No. 18-0918

IN THE

Supreme Court of the United States

OCTOBER TERM, 2018

IN RE BACKSTREETS PLOWING, INC.,
Debtor,

STEVEN VIN SANT, CHAPTER 7 TRUSTEE
Petitioner,

v.

MILTON WEINBERG,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRTEENTH CIRCUIT

BRIEF FOR PETITIONER

Team Number P. 3
Counsel for Petitioner

QUESTIONS PRESENTED

1. Whether a secured creditor violates the automatic stay provision of 11 U.S.C. § 362(a)(3) by retaining collateral repossessed prior to the petition date despite the statute's prohibition against exercising control over property of the estate?

2. Whether a bankruptcy court may grant an administrative expense for substantial contribution in Chapter 7 cases when 11 U.S.C. § 503(b) only provides for substantial contribution claims in Chapter 9 and Chapter 11 cases?

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OPINIONS BELOW

The Bankruptcy Judge for the District of Moot entered an order over the Petitioner's objections approving of the Respondent's retention of repossessed collateral from the debtor following the debtor's petition and a substantial contribution administrative expense in favor of the Respondent. R. at 3. The Petitioner and Chapter 7 trustee ("Trustee"), Steven Vin Sant, appealed to the Bankruptcy Appellate Panel for the Thirteenth Circuit, which affirmed the ruling of the bankruptcy court. R. at 9. The Trustee appealed to the United States Court of Appeals for the Thirteenth Circuit, which again affirmed the bankruptcy court ruling in a split decision. R. at 21. The Supreme Court of the United States granted the 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 are reproduced in Appendices A through E.

11 U.S.C. § 362(a)

11 U.S.C. § 363(c)

11 U.S.C. § 363(e)

11 U.S.C. § 363(f)

11 U.S.C. § 503(b)

11 U.S.C. § 504(b)

11 U.S.C. § 542(a)

11 U.S.C. § 542(c)

11 U.S.C. § 542(d)

11 U.S.C. § 542(e)

STATEMENT OF THE CASE

Bankruptcy is a valuable tool that benefits all parties involved in the process. For struggling debtors, the Bankruptcy Code provides a lifeline that enables them to reorganize, restructure, and emerge stronger financially. For trustees, the Bankruptcy Code provides a mechanism that allows them to maximize the value of the bankruptcy estate and benefit all parties involved. While providing a system that protects the interests of creditors with a claim against the bankruptcy estate, the Bankruptcy Code also prevents other creditors from derailing the orderly process of repayment and reorganization. In this case, unfortunately, Respondent Milton Weinberg ("Weinberg") seeks to circumvent the rights of the debtor, the other creditors, and the protections afforded by the Bankruptcy Code in an effort to maximize his own interests.

The debtor, Backstreets Plowing, Inc. ("Backstreets"), operated a seasonal snow plow business and decided to expand its business by acquiring newer snow plow trucks. R. at 3. To finance this acquisition, Backstreets borrowed $450,000 (the "Note") from Weinberg. R. at 4. Weinberg took a security interest in the snow plows and acquired a personal guarantee from the sole shareholder of Backstreets, Christopher Clemons ("Clemons"). R. at 4. Following its receipt of the loan proceeds, Backstreets purchased the trucks in August 2015. R. at 4.

Backstreets then entered into a contract with the City of Badlands to plow the city streets for the 2015-2016 winter. R. at 4. Under the contract, Backstreets would receive payment at a flat rate, whether it snowed or not. R. at 5. Because the 2015-2016 winter was mild, Backstreets had a profitable winter season. R. at 5.

While Backstreet's first note payment was not due until December 2015, Weinberg and Clemons had a personal dispute in October 2015. R. at 4, 5. As a result, Backstreets did not make

payment on the Note in December. R. at 5. Weinberg filed suit on the Note in April 2016 and obtained a default judgment against Backstreets in October 2016. R. at 5. Backstreets' misfortune continued into the 2016-2017 winter when particularly severe weather hit the City of Badlands. Though Backstreets worked tirelessly to fulfill its contract, it nevertheless suffered heavy operating losses. R. at 5–6.

In January 2017, Weinberg initiated his collections efforts on the 2016 judgment and successfully repossessed Backstreets' snow plow trucks. R. at 6. The trucks were warehoused on Weinberg's property, where they remain today. R. at 6.

Due to Weinberg's repossession, Backstreets was crippled and unable to fulfill its contract with the City of Badlands. R. at 6. Facing a liquidity crisis, Backstreets filed a voluntary Chapter 11 petition on February 4, 2017. R. at 6. Immediately after filing the petition, Backstreets sent Weinberg a demand letter for the return of the snow plow trucks in hopes of resuming operations before the end of the winter season; however, Weinberg refused to return the trucks. R. at 6.

Backstreets, desperate to regain control of its essential operating assets, filed a motion with the bankruptcy court, arguing that Weinberg's retention of the snow plow trucks violated the automatic stay under 11 U.S.C § 362(a)(3). R. at 6. The bankruptcy court, though acknowledging the "close call," held that Weinberg's retention of the trucks was not a violation of the automatic stay. R. at 6.

Backstreets promptly appealed the decision of the bankruptcy court, but with the winter season coming to a close, and the inability to perform the city contract, Backstreets recognized

that reorganization had become futile and voluntarily converted to a Chapter 7 proceeding. R. at 7. Following the conversion, the appeal was delayed to allow the Trustee time to prepare. R. at 7.

In the meantime, Weinberg decided to conduct a creditors' examination of Clemons without contacting the Trustee. R. at 7. Weinberg ultimately discovered that Backstreets had made transfers of approximately $100,000 to Clemons' daughter in May 2016 — shortly after the filing of Weinberg's initial collection suit. R. at 7.

Weinberg informed the Trustee of these transfers, and the Trustee filed a complaint against Clemons' daughter to avoid and recover the transfers. R. at 7. This complaint ultimately resulted in a settlement whereby the estate would recover $75,000. R. at 7. In the course of his investigation, Weinberg incurred $25,000 in legal fees. R. at 7. In an effort to extract that money from the estate, Weinberg moved for an allowance of a substantial contribution administrative expense under 11 U.S.C. § 503(b)(3)(D). R. at 7.

The Trustee opposed the allocation of a substantial contribution administrative expense on the grounds that such claims are impermissible in a Chapter 7 case. R. at 7. However, the bankruptcy court approved the expense and the Trustee appealed. R. at 7.

In September 2017, while both appeals were pending, Tenth Avenue Freeze, Inc. ("Tenth Avenue") — one of Backstreets' competitors — offered to purchase substantially all of Backstreets' assets. R. at 8. The offer was contingent on the Trustee quickly regaining control of the repossessed trucks. R. at 8. The Trustee, recognizing that this sale would maximize value for all of Backstreets' creditors, vigorously pursued negotiations with Weinberg. R. at 8. Weinberg flatly refused to release the trucks to the Trustee. R. at 8.

By November 2017, with the purchase offer and the weather turning cold, Tenth Avenue withdrew its proposal. R. at 8. In January 2018, Stone Pony Plowing, LLC ("Stone Pony"), another of Backstreets' competitors, swooped in and offered $100,000 less for Backstreets' remaining assets. R. at 8. The Trustee, hampered by Weinberg's refusal to turn over the trucks, and recognizing that winter would soon be over, agreed to the Stone Pony sale. R. at 9. The sale was consummated in February 2018. R. at 9.

The Trustee, stymied in his efforts to maximize the bankruptcy estate by Weinberg, continued his appeals in hopes of recovering damages on behalf of the estate and to prevent any outflow for the substantial contribution claim. R. at 9. The bankruptcy appellate panel consolidated both appeals and affirmed on both issues. R. at 9. The Trustee then appealed to the Thirteenth Circuit Court of Appeals. R. at 9. In a split decision, the circuit court affirmed the lower courts, holding that (1) Weinberg's retention of the trucks did not violate the automatic stay and (2) the absence of Chapter 7 language in 11 U.S.C. § 503(b)(3) did not preclude the court from granting a substantial contribution administrative expense in a Chapter 7 case. R. at 16, 21.

SUMMARY OF THE ARGUMENT

To the relief of secured creditors everywhere, the court below has both read language into the Bankruptcy Code that is absent and read language out of the Bankruptcy Code that is present, all under the guise of its equitable power. As a result, the court below has deprived the Backstreets, and subsequently the Trustee, of valuable estate property and their opportunity to maximize the value of the bankruptcy estate. The court below further undercut the value of the bankruptcy estate.

First, Weinberg's retention of the snow plow trucks violated the automatic stay under 11 U.S.C. § 362(a)(3) despite the fact that Weinberg properly seized the trucks prepetition. Congress provided the automatic stay mechanism so that a debtor's property can be accumulated and protected for the benefit of all creditors and provided the turnover mechanism to force creditors to return estate property. To that end, Congress has provided sweeping language preventing creditors from "exercising control over estate property." Weinberg's retention of the snow plow trucks constituted such an exercise of control under the clear language of the Bankruptcy Code because his retention was in violation of the duties imposed by the Code and his retention constituted an affirmative act. Additionally, such an interpretation is consistent with the legislative history of section 362 and its purpose.

Moreover, section 542(a) is self-executing and required Weinberg to return the snow plow trucks after Backstreets initiated the bankruptcy proceeding. While the court below may be willing to turn a blind eye to the language of section 542, this Court has recognized that the "shall" in section 542 imposes a mandatory duty on creditors in possession of estate property and the tenets of statutory construction support the mandatory interpretation.

A self-executing section 542 is consistent with the purpose of the automatic stay — to get property back into the hands the debtor or trustee so that the debtor or trustee can make use of the property to maximize the value of the bankruptcy estate. If section 542(a) were not self-executing, a debtor or trustee would be forced to initiate countless adversarial proceedings to recover property while the value of the bankruptcy estate is left to dwindle.

Finally, the court below erroneously reads language into the Code by holding that adequate protection may act as an exception to the duty imposed by section 542. Congress has

provided three instances in which the duty to turnover estate property is limited and adequate protection is not included. Therefore, Weinberg's duty to turn over the trucks could not be conditioned on a request of adequate protection.

Second, substantial contribution administrative claims are not allowed in a Chapter 7 proceeding, yet the court below had disregarded the limitations Congress placed on section 503(b)(3)(D) and allowed such a claim in this case. Congress has provided a clear blue print for the courts to follow and no statutory interpretation is required as Congress has demonstrated its ability throughout the code to limit a sections applicability. There is no reason to ignore Congress' limitation in this case.

The court below places too much weight on the word "including" in section 503(b) and in doing so, renders portions of section 503(b) superfluous. The word "including" can be found several times throughout section 503(b) and by applying the first "including" to each sub-subsection of 503(b), the court below renders each subsequent "including" meaningless. Furthermore, such a general interpretation ignores more specific, limiting provisions found in section 503(b)(3)(D). Therefore, this Court should only apply the word "including" to the sub-subsection in which it can be found.

Additionally, allowing substantial contribution claims in a Chapter 7 proceeding ignores the practical differences between a Chapter 9 or 11 proceeding and a Chapter 7 proceeding. Creditors serve a useful role in the Chapter 9 and 11 contexts in ferreting out valuable claims for the estate when the debtor-in-possession may lack the motivation to do the same. In the Chapter 7 context, a trustee is already motivated to uncover the estate's claims and creditor involvement would be duplicative and wasteful.

Despite the minority view adopted by the court below, most courts confronted with this issue have interpreted section 503(b)(3)(D) as written and construed the breadth of administrative claims narrowly. Of course, bankruptcy courts are courts of equity, but this Court has made clear that a bankruptcy court cannot contravene the Bankruptcy Code. Therefore, the court below overstepped when relying on equitable powers to grant a substantial contribution claim in a Chapter 7 proceeding.

Finally, even if this Court decides that substantial contribution claims have a place in a Chapter 7 proceeding, Weinberg is not entitled to such a claim in this case. A substantial contribution is one that is necessary to add value to the estate, such that the claimant's actions were absolutely needed to add value to the estate. Weinberg's contribution was not necessary as the Trustee was capable of recovering these funds without Weinberg's assistance. Therefore, granting a substantial contribution claim in this case would not be appropriate.

ARGUMENT

An appellate court reviews a bankruptcy court's findings of fact for clear error and conclusions of law de novo. *Chase Manhattan Mortg. Corp. v. Shapiro (In re Lee)*, 530 F.3d 458, 463 (6th Cir. 2008). Here, the Trustee raises two legal questions: (1) whether retention of property repossessed prior to the bankruptcy petition constitutes a violation of the automatic stay under section 362 and (2) whether the Bankruptcy Code authorizes substantial contribution administrative expenses in a Chapter 7 case. R. at 3. Therefore, the Court's standard of review is de novo. When a court reviews an issue under a de novo standard of review, it gives no deference to the holding of the lower court. *Franklin v. INS*, 72 F.3d 571, 577 (8th Cir. 1995).

I. By Retaining the Snow Plow Trucks and Failing to Turn Them over to the Trustee, Weinberg Violated the Automatic Stay.

Sections 542(a) and 362(a)(3) work in conjunction to further the goals of bankruptcy. Together, these provisions consolidate the debtor's property, protect it from independent dispersion by creditors, and ensure a fair distribution amongst the debtor's creditors. A goal of bankruptcy is the fair and orderly repayment of debts to numerous creditors.

First, section 362 prohibits creditors from "exercis[ing] control over property of the estate," any assets that form part of the bankruptcy estate must be turned over to the trustee. In this case, the parties do not dispute that the trucks are part of the bankruptcy estate. Thus, Weinberg's retention of the trucks is an exercise of control over estate property that violates the plain language of section 362(a)(3). Furthermore, finding that Weinberg's retention violated the automatic stay is consistent with the purpose of section 362 and the goals of the Bankruptcy Code. Therefore, Weinberg's retention of the trucks violated the automatic stay.

Second, section 542(a) states that anyone "in possession, custody, or control" of estate property "shall deliver [such property] to the trustee." 11 U.S.C. § 542(a) (2018). Because the mandatory language of section 542(a) makes the provision self-executing, no turnover action was required to compel Weinberg to return the snow plow trucks. Both the plain language of section 542 and the underlying policies of the Bankruptcy Code demonstrate Congress' intent to make section 542 self-executing. Moreover, none of the exceptions to section 542 apply in this case. Therefore, section 542 required Weinberg to turn over the trucks to the Trustee.

A. Weinberg Violated the Automatic Stay by Retaining Possession of the Trucks.

Passive retention of a debtor's assets violates the automatic stay under the plain language of the Bankruptcy Code. Section 362(a)(3) prevents a creditor from either (1) acting to obtain

possession of estate property or (2) exercising control over estate property. 11 U.S.C. § 362 (2018). Weinberg's retention of the trucks is a violation of a duty to turnover estate property and it is an affirmative act within the meaning of section 362. Therefore, Weinberg's retention of the trucks violated the automatic stay.

Moreover, treating Weinberg's retention of the snow plow trucks as a violation of the automatic stay is consistent with the purpose of section 362(a)(3). Section 362(a)(3) prevents the dismemberment of the estate by precluding creditors from controlling property of the state, so that liquidation can proceed in an orderly fashion. S. REP. NO. 95-989 at 50 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 5787, 5836. Furthermore, it shields debtors from financial pressure during the pendency of the bankruptcy. *In re Stringer*, 847 F.2d 549, 551 (9th Cir. 1988). Allowing Weinberg to retain the snow plow trucks hampers the collection efforts of other creditors and exerts significant financial stress on Backstreets. Therefore, Weinberg's retention was a violation of the automatic stay.

1. Failure to Turnover Estate Property Constitutes Action.

Under the plain language of the Bankruptcy Code, a creditor's passive retention of a debtor's assets violates section 362(a)'s automatic stay. Section 362(a)(3) prevents a creditor from exercising control over property of the estate. 11 U.S.C. § 362(a) (2018). Weinberg's retention of the trucks constitutes an "act" and an "exercise of control." Thus, Weinberg violated section 362 by maintaining possession of the trucks on his property during the pendency of the bankruptcy.

The court below relied on the minority rule in holding that the retention of lawfully repossessed property is not a violation of the automatic stay. R. at 22. Specifically, the court

below held that the word "act" in section 362(a)(3) required affirmative conduct on the part of Weinberg to constitute a violation of the automatic stay. R. at 10. However, to interpret the word "act" within section 362(a) to require an affirmative action on the creditor's part would rob the automatic stay of its effectiveness. *Rutherford. v. Auto Cash, Inc. (In re Rutherford)*, 329 B.R. 886, 896 (Bankr. N.D. Ga. 2005). Merely sitting back and failing to return estate property when the Bankruptcy Code imposes an obligation to do so constitutes "exercising control" over property of the bankruptcy estate within the meaning of section 362(a). *Id.*

In *Rutherford*, a secured creditor repossessed the debtor's car pre-petition. *Id.* at 889. Following the filing of a Chapter 13 petition, the debtor notified the creditor of the petition and made a demand for return of the vehicle. *Id.* There was no dispute that the repossessed vehicle was property of the estate. *Id.* Nevertheless, the creditor refused to return the vehicle. *Id.*

The *Rutherford* court reasoned that by merely sitting back and failing to act when the Bankruptcy Code imposed an obligation to act, the creditor was "exercising control" over property of the bankruptcy estate within the meaning of section 362(a). *Id.* This duty to act arises out of section 542, which imposes an obligation on a party holding estate property to turnover such property. *See infra* Section I, Part B.

Here, Weinberg's failure to comply with the Bankruptcy Code is identical to the inaction of the *Rutherford* creditor. Both Weinberg and the *Rutherford* creditor seized estate property pre-petition. Both received notice of the bankruptcy and a demand for return of the repossessed property. Yet despite these notices, both creditors chose to maintain control over the estate property. Thus, Weinberg's passive retention of the trucks constituted an "act" or "exercise of control" within the meaning of section 362, and consequently violated the automatic stay.

2. Even if an Affirmative Act is Required to Violate Section 362(a)(3), Retaining Estate Property Constitutes an Affirmative Act Under Section 362(a)(3).

Even if the Court finds that an affirmative act is required to violate the automatic stay and inaction, alone, will not suffice, a refusal to turn over estate property constitutes an affirmative act. Thus, Weinberg's decision to maintain possession of the trucks despite requests to return them violated the automatic stay.

The automatic stay is fundamental to the reorganization process, and its scope is intended to be broad. *See* H.R. REP. NO. 95-595 at 340 (1977), *as reprinted in* 1978 U.S.C.C.A.N. 5963, 6296–97; *e.g. Small Bus. Admin. v. Rinehart*, 887 F.2d 165, 168 (8th Cir. 1989). Thus, to give the automatic stay its broad affect, the Court should interpret what constitutes an action under section 362 broadly.

In *Small Business Administration v. Rinehart*, the debtor farmer defaulted on an SBA loan. *Small Bus. Admin.,* 887 F.2d at 167. As a result, the SBA instructed the USDA to set off future agricultural payments due to the debtor in the amount of the SBA loan deficiency, but a few days later, the SBA informed the USDA to cancel the request in an effort to work out a settlement. *Id.* Shortly thereafter, the debtor filed for bankruptcy. *Id.* Following the bankruptcy petition, the USDA delivered the deficiency setoff to the SBA. *Id.*

Despite rescinding its earlier instructions, the SBA refused to turn over the funds to the debtor but did not apply the funds to the debtor's loan balance either. *Id.* The SBA argued that its actions did not violate the automatic stay because its "administrative hold" did not constitute an action exercising control of the property. *Id.* at 168. The court disagreed and held that a government agency violates the automatic stay when it "holds" or "freezes" payments the debtor

is otherwise entitled to receive. *Id.* The court reasoned that a "hold" is an act exercising control because it denies the debtor access to funds which may be critical to the debtor's survival. *Id.*

Here, Weinberg's retention of the snow plow trucks was a greater exercise of control than the SBA's "hold" on funds owed to the debtor. The snow plow trucks were critical to Backstreets survival, yet Weinberg not only denied Backstreets access to the trucks, Weinberg intended to maintain control of the trucks. Thus, if the SBA's passive retention of funds, which it did not intend to receive, is considered an affirmative act exercising control, then Weinberg's intentional retention of the repossessed property must also be an affirmative act exercising control.

3. Holding that Passive Retention of Property Seized Pre-Petition Violates the Automatic Stay Is Consistent with Section 362(a)(3)'s Legislative History and the Bankruptcy Code's Purpose.

Section 362(a)(3)'s legislative history and its purpose provides further support for this Court to find that passive retention of estate property constitutes a violation of the automatic stay. First, the legislative history of section 362(a)(3) reveals that Congress expanded the reach of the automatic stay to prevent more than mere "acts to obtain possession of estate property." *Weber v. SEFCU (In re Weber)*, 719 F.3d 72, 80 (2d Cir. 2013). Second, the overall purpose of section 362(a)(3) is to ensure a fair distribution of the estate property amongst the creditors. *Lincoln Sav. Bank, FSB v. Suffolk Cty. Treasurer (In re Parr Meadows Racing Ass'n)*, 880 F.2d 1540, 1545 (2d Cir. 1989). Allowing a creditor to retain estate property prevents an orderly and fair distribution. Therefore, the Court should find that passive retention of estate property violates the automatic stay.

a. Congress Expanded Section 362(a)(3) to Prohibit Retention of Estate Property

In a 1984 amendment to the Bankruptcy Code, the phrase "to exercise control over property of the estate" was added in section 362(a)(3). *In re Weber*, 719 F.3d at 80; *see California Employment Dev. Dep't v. Taxel (In re Del Mission Ltd.)*, 98 F.3d 1147, 1151 (9th Cir. 1996). Prior to that amendment, section 362(a)(3) was limited to "acts to obtain possession" of estate property. *In re Weber*, 719 F.3d at 80. The fact that Congress expanded the provision to prohibit conduct beyond obtaining possession of an asset suggests that Congress intended to prevent creditors from retaining property of the debtor. *Id.*

The court below reasoned that this change was aimed at expanding section 362(a)(3) to cover property that cannot be possessed, such as intangible property. R. at 15. However, this construction would require giving the word "property" two different definitions within the same subsection. The court below interprets the "property" contained within the first clause — "any act to obtain possession of property" — as any property of the estate as defined by section 541. R. at 15. Conveniently, the court below then interprets the word "property" contained within the third clause — ". . . to exercise control over property of the estate" — as intangible claims, only, instead of using the more expansive definition provided by section 541. R. at 15.

Where Congress uses identical words in different parts of the same act, it is presumed that the words are intended to have the same meaning. *Sullivan v. Stroop*, 496 U.S. 478, 484 (1990). The lower court's interpretation of section 362(a)(3) is in direct conflict with this presumption. Thus, absent an indication to the contrary, Congress likely did not intend for the word "property" to take on different meanings within the same provision. *Bank of Am., N.A. v. Caulkett*, 192 L. Ed. 2d 52, 56 (2015) ("[T]he normal rule of statutory construction [is] that

identical words used in different parts of the same act are intended to have the same meaning."). The more logical interpretation is that Congress intended the word "property" to have the same meaning throughout section 362(a)(3). Thus, the phrase "exercising control" extends to all property, not just intangible property that cannot be possessed.

b. Prohibiting the Retention of Estate Property by a Creditor Furthers the Code's Purpose.

The automatic stay serves the twin purposes of protecting the debtor and all the creditors of the estate. *In re Holtkamp*, 669 F.2d 505, 508 (7th Cir. 1982). "Without [the automatic stay], certain creditors would be able to pursue their own remedies against the debtor's property. Those who acted first would obtain payment of the claims in preference to and to the detriment of other creditors." H.R. REP. NO. 95-595 at 340–41 (1977), *as reprinted in* 1978 U.S.C.C.A.N. 5963, 6296–97.

In *In re Holtkamp*, the debtor was sued in a personal injury action and subsequently filed bankruptcy. *In re Holtkamp*, 669 F.2d at 507. The plaintiff in the personal injury suit sought and received an order from the bankruptcy court lifting the stay so that the suit could proceed to judgment. *Id.* The debtor appealed and argued that the personal injury suit should remain subject to the stay as it would allow the plaintiff to gain a superior position over other creditors. *Id.* at 508. The Seventh Circuit, affirming the bankruptcy court, reasoned that the stay was not appropriate because the personal injury suit did not connect to or interfere with the bankruptcy proceeding and did not prejudice the estate. *Id.* Therefore, conduct that does prejudice the estate is properly subject to the automatic stay.

Weinberg's prepetition repossession and post-petition retention of the snow plow trucks is unlike the *Holtkamp* personal injury suit — it interfered with the bankruptcy proceeding by

giving Weinberg a superior position over other creditors and preventing the Trustee from maximizing the value of the estate. Tenth Avenue was willing to purchase substantially all of the debtor's assets, but its offer was contingent on obtaining the snow plow trucks. R. at 8. Due to Weinberg's refusal to turn over the trucks, the Tenth Avenue deal disintegrated, damaging the value of the estate. R. at 8. Because Weinberg's retention of the trucks was prejudicial to the estate, the retention is a proper subject of the automatic stay.

B. Section 542(a) Is Self-Executing and Required Weinberg to Turn Over the Trucks.

If a creditor has estate property that the Trustee may sell or lease, section 542(a) requires the creditor to deliver that property to the Trustee. 11 U.S.C. § 542(a) (2018). While section 542(a) does not explicitly state that it is self-executing, statutory construction compels the conclusion that section 542(a) is self-executing and mandatory.

Furthermore, the Bankruptcy Code seeks to relieve the debtor from financial pressure and provides a method for reorganization and debt repayment. S. REP. NO. 95-989 at 55 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 5787, 5841. To further this goal, section 542(a) must be self-executing so that the debtor can quickly and inexpensively regain possession of the assets needed to repay debts. Lastly, Congress provided three clear exceptions to the automatic turnover of section 542. None of those exceptions apply in this case. Thus, once Backstreets filed its bankruptcy petition, section 542(a) required Weinberg to turn over the trucks to the Trustee.

1. Statutory Construction Requires that Section 542 is Self-Executing.

Statutory construction mandates that the Court hold section 542 to be self-executing based on (1) Congress' word choice in crafting section 542(a) and (2) Congress's decision to omit a mechanism for court intervention.

Courts can apply unambiguous statutes as written. *Yates v. United States*, 354 U.S. 298, 305 (1957). However, when a statute's language creates an ambiguity in the statute's meaning, the Court must use statutory construction to determine Congressional intent. *Id.* An ambiguity exists when a statute is capable of being understood by reasonable, well-informed persons in two or more senses. *Allen v. Geneva Steel Co. (In re Geneva Steel Co.)*, 281 F.3d 1173, 1178 (10th Cir. 2002). Here, a circuit split exists as to the interpretation of section 542(a) and whether it is self-executing. *In re Denby-Peterson*, 576 B.R. 66, 80 (Bankr. D.N.J. 2017). Therefore, there is an ambiguity and the Court must employ statutory construction to resolve it.

a. Congress' Word Choice Indicates Section 542(a) Is Self-Executing.

The use of the word "shall" rather than "may" in a statute indicates a mandatory duty. *Kingdomware Techs., Inc. v. United States*, 136 S.Ct. 1969, 1977 (2016); *see United States ex rel. Siegel v. Thoman*, 156 U.S. 353, 359–60 (1895). This word choice was ignored by the court below, and in doing so the court ignored this Court's decision in *United States v. Whiting Pools, Inc.*[1]

In *Whiting Pools*, the Internal Revenue Service seized the debtor's property to satisfy a tax lien. 462 U.S. at 198–99. The debtor filed for bankruptcy following that seizure and demanded return of the property. *Id.* at 200–01. This Court addressed whether section 542(a) authorized the turnover of property repossessed prepetition. *Id.* at 202. In holding that section 542(a) did extend to property seized prepetition, this Court stated: "[section 542(a)] *requires* an entity (other than a custodian) holding any property of the debtor that the trustee can use under section 363 to turn that property over to the trustee." *Id.* at 205 (emphasis added). Therefore, this Court has found section 542(a) to be a mandatory, not a discretionary, provision.

[1] 462 U.S. 198 (1983)

b. Congress Did Not Provide a Mechanism for Court Intervention Under Section 542(a).

Additionally, Congress did not include any mechanism for court intervention in section 542(a) as it did in other subsections of section 542, demonstrating that court action would not be required to effectuate the provisions of section 542(a).

A principle of statutory construction is that a court cannot omit or add to the plain meaning of a statute or presume that the legislature failed to state something other than what was plainly stated. *Adam Sommerrock Holzbau, GmbH v. United States*, 866 F.2d 427, 429 (Fed. Cir. 1989). For example, in section 542(e) Congress provided that the court *may* require turnover of estate property only *after notice and a hearing*. 11 U.S.C. § 542(e) (2018). Conversely, section 542(a) states that an entity in possession of estate property *shall* deliver the property to the trustee. 11 U.S.C. § 542(a) (2018). If Congress had intended to require court intervention before a debtor could demand a turnover, it could have expressly provided for that in the statute. *See Adam Sommerrock Holzbau, GmbH*, 866 F.2d at 429.

By refusing to read section 542(a) as self-executing and mandatory, the court below has added language that Congress is presumed to have intentionally left out. Specifically, the court below read section 542(a) to require notice and a hearing as a prerequisite to turnover, but that is simply not what the statute says. Therefore, the omission of a mechanism for court intervention indicates that section 542(a) is not self-executing.

2. Finding That Section 542 Is Self-Executing Is Consistent with the Bankruptcy Code's Reorganizational Purpose

The underlying policy of a bankruptcy proceeding is to allow the debtor to reorganize and repay the majority of its debts without having to liquidate its assets, and the ability to utilize its

productive assets is essential to this goal. *Thompson v. GMAC, LLC*, 566 F.3d 699, 705 (7th Cir. 2009). If the debtor is deprived of assets held by secured creditors, it could hamper the debtor's ability to generate the funds necessary to pay off its debts. *Id.* at 707.

Of course, as the court below pointed out, a debtor could pursue an adversarial proceeding to recover such property. R. at 12. Though this rationale seems sensible in bankruptcy cases involving very few assets, its application becomes untenable in situations where the debtor has far more assets and creditors. Requiring a debtor to seek court relief to retrieve every asset in the hands of a secured creditor runs counter to the purposes of the Bankruptcy Code, since debtors would have to bring a myriad of actions against its creditors. *Thompson*, 566 F.3d at 707. This requirement would not only be costly, but time-consuming as well. The added expense and lost time of these actions would hurt both the debtor and the secured creditors, because the debtor would spend more time without its productive assets and legal expenses would devour the estate. *See id.* If the section 542(a) turnover was self-executing, however, the estate assets could be consolidated in a more efficient and cost-effective manner. *Id.* Furthermore, actions related to the estate assets could be consolidated to further alleviate the debtor's expenses. *Id.* Thus, treating section 542(a) as a self-executing provision furthers the policies underlying the Bankruptcy Code.

By contrast, the reasoning of the court below elicits nonsensical results for even single-asset debtors. For example, in *Thompson v. GMAC, LLC*, the debtor's car was repossessed on January 24, 2008. *Id.* at 701. On February 5, 2008, the debtor filed for bankruptcy. *Id*. Immediately following his bankruptcy filing, the debtor demanded a return of his vehicle because he needed it for his commute to work. *Id.* The creditor refused to return the car, and the debtor was forced to initiate an adversarial proceeding to get his car back. *Id.* The final appeal in

that proceeding did not conclude until May 2009. *Id.* Thus, for over a year the debtor was without the car he needed to get to work. *Id.* at 699. Rather than leaving debtors without productive assets for the duration of litigation, requiring an automatic turnover of repossessed assets under section 542(a) would better serve bankruptcy policy.

3. Section 363(e) Does Not Provide an Exception to the Turnover Requirement of Section 542(a).

As mentioned earlier, section 542 provides that turnover is limited in three situations: (1) when the property is of inconsequential value or benefit to the estate; (2) when the holder of the property has transferred it in good faith without knowledge of the petition; or (3) when the transfer of the property is automatic to pay a life insurance premium. *Whiting Pools, Inc.*, 462 U.S. at 206 n.12; 11 U.S.C. § 542(a), (c), (d) (2018). Notably absent from this list is section 363(e), which the court below read into the list of exceptions. R. at 13. This addition is misguided. Section 363(e) cannot be a condition of section 542(a). First, the language of section 363 limits a debtor or trustee's possession of estate property, but it does not act as a condition to the debtor or trustee's possession. Second, it is not inequitable to require turnover prior to adequate protection.

a. Section 363(e) Acts as a Limit to the Trustee's Possession of Estate Property, Not a Condition.

Treating section 363(e) as an exception to section 542(a) would condition turnover on a creditor's approval of the adequate protection offered, but this is not what Congress intended. *See TranSouth Fin. Corp. v. Sharon (In re Sharon)*, 234 B.R. 676, 685 (B.A.P. 6th Cir.1999. Adequate protection under section 363(e) is a limit to a debtor or trustee's right to use estate

property that must be invoked by the creditor, not a prerequisite to a debtor or trustee's possession of such property. *Id.* at 684. The relevant part of section 363(e) reads:

> 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.

11 U.S.C. § 363(e) (2018). The protection sought by the creditor under this provision is from the trustee's use, sale or lease of the property. But there would be no need for such protection if the trustee was not in possession of that property, because a trustee could not use, sell or lease property not in its possession. Thus, there is no limitation for the creditor to invoke if the debtor or trustee is not in possession of the property.

In other subsections of section 363, Congress clearly conditions a debtor or trustee's right to possession or use of the property on adequate protection. In section 363(c), Congress carves out "cash collateral" from the section 363(e) framework and requires adequate protection of such collateral without a request being made by the creditor. 11 U.S.C. § 363(c) (2018). In other words, adequate protection trumps the debtor's or trustee's right to use estate property with a lien holder's right to adequate protection, but only with respect to cash collateral. *In re Sharon*, 234 B.R. at 684. Because the snow plow trucks are not cash collateral, Weinberg's right to adequate protection cannot be a prerequisite to turning over the trucks. Until the Trustee is in possession of the snow plow trucks, Weinberg does not need adequate protection.

b. Conditioning Turnover on Adequate Protection Is Inequitable.

Finally, it is not inequitable to require secured creditors to immediately turn over collateral before a determination of adequate protection is made; in fact, it is inequitable to do

the opposite. Congress has provided a mechanism by which a creditor can quickly seek adequate protection upon turnover of the property. 11 U.S.C. § 363(f) (2018); *In re Sharon*, 234 B.R. at 685. The relevant part of section 363(f) reads:

> Upon request of a party in interest, the court, with or without a hearing, shall grant such relief from the stay provided under subsection (a) of this section as is necessary to prevent irreparable damage to the interest of an entity in property, if such interest will suffer damage before there is an opportunity for notice and a hearing under subsection (d) or (e) this section.

11 U.S.C. § 363(f) (2018). If a creditor is concerned that its interest in estate property will be adversely affected before the creditor is able to seek adequate protection under section 363(e), Congress provided the expedited process in section 363(f). *In re Sharon*, 234 B.R. at 685. The Bankruptcy Code does not offer the creditor the option of simply refusing to turn over the property or condition turnover on adequate protection. *Id.*

On the other hand, if a creditor is free to ignore these provisions and demand adequate protection, to its subjective satisfaction, as a condition of turnover, the bargaining power is unfairly tipped in favor of that particular creditor. *Thompson*, 566 F.3d at 707. By allowing a creditor to hold property hostage and negotiate a better security package for itself, the creditor can place itself in a position above other secured creditors. *Id.* Thus, it would be inequitable to allow Weinberg to hold the snow plow trucks captive at the expense of other creditors. Instead, this Court should require Weinberg to follow the procedures provided by Congress and require him to seek his adequate protection after turning over the estate property.

II. Substantial Contribution Administrative Expenses Are Not Permitted in Chapter 7 Proceedings.

"Rather than rewriting the law under the pretense of interpreting it, the Court should [leave] it to Congress to decide." *King v. Burwell*, 135 S. Ct. 2480, 2506 (2015) (Scalia, Thomas

and Alito, JJ., dissenting). The court below stepped into the shoes of Congress and attempted to rewrite the law. Section 503(b)(3)(D) of the Bankruptcy Code permits "administrative expenses…incurred by…a creditor…in making a substantial contribution in a case under chapter 9 or 11." 11 U.S.C § 503(b) (2018). Despite the clarity of this language, the court below rewrote section 503(b)(3)(D) to include substantial contributions in cases under Chapter 7. This Court should reverse the court below because (1) the language of section 503 unambiguously prohibits substantial contribution claims in Chapter 7 proceedings; (2) the lower court's reliance on the word "including" in section 503(b) is misguided; (3) including substantial contribution claims in Chapter 7 proceedings does not further the policies of the Bankruptcy Code; (4) the decision in *Connally*, which represents the minority view, is not persuasive in this case; and finally, (5) even if the Court allows substantial contribution claims in the Chapter 7 context, Weinberg is not entitled to one.

A. The Plain Language of Section 503(b)(3)(D) Is Unambiguous and Controls this Issue.

This Court should give effect to section 503(b)(3)(D) as written because Congress' intent to exclude substantial contribution claims from Chapter 7 proceedings is clear. Moreover, a strict interpretation of this section does not lead to absurd results, as there is a clear policy objective in limiting substantial contribution claims. Therefore, the plain language of section 503(b)(3)(D) controls this issue.

1. Congress Clearly Intended to Exclude Substantial Contribution Claims from Chapter 7 Proceedings.

Section 503(b)(3)(D) unambiguously limits substantial contribution administrative expenses to Chapters 9 and 11 proceedings. 11 U.S.C. § 503(b) (2018). Thus, there is no need to

engage in statutory construction of section 503(b)(3)(D). When the statute's language is clear, the sole function of the courts is to enforce it according to its terms, unless such a disposition leads to absurd results. *Lamie v. U.S. Trustee*, 540 U.S. 526, 534 (2004). If Congress intended substantial contribution administrative claims to extend to Chapter 7, it would have done so expressly.

Congress has demonstrated its intent throughout the Bankruptcy Code to expressly limit provisions to certain chapters or procedures. For example, section 303(a) states: "An involuntary case may be commenced only under chapter 7 or 11 of this title. . . " 11 U.S.C. § 303(a) (2018). The court below nevertheless ignores Congress' clear intent by reading section 503(b)(3)(D) to include Chapter 7.

Furthermore, Congress has demonstrated its ability to provide for authorized reimbursement of expenses in Chapter 7 proceedings in other subsections of section 503(b). *See, e. g.*, 11 U.S.C. 503(b)(3)(B) and (C) (2018). The court below claimed that Congress left Chapter 7 out of section 503(b)(3)(D) merely because it is uncommon for a creditor to make such a claim in Chapter 7 proceedings. R. at 19. Rather than supporting the lower court's reading of the statute, this reasoning supports the conclusion that Congress *intentionally* excluded Chapter 7 from section 503(b)(3)(D). *Hyundai Translead, Inc. v. Jackson Truck & Trailer Repair, Inc. (In re Trailer Source, Inc.)*, 555 F.3d 231, 243 (6th Cir. 2009) (finding that Congress' omission of Chapter 7 from section 503(b)(3)(D) was not a mere oversight, but an intentional decision by Congress). It is beyond this Court's province to change the meaning of a statute to what the Court might think is the preferred result. *Lamie*, 540 U.S. at 542.

Finally, the legislative history of section 503(b)(3)(D) reveals that Congress' omission of Chapter 7 was intentional. Senate Bill 236, one of the earliest versions of the Bankruptcy Act,

did not provide for substantial contribution claims in Chapter 7 proceedings. S. 236, 94th Cong. § 4-403(a)(8), (9) (1975); *Mediofactoring v. McDermott (In re Connolly N. Am., LLC)*, 802 F.3d 810, 821 (6th Cir. 2015) (O'Malley, J., dissenting). Later versions of the bill — H.R. 8200, 95th Cong. (1978); H.R. 7330, 95th Cong. (1977); S. 2266, 95th Cong. (1978) (amended); and S. 2266, 95th Cong. (1977) — continued to leave out Chapter 7 proceedings from substantial contribution reimbursements. *In re Connolly N. Am., LLC*, 802 F.3d at 822 (O'Malley, J. dissenting). Therefore, Congress' intent to omit reimbursements for substantial contribution claims in Chapter 7 cases is clear and this Court must apply the law as written.

2. Applying Section 503(b)(3)(D) as Written Does Not Lead to Absurd Results.

Excluding substantial contribution administrative expenses from Chapter 7 proceedings does not lead to absurd results. Thus, this Court should apply the statute as written.

Interpretations of a statute that would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available. *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982). In rare cases, courts have had to address provisions of the Bankruptcy Code that, when literally applied, would produce absurd results. *See In re R.L. Adkins Corp.*, 505 B.R. 770, 775 (Bankr. N.D. Tex. 2014).

One such absurd result pertains to the interplay of subsections 503(b)(3) and 503(b)(4). *Law Offices of Wake v. Sedona Inst. (In re Sedona Inst.)*, 220 B.R. 74, 78 (B.A.P. 9th Cir. 1998). In *In re Sedona Institute*, the Bankruptcy Appellate Panel for the Ninth Circuit addressed whether a creditor needs to incur an expense other than attorney's fees as a prerequisite to an award of a substantial contribution claim under section 503(b). *Id.* at 75. This issue arose out of the language of section 503(b)(4) which states: "reasonable compensation for professional services rendered by an attorney or an accountant of an entity whose expense is allowable under

paragraph (3) of this subsection . . . ."11 U.S.C. § 503(b)(4); *In re Sedona Inst.*, 220 B.R. at 77. The court recognized that a strict reading of the statute precluded recovery of attorney's fees if the claimant incurred no redeemable expenses under section 503(b)(3); however, the court found that interpretation absurd. *In re Sedona Inst.*, 220 B.R. at 78–79. Specifically, the court reasoned that it made no sense to allow a claimant who incurred the cost of sending a letter to his attorney (redeemable under section 503(b)(3)) to recover his attorney's fees, while a claimant who chose to call his attorney, at no expense, to be precluded from recovering his attorney's fees. *Id.* at 79. The court could not find any reason for Congress to intend such a distinction and held that a strict interpretation of these provisions would lead to absurd results and opted for a more liberal reading of the statute. *Id.* at 80.

Here, interpreting section 503(b)(3)(D) as written does not lead to absurd results because Congress had a reason for omitting Chapter 7 from that subsection — keeping administrative expenses at a minimum. *Otte v. United States*, 419 U.S. 43, 53 (1974) ("There is, of course, an overriding concern in the [Bankruptcy] Act with keeping fees and administrative expenses at a minimum so as to preserve as much of the estate as possible for the creditors.").

This Court has held that statutory provisions in the Bankruptcy Code must be read and implemented as written unless the result is "demonstrably at odds with the intentions of its drafters." *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 242 (1989). Because the court below cannot demonstrate how excluding substantial contribution claims from Chapter 7 proceedings leads to absurd results, section 503(b)(3)(D) should be applied as written.

B. The Thirteenth Court of Appeals' Reliance on the Word "Including" Is Misguided.

The word "including" in section 503(b) does not render every subsection of 503(b) illustrative and non-exhaustive. The court below is correct in that the Bankruptcy Codes provides that "including is not limiting." 11 U.S.C. § 102(3) (2018). But the lower court's reading of section 503 creates two issues: (1) it renders words and phrases within section 503(b) superfluous and (2) it allows general provisions to govern specific provisions within section 503(b).

1. The Thirteenth Court of Appeals' Reasoning Renders Portions of Section 503(b) Superfluous.

By finding that the word "including" in section 503(b) can be applied to each sub-subsection found under section 503(b), the court below rendered several words and phrases within section 503(b) superfluous.

First, the word "including" appears in section 503 five times — once in the main section of 503(b), twice in 503(b)'s subsections, and twice in 503(b)'s sub-subsections. 11 U.S.C. § 503(b)(1)-(9). The court below reads the word "including" in the main section of 503(b) to apply both to 503(b)'s subsections *and* sub-subsections. If the court's reading is correct, each subsequent use of the word "including" would be unnecessary, because 503(b)'s "including" would make any list in each subsection non-exhaustive. Thus, the court's reading of section 503(b) renders certain words of section 503's subsections and sub-subsections redundant.

Second, the lower court's reading of section 503(b) renders the limiting language of section 503(b)(3)(D) superfluous. Courts, in construing a statute, must give effect, if possible, to every clause and word of a statute. *United States v. Menasche*, 348 U.S. 528, 538–39 (1955). By

holding that the phrase "under chapter 9 or 11 of this title" does not limit the court's ability to grant an administrative expense under Chapter 7, the court below renders the phrase meaningless and essentially writes that limitation out of the statute. *See In re Hackney*, 351 B.R. 179, 202 (Bankr. N.D. Ala. 2006).

The multiple uses of "including" throughout section 503(b) and the limiting language, "under chapter 9 or 11 of this title" of section 503(b)(3)(D) have a purpose if this Court finds that the first "including" in section 503(b) does not apply to each and every sub-subsection of 503(b). Therefore, this Court should not adopt the reasoning of the court below because it renders portions of the Bankruptcy Code superfluous.

2. The Thirteenth Court of Appeals' Reasoning Allows General Provisions to Govern over Specific Provisions.

The non-limiting word "including" cannot overcome the later and more specific, exclusive phrase, "under chapter 9 or 11 of this title." *See Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 445 (1987). The phrase, "under chapter 9 or 11 of this title," specifically applies to section 503(b)(3)(D) and therefore controls over the general provisions under section 503(b), which states ". . . there shall be allowed administrative expenses . . . including . . . ." 11 U.S.C. § 503(b) (2018). While "including" is intended to be illustrative and non-limiting, it does not overcome the more specific limiting clause found in section 503(b)(3)(D).

Furthermore, when a statute lists items but leaves out the word "including," courts must infer Congress' intent was to restrict the statute's application to only those listed items. *In re Cash Currency Exch.*, 762 F.2d 542, 552 (7th Cir. 1985). As mentioned previously, the Bankruptcy Code provides that the words "includes" and "including" are not limiting. 11 U.S.C. § 102(3) (2018). However, Congress chose not to use the words "includes" or "including" in

section 503(b)(3) as it did in other subsections of 503(b). 11 U.S.C. § 503(b)(1)-(9) (2018). Therefore, this Court must conclude that Congress intended the specific provision of section 503(b)(3)(D) to be an exhaustive list.

C. Bankruptcy Policy Supports Substantial Contribution Administrative Expenses for Chapter 9 and Chapter 11 Creditors, but Not Chapter 7 Creditors.

A substantial contribution claim is defined as an extraordinary action by a creditor, not motivated by self-interest, which creates an actual and direct benefit to the state. *In re Celotex Corp.*, 227 F.3d 1336, 1339 (11th Cir. 2000). A substantial contribution is one that "fosters and enhances . . .the progress of reorganization." *Id.* at 1338 (internal quotations omitted). The purpose of a Chapter 9 or Chapter 11 proceeding is to provide the debtor the opportunity to reorganize and repay creditors more than they would receive in liquidation. *In re Johnson*, 546 B.R. 83, 160 (Bankr. S.D. Ohio 2016); *see In re Mount Carbon Metro. Dist.*, 242 B.R. 18, 32 (Bankr. D. Colo. 1999). On the other hand, the purpose of a Chapter 7 proceeding is an orderly liquidation. *Asociación de Titulares de Condominio Castillo v. DiMarco (In re Asociación de Titulares de Condominio Castillo)*, 581 B.R. 346, 362 (B.A.P. 1st Cir. 2018). Thus, substantial contribution claims that foster reorganization directly tie to the purpose of Chapters 9 and 11 proceedings, but that connection is absent in the Chapter 7 context.

Beyond this absent connection, two additional policy considerations support this Court's limiting of substantial contribution administrative expenses to Chapter 9 and 11 cases: (1) in Chapter 7 cases, the trustee is responsible for pursuing claims on behalf of the estate, not creditors; and (2) allowing substantial contribution claims in the Chapter 7 context encourages vigilante creditors.

1. The Chapter 7 Trustee is Responsible for Pursuing Claims on Behalf of the Estate

In a Chapter 7 proceeding, the trustee is responsible for the case management and is under a duty to maximize the realization of the debtor's estate by marshalling the estate's assets and instituting all necessary litigation. *In re Dinubilo*, 177 B.R. 932, 940 (E.D. Cal. 1993). A trustee does not negotiate on its own behalf and does not have any monetary interest in the value of the bankruptcy estate. *See id.* Thus, a trustee's only interest is in maximizing the value of the estate for the benefit of the creditors. To that end, the trustee is highly motivated to uncover any fraudulent transfers that occurred prior to the trustee's appointment.

Conversely, in the Chapter 11 context, a debtor-in-possession is ultimately tasked with negotiating with its creditors and getting a plan approved. *In re Water's Edge Ltd. P'ship*, 251 B.R. 1, 7 (Bankr. D. Mass. 2000). A debtor-in-possession is permitted to place its own interests above those of unsecured creditors and bargain with those interests in mind. *Id.* A debtor-in-possession is neither independent nor disinterested, unlike a trustee. *Grabscheid v. Knox Metals Corp. (In re Luria Steel & Trading Corp.)*, 168 B.R. 913, 917 (Bankr. N.D. III. 1994).

As a result of the differing goals of a Chapter 7 trustee and a Chapter 11 debtor-in-possession, the motivations of each to pursue claims of the estate will certainly differ. *In re Luria Steel & Trading Corp.*, 168 B.R. at 917. Thus, a disinterested trustee may weigh the benefits and the costs of pursuing a claim differently than the debtor-in-possession. *Id.* For example, if a fraudulent transfer were made to a principal of the debtor, the debtor-in-possession may lack the motivation to pursue such a claim, whereas a trustee would be highly motivated. *Nigro v. Pittsburg Post-Gazette (in re Appliance Store)*, 171 B.R. 525, 527 (Bankr. W.D. Pa. 1994).

With these differing goals and motivations in mind, it is clear why substantial contribution administrative claims are available in the Chapter 11 context but are prohibited in the Chapter 7 context. Vigilant creditors serve as watchdogs over the self-interested debtor-in-possession and substantial contribution claims encourage creditors to take up this role. Once a Chapter 7 proceeding is initiated, a disinterested and independent third party is appointed and the purpose of substantial contribution claims evaporates. The trustee should then be free to pursue claims on behalf of the estate without creditors attempting to do the same.

The facts of this case provide a clear example of the distinctions between Chapter 11 and Chapter 7 proceedings. If this proceeding had remained a Chapter 11 proceeding with Backstreets continuing as a debtor-in-possession, then Clemons may have lacked motivation to uncover any fraudulent transfers to his daughter. With Clemons at the helm of the company, there is an obvious need to incentivize creditors to investigate claims and act as a check against Clemons. However, once Backstreets converted to a Chapter 7 proceeding and the Trustee assumed responsibility for the estate, the need for creditor supervision dissipated.

2. Allowing Administrative Expenses for Substantial Contribution in Chapter 7 Cases Will Encourage Unsecured Creditors to Sua Sponte Seek out Ways to Maximize the Estate's Value.

As noted by Judge Moon in the dissent, the lower court's holding "sacrifices decades of bankruptcy jurisprudence by reducing section 503(b) to nothing more than an equitable statute without any restrictions whatsoever." R. at 28. This conversion of a clear statutory provision to an equitable rule creates an issue between creditors who seek out non-enumerated administrative expenses and those who do not. Additionally, it places an undue burden on the trustee and the estate.

a. Allowing Substantial Contribution in Chapter 7 Cases Will Result in Unequal Treatment of Unsecured Creditors.

Allowing creditors to seek substantial contribution claims in the Chapter 7 context will put creditors at odds with one another and place them on unequal footing. Unsecured creditors are supposed to receive equal treatment in a bankruptcy proceeding. *United States v. Maxwell*, 157 F.3d 1099, 1102 (7th Cir. 1998). Instead, because of the lower court's holding, unsecured creditors will be encouraged to pursue selected transactions of the debtor in order to capture administrative expense claims. Each time a creditor is successful in bringing a substantial contribution claim, the creditor is extracting value from the estate. This is value that cannot then be available for the other creditors upon liquidation.

Moreover, independent actions by creditors during a Chapter 7 proceeding can potentially conflict, duplicate, or undermine the trustee's efforts on behalf of all creditors. *In re Javed*, 592 B.R. 615, 621 (Bankr. D. Md. 2018). Thus, not only may some unsecured creditors extract more from the estate than others, but actions brought by individual creditors may also harm the overall estate and limit what is available for the remaining creditors.

b. Allowing Substantial Contribution in Chapter 7 Cases Will Place Undue Burden on Trustees.

Allowing substantial contribution claims adds significant expense to the Chapter 7 trustee and prevents the trustee from doing its job. When a few creditors investigate and uncover claims on behalf of the estate, the trustee's work is just beginning. First, the trustee must determine whether a substantial contribution was actually made by the creditor. Second, the trustee must determine whether the expenses sought by the creditor actually qualify as an administrative expense reimbursable under the Bankruptcy Code.

The Bankruptcy Code does not define "substantial contribution," but it does provide basic factors to consider in determining whether a substantial contribution has been made. *Cellular 101, Inc. v. Channel Communs., Inc. (In re Cellular 101, Inc.)*, 377 F.3d 1092, 1098 (9th Cir. 2004) (Brunetti, J. concurring). The principal test of substantial contribution is the extent of benefit to the estate. *Id.* at 1097. In order to make that evaluation, the trustee will be forced to determine the value added by the creditor's work compared to the expense claimed by the creditor. This will take up the Chapter 7 trustee's time — time that could otherwise be spent discovering and pursuing these claims and other claims.

Furthermore, if creditors are allowed to pursue and make substantial contribution claims, it could lead to creditors overwhelming the trustee's resources. For example, if a debtor has fifty unsecured creditors, each creditor may attempt to investigate and uncover claims on behalf of the estate immediately upon filing of the Chapter 7 petition. *See In re Javed*, 592 B.R. at 621 (stating that a bankruptcy filing is intended to stop the race to the courthouse by individual creditors). If each creditor rushes to do this, the trustee may never get the opportunity to pursue claims on behalf of the estate. Instead, the trustee will be forced to pay administrative expenses to the various creditors. Therefore, this Court should not allow substantial contribution claims in a Chapter 7 proceeding because it would allow creditors to preempt the trustee by pursuing claims before the trustee has the same opportunity to do so.

D. *Connally* Is Not Persuasive in this Case.

The court below cites to *In re Connolly N. Am. LLC* for the idea that equitable principles of bankruptcy courts can trump the clear language of the Bankruptcy Code. R. at 18–19. This Court has recognized that bankruptcy courts are courts of special equity. *See Curtis v. Loether*, 415 U.S. 189, 195 (1974). But this equitable power is not without limit: "A bankruptcy court has

statutory authority to issue any order, process or judgment that is necessary or appropriate to carry out the provisions of the Bankruptcy Code. . . . But in exercising those statutory and inherent powers, a bankruptcy court may not contravene specific statutory provisions." *Law v. Siegel*, 571 U.S. 415, 420–21 (2014) (citation omitted).

In *Siegel*, a Chapter 7 proceeding, the debtor claimed a homestead exemption of $75,000 as allowed under the applicable state law and authorized by the Bankruptcy Code. *Id.* at 418. A creditor discovered that the debtor had fraudulently misrepresented the existence of certain liens against the homestead, which ultimately led to increased value for the bankruptcy estate. *Law*, 571 U.S. at 419. As a result of this fraud, the bankruptcy court granted a motion "surcharging" the entirety of the debtor's homestead exemption based on the court's equitable powers and awarded that sum to the investigating creditor. *Id.* at 420. This Court ultimately reversed the bankruptcy court finding that the "surcharge" was unauthorized as it contravened a specific provision of the Code which protects the claimed homestead exemption. *Id.* at 422.

Here, this Court is once again faced with a case where the court below has circumvented a clear provision of the Bankruptcy Code under the guise of equitable power. There is no need to resort to equity as Congress has provided creditors a mechanism by which to recover fraudulently transferred property. The *Connally* court and the court below, by resorting to equity, have contravened specific statutory provisions. The creditor can seek court approval and pursue fraudulently transferred property. 11 U.S.C. § 503(b)(3)(B) (2018); 11 U.S.C. § 504(b)(4) (2018). Allowing a creditor to pursue transferred property outside of this statutory procedure would render these provisions meaningless. Thus, this Court should prevent the equitable end-run around the Bankruptcy Code and refrain from following *Connally's* rationale.

Finally, *Connally* is in the minority. An overwhelming 86% of the district or bankruptcy courts confronted with this issue have held that a court cannot allow an administrative expense for a substantial contribution in a Chapter 7 proceeding. *In re Health Trio, Inc.*, 584 B.R. 342, 353 (Bankr. D. Colo. 2018); *In re Connolly N. Am., LLC*, 802 F.3d at 822 n.2. This strong majority is further evidence that the Bankruptcy Code is clear — substantial contribution administrative expenses have no place in a Chapter 7 proceeding.

E. Weinberg's Efforts to Pursue the Claim Were Not Warranted.

Even if the Court finds that a substantial contribution claim may be made in a Chapter 7 proceeding, Weinberg is not entitled to make such a claim. While there is no question that Weinberg provided a substantial contribution to the value of the estate, his actions were not necessary under the circumstances to provide a substantial benefit to the estate.

In order to grant a substantial contribution expense, the trustee must determine that the claim is for actual expenses incurred and that those fees were necessary for the value added to the estate. 11 U.S.C. § 503(b) (2018); *Tidewater Fin. Co. v. Henson (In Re Henson)*, 57 F.App'x 136, 138 (4th Cir. 2003). "Necessary" is defined as "absolutely needed" and "compulsory." *Necessary*, Merriam-Webster's Collegiate Dictionary (11th ed. 2014). Based on the plain-language reading of "necessary," fees should only be granted when they were absolutely needed to provide value to the estate. In other words, the expenses are only necessary if incurring those expenses were the exclusive way to gain that value for the estate.

One of the courts following the minority approach, recognizing substantial contribution claims in Chapter 7 cases, held that a substantial contribution claim for a creditor in a Chapter 7 case should be the rare exception rather than the rule. *In re Javed*, 592 B.R. at 624. The creditor must demonstrate that its actions were not intended to thwart or impede the Chapter 7 process,

but that the actions were necessary under the circumstances and provided a substantial benefit to the estate. *Id.* at 622.

Here, the record indicates that Weinberg incurred $25,000 in legal fees investigating transfers and that the trustee was able to promptly reach a settlement and recover the funds. R. at 7. The record is silent as to whether Weinberg's investigatory efforts were the exclusive manner for the trustee to recover the funds from Clemons' daughter. Therefore, even if this Court holds that substantial contribution administrative expenses are permitted in Chapter 7 proceedings, this is not one of those rare cases where the administrative claim should be granted.

CONCLUSION

It is understandable that the Thirteenth Circuit wants to protect the rights of Weinberg and other similarly situated creditors by allowing such creditors to retain estate property and by allowing such creditors to make substantial contribution claims against the estate in a Chapter 7 proceeding. But Congress has given clear instructions that the courts must follow when an entity seeks bankruptcy protection. While disregarding Congress' design might be favorable in this instance, doing so will set a precedent which will encourage future creditors to refuse to turnover estate property and swarm the estate, scavenging for estate claims. For the foregoing reasons, the Petitioner respectfully asks this Court to reverse the holding of the United States Court of Appeals for the Thirteenth Circuit.

Team P. 3

Counsel of Record

APPENDIX A

11 U.S.C. § 362 (2018).

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--

> **(1)** the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;
>
> **(2)** the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;
>
> **(3)** any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;
>
> **(4)** any act to create, perfect, or enforce any lien against property of the estate;
>
> **(5)** any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;
>
> **(6)** any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;
>
> **(7)** the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor; and
>
> **(8)** the commencement or continuation of a proceeding before the United States Tax Court concerning a tax liability of a debtor that is a corporation for a taxable period the bankruptcy court may determine or concerning the tax liability of a debtor who is an individual for a taxable period ending before the date of the order for relief under this title.

APPENDIX B

11 U.S.C. § 363 (2018).

Use, sale, or lease of property.

(c)

> **(1)** If the business of the debtor is authorized to be operated under section 721, 1108, 1203, 1204, or 1304 of this title [11 USCS § 721, 1108, 1203, 1204, or 1304] and unless the court orders otherwise, the trustee may enter into transactions, including the sale or lease of property of the estate, in the ordinary course of business, without notice or a hearing, and may use property of the estate in the ordinary course of business without notice or a hearing.
>
> **(2)** The trustee may not use, sell, or lease cash collateral under paragraph (1) of this subsection unless--
>
> > **(A)** each entity that has an interest in such cash collateral consents; or
> >
> > **(B)** the court, after notice and a hearing, authorizes such use, sale, or lease in accordance with the provisions of this section.
>
> **(3)** Any hearing under paragraph (2)(B) of this subsection may be a preliminary hearing or may be consolidated with a hearing under subsection (e) of this section, but shall be scheduled in accordance with the needs of the debtor. If the hearing under paragraph (2)(B) of this subsection is a preliminary hearing, the court may authorize such use, sale, or lease only if there is a reasonable likelihood that the trustee will prevail at the final hearing under subsection (e) of this section. The court shall act promptly on any request for authorization under paragraph (2)(B) of this subsection.
>
> **(4)** Except as provided in paragraph (2) of this subsection, the trustee shall segregate and account for any cash collateral in the trustee's possession, custody, or control.

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

(f) The trustee may sell property under subsection (b) or (c) of this section free and clear of any interest in such property of an entity other than the estate, only if--

> **(1)** applicable nonbankruptcy law permits sale of such property free and clear of such interest;
>
> **(2)** such entity consents;

(3) such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property;

(4) such interest is in bona fide dispute; or

(5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.

APPENDIX C

11 U.S.C. § 503 (2018).

Allowance of administrative expenses.

(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.

APPENDIX D

11 U.S.C. § 504 (2018).

Sharing of Compensation.

(b)

(1) A member, partner, or regular associate in a professional association, corporation, or partnership may share compensation or reimbursement received under section 503(b)(2) or 503(b)(4) of this title [11 USCS § 503(b)(2) or 503(b)(4)] with another member, partner, or regular associate in such association, corporation, or partnership, and may share in any compensation or reimbursement received under such sections by another member, partner, or regular associate in such association, corporation, or partnership.

(2) An attorney for a creditor that files a petition under section 303 of this title [11 USCS § 303] may share compensation and reimbursement received under section 503(b)(4) of this title [11 USCS § 503(b)(4)] with any other attorney contributing to the services rendered or expenses incurred by such creditor's attorney.

APPENDIX E

11 U.S.C. § 542 (2018).

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.

(b) [omitted]

(c) Except as provided in section 362(a)(7) of this title [11 USCS § 362(a)(7)], an entity that has neither actual notice nor actual knowledge of the commencement of the case concerning the debtor may transfer property of the estate, or pay a debt owing to the debtor, in good faith and other than in the manner specified in subsection (d) of this section, to an entity other than the trustee, with the same effect as to the entity making such transfer or payment as if the case under this title [11 USCS §§ 101 et seq.] concerning the debtor had not been commenced.

(d) A life insurance company may transfer property of the estate or property of the debtor to such company in good faith, with the same effect with respect to such company as if the case under this title [11 USCS §§ 101 et seq.] concerning the debtor had not been commenced, if such transfer is to pay a premium or to carry out a nonforfeiture insurance option, and is required to be made automatically, under a life insurance contract with such company that was entered into before the date of the filing of the petition and that is property of the estate.

(e) Subject to any applicable privilege, after notice and a hearing, the court may order an attorney, accountant, or other person that holds recorded information, including books, documents, records, and papers, relating to the debtor's property or financial affairs, to turn over or disclose such recorded information to the trustee.