23-2212

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Marilyn O. Marshall, Trustee	)
Trustee-Appellant	)
v.	)
Edward Johnson	)
Debtor-Appellee	)

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

BRIEF OF TRUSTEE-APPELLANT TRUSTEE MARILYN O. MARSHALL

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Appellate Court No: 23-2212

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Attorney's Signature: /s/ O. Anthony Olivadoti Date: 08/17/23

Attorney's Printed Name: O. Anthony Olivadoti

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). Yes ☑ No ☐

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STATEMENT REGARDING ORAL ARGUMENT

Appellant-Trustee is prepared to engage in oral arguments if this Court deems it necessary. Appellant-Trustee believes that oral arguments are not necessary for the disposition of this case. The issues presented in this case are purely issues of law. The facts are not in dispute. Appellant-Trustee believes that the decision-making process of this Court will not be significantly aided by oral argument because the facts and legal arguments are more than adequately presented in the briefs and in the record.

STATEMENT OF JURISDICTION

This appeal arises from a final order entered by the Honorable Judge Timothy A. Barnes of the United States Bankruptcy Court for the Northern District of Illinois (the "*Bankruptcy Court*") in a case under Title 11 of the United States Code (the "*Bankruptcy Code*") and referred to the Bankruptcy Court under 28 U.S.C. § 157(a) and Internal Operating Procedure 15(a) of the United States District Court for the Northern District of Illinois. The Bankruptcy Court's jurisdiction was based on 28 U.S.C. §§ 157(a), 157(b)(1), and 1334. Federal district courts have "original and exclusive jurisdiction" of all cases under the Bankruptcy Code. 28 U.S.C. § 1334(a). 28 U.S.C. § 157(a), in turn, allows the district courts to refer cases to the bankruptcy judges for their districts. A bankruptcy judge to whom a case has been referred may enter final judgment on any "core proceeding arising under" the Bankruptcy Code or arising in a case under the Bankruptcy Code. 28 U.S.C. § 157(b).

Marilyn O. Marshall, Chapter 13 Trustee ("Trustee") is appealing the final order entered on the docket by the Bankruptcy Court in bankruptcy case number 22 B 04449 on May 12, 2023, which Granted the Debtor's Motion for Disgorgement (Appx.1.) and ordered that "The Trustee must return to the Debtor all payments held by the Trustee, unless the return of the same is excepted under the express provisions of 11 U.S.C. § 1326(a)(2)" (Appx.11.) The court also entered an accompanying Memorandum Opinion. (Appx.12.). The Chapter 13 Trustee timely filed a Notice of Appeal with Motion for Leave to Appeal on May 24, 2023 (Appx.21.)

and a Motion for Certification of Direct Appeal to the United States Court of Appeals for the Seventh Circuit Court of Appeals on May 24, 2023 (Appx.24.). On June 1, 2023, the Bankruptcy Court denied the Trustee's Motion as unnecessary relying on its memorandum decision of May 12, 2023 (Appx.30.). The bankruptcy court then on June 5, 2023, entered its own order for Certification for Direct Appeal to the Court of Appeals (Appx.31.).

This Court entered an order granting the Trustee's Request for Direct Appeal on June 23, 2023 (Appx.33.). Thus, jurisdiction in this Court exists under 28 U.S.C. § 158 (d).

STANDARD OF REVIEW

This appeal arises out of a Chapter 13 case and raises a question of law under sections 586(e)(2) & 1326. The facts in this case are not in dispute and the issue presented is purely legal in nature. Conclusions of law are reviewed *de novo*. *In re Davis*, 638 F.3d 549, 553 (7th Cir. 2011).

INTRODUCTION

When an individual files a chapter 13 petition, an impartial trustee is appointed to administer the case. 11 U.S.C. §1302. The chapter 13 trustee both evaluates the case, the debtor's plan to repay creditors, and serves as a disbursing agent, collecting payments from the debtor and making distributions to creditors. 11 U.S.C. §1302(b). Marilyn O. Marshall is one of the chapter 13 trustees appointed to the Norther District of Illinois pursuant to 28 U.S.C. 586(b). The Trustee's duties in

chapter 13 cases are extensive and a great deal of the duties concern collecting documents and investigating the financial affairs of the debtor all take place pre-confirmation. (Appx.34.) In this district, cases can take from 4 to 6 months or more to get confirmed or dismissed. Johnson's bankruptcy case lasted approximately 9 months. During this period the trustee diligently performs all duties as outlined in the Appendix. The bankruptcy code provides that the trustee receives a trustee percentage fee for performing her duties. The Trustee should receive and keep the trustee percentage fee for the performance of her duties pursuant to the code.

STATEMENT OF THE ISSUE

Whether the standing chapter 13 trustee must disgorge her fee in a chapter 13 case pursuant to 11 U.S.C. §1326, when the debtor's plan has not been confirmed even though that fee is provided for in 28 U.S.C. §586 of the bankruptcy code.

STATEMENT OF THE CASE

The relevant facts in this case are not in dispute. Edward Johnson filed the underlying Chapter 13 Bankruptcy case on April 18, 2022. The confirmation hearing regarding Johnson's plan was first set on June 9, 2022, and then continued seven times to allow Johnson time to confirm his proposed chapter 13 repayment plan. The attorney for the Trustee appeared at each hearing as required by the bankruptcy code. 11 U.S.C. §1302(b)(2)(B). Johnson failed to fully address a $20,000.00 undisclosed Paycheck Protection Program loan and his domestic support obligations and his case was ultimately dismissed on January 19, 2023. Over the

course of case, Johnson filed a set of schedules containing a statement of financial affairs, two plans, three sets of amended schedules and two amended statements of financial affairs. The plans filed by Johnson both called for plan payments of $500.00 per month. The debtor's plan also called for the trustee to make pre-confirmation adequate protection payments to creditors. From the time the case was filed until the case was dismissed, in the approximately nine months the case was pending, Johnson paid $3,807.54 to the trustee pursuant to his proposed plan. Of the $3,807.54, the Trustee paid $747.00 to Johnson's creditors. Upon dismissal of Johnson's case, the court allowed $4,508.37 in attorney's fees and costs and the Trustee paid the debtor's attorney $2,807.94 from the funds on hand. The Trustee was paid $262.50 from receipts received on this case. Johnson ultimately failed to confirm a plan and the bankruptcy case was dismissed for unreasonable delay.

On January 23, 2023, after the case was dismissed, Johnson then filed a Motion to Disgorge the Trustee's fees. The motion alleged that the Trustee had no authority to keep fees in the bankruptcy case from the payments made by Johnson while the case was pending. The Trustee filed her Response to Johnson 's Motion on March 9, 2023, and Johnson filed a Reply on March 30, 2023. On May 12, 2023, the bankruptcy court ruled in favor of Johnson issuing an order and a Memorandum Opinion finding that the Trustee must disgorge her fee on chapter 13 cases where a plan has not been confirmed. This Appeal follows.

SUMMARY OF ARGUMENT

The Bankruptcy Court erred in granting the Appellee's Motion for Disgorgement. The fee taken by the trustee in the bankruptcy case was proper and properly taken in accordance with Title 11 U.S.C. §§ 586(e)(2) & 1326(b). The standing trustee's fee for the operation of her office is directly and unambiguously addressed in Title 28 U.S.C. § 586(e)(2). Section 1326(b) provides for the trustee to be paid her fee in this case. Section 1326(a)(2) does not mandate that the trustee return her paid fee in cases where no plan was confirmed. The bankruptcy code does not require that a chapter 13 plan be confirmed for the chapter 13 trustee to take and keep a fee in a chapter 13 case and §1326(b) of the code specifically provides that the trustee is to take a fee when disbursing to creditors pre-petition. Most of the work for a chapter 13 case is expended preconfirmation and the chapter 13 trustee should be allowed to keep the percentage fee as part of the operation costs and compensation to the trustee accordingly.

ARGUMENT

I. When interpreted together, 11 U.S.C. § 1326 and 28 U.S.C. § 586(e) allow the standing Chapter 13 Trustee to retain percentage fees in chapter 13 cases dismissed prior to confirmation.

a. The Statutory Scheme in Appointing Chapter 13 Trustees

The standing trustees under the United States Trustee pilot program were designed to be fiscally self-sustaining from the fees collected in chapter 13 cases assigned to each trustee's office. The fees collected from payments made by debtors in chapter 13 cases are used by the standing chapter 13 trustees to pay employees

and the general expenses used to operate their offices. There are restrictions on what the trustee can use the money collected from fees to purchase. The maximum compensation a chapter 13 trustee can earn is set by the United States Trustee's office. When the fees collected in chapter 13 cases increase, generally the trustee's fee percentage charged against receipts then decreases. Chapter 13 trustees do not earn more personal income then their maximum compensation, even when they collect more fees. Not all trustees are paid the maximum compensation approved by the United States Trustee's Office.

What fee can be charged by a trustee administering a case depends on the specific trusteeship but in any event cannot exceed 10%. In this case, initially the trustee charged a fee of 6.1%, which then increased to 7% in the 9 months the Johnson's case was pending, due to the amount of receipts and office operation expense changes. The fees used to operate the chapter 13 trustees' office should come both from pre and post confirmation cases. The result of denying trustees fees for debtors who do not confirm plan will shift the costs of administration to the debtors who do confirm their plans. Often, and especially in this district bankruptcy cases are filed to have cars released from being impounded without any intention of successfully completing a chapter 13 plan successfully. Successful debtors who have their cases confirmed by complying with the bankruptcy code provisions should not bear the costs for the debtors who do not get their cases confirmed and are merely buying time by filing bankruptcy cases.

The chapter 13 standing trustee's compensation and reimbursement for expenses is not governed by the Bankruptcy Code but by section 586(e) of title 28. The Attorney General of the United States, in consultation with the United States Trustee, fixes each standing chapter 13 trustee's fee percentage based on the trustee's approved operating budget. See 28 U.S.C. §§ 586(e)(1)(B) & (e)(2). This fee percentage cannot exceed 10%. 28 U.S.C. § 586(e)(1). Bankruptcy courts may not determine compensation for standing chapter 13 trustees. 11 U.S.C. § 326(b). *In re Bernard*, 201 B.R. 600, 603 (Bankr. D. Mass. 1996) (analyzing titles 28 and 11 and holding that a chapter 13 debtor had to make payments on a secured claim modified by his plan through the trustee, who was entitled to collect his percentage fee). Payment of the percentage fee obviates the trustees having to file fee applications in each case. *In re Harris*, 200 B.R. 745, 748 (Bankr. D. Mass. 1996). It is essentially a "user fee." *Nardello v. Balboa* (*In re Nardello*), 514 B.R. 105, 114 (D.N.J. 2014).

b. Harmonizing §1326(a) and §586(e)(2)

Judge Nye and the 9th Circuit BAP presents a clear view regarding interpreting and harmonizing § 1326(a)(2) and § 586(e)(2). The Majority in the 9th Circuit BAP opinion sided with the trustee's position that the trustee could retain her fee in a case dismissed before confirmation in the case of *In re Harmon*, 2021 WL 3087744, 4, 9th Cir.BAP (Idaho). The court began its analysis looking to the history of the United States Trustee Pilot Program and how Congress sought to separate how standing trustees are compensated from other fee awards under the Bankruptcy Code. The court noted, "standing trustees are not compensated under the

Bankruptcy Code and their compensation is not subject to adjustment by the bankruptcy court." *Id* at 3. (See also footnote 4:)

> The dissent cites legislative history from 1977 which stated that a standing trustee's compensation is fixed by § 586, but payable under proposed § 1326(a). However, as part of expanding the U.S. Trustee Pilot Program nationwide in 1986, Congress amended § 1302 and 1326. The legislative history of those amendments demonstrates congressional intent to separate a standing trustee's compensation from the Bankruptcy Code:
>
> > Section 222 conforms 11 U.S.C. 1302(a) to the fact that it is the U.S. Trustee who will have appointed the standing trustee, and not the court. 11 U.S.C. 1302(d) and (e) are stricken for this reason.
> >
> > Appointment **and compensation** of a standing trustee will be governed by [28] U.S.C. 586.
> >
> > Section 223 conforms 11 U.S.C. 1326(b) to the fact that [28] U.S.C. 586 will govern the appointment **and compensation** of a standing trustee, and not 11 U.S.C. 1302. H.R. Rep. No. 99-764, at 29, reprinted in 1986 U.S.C.C.A.N. 5227, 5247. (emphasis added)).

The *Harmon* court further addressed dissents concern over the perceived ambiguity in section 586 when read with section 1326. The court noted, "The dissent suggests that § 586 is silent about when the trustee's fee is vested or whether it is refundable, and like the Evans court, it finds ambiguity in the interplay between § 586 and § 1326. The purported ambiguity arises from the

direction in § 1326(a)(2) that a trustee shall retain plan payments until confirmation or denial of confirmation. If the trustee's fee is part of each plan payment, the argument goes, then the fee must be included in the payments to be retained under § 1326(a)(2). But notably absent from the dissent is the identification of any mechanism by which the standing trustee takes ownership of the fee, other than by collecting such percentage fee under § 586(e). And, if the standing trustee takes ownership of the fee upon collecting it, the dissent offers no mechanism for disgorgement of the fee under the Bankruptcy Code". *Id* at 9.

c. The Negative Inference Cannon

Lastly, the *Harmon* court addressed the perceived negative inference canon which many courts rely on. These courts heavily rely on 11 U.S.C §1194(a) and §1226(a) as a comparison to §1326(a). Both §1194(a) and §1226(a) specifically provide that the trustee retain a fee where §1326(a) does not. However, while acknowledging language similar to that found in § 1326 can be found in chapters 11 and 12 of the code, the *Harmon* court noted, "Congress enacted §§ 1194(a) and 1226(a) several years after enacting § 1326(a) and there is no evidence that it was considering a standing chapter 13 trustee when it included the language in the subsequent statutes. Moreover, it does not logically follow that the inclusion of this language means that a chapter 13 trustee cannot retain her fee upon dismissal." *Id* at 11.

Chapter 13 should not be compared to Chapter 11 or Chapter 12 cases because they do not operate in the same fashion. Chapter 13 debtors must begin making

payments starting thirty days after the case is filed pursuant to 11 U.S.C § 1326(a). Chapters 11 and 12 do not have a comparable component as § 1326(a).

Judge Nye in *McCallister v. Evans*, also addressed § 586(e)(2) by breaking down and analyzing the statute into five relevant sections. First, the phrase "shall collect." The phrase shall collect as used in section 586(e)(2) is used without condition or exception. As Judge Nye noted, "Collectors are not in the business of returning payments. And Congress knows this. Thus, when Congress has wanted collection to be conditional or reversible, it has specified. *See, e.g.*, 28 U.S.C. § 576(a) ("Each United States marshal shall collect, *as far as possible*, his lawful fees ....") (emphasis added); *id.* § 1914(b) ("The clerk shall collect ... such additional fees *only as are prescribed* ...."); 23 U.S.C. § 605(b) ("The Secretary may collect ... fees, *contingent* on authority being provided in appropriations Acts ...."). Here, Congress has not conditioned collection." *McCallister v. Evans*, 637 B.R. 144, 149 (D. Idaho 2022). The second prong of the analysis looked to the phrase "from all payments." Specific to chapter 13, the debtor's payments are due 30 days after a chapter 13 case is filed. Notably, section 586(e)(2) does not limit the collection of trustee fees to only post-petition payments. "The trustee payments are due to the trustee before and after confirmation, and the trustee takes the percentage fee from all the payments. The statute does not limit the percentage fees to those taken from payments received after confirmation. Section 586(e)(2), by itself, does not express any exception to collecting the percentage fee." *Id.*

The third step of the analysis focused on the phrase "under plans." As stated by Judge Nye, "This generalization of "plans" includes confirmed, not yet confirmed, and denied plans. If there is a plan, there is also a percentage fee." *Id.* Judge Nye further focused on the phrase "serves as the standing trustee." Judge Nye noted, "The trustee serves in that capacity even before the plan is confirmed. She takes the percentage fee as payment for her work as the standing trustee—not only for the work of the standing trustee after plan confirmation." *Id.* After analyzing the relevant parts of section 586(e)(2), Judge Nye found that "that the context confirms the plain language of § 586(e)(2). Even if § 586(e)(2) were ambiguous, the context supports the mandatory construction." *Id at 150.*

d. The Wording of the Statute

Many courts have analyzed the wording in the different parts of the statute regarding how the trustee gets her fee. Section 586(e)(2) provides that a standing trustee "shall collect such percentage fee from all payments received by such individual under plans … for which such individual serves as standing trustee." *In re Harmon*, 2021 WL 3087744, 4, 9th Cir.BAP (Idaho).

Furthermore, as stated by Judge Grossman,

> The Court does not find ambiguity in this subsection, and the meaning of the term "collect" is clear. The trustee takes the monthly plan payments from each debtor, which must commence within thirty days of the petition date. Each plan payment not only covers the proposed payment to creditors, but it includes the trustee's statutory fee, which is based on a percentage of the

> plan payment. When that fee is collected, it is severed from the portion of the plan earmarked towards creditors. That is what "collect" in this subsection means. Far from being silent as to the status of the trustee's fee prior to confirmation, the use of the word "collect" denotes that the trustee may apportion the one payment made by the debtor under the plan between the trustee's fee and the payments to creditors. Once the trustee collects the fee, there is nothing in the Bankruptcy Code to indicate that these two categories of funds are recombined thereafter." *In re Soussis*, 624 B.R. 559 (Bankr. E.D.N.Y. 2020).

Section 586(e)(2) of title 28 unambiguously directs that the standing trustee collect a fee in all cases in which she serves. Additionally, §1326(b) specifically provides that the trustee get paid a fee when she disburses funds to creditors preconfirmation.

By contrast, as discussed below, 11 U.S.C. § 1326(a)(2) is ambiguous and subject to diverse interpretations. Therefore, the canons of construction require that Section 1326(a)(2) be construed in a manner that makes it consistent with Section 586(e)(2).

Section 1326(a)(2) is not as clear as it appears. Section 1326(a)(2) states in part "A payment made under section (1)(a) shall be retained by the trustee until confirmation or denial of confirmation." This Section implies that it is the denial of confirmation that triggers the refund of funds to debtor. In most cases, as in this case, the denial of confirmation of the debtor's plan did not cause the case to fail but the dismissal of the case for not confirming a plan timely was the trigger event.

Refunding the debtor all funds on hand after the denial of confirmation leads to an absurd result. After having confirmation of their plan denied, debtors are often given a chance to correct errors and to propose new plans. The framework contemplated by § 1326(a)(2) is simply not how chapter 13 trustees nor the courts administer cases. The denial of confirmation does not trigger the refund of the debtor's payments. The dismissal or conversion of a case, after the final resolution of the case, triggers the refunds of funds on hand to the debtor under this section. Even in most cases where there is an order denying confirmation, there is still a pending chapter 13 proceeding where the debtor can opt to propose a subsequent plan to remedy defects that caused the confirmation of the debtor's plan in the first place. Simply put, section 1326(a)(2) is not well drafted while the specific language of section 586(e) requiring the trustee to collect the fee from all payments received from the debtor is clear. Under the rules of statutory construction, a general statutory rule usually does not govern unless there is no more specific rule. See *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 524 (1989).

Other courts have tried to clear up this ambiguity in Section 1326 by distinguishing that the standing trustee's fee does not fall within the scope of section 1326(a)(2) because it is not a payment proposed by the plan. The trustee's fee is a payment required by statute and the percentage fee flows from 28 U.S.C. § 586(e) and is collected outside of the plan. See *Pelofsky v. Wallace*, 102 F.3d 350, 356 (8th Cir. 1996) (citing *In re Wagner*, 36 F.3d 723, 726 (8th Cir. 1994)). See also *In re Turner*, 168 B.R. 882, 887 (Bankr. W.D. Tex. 1994) (trustee's percentage fee is

"paid outside the distributional scheme of the statute"). Because the percentage fee is separate and apart from payments to creditors, section 1326(a)(2) does not require that the fee be returned to the debtor.

Some courts, finding that § 1326(a)(2) and § 586(e)(2) conflict, have accorded greater weight to the former and directed trustees to disgorge their fees. See, e.g., *In re Acevedo*, 497 B.R. 112, 122-123 (Bankr. D.N.M. 2013) (holding that section 586(e)(2) merely authorizes the trustee to collect and to hold percentage fees, while section 1326(a)(2) specifically controls disbursement of payments "after confirmation or denial of confirmation . . ."). *In re Dickens*, 513 B.R. 906 (Bankr. E.D. Ark. 2014) (allowing that while statutory interpretation is a "holistic endeavor," section 586(e)(2) is "ambiguous" and that section 1326(a) controls). *In re Doll*, 57 F.4th 1129 (10th Cir. 2023). However, several other courts have taken the position that trustees may keep fees in cases without confirmed plans. See *Nardello v. Balboa* (*In re Nardello*), 514 B.R. 105, 113 (D.N.J. 2014); see also *In re Sheedy*, No. 10-16236 (Bankr. D. Mass. Mar. 11, 2016); *In re Antonacci*, No. 08-23349 (Bankr. D. Nev. Dec. 27, 2011); *In re Cryder*, No. 11-56676 (Bankr. S.D. Ohio June 15, 2012).

There are two problems with the approach in *Acevedo*, *Dickens and Doll*. First, one would have to ignore the seemingly unambiguous and mandatory language of 28 U.S.C. § 586(e)(2), which provides that a trustee "shall collect such percentage fee from all payments received by such individual under plans in cases under . . . chapter 13 of title 11 for which such individual serves as standing trustee . . .". As

discussed above, "plans" in this section can only be reasonably interpreted to include both confirmed and unconfirmed plans. Moreover, contrary to the *Acevedo* court's assertion that "collect" means merely "collect [that is, gather] and hold," numerous court decisions have found in other contexts that the term "collect" means "to obtain payment." Section 28 U.S.C. § 586(e) is silent to and does not contemplate that once a fee is collected, any part of it should be refunded to the debtor. To the contrary, § 586(e) appears to prohibit funds from being returned to the debtor by providing that excess amounts under certain circumstances should be paid to the United States Trustee for deposit into the United States Trustee System Fund. 28 U.S.C. § 586(e)(2)(A). Thus, even if the court were to find that the language of 11 U.S.C. § 1326(b) and (c) unambiguously require the trustee to return the fee, there would still be a serious question of how to resolve this requirement with the plain language of section 586(e). As such, if both statutory sections are unambiguous, it is difficult to argue that one subsection controls over the other.

II. Section 1326(b) Provides that the Trustee Be Paid Her Fee

The debtor is required to make plan payments commencing 30 days after a chapter 13 case is filed under 11 U.S.C. §1326(a)(1). Section 1326(a)(2) requires the trustee to retain those funds until either a plan is confirmed, or the court denies confirmation of the plan. 11 U.S.C. § 1326(a)(2). If a plan is not confirmed, "the trustee shall return [to the debtor] any such payments not previously paid and not yet due and owing to creditors, after deducting any unpaid administrative expense claims allowed under 11 U.S.C. § 503(b)." Thus, while section 1326 requires funds

on hand to be refunded to the debtor, it is only those funds available after deducting what has already been paid and administrative expense claims. Clearly § 1326(a)(2) acknowledges that not all the funds paid into the plan pre-confirmation will be available to be refunded to the debtor. Section 1326 (b)(2) also states that before or at the time of each payment to creditors under the plan there shall be paid the percentage fee fixed for such standing under section 586 (e)(1)(B) of title 28. This section is further acknowledgement that trustees fees should be paid regardless of whether a plan is confirmed, since creditors are paid pre-confirmation and are not only limited to post confirmation disbursements.

During the pendency of this case, the Standing Trustee made the following distribution[1] to creditors as called for by the debtor's plan:

> $747.00 was paid to Turner Acceptance for adequate protection payments as provided for by the debtor's plan
>
> $2807.94 for debtor's attorney's fees

Pursuant to 11 U.S.C § 1326(b), the Trustee was to be paid her fee when payments were received and "before" the time each of the disbursements were made

[1] The debtor made his first plan payment on June 8, 2022, of $115.00 and the trustee fee was $7.15 or 6.1%. The first distribution to Turner Acceptance for adequate protection payments was made on July 15, 2022, for $249.00. The debtor paid in a total of $3807.54 before the dismissal of the case. The trustee disbursed a total of $747.00 to Turner Acceptance. Additionally, $2,807.94 was paid to the debtor attorney on February 17, 2023. The total trustee fee was $262.50. The case was dismissed pre-confirmation on January 19, 2023. No fee is taken on payments received after the dismissal of the case and those funds are returned to the debtor. The trustee's fee changed to 7.1% on October 1, 2022, the beginning of the new fiscal year. If the Trustee's fee is refunded, it will not go to the debtor because there is a balance owed on the attorney fee. Since the funds were received before the case was dismissed the money will go to the attorney fee. Most have missed the real reason that this law firm wants the fees disgorged from the trustee.

to creditors pursuant to the debtor's plan. The trustee can only pay creditors pursuant a debtor's proposed plan or by court order. These payments are made to creditors, according to the plan both pre and post confirmation. The trustee's fee in this case is specifically provided for by § 1326(b) of Title 11 which says in part:

> (b) Before or at the time of each payment to creditors under the plan, there shall be paid-
>
> (1) any unpaid claim of the kind specified in section 507(a)(2) of this title;
>
> (2) if a standing trustee appointed under section 586(b) if title 28 is serving in the case, the percentage fee fixed for such standing trustee under section 586(e)(1)(B) of title 28:…

All of the statutory requirements of § 1326(b) were met when funds were distributed to creditors pre-confirmation and the paying of the trustees was also proper under that section of the code. When a statute's reading is plain, courts must enforce the statute according to its terms. *Lamie v. U.S. Trustee*, 540 U.S. 526, 534 (2004). Section 1326(a) contemplates that the funds paid out pursuant to §1326(b) are not to be refunded to the debtor. Once paid her fee the trustee should be allowed to keep her fee. Section 1326(a) does not require any payments to be recouped and refunded to the debtor after is has been paid.

III. The Chapter 13 Trustee Handbook and Policy

In deciding whether trustee can keep their percentage fees in cases dismissed preconfirmation at least two courts have suggested that the United States Trustee's handbook can be persuasive on the outcome. Judge Simandle in the *Nardello* case ruled that the Standing Trustee, Isabel Balboa, could keep her fees on payments she received in connection with the case. *In re Nardello*, 514 B.R. 105 (D.N.J.2014).

In *Nardello* the trustee collected and distributed $147,437.29 in funds before the debtors' plan was confirmed. The trustee collected a percentage fee totaling $9,730.79 for "Trustee's fees & Compensation." The bankruptcy case was never confirmed and ended up being dismissed. Judge Simandle affirmed the bankruptcy court's decision that the trustee could take a percentage fee on all payments received and disbursements made in the case. *Id* at 106.

Judge Simandle found that the trustee's fee applied to all payment received by the trustee, stating "the Court must conclude that "all payments received" is not synonymous with "all payments under plans" and includes payments received by the standing trustee for the percentage fee.: *Id* at 111. Judge Simandle went further to address the purpose of § 586, "the Court's interpretation is consistent with the statutory purpose of Section 586 and amendments thereto which changed language to "received" as opposed to "all payments under plans." It is unlikely that Congress added Section 1326(a) to require payments from Debtor prior to confirmation, but not to allow compensation to the standing trustee for services, particularly in circumstances, as here, where the standing trustee was required to hold certain funds. Id at 114.

Judge Simandle also gave consideration and deference to the change in the United States policy in 2012. The policy change was discussed by Martha Hallowell, Deputy Assistant Director for Oversight for the EOUST, in *Successful Projects in 2014 Include Training, Percentage Fee Policy and Unsecured Claims Review*, Exec. Office for United States Trustees, Ms. Hollowell's article read in part:

> In July 2012, the Program informed standing trustees that they could collect and retain a percentage fee on receipts in cases that dismiss or convert prior to confirmation. This policy conclusion was the result of a detailed analysis of 28 U.S.C. § 586(e)(2) as part of our brief filed in *In re Antonacci*, No. BK-S-08-23349-LBR (Bankr. D. Nev., Dec. 27, 2011). In 2014, the Program further modified our policy implementing 28 U.S.C. § 586(e)(2), to address when the standing trustee may collect the percentage fee. Effective in FY 2015, standing trustees collect the percentage fee from all payments received under the chapter 13 plan at the time of receipt of the payment. This is a change from the prior practice of earning the percentage fee upon receipt of payment but collecting it upon disbursement. Interestingly, this is a return to the policy in place over 25 years ago.[2]

As to the policy change, the court noted, "while the EOUST [Executive Office for the United States Trustee] is not entitled to *Chevron* deference, its interpretation is persuasive… The policy change required any standing trustee who desired to earn a percentage fee on receipts in cases that dismiss or convert preconfirmation to send the United States Trustee a letter stating their intention to collect such a percentage fee and stating that they will not receive any fees awarded under 11 U.S.C. § 503(b). *See* 11 U.S.C. § 503(b) (allowing for award of administrative expenses). The EOUST's current policy makes clear that standing trustees are

[2] https://www.justice.gov/ust/file/nactt_201503.pdf/download

entitled to percentage fees in cases dismissed before confirmation when, as here, the Trustee forgoes fees as administrative expense under Section 503(b)." *Id* at 114.

The Ninth Circuit Court of Appeals also addressed the policy behind allowing standing trustees to keep their percentage fees. *Matter of Evans*, 69 F.4th 1001 (2023 Daily Journal D.A.R. 5649) at 1110.

The *Evans* court noted that no one argued that the court should give deference to the Trustee's Handbook., (Citing in footnote 8, *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984), or *Skidmore v. Swift & Co.*, 323 U.S. 134, 65 S.Ct. 161, 89 L.Ed. 124 (1944)). As stated in *Chevron*, "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron* at 843. Clearly there is some ambiguity in the statute and deference should be made for the United States Trustee's policy decision.

Evans is the second circuit court to address the trustee fees in cases chapter 13 cases that are not confirmed and agreed, in part with the Tenth Circuit in *Doll* and concluded that the trustee is not entitled to keep her percentage compensation fee. *Id* at 1110. The court in *Evans* began its' analysis, as other courts have, by looking to 28 U.S.C. § 586(e)(2). As part of its' analysis, the *Evans* court rejected both the Debtor and the Trustee's argument as to the meaning of the word "collect" in §586(e)(2). The court noted "Trustee and Debtors' interpretations suffer from the same basic flaw: they both require us to add words to the statute that are not there. Trustee wants us to read "collect" as "irrevocably collect." Debtors want us to read

"collect" as "collect and hold." We decline the invitation to do either." *Id* at 1106 (Citing *Lamie v. U.S. Trustee*, 540 U.S. 526,538, (124S.Ct 1023) 2004). The court concluded that the amicus filed by the National Consumer Bankruptcy Right Center and National Consumer Bankruptcy Attorneys had a better argument and held that § 1326 (b) "unambiguously shows that it is the specific provision governing when a trustee "shall be paid" : "before or at the time of each payment to creditors under the plan," which necessarily means post-confirmation of a plan." *Id* at 1107. The court reached this conclusion even though § 1326(b) clearly does not limit the trustee's percentage fee to "post" confirmation transactions.

Given the ambiguity between §§ 586 and 1326 that all courts have tried to harmonize and the change in position of the United States Trustee's office, greater deference should be given to the United States Trustee's policy decision making and their policy of allowing standing trustee to keep their percentage fees on cases dismissed before confirmation.

CONCLUSION

For the foregoing reasons the trustee respectfully requests that this Court reverse the decision of the Bankruptcy Court and find that the trustee is allowed to keep her statutory fee pursuant to sections §586(e)(2) and §1326(a). Alternatively, the trustee respectfully requests that this Court reverse the decision of the Bankruptcy Court and find that the Trustee is allowed to keep her statutory fee pursuant to sections §1326(b) of the Bankruptcy Code.

Dated: August 17, 2023

Respectfully submitted,

/s/ O. Anthony Olivadoti
Attorney for Trustee-Appellant,
Marilyn O. Marshall

Marilyn O. Marshall, Chapter 13 Trustee
224 S. Michigan Ave.
Suite 800
Chicago, IL 60604
(312) 431-1300

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6064 words excluding the parts of this brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally-spaced typeface using Microsoft Word in 12-point Century.

Dated: August 17, 2023 By: /s/ O. Anthony Olivadoti
Attorney for Trustee-Appellant,
Marilyn O. Marshall

Marilyn O. Marshall, Trustee
224 S. Michigan Ave.
Suite 800
Chicago, IL 60604
(312) 431-1300

CERTIFICATE OF SERVICE

I, O. Anthony Olivadoti, hereby certify that on August 17, 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. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

I further certify that some of the participants in the case are not CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third-party commercial carrier for delivery within 3 calendar days, to the following non-CM/ECF participants:

Appellee (Debtor): Edward Johnson
3408 N Kilbourn
Chicago, IL 60641

Dated: August 17, 2023

By: /s/ O. Anthony Olivadoti
Attorney for Trustee-Appellant,
Marilyn O. Marshall

Marilyn O. Marshall, Trustee
224 S. Michigan Ave.
Suite 800
Chicago, IL 60604
(312) 431-1300

CERTIFICATE OF COMPLIANCE WITH RULE 30(d)

I, O. Anthony Olivadoti, an attorney, swear and affirm that all the materials required by Circuit Rule 30(a) and (b) have been included in this appendix. These materials do not exceed 50 pages.

Dated: August 17, 2023

By: /s/ O. Anthony Olivadoti
Attorney for Trustee-Appellant,
Marilyn O. Marshall

Marilyn O. Marshall, Trustee
224 S. Michigan Ave.
Suite 800
Chicago, IL 60604
(312) 431-1300

SHORT APPENDIX TABLE OF CONTENTS

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE:	)	
	)	CASE NO. 22 B 04449
Edward Johnson		
	)	HON. Timothy A. Barnes
	)	CHAPTER 13
DEBTOR.	)	

NOTICE OF MOTION

TO:

Marilyn O. Marshall, Chapter 13 Trustee, 224 South Michigan Avenue, Suite 800, Chicago, IL 60604(via electronic notice)

Patrick S Layng, Office of the U.S. Trustee, Region 11, 219 S Dearborn St, Room 873 Chicago, IL 60604; (via electronic notice)

See attached list of creditors.

Please take notice that on February 16, 2023 at 9:30 a.m., I shall appear before the HONORABLE Timothy A. Barnes or before any judge sitting in his place, either in courtroom 744 of the United States Bankruptcy Court, Everett McKinley Dirksen United States Courthouse, 219 S. Dearborn Street, Chicago, IL 60604, or electronically as described below and present this motion to disgorge, a copy of which is attached.

All parties in interest, including the movant, may appear for the presentment of the motion either in person or electronically using Zoom for government.

You may appear electronically by video or by telephone.

To appear by video, use this link: https://www.zoomgov.com/join . Then enter the meeting ID and password.

To appear by telephone, call Zoom for Government at 1-669-254-5252 or 1-646-828-7666. Then enter the meeting ID and password.

Meeting ID and password. The meeting ID for this hearing is 161 329 5276 and the password is 433658. The meeting ID and password can also be found on the judge's page on the court's web site.

If you object to this motion and want it called on the presentment date above, you must file a Notice of Objection no later than two (2) business days before that date. If a Notice of Objection is timely filed, the motion will be called on the presentment date. If no Notice of Objection is timely filed, the court may grant the motion in advance without a hearing.

PROOF OF SERVICE

The undersigned, an attorney, certifies that he transmitted a copy of this notice and the attached motion to the above-named creditors via electronic notice or to the attached service list via regular U.S. Mail with postage prepaid from the mailbox located at 20 S. Clark Street, Chicago, IL 60603 on January 24, 2023.

/s/ *Michael Miller*

Attorney for the Debtor
The Semrad Law Firm, LLC
20 S. Clark Street, 28th Floor
Chicago, IL 60603
312-256-8728

Label Matrix for local noticing
0752-1
Case 22-04449
Northern District of Illinois
Eastern Division
Mon Jan 23 23:26:47 CST 2023

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U.S. Bankruptcy Court
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SALT LAKE CITY UT 84130-0285

Capital One Bank (USA), N.A.
by American InfoSource as agent
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IRS
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Philadelphia Pennsylvania 19101-7346

IRS
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Norfolk Virginia 23502-4952

Portfolio Recov Assoc
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Norfolk, VA 23541-1067

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NORFOLK VA 23541-1067

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The Semrad Law Firm, LLC
20 S. Clark St, 28th Floor
Chicago, IL 60603-1811

Patrick S Layng
Office of the U.S. Trustee, Region 11
219 S Dearborn St
Room 873
Chicago, IL 60604-2027

The preferred mailing address (p) above has been substituted for the following entity/entities as so specified by said entity/entities in a Notice of Address filed pursuant to 11 U.S.C. 342(f) and Fed.R.Bank.P. 2002 (g)(4).

Capital One Bank
PO BOX 85520
RICHMOND Virginia 23285

Jefferson Capital Systems LLC
Po Box 7999
Saint Cloud MN 56302-9617

Portfolio Recovery Associates, LLC
c/o Paypal
POB 41067
Norfolk VA 23541

End of Label Matrix
Mailable recipients 30
Bypassed recipients 0
Total 30

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE:	)	
	)	CASE NO. 22 b 04449
Edward Johnson	)	HON. Timothy A. Barnes
	)	CHAPTER 13
DEBTOR.	)	

MOTION TO DISGORGE

NOW COMES the debtor, Edward Johnson by and through debtor's attorneys, The Semrad Law Firm, LLC and hereby moves this Honorable Court to enter an Order of disgorgement as follows:

I. Background

1. That the Debtor, Edward Johnson ("Debtor") filed a petition for relief pursuant to Chapter 13 on April 18, 2022.
2. The bankruptcy case was assigned to Chapter 13 Trustee, Marilyn O. Marshall ("Trustee").
3. The Debtor filed his Chapter 13 plan on April 29, 2022 with a monthly trustee payment of $500 per month for 36 months. *See* Bankruptcy Docket #11. Under the terms of the Chapter 13 plan, the Debtor proposes to pay his unsecured creditors 10%.[1]
4. The Debtor's case was dismissed prior to confirmation on January 19, 2023,

[1] The Debtor filed an amended plan on September 7, 2022, keeping the payment the same of $500 per month. *See* Bankruptcy Docket #31.

for unreasonable delay. *See* Bankruptcy Docket #63.

5. During the case and prior to dismissal the Debtor made a little over seven payments for a total of $3,692.16 to the Trustee. *See* Exhibit A.

6. From the funds paid by the Debtor, the Trustee paid herself $244.41 for its administrative fee. *Id.*

7. The Debtor objects to Trustee keeping the $244.41 she deducted for her commission fee because the Trustee lacks authority to retain fees in cases that are dismissed prior to confirmation of a plan, and moves this Court for an order directing the Trustee to disgorge $244.41 back to the Debtor..

Argument

II. There is a split in the case law on whether a Chapter 13 Trustee may keep its fee when a case is dismissed prior to a case being confirmed.

8. There currently is a split in the courts on whether a Chapter 13 Trustee may keep the fees deducted from payments from a debtor when a case fails and is dismissed pre-confirmation. There is no direct authority from neither the Seventh Circuit nor the United States Supreme Court.

9. The majority view including the recent Tenth Circuit Court of Appeals *Doll* case supports the Debtor and holds that the Chapter 13 Trustee must return the fee when a case is dismissed pre-confirmation. *See Goodman v. Doll (In re Doll)*, No. 22-1004 (10th Cir. Jan. 18, 2023); *In re Rivera*, 268 B.R. 292 (Bankr. D.N.M. 2001), *affirmed sub nom.*, *In re Miranda*, 285 B.R. 344, 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).

10. Whereas the minority view including two cases pending in the Second and Ninth Circuit Courts of Appeals holds the Chapter 13 Trustee is entitled to keep the commission on funds when a case is dismissed pre-confirmation. *See McCallister v. Evans*, 637 B.R. 144 (D. Idaho 2022) (currently on appeal in the Ninth Circuit Court of Appeals filed January 5, 2022); *Soussis v. Macco*, 2022 WL 203751 (E.D.N.Y. Jan. 24, 2022) (currently on appeal in the Second Circuit filed January 26, 2022); *Nardello v. Balboa (In re Nardello)*, 514 B.R. 105 (D.N.J. 2014).

11. This Court should adopt the better reasoned majority view and order the Trustee to disgorge the commission she collected since this case was dismissed pre-confirmation.

III. Sections 28 U.S.C. § 586 (e)(2) and 11 U.S.C. § 1326(a) when read together unambiguously mandate that the Trustee must return any funds to a debtor when a case is dismissed pre-confirmation.

12. Section 586(e)(2) provides that subchapter V, 11, 12, and 13 standing trustees shall collect a commission from all payments under plans. However, this section only discusses the source of funds *Doll*, No. 22-1004 at *12-13. This section is only requiring a trustee to collect a fee from payments made under plans, not actually keep the fees.

13. To understand when a Chapter 13 Trustee is allowed to keep the fee, Section 1326(a) explains this. Section 1326(a)(2) specifically states that:

> 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 it 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).

14. Parsing Section 1326(a)(2) shows there is no authority for the Chapter 13 Trustee to retain its fee when the case is dismissed pre-confirmation. The last sentence dictates what should happen when the chapter 13 plan is not confirmed in terms of who should be paid.

15. First, Section 1326(a)(2) says § 503(b) claims should be paid. Certain administrative expenses fall under § 503(b) such as attorney fees, but standing trustees and United States Trustee do not fall under § 503(b). *See Doll*, No. 22-1004 at *13-14. Thus, since the Trustee is not a § 503(b) claim, there is not authority for her to keep her fee.

16. Section 1326(a)(2) also authorizes the chapter 13 trustee to return "payments not previously paid and not yet due and owing to creditors pursuant to paragraph [§ 1326](a)(3).". However, Section 1326(a) deals with the use, sale, or lease of bankruptcy estate property when the court at a hearing is modifying pre-confirmation payments. Since this does not involve the Trustee, and there has been no hearing, this also does not authorize the Trustee to receive her fee as well. *Doll*, No. 22-1004 at *14.

17. Thus, while Section 586(e)(2) does authorize the Trustee to collect a fee, Section 1326(a)(2) mandates the Trustee returns this collected fee when a debtor's case fails pre-confirmation. This is further bolstered by the Bankruptcy Code's explicit treatment of how Subchapter V, Chapter 11, and Chapter 13 Trustees are entitled to keep their fee in unconfirmed cases.

18. Section 586(e)(2) also authorizes Subchapter V, Chapter 11, and Chapter 12 Trustees to collect their fees from debtor payments as well. However, the Bankruptcy Code explicitly allows the trustees in these chapters to keep their fees. Sections 1194(a) and (3) states if a plan is not confirmed Subchapter V and 11 Trustees should return any such payments to the debtor after deducting any fee owing to the trustee. Furthermore, Sections 1226(a) and (2) also allows a Chapter 12 trustee to deduct its fee and keep it when a plan is not confirmed.

19. Thus, the explicit instruction that Subchapter V, Chapter 11, and Chapter 12 Trustees can deduct their fees if a plan is not confirmed not only bolsters the Debtor's argument but also show that Congress knew how to allow Chapter 13 Trustees to keep their fees when a plan is not confirmed, but chose not to do so. *Doll*. No. 22-1004 at *16-17. And when "Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983). Thus, Congress did not authorize the Trustee to keep her fees since the Debtor's case was dismissed pre-confirmation.

IV. For the foregoing reasons, the Debtor respectfully requests an Order that the Chapter 13 Trustee disgorge its fees.

WHEREFORE, the Debtor respectfully requests that this Honorable Court to provide an order that the Chapter 13 Trustee disgorge her fee.

Respectfully Submitted,

_/s/ *Michael Miller*__

Attorney for the Debtor

The Semrad Law Firm, LLC

20 S. Clark Street, 28th Floor
Chicago, IL 60603
312-256-872

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

In re:	Case No. 22bk04449
Edward Johnson,	Chapter 13
Debtor.	Judge Timothy A. Barnes

ORDER

On the Motion to Disgorge [Dkt. No. 66] (the "Motion") of debtor, Edward Johnson (the "Debtor"), in the above-captioned case; the court having jurisdiction over the subject matter; the court having considered the Motion to Disgorge and all filings relating thereto; the court further having considered the arguments of the parties at the hearing on April 13, 2023; and the court having issued a Memorandum Decision on this same date and for the reasons set forth in detail therein;

NOW, THEREFORE, IT IS HEREBY ORDERED THAT:

1. The Motion is GRANTED as provided herein. The Trustee must return to the Debtor all payments held by the Trustee, unless the return of the same is excepted under the express provisions of 11 U.S.C. § 1326(a)(2).

2. The court hereby certifies that the factors in 11 U.S.C. § 158(d)(2)(A) are met and respectfully requests that, should an appeal in this matter be timely and properly filed, the Circuit assent to hear the matter on direct appeal. 11 U.S.C. § 158(d)(2)(B).

3. This Order and the Memorandum Decision are hereby stayed pending appeal. Should no party timely and properly file an appeal of this matter, the stay will expire. Should an appeal be timely and properly filed but the Court of Appeals not accept this matter on direct appeal, the stay will also expire.

Dated: May 12, 2023

ENTERED:

Judge Timothy A. Barnes
United States Bankruptcy Court

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

In re:	Case No. 22bk04449
Edward Johnson,	Chapter 13
Debtor.	Judge Timothy A. Barnes

TIMOTHY A. BARNES, Judge.

MEMORANDUM DECISION

The matter before the court comes on the Motion to Disgorge [Dkt. No. 66][1] (the "Motion") of debtor, Edward Johnson (the "Debtor"), in the above-captioned case. In the Motion, the Debtor seeks to cause the chapter 13 trustee assigned to this case, Marilyn O. Marshall (the "Trustee"), to disgorge fees allegedly wrongfully deducted from his payments and not returned to him when his case was dismissed prior to the confirmation of a chapter 13 plan.

For the reasons more fully stated herein, the Motion is well taken. The Trustee is not authorized by statute to deduct the fees in question and pay herself her commission on cases dismissed prior to confirmation. As a result, the Motion will be by order entered concurrent with this Memorandum Decision, GRANTED.

However, the court recognizes that the decision contained herein, if upheld, marks a significant change in the practice of the chapter 13 trustees in this District, if not this Circuit. As a result, the court will stay the effect of its ruling pending an appeal of the same. The court also requests herein that the Seventh Circuit Court of Appeals take up this matter, if appealed, on direct appeal to the Circuit.

JURISDICTION

The federal district courts have "original and exclusive jurisdiction" of all cases under title 11 of the United States Code, 11 U.S.C. §§ 101, *et seq.* (the "Bankruptcy Code"). 28 U.S.C. § 1334(a). The federal district courts also have "original but not exclusive jurisdiction" of all civil proceedings arising under the Bankruptcy Code or arising in or related to cases under the Bankruptcy Code. 28 U.S.C. § 1334(b). District courts may refer these cases to the bankruptcy courts for their districts. 28 U.S.C. § 157(a). In accordance with section 157(a), the District Court for the Northern District of Illinois has referred all of its bankruptcy cases to the Bankruptcy Court for the Northern District of Illinois. N.D. Ill. Internal Operating Procedure 15(a).

[1] References to docket entries in the above-captioned bankruptcy case will be denoted as "Dkt. No. ___."

A bankruptcy court judge to whom a case has been referred has statutory authority to enter final judgment on any core proceeding arising under the Bankruptcy Code or arising in a case under the Bankruptcy Code. 28 U.S.C. § 157(b)(1). Bankruptcy court judges must therefore determine, on motion or *sua sponte*, whether a proceeding is a core proceeding or is otherwise related to a case under the Bankruptcy Code. 28 U.S.C. § 157(b)(3). As to the former, the bankruptcy court judge may hear and determine such matters. 28 U.S.C. § 157(b)(1). As to the latter, the bankruptcy court judge may hear the matters, but may not decide them without the consent of the parties. 28 U.S.C. §§ 157(b)(1) & (c). Absent consent, the bankruptcy court judge must "submit proposed findings of fact and conclusions of law to the district court, and any final order or judgment shall be entered by the district judge after considering the bankruptcy judge's proposed findings and conclusions and after reviewing *de novo* those matters to which any party has timely and specifically objected." 28 U.S.C. § 157(c)(1).

In addition to the foregoing considerations, a bankruptcy court judge must also have constitutional authority to hear and determine a matter. *Stern v. Marshall,* 564 U.S. 462 (2011). Constitutional authority exists when a matter originates under the Bankruptcy Code or, in noncore matters, where the matter is either one that falls within the public rights exception, *id.*, or where the parties have consented, either expressly or impliedly, to the bankruptcy court judge hearing and determining the matter. *See, e.g., Wellness Int'l Network, Ltd. v. Sharif*, 575 U.S. 665, 669 (2015) (parties may consent to a bankruptcy court judge's jurisdiction); *Richer v. Morehead*, 798 F.3d 487, 490 (7th Cir. 2015) (noting that "implied consent is good enough").

The payment of claims and refund of plan payments in a case under chapter 13 of the Bankruptcy Code is a matter concerning the administration of the estate and is thus a core proceeding under the Bankruptcy Code. 28 U.S.C. § 157(b)(2)(A); *see, e.g.*, *Washington Fed. Savs. Bank v. McGuier* (*In re McGuier*), 346 B.R. 151, 157–58 (Bankr. W.D. Pa. 2006). A motion seeking redress for alleged violations of the statutory provisions governing such payment and refund thus "stems from the bankruptcy itself," and thus may constitutionally be decided by a bankruptcy court judge. *Stern*, 564 U.S. at 499.

It follows that the court has the jurisdiction, statutory authority and constitutional authority to hear and determine the Motion.

PROCEDURAL POSTURE

Prior to the commencement of the matter immediately before the court, the Debtor had been a debtor in the above-captioned chapter 13 case (the "Chapter 13 Case"). The Chapter 13 Case was commenced on April 18, 2022. Voluntary Petition for Non-Individuals Filing for Bankruptcy [Dkt. No. 1]. During the pendency of the Debtor's case, there were a total of eight confirmation hearings.[2] All but the first hearing were heard concurrently with the Trustee's Motion to Dismiss Case for Unreasonable Delay [Dkt. No. 21] (the "Motion to Dismiss"). At the hearing on January 19, 2023, the Motion to Dismiss was granted, as was the Amended Attorney's Application for Chapter 13 Compensation Under the Court-Approved Retention Agreement [Dkt.

[2] Confirmation hearings occurred on June 9, 2022, July 7, 2022, August 4, 2022, September 15, 2022, September 29, 2022, November 17, 2022, December 8, 2022, and January 19, 2023. This is, by any measure, an extraordinarily large number of hearings placing an outsized burden on the court, the Trustee, the Debtor and other parties in interest.

No. 36]. *See* Order Dismissing Case for Unreasonable Delay [Dkt. No. 63]; Order Allowing Chapter 13 Compensation Under Court-Approved Retention Agreement [Dkt. No. 64].

On January 23, 2023, less than a week after the dismissal of the above-captioned case but prior to its closure,[3] the Debtor filed the Motion. In accordance with the Local Bankruptcy Rules for the Bankruptcy Court of the Northern District of Illinois (individually "LBR __"), the Trustee filed a Notice of Objection on February 14, 2023.[4] *See* Dkt. No. 64. The Motion was therefore initially heard on February 16, 2023, at which hearing the court entered a scheduling order in relation to the Motion. *See* Order [Dkt. No. 69] (the "Scheduling Order").

In accordance with the Scheduling Order, on March 9, 2023, the Trustee filed her Response to Debtor's Motion to Disgorge [Dkt. No. 70] (the "Response"). On March 30, 2023, the Debtor filed the Debtor's Reply to Marilyn O. Marshall's Response to Debtor's Motion to Disgorge [Dkt. No. 72] (the "Reply").

On April 13, 2023, the court conducted a hearing on the fully briefed Motion, Response and Reply (the "Hearing"). At the Hearing, counsel for the Debtor and counsel for the Trustee appeared and responded to questions from the court. At the conclusion of the Hearing, the court took the matter under advisement.

This Memorandum Decision constitutes the court's ruling on the matters so taken under advisement. In considering the matter, the court has considered the Motion, Response and Reply as well as the arguments and answers of counsel at the Hearing. Though these items do not constitute an exhaustive list of the filings in the above-captioned bankruptcy case, the court has taken judicial notice of the contents of the docket in this matter. *See Levine v. Egidi*, Case No. 93C188, 1993 WL 69146, at *2 (N.D. Ill. Mar. 8, 1993) (authorizing a bankruptcy court judge to take judicial notice of its own docket); *In re Brent*, 458 B.R. 444, 455 n.5 (Bankr. N.D. Ill. 2011) (Goldgar, J.) (recognizing same).

SUMMARY OF ISSUES PRESENTED

This matter pitches a burgeoning trend of cases against the tried-and-true practices of the chapter 13 trustees in this District (and others). Yet, "an observation that something is done frequently does not explain why it may be done *properly*. To infer authority from the existence of some practice is circular." *In re Terrell*, 39 F.4th 888, 891 (7th Cir. 2022).

The facts of this matter are undisputed. In the case at bar, the Debtor was unable to confirm a chapter 13 plan prior to the dismissal of his case. Nonetheless, prior to returning the Debtor's plan payments to him, the Trustee deducted from those payments her statutory fee. The Debtor argues that the Trustee was not authorized to take that action, though taking that action is one frequently performed. The court agrees and finds no authority for the Trustee to deduct from

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[3] Neither dismissal of the case (which occurred) nor closure (which did not) would affect the bankruptcy court's "clean-up" jurisdiction to hear the Motion. *In re Sweports, Ltd.*, 777 F.3d 364, 367 (7th Cir. 2015).

[4] A Notice of Objection is a procedural device utilized by a party with an objection to a motion to ensure that said motion is not granted without hearing at its initial presentment hearing, but instead is called and heard. LBR 9013-1(F).

held plan payments her statutory fee if confirmation of the underlying chapter 13 plan is not obtained prior to dismissal.

DISCUSSION

The question before the court is, first and foremost, one of pure statutory interpretation. It is also one of emerging and recent case law. The court will first, therefore, take up the statutory scheme in question. It will then consider the recent cases on point. Finally, in light of the court's conclusions herein, the court considers the effect of this ruling and the need for a binding determination on the same in this Circuit.

A. The Statutory Scheme

Upon commencement of a chapter 13 case, a debtor is required to file with the court a proposed chapter 13 plan. 11 U.S.C. § 1321; Fed. R. Bank. P. 3015(b) (the plan is due within 14 days of filing a bankruptcy petition or conversion of a case to one under chapter 13). Whether or not such a plan is filed, "[u]nless the court orders otherwise, the debtor shall commence making payments not later than 30 days after the date of the filing of the plan or the order for relief, whichever is earlier, in the amount … (A) proposed by the plan to the trustee …." 11 U.S.C. § 1326(a)(1)(A). In turn, "[a] payment made under paragraph (1)(A) shall be retained by the trustee until confirmation or denial of confirmation." 11 U.S.C. § 1326(a)(2).

What happens to those payments when a plan is confirmed is clear. "If a plan is confirmed, the trustee shall distribute any such payment in accordance with the plan as soon as is practicable." 11 U.S.C. § 1326(a)(2).

What happens to those payments when a case is dismissed before a chapter 13 plan is confirmed is, however, not as clear. Section 1326(a)(2) states that "[i]f 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).*" 11 U.S.C. § 1326(a)(2) (emphasis added).

Upon dismissal of a case where no chapter 13 plan is confirmed, therefore, with two exceptions, the funds paid by the debtor under section 1326(a)(1) are to be returned to the debtor. The first exception is that the trustee need not return funds previously paid or funds due and owing to creditors. The second exception is that the trustee may deduct from the funds, prior to returning them, any unpaid claim allowed under section 503(b) of the Bankruptcy Code.

The statutory interpretation of the Trustee's duties under the Bankruptcy Code appear clear. Into this mix, however, is inserted a chapter 13 trustee's statutory rights to compensation under title 28 of the United States Code (the "Judicial Code").

Section 586(b) of the Judicial Code authorizes, under the right circumstances, the United States Trustee to appoint a standing trustee for administering chapter 13 cases in a specific region. The Northern District of Illinois is in Region 11, where the United States Trustee has appointed four standing trustees including the Trustee here.

Such standing trustees have both fixed and variable compensation. 28 U.S.C. §§ 586(e)(1)(A) & (B). What concerns us here is the variable, or "percentage," compensation. Section 586 states that the standing trustee "[s]hall 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 [the Bankruptcy Code] for which such individual serves as standing trustee." 28 U.S.C. § 586(e)(2).

Notably section 586, while it contains provisions how and in what circumstances a portion of such collections shall be paid to the United States Trustee, 28 U.S.C. §§ 586(e)(2)(A) & (B), is silent as to how and when the collections shall be paid to the standing trustee herself.

As has been noted above, it is the practice of the Trustee in this matter and is understood to be the practice of the chapter 13 trustees in this District, this Circuit and elsewhere throughout the United States that, upon denial of confirmation of a chapter 13 plan, the assigned trustee pays to herself her statutory fee under section 586(e)(2) prior to refunding the funds to the debtor under section 1326(a)(2).

B. The Emergent Case Law

The Debtor's challenge to the Trustee's practice in the above-captioned case is uncomplicated. He alleges that the Trustee has no authority to pay herself her statutory fee in contravention of the plain language of section 1326(a)(2). The Debtor's argument is based almost entirely in the recent cases on point that hold in his favor, the chief of which is *Goodman v. Doll* (*In re Doll*), 57 F.4th 1129 (10th Cir. 2023).

In *Doll*, the United States Court of Appeals for the Tenth Circuit took up the very same issue at bar in a chapter 13 bankruptcy case arising out of Colorado. There, the Tenth Circuit unambiguously concluded that section 586(e)(2) only authorizes a chapter 13 trustee to "collect" the statutory fee in question. As such, it "only addresses the source of funds that may be accessed to pay standing trustee fees." *Id.* at 1140. Instead, "[i]t is 11 U.S.C. § 1326(a) that addresses those Chapter 13 payments and what happens to that money …." *Id.*

Considering the language of section 1326, the Tenth Circuit stated that:

> Our focus here is on § 1326(a)(2)'s straightforward language stating that "[i]f a plan is not confirmed, the trustee shall return any such [pre-confirmation] payments ... to the debtor." Read together with 28 U.S.C. § 586(e), § 1326(a)(2) unambiguously answers the question presented by this appeal. While § 586(e)(2) directs a Chapter 13 standing trustee to collect his fee from all Chapter 13 plan payments that the trustee receives from the debtor, § 1326(a)(2) requires the trustee to return pre-confirmation payments to the debtor when no plan is confirmed. We read that to mean that the standing trustee must return all of the pre-confirmation payments he receives, without first deducting his fee. There is no indication in this statutory language that the trustee should first deduct his fees before returning the pre-confirmation payments to the debtor when no plan is confirmed.

Id. at 1141.

While it found no ambiguity in the statutory scheme, the Tenth Circuit looked further into the Bankruptcy Code and found instances in other types of cases where, upon failure to confirm, trustees were expressly authorized by Congress to first deduct their fees before returning funds. *Id.* at 1141–42; *cf.* 11 U.S.C. § 1194(a)(3) (subchapter V cases); 11 U.S.C. § 1126(a)(2) (chapter 12 cases).

As in this case, the trustee in *Doll* argued that the difference in the drafting of those sections is merely a result in the manner in which the statutes came to pass. Originally, section 586(e)(2) was part of chapter 13 only to be moved to the Judicial Code at a later date. *Doll*, 57 F.4th at 1143. As such, the trustee argued that the use of the term "collect" in section 586(e)(2) must mean "collect and retain," though it means merely collect in subchapter V and chapter 12 cases. The *Doll* court rejected this attempt to find ambiguity in the statute. It concluded that, were it to find "collect" to be sufficiently ambiguous so as to allow the trustee's interpretation, it would be at the same time rendering the specific deduction provisions in subchapter V and chapter 12 as surplusage. *Id.* ("Although the Supreme Court has indicated that its "preference for avoiding surplusage constructions is not absolute," *Lamie*, 540 U.S. at 536, "courts must give effect, if possible, to every clause and word of a statute," *Liu v. S.E.C.*, ––– U.S. ––––, 140 S. Ct. 1936 (2020) (*quoting Parker Drilling Mgmt. Servs., Ltd. v. Newton*, 587 U.S. ––––, 139 S. Ct. 1881, 1890 (2019)) (citations truncated) (partial cite to *Lamie v. U.S. Tr.*, 540 U.S. 526, 536 (2004)).

A number of courts have adopted the same reasoning of *Doll*. *See, e.g.*, *In re Rivera*, 268 B.R. 292 (Bankr. D.N.M. 2001), *affirmed sub nom.*, *In re Miranda*, 285 B.R. 344 (10th Cir. B.A.P. 2001); *In re Crespin*, Case No. 17-11234 ta13, 2019 WL 2246540 (Bankr. D.N.M. May 23, 2019); *In re Lundy*, Case 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).

Still, *Doll* is not the only word on the matter. A number of cases, led by the case chiefly relied upon by the Trustee, have adopted the Trustee's reasoning. *See McCallister v. Evans*, 637 B.R. 144 (D. Idaho 2022); *see also*, *e.g.*, *Soussis v. Macco*, Case No. 20-CV-05673 (JMA), 2022 WL 203751 (E.D.N.Y. Jan. 24, 2022); *Nardello v. Balboa* (*In re Nardello*), 514 B.R. 105 (D.N.J. 2014); *McCallister v. Harmon* (*In re Harmon*), Case No. ID-20-1168-LSG, 2021 WL 3087744 (B.A.P. 9th Cir. July 20, 2021); *In re Baum*, Case No. 22-40755, 2023 WL 3294625 (Bankr. E.D. Mich. May 5, 2023).

While it is unfair, therefore, to qualify *Doll* as the majority opinion, neither is it in the minority. It is, to date, the only Circuit level decision on point. Further, the *Soussis* decision is presently on appeal to United States Court of Appeals for the Second Circuit and the *Evans* decision is presently on appeal to the United States Court of Appeals for the Ninth Circuit.

Majority or no, the reasoning in *Doll* is persuasive. Despite the Trustee's arguments to the contrary, sections 586(e)(2) and 1326(a)(2) are not incongruous. Collection in section 586(e)(2) cannot be given the broad but statute-specific meaning the Trustee proposes without running afoul of other uses throughout the Bankruptcy Code (*e.g.*, the chapter 7 scheme to collect, liquidate and distribute the estate under subchapter II) and creating further ambiguity and surplusage. As the Tenth Circuit stated, "[r]ead together with 28 U.S.C. § 586(e), § 1326(a)(2) unambiguously answers the question presented by this appeal." *Doll*, 57 F.4th at 1141. The Trustee must follow the express language of section 1326(a)(2) and return to the Debtor all collected payments still held by the

Trustee at the time his case was dismissed, unless excepted from doing so by the express conditions of section 1326(a)(2).[5]

C. Exigent Circumstances

The court recognizes that the decision contained herein greatly upsets the manner in which chapter 13 cases are administered in this District. A review of the court's records for this District indicates that a large percentage of chapter 13 cases fail to confirm a plan prior to dismissal.

In 2019, when chapter 13 cases were not yet at the present artificial low, out of 18,154 chapter 13 cases, 3,841 failed to confirm a plan prior to dismissal. That is approximately 21% of chapter 13 cases in the District failing to reach confirmation of a plan. In 2021, out of 7,217 cases, 1,818 failed to confirm a plan prior to dismissal. That is approximately 25% of chapter 13 cases in the District failing to reach plan confirmation. Should trustees in this District lose compensation on such a large percentage of their cases, even if such compensation is truncated due to the early cessation of payments in such cases caused by dismissal early in their term, the result will be momentous.

For that reason alone, the parties herein deserve an expedited course to a binding determination. The Judicial Code provides for just such a path. The Court of Appeals may hear a direct appeal from the bankruptcy court.

> [I]f the bankruptcy court, the district court, or the bankruptcy appellate panel involved, acting on its own motion or on the request of a party to the judgment, order, or decree described in such first sentence, or all the appellants and appellees (if any) acting jointly, certify that—
>
> > (i) the judgment, order, or decree involves a question of law as to which there is no controlling decision of the court of appeals for the circuit or of the Supreme Court of the United States, or involves a matter of public importance;
> >
> > (ii) the judgment, order, or decree involves a question of law requiring resolution of conflicting decisions; or

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[5] There remain open issues here not raised by the parties in their filings or advanced meaningfully in their arguments.

First, section 1326(a)(2) only instructs a chapter 13 trustee how to distribute funds if a plan is confirmed or not confirmed and never addresses dismissal. Denial of confirmation, while it is grounds for dismissal, *see* 11 U.S.C. § 1307(c)(5), does not automatically result in the dismissal of a chapter 13 case. What should happen to the funds held by a trustee when confirmation is denied but a debtor seeks to continue the case is not answered here, though the express language of section 1326(a)(2) might be problematic to such cases.

Second, neither party here was able to answer the court's questions on what might happen to funds collected by a chapter 13 trustee if the trustee is required to pay those funds to the United States Trustee under 28 U.S.C. §§ 586(e)(2)(A) or (B) while a case is pending confirmation of a plan. While the use of the term "pay" in these provisions adds further complication to the questions presented herein and should be addressed, it is beyond the scope of the matters as presented to this court.

> (iii) an immediate appeal from the judgment, order, or decree may materially advance the progress of the case or proceeding in which the appeal is taken;
>
> and if the court of appeals authorizes the direct appeal of the judgment, order, or decree.

28 U.S.C. § 158(d)(2)(A).

Here, all three subsections are met. The decision contained herein involves a question of law as to which there is no controlling decision of the court of appeals in this Circuit or of the Supreme Court of the United States and involves a matter of public importance. Further, the question presented herein requires a resolution of conflicting decisions among the various Circuits. Finally, an immediate appeal of the issues contained herein will materially advance the progress of bankruptcy cases in this Circuit. Without the same, conflicting decisions with the Circuit can and likely will arise, resulting in different treatment of the statutory trustees herein.

As a result, the court hereby certifies that the factors in section 158(d)(2)(A) are met and respectfully requests that, should an appeal in this matter be timely and properly filed, the Circuit assent to hear the matter on direct appeal. 11 U.S.C. § 158(d)(2)(B).

Further, though section 158 is clear that authority to appeal directly does not in and of itself act as a stay, 11 U.S.C. § 158(d)(2)(D), and a process by which the parties may seek such a stay is clear, Fed. R. Bankr. P. 8007, it is equally clear that this court has the authority to *sua sponte* issue such a stay. *Landis v. N. Am. Co.*, 299 U.S. 248, 254–55 (1936) ("[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants."); *Cascades Computer Innovation, LLC v. SK hynix Inc.*, Case No. 11 C 4356, 2012 WL 2086469, at *2 (N.D. Ill. May 25, 2012) ("[T]he court may order a stay pursuant to its inherent power to manage its docket, even *sua sponte*.") (citation omitted); R*ogers v. Ameriprise Fin. Servs., Inc.*, Case No. 07 C 6876, 2008 WL 4826262, at *2 (N.D. Ill. Nov. 4, 2008) (same). The Supreme Court has, in matters of great tumult in bankruptcy cases, done the same. *N. Pipeline Const. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 88 (1982) ("The judgment of the District Court is affirmed. However, we stay our judgment until October 4, 1982. This limited stay will afford Congress an opportunity to reconstitute the bankruptcy courts or to adopt other valid means of adjudication, without impairing the interim administration of the bankruptcy laws.").

As a result and, in keeping with the importance of this matter, the court will stay the decision herein pending a determination of this matter by the Court of Appeals. Should the parties fail timely and properly to file an appeal of this matter, the stay will expire. Further, should an appeal be timely and properly filed but the Court of Appeals not accept this matter on direct appeal, the stay will also expire.

CONCLUSION

Based on the foregoing, the court finds that the Motion is well taken. The Trustee is not authorized to deduct from held plan payments her statutory fee if a chapter 13 case is dismissed without confirmation of a plan. As a result, the Trustee must return to the Debtor all payments held

by the Trustee, unless the return of the same is excepted under the express provisions of section 1326(a)(2).

The Motion will be, therefore, GRANTED in the manner set forth herein. A separate order to that effect will be entered concurrently herewith.

Dated: May 12, 2023

ENTERED:

Judge Timothy A. Barnes
United States Bankruptcy Court

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

In re: **Edward Jones**	)	**22 B 04449**
Debtor(s),	)	**Judge Timothy A Barnes**
	)	**Chapter 13**

NOTICE OF APPEAL

Marilyn O. Marshall, Trustee appeals under 28 U.S.C. §158(a) and (d) from the final judgment order entered in this case Granting Disgorgement entered by Judge Timothy A Barnes of the United States Bankruptcy Court on May 12, 2023, docket 73.

The names of all parties to the judgment order appealed from and the names, addresses and telephone numbers of their respective attorneys are as follows:

Appellant: Marilyn O. Marshall, Trustee
Attorneys: O. Anthony Olivadoti, Marilyn O. Marshall, Office of the Chapter 13, Trustee Marilyn O. Marshall, 224 S Michigan Suite 800, Chicago, IL 60604, (312) 431-6512

Appellee: Edward Jones, 3408 N Kilbourn Ave, Chicago, IL 60641
Attorneys: Michael A Miller, The Semrad law Firm, 11101 S Western Ave, Chicago, IL 60643, (312) 284-8728

Dated May 24, 2023

Marilyn O. Marshall,
Standing Trustee

/s/ O. Anthony Olivadoti

Office of the Chapter 13 Trustee
Marilyn O. Marshall
224 S. Michigan Ave.
Suite 800
Chicago, IL 60604
(312) 431-6512

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

In re: **Edward Jones**	)	**22 B 04449**
Debtor(s),	)	**Judge Timothy A Barnes**
	)	**Chapter 13**

MOTION FOR LEAVE TO APPEAL

COMES NOW Marilyn O. Marshall, Standing Trustee ("*Trustee*"), respectfully moves for leave to appeal pursuant to 28 U.S.C. § 158(a) and (d). The Trustee seeks to appeal Judge Barnes' Order Granting Motion for Disgorgement of Fees entered May 12, 2023. In support of said motion, the Trustee submits this brief.

STATEMENT OF FACTS

The debtor's case was filed on April 18, 2022. During the pendency of this case the debtor failed to confirm a plan. After eight confirmation hearings before the bankruptcy court, the debtor's case was dismissed for unreasonable delay on January 19, 2023. At the same time the case was dismissed the bankruptcy court entered an order allowing attorney's fees.

On January 23, 2023, the debtor filed a motion to disgorge fees from the Trustee. Judge Barnes granted the debtor's motion on May 12, 2023, and ordered the Trustee must return all funds to the debtor unless the return is excepted under 11 USC §1326(a). The court further stayed the decision pending appeal and certified the matter for direct appeal to the Circuit Court.

THIS APPEAL SHOULD BE GRANTED

The issue addressed in this appeal involves a question of law as to which there is no controlling decision in the United States Court of Appeals for the Seventh Circuit or in the

United States Supreme Court. The matter is of great public importance because it would apply to all Chapter 13 cases and directly impacts the Chapter 13 Trustees in this district. Judge Barnes recognized in his decision that there is currently a split in authority with the courts that have addressed this issue.

Consequently, the Trustee respectfully requests that the Trustee's motion for leave to appeal be granted, and for such other and further relief as the court deems appropriate.

Respectfully Submitted,
Marilyn O. Marshall

/s/ O. Anthony Olivadoti

Office of the Chapter 13 Trustee
Marilyn O. Marshall
224 S. Michigan Ave.
Suite 800
Chicago, IL 60604
(312) 431-6512

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

In re: Edward Jones,	)	**22 B 04449**
Debtor(s),	)	**Judge Timothy A. Barnes**

Notice of Motion

TO:

Michael Miller
The Semrad Law
11101 S Western Ave
Chicago, IL 60643

Edward Jones
3408 N Kilbourn Ave
Chicago, IL 60641

US Trustee *via the Clerk's ECF noticing procedures*

PLEASE TAKE NOTICE that on **June 1, 2023,** at **9:15 A.M.**, I will appear before the Honorable Timothy A. Barnes, or any judge sitting in that judge's place, **either** in Courtroom 744 of the Dirksen Federal Building, 219 South Dearborn, Chicago, Illinois, or electronically as described below, and present the Trustee's Motion to Certify Appeal, a copy of which is attached.

All parties in interest, including the movant, may appear for the presentment of the motion either in person or electronically using Zoom for Government (audio only).

To appear by Zoom using the internet, go to this link: https://zoomgov.com/. Then enter the meeting ID and passcode.

To appear by Zoom using a telephone, call Zoom for Government at 1-669-254-5252 or 1-646-828-7666. Then enter the meeting ID and passcode.

Meeting ID and passcode. The meeting ID for this hearing is 161 329 5276, and the passcode is 433658. The meeting ID and passcode can also be found on the judge's page on the court's website.

If you object to this motion and want it called on the presentment date, you must file a Notice of Objection no later than two (2) business days before that date. If a Notice of Objection is timely filed, the motion will be called on the presentment date. If no Notice of Objection is timely filed, the court may grant the motion in advance without calling it.

By: Marilyn O. Marshall, Standing Trustee

Certificate of Service

The undersigned certifies that a copy of the foregoing Notice of Motion was served to the above listed persons by placing a copy of same in the US mail, first class postage prepaid and/or as addressed and by the method indicated above on May 24, 2023.

Marilyn O. Marshall, Standing Trustee

/s/ O. Anthony Olivadoti

Office of the Chapter 13 Trustee
Marilyn O. Marshall
224 S. Michigan Ave.
Suite 800
Chicago, IL 60604
(312) 431-6512

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

In re: **Edward Jones**	)	**22 B 04449**
Debtor(s),	)	**Judge Timothy A Barnes**
	)	**Chapter 13**

TRUSTEE'S MOTION FOR CERTIFICATION FOR DIRECT APPEAL TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

COMES NOW Marilyn O. Marshall, Standing Trustee ("*Trustee*"), pursuant to 28 U.S.C. § 158(d)(2)(B)(i), respectfully requests that the Bankruptcy Court certify that the appeal filed in this matter meets the requirements of 28 U.S.C. §§ 158(d)(2)(A)(i), (ii), and (iii) for direct appeal to the United States Court of Appeals for the Seventh Circuit pursuant to Federal Rule of Bankruptcy Procedure 8008(c). Certification is warranted for the following reasons:

PROCEDURAL POSTURE

This court entered an order on May 12, 2023, granting the debtor's motion to disgorge funds from the Trustee in the underlying case. The Trustee filed a Notice of Appeal and a Motion for Leave to Appeal on May 24, 2023.

Pursuant to Bankruptcy rule 8006(f)(1), any party to an appeal may request for certification of an appeal to the Circuit Court where the appeal involves circumstances as specified in 28 U.S.C. §158(d)(2)(A)(i)-(iii). Pursuant to Rule 8006(b), a matter remains pending in the bankruptcy court for 30 days after the effective date under Rule 8002 of the first notice of appeal from the order for which direct review is sought. Pursuant to Rule 8006(f)(2), the request must contain: (1) the facts necessary to understand the question presented; (2) the question itself; (3) the relief sought; (4) the

reasons why the direct appeal should be allowed, including which circumstances specified in 28 U.S.C. §158(d)(2)(A)(i)-(iii) applies; and a copy of the order and opinion appealed.

THE FACTS NECESSARY TO UNDERSTAND THE QUESTION PRESENTED

The debtor Edward Jones filed a chapter 13 case on April 18, 2022. During the pendency of this case the debtor failed to confirm a plan. After eight confirmation hearings before the bankruptcy court, the debtor's case was dismissed for unreasonable delay on January 19, 2023. At the same time the case was dismissed the bankruptcy court entered an order allowing attorney's fees.

Shortly thereafter, on January 23, 2023, the debtor filed a motion to disgorge fees from the Trustee. Judge Barnes granted the debtor's motion on May 12, 2023, and ordered the Trustee must return all funds to the debtor unless the return is excepted under 11 U.S.C. §1326(a). The court further stayed the decision pending appeal to the Seventh Circuit Court of Appeals and certified the matter for direct appeal to the Circuit Court. (*See* Bankruptcy Docket 73).

THE QUESTION ITSELF

The question presented for certification is a question of law as to which there is no controlling decision of the court of appeals in this Circuit or of the Supreme Court of the United States. The question is whether the Standing Trustee can take her fee pursuant to 28 U.S.C. § 586 (e)(2) and keep that fee on cases dismissed pre-confirmation or does 11 U.S.C. § 1326(a)(2) require the Standing Trustee to disgorge that fee and return it to the debtor.

THE RELIEF REQUESTED

The Standing Trustee requests that the Court of Appeals reverses bankruptcy court's order requiring the Trustee to disgorge her fee in this case.

THE BASIS FOR DIRECT CERTIFICATION UNDER 28 U.S.C. §158(d)(2)

Section 158(d)(2)(A)(i)-(iii) states that the appropriate court of appeals shall have jurisdiction over a bankruptcy appeal if the bankruptcy court or district court where the case is pending, on the request of a party to the judgment, order, or decree certifies that: (i) the judgment, order or decree involves a question of law as to which there is no controlling decision of the court of appeals for the circuit or of the Supreme Court of the United States, or involves a matter of public importance; (ii) the judgment, order, or decree involves a question of law requiring resolution of conflicting decisions; or (iii) an immediate appeal from the judgment, order, or decree may materially advance the progress of the case or proceeding in which the appeal is taken. In this case all three of the conditions have been met.

Subsection (i) of § 158 has been met. This matter concerns a question of law as to which there is no controlling authority in the Seventh Circuit. This decision by the bankruptcy court reverses the practice of the Trustee in this district and is of great public importance and will affect thousands of cases. As the court noted, approximately 25% of chapter 13 cases fail pre-confirmation. This decision impacts the Trustee's revenue and the way she receives her fees in cases dismissed pre-confirmation.

Subsection (ii) of § 158 has been met. This appeal involves a question of law requiring resolution of conflicting decisions. As the court noted, there are currently two distinct lines of cases on this matter currently developing. The court ruled in favor of the Debtor following the reasoning in the Tenth Circuit case *In re Doll*, 57, F.4th 1129 (10th Cir. 2023), and the other cases that have adopted the same reasoning. (*See, e.g.*, *In re Rivera*, 268 B.R. 292 (Bankr. D.N.M. 2001), *affirmed sub nom*., *In re Miranda*, 285 B.R. 344 (10th Cir. B.A.P. 2001); *In re Crespin*, Case No. 17-11234 ta13, 2019 WL 2246540 (Bankr. D.N.M. May 23, 2019); *In re Lundy*, Case 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). Further, as the court noted, there is a second line of conflicting cases that would have allowed the Trustee to keep her fee. *See McCallister v. Evans*, 637 B.R. 144 (D. Idaho 2022); *see also*, *e.g.*, *Soussis v. Macco*, Case No. 20-CV-05673 (JMA), 2022 WL 203751 (E.D.N.Y. Jan. 24, 2022); *Nardello v. Balboa* (*In re Nardello*), 514 B.R. 105 (D.N.J. 2014); *McCallister v. Harmon* (*In re Harmon*), Case No. ID-20-1168-LSG, 2021 WL 3087744 (B.A.P. 9th Cir. July 20, 2021); *In re Baum*, Case No. 22-40755, 2023 WL 3294625 (Bankr. E.D. Mich. May 5, 2023). There are many conflicting decisions which warrant resolution with two other circuit appeals currently pending before the Ninth and Second Circuits.

Subsection (ii) of § 158 has been met. An immediate appeal of the bankruptcy court's order will materially advance the progress of this case and of all the bankruptcy cases in this Circuit. Without controlling authority conflicting decisions are likely to arise that will affect how the Trustee administers her cases.

THE ORDER AND OPINION APPEALED ARE ATTACHED

The final requirement for certification of this appeal is to attach the order and opinion being appealed. These documents are attached as Exhibit A.

WHEREFORE, the Trustee respectfully requests that this Honorable Court certify the appeal in this case for direct appeal to the Court of Appeals.

Respectfully Submitted,

O. Anthony Olivadoti
Attorney for Marilyn O. Marshall. Trustee

Marilyn O. Marshall
Chapter 13 Trustee
224 S. Michigan Ave., Suite 800
Chicago, IL 60604 (312) 431-6512

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS

Eastern Division

In Re: Edward Jones	)	BK No.: 22-04449
	)	Chapter: 13
	)	Honorable Timothy A. Barnes
Debtor(s)	)	

Order Denying Motion for Certification as Unnecessary

This matter coming before the Court on Trustee's Motion for Certification for Direct Appeal to the Seventh Circuit Court of Appeals, the court having heard the facts and the arguments of Counsel,

THE COURT FINDS:

The court, in the Memorandum Decision [Dkt. No. 74] and Order [Dkt. No. 73], previously determined that all three subsections of 28 U.S.C § 158(d)(2) are met with respect to its decision on the Debtor's Motion for Disgorgement [Dkt. No. 66]. The Memorandum Decision involves a question of law as to which there is no controlling decision of the court of appeals in this Circuit or of the Supreme Court of the United States and involves a matter of public importance. Further, the questions presented require a resolution of conflicting decisions among the various Circuits. Finally, an immediate appeal of the issues contained therein will materially advance the progress of bankruptcy cases in this Circuit. Without the same, conflicting decisions with the Circuit can and likely will arise, resulting in different treatment of the statutory trustees herein.

IT IS HEREBY ORDERED:

Because the court previously determined that certification is appropriate with respect to the issues in the Memorandum Decision and Order and has filed the appropriate Certification, the Trustee's Motion for Certification of Direct Appeal is denied as unnecessary.

Dated: 06.02.2023

Enter:

Timothy A. Barnes
United States Bankruptcy Judge

Prepared by:

Office of the Chapter 13 Trustee
Marilyn O. Marshall
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224 South Michigan Avenue
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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

In re:	Case No. 22bk04449
Edward Johnson,	Chapter 13
Debtor.	Judge Timothy A. Barnes

TIMOTHY A. BARNES, Judge.

CERTIFICATION FOR DIRECT APPEAL TO THE COURT OF APPEALS

The court having been informed by the Office of the Clerk of Courts for the United States Bankruptcy Court (the "Clerk's Office") that the court's *sua sponte* order directly certifying its Memorandum Decision [Dkt. No. 74] in this matter for direct appeal will not be processed as submitted without an additional, separate certification for direct appeal, hereby states as follows:

This court has already found the certification for direct appeal is merited. *See* Memorandum Decision at pp. 7-8 (the "Original Certification"). In the Original Certification, the court determined that all three factors of 28 U.S.C. § 158(d)(2)(A) have been met and explained why. The court expressly requested that "the Circuit assent to hear the matter on appeal." Original Certification at p. 8. Further, in its accompanying Order [Dkt. No. 73], the court stated that: "The court hereby certifies that the factors in 11 U.S.C. § 158(d)(2)(A) are met and respectfully requests that, should an appeal in this matter be timely and properly filed, the Circuit assent to hear the matter on direct appeal. 11 U.S.C. § 158(d)(2)(B)." Order at ¶ 2.

While the court had attempted to simplify this matter by providing its certification in the Original Certification, that attempt has not had the desired effect. As a result, and out of an abundance of caution, this additional certification is submitted to give the Clerk's Office comfort that it may process the certification.

The Memorandum Decision contains a strict statutory analysis not driven by facts which results in a substantial change in the way chapter 13 trustees are compensated in this Circuit. Should this Memorandum Decision be upheld, upon the dismissal of a chapter 13 case prior to confirmation of a plan, chapter 13 trustees will be required to return to debtors held plan payments which heretofore were first applied by the trustees to pay their statutory compensation and only then returned in the balance.

In 2019, when chapter 13 cases were not yet at the present artificial low, out of 18,154 chapter 13 cases, 3,841 failed to confirm a plan prior to dismissal. That is approximately 21% of chapter 13 cases in the District failing to reach confirmation of a plan. In 2021, out of 7,217 cases, 1,818 failed to confirm a plan prior to dismissal. That is approximately 25% of chapter 13 cases in the District failing to reach plan confirmation. Should trustees in this District lose compensation on such a large percentage of their cases, even if such compensation is truncated due to the early

cessation of payments in such cases caused by dismissal early in their term, the result will be momentous.

The Memorandum Decision addresses an issue that is presently being raised and determined in jurisdictions throughout the United States and requires a resolution of conflicting decisions among the various Circuits. *Compare Goodman v. Doll* (*In re Doll*), 57 F.4th 1129 (10th Cir. 2023) (upon which the Memorandum Decision is predicated); *In re Rivera*, 268 B.R. 292 (Bankr. D.N.M. 2001), *affirmed sub nom.*, *In re Miranda*, 285 B.R. 344 (10th Cir. B.A.P. 2001); *In re Crespin*, Case No. 17-11234 ta13, 2019 WL 2246540 (Bankr. D.N.M. May 23, 2019); *In re Lundy*, Case 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) *with Soussis v. Macco*, Case No. 20-CV-05673 (JMA), 2022 WL 203751 (E.D.N.Y. Jan. 24, 2022); *McCallister v. Evans*, 637 B.R. 144 (D. Idaho 2022); *Nardello v. Balboa* (*In re Nardello*), 514 B.R. 105 (D.N.J. 2014); *McCallister v. Harmon* (*In re Harmon*), Case No. ID-20-1168-LSG, 2021 WL 3087744 (B.A.P. 9th Cir. July 20, 2021); *In re Baum*, Case No. 22-40755, 2023 WL 3294625 (Bankr. E.D. Mich. May 5, 2023).[1]

The Memorandum Decision involves a question of law as to which there is no controlling decision of the court of appeals in this Circuit or of the Supreme Court of the United States and involves a matter of public importance. While the Supreme Court has held that a chapter 13 trustee must return held plan payments to a debtor upon conversion of a chapter 13 case with a confirmed plan, it did so only in that context and with respect to the competing rights of creditors, not trustees. *Harris v. Viegelahn*, 575 U.S. 510, 519, 135 S. Ct. 1829, 1838 (2015).

An immediate appeal of the issues contained herein will therefore materially advance the progress of bankruptcy cases in this Circuit. Without the same, conflicting decisions with the Circuit can and likely will arise, resulting in different compensation applied to statutory chapter 13 trustees within the Circuit.

For these reasons, the court once again certifies all three factors of 28 U.S.C. § 158(d)(2)(A) have been met and respectfully requests that, should an appeal in this matter be timely and properly filed, the Circuit assent to hear the matter on direct appeal. 11 U.S.C. § 158(d)(2)(B).

Dated: June 5, 2023

ENTERED:

Judge Timothy A. Barnes
United States Bankruptcy Court

[1] The *Soussis* decision is presently on appeal to United States Court of Appeals for the Second Circuit and the *Evans* decision is presently on appeal to the United States Court of Appeals for the Ninth Circuit.

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Everett McKinley Dirksen
United States Courthouse
Room 2722 - 219 S. Dearborn Street
Chicago, Illinois 60604

Office of the Clerk
Phone: (312) 435-5850
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ORDER

June 23, 2023

Before
DIANE P. WOOD, *Circuit Judge*
MICHAEL B. BRENNAN, *Circuit Judge*
AMY J. ST. EVE, *Circuit Judge*

No. 23-2212	IN RE: EDWARD JOHNSON, Debtor
Originating Case Information:	
Bankruptcy Case No: 22-04449 Northern District of Illinois, Eastern Division-BK Bankruptcy Judge Timothy A. Barnes	

The following are before the court:

1. **NOTICE OF APPEAL; MOTION FOR LEAVE TO APPEAL**, filed on June 20, 2023, by counsel for the appellant.

2. **APPELLEE'S RESPONSE TO NOTICE OF APPEAL**, filed on June 21, 2023, by counsel for the appellee.

IT IS ORDERED that the petition is **GRANTED**. The appellant shall pay the required appellate fees to the clerk of the bankruptcy court within 14 days from the entry of this order pursuant to Federal Rule of Appellate Procedure 5(d)(1).

form name: **c7_Order_3J** (form ID: **177**)

MARILYN O. MARSHALL
CHAPTER 13 TRUSTEE
PRE-CONFIRMATION TASKS

1.	Extract/Import data from the voluntary petition, plans and schedules in case administration software.
2.	Send Debtor Welcome letter to the debtor to provide Information on documents needed: • Image of Social Security Card • Photo Identification Documents • Domestic Support Obligation Questionnaire • ZoomVideo Conference Form • Tax Returns and Pay Advices (§521Requirements)
3.	Staff Attorney Reviews Attorney Review Worksheet for Completeness and to prepare hearing officers for §341 Meetings.
4.	Send Reminder Letter/email for missing documents and issues to cover at §341 Meetings.
5.	Review case for four years of tax returns and 60 days of pay advices which are usually not submitted timely.
6.	Schedule and Send out Zoom Invitation for individual 341(a) Meeting of Creditors so that debtors/attorneys don't have to use a waiting room.
7.	Email 341(a) Meeting of Creditors Zoom Meeting Date, Time, and Zoom ID to Debtor Attorneys and debtors.
8.	Perform Pre-Confirmation Review (PCR) Audit to review scheduled debt in Case Management System.
9.	Pre-Confirmation(PCR) Audit Set up Proofs of Claim for the case.
10.	Set up Adequate Protection Payments per plan and proof of claim.
11.	Audit variance between Scheduled Debt and Proof of Claim Amounts.
12.	Audit Plan, Schedules, Declarations, Forms.
13.	Review and analyze Creditor Objections, Motions and Orders related to the case.
14.	File Motion for Unreasonable delay if DAT has not complied with documents request.
15.	Review and analyze Tax Returns and tax schedules.
16.	Review case for plan payment receipts. Receipts are due 30 days after date Petition is Filed. File Motion to Dismiss for failure to make plan payments, if applicable.
17.	Hold 341(a) Meeting of Creditors.

18.	Prepare and File Trustee Objections.
19.	Schedule continued 341(a) Meeting of Creditors if required. Some meetings are continued at least 3 times.
20.	Process Plan Payments through the Case Management System and Accounting System.
21.	Review Proof of Income and compare with Schedule I and Tax Returns.
22.	Administer Closing Tasks related to Dismissed cases.
23.	Disburse Adequate Protection Payments.
24.	Prepare for the confirmation hearing by auditing Amended Plans, Schedules, Feasibility and Responses to Trustee Objections, Creditor Objections and Motions.
25.	Appear at the Confirmation Hearings.