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 P21

Counsel for Petitioner

QUESTIONS PRESENTED

I. Whether 11 U.S.C. § 362(a)(3) is violated when a secured creditor refuses to return property of the estate that it lawfully repossessed from the debtor prior to the petition date.

II. Whether 11 U.S.C. § 503(b) permits a court to grant an administrative expense for a substantial contribution in a case under chapter 7 of the Bankruptcy Code.

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OPINIONS BELOW

In unreported opinions, the Bankruptcy Court for the District of Moot and the Bankruptcy Appellate Panel for the Thirteenth Circuit answered both questions in favor of Weinberg, concluding that (i) his retention of snow plow trucks that he legally repossessed prior to the bankruptcy filing did not violate section 326(a)(3) and (ii) he was entitled to a substantial contribution administrative expense under section 503(b), notwithstanding section 503(b)(3)(D). R. at 3. The Thirteenth Circuit 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. § 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)—(5) [omitted]

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

(7)—(8) [omitted]

(b)—(e) [omitted]

(f) Upon request of a party in interest, the court, with or without a hearing, shall grant such relief from the stay provided under subsection (a) of this section as is necessary to prevent irreparable damage to the interest of an entity in property, if such interest will suffer such damage before there is an opportunity for notice and a hearing under subsection (d) or (e) of this section.

(g) [omitted]

(h) (1) In a case in which the debtor is an individual, the stay provided by subsection (a) is terminated with respect to personal property of the estate or of the debtor securing in whole or in

part a claim, or subject to an unexpired lease, and such personal property shall no longer be property of the estate if the debtor fails within the applicable time set by section 521(a)(2)--

(A) to file timely any statement of intention required under section 521(a)(2) with respect to such personal property or to indicate in such statement that the debtor will either surrender such personal property or retain it and, if retaining such personal property, either redeem such personal property pursuant to section 722, enter into an agreement of the kind specified in section 524(c) applicable to the debt secured by such personal property, or assume such unexpired lease pursuant to section 365(p) if the trustee does not do so, as applicable; and

(B) to take timely the action specified in such statement, as it may be amended before expiration of the period for taking action, unless such statement specifies the debtor's intention to reaffirm such debt on the original contract terms and the creditor refuses to agree to the reaffirmation on such terms.

(2) Paragraph (1) does not apply if the court determines, on the motion of the trustee filed before the expiration of the applicable time set by section 521(a)(2), after notice and a hearing, that such personal property is of consequential value or benefit to the estate, and orders appropriate adequate protection of the creditor's interest, and orders the debtor to deliver any collateral in the debtor's possession to the trustee. If the court does not so determine, the stay provided by subsection (a) shall terminate upon the conclusion of the hearing on the motion.

(i)—(o) [omitted]

11 U.S.C. § 363

(a)—(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)—(p) [omitted]

11 U.S.C. § 503

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

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

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

(i) wages, salaries, and commissions for services rendered after the commencement of the case; and

(ii) wages and benefits awarded pursuant to a judicial proceeding or a proceeding of the National Labor Relations Board as back pay attributable to any period of time occurring after commencement of the case under this title, as a result of a violation

of Federal or State law by the debtor, without regard to the time of the occurrence of unlawful conduct on which such award is based or to whether any services were rendered, if the court determines that payment of wages and benefits by reason of the operation of this clause will not substantially increase the probability of layoff or termination of current employees, or of nonpayment of domestic support obligations, during the case under this title;

(B)—(D) [omitted]

(2) [omitted]

(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)—(8) [omitted]

(c) [omitted]

11 U.S.C. § 507

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

(1) [omitted]

(2) Second, administrative expenses allowed under section 503(b) of this title, unsecured claims of any Federal reserve bank related to loans made through programs or facilities authorized under section 13(3) of the Federal Reserve Act, and any fees and charges assessed against the estate under chapter 123 of title 28.

(3)—(8) [omitted]

(b)—(d) [omitted]

11 U.S.C. § 541

(a) The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:

(1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.

(2)—(5) [omitted]

(b)—(f) [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) Except as provided in subsection (c) or (d) of this section, an entity that owes a debt that is property of the estate and that is matured, payable on demand, or payable on order, shall pay such debt to, or on the order of, the trustee, except to the extent that such debt may be offset under section 553 of this title against a claim against the debtor.
(c) Except as provided in section 362(a)(7) of this title, an entity that has neither actual notice nor actual knowledge of the commencement of the case concerning the debtor may transfer property of the estate, or pay a debt owing to the debtor, in good faith and other than in the manner specified in subsection (d) of this section, to an entity other than the trustee, with the same effect as to the entity making such transfer or payment as if the case under this title concerning the debtor had not been commenced.
(d) A life insurance company may transfer property of the estate or property of the debtor to such company in good faith, with the same effect with respect to such company as if the case under this title concerning the debtor had not been commenced, if such transfer is to pay a premium or to carry out a nonforfeiture insurance option, and is required to be made automatically, under a life insurance contract with such company that was entered into before the date of the filing of the petition and that is property of the estate.
(e) Subject to any applicable privilege, after notice and a hearing, the court may order an attorney, accountant, or other person that holds recorded information, including books, documents, records, and papers, relating to the debtor's property or financial affairs, to turn over or disclose such recorded information to the trustee.

Fed. R. Bank P. 7001

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

(1) a proceeding to recover money or property, other than a proceeding to compel the debtor to deliver property to the trustee, or a proceeding under § 554(b) or § 725 of the Code, Rule 2017, or Rule 6002;
(2)(6) [omitted]
(7) a proceeding to obtain an injunction or other equitable relief, except when a chapter 9, chapter 11, chapter 12, or chapter 13 plan provides for the relief;
(8)—(10) [omitted]

STATEMENT OF THE FACTS

I. Debtor's Snow Plow Business And The Loan From Weinberg

Christopher Clemons ("Clemons") is the sole shareholder of Backstreets Plowing, Inc. (the "Debtor"), a seasonal snow plow business. R. at 3. In the spring of 2015, the Debtor borrowed $450,000 from Milton Weinberg ("Weinberg") in order to purchase newer, more fuel-efficient snow plows trucks. R. at 3-4. In exchange, the Debtor agreed to make monthly payments to Weinberg starting in December 2015. R. at 4. Clemons personally guaranteed the loan and Weinberg was granted a purchase money security interest in the trucks. *Id.* After receiving the loan proceeds and purchasing the trucks, the Debtor secured a major plowing contract with the City of Badlands. *Id.*

After a falling out, Clemons and Weinberg did not speak again for some time. R. at 4-5. The Debtor then failed to make the first few payments that were due to Weinberg. R. at 5. When Weinberg approached the Debtor requesting payment in late February 2016, another argument ensued. *Id.* In response, Weinberg sued the Debtor on his personal guarantee and obtained a default judgement for $450,000 plus interest and fees. *Id.*

II. Weinberg's Repossession Of The Snow Plow Trucks

Weinberg waited until the Debtor's business fell on hard times to begin efforts to collect on his judgement. R. at 6. In late January 2017, as the Debtor began realizing substantial losses from the City of Badlands contract, Weinberg hired a repossession company to retrieve the trucks from the Debtor's parking lot. *Id.* The trucks were delivered to Weinberg's warehouse, where they have sat unused in storage to this day. *Id.* Since Weinberg repossessed the trucks without engaging in any foreclosure or title proceeding, title to the trucks remains with the Debtor. R. at 6 n.4.

III. Chapter 11 Filing And Weinberg's Refusal To Return The Trucks To The Debtor

Without the trucks that were essential to the Debtor's snow plow business, the Debtor suffered further losses and was unable to fulfill its contract with the City of Badlands. R. at 6. In early February 2017, when the City of Badlands threatened to cancel the contract and sue the Debtor for damages, the Debtor filed a Chapter 11 petition. *Id.*

In an attempt to collect the trucks so the Debtor could effectively reorganize and continue its business, the Debtor's attorney sent Weinberg a letter requesting that the trucks be returned. R. at 6. Without filing any request for adequate protection, Weinberg refused to return the trucks and waited until the Debtor was forced to initiate legal proceedings. *Id.*

Running out of options to save its business from liquidation, the Debtor filed a motion asking the Bankruptcy Court to find that Weinberg's refusal to return the snow plow trucks constituted a violation of the automatic stay under section 362(a)(3) of the Bankruptcy Code[1]. *Id.* After a finding in favor of Weinberg and the loss of its contract with the City of Badlands, the Debtor was left with no choice but to end its snow plow business. R. at 6-7.

IV. Conversion From Chapter 11 Case To A Chapter 7 Case

In early April, the Debtor voluntarily converted the Chapter 11 case to a case under Chapter 7 of the Bankruptcy Code. R. at 7. Shortly following the conversion, Steven Vin Sant (the "Trustee") was appointed to administer the estate. *Id.*

V. Weinberg Pursues Collection Of Judgment Related To Personal Guarantee And Initiates a Creditor's Examination of Clemons

Realizing that he still possessed a judgment against Clemons related to Clemons' personal guarantee of the loan, Weinberg decided to finally pursue collection efforts. R. at 7.

[1] The Bankruptcy Code is set forth is 11 §§ 101 *et. seq.* Specific sections of the Bankruptcy Code are identified herein as "section __."

But, these efforts only began after the case was converted to Chapter 7. *Id.* Weinberg hired a collection law firm to carry out a creditor's examination of Clemons. *Id.* This examination uncovered a transfer that Clemons initiated shortly after Weinberg had filed his initial lawsuit. *Id.* The law firm reported that Clemons transferred approximately $100,000.00 in cash to his daughter Patti. *Id.*

VI. Weinberg Voluntarily Presents To The Trustee Clemons' Fraudulent Activity Uncovered During The Creditor's Examination

At the conclusion of the creditor's examination, Weinberg voluntarily presented to the trustee all documentation and testimony related to the investigation that effectively established the transfer avoidable as a fraudulent transfer. *Id.* The Trustee filed suit against Patti and successfully recovered $75,000 of the funds for the benefit of the estate. *Id.*

VII. Weinberg Requests Reimbursement Under Section 503(b) For Administrative Expenses Incurred Conducting A Creditor's Examination Of Clemons

As a result of the creditor's examination, Weinberg incurred $25,000 in legal fees. *Id.* Shortly after the bankruptcy court approved the settlement between the Trustee and Patti (in the amount of $75,000), Weinberg filed a motion seeking to have his legal fees reimbursed as a substantial contribution under section 503(b). *Id.*

Even though the Trustee acknowledged Weinberg's substantial contribution to the estate, he nonetheless opposed the reimbursement because under section 503(b)(3)(D), administrative expenses for substantial contributions are not permissible for Chapter 7 cases. R. at 7-8. The Trustee argued that section 503(b)(3)(D) limits these expenses to cases arising under Chapters 9 and 11. R. at 8. The bankruptcy court subsequently approved Weinberg's motion, granting him $25,000 in administrative expenses pursuant to section 503(b)(3)(D). *Id.*

VIII. Trustee Receives Multiple Purchase Offers To Liquidate The Estate But Faces Difficulties In Negotiation Due To Weinberg Holding Possession Of The Snow Plow Trucks

In September 2017, Tenth Avenue, a former competitor of the Debtor, approached the Trustee offering to purchase substantially all of the Debtor's assets, including its snow plow trucks. R. at 8. Weinberg's refusal to return the trucks to the estate led Tenth Avenue to withdraw its offer in November 2017. *Id.*

When Stone Pony, another former competitor of the Debtor, learned of the failed negotiations between Tenth Avenue and the Trustee, it offered the Trustee $100,000 less for the Debtor's assets, excluding the trucks. *Id.* Worried that the estate's assets would only diminish in value after the winter season was over, the Trustee accepted Stone Pony's offer. R. at 8-9. In February 2018, the bankruptcy court approved the sale to Stone Pony. R. at 9.

IX. Trustee Timely Appeals The Thirteenth Circuit's Ruling To This Court

Despite the closing of the sale, the Trustee timely appealed the stay violation and substantial contribution issues to the Thirteenth Circuit. R. at 9. The Thirteenth Circuit affirmed the decisions of the bankruptcy court and the Trustee timely appealed both determinations to this Court. R. at 1.

SUMMARY OF THE ARGUMENT

The automatic stay under section 362(a)(3) is violated when a creditor refuses to return property of the estate after a debtor has filed for bankruptcy. The refusal is an "exercise [of] control" because it prevents the debtor's beneficial use of the asset. The dictionary defines the word "control" as "to exercise restraining or directing influence over." Weinberg's decision to ignore the Debtor's turnover request and instead keep the trucks locked in storage was certainly an act "to exercise restraining or directing influence over" the trucks.

Refusing to return property of the estate is an "act" in violation of the automatic stay because 362(a)(3) is applied broadly. One main purpose of the automatic stay is to facilitate the

gathering of the debtor's property so creditors can benefit from its use or liquidation. Any attempt to withhold estate property after a debtor has filed for bankruptcy runs counter to this purpose and is therefore an "act" in violation of section 362(a)(3).

If a refusal to return property of the estate was not an "act … to exercise control," the 1984 Amendments to section 362(a)(3) would be mere surplusage. If the minority's exceedingly limited interpretation of 362(a)(3) were correct, the added language would only stay previously prohibited attempts "to obtain possession." To avoid rendering Congress' language superfluous, section 362(a)(3) must be read to prohibit a creditor's refusal to return estate property.

When a creditor fails to return estate property in accordance with 542(a), they will violate the automatic stay. The turnover obligation is self-executing and independent of a creditor's right to adequate protection under section 363(e) because section 542(a) imposes a mandatory obligation that does not include an exception for adequate protection. Further, a creditor must actually move the court in accordance with the "congressionally established bankruptcy procedures" to prove inadequate protection. If creditors could unilaterally determine their entitlement to adequate protection, "the powers of a bankruptcy court… would be vastly reduced."

If refusing to return property of the estate was not an "act… to exercise control," debtors would be forced to initiate a turnover proceeding to collect each item of estate property. This would add to the long list of tasks a debtor must perform to reorganize and general creditors would end up paying for the numerous turnover orders. Since Congress did not intend to place such a burden on the estate, section 542(a) is self-executing and Weinberg's failure to comply with the provision constituted a violation of the automatic stay under section 362(a)(3).

Weinberg also urges this Court to affirm the reimbursement of his administrative expense; but doing so would be expressly against the language of the Bankruptcy Code. Section 503(b)(3)(D) explicitly sets forth the parameters for when creditors can be reimbursed for an administrative expense related to a substantial contribution to the estate. Such expenses are allowed in cases arising under Chapters 9 and 11 only. Even though bankruptcy courts are courts of equity, equitable powers of the court cannot bypass the plain language of the Bankruptcy Code. If any inequities result from adjudicating as per the parameters set forth in Section 503(b)(3)(D), these inequities need to be addressed by Congress and not the courts.

Weinberg would also have this Court affirm the lower court's decision and embrace the general nature of section 503(b), and disregard the specific limitations placed in section 503(b)(3)(D). But, the general nature of 503(b) cannot control where specific language in section 503(b)(3)(D) limits reimbursement to cases arising under Chapters 9 and 11.

The majority of courts have consistently interpreted section 503(b)(3)(D) as limited to Chapters 9 and 11. Accepting Weinberg's interpretation would effectively rewrite rules that our Legislature has affirmatively and explicitly enacted.

ARGUMENT

The facts of this case are undisputed. R. at 3 n.2. This appeal presents only questions of law, which are reviewed de novo. *Texas v. Soileau (In re Soileau)*, 488 F.3d 302, 305 (5th Cir. 2007).

I. Section 362(a)(3) Is Violated When A Creditor Refuses To Return Property Of The Estate That It Lawfully Repossessed From The Debtor Prior To The Petition Date.

This Court should reverse the decision of the Thirteenth Circuit and hold that section 362(a)(3) is violated when a secured creditor passively retains possession of collateral that it lawfully repossessed from the debtor prior to the petition date.

The case law on this issue is split. Two Circuits have found that a creditor's refusal to return property of the estate does not violate the automatic stay under section 362(a)(3). *WD Equip., LLC v. Cowen (In re Cowen)*, 849 F.3d 943 (10th Cir. 2017); *United States v. Inslaw, Inc.*, 932 F.2d 1467 (D.C. Cir. 1991). But, the Second, Seventh, Eighth, and Ninth Circuits, as well as a number of Bankruptcy Appellate Panels, have held that the refusal does violate section 362(a)(3). *Weber v. SEFCU (In re Weber)*, 719 F.3d 72 (2d Cir. 2013); *Thompson v. GMAC, LLC*, 566 F.3d 699 (7th Cir. 2009); *Knaus v. Concordia Lumber Co. (In re Knaus)*, 889 F.2d 773 (8th Cir. 1989); *In re Del Mission Ltd.*, 98 F.3d 1147, 1150 (9th Cir. 1996); *Transouth Fin. Corp. v. Sharon (In re Sharon)*, 234 B.R. 676 (B.A.P. 6th Cir. 1999).

Filing a voluntary petition for bankruptcy has two discrete effects: an estate is created under section 541 and the automatic stay goes into effect under section 362. The estate created is comprised of all property that the debtor has a "legal or equitable interest in … as of the commencement of the case." 11 U.S.C. § 541. Even though Weinberg repossessed the snow plow trucks in accordance with applicable non-bankruptcy law, it is undisputed that the Debtor

still holds title in the trucks. R. at 6 n.4. Thus, the trucks are property of the Debtor's estate and Weinberg's refusal to return them constituted a violation of the automatic stay.

"Full understanding of this issue requires appreciation of the relationship" between sections 363 and 542. R. at 12. Section 542, which requires any entity "in possession, custody, or control" of estate property to deliver that property to the debtor, works with section 362 to protect the debtor's estate. 11 U.S.C. § 542(a). Section 363(e) allows a secured creditor who fears the debtor's use, sale, or lease of property will adversely affect their interest to file a motion with the court requesting adequate protection. Ultimately, section 542(a) is self-executing and independent of section 363(e). Because a creditor's duty to turnover estate property is triggered once a debtor files for bankruptcy, a refusal to do so will result in a violation of the automatic stay. *In re Knaus*, 889 F.2d at 775.

A. Section 362(a)(3) Is Violated When A Creditor Refuses To Return Property Of The Estate Because Doing So Constitutes An "Act… To Exercise Control."

1. Refusing to return property of the estate is an "act… to exercise control" because doing so prevents "a debtor's beneficial use of [the] asset."

All cases of statutory interpretation involving the Bankruptcy Code must begin with the language of the Code itself. *Ransom v. FIA Card Servs., N.A.*, 562 U.S. 61, 62 (2011). Since "control" is neither a term of art nor expressly defined in the Code, this Court should consult the dictionary definition of the word. *See Asgrow Seed Co. v. Winterboer*, 513 U.S. 179, 187 (1995).

When a creditor refuses to return property of the estate to a debtor who has filed for bankruptcy, the creditor has chosen "to exercise control" over that property. *Thompson*, 566 F.3d at 703. In *Thompson*, the debtor defaulted on his car payments and the creditor repossessed the car. *Id.* at 700-01. After repossession, the debtor filed for bankruptcy, but the creditor refused to

return the car. *Id.* at 701. In holding that the creditor's refusal was an act "to exercise control," the court relied on the ordinary meaning of the verb "control," which Webster's Dictionary defines as "to exercise restraining or directing influence over" or "to have power over." *Id.* at 702-03; *Merriam- Webster's Collegiate Dictionary* 437 (11th ed. 2007). The court found that "holding onto an asset, refusing to return it, and otherwise prohibiting a debtor's beneficial use of an asset" fit nicely within the Webster's Dictionary definition, as well as the "commonsense meaning of" exercising control. *Thompson*, 566 F.3d at 702-03.

In this case, Weinberg "exercise[d] control" over property of the estate in violation of the automatic stay. Even after receiving a letter from the Debtor's attorney requesting that the snow plow trucks be returned, Weinberg refused to do so. R. at 6. The decision to ignore the Debtor's attorney and withhold the trucks from the Debtor surely constitutes a decision "to exercise restraining or directing influence over" the trucks. *Thompson*, 566 F.3d at 703. Instead of allowing the Debtor to utilize trucks that were essential to its business, Weinberg left the trucks unused in storage. R. at 6. Doing so prevented the Debtor from not only continuing its business operations, but also caused the Debtor to lose a valuable plowing contract that could have saved its business from liquidation in Chapter 7. R. at 7.

By withholding estate property and therefore "negotiating a better security package for itself," a creditor can "place itself in a position above other" interested parties. *Thompson*, 566 F.3d at 707; *see also In re Germansen Decorating, Inc.*, 149 B.R. 517, 521 (Bankr. N.D. Ill. 1992) (primary purpose of the automatic stay is to prevent dismemberment of the estate by fast-acting creditors). Here, out of pure self-interest, Weinberg did just that when he prevented the Debtor from using the trucks to benefit the estate. Since "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," the refusal to return estate property constitutes an "act… to exercise control" in violation of the automatic stay. *Id.* at 702.

2. Refusing to return property of the estate is an "act… to exercise control" because section 362(a)(3)'s "scope is intended to be broad."

Several Circuit courts have repeatedly held that "the automatic stay is fundamental ... and its scope is intended to be broad." *Small Bus. Admin. v. Rinehart*, 887 F.2d 165, 168 (8th Cir. 1989); *In re Knaus*, 889 F.2d at 774; *In re Smith*, 876 F.2d 524, 525 (6th Cir. 1989); *Andrews Univ. v. Merch. (In re Merch.)*, 958 F.2d 738, 741 (6th Cir. 1992). Applying the automatic stay broadly, to a wide array of actions, has allowed these courts to interpret the word "act" in a way that does not rob the automatic stay of its ability to protect the debtor's estate.

In *Merch.*, the court found that a school violated the automatic stay when it refused to deliver a transcript to a student-debtor after bankruptcy was commenced. *In re Merch.*, 958 F.2d at 741. In applying the automatic stay broadly, the court held that the refusal to issue the transcript was an "act" in violation of section 362. *Id* The court in *Rutherford* later applied the reasoning from *Merch* to situations where a creditor refuses to return a debtor's vehicle that it lawfully repossessed prior to filing. *Rutherford v. Auto Cash, Inc. (In re Rutherford)*, 329 B.R. 886, 889 (Bankr. N.D. Ga. 2005). In doing so, the court held that the refusal to return the vehicle once a debtor has filed for bankruptcy is an "act" in violation of section 362(a)(3). *In re Rutherford*, 329 B.R. at 889.; *see also In re Williams*, 316 B.R. 534, 537 (Bankr. E.D. Ark. 2004); *Hampton v. Yam's Choice Plus Autos, Inc. (In re Hampton)*, 319 B.R. 163, 170-71 (Bankr. E.D. Ark. 2005).

Applying the automatic stay broadly to the present case, Weinberg's refusal to return the trucks to the Debtor was an "act… to exercise control" that is prohibited by section 362(a)(3). Aside from deliberately ignoring the letter from the Debtor's attorney, Weinberg spent months

maintaining a storage environment that protected his collateral from a loss in value. R. at 6. These deliberate actions to avoid assisting in the Debtor's reorganization surely constitute "doing something" that violates the automatic stay. *In re Cowen*, 849 F.3d at 949.

While the minority position interprets the word "act" to include only affirmative conduct, such a narrow construction of section 362(a)(3) is inconsistent with the main purpose of the automatic stay: to facilitate the gathering of the debtor's property so creditors can benefit from its use or liquidation. *In re Rutherford*, 329 B.R. at 896-97. There is little difference between a creditor who repossesses property of the estate after bankruptcy is commenced and a creditor who refuses to return property of the estate it repossessed before bankruptcy. *In re Knaus*, 889 F.2d at 775. In either case, the estate is deprived of valuable assets. *Id.*

Weinberg's refusal to return estate property left a diminished estate for other creditors and caused the Debtor to lose a lucrative plowing contract that could have saved its business from liquidation in Chapter 7. R. at 6-7. To hold that Weinberg wasn't "doing something" when he refused to return the trucks would be nonsensical. *In re Cowen*, 849 F.3d at 949. Because the automatic stay is applied broadly, Weinberg's decision to retain the trucks when he was obligated to return them to the Debtor constitutes an "act" in violation of section 362(a)(3).

3. Refusing to return property of the estate is an "act… to exercise control" because otherwise, the 1984 Amendments by Congress would be rendered "superfluous, void, [and] insignificant."

This Court has stated that a primary principle of statutory interpretation is to give effect to each word written by Congress, "so that no clause, sentence, or word shall be superfluous, void, or insignificant." *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (citing *Duncan v. Walker*, 533 U.S. 167, 174 (2001)). Applying this principle to section 362(a)(3), it becomes clear that

Congress expanded the automatic stay in 1984 to prohibit scenarios where a creditor refuses to return property of the estate after a debtor has filed for bankruptcy.

With the passage of the Bankruptcy Amendment and Federal Judgeship Act of 1984, Congress broadened the reach of the automatic stay. *In re Weber*, 719 F.3d at 80. Prior to the 1984 Amendments, section 362(a)(3) only prohibited acts "to obtain possession" of property of the estate, but after 1984, the provisions prohibited acts "to exercise control" as well. *Id.* By expanding the scope of section 362(a)(3), Congress must have intended to prohibit a different type of conduct than was prohibited before or else the 1984 Amendments would be "superfluous, void, [and] insignificant." *TRW Inc.*, 534 U.S. at 31.

The minority's exceedingly limited interpretation of the word "act" falls apart here because it leaves no room for conduct other than acts "to obtain possession." 11 U.S.C. § 362(a)(3). The court in *Cowen* makes sense of the 1984 Amendments by stating that they bar a creditor from selling the repossessed property to collect on their claim. However, the court's reasoning is incorrect because the Code already prohibited such conduct under 362(a)(6), which stays any act "to collect… or recover a claim against the debtor." 11 U.S.C. § 362(a)(6); Hon. Eugene R. Wedoff, *The Automatic Stay Under § 362(a)(3) – One More Time*, 38 BANKR. L. LETTER 7, July 2018, at 3.

Possibly recognizing the missteps in *Cowen*, the Thirteenth Circuit took a different route to justify its reasoning. The lower court stated that section 362(a)(3) was amended to prohibit creditors from interfering with the estate's "intangible property rights," since these property rights technically cannot be possessed. R. at 15. However, even if such a claim by the lower court were reasonable, "it is difficult to imagine that [intangible property rights] were a significant enough problem in 1984 that Congress would specially legislate to address them."

Wedoff, *supra* at 4. Rather, the abundance of cases involving a creditor refusing to return estate property proves that the creditor's refusal is the "issue significant enough to prompt legislation." *Id.*

Since the minority's interpretation of an "act… to exercise control" would only include scenarios where a creditor has acted "to obtain possession," the minority has rendered Congress' language "superfluous, void, [and] insignificant." *TRW Inc.*, 534 U.S. at 31. To avoid such a result, section 362(a)(3) must be read to prohibit scenarios where a creditor retains estate property and denies access to it after the debtor has filed for bankruptcy. Since "withholding possession of property of a bankruptcy estate is the *essence* of 'exercising control,' Weinberg's refusal to return the trucks violated section 362(a)(3). *In re Sharon*, 234 B.R. at 682 (emphasis added).

B. Section 362(a)(3) Is Violated When A Creditor Refuses To Return Property Of The Estate Because Section 542(a) Is Self-executing.

Once a Debtor has filed for bankruptcy, section 542(a) is triggered and any creditor in possession of estate property must return it to the debtor. *In re Knaus*, 889 F.2d at 775; *In re Sharon*, 234 B.R. at 686 (when the turnover obligation is triggered, the creditor must "tender the goods or face sanctions for violation of the stay"). While section 363(e) allows a creditor to request adequate protection for its interest in the property it is holding, section 363(e) does not interfere with the creditor's turnover obligation under section 542. *In re Knaus*, 889 F.2d at 775. Thus, a creditor must first return the property to the bankruptcy estate and "then, if necessary, seek adequate protection of its interest in the Bankruptcy Court." *Thompson*, 566 F.3d at 707-08. Ultimately, Weinberg failed to "tender the goods" and thus should be liable "for [his] violation of the stay." *In re Sharon*, 234 B.R. at 686.

The court in *Cowen* questioned the relevance of section 542 in an inquiry of a stay violation under section 362(a)(3). *In re Cowen*, 849 F.3d at 950. However, the court failed to see that the remedial provision under section 362 is used to punish violations of section 542, which has no remedial provision. *See* 11 U.S.C. § 362(h). Thus, "section 542 provides the *right* to the return of estate property, while section 362 provides the *remedy* for failure to do so." *In re Abrams*, 127 B.R. 239, 242-43 (B.A.P. 9th Cir. 1991). Further, following "the cardinal rule that a statute is to be read as a whole…," section 362 must be interpreted with regard to the other provisions of the Bankruptcy Code. *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991).

The turnover obligation under section 542(a) is relevant to determine whether a creditor has violated the automatic stay by refusing to return property of the estate once a debtor has filed for bankruptcy. Since Weinberg was obligated to return the trucks and failed to do so, he violated the automatic stay under section 362(a)(3).

1. Section 542(a) is self-executing because it is mandatory and does not include an exception for adequate protection under section 363(e).

When a creditor refuses to return estate property in its possession to a debtor who has filed for bankruptcy, the creditor has failed its turnover obligation and violated the automatic stay. *In re Knaus*, 889 F.2d at 775. The turnover obligation in section 542(a) is mandatory. *See In re Weber*, 719 F.3d at 75-76; *Kingdomware Tech., Inc. v. United States*, __ U.S. __, 136 S. Ct. 1969, 1977 (2016) (Congress used language "shall deliver" instead of a permissive "may deliver"). As this Court has previously held, "any other interpretation of section 542(a) would deprive the bankruptcy estate of the assets and property essential to its rehabilitation and thereby frustrate the congressional purpose behind the reorganization provisions." *United States v. Whiting Pools*, 462 U.S. 198, 199 (1983).

Section 542(a) is independent of section 363(e) because it does not include an exception for adequate protection. *In re Sharon*, 234 B.R. at 683. In requiring that all estate property be delivered to the debtor, Congress expressed three exceptions, none of which pertain to adequate protection. *Whiting Pools*, 462 U.S. at 206 n.12. *Expressio unius est exclusio alterius* tells us that the explicit inclusion of other exceptions to section 542(a) means that Congress intentionally excluded an exception for adequate protection. *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 452 (2002).

The Thirteenth Circuit expressed concerns that if 542(a) were self-executing, then possessory lien creditors would be forced to (i) turnover the property and lose their lien, or (ii) retain the property and violate the stay. R. at 13-14. Despite not being an issue in this case, the lower court's concerns are unfounded because possessory liens do not terminate when a creditor is legally required to return the property. Restatement (First) of Security § 80 (1941); *see also Finch v. Miller,* 531 P.2d 892, 893 (Or. 1975).

Ultimately, a creditor's right to adequate protection under section 363(e) does not allow a creditor to ignore the turnover obligation under section 542(a).

2. Section 542(a) is self-executing because a creditor's right to adequate protection under section 363(e) would be meaningless otherwise.

"It is an elementary rule of statutory interpretation that 'the act cannot be held to destroy itself.'" *Citizens Bank v. Strumpf*, 516 U.S. 16, 20 (1995) (citing *Texas & Pacific R. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 446 (1907)). If section 542(a) were not self-executing, then the right to adequate protection would be meaningless to creditors.

The basic purpose of adequate protection is to protect secured creditors against declines in the value of their collateral post-petition. *United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs.*, 484 U.S. at 370-71 (1988). Adequate protection accomplishes this by providing

compensation to creditors while their collateral is in the hands of the Debtor's estate. *Id.*; *see also Whiting Pools*, 462 U.S. at 207 (adequate protection replaces "the protection afforded by possession").

If the turnover obligation in section 542(a) was subject to a creditor's right to adequate protection under section 363(e), then creditors would still be in lawful possession when the debtor files for bankruptcy. In that case, there would be no need for the protections of section 363(e) because any declines in the value of the collateral would occur under the creditor's watch, and not the debtor's estate. Section 542(a) "cannot be held to destroy [section 363(e)]." *Citizens Bank*, 516 U.S. at 20. Since the right to adequate possession depends on a creditor not being in possession of an asset, section 542(a) must be self-executing.

3. Section 542(a) is self-executing because Congress drafted the turnover obligation under section 542(a) as an affirmative obligation with limited exceptions, and did not do so for adequate protection under section 363(e).

The notion that section 542(a) is self-executing is further supported by the fact that Congress drafted section 542(a) as an affirmative obligation subject to a limited set of exceptions. If Congress had intended adequate protection under section 363(e) to trump the turnover obligation under section 542(a), then Congress would have drafted a creditor's right to adequate protection as mandatory with an exception allowing the debtor to collect property of the estate. Instead, Congress drafted section 542(a), and not section 363(e), as a mandatory obligation subject to narrow exceptions.

As the Thirteenth Circuit notes, "Congress does not 'hide elephants in mouseholes.'" R. at 15.; *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001). If Congress wanted to force debtors to prove adequate protection to collect each piece of estate property in the hands of creditors, it would have "unmistakably said so." *In re Sharon*, 234 B.R. at 682 (Congress clearly

states when it intends to limit a debtor's possession of property of the estate). However, the plain language of sections 542 and 363 tells us that "the onus to return estate property is placed upon the possessor; it does not fall on the debtor to pursue the possessor." *In re Del Mission Ltd.*, 98 F.3d at 1151. Therefore, 542(a) must be self-executing.

4. Section 542(a) is self-executing because a creditor's right to adequate protection under section 363(e) is not automatic.

i. Section 363(e) is not automatic because a creditor must move the court in order to prove its interest is inadequately protected.

Unlike the turnover obligation in section 542(a), adequate protection under section 363(e) is not self-executing. *Thompson*, 566 F.3d at 706. While a creditor has the right to file a motion for relief from the stay or a motion requesting adequate protection, the burden to do so is entirely on them. *Whiting Pools*, 462 U.S. at 212 ("*at the secured Creditor's insistence*, the bankruptcy court must place limits or conditions… to protect the creditor").

While some courts have interpreted this Court's holding in *Whiting Pools* to mean that a creditor must be provided adequate protection before it has an affirmative obligation to turn over estate property, this Court framed the issue as only whether the IRS could be subject to a bankruptcy court's turnover order. *Whiting Pools*, 462 U.S. at 199; *see In re Rutherford*, 329 B.R. at 894 (interpreting the holding in *Whiting Pools*). However, while *Whiting Pools* does not answer the question at issue here, "the language and tenor" of the holding supports the proposition that a creditor may not withhold estate property after unilaterally determining they are entitled to adequate protection. *In re Rutherford*, 329 B.R. at 894. Instead, they must refer to the bankruptcy court and "seek protection of [their] interest according to the congressionally established bankruptcy procedures." *Whiting Pools*, 462 U.S. at 212.

Weinberg's refusal to return the trucks to the Debtor was a violation of the automatic stay because he failed his duty under section 542(a) to turn over estate property. Weinberg's "understanding that the Debtor had the burden to bring a turnover action" was presumptuous and incorrect. R. at 6. Once the Debtor filed for bankruptcy, the turnover obligation was triggered, and he became obligated to return the trucks to the Debtor.

Weinberg's belief that his right to "adequate protection of his interest in the snow plow trucks" trumped his obligation to turn over estate property was also presumptuous and incorrect. R. at 6. As discussed, adequate protection is not automatic. "If you don't ask for it, you won't get it," and Weinberg never asked. *In re Kain*, 86 B.R. 506, 512 (Bankr. W.D. Mich. 1988). In fact, Weinberg chose not to utilize any of the procedural options that would allow him to keep the trucks. If Weinberg was genuinely concerned that returning the trucks to the Debtor might harm his interest in the property, he could have filed motions for relief from the stay or a request for adequate protection. *Expeditors Int'l v. Colortran, Inc. (In re Colortran, Inc.),* 210 B.R. 823, 827-28 (B.A.P. 9th Cir. 1997). If Weinberg feared that harm could occur before his motions were heard, he could have requested an emergency hearing under section 362(f). *Id.* Despite several "congressionally established bankruptcy procedures" at his disposal, Weinberg chose the option that would be most harmful to the Debtor's reorganization efforts: the "nonbankruptcy remedy of possession." *Whiting Pools*, 462 U.S. at 204.

In holding that section 542(a) was subject to section 363(e), the Thirteenth Circuit relied heavily on the fact that section "542(a) expressly references section 363(e)." R. at 13. However, section 542(a) only references section 363 generally and does not reference subsection (e) specifically. *See* 11 U.S.C. § 542(a). The turnover requirement for "property that the trustee may use, sell, or lease under section 363" only establishes what property must be turned over and

does not create an exception for adequate protection. *Id*. Any right to adequate protection has little to do with 542(a) and does not change the fact that a creditor must move the court to actually receive relief. Thus, the Thirteenth Circuit's reliance on section 542(a)'s reference to section 363 is oversimplified and misses the point.

Ultimately, Weinberg violated section 362(a)(3) when he retained the trucks without even filing the motions necessary to prove inadequate protection. Any other conclusion by this Court would allow creditors like Weinberg to sit back and wait until an already financially-strained Debtor is forced to pursue them.

ii. Section 363(e) is not automatic because if it were, creditors could unilaterally determine they are entitled to adequate protection and "the powers of a bankruptcy court… would be vastly reduced."

A holding by this Court in favor of Weinberg would mean that a creditor can flatly ignore the turnover obligation under section 542(a). If this court were to allow creditors like Weinberg to unilaterally determine their entitlement to adequate protection, "the powers of a bankruptcy court and its officers to collect the estate … would be vastly reduced." *In re Knaus*, 889 F.2d at 775 (quoting Chief Bankruptcy Judge Stewart's opinion on remand). In that case, creditors could substitute their judgement for that of the bankruptcy judge and circumvent the expertise and established body of law within the bankruptcy court system.

The danger of allowing a creditor to preside over their own motion for relief must be avoided. Since "any prerequisite to turnover is determined by the bankruptcy court, [and] not by the creditor," creditors may not ignore the turnover obligation under section 542(a) solely because they feel adequate protection is necessary. *In re Sharon*, 234 B.R. at 686 (citing *In re Colortran, Inc.*, 210 B.R. at 686).

5. Section 542(a) is self-executing because otherwise, debtors would be forced to commence a formal adversary proceeding and file a motion for injunctive relief every time they wished to recover an item of estate property.

"The potential for multiple actions to obtain what is rightfully due to the bankruptcy estate is a very real concern" for debtors seeking reorganization. *In re Del Mission Ltd.*, 98 F.3d at 1152. A holding by this Court in favor of Weinberg could create dangerous precedent for debtors seeking reorganization for two reasons.

First, if the turnover obligation was limited by a creditor's right to seek adequate protection, then debtors would be forced to seek turnover before a creditor was obligated to return property of the estate. *In re Knaus*, 889 F.2d at 775. There is no question that adding to the long list of tasks a debtor must perform to effectively reorganize would distract the debtor from its goal of proposing a confirmable plan. Placing such an undue burden on the very party seeking relief would make little sense. Rather, "it makes far more sense for creditors to move before the court in a consolidated proceeding than for the debtor to file a myriad of motions in an attempt to recover his dispersed assets." *Thompson*, 566 F.3d at 706; *see also Gen. Motors Acceptance Corp. v. Ryan*, 183 B.R. 288, 289 (M.D. Fla. 1995).

Second, these turnover orders are costly and would be paid for by general creditors. After an initial adversary proceeding determining adequate protection, the debtor may be required to file a motion for injunctive relief and commence an *additional* adversary proceeding to seek turnover of the property. *See* Fed. Bankr. P. 7001. Since administrative expenses like legal fees are given priority under the Code, the non-priority, general creditors would bear the cost of the extra litigation. 11 U.S.C. § 507.

Since "Congress did not intend to place the burden on the bankruptcy estate to absorb the expense of potentially multiple turnover actions," section 542(a) is self-executing and a debtor is

not required to initiate turnover proceedings to recover each item of estate property. *In re Abrams*, 127 B.R. at 243. Thus, Weinberg violated the automatic stay under section 362(a)(3) when he refused to return the trucks after the Debtor filed for bankruptcy.

II. Section 503(b) Does Not Permit A Court to Grant A Creditor An Administrative Expense For A Substantial Contribution In A Chapter 7 Case.

A. Bankruptcy Courts Are Not Authorized Under The Principles Of Equity To Bypass The Plain Language Of Section 503(b)(3)(D).

While bankruptcy courts are courts of equity, and as such, equitable principles may govern their jurisdiction; this principle does not bestow upon these courts the power to substitute judgements in equity for direction plainly stated in the language of the Bankruptcy Code. *Raleigh v. Ill. Dep't of Revenue*, 530 U.S. 15, 24-25 (2000). This Court has consistently affirmed that a bankruptcy court's equitable powers "can only be exercised within the confines of the Bankruptcy Code." *Law v. Siegel*, 134 S. Ct. 1188, 1194-95 (2014).

The Trustee does not dispute that Weinberg made a substantial contribution to the estate by uncovering the Debtor's fraud and thus increasing the available funds to pay its creditors R. at 7. But, there are limitations imposed by Congress upon bankruptcy courts that cannot be circumvented through the disguise of equitable relief.

B. The Plain Language Of Section 503(b)(3)(D) Demonstrates Congress' Intent For "Substantial Contribution" To Be Awarded Solely In Cases Arising Under Chapters 9 And 11.

It is a well-accepted tenet of statutory interpretation that Congress "says in a statute what it means and means in a statute what is says there." *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000). This Court has recognized that "[i]t is well established that 'when the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms.'" *Lamie v.*

U.S. Trustee, 540 U.S. 526, 534 (2004) (citation omitted). The language at issue in this case could not be more plainly stated. The section in dispute allows for reimbursement of administrative expenses incurred by "a creditor . . . in making a substantial contribution in a case *under Chapter 9 or 11* of this title." 11 U.S.C. § 503(b)(3)(D) (emphasis added).

Weinberg's interpretation of section 503(b)(3)(D) would have this Court read an absent bankrtuptcy chapter into the statute. His interpretation would result "not [in] a construction of [the] statute, but, in effect, an enlargement of it by the court, so that what was omitted [by Congress], presumably by inadvertence, may be included within its scope." *Lamie*, 540 U.S. at 538 (citation omitted). Congress had the power to create "'substantial contribution' administrative expense for cases it believed were appropriate for that benefit," and it did so only for Chapters 9 and 11. It could have included Chapter 7, but, it did not do so. *In re Hackney*, 351 B.R. 179, 201 (Bankr. N.D. Ala. 2006).

If creditors under Chapters 7, 12, and 13 become entitled to "substantial contribution" under section 503(b)(3)(D), "the phrase 'in a case under Chapter 9 or 11 of this tile'" will essentially become verbose. *United States Tr. v. Farm Credit Bank (In re Peterson)*, 152 B.R. 612, 614 (D.S.D. 1993). As discussed previously, this Court has articulated that "[o]ur cases consistently have expressed 'a deep reluctance to interpret a statutory provision so as to render superfluous other provisions in the same enactment.'" *Freytag v. Comm'r*, 501 U.S. 868, 877 (1991). In interpreting section 503(b), the lower court rendered section 503(b)(3)(D) utterly unnecessary.

The Trustee urges this Court to interpret section 503(b)(3)(D) according to its plain language, which expressly bars substantial contribution of administrative expenses under Chapter 7 proceedings.

C. Administrative Expenses Under Section 503(b)(3)(D) Should Be Narrowly Construed To Maximize Value Of The Estate For All Creditors.

Section 507 affords administrative expenses one of the highest priorities. 11 U.S.C. § 507. This priority in turn reduces the funds available for creditors and other beneficiaries of the estate. *Mediofactoring v. McDermott (In re Connolly N. Am., LLC)*, 802 F.3d 810, 816 (6th Cir. 2015). If funds are to be disbursed equally amongst all creditors, fairness dictates that statutory priorities should be narrowly construed to reduce harm to creditors and other claimants. *Supplee v. Bethlehem Steel Corp. (In re Bethlehem Steel Corp.)*, 479 F.3d 167, 172 (2d Cir. 2007).

There is very little dispute about the illustrative nature of section 503(b), but, where Congress chose to expressly limit the confines of section 503(b)(3)(D) to Chapters 9 and 11, this limitation should be narrowly interpreted. *In re Blount*, 276 B.R. 753, 764 (Bankr. M.D. La. 2002). Despite the expansiveness in which the lower court and Weinberg interpret section 503(b)(3)(D), in order to avoid unfair prejudice and maximize the estate's value for its creditors, judicial construction of this section should be narrowly construed.

Even though the parties agree that in uncovering the Debtor's fraud Weinberg provided a "substantial contribution" to the estate, Weinberg is but one of the creditors the estate must compensate. R. at 6. This Court has warned that "[t]here is a basic difference between filling a gap left by Congress' silence and rewriting rules that Congress has affirmatively and specifically enacted." *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978). In broadly construing this statute, the lower court has unjustly prejudiced the estate's other creditors by "rewriting rules that Congress has affirmatively and specifically enacted." *Mobil Oil Corp*, 436 at 625.

The Trustee prays that this court strike a balance between the illustrative nature of section 503(b) and the limitations imposed by Congress under section 503(b)(3)(D) by narrowly construing section 503(b)(3)(D) per its limitation to Chapters 9 and 11.

D. The Specificity Of Section 503(b)(3)(D) Governs The General Nature Of Section 503(b).

The preamble of section 503(b) provides for a non-exhaustive list of administrative expenses bankruptcy courts may award. This section states that "[a]fter notice and hearing, there shall be allowed administrative expenses . . . *including*. . ." 11 U.S.C. § 503(b) (emphasis added). Section 102 defines "'includes' and 'including' [as] not limiting." 11 U.S.C. § 102(3). When Congress drafted the word "including" in the preamble of section 503(b), it created a mechanism for bankruptcy courts to award administrative expenses when the facts dictate it is necessary for fairness and equity.

Congress also drafted the word "including" in subsection 503(b)(1)(A). By doing so, Congress demonstrates that it also intended this subsection not to contain an exhaustive list. But Congress chose not to draft the word "including" under subsection 503(b)(3). This leads to the interpretation that Congress intended the list of "actual, necessary expenses" under subsection 503(b)(3) to be an exhaustive list. *In re Connolly N. Am.*, LLC, 802 F.3d at 821.

This Court has consistently affirmed that "[i]t is a commonplace of statutory construction that the specific governs the general." *NLRB v. SW Gen., Inc.*, 137 S. Ct. 929, 941 (2017) (citation omitted); *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012); *Morales v. TWA*, 504 U.S. 374, 384-85 (1992). Where Congress chose to limit the scope of a subsection under a general section, the limitation in place in the subsection should govern the general nature of the section.

Weinberg and the lower court seek to avoid the restriction Congress placed in sections 503(b)(3) and 503(b)(3)(5) by appealing to the general nature of 503(b). Affirming Weinberg and the lower court's interpretation of these sections would frustrate a "commonplace of statutory construction." *NLRB*, 137 S. Ct. at 941 (citation omitted).

E. Courts Should Not Engage In Speculation When Interpreting The Language Of Section 503(b)(3)(D) And Should Allow Congress To Address Any Inequities Created By The Provision.

The principle of *Expressio Unius Est Exclusio Alterius* ("the expression of one thing excludes others") directly applies here. Since the plain language of 503(b)(3)(D) includes Chapters 9 and 11 as the Chapters in which "substantial contribution" may be awarded, this provision excludes Chapters 7, 12, and 13. *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). By drafting a list under section 503(b)(3)(D) without incorporating the word "including," this Court must infer Congress' intention to constrain the application of this section to Chapters 9 and 11.

Weinberg urges this court to "engage in speculation and attempt to divine congressional wisdom" when interpreting the language of 503(b)(3)(D). *In re Peterson,* 152 B.R. at 614. Congress expressly chose not to include Chapter 7 in this section. This Court has held that if any inequities derive from the plain language of a statute, these inequities should be addressed by Congress and not the courts. *Taylor v. Freeland & Kronz,* 503 U.S. 638 (1992).

Even though both parties agree that Weinberg provided a substantial contribution to the estate, any inequity derived from not being awarded compensation for his expenses should be addressed by Congress and not this Court.

F. Section 503(b)(3)(B) Provided Weinberg With Possible Means For Obtaining Reimbursement For His Administrative Expense And He Failed To Take Advantage Of It.

Section 503 provides a provision other than subsection (b)(3)(D) that allows a bankruptcy court discretion in awarding administrative expenses for a substantial contribution arising in a Chapter 7 case. Section 503(b)(3)(B) allows reimbursement for "[a] creditor that recovers, after

the court's approval, for the benefit of the estate any property transferred or concealed by the debtor." 11 U.S.C. § 503(b)(3)(B). These types of administrative expenses "were intended to be reimbursable under that provision or not at all." *Lebron v. Mechem Fin.*, 27 F.3d 937, 945 (3d Cir. 1994).

Weinberg had a viable avenue to properly obtain reimbursement. That avenue consisted of obtaining court approval under section 503(b)(3)(B) before commencing an investigation into the Clemons' finances. By failing to do so, Weinberg eliminated the only possibility of obtaining administrative expense reimbursement arising under a Chapter 7 case.

G. This Court Should Follow The Majority Of Courts That Have Interpreted Section 503(B)(3)(D) As Limited To Chapters 9 And 11.

The lower court and Weinberg rely heavily on an outlier opinion from the Sixth Circuit in which "substantial contribution" under section 503(B)(3)(D) for a Chapter 7 case was awarded. *See In re Connolly N. Am., LLC*, 802 F.3d at 825. "At the time *Connolly* was decided, 86% of the courts confronted with the issue held that a court cannot allow an administrative expense for a substantial contribution in Chapter 7, while only 14% agreed with the *Connolly* majority." R. at 31. The *Connolly* opinion also resulted in an intra-circuit split. *In re Connolly N. Am., LLC*, 802 at 822. One panel from the Sixth Circuit has held that Congress limited section 503(b)(3)(D) to only Chapter 9 and 11. *Id.*

What Congress intended this section to mean is clear by the overwhelming majority of case law interpreting section 503(b)(3)(D) as limiting administrative expense contributions to Chapters 9 and 11. Accepting Weinberg's interpretation would consequently erase this section from the Bankruptcy Code.

CONCLUSION

For all the foregoing reasons, this Court should reverse the lower court's decision and find in favor of Petitioner.

Respectfully submitted,

Team P. 21
Counsel for Petitioner