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

Team Number R. 12
Counsel for Respondent

Oral Argument Requested

QUESTIONS PRESENTED

I. Whether 11 U.S.C. § 362(a)(3) is violated when a secured creditor passively retains possession of collateral that it lawfully repossessed from the debtor prior to the petition date?

II. Whether 11 U.S.C. § 503(b) permits a court to grant an administrative expense for a substantial contribution in a case under chapter 7 of the Bankruptcy Code?

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OPINIONS BELOW

In unreported opinions, the Bankruptcy Court for the District of Moot held that a creditor who retained possession of property that it legally repossessed before the debtor filed a petition for relief did not violate the automatic stay. R. at 7. The District Court also held that the creditor made a substantial contribution in the chapter 7 case when it expended money that benefited the estate by uncovering a fraudulent transfer. *Id.* The Thirteenth Circuit affirmed both decisions; its opinion is reproduced as the record in this appeal.

STATEMENT OF JURISDICTION

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

STATUTORY PROVISIONS

The relevant statutory provisions involved in this case are listed below and are reproduced in Appendices A through F.

U.S. CONST. amend. V.

11 U.S.C. § 102(3) (2012).

11 U.S.C. §§ 105(a-c) (2012).

11 U.S.C. § 362(a)(3) (2012).

11 U.S.C. § 503(b)(3)(D) (2012).

11 U.S.C. § 542 (2012).

STATEMENT OF THE CASE

Backstreets Plowing, Inc. (the "Debtor") operated a seasonal snow plow business, headquartered in the City of Badlands. R. at 3-4. In August 2015, Milton Weinberg loaned $450,000 to the Debtor via a promissory note, which enabled the Debtor to purchase new snow plow trucks for the upcoming season. R. at 4. The Debtor granted Weinberg a purchase money security interest in the trucks. *Id.* Also, Christopher Clemons, the Debtor's sole shareholder, personally guaranteed the loan. *Id.* The Debtor agreed to make monthly payments to Weinberg after the business began generating revenue in December 2015. *Id.*

After submitting a notably low bid, the Debtor won a snow plowing contract with the City of Badlands. *Id.* Despite concerns about the Debtor's ability to perform due to slim profit margins, the city awarded the Debtor a contract for the 2015-2016 winter, renewable at the city's sole discretion. *Id.* The Debtor turned a profit in the winter of 2015-2016 because the winter was mild, which lowered the Debtor's operating costs. R. at 5. However, the Debtor failed to make the agreed-upon payments to Weinberg. *Id*. Weinberg subsequently sued the Debtor on the note and Clemons on his personal guarantee in April 2016. *Id.* In October of 2016, the State of Moot Circuit Court granted Weinberg a default judgment against the Debtor and Clemons, jointly and severally, for $450,000 plus fees and interest. *Id.*

The city renewed the contract for the 2016-2017 winter. *Id*. The Debtor sustained heavy financial losses in the winter of 2016-2017 because its operating costs increased due to a brutal winter. R. at 5-6. The Debtor was unable to pay labor, maintenance, and fuel costs. R. at 6. Moreover, Weinberg lawfully repossessed the trucks pursuant to the court judgment in January 2017. *Id*. Subsequently, the Debtor breached its contract with the city, which threatened to cancel

the contract and sue for damages. *Id.* On February 4, 2017, the Debtor filed its chapter 11 petition for relief. *Id.*

After filing, the Debtor demanded that Weinberg immediately return the trucks. *Id*. Weinberg refused under the belief that the Debtor was required to bring a turnover action, which would allow Weinberg to demand adequate protection of his interest in the trucks. *Id.* Instead of filing a turnover action, the Debtor moved the bankruptcy court to determine that Weinberg violated the automatic stay by retaining the trucks. *Id.* The court denied the Debtor's motion, holding that Weinberg's mere retention of the trucks did not constitute an "act to . . . exercise control over property of the estate," and thus did not violate the automatic stay. *Id.*

In March of 2017, the Debtor appealed the bankruptcy court's ruling. *Id.* Shortly thereafter, the city informed the Debtor that it would not renew the contract; the Debtor deemed the reorganization infeasible and voluntarily converted the case into a chapter 7 liquidation. R. at 6-7. Post-conversion, Weinberg pursued collection efforts against Clemons on his personal guarantee. R. at 7. In the process, Weinberg incurred $25,000 in legal fees, but discovered the Debtor fraudulently transferred $100,000. *Id.* After Weinberg voluntarily provided the Trustee with this information, the Trustee recovered $75,000 in a settlement with the transferee. *Id.*

Weinberg motioned the court to have his legal fees deemed an administrative expense as a substantial contribution to the estate. *Id*. The Trustee opposed granting Weinberg an administrative expense for the legal fees despite acknowledging that the fees were a substantial contribution. *Id*. The Trustee asserted that section 503(b)(3)(D) expressly limits such administrative expenses to chapter 9 and 11 cases. R. at 8. The bankruptcy court granted Weinberg an allowed administrative expense for his legal fees, which the Trustee timely appealed. *Id.*

In September 2017, Tenth Avenue Freeze, Inc. ("Tenth Avenue") offered to purchase substantially all of the Debtor's assets, including the trucks in Weinberg's possession, conditioned on the Trustee's immediate recovery of the trucks. *Id.* Weinberg refused to relinquish possession. *Id.* Tenth Avenue withdrew its offer when it determined that the Trustee was incapable of obtaining the trucks prior to snow plowing season. *Id.* In January of 2018, Stone Pony Plowing, LLC offered $100,000 less than Tenth Avenue offered for the Debtor's assets, excluding the trucks. *Id.* The Trustee accepted the offer and the bankruptcy court approved the transaction. *Id.* The Trustee continued his appeals, which were consolidated. *Id.* Both, the appellate panel and Thirteenth Circuit affirmed the bankruptcy court's holdings that Weinberg's passive possession did not violate the automatic stay and that Weinberg was entitled to administrative priority for his substantial contribution. R. at 8, 21. This petition follows.

SUMMARY OF THE ARGUMENT

A creditor's passive retention of collateral that was lawfully repossessed prior to the petition date does not violate the automatic stay because (1) Congress provided a different mechanism for a debtor to recover property; (2) the Code's text and Congressional intent behind its amendments to the Code indicate only affirmative acts violate the stay; (3) the automatic stay freezes the status quo upon filing and passive possession preserves this status quo; and (4) holding that filing a petition for relief triggers an automatic duty to turnover collateral effectively modifies the Bankruptcy Code to create an automatic turnover provision, an absurd result.

First, Congress provided that the proper way for a debtor in possession to recover property is by filing a turnover action pursuant to section 542 of the Code. If the debtor requires immediate return of the property, the debtor may file an emergency motion for *ex parte* relief

pursuant to sections 105 and 542 of the Code. While contrary to the general prohibition against *ex parte* relief, such a procedure adheres to applicable law and provides creditors with due process that this Court would strip them of if it forced them to automatically turn over lawfully repossessed property.

Second, the automatic stay prohibits "*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. § 362(a)(3) (2012) (emphasis added). A textual examination reveals that this "act" must be an affirmative action because an "act" involves doing something, not the absence of doing something. Thus, not relinquishing possession of collateral does not amount to an act that violates the stay. An examination of the legislative intent behind the Code supports this finding.

Third, under the construct that the automatic stay freezes the status quo between creditors and debtors, passive retention of collateral maintains the status quo. Allowing creditors to retain possession preserves this status quo because it affords them the opportunity to assert defenses to turnover and protects their ability to adequately protect their interests in property.

Finally, holding that the automatic stay requires turnover involves reading section 542 as self-executing, which conflates the provisions of 362 and 542 to create an automatic turnover provision. It is only the purview of Congress to create such a provision. Further, an automatic turnover provision is absurd because it destroys the adversarial balance between possessory interest and adequate protection.

Next, bankruptcy courts are permitted to grant administrative expenses for substantial contributions in chapter 7 bankruptcy cases because the language of the Bankruptcy Code contemplates the allowance of administrative expenses, and allowing such administrative expenses furthers the Code's purpose.

Congress refused to expressly limit courts' discretion under 503(b)(3)(D), which indicates that Congress did not intend to prohibit substantial contributions in chapter 7 bankruptcies from being categorized as administrative expenses. Congress's use of non-limiting language in section 503(b) permits courts to consider more entities for administrative priority than those expressly enumerated. In essence, Congress designed section 503(b)(3)(D) to allow administrative expenses for substantial contributions in chapter 7 bankruptcies.

Further, allowing administrative expenses for substantial contributions in chapter 7 bankruptcies promotes fairness to creditors, prevents abuse by unscrupulous debtors, and encourages substantial contributions in the enumerated chapters—all of which further the Code's purpose.

For the reasons stated herein, this Court should hold that passive retention of lawfully repossessed collateral does not violate the automatic stay; and that bankruptcy courts are permitted to grant administrative expenses for substantial contributions in chapter 7.

ARGUMENT

I. PASSIVE RETENTION OF LAWFULLY REPOSSESSED COLLATERAL DOES NOT VIOLATE THE AUTOMATIC STAY BECAUSE CONGRESS ALREADY PROVIDED A MECHANISM FOR A DEBTOR TO RECOVER PROPERTY, THE MERE RETENTION OF PROPERTY IS NOT AN AFFIRMATIVE ACT, THE STATUS QUO IS MAINTAINED, AND THE CODE DOES NOT IMPOSE AN AFFIRMATIVE OBLIGATION TO TURN OVER THE PROPERTY WITHOUT DUE PROCESS.

Passive retention of lawfully repossessed collateral by a creditor is not an "act" and does not violate the automatic stay. When debtors file for bankruptcy relief, section 362(a), otherwise known as the "automatic stay," prevents creditors from making any act to collect on a debt, including repossessing assets within the debtor's estate. *Midlantic Nat'l Bank v. New Jersey Dep't of Env't Prot.*, 474 U.S. 494, 503 (1986). The automatic stay is a critical piece of the Code

that allows debtors to reorganize. *Id.* Section 362(a) stays "any *act* to obtain possession of property of the estate . . . or to exercise control over the property of the estate." 11 U.S.C. § 362(a)(3) (2012) (emphasis added). A creditor who lawfully repossessed property prior to the debtor's filing for relief, such as Weinberg did in this case, has no obligation to return the property to the debtor under section 362 because (1) Congress has provided a separate mechanism for the debtor to recover the property; (2) the text of section 362(a) requires an affirmative act to violate the stay; (3) the automatic stay freezes the status quo of the estate at the time of filing, and passive possession preserves the status quo; and (4) courts should not combine turnover with the automatic stay to create automatic turnover because turnover is not self-executing.

The automatic stay "gives the debtor a breathing spell from his creditors. It stops all collection efforts, all harassment, and all foreclosure actions." H.R. REP. NO. 95-595, at 340 (1978). A creditor, like Weinberg, who has not attempted to collect, harass, or foreclose on a debtor's property after the debtor files the petition for relief, *see* R. at 3-9, should not be required to return lawfully repossessed property under section 362. While the automatic stay provides the debtor a breathing spell from creditors, it does not require creditors to breathe life into an inept debtor. Therefore, this Court should hold that passive possession of legally repossessed property does not constitute a violation of the automatic stay.

A. Passive retention of lawfully obtained property does not violate the automatic stay because debtors have a sufficient means of recovering property.

This Court should not fashion a new mechanism for a debtor to recover property when Congress already provided one. Pursuant to section 542(a), "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 . . . shall deliver to the trustee, and account for, such property or the value of such property." 11 U.S.C. § 542(a) (2012). Turnover requires an adversarial proceeding. FED. R. BANKR. P. 7001(1) (stating that "a proceeding to recover money or property" requires an adversary proceeding). Notice of such proceeding requires a twenty-one-day notice to the creditor. *See* FED. R. BANKR. P. 2002. The notice and hearing requirements generally preserve the Constitutional guarantee of due process. *See Mullane v. Cent. Hanover Bank & Tr. Corp.*, 339 U.S. 306, 313 (1950). Congress provided that turnover is the appropriate mechanism, which can be achieved without compromising the feasibility of a reorganization.

However, in *Mullane*, this Court stated, "an elementary and fundamental requirement of due process in any proceeding *which is to be accorded finality* is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Id.* at 314 (emphasis added). Generally, Bankruptcy Rules prohibit *ex parte* communications with the court, except as permitted by applicable law. *See* FED. R. BANKR. P. 9003(a). Yet, Congress provided bankruptcy courts with equitable power to issue orders, not inconsistent with the Code or Bankruptcy Rules, to "further the expeditious and economical resolution of the case." 11 U.S.C. § 105(d)(1) (2012); *see also Law v. Siegel*, 571 U.S. 415, 421 (2014). In *Mitchell v. W. T. Grant Co.*, 416 U.S. 600, 610 (1974) (quoting *Inland Empire Dist. Council, Lumber & Sawmill Workers Union v. Millis*, 325 U.S. 697, 710 (1945)), this Court held that an *ex parte* seizure of property under judicial supervision did not violate due process because the "requirements of due process of law 'are not technical, nor is any particular form of procedure necessary.'"

While debtors may require property of the estate to generate income within the standard twenty-one-day notice period, this Court should not fashion a new mechanism to satisfy this via

the automatic stay when one, created by Congress, and which affords due process, already exists. At the outset of a reorganizing bankruptcy in which the debtor requires immediate use of property, the debtor may file, *ex parte*, an emergency motion for turnover pursuant to sections 105 and 542 of the Code. The Bankruptcy Rules governing adversary proceedings generally incorporate the Federal Rules of Civil Procedure. *See* FED. R. BANKR. P. 7003. The Federal Rules of Civil Procedure provide that equitable relief, which lasts up to fourteen days, may be granted without notice and a hearing upon a showing of immediate or irreparable injury. *See* FED. R. CIV. P. 65. Therefore, a bankruptcy court may fashion preliminary injunctive relief in the form of a turnover order—in doing so, the court would naturally require the debtor maintain insurance on the property, thus providing the creditor with necessary adequate protection.

Instead of manipulating the automatic stay via conflation with turnover to create an automatic turnover provision, this Court should mandate the following procedure: (1) along with the petition for relief, the debtor should make every effort to notify the creditor in possession of property, but may file an emergency *ex parte* motion for turnover pursuant to sections 105 and 542 of the Code; (2) if the bankruptcy court finds that the debtor is likely to prevail on the merits in a turnover action and that the debtor would suffer irreparable harm absent equitable relief, it may grant a temporary order requiring turnover; and (3) as soon as practicable, the bankruptcy should shall hold a hearing on the matter (something the creditor in possession would likely pursue if possession is important) and make a final determination. This flexible procedure comports with the "traditional notions of fair play and substantial justice" implicit in due process, *Milliken v. Meyer*, 311 U.S. 457, 463 (1940), because the "very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." *Cafeteria & Rest. Workers Union, Local 473 v. McElroy*, 367 U.S. 886, 895 (1961).

Additionally, enabling the debtor to recover property necessary to reorganize, but preserving the creditor's rights furthers the "expeditious and economical resolution of the case." *See* § 105(d)(1).

In this case, Weinberg believed that the Debtor carried the burden of bringing a turnover action, which would provide him an opportunity to demand adequate protection of his interest in the trucks. R. at 6. If the preceding procedures were followed, the Debtor would have presented Weinberg with a court order that required turnover, but necessitated the Debtor carry insurance, which would have preserved Weinberg's rights pending a hearing. This procedure would provide Weinberg with due process of law, which guarantees "no particular form of procedure; it protects substantial rights." *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333, 351 (1938). Because Congress already provided an effective mechanism for a debtor to recover property, this Court should not fashion a new mechanism by manipulating the automatic stay to apply to passive retention.

B. Passive retention of lawfully obtained property does not violate the automatic stay because neither the textual nor the intentional interpretations of section 362 suggest that passive retention is an "act" or an "exercise [of] control."

The text and legislative intent of the Code do not consider passive retention to be an act exercising control over property. Four circuits conclude that passive retention of an asset constitutes "exercising control" over the asset. *See Weber v. SEFCU (In re Weber)*, 719 F.3d 72, 81 (2d Cir. 2013); *Thompson v. Gen. Motors Acceptance Corp.*, 566 F.3d 699, 707-708 (7th Cir. 2009); *California Emp't Dev. Dep't. v. Taxel (In re Del Mission)*, 98 F.3d 1147, 1151 (9th Cir. 1996); *Knaus v. Concordia Lumber Co. (In re Knaus)*, 889 F.2d 773, 775 (8th Cir. 1989). However, a textual examination of the Code reveals that this conclusion is flawed because the word "act" modifies both clauses of section 362(a)(3), an act must be an affirmative action under

section 362(a)(3), and the legislative intent of the Code supports finding section 362(a)(3) requires an affirmative act to violate the automatic stay.

Interpretation of the Code must start "with the language of the statute itself" prior to evaluating practical or policy considerations. *Ransom v. FIA Card Servs., N.A.*, 562 U.S. 61, 69 (2011). When the "statute's language is plain, the sole function of the courts is to enforce it according to its terms." *Frieouf v. United States (In re Frieouf),* 938 F.2d 1099, 1102-03 (10th Cir. 1991). After a debtor files a petition for relief under the Code, "*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" is automatically stayed. § 362(a)(3) (emphasis added).

The plain language of section 362 requires an affirmative action to violate the automatic stay. When a statute uses a term, but does not define it, courts look to the ordinary meaning of the term within legal dictionaries. *See Asgrow Seed Co. v. Winterboer*, 513 U.S. 179, 187 (1995). The ordinary definition of "act" is "[s]omething done or performed, esp[ecially] voluntarily; a deed. – Also termed *action*." *Act,* Black's Law Dictionary (10th ed. 2014). (emphasis in original). Under section 362(a)(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" violates the automatic stay. § 362(a)(3). The definition of "act" includes doing something, not the absence of doing something. *See Act*, Black's Law Dictionary (10th ed. 2014); *WD Equip. v. Cowen (In re Cowen),* 849 F.3d 943, 949 (10th Cir. 2017). Therefore, a creditor must *do* something to violate the automatic stay under section 362.

The phrase "any act" equally modifies both "to obtain possession" and "to exercise control." *See In re Cowen*, 849 F.3d at 949. Separating the "to exercise control" clause from the rest of the section without applying "any act" results in the entire clause reading: "applicable to

all entities, of—to exercise control over property of the estate." *See* § 362(a)(3). Obviously, this reading makes no grammatical sense and the Code cannot be held to destroy itself. *Citizens Bank of Md. v. Strumpf*, 516 U.S. 16, 20 (1995). Due to this absurdity, "any act" must apply to both clauses. Under this proper interpretation, the automatic stay is violated by "any act . . . to exercise control over property of the estate." § 362(a)(3). Thus, "exercis[ing] control" requires an act, which as discussed above, cannot be passive.

When a creditor does nothing, the plain language of the statute dictates that the creditor does not violate the stay. *Citizens Bank*, 516 U.S. at 21. In *Citizens Bank*, this Court held that a bank that did not pay a debtor sums on its bank account post-petition did not violate the stay because the administrative hold was not considered an act. *Id.* Likewise, Weinberg did not *do* anything after the petition was filed. *See* R. at 3-9. He did not repossess, he did not harass, he simply held onto the lawfully repossessed property. *See id*. Thus, without an affirmative act, the automatic stay is not violated.

When statutory language is unambiguous, courts do not inquire into the statute's meaning and their inquiry ordinarily ends at the text. *Lamie v. United States Tr.*, 540 U.S. 526, 534 (2004). However, the Second, Seventh, Eighth, and Ninth Circuits' conclusion that passive retention of an asset constitutes an act "exercising control" over the asset endorsed a dramatic change in practice. This change necessitates the consultation of legislative history to evaluate the soundness of the circuit courts' decisions. *See Pennsylvania Dept. of Pub. Welfare v. Davenport*, 495 U.S. 552, 563 (1990).

Congress did not intend for passive retention of property to violate the automatic stay. The passive violation courts contend that "exercising control" clause was intended to include post-petition retention. *See In re Knaus*, 889 F.2d at 773. However, notwithstanding the

requirement of an *act* to violate the stay, these courts misinterpret Congress's intent. Prior to the 1984 amendments to the Code, the language of section 362(a)(3) lacked the "to exercise control" clause. *In re Young*, 193 B.R. 620, 623 (Bankr. D.D.C. 1996). Congress's addition of "exercising control" to "obtaining possession" indicated that Congress intended these provisions to differ in their meanings. *See id.* at 624.

Acts to "exercise control" cover different acts than those acts that "obtain possession." For instance, the act of selling intangible property, such as intellectual property, clearly falls within the "exercise control" clause because intangible property rights are not capable of real possession. *See In re Cowen*, 849 F.3d at 950. Including protections for intangible property that were not previously covered under the pre-1984 version of the Code gives meaning to the new language and furthers Congress's intent. *See id.*

Ultimately, the purpose of the automatic stay is to "make sure that creditors do not destroy the bankruptcy estate in their scramble for relief." *United States v. Inslaw, Inc.*, 932 F.2d 1467 (D.C. Cir. 1991). Passive retention does not destroy property within the estate. In fact, retention preserves it. Post-petition passive retention merely delays the debtor's demands until a proceeding can occur, preserving the estate and due process. Therefore, both the plain meaning of the Code's text and Congress's intention regarding its Code amendments require that a creditor engage in an affirmative act in order to violate the automatic stay. Passive retention does not amount to an affirmative act.

C. Passive retention of lawfully obtained property preserves the status quo and thus, does not violate the automatic stay.

The purpose of the automatic stay is to freeze collection efforts by creditors, stop harassment of the debtor, and to "maintain the status quo between the debtor and [its] creditors." *Zeoli v. RIHT Mortg. Corp.*, 148 B.R. 698, 700 (D.N.H. 1993). Thus, section 362(a)(3) is often

considered to freeze the status quo upon filing a petition. *See Perez v. Deutsche Bank Nat'l Tr. Co. (In re Perez)*, 556 B.R. 527, 537 (B.A.P. 1st Cir. 2016) (holding that the automatic stay places an immediate freeze on parties at the outset of bankruptcy proceedings). Allowing passive retention keeps the status quo and does not violate the automatic stay because it ensures that a creditor does not forgo its statutory defenses under the Code, and that the creditor can adequately protect itself.

A central objective for the stay is to "provide a reasonable opportunity for a financially distressed debtor, its creditors and the [c]ourt to determine whether there are reasonable prospects for the debtor's survival." *I.C.C. v. Holmes Transp., Inc.*, 931 F.2d 984, 987 (1st Cir. 1991). Post-petition affirmative acts certainly constitute violations of the automatic stay, however, creditors that maintain possession of lawfully pre-petition-seized property are "merely complying with the spirit of the [section] 362 freeze." *In re Richardson*, 135 B.R. 256, 258-59 (Bankr. E.D. Tex. 1992).

Although the stay grants relief to the debtor, it does not require creditors "to capitulate to the debtor's every demand." *Checkers Drive-In Rests., Inc. v. Comm'r of Patents & Trademarks*, 51 F.3d 1078, 1084-85 (D.C. Cir. 1995). In *Checkers*, the court recognized that the automatic stay offered protection for creditors who would otherwise be unable to seek their own remedies. *Id.* at 1082. Therefore, courts must consider both the interests of debtors and creditors when they evaluate whether the status quo is maintained. *See id.*

Preserving the status quo requires that the creditor maintain its statutory rights under the Code. If this Court holds that passively retaining lawfully repossessed property violates the automatic stay, then it effectively forces creditors to waive any motion for adequate protection under section 363(e). *See In re Young*, 193 B.R. at 625. Section 363(e) guarantees creditors the

right to demand adequate protection. 11 U.S.C. § 363(e) (2012). Adequate protection generally provides creditors with an interest in property of the estate payment if the property decreases in value. *See* 11 U.S.C. § 361 (2012). In cases where debtors fail to provide adequate protection to creditors, preserving the status quo would prevent the debtor from depriving the creditor its statutory right to adequate protection. *See In re Richardson*, 135 B.R. at 258-59. Thus, allowing passive possession to violate the automatic stay deprives the creditor of its right to adequate protection and disrupts the status quo.

This case is illustrative. The Debtor failed to make a single payment due on the promissory note to Weinberg. *See* R. at 5-6. If Weinberg turned over the trucks without a court order, he would be forced to incur the substantial risk that the Debtor would fail to adequately protect Weinberg's interest in the trucks. The risk is even more substantial when vehicles are at issue. In cases involving vehicles, creditors should maintain the status quo by retaining the vehicle until the Debtor provides adequate protection. *In re Denby-Peterson*, 576 B.R. 66, 81-82 (Bankr. D.N.J. 2017) (holding that a creditor who retained possession of the vehicle pending the debtor's provision of proof of insurance did not violate the automatic stay).

Denby-Peterson involved a vehicle used for personal purposes; however, a creditor has an even greater interest in adequate protection for vehicles used for snow plowing because they endure harsher wear and tear. In this case, the Debtor failed to offer proof of insurance or remuneration in the form of cash payments to offset depreciation, which was assured to occur. *See* R. at 5-6. Further, Weinberg believed, and the bankruptcy court agreed, that the proper avenue for the Debtor to recover its property was via a turnover action pursuant to section 542. *See* R. at 6. Holding that passive possession violates the stay would deprive creditors of their statutorily guaranteed rights and disrupt the balance of the debtor/creditor relationship. Thus, this

Court should determine that passive possession preserves the status quo because it preserves the creditors' rights granted in the Code and does not violate the automatic stay.

D. Passive retention of lawfully obtained property does not violate the automatic stay because creditors are entitled to ensure their property interests are adequately protected and, unlike the automatic stay, turnover is not self-executing.

Weinberg did not violate the automatic stay because he was concerned with adequate protection, which requires an adversarial proceeding, which had not yet occurred. Trustees are authorized to use or sell estate property upon court approval. § 363(b)(1). If the property of the estate is in another entity's "possession, custody, or control . . . [that entity] shall deliver" the property to the trustee, if the property has any value. § 542(a).

Section 542, the turnover power, allows the trustee to reclaim the debtor's property that was out of the debtor's possession at the time of filing. *Inslaw Inc.*, 932 F.3d at 1471. While this power turns the tables on the creditor, the Code guarantees the creditor a seat at the table. Bankruptcy Rule 7001(1) provides that proceedings to recover money or property, including turnover proceedings, require an adversarial proceeding. *In re Perkins*, 902 F.2d 1254, 1258 (7th Cir. 1990). Creditors have a right to retain possession of a debtor's property if the creditor has concerns about the debtor's ability to provide adequate protection to the property's value. § 363(e); *In re Young*, 193 B.R. at 621.

Generally, courts that hold the automatic stay can be violated passively read sections 362 and 542 together, to find the turnover power is "self-executing." *See In re Knaus*, 889 F.2d at 775 (holding that the duty to turnover property arises when the petition is filed); *Thompson*, 566 F.3d at 702 (holding that reading sections 542 and 362 together furthers the goals of bankruptcy). This holding would mean that possessors of estate property must turn over it over without the due process provided by an adversarial proceeding. Yet, creditors should have the right to

passively retain property without violating the stay to demand their adequate protection rights in an adversarial proceeding. *See In re Young*, 193 B.R. at 625 (holding that retaining possession in pending resolution of adequate protection does not violate the automatic stay); *In re Cowen*, 849 F.3d at 948.

1. Section 542(a) provides an adversarial balance between possessory interest and adequate protection.

Section 542(a) balances the possessory interest of the estate, and the creditor's right to adequate protection. In *United States v. Whiting Pools, Inc.*, 462 U.S. 198, 211-12 (1983), this Court held that the estate had a possessory interest in property that was seized prepetition. However, this Court in *Whiting Pools* was silent on the timing of turnover, and merely stated that the creditor must comply with the Code when seeking protection of its interests. *Id.* The IRS, in *Whiting Pools*, attempted to make a sale of a debtor's property post-petition. *Id.* at 200-01. Unlike the IRS in *Whiting Pools*, Weinberg complied with the Code by not selling the trucks, but merely passively possessing them until he could demand adequate protection. R. at 6.

Interpreting section 542(a) as self-executing eviscerates the secured creditor's right to adequate protection and lacks tradeoff for the debtor and trustee, which creates an adversarial imbalance. *In re Young*, 193 B.R. at 626. Forcing the creditor to turn over property to the trustee tears the right to adequate protection from the creditor's hand. *Id.* Additionally, some forms of adequate protection, such as a lien holder's right to obligate a debtor to insure collateral, would be utterly worthless. *In re Hall*, 502 B.R. 650, 660 (Bankr. D.D.C. 2014). If the debtor defaced or destroyed the uninsured property, the debtor would destroy the lien as well. *Id.*

Further, the "passive violation" courts' interpretation eliminates defenses to turnover provided within section 542(a). For instance, the creditor would have no opportunity to argue that the property is "of inconsequential value to the estate" before having to forfeit the property.

See § 542(a). Also, interpreting turnover as self-executing harms a creditor's nonbankruptcy right to lawfully repossess property, which potentially disincentivizes lending, and thus harms commerce. This Court should mandate section 542(a) be used as the procedural device for the purpose designed by Congress. *See In re Hall*, 502 B.R. at 655. Section 542(a) provides the ability for the trustee to recover property without harming the creditor's right to assert defenses.

Section 542 should not be construed as self-executing because this Court was silent on the issue in *Whiting Pools* and the pre-Code process for a turnover action required a court order. *Whiting Pools* was decided before the 1984 amendments to the Code, and the suggestion of self-executing turnover. *In re Hall*, 502 B.R. at 654-55. This Court in fact was silent on the issue of self-execution in *Whiting Pools*. *See* 462 U.S. at 208. Courts did not regard turnover as self-executing before the amendments to the Code and should not construe turnover as self-executing after the amendments. *See In re Hall*, 502 B.R. at 655. Section 542(a) codified the pre-Code practice of turnover, requiring that it be ordered by a court against a creditor in possession of seized property, but on the condition of adequate protection. *Whiting Pools*, 462 U.S. at 208 (citing *Reconstruction Fin. Corp. v. Kaplan*, 185, F.2d 791, 796 (1st Cir. 1950)).

While the bankruptcy court can "*order* the turnover of collateral in the hands of a secured creditor," *Whiting Pools*, 462 U.S. at 208 (emphasis added), requiring such turnover without notice and a hearing not only eliminates a creditor's right to adequate protection, but amounts to a taking in violation of due process. *See* U.S. CONST. amend. V. Therefore, this Court should hold that section 542 is not self-executing and requires compliance with Rule 7001.

2. Sections 362 and 542 have different operations and should be read independently.

The turnover power is not self-executing because the statutory construction of the Code does not place an affirmative duty to turn over property. The "passive violation" courts read

sections 542 and 362 together, but 542 is nowhere to be found within 362. *See* § 362. The only reference to section 362 within section 542 is the provision to grant relief for entities who transfer property in good faith without notice of a bankruptcy filing. *See* § 542(c). If Congress intended an affirmative duty to turnover property, it would have done so explicitly when amending the Code. *In re Cowen,* 849 F.3d at 950. Thus, there is no need for courts to read section 362 to enforce a turnover action through section 542(a), especially because a trustee can move for turnover via section 542 at any time. *Id.*

While section 542 allows creditors to voluntarily relinquish their property, it does not force them to do so. Rather, section 542 empowers trustees to move for turnover when creditors do not give up property voluntarily. *In re Hall*, 502 B.R. at 656. Reading the statutes together erroneously conflates the automatic stay's self-executing, affirmative duty to refrain from any act to collect, with the duty to turnover property, creating an automatic turnover duty. Such a result is absurd.

Combining the unrelated statutory provisions of 542 and 362 is erroneous. Section 542(b) provides that "an entity that owes a debt that is property and that is matured . . . *shall* pay such debt to . . . the trustee." § 542(b) (emphasis added). Courts have consistently held that section 542(b), having the same "shall" language as 542(a), is not self-executing. *See, e.g., Citizens Bank,* 516 U.S. at 20; *Pardo v. Nylcare Health Plans, Inc. (In re APF Co.),* 274 B.R. 408, 417 (Bankr. D. Del. 2001); *In re Randolph Towers Coop., Inc.*, 458 B.R. 1, 6-7 (Bankr. D.D.C. 2011). The "passive violation" courts cannot logically contend that "shall" is passive in one subsection of the Code, yet active in the very next. Because turnover actions provide an adversarial balance and sections 362 and 542 are distinctly independent, passive retention of lawfully repossessed property does not violate the automatic stay. For the foregoing reasons, this

Court should hold that passive possession of legally repossessed property does not violate the automatic stay.

II. ADMINISTRATIVE EXPENSES FOR SUBSTANTIAL CONTRIBUTIONS IN CHAPTER 7 BANKRUPTCY ARE ALLOWED BECAUSE THE LANGUAGE OF SECTION 503(b) ALLOWS ADDITIONAL ADMINISTRATIVE EXPENSES AND ALLOWING THE EXPENSES FURTHERS THE CODE'S PURPOSE.

This Court next decides whether a creditor who makes a substantial contribution to the estate in a chapter 7 bankruptcy can be granted an administrative expense under section 503(b)(3)(D). Bankruptcy courts have statutory and inherent powers to create rules to advance the Code's purpose. *See, e.g.*, 11 U.S.C. § 105(a) (2012); *Marrama v. Citizens Bank of Mass.*, 549 U.S. 365, 373 (2007). However, these powers are constrained "and can only be exercised within the confines of the Bankruptcy Code." *Law v. Siegel*, 571 U.S. 415, 421 (2014) (citations omitted). Therefore, a bankruptcy court lacks the power to contradict any specific provision of the Code. *Id.* Thus, to determine if substantial contributions in chapter 7 bankruptcies can be granted administrative priority, this Court should first determine if allowing such administrative expenses directly contradicts the language of the Code. Then, this Court should decide if allowing administrative expenses for substantial contributions in chapter 7 bankruptcies advances the Code's purpose.

Administrative expenses are allowed for substantial contributions in chapter 7 bankruptcies because (1) the language of the Code contemplates additional administrative expenses and (2) allowing the administrative expenses advances the Code's purpose. First, the language of the Code allows administrative expenses for substantial contributions in chapter 7 bankruptcies because the Code does not expressly prohibit administrative expenses and the Code contemplates that more entities might be eligible for administrative expenses than those listed in section 503(b)(3)(D). Second, allowing administrative expenses for substantial contributions in

chapter 7 cases advances the Code's purpose because doing so is fundamentally fair, prevents abusive practices by the debtor, and encourages substantial contributions in all bankruptcy chapters.

A. The Bankruptcy Code allows courts to categorize substantial contributions in chapter 7 as administrative expenses because the language of the code does not expressly prohibit it and the Code anticipates more entities might be eligible for administrative expenses by its use of a non-exclusive list.

The Code's language suggests this Court should hold that substantial contributions in chapter 7 bankruptcies can be granted administrative priority. Congress's refusal to expressly limit courts' discretion under 503(b)(3)(D) indicates that Congress did not intend to prohibit substantial contributions in chapter 7 bankruptcies from being categorized as administrative expenses. *See* 11 U.S.C. § 503(b)(3)(D) (2012). Further, Congress allowed courts to consider more entities for administrative priority than those listed after 503(b) because the section uses non-limiting language. Thus, Congress built a mechanism into section 503(b)(3)(D) to allow administrative expenses for substantial contributions in chapter 7 bankruptcies.

Bankruptcy courts have equitable power to fashion rules within the Code's language. In *Law*, this Court invalidated a judge-made rule that allowed the trustee to "surcharge" the homestead exemption and move the exemption into an administrative expense when there were extraordinary circumstances. 571 U.S. at 421. This Court invalidated the surcharge rule because it directly contradicted the language of section 522(k), which explicitly stated the homestead exemption is "not liable for payment of *any* administrative expense." *Id.* at 422 (emphasis added). When interpreting the text of a statute, courts should not look beyond the text if the language is clear and unambiguous. *See Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997). *See also Marrama*, 549 U.S. at 372-73 (refusing to rely on committee reports to affirm the First

Circuit's holding that a chapter 7 debtor did not have an absolute right to convert to chapter 13 because the language of sections 706 and 1307(c) was clear and nothing in the Code prevented a judge denying a request for conversion after finding "bad faith" in fact).

When a list is non-exhaustive, courts may provide additional items to the list that are not expressly stated in order to fulfill the Code provision's purpose. *See Mediofactoring v. McDermott (In re Connolly N. Am., LLC)*, 802 F.3d 810, 816 (6th Cir. 2015). The Code explains that the words "include" and "including" are not limiting and lists that follow the words are non-exhaustive. 11 U.S.C. § 102(3) (2012). In *Marrama*, bad faith was not one of the enumerated "for cause" reasons listed under section 1307(c), which provided the statutory basis to deny a conversion from chapter 7 bankruptcy to chapter 13 bankruptcy. 549 U.S. at 373. However, the list under 1307(c) was non-exhaustive because it used the word "including." *Id.* at 373 n.8. This Court reasoned that the limitations for denying a conversion were not restricted by the listed causes under section 1307(c) and the language of the Code did not prohibit finding additional "for cause" reasons. *Id.* at 374. In *Connolly*, the Sixth Circuit determined that the word "including" expanded the bankruptcy chapters eligible for an administrative expense under 503(b)(3)(D) beyond what is listed because Congress defined "including" as non-exhaustive and it did not intend for the word to be meaningless. 802 F.3d at 816. The Sixth Circuit explained that Congress "built a mechanism into 503(b) for bankruptcy courts to reimburse expenses not specifically mentioned in 503(b) subsections." *Id*.

The language of the Code does not expressly forbid the grant of administrative expenses for substantial contributions in chapter 7 bankruptcy cases. In *Law*, this Court found that the language of 522(k) expressly forbid the homestead-surcharge rule because 522(k) states that the homestead exemption is "not liable for payment of *any* administrative expense." 571 U.S. at 421

(emphasis added). There, the judge attempted to use the homestead exemption as an administrative expense, which directly contradicted the language in the section. *Id.* In this case, section 503(b)(3)(D) does not expressly forbid other chapters from being included as an administrative expense. The section does not say that administrative expenses for substantial contribution are not allowed in a chapter 7 bankruptcy; rather, it explains that "a creditor, an indentured trustee, an equity security holder, or a committee representing creditors or equity security holders" are entitled to an administrative expense "for making a substantial contribution in a case under chapter 9 or 11." *See* § 503(b)(3)(D).

Section 503(b)(3)(D) does not restrict administrative expenses under chapter 7 by its language. Unlike the language in section 522(k), it does not expressly say that chapter 7 bankruptcies "do not qualify" for an administrative expense after a substantial contribution, instead it states simply that chapter 9 and 11 bankruptcies do qualify. *See id.* The failure of Congress to expressly limit the discretion of bankruptcy courts under section 503(b)(3)(D) distinguishes this case from *Law* and demonstrates that the language of the section does not expressly forbid the grant of additional administrative expenses.

By using the word "including," Congress contemplated more entities would be eligible for administrative expenses than those listed under section 503(b)(3)(D). The Code explains that the word "including" is not limiting. *See* § 102(3). When a section uses the word "including" prior to a list, the subsequent list is viewed as non-exhaustive and not limited to only those enumerated entities. *See Connolly*, 802 F.3d at 816. Here, section 503(b) states: "[a]fter notice and a hearing, there shall be allowed administrative expenses, other than claims allowed under section 502(f) of this title, *including*—. . . ." § 503(b) (emphasis added). It then lists various entities eligible for administrative expenses. *Id.* By using the word "including" in 503(b)

Congress made the subsequent list of eligible entities under 503(b)(3)(D) non-exhaustive and not limited to only those listed entities. Thus, the language of the Code contemplates the allowance of administrative expenses for bankruptcy chapters beyond the listed chapters of 9 and 11.

Courts have the power to add unenumerated items to non-exhaustive lists in the Code. In *Marrama*, this Court reasoned that the list in 1307(c) was non-exhaustive and did not prevent a judge denying a conversion based on a finding of "bad faith," which was not listed as a reason for denial in 1307(c). 549 U.S. at 373. Notably, section 1307(c) used the word "including" prior to the listed reasons for denial. *Id*. at 373 n.8. Similarly, section 503(b) uses the word "including" prior to the listed entities eligible for administrative expenses. § 503(b). The use of the word, "including," in section 503(b) expands the list of eligible entities beyond the expressly listed entities, like the use of the word, "including," does in section 1307(c) as this Court explained in *Marrama*.

In *Connolly*, the Sixth Circuit reasoned that Congress "built a mechanism into 503(b) for bankruptcy courts to reimburse expenses not specifically mentioned in 503(b)'s subsections" by using the word "including." 802 F.3d at 816. The defined language of the Code supports the Sixth Circuit's interpretation. Congress expressly defined the word "including" to expand the scope of subsequent lists. *See* § 102(3). When Congress placed "including" at the beginning of section 503(b)(3)(D), it chose to expand the list of eligible entities for administrative expenses. Thus, this Court should follow its own precedent in *Marrama* and find that non-exhaustive lists allow judges to fashion additional unenumerated criteria onto a list.

Congress clearly indicated its intention under section 503(b)(3)(D) and this Court does not need to look beyond the text of the Code. "[This Court's] inquiry must cease if the statutory language is unambiguous and the statutory scheme is coherent and consistent." *Robinson*, 519

U.S. at 340. In *Marrama*, this Court found that interpretive devices—the committee reports for sections 706 and 1307—could not overcome the plain language of the Code in subsection 706(d) and section 1307(c). 549 U.S. at 372-73. Similarly, interpretive devices such as *expressio unius est exclusio alterius* cannot overcome the plain language of section 503(b)(3)(D). Congress defined the word "including" as non-exhaustive and it chose to place the word "including" prior to the list in 503(b)(3)(D). As this Court found in *Marrama* when it interpreted 1307(c), Congress clearly indicated its choice to allow additional non-listed items. *See* 549 U.S. at 373. This Court should refuse to apply interpretive devices just as it did in *Marrama*. *See id.* This Court does not need to look beyond the language that Congress used. Congress provided clear and unambiguous language, and thus, this Court should not preclude bankruptcy courts from considering additional chapters under section 503(b)(3)(D). Ultimately, the language of section 503(b)(3)(D) does not bar administrative expenses for substantial contributions in chapter 7 because the section does not expressly prohibit such administrative expenses and the section contemplates additional entities being eligible for administrative expenses.

B. Allowing administrative expenses for creditors who make substantial contributions in chapter 7 bankruptcy furthers the Code's purpose by rewarding creditors who do good deeds, preventing fraud, and promoting substantial contributions in every bankruptcy case.

Allowing administrative expenses for substantial contributions in chapter 7 bankruptcy protects the "equality of distribution for creditors," while ensuring that deserving creditors who benefit the estate are rewarded for their endeavors. Equality of distribution is the cornerstone of creditors' rights in bankruptcy, and it can only be disturbed for a creditor that "can clearly demonstrate that it deserves some priority in the bankruptcy payout." ELIZABETH WARREN ET AL., THE LAW OF DEBTORS AND CREDITORS 58 (7th ed. 2014). In *Reading Co. v. Brown*, 391 U.S. 471, 485 (1968), a Bankruptcy Act case with strong precedential value, this Court explained

that courts may grant administrative expenses to creditors to ensure fairness to all persons having a claim against the estate. This Court also held in *Marrama* that bankruptcy courts have broad authority to prevent debtors from abusing the bankruptcy process and may issue orders to carry out provisions of the Code under section 105(a). 549 U.S. at 374-75. Thus, when a court grants an unenumerated administrative expense that gives priority to a specific creditor over others, it must do so to ensure fairness amongst the creditors, prevent abuse of the bankruptcy process, and further the Code. *See id.* Allowing administrative expenses for a substantial contribution in chapter 7 bankruptcy ensures fairness among creditors, prevents abusive practices, and furthers the Code's purpose because it rewards creditors for good deeds, prevents fraud, and promotes substantial contributions in all bankruptcy cases.

Courts can allow administrative expenses to promote fairness among creditors. *See Reading*, 391 U.S. at 485. In *Reading*, this Court held that post-petition tort damages caused by a court appointed receiver could be treated as administrative expenses for the injured parties. *Id.* This Court read section 64a of the Bankruptcy Act broadly and allowed the injured party an administrative expense to ensure "fairness to all persons having claims against [the] insolvent," which it declared was one of the key objectives of the Act. *Id.* at 477. After the adoption of the Code, courts have continued to follow the rationale in *Reading* and allow administrative expenses to provide fairness to creditors. *See, e.g., Al Copeland Enters. Inc. v. Texas (In re Al Copeland Enters., Inc.)*, 991 F.2d 233, 238 (5th Cir. 1993) (affirming district court's affirming of the bankruptcy court's award of interest on sales tax in accordance with state law); *Alabama Surface Mining Comm'n v. N.P. Mining Co. (In re N.P. Mining Co.)*, 963 F.2d 1449, 1458 (11th Cir. 1992) (finding "that a policy of ensuring compliance by trustees with state law is sufficient justification to place civil penalties assessed for postpetition mining operations in the category of

the 'some cases' in which 'costs ordinarily incident to operation of business', are accorded administrative-expense priority"); *Munce's Superior Petroleum Prod., Inc. v N.H. Dept. of Envtl. Servs. (In re Munce's Superior Petroleum Prod., Inc.)*, 736 F.3d 567, 572 (1st Cir. 2013) (affirming the district court's affirmance of the bankruptcy court's holding that fines and penalties assessed against chapter 11 debtors in post-petition contempt proceeding were payable on priority basis as administrative expenses).

Courts may fashion rules to prevent abuse of the bankruptcy process and further the Code's purpose. In *Marrama*, this Court reasoned that bankruptcy judges have broad authority under section 105(a) to "prevent abuse of process" by the debtor. 549 U.S. at 374-75. In *Connolly*, the Sixth Circuit explained that, while the U.S. Trustee is tasked with safeguarding the estate, the U.S. Trustee is not a "fail-proof safeguard" and sometimes a creditor may be compelled to expend its own resources to protect itself and other creditors. 802 F.3d at 817. Thus, the Sixth Circuit found that allowing administrative expenses for substantial contributions by creditors in chapter 7 bankruptcies incentivized creditors to participate in bankruptcy and to monitor the debtor. *Id.* at 819. In *In re Maust Transp., Inc.*, 589 B.R. 887, 898 (Bankr. W.D. Wash. 2018), the court reasoned that the purpose of section 503(b)(3)(D) is "to encourage creditors in whatever chapter a bankruptcy case is filed to 'substantially contribute' to the estate by pursuing funds that will be available for distribution to claimants" (citations omitted).

The allowance of administrative expenses for substantial contributions in a chapter 7 bankruptcy in certain cases is fundamentally fair because creditors should be rewarded for uncovering the bad acts of debtors and bringing money back into the estate. In *Reading* it was the negligent acts of the receiver that caused harm to certain creditors. 391 U.S. at 477. This Court permitted the grant of an administrative expense to the injured creditors because it was

fundamentally fair to the creditors. *Id.* Similarly, in certain chapter 7 cases the debtor's actions will cause harm to creditors. A debtor who fraudulently transfers money harms creditors by hiding assets away, reducing their distributions. When such harm occurs, it is fundamentally fair to reimburse the expenses of a creditor who discovers the bad conduct and brings money back into the estate. The discovering creditor served justice by identifying fraud and promoted equity by providing more money for the estate.

This case illustrates the point. Weinberg discovered that Clemons fraudulently transferred $100,000 to his daughter to hide the money from his creditors. R. at 7. Weinberg's investigation and hard work uncovered the bad deed and his actions benefited the estate as a whole. *See id.* Weinberg should be rewarded for his conduct because it is what creditors should do in bankruptcy. If it is fundamentally fair to reward a creditor with an administrative expense based on the negligent acts of a receiver, like in *Reading*, then it is fundamentally fair to reward a creditor with an administrative expense based on the creditor's valiance, in discovering the debtor's intentional bad conduct, which benefited the estate. Fairness requires that such creditors be rewarded for their good deeds with administrative priority.

Allowing administrative expenses for substantial contributions in chapter 7 bankruptcy could prevent debtors from abusing the bankruptcy process. This Court, in *Marrama*, explained that judges can fashion rules in bankruptcy under section 105(a) to prevent abusive practices in bankruptcy. 549 U.S. at 374-75. Hiding assets and not paying creditors back by declaring bankruptcy constitutes an abuse of the bankruptcy process. By allowing administrative expenses for substantial contributions in chapter 7 bankruptcies, courts may prevent this abuse by incentivizing creditors to scrutinize the debtor's actions.

For example, in this case, Weinberg uncovered a $100,000 fraudulent transfer by Clemons by scrutinizing his action. R. at 7. The entire estate benefited by the return of Clemons's fraudulent transfer because of Weinberg's actions. *Id*. If more creditors scrutinize more debtors, more fraudulent transfers will be uncovered, and more estates benefited. Granting creditors administrative expenses encourages them to scrutinize debtors. Thus, granting administrative expenses will provide more oversight and prevent debtors' abuse of the bankruptcy process.

Creditors are often in the best position to identify and prevent fraud because they are financially incentivized and directly involved—augmenting the value of the U.S. Trustee. In *Connolly*, the Sixth Circuit explained that the U.S. Trustee is not a fail-proof safeguard against abuse. 802 F.3d at 817. The U.S. Trustee often only reviews the conduct of the acting trustee on a motion brought by a creditor. *Id.* Creditors will have little incentive to monitor and report if not reimbursed for their administrative expenses because the cost of investigation would greatly outweigh the benefits.

For instance, even when a creditor uncovers fraud, that creditor's individual share could be outweighed by the cost of investigation. In this case, Weinberg spent $25,000 to bring $75,000 back into the estate. R. at 7. His *pro rata* share of $75,000 will almost certainly be less than $25,000. Without administrative priority, Weinberg will likely suffer a net loss for his efforts, even though his efforts discovered the fraudulent transfer and benefited the estate. A creditor will almost never investigate fraud if it means losing money—even when fraud is uncovered. Allowing an administrative expense to creditors in this situation fosters greater oversight, augments the value of the U.S. Trustee, and helps ensure that the bankruptcy process is fair and equitable.

Finally, this Court would discourage creditors from making substantial contributions in chapter 9 and 11 cases if it disallowed administrative expenses for substantial contributions in chapter 7. Section 503(b)(3)(D) undoubtedly allows administrative expenses for substantial contributions in a chapter 9 or 11 cases. If creditors are not allowed to receive administrative expenses for substantial contributions in chapter 7 bankruptcies, then creditors who investigate wrongdoing in chapter 9 or 11 bankruptcies would expose themselves to significant loss.

Creditors that investigate wrongdoing in chapter 9 or 11 bankruptcies could lose their priority if the case converts to a chapter 7 before they discover the fraudulent transfer. Such a system discourages investigation not only in chapter 7 bankruptcies, but also in chapter 9 and 11 bankruptcies. For example, if Weinberg had discovered Clemons's fraudulent conduct only a few months earlier when the case was in chapter 11, then he would be entitled to priority. *See* § 503(b). However, under a system of per se denial of administrative expenses for substantial contributions in chapter 7 cases, Weinberg would lose priority because he did not uncover the transfer before the case converted to chapter 7. *See* R. at 7. Such a system is blatantly arbitrary and exposes creditors in chapters 9 and 11 to harm simply for not uncovering the bad acts of the debtor soon enough.

As the court in *Maust* explained, the purpose of section 503(b)(3)(D) is to encourage substantial contributions from the creditors in any chapter. 589 B.R. at 898. By disallowing administrative expenses in chapter 7 for substantial contributions, this Court would discourage contributions not only in chapter 7 bankruptcy, but also chapters 9 and 11. Disallowing administrative expenses in chapter 7 undermines the purpose of section 503(b)(3)(D) because it discourages substantial contributions in all bankruptcy cases. This Court should follow its precedent in *Marrama* and *Reading* and allow administrative expenses for substantial

contributions in chapter 7 bankruptcy because it is fundamentally fair, prevents abuse, and promotes substantial contributions in every case. Ultimately, this Court should allow the administrative expenses for substantial contributions in chapter 7 because the Code's language provides for it and doing so furthers the Code's purpose.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests this Court affirm the judgment of the Court of Appeals for the Thirteenth Circuit.

Respectfully submitted,

Team R. 12
Counsel for Respondent
Date: January 21, 2019

APPENDIX A

U.S. CONST. amend. V.

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX B

11 U.S.C. § 102(3) (2012).

Rules of construction

In this title—

(3) "includes" and "including" are not limiting;

APPENDIX C

11 U.S.C. §§ 105(a-c) (2012).

Power of court

(a) The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

(b) [omitted]

(c) The ability of any district judge or other officer or employee of a district court to exercise any of the authority or responsibilities conferred upon the court under this title shall be determined by reference to the provisions relating to such judge, officer, or employee set forth in title 28. This subsection shall not be interpreted to exclude bankruptcy judges and other officers or employees appointed pursuant to chapter 6 of title 28 from its operation.

APPENDIX D

11 U.S.C. § 362(a)(3) (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;

APPENDIX E

11 U.S.C. § 503(b)(3)(D) (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—

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

(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;

APPENDIX F

11 U.S.C. § 542 (2012).

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.

(b) Except as provided in subsection (c) or (d) of this section, an entity that owes a debt that is property of the estate and that is matured, payable on demand, or payable on order, shall pay such debt to, or on the order of, the trustee, except to the extent that such debt may be offset under section 553 of this title against a claim against the debtor.

(c) [omitted]

(d) [omitted]

(e) [omitted]