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

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BRIEF FOR PETITIONER

ORAL ARGUMENT REQUESTED

Team 25P
Counsel for Petitioner

QUESTIONS PRESENTED

1. Is 11 U.S.C. § 362(a)(3) violated when a secured creditor passively retains possession of collateral that it lawfully repossessed from a debtor prior to the petition date?
2. Does 11 U.S.C. § 503(b) permit 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

The United States Bankruptcy Court for the District of Moot held that (i) secured creditor Weinberg's retention of debtor Backstreets Plowing's snow plow trucks that were legally repossessed prior to the bankruptcy filing – each of which constituted collateral for a loan made to Backstreets – did not violate the automatic stay in section 362(a)(3), and (ii) Weinberg was entitled to a substantial contribution administrative expense under section 503(b), notwithstanding section 503(b)(3)(D). R. at 3. The Bankruptcy Appellate Panel affirmed. R. at 9. On appeal, the Thirteenth Circuit Court of Appeals affirmed. R. at 3. The Thirteenth Circuit's opinion is reproduced as the record in this appeal.

STATEMENT OF JURISDICTION

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

STATUTORY PROVISIONS

11 U.S.C. § 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)** any act to create, perfect, or enforce any lien against property of the estate;
> **(5)** any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;
> **(6)** any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;
> **(7)-(8)** [omitted]

(b)-(j) [omitted]

(k)

> **(1)** Except as provided in paragraph (2), an individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages.
> **(2)** [omitted]

(l)-(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.)

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)-(2) [omitted]

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

(A)-(C) [omitted]

(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 in making a substantial contribution in a case under chapter 9 or 11 of this title.

(E) –(F) [omitted]

(4)-(9) [omitted]

(c) [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.

(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)-(e) [omitted]

11 U.S.C. § 554

(a)-(b) [omitted]

(c) Unless the court orders otherwise, any property scheduled under section 521(a)(1) of this title not otherwise administered at the time of the closing of a case is abandoned to the debtor and administered for purposes of section 350 of this title.

(d) [omitted]

STATEMENT OF FACTS

The debtor, Backstreets Plowing, Inc. ("Backstreets"), ran a seasonal snow plowing operation headquartered in the City of Badlands. R. at 3-4. Christopher Clemons, Backstreets' sole shareholder, decided to purchase new snow plow trucks to remain competitive with other snow-plowing businesses by saving money on fuel and repair costs. R. at 3. Backstreets needed the new trucks to compete for a potentially lucrative one-year plowing contract ("the Plowing Contract") with Badlands that could be renewed from season to season at the option of the City. R. at 3-4.

In the spring of 2015, Clemons approached an acquaintance, Milton Weinberg, about borrowing $450,000 so Backstreets could purchase the new snow plow trucks. R. at 4. Weinberg agreed to loan the funds, and Backstreets granted Weinberg a security interest in the new trucks. R. at 4. Clemons also personally guaranteed the loan. R. at 4. Backstreets purchased the trucks in August 2015, and Weinberg agreed that Backstreets would begin monthly payments in December—once the business generated income in the midst of the plowing season. R. at 4.

The following month, Backstreets and two competing businesses, Tenth Avenue Freeze, Inc. and Stone Pony Plowing, LLC, submitted bids for the Plowing Contract. R. at 4. Backstreets won the bid, though council members were unsure of Backstreets' ability to make a profit considering how low the bid was. R. at 4. The Plowing Contract provided for a flat fee, whether it snowed or not. R. at 5. A month after securing the Plowing Contract, Clemons and Weinberg got into an argument unrelated to the loan or their business dealings. R. at 5. They did not speak again for some time afterwards. R. at 5.

Badlands had an uncommonly warm winter, and Backstreets earned a profit through the Plowing Contract. R. at 5. Potentially due to the animosity between Clemons and Weinberg,

Clemons did not make the first loan payment to Weinberg in December 2015. R. at 5. After three payments became outstanding, Weinberg contacted Clemons in February 2016, and another argument ensued. R. at 5. Weinberg then filed suit on the note against Backstreets and Clemons' personal guarantee in April 2016. R. at 5. Weinberg obtained a default judgment against Backstreets and Clemons, jointly and severally, for $450,000 plus interest and fees that October. R. at 5. Weinberg took no other action to collect on his judgment until January 2017. R. at 5-6.

Backstreets incurred substantial losses under its second Plowing Contract due to a brutal winter in 2016. R. at 5. Specifically, Backstreets could not pay its labor, maintenance, and fuel costs as they came due. R. at 6. At the same time, Weinberg began his efforts to collect on the default judgment in January. R. at 6. He hired a repossession company to retrieve Backstreets' trucks; the company delivered the trucks to a warehouse Weinberg owned, and the vehicles are still in Weinberg's warehouse today. R. at 6. Weinberg repossessed the trucks under applicable non-bankruptcy law, but no foreclosure proceedings occurred, and title to the trucks remained with Backstreets and Clemons. R. at 6, n.4.

Without its snow plow trucks, Backstreets was unable to fulfill the Plowing Contract, and the City threatened to cancel the contract and sue Backstreets for damages. R. at 6. Backstreets filed a Chapter 11 bankruptcy petition on February 4, 2017. R. at 6. Backstreets' attorneys then sent Weinberg a letter demanding the return of the trucks. R. at 6. Weinberg refused to return the trucks "based on his understanding" that Backstreets had the burden to bring a turnover action where Weinberg would then have demanded adequate protection of his interests in the trucks. R. at 6. Rather than commencing a turnover action, Backstreets filed a motion asking the bankruptcy court to determine that Weinberg's continued possession of the trucks constituted a violation of the automatic stay. R. at 6. The bankruptcy court found that, though it was a "close

call," Weinberg's retention of property that he lawfully repossessed pre-petition was not an "act to . . . exercise control over property of the estate" under § 362(a)(3). R. at 6.

Backstreets timely appealed, but Clemons ultimately determined that reorganization efforts would be fruitless since the city council informed him that Badlands would not offer a Plowing Contract for the following winter. R. at 6-7. Backstreets voluntarily converted its Chapter 11 case to Chapter 7. R. at 7. In April 2017, Steven Vin Sant was appointed as the Chapter 7 trustee to administer Backstreets' estate and liquidate its assets. R. at 7. The Thirteenth Circuit's Bankruptcy Appellate Panel stayed Backstreets' appeal in order for Vin Sant to become acclimated with the case. R. at 7. At the same time, Weinberg began pursuing collection efforts against Clemons on his personal guarantee of the loan. R. at 7. In May 2017, a creditors' examination of Clemons produced that since May of 2016 (around the time of Weinberg's initial suit against Clemons and Backstreets), Backstreets had transferred approximately $100,000 in cash to Clemons' daughter, Patti. R. at 7.

Weinberg provided Vin Sant with documentation and testimony to prove that the transfers were avoidable as fraudulent transfers. R. at 7. Vin Sant filed a complaint against Patti to avoid and recover the transfers, and the parties settled by Patti agreeing to pay $75,000 to the estate to satisfy the claims asserted in the adversary proceeding; the bankruptcy court approved the settlement. R. at 7. Weinberg, having incurred $25,000 in legal fees investigating Backstreets' transfers, filed a motion seeking allowance of a substantial contribution administrative expense. R. at 7. Vin Sant 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 granted Weinberg a $25,000 administrative expense. R. at 8. Vin Sant appealed. R. at 8.

In September 2017, Vin Sant received a letter from Tenth Avenue with an offer to purchase most of Backstreets' assets, including the snow plow trucks. R. at 8. The offer was contingent on Vin Sant successfully retrieving the trucks from Weinberg and conveying the trucks to Tenth Avenue. R. at 8. Vin Sant tried to consult with Weinberg about the trucks, but the negotiations were futile. R. at 8. Vin Sant continued prosecution against Weinberg for his alleged violation of the automatic stay in an attempt to pressure Weinberg into turning over the trucks so Vin Sant could close the sale with Tenth Avenue before winter. R. at 8. Tenth Avenue withdrew its offer in November 2017 since Weinberg would not release the trucks to Vin Sant. R. at 8. Stone Pony then offered $100,000 less for Backstreets' assets, excluding the trucks, in January 2018. Vin Sant accepted the offer, and the bankruptcy court approved the sale in February 2018. R. at 8-9.

Vin Sant refused to dismiss his two appeals against Weinberg after the court approved the sale with Stone Pony. R. at 9. First, Vin Sant pursued the appeal regarding the automatic stay, wanting to recover the difference between the offer initially made by Tenth Avenue and the sale proceeds received from Stone Pony as damages from Weinberg. R. at 9. Second, Vin Sant proceeded with his substantial contribution appeal. R. at 9. The Bankruptcy Appellate Panel consolidated the two actions and affirmed both decisions. R. at 9. Vin Sant appealed to the Thirteenth Circuit, and the court affirmed. R. at 16, 21. Vin Sant now appeals to this Court.

SUMMARY OF ARGUMENT

This Court should reverse the Thirteenth Circuit's decision because Weinberg's passive retention of Backstreets' snow plow trucks is a prohibited exercise of control over property of the estate. Four of six Circuit Courts agree that retaining property of the estate is a violation of the automatic stay, as the retention constitutes exercising control over property of the estate. The

Thirteenth Circuit adopted the "minority rule" from the two sister circuits that focus solely on the language "any act." This minority rule places additional burdens upon debtors and trustees, which in turn increases the costs of reorganizations, while decreasing the availability of assets central to a debtor's chances at a successful reorganization.

Instead, this Court should adopt the majority view and hold that the post-petition retention of property of the estate is a prohibited exercise of control under § 362(a)(3). The "majority rule" gives proper weight to the entire text of § 362(a)(3). Further, the majority rule's approach focuses on the entire text of § 362(a)(3) and honors the central purpose of reorganizations in bankruptcy rather than hindering it. Moreover, Congress' inclusion of the "exercising control" language in § 362(a)(3) through the 1984 Amendments evinces the intent to broaden the scope of § 362(a)(3) to include passive retention of property of the estate.

Additionally, the minority rule will cause confusion in the courts. Indeed, one court bound by the Tenth Circuit's decision in *In re Cowen* has already faced difficulty in applying the minority rule to other provisions in § 362(a) that contain the language "any act." Since the majority view affords appropriate weight to the entire statute and furthers the objectives of the Bankruptcy Code (the "Code") – especially in reorganization cases – this Court should resolve the circuit split and hold that the post-petition passive retention of property of the estate is a violation of § 362(a)(3).

Further, this Court should also hold that Weinberg, by refusing to return the snow plow trucks to Vin Sant, the trustee, violated his affirmative turnover duties under § 542(a). The Thirteenth Circuit failed to recognize that the plain language of § 542(a) evinces that the turnover obligations are an affirmative duty. Holding that the statutory command that entities "*shall* deliver to the trustee" property of the estate will allow debtors a meaningful chance at

reorganization, rather than forcing them to undertake multiple adversary proceedings to gather up all of the property of the estate. Moreover, Weinberg's knowing failure to turn over the snow plow trucks was a willful violation of the automatic stay. Since Weinberg willfully violated the automatic stay, Vin Sant is entitled to damages under § 362(k).

Alternatively, even if this Court determines that the minority view is correct, and that an "affirmative act" is required to violate § 362(a)(3), this Court should still reverse the Thirteenth Circuit because Weinberg's refusal to return the snow plow trucks to Vin Sant was, in fact, an affirmative act. Weinberg's refusal to turn over the snow plow trucks permitted him to exercise control over property of the estate as prohibited by § 362(a)(3). Therefore, even if this Court adopts the minority view, it should still reverse the Thirteenth Circuit's decision.

Turning to the second issue, Weinberg is not entitled to an administrative expense under § 503(b)(3)(D). Despite the fact that Weinberg made a substantial contribution to the estate, the purview of § 503(b)(3)(D) does not extend to cases under Chapter 7. The statute's plain language renders the allowance of administrative expenses exclusively to Chapter 9 and 11 cases. Specifically, the prefatory term "including" in the statute does not render the chapters included in § 503(b)(3)(D) as an illustrative list, nor does it diminish the exclusivity of Chapters 9 and 11 within its text.

The Thirteenth Circuit incorrectly adhered to a holding in a Sixth Circuit case that effectively rendered § 503(b)(3)(D) void. The court there employed principles of equity, though equity could have been found elsewhere in the Code's provisions. But, as the Thirteenth Circuit's dissent noted, the purpose of § 503(b) is to keep administrative expenses at a minimum to preserve the estate for the profit of creditors. The majority opinion fails to do so. Therefore,

this Court should reverse the Thirteenth Circuit's decision to grant Weinberg an allowed substantial contribution administrative expense in a Chapter 7 case.

ARGUMENT

The facts of this case are undisputed. R. at 3, n.2. Questions of statutory interpretation are purely legal. *In re Fairfield Sentry Ltd. Litig.*, 485 B.R. 665, 674 (S.D.N.Y. 2011). Thus, the questions on certiorari are questions of law and are reviewed de novo. *Cui Yan Lin v. Holder*, 365 Fed. App'x 311, 312 (2d Cir. 2010).

I. By retaining possession of Backstreets' snow plow trucks post-petition, Weinberg exercised control over property of the estate as prohibited by § 362(a)(3), violating the automatic stay.

This Court should reverse the decision of the United States Court of Appeals for the Thirteenth Circuit because the court failed to recognize that § 362(a)(3)'s prohibition of any entity's "exercise of control" over property of a bankruptcy estate encompasses "passive retention" of property of the estate. *See* 11 U.S.C. §§ 362(a)(3), 541 (2018). Here, Weinberg refused to return snow plow trucks essential to Backstreets' reorganization efforts. R. at 6. Weinberg therefore exercised control over property of the estate and violated the automatic stay.

Further, Weinberg neglected his affirmative duty to turn over property of the estate to Vin Sant under § 542(a). Read together, §§ 362(a)(3) and 542(a) create an affirmative duty for creditors to turn over property of an estate, which Weinberg failed to do. Additionally, multiple courts have recognized that a failure to turn over property of an estate pursuant to § 542 constitutes a willful violation of the automatic stay and, therefore, could result in sanctions and damages for the violation. *See* 5 COLLIER ON BANKRUPTCY ¶ 542.03 (16th ed. 2018).

Finally, even if this Court determines that an "affirmative act" is required to prove a violation of the automatic stay, as the minority of Circuit Courts of Appeal have suggested,

Weinberg's refusal to return the snow plow trucks still constitutes an "act" to "exercise control" under § 362(a)(3). His retention of Backstreets' estate property would, as a result, violate § 362(a)(3). Since Weinberg's post-petition retention of the snow plow trucks – undisputed property of the estate – is a violation of the automatic stay, or at least a violation of his affirmative duties under § 542(a) to turn over property of the estate to Vin Sant and therefore a willful violation of the automatic stay when read in conjunction with § 362(a)(3), this Court should reverse the Thirteenth Circuit's decision.

A. "Passive retention" of property of the estate is a prohibited "exercise of control" over property of the estate under § 362(a)(3).

1. This Court should adopt the majority rule because it accounts for the entire language of § 362(a)(3), rather than focusing solely on the term "act."

Weinberg, by retaining possession of the snow plow trucks after Backstreets filed its Chapter 11 petition, exercised control over property of Backstreets' estate and therefore violated the automatic stay. R. at 6. Section 362(a)(3) stays "any act to . . . *exercise control over* property of the estate" and clearly prohibits the post-petition retention of collateral that constitutes property of a debtor's bankruptcy estate. 11 U.S.C. § 362(a)(3) (emphasis added). Of the six Circuit Courts of Appeal to previously consider "passive violations" of the stay, only two have held that violating the automatic stay requires an affirmative act. *See Davis v. Tyson Prepared Foods, Inc. (In re Garcia)*, 740 Fed. App'x 163 (10th Cir. 2018); *see also WD Equip., LLC v. Cowen (In re Cowen)*, 849 F.3d 943 (10th Cir. 2017), *United States v. Inslaw, Inc.*, 932 F.2d 1467 (D.C. Cir. 1991). The Thirteenth Circuit joined the Tenth and D.C. Circuits by holding that a violation of the automatic stay requires an affirmative act. R. at 11. But the Thirteenth Circuit's decision fails to give meaning to the phrase "exercise control over property of the estate," instead focusing heavily on the word "act" in the section. *See* 11 U.S.C. § 362(a)(3).

In contrast, the Second, Seventh, Eighth, and Ninth Circuits have all held that retention of property of the estate post-petition amounts to "exercising control" and therefore violates § 362(a)(3). *See Weber v. SEFCU (In re Weber)*, 719 F.3d 72, 81 (2d Cir. 2013); *see also Thompson v. Gen. Motors Acceptance Corp., LLC*, 566 F.3d 699, 707-08 (7th Cir. 2009); *Knaus v. Concordia Lumber Co., Inc. (In re Knaus)*, 889 F.2d 773, 775 (8th Cir. 1989); *State of Cal. Emp't Dev. Dept. v. Taxel (In re Del Mission Ltd.)*, 98 F.3d 1147, 1151 (9th Cir. 1996). Unlike the minority rule, the majority of Circuit Courts successfully "'give effect . . . to every clause and word of [the] statute.'" *See Duncan v. Walker*, 533 U.S. 167, 174 (2001) (quoting *United States v. Manasche*, 348 U.S. 528, 538-539 (1955)) (internal citations omitted). This Court should likewise give effect to every clause and word of § 362(a)(3) and hold that the post-petition retention of property of the estate amounts to "exercising control" over property of the estate in violation of the automatic stay.

As the Thirteenth Circuit recognized, where "the meaning of a term that is neither considered a term of art *nor expressly defined by statute* is in question, courts should consult ordinary meanings contained in general and legal dictionaries." R. at 11 (citing *Asgrow Seed Co. v. Winterboer*, 513 U.S. 179, 187 (1995)) (emphasis added). Unlike the Thirteenth Circuit, however, the majority rule does not focus solely on the word "act" in § 362(a)(3), but also examines the phrase "exercise control," which plays an important role in understanding § 362(a)(3). *See In re Weber*, 719 F.3d at 79. *In re Weber* noted that reviewing an ordinary dictionary "confirm[s] that a typical definition of 'control' is: 'To exercise authority over; direct; command.'" *Id.* (quoting Webster's New World College Dictionary (4th ed. 2002)). This definition left the court with "no way to avoid the conclusion that, by keeping custody of the vehicle and refusing Weber access to or use of it, SEFCU was 'exercising control' over the

object . . . and its retention of the vehicle violated the stay." *Id.* at 79. Like SEFCU in *In re Weber*, Weinberg retained custody of the snow plow trucks and refused to allow Backstreets access to the trucks. R. at 6. By keeping custody of the snow plow trucks and refusing Backstreets access to or use of the trucks for reorganization purposes, Weinberg exercised control over the trucks and violated the automatic stay.

The Second Circuit in *In re Weber* also examined the legislative history of the Code, including The Bankruptcy Amendments and Federal Judgeship Act of 1984 (the "1984 Amendments"). *See In re Weber*, 719 F.3d at 80. The court noted that the 1984 Amendments broadened the language of § 362(a)(3) and the scope of the automatic stay "further to prohibit expressly not only 'acts to obtain possession' of property of the estate, but also 'any act . . . to exercise control over property of the estate.'" *Id.* (citing Pub. L. No. 98-353, 98 Stat. 333, 371). The 1984 Amendment's expansion was in line with "the Supreme Court's interpretation that Congress intended to prevent creditors from retaining property of the debtor in derogation of the bankruptcy procedure." *Id.* at 80.

Next, the Second Circuit considered the practical implications of adopting a rule similar to that of the Tenth and D.C. Circuits' decisions in *In re Cowen* and *Inslaw* respectively, noting that the minority rule places "on the debtor or trustee the burden of undertaking a series of adversary proceedings to pull together the bankruptcy estate, and thereby increase[s] the costs of administering the estate and decrease[s] the assets available to effect a successful reorganization." *Id.* The present case demonstrates the concerns *In re Weber* contemplated. Failing to recognize Weinberg's violation of the automatic stay decreased the assets available to Backstreets to effect a successful reorganization and ultimately required it to liquidate. *See* R. at 7.

Further, the Seventh Circuit considered a situation where a creditor, General Motors Acceptance Corporation, LLC ("GMAC"), refused to return a Chapter 13 debtor's vehicle to the debtor's estate. *Thompson v. General Motors Acceptance Corp., LLC*, 566 F.3d 699, 701 (7th Cir. 2009). The court examined the plain meaning of "exercising control" and determined that "[h]olding onto an asset, refusing to return it, and otherwise prohibiting a debtor's beneficial use of an asset all fit within" the Webster's Dictionary definition "as well as within the commonsense meaning of the word." *See id.* at 702. (quoting Merriam-Webster's Collegiate Dictionary (11th ed. 2003)). Additionally, the court posited that reducing the meaning of "exercising control" only to situations where property of the estate is sold or destroyed "would not be logical given the central purpose of reorganization in bankruptcy." *Id.* By electing to adopt the "commonsense meaning" of "exercising control" as the Seventh Circuit did, this Court will honor the central purpose of reorganization as well.

Next, the *Thompson* court looked to the history of § 362(a)(3) and determined that "Congress's decision to amend section 362 evinces its intent to expand the prohibited conduct beyond mere possession," and "the mere fact that Congress expanded the provision to prohibit conduct above and beyond obtaining possession of an asset suggests that it intended to include conduct by creditors who seized an asset pre-petition." *Id.* (citing *In re Del Mission Ltd.*, 98 F.3d at 1151; *In re Young*, 193 B.R. 620, 623 (Bankr. D.C. 1996)). Ultimately, the court held that GMAC's passive retention over Thompson's vehicle amounted to an exercise of control over the vehicle. *Id.* at 703. Since Weinberg, like GMAC, retained possession of the snow plow trucks post-petition, this Court should hold that Weinberg exercised control over the snow plow trucks within the meaning of § 362(a)(3).

The Ninth Circuit examined whether the California Employment Development Department and State Board of Equalization (the "State") violated the automatic stay by refusing to repay disputed taxes to Del Mission Limited. *In re Del Mission Ltd.*, 98 F.3d at 1149-50. The court examined the legislative history of § 362(a)(3), including the 1984 Amendments and relevant caselaw. *Id.* at 1150-52. After its examination, the court concluded that "'Congress did not intend to place the burden on the bankruptcy estate to absorb the expense of potentially multiple turnover actions, at least not without providing a means to recover damages sustained as a consequence thereof.'" *Id.* at 1151-52 (quoting *Abrams v. Southwest Leasing & Rental Inc. (In re Abrams)*, 127 B.R. 239, 243 (B.A.P. 9th Cir. 1991)). The Ninth Circuit *In re Del Mission Ltd.* adopted the Ninth Circuit Bankruptcy Appellate Panel's interpretation of the effect of the 1984 Amendments to the Code: that the scope of § 362(a)(3) was broadened "to proscribe the mere knowing retention of estate property." *Id.* at 1151 (citing *In re Abrams*, 127 B.R. at 241-43).

Prohibiting creditors like Weinberg from retaining possession of estate property honors "the underlying purpose of the automatic stay, which is to alleviate the financial strains of the debtor." *Id.* Here, Backstreets' financial strains would have been alleviated had the snow plow trucks been available to it during post-petition reorganization. Moreover, "the onus to return estate property is placed upon the possessor; it does not fall on the debtor to pursue the possessor." *Id.* (quoting *In re Abrams*, 127 B.R. at 243). Regrettably, Backstreets did not have the benefit of its financial strains being alleviated and, as a result, did not have a meaningful opportunity at reorganization. By adopting the minority rule, this Court would substantially decrease the chances at successful reorganizations under Chapter 11 of the Code. Reducing reorganization chances would not only harm debtors, but also creditors who may see a lower distribution in cases liquidated under Chapter 7.

Just as the dissent suggested in the Thirteenth Circuit's opinion, "withholding possession 'is the essence of exercising control' over property." R. at 24 (quoting *TranSouth Fin. Corp. v. Sharon (In re Sharon)*, 234 B.R. 676, 682 (B.A.P. 6th Cir. 1999). Again, "'Congress did not intend to place the burden on the bankruptcy estate to absorb the expense of potentially multiple turnover actions, at least not without providing a means to recover damages sustained as a consequence thereof.'" *In re Del Mission Ltd.*, 98 F.3d at 1151-52 (quoting *In re Abrams*, 127 B.R. at 243). And just like the State in *In re Del Mission, Ltd.* only needed to knowingly retain disputed taxes to violate the automatic stay, Weinberg's knowing retention of the snow plow trucks here is an equally strong example of a clear violation of § 362(a)(3). *See id.* at 1152.

Additionally, the Eighth Circuit in *In re Knaus* considered a case where a debtor demanded the return of property of the estate after it filed a chapter 11 petition, and the creditor refused to comply with the debtor's demands. *In re Knaus*, 889 F.2d at 774. There, the court determined that there was no "distinction between a failure to return property taken before the stay and a failure to return property taken after the stay." *Id.* at 775. Weinberg failed to return the snow plow trucks upon Backstreets filing its Chapter 11 petition, which amounts to a prohibited attempt to exercise control over property of the estate in violation of the automatic stay, similar to the creditor in *In re Knaus*. *See id.*

The holdings of the majority of Circuit Courts of Appeal to consider whether a creditor violates § 363(a)(3) after passively retaining property of the estate have all determined that passive retention indeed does amount to exercising control over property of the estate and therefore violates the automatic stay. Each opinion based its holdings on sound reasoning, accounting for the appropriate rules of statutory construction, the legislative history of the Code, and the overall objectives of the Code. The minority view, on the other hand, runs counter to the

purpose of the automatic stay, vitiating a debtor's opportunity for breathing room and diminishing a debtor's chance at a successful reorganization.

Further, holding that the automatic stay requires an "affirmative act" for a violation places far too much weight on the word "act" and effectively ignores the phrase "exercise control" in the statute. The minority rule also ultimately increases the cost of administering the estate by forcing the debtor-in-possession or trustee to initiate multiple adversary proceedings to effectuate the return of property of the estate that all entities have an affirmative duty to return under the Code. Therefore, this Court should hold that a creditor like Weinberg who passively retains property of the estate exercises control of property of the estate and, as a result, violates the automatic stay.

2. The minority rule from *In re Cowen* is incompatible with other provisions within § 362(a) and will ultimately result in confusion among the courts.

If this Court adopts the minority rule advanced by the Thirteenth Circuit now, the rule will adversely affect the administration of other provisions in § 362(a) because the minority rule is incompatible with the entirety of § 362(a). Indeed, in the short time since the Tenth Circuit decided *In re Cowen*, at least one bankruptcy court within the Tenth Circuit has already faced the inadequacies of the minority rule when applying § 362(a)(4). Focusing on § 362(a)(3)'s language describing its "stay . . . of . . . any act," the Tenth Circuit held that § 362(a)(3) only encompasses affirmative acts to obtain possession of or exercise control over property of the estate. *In re Cowen*, 849 F.3d at 949. Unfortunately, the Tenth and Thirteenth Circuits failed to consider the effect that its decisions would have on other provisions within § 362(a) that describe "any act."

Section 362(a)(4) provides that the filing of a bankruptcy petition "operates as a stay, applicable to all entities, of . . . any act to create, perfect, or enforce any lien against property of the estate." 11 U.S.C. § 362(a)(4). In *In re Garcia*, the Bankruptcy Court for the District of Kansas encountered difficulty in applying the rule from *In re Cowen* to other subsections in § 362(a) that also contemplate "any act." *See generally Davis v. Tyson Prepared Foods, Inc. (In re Garcia)*, No. 13-10458, 2017 WL 2951439, at *1 (Bankr. D. Kan. July 7, 2017).

In *In re Garcia*, the debtor slipped and fell while working at Tyson Foods. *Id.* at *1. After the debtor filed for bankruptcy, the debtor settled her personal injury claim with Aramark for placing the wet floor mat at her workplace. *Id.* The debtor's employer, Tyson, then claimed subrogation rights and "a lien against the settlement proceeds to recoup the $22,061.25 in workers compensation benefits" paid to the debtor post-petition. *Id.* The Chapter 13 trustee argued that Tyson's lien was "void because Tyson created it post-petition in violation of the automatic stay." *Id.* at *3.

Tyson's right to subrogation arose when the debtor "settled her action against Aramark, resulting in a 'recovery.'" *Id.* at *4. This subrogation right was secured by a statutory lien under Kansas law. *See id.* The *In re Garcia* court noted that in two of its prior decisions involving an almost identical statute creating a statutory lien post-petition, it followed the majority rule and held that "[b]y 'asserting the [PIP] lien post-petition,' the insurers acted to create, perfect, or enforce a lien against property of the estate in violation of § 362(a)(4)." *See id.* at *5 (discussing the court's prior decisions in *Nazar v. Allstate Ins. Co. (In re Veazey)*, 272 B.R. 486 (Bank. D. Kan. 2002) and *In re White*, 297 B.R. 626 (D. Kan. 2003)).

The bankruptcy court continued, discussing *In re Cowen* and concluded that it was "duty bound" to follow the decision. *Id* at *5-6. Then, the court contemplated the broad reach of *In re*

Cowen: "[w]hile it does not specifically address the creation of a statutory subrogation lien, it provides controlling authority interpreting the words 'any act' as used in § 362(a)." *Id.* at *6. On appeal, the Tenth Circuit declined to revisit the validity of *In re Cowen* without sitting *en banc*. *See Davis v. Tyson Prepared Foods, Inc. (In re Garcia)*, 740 Fed. App'x 163, 164 (10th Cir. 2018).

The problem with applying the minority rule to § 362(a) is highlighted by the number of sections that incorporate the "any act" language: §§ 362(a)(3), (4), (5), and (6). Since "'identical words used in different parts of the same statute are . . . presumed to have the same meaning'," the minority rule applied to § 362(a)(3) in *In re Cowen* would necessarily apply to each subsection including the "any act" language, resulting in inconsistent opinions like the bankruptcy court's decision in *In re Garcia*. *See Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 86 (2006) (quoting *IBP, Inc. v. Alvarez*, 546 U.S. 21, 34 (2005)).

Since the application of the minority rule from *In re Cowen* would ultimately be applied by courts to each subsection with identical language within § 362(a), this Court should decline to adopt a rule with such sweeping implications. Otherwise, confusion and inconsistency in the courts could ensue, just as it did in the bankruptcy court of *In re Garcia*.

B. Weinberg's violation of his affirmative duty to turn over property of the estate under § 542 is a willful violation of the automatic stay.

Weinberg had an affirmative duty under § 542(a) to turn over the snow plow trucks to Vin Sant. Weinberg's failure to do so amounts to a willful violation of the automatic stay under § 362(k). *See* 5 COLLIER ON BANKRUPTCY ¶ 542.03 (16th ed. 2018) ("[t]he turnover requirement is an affirmative duty that arises upon the filing of the bankruptcy petition"); *see also Mwangi v. Wells Fargo Bank, N.A. (In re Mwangi)*, 432 B.R. 812, 823 (B.A.P. 9th Cir. 2010); *Cornerstone Prods., Inc. v. Pilot Plastics, Inc. (In re Cornerstone Products, Inc.)*, 2007 B.R. LEXIS 4101, *1

(Bankr. E.D. Tex. Dec. 5, 2007). As a result of Weinberg's willful violation, Vin Sant is entitled to damages under § 362(k).

1. Weinberg failed to comply with his affirmative turnover duties under § 542(a).

Contrary to the Thirteenth Circuit's holding, the plain language of § 542(a) clearly evinces that it is a self-executing provision, which Weinberg failed to comply with. This Court's decision in *Whiting Pools*, along with the Second and Seventh Circuit's interpretations of the interplay between §§ 362(a)(3) and 542(a), indicate that the Thirteenth Circuit incorrectly analyzed the duties imposed by § 542(a). *See United States v. Whiting Pools*, 462 U.S. 198 (1983). This Court should instead endorse the Thirteenth Circuit's dissenting opinion and recognize the affirmative duty of an entity in possession of property of the estate to turn over property of the estate to a debtor-in-possession or trustee. Otherwise, the minority rule would impose "piecemeal assembly of the estate," resulting in a denial to debtors of "any realistic prospect of reorganization and fresh start" and a deprivation to creditors "of the maximum distribution of estate assets due to increased costs of administration." R. at 27 (Moon, J., dissenting).

The Thirteenth Circuit's reasoning that Weinberg should be able to retain possession of property of the estate until receiving adequate protection of his possessory lien is of no moment. While it is true that Weinberg is entitled to adequate possession of his interest, the Code provides procedures for securing such adequate protection. Specifically, Weinberg could have suggested "'terms of adequate protection,'" but it could not "'unilaterally condition the return of the property on its own determination of adequate protection.'" *See Mitchell v. BankIllinois*, 316 B.R. 891, 901 (S.D. Tex. 2004) (quoting *In re Sharon*, 233 B.R. at 104). Instead, the adequate protection measures may have been "'determined by the bankruptcy court, not by the creditor.'"

Id. Weinberg could not have conditioned the return of property of the estate upon assurances of adequate protection. Rather, Weinberg could have utilized the protections afforded to creditors under § 362(e).

Further, the Second Circuit examined a similar assertion from a creditor and ultimately held that prior to receiving adequate protection, "[t]he Code requires the creditor first to surrender the property" and that "[o]nly then or in conjunction with that surrender may it proceed to 'request' from the Bankruptcy Court 'adequate protection' for its interests." *In re Weber*, 719 F.3d at 81 (citing 11 U.S.C. §§ 362(d), (e)). The court continued, noting that "[t]he provisions authorizing imposition of such protection operate only upon application of the creditor to the Bankruptcy Court" and "[u]nlike section 542(a), these are not self-executing." *Id.* This Court should also recognize that the plain language of § 542(a), providing that "an entity . . . in possession, custody, or control . . . of property that the trustee may use, sell, or lease under section 363 . . . *shall* deliver to the trustee . . . such property . . . ," is self-executing and creates an affirmative duty for creditors to turn over property of the estate. *See* 11 U.S.C. § 542(a) (emphasis added). By refusing to turn over the snow plow trucks to Vin Sant, Weinberg neglected his affirmative duty. R. at 6.

2. Failure to turn over property of the estate under § 542(a) amounts to a willful violation of the automatic stay, entitling Vin Sant to damages.

The Thirteenth Circuit's decision also fails to recognize that "[t]he failure of an entity in possession of estate property to turn over the property to the trustee would be a violation of section 362(a)(3)." *See* 3 COLLIER ON BANKRUPTCY ¶ 362.01[5] (16th ed. 2018). Section 542(a) provides that:

> [A]n entity, other than a custodian, in possession, custody, or control, during the case, of property that the trustee may use, sell, or lease under section 363 of this title . . . *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) (emphasis added). This Court addressed the application of § 542(a) in *United States v. Whiting Pools, Inc.* and determined that § 542(a) is a provision that "bring[s] into the estate property in which the debtor did not have a possessory interest at the time the bankruptcy proceedings commenced," and that § 542(a) "requires an entity . . . holding any property of the debtor . . . to turn that property over to the trustee." 462 U.S. at 205. Additionally, the *Whiting Pools* Court concluded that "property of the debtor repossessed by a secured creditor falls within this rule." *Id.* at 206. The trucks that Weinberg repossessed clearly fall within this Court's understanding of property subject to § 542(a)'s turnover obligations, and the statute provided a clear command to Weinberg to deliver the trucks to Vin Sant.

Further, there is support for reading and applying §§ 362(a)(3) and 542(a) together. In 2009, the Seventh Circuit found that GMAC exercised control over the debtor's vehicle by refusing to return the vehicle to the bankruptcy estate. *See Thompson*, 566 F.3d at 703. The *Thompson* Court held that by doing so, GMAC's passive retention of the vehicle violated the automatic stay. *Id.* Like GMAC in *Thompson*, Weinberg refused to return the trucks to the bankruptcy estate and therefore exercised control over property of the estate. R. at 6. Further, when read together, §§ 542(a) and 362(a)(3) support an automatic turnover duty with respect to property repossessed prepetition. *See Brown v. Joe Addison, Inc. (Matter of Brown)*, 210 B.R. 878, 882 (Bankr. S.D. GA 1997). Moreover, the Second Circuit supports reading §§ 362(a)(3) and 542(a) together:

> In our view, the plain language of section 542 (directing that those in custody of assets of the estate 'shall deliver' them to the trustee); the approach of the *Whiting Pools* Court to equitable interests and bankruptcy estates; and the broad language of the 1984 Amendments enlarging the scope of the automatic stay point

> unmistakably away from any Congressional desire to impose such an additional burden on debtors seeking bankruptcy protection.

In re Weber, 719 F.3d at 80. The Second Circuit ultimately decided that § 362 "requires a creditor in possession of property seized as security . . . to deliver that property to the trustee or debtor-in-possession promptly after the debtor has filed a petition in bankruptcy." *See id.* at 81. Additionally, the Eighth Circuit previously discussed the turnover duties of creditors under § 542 and held that "[t]he failure to fulfill this duty, regardless of whether the original seizure was lawful, constitutes a prohibited attempt to 'exercise control over the property of the estate' in violation of the automatic stay." *See In re Knaus*, 889 F.2d at 775.

This Court's decision in *Whiting Pools*, along with the Seventh and Eighth Circuits' examination of the obligations imposed upon a creditor under § 542(a) and the connection of those obligations to § 362(a)(3), support a rule providing that a violation of § 542(a) amounts to a violation under §362(a)(3) as an improper exercise of control over property of the estate. Also, by retaining property of the estate with knowledge of the stay, Weinberg's exercise of control over property of the estate is not only a *per se* violation of § 362(a)(3), but a willful violation of the automatic stay under § 362(k). *See* 11 U.S.C. § 362(k).

Where a creditor like Weinberg knowingly neglects their turnover obligations, the stay violation is willful. *See Friendly Fin. Disc. Corp. v. Gaston*, No. 07-2196, 2008 WL 4330467, at *4 (W.D. La. Sept. 17, 2008) (noting that the Fifth Circuit regards a willful violation as a violation where an entity is "acting with knowledge of the stay"); *see also* 3 COLLIER ON BANKRUPTCY ¶ 362.12[3] (16th ed. 2018). Further, "[a] willful violation of the automatic stay occurs when the creditor acts deliberately with knowledge of the bankruptcy petition." *Mitchell*, 316 B.R. at 901 (quoting *In re Sharon*, 234 B.R. at 687). A creditor's "belief that withholding

possession would not violate a stay does not preclude a finding of willful violation of 362(h)."[1] *Id.* In *Mitchell*, the District Court for the Southern District of Texas considered whether BankIllinois' post-petition retention of a debtor's vehicle violated the automatic stay. *See id.* at 901. The court found that the retention of the vehicle was a violation of the stay and considered whether the violation was willful. *Id.* The court ultimately found that the violation was willful. *Id.*

Since Weinberg had knowledge of Backstreets' petition, and since he knowingly refused to return property of the estate, Weinberg willfully violated the automatic stay. Therefore, Vin Sant is entitled to collect damages for the benefit of Backstreets' estate. *See* 11 U.S.C. § 362(k) (providing that a party in interest harmed by a willful violation of the automatic stay is entitled to damages); *see also St. Paul Fire & Marine Ins. Co. v. Labuzan*, 579 F.3d 533, 544 (5th Cir. 2009) (discussing a trustee's ability to recover damages for willful violations of the automatic stay in light of § 1109(b)).

C. Alternatively, even if § 362(a)(3) requires an "affirmative act" for a violation, Weinberg still violated the automatic stay because his refusal to return the property of the estate is an "act" itself.

Even if this Court determines that a violation of the automatic stay requires an "affirmative act," Weinberg still violated the automatic stay because his refusal to turn over the trucks amounted to an affirmative act to exercise control over property of the estate. In *In re Cowen*, the Tenth Circuit determined that § 362(a)(3) only prohibited "entities from *doing* something to obtain possession of or to exercise control over the estate's property," and did not apply to "'the act of passively holding onto an asset.'" *In re Cowen*, 849 F.3d at 949 (quoting *Thompson*, 566 F.3d at 703) (emphasis in original). The court additionally stated that

[1] Section 362(h) is the predecessor to § 362(k). *See generally In re Silk*, 549 B.R. 297, 300 n.4 (Bankr. D. Mass. 2016)

§ 362(a)(3) does not "impose an affirmative obligation to turnover property to the estate." *See id.* at 949. The Tenth Circuit in *In re Cowen*, and therefore the Thirteenth Circuit as well, were incorrect. *See* Claudia A. Restrepo, *A Pro Debtor and Majority Approach to the 'Automatic Stay' Provision of the Bankruptcy Code—In re Cowen Incorrectly Decided*, 59 B.C. L. REV. E-SUPPLEMENT 537, 551 (May 24, 2018) (arguing that the Tenth Circuit in *In re Cowen* "undermined important policy considerations surrounding bankruptcy and the automatic stay").

The Tenth and Thirteenth Circuits failed to appreciate that refusing to turn over property of an estate is, in fact, an "act" that prevents debtors from accessing property of the estate that is instrumental in rehabilitation efforts. *See* R. at 23 (Moon, J., dissenting). Weinberg's refusal to turn over the trucks amounted to an affirmative act to exercise control over property of the estate. Indeed, "when applying the appropriate canons of construction, it is natural to give the term 'act' the broadest meaning when construing the expansively-interpreted language in section 362(a)(3)." *In re Peake*, 588 B.R. 811, 832 (Bankr. N.D. Ill. 2018) (comparing different treatments of the word "act" in §§ 362(a)(3) and 362(b)(3)). It was therefore improper for the Tenth and Thirteenth Circuits to interpret the term "act" in § 362(a)(3) so narrowly.

The undisputed facts show that Weinberg, by refusing to return the property of the estate, committed an act to exercise control over property of Backstreets, in direct violation of § 362(a)(3). Weinberg testified to the bankruptcy court that he "refused to return the vehicles" after Backstreets' attorneys sent Weinberg a letter demanding that the snow plow trucks be returned immediately. R. at 6. The "affirmative act" that Weinberg committed was his refusal to return the vehicles to Backstreets. This refusal allowed Weinberg to continue exercising control over property of the Backstreets' estate—a clear violation of § 362(a)(3). Interpreting the term "act" in § 362(a)(3) to encompass a refusal to return property would further the purpose of the

automatic stay by allowing debtors breathing room and a better chance at reorganization. Therefore, this Court should hold that Weinberg's refusal to return the trucks was an affirmative act to exercise control over property of the estate and reverse the decision of the Thirteenth Circuit.

II. Administrative expenses for substantial contribution to an estate are impermissible in a Chapter 7 case because § 503(b)(3)(D) expressly limits such expenses to cases under Chapters 9 and 11 in the Code.

This Court should reverse the Thirteenth Circuit's decision that allows Weinberg an administrative expense in the amount of $25,000 because he is not entitled to such an expense under § 503(b)(3)(D). Under the plain language of § 503(b)(3)(D), Weinberg may not acquire an administrative expense, despite the fact that he made a substantial contribution to the estate, because the purview of § 503(b)(3)(D) does not extend to cases under Chapter 7 of the Code. The statute's plain language renders the allowance of administrative expenses exclusively to Chapter 9 and 11 cases. *See* 11 U.S.C. § 503(b)(3)(D).

In addition to the statute being plain on its face, the Congressional intent behind the statute's drafting implies that Congress did not intend for substantial contribution to extend to Chapter 7 cases. Because the present case was converted by Backstreets from a Chapter 11 case to a Chapter 7 case before Weinberg filed the motion seeking allowance of substantial contribution administrative expense, Weinberg's claim is not entitled to priority as an administrative expense under § 503(b)(3)(D). R. at 7.

Further, the allowance of substantial contribution administrative expenses in Chapter 7 cases would result in an unfortunate effect on bankruptcy courts and would have a negative impact as a matter of public policy. The expansion of parties in interest that may be granted an expense would naturally be followed by more administrative claimants, which would in turn

require more individual inquiries and create a strain on bankruptcy courts. The goal of maintaining administrative expenses to preserve the estate for the benefit of creditors would be severely weakened by the inclusion of Chapter 7 cases. Because of the negative effect that reading Chapter 7 into § 503(b) would have, and the explicit exclusion of Chapter 7 within the statute, this Court should reverse the Thirteenth Circuit's decision granting Weinberg's motion for a substantial contribution administrative expense.

A. Section 503(b)(3)(D)'s language clearly confines the allowance of administrative expenses for substantial contribution to only Chapters 9 and 11 with its expressive and exclusive wording.

1. The prefatory term "including" does not render the chapters included in § 503(b)(3)(D) as an illustrative list, nor does it diminish the exclusivity of Chapters 9 and 11 within the statute.

Weinberg's claim is not entitled to priority as a substantial contribution administrative expense because claims under Chapter 7 of the Code are excluded from the exhaustive list of chapters within § 503(b)(3)(D). "It is well established that 'when the statute's language is plain, the sole function of the courts—at least where the disposition required by text is not absurd—is to enforce it according to its terms.'" *Hartford Underwriters Ins. Co. v. Union Planters Bank, N. A.*, 530 U.S. 1, 6 (2000) (internal quotation marks omitted) (quoting *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989)). Here, while § 503(b) may contain illustrative language that lends itself to a non-exhaustive list, the specific provision of § 503(b)(3)(D) places limitations on the chapters of the Code where administrative expenses for substantial contributions shall be allowed. Therefore, this Court should find that Weinberg's Chapter 7 claim does not fall under § 503(b) by looking to the express allowance of only Chapters 9 and 11 claims in subsection § 503(b)(3)(D).

The granting of administrative expenses within § 503(b) contains the prefatory word, "including," followed by a list of nine administrative expense claims that are permissible under the statute. *See generally* 11 U.S.C. § 503(b). One of these listed expenses, § 503(b)(3)(D), specifically provides an expenditure allowance to a creditor, indenture trustee, an equity security holder, or a committee who has made a "substantial contribution in a case under chapter 9 or 11" of the Code. 11 U.S.C. § 503(b)(3)(D).

Under § 503(b), the term "including" may evince a non-exhaustive list of categories under which a party in interest may be entitled to administrative expenses. But under § 503(b)(3)(D), however, the only chapters that a party in interest may be allowed expenses under are explicitly mentioned. Only under Chapter 9 and Chapter 11 may a party in interest be allowed a substantial contribution administrative expense. While the general list in § 503(b) may be non-exhaustive, the chapters of the Code mentioned in the § 503(b)(3)(D) provision mandate that claims arising under any other chapter of the Code are impermissible.

On its face, § 503(b) contains a generalized list of instances where a party in interest may recover expenses. There may be instances, other than the nine listed within the statute, where the Court may see fit to grant an administrative expense. To ignore a provision within the very same statute that explicitly confines substantial contribution administrative expenses to Chapter 9 and 11 exclusively, however, would render all of § 503(b)(3)(D) void. As the Thirteenth Circuit's dissent correctly recognized, the majority of courts have held that § 503(b)(3)(D) precludes courts from granting administrative expenses for substantial contributions made in Chapter 7 cases. *See* R. at 28.

The Ninth Circuit held that "[t]he proper interpretation of § 503(b)(3)(D) is that it does not authorize administrative priority for expenses incurred in a chapter 7 case or after a case has

been converted from chapter 11 to chapter 7." *Mosier v. Kupetz (In re United Educ. & Software)*, 2005 B.R. LEXIS 3408 (Bankr. C.D. Cal. 2005); *see also Lebron v. Mechem Fin. Inc.*, 27 F.3d 937, 944-945 (3d Cir. 1994); *In re United Container LLC*, 305 B.R. 120, 128 (Bankr. M.D. Fla. 2003); *In re Alumni Hotel Corp.*, 203 B.R. 624 (E.D. Mich. 1996).

The Second Circuit expressed a similar concern over the extent of flexibility that the bankruptcy courts may employ by expanding the § 503(b) to include more than what is listed in the statute. *Davis v. Elliot Mgmt. Corp. (In re Lehman Bros. Holdings Inc.)*, 508 B.R. 283 (2d Cir. 2014). The court there held that while a certain amount of flexibility is required, "the federal scheme cannot remain comprehensive if interested parties and bankruptcy courts in each case are free to tweak the law to fit their preferences." *Id*. at 294. The Second Circuit posited that though the term "including" may suggest that the list is not exhaustive, in actuality, the term modifies "administrative expenses" and implies that the list describes all administrative expenses. *Id*. at 289. Therefore, as the court held, "while there can be some administrative expenses that are not listed in § 503(b), they must nonetheless fall within § 503(b)'s interstices." *Id*. This Court should therefore reverse the Thirteenth Circuit because Weinberg's claim does not fall within § 503(b)'s interstices.

2. The intent of Congress is clear in its drafting of § 503(b)(3)(D) and implies that substantial contribution administrative expenses are prohibited in Chapter 7 cases.

This Court should examine the Congressional intent behind the exclusion of Chapter 7 within the statute, and in doing so, hold that Chapter 7 was omitted from § 503(b)(3)(D) because substantial contribution administrative expenses cannot exist in Chapter 7 cases. The doctrine of *expressio unius est exclusion alterius* – the expression of one thing excludes the other – directly applies when analyzing the inclusion of only two chapters of the Code within § 503(b)(3)(D).

Carval Inv'rs UK Ltd. v. Giddens (In re Lehman Bros.), 506 B.R. 346, 357 (S.D.N.Y. 2014). This canon is applicable if it is reasonable to assume that Congress considered an unaddressed possibility and still chose to ignore it. *Id.* To determine the reasonableness of Congress' decision, it requires "identifying a series of two or more terms or things that should be understood to go hand in hand, which is abridged in circumstances supporting a sensible inference that the term left out must have been meant to be excluded." *Id.* (quoting *Chevron U.S.A. v. Echazabal*, 536 U.S. 73, 81 (2002)).

Here, Chapters 9 and 11 are indeed identifiable in § 503(b)(3)(D). Further, it is understood that these two chapters of the Code may be distinguished from Chapter 7. The purpose of § 503 is to allow repayment of administrative expenses to all creditors in order to induce entities to do business with debtors following bankruptcy. *See* 4 COLLIER ON BANKRUPTCY ¶ 503.10 (16th ed. 2018). The policies set forth within the statute are crafted to promote such successful reorganization efforts. *In re Armorflite Precision, Inc.*, 43 B.R. 14, 16 (Bankr. D. Me. 1984). While Chapters 9 and 11 aim to allow effective reorganization, Chapter 7 centers around liquidation of the debtor's assets. *See* 6 COLLIER ON BANKRUPTCY ¶ 700.01 (16th ed. 2018) ("Chapter 7, colloquially known as 'straight bankruptcy,' is the 'operative' chapter of the Bankruptcy Code that normally governs liquidation of a debtor."). This distinction is important when considering why Chapter 7 was explicitly excluded from § 503(b)(3)(D) and in ascertaining why Chapters 9 and 11 were included.

Yet another distinction is the main actor under each chapter of the Code. In Chapter 7, the primary role at the outset of the case belongs to the trustee, whose task when appointed is to gather the pre-petition assets of the estate and liquidate them. The outcomes under Chapters 9 and 11 compared to Chapter 7's are also distinct. A confirmed plan under Chapters 9 and 11

bind any creditors and debtors. *See* 11 U.S.C. §§ 944, 1141. In Chapter 7, however, any assets not administered at the time of closing of the case are abandoned back to the debtor, and corporate debtors are not granted a discharge. *See* 11 U.S.C. § 554(c). In terms of corporate Chapter 7 cases, the creditor is able to continue to seek un-administered assets, even after the closure of the case. *See* 11 U.S.C. § 727(a). Because Chapter 7 liquidations are distinct from the reorganization efforts outlined in Chapters 9 and 11, it is clear that Congress chose to purposefully leave Chapter 7 out of the statute primarily because this chapter does not promote reorganization efforts of the debtor.

Congress "says in a statute what it means and means in a statute what it says there." *Conn. Nat. Bank v. Germain*, 503 U.S. 249, 254 (1992). This Court recently considered a question of Congressional intent similar to the present case. *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 638 (2012). In *RadLAX*, the Seventh Circuit affirmed a bankruptcy court's holding that a "cramdown" bankruptcy plan did not comply with the requirements within § 1129(b)(2)(A). *Id.* at 643. The petitioner bank argued that the "cramdown" plan should be allowed under the general provision of the statute, and that the specific provision did not forbid the plan. *Id.* at 642. Upon review, this Court affirmed the Seventh Circuit's holding, finding that "nothing in the generalized statutory purpose of protecting secured creditors can overcome the specific manner of that protection which the text of § 1129(b)(2)(A) contains." *Id.* at 649.

Ultimately, this Court looked to the Congressional intent behind the enactment of § 1129(b)(2)(A) and considered the staple of statutory construction that specific provisions within a statute govern the general. *Id.* at 645 (citing *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992)). This Court held that this canon is primarily "true where, as in

§ 1129(b)(2)(A), 'Congress has enacted a comprehensive scheme and has deliberately targeted specific problems with specific solutions.'" *Id*. (quoting *Varity Corp. v. Howe*, 516 U.S. 489, 519 (1996) (Thomas, J., dissenting)).

Congress employed the identical approach when drafting § 503(b)(3)(D). The generalized provision, § 503(b), which contains the word "including," contains a priority list of allowable administrative expenses; however, within it is the specific language that substantial contribution administrative expenses are allowable in Chapters 9 and 11. Congress' intent is clear: substantial contribution administrative expenses were not intended to be granted in Chapter 7 cases. Therefore, this Court should reverse the Thirteenth Circuit and hold that Weinberg is not entitled to a substantial contribution administrative expense here.

B. Relying on equitable principles to find that § 503(b)(3)(D) allows for substantial contribution administrative expenses eliminates all restrictions for such allowances and renders § 503(b)(3)(D) void.

This Court should reverse the Thirteenth Circuit's decision because in allowing Weinberg a substantial contribution administrative expense, the court essentially rendered § 503(b)(3)(D) void. The Thirteenth Circuit reasoned that because the term "including" appears to be non-exhaustive, it possessed authority to allow administrative expenses for substantial contribution to the estate in Chapter 7 cases. The court failed, however, to consider that by allowing administrative expenses under Chapter 7 cases, the court eliminated all restrictions on administrative expense allowances. As the dissent correctly acknowledged, "[t]his could not have been Congress' intent." R. at 32.

In reaching its incorrect conclusion, the Thirteenth Circuit relied on the minority approach adopted by the Sixth Circuit in *In re Connolly*. *Mediofactoring v. McDermott (In re Connolly N. Am., LLC)*, 802 F.3d 810 (6th Cir. 2015); *see* R. at 17. In *In re Connolly*, a creditor

made a substantial contribution to the bankruptcy estate in a Chapter 7 case. *Id.* at 813. The creditor requested attorney's fees and costs under § 503(b). *Id*. The bankruptcy court denied the application, stating that

> Congress's failure to extend § 503(b)'s express provision for reimbursement for a creditor that makes a substantial contribution in a case under Chapter 9 or 11 . . . to a creditor making such a contribution in a case under Chapter 7 reflected 'a Congressional intent' to deny reimbursement in Chapter 7 cases.

Id. at 814. The creditor appealed to the Sixth Circuit, and the appellate court reversed and remanded. *Id*. at 819.

The Sixth Circuit relied on principles of equity where the bankruptcy courts possess the power to make decisions that are "unimpeachable so long as these powers are 'exercised within the confines of the Bankruptcy Code.'" *Id.* at 814 (citation omitted). By this logic, bankruptcy courts have unlimited power to disregard the statute's meaning and interpret any rule as exactly what it deems to be equitable. The dissent in *In re Connolly* argued that notwithstanding the bankruptcy court's authority, the majority reached too far when relying on the term "including" in the introductory provision and disregarded the "explicitly narrower language" in § 503(b)(3)(D), which does not incorporate Chapter 7 within its scope. *Id.* at 820 (O'Malley, J., dissenting).

The Thirteenth Circuit's dissenting opinion here posits that the majority's attempt in *In re Connolly* to provide creditors relief is unnecessary because Congress has allotted means for creditors to recover in statutes separate from § 503(b). R. at 31. (Moon, J., dissenting). The purpose of § 503(b) is to keep administrative expenses at a minimum to preserve the estate for the profit of creditors. *See* 4 COLLIER ON BANKRUPTCY ¶ 503.10 (16th ed. 2018). The inclusion of Chapter 7, as with any other chapter that a court believes will promote equity, is inconsistent with the goal of § 503(b). It is clear that Congress specifically excluded Chapter 7 from

§ 503(b)(3)(D) because this chapter is distinct from Chapters 9 and 11. As noted repeatedly by this Court, when a statute is plain on its face, no judicial construction is necessary. *See, e.g., Demarest v. Manspeaker.*, 498 U.S. 184, 190 (1991) (when statutory language is unambiguous, "judicial inquiry is complete except in rare and exceptional circumstances.").

Here, § 503(b)(3)(D) exclusively allows parties in interest to receive administrative expenses for substantial contribution to the estate in Chapters 9 and 11 only. Under the precept of *expressio unius est exclusion alterius*, the expression of Chapters 9 and 11 in § 503(b)(3)(D) excludes Chapter 7. Weinberg's substantial contribution claim is not entitled to an administrative expense under § 503(b)(3)(D). Thus, this Court should reverse the decision of the Thirteenth Circuit.

CONCLUSION

The Thirteenth Circuit was incorrect in both of its holdings. First, Weinberg's passive post-petition retention of Backstreets' snow plow trucks was a prohibited exercise of control under § 362(a)(3) that blocked Backstreets' reorganization efforts entirely. Additionally, Weinberg neglected his affirmative duty to turn over the snow plow trucks under § 542(a), which amounts to a willful violation of the automatic stay entitling Vin Sant to damages under § 362(k). Moreover, even if this Court holds that passive retention is not equivalent to exercising control, this Court should nonetheless find that the refusal to return property of the estate to the trustee amounts to an "act" to exercise control over property of the estate and violates the automatic stay.

Second, this Court should hold that Weinberg is not entitled to an administrative expense for a substantial contribution under § 503(b) because § 503(b)(3)(D) exclusively mentions cases under Chapters 9 and 11—not cases under Chapter 7. The statute's unambiguous language and

Congress' intent forecloses any argument to the contrary. Further, extending administrative expense allowances to Chapter 7 effectively eliminates all restrictions for such expenses.

Due to all the foregoing, this Court should reverse the United States Circuit Court of Appeals for the Thirteenth Circuit.

Respectfully submitted,

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