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 THE PETITIONER

Team P. 13
Counsel for Petitioner

QUESTIONS PRESENTED

I. Does a creditor "act . . . to exercise control" over estate property in violation of 11 U.S.C. § 362(a)(3) by holding the property in his garage and refusing to return it post-petition?

II. Does 11 U.S.C. § 503(b)(3)(D), which references only chapters 9 and 11, restrict a bankruptcy court's discretion to award an administrative expense for a substantial contribution in a chapter 7 case?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

UNITED STATES SUPREME COURT CASES

UNITED STATES COURTS OF APPEAL CASES

UNITED STATES BANKRUPTCY COURT CASES

STATUTES

RULES

SECONDARY SOURCES

OPINIONS BELOW

The Bankruptcy Court for the District of Moot ruled that holding and refusing to return estate property does not violate 11 U.S.C. § 362(a)(3) and that 11 U.S.C. § 503(b) does not preclude awarding substantial contribution expenses in chapter 7 cases. The Bankruptcy Appellate Panel for the Thirteenth Circuit and the Thirteenth Circuit Court of Appeals affirmed the district court's ruling in its entirety.

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 reproduced in Appendices A through I.

STATEMENT OF FACTS

Backstreet's Plowing, Inc. ("Backstreet") was a seasonal snowplow company owned and operated by Christopher Clemons, its sole shareholder. (R. at 3.) Backstreet needed newer, fuel-efficient snowplow trucks to remain competitive and secure a contract with the City of Badlands (the "City"). (R. at 3–4.) Milton Weinberg ("Weinberg"), an acquaintance from Clemons' bowling club, financed the snowplow trucks for $450,000. (R. at 4.) Weinberg holds a perfected, first priority security interest in the snowplow trucks, and Clemons personally guaranteed the loan. (*Id.*) The terms of the loan required monthly payments once Backstreet began generating revenue in December 2015. (*Id.*)

Backstreet purchased new snowplow trucks and secured the contract with the City of Badlands. (*Id.*) Three local entities, including Backstreet, submitted a bid to plow the City's streets. (R. at 4.) The bidding process was competitive, forcing Backstreet to submit a bid with narrow profit margins. (*Id.*) The final contract was for one year, had a flat-rate fee, and was renewable at the City's discretion. (*Id.*)

Shortly after purchasing the snowplow trucks, Weinberg and Clemons got into an argument over a football game. (R. at 4–5.) Moot State and the University of Moot–intense college football rivals–held their annual "big game" in October 2015. (R. at 4.) Weinberg and Clemons attended together, even though Weinberg was a Moot State fan and Clemons was a University of Moot fan. (*Id.*) The argument began after Moot State, Weinberg's team, prevailed. (R. at 5.) Tensions between the two continued after the game and the two did not speak for some time. (*Id.*)

Backstreet defaulted on the loan in December 2015. (*Id.*) Weinberg tried to contact Clemons about the default in February 2016, and he ultimately drove to Backstreet's warehouse to confront Clemons. (*Id.*) The two argued again, and Clemons asked Weinberg to leave. (*Id.*)

Before Weinberg left, he shouted at Clemons to "lawyer up," and in April 2016, Weinberg sued on the loan in the State of Moot. (*Id.*) Weinberg obtained a default judgment in October 2016 for $450,000 but took no immediate action to collect. (*Id.*)

Instead, Weinberg opted to collect on the judgment in the middle of winter—January 2017—and repossessed the snowplow trucks when the City needed Backstreet the most. (R. at 6.) Because the 2016–2017 season was brutal, Backstreet's maintenance and fuel costs were much higher than the previous year. (*Id.*) The higher costs were detrimental to Backstreet given the flat-rate nature of its contract with the City and its small profit margins. (R. at 4.)

Without the snowplow trucks, Backstreet could not perform under its contract and filed for chapter 11 relief on February 4, 2017. (R. at 6.) Weinberg, however, did not turnover the snowplow trucks on the petition date. (*Id.*) Backstreet's attorneys then sent Weinberg a letter asking him to return the snowplow trucks. (*Id.*) Weinberg refused to return the trucks based on his personal belief that Backstreet needed to commence a turnover action. (*Id.*)

As a result, Backstreet could not continue operations or propose a plan. (R. at 7.) Needing immediate relief, Backstreet sought a determination in the bankruptcy court that Weinberg's refusal violated the automatic stay. (R. at 6.) In a "close call," the bankruptcy court held that Weinberg did not violate the stay. (*Id.*) Backstreet appealed the decision, but in the meantime, it had no snowplow trucks. With no cash flow and with the offseason looming, Backstreet had to convert to a chapter 7. (R. at 7.) Steven Vin Sant was appointed as Trustee on April 13, 2017. (*Id.*)

In May 2017, Weinberg began his collection efforts against Clemons' personal guarantee. (*Id.*) While pursuing Clemons, Weinberg stumbled across some documents showing a potentially fraudulent transfer between Backstreet and Patti Clemons. (*Id.*) Weinberg gave this information to

the Trustee, who sought recovery from Patti Clemons under sections 548 and 550 of the Bankruptcy Code. (*Id.*) Patti Clemons settled with the Trustee for $75,000. (*Id.*)

Weinberg filed a motion with the bankruptcy court requesting a substantial contribution administrative expense under section 503(b) of the Bankruptcy Code. (*Id.*) He sought to recover the $25,000 in attorney's fees he incurred investigating the fraudulent transfer. (R. at 7–8.) The Trustee objected on the basis that section 503(b)(3)(D), by its express language, only allows substantial contribution expenses in chapters 9 and 11, not chapter 7. (R. at 8.) The court granted Weinberg's motion over the Trustee's objections. (*Id.*)

As all this was unfolding, Weinberg continued his refusal to return the snowplow trucks. This proved detrimental to the estate because there were two competing offers for Backstreet's assets. (*Id.*) One offer was from Tenth Avenue Freeze, Inc. ("Tenth Avenue"), which was contingent upon the return of the snowplow trucks. (*Id.*) A second offer was from Stone Pony Plowing, LLC ("Stone Pony"), which was for $100,000 less than Tenth Avenue's offer but did not include the snowplow trucks. (*Id.*) Realizing that Weinberg would not return the snowplow trucks, the Trustee accepted Stone Pony's offer, and the court approved the sale. (R. at 8–9.)

The Trustee appealed both rulings. (R. at 9.) First, he appealed to the Bankruptcy Appellate Panel for the Thirteenth Circuit, which affirmed the bankruptcy court. (*Id.*) The Trustee then appealed to Thirteenth Circuit Court of Appeals, which also affirmed the bankruptcy court. (*Id.*) First, the Thirteenth Circuit held that Weinberg did not violate section 362(a)(3) by refusing to turnover Backstreet's snowplow trucks because section 362(a)(3) does not prohibit passive retention of property lawfully seized pre-petition. (R. at 9–15.) Second, the Thirteenth Circuit awarded Weinberg an administrative expense under section 503(b) because section 503(b) does not expressly prohibit awarding administrative expenses in chapter 7. (R. at 18–20.)

SUMMARY OF THE ARGUMENTS

The Thirteenth Circuit erred when it held that section 362(a)(3) allows for post-petition retention of estate property. First, the plain meaning of the word "act" in section 362(a)(3) demonstrates that an active refusal to return estate property is an act. When creditors retain estate property and refuse to turn it over, their actions also fall within the plain meaning of the word "control" as used in section 362(a)(3) because they are asserting power and influence over estate property.

Retaining estate property also implicates a violation of section 362(a)(3) by violating section 542(a). Section 542(a) is self-effectuating and requires creditors to turnover estate property. Sections 542(a) and 362(a)(3) use the same "control" language, leading to the inference that a violation of section 542(a) is also a violation of section 362(a)(3). This inference is further supported by the way section 542(a) and 362(a)(3) work together and complement each other.

Holding that section 362(a)(3) does not require creditors to return estate property post-petition undermines the broad scope of the automatic stay by interpreting its provisions narrowly and by decentralizing estate property. Lastly, holding that section 362(a)(3) does not require creditors to return estate property frustrates the purposes of the Bankruptcy Code's reorganization provisions. Such a holding keeps valuable property out of the hands of a debtor, preventing the debtor from remaining in operation, resulting in cost and delay.

With respect to the second issue, the plain language of section 503(b)(3)(D) expressly limits substantial contribution expenses to cases arising under chapter 9 or 11. Any broad interpretation the word "including" might have in section 503(b) is limited, first by the absence of the term in section 503(b)(3), and second by the restrictions in section 503(b)(3)(A)-(F). Further, awarding a substantial contribution expense in chapter 7 renders section 503(b)(3)(D) superfluous.

The Thirteenth Circuit erred by misapplying the only circuit case to hold that a bankruptcy court has discretion to allow a substantial contribution expense in chapter 7, notwithstanding the plain strictures of the Bankruptcy Code.

In addition, a bankruptcy court may not exercise its equitable powers in contravention of specific Code provisions. There are no exceptions, even in atypical cases. If a case falls outside the confines of the Bankruptcy Code, it is up to Congress to amend the statute.

Lastly, awarding a substantial contribution expense in chapter 7 frustrates the Code's priority scheme by diminishing the size of the estate for the benefit of one creditor and incentivizing self-serving behavior by expanding the scope of administrative expenses beyond the strictures of the Code. Congress provided substantial contribution expenses in chapters 9 and 11 because creditors in those chapters help facilitate reorganization.

ARGUMENT

The facts of the instant appeal are undisputed. (R. at 3 n.2.) Therefore, this case presents only questions of law. This Court reviews questions of law *de novo*. *See Texas v. Soileau (In re Soileau)*, 488 F.3d 302, 305 (5th Cir. 2007); *Motorola, Inc. v. Official Comm. of Unsecured Creditors (In re Iridium Operating LLC)*, 478 F.3d 452, 461 n.13 (2d Cir. 2007). "When de novo review is compelled, no form of appellate deference is acceptable." *Salve Regina Coll. v. Russell*, 499 U.S. 225, 238 (1991).

I. POST-PETITION RETENTION OF ESTATE PROPERTY IS A VIOLATION OF 11 U.S.C. § 362(a)(3).

Congress amended 11 U.S.C.§ 362(a)(3) in 1984. As originally drafted, section 362(a)(3) prohibited "any act to obtain possession of property of the estate or of property from the estate[.]" 11 U.S.C. § 362(a)(3) (1978). It now precludes "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) (1984) (emphasis added).

Since the 1984 amendment, the longstanding practice of circuit courts has been to hold that by adding the "exercise control" language to section 362(a)(3), Congress prohibited the post-petition retention of estate property. *E.g.*, *Weber v. SEFCU (In re Weber)*, 719 F.3d 72 (2d Cir. 2013); *Thompson v. GMAC, LLC*, 566 F.3d 699 (7th Cir. 2009); *California Empl. Dev. Dep't v. Taxel (In re Del Mission)*, 98 F.3d 1147 (9th Cir. 1996); *Knaus v. Concordia Lumber Co. (In re Knaus)*, 889 F.2d 773 (8th Cir. 1989); *see Rozier v. Motors Acceptance Corp. (In re Rozier)*, 376 F.3d 1323 (11th Cir. 2004). Other than the Thirteenth Circuit, only one circuit court has directly addressed the issue and come to the opposite conclusion. *WD Equipment, LLC v. Cowen (In re Cowen)*, 849 F.3d 943 (10th Cir. 2017).

This Court should reverse the Thirteenth Circuit. The cogent reasoning of the Second, Seventh, Eighth, Ninth, and Eleventh Circuits indicates that creditors violate section 362(a)(3) by retaining estate property. Interpreting section 362(a)(3) in this manner is supported by the explicit language of section 362(a)(3) and section 542(a) of the Bankruptcy Code. This interpretation is also consistent with the broad protections of the automatic stay and reorganization bankruptcy.

A. Creditors Violate the Explicit Language of 11 U.S.C. § 362(a)(3) by Retaining Estate Property.

Statutory interpretation begins with the text of the statute. *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253–54 (1992). The relevant language of section 362(a)(3) deserves repeating. Section 362(a)(3) prohibits "any act . . . to exercise control over property of the estate[.]"

A creditor "acts" and "exercises control" over estate property when it refuses to return estate property. [1]

1. A refusal is an act.

Creditors act when they refuse to return estate property. Act means "the doing of a thing" or "the process of doing something." *Act*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/act (last visited Dec. 22, 2018). Therefore, Weinberg acted when refusing to return the snowplow trucks because a refusal is surely "the doing of a thing." Indeed, this Court has recognized that a refusal is an act. *See Taylor v. Mason*, 22 U.S. 325, 347–48 (1824) (characterizing a voluntary refusal as an "act of intention"). Therefore, Weinberg acted when he refused to return the snowplow trucks.

Black's Law Dictionary also supports this conclusion. It defines "act" as "an occurrence that results from a person's will being exerted on the external world." *Act*, BLACK'S LAW DICTIONARY (10th ed. 2014). Weinberg's actions also fit within this definition of act. Weinberg did not want to return the snowplow trucks to Backstreet, and he in fact refused to return the trucks. By refusing to return the snowplow trucks, Weinberg exerted his will on Backstreet's estate and by extension the "external world." *Id.*; *see Taylor*, 22 U.S. at 344 (stating that "where the condition to be performed depends on the will of [an individual], his failure to perform it is equivalent to a refusal . . ," which is an act).

2. Retaining estate property is "exercising control" of estate property.

The Thirteenth Circuit erred when it held that Weinberg's retention of the snowplow trucks was not "exercising control" over them. Weinberg exercised control over the snowplow trucks by

[1] It is undisputed that the snowplow trucks are property of the estate and that Backstreet had legal and equitable title to the snowplow trucks on the petition date. (R. at 10.)

keeping them in his garage under lock and key. (R. at 6.) The definition of the word "control" and pre-1984 practice supports this interpretation.

Weinberg's actions fall within the plain meaning of the word control. Control means "to exercise restraining or directing influence over," or to "have power over." *Control*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/control (last visited Dec. 22, 2018). Not only are the snowplow trucks in Weinberg's garage, but Weinberg also has influence and power over the snowplow trucks because the facts demonstrate that he is the one deciding whether to return them or hold onto them. (R. at 6–7.) Thus, Weinberg ultimately controls what will happen to the snowplow trucks.

This Court's ruling in *Strumpf* further demonstrates that Weinberg exercised control over the snowplow trucks. *Citizens Bank v. Strumpf*, 516 U.S. 16, 21 (1995). *Strumpf* involved a bank placing an administrative freeze on a debtor's checking account. *Id.* at 17–18. The freeze was not a violation of section 362(a)(3) because the bank account did not consist of money belonging to the debtor. *Id.* at 21 (A "bank account [does not consist] of money belonging to the depositor and held by the bank. . . it consists of nothing more or less than a promise to pay, from the bank to the depositor."). If the bank account did consist of the debtor's money, this Court suggested that the freeze could be a violation of section 362(a)(3) because the bank arguably "exercised dominion" over estate property. *Id.* Here, Weinberg has control over the snowplow trucks and is refusing to return them. Therefore, his actions are identical to the bank's freeze in *Strumpf*. But unlike the money in *Strumpf*, the snowplow trucks are Backstreet's property. *Id.*; (R. at 10). Thus, Weinberg exercised dominion over the snowplow trucks.

The Thirteenth Circuit incorrectly held that Congress added the phrase "exercise control" to section 362(a)(3) to prohibit acts to obtain intangible estate property. (R. at 15); *In re Cowen*,

849 F.3d at 950 (citing examples of intangible property such as "contract rights or causes of action . . ."). Prior to the 1984 amendment, courts held that the phrase "obtain possession" in section 362(a)(3) covered acts to obtain intangible property. *E.g.*, *In re MortgageAmerica Corp.*, 714 F.2d 1266, 1277–78 (5th Cir. 1983) (holding that a creditor cannot pursue a cause of action belonging to the debtor corporation without violating "[t]he literal language of section[] 362(a)(3) . . ."). When the Fifth Circuit decided *MortgageAmerica*, section 362(a)(3) referenced only acts to "obtain possession" of estate property. 11 U.S.C. § 362(a)(3) (1978). Therefore, when Congress amended section 362(a)(3) in 1984, it knew of at least one circuit to hold that the phrase "obtain possession" covered acts to obtain intangible property. *See MortgageAmerica*, 714 F.2d at 1277.

In addition, the Thirteenth Circuit mistakenly relied on *Inslaw* for the proposition that section 362(a)(3) does not require a creditor to return estate property post-petition. (R. at 10–12.) *Inslaw* does not address the issue at hand. *Inslaw* addressed whether the automatic stay required the return of software in which ownership was in dispute. *United States v. Inslaw*, 932 F.2d 1467, 1472 (D.C. Cir. 1991). Because ownership of the software was in dispute, the software was not property of the estate. *Id.* As the D.C. Circuit noted, section 362(a)(3) "serves as a restraint only on acts to gain possession or control over property of the estate . . . ." *Id.* at 1473–74. *Inslaw* did not concern the scope of section 362(a)(3) in cases where the ownership of property is not in dispute, such as here where both parties agree Backstreet has title to the snowplow trucks. (R. at 10.) In its only reference to a scenario where property ownership was not in dispute, the D.C. Circuit cited *In re Knaus*. *Inslaw*, 932 F.2d at 1472 (citing *In re Knaus*, 889 F.2d at 775). *In re Knaus* was the first circuit court to hold that post-petition retention of estate property *is* an act to "exercise control." *In re Knaus*, 889 F.2d at 775.

Congress added the phrase "exercise control" to section 362(a)(3) to codify the pre-1984 practice of prohibiting post-petition retention of estate property. "When Congress amends the bankruptcy laws, it does not write on a clean slate." *Dewsnup v. Timm*, 502 U.S. 410, 419 (1992) (internal citations and quotations omitted). Courts should not interpret a provision in a way that dramatically changes pre-amendment practice without some discussion of the change in the legislative history. *See Dewsnup*, 502 U.S. at 419. Prior to 1984, many courts prohibited post-petition retention of estate property.[2] These courts relied on the purpose of various Bankruptcy Code provisions for their holdings. *E.g.*, *In re Miller*, 22 B.R. at 481 (relying on the broad purpose of the automatic stay to hold that retention of estate property is improper). With the 1984 amendment, Congress provided express language in section 362(a)(3) that prevents post-petition retention of estate property. Thus, section 362(a)(3) codifies pre-1984 practice. *Dewsnup*, 502 U.S. at 419.

In sum, Weinberg's active refusal to return the snowplow trucks was an "act . . . to exercise control over property of the estate." Weinberg's refusal was an "act," because he did something; he refused to return the snowplow trucks. *Act*, MERRIAM-WEBSTER. Second, Weinberg "exercised control" over the snowplow trucks because he ultimately decided what would happen to the snowplow trucks. *Strumpf*, 516 U.S. at 21; *Control*, MERRIAM-WEBSTER. Lastly, section 362(a)(3) codifies pre-1984 practice by providing express language that prohibits post-petition retention of estate property. *E.g.*, *Miller*, 22 B.R. at 481.

[2] *See, e.g.*, *Miller v. Sav. Bank of Balt*. (*In re Miller*), 22 B.R. 479, 481 (Bankr. D. Md. 1982) (citing *In re Norton*, 15 B.R. 627 (Bankr. E.D. Pa. 1981) (retention of tax refund was improper); *In re Howren*, 10 B.R. 303 (Bankr. D. Kansas 1981) (withholding by university of debtor's transcript violated automatic stay); *In re Eisenberg*, 7 B.R. 683 (Bankr. E.D.N.Y. 1980) (refusal by city to withdraw tax lien from tax lien sale was improper)).

B. A Creditor Violates 11 U.S.C. § 362(a)(3) by Violating 11 U.S.C. § 542(a).

Refusing to turnover estate property post-petition also violates section 542(a). Section 542(a) provides that an entity "in . . . *control* . . . of property that the trustee may use . . . under section 363[3] . . . shall deliver to the trustee . . . such property . . . ." 11 U.S.C. § 542(a) (1994) (emphasis added). Weinberg's refusal to turnover the snowplow trucks under section 542(a) amounts to exercising control within the meaning of section 362(a)(3). The interplay between section 362(a)(3) and 542(a) supports this result.

1. Section 542(a) requires creditors to turnover estate property.

A plain reading of section 542(a) demonstrates that it is self-effectuating and requires a creditor to turnover estate property upon the commencement of a bankruptcy. *See In re Weber*, 719 F.3d at 79.

Where the language of the statute is plain "the sole function of the courts is to enforce it according to its terms." *Caminetti v. United States*, 242 U.S. 470, 485 (1917). Section 542(a) reads that an entity "shall" turn over estate property in its possession. The word "shall" means "will have to" or "must." *Shall*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/shall (last visited Dec. 22, 2018). Therefore, a plain reading of section 542(a) demonstrates that Weinberg must turnover the snowplow trucks. 5 COLLIER ON BANKRUPTCY, ¶ 542.02 (16th ed. 2012) ("By its express terms, [section 542] is self-executing . . ." and requires creditors to turnover estate property.).

If Congress intended for turnover under section 542(a) to be conditional upon debtor action, it would have expressly stated so. Section 543 demonstrates this. 11 U.S.C. § 543(b) (1994).

[3] Section 363 allows an entity to use, sell, or lease estate property in the ordinary course of business. 11 U.S.C. § 363(b)(1) (2010). Backstreet is a snowplowing business and as such, using its snowplow trucks is in the ordinary course of its business.

Under section 543(b), "[a] *custodian shall* . . . deliver to the trustee any property of the debtor [it holds]. . . ." 11 U.S.C. § 543(b) (emphasis added). The very next subsection, section 543(c), reads, "*[t]he court, after notice and a hearing, shall* . . . provide the payment of reasonable compensation for services rendered . . . by such custodian . . . ." 11 U.S.C. § 543(c) (1994) (emphasis added). As sections 543(b) and 543(c) demonstrate, Congress is clear when it differentiates between mandatory and conditional conduct. In addition, Congress would have used the permissive word "may" in section 542(a) to suggest non-mandatory conduct, but it specifically chose to use "shall." *See Lopez v. Davis*, 531 U.S. 230, 241 (2001) (finding that "Congress' use of the permissive 'may' . . . contrast[ed] with the legislators' use of a mandatory 'shall' in the very same section . . .").

The Thirteenth Circuit erred when it held that section 542(a)'s turnover power is contingent upon court order.[4] Section 542(a)'s turnover requirement is not contingent upon any court order. 5 COLLIER ON BANKRUPTCY, ¶ 542.02 ("By its express terms, section 542(a) is self-executing and does not require that the trustee . . . obtain a court order to compel the turnover."). If section 542(a) required a court order before turnover, it would include the phrase "after notice and a hearing." But it does not. Congress is clear when court involvement is required prior to third party action. In fact, Congress requires "notice and a hearing" at least seventy-five times in various provisions of the Bankruptcy Code. For example, section 542(e) provides that only after "notice and a hearing" shall the holder of recorded information be compelled to turnover estate property. 11 U.S.C. § 542(e).

[4] (R. at 16.) Tellingly, the two other circuits comprising the minority did not address whether section 542(a) is self-effectuating. The court in *In re Cowen*, 849 F.3d at 950, explicitly refused to decide the issue. In *Inslaw*, 932 F.2d at 1472, the court did not address the argument.

Further, this Court's ruling in *Whiting Pools*[5] supports the proposition that section 542(a) is self-effectuating. In *Whiting Pools*, the Internal Revenue Service seized collateral from the debtor pre-petition. *Whiting Pool*s, 462 U.S. at 200–01. After filing, the debtor moved to compel turnover under section 542(a). *Id.* This Court held that the Bankruptcy Code "requires an entity (other than a custodian) holding any property of the debtor that the trustee can use under § 363 to turn that property over to the trustee." *Id.* at 205.

In *Whiting Pools*, this Court emphasized that a creditor bears the burden of initiating a proceeding to protect its interest rather than actively retaining possession of estate property. *Id.* at 204. ("Section 542(a) simply requires [a creditor] to seek protection of its interest according to the congressionally established bankruptcy procedures, rather than by withholding the seized property from the debtor's efforts to reorganize."). In other words, this Court suggested that section 542(a) requires "a creditor [to] *first* return an asset in which the debtor has an interest to his bankruptcy estate *and then*, if necessary, seek adequate protection of its interests in the bankruptcy court." *Thompson*, 566 F.3d at 708. (emphasis added). By placing the onus on the creditor to protect its interest, the Court precluded the debtor from taking any affirmative steps prior to regaining possession of its property, thereby supporting the self-effectuating nature of section 542(a).

2. A violation of 11 U.S.C. § 542(a) is a violation of 11 U.S.C. § 362(a)(3).

A failure to turnover under section 542(a) is a violation of section 362(a)(3). In section 542(a), Congress required creditors in "control" over estate property to turnover that property to the debtor or trustee. 11 U.S.C. § 542(a). The same "control" is prohibited in section 362(a)(3). 11

[5] The Supreme Court did not express any view on "whether Section 542 has the same broad effect in liquidation or adjustment of debt proceedings." *United States v. Whiting Pools Inc.*, 462 U.S. 198, 208 n.17 (1983).While this is a chapter 7 proceeding, it initially started off as a Chapter 11 case, and Weinberg refused to return the trucks while Backstreet was in chapter 11. (R. at 6.)

U.S.C. § 362(a)(3) (precluding a person from "exercising control" over estate property). As this Court held in *Whiting Pools*, section 542(a) prohibits a creditor from "withholding [estate] property from the debtor's efforts to reorganize." *Whiting Pools*, 462 U.S. at 204. By using the word "control" in section 362(a)(3), Congress wanted to prohibit the same kind of control that section 542(a) prohibits—withholding estate property from the debtor. *Id.* Therefore, by controlling estate property under section 542(a), Weinberg effectively "exercised control" of estate property as the term is used in section 362(a)(3).

The majority of circuits to address this issue have held that a creditor's failure to turnover is "exercising control" in violation of section 362(a)(3). *E.g.*, *Thompson*, 566 F.3d at 704; *In re Del Mission*, 98 F.3d at 1151 ("11 U.S.C. § 542(a) provides that an entity in possession of estate property 'shall' deliver such property to the trustee. This is a mandatory duty . . . . Thus, 'without doubt, a creditor's knowing retention of property of the estate constitutes a violation of § 362(a).'"); *see also In re Knaus*, 889 F.2d at 775.

In an analogous case, the Second Circuit adopted the majority position and held that a violation of section 542(a) is equivalent to "exercising control" under section 362(a)(3). *In re Weber*, 719 F.3d at 79. In *Weber*, a credit union repossessed a debtor's work truck pre-petition and the debtor filed for chapter 13 relief four days later. *Id.* at 74. The debtor's attorneys sent a letter to the creditor requesting return of the truck, but the creditor refused. *Id.* The Second Circuit held that the creditor's failure to turnover the truck under section 542(a) was "exercising control" over the truck, "and its retention of the vehicle violated the stay." *Id.* at 79. Similarly, Weinberg refused to return Backstreet's snowplow trucks after demand from Backstreet's attorneys, and later during the proceedings. (R. at 6, 8.) Accordingly, Weinberg's post-petition retention of the snowplow

trucks not only violated section 542(a)'s turnover requirement but also constituted "exercising control" within the plain meaning of section 362(a)(3).

3. Sections 362 and 542 complement each other.

Section 362(a)(3) is bolstered by section 542(a) in instances like the case at hand, where a creditor refuses to turnover estate property repossessed prepetition. Once a debtor files a petition, the automatic stay serves as a blanket protection over estate property. Creditors are prohibited from engaging in numerous activities, including initiating judicial proceedings, 11 U.S.C. § 362(a)(1), collecting on a judgment, 11 U.S.C. § 362(a)(2), taking possession of estate property 11 U.S.C. § 362(a)(3), or enforcing a lien, 11 U.S.C. § 363(a)(4). Section 362(a)(3) precludes a creditor from exercising control over estate property upon the filing of a petition, whereas section 542(a) gives a trustee the right to possession of estate property in the hands of third parties. *Thompson*, 566 F.3d at 704 ("The right of possession is incident to the automatic stay."). As such, section 542(a) works with section 362(a) "to draw back into the estate[,] [property repossessed] by a lien creditor pursuant to a prepetition seizure." *Id.*

The minority position fails to appreciate the interplay between sections 362(a)(3) and 542(a). In *In re Cowen*, 849 F.3d at 950–51, the Tenth Circuit held that section 542(a) does not impose an affirmative obligation on creditors to turnover estate property without first initiating a turnover proceeding. The court declined to read sections 542(a) and 362(a)(3) together because the two provisions lacked a "textual link." *Id.* ("Even if the turnover provision were 'self-executing' (which we do not decide), there is still no textual link between § 542 and § 362."). The court also reasoned that "bankruptcy courts do not need section 362 to enforce the turnover of property of the estate" because of their broad equitable powers under section 105(a). *Id.* (citing 11 U.S.C. § 105(a) (2010)).

The Tenth Circuit's analysis of sections 542(a) and 362(a)(3) is misguided. First, a textual link between sections 362(a)(3) and 542(a) is unnecessary because property of the estate connects the two provisions. Section 541(a) defines property of the estate, which both section 362(a) and section 542(a) protect. Second, the two provisions are connected because section 362(a)(3) prohibits the same kind of "control" section 542(a) prohibits. Third, section 105(a) could never replace the strong protections of the automatic stay. Bankruptcy courts need not rely on section 105(a)'s equitable powers to enforce section 542(a). Section 105(a) is derivative of other Bankruptcy Code provisions and its reach is limited, *Norwest Bank Worthington v. Ahlers*, 485 U.S. 197, 206 (1988), unlike the automatic stay's broad reach.

In sum, failing to turnover estate property is a violation of section 542(a). Because both section 542(a) and section 362(a)(3) contain the same "control" language, a violation of section 542(a) equates to "exercising control" within the meaning of section 362(a)(3). *Compare* 11 U.S.C. § 542(a), *with* 11 U.S.C. § 362(a)(3). Section 542(a) and section 362(a)(3) thus work together "to draw back into the estate[,] [property repossessed] by a lien creditor pursuant to a prepetition seizure." *Thompson*, 566 F.3d at 704.

C. Holding That Creditors Can Retain Estate Property Undermines the Purposes of the Automatic Stay and Frustrates Reorganization Efforts.

1. Holding that 11 U.S.C. § 362(a)(3) allows a creditor to retain estate property would be inconsistent with the purposes of the automatic stay.

Interpreting section 362(a)(3) to allow creditors to retain estate property post-petition prevents the centralization of estate property. "[T]he automatic stay allows the bankruptcy court to centralize all disputes concerning property of the debtor's estate in the bankruptcy court so that reorganization can proceed efficiently . . . ." *Shugrue v. Air Line Pilots Ass'n, Int'l (In re Ionosphere Clubs, Inc.)*, 922 F.2d 984, 989 (2d Cir. 1990) (internal citations and quotation marks omitted). If

property is held by numerous creditors, it is not centralized. In contrast, requiring third parties to return property to the debtor centralizes estate property, giving the bankruptcy court oversight and ultimate control over the property. Centralization generates efficiency because property is in one place.

In addition, holding that Congress does not require creditors to return estate property under section 362(a)(3) is inconsistent with the broad scope of the automatic stay. *E.g.*, *AP Indus., Inc. v. SN Phelps & Co. (In re AP Indus., Inc.)*, 117 B.R. 789, 798 (Bankr. S.D.N.Y. 1990) ("Congress intended that the scope of the automatic stay be broad in order to effectuate its protective purposes on behalf of both debtors and creditors . . . ."). To complement this broad scope, any provision of the Bankruptcy Code touching upon the automatic stay should be interpreted liberally. The Thirteenth Circuit held that the use of the words "act" and "exercise control" in section 362(a)(3) suggests Congress only wanted to prohibit acts to gain possession of intangible property. This interpretation only prevents creditors from engaging in a small subset of actions (affirmative acts) with a small subset of estate property (intangible property). This narrow reading is at odds with the broad scope of the automatic stay. Instead, reading section 362(a)(3) to prohibit both positive acts and negative acts (such as retention), and to extend to all estate property and not just intangible property, is more consistent with the broad nature of the automatic stay. This is achieved by interpreting section 362(a)(3) as prohibiting a creditor's post-petition retention of estate property.

2. A holding that allows creditors to retain estate property contradicts the central purpose of reorganization in bankruptcy.

Keeping valuable estate property out of the hands of a debtor reduces its chances of reorganization. As this Court has stated:

> By permitting reorganization, Congress anticipated that the business would continue to provide jobs, to satisfy creditors' claims, and to produce a return for its owners. Congress presumed that the assets of the debtor would be more valuable if

> used in a rehabilitated business than if "sold for scrap." The reorganization effort would have small chance of success, however, if property essential to running the business were excluded from the estate. Thus, to facilitate the rehabilitation of the debtor's business, all the debtor's property must be included in the reorganization estate.

Whiting Pools, 462 U.S. at 203 (citations omitted). Withholding estate property from a debtor leaves a debtor with no assets to operate. For instance, Backstreet could not reorganize under chapter 11 in part because it did not have any snowplow trucks to generate revenue; Weinberg had the snowplow trucks in his garage. As the Seventh Circuit stated, "[a]n asset actively used by a debtor serves a greater purpose to both the debtor and his creditors than an asset sitting idle on a creditor's lot." *Thompson*, 556 F.3d at 702.

Additionally, cost and delay will result if the Thirteenth Circuit is upheld and a debtor is required to file a turnover motion for every piece of collateral held by a third party. *Katchen v. Landy*, 382 U.S. 323, 328 (1966) ("[T]his Court has long recognized that a chief purpose of the bankruptcy laws is to secure a prompt and effectual administration and settlement of the estate of all bankrupts within a limited period.") (citations in quotation marks omitted). Reorganization would be futile if a debtor expends all its time and resources filing turnover motions. Turnover motions require an adversary proceeding. Fed. R. Bankr. P. 7001(1). Adversary proceedings often require pleadings and discovery before a court can issue a ruling. This could take months. For example, the debtor in *Weber* had to wait nearly six weeks before oral arguments in its turnover proceedings. *In re Weber*, 719 F.3d at 74. Requiring an adversary proceeding every time a creditor refuses to return estate property creates unnecessary cost and delay, and would affect everyone involved in the reorganization process.

II. 11 U.S.C. § 503(b)(3)(D) ALLOWS SUBSTANTIAL CONTRIBUTION EXPENSES ONLY IN CHAPTERS 9 AND 11.

Section 503(b)(3)(D) permits administrative expenses for substantial contributions in cases arising under only chapter 9 or 11 of the Bankruptcy Code. 11 U.S.C. § 503(b)(3)(D) (2005). Section 503(b) does not mention chapter 7. The majority of courts to interpret the text—approximately 86%—all agree that section 503 precludes bankruptcy courts from allowing administrative expenses for substantial contributions in chapter 7 cases. (R. at 31); *In re Health Trio, Inc.*, 584 B.R. 342 (Bankr. D. Colo. 2018); *accord e.g.*, *In re Lloyd Sec., Inc.*, 75 F.3d 853 (3d Cir. 1996); *Lebron v. Mechem Fin. Inc.*, 27 F.3d 937 (3d Cir. 1994); *In re Fesco Plastics Corp., Inc.*, 996 F.2d 152 (7th Cir. 1993); *see also Goodman v. Phillip R. Curtis Enter., Inc.*, 809 F.2d 228 (4th Cir. 1987). Other than the Thirteenth Circuit, only one circuit has held otherwise. *See Mediofactoring v. McDermott (In re Connolly N. Am., LLC)*, 802 F.3d 810 (6th Cir. 2015).

This Court should reverse the Thirteenth Circuit and adopt the well-reasoned opinions of the Third, Fourth, and Seventh Circuits that substantial contribution expenses are limited to chapters 9 and 11.

A. By Its Express Terms, 11 U.S.C. § 503(b)(3)(D) Only Applies to Chapters 9 and 11.

Statutory interpretation begins with the text of the statute itself. *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989). When the text is plain, the inquiry ends. *Id.* Relevant here, section 503(b)(3)(D) limits administrative expenses for substantial contributions[6] to cases arising under chapters 9 and 11:

> (b) After notice and a hearing, there shall be allowed administrative expenses . . . including–
>
> (3) the actual, necessary expenses . . . incurred by–
>
> . . .

[6] The parties stipulate that Weinberg's contribution was substantial under section 503(b)(3)(D). (R. at 17.)

> (D) a creditor . . . in making a substantial contribution in a case *under chapter 9 or 11 of this title.*

11 U.S.C. § 503(b)(3)(D) (emphasis added).

1. Section 503(b)(3)(D)'s language is plain and precludes relief in chapter 7 cases.

Section 503(b)(3)(D) gives a bankruptcy court authority to grant substantial contribution expenses in two chapters; 9 and 11. *Id.* Section 503(b)(3)(D) leaves out chapters 7, 12, 13, and 15. Thus, by its plain terms, section 503(b)(3)(D) unambiguously limits expenses for substantial contributions to cases arising under chapter 9 and 11. *Id.*

Further, section 503(b)(3)(D)'s express reference to chapters 9 and 11 demonstrates that Congress meant to exclude chapter 7 from its scope. Contrary to the Thirteenth Circuit's assertion, Congress need not explicitly preclude chapter 7 in section 503(b)(3)(D) to prevent a court from granting relief in chapter 7. In fact, this Court rejected the argument "that the expression of one thing indicates the exclusion of others *unless the exclusion is made explicit*, [because it] is contrary to common sense and common usage." *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 8 (2000) (emphasis added). It would make little sense for Congress to indicate which two chapters are eligible for a substantial contribution expense if Congress actually intended to give bankruptcy courts blanket discretion to award substantial contributions in any case under any chapter. Congress could have ended section 503(b)(3)(D) before listing chapters 9 and 11, but it did not. That Congress still included the words "chapter 9 or 11" is telling.

2. The absence of the word "including" in section 503(b)(3) indicates that the restrictions therein are exhaustive.

Section 503(b)(3)(D) sets forth the only two chapters eligible for a substantial contribution expense; chapters 9 and 11. Thus, the plain terms of section 503(b)(3)(D) leave no room for interpretation of the word "including" in 503(b). Even if they did, provisions that "seem ambiguous

in isolation [are] often clarified by the remainder of the statutory scheme because the same terminology is used elsewhere in a context that makes its meaning clear." *United Sav. Ass'n of Texas v. Timbers of Inwood Forest Ass'n, Ltd.*, 484 U.S. 365, 371 (1988).

The word "including" is employed in section 503(b) and subsection (b)(1)(A), but it is missing from subsection (b)(3). That omission is crucial because it indicates that Congress selectively employs the term. For example, section 503(b)(1)(A) allows administrative expenses for "the . . . costs and expenses of preserving the estate *including* . . ." 11 U.S.C. § 503(b)(1)(A) (emphasis added). In contrast, section 503(b)(3) allows administrative expenses for "expenses . . . *incurred by* . . ." 11 U.S.C. § 503(b)(3) (emphasis added).

Read together, the sections demonstrate that if Congress intended to make section 503(b)(3)(D) non-exhaustive, it would have employed the word "including" as it did in section 503(b)(1)(A). But it did not. Instead, Congress chose to use the words "incurred by" in section 503(b)(3)(D), indicating that the restrictions there are exhaustive.

Further, section 503(b)(3)(D)'s specific restrictions govern over the general authorization in section 503(b). *See, e.g.*, *RadLAX,Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012). Section 503(b) authorizes administrative expenses generally, and section 503(b)(3)(D) expressly limits substantial contribution expenses to cases arising under chapters 9 and 11.

The Thirteenth Circuit interpreted "including" as non-limiting under section 102(3) and erred when it held that section 503(b) gives a bankruptcy court discretion to award substantial contribution expenses in chapter 7. (R. at 19) (citing 11 U.S.C. § 102(3) (1986)). If section 503(b) and its subsections are to exist cohesively and have effect, the specific qualifications of each subsection must apply. *See, e.g.*, *RadLAX*, 566 U.S. at 550–55 ("[Where] a general authorization and a more limited, specific authorization exist side by side . . . [t]he terms of the specific

authorization must be complied with . . . [because] effect shall be given to every clause and part of a statute.").

Thus, even if the word "including" did create a non-limiting list, if "a subsection directly addresses the type of administrative expense sought, the restrictions in it cannot be avoided by appealing to the non-exclusive nature of § 503(b)." *In re Engler*, 500 B.R. 163, 174 (Bankr. M.D. Fla. 2013). Here, section 503(b)(3) sets forth six specific restrictions to section 503(b). Section 503(b)(3)(D) is one of those restrictions. *In re Blount*, 276 B.R. 753, 764 (Bankr. M.D. La. 2002); *see also In re Fontainebleau Las Vegas Holdings, LLC*, 574 B.R. 895, 903–05 (Bankr. S.D. Fla. 2017).

3. Interpreting Section 503(b) to allow substantial contribution expenses in chapter 7 renders section 503(b)(3)(D) superfluous.

This Court has confirmed that statutes cannot be interpreted in a way that makes other provisions of the same act superfluous. *Freytag v. Comm'r*, 501 U.S. 868, 877 (1991). Certainly, as the Thirteenth Circuit acknowledges, statutes must "be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant." (R. at 18); *Hibbs v. Winn*, 542 U.S. 88, 101 (2004) (citation omitted).

Ignoring the express limitations in section 503(b)(3)(D) renders that provision superfluous and opens the door to awarding unlimited categories of administrative expenses. *See U.S. Trustee v. Farm Credit Bank of Omaha (In re Peterson)*, 152 B.R. 612, 614 (D.S.D. 1993). If this Court allows substantial contribution expenses in chapter 7 under section 503(b), then nothing precludes awarding those expenses in other chapters, such as chapters 12 or 13. Thus, the words "chapter 9 or 11 of this title" would become superfluous in section 503(b)(3)(D).

In sum, the plain language of section 503(b)(3)(D) limits substantial contribution expenses to cases arising under chapters 9 and 11. The use of the word "including" in section 503(b)

indicates that Congress chose to selectively employ the term. Thus, the absence of the word "including" in section 503(b)(3)(D) demonstrates that substantial contribution expenses are limited. Lastly, interpreting section 503(b) to allow substantial contribution expenses in chapter 7 renders section 503(b)(3)(D) superfluous. *Freytag*, 501 U.S. at 877.

B. The Bankruptcy Code's Express Restraints Limit a Bankruptcy Court's Equitable Powers.

This Court has repeatedly confirmed that a bankruptcy court's equitable powers "can only be exercised within the confines of the Bankruptcy Code." *Ahlers*, 485 U.S. at 206; *Law v. Siegel*, 571 U.S. 415, 421 (2014). This Court has also confirmed that "a bankruptcy court may not contravene specific statutory provisions." *Siegel*, 571 U.S. at 421. The Thirteenth Circuit erred when it allowed a substantial contribution expense in a chapter 7 case because it ignored section 503(b)(3)(D)'s express restriction to chapter 9 and 11.

1. A bankruptcy court cannot utilize section 105 to circumvent express Code provisions.

A bankruptcy court cannot "tak[e] action that the Code prohibits." *Id.* Significantly, a bankruptcy court's equitable powers remain limited, even in instances involving bad-faith conduct. *Id.* at 425–27. The Thirteenth Circuit acknowledged that a bankruptcy court's equitable powers are limited but nonetheless allowed a bankruptcy court to contravene the Code's restrictions in section 503(b)(3)(D). (R. at 20.) Yet there are other ways to allow compensation without contravening the Code's express provisions. For example, section 327 allows the trustee to employ professionals to assist in carrying out its duties. 11 U.S.C. § 327(a), (c) (1986). Additionally, section 503(b)(3)(B) allows creditors to recover property for the benefit of the estate with court approval. 11 U.S.C. § 503(b)(3)(B) (2005).

Allowing a bankruptcy court to use equitable powers to grant substantial contribution expenses in chapter 7 will circumvent the Code's express restriction in section 503(b)(3)(D). The Thirteenth Circuit erred when it set aside the strictures of section 503(b)(3)(D) and allowed recovery for Weinberg after he failed to request protection under other applicable Code provisions or seek retroactive approval from the court. *See In re George*, 23 B.R. 686 (Bankr. S.D. Fla. 1982) (retroactively allowing recovery for creditor and attorney under section 503(b)(3)(B) for efforts benefitting the estate); *but see In re Monahan*, 73 B.R. 543 (Bankr. S.D. Fla. 1987) (holding that section 503(b)(3) requires court approval before recovering property beneficial to the estate). Weinberg could have applied for compensation under section 327, but he did not. Weinberg could have sought court approval under section 503(b)(3)(B), but he did not. Nevertheless, the Thirteenth Circuit gave Weinberg relief under section 503(b), notwithstanding the express limitation in subsection (b)(3)(D).

2. There is no exception for an "atypical case."

This Court recently rejected using a "rare case exception" to justify a bankruptcy court's exercise of discretion in contravention of express Code provisions. *See Czyzewski v. Jevic Holding Corp.*, 137 S. Ct. 973, 986–87 (2017) (reasoning that, "[f]or one thing, it is difficult to give precise content to the concept 'sufficient reasons'"). Because a "rare case" exception can become "a more general rule," this Court declined to "alter the balance struck by the statute," even in an atypical case. *Id.*

The Thirteenth Circuit erred when it relied on the sole circuit case to approve a bankruptcy court's exercise of discretion in allowing a substantial contribution in chapter 7. *In re Connolly*, 802 F.3d at 815. In *In re Connolly,* creditors Coface Argentina and Mediofactoring (together "Coface") applied for an administrative expense for costs that it contended substantially benefitted

the chapter 7 bankruptcy estate. *Id.* at 814. Coface acted to remove the initial panel trustee for misfeasance and gathered information that helped the successor trustee settle an adversary proceeding against the initial trustee. *Id.* The successor trustee supported Coface's application, but the U.S. Trustee objected, asserting that no provision of section 503 could justify awarding a substantial contribution expense. *Id.* at 815. The Sixth Circuit held that a bankruptcy court could use its discretion to allow substantial contributions in "atypical" chapter 7 cases, notwithstanding section 503(b)(3)(D)'s express terms. *Id.* at 813 (stating that expenses were allowable "*in these circumstances*") (emphasis added). That was error. The Sixth Circuit, by basing its holding on equity and placing weight in its broad interpretation of "including" in section 503(b), overlooked this Court's indication in *Jevic* that there can be no rare case exception if the Bankruptcy Code is clear. The Sixth Circuit contended that utilizing equitable powers was necessary to incentivize creditor participation and protect the interests of creditors in "the most atypical chapter 7 case[s]." *Id.* at 817.

This is not "the most atypical chapter 7 case." *Id.* The policy concerns at the core of *In re Connolly* are absent here because Weinberg did not act as a de-facto trustee. In *In re Connolly*, Coface's actions benefitted the estate because Coface removed the panel trustee and took steps to administer the case when both the initial panel trustee and the U.S. Trustee failed to do so. There, the U.S. Trustee should have been the procedural safeguard for the panel trustee's misfeasance, but for three years after the mistrial, no parties—neither Coface, nor the U.S. Trustee—attempted to remove the initial trustee under section 324.

Thus, even if the circumstances in *In re Connolly* may have merited different treatment, it was because Coface acted as a de-facto trustee by taking on a fundamental role in administering the bankruptcy case itself. Here, equity does not require a similar result. Weinberg did not have to

administer the bankruptcy case. He did not have to remove the Trustee to protect the estate. The United States Trustee did not fail as "the bankruptcy watchdog." *Id.* at 817. In fact, Weinberg had a self-serving financial incentive to investigate the personal guarantee and incurred his legal costs to maximize his own recovery.

3. *Cases that fall outside the Code's authority require legislative attention.*

In instances where procedural safeguards fail, but Code provisions prohibit the bankruptcy court from exercising discretion, parties must turn to administrative law remedies or seek a legislative fix. *See* Larson, Keith J., *Congress: Resolve Split on Ch. 7 Substantial-Contribution Claims*, 20 AM. BANKR. INST. J. 110, 112 (April 2016) (stating that the Bankruptcy Code currently divests courts of authority to grant substantial contributions in chapter 7). The circumstances in *In re Connolly* should have been addressed by Congress. *See In re Peterson*, 152 B.R. at 614 (stating that, "authority to address any inequities which may be present in the application of the plain meaning rule to section 503(b) is vested in Congress, not the courts") (citing *Taylor v. Freeland & Kronz*, 503 U.S. 638 (1992)); *see also Siegel*, 571 U.S. at 420–23. The fact that they were not does not grant the bankruptcy court *carte blanche* to step outside the Code and grant relief the Code does not provide.

C. An Overly Expansive Interpretation of 11 U.S.C. § 503(b)(3)(D) Undermines the Code's Priority Scheme.

1. Granting an administrative expense priority necessarily diminishes recoveries to unsecured creditors.

A fundamental goal of bankruptcy is to foster equitable distribution to similarly situated parties by "maximiz[ing] return on a collective basis to all creditors." *In re Heron, Burchette, Ruckert & Rothwell*, 148 B.R. 660, 689 (Bankr. D.D.C. 1992). For example, the bankruptcy process puts all creditors on similar footing at the beginning of a case by stopping a "race to the

courthouse," where one creditor could obtain better treatment than another simply because of how quickly it sought relief. *Union Bank v. Wolas*, 502 U.S. 151, 162 (1991) (stating that the Code has a "policy of deterring the race to the courthouse and . . . [a] goal of equal distribution as well").

Administrative expenses are construed narrowly to preserve the estate and foster equitable distribution. *See Lebron*, 27 F.3d at 944 (citation omitted). An expansive interpretation of section 503(b)(3)(D) necessarily diminishes recoveries to unsecured creditors, such as the City of Badlands, because administrative expenses are higher in the Code's priority scheme than unsecured claims. Granting an administrative expense to Weinberg will ensure he is paid before other claimants. 11 U.S.C. § 507(a)(2) (2010). If there is not enough cash after all administrative claims are paid, then unsecured creditors get no distribution. Because this is a chapter 7 liquidation, the unsecured creditors are at risk of receiving nothing; the epitome of unequal distribution.

2. Congress chose to reward creditors who make substantial contributions in chapters 9 and 11.

Congress separated the Bankruptcy Code into chapters, each of which serves a different purpose. In a chapter 7, the trustee liquidates all the debtor's nonexempt assets with the goal of maximizing value for the estate so that creditors can receive recovery on their claims. In reorganization cases, the goal is keeping the proverbial "ship" afloat to restructure and pay down debt.

In chapters 9 and 11, creditors frequently take action that helps facilitate reorganization. In chapter 7, however, all assets are sold and the business will no longer exist. It is no surprise, therefore, that Congress only included chapters 9 and 11 in section 503(b)(3)(D), as they comprise two chapters where creditors frequently take action to benefit a business debtor. By including only chapters 9 and 11, it seems that Congress wanted to encourage actions that benefit the debtor in reorganization.

In addition, administrative expenses are usually granted if the expense incurred was "beneficial to the debtor-in-possession in the operation of the business." *In re Jartran*, 732 F.2d 584, 587 (7th Cir. 1984). Though this case initially started out in chapter 11, Weinberg did nothing to begin collection on his guarantee until the case converted to chapter 7 and reorganization was futile. (R. at 7.) Thus, Weinberg did nothing to benefit Backstreet's operation because Backstreet was already in chapter 7, and it was being sold. Awarding a substantial contribution expense to Weinberg only encourages creditors to circumvent the restrictions in section 503, which include seeking court approval before taking it upon themselves to investigate a fraudulent transfer. 11 U.S.C. § 503(b)(3)(B) (allowing an administrative expense for "a creditor that recovers, after the court's approval, for the benefit of the estate any property transferred or concealed by the debtor . . .").

The Bankruptcy Code balances incentivizing creditor participation "in the reorganization process" with narrowly construing administrative expenses "to preserve as much of the estate as possible for the creditors." *Lebron*, 27 F.3d at 944 (internal quotations omitted). Administrative expense compensation should be reserved for those instances where a "creditor's involvement truly fosters and enhances the administration of the estate." *In re S&Y Enterprises, LLC*, 480 B.R. 452, 459 (Bankr. E.D.N.Y. 2012) (reasoning that "administrative expenses for substantial contributions are the exception, not the rule") (internal quotations omitted).

Even in reorganization cases, where substantial contributions are expressly authorized under section 503(b)(3)(D), "creditors are presumed to be acting in their own interests until they satisfy the court that their efforts have transcended self-protection." *Lebron*, 27 F.3d at 944. Indeed, "[i]nherent in the term 'substantial' is the concept that the benefit received by the estate *must be more than an incidental one arising from activities the applicant has pursued in protecting*

his or her own interests." *Id.* (emphasis added). If this were a reorganization case, Weinberg's conduct would be less deserving of judicial intervention because his motivation was rooted in self-interest, rather than estate maximization.

Weinberg's action to collect on his guarantee was designed for his sole benefit. The information about the fraudulent transfer was incidental because Weinberg would have investigated the guarantee either way. The mere fact that Weinberg set out to investigate the guarantee, rather than a fraudulent transfer, evinces that he did not act to benefit Backstreet. He could not have set out to benefit or protect the estate because he did not know a fraudulent transfer existed. The fact that Weinberg stumbled upon the information should not give rise to a basis for a substantial contribution expense, even in chapter 11.

CONCLUSION

For the foregoing reasons, the Trustee respectfully requests that this Court reverse the judgment of the United States Court of Appeals for the Thirteenth Circuit and hold that Weinberg's post-petition retention of estate property violated section 362(a)(3) and that administrative expenses for substantial contributions do not extend to chapter 7 cases under the express provision in section 503(b)(3)(D).

Respectfully submitted,

Team P.13
Counsel for Petitioner
Date: January 21, 2019

Appendix A

11 U.S.C. § 102 (2010)

Rules of construction.

In this title—

* * *

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

* * *

Appendix B

11 U.S.C. § 105 (2010)

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.

* * *

Appendix C

11 U.S.C. § 362 (2010)

Automatic Stay.

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title [11 USCS § 301, 302, or 303], or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970 [15 USCS § 78eee(a)(3)], operates as a stay, applicable to all entities, of—

> (1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;
>
> (2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;
>
> (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 D

11 U.S.C. § 327 (1986)

Employment of professional persons.

(a) Except as otherwise provided in this section, the trustee, with the court's approval, may employ one or more attorneys, accountants, appraisers, auctioneers, or other professional persons, that do not hold or represent an interest adverse to the estate, and that are disinterested persons, to represent or assist the trustee in carrying out the trustee's duties under this title [11 USCS §§ 101 et seq.].

* * *

(c) In a case under chapter 7, 12, or 11 of this title [11 USCS §§ 701 et seq., 1201 et seq., or 1101 et seq.], a person is not disqualified for employment under this section solely because of such person's employment by or representation of a creditor, unless there is objection by another creditor or the United States trustee, in which case the court shall disapprove such employment if there is an actual conflict of interest.

* * *

Appendix E

11 U.S.C. § 363 (2010)

Use, sale, or lease of property.

* * *

(b) (1) The trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate, except that if the debtor in connection with offering a product or a service discloses to an individual a policy prohibiting the transfer of personally identifiable information about individuals to persons that are not affiliated with the debtor and if such policy is in effect on the date of the commencement of the case, then the trustee may not sell or lease personally identifiable information to any person unless—

* * *

Appendix F

11 U.S.C. § 503 (2005)

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 [11 USCS § 502(f)], 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;

* * *

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

* * *

(B) a creditor that recovers, after the court's approval, for the benefit of the estate any property transferred or concealed by 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 [11 USCS § 1102], in making a substantial contribution in a case under chapter 9 or 11 of this title [11 USCS §§ 901 et seq. or 1101 et seq.];

* * *

Appendix G

11 U.S.C. § 507 (2016)

Priorities.

(a) The following expenses and claims have priority in the following order:

* * *

(2) Second, administrative expenses allowed under section 503(b) of this title [11 USCS § 503(b)], unsecured claims of any Federal reserve bank related to loans made through programs or facilities authorized under section 13(3) of the Federal Reserve Act (12 U.S.C. 343), and any fees and charges assessed against the estate under chapter 123 of title 28 [28 USCS §§ 1911 et seq.].

* * *

Appendix H

11 U.S.C. § 542 (1994)

Turnover of property of 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 [11 USCS § 363], or that the debtor may exempt under section 522 of this title [11 USCS § 522], 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.

* * *

(e) Subject to any applicable privilege, after notice and a hearing, the court may order an attorney, accountant, or other person that holds recorded information, including books, documents, records, and papers, relating to the debtor's property or financial affairs, to turn over or disclose such recorded information to the trustee.

* * *

Appendix I

11 U.S.C. § 543 (1994)

Turnover of property by a custodian.

* * *

(b) A custodian shall—

(1) deliver to the trustee any property of the debtor held by or transferred to such custodian, or proceeds, product, offspring, rents, or profits of such property, that is in such custodian's possession, custody, or control on the date that such custodian acquires knowledge of the commencement of the case; and

(2) file an accounting of any property of the debtor, or proceeds, product, offspring, rents, or profits of such property, that, at any time, came into the possession, custody, or control of such custodian.

(c) The court, after notice and a hearing, shall—

(1) protect all entities to which a custodian has become obligated with respect to such property or proceeds, product, offspring, rents, or profits of such property;

(2) provide for the payment of reasonable compensation for services rendered and costs and expenses incurred by such custodian; and

(3) surcharge such custodian, other than an assignee for the benefit of the debtor's creditors that was appointed or took possession more than 120 days before the date of the filing of the petition, for any improper or excessive disbursement, other than a disbursement that has been made in accordance with applicable law or that has been approved, after notice and a hearing, by a court of competent jurisdiction before the commencement of the case under this title.

* * *