Docket No. 18-0918

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2018

IN RE BACKSTREETS PLOWING, INC., DEBTOR,

STEVEN VIN SANT, CHAPTER 7 TRUSTEE, PETITIONER

v.

MILTON WEINBERG, RESPONDENT.

On Writ of Certiorari to the
United States Court of Appeals for the Thirteenth Circuit

BRIEF FOR RESPONDENT

Team R. 20
Counsel for Respondent

QUESTIONS PRESENTED

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

II. Whether 11 U.S.C. § 503(b) permits an administrative expense for a substantial contribution that enhances the pool of funds available to creditors in a case under chapter 7 of the Bankruptcy Code.

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In unreported opinions, the bankruptcy court held that section 362(a)(3) was not violated when collateral of a loan was legally repossessed prior to the bankruptcy filing and a substantial contribution administrative expense was permitted under section 503(b), and the Bankruptcy Appellate Panel affirmed on both issues. R. at 3. The Thirteenth Circuit also affirmed on both issues; its opinion is reproduced as the record in this appeal.

STATEMENT OF JURISDICTION

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

STATUTORY PROVISIONS

11. U.S.C. § 102

In this title—

(1-2) [omitted]

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

(4-9) [omitted]

11 U.S.C. § 105

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

(b-d) [omitted]

11 U.S.C. § 362

(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—

(1-2) [omitted]

(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;

(4-8) [omitted]

11 U.S.C. § 363

(a-b) [omitted]

(c)

(1) If the business of the debtor is authorized to be operated under section 721, 1108, 1203, 1204, or 1304 of this title and unless the court orders otherwise, the trustee may enter into transactions, including the sale or lease of property of the estate, in the ordinary course of business, without notice or a hearing, and may use property of the estate in the ordinary course of business without notice or a hearing.

(2) The trustee may not use, sell, or lease cash collateral under paragraph (1) of this subsection unless—

(A) each entity that has an interest in such cash collateral consents; or

(B) the court, after notice and a hearing, authorizes such use, sale, or lease in accordance with the provisions of this section.

(d) [omitted]

(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).

(f-o) [omitted]

(p) In any hearing under this section—

(1) the trustee has the burden of proof on the issue of adequate protection; and

(2) [omitted]

11 U.S.C. § 503

(a) [omitted]

(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 entity other 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, including any 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) [omitted]

11 U.S.C. § 542

(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-e) [omitted]

11 U.S.C. § 704

(a) The trustee shall—

> **(1)** collect and reduce to money the property of the estate for which such trustee serves, and close such estate as expeditiously as is compatible with the best interests of parties in interest;
>
> **(2-12)** [omitted]

STATEMENT OF FACTS

Chris "Big Man" Clemons ("Big Man") was the sole shareholder and operator of Backstreets Plowing, Inc. (the "Debtor"), a seasonal snow plow business. R. at 3. In the spring of 2015, Big Man realized that in order to keep his business competitive, he would need to purchase newer, more fuel-efficient snow plow trucks (the "Trucks"). R. at 3. The Trucks would allow the company to save on fuel costs and avoid the substantial expenses incurred every winter in maintaining and repairing his much older vehicles. R. at 3. Additionally, the Trucks would allow the Debtor to compete for a valuable one-year contract with the City of Badlands, that was renewable at the sole option of the City (the "Contract"). R. at 3, 4.

In need of cash, Big Man approached a bowling club acquaintance, Milton Weinberg ("Weinberg") in an attempt to leverage his personal connection into borrowing $450,000 to buy the Trucks. R. at 4. Weinberg agreed to loan the Debtor the money but required a security interest in the Trucks and for Big Man to personally guarantee the loan (the "Agreement"). R. at 4. Big Man agreed to both requests. R. at 4. In August 2015, Weinberg dispersed the loan to Big Man, and he purchased the Trucks for the Debtor. R. at 4. Pursuant to the terms of the promissory note, the Debtor agreed to make monthly payments to Weinberg starting in December 2015. R. at 4. As such, Weinberg secured a purchase money security interest, which he perfected, granting him a first priority in the Trucks. R. at 4. n.3.

Thereafter, the Debtor and two other local snow plow companies, namely Tenth Avenue Freeze, Inc. ("Tenth Avenue") and Stone Pony Plowing, LLC ("Stone Pony"), submitted bids for the Contract. R. at 4. To influence the awarding of the Contract, the Debtor submitted a bid so suspiciously low that several members of the city council publicly questioned whether the Debtor would be able to perform under the Contract given the razor thin profit margins his bid permitted. R. at 4. Nevertheless, the city council awarded the Contract to the Debtor. R. at 4.

The winter of 2015-2016 (year one of the Agreement) was an unusually tepid winter in the Badlands. R. at 5. The lack of snow kept the Debtor's labor, maintenance, and fuel costs far below expected. R. at 5. This proved profitable for the Debtor, as the Contract paid a flat rate regardless of the amount of work performed. R. at 5. Despite this financial windfall, the Debtor chose not to pay a single cent of the December loan payment to Weinberg in violation of the Agreement. R. at 5. The record suggests that Big Man held a grudge against Weinberg stemming from a college football rivalry and used this illogical reasoning to justify his reneging on the payment. R. at 4.

In February 2016, following months of the Debtor's default on the Agreement and unreturned telephone calls, Weinberg drove to the Debtor's facility in an attempt to reestablish lines of communication and collect on the payments due and owing. R. at 5. This meeting proved unproductive. R. at 5. Big Man vociferously argued with Weinberg and, according to Weinberg, had a group of his employees forcibly remove Weinberg from the property. R. at 5. Based on Big Man's actions, and the Debtor's refusal of payment, Weinberg filed suit on the note in April 2016 in the State of Moot Circuit Court. R. at 5. As part of the same lawsuit, Weinberg also brought an action against Big Man on his personal guarantee. R. at 5. In October 2016, Weinberg obtained a default judgment against the Debtor and Big Man, jointly and severally, for $450,000 plus interest and fees. R. at 5.

The winter of 2016-2017 (year two of the Agreement) was nothing like the prior year as brutal Nor'easters covered the region with heavy snowfall and dashed the Debtor's hopes of reaping easily earned profits. R. at 6. Consequently, the Debtor incurred substantial financial losses. R. at 6. These losses stemmed directly from the Debtor's low-balled bid with the City as the monthly payments it received under the Contract failed to cover labor, maintenance, and fuel costs as they came due. R. at 4, 6. It was at this time, in January 2017, when Weinberg began efforts to collect on his judgment. R. at 6. Weinberg hired a repossession company, E Street Auto

Recovery, to retrieve the Trucks from the Debtor's parking lot. R. at 6. Later that month, E Street successfully and lawfully repossessed the Trucks from the Debtor and delivered them to a warehouse owned by Weinberg. R. at 6.

The Debtor now unable to fulfill its obligations under the Contract, proceeded to file a chapter 11 bankruptcy petition on February 4, 2017. R. at 6. Shortly after the petition date, the Debtor's attorney sent Weinberg a letter demanding that the Trucks be immediately returned. R. at 6. Weinberg testified before the bankruptcy court that he did not return the Trucks based on the understanding that before doing so, the Debtor had the burden to bring a turnover action. R. at 6. To date, the Debtor has never requested, nor filed a turnover action with the bankruptcy court. R. at 6. Rather, the Debtor filed a motion asking the court find that Weinberg's continued retention of the Trucks constituted a violation of the automatic stay under section 362(a)(3). R. at 6. The court found that Weinberg had not violated the stay, as retaining lawfully repossessed assets prepetition was not outside of the scope of section 362(a)(3). R. at 6. The Debtor appealed the bankruptcy court's ruling in March 2017. R. at 6.

After the appeal was filed, the Debtor realized that its efforts to reorganize under chapter 11 would be in vain as it learned that the Badlands' city council would not be renewing the Contract for the following year. R. at 7. With meager means, and no prospects on the horizon, the Debtor voluntarily converted the chapter 11 case to a chapter 7 case under the Bankruptcy Code. R. at 7. On April 13, 2017, Steven Vin Sant (the "Trustee") was appointed to administer the Debtor's bankruptcy estate and liquidate its assets. R. at 7. The Bankruptcy Appellate Panel stayed the pending appeal in order to allow the Trustee to substitute in for the Debtor and familiarize himself with the case. R. at 7.

With the case now under chapter 7, Weinberg pursued collection efforts against Big Man on the judgment related to his personal guarantee. R. at 7. In doing so, Weinberg hired a collection

law firm which undertook a creditors' examination of Big Man in May 2017. R. at 7. This examination revealed that a year prior, shortly after Weinberg had filed his initial lawsuit against the Debtor and Big Man, the Debtor fraudulently transferred approximately $100,000 to a bank account in the name of Big Man's daughter, Patti Clemons ("Patti"). R. at 7. Following the creditors' examination, Weinberg voluntarily provided the Trustee with sufficient documentation and testimony to establish that the transfers were voidable as fraudulent. R. at 7. The Trustee filed a complaint against Patti to void and recover the transfers under sections 548 and 550 of the Code. R. at 7. Patti quickly agreed to settle and returned $75,000 of the roughly $100,000 she fraudulently obtained from the Debtor. R. at 7. This settlement was in satisfaction of all claims asserted by the estate in the adversarial proceeding and the bankruptcy court approved the settlement. R. at 7.

Weinberg personally incurred $25,000 in legal fees while investigating and uncovering Big Man's fraudulent transfers. R. at 7. Accordingly, Weinberg filed a motion seeking the allowance of an administrative expense for his substantial contribution pursuant to section 503(b) of the Code. R. at 7. The Trustee acknowledged that Weinberg had made a substantial contribution to the estate but opposed the motion on the grounds that administrative expenses for substantial contributions are not permissible in a chapter 7 case. R. at 7, 8. The bankruptcy court disagreed and granted Weinberg's motion for an administrative claim in the amount of $25,000. R. at 8. The Trustee appealed. R. at 8.

In September 2017, the Trustee received a letter from Tenth Avenue offering to purchase substantially all of the Debtor's assets, including the Trucks. R. at 8. However, the offer was contingent on the Trustee promptly obtaining possession of, and conveying title to, the Trucks to Tenth Avenue. R. at 8. Weinberg received no direction from the court on the matter and, in line with his previous judgment, continued to maintain lawful possession of the Trucks. R. at 8. In November 2017, negotiations with Tenth Avenue broke down and it withdrew its purchase offer.

R. at 8. In January 2018, the Trustee received a separate bid from Stone Pony for all the Debtor's assets, this time, excluding the Trucks. R. at 8. The offer was for $100,000 less than Tenth Avenue's. R. at 8. The Trustee accepted this offer and the bankruptcy court approved it in 2018. R. at 8, 9.

Despite the closing of the sale, the Trustee refused to dismiss the appeals. R. at 9. The Trustee has stated that he hopes to prevail on the appeal of the automatic stay and, thereafter, recover from Weinberg the difference between the offer initially made by Tenth Avenue and the sale proceeds received from Stone Pony. R. at 9. Simultaneously, the Trustee has proceeded with the administrative claim appeal. R. at 9. Both parties consented to consolidate the two appeals before the Bankruptcy Appellate Panel. R. at 9.

The Appellate Panel affirmed the lower court's decision and found for Weinberg on both issues and the Trustee appealed. R. at 9. On appeal, the Thirteenth Circuit held that only post-petition affirmative acts to gain possession of, or to exercise control over, estate property violate section 362(a)(3). R. at 16. Additionally, section 503(b) empowers bankruptcy courts to award substantial contribution administrative expenses in chapter 7 cases when the grant of such an award is equitably based on the totality of the circumstances. R. at 21.

Wherefore, Weinberg asks this Court to affirm the holding of the the Thirteenth Circuit on both of these issues.

SUMMARY OF ARGUMENT

Weinberg extended a secured loan to the Debtor to purchase the Trucks in order to compete for the Contract. After the Debtor failed to repay on the loan, Weinberg legally repossessed the Trucks. Following the lawful repossession of the Trucks, the Debtor filed for bankruptcy. Instead of filing a turnover action, the Debtor filed a motion wrongfully accusing Weinberg of violating the automatic stay contained in section 362(a)(3). As a matter of law, a creditor may lawfully

repossess collateral of a secured loan prior to the commencement of a bankruptcy petition and maintain possession following the commencement of that petition. As such, section 362(a)(3) allows for a creditor to passively maintain possession of the collateral in this specific situation. This is due to the unambiguous statutory construction of this automatic stay held within section 362(a)(3) as it relates to passive retention of an estate's assets acquired by a creditor prepetition.

Moreover, once the bankruptcy petition is filed, there is an avenue of relief for a debtor or trustee to request the turnover of estate assets provided in section 542(a). However, as the Debtor and the Trustee failed to file such an action, this opportunity is foregone, and Weinberg may abide by the automatic stay provision by passively maintaining possession of the Trucks. Regardless, if this action had been pursued, the burden is on the debtor to provide adequate protection for the value of the assets held by the creditor which, here, the Debtor has not done. As this provision is not self-executing, Weinberg is not in violation of the Bankruptcy Code by a mere passive retention of the Trucks. Additionally, the burden is also on the debtor to show that the assets are of consequential value and benefit to the estate, which, again, is not present here. Therefore, the finding that the automatic stay was not violated should be affirmed.

Turning to the second issue, the non-exhaustive nature of section 503(b) allows a court to grant an administrative expense for a substantial contribution in a case under chapter 7 of the Bankruptcy Code. This allowance is permitted under the plain language of section 503(b) which is prefaced by the term "including". "Including", as defined by section 102 of the Code, is a non-limiting term that permits bankruptcy courts to look beyond the itemized categories of administrative expenses found in section 503(b). As such, administrative claims entitled to priority status are not limited to those listed in section 503(b). Therefore, an administrative expense for a substantial contribution may be granted under section 503(b).

Next, section 503(b)(3)(D) does not preclude cases filed under chapter 7 from being

awarded an administrative expense for a substantial contribution. Again, the prefatory use of the term "including", and its non-limiting nature, apply to all sections of 503(b). Additionally, given the distinct roles a trustee plays in chapter 9 and 11 cases, relative to a chapter 7 case, it makes sense that Congress omitted chapter 7 from section 503(b)(3)(D) while still permitting an administrative expense to be granted under that chapter. Furthermore, when a trustee fails to maximize the value of the estate, a creditor may be reimbursed for its efforts in recovering assets the trustee otherwise missed. In such cases, a creditor's substantial contribution should be granted an administrative expense so long as the creditor's efforts are not duplicative of the trustees. Lastly, the bankruptcy process will be frustrated if substantial contributions are not permitted as administrative expenses under section 503(b)(3)(D) because creditors will lack incentive to participate in chapter 7 cases. If instead, a creditor is denied the chance to receive an administrative claim for its substantial contribution, it will lack the impetus to engage in the process of maximizing the estate and it would embolden fraudulent debtors, especially if they only have to deceive the trustee.

Finally, even if this Court finds that section 503(b) prevents chapter 7 cases from allowing a substantial contribution as an administrative expense, equitable principles provide creditors a remedy. These equitable principles are granted in section 105(a) which gives bankruptcy courts broad authority to issue equitable relief necessary to carry out the provisions of the Code. In light of this flexibility, when a creditor provides information to a trustee that the trustee relies upon to benefit the estate, an administrative expense should be granted to the creditor. This is especially true when this information involves a debtor's fraudulent conduct and is uncovered by a creditor in a chapter 7 case. If the opposite were held, debtors would essentially be encouraged to engage in fraud as the debtor would face no ramifications for its illicit conduct. Therefore, an administrative expense for a substantial contribution in a chapter 7 case should be granted.

ARGUMENT

The facts of this case are undisputed. R. at 3 n.1. This appeal presents only questions of law, which are reviewed *de novo*. *In re Applied Theory Corp.*, 493 F.3d 82, 85 (2d Cir. 2007).

I. A CREDITOR MAY LAWFULLY REPOSSESS SECURED COLLATERAL OF A LOAN PRIOR TO THE FILING OF A BANKRUPTCY PETITION, AND MAINTAIN POSSESSION, FOLLOWING THE COMMENCEMENT OF THAT PETITION.

Weinberg lawfully repossessed the Trucks prior to the time the Debtor filed its chapter 11 petition. R. at 6. The Debtor is asking this Court for an expansive interpretation of section 362(a)(3) as a way of casting a shadow on the fact that it missed its chance at getting the Trucks by failing to file a turnover action pursuant to section 542(a). Section 362(a)(3) of the Bankruptcy Code provides for an automatic stay once a petition is filed and prohibits any further "act" to "obtain possession" or "exercise control" over property of the estate. 11 U.S.C. § 362(a)(3). More circuit courts have recently held that in order to be considered an "act" as defined in section 362(a)(3), one must affirmatively do something post-petition. R. at 10. In this case, there is no affirmative post-petition "act" that has occurred. R. at 16. However, it is through the turnover action provided in section 542(a), that debtors can ask the court to have their assets returned that were seized prepetition. 11 U.S.C. § 542(a). Here, the Debtor has not done so. R. at 16.

A. 11 U.S.C. § 362(a)(3) Allows for Creditors to Passively Retain Estate Property Lawfully Repossessed Prepetition.

When a petition is filed, an automatic stay takes effect which prohibits "any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate." 11 U.S.C. § 362(a)(3). However, the circuit courts are split as to whether a creditor's passive retention of an asset that was possessed prepetition falls under the purview of section 362(a)(3). Some circuits have found that a creditor's retention of a prepetition seized asset violates the relevant section as it constitutes "control" over the property of the estate. *See*, *e.g.*,

Weber v. SEFCU (In re Weber), 719 F.3d 72, 81 (2d Cir. 2013); *Thompson v. Gen. Motors Acceptance Corp.*, 566 F.3d 699, 703 (7th Cir. 2009).

However, and *a fortiori*, other circuits have held that if an affirmative "act" does not take place, or takes place prepetition, a violation of the automatic stay has not occurred. *See*, *e.g.*, *Davis v. Tyson Prepared Foods, Inc. (In re Garcia)*, 740 Fed. Appx.163, 164 (10th Cir. 2018); *United States v. Inslaw, Inc.*, 932 F.2d 1467, 1474 (D.C. Cir. 1991). This latter interpretation of the Code is substantiated by the fact that an "automatic stay, as its name suggests, serves as a restraint only on acts to gain possession or control over property of the estate." *Inslaw, Inc.*, 932 F.2d at 1474. As such, "[t]he statutory language makes clear that the stay applies only to acts taken after the petition is filed." *Id*. (emphasis added); *see In re Stucka*, 77 Bankr. 777, 782 (Bankr. C.D. Cal. 1987) ("The automatic stay is effective as of the moment of filing of the bankruptcy petition."); see also *In re Mewes*, 58 Bankr. 124, 127 (Bankr. D.S.D. 1986) (same). In other words, "[t]he date of filing a petition in bankruptcy is the Prime Meridian of bankruptcy law and is important for determining what claims are applicable to the automatic stay." Daniel J Bussel and David A. Skeel, Jr., *Bankruptcy* 162 (10th ed. 2015). As such, it is only after a bankruptcy petition is filed "section 362 prevents creditors from taking further action against [a debtor] except through the bankruptcy court." *Price v. Rochford*, 947 F.2d 829, 831 (7th Cir. 1991) (alteration in original). Also, "the meaning of 'act' for the purposes of 11 U.S.C. § 362(a)(3) is limited to affirmative conduct." *In re Garcia*, 740 Fed. Appx. at 164 (citing *In re Cowen*, 849 F.3d at 949 Therefore, a creditor who lawfully possessed property of the estate prepetition and passively retains said property post-petition is not in violation of section 362(a)(3) of the Bankruptcy Code.

i. The statutory construction of section 362(a)(3) is unambiguous in that an automatic stay does not apply to a creditor's passive retention of property of the estate acquired prepetition.

"Our interpretation of the Bankruptcy Code starts where all such inquiries must begin: with

the language of the statute itself." *Ransom v. FIA Card Servs., N.A.*, 562 U.S. 61, 69 (2011) (citing *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989)). Here, the language of section 362(a)(3) plainly sets forth two separate ways an automatic stay may be violated, both of which require an "act". *See* 11 U.S.C. § 362(a)(3). Specifically, there must be (1) an "act" to obtain possession of property of the estate, and/or, (2) an "act" to exercise control over property of the estate. *Id*. The latter of these acts was added to section 362(a)(3) under the Bankruptcy Amendments and Federal Judgeship Act of 1984 which "broadened the already sweeping provisions of the automatic stay even further to prohibit 'any act . . . to exercise control over the property of the estate.'" *In re Weber*, 719 F.3d at 80. In either case, the definition of the term "act" is imperative to determine if and when a violation of the stay has been committed. *See In re Frieouf*, 938 F.2d 1099, 1102–03 (10th Cir. 1991) ("[F]or where, as here, the statute's language is plain, the sole function of the courts is to enforce it according to its terms.").

To begin, "'any act' is the prepositive modifier of both infinitive phrases. In other words, § 362(a)(3) prohibits 'any act to obtain possession of property' or 'any act to exercise control over property.'" *In re Cowen*, 849 F.3d at 949. "'Act', in turn, commonly means to 'take action' or 'do something.'" *Id*. (citing New Oxford American Dictionary 15 (3d ed. 2010)). Under this definition, the "section, then, stays entities from doing something to obtain possession of or to exercise control over the estate's property. It does not cover 'the act of passively holding onto an asset,' nor does it impose an affirmative obligation to turnover property to the estate." *In re Cowen*, 849 F.3d at 949 (quoting *Thompson*, 566 F.3d at 703 (7th Cir. 2009)).

The application of section 362(a)(3) in this context is consonant with the plain language of the statute because "[i]f Congress had meant to add an affirmative obligation—to the automatic stay provision no less, as opposed to the turnover provision—to turn over property belonging to the estate, it would have done so explicitly." *In re Cowen*, 849 F.3d at 950. Congress did not intend

to broaden the sweeping provisions of the automatic stay to prevent a creditor's passive retention of an estate's assets without expressly stating so, as "Congress . . . does not, one might say, hide elephants in mouseholes." *Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 468 (2001).

Additionally, "§ 362(a)(3) *freezes* the status quo on the filing of the petition rather than mandates affirmative action by the creditor in possession of property seized prepetition to return it immediately." *In re Young*, 193 B.R. 620, 623 (Bankr. D.D.C. 1996) (emphasis added) (citing *In re Richardson*, 135 Bankr. 256, 258-259 (Bankr. E.D. Tex. 1992)). Furthermore, "[i]n explaining the clause prohibiting any 'act to obtain possession … of property of the estate,' both the House and Senate Reports describe this provision as designed to protect 'property over which the estate has control or possession'" and not property already in the possession of a creditor. Ralph Brubaker, *Turnover, Adequate Protection, and the Automatic Stay (Part II): Who is "Exercising Control" Over What?*, 33 No. 9 Bankruptcy Law Letter NL 1 (September 2013).

Here, the Debtor filed its chapter 7 petition for bankruptcy on February 4, 2017. R. at 6. Weinberg did not "take action" or "do something" thereafter, but rather continued holding the Trucks he had lawfully repossessed the prior month. R. at 6. Properly, Weinberg did not act affirmatively, post-petition, to gain possession or control of the Trucks once the automatic stay was in place as he already possessed them at that time. R. at 6. Weinberg is abiding by the automatic stay as he has not attempted to sell the Trucks and use the proceeds to recoup the money he loaned to the Debtor. Rather, he is merely holding the Trucks until granted authority to sell them which is what the stay provides – a freeze of current conditions. *See In re Richardson*, 135 B.R. at 258 ("In maintaining the seized property in the status it enjoyed just before the filing of debtor's petition, a creditor is merely complying with the spirit of the § 362 freeze."). These facts, as applied to the Code, show that the Debtor's estate did not have control or possession over the Trucks at the time the Debtor filed its petition. R. at 6. Therefore, it should not be inferred that

Weinberg's prepetition actions constitute an "act" in violation of the stay under section 362(a)(3) as "only affirmative acts to gain possession of, or to exercise control over, property of the estate violate § 362(a)(3)." *In re Cowen*, 849 F.3d at 950.

B. When a Debtor Fails to Seek a Turnover Action Under 11 U.S.C. § 542(a), a Creditor May Maintain Possession of Lawfully Possessed Property of the Estate.

Along with the requirement of a post-petition "act" needed to violate an automatic stay, it is necessary to understand how sections 363 and 542(a) of the Bankruptcy Code work in concert with section 362(a)(3) to fully discern the matter at hand. *See In re Young*, 193 B.R. at 625-26 ("The view that § 362(a)(3) mandates immediate turnover pursuant to § 542(a) undermines § 363(c)(2)'s requirement of the creditor's consent or a court order."). First, at its core, section 363 authorizes how a trustee "may use, sell, or lease . . . property of the estate." *See* 11 U.S.C. § 363. More specifically, and relevant here, subsection (e) protects third-parties who have an interest in an estate's property and, in pertinent part, provides:

> Notwithstanding any other provision of this section, at any time, on request of an entity that has an interest in property . . . 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.

11 U.S.C. § 363(e). Second, section 542(a) "requires an entity (other than a custodian) holding any property of the debtor that the trustee can use under § 363 to turn that property over to the trustee." *United States v. Whiting Pools*, 462 U.S. 198, 205 (1983). Particularly, this section provides:

> 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 . . . shall deliver to the trustee, and account for, such property or the value of such property, unless such property is of inconsequential value or benefit to the estate.

11 U.S.C. § 542(a). This latter section, better known as a turnover action, "grants to the estate a possessory interest in certain property of the debtor that was not held by the debtor at the commencement of reorganization proceedings." *Whiting Pools*, 462 U.S. at 207. Accordingly, the

purpose of this section is to "empower the trustee in bankruptcy to get hold of the property of the debtor, some of which will be in the possession, custody, or control of third parties." *Boyer v. Carlton, Fields, Ward, Emmanuel, Smith & Cutler, P.A. (In re USA Diversified Prods., Inc.)*, 100 F.3d 53, 56 (7th Cir. 1996). However, a trustee is required to exercise the right of a turnover action under section 542(a) and not simply await the turnover's automatic actuation.

i. A turnover action is not self-executing as a creditor has the right to receive adequate protection prior to turning over property of the estate.

A turnover action is not self-executing, but instead, must be opted into by the estate. *See In re Hall*, 502 B.R. 650, 655 (Bankr. D.D.C. 2014) "§ 542(a) . . . was not viewed as self-executing prior to the 1984 amendment of § 362(a)(3) and continues to be not self-executing."). Rather, courts have consistently interpreted section 542(a) as "providing bankruptcy courts with the authority to order the turnover of collateral or other property of the estate, but with the courts authorized to require adequate protection of a secured creditor's interest before directing turnover." *Id*. at 657; *see*, *e.g*., *In re Riding*, 44 B.R. 846, 848-49 (Bankr. D. Utah 1984); *Sunrise Equip. & Dev. Corp. v. Pac. Am. Leasing Corp. (In re Sunrise Equip. & Dev. Corp.)*, 24 B.R. 26, 27-28 (Bankr. D. Ariz. 1982).

This interpretation of the Code is grounded in the conjunctive relationship between sections 363 and 542(a). *See Whiting Pools*, 462 U.S. at 206 n.12 (One of the "explicit limitations on § 542(a)" is that "Section 542 provides that the property be usable under § 363."). Thus, "[p]roperty 'usable under § 363' necessarily includes the limitation of § 363(e) that, '[n]otwithstanding any other provision of this section,' any proposed use is subject to the trustee's obligation to comply with any order issued by the court for adequate protection." *In re Hall*, 502 B.R. 650, 659; *see* 11 U.S.C. § 363(e).

The proceeding two examples illustrate why this makes sense. First, "[i]f a creditor is required to turn over the asset before it can seek adequate protection, it might be irreparably

harmed and lose the protection that § 363(e) is intended to provide." *In re Hall*, 502 B.R. at 659 (citing *In re Bernstein*, 252 B.R. 846, 850-51 (Bankr. D.D.C. 2000). Therefore "it stands to reason that the creditor ought to be able to defend against turnover on the basis of lack of adequate protection before being required to turn over the collateral." *In re Bernstein*, 252 B.R. at 850. Second, "§ 542(a), if treated as a mandatory injunction, would compel immediate turnover, and would result in the creditor being in contempt if it delayed making turnover while it pursued a request for adequate protection." *In re Hall*, 502 B.R. at 660. Yet, "the right to adequate protection . . . replace[s] the protection afforded by possession." *Whiting Pools*, 462 U.S. at 207 (alteration in original). Furthermore, "[a]t the creditor's insistence, the bankruptcy court must place such limits or conditions on the trustee's power to sell, use, or lease property as are necessary to protect the creditor." *Id*. at 204. Therefore, "[t]he right of adequate protection cannot be rendered meaningless by an interpretation of §§ 362(a)(3) and 542(a) that would compel turnover even before an opportunity for the court's granting adequate protection." *In re Bernstein*, 252 B.R. at 851; *see Citizens Bank of Maryland v. Strumpf*, 516 U.S. 16, 20 (1995) (citation omitted) ("It is an elementary rule of construction that 'the act cannot be held to destroy itself.'").

In the present matter, the Debtor, and the Trustee after being substituted in for the Debtor, never filed a turnover action pursuant to section 542(a). R. at 6, 7. By failing to exercise this right, the estate forfeited the opportunity to have the Trucks returned to it. *See Barringer v. EAB Leasing (In re Barringer)*, 244 B.R. 402, 407 (Bankr. E.D. Mich. 1999) ("[T]he trustee's rights under § 542(a) are not simply 'inherited' from the debtor, but must instead be affirmatively exercised."); *see also Matter of Perkins*, 902 F.2d 1254, 1258 (7th Cir. 1990) ("[a] turnover action is an adversary proceeding which must be commenced by a properly filed and served complaint."). Consequently, the Trustee is attempting to put the Trucks before the horse by demanding the turnover of the Trucks prior to any hearing before the court, and without providing adequate

protection to Weinberg. R. at 6.

Moreover, Weinberg has not been permitted a chance to be heard on why such a turnover action would be inappropriate as he has not been afforded the opportunity to assert his defenses. *See In re Barringer*, 244 B.R. at 410 ("[T]here are a range of potentially complex considerations which can enter into a determination that property is or is not subject to turnover."). Plus, the Debtor has not provided Weinberg with any adequate protection to ensure that turning over the Trucks would not put him in a worse position than he sits today. *See In re Sharon*, 234 B.R. 676, 689 (B.A.P. 6th Cir. 1999) ("By forcing immediate turnover of the collateral without adequate protection, the creditor loses the costs of repossession and the prospects of obtaining some type of payments toward depreciating collateral, upon which the creditor will not receive any further payments until after confirmation."). In fact, it is more likely that Weinberg will be worse off based on the following: the Debtor's failure to make a single payment on the Agreement despite early financial success; the Debtor's fraudulent conduct that sought to shelter funds from the estate; the Debtor's lack of resources; and the non-renewal of the Contract between the Debtor and the City of Badlands. *See* 11 U.S.C. § 363(p)(1) ("[T]he trustee has the burden of proof on the issue of adequate protection.").

To not permit Weinberg a chance to be heard on these issues would be in derogation of well-established precedent as "[i]n response to the trustee's [turnover] action, a secured party will have an opportunity to assert defenses that are described in and around Section 542(a)." *Gouveia v. IRS (In re Quality Health Care)*, 215 B.R. 543, 577 (Bankr. N.D. Ind. 1997) (alteration in original). Consequently, "in light of the fact that the Code explicitly provides the creditor with a right to be heard on some of these issues, we cannot accept the proposition that Congress intended that the trustee's right of possession under § 542(a) be absolute or self-effectuating." *Id*. Therefore, in order to obtain a turnover of estate property, "the right must be judicially recognized in the form

of a court order compelling turnover." *In re Barringer*, 244 B.R. at 410; *see* 11 U.S.C. § 363(c)(2).

C. The Trucks are of Inconsequential Value and of No Benefit to the Estate.

In order to have collateral turned over to the estate, the Debtor is required to show that the collateral is of consequential value or benefit to the estate. 11 U.S.C. § 542(a). Here, the collateral is of inconsequential value and of no benefit to the estate because the Trucks are no longer necessary since the Debtor's operations have ceased to exist. Additionally, the record shows that Trucks are valued at $100,000 which is less than the amount owed to Weinberg according to the terms of the note.

The Debtor has sold all assets of the company, and no longer has a use for the Trucks, making them of inconsequential value or benefit to the estate. R. at 8. Because the Debtor no longer needs the Trucks for operation, they are of no more value to it than they are in the hands of Weinberg. Either way, the estate will be credited for the value of the Trucks and, therefore, it is inconsequential whether the estate holds the Trucks or Weinberg maintains possession. Turnover is not available to a debtor when the collateral is of inconsequential value to the estate. 11 U.S.C. § 542(a). "The [turnover] of either property burdensome to the estate or, though perhaps to a lesser extent, property of inconsequential value and benefit to the estate, tends to reduce the overall value of the estate. Consequently, the creditors, as a whole, would benefit by the [retention] of such properties from the estate." Leonard J. Long, *Burdensome Property, Onerous Laws, and Abandonment: Revisiting Midlantic National Bank v. New Jersey Department of Environmental Protection*, 21 Hofstra L. Rev. 63 (1992) (alteration in original). Here, the Trustee sold off the Debtor's business and its remaining assets. There is no rational reason for the Debtor to obtain the Trucks when the business is obsolete since the Debtor no longer has a facility to store them. R. at 8. Therefore, the Trucks would be a financial and logistical burden on the estate.

Specifically, it would be an additional burden on the estate to incur the costs of reclaiming,

maintaining, and selling the Trucks, just in hopes to return to Weinberg more than he will receive by maintaining possession of the Trucks. *See In re Kalter*, 292 F.3d 1350, 1354 (11th Cir. 2002) ("[T]he debtor must tender fulfillment of all obligation secured by collateral as well as the expenses incurred by the secured party in preparing for the disposition of the collateral."). In fact, it is likely Weinberg's return would be less due to the fact that the estate would incur carrying costs of the Trucks which would reduce the proceeds relative to the value Weinberg could currently obtain. "The trustee [relinquishes] the property in an effort to achieve a primary goal of bankruptcy - serving the best interest of the creditors by satisfying, within certain statutory constraints, the aggregate claims of prepetition creditors." Long, 21 Hofstra L. Rev. 1 (alteration in original). It is well settled that retention by the creditor is preferable, since if the property was turned over to the estate, the trustee would incur additional charges decreasing the amount available to satisfy creditor's lien, thereby reducing the value of the estate. In other words, "[f]orcing the trustee to administer burdensome property would contradict this purpose, slowing the administration of the estate and draining its assets." *Id*. at 21 n. 60.

Furthermore, when evaluating the value of collateral to a debtor, "[t]he [collateral] is of 'inconsequential value' if the [creditor's] lien exceeds the [collateral's] present market value and if the [creditor's] security interest in the [collateral] is superior to that of the trustee." *In re Brannan*, 5 B.R. 505, 506 (D.V.I. 1980) (alteration in original). Here, Trustee sold all of Debtor's assets to Stone Pony, excluding the Trucks, for $100,000 less than what Tenth Avenue had offered for the assets had the Trucks been included. R. at 8. Therefore, the difference in bids between Tenth Avenue and Stone Pony placed the approximate value of the Trucks at $100,000. R. at 8. However, Weinberg's secured loan totaled $450,000, and because the Debtor has not made any of the scheduled payments on the note to date, the amount outstanding on the note exceeds the fair market value of the Trucks by $350,000. R. at 4. The Trucks, therefore, do not have a value

that could secure full payment of the loan and is thus of inconsequential value to the estate.

II. THE NON-EXHAUSTIVE NATURE OF 11 U.S.C. § 503(b) ALLOWS A COURT TO GRANT AN ADMINISTRATIVE EXPENSE FOR A SUBSTANTIAL CONTRIBUTION IN A CASE UNDER CHAPTER 7 OF THE BANKRUPTCY CODE.

In May 2016, the Debtor fraudulently transferred approximately $100,000 to a bank account held by Big Man's daughter, Patti Clemons. R. at 7. This fraudulent activity was exposed by Weinberg when he hired a collection law firm to perform a creditors' examination reviewing all of Big Man's previous financial dealings. R. at 7. Weinberg incurred $25,000 in having the examination taken. R. at 7. Ultimately, Weinberg's findings led to a settlement whereby $75,000 of the fraudulent transfer was returned to the estate. R. at 7. The Trustee acknowledged that Weinberg had made a substantial contribution to the estate by enhancing the pool of funds available for creditors. R. at 7, 8. Weinberg is now seeking to have an administrative expense granted for his substantial contribution pursuant to section 503(b) of the Bankruptcy Code. R. at 7. Specifically, the non-exhaustive nature of section 503(b)'s enumerated administrative expenses permits an administrative claim for a substantial contribution. R. at 16. Additionally, the administrative expenses permitted under section 503(b) are not limited to cases filed under chapters 9 and 11 as the prefatory use of the term "including" provides bankruptcy courts with the necessary flexibility to grant administrative claims in a chapter 7 case. R. at 19. Finally, even if it is found that the Code does not permit an administrative claim for a substantial contribution in a chapter 7 case, equity permits bankruptcy courts to fashion a remedy for reimbursement in cases of fraud. R. at 20.

A. The Plain Language of Section 503(b) Allows Bankruptcy Courts to Award an Administrative Expense for a Substantial Contribution Under Chapter 7.

Section 503 of the Bankruptcy Code enumerates the allowance of administrative expenses. *See* 11 U.S.C. § 503. Specifically, section 503(b) provides, in pertinent part, that "there shall be

allowed administrative expenses, . . . including --" then lists a series of nine expenses. *See* 11 U.S.C. § 503(b)(1-9). While section 503(b) provides an itemized list of administrative expenses, it has been widely held that the statute's specific categories are non-exhaustive. *See*, *e.g.*, *In re Al Copeland Enters.*, 991 F.2d 233, 239 (5th Cir. 1993); *United States v. Ledlin (In re Mark Anthony Constr., Inc.)*, 886 F.2d 1101, 1106 (9th Cir. 1989); *In re T.A. Brinkoetter & Sons, Inc.*, 467 B.R. 668, 670 (Bankr. C.D. Ill. 2012); *Pergament v. Maghazeh Family Trust (In re Maghazeh)*, 315 B.R. 650, 654 (Bankr. E.D.N.Y. 2004). Most recently, the Sixth Circuit held that "by using the term 'including' . . . Congress built a mechanism into § 503(b) for bankruptcy courts to reimburse expenses not specifically mentioned in § 503(b)'s subsections." *Mediofactoring v. McDermott (In re Connolly N. Am., LLC)*, 802 F.3d 810, 816 (6th Cir. 2015). Accordingly, "Congress's failure to expressly designate a given expense as allowable under § 503(b) does not mean that it is excluded." *Id*. (emphasis added).

This holding reflects a growing consensus that the administrative expenses enumerated in section 503(b) are non-exhaustive. *See*, *e.g.*, *United States v. Flo-Lizer, Inc. (In re Flo-Lizer, Inc.)*, 916 F.2d 363, 365 (6th Cir. 1990) (alteration in original) ("[T]he failure of Congress to expressly list interest as an administrative expense [in a subsection of § 503(b)] does not mean that it cannot be an administrative expense."); *see also In re George Worthington Co.*, 921 F.2d 626, 634 (6th Cir. 1990) ("Although we fail to find express authority for the reimbursement of an official committee's administrative expenses in the Code, we believe it is implied in the overall scheme."). Still, not all circuit courts agree. *See*, *e.g.*, *In re Lloyd Sec., Inc*., 75 F.3d 853, 857 (3d Cir. 1996); *Lebron v. Mechem Fin. Inc*., 27 F.3d 937, 946 (3d Cir. 1994); *In re Fesco Plastics Corp., Inc*., 996 F.2d 152, 157 n.5 (7th Cir. 1993); *see also Goodman v. Phillip R. Curtis Enter., Inc.*, 809 F.2d 228, 231 n.4 (4th Cir. 1987). Nevertheless, a substantial contribution that enhances the pool of funds available to creditors should be permitted as an administrative expense under chapter 7.

i. Statutory construction of section 503(b) shows a clear intent to permit substantial contributions beyond the statute's listed categories.

Courts have uniformly looked to the statute's construction in determining that the itemized categories provided in section 503(b) are non-exhaustive. General rules of statutory construction dictate that the plain meaning of a statute's language is conclusive. *See Ron Pair Enters.*, 489 U.S. at 241, (quoting *Caminetti v. United States*, 242 U.S. 470, 485 (1917)) ("[W]here . . . the statute's language is plain, 'the sole function of the courts is to enforce it according to its terms.'"). Accordingly, courts "begin with the understanding that Congress 'says in a statute what it means and means in a statute what is says.'" *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) (quoting *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 254 (1992)). Bankruptcy statutes are no different. "The task of resolving the dispute over the meaning of [the Bankruptcy Code] begins where all such inquiries must begin: with the language of the statute itself." *Ron Pair Enters., Inc.*, 489 U.S. at 241 (alteration in original).

To reiterate, Section 503(b) provides that "there shall be allowed administrative expenses, . . . *including* --" then lists a series of nine expenses. *See* 11 U.S.C. § 503(b)(1-9). However, despite the itemized expenses provided in the section, the statute's language presents two seemingly contradictory aspects to its meaning. On the one hand, section 503(b) "lists a series of expenses which should be treated as first priority administrative expenses." *In re Mark Anthony Constr.*, 886 F.2d at 1106. Certainly, the examples provided in the subsections of 503(b) are not inconsequential as "Congress intended to provide guidance, and in doing so, it set forth the more common administrative expenses intended to be allowed." *In re Connolly N. Am., LLC*, 802 F.3d at 817. Moreover, the enumeration of such expenses under the general rule of the statute lends credence to the canon of *expressio unius est exclusio alterius*[1], "under which a court infers an

[1] To express or include one thing implies the exclusion of another.

intention to make the statute's application restricted." *Id*. (citing 2A Singer, Sutherland, *Statutory Construction*, § 47.23 at 194 (1984)).

On the other hand, section 503(b)'s use of the term "including" is inconsistent with a restricted application of the statute. As an overarching principle "the Bankruptcy Code itself encourages an expansive reading of § 503(b)." *In re Connolly N. Am., LLC*, 802 F.3d at 816. Additionally, "when the verb 'include' is utilized in a definitional section, it is generally improper . . . to conclude that entities not specifically enumerated in the definition of [the relevant term] are to be excluded." *Matter of Maidman*, 2 Bankr. 569, 575 (Bankr. S.D.N.Y. 1980). In other words, an expansive reading of section 503(b) is furthered by the fact that "[t]he statute explains in § 102(3) that the terms 'includes' and 'including' are not limiting." *In re Connolly N. Am., LLC*, 802 F.3d at 816 (citing *In re Flo-Lizer, Inc.*, 916 F.2d at 365); *see* 11 U.S.C. § 102(3).

As the Ninth Circuit correctly pointed out, "[w]hen a statute sets forth a series of items in a general rule, and does not use the term 'including,' the canon of *expressio unius est exclusio alterius* applies." *Mosier v. Kupetz (In re United Educ. & Software)*, No. CC-05-1067-MaMeP, 2005 Bankr. LEXIS 3408, at *18-19 (B.A.P. 9th Cir. Oct. 7, 2005). This then restricts the application of the statute to "only those specific listed examples." *Id*. at 19. However, here, the use of the term "including" in section 503(b) must be given its full force and effect. *See Lamie v. United States Tr.*, 540 U.S. 526, 534 (2004) ("[W]hen 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."). Accordingly, case law, and the Bankruptcy Code itself, offer but one logical conclusion to the seemingly inconsistent nature of section 503(b): "[t]he insertion of the term [including] indicates that Congress did not intend to provide an exhaustive list of allowable expenses." *In re Connolly N. Am., LLC*, 802 F.3d at 816 (alteration in original).

Therefore, "administrative expenses entitled to first priority status are not necessarily

confined to those enumerated at 11 U.S.C. § 503(b)." *In re Flo-Lizer, Inc.,* 107 Bankr. 143, 145 (Bankr. S.D. Ohio 1989)*, aff'd,* 916 F.2d 363 (6th Cir.1990); *see In re DeSardi*, 340 B.R. 790, 799 (Bankr. S.D. Tex. 2006) (alteration in original) ("[a]dministrative priority may be granted to appropriate claims that are not explicitly enumerated in the categories [of section 503(b)]."); *see also* 3 Collier, *On Bankruptcy* P 503.03, p. 503-11-503-12 (15th ed. 1980) (a "court might well conclude that there are to be allowed as administrative expenses claims not necessarily precisely covered by the provisions of § 503(b) itself."). Moreover, while Congress has had the opportunity to amend the allowance of administrative expenses, "the repeated attempts to amend section 503(b) and the floor debate indicate that this omission was an oversight and is contrary to Congressional intent." *In re George Worthington Co.*, 921 F.2d at 631 (6th Cir. 1990). Therefore, despite the omission of such claims from the statute, the plain language of section 503(b) allows bankruptcy courts to award an administrative expense for a substantial contribution in chapter 7 cases.

B. Subsection 503(b)(3)(D) Does Not Preclude Cases Filed Under Chapter 7 from Being Awarded an Administrative Expense for a Substantial Contribution.

Subsection 503(b)(3)(D) permits the allowance of an administrative expense for "the actual, necessary expenses . . . incurred by . . . a creditor . . . in making a substantial contribution in a case under chapter 9 or 11 of this title." *See* 11 U.S.C. § 503(b)(3)(D). Some courts have interpreted the omission of chapter 7 from this subsection to mean that substantial contributions are not permitted under said chapter. *See, e.g*., *In re Lloyd Sec., Inc*., 75 F.3d at 857; *Lebron*, 27 F.3d at 946; *In re Fesco Plastics Corp., Inc*., 996 F.2d at 157 n.5; *Goodman*, 809 F.2d at 231 n.4; *In re Am. Motor Club, Inc*., 125 B.R. 79, 82 (Bankr. E.D.N.Y. 1991).

However, this interpretation of the Code is flawed because, as detailed in the preceding section, the use of the term "including" clearly illustrates that section 503(b) is "illustrative, not exhaustive." *In re Pappas*, 277 B.R. 171, 176 (Bankr. E.D.N.Y. 2002) (citing *In re Colortex Indus.*, 19 F.3d 1371, 1377 (11th Cir. 1994)). By logical extension, the non-limiting nature of section

503(b) must apply to all subsequent subsections in the statute – not just the overarching categories of administrative expenses that follow. Thus, courts should consider an "application for administrative expense status under Section 503(b) generally, rather than limited to the specific category of administrative expense." *In re Pappas*, 277 B.R. at 176. Subsection 503(b)(3)(D) is no exception.

It would be entirely inconsistent to rule that the use of term "including" provides for a non-exhaustive list of allowable administrative expenses under section 503(b), while at the same time confining such expenses under subsection 503(b)(3)(D) to only those brought under chapters 9 and 11. *See Hibbs v. Winn,* 542 U.S. 88, 101 (2004) ("A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant."). Rather, the effect of subsection 503(b)(3)(D) is to permit administrative expenses for substantial contributions in a non-limiting manner. *See In re Connolly N. Am., LLC*, 802 F.3d at 819 (emphasis added) ("§ 503(b)(3)(D) . . . does not divest bankruptcy courts of authority to allow reimbursement under § 503(b) of reasonable administrative expenses of creditors whose efforts substantially benefit the bankruptcy estate and its creditors in a Chapter 7 proceeding."). Thus, the omission of chapter 7 from section 503(b)(3)(D) does not mean that a creditor is prohibited from seeking an administrative expense for a substantial contribution under this subsection of the Code.

An administrative expense for a substantial contribution in a chapter 7 case should be permitted under subsection 503(b)(3)(D) for a second reason. As a matter of course, "a creditor will spend its own time and resources to benefit the estate [in both chapters 9 and 11]; however, in all but the most atypical Chapter 7 case (such as the one here) the U.S. trustee fulfills this role." *In re Connolly N. Am., LLC*, 802 F.3d at 817 (alteration in original). In other words, as the Appellate Court in this matter held, "it is fair to infer that chapters 9 and 11 were expressly referenced in the statute because such cases require creditors to step in and make a substantial

contribution for the benefit of the estate far more frequently than chapter 7 cases do." R. at 19. Given this dichotomy in how a bankruptcy estate is administered relative to the chapter it is filed under, it "makes good sense" that Congress would not expressly reference chapter 7 while still permitting an administrative expense to be filed under that chapter. *See In re Connolly N. Am., LLC*, 802 F.3d at 817.

By the same token, a "trustee is not a fail-proof safeguard, and in certain circumstances, a Chapter 7 creditor may be compelled to utilize its own resources to protect the estate as a whole." *Id*. Such was the case here. In May 2017, Weinberg hired a collection firm to undertake a creditors' examination of Big Man. R. at 7. The examination revealed that a year earlier, shortly after Weinberg initially filed suit against Big Man and the Debtor, the Debtor had made approximately $100,000 in fraudulent cash transfers to his daughter, Patti. R. at 7. Thereafter, the Trustee filed a complaint against Patti, and a settlement was reached wherein $75,000 of the fraudulent transfer was returned to the bankruptcy estate. R. at 7.

Notably, the Trustee was appointed in early 2017, but never pursued a similar action. R. at 7. Meanwhile, the return of those fraudulent transfers resulted in the enhancement of the pool of funds available to creditors – a substantial contribution the Trustee admits to having occurred. R. at 20. Given this admitted contribution, Weinberg should be allowed to pursue an administrative expense. *See In re Summit Metals, Inc.*, 379 B.R. 40, 50 (Bankr. D. Del. 2007) (alteration in original) (emphasis added) ("The plain language of section 503(b)(3)(D) is clear that an applicant who substantially contributes to a debtor's estate and creditors may be awarded [] actual and necessary expenses."). Moreover, none of Weinberg's claimed expenses duplicate any costs incurred by the Trustee. R. at 7. This is evidenced by the clear fact the Trustee failed to fulfill his duty in maximizing the value of the estate by neglecting to take a creditors' examination of Big Man. *See Commodity Futures Trading Com v. Weintraub*, 471 U.S. 343, 352 (1985) (citing 11

U.S.C. § 704(1)) (A "trustee . . . has the duty to maximize the value of the estate."). Therefore, since the estate would have inevitably encountered these costs had Weinberg not proactively undertook to have the creditors' examination completed, it is only equitable that his administrative claim be granted.

i. The bankruptcy process will be severely frustrated if substantial contributions are not permitted as administrative expenses under subsection 503(b)(3)(D) because creditors will have no incentive to participate in chapter 7 cases.

The purpose of § 503(b)(3)(D) is "to encourage creditors in *whatever* chapter a bankruptcy case is filed to 'substantially contribute' to the estate by pursuing funds that will be available for distribution to claimants." *In re Maust Transp., Inc.*, 589 B.R. 887, 898 (Bankr. W.D. Wash. 2018) (emphasis added). As such, "[i]f the particular facts of a case warrant reimbursement, the court should have the ability to fashion a remedy that will foster rather than hinder such actions for the benefit of the estate." *Id*. at 898-99. Of course, permitting such claims would be a rarity and should be restricted to avoid the duplication and overlap of similar efforts put-forth by the trustee. *Id*. at 899. Nevertheless, cases will inevitably arise wherein a creditor will provide for a substantial contribution that should be afforded the opportunity to pursue an administrative expense. *Id*.

In those cases, such administrative claims should be permitted under subsection 503(b)(3)(D). If instead, creditors are automatically denied the opportunity to receive an administrative expense, creditors will be deterred from participating in chapter 7 cases. This would perniciously impair the bankruptcy estate from viable and vital resources – resources which greatly benefited the estate in the present matter as detailed below.

By paying $25,000 for the creditors' investigation that revealed Debtor's fraudulent transfers, there is no dispute that Weinberg made a substantial contribution that resulted in an actual and demonstrable benefit of $75,000 to the bankruptcy estate. R. at 20; *see In re Lister*, 846 F.2d 55, 57 (10th Cir. 1988) (citing *In re Jensen-Farley Pictures, Inc.*, 47 Bankr. 557, 569 (Bankr.

D. Utah 1985) ("In determining whether there has been a 'substantial contribution' pursuant to section 503(b)(3)(D), the applicable test is whether the efforts of the applicant resulted in an actual and demonstrable benefit to the debtor's estate and the creditors."). However, had Weinberg known that he could never receive prioritized reimbursement for this contribution, Weinberg would have little to no incentive to pursue this action which ultimately enhanced the pool of funds available to the estate. *See In re Essential Therapeutics, Inc.*, 308 B.R. 170, 174 (Bankr. D. Del. 2004) ("Creditors are presumed to be self-interested. . ."). Therefore, should this Court find that pursuant to subsection 503(b)(3)(D) a substantial contribution is not permitted as an administrative expense under chapter 7, and restrict creditor recovery, it would be inapposite to well-established bankruptcy jurisprudence. *See Corp. Assets, Inc. v. Paloian*, 368 F.3d 761, 767 (7th Cir. 2004) ("A central purpose of bankruptcy, after all, is to maximize creditor recovery.").

C. Even if this Court Finds that Section 503(b) Prevents Chapter 7 Cases from Allowing a Substantial Contribution as an Administrative Expense, Equitable Principles Provide Creditors a Remedy.

"There is an overriding consideration that equitable principles govern the exercise of bankruptcy jurisdiction." *Bank of Marin v. Eng.*, 385 U.S. 99, 103, (1966). Accordingly, bankruptcy courts are "specialized court[s] of equity." *Curtis v. Loether*, 415 U.S. 189, 195 (1974). Congressional recognition of these broad equitable principles is reflected in section 105(a) of the Code which authorizes a bankruptcy court to "issue *any* order, process or judgment that is necessary or appropriate to carry out the provisions of this title." *In re Taubman*, 160 B.R. 964, 980 (Bankr. S.D. Ohio 1993) (emphasis added); *see* 11 U.S.C. § 105(a). And while "bankruptcy courts equitable powers 'are not unlimited,' their decisions are unimpeachable so long as these powers are 'exercised within the confines of the Bankruptcy Code.'" *In re Connolly N. Am., LLC*, 802 F.3d at 814 (quoting *XL/Datacomp v. Wilson (In re Omegas Grp.),* 16 F.3d 1443, 1453 (6th Cir. 1994)).

Bearing these equitable principles in mind, when a creditor, like Weinberg, expends its own resources to substantially contribute to the bankruptcy estate, that contribution should be afforded priority status as an administrative expense. As a matter of law, an administrative expense "is a means of seeking priority reimbursement for 'the actual, necessary costs and expenses of preserving the estate.'" *Corp. Assets, Inc*, 368 F.3d at 773 (citing 11 U.S.C. § 503(b)(1)(A)). "Where the speculative benefit is not quantifiable, the mere potential benefit does not qualify as a benefit for purposes of determining administrative expense priority status." *In re CIS Corp.*, 142 B.R. 640, 643-44 (S.D.N.Y. 1992). However, "[w]here a creditor expended its own funds to obtain information that a trustee would have had to incur an expense to obtain, and the information was made available to the trustee and the trustee benefited from this information, such creditor may be entitled to an administrative expense claim." *In re Ideal Mortg. Bankers, Ltd.*, 539 B.R. 409, 431 (Bankr. E.D.N.Y. 2015); *see In re Pappas*, 277 B.R. at179 (Bankr. E.D.N.Y. 2002) (granting an administrative expense claim where the creditor hired a licensed private investigator and obtained documents in the chain of title and made such information available to the trustee, and the trustee benefitted from this information without having to incur the cost of procuring the information.). Ultimately, "administrative expense status should be granted only to claims representing post-petition debts incurred by the debtor to preserve the estate." *In re Keegan Util. Contractors, Inc.*, 70 B.R. 87, 89 (Bankr. W.D.N.Y. 1987).

Here, the Trustee admits that Weinberg made a post-petition substantial contribution to the estate when the creditors' examination culminated in a settlement for the return of $75,000 of fraudulent transfers to the estate. R. at 20. This contribution is not speculative, but rather is directly quantifiable. Furthermore, without Weinberg's substantial contribution, the amount of funds available to creditors would have been seriously depleted by $75,000 – an action that benefited the Debtor's bankruptcy estate. *See In re Drexel Burnham Lambert Group Inc.*, 134 B.R. 482, 489

(Bankr. S.D.N.Y. 1991) ("A clear relationship between the expenditures made and the benefit conferred on the estate must therefore be shown."). Given the substantial contribution that the estate received, owing directly to Weinberg's action, the Court should allow said contribution to be deemed an administrative expense under the totality of the circumstances of this case.

Such a holding would be in line with the principles of equity bankruptcy courts inherently imbue. *See In re Combustion Eng'g, Inc.*, 391 F.3d 190, 236 (3d Cir. 2004) (alteration in original) (citation omitted) ("[Section 105(a)] has been construed to give a bankruptcy court 'broad authority' to provide equitable relief appropriate to assure the orderly conduct of reorganization proceedings."). Moreover, as the Supreme Court has noted, "[e]quity eschews mechanical rules; it depends on flexibility." *Holmberg v. Armbrecht*, 327 U.S. 392, 396 (1946). Such flexibility should allow a creditor like Weinberg to receive an administrative expense when there is no dispute that said creditor substantially contributed to the bankruptcy estate – even if such an administrative claim is not directly permitted by the Code. This logically follows because "[a]s courts of equity, bankruptcy courts have broad authority to modify creditor-debtor relationships." *In re Combustion Eng'g, Inc.*, 391 F.3d at 199 (3d Cir. 2004). Thus "[bankruptcy] courts are able to craft flexible remedies that, while not expressly authorized by the Code, effect the result the Code was designed to obtain." *Official Comm. of Unsecured Creditors of Cybergenics Corp. ex rel. Cybergenics Corp. v. Chinery*, 330 F.3d 548, 568 (3d Cir. 2003) (alteration in original). Under this purview, the requisite judicial discretion exists to grant an equitable administrative expense in this matter.

i. As a matter of public policy, when a debtor's fraudulent conduct is uncovered by a creditor in a chapter 7 case, equity empowers the court to permit an administrative expense for a substantial contribution to deter similar future conduct.

Courts have "recognized that fundamental fairness may, in appropriate circumstances, demand that a party injured in some manner by the administration of the estate be compensated pursuant to section 503." *Corp. Assets, Inc.*, 368 F.3d at 773; *Yorke v. N.L.R.B.*, 709 F.2d 1138,

1143 (7th Cir. 1983). Moreover, fraudulent conduct was contemplated in the legislative history of section 503(b)(3)(D). "[In] many cases it will be a substantial contribution if the person involved uncovers facts . . . such as fraud in connection with the case." Sen. Rep. No. 95-989, 95th Cong., 2nd Sess. 5, reprinted in 1978 U.S.C.C.A.N. 5852-53 (alteration in original). The allowance of a substantial contribution as an administrative expense in a chapter 7 case when a debtor engages in fraud is, therefore, a matter of equity and fundamental fairness. If, for example, this Court were to hold that even if a debtor in a chapter 7 case engages in fraud, a substantial contribution made by a creditor that uncovers that fraud does not receive an administrative claim, debtors on the whole would be encouraged to commit fraud because there would be a lack of ramifications for their actions. The present matter provides an excellent example of how a ruling of this kind would come to bear such an untenable result.

Here, Weinberg uncovered facts that the Debtor had engaged in fraudulent activity via the creditors' examination. R. at 7. This uncovering led to an undisputed substantial contribution in the form of a settlement that recovered $75,000 of the $100,000 that was fraudulently transferred. R. at 20. However, Weinberg was injured by the administration of the Debtor's estate in two ways. First, the Trustee never sought a creditors' examination of Big Man, forcing Weinberg to spend $25,000 of his own money to do so. R. at 7. Second, and an injury that was exposed as a result of the first, the Debtor made fraudulent transfers that sought to illicitly shelter funds from the estate – only 75% of which were eventually returned. R. at 7. In total, if Weinberg is not granted an administrative claim for his substantial contribution, he stands to lose $50,000 as a result of Big Man's fraudulent conduct – $25,000 for a non-prioritized substantial contribution and $25,000 for the money spent uncovering the fraudulent transfers not returned by Patti. Meanwhile, Big Man would essentially be rewarded for his fraudulent conduct for he and his company would be no worse off than they were before the fraudulent activity took place. In fact, Big Man would be better

off because his daughter was able to retain $25,000 of the illicitly transferred funds. R. at 7. This result would signal to future debtors that there is no penalty for engaging in fraud (at least as far as administrative claims are concerned) and would even encourage them to commit fraud because even getting caught leaves them better off.

However, in such unscrupulous cases, bankruptcy courts are not powerless to render an equitable remedy. "Rather, it appears that Congress anticipated that bankruptcy courts would encounter a variety of administrative expenses and circumstances warranting reimbursement, which it could then evaluate on a case-by-case basis." *In re Connolly N. Am., LLC*, 802 F.3d at 816. The outcome of which "depend[s] on the specific facts of the case." *Id*. Here, the facts are clear. Debtor engaged in fraudulent activity. R. at 7. Weinberg exposed this activity and, in doing so, benefited the estate with an admitted substantial contribution. R. at 20. *See Holzer v. Barnard*, No. 15-CV-6277 (JFB), 2016 U.S. Dist. LEXIS 98175, at *25-26 (E.D.N.Y. July 27, 2016) (alteration in original) ("It is possible for a creditor to be granted an administrative expense claim where it used its own funds to obtain information [and] the information is shared with the trustee and the trustee benefits from this information."). Moreover, it would inequitable to allow Big Man, or any future debtor, to employ such crooked tactics without the threat and/or promise of consequence. Therefore, equity insists that Weinberg receive an administrative expense for his undisputed substantial contribution that revealed Big Man's fraudulent transactions and preserved the estate.

CONCLUSION

Despite having never made a single payment on the Agreement, the Debtor is using section 362(a)(3) as a last-ditch effort to renege on past promises and contractual obligations made to Weinberg. The Debtor willingly gave Weinberg a secured interest in the Trucks as a way of gaining his trust in order to procure the $450,000 loan. The Debtor was fully aware that it was within Weinberg's legal and contractual rights to repossess the Trucks if the Debtor violated the Agreement. Weinberg never would have agreed to loan the Debtor money if the secured interest had no teeth to hold when the assets are lawfully repossessed prepetition. Given that Weinberg received a default judgment against Big Man and the Debtor on the personal guarantee and the note respectively, the Debtor should never have waited to file its bankruptcy petition. Accordingly, 362(a)(3) is only appropriate when dealing with post-petition acts and does not apply to assets repossessed prepetition. Neither the Debtor or the Trustee pursued a turnover action pursuant to section 542(a).

The Debtor also wishes to throw shade on the fact that Weinberg incurred $25,000 in an allowable administrative expense for his legal fees incurred uncovering the Debtor's fraud. It was this substantial contribution that resulted in recovering an additional $75,000 for the estate. Weinberg should not be penalized for doing what was necessary in order to maximize the value estate. Section 503(b)'s broad language empowers bankruptcy courts to award a substantial contribution as an administrative expense in a chapter 7 case. Additionally, the grant of an administrative claim may be based on equitable principals if the totality of the circumstances so dictates.

The Debtor has had many opportunities to assert its interests. It could have paid Weinberg when it had a financial windfall from year one of the Contract; it could have paid Weinberg instead of fraudulently transferring approximately $100,000 to Big Man's daughter; it could have gotten

the trucks back by filing a timely turnover action with the court provided it show adequate protection; and it could have voluntarily returned the approximately $100,000 that was fraudulently transferred outside of the estate thereby removing the need for Weinberg to spend $25,000. Debtor did none of these things.

Now, in a late effort to frustrate Weinberg's legal rights, the Debtor is grasping for straws. Therefore, the Thirteen Circuit's decision on both issues should be affirmed.