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

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BRIEF FOR THE RESPONDENT

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Counsel for Respondent

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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The decision of the Thirteenth Circuit Court of Appeals is reproduced in the record on appeal. The decisions of the Bankruptcy Appellate Panel for the Thirteenth Circuit and the United States Bankruptcy Court for the District of Moot are unreported.

STATEMENT OF JURISDICTION

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

STATUTORY PROVISIONS

The relevant statutory provisions are listed below and their pertinent text are reproduced in Appendix A.

11 U.S.C. § 102(3)

11 U.S.C. §105(a)

11 U.S.C. § 362(a)

11 U.S.C. §363

11 U.S.C. § 503(b)

11 U.S.C. § 507(a)

11 U.S.C. § 542(a)

11 U.S.C. § 704(a)

Fed. R. Bankr. P. 7001(1)

STATEMENT OF THE CASE & FACTS

Backstreets Plowing, Inc. (hereinafter "Debtor") operated as a seasonal snow plow business in the City of Badlands. R. at 3. In the spring of 2015, the Debtor and its sole shareholder, Christopher "Big Man" Clemons (hereinafter "Clemons"), elected to purchase newer, more fuel-efficient slow plow trucks. *Id*. This avoided substantial repair costs on the Debtor's older snow plows trucks and allowed the Debtor to compete for a valuable plowing contract with the City of Badlands. R. at 3-4. Financially limited, Clemons approached Milton Weinberg (hereinafter "Weinberg") about borrowing $450,000 to purchase the new trucks. Weinberg agreed, and Debtor purchased the trucks in August 2015. R. at 4. To secure repayment of the loan, the Debtor granted Weinberg a security interest in the new trucks and they agreed on a monthly payment plan beginning when the Debtor's operation began generating revenue in December 2015. *Id.* The Debtor won the contract with the City of Badlands, albeit on such a low bid that members of the Badlands City Council "publicly questioned whether the Debtor would be able to perform under the contract given the projected small profit margins." *Id.*

In October 2015, Clemons, a University of Moot alumnus, and Weinberg, a Moot State University alumnus, had a falling out over their rivalry football game. *Id.* The University of Moot won the weather-plagued game, and Weinberg and Clemons got into a heated argument and did not speak to one another for some time thereafter. R. at 5. Despite the Debtor's profitable 2015 - 2016 winter season, it failed to make the required December 2015 loan payment to Weinberg. *Id.* In February 2016, Weinberg, after multiple unanswered phone calls, drove to the Debtor's facility resulting in another verbal altercation. *Id.* Thereafter, in April 2016, Weinberg filed suit on the note in the State of Moot Circuit Court. Weinberg obtained a default judgment against both the Debtor and Clemons, jointly and severally, for $450,000 plus interest and fees.

Id. Weinberg did not take any immediate action to collect on the judgment. *Id.* Unlike the mild 2015 - 2016 winter season, a brutal 2016 - 2017 winter resulted in substantial losses for the Debtor because the payments Clemons negotiated to receive from the City of Badlands did not cover the Debtor's costs of operations. R. at 5-6. Weinberg, having received no payment under the lending agreement, employed E Street Auto Recovery to repossess the trucks in late January. R. at 6. Due to questionable business decisions, the Debtor failed to make even one of its required payments to Weinberg, despite a lucrative winter in 2015-2016. Id. The Debtor filed a Chapter 11 petition on February 4, 2017. *Id.*

Shortly after the petition date, Debtor's counsel demanded Weinberg return the trucks. *Id.* Weinberg refused, asserting that the Debtor had the burden to bring a turnover action. *Id.* In another attempt to obtain lawfully repossessed property, the Debtor then asserted that Weinberg's holding of the trucks constituted a violation of the automatic stay under § 362(a)(3) of the Bankruptcy Code. *Id.* The United States Bankruptcy Court for the District of Moot disagreed and ruled in favor of Weinberg. *Id.* The Debtor appealed the decision in March 2017 and voluntarily converted the Chapter 11 case to a Chapter 7 case on April 13, 2017. R. at 7. After conversion, Weinberg hired a collection law firm to perform a creditors' examination. *Id.* In May 2017, Weinberg discovered that the Debtor made fraudulent transfers of approximately $100,000 to a bank account in the name of Clemons' daughter. *Id.* Weinberg volunteered this information to Steven Vin Sant (hereinafter "Trustee") who then filed suit to avoid the transfers pursuant to §§ 548 and 550 of the Bankruptcy Code. *Id.* A settlement was quickly reached where Clemons' daughter agreed to return $75,000 to the estate. *Id.* Weinberg incurred $25,000 in legal fees investigating the fraudulent transfer and filed a motion seeking allowance of a substantial contribution administrative expense pursuant to § 503(b). *Id.* Despite Weinberg's assistance and

$75,000 recovery for the estate, the Trustee objected, arguing § 503(b)(3)(D)'s language precluded allowing the administrative expense. The Bankruptcy Court ruled in favor of Weinberg, granting him an administrative expense of $25,000. R. at 8. The Trustee timely appealed. *Id.*

In September 2017, Tenth Avenue Freeze, Inc., (hereinafter "Tenth Avenue") a competitor of the Debtor, offered to purchase all of the Debtor's assets, including the new trucks. *Id*. The Trustee unsuccessfully attempted to negotiate the return of the trucks with Weinberg and Tenth Avenue withdrew its offer in November 2017. *Id.* In January 2018, Stone Pony Plowing, Inc. (hereinafter "Stone Pony") offered to purchase the Debtor's assets, excluding the new trucks, to which the Trustee agreed. R. at 8-9. The Bankruptcy Court approved the sale in February 2018. *Id*. Despite the sale, the Trustee refused to dismiss the appeals, hoping to recover the difference between Tenth Avenue's and Stone Pony's offers. R. at 9. The two appeals were consolidated before the Bankruptcy Appellate Panel. *Id*. The appellate panel and the Thirteenth Circuit affirmed on both issues. *Id*. This appeal follows.

SUMMARY OF THE ARGUMENT

This Court should affirm the Thirteenth Circuit because a creditor's passive retention of property lawfully repossessed prior to the filing of a bankruptcy is not a violation of the automatic stay under 11 U.S.C. § 362(a)(3). The plain language of § 362(a)(3) stays "any act … to exercise control over property of the estate." Applying the stay to a creditor's refusal to act would effectively read the requirement that there be an "act" out of the statute and instead impose an obligation upon creditors to turn over any property that may be part of the estate. Such an interpretation unnecessarily duplicates the efforts of the turnover provision, § 542(a).

Further, courts that impose a stay violation for passive retention of estate property (hereinafter "passive violation courts") place undue reliance on § 542(a), which is not self-effectuating. Turnover is entirely premised on giving the Trustee the opportunity to sell property under § 363, yet § 363(e) requires that a creditor be given the opportunity to pursue adequate protection of its interest. Therefore, Trustee *must* request a turnover order from the Bankruptcy Court before Weinberg can be required to turn over property to the estate. Such an order is required to give Weinberg an opportunity to request adequate protection pursuant to § 363(e).

Pre-Code practice allowed turnover of estate property only in the reorganization context and only when ordered to do so by a bankruptcy court. There is no evidence in legislative history that §§ 362 and 542 were meant to compel the turnover of property without a court order. Courts advocating for a passive violation of the automatic stay fail to produce an instance in which passive retention of estate property violated the automatic stay prior to the 1984 amendments to the Code. Further, there is no indication from Congress that the 1984 amendment to § 362(a)(3) reversed this practice. If Congress intended to impose an obligation upon every entity passively holding estate property, it would have done so explicitly.

This Court has noted that § 542(a) has explicit limitations, including when property is of inconsequential value to the estate. These exceptions explicitly referenced in § 362(a)(3). Therefore, under the passive violation approach a creditor could be exempt from turnover yet still violate the automatic stay.

Additionally, this Court should affirm the Thirteenth Circuit's decision because § 503(b) permits a bankruptcy court to grant an administrative expense for a substantial contribution in a case under Chapter 7 of the Bankruptcy Code. Congress drafted § 503(b) to be adaptable to the unique circumstances of each bankruptcy case. By defining the term "including" in § 102(3) as

"not limiting," Congress designed § 503(b) to be a non-exhaustive list of examples, rather than an exclusive listing of administrative expenses. The term "including" appeared in § 64(a)(1) of the Bankruptcy Act of 1898, the predecessor of § 503(b)(1)(A), and the statutes remain essentially identical to date. Given this legislative history and unequivocal Congressional directive, this Court should find that Weinberg is entitled to a reasonable administrative expense, in this case $25,000.

Alternatively, Weinberg is entitled to an administrative expense under § 503(b)(1)(A). When a creditor incurs actual and necessary expenses in order to preserve assets of the estate, the Code allows for reimbursement. Weinberg's actions were essential to the preservation of the estate and are eligible for expense priority.

Also, the Common Fund Doctrine permits a bankruptcy court to award attorneys' fees. Since 1881, federal courts have held broad equity powers concerning attorneys' fees. If a party to litigation has worked diligently for the estate and himself, other parties to the estate must not be unjustly enriched. Weinberg's counsel undisputedly benefitted the Debtor's estate, and therefore, is entitled to reimbursement for his expenses.

Finally, permitting administrative expenses in the case-at-bar advances the policy of the Bankruptcy Code. Without the potential for priority payment pursuant to § 507(a), creditors have little incentive to actively protect and engage with a debtor's estate. The possibility for reimbursement encourages creditors to undertake actions that will benefit the estate, which this Court should promote. Interpreting § 503(b) as a narrow list of specific instances disregards legislative intent and discourages creditors from actively participating in bankruptcy proceedings. This Court should affirm the Thirteenth Circuit's decision and uphold Weinberg's $25,000 administrative expense.

STANDARD OF REVIEW

The parties do not dispute the facts set forth above. Rather, the issues before this Court are questions of law. Therefore, the standard of review is de novo. *Pierce v. Underwood,* 487 U.S. 552, 558 (1988). Under the de novo standard of review, this Court decides each issue of law as if it were the original trial court in the matter. *Razavi v. Comm'r of Internal Revenue*, 74 F.3d 125, 127 (6th Cir. 1996).

ARGUMENT

I. WEINBERG'S PASSIVE RETENTION OF THE COLLATERAL DID NOT VIOLATE THE AUTOMATIC STAY.

Section 362 of the Bankruptcy Code operates as a stay to prohibit "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," by a creditor once a petition has been filed with the Bankruptcy Court. § 362(a)(3). The Code further requires creditors, or any other entity, in possession of property that the trustee may use, sell, or lease to deliver that property or its value to the trustee. § 542(a)(3).

In this case, the Trustee requests the Court find that Weinberg violated the automatic stay based on § 362(a)(3) by passively retaining the snow plow trucks post-petition. A plain, statutory reading of § 362(a)(3) does not include passive behavior, but instead requires a specific act by the creditor to trigger a violation of the automatic stay. Weinberg made no such act. Furthermore, when § 362(a)(3) is read in combination with the totality of the Code and procedural rules of Bankruptcy, requiring Weinberg to turn over his collateral without an adversary would be both impractical and improper.

A. Section 362(a) Does Not Prohibit A Secured Creditor from Passively Retaining Estate Property Lawfully Repossessed Pre-Petition.

According to this Court, when the language of a statute is plain, "the sole function of the courts is to enforce it according it its terms." *Caminetti v. United States*, 242 U.S. 470, 485

(1917). This Court's first duty, then, is to examine the statutory language at issue and determine if the language is plain. *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 240-41 (1989). If the language is indeed plain, this Court should presume the legislature meant what the statute says. *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992). "When the words of a statute are unambiguous, then this first canon is also the last: 'judicial inquiry is complete.'" *Id.* (quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981)).

Section 362(a)(3) explains that a petition filed with a bankruptcy court "operates as a stay, applicable to all entities, of . . . 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." The word "act," which is not defined by the Code, applies to two phrases: 1) an act "to obtain possession of property" and 2) an act "to exercise control over property." If the word "act" does not apply to *both* phrases, the grammatical form of the second clause of the sentence is incorrect and the clause loses its meaning. The Tenth Circuit explained, "[b]reaking down the sentence, 'any act' is the prepositive modifier of both infinitive phrases. In other words, § 362(a)(3) prohibits 'any act to obtain possession of property' or 'any act to exercise control over property.'" *WD Equip., LLC v. Cowen (In re Cowen)*, 849 F.3d 943, 949 (10th Cir. 2017).

Since the Code does not define "act," this Court should apply the ordinary meaning of the word. *Asgrow Seed Co. v. Winterboer*, 513 U.S. 179, 187 (1995). "Act" plainly means to "do something" or to "take action." *Act*, NEW OXFORD AMERICAN DICTIONARY 15 (3d ed. 2010) (primary definition of act). Section 362(a), then, prohibits entities from *doing something* or *taking action* to exercise control over property of the estate post-petition. In fact, this Court has already interpreted the language of § 362(a)(3) to have such a meaning. *Strumpf*, 516 U.S.at 21.

In *Citizens Bank v. Strumpf*, the debtor defaulted on a loan owed to Citizens Bank, with whom the debtor also had a checking account. *Id.* at 16. Citizens Bank placed a temporary freeze on withdrawals from the debtor's checking account, which the debtor argued was a violation of the automatic stay. *Id.* at 18. This Court held that the bank's refusal to release money to the debtor—essentially a passive retention—was "neither a taking of possession of [debtor's] property nor an exercising of control over it, but merely a refusal to perform it's promise." *Id.* at 21.

The allegation against Weinberg is the same—that he passively retained property already in his possession. R. at 6. It is precisely Weinberg's *lack of action* in turning over the property that has provoked the Trustee's claims. Just as Citizens Bank did not violate the automatic stay when it did not release a debtor's funds, Weinberg did not violate the stay where he *did not act* to return the collateral to the Debtor.

Further, § 362(a) does not require an affirmative action to turn over property to the estate. The statute merely stays action *against* the property. "'The automatic stay, as its name suggests, serves as a restraint only on acts to gain possession or control over property of the estate.' *Stay means stay, not go.*" *Cowen*, 849 F.3d at 949 (quoting *United States v. Inslaw, Inc.* 932 F.2d 1467, 1474 (D.C. Cir. 1991)) (emphasis added). The "petition . . . operates as a stay," which indicates that the stay becomes effective *when the bankruptcy petition is filed*. § 362(a). The language of the statute makes no reference to any expectation that the creditor counterbalance pre-petition actions with affirmative post-petition actions. If the court were to require such an action of the creditor under the automatic stay, it would be legislating additional obligations that were not written into the Code. "Nowhere in its language is there a hint that it creates an affirmative duty to remedy past acts . . . as soon as a debtor files a bankruptcy petition. The

statutory language makes clear that the stay applies only to acts taken *after* the petition is filed." *Inslaw*, 932 F.2d at 1474. Weinberg is not required by the stay to turn over the property, so his passive retention of the property does not violate the automatic stay.

Passive violation courts interpret § 362(a)(3) by focusing exclusively on the phrase "to exercise control." *See Weber v. SEFCU (In re Weber)*, 719 F.3d 72, 79 (2nd Cir. 2013) (defining "control" but not "act"); *Thompson v. Gen. Motors Acceptance Corp.*, 566 F.3d 699, 702 (7th Cir. 2009) (defining "control" but not "act"). Such interpretations effectively read "any act" out of the statute. The result is a stay violation not just for those who act to decrease the value of the estate post-petition but for those who do not aid in assembling the bankruptcy estate. The passive violation interpretation requires nothing less than a rewriting of the automatic *stay* into an automatic *obligation*.

This Court must consider the context of the statutory inclusion of the word "control." § 362(a)(3). The 1984 amendments to the Bankruptcy Code included an expansion of the automatic stay, adding the language "to exercise control over property of the estate" as a second clause under § 362(a)(3). The passive violation courts assume that Congress's intent in adding the language was to require creditors to turnover property that had been lawfully retained. *Weber*, 719 F.3d at 80. Those courts cite "the mere fact that Congress expanded the provision" as evidence that the stay provision now requires action on the part of secured creditors who hold repossessed collateral. *Id*. (citing *Thompson*, 566 F.3d at 702).

However, Congress made no indication in legislative history that its intent was to require such an action. The mere addition of a single phrase to the end of § 362(a)(3) does not illustrate an intent of Congress to completely transform the statute's meaning from a stay of action into an obligation to act. *Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 468 (2001) ("Congress

does not hide elephants in mouseholes"). If Congress wanted to use the automatic stay to impose an obligation on every entity passively holding estate property, it would have done so expressly, not with a single phrase added to § 362(a)(3) with no explanation. *See Cowen*, 849 F.3d at 949-50.

There are ample alternative explanations for Congress's addition of the "control" language. Ralph Brubaker offers a substantial explanation for the addition of the phrase "to exercise control" that does not excessively expand the statute as the passive violation courts do:

> [U]se of the word 'control' in the 1984 amendment to § 362(a)(3) suggests that the drafters meant to distinguish the newly prohibited 'control' from the already-prohibited acts to obtain 'possession,' in order to reach nonpossessory conduct that would nonetheless interfere with the estate's authority over a particular property interest. . . . Such prohibited nonpossessory "control," in the absence of a stay relief from the bankruptcy court, might include a nondebtor counter-party's unilateral post-petition termination of an executory contract or the post-petition efforts of someone other than the trustee or DIP (such as an individual shareholder or creditor of a corporate debtor or even the individual debtor in a Chapter 7 case) to prosecute a cause of action belonging to the debtor's bankruptcy estate.

Ralph Brubaker, *Turnover, Adequate Protection, and the Automatic Stay (Part II): Who is "Exercising Control" Over What?*, 33 No. 9 BANKR. L. LETTER at 1 (September 2013) (hereinafter "Brubaker, *Part II"*). The *Cowen* court also offered examples of exercising control that do not fall under "obtaining possession," but are more egregious than passive retention of property that Congress likely wanted to prevent. Such purposes include preventing a creditor from *selling* property belonging to the estate post-petition, or preserving intangible property rights, contract rights, and causes of action, that "are incapable of real possession," but still significant to the estate. *Cowen*, 849 F.3d at 950 (citing *In re Hall*, 502 B.R. 650, 665 (Bankr. D. D.C. 2014)). The commentary from both Brubaker and the Tenth Circuit directly dispels the contention of passive violation courts that the expansion of § 362(a)(3) must mean Congress

"intended to prevent creditors from retaining property of the debtor." *In re Weber*, 719 F.3d at 80 (2d Cir. 2013).

B. Section 362(a)(3), in the Context of the Entire Code, Does Not Require a Secured Creditor to Turn Over Property Without Adjudication by the Bankruptcy Court of Adequate Protection or Other Exceptions from the Turnover Provision.

The statutory language of § 362 in itself favors Weinberg's position and protects his passive retention of the property, which he possessed prepetition. "[A]s long as the statutory scheme is coherent and consistent, there generally is no need for a court to inquire beyond the plain language of the statute." *Ron Pair Enters. Inc.*, 489 U.S. at 242. The language of § 362 becomes more clear when read within the context of the entire Code, specifically the other applicable section to this case, § 542—the turnover provision. *Cowen*, 849 F.3d at 950. The passive violation application of the statute's language, meanwhile, is inconsistent with the overall scheme of the Code.

The passive violation approach relies heavily on § 542(a) to support its interpretation of § 362(a)(3). It reasons that if § 542(a) requires a creditor, such as Weinberg, to voluntarily turn over estate property, then § 362(a)(3) can operate as a stay over that creditor's failure to turn over the property. In essence, the passive violation courts view the automatic stay as a means by which to enforce § 542(a) and sanction violations of that provision. *Abrams v. Sw. Leasing & Rental*, Inc. (In re Abrams), 127 B.R. 239, 242-43 (9th Cir. BAP 1991) ("§ 542 provides the right to the return of estate property, while § 362(h) [now § 362(k)] provides the remedy for the failure to do so"). However, an interpretation of § 362(a)(3) that views failure to turn over property of the estate as a violation of the automatic stay extends turnover requirements well beyond those in § 542, and renders the turnover provision under § 542(a) entirely superfluous. Furthermore, even if § 542(a) were interpreted to require creditors such as Weinberg to turn over estate property to

the Trustee without a turnover order, that does not necessitate a finding that § 362(a)(3) requires the same. *Cowen*, 849 F.3d at 950 ("there is still no textual link between § 542 and § 362").

i. Secured creditors cannot be made to turn over property without a court's consideration of adequate protection under § 363.

Section 542 requires that "an entity . . . in possession, custody, or control, during the case, of property that the trustee may use, sell, or lease under § 363 of this title . . . shall deliver to the trustee, and account for, such property . . . unless such property is of inconsequential value or benefit to the estate." § 542(a). Passive violation courts rely on the understanding that the turnover provision is self-effectuating, in part, because of the use of the word "shall." However, courts must "follow the cardinal rule that a statute is to be read as a whole since the meaning of statutory language, plain or not, depends on context." *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991).

Section 542, in context with § 363, then, follows that the Bankruptcy Court "shall prohibit or condition such use, sale, or lease as necessary to provide adequate protection of such interest." § 363(e). Requiring creditors to turn over property under § 542(a) before the creditors have had the opportunity to seek adequate protection would invalidate the protection they receive under § 363(e). "[I]t is an elementary rule of construction that the act cannot be held to destroy itself. The right of adequate protection cannot be rendered meaningless by an interpretation of §§ 362(a)(3) and 542(a) that would compel turnover even before an opportunity for the court's granting adequate protection." *In re Bernstein* 252 B.R. 846, 851 (Bankr. D.D.C. 2000) (quoting *Citizens Bank of Md. v. Strumpf*, 516 U.S. 16, 20 (1995)) (internal quotation marks omitted).

Under a passive violation interpretation, secured creditors are stripped of the right to adequate protection prior to a defense against turnover. A secured creditor must turn over property it lawfully possessed without adequate protection, or risk punitive judgments violating

the stay. § 362(k). A secured creditor, in an attempt to ensure adequate protection, could fully comply with § 363(e) and request the court prohibit or condition the sale of property to determine if a trustee is in fact permitted to sell the property, which *then* makes it eligible for turnover. *See* §§ 542(a), 363(e) ("an entity… in possession… of *property that the trustee may use, sell, or lease under § 363 of this title*… shall deliver….") (emphasis added). A creditor must first be afforded the opportunity to determine whether the property could be used by a trustee under § 363 and whether lack of adequate protection prevents such use. Under the passive violation interpretation, a creditor would be found in violation of the automatic stay despite fully complying with the turnover provision. Such an interpretation gives meaning to § 362(a)(3) that directly circumvents §§ 542 and 363.

Applying § 362(a)(3) as an "independent, self-executing turnover provision … can also fully jeopardize the secured creditor's entire 'right to adequate protection [that] replace[s] the protection afforded by possession.'" Brubaker, *Part II*, at 1. (quoting *United States v. Whiting Pools*, 462 U.S. 198 at 207 (1983)). A secured creditor's right to adequate protection is triggered by the filing of a request with the court. However, if a secured creditor were to faithfully comply with a § 362(a)(3) obligation to turn over property as required by the passive violation courts, then secured creditor would consequently "be subjected to a period during which its lien is subject to wholesale dissipation with no recourse." *Id.* Examples of such collateral include uninsured property that is destroyed post-turnover or security interests perfected by possession. *Id*. (citing *N. Am. Banking Co. v. Leonard (In re WEB2B Payment Solutions, Inc.)*, 252 B.R. 846 (B.A.P. 8th Cir. 2013)).

This Court has taken notice of such situations in which self-effectuating turnover can destroy a creditor's property rights. In *Strumpf*, the Bankruptcy Court held the creditor in

contempt for withholding funds from the debtor's bank account and required the bank to lift the freeze on the account. When the Court eventually lifted the automatic stay, no funds remained in the account. This Court later ruled that the Bankruptcy Court erred because it extended the automatic stay to the point of violating and contradicting § 542(b) and its setoff provisions. This Court continued:

> We will not give § 362(a)(3) or § 362(a)(6) an interpretation that would proscribe what § 542(b)'s 'except[ion]' and § 553(a)'s general rule were plainly intended to permit: the temporary refusal of a creditor to pay a debt that is subject to setoff against a debt owed by the bankrupt.

Strumpf, 516 U.S.at 21. The *Bernstein* court applied this Court's logic to a creditor's refusal to turn over property repossessed pre-petition. *Bernstein*, 252 B.R. at 851. It held that § 362(a)(3) "no more operates to destroy the right to adequate protection as a condition to turnover than did § 362(a)(3) destroy the right of setoff in *Strumpf*." *Id*.

Passive violation courts acknowledge the problem of destroying a creditor's rights under its interpretation, without offering any effective remedy. The Eighth Circuit Bankruptcy Panel suggested that that "a creditor in [the] position … where relinquishment of possession will in and of itself destroy the creditor's rights … may withhold turning the collateral over until the bankruptcy court is able to make a determination as to whether, and to what extent, the creditor is entitled to adequate protection." *WEB2B*, 488 B.R. at 393. *Contra Knaus v. Concordia Lumber Co. (In re Knaus)*, 889 F.2d 773 (8th Cir. 1989) ("The duty to turn over property is not contingent upon . . . any order of the bankruptcy court.") The Seventh Circuit added, ""[i]f the creditor is concerned that its interest will be irreparably harmed if the property is turned over before [a] motion for relief from stay can be heard it may request an emergency hearing under § 362(f)." *Thompson*, 566 F.3d at 707 (quoting *Expeditors Int'l of Wash., Inc. v. Colotran, Inc. (In re Colortran)*, 210 B.R. 823, 827-28 (B.A.P. 9th Cir. 1997), aff'd in part, vacated in part, 165

F.3d 35 (9th Cir. 1998)). These weak attempts to maintain some façade of protection for the creditor involve the creditor acting in contempt of § 362(a)(3) if it retains possession of the property for any period of time while it attempts to secure the protections discussed by either Circuit. The protections these courts suggest directly contradict the obligations they seek to impose.

Further, the implications of imposing a self-effectuating turnover obligation on secured creditors are severe.

> A well-advised debtor . . . would *never* offer *any* adequate protection in demanding turnover and would *always* put the secured creditor to the burden of moving for stay relief/adequate protection before the bankruptcy court, or use the prospective burden of doing so as leverage in adequate protection negotiations, but only *after* securing turnover *without* providing *any* adequate protection, which (as we've seen) holds the (not unrealistic) prospect of entirely eviscerating the secured creditor's right to receive adequate protection.

Brubaker, *Part II*, at 1.

ii. The passive violation interpretation of the automatic stay is inconsistent with specifically codified exceptions to the turnover provision.

Other inconsistencies between the Code and this passive violation interpretation flow from the existence of various exceptions to the turnover provision that are not exceptions to the automatic stay. Under certain circumstances, a creditor is not required to turn over property to the estate, but, if the misguided passive violation approach applies, a creditor would violate the automatic stay for exercising control over such property in ways permitted by other Code sections. For instance, § 542(a) exempts from turnover property that "is of inconsequential value or benefit to the estate." § 542(a). If a bankruptcy court determines that specific property is of inconsequential value, a creditor is not be required to turn over that property under § 542(a). However, no such exception exists under § 362(a)(3). Under the broad passive violation interpretation of the automatic stay, the entity possessing such inconsequential property would

have violated the automatic stay for failure to turn over the property, despite its exception in § 542(a). This Court has previously refused to permit the interpretation of one section in the Bankruptcy Code that proscribes another section. *Strumpf*, 516 U.S. at 21. The passive violation conception of § 362 voids the "inconsequential value" exception provided in § 542(a), which contradicts this Court's practice.

Another well-settled exception to turnover is that the § 542 cannot be used to force turnover of property if a creditor holds that property under a legal claim of right. *Inslaw*, 932 F.2d at 1472; *Charter Crude Oil Co. v. Exxon Co. (In re Charter Co.)*, 913 F.2d 1575, 1579 (11th Cir. 1990). "It is settled law that the debtor cannot use the turnover provisions to liquidate contract disputes or otherwise demand assets whose title is in dispute." *Inslaw*, 932 F.2d at 1472. Again, no such exception to the automatic stay is recognized under the passive violation interpretation of "exercise control." Therefore, those who passively hold property under a claim of right would violate the automatic stay if they do not voluntarily surrender property to the estate. A debtor or trustee could simply declare property to be part of the estate, and creditors must capitulate or risk violating the stay. Such an interpretation only further fosters uncertainty and holds creditors hostage to the trustee or debtor's demands regardless of their legal rights.

The D.C. Circuit addressed the absurdity of embracing such a broad interpretation of the automatic stay, even noting possible Constitutional violations. *Id*. The debtor, Inslaw, contended that the U.S. Department of Justice (hereinafter "DOJ") was unlawfully using copies of software developed by Inslaw and sold to the DOJ under a contract governing the terms the software's use. *Id*. The DOJ contested the accusations that use of Inslaw's software was unlawful, arguing that the contract governing the software permitted for its continued use of Inslaw's software. *Id*. After filing for bankruptcy, Inslaw demanded that the DOJ return the software to the bankruptcy

estate. *Id*. When the DOJ refused, Inslaw sought a determination that the DOJ willfully violated the automatic stay under § 362(a)(3) by exercising control over Inslaw's property. *Id.* at 1469-70. Like the Trustee in the instant case, Inslaw never sought possession of the software under a formal turnover order. Instead, Inslaw relied upon a passive stay violation to compel the DOJ to turn over the property.

The Court rejected Inslaw's interpretation because allowing a bankruptcy court to impose a stay violation for failure to turn over property subject to a contract dispute raises severe Constitutional problems. *Id*. at 1472. (citing *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982) ("Congress may not vest in a non-Article III (bankruptcy) court the power to adjudicate a traditional contract action…").

> If the bankruptcy court's [and other passive violation courts'] idea of the scope of "exercise of control" were correct, the sweep of § 362(a) would be extraordinary-with a concomitant expansion of the jurisdiction of the bankruptcy court. Whenever a party against whom the bankrupt holds a cause of action (or other intangible property right) acted in accord with his view of the dispute rather than that of the debtor-in-possession or bankruptcy trustee, he would risk a determination by a bankruptcy court that he had "exercised control" over intangible rights (property) of the estate.

Id. Under the passive violation interpretation of the automatic stay, any instance in which a debtor or trustee asserts that property belongs to the estate would require turnover of such property, without any judicial consideration as to whether such claim by a debtor or trustee is valid.

If debtors are able to force the turnover of another entity's property by merely claiming it is within the estate, any property would be required to be brought into bankruptcy court *before* the court can determine whether the property is actually part of the estate. *Id*. at 1473 ("[I]t 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.").

iii. The passive violation interpretation is inconsistent with the purpose of Bankruptcy Rule 7001(1) – Mandatory Adversary Proceedings.

Bankruptcy Rule 7001(1) includes a list of what the Bankruptcy Code considers adversary proceedings, including "a proceeding to recover money or property." Fed. R. Bankr. P. 7001(1). "A turnover action is an adversary proceeding which must be commenced by a properly filed and served complaint." *In re Perkins*, 902 F.2d 1254, 1258 (7th Cir. 1990) (citing Fed. R. Bankr. P. 7001; *In re Interpictures, Inc.*, 86 B.R. 24, 29 (Bankr. E.D.N.Y. 1988); *In re Gold Leaf Corp.*, 73 B.R. 146, 147 (Bankr. N.D. Fla. 1987); *In re Ace Industries, Inc.*, 65 B.R. 199, 200 (Bankr. W.D. Mich. 1986); *In re Riding*, 44 B.R. 846, 858 (Bankr. D. Utah 1984). Imposing § 542(a) as a mandatory obligation without allowing an adversary proceeding would contradict the entire purpose of Rule 7001(1). As illustrated above, there are a range of potentially complex considerations which can enter into a determination of whether property is or is not subject to turnover. It, therefore, should be no surprise that such a determination is to be made in the context of an adversary proceeding.

The central problem to these complex considerations is the turnover of property *before* an adversary proceeding.[1] Rule 7001(1) requires adjudication of disputes regarding recovery of property or money—in essence a turnover—before a creditor turns over the property in dispute. Importantly, then, § 542(a) must not be self-effectuating, and a creditor cannot be found in violation of the stay for refusing to capitulate to the demands of a debtor or trustee before having an opportunity to address these issues in an adversary proceeding. *In re Barringer*, 244 B.R. 402, 410 (Bankr. E.D. Mich 1999).

[1] Such issues include adequate protection, whether the property is of inconsequential value to the estate, or whether the property is actually property of the estate at all (as was the case in *Inslaw*). See *supra* Section I.B.ii.

iv. A passive violation interpretation of § 362(a) is unnecessary to enforce turnover because the Bankruptcy Court can do so under § 105 – Broad Equitable Powers.

Even where a creditor fails to turn over property of the estate as directed by a bankruptcy court, a stay violation is not imperative to enforce § 542(a). As the Tenth Circuit noted, bankruptcy courts also have "broad equitable powers" provided under §105(a). "[B]ankruptcy courts do not need § 362 to enforce the turnover of property to the estate," because § 105 grants the court the power to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title," including § 542. *Cowen*, 849 F.3d at 950; § 105(a). The *Cowen* decision concluded that because a bankruptcy court has the power to sanction conduct and enter civil contempt orders, among other broad equitable powers under § 105, it can also enforce § 542 turnover without Congress including a separate power under § 362. *Id*.

Ultimately, the conclusion that § 362(a)(3) implements a mandatory obligation to act, beyond the mere stay, would be inconsistent with sections that are far more applicable to turnover actions and, in fact, would circumvent the entire purpose of those other sections, including §§ 542 and 363. Such a result is wholly unnecessary given the powers provided to bankruptcy courts under § 105 and Rule 7001(1). "If Congress had meant to add an affirmative obligation . . . to turn over property belonging to the estate, it would have done so explicitly." *Cowen*, 849 F.3d at 950.

C. Legislative History and Pre-Code Practice Support Secured Creditors Passively Retaining Estate Property Lawfully Repossessed Pre-Petition Without Violating the Automatic Stay or Another Injunction.

Courts must examine both the language of the statute in its context and its legislative history. Congress did not add the phrase "to exercise control" to § 362(a) in a vacuum. The 1984 amendment was added in the context of decades of bankruptcy practices that are not nullified without explicit direction.

> When Congress amends the bankruptcy laws, it does not write 'on a clean slate.' Furthermore, this Court has been reluctant to accept arguments that would interpret the Code, however vague the particular language under consideration might be, to effect a major change in pre-code practice that is not the subject of at least some discussion in the legislative history.

Dewsnup v. Timm, 502 U.S. 410, 419 (1992) (citing *Emil v. Hanley*, 318 U.S. 515, 521 (1943)).

Prior to the 1984 amendment of § 362(a)(3), the common practice of conditioning turnover orders on proof of adequate protection continued. Courts uniformly supported the practice that "[a] secured creditor may insist upon adequate protection *as a condition precedent* to the turnover of property since the property may not be used, sold or leased under § 363 without it." *In re Young*, 193 B.R. 620, 626 (Bankr. D.D.C. 1996) (citations omitted).

This Court described the authority of turnover powers despite the absence of its explicit codification. "The turnover procedure is one not expressly created or regulated by the Bankruptcy Act. It is a judicial innovation by which the court seeks efficiently and expeditiously to accomplish ends prescribed by the statute, which, however, left the means largely to judicial ingenuity." *Maggio v. Zeitz*, 333 U.S. 56, 61 (1948).

Indeed, this Court has explained that § 542 is a codification of turnover powers "consistent with judicial precedent predating the Bankruptcy Code." *Whiting Pools*, 462 U.S. at 208. Pre-Code, "the bankruptcy court could *order* the turnover of collateral in the hands of a secured creditor. Nothing in the legislative history evinces a congressional intent to depart from that practice." *Id*. at 208 (internal citations omitted) (emphasis added). Current passive violation courts fail to cite cases pre-1984 that held creditors' passive retention as violative of § 542, "presumably because there are none." Brubaker, *Part II*, at 1.

This Court has articulated that it finds no evidence from a study of legislative history to indicate that there has ever been Congressional intent to depart from those pre-Code turnover practices. *Whiting Pools*, 462 U.S. at 208. Because this Court "will not read the Bankruptcy

Code to erode past bankruptcy practice absent a clear indication that Congress intended such a departure," the turnover practice used before the amendment of § 362 in 1984 should influence its interpretation. *Cohen v. De La Cruz*, 523 U.S. 213 (1998). The judgment of the Thirteenth Circuit should be *affirmed*.

II. WEINBERG IS ENTITLED TO A SUBSTANTIAL CONTRIBUTION ADMINISTRATIVE EXPENSE UNDER CHAPTER 7 OF THE BANKRUPTCY CODE.

Section 503(b) permits a bankruptcy court to grant an administrative expense for a substantial contribution in a case under Chapter 7 of the Bankruptcy Code. Section 503(b), read in conjunction with the definition of its prefatory language in § 102(3), permits the inclusion of Chapter 7 substantial contribution administrative expenses because the term "including" is non-limiting. Further, in *Mediofactoring v. McDermott (In re Connolly N. Am., LLC)*, 802 F.3d 810 (6th Cir. 2015), the Sixth Circuit adopted a flexible, totality of the circumstances approach befitting of the "overriding consideration that equitable principles govern the exercise of bankruptcy jurisdiction." *Bank of Marin*, 385 U.S. at 103 (citations omitted). It is imperative that this Court recognize, as a matter of policy, that creditors who substantially contribute to the resolution of bankruptcy litigation should be *and must be* compensated. Because Weinberg made an undisputed substantial contribution to the bankruptcy estate and a comprehensive examination of § 503(b) allows a bankruptcy court the jurisdiction to grant reimbursement to a party in interest, this Court should *affirm* the Thirteenth Circuit's decision.[2]

A. A Plain Reading of § 503(b) in Conjunction with § 102(3) Permits Reimbursement Under Chapter 7.

Congress intentionally used the defined term "including" to indicate that § 503(b) is flexible and "adaptable to the unique circumstances of each case." *In re Maust Transp., Inc.*, 589 B.R. 887, 898 (Bankr. W.D. Wash. 2018). Congress did not intend to exclude reimbursement of

[2] The parties do not dispute that Weinberg made a substantial contribution to the bankruptcy estate. R. at 17.

administrative expenses in Chapter 7 cases, instead, "the legislative history of [the] section indicates that Congress's intent in enacting subsection (b)(3)(D) was to resolve a problem that was occuring in Chapters 9 and 11, *not to exclude the allowance of such fees in the rare Chapter 7 case to which it would be applicable." Id.* (emphasis added). The U.S. Bankruptcy Court for the District of Moot, the Bankruptcy Appellate Panel for the Thirteenth Circuit, and the Thirteenth Circuit all properly interpreted Congress's directives and their judgments should be *affirmed*.

Interpreting § 503(b), in cases such as Weinberg's, "presents a single, *straightforward* question of statutory construction." *United States v. Ledlin (In re Mark Anthony Constr., Inc.),* 886 F.2d 1101 (9th Cir. 1989) (emphasis added). Section 503(b)(3)(D) authorizes an administrative expense for "actual, necessary expenses . . . incurred by . . . a creditor . . . in making a substantial contribution under chapter 9 or 11 of this title," and § 503(b)(4) permits a bankruptcy court to award "reasonable compensation for professional services rendered by an attorney" on behalf of a creditor.[3] To recover on a § 503(b)(3)(D) claim, a claimant must be a creditor of the estate and have made a substantial contribution to the bankruptcy estate. *See Mosier v. Kupetz (In re United Educ. & Software),* CC–05–1067–MaMeP, 2005 WL 6960237, at *5 (B.A.P. 9th Cir. Oct. 7, 2005). To determine if there has been a "substantial contribution" to the estate, one must ask "whether the efforts of the applicant resulted in an actual and demonstrable benefit to the debtor's estate and the creditors." *Lebron v. Mechem Fin.*, 27 F.3d 937, 943 (3rd. Cir. 1994). Perhaps the most paramount section to the case-at-bar, § 102(3), reads, *"'includes' and 'including' are not limiting."* (emphasis added).

[3] As noted on page 17 of the Thirteenth Circuit's decision, § 503(b)(3)(B) is not applicable in this case.

In 1914, Congress declared "[t]he bankruptcy law has now been so thoroughly construed that there is not much doubt about any of its provisions." *See* H.R. Rep. No. 1182, 63d Cong., 2d Sess. 1 (1914); S. Rep. NO. 847, 63d Cong., 3d Sess. 2 (1914). Weinberg agrees. That same Congress also enshrined bankruptcy courts as inherent courts of equity. *See Local Loan Co. v. Hunt,* 292 U.S. 324, 240 (1934). Courts have routinely employed statutory interpretation in order to illustrate § 503's text, however, "[w]hen 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). Section 503's language renders any professorial interpretative endeavor bootless. The "Negative Pregnant," the more sumptuous *expressio unius est exclusio alterius*, or any of the other Latin idioms do not demystify § 503(b). This Court need simply read the statute in order to rule in favor of Weinberg. The Ninth Circuit agreed, and held that § 503(b)'s use of "including" "renders the *expressio unius* rule inapplicable." *In re Maqsoudi,* 566 B.R. 40, 45 (Bankr. C.D. Cal. 2017) (citing *Mark Anthony Constr,* 886 F.2d 1101). The Honorable Judge Moon, dissenting in the case-at-bar, described § 503(b)(3)(D) as a "counter-balance to the term 'including' in the introductory paragraph of section 503(b)." R. at 30. Judge Moon and Judge Kathleen O'Malley, who dissented in *Connolly*, both employ *In re United Educ. & Software*, 2005 WL 6960237 (9th Cir. BAP 2005) as support of their narrow reading of § 503(b). However, the proposition that, "the five examples under § 503(b)(3) are restricted to only those five," is grammatically illogical and is contradictory to Congressional intent. *Maqsoudi*, 566 B.R. at 44 (citing *United Educ. & Software*, 2005 WL 6960237). The *In re Maqsoudi* court re-structured § 503(b)'s language as such:

> *After notice and a hearing, there shall be allowed administrative expenses, other than claims allowed under section 502(f) of this title, including* the actual, necessary expenses, other than compensation and reimbursement specified in paragraph (4) of this subsection, incurred by *a creditor, an indenture trustee, an equity security holder, or a committee representing creditors or equity security holders other than a committee appointed under section 1102 of this title, in making a substantial contribution in a case under chapter 9 or 11 of this title*.

Id. To conclude that the earlier italicized text applies to the non-italicized text, but not the latter-italicized text is to lose sight of the forest for the trees.

This Court cannot ignore statutory language, and the term "including" in § 503(b) must be given meaning. *See Hibbs v. Winn*, 542 U.S. 88, 101 (2004). The only way to give effect to § 503(b)'s provisions so no part will be "inoperative or superfluous, void or insignificant," is to "acknowledge that administrative expenses other than the statutory examples are permissible." R. at 18 (citing *Hibbs*, 542 U.S. 88, 101 (2004)). "[T]he structure of section 503(b) is inconsistent with a restrictive interpretation of its list of administrative expenses," and the use of the word "including" shows that, the "terms listed immediately afterwards are an inexhaustive list of examples, rather than a bounded set of applicable items." *Mark Anthony Constr*, 886 F.2d at 1106. The officialdom, Black's Law Dictionary, states "[t]he participle *including* typically indicates a partial list." *Include*, BLACK'S LAW DICTIONARY (10th ed. 2014). Courts outside of the bankruptcy arena also agree with Weinberg's interpretation of "including." *See Boll v. Bryan*, No. A13-0991, 2013 WL 6839913, at *2 (Minn. Ct. App. Dec. 30, 2013), "The plain meaning of 'includes' refers to a nonexhaustive and nonexclusive list." "'[I]ncluding' is defined as a term of enlargement and not an exclusive numeration . . . ." *Soto v. State*, No. 08-05-00227-CR, 2007 WL 4214399, at *3 (Tex. App. Nov. 29, 2007). "The term 'including' is defined . . . as illustrative and not limitative." *Triangle Publ'n, Inc. v. Knight-Ridder Newspapers, Inc.*, 626 F.2d 1171, 1175 (5th Cir. 1980) (internal quotation marks omitting). "'Including' is defined as to contain, as a whole does parts or any part or element." *Nat'l Mfg. Co. v. Citizens Ins. Co. of Am.*,

No. CV 13-314, 2016 WL 7491805, at *9 (D.N.J. Dec. 30, 2016) (internal quotation marks omitted). If Congress intended § 503(b) to be an exclusive list, it would not have used "including" in the statute.

Congress has repeatedly and unquestionably broadened the definition of administrative expenses under § 503(b). The Fifth Circuit has wrestled with post-petition interest on taxes owed to the State of Texas under § 503(b). *Al Copeland Enters. Inc. v. Texas (In re Al Copeland Enters., Inc.)*, 991 F.2d 233 (5th Cir. 1993). Ruling in favor of the State, the Fifth Circuit examined *Reading Co. v. Brown*, and the former Bankruptcy Act. *Reading Co. v. Brown*, 391 U.S. 471, 485 (1968). Weinberg concedes that while pre-Bankruptcy Code jurisprudence is not controlling, it does assist courts in understanding the Code and its many nuances. *See In re Stainless Sales Corp.*, 579 B.R. 836, 841 (Bankr. N.D. Ill. 2017) (citing *Hartford Underwriters Ins. Co. v. Union Planters Bank*, 530 U.S. 1, 10 (2000)). *Reading* held that "damages resulting from the negligence of a receiver acting within the scope of his authority as receiver [gave] rise to actual and necessary costs of a Chapter XI arrangement." *Reading*, 391 U.S. at 485 (internal quotation marks omitted). Congress could have, in response to *Reading*, amended the definition of "administrative expense," however, ". . . it appears that [Congress] *broadened* the concept of administrative expense claim[s] by using the word 'including' to demonstrate that the subparts of § 503(b)(1) are examples *and not limitations* of what can be determined to be an administrative claim." *Id*. (citing *In re Execuair Corp.*, 125 B.R. 600, 602 (Bankr. C.D. Cal. 1991) (emphasis added)).

When Congress wishes to amend the Code, they do. Business executives receiving "titanic personal fortunes" in bankruptcies "garnered intense public scrutiny and congressional attention. . . [resulting] in newly enacted 11 U.S.C. § 503(c)(1)." Melissa C. King, *Are Kerps*

Alive in Essence? The Viability of Executive Incentive Bonus Plans After 11 U.S.C. § 503(c)(1), 82 St. John's L. Rev. 1509, 1510 (2008). Congress, with ample opportunity, has remained silent regarding § 503(b) and *Connolly.* Bankruptcy practitioners have even written Congress pleading for clarification on § 503(b), because "doing so would definitively solve the issue by taking the problem out of the hands of the courts." Brendan Chisholm, *Equity Will Rule Until Amendment in Section 503 Bankruptcy Administrative Expenses*, 85 U. Cin. L. Rev. 553, 571 (2017). Significantly, there has been no response from the Legislature to date. If Congress wished to amend § 503(b) to be a narrow listing, it could have. It has not. This Court should interpret § 503(b) as a non-exhaustive listing privy to judicial interpretation by bankruptcy judges.

Congress intended for bankruptcy courts to be arbiters of proper administrative expenses *long before* the current Bankruptcy Code. Congress used the non-limiting term "including" in the preface of § 64(a)(1) of the Bankruptcy Act—the predecessor of § 503(b)(1)(A)—and "a comparison of the two provisions show that they are, in relevant part, essentially identical." *Ala. Surface Mining Comm'n v. N.P. Mining Co. (In re N.P. Mining Co.)*, 963 F.2d 1449, 1455 (11th Cir. 1992). The Eleventh Circuit described two ways expenses not specifically enshrined in § 503(b) may become administrative expenses: "either as a [non-listed] 'actual, necessary' expense of preserving the estate under 503(b)(1)(A) or as a [non-listed] administrative expense under 503(b) in general." *Id.* at 452. Weinberg's substantial contribution to this case not only preserved the estate, it was deemed by three lower courts to be a non-listed, allowable administrative expense under § 503(b). This Court need only view the statute as Congress codified it. Section 503(b) uses the defined § 102(3) term "including" that is unambiguously non-limiting. This Court should read § 503(b) and affirm that Weinberg is entitled to an administrative expense of $25,000.

Section 503(b)(1)(A) adds "[a]fter 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 . . . ." Much dispute is made concerning § 503(b)(3)(D) in the case-at-bar. However, Weinberg is also entitled to an administrative expense claim pursuant to § 503(b)(1)(A).

Expenses not specifically enshrined in § 503(b) may become administrative expenses by classifying as actual and necessary expenses or a non-listed expense generally. For a claim to classify as an administrative expense, it "must be *actual and necessary* to the preservation of the debtor's estate and must have been incurred in an effort to benefit the estate as a whole." *In re EZ Pay Servs., Inc.,* 380 B.R. 861, 864 (Bankr. M.D. Fla. 2007) (citing *Park Nat'l Bank v. Univ. Ctr. Hotel, Inc.,* 2007 WL 604936, at *5 (N.D.Fla.2007)) (emphasis added). The expense must assign a concrete benefit to the estate as a whole, and "the costs of salvage [i.e. rescuing what remains in the estate] are to be paid." *Matter of H.L.S. Energy Co.,* 151 F.3d 434, 437 (5th Cir. 1998) (citing 3 DANIEL R. COWAN, BANKRUPTCY LAW AND PRACTICE § 12.23(e)(1), at 83 (6th ed.1994)). Further, the estate must "actually make beneficial use of any value received in exchange for the incurring of the expense." *In re Right Time Foods, Inc.,* 262 B.R. 882, 884 (Bankr.M.D.Fla.2001) (citing *EZ Pay Servs.,* 380 B.R. at 864).

There are many ways a creditor can preserve a debtor's estate. In Texas, the plugging of a debtor's defunct oil well was considered an actual and necessary expense under § 503(b)(1)(A). *H.L.S. Energy Co.,* 151 F.3d 434. In Pennsylvania, a landlord's rental costs preserved assets of the estate and were allowable administrative expenses pursuant to § 503(b)(1)(A). *In re C & L Country Mkt. of New Mkt., Inc.,* 52 B.R. 61 (Bankr. E.D. Pa. 1985). A stalking horse that "placed the assets of the Debtor in a posture such that other bids were attracted," was allowed an

administrative expense because it provided a substantial benefit to the estate. *In re Dorado Marine, Inc.*, 332 B.R. 637, 641 (Bankr. M.D. Fla. 2005). Most analogous to Weinberg's case, a $70,000 claim by a computer forensics expert that resulted in the discovery of $400,000 for the estate was determined to be actual and necessary. *EZ Pay Servs.*, 380 B.R. 861.

Weinberg, without question, substantially benefited the bankruptcy estate with a $75,000 capital injection. Without Weinberg's initiative, Clemons' fraudulent transfers of $100,000 would have otherwise gone unnoticed. Just as in *EZ Pay Servs.*, Weinberg prevented the bleeding out of estate monies, and Weinberg's "services . . . enabled [the Trustee] to trace certain funds that had been transferred from the estate before the bankruptcy petition was filed." *Id.* at 867. Weinberg is entitled to an administrative expense reimbursement of $25,000 because he assumed the actual and necessary costs of preserving the debtor estate. R. at 7.

B. The Well-Established Common Fund Doctrine Permits Bankruptcy Courts to Award Attorneys' Fees in Chapter 7 Cases.

Congress granted bankruptcy courts the jurisdiction to award administrative expenses in Chapter 7 cases via § 503(b), and this Court has repeatedly reaffirmed the historic equity of federal courts to allow attorneys' fees generally. This Court held that federal courts, employing their equitable authority, may award attorneys' fees "when the interests of justice so require." *Hall v. Cole*, 412 U.S. 1, 4-5 (1973). Further, unless barred by Congressional mandate, there are "unquestionably assertions of inherent power in the courts to allow attorneys' fees in particular situations." *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 259 (1975). Admittedly, the "preferential treatment of a class of creditors is in order only when clearly authorized by Congress," but the Bankruptcy Code allows, via §§ 503(b)(1)(A) and 503(b)(3)(D), courts to award attorneys' fees to creditors making a substantial contribution to the estate. *In re Patton*, 358 B.R. 911, 915 (Bankr. S.D. Tex. 2007) (citing *Howard Delivery Serv. v.*

Zurich American Ins., 126 S. Ct. 2105 (2006)). Even if Congress did not speak directly to the matter, federal courts may award attorneys' fees in any dispute *sua sponte.* "[A]ll creditors of the debtor share the burden of paying for all legal services rendered," and therefore, Weinberg is entitled to an administrative reimbursement in the case-at-bar and the judgment of the Thirteenth Circuit should be *affirmed*. *In re Coron, Inc.,* 161 B.R. 449, 453 (Bankr. N.D. Ill. 1993).

Since 1881, federal courts have held broad equity powers concerning attorneys' fees. This Court noted that if a party to litigation "has worked for [the estate] as well as for himself . . . [others] ought to contribute their due proportion of the expenses which he has fairly incurred." *Internal Improvement Fund Trustees v. Greenough,* 105 U.S. 527, 532 (1881). It is a sensible rule, and the *Greenough* court specifically noted "a party who recovers a fund for the common benefit of creditors is entitled to have his costs and expenses paid out of the fund, [and this philosophy] *prevails in bankruptcy cases.*" *Id*. at 534 (emphasis added). In 1939, this Court held that federal courts have the power "not only to give a fixed allowance for the various steps in a suit," but also "as much of the entire expenses of the litigation of one of the parties as fair justice to the other party will permit. . ." *Sprague v. Ticonic Nat'l Bank,* 307 U.S. 161, 165 (1939). Further, "the relation of its vindication to beneficiaries similarly situated but not actually before the court, as well as the interest of the common creditors where the funds of the bank are not sufficient to pay them in full, and doubtless other considerations" must be taken into account by bankruptcy courts. *Id.* at 167. This judicial tradition continued into 2013. This Court opined, "a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole." *US Airways, Inc. v. McCutchen,* 569 U.S. 88, 96 (2013) (citing *Boeing Co. v. Van Gemert,* 444 U.S. 472, 478 (1980)). Although, "[m]ost activities of an interested party that contribute to the estate will also,

of course, benefit that party to some degree, *the existence of a self-interest cannot in and of itself preclude reimbursement.*" *In re Deval Corp.*, 592 B.R. 587, 599 (Bankr. E.D. Pa. 2018) (citing *In re Essential Therapeutics, Inc*., 308 B.R. 170 (Bankr. D. Del. 2004) (emphasis added)). The *Deval* court determined that if a creditor "transcends" its own interest to benefit the estate, as Weinberg did, then its expense should be eligible for reimbursement. *Id.*

Without Weinberg's creditors' examination, the Debtor's estate would be void of $75,000 and the Debtor's deviant actions would likely continue without penalty. The Common Fund Doctrine is deeply rooted in the mantra that "those who would obtain a benefit from litigation without contributing to the cost [will be] be unjustly enriched." *In re Second Pa. Real Estate Corp.*, 192 B.R. 663, 666 (Bankr. W.D. Pa. 1995). Ruling in favor of Petitioner would allow "'stranger' beneficiaries [to] receive benefits without bearing any of the costs," and enrich the Debtor at the expense of Weinberg. *Id.* (citing *Vincent v. Hughes Air W., Inc.*, 557 F.2d 759, 769 (9th Cir.1977)). Weinberg placed the Debtor's estate in position for a profitable sale and *must* be compensated for it.

C. *In re Connolly's* Holding Properly Interprets the Bankruptcy Code and Should Govern Administrative Expenses Under § 503(b).

When reimbursement of administrative expenses "properly follows from the totality of the pertinent facts, interpretation of the statutory language, and relevant equitable considerations . . . § 503(b) allows for reimbursement in Chapter 7 cases." *Mediofactoring v. McDermott (In re Connolly N. Am., LLC)*, 802 F.3d 810, 815 (6th Cir. 2015). This Court must not "find a limitation where Congress did not expressly create one." *Id.* at 818. Applying *Connolly's* test to the case-at-bar, Weinberg is entitled to an administrative expense of $25,000.

The Thirteenth Circuit noted *Connolly* as a "recent trend in case law." *See* R. at 17. However, an equitable reading of § 503(b) is far from recent, and courts have repeatedly granted

administrative expense reimbursements unmentioned in § 503(b). In 1985, *a full three decades* before *Connolly,* a South Dakota bankruptcy court awarded an administrative expense to creditor's counsel because their actions were instrumental in the discovery of assets for the estate, irrespective of prior court approval. *See In re Rumpza,* 54 B.R. 107, 108 (Bankr. D.S.D. 1985). In 1994, a Louisiana bankruptcy court permitted an administrative expense in a Chapter 7 case when a creditor's attorney assisted in prosecuting an avoidance action, even though section 503(b) did not speak directly to such an action. *See Matter of Zedda,* 169 B.R. 605 (Bankr. E.D. La. 1994). In 2009, an Ohio bankruptcy court allowed a "nonlisted administrative expense" pursuant to § 503(b) for the United States Locator Service when it assisted in the recovery of assets benefitting the estate. *In re Integrity Supply,* 417 B.R. 514 (Bankr. S.D. Ohio 2009). Because *Connolly's* holding is "more consistent with both the plain meaning and the structure" of § 503(b) and it furthers the "overriding consideration that equitable principles govern the exercise of bankruptcy jurisdiction," this Court should adopt it and affirm the Thirteenth Circuit's opinion. R. at 5; *Bank of Marin v. England,* 385 U.S. 99, 103 (1966).

Courts are to examine the Code with a fine-tooth comb. However, "in discerning that intended meaning, [courts] properly look to the overall intent and purpose of the Code." *Connolly,* 802 F.3d at 818. *Connolly* and Weinberg stand not for the proposition that § 503(b) should be open to *every* instance of Chapter 7 reimbursement. Instead, Weinberg asks this Court to interpret § 503(b) "to embrace reimbursement of administrative expenses in cases such as this one and § 503(b)(3)(D) as not divesting the bankruptcy courts of the authority to do so." *Id.* Bankruptcy courts encounter a myriad of situations in which they must apply the Code, and Weinberg asks this Court to afford them the authority and "the responsibility to reach equitable decisions . . . where applicable." Chisholm, 85 U. Cin. L. Rev. at 567.

When the circumstances mandate, bankruptcy courts should have license to award administrative expenses in Chapter 7 cases, especially where the trustee safeguard function fails. A trustee is required by law to, alongside an abundance of other responsibilities, "investigate the financial affairs of the debtor," and "furnish such information concerning the estate and the estate's administration as is requested by a party in interest." § 704(a). Further, "the trustee is *always* bound by a duty to creditors and the estate to collect the assets of the debtor . . . and close the estate as quickly as possible." 4 BANKR. SERVICE L. ED. § 37:75 (citing *In re Nangle*, 288 B.R. 213 (B.A.P. 8th Cir. 2003)) (emphasis added). Weinberg acknowledges that the Trustee's conduct in the case-at-bar does not rise to the egregiousness of that in *Connolly*, however, a "trustee is not a fail-proof safeguard, and in certain circumstances, a Chapter 7 creditor may be compelled to utilize its own resources to protect the estate as a whole." *Connolly*, 802 F.3d at 817. When a creditor goes above and beyond its duties, an award is in order.

D. Allowing Weinberg's Administrative Expense Claim Furthers the Principles of the Bankruptcy Code.

Creditor participation is integral to equitable resolutions of bankruptcy proceedings. Without the potential for priority payment pursuant to § 507(a), creditors have little incentive to actively protect and engage with a debtor's estate. *See N.P. Mining Co.*, 963 F.2d 1449. This Court must dispense holdings that promote creditor participation in bankruptcy litigation—here, finding in favor of Weinberg.

> Failing to award administrative expenses to the rare Chapter 7 creditors who are forced by circumstances to 'tak[e] action that benefits the [bankruptcy] estate when no other party is willing or able to do so,' would deter them from participating in bankruptcy cases and proceedings, *which is plainly inconsistent with the purposes of the Act."*

BANKR. CODE MANUAL § 503:24 (citing *Connolly*, 802 F.3d at 819 (emphasis added).

Weinberg, without solace that his counsel will be compensated, would have sat idly by and allowed the Debtor to fraudulently convey $100,000—unbeknownst to Weinberg, the Trustee, and the Court. Weinberg is mindful of the "overriding concern in . . . keeping fees and administrative expenses at a minimum so as to preserve as much of the estate as possible for the creditors," and understands that a hesitant judiciary might interpret § 503(b) narrowly. *N.P. Min. Co., Inc.*, 963 F.2d at 1454 (citing *Otte v. United States,* 419 U.S. 43, 53 (1974)). However, Weinberg proposes the *Connolly* test as a *fact-specific* inquiry. Here, as with most cases allowing an administrative expense in Chapter 7, the occasion is rare and used only when the circumstances mandate. Interpreting § 503(b) to permit bankruptcy courts to award administrative expenses in Chapter 7 cases would not "open the floodgates of litigation" as Petitioner contends and does not upset prior readings of the Code. *In re Riverfront Properties, LLC*, 405 B.R. 570, 575 (Bankr. D.S.C. 2009).

The "public interest is best served by encouraging entities . . . to alert a Trustee of the existence of assets that will benefit a bankruptcy estate." *Integrity Supply*, 417 B.R. at 522. There will be a "chilling effect upon creditor participation within a bankruptcy proceeding" if creditors such as Weinberg are not compensated for their substantial contributions to an estate. *See In re Antar,* 122 B.R. 788, 791 (Bankr. S.D. Fla. 1990). Further, without creditor/trustee oversight, a devious debtor may be empowered to conceal and carry off with property of the estate. Oftentimes, "a creditor will possess both knowledge and resources which, if applied properly, could benefit the estate." *In re Fall*, 93 B.R. 1003, 1012 (Bankr. D. Or. 1988). The opportunity for reimbursement encourages creditors to undertake actions that will benefit the estate and prevent unjust enrichment of the estate (such as here, a fraudulent transfer). *See In re BCE W., L.P.*, 319 F.3d 1166, 1172 (9th Cir. 2003) (citing *In re Abercrombie*, 139 F.3d 755 (9th Cir.

1998)). Section 507, in conjunction with § 503, are designed to be read "in tandem," in order to "sustain the viability of estates in bankruptcy by giving highest priority to the payment of 'administrative expenses'—the 'actual, necessary costs and expenses of preserving the estate.'" *Zagata Fabricators, Inc. v. Superior Air Prods.*, 893 F.2d 624, 627 (3d Cir. 1990) (quoting § 503(b)(1)(A)). Weinberg and creditors similarly situated should be encouraged by the judiciary to participate in bankruptcy proceedings. Ruling in favor of Petitioner will chill creditor participation, causing substantial hesitancy for creditors to contribute to debtors' estates. The decision of the Thirteenth Circuit should be *affirmed*.

CONCLUSION

Weinberg's passive retention of estate property, which it repossessed prior to the petition date, was not a violation of the automatic stay. Further, § 503(b)'s language permits bankruptcy courts to grant an administrative expense for a substantial contribution in a case under Chapter 7 of the Bankruptcy Code. The decision of the Thirteenth Circuit should be *affirmed*.

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Counsel for Respondent

APPENDIX A

11 U.S.C. § 102(3): In this title-- (3) "includes" and "including" are not limiting;

11 U.S.C. §105(a): The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

11 U.S.C. § 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—
. . .
(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 . . .

11 U.S.C. §363: . . . (e) Notwithstanding any other provision of this section, at any time, on request of an entity that has an interest in property used, sold, or leased, or proposed to be used, sold, or leased, by the trustee, the court, with or without a hearing, shall prohibit or condition such use, sale, or lease as is necessary to provide adequate protection of such interest. This subsection also applies to property that is subject to any unexpired lease of personal property (to the exclusion of such property being subject to an order to grant relief from the stay under section 362) . . .

11 U.S.C. § 503(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—
. . .
(3) the actual, necessary expenses, other than compensation and reimbursement specified in paragraph (4) of this subsection, incurred by—
. . .
(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;
. . .
(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 . . .

11 U.S.C. § 507(a): The following expenses and claims have priority in the following order:
. . .
(2) Second, administrative expenses allowed under section 503(b) of this title, unsecured claims of any Federal reserve bank related to loans made through programs or facilities authorized

under section 13(3) of the Federal Reserve Act (12 U.S.C. 343), and any fees and charges assessed against the estate under chapter 123 of title 28.

11 U.S.C. § 542(a): (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.

11 U.S.C. § 704(a): The trustee shall--
(1) collect and reduce to money the property of the estate for which such trustee serves, and close such estate as expeditiously as is compatible with the best interests of parties in interest;
(2) be accountable for all property received;
(3) ensure that the debtor shall perform his intention as specified in section 521(a)(2)(B) of this title;
(4) investigate the financial affairs of the debtor;
(5) if a purpose would be served, examine proofs of claims and object to the allowance of any claim that is improper;
(6) if advisable, oppose the discharge of the debtor;
(7) unless the court orders otherwise, furnish such information concerning the estate and the estate's administration as is requested by a party in interest . . .

Fed. R. Bankr. P. 7001(1): An adversary proceeding is governed by the rules of this Part VII. The following are adversary proceedings:
(1) a proceeding to recover money or property, other than a proceeding to compel the debtor to deliver property to the trustee, or a proceeding under § 554(b) or § 725 of the Code, Rule 2017, or Rule 6002