No. 18-0918

IN THE

SUPREME COURT OF THE UNITED STATES

IN RE BACKSTREETS PLOWING, INC., DEBTOR

STEVEN VIN SANT, CHAPTER 7 TRUSTEE, PETITIONER

V.

MILTON WEINBERG, RESPONDENT.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE UNITED STATES

BRIEF FOR THE PETITIONER

Team P31
Counsel for Petitioner

QUESTIONS PRESENTED

I. Does a secured creditor who repossessed his collateral prepetition violate 11 U.S.C. § 362(a)(3) when he retains that collateral after it becomes property of the estate?

II. Whether 11 U.S.C. § 503(b) authorizes an administrative expense to a creditor who makes a substantial contribution in a chapter 7 case despite 11 U.S.C. § 503(b)(3)(D) expressly limiting such administrative expenses to "chapter 9 or 11" cases?

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OPINIONS BELOW

In unreported opinions, the Bankruptcy Court for the District of Moot entered, and the Bankruptcy Appellate Panel affirmed, an order in favor of Respondent Milton Weinberg, holding that Weinberg (1) did not violate § 362(a)(3) because he repossessed the collateral snow plow trucks before the bankruptcy filing and only "passively retained" postpetition possession of them; and (2) is entitled to an administrative expense for his substantial contribution to Backstreets's chapter 7 case under § 503(b). R. at 3. Backstreets appealed to the United States Court of Appeals for the Thirteenth Circuit, but the bankruptcy court's order was affirmed; its opinion is reproduced as the record in this appeal. *Id.*

STATEMENT OF JURISDICTION

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

STATUTORY PROVISIONS

The statutory provisions relevant to this case are listed below and reproduced in pertinent part in Appendices A through J.

STATEMENT OF THE CASE

Bowling brought Christopher Clemons ("Clemons") and Milton Weinberg ("Weinberg") together. R. at 4. College football tore them apart. *Id.* Backstreets Plowing, Inc. ("Backstreets"), now in bankruptcy, finds itself caught in the middle of their ongoing feud.

In August 2015, Backstreets borrowed $450,000 from Weinberg to purchase new trucks for its snow-plow business. *Id.* at 3. In return, Backstreets granted Weinberg a security interest[1] in the snow plow trucks, and the parties agreed that loan payments would start in December 2015. *Id.* at 4. Clemons, the Debtor's sole shareholder, personally guaranteed the loan. *Id.* at 3–4.

With its new trucks, Backstreets secured a contract with the City of Badlands. *Id.* at 4. The contract guaranteed one year of work at a flat rate, renewable at the City's sole discretion. *See id.* at 4–5. Because of the contract's flat rate, the mild 2015–16 winter was profitable for Backstreets when costs "were far less than expected." *Id.* However, the brutal winter of 2016–17 increased costs, leading to Backstreets's insolvency. *Id.* at 5–6.

I. Giving the cold shoulder: college football cast a pall on the parties' relationship.

The relationship between Clemons and Weinberg soured in October 2015, when the University of Moot's football team beat Moot State. *Id.* at 4–5. Unfortunately for Clemons, a proud alumnus of the University of Moot, Weinberg was an avid Moot State alumnus. *Id.* A heated argument ensued, and the two did not speak again for some time. *Id.* at 5.

Despite Backstreets's profitability in 2015–16, Clemons did not make loan payments. *Id.* In February 2016, Weinberg contacted, and later confronted, Clemons about his nonpayment, resulting in another heated argument. *Id.* In April 2016, Weinberg sued Backstreets on the note and Clemons on his personal guarantee. *Id.*

[1] The parties agree that Weinberg properly perfected his purchase money security interest and holds a first priority lien on the trucks. R. at 4 n.3.

October 2016 was unkind to Clemons. First, Weinberg "obtained a default judgment against both the Debtor and Clemons, jointly and severally, for $450,000 plus interest and fees." *Id.* Simultaneously, Moot State eked out a win against the University of Moot. *Id.* The silver lining was that Weinberg, content with both wins, did not immediately execute on his judgment. *Id.*

Unfortunately for Backstreets, Weinberg's disdain for Clemons was only temporarily abated. *Id.* at 5–6. In the brutal winter of 2016–17, Backstreets was unable to pay its labor, maintenance, and fuel costs, let alone make payments on Weinberg's loan. *Id.* at 6. In January 2017, Weinberg struck the coup de grâce: he repossessed the snow plow trucks.[2] *Id.*

II. There was "snow" way out: Backstreets filed for bankruptcy

Weinberg left Backstreets—a snow-plow business—without snow plow trucks. *Id.* Backstreets could not fulfill its obligations to the City. *Id.* With both debt and snow piling up, Backstreets filed chapter 11 bankruptcy on February 4, 2017. *Id.* at 6.

A. Backstreets's financial distress snowballed because of Weinberg.

Backstreets requested that Weinberg return the snow plow trucks so that Backstreets could pursue its only hope of financial viability: performing under the City contract. *Id.* at 6–7. Despite Backstreets's request, Weinberg refused to return the snow plow trucks unless Backstreets brought a formal turnover action. *Id.* Although Backstreets never brought a turnover action, it moved the court to find that Weinberg violated the automatic stay, § 362(a)(3), by retaining the trucks. *Id.* The bankruptcy court denied the motion, and Backstreets timely appealed. *Id.*

The City did not renew its contract with Backstreets. *Id.* at 7. Without future work, Backstreets converted its bankruptcy to a chapter 7 case. *Id.* Steven Vin Sant ("Trustee") was appointed on April 13, 2017, and the Bankruptcy Appellate Panel stayed Backstreets's appeal. *Id.*

[2] Although Weinberg repossessed the snow plow trucks, no disposition occurred. R. at 10. Thus, the parties agree that "legal (as well as equitable) title remained with the Debtor on the petition date." *Id.*

Hoping to secure a contract with the City of Badlands that year, Tenth Avenue Freeze, Inc. ("Tenth Avenue") offered to purchase substantially all of Backstreets's assets—including possession of, and title to, the snow plow trucks—in September 2017. *Id.* at 8. Tenth Avenue's offer "was the best way to maximize value for the benefit of the Debtor's creditors." *Id.* The Trustee asked Weinberg to turn over the trucks, but Weinberg refused. *Id.* The Trustee continued prosecuting the appeal to pressure Weinberg into cooperating, but Weinberg still refused. *Id.*

Tenth Avenue withdrew its offer in November 2017. *Id.* In January 2018, Stone Pony Plowing, LLC ("Stone Pony") offered $100,000 less than Tenth Avenue to purchase Backstreets's assets excluding the snow plow trucks. *Id.* at 8–9. The Trustee, with no other options, accepted Stone Pony's offer and the bankruptcy court approved the sale. *Id.* at 8–9. The Trustee pursued the appeal, hoping to recover $100,000 from Weinberg for sabotaging the Tenth Avenue sale. *Id.* at 9.

B. Take a cold, hard look: Weinberg attempts to collect against Clemons personally

Backstreets was insolvent and under the bankruptcy court's protection when it converted its bankruptcy to a chapter 7 and faced liquidation. *Id.* at 7. Thus, Weinberg pursued Clemons on his personal guarantee instead. *Id.* at 7. Weinberg hired a collection firm and conducted a creditors' examination of Clemons in May 2017. *Id.* Weinberg discovered that Backstreets fraudulently transferred $100,000 to a bank account belonging to Clemons's daughter, Patti, in May 2016. *Id.* at 5, 7. Weinberg incurred $25,000 in legal fees investigating the transfer. *Id.*

The Trustee brought an avoidance action against Patti using information Weinberg voluntarily provided. *Id.* The parties quickly settled. *Id.* Patti repaid $75,000 to the estate in satisfaction of all claims against her. *Id.* After the settlement, Weinberg requested—and the bankruptcy approved—a $25,000 substantial contribution administrative expense. *Id.* at 7–8. The Trustee conceded that Weinberg made a substantial contribution, but timely appealed the decision because § 503(b)(3)(D) limits such administrative expenses to chapter 9 and 11 cases. *Id.* at 8.

SUMMARY OF ARGUMENT

Congress wrote the Bankruptcy Code, which outlines the process by which debtors regain their financial footing and creditors collect their equitable share. The bankruptcy court is obligated to adhere to this process but, in this case, Weinberg was permitted to circumvent the Code in two ways. First, Weinberg violated the automatic stay under § 362(a)(3). Additionally, the lower court completely disregarded § 503(b)(3)(D)'s express language by awarding Weinberg an administrative expense in Backstreets's chapter 7 case.

The automatic stay is an integral part of the bankruptcy process and a fundamental protection afforded to bankrupt debtors. Section 362(a)(3) prevents creditors from "exercising control over estate property." Here, Weinberg exercised control over the snow plow trucks by refusing to turn them over, which ensured that they sat idle in his warehouse. By retaining the snow plow trucks, Weinberg denied Backstreets its "breathing spell." Backstreets should have had possession of the trucks to conduct business and generate cash. But because Weinberg retained the trucks, Backstreets could not fund a plan of reorganization or pay its creditors. As a result, Backstreets had to sell substantially all its assets—less the repossessed snow plows.

Weinberg did not need to retain possession of the snow plow trucks because Weinberg could have adequately protected his interest under §§ 362(d), 362(f), and 363(e). Upon request under either §§ 362(d) or 362(f), the court would have been required to ensure his interest was adequately protected or relieve him from the stay. If Weinberg had requested adequate protection of his interest under § 363(e), the court would have been required to oblige. Creditors must use the bankruptcy process to receive their equitable portion of the bankruptcy estate but, nonetheless, Weinberg circumvented the process provided by the Code.

Next, Congress intended for administrative expenses to be sparingly awarded to prevent creditors from contravening the bankruptcy process and maximize the value of the estate.

Weinberg cannot receive an administrative expense for his contribution to Backstreets's chapter 7 bankruptcy because § 503(b)(3)(D) expressly provides that creditors may be reimbursed for their substantial contributions in only "chapter 9 or 11" cases. Although Weinberg seeks to bypass § 503(b)(3)(D) by stretching the term "including" in § 503(b), § 503(b)(3)(D)'s specific limitations govern § 503(b)'s general language. This narrow interpretation is supported by the Code's express language, equitable principles, legislative history, and purpose.

Weinberg should not collect more than his equitable share of the bankruptcy estate. Weinberg repeatedly took it upon himself to ensure he was paid. He repossessed the snow plow trucks to ensure for his own benefit, dooming Backstreets's chance of reorganization thereby violating the automatic stay. Weinberg now seeks an award of $25,000 for costs that *he* incurred while trying to execute on *his* judgment for *his* benefit. Because administrative expenses exist to benefit the bankruptcy proceeding *as a whole*, Weinberg cannot use § 503(b) to take money from the estate when he is ineligible for administrative relief under § 503(b)(3)(D)'s express limitations.

Therefore, this Court should reverse the lower court and find that Weinberg (1) violated § 362(a)(3) by exercising control over estate property, and (2) is not entitled to an administrative expense under § 503(b) because he cannot circumvent § 503(b)(3)(D)'s express limitations.

ARGUMENT

I. Legal Standard

Courts interpret provisions of the Bankruptcy Code under a de novo standard of review, deciding a case as though it were the original trial court. *See United States v. Hatton (In re Hatton)*, 220 F.3d 1057, 1059 (9th Cir. 2000). Backstreets asks this Court to clarify the proper interpretation of two Bankruptcy Code provisions: § 362(a)(3) and § 503(b). R. at 3.

II. Weinberg cannot circumvent the purpose of the automatic stay and administrative expense provisions.

Taking a page from the Philadephia 76ers's playbook: "trust the process."[3] Here, this Court is compelled to "trust the Code."[4] Congress drafted the Code, including §§ 362 and 503, to maximize the value of the bankruptcy estate. *See Thompson v. GMAC, LLC*, 566 F.3d 699, 702 (7th Cir. 2009); *Lebron v. Mechem Financial Inc.*, 27 F.3d 937, 944 (3d Cir. 1994). Because Congress writes and revises the Code, this Court "must presume that a legislature says in a statute what it means and means in a statute what it says there." *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253–54 (1992). When interpreting the Code, this Court recognizes that bankruptcy courts "are courts of equity and 'apply the principles and rules of equity jurisprudence.'" *Young v. United States*, 535 U.S. 43, 50 (2002) (*quoting Pepper v. Litton*, 308 U.S. 295, 304 (1939)).

The first issue in this case arose when Weinberg violated the automatic stay by exercising control over estate property. *See* 11 U.S.C. § 362(a)(3). Weinberg refused to turnover snow plow trucks that were property of the estate. R. at 6, 8. Admittedly, Weinberg lawfully repossessed the collateral snow plow trucks prepetition. *Id.* at 6. Postpetition, however, Weinberg erroneously maintained that he did not have to comply with §§ 542 and 362 of the Code because he believed

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[3] Max Rappaport, *The Definitive History of 'Trust the Process,'* BLEACHER REPORT, Aug. 23, 2017, *available at* https://bleacherreport.com/articles/2729018-the-definitive-history-of-trust-the-process.

[4] This Court should trust the Code particularly because "bankruptcy law has now been so thoroughly construed that there is not much doubt about any of its provisions." *See* H.R. REP. NO. 1182, 63d Cong., 2d Sess. 1 (1914); S. REP. NO. 847, 63d Cong., 3d Sess. 2 (1914).

that his security interest was not adequately protected. *Id.* The express language of §§ 362 and 542 does not condone Weinberg's conduct because it undermines Backstreets's "fresh start." Further, Weinberg did not utilize any of the Code's three opportunities that could have protected his security interest. *See* 11 U.S.C. §§ 362(d), 362(f), 363(e). Thus, Weinberg violated the automatic stay because he retained estate property while simultaneously refusing to request adequate protection.

The second issue before this Court results from Weinberg demanding an administrative expense under § 503(b), despite § 503(b)(3)(D)'s express limitation to substantial contributions made in chapter 9 and 11 cases. *Id.* § 503(b)(3)(D). The majority courts, while adhering to § 503(b)(3)(D)'s plain language, have found that § 503(b)(3)(D) applies in only chapter 9 or 11 cases. *See Mediofactoring v. McDermott (In re Connolly N. Am., LLC)*, 802 F.3d 810, 822 n.2 (6th Cir. 2015) (O'Malley, J., dissenting). However, the lower court joined the minority courts, finding that the term "including" stretched § 503(b)'s scope to allow administrative expenses when a creditor makes a substantial contribution a chapter 7 estate. R. at 19–21. Although the Trustee conceded that Weinberg made a substantial contribution to the estate, Weinberg now effectively requests that a third of the recovered money pay the costs he incurred for his own benefit and in violation of the Code's administrative expense process. *See* R. at 7. This Court should hold that Weinberg's request disregards § 503(b)(3)(D)'s language and the Code's equitable principles.

A. Weinberg undermined the Code's purpose when he circumvented § 362(a)(3).

When drafting the Code, Congress balanced the rights of both creditors and debtors with the Code's principal purpose in mind: "to grant a 'fresh start' to the 'honest but unfortunate debtor.'" *Marrama v. Citizens Bank*, 549 U.S. 365, 367 (2007) (citation omitted). To that end, filing a bankruptcy petition instantly creates, collects, and protects the debtor's "bankruptcy estate." *See generally* 11 U.S.C. §§ 362, 541, 542. This "bankruptcy estate" is comprised of "*all*

legal or equitable interests of the debtor in property as of the commencement of the case," including property "wherever located and by whomever held." *Id.* § 541(a) (emphasis added).

Since the estate includes property not in the debtor's possession at the time of filing, § 542 ensures that any creditor "in possession, custody, or control . . . of [estate] property . . . *shall deliver*" that property to the trustee. *Id.* § 542(a) (emphasis added). Congress used the phrase "shall deliver," which "creates an obligation impervious to judicial discretion." *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998). Thus, § 542(a) requires creditors to return estate property without *any* indication that this obligation is contingent upon the trustee or the debtor bringing a formal turnover action.[5] *See generally,* 11 U.S.C. § 542.

The Code immediately protects the debtor because the bankruptcy petition automatically "operates as a stay" which "is broad in scope and applies in almost any type of action against the debtor or the property of the estate." 11 U.S.C. § 362; *GMAC v. Yates Motor Co.*, 283 S.E.2d 74, 76 (Ga. Ct. App. 1981); *see also* 3 COLLIER ON BANKRUPTCY ¶ 362.03 (16th 2018).

Backstreets filed its bankruptcy petition on February 4, 2017, immediately creating the bankruptcy estate. R. at 6. Backstreets's bankruptcy petition *should* have also collected Backstreets's property, "wherever located and by whomever held," and protected it from "almost any type of action." Instead, Weinberg retained the snow plow trucks, which indisputably constitute estate property. *Id.* at 10. Weinberg slept on the opportunities the Code afforded him to adequately protect his interest—opportunities that would not have doomed Backstreets.

[5] To the contrary, there are only three exceptions to a creditor's turnover obligation. *See generally* 11 U.S.C. § 542; *see also United States v. Whiting Pools*, 462 U.S. 198, 206 n.12 (1983). Turnover is excused if: (1) "such property is of inconsequential value or benefit to the estate"; (2) the creditor, without knowledge of the case, transferred the estate property in good faith; or (3) when the transfer of the property is automatic to pay a life insurance premium. 11 U.S.C. § 542(a), (c)–(d). None of the exceptions apply here.

1. Weinberg violated § 362(a)(3) when he retained estate property, depriving Backstreets of the snow plow trucks to the detriment of all parties in interest.

Section 362(a)(3) prevents "any act to obtain possession of property of the estate or of property from the estate or to *exercise control* over property of the estate." 11 U.S.C. §§ 362(a)(3) (emphasis added). The automatic stay is "one of the fundamental debtor protections provided by the bankruptcy laws." H.R. REP. NO. 595, 95th Cong., 1st Sess., 340 (1977); S. REP. NO. 989, 95th Cong., 2nd Sess., 54 (1978). Prior to 1984, the automatic stay prevented only "acts to obtain possession of" estate property, but Congress deliberately expanded § 362(a)(3)'s scope to also prevent creditors from "exercis[ing] control over" estate property. 11 U.S.C. § 362(a)(3); *Thompson v. GMAC, LLC*, 566 F.3d 699, 702 (7th Cir. 2009). ("Congress's decision to amend section 362 evinces its intent to expand the prohibited conduct beyond mere possession.").

Further, an "estate includes property of the debtor that has been seized by a creditor prior to the filing of a petition." *United States v. Whiting Pools, Inc.*, 462 U.S. 198, 209 (1983). Although property may be seized, that seizure "merely bring[s] the property into the [creditor's] legal custody"; the debtor remains the owner of that seized property. *Id.* at 210–11 Accordingly, creditors must "seek protection of its interest according to the congressionally established bankruptcy procedures, *rather than by withholding the seized property* from the debtor's efforts to reorganize." *Id.* at 212 (emphasis added).

Following this reasoning, the majority circuits have confirmed that creditors violate the automatic stay when they retain, post-petition, estate property seized prepetition. *See Weber v. SEFCU (In re Weber)*, 719 F.3d 72, 81 (2d Cir. 2013); *Thompson*, 566 F.3d at 707–08; *Rozier v. Motors Acceptance Corp. (In re Rozier)*, 376 F.3d 1323 (11th Cir. 2004) (holding a creditor in contempt of § 362 for retaining a collateral vehicle it repossessed, but never took title to, prepetition); *State of Cal. Emp't Dev. Dept. v. Taxel (In re Del Mission Ltd.)*, 98 F.3d 1147, 1151

(9th Cir. 1996); *Knaus v. Concordia Lumber Co., Inc. (In re Knaus)*, 889 F.2d 773, 775 (8th Cir. 1989); *Transouth Fin. Corp. v. Sharon (In re Sharon)*, 234 B.R. 676, 682 (B.A.P. 6th Cir. 1999).

Based on § 362(a)(3)'s plain language, Weinberg violated the automatic stay when he withheld the seized snow plow trucks after Backstreets filed bankruptcy. Weinberg—acting in his own self-interest and to the detriment of the bankruptcy estate and Backstreets's other creditors[6]—ensured that the snow plow trucks sat idly in his warehouse. R. at 6. While the snow plow trucks gathered dust, Backstreets floundered financially. *See generally id.* at 6–9. Without the snow plow trucks, Backstreets could not conduct business, lost its contract with the City of Badlands, and converted its case to a chapter 7—only to find that even its ability to liquidate was hamstrung. *Id.* at 7–8. Tenth Avenue's offer to purchase substantially all of Backstreets's assets "was the best way to maximize value for the benefit of the Debtor's creditors." *Id.* at 8. But, because Weinberg violated § 362(a)(3), Backstreets could not accept Tenth Avenue's offer. *See id.* Thus, Weinberg should be obligated to pay $100,000 as recompense for his violation.

i. By retaining possession of the snow plow trucks postpetition, Weinberg exercised control over estate property.

Because the Code does not define either an "act . . . to exercise control" or any of the words individually, this Court gives the terms their ordinary meaning. *Asgrow Seed Co. v. Winterboer*, 513 U.S. 179, 187 (1995). Turning to BLACK'S LAW, an "act" is "[t]he process of doing or performing; an occurrence that results from a person's will being exerted on the external world." *Act*, BLACK'S LAW DICTIONARY 29 (10th ed. 2014). To "exercise" is "[t]o make use of; to put into action." *Exercise*, BLACK'S LAW DICTIONARY 693 (10th ed. 2014). And "control" is the ability "to exercise power or influence over." *Control*, BLACK'S LAW DICTIONARY 403 (10th ed. 2014).

[6] Although the record is silent regarding what, if any, other creditors had claims against Backstreets.

Courts should give "act" "its 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). Courts "must consider not only the bare meaning of words in isolation, but also their 'placement and purpose in the statutory scheme.'" *Id.* at 828 (*quoting Khan v. United States*, 548 F.3d 549, 554 (7th Cir. 2008)). In *Peake*, the court grappled with the meaning of "act" in both §§ 362(a)(3) and 362(b)(3). *Id.* There, the court turned to two definitions of "act" from Merriam-Webster's dictionary: the "doing of a thing"—which would cover "definite acts"—or "the process of doing something"—which would cover "continuing actions."[7] *Id.* at 828. The court held that "act" included ongoing or continuing actions, reasoning that the power of the automatic stay must be broadly construed to protect the debtor, while exceptions to the stay should be narrowly construed. *Id.* at 828–30 (*citing Viii. of San Jose v. McWilliams*, 284 F.3d 785, 790 (7th Cir. 2002) ("We construe the Bankruptcy Code liberally in favor of the debtor and strictly against the creditor.")).

Further, "[w]ithholding possession of property from a bankruptcy estate is the *essence* of 'exercising control' over possession." *In re Sharon*, 234 B.R. at 682 (emphasis added). In *Sharon*, the secured creditor repossessed the debtor's car prepetition. *Id.* at 680. After filing bankruptcy, the debtor requested that the car be returned. *Id.* Despite receiving the debtor's bankruptcy schedules and proof of insurance, the creditor refused. *Id.* The court, emphasizing that the debtor "shall remain in possession of all property of the estate" for the duration of the bankruptcy case, concluded that the creditor "exercised control" when it denied the debtor possession. *Id.* at 687; *see* 11 U.S.C. §§ 1115(b) (chapter 11 cases), 1306(b) (chapter 13 cases).

Only the Tenth and D.C. Circuits have declined to hold that creditors violate § 362(a)(3) by retaining estate property postpetition. *See WD Equip., LLC v. Cowen (In re Cowen)*, 849 F.3d

[7] The definition "the process of doing something" in *Peake* is almost identical to the first portion of the BLACK'S LAW definition, which the Thirteenth Circuit notably omitted when supporting its interpretation. R. at 11 (defining "act" as only "the process of doing something or performing").

943, 948 (10th Cir. 2017); *United States v. Inslaw, Inc.*, 932 F.2d 1467, 1474 (D.C. Cir. 1991). In *Cowen*, the Tenth Circuit disregarded the automatic stay's purpose by centering its analysis on an unreasonably narrow interpretation of "act." *In re Cowen*, 849 F.3d at 949 (using the New Oxford American Dictionary's definition of "act" as "take action" or "do something"). Attempting to justify its unreasonably narrow definition, the court gave two examples of acts that exercise control, but do not obtain possession of, estate property. *Id.* at 950. The court suggested that both "a creditor in possession who improperly sells property belonging to the estate" and a creditor who exercised control over the debtor's "intangible property rights" would violate the automatic stay. *Id.* Although the court correctly concluded both creditors would violate the automatic stay, the court overlooked the fact that possession is the essence of control.[8]

Here, Weinberg violated § 362(a)(3) when he exercised control over estate property—the snow plow trucks. Prepetition, Weinberg was entitled to act, which he did by lawfully repossessing the snow plow trucks in late January 2017. R. at 6. Prepetition, Weinberg was entitled to exercise control over the snow plow trucks, which he did by ensuring the trucks sat idle in his warehouse. *Id.* Backstreets was entitled possession of all estate property from the moment it filed chapter 11 bankruptcy on February 4, 2017, until it confirmed a plan. *Id.* But to this day, Weinberg exercises his control over the snow plow trucks because, to this day, the trucks sit idle in his warehouse. *Id.*

Looking to BLACK'S LAW, Weinberg engaged in "the process" (an act) of "using" (exercise) his "power" (control) over the snow plow trucks. Weinberg used his power over the snow plow trucks when he actively refused to turn them over to Backstreets. *Id.* at 6. Weinberg used his power over the trucks again when he actively refused to turn them over to the Trustee. *Id.* at 8. Although the *Cohen* court would find that Weinberg violated § 362(a)(3) only if he was

[8] Although, by suggesting that creditors who "passively" retain property of the estate can be sanctioned under § 105(a), the Tenth Circuit tacitly acknowledges that withholding possession of estate property is the essence of "exercising control" over it. *In re Cowen*, 849 F.3d at 950–51.

audacious enough to *sell* the trucks, Weinberg committed a discrete act each time he actively *refused* to return them. Weinberg's continued possession was—and is—an ongoing act. Thus, this Court should broadly construe "act" and hold that Weinberg violated § 362(a)(3).

ii. By maintaining possession of the snow plow trucks, Weinberg prevented Backstreets from reorganizing.

The automatic stay "gives the debtor a breathing spell from his creditors," ensuring that the debtor has access to all its essential property. *Weber v. SEFCU (In re Weber)*, 719 F.3d 72, 76 n.5, 78 (2d Cir. 2013) (*quoting* H.R. REP. NO. 595, 95th Cong., 1st Sess., 340 (1977)). The automatic stay ensures that the debtor—not his creditors—possesses estate property because "[a]n 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." *Thompson v. GMAC, LLC*, 566 F.3d 699, 702 (7th Cir. 2009). Estate property is integral to the debtor's ability to reorganize because "these assets will generate money that could contribute to paying down the debtor's obligations." *Id.* at 707. Given the importance of estate property to a bankruptcy, exceptions to the automatic stay should be narrowly construed.[9] *In re Baldwin Builders*, 232 B.R. 406, 412 (B.A.P. 9th Cir. 1999).

Although Backstreets should have had a "breathing spell," Backstreets's most essential property—the snow plow trucks—sat idle in Weinberg's warehouse. R. at 6. Without its trucks, Backstreets's financial distress snowballed. *See generally id.* at 6–9. Backstreets needed its trucks to conduct business and fund its reorganization,[10] so it asked Weinberg to return them. *Id.* Weinberg refused. *Id.* Backstreets consequently lost its contract with the City of Badlands and was forced to convert its bankruptcy to a chapter 7. *Id.* at 7.

[9] Particularly because "[w]hen Congress intended 'adequate protection' to limit a debtor's right to possession or use of property of the estate, it unmistakably said so." *In re Sharon*, 234 B.R. at 684 (discussing how § 363(c)(2) explicitly requires a debtor or trustee to get the creditor's consent or a court before using cash collateral).

[10] Because the snow plow trucks were "necessary to an effective reorganization," It is unlikely that the court would relieve him from the automatic stay under § 362(d)(2). 11 U.S.C. § 362(d)(2).

When Tenth Avenue offered to purchase substantially all of Backstreets's assets, it "was the best way to maximize value for the benefit of the Debtor's creditors." *Id.* at 8. But the Trustee needed the snow plow trucks before accepting the offer, so he asked Weinberg to return them. *Id.* Weinberg refused. *Id.* As a result, Tenth Avenue withdrew its offer. *Id.* Because Weinberg retained the snow plow trucks, the Trustee was forced to sell the Backstreets's remaining assets for $100,000 less than it was worth with the snow plow trucks. *Id.*

Had Weinberg respected the Code by, consistent with § 362(a)(3), turning over the snow plow trucks, Backstreets would have likely been able to perform under the City contract. Had Backstreets been able to perform, the City could have renewed the contract. Backstreets's business might have been able to reorganize. At the very least, had Weinberg returned the snow plow trucks, the Trustee could have accepted Tenth Avenue's offer for $100,000 more than Stone Pony paid. But because Weinberg did not give Backstreets a breathing spell, he summarily destroyed any possibility of Backstreets's financial recovery.

iii. Rather than violate § 362(a)(3), Weinberg should have trusted the bankruptcy process—not unilateral action—to pay his claims.

The automatic stay ensures that creditors receive their equitable share of the estate through the bankruptcy process rather than piecemeal litigation. *Lincoln Sav. Bank, FSB v. Suffolk Cty. Treasurer (In re Parr Meadows Racing Ass'n)*, 880 F.2d 1540, 1545 (2d Cir. 1989) (citations omitted). When a debtor is in financial distress, creditors begin circling like buzzards over carrion. If left to their own devices, those creditors would "pursue their own remedies against the debtor's property. Those who acted first would obtain payment of the claims in preference to and to the detriment of other creditors." H.R. REP. NO. 595, 95th Congr., 1st Sess., 340 (1977). The automatic stay keeps the buzzards at bay.

Instead of making creditors scavenge on scraps through piecemeal litigation, debtors must treat secured creditors equitably under a chapter 11 plan.[11] *See,* 11 U.S.C. §§ 1122(a) (requiring that each class of claims contains only those interests that are "substantially similar"), 1129(a) (listing the requirements for plan confirmation, including either leaving classes of creditors unimpaired or getting their acceptance of the plan), 1129(b)(2)(A) (even a "cramdown" plan must be fair and equitable regarding each class of secured claims).

The Code's process explicitly protects secured creditors. Creditors cannot bypass this process by forcing the debtor to bear the cost of recovering its assets. *Thompson*, 566 F.3d at 707. Here, Weinberg wanted to place himself in a position above other secured creditors. He pursued his own remedy by maintaining possession of the trucks. R. at 6. Rather than rely on the Code's process, Weinberg argued that Backstreets was forced to bear the costs of filing a turnover action to recover its property. Accordingly, Weinberg violated the automatic stay.

2. Rather than seek adequate protection under the Code, Weinberg chose to violate the automatic stay.

A creditor may petition the court to protect his interest in estate property under §§ 362(d), 362(f), and 363(e). *See* 11 U.S.C. §§ 362(d), 362(f), 363(e). Section 361 provides three nonexhaustive, non-mutually exclusive examples of the "adequate protection" that the court may afford secured creditors.[12] *See* 11 U.S.C. § 361. The bankruptcy court—not the creditor—determines whether, and to what extent, adequate protection is required. *Expeditors Int'l v. Colortran, Inc. (In re Colortran, Inc.)*, 210 B.R. 823, 827 (B.A.P. 9th Cir. 1997), *aff'd in part, and vacated on other grounds*, 165 F.3d 35 (9th Cir. 1998). While secured creditors have the right to adequate protection of their interests under §§ 362(d), 362(f), and 363(e), the Code requires

[11] Although not at issue here, chapter 13 also protects the interests of secured creditors by requiring debtors to cure defaults and maintain payments while the case is pending. *Id.* § 1322(b)(5).

[12] Creditors like Weinberg may receive cash payments to offset any decrease in the value of their interest, get "an additional or replacement lien," or the court may "grant such other relief" to ensure the creditor realizes "the indubitable equivalent" of his interest. 11 U.S.C. § 361.

creditors to assert that right. *Cf. Transouth Fin. Corp. v. Sharon (In re Sharon)*, 234 B.R. 676, 685 (B.A.P. 6th Cir. 1999) ("Creditors have a responsibility to timely act on their rights under the Bankruptcy Code . . ."). Grounded in equitable principles, the Code "aids the vigilant, not those who sleep on their rights." *In re Tosenberger*, 67 B.R. 256, 259 (Bankr. N.D. Ohio 1986).

To illustrate, creditors may seek relief from the automatic stay under § 362(d)(1) "for cause, including the lack of adequate protection of [their] interest in such property . . . ." 11 U.S.C. § 362(d)(1). After a creditor turns over estate property and requests adequate protection, the bankruptcy court "*shall* grant relief from the stay . . . such as by terminating, annulling, modifying, or conditioning such stay."[13] *Id.* (emphasis added); *see also In re Sharon*, 234 B.R. at 684 ("Section 362(d) is not an 'exception' to the automatic stay; it is the congressionally prescribed method for a creditor to get relief from the stay."). Because § 362(d) uses "the mandatory 'shall,'" courts are required to either grant relief from the automatic stay or ensure the creditor's interest is adequately protected. *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998).

Creditors may also seek relief from the automatic stay under § 362(f). Admittedly, § 362(d) does not instantly protect that creditor's interest. *See* 11 U.S.C. § 362(e)(1) (granting relief from the automatic stay thirty days after a creditor makes a request under § 362(d)). But when time is of the essence, § 362(f) provides creditors an expedited process. If a creditor can show that their interest will suffer "irreparable damage . . . before there is an opportunity for notice and hearing," the court may grant *ex parte* relief. *Id.* § 362(f); *see also* FED. R. BANKR. PRO. 4001(a)(2).

Further, under §§ 362(d) and (f), a creditor has "the right to file a motion for relief from the stay and request adequate protection such that its lien rights are preserved." *In re Colortran, Inc.*, 210 B.R. at 827. In *Colortran*, a creditor alleged that it had a possessory lien over a shipment

[13] Unless the court expressly orders otherwise, the Code relieves the creditor from the automatic stay after thirty days. 11 U.S.C. § 362(e)(1).

that was property of the estate and refused to turn the shipment over until the debtor agreed to pay its past-due balance. *Id.* at 825. There, the right to adequate protection did not excuse a violation of the automatic stay. *Id.* at 827. The court explained that, if the parties could not agree to the terms of adequate protection, the proper procedure was to either request either a hearing under § 362(d) or an emergency hearing under § 362(f). *Id.* at 827–28. Therefore, creditors may *request*—and even suggest terms of—adequate protection, but "may not unilaterally condition the return of the property on its own determination of adequate protection." *Id.*

In addition to the protections of §§ 362(d) and (f), a creditor may also receive adequate protection under § 363(e).[14] Section 363(e) provides that:

> 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.

11 U.S.C. § 363(e).[15] Thus, § 363(e)'s protection is more than sufficient to protect a creditor's interest in estate property. Like other Code provisions, however, § 363(e) is triggered only "on *request* of an entity that has an interest in property." *Id.* (emphasis added). Creditors may invoke § 363(e) "at any time," even when the property is simply "*proposed* to be used, sold, or leased." *Id.* (emphasis added). Courts may also provide the creditor with adequate protection *ex parte*. *Id.* And § 363(e)—like § 362(d)—uses "the mandatory 'shall.'" *Lexecon Inc.*, 523 U.S. at 35. Thus, § 363(e) guarantees that the creditor is adequately protected.

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[14] Weinberg could have requested adequate protection under *both* §§ 362(d) and 363(e). 3 COLLIER ON BANKRUPTCY ¶ 363.05 (16th ed. 2018) ("The relationship between sections 362 and 363 . . . suggests that the better practice may be for the entity with the adverse interest in the property to request relief under both sections.").

[15] The lower court erroneously contends that § 542(a)'s cross-reference to § 363 somehow makes § 363(e) a limitation or exception to turnover under § 542. R. at 13. However, § 363(e) conditions only the Trustee's "use, sale, or lease" of estate property, not the Trustee's *possession* of estate property. 11 U.S.C. § 362(e). Thus, Weinberg was obligated to first turn over the snow plow trucks and *then* move to condition Backstreets's *use* of the trucks on its ability to adequately protect Weinberg's interest.

In fact, this Court unambiguously held that "[t]he creditor with a secured interest in property included in the estate *must* look to [§ 363(e)] for protection, rather than to the nonbankruptcy remedy of possession." *Whiting Pools*, 462 U.S. at 204 (emphasis added). The Code requires that creditors turnover estate property but does not do so without offering something in exchange: adequate protection. *Id.* at 207. The right to adequate protection, however, is designed to "*replace* the protection afforded by possession." *Id.* (emphasis added).

Under all three provisions, the Code empowers creditors to *request* adequate protection *after* turning estate property over.[16] *See, e.g.*, *In re Colortran, Inc.*, 210 B.R. at 828; *In re Sharon*, 234 B.R. at 684 ("Entitlement to adequate protection in the first instance with respect to all property of the estate other than cash collateral is triggered by a creditor's request to the bankruptcy court."); *In re Shannon*, 590 B.R. 467, 476 (Bankr. N.D. Ill. 2018) ("The creditor then bears the burden of filing a motion seeking adequate protection after it returns the vehicle to the debtor."); *Cross v. City of Chi. (In re Cross)*, 584 B.R. 833, 837 (Bankr. N.D. Ill. 2018) (requiring creditors to successfully show why they should retain estate property repossessed prepetition); *Dean v. Carr (In re Dean)*, 490 B.R. 662, 667 (Bankr. M.D. Pa. 2013) (holding that a debtor must provide creditors with adequate protection only after the creditor requests it).

Once Backstreets filed bankruptcy, the Code replaced Weinberg's right to possession with his right to adequate protection. Prepetition, Weinberg had every right to repossess the snow plow trucks. *Id.* at 6. Postpetition, however, Weinberg had the right to request that either Backstreets or

[16] Weinberg arguably could have retained the snow plow trucks while waiting for the bankruptcy court to grant him relief from the automatic stay *had he so requested* rather than simply withholding the snow plow trucks. *Cf. Schwartz v. United States (In re Schwartz)*, 954 F.2d 569, 572 (9th Cir. 1992) ("Thus, section 362 gives the bankruptcy court wide latitude in crafting relief from the automatic stay, including the power to grant retroactive relief from the stay."); *Powell v. Shorty's Used Cars (In re Powell)*, 555 B.R. 907, 916 (Bankr. S.D. Ga. 2016) (indicating that a creditor may "promptly seek[] an order in the bankruptcy court for adequate protection and permission to withhold possession of the vehicle pending the provision of adequate protection.").

the Trustee adequately protect his interest, suggest what terms would adequately protect his interest, and petition the court under §§ 362(d), 362(f), or 363(e).

Under §§ 362(d) and (f), the court could have adequately protected Weinberg's interest or relieved him from the automatic stay *had he so requested*. Under § 363(e), the court could have adequately protected Weinberg's interest *had he so requested*. But, because Weinberg never requested adequate protection under § 362(d) or § 362(f) or § 363(e), Weinberg cannot receive that protection. Weinberg slept on those rights. *See generally id.* at 6–9.

Instead, Weinberg circumvented the bankruptcy process. Like the creditor in *Colortran* who withheld the debtor's shipment until the debtor paid his overdue balance, here Weinberg—whether motivated by a lack of adequate protection or Moot State's football season—withheld the snow plow trucks. R. at 6, 8. But, as the *Colortran* court found, Weinberg "may not unilaterally condition the return of the property on [his] own determination of adequate protection."

Weinberg should have utilized any of the three protections afforded to him by the Code rather than retaining possession of the snow plow trucks. But since Weinberg chose to deny both Backstreets and the Trustee access to the snow plow trucks, Weinberg violated the automatic stay.

B. Weinberg undermined the Code's process when he requested an administrative expense for his substantial contribution to Backstreet's chapter 7 case under § 503(b) despite § 503(b)(3)(D) limiting such awards to chapter 9 or 11 cases.

Congress painstakingly crafted a process to govern every bankruptcy proceeding. To uphold the equitable principles of bankruptcy, the Code requires a bankruptcy trustee to administer the estate "as expeditiously as is compatible with the best interests of parties in interest."[17] 11 U.S.C. § 704. The trustee maximizes the bankruptcy estate's value to benefit of *all* parties. *Cf. In re Trailer Source, Inc.,* 555 F.3d 231, 242 (6th Cir. 2009) ("[T]he system designed by Congress

[17] A trustee is immediately appointed in every chapter 7 case. *See generally* 11 U.S.C. §§ 701–04. Where the Code authorizes a debtor-in-possession to administer the estate, that debtor-in-possession has the same obligations as a trustee. *Id.* § 1107. The Code protects the equitable principles of bankruptcy by authorizing a trustee to administer the estate if the debtor-in-possession acts fails to fulfill its obligations. *See Id.* §§ 1104–06.

ensures that the value of the estate is maximized and that creditors' rights are protected because the *trustee* will pursue valuable avoidance claims" (emphasis added)).

In the event that a trustee fails to meet his obligations, Congress carefully implemented safeguards that allow various parties, including creditors, to administer the estate in a limited capacity.[18] *See* 11 U.S.C. §§ 503(b), 544(b), 550(a); *see also Lebron v. Mechem Fin. Inc.*, 27 F.3d 937, 944–45 (3d Cir. 1994) (Congress intended to "reimburse those efforts that directly benefitted the reorganization process."). However, Congress placed express limitations in the Code because these safeguards are not a license for parties to circumvent the bankruptcy process. *In re Javed*, 2018 WL 4955839 *5 (2018) (noting that creditors circumventing the bankruptcy process "could impede the trustee's efforts on behalf of all creditors"). As this Court recognized:

> Allowing recovery to be sought at the behest of parties other than the trustee could therefore impair the ability of the bankruptcy court to coordinate proceedings, as well as the ability of the trustee to manage the estate. Indeed, if administrative claimants were free to seek recovery on their own, they could proceed even where the trustee himself planned to do so.

Hartford Underwriters Ins. Co. v. Union Planters Bank, 530 U.S. 1, 13 (2000).

At issue here, § 503(b)(3)(D) awards an administrative expense to creditors who make substantial contributions in "chapter 9 or 11" cases. 11 U.S.C. § 503(b)(3)(D). This Court is called upon to hold that § 503(b) does not authorize administrative expenses for substantial contributions in chapter 7 cases. Looking to § 503(b)(3)(D)'s plain language and equitable principles, the overwhelming majority of courts limit § 503(b)(3)(D) to chapter 9 or 11, and therefore refuse to extend administrative relief to creditors who make a substantial contribution in a chapter 7 case. *Mediofactoring v. McDermott (In re Connolly N. Am., LLC)*, 802 F.3d 810, 822 n.2 (6th Cir. 2015)

[18] Section 503(b) lists occasions when a party may receive an "administrative expense." *See* 11 U.S.C. § 503(b). With the court's permission, Chapter 7 creditors may receive an administrative expense for *recovering* "any property transferred or concealed by the debtor." *Id.* § 503(b)(3)(B). Attorneys may even receive an administrative expense for assisting a chapter 7 creditor with recovering transferred or concealed debtor property. *Id.* § 503(b)(4).

(O'Malley, J., dissenting) (86 percent of courts refuse to extend administrative expenses to chapter 7 creditors under § 503(b)). However, after courts have interpreted § 503(b) consistently for twenty-five years, the Sixth Circuit[19]—now joined by the Thirteenth Circuit—has created tension within § 503(b) by granting creditors administrative expenses for making substantial contributions to chapter 7 cases. *Id.* at 814–19 Even then, the Sixth Circuit did so only in an abnormal case where the trustee was grossly negligent. *Id.* But no matter the circumstance, such a broad interpretation of § 503(b) circumvents § 503(b)(3)(D)'s express limitations and disrupts § 503(b)'s equitable principles and statutory scheme.

Here, Backstreets converted its bankruptcy to a chapter 7, and only then did Weinberg realize—after sitting on his default judgment for seven months—that he needed to collect. R at 7. After taking it upon himself to hire a collection firm to conduct a creditor's examination against Clemons personally, Weinberg discovered that Backstreets had transferred $100,000 to Patti. *Id.* Weinberg now requests that Backstreets's estate fund his creditors examination. *Id.* However, as a chapter 7 creditor, Weinberg is ineligible for administrative relief under § 503(b) because § 503(b)(3)(D) permits such relief only when creditors make a substantial contribution to a chapter 9 or 11 case. Additionally, Weinberg's interpretation of § 503(b) would stretch the term "including" beyond reason, rendering all nine of its subsections superfluous. This Court should deny Weinberg administrative relief under §503(b) to prevent future parties from circumventing the Code's express process.

[19] To note, when compared to its sister courts, the Sixth Circuit has the highest reversal rate for its decisions that come before this Court. Timothy B. Dyk, *Thoughts on the Relationship Between the Supreme Court and the Federal Circuit*, 16 Chi. Kent J. Intellectual Property 67, 72 (2016).

1. Weinberg cannot receive an administrative expense for his substantial contribution to Backstreet's chapter 7 bankruptcy under § 503(b).

Questions of statutory interpretation must begin—and where appropriate, end—with a statute's plain language. *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997). As courts of equity, bankruptcy courts narrowly construe requests for administrative expenses under § 503(b) to "maximize the value of the estate for all creditors."[20] *Young v. United States*, 535 U.S. 43, 50 (2002); *see also* 4 COLLIER ON BANKRUPTCY ¶ 503.06(2) (16th ed. 2017). While this Court need not look beyond a statute's natural reading, it may consider other tools of statutory construction "in close cases, or when statutory language is ambiguous" to ensure that the statute as a whole is "'coherent and consistent.'" *United States v. Monsanto*, 491 U.S. 600, 611 (1989); *Robinson*, 519 U.S. at 340 (*quoting United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 240 (1989)).

Neither §§ 503(b)(3)(D) nor 503(b) extend administrative relief to creditors who make a substantial contribution to a chapter 7 case. The only "coherent and consistent" interpretation of § 503(b)(3)(D) limits administrative expenses to substantial contributions in chapter 9 or 11 cases, as supported by the exclusionary and specific-general canons. Further, equitable principles of bankruptcy and the canon against superfluity prevent § 503(b) from granting administrative relief to chapter 7 creditors.

[20] Courts have looked to the express limitations to "chapter 9 or 11" in § 503(b)(3)(D) to narrowly interpret the scope of other § 503(b) provisions. *See, e.g.*, *In re Trailor Source Inc.*, 555 F.3d 231 (6th Cir. 2009) (finding that the Code does not expressly distinguish between chapter 7 and chapter 11 cases for the purposes of § 503(b)(3)(B)); *In re Am. Motor Club, Inc.*, 125 B.R. 79, 82 (Bankr. E.D.N.Y. 1991) (Duberstein, J.) (finding § 503(b)(3)(E) cannot allow an administrative expense in a situation already addressed by § 503(b)(1)(A)).

i. Section 503(b)(3)(D) expressly limits administrative expenses for substantial contributions to chapter 9 or 11 cases.

Section 503(b) does not mention a party's substantial contribution. *See* 11 U.S.C. § 503(b). However, § 503(b)(3)(D) awards administrative expenses to creditors who "mak[e] a substantial contribution in a case under *chapter 9 or 11 of this title*." *Id.* § 503(b)(3)(D) (emphasis added).[21]

The majority courts confirm that § 503(b)(3)(D) is limited to substantial contributions made in only chapter 9 or 11 cases. *See, e.g.*, *In re Lloyd Sec., Inc.*, 75 F.3d 853, 857 (3d Cir. 1996) (refusing to extend administrative expenses to parties in a SIPA liquidation proceeding that mirrored a chapter 7 proceeding); *Lebron v. Mechem Fin. Inc.*, 27 F.3d 937, 946 (3d Cir. 1994); *In re Fesco Plastics Corp., Inc.*, 996 F.2d 152, 157 n.5 (7th Cir. 1993); *see also In re Concrete Prod., Inc.*, 208 B.R. 1000, 1006 (Bankr. S.D. Ga. 1996) ("The claim of priority should be founded on a strict statutory basis; if the claim does not derive from the language of 503, it must fail."). In *Lebron*, the court considered whether creditors who made a substantial contribution to the estate after the bankruptcy was converted from chapter 11 to chapter 7 were eligible for administrative expenses under § 503(b)(3)(D). *Lebron*, 27 F.3d at 945. The court reasoned that Congress intended for expenses that creditors incur post-conversion to be reimbursed under §§ 503(b)(3)(B) and (C) "or not at all." *Id.* Since the creditors made their substantial contribution while investigating the debtor's fraudulent activities after the case was converted to a chapter 7, the court denied the creditors administrative expenses under §503(b)(3)(D)'s plain language. *Id.*

Weinberg contends that § 503(b) should provide administrative relief in chapter 7 cases because the nine enumerated subsections under §503(b) are nonexhaustive. Weinberg disregards § 503(b)(3)(D), which spells out exactly who may receive an administrative expense—a creditor

[21] Under § 503(a), an entity may request payment of an administrative expense claim. 11 U.S.C. § 503(a). Although the Bankruptcy Code does not define "administrative expense," courts generally analyze the timing of the incurred expense in relation to the bankruptcy estate. Moreover, § 507 provides a second priority status to an administrative expense that falls under section 503(b). 11 U.S.C. § 507(a)(2).

who makes a substantial contribution—and under what circumstances they are eligible—in a case under chapter 9 or 11. As the *Lebron* court reasoned, Weinberg is ineligible for relief under § 503(b) because he is ineligible for relief under §§ 503(b)(3)(B) and 503(b)(3)(D). Therefore, this Court should find that Weinberg cannot circumvent § 503(b)(3)(D)'s express limitations.

a. Section 503(b)(3)(D) expressly limits itself to chapter 9 or 11 cases, thereby implying the exclusion of any other bankruptcy chapter.

Although this Court need not look beyond § 503(b)(3)(D)'s plain language, the *expressio unius est exclusion alterius* canon (the expression of one thing implies the exclusion of others, or "the exclusionary canon") further proves that Congress excluded creditors who substantially contribute to a chapter 7 case from § 503(b) relief. *Mosier v. Kupetz (In re United Educ. & Software)*, 2005 WL 6960237 *7 (9th Cir. Oct. 7, 2005). Because § 503(b)(3)(D) "sets forth a series of items included under a general rule, and does not use the term 'including' . . . a court [may infer] an intention to restrict the statute's application to the specific listed examples." *Id.* This Court has confirmed that when "Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983) (internal quotation marks omitted).

On several occasions, courts have used the exclusionary canon to find that, while the term "including" in § 503(b) makes the six enumerated subsections nonexhaustive, the five subsections within § 503(b)(3) are exhaustive. *See In re United Educ. & Software*, WL 6960237 at *7; *see also In re Egler,* 500 B.R. 163, 174 (Bankr. M.D. Fla. 2013) (joining "the other courts that have recognized that '[w]hen a subsection directly addresses the type of administrative expense sought, the restrictions in it cannot be avoided by appealing to the non-exclusive nature of § 503(b).'" (citations omitted)). Following this logic, when Congress expressly limited § 503(b)(3)(D) to only chapter 9 or 11 cases, it excluded all other bankruptcy chapters. Weinberg should not receive an

administrative expense because, by expressly granting chapter 9 or 11 creditors relief under § 503(b)(3)(D), Congress did not intend for creditors to receive administrative relief for making a substantial contribution in a chapter 7 case.

b. Because the more specific § 503(b)(3)(D) must govern the general § 503(b), § 503(b)(3)(D) precludes administrative expenses for chapter 7 creditors.

When a specific provision overlaps with a broader one, the specific provision controls because "Congress has enacted a comprehensive scheme and has deliberately targeted specific problems with specific solutions." *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012); *see also Matter of Nobleman*, 968 F.2d 483, 488 (5th Cir. 1992), *aff'd*, 508 U.S. 324 (1993) ("General language of a statute does not prevail over matters specifically dealt with in another part of the same enactment").

Within the Code, specific provisions govern the more general provisions. *RadLAX*, 566 U.S. at 645. In *RadLAX*, this Court contemplated whether a specific subsection within the Code, § 1129(b)(2)(A)(ii), could be disregarded in favor of a general subsection. *Id.* at 643–45. There, the debtor sought relief under the more general § 1129(b)(2)(A)(iii) after admitting that he could not satisfy the specific requirement provided in § 1129(b)(2)(A)(ii). *Id.* In addition to finding the debtor's argument "hyperliteral and contrary to common sense," this Court held that the specific provision must govern the general in accordance with congressional intent. *Id.* at 645.

Even prior to *RadLAX*, circuit courts had found that specific provisions within § 503(b) should govern general provisions. *See, e.g., In re Keren Ltd. Partnership*, 189 F.3d 86, 88 (2d Cir. 1999) (holding that the general § 503(b)(1)(A) governed the specific requirements of § 503(b)(2) when a broker failed to meet § 503(b)(2)'s requirements); *In re Milwaukee Engraving Co., Inc.*, 219 F.3d 635, 637 (7th Cir. 2000) (holding that professionals cannot receive administrative relief under § 503(b)(1)(A) when they fail to satisfy § 503(b)(2)'s requirements).

Under the same reasoning, bankruptcy courts have confirmed that § 503(b)(3)(D) must govern § 503(b). *In re Fontainebleau Las Vegas Holdings, LLC*, 574 B.R. 895, 903 (Bankr. S.D. Fla. 2017) (rejecting an attorney's request for administrative expenses under §§ 503(b)(3)(D) and 503(b)(4) because he failed to satisfy § 503(b)(3)(D)'s requirements); *In re Engler*, 500 B.R. 163, 174 (Bankr. M.D. Fla. 2013) (refusing to grant a creditor administrative relief under § 503(b) because § 503(b)(3)(D) "directly address[ed] the type of administrative relief sought").

Here, Weinberg's interpretation of § 503(b) is hyperliteral and contrary to common sense. The more specific § 503(b)(3)(D) must govern the general § 503(b) to prevent creditors, like Weinberg, from evading the specific limitations provided in § 503(b)(3)(D). Like the debtor in *RadLAX* who sought relief under the general provision after failing to meet the requirements of the specific provision, here, Weinberg attempted to circumvent § 503(b)(3)(D) because he did not make a substantial contribution to a chapter 9 or 11 case. However, § 503(b)(3)(D) serves an important purpose in § 503's statutory scheme; it counter-balances the term "including" in § 503(b) by limiting administrative expenses for a substantial contribution to chapter 9 or 11 cases. *See In re Fontainebleau Las Vegas Holdings, LLC*, 574 B.R. at 903. Notwithstanding "including" in § 503(b), this Court should find that §503(b)(3)(D)'s specificity limits administrative expenses to creditors who substantially contribute to a chapter 9 or 11 case.

c. A bankruptcy court abuses its discretionary authority when it deviates from the Code's language and purpose.

"Bankruptcy courts are not authorized in the name of equity to make wholesale substitution of underlying law . . . but are limited to what the Bankruptcy Code itself provides." *Raleigh v. Illinois Department of Revenue*, 530 U.S. 15, 24–25 (2000). The lower court correctly acknowledged that that bankruptcy courts' "decisions are unimpeachable so long *as these powers are 'exercised within the confines of the Bankruptcy Code.'*" R. at 20 (emphasis added) (*quoting In re Connolly N. Am., LLC*, 802 F.3d at 814). Even under § 105(a)'s discretionary authority, courts

cannot contravene the specific limitations of § 503(b)(3)(D) simply because "including" appears in § 503(b). *See* 11 U.S.C. § 105(a).

Nonetheless, the lower court exercised powers outside the confines of the Code. Despite § 503(b)'s use of "including," "judicial construction is limited by the countervailing doctrine that section 503 priorities should be narrowly construed to maximize the value of the estate preserved for the benefit of all creditors." *In re Colortex Indus., Inc.*, 19 F.3d 1371, 1377 (11th Cir. 1994). In *Milwaukee Engraving*, the court declined to extend administrative relief to a party under § 503(b)(1)(A) after the party failed to satisfy § 503(b)(2)'s requirements because, even though a literal reading of the Code might slight creditors, bankruptcy courts cannot erase provisions in the name of equity. *In re Milwaukee Engraving Co., Inc.*, 219 F.3d 635, 637 (7th Cir. 2000).

Just as the court in *Milwaukee* could not erase a specific provision in the name of equity, this Court should refrain from erasing § 503(b)(3)(D) by stretching "including" to provide Weinberg administrative expense. Weinberg is simply ineligible for an administrative expense.

ii. Weinberg cannot circumvent § 503(b)(3)(D)'s express limitations by stretching the term "including" in § 503(b) to receive an administrative expense.

Section 503(b) provides that "[a]fter notice and a hearing, there shall be allowed administrative expenses . . . *including*—[non-exhaustive list of nine examples of entities who may collect]." 11 U.S.C. § 503(b) (emphasis added). Admittedly, within the context of the Bankruptcy Code, "including" is "not limiting." *See id.* § 102(3). However, the minority of courts contravene § 503(b)(3)(D) by unnecessarily stretching § 503(b) to grant administrative relief to creditors who make a substantial contribution to a chapter 7 case. Stretching the term "including" also renders every other subsection of § 503(b)—particularly §§ 503(b)(3)(D) and 503(b)(1)(A)—superfluous.

a. This Court may depart from the Code's definition of "including" to avoid giving § 503(b)(3)(D) a meaning that conflicts with § 503(b)'s purpose.

Bankruptcy courts cannot "contravene specific statutory provisions" and "create[] substantive rights that are otherwise unavailable under applicable law." *Law v. Siegel*, 134 S.Ct. 1188, 1194–95 (2014); *In re Smart World Tech., LLC*, 423 F.3d 166, 184 (2d Cir. 2005) (restricting a bankruptcy court's discretion under § 105(a)); *see also In re Fesco Plastics Corp. Inc.*, 996 F.2d 152, 154 (7th Cir. 1993) ("[W]hen a specific Code provision addresses an issue, a court may not employ its equitable powers to achieve a result not contemplated by the Code."). To avoid creating substantive rights, courts may depart from a statutory definition if it conflicts with other statutory language or the statute's purpose. *Cf. Bond v. United States*, 134 S.Ct. 2077, 2091 (2014) (rejecting the statutory definition of "chemical weapon" because it conflicted with the statute's purpose).

By stretching the term "including" in § 503(b), the minority of courts contravene § 503(b)(3)(D) and create a substantive right not expressly provided by the Code. Those courts contend that because the term "including" appears once in the umbrella of § 503(b), Congress did not actually limit administrative expenses to creditors in only chapter 9 or chapter 11 cases. *In re Connolly N. Am., LLC*, 802 F.3d at 816–18. Yet, Congress did *not* use the term "including" in 503(b)(3) or 503(b)(3)(D). Instead, Congress expressly limited § 503(b)(3)(D) to only "chapter 9 or 11" cases. *Id.* at 821–22 (O'Malley, J., dissenting). The Code's broad definition of "including" cannot circumvent § 503(b)(3)(D)'s plain language or expand § 503(b) to provide limitless relief.

Here, the lower court not only "create[d] substantive rights that are otherwise unavailable under [the Code]," but also relied on an interpretation of "including" that conflicts with § 503's underlying purpose: narrowly granting administrative expenses to maximize the value of the bankruptcy estate. The lower court erroneously concluded that the only way to give meaning to "including" under § 503(b) is to "acknowledge that administrative expenses other than the statutory examples are permissible." R. at 18. This Court does not need to go to such great lengths

to give meaning to "including." Instead, this Court may depart from the Code's definition of "including" to the extent that § 503(b) may allow relief in occasions *not* already anticipated by the Code. *See, e.g., In re N.P. Min. Co., Inc.*, 963 F.2d 1449, 1452 (11th Cir. 1992) (listing instances where courts have used § 503(b) in situations *not* already anticipated by § 503(b), including: a damage claim for torts caused by a trustee, compensation for injunction violation, and compensation for costs associated with cleaning environmental hazards). Therefore, Weinberg cannot receive an administrative expense under § 503(b) because stretching the definition of "including" conflicts with the § 503's language and purpose.

b. Granting Weinberg an administrative expense in Backstreets's chapter 7 case would render huge swaths of § 503(b) superfluous.

Every word in a statute must be given meaning to avoid making any word or provision superfluous, void, or insignificant. *NLRB v. SW General Inc.,* 137 S.Ct. 929, 941 (2017) (rejecting an interpretation that would make a provision superfluous since that is a "result we typically try to avoid"). Further, while a statute's punctuation is not controlling, it may confirm conclusions drawn from the statutory language. *Cf. United States v. Naftalin*, 441 U.S. 768, 774, n.5 (1979).

The subsections under § 503(b)—including § 503(b)(3)(D)—are erased from the Code entirely if § 503(b) creates a result otherwise precluded by the express limitations in its subsections. For instance, if a creditor may be awarded an administrative expense for his substantial contribution in a chapter 7 case under § 503(b), then there would never be a reason for any chapter 9 or 11 creditor to request an administrative expense under § 503(b)(3)(D).[22] The same goes for creditors filing petitions under § 503(b)(3)(A), court-approved creditors making

[22] The lower court attempted to reconcile its interpretation's consequences on §503(b)(3)(D) by providing that §503(b)(3)(D)'s "contextual framework" would still provide "guidance" to other courts. However, Congress could not have intended for any provision of the Code—let alone § 503(b)(3)(D)—to be mere "guidance" or "contextual framework" when it used express language.

recoveries under § 503(b)(3)(B), and attorneys under § 503(b)(4). Section 503(b) would be the first, last, and only recourse for any and every creditor.

Even if the subsections themselves survive, portions of their express language do not. If a creditor may be awarded an administrative expense for his substantial contribution in a chapter 7 case, Congress wasted both time and ink penning the words "in a chapter 9 or 11 case." Moreover, extending the term "including" in § 503(b) to § 503(b)(3)(D) simultaneously extends the term "including" to each of the nine examples of entities who may collect an administrative expense under § 503(b). But "including" appears twice within § 503: once in § 503(b) and again immediately after in § 503(b)(1)(A). Extending "including" in § 503(b) to each and every subsection would make the "including" in § 503(b)(1)(A) wholly redundant.

This interpretation is confirmed when this Court considers Congress's placement of em dashes within § 503. Congress included an em dash between "including" in § 503(b) and the nine enumerated subsections, which links § 503(b) only to those nine subsections. *See* 11 U.S.C. § 503(b). Similar em dashes are selectively placed in § 503(b): one in § 503(b)(1)(A), another in § 503(b)(1)(B), a third in § 503(b)(3), and the last in § 503(b)(8). Each em dash links *that* section to *that* list. The remaining subsections lack em dashes altogether. Thus, the em dashes in § 503(b) and § 503(b)(3) support the narrow plain language interpretation of § 503(b)(3)(D).

To avoid making a mess of the Code, this Court should refrain from expanding § 503(b) to include creditors who make a substantial contribution to chapter 7 cases. To find otherwise would render em dashes, terms, and entire provisions wholly superfluous.

2. Stretching § 503(b) beyond chapter 9 or 11 cases violates equitable principles.

Even when presented with "compelling policy reasons," this Court has refused to carve out exceptions absent express congressional intent. *See, e.g., Hall v. United States*, 566 U.S. 506 (2012). Courts conservatively grant administrative expense requests because they reduce funds

available to prepetition creditors. *See Suplee v. Bethlehem Steele Corp. (In re Bethlehem Steel Corp.)*, 479 F.3d 167, 172 (2d Cir. 2007); *see also* 11 U.S.C. 726(a). A judicially-made "totality of the circumstances" approach cannot override Congress's goal of keeping administrative expenses at a minimum. Section 503(b)(3)(D) balances "the twin objectives of encouraging 'meaningful creditor participation in the reorganization process' and 'keeping fees and administrative expenses at a minimum so as to preserve as much of the estate as possible for the creditors.'" *Lebron v. Mechem Financial Inc.*, 27 F.3d 937, 944 (3d Cir. 1994) (citations omitted).

Even the minority courts hesitated before they violated the equitable principles of bankruptcy by stretching the term "including" under § 503(b). Concerned with the "chilling effect" a narrow § 503(b) interpretation would have on creditor participation, minority courts extended § 503(b) relief to chapter 7 creditors "only in extraordinary circumstances," such as investigating a debtor's fraudulent transfers because the trustee failed to do so or working with the trustee to investigate fraudulent transfers that the creditor had unique prepetition knowledge of. *Mediofactoring v. McDermott (In re Connolly N. Am., LLC)*, 802 F.3d 810, 813 (6th Cir. 2015) (trustee "breached discovery obligations due to gross negligence"); *In re Javed*, 2018 WL 4955839 *2 (Bankr. D.Md. Oct. 11, 2018) (creditor had knowledge of debtor's prepetition assets); *In re Antar*, 122 BR. 788, 791 (Bankr. S.D. Fla. 1990); *see also In re Maust Transp., Inc.*, 589 B.R. at 891 (trustee lacked funds to investigate the debtor's fraudulent transfer).

The concern about a "chilling effect" on creditor participation is misplaced. Chapter 7 creditors may intervene in "exceptional circumstances," but they must do so by either working with the trustee or petitioning the court. *See* 11 U.S.C. §§ 503(b)(3)(B), 503(b)(4). But, even if unilateral creditor action could be reimbursed under § 503(b)(3)(D) in "exceptional circumstances," the lower court forgot one thing: this is not an exceptional circumstance.

Nothing in the record evinces that the Trustee was inept or failed to satisfy his obligations.[23] Yes, Weinberg discovered that Backstreets fraudulently transferred $100,000 to Patti Clemons. R. at 7. But Weinberg was not investigating Clemons for the benefit of the bankruptcy estate.[24] *Id.* Weinberg, who sat on his default judgment for seven months, was unable to execute against Backstreets. *Id.* at 5–6. So, instead, he went on a fishing expedition: he took a creditor's examination of Clemons hoping to find some money—any money—to satisfy his judgment. *Id.* at 7. So, Weinberg simply informed the Trustee of what he discovered, and the Trustee bore the cost of bringing an avoidance action. *Id.* Any benefit to the estate was purely incidental. Now, Weinberg stands to benefit from railroading this bankruptcy. If granted administrative priority under § 503(b), Weinberg would receive $100,000 as a secured creditor[25] and another $25,000 as an administrative expense before unsecured creditors saw a penny.[26] *See id.*

The lower court's holding allows creditors, like Weinberg, to bypass the Code's process, investigate non-parties, rack up huge bills, and then charge the estate for an incidental discovery. Meanwhile, there is less money in the estate to pay prepetition creditors who actually abide by the Code. Such a result exceeds the statutory language that Congress used, undermines congressional authority, and opens the floodgates for abuse. Considering Congress's underlying purpose for § 503, this Court cannot empower Weinberg—or any other creditor—to circumvent the Code through § 503(b).

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[23] To the contrary, the Trustee repeatedly tried to maximize the value of Backstreets's estate. R. at 8. The Trustee even tried to work with Weinberg to do so. *Id.*

[24] Which, had the Trustee not made the dubious concession that Weinberg made a substantial contribution, might have been enough to determine that this was not actually a substantial contribution. *See, e.g., Lebron v. Mechem Financial Inc.*, 27 F.3d 937, 944–45 (3d Cir. 1994).

[25] Weinberg has "a secured claim to the extent of the value of" the snow plow trucks, but the record does not disclose their value. 11 U.S.C. § 506(a)(1). The record suggests the snow plow trucks had a value of $100,000 because Stone Pony's offer to purchase "the Debtor's assets, excluding the snow plow trucks," was $100,000 less than Tenth Avenue had offered for all of Backstreets's assets, *including* the snow plow trucks. R. at 8.

[26] Which, incidentally, includes Weinberg if the snow plows are worth $100,000. Weinberg lent Backstreets $450,000 and holds a perfected purchase money security interest. R. at 4. Thus, Weinberg has an unsecured claim for the deficiency between the trucks' value and the loan: $350,000. 11 U.S.C. § 506(a)(1).

3. After twice amending § 503, Congress did not expand § 503(b)(3)(D) to include chapter 7 cases.

"When Congress amends one statutory provision but not another, it is presumed to have acted intentionally." *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 174 (2009). Congress wrote § 503(b) to allow bankruptcy courts to award administrative expenses, but Congress also wrote § 503(b)(3)(D) to limit its application to only chapter 9 or 11 cases. *See* 11 U.S.C. §§ 503(b), 503(b)(3)(D). After the majority courts began holding that chapter 7 creditors cannot receive administrative relief under § 503(b)(3)(D), Congress amended § 503 twice, once in 1994 and again in 2005. *See e.g.*, *Lebron v. Mechem Financial Inc.*, 27 F.3d 937 (1994).

Congress revisited § 503 in 1994 when it added § 503(b)(3)(F), which expanded § 503(b)(3)'s exhaustive list. H.R. REP. No. 835, 103rd Cong., 2nd Sess. (1994). Prior to 1994, courts interpreted § 503(b)(3)(D) to allow only *unofficial* committees to receive administrative expenses. *See In re Maust Transport. Inc.*, 589 B.R. 887, 893 (Bankr. W.D. Wash. 2018). In 1994, Congress added § 503(b)(3)(F) to expressly authorize administrative expenses for *official* committee members in order to resolve that misinterpretation. *See id.*

Congress revisited § 503 again in 2005 when it amended § 503(c). Prior to 2005, courts had improperly exercised their discretion to allow "certain types of retention compensation to insiders." *Id.* In 2005, Congress restricted the bankruptcy court's broad discretion to correct this. *Id.*; *see also* Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 331, 119 Stat. 23, 102 (2005).

The minority courts claim that, by placing "under chapter 9 or 11 of this title" in § 503(b)(3)(D), Congress did not expressly exclude creditors who make a substantial contribution to a chapter 7 case. *Mediofactoring v. McDermott (In re Connolly N. Am., LLC)*, 802 F.3d 810, 818 (6th Cir. 2015). The *Connolly* court tried its hand at legislating, and suggested that Congress should have explicitly included one of three restrictions: (1) "expenses incurred by a creditor in

security the removal of a Chapter 7 trustee are not allowable"; (2) "expenses incurred in making a substantial contribution in a case under Chapters 9 or 11, but not Chapter 7, may be allowed" or; (3) "only the enumerated expenses shall be allowed."[27] *Id.* at 816.

It is easy to Monday-morning quarterback legislative drafting—which is why courts should avoid doing so altogether. After all, Congress could have amended § 503(b)(3)(D) to read "in cases under chapter 7, 9, or 11 of this title." Congress could have added "including" to either §§ 503(b)(3) or 503(b)(3)(D). Congress could have added "§ 503(b)(3)(G)" to expressly allow administrative expenses for creditors that make substantial contributions in chapter 7 cases. Yet, Congress *twice* had the opportunity to implement something akin to the minority's version of § 503(b)(3)(D). Instead, Congress—fully aware that the majority courts were holding that § 503(b)(3)(D) did not apply in chapter 7 cases—left § 503(b)(3)(D) untouched. *See, e.g.*, *In re Hackney*, 351 B.R. 179, 201 (Bankr. N.D. Ala. 2006) ("Although the parties speculate as to the reasons why Congress did not include the other bankruptcy chapters in § 503(b)(3)(D), the Court is not going to engage in speculation and attempt to divine congressional wisdom.").

Congress amended statutory provisions in § 503, but not § 503(b)(3)(D). This Court may presume Congress acted intentionally. If Congress has a problem with the narrow interpretation of § 503(b)(3)(D), "Congress is entirely free to change the law by amending the text." *Hall v. United States*, 566 U.S. 506, 523 (2012). Thus, it flies in the face of Congress to extend § 503(b) to award an administrative expense to creditors who make a substantial contribution to a chapter 7 case.

[27] The lower court also pointed to the 2005 amendment to § 503(c) to show that Congress could have "expressly preclude[d] a bankruptcy court from using its discretion to award a substantial contribution administrative expense in chapter 7 cases." R. 19 n.12.

CONCLUSION

Congress delicately drafted a process—the Bankruptcy Code—to give debtors a "breathing spell" and for creditors to collect their equitable share. Courts should trust this process. Backstreets respectfully requests this Court reverse the lower court's decision and hold that Weinberg (1) violated § 362(a)(3) when he actively maintained possession of the snow plow trucks after Backstreets filed bankruptcy, and continued to violate § 362(a)(3) by refusing to return the trucks after both Backstreets and the Trustee requested he do so; and (2) is not entitled to an administrative expense for his substantial contribution to Backstreets's chapter 7 case under § 503(b) because § 503(b)(3)(D) expressly limits such relief to "chapter 9 or 11" cases.

Dated January 21, 2019

Respectfully Submitted,

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Team P. 31
Counsel for Petitioner

APPENDIX A

In this title—

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

11 U.S.C. § 102(3) (2012).

APPENDIX B

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

11 U.S.C. § 105(a) (2012).

APPENDIX C

When adequate protection is required under section 362, 363, or 364 of this title of an interest of an entity in property, such adequate protection may be provided by--

(1) requiring the trustee to make a cash payment or periodic cash payments to such entity, to the extent that the stay under section 362 of this title, use, sale, or lease under section 363 of this title, or any grant of a lien under section 364 of this title results in a decrease in the value of such entity's interest in such property;

(2) providing to such entity an additional or replacement lien to the extent that such stay, use, sale, lease, or grant results in a decrease in the value of such entity's interest in such property; or

(3) granting such other relief, other than entitling such entity to compensation allowable under section 503(b)(1) of this title as an administrative expense, as will result in the realization by such entity of the indubitable equivalent of such entity's interest in such property.

11 U.S.C. § 361 (2012).

APPENDIX D

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970, operates as a stay, applicable to all entities, of--

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

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

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

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

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

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

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

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

(b) [omitted]

(c) [omitted]

(d) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay--

(1) for cause, including the lack of adequate protection of an interest in property of such party in interest;

(2) with respect to a stay of an act against property under subsection (a) of this section, if--

(A) the debtor does not have an equity in such property; and

(B) such property is not necessary to an effective reorganization;

(3) [omitted]

(4) [omitted]

(e)

(1) Thirty days after a request under subsection (d) of this section for relief from the stay of any act against property of the estate under subsection (a) of this section, such stay is terminated with respect to the party in interest making such request, unless the court, after notice and a hearing, orders such stay continued in effect pending the conclusion of, or as a result of, a final hearing and determination under subsection (d) of this section. A hearing under this subsection may be a preliminary hearing, or may be consolidated with the final hearing under subsection (d) of this section. The court shall order such stay

> continued in effect pending the conclusion of the final hearing under subsection (d) of this section if there is a reasonable likelihood that the party opposing relief from such stay will prevail at the conclusion of such final hearing. If the hearing under this subsection is a preliminary hearing, then such final hearing shall be concluded not later than thirty days after the conclusion of such preliminary hearing, unless the 30-day period is extended with the consent of the parties in interest or for a specific time which the court finds is required by compelling circumstances.
>
> **(2)** [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.

11 U.S.C. § 362 (2012).

APPENDIX E

(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. § 363(e) (2012).

APPENDIX F

(a) An entity may timely file a request for payment of an administrative expense, or may tardily file such request if permitted by the court for cause.
(b) After notice and a hearing, there shall be allowed administrative expenses, other than claims allowed under section 502(f) of this title, **including**—

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

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

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

(B) any tax—

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

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

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

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

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

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

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

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

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

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

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

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

(4) reasonable compensation for professional services rendered by an attorney or an accountant of an entity whose expense is allowable under subparagraph (A), (B), (C), (D), or (E) of paragraph (3) of this subsection, based on the time, the nature, the extent, and the value of such services, and the cost of comparable services other than in a case under this title, and reimbursement for actual, necessary expenses incurred by such attorney or accountant;
(5) reasonable compensation for services rendered by an indenture trustee in making a substantial contribution in a case under chapter 9 or 11 of this title, based on the time, the nature, the extent, and the value of such services, and the cost of comparable services other than in a case under this title;
(6) the fees and mileage payable under chapter 119 of title 28;
(7) with respect to a nonresidential real property lease previously assumed under section 365, and subsequently rejected, a sum equal to all monetary obligations due, excluding those arising from or relating to a failure to operate or a penalty provision, for the period of 2 years following the later of the rejection date or the date of actual turnover of the premises, without reduction or setoff for any reason whatsoever except for sums actually received or to be received from an entity other than the debtor, and the claim for remaining sums due for the balance of the term of the lease shall be a claim under section 502(b)(6);
(8) the actual, necessary costs and expenses of closing a health care business incurred by a trustee or by a Federal agency (as defined in section 551(1) of title 5) or a department or agency of a State or political subdivision thereof, including any cost or expense incurred—
(A) in disposing of patient records in accordance with section 351; or
(B) in connection with transferring patients from the health care business that is in the process of being closed to another health care business; and
(9) the value of any goods received by the debtor within 20 days before the date of commencement of a case under this title in which the goods have been sold to the debtor in the ordinary course of such debtor's business.
(c) Notwithstanding subsection (b), there shall neither be allowed, nor paid--
(1) a transfer made to, or an obligation incurred for the benefit of, an insider of the debtor for the purpose of inducing such person to remain with the debtor's business, absent a finding by the court based on evidence in the record that--
(A) the transfer or obligation is essential to retention of the person because the individual has a bona fide job offer from another business at the same or greater rate of compensation;
(B) the services provided by the person are essential to the survival of the business; and
(C) either--
(i) the amount of the transfer made to, or obligation incurred for the benefit of, the person is not greater than an amount equal to 10 times the amount of the mean transfer or obligation of a similar kind given to nonmanagement employees for any purpose during the calendar year in which the transfer is made or the obligation is incurred; or
(ii) if no such similar transfers were made to, or obligations were incurred for the benefit of, such nonmanagement employees during such calendar year, the amount of the transfer or obligation is not greater than an amount equal to 25 percent of the amount of any similar transfer or obligation

made to or incurred for the benefit of such insider for any purpose during the calendar year before the year in which such transfer is made or obligation is incurred;

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

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

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

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

11 U.S.C. § 503 (2012).

APPENDIX G

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

(1) First:

(A) Allowed unsecured claims for domestic support obligations that, as of the date of the filing of the petition in a case under this title, are owed to or recoverable by a spouse, former spouse, or child of the debtor, or such child's parent, legal guardian, or responsible relative, without regard to whether the claim is filed by such person or is filed by a governmental unit on behalf of such person, on the condition that funds received under this paragraph by a governmental unit under this title after the date of the filing of the petition shall be applied and distributed in accordance with applicable nonbankruptcy law.

(B) Subject to claims under subparagraph (A), allowed unsecured claims for domestic support obligations that, as of the date of the filing of the petition, are assigned by a spouse, former spouse, child of the debtor, or such child's parent, legal guardian, or responsible relative to a governmental unit (unless such obligation is assigned voluntarily by the spouse, former spouse, child, parent, legal guardian, or responsible relative of the child for the purpose of collecting the debt) or are owed directly to or recoverable by a governmental unit under applicable nonbankruptcy law, on the condition that funds received under this paragraph by a governmental unit under this title after the date of the filing of the petition be applied and distributed in accordance with applicable nonbankruptcy law.

(C) If a trustee is appointed or elected under section 701, 702, 703, 1104, 1202, or 1302, the administrative expenses of the trustee allowed under paragraphs (1)(A), (2), and (6) of section 503(b) shall be paid before payment of claims under subparagraphs (A) and (B), to the extent that the trustee administers assets that are otherwise available for the payment of such claims.

(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 (12 U.S.C. 343), and any fees and charges assessed against the estate under chapter 123 of title 28.

(3) Third, unsecured claims allowed under section 502(f) of this title.

(4) Fourth, allowed unsecured claims, but only to the extent of $12,8501 for each individual or corporation, as the case may be, earned within 180 days before the date of the filing of the petition or the date of the cessation of the debtor's business, whichever occurs first, for--

(A) wages, salaries, or commissions, including vacation, severance, and sick leave pay earned by an individual; or

(B) sales commissions earned by an individual or by a corporation with only 1 employee, acting as an independent contractor in the sale of goods or services for the debtor in the ordinary course of the debtor's business if, and only if, during the 12 months preceding that date, at least 75 percent of the amount that the individual or corporation earned by acting as an independent contractor in the sale of goods or services was earned from the debtor.

(5) Fifth, allowed unsecured claims for contributions to an employee benefit plan--

(A) arising from services rendered within 180 days before the date of the filing of the petition or the date of the cessation of the debtor's business, whichever occurs first; but only

(B) for each such plan, to the extent of--

(i) the number of employees covered by each such plan multiplied by $12,8501; less

(ii) the aggregate amount paid to such employees under paragraph (4) of this subsection, plus the aggregate amount paid by the estate on behalf of such employees to any other employee benefit plan.

(6) Sixth, allowed unsecured claims of persons--

(A) engaged in the production or raising of grain, as defined in section 557(b) of this title, against a debtor who owns or operates a grain storage facility, as defined in section 557(b) of this title, for grain or the proceeds of grain, or

(B) engaged as a United States fisherman against a debtor who has acquired fish or fish produce from a fisherman through a sale or conversion, and who is engaged in operating a fish produce storage or processing facility--

but only to the extent of $6,3251 for each such individual.

(7) Seventh, allowed unsecured claims of individuals, to the extent of $2,8501 for each such individual, arising from the deposit, before the commencement of the case, of money in connection with the purchase, lease, or rental of property, or the purchase of services, for the personal, family, or household use of such individuals, that were not delivered or provided.

(8) Eighth, allowed unsecured claims of governmental units, only to the extent that such claims are for--

(A) a tax on or measured by income or gross receipts for a taxable year ending on or before the date of the filing of the petition--

(i) for which a return, if required, is last due, including extensions, after three years before the date of the filing of the petition;

(ii) assessed within 240 days before the date of the filing of the petition, exclusive of--

(I) any time during which an offer in compromise with respect to that tax was pending or in effect during that 240-day period, plus 30 days; and

(II) any time during which a stay of proceedings against collections was in effect in a prior case under this title during that 240-day period, plus 90 days; or

(iii) other than a tax of a kind specified in section 523(a)(1)(B) or 523(a)(1)(C) of this title, not assessed before, but assessable, under applicable law or by agreement, after, the commencement of the case;

(B) a property tax incurred before the commencement of the case and last payable without penalty after one year before the date of the filing of the petition;

(C) a tax required to be collected or withheld and for which the debtor is liable in whatever capacity;

(D) an employment tax on a wage, salary, or commission of a kind specified in paragraph (4) of this subsection earned from the debtor before the date of the filing of the petition, whether or not actually paid before such date, for which a

return is last due, under applicable law or under any extension, after three years before the date of the filing of the petition;

(E) an excise tax on--

(i) a transaction occurring before the date of the filing of the petition for which a return, if required, is last due, under applicable law or under any extension, after three years before the date of the filing of the petition; or

(ii) if a return is not required, a transaction occurring during the three years immediately preceding the date of the filing of the petition;

(F) a customs duty arising out of the importation of merchandise--

(i) entered for consumption within one year before the date of the filing of the petition;

(ii) covered by an entry liquidated or reliquidated within one year before the date of the filing of the petition; or

(iii) entered for consumption within four years before the date of the filing of the petition but unliquidated on such date, if the Secretary of the Treasury certifies that failure to liquidate such entry was due to an investigation pending on such date into assessment of antidumping or countervailing duties or fraud, or if information needed for the proper appraisement or classification of such merchandise was not available to the appropriate customs officer before such date; or

(G) a penalty related to a claim of a kind specified in this paragraph and in compensation for actual pecuniary loss.

An otherwise applicable time period specified in this paragraph shall be suspended for any period during which a governmental unit is prohibited under applicable nonbankruptcy law from collecting a tax as a result of a request by the debtor for a hearing and an appeal of any collection action taken or proposed against the debtor, plus 90 days; plus any time during which the stay of proceedings was in effect in a prior case under this title or during which collection was precluded by the existence of 1 or more confirmed plans under this title, plus 90 days.

(9) Ninth, allowed unsecured claims based upon any commitment by the debtor to a Federal depository institutions regulatory agency (or predecessor to such agency) to maintain the capital of an insured depository institution.

(10) Tenth, allowed claims for death or personal injury resulting from the operation of a motor vehicle or vessel if such operation was unlawful because the debtor was intoxicated from using alcohol, a drug, or another substance.

11 U.S.C. § 507(a) (2012).

APPENDIX H

(c)(1) Except as provided in subsection (a)(3)(B) of this section, the debtor shall be discharged from a debt of a kind specified in paragraph (2), (4), or (6) of subsection (a) of this section, unless, on request of the creditor to whom such debt is owed, and after notice and a hearing, the court determines such debt to be excepted from discharge under paragraph (2), (4), or (6), as the case may be, of subsection (a) of this section.
(2) Paragraph (1) shall not apply in the case of a Federal depository institutions regulatory agency seeking, in its capacity as conservator, receiver, or liquidating agent for an insured depository institution, to recover a debt described in subsection (a)(2), (a)(4), (a)(6), or (a)(11) owed to such institution by an institution-affiliated party unless the receiver, conservator, or liquidating agent was appointed in time to reasonably comply, or for a Federal depository institutions regulatory agency acting in its corporate capacity as a successor to such receiver, conservator, or liquidating agent to reasonably comply, with subsection (a)(3)(B) as a creditor of such institution-affiliated party with respect to such debt.

11 U.S.C. § 523 (2012).

APPENDIX I

(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.

11 U.S.C. § 541(a) (2012).

APPENDIX J

(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.

11 U.S.C. § 542 (2012).