No. 18-0918

In The

SUPREME COURT OF THE UNITED STATES

October Term, 2018

IN RE BACKSTREET PLOWING, INC.,
Debtor,

STEVEN VIN SANT, CHAPTER 7 TRUSTEE,
Petitioner,

v.

MILTON WEINBERG,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRTEENTH CIRCUIT

BRIEF FOR THE PETITIONER

Team Number P. 41
Counsel for Petitioner

QUESTIONS PRESENTED

1. Whether a secured creditor passively withholding property of the estate from a debtor or trustee of the estate is in violation of the automatic stay provision of 11 U.S.C. §362(a)(3).
2. Whether the statutory provision in section 503(b) allows a substantial contribution claim as administrative expense in a chapter 7 case.

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The Bankruptcy Judge for the District of Moot entered a ruling over petitioner's objections that Respondent's retention of snow plow trucks legally repossessed prior to the bankruptcy filing did not violate section 362(a)(3) and that Respondent was entitled to a substantial contribution administrative expense under section 503(b). The Petitioner then appealed to the Bankruptcy Appellate Panel for the Thirteenth Circuit, which affirmed the ruling. Petitioner then appealed to the United States Court of Appeals for the Thirteenth Circuit, but the ruling was again upheld in a split decision. The Supreme Court of the United States then granted Highway's petition for writ of certiorari.

STATEMENT OF JURISDICTION

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

STATEMENT OF THE CASE

This case concerns the fundamental purpose of the Bankruptcy Code to enable an efficient reorganization of an estate. Bankruptcy courts, officers and the code operate to conduct a swift and profit-maximizing reorganization for the benefit and protection of all creditors and the economy as a whole. This primary goal of bankruptcy is at odds with recent court rulings on the facts below.

The Debtor, Backstreets Plowing Inc., and its sole shareholder Christopher "Big Man" Clemons ("Clemons"), operated a seasonal snow plow business. In the spring of 2015, the Debtor contracted with Weinberg for a loan of $450,000 order to purchase a new set of snow plow trucks to remain competitive and secure contracts with the City if Badlands. To secure repayment of the loan, the Debtor granted Weinberg a security interest in the trucks. Clemons also personally guaranteed the loan. Clemmons and Weinberg had a fallout regarding a personal matter outside the scope of the contract, nonetheless the relationship between the two soured. The winter of 2015-2016 was profitable for the debtor due to mild winter season, leaving little cost in labor and fuel and maintenance.

Because of a personal dispute between parties and the possible confusion that ensued, Clemons did not make the December 2015 loan payment to Weinberg. After not receiving the first few payments under the note, Weinberg contacted Clemons regarding payment in February 2016.

In April 2016, Weinberg filed suit in the state of Moot Circuit court and as part of the lawsuit, Weinberg sued Clemons on his personal guarantee. In October 2016, Weinberg obtained a default judgement against both the debtor and Clemons, jointly and severally liable, for $450,000 plus the interest and fees. However Weinberg did not immediately take any action to collect on his judgement.

Unlike the prior winter season, the winter of 2016-2017 was costly due to several Nor'easters which resulted in heavy snowfall and subsequently substantial losses. The amount of money the from the City of Badlands were not large enough to cover costs of labor maintenance and fuel and to make matters worse, Weinberg suddenly begins his efforts to collect on his judgement in January 2017. Weinberg, without any formal proceedings or any sort of communication or warning to the debtor or Clemons, hired a repossession company which took away the snow plow trucks to a warehouse owned by Weinberg where they remain today.

Without the trucks, the debtor was unable to fulfill its plowing contract with the city who threatened to terminate the contract and sue the debtor for damages. Backed to a corner because of Weinberg's action, the debtor was running low and cash and had no choice but to file for chapter 11 petition in February. Shortly thereafter, the debtor's attorneys asked for the snow plows be returned so that the company could generate revenue, yet Weinberg refused to return the vehicles. The debtor filed a motion asking the bankruptcy court to determine that Weinberg violated the automatic stay under section 362(a)(3) in which the court sided with Weinberg and the debtor timely appealed in March 2017. Because of undue financial hardships, the debtor voluntarily converted the chapter 11 case into a chapter 7 case and the trustee was appointed to administer and liquidate the debtor's estate. After the conversion, Weinberg hired a collection firm to pursue collection efforts. Upon investigation, the firm discovered that the debtor had made transfers of approximately $100,000 to Clemons' daughter: Patti Clemmons.

Following the investigation, a settlement was reached where Patti agreed to pay $75,000 to the estate. Weinberg filed a motion seeking allowance of a substantial contribution administrative expense for the legal fees incurred in the investigation. The trustee rebutted acknowledging that Weinberg had made a substantial contribution to the estate. The bankruptcy court approved of Weinberg's motion.

In September 2017, Tenth Avenue offered to purchase substantially all of the debtor's assets including the snow plow trucks. The trustee, in good faith attempted to negotiate with Weinberg for the return of the trucks. Unfortunately, negotiations proved unsuccessful and Tenth Avenue withdrew its purchase offer in November 2017. Stone Pony offered $100,000 less than tenth avenue for the Debtor's assets excluding the snow plow trucks in January 2018. The bankruptcy court approved the sale to stone pony in February 2018.

The Trustee refuses to dismiss the appeals on the stay violation issue in hopes that he will prevail so he can rightfully recover damages from Weinberg for the violation of the automatic stay and obtain the difference between the initial offer by Tenth Avenue and the sale from Stone Pony. The trustee is also timely appealing the substantial contribution appeal from the previous courts including the recent decision by the United States Court of Appeals for the Thirteenth Circuit.

SUMMARY OF THE ARGUMENT

The courts below have failed to adhere to statutory components of the Bankruptcy Code that support and efficient and fair reorganization of the estate for the benefit of all creditors.

First, the Thirteenth Circuit erred in holding the passive withholding of property of an estate does not constitute an act of exercising control under section 362(a)(3) of the Bankruptcy Code. This holding is contrary to a plain text analysis of the statute, which supports a broad approach to the meaning of the word "act" particularly in its contextual use with the phrase "exercise control." This holding is also contrary to congressional intent as evidenced by congress amending section 362 shortly after the Supreme Court held that property of the estate subject to reorganization includes that which has been seized by the creditor. The Thirteenth Circuit's holding that any act subject to section 362 must be an "affirmative" act unreasonably and

restricts the intentionally broad applicability of section 362 without a clear basis and diverges from a plurality of sister court holdings.

The Thirteenth Circuit further erred in restricting a bankruptcy officer's ability to collect the estate for the benefit of all creditors by holding that the turnover power of section 542(a) is not self-effectuating but must be compelled by court action. Similar to the court's interpretation of section 362, this opinion unjustly restricts the efficient reorganization of an estate contrary to a plain text analysis of the statute and to the detriment of the purpose of the Bankruptcy Code. This opinion has the perverse effect of rendering section 363 protections for debtors self-effectuating in their own right despite the clear statutory requirement that they be compelled by courts, unlike section 542(a).

The courts below have also misinterpreted the statutory provision of the bankruptcy code and in doing so had created a construction that goes far beyond what the plain meaning indicated and what legislature intended for what seems to be addressing concerns of equity.

Before going into a technical analysis of the issue, it must be noted that the vast majority of courts that have addressed this issue have held that substantial contribution claims administrative expenses are limited to chapter 9 and 11 cases and not applicable to chapter 7 cases. Yet, the majority cites the Sixth Circuit, in the minority that has held the opposite, whose ruling seems to be contradicted based on a recent outcome of a case in the very same Court. The Circuit held that when there is strong common law precedent, unless otherwise indicated by clear statutory interpretation, the precedent must be adhered to. However, the case, in the Sixth Circuit that established the "minority" approach did the exact opposite in which there was a common law precedent, the court recognized it, yet came with a different outcome because of a strange flexible reading of the statute whereas other Circuits at the time have held that the explicit mentioning of chapters 9 and 11 limit the application of the provision to those specific cases.

Statutory interpretation should always be the first tool, and the manner in which the majority in the Thirteenth Circuit makes their reasoning is unusual. The circuit reasons that the term "including" in the beginning of section 503(b) allows, what is practically an unlimited number of interpretations and additions to a statute. This is a highly unusual and dangerous and as such the construction of the Majority trend should apply in which is limited to the two terms stated. The term "including" should be interpreted to show the significance of the listed examples shown in the provision.

As for legislative history other judges have pointed out, the legislature seemed to have intentionally limited 503(b)(3)(D) to chapter 9 and 11 with respect to allowing substantial contribution claims for administrative expenses. Thus, it helps supports the canon of expression unis est exclusion alterius to apply and this limit the terms to chapter 9 and 11 cases. Ultimately supporting the holdings of the majority trend that chapter 7 cases do not apply**.**

Lastly it seems like the Thirteenth Circuit ruled the way it did because of concerns of equity with regard to the specific facts of the case. The facts of this case are very uncommon which does make it an outlier. Nonetheless, the statute's meaning surpasses concerns of equity as this court has viewed. It is also important to mention that while creditors are often heavily considered in Bankruptcy cases, the debtors are also in a position that must be appreciated as this court has hinted. Thus, primarily ruling in a way that benefits the creditor yet goes against the clear meaning of a statute will lead to gross injustices that will follow if the majority's position is upheld.

ARGUMENT

I. A non-debtor party withholding property of the Estate is an act of exercising control in violation the §362(a)(3).

The passive withholding of property of an estate is inherently an act of exercising control. A non-debtor party doing so violates section 362(a)(3) when a Debtor or Trustee asserts a right to turnover of the property under section 542(a).

Section 362 of the Bankruptcy Code provides an automatic stay over a broad range of non-debtor actions upon "the filing of a bankruptcy petition under any chapter of the Bankruptcy Code," including "wide range of actions that would affect or interfere with property of the estate, property of the debtor or property in the custody of the estate." 3 Collier on Bankruptcy P 362.01 (16th 2018). Particularly, section 362(a)(3) requires a stay over "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.S. §362(a)(3).

The filing of a bankruptcy petition further grants a Trustee the right to "use, sell, or lease…property of the estate." 11 U.S.C.S. §363(a). In concert with section 363, any entity "in possession, custody, or control, during the case, of property that the trustee may use, sell, or lease under section 363… shall deliver to the trustee… such property," commonly referred to as a 'turnover.' 11 U.S.C.S. §542(a).

The Thirteenth Circuit erred in its interpretation of these sections of the Bankruptcy Code two regards. First, the court ruled, contrary to a majority of circuit court holdings, section 362(a)(3) does not prohibit the passive withholding of property of an estate since it does not constitute an affirmative act exercising control. By reading into the statute the requirement of a violation to be an "affirmative" act beyond passive retention, this holding neglected both the plain text meaning and the congressional intent of the addition of the "exercise control" standard in 1984.

Second, the Thirteenth Circuit's holding that the turnover power of section 542 is not self-effectuating and can only be compelled by court action is improperly based on an overestimation of limited exceptions to section 542 and a misinterpretation of Federal Rules of Bankruptcy Procedure. This reading of section 542 is again contradicted by a plain text reading of the statute, as well as the Supreme Court's own prior holdings, and the central purpose of the Bankruptcy Code

A. The scope of §362(a)(3) is not limited to affirmative acts and includes passive retention of control.

As is standard, statutory interpretation must begin with the text of the statute itself. See *United States v. Ron Pair Enters., Inc.,* 489 U.S. 235, 240-241 (1989). Further, this court has held we must "presume that a legislature says in a statute what it means and means in a statute what it says there… When the words of a statute are unambiguous, then this first canon is also the last: 'judicial inquiry is complete.'" *Conn. Nat'l Bank v. Germain,* 503 U.S. 249, 253-54 (1992).

The Bankruptcy Code neglects to define any of the words contained in section 362(a)(3). Black's Law Dictionary, however, defines "act" as "the process of doing something or performing; an occurrence that results from a person's will being exerted on the external world" and "control" as "[t]o exercise restraining or directing influence over. To regulate; restrain; dominate; curb; to hold from action; overpower; counteract; govern." Black's Law Dictionary 29 (10th ed. 2014); 329 (6th ed. 1990). Taken together, an act of exercising control can appropriately be interpreted as 'the process of restraining or holding from action.'

Withholding property from a debtor and preventing its use in action squarely fits within the definition of an act of exercising control. Weinberg's refusal to return property of the estate is a manner of "his will being exerted" that he "restrains" the snow plow trucks and the Trustee be prevented for selling them in bankruptcy reorganization. According to the Seventh Circuit, an

alternative view "would not be logical given the central purpose of reorganization bankruptcy… to group all of the debtor's property together in his estate such that he may rehabilitate his credit and pay off his debts." *Thompson v. GMAC, LLC*, 566 F.3d 699, 702 (7th Cir. 2009). Further, in *Transouth Fin. Corp. v. Sharon (In re Sharon)*, the court considered "withholding possession of property from a bankruptcy estate is the essence of 'exercising control' over possession." 234 B.R. 676 (B.A.P. 6th Cir. 1999). Similar to the present facts, in *In re Sharon* the lender's refusal to return the debtor's vehicle upon declaration of bankruptcy was deemed an act of exercising control because it prevented the debtor's use of their vehicle.

This statutory analysis is not necessarily mutually exclusive from the Thirteenth Circuit's restrictive view that an "act" requires "doing something" when one properly accounts for the inclusion of "exercising control" in the statute. As held in *Montclair v. Ramsdell* and continually reiterated by this court, "It is the duty of the court to give effect, if possible, to every clause and word of a statute." 107 U.S. 147, 2 S. Ct. 391 (1882). An interpretation of section 362(a)(3) that neglects the effect of "exercise control" upon "act" fails precisely in this regard. However, the Thirteenth Circuit neglected to emphasize the importance "exercise control" upon what constitutes an "act."

Furthermore, the Thirteenth Circuit erred in reaching the conclusion that any "act" subject to section 362(a)(3) must be an "affirmative" act. Such a classification of an act has no clear legal definition in the Bankruptcy Code or legal dictionaries, but given the context of its use in the court's opinion it is clear that the court's holding essentially requires a "positive" act or an act of "commission." Such a restrictive classification is not present in the statutory text of section 362(a)(3), and improperly narrows the definition to exclude acts of omission such as a refusal to return the property of the Estate, again contrary to the "central purpose of reorganization bankruptcy… to group all of the debtor's property together." *Thompson,* 566 F.3d

at 702. This restrictive classification is also contrary to the broad approach to the term "act" which both legal authorities and courts generally recognize. As is cited by Black's Law Dictionary under the definition of "act," "when it is said…an act is one of the essential conditions of liability, we use the term in the widest sense of which it is capable. We mean by it any event which is subject to the control of the human will." John Salmond, *Jurisprudence* 367 (Glanville L. Williams ed., 10th ed. 1947) [Black's Law Dictionary (10th ed. 2014); 29].

The court in *Accord In re Peake* recognized the "widest sense" of the word "act" in the context of section 362(a)(3), stating, "when applying the appropriate canons of construction, it is natural to give the term 'act' its broadest meaning when construing the expansively-interpreted language in section 362(a)(3)." 588 B.R. 811. 832 (Bankr. N.D. Ill. 2018). In that case, the court appropriately contrasted the expansive use of the word "act" in section 362(a)(3) as had been interpreted by the Seventh Circuit in *Thompson* in light of the similarly broad nature of the term "exercise control" with a more restrictive use in section 362(b)(3) of "any act to perfect… maintain… or continue to perfect". 11 U.S.C.S. §362(b)(3). Given section 362(b)(3) is an exemption to the automatic stay, the court followed Ninth Circuit precedent which holds an exemption to an automatic stay "should be read narrowly to secure the broad grant of relief to the debtor" since "congress clearly intended the automatic stay to be quite broad." *In re Stringer*, 847 F.2d 549, 552 (9th Cir. 1988). Section 362(a) does operate as a category for inclusion to the stay, not exemption. Given the broadness of the qualifying language of "exercise control" and that "congress clearly intended the automatic stay to be quite broad," a proper interpretation of the section 362(a)(3) in the "widest sense" would not be exclusory of acts of omission that amount to an exercise of control.

Congress' act of expanding section 362(a)(3) in 1984 to include "to exercise control over property of the estate" suggests the case at hand is the precise scenario congress intended this

language to apply to. Prior to the 1984 revision, the statute only extended to acts over property that was not already in possession of the estate. Then, in 1983 the Supreme Court ruled in *United States v. Whiting Pools* that "the reorganization estate includes property of the debtor that has been seized by a creditor prior to the filing of a petition for reorganization" and such property shall be turned over to the trustee pursuant to section 542(a) of the bankruptcy code. 462 U.S. 198, 209 (1983). As noted by the Seventh Circuit, "although Congress did not provide an explanation" of the expansion of section 362(a)(3), "the mere fact that Congress expanded the provision to prohibit conduct above and beyond obtaining possession of an asset suggests that it intended to include conduct by creditors who seized an asset pre-petition." *Thompson*, 566 F.3d at 702. Further, the Second Circuit recognized "this significant textual enlargement is consonant with… the Supreme Court's interpretation [in *Whiting Pools*] that Congress intended to prevent creditors from retaining property of the debtor in derogation of the bankruptcy procedure and the broad goals of debtor protection… without regard to what party was in possession of the property in question when the petition was filed." *Weber v. SEFCU (In re Weber),* 719 F.3d 72, 80 (2d Cir. 2013).

The Thirteenth Circuit offers a potential alternative reason for the 1984 revision, suggesting the provision was aimed at the protection of intangible property rights of the estate, such as contract rights or causes of action. Yet, the court's interpretation restricts the statutes effect without with any textual or historical basis, again despite the fact that "congress clearly intended the automatic stay to be quite broad." The interpretation recognized by a majority of circuit courts both stands in line with congress' aforementioned intent and is supported by historical proximity to *Whiting Pools*.

B. The turnover power of §542(a) is self-effectuating and is not excused by protected interests of the creditor under §363(e).

A plaint text analysis of section 542(a) makes clear the turnover power therein does not require court action to compel but is self-effectuating. Once again, the interpretation of the statute must begin with the text of the statute itself. See *Ron Pair Enters., Inc.,* 489 U.S. at 240-241. Section 542(a) contains the operative requirement that an "shall" deliver property of the estate to the trustee that is subject to section 363(e). As held by this court in *Kingdomware Tech., Inc. v. United States, "*When a statute distinguishes between 'may' and 'shall,' it is generally clear that 'shall' imposes a mandatory duty." 136 S. Ct. 1969, 1977 (2016). In section 542(e), congress clearly exhibited their ability and desire to distinguish a "shall" command for turnover from a requirement for preliminary court intervention by clarifying that a "court may order" a turnover of information related to debtor's property only "after notice and a hearing." 11 U.S.C.S. §542(e). As recognized by the preeminent bankruptcy treatise, "By its express terms, [section 542] is self executing, and does not require that the trustee take any action or commence a proceeding or obtain a court order to compel the turnover." 5 Collier on Bankruptcy 542.03 (16th ed. 2017).

The Thirteenth Circuit ruling disregarded this plain text analysis based upon the concern that self-effectuating turnover power would render the limited exceptions to section 542(a) moot. This concern presents a false choice of either enforceable exceptions to section 542(a) that protect creditor's or a self-effectuating turnover power which is not consistent with the structure of the statute the Bankruptcy Rules it is based upon.

A self-effectuating section 542(a) does not limit a creditor's rights to protect their interests under section 363(e). Section 363(e) grants that "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.S. §363(e). By its text this section merely limits the trustee's ability to use, sell or lease property of the estate, not necessarily what property of the estate can be subject to such action by the trustee. As explained by the court in *Whiting Pools,* self-effectuating turnover under section 542(a) is in effect complementary to the protected rights of creditors under section 363(e) because "[s]ection 542(a) simply requires the [creditor] to seek protection of its interest according to the congressionally established procedures, rather than by withholding seized property." 462 U.S. at 211-212.

To hold section 542(a) as not self-effectuating on the basis of section 363(e) would reject not only the statutory text of 542(a) but ironically in effect render section 363(e) self-effectuating. As section 363(e) is clear, only "on request" of the creditor shall the court "prohibit or condition such use, sale or lease." As *Whiting Pools* makes clear, such protection is only granted "At the secured creditor's insistence." 462 U.S. at 204. However, a ruling that prevents section 542(a) from acting self-effectuating based on the right of entity's to potentially exert their interest in property of the estate in effect exerts some of the power of that right automatically by limiting the effective nature of section 542(a). Such a perverse consequence is not only contradictory to the text of both statutes, but would lead "the powers of a bankruptcy court and its officers to collect the estate for the benefit of creditors [to] be vastly reduced." *State of Cal. Emp't Dev. Dept. v. Taxel (In re Del Mission Ltd.)*, 98 F.3d 1147, 1151.

Although the Federal Rules of Bankruptcy Procedure do require turnover proceedings to occur in the format of an adversary proceeding, such a rule does not require the commencement of an adversary hearing for all turnovers. Bankruptcy Rule 7001(1) provides that "a proceeding to recover money or property" constitutes an adversary proceeding. Fed. R. Bankr. P. 7001(1). The Seventh Circuit clarified that a turnover action meets this standard to require an adversary proceeding. *See In re Perkins,* 902 F.2d 1254, 1258 (7th Cir. 1990). Both Bankruptcy Rule 7001

and the Seventh Circuit distinguish between a mere turnover of property of the estate and a turnover proceeding. Bankruptcy Rule 7001 clearly applies to court action to recover property alone, or disputes over the recovery of property. In no way does the rule require all manners of recovering property of an estate to occur through court action, nor does it reject the automatic effect of section 542(a). Should a dispute arise from a turnover, whether regarding the explicit limitations on turnovers in section 542(a) or a creditor's assertion of a right to protection under section 363(e), that dispute must be litigated in an adversary proceeding in accords with Bankruptcy Rule 7001. However, creditor's that refuse to automatically turnover property of the estate prior to the completion of such proceeding risk noncompliance with section 362(a)(3) and section 542(a).

The requirement that creditor's unconditionally turnover property of the estate does not unfairly inhibit their right to seek adequate protection of their interest. Courts have identified two means to provide creditors a means to adequately protect their interests while ensuring the prompt turnover of property of the estate. One approach identified by *In re Weber* "requires the creditor first to surrender the property… then or in conjunction with that surrender may it proceed to 'request' from the Bankruptcy Court "adequate protection" for its interests." 719 F.3d at 81. As the court clarifies and is distinguished above, "The provisions authorizing imposition of such protection operate only upon application of the creditor to the Bankruptcy Court. Unlike section 542(a), these are not self-executing." *Id.* An alternative approach described in *Stephens v. Guaranteed Auto (In re Stephens)* holds that an "automatic stay requires the immediate and unconditional return of a repossessed vehicle unless the creditor promptly seeks an order in the bankruptcy court for adequate protection and permission to withhold possession of the vehicle pending the provision of adequate protection." 495 B.R. 608, 614 (Bankr. N.D. Ga. 2013). The court described the novelty of this approach as:

> It gives effect to the self-executing nature of the automatic stay and turnover provisions by putting the burden on the creditor to seek relief in the bankruptcy court while recognizing that the requirement of immediate delivery… to the debtor poses unfair risks to the creditor. In this regard, it gives practical effect to provisions of the Bankruptcy Code that authorize a bankruptcy court, without a hearing, to grant relief from the stay to prevent irreparable damage or to condition the use of encumbered property on the provision of adequate protection.

Id.

The alternative to both of the above approaches, in which a creditor could refuse turnover without a substantial basis unless compelled by the court, would be contrary to the goals of the Bankruptcy Code. As observed by *In re Del Mission Ltd.*, by compelling "the debtor or his trustee to bring a suit as a prerequisite to returning the property, the powers of a bankruptcy court and its officers to collect the estate for the benefit of creditors would be vastly reduced." *In re Del Mission*, 98 F.3d at 1151. The fear of the Ninth Circuit and other courts that subscribe to this majority view, and as recognized by the dissent to the Thirteenth Circuit's ruling, is that such a withholding could impede the Debtor's reorganization efforts and the Trustee's ability to maximize the value for the estate and its creditors. This precise scenario occurred in the present case. Weinberg's "act" of refusal to turn over the snow plow trucks without court action resulted in the Debtor being unable to not only fulfill his contractual duties with the City of Badlands, but also the Trustee being unable fulfill an asset purchase agreement with Tenth Avenue which he believed was the best means to maximize value of the estate. This inhibition on the ability of the bankruptcy officer to fulfill his responsibility to all of Clemons creditors is contrary to the purpose of the bankruptcy code of efficient reorganization, and the exact scenario sought to be prevented by a self-effectuating 542(a) and an automatic stay over passive withholding of property of the estate by 362(a)(3).

II. Section 503(b) does not allow an administrative expense for making a substantial contribution claim in a Chapter 7 case.

The first three Articles of the United States Constitution established the Legislative, Executive and the Judicial branch of government. Although not explicit the language and the intention of the founders was to set forth a system of separation of powers between the three branches of government. As such there are specific duties that are designated exclusively to a single branch of government and not another. One critical duty is that of creating law for the nation which is delegated to Congress, and only to Congress. It is the duty of the judiciary to interpret the laws, not create new ones. The Supreme Court has recognized this and has even gone further to respect the process of passing laws in Congress with regard to its interpretations of its laws, holding that "when a statute is plain, the sole function of the courts, at least where the disposition required by the text is not absurd, is to enforce it according to its term." *Lamie v. U.S. Trustee*, 540 U.S. 526, 534 (2004). Statutes are to be interpreted in their official meaning.

Milton Weinberg is seeking to recuperate an expense for a substantial contribution claim he made in a chapter 7 case through section 503(b). The focus of the present argument is section 503(b)(3)(D). While other courts have addressed this issue practically and with an open and shut case, the Thirteenth Circuit failed to do so. The Thirteenth Circuit seems to have broken away from this principal or applied it in an unusual way that results in an uncommon outcome as compared to other courts that have dealt with this issue.

A. Circuit Split

The majority of courts that have addressed this issue, called the "majority approach" or the majority trend, have maintained a consistent ruling for years. As dissent of the previous court goes as far to argue that decades of "bankruptcy jurisprudence" is at issue. The *Lebron* court was one of the first to address the issue extensively and whose holding has been adopted by a number of circuits. The court, when addressing a number of concerns with regard to section 503(b)(3)(D)

noted that administrative expense recovery for substantial benefits are unavailable to expenses incurred after conversion from a chapter 11 to chapter 7 case, just as the case at bar. *See Lebron v. Mechem Fin. Inc.,* 27 F.3d 937, 945 (3d Cir. 1994). Other courts have added onto this view and held that according to the text of the statute section 503(b)(3)(D) does not allows an administrative expense for making a substantial contribution claim primarily because the specific provision states chapter 9 and 11 and nothing else thus leaving the analysis there. *See Lloyd Sec., Inc.,* 75 F.3d 853, 858 (3d Cir. 1996).

Despite the fact that this position that has been the established view of courts for many years, the previous court adopted a "minority view," previously held by the Sixth Circuit in *In re Connolly*. The *Conolly* court held that the specific provision is very flexible, a view that permits administrative expenses for a substantial contribution claim. *See In re Connolly N. Am., LLC*, 802 F.3d 810. The view in *Connolly* interprets the language in an unusual way. To further justify their approach, *Connolly* cites concerns of equity. However, a recent decision in the Sixth Circuit seems to contradict some of the reasoning used in *Connolly*. In *Arangure v. Whitaker*, the Sixth Circuit held that "the common law presumption canon qualifies as a 'traditional tool' of statutory interpretation. This canon presumes that the existing common law still applies unless the statute clearly indicates otherwise." *Arangure v. Whitaker,* 911 F.3d 333, 342 (6th Cir. 2018). This canon becomes an issue because by applying the rationale to this case. The common law presumption would be the majority trend adopted by many other circuits prior to the Sixth circuit's holding in *Connolly* which recognizes that section 503(b)(3)(D) limits courts from providing as an administrative expense to a chapter 7 case. There is no clear text in the statutory provision or in the statute itself that would indicate that chapter 7 is permissible case for applying section 503(b)(3)(D). The majority of other courts that have addressed this issue have held this.

To hold otherwise would be a direct contradiction of the statute and overstep the bounds of the court.

B. Statutory Language

Language, legislative history and policy concerns are all crucial factors in determining statutory interpretation and are the common tools prior courts have used in their assessment of this statute. Regarding language analysis, the Supreme Court has reiterated that when the text of a statute is clear, the court does not need to consider extra-textual evidence. *See N.L.R.B. v. SW Gen., Inc.*, 137 S. Ct. 929, 942, 197 L. Ed. 2d 263 (2017). Section 503(b)(3)(D) explicitly restricts a substantial contribution claim to chapter 9 and 11 cases. The language of the text states:

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

11 U.S.C. §503(b)(3)(D)

To apply this statute to a chapter 7 bankruptcy would go against the very language of the statute and goes against a fundamental precedent by the Court. The legislature included chapters 9 and 11 in the provision explicitly and there is nothing surrounding the provision that indicates that other bankruptcy chapters apply, not just chapter 7. While the Thirteenth Circuit supported the argument that the use of "including" in the end of the opening provision for section 503 allows for additional terms to be added to subsequent provisions, such a view to far too broad. It allows any interpretation to be added to the statute, thus stretching the language of the statute unreasonably. This court previously held in *Florida Dept. Of Revenue v. Piccadilly Cafeterias, Inc.* that in interpreting the Bankruptcy Code, provisions allowing preferences must be tightly construed. *See Fla. Dep't of Revenue v. Piccadilly Cafeterias, Inc.,* 554 U.S. 33, 128 S. Ct. 2326, 171 L. Ed. 2d 203 (2008). A strict interpretation is simply more appropriate given the Supreme

Court's precedent. Adopting a flexible approach as the Sixth and Thirteenth circuits have done will unjustly lead to complicated issues in bankruptcy law.

The previous court adopted the Sixth circuit's view that chapter 7 is a permissible case to allow for a substantial contribution claim as an administrative expense despite the majority trend which conforms to the language of the statute. The majority in *Connolly* and of the Thirteenth circuit reasons that the term "including" in section 503(b) signifies a non-exhaustive list and does not preclude an award for substantial contribution as an administrative expense in a chapter 7 case. *See In re Connolly N. Am., LLC*, 802 F.3d 816. The broad discretion the majority provides to the term "including" in section 503(b) is unprecedented. The use of "including" in the section could refer to simply the six listed examples of approved administrative expense. As Judge Moon in his dissent points out, "the majority takes it too far," blows out of proportion their interpretation of the word "including" and applies a construction no other circuit besides the Sixth utilizes. Going further would again disrupt the separation of powers and push the court in a direction where it will be doing more than interpreting the law but adding onto it which may also contradict the legislature's intentions.

C. Legislative History

Often, when analyzing the construction of the statute, an external analysis is helpful in terms of legislative history. Legislative history helps conform what the plain meaning of the statute is and refute arguments of contrary interpretation. The dissent in *Connolly* was one of the few that dissected the history behind the statute which helps supports the adoption of the majority trend. *See In re Connolly N. Am., LLC,* 802 F.3d 820. In the dissent in *Conolly*, judge O'Malley, captures records from both the senate and the house that limited section 503(b)(3)(D) to chapter 9 and 11. *Id* at 821. O'Malley points out that there is no record of either chamber intending chapter 7 to be included. *See Id.* As O'Malley argues throughout if Congress would

have intended to include chapter 7 or other bankruptcy chapter cases they would have used the term "including" within the provision of section 503(b)(3)(D) yet they chose to only state chapter 9 and 11. *See Id.* It does seem that the decision to explicitly state 9 and 11 and no other chapter and not even mention including in the provision as they have done for other provisions is powerful evidence that shows that congress truly did intend to limit substantial contribution expenses to chapter 9 and 11 cases. In sum the only direction including the historical analysis that Congress left regarding the interpretation of the specific provision is that it is only available in chapter 9 and 11 cases. So, it seems that the phrase "expression unis est exclusion alterius" is fitting for this particular case. The Supreme Court has stated that the *expressio unius* canon applies only when "circumstances support… a sensible inference that the term left out must have been meant to be excluded." *N.L.R.B. v. SW Gen., Inc.*, 137 S. Ct. 929, 940, 197 L. Ed. 2d 263 (2017). Judge Moon correctly captures in his dissent that the cannon of expresssio unis est exclusion alterius applies and thus inferences based on a statute's language should be restricted to the examples listed. *See In re Connolly N. Am., LLC*, 802 F.3d 810 (6th Cir. 2015).

Judge Moon in his dissent also speaks to the legislative history in the dissent, stating, "Congress purposely limited the scope of the section 503(b)(3)(D) so as to exclude section 7". He then concluded that one just because congress did not foresee that a creditor may need to use a substantial contribution claim in a chapter 7 case "does not justify the departure from the plain meaning of section 503(b)(30(D)", which limits the claim to chapters 9 and 11 cases. The legislative history supports the majority trend by providing a backdrop that reveals that specific provision at issue was meant to be applied in two specific bankruptcy chapter cases. The legislative history helps to reveal the legislatures intentions and as the dissent of the previous court argues, it was an intentional decision to exclude chapter 7 as a means for obtaining a substantial contribution claim as a administrative expense. Nonetheless the majority continues

with their analysis and speaks heavily about equitable concerns which seems to be a huge point in not only the Weinberg's court's decision but of the Connolly court in the Sixth circuit as well.

D. Public Policy Concerns of Equity

The Thirteenth Circuit and *Connolly* both implicate concerns of equity with regard to their decisions. However, this court has stated and has been reemphasized by the dissents by Judge Moon in *Backstreet Plowing* and Judge O'Malley in *Connolly* in that there is a clear limitation regarding enforcing certain decisions in equity and that is statutory law. We do not dispute the majority's statement in Weinberg, which the court cites prior statements from this courts which speaks to the fact that bankruptcy courts "are essentially courts of equity and their proceedings [are] inherently proceedings in equity." *Local Loan co v. Hunt*, 292 us 234, 240 (1934). Yet recently this Court has stated in *Law v. Siegel*, "It is hornbook law that § 105(a) "does not allow the bankruptcy court to override explicit mandates of other sections of the Bankruptcy Code." *Law v. Siegel*, 571 U.S. 415, 421, 134 S. Ct. 1188, 1194 (2014).

The Court has also said that Bankruptcy courts must not "contravene specific statutory provisions." The majority in the Thirteenth Circuit seems to agree with this yet their ruling seems to contradict this understanding. Both precedents speak volumes with regard to the effect on equity and helps set a clear ruling for this case that is that regardless of the concern of equitable principles, the laws passed by congress must be upheld. The law essentially triumphs over concerns of equity. Therefore, the first priority this court should consider is to interpret the laws to the closest construction it was passed.

This is not to say that the equitable concerns are to be dismissed completely. As a matter of fact, it seems to be that both courts below have ruled this way primarily because of concerns of equity with regard to the facts and circumstances of their respective cases. However, it must be noted that the circumstances of both cases are very special and to a certain extent unusual.

Setting the precedent that concerns of equity trump interpretation of statute not only violates the record set by this court but also reinforces the perception that courts are overstepping their constitutional boundaries.

The Thirteenth Circuit ruled in favor of Weinberg because of the concern that actions that Weinberg that benefited the estate could deter creditors from participating in chapter 7 cases. However, this Court has noted that the revisions made to chapter 7 (and other areas of bankruptcy) in the *Bankruptcy Abuse Prevention and Consumer Protection Act* (BAPCPA) was to "help ensure that debtors who can pay for creditors do pay them." *Ransom v. FIA Card Servs., N.A.,* 562 U.S. 61, 64, 131 S. Ct. 716, 721, 178 L. Ed. 2d 603 (2011). Overhaul in 2005 was intended as this court noted to address abuses in the system. Rhe revisions are more favorable to creditors. This point was restated in by the dissent in the Thirteenth Circuit which made the argument that "congress provided creditors like Weinberg with means by which to obtain an administrative expense for their efforts to recover fraudulently transferred property, provided they seek court approval." In essence, the congress with the 2005 additions have made the Bankruptcy Code with respect to chapter 7 and other aspects more supportive of creditors as it stands, there is no reason/need to interpret it as the previous courts did . However, this courts makes a crucial point in Harris that the Bankruptcy Code provides diverse courses for overburdened debtors who may honestly pursue the right to successfully gain discharge of their financial obligations, and thereby a "fresh start." *Harris v. Viegelahn*, 135 S. Ct. 1829, 1835, 191 L. Ed. 2d 783 (2015).

Thus, while creditors are often considered the primary party to be considered in bankruptcy cases, there is also room for debtors to be acknowledged. Favorable interpretations to creditors are only seem unjust when finding a closer balance is the goal *See Id*. Even if concerns of equity were the driving force of the majority's holding in the previous court it is also

important to note that debtors have rights in bankruptcy and there is a recognized view that their position in bankruptcy cases should be valued to a certain degree as well and not completely ignored in an unjust matter as the previous court has done to the Trustee of Clemons' estate.

While public policy concerns are a device often used by courts in their decisions with regard to statutory interpretation, this court and many courts following have acknowledged there is a clear limitation when utilizing this device. Respect for the words of the law and its meaning the way the legislature intended is to come first and unless there is significant ambiguity in the language, the plain meaning and thus a strict interpretation is to control. The previous courts have not employed a plain interpretation but a flexible interpretation that has been used by only a minority of courts. This interpretation is clearly incompatible with the plain interpretation. Nonetheless, the previous court cites concerns of equity as one of the driving, and perhaps the, main reason they adopted their ruling. This case is indeed an unusual case, however that cannot trump the importance of the interpreting the statute the way the Supreme Court has established for decades and which respects the integrity set by the Constitution to the judiciary and the legislative branches.

The ruling of the previous court is truly an abnormal outcome among the circuits and the entire judiciary system, with only one major circuit viewing the rule the same way the previous court has. The dissent of the previous court noted that the Sixth Circuit's view at the time it was adopted, 86% of court confronted with the issue held that a court cannot allow an administrative expense for a substantial contribution claim and yet only 14% of the courts have held similar to as the *Connolly* court. The difference is expressive in that the majority of courts view the plain meaning of the text of section 503(b)(3)(d) limited to just chapters 9 and 11 as the Congress passed. Our client, the Trustee of the estate has suffered a great burden because he now must pay for a substantial expense that the majority of courts that have addressed this issue previously

would not have allowed. Weinberg voluntarily took the action of hiring a collection agency and providing the trustee with the documentation he acquired. He was not asked nor necessarily had the obligation to do so, if there is no provision in the code in its plain meaning and construction that would allow Weinberg to collect, then it seems like the legislature intended that creditors like him not get any compensation for such voluntary acts. This court should follow the trend that has been followed by most courts in the country, a precedent that has been occurring for decades, and one that is consistent with the views the legislature intended it to be.

CONCLUSION

If this court does not compel turnover of property of the estate based on section 362(a)(3) and related provisions, the power and efficiency of the U.S. bankruptcy system will be severely hindered to the detriment of all creditors. If this court allows a creditor to recover administrative expenses as a substantial contribution claim, the fairness and equity of the U.S. bankruptcy system will similarly be impeded to the detriment. The court should overturn the ruling of the Thirteenth Circuit below and prevent these harmful effects from rippling through the U.S. bankruptcy system for generations to come.

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Counsel of Record

APPENDIX A

11 U.S.C. § 362

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

(1) [omitted]
(2) [omitted]
(3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;
(4) – (8) [omitted]

(b) The filing of a petition under section 301, 302, or 303 of this title, or of an application under section 5(a)(3) of the Securities Investor Protection Act of 1970, does not operate as a stay—

(1) [omitted]
(2) [omitted
(3) under subsection (a) of this section, of any act to perfect, or to maintain or continue the perfection of, an interest in property to the extent that the trustee's rights and powers are subject to such perfection under section 546(b) of this title or to the extent that such act is accomplished within the period provided under section 547(e)(2)(A) of this title;
(4) – (28) [omitted]

(c) – (o) [omitted]

APPENDIX B

11 U.S.C. § 363

(a) In this section, "cash collateral" means cash, negotiable instruments, documents of title, securities, deposit accounts, or other cash equivalents whenever acquired in which the estate and an entity other than the estate have an interest and includes the proceeds, products, offspring, rents, or profits of property and the fees, charges, accounts or other payments for the use or occupancy of rooms and other public facilities in hotels, motels, or other lodging properties subject to a security interest as provided in section 552(b) of this title, whether existing before or after the commencement of a case under this title.

(b) – (d) [omitted]

(e) Notwithstanding any other provision of this section, at any time, on request of an entity that has an interest in property used, sold, or leased, or proposed to be used, sold, or leased, by the trustee, the court, with or without a hearing, shall prohibit or condition such use, sale, or lease as is necessary to provide adequate protection of such interest. This subsection also applies to property that is subject to any unexpired lease of personal property (to the exclusion of such property being subject to an order to grant relief from the stay under section 362).

(f) – (o) [omitted]

APPENDIX C

11 U.S.C. § 503

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

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

(1) [omitted]
(2) [omitted]
(3) the actual, necessary expenses, other than compensation and reimbursement specified in paragraph (4) of this subsection, incurred by—
    (A) [omitted]
    (B) [omitted]
    (C) [omitted]
    (D) a creditor, an indenture trustee, an equity security holder, or a committee representing creditors or equity security holders other than a committee appointed under section 1102 of this title, in making a substantial contribution in a case under chapter 9 or 11 of this title;
    (E) [omitted]
    (F) [omitted]
(4) – (9) [omitted]

(c) [omitted]

APPENDIX D

11 U.S.C. § 542

(a) Except as provided in subsection (c) or (d) of this section, an entity, other than a custodian, in possession, custody, or control, during the case, of property that the trustee may use, sell, or lease under section 363 of this title, or that the debtor may exempt under section 522 of this title, shall deliver to the trustee, and account for, such property or the value of such property, unless such property is of inconsequential value or benefit to the estate.

(b) [omitted]

(c) [omitted]

(d) [omitted]

(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.

APPENDIX E

Federal Bankruptcy Rule 7001

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

> (1) a proceeding to recover money or property, other than a proceeding to compel the debtor to deliver property to the trustee, or a proceeding under §554(b) or §725 of the Code, Rule 2017, or Rule 6002;
>
> (2) – (10) [omitted]