No. 18–0918

IN THE

Supreme Court of the United States

OCTOBER TERM, 2018

IN RE BACKSTREET 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

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BRIEF FOR RESPONDENT

TEAM R14
COUNSEL FOR RESPONDENT

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 February of 2017, the Debtor, Backstreets Plowing, Inc., filed for chapter 11 relief. (R. at 6). The Respondent, Mr. Milton Weinberg, had already lawfully repossessed the Debtor's snow plow trucks (*Id.*) Instead of moving for turnover, the Debtor moved the court to find that Mr. Weinberg's passive retention of the trucks after the filing of the bankruptcy petition was a violation of the automatic stay provision in 11 U.S.C. § 362(a)(3) (2018). (*Id*.) The Bankruptcy Court determined that Mr. Weinberg did not violate the stay and held that such passive retention of the trucks was not within the scope of the prohibitions in § 362(a)(3). (*Id*.) The Debtor appealed to the bankruptcy appellate panel ("BAP"). (R. at 9).

In May of 2017, the Debtor converted the case from chapter 11 to chapter 7, and Mr. Steven Vin Sant was appointed as the Trustee. Mr. Weinberg then moved for allowance of an administrative expense of $25,000 for attorneys' fees incurred investigating fraudulent transfers by the Debtor. (R. at 7). His investigation allowed the Trustee to recover $75,000 for the estate. (*Id.*) The Bankruptcy Court approved the motion, and the Trustee appealed to the BAP. (R. at 8).

With both parties' consent, the BAP consolidated the automatic stay issue and the administrative expense issue for review. (R. at 9). The BAP affirmed on both issues. (*Id*.) The Trustee appealed both issues to the Thirteenth Circuit. (*Id*.) The Thirteenth Circuit also affirmed, holding that (1) Mr. Weinberg's conduct did not violation the automatic stay provision, and (2) the Bankruptcy Court was authorized to grant Mr. Weinberg an administrative expense for a substantial contribution to the estate. (R. at 16, 21). Following that decision, the Trustee filed a request for discretionary review with this Court and that request was granted. (R. at 1).

STATEMENT OF JURISDICTION

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

STATEMENT OF FACTS

The Debtor is a company that operates a seasonal snow plow business. (R. at 3). In the spring of 2015, the Debtor needed an influx of money to purchase new snow plow trucks to compete for a plowing contract offered by the City of Badlands ("City"). (*Id.*) To this end, the Debtor's sole shareholder, Christopher Clemons ("Clemons"), sought a loan from one of his friends, Milton Weinberg ("Mr. Weinberg"). (R. at 3-4). Mr. Weinberg agreed to loan $450,000 to the Debtor and the Debtor agreed to make monthly payments on a promissory note to Mr. Weinberg that would commence when the business began generating revenue. (R. at 4). With the loan secured, the Debtor purchased several new trucks and won the contract bid. (*Id.*) The one-year contract paid a flat rate and could be renewed at the City's sole discretion. (R. at 4-5).

The winter of 2015-2016 brought little snowfall. (R. at 5). Because the City's contract paid a flat rate, the Debtor enjoyed a windfall that winter. (*Id.*) However, in October of 2015, Clemons' and Mr. Weinberg's friendship deteriorated after a "heated argument" over a football game. (R. at 4-5). Clemons never made any payments on the loan to Mr. Weinberg, the first of which had been due in December of 2015. (R. at 5). Despite several phone calls, Mr. Weinberg was unable to reach Clemons. (*Id.*) After months of missed payments, Mr. Weinberg drove to the Debtor's facility to speak with Clemons. (*Id.*) Another argument ensued. (*Id.*) Clemons had Mr. Weinberg forcibly removed. (*Id.*)

In April of 2016, Mr. Weinberg filed suit on the promissory note in the State of Moot Circuit Court. (*Id.*) The court granted Mr. Weinberg a default judgment against both the Debtor and Clemons, jointly and severally, for $450,000 plus interest. (*Id.*). In January of 2017, Mr. Weinberg lawfully repossessed the trucks pursuant to the judgment. (R. at 5-6). The winter of 2016-2017 brought heavy snowfall in the City. (*Id.*) The monthly payments from the City were

insufficient for the Debtor to cover its costs. (*Id.*) Because of the weather, the Debtor incurred substantial losses. (*Id.*) In light of those losses and the trucks' lawful repossession, the Debtor filed for chapter 11 relief on February 4, 2017. (R. at 6).

After filing the petition, the Debtor demanded that Mr. Weinberg return the trucks. (*Id.*) Mr. Weinberg did not, because he understood that a turnover action may only be compelled by a court in exchange for the Debtor providing him with adequate protection. (*Id.*) The Debtor did not pursue a turnover action, opting instead to sue Mr. Weinberg for violating the automatic stay. (*Id.*) Shortly thereafter, the City informed the Debtor that it would not renew the contract. (R. at 7). As a result, the Debtor voluntarily converted the chapter 11 case to a chapter 7 case. (*Id.*)

In May of 2017, Mr. Weinberg initiated a creditor's examination of Clemons, discovering avoidable transfers of roughly $100,000 from the Debtor to Clemons' daughter. (R. at 7). The Trustee recovered $75,000 for the estate after Mr. Weinberg provided this information. (*Id.*) Mr. Weinberg filed for reimbursement of the $25,000 in attorneys' fees he incurred investigating the transfers. (*Id.*) The Bankruptcy Court, over the Trustee's opposition, awarded Mr. Weinberg a reimbursement, and the Trustee appealed. (R. at 7-8).

The Trustee continued to pursue the appeal on the automatic stay issue, and both disputes were consolidated for joint appeal. (R. at 9). The Thirteenth Circuit affirmed the BAP, concluding both that Mr. Weinberg's conduct did not violate the automatic stay provision in 11 U.S.C. § 362(a)(3) and that 11 U.S.C. § 503(b) does authorize courts to award administrative expenses for substantial contributions in chapter 7 cases. (*Id*.)

STATEMENT OF THE STANDARD OF REVIEW

The parties do not dispute the material facts, and the issues for review are questions of law. (R. at 9). This Court reviews questions of law *de novo*. *Highmark Inc. v. Allcare Health Mgmt. Sys., Inc.*, 572 U.S. 559, 563 (2014).

SUMMARY OF THE ARGUMENT

11 U.S.C. § 362(a)(3), the automatic stay provision, does not prohibit a secured creditor from retaining possession over property it lawfully repossessed prior to the filing of a bankruptcy petition. The plain language of § 362(a)(3) prohibits only post-petition *affirmative* acts to obtain possession or exercise control over property of the estate. The operative phrase triggering § 362(a)(3) is "any act," and its plain meaning is defined as "doing something" or taking an action without including inaction. The phrase "exercise control" does not refer to retaining property of the estate that was lawfully repossessed pre-petition; rather, it serves to prohibit actions by creditors to obtain possession over intangible rights associated with or constituting property of the estate. Prior to the 1984 Amendment to the Bankruptcy Code ("the Code"), courts applying § 362(a)(3) never found passive retention of property to be a violation of the automatic stay. Therefore, in the absence of legislative history regarding the amendment, courts should look to the plain meaning and prior application of § 362(a)(3). The plain meaning of the phrase "any act" was not affected by the 1984 Amendment because it remained the operative phrase of § 362(a)(3). Furthermore, this Court's decision in *Citizens Bank of Md. v. Strumpf* holds that passive retention of property does not constitute an exercise of control. 516 U.S. 16 (1995).

Additionally, other provisions of the Code support the plain-language interpretation of § 362(a)(3). Congress' deliberate use of "an act" and "failure to act" in other provisions infers

that Congress intentionally omitted inaction in § 362(a)(3). Reading § 362(a)(3) to cover anything other than affirmative actions would impermissibly alter the turnover provision to become self-effectuating. Finally, the plain-language interpretation of § 362(a)(3) provides the best results for bankruptcy litigants by maintaining the pre-petition status quo and protecting the interests of secured creditors.

11 U.S.C. § 503(b), the administrative expense provision, authorizes courts to award administrative expenses to creditors in chapter 7 cases for substantial contributions to the estate. Because § 503(b) uses the word "including," which the Code defines as non-exclusive, courts may choose to reimburse creditors for administrative expenses in chapter 7 cases when appropriate. Reading § 503(b) to limit awards of administrative expenses to chapter 9 and 11 creditors would deprive the word "including" of meaning. Furthermore, public policy supports courts' ability to reimburse chapter 7 creditors in the rare cases where they make substantial contributions to the estate. Allowing reimbursement incentivizes creditors to act in the best interests of the estate and upholds fundamental standards of fairness. Finally, awards of administrative expenses to creditors who make substantial contributions will not lessen the value of the estate because courts will be able to control when such awards are appropriate.

ARGUMENT

I. A SECURED CREDITOR DOES NOT VIOLATE THE AUTOMATIC STAY BY RETAINING PROPERTY IT LAWFULLY REPOSSESSED PRE-PETITION.

The automatic stay provision in § 362(a)(3) does not prohibit a secured creditor from retaining property of the estate that it lawfully repossessed prior to the filing of a bankruptcy petition. The automatic stay prohibits "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) (emphasis added). The plain language of § 362(a)(3) indicates that an affirmative action is required to trigger the

provision and that inaction such as retention of property does not trigger it. Therefore, this Court should affirm the Thirteenth Circuit because (1) the plain language of § 362(a)(3) is unambiguous, (2) other provisions in the Code show Congress follows the statute's plain meaning, and (3) public policy supports the plain language.

A. The Plain Language of § 362(A)(3) Prohibits Only Affirmative Actions to Exercise Control of Property.

The plain language of § 362(a)(3) indicates that passive retention of property does not violate the automatic stay. A court's interpretation of the Code starts with the language of the statute itself. *United States v. Ron Pair Enters.*, 489 U.S. 235, 241 (1989). To understand statutory language, courts should look to the plain meaning of the words used. *See Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) ("Congress says in a statute what it means and means in a statute what it says there.") If the words are not a term of art or expressly defined by the Code, "courts should consult the ordinary meanings contained in general and legal dictionaries." *Asgrow Seed Co. v. Winterboer*, 513 U.S. 179, 187 (1995). A statute is ambiguous when it can be reasonably read in different ways. *See United States v. R.L.C.*, 503 U.S. 291, 297-98 (1992); *see also United States v. Gibbens*, 25 F.3d 28, 34 (1st Cir. 1994) (applying the same interpretation of ambiguity to the Code).

When a statute's language is unambiguous, a court's inquiry necessarily comes to an end. The plain meaning of § 362(a)(3) should be conclusive, except in the "rare cases [in which] the literal application will produce a result demonstrably at odds with the intentions of its drafters." *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982). When courts establish the plain meaning of a statute, "the sole function of the courts is to enforce it according to its terms." *Caminetti v. United States*, 242 U.S. 470, 485 (1917). Therefore, "[a] party seeking to defeat

plain meaning of Bankruptcy Code text bears an exceptionally heavy burden." *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 552 (1994) (quotations omitted).

i. The plain meaning of "any act" excludes the failure to act.

The crux of the plain meaning of § 362(a)(3) is the operative phrase "any act." Section 362(a)(3) states that when a petition is filed, that provision 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). The provision begins with the phrase "any act," making it the operative phrase of the provision. *See id.* Thus, this Court must look to the plain meaning of the word "act" to determine if retaining property is an "act" contemplated under the Code. *See Hartford Underwriters Ins. Co.*, 530 U.S. at 6.

The operative phrase "any act" in § 362(a)(3) is unambiguous. The word "act" is not used as a term of art, nor is it expressly defined in the Code. *See generally* 11 U.S.C. §§ 101, 102. Hence, the Court should consult legal and general dictionaries to determine its plain meaning. *See Asgrow Seed Co.*, 513 U.S. at 187. The word "act" is universally defined as "doing something." *See* BLACK'S LAW DICTIONARY (10th ed. 2014) ("The process of doing something or performing"); *see also* MERRIAM-WEBSTER COLLEGIATE DICTIONARY (11th ed. 2009) ("The doing of a thing"); NEW OXFORD AMERICAN DICTIONARY (3d ed. 2010) ("Take action; do something"); WEST'S ENCYCLOPEDIA OF AMERICAN LAW (2d ed. 2005) ("Something done; usually, something done intentionally or voluntarily with a purpose"). No definition of the word "act" includes the *failure* to act or "inaction." *See, e.g.,* BLACK'S LAW DICTIONARY. Therefore, the plain meaning of "act" does not include passivity.

Furthermore, courts analyzing the plain meaning of the word "act" in § 362(a)(3) hold that "[the provision's] language itself suggests that an *affirmative act* of exercising control is

required" to violate the automatic stay. *In re Hall*, 502 B.R. 650, 665 (Bankr. D.D.C. 2014) (emphasis added); *see also WD Equip., LLC v. Cowen (In re Cowen)*, 849 F.3d 943, 950 (10th Cir. 2017) ("[O]nly affirmative acts to gain possession of, or to exercise control over, property of the estate violate § 362(a)(3)"); *In re Richardson*, 135 B.R 256, 259 (Bankr. E.D. Tex. 1992) (finding the action "must occur post-petition and involve an affirmative act"); *Matter of Brown*, 210 B.R. 878, 883 (Bankr. S.D. Ga. 1997) (agreeing with *Richardson*); *Conn. Pizza, Inc. v. Bell Atl.-Washington, D.C., Inc. (In re Conn. Pizza)*, 193 B.R. 217, 228 (Bankr. D. Md. 1996) (the same); *In re U.S. Physicians, Inc.*, 235 B.R. 367, 375-76 (Bankr. E.D. Pa. 1999) (the same).

The Tenth Circuit is the only appellate court that interprets § 362(a)(3) by focusing on the plain meaning of the operative phrase "any act." *See Cowen*, 849 F.3d at 949-51. In *Cowen*, the court defined retaining property as "passively holding onto an asset." *Id.* (internal quotations omitted). Using the plain meaning of "act," the court concluded that simply retaining property does not constitute "doing something." *Id.* In other words, the retention of property was not an act because it did not involve an affirmative action. *Id.* Moreover, the purpose of the automatic stay supports this decision. The automatic stay was created to maintain the status quo after a petition is filed by prohibiting post-petition attempts to change possession of property. *Lynch v. Johns-Manville Sales Corp.*, 710 F.2d 1194, 1197 (6th Cir. 1983). Passive retention of property does not violate the automatic stay because it does not disrupt the status quo post-petition. *Cowen*, 849 F.3d at 949 ("Stay means stay, not go"). However, the court found that perjury, witness tampering, and forging documents post-petition to maintain possession over the debtor's property were "acts" to exercise control and in violation of the stay because they involved affirmative activity. *Id.* at 951.

Only courts that do not analyze the statute's operative phrase find that the statute is ambiguous. *See Knaus v. Concordia Lumbar Co. (In re Knaus)*, 889 F.2d 773 (8th Cir. 1989); *Cal. Emp't Dev. Dep't v. Taxel (In re Del Mission Ltd.)*, 98 F.3d 1147 (9th Cir. 1996); *Thompson v. Gen. Motors Acceptance Corp.*,566 F.3d 699 (7th Cir. 2009); *Weber v. SEFCU (In re Weber)*, 719 F.3d 72 (2d Cir. 2013). Instead, these courts focus exclusively on the phrase "exercise control" and find that the amendment to § 362(a)(3) was drafted to include passive retention of estate property. *See, e.g., Thompson*, 566 F.3d at 702. However, focusing on the phrase "exercise control" creates artificial ambiguity because it fails to focus on the operative words of the provision. The operative phrase of § 362(a)(3) is "any act" because it precedes the "exercise control" phrase. *See Garcia v. Tyson Prepared Foods, Inc. (In re Garcia)*, 740 F. App'x 163, 164 n.1 (10th Cir. 2018). The provision does not say it prohibits "exercise of control"; rather, it prohibits "any *act* to exercise control." *Denby-Peterson v. Nu2u Auto World*, No. 17-9985(NLH), 2018 WL 5729907, at *4 (D.N.J. Nov. 1, 2018) ("As is clear from the statutory text, the exercise of control is not stayed, but the *act to* exercise control is stayed" (emphasis added)). Therefore, § 362(a)(3) is not ambiguous because the plain meaning of "act" has a clear and consistent dictionary definition, and courts have found that it does not include a failure to act.

Here, Mr. Weinberg did not violate the automatic stay because his retention of the trucks does not constitute an "act" under the plain meaning of § 362(a)(3). Mr. Weinberg solely kept the repossessed trucks stored in his warehouse. (R. at 6). The Record does not indicate that Mr. Weinberg committed any affirmative actions to exercise control. Had Mr. Weinberg repossessed the trucks *after* the Debtor filed his bankruptcy petition, that would constitute "doing something" and thus an "act" under the plain meaning of § 362(a)(3). However, that is not what happened

here. Without any affirmative actions to accompany retention, Mr. Weinberg did not violate the stay by merely retaining possession of the trucks.

ii. Prior to the amendment, courts applying § 362(a)(3) never found passive retention to be a violation of the automatic stay.

In the absence of legislative history, courts should look to the plain meaning of the operative phrase of § 362(a)(3). Without legislative history regarding a statutory amendment, interpretation of the amended statute focuses on its pre-amendment application. *See Dewsnup v. Timm*, 502 U.S. 410, 419 (1992) ("When Congress amends the bankruptcy laws, it does not write on a clean slate" (internal quotations omitted)). Under the normal rule of statutory construction, "if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific." *Kelly v. Robinson*, 479 U.S. 36, 47 (1986). Courts should "not read the Bankruptcy Code to erode past bankruptcy practice absent a clear indication that Congress intended such a departure." *Pa. Dep't of Pub. Welfare v. Davenport*, 495 U.S. 552, 563 (1990). A clear indication of Congress' intent to change pre-amendment practice would be reflected in the legislative history of that amendment. *Dewsnup*, 502 U.S. at 419 ("[T]his Court has been reluctant to . . . effect a major change in the pre-Code practice that is not the subject of at least some discussion in the legislative history"). Thus, a court attempting to override the plain meaning of a provision in the Code cannot do so without the *imprimatur* of legislative history. *Id.* at 422-23.

Here, there is no legislative history that indicates Congress' intent to amend § 362(a)(3). *See* Ralph Brubaker, *Turnover, Adequate Protection, and the Automatic Stay (Part II): Who is "Exercising Control" Over What?*, 33 Bankr. L. Letter 9, Sept. 2013 ("[T]here is absolutely no legislative history explaining Congress' objective in adding the intractably vague 'exercise control' amendment to § 362(a)(3)"). A 1980 congressional report, which was ultimately enacted

as the 1984 Amendment, is the only legislation that gives some indication of Congress' intent. *See* H.R. Rep. No. 96-1195, at 1, 2 (1980). The report stated that "[e]very effort has been made to maintain existing policy intact" because it is "premature to change a statute that has been in effect for such a short period where it is not really known to what extent [any] concerns are other than transitory." *Id.* Although Congress did not specifically address § 362(a)(3) in the report, its general intent with the amendment was to preserve the existing interpretation of the entire Code. This includes § 362(a)(3) and its operative phrase "any act." Because there is no legislative history displaying intent to change the interpretation of § 362(a)(3), Congress did not mean for the amendment to depart from pre-1984 practice. *See Kelly*, 479 U.S. at 47.

Initially, § 362(a)(3) only applied to post-petition acts to obtain possession; this indicates the reason for amending it was to close loopholes that appeared because the provision only applied to acts to "obtain possession" of property. *See In re Bernstein*, 252 B.R. 846, 848 (Bankr. D.D.C. 2000) ("Since an act designed to change control of property could be tantamount to obtaining possession and have the same effect, it appears that § 362(a)(3) was merely tightened to obtain full protection"). Prior to the amendment, if a party attempted to control or influence property of the estate without obtaining possession, it would not violate the stay. *See Amplifier Research Corp. v Hart*, 144 B.R. 693, 694 (E.D. Pa. 1992). This included passive retention because "retaining" property is not "obtaining" property. *See, e.g.,* BLACK'S LAW DICTIONARY ("To *hold* possession" (emphasis added)). Other examples of intangibles include contract rights and causes of action. *See Cowen*, 849 F.3d at 950. Thus, the inclusion of the "exercise control" phrase indicates Congress intended to tighten the provision to cover post-petition non-possessory acts to control or indirectly possess a debtor's property.

If the purpose of the amendment was to broaden the scope of § 362(a)(3), then Congress could have simply replaced "obtain possession" with "exercise control" and achieved that result. Possession is a specific type of control and replacing "obtain possession" with "exercise control" would broaden the provision to cover what the passive courts claim it covers. Yet Congress decided to include *both* phrases in the amendment because the purpose of the amendment was to address non-possessory control over property. Possession commonly refers to physical property, which explains why the amendment includes both words; the explicit distinction between "possession" and "control" was needed to apply the stay to both physical and intangible property. *See* Ralph Brubaker, *Turnover, Adequate Protection, and the Automatic Stay: A Reply to Judge Wedoff*, 38 No. 11 Bankr. L. Letter NL 1. Contrary to the arguments made by passive violation courts, the purpose of the amendment was not to broaden the stay without limitation. Its purpose was to strengthen the effect of the stay by expressly covering intangibles in addition to physical property.

Furthermore, the plain meaning of "any act" was not affected by the 1984 Amendment because it remained the operative phrase of § 362(a)(3). The only change to the provision was the addition of the "exercise control" phrase. *Compare* 11 U.S.C. § 362(a)(3) (2018) *with* 11 U.S.C. § 362(a)(3) (1982). Because the operative phrase did not change, the pre-1984 interpretation of "any act" remains intact. Prior to 1984, no court would have found that the automatic stay applied to anything other than post-petition affirmative action. *Denby-Peterson v. Nu2u Auto World*, No. 17-9985(NLH), 2018 WL 5729907, at *4 (D.N.J. Nov. 1, 2018) ("Considering there is no case law cited before 1984 showing the [original] clause in this subsection – which is subject to the *same prospective prefatory* language – reaches pre-petition action, there is no reason to treat the added language any differently" (emphasis added)). Had

Congress intended to change the plain meaning of "act," it would have explicitly stated so in the legislative history or amended the word itself. It did neither of those things. Without legislative history, the passive violation courts cannot change the plain meaning of § 362(a)(3) on its own accord. Thus, in the absence of legislative history, courts should look to the pre-amendment application of the provision. Accordingly, the plain language of § 362(a)(3) stands.

iii. Passive retention does not constitute an exercise of control.

The passive violation courts focus exclusively on the phrase added to § 362(a)(3) in the 1984 Amendment. The Amendment stays "any act . . . to exercise control over property of the estate." 11 U.S.C. § 362(a)(3) (2018). However, the passive violation courts overlook the effects of this Court's interpretation of this phrase in *Strumpf*. 516 U.S. at 21.

This Court holds that passive retention by itself is not a form of exercising control. *See id.* The creditor in *Strumpf*, a bank, had possession of the debtor's money prior to the debtor filing a bankruptcy petition. *Id.* at 17-18. The bank placed an administrative hold over the money, refusing to allow the debtor or anyone else to withdraw money from the debtor's account. *Id.* The bank continued to do so even after the debtor filed a bankruptcy petition. *Id.* This Court determined that the bank's administrative hold was "neither a taking of possession of [debtor's] property or exercising control over it, but merely a refusal to perform its promise." *Id.* at 21.

This case is identical to the situation in *Strumpf*.[1] *Id*. Here, Mr. Weinberg, like the bank in *Strumpf*, loaned money to the Debtor. *Id.*; (R. at 4). Mr. Weinberg also repossessed and retained the trucks prior to the petition, as the bank in *Strumpf* did when it placed an administrative hold on the debtor's account before the debtor filed its petition. 516 U.S. at 21; (R. at 5-6). Here, the Record does not indicate that Mr. Weinberg engaged in any affirmative acts post-petition; neither

[1] Despite this Court noting that the debtor's money in *Strumpf* was not property of the estate because it was considered in a setoff context, this Court still held that the passive act of retaining property was not an exercise of control. *See Strumpf*, 516 U.S. at 21.

did the bank in *Strumpf*. 516 U.S. at 21. Additionally, the Record shows that the trucks stored by Mr. Weinberg were not accessed by anyone. Similarly, in *Strumpf*, nobody accessed the money in the account that was frozen. 516 U.S. at 17-18. In both cases, the creditor solely retained the debtor's property after the bankruptcy petition was filed without taking any affirmative action. This effectively kept the status quo of possession of the properties prior to the petitions. Accordingly, this Court should follow its reasoning in *Strumpf* to conclude that passive retention of property is not an exercise of control and does not violate § 362(a)(3). 516 U.S. at 21.

Moreover, the premise of the passive violation courts' argument no longer exists following this Court's holding in *Strumpf*. *Id.* The passive violation jurisdictions base their decisions on *Reinhart*, an Eighth Circuit case with similar facts to *Strumpf* that was also decided in a setoff context. *See Knaus*, 889 F.2d at 774-75 (citing *Small Bus. Admin. v. Reinhart*, 887 F.2d 165 (8th Cir. 1989)). The Eighth Circuit in *Reinhart* held that an administrative hold constituted exercising control within the meaning of § 362(a)(3) and was thus a stay violation. 887 F.2d at 170. Using that premise, *Knaus* broadened the *Reinhart* holding to cover retention of property in general. 889 F.2d at 774-75. Subsequently, every circuit in the passive violation jurisdictions adopted the *Knaus* precedent. *See Del Mission Ltd.*, 98 F.3d at 1151; *Thompson*, 566 F.3d at 703; *Weber*, 719 F.3d at 80. However, *Reinhart* was decided in 1989, six years before *Strumpf*. This Court currently holds that an administrative hold is not an exercise of control. *See Strumpf*, 516 U.S. at 21. If the passive violation courts had applied the *Strumpf* rationale in their reasoning, they could not have found that passive retention is an exercise of control. Therefore, passive retention is not an act to exercise control under § 362(a)(3).

B. Other Code Provisions Support the Plain Language, Affirmative Violation Interpretation of § 362(A)(3).

Although the plain meaning interpretation of the operative phrase "any act" is conclusive, other provisions in the Code also support this interpretation. A court need not go farther in its inquiry than the plain language of the statute, so long as the overall statutory scheme is coherent and consistent. *Ron Pair Enters.*, 489 U.S. at 240-41. One of the fundamental principles of statutory construction is that the meaning of a word or phrase cannot be determined in isolation, but the meaning must be drawn from the context in which it is used. *Deal v. United States*, 508 U.S. 129, 132 (1993). Therefore, the plain meaning of a phrase can be determined by its place within the broader context of the whole statutory scheme. *Robinson v. Shell Oil Co.*, 546 U.S. 481, 486 (2006).

i. Congress' deliberate use of an act and a failure to act in other provisions infers that Congress intentionally omitted inaction in § 362(a)(3).

In other provisions of the Code, Congress uses the word "act" according to its plain meaning by referencing both affirmative action and inaction in those provisions. For example, in § 727 Congress uses the phrases "act or failure to act" and "acting or forbearing to act" to state that affirmative action *and* inaction will trigger that provision. 11 U.S.C. § 727(a)(3), (4)(C). If Congress did not follow the plain meaning of "act," it would not need to include both the act and the failure to act in the same sentence. The passive violation courts' interpretation construes "act" broadly to include affirmative action and inaction. If that was the case, Congress would have no need to explicitly include inaction in a provision.

Moreover, had Congress intended for the word "act" to be interpreted in its broadest sense, it would have explicitly said so like it did for the term "property." *See* 11 U.S.C.A § 102 (Westlaw 2018). There, not only did Congress explain that the word "property" was to be used

"consistently in its broadest sense," it also used the phrase "act or forbear to act." *See id.* Even when clarifying the Code, Congress phrases definitions to include both affirmative action and inaction. This indicates that Congress defines the word "act" under its plain meaning. *See id.*; *see also* S. Rep. 95-989 (1978) (using the phrase "acting or forbearing to act"). Because Congress uses the term "act" by its plain meaning, it did not intend for § 362(a)(3) to cover passive retention. Therefore, passive retention of property is not an "act" under Congress' definition and is not a violation of the automatic stay.

ii. The turnover provision supports the plain language, affirmative violation interpretation of § 362(a)(3).

The plain meaning of § 362(a)(3) does not alter applications of other sections of the Code. Section 362(a)(3) is not consistent with § 542(a), the turnover provision, unless § 362(a)(3) only prohibits affirmative acts post-petition. If § 362(a)(3) prohibits passive retention of property post-petition, then the turnover provision must be a self-effectuating provision. This imposes an immediate obligation on creditors to turn property over to the estate. However, § 542(a) is not a self-effectuating provision. First, Congress did not intend for the turnover provision to be self-effectuating because Congress placed explicit limitations on turnover within the statute itself. *See* 11 U.S.C. 542(a). Second, courts that found the turnover provision to be self-effectuating misread both the plain language of the statute and this Court's opinion in *Whiting Pools*. *Compare Del Mission Ltd.*, 98 F.3d at 1151, *Thompson*, 566 F.3d at 703, *and Weber*, 719 F.3d at 80 *with Whiting Pools*, 462 U.S. at 204. Finally, § 542(a) is limited by creditors' right to adequate protection of their interests under § 363(e). *See Whiting Pools*, 462 U.S. at 204. Before a secured creditor must return property of the estate, the creditor may insist upon adequate protection as a condition precedent to the turnover of the property. *In re Young*, 193 B.R. 620, 626 (Bankr. D.D.C. 1996).

First, Congress did not intend for the turnover provision to be self-effectuating. This is evident from the fact that Congress explicitly imposed limitations on the turnover provision within § 542(a) itself. For example, § 542(a), by its own terms, is rendered inapplicable if the property in question is of inconsequential value or benefit to the estate. 11 U.S.C. § 542(a). The turnover provision cannot be self-effectuating if such limitations and to turnover are in place. Instead, a court must determine the rights of the litigants at a turnover proceeding and enter an order if appropriate. *Hall*, 502 B.R. at 653. If a court finds one of the limitations to turnover valid, then the property of the estate will remain with the possessor. *Id*. The possessor does not have to return the property to the debtor before such an order issues. *Id*. The passive violation courts misconstrue the turnover provision as self-effectuating, which is impossible given that the turnover provision itself provides limitations to turnover.

Here, Mr. Weinberg had no obligation to turn over the trucks because the Debtor did not file a turnover action. (R. at 6). The Bankruptcy Court had no opportunity to determine if the trucks were of inconsequential value or benefit to the estate. (*Id.*) If such a proceeding took place, Mr. Weinberg could have argued that the trucks were of no benefit or value to the Debtor's estate; at the time of repossession, the Debtor was already suffering severe losses and could not improve its position by performing its contract with the City. (R. at 5). Because the contract paid a monthly flat rate, there could not be any increase in capital coming into the estate. (*Id.*) Additionally, the City informed the Debtor that the contract was not going to be renewed, further reducing any benefit the Debtor could receive by obtaining the trucks. (R. at 7). Even in a chapter 7 context, Mr. Weinberg could argue that because the value of the trucks depreciated over two years, their value could not exceed Mr. Weinberg's lien. If the trucks were sold, all of the proceeds would be given to Mr. Weinberg anyway. Regardless, the value of the trucks to the

estate would be debatable. At the very least, the value of the trucks should have been a question of fact for the Bankruptcy Court. Mr. Weinberg was under no obligation to turn the trucks over because the turnover provision is not self-effectuating and no turnover action was initiated.

Moreover, passive violation courts miscite this Court's precedent and read the turnover provision inaccurately. For example, the Second Circuit finds that the turnover provision is self-effectuating because it requires that any entity in possession of property of the estate shall deliver the property to the trustees, without condition. *Weber*, 719 F.3d at 79. The Second Circuit holds that § 542(a) creates an affirmative obligation of turnover that has no limitations. *Id*. That is incorrect. First, § 542(a) is expressly limited by its own terms. Second, the Second Circuit's holding conflicts with this Court's holding in *Whiting Pools*. 462 U.S. at 206. In *Whiting Pools*, this Court acknowledged there are explicit limitations to turnover in § 542(a). *Id.* This shows that the turnover provision is not self-effectuating because this Court stated that turnover can be defended. *Id.* Not only are there limitations on the turnover power, but none of those limitations require that the *debtor* possess the property once the bankruptcy petition is filed. *Id.* Thus, this Court's precedent does not support the Second Circuit's holding in *Weber*. The turnover provision does not require immediate return of all property of the estate to the debtor. For that reason, the passive violation interpretation of § 362(a)(3) cannot be correct. The plain language, affirmative violation reading of § 362(a)(3) is far more compatible with the mechanics of the turnover provision and this Court's holding in *Whiting Pools*.

Furthermore, the turnover provision is also limited by creditors' right to adequate protection of their interests. *See Whiting Pools*, 462 U.S. at 206. Turnover does not need to happen before a request for adequate protection. *Young*, 193 B.R. at 626. Prior to the 1984 Amendment, the common practice under the Code was to condition turnover orders on proof of

adequate protection of a creditor's security interests. *Id.* (holding that a secured creditor may insist upon adequate protection *as a condition precedent* to turnover since the property may not be used, sold, or leased under § 363 without it). This shows that courts and litigants understood that Congress intended adequate protection to be a condition to turnover. For example, the Fourth Circuit intuited that a creditor's right to adequate protection not only could be dealt with prior to requiring turnover, but also *should* be protected before turnover. *Tidewater Fin. Co. v. Moffet*, 356 F.3d 518, 519 (4th Cir. 2004). In *Moffet*, the creditor moved for relief from the automatic stay and sought permission to sell the repossessed vehicle of the debtor. *Id.* The Fourth Circuit held that the debtor's reorganization plan already afforded the creditor adequate protection of his security interest. *Id.* After determining that the creditor was adequately protected, the court required the creditor to return the vehicle to the debtor. *Id.* The Fourth Circuit understood that the automatic stay could not be violated before the creditor was afforded his right to adequate protection under § 363(e). *Id.* This comports with the plain language, affirmative violation interpretation of § 362(a)(3).

Additionally, bankruptcy procedure recognizes turnover to be an adversarial process, which can only be initiated by commencing a turnover action in court. Turnover is not an automatic right afforded to the Debtor. The Federal Rules of Bankruptcy Procedure define "adversarial proceeding" as a proceeding to recover money or *property*. *See* Fed. R. Bankr. P. 7001(1) (2018). Such proceedings must follow Rule 3 of the Federal Rules of Civil Procedure. *See* Fed. R. Bankr. P. 7003. Rule 3 states that any action must begin by filing a complaint with the court. *See* Fed. R. Civ. Pro. 3. Therefore, a debtor requesting turnover must file a complaint with the court in order to commence a turnover action. *See In re Perkins*, 902 F.2d 1254, 1258 (7th Cir. 1990) ("A turnover action is an adversary proceeding which must be commenced by a

properly filed and served complaint"). Because turnover must be initiated in a judicial proceeding, a creditor does not have an automatic obligation to turn over property upon the filing of the bankruptcy petition. *Id*. Thus, the creditor cannot violate the automatic stay by passively holding on to property of the estate. The plain language, affirmative violation approach harmonizes § 362(a)(3) and § 542(a) by prohibiting only affirmative acts to exercise control over the property while the creditor waits for the resolution of a turnover proceeding.

Here, the Debtor should have instituted a turnover action to get his trucks back. Mr. Weinberg is an under-secured creditor; the trucks have been used for two years and will have depreciated in value. (R. at 4, 6). Therefore, Mr. Weinberg is in even more need of adequate protection. A turnover proceeding would have provided Mr. Weinberg with an opportunity to request adequate protection. The Bankruptcy Court could have conditioned turnover on adequate protection of Mr. Weinberg's security interest. Unfortunately, the Debtor did not institute a turnover action. (R. at 6). The turnover provision is not self-effectuating and is subject to limitations, including Mr. Weinberg's right to adequate protection. Thus, Mr. Weinberg was under no obligation to return the trucks to the Debtor upon the commencement of bankruptcy proceedings. In the absence of a petition for turnover by the Debtor and an order directing turnover by a court, Mr. Weinberg did not violate the automatic stay by passively retaining the trucks post-petition.

C. The Plain Language, Affirmative Violation Interpretation of the Automatic Stay Provision Does Not Result in an Abuse of Bankruptcy Proceedings.

This Court should follow the plain language of § 362(a)(3) because it achieves the best overall results for bankruptcy litigants. This Court holds that bankruptcy courts "are essentially courts of equity, and their proceedings [are] inherently proceedings in equity." *Local Loan Co. v. Hunt*, 292 U.S 234, 240 (1934). Courts applying the Code seek to reach the most equitable result

for all parties involved, given the limited availability of assets in the property of the estate. *Id.* Interpreting § 362(a)(3) to prohibit only affirmative, post-petition acts by a possessor delivers the most equitable result. First, the affirmative violation interpretation adheres to Congress' purpose behind the automatic stay. Second, the affirmative violation approach prevents both unfair prejudice and the absurd results of passive violation jurisdictions.

The affirmative violation jurisdictions uphold Congress' purpose of the automatic stay. The legislative history of the automatic stay discloses a congressional intent to preserve the status quo of bankruptcy estates post-petition so that a court may ultimately implement a successful and equitable reorganization of estates. *Lynch*, 710 F.2d at 1197; *see also Thompson*, 566 F.3d at 702 (explaining the purpose behind the automatic stay is to preserve the status quo). Specifically, Congress developed § 363 to stop creditors from diminishing the value of the property of the estate post-petition. *See Young*, 193 B.R at 629 (finding that the automatic stay was enacted to prohibit affirmative acts by creditors that would disrupt the status quo of the estate post-petition). The affirmative violation approach comports with Congress' intent to maintain the status quo of the estate post-petition because it prohibits activity to change possession of property. Accordingly, passive retention of property post-petition does nothing to upset that status quo because retaining property keeps it in possession of the party that held the property prior to the petition.

Here, Mr. Weinberg's passive retention of the trucks does not interfere with Congress' purpose behind the automatic stay. The Record does not reflect Mr. Weinberg taking any post-petition action to enforce his lien or otherwise exercise control of the Debtor's property. In fact, by not taking any post-petition actions, Mr. Weinberg successfully maintained the status quo of the estate at the time of the bankruptcy petition. When the Debtor filed his petition, Mr.

Weinberg had already lawfully repossessed the trucks. (R. at 5-6). Because Mr. Weinberg did not attempt to *act* on his lien post-petition or interfere with the Debtor's intangible property rights in the trucks, Mr. Weinberg did not violate the automatic stay. Mr. Weinberg's conduct comports with Congress' intent behind the automatic stay because he maintained the status quo.

Moreover, the passive violation approach leads to absurd results for bankruptcy litigants. If this Court were to adopt the passive violation interpretation of § 362(a)(3), that could result in situations where bankruptcy courts find creditors do not need to return property in their possession to the estate *and* also find those creditors were liable for violating the automatic stay. For example, a court could find that a creditor was entitled to keep property in its possession because the property was of inconsequential value to the estate, as established in § 542(a). Simultaneously, that creditor could be sanctioned under § 362(a)(3) of the Code because the creditor did not immediately turn the property over to the debtor. This is not an equitable result. If a court applied an affirmative violation standard, this result would be avoided. When only affirmative acts violate § 362(a)(3), parties' rights can be resolved before the property changes hands. This approach harmonizes the Code's various provisions and produces rational results.

Finally, the affirmative violation approach prevents unfair prejudice to litigants. Passive violation courts promote debtors' interests at the expense of creditors. This approach transforms the stay from a "shield" meant to protect debtors into a "sword" that gives debtors unequal power over creditors. *See* Brubaker, *Turnover, Adequate Protection, and the Automatic Stay: A Reply to Judge Wedoff*. Although grouping the property of the estate for reorganization is a primary goal of the Code, it is not the only goal. *Denby-Peterson*, 2018 U.S. Dist. Lexis 187686 at *4. Another important goal of the Code is ensuring that debtors pay off their debts. The affirmative violation approach achieves a better balance of both sides' interests in bankruptcy proceedings.

This method still allows for the return of debtors' property and punitive damages for willful violations of the stay. *Id.* At the same time, the creditor's security interest is protected by allowing the creditor to seek adequate protection at an adversarial proceeding. This approach is both equitable and will result in less cost and risk to creditors, encouraging creditors to finance loans and participate in further economic ventures.

This Court should find that the plain language of § 362(a)(3) does not prohibit passive retention of property post-petition. The statute restricts affirmative acts by secured creditors to exercise control over the property, but it does not include passive retention. Therefore, Mr. Weinberg did not violate the automatic stay by merely retaining possession of the Debtor's property post-petition. A comprehensive reading of the Code, this Court's precedents, and public policy indicate this Court should follow the plain language of § 362(a)(3). Accordingly, this Court should affirm the Thirteenth Circuit Court of Appeals' decision.

II. COURTS MAY AWARD ADMINSITRATIVE EXPENSES TO CREDITORS IN CHAPTER 7 CASES FOR SUBSTANTIAL CONTRIBUTIONS TO THE ESTATE.

11 U.S.C. § 503(b) is inclusive and allows courts to exercise discretion in determining administrative expenses. Because § 503(b) uses the word "including" before listing allowable administrative expenses, the statute is not exclusive. *Mediofactoring v. McDermott (In re Connolly N. Am., LLC)*, 802 F.3d 810, 818 (6th Cir. 2015). Principles of statutory construction favor the understanding that § 503(b) does not bar courts from awarding administrative expenses to creditors, when appropriate, in chapter 7 cases. *Id.* Furthermore, public policy supports courts' abilities to exercise discretion and award such expenses in the rare instances that creditors provide substantial contributions to debtors' estates in chapter 7 cases. *Id.* at 819. Therefore, this Court should affirm the Thirteenth Circuit Court of Appeals' decision that bankruptcy courts

may grant administrative expenses for creditors who provide substantial contributions to estates in chapter 7 cases.

A. Section 503(b) Is Inclusive, Not Exclusive.

Section 503(b) should be read inclusively because of its use of the word "including." *Id.* at 816. Applying the principle of statutory construction that all words in a statute must be given effect and incorporating the Code's own definition of the word "including" leads to this interpretation. *Hibbs v. Winn*, 542 U.S. 88, 101 (2004); 11 U.S.C. § 102(3). Viewing § 503(b) in its entirety, this interpretation makes logical sense and retains the full meaning of each word used in the statute. *Connolly*, 802 F.3d at 818.

i. Principles of statutory interpretation require that the word "including" in § 503(b) be given meaning.

Interpretation of the Code should begin with and focus on the statute's plain language. *Ransom v. FIA Card Servs., N.A.*, 562 U.S. 61, 69 (2011). When a statute's language is clear, courts enforce the statute "according to its terms." *Caminetti*, 242 U.S. at 485; *see also Lamie v. U.S. Trustee*, 540 U.S. 526, 534 (2004) ("When the statute's language is plain, the sole function of the courts – at least where the disposition required by the text is not absurd – is to enforce it according to its terms" (quotations omitted)). When Congress speaks plainly, application of a statute requires little analysis by a court. *Lamie*, 540 U.S. at 534.

However, statutes are not always perfectly clear: when they are not, courts look to the entirety of the statute's language to determine meaning. *Hibbs*, 542 U.S. at 101. Statutory language should be considered in context. *Id.* Each and every word of a statute should be given weight and meaning. *Id.* Otherwise, portions of the statute could be rendered "inoperative or superfluous, void, or insignificant," which would defeat an essential principle of statutory construction. *Id.* When focusing on the plain language of the statute, courts should ensure that

each word retains its place in the overall structure, so long as doing so does not produce absurd results. *Id.*; *Lamie*, 540 U.S. at 534.

Section 503(b) allows courts to grant, "[a]fter notice and a hearing[,] . . . administrative expenses . . . including [the following]." The statute goes on to list nine subsections, each discussing allowable administrative expenses. *Id.* At issue here, § 503(b)(3)(D) states that administrative expenses may be awarded to "a creditor . . . making a substantial contribution in a case under chapter 9 or 11 of this title." Some courts have found the language in § 503(b)(3), which does not use the word "including" when introducing subsection (D), to mean that awards for administrative expenses to creditors who make substantial contributions must be restricted to chapter 9 and 11 cases. *Lebron v. Mechem Fin. Inc.*, 27 F.3d 937, 945 (3d Cir. 1994) ("Expenses incurred after a chapter 11 case is converted to one under chapter 7, however, are not recoverable pursuant to [§ 503(b)(3)(D)]"); *see also Mosier v. Kupetz (In re United Educ. & Software)*, No. BAP CC-05-1067-MAMEP, 2005 WL 6960237, at *7 (B.A.P. 9th Cir. Oct. 7, 2005) (finding the same). However, because those courts' conclusions deprive § 503(b) of its inclusivity, the Sixth Circuit's decision in *Connolly* better reflects the statute's meaning. 802 F.3d at 818.

The Code defines the words "includes" and "including" as "not limiting." 11 U.S.C. § 102(3). When § 503(b) is viewed in coordination with § 102(3)'s definition, the statute should be viewed as non-exhaustive. *Connolly*, 802 F.3d at 816. There is a "broad consensus" among courts that § 503(b)'s nine listed categories are "not exhaustive." *Id.* (citing *In re Al Copeland Enters.*, 991 F.2d 233, 239 (5th Cir. 1993); *United States v. Ledlin (In re Mark Anthony Constr., Inc.)*, 886 F.2d 1101, 1106 (9th Cir. 1989); *In re T.A. Brinkoetter & Sons, Inc.*, 467 B.R. 668, 670 (Bankr. C.D. Ill. 2012); *Pergament v. Maghazeh Family Trust (In re Maghazeh)*, 315 B.R. 650, 654 (Bankr. E.D.N.Y. 2004)). Because § 503(b) is inclusive, courts' inherent equitable

powers allow them to award administrative expenses for creditors' substantial contributions in chapter 7 cases. *Connolly*, 802 F.3d at 819; *see also Bank of Marin v. England*, 385 U.S. 99, 103 (1966) ("Equitable principles govern the exercise of bankruptcy jurisdiction").

Reading § 503(b) otherwise would deprive "including" of its defined meaning under § 102(3). *Connolly*, 802 F.3d at 819. This result would contradict the principle that each word in the statute must be given distinct meaning. *Hibbs*, 542 U.S. at 101. Furthermore, had Congress intended such a result, it could have explicitly excluded reimbursement in chapter 7 cases, which it did not do. *Connolly*, 802 F.3d at 818. This result has sound practical applications as well: creditors will rarely provide substantial contributions in chapter 7 cases because of the trustee's role in managing the estate, but they may do so under unique circumstances. *Id.* at 818. *Connolly* provides one such example, where the trustee failed to fulfill his duties; so too does the present case, where Mr. Weinberg found avoidable transfers that the Trustee missed. *Id.* at 813; (R. at 7). Given the trustee's role in chapter 7 cases, Congress' reference to chapters 9 and 11 in § 503(b)(3)(D) makes sense. *Connoll*y, 802 F.3d at 817. Creditors will more regularly provide substantial contributions in chapter 9 and 11 cases, where there is no trustee. *Id.* Therefore, the result obtained by reading § 503(b)'s use of "including" as non-exhaustive is not "absurd." *Lamie*, 540 U.S. at 534. Instead, this interpretation provides bankruptcy courts with appropriate flexibility to award expenses to creditors in the rare instances when creditors do provide substantial contributions to estates in chapter 7 cases. *Connolly*, 802 F.3d at 819.

ii. A limited reading of § 503(b) would nullify the meaning of "including."

Applying the principle of statutory interpretation that the specific must govern the general would fundamentally alter the meaning of § 503(b). Courts that have declined to grant administrative expenses in chapter 7 cases erroneously apply this principle. *See, e.g., United*

Educ. & Software, 2005 WL 6960237, at *7; *see also In re Fontainebleau Las Vegas Holdings, LLC*, 574 B.R. 895, 903 (Bankr. S.D. Fla. 2017) (declining to adopt *Connolly*'s reasoning and construing § 503(b)(3)(D)'s language to be exhaustive).[2] Those courts also focus on the need to keep administrative expenses to a minimum. *See, e.g., United Educ. & Software*, 2005 WL 6960237, at *7. However, these arguments provide a less compelling understanding of § 503(b) for two reasons.

First, awards of administrative expenses to chapter 7 creditors for substantial contributions will be rare. *Connolly*, 802 F.3d at 817. Therefore, the occasional award of expenses to chapter 7 creditors will not generally subtract from the total value of the estate, as courts will retain the ability to determine when such awards are appropriate. *Id.* Some bankruptcy courts addressing the issue and applying *Connolly*'s reasoning have set limits on such awards, requiring creditors to prove their actions have added value to the estate before granting reimbursement. *See, e.g., In re Javed*, 592 B.R. 615, 622 (Bankr. D. Md. 2018) (finding a rebuttable presumption against awarding administrative expenses to chapter 7 creditors for substantial contributions); *see also In re Maust Transp., Inc.*, 589 B.R. 887, 899 (Bankr. W.D. Wash. 2018) (finding chapter 7 creditors may be reimbursed for administrative expenses in rare cases when they provide substantial contributions to the estate). Given the rarity of awards to chapter 7 creditors and the ability of courts to fashion appropriate methods of analysis regarding claims, awards of administrative expenses to chapter 7 creditors for substantial contributions need not decrease the value of the estate. *Connolly*, 802 F.3d at 819; *Javed*, 592 B.R. at 622.

Second, applying the canon that the specific must govern the general in § 503(b)'s context strips the statute of its given meaning. *Connolly*, 802 F.3d at 818. The Ninth Circuit's

[2] In *Lebron*, the Third Circuit did not conduct any statutory analysis to determine that § 503(b)(3)(D) does not allow grants of administrative expenses in chapter 7 cases. 27 F.3d at 945. Instead, the Third Circuit simply held that § 503(b)(3)(D) does not apply to chapter 7 cases because chapter 7 cases are addressed elsewhere within § 503. *Id.*

BAP reasoned that the specific exclusion of "including" in § 503(b)(3) meant that chapter 7 cases must be excluded by implication of the maxim "*expressio unius est exlcusio alterius*." *United Educ. & Software*, 2005 WL 6960237, at *7. This canon's use is inappropriate here, however, because its application conflicts with the requirement that all words in a statute be given meaning. *Hibbs*, 542 U.S. at 101. Additionally, Congress' listing of only chapter 9 and 11 cases in § 503(b)(3)(D) does not necessarily mean chapter 7 was meant to be excluded. *N.L.R.B. v. SW Gen., Inc.*, 137 S. Ct. 929, 933 (2017) ("[*exclusio unius*] applies, however, only when circumstances support [ ] a sensible inference that the term left out must have been meant to be excluded" (quotations omitted)). Rather, chapter 7 was not listed because Congress focused on instances where a creditor's involvement was more likely. *Connolly*, 802 F.3d at 818.

Furthermore, at least one bankruptcy court within the Ninth Circuit disagrees with the BAP's conclusion and finds there to be Ninth Circuit precedent contrary to the BAP's decision. *In re Maqsoudi*, 566 B.R. 40, 44-45 (Bankr. C.D. Cal. 2017) (citing *Mark Anthony Constr., Inc.*, 885 F.2d at 1106 and *United Educ. & Software*, 2005 WL 6960237, at *7). In *Mark Anthony Constr., Inc.*, the Ninth Circuit holds that "the administrative expense statute's use of 'including' renders the *expressio unius* rule inapplicable to section 503." 886 F.2d at 1106. This conflicts with the Ninth Circuit BAP's finding that § 503(b)(3)(D) prohibits courts from awarding administrative expenses for substantial contributions in chapter 7 cases. *Maqsoudi*, 556 B.R. at 45. The Ninth Circuit's holding that *expressio unius* does not apply to § 503(b) should thus apply here: § 503(b)(3)(D) should not control § 503(b). *Id.*

Because § 503(b) is non-exhaustive, courts may award administrative expenses to creditors in chapter 7 cases for substantial contributions to the estate. *Connolly*, 802 F.3d at 816. Section 503(b) should be read this way because the statute uses the word "including," which is

defined as non-exhaustive, and each word of the statute must be given effect. *Id.* at 818; *Hibbs*, 542 U.S. at 101. This interpretation comports with the general understanding that § 503(b) is not meant to be exhaustive. *Connolly*, 802 F.3d at 819. This provides bankruptcy courts with the necessary flexibility to award administrative expenses to creditors in the rare chapter 7 cases where such awards may be appropriate. *Id.* Therefore, this Court should affirm the Thirteenth Circuit's determination that the Bankruptcy Court could award Mr. Weinberg attorneys' fees as an administrative expense for his discovery of the missing funds and role in recovering those funds for the estate. (R. at 7-8).

B. Public Policy Supports Courts Awarding Administrative Expenses to Chapter 7 Creditors Who Make Substantial Contributions in Rare Cases.

Granting administrative expenses for substantial contributions in chapter 7 cases provides courts the ability to incentivize creditors to act in the rare instances that the trustee does not. *Connolly*, 802 F.3d at 819. Furthermore, failing to reward creditors who expend their own funds seeking to benefit the estate violates the fundamental standard of fairness. *Id.* Because bankruptcy courts are inherently courts of equity, these principles should guide courts in determining when such awards are appropriate. *Local Loan Co.*, 292 U.S. at 240; *see also Pepper v. Litton*, 308 U.S. 295, 307 (1939) ("The bankruptcy court in passing on allowance of claims sits as a court of equity"). Courts may grant administrative expenses for substantial contributions where appropriate in chapter 7 cases and still limit such expenses.

Courts should incentivize creditors to maximize the estate in chapter 7 proceedings because such actions will benefit all parties. *Connolly*, 802 F.3d at 818-19. While creditors' actions to benefit the estate will be rarer in chapter 7 cases than in chapter 9 or 11 cases, such instances provide examples of when courts should desire creditors to act. *Id*. For instance, in *Connolly*, the creditor applying for reimbursement spent over $100,000 of its own funds to

remove the original trustee for negligently failing to pursue several claims of the estate. *Id.* at 814. Other courts applied § 503(b) to grant such administrative expenses in similar circumstances. *See, e.g., Javed*, 592 B.R. at 617 (noting that the creditor seeking expenses discovered assets the debtor transferred to family members prior to filing for bankruptcy).

Here, as in *Javed*, courts should be able to reward creditors who discover assets that the trustee did not when such discoveries benefit the estate as a whole. *Id.*; (R. at 20). A creditor's percentage share of the estate may not be sufficient to prompt that creditor to act for the benefit of the estate as a whole where that creditor holds only a small percentage interest. *Connolly*, 802 F.3d at 819. Therefore, creditors who add value to the estate should be able to recoup administrative expenses because such awards will incentivize all creditors to act. Mr. Weinberg should be rewarded for his efforts to recover the $75,000 gained by the Debtor's estate, in part so that other creditors in his position will be similarly motivated to act.

Moreover, denying reimbursement to creditors who take initiative to enhance the estate would run counter to the principles of fairness inherent to proceedings in equity. *Connolly*, 802 F.3d at 819. Because such instances are much rarer in chapter 7 cases than in chapter 9 or 11 cases, these circumstances often involve extraordinary action by creditors. *See Connolly*, 802 F.3d at 813; *see also Javed*, 592 B.R. at 617. Courts should not expect creditors to remove a trustee or discover funds that debtors transferred pre-petition. *See Connolly*, 802 F.3d at 818; *see also Javed*, 592 B.R. at 623. When a creditor takes on personal expense and risk to seek such an outcome, reimbursement of those expenses is a fair reward for the creditor's success. *Connolly*, 802 F.3d at 819. Therefore, Mr. Weinberg should be able to recover the funds he spent pursuing the Debtor's prepetition transfers because his actions provided a net benefit to the estate at his own personal expense.

Finally, courts need not award administrative expenses in every chapter 7 case where a creditor seeks reimbursement. *Javed*, 592 B.R. at 622. Like any proceeding in equity, courts retain discretion to award reimbursement based on the totality of the circumstances. *Id.* Therefore, reimbursement in certain chapter 7 cases will not conflict with the understanding that administrative expenses should be construed narrowly to preserve the estate for other creditors. *See Mark Anthony Constr., Inc.*, 885 F.2d at 1106. Rather, reimbursement of expenses can be limited to circumstances like those in *Connolly*, *Javed*, or this case, where the estate gains a net benefit even after the creditor is reimbursed. *Connolly*, 802 F.3d at 818-19; *Javed*, 592 B.R. at 622; (R. at 20). This result is consistent with bankruptcy courts' equitable powers, and the Code allows courts to exercise those powers in cases like Mr. Weinberg's under § 503(b). *See Norwest Bank Worthington v. Ahlers*, 485 U.S. 197, 206 (1988) (holding that bankruptcy courts' exercise of equitable powers must stay within the boundaries of the Code). Therefore, courts should be able to grant reimbursement of administrative expenses to creditors who produce substantial contributions to chapter 7 estates.

CONCLUSION

For the foregoing reasons, Mr. Weinberg respectfully requests this Court affirm the Court of Appeals for the Thirteenth Circuit and find that his passive retention of the Debtor's property did not violate the automatic stay and that he may be reimbursed for his expenses incurred uncovering the Debtor's fraudulent transfers.

Respectfully Submitted,

Team R14
Counsel for Respondent
DATED: January 21, 2019

APPENDIX A

UNITED STATES CODE TITLE 11: BANKRUPTCY

11 U.S.C. § 101 – Definitions

In this title the following definitions shall apply:

(1) The term "accountant" means accountant authorized under applicable law to practice public accounting, and includes professional accounting association, corporation, or partnership, if so authorized.

(2) The term "affiliate" means--

> **(A)** entity that directly or indirectly owns, controls, or holds with power to vote, 20 percent or more of the outstanding voting securities of the debtor, other than an entity that holds such securities--
>
> > **(i)** in a fiduciary or agency capacity without sole discretionary power to vote such securities; or
> >
> > **(ii)** solely to secure a debt, if such entity has not in fact exercised such power to vote;
>
> **(B)** corporation 20 percent or more of whose outstanding voting securities are directly or indirectly owned, controlled, or held with power to vote, by the debtor, or by an entity that directly or indirectly owns, controls, or holds with power to vote, 20 percent or more of the outstanding voting securities of the debtor, other than an entity that holds such securities--
>
> > **(i)** in a fiduciary or agency capacity without sole discretionary power to vote such securities; or
> >
> > **(ii)** solely to secure a debt, if such entity has not in fact exercised such power to vote;
>
> **(C)** person whose business is operated under a lease or operating agreement by a debtor, or person substantially all of whose property is operated under an operating agreement with the debtor; or
>
> **(D)** entity that operates the business or substantially all of the property of the debtor under a lease or operating agreement.

(3) The term "assisted person" means any person whose debts consist primarily of consumer debts and the value of whose nonexempt property is less than $192,4501.

(4) The term "attorney" means attorney, professional law association, corporation, or partnership, authorized under applicable law to practice law.

(4A) The term "bankruptcy assistance" means any goods or services sold or otherwise provided to an assisted person with the express or implied purpose of providing information, advice, counsel, document preparation, or filing, or attendance at a creditors' meeting or appearing in a

case or proceeding on behalf of another or providing legal representation with respect to a case or proceeding under this title.

(5) The term "claim" means--

(A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or

(B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured.

(6) The term "commodity broker" means futures commission merchant, foreign futures commission merchant, clearing organization, leverage transaction merchant, or commodity options dealer, as defined in section 761 of this title, with respect to which there is a customer, as defined in section 761 of this title.

(7) The term "community claim" means claim that arose before the commencement of the case concerning the debtor for which property of the kind specified in section 541(a)(2) of this title is liable, whether or not there is any such property at the time of the commencement of the case.

(7A) The term "commercial fishing operation" means--

(A) the catching or harvesting of fish, shrimp, lobsters, urchins, seaweed, shellfish, or other aquatic species or products of such species; or

(B) for purposes of section 109 and chapter 12, aquaculture activities consisting of raising for market any species or product described in subparagraph (A).

(7B) The term "commercial fishing vessel" means a vessel used by a family fisherman to carry out a commercial fishing operation.

(8) The term "consumer debt" means debt incurred by an individual primarily for a personal, family, or household purpose.

(9) The term "corporation"--

(A) includes--

(i) association having a power or privilege that a private corporation, but not an individual or a partnership, possesses;

(ii) partnership association organized under a law that makes only the capital subscribed responsible for the debts of such association;

(iii) joint-stock company;

(iv) unincorporated company or association; or

(v) business trust; but

(B) does not include limited partnership.

(10) The term "creditor" means--

(A) entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor;

(B) entity that has a claim against the estate of a kind specified in section 348(d), 502(f), 502(g), 502(h) or 502(i) of this title; or

(C) entity that has a community claim.

(10A) The term "current monthly income"--

(A) means the average monthly income from all sources that the debtor receives (or in a joint case the debtor and the debtor's spouse receive) without regard to whether such income is taxable income, derived during the 6-month period ending on--

(i) the last day of the calendar month immediately preceding the date of the commencement of the case if the debtor files the schedule of current income required by section 521(a)(1)(B)(ii); or

(ii) the date on which current income is determined by the court for purposes of this title if the debtor does not file the schedule of current income required by section 521(a)(1)(B)(ii); and

(B) includes any amount paid by any entity other than the debtor (or in a joint case the debtor and the debtor's spouse), on a regular basis for the household expenses of the debtor or the debtor's dependents (and in a joint case the debtor's spouse if not otherwise a dependent), but excludes benefits received under the Social Security Act, payments to victims of war crimes or crimes against humanity on account of their status as victims of such crimes, and payments to victims of international terrorism (as defined in section 2331 of title 18) or domestic terrorism (as defined in section 2331 of title 18) on account of their status as victims of such terrorism.

(11) The term "custodian" means--

(A) receiver or trustee of any of the property of the debtor, appointed in a case or proceeding not under this title;

(B) assignee under a general assignment for the benefit of the debtor's creditors; or

(C) trustee, receiver, or agent under applicable law, or under a contract, that is appointed or authorized to take charge of property of the debtor for the purpose of enforcing a lien against such property, or for the purpose of general administration of such property for the benefit of the debtor's creditors.

(12) The term "debt" means liability on a claim.

(12A) The term "debt relief agency" means any person who provides any bankruptcy assistance to an assisted person in return for the payment of money or other valuable consideration, or who is a bankruptcy petition preparer under section 110, but does not include--

(A) any person who is an officer, director, employee, or agent of a person who provides such assistance or of the bankruptcy petition preparer;

(B) a nonprofit organization that is exempt from taxation under section 501(c)(3) of the Internal Revenue Code of 1986;

(C) a creditor of such assisted person, to the extent that the creditor is assisting such assisted person to restructure any debt owed by such assisted person to the creditor;

(D) a depository institution (as defined in section 3 of the Federal Deposit Insurance Act) or any Federal credit union or State credit union (as those terms are defined in section 101 of the Federal Credit Union Act), or any affiliate or subsidiary of such depository institution or credit union; or

(E) an author, publisher, distributor, or seller of works subject to copyright protection under title 17, when acting in such capacity.

(13) The term "debtor" means person or municipality concerning which a case under this title has been commenced.

(13A) The term "debtor's principal residence"--

(A) means a residential structure if used as the principal residence by the debtor, including incidental property, without regard to whether that structure is attached to real property; and

(B) includes an individual condominium or cooperative unit, a mobile or manufactured home, or trailer if used as the principal residence by the debtor.

(14) The term "disinterested person" means a person that--

(A) is not a creditor, an equity security holder, or an insider;

(B) is not and was not, within 2 years before the date of the filing of the petition, a director, officer, or employee of the debtor; and

(C) does not have an interest materially adverse to the interest of the estate or of any class of creditors or equity security holders, by reason of any direct or indirect relationship to, connection with, or interest in, the debtor, or for any other reason.

(14A) The term "domestic support obligation" means a debt that accrues before, on, or after the date of the order for relief in a case under this title, including interest that accrues on that debt as provided under applicable nonbankruptcy law notwithstanding any other provision of this title, that is--

(A) owed to or recoverable by--

(i) a spouse, former spouse, or child of the debtor or such child's parent, legal guardian, or responsible relative; or

(ii) a governmental unit;

(B) in the nature of alimony, maintenance, or support (including assistance provided by a governmental unit) of such spouse, former spouse, or child of the debtor or such child's parent, without regard to whether such debt is expressly so designated;

(C) established or subject to establishment before, on, or after the date of the order for relief in a case under this title, by reason of applicable provisions of--

(i) a separation agreement, divorce decree, or property settlement agreement;

(ii) an order of a court of record; or

(iii) a determination made in accordance with applicable nonbankruptcy law by a governmental unit; and

(D) not assigned to a nongovernmental entity, unless that obligation is assigned voluntarily by the spouse, former spouse, child of the debtor, or such child's parent, legal guardian, or responsible relative for the purpose of collecting the debt.

(15) The term "entity" includes person, estate, trust, governmental unit, and United States trustee.

(16) The term "equity security" means--

(A) share in a corporation, whether or not transferable or denominated "stock", or similar security;

(B) interest of a limited partner in a limited partnership; or

(C) warrant or right, other than a right to convert, to purchase, sell, or subscribe to a share, security, or interest of a kind specified in subparagraph (A) or (B) of this paragraph.

(17) The term "equity security holder" means holder of an equity security of the debtor.

(18) The term "family farmer" means--

(A) individual or individual and spouse engaged in a farming operation whose aggregate debts do not exceed $4,153,1501 and not less than 50 percent of whose aggregate noncontingent, liquidated debts (excluding a debt for the principal residence of such individual or such individual and spouse unless such debt arises out of a farming operation), on the date the case is filed, arise out of a farming operation owned or operated by such individual or such individual and spouse, and such individual or such individual and spouse receive from such farming operation more than 50 percent of such individual's or such individual and spouse's gross income for--

(i) the taxable year preceding; or

(ii) each of the 2d and 3d taxable years preceding; the taxable year in which the case concerning such individual or such individual and spouse was filed; or

(B) corporation or partnership in which more than 50 percent of the outstanding stock or equity is held by one family, or by one family and the relatives of the members of such family, and such family or such relatives conduct the farming operation, and

(i) more than 80 percent of the value of its assets consists of assets related to the farming operation;

(ii) its aggregate debts do not exceed $4,153,1501 and not less than 50 percent of its aggregate noncontingent, liquidated debts (excluding a debt for one dwelling which is owned by such corporation or partnership and which a shareholder or partner maintains as a principal residence, unless such debt arises out of a farming operation), on the date the case is filed, arise out of the farming operation owned or operated by such corporation or such partnership; and

(iii) if such corporation issues stock, such stock is not publicly traded.

(19) The term "family farmer with regular annual income" means family farmer whose annual income is sufficiently stable and regular to enable such family farmer to make payments under a plan under chapter 12 of this title.

(19A) The term "family fisherman" means--

(A) an individual or individual and spouse engaged in a commercial fishing operation--

(i) whose aggregate debts do not exceed $1,924,5501 and not less than 80 percent of whose aggregate noncontingent, liquidated debts (excluding a debt for the principal residence of such individual or such individual and spouse, unless such debt arises out of a commercial fishing operation), on the date the case is filed, arise out of a commercial fishing operation owned or operated by such individual or such individual and spouse; and

(ii) who receive from such commercial fishing operation more than 50 percent of such individual's or such individual's and spouse's gross income for the taxable year preceding the taxable year in which the case concerning such individual or such individual and spouse was filed; or

(B) a corporation or partnership--

(i) in which more than 50 percent of the outstanding stock or equity is held by--

(I) 1 family that conducts the commercial fishing operation; or

(II) 1 family and the relatives of the members of such family, and such family or such relatives conduct the commercial fishing operation; and

(ii) **(I)** more than 80 percent of the value of its assets consists of assets related to the commercial fishing operation;

(II) its aggregate debts do not exceed $1,924,5501 and not less than 80 percent of its aggregate noncontingent, liquidated debts (excluding a debt for 1 dwelling which is owned by such corporation or partnership and which a shareholder or partner maintains as a principal residence, unless such debt arises out of a commercial fishing operation), on the date the case is filed, arise out of a commercial fishing operation owned or operated by such corporation or such partnership; and

(III) if such corporation issues stock, such stock is not publicly traded.

(19B) The term "family fisherman with regular annual income" means a family fisherman whose annual income is sufficiently stable and regular to enable such family fisherman to make payments under a plan under chapter 12 of this title.

(20) The term "farmer" means (except when such term appears in the term "family farmer") person that received more than 80 percent of such person's gross income during the taxable year of such person immediately preceding the taxable year of such person during which the case under this title concerning such person was commenced from a farming operation owned or operated by such person.

(21) The term "farming operation" includes farming, tillage of the soil, dairy farming, ranching, production or raising of crops, poultry, or livestock, and production of poultry or livestock products in an unmanufactured state.

(21A) The term "farmout agreement" means a written agreement in which--

(A) the owner of a right to drill, produce, or operate liquid or gaseous hydrocarbons on property agrees or has agreed to transfer or assign all or a part of such right to another entity; and

(B) such other entity (either directly or through its agents or its assigns), as consideration, agrees to perform drilling, reworking, recompleting, testing, or similar or related operations, to develop or produce liquid or gaseous hydrocarbons on the property.

(21B) The term "Federal depository institutions regulatory agency" means--

(A) with respect to an insured depository institution (as defined in section 3(c)(2) of the Federal Deposit Insurance Act) for which no conservator or receiver has been appointed, the appropriate Federal banking agency (as defined in section 3(q) of such Act);

(B) with respect to an insured credit union (including an insured credit union for which the National Credit Union Administration has been appointed conservator or liquidating agent), the National Credit Union Administration;

(C) with respect to any insured depository institution for which the Resolution Trust Corporation has been appointed conservator or receiver, the Resolution Trust Corporation; and

(D) with respect to any insured depository institution for which the Federal Deposit Insurance Corporation has been appointed conservator or receiver, the Federal Deposit Insurance Corporation.

(22) The term "financial institution" means--

(A) a Federal reserve bank, or an entity that is a commercial or savings bank, industrial savings bank, savings and loan association, trust company, federally-insured credit union, or receiver, liquidating agent, or conservator for such entity and, when any such Federal reserve bank, receiver, liquidating agent, conservator or entity is acting as agent or custodian for a customer (whether or not a "customer", as defined in section 741) in connection with a securities contract (as defined in section 741) such customer; or

(B) in connection with a securities contract (as defined in section 741) an investment company registered under the Investment Company Act of 1940.

(22A) The term "financial participant" means--

(A) an entity that, at the time it enters into a securities contract, commodity contract, swap agreement, repurchase agreement, or forward contract, or at the time of the date of the filing of the petition, has one or more agreements or transactions described in paragraph (1), (2), (3), (4), (5), or (6) of section 561(a) with the debtor or any other entity (other than an affiliate) of a total gross dollar value of not less than $1,000,000,000 in notional or actual principal amount outstanding (aggregated across counterparties) at such time or on any day during the 15-month period preceding the date of the filing of the

petition, or has gross mark-to-market positions of not less than $100,000,000 (aggregated across counterparties) in one or more such agreements or transactions with the debtor or any other entity (other than an affiliate) at such time or on any day during the 15-month period preceding the date of the filing of the petition; or

(B) a clearing organization (as defined in section 402 of the Federal Deposit Insurance Corporation Improvement Act of 1991).

(23) The term "foreign proceeding" means a collective judicial or administrative proceeding in a foreign country, including an interim proceeding, under a law relating to insolvency or adjustment of debt in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation.

(24) The term "foreign representative" means a person or body, including a person or body appointed on an interim basis, authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor's assets or affairs or to act as a representative of such foreign proceeding.

(25) The term "forward contract" means--

(A) a contract (other than a commodity contract, as defined in section 761) for the purchase, sale, or transfer of a commodity, as defined in section 761(8) of this title, or any similar good, article, service, right, or interest which is presently or in the future becomes the subject of dealing in the forward contract trade, or product or byproduct thereof, with a maturity date more than two days after the date the contract is entered into, including, but not limited to, a repurchase or reverse repurchase transaction (whether or not such repurchase or reverse repurchase transaction is a "repurchase agreement", as defined in this section) consignment, lease, swap, hedge transaction, deposit, loan, option, allocated transaction, unallocated transaction, or any other similar agreement;

(B) any combination of agreements or transactions referred to in subparagraphs (A) and (C);

(C) any option to enter into an agreement or transaction referred to in subparagraph (A) or (B);

(D) a master agreement that provides for an agreement or transaction referred to in subparagraph (A), (B), or (C), together with all supplements to any such master agreement, without regard to whether such master agreement provides for an agreement or transaction that is not a forward contract under this paragraph, except that such master agreement shall be considered to be a forward contract under this paragraph only with respect to each agreement or transaction under such master agreement that is referred to in subparagraph (A), (B), or (C); or

(E) any security agreement or arrangement, or other credit enhancement related to any agreement or transaction referred to in subparagraph (A), (B), (C), or (D), including any guarantee or reimbursement obligation by or to a forward contract merchant or financial participant in connection with any agreement or transaction referred to in any such subparagraph, but not to exceed the damages in connection with any such agreement or transaction, measured in accordance with section 562.

(26) The term "forward contract merchant" means a Federal reserve bank, or an entity the business of which consists in whole or in part of entering into forward contracts as or with merchants in a commodity (as defined in section 761) or any similar good, article, service, right, or interest which is presently or in the future becomes the subject of dealing in the forward contract trade.

(27) The term "governmental unit" means United States; State; Commonwealth; District; Territory; municipality; foreign state; department, agency, or instrumentality of the United States (but not a United States trustee while serving as a trustee in a case under this title), a State, a Commonwealth, a District, a Territory, a municipality, or a foreign state; or other foreign or domestic government.

(27A) The term "health care business"--

(A) means any public or private entity (without regard to whether that entity is organized for profit or not for profit) that is primarily engaged in offering to the general public facilities and services for--

(i) the diagnosis or treatment of injury, deformity, or disease; and

(ii) surgical, drug treatment, psychiatric, or obstetric care; and

(B) includes--

(i) any--

(I) general or specialized hospital;

(II) ancillary ambulatory, emergency, or surgical treatment facility;

(III) hospice;

(IV) home health agency; and

(V) other health care institution that is similar to an entity referred to in subclause (I), (II), (III), or (IV); and

(ii) any long-term care facility, including any--

(I) skilled nursing facility;

(II) intermediate care facility;

(III) assisted living facility;

(IV) home for the aged;

(V) domiciliary care facility; and

(VI) health care institution that is related to a facility referred to in subclause (I), (II), (III), (IV), or (V), if that institution is primarily engaged in offering room, board, laundry, or personal assistance with activities of daily living and incidentals to activities of daily living.

(27B) The term "incidental property" means, with respect to a debtor's principal residence--

(A) property commonly conveyed with a principal residence in the area where the real property is located;

(B) all easements, rights, appurtenances, fixtures, rents, royalties, mineral rights, oil or gas rights or profits, water rights, escrow funds, or insurance proceeds; and

(C) all replacements or additions.

(28) The term "indenture" means mortgage, deed of trust, or indenture, under which there is outstanding a security, other than a voting-trust certificate, constituting a claim against the debtor, a claim secured by a lien on any of the debtor's property, or an equity security of the debtor.

(29) The term "indenture trustee" means trustee under an indenture.

(30) The term "individual with regular income" means individual whose income is sufficiently stable and regular to enable such individual to make payments under a plan under chapter 13 of this title, other than a stockbroker or a commodity broker.

(31) The term "insider" includes--

(A) if the debtor is an individual--

(i) relative of the debtor or of a general partner of the debtor;

(ii) partnership in which the debtor is a general partner;

(iii) general partner of the debtor; or

(iv) corporation of which the debtor is a director, officer, or person in control;

(B) if the debtor is a corporation--

(i) director of the debtor;

(ii) officer of the debtor;

(iii) person in control of the debtor;

(iv) partnership in which the debtor is a general partner;

(v) general partner of the debtor; or

(vi) relative of a general partner, director, officer, or person in control of the debtor;

(C) if the debtor is a partnership--

(i) general partner in the debtor;

(ii) relative of a general partner in, general partner of, or person in control of the debtor;

(iii) partnership in which the debtor is a general partner;

(iv) general partner of the debtor; or

(v) person in control of the debtor;

(D) if the debtor is a municipality, elected official of the debtor or relative of an elected official of the debtor;

(E) affiliate, or insider of an affiliate as if such affiliate were the debtor; and

(F) managing agent of the debtor.

(32) The term "insolvent" means--

(A) with reference to an entity other than a partnership and a municipality, financial condition such that the sum of such entity's debts is greater than all of such entity's property, at a fair valuation, exclusive of--

(i) property transferred, concealed, or removed with intent to hinder, delay, or defraud such entity's creditors; and

(ii) property that may be exempted from property of the estate under section 522 of this title;

(B) with reference to a partnership, financial condition such that the sum of such partnership's debts is greater than the aggregate of, at a fair valuation--

(i) all of such partnership's property, exclusive of property of the kind specified in subparagraph (A)(i) of this paragraph; and

(ii) the sum of the excess of the value of each general partner's nonpartnership property, exclusive of property of the kind specified in subparagraph (A) of this paragraph, over such partner's nonpartnership debts; and

(C) with reference to a municipality, financial condition such that the municipality is--

(i) generally not paying its debts as they become due unless such debts are the subject of a bona fide dispute; or

(ii) unable to pay its debts as they become due.

(33) The term "institution-affiliated party"--

(A) with respect to an insured depository institution (as defined in section 3(c)(2) of the Federal Deposit Insurance Act), has the meaning given it in section 3(u) of the Federal Deposit Insurance Act; and

(B) with respect to an insured credit union, has the meaning given it in section 206(r) of the Federal Credit Union Act.

(34) The term "insured credit union" has the meaning given it in section 101(7) of the Federal Credit Union Act.

(35) The term "insured depository institution"--

(A) has the meaning given it in section 3(c)(2) of the Federal Deposit Insurance Act; and

(B) includes an insured credit union (except in the case of paragraphs (21B) and (33)(A) of this subsection).

(35A) The term "intellectual property" means--

(A) trade secret;

(B) invention, process, design, or plant protected under title 35;

(C) patent application;

(D) plant variety;

(E) work of authorship protected under title 17; or

(F) mask work protected under chapter 9 of title 17;

to the extent protected by applicable nonbankruptcy law.

(36) The term "judicial lien" means lien obtained by judgment, levy, sequestration, or other legal or equitable process or proceeding.

(37) The term "lien" means charge against or interest in property to secure payment of a debt or performance of an obligation.

(38) The term "margin payment" means, for purposes of the forward contract provisions of this title, payment or deposit of cash, a security or other property, that is commonly known in the forward contract trade as original margin, initial margin, maintenance margin, or variation margin, including mark-to-market payments, or variation payments.

(38A) The term "master netting agreement"--

(A) means an agreement providing for the exercise of rights, including rights of netting, setoff, liquidation, termination, acceleration, or close out, under or in connection with one or more contracts that are described in any one or more of paragraphs (1) through (5) of section 561(a), or any security agreement or arrangement or other credit enhancement related to one or more of the foregoing, including any guarantee or reimbursement obligation related to 1 or more of the foregoing; and

(B) if the agreement contains provisions relating to agreements or transactions that are not contracts described in paragraphs (1) through (5) of section 561(a), shall be deemed to be a master netting agreement only with respect to those agreements or transactions that are described in any one or more of paragraphs (1) through (5) of section 561(a).

(38B) The term "master netting agreement participant" means an entity that, at any time before the date of the filing of the petition, is a party to an outstanding master netting agreement with the debtor.

(39) The term "mask work" has the meaning given it in section 901(a)(2) of title 17.

(39A) The term "median family income" means for any year--

(A) the median family income both calculated and reported by the Bureau of the Census in the then most recent year; and

(B) if not so calculated and reported in the then current year, adjusted annually after such most recent year until the next year in which median family income is both calculated and reported by the Bureau of the Census, to reflect the percentage change in the Consumer Price Index for All Urban Consumers during the period of years occurring after such most recent year and before such current year.

(40) The term "municipality" means political subdivision or public agency or instrumentality of a State.

(40A) The term "patient" means any individual who obtains or receives services from a health care business.

(40B) The term "patient records" means any record relating to a patient, including a written document or a record recorded in a magnetic, optical, or other form of electronic medium.

(41) The term "person" includes individual, partnership, and corporation, but does not include governmental unit, except that a governmental unit that--

(A) acquires an asset from a person--

(i) as a result of the operation of a loan guarantee agreement; or

(ii) as receiver or liquidating agent of a person;

(B) is a guarantor of a pension benefit payable by or on behalf of the debtor or an affiliate of the debtor; or

(C) is the legal or beneficial owner of an asset of--

(i) an employee pension benefit plan that is a governmental plan, as defined in section 414(d) of the Internal Revenue Code of 1986; or

(ii) an eligible deferred compensation plan, as defined in section 457(b) of the Internal Revenue Code of 1986;

shall be considered, for purposes of section 1102 of this title, to be a person with respect to such asset or such benefit.

(41A) The term "personally identifiable information" means--

(A) if provided by an individual to the debtor in connection with obtaining a product or a service from the debtor primarily for personal, family, or household purposes--

(i) the first name (or initial) and last name of such individual, whether given at birth or time of adoption, or resulting from a lawful change of name;

(ii) the geographical address of a physical place of residence of such individual;

(iii) an electronic address (including an e-mail address) of such individual;

(iv) a telephone number dedicated to contacting such individual at such physical place of residence;

(v) a social security account number issued to such individual; or

(vi) the account number of a credit card issued to such individual; or

(B) if identified in connection with 1 or more of the items of information specified in subparagraph (A)--

(i) a birth date, the number of a certificate of birth or adoption, or a place of birth; or

(ii) any other information concerning an identified individual that, if disclosed, will result in contacting or identifying such individual physically or electronically.

(42) The term "petition" means petition filed under section 301, 302, 303 and 1504 of this title, as the case may be, commencing a case under this title.

(42A) The term "production payment" means a term overriding royalty satisfiable in cash or in kind--

(A) contingent on the production of a liquid or gaseous hydrocarbon from particular real property; and

(B) from a specified volume, or a specified value, from the liquid or gaseous hydrocarbon produced from such property, and determined without regard to production costs.

(43) The term "purchaser" means transferee of a voluntary transfer, and includes immediate or mediate transferee of such a transferee.

(44) The term "railroad" means common carrier by railroad engaged in the transportation of individuals or property or owner of trackage facilities leased by such a common carrier.

(45) The term "relative" means individual related by affinity or consanguinity within the third degree as determined by the common law, or individual in a step or adoptive relationship within such third degree.

(46) The term "repo participant" means an entity that, at any time before the filing of the petition, has an outstanding repurchase agreement with the debtor.

(47) The term "repurchase agreement" (which definition also applies to a reverse repurchase agreement)--

(A) means--

(i) an agreement, including related terms, which provides for the transfer of one or more certificates of deposit, mortgage related securities (as defined in section 3 of the Securities Exchange Act of 1934), mortgage loans, interests in mortgage related securities or mortgage loans, eligible bankers' acceptances, qualified foreign government securities (defined as a security that is a direct obligation of, or that is fully guaranteed by, the central government of a member of the Organization for Economic Cooperation and Development), or securities that are direct obligations of, or that are fully guaranteed by, the United States or any agency of the United States against the transfer of funds by the transferee of such certificates of deposit, eligible bankers' acceptances, securities, mortgage loans, or interests, with a simultaneous agreement by such transferee to transfer to the transferor thereof certificates of deposit, eligible bankers' acceptance, securities, mortgage loans, or interests of the kind described in this clause, at a date certain not later than 1 year after such transfer or on demand, against the transfer of funds;

(ii) any combination of agreements or transactions referred to in clauses (i) and (iii);

(iii) an option to enter into an agreement or transaction referred to in clause (i) or (ii);

(iv) a master agreement that provides for an agreement or transaction referred to in clause (i), (ii), or (iii), together with all supplements to any such master agreement, without regard to whether such master agreement provides for an agreement or transaction that is not a repurchase agreement under this paragraph, except that such master agreement shall be considered to be a repurchase agreement under this paragraph only with respect to each agreement or

transaction under the master agreement that is referred to in clause (i), (ii), or (iii); or

(v) any security agreement or arrangement or other credit enhancement related to any agreement or transaction referred to in clause (i), (ii), (iii), or (iv), including any guarantee or reimbursement obligation by or to a repo participant or financial participant in connection with any agreement or transaction referred to in any such clause, but not to exceed the damages in connection with any such agreement or transaction, measured in accordance with section 562 of this title; and

(B) does not include a repurchase obligation under a participation in a commercial mortgage loan.

(48) The term "securities clearing agency" means person that is registered as a clearing agency under section 17A of the Securities Exchange Act of 1934, or exempt from such registration under such section pursuant to an order of the Securities and Exchange Commission, or whose business is confined to the performance of functions of a clearing agency with respect to exempted securities, as defined in section 3(a)(12) of such Act for the purposes of such section 17A.

(48A) The term "securities self regulatory organization" means either a securities association registered with the Securities and Exchange Commission under section 15A of the Securities Exchange Act of 1934 or a national securities exchange registered with the Securities and Exchange Commission under section 6 of the Securities Exchange Act of 1934.

(49) The term "security"--

(A) includes--

(i) note;

(ii) stock;

(iii) treasury stock;

(iv) bond;

(v) debenture;

(vi) collateral trust certificate;

(vii) pre-organization certificate or subscription;

(viii) transferable share;

(ix) voting-trust certificate;

(x) certificate of deposit;

(xi) certificate of deposit for security;

(xii) investment contract or certificate of interest or participation in a profit-sharing agreement or in an oil, gas, or mineral royalty or lease, if such contract or interest is required to be the subject of a registration statement filed with the Securities and Exchange Commission under the provisions of the Securities Act

of 1933, or is exempt under section 3(b) of such Act from the requirement to file such a statement;

(xiii) interest of a limited partner in a limited partnership;

(xiv) other claim or interest commonly known as "security"; and

(xv) certificate of interest or participation in, temporary or interim certificate for, receipt for, or warrant or right to subscribe to or purchase or sell, a security; but

(B) does not include--

(i) currency, check, draft, bill of exchange, or bank letter of credit;

(ii) leverage transaction, as defined in section 761 of this title;

(iii) commodity futures contract or forward contract;

(iv) option, warrant, or right to subscribe to or purchase or sell a commodity futures contract;

(v) option to purchase or sell a commodity;

(vi) contract or certificate of a kind specified in subparagraph (A)(xii) of this paragraph that is not required to be the subject of a registration statement filed with the Securities and Exchange Commission and is not exempt under section 3(b) of the Securities Act of 1933 from the requirement to file such a statement; or

(vii) debt or evidence of indebtedness for goods sold and delivered or services rendered.

(50) The term "security agreement" means agreement that creates or provides for a security interest.

(51) The term "security interest" means lien created by an agreement.

(51A) The term "settlement payment" means, for purposes of the forward contract provisions of this title, a preliminary settlement payment, a partial settlement payment, an interim settlement payment, a settlement payment on account, a final settlement payment, a net settlement payment, or any other similar payment commonly used in the forward contract trade.

(51B) The term "single asset real estate" means real property constituting a single property or project, other than residential real property with fewer than 4 residential units, which generates substantially all of the gross income of a debtor who is not a family farmer and on which no substantial business is being conducted by a debtor other than the business of operating the real property and activities incidental thereto.

(51C) The term "small business case" means a case filed under chapter 11 of this title in which the debtor is a small business debtor.

(51D) The term "small business debtor"--

(A) subject to subparagraph (B), means a person engaged in commercial or business activities (including any affiliate of such person that is also a debtor under this title and excluding a person whose primary activity is the business of owning or operating real

property or activities incidental thereto) that has aggregate noncontingent liquidated secured and unsecured debts as of the date of the filing of the petition or the date of the order for relief in an amount not more than $2,566,050 (excluding debts owed to 1 or more affiliates or insiders) for a case in which the United States trustee has not appointed under section 1102(a)(1) a committee of unsecured creditors or where the court has determined that the committee of unsecured creditors is not sufficiently active and representative to provide effective oversight of the debtor; and

(B) does not include any member of a group of affiliated debtors that has aggregate noncontingent liquidated secured and unsecured debts in an amount greater than $2,566,050 (excluding debt owed to 1 or more affiliates or insiders).

(52) The term "State" includes the District of Columbia and Puerto Rico, except for the purpose of defining who may be a debtor under chapter 9 of this title.

(53) The term "statutory lien" means lien arising solely by force of a statute on specified circumstances or conditions, or lien of distress for rent, whether or not statutory, but does not include security interest or judicial lien, whether or not such interest or lien is provided by or is dependent on a statute and whether or not such interest or lien is made fully effective by statute.

(53A) The term "stockbroker" means person--

(A) with respect to which there is a customer, as defined in section 741 of this title; and

(B) that is engaged in the business of effecting transactions in securities--

(i) for the account of others; or

(ii) with members of the general public, from or for such person's own account.

(53B) The term "swap agreement"--

(A) means--

(i) any agreement, including the terms and conditions incorporated by reference in such agreement, which is--

(I) an interest rate swap, option, future, or forward agreement, including a rate floor, rate cap, rate collar, cross-currency rate swap, and basis swap;

(II) a spot, same day-tomorrow, tomorrow-next, forward, or other foreign exchange, precious metals, or other commodity agreement;

(III) a currency swap, option, future, or forward agreement;

(IV) an equity index or equity swap, option, future, or forward agreement;

(V) a debt index or debt swap, option, future, or forward agreement;

(VI) a total return, credit spread or credit swap, option, future, or forward agreement;

(VII) a commodity index or a commodity swap, option, future, or forward agreement;

(VIII) a weather swap, option, future, or forward agreement;

(IX) an emissions swap, option, future, or forward agreement; or

(X) an inflation swap, option, future, or forward agreement;

(ii) any agreement or transaction that is similar to any other agreement or transaction referred to in this paragraph and that--

(I) is of a type that has been, is presently, or in the future becomes, the subject of recurrent dealings in the swap or other derivatives markets (including terms and conditions incorporated by reference therein); and

(II) is a forward, swap, future, option, or spot transaction on one or more rates, currencies, commodities, equity securities, or other equity instruments, debt securities or other debt instruments, quantitative measures associated with an occurrence, extent of an occurrence, or contingency associated with a financial, commercial, or economic consequence, or economic or financial indices or measures of economic or financial risk or value;

(iii) any combination of agreements or transactions referred to in this subparagraph;

(iv) any option to enter into an agreement or transaction referred to in this subparagraph;

(v) a master agreement that provides for an agreement or transaction referred to in clause (i), (ii), (iii), or (iv), together with all supplements to any such master agreement, and without regard to whether the master agreement contains an agreement or transaction that is not a swap agreement under this paragraph, except that the master agreement shall be considered to be a swap agreement under this paragraph only with respect to each agreement or transaction under the master agreement that is referred to in clause (i), (ii), (iii), or (iv); or

(vi) any security agreement or arrangement or other credit enhancement related to any agreements or transactions referred to in clause (i) through (v), including any guarantee or reimbursement obligation by or to a swap participant or financial participant in connection with any agreement or transaction referred to in any such clause, but not to exceed the damages in connection with any such agreement or transaction, measured in accordance with section 562; and

(B) is applicable for purposes of this title only, and shall not be construed or applied so as to challenge or affect the characterization, definition, or treatment of any swap agreement under any other statute, regulation, or rule, including the Gramm-Leach-Bliley Act, the Legal Certainty for Bank Products Act of 2000, the securities laws (as such term is defined in section 3(a)(47) of the Securities Exchange Act of 1934) and the Commodity Exchange Act.

(53C) The term "swap participant" means an entity that, at any time before the filing of the petition, has an outstanding swap agreement with the debtor.

(56A) The term "term overriding royalty" means an interest in liquid or gaseous hydrocarbons in place or to be produced from particular real property that entitles the owner thereof to a share of production, or the value thereof, for a term limited by time, quantity, or value realized.

(53D) The term "timeshare plan" means and shall include that interest purchased in any arrangement, plan, scheme, or similar device, but not including exchange programs, whether by membership, agreement, tenancy in common, sale, lease, deed, rental agreement, license, right to use agreement, or by any other means, whereby a purchaser, in exchange for consideration, receives a right to use accommodations, facilities, or recreational sites, whether improved or unimproved, for a specific period of time less than a full year during any given year, but not necessarily for consecutive years, and which extends for a period of more than three years. A "timeshare interest" is that interest purchased in a timeshare plan which grants the purchaser the right to use and occupy accommodations, facilities, or recreational sites, whether improved or unimproved, pursuant to a timeshare plan.

(54) The term "transfer" means--

(A) the creation of a lien;

(B) the retention of title as a security interest;

(C) the foreclosure of a debtor's equity of redemption; or

(D) each mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with--

(i) property; or

(ii) an interest in property.

(54A) The term "uninsured State member bank" means a State member bank (as defined in section 3 of the Federal Deposit Insurance Act) the deposits of which are not insured by the Federal Deposit Insurance Corporation.

(55) The term "United States", when used in a geographical sense, includes all locations where the judicial jurisdiction of the United States extends, including territories and possessions of the United States.

11 U.S.C. § 102 – Rules of Construction

In this title--

(1) "after notice and a hearing", or a similar phrase--

(A) means after such notice as is appropriate in the particular circumstances, and such opportunity for a hearing as is appropriate in the particular circumstances; but

(B) authorizes an act without an actual hearing if such notice is given properly and if--

(i) such a hearing is not requested timely by a party in interest; or

(ii) there is insufficient time for a hearing to be commenced before such act must be done, and the court authorizes such act;

(2) "claim against the debtor" includes claim against property of the debtor;

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

(4) "may not" is prohibitive, and not permissive;

(5) "or" is not exclusive;

(6) "order for relief" means entry of an order for relief;

(7) the singular includes the plural;

(8) a definition, contained in a section of this title that refers to another section of this title, does not, for the purpose of such reference, affect the meaning of a term used in such other section; and

(9) "United States trustee" includes a designee of the United States trustee.

11 U.S.C. § 362 – Automatic Stay

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

. . .

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

11 U.S.C. § 363 – Use, Sale, or Lease of Property

(e) Notwithstanding any other provision of this section, at any time, on request of an entity that has an interest in property used, sold, or leased, or proposed to be used, sold, or leased, by the trustee, the court, with or without a hearing, shall prohibit or condition such use, sale, or lease as is necessary to provide adequate protection of such interest. This subsection also applies to property that is subject to any unexpired lease of personal property (to the exclusion of such property being subject to an order to grant relief from the stay under section 362).

11 U.S.C. § 503 – 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;

11 U.S.C. § 542 – Turnover of Property to the Estate

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

11 U.S.C. § 727 - Discharge

(a) The court shall grant the debtor a discharge, unless--

. . .

(3) the debtor has concealed, destroyed, mutilated, falsified, or failed to keep or preserve any recorded information, including books, documents, records, and papers, from which the debtor's financial condition or business transactions might be ascertained, unless such act or failure to act was justified under all of the circumstances of the case;

(4) the debtor knowingly and fraudulently, in or in connection with the case--

. . .

(C) gave, offered, received, or attempted to obtain money, property, or advantage, or a promise of money, property, or advantage, for acting or forbearing to act; or

APPENDIX B

UNITED STATES CODE ANNOTATED TITLE 11: BANKRUPTCY

11 U.S.C.A. § 102 – Rules of Construction

Legislative Statements

Although "property" is not construed in this section, it is used consistently throughout the code in its broadest sense, including cash, all interests in property, such as liens, and every kind of consideration including promises to act or forbear to act as in section 548(d).

APPENDIX C

FEDERAL RULES OF BANKRUPTCY PROCEDURE

Rule 7001 – Scope of Rules of Part VII

An adversary proceeding is governed by the rules of this Part VII. The following are adversary proceedings:

> **(1)** a proceeding to recover money or property, other than a proceeding to compel the debtor to deliver property to the trustee, or a proceeding under § 554(b) or § 725 of the Code, Rule 2017, or Rule 6002;

Rule 7003 – Commencement of Adversary Proceeding

Rule 3 Fed. R. Civ. P. applies in adversary proceedings.

FEDERAL RULES OF CIVIL PROCEDURE

Rule 3 – Commencing an Action

A civil action is commenced by filing a complaint with the court.