No. 18-0918

IN THE

Supreme Court of the United States

OCTOBER TERM, 2018

IN RE BACKSTREETS PLOWING, INC., DEBTOR

STEVEN VIN SANT, CHAPTER 7 TRUSTEE,
PETITIONER

V.

MILTON WEINBERG,
RESPONDENT

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRTEENTH CIRCUIT

BRIEF FOR PETITIONER

QUESTIONS PRESENTED

1. Section 362(a)(3) of the Bankruptcy Code provides for an automatic stay prohibiting, among other things, any act to exercise control over property of the bankruptcy estate. Despite Petitioner's objections, Respondent retained possession of the snow plows which he had lawfully repossessed prior to the debtor's filing for bankruptcy. As a result, the bankruptcy estate has been deprived of the snow plows. Did Respondent violate section 362(a)(3)?

2. Section 503(b)(3)(D) of the Bankruptcy Code allows creditors of chapters 9 and 11 to obtain administrative expenses for substantial contributions to the bankruptcy petition. Petitioner converted the chapter 11 bankruptcy to chapter 7 to begin the liquidation process. May a bankruptcy court provide a substantial contribution to a creditor involved in a chapter 7 petition despite the clear language of 503(b)(3)(D)?

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OPINIONS BELOW

Petitioner-Debtor, Backstreets Plowing, Inc. filed a petition for chapter 11 bankruptcy on February 4, 2017. R. at 6. Petitioner filed a motion requesting a determination that 11 U.S.C. § 362(a)(3), the automatic stay provision, was violated by Respondent's custody of the collateral from a pre-petition repossession. R. at 6. The United States Bankruptcy Court for the District of Moot found the stay had not been violated, Petitioner appealed. R. at 6. Following the appeal, Petitioner converted to a chapter 7 case for liquidation and a Trustee was appointed. R. at 7. Respondent filed a motion seeking a substantial contribution administrative expense under § 503(b)(3)(D). R. at 7. The bankruptcy court allowed the administrative expense and again Petitioner appealed. R. at 8. The two appeals were consolidated and the Bankruptcy Appellate Panel for the Thirteenth Circuit found in favor of Respondent, allowing retention of the collateral and the substantial contribution administrative expense. R. at 3. The Petitioner appealed to the United States Court of Appeals for the Thirteenth Circuit which found for Respondent again on both issues. The Supreme Court of the United States granted Backstreets Plowing, Inc. and the Chapter 7 Trustee's petition for a writ of certiorari.

STATEMENT OF JURISDICTION

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

STATUTORY PROVISIONS

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

11 U.S.C. § 362(a)(3)

11 U.S.C. § 503

11 U.S.C. § 542(a)

11 U.S.C. § 542(e)

STATEMENT OF THE CASE

Backstreets Plowing, Inc. wanted to remain a profitable company. R. at 3. In a difficult economic environment, Christopher Clemmons as the sole shareholder of Backstreets, made the decision to purchase new snow plow trucks that were more fuel efficient, required less maintenance, and overall increase the success of the company. *Id*. A former bowling acquaintance Weinberg, agreed to loan Mr. Clemmons funds to purchase the trucks by retaining a security interest in the trucks which served as collateral for the loan. R. at 4. The common phrase "boys will be boys" plagued this former bowling and business relationship as Weinberg and Clemmons got into a serious argument over their favorite college football teams. R. at 4-5. The two have not spoken since. R. at 5.

The loan agreement required monthly payments to Weinberg but by February 2016, without much profitable work, no payments had been made. R. at 5. Weather conditions limited the work Backstreets could perform and a default judgement for $450,000 was entered against Clemmons in October 2016. *Id*. Collections on the judgement began January 2017 and the trucks were repossessed by E Street Auto Recovery. R. at 6. Unfortunately, with the loss of trucks to operate the business, Backstreets was forced into filing a petition for chapter 11 bankruptcy on February 4, 2017. *Id*. A motion was filed pursuant to the chapter 11 petition and the automatic stay provisions of § 362(a)(3) to recover possession of the trucks. *Id*. The bankruptcy court denied the recovery and the appeal led the Debtor to converting to a chapter 7 petition. R. at 6-7.

During the chapter 7 petition period, Weinberg hired a law firm to assist in collection efforts, despite the appointment of a trustee. R. at 7. The investigation revealed a fraudulent transfer made in 2016 of $100,000 and a settlement resulted in payment of $75,000 to Weinberg. *Id*. However, Weinberg sought reimbursement of the remaining $25,000 through a substantial

contribution of administrative expenses. *Id*. Finally, Clemmons sought to sell Backstreets but without the trucks, sales fell through. R. at 8. It was because of the retention of the trucks that the trustee continued the appeal on the automatic stay issue as well as the administrative expense. R. at 8-9. Even after this long period, the trustee and the ownership of Backstreets are trying to keep the business afloat.

SUMMARY OF THE ARGUMENT

This Court should reverse the Thirteenth's Circuit's decision that passive retention of property of the bankruptcy estate is not a violation of the automatic stay in § 362(a)(3). Circuit Courts are split on whether a violation of § 362(a)(3) encompasses passive retention of property or whether an affirmative act is required. A majority of circuit courts correctly hold that passive retention of estate property is a violation of § 362(a)(3). A minority of circuits hold that a violation of § 362(a)(3) requires some post-petition affirmative conduct.

This Court should adopt the approach taken by the majority. This approach aligns with the canons of statutory construction established by this Court and accomplishes the broad goals of the Bankruptcy Code. Namely, (1) the plain meaning of § 362(a)(3) mandates a conclusion that passive retention is prohibited, (2) the legislative history of § 362(a)(3) supports the majority position, and (3) read in conjunction with § 542(a), the majority approach is required to accomplish the broad goals of the Bankruptcy Code.

An adoption of the minority approach defeats the central purpose of reorganization bankruptcy. Allowing creditors to obtain property belonging to the bankruptcy estate prevents debtors from being able to properly reorganize. As was the result in this case, debtors could be forced to convert their petitions to chapter 7.

This Court should reverse the Thirteenth Circuit's decision awarding substantial contribution administrative expenses in a chapter 7 bankruptcy case. The plain language of the United States Bankruptcy Code should govern in all cases of statutory construction. The court below incorrectly relied on equitable considerations, rather than focusing on the clear language of Section 503(b)(3)(D). Claims for substantial contribution administrative expenses are only permitted in a narrow set of circumstances: chapters 9 or 11 bankruptcy. When the statute specifically contemplates one action over another, this Court has held that lower courts are bound by the language. Principles of equity cannot overcome this clear enumeration by Congress.

Section 503(b)(3)(D) provides for administrative expense claims by creditors in chapters 9 and 11. Despite this clear articulation of a rule, the courts below held it should apply to chapter 7 petitions as well. This reasoning is misguided for multiple reasons. First, basic canons of statutory construction and myriad opinions laid down by this Court have held that when the plain language is obvious, the role of the court is limited to enforcement. To hold that by specifically enumerating chapters 9 and 11, Congress meant to include chapter 7 petitions would be rewriting the statute. Second, Congress specifically limited the section to certain chapters; chapter 7 petitions existed at the time of the last set of amendments. Had Congress intended to enlarge the statute, it could have and applying a rule contrary to the specific language would actually fly in the face of equity. Third, the section providing for administrative expenses in chapters 9 and 11 is exhaustive based on the Bankruptcy Code's own tools of construction. Use of the term "including" in subsection (b) but not in the list appearing in (b)(3)(D) indicates that the latter clause is exhaustive. Excluding the term "including" in the subsection as well as excluding chapter 7, indicates the provision is limited in scope to chapters 9 and 11.

Finally, the claims for administrative expenses should be denied because to hold otherwise would make portions of the Code superfluous. Courts should not interpret or apply rules of construction in ways that make portions of the law unnecessary. Along with § 503(b)(3)(D) which would become superfluous if read to mean something other than what it actually says, other provisions in the code providing remedies to creditors would become unnecessary.

ARGUMENT

I. Standard of Review

A bankruptcy court's conclusions of law are to be reviewed de novo. *Weber v. SEFCU (In re Weber)*, 719 F.3d 72, 75 (2nd Cir. 2013). Both issues present questions of law. R. at 5.

II. Section 362(a)(3) prohibits passive retention of property of the estate.

The Bankruptcy code governs the actions of both debtors and creditors once a petition has been filed. 11 U.S.C. § 362(a)(3) (2018). "When a debtor files for bankruptcy, section 362 prevents creditors from taking further action against him except through the bankruptcy court." *W.D. Equipment, LLC v. Cowen (In re Cowen)*, 849 F.3d 943, 948 (10th Cir. 2017) (quoting *Price v. Rochford*, 948 F.2d 829, 831 (7th Cir. 1991). Accordingly, 11 U.S.C. § 362(a)(3) prohibits creditors from performing "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). Violation of § 362's automatic stay results in liability for damages.

The automatic stay protects "property of the estate." 11 U.S.C. § 362(a)(3). "This estate is created by the filing of a petition and comprises property of the debtor 'wherever located and by whomever held,' including, among other things, 'all legal or equitable interests of the debtor in property as of the commencement of the case.'" *United States v. Inslaw*, 932 F.2d 1467 (1991)(Citing 11 U.S.C. § 541(a)(1)). "The estate also includes property recoverable under the [Bankruptcy] Code's turnover provisions, which allow the trustee to recover property that 'was merely out of the possession of the debtor yet remained property of the debtor.'" *Id.* citing *United States v. Whiting Pools*, 462 U.S. 198 (1983). It is uncontested that both legal and equitable title remained with the Debtor on the petition date. R. at 10. The snow plow trucks are property of the

estate. At issue is whether Weinberg's retention of the snow plow trucks is an "act" under § 362(a)(3) which would be a violation of the automatic stay.

Circuit courts are divided on whether passive retention of collateral obtained prior to the petition date violates the automatic stay in § 362(a)(3). This Court should adopt the majority rule that the automatic stay in § 362(a)(3) is violated when a creditor passively retains property of the estate obtained prior to the petition date. First, the canons of statutory construction established by this Court require the plain language of the statute to control where it is unambiguous; the majority approach is consistent with the plain language of § 362(a)(3). Second, the majority approach is supported by both the legislative history of § 362(a)(3) and the broad goals of the Bankruptcy Code. Third, reading § 362(a)(3) in conjunction with § 542(a) requires an adoption of the majority rule to effectuate the purpose of the Bankruptcy Code. Fourth, the lower court mischaracterized this Court's jurisprudence. Last, sound policy supports an adoption of the majority approach.

This Court should adopt the majority rule and find that Weinberg violated the automatic stay in § 362(a)(3) through passive retention of property of the estate.

A. Circuit Courts are split on what constitutes an "act" under section 362(a)(3).

The Second, Seventh, Eighth, and Ninth Circuits have all expressly held that passive retention of property of the estate violates the automatic stay in § 362(a)(3). *See Weber v. SEFCU (In re Weber)*, 719 F.3d 72 (2d. Cir. 2013); *Thompson v. Gen. Motors Acceptance Corp., LLC*, 566 F.3d 699 (7th Cir. 2009); *State of Cal. Emp't Dev. Dept. v. Taxel (In re Del Mission Ltd.)*, 98 F.3d 1147 (9th Cir. 1996); *Knaus v. Concordia Lumber Co., Inc. (In re Knaus)*, 889 F.2d 773 (8th Cir. 1989).

In contrast, a minority of circuit courts have concluded that a violation of § 362(a)(3) requires post-petition affirmative conduct. *See Davis v. Tyson Prepared Foods, Inc. (In re Garcia)*, 740

Fed. Appx. 163 (10th Cir. 2018); *WD Equip., LLC v. Cowen (In re Cowen)*, 849 F.3d 943 (10th Cir. 2017); *United States v. Inslaw, Inc.*, 932 F.2d 1467 (D.C. Cir. 1991).

The Second, Seventh, Eighth, and Ninth Circuits correctly construct their approaches on the foundations of statutory construction as previously set out by this Court. The minority approach, on the other hand, ignores important tenants of statutory construction to create a rule inconsistent with the broad goals of the bankruptcy code.

B. The majority rule correctly interprets section 362(a)(3).

"The starting point in every case involving construction of a statute is the language itself." *Sec'y of Interior v. Cal.*, 464 U.S. 312, 346 (1984). As the court below correctly stated, we must "presume that a legislature says in a statute what it means and means in a statute what is says there . . . When the words of a statute are unambiguous, then this first canon is also the law: 'judicial inquiry is complete.'" R. at 11. (Citing *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992) (internal citations omitted)). "In approaching a statute, moreover, a judge must presume that Congress chose its words with as much care as the judge himself brings to bear on the task of statutory interpretation." *FBI v. Abramson*, 456 U.S. 615, 635 (1982).

1. The plain meaning of section 362(a)(3) prohibits passive retention of estate property.

The plain meaning of the language in § 362(a)(3) mandates a conclusion that the provision prohibits even passive retention of property of the estate lawfully obtained prior to the petition date. The operative phrase in this analysis is the phrase "any act . . . to exercise control." 11 U.S.C. 362(a)(3). Both the Seventh and Second Circuits looked to a leading legal dictionary to provide the general meaning of the word "control," which it defines as "[to] exercise restraining or directing influence over. To regulate; restrain; dominate; curb; to hold from action; overpower;

counteract; govern." BLACK'S LAW DICTIONARY 329 (6th ed. 1990). *See In re Weber*, 719 F.3d at 79; *Thompson*, 566 F.3d at 702.

"'Withholding possession of property from a bankruptcy estate is the essence of 'exercising control' over possession because it prevents the debtor from achieving beneficial use of the estate's property.'" *See Thompson*, 566 F.3d at 703 (Citing *In re Sharon*, 234 B.R. 676, 682 (BA 6th Cir. 1999)). When Weinberg retained possession of the snow plows and refused to return them, he performed an "act to exercise control" as contemplated in the definition above. 11 U.S.C. § 362(a)(3). Weinberg violated the automatic stay in § 362(a)(3).

Another tenant of statutory interpretation is that a statute should be read as a whole. *Kelly v. Robinson*, 479 U.S. 36, 44 (1986). This Court has made clear that when interpreting the language of the governing statute, this examination must be guided "not by a single sentence or member of a sentence, but looking to the provisions of the law as a whole . . ." *Id. See also Stenberg v. Carhart*, 530 U.S. 914, 942 (2000); *John Hancock Mut. Life Ins. Co. v. Harris Tr. & Sav. Bank*, 510 U.S. 86 (1992); *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987).

For example, in *Mastro Plastics Corp. v. NLRB* this Court rejected an interpretation that it deemed possible only by reading the words at issue in complete isolation from the rest of the text in the statute. *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 185 (1956). This Court was tasked with interpreting section 8(d) of the National Labor Relations Act, which states "[a]ny employee who engages in a strike within the sixty-day period specified in this subsection shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of section 8, 9, and 10 of this Act, as amended." *Id.* The petitioners argued "that the words must be so read that employees who engage in any strike, regardless of its purpose, within the 60-day waiting period, thereby lose their status as employees." *Id.* The Court instead interpreted the statute by

reading the words at issue in conjunction with the rest of the statute. *Mastro Plastics Corp.*, 350 U.S. at 185. This is the same approach that should be taken here.

The Circuit Courts that adopt the minority rule rely on an approach at odds with this Court's decision in *Mastro Plastics*. 350 U.S. at 185. The minority rule rests it analysis solely on a restrictive definition of the word "act" without any regard to the other words in the statute, much like the interpretation rejected by this Court in *Mastro Plastics*. *See Davis v. Tyson Prepared Foods, Inc. (In re Garcia)*, 740 Fed. Appx. 163, 164 (10th Cir. 2018); *WD Equip., LLC v. Cowen (In re Cowen)*, 849 F.3d 943, 948 (10th Cir. 2017); *United States v. Inslaw, Inc.*, 932 F.2d 1467, 1474 (D.C. Cir. 1991). Like in *Mastro Plastics*, this interpretation should also be rejected. 350 U.S. at 185. The minority approach advocates for an interpretation that § 362(a)(3) does not prohibit passive retention of estate property. Reading the statute as a whole and considering the words "to exercise control," requires a contrary conclusion than that taken by the minority. Section 362(a)(3) prohibits passive retention of estate property.

2. The minority rule cannot be reconciled with the legislative history of section 362(a)(3).

A look to the legislative history is both permissible and productive to resolve a dispute regarding the plain language interpretation of a statute. *See FBI v. Abramson*, 456 U.S. 615, 635 (1982) (reprimanding the lower court for failing to look to the legislative history). The minority rule is at odds with Congress' 1984 amendment to § 362(a)(3).

In fact, "Congress' decision to amend section 362 [evidences] its intent to expand the prohibited conducted beyond mere possession." *Thompson*, 566 F.3d at 702. Prior to this amendment, § 362(a)(3)'s stay prohibited only any act to obtain possession of property belonging to a bankruptcy estate. *Id.* Congress' amendment to § 362(a)(3) came when it passed the Bankruptcy Amendments and Federal Judgeship Act of 1984. *Id.* citing Pub.L. No. 98-353

U.S.C.C.A.N. (98 Stat.). In this amendment Congress expanded § 362(a)(3) to include as prohibited conduct "exercising control" over any asset belonging to the bankruptcy estate. *Thompson*, 566 F.3d at 702.

Although Congress did not provide an explanation of the amendment to § 362(a)(3), many Circuit Courts have concluded "the mere fact that Congress expanded the provision to prohibit conduct above and beyond obtaining possession of an asset suggests that it intended to include conduct by creditors who seized an asset pre-petition." *Id. See also California Empl. Dev. Dep't v. Taxel (In re del Mission)*, 98 F.3d 1147,1151 (9th Cir. 1996) (interpreting the amendment as broadening the scope of section 362(a)(3)); *In re Javens*, 107 F.3d 359, 368 (6th Cir. 1997); *In re Weber*, 719 F.3d 712 (2013).[1]

C. Reading section 362(a)(3) in conjunction with section 542(a) reinforces the adoption of the majority rule by this Court.

Section 542(a) of the bankruptcy code contains what is often referred to as the turnover power. 11 U.S.C. §542 (2018). Section 542(a) provides in part that a creditor "shall deliver to the trustee, and account for such property or the value or such property, unless such property is of inconsequential value or benefit to the estate." 11 U.S.C. § 542(a).

1. Section 542(a) is self-executing.

In *Whiting Pools*, this Court addressed the issue of whether § 542(a) of the turnover provision required the creditor to turn over property that was repossessed pre-petition. *United States v. Whiting Pools*, 462 U.S. 198, 205 (1983). This Court ruled that debtor property not in the debtor's possession at the time of the petition was nonetheless part of the bankruptcy estate and still subject to the turnover provision. *Id.* *Whiting Pools* stands for the proposition that the

[1] "This significant textual enlargement is consonant with our understanding and the Supreme Court's interpretation that Congress intended to prevent creditors from retaining property of the debtor in derogation of the bankruptcy procedure and the broad goals of debtor protection . . ." *In re Weber*, 719 F.3d 712 (2013).

debtor's possessory interest has priority over that of the creditor's interest. *Whiting Pools*, 462 U.S. at 205.[2] "Section 542 provides the right and section 362(a)(3) provides the remedy." *In re Abrams*, 127 B.R. 239, 243 (B.A.P. 9th Cir. 1996). Section 542(a) is self-executing and possession of an estate asset after bankruptcy has been filed is a violation of the automatic stay in § 362(a)(3).

"Section 542(a) requires that any entity in possession of property of the estate deliver it to the trustees, without condition or any further action: the provision is self-executing." *In re Weber*, 719 F.3d at 79. "By its express terms, [section 542(a)] is self-executing, and does not require that the trustee take any action or commence a proceeding or obtain a court order to compel turnover." 5 COLLIER ON BAKNRUPTCY ¶ 542.03 (16th ed. 2017).

The use of the term "shall" rather than "may" in § 542(a) evidences Congress' intent for the turnover power to be self-executing. 11 U.S.C. § 542(a). This Court has made clear that "when a statute distinguishes between 'may' and 'shall,' it is generally clear that 'shall' imposes a mandatory duty." *Kingdomware Techs., Inc. v. United States*, _ U.S. _, _ (2016) *See also Lexecon Inc. v. Millberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1988); *United States v. Rodgers*, 461 U.S. 677, 706 (1983).

For example, in *Kingdomware Techs., Inc.*, this Court rested its analysis solely on the aforementioned principle to conclude Congress' use of the word "shall" in 38 U.S.C. § 8127(d) mandated the use of the "Rule of Two" in all contracting before using competitive procedures. *Kingdomware Techs., Inc. v. United States*, 136 S.Ct. 1969, 1977 (2016). Here, Congress employed the word "shall" when describing the turnover power of the trustee. 11 U.S.C. § 542(a). This evidences that the turnover of estate property to the trustee should be automatic, not requiring

[2] "Section 542(a) grants a possessory interest to the debtor's estate even if such asset was not held by the estate and that was held by the secured creditor when the bankruptcy petition was filed." *United States v. Whiting Pools*, 462 U.S. 198, 207 (1983).

an adversary proceeding. Like in *Kingdomware Techs., Inc.* this Court should conclude that Congress intended the turnover of property of the estate to be mandatory and thus self-executing.

Had Congress intended to require judicial process to execute § 542's turnover power, it would have done so expressly. This is apparent from Congress' use of the language in § 542(e) "after notice and a hearing, the court may order . . ." which clearly contemplates and requires judicial process. 11 U.S.C. § 542(e) (2018). Section 542(a) being replete of such language is of great significance. 11 U.S.C. § 542(a).

"While bankruptcy proceedings are pending, the automatic stay provisions of section 362 work with section 542(a) . . . to shelter the debtor's estate from action by creditors, enabling the debtor to get the relief and fresh start that are among the goals of the bankruptcy regime." *In re Weber*, 719 F.3d at 79. By virtue of § 542(a) being self-executing, the majority approach to § 362(a)(3) is correct. Together, these provisions accomplish the goals of the bankruptcy regime by grouping all of the debtor's property together, protecting it from creditors, and allowing the debtor a 'fresh start' via paying off their debts.

2. The lower court's approach mischaracterizes this Court's precedent.

Pursuant to the turnover power in § 542(a), Weinberg was required to turn over property of the estate that had been previously repossessed. The lower court however, purports to be subject to fictional exceptions to § 542(a). R. at 13. Instead of acknowledging that Weinberg was required to turn over the snow plows, the lower court focuses only on the "explicit limitations" to § 542(a) mentioned by this Court in *Whiting Pools*. *Whiting Pools*, 462 U.S. 198 (1983).

The limitations to § 542(a) established by this court include: when the property is of inconsequential value or benefit to the estate, when the holder of the property has transferred it in

good faith without knowledge of the petition, or when the transfer of the property is automatic to pay a life insurance premium. *Whiting Pools*, 462 U.S. at 206 n. 12.

The purported "explicit limitations" to § 542(a) relied on by the lower court are (1) a creditor's right to adequate protection under § 363(3), (2) § 542(a) does not include property that is not property of the estate, and (3) if the property is of inconsequential value or benefit to the estate turnover is not required. R. at 13. Notably, each of these "exceptions" is absent from this Court's opinion in *Whiting Pools*. *Id*.

To assert that the existence of exceptions to § 542(a) allows a creditor to retain possession of an asset of the bankruptcy estate is misguided. The language and tenor of the holding in *Whiting Pools* supports the position that creditors have a duty to look to the Bankruptcy Code to protect their interests rather than engaging in any kind of self-help. *Whiting Pools*, 462 U.S. 198 (1983) (stating that "Section 542(a) simply requires the [creditor] to seek protection of its interest according to the congressionally established bankruptcy procedures, rather than by withholding the seized property from the debtor's efforts to reorganize."). *See also In re Weber*, 719 F.3d; *Rutherford v. Auto Cash, Inc. (In re Rutherford)*, 329 B.R. 886 (Bankr. N.D. Ga. 2005).

D. Sound policy supports the adoption of the majority rule.

The focus of the Bankruptcy Code and its provisions revolve around protection of the debtor. *In re Del Mission*, 98 F.3d 1147 (9th Cir. 1996). Specifically, chapter 11 reorganization seeks to facilitate two things (1) the debtor regaining his financial foothold and (2) the debtor repaying his creditors. *Thompson v. GMAC, LLC*, 566 F.3d 699, 706 (2009). To that end, it is necessary to group *all* of the debtor's property together in his estate such that he may rehabilitate his credit and pay off his debts. *Id*. An adoption of the

minority approach not only runs contrary to the broad policies of the Bankruptcy Code but could severely prejudice the debtor's efforts to reorganize.

To hold that "exercising control" over an asset encompasses only selling or otherwise destroying the asset would not be logical given the central purpose of reorganization bankruptcy. Allowing a creditor to retain possession of estate property can impede a debtor's efforts to reorganize under chapter 11. "An asset actively used by a debtor serves a greater purpose to both the debtor and his creditors than an asset sitting idle in a creditor's lot." *In re Weber*, 719 F.3d 72 at 81 (internal citations omitted). Respondent hampered the debtor's reorganization efforts through his retention of the snow plows. The debtor was unable to continue working without his snowplows and as a result was forced to convert his petition to chapter 7. This is the exact result the bankruptcy code and specifically § 362(a)(3) are seeking to avoid—the estate will be deprived of possession of that property.

A second consequence of this Court's adoption of the minority rule is that debtors will be required to obtain property belonging to the estate through an adversary proceeding. As the Ninth Circuit accurately stated, "[th]e case law and legislative history of section 362 indicate that congress did not intend to place the burden on the bankruptcy estate to absorb the expense of potentially multiple turnover actions." *In re Del Mission*, 98 F.3d 1147. Requiring adversary proceedings to compile the bankruptcy estate is contrary to the interests of both the debtor and judicial economy.

E. <u>This Court should reverse the ruling of the Thirteenth Circuit.</u>

For the reasons stated above, this Court should reverse the ruling of the Thirteenth Circuit. This ruling best serves the goals of the Bankruptcy Code and ensures judicial

economy. Passive retention of property of the estate lawfully obtained prior to the petition date is a violation of § 362(a)(3).

III. Circuit courts are divided on whether section 503(b)(3) applies to chapter 7 bankruptcy petitions but this Court should adopt the majority rule to restrict the sections to chapters 9 and 11.

The United States Court of Appeals for the Third Circuit, the Bankruptcy Appellate Panel of the Ninth Circuit, and at least three lower federal bankruptcy district courts have held § 503(b)(3)(D) of the United States Bankruptcy Code does not apply to Chapter 7 bankruptcy petitions. *See In re Lloyd Sec. Ins.*, 75 F.3d 853 (3rd. Cir. 1996); *Lebron v. Mechem Fin. Inc.*, 27 F.3d 937 (3rd Cir. 1994); *In re Hackney*, 351 B.R. 179 (Bankr. N.D. Ala. 2006); *U.S. Trustee v. Farm Credit Bank of Omaha*, 152 B.R. 612 (D.S.D. 1993).

In contrast, some courts have utilized the reasoning of the United States Court of Appeals for the Sixth Circuit decision *In re Connolly*. *See Mediofactoring v. McDermott (In re Connolly N. Am., LLC)*, 802 F.3d 810 (6th Cir. 2015); *In re Health Trio*, 584 B.R. 342 (Bankr. Col. 2018); *In re Maust Transp., Inc.*, 589 B.R. 887 (Bankr. W.D. Wash. 2018); *In re Maqsoudi*, 566 B.R. 40 (Bankr. C.D. Cal. 2017).

The "majority of courts, including the Third Circuit" correctly applied canons of statutory construction established by this Court to conclude § 503(b)(3)(D) does not apply to chapter 7 petitions. *In re Health Trio*, 584 B.R. 351-352. First, the canons of statutory construction should take priority over principles of equity. Second, the plain language of § 503(b)(3)(D) holds claims for administrative expenses reimbursement are strictly limited to chapters 9 and 11. Third, subsection (D) is exhaustive based on the Bankruptcy Code principles of construction. Fourth, courts have incorrectly relied on the flawed *In re Connolly* decision. Finally, other remedies are available for creditors in chapter 7 proceedings.

This Court should adopt the majority rule that § 503(b)(3)(D) is limited to claims for reimbursement in chapters 9 and 11 and therefore, Respondent's claim should be denied.

A. The Bankruptcy Code must represent a balance of equitable principles and canons of statutory construction.

The Bankruptcy Code specifically governs entities that may claim repayment for administrative expenses made during the pendency of a bankruptcy petition. 11 U.S.C. § 503 governs such claims for expenses, allowing "the actual, necessary expenses other than compensation and reimbursement specified in paragraph (4) . . . ." 11 U.S.C. § 503(b)(3) (2018). However, this allowance of administrative expenses is notably curtailed by subparagraph (D). A person or entity may claim an administrative expense only "in making a substantial contribution in a case under chapter 9 or 11 of this title . . . ." 11 U.S.C. § 503(b)(3)(D). The timeline of the current case is complicated and protracted, such factual scenarios often lead to equitable decisions, but this Court should properly balance equity with the specific statutory language of the Code.

There is no doubt the payment made by Clemmons was an avoidable fraudulent transfer.[3] The balance of equity and the statutory language should turn on however, the time at which the Respondent became aware of the transfer through investigation, here after conversion to chapter 7.[4] "There is an overriding consideration that equitable principles govern the exercise of bankruptcy jurisdiction." *Bank of Marin v. England*, 385 U.S. 99, 103 (1966). Those principles of equity however, are sharply limited by canons of statutory construction, canons that lead to holding this claim for a substantial contribution cannot be maintained. It is the specific statutory language of § 503(b)(3)(D) that prevents the exercise of equity as the United States Court of Appeals for the

[3] R. at 17. As noted by the majority opinion below, the Petitioners are not contesting the existence of a substantial contribution. The Petitioner contends these substantial contributions are not recognizable under § 503(b)(3)(D).
[4] R. at 7. The timing of the conversion and allowance of substantial contributions is important to distinguish. The Third Circuit in *Lebron* wrote, "we do not see how expenses incurred after the conversion can be said to have made a substantial contribution in the proceedings under chapter 11." *Lebron*, 27 F.3d at 945.

Seventh Circuit has written: "when a specific Code section addresses an issue, a court may not employ its equitable powers to achieve a result not contemplated by the Code." *In re Fresco Plastic Corp. Inc.*, 996 F.2d 152, 157 n.5 (7th Cir. 1993).

1. Canons of statutory construction control the outcome of this case.

Section 503(b)(3)(D) states unequivocally that administrative expenses may be granted to those in cases "under chapter 9 or 11 of this title . . . ." 11 U.S.C. § 503(b)(3)(D). Chapter 7 bankruptcy was in existence and common at the time the Code was last amended to specifically enumerate chapters 9 and 11. *U.S. Trustee v. Farm Credit Bank of Omaha*, 152 B.R. 612, 614 (D.S.D. 1993) (herein "*US Trustee*"). It is with this backdrop that the tools of statutory construction must apply when assessing the Code. General canons of statutory construction, developed outside of the Bankruptcy Code, are still applicable nonetheless to the Code. *See generally Lamie v. U.S. Trustee*, 540 U.S. 526 (2004). This Court has made clear when "Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of a contrary legislative intent. *TRW Inc., v. Andrews*, 534 U.S. 19, 28 (2001) (Citing *Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616-617 (1980)).

A "'cardinal principle of statutory construction'" is that statutes, here the Bankruptcy Code, should not be read to make provisions, clauses, or words unnecessary. *Id*. at 31. Indeed, every word should be given meaning and not read to remove any force or purpose. *Id*. To determine the meaning or purpose of specifically delineating chapters 9 and 11 then is to some degree an exploration "of statutory intent, and we accordingly 'begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.'" *Morales v. TWA*, 504 U.S. 374, 381 (1992) (Citing *FMC Corp. v. Holliday*, 498 U.S. 52, 57 (1990)). This approximation of legislative purpose requires the interpreting court

to look to surrounding words and provisions which may give context to the text at issue. *Hibbs v. Winn*, 542 U.S. 88, 101 (2004) (Citing *Gen. Dynamics Land Sys. v. Cline*, 540 U.S. 581, 596 (2004)). Equity therefore, being applied to the Code, must be limited to conform to the specific rules chosen by Congress: "[w]here court-created rules fail to anticipate unusual circumstances that fit securely within a federal statute's compass, the statute controls our decision." *Id*. at 99. The Third Circuit has correctly relied on canons of statutory construction rather than equity and this reasoning should be followed by this Court. *Lebron*, 27 F.3d at 944.

2. *The plain language of the statue is clear and should be enforced over equitable considerations.*

"The starting point in discerning congressional intent is the existing statutory text." *Lamie*, 540 U.S. at 534. The quintessential statutory interpretation case in this Court involved interpreting the Bankruptcy Code. *Lamie v. US Trustee* involved an issue of statutory interpretation specifically, omission versus inclusion of persons who could be awarded fees in the bankruptcy process. *Id*. at 529. This case is factually analogous and should control the ultimate decision of this Court. In *Lamie*, the amendments to the Code removed the terms "or to the debtor's attorney" from the list of professionals who may be paid. *Id*. at 529-530. Myriad canons of construction were utilized by this Court to come to the ultimate conclusion the statute did not allow for compensation under that narrow provision. *Id*. at 538.

This Court began its analysis, as noted above, with the plain language of the statutory text. *Id*. at 534. The importance of statutory text was not lost on this Court; it was "well established that '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.'" *Id*. (Citing *Hartford Underwriters Ins. Co. v. Union Plainters Bank, N. A.*, 530 U.S. 1, 6 (2000)). The plain meaning of the text should be enforced whenever possible as it "respects the words of Congress." *Id*. at 536.

This Court made two final points in its analysis which are pertinent to the present discussion of § 503(b)(3)(D). First, the Court in *Lamie* noted that an argument advocating for the inclusion of the bankruptcy attorney in professional fees allocations "would result 'not [in] a construction of [the] statute, but, in effect, an enlargement of it by the court . . . .'" *Lamie,* 540 U.S. at 538. (Citing *Iselin v. U.S.*, 270 U.S. 245, 251 (1926)). Secondly, this Court noted "'a basic difference between filling a gap left by Congress' silence and rewriting rules that Congress has affirmatively and specifically enacted.'" *Id*. (Citing *U.S. v. Locke*, 471 U.S. 84, 95 (1985)).

3. Universal canons of statutory construction prohibit applying §503(b)(3)(D) to chapter 7 as the court below incorrectly held.

Applying the same canons of construction as this Court did in *Lamie v. US Trustee* as well as the majority of lower federal courts will result in holding that Respondent may not be awarded a substantial contribution administrative expense under chapter 7. The court below was incorrect in finding equitable considerations have priority over the specific statutory language. The plain language of the § 503(b)(3)(D) as the loadstar of the analysis provides expenses only "in a case under chapter 9 or 11 of this title . . . ." 11 U.S.C. § 503(b)(3)(D). As previously noted, chapter 7 was in existence and common at the time of this change in the law and under the principles enumerated in *Lamie,* the plain language should be enforced. *Lamie*, 540 U.S. at 534.

Utilizing this Court's final two points in *Lamie* result in one conclusion: administrative expenses may not be awarded in chapter 7 cases. First, it would not be considered statutory construction to view the terms chapter 9 and chapter 11 in subsection (b)(3)(D) and conclude it must include chapter 7; that would be "an enlargement of it by the court . . . ." *Id*. at 538. Secondly, to hold otherwise would be "'rewriting rules that Congress has affirmatively and specifically enacted.'" *Id*. at 538 (Citing *U.S. v. Locke*, 471 U.S. 84, 95 (1985)). The expansion of clear statutory language or an alteration to existing language were both specifically prohibited by this

Court in *Lamie*. This Court was clear, "'[i]f Congress enacted into law something different from what it intended, then it should amend the statute to conform to its intent. 'It is beyond our province to rescue Congress from its drafting errors, and to provide for what we think . . . is the preferred result.'" *Lamie*, 540 U.S. at 542. (Citing *United States v. Granderson*, 511 U.S. 39, 68 (1994)). The court below was incorrect for ignoring the fundamental premises of statutory construction. This Court should continue its jurisprudence emphasizing the canons of construction by adopting the approach of the Third Circuit and others.

B. In a chapter 7 case, the clear language of the statute in 503(b)(3)(D) prohibits the court from awarding an administrative expense as the majority of lower courts have held.

The Bankruptcy Code contains provisions which allow for courts to exercise equitable decisionmaking. 11 U.S.C. § 105(a) provides a "court may issue any order, process, or judgement that is necessary or appropriate to carry out the provision of this title." 11 U.S.C. § 105(a) (2018). However, it is important for the present case to note a limitation on this authority. The United States Court of Appeals for the Seventh Circuit has held that "a court may exercise its equitable power only as a means to fulfill some specific Code provision." *In re Fresco Plastic Corp. Inc.*, 996 F.2d at 154. Furthermore, when the Code has specific statutory language which should dictate the ultimate outcome, "a court may not employ its equitable powers to achieve a result not contemplated by the Code." *Id*. at 155.

1. *The Third Circuit has correctly decided that section 503(b)(3)(D) will not apply to chapter 7.*

The United States Court of Appeals for the Third Circuit has specifically addressed the issue of § 503(b)(3)(D)'s language in *Lebron v. Mechem Fin. Inc.* A former corporate officer of a business, Scott sought reimbursement for administrative expenses. *Lebron v. Mechem Fin. Inc.*,

27 F.3d 937, 940 (3rd Cir. 1994). The case was eventually converted to a chapter 7 proceeding and Scott continued to seek reimbursement "in connection with the Mechem legal actions and his participation in the chapter 11 and chapter 7 proceedings." *Lebron*, 27 F.3d at 941. The Third Circuit held a creditor or other qualifying individual under the subsection, may be awarded administrative expenses "if he incurred them as a result of activities which (1) made a 'substantial contribution,' (2) 'in a case under chapter 9 or 11.'" *Id.* at 943.

Importantly, the Third Circuit identified the "twin objectives" of § 503(b)(3)(D): "'meaningful creditor participation in the reorganization process' . . . and 'keeping fees and administrative expenses at a minimum so as to preserve as much of the estate as possible for the creditors.'" *Id.* at 944 (Citing *Otte v. U.S.*, 419 U.S. 43 (1974)). This subsection is designed, so the Third Circuit held, to "benefit the estate as a whole" so reimbursement should not be allowed when the actions of creditors "are designed primarily to serve their own interests and which . . . would have been undertaken absent an expectation of reimbursement from the estate." *Id.* The Third Circuit concluded that costs or administrative expenses "incurred after a chapter 11 case is converted to one under chapter 7 . . . are not recoverable pursuant to [Section 503(b)(3)(D)]." *Id.* at 945.

Section 503(b)(3)(D) was found to not apply to proceedings in chapter 7 again by the Third Circuit but in an entirely different factual scenario in *In re Lloyd Sec. Ins.,* 75 F.3d 853 (3rd. Cir. 1996). In that case, the Securities Exchange Commission (SEC) prosecuted a case involving the Securities Investor Protection Act (SIPA). *Id.* at 855-856. Statutory construction was utilized to determine first, that SIPA treated its version of liquidations as that of chapter 7 and secondly, that § 503(b)(3)(D) therefore did not apply. *Id.* at 857. Looking generally to the decision in *Lebron*, the Third Circuit held "[t]aken literally, then, if § 503 of the Bankruptcy Code is incorporated into

SIPA, there can be no recovery for customer expenses in this (or any other) SIPA liquidation." *In re Lloyd*, 75 F.3d at 857. (Citing *Lebron v. Mechem Fin. Inc.*, 27 F.3d 937, 946 (3rd Cir. 1994)).

2. The reasoning of the Third Circuit should be adopted by this Court to hold Respondent cannot claim a reimbursement.

These consistent methods of statutory construction ultimately control this case. In a variety of factual scenarios presented above, courts have found that despite equitable considerations, the controlling rule of law is that of statutory language. *Lamie*, 540 U.S. at 534. Section 503(b)(3)(D) specifically allows for administrative expenses to be paid out to creditors under chapter 9 and 11. 11 U.S.C. § 503(b)(3)(D). Courts cannot deviate from the statutory language by appealing to concepts of equity when the specific language provides the appropriate remedy. *In re Fresco Plastic Corp. Inc.*, 996 F.2d at 154. Had Congress wished to extend the equitable powers of Bankruptcy proceedings, it could have provided for allowance of administrative expenses in chapter 7 petitions. *Id*. at 156.

With the absence of trustees in chapter 9 and chapter 11 petitions, creditors often act for their own best interest, not that of the estate. *Lebron*, 27 F.3d at 945. The trustee on the other hand, has the responsibility of administering the estate in a way that benefits the entire group of creditors. Chapters 9 and 11 are specifically mentioned in § 503(b)(3)(D) because without trustees, the bankruptcy proceedings require some method of ensuring useful participation by creditors, ensuring low administrative expenses, and protecting the estate's final pot of funds. *Lebron*, 27 F.3d at 944-945. Here however, Petitioner is in the position to provide the appropriate remedies as the trustee of the estate and Respondent's claim for expenses has no statutory basis.

C. Section 503(b)(3)(D) applies to administrative expenses incurred during chapter 9 or 11 proceedings.

Congress specifically provided for administrative expense reimbursements in chapter 9 and 11 proceedings. 11 U.S.C. § 503(b)(3)(D). The statutory language shows that Congress knew how to provide for such expenses yet limit the reimbursements in some way. "'The task of resolving the dispute over the meaning of [the statute] begins where all such inquiries must begin: with the language of the statute itself.'" *US Trustee v. Farm Credit Bank of Omaha*, 152 B.R. 612, 614 (D.S.D. 1993) (Citing *US v. Ron Pair Enters. Inc.*, 489 U.S. 235, 241 (1989)). When the language of the statute is clear, as it is here, the role of the court is limited to applying it as written. *Id*. at 613. Only in exceptional circumstances should courts deviate from the language of the statute; when "'the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters.'" *Id*.

1. Section 503(b)(3)(D) does not apply except in chapters 9 or 11.

In *US Trustee v. Farm Credit Bank of Omaha*, the Federal District Court for the District of South Dakota was tasked with applying § 503(b)(3)(D) to a case proceeding under chapter 12. *Id*. at 612. The trustee maintained there was no statutory basis for awarding administrative expenses in a chapter 12 case. *Id*. The district court held that allowing claims for administrative expenses in cases other than 9 or 11 would result in an "effectively rewritten § 503(b)(3)(D)." *Id*. at 614. The court in *US Trustee* looked to this Court which had "explicitly stated 'that whatever equitable powers remain in the bankruptcy courts must and can only be exercised within the confines of the Bankruptcy Code.'" *Id*. at 614. (Citing *Norwest Bank Worthington v. Ahlers*, 485 U.S. 197, 206 (1988)). Therefore, it is up to Congress and not this Court, to provide for equity or amend the statute.

The present case is analogous to *US Trustee* regarding the statutory construction that is required. First, this case has presented a claim for an administrative expense in a case other than chapter 9 or 11. R. at 7. Petitioners have maintained, just as the trustee above did, there is no statutory justification for awarding an administrative expense here. R. at 8. To allow the administrative expense claim in this chapter 7 proceeding and go beyond the chosen language of Congress would rewrite § 503(b)(3)(D). *US Trustee*, 152 B.R. at 614. The most equitable and consistent outcome then would be to apply the language of the statute, providing Congress with the opportunity to make appropriate changes to the law. *Id*.

2. Congress specified chapters 9 and 11 as the only bankruptcy proceedings in which an administrative expense may be reimbursed.

"[W]e begin with the understanding that Congress 'says in a statute what it means and means in a statute what it says there.'" *Hartford Underwriters Ins. Co. v. Union Planters*, 530 U.S. 1, 6 (2000) (Citing *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 254 (1992)). In *Hartford Underwriters*, this Court interpreted § 506 of the Bankruptcy Code to determine whether an administrative claimant may seek payment. *Id*. at 3. Justice Scalia used the language of the statute itself, making three distinct points, to hold § 506 was the exclusive list of remedies. *Id*. at 6. When a statute delineates a certain action by a certain individual in the proceeding, "it is surely among the least appropriate in which to presume nonexclusivity." *Id*. This Court found the trustee "has a unique role in bankruptcy proceedings" and Congress likely would have given "a power to him and not to others." *Id*. at 7. Finally, if Congress had an alternative intent in writing the statute, allowing the claims in a wider set of situations, "it could simply have said so . . . ." *Id*.

The analytical framework of this Court in *Hartford Underwriters* is helpful here. First, where Congress has specifically enumerated chapters 9 and 11 in the statute, "it is surely among the least appropriate in which to presume" chapter 7 also applies. *Id*. at 6. In chapters 9 and 11, the

creditors and committees have a predominate role; it is likely Congress enumerated those chapters in § 503(b)(3)(D) because the trustee is available in other chapters. *Hartford Underwriters*, 530 U.S. at 7. If Congress had wanted to extend this subsection to include chapter 7 proceedings, "it could simply have said so . . . ." *Id*. Justice Scalia concludes, the theories of lower courts "that the expression of one thing indicates the inclusion of others unless exclusion is made explicit—is contrary to common sense." *Id*. at 8. The court below erred by deciding the inclusion of chapters 9 and 11 required an equitable decision to include chapter 7. By explicitly enumerating certain chapters, Congress was clear that administrative expenses for chapter 7 may not be reimbursed under § 503(b)(3)(D).

In re Hackney presented the same facts as this case, pre-chapter 7 actions that result in expenses by a creditor who then sought administrative expenses. *In re Hackney*, 351 B.R. 179 (Bankr. N.D. Ala. 2006). The Northern District of Alabama District Court held § 503(b)(3)(D) did not apply to cases arising under chapter 7. *Id*. at 181. Applying the subsection, the court wrote it is "of course, limited to Chapter 9 and 11 cases and does not apply here . . . ." *Id*. at 195-196. The court found most cases applying the section held that it did not apply to chapter 7. *Id*. at 200. Furthermore, the court noted Congress clearly had the knowledge and ability to create a vehicle for substantial contributions and "could have done the same in Chapter 7 cases. It did not." *Id*. at 201. Finally, the district court wrote:

> this Court must conclude that if Congress intended for there to be a 'substantial contribution' administrative expense in Chapter 7 cases, Congress would not have limited 503(b)(3)(D) to cases under Chapter 9 and Chapter 11. Its limitation . . . to cases under Chapter 9 and Chapter 11 is a clear indication that it did not intend such an administrative expenses to be allowed in Chapter 7 cases.

Id. at 205. This same analysis should apply here and this Court should conclude the court below was incorrect for allowing a substantial contribution reimbursement for the Respondent

D. The list of administrative expenses in Section 503(b)(3)(D) is exhaustive and the inclusion of (b)(3)(D) limits the power of courts to go beyond the listed remedies.

Section 503(b) uses the term "including" before listing the various types of administrative expenses for which reimbursement is available. 11 U.S.C. § 503(b). Importantly, one of items on the list below "including" was subsection (3): "the actual, necessary expenses other than compensation and reimbursement specified in paragraph (4) . . . ." 11 U.S.C. § 503(b)(3).

1. Subsection (b)(3) does not use the term "including" it is therefore exhaustive and additional administrative expenses violate the plain language.

The court below was incorrect when it held "including" gave courts the power to utilize equitable principles and "flexibility in dealing with specific factual situations where the grant of an administrative expense is warranted." R. at 19. As previously discussed, equitable powers are curtailed by the clear statutory language. *In re Fresco Plastic,* 996 F.2d at 157. In the words of the dissenting opinion by Circuit Judge Moon, "a statute sets forth a series of items in a general rule but excludes 'including,' the canon of *expressio unius est exclusio alterius* applies, under which a court infers an intention to restrict the statute's application to only those specific examples listed." R. at 29-30. Indeed, when the statute uses the term "including" in one provision before a list, the absence of "including" before setting forth another list must have some purpose. *See Russello v. United States*, 464 U.S. 16, 23 (1983) (holding "where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.").

In a claim for administrative expenses, the United States Bankruptcy Appellate Panel for the Ninth Circuit in *Mosier v. Kupetz* held there are "two requirements to recover on a § 503(b)(3)(D) claim . . . ." *Mosier v. Kupetz,* 2005 Bankr. LEXIS 3408 at 13 (B.A.P. 9th Cir. Oct. 7, 2005). An administrative expense reimbursement is limited to "a creditor of the estate" and "the

creditor must have made a substantial contribution to the chapter 9 or 11 bankruptcy estate." *Mosier*, 2005 Bankr. LEXIS at 13. The chapter 11 proceeding in *Mosier* was converted to chapter 7 early in the process. *Id*. at 2. Like Petitioners here, the trustee in *Mosier* contested awarding a substantial contribution for similar reasons. *Id*. at 8. The Ninth Circuit panel correctly noted that "[a] bankruptcy court may abuse its discretion if it does not apply the correct law or rests its decision on a clearly erroneous assessment of evidence." *Id*. at 10-11. Claims under § 503(b) should be "construed narrowly" because the funds must come from the entirety of the estate. *Id*. at 11. The *Mosier* panel found § 503(b) to be "a nonexhaustive list of allowable administrative expenses." *Id*.

Continuing the discussion of § 503(b)(3)(D), the Ninth Circuit panel noted "[t]he proper interpretation . . . is that it does not authorize administrative expenses incurred in a chapter 7 case or after a case has been converted from chapter 11 to chapter 7." *Id* at 14. (Citing *Lebron*, 27 F.3d at 944-945). The court moved on to the issue of exhaustion of § 503 holding: "unlike the six enumerated subsections under § 503(b), in which the use of the word 'include' is significant for being nonexhaustive, the five examples under § 503(b)(3) are restricted to only those five." *Id*. at 19. Finally, when looking to a court's powers of equity, it is a consistent bankruptcy principle that such equity "may only be exercised in a manner that is consistent with the provisions of the Code." *Id*. at 23 (Citing *Unsecured Creditors' Committees v. Pioneer Commercial Funding Corp. (In re Pac. Express, Inc.)*, 69 B.R. 112, 115 (9th Cir. BAP 1986)).

2. The Bankruptcy Code Rules of Construction require that (b)(3)(D) is limited to chapters 9 and 11.

The Bankruptcy Code has specific "Rules of construction" found in 11 U.S.C. § 102. Specifically, subsection (3) states "'[i]ncludes' and 'including' are not limiting." 11 U.S.C. § 102(3) (2018). Section 503(b)'s addition of "including," as discussed above, shows it is not

exhaustive. Nothing in subsection (b)(3)(D) indicates there is an option for other chapters except 9 or 11. *US Trustee*, 152 B.R. at 614. Chapter 7 existed at the time and the language indicates it was not intended to be included, even under the Code's own rules of construction. Furthermore, the court in *In re Hackney* noted "the existence of 503(b)(3)(D) precludes recognition of an unlisted administrative expense for 'substantial contributions' made by creditors in Chapter 7 cases." *In re Hackney*, 351 B.R. at 205. "[W]hen a subsection directly addresses the type of administrative expense sought, the restrictions in it cannot be avoided by appealing to non-exclusive nature of § 503(b)." *In re Elder*, 321 B.R. 820, 829 (Bankr. E.D. Va. 2005).

3. This Court should not read the law in a way that would make a portion of 503(b) superfluous or unnecessary.

In *TRW Inc. v. Andrews*, this Court discussed a "'cardinal principle of statutory construction'" to read and interpret a statute so "'no clause, sentence, or word shall be superfluous, void, or insignificant.'" *TRW Inc.*, 534 U.S. at 31. (Citing *Duncan v. Walker*, 533 U.S. 167, _, (2001)). This Court should not make the law have unnecessary portions. *In re Blount*, 276 B.R. 753 (Bankr. M.D. La. 2002). Applying these concepts, interpreting "including" in § 503(b) and the absence of the word in subsection (b)(3)(D), would indicate it was given meaning in the former. The latter however must be exhaustive. Without the broader term that is designed to extend the sphere, canons of construction would indicate that (b)(3)(D) is limited. 11 U.S.C. § 102(3).

E. <u>The court below incorrectly relied on equitable principles and *In re Connolly*.</u>

The court below incorrectly held that "a more flexible, totality of the circumstances approach" should dictate the outcome of this case. R. at 17. To reach the outcome that § 503(b)(3)(D) applied equally to chapter 7 cases, despite clear statutory language, the court below ignored "[a] majority of courts, including the Third Circuit . . . ." *In re Health Trio*, 584 B.R. 342, 351 (Bankr. Col. 2018). The court below looked to *In re Connolly* and the use of equitable

principles to decide "including" in subsection (b) created a non-exhaustive list of factors. R. at 17. Furthermore, the court found that "a number of lower courts" have used similar reasoning, by its count, four lower district courts indicated a trend in the direction of *In re Connolly*. *Id*. at 18. A review of *In re Connolly* and its progeny highlight the issues of relying on strictly equitable principles. As discussed above, equity may only be used to support the clear language of the Code. *See Mediofactoring v. McDermott (In re Connolly N. Am., LLC)*, 802 F.3d 810, 815 (6th Cir. 2015) (finding "we have checked the bankruptcy court's exercise of its equitable powers where that exercise contradicts the plain, unambiguous meaning of the Bankruptcy Code.").

1. *In re Connolly was incorrectly decided based on canons of statutory construction and the Sixth Circuit allowed equity to drive the conclusion.*

The United States Court of Appeals for the Sixth Circuit in *In re Connolly* allowed administrative expense reimbursement for three creditors in a chapter 7 proceeding under § 503(b)(3)(D). *Id*. at 812-813. Interestingly, the court began its discussion, not unlike this case, by noting the principles of equity must compete with canons of statutory construction. *Id*. at 814-815. The Sixth Circuit wrote the starting place analytically is the language of the statute and it would not strictly enforce equitable actions when to do so would violate plain language. *Id*. at 815. Furthermore, "claims for expenses under § 503(b) [must] be strictly construed." *Id*. at 816. That is where the logic of its decisionmaking ends however. The court in *In re Connolly* asserts the proposition that Congress' use of "including" shows an intent to not make the list exhaustive, but rather allow for courts to use their discretion. *Id*. According to the majority, chapter 7 is not listed because to do so would be unnecessary, only 9 and 11 need a discussion relating to creditors. *Id*. at 817. The Sixth Circuit concludes that if Congress had wanted to expressly forbid reimbursement in chapter 7 then it could have done so itself. *Id*. at 818.

Analytical reasoning utilized by courts like that in *In re Connolly* is precisely what Justice Scalia warned of as noted above concerning theories "that the expression of one thing indicates the inclusion of others unless exclusion is made explicit—is contrary to common sense." *Hartford Underwriters*, 530 U.S. at 8. *In re Connolly* was correct when it noted the loadstar of analysis should be balancing equity in response to the clear statutory language. *In re Connolly*, 802 F.3d at 814-815. However, the parsing of terms and bending of legal principles reek of a results-oriented decisionmaking. If as the court in *Connolly* said, claims for reimbursement under § 503(b) must be "strictly construed" and the language of subsection (b)(3)(D) is limited to chapters 9 and 11, nothing mandates expansion of the statute to chapters 7. *In re Connolly*, 802 F.3d at 816.

2. *Only a few courts have adopted the holding of In re Connolly and that approach should not overcome clear statutory language.*

Lower federal district courts have taken the expansive permission of *In re Connolly* and promulgated decisions interpreting it as the correct statement of the law. This move is despite the dissent in *In re Maqsoudi*, 566 B.R. 40 (Bankr. C.D. Cal. 2017) noting that 86% of bankruptcy or district courts have denied claims for expenses under § 503(b) for chapter 7 cases. *In re Maqsoudi*, 566 B.R. 40, 44 (Bankr. C.D. Cal. 2017). Even with a clear trend denying claims for administrative expenses in chapter 7 cases, *In re Maqsoudi* held it was "illogical" to interpret the use of "including" to not make subsection (b)(3)(D) also nonexhaustive. *Id.* at 44. The Bankruptcy District Court of Colorado in *In re Health Trio* found this large majority incorrect for a variety of reasons, most notably that plain language of a statute is not always the best guide and canons of construction should not limit courts. *In re Health Trio*, 584 B.R. 342, 352 (Bankr. Col. 2018). The canons of construction and precedent of this Court make clear this type of reasoning is flawed.

The strongest argument for allowing administrative expenses in chapter 7 cases posited by the Sixth Circuit in *In re Connolly* and utilized by the court below was the role of a trustee in

chapter 7. *In re Connolly*, 802 F.3d at 816-817. While it is true that creditors need more guidance in chapter 9 and 11 cases, the statute has no explicit language indicating a trustee also should be paid. As will be discussed below, there are ample alternative remedies for trustees and others in chapter 7 proceedings to seek reimbursement. The use of equity to override the plain language of the statute and the erosion of basic canons of statutory construction should not be used to rewrite statutes. That is the effect of the *In re Connolly* reasoning and jurisprudence. This Court should utilize the analytical reasoning and statutory construction of the Third and Ninth Circuits rather than exploiting powers of equity to overcome clear statutory language.

F. Other remedies are available for chapter 7 substantial contribution administrative expenses.

Two other sections of the Bankruptcy Code provide for administrative expenses and relief for those involved in chapter 7 proceedings. First, as some of the courts discussed above, § 503(b)(4) (2018) allows for some remedies that may not have applied in (b)(3)(D). Indeed as the court in *Lebron* noted there exists "provisions of § 503 other than subsection (b)(3)(D) that authorize reimbursement of expenses incurred in connection with a chapter 7 proceeding . . . ." *Lebron*, 27 F.3d at 945. Section 503(b)(4) gives other avenues for creditors by providing "reasonable compensation for professional services rendered by an attorney or accountant of an entity whose expense is allowable under subparagraph (A), (B), (C), (D), or (E) of paragraph (3) of this subsection . . . ." 11 U.S.C. § 503(b)(4) (2018). *In re Hackney* specifically states that subsection (b)(4) is "also applicable to Chapter 7 cases . . . ." *In re Hackney*, 351 B.R. at 205. Finally, Section 327(c) allows for the appointment or employment of additional counsel in a chapter 7 case. 11 U.S.C. 327(c) (2018). This subsection may give the authority of others to make administrative expense claims and be reimbursed.

G. This court should reverse the ruling of the Thirteenth Circuit

Section 503(b)(3)(D) provides for substantial contribution administrative expenses in chapters 9 and 11. 11 U.S.C. § 503(b)(3)(D). The statute, traditional canons of construction, and the Bankruptcy Code rules of construction require this Court to limit subsection (b)(3)(D) to the plain language. The United States Court of Appeals for the Thirteenth Circuit failed to apply rules of this Court and incorrectly permitted such claims for administrative expense in this chapter 7 proceeding. This Court should hold that Respondent's claim should be denied and reverse the Thirteenth Circuit.

CONCLUSION

Petitioner respectfully requests that this Court reverse the ruling of the United States Court of Appeals for the Thirteenth Circuit.

Respectfully submitted,

Team 17P
Counsel for Petitioner

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APPENDIX A

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—

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

(2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;

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

(4) any act to create, perfect, or enforce any lien against property of the estate;

(5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;

(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;

(7) the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor; and

(8) the commencement or continuation of a proceeding before the United States Tax Court concerning a tax liability of a debtor that is a corporation for a taxable period the bankruptcy court may determine or concerning the tax liability of a debtor who is an individual for a taxable period ending before the date of the order for relief under this title.

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APPENDIX B

11 U.S.C. § 503. Allowance of Administrative Expenses.

(a) An entity may timely file a request for payment of an administrative expense, or may tardily file such request if permitted by the court for cause.

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

(1)

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

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

(B) any tax—

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

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

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

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

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

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

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

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

(C) a creditor in connection with the prosecution of a criminal offense relating to the case or to the business or property of the debtor;

(D) a creditor, an indenture trustee, an equity security holder, or a committee representing creditors or equity security holders other than a committee appointed under section 1102 of this title, in making a substantial contribution in a case under chapter 9 or 11 of this title;

(E) a custodian superseded under section 543 of this title, and compensation for the services of such custodian; or

(F) a member of a committee appointed under section 1102 of this title, if such expenses are incurred in the performance of the duties of such committee;

(4) reasonable compensation for professional services rendered by an attorney or an accountant of an entity whose expense is allowable under subparagraph (A), (B), (C), (D), or (E) of paragraph (3) of this subsection, based on the time, the nature, the extent, and the value of such services, and the cost of comparable services other than in a case under this title, and reimbursement for actual, necessary expenses incurred by such attorney or accountant;

(5) reasonable compensation for services rendered by an indenture trustee in making a substantial contribution in a case under chapter 9 or 11 of this title, based on the time, the nature, the extent, and the value of such services, and the cost of comparable services other than in a case under this title;

(6) the fees and mileage payable under chapter 119 of title 28;

(7) with respect to a nonresidential real property lease previously assumed under section 365, and subsequently rejected, a sum equal to all monetary obligations due, excluding those arising from or relating to a failure to operate or a penalty provision, for the period of 2 years following the later of the rejection date or the date of actual turnover of the premises, without reduction or setoff for any reason whatsoever except for sums actually received or to be received from an entityother than the debtor, and the claim for remaining sums due for the balance of the term of the lease shall be a claim under section 502(b)(6);

(8)the actual, necessary costs and expenses of closing a health care business incurred by a trustee or by a Federal agency (as defined in section 551(1) of title 5) or a department or agency of a State or political subdivision thereof, includingany cost or expense incurred—

(A) in disposing of patient records in accordance with section 351; or

(B) in connection with transferring patients from the health care business that is in the process of being closed to another health care business; and

(9) the value of any goods received by the debtor within 20 days before the date of commencement of a case under this title in which the goods have been sold to the debtor in the ordinary course of such debtor's business.

(c)Notwithstanding subsection (b), there shall neither be allowed, nor paid—

(1)a transfer made to, or an obligation incurred for the benefit of, an insider of the debtor for the purpose of inducing such person to remain with the debtor's business, absent a finding by the court based on evidence in the record that—

(A) the transfer or obligation is essential to retention of the person because the individual has a bona fide job offer from another business at the same or greater rate of compensation;

(B) the services provided by the person are essential to the survival of the business; and

(C)either—

(i) the amount of the transfer made to, or obligation incurred for the benefit of, the person is not greater than an amount equal to 10 times the amount of the mean transfer or obligation of a similar kind given to nonmanagement employees for any purpose during the calendar year in which the transfer is made or the obligation is incurred; or

(ii) if no such similar transfers were made to, or obligations were incurred for the benefit of, such nonmanagement employees during such calendar year, the amount of the transfer or obligation is not greater than an amount equal to 25 percent of the amount of any similar transfer or obligation made to or incurred for the benefit of such insider for any purpose during the calendar year before the year in which such transfer is made or obligation is incurred;

(2) a severance payment to an insider of the debtor, unless—

(A) the payment is part of a program that is generally applicable to all full-time employees; and

(B) the amount of the payment is not greater than 10 times the amount of the mean severance pay given to nonmanagement employees during the calendar year in which the payment is made; or

(3) other transfers or obligations that are outside the ordinary course of business and not justified by the facts and circumstances of the case, including transfers made to, or obligations incurred for the benefit of, officers, managers, or consultants hired after the date of the filing of the petition.

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APPENDIX C

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.

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

(c) Except as provided in section 362(a)(7) of this title, an entity that has neither actual notice nor actual knowledge of the commencement of the case concerning the debtor may transfer property of the estate, or pay a debt owing to the debtor, in good faith and other than in the manner specified in subsection (d) of this section, to anentity other than the trustee, with the same effect as to the entity making such transfer or payment as if the case under this title concerning the debtor had not been commenced.

(d) A life insurance company may transfer property of the estate or property of the debtor to such company in good faith, with the same effect with respect to such company as if the case under this title concerning the debtor had not been commenced, if such transfer is to pay a premium or to carry out a nonforfeiture insurance option, and is required to be made automatically, under a life insurance contract with such company that was entered into before the date of the filing of the petition and that is property of the estate.

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