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 THE PETITIONER

TEAM NUMBER P. 51
COUNSEL FOR PETITIONER

QUESTIONS PRESENTED

1. 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?
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.

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OPINIONS BELOW

The United States Bankruptcy Court for the District of Moot entered an order over the Petitioner's objections, concluding that (i) Respondent's retention of snow plow trucks that he legally repossessed prior to the bankruptcy filing did not violate § 362(a)(3) of the Bankruptcy Code, and (ii) Respondent was entitled to a substantial contribution administrative expense under § 503(b), notwithstanding § 503(b)(3)(D). *R. at 3*. The Debtor, Backstreets Plowing, Inc., ("Backstreets"), appealed to Bankruptcy Appellate Panel for the Thirteenth District, which affirmed the Bankruptcy Court's decision. *Id*. The Trustee, Steven Vin Sant ("Trustee") appealed both determinations to the United States Court of Appeals for the Thirteenth District, which again affirmed the decision. *Id*. The Supreme Court of the United States then granted Trustee's petition for writ of certiorari. *R. at 1*.

STATEMENT OF JURISDICTION

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

STATUTORY PROVISIONS

The relevant statutory provisions involved in this case are listed below and are reproduced in Appendices A through E.

11 U.S.C. § 303

11 U.S.C. § 362(a)(3)

11 U.S.C. § 541(a)(1)

11 U.S.C. § 542

11 U.S.C. § 503

STATEMENT OF THE CASE

Backstreets Plowing, Inc. (hereinafter, "Debtor"), was a snow plow company headquartered in the City of Badlands (the "City"). In order to acquire a lucrative plowing contract with the City, on August 15, 2015, Debtor purchased new snow plow trucks, financed by a $450,000 loan from Milton Weinberg (hereinafter, "Respondent", "Creditor"). Respondent took a security interest in the new trucks and the Debtor's sole shareholder, Christopher Clemons (hereinafter, "Clemons") also personally guaranteed the loan.

According to the terms of the promissory note, the Debtor agreed to make monthly payments to Creditor in December 2015. However, after purchasing the trucks, the relationship between Debtor and Creditor soured drastically. Debtor failed to make the first several payments under the promissory note, and in April 2016, Creditor filed suit in the State of Moot Circuit Court. Creditor obtained a default judgment against both the Debtor and Clemons, jointly and severally, for $450,000 plus interest and fees.

Creditor did not begin efforts to collect on the judgment until January 2017, when the Debtor was sustaining heavy losses due to a particularly brutal and unprofitable winter season. That same month (January 2017), Creditor repossessed the trucks from Debtor and, as of this date, still maintains possession of them.

On February 4, 2017, the Debtor filed a Chapter 11 petition. Shortly thereafter, the Debtor demanded that Creditor return the trucks in order for Backstreets to reorganize. A dispute arose over whether Creditor was required to do so, and the Bankruptcy Court for the District of Moot determined that Creditor's retention of the trucks did not violate the automatic stay under §362(a)(3). Debtor appealed the bankruptcy court's ruling, but without the trucks, Backstreets could not operate and eventually ran out of funds. Thereafter, Debtor voluntarily converted the

Chapter 11 case to a Chapter 7 case. On April 13, 2017, Trustee, Steven Vin Sant (hereinafter, the "Trustee", "Petitioner-Trustee"), was appointed to administer the estate and liquidate its property.

In May 2017, after the case was converted to a Chapter 7, Creditor, by his own volition and without notice to the bankruptcy court, hired a collection law firm to take a creditor's examination of Clemons. That examination revealed a transfer of approximately $100,000 in cash to Clemons's daughter. Creditor voluntarily provided the details to Trustee. Eventually, Clemons's daughter agreed to settle and pay $75,000 to the estate in satisfaction of all claims. The investigation cost Creditor $25,000 in legal fees, and Creditor filed a motion seeking a substantial contribution administrative expense under § 503(b) of the Bankruptcy Code. Trustee opposed the motion, arguing that substantial contributions are not permissible in a Chapter 7 case. The bankruptcy court granted an administrative expense in the amount of $25,000.

In September 2017, Trustee received an offer to purchase substantially all of Debtor's assets, including the trucks, but that offer was eventually rescinded when Creditor refused to return the property. Later, in January 2018, Trustee received another offer, lower by $100,000, to purchase substantially all of Debtor's assets, excluding the trucks. That offer was accepted and approved by the bankruptcy court.

Trustee timely appealed both the bankruptcy court's allowance of a substantial contribution administrative expense as well as the court's dismissal of the automatic stay violation. The Bankruptcy Appellate Panel for the Thirteenth Circuit affirmed the bankruptcy court on both issues. Trustee timely appealed both determinations to this Court.

SUMMARY OF THE ARGUMENT

Creditor violated the automatic stay when it refused to return property of the bankruptcy estate. The Thirteenth Circuit decision compromises the careful balance between debtor and creditor interests that Congress codified in the Bankruptcy Code (the Code) and is essential to the fair operation of the federal bankruptcy system.

First, the Trustee argues, that the plain language of § 362(a) of the Bankruptcy Code (the "Code") imposes a stay that prohibits creditors from "exercis[ing] control" over property of the estate. Section 362(a), when read to give every word its ordinary meaning, stays creditor's continued possession as an "act to exercise control over the property of the estate." Furthermore, the Trustee argues that the weight of judicial precedent and legislative history of the Code's provisions demonstrate that Congress intended prepetition seized property be included in the estate and the property's continued possession by a creditor to be fundamentally opposed the aims of bankruptcy system. Finally, duty to return property is consistent with expressed purposes of the automatic stay and advances the policies that undergird the federal bankruptcy system.

Second, the Trustee urges this Court to follow the text of § 503(b)(3)(D) and overturn the Thirteen Circuit's generous gift of $25,000 to the Creditor. The application of canons of statutory construction make contributions - regardless of how substantial - to Chapter 7 cases ineligible to for the administrative expense priority granted to contributions made to Chapter 11 and Chapter 9 cases. Furthermore, there is no public policy justification to diverge from the language of the statute and grant the Creditor an administrative expense priority.

The protections and procedures contained in the Code were crafted by Congress' to strike a balance between two competing constituencies. The Code's balance not only promotes efficacy and efficiency of bankruptcy cases, but is also an important, albeit peripheral, presumption that is implicitly part of all financial transactions between debtors and creditors that occur on a daily

basis. Given its importance in the health and functioning of an economy, the Courts must carefully consider how its decision affects the balance between the competing interest.

The Thirteenth Circuit failed to do so. Therefore, this Court should reverse the Thirteenth Circuit on the grounds that (A) a Creditor is under an affirmative duty to return property seized prepetition to the debtor upon notice of the Debtor's bankruptcy case and (B) that an administrative expense for substantial contribution under § 503(b)(3)(D) is unavailable to a Creditor in a Chapter 7 case.

ARGUMENT

I. THE BANKRUPTCY CODE REQUIRES A CREDITOR TO RETURN PROPERTY OF THE ESTATE TO THE DEBTOR

A. When Read to Give Every Word its Common Meaning, Retention of Property Seized Prepetition Violates the Automatic Stay

The application of the canons of statutory interpretation to the provisions of the Code places an affirmative duty on a creditor to return property seized prepetition upon the creditor's notice of the commencement of a bankruptcy case. Furthermore, the statute makes a creditor's failure to remit property to the debtor is a violation of the automatic stay under 11 U.S.C. § 362(a)(3). First, a reading of § 362(a)(3) that gives words their common everyday meaning and assumes no surplusage shows that a creditor's retention of repossessed property after the filing of bankruptcy constitutes an act to exercise control because the possessor prevents the debtor's access to the property.

Second, construction of 11 U.S.C. § 362(a)(3) that gives words their everyday meaning and assures internal consistency demonstrates that "property of the estate" is property in the ordinary sense, which includes the all property to which the debtor claims title.

Even if the Court finds it necessary to look beyond the plain meaning of the terms, rules of statutory construction compel the same outcome. The addition of the phrase "to exercise control" demonstrates Congress' intent that the automatic stay apply in cases where the creditor already has lawful possession of estate property at the time of petition. By retaining custody of the trucks and prohibiting Backstreets's access to or use of the vehicles, Creditor's actions to exercise control over property of the estate violate the automatic stay.

1. A Creditor that Retains Possession of Repossessed Property Is Exercising Control over Property of the Estate

A court's interpretation of the Bankruptcy Code starts with the language of the statute itself. *Lamar, Archer & Cofrim, LLP v. Appling*, 138 S.Ct. 1752, 1759 (2018). "If the statute's language is plain, 'the sole function of courts is to enforce it according to its terms." *U.S. v Ron Pair*, 489 U.S. 235, 241 (1981) (quoting *Caminetti v. U.S.*, 242 U.S. 470, 485 (1917)). Section 362(a) of the Code enforces an automatic stay on "an *act* to *exercise control* over property of the estate." 11 U.S.C.A. § 362(a)(3) (West 2019) (emphasis added). Both "act" and "exercise control" are undefined by the Code. 11 U.S.C.A. § 101 (West 2019). When statutory language is not defined, courts use a word's common meaning. *Appling*, 138 S.Ct. at 1759.

"[C]ommon understanding dictates that if exercise control is anything it means the ability to keep others from access or use of the object." *In re Yates*, 332 B.R. 1, 4 (B.A.P. 10th Cir. 2005). To determine the common meaning of a words the Code does not define, courts looks to available dictionaries. *Schwab v. Reilly,* 560 U.S. 770, 783 (2010). *Merriam-Webster's Collegiate Dictionary* defines "exercise," in its verb form as "to make effective in action." 437 (11th ed. 2007). The Seventh Circuit, also quoting *Merriam-Webster's Collegiate Dictionary*, defined "control" to include the exercise of "restraining or directing influence over" property. *Thompson v. Gen. Motors Acceptance Corp.*, 566 F.3d 699, 702 (7th Cir. 2009). Courts have

adopted a broad definition of "control" which extends beyond obtaining possession to "encompass conduct above and beyond obtaining possession of an asset." *Lex Claims, LLC v. Financial Oversight and Management Board*, 853 F.3d 548, 551-552 (1st Cir. 2017). This understanding represents the majority view. *See In re Weber*, 719 F.3d 72, 81 (2d Cir. 2013); *In re Del Mission Ltd.* 98 F.3d 1147, 1151 (9th Cir. 1996); *In re Yates*, 332 B.R. 1, 4 (10th Cir. BAP 2005).

Taken together "exercise control" means conduct that demonstrates a party's continuing power to restrict or deny access to others. Such power is the most important assertion of a party's right to make all other exercises of control possible. In light of the definition given to 'exercise control' by a majority of the circuits there is "no way to avoid the conclusion that, by keeping custody of the vehicle and refusing [the debtor] access to or use of it, [the secured creditor] was 'exercising control' over the object in which the estate's equitable interest lay, and its retention of the vehicle violated the stay." *In re Weber*, 719 F.3d at 79 (2d Cir. 2013). Here, Creditor acted by refusing Debtor access to or use of the property while keeping its custody when he repossessed the trucks, had them delivered to a warehouse and prevented Debtor's ability to fulfill its plowing contract with the City of Badlands. Creditor's act, then, was continuing exercise of control.

The minority view, best summarized in the Tenth Circuit's decision in *In re Cowen*, instead argues that § 362(a)(3) requires an affirmative act, and that by its very nature passive retention does not constitute an act but rather an omission. *See In re Cowen*, 849 F.3d 943, 949 (10th Cir. 2017). The Trustee does not disagree with the first part of Cowen's analysis: the plain language of the statute requires an affirmative act of the creditor. The Trustee, however, argues that the Creditor's decision to retain possession and refuse access to the trucks was an

affirmative act to exercise control. This minority view simply ignores the majority position by mistaking the *acuteness* of an action for the *definition* of an act. By exercising exclusive control over the property after notice of the Debtor's bankruptcy filing, Creditor acted to prevent the debtor's access to or use of the property. That the act was continuous does not protect it against the operation of the automatic stay.

2. Property of the Estate Includes Any Repossessed Property Held by a Creditor

The term "property of the estate" as it appears in § 362(a)(3) should be read with consideration to how it is used elsewhere in the Code. Absent affirmative language saying otherwise, "[i]dentical words used in different parts of the same act are intended to have the same meaning." *Sorenson v. Sec'y of Treasury of U.S.*, 475 U.S. 851, 860 (1986). In order for the term "property of the estate" to remain consistent with its other appearances in the Code, the term must refer to the all property to which the debtor retains title, even if another party is in possession at the time of filing or holds a bona fide claim of interest adverse to the debtor. *Precision Industries, Inc. v. Qualitech Steel SBQ, LLC*, 327 F.3d 537, 544 (7th Cir. 2003); *See also, The Automatic Stay Under § 362(a)(3)—One More Time*, 38 No. 7 BLL-NL 1 (July 2018).

The intentionally broad scope of § 541(a)(1) defines the estate as "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C.A § 541(a)(1) (West 2019). In *Whiting Pools*, this Court held that the estate was granted a possessory interest in property that was seized prepetition by the creditor by reference to the Code's turnover provision in § 542(a). 462 U.S. 198, 209 (1983). Specifically, this Court found that § 541 works in tandem with other provisions of the Code, including § 542(a), to draw as much property as possible into the estate to effectuate the overall aims of federal bankruptcy system. *Id*. at 204. By requiring in § 542(a) that an entity in control of property that the trustee may use, sell or lease under § 363

during the case shall deliver such property to the estate, the Code contemplates that "property of the estate" may exist outside the possession of the debtor. 11 U.S.C.A. § 542(a) (West 2019). This Court was unambiguous in its holding: "While there are explicit limitations on the reach of § 542(a), none requires that the debtor hold a possessory interest in the property at the commencement of the reorganization proceedings". *Id.* at 206. Applying the rule in Whiting Pools, the trucks in Creditor's possession were considered property of the estate under § 362(a)(3).

TranSouth Fin. Corp v. Sharon (*In re Sharon),* the Bankruptcy Appellate Panel ("BAP") for the Sixth Circuit adopted *Whiting Pools* when it held that a creditor willfully violated the automatic stay by retaining the repossessed property after the debtor's bankruptcy filing and making request to creditor. 234 B.R. 676 (1999). By applying *Whiting Pools*, the court reasoned that upon of the filing of the bankruptcy petition the debtor's car became property of the estate. *Sharon*, 234 B.R. at 682. Just like all other property of the estate, the protections of the Code are applicable to the debtor's car, including one of the Code's most important protection: the automatic stay. *Id*. The Creditor's continued withholding of property of the estate was an exercise of control over property and is, therefore, a violation of the automatic stay. *Id*.

The Sixth Circuit is not alone but joins a majority of circuit courts and BAPs that have faithfully adopted *Whiting Pools* in holding that a creditor's refusal to return property, lawfully repossessed pre-petition, to the debtor upon notice of a bankruptcy filing is a violation of the automatic stay. *See Cal. Emp. Dev. Dep't v. Taxel (In re Del Mission, Ltd.),* 98 F.3d 1147, 1151 (9th Cir. 1996) (holding that exercising control over property after the creditor received notice of the bankruptcy is a violation of the automatic stay); *In re Rozier*, 376 F.3d 1323, 1324 (11th Cir. 2004) (same); *Knaus v. Concordia Lumber Co., Inc. (In re Knaus)*, 889 F.2d 773, 775 (8th Cir.

1989) (same); *Thompson v. Gen. Motors Acceptance Corp.*, LLC, 566 F.3d 699, 703 (7th Cir.2009) (same); *In re Weber*, 719 F.3d 72, 80 (2d Cir. 2013) (same); *In re Carrigg*, 216 B.R. 303 (B.A.P. 1st Cir. 1998) ("A violation of the automatic stay, § 362(a)(3), occurs when a creditor continues to hold property of the estate post-petition, even when the initial prepetition retention was lawful).

Sharon's analysis, and the findings of the Circuit Court majority, are instructive to deciding the case at bar. As recognized by this Court's decision in *Whiting Pools*, the bankruptcy estate was granted a possessory interest in the trucks–property of the debtor lawfully repossessed pre-petition–upon the filing of a bankruptcy petition and was, therefore, within the broad scope of the property of the estate. As property of the estate, the trucks were entitled to the same protection as all property of the estate, including the automatic stay. The plain language of § 362(a)(3), see *supra*, stayed the Creditor's exercise of control over the trucks. Upon notice of the Debtor's filing for Chapter 11 bankruptcy the Code placed an affirmative duty on the Creditor to turnover of the trucks. The Creditor's failure to do so is a violation of the automatic stay and, consequently led, first, to the conversion of Debtor's case from Chapter 11 to Chapter 7 case and then, after continued intransigence, $100,000 diminution of the liquidation proceeds when the entity was sold.

3. An affirmative Duty for a Creditor to Return Repossessed Property Gives Each Word in § 362(a)(3) Meaning

Even if the terms "act" and "exercise" control are interpreted differently than the common meaning assigned by the majority of the courts, the canon of statutory interpretation against surplusage requires that "exercise control" is given meaning. *Hibbs v. Winn*, 542 U.S. 88, 101 (2004) ("A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant. . . ."). Furthermore, modification of

a statute indicates an intent to change the meaning of the statute, this meaning must be different than "obtain possession." *United States v. Wilson*, 503 U.S. 333, 336 (1992). *See also Stone v. INS*, 514 U.S. 386, 397 (1995) ("when Congress alters the words of a statute, it must intend to change the statute's meaning."). Congress "says in a statute what it means and means in a statute what it says there," *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 254 (1992).

It is difficult to determine what would be included in the definition of "exercise control" if, as the Creditor contends, maintaining exclusive possession of the property is not included as a central piece of the definition. At the time of the "exercise control" was added, the stay already prohibited acts to "obtain possession" of estate property held by the debtor. In making the 1984 amendment to include "exercise control" Congress must have intended to prohibit conduct different than just obtaining possession.

A definition of "exercise control" that excludes passive retention of property from "exercise control," renders either "obtain possession" or "exercise control" as superfluous; an unacceptable outcome. No court representing such a view has offered a coherent definition of "exercise control" that does not include passive retention. Rather courts have offered hypotheticals layered with assumptions, which are more likely acts to obtain possession of an interest rather than an exercise of control. *See The Automatic Stay Under Section 362(a)(3) - One More Time*, 38 No. 7 BLL-NL 1 (July 2018) (in this Law Letter Judge Eugene Wedoff, former judge of the Bankruptcy Court of the Northern District of Illinois, compiles proffered definitions from leading circuit court minority cases and analyzes how the outcomes are actually consonant with the Circuit Court Majority's reading of the statute).

According to the Supreme Court's decision in *Whiting Pools*, the term "property of the estate" under § 362(a)(3) includes all property in which the debtor has interests regardless of

whether he has possession. As a result, a plain reading of the Code dictates that the trucks were property of the estate and subject to the protection of the automatic stay. Canons of statutory interpretation require that the undefined terms, “act” and “exercise control”, be understood according to their plain meanings. By refusing to return the trucks to the Debtor, Creditor “exercised control” by preventing the debtor’s access to and use of the property.

B. Mandatory Turnover is Supported by the Code’s Legislative History and the Weight of Judicial Precedent defining Seized Property as “Property of the Estate”

The Congressional record is silent on the amendment that led to the language “to exercise control over property of the estate” in § 362(a)(3). Congress, however, does not write law in a vacuum. Courts presume that when Congress passes legislation it is aware of existing law and relevant judicial precedent. *Hall v. U.S.*, 566 U.S. 506, 516 (2012). Where the legislative record, therefore, is silent the judicial precedent can serve as a persuasive guide to the intention of Congress. The relevant judicial precedent is not specific to § 362(a)(3) of the Code but concerns itself with §§ 541 and 542 - the provisions that define the scope of the property of the estate and turnover, respectively - which are implicated by the 1984 amendment’s reference to “property of the estate.”

The case law that preceded the 1984 Amendment to § 362(a)(3), culminating in this Court’s decision of *Whiting Pools*, conclusively points toward the inclusion of seized property within the estate requiring that it would be turned over. When amending the Code in 1984, Congress did not alter the text of the turnover provision nor the scope of the property of the estate. Accordingly, Congress is presumed to have adopted the court’s construction of the both provisions. *Forest Grove School Dist. v. T.A.*, 557 U.S. 230, 239 (2009). Therefore, taken together, creditors would be in possession of property of the estate (judicial precedent, see

Whiting Pools) and continued possession would be an "exercise of control" (1984 Amendment) in violation of the automatic stay.

Prior to the 1978 reform, there was no turnover provision in the relevant bankruptcy laws. In writing the opinion for Second Circuit in *Whiting Pools*, Judge Friendly summarized the case law and the legislative record that led to the inclusion of the turnover provision in the 1978 reforms. 674 F.2d 144, 155 (2d Cir. 1982). Judge Friendly called specific attention to the First Circuit's decision in *Reconstruction Finance Corp. v. Kaplan* and its importance it played in the shaping the issue. The First Circuit held that bankruptcy courts are conferred "appropriate broad powers" to require turnover in rehabilitation cases under Chapter X of the Bankruptcy Act in order to advance the underlying objections of rehabilitation. *Kaplan*, 185 F.2d 791, 794 (1950). Other courts had reached a similar decision as the Kaplan court as it regards turnover. *See In re Prudence-Bonds Corp.*, 77 F.2d 328 (2d Cir.) (holding that court's equitable power under Section 77B, the precursor to Chapter X), cert. denied, 296 U.S. 584 (1935); *John Hancock Mutual Life Insurance Co. v. Casey*, 134 F.2d 162 (1st Cir.) (per curiam), cert. denied, 319 U.S. 757 (1943).

As Congress considered reform of the federal bankruptcy system the matter of turnover was the subject of numerous House and Senate hearings that ultimately resulted in § 542(a) of the Code. *U.S. v. Whiting Pools, Inc.*, 674 F.2d 144, 153-56 (2d Cir. 1982). The witness' testimony before the House and Senate subcommittees went uncontradicted and, shortly after the witnesses' appearances, § 542 was added to the legislation and was included in all other drafts of the bill. *Id; See also,* Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, Bankruptcy Act Revision, 94th Cong., 1st Sess., Hearings on H.R. 31 and 32, Part I, at 439, 489-93, 1023, 1497-98, 1838-39 (1976). Judge Friendly found that the "sequence

of events compels the inference that § 542 was added to the Code to make clear - as a number of witnesses had explicitly urged - that the turnover power approved in RFC v. Kaplan was to be incorporated in the new statute." *Whiting Pools*, 674 F.2d at 155.

In affirming the Second Circuit's decision in *Whiting Pools,* this Court found Judge Friendly's analysis of judicial precedent of the turnover provision under the Bankruptcy Act and the legislative record on § 542(a) of the Code to be "unassailable." 462 U.S. at 206, nt. 16 ("In general, we find Judge Friendly's careful analysis of this history for the Court of Appeals, 674 F.2d, at 152-156, to be unassailable."). Judge Friendly's inference is made only more compelling because, as this Court noted, the legislative record for the bankruptcy reform act states that the estate includes "property recovered by the trustee under § 542…, if the property recovered was merely out of the possession of the debtor, yet remained 'property of the debtor.'" *supra*, n. 11 (quoting H.R. Rep. No. 95-595 at 367 (1977), *as reprinted in* 1978 U.S.C.C.A.N. 5963).

Therefore, this Court held that § 541's intentionally broad scope would include any property available to the estate by provisions of the Code. *Whiting Pools*, 462 U.S. 198 at 205. "[G]iven the broad scope of the reorganization estate, property of the debtor repossessed by a secured creditor falls within [§ 542(a)'s ambit], and therefore may be drawn into the estate." at 205-06. § 542(a) grants the estate, which is formed upon filing for bankruptcy, a possessory interest in the previously seized property. This interest is sufficient to trigger the protections of the bankruptcy system, including the automatic stay. The Court found that not only was this outcome supported by a close reading of the text of the statute but also by the legislative history and policies that undergird the federal bankruptcy system.

In amending the language of the Code's automatic stay provision, a year after the *Whiting Pools* decision, Congress was codifying principles that decades of judicial decisions, stretching

as far back as *Kaplan,* found essential to the turnover provision: the debtor should be able to use all estate property until the creditor requests relief. *See The Automatic Stay Under Section 362(a)(3) - One More Time*, 38 No. 7 Bankruptcy Law Letter NL 1 (July 2018).

Congress is presumed to have known about the judicial precedent, including this Court's decision in *Whiting Pools,* when it passed the amendment. Absent specific language to the contrary, it is assumed that Congress intended the amendment to reflect the judicial interpretation. *See Midlantic National Bank v. New Jersey Dept. of Environmental Protection*, 474 U.S. 494 (1986). Therefore, because of the legislative history, as well as the weight of judicial precedent, § 362(a)(3) is applicable to property of the debtor that was seized by the creditor prior to bankruptcy and any "act to exercise control" would be a violation of the automatic stay. As noted above, a plain reading of the statute includes possession as an act of control.

The legislative record is silent, but Congressional action speaks loudly. The "textual enlargement is consonant with our understanding . . . that Congress intended to prevent creditors from retaining property of the debtor . . . without regard to what party was in possession of the property in question when the petition was filed." *In re Weber*, 719 F.2d at 80. Following the judicial precedent of this Court, the majority of Circuit Courts and BAPs, as well as the legislative history leading to the 1978 revisions all demonstrate that it was Congress' intention that (1) repossessed property in the hands of creditors is property of the estate, (2) the protection of the automatic stay applies to all property of the estate, and (3) a creditor's continued possession of the property is an act to "exercise control" in violation of the automatic stay.

C. Creditor's Affirmative Obligation to Turnover Repossessed Property and Seek Protections through Congressionally Sanctioned Bankruptcy Remedies is Essential

to Effectuate Fundamental Policies and the Orderly Administration of the Federal Bankruptcy System

When the language of the statute is clear, the Court's inquiry should end there. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council*, Inc., 467 U.S. 837 (1984). As argued above, Trustee maintains that the plain language of the statute, when read to give every word and phrase a non-superfluous meaning supports a basic contention: the estate acquires a possessory interest in property seized by the creditor pre-petition and subject to the automatic stay. We ask this Court to overturn the Thirteenth Circuit in order to honor the plain language of the statute, and the overarching policy aims of the bankruptcy system.

Bankruptcy is a collective remedy devised to balance two principal aims: (1) ensure a "fresh start" for individual debtors; and, (2) obtain a maximum and equitable distribution for creditors as a class. *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 563 (1994) (Souter, J., dissenting) (*See Stellwagen v. Clum*, 245 U.S. 605, 617 (1918); *Williams v. United States Fidelity & Guaranty Co.*, 236 U.S. 549, 554-555 (1915)). The Bankruptcy Code provides a comprehensive system of protections and procedures to govern the conduct of debtors' affairs and creditors' rights. *Eastern Equipment and Services Corp. v. Factory Point Nat. Bank, Bennington*, 236 F.3d 117, 120 (2d Cir. 2001). Central to these protections and procedures is the automatic stay. "The automatic stay is one of the most important protections provided by the bankruptcy laws." H.R. Rep. No. 95-595 at 340 (1977), *as reprinted in* 1978 U.S.C.C.A.N. 5963 "The scope of the automatic stay is broad." *Id*.

The automatic stay has been widely held to provide two essential protections: (1) to the debtor, the protection from financial pressures and creditor harassment to reorder his affairs and receive the promise of a fresh start; and, (2) to the creditor, protection from a chaotic and

uncontrolled scramble for the debtor's assets. *Matter of Cowin*, 864 F.3d 344, 352 (5th Cir. 2017); *In re Parr Meadows Racing Ass'n, Inc.*, 880 F.2d 1540, 1545 (2d Cir. 1989); *In re Robinson*, 764 F.3d 554 (6th Cir. 2014); *Matter of Holtkamp*, 669 F.2d 505 (7th Cir. 1982); *In re Ahlers*, 794 F.2d 388 (8th Cir. 1986); *In re Swintek*, 906 F.3d 1100 (9th Cir. 2018).

A creditor's continued possession is an act to exercise control over property of the estate that thwarts the Congressionally intended operation of the automatic stay. Only by the return of all property can a debtor truly be provided respite from the financial pressures that drove him into bankruptcy and be afforded the hope of a fresh start. Requiring that seized property is returned upon bankruptcy disincentivizes a scramble for debtor's property by concerned creditors and ensures that creditors are treated equitably in a distribution.

The Trustee's position furthers the protections that Congress desired the automatic stay to bring about, and advances the two core policies that animate the bankruptcy system: provide the debtor a fresh start and obtain a maximum and equitable distribution for debtors.

1. Mandatory Turnover Alleviates the Financial Strains that Forced the Debtor to Seek the Refuge of Bankruptcy to Reorder Affairs

This Court has recognized the automatic stay as "one of the most fundamental *debtor* protections provided by the bankruptcy laws." *Midatlantic Nat. Bank v. New Jersey Dept. of Environmental Protection*, 474 U.S. 494, 503 (1986) (emphasis added). The automatic stay provides the debtor with breathing room so that the debtor can focus on rehabilitation rather than on litigation. *Porter v. Nabors Drilling USA, L.P.*, 854 F.3d 1057, 1061 (9th Cir. 2017). Any realistic opportunity to succeed in the effort of rehabilitation would be defeated if property essential to operation of the business was excluded from the estate and, therefore, outside the scope of the automatic stay. *Whiting Pools, Inc.*, 462 U.S. at 203. Requiring that creditors return seized property allows for its productive use and maximizes its economic value, thus maximizing

benefit for all creditors in a reorganization case. *Thompson*, 566 F.3d at 702. Such an outcome places all parties to a case in a better position than if the property were permitted to sit idle on an empty lot of a creditor. *Id*.

Allowing creditors to continue to retain possession, as the Respondent-Creditor urges, would only serve to heighten the financial pressures that drove the debtor into bankruptcy, and provides no material benefit to the operation of the federal bankruptcy system. The only beneficiary of such a position is the individual creditor that is afforded additional security and peace of mind via possession of the property. While this benefit might be available to the creditor prior to bankruptcy, upon the filing of the petition it is no longer appropriate. "The Bankruptcy Code provides secured creditors various rights, including the right to adequate protection, and these rights replace the protection afforded by possession." *Whiting Pools*, 462 U.S. at 207. This Court's justification in *Whiting Pools* is just as applicable to today's case: the creditor must seek protection using the congressionally established procedures rather than by withholding secured property.

The Creditor here had the right to seek adequate protection from the bankruptcy court, but it would only be available after the trucks were turned over to the estate and not as a condition precedent to their return. *See* 11 U.S.C.A. § 542 (West 2019). The creditor does not have the right to withhold possession until the debtor has sought turnover and creditor has decided it has been afforded adequate protection. Such an outcome allows the tail to wag the dog. Placing such an onus on the debtor to take the affirmative legal steps to recover property, as the Creditor suggests, would make the break from financial pressures promised by the automatic stay illusory. Such an outcome, forcing a debtor with the responsibility to find property of the estate and then initiate adversary proceedings, only serves to increase the financial costs born by

the debtor, deprives debtor use of necessary assets and distracts from efforts rehabilitating the going-concern.

The Creditor may question what the Debtor's chances of a successful rehabilitation were: that is neither its prerogative nor relevant. First, the Code unambiguously places the responsibility of evaluating the feasibility of a Debtor's proposed plan in the Court's hands alone. A debtor's right to possession and use of his car should not depend on the subjective judgement of a creditor. *In re Sharon*, 243 B.R. 683, 685 (B.A.P. 6th Cir. 1999). Second, by its actions, the Creditor denied the Debtor *any* chance at success, which is necessarily worse than any subjective probability the Creditor assigned to the Debtor's chances of a successful rehabilitation.

By increasing the immediacy of the financial pressures that debtors face, the Creditor's position contravenes the specifics aims of the Code, and the automatic stay in particular, to provide debtors respite from creditors. The affirmative duty to turn over property is a justifiable cost imposed on the creditor in possession. First, such a duty advances the automatic stay's promise of breathing room for the debtor. Second, a creditor-in-possession is able to mitigate its costs by seeking adequate protection from the court and is afforded additional insurance of an administrative expense should that protection prove inadequate.

Finally, a creditor that is permitted to retain property essential to operation of the business would have the ability to drive the debtor into liquidation. Such an outcome would short-circuit the Code's meticulously circumscribed Involuntary Bankruptcy provisions. 11 U.S.C.A. § 303(b) (West 2019). By retaining possession of an asset which is essential to rehabilitation of the going concern, the creditor-in-possession is able to achieve that which it could not by the explicit language of the Code's provisions. As was noted in *In Re Murray*:

> The Code's provisions and the rules of procedure governing involuntary cases are strict because the severe nature of involuntary relief and the extreme consequences to the debtor in being forced into bankruptcy. . . . An involuntary petition is a powerful weapon and therefore the Code and Federal Rules of Bankruptcy procedure include numerous requirements and restrictions to curtail misuse and to insure that the remedy is sought only in appropriate circumstances.

543 B.R. 484, 496-97 (Bankr. S.D.N.Y. 2016) (quoting Hon. Joan Feeney, Hon. Michael Williamson and Michael Stepan, Bankruptcy Law Manual (5th ed. 2014)), aff'd, 565 B.R. 527 (S.D.N.Y.), aff'd, 900 F.3d 53 (2d Cir. 2018).

The case at bar is instructive: but for the Creditor's possession of the Debtor's property, the Debtor might have reorganized and saved the business. Instead, being deprived of property essential to its operation, the Debtor was forced into Chapter 7 by the Creditor's continued possession of the property. The Creditor by itself would not have been able to successfully petition for involuntary Chapter 7 because it necessarily fails the § 303(b)'s requirement that involuntary bankruptcy petitions be brought by at least three creditors of the debtor.

2. Mandatory Turnover Disincentivizes a Scramble for a Debtor's Assets and Advances the Code's Core Assurance that all Creditors are Treated Equitably

"Historically one of the prime purposes of the bankruptcy law has been to bring about a ratable distribution among creditors of a bankrupt's assets; to protect the creditors from one another." *Young v. Higbee Co.*, 324 U.S. 204, 210 (1945). This purpose is no less true today. *See In re Klaas*, 858 F.3d 820, 831 (3d Cir. 2017); *Covert v. LVNV Funding, LLC*, 779 F.3d 242, 248 (4th Cir. 2015). Congress intended that the automatic stay be a protection to effect this purpose:

> The automatic stay also provides creditor protection. Without it certain creditors would be able to pursue their own remedies against the debtor's property. Those who acted first would obtain payment of the claims in preference to and to the detriment of other creditors. Bankruptcy is designed to provide an orderly liquidation procedure under which all creditors are treated equally. A race of diligence by creditors for the debtor's assets prevents that.

H.R. Rep. No. 95-595 at 340 (1977), *as reprinted in* 1978 U.S.C.C.A.N. 5963. Congress was evidently worried about the possibility that creditors with competing interest in the debtor's dwindling assets would race to take independent remedies and, therefore, allow the swiftest or the most aggressive creditors to sap the estate of property and deprive all other creditors their equal share. *See In re Murray*, 543 B.R. 484, 494-95 (Bankr. S.D.N.Y. 2018).

Passive retention of repossessed property would incentivize creditors to avoid the collective system by preemptively foreclosing on property of the struggling debtor and, therefore, not only deny the creditors protection of the automatic stay but also thwarts the stay's goal of efficient procedures by decreasing the overall value of the bankruptcy estate. If a party that had no substantial claim in the seized property could, without any cost, compel the debtor to bring a suit as a prerequisite to recover the property, the equitable powers of the court and its officers would be substantially reduced. *See In re Knaus*, 889 F.2d at 775. "The general creditors for whose benefit the return of property is sought, would have to needlessly bear the cost of its return. And those who unjustly retain possession of such property do so with impunity." Id. Such an outcome could lead to duplicative individual actions to stitch together the property of the estate for distribution or reorganization. The legislative history and underlying policy of the bankruptcy point away from placing such a burden on the estate, a party seeking the protection of the bankruptcy laws because of mounting financial troubles.

Furthermore, allowing a secured creditor to maintain possession of the asset, tips the bargaining power in the favor of the creditor. This leverage may allow it to negotiate a better security package than it would otherwise receive if it did not retain possession. Such a result would very likely lead to inequitable outcomes and circumvents the equitable powers of the bankruptcy estate. *See In re Knaus*, 889 F.2d at 775.

In reorganizations, the creditor-in-possession harms fellow creditors by frustrating one of the main overarching goals of bankruptcy: the maximum and equitable distribution for creditors as a class. In permitting reorganizations, Congress recognized that they would lead to more efficient economic outcomes for creditors because debtors-in-possession were able to achieve greater value from continued productive use of the assets and, therefore, make greater payments to creditors than the value creditors would obtain from a liquidation auction. *See* H.R. Rep. No. 95-595 at 220 (1977), *as reprinted in* 1978 U.S.C.C.A.N. 5963. The debtor would have no realistic opportunity to succeed in the effort if property essential to operating of the business was excluded from the estate. *Whiting Pools, Inc.*, 462 U.S. at 203. “Thus, to facilitate, the rehabilitation of the debtor’s business, all the debtor’s property must be included in the reorganization estate.” Id. The failure to turn over property, therefore, leads to less efficient outcomes for all non-possessing creditors.

Once again the case at bar is instructive on the dangers of permitting passive retention. At the outset of the Chapter 11 case, Creditor’s refusal to immediately turnover the trucks prevented Backstreets Plowing from fulfilling its obligations to the City of Badlands, exposing it to additional liability and jeopardizing its chance to win the contract for the following year. The inability to operate during the final months of the season and being deprived of the central assets necessary to plan a reorganization foreclosed any successful reorganization opportunity Backstreets might have had, and forced a conversion into Chapter 7. Creditor’s continued intransigence during Backstreets Plowing’s Chapter 7 case further harmed the creditors in the amount of $100,000, the difference between the two offers that Stone Pony made for the going concern with and without the trucks. Therefore, Creditor’s passive retention thwarted the automatic stay, a protection Congress intended for creditors as a class, and deprived all other

creditors by at least $100,000 -- potentially more if a successful reorganization allowed Backstreet Plowing to make greater payments to creditors -- and thwarted the protections that Congress specifically devised and intended to protect creditors as a class.

The automatic stay is essential to the operation of the federal bankruptcy system and advances its two fundamental principles: debtor relief and equitable creditor treatment. For the debtor, the stay promises a safe harbor where it is afforded a wide berth to right the ship or lifeboat to smooth the financial water. For the creditor, the stay promises that it will receive equitable treatment in the orderly distribution of proceeds from the liquidation or the free cash flow from the righted concern before the process is commandeered by an overly aggressive creditor. In order to afford these two constituencies their full protection under the Code, an affirmative duty to return prepetition seized property must be placed on the creditor. Today's case shows the consequences of the Creditor's position:

- A Debtor was denied the promised breathing room from financial pressure or a realistic opportunity to right the ship; and,
- Non-possessing Creditors were deprived of at least $100,000 in recovery by a single creditor commandeering essential property of the business.

In order that the automatic stay is able to fulfill its Congressionally intended purpose, we urge this Court to reverse the Thirteenth Circuit's decision and affirm the *Whiting Pools* Court's determination that a creditor has an affirmative duty to turn over property of the debtor and that a creditor's continued possession of such property after notice is a violation of the automatic stay.

II. ADMINISTRATIVE EXPENSE CLAIMS FOR SUBSTANTIAL CONTRIBUTIONS ARE NOT PERMITTED IN CHAPTER 7

When applying the Bankruptcy Code, the first task of the Court is to simply apply the statute as it is written. *See Lamar, Archer & Cofrin LLP v. Appling*, 138 S.Ct. at 1759 (2018). Nowhere in § 503(b) of the Code are substantial contribution administrative expenses granted under a Chapter 7, and specifically, the clear and unambiguous text of § 503(b)(3)(D) only allows a creditor, among others, to recover substantial contribution administrative expenses under Chapter 9 or 11. The words of § 503(b) provide all the meaning necessary to apply it, and it is the responsibility of the Court to do so. However, if the Court still finds it necessary to look beyond the plain meaning of the statute, the provision's legislative history and the overall statutory structure confirm Congressional intent to exclude substantial contribution administrative expenses from Chapter 7.

A. The Plain Language of § 503(b)(3)(D) Expressly Limits Substantial Contribution Administrative Expenses to Instances Arising Under Chapter 9 or 11

Substantial contribution administrative expenses are only contemplated in two subsections to § 503(b) but, for the purposes of the case at hand, the inquiry will focus mainly on § 503(b)(3)(D). That subsection entitles certain parties in interest to an administrative expense for "making a substantial contribution in a case under Chapter 9 or 11…" 11 U.S.C.A. § 503(b)(3)(D) (West 2019). Clearly then, substantial contribution administrative expenses under Chapter 7 were excluded from express eligibility, and "[i]t is well established that when the statute's language is plain, the sole function of the courts…is to enforce it according to its terms." *Lamie v. U.S. Trustee*, 540 U.S. 526, 534 (2004). "The inquiry should therefore end here." *In re Backstreets Plowing, Inc.*, Case No. 17-0805 (Moon, J., dissenting).

Of course, statutory silence is not always the end of the analysis, but, "[a]s one court has aptly put it, '[n]ot every silence is pregnant.'" *Burns v. United States*, 501 U.S. 129, 136 (1991)

(quoting *Illinois Dep't of Public Aid v. Schweiker*, 707 F.2d 273, 277 (1983) (overruled in part on other grounds)). Moreover, "[a]n inference drawn from congressional silence certainly cannot be credited when it is contrary to all other textual and contextual evidence of congressional intent." *Id*. Regarding § 503(b), any inference that Congress intended to leave open the eligibility for substantial contribution administrative expenses should fail when considering, either alone or together, broadly accepted principles of statutory interpretation, Congressional intent, and the overall structure of § 503(b).

B. Established Principles of Statutory Interpretation, in Addition to Supporting Context, Preclude Substantial Contribution Claims from Chapter 7

In addition to the plain language of the Code, the common canon of statutory interpretation–*expressiounius est exclusion alterius*–also serves to limit substantial contribution administrative expenses to cases under Chapter 9 or 11. While this rule of statutory interpretation is not omnipotent, it applies "when the items expressed are members of an associated group or series, justifying the inference that items not mentioned were excluded by deliberate choice." *Barnhart v. Peabody Coal Co.,*537 U.S. 149, 168 (2003) (citations and internal quotations omitted). Here, § 503(b)(3)(D) clearly refers to related items – chapters of bankruptcy relief - and further, *expressiounius est exclusion alterius* applies when "it is fair to suppose that Congress considered the unnamed possibility and meant to say no to it." *Marx v. Gen. Revenue Corp.*, 568 U.S. at 1169 (2013) (citations and internal quotations omitted). Given that six chapters of bankruptcy exist, and that only two were included in § 503(b)(3)(D), context would

certainly seem to suggest that Congress "considered" the remaining chapters yet "meant to say no" to them.[1] *Id.*

Paradoxically, even courts permitting substantial contribution administrative expenses in Chapter 7 have suggested as much. In *In re Connolly N. Am.*, the Sixth Circuit noted that "[i]t makes good sense that in providing these examples, Congress would expressly mention Chapters 9 and 11 in the context of creditor activity making a substantial contribution, but not Chapter 7." 802 F.3d 810, 817 (6th Cir. 2015) (internal quotations omitted). However, in doing so, the court contradicts itself. If the reasons Congress would leave Chapter 7 out of § 503(b)(3)(D) make "good sense," this would seem to suggest that Congress did in fact consider excluding Chapter 7 and nevertheless "meant to say no" to it. *Connolly*, at 817; *Marx*, at 1169. In other words, Congress has said what it meant and meant what it said. *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000).

The Court in *Iselin v. U.S* applied the same logic when it refused to extend tax coverage under the Revenue Act of 1918 to a category of ticket sale not specifically enumerated within that law. 70 U.S. 245 (1926). There the Court even presumed that Congress did not intend to exempt the class of tickets at issue, but that nevertheless, "the act contains no provision referring to tickets of the character here involved…" *Id.* at 250. Regardless of how the particular tickets were excluded, by inadvertence or otherwise, "[t]o supply omissions transcends the judicial function." *Id.* In reaching its conclusion, the Court noted the "particularization and detail" within the "scope of each provision" as evidence that Congress knew what it was saying when it wrote the statute, and to extend coverage despite this specificity, would amount to "enlargement" of the law rather than "construction" of it. *Id.*; *see also Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618,

[1] Moreover, Congress made this choice not once but twice. Not only does § (b)(3)(D) expressly limit substantial contribution administrative expenses to Chapters 9 and 11, but the same exclusion was also made in §503(b)(5).

625 (1978) ("There is a basic difference between filling a gap left by Congress' silence and rewriting rules that Congress has affirmatively and specifically enacted. The Court's deference to the legislature makes sense given that, "Congress knew how to create a substantial contribution administrative expense for cases it believed were appropriate for that benefit" and "could have done the same in Chapter 7 cases." *In re Hackney*, 351 B.R. 179, 201 (Bankr. N.D. Ala. 2006).]

C. Subsection 503(b)(3)(D) Governs the General Language of § 503(b)

Despite the "commonplace of statutory construction that the specific governs the general," *Morales v. Trans World Airlines, Inc.,*504 U.S. 374, 384 (1992), Respondent-Creditor is expected to argue that § 503(b)(3)(D) does not constitute an exhaustive list but is instead mere Congressional guidance. That argument is premised on the use of the word "including" in the introduction paragraph of § 503(b). It is true that § 102(3) of the Code provides that the terms "includes" and "including" are not limiting, and, it is possible that despite listing nine types of administrative expenses, Congress did not seek to foreclose the possibility that principles of equity may require the use of other administrative expenses. 11 U.S.C.A. § 503(b)(1)-(9) (West 2019). However, Congress drafted § 503(b)(3)(D) as an expressly limiting and exhaustive list with respect to a specific sort of administrative expense – substantial contributions. No open-ended or qualifying terms are present in that subsection which would serve to modify the list of cases in which substantial contribution administrative expenses are allowed.[2] "When a subsection directly addresses the type of administrative expense sought, the restrictions in it cannot be avoided by appealing to the non-exclusive nature of § 503(b)." *In re Engler*, 500 B.R. 163, 174 (Bankr. M.D. Fla. 2013) (citations and internal quotations omitted). While Congress,

[2] The use of the term "including" in § 503(b) suggests that Congress knows how to create a non-exhaustive list when it wants to, yet in § 503(b)(3)(D) it chose not to leave open the list of Chapters in which substantial contribution administrative expenses are permitted.

therefore, did not exhaust the list of possible administrative expenses in the general language of § 503(b), it did use specific language in § 503(b)(3)(D) to impose certain restrictions with respect to substantial contributions. This specific language regarding substantial contribution governs the general language of Code's provision of administrative expenses.

Similarly, the Court in *Fourco Glass Co. v. Transmirra Products Corp.* held "[h]owever inclusive may be the general language of a statute, it will not be held to apply to a matter specifically dealt with in another part of the same enactment." 353 U.S. 222, 228 (1957) (holding that the general language of 28 U.S.C. § 1391(c) could not supplement the specific language of 28 U.S.C. 1400(b)). In reaching its conclusion, the Court appropriately narrowed the question to, not whether the general provision, § 1391(c), was in fact general, but rather, whether 1391(c) facilitated 1400(b). "[I]n other words, [the question is] whether [1400(b)] is complete, independent and alone controlling in its sphere…" *Id.* The outcome should be the same in the matter presently before the Court. Subsection 503(b)(3)(D) stands alone in its express consideration of administrative claims for substantial contribution for creditors, like Creditor in this case, and constitutes the entire sphere within which such specific types of claims are governed. "[W]hen a claim by its nature does fall within the general parameters of the subsection of § 503(b), courts generally allow or disallow the expense based upon whether it meets the requirements of that subsection." *In re Watson*, 495 B.R. 88, 94–95 (Bankr. D. Col. 2013). The administrative expense that Creditor seeks clearly does not meet the specific requirements of § 503(b)(3)(D), and those requirements are not erased by the general language of § 503(b).

D. Allowing the General Language of § 503(b) to Invade §§ 503(b)(1)-(9) Would Strip the Latter of Meaning

Allowing substantial contribution administrative claims in Chapter 7 would run afoul of another "cardinal principle of statutory construction that a statute ought, upon the whole, to be constructed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant. *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (quoting *Duncan v. Walker*, 533 U.S. 167, 174 (2001)). If the use of the word "including" in § 503(b) can invade §§ 503(b)(1)-(9) in their entirety, their drafted internal limitations would be rendered meaningless and superfluous. Following such a construction would render the subsections as mere guidance rather than carefully drafted creditor protections. Additionally, such a construction would make the list of specific limitations superfluous: each subsection would be serve only the same function–example–as its counterparts. This construction, as it specifically relates here, would render § 503(b)(3)(D)'s express limitation of substantial contribution administrative expenses to be meaningless and superfluous language. Such a construction of the statute, therefore, violates this "cardinal principle" and ought to be rejected by this court.

Indeed, the only construction that would assign meaning to the whole of § 503(b) is one that recognizes that Congress intended subsections (1) through (9) to govern themselves. In this way, §§ 503(b)(1)-(9) remains a non-exhaustive list, thus maintaining the meaning and use of the term "including" in the introductory paragraph of § 503(b) while still allowing the items in the list themselves to be meaningful. Despite this construction and decades of jurisprudence trumpeting the importance of assigning meaning to all language in a statue, a minority of courts has taken the opposite view.[3] For example, the Thirteenth Circuit reasoned that the only way to provide "including" with any meaning is to sacrifice the functionality of the nine ensuing subsections. Such a construction is one step forward and nine steps backward.

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[3] In 2015 "25 bankruptcy or district courts either denied recovery for substantial contributions in a Chapter 7 case or recognized that § 503(b)(3)(D) is limited to only Chapters 9 and 11." *In re Connolly North America, LLC*, 802 F.3d at n.2.

Trustee agrees with the Thirteenth Circuit that § 503(b) was intended to provide a non-exclusive list and that the insertion of the term "including" into the introductory paragraph does indeed grant bankruptcy courts necessary flexibility. *In re Backstreets Plowing, Inc.*, Case No. 18-0918. However, Trustee cannot agree that the price of this objective must be to render meaningless the carefully drafted and specific boundaries placed around certain administrative expenses. If the Court agrees with Trustee, every word Congress placed in § 503(b) has purpose without sacrificing systematic flexibility or discretion.

E. The Legislative History of § 503(b)(3)(D), as well as the Commonly Used Definition of "Substantial Contribution," Preclude Creditor from Receiving Reimbursement for a Substantial Contribution Administrative Expense

The legislative history of § 503(b)(3)(D) confirms that Congress intended administrative expenses for substantial contributions to be limited to petitions under Chapters 9 and 11.[4] "Under 77B(c) of the Bankruptcy Act, reimbursement of fees was authorized for . . . services . . . where those services directly benefited the reorganization." *Lebron v. Mechem Fin. Inc.*, 27 F.3d 937, 945 (3d Cir. 1994). Later, when the Code was adopted, § 503(b)(3)(D) was intended to alter the preexisting law only insofar as a substantial contribution did not need to result in the confirmation of a plan for reorganization. *Id. (citing* 1978 U.S.C.C.A.N. at 5852-53) (internal quotations omitted). However, § 503(b)(3)(D) still required that the efforts for which a party sought reimbursement "directly benefited the *reorganization process*." *Mosier v. Kuptez (In re United Educ. & Software)*, 2005 WL 6960237, at *5 (B.A.P. 9th Cir. Oct. 7, 2005) (emphasis added); *See also In re United Container LLC*, 305 B.R. 120, 126 (Bankr. M.D. Fla. 2003) ("expenses are allowable under § 503(b)(3)(D) only if they directly and materially contributed to

[4] *See* Judge O'Malley's dissent in *In re Connoly North America, LLC*, 802 F.3d 810, 819-25 (2015) for a more detailed survey of the legislative history to § 503(b)(3)(D). Across various House and Senate bills, substantial contribution administrative expenses in Chapter 7 were never contemplated. *Id.*

the reorganization") (internal quotations omitted); *In re Alumni Hotel Corp.*, 203 B.R. 624, 630 (Bankr. E.D. Mich. 1996) (finding subsection § 503(b)(3)(D) as an accommodation between encouraging meaningful creditor participation in the reorganization process and keeping administrative expenses to a minimum) (internal quotations omitted). Of course, there can be no "reorganization process" once a case is converted to Chapter 7 and, consequently, there can be no "substantial contribution" to the reorganization. However, it should be noted that Trustee does not dispute that Creditor did indeed make a substantial contribution, but that substantial contribution was to the Chapter 7 bankruptcy estate, not a reorganization process Creditor's "substantial contribution" was not the type of "substantial contribution" contemplated by § 503(b)(3)(D). When considering whether a creditor has made a "substantial contribution," courts have defined the phrase as "services which . . . foster and enhance, rather than retard or interrupt the progress of reorganization." *Matter of DP Partners Ltd. P'ship*, 106 F.3d 667, 672 (5th Cir. 1997). While Creditor's actions certainly benefited the Chapter 7 estate, it was not the type of creditor behavior that Congress intended to protect nor incentivize through § 503(b)(3)(D).

F. Neither Policy nor Equitable Considerations Warrant the Extension of Substantial Contribution Administrative Expenses to Chapter 7 Contrary to the Explicit Text of the Statute

Underlying the whole of this issue, is the policy that "[c]laims for administrative expenses under § 503(b) are strictly construed because priority claims reduce the funds available for creditors and other claimants." *In re Federated Dept. Stores, Inc.*, 270 F.3d 994, 1000 (6th Cir. 2001); *see also In re Flight Transp. Corp. Securities Litigation*, 874 F.2d 576, 581 (8th Cir. 1989) ("priority statutes are strictly construed"). Further, "courts narrowly construe the substantial-contribution statute and grant substantial-contribution applications only in unusual or

rare cases." *In re American Plumbing & Mechanical, Inc.*, 327 B.R. 273, 279 (Bankr. W.D. Tex. 2005) (internal citations and quotations omitted).

Allowing a substantial contribution administrative expense in an instance that is not expressly provided for in the Code is the exact opposite of a narrow construction of such claims. A disregard for the established judicial precedent in this way is especially detrimental here because expanding § 503(b)(3)(D) is wholly unnecessary. Creditor could have simply claimed an administrative expense under § 503(b)(3)(B) which provides reimbursement for "a creditor that recovers . . . for the benefit of the estate any property transferred or concealed by the debtor." 11 U.S.C.A. § 503(b)(3)(B) (West 2019). Of course, recovering property for the benefit of the estate is exactly what Creditor's investigation led to. There is just no reason to expand the scope of certain administrative expenses, when the language existing in the Code already provides the proper route to reimbursement for creditors like Creditor.

For this reason, any appeal to equity as a cause to diverge from the Code should also fail. Trustee agrees with the longstanding principle that bankruptcy courts are indeed courts of equity, but equity can't be allowed to dominate the Code. "[E]quitable powers . . . must and can only be exercised within the confines of the Bankruptcy Code." *Norwest Bank Worthington v. Ahlers,* 485 U.S. 197, 206 (1988). Although administrative expenses are to be strictly applied, Congress nevertheless offered myriad avenues to reimbursement, including a provision that Creditor could have availed himself of. Even if the Court were amenable to making such an expansion, this would not be the case to use. Creditor failed to properly use the Bankruptcy Code when he chose to not to seek court approval in accordance with § 503(b)(3)(B), before seeking to recover $25,000.Creditor's failure does not now require the Court to rewrite the Code and derogate from Congressional intent. The Court's "unwillingness to soften the import of Congress' chosen

words even if . . . the words lead to a harsh outcome is longstanding." *Lamie v. U.S. Tr.*, 540 U.S. 526, 538, (2004). Such unwillingness "results from deference to the supremacy of the Legislature, as well as recognition that Congressmen typically vote on the language of a bill." *Id.* (internal quotations and citations omitted). Here, there is not even a "harsh outcome" that could convince the Court otherwise. Creditor would merely be foreclosed from recovering a substantial contribution administrative expense under § 503(b). His remaining rights under the Code remain and he may still pursue his claim for an administrative expense, subject to the respective court's discretion.[5]

Declining to award an administrative expense to Creditor would also not impact creditor participation in Chapter 7. First, creditors in Creditor's exact position are expressly encouraged to "participate," or recover property for the estate, because such actions warrant an administrative expense claim. 11 U.S.C.A § 503(b)(3)(B). Second, § 503(b) explicitly offers administrative expense claims for myriad circumstances. Specifically, § 503(b) alone lists approximately twenty scenarios for which an administrative claim may be made.[6] It is hyperbole to suggest that limiting only substantial contribution administrative expenses to Chapters 9 and 11 would deter creditor participation in Chapter 7. Third, creditor participation in Chapter 7 proceedings is limited anyway. Because the end result is liquidation, not reorganization, the only meaningful creditor participation would be to increase the amount of property that is liquidated, i.e., recovering property for the estate. Of course, such participation is already accounted for in § 503(b)(3)(B). Thus, it is extraordinarily unlikely that there would be any significant decrease with respect to creditor participation in Chapter 7 if substantial contribution administrative expenses are foreclosed in that scenario.

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[5] For example, § 503(a) permits a creditor to tardily file a request for payment of an administrative expense if permitted by the court for cause. 11 U.S.C.A. § 503(a) (West 2019).
[6] Sections 503(b)(1)-(9) in addition to the subsections therein.

IV. CONCLUSION

Section 362(a)(3) is unambiguous. When read to give every word meaning, retention of prepetition seized property violates the automatic stay as the creditor acts to exercise control over property of the estate. While passive retention does not appear to be the affirmative act required by the section, the creditor's prevention of the debtor's use of and access to the property satisfies this requirement. Even more, the Code's legislative history and the weight of judicial precedent mandate this understanding. This interpretation effectuates Congress' intent and is essential to achieving the fundamental policies and orderly administration of the federal bankruptcy system.

Additionally, the text of § 503(b) is clear. Substantial contribution administrative expenses are only available in a case under Chapter 9 or 11. While it is true that Congress could have explicitly stated that Chapter 7 was meant to be excluded, it remains just as true that Congress meant to specify that substantial contribution claims can be made only under Chapters 9 and 11. *In re Connolly* at 821 (O'Malley, J., dissenting) Canons of statutory interpretation, legislative history, and the overall structure of § 503(b), undoubtedly support the latter conclusion.

For the reasons above, the Trustee respectfully prays that this Court reverse the decision of the United States Court of Appeals for the Thirteenth Circuit.

Team P. 51

Counsel of Record

Appendix A

11 U.S.C. § 303 - Involuntary Cases

(a) [omitted]

(b) An involuntary case against a person is commenced by the filing with the bankruptcy court of a petition under chapter 7 or 11 of this title –

(1) by three or more entities, each of which is either a holder of a claim against such person that is not contingent as to liability or the subject of a bona fide dispute as to liability or amount, or an indenture trustee representing such a holder, if such noncontingent, undisputed claims aggregate at least $10,000 more than the value of any lien on property of the debtor securing such claims held by the holders of such claims;

(2) if there are fewer than 12 such holders, excluding any employee or insider of such person and any transferee of a transfer that is voidable under section 544, 545, 547, 548, 549, or 724(a) of this title, by one or more of such holders that hold in the aggregate at least $10,000 of such claims;

(3) if such person is a partnership -

A. by fewer than all of the general partners in such partnership; or

B. if relief has been ordered under this title with respect to all of the general partners in such partnership, by a general partner in such partnership, the trustee of such a general partner, or a holder of a claim against such partnership; or

(4) by a foreign representative of the estate in a foreign proceeding concerning such person

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)** [omitted]
> **(2)** [omitted]
> **(3)** any act to obtain possession of property of the estate or of property from the estate or to exercise control over the property of the estate;
> **(4)** [omitted]
> **(5)** [omitted]
> **(6)** [omitted]
> **(7)** [omitted]
> **(8)** [omitted]

Appendix C

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, whenever 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)** [omitted]
> **(3)** [omitted]
> **(4)** [omitted]
> **(5)** [omitted]
> **(6)** [omitted]
> **(7)** [omitted]

(b) [omitted]

(c) [omitted]

(d) [omitted]

(e) [omitted]

(f) [omitted]

Appendix D

11 U.S.C. § 542 - Turnover of property to 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 362 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 E

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)

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

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

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

(B) any tax—

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

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

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

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

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

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

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

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

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

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

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

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

(4) reasonable compensation for professional services rendered by an attorney or an accountant of an entity whose expense is allowable under subparagraph (A), (B), (C), (D), or (E) of paragraph (3) of this subsection, based on the time, the nature, the extent, and the value of such services, and the cost of comparable services other than in a case under this title, and reimbursement for actual, necessary expenses incurred by such attorney or accountant;

(5) reasonable compensation for services rendered by an indenture trustee in making a substantial contribution in a case under chapter 9 or 11 of this title, based on the time, the nature, the extent, and the value of such services, and the cost of comparable services other than in a case under this title;

(6) the fees and mileage payable under chapter 119 of this title;

(7) with respect to a nonresidential real property lease previously assumed under section 365, and subsequently rejected, a sum equal to all monetary obligations due, excluding those arising from or relating to a failure to operate or a penalty provision, for the period of 2 years following the later of the rejection date or the date of actual turnover of the premises, without reduction or setoff for any reason whatsoever except for sums actually received or to be received from an entity other than the debtor, and the claim for remaining sums due for the balance of the term of the lease shall be a claim under section 502(b)(6);

(8) the actual, necessary costs and expenses of closing a health care business incurred by a trustee or by a Federal agency (as defined in section 551(1) of this title) or a department or agency of a State or political subdivision thereof, including any cost or expense incurred—

(A) in disposing of patient records in accordance with section 351; or

(B) in connection with transferring patients from the health care business that is in the process of being closed to another health care business; and

(9) the value of any goods received by the debtor within 20 days before the date of commencement of a case under this title in which the goods have been sold to the debtor in the ordinary course of such debtor's business.

(c) [omitted]