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 UNITED STATES COURT OF APPEALS
FOR THE THIRTEENTH CIRCUIT

BRIEF FOR THE RESPONDENT

QUESTIONS PRESENTED

1. Whether the automatic stay of 11 U.S.C. § 362(a)(3) is violated when a secured creditor passively retains possession of collateral that it lawfully repossessed from the debtor prior to the petition date?
2. Whether 11 U.S.C. § 503(b) permits a court to grant an administrative expense for a substantial contribution in a case under chapter 7 of the Bankruptcy Code, notwithstanding § 503(b)(3)(D) which expressly states that it applies to creditors "making a substantial contribution in a case under chapter 9 or 11 of this title"?

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The Bankruptcy Judge for the District of Moot answered both of the questions presented in this case in favor of the Respondent. The Petitioner then appealed to the Bankruptcy Appellate Panel for the Thirteenth Circuit. The Supreme Court of the United States then granted the Petitioner's writ of certiorari.

STATEMENT OF JURISDICTION

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

STATUTORY PROVISIONS

The relevant constitutional and statutory provisions in this case are: 11 U.S.C. § 101(29), 11 U.S.C. § 362, 11 U.S.C. § 363, 11 U.S.C § 503, 11 U.S.C. § 541, 11 U.S.C. § 542, and Fed. R. Bankr. 7001. These provisions are reproduced in Appendices A-G.

STATEMENT OF THE CASE

Christopher Clemons is the sole shareholder of a seasonal snowplow business, Backstreets Plowing, Inc. ("Debtor"). The business is headquartered in the City of Badlands. (R. at 4.) In August 2015, Clemons borrowed $450,000 from Milton Weinberg ("Weinberg") to purchase new snowplow trucks. (R. at 3-4.) When Weinberg made the loan, he properly attached the snowplows and perfected a purchase money security loan. (R. at 4.) Weinberg, an acquaintance of Clemons, also required Clemons to personally secure the loan. (*Id*.) Monthly payments were set to begin in December 2015, when business for the Debtor is typically highest. (*Id*.)

In October 2015 (midway between the loan and the first payment due date), Clemons and Weinberg had a disagreement over the annual intra-state university football game. (R. at 4-5.) The two men respectively attended rival state schools. (*Id*.) Clemons' team won the weather-plagued game. (*Id*.) This caused an angry argument between the men as to which was really the better team. (R. at 5.) The men did not speak for some time after the exchange. (*Id*.) This may have set the stage for the initial legal battle considered in this dispute. (*Id*.)

Purchasing new snowplows improved Debtor's productivity and lessened maintenance expenses associated with using older vehicles. (R. at 3.) New trucks created a competitive advantage for Debtor to secure additional plowing contracts. (*Id*.) The City of Badlands released a snow removal contract annually. (R. at 4-5.) The contract was for a fixed amount, and not dependent on actual expenses. (R. at 5.) This arrangement could prove to be very fruitful or costly to the winner of the bid, depending on the amount of snow that fell in any given year. (*Id*.) Debtor, after the purchase of the new snowplows, determined the company was now competitive and pursued the government snow removal contract. (R. at 3.) Debtor submitted a low bid for the

contract for the winter of 2015-2016. (R. at 4.) The bid was substantially lower than the competitors', and the City of Badlands awarded the contract to Debtor. (*Id.*) Although the city council was concerned that Debtor's bid was too low to be carried out appropriately, the contract was nonetheless given to Debtor. (*Id.*) Luckily for Debtor, the winter of 2015 was mild and business expenses were low. (*Id.*) In spite of this, and perhaps due to the October football argument, Debtor did not make the required payments to Weinberg. (*Id.*) By February of 2016, Weinberg was seeking payments on the loan. (*Id.*)

Weinberg tried to call Clemons repeatedly to ask about the required payments. (*Id.*) The calls were ignored so in February 2016, Weinberg drove to Debtor's facility where he was forcibly removed by Debtor's employees. (*Id.*) Weinberg informed Clemens legal action would follow, and Weinberg filed a law suit in Asbury Park County, State of Moot in April 2016. (*Id.*) The $450,000 suit was filed both against the Debtor and Clemons personally. Weinberg obtained a default judgment against Debtor and Clemons in October 2016, jointly and severally, for the $450,000 plus interest and fees. (*Id.*) Weinberg did not take immediate action for collection on the judgment. (*Id.*)

Now almost one year behind in payments, and a default judgment awarded against him, Debtor faced a brutal, snowy winter where plowing expenses exceeded revenues. (R. at 5-6.) The winter of 2016-2017 proved to be the proverbially straw that broke Debtor. (R. at 6) Not only was the snow piling up, but Weinberg piled on as well. (R. at 6.) Debtor had not made payments, and Weinberg wanted his money. (*Id.*) Weinberg repossessed the snowplows in late January 2017 and maintains possession today. (*Id.*)

On February 4, 2017, when contracts could no longer be completed without the snowplows, Debtor filed for Chapter 11 bankruptcy. (R. at 6.) Debtor attorneys tried to get the

snowplows back through a demand letter, but Weinberg refused to return the trucks. (*Id*.) He stated he had legal rights and protections based in bankruptcy turnover proceedings, but Debtor disagreed believing Weinberg had violated section 362(a)(3), the automatic stay required in bankruptcy. (*Id*.) The bankruptcy court ruled against Debtor stating the repossession was not an "act to . . . exercise control over property of the estate" since it occurred before the filing, thus preventing Debtor from regaining possession of the trucks. (*Id*.) Debtor appealed the ruling in March 2017. (R. at 6.)

Additionally, Debtor lost the next year's contract with the City of Badlands. (R. at 7.) Having little other recourse since the business would be defunct without snow removal equipment or contracts, Debtor converted the Chapter 11 to Chapter 7 on April 13. 2017, and a Trustee was appointed. (*Id*.) After this event, Weinberg decided to pursue personal action against Clemons as well. (*Id*.)

After a thorough creditor examination of Clemons, conducted by Weinberg in anticipation of the personal action, at a cost of $25,000, Weinberg discovered Clemons had transferred $100,000 in cash to his daughter, Patti Clemons. (*Id*.) Weinberg took this information to the Trustee and claimed the transfers were fraudulent. (*Id*.) The Trustee used sections 548 and 550 as the basis to avoid the transfer and recover the $100,000 deposited in Patti Clemons' account. (*Id*.) Patti settled with the Trustee for $75,000 in release of all claims. (*Id*.) Weinberg then filed an administrative claim, section 503(b), against the settlement believing he had contributed substantially to the finding and deserved repayment. (*Id*.) The Trustee disagreed citing section 503(b)(3)(D) as only applying to administrative expenses in Chapters 9 and 11 cases. (*Id*.) The bankruptcy court found for Weinberg and allowed for repayment of the administrative expense. (R. at 8.) The Trustee appealed. (*Id*.)

In September 2017, the Trustee received an offer from a local plowing competitor to purchase the Debtor's assets, including the snowplows held by Weinberg. (*Id*.) The Trustee believed this offer could be the best chance to maximize the benefit to the creditors, but the sale would have to happen quickly as the buyer needed the trucks to fulfill the upcoming winter's plowing contracts. (*Id*.) Weinberg would not negotiate with the Trustee believing he had rightful title to the trucks, in spite the Trustee's accusation that Weinberg had violated the automatic stay. (*Id*.) By November 2017, it became clear the Trustee would not regain title to the snowplows. (*Id*.) The buyer withdrew his offer. (*Id*.)

In January 2018, a new offer was made for the Debtor's remaining assets excluding the plows. (*Id*.) It was $100,000 less than the previous offer. (*Id*.) The Trustee accepted the deal, and the Bankruptcy Court approved the offer in February 2018. (R. at 9.) The Trustee believes the estate is still entitled to the difference in the sale price with and without the snowplows. (*Id*.) The Trustee also believes the estate is entitled to the $25,000 substantial contribution. (*Id*.) Both parties have agreed to the consolidated appeal that follows. (*Id*.)

SUMMARY OF ARGUMENT

The courts below have improperly interpreted the automatic stay provision of 11 U.S.C. § 362(a)(3) and the administrative expenses provision of 11 U.S.C. § 503(b). As a result, the courts have deprived the Trustee of the opportunity to recover a fair and equitable amount of the Debtor's estate. Additionally, the courts have awarded administrative expense status to a creditor that, by the plain language of the statute, does not qualify for such status. The Trustee is before the Supreme Court because of this wrongful deprivation and improper administrative expense award.

The first issue of this case is broken into three major points. First, Weinberg's retention of the Debtor's snowplows violated of the automatic stay and deprived the Debtor, and later the Trustee, of receiving the full potential funds of the bankruptcy estate. Congress added the phrase "to exercise control over" to 11 U.S.C. 362(a)(3) in the 1984 amendments. The lower courts adopted the view of the Tenth and D.C. circuits stating that since Wienberg passively held onto the plows which he repossessed prior to the filing of the Debtor's bankruptcy petition he therefore did not take affirmative action to exercise control over the plows . However, under the remaining circuits' view, section 362 does not require affirmative action to happen, and the phrase "to exercise control" includes withholding property of the estate.

Additionally, the turnover provision of 11 U.S.C. § 542 requires anyone in possession of property of the estate to turn over the property to the trustee upon the filing of a petition. Section 542 is self-effecting. Moreover, when read together with 362(a)(3), a creditor is in violation of the automatic stay provisions when the creditor withholds property from the estate. However, together sections 542 and 362(a)(3) do not erase the protections afforded to creditors by 363(e) and the exemptions found elsewhere in 542. The creditor still has a right to file a claim under these protections. Reading 542 and 362(a)(3) together ensures the debtor has protection and a chance to breathe.

Lastly, Congress did not intend for the adequate protection clause of 11 U.S.C. § 363(e) to allow a creditor to withhold property from the estate. Section 542 refers to section 363 but only to give the trustee power over the property of the estate. Also, the text of section 363(e) does not excuse the creditor from the turn over duty found in section 542. The lower courts were wrong in allowing Weinberg to withhold the property of the estate from the Debtor and Trustee while awaiting adequate protection over his interests. The lower courts intrepeted each of the

above issues regarding sections 362, 542, and 363 and the Trustee should be allowed to recover the difference in what the estate was valued at by the first potential purchaser and what it eventually sold for.

The second issue in this case is broken into two major points. First, the plain language of 503(b) and its subsections, section 503(b)(3)(D) in particular, precludes the award of substantial contribution administrative expenses in chapter 7 cases. However, the lower courts, following a minority approach that emerged from a split decision in the Sixth Circuit, held that the presence of the word "including" in 503(b) indicates that the provisions that follow are non-exhaustive, and that the equitable powers of the bankruptcy courts permit the court to use its discretion in awarding administrative expense status. Citing a concern that failing to award administrative expense status to creditors like Weinberg who offer assistance to a trustee that ultimately benefits the bankruptcy estate might deter other creditors from participating in chapter 7 cases, the lower courts awarded administrative expense status to Weinberg for his "substantial contribution" to the estate. The plain language of section 503(b)(3)(D), however, states that a creditor may recover expenses incurred in making a substantial contribution in a case under chapter 9 or 11, and the majority of courts that have addressed its applicability in chapter 7 cases have determined that the plain language of the statute precludes substantial contribution expenses in chapter 7 cases.

Accepting that bankruptcy courts are equitable venues, and that the policy goal of encouraging creditor participation in chapter 7 cases is admirable, the second major point challenges the appropriateness of favoring equitable considerations over other principles of statutory interpretation. Bankruptcy courts do, indeed, have equitable powers in making determinations; however, those powers must be exercised within the confines of the Bankruptcy

Code. Since the Code is statutory law, interpreting its provisions requires use of the conventional tools of statutory interpretation. Exploring the provision at issue using these tools, including legislative history, conventional canons of construction, statutory context, and practical consequences, demonstrates that the court chose to exercise its equitable powers to rule in a manner that contradicts the outcome dictated by the Code.

As such, the determinations of the Thirteenth Circuit on these issues are improper and should be overturned.

ARGUMENT

The facts of this case are undisputed. (R. at 9.) This appeal presents only questions of law, which are reviewed de novo. *Texas v. Soileau* (*In re Soileau*), 488 F.3d 302, 305 (5th Cir. 2007). Here, Trustee raises the legal question of whether the retention of property of the estate constitutes a violation of the automatic stay under 11 U.S.C. §362(a)(3) and whether 11 U.S.C. § 503(b)(3)(D) precludes the allowance of an administrative expense for making a substantial contribution in a Chapter 7 case. Therefore, the Court's standard of review is de novo. When a court reviews an issue under a de novo standard of review, the court decides the issue without regard to the lower court's holding. *Bd. of Cty. Comm'rs v. L. Robert Kimball & Assocs.,* 860 F.2d 683, 686 (6th Cir. 1988).

I. Retention of Property of the Estate Violates the Automatic Stay in 11 U.S.C. § 362(a)(3)

The majority of circuit courts agree that retaining property of an estate is a violation of the automatic stay provisions found in 11 U.S.C. § 362 ("Majority View") whilst the minority of circuit courts find that only affirmative acts to exercise control over property of the estate violates the stay ("Minority View"). Both the Majority and Minority Views are based on the

statutory interpretation of sections 362(a)(3), 542, and 363. The circuits are ultimately spilt on three issues in deciding whether or not retention of property of the estate violates the automatic stay. First, whether the withholding of property from the estate is an act to exercise control over the property as contemplated under section 362(a)(3). Second, whether section 542's turnover power is self-effecting, if it is connected or has power over the actions contemplated in section 362(a)(3), and whether section 542 and 362(a)(3) together erase the protections provided to creditors. Finally, whether secured creditors are exempt from turning over property until the court makes a determination regarding the adequate protection of said property as provided under section 363(e).

A. Withholding Property is an Act to Exercise Control Over the Property of the Estate Under 11 U.S.C. § 362(a)(3)

The purpose of the automatic stay in the Bankruptcy Code is to protect the debtor. *In re Peake,* 588 B.R. 811, 830 (Bankr. N.D. Ill. 2018) ("One of the main purposes of the automatic stay is to give the debtor a breathing spell from his creditors and to allow him to attempt a repayment or reorganization plan"). Section 362(a)(3) stays "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) (2010). The phrase "to exercise control of property over the estate" was added by Congress in the 1984 amendments. *In re Del Mission Ltd*., 98 F.3d 1147, 1151 (9th Cir. 1996). This phrase created a circuit split in its interpretation and is currently at issue here regarding whether or not Weinberg's withholding of the plows from the estate violates the automatic stay. The circuits are split on this issue first, regarding the definition of the word act and its effect on the phrase "to exercise control," and second, whether or not the act is pre-petition or post-petition.

Since none of the words in the phrase "act...to exercise control" are terms of art, nor are they defined in the Bankruptcy Code, the Court is to give these terms their ordinary meaning. *See Asgrow Seed Co. v. Winterboer, 513 U.S. 179, 187 (1995)*. Using this canon of construction, this Court should give "the term 'act' its broadest meaning" in deciphering section 362(a)(3). *In Re Peake* at 832. The lower court and other courts adopting the Minority View are correct in defining act as "the process of doing something or performing". BLACK'S LAW DICTIONARY 27 (9th ed. 2009); R. at 11. What the Minority View gets wrong is the narrowing of the definition of the word "act" to mean an affirmative action, post-petition. *See Davis v. Tyson Prepared Foods, Inc. (In re Garcia),* 740 Fed. Appx. 163, 164 (10th Cir. 2018); *WD Equip., LLC v. Cowen* (*In re Cowen*), 849 F.3d 943, 948 (10th Cir. 2017); *United States v. Inslaw, Inc.,* 932 F. 2d 1467,1474 (D.C. Cir. 1991). This interpretation of the word act would require the creditor to only act post-petition and would excuse the creditor from violating the automatic stay by maintaining property repossessed pre-petition. The Minority View argues that Congress, by adding the phrase "to exercise control," did not intend to make the creditor return any withheld property from the estate or else be in violation of the automatic stay.

Other courts have held differently. *In re Sharon* addressed this issue stating that Congress' 1984 addition of "to exercise control" broadened the scope of section 362(a)(3). *In re Sharon,* 234 B.R. 676, 682 (1999)*; In re Del Mission Ltd.,* 98 F.3d at 1151. The facts of *Sharon* are very similar to the facts in this case. The creditor exercised control over the debtor's car and over the debtor's right to possess the car by withholding possession and refusing to allow the debtor to use the car. *In re Sharon,* 234 B.R. at 682. Here, Weinberg exercised control over the Debtor's snow plows and over the Debtor's right to use and possess the plows.

Other courts similarly state that Congress did not intend for the creditor to be able to remain in possession of property repossessed pre-petition. *Thompson v. General Motors Acceptance Corp., LLC,* 566 F.3d 699, 706 (7th Cir. 2009) ("It is unlikely that Congress, in creating the Bankruptcy Code, intended to affirm any pre-petition convention that might have existed that allowed a creditor to retain possession of an asset properly belonging to a debtor's bankruptcy estate"). Here, Weinberg repossessed the plows pre-petition and did not have a right to hold onto the plows once the debtor filed the bankruptcy petition, especially while the debtor still held legal and equitable title to the plows. R. at 10. Weinberg was a secured creditor and not the owner of the plows. It is undisputed that this property belonged to the estate. *Id.* By holding onto the plows Weinberg exercised control over them. He also verbally refused to return the plows to the bankruptcy estate. R. at 6. This, in the broadest sense of the word is an act, it is doing something.

Additionally, even if the Minority View's narrower definitions are to be used, Weinberg's refusal to return the plows constitutes an affirmative action. The Debtor's attorney asked Weinberg to return the plows to the estate for reorganizing purposes, and Weinberg decided not to do so, therefore affirmatively acting against the Debtor. R. at 6. But Weinberg didn't stop there. He went so far as to testify to the lower court that he would not return the plows unless a turnover action was brought by the Debtor and then he would request adequate protection. *Id*. Weinberg did not make a claim to get adequate protection at that time. *Id.*

By either action, the initial refusal to return the property to the Debtor and testifying in court, Weinberg was in violation of the automatic stay. Weinberg withheld possession of the property from the estate violating section 362(a)(3). *In re Sharon,* 234 B.R. at 682 ("Withholding possession of property from a bankruptcy estate is the essence of exercising control"); *Del*

Mission Ltd., 98 F.3d at 1151 ("the knowing retention of estate property violates the automatic stay"). Consequently, withholding possession of property from the estate constitutes an act to exercise control over property of the estate and is therefore a violation of the automatic stay which resulted in a $100,000.00 loss to the bankruptcy estate's efforts in liquidating its assets.

B. Section 542 is Self-Effecting and Should be Read in Unison with Section 362(a)(3)

Section 542 of the Bankruptcy Code handles the turnover of property to the estate. Section 542(a) requires anyone in possession of property of the estate to return said property except in one situation. 11 U.S.C. § 542(a) (1994). This exception allows a party (someone other than the trustee) in possession of property of the estate to assert that the property being of "inconsequential value or benefit to the estate." *Id*. The lower court states that Section 542(a) explicitly refers to section 363 allowing a party the ability to ask the court for adequate protection. R. at 12*;* 11 U.S.C. § 363(e) (2010).

The circuits split on two issues regarding section 542. First, the Minority View states that section 542 requires the debtor to bring a turnover action, whereas the Majority View states the turnover power under section 542 is self-effecting. The second issue in the circuit split is two-fold: first, section 542 and section 362 should be read as a statutory scheme; and second, by reading these two sections together the exceptions that protect creditors are erased from the Bankruptcy Code.

i. Section 542 Does not Require the Debtor to Bring Turnover Action

The plain language of section 542(a) states that anyone in possession, not including a custodian of the property, "shall deliver to the trustee, and account for, such property or the value of such property, unless such property is of inconsequential value or benefit to the estate." 11 U.S.C. § 542(a) (1994); *U.S. v. Whiting Pools, Inc.,* 462 U.S. 198, 205 (1983). This means that

property of a debtor repossessed by a secured creditor must be returned to the estate. *Whiting Pools*, 462 U.S. at 205. Furthermore, the use of the word "shall" signals that the turnover of property of the estate is mandatory. *Id*. at 202 ("Section 542(a) requires an entity in possession of property that the trustee may use, sell, or lease under §363 to deliver that property to the trustee"). This Court has read this provision to include interests of the debtor before the filing of a petition. *Id*. at 203. Nowhere in section 542(a) does it state that the Debtor or Trustee must initiate a turnover action in order for the property held by someone else to be returned to the estate. 11 U.S.C. 542(a) (1994).

The lower court, adopting the Minority View, points out that this turnover power is not self-effecting because of the exceptions under 363(e) and other defenses that "the party subject to a turnover action is permitted to assert." R. at 13. The Minority View's interpretation is detrimental to the bankruptcy process. This interpretation requires a trustee to obtain a court order to retrieve property of the estate from a creditor who possesses it, which can take months or years to complete. By the time a trustee goes through court and regains all of the property of the estate, the debtor may be out of luck and instead of reorganization, may have to now liquidate all of its assets which happened to the Debtor in this case. Here, Weinberg should have returned the snowplows when notified by the Debtor's attorney requesting the plows under the Chapter 11 reorganization plan. R. at 6. Without the plows, the reorganization plan became futile since the Debtor lost the City contracts. R. at 6-7. Debtor was then forced to convert its chapter 11 petition into a chapter 7 and liquidate its assets. R. at 7.

This situation will occur in cases across the board if the Minority View is adopted. Debtors in chapter 7, 11, or 13 proceedings will be required to seek court orders to obtain property of the estate to which the debtor has legal and equitable title. This not only causes court

inefficiencies, but it could also cause debtors to lose out on key opportunities to fix their bankruptcy problems. A key solution to keeping this from happening is to require creditors to return all property or be in violation of the automatic stay.

ii. Section 542 and Section 362 Should be Read Together

The Minority View uses the argument that section 542 is not self-effecting to counter the Majority View's argument that withholding possession of property under section 362(a)(3) violates the automatic stay. The Minority View states that since there is not a textual link between sections 542 and 362, the sections do not have control or any type of effect over each other. *In re Cowen,* 849 F.3d at 950. The Majority View holds otherwise. The *In re Sharon* court found that section 542(a) works with the stay provision in section 362(a) "to draw back into the estate a right of possession that is claimed by a lien creditor pursuant to a pre-petition seizure." *In re Sharon*, 234 B.R. at 683.

To hold that sections 362 and 542 do not have an effect on one another, and that without a textual link between the two sections they should not be read together, would be damaging to the very purpose of bankruptcy proceedings. Congress created chapter 11 plans in anticipation "that the business would continue to provide jobs, to satisfy creditor claims, and to produce a return for its owners." *Whiting Pools,* 462 U.S. at 204. In order for a chapter 11 plan to work, the debtor must be given the opportunity to use essential property from the estate to run its business. *Id*. The same can be said for all bankruptcy proceedings including chapter 7 and 13.

Here, Weinberg's refusal to return the snowplows was the ultimate cause of the Debtor losing its contract with the City and having to convert the chapter 11 case to a chapter 7 case. Had Weinberg been required to return the property under 542 or face being in violation of the

automatic stay under section 362(a)(3), the Debtor may have been able to continue to run its business and climb out of the hole of debt it had dug itself into.

Instead, Weinberg continued to withhold the property from the estate and caused the Debtor to have to liquidate its assets. This is why it is essential that section 362(a)(3) and section 542 are read together as a type of bankruptcy scheme requiring the creditor or other parties holding property of the estate to automatically return the property without a hearing or else be in violation of the automatic stay provision. Without some sort of violation, creditors would wield immense control and cause debtors to continue to spiral into a deeper dark hole of debt and despair. Instead the Minority View would rather protect the creditor and frustrate the purpose of the Bankruptcy Code in general.

iii. The Turnover Powers of Section 542 together with the Automatic Stay Provision of Section 362 Does Not Erase the Explicit Limitations Provided Under the Bankruptcy Court

The Minority View continues in its quest to afford creditors all the protection they can get by arguing the potential loss of protection to creditors if the Majority View is adopted. The lower court states that if section 542 is read as self-effecting, causing a creditor to be in violation of the automatic stay under 362(a)(3) until the property is returned to the estate, then the creditor is left without the protection of the explicit limitations afforded to it under the Bankruptcy Code. The lower court lists these explicit limitations as the right to assert that the property does not belong to the estate or that the property is of inconsequential value or benefit to the estate. R. at 13. However, this interpretation of sections 542 and 362(a)(3) together is incorrect.

Under Federal Rules of Bankruptcy Procedures § 7001(1), if there is dispute as to whether the or not the property is part of the estate under 11 U.S.C. § 541, it will be litigated. *See* Fed. R. Bankr. P. 7001(1); 11 U.S.C. § 541 (2016). If the property is not part of the estate, then

there is no violation of the automatic stay because the property never was part of the estate. Reading section 542 as self-effecting does not change this outcome. If a creditor or party subject to turnover wants to dispute whether or not the property belongs to the estate, the creditor must bring forward a claim proving that the property does not belong to the estate and not just refuse to return the property until the debtor brings a turnover action. The onus is on the creditor to act, and nothing in sections 542 and 362(a)(3) being read together keeps that from happening. The same would happen when a party brings forward a claim that the property is of inconsequential value or benefit to the estate. The claim will also be litigated, or the property abandoned by the debtor. *See* 11 U.S.C. § 554 (2010).

Moreover, Congress also provided a process for the creditor, in section 362(d), to lift the automatic stay. Under section 362(d) a creditor or party subject to the automatic stay may request that the court shall grant relief from the stay for cause, such as a lack of adequate protection, that the property doesn't belong to the estate, or that the property is not necessary to effective reorganization. 11 U.S.C. § 362(d) (2010). This relief goes hand in hand with the automatic stay of section 362(a)(3). Therefore, requiring that a creditor or other party automatically return property of the estate in its possession back to the estate or be in violation of the automatic stay, while still allowing the creditor to request termination of the automatic stay does not erase any of the protections the creditor has in protecting its interests in the property. Instead this process helps protect both parties in a Bankruptcy Proceeding by giving both parties a chance to be heard and engage in the process.

C. Adequate Protection Under Section 363 Does Not Excuse Possessor of Property from Duty Under Section 542 and Violates the Automatic Stay

Section 363 states that the trustee may use, sell, or lease property of the estate after notice and hearing unless the use, sale, or lease occurs within the ordinary course of business, and then

the trustee does not need to seek court permission. 11 U.S.C. § 363(b) (2010). It further allows any creditor to request that the court prohibit or condition the trustee's actions, giving the creditor adequate protection in its property interest. 11 U.S.C. § 363(e) (2010). The creditor may bring this request forward at any time. *Id.* "The concept of adequate protection enables the bankruptcy court to balance the right of a secured creditor to have the value of its interest in the collateral maintained during the pendency of a bankruptcy case." *In re Rutherford* 329 B.R. 886, 892 (Bankr. N.D. Ga. 2005).

The court below excused the creditor's violation of the automatic stay under section 362(a)(3) and the mandatory turnover provision in section 542, because of section 363(e)'s adequate protection clause. R. at 13. Congress did textually connect section 542 and 363 but not in the way the Minority View interprets them. The Minority View in the circuit split states that section 542 and 363(e) "together allow a debtor to request turnover of property he or she can use while allowing the creditor to respond with a request for adequate protection." *In re Denby-Peterson*, 576 B.R. 66, 80-81 (Bankr. D. N.J. 2017). The Minority View also contends that refusing to turn over property because the creditor is not adequately protected is not the kind of post-petition control that violates the stay. *In re Cowen,* 849 F.3d at 949-50.

However, this view goes against Congressional intent. Since Congress does not "hide elephants in mouseholes" *Whitman v. American Trucking Ass'ns Inc.,* 531 U.S. 457, 468 (2001); it is clear that if Congress intended to allow secured creditors to withhold property from the estate while the bankruptcy court determines adequate protection then Congress would have included that language in a specific exception. *In re Rutherford,* 329 B.R. at 892. Congress explicitly wrote under section 542 that a creditor <u>shall</u> return property in its possession to the estate. 11 U.S.C. 542(a) (1994). Shall is a command. Shall signals that an action is mandatory.

Congress did not write that a creditor may return the property once it was guaranteed adequate protection by the court. Congress decided to use shall, signaling that turnover is mandatory unless there is a showing of inconsequential value or benefit to the estate. *Id.*

The Minority View disagrees with the above interpretation stating that since section 542(a) refers to section 363, giving the creditor a right to maintain possession until adequate possession is provided. R. at 13. However, Section 542(a) doesn't exactly state that turnover may be excused for a request for adequate protection under 363(e), instead it reads as follows:

> 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 that such property is of inconsequential value or benefit to the estate.

11 U.S.C. §542(a) (1994). A plain reading of this provision clarifies that the only way a creditor may be protected and potentially excused from having to turnover property of the estate is if the creditor can prove the property does very little for the overall estate. Moreover, the reference to section 363 describes the type of property listed for the trustee to use, sell, or lease and does not give protection to the creditor. While under section 363(e) a party who has an interest in property in a bankruptcy estate may ask for adequate protection, section 363(e) does not excuse the party from turning over said property. 11 U.S.C. 363(e) (2010).

Reading section 542(a) as self-effecting has no effect on the creditors protections under sections 542 or 363(e). Requiring a party to turnover property without a court order aids the whole purpose of the Bankruptcy Code and moves the process along at a quickened pace. A party may ask for adequate protection at any time under section 363(e) and does not have to turnover property under section 542 if it can prove the property to be of little or no value to the

estate. Here, neither issue was raised by Weinberg, and the onus was on Weinberg to raise both, however the lower court still excused Weinberg's withholding of the plows which violated the automatic stay of section 362(a)(3) due to a lack of adequate protection.

In *In re Rutherford* the ninth circuit dealt with the same issue stating that "the language and tenor of the holding [in Whiting Pools] supports the majority position that secured creditors must return repossessed property, pending a determination by the bankruptcy court as to whether the creditor's interests are adequately protected." *In re Rutherford,* 329 B.R.886 at 892. Other courts have followed this interpretation of the holding in Whiting Pools. *See Thompson,* 566 F.3d at 707-708. Here, under section 542, Weinberg was required to return the snowplows to the Debtor upon the Debtor's filing of the petition. By not turning over the property, even after being asked to by the Debtor's Attorney, Weinberg was in violation of the turnover power of section 542 and therefore the stay in section 362. He cannot be excused under section 363(e) for these violations.

Even if this Court finds that section 363(e)'s adequate protection clause does allow the creditor to maintain possession of the property, Weinberg never asked for a determination of adequate protection. Weinberg only made an assertion that he intended to ask for adequate protection if the Debtor filed a turnover action. R. at 6. Weinberg could have asked for adequate protection at any time in the process, including when he testified in the lower court. *See* 11 U.S.C. 363(e) (2010). Since Weinberg did not ask for the Bankruptcy Court to prohibit or condition the Trustee's use, sale or lease ensuring him adequate protection, Weinberg still violated both the automatic stay and the requirement to turn over the property to the Trustee, and his actions cannot be excused by the adequate protection provision of section 363(e).

Moreover, creditors should not be allowed to use 363(e) as an excuse. If creditors are allowed to use section 363(e) as an excuse, then the creditors could tie the hands of debtors by limiting the use, sale, or lease powers afforded to the trustee or debtor, while also keeping the property out of the estate while adequate protections are decided upon. This will drag out the bankruptcy process and potentially have adverse effects on the debtor in the long run, not to mention it will also tie up the courts bringing numerous creditors into the courtroom to ask for such protections.

D. The Majority View Decisions on Sections 362, 542, and 363 Should Be Adopted

Affirming the Minority View of the Thirteenth, Tenth, and D.C. circuits will frustrate the purpose of the Bankruptcy Code and create judicial inefficiencies. The Minority View's reading of the statutes requires the debtor to bring a turnover action to compel the creditor to return the property, allows the creditor in possession of property of the estate to continue to withhold said property from the trustee until the court provides adequate protection, and provides that the creditor is not in violation of the automatic stay through its withholding of property of the estate.

Adopting the Minority View would not only create more work for each individual debtor/trustee, but also the court by making a debtor or trustee bring a turnover action against each creditor and making the court issue an order requiring the creditor to return the property. Additionally, who will bear the costs of these lengthy proceedings? Not the creditors who are secured and guaranteed to be paid out of the estate before numerous other parties in line. No, it will be the debtor and the bankruptcy estate that will shoulder these elevated costs. Here, the Debtor lost out on a chance to reorganize its business and then lost the chance to liquidate its assets at a higher price. R. at 7. "Congress did not intend to place the burden on the bankruptcy estate to absorb the expense of potentially multiple turnover actions." *Del Mission Ltd.,* 98 F.3d

at 1151. It would also frustrate the purpose of reorganization under Chapter 11, cause the debtor to miss out on the ability to pay off its debts under the liquidation of assets under Chapter 7, and would create hardships on debtors attempting to pay off debts under Chapter 13. *See generally Del Mission*, 98 F.3d 1147 (1996).

Adopting the Majority View of the other circuit courts would simply require the creditor to return the property or prove that the property is insubstantial or inconsequential to the estate. The courts would then continue to hear claims by creditors, as the courts do now, requesting adequate protection or some other exception under sections 363 and 542 as these issues present themselves. This approach enables the bankruptcy process to help debtors create plans to resolve their debts. It allows businesses to continue running and employing people which keeps the economy growing. The policy issues presented here must be taken into consideration as well as the statutory language itself. Creditors would be quicker to turn over property to the estate if the creditors would face a violation alongside penalties for violating the automatic stay. The creditor will still be allowed to assert defenses and protect itself.

Therefore, the Court should adopt the Majority View making the withholding of property a violation of the automatic stay under 11 U.S.C. §362(a)(3) and require all creditors or other parties who hold interests of the estate to return that property upon request from the trustee in the proceedings. Otherwise, creditors will be allowed to derail the plans and purposes of Chapter 7, 11, and 13 Bankruptcy schemes.

II. 11 U.S.C. § 503(b) Does Not Permit A Court To Grant An Administrative Expense For Substantial Contribution In A Case Under Chapter 7 Because The Plain Language Of Its Subsections Limits Substantial Contribution Expenses To Chapters 9 And 11

Any analysis of the applicability of a statutory provision begins with an examination of the statutory language. *Lamie v. U.S. Trustee*, 540 U.S. 526, 534 (2004). If the language of the

statute is clear and unambiguous, then the plain language is applied and enforced according to its terms. *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000). Further, bankruptcy courts construe the statutory language for priority narrowly because of the goal of fair distribution among creditors. *In re United Educ. and Software*, 2005 WL 6960237, *4.

Section 503 governs the allowance of administrative expenses in bankruptcy cases generally. 11 U.S.C. § 503 (2005). Subsection (b) states that "after notice and a hearing, there shall be allowed administrative expenses, other than claims allowed under section 502(f) of this title, **including--**" (emphasis added). 11 U.S.C. § 503(b) (2005). The subsections that follow provide a list of categories that qualify as administrative expenses. 11 U.S.C. § 503(b)(1)-(9) (2005). Substantial contribution expenses are referenced twice in the statute: under sections 503(b)(3)(D) and 503(b)(5); and in both instances the reference appears as "substantial contribution in a case under chapter 9 or 11 of this title." 11 U.S.C. § 503(b)(3)(D) (2005); 11 U.S.C. § 503(b)(5) (2005).

Section 503(b)(5) involves "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." As defined in the Code, "the term 'indenture trustee' means trustee under an indenture." 11 U.S.C. § 101(29) (2010). Since Weinberg is not holding an indenture for the benefit of another, he is not an "indenture trustee," which makes that provision inapplicable in this case.

Section 503(b)(3)(D) involves "the actual, necessary expenses, other than compensation and reimbursement specified in paragraph (4) of this subsection, incurred by 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) (2005). Weinberg is a creditor; thus, this provision would be applicable but for the limitation to a case under chapters 9 or 11. The court below, however, chose to follow a trend that emerged from a split Sixth Circuit opinion in *In re Connolly N. Am., LLC*, adopting an approach that instead relies upon the word "including" in section 503(b) and principles of equity (the "Minority Approach"). R. at 17; *In re Connolly North America, LLC*, 802 F.3d 810 (6th Cir. 2015). This approach attempts to circumvent the restrictions of 503(b)(3)(D) implemented by Congress, so that bankruptcy courts may rule in a manner that they believe offers a more equitable outcome.

Since the plain language of section 503(b)(3)(D) unambiguously states "substantial contribution in a case under chapter 9 or 11," administrative expenses for substantial contribution in chapter 7 cases are inappropriate. However, the Minority Approach utilized by the Thirteenth Circuit below, challenges the contention that the language of 503(b)(3)(D) is unambiguous. It favors equitable considerations in reaching its conclusions, even though an analysis of the language of 503(b)(3)(D) using the other principles of statutory interpretation, including legislative history and congressional intent, canons of construction, context, and practical consequences, demonstrates that substantial contribution administrative expenses were intentionally limited to cases under chapter 9 or 11 of the Code.

A. The Plain Language of 503(b)(3)(D) Precludes Substantial Contribution Administrative Expenses in Chapter 7 Cases

The issue of whether substantial contribution administrative expenses may be granted in chapter 7 cases is not new, and the majority of courts addressing it have held that the plain language of section 503(b)(3)(D) limits its application to chapters 9 and 11. For example, the Third Circuit in *In re Lloyd Securities, Inc.* was faced with a claim by defrauded customers for recovery of fees and costs related to actions taken to liquidate the assets of a failed securities

dealer, and noted that "the district court held that if appellants were entitled to receive compensation under the provisions of the Bankruptcy Code, they would have to meet the strictures of section 503(b)(3)(D)." *In re Lloyd Securities, Inc.*, 75 F.3d 853, 857 (3rd Cir.1996). The Third Circuit went on to state that "[u]nfortunately for appellants, sec. 503(b)(3)(D), **by its terms**, applies only to chapter 9 and 11 bankruptcy cases…" (emphasis added) *Id.* In another Third Circuit decision, *Lebron v. Mechem Financial Inc.*, the court was faced with a request for reimbursement of fees and costs incurred by a corporate director while attempting to expose fraudulent activity within the corporation-debtor. *Lebron v. Mechem Financial Inc.*, 27 F.3d 937 (3rd Cir. 1994). Like the Debtor here, that case began as a chapter 11 and was later converted to chapter 7, and the Third Circuit held that "[t]here are provisions of § 503 other than subsection (b)(3)(D) that authorize reimbursement of expenses incurred in connection with a chapter 7 proceeding, and we believe that post-conversion expenses were intended to be reimbursable under those provisions or not at all. (internal citations omitted)" *Id.* at 946.

In a Seventh Circuit decision where an attorney asked the court to use its equitable powers to enable him to recover attorney fees and costs in a chapter 7 case that had been converted from a chapter 11, the court declined to do so saying that "Section 503(b)(4), which entitled attorneys to recover fees when they 'mak[e] a substantial contribution in a case', only applies in cases under Chapters 9 and 11, and this is a Chapter 7." *Matter of Fesco Plastics Corp., Inc.*, 996 F.2d 152, 157 n.5 (7th Cir. 1993). Although section 503(b)(4) is not the provision in dispute here, the situation is analogous. Section 503(b)(4) is the provision that allows recovery of professional fees to the attorney of "an entity whose expense is allowable" under section 503(b)(3)(D). 11 U.S.C. § 503(b)(4) (2005). Thus, the Seventh Circuit's holding, that recovery of attorney fees when making a substantial contribution in a case only applies in

cases under chapters 9 and 11, may be analogized to hold that a creditor's recovery of fees or costs under Section 503(b)(3)(D) only applies in cases under chapters 9 and 11.

Despite the case law recognizing that the plain language of section 503(b)(3)(D) precludes recovery in chapter 7 cases, the Thirteenth Circuit's decision below held that the presence of the word "including" in section 503(b) signifies that the list of subsections that follows is non-exclusive, and thus, "provides bankruptcy courts with much needed flexibility" that allows the court to fashion an equitable result, despite the plain language of the statute. R. at 19. However, there is also case law evaluating the validity of that argument, and an examination of that case law suggests that while some courts have conceded that the word "including" in 503(b) does suggest that a non-exhaustive list follows, prior to the Sixth Circuit's holding in *In re Connolly* none had overcome the specific, plain language of section 503(b)(3)(D).

Similar to the case here, the court in *In re Hackney* had to decide whether professional fees and costs expended by a bank investigating fraudulent transfers by a would-be debtor could be collected as administrative expenses in the later-filed chapter 7 case. In that case, the bank conducted its investigation in anticipation of an involuntary chapter 7 filing, and although the trustee agreed that the pre-petition investigation conducted by the bank substantially benefitted the estate, the court held that "'substantial contribution' does not exist in Chapter 7 cases." *In re Hackney*, 351 B.R. 179, 183 (Bankr. N.D. Ala. 2006). Like Weinberg, the bank's argument appealed to the non-exhaustive nature of Sec. 503(b), evidenced by the word "including." However, the court dismissed that argument, stating that "when a subsection directly addresses the type of administrative expense sought, the restrictions in it cannot be avoided by appealing to the non-exhaustive nature of sec. 503(b).' (citation omitted)." *Id.* at 205; *see also In re Engler*, 500 B.R. 163, 174 (Bankr. M.D. Fl. 2013).

Therefore, even conceding that 503(b) is non-exhaustive, because 503(b)(3)(D) specifically addresses "substantial contribution," and the plain language of the statute unambiguously limits its application to cases under chapters 9 and 11, a "substantial contribution" expense under chapter 7 is improper. Thus, the holding from the court below is in contravention to both plain language of 503(b)(3)(D) and the case law evaluating its applicability in similar circumstances.

B. The "Minority Approach" Adopted by the Thirteenth Circuit Improperly Favors Equitable Considerations Over Other Principles of Statutory Interpretation

It is well established that bankruptcy courts do have an equitable component. *See generally, Local Loan Co. v. Hunt,* 292 U.S. 234, 240 (1934); *Pepper v. Litton,* 308 U.S. 295, 307 (1939); *Bank of Marin v. England,* 385 U.S. 99, 103 (1966). However, that power "must be exercised within the confines of the Bankruptcy Code." *Law v. Siegel*, 571 U.S. 415, 421 (2014). Further, this Court has also said: "It is a 'basic doctrine of equity jurisprudence that courts in equity should not act…when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief.' (citations omitted)" *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 380 (1992). Here, Weinberg and his attorneys undertook the creditors' investigation into Clemons personal finances for the purpose of pursuing an action to enforce Clemons' personal guarantee – not for the purpose of aiding the Trustee or benefitting the estate. R. at 7. It may be true that the information obtained and offered to the Trustee ultimately did provide a substantial benefit to the bankruptcy estate, but that does not mean that it was undertaken for that purpose, nor does it mean that Weinberg's ability to utilize that information is foreclosed. Weinberg is free to pursue an action against Clemons personally and may attempt to recover the fees and costs of the creditors' investigation as part of that action;

thus, another remedy at law exists for Weinberg. He will not be denied equitable relief if this Court holds that he is unable to recover those fees and costs from the bankruptcy estate.

While it may be tempting to appeal to the equitable nature of bankruptcy to offer relief to Weinberg, especially given the policy consideration of encouraging creditors to participate in bankruptcy proceedings, there is ample case law demonstrating that there no legal basis to do so. Looking again to the Seventh Circuit in *Matter of Fesco Plastics Corp., Inc.*, the court declined to use its equitable powers to allow recovery of fees to an attorney claiming to have provided a substantial contribution in a chapter 7 case. *Matter of Fesco Plastics Corp., Inc.*, 996 F.2d 152. The court determined that doing so would effectively create an exception to the plain language of the statute, and observed that "[f]or a bankruptcy court to create a new exception would go beyond the authority granted in 105, which allows such courts to use their equitable powers only as necessary to enforce the provisions of the Code, not to add on to the Code as they see fit." *Id*. at 156. By interpreting the statute to avoid the limitation in 503(b)(3)(D), the court below effectively added an exception to the Code that is not present in the plain language and instead relies upon the court's authority to weigh equitable considerations.

Another example of case law that demonstrates that equitable considerations may not be favored over the statutory language comes from *In re Peterson*, where the district court addressed whether a creditor in a chapter 12 case may recover administrative expenses for costs that the creditor claimed were expended making a substantial contribution to the bankruptcy estate. *In re Peterson*, 152 B.R. 612 (Bankr. D. Wy. 1993). In that case, the creditor expended fees and costs resisting the debtors' discharge, even though the Chapter 12 trustee had already filed objections and did not request assistance from the creditor. *Id.* at 613. When the debtors reached an agreement with the chapter 12 trustee, the creditor attempted to use section 503(b) to

recoup the fees and costs expended for preparation and filing of its objections. *Id.* The creditor's contention was that the non-exclusive nature of section 503(b), implicated by the word "including," meant that the court could use its equitable powers to award its fees administrative expense status. *Id.* The bankruptcy court evaluated the statutory language of section 503(b) and agreed that the "including" language of 503(b) meant that the specified activities "are not the only activities which may qualify as compensable administrative expenses." *Id.* at 614. And while the district court agreed generally with that conclusion, it also recognized that the inclusion of section 503(b)(3)(D), and its plain language in limiting the applicability of substantial contribution expenses to chapters 9 and 11, "casts an entirely different light on the analysis of the statute." *Id.* The district court reasoned that the specific reference to chapters 9 and 11 meant that Congress intended to exclude other chapters from the provision; in overruling the bankruptcy court's decision, the district court observed:

> The ruling of the bankruptcy court in this case has effectively rewritten 503(b)(3)(D) to include Chapter 12. While this may be an equitable result […] in this case, the Supreme Court has explicitly stated "that whatever equitable powers remain in the bankruptcy courts must and can only be exercised within the confines of the Bankruptcy Code." (internal citation omitted) The authority to address any inequities which may be present in the application of the plain meaning rule to 503(b) is vested in Congress, not the courts.

Id. at 614. Analogizing this holding to the case at issue here, the court below has effectively rewritten 503(b)(3)(D) to include chapter 7 in an effort to achieve what it believes is an equitable outcome; but as described above, the authority to do so is vested in Congress, not the Thirteenth Circuit.

Finally, even this Court has previously addressed the appropriateness of using the equitable authority offered to bankruptcy courts to reach a result that is counter to the statutory text. In *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, this Court was faced with

the question of whether the petitioner, an administrative claimant under 503(b), could instead seek recovery under 506(c). *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1 (2000). In that case, there were insufficient funds to cover the administrative claims, so the petitioner argued that its claim should instead be paid pursuant to 506(c), which creates an exception to the priority rules and allows payment to a trustee from the secured property in a bankruptcy estate. *Id.* at 5. Petitioner's argument in that case highlighted that the text of 506(c) says "the trustee may…" and does not say "only the trustee," and it appealed to the equitable authority given to courts in the Bankruptcy Code, asking this Court to read into the provision that any party in interest may recover under 506(c) since petitioner's claim arguably constituted a "benefit to the holder" as described in the provision. *Id.*

This Court, responding to petitioner's argument that policy considerations compelled adoption of its reading of 506(c), dismissed petitioner's argument and stated: "we do not sit to assess the relative merits of different approaches to various bankruptcy problems. It suffices that the natural reading of the text produces the result we announce. Achieving a better policy outcome – if what petitioner urges is that – is a task for Congress, not the courts." *Id.* at 13-14. The Thirteenth Circuit, in its opinion below, has elected to forego the natural reading of the text of 503(b)(3)(D), and has adopted a result that is aimed at what it believes to be a better policy outcome, counter to this Court's explicit directive.

As evidenced by the foregoing case law, equitable considerations may weigh into the analysis of congressional intent in the application of a statutory provision in the Code, but they may not be used to overturn the results of a logical statutory construction achieved using common principles of statutory interpretation. The following subsections explore those additional principles of statutory interpretation that support the limitation of substantial

contribution administrative expenses to cases under chapters 9 or 11. First, prior case law examining the legislative history and congressional intent of section 503(b)(3)(D) demonstrates that Congress knew how to provide for a substantial contribution administrative expense if it wished to do so and that Congress intended for the scope of 503(b)(3)(D) to be limited. Second, the canons of statutory construction "*expressio unius est exclusio alterius*" and "the rule against surplusage" offer additional support for the contention that Congress intended to preclude substantial contribution administrative expenses in chapter 7. Third, the statutory context of the language "in a case under chapters 9 or 11" suggests that, conceptually, substantial contribution administrative expenses may only exist in chapters 9 or 11. Finally, the practical outcome of a holding that 503(b)(3)(D) does allow for substantial contribution administrative expenses in other chapters of the Bankruptcy Code, would render the references to chapters 9 and 11 in the provision unnecessary, as equity would become the only necessary factor for determining whether an expense would qualify under 503(b).

i. Legislative History Demonstrates that Congress Intended to Limit the Scope of Section 503(b)(3)(D)

First, Congress knew how to provide for substantial contribution administrative expenses in chapter 7 if it intended to do so. *In re Hackney*, 351 B.R. at 209; *see also Hartford Underwriters Ins. Co.* 530 U.S. at 8 ("[The] theory – that the expression of one thing indicates the inclusion of others unless exclusion is made explicit – is contrary to common sense and common usage.")

The court below, in its reasoning for extending the applicability of 503(b)(3)(D) to cases under chapter 7, incorporated the proposition from the majority opinion in *In re Connolly*, which suggested that Congress included the language referencing chapters 9 and 11 because creditors in those types of cases are more likely to spend their own time and resources for the benefit of the

estate, whereas the U.S. Trustee fills that role in chapter 7 cases. R. at 19. However, as observed by J. O'Malley in his dissenting opinion in *In re Connolly*, "what little legislative history there is regarding § 503(b)(3)(D) indicates that Congress intended its scope to be limited." *In re Connolly North America, LLC*, 802 F.3d 810, 821 (6th Cir. 2015). O'Malley's dissent goes on to describe the evolution of the provision, beginning with Senate Bill 236 and continuing through various bills and amendments in the 1970s, and he notes that the Senate and House reports and hearings are silent regarding subsection 503(b)(3)(D). He concludes that "Congress may not have foreseen the unusual circumstances at issue [in the case before it, but that] does not give us the freedom to rewrite the statute in order to take account of them and reach an 'equitable' solution." *Id.* at 822. Likewise, the Thirteenth Circuit should not be permitted to extend the scope of a provision that was intentionally limited by Congress.

ii. Conventional Canons of Construction Support a Reading of 503(b)(3)(D) that Precludes Substantial Contribution Administrative Expenses in Chapter 7 Cases

Second, the canons of construction "*expressio unius est exclusio alterius*" and "the rule against surplusage" offer additional support for the contention that the plain language of Section 503(b)(3)(D) precludes substantial contribution administrative expenses in chapter 7 cases. The canon of *expressio unius est exclusio alterius,* which translates as "the expression of one thing implies the exclusion of others," was used by the court in *In re United Educ. and Software* to compare the language of 503(b) and 503(b)(3). *In re United Educ. and Software*, 2005 WL 6960237. The *Software* court ultimately concluded that "unlike the six enumerated subsections under 503(b), in which the use of the word 'include' is significant for being non-exhaustive, the five examples under 503(b)(3) are restricted to only those five." *Id.* at *7.

Additionally, the lower court's dissenting opinion observes: "When, like here, a statute sets forth a series of items in a general rule but excludes the term 'including,' the canon of

expressio unius est exclusion alterius applies, under which a court infers an intention to restrict the statute's application to only those specific examples listed" (internal citations omitted). R. at 29-30. Since 503(b)(3)(D) represents one of the five restricted examples under 503(b)(3), the fact that 503(b) is non-exhaustive because of the presence of the word "including" does not change the interpretation of the language "substantial contribution in a case under chapter 9 or 11." Congress chose to affirmatively express the idea that substantial contribution administrative expenses may be allowed in cases under chapters 9 or 11, so the logical effect of that language is to exclude their allowance under other chapters of the Code.

Another useful canon of construction for evaluating 503(b)(3)(D) is the rule against surplusage. "It is 'a cardinal principle of statutory construction' that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.' (internal citations omitted)." *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001). The Sixth Circuit and its progeny, including the Thirteenth Circuit below, advocate that the language "in a case under chapter 9 or 11" of 503(b)(3)(D) is merely offered as examples of scenarios in which it is likely that a substantial contribution to the bankruptcy estate might be necessary. The problem with that construction is that it relies on the presumption that the word "including" in 503(b) creates a non-exhaustive list, which would ultimately render the references to chapters 9 or 11 superfluous – if the list is non-exhaustive, there is no need to specify the additional examples.

Again, looking to the court's opinion in *In re Peterson*, extending recovery for substantial contribution in cases besides chapters 9 or 11 based on a reading of the statutory text that focuses on the non-exclusive nature 503(b), "would render subsection (3)(D) of 503(b) meaningless." *In re Peterson*, 152 B.R. at 614. The court goes on to state that, "if a creditor who makes a

substantial contribution in a Chapter 12 proceeding is entitled to compensation for its expenses under 503(b), the phrase 'in a case under Chapter 9 or 11 of this title' in subsection (3)(D) would be merely excess verbiage." *Id.* Likewise, if the holding below stands, and chapter 7 creditors like Weinberg are allowed to recover for substantial contribution under 503(b), subsection (3)(D) would become superfluous in violation of the rule against surplusage.

iii. Statutory Context Suggests that Substantial Contribution is a Concept that Only Exists in Chapter 9 or 11 Cases

Context is another tool of statutory interpretation that cuts in favor of a reading of 503(b)(3)(D) that precludes substantial contribution administrative expenses in chapter 7 cases. *See Hibbs v. Winn*, 542 U.S. 88, 101 (2004) ("[W]e follow 'the cardinal rule that statutory language must be read in context [since] a phrase gathers meaning from the words around it." (internal citation omitted).) As referenced above, substantial contribution appears twice in section 503, and in both instances the words that follow are "in a case under chapter 9 or 11 of this title." 11 U.S.C. § 503(b)(3)(D) (2005); 11 U.S.C. § 503(b)(5) (2005). Thus, the phrase is properly read as "substantial contribution in a case under chapter 9 or 11 of this title," and the context suggests that, conceptually, "substantial contribution" only exists in chapters 9 or 11. Divorcing the two phrases removes them from their proper context within the statute.

Additionally, the justification for its reading of 503(b) offered by the court in *In re Connolly*, and adopted by the Thirteenth Circuit, which suggests that Congress referenced chapters 9 and 11 simply because those creditors are more likely to have to expend their own resources, falls short when looking at the language of the statute in its full context. If that reasoning holds true, and is extended to the other reference to "substantial contribution in a case under chapter 9 or 11 of this title," it must be the case that indenture trustees in 503(b)(5) are more likely to expend resources in chapters 9 and 11, but that they may still make claims for

administrative expenses no matter which chapter of the Code the case is filed in. An examination of the role of the indenture trustee in the various chapters of bankruptcy is beyond the scope of the issues presented here; however, it is notable that Congress chose to express substantial contribution in a manner that suggests that it is a concept that, for purposes of administrative expenses, only exists in certain chapters of the Code.

iv. The Practical Consequences of a Reading of Section 503(b)(3)(D) that Extends Substantial Contribution to Cases in Other Chapters of the Bankruptcy Code Would Render the References to Chapters 9 or 11 Unnecessary and Make Equity the Only Relevant Factor in Determining Qualification for Administrative Expenses Under Section 503

Finally, as the dissent of the lower court observes, "[t]aking the majority's holding to its logical conclusion, administrative expenses in this circuit are no longer subject to any boundaries, restrictions or limitations. They may now be allowed in any and all forms." R. at 31. If the holding below stands, the existing case law that charges the courts with faithfully evaluating and interpreting the plain statutory language in bankruptcy cases will be overturned, and a determination of the equities of a case will become the main factor in determining the applicability of the provisions of the Bankruptcy Code.

The court below has chosen to extend substantial contribution expenses to chapter 7 cases by determining the outcome it believes is most equitable, and reasoning backwards through the statutory language to justify its holding – specifically, by relying on the word "including" in 503(b) and the equitable powers of bankruptcy courts, and disregarding the plain language of the applicable subsection, the court renders the subsection unnecessary. If this practice is allowed to continue, courts will be permitted to disregard any subsection that does not allow it to reach the equitable result it desires. That practice cannot possibly be what Congress intended by using the

word "including" in 503(b) and granting the courts equitable powers to enforce the provisions of the Code.

CONCLUSION

In order to correct the improper adoption by the Thirteenth Circuit of minority positions in both of the issues presented in this case, this Court should adopt the majority view that retaining property of the estate is considered exercising control over the property in violation of the automatic stay provision under section 362(a)(3) of the Code. Further, this Court should also adopt the majority approach to interpreting the language of 503(b)(3)(D), recognizing that the plain language of the provision intentionally limits the award of substantial contribution administrative expenses to cases under chapters 9 or 11, and precluding the award of substantial contribution expenses in this and other chapter 7 cases.

Petitioner respectfully requests that this Court reverse the decision of the Thirteenth Circuit.

Team P. 42
Counsel of Record

APPENDIX A

11 U.S.C. § 101(29)

Defintions

In this title the following definitions shall apply:

…

(29) The term "indenture trustee" means trustee under an indenture.

APPENDIX B

11 U.S.C. § 362

Automatic Stay

(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-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) with respect to a stay of an act against single asset real estate under subsection (a), by a creditor whose claim is secured by an interest in such real estate, unless, not later than the date that is 90 days after the entry of the order for relief (or such later date as the court

may determine for cause by order entered within that 90-day period) or 30 days after the court determines that the debtor is subject to this paragraph, whichever is later--

(A) the debtor has filed a plan of reorganization that has a reasonable possibility of being confirmed within a reasonable time; or

(B) the debtor has commenced monthly payments that--

(i) may, in the debtor's sole discretion, notwithstanding section 363(c)(2), be made from rents or other income generated before, on, or after the date of the commencement of the case by or from the property to each creditor whose claim is secured by such real estate (other than a claim secured by a judgment lien or by an unmatured statutory lien); and

(ii) are in an amount equal to interest at the then applicable nondefault contract rate of interest on the value of the creditor's interest in the real estate; or

(4) with respect to a stay of an act against real property under subsection (a), by a creditor whose claim is secured by an interest in such real property, if the court finds that the filing of the petition was part of a scheme to delay, hinder, or defraud creditors that involved either--

(A) transfer of all or part ownership of, or other interest in, such real property without the consent of the secured creditor or court approval; or

(B) multiple bankruptcy filings affecting such real property.

If recorded in compliance with applicable State laws governing notices of interests or liens in real property, an order entered under paragraph (4) shall be binding in any other case under this title purporting to affect such real property filed not later than 2 years after the date of the entry of such order by the court, except that a debtor in a subsequent case under this title may move for relief from such order based upon changed circumstances or for good cause shown, after notice and a hearing. Any Federal, State, or local governmental unit that accepts notices of interests or liens in real property shall accept any certified copy of an order described in this subsection for indexing and recording.

(e-o) Omitted

APPENDIX C

11 U.S.C. § 363

Use, Sale, or Lease of Property

(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-p) omitted

APPENDIX D

11 U.S.C. § 503

Allowance of administrative expenses

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

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

(1-2) omitted

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

(A-C) omitted

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

(E-F) omitted

(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;

(6-9) omitted

(c) omitted

APPENDIX E

11 U.S.C. § 541

Property of the Estate

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

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

(2) All interests of the debtor and the debtor's spouse in community property as of the commencement of the case that is--

(A) under the sole, equal, or joint management and control of the debtor; or

(B) liable for an allowable claim against the debtor, or for both an allowable claim against the debtor and an allowable claim against the debtor's spouse, to the extent that such interest is so liable.

(3) Any interest in property that the trustee recovers under section 329(b), 363(n), 543, 550, 553, or 723 of this title.

(4) Any interest in property preserved for the benefit of or ordered transferred to the estate under section 510(c) or 551 of this title.

(5) Any interest in property that would have been property of the estate if such interest had been an interest of the debtor on the date of the filing of the petition, and that the debtor acquires or becomes entitled to acquire within 180 days after such date--

(A) by bequest, devise, or inheritance;

(B) as a result of a property settlement agreement with the debtor's spouse, or of an interlocutory or final divorce decree; or

(C) as a beneficiary of a life insurance policy or of a death benefit plan.

(6) Proceeds, product, offspring, rents, or profits of or from property of the estate, except such as are earnings from services performed by an individual debtor after the commencement of the case.

(7) Any interest in property that the estate acquires after the commencement of the case.

(b-f) Omitted

APPENDIX F

11 U.S.C. § 542

Turnover of Property of the Estate

(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.

APPENDIX G

Fed. R. Bankr. 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) a proceeding to determine the validity, priority, or extent of a lien or other interest in property, but not a proceeding under Rule 3012 or Rule 4003(d);

(3) a proceeding to obtain approval under §363(h) for the sale of both the interest of the estate and of a co-owner in property;

(4) a proceeding to object to or revoke a discharge, other than an objection to discharge under §§727(a)(8),[1] (a)(9), or 1328(f);

(5) a proceeding to revoke an order of confirmation of a chapter 11, chapter 12, or chapter 13 plan;

(6) a proceeding to determine the dischargeability of a debt;

(7) a proceeding to obtain an injunction or other equitable relief, except when a chapter 9, chapter 11, chapter 12, or chapter 13 plan provides for the relief;

(8) a proceeding to subordinate any allowed claim or interest, except when a chapter 9, chapter 11, chapter 12, or chapter 13 plan provides for subordination;

(9) a proceeding to obtain a declaratory judgment relating to any of the foregoing; or

(10) a proceeding to determine a claim or cause of action removed under 28 U.S.C. §1452.