases and thus that the Bankruptcy Court erred by dismissing his case for failure to comply with the confirmation order because that order required that he serve quarterly reports on the U.S. Trustee only while his case was "open."

We may skip past the inconvenient fact for Brown that it appears that he failed to serve two quarterly reports before his case was ever administratively closed: for the fourth calendar quarter of 2015 (October - December 2015) and the third calendar quarter of 2016 (as relevant, July 2016 - August 12, 2016). We may do so because the Bankruptcy Court explained, in dismissing Brown's case under § 1112(b)(1) and (b)(4)(E), that the confirmation order required Brown to serve the quarterly reports on the U.S. Trustee not only up until the time the case was administratively closed for the first time, but also for all the quarters in which the case was open, including the quarters in which the case had been reopened. See In re Brown, 2021 WL 2656686, at *4. Given that we owe deference

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[3] The District Court rejected Brown's contention that the Bankruptcy Court lacked jurisdiction to grant the motion to dismiss because it was filed after his Plan's confirmation. In re Brown, 2022 WL 1200783, at *1-3. In his brief to this court, Brown notes that he "is persuaded by the District Court's reasoning as to jurisdiction," but "incorporates his argument . . . as if fully set forth herein" in the event we disagree. The District Court correctly concluded that the U.S. Trustee's motion to dismiss for cause was squarely within the Bankruptcy Court's jurisdiction. See Gupta v. Quincy Med. Ctr., 858 F.3d 657, 661-63 (1st Cir. 2017).

to the Bankruptcy Court's interpretation of its own order, see Monarch Life Ins. Co. v. Ropes & Gray, 65 F.3d 973, 983 & n.12 (1st Cir. 1995), and that the case was "open" in all operative respects during the periods in which it had been reopened, we see no interpretive error with respect to the meaning that the Bankruptcy Court gave to the word "open" in that order.

In urging us to rule otherwise, Brown asserts that the confirmation order's reporting requirement must be understood by reference to 28 U.S.C. § 1930(a)(6), and that when the Bankruptcy Court issued the confirmation order the version of § 1930(a)(6) then in place did not expressly refer to "reopened" cases,[4] even though the 2021 version of that statutory provision does so and also separately refers to "open" cases. Brown thus contends that "the necessary inference" from the statutory language is that Congress understood reopened cases not to require payment of quarterly fees, such that the confirmation order's reference to "open" may be read to refer only to the period that preceded the initial administrative closure of his case.

Brown does not explain, however, why we must construe the word "open" in the confirmation order's requirement to serve the U.S. Trustee with quarterly reports in light of § 1930(a)(6). After all, that provision imposes no such requirement, as that provision

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[4] In 2014, § 1930(a)(6) did not include a subsection (B). Congress added subsection (B) for the first time in 2017. As explained above, that 2017 version of subsection (B) was held unconstitutional. See supra note 1.

addresses only the payment of quarterly fees to the U.S. Trustee. Moreover, the version of § 1930(a)(6) in effect at the time of the confirmation order's issuance did not use the word "open" in reference to the requirement to pay fees to the U.S. Trustee. That version referred only to "each case." 28 U.S.C. § 1930(a)(6) (2014). And, by the time of the confirmation order's issuance, one bankruptcy court had interpreted "each case" in § 1930(a)(6) to require payment of quarterly fees in reopened cases, see In re Barbetta, LLC, No. 11–04370–8, 2014 WL 3638853 (Bankr. E.D.N.C. July 23, 2014), while reasoning that § 1930(a)(6) applies "'in each case under chapter 11,' and a reopened case is, in fact, a case under Chapter 11." Id. at *4 (citation omitted).

There is also no basis for the conclusion that Brown would have been laboring under a contrary impression about the meaning of the word "open" in the confirmation order when the Bankruptcy Court issued that order. In fact, Brown's December 30, 2020 emergency motion to administratively close his chapter 11 case includes a full and accurate citation to precedent that comes to the same conclusion as In re Barbetta, LLC about the meaning of § 1930(a)(6), namely In re Chandni, LLC, 570 B.R. 530 (Bankr. W.D. La. 2017).[5] We add that Brown identifies no contrary precedent and did not seek clarification about the meaning of "open" in the confirmation order.

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[5] The 2017 version of § 1930(a)(6)(A) was substantially the same as the 2014 version. Critically, the 2021 amendment to subsection (B) introducing the word "reopened" had not yet been added. See 28 U.S.C. § 1930(a)(6) (2017).

Brown does separately contend to us that failure to serve the quarterly reports on the U.S. Trustee was not cause for dismissal within the meaning of § 1112(b)(1) and (b)(4)(E) because, "[w]hen a chapter 11 debtor has confirmed a plan and the case closed, and then reopened," such reports are "of minimal significance, if at all." But, because Brown did not make this argument below, we do not consider it now. Privitera v. Curran (In re Curran), 855 F.3d 19, 27 n.4 (1st Cir. 2017).

III.

For these reasons, the judgment of the District Court is **affirmed**.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 21-11284-GAO
(Chapter 11 Case No. 11-12265-FJB)

[Filed April 22, 2022]

In re: ALEXANDER V. BROWN, Debtor.	)
ALEXANDER V. BROWN, Appellant,	)
v.	)
WILLIAM K. HARRINGTON, UNITED STATES TRUSTEE, REGION 1, Appellee.	)

OPINION AND ORDER
April 22, 2022

O'TOOLE, D.J.

This case presents an appeal from an order of the bankruptcy court dismissing the debtor's Chapter 11 case. The debtor, Alexander Brown, claims that the bankruptcy court erred in dismissing his case after he failed to discharge his obligations under his sixth debt reorganization plan ("the Plan"). For the reasons

detailed below, the judgment of the bankruptcy court is affirmed.

I. Background

The debtor filed his bankruptcy petition in March 2011. In September 2014, the bankruptcy court confirmed the Plan, which provided for the restructuring of mortgage debt and the payment of tax debts over thirty-six months. The Plan imposed several duties on the debtor, including: 1) paying quarterly fees to the United States Trustee, as required by 28 U.S.C. § 1930(a)(6), "until [his] case is closed or dismissed"; and 2) providing the Trustee with quarterly reports detailing payments to creditors "so long as the case is open." (Appellee's App. at 67 (dkt. no. 12-3)).

In August 2016, the bankruptcy court administratively closed the case. Over the next two years, the case was reopened, reclosed, and reopened again, all at the debtor's request. The case has remained open since the second reopening in September 2018. The debtor moved to reclose the case in December 2020, but the bankruptcy court demurred. After a court-ordered accounting of the debtor's payment history revealed repeated violations of the Plan, the Trustee moved to dismiss the case for cause under 11 U.S.C. § 1112(b).

The bankruptcy court found that the debtor had failed to pay quarterly fees to the Trustee—as required by 28 U.S.C. § 1930—in eighteen quarters since the Plan was confirmed, and that he had failed to send quarterly disbursement reports to the Trustee—as required by the Plan—in twenty-one quarters since the

Plan was confirmed. The court concluded that those violations constituted cause for dismissal under § 1112(b)(4)(K) (failure to pay fees) and § 1112(b)(4)(E) (failure to obey an order of the court), respectively. The court granted the motion to dismiss, and the debtor appealed.

II. Standard of Review

A district court reviews a bankruptcy court's legal conclusions *de novo* and its factual findings for clear error. Palmacci v. Umpierrez, 121 F.3d 781, 785 (1st Cir. 1997). To survive clear error review, a factual finding must be "plausible in light of the record viewed in its entirety." Anderson v. City of Bessemer City, N.C., 470 U.S. 564, 574 (1985). Dismissal of a bankruptcy case under § 1112(b) is reviewed for abuse of discretion. In re Abijoe Realty Corp., 943 F.2d 121, 128 (1st Cir. 1991). Dismissal for cause is an abuse of discretion only if the bankruptcy court "does not apply the correct law" or "rests its decision on a clearly erroneous finding of material fact." In re Andover Covered Bridge, LLC, 553 B.R. 162, 171 (B.A.P. 1st Cir. 2016).

III. Discussion

The debtor makes two arguments on appeal: 1) that the bankruptcy court lacked jurisdiction to grant the motion to dismiss because the motion was filed after the Plan was confirmed; and 2) that, even if jurisdiction was proper, the court erred in dismissing his case because his case was not "open" for the purposes of § 1112(b). Neither argument is persuasive.

A. The Jurisdiction of the Bankruptcy Court

28 U.S.C. § 1334 "establishes two main categories of bankruptcy matters over which the district courts have jurisdiction." Gupta v. Quincy Med. Ctr., 858 F.3d 657, 661 (1st Cir. 2017). The first category—"cases under title 11" of the Bankruptcy Code—"refers only to the bankruptcy petition itself." Id. The second category includes "proceedings arising under title 11, or arising in or related to cases under title 11." 28 U.S.C. § 1334(b). The latter category contains three distinct grants of authority. Proceedings "arising under title 11" are causes of action created by the Bankruptcy Code. Quincy Med. Ctr., 858 F.3d at 662. Proceedings "arising in" title 11 cases are not created by title 11, but nonetheless "would have no existence outside of bankruptcy." Id. at 662–63. Proceedings "related to" title 11 are those that might potentially affect the bankruptcy estate or impact the debtor's rights or liabilities, but that are not born of the bankruptcy case. Id. at 663.

Additionally, whether a bankruptcy court may issue a final order in a proceeding turns on whether that proceeding is "core" or "non-core." Final orders are only permitted in "core" proceedings. Id. at 662 n.5. Both "arising under" proceedings and "arising in" proceedings are "core," while "related to" proceedings are "non-core." Id. Thus, a bankruptcy court may only enter a final, appealable order—such as an order dismissing a case under § 1112(b)—if the matter before it is "arising under title 11" or "arising in" a title 11 case. Id. A bankruptcy court may not enter a final order

in a proceeding that is merely "related to" a title 11 case. Id.

The debtor argues that the motion to dismiss is at best "related to" title 11 because the Trustee could have sued him for breach of contract in state court, and that the bankruptcy court therefore lacked jurisdiction to issue a final order. He also claims that the confirmation of the Plan in September 2014 "attenuated" the bankruptcy court's "related to" jurisdiction, putting all subsequent matters in his case beyond the court's reach entirely. He is wrong on both fronts.

Dismissal under § 1112(b) is a remedy created by statute that could not exist outside of bankruptcy. It falls under the court's "arising under" and "arising in" jurisdiction—not its "related to" jurisdiction—and presents a core bankruptcy issue. See, e.g., In re Israel Sand, LLC, 569 B.R. 433, 437–38 (Bankr. S.D. Tex. 2017) (holding that § 1112(b) dismissal "is a core proceeding . . . because a dismissal of a case necessarily affects the administration of the bankruptcy estate"); In re Charles St. Afr. Methodist Episcopal Church of Bos., 499 B.R. 66, 99 (Bankr. D. Mass. 2013) (holding that all matters related to plan confirmation and enforcement are core); see also Quincy Med. Ctr., 858 F.3d at 662–63 (noting that "arising under" jurisdiction covers matters created by the Bankruptcy Code, while "arising in" jurisdiction covers matters that would not exist outside of bankruptcy). The bankruptcy court properly exercised jurisdiction over the motion to dismiss.

Notably, the debtor's claim of post-confirmation attenuation would fail even if the Trustee's motion did not "aris[e] under title 11" or "aris[e] in" a title 11 case. The debtor relies on In re Boston Regional Medical Center, Inc., in which the First Circuit noted that "courts sometimes have found a need to curtail the reach of related to jurisdiction in the post-confirmation context . . . ." 410 F.3d 100, 106 (1st Cir. 2005). The court, however, held that jurisdiction had not been attenuated in that case, and it expressly rejected the broad rule advocated by the debtor here. Id. ("The solution, however, is not to discard the baby with the bath water. While courts have interpreted the term 'related to' more grudgingly in some post-confirmation settings, context is important . . . . No case has suggested that courts should abandon the general rule in all post-confirmation cases."). Boston Regional merely evinces a practical recognition that "once confirmation has occurred, fewer proceedings are actually related to the underlying bankruptcy case." Id. In other words, some matters that qualify for "related to" jurisdiction pre-confirmation might no longer qualify post-confirmation, but the authority for "related to" jurisdiction never disappears. Id. A motion is not necessarily beyond a bankruptcy court's jurisdiction simply because it was filed after the confirmation of the latest reorganization plan.

Matters affecting "the interpretation, implementation, consummation, execution, or administration of the plan" remain in the bankruptcy court's jurisdiction post-confirmation. In re Resorts Int'l, Inc., 372 F.3d 154, 167 (3d Cir. 2004); see also In re Pegasus Gold Corp., 394 F.3d 1189, 1194 (9th Cir.

2005) (holding that matters affecting "the implementation and execution of the Plan" fall under the court's post-confirmation jurisdiction); In re Craig's Stores of Tex., Inc., 266 F.3d 388, 390 (5th Cir. 2001) (holding that jurisdiction attenuates post-confirmation "other than for matters pertaining to the implementation or execution of the plan"). The motion at issue in this case—which concerns the debtor's fulfillment of his responsibilities under the Plan—clearly falls into that category. The Trustee's motion fell within the bankruptcy court's jurisdiction, however you slice it.

B. Cause for Dismissal

Section 1112(b)(1) provides that a bankruptcy court "shall convert a case under [Chapter 11] to a case under Chapter 7 or dismiss a case under [Chapter 11] . . . for cause" if a debtor commits certain acts. 11 U.S.C. § 1112(b)(1). Section 1112(b)(4) lists the acts that constitute "cause" for dismissal or conversion, including "failure to comply with an order of the court," id. § 1112(b)(4)(E), and "failure to pay any fees or charges required under [28 U.S.C. § 1930]," id. § 1112(b)(4)(K). The bankruptcy court dismissed the debtor's case under (b)(4)(K) for failure to pay fees, and under (b)(4)(E) for failure to obey the court's order to file disbursement reports with the Trustee. The debtor claims that he was not bound by those requirements—which applied as long as his case was "open"—because his case was closed and later *reopened* before it was ultimately dismissed. He is wrong.

I. Failure to Pay Fees

When the Plan was confirmed in 2014, 28 U.S.C. § 1930 required payment of quarterly fees to the Trustee "in each case . . . until the case is converted or dismissed." 28 U.S.C. § 1930(a)(6)(A). As of January 1, 2021, § 1930 was amended to require fees in "each *open and reopened* case . . . until the case is closed, converted, or dismissed." Id. § 1930(a)(6)(B)(I) (emphasis added). The debtor argues that Congress' decision to add the words "open and reopened" to § 1930 shows that the prior version applied only to "open" cases, and not to "reopened" cases like his. He therefore argues that dismissal was improper because he was not required to pay fees.

The bankruptcy court rightly held that the debtor's obligation to pay fees extended to all quarters in which his case was open, regardless of whether it had been closed and reopened. Section 1930 applies broadly; it only excludes cases with "no open docket in which to assess the fees." In re CF & I Fabricators of Utah, Inc., 150 F.3d 1233, 1237 (10th Cir. 1998). As a result, "[u]pon the reopening of the case, the debtor is again responsible for the payment of quarterly fees because, pursuant to § 1930(a)(6), quarterly fees are required 'in each case under chapter 11,' and a reopened case is, in fact, a case under Chapter 11." In re Barbetta, LLC, No. 1-04370-8-SWH, 2014 WL 3638853, at *4–5 (Bankr. E.D.N.C. July 23, 2014) (internal citation omitted); see In re Chandni, LLC, 570 B.R. 530, 532 (Bankr. W.D. La. July 13, 2017) ("[O]nce re-opened, a case is 'live' in all respects. The parties are free to seek relief from the court and, more importantly for the

purposes of section 1930(a)(6), the U.S. Trustee is required to exercise its statutory duties with respect to the case."). Put simply, failure to pay quarterly fees in a reopened case constitutes cause for dismissal. Chandni 570 B.R. at 532 ("[Q]uarterly fees were due to the U.S. Trustee under section 1930(a)(6) once the case was re-opened. The debtor has failed to pay those fees. Failure to pay the quarterly U.S. Trustee's fee is a ground to convert or dismiss the case under § 1112(b)(4)(K).").

Because § 1930 applies to the debtor's reopened case, the case is subject to dismissal under § 1112(b)(4)(K). The debtor failed to pay fees in eighteen quarters between the third quarter of 2012 and the first quarter of 2021. He conceded his non-payment below, and he does not dispute it on appeal. The court's factual finding that the debtor missed payments was not clearly erroneous, and dismissal on that ground was not an abuse of discretion.

ii. Failure to Comply with an Order of the Court

The Plan states: "After confirmation, the Debtor will serve the United States Trustee with a quarterly disbursement report for each quarter (or portion thereof) so long as the case is open." (Appellee's App. at 67). The bankruptcy court read that language as an order to serve reports that applied after the case was reopened. The debtor does not dispute that the Plan contained an order to serve reports. Instead, he reprises his argument that his case was not actually "open," and he claims that the order therefore did not apply to him. Again, however, the debtor cannot

support his proposed distinction between "open" and "reopened" cases. As noted above, "once reopened, a case is 'live' in all respects"; violations committed in reopened cases can qualify as cause for dismissal under § 1112(b). Chandni, 570 B.R. at 532 (dismissing a reopened case under § 1112(b)(4)(K) for nonpayment of fees); see Barbetta, 2014 WL 3638853, at *4–5.

As a result, the case is subject to dismissal under § 1112(b)(4)(E). The debtor failed to serve reports on the Trustee—as ordered by the court in the Plan—in twenty-one quarters between the third quarter of 2012 and the first quarter of 2021. He conceded his non-compliance below and does not dispute it on appeal. The bankruptcy court's finding that the debtor failed to comply with the order was not clearly erroneous, and dismissal on that ground was not an abuse of discretion.

C. Unusual Circumstances

Once the court finds cause for dismissal under § 1112(b), a debtor can only avoid dismissal by: 1) identifying "unusual circumstances" that counsel against dismissal; 2) demonstrating that a new plan can be confirmed quickly; and 3) showing that any grounds for dismissal or conversion are justified and curable. 11 U.S.C. §§ 1112(b)(1)–(2). The debtor has not proffered evidence of any factors counseling against dismissal, nor has he addressed the feasibility of a new plan or the curability of the grounds for dismissal. See Andover, 553 B.R. at 172.

IV. Conclusion

The bankruptcy court, acting within its statutory jurisdiction, properly dismissed the debtor's case for cause under § 1112(b). For the foregoing reasons, the judgment of the bankruptcy court is AFFIRMED.

It is SO ORDERED.

/s/ George A. O'Toole, Jr.
United States District Judge

APPENDIX C

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MASSACHUSETTS
EASTERN DIVISION

Chapter 11
Case No. 11-12265-FJB

[Filed June 28, 2021]

In re	)
	)
ALEXANDER BROWN,	)
Debtor,	)
	)

MEMORANDUM OF DECISION

By his Second Motion to Dismiss Debtor's Chapter 11 Case for Post-Confirmation Default, the United States Trustee ("UST"), William Harrington, seeks an order under 11 U.S.C. § 1112 dismissing this chapter 11 case. A creditor, the Massachusetts Department of Revenue (the "MDOR"), has filed a statement in support of the motion, and the debtor, Alexander Brown (the "Debtor"), opposes dismissal. For the reasons stated herein, the Court will allow the motion.

Background and Travel of the Case

This reorganization case was initially filed in March 2011 as a case under chapter 13 and later converted to

one under chapter 11. By order dated September 9, 2014, the Court confirmed the Debtor's sixth amended plan of reorganization (the "Plan") (Dkt. #352). The road has indeed been rocky since confirmation. The confirmed plan provided for a restructuring of certain mortgage debt and for the payment of federal and state tax obligations over a thirty-six-month period. There was no provision made for any payment to nonpriority unsecured creditors. Following confirmation and in accord with a local rule in the District of Massachusetts, on August 12, 2016, the Court administratively closed the case. The case was later reopened on a motion of the Debtor to permit the Debtor to sell certain real property. At that time, the Debtor stated his intention to pay off the Plan in full from the proceeds of the sale. See Dkt. # 377, July 21, 2017 ("upon completion of the sale, [Debtor] anticipates being able to complete all of the payments required by the plan."). The sale occurred, but the payoff of the plan did not. The case was again administratively closed on May 18, 2018, only to be reopened a second time on September 17, 2018, on the Debtor's motion to permit the filing of an adversary proceeding against a lender. The case has remained open continuously since September 17, 2018.

On December 30, 2020, the Debtor moved to administratively close the case again. The Court, concerned with the "revolving door" nature of this case more than six years after confirmation, ordered the Debtor to file "an accounting of all plan payments made on (I) the class III secured claim of the MDOR, (ii) the administrative and priority claims of the MDOR, and (iii) the priority claims of the IRS . . . [and] an affidavit

in which he attests to the payments set forth in the accounting and indicates whether these claims have been paid in full[.]" Dkt. # 513. In an affidavit filed in compliance with that order, the Debtor admitted that he had failed to pay the claims of the IRS and the MDOR as required by the Plan.

Regarding payment of fees, the confirmation order, entered September 9, 2014, states that "[t]he Debtor will be responsible for timely payment of quarterly fees incurred pursuant to 28 U.S.C. 1930(a)(6) until [his] case is closed or dismissed." Regarding the filing of quarterly reports, the confirmation order states: "After confirmation, the Debtor will serve the United States Trustee with a quarterly disbursement report for each quarter (or portion thereof) so long as the case is open. The quarterly report shall be due fifteen days after the end of the calendar quarter." Regarding the content of the quarterly financial report, the confirmation order states:

> [T]he quarterly financial report shall include the following:
>
> a. a statement of all disbursements made during the course of the quarter, by month, whether or not pursuant to the plan;
>
> b. a summary, by class, of amounts distributed or property transferred to each recipient under the plan, and an explanation of the failure to make any distributions or transfers of property under the plan, if any;

> c. a description of any other factors which may materially affect the Debtor's ability to complete its obligations under the plan; and
>
> d. an estimated date when an application for final decree will be filed with the court (in the case of the final quarterly report, the date the decree was filed).

The Debtor admits that he failed to submit to the UST the quarterly reports required by the confirmation order in each of the third quarter of 2012, the fourth quarter of 2015, and the third quarter of 2016 through the first quarter of 2021. The Debtor further concedes that he has failed to pay the quarterly fees required under 28 U.S.C. § 1930(a)(6) for some eighteen quarters, including the third quarter of 2012, the fourth quarter of 2015, the third quarter of 2016, and the third quarter of 2017 through the first quarter of 2021. For these quarters, the UST estimates that a total of $6,500 is due. The Debtor admits that he owes approximately $6,500 in fees, arguing only that the UST failed to send bills for the fees. The UST concedes that it sent no invoices for these quarters. Without quarterly reports from the Debtor as to the extent of his disbursements in these quarters, the UST cannot have known how much to bill the Debtor for these quarters.

Arguments of the Parties

Citing 11 U.S.C. § 1112(b)(4)(E) (failure to comply with an order of the court), (H) (failure to provide information reasonably requested by the United States Trustee), (K) (failure to pay any fees and charges

required under chapter 123 of title 28) and, § 1112(b)(4) generally (undue delay), the UST requests that the court dismiss the Debtor's chapter 11 case. The UST also argues that dismissal (as opposed to conversion to a case under chapter 7) is in the best interests of creditors and the estate. The MDOR, for its part, supports dismissal, noting that under the confirmed plan the Debtor was to complete payments to the MDOR by November 1, 2017, which it is uncontested has not occurred. Although the Debtor stated in his February 27, 2021, affidavit that he was "continuing to make payments in the amounts required" to the MDOR, the MDOR reports that in fact no payments have been received by the MDOR in the months since that statement was made under oath. The MDOR avers that the last payments from the Debtor were on June 26 and July 11, 2019, and the one before that was more than two years earlier on April 26, 2017. Thus, the Debtor is admittedly in arrears to the MDOR, and his payments have been at best erratic.

At the hearing, Debtor's counsel could not contest the facts asserted in the UST's motion or the MDOR's joinder. Moreover, Debtor's counsel could not propose a schedule for paying the arrears to the MDOR or the arrears due in Fees to the UST. Debtor's counsel stated that he had not discussed the Debtor's ability to cure the arrears with his client. Rather, the Debtor raised two legal arguments in opposition to the Motion. First, he argued that the confirmation order is "silent" as to the Debtor's responsibility to file Reports and pay Fees when the case is "reopened." He further argues that the relevant statute on the payment of Fees to the UST is silent on whether that duty applies to reopened

chapter 11 cases. Second, the Debtor argued that the equitable doctrine of laches bars the UST and MDOR from seeking dismissal because they have waited too long to bring the Motion. Neither argument carries the day.

Analysis

This motion is brought under § 1112(b)(1) of the Bankruptcy Code, which states: "after notice and a hearing, the court shall convert a case under [chapter 11] to a case under chapter 7 or dismiss a case under [chapter 11], whichever is in the best interests of creditors and the estate, for cause unless the court determines that the appointment under section 1104(a) of a trustee or an examiner is in the best interests of creditors and the estate." 11 U.S.C. § 1112(b)(1). To support a motion to dismiss under § 1112(b), the movant must show "cause." 11 U.S.C. § 112(b)(1). Cause is defined as including certain enumerated events, including: "failure to comply with an order of the court," 1112(b)(4)(E), "failure timely to provide information . . . reasonably requested by the United States trustee," § 1112(b)(4)(H), and "failure to pay any fees or charges required under chapter 123 of title 28," § 1112(b)(4)(K). The UST argues that each of these causes for dismissal is present in this case. The enumeration of cause in § 1112(b)(4) is not exhaustive. The UST contends that further cause exists, specifically that the debtor's failure to close this case within 955 days after it was most recently reopened (September 17, 2018) constitutes unreasonable delay and, as such, is further cause to dismiss.

a. Failure to Pay a Fee Required under Chapter 123 of Title 28

The UST alleges, and the Debtor does not dispute, that the Debtor failed to pay fees due for certain quarters during which this case was open. The Debtor disputes only that fees were due for those quarters, saying the obligation applies only in open cases and not in reopened cases. I conclude that the requirement to pay a fee applied to any quarter in which the case was open, whether because it had never been closed or because it had been reopened.

By 28 U.S.C. § 1930, which is part of Chapter 123 of Title 28, a chapter 11 debtor is required to pay quarterly fees to the UST until a case is converted or dismissed.

> Except as provided in subparagraph (B), in addition to the filing fee paid to the clerk, a quarterly fee shall be paid to the United States trustee, for deposit in the Treasury, in each case under chapter 11 of title 11, other than under subchapter V, for each quarter (including any fraction thereof) until the case is converted or dismissed, whichever occurs first.

28 U.S.C. § 1930(a)(6)(A). Moreover, since January 1, 2021, and the effective date of the CARES Act, the plain text of § 1930(a)(6)(B) states that such fees are to be paid to the United States trustee in each *open and reopened* case under chapter 11:

> During the 5-year period beginning on January 1, 2021, in addition to the filing fee paid to the clerk, a quarterly fee shall be paid to the

> United States trustee, for deposit in the Treasury, in each open and reopened case under chapter 11 of title 11, other than under subchapter V, for each quarter (including any fraction thereof) until the case is closed, converted, or dismissed, whichever occurs first.

28 U.S.C. § 1930(a)(6)(B)(I). For most of the periods cited by the UST, the Debtor's obligations were governed by section 1930(a)(6)(A), which simply required that fees be paid until the case is converted or dismissed. For the periods since January 1, 2021, the Debtor's obligations were and are governed by section 1930(a)(6)(B), which requires that fees be paid in each "open and reopened case." I hasten to note that Congress has made it clear that "notwithstanding any other provision of law, the fees under § 1930(a)(6) shall accrue and be payable from and after January 27, 1996, in all cases (including, without limitation, any cases pending as of that date), regardless of confirmation status of their plans." *In re CF & I Fabricators of Utah, Inc.*, 150 F.3d 1233, 1236 (10th Cir. 1998), citing Omnibus Consolidated Appropriations Act, 1997**,** Pub. L. No. 104–208, § 109(d), 110 Stat. 3009, 3009–19 (1996). For these reasons, I conclude that the Debtor was obligated to pay a fee to the UST in each of the quarters in issue. The Debtor's failure to pay the fees due in each of eighteen quarters—the third quarter of 2012, the fourth quarter of 2015, the third quarter of 2016, and the third quarter of 2017 through the first quarter of 2021—is cause (eighteen times over) for dismissal within the meaning of § 1112(b)(1) and (b)(4)(K).

b. Failure to Comply with an Order of the Court

Under § 1112(b)(4), failure to comply with an order of the court is cause for dismissal. 11 U.S.C. § 1112(b)(4)(E). The UST contends the Court's order confirming the Debtor's chapter 11 plan contained two provisions requiring the Debtor's compliance, and that the Debtor has failed to comply with both.

The first concerned payment of fees. In relevant part, the confirmation order stated: "[t]he Debtor will be responsible for timely payment of quarterly fees incurred pursuant to 28 U.S.C. 1930(a)(6) until its case is closed or dismissed." I do not find that this language constituted an order to pay fees, or at least not clearly-enough so as to constitute a basis for the present motion. It can plausibly be read as merely putting the Debtor on notice that, under § 1930(a)(6), he will be obligated to pay quarterly fees.

The second concerned the submission of quarterly reports to the UST. Here, the relevant language is: "After confirmation, the Debtor *will serve* the United States Trustee with a quarterly disbursement report for each quarter (or portion thereof) so long as the case is open." Here, the language was clearly directive and injunctive, an order to serve the reports. Moreover, the language is clear that the obligation to produce these quarterly reports applies "so long as the case is open." By virtue of these words, the obligation applied even after reopening, because a reopened case is, until closed again, open. It is not disputed that the Debtor failed to produce reports for twenty-one quarters in which the case was open: the third quarter of 2012, the fourth

quarter of 2015, and the third quarter of 2016 through the first quarter of 2021. Accordingly, the UST has established that the Debtor twenty-one times failed to obey an order of the Court. These failures constitute cause for dismissal under § 1121(b)(1) and (b)(4)(E).

c. Failure to Provide Information Requested by the UST

The third enumerated cause on which the UST relies is "failure timely to provide information . . . reasonably requested by the United States trustee." 11 U.S.C. § 1112(b)(4)(H). The UST appears to contend that this provision is satisfied by the Debtor's failure to produce the quarterly reports required by the confirmation order, but he does not explain how these reports might be deemed "requested by" the United States trustee, and I fail to see how the Court's order to provide the reports constitutes a request by the UST for the same. Nor does the UST allege that he otherwise requested these reports, or some or all of the information they were required to contain, from the Debtor. Accordingly, for failure to demonstrate that the information required by the reports was requested by the UST, I find no showing of cause under subsection (b)(4)(H).[1]

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[1] Subsection (b)(4) identifies a closely related cause for dismissal: "unexcused failure to satisfy timely any filing or reporting requirement established by this title or by any rule applicable to a case under this chapter[.]" 11 U.S.C. § 1112(b)(4)(F). Though it may well apply here, the UST does not invoke this particular cause for dismissal.

d. Laches

The UST has established "cause" for dismissal: the Debtor's failure to pay fees required under chapter 123 of title 28 (for many quarters), and his failure to comply with an order of the Court regarding the submission of quarterly reports to the UST (again for many quarters).

I turn then to the Debtor's argument that the UST and MDOR are barred from seeking dismissal by application of the equitable doctrine of laches. Laches is defined as unreasonable delay in making an assertion or claim resulting in prejudice to a party. The Debtor asserts that the UST's failure to send invoices for the Fees establishes the equitable defense of laches. This argument fails for at least four reasons. First, laches does not generally apply to government entities. *A-Plus Auto Wholesalers, LLC*, 379 B.R. 228, 231 (Bankr. D. Conn. 2007). Second, the Debtor failed to file the required disbursement reports and therefore cannot, in equity, be heard to complain that the UST did not calculate the Fees due on the disbursements that he failed to report. Third, the Debtor has not demonstrated that he was prejudiced by any delay by the UST or the MDOR; indeed, he was likely advantaged by such delay. And fourth, the Debtor's failures to pay fees and file reports extend into the first quarter of 2021 and are thus, for at least that quarter, of such recent vintage that laches cannot plausibly be said to apply.

e. Unreasonable Delay in Closing Case

As further cause for dismissal, the UST alleges that the Debtor has unreasonably delayed in closing this

bankruptcy case. The UST's motion develops this basis almost not at all; its application here would be complex; and this basis is not one that is listed as cause *per se* in subsection 1112(b)(4). Having found ample other cause for dismissal, the Court will simply take no action on this one.

f. § 1112(b)(2)

Once cause is shown, a debtor may escape conversion or dismissal by establishing "unusual circumstances establishing that converting or dismissing the case is not in the best interests of creditors and the estate," and that (A) there is a likelihood that a plan will be confirmed in a reasonable time and (B) "the grounds for converting or dismissing the case include an act or omission of the debtor other than under paragraph (4)(A)--(I) for which there exists a reasonable justification for the act or omission; and (ii) that will be cured within a reasonable period of time fixed by the court." 11 U.S.C. § 1112(b)(2). In this case, the Debtor has offered no unusual circumstances establishing that conversion or dismissal is not in the best interest of creditors or the estate. He has already confirmed a plan, but he cannot meet the other requirements of this statutory test. He has shown no reasonable justification for the omissions—the numerous failures to submit reports and to pay fees—that constitute the established causes for dismissal. Nor has he shown that the omissions could be cured within a reasonable time. His counsel could not, despite direct questioning from the court, provide any offer of proof as to when the omissions could be cured or offer any justification for years of failures to comply with the

confirmation order and the statutory requirements of an open chapter 11 case. Counsel did mention the onset of the pandemic in early 2020 as an excuse, but many of the Debtor's failures here occurred long before the pandemic.

g. Best Interests of Creditors and the Estate

If cause is established to convert or dismiss, and the debtor has been unsuccessful under subsection (b)(2), the Court must convert or dismiss, "whichever is in the best interest of creditors and the estate," "unless the court determines that the appointment under section 1104(a) of a trustee or an examiner is in the best interests of creditors and the estate." 11 U.S.C. § 1112(b)(1). No one has suggested that the appointment of a chapter 11 trustee or of an examiner might be in the best interest of creditors or the estate; I do not see that either a trustee or an examiner would be of use here. As between conversion and dismissal, the UST seeks dismissal; no one has suggested that conversion to chapter 7 would better serve the interests of creditors or the estate; and I see no benefit in conversion to chapter 7 for creditors or the estate. I conclude that dismissal is in the best interests of creditors and the estate.

Conclusion

For the foregoing reasons, Court will by separate order allow the UST's motion to dismiss.

Date: June 28, 2021

/s/ Frank J. Bailey
Frank J. Bailey
United States Bankruptcy Judge