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APPENDIX A

PUBLISH

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

FILED
United States Court of Appeals
Tenth Circuit
January 18, 2023
Christopher M. Wolpert
Clerk of Court

In re: DANIEL RICHARD DOLL,
Debtor.

ADAM M. GOODMAN, Chapter 13 Trustee,
Appellant,

v.

DANIEL RICHARD DOLL,
Appellee.

THE NATIONAL ASSOCIATION OF CHAPTER 13 TRUSTEES; NATIONAL CONSUMER BANKRUPTCY RIGHTS CENTER; NATIONAL ASSOCIATION OF CONSUMER BANKRUPTCY ATTORNEYS,
Amici Curiae.

No. 22-1004

Appeal from the United States District Court for the District of Colorado (D.C. No. 1:21-CV-00731-RBJ)

Adam M. Goodman (Jennifer K. Cruseturner, Staff Attorney for Trustee Adam M. Goodman on the briefs), Denver, Colorado, for Appellant Goodman.

Stephen E. Berken (Thomas M. Mathiowetz, Pueblo, Colorado, and Sean M. Cloyes, with him on the brief), Berken Cloyes, P.C., Denver, Colorado, for Appellee Doll.

Henry E. Hildebrand, III, Chapter 13 Standing Trustee, and James M. Davis, Staff Attorney, Nashville, Tennessee, filed an Amicus Curiae brief for the National Association of Chapter Thirteen Trustees, in support of Appellant.

Tara Twomey, National Consumer Bankruptcy Rights Center, San Jose, California, filed an Amici Curiae brief for the National Consumer Bankruptcy Rights Center and the National Association of Consumer Bankruptcy Attorneys, in support of Appellee.

Before **HOLMES**, Chief Judge, **EBEL**, and **EID**, Circuit Judges.

EBEL, Circuit Judge.

This bankruptcy appeal presents a question of

statutory interpretation involving the fee a debtor pays to a standing trustee appointed in the debtor's Chapter 13 reorganization case. A Chapter 13 debtor makes payments to a trustee who then disburses those payments to creditors according to a confirmed reorganization plan. A Chapter 13 standing trustee is compensated through fees he collects by taking a percentage of these payments the trustee receives from the debtor. 28 U.S.C. § 586(e)(2) directs that the standing trustee "shall collect" his fee "from all payments received . . . under" Chapter 13 reorganization plans for which he serves as trustee. 11 U.S.C. § 1326(a)(1) provides that a Chapter 13 debtor "shall commence making payments" to the standing trustee within thirty days of the date the debtor files a proposed reorganization plan. Often these payments begin before the confirmation hearing on the proposed plan occurs. In light of that, 11 U.S.C. § 1326(a)(2) directs the standing trustee to "retain" these pre-confirmation payments until the confirmation hearing, when the proposed reorganization plan is either confirmed or confirmation is denied. *Id.* § 1326(a)(2). "If a plan is confirmed, the trustee shall distribute any such [pre-confirmation] payment in accordance with the plan . . . ." *Id.* But "[i]f a plan is not confirmed, the trustee shall return any such [pre-confirmation] payments . . . to the debtor." *Id.* The question presented here is: If a plan is not confirmed, can the standing trustee deduct and keep his fee before returning the rest of the pre-confirmation payments to the debtor or must the trustee instead return the entire amount of pre-confirmation payments to the debtor without deducting his fee? We conclude that,

read together, 28 U.S.C. § 586(e)(2) and 11 U.S.C. § 1326(a)(2) unambiguously require the trustee to return the pre-confirmation payments to the debtor without deducting the trustee's fee when a plan is not confirmed. Our conclusion is bolstered by the fact that, in bankruptcies under Chapter 12 and Chapter 11 (Subchapter V), Congress expressly directed a standing trustee to deduct his fee before returning pre-confirmation payments to the debtor when a proposed plan is not confirmed, but Congress did not direct Chapter 13 standing trustees to deduct their fee before returning pre-confirmation payments to the debtor. Having jurisdiction under 28 U.S.C. § 158(d)(1), we, therefore, AFFIRM the district court's decision denying the trustee his fee in this case.

I. BACKGROUND

A. Chapter 13 bankruptcies generally

"Congress established two main types of consumer bankruptcy": liquidation under Chapter 7 and reorganization under Chapter 13. *In re Johnson*, 634 B.R. 806, 807 (Bankr. D. Colo. 2021). Chapter 13, at issue here,

> provides bankruptcy protection to "individual[s] with regular income" whose debts fall within statutory limits. 11 U.S.C. §§ 101(30), 109(e). Unlike debtors who file under Chapter 7 and must liquidate their nonexempt assets in order to pay creditors, see §§ 704(a)(1), 726, Chapter 13 debtors

> are permitted to keep their property, but they must agree to a court-approved plan under which they pay creditors out of their future income, see §§ 1306(b), 1321, 1322(a)(1), 1328(a).

Hamilton v. Lanning, 560 U.S. 505, 508 (2010). Chapter 13, thus,

> affords individuals receiving regular income an opportunity to obtain some relief from their debts while retaining their property. To proceed under Chapter 13, a debtor must propose a plan to use future income to repay a portion (or in the rare case all) of his debts over the next three to five years. If the bankruptcy court confirms the plan and the debtor successfully carries it out, he receives a discharge of his debts according to the plan.

Bullard v. Blue Hills Bank, 575 U.S. 496, 498 (2015). "A bankruptcy trustee oversees the filing and execution of a Chapter 13 debtor's plan." *Hamilton*, 560 U.S. at 508. "The plan . . . shall provide for the submission of all or such portion of future earnings or other future income of the debtor to the supervision and control of the trustee as is necessary for the execution of the plan." 11 U.S.C.A. § 1322(a)(1).

1. Standing trustees

There will, then, always be a trustee of some sort

appointed in a Chapter 13 case. *See Hamilton*, 560 U.S. at 508; *see also* 11 U.S.C. § 1302. In this case, there was a standing trustee. Congress provided for the possibility of standing trustees as part of its U.S. Trustee program.

Generally speaking, before 1978, bankruptcy courts conducted administrative tasks for each bankruptcy case themselves or, when necessary, bankruptcy courts appointed private trustees to conduct administrative tasks in a given case. *See Siegel v. Fitzgerald*, 142 S. Ct. 1770, 1775 (2022). Bankruptcy courts would oversee and approve the compensation for a private trustee's work and expenses in each case. Beginning with a pilot program in 1978, which was made permanent in 1986, Congress "transferred the administrative functions previously handled by the bankruptcy courts to newly created U.S. Trustees, housed within the Department of Justice rather than the Administrative Office of the U. S. Courts." *Id.* at 1776. As part of that transfer, Congress directed the Attorney General to appoint a U.S. Trustee for each judicial district (except those in Alabama and North Carolina), and to supervise those U.S. Trustees. *See* 28 U.S.C. §§ 581, 586(c); *see also Siegel*, 142 S. Ct. at 1776. Compensation for the U.S. Trustee program is based on "user fees" paid by debtors. *Siegel*, 142 S. Ct. at 1776. Reflecting Congress' transfer of administrative duties from bankruptcy courts to the U.S. Trustee Program, which is part of the Department of Justice, the statutes addressing the U.S. Trustee Program are found in Title 28 of the U.S. Code, rather than in Title 11, which contains the

Bankruptcy Code.

Congress authorized U.S. Trustees to appoint, when necessary, and then to supervise "standing trustees" in several types of bankruptcy cases, including those filed under Chapter 13:

> *If the number of cases under* subchapter V of *chapter* 11 or chapter 12 or *13 of title 11 commenced in a particular region so warrants, the United States trustee for such region may, subject to the approval of the Attorney General, appoint one or more individuals to serve as standing trustee*, or designate one or more assistant United States trustees to serve in cases under such chapter.

28 U.S.C. § 586(b) (emphasis added). Section 586(b), then, addresses standing trustees for Chapter 13 cases, as well as Chapter 12 cases involving reorganization by family farmers and fishermen and cases under Chapter 11 (Subchapter V) involving small business reorganization. *See generally* 11 U.S.C. §§ 1183(a), 1202(a), 1302(a) (addressing appointment of standing trustees in these types of cases).

As we have said, there will always be a trustee of some sort appointed in a Chapter 13 case. *See Hamilton*, 560 U.S. at 508; *see also* 11 U.S.C. § 1302. If the U.S. Trustee for a district does not invoke 28 U.S.C. § 586(b) to appoint one or more standing trustees, the U.S. Trustee can designate an assistant

U.S. Trustee to act as trustee in Chapter 13 cases, see 28 U.S.C. § 586(b), or appoint a "disinterested" private trustee in a given case, see 11 U.S.C. § 1302(a). This case involves a standing trustee appointed by the U.S. Trustee for the District of Colorado.

The trustee performs a number of duties in a Chapter 13 case, both before and after a plan's confirmation. *Id.* § 1302(b)-(d); *see McCallister v. Harmon (In re Harmon)*, BAP No. ID-20-1168-LSG, 2021 WL 3087744, at *7 (BAP 9th Cir. July 20, 2021) (unpublished) (describing standing trustee's pre-confirmation duties). Those duties include facilitating the debtor's development of a proposed reorganization plan and receiving payments from the debtor and disbursing those payments to creditors according to a confirmed reorganization plan.

A standing trustee is compensated through fees paid by debtors. Those fees are based on a percentage of the payments the trustee receives from the debtor for disbursement to creditors under the confirmed reorganization plan. *See* 28 U.S.C. § 586(e). The Attorney General sets the standing trustee's maximum annual compensation, *id.* § 586(e)(1)(A), and, after considering the standing trustee's annual compensation and his projected yearly expenses, the Attorney General establishes a percentage of the payments that the trustee receives from the debtor that the trustee will take as his fee. *Id.* § 586(e)(1)(B). For Chapter 13 bankruptcies, Congress has capped that "percentage fee" at 10%, id. § 586(e)(1)(B)(i), and that 10% is the percentage fee at issue here. The

standing trustee turns over fees collected from all debtors that exceed the amount necessary to compensate the standing trustee and cover his or her expenses to the district's U.S. Trustee to be deposited in the U.S. Trustee System Fund. *Id.* § 586(e)(2). *See generally Dunivent v. Schollett (In re Schollett)*, 980 F.2d 639, 641–44 (10th Cir. 1992) (discussing this statutory scheme).

Summarizing this system of standing trustees, the Rhode Island district court, taking a 30,000-foot view, explained that the standing trustees Congress established

> represented an effort to transfer ministerial responsibilities incident to Chapter 13 cases from a judicial arena to an administrative one, that is, from the bankruptcy courts to the Attorney General. The method of compensating standing trustees must realistically be viewed as an important part of this endeavor. Rather than enmire the courts in the laborious business of setting fees in individual cases—many of them small in terms of assets, and some of them bone-dry—the Code and Title 28 authorized the Attorney General to fix the allowances of standing trustees on a yearly basis. An overall sense of balance thus became achievable. The "no asset" or "meagre assets" cases can be handled professionally, because the system is not dependent upon each individual

> matter to generate its own fees. To the contrary, the Attorney General considers the volume of cases committed to the trustee, reviews the trustee's program-related expenses for the prior year, and projects the amount of funds that will be handled during the upcoming year. This overall forecast—rather than the vicissitudes of each individual filing—becomes the cynosure of the fee calculation. And, there is some built-in prophylaxis: lest the remuneration for standing trustees prove excessive, the statute sets a ceiling on both annual and per case compensation. *See* 28 U.S.C. §§ 586(e)(1)(A), (e)(2).

In re Savage, 67 B.R. 700, 706–07 (D. R.I. 1986). "Congress has . . . plainly chosen to spread the costs of trusteeship pro rata over all Chapter 13 debtors within the court's jurisdiction." *Id.* at 707. In light of this structure,

> [t]he percentage fixed by the Attorney General to determine allowable compensation in no way purports to constitute a precise prognostication of what the value of a trustee's services will be in *every* Chapter 13 case. It is certainly true that in some instances, . . . the allowance collected under the statute will exceed the fair value of the work performed. But, in as many (or more) instances—say, where the case had an inordinate degree of complexity

> or is one in which no monies whatever are available for distribution—the statutory percentage will provide remuneration insufficient to reimburse the trustee fully (or, in the worst cases, at all) for his time and expenses.

Id. at 708. Thus,

> [a] standing trustee undertakes the obligation to serve as trustee in all cases filed within the district. She cannot know in advance which cases will actually arise or the degree of effort they will require. Her agreement to accept the percentage fee in exchange for a commitment to undertake all of the district's trusteeship duties is thus based on a calculation of the average effort required compared with the average payments involved. The cases in which she receives greater compensation will presumably be counterbalanced by those for which her fees will be minimal.

In re Schollett, 980 F.2d at 645.

2. Chapter 13 procedures generally

Chapter 13 cases are designed to move fairly quickly. After a debtor files his bankruptcy petition, a trustee is appointed and the debtor has fourteen days to file a proposed plan to adjust his debts. *See* 11 U.S.C. §§ 1302(a), 1321–22; Bankr. R. 3015(b). "Unless

the court orders otherwise, the debtor shall commence making payments not later than 30 days after the date of the filing of the plan or the order for relief, whichever is earlier." 11 U.S.C. § 1326(a)(1). That means that the debtor must begin making payments even if there has not yet been a confirmation hearing on the proposed plan. Such pre-confirmation payments are payable to the trustee "in the amount . . . proposed by the plan." *Id.* § 1326(a)(1)(A).[1] In requiring these pre-confirmation payments, Congress reasoned that "when the payments do not begin promptly, the debtor becomes accustomed to living on money that will not be available once the plan becomes operational," and that "the period between the filing of a plan and confirmation provides a good test of whether the debtor will be able to carry out the plan, or whether some modification is necessary." *In re Acevedo*, 497 B.R. 112, 121 n. 22 (Bankr. D. N.M. 2013) (quoting S. Rep. No. 98-65, at 15–16 (1983)). The pre-confirmation payments at issue in this case had to include the trustee's fee. Bankr. D. Colo. R. 2083-1(a).

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[1] A debtor can also make some payments directly to creditors instead of to the trustee. *See* 11 U.S.C. § 1326(a)(1)(B) (payments scheduled in a lease of personal property), (C) (payments that provide adequate protection to creditor holding an allowed claim secured by personal property to extent claim is attributable to purchase of such property). *But see* Bankr. D. Colo. R. 2083-1(a) (requiring debtor to make pre-confirmation adequate-protection payments to trustee instead of secured creditor unless otherwise ordered). The payments the debtor makes directly to creditors must also begin within thirty days of the debtor filing his proposed plan or the order of relief, whichever is earlier. *See* 11 U.S.C. § 1326(a)(1).

As for what becomes of those pre-confirmation payments that 11 U.S.C. § 1326(a)(1)(A) requires the debtor to make to the trustee, 11 U.S.C. § 1326(a)(2) provides 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 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).[2]

(Emphasis, footnote added.)

A debtor whose proposed plan is denied can usually file a new proposed plan and seek to have it confirmed. *See Bullard*, 575 U.S. at 498. A Chapter 13 case can, instead, be converted to another type of bankruptcy case or can be dismissed completely, at the debtor's request or the request of the trustee or an interested party. 11 U.S.C. § 1307.

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[2] A standing trustee's fee is not a claim covered by 11 U.S.C. § 503(b). *See Skehen v. Miranda (In re Miranda)*, 285 B.R. 344, 2001 WL 1538003, at *2 (BAP 10th Cir. 2001) (unpublished). This issue is not contested.

B. This case

In 2017, Debtor Daniel Doll lived in Rifle, Colorado, and was the sole proprietor of Doll Ventures LLC, a business that repaired forklifts. Doll, through counsel, initiated this Chapter 13 case in November 2017. Doll proposed four reorganization plans over the next year and a half. Each proposed plan called for Doll to make monthly payments to the standing trustee for the benefit of his creditors. The bankruptcy court declined to confirm any of those plans, based on objections from the standing trustee, Doll's former spouse, and the former spouse's attorney.[3] After the fourth denial, Doll declined to file another amended plan and the bankruptcy court, therefore, dismissed his case. By that time, Doll had made pre-confirmation payments to the standing trustee totaling $29,900.[4] From those preconfirmation payments, the standing trustee paid $19,800 to Doll's bankruptcy attorney for

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[3] "If an unsecured creditor or the bankruptcy trustee objects to confirmation, [11 U.S.C.] § 1325(b)(1) requires the debtor either to pay unsecured creditors in full or to pay all 'projected disposable income' to be received by the debtor over the duration of the plan." *Hamilton*, 560 U.S. at 508–09. Generally speaking, "'disposable income' means current monthly income received by the debtor," minus "amounts reasonably necessary" for debtor's "maintenance or support," certain charitable contributions and, if the debtor is engaged in business, the business's necessary expenses. 11 U.S.C. § 1325(b)(2); *see Hamilton*, 560 U.S. at 510.

[4] No one in this case appears to dispute that the trustee can hold all the pre-confirmation payments while the debtor continues to propose amended plans.

attorney's fees[5]; paid, with Doll's consent, over $7,500 to the Colorado Department of Revenue to cover some of Doll's taxes; and retained $2,596.70 as the trustee's fee. Doll then filed a "Motion to Disgorge Trustee's Fees" by which Doll sought to have the standing trustee return to Doll the $2,596.70 fee the trustee had kept, arguing the trustee was not entitled to any fee because no plan had been confirmed before Doll's case was dismissed.

The bankruptcy court denied the "Motion to Disgorge." Doll appealed. The district court[6] reversed, agreeing with Doll that the standing trustee was not entitled to keep any fee because no plan had been confirmed and thus such payments should be returned to Doll. The Trustee challenges the district court's decision in this appeal.[7]

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[5] *See generally In re Oliver*, 222 B.R. 272, 274 (Bankr. E.D. Va. 1998) (recognizing that "the debtor's attorney's fees and expenses are administrative expenses which are properly payable by the Trustee prior to the return of the remaining funds to the debtor pursuant to section 1326(a)(2)").

[6] Debtor Doll appealed the bankruptcy court's decision to the bankruptcy appellate panel ("BAP") for the Tenth Circuit. But the Trustee exercised his option under 28 U.S.C. § 158(c)(1)(B), to have the district court hear the appeal instead.

[7] Bankruptcy and district courts are divided on the question of whether a Chapter 13 standing trustee can keep his fee if no plan is confirmed. *Compare, e.g., Nardello v. Balboa (In re Nardello)*, 514 B.R. 105, 109 (D. N.J. 2014) (holding Chapter 13 standing trustee is entitled to her fee even though no plan was confirmed), *with, e.g., In re Acevedo*, 497 B.R. at 114 (Bankr. D. N.M. 2013)

II. DISCUSSION

We review de novo questions of statutory interpretation. *See William F. Sandoval Irrevocable Tr. v. Taylor (In re Taylor)*, 899 F.3d 1126, 1129 (10th Cir. 2018). In doing so, we must give a statute its "plain," *Lamie v. U.S. Tr.*, 540 U.S. 526, 534 (2004), or "natural" reading, *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989). Only if a statute is ambiguous—that is, when "its text, literally read, admits of two plausible interpretations," *Graham Cty. Soil & Water Conservation Dist. v. U.S. ex rel. Wilson*, 545 U.S. 409, 420 n.2 (2005)—will a court consider legislative history or, when appropriate, defer to an agency's interpretation of that statute. *See Estrada-Cardona v. Garland*, 44 F.4th 1275, 1283 (10th Cir. 2022); *Nelson v. United States*, 40 F.4th 1105, 1117 (10th Cir. 2022). Whether a statute is ambiguous "'is determined [not only] by reference to the language itself, [but as well by] the specific context in which that language is used, and the broader context of the statute as a whole.'" *Yates v. United States*, 574 U.S. 528, 537 (2015) (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997) (alterations added in *Yates*)).

A. 28 U.S.C. § 586(e)(2) and 11 U.S.C. § 1326(a), read together, unambiguously require a Chapter 13 standing trustee to return pre-confirmation

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(holding 11 U.S.C. § 1326(a)(2) requires Chapter 13 standing trustee to return to debtor payments made under proposed plan without deducting trustee's fee when case is dismissed before plan is confirmed).

payments to the debtor without deducting the trustee's fee when no plan is confirmed

The question presented here is resolved unambiguously by reading together both 28 U.S.C. § 586 and 11 U.S.C. § 1326. We start with 28 U.S.C. § 586(e)(2), which provides that a standing trustee "shall collect [the trustee's] percentage fee from all payments received by such individual under plans in the cases under subchapter V of chapter 11 or chapter 12 or 13 of title 11 for which such individual serves as standing trustee." Relevant here, § 586(e)(2) only addresses the source of funds that may be accessed to pay standing trustee fees. It requires a Chapter 13 standing trustee to "collect" his fee from "all payments received . . . under plans" for which he acts as trustee.

It is 11 U.S.C. § 1326(a) that addresses those Chapter 13 payments and what happens to that money, including, importantly, what happens to such payments if a Chapter 13 plan is not confirmed. Most relevant here, § 1326(a) states:

> (1) Unless the court orders otherwise, the debtor shall commence making payments not later than 30 days after the date of the filing of the plan or the order for relief, whichever is earlier, in the amount--
>
> > (A) proposed by the plan to the trustee;
> >
> > . . . .

> (2) *A payment made under paragraph (1)(A) shall be retained by the trustee until confirmation or denial of confirmation*. If a plan is confirmed, the trustee shall distribute any such payment in accordance with the plan as soon as is practicable. *If a plan is not confirmed, the trustee shall return any such payments* not previously paid and not yet due and owing to creditors pursuant to paragraph (3) *to the debtor*, after deducting any unpaid claim allowed under section 503(b).

(Emphasis added.)

As an initial matter, there are several situations addressed in § 1326(a)(2)'s final sentence that are not implicated here. First, § 1326(a)(2) requires the trustee to "deduct[] any unpaid claim allowed under [11 U.S.C.] § 503(b)" before returning pre-confirmation payments to the debtor when no plan has been confirmed. Both parties agree that the standing trustee's fee is not an "unpaid claim allowed under section 503(b)," which deals instead with certain specified administrative expenses. *See Skehen v. Miranda (In re Miranda)*, 285 B.R. 344, 2001 WL 1538003, at *2 (BAP 10th Cir. 2001) (unpublished) ("The standing Chapter 13 trustee's percentage fee is not an administrative claim within the meaning of § 503(b)." (citing *In re Ward*, 132 B.R. 417, 419 (Bankr. D. Neb. 1991))).

Second, § 1326(a)(2) also clearly specifies that

when a plan is not confirmed the trustee is to return to the debtor "payments not previously paid and not yet due and owing to creditors pursuant to paragraph (3)." The "paragraph (3)" to which this language refers is 11 U.S.C. § 1326(a)(3), which provides: "Subject to section 363," which addresses the use, sale, or lease of the bankruptcy estate's property, "the court may, upon notice and a hearing, modify, increase, or reduce the payments required under this subsection pending confirmation of a plan." Because there was no hearing in this case to modify, increase, or reduce pre-confirmation payments, § 1326(a)(3) is not implicated here. The Trustee does not argue to the contrary.[8]

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

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[8] Rather than reading this language from 11 U.S.C. § 1326(a)(2)—requiring the trustee to return to the debtor "payments not previously paid and not yet due and owing creditors pursuant to" § 1326(a)(3)—to refer in its entirety to § 1326(a)(3), Amicus National Association of Chapter 13 Trustees reads this language to make two separate statements: "the trustee shall return any such [pre-confirmation] payments [1] not previously paid and [2] not yet due and owing to creditors pursuant to paragraph (3) to the debtor" (numbers added). That interpretation does not change our conclusion that this part of the statute is not implicated in this case. We disagree that the standing trustee's fee was already paid at the time the trustee received the pre-confirmation payment. We explain why later in this opinion, in Section II.B.1.

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.

Our conclusion is bolstered by how Congress addressed the same fee question in Chapter 12 and Chapter 11 (Subchapter V) bankruptcies. *See, e.g., State of Utah v. Babbitt*, 53 F.3d 1145, 1148 (10th Cir. 1995) ("In determining the meaning of a statute, we look at not only the statute itself but also at the larger statutory context.").

Like Chapter 13 cases, 28 U.S.C. § 586(e)(2) directs standing trustees in Chapter 12 and Chapter 11 (Subchapter V) cases to "collect" their "fee from all payments received" by the trustee "under plans" for which they serve as trustee. Like Chapter 13 debtors, Chapter 12 and Chapter 11 (Subchapter V) debtors sometimes make pre-confirmation payments to the standing trustee. *See* 11 U.S.C. §§ 1194(a), 1226(a). And, like Chapter 13, when a proposed plan under Chapter 12 and Chapter 11 (Subchapter V) is not confirmed, the standing trustee must return pre-confirmation payments to the debtor. *See* §§ 1194(a),

1226(a). But, in contrast to Chapter 13, in Chapter 12 and Chapter 11 (Subchapter V) cases Congress provided explicitly that the standing trustee *should first deduct his or her fee* before returning pre-confirmation payments to the debtor. 11 U.S.C. § 1194(a), for example, which addresses Chapter 11 (Subchapter V) cases, specifically provides:

> Payments and funds received by the trustee shall be retained by the trustee until confirmation or denial of confirmation of a plan. If a plan is confirmed, the trustee shall distribute any such payment in accordance with the plan. If a plan is not confirmed, the trustee shall return any such payments to the debtor after deducting--
>
> > (1) any unpaid claim allowed under section 503(b) of this title;
> >
> > (2) any payment made for the purpose of providing adequate protection of an interest in property due to the holder's secured claim; and
> >
> > (3) *any fee owing to the trustee.*

(Emphasis added.) Similarly, in Chapter 12 cases, 11 U.S.C. § 1226(a) states:

> Payments and funds received by the trustee shall be retained by the trustee

> until confirmation or denial of confirmation of a plan. If a plan is confirmed, the trustee shall distribute any such payment in accordance with the plan. If a plan is not confirmed, the trustee shall return any such payments to the debtor, *after deducting*--
>
> > (1) any unpaid claim allowed under section 503(b) of this title; and
> >
> > (2) *if a standing trustee is serving in the case, the percentage fee fixed for such standing trustee.*

(Emphasis added.)

While Congress, then, in §§ 1194(a)(3) and 1226(a)(2), specifically directed the standing trustees appointed in Chapter 12 and Chapter 11 (Subchapter V) cases to deduct their fees before returning any remaining pre-confirmation payments to the debtor when a plan is not confirmed, Congress did not so provide in § 1326(a)(2) addressing Chapter 13 cases. From that, we are persuaded that Congress intended that Chapter 13 standing trustees not deduct their fees before returning pre-confirmation payments to the debtor when a plan is not confirmed. "[W]here 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) (internal quotation marks omitted). Said another way, had Congress intended Chapter 13 trustees to deduct their fees before returning pre-confirmation payments to debtors when a plan is not confirmed, Congress "presumably would have" stated that "expressly as it did" in §§ 1194(a)(3) and 1226(a)(2). *Id.*

The Trustee in this case, focusing primarily on Chapter 12, seeks to distinguish that chapter from Chapter 13. Among other differences, the Trustee points out that Chapter 12 bankruptcies are less common than Chapter 13 cases; while pre-confirmation payments to a trustee are mandatory under Chapter 13, they are only voluntary under Chapter 12 unless the bankruptcy court orders them; Chapter 12 pre-confirmation payments, thus, occur less frequently than in Chapter 13 cases; the timeline for Chapter 13 bankruptcies is quicker than it is for Chapter 12 bankruptcies; and § 1326(a) addresses "payments" the trustee receives in Chapter 13 cases, while § 1226(a) addresses "payments and funds" received by the trustee in Chapter 12 cases. We do not believe these distinctions between Chapter 12 and Chapter 13 bankruptcies are material to the question before us. It remains clear that when Congress wanted the standing trustee to deduct his fee before returning pre-confirmation payments to the debtor when a plan is not confirmed, Congress expressly said so as in Chapter 12 and Chapter 11 (Subchapter V). But Congress did not so provide in Chapter 13 cases.

The Trustee contends that this difference in

drafting can be explained by the fact that Congress enacted § 1326 earlier than it enacted § 1226. But Congress enacted § 1326(a) in 1984, only two years before it enacted § 1226(a) in 1986. *In re Harmon*, 2021 WL 3087744, at *20–21 (Lafferty, J., dissenting). "Chapter 12 was closely modeled after Chapter 13." *Foulston v. BDT Farms, Inc. (In re BDT Farms)*, 21 F.3d 1019, 1021 n.3 (10th Cir. 1994). Furthermore, although Congress also amended § 1326(b) in 1986, the same year it enacted Chapter 12, Congress did not at that time amend § 1326(a) and, in particular, did not add language directing the Chapter 13 trustee to deduct his fee before returning pre-confirmation payments to the debtor when no plan is confirmed. *See In re Harmon*, 2021 WL 3087744, at *21 (Lafferty, J., dissenting); cf. *Lindh v. Murphy*, 521 U.S. 320, 330 (1997) (noting that "negative implications raised by disparate provisions are strongest when the portions of a statute treated differently had already been joined together and were being considered simultaneously when the language raising the implication was inserted").

Congress reiterated the language in § 1226(a) expressly directing the standing trustee to deduct his fees before returning pre-confirmation payments to the debtor thirty-three years later, when in 2019 Congress used that same language in enacting § 1194(a)(3). *See id.* (Lafferty, J., dissenting).

Congress's differing treatment of standing trustee fees in these various types of bankruptcy reorganization cases is compelling. Congress's

treatment of trustee fees in Chapter 12 and Chapter 11 (Subchapter V) cases establishes that Congress knew how to direct the standing trustee to deduct his fees before returning any pre-confirmation payments to the debtor when a proposed plan is not confirmed. Yet Congress did not direct a Chapter 13 standing trustee to deduct his fees before returning pre-confirmation payments to a Chapter 13 debtor.

If we were to conclude instead, as the Trustee urges, that Congress just stated more clearly in §§ 1194(a)(3) and 1226(a) what it had already implicitly provided in § 1326(a)—that the standing trustee should keep his fee before returning pre-confirmation payments to the debtor when a plan is not confirmed—that would render the express language directing the standing trustee to deduct his fee in §§ 1194(a)(3) and 1226(a) surplusage. 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.*, 140 S. Ct. 1936, 1948 (2020) (quoting *Parker Drilling Mgmt. Servs., Ltd. v. Newton*, 587 U.S. —, 139 S. Ct. 1881, 1890 (2019)). Giving effect to §§ 1194(a)(3) and 1226(a)(2)'s express direction that standing trustees in Chapter 12 and Chapter 11 (Subchapter V) cases should deduct their fees from pre-confirmation payments before returning them to the debtor when no plan is confirmed suggests that Congress did not intend Chapter 13 standing trustees to do the same where such language is omitted.

While the Trustee asserts several policy arguments for why requiring him to return his fee to a Chapter 13 debtor when no plan is confirmed is a bad idea, Congress has unambiguously already made that policy decision for Chapter 13 debtors. *See Fla. Dep't of Rev. v. Piccadilly Cafeterias, Inc.*, 554 U.S. 33, 52 (2008) (stating "it is not for us to substitute our view of . . . policy for the legislation which has been passed by Congress" (quoting *Baltimore Cty. v. Hechinger Liquidated Tr. (In re Hechinger Inv. Co. of Del., Inc.)*, 335 F.3d 243, 256 (3d Cir. 2003)). There are good reasons for Congress' choice, *see In re Harmon*, 2021 WL 3087744, at *21 (Lafferty, J., dissenting); Amicus Br. (Nat'l Consumer Bankr. Rights Ctr. & Nat'l Ass'n. of Consumer Attorneys) at 1–2, but we need not consider them because the statute's language is clear.

We, therefore, hold that 11 U.S.C. § 1326(a), read together with 28 U.S.C. § 586(e)(2), and considered in light of the different language in 11 U.S.C. §§ 1194(a)(3) and 1226(a)(2), unambiguously require the standing Chapter 13 trustee to return pre-confirmation payments to the debtor without the trustee first deducting his fee, when a proposed Chapter 13 reorganization plan is not confirmed.[9]

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[9] In light of our holding, we need not address Debtor Doll's alternative argument for affirmance— that § 586(e)(2)'s language providing that the standing trustee "shall collect" his fee "from all payments received . . . under" Chapter 13 "plans" refers only to confirmed plans, and not to proposed but as yet unconfirmed plans. Doll forfeited that argument by not raising it until this

B. The Trustee's other arguments lack merit

The Trustee makes several additional arguments which, as we briefly explain, we find unpersuasive.

1. The Trustee argues 28 U.S.C. § 586(e)(2), read by itself, permits him to keep his fee when no Chapter 13 plan is confirmed

The Trustee contends that 28 U.S.C. § 586(e)(2)'s language clearly permits him to deduct his fees before returning pre-confirmation payments to the debtor when a plan is not confirmed. The Trustee specifically points to 28 U.S.C. § 586(e)(2)'s language stating that the Chapter 13 standing trustee "shall collect" his "fee from all payments received by [the trustee] under [Chapter 13] plans." Citing Black's Law Dictionary, among other authorities, the Trustee argues that "collect" means to obtain payment for his fee, and that means final and irrevocable payment.

This argument fails, however, because it conflates the initial "collection" of funds from which subsequent payments may be made, and the subsequent act by the trustee of the disbursement of those funds to various creditors or claimants. The Trustee seeks to support his position by reading the word "irrevocable" into the statute as an adjective defining "collect." *See Lamie*, 540 U.S. at 538

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appeal and not arguing for plain-error review. *See Rumsey Land Co. v. Res. Land Holdings, LLC (In re Rumsey Land Co.)*, 944 F.3d 1259, 1271–72 (10th Cir. 2019).

(declining to "read an absent word into the statute," distinguishing between filling in a statutory "'gap left by Congress' silence,'" which might be acceptable, and rewriting the statute, which is not acceptable (quoting *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978))).

Moreover, "collect" in 28 U.S.C. § 586(e)(2) cannot mean, as the Trustee urges, that the act of "collection" of funds irrevocably constitutes a payment to the Trustee of his fees. As said previously, Congress separately directed standing trustees in Chapter 12 and Chapter 11 (Subchapter V) cases to deduct their fees before returning pre-confirmation payments to debtors when no plan is confirmed but used no such language in Chapter 13. *See* 11 U.S.C. §§ 1194(a)(3), 1226(a)(2).

2. The Trustee argues 11 U.S.C. § 1326(b)(2) permits him to keep his fee when no Chapter 13 plan is confirmed

Next, the Trustee cites to 11 U.S.C. § 1326(b)(2), which is another part of the statute addressing payments in Chapter 13 cases. Section 1326(b)(2) provides that "[b]efore or at the time of each payment to creditors under the plan, there shall be paid . . . if a standing trustee appointed under section 586(b) of title 28 is serving in the case, the percentage fee fixed for such standing trustee under section 586(e)(1)(B) of title 28."

The Trustee relies on this language to argue that

the trustee was already paid his fee at the moment the trustee received the debtor's pre-confirmation payments. When § 1326(b) is read as a whole, however, it is clear that this statutory provision does not address pre-confirmation payments but instead addresses only payments made *after* a plan has been confirmed.

> Section 1326(b) requires the standing Chapter 13 trustee to pay the trustee's percentage fee "before or at the time of each payment to creditors under the plan." But the trustee may pay creditors only under a confirmed plan. *See* 11 U.S.C. § 1326(a)(2) (requiring the trustee to retain the payments until confirmation or denial of confirmation, and then distribute the payments in accordance with the plan "[i]f a plan is confirmed"). Because the trustee will never pay creditors if no plan is confirmed, and § 1326(b) provides for payment of trustee fees before or at the time the trustee pays creditors, it follows that, if confirmation never happens, § 1326(b) does not contemplate payment of the trustee's percentage fee. *See [In re] Rivera*, 268 B.R. [292,] 294 [(Bankr. D. N.M.)] (observing that § 1326(b) "seems to assume a prior confirmation.").

In re Acevedo, 497 B.R. at 120–21. Our conclusion that § 1326(b) only addresses payments made under a confirmed plan is bolstered by the fact that Congress

included this language in the Bankruptcy Code before Congress required any pre-confirmation payments under Chapter 13. *See id.* at 121. The Trustee's argument based on § 1326(b), then, is unavailing.

3. The Trustee relies, alternatively, on the Chapter 13 Trustee Handbook

The Trustee also argues, alternatively, that § 586(e)(2) could be ambiguous, requiring this court to defer to the Chapter 13 Trustee Handbook's interpretation of § 586(e)(2)'s language. The Handbook, promulgated by the Executive Office for the U.S. Trustee (and quoted below), indicates that the Trustee might get to keep his fee if no plan is confirmed. The Trustee's argument for deference to the Chapter 13 Trustee Handbook fails because, as we have explained earlier, 28 U.S.C. § 586(e)(2), when read with 11 U.S.C. § 1326(a)(2), unambiguously requires a Chapter 13 standing trustee to return pre-confirmation payments to the debtor without deducting the trustee's fee, when a proposed plan is not confirmed. Thus, we need not rely on the extrinsic evidence of the Handbook to determine the meaning of this statutory language.

In resisting that conclusion, the Trustee argues 28 U.S.C. § 586(e)(2) is ambiguous, relying on our decision in *In re BDT Farms*, 21 F.3d 1019. But that case which involved a Chapter 12 family farmer bankruptcy, presented a different question than the issue presented in our case. The issue in *In re BDT Farms* was how the standing trustee's fees should be

calculated, *see id.* at 1021, not whether the trustee gets a fee if no plan is confirmed. However, the fact that *In re BDT Farms* deemed § 586(e)(2) to be ambiguous as to the question presented in that case of how to calculate a trustee's fee does not mean that the statute is ambiguous in all circumstances. *See generally Yates*, 574 U.S. at 537 (stating that whether a statute is ambiguous "'is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole'" (quoting *Robinson*, 519 U.S. at 341)). Here, as we have already explained, § 586(e)(2), when read together with 11 U.S.C. § 1326(a), unambiguously answers the question presented here, which was a different question than that presented in *In re BDT Farms*.

In light of that conclusion, we need not consider the Trustee's arguments for affording *Chevron* deference to the Chapter 13 Trustee Handbook. But we note that there are additional problems with such an argument. *In re BDT Farms* afforded the Chapter 12 Trustee Handbook *Chevron* deference in 1994. The Supreme Court has since held that an agency's "interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference." *Christensen v. Harris Cnty.*, 529 U.S. 576, 587 (2000). Instead, such documents are "'entitled to respect'" only to the extent they "have the 'power to persuade.'" *Id.* (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

In this case, the Trustee asserts that the Chapter 13 Trustee Handbook should "still be given a measure of deference." (Aplt. Br. 48.) But the Handbook is not strongly persuasive on the issue before us. It provides, in relevant part:

> The standing trustee is authorized to collect the percentage fee upon receipt of the payment. The trustee must transfer the percentage fee to the operating expense account at least monthly. If the plan is dismissed or converted prior to confirmation, the standing trustee must reverse payment of the percentage fee that has been collected upon receipt *if there is controlling law in the district requiring such reversal or if* (after consultation with the United States Trustee) *the standing trustee determines that there are other grounds for concern in the district.*

(Aplt. App. 162 (emphasis added).) As drafted, then, it appears that the Handbook's default position is that, when a plan is not confirmed, the trustee should keep his fee unless a court says he cannot or unless there are "other grounds for concern in the district." It is not apparent what "other grounds for concern in the district" might mean. This is hardly the exercise of agency expertise in interpreting an ambiguous statute or filling a regulatory gap left by Congress to which a court usually defers. In any event, we need not decide here whether the Handbook is entitled to any sort of deference because the statutory language at issue here

is unambiguous.[10]

III. CONCLUSION

Read together, 28 U.S.C. § 586(e)(2) and 11 U.S.C. § 1326(a) unambiguously provide that a Chapter 13 standing trustee must return pre-confirmation payments to the debtor without deducting the trustee's fee, when a proposed Chapter 13 plan is not confirmed. Our conclusion is bolstered by comparing other sections of the Bankruptcy Code that expressly permit Chapter 12 and Chapter 11 (Subchapter V) standing trustees to deduct their fee before returning pre-confirmation payments to debtors when no plan is confirmed. Congress did not make the same provision for Chapter 13 standing trustees. We, therefore, AFFIRM the district court's decision not allowing the Chapter 13 trustee in this case to keep his fee.

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[10] Doll raises another concern, suggesting that deferring to the Chapter 13 Trustee Handbook, which provides that court decisions contrary to the Handbook would control in districts where such decisions exist, might violate the Constitution's requirement that bankruptcy laws be uniform nationally. We need not address that question here.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge R. Brooke Jackson

Civil Action No. 21-cv-00731-RBJ

Bankruptcy Case No. 17-20831-MER

IN RE: DANIEL RICHARD DOLL,
Debtor.

DANIEL RICHARD DOLL,
Appellant,

v.

ADAM M. GOODMAN,
Appellee.

ORDER

In this appeal from the bankruptcy court the question is whether a Chapter 13 standing trustee may retain a fee that he paid himself from amounts collected from the petitioner if petitioner's plan was not confirmed. The bankruptcy court answered the question "yes." This Court answers the question "no," and therefore the decision of the bankruptcy court is reversed.

FACTS

The facts are not disputed. Mr. Doll filed his voluntary petition on November 20, 2017. The bankruptcy court ultimately declined to confirm his plan, and the matter was dismissed on March 6, 2020. Mr. Doll made $29,900 in Chapter 13 plan payments to the trustee. From this amount Mr. Doll's counsel received $19,800, and $7,503.30 was disbursed to the Colorado Department of Revenue on an allowed priority tax claim. The trustee paid the remainder, $2,596.70, to himself in partial satisfaction of the statutory 10% trustee's fee provided at 28 U.S.C. § 586(e) and 11 U.S.C. § 1326(a) and (b). The $2,596.70 payment is the sum now in dispute. Mr. Doll requested that it be returned to him. The bankruptcy court denied his request.

STANDARD OF REVIEW

The Court reviews the bankruptcy court's conclusions of law de novo. *Bartmann v. Maverick Tube Corp.,* 853 F.2d 1540, 1543 (10th Cir. 1988).

ANALYSIS and CONCLUSIONS

A. Petitioner's Position.

Petitioner relies on 11 U.S.C. § 1326 which provides, as to a Chapter 13 proceeding, that:

> If a plan is confirmed, the trustee shall distribute any such payment in accordance

> with the plan as soon as practical. *If a plan is not confirmed, the trustee shall return any such payments not previously paid out 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).

Petitioner compares that provision to its Chapter 12 counterpart where trustees may retain fees notwithstanding the denial of confirmation of a plan:

> Payments and funds received by the trustee shall be retained by the trustee until confirmation or denial of confirmation of a plan. If a plan is confirmed, the trustee shall distribute any such payment in accordance with the plan. *If a plan is not confirmed, the trustee shall return any such payments to the debtor, after deducting* – (1) any unpaid claim allowed under section 503(b) of this title; and (2) *if a standing trustee is serving in the case, the percentage fee fixed for such standing trustee.*

11 U.S.C. § 1226(a)(1) (emphasis added).

Thus, per petitioner, Congress knew how to permit the trustee to retain fees when a plan is not confirmed and did so with respect to Chapter 12 but not Chapter 13. I note that the bankruptcy court

acknowledged that "most courts that have addressed the issue conclude the standing trustee may not retain his percentage fee from returned payments." Order at 3, ECF No. 16-2 at 179. The United States Bankruptcy Appellate Panel of the Tenth Circuit has found that § 1326(a)(2) "unambiguously" requires the return of all payments except § 503(b) claims. *In re Miranda,* 285 B.R. 344, 2001 WL 1538003, at *2 (10th Cir. BAP Dec. 4, 2001) (unpublished).

B. Respondent's Position.

Respondent cites 28 U.S.C. § 586(e) of the Judicial Code which provides,

> *[The standing trustee] shall collect such percentage fee from all payments received by such individual under plans in cases under chapter 12 or 13 of title 11 for which such individual serves as standing trustee.* Such individual shall pay to the United States trustee, and the United States trustee shall deposit in the United States Trustee System Fund [the statutorily required amount]. . . .

28 U.S.C. § 586(e)(2) (emphasis added).

Respondent also cites The HANDBOOK FOR CHAPTER 13 STANDING TRUSTEES (the "Handbook"), promulgated by the Executive Office for United States Trustees. It provides that "[i]f the plan is dismissed or converted prior to confirmation, the

standing trustee must reverse payment of the percentage fee that had been collected upon receipt if there is controlling law in the district requiring such reversal[.]. *Id.* at 2-3 to 2-4. The bankruptcy court found that "[t]here is no controlling law in the District of Colorado or the Tenth Circuit that would reverse the UST's default position. Under this Court's interpretation of *BDT Farms,* the controlling law in this Circuit appears consistent with the UST's position." Order at 11, ECF No. 16-2 at 187 (Feb. 19, 2021).

Respondent also cites, among other cases, a recent decision of the United States Bankruptcy Appellate Panel of the Ninth Circuit in which the panel in a 2-1 decision reversed the bankruptcy court's denial of the trustee's statutory fee after dismissal of the debtor's case. *In re Harmon,* 2021 WL 3087744 (9th Cir. BAP July 20, 2021) (unpublished).

C. Conclusions.

The bankruptcy court's reference in its order denying Mr. Doll's request was to *In re BDT Farms, Inc.,* 21 F.3d 1019 (10th Cir. 1994). The case concerned the calculation of the standing trustee's fee under 28 U.S.C. § 586(e) in a Chapter 12 bankruptcy. The question was whether the standing trustee's fee should be calculated on the total amount collected by the trustee or on the amount to be paid to creditors (after deduction of the trustee's fee). The Handbook's policy was that the trustee's fee was a percentage of all monies received from the debtor, including the

trustee's fee itself. The court held that § 586 was ambiguous and, therefore, the court would defer to a reasonable interpretation of the statute by the agency, i.e., so-called *Chevron* deference. *Id.* at 1023.

However, the court did not consider the issue presented in the present case. *BDT* was not a case where the plan was not confirmed, nor did *BDT* construe § 1326. I do not consider *BDT* as controlling law as to whether the amount the trustee paid himself in the present case should or should not be repaid.

The language of § 586 that the standing trustee "shall collect such percentage fee from all payments received" could be read as implying that the collected fee may be retained regardless of whether the plan is confirmed. However, it does not expressly address the question, and I conclude that it does not compel that result. But 11 U.S.C. § 1326(a)(2) provides, "[i]f a plan is not confirmed, the trustee shall return any such payments not previously paid out and not yet due and owing to creditors." If the payments must be returned, then in my view it follows that fees collected from such payments must be returned.

Notably, the language of § 1326(a)(2) stands in contrast to Chapter 12 which provides that "[i]f a plan is not confirmed, the trustee shall return any such payments to the debtor, after deducting . . . the percentage fee fixed for such standing trustee." No similar allowance for a deduction of the standing trustee's fee before returning the payments is built into § 1326(a)(2).

Therefore, I do not find any cause to apply *Chevron* deference, because I conclude that the answer can be found in the language of the statutes. Although I might, as a policy matter, prefer that the trustee be fairly compensated for his efforts, it is a matter for Congress to address, just as Congress did in the Chapter 12 context.

ORDER

The order of the United States Bankruptcy Court for the District of Colorado permitting Chapter 13 Trustee Adam Goodman to retain the $2,596.70 fee is reversed. The matter is remanded with directions to order the Trustee to return the fee to Mr. Doll.

DATED this 6th day of December, 2021.

BY THE COURT:

/s/
R. Brooke Jackson
Senior United States District Judge

APPENDIX C

IN THE UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF COLORADO

The Honorable Michael E. Romero

In re:
DANIEL RICHARD DOLL,
Debtor.

Case No. 17-20831 MER

Chapter 13

ORDER

Debtor Daniel Richard Doll ("**Doll**") was unable to confirm a Chapter 13 Plan in this case. Following denial of confirmation, Doll's Chapter 13 case was duly dismissed.[1] Doll and Chapter 13 Trustee Adam Goodman ("**Trustee**") now dispute the proper distribution of Doll's payments under the failed plan prior to dismissal. The central issue is whether a Chapter 13 Trustee is entitled to retain a 10% fee in cases dismissed prior to confirmation of a Chapter 13 plan.

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[1] ECF No. 146.

BACKGROUND

Doll commenced this Chapter 13 case by filing a voluntary petition on November 20, 2017 ("**Petition Date**").[2] Following a heavily litigated confirmation process, the Court declined to confirm Doll's Chapter 13 Plan on February 7, 2020.[3] The bankruptcy case was dismissed on March 6, 2020 ("**Dismissal Date**").

Trustee filed his Final Report and Account on June 2, 2020.[4] According to the Final Report, Doll paid a total of $29,900 to the Trustee between the Petition Date and the Dismissal Date. From this amount, Doll's counsel received a total of $19,800 as administrative expenses representing allowed compensation.[5] Trustee disbursed an additional $7,503.30 to the Colorado Department of Revenue on account of an allowed priority tax claim. The net balance of Trustee's funds on hand as of the Dismissal Date is $2,596.70, and it is this sum that is the subject of the present dispute ("**Disputed Balance**"). According to the Final Report, Trustee paid this amount to himself at the time of each of Doll's periodic payments, in partial satisfaction of the statutory 10% trustee's fee provided in 28 U.S.C.

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[2] ECF No. 1.

[3] ECF No. 139.

[4] ECF No. 159 ("**Final Report**").

[5] *See* ECF No. 153.

§ 586(e) and 11 U.S.C. § 1326(a) and (b).[6]

On the same day Trustee filed his Final Report, Doll filed a Motion to Disgorge Trustee's Fees.[7] Through the Disgorgement Motion, Doll disputes Trustee's entitlement to the 10% statutory fee in Chapter 13 cases which are dismissed prior to plan confirmation and requests the Court disgorge the fees previously paid to Trustee.

ANALYSIS

A. Relevant Statutes

Naturally, the Court's analysis begins with a recitation of the applicable statutes. Section 586(b) provides the basic authority for the United States Trustee ("**UST**"), with approval of the Attorney General, to appoint standing trustees in Chapter 13 cases.[8] Section 586(e)(1) then gives the UST and

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[6] Unless otherwise specified, all references herein to "Section," "§," and "Code" refer to Title 11 of the United States Code, 11 U.S.C. § 101, *et seq*., provided however, references to "Section 586" or "§ 586" shall refer to 28 U.S.C. § 586.

[7] ECF No. 157 ("**Disgorgement Motion**").

[8] Section 586(b) provides "If the number of cases under subchapter V of chapter 11 or chapter 12 or 13 of title 11 commenced in a particular region so warrants, the United States trustee for such region may, subject to the approval of the Attorney General, appoint one or more individuals to serve as standing trustee, or designate one or more assistant United States

Attorney General the power to compensate standing trustees through a percentage fee which is capped at 10% for cases which do not involve family farmers.[9] Section 586(e)(2) provides the method for collection of the percentage fee, providing the standing trustee "shall collect such percentage fee from all payments received by such individual under plans in the case under chapter 12 or 13 of title 11 for which such individual serves as standing trustee."

Section 1326(a)(1)(A) provides in pertinent part "[u]nless the court orders otherwise, the debtor shall commence making payments not later than 30 days after the filing of the plan or the order for relief, whichever is earlier, in the amount . . . proposed by the plan to the trustee[.]" Section 1326(a)(2) requires:

> A payment made under paragraph (1)(A) [of Section 1326] shall be retained by the trustee until confirmation or denial of confirmation. If a plan is confirmed, the trustee shall distribute any such payment

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trustees to serve in cases under such chapter. The United States trustee for such region shall supervise any such individual appointed as standing trustee in the performance of the duties of standing trustee."

[9] Section 586(e)(1) provides "The Attorney General, after consultation with a United States trustee that has appointed an individual under subsection (b) of this section to serve as standing trustee in cases under subchapter V of chapter 11 or chapter 12 or 13 of title 11, shall fix . . . a percentage fee not to exceed . . . in the case of a debtor who is not a family farmer, ten percent[.]"

> in accordance with the plan as soon as is practicable. If a plan is not confirmed, the trustee shall return any such payments not previously paid and not yet due and owing to creditors pursuant to paragraph (3) to the debtor, after deducting any unpaid claim allowed under section 503(b).

The parties agree the Trustee's percentage fee is not allowable as an administrative expense subject to the express carve-out for § 503(b) claims from returned payments under § 1326(a)(2).[10] Properly putting that provision of § 1326(a)(2) aside, the precise question before the Court is how to resolve the conflict, if any, between § 586(e)(2), allowing the Trustee to take a percentage fee on all payments "under plans[,]" and § 1326(a)(2), requiring the Trustee to return payments following denial of confirmation.

B. Divergent Constructions

Most courts that have addressed the issue conclude the standing trustee may not retain his percentage fee from returned payments. Some courts, including the Bankruptcy Court for the District of Nebraska in *In re Ward*, take a simplistic approach to the question, reasoning § 1326(a)(2) only permits deduction for § 503(b) claims, and the percentage fee

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[10] *See* ECF No. 162 at p. 6 and ECF No. 172 at p. 2, n.3. *Accord* 8 Collier on Bankruptcy ¶ 1326.02(2)(c).

is plainly not a § 503(b) administrative expense.[11] A more recent line of opinions, several originating from courts within the Tenth Circuit, expand on the court's reasoning in *Ward* and ultimately agree with its conclusion.

The first such case is *In re Rivera*.[12] In *Rivera*, the court began by noting its agreement with *Ward*'s initial conclusion "the standing Chapter 13 trustee's percentage fee is not an administrative expense claim within the meaning of [§ 503(b)]."[13] The court then considered the language of § 1326(b) providing for the percentage fee to be paid "before or at the time of each payment to creditors under the plan," and the possibility "this section viewed alone could be interpreted to mean that a standing Chapter 13 trustee can collect its percentage fee upon dismissal or conversion because the timing of payment would be 'before . . . payment to creditors under the plan.'"[14] The court rejected this interpretation, reasoning it would nullify the exclusivity of § 503(b) as the sole carve-out

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[11] *See In re Ward*, 132 B.R. 417, 419 (Bankr. D. Neb. 1991) ("If a case is converted or dismissed before confirmation of a plan, the standing trustee is not entitled to a percentage fee under § 586(e) and the bankruptcy court is prohibited from allowing such compensation by § 326(b). . . . The standing trustee's only source of compensation will be from cases that have confirmed plans.").

[12] *In re Rivera*, 268 B.R. 292 (Bankr. D. N.M. 2001).

[13] *Id.* at 294.

[14] *Id.*

to returned payments under § 1326(a)(2).[15] The *Rivera* court held, consistent with *Ward*, its interpretation was the only way "to give full effect to all applicable provisions" because "§ 1326(b) seems to assume a prior confirmation."[16]

Following *Rivera*, the Tenth Circuit Bankruptcy Appellate Panel considered the same question in an unpublished opinion in *In re Miranda*.[17] Initially, the appellate panel reviewed and agreed with the rule excluding § 586 percentage fees from § 503(b) administrative expense.[18] Importantly, the panel found § 1326(a)(2) "unambiguously" calls for the return of all payments except § 503(b) claims[19]. In concluding § 1326(a)(2) is unambiguous, *Miranda* noted "the parallel Chapter 12 section, § 1226(a), specifically calls for the standing Chapter 12 trustee, if a plan is not confirmed, to return all payments to the debtor, less any § 503(b) claim *and the standing trustee's percentage fee*."[20] Thus, the panel reasoned "Congress knew how to clearly express such allowance of

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[15] *Id.*

[16] *Id.*

[17] *In re Miranda*, 285 B.R. 344 (10th Cir. BAP 2001).

[18] *Id.* at *2.

[19] *Id.*

[20] *Id.* (emphasis in original).

percentage fees, and its failure to do so in § 1326(a) indicates Congress did not intend to allow such fees in Chapter 13 cases where plans are not confirmed."[21] Twelve years after *Rivera* and *Miranda*, the Bankruptcy Court for the District of New Mexico agreed to revisit the same question posed in those earlier cases *en banc*.[22] In *Acevedo*, the court initially distinguished between what it characterized as "two types of payments" under § 1326(a).[23] "First, the debtor makes plan payments to the trustee" under § 1326(a)(2)(1)(A).[24] "Then, when the plan is confirmed the trustee takes those payments, deducts her fee, pays administrative expense claims, and pays pre-petition creditors in accordance with the terms of the plan."[25] With this framework, the court characterized the issue of statutory construction as follows:

> In cases where no plan is confirmed, whether § 1326(a)(2) allows the trustee to retain the trustee's fee depends on the meaning of "payments . . . in the amount . . . proposed by the plan to the trustee." 11 U.S.C. § 1326(a)(1)(A). If the payment

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[21] *Id.*

[22] *In re Acevedo*, 497 B.R. 112 (D.N.M. 2013).

[23] *Id.* at 118.

[24] *Id.*

[25] *Id.*

> described in § 1326(a)(1)(A) includes trustee's fees, then under § 1326(a)(2) the trustee would not be entitled to retain the fees in unconfirmed cases.[26]

The UST in *Acevedo* argued the amount "proposed" under § 1326(a)(1) represents only the second category of payments, *i.e.*, the amount to be paid by the trustee to creditors, and not the amount paid by the debtor to the trustee.[27] The court analyzed this argument and explained:

> If the UST's construction were adopted, 11 U.S.C. § 1326(a) and 28 U.S.C. § 586(e) could be harmonized: § 586(e)(2) would require payment of the trustee's fees in all cases in which a debtor makes payments to the trustee, including cases in which no plan is confirmed, while payments under § 1326(a)(1)(A) would only include payments to the trustee for disbursement to creditors; thus the payments the trustee is required to return to the debtors under § 1326(a)(2) would not include the trustee's fee.[28]

Utilizing a plain language interpretation, the court found "the ordinary and natural meaning of the

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[26] *Id.*

[27] *Id.* at 118-19.

[28] *Id.*

phrase 'the amount proposed by the plan to the trustee' is whatever amount will be paid to the trustee under the plan."[29] This amount "includes both the amount of the of the trustee's percentage fee and the amount to be distributed by the trustee to creditors."[30] The court rejected the UST's argument the plan does not "propose" to pay the trustee's fee; although the fee is mandatory, the debtor can nonetheless propose a plan which omits the required amount (even though such a plan may thus become unconfirmable).[31] Thus, the court held payments under § 1326(a)(1) include the trustee's fees.[32]

The *Acevedo* court then considered whether its interpretation of § 1326(a)(1) creates a conflict with § 586(e)(2). The court focused specifically on the first sentence of § 586(e)(2), which states the trustee "shall collect such percentage fee from all payments received . . . under plans[.]" *Acevedo* found three possible constructions of this language:

> —*Mandatory Construction:*
>
> The subsection obligates the trustee to collect trustee fees from all payments she

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[29] *Id.* at 119.

[30] *Id.*

[31] *Id.*

[32] *Id.*

> receives under a plan, which includes payment of the collected fee to herself or the UST System Fund even in cases where no plan is confirmed;
>
> —*Collect and Hold Construction:*
>
> The subsection requires the Trustee to collect and hold the fees until confirmation, then to disburse them as directed by 11 U.S.C. § 1326(a)(2) and 28 U.S.C. § 586(e)(2).
>
> —*Responsibility and Source Construction:*
>
> The subsection identifies the Trustee as the party responsible for collecting the percentage fees, and identifies the plan payments received by the Trustee as the sole source for collection, but does not address when the fees should be collected or paid to the Trustee or UST System Fund.[33]

Of course, the court noted its interpretation of § 1326(a)(1) creates a conflict with § 586(e)(2) under the "mandatory construction" proposal "because it requires the trustee to collect and retain the percentage fee. . . in the face of § 1326(a)(2)'s directive to return

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[33] *Id.* at 122.

payments to the debtor if a plan is not confirmed."[34] Instead, the court concluded the "best, most harmonious reading of the two statutes is that § 586(e)(2) directs the trustee to collect and hold the percentage fees pending plan confirmation, while § 1326(a)(2) tells the trustee when and how to disburse payments after confirmation or denial of confirmation, including the trustee's percentage fee."[35] Thus, *Acevedo* concluded the "collect and hold" construction best represented congressional intent.

Finally, the *Acevedo* court considered the divergent language in § 1326(a)(2) and its parallel Chapter 12 provision, § 1226(a)(2). Unlike § 1326(a), § 1226(a)(2) specifically provides for the return of payments to the debtor upon denial of confirmation after deduction for administrative expenses *and* the trustee's percentage fee. Because of the difference, the court held it would be "improper" to "read § 1226(a)(2) into Chapter 13, or to ignore the crucial difference between the sections."[36] Ultimately, *Acevedo* held § 1326 and § 586 "can best be harmonized if § 586(e)(2) is construed to a) identify a source from which trustee's percentage fees are to be paid; and b) instruct the trustee to collect and hold the fees pending plan confirmation; § 1326(a), in turn, dictates the conditions

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[34] *Id.*

[35] *Id.*

[36] *Id.* at 124.

and timing of payment."[37]

The Bankruptcy Court for the District of Idaho recently examined the identical issue and reached the same conclusion as *Acevedo*.[38] The *Evans* court reasoned § 1326(b) requires the trustee to pay the trustee's percentage fee before or at the time of each payment to creditors under the plan, yet § 1326(a)(2) only allows the trustee to pay creditors after a plan is confirmed.[39] Thus, "[i]f the trustee cannot pay creditors until a plan is confirmed pursuant to § 1326(a)(2), then § 1326(b) is not operative until a plan is in effect."[40] The *Evans* court goes on to note that §§ 1226(b)(2) and 1326(b)(2) contain almost identical language, except for the special deduction in § 1226(b)(2) for the trustee's percentage fee.[41]

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[37] *Id.*

[38] *In re Evans*, 615 B.R. 290 (Bankr. D. Id. 2020).

[39] *Id.* at 296.

[40] *Id.*

[41] *Id.* at 295 ("If the Trustee's argument is correct, a standing trustee in a chapter 12 case could use the § 1226(a)(2) provision without § 586(e) in order to retain trustee fees in a chapter 12 case that has been dismissed prior to plan confirmation. Yet, a standing trustee in a chapter 13 case would need to use § 586(e) in order to retain trustee fees in a case that has been dismissed prior to plan confirmation. Furthermore, in either a chapter 12 case or a chapter 13 case, a trustee could simply point to § 586(e) to retain fees without regard to the chapter 12 or chapter 13 provisions entirely. This would render at least § 1226(a)(2)

Going in the opposite direction, Trustee argues § 586(e) is "specific, unambiguous, mandatory, and stands on its own: the trustee shall collect his percentage fee from all payments received. There is no reference to whether the plan has been confirmed or not."[42] Trustee's view thus comports with the "mandatory construction" framework contemplated by the *Acevedo* court. Trustee points to the opinion of the District of New Jersey in *In re Nardello* as an example of what he contends is the proper construction.[43]

The court in *Nardello* began by finding § 586 ambiguous because "it does not define 'all payments received under plans.'"[44] "Especially when viewed in conjunction with 11 U.S.C. §§ 1325 and 1326, it is unclear whether 'payments received' is coextensive with payments to creditors and whether it includes amounts to cover the percentage fee."[45] Relying on the statutory language, *Nardello* found "[t]he plain language of Section 586 directs the standing trustee to collect a percentage fee based on 'all payments received' by the trustee and this language makes

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superfluous and give it no operative effect."

[42] ECF No. 162 at p. 7.

[43] *In re Nardello*, 514 B.R. 105 (D.N.J. 2014).

[44] *Id.* at 110.

[45] *Id.*

payment of the percentage fee mandatory."[46] Viewing §§ 586 and 1326 together, the *Nardello* court sided with the "mandatory construction" paradigm, holding "[i]t is clear that the percentage fee is distinct from payments to creditors and that Section 1326(a)(2) is silent as to whether the trustee's percentage fee shall be returned when a plan is unconfirmed. Because the percentage fee is separate and apart from payments to creditors, Section 1326(a)(2) does not require that it be returned to the debtor."[47]

Thus, *Acevedo* and *Evans* represent the predominant view among lower courts in this Circuit, which holds § 586 exclusively requires the trustee to collect the percentage fee as payments are made, while § 1326 exclusively governs the disposition of payments inclusive of the percentage fee. These authorities follow what the *Acevedo* court characterized as the "collect and hold construction." *Nardello* represents the contrary view, finding § 586 ambiguous on the meaning of "payments received under plans," while § 1326(a)(2) is silent on any distinction between confirmed and unconfirmed plans. *Nardello* effectively adopts the "mandatory construction" paradigm requiring collection of the fee on all payments received, even when no plan is confirmed.

C. *BDT Farms, Inc.*

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[46] *Id.* at 111.

[47] *Id.* at 113.

Although the foregoing discussion focuses on lower court opinions, the Tenth Circuit Court of Appeals published an opinion on a similar question in *In re BDT Farms, Inc.*[48] There, BDT Farms filed a voluntary petition as a family farmer under Chapter 12 of the Code.[49] In the underlying proceedings, the bankruptcy court questioned whether the Chapter 12 trustee's practice of assessing his fee on the total amount transferred resulted in an effective rate of 11.11% in violation of the ten percent maximum fee under § 586.[50] The lower courts found the trustee's practice violated the 10% fee cap.[51]

On appeal to the Tenth Circuit, the only issue was "whether the standing trustee's percentage fee under 28 U.S.C. § 586(e) is computed on the amount intended to be paid creditors through the trustee, or on the total amount transferred to the trustee."[52] Although presented in the Chapter 12 context, the question before the Tenth Circuit in *BDT* was essentially the same question under consideration in *Acevedo*. As discussed, the *Acevedo* court distinguished between "two types of payments" under § 1326(a) –

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[48] *In re BDT Farms, Inc.*, 21 F.3d 1019 (10th Cir. 1994).

[49] *Id.* at 1021.

[50] *Id.*

[51] *Id.*

[52] *Id.*

debtor's plan payments to the trustee under § 1326(a)(2)(1)(A) and trustee's payments in accordance with the plan.[53] As framed by the *Acevedo* court, the question whether § 1326(a)(2) allows the trustee to retain the trustee's fee depends on the meaning of "payments . . . in the amount . . . proposed by the plan to the trustee."[54] If the payment described in § 1326(a)(1)(A) includes trustee's fees, then under § 1326(a)(2) the trustee would not be entitled to retain the fees in unconfirmed cases.

BDT turns on the same distinction. In the underlying proceedings, the bankruptcy court found § 586(e) unambiguous based on its view that § 1226(b)(2) defines "payments under the plan" as payments to creditors.[55] In reaching such conclusion, *BDT* cited to the lower court's consideration of *In re Edge*, a Chapter 13 case, which likewise held § 586(e) was unambiguous, albeit based on the language of the parallel Chapter 13 statute with identical language, § 1326(b)(2).[56] "The [*In re Edge*] court therefore found that the trustee's fee is not a 'payment [] received by such individual under [a Chapter 13] plan [],' 28 U.S.C. § 586(e)(2), and that the trustee's fee is

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[53] *Id.* at 118.

[54] *Id.*

[55] *BDT Farms, Inc.*, 21 F.3d at 1022 (citing *In re Edge*, 122 B.R. 219 (D. Vt. 1990)).

[56] *Id.*

therefore properly calculated as a percentage of only the money received by the trustee that is earmarked to be paid to creditors."[57]

The Tenth Circuit rejected the proposition this question can be resolved by application of the plain unambiguous language of the statutes. Instead, the court stated "[w]e can only conclude that § 586(e) is ambiguous."[58] Thus, the Tenth Circuit concluded "[w]hether Congress intended to allow the standing trustee to, in effect, collect a fee on his or her fee, or intended to limit the trustee's fee to a percentage of disbursements, is not clear from the statutory language, the larger statutory context, or the legislative history."[59]

Having found § 586 ambiguous, the Tenth Circuit held the proper approach was to defer to the UST's interpretation.[60] "Here, the Executive Office of the U.S. Trustee has construed § 586(e) as providing that the standing trustee is entitled to collect a percentage fee

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[57] *Id.*

[58] *Id.* at 1023.

[59] *Id.*

[60] *Id.* ("When Congress has not directly addressed a specific issue arising in construction of a statute, we must defer to the construction of the statute by the administering agency unless it is 'arbitrary, capricious, or manifestly contrary to the statute.") (citing *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984)).

of all monies he receives from the debtor, including the trustee's fees."[61] Finding this interpretation permissible, the court deferred to it.[62]

The court in *Acevedo* cited *BDT Farms* as supportive of *Acevedo*'s conclusion that payments under § 1326(a)(1)(A) necessarily include the amount for the trustee's fee.[63] However, *Acevedo* avoided following *BDT Farms's* decision to give *Chevron* deference to the UST's interpretation of § 586(e).[64] In a footnote, the *Acevedo* court gave three reasons for diverging from *BDT Farms*'s approach. First, *Acevedo* held § 1326, not § 586, "establishes when and under what conditions the Trustee may deduct and retain the percentage fee."[65] Second, the UST Handbook at the time was "consistent with the Court's conclusion that the Trustee may not retain a percentage fee in unconfirmed cases."[66] Third, *Acevedo* noted § 1326 is not ambiguous.[67]

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[61] *BDT Farms, Inc.*, 21 F.3d at 1023.

[62] *Id.*

[63] *Acevedo*, 497 B.R. at 119-120.

[64] *Id.* at 119 n. 19.

[65] *Id.*

[66] *Id.*

[67] The Tenth Circuit Bankruptcy Appellate Panel's unpublished opinion in *Miranda* neither cites nor discusses *BDT Farms*.

This Court disagrees with *Acevedo's* decision to not follow *BDT Farms's* deference approach. Importantly, *BDT Farms's* discussion focused on its rejection of the bankruptcy court's reliance on *In re Edge* as the basis for finding § 586(e) unambiguous, which itself "found its definition for § 586 language in a Chapter 13 statute, 11 U.S.C. § 1326(b)(2) . . . ."[68] In finding ambiguity in § 586, *BDT Farms* explained "[w]e have reviewed the many court decisions considering the language and legislative history of § 586(e)(2) as applied to related questions under Chapters 12 and 13, but these cases add confusion rather than clarity to the construction of § 586(e)."[69] *BDT Farms* gives two examples of such "related questions under Chapters 12 and 13," namely, whether § 503(b) claims are paid "under the plan" and whether direct payments to creditors are "under the plan."[70]

Thus, *Acevedo* distinguishes *BDT Farms* by focusing on § 1326 as an unambiguous statute, rather than § 586, but this is tautological reasoning. That is, the question in this case, and the question before the court in *Acevedo*, is one such "related question under Chapters 12 and 13" referenced in *BDT Farms*. To be sure, *Acevedo* found clarity in the construction of § 586(e) on the questions where the Tenth Circuit Court

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[68] *BDT Farms, Inc.*, 21 F.3d at 1023 (citing *In re Edge*, 122 B.R. at 219).

[69] *Id.*

[70] *Id.* at 1023 n. 6.

of Appeals found nothing but confusion. In this Court's view, *BDT Farms's* rejection of the bankruptcy court's reliance on *In re Edge* shows the appellate court considered and rejected the possibility of finding an unambiguous construction of § 586 by reading it together with § 1326(b); yet, this is the conclusion reached in *Acevedo*.

Finally, while the *Acevedo* court noted some distinction between the UST Handbook and the parties' litigation position, the current handbook reflects a policy change effective October 1, 2014. The current UST Handbook states:

> The standing trustee is authorized to collect the percentage fee upon receipt of the payment. The trustee must transfer the percentage fee to the operating expense account at least monthly. If the plan is dismissed or converted prior to confirmation, the standing trustee must reverse payment of the percentage fee that had been collected upon receipt if there is controlling law in the district requiring such reversal or if (after consultation with the United States Trustee) the standing trustee determines that there are other grounds for concern in the district. If the standing trustee determines that all or part of the payment may not be a payment under the plan, the standing trustee may delay collection of the percentage fee on that payment or part of a payment until

there is a determination of the issue.[71]

Thus, the default position of the UST is to collect the percentage fee at the time of payment and transfer the fee to an operating account. The payment is final but may be reversed if, and only if, there is controlling law requiring a different result, or the UST and Trustee find "other grounds for concern."

There is no controlling law in the District of Colorado or the Tenth Circuit which would reverse the UST's default position. Under this Court's interpretation of *BDT Farms*, the controlling law in this Circuit appears consistent with the UST's position. In any event, *BDT Farms* expressly found the UST's construction of § 586(e) reasonable.[72] The Court sees nothing in the current language of the UST Handbook on this specific question which would mandate a different conclusion. Rather, the UST Handbook clearly states the UST's position while recognizing the divergent interpretations of § 586(e) and providing necessary flexibility.[73]

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[71] https://www.justice.gov/sites/default/files/ust/legacy/2015/05/05/Handbook_Ch13_Standing_Trustees_2 012.pdf at pp. 2-3 and 2-4.

[72] *BDT Farms, Inc.*, 21 F.3d at 1023 ("This interpretation is permissible[.]").

[73] *BDT Farms* appears to apply *Chevron's* deference to the UST's construction of § 586 as mandatory. Other courts have declined to apply mandatory *Chevron* deference, reasoning the UST Handbook was not subject to the formal rulemaking as

None of this is to say the Tenth Circuit's approach in *BDT Farms* is without its issues. For example, Doll makes powerful arguments regarding the inclusion of language in § 1226 specifically allowing the standing trustee to deduct its percentage fee in unconfirmed cases. But *BDT Farms* provides no guidance on this argument, and the Court should not follow Doll's reasoning to find an unambiguous statutory construction where the Tenth Circuit has already held the statute is ambiguous. If *BDT Farms* ought to be revisited, only the Tenth Circuit itself may do so.

CONCLUSION

In the published opinion of *In re BDT Farms*, the Tenth Circuit Court of Appeals held § 586(e) is ambiguous and deferred to the UST's construction to determine what payments are "under the plan." Most other courts have found a way to construe § 586(e) with § 1326 so as to reach an unambiguous and harmonious result. Those opinions are well reasoned but incompatible with *BDT Farms*. Regardless of preference or public policy, this Court is required to follow *BDT Farms's* conclusion that § 586(e) is ambiguous and to reach the same result. The Court

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contemplated by *Chevron*. *See Nardello*, 5114 B.R. at 111. However, even under such an approach the agency's construction is "entitled considerable weight in the Court's analysis." *Id.* (citing *In re Jackson*, 321 B.R. 94, 97 (Bankr. D. Ga. 2005)). The Court would reach the same conclusion whether deference is mandatory or merely persuasive.

defers to the UST Handbook which permits Trustee to retain the percentage fee in this case.[74]

For the foregoing reasons, the Disgorgement Motion is DENIED.

Dated February 19, 2021

BY THE COURT:

/s/
Michael E. Romero, Chief Judge
United States Bankruptcy Court

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[74] After this matter became at issue, the Trustee directed the Court's attention to a very recent decision in *In re Soussis*, No. 8-19-73686-REG. 2020 WL 6701357 (Bankr. E.D. N.Y. November 12, 2020). In pertinent part, *Soussis* rejected the concept of forcing a trustee to disgorge percentage fee payments already made. Because the Court holds Trustee may retain the percentage fee in this case, the supplemental issue raised in *Soussis* is immaterial.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

FILED
United States Court of Appeals
Tenth Circuit
April 27, 2023
Christopher M. Wolpert
Clerk of Court

In re: DANIEL RICHARD DOLL,
Debtor.

ADAM M. GOODMAN, Chapter 13 Trustee,
Appellant,

v.

DANIEL RICHARD DOLL,
Appellee.

THE NATIONAL ASSOCIATION OF
CHAPTER 13 TRUSTEES, et al.,
Amici Curiae.

No. 22-1004
(D.C. No. 1:21-CV-00731-RBJ)
(D. Colo.)

ORDER

Before **HOLMES**, Chief Judge, **EBEL**, and **EID**, Circuit Judges.

Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court

/s/
CHRISTOPHER M. WOLPERT, Clerk

APPENDIX E

28 U.S.C. § 586

§586. Duties; supervision by Attorney General

(a) Each United States trustee, within the region for which such United States trustee is appointed, shall—

(1) establish, maintain, and supervise a panel of private trustees that are eligible and available to serve as trustees in cases under chapter 7 of title 11;

(2) serve as and perform the duties of a trustee in a case under title 11 when required under title 11 to serve as trustee in such a case;

(3) supervise the administration of cases and trustees in cases under chapter 7, 11 (including subchapter V of chapter 11), 12, 13, or 15 of title 11 by, whenever the United States trustee considers it to be appropriate—

(A)(i) reviewing, in accordance with procedural guidelines adopted by the Executive Office of the United States Trustee (which guidelines shall be applied uniformly by the United States trustee except when circumstances warrant different treatment), applications filed for compensation and re-

imbursement under section 330 of title 11; and

(ii) filing with the court comments with respect to such application and, if the United States Trustee considers it to be appropriate, objections to such application;

(B) monitoring plans and disclosure statements filed in cases under chapter 11 of title 11 and filing with the court, in connection with hearings under sections 1125 and 1128 of such title, comments with respect to such plans and disclosure statements;

(C) monitoring plans filed under chapters 12 and 13 of title 11 and filing with the court, in connection with hearings under sections 1224, 1229, 1324, and 1329 of such title, comments with respect to such plans;

(D) taking such action as the United States trustee deems to be appropriate to ensure that all reports, schedules, and fees required to be filed under title 11 and this title by the debtor are properly and timely filed;

(E) monitoring creditors' committees appointed under title 11;

(F) notifying the appropriate United States attorney of matters which relate to the occurrence of any action which may constitute a crime under the laws of the United States

and, on the request of the United States attorney, assisting the United States attorney in carrying out prosecutions based on such action;

(G) monitoring the progress of cases under title 11 and taking such actions as the United States trustee deems to be appropriate to prevent undue delay in such progress;

(H) in small business cases (as defined in section 101 of title 11), performing the additional duties specified in title 11 pertaining to such cases; and

(I) monitoring applications filed under section 327 of title 11 and, whenever the United States trustee deems it to be appropriate, filing with the court comments with respect to the approval of such applications;

(4) deposit or invest under section 345 of title 11 money received as trustee in cases under title 11;

(5) perform the duties prescribed for the United States trustee under title 11 and this title, and such duties consistent with title 11 and this title as the Attorney General may prescribe;

(6) make such reports as the Attorney

General directs, including the results of audits performed under section 603(a) of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005;

(7) in each of such small business cases—

(A) conduct an initial debtor interview as soon as practicable after the date of the order for relief but before the first meeting scheduled under section 341(a) of title 11, at which time the United States trustee shall—

(i) begin to investigate the debtor's viability;

(ii) inquire about the debtor's business plan;

(iii) explain the debtor's obligations to file monthly operating reports and other required reports;

(iv) attempt to develop an agreed scheduling order; and

(v) inform the debtor of other obligations;

(B) if determined to be appropriate and advisable, visit the appropriate business premises of the debtor, ascertain the state

of the debtor's books and records, and verify that the debtor has filed its tax returns; and

(C) review and monitor diligently the debtor's activities, to determine as promptly as possible whether the debtor will be unable to confirm a plan; and

(8) in any case in which the United States trustee finds material grounds for any relief under section 1112 of title 11, apply promptly after making that finding to the court for relief.

(b) If the number of cases under subchapter V of chapter 11 or chapter 12 or 13 of title 11 commenced in a particular region so warrants, the United States trustee for such region may, subject to the approval of the Attorney General, appoint one or more individuals to serve as standing trustee, or designate one or more assistant United States trustees to serve in cases under such chapter. The United States trustee for such region shall supervise any such individual appointed as standing trustee in the performance of the duties of standing trustee.

(c) Each United States trustee shall be under the general supervision of the Attorney General, who shall provide general coordination and assistance to the United States trustees.

(d)(1) The Attorney General shall prescribe by rule qualifications for membership on the panels established by United States trustees under paragraph

(a)(1) of this section, and qualifications for appointment under subsection (b) of this section to serve as standing trustee in cases under subchapter V of chapter 11 or chapter 12 or 13 of title 11. The Attorney General may not require that an individual be an attorney in order to qualify for appointment under subsection (b) of this section to serve as standing trustee in cases under subchapter V of chapter 11 or chapter 12 or 13 of title 11.

(2) A trustee whose appointment under subsection (a)(1) or under subsection (b) is terminated or who ceases to be assigned to cases filed under title 11, United States Code, may obtain judicial review of the final agency decision by commencing an action in the district court of the United States for the district for which the panel to which the trustee is appointed under subsection (a)(1), or in the district court of the United States for the district in which the trustee is appointed under subsection (b) resides, after first exhausting all available administrative remedies, which if the trustee so elects, shall also include an administrative hearing on the record. Unless the trustee elects to have an administrative hearing on the record, the trustee shall be deemed to have exhausted all administrative remedies for purposes of this paragraph if the agency fails to make a final agency decision within 90 days after the trustee requests administrative remedies. The Attorney General shall prescribe procedures to implement this paragraph. The decision of the agency shall be affirmed by the district court unless it is unreasonable and without cause based on the administrative record before the agency.

(e)(1) The Attorney General, after consultation with a United States trustee that has appointed an individual under subsection (b) of this section to serve as standing trustee in cases under subchapter V of chapter 11 or chapter 12 or 13 of title 11, shall fix—

(A) a maximum annual compensation for such individual consisting of—

(i) an amount not to exceed the highest annual rate of basic pay in effect for level V of the Executive Schedule; and

(ii) the cash value of employment benefits comparable to the employment benefits provided by the United States to individuals who are employed by the United States at the same rate of basic pay to perform similar services during the same period of time; and

(B) a percentage fee not to exceed—

(i) in the case of a debtor who is not a family farmer, ten percent; or

(ii) in the case of a debtor who is a family farmer, the sum of—

(I) not to exceed ten percent of the payments made under the plan of such debtor, with respect to payments in an aggregate amount not to exceed $450,000; and

(II) three percent of payments made under the plan of such debtor, with respect to payments made after the aggregate amount of payments made under the plan exceeds $450,000;

based on such maximum annual compensation and the actual, necessary expenses incurred by such individual as standing trustee.

(2) Such individual shall collect such percentage fee from all payments received by such individual under plans in the cases under subchapter V of chapter 11 or chapter 12 or 13 of title 11 for which such individual serves as standing trustee. Such individual shall pay to the United States trustee, and the United States trustee shall deposit in the United States Trustee System Fund—

(A) any amount by which the actual compensation of such individual exceeds 5 per centum upon all payments received under plans in cases under subchapter V of chapter 11 or chapter 12 or 13 of title 11 for which such individual serves as standing trustee; and

(B) any amount by which the percentage for all such cases exceeds—

(i) such individual's actual compensation for such cases, as adjusted under subparagraph (A) of paragraph (1); plus

(ii) the actual, necessary expenses incurred by such individual as standing trustee in such cases. Subject to the approval of the Attorney General, any or all of the interest earned from the deposit of payments under plans by such individual may be utilized to pay actual, necessary expenses without regard to the percentage limitation contained in subparagraph (d)(1)(B) of this section.

(3) After first exhausting all available administrative remedies, an individual appointed under subsection (b) may obtain judicial review of final agency action to deny a claim of actual, necessary expenses under this subsection by commencing an action in the district court of the United States for the district where the individual resides. The decision of the agency shall be affirmed by the district court unless it is unreasonable and without cause based upon the administrative record before the agency.

(4) The Attorney General shall prescribe procedures to implement this subsection.

(5) In the event that the services of the trustee in a case under subchapter V of chapter 11 of title 11 are terminated by dismissal or conversion of the case, or upon substantial consummation of a plan under section 1183(c)(1) of that title, the court shall award compensation to the trustee consistent with services performed by the trustee and the limits on the compensation of the trustee established pursuant to paragraph (1) of this subsection.

(f)(1) The United States trustee for each district is authorized to contract with auditors to perform audits in cases designated by the United States trustee, in accordance with the procedures established under section 603(a) of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005.

(2)(A) The report of each audit referred to in paragraph (1) shall be filed with the court and transmitted to the United States trustee. Each report shall clearly and conspicuously specify any material misstatement of income or expenditures or of assets identified by the person performing the audit. In any case in which a material misstatement of income or expenditures or of assets has been reported, the clerk of the district court (or the clerk of the bankruptcy court if one is certified under section 156(b) of this title) shall give notice of the misstatement to the creditors in the case.

(B) If a material misstatement of income or expenditures or of assets is reported, the United States trustee shall—

(i) report the material misstatement, if appropriate, to the United States Attorney pursuant to section 3057 of title 18; and

(ii) if advisable, take appropriate action, including but not limited to commencing an adversary proceeding to revoke the debtor's discharge pursuant to section 727(d) of title 11.

* * *

11 U.S.C. § 1326

§1326. Payments

(a)(1) Unless the court orders otherwise, the debtor shall commence making payments not later than 30 days after the date of the filing of the plan or the order for relief, whichever is earlier, in the amount—

(A) proposed by the plan to the trustee;

(B) scheduled in a lease of personal property directly to the lessor for that portion of the obligation that becomes due after the order for relief, reducing the payments under subparagraph (A) by the amount so paid and providing the trustee with evidence of such payment, including the amount and date of payment; and

(C) that provides adequate protection directly to a creditor holding an allowed claim secured by personal property to the extent the claim is attributable to the purchase of such property by the debtor for that portion of the obligation that becomes due after the order for relief, reducing the payments under subparagraph (A) by the amount so paid and providing the trustee with evidence of such payment, including the amount and date of payment.

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

(3) Subject to section 363, the court may, upon notice and a hearing, modify, increase, or reduce the payments required under this subsection pending confirmation of a plan.

(4) Not later than 60 days after the date of filing of a case under this chapter, a debtor retaining possession of personal property subject to a lease or securing a claim attributable in whole or in part to the purchase price of such property shall provide the lessor or secured creditor reasonable evidence of the maintenance of any required insurance coverage with respect to the use or ownership of such property and continue to do so for so long as the debtor retains possession of such property.

(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) of title 28 is serving in the case, the percentage fee fixed for such standing trustee under section 586(e)(1)(B) of title 28; and

(3) if a chapter 7 trustee has been allowed compensation due to the conversion or dismissal of the debtor's prior case pursuant to section 707(b), and some portion of that compensation remains unpaid in a case converted to this chapter or in the case dismissed under section 707(b) and refiled under this chapter, the amount of any such unpaid compensation, which shall be paid monthly—

(A) by prorating such amount over the remaining duration of the plan; and

(B) by monthly payments not to exceed the greater of—

(i) $25;[1] or

(ii) the amount payable to unsecured nonpriority creditors, as provided by the plan, multiplied by 5 percent, and the result divided by the number of months in the plan.

(c) Except as otherwise provided in the plan or in the order confirming the plan, the trustee shall make payments to creditors under the plan.

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[1] See Adjustment of Dollar Amounts notes below.

(d) Notwithstanding any other provision of this title—

(1) compensation referred to in subsection (b)(3) is payable and may be collected by the trustee under that paragraph, even if such amount has been discharged in a prior case under this title; and

(2) such compensation is payable in a case under this chapter only to the extent permitted by subsection (b)(3).