NO. 23-2212

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Marilyn O. Marshall,
Plaintiff-Appellant

v.

Edward Johnson
Defendant-Appellee

Appeal from the United States District Court
For the Northern District of Illinois, Eastern Division
Bankruptcy Case No. 22-BK-04449
The Honorable Judge Timothy A. Barnes

BRIEF OF THE APPELLEE EDWARD JOHNSON

The Semrad Law Firm, LLC.
Michael A. Miller
Attorney for Appellants-Debtors
11101 South Western Avenue
Chicago, IL 60643
312-256-8728

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Appellate Court No: 23-2212

Short Caption: Marilyn Marshall v. Edward Johnson

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Address: 11101 South Western Avenue, Chicago, IL 60643

Phone Number: 312-256-8728 Fax Number:

E-Mail Address: mmiller@semradlaw.com

ORAL ARGUMENT REQUESTED

Edward Johnson, appellee, respectfully requests oral argument in this case. The issue presented is one of first impression in this circuit. A clear answer to the legal question presented is necessary to provide much needed guidance to chapter 13 trustees, attorneys for debtor, and debtors.

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JURISDICTIONAL STATEMENT

The statement of jurisdiction in the Appellant Marilyn O. Marshall's brief is correct.

STATEMENT OF ISSUE

Whether the bankruptcy court was correct in determining that pursuant to 11 U.S.C. § 1326(a)(2) and 28 U.S.C. § 586(e)(2), a Chapter 13 Trustee may not retain a percentage fee in a chapter 13 case when a debtor's case has been dismissed prior to confirmation of a chapter 13 plan?

SUMMARY OF ARGUMENT

The bankruptcy court correctly determined that a Chapter 13 Trustee cannot retain her fee when a plan remains unconfirmed. Both the Ninth and Tenth circuits —the only two federal appellate courts to address this issue — concur that Sections 586(e)(2) and 1326(a)(2) unambiguously stipulate that a Chapter 13 Trustee must refund her fee if a chapter 13 plan is not confirmed. *See Evans v. McCallister (In re Evans)*, 69 F.4th 1101 (9th Cir. 2023) and *Goodman v. Doll (In re Doll)*, 57 F.4th 1235 (10th Cir. 2023). Though *Evans* and *Doll* reach the same conclusion, their analytical routes slightly differ.

Section 586(e)(2) of the Judicial Code authorizes standing trustees in chapter 13, chapter 11, subchapter V, and chapter 12 to oversee cases. Crucially, Section 586(e)(2) permits standing trustees to "collect" percentage fees only "under plans" within Chapter 13, 12 or 11, subchapter V. Section 1326(a)(2) of the Bankruptcy

Code elaborates those payments made as per Section 1326(a)(1)(A) — which are due within 30 days of a proposed plan — are to be "retained by the trustee until confirmation or denial". Upon plan confirmation, the trustee disburses in line with the plan. But if confirmation is denied, the trustee is compelled to return these payments. Lastly, Section 1326(b) states that "under the plan" i.e. when the case is confirmed, the trustee shall be paid.

The *Evans* court aptly interprets "under the plan" as referencing a confirmed plan. On the initial filing of Chapter 13, a proposed plan is filed. Payment becomes due within 30 days. The proposed plan awaits confirmation before becoming effective and legally binding. Hence, any mention in Sections 586(e)(2), 1326(a)(2), and 1326(b) of "under the plan" pertains strictly to confirmed plans. Post-confirmation, these sections activate entitling the Chapter 13 Trustee to her fees. Conversely, with only a "proposed plan" and absent confirmation, neither Section 586(e)(2) or 1326(b) activate. Here, Section 1326(a)(2) instructs that retained payments — under Section 1326(a)(1)(A) —must be refunded.

Contrastingly, the *Doll* court's analysis hinges on "collect" from Section 586(e)(2). *Doll* holds that "collect" does not grant irrevocable retention of the fees from the proposed payments for the Chapter 13 Trustee as the Trustee argues. *Doll* explains that Section 586(e)(2) merely delineates the funds' origin for standing trustees. Both *Doll and Evans* highlight compelling evidence within the Bankruptcy Code's explicit directives regarding Chapter 11, subchapter V and Chapter 12 Trustees' entitlement to keep fees in unconfined plans. For instance, Sections 1194(a) and

Section 1226(a) both explicitly state "if a plan is not confirmed" that chapter 11, subchapter V and Chapter 12 trustees can keep their fees. Notably, such explicit language is absent from Section 1326(a)(2). This omission underscores Congress's intent, having made a conscious choice to exclude Chapter 13 Trustees from being paid in unconfirmed plans.

The amendment history of Section 1326 further bolster this. With amendments in 1986, 1994, and 2005 to Chapter 13, and the introduction of Sections 1224(a) in 1986 and 1194(a) in 2019, Congress abstained from amending Section 1326(a) to explicitly permit Chapter 13 Trustees to be paid a fee in unconfirmed plans. This contrast —in light of explicit provisions for chapter 12 and chapter 11, subchapter V cases —reinforces the legislative intent against Chapter 13 Trustees being paid in unconfirmed cases.

Lastly, this Court's deliberation centers on statutory interpretation, making the Trustee's policy arguments, especially those regarding potential fee hikes for other debtors, less relevant. There is no concrete evidence in the record on appeal to substantiate these claims. Furthermore, many chapter 13 cases that do not get confirmed get dismissed rapidly, often involving negligible funds for the 13 Trustee. Policy considerations belong to Congress who is responsible for amending the Bankruptcy Code. The judiciary's mandate lies in interpretation. Hence, this Court should affirm the bankruptcy court's decision: a chapter 13 Trustee is not entitled to keep her fee in an unconfirmed plan.

ARGUMENT

I. Standard of Review

The Appellee, Edward Johnson ("Mr. Johnson") does not contest the Appellant, Marilyn O. Marshall's ("Trustee") statement of the standard of review.

II. The framework of Chapter 13 cases.

Consumer debtors typically have two primary bankruptcy options available to them: Chapter 7 and Chapter 13. *Goodman v. Doll (In re Doll)*, 57 F.4th 1129, 1135 (10th Cir. 2023). Chapter 7 offers a quick pathway to debt relief through the discharge of liabilities, offset by the potential liquidation of non-exempt assets. *Id.* Typically, a Chapter 7 case can reach discharge within approximately 90 days. In contrast, Chapter 13 allows individuals with regular incomes to restructure their debts, repaying them over a span of 3 to 5 years. *Id.* Chapter 13 permits debtors to retain non-exempt assets. *Id.*

The Bankruptcy Code restricts its availability to individual debtors, excluding business entities. *See* 11 U.S.C. 101(30) and 11 U.S.C. 109(e)[1]. Additionally, Congress has prescribed debt limits for Chapter 13 eligibility, capped at $465,275 for unsecured debts and $1,395,875 for secured debts on a debtor to be eligible for Chapter 13. *See* § 109(e). A temporary adjustment, effective until June 2024, has raised this limit to $2.75 million in total noncontingent liquidated debt until June 2024. *See* The

[1] All citations to statutes will be to the Bankruptcy Code 11 U.S.C, except for citations to 11 U.S.C. Section 586.

Bankruptcy Threshold Adjustment and Technical Corrections Act, Pub L. No. 117-151, § 2(f), 136 Stat. 1298 (2022).

Upon filing Chapter 13 petition, as was done by Mr. Johnson on April 18, 2023, the proceedings advance promptly. The debtor is obligated to file a Chapter 13 proposed plan either currently with the petition or within the ensuing 14 days. *See* § 1321 and Federal Rule Bankruptcy Procedure 3015(b). Payments to the Chapter 13 Trustee commenced within 30 days of either the plan's submission or the petition's filing, whichever occurs first. *See* § 1326(a)(1). Furthermore, debtors are mandated to attend the Section 341 meeting of creditors ("341 meeting"), usually convened between 21 and 50 days after filing. *See* Fed R. Bankr. P. 2003(a). In the Northern District of Illinois, such meetings often take place roughly 35 days post-petition, as evidenced by Mr. Johnson's meeting set for May 16, 2023.[2] The 341 meeting is typically brief with usually only the Chapter 13 Trustee, the debtor ,and their counsel present. Most creditors don't attend because objections are filed directly in the bankruptcy court.

To finalize the Chapter 13 plan, a confirmation hearing is conducted to determine the plan's approval. In adherence to Section 1324(b), this hearing occurs between 20 to 45 days following the 341 hearing, reflecting Congressional intent for expedited Chapter 13 confirmations as elucidated by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. *In re Butcher*, 459 B.R. 115, 119 (Bankr. D. Colo. 2011). In practice, the Northern District of Illinois typically holds this hearing

[2] The original 341 meeting was continued and held on June 22, 2023.

approximately 70 days after the initial filing of the chapter 13 bankruptcy. For Mr. Johnson, this was set for June 9, 2022 which was only 52 days from the petition date.

If a chapter 13 case is not confirmed in a speedy manner, then the Chapter 13 Trustee or a creditor can file a motion to dismiss for unreasonable delay pursuant to Section 1307(c). *See In re Dempsey*, 247 Fed. App'x. 21 at *25 (7th Cir. 2007). Notably, Mr. Johnson's two Chapter 13 plans – the initial on April 29, 2022, and a subsequent amended plan on September 7, 2022 – resulted in two dismissal motions by the Trustee for unreasonable delay in confirming a plan and the case was ultimately dismissed by the Trustee's motion[3]. *See* Trustee's Brief at 5. Yet, no motion was ever filed by the Trustee to deny confirmation of a proposed plan.

A. Chapter 13 Trustees

In every chapter 13 case, an appointed chapter 13 trustee is designated. *Doll*, 57 F.4th at 1136. Pursuant to Section 586(b), standing trustees may be appointed to supervise cases in Chapter 13, Chapter 11, subchapter V, and Chapter 12. The primary responsibilities of the Chapter 13 Trustee encompass supervising the case, conducting the 341 meetings, objecting to confirmation if deemed necessary, collecting payments from the debtor, and disbursing payments to creditors. *Evans v. McCallister (In re Evans)*, 69 F.4th 1101, 1104, (9th Cir.2023).

Chapter 13 trustees receive their compensation as a percentage fee derived from the plan payments made by the debtor. *See* § 586(e)(2). The maximum compensation

[3] The Trustee's motion to dismiss was three sentences long and contained no substantive arguments, and stated the debtor's case should be dismissed for failure to confirm a plan timely and failure to provide all pay advices from the prior 60 days. *See* Record of Appeal, docket entry #7 in Seventh Circuit, pp. 93-95.

a Chapter 13 Trustee can attain is statutorily capped at 10% by Congress. *See* 11 U.S.C. § 586(e)(1)(B)(i). In the case at bar, the Trustee's fee began at 6.1% and subsequently increased to 7% later in the case. *See* Trustee's Brief at p. 7.

III. Sections 586 and 1326, when read together in harmony, unambiguously require a Chapter 13 Trustee to return her fee when a plan is not confirmed.

A. The Ninth Circuit *Evans* Approach.

The Ninth Circuit Court of Appeals in the recent *Evans* decision elucidates how Sections 586(e)(2) and 1326(a)(2) dictate that a Chapter 13 trustee must refund her fee, if a plan isn't confirmed, and that a Chapter 13 trustee can only retain the fee when a plan is confirmed.[4] *Evans* underscores four key statutes that collectively demand the return of the trustee's commission when a Chapter 13 plan is not confirmed. *See Evans*, 69 F.4th 1101 at 1106-8. *Evans* holds that the term "under the plan" only applies to a confirmed plan, and not an unconfirmed plan. *Id. at* 1107-8. And when the term "proposed plan" is used, that relates to an unconfirmed plan. *Id.* The four sections that *Evans* parsed to conclude that the 13 Trustee cannot keep its fee when a plan is unconfirmed are:

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[4] There is currently a split in the lower courts on the issue of whether a Chapter 13 Trustee can keep its fee deducted from an unconfirmed plan in the lower courts, with most case law supporting the Appellee. The majority view supporting the Appellee holds the Chapter 13 Trustee must return its fee when a case is not confirmed. *See In re Rivera*, 268 B.R. 292 (Bankr. D.N.M. 2001), *affirmed sub nom.*, *In re Miranda*, 2001 WL 1538003 (10th Cir. B.A.P. 2001); *In re Crespin*, No. 17-11234 TA13 2019 WL 2246540 (Bankr. D.N.M. May 23, 2019); *In re Lundy*, No. 15-32271, 2017 WL 4404271 (Bankr. N.D. Ohio Sep. 29, 2017); *In re Dickens*, 513 B.R. 906 (Bankr. E.D. Ark. 2014); *In re Acevedo*, 497 B.R. 112 (Bankr. D.N.M. 2013).*but see In re Harmon*, 2021 WL 3087744 (9th Cir. BAP July 20, 2021); *overruled by Evans v. McCallister (In re Evans)*, 69 F.4th 1101 (9th Cir. 2013);*Nardello v. Balboa (In re Nardell)*; 514 B.R. 105 (D.N.J. 2014); *In re Soussis v. Macco*, 2022 WL 203751 (E.D.N.Y. Jan 24, 2022), currently on appeal in the Second Circuit Court of Appeals; *Soussis v. Macco*, No. 22155 (2d Cir. Argued Feb. 15, 2023).

Section 586(e)(2)

Originating from the Judicial Code, Section 586(e)(2) of title 28 is not part of the Bankruptcy Code. It broadly applies to standing trustees across Chapter 11 subchapter V, chapter 12, and chapter 13. Section 586(e)(2) discusses the percentage fee system for standing trustees "under plans" and provides that standing trustees:

> …*shall collect* such percentage fee from all payments received by such individual *under plans* in the cases under subchapter V of chapter 11 or chapter 12 or 13 of title 11 for which such individual serves as standing trustee…

(emphasis added).

Section 1326(a)(1)(A)

This section mandates the debtor to initiate payments "proposed by the plan to the trustee within 30 days post-filing:

> (1) Unless the court orders otherwise, the debtor shall commence making payments not later than 30 days after the date of the filing of the plan… (A) *proposed by the plan* to the trustee[]… (emphasis added)

Section 1326(a)(2)

This section delineates the Chapter 13 Trustee's obligations in handling fees relative to confirmed and unconfirmed "proposed plans":

> *A payment made under paragraph (1)(A) shall be retained by the trustee until confirmation or denial of confirmation.* If a plan is confirmed, the trustee shall distribute any such payment in accordance with the plan as soon as is practicable*. If a plan is not confirmed, the trustee shall return any such payments* not previously paid and not yet due and owing to creditors pursuant to paragraph (3) *to the debtor*, after deducting any unpaid claim allowed under section 503(b). (emphasis added).

Section 1326(b)

Lastly, this section which follows Section 1326(a)(2), and cross references Section 586 discusses what happens "under the plan" when a case is confirmed:

> (b) Before of at the time of each payment to creditors *under the plan*, there shall be paid [] … (2) if a standing trustee appointed under section 586(b) of title 28 is serving in the case, the percentage fee fixed for such standing trustee under section 586(c)(1)(B) of title 28. (emphasis added).

Drawing from the Supreme Court canon on statutory interpretation in *Oneok, Inc. v. Learjet, Inc.*, 575 U.S. 373 (2015), "statutory provisions should not be read in isolation, and the meaning of a statutory provision must be consistent with the structure of a statute of which it is a part." *Evans'* analysis of Sections 586(e)(2), 1326(a)(1)(A), 1326(a)(2), and 1326(b) concludes a Chapter 13 Trustee does not keep her fees if a Chapter 13 plan fails to gain confirmation. *Evans*, 69 F.4th at 1106-8.

First, the phrase "payments …under plans" in Section 586(e)(2) pertains exclusively to confirmed plans, rendering the provision irrelevant during the pre-confirmation stage. Section 586(e)(2) specifically mandates that the Chapter 13 Trustee shall collect its fee from all payments "under plans". Though a chapter 13 plan is indeed proposed and filed upon initiating a chapter 13 bankruptcy, the term "under plans" in Section 586(e)(2) connotes a confirmed plan, not merely a proposed one. The context of Section 586(e)(2) revolves around the post-confirmation period when a plan is confirmed. *Id.* at 1107. Section 586(e)(2) is discussing the post-confirmation period of payments. To discern when pre-confirmation payments are required, one should consult Section 1326(a)(2).

Second, for the preconfirmation phase of proposed payments, Section 1326(a)(1)(A) is instructive. *Evans*, 69 F.4th at 1107. This section is unambiguous, mandating that a debtor commence payments as "proposed by a plan" within 30 days of the Chapter 13 case filing of upon plan submission, whichever occurs first. Hence, Section 1326(a)(1)(A) addresses a proposed, not confirmed plan – a sharp departure from Section 586(e)(2) which pertains to payment pursuant to a confirmed plan.

Third, Section 1326(a)(2) refers to Section 1326(a)(1)(A), providing that payments made under a "proposed plan", are retained by the Chapter 13 Trustee pending confirmation or denial. If the plan is confirmed, the trustee is then tasked with disbursing payments as delineated in the plan. Lastly, enter Section 1326(b): the linchpin of a confirmed plan. This section provides that once a plan is confirmed, the trustee can receive it set percentage fee from payments "under the plan" and even explicitly cross-references Section 586. *Evans*, 69 F.4th at 1107.

When contrasting the usage of "under plan" in Sections 586(e)(2) and 1326(b) with "proposed plan" in Sections 1326(a)(1)(A) and 1326(a)(2), the conclusion is clear. At a chapter 13's case inception, when a plan is proposed, Section 1326(a)(1)(A) specifies that the Chapter 13 Trustee retain pre-confirmation payments paid under a proposed plan in line with Section 1326(a)(2). Only upon a plan being confirmed, is the trustee's fee furnished as outlined in Sections 1326(a)(2). Absent confirmation, no plan is binding and there is no plan. This is

because "under plan" means a confirmed plan and does not mean an unconfirmed plan. There is no binding plan until one is confirmed. *Evans*, 69 F.4th at 1107.

The Trustee postulates that "under the plan" in Section 586(e)(2) encompasses both proposed and confirmed plans. *See* Trustee's Brief at p.12. However, this argument is flawed for three reasons. First, the Bankruptcy Code does not define the phrase "under the plan." Second, it neglects the explicit directive in Section 1326(a)(2) which directs the Chapter 13 Trustee to refund payments if a plan is denied.

Third, the Chapter 13 plan does not become binding and have authority until it is confirmed, so a more natural reading is that "under the plan" equates to when the Chapter 13 plan is confirmed since that is when the plan has authority and becomes binding and operative. If a plan is never confirmed, then there are no payments that could ever be made "under the plan". The United States Supreme Court and a recent Fifth Circuit Court of Appeals case support that "under the plan" refers only to a confirmed plan, and not an unconfirmed plan. *See Florida Dept. of Rev. v. Piccadilly Cafeterias, Inc.*, 554 U.S. 33, 39-41 (2008). ("Though 'under' bears multiple meanings, a payment 'under' a bankruptcy plan is "more naturally read as something subject to …or under the authority of the plan.). *See also Kinney v. HSBC Bank USA, N.A. (In re Kinney)*, 5 F.4th 1136 (10th Cir. 2021) (holding that payments under a plan are only subject to or under the authority of a plan when it's confirmed). An unconfirmed plan lacks authority: hence, Sections 586(e) and 1326(b) cannot mean an unconfirmed plan and refer only to a confirmed plan.

Therefore, a cohesive reading of Sections 586(e)(2) and 1326(a) elucidates that a Chapter 13 Trustee is not entitled to her fee for a "proposed plan" that is not confirmed. Only upon case confirmation, or "under the plan" can the Chapter 13 trustee keep the fee.

B. The Tenth Circuit *Doll* approach.

The Tenth Circuit Court of Appeals recent decision in *Doll* mirrors the holding in *Evans* that Sections 586(e)(2) and 1326 unambiguously dictate that a Chapter 13 Trustee cannot retain its fee in an unconfirmed case. However, *Doll* arrived at this conclusion through a slightly nuanced rationale. Specifically, the court in *Doll* zeroed in on Section 586(e)(2). This statute mandates that the Chapter 13 Trustee "collect" its fee only from "all payments received… under [the] plan." *Doll* interpreted the term "collect" in Section 586(e)(2) as merely pinpointing the "source of funds that may be accessed" for paying Chapter 13 Trustee fees. *Doll*, 57 F.4th at 1140. This is distinct from Section 1326(a)(2), a provision within the Bankruptcy Code that lays out the mechanism detailing when and how a Chapter 13 Trustee may keep its fee.

In its examination of Section 1326(a)(2), the *Doll* court highlighted that if a plan remains unconfirmed, the Chapter 13 Trustee can only pay certain things such as unpaid claims under Section 503(b) and 363 transfers (pursuant to Section 1326(a)(3)), prior to refunding the debtor. While some administrative expenses, like attorney fees, are categorized under Section 503(b), the standing trustees and the United States Trustee are not included within this section. *Id.* at 1140-1. In the case at hand, the Trustee is not suggesting her fee is covered by either Section 503(b) or

Section 363. However, *Doll* emphasized that Section 1326(a)(2) explicitly dictates that, should a plan fail to be confirmed, "the trustee shall return any such payments…to the debtor." *Doll*, 57 F.4th at 1141. Thus, harmonizing both sections, while Section 586(e)(2) directs the Chapter 13 Trustee to collect its fee, Section 1326(a)(2) obliges the Trustee to refund this fee in situations where the plan is not confirmed. *Id.* The *Doll* court was clear in its interpretation: Section 1326(a)(2) does not grant the Chapter 13 Trustee permission to withhold her fee with the plan is not confirmed. *Id.*

C. The phrase under Section 586(e)(2) "shall collect" means to gather or accumulate, rather than to irrevocably keep.

The Trustee argues that the term "shall collect" in Section 586(e)(2) means once she deducts her fee it is hers to keep permanently, and it is a final and irrevocable payment. *See* Trustee's Brief at pp.12-13. Even if Section 586(e)(2) did not apply only to payments under plans, such an interpretation was squarely rejected in *Doll* for the following reasons. First *Doll* clarified that the chapter 13 trustee's argument erroneously "conflates the initial collection of funds" with the subsequent act where the Trustee will distribute the funds. *Doll*, 57 F.4th at 1144-5. An analogy is the attorney-client retainer relationship. When an attorney collects a retainer, it does not grant them the irrevocable right to retain it. They must earn it. Should the client terminate the attorney before exhausting the entire retainer, a refund is in order. Another parallel can be drawn from the borrower and lender relationship for a mortgage where borrowers often have their property taxes and insurance escrowed. Here, the lender does not have an irrevocable right to the entire mortgage payment. Overages in the escrow might even lead to a refund of part of the

mortgage payments.

Second, the Trustee's reading introduces the notion of irrevocability into Section 586(e)(2) to define "collect". However, Section 586(e)(2) does not explicitly state that the collection process results in an irreversible payment for the Trustee's retention *Doll*, 57 F.4th at 1144. Adhering to the Supreme Court cannon, a court should not read an absent word into a statute. *Lamie v. U.S. Trustee*, 540 U.S. 526, 538 (2004). The debate over the definition of "collect" was similarly addressed in *Evans*. While it dismissed the Trustee's definition that aligned with permanent retention, it did not entirely side with the debtor's perspective either. *Evans*, 69 F.4th at 1106. *Evans* found both the debtor and trustee were asking the court to add words to the statute that were not there, by asking it to read "collect" to mean irrevocably collect or to collect and hold. *Id.* However, the *Evans* holding is still consistent with *Doll*. *Id.* at 1108.

Third, the term "collect" does not mean the Trustee can irrevocably keep the funds because, as argued *infra*, Congress separately directed Chapter 12, and chapter 11, subchapter V Trustees to deduct their fees with explicit language in the Code. *Doll*, 57 F.4th at 1134-5. Therefore, the Trustee's interpretation that "collect" equates to permanently retain its fees should be disregarded by this Court.

IV. Section 1326(a)(2) is clear and unambiguous, and the Trustee's other arguments are unavailing.

The Trustee also makes several arguments suggesting that Section 1326(a)(2) is ambiguous or unclear. Notably, Section 1326(a)(2) states in part "A payment under section (1)(a) shall be retained by the trustee until confirmation or denial of

confirmation.". Based on this provision, the Trustee posits that if a plan remains unconfirmed, she must refund the fee even if the chapter 13 has yet to be dismissed and still might attain confirmation. *See* Trustee's Brief at pp.13-14. However, this stance is flawed for two primary reasons.

Firstly, the Trustee's assertion is inapplicable to the case at hand. As conceded by the Trustee and corroborated by the record, there was no motion by the Trustee to deny confirmation filed in the bankruptcy. In this case, Mr. Johnson presented two separate proposed plans. A motion to deny confirmation was not a requisite for Mr. Johnson to seek confirmation of a new plan. A debtor can submit multiple proposed plans without any prior motion to deny confirmation.

Secondly, Section 1326(a)(2) mandates the trustee to *retain* payments until confirmation or denial of a plan. This implies a requisite triggering event for the trustee to disburse the retained payments. Logically, the most natural reading is if a plan is confirmed, the trustee disburses according to the plan's terms. Conversely, if the plan remains unconfirmed, disbursements occur following either conversion or dismissal, and the chapter 13 has expired. *See Acevedo*, 497 B.R. at 117 *citing Leocal v. Ashcroft*, 543 U.S. 1, 9 (2004) ("When interpreting a statute, words should generally be given their ordinary or natural meaning.")

The next argument the Trustee makes is a perceived conflict between Sections 1326(a)(2) and 586(e)(2). *See* Trustee's Brief at 13-14,. The Trustee posits that Section 586(e)(2)(A) requires any surplus of trustee fees to be deposited into the United States Trustee System Fund. How, then, can a chapter 13 trustee return

funds to the debtor from an unconfirmed plan should such a scenario arise?

Acevedo addressed and dismissed this very same contention. *Acevedo* determined no conflict existed, because Section 586(e)(2) "can be reasonably interpreted only to require payments in cases in which plans are confirmed [,] [and] [n]othing"… under Section 586(e)(2) mandates the chapter 13 trustee to "generate such a surplus by paying her salary and operating expenses from funds collected in cases where no plan is confirmed." *Acevedo*, 497 B.R. at 123. Consequently, the Trustee's argument is misplaced.

V. A comparison of Section 1326(a)(2) with Sections 1226(a) and 1194(a) supports the bankruptcy court's decision that the Trustee must refund her fee in an unconfirmed plan.

Section 586(e)(2) is not part of the Bankruptcy Code and comes from the Judicial Code. It is a general provision that applies to all standing trustees under chapter 11, subchapter V, chapter 12, and chapter 13. Section 586(e)(2) does not explain when a standing trustee gets to keep her fee, but only addresses "the source of funds that may be accessed to pay standing trustees." *Doll*, 57 F.4th at 1140. It is the Bankruptcy Code that gives express direction when a standing trustee can keep its fee in a case with an unconfirmed plan. For Chapter 13, 12, and chapter 11, subchapter V trustees, there is a specific Bankruptcy Code provision that explicitly provides if the trustee can keep her fee in an unconfirmed case.

For Chapter 11 subchapter V standing trustees, Section 1194(a) states "…If a plan is not confirmed, the trustee shall return any such payments to the debtor after deducting…(3) any fee owing to the trustee". For Chapter 12

Trustees, Section 1226(a) states "…If a plan is not confirmed, the trustee shall return any such payments to the debtor, after deducting…if a standing trustee is serving in the case, the percentage fee fixed for such standing trustee." Thus, Sections 1194(a) and 1226(a) are crystal clear that if a Chapter 11, subchapter V, or 12 plan is not confirmed, the trustee should deduct its fee.

Evans and *Doll* both opine that because Congress explicitly stated in Sections 1194(a) and 1226(a) that the trustee shall deduct its fees when a plan is not confirmed, but did not put that same language in Section 1326(a)(2), that this is strong evidence that Congress did not want 13 Trustees to be paid a fee when a plan is not confirmed, but only trustees in Chapter 11 subchapter V, and chapter 12 should be paid a fee when a plan is not confirmed. *Evans*, 69 F.4th at 1108-9; *Doll*, 57 F.4th at 1141-2. It is axiomatic "where Congress includes particular language in one section of a statute but omits it in another, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Keene Corp. v. United States*, 508 U.S, 200, 208 (1993). Congress using explicit language in Sections 1194(a) and 1226(a) that the standing trustee should deduct its fee when a case is not confirmed is compelling evidence that Congress knows exactly how to write a Bankruptcy Code provision to clearly state that a Chapter 13 Trustee should be paid when a plan is not confirmed but chose not to under Section 1326(a). *Doll*, 57 F.4th at 1142.

A. The amendment history of Section 1326(a)(2) underscores Congress's intent against Chapter 13 Trustees receiving payment from an unconfirmed plan.

The Trustee contends that the distinct language in Sections 1226(a) and 1194(a), which explicitly permits the standing trustee to keep her fee from an unconfirmed plan – yet absent in Section 1326(a)(2) – is not determinative since Sections 1226(a) and 1194(a) were enacted after Section 1326(a). The Trustee further asserts that it's not appropriate to juxtapose Chapter 13's with Chapter 11 and 12. These assertions, however, are flawed.

The chronology, where Congress initially enacted Section 1326(a), followed by and the subsequent enactment of Sections 1194(a) and 1226(a) is compelling evidence that Congress intended to prevent Chapter 13 Trustee's from being paid in unconfirmed plans. Had Congress desired to align Section 1326(a)(2) with the later sections, then amendments to Section 1326(a) could have easily been done at the time it enacted Sections 1194(a) and 1226(a). Yet, Congress refrained. Both the *Evans* and *Doll* courts found this line of reasoning persuasive. *Doll* highlighted that Congress amended Section 1326(b) in 1986, the same year Congress enacted Chapter 12. *Doll*, 57 F.4th at 1143. When Congress enacted Chapter 12 in 1986, it also created Section 1226(a) *Id.* Congress modeled Chapter 12 after Chapter 13 and when it amended Section 1326(b) in the same year it created Section 1226(a), it refrained from taking any action to amend Section 1326(a)(2). *Id.* This was the perfect opportunity for Congress to algin the goal of having a Chapter 13 trustee get paid in an unconfirmed plan, like it explicitly stated in Section 1226(a) for Chapter

12 Trustees. Moreover, Congress enacted Section 1194(a) in 2019 to allow chapter 11, subchapter V trustees to retain fees in unconfirmed plans. Such inaction to fail to amend Section 1326 in 2019 indicates Congress's deliberate choice against allowing Chapter 13 Trustee to be paid fees from unconfirmed plans. *Id.*

Moreover, Congress has amended Section 1326 on multiple occasions: Section 1326(b) in 1986; Section 1326(a)(2) in 1994 to require payments to begin to creditors to begin "as soon as practicable" after confirmation, and again in 2005 by adding the words "not previously paid and not yet due and owing to creditors pursuant to paragraph (3). *See Doll*, 57 F.4th at 1142; *Evans*, 69 F.4th at 1109. This series of amendments underlines Congress's repeated opportunities to amend Sections 1326(a)(2) or 582(e)(2) to add explicit language to ensure Chapter 13 Trustees are paid a fee for unconfirmed cases, yet each time it abstained. *Evans*, 69 F.4th at 1109. The Supreme Court has recognized that "negative implications raised by disparate provisions are strongest when the portions of a statute treated differently had already been joined together and were being considered simultaneously when the language raising the implication was inserted." *Id.*, citing *Lindh v. Murphy*, 521 U.S. 320, 330 (1997).

When examining the overarching legislative actions – from the non-amendments of Section 1326(a) across 1986, 1994, and 2005, to the specific provisions within Sections 1226(a) and 1194(a) – a consistent pattern emerges. Congress has consistently chosen not to authorize Chapter 13 Trustees to be paid a fee from unconfirmed plans. The repeated legislative decisions are evidence of a negative

implication disallowing Chapter 13 Trustees to be paid a fee in an unconfirmed case.

The Trustee argues that the language in Sections 1194(a) and 1226(a) is non-determinative and that Section 1326(a)(2) should not be compared to the former sections because Chapter 13's are different than chapter 11, subchapter V and Chapter 12 cases. *See* Trustee's Brief at 10-11. This argument is without merit. Ignoring the express directives in Sections 1194(a) and 1226(a) which allow a trustee to be paid in an unconfirmed plan, and the absence of such a provision in Section 1326(a)(2) would render the express language in Section 1194(a) and 1226(a) surplusage. *Doll*, 57 F.4th at 1143. The Supreme Court holds that "courts must give effect, if possible, to every clause and word of a statute." *Liu v. SEC*, 140 S. Ct. 1936, 1948 (2020).

Furthermore, the Trustee's argument that this Court should ignore the similarities between Section 1194(a) and 1226(a) with Section 1326(a)(2) because Chapter 13's are different than chapter 11, subchapter V and chapter 12 cases is unconvincing. *Doll* rejected this argument and reasoned that the "distinction between Chapter 12 and Chapter 13 bankruptcies are not material" to the legal question. *Doll*, 57 F.4th at 1142. Chapter 13's are similar to Chapter 13 and Chapter 11, subchapter V cases because they all involves a 3 to 5 year payment plan. For perspective, Chapter 12, when introduced in 1975, was modeled closely after Chapter 13 *See Doll*, 57 F.4th at 1143, *citing Foulston v. BDT Farms, Inc. (In re BDT Farms)*, 21 F.3d 1019, 1021 n.3 (10th Cir. 1994).

Moreover, the Trustee's argument that chapter 13 bankruptcies are different than chapter 11, subchapter V and chapter 12 cases bolsters Mr. Johnson's stance. This is because it would make sense that Congress chose to treat standing trustees differently in chapter 13's versus chapter 11, subchapter V and chapter 12 cases. This is because chapter 13 and chapter 11, subchapter V cases tend to be much more complicated and lengthier, and usually involve much higher payments since they are meant for farmers and businesses rather than individuals like in chapter 13. The debt limits for chapter 11, subchapter V and chapter 12 are almost three to four times higher than the debt limits for a chapter 13 debtor.[5] So it would be logical that Congress aimed to make sure standing trustees were paid in cases where plans were not confirmed in chapter 12 and chapter 11, subchapter V cases versus chapter 11 cases which happen much faster and usually have lower payments. *See supra*-Section II for summary of expedited timeline in chapter 13. Therefore, the Trustee's argument is untenable.

VI. Since Sections 586(e)(2) and 1326(a)(2) are clear and unambiguous, this Court should not consult the Chapter 13 Trustee handbook and policies.

The Trustee contends that Section 1326(a)(2) is ambiguous. As a result, she believes she's entitled to use *Chevron* deference to validate the Chapter 13 Handbook's ("Handbook") and internal policies of the United States Trustee's

[5] The debt limit in Chapter 11, Subchapter V is currently $7.5 million. 11 U.S.C. 1182. The debt limit in Chapter 12 for famers is $11,097,350 million and $2,268,550 for a family fisherman. §§ 101(18) and 101(19). Whereas the debt limit for a chapter 13 is temporarily $2.75 million but will decrease back down to $1,395.875 for secured debts and $465,275 for unsecured debts in July 2024.

interpretation of Section 586(e)(2).[6] *See* Trustee's Brief at pp. 20-21. *Chevron* deference is a principle that, in the event of a statute's ambiguity, courts should defer to any reasonably interpretation by the executive agency tasked with administering that statute. The doctrine originates from the 1984 U.S. Supreme Court case, *Chevron U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837 (1984).

The pertinent Handbook section that addresses payment for an unconfirmed case states:

> …If the [Chapter 13] plan is dismissed or converted prior to confirmation, the standing trustee must reverse payment of the percentage fee that has been collected upon receipt if there is controlling law in the district requiring such reversal or if (after consultation with the United State Trustee) the standing trustee determines that there are other grounds for concern in the district.

See Handbook for Chapter 13 Trustees, Chapter 2, Section D. p. 2-3 located at https://www.justice.gov/ust/private-trustee-handbooks-reference-materials/chapter-13-handbooks-reference-materials. The Trustee also references a brief article from the Executive Office for the United States Trustee, which she claims sheds lights on its policy regarding Chapter 13 Trustees receiving a fee when a plan is not confirmed. *See* https://www.justice.gov/ust/file/nactt_201503.pdf/download.

However, the Trustee's reliance on the Handbook was previously challenged and rejected in *Doll*. *Doll*, 57 F.4th at 1145-6. The same critique applies here. Primarily, the Trustee has not demonstrated that the statutes at issue are ambiguous. As previously argued, Sections 586(e)(2) and 1326(a)(2), when interpreted in

[6] The Chapter 13 Handbook is promulgated by the Executive Office for the United States Trustee.

conjunction, unambiguously mandate that a Chapter 13 Trustee cannot keep her fee. Moreover, the Executive Office for the United States Trustee is not charged with administrating Section 1326, which is part of the Bankruptcy Code. Hence it does not qualify for *Chevron* deference. *Acevedo*, 497 B.R. at 119, n. 19.

Further, in 2000, the U.S. Supreme Court held that agency "interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law–do not warren Chevron–style deference." *Doll*, 57 F.4th at 1146; *citing Christensen v. Harris Cnty.*, 529 U.S. 576, 587 (2000). Such documents are "entitled to respect" only to the extent they "have the power to persuade". *Id.* The Handbook and the brief article do not meet this threshold. The Handbook concedes that the decision of whether a Chapter 13 trustee can be paid its fee depends on a court's interpretation, not its own ("the trustee should keep his fee unless there is controlling law in the district requiring such reversal" or there are other "grounds for concern"). Furthermore, why did the Handbook not get amended to conform to this new alleged policy in 2014? The Handbook has been amended six different times, with the last time being in 2023[7], however Chapter 2, Section D did not get changed to clarify its position, so the extrinsic material as the *Doll* court opined is "hardly the exercise of agency expertise in interpreting an ambiguous statute…" *Doll*, 57 F.4th at 1146.

If, hypothetically, Section 1326(a)(2) were ambiguous as the Trustee suggests,

[7] *See* https://www.justice.gov/ust/private-trustee-handbooks-reference-materials/chapter-13-handbooks-reference-materials

this Court could consider legislative history. But delving into legislative history is unnecessary when a statute's chosen language is clear. *Lamie*, 540 U.S. at 534. As Sections 586(e)(2) and 1326(a)(2) are clear, there is no need to analyze legislative history or external evidence like the Handbook. The Trustee fails to offer any legislative history evidence in her arguments.

However, a bankruptcy case in favor of Mr. Johnson found legislative history useful, supporting the notion that a Chapter 13 should not keep its fee in unconfirmed cases. In *Lundy*, the court found legislative history supported its conclusion that the 13 Trustee should not keep its fee. *Lundy* looked at the legislative history in 1978 which stated "[i]f a private standing trustee serves, his fee is fixed by the Attorney General under proposed …586(e), and it will be payable under proposed 11 U.S.C. 1326(a)(2)" which subsequently was redesignated as Section 1326(b)(2). *In re Lundy*, No. 15-32271 at *13-14 (Bankr. N.D. Ohio Sep. 29, 2017). Thus, even if this Court were to agree that Section 1326(a)(2) is ambiguous, legislative history supports Mr. Johnson.

VII. This case pivots on statutory interpretation, making the Trustee's policy arguments irrelevant.

The Trustee forwards several policy arguments, some which are briefly presented without substantial support. This Court should ignore these policy arguments as the instant case turns on the statutory interpretation of Sections 586(e) and 1326(a)(2). This Court should not substitute its view of policy for legislation which was passed by Congress. *Doll*, 57 F.4th at 1143-4; *citing Piccadilly*,

554 U.S. at 52. Moreover, policy arguments cannot overcome the plain language of a statute.

The Trustee's contention, as outlined in her brief at page 7, is that denying her a fee in unconfirmed cases would indirectly tax other debtors who do see their cases confirmed. This suggests a possible rise in the percentage fee, putting a greater financial burden on other Chapter 13 debtors. Yet, the *Dickens* court refuted this very argument. In *Dickens*, an administrator in the Trustee's office testified that "the percentage fees collected in cases that were dismissed or converted … [in unconfirmed cases] was insignificant compared to the total revenues of the [chapter 13] [t]rustee's office. *Dickens*, 513 B.R. at 915-6. The administrator for the trustee further testified that pre-confirmation revenues for unconfirmed plans in 2012 were only $19,500, whereas the revenue for confirmed plans was a whopping $2,672,000. Notably, from 1998 to 2012, Chapter 13 Trustees were typically not compensated until plan confirmation. *See Evans*, 69 F.4th at 1109.

This exemplifies the red herring of the Trustee's policy concerns. Most unconfirmed Chapter 13 cases swiftly transition to either dismissal or Chapter 7 conversion, often with limited to no plan payments. This means negligible fees for the Chapter 13 Trustee. The significant fees come from confirmed plans that persist for up to 5 years. The Trustee has not presented compelling evidence nor is there any evidence in the record on appeal to support her speculation on increased fees due to unconfirmed cases. Also, every Chapter 13 Trustee has varied operational costs, which can fluctuate for countless reasons. Baseless speculations, not

corroborated by the record, shouldn't influence the Court's decision.

Further cementing this is Section 586(e)(1), which caps Chapter 13 Trustees fees at 10%. These are not cumulative fees spread across debtors from both confirmed and unconfirmed plans. Instead, as per Section 586(e)(2), fees are case-specific. While some cases might offer minimal trustee fees, others might present more substantial compensation. *See Doll*, 57 F.4th at 1137; *citing* In *re Schollett*, 980 F.2d 639, 643 (10th Cir. 1992). Therefore, the cost dynamics of unconfirmed plans will unlikely influence the administrative costs of cases that are dismissed prior to plan confirmation. Given these points, the Trustee's policy argument should be set aside by this Court.[8]

[8] The Trustee suggests that, in this district, some cases are filed merely to retrieve cars from impound, without any genuine intent to fulfil a Chapter 13 plan. *See* Trustee's Brief at 7. The Trustee's assertion is both vague and unsupported by any evidence in the record on appeal or the court below. Moreover, the Trustee implies that debtors might initiate Chapter 13 proceedings without aiming for completion, such debtors might not commit any payments, resulting in zero fees for the Trustee. Also, any concerns about debtors filing 13's with no intention of confirming a plan is irrelevant to the instant case because of the "current checks in place to prevent abuse of the bankruptcy system" such as § 362(d)(1) (allows automatic stay to be lifted for cause); § 1307(c) (allows dismissal or conversion for cause). *Dickens*, 513 B.R. at 915.

CONCLUSION

For the foregoing reasons, the bankruptcy court 's decision should be affirmed.

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RESPECTFULLY SUBMITTED,

Michael A. Miller
Attorney for Appellee

/s/ Michael A. Miller+

Michael A. Miller
The Semrad Law Firm, LLC
11101 S. Western Avenue
Chicago, IL 60643
Phone: 312-256-8728
Email: mmiller@semradlaw.com

CERTIFICATE OF SERVICE

I certify that on September 18, 2023, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users, and that service will be accomplished by the CM/ECF system.

/s/ Michael A. Miller