No. 18-0918

IN THE

Supreme Court of the United States

OCTOBER TERM, 2018

IN RE BACKSTREETS PLOWING, INC., DEBTOR,

STEVEN VIN SANT, CHAPTER 7 TRUSTEE, PETITIONER

V.

MILTON WEINBERG, RESPONDENT

On Writ of Certiorari to the

United States Court of Appeals for the Thirteenth Circuit

Brief for Respondent

Team 4R

Counsel for Respondent

Questions Presented

I. Whether 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?

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

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Statues

OPINIONS BELOW

In unreported opinions, the Bankruptcy Court for the District of Moot determined there was no stay violation and approved the administrative expenses in favor of Weinberg. R. at 6, 9. The Thirteenth Circuit also affirmed; its opinion is reproduced as the record in this appeal.

STATEMENT OF JURISDICTION

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

STATUTORY PROVISIONS

11 U.S.C. 105

In this title—

(1) – (2) [omitted]

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

(4) – (9) [omitted]

11 U.S.C. 362

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

(1) – (2) [omitted]

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

(b) – (o) [omitted]

11 U.S.C. 363

(a) – (d) [omitted]

(e) Notwithstanding any other provision of this section, at any time, on request of an entity that has an interest in property used, sold, or leased, or proposed to be used, sold, or leased, by the trustee, the court, with or without a hearing, shall prohibit or condition such use, sale, or lease as

is necessary to provide adequate protection of such interest. This subsection also applies to property that is subject to any unexpired lease of personal property (to the exclusion of such property being subject to an order to grant relief from the stay under section 362).

(f) – (p) [omitted]

11 U.S.C. 503

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

(b)vAfter 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) – **(9)** [omitted]

(c) [omitted]

11 U.S.C. 542

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

(b) – **(e)** [omitted]

Statement of Case

This appeal arises out of the bankruptcy case of Backstreets Plowing, Inc. (the Debtor) a snow plow business. R. at 2. This dispute all began when the Debtor's sole shareholder, Christopher "Big Man" Clemons (Clemons), decided he needed to purchase newer, more fuel-efficient, snow plow trucks. R. at 3. Clemons also figured this would allow him to avoid costs associated with having older trucks. *Id.* Clemons also envisioned an expansion of the business to the City of Badlands with the new trucks. R. at 3-4. The City of Badlands were offering the Debtor a one year contract for plowing that would be renewable based on an option held by the city. R. at 4. To secure funds to make Clemons plan work he approached Weinberg. *Id.* Clemons asked Weinberg for a $450,000 loan to purchase the new trucks. *Id.* Weinberg agreed to the loan but secured a security interest in the trucks owned by the Debtor. *Id.* Clemons also personally guaranteed the loan. *Id.* The promissory note stated the Debtor would commence payments in December 2015 after the business started generating revenue. *Id.* Weinberg properly perfected his security interest allowing him a first priority lien on the trucks. *Id.* With the agreement in place the Debtor purchased the new trucks in August 2015. *Id.*

With new trucks in hand the Debtor and local competitors submitted bids for the plowing contract in the City of Badlands. *Id.* The Debtor's bid was far superior to the other competitors. *Id.* The bid was so superior that the city council questioned whether the Debtor could even perform the contract with such a small projected profit margin. *Id.* However, even with these concerns the city approved the bid to the Debtor. *Id.*

Sometime after the bid was accepted Clemons and Weinberg had a falling out because of their love of college football. *Id.* Clemons and Weinberg were alumnus of competing universities that were set to face off. *Id.* Weinberg invited Clemons to attend the game with him. R. at 5.

During the game both men entered into a heated argument about each football program. *Id.* This led to them not speaking again for some time. *Id.*

Fortunately, the winter of 2015-2016 was unusually mild in the Badlands. *Id.* This proved to be quite profitable for the Debtor because they were paid a flat rate. *Id.* The Debtor was able to keep costs down because of the lack of snow. *Id.* However, Clemons never made the December 2015 loan payment to Weinberg. *Id.* After the first few payments were not met, Weinberg contacted Clemons regarding payment. *Id.* Weinberg having several of his calls unanswered drove out to the Debtor's facility in February 2016. *Id.* At this time another argument ensued. *Id.* Weinberg was forcibly removed from the facility by the drivers after being directed by Clemons. *Id.* Weinberg told Clemons to "lawyer up" and filed suit in April 2016. *Id.* Weinberg brought suit against the Debtor and Clemons, based on his personal guarantee. *Id.* Weinberg obtained a judgment in October 2016 holding the Debtor and Clemons, jointly and severally, for $450,000 plus interest and fees. *Id.* Weinberg did not take immediate action on the judgment. *Id.*

The following winter of 2016-2017 was particularly brutal. *Id.* The brutal winter resulted in substantial losses for the Debtor. *Id.* The flat rate payments were no longer large enough to cover operating costs of the Debtor. R. at 6. At this same time Weinberg began efforts to collect on his judgment. *Id.* Weinberg hired E Street Auto Recovery, a repossession company, to retrieve the trucks which they accomplished successfully. *Id.* The trucks were delivered to a warehouse owned by Weinberg where they remain to this day. *Id.*

Without the trucks the Debtor was unable to fulfill the contract with the city. *Id.* With cash running out the Debtor filed a chapter 11 petition on February 4, 2017. *Id.* The Debtors attorneys sent Weinberg a letter demanding the return of the vehicles. *Id.* However, Weinberg

refused, believing the Debtor had the burden to bring a turnover action, where he could then demand adequate protection. *Id.* Instead of filing the turnover action, the Debtor claimed the continued retention constituted a violation of the automatic stay under 362(a)(3). *Id.* The court found that Weinberg had not violated the stay, holding that repossessed prepetition is not an "act to . . . exercise control over property of the estate" within the scope of section 362(a)(3). *Id.* The Debtor made a timely appeal of this ruling in March 2017. *Id.* The Debtor then ceased trying to get the trucks back because the city would not be offering a new contract. R. at 7. Based on these new events the Debtor voluntarily converted the chapter 11 case to a chapter 7. *Id.* A Trustee was appointed on April 13, 2017 to liquidate the property. *Id.*

Weinberg after the conversion decided to pursue collection efforts against Clemons. *Id.* Weinberg hired a collection firm, who upon examination found that shortly after the filing of Weinberg's initial lawsuit the Debtor made transfers of approximately $100,000 to Clemons Daughter. *Id.* Weinberg voluntarily provided this information to the Trustee to establish the transfers were avoidable as fraudulent transfers. *Id.* Clemons daughter reached a settlement where she would pay $75,000 to the estate to satisfy the claims. *Id.*

While investigating these claims Weinberg incurred $25,000 worth of legal fees. Weinberg then filed a motion seeking allowance of a substantial contribution administrative expense pursuant to section 503(b). *Id.* Trustee opposed this motion. R. 8. The bankruptcy court approved Weinberg's motion, which the Trustee timely appealed. *Id.*

In September 2017, the Trustee received a letter from Tenth Avenue offering to purchase all of the Debtor's assets, including the trucks. *Id.* This offer was contingent on the Trustee immediately obtaining possession of and conveying title to the trucks. *Id.* Believing this was the best offer the Trustee attempted to negotiate with Weinberg for the return of the trucks. *Id.*

Proving unsuccessful the Trustee continued the appeal hoping to pressure Weinberg into turning over the trucks. *Id.*

In November 2017 Tenth Avenue withdrew its purchase offer. *Id.* Now the best offer was Stone Pony who offered $100,000 less for the assets, excluding the trucks. *Id.* The Trustee accepted this offer, for fear of diminishing returns. R. at 9. The sale was then approved by the bankruptcy court. *Id.* However, the Trustee has refused to dismiss the appeals hoping to prevail and then recover from Weinberg for damages for his alleged violation of the stay. *Id.* With party consent the appeals were consolidated. *Id.* The appellate panel affirmed on both issues. *Id.* Trustee appealed both determinations. *Id.*

SUMMARY OF ARGUMENT

The plain language of Section 362 only prohibits "acts" to obtain possession or to exercise control over the property of the estate. This conclusion is the only reasonable interpretation of the automatic stay. Interpreting otherwise impermissibly reads policy considerations into a clear statute and effective nullifies Section 542. Weinberg acted to seize the Debtor's trucks pre-petition and took no further action post-petition. Therefore, Weinberg's passive possession of the Debtor's trucks by leaving them in a warehouse did not violate the automatic stay.

Bankruptcy courts should grant Chapter 7 creditors administrative expenses because Section 503(b) is not limiting in how many expenses a creditor can claim are administrative. By including the term "including" in Section 503(b) congress intended the administrative expense list to be non-exhaustive, allowing the bankruptcy courts discretion when granting administrative expenses. While explicitly listing Chapter 9 and Chapter 11, Congress elected to make the list

non-exhaustive because while most instances of expenses will fall under Chapter 9 and 11, there are rare instances in Chapter 7 where administrative expenses are necessary. This is clear when looking at Weinberg using his own funds to find a fraudulent transfer, which allowed for the return of the money to the Trustee.

Bankruptcy courts are also courts of equity. This allows them to utilize the common-fund doctrine which is based on the underlying purpose of equity. It allows bankruptcy courts to use their equitable powers to reimburse a deserving creditor. Weinberg used his own money to find fraud in the bankruptcy, which makes him a deserving creditor. Weinberg in the best interest of the bankruptcy used his money to enhance the bankruptcy estate by finding fraudulent transfers. Through these acts the bankruptcy court determined that administrative expenses should be reimbursed.

Argument

I. Weinberg Did Not Violate the Automatic Stay Under Section 362(a)(3) By Leaving the Property of the Estate in a Warehouse After It Was Repossessed Pre-Petition.

A. The automatic stay only prohibits acts to possess or acts to control property of the estate, not passive possession of the property.

Courts are generally bound to interpret the language of a statute based on the ordinary meaning of the words as found in legal and ordinary dictionaries. *See Asgrow Seed Co. v. Winterboer,* 513 U.S. 179, 187 (1995).

Despite the requirement to interpret a facially clear statute consistent with its language, the Second and Seventh Circuits have judicially amended Section 362. *See Weber v. SEFCU (In re Weber),* 719 F.3d 72 (2d Cir. 2013); *Thomson v. GMAC, LLC,* 566 F.3d 699 (7th Cir. 2009). Rather than interpreting "acts . . . to exercise control," those courts have interpreted the Section

362 that would be convenient if passed. The judicial amendment would read to prohibit creditors from "exercising control" rather than acting to exercise control. *Weber,* 719 F.3d at 79; *Thomson,* 566 F.3d at 702. The difference, albeit semantic, is critical: The former proscribes passive control whereas the latter proscribes only active attempts to control.

The language of Section 362 must be the starting point for any discussion of the automatic stay. Section 362(a)(3) proscribes:

> 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). Under basic grammatical conventions, this section prohibits: (1) any act to obtain possession of property of the estate; (2) any act to obtain possession from the estate; and (3) any act to exercise control over property of the estate. Notably, the structure of the plain language does not prohibit "possessing" property of the estate, nor does it prohibit "exercising control." Rather, it specifically prohibits "any *act* . . . to exercise control." *Id.* (emphasis added). The grammatical structure of any act to exercise control is critical. Under basic English usage, the statutory language consists of an adjective (any), a noun (act), an adjectival infinitive (to exercise), and a direct object (control). Based on this structure, the acts are prohibited and "to exercise" describes the act. Therefore, the automatic stay prohibits "acts," specifically those acts to exercise control over property of the estate.

If Congress desired to prohibit "exercising control" rather than "acts," it could have enacted or revised the subsection to prohibit "exercising control over property of the estate." *WD Equipment, LLC v. Cowen (In re Cowen),* 849 F.3d 943, 950 (10th Cir. 2017). Because Congress did not do so, courts must defer to the statute that was actually passed, not reinvent the statute to read as the judiciary wished it read.

The Tenth Circuit followed the basic English reading of Section 362. *Id.* at 949. The secured creditor repossessed the truck at issue pre-petition. *Id.* at 945. The creditor then changed the title of the truck, again, prior to the bankruptcy petition. *Id.* at 946. The trustee moved for sanctions for violating the automatic stay. *Id.* The Tenth Circuit did not agree with the trustee that the pre-petition seizure violated the automatic stay. *Id.* at 949. The court reasoned that Section 362 "stays entities from *doing* something to obtain possession of or to exercise control over the estate's property[;] [i]t does not cover 'the act of passively holding onto an asset,' nor does it impose an affirmative obligation to turnover property to the estate." *Id.* (emphasis in original) (internal citations omitted). The court went further, noting that its sister circuits read "too much into the section's legislative history." *Id.* Instead, the court noted that Congress does not "hide elephants in mouseholes." *Id.* (quoting *Whitman v. American Trucking Assn'ns,* 531 U.S. 457, 468 (2001). (internal quotation marks omitted). The purpose of the amendments to the Bankruptcy Code in 1984 (the "1984 Amendments"), it opined, was to expand Section 362 to include acts to control in addition to acts to possess. *Id.* The court noted that "[i]t's not hard to come up with examples of such 'acts' that 'exercise control' over, but do not 'obtain possession of,' the estate's property," for example, "intangible property rights that belong to the estate, such as contract rights or causes of action [that] are incapable of real possession unless they are reified." *Id.* at 950 (quoting *In re Hall*, 502 B.R. 650, 665 (Bankr. D.D.C. 2014)). The court declines to interpret Section 542, which requires turnover of property of the estate. *Id.* The court noted that "there is still no textual link between [Section] 542 and [Section] 362." *Id.* Further, the court emphasizes that "bankruptcy courts do not need [Section] 362 to enforce the turnover of property to the estate" because of the courts' broad equitable powers including turnover under Section 542. *Id.*

The distinction between the effect of the automatic stay and turnover powers is illuminated through the D.C. Circuit's reasoning. *See United States v. Inslaw, Inc.,* 932 F.2d 1467 (D.C. Cir. 1991). The secured creditor controlled intangible property pre-petition. *Id.* at 1469-70. The court noted that the purpose of the expansion of the automatic stay in 1984 was to include post-petition control of intangible assets, which likely cannot be possessed. *Id.* at 1472-73. However, the court opined that the automatic stay proscribed *acts* not passive control. *Id.* at 1473. In addition to basing its decision on textual analysis, the court noted that the conclusion is the correct one based on Congress's purpose for Section 362. *Id.* The court noted that "someone defending a[n] [unrelated] suit brought by the debtor does *not* risk violation of [Section] 362(a)(3) by filing a motion to dismiss the suit, though his resistance may burden the rights asserted by the bankrupt." *Id.* The court further opined that because of the liability for compensatory and punitive damages, costs, and attorney's fees for violations of Section 362, "it is difficult to believe that Congress intended a violation whenever someone already in possession of property mistakenly refuses to capitulate to a bankrupt's assertion of rights in that property." *Id.* The primary concern, according to the court, was that such a broad interpretation of Section 362 would create "a kind of universal end-run around the limits of turnover." *Id.* This concern is well-founded: It is a basic canon of statutory construction that courts cannot interpret one statutory provision so as to nullify another. *Citizens Bank of Md. V. Strumpf,* 516 U.S. 16, 20 (1995). Additionally, the underlying purpose of the automatic stay is to "solve a collective action problem – to make sure that creditors do not destroy the bankruptcy estate in their scramble for relief." *Inslaw,* 932 F.2d at 1473. The court also noted that "[n]owhere in [Section 362's] language is there a hint that it creates an affirmative duty to remedy past acts . . . as soon as a debtor files a bankruptcy petition." *Id.* at 1474.

The D.C. District Court correctly applied this analysis in *In re Hall*, 502 B.R. 650 (Bankr. D.D.C. 2014). The court opined that "it is only an affirmative act to change control property of the estate that can give rise to a violation of [Section] 362(a)(3)." *Id.* at 653. The court went further by noting that Section 362(a)(3) "does not bar continued retention of property seized prepetition." *Id.*

The word "act" is simply defined: to "take action" or to "do something." *In re Cowen*, 849 F.3d at 949. (quoting *New Oxford American Dictionary* 15 (3d ed. 2010). Reading pragmatic and policy concerns into the statute not only contravenes rules of interpretation, but also yields a perverse definition of "act." The Second and Seventh Circuits work around this definition by interpreting "exercising control" rather than "act." *Weber*, 719 F.3d at 80 (interpreting "exercising control"); *Thompson*, 566 F.3d at 702 (providing the dictionary definition of "exercising control"). "Exercising control" does not appear in Section 362. 11 U.S.C. § 362. They included doing *nothing* in the automatic stay through this redrafting. This interpretation not only is an exemplar of judicial activism, but one of judicial amendment. Such activism presupposes that Congress is incapable of reaching the specific policy results that it desires. However, if Congress desired to enact a specific meaning of a statute, it has the ability to do so. *Cowen*, 849 F.3d at 950. Judicially creating statutes from thin air usurps the separation of powers and yields unintended results.

The Seventh Circuit interprets Section 362 to include "exercising control" over property of the estate. *Thompson*, 566 F.3d at 702. It concluded that a pre-petition seizure of an automobile violates the automatic stay. *Id.* at 707-08. The Seventh Circuit purports that the result is required under the "plain reading of the Bankruptcy Code's provisions." *Id.* at 703. Curiously, it also rests its interpretation on *Whiting Pools*, which interprets the entirely separate Section 542, and "various practical considerations." *Id.* Based on its "plain reading," the Seventh Circuit opines that passive retention of property of the estate is "at odds" with Section 362. *Id.* at 702. The court goes further

by stating that "to hold that 'exercising control' over an asset encompasses only selling or otherwise destroying the asset would not be logical given the central purpose of reorganization bankruptcy." *Id.* Indeed, the court reiterates "[w]ithholding possession of property from a bankruptcy estate is the essence of 'exercising control' over possession [*sic*]." *Id.* at 703 (quoting *In re Sharon*, 234 B.R. 676, 682 (BAP 6th Cir. 1999) (internal quotations omitted). It is quite possible that "exercising control" is not limited to those instances the court describes. However, the words "exercising control" do not appear in Section 362. 11 U.S.C. § 362. Likewise, "exercising control" is not within the scope of the automatic stay. As discussed in depth above, Section 362 prohibits "any acts . . . to exercise control." *Id.* The prohibited conduct must be an *act*, not an *exercise* of control. Despite the court's efforts to provide a detailed textual analysis, the motivating policy concerns illuminate this textual endeavor. First, the court considers that the debtor must be able to regain a financial foothold to repay his creditors. *Thompson*, 566 F.3d at 706. Second, the court takes the position that contrary interpretation "unfairly tips the bargaining power in favor of the creditor." *Id.* at 707. Finally, the court opines that "it makes far more sense" for the creditors to bear the burden of seeking adequate protection instead of the debtor moving to recover assets. *Id.* These concerns may well be valid. Perhaps Congress will include them in its next revision of the Bankruptcy Code. In the interim, this Court must interpret the *enacted* statute which does not provide leeway for these policy concerns.

The Second Circuit similarly delved into this textual analysis of "exercising control." *See In re Weber*,719 F.3d 72. The analysis, at least facially, is consistent with the text of Section 362. *Id.* at 79. The court notes that "[S]ection 362 forbids any act to 'obtain possession' or 'exercise control' over property of the estate." *Id.* However, the court does not interpret the noun under Section 362(a)(3), act, but rather the adjectival infinitive and the direct object. *Id.* at 79-80. It

defines "control" rather than act. *Id.* at 79. Then, the court continues to conclude that "exercising control" violates the automatic stay. *Id.* The court justifies this conclusion based on the "broadened" 1984 Amendments to the Bankruptcy Code. *Id.* at 80. Congress, the court reasons, must have desired to expand the scope of Section 362 based on the broad amendments. *Id.* Even if the purpose was to broaden Section 362, Congress stopped short of prohibiting "exercising control" over property of the estate. 11 U.S.C. § 362(a)(3). The court need not delve into congressional intent because the text itself is clear that it did not create a prohibition on "exercising," but only "acts." The court further reasons that read with Section 542, this interpretation is the logical conclusion to prevent burden and cost. *Weber*, 719 F.3d at 80. However, this interpretation would render Section 542 a nullity: There would be no use for a turnover motion if the creditor was obligated to surrender the property on petition.

Section 362(a)(3) does not proscribe possessing property of the estate. 11 U.S.C. § 362(a)(3). It proscribes *acts* to possess the property of the estate. *Id.* The Second and Seventh Circuits extensively review the policy considerations behind Section 362. *See Weber v. SEFCU (In re Weber),* 719 F.3d 72 (2d Cir. 2013); *Thomson v. GMAC, LLC,* 566 F.3d 699 (7th Cir. 2009). Such policy considerations are not relevant to the statutory analysis when the text is clear on its face. *Conn. Nat'l Bank v. Germain,* 503 U.S. 249, 253-53 (1992). It very well may serve the underlying purposes of the Bankruptcy Code for the estate to regain possession of as much property as possible to administer the estate. However, those policy considerations were explicitly omitted from the enacted statute. Congress was perfectly capable of expanding the automatic stay. The reality remains that Congress did *not* do so. Therefore, the courts are bound to interpret the law as enacted and give effect to the fact that Congress did not enact the alternative language of Section 362. The automatic stay is clear on its face and proscribes only affirmative acts to possess

or acts to exercise control over property of the estate post-petition. Further, the automatic stay does not require that the creditor remedy past acts that would violate it. There is no such requirement in its language. *See* 11 U.S.C. § 362.

Weinberg did not violate the automatic stay by simply possessing the property because there was no *act* to obtain possession, which Section 362(a)(3) requires. In fact, it is undisputed that Weinberg only retained passive possession of the property. (R. at 6.) There was no act to possess the property post-petition. (R. at 6-8.) Leaving trucks stored in a warehouse cannot be interpreted as "taking action" or "doing something." If anything, Weinberg was doing *nothing* by leaving the trucks in the warehouse. Therefore, Weinberg could not have violated the automatic stay by leaving the trucks in a warehouse and taking no further acts to collect the debt.

If the Trustee or Debtor desires to have the trucks relinquished, there is a means by which he could accomplish it. The Trustee only needs to move for turnover under Section 542. 11 U.S.C. § 542. Following the motion, the secured creditor would be obliged to turn over the property provided that adequate protection is provided. However, this Section 542 motion under the guise of the automatic stay is inconsistent with the Bankruptcy Code and Congress's intent for the automatic stay.

Based on the plain meaning of Section 362, Weinberg did not violate the automatic stay through his passive possession of property of the estate. Weinberg did act to repossess the property in question; however, he did so before the bankruptcy petition. The automatic stay only operates to prevent post-petition collection activity and actions to repossess or control property of the estate. Because Weinberg did not pursue any collection activity or repossession or act to exercise control post-petition, the decision of the Bankruptcy Court must be affirmed.

B. Weinberg did not violate the automatic stay because if passive possession were considered an "act" it would render Sections 542 meaningless.

The meaning of Section 362 is more clearly illuminated through the Court's jurisprudence on Section 542. Section 542, commonly referred to as the turnover power, allows the trustee to move for the property to be returned to the estate. *See generally United States v. Whiting Pools, Inc.,* 462 U.S. 198 (1983). The turnover power also requires that the secured creditor receive adequate protection under Section 363(e). 11 U.S.C. § 363(e). The distinction between the automatic stay and turnover power is critical: Violations of the automatic stay may result in sanctions, whereas the remedy for the turnover power is only the surrender of the property. 11 U.S.C. §§ 362, 542.

The passive violation theory of the automatic stay largely relies on *Whiting Pools* to interpret Section 362. However, *Whiting Pools* only interprets what is "property of the estate" under Section 542. *See Whiting Pools,* 462 U.S. 198. In its decision, the Supreme Court opines that Congress intended that Section 542 be interpreted broadly to include all property of the estate. *Id.* at 205-06. It is notable that the Court did not interpret Section 362 or any part of the automatic stay. Regardless, the passive violation courts rely on *Whiting Pools* to interpret Section 362. *See Weber v. SEFCU (In re Weber),* 719 F.3d 72 (2d Cir. 2013); *Thomson v. GMAC, LLC,* 566 F.3d 699 (7th Cir. 2009). They conclude that because the property of the estate must be interpreted broadly, it logically follows that all property must be surrendered on petition due to the automatic stay. *Id.* However, the issue in Section 362 is not what "property of the estate" means, but rather, "acts," or as the passive violation courts amend Section 362, "exercising control." Because the issue of "property of the estate" is not at bar, *Whiting Pools* does not control, nor is it informative. Additionally, the expansive view of "property of the estate" does not prevent Section 362 from only proscribing post-petition collection activity. The purpose of Section 542 is to permit as much property to be eligible for turnover as possible. *See Whiting Pools,* 462 U.S. 198. In contrast, the

automatic stay serves the purpose of preventing post-petition collection actions by all creditors so as to preserve as much of the estate as possible. *Inslaw,* 932 F.2d at 1473. The two sections serve different purposes and operate separately. Likewise, interpreting Section 542 is not informative of Section 362.

The Second Circuit relies heavily on *Whiting Pools* in its interpretation of Section 362. *See In re Weber,* 719 F.3d 72. It reasons that because the property is subject to the turnover power under Section 542, it must be surrendered under the automatic stay. *Id.* at 79. The court goes further, concluding that Section 542 is "self-executing." *Id.* Even if Section 542 is self-executing, it is wholly immaterial to the case at bar. The Trustee did not move under Section 542 and the Court must interpret Section 362—not Section 542. The Second Circuit further relies on the broadened scope of the property of the estate under the 1984 Amendments. *Id.* at 78. Again, the court raises a collateral and unrelated issue to the automatic stay. The issue is not whether the property is "property of the estate," but rather whether passively leaving the property in a warehouse is an "act." Likewise, Section 542 and its interpretations serve little, if any, use in interpreting "acts" under Section 362.

Interpreting Section 362 to require immediate surrender of property seized pre-petition would render Section 542 irrelevant. There is no use for a motion to turnover under Section 542 if the property had to be surrendered on petition. Additionally, the trustee could move under Section 362 for violation of the automatic stay under this interpretation. Under this system, there is no use for Section 542: All of the property has been returned to the estate well before a turnover motion could be filed. Even if there remained unreturned property, the trustee could move under Section 362 and obtain sanctions *in addition* to the property. The result is that Section 542 would be a dead letter: It would serve no purpose whatsoever. As a rule of construction, courts cannot interpret one

section to supersede another section. *Strumpf,* 516 U.S. at 20. Therefore, the passive violation interpretation of the automatic stay cannot be a valid interpretation.

Moving for turnover would have been an option for the Trustee. However, inexplicably, he sought sanctions for violation of the automatic stay. (R. at 6.) The passive violation interpretation of Section 362 results, in effect, in a more powerful turnover power. This interpretation would yield the same result as a turnover motion, plus additional sanctions not provided for in Section 542.

The Court must interpret Section 362 consistent with its plain language. This result is necessary under the structure of the separation of powers. Judicial amendment to the statute, as the Second and Seventh Circuits have done, is impermissible under this system. Therefore, the Court must interpret "act," which appears in the statute, as compared to "exercising control," which does not. The passive violation interpretation also nullifies Section 542, which is another impermissible statutory construction. Likewise, the Court is again bound to interpret "act" as defined above. Under the basic definition of act, the creditor must have done *something* post-petition to violate the automatic stay. Instead, the creditor did *nothing* post-petition. For the foregoing reasons, the creditor did not violate the automatic stay by passively leaving the property of the estate in a warehouse.

II. A chapter 7 creditor whom substantially contributes to the estate should be granted an administrative expense under Section 503(b)(3)(D).

Bankruptcy code does not exclude creditors from receiving administrative expenses in Chapter 7 cases under Section 503(b)(3)(D), therefore this Court should grant the $25,000 administrative expense incurred by the Respondent Weinberg. (R. at 7) By including the term

"including" in Section 503(b), Congress is saying that the administrative expense list under Section 503(b) is non-exhaustive, and therefore, bankruptcy courts can use discretion when awarding administrative expenses. Bankruptcy courts are courts of equity; therefore, the courts have authority to approve motions for administrative expenses when there are special circumstances are presented between a creditor and debtor. *United States v. Energy Res. Co*., 495 U.S. 545, 549, (1990). When looking at the totality of the pertinent facts in a bankruptcy case, a court should not add restrictions to the statutes that were clearly not intended by Congress. *Mediocrafting v. McDermott* (*In re Connolly N. Am., LLC)*, 802 F.3d 810, 814 (6th Cir. 2015). Absent the expressed exclusion of Chapter 7 creditors under §503(b) and the equitable powers of bankruptcy courts, the Respondent, Weinberg, should be allowed to receive administrative expenses for his substantial contribution to the estate.

A. The term "including" in Section 503(b) is not limiting and thus Section 503(3)(b)(D) should be read to allow administrative costs in Chapter 7 cases.

Bankruptcy courts should not be limited in deciding what administrative expenses are allowed under Section 503(b). Section 503(b) states that "After notice and a hearing, there shall be allowed, administrative expenses . . . *including*-" 11 U.S.C. § 503(b). (emphasis added). The statute then lists nine non-exhaustive administrative expenses that can be requested by a party. By inserting "including" before listing the administrative expenses, the drafters are indicating that the courts should not be limited to just those nine express expenses when considering if a party should be granted administrative expenses. The Bankruptcy Code in its rules of construction defines "including" as not limiting. 11 U.S.C. § 102(3). Therefore, the courts should not be constrained to the nine administrative expenses that are delineated under Section 503(b).

Because all allowable administrative expenses are not expressed under Section 503(b), a court should be empowered to look at the totality of the circumstances in a case and use its discretion in deciding if it shall grant an administrative expense. Some courts have held that Chapter 7 creditors should not be granted administrative expenses for the creditor's substantial contribution because Section 503(b)(3)(D) only addresses Chapter 9 and 11 creditors. *See, e.g., Lebron v. Mechem Fin., Inc.*, 27 F.3d 937, 945 (3d Cir. 1994); *Mosier v. Kupetz (In re United Educ. & Software)*, 2005 WL 6960237, at *5 (B.A.P. 9th Cir. Oct. 7, 2005). With this holding, these courts completely disregard "including" when they interpret the statute and therefore render the administrative expenses under Section 503(b) as an exclusive list of expenses that can be granted.

The United States Supreme Court has used its discretion to determine what claims can be considered an administrative expense in bankruptcy cases. *Reading Co. v. Brown*, 391 U.S. 471, 479 (1968). In *Reading*, a petitioner filed for administrative expenses after the debtor's property caused the petitioner's property to burn down. *Id.* at 753. The trustee argued that petitioner's tort claim was not an administrative expense but rather a debt owed by the estate and therefore to a creditor. *Id.* at 754. The Court held that the petitioner's claim was indeed an administrative expense and the expense would receive priority over other debtors. *Id.* at 759. The Court in *Reading* displays its intent to allow bankruptcy courts to consider administrative expenses that are not expressed under the code.

Courts should interpret Section 503(b) as a non-exclusive list of administrative expenses that can be awarded to bankruptcy creditors. Weinberg acknowledges that this argument is not the majority (*See, e.g., In re Morad*, 328 B.R. 264, 273 (1st Cir. BAP 2005)), but the argument is not unsupported. Multiple circuit courts have held that by using the word "including" in Section

503(b)'s introductory sentence, it demonstrates that the Section 503(b) list of expenses is meant to be non-exhaustive. *See, e.g., Mediofactoring v. McDermott* (*In re Connolly N. Am., LLC*) , 802 F.3d 810, 812 (6th Cir. 2015); *Al Copeland Enters. Inc. v. Texas* (*In re Al Copeland Enters., Inc*.), 991 F.2d 233, 238 (5th Cir. 1993); *Ala. Surface Mining Comm'n v. N.P. Mining Co., Inc*. (*In re N.P. Mining Co. Inc*.), 963 F.2d 1449, 1452 (11th Cir.1992); *United States v. Ledlin* (*In re Mark Anthony Constr., Inc*.), 886 F.2d 1101, 1106 (9th Cir.1989). With this interpretation bankruptcy courts have held that Chapter 7 creditors are allowed to receive attorney fees under Section 503(b). *See, e.g., In re Pappas*, 277 B.R. 171, 176 (Bankr. E.D.N.Y. 2002); *In re Javed*, 2018 WL 4955839, at *4 (Bankr. D. Md. Oct. 11, 2018*); In re Maust Transp*., Inc., 589 B.R. 887, 898-99 (Bankr. W.D. Wash. 2018); *In re Health Trio, Inc*., 584 B.R. 342, 353-54 (Bankr. D. Colo. 2018); *In re Maqsoudi*, 566 B.R. 40, 44-45 (Bankr. C.D. Cal. 2017).

With this interpretation, it shows that judges want to do the right when as they see fit—that is, to award Chapter 7 creditors administrative expenses when deserved. The court in *In re Connolly* dealt with an issue where creditors in a Chapter 7 proceeding removed a bankruptcy trustee, and the removal resulted in a significant increase in funds available to the bankruptcy estate. *Id.* at 813. The creditors incurred attorney costs in the process of removing the attorney, which led them to motion for administrative costs under Section 503(b)(3)(D). *Id.* It is clear that Section 503(b)(3)(D) does not contain an express statutory provision for Chapter 7 creditors. *Id.* at 815. But also, the Code does not say that Chapter 7 creditors who substantially contribute are disallowed from receiving administrative expenses under Section 503(b). *Id.* at 816. Therefore, the court in *In re Connolly* reasoned what many other courts have conceded that the list of administrative expenses under Section 503(b) is non-exhaustive. *Id.*

Section 503(b) should be read as an illustrative list of administrative expenses because of Section 503(b)'s opening sentence that has "including," which is defined as not limiting. *Id.* The court in *In re Connolly* held that Congress inserted "including" in Section 503(b)'s opening sentence to give bankruptcy courts flexibility to grant administrative expenses in a case-by-case basis because not all bankruptcies are the same and some cases have special circumstances. *Id.* Ruling that Section 503(b)'s list of expenses is non-exhaustive should worry the Court that it will render the subsections of the statute meaningless because the list provides a contextual framework of common administrative expenses that will guide bankruptcy courts. *Id.* at 816-817. Ultimately the court in *In re Connolly* held that because the U.S. trustee is not a fail-proof safeguard to make sure that a Chapter 7 debtor is held in check, creditors should be allowed to use their own resources to make sure that the estate is protected. *Id.* at 817. The creditors in *In re Connolly* did just that after realizing that the debtor would be defrauding if they did not act, and the Sixth Circuit granted them the administrative expenses because denying it would "impugn the fundamental notion of bankruptcy as equitable relief." *Id.* at 819.

Weinberg acted to make sure that the Clemons did not defraud Weinberg and other creditors, and therefore, this Court using Section 503(b) should affirm Weinberg's administrative expense. Just as the court in *In re Connolly* held that Section 503(b) list of expenses is non-exhaustive, this Court should use that holding to rule that Section 503(b) allows Chapter 7 creditors to receive administrative expenses when they substantially contribute to the estate. Weinberg does not ask that courts always grant administrative expenses to Chapter 7 creditors, but solely that it allow administrative expenses for Chapter 7 creditors and give courts the discretion to grant them.

B. Bankruptcy Courts are courts of equity thus, courts shall be allowed to award substantial contribution administrative expenses to Chapter 7 creditors under the "common fund" theory.

Following the long-standing federal jurisprudence that is the common-fund doctrine and that bankruptcy courts are courts of equity, this Court should grant Weinberg administrative expenses for his substantial contribution to the estate. To allow the trustee the full benefit from Weinberg's efforts without the contribution of the trustee would be contrary to the Court's belief that bankruptcy courts are courts of equity. Denying Weinberg's administrative expense would be an unjust enrichment to the estate at the expense of the Weinberg. Furthermore, this Court should simply look at the common-fund doctrine when looking to exercise its equity powers.

Bankruptcy courts are principled on doing what is fair for both debtors and creditors. The Supreme Court has held that "equitable principles govern the exercise of bankruptcy jurisdiction." *Bank of Marin v. England*, 385 U.S. 99, 103 (1966). Courts of equity "exercise judgment in light of prior precedent, but with awareness of the fact that specific circumstances, often hard to predict in advance, could warrant special treatment in an appropriate case." *Holland v. Fla.*, 560 U.S. 631, 650 (2010). Moreover, an "exercise of a court's equity powers . . . must be made on a case-by-case basis." *Id.* at 649-50. Essentially that means that bankruptcy courts are "specialized court[s] of equity." *Curtis v. Loether*, 415 U.S. 189, 195 (1974). The caveat to the courts' equitable powers is that bankruptcy courts must exercise that power "within the confines of the Bankruptcy Code." *In re Connolly N. Am., LLC*, 802 F.3d at 814 (internal citation omitted).

The Sixth Circuit held that in order to advance the equitable principles of bankruptcy courts, Chapter 7 creditors should be granted administrative expenses when they substantially contribute to the bankruptcy estate. The court in *In re Connolly* empowered lower courts in the

spirit of equity to award creditors "who are forced by circumstances to take action that benefits the bankruptcy estate when no other party is willing or able to do so." *Id.* at 818. Furthermore, rewarding creditors who substantially contribute to the bankruptcy estate will motivate creditors to participate in the bankruptcy proceeding, furthering purposes of the Code. *Id.* A court's goal should not be to disincentivize creditors from participating in bankruptcy proceedings. *Id.* at 819. Rather, a court should follow the fundamentals of bankruptcy jurisdiction and its equitable relief. *Id. In re Connolly* set the rule that courts using discretion can grant deserving creditors attorneys' fees when creditors use their own resources in ways to benefit the estate. *Id.* at 815.

Here, Weinberg used his own resources to benefit the entire estate and he should be granted administrative expenses for his risky effort. The examination concluded that Clemons had maliciously transferred $100,000 in cash to his daughter in order to avoid paying that money to Weinberg and other creditors. (R. at 7). By paying the law firm, Weinberg advanced the Debtor his own money to make sure that the actions of Clemons did not wrong he and other creditors. If it had not been for Weinberg's actions, then Clemons might have gotten away with hiding $100,000 in his daughter's bank account. (R. 7).

The Trustee does not contest the fact that Weinberg substantially contributed to the estate, which resulted in $75,000 being available to creditors. (R. at 17). Section 503(b)(3)(D) states that administrative costs should be awarded to creditors who substantially contribute to Chapter 9 or 11 bankruptcies. But, as argued above, based on the "including" definition and the principles of equity that govern bankruptcy courts, this Court should look at the special circumstance and grant Weinberg's administrative expenses. Weinberg does not ask that the Supreme Court rule that all Chapter 7 creditors be granted administrative expenses. However, he does ask the Supreme Court to acknowledge that in the spirit of equity it should empower courts

to use their discretion to allow administrative expenses to deserving Chapter 7 creditors who use their own resources to benefit the estate. Weinberg hired a law firm, discovered the $100,000 that were fraudulently conveyed to Clemons daughter, and willingly shared this information to the Trustee to make sure the $100,000 were not lost. (R. at 7). If this Court rules against Weinberg's petition, then it will set a precedent that will cause a negative ripple felt across Chapter 7 proceedings. Chapter 7 creditors would be less willing to participate in proceedings and can cause a big delay on an already backlogged docket (In 2017 there were 486,542 Chapter 7 bankruptcies filed in the U.S.[1]).

The common-fund doctrine is based on the underlying purpose of equity and bankruptcy courts should use their equitable powers when a deserving creditor seeks reimbursement for his or her efforts that benefitted the bankruptcy estate. The Supreme Court has held that this doctrine allows courts to award attorneys' fees to a party whose litigation efforts directly benefit others. *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 257–58 (1975). The Supreme Court as recently as 2013 has endorsed the common-fund and recognized that a creditor "who recovers a common fund for the benefit of persons other than himself is due a reasonable attorney's fee from the fund as a whole. *U.S. Airways, Inc. v. McCutchen*, 569 U.S. 88, 104 (2013) (quoting *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980)). The doctrine reflects the traditional practice in courts of equity. *Id.* Parties to a litigation should not be permitted to take "the fruits while contributing nothing to the labor." *Id.* at 105. Unless Congress says that a court cannot grant the attorneys' fees, then a court is allowed to reimburse an attorney or litigant that benefits a fund. *In re Connolly,* 802 F.3d at 819. Congress has not declared if courts can use the common-fund doctrine to interpret §503(b). Therefore, courts should be allowed to use that

[1] https://www.uscourts.gov/news/2017/10/18/bankruptcy-filings-decline-smallest-years

doctrine as an authority or as an interpretive aid to grant Chapter 7 administrative expenses when they substantially contribute to the bankruptcy estate.

This Court should use the principles of equity and the common-fund doctrine to hold that Chapter 7 creditors who substantially contribute to the estate will be granted administrative expenses. Here, Weinberg hired a law firm to perform a creditors examination of Clemons that created a $75,000 fund that benefitted the Trustee and Clemons' creditors. That examination was not free. Weinberg should be granted the administrative expenses under the common-fund doctrine as a person who recovered funds that benefit creditors, besides himself, because without sharing the cost, the Trustee and other creditors will free ride on Weinberg's efforts. The principles of equity govern bankruptcy courts and therefore have the authority to implement the common-fund doctrine to award Chapter 7 creditors like Weinberg administrative expenses when they substantially contribute to the bankruptcy estate.

CONCLUSION

For the forgoing reasons, the decision of the bankruptcy court should be affirmed.