No. 18-0918

IN THE

Supreme Court of the United States

October Term, 2018

IN RE BACKSTREETS PLOWING, INC.,

Debtor,

STEVEN VIN SANT, CHAPTER 7 TRUSTEE

Petitioner,

v.

MILTON WEINBERG

Respondent.

On Writ of Certiorari to
the United States Court of Appeals
for the Thirteenth Circuit

BRIEF FOR RESPONDENT

10R
Counsel for Respondent

QUESTIONS PRESENTED

I. Whether a secured creditor who lawfully repossesses collateral prior to the filing of a debtor's bankruptcy petition violates 11 U.S.C. § 362(a)(3) by passively retaining possession of the collateral post-petition?

II. Whether a creditor who makes a substantial contribution to an estate in a Chapter 7 case may receive an administrative expense priority claim under 11 U.S.C. § 503(b) even though only one specific section of the statute refers to Chapters 9 and 11?

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OPINIONS BELOW

The United States Bankruptcy Court for the District of Moot and the Bankruptcy Appellate Panel for the Thirteenth Circuit held for the creditor Weinberg on both issues. (R. at 3). Specifically, the court found that: (I) Weinberg's retention of the snow plow trucks that he legally repossessed pre-petition, each of which constituted collateral for a loan made to the Debtor, did not violate section 362(a)(3); and (II) Weinberg was entitled to a substantial contribution administrative expense under section 503(b), notwithstanding section 503(b)(3)(D). *Id.* Thirteenth Circuit Court of Appeals affirmed on both issues. *Id.* at 21. This Court then granted Debtor's petition for writ of certiorari. *Id.* at 1.

STATEMENT OF JURISDICTION

The formal statement of jurisdiction is waived pursuant to Competition Rule VIII.

STATUTES INVOLVED

The relevant federal laws controlling this case are 11 U.S.C. §§ 362(a)(3), 503(b), 542(a) (2012) of the United States Bankruptcy Code. The text of these provisions are attached in their entirety in Appendix A.

STATEMENT OF THE CASE

I. Facts

Christopher Clemons ("Clemons"), the sole shareholder of Backstreets Plowing, Inc. (the "Debtor"), decided that the business needed "newer, more fuel-efficient, snow plow trucks" in spring 2015. R. at 3. The new trucks would allow Debtor to avoid the higher maintenance costs of its older trucks, and would allow it to bid on an annual plowing contract with the City of Badlands. *Id.* at 3-4. Each year the City would determine whether to renew the contract. *Id.* at 4. Because Debtor was short on funds, Clemons asked his acquaintance, Milton Weinberg ("Weinberg" or the "Creditor"), on behalf of Debtor to loan $450,000 to purchase the new trucks. *Id.* Weinberg provided the loan, *id.*, and "properly perfected a purchase money security interest in the snow plow trucks." *Id.* at 4 n.3. Clemons also "personally guaranteed the loan." *Id.* at 4. Payments on the secured debt were to commence once Debtor began generating revenue in December 2015. *Id.* Debtor received the loan in August 2015 and purchased the trucks soon after. *Id.* Debtor submitted a bid for the City's plowing contract. *Id.* While Debtor's bid was superior to the other submitted bids, "several members of the city council publicly questioned whether Debtor would be able to perform under the contract given the projected small profit margins." *Id.* Yet, the city granted the contract to the Debtor. *Id.* Weinberg and Clemons's relationship became strained in October 2015, and they did not talk to each other for a period of time after. *Id.* at 4-5.

While Debtor's business was profitable during the winter of 2015-2016, Clemons failed to make the first loan payment to Weinberg that became due in December. *Id.* at 5. Weinberg contacted Clemons in February 2016 after Debtor failed to make any payments under the loan. *Id.* Clemons eventually stopped answering Weinberg's calls, which led to Weinberg going to Debtor's facility. *Id.* There was an argument, and Weinberg "file[d] suit on the note in April 2016 in the State of Moot Circuit Court," which also included a claim against "Clemons on his personal

guarantee." *Id.* Weinberg prevailed against Debtor and Clemons obtaining a default judgment of $450,000 plus interests and fees in joint and several damages in October 2016. *Id.*

Winter 2016-2017 was harsh due to several Nor'easters, which caused Debtor to suffer substantial losses. *Id.* The payments under the City contract were not enough for Debtor to afford the cost of labor, maintenance, and fuel. *Id.* at 5-6. In January 2017, Weinberg decided to start collection efforts on the default judgment, and repossessed the trucks late that month. *Id.* at 6. These trucks were taken to Weinberg's warehouse and remain stored there. *Id.* Due to the repossession, Debtor was unable to perform obligations under the contract and it filed a bankruptcy petition under Chapter 11 in February 4, 2017, *id.*, before Weinberg had begun foreclosure proceedings on the lawfully repossessed collateral. *Id.* at 6 n.4. After the filing, Debtor's attorney sent a letter demanding Weinberg to return the collateral. *Id.* at 6. Weinberg, "based on his understanding that the Debtor had the burden to bring a turnover action, in which case [he] could demand adequate protection of his interests in the snow plow trucks," refused to acquiesce to Debtor's demands. *Id.* However, as opposed to bringing a turnover proceeding, Debtor asked the bankruptcy court to determine whether Weinberg's passive retention of the collateral violated § 362(a)(3). The Bankruptcy court sided with Weinberg, finding that passive retention of lawfully repossessed collateral did not violate the automatic stay. *Id.*

After appealing the decision, Debtor determined that its Chapter 11 reorganization was futile because the city did not renew the contract, the business was out of cash, and the offseason was approaching. *Id.* at 6–7. Consequently, Debtor converted its case to a Chapter 7 case. *Id.* After converting to Chapter 7 under the Bankruptcy Code, the Trustee was appointed to administer the Debtor's bankruptcy estate and liquidate its property on April 13, 2017. R. at 7. After conversion to Chapter 7, Weinberg hired a collection law firm to pursue collection efforts on the judgment related to Clemons' personal guarantee. *Id.* The collection firm took a creditors' examination of

Clemons in May 2017. *Id.* Through the examination, Weinberg discovered that shortly after the filing of his initial lawsuit against the Debtor and Clemons, Debtor had made transfers of approximately $100,000 in cash directly to a bank account in the name of Clemons' daughter, Patti. *Id.* Weinberg then voluntarily provided the information obtained in the examination to the Trustee. *Id.* The documentation and testimony obtained from Clemons during the examination enabled the Trustee to file a complaint against Patti Clemons to avoid and recover the $100,000 transfer under §§ 548 and 550. *Id.* In response to the complaint, the parties quickly reached a settlement where Patti Clemons agreed to pay $75,000 to the estate in satisfaction of all claims asserted in the adversary proceeding. *Id.*

The examination leading the Trustee to settle the claim with Patti Clemons resulted in Weinberg person incurring $25,000 in legal fees. *Id.* After the settlement, Weinberg filed a motion seeking the allowance of a substantial contribution expense under section 503(b) in the amount of $25,000 from the legal fees incurred during the investigation. *Id.* Trustee further conceded that Weinberg's efforts in conducting the examination constituted a substantial contribution to Debtor's bankruptcy estate. *Id.* at 8. However, after obtaining the benefit of Weinberg's investigation efforts, Trustee subsequently claimed that § 503(b)(3)(D) limits the allowance administrative expenses only to cases under Chapter 9 and 11. *Id.*

II. Procedural History

Debtor filed a petition for relief under Chapter 11 of the United States Bankruptcy Code on February 4, 2017. *Id.* at 6. Debtor then filed a motion in the bankruptcy court asking it to determine whether Weinberg's passive retention of the collateral repossessed pre-petition was a violation of § 362(a)(3). *Id.* The bankruptcy court determined that Weinberg did not violate § 362(a), and Debtor appealed the ruling in March 2017. *Id.* Debtor converted the bankruptcy case to a case under Chapter 7, and the Trustee was appointed on April 13, 2017. *Id.* at 7. Weinberg

then filed a motion in the bankruptcy court seeking the allowance of a substantial contribution administrative expense pursuant to § 503(b). *Id.* at 8. The bankruptcy court approved Weinberg's motion, granting him an allowed administrative expense in the amount of $25,000. *Id.* Trustee persisted in the appeals, and the appellate panel affirmed the decision on both issues. *Id.* at 9. The Trustee appealed the decision to the Thirteenth Circuit where the decision was affirmed on both issues, in favor of Weinberg. *Id.*

STANDARD OF REVIEW

The facts of the case are not in dispute by the parties. *Id.* at 3 n.2. The Thirteenth Circuit's holding that a creditor's passive retention of collateral repossessed pre-petition did not violate § 362(a)(3) of the United States Bankruptcy Code and that a creditor is entitled to an administrative expense priority claim for a substantial contribution made to an estate in a Chapter 7 case under § 503(b) are both questions of law, which are reviewed *de novo*. *Ornelas v. United States*, 517 U.S. 690, 699 (1996).

SUMMARY OF THE ARGUMENT

The Thirteenth Circuit properly held that Weinberg did not violate the automatic stay under § 362(a)(3) through his passive retention of collateral that was lawfully repossessed pre-petition. The plain meaning of § 362(a)(3) prohibits affirmative post-petition conduct to obtain possession or exercise control over property of the debtor's bankruptcy estate. Weinberg repossessed the collateral pre-petition, and he has not taken further actions toward the collateral during the time after Debtor filed its bankruptcy petition. Because Weinberg only passively retains the collateral, there is no violation of § 362(a)(3).

There is no self-executing obligation under § 362(a)(3) stemming from § 542(a) for a creditor to turnover collateral lawfully repossessed before the debtor filed a petition for relief under the Bankruptcy Code. Section 542(a) merely enables a trustee to request the bankruptcy court to

order turnover of estate property. Rule 7001 of the Federal Rules of Bankruptcy Procedure requires the trustee to bring an adversary proceeding in the bankruptcy court to obtain an order that creates an affirmative obligation for a creditor to turnover property of the estate under § 542. The view that § 542(a) is not self-executing is also consistent with pre-Bankruptcy Code practice, recognized by this Court, where it is a bankruptcy court that orders turnover of estate property. In addition, because § 542(a) is subject to an express exception for property that is of inconsequential value or benefit to the bankruptcy estate. Section 542(a), from its cross reference to § 363, is also subject to § 363(e) entitling a creditor to seek adequate protection of property of the estate that a creditor has an interest in. Because there was never a turnover action brought in the bankruptcy court, Weinberg never had the ability to violate an affirmative obligation to turnover property in violation of the automatic stay. Weinberg also never had the opportunity to assert the defenses to turnover in a proceeding even though the snow plows are of inconsequential value and benefit to the estate and Weinberg is entitled to adequate protection.

The requirement of an affirmative, post-petition act to violate the automatic stay comports with the purpose of the automatic stay. The automatic stay is intended to preserve the status quo as it existed at the time the bankruptcy petition was filed. Further, the requirement of an adversary proceeding for a creditor to be ordered to turnover property of the estate balances the interests of both the debtor and the creditor; it furthers the debtor's interest in a fresh start, while allowing the creditor to seek adequate protection and assert the explicit exception within § 542(a). As, Weinberg has taken no affirmative post-petition actions towards the collateral, and no turnover action has been commenced, the Thirteenth Circuit properly held that no violation of § 362(a)(3) occurred.

Furthermore, the Thirteenth Circuit properly held that Weinberg's substantial contribution in Debtor's Chapter 7 case was entitled to priority status as an administrative expense pursuant to § 503(b). Specifically, Weinberg incurred $25,000 by engaging in collection efforts that led to the

discovery of an allegedly fraudulent transfer of $100,000 of Debtor's assets to Patti Clemons. Weinberg then voluntarily gave this information to the Trustee, who in turn used it to obtain a settlement with Patti Clemons and an agreement to pay $75,000 to the bankruptcy estate. Weinberg's incurred costs of $25,000 that ultimately led to the $75,000 addition to the estate constitutes a substantial contribution.

Creditors, like Weinberg, who make substantial contributions to a Chapter 7 bankruptcy are entitled to claim administrative expenses because the text and legislative history of § 503(b) permit the allowance of such expenses. Furthermore, the equitable powers of the bankruptcy court accord authority to award administrative expenses to creditors like Weinberg as a method to promote several underlying policies of the Bankruptcy Code. Namely, such allowance promotes both the policy of encouraging creditor participation in the bankruptcy case and the policy of deterring post-petition debtor misconduct. Even if the Court does not find that § 503(b) permits substantial contributions for creditors in all Chapter 7 cases, Weinberg has met his burden of establishing that his costs incurred in exposing the fraudulent transfers are entitled to administrative expense status in this case. Since administrative expense claims for creditors in Chapter 7 cases are permitted and encouraged by the Code and Weinberg has properly shown that he has incurred expenses leading to a substantial contribution to the estate, the Thirteenth Circuit properly held that his $25,000 in legal costs were entitled to priority status under § 503(b).

ARGUMENT

I. THE THIRTEENTH CIRCUIT PROPERLY HELD THAT THE CREDITOR'S RETENTION OF COLLATERAL LAWFULLY REPOSSESSED PRE-PETITION WAS NOT A VIOLATION OF THE AUTOMATIC STAY.

The bankruptcy estate is formed upon the filing of a bankruptcy petition. 11 U.S.C. § 541(a). This estate is comprised of "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. § 541(a)(1). The language of § 541 shows "that

Congress intended a broad range of property to be included in the estate." *United States v. Whiting Pools, Inc.*, 462 U.S. 198, 204 (1983). *See also In re Shore Air Conditioning & Refrigeration, Inc.*, 18 B.R. 643, 646 (Bankr. D.N.J. 1982) ("The clear wording of [§ 541] and the intent of the drafters demonstrates that the scope of the statute is very broad and encompasses all interests of the debtor as of the date its petition is filed.").[1]

Additionally, from the time that a debtor files "a petition . . . under section 301, . . . of this title" the automatic stay takes effect. 11 U.S.C. § 362(a) (2012). The automatic stay prevents "all entities" from taking "any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate." *Id.* at § 362(a)(3). To establish a violation of the automatic stay under § 362(a)(3), a creditor would have to perform an action after a debtor filed a bankruptcy petition to "obtain possession . . . or to exercise control over property of the estate." *Id.* Because Weinberg made no affirmative act upon the property of the estate following Debtor's bankruptcy filing, r. at 6, there was no violation of the automatic stay. *See In re Hall*, 502 B.R. 650, 665 (Bankr. D.D.C. 2014).

Moreover, without an adversary proceeding under Rules 7001(1) and 7003 and an order by the bankruptcy court, *see* Fed. R. Bankr. P. 7001(1), 7003, a creditor is under no affirmative obligation under § 542(a) to turnover property of the estate to a debtor. *See In re Brown*, 210 B.R. 878, 884-85 (Bankr. S.D. Ga. 1997). In this case, Debtor did not commence a turnover action in the bankruptcy court, which would have given Weinberg an opportunity to seek adequate protection. R. at 6. *See also* 11 U.S.C. §§ 363(e), 542(a) (2012). Accordingly, there was no opportunity for Weinberg to violate an obligation to turnover estate property to Debtor because there was no opportunity for the bankruptcy court to order turnover. In addition, even if § 542(a)

[1] *But see* In re Lewis, 137 F. 3d 1280, (11th Cir. 1998) (footnote omitted) ("[W]e hold that the Lewises' bankruptcy estate's only interest in the repossessed automobile—a bare right of redemption—failed to render the automobile 'property of the estate' under 11 U.S.C. § 541(a)(1) and subject to turn-over under 11 U.S.C. § 542(a).").

contains a self-executing duty, a creditor need not return property that "is of inconsequential value or benefit to the estate." 11 U.S.C. § 542(a). As the collateral in the present case is of inconsequential value and benefit to the estate from its used condition and lack of equity, *see* r. at 5-6, Weinberg is under no obligation to return the collateral. An interpretation of § 362(a)(3) and § 542(a) in this manner comports with the overall purpose of the Bankruptcy Code, which is to balance a debtor's interest in securing a fresh start with a creditor's interest in securing protection of interests in property and repayment. *See In re Franke*, 268 B.R. 133, 134 (Bankr. W.D. Mich. 2001). Therefore, Weinberg did not violate the automatic stay in this case.

A. The plain language of § 362(a)(3) provides that automatic stay is not violated by a Creditor's passive retention of collateral that was lawfully repossessed pre-petition.

When a petition for relief is filed under the United States Bankruptcy Code an automatic stay is initiated to halt future efforts by creditors to collect from the bankruptcy estate. 11 U.S.C. § 362. Specifically, the automatic stay prohibits "any act to obtain possession of property from the estate or to exercise control over property of the estate." *Id.* at § 362(a)(3). Some circuits view passive retention of collateral that was repossessed pre-petition as conduct falling under § 362. *See In re Weber*, 719 F. 3d. 72, 83 (2d Cir. 2013) (holding that the creditor violated § 362(a) for failing to turnover property of the estate after learning of the debtor's bankruptcy); *In re Thompson*, 566 F. 3d 699, 703 (7th Cir. 2009) ("The act of passively holding onto an asset constitutes 'exercising control' over it."); *In re Del Mission*, 98 F.3d 1147, 1151 (9th Cir. 1996) ("[T]he knowing retention of estate property violates the automatic stay of § 362(a)(3)."); *In re Knaus*, 889 F. 2d 773, 775 (8th Cir. 1989) (finding that the creditor's failure to turnover estate property following the filing of a bankruptcy petition is "a prohibited attempt to 'exercise control over the property of the estate' in violation of the automatic stay."). However, these circuits overlook the plain language of the § 362(a)(3), which results in an overly broad interpretation of "exercise control." *See United States*

v. Inslaw, Inc., 932 F. 2d 1467, 1472 (D.C. Cir. 1991) (explaining its concerns connected with a broad reading of "exercised control" under § 362(a)(3)). As such, these circuits ignore a fundamental canon of statutory construction that the "interpretation of the Bankruptcy Code starts 'where all such inquiries must begin: with the language of the statute itself.'" *Ransom v. FIA Card Servs., N.A.*, 562 U.S. 61, 69 (2011) (quoting *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989)).

While the reach of the automatic stay is broad, it "serves as a restraint only on acts to gain possession or control over property of the estate." *Inslaw*, 932 F. 2d at 1474. The Bankruptcy Code specifically prohibits "any act." 11 U.S.C. 362(a)(3). "Act" is defined by Merriam-Webster as "the doing of a thing" or "something done voluntarily," *Act*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/act (last visited Jan. 19, 2019), and by Oxford Dictionary as to "[t]ake action; do something." Oxford Univ. Press, *Act*, ENGLISH OXFORD LIVING DICTIONARIES, https://en.oxforddictionaries.com/definition/act (last visited Jan. 19, 2019). The common understanding of the term "act" does not include passive behavior or doing nothing. *See Moskal v. United States*, 498 U.S. 103, 108 (1990) (internal citations and quotations omitted) ("In determining the scope of a statute, we look first to its language, giving the words used their ordinary meaning.").

Furthermore, "'any act' is the prepositive modifier of both infinitive phrases" that follow. *In re Cowen*, 849 F. 3d 943, 949 (10th Cir. 2017); *see* 11 U.S.C. 362(a)(3). In this context, "any act" works to modify actions to "obtain possession" and actions to "exercise control over property of the estate." *Cowen*, 849 F.3d at 949; *Brown*, 210 B.R. at 883 (internal citations omitted) ("[*Knaus*] which holds differently than I focuses solely on the language of 'exercise control' to the exclusion of the word 'act.' . . . This leads, inevitably and erroneously I believe, to an over-broad application of Section 362(a)(3)."). While § 362(a)(3) prevents affirmative actions taken for the

purpose of coming into possession or exercising control over property of the estate, it does not prohibit the passive retention of estate property. *See Moskal*, 498 U.S. at 108.

The plain language of § 362(a)(3) also requires for the affirmative act to be performed after the filing of the bankruptcy petition. *In re APF Co.*, 274 B.R. 408, 416-17 (Bankr. D. Del. 2001). Specifically, "[e]ven if the Withheld [property] [is] property of the estate," the debtor must show that the creditor "engaged in conduct which was an **affirmative post-petition act** manifesting either an exercise of control over property of the estate, or collecting, assessing or recovering such property in order to demonstrate a stay violation." *Id.* at 417 (emphasis in original). Because the meaning of § 362(a)(3) is plain, the analysis into that meaning should begin and end at its plain language. *Puerto Rico v. Franklin Cal. Tax-Free Tr.*, 136 S. Ct. 1938, 1946 (2016) (citing *Ron Pair*, 489 U.S. at 241) ("The plain text of the Bankruptcy Code begins and ends our analysis."). In the present case, Weinberg lawfully repossessed the property prior to the filing of Debtor's bankruptcy petition. R. at 6. Additionally, the collateral has remained stored in the same warehouse since the date of repossession. *Id.* Because no changes have been made to the location of the collateral, Weinberg has made no affirmative post-petition acts that affect the collateral. *See Hall*, 502 B.R. at 653 ("[I]t is only an affirmative act to change control of property of the state that can give rise to a violation of § 362(a)(3)."). Thus, under the plain meaning of § 362(a)(3), Weinberg's pre-petition repossession of the collateral in accordance with state law and passive, post-petition retention of that collateral does not amount to a violation of the automatic stay.

B. Creditor's was under no obligation upon the filing of Debtor's bankruptcy petition to turnover lawfully repossessed property.

Section 542(a) provides that:

> an entity, other than a custodian, in possession, custody, or control, during the case, or property that the trustee may use, sell, or lease under section 363 of this title, or that the debtor may exempt under section 522 of this title, shall deliver to the trustee, and account for, such property or value of such property, unless such property is of inconsequential value or benefit to the estate.

11 U.S.C. § 542(a). Under this Section, "a bankruptcy court 'may generally order a third party to turn property in its possession over to the debtor's estate'" under the following circumstances: "[f]irst, such property must be 'property of the estate.' Second, at the moment the debtor filed a petition, the debtor must have had the right to use, sell, or lease the property. Finally, upon request, the court must ensure" adequate protection of "the third party's interest in the property" subject to turnover. *In re Builders Transp., Inc.*, 471 F. 3d 1178, 1184-85 (11th Cir. 2006) (quoting *In re Lewis*, 137 F. 3d 1280, 1282 (11th Cir. 1998)).

i. Creditor is under no affirmative obligation to return collateral that was lawfully repossessed pre-petition upon the Debtor's bankruptcy filing because the turnover provision of § 542(a) is not self-executing.

For a creditor to be required to turnover property of the estate that was repossessed pre-petition, a court would have to order the creditor to turnover the property under § 542. *See Hall*, 502 B.R. at 654-64. "In contrast to the automatic stay of § 362(a), § 542(a) does not provide that it is to operate as an order . . . and the provision is subject on its face to defenses (with an additional defense against entry on a turnover order, of lack of adequate protection, being contained in 11 U.S.C. § 363(e))." *Id.* at 655. Thus, while a creditor may voluntarily decide to return the repossessed property upon the filing of the petition, there is no statutory authority that requires a creditor to do so. *Id.* at 656. Further, "[w]hen possession is not relinquished voluntarily, § 542(a) empowers the trustee to obtain an order directing turnover unless one of the defenses to entry of a turnover applies." *Id. See also id.* ("But unlike § 362(a), which operates as a statutory injunction, §542(a) does not operate as a statutory injunction and thus does not enjoy the statute of an order as to which contempt sanctions may lie if disobeyed."). Finding that § 542(a) is self-executing would make the practice of requesting a bankruptcy court to order turnover as "entirely unnecessary." *Id.* at 657. In the present case, an adversary proceeding under Rule 7001 of the Federal Rules of Bankruptcy Procedure was never brought to request the bankruptcy court to order

turnover under § 542(a), r. at 6, and, as such, Weinberg could not have possibly been obligated to turn the collateral over to the estate.

Section 542(a) should also be interpreted in light of its place within the overall statutory structure of the Bankruptcy Code. *See United States v. Morton*, 467 U.S. 822, 828 (1984) ("We do not . . . construe statutory phrases in isolation; we read statutes as a whole."). The turnover provision of this subsection is subject to express limitations. *See* 11 U.S.C. § 542(a). It is subject to the limitation that property that is of inconsequential value or benefit to the estate is not subject to turnover. *Id.* "Because § 542(a) is on its face subject to explicit defenses, § 542(a) is not self-executing," and, as such, does not require the turnover of collateral repossessed pre-petition automatically upon the filing of a debtor's bankruptcy petition. *Hall,* 502 B.R. at 663.

Further, § 542(a) makes a cross-reference to § 363. 11 U.S.C. § 542(a). It states that "property that the trustee may use, sell, or lease under section 363" is subject to the turnover outlined by that subsection. *Id.* When looking at Section 363 as a whole, "[p]roperty 'usable under § 363' necessarily includes the limitation of § 363(e)." *Hall*, 502 B.R. at 659. Section 363(e) allows the bankruptcy court to "prohibit or condition such use, sale, or lease" of property that an entity has interest in "as use necessary to provide adequate protection of such interest." 11 U.S.C. § 363(e). If § 542(a) is interpreted to be a self-executing provision that requires a creditor in possession of collateral repossessed pre-petition, "a creditor [would be] required to turn over the asset before it can seek adequate protection." *Hall*, 502 B.R. at 660. This interpretation puts the creditor at risk for "irreparabl[e] harm[]" and at risk to "lose the protection that § 363(e) is intended to provide." *Id.* Specifically, it could lead to the creditor having to decide whether to seek adequate protection and risk being held in contempt, or relinquishing the collateral before securing adequate protection. *See id.* Because a creditor possesses the "right to raise its right to adequate protection as a defense," § 542(a) is not a self-executing. *Id.* at 661. *See also Peck v. Jenness*, 48 U.S. 612,

623 (1849) ("But it is among the elementary principles with regard to the construction of statutes, that every section, provision, and clause of a statute shall be expounded by a reference to every other; and if possible, every clause and provision shall avail, and have the effect contemplated by the legislature. One portion of a statute should not be construed to annul or destroy what has been clearly granted by another."). Accordingly, Weinberg should not be found to have violated the automatic stay by failing to immediately return the collateral to the estate because no turnover proceeding was initiated to which Weinberg could have asserted the defenses referenced to within § 542(a). *See* r. at 6.

ii. Legislative history does not indicate any intent to displace pre-Bankruptcy Code practice allowing passive retention prior to a court's turnover order.

The Bankruptcy Code is "not read . . . to erode past bankruptcy practice absent clear indication that Congress intended such a departure." *Hall*, 502 B.R. at 664 (quoting *Cohen v. de la Cruz*, 523 U.S. 213, 221 (1998)). This Court in *Whiting Pools* interpreted § 542(a) as "grant[ing] to the estate a possessory interest in certain property of the debtor that was not held by the debtor at the commencement of reorganization proceedings." 462 U.S. at 207. In addition, the Court states that "[t]he Bankruptcy Code provides secured creditors various rights, including the right to adequate protection and these rights replace the protection afforded by possession." *Id.* However, pre-bankruptcy code practice provides insight to the operation of § 542(a) in the present case. *See id.* at 208.

While *Whiting Pools* references "the reorganization context," *id.*, at the time the Debtor's bankruptcy petition was filed, the Debtor sought reorganization under Chapter 11. R. at 6. Prior to the current Bankruptcy Code, "[u]nder Chapter X of the Bankruptcy Act of 1878," *Whiting Pools*, 462 U.S. at 208 (internal citation omitted), "the bankruptcy court could *order* the turnover of collateral in the hands of a secured creditor." *Id.* (citing *Reconstruction Fin. Corp. v. Kaplan*, 185 F. 2d 791, 796 (1st Cir. 1950)) (emphasis added). "Nothing in the legislative history evinces a

congressional intent to depart from that practice." *Id.* Thus, while this Court recognizes that the bankruptcy "estate includes property of the debtor that has been seized by a creditor prior to the filing of a" bankruptcy petition, *id.* at 209, this Court does so while recognizing the applicability of a pre-Code practice of the bankruptcy court *ordering* the creditor to turnover property. *See id.* at 208. Because a bankruptcy court must order turnover before a creditor has an obligation to return the property, "§ 542(a) is *not* self-executing," which means that this section "simply provides an express statutory basis for a bankruptcy court to enter an injunctive order compelling turnover of identified property in the possession of a third party." *Hall*, 502 B.R. at 657 (emphasis in original).

In addition, before the amendments to § 362(a)(3) "[took] effect in 1984 . . . courts *uniformly* viewed § 542(a) as providing bankruptcy courts with the authority to order turnover of collateral or other property of the estate, but with the courts authorized to require adequate protection of a secured creditor's interest before directing turnover." *Id.* (emphasis added). Furthermore, the current version of § 362(a)(3) makes no reference to § 542(a). *See* 11 U.S.C. §§ 362(a)(3), 542(a); *see also Hall*, 502 B.R. at 664 ("Nothing in § 362(a)(3) purports to amend § 542(a)."). "[The Court] [has] stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992). For example, because § 542(a) makes an explicit cross-reference to § 363, *see* 11 U.S.C. § 542(a), it can be presumed that if Congress had wanted to amend § 362(a)(3) to require immediate turnover of collateral repossessed pre-petition, it could have included that cross-reference. *See Russello v. United States*, 464 U.S. 16, 23 (1983) ("[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.") (quoting *United States v. Wong Kim Bo*, 471 F. 2d 720, 722 (5th Cir. 1972)) (alteration in original) (internal quotations omitted). Because nothing in the

statutory language of § 362(a)(3) purports to create a turnover requirement for collateral that was repossessed pre-petition in contravention of the pre-code practice as recognized by this Court, *see Whiting Pools*, 523 U.S. at 208, the addition of "'exercise control' . . . in 1984" did not undo the practice allowing "mere retention" of collateral prior to a bankruptcy court ordering turnover. *Hall*, 502 B.R. at 664. Therefore, Weinberg's post-petition retention did not violate § 362(a)(3) because the imposition of the automatic stay does not require immediate turnover of property of the estate without a court order under § 542(a).

iii. The Debtor is not entitled to the turnover under § 542(a) because the collateral is of inconsequential value or benefit to the estate, and the Creditor is entitled to adequate protection.

If this Court interprets there to be a turnover obligation under § 542(a), the facts of the current case would fall under the explicit exceptions stated therein. Section 542(a) explicitly states that property of the estate that is "of inconsequential value or benefit to the estate" is not subject to turnover. 11 U.S.C. § 542(a). "There is no single test to determine whether property would not be of inconsequential value to a debtor's chapter 7 estate." *In re Brizinova*, 554 B.R. 64, 78 (Bankr. E.D.N.Y. 2016). However, "[o]ne method noted by courts is to compare the amount of claims filed in a debtor's bankruptcy case to the value of the property that the trustee seeks to recover." *Id.* (citing *In re Calvin*, 329 B.R. 589, 598 (Bankr. S.D. Tex. 2005)). In the present case, Weinberg provided a secured loan of $450,000 to the Debtor for the purchase of snow plow trucks in 2015. R. at 4. Debtor never began making payments to Weinberg on the secured loan, which led him to seek a default judgment and eventually repossess the collateral in January 2017. R. at 5-6. In addition to failing to repay the debt, Debtor used the trucks during two winter seasons, one of which "was particularly brutal." R. at 5. Consequently, the collateral not only has aged from 2015 to 2017, it has also been used, which likely reduces the value of the trucks. In addition, because Debtor never made payments, the debt has likely increased due to interest and fees. *See* R. at 5;

see also 11 U.S.C. § 502(b) (2012) (explaining that the amount of the creditor's claim is determined as of the date of filing, which also includes pre-petition interest and pre-petition fees, if allowed under the contract, in addition to the principal). Therefore, under the method provided in *Brizinova*, any potential monetary value of a secured debt would be of inconsequential value and benefit to the estate because it will not help pay unsecured creditors as there is likely no equity in the trucks. *See* 11 U.S.C. § 726(a) (providing the order of distribution for unsecured creditors to be paid after secured creditors are paid for the value of the collateral).

Furthermore, while the Debtor originally filed for reorganization under Chapter 11, r. at 6, the collateral would still be of inconsequential benefit to the estate and still subject to exemption under § 542 if the court evaluates the eligibility of the exemption at the time the original petition was filed. The question that should be asked in this context is whether without the use of the collateral, would "the success of the [reorganization] plan" be "seriously weakened." *In re King*, 14 B.R. 316, 317-18 (Bankr. M.D. Tenn. 1981). At first glance, it may appear that without the snow plows, the chance of a successful reorganization would be weakened. However, from the outset of the Debtor's business, the chance for the business to be successful was questionable. *See* R. at 4 ("The Debtor's bid was far superior to the other two bids, to the point that several members of the city council publicly questioned whether the Debtor would be able to perform under the contract given the projected small profit margins."). Concerns over the profitability and ability for success of the business were confirmed when there was a hard winter and the income under the contract "[was] not large enough to allow [Debtor] to pay its labor, maintenance and fuel costs as they came due." R. at 5-6. Even though Weinberg denied Debtor's demand to return the repossessed collateral, *id.*, the chance of a successful reorganization seemed questionable because of both the concerns surrounding the lack of potential for profits and the city's decision not to renew the contract with the Debtor for the following year. *Id.* at 6-7. Thus, the collateral would

fall under the inconsequential value or benefit exception under § 542(a), which exempts Weinberg from any turnover requirement.

Section 542(a) makes reference to § 363 in terms of "property that the trustee may use, sell, or lease under section 363." 11 U.S.C. § 542(a). Since § 363(e) provides that a court may condition the "use, sale, or lease as . . . necessary to provide adequate protection" to the Creditor's interest, 11 U.S.C. § 363(e), turnover of property under § 542(a) would be exempt where adequate protection is needed to protect the interest of the creditor. *See Hall*, 502 B.R. at 659. Because Weinberg is entitled to adequate protection, the property was exempt from any obligation to turnover the property without the bankruptcy court granting adequate protection of Weinberg's interest in the property. *See id.* at 659-60. "[T]he trustee has the burden of proof on the issue of adequate protection," 11 U.S.C. § 363(p) (2012), as Weinberg holds a "properly perfected . . . purchase money security interest in the snow plow trucks," R. at 4 n.3. Further, if the property is "declining in value," Weinberg "would [be] entitled, under § 362(d)(1) to" a form of adequate protection. *United Savings Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 370 (1988). "[A]dequate protection under § 363 should be treated the same as under § 362." *In re McCombs Properties VI, Ltd.*, 88 B.R. 261, 266 (Bankr. C.D. Cal. 1988). *See also In re Attinello*, 38 B.R. 609, 612 (Bankr. E.D. Pa. 1984) (internal citations omitted) ("To be entitled [to turnover], [the debtors] must show that the plaintiff's secured interest in the tractor is adequately protected. We find that, under the circumstances of this case, the plaintiff's secured interest is adequately protected by the equity cushion which the debtors have in the tractor."). Because the snow plows were used and aging, and because Debtor had made no payments on the debt to the secured creditor and was unable to keep up with the cost of maintenance prior to filing its bankruptcy petition, r. at 4-6, Weinberg lacks adequate protection of his interest in the collateral. As such, Weinberg did not violate the automatic stay because the facts of the case qualify it for the application of both the

lack of adequate protection, and inconsequential value and benefit exceptions to the turnover provision of § 542.

C. The requirement of an affirmative act to violate § 362(a)(3) is consistent with the purpose of the automatic stay and supports important public policy considerations.

"The object of the automatic stay provision is essentially to solve a collective action problem." *Inslaw*, 932 F. 3d at 1473. Furthermore, "[t]he purpose of the automatic stay" under Section 362 "is to maintain the status quo that exists at the time of the debtor's bankruptcy filing." *APF Co.*, 274 B.R. at 417 (citing *In re Richardson*, 135 B.R. 256, 258 (Bankr. E.D. Tex. 1992)). In the present case, the situation at the time of filing was that Weinberg retained legally repossessed collateral. R. at 6. Weinberg's refusal to voluntarily turnover property to the Debtor's estate, *id.*, should not be viewed as a violation of the automatic stay because "[f]ulfillment of [the] purpose cannot require that every party who acts in resistance to the debtor's view of its rights violates § 362(a) if found in error by the bankruptcy court." *Inslaw*, 932 F. 3d 1473. Once a petition is filed, the automatic stay operates solely to prohibit "acts to gain possession or control over property of the estate." *Id.* at 1474. Additionally, as "[t]he statutory language makes clear . . . the stay applies only to acts taken *after* the petition is filed." *Id.*

However, if the automatic stay prevented a secured creditor from having a contrary view from the debtor in regard to collateral repossessed pre-petition, it would essentially render the secured creditor's rights under state law meaningless. "The protection afforded to secured claims throughout the Code makes it clear that Congress intended, at least to a large extent, to preserve the sanctity which state law gives to secured transactions." *In re Grosso*, 51 B.R. 266, 269 (Bankr. D.N.M 1984). *See also Ex parte Christy*, 44 U.S. 292, 316 (1845) ("There is no doubt that the liens, mortgages, and other securities within the purview of this proviso, as far as they are valid by the state laws, are not to be annulled, destroyed, or impaired under the proceedings in bankruptcy; . . . The District Court, sitting in bankruptcy, is bound to respect and protect them."); *In re Merrill*,

252 B.R. 497, 503 (B.A.P. 10th Cir.) (quoting *In re Sampson*, 997 F. 2d 717, 721 (10th Cir. 1993) ("[C]ertain competing public policy interests, . . . will trump the 'fresh start policy.'"). If the rights of a secured creditor to repossess collateral prior to the debtor filing for bankruptcy could be frustrated by holding that the creditor must automatically return the property upon the filing of a bankruptcy proceeding without allowing the creditor to first seek protection of its interests from the bankruptcy court, a chilling effect on the market may occur from creditors being less willing to loan money.

Requiring a bankruptcy court to have to first make the decision of whether to order turnover under § 542(a) balances the interests of both the debtor and the creditor. In this situation a debtor is still able to seek turnover, and a creditor's interests in the collateral are protected. Because "maintain[ing] the status quo" is the policy behind the automatic stay, *Inslaw*, 932 F. 3d 1473, ensuring that a secured creditor has an opportunity to obtain adequate protection or to use the other exception under § 542(a) during a turnover proceeding helps protect the interest that a secured creditor has in the collateral. *See In re La Toya Jackson*, 434 B.R. 159, 167 (Bankr. S.D.N.Y. 2010) ("The Bankruptcy Code's overarching objective is to balance the interests of both creditors and debtors."); *Franke*, 268 B.R. at 134 ("The overall purpose and function of the Bankruptcy Code is to strike a balance between creditor protection and debtor relief. In other words, when interpreting the Bankruptcy Code, we must balance as equally as possible all parties' interests."). An approach to § 363(a)(3) that requires an affirmative post-petition act and does not carry with it a self-executing duty under § 542 respects this overarching purpose of the Bankruptcy Code of balancing the debtor's interest in a fresh start and the secured creditors interest in repayment. Accordingly, the Thirteenth Circuit should be affirmed because Weinberg did not violate the automatic stay through his passive retention of collateral that was lawfully repossessed prior to the filing of the Debtor's bankruptcy petition.

II. THE THIRTEENTH CIRCUIT PROPERLY HELD THAT WEINBERG'S SUBSTANTIAL CONTRIBUTION IN DEBTOR'S CHAPTER 7 CASE WAS ENTITLED TO PRIORITY STATUS AS AN ADMINISTRATIVE EXPENSE UNDER § 503(b) OF THE BANKRUPTCY CODE.

Under the United States Bankruptcy Code, an administrative expense allowed under § 503(b) is the highest priority claim to be paid in a bankruptcy case. *See* 11 U.S.C. § 507(a)(1). Section 503(b), in turn, provides for the allowance of an administrative expense if the incurred cost is related to certain types of activities. *See generally* 11 U.S.C. § 503(b). The priority status of an allowable administrative expense requires a trustee to pay the value of such a claim out of the estate before making any distributions to holders of lower priority claims or general unsecured creditors. *See* 11 U.S.C. § 726(a). Accordingly, if this Court determines that Weinberg's costs incurred in exposing Debtor's fraudulent transfer of estate property constituted an "administrative expense" under § 503(b), the Bankruptcy Code requires that Weinberg receive such amount ahead of lower priority claims and unsecured creditors. For the reasons stated below, the Code demands just that.

Weinberg is entitled to claim the expenses incurred in exposing the fraudulent transfer as an "administrative expense" because the text, legislative history, and equitable powers of the Bankruptcy Court compel an interpretation of § 503(b) that permits priority administrative expense status to substantial contributions by creditors in Chapter 7 cases. Alternatively, even if the Court does not find that substantial contributions by creditors in all Chapter 7 case should be categorically permissible as administrative expenses, Weinberg has met his burden of demonstrating that his specific costs are entitled to § 503(b) priority status as an administrative expense.

A. Substantial contributions by creditors in Chapter 7 cases are eligible for priority administrative expense status because this result is consistent with the text and legislative history of § 503(b) and the equitable authority of the bankruptcy court.

The term "administrative expense" is loosely defined in the Code as "actual, necessary costs of preserving the estate." *See* 11 U.S.C. § 503(b). Beyond this broad description, courts agree that administrative expenses "have two defining characteristics: (1) the expense and right to payment arise after the filing of bankruptcy, and (2) the consideration supporting the right to payment provides some benefit to the estate." *In re Midway Airlines Corp.*, 406 F.3d 229, 237 (4th Cir. 2005). Furthermore, courts recognize that administrative expenses entitled to first priority status are "not necessarily confined to those enumerated at 11 U.S.C. § 503(b)." *In re Flo-Lizer, Inc.,* 107 Bankr. 143, 145 (Bankr. S.D. Ohio 1989), *aff'd,* 916 F.2d 363 (6th Cir. 1990). An interpretation of § 503(b) consistent with these guiding principles in mind demonstrates that Weinberg is entitled to an administrative expense.

i. The text of § 503(b) permits administrative expense priority status for substantial contributions made by creditors in Chapter 7 Cases.

The text of the Bankruptcy Code controlling this case reads that "[a]fter notice and a hearing, there shall be allowed administrative expenses . . . including . . . the actual, necessary expenses . . . incurred by . . . a creditor . . . in making a substantial contribution in a case under chapter 9 or 11 of this title." *See* 11 U.S.C. § 503(b)(3)(D). Textual tools of statutory interpretation such as the presumption of nonexclusive include, the Bankruptcy Rules of Construction, and the scope of subparts canon, along with parallel nonexhaustive structures in other Code provisions, all demonstrate that the list of administrative expenses in § 503(b)(3)(D) is not exhaustive.

The word "including" was used to demonstrate that the subparts of § 503(b) are examples and not limitations of what can be determined to be an administrative expense claim. *See In re Execuair Corp.*, 125 B.R. 600, 602-03 (Bankr. C.D. Cal. 1991). The word "including" within the text of § 503(b) is significant, and it must be given meaning. *Hibbs v. Winn*, 542 U.S. 88, 101 (2004) ("A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant . . . ."). The Bankruptcy Code's Rules of

Construction expressly state that the words "includes" and "including" are not limiting. 11 U.S.C. § 102(3). This guiding principle is not specific to the Bankruptcy Code, as the rule has been codified by other jurisdictions in other contexts as well. *See, e.g.* Tex. Gov't Code Ann. § 311.002(13) (West 1989) ("'Includes' and 'including' are terms of enlargement and not of limitation or exclusive enumeration, and use of the terms does not create a presumption that components not expressed are excluded."). Additionally, it is firmly established in statutory interpretation that "[t]he verb *to include* introduces examples, not an exhaustive list." ANTONIN SCALIA & BRYAN A. GARNER, READING LAW 132 (Thomson/West ed. 2012). Furthermore, the Eleventh Circuit has acknowledged that, "the use of the word 'including' is not intended to be limiting." *In re Colortex Indus., Inc.*, 19 F.3d 1371, 1377 (11th Cir. 1994) (discussing 11 U.S.C. § 102(3)). Accordingly, an interpretation embracing substantial contributions in Chapter 7 cases, like Weinberg's contribution, would give effect to the word "including" within § 503(b). Such a reading ensures that no part of the statutory language of § 503(b) will be "void or insignificant" in its application. *See Hibbs*, 542 U.S. at 101.

The scope-of-subparts canon further bolsters an interpretation of § 503(b) favoring inclusion of Weinberg's substantial contribution as an administrative expense. *See Jama v. Immigration & Customs Enf't*, 543 U.S. 335 (2005). The scope-of-subparts canon, grounded in textualist principles, states that "material within an indented subpart relates only to that subpart; material contained in unindented text relates to all the following or preceding indented subparts." ANTONIN SCALIA & BRYAN A. GARNER, READING LAW 156 (Thomson/West ed. 2012). In other words, this canon emphasizes the significance of paragraph alignment and indentation within a statute. *See In re Pirani*, 824 F.3d 483, 495 (5th Cir. 2016) (applying the canon to hold that a broad overall definition of "company" in a previously unindented paragraph subjected appellee to liability despite a later indented subparagraph not specifically including appellee within the

definition of "company"). Once the canon is applied, the general "including" language in § 503(b) has equal force within the following indented subpart of § 503(b)(3)(D).

Furthermore, § 503(b) is not the only section of the Bankruptcy Code that utilizes "including" language in a manner that permits outcomes consistent with, but not explicitly mentioned within, a bankruptcy provision's directive. Section 362(d)(1) allows a party to request relief from the automatic stay "for cause, including the lack of adequate protection of an interest in property of such party in interest." *See* 11 U.S.C. § 362(d)(1). As courts have noted, "[n]either the statute nor the legislative history defines the term 'for cause' and the legislative history gives only very general guidance." *In re Sonnax Indus*., 907 F.2d 1280, 1285 (2d Cir. 1990). As the language makes clear, the statute's use of "including" contemplates cases where a requesting party may be granted relief from the automatic stay for reasons *other than* a lack of adequate protection, despite such reasons not being explicitly mentioned as grounds for relief. *Id.* Courts have granted relief under § 362(d)(1) for a multitude of reasons other than adequate protection: (1) permitting litigation in a more appropriate forum[2], (2) allowing a creditor to pursue a claim against a debtor merely to seek payment from insurance proceeds[3], and (3) allowing an action where the debtor has acted in bad faith.[4] Accordingly, the courts' expansion of what constitutes "cause" demonstrates the Bankruptcy Code's adaptability when inserted "including" language indicates that a provision is not exhaustive. *See* 11 U.S.C. § 362(d)(1).

The centerpiece of Petitioner's argument hinges on the use of the *expressio unius* canon, which states that Congress's expression of one thing within a statute implies the exclusion of the others. *N.L.R.B. v. SW Gen., Inc.,* 137 S. Ct. 929, 940 (2017); R. at 30. Under this principle, Petitioner asserts that the specific mention of "in a case under Chapter 9 or 11" in the statute

[2] *See In re Scarborough St. James Corp.*, 554 B.R. 714 (D. Del. 2016).
[3] *See In re Fernstrom Storage & Van Co.*, 938 F.2d 731 (7th Cir. 1991).
[4] *See In re Merchant*, 256 B.R. 572 (Bankr. W.D. Pa. 2000).

implies the exclusion of "in a case under Chapter 7." *See* 11 U.S.C. § 503(b)(3)(D). However, the force of the *expressio unius* canon depends on context. *See Marx v. Gen. Revenue Corp.,* 568 U.S. 371 (2013). Furthermore, the canon applies only when "circumstances support a sensible inference that the term left out must have been meant to be excluded." *Chevron U.S.A. v. Echazabal*, 536 U.S. 73, 81 (2002). Under these guiding principles, Petitioner fails to both (1) utilize the canon correctly, and (2) cite authority that substantiates its purported outcome.

In defense of its position, Petitioner relies on an unpublished opinion where the *expressio unius* canon is utilized to resolve a similar dispute in Petitioner's favor. *See In re United Educ. & Software*. 2005 WL 6960237, at *7 (B.A.P. 9th Cir. 2005); R. at 30. A closer reading, however, reveals that this case cuts directly against the proposition for which it is cited. Instead of giving the issue intensive analysis, *United Education & Software* reached its decision by conclusively citing and relying on *In re Mark Anthony Constr., Inc.*, another Ninth Circuit case. *Id.* at *19; *see In re Mark Anthony Constr., Inc.,* 886 F.2d 1101, 1106 (9th Cir. 1989). In *Mark Anthony*, the court held that interest incurred post-petition on unpaid taxes were includible as an administrative expense despite such interest not being explicitly authorized by § 503(b). *In re Mark Anthony Constr., Inc.* 886 F.2d at 1106. The court reasoned that "the administrative expense statute's use of 'including' renders the *expressio unius* rule inapplicable to section 503." *Id.* As the *Mark Anthony* court correctly observed, the addition of the word "including" did not create "circumstances support[ing] a sensible inference that [the interest on the taxes] must have meant to be excluded." *Id.*; *see Echazabal*, 536 U.S. at 81. Given this outcome, Petitioner incorrectly relies on a case holding that the *expressio unius* canon *does not* apply to § 503(b). *In re Mark Anthony Constr., Inc.* 886 F.2d at 1106. Accordingly, Petitioner has failed to show a use of the *expressio unius* canon that compels the result it seeks.

Petitioner next argues that Weinberg's interpretation of § 503(b) would render § 503(b)(3)(D) superfluous. *See In re Connolly* 802 F.3d 810, 821 (6th Cir. 2015) (O'Malley J., dissenting); R. at 30. If substantial contributions by a creditor in a Chapter 7 proceeding can be considered an administrative expense under the broader language of "including" in § 503(b), the argument goes, then there was no reason to specifically include substantial contributions in Chapter 9 and 11 under § 503(b)(3)(D). *See id.* While the canon of superfluity is undeniably a foundational canon of statutory interpretation, Petitioner's reliance is misguided. The canon against superfluity "assists only where a competing interpretation gives effect to every clause and word of a statute." *See Microsoft Corp. v. i4i Ltd. P'ship*, 564 U.S. 91, 92 (2011) (internal citations and quotations omitted). Petitioner's asserted interpretation of § 503(b) would not give effect to every word of § 503(b), and, therefore, it does not resolve the problem of superfluity. Instead, Petitioner's narrow construction excluding substantial contributions by a creditor in Chapter 7 cases would read the broader term "including" in § 503(b) completely out of the statute. *See* 11 U.S.C. § 503(b)(3)(D). Under the logic of the surplusage canon, neither interpretation provides a definitive measure of clarity, therefore, this particular tool of construction cannot be utilized to resolve the proper meaning of § 503(b).

Petitioner further contends that the failure to use the word "including" within the specific provision of § 503(b)(3)(D) precludes substantial contributions in Chapter 7 cases from ever being a permissible administrative expense. R. at 9. To bolster this argument, Petitioner cites § 503(b)(1)(A), a subset of administrative expenses where the "including" language is inserted within the specific provision, indicating that other expenses related to, but outside the provision may be considered. *Id.*; 11 U.S.C. § 503(b)(1)(A) (stating that administrative expenses may include "the actual, necessary costs and expenses of preserving the estate *including* . . . ."). The existence of this example, however, does not furnish sufficient evidence to prove a negative.

Despite a failure to explicitly use "including" within § 503(b)(3), an applicant's request may still be analyzed under the general "including" language of § 503(b). As one court has stated on this specific point, "[w]hat determines which level of the statute an applicant's request should be analyzed under? If the subsections cannot be expanded to include the request, what prevents the applicant from requesting the expansion of the subsections of § 503(b) to allow the request?" *In re Maqsoudi*, 566 B.R. 40, 44 (Bankr. C.D. Cal. 2017). The construction of the § 503 statute as a whole, "when section 503(b), subsection 503(b)(3), and subsections 503(b)(3)(A)-(F) are read as one coherent sentence, should not be read to limited subsections 503(b)(3)(A)-(F)." *Id.* Consequently, Petitioner's attempt to segregate parts of the statute, that is, parts of "one coherent sentence[,]" would appear then to be inconsistent with the statute as a whole. *Id.*

ii. The legislative history of § 503(b) does not preclude the allowance of substantial contributions by creditors in Chapter 7 cases.

In addition to the text of § 503(b), its legislative history demonstrates that Congress is capable of putting statutory constraints on the utility and breadth of § 503 administrative expense claims when it deems such action necessary. *See In re Maust Transp., Inc*., 589 B.R. 887, 898 (Bankr. W.D. Wash. 2018). Two separate accounts of legislative history demonstrate that Congress chose to delineate permissible administrative expense claims in § 503(b) without restricting Chapter 7 claims from the statute's scope.

First, Congress was fully capable of stating that § 503(b) excludes administrative expense claims to creditors in Chapter 7 cases if that is what it intended the statute to do. *In re Connolly* 802 F.3d at 818. The 2005 Amendments to § 503 added § 503(c)(1), a provision which served to explicitly prohibit priority status to certain "insider retention bonus administrative claims." Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, 109 P.L. 8, 119 Stat. 23, (2005); *see also* 11 U.S.C. § 503(c)(1). This example indicates that Congress could have said that

administrative claims are never allowed in Chapter 7, 12, or 13, like the specific prohibition in § 503(c)(1), but it instead chose not to do so. *Id.*

Second, Congress's intent in enacting § 503(b)(3)(D) was to resolve a problem that was recurring in Chapters 9 and 11, not to exclude the allowance of such fees in the rare Chapter 7 case. *In re Maust Transp., Inc*., 589 B.R. 887, 898 (Bankr. W.D. Wash. 2018). Petitioner contends that the legislative history of § 503(b)(3)(D) indicates that the provision was meant to exclusively reimburse efforts that directly benefited the bankruptcy reorganization process present in Chapter 9 and 11 cases. *See Lebron v. Mechem Fin. Inc.,* 27 F.3d 937, 944-45 (3d Cir. 1994); R. at 30. However, the legislative history makes clear that, in the process of drafting the current Bankruptcy Code, Congress did not intend administrative expenses to be shackled to the pre-Bankruptcy Code practice of allowing only those expenses related to plan-related activity. *See* S. REP. NO. 95–989 (1978), *as reprinted in* 1978 U.S.C.C.A.N., pp. 5787, 5852–53 (explaining that a substantial contribution "does not require a contribution that leads to confirmation of a plan"). Outside of plan confirmation, there may be a substantial contribution in many cases if a creditor "uncovers facts that would lead to a denial of confirmation, such as fraud in connection with the case." *Id.* As a House Report commented on the importance of administrative expense status, "those who must wind up the affairs of a debtor's estate must be assured of payment, or else they will not participate in the liquidation or distribution of the estate." H.R. REP. NO. 95-595 (1977), *as reprinted in* 1978 U.S.C.C.A.N., pp. 5963, 6147. Therefore, the purpose of § 503(b)(3)(D) is to "encourage creditors in whatever chapter of a bankruptcy case is filed to 'substantially contribute' to the estate by pursuing funds that will be available for distribution to claimants." *See In re Maust Transp., Inc.* 589 B.R. at 898. Accordingly, this clarification demonstrates that § 503(b)(3)(D) does not foreclose the allowance of Chapter 7 administrative expense claims.

iii. The equitable powers of the bankruptcy court accord authority to award priority administrative expense status to substantial contributions made by creditors in Chapter 7

cases.

It is proper for the bankruptcy court, a court of equity, to award a substantial contribution claim in a Chapter 7 case where a creditor like Weinberg substantially assists the Chapter 7 trustee. An interpretation of § 503(b)(3)(D) permitting priority status to Weinberg's expenses is consistent with the Bankruptcy Code policies of encouraging creditor participation in all cases and deterring post-petition misconduct.

It is well established that the bankruptcy court may exercise its equitable powers in a manner consistent with the provisions of the Code. *See Local Loan Co. v. Hunt*, 292 U.S. 234, 240 (1934). One such manner in which the court has permissibly exercised this authority within the confines of administrative expense claims has been through a mechanism known as the "fundamental fairness" doctrine. *See Reading v. Brown*, 391 U.S. 471, 485 (1968) (interpreting the precursor to § 503(b) broadly to carve out a basis for an administrative expense claim based on damages caused by a trustee's negligence in the operation of the estate). This doctrine is premised in one overlooked "decisive, statutory objective: fairness to all persons having claims against an insolvent." *Id.* at 477. It is often applied and expanded "in various contexts to allow an administrative expense claim if needed to deter the trustee or debtor from injuring third parties for whom fundamental fairness requires recompense." *In re United Educ. & Software*, 2005 WL at *20 (discussing the "fundamental fairness" doctrine). The policies underlying usage of the "fundamental fairness" doctrine are equally applicable to Weinberg's incurred expenses here.

Courts have used the "fundamental fairness" doctrine to find an allowable administrative expense where a debtor has, by its post-petition conduct, violated a court order or statute. *See In re E.A. Nord Co.*, 78 B.R. 289 (Bankr. W.D. Wash. 1987). In *E.A. Nord*, the debtor made legally frivolous arguments in its demand for post-petition arbitration with the creditor. *Id.* at 290. The court found that the creditor's attorney fees and arbitration costs incurred entertaining the debtor's

frivolous claims were entitled to administrative expense priority. *Id.* at 292. Whatever monetary ill potentially resulting to other creditors, the court reasoned, "is outweighed by the critical need to discourage parties from wasting valuable time and causing needless expense." *Id.*

Debtor engaged in post-petition conduct alleged to constitute a violation of a statute, namely, the Uniform Voidable Transfers Act. *See, e.g.,* CAL. CIV. CODE § 3439.04 (2018) ("A transfer made or obligation incurred by a debtor is voidable as to a creditor . . . if the debtor made the transfer . . . [w]ith actual intent to hinder, delay, or defraud any creditor of the debtor."); *see also* R. at 7. The allegations of fraudulent transfers to Patti Clemons ultimately resulted in a settlement to pay $75,000 to the estate. R. at 7. Like the debtor in *E.A. Nord*, Debtor in this case engaged in questionable post-petition conduct. *E.A. Nord* 78 B.R. at 290. Therefore, administrative expense priority should be accorded to Weinberg due to "the critical need" to curb post-petition misconduct and to deter the "injuring of third parties for whom fundamental fairness requires recompense." *E.A. Nord* 78 B.R. at 292; *see also In re United Educ. & Software* 2005 WL at *20.

The restrictive view advocated by Petitioner on Chapter 7 claims stems from the fact that the trustee "has a statutory duty to investigate and pursue claims held by the estate where appropriate." *In re Maust Transp., Inc.* 589 B.R. at 900; R. at 30. Therefore, it is argued, the language of § 503(b)(3)(D) fails to mention substantial contributions in Chapter 7 cases because of the watch-dog role of the Trustee; a role which would ordinarily make creditor participation unnecessary. *See In re Connolly N. Am., LLC*, 802 F.3d 810, 817 (6th Cir. 2015).

However diligent a trustee's efforts may be, this statutory obligation may not always provide sufficient protection of creditor interests. *Id.* As courts have recognized, "[m]any times the chapter 7 trustee is faced with a business and its books and records in shambles." *In re Health Trio, Inc*., 584 B.R. 342, 354 (Bankr. D. Colo. 2018). Cases where creditors' substantial contribution claims have been allowed under § 503(b)(3)(D) have been described as those in which

"the creditor played a leadership role that normally would be expected of an estate-compensated professional but was not so performed." *In re Bayou Grp., LLC*, 431 B.R. 549, 562 (Bankr. S.D.N.Y. 2010). As these decisions indicate, the language of § 503(b)(3)(D) does not foreclose the possibility of a creditor in a Chapter 7 case from ever being in a position to "substantially contribute" to the estate and trustee's efforts. *See In re Maust Transp. Inc.*, 589 B.R. at 899; 11 U.S.C. § 503(b)(3)(D). To not allow, under certain circumstances, creditors to "recover fees and costs incurred and paid with relation to this investigation [of the financial affairs of the debtor] and prosecution of action would have a chilling effect upon creditor participation within a bankruptcy proceeding." *In re Antar*, 122 B.R. 788, 791 (Bankr. S.D. Fl. 1990).

Weinberg's role in the fraudulent transfer investigation is similar to a creditor's awarded efforts in the case of *In re Rumpza*. 54 B.R. 107 (Bankr. S.D. 1985). In that case, the creditor's attorney sent a letter to the trustee informing her of irregularities in the debtor's schedules; namely, the omission of a $14,000 cabin. *Id.* at 107. In turn, the trustee was able to use the information in the debtor's Rule 2004 examination in a manner that ultimately pressed the debtor into revealing the cabin and subsequently include it in his schedules. *Id.* The court held that the attorney's efforts were "instrumental in the discovery of concealed assets for the estate[,]" and, therefore, the legal fees incurred were entitled to administrative expense status. *Id.* at 109. Like the creditor in *Rumpza*, Weinberg took the risk that he might not be compensated out of estate funds for his efforts. *In re Rumpza*, 54 B.R. at 109. Those efforts in total benefited all the creditors of the estate to the tune of $75,000. *Id*; *see also* R. at 7. Accordingly, like the creditor's compensated efforts in *Rumpza*, Weinberg's risk "[should] be rewarded." *Id.*

B. Even if this Court does not find that § 503(b) permits substantial contributions by creditors in all Chapter 7 cases, Weinberg has met his burden of establishing that his costs incurred in exposing the fraudulent transfer are entitled to priority administrative expense status.

Even if the Court is not persuaded that substantial contributions by creditors in Chapter 7 cases should be granted priority administrative expense status under § 503(b) as a categorical matter, Weinberg has met his burden of demonstrating that his expenses are entitled to such status in this case. As one court has observed, "[a]bsent a clear intention to disallow a type of expense, such expenses should rise or fall based on the facts of the case . . . ." *In re Maust Transp., Inc.,* 589 B.R. 887, 893 (Bankr. W.D. Wash. 2018). Even in jurisdictions that do not wholesale permit administrative expenses for Chapter 7 claims, these courts still speak of a burden shifting framework that a creditor may overcome to demonstrate that he is entitled to an administrative expense. *See In re United Educ. & Software*, 2005 WL at *11 (internal citations omitted) ("In the Ninth Circuit, the claimant has the burden of proving an administrative expense under a standard which "limit[s] abuses of the administrative expense priority."); *see also Lebron v. Mechem Fin*., 27 F.3d 937, 946 (3d Cir. 1994) ("A creditor should be presumed to be acting in his or her own interest unless the court is able to find that his or her actions were designed to benefit others who would foreseeably be interested in the estate.") The facts of this case, paired with the lack of a clear intention to bar substantial contributions in Chapter 7 cases, demonstrate that Weinberg's costs were "designed to benefit others would foreseeably be interested in the estate." *See Lebron* 27 F.3d at 946. Therefore, Weinberg's costs amount to permissible administrative expenses.

It is acknowledged that not every instance should warrant an allowance and authorization of fees for a creditor's counsel under § 503(b). *In re Zedda*, 169 B.R. 605, 608 (Bankr. E.D. La. 1994). Indeed, only those services that "substantially benefit the estate" should be allowed priority status. *Id.*; *see also In re Bayou Grp*., *LLC*, 431 B.R. 549, 560 (Bankr. S.D.N.Y. 2010) (explaining substantial contributions are a question of fact and that the movant bears the burden of proof by a preponderance of evidence). Therefore, to determine whether Weinberg's expenses are an

admissible priority administrative expense, it must be determined what constitutes a "substantial contribution" to the estate. *See* 11 U.S.C. § 503(b)(3)(D).

To constitute a "substantial contribution[,]" there must be an "actual, direct and demonstrable benefit to the bankruptcy estate." *In re Lister*, 846 F.2d 55, 57 (10th Cir. 1988). Weinberg incurred expenses in efforts that ultimately led to $75,000 being added to the estate for the benefit of other creditors. R. at 8. Therefore, this vast increase in estate value was objectively "an actual, direct and demonstrable benefit" to the estate. *Id.* Furthermore, the Trustee has conceded that this action constituted a substantial contribution to the estate. R. at 8. Courts have found this point critical to a recovery of administrative expenses that are not explicitly mentioned within § 503(b). *See In re Pappas*, 277 B.R. 171, 176 (Bankr. E.D.N.Y. 2002) (explaining that "[i]t is necessary that the trustee agree that the creditor's efforts actually 'assisted' the trustee"). Accordingly, Weinberg made a "substantial contribution" to the estate.

Fees incurred by a creditor to provide information that leads to the discovery of undisclosed debtor assets have been allowed as permissible administrative expenses under § 503(b)(3). *In re Javed*, 2018 WL 4955839 (Bankr. D. Md. Oct. 11, 2018). In *In re Javed*, shortly after the debtor filed Chapter 7 but before active engagement by the Chapter 7 trustee, the creditor took actions that led to the debtor disclosing assets thought to have been transferred pre-petition or not listed on debtor's schedules. *Id.* at *2. Under a similar burden shifting framework, the court explained that "[t]here is a general presumption against awarding substantial contribution claims to creditors in a chapter 7 case, rebuttable by the creditor." *Id.* at *5. Under this test, the court found that "creditor's pre-petition litigation and general familiarity with the Debtor allowed it to move more quickly than the Chapter 7 Trustee initially, thereby creating efficiencies for the Trustee and the estate." *Id.* at *6. Such creditor action, the court reasoned, led to a "swift recovery and sale of the

vehicles[,] underscor[ing] the value provided to the estate – it is tangible and not just theoretical value." *Id.*

Similar to the creditor's efforts in *In re Javed*, Weinberg's further investigation into the fraudulent transfer action provided a benefit to the estate. *Id.*; R. at 7. More specifically, Weinberg's efforts led to a settlement where Patti Clemons agreed to pay $75,000 to the bankruptcy estate. R. at 7. This $75,000 increase to the value of the estate is "tangible and not just theoretical value[,]" now capable of distribution amongst other creditors due solely to the fact that Weinberg undertook such action. *See In re Javed* 2018 WL at *6; *see also In re Zedda*, 169 B.R. 605, 607 (Bankr. E.D. La. 1994) (holding that "but for the work completed by the [creditors], a judgment in favor of the estate in the amount of $54,383.47 would not have been entered"). But for Weinberg's actions, creditors of the estate would be forced to accept their distributions less the substantial addition of $75,000 to the estate. R. at 7. As the creditor did in *In re Javed*, Weinberg has likewise met his burden of demonstrating a substantial contribution that amounted to a benefit to the estate.

Section 503(b)(3) allows for administrative expense priority for "substantial contributions" made by creditors like Weinberg. 11 U.S.C. § 503(b). It has been established that Weinberg made a substantial contribution to the estate, as the Trustee even concedes, in the amount of $75,000. R. at 7. This recovered sum constitutes a global benefit, not specific to Weinberg, for all creditors of the estate. Nowhere in the text of § 503(b) are creditors in Chapter 7 cases precluded from recovering administrative expenses under this provision. The text of § 503(b), its legislative history, and the equitable authority of the Bankruptcy Court all allow Weinberg to recover the fees incurred during his ultimately fruitful investigation.

CONCLUSION

The decision of the Thirteenth Circuit should be affirmed. The court properly held that Weinberg did not violate the automatic stay from the passive retention of collateral that he lawfully repossessed prior to the Debtor's bankruptcy filing. Furthermore, the court properly held that Weinberg was entitled to an administrative expense for his substantial contribution to the Debtor's bankruptcy estate. Therefore, Respondents respectfully request this Court to affirm the decision of the Thirteenth Circuit.

APPENDIX A

11 U.S.C. 362 (2012). Automatic stay

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970, operates as a stay, applicable to all entities, of—

. . . .

(3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;

. . . .

11 U.S.C. 503 (2012). Allowance of administrative expenses

(b) After notice and a hearing , there shall be allowed administrative expenses, other than claims allowed under section 502(f) of this title, including—

(1)(A) the actual, necessary costs and expenses of preserving the estate including—

(i) wages, salaries, and commissions for services rendered after the commencement of the case; and

(ii) wages and benefits awarded pursuant to a judicial proceeding or a proceeding of the National Labor Relations Board as back pay attributable to any period of time occurring after commencement of the case under this title, as a result of a violation of Federal or State law by the debtor, without regard to the time of the occurrence of unlawful conduct on which such award is based or to whether any services were rendered, if the court determines that payment of wages and benefits by reason of the operation of this clause will not substantially increase the probability of layoff or termination of current employees, or of nonpayment of domestic support obligations, during the case under this title;

(B) any tax—

(i) incurred by the estate, whether secured or unsecured, including property taxes for which liability is in rem, in personam, or both, except a tax of a kind specified in section 507(a)(8) of this title; or

(ii) attributable to an excessive allowance of a tentative carryback adjustment that the estate received, whether the taxable year to which such adjustment relates ended before or after the commencement of the case;

(C) any fine, penalty, or reduction in credit relating to a tax of a kind specified in subparagraph (B) of this paragraph; and

(D) notwithstanding the requirements of subsection (a), a governmental unit shall not be required to file a request for the payment of an expense described in subparagraph (B) or (C), as a condition of its being an allowed administrative expense;

(2) compensation and reimbursement awarded under section 330(a) of this title;

(3) the actual, necessary expenses, other than compensation and reimbursement specified in paragraph (4) of this subsection, incurred by—

(A) a creditor that files a petition under section 303 of this title;

(B) a creditor that recovers, after the court's approval, for the benefit of the estate any property transferred or concealed by the debtor;

(C) a creditor in connection with the prosecution of a criminal offense relating to the case or to the business or property of the debtor;
(D) a creditor, an indenture trustee, an equity security holder, or a committee representing creditors or equity security holders other than a committee appointed under section 1102 of this title, in making a substantial contribution in a case under chapter 9 or 11 of this title;
(E) a custodian superseded under section 543 of this title, and compensation for the services of such custodian; or
(F) a member of a committee appointed under section 1102 of this title, if such expenses are incurred in the performance of the duties of such committee;

(4) reasonable compensation for professional services rendered by an attorney or an accountant of an entity whose expense is allowable under subparagraph (A), (B), (C), (D), or (E) of paragraph (3) of this subsection, based on the time, the nature, the extent, and the value of such services, and the cost of comparable services other than in a case under this title, and reimbursement for actual, necessary expenses incurred by such attorney or accountant;
(5) reasonable compensation for services rendered by an indenture trustee in making a substantial contribution in a case under chapter 9 or 11 of this title, based on the time, the nature, the extent, and the value of such services, and the cost of comparable services other than in a case under this title;
(6) the fees and mileage payable under chapter 119 of title 28;
(7) with respect to a nonresidential real property lease previously assumed under section 365, and subsequently rejected, a sum equal to all monetary obligations due, excluding those arising from or relating to a failure to operate or a penalty provision, for the period of 2 years following the later of the rejection date or the date of actual turnover of the premises, without reduction or setoff for any reason whatsoever except for sums actually received or to be received from an entity other than the debtor, and the claim for remaining sums due for the balance of the term of the lease shall be a claim under section 502(b)(6);
(8) the actual, necessary costs and expenses of closing a health care business incurred by a trustee or by a Federal agency (as defined in section 551(1) of title 5) or a department or agency of a State or political subdivision thereof, including any cost or expense incurred—
(A) in disposing of patient records in accordance with section 351; or
(B) in connection with transferring patients from the health care business that is in the process of being closed to another health care business; and
(9) the value of any goods received by the debtor within 20 days before the date of commencement of a case under this title in which the goods have been sold to the debtor in the ordinary course of such debtor's business.

11 U.S.C. § 542. Turnover of property to the estate

(a) Except as provided in subsection (c) or (d) of this section, an entity, other than a custodian, in possession, custody, or control, during the case, of property that the trustee may use, sell, or lease under section 363 of this title, or that the debtor may exempt under section 522 of this title, shall deliver to the trustee, and account for, such property or the value of such property, unless such property is of inconsequential value or benefit to the estate.