Docket No. 18-0918

IN THE

Supreme Court of the United States

OCTOBER TERM, 2018

IN RE BACKSTREETS PLOWING, 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 PETITIONER

Team P61
Counsel for Petitioner

QUESTIONS PRESENTED

I. Whether 11 U.S.C. § 362(a)(3) is violated when a secured creditor passively retains possession of collateral that it lawfully repossessed from the debtor prior to the petition date?

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

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OPINIONS BELOW

The United States Bankruptcy Court for the District of Moot determined that Weinberg's retention of snow trucks that he legally repossessed prior to the bankruptcy filing, each of which constituted collateral for a loan made to the Debtor, did not violate section 362(a)(3). (R. at 3.)

It further affirmed that that Weinberg was entitled to a substantial contribution administration expense under section 503(b), notwithstanding section 503(b)(3)(d). (R. at 3.) The Court of Appeals for the Thirteenth Circuit affirmed the holding of the Bankruptcy Court. (R. at 21.) The Supreme Court of the United States then granted Trustee's petition for writ of certiorari.

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 reproduced in Appendices A through G.

11 U.S.C. § 102(3)
11 U.S.C. § 324
11 U.S.C. § 361
11 U.S.C. § 362(a)(3)
11 U.S.C. § 503(b)
11 U.S.C. § 507
11 U.S.C. § 542
11 U.S.C. § 542(a)
11 U.S.C. § 704

STATEMENT OF FACTS

Christopher "Big Man" Clemons ("Clemons"), the sole shareholder of Backstreets Plowing Company, (the "Debtor") realized he would need to purchase newer, more fuel-efficient, snow plow trucks to stay competitive in the upcoming winter season. (R. at 3). Besides savings in fuel, the new trucks would also allow the Debtor to avoid the substantial costs that were ordinary and customary during the winters for the maintenance and repairing of the older trucks. (*Id.*) Purchasing the new trucks would enable the company to enter a bid for a valuable plowing contract with the City of Badlands where the company was headquartered. (R. at 3-4).

Clemons reached out to Respondent Milton Weinberg ("Weinberg") to obtain a $450,000 loan. (R. at 4). It is undisputed that Debtor granted Weinberg with a security interest in the trucks and a personal guarantee on the loan. (*Id.*). Debtor agreed to make monthly payments on the note as of December 2015, once the business started generating revenue. (*Id.*). Shortly after receiving the funds the Debtor purchased the trucks in August 2015. Thereafter the Debtor submitted an unbeatable bid to the City of Badlands and was awarded the contract. (*Id.*).

The winter of 2015-2016 was a mild one in Badlands. (R. at 5). This fashioned a profitable winter for the company as the lack of snow resulted in vastly reduced maintenance, fuel, and labor costs. (*Id.*). For an unknown reason, Clemons defaulted on the December 2015 loan payment. (*Id.*). Weinberg contacted Clemons in February 2016 after a few missed payments. (*Id.*).

Weinberg filed suit on the note in April 2016 in the State of Moot Circuit Court. In the same lawsuit, Weinberg sued Clemons for his personal guarantee. (R. at 5). In October 2016, Weinberg obtained a default judgment, but did not immediately proceed to collect on the judgment. (*Id.*).

Unlike the prior winter, 2016-2017 was particular brutal, the heavy snowfall resulted in substantial loss for the Debtor's business. (R. at 5). The City of Badland's payments were not large enough to pay for labor, maintenance and fuel costs. (R. at 6). In January 2017 Creditor began efforts to collect and hired a repossession company to retrieve the snow trucks from the Debtor. (*Id.*). In late January 2017, the company hired by Weinberg repossessed the trucks from Debtor and delivered them to a warehouse owned by the Weinberg. (*Id.*).

Without the trucks, the Debtor was unable to fulfill its contract with the City of Badlands. (R. at 6). On February 4, 2017, Debtor filed for chapter 11 petition. (*Id.*). Thereafter, a demand letter was sent to Weinberg demanding immediate return of the snow plow trucks. Weinberg testified in the bankruptcy court that he refused to return the vehicles, due to his understanding that instead of a motion, Debtor had to bring a turnover action. (*Id.*). Instead of commencing a turnover action, the Debtor filed a motion with the bankruptcy court asking the bankruptcy court to determine that Weinberg's retention of the vehicles was a violation of the automatic stay under section 362(a)(3). (*Id.*). The bankruptcy court found that Weinberg had not violated the stay, holding that mere retention of property lawfully repossessed prepetition was not an "act to…exercise control over property of the estate within the scope of section 362(a)(3). (*Id.*).

Debtor timely appealed the bankruptcy court's ruling in March 2017. (R. at 6). Concluding that his efforts to reorganize would be futile, Debtor voluntarily converted the bankruptcy from a chapter 11 case to a chapter 7 case. (R. at 6-7). On April 13, 2017, Respondent Steven Vin Sant ("Trustee") was appointed and a stay on the appeal was enforced in order to allow Trustee to get up to speed on the appeal. (*Id.*).

During this time, Weinberg decided to collect against Clemons on his personal guarantee and discovered that in May 2016, Debtor had made transfers of approximately of $100,000 in cash

to a bank account under the name of Clemons daughter, Patti. (*Id.*). The Trustee filed a complaint against Patti under section 548 and 550 to recover the transfers. Patti Clemons and the Trustee agreed to a $75,000 settlement to satisfy all claims. (*Id.*).

Creditor filed a motion seeking allowance of a substantial contribution administrative expense pursuant to section 503(b). (R. at 7). The bankruptcy court approved Weinberg's motion allowing his administrative expense in the amount of $25,000; Trustee timely appealed opposing the motion on the grounds that substantial contributions are not permissible under a chapter 7 case. (*Id.*).

In September 2017, Trustee received an offer from Tenth Avenue to purchase substantially all of the Debtor's assets, including the snow plow trucks; Contingent upon Trustee obtaining possession of, and conveying title to, the snow trucks that had been repossessed by Weinberg. (R. at 8). When negotiations proved unsuccessful Trustee continued to appeal hoping to pressure Weinberg to return the trucks. (*Id.*). Unable to recover the trucks from the Weinberg, Trustee was powerless to convey the trucks to Tenth Avenue. (*Id.*) Thereafter, Tenth Avenue withdrew its purchase offer when it became clear that Trustee would not be able to convey title of the trucks prior to the winter plowing season. (*Id.*). In January 2018, Stone Pony offered $100,000 less for Debtor's assets, excluding the snow plow trucks. (*Id.*). The Bankruptcy court approved the sale in February 2018. (*Id.*).

Trustee continued to appeal hoping to prevail on the stay violation issue and recover from Weinberg as damages, the difference between the offer from Tenth Avenue and the sale proceeds received from Stone Pony. (R. at 9). At the same time, Trustee proceeded with the substantial contribution appeal. (*Id.*). The appellate panel affirmed both issues. (R. at 9). Trustee timely appealed to this court. (*Id.*).

SUMMARY OF THE ARGUMENT

The courts below have deprived the Debtor from one of the fundamental protections created by bankruptcy. That being the safeguard provided by the automatic stay pursuant to section 362, intended to give debtors a breathing space from creditor's harassment, collection, and foreclosure efforts. The United States Bankruptcy Court for the District of Moot erred in holding that Weinberg's retention of the snow plow trucks was not in fact a violation of the automatic stay set forth in section 362(a)(3).

First, pursuant to 11 U.S.C. § 362(a)(3), Congress intended to automatically stay any conduct from creditors to attempt to satisfy claims by obtaining possession of property of the estate or of property from the estate or to exercise control over property of the estate. Furthermore, by amending the code in 1984 to include the word control, Congress intentionally meant for a violation to expand above mere possession, and to include 'exercising control'. To now hold that 'exercising control' of property of the estate is not a violation of the stay would go against the holding of majority of courts, including this Supreme Court.

Furthermore, section 542(a) is self-executing and requires the automatic turnover of property of the estate upon the filing of bankruptcy by debtor. Despite the view adopted by the court below, Congress's use of the word "shall" in the provision deliberately imposes a duty on a creditor. The duty is to immediately deliver property that the trustee may sell, use or lease under section 363.

Finally, the safeguards intended by provisions 362(a)(3) and 542 will be frustrated as creditors may continue to exercise control and retain possession of property of the estate without any protection provided to debtors. Ignoring a fundamental purpose of bankruptcy, the court below erred allowing for the continuous retention of the vehicles by Weinberg.

Moreover, money is valuable and everybody wants it. But chapter 7 bankruptcies were designed in a different method than other chapters, as its purpose was to distribute liquidated assets so that the creditors could recover on their claims as best as possible. Further, Congress contemplated scenarios that necessitated a method for reimbursing entities that bolstered the bankruptcy process by adding section 503(b). And ever still further, Congress contemplated scenarios where creditors rise above the call-of-duty by allowing creditors to make a substantial contribution claim under 503(b)(3)(D), so long as they are a creditor of a chapter 11 or 9 case. Congress intentionally left out chapter 7 cases as these cases have unique rules and parties that are in place so as to effectuate the bankruptcy process without the need of substantial contribution claims. There are three reasons why Congress's omission was intentional: (1) the plain language of the statute, (2) the 1978 Senate report explicitly states for which chapters substantial contribution is allowed, and (3) to say otherwise would destroy the priority system and skyrocket costs.

First, when interpreting statutes that Congress enacted, there are many tools to look be able to interpret what was meant. In this case, the clear language of section 503(b) would preclude chapter 7 cases from being subjected to substantial contribution claims. Its clear language is understood using common sense that chapter 7 would not be included. When the language is clear, the only job the court has is to enforce the statue according to its terms. Further, it is improper for courts to read into a statute to resolve a known statutory issue. Thus, 503(b) should be read so that chapter 7 cases are excluded from substantial contribution claims.

Additionally, Congress operates fully expansive lists in a different manner. Consider section 361(3), which provides for adequate protection for creditors. This section states that the court may provide "any other relief" for the creditor. This language is intended to fully open the

list to any and all indubitable equivalent offerings the debtor may present to the court. Compare that language to the language of the last item of 503(b). That list concludes with providing an administrative claim for the "value of any goods received by the debtor" which the debtor sold. This language shares no resemblance to the open language of section 361(3); if Congress had intended 503(b) to be fully expansive, they would have created 503(b) will similar language. But they did not. Thus, the language is clear and should be enforced according to its terms.

Second, when determining what Congress intended, it is necessary to look at the legislative history. Here, the Senate report regarding the enactment of the 1978 bankruptcy code clearly shows that the substantial contribution claim would be solely for reorganization and municipality claim. In the report, the Senate writes that 503(b)(3)(D) allows for substantial contribution claims for benefiting the estate of a reorganization case or a municipality case. The present case is not reorganization or a municipality case as it is a liquidation case under chapter 7. The significance of the unique nature of a liquidation case is parallel to the unique existence of the chapter 7 trustee.

Moreover, the parties that dance through the bankruptcy in chapter 9 and 11 cases are thought to be acting in their self-interest, which is why Congress designed section 503(b)(3)(D) to those that thwart bad-faith acts or bring a faster finale to the bankruptcy. In such cases creditor participation is almost a necessity. But in chapter 7 cases, Congress changed directions and brought in the chapter 7 trustee. These trustees are different than other trustees as they act in the best interest for all parties – not solely for the estate. Thus, Congress designed chapter 7 cases differently. So much so that they did not include chapter 7 cases from being burdened by substantial contribution claims.

Third, Congress specifically designated the chapter 7 trustee with the duty to investigate and manage the debtor and the estate so as to maximize the payout to the creditors. It is this duty

that should comfort the creditors as it is assumed that the trustee does his best work. Should the creditors be allowed to duplicate the efforts of the trustee, then money is wasted for either the creditors or the trustee. It is best to leave the designated investigator as the only investigator. Therefore, chapter 7's should not be subjected to substantial contribution claims as Congress intended there to be only one investigator in a chapter 7 case.

ARGUMENT

(I) Weinberg's Retention of the Vehicles Violated the Automatic Stay Set Forth in Section 362(a)(3).

Bankruptcy is one of the greatest legal remedies in America. It provides an efficient process for parties to work out their debts, and further ensures that each party's interest is protected to warrant a fair solution. Congress intended that upon filing a bankruptcy, any act to obtain possession of property of the estate or of property of the estate or to exercise control over property of the estate be automatically stayed. 11 U.S.C. § 362(a)(3). This section precludes Weinberg's retention of the vehicles as this is a prohibit exercise control over property of the estate.

Additionally, even if this Court finds that section 362(a)(3) requires creditor to "act" post-petition for a violation to be found, in this instance, Weinberg's passive retention of the snow trucks in a warehouse is in itself an act. Therefore, the requirements for a violation to occur under section 362(a)(3) are satisfied.

Finally, in holding that passive retention of the vehicles does not violate section 362(a)(3), the court below has extended creditor's right beyond that of debtors in the same bankruptcy proceeding. Such holding would allow for future possession of property of the estate by creditors, Thus, negatively disrupting the safeguard created by section 362(a)(3).

(A) Standard of Review

Debtor raises the legal question of whether Weinberg's post-petition retention of the snow truck constitutes a violation of the stay set forth by provision 362(a)(3). Whether a party's actions have violated the automatic stay is a question of law, which is reviewed *de novo. Rael v. Wells Fargo Bank, N.A (In re Rael),* 527 B.R. 799 (B.A.P. 10th Cir. 2015). "*De novo* review requires an independent determination of the issues, giving no special weight to the bankruptcy court's decision." (*Id.* at 908). Therefore, when the court reviews an issue de novo, the court disregards the lower court's holding and considers the case anew.

(B) Weinberg 'Exercised Control' of Property of the Estate by Retaining Possession of the Vehicles.

While the language of 362 does not appear to be complex courts have great difficulty in interpreting the scope of the stay as imposed by section 362(a). *Allentown Ambassadors, Inc. v. Ne. Am. Baseball, LLC (In re Allentown Ambassadors, Inc.),* 361 B.R. 422, 435 (Bankr. E.D. Pa. 2007). Section 362 automatically imposes a stay upon most actions of a creditor, including attempts to "exercise control" over property of the estate. *Knaus v. Concordia Lumber Co., (In re Knaus),* 889 F.2d 773, 774 (8th Cir. 1989). The difficulty in interpreting the statute has resulted in a division of opinions between the courts as to the issue of whether a party's knowing post-petition retention of estate property lawfully seized pre-petition constitutes a violation of the automatic stay. *Reliable Equip. Corp. v. Turabo Motors Co. (In re Turabo Motors Co.), BAP* No. Pr. 01-035, 2002 Bankr. LEXIS 1278 (B.A.P. 1st Cir, 2002).

(1) The Language of 362(a)(3) is Violated if a Creditor Exercises Control Over Property of the Estate.

The court below concluded respondent had not violated the stay, holding that mere retention of lawfully repossessed prepetition is not an "act to . . . exercise control over property of the estate" within the scope of section 362(a)(3). (R. at 3). In fact, by "exercising control" of

property of the estate a creditor violates the stay. Prior to 1984, the stay only prohibited an "act" to obtain possession of property belonging to the estate. *Thompson v. Gen Motors Acceptance Corp.*, 566 F.3d 699, 702 (7th Cir. 2009). Congress amended section 362(a)(3) when it passes the Bankruptcy Amendments and Federal Judgeship Act of 1984 to include as prohibited conduct "exercising control" over any asset belonging to the estate. (*Id.*) As some courts have observed, the term "exercise control" is not defined in the code nor is there any legislative history to clarify Congress' purpose for the amendment of the statute. *In re Allentown Ambassadors, Inc.*, 361 B.R. at 436.

However, this Court has previously held that courts are to "presume that legislatures says in a statute what it means and means in a statute what it says." *Conn. Nat'l Bank v. Germain,* 503 U.S. 249, 253-54 (1992). Further, absent to an obvious misunderstanding or ambiguity, courts are obligated to interpret the state according to its plain meaning. *In re Weidenbenner*, 521 B.R. 74, 81 (Bankr. S.D.N.Y. 2014). Where the statute is clear and unambiguous, that is the end of the inquiry except in "rare and exceptional circumstances. (*Id.*). There is no reason to assume that Congress's addition of the phrase "to exercise control" to the statute was to be read with the word "act". Rather, the addition of the language indicates the intent to expand the prohibit conduct beyond possession. *Thompson,* 566 F.3d at 702.

In the court of *Thompson*, Thompson purchased a vehicle from GM, and thereafter defaulted on the car payments. (*Id.*). at 701. Subsequently, GM seized the vehicle from Thompson. (*Id.*). Thompson filed a chapter 13 bankruptcy and requested that the vehicle be returned to his estate. (*Id.*). When GM refused to relinquish possession of the vehicle, Thompson moved for the court on the ground that GM willfully violated the stay provision in 362(a)(3). (*Id.*). The court relied on Webster's dictionary definition of the word 'control' meaning as, among other things,

"to exercise restraining or directing influence over" or "to have power over." Further stating that holding on to an asset, refusing to return it, and otherwise prohibiting a debtor's beneficial use fit within this definition. (*Id.*). at 702. The court held that creditor exercised control over the debtor's vehicle when it refused to return it to the bankruptcy estate upon request. (*Id.*).

In the instant case, respondent hired a repossession company to take the snow trucks from debtor. (R. at 6). The vehicles were delivered to a warehouse owned by respondent and remain stored to this day. (*Id.*). The respondent testified in the bankruptcy court that upon receiving demand for the return for the vehicles by debtor he refused. (R. at 6). Respondent's retention of the snow trucks upon having learned of the bankruptcy proceeding was a violation of the automatic stay by exercising control of property of the estate. *See In re Abrams,* 127 B.R. 239 (9th Cir. 1991). The court held that upon learning of the bankruptcy, the "willful and intentional" failure of creditor to return the repossessed vehicle after the bankruptcy filing, was "exercising exclusive control" by the creditor of the property of the estate.

(2) Weinberg's Passive Retention of the Vehicle is An Act.

Even if the Court holds that 362(a)(3) requires an "act" to "exercise control" of property of the estate must be taken by creditor for a violation to be found; passive retention of property of the estate, nevertheless, is a prohibited "act" restricted under 362(a)(3). The court below reasoned that the relevant statutory provision identifies two separate types of stay violations, both of which require an "act", specifically (i) an "act" to obtain possession of property of the estate, and (ii) an "act" to exercise control over property of the estate. (R. at 11). The court below applied the term "act" defined as the "process of doing something or performing," and held that absent of some post-petition "act" by the non-debtor, no stay violation exists. (*Id.*) This application to the statute has overlooked the purpose of Congress's amendment to the stay.

In the court of *WD Equip., LLC v. Cowen (In re Cowen),* 849 F.3d 943 (10th Circ. 2017) the appellate court reversed the trial courts holding that WD's refusal to return the vehicle to Cowen was "exercising control" of property of the estate in violation of section 362(a)(3). The appellate court held that only affirmative "acts" to gain possession of, or to exercise control over property of the estate constituted a violation of the automatic stay. Passive retention is itself an act. To interpret the word "act" within section 362(a) to require only affirmative action by the creditor would rob the automatic stay of its effectiveness. *In re Rutherford,* 329 B.R. 886, 894 (Bankr. N.D. Ga. 2005).

To allow a creditor to maintain passive retention bestows too much power in creditors who possess estate property. *See In re Berscheit,* 223 B.R. 579 (Bankr. D. Wyo. 1998). The creditor, Newcourt, argued that passive retention of the estate property was maintaining the status quo and, therefore, no conduct in violation of the stay occurred. (*Id.*) The court disagreed by holding that a violation of section 362(a) occurs when the creditor has knowledge of the bankruptcy proceedings but disregards the commands of section 542. (*Id.*). Section 542 creates a mandatory duty to turnover the property of the estate upon receipt of notification of the bankruptcy proceedings. *(Id.)*

In the same way, Weinberg violated the automatic stay. Respondent repossessed the vehicle prior, shortly after debtor filed for bankruptcy. (R. at 6). The debtor, through counsel, sent a demand letter to respondent requesting the return of the snow trucks that were an essential part the debtor's business. (*Id.*) Here, respondent's passive retention of the vehicles an act by exercising control of property of the estate.

Even if the Court reasons, as did the court of *In re Rutherford,* 329 B.R. at 894, that the traditional definition of "act" does not include failure to act, and if Congress had intended to reach passive conduct it would have used the words "retain possession" of property of the estate instead

of exercise control. Congress did in fact intend to reach passive conduct by amending the provision to include 'exercise of control' to constitute a violation. The court of *Cross v. City of Chicago (In re Cross),* 584 B.R. 833, (Bankr. N.D. Ill. 2018) disagreed with the argument of the City of Chicago stating that passive possession of debtor's property for the purposes of solely maintaining possession does not constitute an act. Instead, the court held that the City had violated section 362(a)(3) by not complying to turn over the vehicle upon debtor's request. *Id*.

Most courts have followed that "withholding possession of property from a bankruptcy estate is the essence of 'exercising control' over possession" because it prevents debtor from achieving beneficial use of the estate's property. The act of passively holding onto an asset constitutes "exercising control" over it, thus violates section 362(a)(3) of the bankruptcy code. *Thompson,* 566 F.3d at 703. Finding that respondent's passive retention of the snow trucks was not an "act" pursuant to section 362(a)(3) and thus did not constitute a prohibit conduct under section 362(a)(3) was erroneous.

(C) Section 542 is Self-Executing.

Denying that turnover of property by respondent to the estate is not automatic pursuant to 542(a), as the court below suggests is an inappropriate refusal of debtor's right to retain possession of their property. Similar to the 362, the language of 542 is clear in that it imposes an affirmative duty on creditors to return property that belongs to the estate; failure to do so is a violation of the statute.

Furthermore, section 542, in conjunction with section 362 work together to prevent the continued exercise of control of property of the estate by creditors. While 542 mainly provides for the protection of debtors, the section also provides for the creditor's interest in the property to be protected at the determination of the court.

(1) Turnover of Property is Automatic Upon Filing Bankruptcy Pursuant to 542(a)

Full appreciation of the turnover of the snow trucks requires a clear understanding of section 542 of the bankruptcy code. More specifically, section 542(a) provides that upon the filing bankruptcy, an entity in possession of property that a trustee may use, sell, or lease under section 363, shall deliver such property to trustee. 11 U.S.C. § 542(a). Furthermore, by its express terms, the section is self-executing, and does not require that the trustee take any action or commence a proceeding to obtain a court order to compel the turnover. *Peterson v. Wells Fargo Bank (In re Peterson),* 558 B.R. 1, 18 (Bankr. D. Conn 2018).

It is undisputed by the parties that the snow trucks constitute property of the estate. (R. at 10). Rather, the issue is whether upon notice of bankruptcy proceeding, the respondent was obligated to return the vehicles to the debtor. Here, respondent testified in the bankruptcy court that he refused to return the snow trucks upon demand of debtor based on his understanding that debtor had to bring a turnover action. (R. at 6). Furthermore, once the Trustee was assigned to the proceeding, he also attempted to negotiate the return of the snow trucks with respondent. (R. at 8). This negotiation proved unsuccessful. (*Id.*)

The court below reasoned that a creditor in possession of property of the estate may be compelled to turn such property over to trustee by way of a turnover action brought pursuant to section 542(a) and Bankruptcy Rule 7001(1). Bankruptcy Rule 7001(1) governs turnover proceedings under 11 U.S.C § 542. It requires the debtor in possession or the trustee to bring a request for turnover in an adversary proceeding. *In re Perkins,* 902 F.2d 1254,1258 (7th Cir. 1990). However, as stated in the of *United Students Aid Funds, Inc. v. Espinosa,* 559 U.S. 260, 271 (2010), Rule 7001 is a procedural rule adopted by Bankruptcy courts and it is not jurisdictional.

The court below erred in concluding that an adversary hearing is required for the turnover of the vehicles. In the court of *In re Ballard,* 502 B.R. 311 (Bankr. S.D. Ohio 2015) the debtor

Ballard filed a chapter 7 case. (*Id.*). Debtor then filed a complaint called "Debtor's Amended Motion for Order of Contempt and Damages for Violation of the Automatic Stay" to see damages from the United States asserting a violation of 362(a) after the IRS garnished funds from Ballard. (*Id.* at 314). The IRS returned the funds to Ballard and the United States filed a response where the IRS contended that Ballard had to commence an adversary proceeding to recover damages. (*Id.*). The United States argued that the interpretation of rule 7001(1) is that in order to recover damages is to "recover money or property" as the term is used in the statute and therefore 7001 dictates that an adversary proceeding be filed and prosecuted to recover damages. (*Id.* at 317). The court analyzed the term "recover money and property" as used un rule 7001(1). The word "recover" by itself could at least have one of two primary meanings a) to get back or regain or b) to gain by legal process. (*Id.*). The United States argued that rule 7001 used the latter meaning to "gain by legal process". The court disagreed. (*Id.*). The court reasoned that to recover damages does not fit within the term "to recover money or property" as the term uses it in rule 7001. (*Id.*). The court held that the language of 7001(1) does not require that an adversary proceeding be prosecuted for a debtor to recover damages. (*Id.* at 318).

While the present case does not concern the recovery of damages, it does concern the recovery of property. Adopting the same analyzes that was applied by the court of *In re Ballard,* it could be warranted that similar to there not being a requirement to recover damages by an adversary proceeding, likewise, there is not a requirement to prosecute an adversary proceeding for the recovery of property. Instead, the recovery of the snow vehicles was automatic upon demand from debtor pursuant to 542(a).

The majority of courts hold that creditor has an immediately duty to return property of the estate upon the filing of a bankruptcy and failure to do so constitutes an exercise control of property

of the estate. *Transouth Fin. Corp. v. Sharon (In re Sharon),* 234 B.R. 679 (6th Cir. 1999). Appellee purchased a new vehicle and financed it through an installment contract with appellant. (*Id.*) Appellee missed a payment and appellant repossessed the vehicle. (*Id.*) Two weeks later, appellee filed for bankruptcy, appellee's counsel attempted to attain return of the vehicle, but appellant refused. (*Id.*) The court ordered the return of the vehicle holding that refusal to return the car violated the automatic stay. (*Id.*) Furthermore, The court held *Transouth* exercised control over the debtor's car and over debtor's right to possess the car by withholding possession and refusing use of the car after demand and tender of adequate protection by the debtor. (*Id. at* 682).

Here, Respondent's testified that under his understanding was that debtor had to bring an adversary proceeding by which respondent could demand adequate protection. (R. at 6). It has persistent through case law, that upon receiving notice of bankruptcy proceeding, a creditor is compelled to immediately turnover property of the estate, pursuant to 542. To effectuate the purpose of the automatic stay, the burden of returning estate property is placed on the possessor; it does not fall on debtor to pursue the possessor. *(In re Sharon),* 234 B.R. at 685. Thus, if Respondent believe that he, as a secured creditor needs to have adequate protection by debtor, it is his duty to file a motion with the court.

Even if 542 is not self-executing the statute places a burden of creditor to turnover property of the estate by its use of the word "shall". The court of *In re Hall,* 502 B.R. 650, 660 (Bankr. D.D.C. 2014) concluded that 542 is not self-executing. Furthermore, the court stated that even if isolating the word "shall" could be read as imposing a mandatory obligation of a turnover, the court must follow that a statute is to be read as a whole since meaning of statutory language, plain or not depends on context" (*Id.* at 659). The use of the word shall in the statute make the language clear in that an immediate turnover is required.

The court of *Nissan Motors Acceptance Corp. v. Baker*, 239 B.R. 484 (N.D. Tex. 1999), appellee filed for a chapter 7 bankruptcy, thereafter Nissan repossessed the vehicle without knowledge of the proceeding. (*Id.* at 486). Thereafter, appellee was notified by appellant's counsel of the bankruptcy and was asked to return the vehicle. (*Id.*). Appellant did not turn over the vehicle upon notice, but instead retained it. (*Id.*). The court held that contrary to appellants argument, a creditor like appellant *"Shall"* deliver to trustee and account for, property or the value of such property" (emphasis added). The court further stated that section 542 establishes an affirmative obligation on creditor to return property of the estate, and nothing in the section requires debtor to provide creditor with adequate protection as a condition precedent to turnover. (*Id.* at 489). Thus, upon receiving notice of the demand for the turnover of the snow trucks by debtor, it was respondent's duty to return the vehicles automatically. Further, the burden fell on respondent to file motion with the bankruptcy court to determine adequate protection.

Lastly, this Supreme Court has previously held that under 542(a) the secured creditor was required to return the seized property of the estate for the purpose of reorganization. *U.S. v. Whiting Pools, Inc.*, 462 U.S. 198 (1983). *In Whiting Pools,* the IRS seized Whiting Pools corporation tangible personal property pursuant to a tax lien. The corporation filed a chapter 11-reorganization proceeding and the United States filed a motion for declaration that 362 did not apply to the IRS. Whiting Pools filed for an order for the court to request that the IRS turnover the property pursuant to 542(a). (*Id.*). The court held the IRS was bound by the stay and order the IRS to turn over the property. The U.S. District court reversed the lower court, and the Court of Appeals reversed holding that IRS was bound by 542(a). (*Id.*). The Supreme Court granted certiorari. (*Id.*)

In its analysis this Court stated that 542 grants to the estate a possessory interest in certain property that is not held by debtor at the commencement of the reorganization proceeding. The

statute also provides secured creditors various rights such as adequate protection and these rights replace the protection afforded by possession. (*Id.* at 206). The Court further reasoned judicial precedent preceding the bankruptcy code supports interpretation of section 542 within reorganization context. As the court noted, under chapter X of the Bankruptcy Act of 1878, the court could order turnover of collateral in the hands of secured creditors. (*Id.* at 208). Nothing in the legislative history evinces Congress intent to depart from this practice. (*Id.*). Any other interpretation would deprive bankruptcy estate if property essential to rehabilitate and thus frustrate the purpose of reorganization. (*Id.*).

While the present case does not involve a reorganization proceeding, the snow vehicles which are part of the debtor's estate are essential for the liquidation of the debtor's assets. The facts state that Trustee attempted to negotiate with respondent the return of the vehicles. (R. at 8). The Trustee was negotiating debtor's assets, including the snow trucks. (*Id.*). Thus, the snow trucks were essential for a liquidation of the estate. The future of liquidation of the estate by Trustee depends on the reversal of this Court.

(2) Respondent had Burden To Turnover Vehicles and The Seek Adequate Protection From The Bankruptcy Court.

A creditor who has repossessed the vehicle of a debtor prepetition is obligated to return that vehicle one a debtor has made a demand during a bankruptcy proceeding. A creditor may the seek adequate protection from debtor. Alternatively, a creditor may file an emergency motion for relied from the automatic stay and attempt to initiate a showing of why they should retain possession of the vehicles seized prepetition. *In re Cross,* 584 B.R. at 833. There are congressionally established bankruptcy procedures for asserting a lien creditor's right to adequate protection, this does not include the unilateral refusal to deliver possession. *(In re Sharon),* 234 B.R. at 683.

Even if the Court agrees with the *Hall* court, holding that compelling a creditor is to turn over the asset before it can seek adequate protection may lead to creditor being irreparably harmed. *In re Hall*, 502 B.R. at 660. This is not at issue in the present case. Instead, as the court *Unified People's Fed. Credit Union v. Yates (In re Yates),* 332 B.R. 1 (B.A.P. 10th Cir. 2005), held that creditor must first return the asset to bankruptcy estate and the move to have its interest adequately protected. The case of *In re Yates*, Credit Union entered into an agreement with the Yates to provide a loan. With this loan the Yates purchased a GMC truck. The Yates became delinquent in the obligation to repay the loan, Credit Union repossessed the GMC.T Thereafter the Yates filed a chapter 13 and sent a notice and demand for return of the GMC to Credit Union. Credit Union refused. The Court held that Credit Unions refusal to turn over the GMC was a violation of the stay. *Id.*

The court of *In re Turabo Motors Co.*, reasoned that section 541 and section542 work together to draw back to the estate a right of possession claimed by lien creditors pursuant to the pre-petition seizure; the code then substitutes adequate protection for possession as one of the lien creditors rights under bankruptcy. The court further held that when a debtor has requested the return of property and a secured creditor believes it is entitled to adequate protection of the pre-petition lien, the creditor must first return the property and then request the court to determine if the creditor is entitled to adequate protection.

This Court in *Whiting Pools* stated that a 542(a) required the IRS to seek protection of its interest according to the congressionally established bankruptcy procedures, rather than by withholding the seized property from the debtor's efforts to reorganize. *Whiting Pools*, 462 at 212). Because there is a clear obligation on creditor by the express language of 542 to turnover property of the estate and it is the secured creditor's burden to seek protection for adequate protection;

affirming the courts below decision would ultimately allow for creditors in possession of estate property to be the final arbiter of what is or is not adequate protection. *In re Berscheit,* 223 B.R. at 581. As a matter of law and policy this holding should not stand, thus reversal is proper.

(II) An Administrative Expense for Substantial Contribution is Disallowed under Chapter 7 of the Bankruptcy Code.

The Trustee is allowed to lead the court through a yard of freshly fallen snow of appellate review. When the issues presented are questions of law, the standard is *de novo*; and, like a fresh layer of snow, this Court reviews the record freshly as the bankruptcy court did. *Nationwide Mut. Ins. Co. v. Berryman Prods. (In re Berryman Prods.),* 158 F.3d 941, 943 (5th Cir. 1999).

(A) Section 503(b) is Clear, Unambiguous and Precludes Recovery Under Chapter 7 of the Bankruptcy Code.

Senators and Representatives are generally very smart; in fact, most of them are also assumed to be very capable writers. Congress approved the writing of section 503(b) without including any language to indicate that a substantial contribution claim could survive in a chapter 7 case. 11 U.S.C. § 503(b). In order for Weinberg to recover for administrative expenses in a chapter 7 case, he must successfully argue that the term "including" as it appears in the introductory paragraph of 503(b) renders the subsequent list provided therein as non-limiting. He must convince this Court to add in chapter 7 cases to the expressed list Congress wrote. However, the language of 503(b) is clear that substantial contribution claims were not meant for a chapter7 case. Both the intentional omission of chapter 7 from 503(b) and the specific nature of the substantial contribution subsection lean into the conclusion that Congress intended to exclude chapter 7 cases.)

(1) Section 503(b) is Clear; Substantial Contribution Claims in Chapter 7 Cases were Intentionally Omitted.

It is necessary to first establish that Congress means what it says and says what it means. *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000). In *Hartford*, this Court was tasked with deciding whether section 506(c) implicitly allowed other entities, apart from the enumerated trustee, to recover from the property of a secured claim. *Id*. This Court found the theory that the "expression of one thing indicates the inclusion of others, unless exclusion is made explicit" to be against common sense and common usage. *Id*. Thus, when Congress enumerated the list within section 503(b), that list was meant to be exhaustive. This exhaustive nature is derived from the plain language of the statute, as well as the lack of any language that would indicate Congress intended for chapter 7's to be included.

Primarily, there is no explicit language in section 503(b) that would allow a court to expand 503(b) to allow substantial contribution claims in a chapter 7 case. Thus, because the statute's language is clear, the only job of this Court is to enforce the statute accordingly. *U.S. v. Ron Pair Enters.*, 489 U.S. 235, 241 (1989). Consider section 361, which allows a court to grant adequate protection to an entity of interest. 11 U.S.C. § 361. To conclude the list of methods that adequate protection is granted, section 361(3) allows the court to grant "any other relief" that will convey an indubitable equivalent to a creditor. *See In re Anchorage Boat Sales*, 4 B.R. 635 (Bankr. E.D.N.Y. 1980) (Finding that the statute allows a debtor to choose any method for providing adequate protection). The court reasoned that Congress intended this section to be fully expansive. (*Id.*)

But the language of the last item of section 361 is in stark contrast to the last item of 503(b). The last item of the administrative list of 503(b) solely provides for an administrative expense for the "value of any goods received by the debtor within 20 days," and lacks any language consistent

with the spirit of "any other relief" of 361(3). Thus, Congress did not intend for Courts to write-in an addition to 503(b) such that a 503(b)(10) provision could provide for a substantial contribution claim in a chapter 7 case.

Also, consider the section and subsections of 503(b)(1)(A). Here, Congress added "including" to the parent clause of 503(b)(1)(A), such that the two subsections of (A)(i) and (A)(ii) could. 11 U.S.C. 503(B)(1)(A). While every word of a statute must be given meaning, a word cannot also be superfluous. *See Platt v. Union P.R. Co.*, 99 U.S. 48 (1878), *Conn. Nat'l Bank v. Germain*, 503 U.S. 249 (1992). If Congress had intended for the overarching 503(b) "including" to expand the entire list, including subcategories, then Congress would not have repeated the same word in 503(b)(3)(1)(A). But they did repeat the word.

This is especially impactful when considering section 503(b)(3)(D), which is the realm of substantial contribution claims. This subsection's parent, section 503(b)(3), does not contain the word "including," but rather transitions to the lower levels with the words: expenses "incurred by." 11 U.S.C. 503(b)(3). In accordance with another canon of construction, the general is governed by the specific. See Scalia & Garner, 183 (Concluding that specific statutes are more tailored to address the issue at bar and thus more controlling). Thus, because section 503(b)(3)(D) stipulates the two distinct situations in which a substantial contribution claim may be brought, it is more tailored to the individual situations and should be controlling.

Further, this Court refuses to read into the words of a statute that would enlarge a given word's meaning. *Lamie v. U.S. Trustee*, 540 U.S. 526, 538 (2004). In *Lamie,* an attorney that represented a chapter 11 debtor-in-possession argued that he was entitled to compensation based on the word "attorney" in 11 U.S.C. § 330(a)(1)(A) which governs payment to officers of the estate. (*Id.*) This Court disagreed with the petitioner because expanding the word "attorney" to

refer to the debtor's attorney was an enlargement of the intended meaning. *Id*. In arriving at this conclusion, this Court gave significant deference to the supremacy of the legislation and refused to "soften…Congress's chosen words." (*Id.*) The appellate court in this case decided that 503(b) was judicially expandable, the very thing this Court refused to do in *Lamie*. (R. at 21). Accordingly, it would be improper for this Court to read into 503(b) such that a substantial contribution claim would be permissible in this chapter 7 case. Doing so would "soften" Congress's words by loosening the constraints of the enumerated list and risk opening the statute to unchecked expansion sought by a claimant. Thus, the courts should enforce section 503(b)(3)(D) as written.

Additionally, it is against the policy of courts to rewrite a statute, even if the legislature intended the statute to be added to. *People v. Boothe*, 944 N.E.2d 1137, 1139 (N.Y. 2011). Here, the New York Court of Appeals refused to read into the word "insurance" so that "health care insurance" could be added to a criminal fraud statute. *Id*. The court stated that "courts are not to legislate under the guise of interpretation" and called for the state legislature to resolve the error. *Id*. This Court should do likewise and refuse to write in a word that Congress has not written into the statute itself. If this Court does believe that chapter 7 cases should be added, it should call upon Congress to effectuate the change. For instant purposes, however, this Court should rule that Congress did not intend to allow chapter 7 because Congress did not expressly authorize such claims in the relevant sections.

If Congress's clear words are not enough to preclude a substantial contribution claim in a chapter 7 case, there are many methods of diving into the fact that Congress did not intend such a claim when they enacted the law. And while there many ways of interpreting section 503(b)(3)(D), which governs substantial contribution specifically, the truly inexhaustive list of statutory canons all point to its own legislative history. 11 U.S.C. § 503(b)(3)(D). Thus, interpreting the statute

using canons of construction will illuminate the legislative history, revealing that Congress fully intended to exclude chapter 7 from substantial contribution claims.

Congress means what it says and says what it means, even if the statute does not explicitly preclude implicit alternatives. *See Hartford Underwriters*, 530 U.S. at 6. This Court concluded that the incorrect "expression of one thing indicates the inclusion of others unless exclusion is made explicit" is not conducive to common sense and common usage. (*Id.*) Rather, the correct common usage is the well-known *expressio unios est exclusio alterious*, or the expression of one thing implies the exclusion of others. See Antonin Scalia & Bryan Garner, READING THE LAW: THE INTERPRETATION OF LEGAL TEXTS (Thompson/West) (2012) (Stating that when common sense renders a reasonable belief that the things mentioned are encompassing, the unnamed things are excluded). The express language of section 503(b)(3)(D) states that a creditor may bring a claim for "substantial contribution in a case under chapter 9 or 11 of this title." 11 U.S.C. § 503(b)(3)(D). Congress unambiguously stated "chapter 9 or 11," and explicitly omitted chapter 7. Congress could have easily added chapter 7, but they chose to expressly limit substantial contribution claims as an allowable administrative expense in a case under chapter 9 or 11. As such, this court should not add it in their stead.

There is a presumption against implicit rights to a cause of action. *See Cort v. Ash*, 422 U.S. 66 (1979). The court in *Ash* was tasked with determining whether a statute carried an implicit right for a shareholder to sue for a violation of corporate campaign contributions in the 1972 presidential election. *Id.* at 70. The statute in question allowed for corporations to be sued by the Attorney General of the United States but was silent on the issue of whether an individual could bring a suit. (*Id.*) at 79. Thus, in deciding whether to read into the statute, the court considered a four prong test: (1) is the plaintiff a member of the class that the statute was intended to protect;

(2) is there legislative intent, explicit or implicit, to create an action; (3) is the right consistent with underlying purposes of the entire scheme, and (4) is the claim usually relegated to the states. *Id*. In its analysis the court looked to the legislative history to evaluate each prong. In doing so, the court could not find any indication that Congress intended to "vest in…shareholders a right to damages" and thusly denied the shareholder's claim. (*See Id).* While *Ash* dealt with a private right of action, its test offers a valid navigation tool to determine whether substantial contribution claims are implicitly within 503(b)(3)(D).

As in *Ash*, the legislative history of 503(b)(3)(D) is equally impactful for considering the four prongs test. When the 1978 Bankruptcy Code was enacted, the Senate stated that creditors can recover actual and necessary expenses "that [make] a substantial contribution to a reorganization or municipal debt adjustment case." and excluded liquidation cases. S. Rep. No. 95-989, at 5853 (1978).

Under the first prong, whether the plaintiff is a member of the class the statue was intended to protect, the plain language of the statute is clear and a substantial contribution claim was not intended for use by a creditor of a chapter 7 estate. If Congress did not intend for a creditor of a liquidation case to recover for a substantial contribution, then how is this court able to add such a claim for the respondent? To do so would be against the practice that this court does not read into statutes. *Lamie*, 540 U.S. at 538.

Second, the next prong of the *Ash* test would lead to a similar conclusion. The second prong requires a look to the legislative intent of the statute. *See Ash*, 422 U.S. 66. Thus, the analysis should turn to the Senate Report of 1978. This Report does not detail the motive behind such an administrative expense, but the Report notes that a creditor may bring a substantial contribution claim "for a municipality or reorganization case." S. Rep. No. 95-989, at 5853 (1978). The case

at present is a liquidation case, not a municipality or reorganization case. *See Harris v. Viegelahn*, 135 S. Ct. 1829 (2015) (Reviewing the liquidation nature of a chapter 7 proceeding). (*Id.*) Again, if Congress means what it says and says what it means, the stated "reorganization and municipalities" would thereby exclude liquidation cases. *Hartford Underwriters*, 530 U.S. at 6.

Third, the test in *Ash* requires an implicit action to be consistent with the underlying purpose of the entire scheme. *See Ash*, 422 U.S. 66. The duties of the chapter 7 trustee are expressly enumerated and defined by Congress in section 704. Allowing chapter 7 estates to be subjected to substantial contribution claims would destroy the purpose of the trustee. Primarily, the trustee is tasked with collecting and reducing the debtor's estate to money. 11 U.S.C. § 704. This duty to maximize the estate for disbursements necessitates that the estate's costs be kept as low as possible. *In re S&Y Enters.*, 480 B.R. 452, 460 (E.D.N.Y. Bankr. 2012) (Noting that any administrative expense is essentially paid for by all junior creditors as the money is taken from the estate's disbursements). Thus, creditors who duplicate the trustee's efforts are acting against the trustee itself.

Fourth, this claim is dealing with the federal Bankruptcy Code, and as such, is not relegated to the states; this Court could have the power to create an implicit action. But the preceding three points should indicate that Congress did not intent for the adoption of chapter 7 cases to 503(b)(3)(D).

The Senate Report and the canons of statutory interpretation lead only to the conclusion that chapter 7 cases were not meant to be subjected to a creditor's substantial contribution claim. But the analysis can go further – the respondent's argument for "including" is not without weakness.

(2) The Word "Including" Does Not Create an All-Embracing Term, but rather a Term of Illustration of Delimiting Examples

The Respondent is likely to argue that the word "including" is explained in the Rules of Construction in 102(3) to be non-limiting and that this evidences Congress's intent to include chapter 7 in a substantial contribution claim. See 11 U.S.C. 102(3). However, as the title to 102(3) states, these are simply Rules of Construction, and are not definitions. (*Id.*)

This Court has found that the word "including" merely indicates examples that illustrate a general principle, not an "all-embracing definition." *Federal Land Bank v. Bismarck Lumber Co.,* 314 U.S. 95, 99 (1941). In *Bismarck,* the petitioner bank sought to be excluded from paying a state sales tax on their sale of land, alleging that the word "including" allowed the sale of land assets to be included in the statutory exemption. *Id*. This Court held that the term "including" does not indicate an "all-embracing definition, but...an illustrative application of the general principle," and ruled that allowing land sales would destroy the purpose of the overall statute. (*Id.)*. This Court specifically looked at the enumerated list to find that the two mentioned exemptions of "capital and reserve...and the income derived therefrom," to be "delimiting." *(Id.)* at 99. The definition of "delimit" is to "mark or lay out the limits or boundary line." See BLACK'S LAW DICTIONARY 385 (5th ed. 1979). Thus, the *Bismarck* court found that land sales were outside of the scope set forth by the enumerated list of income derived from capital. (*Id* at 100).

While the *Bismarck* case dealt with a tax outside of bankruptcy, its decision sheds no less light on the interpretation of the word "including." In the present case, the appellate court's argument that "including" allows the chapter 7 substantial claim is outside the scope presented by Congress's enumerated list of chapter 9 and 11 cases, especially in light of the Senate Report that supports the limitations of reorganization and municipality bankruptcy cases. Bringing *expressio unios* into this "delimitation" of chapter 9 and 11 cases would show that the liquidation chapter is

outside of the boundary line set forth by the enumerated reorganization and municipality chapters. Surely it is not a coincidence that Congress also provided a fiduciary to preside over the liquidation chapter but not the other listed chapters? Congress means what it says and says what it means.

There are inherent differences between a chapter 7 case and a chapter 11 case; primarily, the existence of a fiduciary representative of both the estate and the creditors. *See Official Comm. of Unsecured Creditors v. Belgravia Paper Co. (In re Great N. Paper, Inc.),* 299 B.R. 1 (D. Me. 2003) (Finding that the creditors committee is encouraged to protect their own self-interests, but that the trustee has both interests to protect). This is primarily based on the assumption that in a chapter 11 case, the creditors, and the committee, are sophisticated enough to work with the debtor throughout the reorganization process. (*Id.*) This faith in the creditor-debtor exchange is removed in a chapter 7 with the insertion of a chapter 7 trustee, who has the duties to effectuate the liquidation process with the best interest of all parties of interest. Thus, chapter 7 cases should not be treated as the same as chapter 11 or chapter 9 cases. There are entirely different rules, and objectives, for each party that further distinguishes the rules and objectives under a chapter 7 case. Thus, bringing the *Bismarck* test from above into play here, the distinguished chapter 7 case is not within the boundaries of the reorganization or municipality case. The word "including" may have a section in the Rules of Construction, but this Court has held that "including" is not all-embracing. *Bismarck,* 314 U.S. at 99. Therefore, this court should not read into 503(b)(3)(D) so as to write-in a term that is not expressly stated. Further, doing so would chip away at the purposes of a chapter 7 trustee.

The present issue revolves around the purpose of the chapter 7 trustee, as the interactions between the assigned duties of a trustee may clash with the incentives of obtaining an administrative claim through a substantial contribution claim.

Although the Rules of Construction explains the that word "including" is not limiting, Congress's decision to not expressly exclude every chapter does not subject every chapter 7 to 503(b)(3)(D). *See Mediofactoring v. McDermott (In re Connolly N. Am.),* 802 F.3d 810, 816 (6th Cir. 2015). *In re Connolly*, the Sixth Circuit held that, because Congress did not expressly exclude chapter 7 cases, the word "including" does not allow courts to add chapter 7 cases. (*Id.*)

By ruling thusly, both the Thirteenth Circuit and the Sixth Circuit have commanded Congress to enumerate each possibility as an expressed limitation, lest the word "including" allows any and all claims under a statutory list to be actionable. But such a course of action is against this Court's usage of the word "including."

This Court should resolve the split amongst the circuits by ruling that the plain language of the statute would preclude chapter 7 cases from recovering in a substantial contribution claim.

(B) Allowing Weinberg to Recover an Administrative Expense Would Destroy the Purpose of a Chapter 7 Trustee and the Priority System.

When the bankruptcy code was enacted in 1978, Congress enacted it with chapter 7 designating a trustee to preside over the bankruptcy estate. *See* 11 U.S.C. 704. If Congress included this trustee, and Congress means what it says, it is clear that Congress intends the trustee to be necessary in chapter 7 proceedings. One of the purposes of section 330(a) was to curtail bankruptcy fees and place them under control. S. Rep. No. 95-989, at 5826 (1978).. But allowing substantial contribution claims for a chapter 7 bankruptcy will only increase the trustee's costs as more creditors will attempt to seek an award for a substantial contribution.

(1) Specific Duties of a Chapter 7 Trustee are Clearly Enumerated in the Bankruptcy Code.

One of the fundamental responsibilities of a chapter 7 trustee is to collect and reduce to money the property of the estate. See *In re Robert Plan Corp.*, 439 B.R. 29, 38 (E.D.N.Y. 2010). Trustees have a fiduciary duty to perform this task such that there is a duty to maximize the

distribution to the debtor's creditors. *Id*. In the present case, the Trustee, had an obligation to research the financial history of the Debtor; and, though the facts do not address whether how he would find the transfer, it is his statutorily duty to investigate the debtor and can be sued should they fail to bring the money to the estate. (R. at 7-8). But if a creditor should preemptively investigate the debtor, it gives rise to a redundancy in the bankruptcy proceeding, and an impossible choice is presented for the trustee.

On one hand, the trustee can allow the creditors to investigate the debtor, knowing they have an interest in the accuracy, and, if permitted, reimburse them through section 503(b)(3)(D). But choosing this route bears many risks. One risk the trustee may be forced to confront is whether to perform an additional investigation of the debtor when the creditor has already done so. The trustee has a fiduciary duty to investigate the debtor and will be held responsible should a transaction escape the searches. Should a creditor fail to identify a hidden transaction, the trustee can be removed. *See* 11 U.S.C. 324.

On the other hand, the trustee can investigate the debtor in addition to each creditor. This choice adds unknown legal costs to the estate on top of any substantial contribution claim the creditors bring. Would it not be better to avoid these cross-roads and only have one investigator? Congress was clear in the Senate Report in that creditors could bring a substantial contribution claim for a reorganization or municipality case but left out the trustee who has a fiduciary duty to perform the same job. S. Rep. No. 95-989, at 5853 (1978). Congress says what it means and means what it says. *Hartford Underwriters*, 530 U.S. at 6. Thus, Congress approved chapter 7 believing the trustee should be the entity with the delegable responsibility for investigating the debtor; and substantial contribution claims should not be awarded as they usurp the structure set by Congress.

Further, this Court should exclude chapter 7 from the statute because statutes are supposed to be read in such a way that does not render another statute superfluous. *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 252 (1992). In *Germain*, a chapter 7 creditor moved to strike the trustee's demand for a jury trial in an adversary proceeding. (*Id.*) at 250. This Court was tasked with deciding whether the bankruptcy appellate jurisdiction in a district's court of appeals would render the bankruptcy appeals statute superfluous. (*Id.*). This Court found that the unambiguous nature of the statute for the court's appellate jurisdiction did not render the bankruptcy code superfluous because each statute covered separate cases that the other did not. (*Id.*) at 253. But here if Weinberg and future creditors are allowed, or even encouraged, to investigate a debtor, then the trustee will have no reason to use the estate's resources in doing so. Therefore, section 704 would become superfluous as, unlike the statutes in *Germain*, section 503(b)(3)(D) envelops the investigative commands of section 704(a) by providing incentives for creditors to investigate the debtor on their own.

The Bankruptcy Code is extremely detailed in the roles of trustees, both in the operation and removal of the trustee. It is safe to assume that an appointed trustee acts in its own best interest because if it is removed from one case, it is removed from all cases. 11 U.S.C. § 324. There are built-in safeguards for creditors to ensure the adequacy of the chapter 7 trustee. Congress intended these rules to dictate the bankruptcy proceedings and the rules should be followed; after all, Congress says what it means and means what it says. *Hartford Underwriters*, 530 U.S. at 6.

(2) Congress Provided Creditors with a Means to Participate.

The manner in which Congress intended creditors to participate is already set forth in the statute. section 327 clearly indicates that the trustee may employ any number of professionals once the court has granted permission. 11 U.S.C. § 327. The argument that the Thirteenth Circuit in this

case and the Sixth Circuit made in the case of *In re Connolly* regarding adding chapter 7 cases to section 503(b)(3)(D) as a means to increase participation is misguided.

The argument is predicated upon the theory that denying creditors administrative expenses would "disincentivize participation" in chapter 7 proceedings. *In re Connolly*, 802 F.3d at 819. But the court disregards the methods by which the statute has provided a clear path for a chapter 7 creditor to participate. Section 327 clearly states that a creditor can employ a professional person upon approval by the court. *See* § 327(a). Then, section 330 sets forth the methods of compensating the employed party. 11 U.S.C. § 330. And lastly, bankruptcy rule 2014 instructs the clear procedure for submitting an employment application. B.R. 2014. But Weinberg did none of the aforementioned procedural steps. Neither did the unsecured creditors in *Connolly*. *See In re Connolly*, 802 F.3d at 813. Both of these creditors obtained their documents in prior proceedings. (R. at 7-8; *See In re Connolly*, 802 F.3d at 813). And while neither section 324 nor 330 gives rise to reimbursements to creditors who remove the trustee, amending what should happen based on a missing statute is a question for the legislature and not the courts. *Boothe*, 944 N.E.2d at 1137. Thus, while no specific statutory remedy exists for the expenses incurred in the respective cases, this is an issue for the legislature to resolve, and creditors should not be rewarded for circumventing the procedural steps set forth in the statute.

(C) Substantial contribution claims in a chapter 7 case would skyrocket the estate's costs and break the priority scheme in such cases.

Another aspect of bankruptcy the thirteenth court of appeals failed to consider is the ability of the trustee to identify and collect the money likely for a lower cost. The appellate court's decision to grant Weinberg his substantial contribution claim should be overturned because allowing Weinberg to recover would frustrate the purpose of chapter 7 bankruptcies.

(1) The priority system would be destroyed as each creditor would be forced to investigate the debtor or the trustee in hoping that there is a way to contribute.

When the sixth circuit rendered the *Connolly* judgement, they not only dismissed the purpose of a chapter 7 trustee, but also encourage creditors to risk their own attorney fees so that they might discover any fraudulent transaction. *Mediofactoring v. McDermott (In re Connolly N. Am. L.L.C.),* 802 F.2d 810 (6th Cir. 2015). The *Connolly* standard to which Weinberg clings would create drastic expenses for both the creditors and the estate.

Creditors' payments are organized based on their priority status under section 507. If allowed, Weinberg's substantial contribution claim would place his legal fees in second. 11 U.S.C. 507(a)(2). However, his legal fees are derived from his personal lawsuit against the debtor, not in the pursuit of any claim for the estate. (R. at 7). This presents issues for future chapter 7 trustees that are seeking to maximize the estate.

First, statutes should be narrowly construed so as to contain the amount of administrative expenses for the benefit of all creditors. *In re Canton Jubilee, Inc.*, 523 B.R. 770, 774 (Bankr. E.D. Tex. 2000). The court in this case was tasked with determining whether a creditor could make a claim for substantial contribution because he saved the estate money by preventing an attorney with a conflict of interest from being hired. *(Id.)* at 774. The court held that this did not rise to the level necessary because administrative expenses are paid by each junior creditor, as these expenses take money away from the estate. *(Id.)* If the purpose of the trustee is to maximize the estate, there is strong policy arguments for keeping the expenses of the estate low so that the most money may go to the creditors as possible. In the present case, Weinberg's contribution is undisputed, but this case is a chapter 7 liquidation proceeding – where the trustee is already designated as the investigator and administrator. In the same vein as the above policy of keeping administrative costs

minimal, so too should the trustee. Thus, allowing creditors of a chapter 7 leads the case to the awkward situation discussed above.

For the creditors, however, there are also two scenarios: (1) if a creditor does not preemptively investigate the debtor, they may lose money because there is less money in the estate to be disbursed; or (2) if the creditor does investigate the debtor and the debtor has not committed a fraudulent transfer, they may lose money in paying fees. Either way, if future chapter 7 estates are subjected to substantial contribution claims, the priority system will be damaged and creditors will lose money. Thus, the result should be that section 503(b)(3)(D) excludes chapter 7 creditors from substantial contribution claims.

Even more so, Weinberg's administrative expense claim may not have been necessary at all. The trustee received the relevant information before he was able to investigate the debtor's financial history. (R. at 7). In order to recover for an administrative expense, the expense must have been a necessity. *See In re Canton*, 523 B.R. at 775. There are no facts that the trustee was able to conduct the investigation, which he failed to discover the transfer, and was alerted and supported by Weinberg's information. Rather, Weinberg discovered the transfer during his personal lawsuit against the debtor, which he won, and now he seeks to have his legal expenses for his personal claim paid for by the estate. (R. at 7). If Vin Sandt, the trustee, had found the transaction through his own investigation, then this expense may not have been necessary. Further, the estate may have saved money by not having to pay for two investigations.

Allowing creditors to present claims such as this is completely against the policy of the courts. This policy is to encourage creditor participation in the bankruptcy, but not at the expense of the estate. *See In re Consol. Bancshares, Inc.*, 785 F.2d 1249 (5th Cir. 1986). Thus, Weinberg's

substantial contribution claim should be denied, as allowing future creditors in a chapter 7 to lump claims onto the estate is against the policy of the court.

(2) It is not for the courts to resolve issues of inadequate text, but rather left for Congress.

The purpose of the courts is not to fix what is left for Congress to decide. And while it may be argued that allowing substantial contribution claims in a chapter 7 case can prevent unforeseen breaks within the bankruptcy court system, such an issue should be left for Congress.

Further, denying such claims may disincentivize creditor participation in chapter 7 cases because there is no guarantee of reimbursement. *In re Connolly*, 802 F.2d at 819. This argument is flawed on the grounds that correcting such a misstep by the code should only be performed by Congress. While considering *In re Connolly*, the court looked to the unusual facts where a U.S. trustee failed to remove a trustee who had breached his duty during discovery. (*Id.*) at 813. Thus, it was left to a creditor to remove the trustee, and by doing so, incurred legal costs. *(Id.*). Not only is it unusual, but the code does not address a remedy for any parties that were involved or damage by the removal.

But this issue cannot be resolved by the courts, it should be left to Congress rather than courts legislating under statutory interpretation. *Boothe*, 944 N.E.2d at 1139.

For these reasons, the court should reverse and remand this case, and in doing so preclude substantial contribution cases in chapter 7 bankruptcy. For Congress intended the chapter 7 trustee to be the manager and investigator of the estate, as well as act in such ways as to maximize the available money therein. This court should reverse and remand this case.

CONCLUSION

Therefore, we pray that this Court reverse the decision of the Thirteenth Circuit Court of Appeals and render a take nothing judgment in favor of the Trustee, as well as any other relief the Trustee is entitled to by law.

Respectfully submitted,

Team P61,
Counsel for Petitioner

APPENDIX A

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 [11 USCS § 301*, *302*, or *303*], or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970 [*15 USCS § 78eee(a)(3)*], 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;

APPENDIX B

11 U.S.C. § 541. Property of the estate

(a) The commencement of a case under section 301, 302, or 303 of this *title [11 USCS § 301*, *302*, or *303*] creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:

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

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

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

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

APPENDIX C

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 363 of this *title [11 USCS § 363*], or that the debtor may exempt under section 522 of this *title [11 USCS § 522*], 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.

APPENDIX D

11 U.S.C. Rule 7001. Scope of Rules of Part VII.

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

(1) a proceeding to recover money or property, other than a proceeding to compel the debtor to deliver property to the trustee, or a proceeding under § 554(b) or *§ 725 of the Code*, *Rule 2017*, or *Rule 6002*;

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

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

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

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

(6) a proceeding to determine the discharge ability of a debt;

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

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

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

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

APPENDIX E

11 U.S.C. § 361. Adequate protection

When adequate protection is required under section 362, 363, or 364 of this *title [11 USCS § 362*, *363*, or *364*] of an interest of an entity in property, such adequate protection may be provided by--

(1) requiring the trustee to make a cash payment or periodic cash payments to such entity, to the extent that the stay under section 362 of this *title [11 USCS § 362*], use, sale, or lease under section 363 of this *title [11 USCS § 363*], or any grant of a lien under section 364 of this *title [11 USCS § 364*] results in a decrease in the value of such entity's interest in such property;

(2) providing to such entity an additional or replacement lien to the extent that such stay, use, sale, lease, or grant results in a decrease in the value of such entity's interest in such property; or

(3) granting such other relief, other than entitling such entity to compensation allowable under section 503(b)(1) of this *title [11 USCS § 503(b)(1)*] as an administrative expense, as will result in the realization by such entity of the indubitable equivalent of such entity's interest in such property.

APPENDIX F

11 U.S.C. § 503. Allowance of administrative expenses

(a) [omitted]

(b) After notice and a hearing, there shall be allowed, administrative expenses, other than claims allowed under section 502(f) of this title [11 USCS § 502(f)], 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 [11 USCS § 507(a)(8)]; 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 [11 USCS § 330(a)];

(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 [11 USCS § 303];

(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 [11 USCS § 1102], in making a substantial

contribution in a case under chapter 9 or 11 of this title [11 USCS §§ 901 et seq. or 1101 et seq.];

(E) a custodian superseded under section 543 of this title [11 USCS § 543], and compensation for the services of such custodian; or

(F) a member of a committee appointed under section 1102 of this title [11 USCS § 1102], 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 [11 USCS §§ 901 et seq.; 1101 et seq.], 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 title 28 [28 USCS §§ 1821 et seq.];

(7) with respect to a nonresidential real property lease previously assumed under section 365 [11 USCS § 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) [11 USCS § 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 title 5 [5 USCS § 551(1)]) 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 [11 USCS § 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]

APPENDIX G

11 U.S.C. § 704. Duties of trustee

(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 [11 USCS § 521(a)(2)(B)*];

(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;

(8) if the business of the debtor is authorized to be operated, file with the court, with the United States trustee, and with any governmental unit charged with responsibility for collection or determination of any tax arising out of such operation, periodic reports and summaries of the operation of such business, including a statement of receipts and disbursements, and such other information as the United States trustee or the court requires;

(9) make a final report and file a final account of the administration of the estate with the court and with the United States trustee;

(10) if with respect to the debtor there is a claim for a domestic support obligation, provide the applicable notice specified in subsection (c);

(11) if, at the time of the commencement of the case, the debtor (or any entity designated by the debtor) served as the administrator (as defined in section 3 of the Employee Retirement Income Security Act of 1974 [*29 USCS § 1002*]) of an employee benefit plan, continue to perform the obligations required of the administrator; and

(12) use all reasonable and best efforts to transfer patients from a health care business that is in the process of being closed to an appropriate health care business that--

(A) is in the vicinity of the health care business that is closing;

(B) provides the patient with services that are substantially similar to those provided by the health care business that is in the process of being closed; and

(C) maintains a reasonable quality of care.

(b) [Omitted]

(c) [Omitted