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

Team P. 19
Counsel for Petitioner

QUESTIONS PRESENTED

I. Whether a creditor violates the automatic stay under 11 U.S.C. § 362(a)(3) when the creditor refuses to relinquish possession of estate property seized prepetition, preventing the trustee from most effectively liquidating the estate.

II. Whether the plain language of 11 U.S.C. 503(b), when read in the context of the Bankruptcy Code, allows a court to grant administrative expense priority for a substantial contribution in a case under chapter 7.

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OPINIONS BELOW

In an unreported opinion, the Bankruptcy Court for the District of Moot found that Weinberg had not violated the automatic stay and that he was entitled to recover his administrative expenses. R. at 6, 8. The Bankruptcy Appellate Panel affirmed on both issues. R. at 9. In an opinion written by Judge Bonham, the Thirteenth Circuit also affirmed. R. at 3. Judge Moon filed a dissenting opinion, stating that the bankruptcy court should be reversed on both issues. R. at 27, 32. The entirety of the Thirteenth Circuit's opinion is reproduced as the record in this appeal.

STATEMENT OF JURISDICTION

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

STATUTORY PROVISIONS

11 U.S.C.A. § 102 (West 2016) reads, in pertinent part, as follows:

> In this title—
> (3) "includes" and "including" are not limiting; . . . .

11 U.S.C. § 362(a)(3) (2012) reads, in pertinent part, as follows:

> (a) [A] petition filed under . . . this title . . . 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(e) (2012) reads as follows:

> (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 (2012) reads, in pertinent part, as follows:

> (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 . . . 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; . . .
. . .
(3) the actual, necessary expenses . . . 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. § 541(a)(1) (2012) reads, in pertinent part, as follows:

(a) The commencement of a case . . . under this title creates an estate. Such an estate is comprised of all the following property, wherever located and by whomever held:
(1) [A]ll legal and equitable interests of the debtor in property as of the commencement of the case.

11 U.S.C. § 542 (2012) reads, in pertinent part, as follows:

(a) [A]n 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.
. . .
(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.

11 U.S.C.A. § 704(a) (West 2016) reads, in pertinent part, as follows:
(a) The trustee shall—
. . .
(4) investigate the financial affairs of the debtor; . . . .

STATEMENT OF THE CASE AND FACTS

Debtor, Backstreets Plowing, Inc. ("Backstreets"), operated a seasonal snow plow business in the State of Moot. R. at 3, 5. Backstreets' owner, Christopher Clemons ("Clemons"), approached Milton Weinberg ("Weinberg") about borrowing $450,000 on behalf of Backstreets. R. at 4. With the funds, Backstreets purchased new snow plow trucks to meet anticipated higher service demands. R. at 4. To secure repayment of the loan, Backstreets granted Weinberg a security interest in the snow plows. R. at 4. Clemons also personally guaranteed the loan. R. at 4. The promissory note provided that Backstreets would make monthly payments to Weinberg starting December 2015. R. at 4.

Backstreets did not make the December 2015 payment. R. at 5. Weinberg attempted to contact Clemons regarding the nonpayment in February 2016. R. at 5. When Weinberg was unable to reach Clemons, Weinberg drove to Backstreets' facility. R. at 5. An argument ensued, and Clemons demanded that Weinberg leave. R. at 5. Weinberg told Clemons to "lawyer up." R. at 5.

Weinberg sued Backstreets for default in Moot state court in April 2016. R. at 5. In the same suit, Weinberg sued Clemons on his personal guarantee. R. at 5. Weinberg obtained a default judgment against Backstreets and Clemons, jointly and severally, for $450,000 plus interest and fees. R. at 5. However, Weinberg did not immediately seek to recover on his judgment. R. at 5.

Unfortunately, the 2016–2017 winter caused substantial losses for Backstreets. R. at 5. In addition, Weinberg began attempting to collect on his judgment in January 2017. R. at 6. Weinberg hired E Street Auto Recovery, who repossessed the snow plows from Backstreets' lot later that month. R. at 6. The snow plows were delivered to Weinberg's warehouse, where they currently remain. R. at 6. However, no foreclosure proceedings occurred, so the snow plows remain titled in Backstreets' name. R. at 6.

Without the snow plows, Backstreets could not fulfill contractual obligations to its clients. R. at 6. When a client threatened to sue, Backstreets filed for chapter 11 bankruptcy on February 4, 2017. R. at 6. Shortly after, Backstreets' attorneys sent Weinberg a letter demanding that the snow plows be returned. R. at 6. Weinberg refused to return the snow plows, saying that he was waiting for Backstreets to commence a turnover action. R. at 6. Once turnover had been requested, Weinberg would demand adequate protection of his interest in the snow plows. R. at 6.

In response, Backstreets filed a motion in the bankruptcy court alleging that Weinberg's retention of the snow plows violated the automatic stay under section 362(a)(3).[1] R. at 6. The bankruptcy court, calling it a "close call," determined that Weinberg had not violated the automatic stay. R. at 6. Backstreets appealed this ruling, but Clemons subsequently determined that a chapter 11 reorganization would be futile. R. at 6–7. Consequently, Backstreets voluntarily converted the case to chapter 7 and Trustee Vin Sant was appointed to administer the estate. R. at 7.

After conversion to chapter 7, Weinberg began efforts to collect on the judgment against Clemons. R. at 7. Weinberg hired a collection firm who discovered that shortly after Weinberg filed his initial suit against Backstreets and Clemons, Clemons transferred about $100,000 to his daughter, Patti. R. at 7. Weinberg then provided this information to Vin Sant, establishing that the transfers were avoidable as fraudulent. R. at 7. Vin Sant sued Patti to avoid the transfer and quickly settled for Patti to pay $75,000 back into the estate. R. at 7.

By investigating Clemons' transfers, Weinberg incurred $25,000 in legal fees. R. at 7. Upon approval of the Patti settlement, Weinberg filed a motion under section 503(b) to recover these administrative expenses. R. at 7. Although Vin Sant agreed that Weinberg made a substantial contribution to the estate, Vin Sant opposed the motion, arguing that such expenses are not

[1] The Bankruptcy Code is set forth in 11 U.S.C. §§ 101–1532. Specific sections of the Bankruptcy Code are referred to as "section ___."

permissible in a chapter 7 case. R. at 7–8. The bankruptcy court approved Weinberg's motion and Vin Sant appealed. R. at 8.

In September 2017, Vin Sant received a letter from Backstreets' competitor, Tenth Avenue Freeze, Inc. ("Tenth Avenue"). R. at 8. The letter offered to purchase all of Backstreets' assets if Backstreets could ensure that the sale would include the snow plows. R. at 8. Vin Sant attempted to effectuate the sale by negotiating with Weinberg for the return of the snow plows. R. at 8. However, Weinberg refused to turn over the snow plows and Tenth Avenue withdrew its offer in November 2017. R. at 8.

In January 2018, another competitor of Backstreets named Stony Pony Plowing, LLC ("Stony Pony") offered to buy Backstreets' assets—excluding the snow plows—for $100,000 less than what Tenth Avenue offered. R. at 9. Vin Sant accepted this offer and the bankruptcy court approved of the sale in February 2018. R. at 9. Vin Sant continued pursuing the appeal in the Bankruptcy Appellate Panel, seeking to recover the difference between Tenth Avenue and Stony Pony's purchase offers. R. at 9. However, the panel affirmed the bankruptcy court on both issues. R. at 9. Accordingly, Vin Sant appealed both issues to the Thirteenth Circuit. R. at 9.

SUMMARY OF ARGUMENT

The automatic stay is a fundamental element of a debtor's fresh start. Thus, maintaining the integrity of the automatic stay is crucial to the purpose of bankruptcy law. However, to allow a creditor to retain possession of estate property after the bankruptcy petition has been filed would undermine the very purpose of the bankruptcy system. Accordingly, this Court should hold that Weinberg violated the automatic stay by retaining possession of Backstreets' snow plows and therefore, reverse the decision below.

The majority of circuit courts to have addressed this issue understand the importance of estate property remaining beneficial to the estate and its creditors. This reasoning is established upon both this Court's precedent and a sound interpretation of the Bankruptcy Code. On the other hand, the minority circuits misinterpret this Court's jurisprudence and the Bankruptcy Code. Additionally, this minority view permits creditors to take advantage of estate property at the expense of the other creditors. Consequently, this Court should reject the minority circuits' view and should reaffirm its commitment to treating creditors and debtors fairly.

By failing to return the snow plows to Backstreets, Weinberg acted to exercise control over estate property in violation of the automatic stay. Weinberg's violation of the automatic stay cause Vin Sant to be unable to sell Backstreets for the best available price. This undervalued sale prevented the estate from being effectively liquidated, thus harming Backstreets, Vin Sant, and the estate's other creditors. This Court should decline to tolerate such a violation of the automatic stay and should reverse the decision below.

Furthermore, 11 U.S.C. § 503(b) prohibits allowance of an administrative expense in making a substantial contribution in a chapter 7 bankruptcy case. Section 503(b)(3)(D) limits allowance of a substantial contribution administration expense to chapter 9 and chapter 11 cases. A recent opinion by the Sixth Circuit deviated from the majority of district and bankruptcy court's interpretation of the statute. This recent deviation threatens to undermine the presumption in bankruptcy cases that statutes should be narrowly construed to limit priority distributions and insure that the debtor's limited resources will be equally distributed to all creditors.

Additionally, the minority view adopted by the Sixth Circuit violates a tenet of statutory construction that has been well-established by this Court because it renders an entire phrase in section 503(b)(3)(D) superfluous and meaningless. While the use of the term "including" does

create a mechanism in section 503(b) allowing bankruptcy courts to use their equitable powers to allow expenses not specifically listed in the statute, it does not apply to substantial contributions because this Court has long held that general language does not apply to a matter specifically dealt with in another part of the same enactment.

The first circuit court to address this issue explicitly adopted the view already in place in the majority of district and bankruptcy courts when it determined that substantial contribution administrative expenses are limited to chapter 9 and 11 cases. This interpretation of section 503(b) best balances the competing objectives of encouraging meaningful creditor participation and keeping fees at a minimum so as to preserve as much of the estate as possible for the creditors. This is because the first objective of encouraging meaningful creditor participation is accomplished in chapter 7 cases due to the presence of a trustee. Allowing a creditor to recover administrative expenses in making a substantial contribution in chapter 7 cases would allow the creditor to usurp the trustee's role as a representative of the estate which would frustrate Congress' intention and sidestep the remedial scheme they have put in place for chapter 7 proceedings.

Even if this Court were to permit administrative expenses in making a substantial contribution in chapter 7 cases, such expenses should not be allowed in the instant case. The narrow holding by the Sixth Circuit carves out allowance for only the rarest of chapter 7 cases where the trustee in place is not fulfilling its role forcing a creditor to take action to benefit the estate. In the instant case, Vin Sant was fulfilling his role as trustee and therefore Weinberg was not forced to take action. Allowing recovery by Weinberg would be an exercise of equitable power beyond what is permitted by the Bankruptcy Code. Accordingly, this Court should refrain from overstepping the equitable powers establish by Congress and reverse the decision below.

ARGUMENT

I. SECTION 362(a)(3) OF THE BANKRUPTCY CODE PROHIBITS RETENTION OF ESTATE PROPERTY SEIZED PREPETITION.

A primary purpose of the federal bankruptcy system is "to aid the unfortunate debtor by giving him a fresh start in life, free from debts, except of a certain character." *Lamar, Archin & Cofrin, LLP v. Appling*, 138 S. Ct. 1752, 1758 (2018) (quoting *Stellwagen v. Clum*, 245 U.S. 605, 617 (1918)). Within this "fresh start" is the automatic stay imposed upon creditors once a debtor petitions for bankruptcy. *See* 11 U.S.C. § 362(a) (2012). This stay provides that creditors are prohibited from "any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate." *Id.* § 362(a)(3). Violating this stay results in the malfeasant creditor paying the actual and potentially punitive damages arising from the violation. *Id.* § 362(k)(1).

A fundamental purpose of the automatic stay is to protect the debtor. *Midlantic Nat'l Bank v. N.J. Dep't of Envtl. Prot.*, 474 U.S. 494, 503 (1986). Thus, to hold that passive retention does not violate the automatic stay would be fundamentally at odds with the purpose of the stay because the debtor is inhibited in his plan to pay off his debts. *See Thompson v. Gen. Motors Acceptance Corp., LLC*, 566 F.3d 699, 705 (7th Cir. 2009). Moreover, by retaining possession of estate property postpetition, a creditor improves its position without the necessity of filing a motion. *In re Rutherford*, 329 B.R. 886, 891 (Bankr. N.D. Ga. 2005). To allow such possession would not only fail to protect all the other creditors, *see id.*, but would also contradict this Court's foundational bankruptcy jurisprudence that "[e]quality between creditors is necessarily the ultimate aim of the bankrupt law . . . ." *Clark v. Rogers*, 228 U.S. 534, 548 (1913). Thus, this Court must find that section 362(a)(3) prohibits creditors from retaining possession of estate property seized prepetition and accordingly, reverse the decision below.

A. The plain language of the Bankruptcy Code prohibits creditors from retaining possession of estate property seized prepetition.

When interpreting a statute, this Court begins its inquiry "where all such inquiries must begin: with the language of the statute itself." *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989). "[T]here generally is no need for a court to inquire beyond the plain language of the statute." *Id.* at 240–41. This Court must be cautious to abstain from "rewriting the law under the pretense of interpreting it." *King v. Burwell*, 135 S. Ct. 2480, 2506 (2015) (Scalia, J., dissenting). Lastly, this Court should interpret statutes to give meaning to every clause and word of the statute. *Duncan v. Walker*, 533 U.S. 167, 174 (2001).

1. By retaining possession of the snow plows, Weinberg acted to exercise control over property of the estate in direct violation of the language of section 362(a)(3).

A creditor shall not act to obtain or exercise control over estate property once a debtor files for bankruptcy. 11 U.S.C. § 362(a)(3). This automatic stay comes into effect the moment the debtor files the bankruptcy petition. *In re McLouth*, 268 B.R. 244, 247 (D. Mont. 2001); *see also Citizens Bank of Md. v. Strumpf*, 516 U.S. 16, 17 (1995) (stating that the automatic stay arose upon the debtor's bankruptcy filing). Therefore, the moment after a debtor files his petition, any act to exercise control over estate property is a violation of the automatic stay.

"Property of the estate" is a broad term; it includes, among other things, all legal and equitable interests a debtor may have in certain property at the commencement of the estate. 11 U.S.C. § 541(a)(1) (2012). In the instant case, the snow plows are property of the estate because the bankruptcy estate includes property that remains titled in the debtor's name, despite being seized prepetition. *United States v. Whiting Pools, Inc.*, 462 U.S. 198, 209 (1983). Therefore, any act by Weinberg to exercise control over the snow plows after Backstreets filed its petition violates section 362(a)(3).

Weinberg's "passive" retention of the snow plows violated the automatic stay because Weinberg exercised control over the plows. "Control" is defined as "exercising influence over" or "having power over." *Thompson*, 566 F.3d at 702 (quoting Merriam-Webster's Collegiate Dictionary). Weinberg had power over the snow plows, as evidenced by his ability to prevent Backstreets and Vin Sant from regaining possession over the plows. R. at 6. Accordingly, it is clear that by having power and influence over the snow plows, Weinberg violated the automatic stay. As Judge Moon observed below: "The inquiry should therefore end here." R. at 23.

Despite this clear interpretation, Weinberg and the court below argue that Weinberg did not "act" to control estate property because Weinberg did not "do something" to control the estate property. R. at 11. However, as the dissent points out, Weinberg "did 'do something.'" R. at 23. Weinberg acted by preventing Clemons or Vin Sant from regaining possession of the snow plows, causing the property to be useless in the liquidation efforts. To adopt any other view of Weinberg's actions would contravene the statute's intended meaning of the word "act." *See In re Peake*, 588 B.R. 811, 832 (Bankr. N.D. Ill. 2018) ("[I]t is natural to give the term 'act' its broadest meaning when construing the expansively-interpreted language in section 362(a)(3) . . . ."); *see also In re Stringer*, 847 F.2d 549, 552 (9th Cir. 1988) ("Congress clearly intended the automatic stay to be quite broad.").

Indeed, "[w]ithholding possession of property from a bankruptcy estate is the essence of 'exercising control'" over the property. *In re Sharon*, 234 B.R. 676, 682 (B.A.P. 6th Cir. 1999). By withholding the snow plows, Weinberg clearly acted to exercise control over property of the estate. To find that Weinberg's retention of the snow plows was not an "act" would allow creditors to effectively ignore the automatic stay and would destroy its fundamental purpose: to protect debtors. *See Midlantic Nat'l Bank*, 474 U.S. at 503.

2. By retaining possession of the snow plows, Weinberg withheld property from the estate in direct violation of the language of section 542(a) and thus, section 362(a)(3).

Although Congress prohibited Weinberg's retention of the snow plows by adopting the language of section 362(a)(3), that provision alone is not the only language to be considered. Instead, this Court reads the Bankruptcy Code as a whole "since the meaning of statutory language, plain or not, depends on context." *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991). The words of a statute exist communally, and they take their meaning as an aggregate from the context in which they are used. *Shell Oil Co. v. Iowa Dep't of Revenue*, 488 U.S. 19, 25 n.6 (1988). Thus, in addition to section 362(a)(3), this Court should examine section 542(a) to determine whether Weinberg violated the automatic stay. *See* David Gray Carlson, *Turnover of Collateral in Bankruptcy: Must a Secured Party-In-Possession Volunteer?*, 6 J. Bankr. L. & Prac. 483, 488 (1997) ("Section 362(a)(3) must be read in conjunction with [s]ection 542(a).").

Upon examination, it is clear that Weinberg acted in contravention of section 542(a). Titled "Turnover of property to the estate," section 542 provides that a person in control of property of the bankruptcy estate "*shall* deliver" that property to the trustee. 11 U.S.C. § 542(a) (2012) (emphasis added). This Court has identified three exceptions to the turnover requirement of section 542(a), but none are applicable in the present case. *See Whiting Pools, Inc.*, 462 U.S. at 206 n.12. Thus, this Court is left with the plain meaning of the turnover provision: A creditor "shall deliver" estate property to the trustee. 11 U.S.C. § 542(a).

The word "shall" is defined as "[h]as a duty to; more broadly, is *required* to." *Shall*, Black's Law Dictionary (10th ed. 2014) (emphasis added). Likewise, this Court reads "shall" in mandatory terms; such language creates "an obligation impervious to judicial discretion." *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998); *see also Kingdomware Techs.*,

Inc. v. United States, 136 S. Ct. 1969, 1977 (2016) (reading the word "shall" to connote a mandatory obligation).

Congress does not "hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001). If Congress used the word "shall" in section 542(a), it meant to convey exactly what "shall" means: a mandatory obligation to turn over property of the estate to the trustee. Said another way, Congress wrote section 542(a) to be "self-executing." *In re Weber*, 719 F.3d 72, 79 (2d Cir. 2013) (quoting *Collier on Bankruptcy* § 542.02 (16th ed. 2012) (''By its express terms, [section 542] is self-executing, and does not require that the trustee take any action or commence a proceeding or obtain a court order to compel the turnover.'')). Consequently, if no exceptions are applicable, a creditor's failure to turn over estate property to the trustee is a violation of section 542(a). *Thompson*, 566 F.3d at 708.

To read section 542(a) as self-executing is in accord with this Court's jurisprudence. In *Whiting Pools*, this Court required a secured creditor to turn over lawfully repossessed property once the creditor became aware of the debtor's bankruptcy petition. *Whiting Pools*, 462 U.S. at 209–10. In interpreting the turnover provision, this Court established that section 542(a) does not allow a creditor to seek protection of its interests through non-bankruptcy procedures, like continued possession of estate property. *Id.* at 212. Therefore, because continued possession is improper, the only other option is to automatically turn over the property to the trustee and seek protection through established bankruptcy procedures. *See id.*; *see also In re Weber*, 719 F.3d at 81 ("The Code requires the creditor first to surrender the property. Only then or in conjunction with that surrender may it proceed to 'request' from the Bankruptcy Court 'adequate protection' for its interests.").

Upon this standard, it is clear that Weinberg acted in contravention of the Bankruptcy Code's turnover provision. When Backstreets' attorneys demanded that Weinberg return the snow plows, Weinberg was indisputably put on notice of the filing of the bankruptcy petition. R. at 6. Following notice of the petition, Weinberg assumed all the normal responsibilities of a secured creditor, including the obligation to turn over estate property in his possession. By refusing to turn over the snow plows, Weinberg precluded Vin Sant from selling Backstreets for the best available price. R. at 8. As a result, Vin Sant was forced to sell Backstreets for $100,000 less than the original offer. R. at 8–9. By causing this devalued sale, Weinberg benefited at the expense of all the other creditors and acted "in derogation of the bankruptcy procedure," violating section 542(a). *In re Weber*, 719 F.3d at 80.

A creditor's violation of section 542(a) necessarily represents a violation of section 362(a)(3). *See id.* at 76 (holding that sections 542(a) and 362(a)(3) work together to shelter the debtor from actions by the creditor). For section 542(a) to apply, a creditor must be in "possession, custody, or control" of property during the bankruptcy case. 11 U.S.C. § 542(a). Thus, if a creditor is in control of estate property postpetition, any act by the creditor regarding that property is an act to exercise control over the property in violation of section 362(a)(3). Considering the broad definition of the word "act," *In re Peake*, 588 B.R. at 832, a denial of turnover certainly qualifies as acting to exercise continued control of estate property.

By rejecting Backstreets' turnover request, Weinberg violated section 542(a) and concomitantly violated section 362(a)(3). Weinberg had control over the snow plows and refused to turn them over to the bankruptcy estate, citing "adequate protection" of his interests, despite this Court's reasoning in *Whiting Pools* clearly establishing that such action was improper. 462 U.S. at 212. He thus violated section 542(a). Furthermore, by denying Vin Sant the ability to possess

the snow plows, Weinberg acted to continue exercising his control over the snow plows such that the property was unusable to the bankruptcy estate. Weinberg therefore also violated section 362(a)(3). As a result, this Court should find that Weinberg violated the automatic stay and that Backstreets is entitled to damages for Weinberg's misconduct.

A minority of courts have found that section 542(a) is not self-executing. *See, e.g.*, *In re Hall*, 502 B.R. 650, 659–60 (Bankr. D. D.C. 2014). However, to hold otherwise would be to turn a blind eye to this Court's "cardinal principle of statutory interpretation" that a statute should be read as a whole such that no word is rendered void or insignificant. *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001). To read section 542(a) as non-self-executing would render language in section 362(a)(3) insignificant. In particular, it would contradict the prohibition of exercising control over estate property because refusing to turn over property is the essence of exercising control. *See In re Sharon*, 234 B.R. at 682.

Additionally, when reading the statute as a whole, Congress clearly meant "shall" to convey a mandatory obligation. If Congress had not intended to impose a mandatory obligation, it would have used the word "may." In fact, the word "may" appears in section 542(e), which allows—but does not mandate—a court to order disclosure of the debtor's financial information from attorneys or accountants who have relevant information.[2] 11 U.S.C. § 542(e) (2012). Accordingly, Congress intended different meanings to apply to "shall" and "may," as each is used in different contexts and receives differing levels of discretion. *See In re Rutherford*, 329 B.R. at 892 (holding that section 542(a) "creates an affirmative obligation on the part of the party holding

[2] Congress was not using "may" just because it was referencing the courts. Section 363(e) provides that a court "shall" provide for adequate protection of a creditor's interest in certain estate property. 11 U.S.C. § 363(e) (2012). Hence, Congress was not reluctant to use the word "shall" when it felt a mandatory obligation was necessary, whether to the court or the creditor.

estate property to turn the property over, and that obligation is not dependent upon the holding of a hearing or the entry of an order by the bankruptcy court").

Moreover, this Court assumes that "[t]he word 'may,' when used in a statute, usually implies some degree of discretion." *United States v. Rodgers*, 461 U.S. 677, 706 (1983). In contrast, the word "shall" connotes an obligation not subject to discretion. *Lexecon Inc.*, 523 U.S. at 35. Certainly, when identical words are used in different parts of the same statute, they are presumed to have the same meaning. *IBP, Inc. v. Alvarez*, 546 U.S. 21, 34 (2005). However, the instant case presents the exact opposite situation: Congress used *different* words in the statute. To read the word "shall" and "may" to have the same meaning would be fundamentally at odds with this Court's long line of statutory interpretation precedent. Therefore, this Court should find that section 542(a) is self-executing and thus, that Weinberg violated the automatic stay by rejecting Backstreet's turnover request and continuing to exercise control over estate property.

B. <u>This Court and the majority of circuit courts have correctly interpreted the Bankruptcy Code to prohibit creditors from retaining possession of estate property seized prepetition.</u>

Prior to 1984, the automatic stay only prohibited acts to obtain possession of estate property. *Thompson*, 566 F.3d at 702. Upon adoption of the Bankruptcy Amendments and Federal Judgeship Act of 1984, however, Congress expanded the stay to forbid acts to exercise control over estate property. Act of July 10, 1984, Pub. L. No. 98-353, § 441, 98 Stat. 333. Since this new legislation, courts have split regarding whether retention of repossessed estate property constitutes a violation of the automatic stay. The majority of circuit courts hold that postpetition retention is a violation of the automatic stay, while a minority of circuits take the opposite view. *Mitchell v. BankIllinois*, 316 B.R. 891, 899 (S.D. Tex. 2004) (listing authorities on each side of the split). Additionally, when faced with a similar question, this Court reasoned that retention of estate

property seized prepetition is a violation of the automatic stay. *See Whiting Pools*, 462 U.S. at 203 (pointing out that bankruptcy efforts would be unlikely to succeed if crucial property was excluded from the estate). Accordingly, this Court should adopt the majority circuits' view and reaffirm its commitment to debtor protection and to the integrity of the automatic stay.

1. This Court's bankruptcy jurisprudence prohibits creditors like Weinberg from retaining possession of estate property seized prepetition.

Although this Court decided *Whiting Pools* before the 1984 amendments to the Bankruptcy Code, the ruling and language from that case favor the majority circuits' rule regarding the interplay between section 542(a) and section 362(a)(3). *In re Rutherford*, 329 B.R. at 894. In *Whiting Pools*, this Court identified the issue as whether section 542(a) authorized the bankruptcy court to order the IRS to turn over property seized prepetition. 462 U.S. at 199. Because the "exercise control" language was not added to the automatic stay until one year later, this Court did not directly answer whether a failure to turn over property—like Weinberg's—violated section 362(a)(3). *In re Rutherford*, 329 B.R. at 894.

However, this Court did offer reasoning to illustrate the proper disposition of the question at hand. For example, this Court stated that the Bankruptcy Code provides secured creditors numerous rights, like the right to adequate protection. *Whiting Pools*, 462 U.S. at 207. The right to adequate protection, however, is a replacement for other rights that creditors have, like possession. *Id.* Thus, once a petition is filed and the Bankruptcy Code governs, a creditor's rights are protected by the bankruptcy court, not by continued possession.

This Court also addressed an argument that section 363(e) allowed a creditor to retain possession of a seized interest until that creditor received adequate protection of its interest. *Id.* at 203–04. This Court soundly rejected that argument, stating that a secured creditor must rely on the

procedures outlined in section 363(e) for protection of its interest. *Id.* at 204. This Court further condemned creditors protecting their interests through the "nonbankruptcy remedy of possession." *Id.* Rather, this Court emphasized that section 542(a) modifies the procedural rights available to creditors to protect their interests. *Id.* at 205. This Court illustrated that modification by holding that section 542(a) required the creditor to turn over the seized property to the estate, rather than withhold it from the debtor's bankruptcy efforts. *Id.* at 212. Therefore, this Court has firmly disapproved of creditors relying on possession to protect their interests once a bankruptcy petition has been filed.

When applying this Court's reasoning in *Whiting Pools* to the instant case, it is undeniable that Weinberg acted improperly by retaining possession of Backstreet's snow plows. Instead of using the congressionally sanctioned procedures to protect his interest in the snow plows, Weinberg acted in direct opposition to this Court's mandates. Weinberg wholeheartedly relied on the "nonbankruptcy remedy of possession." To make matters worse, Weinberg's misconduct resulted in exactly what this Court expressed concern about: a debtor being inhibited in his attempt to pass through bankruptcy efficiently. *See id.* at 208. By refusing to comply with the Bankruptcy Code, Weinberg caused Backstreets to be sold for $100,000 less than the best available offer. R. at 8–9. To rule in favor of Weinberg would be to condone conduct that contravenes this Court's longstanding practice of protecting debtors and treating creditors equally. *See Midlantic Nat'l Bank*, 474 U.S. at 503; *Clark*, 228 U.S. at 548. Thus, this Court should hold true to its precedent and find that Weinberg violated the automatic stay.

2. The majority of circuit courts, guided by this Court's jurisprudence, have held that conduct such as Weinberg's constitutes a violation section 362(a)(3).

In addition to this Court's precedent favoring Backstreet's position, the majority of other legal authorities that have addressed the issue have decided that retention of estate property seized prepetition is a violation of the automatic stay. *Mitchell*, 316 B.R. at 899; *see also, e.g.*, Eugene R. Wedoff, *The Automatic Stay Under § 362(a)(3)—One More Time*, 38 Bankr. L. Letter 7 (2018) ("[I]f exercising control over estate property did not include maintaining exclusive possession of the property, there would be the question of what [exercising control] does include."). The majority consists of six circuits. The minority, on the other hand, has only three.[3] Because the majority circuits' view is most in line with this Court's bankruptcy jurisprudence and most accurately follows the Bankruptcy Code, this Court should adopt the majority view.

After the 1984 amendments to the Bankruptcy Code, the first circuit to address the present issue was in *In re Knaus*, 889 F.2d 773 (8th Cir. 1989). In *Knaus*, a creditor seized equipment belonging to the debtor after the debtor defaulted on a loan. *Id.* at 774. Shortly after, the debtor filed for bankruptcy and requested the creditor to return the equipment. *Id.* When the creditor refused, the debtor initiated a turnover action in the bankruptcy court. *Id.* In addressing whether the creditor violated the automatic stay, the Eighth Circuit emphasized how fundamental the automatic stay was to the efficacy of the bankruptcy process. *Id.* Upon that, the court found that the duty to turn over property under section 542(a) is not contingent upon any order of the bankruptcy court. *Id.* at 775. Rather, the duty to turn over estate property arises upon filing of the bankruptcy petition. *Id.* The court assigned that duty to creditors in all types of bankruptcy proceedings, including chapter 7. *Id.* From this reasoning, the court awarded the debtor damages based on the creditor's violation of the automatic stay. *Id.*

[3] *See In re Cowen*, 849 F.3d 943, 950 (10th Cir. 2017) (placing the Tenth Circuit in the minority); *United States v. Inslaw, Inc.*, 932 F.2d 1467, 1474 (D.C. Cir. 1991) (placing the D.C. Circuit in the minority). The third and most recent circuit to adopt the minority view is the Thirteenth Circuit, who adopted the minority view in its decision below. R. at 16.

Similarly, when the Ninth Circuit faced this issue, it too held that retention of estate property postpetition was a violation of the automatic stay. *In re Del Mission*, 98 F.3d 1147, 1152 (9th Cir. 1996). There, the State of California failed to repay taxes after the debtor had filed its bankruptcy petition. *Id.* at 1149–50. In addressing whether California's conduct violated the stay, the court emphasized the purpose of the automatic stay: to alleviate financial strains on the debtor. *Id.* at 1151. The court found that to effectuate the purpose of the automatic stay, the onus to return estate property must fall to the possessor. *Id.* The court thus concluded that the State's retention of the taxes violated the automatic stay. *Id.* at 1152. The creditor attempted to justify the nonpayment because the debtor did not make a specific demand of it, but the court labeled the argument as frivolous. *Id.*

The next circuit to join the expanding majority view came in *In re Sharon*, 234 B.R. 676 (B.A.P. 6th Cir. 1999). In that case, the creditor repossessed the debtor's car due to default. *Id.* at 680. The debtor filed for bankruptcy ten days later. *Id.* The same day, the debtor's counsel contacted the creditor and requested return of the car. *Id.* The creditor responded that it would not return the vehicle. *Id.* Five days later, the debtor filed a motion in the bankruptcy court alleging that the creditor had violated the automatic stay. *Id.* The bankruptcy court granted the motion and awarded the debtor damages. *Id.* at 681. On appeal, the bankruptcy panel emphasized the broad scope of the automatic stay. *Id.* at 682. Finding that withholding possession was the essence of exercising control over property, the court determined that the creditor violated the automatic stay. *Id.* (citing *In re Javens*, 107 F.3d 359, 368 (6th Cir. 1997)).

The Eleventh Circuit also sided with the majority when it addressed this issue in *In re Rozier*, 376 F.3d 1323 (11th Cir. 2004). In that case, the creditor repossessed the debtor's vehicle after the debtor went into default. *In re Rozier*, 348 F.3d 1305, 1306 (11th Cir. 2003). Several days

later, the debtor filed for bankruptcy and requested the creditor return the vehicle. *Id.* When the creditor refused, the debtor filed a motion alleging that the creditor's actions violated the automatic stay. *Id.* The bankruptcy court ruled that the creditor's actions violated the automatic stay and held the creditor in contempt. *Id.* When the appeal reached the Eleventh Circuit, the court certified to the Supreme Court of Georgia the question of whether repossession automatically transfers ownership to the creditor. *In re Rozier*, 376 F.3d at 1324. When the Georgia high court answered in the negative, the Eleventh Circuit affirmed the bankruptcy court. *Id.* The court reasoned that because the vehicle remained property of the estate, a failure by the creditor to return that property constituted a violation of the automatic stay. *Id.*

Like *Rozier*, the next court to address this issue also joined the majority. *Thompson v. Gen. Motors Acceptance Corp., LLC*, 566 F.3d 699 (7th Cir. 2009). In *Thompson*, the creditor repossessed the debtor's vehicle and refused to relinquish possession of it after the debtor filed for bankruptcy. *Id.* at 700–01. The debtor alleged that this conduct was a violation of the automatic stay. *Id.* On appeal, the court stressed how the automatic stay helps a debtor pay off his debts and rehabilitate his credit. *Id.* at 702. The court also noted the expansion of the automatic stay in 1984, stating that the mere fact that Congress expanded the provision to prohibit "exercising control" suggests that Congress intended to stay possession of property seized prepetition. *Id.* Accordingly, the court held that passively holding onto estate property constitutes exercising control over the property, thus violating the automatic stay. *Id.* at 703.

Most recently, the Second Circuit joined the majority in *In re Weber*, 719 F.3d 72 (2d Cir. 2013). There, a creditor seized possession of the debtor's pickup truck. *Id.* at 74. Four days later, the debtor filed for bankruptcy. *Id.* The debtor's counsel then informed the creditor of the petition and sought return of the pickup. *Id.* When the creditor failed to return the vehicle, the debtor filed

a proceeding seeking return of the pickup. *Id.* Addressing the case, the Second Circuit highlighted that the automatic stay contributes to a debtor's "fresh start," which is one of "the goals of the bankruptcy regime." *Id.* at 76. The court also underscored the fact that had the debtor possessed the pickup, the success of his bankruptcy efforts would have been significantly improved. *Id.* at 78. In that vein, the court found that section 542(a) interplayed with section 362(a)(3) to establish that the creditor violated the automatic stay by retaining possession of the pickup. *Id.* at 78, 79.

3. Weinberg violated section 362(a)(3) as interpreted by this Court and the majority of circuit courts when he retained possession of estate property seized prepetition.

By refusing to turn the snow plows over to the bankruptcy estate, Weinberg acted in clear violation of section 362(a)(3). When viewed through the lens of this Court and the majority circuits' precedents, Weinberg acted to exercise control of estate property in spite of his duty to turn that property over to the estate. Like the creditors in *Weber* and *Thompson*, Weinberg repossessed Backstreet's vehicles due to a loan default. R. at 6. However, like in *Rozier*, the property remained titled in Backstreet's name. R. at 6. Moreover, like the debtors in *Weber*, *Thompson*, *Knaus*, and *Sharon*, Backstreets filed a bankruptcy petition then requested return of its seized property. R. at 6. When Weinberg rejected that request, Backstreet, like the debtor in *Sharon*, pointed out this violation of the automatic stay to the bankruptcy court. R. at 6.

The purpose of the automatic stay has not changed between the decisions in past cases and the instant case. Rather, the stay's purpose has been reiterated and more firmly established with each case: The automatic stay broadly protects debtors from creditors so that the debtor can effectively administer his estate and attain bankruptcy's fundamental goal of a fresh start. *E.g.*, *Thompson*, 566 F.3d at 702; *In re Weber*, 719 F.3d at 76; *In re Del Mission*, 98 F.3d at 1151. In the instant case, it is clear that Weinberg's actions were at odds with this purpose.

Secondarily, the majority circuits' reasonings illustrate how section 362(a)(3) and section 542(a) interplay to prohibit conduct such as Weinberg's. For example, Weinberg testified that he was waiting for the bankruptcy court to become involved before he turned over the snow plows. R. at 6. However, the court in *Knaus* persuasively found that a creditor's turnover duty under section 542(a) is not contingent upon an order from the bankruptcy court. 889 F.2d at 775. That being the case, a creditor who fails to turn over estate property acts to exercise control over that property because that creditor has exclusive control and can exclude others from regaining possession. Accordingly, this Court should find that Weinberg's retention of the snow plows violated section 362(a)(3).

C. To adopt the minority circuits' viewpoint would be improper because it contradicts the language of the Bankruptcy Code and this Court's bankruptcy jurisprudence.

A minority of circuits have taken the opposite stance when addressing the automatic stay, including the Thirteenth Circuit in its opinion below. These courts hold that only by some sort of "affirmative act" can a creditor violate section 362(a)(3). *See, e.g.*, *In re Cowen*, 849 F.3d 943, 950 (10th Cir. 2017); *In re Hall*, 502 B.R. at 665. However, this minority ignores the language and context of section 362(a)(3), this Court's foundational bankruptcy policies, and the only approach that makes beneficial use of estate property for both the debtor and creditors. Thus, this Court should reject the erroneous minority circuits and reverse the decision below.

First, the minority circuits' approach inaccurately applies section 362(a)(3) and section 542(a) by neglecting canons of statutory interpretation. The primary justification for this approach is that a creditor has a right to adequate protection of its interest under section 363(e). *See In re Cowen*, 849 F.3d at 949. Thus, according to the minority circuits, "adequate protection" is an exception to turnover required by section 542(a): A creditor has no duty to turn over seized

property until the debtor can show adequate protection. *United States v. Inslaw, Inc.*, 932 F.2d 1467, 1473 (D.C. Cir. 1991). However, this interpretation of section 542(a) erroneously inputs an exception that Congress did not intend to include. *See Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253–54 (1992) ("[A] legislature says in a statute what it means and means in a statute what it says there."). This Court explicitly listed the exceptions to section 542(a). *Whiting Pools, Inc.*, 462 U.S. at 206 n.12. None of those exceptions resembled waiting until the debtor proves that it can adequately protect the creditor's interest. *See id.* Further, regarding the automatic stay, "[n]othing in § 362 itself suggests the 'adequate protection' exception to the automatic stay argued by [Weinberg]." *In re Sharon*, 234 B.R. at 683. As such, this Court should reject such an addition to the law lest it "rewrit[e] the law under the pretense of interpreting it." *Burwell*, 135 S. Ct. at 2506 (Scalia, J., dissenting).

In addition to improperly adding language to the statute, the minority circuits' view ignores the legislative history and the clear context that history sets for section 362(a)(3). When contemplating the 1984 amendments to section 362, Congress heavily stressed the importance of the automatic stay in protecting debtors from creditors. *In re Weber*, 719 F.3d at 76 n.5. Consequently, by expanding the language of section 362(a)(3) to stay acts to "exercise control," Congress clearly intended to expand the protections offered to debtors. *Thompson*, 566 F.3d at 702. The minority circuits' approach debilitates such efforts to protect debtors. This Court should reject such an approach.

Second, the minority approach is fundamentally at odds with this Court's most established bankruptcy policies. One of those policies is that creditors are to be treated equally. *Clark*, 228 U.S. at 548. To allow conduct like Weinberg's would allow one creditor to benefit at the expense of all the others. *In re Rutherford*, 329 B.R. at 891. Essentially, by retaining possession of the snow

plows, Weinberg can withhold crucial estate property until he is subjectively satisfied with Backstreet's plan to protect Weinberg's interest under section 363(e). However, to permit such behavior is contrary to the mandate in section 363 that the bankruptcy court—not the creditor—determines the sufficiency of a debtor's bankruptcy plan. *Id.*

A second and more broad policy of this Court is that bankruptcy is intended to give the debtor a fresh start and alleviate his financial strains. *Appling*, 138 S. Ct. at 1758. The minority circuits argue that the onus to retrieve estate property falls to the debtor. *See In re Rutherford*, 329 B.R. at 892. However, such a determination is contrary to this Court's protection of debtors. In fact, this Court imposed upon the creditor the burden of ensuring adequate protection by holding that the bankruptcy court mandates protection of interests at "the *secured creditor's insistence*." *Whiting Pools*, 462 U.S. at 204 (emphasis added). This Court did not find that the debtor had to act first to regain possession of estate property. *See id.*; *see also In re Abrams*, 127 B.R. 239, 243 (B.A.P. 9th Cir. 1991) ("[T]he case law and the legislative history of § 362 indicate that Congress did not intend to place the burden on the bankruptcy estate to absorb the expense of potentially multiple turnover actions . . . ."). Therefore, this Court should not place the burden on Backstreets to regain possession of the snow plows. Instead, this Court should impose that duty according to the language of the statute: upon Weinberg.

Third and finally, the minority circuits' approach fails to most efficiently administer the bankruptcy estate. In addition to treating creditors unequally, adopting the minority circuits' view allows estate property to sit idly rather than be used for the purposes of reorganization and liquidation. The court in *Thompson* understood this reality: "An asset actively used by a debtor serves a greater purpose to both the debtor and his creditors than an asset sitting idle on a creditor's lot." 566 F.3d at 702. To adopt the minority view would cause the snow plows to sit idly in

Weinberg's lot. That not only deprives Backstreets and other creditors of beneficial estate property, but borders the line of absurdity. Thus, this Court should reject the minority view and hold that by retaining possession of the snow plows, Weinberg acted to exercise control over estate property and violated section 362(a)(3).

The Bankruptcy Code puts a premium on ensuring that both debtors and creditors are treated fairly. This Court's jurisprudence reflects that premium, striking a balance between a debtor's fresh start and the repayment of debts. The majority circuits' view is most in accord with this premium and the purpose of bankruptcy law. Accordingly, this Court should adopt the majority circuits' reasoning and reverse the decision below.

II. 11 U.S.C. § 503(b) PROHIBITS ALLOWANCE OF AN ADMINISTRATIVE EXPENSE FOR A SUBSTANTIAL CONTRIBUTION IN A CHAPTER 7 BANKRUPTCY CASE

The task of resolving a dispute over the meaning of the Bankruptcy Code begins with the language of the statute itself. *Ron Pair Enters., Inc.*, 489 U.S. at 241. The Bankruptcy Code allows for administrative expenses to be granted to creditors in some circumstances. *See* 11 U.S.C. § 503(b) (2012). One of the circumstances for which administrative expenses are permitted is when a creditor makes a substantial contribution in a case under chapter 9 or 11. 11 U.S.C. § 503(b)(3)(D).

A. Section 503(b)(3)(D) of the Bankruptcy Code limits allowance of an administration expense for a substantial contribution to chapter 9 and chapter 11 cases.

This Court must decide whether the non-exhaustive nature of the list found in section 503(b) allows for an administrative expense in making a substantial contribution under a chapter intentionally excluded in a subsection while other chapters are expressly included in that same subsection. In the statute in question, both chapter 9 and chapter 11 are expressly mentioned as

allowable, while chapter 7, a chapter of the same associated group, is excluded. *See id*. To answer this question, this Court must look to the language of the statute.

1. This Court's jurisprudence mandates expressio unius should be applied to section 503(b)(3)(D).

Expressio unius est exclusio alterius ("*expressio unius*") is a canon of statutory interpretation where expressing one item of an associated group or series excludes another left unmentioned. *See Chevron Inc. v. Echazabal*, 536 U.S. 73, 80 (2002). This Court recently stated *expressio unius* applies only when circumstances support a sensible inference that the term left out must have been excluded intentionally and that the force of any negative implication depends on the context. *Marx v. Gen. Revenue Corp.*, 568 U.S. 371, 381 (2013). This Court has also contemplated that *expressio unius* does not apply unless it is fair to suppose that Congress considered the unnamed possibility and meant not to say it. *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168 (2003).

When examining contextual factors to determine whether *expressio unius* applies, this Court has previously started with highly relevant background presumptions. *See Marx* 568 U.S. at 381–82. The presumption in bankruptcy is that the debtor's limited resources will be equally distributed among his creditors. *Joint Indus. Bd. v. United States*, 391 U.S. 224, 228 (1968). There is also a presumption that if one claimant is to be preferred over another, the purpose should be clear from the statute. *Nathanson v. N.L.R.B.*, 344 U.S. 25, 29 (1952). The Second Circuit reasoned that statutory provisions should be narrowly construed in order to best satisfy the presumptions set forth by this Court in *Joint Indus. Bd.* and *Nathanson. Trs. of Amalgamated Ins. Fund v. Mcfarlin's, Inc.*, 789 F.2d 98, 100 (2d Cir. 1986). Interpreting section 503(b)(3)(D) to include other chapters not expressly mentioned, such as chapter 7, would construe the statute too broadly and violate a major presumption in bankruptcy cases. By applying *expressio unius* to limit allowance for

administrative expenses in making a substantial contribution to only chapter 9 and 11 cases, this Court would better limit priority distributions and would ensure that the debtor's limited resources will be equally distributed amongst his creditors.

Next, this Court has looked to the language of other subsections in the same statute. *See Marx* 568 U.S. at 382. Section 503(b)(3)(D) is the only subsection to mention expressly any of the chapters of bankruptcy. *See* 11 U.S.C. § 503(b)(3). This is significant because "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." *Rusello v. United States*, 464 U.S. 16, 23 (1983). In *Rusello*, this Court refrained from concluding that the different language in two subsections had the same meaning in each. *Id.* Therefore, it should not be concluded that the more specific language in section 503(b)(3)(D) was meant to apply as broadly as the language in other subsections where no specific chapters are mentioned. Concluding that substantial contribution administrative expenses were intended to apply as broadly as the other administrative expenses listed would render the phrase "in a case under chapter 9 or 11 of this title" meaningless and merely excess verbiage. *In re Hackney*, 351 B.R. 179, 202 (Bankr. N.D. Ala. 2006). There is a well-established tenet of statutory construction that a statute should not be interpreted so as to render other provisions of the same enactment superfluous. *Freytag v. Comm'r*, 501 U.S. 868, 877–78 (1991). Interpreting section 503(b)(3)(D)'s phrase "in a case under chapter 9 or 11 of this title" as merely excess verbiage would violate that well-established tenet of statutory construction. Had Congress intended to accord administrative expense priority to the fees and expenses incurred by a creditor in making a substantial contribution in a chapter 7 case, it presumably would have done so expressly as it did for chapters 9 and 11. *In re Hackney*, 351 B.R. at 201. The construction of the statute and the

surrounding subsections further suggests that *expressio unius* should be applied to the language of section 503(b)(3)(D).

Expressio unius can still be overcome by "contrary indications that adopting a particular rule or statute was probably not meant to signal any exclusion." *United States v. Vonn*, 535 U.S. 55, 65 (2002). There are no such indications here to overcome the application of *expressio unius*. A primary indication this Court looked at in *Vonn* was the implications of reading the statute as if Congress had intended to exclude what is not expressly stated. *Id.* In that case, using *expressio unius* would partially repeal another statute which this Court had already found to be a disfavored result in a prior case. *Id.* In the instant case, applying *expresso unius* would have no such effect on any other statute or subsection. In addition, this Court has looked at the effect the interpretation would have on rendering a regulation inconsistent with the purpose and language of the authorizing statute. *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 703–04 (1991). Again, there is no such consequence of applying *expressio unius* to section 503(b)(3)(D). The only effect of reading the statute as excluding chapter 7, as well as other chapters not expressly mentioned, is that the presumptions of bankruptcy set forth by this Court are best protected.

It is apparent that evaluating the context of section 503(b)(3)(D) in the manner established by this Court supports a sensible inference that the exclusion of chapter 7 was considered by Congress and excluded intentionally. The presumptions of bankruptcy cases support a narrow interpretation of section 503(b)(3)(D) and the language of the surrounding subsections support such an interpretation. Therefore, absent any contrary indications, *expressio unius* cannot be overcome and should apply to the statute as excluding chapters not expressed.

2. The use of the word "including" in section 503(b) does not allow administrative expenses in making a substantial contribution in chapter 7 cases.

Section 102(3) of the Bankruptcy Code explains that the terms "includes" and "including" are not limiting. 11 U.S.C.A. § 102(3) (West 2016). The Sixth Circuit reasons, and the appellate court agrees, that by using the term "including" in the opening lines of the subsection, Congress built a mechanism in section 503(b) for bankruptcy courts to reimburse expenses not specifically listed. *In re Connolly N. Am., LLC*, 802 F.3d 810, 816 (6th Cir. 2015). This reasoning, however, cannot be extended to include allowance for administrative expenses in making a substantial contribution in chapter 7 cases.

The mechanism in section 503(b) allowing bankruptcy courts to reimburse expenses not specifically listed doesn't apply to substantial contributions because substantial contributions are specifically listed. *See* 11 U.S.C. 503(b). This Court has long held that the "general language of a statutory provision, although broad enough to include it, will not be held to apply to a matter specifically dealt with in another part of the same enactment." *D. Ginsberg & Sons, Inc. v. Popkin*, 285 U.S. 204, 208 (1932). That language was quoted approvingly by this Court as recently as 2010 when determining that the general language of a provision did not cover a matter already specifically dealt with in that same provision. *See Bloate v. United States*, 559 U.S. 196, 207 (2010). In the context of this statute, courts have already concluded the restrictions of a subsection that directly addresses the type of administrative expense sought cannot be avoided by appealing to the non-exclusive nature of 503(b). *In re Elder*, 321 B.R. 820, 829 (Bankr. E.D. Va. 2005).

This Court's jurisprudence is that the specific governs the general when interpreting statutes. *Morales v. TransWorld Airlines, Inc.*, 504 U.S. 374, 384 (1992). When interpreting section 503(b), this Court should look to its jurisprudence and determine that the specific nature of 503(b)(3)(D) overrides the use of the word "including." Thus, when Congress specifies certain chapters of bankruptcy that are to be included, the general language does not broaden the

application to other chapters that are not specified. Therefore, a creditor's administrative expenses in making a substantial contribution in chapter 7 cases are not allowed as a priority disbursement.

Furthermore, while section 503(b) uses the word including, subsection 503(b)(3) does not. *See* 11 U.S.C. § 503(b)(3). This implies, as the dissent in *Connolly* notes, that the list of actual, necessary expenses found under subsection 503(b)(3) is exhaustive. *In re Connolly*, 802 F.3d at 821 (O'Malley, J., dissenting). That Congress used "including" in some provisions of the Bankruptcy Code, such as subsection 503(b)(1)(A), but conspicuously chose not to include similar language in others, like subsection 503(b)(3), is meaningful. *Id.* Generally, "Congress says in a statute what it means and means in a statute what it says." *Hartford Underwriters Ins. Co. v. Union Planters Banks, N.A.*, 530 U.S. 1, 6 (2000). The plain language of section 503(b)(3) indicates that the subsections thereunder represent an exhaustive list of actual, necessary administrative expenses allowable. Contrary to the reasoning of the Sixth Circuit, this would disallow administrative expenses in making a substantial contribution for any case not under chapters 9 or 11 of the Bankruptcy Code.

The Sixth Circuit also claims that Congress did not include chapter 7 because it is only in the most atypical of cases under chapter 7 where a creditor would need to step in to benefit the estate. *In re Connolly*, 802 F.3d at 817. As the dissent points out, this explanation seems to support the notion that Congress consciously chose to exclude chapter 7. *Id.* at 821 (O'Malley, J., dissenting). When a sensible inference can be made that Congress considered the unnamed possibility and intentionally excluded it, *expressio unius* should be applied. *Marx*, 568 U.S. at 381. Once it has been determined that chapter 7 is excluded, this Court cannot rewrite the statute in order to take account of circumstances that Congress may not have foreseen in order to provide an equitable solution. *In re Connolly*, 802 F.3d at 822 (O'Malley, dissenting). Therefore, the Sixth

Circuit's own reasoning in overstepping the equitable powers granted to them by the Bankruptcy Code, suggests that substantial contribution administration expenses in chapter 7 cases should be excluded.

3. The presence of a trustee in chapter 7 cases indicates that administration expenses incurred by a creditor in making a substantial contribution should not be allowed in cases under that chapter.

The Third Circuit is the only other circuit to contemplate this issue as it pertains to section 503(b). *See Lebron v. Mechem Fin., Inc.*, 27 F.3d 937 (3d Cir. 1994). In *Lebron*, the court weighed two competing objectives. *See id.* at 944. The first of these "twin objectives," as the court referred to them, is to encourage meaningful creditor participation in the reorganization process. *Id.* The second objective is to keep fees at a minimum so as to preserve as much of the estate as possible for the creditors. *Id.* In doing so, it stated that section 503(b)(3)(D) requires that expenses for a substantial contribution be expenses incurred in a case under chapter 9 or 11. *Id.* While the court does not provide much reasoning behind this conclusion, a majority of lower courts addressing the issue have also concluded that administrative expense priority may not be accorded to expenses incurred by a creditor in making a substantial contribution in a chapter 7 case. *In re Hackney*, 351 B.R. at 200. When balancing the two objectives stated in *Lebron*, this court should determine, as a majority of the lower courts have, that the second objective is satisfied by a narrow interpretation of the statute. As for the first objective, this court should find that the need for creditor participation is mitigated by the presence of a trustee and the very nature of chapter 7 cases.

In cases under chapter 7, unlike chapters 9 and 11, there is always a trustee in place who does not have any prepetition relationship with the debtor or his creditors. *In re Cooper*, 405 B.R. 801, 812 (Bankr. N.D. Tex. 2009). The trustee has a unique role as an independent fiduciary with a perspective and interest in the bankruptcy estate that differs from both the debtor and the

creditors. *Id.* Among other responsibilities, the trustee is expected to be a gatekeeper and exercise reasonable business judgement in deciding what actions to bring and what are not worth the expense. *Id.* The existence of a trustee in all chapter 7 cases mitigates, if not nullifies, the second objective the court in *Lebron* spoke of.

Due to the unique role of the trustee in chapter 7 cases, there is no equitable rationale to deviate from the Bankruptcy Code's apparent remedial scheme. *Id.* Allowing a creditor, a non-statutory fiduciary, to act in the trustee's place could facilitate a creditor "hijacking" a chapter 7 bankruptcy case in a manner that Congress did not envision when it put its remedial schemes in place. *Id.* The court in *Cooper* stated that it would be generally unwise to allow a creditor to usurp the trustee's role as a representative of the estate, which includes the responsibility of being a gatekeeper for what actions make sense and weighing the potential benefits of litigation. *Id.* If this Court were to weigh the second objective too heavily and allow an administrative expense in making a substantial contribution in chapter 7 cases, then it would be going against Congress's intention and apparent remedial scheme that entrusts the trustee, not the creditor, to perform these functions. Thus, this Court should rule that substantial contribution administrative expenses are not allowable in chapter 7 cases.

B. Weinberg cannot recover administrative expenses even if this Court determines that administrative expenses incurred by a creditor in making a substantial contribution are allowable in chapter 7 cases.

The instant case is significantly distinguishable from *Connolly*. In *Connolly*, the creditors filed a motion to remove the trustee of the chapter 7 estate. *In re Connolly*, 802 F.3d at 813. They prevailed in their motion and the successor trustee filed an adversary proceeding against the original trustee. *Id.* The parties reached a court-approved settlement and the bankruptcy court recognized that at least some of the work that one of the creditors paid its attorneys to do

substantially benefitted the bankruptcy estate and the other creditors. *Id.* The court deemed that the creditor had contributed greatly to there being a significant increase in the amount of funds that the unsecured creditors would receive. *Id.* The court then held that the term "including" in the opening lines of the subsection allowed them to grant administrative expenses to the creditor for making a substantial contribution. *Id.* at 816.

In determining that administrative expenses should be granted to the creditor, the court reasoned that the U.S. trustee is not a fail-proof safeguard, and in some cases, a chapter 7 creditor may be compelled to utilize its own resourced to protect the estate as a whole. *Id.* at 817. The court then ruled that, in fulfilling its role as a court of equity, administrative expenses should be awarded to the rare chapter 7 creditors who are forced by circumstances to take action that benefits the estate when no other party is willing or able to do so. *Id.* at 818.

In the instant case, Vin Sant was appointed as trustee to administer Backstreet's bankruptcy estate and liquidate its property on April 13, 2017. R. at 7. Following the appointment of Vin Sant, the collection law firm Weinberg hired began a creditor's examination of Clemons in May 2017. R. at 7. During this examination, Weinberg discovered that Backstreets had made fraudulent transfers and provided Vin Sant with sufficient documentation and testimony to file a complaint against Patti Clemons where a settlement was quickly reached. R. at 7. It is for the legal fees incurred during this investigation that Weinberg seeks allowance of a substantial contribution administrative expense pursuant to section 503(b). R. at 7.

The court's holding in *Connolly* applies narrowly, only in the most atypical case where the trustee does not fill its role. *See In re Connolly*, 802 F.3d at 817. The facts of this case do not fall within the narrow scope of the *Connolly* holding. In the instant case, Vin Sant was appointed as trustee to fulfill the role as gatekeeper of the bankruptcy estate. R. at 7. One of the enumerated

duties of the trustee in a chapter 7 case is to investigate the financial affairs of the debtor. 11 U.S.C.A. § 704(a)(4) (West 2016). There are no claims of Vin Sant not fulfilling this, or any other, duty he had a statutory obligation to perform. *See* R. at 7–8. Since a non-negligent trustee was in place, this is not the rare chapter 7 case where creditors were forced by circumstances to take action that benefits the estate when no other party was willing or able to do so. There are no facts to suggest that Weinberg was compelled to utilize its own resources to protect the estate as a whole. Allowing substantial contribution administrative expenses for Weinberg would be allowing a creditor to usurp Vin Sant's role as trustee and would facilitate Weinberg in "hijacking" the bankruptcy case in a manner that Congress did not envision. *See In re Cooper*, 405 B.R. at 812–13.

Even if this Court were to determine that substantial contribution administration expenses were allowed in chapter 7 cases, allowances should be limited to the narrow circumstances set forth in *Connolly* so as to not frustrate Congress's intention that the trustee be the gatekeeper of the bankruptcy estate. Therefore, the expenses incurred by Weinberg's investigation should not be allowed as his actions clearly fall within the scope of duties allocated to the trustee in chapter 7 cases.

While the courts below felt it was within their equitable powers to allow Weinberg to recover administrative expenses, this Court has stated explicitly "that whatever equitable powers remain in the bankruptcy courts must and can only be exercised within the confines of the Bankruptcy Code." *Norwest Bank Worthington v. Ahelrs*, 485 U.S. 197, 206 (1988). The authority to address any inequities which may be present in the application of the plain meaning rule to section 503(b) is vested in Congress, not the courts. *In re Hackney*, 351 B.R. at 202 (citing *Taylor v. Freeland & Kronz*, 503 U.S. 638, 645–46 (1992)). Even if this Court had the power to remedy

an inequity in the instant case, which the Bankruptcy Code does not grant here, allowing an administrative expense for Weinberg would not be an equitable remedy. If allowed, Weinberg would be removing $25,000 of the $75,000 recovered from the bankruptcy estate. R. at 7. This priority distribution would be on top of the percentage of the remaining $50,000 Weinberg will receive when the remainder of the estate is disbursed. Such an allowance would be in violation of the underlying presumption of bankruptcy that the debtor's limited resources will be equally distributed amongst his creditors. This Court should find, no matter what, that the equitable remedy in the instant case is to disallow administrative expenses in making a substantial contribution to Weinberg.

CONCLUSION

The Bankruptcy Code and this Court's interpretation of the Code balance the interests of a debtor seeking a fresh start with the interests of a creditor in receiving repayment of its debts. In its decision below, the Thirteenth Circuit erroneously placed too much weight on protecting a single creditor. First, the court below permitted Weinberg to exercise control over estate property in direct violation of the automatic stay. Second, the court below overstepped the bounds of the judiciary by reading section 503(b)(3)(D) to allow Weinberg to recover administrative expenses, despite no language in section 503(b)(3)(D) permitting such recovery in chapter 7 cases. As a result, the estate was deprived of valuable property, harming all parties involved except Weinberg. This Court should refuse to tolerate such an inequity and—in accordance with its precedent and the language of the Bankruptcy Code—should reverse the decision below.