

11 U.S.C. § 1326(c)
28 U.S.C. § 586(e)
LBR 3015-1(b)(7)

Peter and Elaine Evans, Case No. 17-62302-tmr13

3/8/18 tmr

Trustee objected to confirmation of Debtors' Modified Chapter 13 Plan, which proposed to pay in full two judgment lien creditors and the Linn County Tax Assessor upon the sale or refinance of their real property in three years. Trustee argued that he is entitled to his statutory fee on the funds paid to those creditors through escrow pursuant to LBR 3015-1(b)(7). Debtors argued that the Local Rule conflicts with 28 U.S.C. § 586(e) and is, therefore, invalid.

The issue turned on whether the affected creditors' claims were "impaired" within the meaning of 11 U.S.C. § 1326(c) and related caselaw. Extrapolating from Chapter 11, 12, and 13 cases regarding "impaired" claims, the Court defined "impairment" as any alteration of the rights of a creditor which the debtor could not insist on but for the protections of the Bankruptcy Code. The Court then held that the "under the plan" language of § 1326(c) include claims that are impaired by operation of bankruptcy law.

The Court concluded that the proposed three-year delay in payment to the effected creditors impaired their right to foreclose on their respective liens, notwithstanding the fact that they would receive payment in full with interest upon sale or refinance. As such, it found that the claims fall within the ambit of § 1326(c) and the presumption that Trustee, not the escrow agent, will disburse payments to the creditors. The Court recognized the Bankruptcy Court-endorsed exception to this presumption reflected in LBR 3015-1(b)(7), but noted that, where Debtors and Trustee could not agree on payment of Trustee's fee, the Local Rule was inapplicable. The Court sustained Trustee's Objection to Confirmation and denied confirmation of Debtor's Modified Plan.

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UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF OREGON

IN RE)
PETER MICHAEL EVANS and) Bankruptcy Case
ELAINE CHERIE EVANS,) No. 17-62302-tmr13
)
) MEMORANDUM OPINION
Debtors.)

This matter comes before the Court on the Trustee’s Objection to Confirmation of Debtors’ Modified Chapter 13 Plan dated October 2, 2017 (Doc. #19). The parties have agreed that resolution of Trustee’s objection turns on a legal issue and that the record before me is sufficient. I have reviewed the parties’ memoranda and reply briefs, considered counsel’s arguments at the hearing, and conducted my own research into the issues.

The parties’ arguments focus primarily on the validity and applicability of Local Bankruptcy Rule (LBR) 3015-1(b)(7) and, by extension, whether [28 U.S.C. § 586\(e\)](#) permits Trustee to take a fee on claims paid through escrow. In fact, Debtors argue that the Local Rule is invalid. While those issues are the core of the dispute, the analysis for resolving objections to confirmation must begin with the Bankruptcy Code.¹

In their Plan, Debtors propose to pay secured creditors through escrow upon the sale or refinance of the real property. As such, we look first to the section governing the manner of payments to creditors.

¹ Unless otherwise indicated, all subsequent statutory references are to Title 11 of the United States Code, the Bankruptcy Code.

1 Section 1326(c) states “except as otherwise provided in the plan or in the order confirming plan, the trustee
2 shall make payments to creditors under the plan.” Section 1326(c), thus, contemplates permitting debtors to
3 make payments to creditors directly, but it presumes that payments are disbursed by the trustee. While the
4 Code does not provide guidance for determining when direct payments are appropriate, the Ninth Circuit
5 Bankruptcy Appellate Panel (BAP) and the Ninth Circuit addressed the issue in *Cohen v. Lopez (In re*
6 *Lopez)*, [372 B.R. 40](#) (9th Cir. BAP 2007), *aff’d* [550 F.3d 1202](#) (9th Cir. 2008).² In *Lopez* the panel
7 determined that a debtor’s ability to directly pay creditors turned on whether the creditor’s claim was
8 “impaired.” [372 B.R. at 47](#). If impaired, the claim must be paid by the trustee unless the court, in its
9 discretion, determines that direct payment is appropriate. *Id.* at 46-47.

10 During oral argument, at my request, counsel spent considerable time discussing the term
11 “impairment” and how to define it. Debtors ask that I restrict my review of this question to Chapter 13 of the
12 Code, which does not define the term, and caselaw pertaining only to Chapter 13. Trustee asks that, in
13 addition to Chapter 13-specific cases, I also consider the matter in light of § 1124(1), defining “impaired” in
14 the context of Chapter 11 plans, as well as cases analyzing the term for plan confirmation purposes in
15 Chapters 11 and 12. I think the latter approach harmonizes with caselaw on the subject and is consistent
16 with the notion that Title 11 is a cohesive body of law. Notwithstanding the characteristics unique to each
17 chapter, courts “consider[ing] whether case law interpreting a particular chapter of the Bankruptcy Code is
18 applicable to interpretations of substantially similar sections in other chapters. . . almost universally [find]
19 that such interpretations are applicable.” *Lopez*, [372 B.R. at 45](#) n.13 (internal citations omitted). Within the
20 Code, “similar words and phrases presumptively will receive the same construction, even if found in
21 different parts of the Code.” *In re Trejos*, [352 B.R. 249, 257](#) (Bankr. D. Nev. 2006) (citing *Rousey v.*
22 *Jacoway*, [544 U.S. 320, 326-27](#) (2005)).

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25 ² The Ninth Circuit did not draft a separate opinion, but entered an order for publication affirming the
26 BAP, noting “we adopt as our own the well-reasoned published opinion of the [BAP].” *Lopez*, [550 F.3d at](#)
[1202](#). Therefore, the reasoning in the BAP opinion should be treated as Ninth Circuit controlling precedent.

1 Taking into consideration the larger body of law interpreting “impairment” in the plan confirmation
2 context, we’ll start with *Lopez*. *Lopez* does not conclusively define “impairment,” but states that it “occurs
3 when the plan purports to pay an obligation as originally scheduled notwithstanding a creditor’s
4 nonbankruptcy rights other than the right to accelerate the debtor’s maturity date.” 372 B.R. at 47. Although
5 *Lopez* is a Chapter 13 case, throughout its 16 pages, it extensively analyzes and applies in a limited fashion
6 the BAP and Ninth Circuit rulings in *In re Fulkrod*. *Fulkrod*, a Chapter 12 case, considered whether
7 § 1226(c)³ requires impaired claims to be paid through the trustee.⁴ *Fulkrod v. Barmettler (In re Fulkrod)*,
8 126 B.R. 584, 588 (9th Cir. BAP 1991) (*Fulkrod I*). The BAP stated:

9 We believe that Congress intended to use the term “under the plan” to mean those payments
10 which result from the operation of Chapter 12 bankruptcy law. Those payments should be
11 made by the trustee, and the trustee’s fee should be assessed against the funds received from
the debtor for that purpose. Typically, those payments will involve impaired claims which the
debtor could not insist upon but for the protections of Chapter 12.

12 *Fulkrod I*, 126 B.R. at 588. On appeal, the Ninth Circuit did not define impairment, but stated in its holding
13 that “Chapter 12 of the bankruptcy code does not authorize a debtor to make payments directly to creditors
14 with claims modified by a plan of reorganization in order to avoid paying the bankruptcy trustee the statutory
15 fee under 28 U.S.C. § 586.” *Fulkrod v. Savage (In re Fulkrod)*, 973 F.2d 801, 803 (9th Cir. 1992) (*Fulkrod*
16 *II*).

17 Turning to Chapter 11, § 1124(1) specifies that a class of claims is impaired unless the plan “leaves
18 unaltered the legal, equitable, and contractual rights” of the creditor. In this context, “Congress defined
19 impairment in the broadest possible terms.” *In re L & J Anaheim Associates*, 995 F.2d 940, 942 (9th Cir.
20 1993) (internal citations omitted). “[A]ny alteration of the rights constitutes impairment even if the value of
21 the rights is enhanced.” *Id.* Clarifying that this broad definition of impaired is not specific to Chapter 11, the

23 ³ Section 1226(c), identical to § 1326(c), reads “[e]xcept as otherwise provided in the plan or in the
24 order confirming plan, the trustee shall make payments to creditors under the plan.”

25 ⁴Although *Fulkrod* also addresses the application of 28 U.S.C. § 586(e) to impaired claims paid
26 directly by the debtor, I am limiting my review of the case to its analysis of § 1226(c) and the definition of
“impaired.”

1 BAP analyzed the treatment of a creditor’s claim in a proposed Chapter 13 plan within the context of this
2 definition. *In re Geisbrecht*, 429 B.R. 682, 685 n.2 (9th Cir. BAP 2010) (citing *L & J Anaheim Associates*,
3 the BAP stated: “[W]e use the term ‘unimpaired’ in this case because the claim being paid directly to the
4 creditor was not in default at the petition date and there was no alteration or modification of treatment of the
5 claim by the debtors’ chapter 13 plan. Accordingly, there was no impairment, even under the Ninth Circuit’s
6 very broad definition of impairment.”).

7 The consistency between the definitions – or, rather, descriptions – of “impairment” found in *Lopez*
8 (“when the plan purports to pay an obligation as originally scheduled notwithstanding a creditor’s
9 nonbankruptcy rights”), *Fulkrod I* (payments on claims “which the debtor could not insist upon but for the
10 protections of chapter 12”), *L & J Anaheim Associates* (“any alteration of the rights” of a creditor), and
11 § 1124(1) (an alteration of the legal, equitable, or contractual rights of the creditor) is clear. Read together,
12 they define impairment as any proposed alteration of the rights of a creditor, which the debtor could not
13 insist on but for the protections of the Bankruptcy Code. Moreover, where the *Fulkrod I* definition is based
14 on an analysis of § 1226(c), the Chapter 12 equivalent to § 1326(c), I see no reason to impose a different or
15 more restrictive definition in the Chapter 13 context. Therefore, consistent with the definition outlined
16 above, I hold that the “under the plan” language of § 1326(c) includes claims that are impaired by operation
17 of bankruptcy law.

18 The question in this case then becomes: are the secured claims at issue impaired? As to the two
19 judicial lien creditors, Debtors propose to pay the claims in full, per the terms of the judgments, upon the sale
20 or refinance of the real property. They give themselves until July of 2020 to do so, proposing no payments
21 to the two creditors in the interim. Debtors argue that the claims are not impaired, because they will receive
22 full payment including the judgment rate of interest at closing. Nevertheless, the bankruptcy filing and
23 proposed plan treatment curtails the creditors’ rights to execute and foreclose on the liens for a three-year
24 period. This is an impairment, plain and simple.

25 Regarding Linn County’s property tax arrearage claim, the analysis is very similar. The County’s
26 claim includes past due taxes for 2015 and 2016. (POC #3-1; filed 8/4/17). In paragraph 2(b)(1) of the Plan,

1 Debtors propose to pay the total claim in full with all funds available from Debtors' monthly plan payments
2 after attorney fees are paid and after accounting for the \$125 monthly adequate protection payment to Wells
3 Fargo. The balance remaining at the time the home is sold or refinanced in 2020 will be paid through
4 escrow. But again, notwithstanding the proposal to pay the County in full, the proposed treatment impedes,
5 among other things, the County's right to pursue foreclosure for the delinquent taxes pursuant to ORS
6 § 312.010. Thus, the claim is impaired.

7 In light of counsel's arguments at the hearing about the applicability of *In re Bettger*, 105 B.R. 607
8 (Bankr. D. Or. 1989) and *In re Stinebaugh*, 2013 WL 5883765 (Bankr. D. Id. 2013), I want to briefly address
9 how I think they impact the "impairment" analysis in this case. As discussed at the hearing, there are key
10 factual distinctions between those cases and this one, the most notable being that the secured creditors'
11 claims in those cases were paid in full through escrow either before the debtor's plan was confirmed (in the
12 case of *Stinebaugh*) or contemporaneously with confirmation (*Bettger*). See *Stinebaugh*, 2013 WL 5883765,
13 at *1; *Bettger*, 105 B.R. at 610 (the court extended a deadline to October 30, 1989, before which the debtors
14 intended to close on a pending sale). The *Stinebaugh* opinion did not include any discussion regarding
15 impairment of the creditors' claims; it was not at issue. 2013 WL 5883765, at *2 (the analysis was limited to
16 the trustee's right to collect a fee under 28 U.S.C. § 586(e) from sale proceeds already paid directly to the
17 creditor prior to confirmation). The *Bettger* court's discussion regarding modification was relatively short:

18 Here the debtors are not seeking to modify any of [the contract] terms. They merely seek a
19 short time in which to sell the collateral and distribute the proceeds to the secured creditors, in
a lump sum.

20 105 B.R. at 609. Notwithstanding the fact that the sale had not closed at the time the court issued its opinion
21 and that the record does not specify whether it closed before or shortly after entry of the confirmation order
22 on November 17, 1989, it is clear that the court based its opinion on the assumption that closure and payment
23 of the claims was imminent. See Order Confirming Plan, *In re Bettger*, No. 689-60163-R13 (Bankr. D. Or.
24 Nov. 17, 1989), Doc. #22. The court did not use the term "contemporaneous" to describe the timing of these
25 two events in relation to one another, but I think it fair to consider them as such and to conclude that the
26 *Bettger* court did as well.

1 Although the question of impairment was not important in either case, the fact that the sales in both
2 cases occurred prior to or contemporaneously with confirmation adds clarity to our understanding of the term
3 and the circumstances under which debtors are allowed to pay secured claims through escrow. Borrowing
4 again from Chapter 11 practice, even after the statute's amendment, creditors that receive cash equal to their
5 allowed claims, together with post-petition interest, on the effective date of the plan are not "impaired" under
6 § 1124. *In re PPI Enterprises (U.S.), Inc.*, [324 F.3d 197, 205-207](#) (3d Cir. 2003) (citing *L & J Anaheim*
7 *Associates*, [995 F.2d at 942-43](#) for treating "impairment" as a term of art). The *PPI Enterprises* court
8 outlined this holding as part of its examination of whether a particular creditor was entitled to vote on the
9 debtor's Chapter 11 plan. *Id.* Voting rights are not at issue in this case, but the holding in *PPI Enterprises*,
10 as an elaboration on the meaning of "impaired," highlights a key component of § 1326(c): a creditor who is
11 paid in full with interest before confirmation, by definition, cannot be impacted by the plan. Similarly,
12 satisfaction of a creditor's claim consistent with nonbankruptcy law as of the effective date of the plan (i.e.,
13 contemporaneously with confirmation) necessarily means that the claim is unaltered by the plan and, thus,
14 there is no "payment[] to creditor[] under the plan" within the meaning of § 1326(c). Applying this reasoning
15 to *Bettger* and *Stinebaugh*, I conclude that the secured claims in those cases fell outside the ambit of
16 § 1326(c). By contrast, in this case, Debtor's proposed Plan and confirmation thereof is the mechanism for
17 delaying payment to the secured claims for three years. The Plan thereby invokes § 1326(c) and the
18 applicable caselaw regarding impaired claims.

19 That said, a determination that the claims are impaired does not end the inquiry under § 1326(c).
20 "[B]ankruptcy courts have been afforded the discretion to make the determination of when direct payments
21 may or may not be appropriate based upon the confirmation requirements of § 1325, policy reasons, and the
22 factors set forth by case law, local rules or guidelines." *Geisbrecht*, [429 B.R. at 690](#) (citing *Lopez*, [372 B.R.](#)
23 [at 46-47](#)). Both parties in this case recognize the inherent limitations on Trustee's ability to act as an escrow
24 agent. As Trustee acknowledges, "chapter 13 trustees - are not equipped to guarantee title to real properties,
25 or to coordinate lien payoffs and releases, or to handle other matters required in real estate transactions."
26 TRUSTEE'S MEMORANDUM at 5 (Doc. #28; filed 11/28/17).

1 Presumably with these limitations in mind, the Bankruptcy Court for the District of Oregon
2 implemented LBR 3015-1(b)(7), which provides as follows:

3 **Payment of Certain Claims Secured by Real Property.** If a debtor and the trustee agree,
4 the debtor may pay mortgage arrearages and other claims secured by real property upon a sale
5 or refinance of the property directly to the creditor. The trustee may, upon demand, be paid
6 the trustee's authorized fee based upon those payments either by the debtor or the escrow
7 agent.

8 The first sentence, pertaining to agreement between a debtor and the trustee, is not remarkable. It implies the
9 assumption that the types of claims named in the Local Rule would otherwise be paid by the trustee, yet
10 provides a practical alternative to having the trustee serve the role of an escrow agent. It reflects the long-
11 standing principle that parties are free to contract for treatment that they are not entitled to demand. It also
12 facilitates the relatively common practice of selling or refinancing real property in Chapter 13 through
13 escrow by providing parameters for such agreements.

14 The second sentence, regarding payment of the trustee's fee, should be considered a qualification on
15 the first. It outlines the requirement⁵ that the debtor pay the trustee's percentage fee if the parties agree to
16 direct payment through escrow *and* if the trustee so demands. If the debtor is unwilling to agree to this latter
17 requirement, there cannot be an "agreement" between the two parties under LBR 3015-1(b)(7). The
18 alternative, of course, is for the debtor to turn over to the trustee (or direct the buyer to pay to the trustee)
19 funds sufficient to pay the relevant claims in full. If the funds are paid to the trustee for distribution,
20 28 U.S.C. § 586(e)(2)⁶ permits the trustee to collect a fee on the received amounts. But if, under LBR 3015-
21 1(b)(7), the parties agree to direct payment through escrow as well as the trustee taking a fee on those
22 payments, the trustee's right to the fee is not a function of 28 U.S.C. § 586, but rather an agreement by the


23 ⁵ Unless otherwise specified, the term "may," when used in the LBRs, means "has discretion to, is
24 permitted to, or has a right to." LBR 9001-1(y). In the context of the "trustee may, upon demand" portion of
25 LBR 3015-1(b)(7), the term gives the trustee the right to demand payment of the statutory fee for claims paid
26 through escrow.

⁶ The statute provides: "[s]uch individual shall collect such percentage fee from all payments
received by such individual under plans in the cases under chapter 12 or 13 of title 11 for which such
individual serves as standing trustee."

1 debtor. Alternatively, it could be said that the parties have agreed, and the plan orders, that the payments
2 made through escrow were constructively received by the trustee. In this manner, there is no inconsistency
3 between 28 U.S.C. § 586 and LBR 3015-1(b)(7).

4 In this case, Debtors wish to pay all secured claims through escrow at closing, but are unwilling to
5 meet Trustee's demand that they pay his fee on the impaired claims. As such, there is no agreement under
6 LBR 3015-1(b)(7). Where Debtors propose to pay the impaired secured claims directly, the Plan does not
7 satisfy § 1326(c) and cannot be confirmed. I therefore sustain Trustee's Objection to Confirmation. Debtors
8 have 21 days to do one of two things: (1) file a 2nd Modified Plan consistent with this ruling, or (2) submit
9 to Trustee a proposed Order Confirming Plan that amends paragraph 10 of the Plan to reflect payment of
10 Trustee's fee. Failure to take either action will result in dismissal of the case. If, by the 21-day deadline,
11 Wells Fargo's pending objection to confirmation is resolved and withdrawn, the proposed Order (or 2nd
12 Modified Plan) should reflect that resolution. If not, Debtors should, within that same 21-day period, notify
13 the Court in writing and request an evidentiary hearing.

14 The above sets forth my findings and conclusions under Fed. R. Bankr. P. 7052. The Court will
15 prepare its own order.

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19 THOMAS M. RENN
20 Bankruptcy Judge
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