**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.

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THE PETITION FOR A WRIT OF CERTIORARI IS GRANTED, LIMITED TO THE FOLLOWING QUESTIONS:

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

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

Recommended for Full Text Publication

**UNITED STATES COURT OF APPEALS**
**FOR THE THIRTEENTH CIRCUIT**

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IN RE BACKSTREETS PLOWING, INC.,

CASE NO. 17-0805

DEBTOR.
_____/

STEVEN VIN SANT, CHAPTER 7 TRUSTEE,

APPELLANT,

V.

MILTON WEINBERG,

APPELLEE.
_____/

Appeal from the Bankruptcy Appellate Panel
for the Thirteenth Circuit

Decided: March 5, 2018

Before: BONHAM, MOON and WATTS, Circuit Judges

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**OPINION**

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**BONHAM, Circuit Judge:**

This appeal arises out of the bankruptcy case of Backstreets Plowing, Inc. (the "Debtor"). It involves two separate disputes, which have been consolidated for appeal, between Steven Vin Sant, the duly-appointed chapter 7 trustee (the "Trustee"), and Milton Weinberg, a secured creditor ("Weinberg"). In the first dispute, we are asked to determine whether a secured creditor

violates the automatic stay set forth in section 362(a)(3) of the Bankruptcy Code[1] by passively retaining possession of collateral that it lawfully repossessed from the debtor in accordance with applicable non-bankruptcy law prior to the petition date. Second, we are asked to determine whether a court is permitted to grant an administrative expense to a party who makes a substantial contribution to the estate in a case under chapter 7 of the Bankruptcy Code pursuant to section 503(b).

The United States Bankruptcy Court for the District of Moot and the Bankruptcy Appellate Panel for the Thirteenth Circuit answered both questions in favor of Weinberg, concluding that: (i) his retention of snow plow 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), and (ii) he was entitled to a substantial contribution administrative expense under section 503(b), notwithstanding section 503(b)(3)(D). We affirm the bankruptcy court on both issues.

## Factual Background and Procedural History[2]

The Debtor operated a seasonal snow plow business. In the spring of 2015, the Debtor's sole shareholder, Christopher "Big Man" Clemons ("Clemons"), realized that in order for his business to remain competitive, he would need to purchase newer, more fuel-efficient, snow plow trucks. In addition to fuel savings, the new plow trucks would allow the Debtor to avoid the substantial costs that it incurred every winter maintaining and repairing its much older trucks. The new trucks would also enable the Debtor to compete for a valuable plowing contract with

[1] The Bankruptcy Code is set forth in 11 U.S.C. §§ 101 *et seq.* Specific sections of the Bankruptcy Code are identified herein as "section __." Similarly, specific rules from the Federal Rules of Bankruptcy Procedure are identified herein as "Bankruptcy Rule __."

[2] The facts, as set forth herein, are not disputed by the parties to this appeal.

the City of Badlands, where the Debtor was headquartered. The contract, although guaranteeing only one year of work, was renewable at the sole option of the City.

Short on funds, Clemons approached Weinberg, an acquaintance through his bowling club, about borrowing $450,000 so that the Debtor could purchase the new snow plow trucks. Weinberg agreed to loan the Debtor the funds. To secure repayment of the loan, the Debtor granted Weinberg a security interest in the trucks.[3] Clemons also personally guaranteed the loan. Pursuant to the terms of a promissory note, the Debtor agreed to make monthly payments to Weinberg, with payments to commence once the plowing business started generating revenue in December 2015. The Debtor purchased the new trucks shortly after receiving the loan proceeds in August 2015.

Thereafter, the Debtor and its local competitors, Tenth Avenue Freeze, Inc. ("Tenth Avenue") and Stone Pony Plowing, LLC ("Stone Pony"), submitted bids for the plowing contract with the City of Badlands. The Debtor's bid was far superior to the other two bids, to the point that several members of the city council publicly questioned whether the Debtor would be able to perform under the contract given the projected small profit margins. Nevertheless, the city council voted to award the contract to the Debtor.

The record suggests that Clemons and Weinberg had a falling out related to, of all things, their mutual love of college football. Weinberg was an alumnus of Moot State University and held season tickets to its football games. Clemons was an alumnus of the University of Moot. In October 2015, Moot State hosted the University of Moot in the annual "big game." Weinberg

[3] The parties submitted a stipulation of undisputed facts to the bankruptcy court wherein they agreed, among other things, that Weinberg properly perfected a purchase money security interest in the snow plow trucks under applicable non-bankruptcy law and, thus, holds a first priority lien on the trucks. Weinberg does not assert that he obtained a security interest in any property of the debtor other than the trucks, by way of a blanket lien or otherwise.

invited Clemons to join him at the game. After the University of Moot beat Moot State in a weather-plagued game, Weinberg and Clemons got into a heated argument about whose football program was better. The record suggests that the two did not speak again for some time thereafter.

The winter of 2015-2016 was an unusually mild one in Badlands. This proved profitable for the Debtor, as its contract with the City paid it a flat rate, whether it snowed or not. Due to the lack of snow, the Debtor's labor, maintenance and fuel costs were far less than expected. Perhaps still angry about their argument, though, Clemons did not make the December 2015 loan payment to Weinberg. After not receiving the first few payments under the note, Weinberg contacted Clemons regarding payment in February 2016.

Following several unanswered calls, Weinberg drove to the Debtor's facility in late February 2016. Another argument ensued. Clemons demanded that Weinberg leave immediately and, according to Weinberg, directed a group of the Debtor's drivers to forcibly remove him from the premises. Weinberg told Clemons that he better "lawyer up," and proceeded to file suit on the note in April 2016 in the State of Moot Circuit Court located in Asbury Park County. As part of the same lawsuit, Weinberg sued Clemons on his personal guarantee. In October 2016, Weinberg obtained a default judgment against both the Debtor and Clemons, jointly and severally, for $450,000 plus interest and fees. Placated for the time being by Moot State's victory over the University of Moot in that year's football game, Weinberg did not immediately take any action to collect on his judgment.

Unlike the prior winter, the winter of 2016-2017 was particularly brutal due to several Nor'easters. As good as the prior winter's light snowfall was for the Debtor's business, the heavy snowfall resulted in substantial losses. The monthly payments that the Debtor received

from the City of Badlands were not large enough to allow it to pay its labor, maintenance and fuel costs as they came due. Making matters worse, Weinberg began efforts to collect on his judgment in January 2017. Weinberg hired a repossession company, E Street Auto Recovery, to retrieve the snow plow trucks. E Street successfully repossessed the trucks from the Debtor's parking lot in late January 2017.[4] E Street delivered the trucks to a warehouse owned by Weinberg, where they remain stored to this day.

Without the trucks, the Debtor was unable to fulfill its plowing contract with the City of Badlands, who threatened to cancel the contract and sue the Debtor for damages. Running out of cash, the Debtor filed a chapter 11 petition on February 4, 2017. Shortly after the petition date, the Debtor's attorneys sent Weinberg a letter demanding that the snow plow trucks be returned immediately. Weinberg testified before the bankruptcy court that he refused to return the vehicles based on his understanding that the Debtor had the burden to bring a turnover action, in which case Weinberg could demand adequate protection of his interest in the snow plow trucks.

Instead of commencing a turnover action, the Debtor filed a motion asking the bankruptcy court to determine that Weinberg's continued retention of the vehicles constituted a violation of the automatic stay under section 362(a)(3). Stating that it was a "close call," the bankruptcy court found that Weinberg had not violated the stay, holding that mere retention of property lawfully repossessed prepetition is not an "act to . . . exercise control over property of the estate" within the scope of section 362(a)(3).

The Debtor timely appealed the bankruptcy court's ruling in March 2017. Shortly after the filing of the appeal, however, Clemons concluded that efforts to reorganize the Debtor would

[4] It is undisputed that, although Weinberg repossessed the snow plow trucks in accordance with applicable non-bankruptcy law, no foreclosure or similar proceedings have occurred, and the trucks remain titled in the name of the Debtor.

be futile because, among other reasons, the Badlands city council had informed him that it would not be offering a new contract for the following winter. Out of cash, and with the summer offseason about to begin, the Debtor voluntarily converted the chapter 11 case to a case under chapter 7 of the Bankruptcy Code. The Trustee was appointed to administer the Debtor's bankruptcy estate and liquidate its property on April 13, 2017. The Bankruptcy Appellate Panel stayed the pending appeal in order to allow the Trustee to substitute in for the Debtor and get up to speed on the appeal.

After the conversion of the case to chapter 7, Weinberg decided to pursue collection efforts against Clemons on the judgment related to his personal guarantee. Weinberg hired a collection law firm, who took a creditors' examination of Clemons in May 2017. Through that examination, Weinberg discovered that beginning in May 2016, shortly after the filing of Weinberg's initial lawsuit against the Debtor and Clemons, the Debtor had made transfers of approximately $100,000 in cash directly to a bank account in the name of Clemons' daughter, Patti.

Following the completion of the creditors' examination, Weinberg voluntarily provided the Trustee with sufficient documentation and testimony to establish that the transfers were avoidable as fraudulent transfers. The Trustee filed a complaint against Patti Clemons to avoid and recover the transfers under sections 548 and 550. A settlement was quickly reached whereby Patti Clemons agreed to pay $75,000 to the estate in satisfaction of all claims asserted in the adversary proceeding.

Weinberg incurred $25,000 in legal fees investigating the transfers. After the bankruptcy court approved the settlement, he filed a motion seeking allowance of a substantial contribution administrative expense pursuant to section 503(b). Although the Trustee acknowledged that

Weinberg had made a substantial contribution to the estate, he opposed the motion on the grounds that administrative expenses for substantial contributions are not permissible in a chapter 7 case. According to the Trustee, section 503(b)(3)(D) expressly limits such administrative expenses to cases under chapters 9 and 11. The bankruptcy court approved Weinberg's motion, granting him an allowed administrative expense in the amount of $25,000. The Trustee timely appealed.

In September 2017, the Trustee received a letter from Tenth Avenue whereby it offered to purchase substantially all of the Debtor's assets, including the snow plow trucks. Tenth Avenue had plowing contracts with several neighboring municipalities. It hoped to restart the operations of the Debtor and secure its own contract with the City of Badlands. However, Tenth Avenue's offer to purchase the assets was contingent on the Trustee immediately obtaining possession of, and conveying title to, the snow plow trucks that had been repossessed by Weinberg.

Convinced that Tenth Avenue's "going concern" offer for the business was the best way to maximize value for the benefit of the Debtor's creditors, the Trustee attempted to negotiate with Weinberg for the return of the trucks. After the negotiations proved unsuccessful, the Trustee continued prosecution of the appeal regarding Weinberg's alleged violation of the automatic stay. By continuing the appeal, the Trustee hoped to pressure Weinberg into turning over the trucks so that a sale could be consummated with Tenth Avenue before the winter.

Tenth Avenue withdrew its purchase offer in November 2017 when it became clear that the Trustee would not be able to convey title to the snow plow trucks before the start of the winter plowing season. With Tenth Avenue out of the picture, Stone Pony offered $100,000 less for the Debtor's assets, excluding the snow plow trucks, in January 2018. The Trustee agreed to

accept this offer, believing that the value of the Debtor's remaining assets would only diminish further once winter concluded. The bankruptcy court approved the sale to Stone Pony in February 2018.

Despite the closing of the sale, the Trustee refused to dismiss the appeals. The Trustee has stated that he hopes to prevail on his appeal of the stay violation issue and, thereafter, recover from Weinberg, as damages for his alleged violation of the automatic stay, the difference between the offer initially made by Tenth Avenue and the sale proceeds received from Stone Pony. At the same time, the Trustee proceeded with the substantial contribution appeal. With the consent of the parties, the two appeals were consolidated before the bankruptcy appellate panel. The appellate panel affirmed on both issues. The Trustee timely appealed both determinations to this court.

## Discussion

### I. Legal Standard

We review a bankruptcy court's decision directly, not the appellate panel's review of the bankruptcy court's decision. *Charbono v. Sumski (In re Charbono)*, 790 F.3d 80, 84-85 (1st Cir. 2015) (citations omitted). The parties do not dispute the facts as set forth herein. Rather, the issues that we address involve questions of law. Thus, our review is de novo. *Texas v. Soileau (In re Soileau)*, 488 F.3d 302, 305 (5th Cir. 2007) (citation omitted). Under a de novo standard of review, the reviewing court decides an issue as if the court were the original trial court in the matter. *Razavi v. Comm'r of Internal Revenue*, 74 F.3d 125, 127 (6th Cir. 1996) (quotation omitted).

### II. Section 362(a)(3) Does Not Prohibit A Secured Creditor from Passively Retaining Estate Property That Was Lawfully Repossessed Prepetition

When a debtor files for relief under the Bankruptcy Code, section 362 prevents creditors from taking further action against it except through the bankruptcy court. To effectuate this result, section 362(a) imposes an automatic stay of, among other things, "any act to obtain possession of property of the estate . . . or to exercise control over property of the estate." 11 U.S.C. § 362(a)(3).[5] The estate comprises property of the debtor "wherever located and by whomever held," including "all legal or equitable interests of the debtor in property" as of the petition date. 11 U.S.C. § 541(a)(1). It is not disputed that the snow plow trucks constitute property of the estate within the scope of section 541(a)(1). Although they were lawfully repossessed prior to the petition date, no disposition occurred. Therefore, legal (as well as equitable) title remained with the Debtor on the petition date.

In this case, the Trustee asks us to find that Weinberg violated the automatic stay by passively retaining possession of the trucks post-petition. A number of circuit courts of appeal have held that passive retention of estate property constitutes a prohibited exercise of control within the scope of section 362(a)(3). *See, e.g.*, *Weber v. SEFCU (In re Weber)*, 719 F.3d 72, 81 (2d Cir. 2013); *Thompson v. Gen. Motors Acceptance Corp.*, 566 F.3d 699, 703 (7th Cir. 2009). Other circuit courts of appeal have concluded that Congress' use of the word "act" in section 362(a)(3) evidences that some affirmative, post-petition conduct is required in order for a stay violation to be found. *See Davis v. Tyson Prepared Foods, Inc. (In re Garcia)*, 740 Fed. Appx. 163, 164 (10th Cir. 2018); *WD Equip., LLC v. Cowen (In re Cowen)*, 849 F.3d 943, 948 (10th Cir. 2017); *United States v. Inslaw, Inc.*, 932 F.2d 1467, 1474 (D.C. Cir. 1991). We respectfully

[5] No party has alleged that Weinberg violated any other subsection of section 362(a) in this case. Moreover, Weinberg has not alleged that any of the exceptions to the automatic stay set forth in section 362(b) are applicable here. Thus, our analysis focuses solely on section 362(a)(3).

disagree with the conclusion reached by the "passive violation" courts and adopt the analysis of the Tenth and D.C. Circuits, which more faithfully adheres to the text of the statute.

It appears that the "passive violation" view is driven primarily by practical and policy considerations rather than a sound, principled interpretation of the statute. *See* Ralph Brubaker, *Turnover, Adequate Protection, and the Automatic Stay (Part II): Who is "Exercising Control" Over What?*, 33 BANKR. L. LETTER 9, Sept. 2013, at 1. As in all statutory interpretation cases, we begin with the statutory language. *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 240-41 (1989). The Supreme Court has instructed us to "presume that a legislature says in a statute what it means and means in a statute what it says there. . . When the words of a statute are unambiguous, then this first canon is also the last: 'judicial inquiry is complete.'" *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992) (internal citations omitted).

In this case, the relevant statutory provision is section 362(a)(3). That section plainly 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. When the meaning of a term that is neither considered a term of art nor expressly defined by statute is in question, courts should consult the ordinary meanings contained in general and legal dictionaries. *See Asgrow Seed Co. v. Winterboer*, 513 U.S. 179, 187 (1995). Applying this canon of construction, the term "act" is defined as "the process of doing something or performing." BLACK'S LAW DICTIONARY 27 (9th ed. 2009). The statute, therefore, unambiguously precludes entities from "doing something" to obtain possession of, or to exercise control over, property of the estate. In the absence of some post-petition "act" by the non-debtor party, however, no stay violation exists. *See Cowen*, 849 F.3d at 949; *Inslaw*, 932 F.2d at 1474.

Full understanding of this issue requires appreciation of the relationship between two additional code provisions. First, section 363 authorizes a trustee to use or sell estate property with court approval. Subsection (e) of section 363 protects third parties who have an interest in such property, by providing that:

> Notwithstanding any other provision of [section 363], at any time, on request of an entity that has an interest in property . . . 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.

Second, section 542(a) provides that "an entity . . . in possession, custody, or control, during the case, of property that the trustee may use, sell, or lease under section 363" shall deliver such property to the trustee "unless such property is of inconsequential value or benefit to the estate." This power, colloquially referred to as the turnover power, allows the trustee in bankruptcy to recover property that was "out of the possession of the debtor, yet remained 'property of the debtor'" on the petition date.[6] *Inslaw*, 932 F.3d at 1471 (citing legislative history).

According to the "passive violation" courts: "Section 542 requires that any entity in possession of property of the estate deliver it to the trustee, without condition or any further action: the provision is self-executing." *In re Weber*, 719 F.3d at 79 (internal quotation and citation omitted); *see also Thompson*, 566 F.3d at 702. To the contrary, the statute clearly contemplates that the turnover power is not self-effectuating. Rather, section 542(a) merely provides a procedure whereby a trustee can seek entry of an order compelling turnover of property of the estate that is held by another. *See In re Hall*, 502 B.R. 650, 654-59 (Bankr. D.D.C. 2014) (analyzing the history and purpose of the turnover power).

[6] In a chapter 11 case, the debtor acts as a debtor in possession pursuant to section 1101(1), and is vested with a trustee's rights under section 542(a) pursuant to section 1107(a).

The "passive violation" view relies heavily on *United States v. Whiting Pools, Inc.*, 462 U.S. 198 (1983), wherein the Supreme Court permitted a chapter 11 debtor to obtain turnover of property in the hands of the Internal Revenue Service. But *Whiting Pools* acknowledged that the statute contains "explicit limitations" on section 542(a). *Id.* at 206 n.12. For example, a party subject to a turnover action is permitted to assert defenses to turnover including by disputing whether such property is property of the estate in the first place or, even if it is property of the estate, by asserting that the property is "of inconsequential value or benefit to the estate." 11 U.S.C. § 542(a). Additionally, because section 542(a) expressly references section 363, the turnover power is necessarily subject to section 363(e) which, as noted, requires the bankruptcy court to "prohibit or condition" turnover "as is necessary to provide adequate protection of" the non-debtor's interest in the property. 11 U.S.C. § 363(e). These limitations evidence that the turnover power is not self-effectuating.[7]

Interpreting the turnover power as automatic, as the "passive violation" courts do, effectively writes these "explicit limitations" out of the Bankruptcy Code and vitiates the safeguards contemplated for parties lawfully in possession of property that may arguably fall within the broad scope of property of the estate. The "passive violation" courts' interpretation of the statute would be particularly problematic in cases where a secured lender holds property subject to a possessory lien. If the requirement to relinquish possession of such collateral is automatic, as the "passive violation" courts insist it is, such creditors would be forced to choose between: (i) immediately turning the property over, thereby potentially losing their possessory

[7] This conclusion is bolstered by Bankruptcy Rule 7001(1), which provides that "a proceeding to recover money or property," such as a turnover proceeding, requires the commencement of an adversary proceeding, and the procedural protections contemplated therein. *See, e.g.*, *In re Perkins*, 902 F.2d 1254, 1258 (7th Cir. 1990) (citations omitted) (holding that turnover actions fall within the scope of Bankruptcy Rule 7001(1)).

lien, or (ii) willfully violating the stay by retaining such property pending a determination of their rights.

"It is an elementary rule of construction that 'the act cannot be held to destroy itself.'" *Citizens Bank of Md. v. Strumpf*, 516 U.S. 16, 20 (1995) (quotation omitted). Therefore, the better interpretation of the statute, and the interpretation that gives meaning and effect to sections 363(e) and 542(a), is that the Bankruptcy Code contemplates a trade-off. A creditor in possession of property of the estate may be compelled to turn such property over to the trustee by way of a turnover action brought pursuant to section 542(a) and Bankruptcy Rule 7001(1). However, such turnover is subject to a condition precedent, to wit, a creditor's right to defend the turnover action and/or receive adequate protection of its interest pursuant to section 363(e).[8] Indeed, this tradeoff was acknowledged in *Whiting Pools*, where the Supreme Court stated: "The Bankruptcy Code provides secured creditors various rights, including the right to adequate protection, and these rights replace the protection afforded by possession." *Whiting Pools*, 462 U.S. at 207.

The "passive violation" courts reason that the expansion of section 362(a)(3) as part of the Bankruptcy Amendments and Federal Judgeship Act of 1984 to prohibit acts "to exercise control over property of the estate" was intended to redress situations such as this. Prior to 1984, "the Code's stay provision only prohibited any act to obtain possession of property belonging to a bankruptcy estate." *Thompson*, 566 F.3d at 702. The 1984 Amendments "broadened the already sweeping provisions of the automatic stay" to prohibit "any act . . . to exercise control

[8] Moreover, it would be inequitable to secured creditors to require them to immediately turn repossessed collateral over to the debtor before a determination of adequate protection is made. By way of example, if a turned over vehicle is destroyed in an accident prior to the court awarding adequate protection to the creditor in the form of proof of insurance identifying the creditor as a loss payee, the creditor would be irreparably – and unfairly – harmed. *See, e.g., In re Denby-Peterson*, 576 B.R. 66, 82 (Bankr. D.N.J. 2017) *aff'd*, 2018 WL 5729907, at *6 (D.N.J. Nov. 1, 2018).

over the property of the estate." *In re Weber*, 719 F.3d at 80. The "passive violation" courts infer that the expansion of section 362(a)(3) can only mean that Congress "intended to prevent creditors from retaining property of the debtor." *See id.*

It is equally plausible, however, that the prohibition against "exercising control" was aimed at factual scenarios other than forcing turnover of collateral in derogation of a secured creditor's established rights under sections 363(e) and 542(a). A common example of "exercising control" that would be prohibited by section 362(a)(3), as amended, involves utilizing or pursuing intangible property rights that belong to the estate, such as contract rights or causes of action. Such intangible property rights cannot be "possessed," so they did not fall within the scope of the pre-1984 language of section 362(a)(3). The 1984 amendment to section 362(a)(3) can be given meaning, then, by viewing the "exercise control" language as protecting against interference with such intangible rights that belong to the estate. *See In re Hall*, 502 B.R. at 665.

Finally, Congress does not "hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001). As the *Cowen* court noted: "If Congress had meant to add an affirmative obligation . . . to turn over property belonging to the estate, it would have done so explicitly." *Cowen*, 849 F.3d at 950. And it likely would have done so by amending section 542, not section 362. It is highly unlikely that Congress would indirectly impose a self-effectuating turnover obligation via section 362(a)(3) that exceeds the scope of section 542(a) itself. *See Denby-Peterson v. Nu2u Auto World*, 2018 WL 5729907, at *5 (D.N.J. Nov. 1, 2018). This is particularly true because willful violations of the automatic stay in bankruptcy may expose the offending party to liability for compensatory damages, costs, attorney's fees, and, in some cases, punitive damages. *See, e.g.*, 11 U.S.C. §§ 105(a) and 362(k).

Adhering to the text of the statute, as we must, we adopt the view espoused by the Tenth and D.C. Circuits. Only affirmative acts to gain possession of, or to exercise control over, estate property violate section 362(a)(3). Refusing to immediately turn over property lawfully possessed is not the kind of post-petition "control" that violates the stay. Weinberg may ultimately be ordered to deliver the snow plow trucks to the Trustee upon the commencement of an adversary proceeding seeking turnover pursuant to section 542(a). However, such a proceeding is not presently before the court. Accordingly, we affirm the bankruptcy court's determination that Weinberg did not violate the automatic stay.

## III. Substantial Contribution Administrative Expenses are Permitted in Chapter 7

The second issue before the court requires us to determine whether a party in interest can be granted an administrative expense for making a substantial contribution in a chapter 7 case. Generally speaking, the Bankruptcy Code contemplates that the holders of administrative expenses must be paid in full before unsecured creditors receive any distribution. 11 U.S.C. § 507(a). At issue here is whether amounts sought by Weinberg for making a substantial contribution in this chapter 7 case are entitled to priority as an administrative expense.

Once again, we begin with the statutory language. Section 503(b) contains a non-exclusive list of specific categories of expenses that shall be allowed as administrative expenses. The non-exclusive nature of this list is evidenced by the insertion of the word "including" in section 503(b), which provides: "After notice and a hearing, there shall be allowed, administrative expenses . . . ***including*** - . . ." 11 U.S.C. § 503(b) (emphasis added). One category of itemized administrative expenses speaks to efforts by creditors who make a substantial contribution in a bankruptcy case. Specifically, section 503(b)(3)(D) allows an administrative expense for "the actual, necessary expenses . . . incurred by . . . a creditor . . . in

making a substantial contribution in a case under chapter 9 or 11 of this title."[9] Section 503(b)(3)(D) does not address substantial contribution administrative expenses in cases under other chapters of the Bankruptcy Code, such as chapter 7.[10]

In this case, the parties do not dispute that Weinberg made a substantial contribution to the bankruptcy estate. Rather, the only dispute is whether the court can grant an administrative expense for such substantial contribution where, as here, the case is a chapter 7 case. Once again, courts are divided on this issue. Some courts reject any claim for substantial contribution by creditors in a chapter 7 case. *See, e.g.*, *Lebron v. Mechem Fin., Inc.*, 27 F.3d 937, 945 (3d Cir. 1994); *Mosier v. Kupetz (In re United Educ. & Software)*, 2005 WL 6960237, at *5 (B.A.P. 9th Cir. Oct. 7, 2005). Such courts hold that the phrase "in a case under chapter 9 or 11" in section 503(b)(D) precludes the grant of a substantial contribution administrative expense in a chapter 7 case, relying on the precept *expressio unius est exclusio alterius* (*i.e.*, to express or include one thing implies the exclusion of another). *See also N.L.R.B. v. SW Gen., Inc.*, __ U.S. __, 137 S. Ct. 929, 940 (2017) (discussing *expressio unius est exclusio alterius*).

However, a more recent trend in the case law has emerged based on *Mediofactoring v. McDermott (In re Connolly N. Am., LLC)*, 802 F.3d 810 (6th Cir. 2015), wherein the Sixth Circuit adopted a more flexible, totality of the circumstances approach. In *Connolly*, the Sixth Circuit relied on the term "including" and principles of equity to find that the enumerated categories of administrative expenses are not exhaustive and, therefore, a court is not precluded

[9] Section 503(b)(3) also specifies expenses incurred by "a creditor that recovers, after the court's approval, for the benefit of the estate any property transferred or concealed by the debtor. . ." 11 U.S.C. § 503(b)(3)(B). This subsection is not applicable in the present case because Weinberg did not request or obtain court approval to pursue the fraudulent transfer claims on behalf of the estate.

[10] Section 503(b)(4) also authorizes the payment of "reasonable compensation for professional services rendered by an attorney" on behalf of a creditor in connection with a claim allowed under section 503(b)(3).

from awarding a substantial contribution administrative expense in a chapter 7 case. In the few years since *Connolly* was decided, a number of lower courts have adopted the Sixth Circuit's analysis. *See, e.g.*, *In re Javed*, 2018 WL 4955839, at *4 (Bankr. D. Md. Oct. 11, 2018); *In re Maust Transp., Inc.*, 589 B.R. 887, 898-99 (Bankr. W.D. Wash. 2018); *In re Health Trio, Inc.*, 584 B.R. 342, 353-54 (Bankr. D. Colo. 2018); *In re Maqsoudi*, 566 B.R. 40, 44-45 (Bankr. C.D. Cal. 2017).

This is yet another challenging issue of statutory interpretation,[11] and on first glance there is some appeal to limiting substantial contribution administrative expenses to cases under chapters 9 and 11. *See* 11 U.S.C. § 503(b)(3)(D). As the dissent notes, such an interpretation is consistent with the axiom that the provisions of section 503(b) should be strictly construed because of the overarching goal of keeping administrative expenses at a minimum, thereby preserving the estate for the benefit of all creditors. *See, e.g.*, *Suplee v. Bethlehem Steel Corp. (In re Bethlehem Steel Corp.)*, 479 F.3d 167, 172 (2d Cir. 2007). Nevertheless, after a thorough review of the applicable code provisions and case law, we are persuaded that the reasoning of the Sixth Circuit in *Connolly* is more consistent with both the plain meaning and the structure of the statute.

The word "including" in the prefatory language of section 503(b) must be given meaning, *Hibbs v. Winn*, 542 U.S. 88, 101 (2004) (quotation omitted) ("A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant, . . ."), and the only way to do that is to acknowledge that administrative expenses other than the statutory examples are permissible. Indeed, the Bankruptcy Code itself provides

[11] We are reminded of Congress' declaration in 1914 that: "The bankruptcy law has now been so thoroughly construed that there is not much doubt about any of its provisions." *See* H.R. REP. NO. 1182, 63d Cong., 2d Sess. 1 (1914); S. REP. NO. 847, 63d Cong., 3d Sess. 2 (1914).

in section 102(3) that the terms "includes" and "including" are not limiting. 11 U.S.C. § 102(3). Thus, as several appellate courts (and even more lower courts) have opined, section 503(b) was intended to provide a non-exclusive list of claims entitled to administrative expense priority. *See, e.g., Al Copeland Enters. Inc. v. Texas (In re Al Copeland Enters., Inc.),* 991 F.2d 233, 238 (5th Cir. 1993); *Ala. Surface Mining Comm'n v. N.P. Mining Co., Inc. (In re N.P. Mining Co. Inc.),* 963 F.2d 1449, 1452 (11th Cir.1992). The insertion of the term "including" into the introductory paragraph of section 503(b), therefore, provides bankruptcy courts with much needed flexibility in dealing with specific factual situations where the grant of an administrative expense is warranted.

Certainly, section 503(b)(3)(D) does not expressly preclude a bankruptcy court from using its discretion to award a substantial contribution administrative expense in chapter 7 cases based on the prefatory language in section 503(b). If Congress had intended such a result, it could have said so.[12] Indeed, as the *Connolly* court observed, there is a reasonable explanation for why section 503(b)(3)(D) references only cases under chapters 9 and 11:

> It makes good sense that in providing the examples [in section 503(b)], Congress would expressly mention Chapters 9 and 11 in the context of creditor activity making a "substantial contribution," but not Chapter 7. In both Chapters 9 and 11, as a matter of course, a creditor will spend its own time and resources to benefit the estate; however, in all but the most atypical Chapter 7 case (such as the instant case), the U.S. trustee fulfills this role.

*In re Connolly N. Am., LLC*, 802 F.3d at 817 (citation omitted). In other words, it is fair to infer that chapters 9 and 11 were expressly referenced in the statute because such cases require creditors to step in and make a substantial contribution for the benefit of the estate far more frequently than chapter 7 cases do. This is because of the important fiduciary role that trustees

[12] See, for example, section 503(c), where Congress recently reduced the broad discretion previously afforded to courts in awarding compensation to insiders as an administrative expense.

play in most chapter 7 cases, in contrast to chapters 9 and 11 where the debtor usually remains in possession of the estate.

Importantly, our conclusion today is rooted in the "overriding consideration that equitable principles govern the exercise of bankruptcy jurisdiction." *Bank of Marin v. England*, 385 U.S. 99, 103 (1966) (citations omitted). Indeed, the Supreme Court has for decades recognized that bankruptcy courts "are essentially courts of equity, and their proceedings [are] inherently proceedings in equity." *See Local Loan Co. v. Hunt*, 292 U.S. 234, 240 (1934) (citations omitted); *see also Pepper v. Litton*, 308 U.S. 295, 307 (1939) ("As we have said, the bankruptcy court in passing on allowance of claims sits as a court of equity.").[13] Although bankruptcy courts' equitable powers are not unlimited "their decisions are unimpeachable so long as these powers are 'exercised within the confines of the Bankruptcy Code.'" *In re Connolly N. Am., LLC*, 802 F.3d at 814 (citation omitted).

In this case, the Trustee acknowledges that Weinberg made a substantial contribution to the chapter 7 estate. Such efforts, which resulted in a quick settlement of the fraudulent transfer claims, should be rewarded as they enhanced the pool of funds available for creditors. Failing to award an administrative expense to a creditor like Weinberg, who takes action to benefit the estate, could deter creditors from participating in chapter 7 cases. *In re Maust Transp., Inc.*, 589 B.R. at 898-99 ("If the particular facts of a case warrant reimbursement, the court should have the ability to fashion a remedy that will foster rather than hinder such actions for the benefit of the estate."). Section 503(b) simply cannot be read to compel such a result.

It is not our place to add restrictions to section 503(b) that were not expressly set forth

[13] Bankruptcy courts' equitable powers are expressly reinforced by section 105(a), which provides that: "The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C. § 105(a).

therein. Rather, that is the job of Congress. Section 503(b)'s broad language empowers bankruptcy courts to award substantial contribution administrative expenses in chapter 7 cases where, as here, the grant of such an award is equitable based on the totality of the circumstances. Accordingly, we affirm the holding of the bankruptcy court granting Weinberg an allowed administrative expense pursuant to section 503(b).

## Conclusion

For the reasons set forth herein, we AFFIRM the decision of the bankruptcy court below.

**MOON, Circuit Judge, dissenting:**

I respectfully dissent from both of the conclusions reached by the majority. With its holdings today, the majority promotes the interests of individual creditors over the bankruptcy estate and its creditor constituency by "rewriting the law under the pretense of interpreting it."[14] While the majority's desire to protect the interests of individual creditors may be commendable, it is nonetheless irreconcilable with the Bankruptcy Code.

[14] *King v. Burwell*, __ U.S. __, 135 S. Ct. 2480, 2506 (2015) (Scalia, J., dissenting).

## I. Passive Retention of Property of the Estate Violates Section 362(a)(3)

Relying on the "minority approach" recently revived by one of our sister circuits, the majority concludes that section 362(a)(3) prohibits only affirmative acts to exercise control over property of the estate. *See, e.g., WD Equip., LLC v. Cowen (In re Cowen)*, 849 F.3d 943, 950 (10th Cir. 2017). The majority reasons that in order to prevent prejudice to creditors like Weinberg, section 362(a)(3) must logically be read to permit creditors to passively retain repossessed property of the estate without violating the automatic stay.

The majority misinterprets section 362(a)(3). The plain text of the statute compels me to conclude that the passive retention of property of the estate violates the automatic stay. I therefore join four other circuit courts of appeal in finding the "majority approach" to be more persuasive. *See Weber v. SEFCU (In re Weber)*, 719 F.3d 72, 81 (2d Cir. 2013); *Thompson v. Gen. Motors Acceptance Corp., LLC*, 566 F.3d 699, 707-708 (7th Cir. 2009); *State of Cal. Emp't Dev. Dept. v. Taxel (In re Del Mission Ltd.)*, 98 F.3d 1147, 1151 (9th Cir. 1996); *Knaus v. Concordia Lumber Co., Inc. (In re Knaus)*, 889 F.2d 773, 775 (8th Cir. 1989).

As the majority correctly notes, the starting and ending point for any matter of statutory interpretation is the plain meaning of the text. Focusing exclusively on the term "act," the majority concludes that Weinberg's continued possession of property of the estate did not violate section 362(a)(3). Without so much as a mention, the majority removes the phrase "to exercise control" from the statute. *Cf. Duncan v. Walker*, 533 U.S. 167, 174 (2001) (citations omitted) (statute should be interpreted to give every clause and word meaning). However, when the phrase "to exercise control" is properly considered, it is clear that even passive retention of estate property violates the automatic stay.

Neither the phrase "any act . . . to exercise control" nor any of the words contained therein are defined in the Bankruptcy Code. According to a leading legal dictionary, the term "control" is defined as, among other things, "[t]o exercise restraining or directing influence over. To regulate; restrain; dominate; curb; to hold from action; overpower; counteract; govern." BLACK'S LAW DICTIONARY 329 (6th ed. 1990); *see Thompson*, 566 F.3d at 702 (citation omitted); *In re Weber*, 719 F.3d at 79 (citation omitted). By retaining possession of the snow plow trucks, refusing to return them, and otherwise prohibiting the Debtor from using property of the estate, Weinberg violated the automatic stay under section 362(a)(3). The inquiry should therefore end here.

Even if its restrictive reading of the statute is correct, the majority misconstrues the term "act," because, of course, Weinberg did "do something." *Accord In re Peake*, 588 B.R. 811, 832 (Bankr. N.D. Ill. 2018) (citation omitted) ("act" should be given "broadest meaning when construing the expansively-interpreted language in section 362(a)(3)"). Weinberg prevented the Debtor from obtaining access to property of the estate that was critical to the Debtor's rehabilitation efforts. *See, e.g.*, *Thompson*, 566 F.3d at 702; *see also* Hon. Eugene R. Wedoff, *The Automatic Stay Under § 362(a)(3) – One More Time*, 38 BANKR. L. LETTER 7, July 2018, at 1.

The "majority approach" is consistent with the history of section 362(a)(3). Prior to 1984, section 362(a)(3) only stayed "any act to obtain possession of property of the estate or of property from the estate." *TranSouth Fin. Corp. v. Sharon (In re Sharon)*, 234 B.R. 676, 682 (B.A.P. 6th Cir. 1999). When it expanded section 362(a)(3) to prohibit any exercise of control over property of the estate, Congress made it clear that all property of the estate, including any property obtained by a creditor prepetition, must be promptly turned over to the trustee. After

all, withholding possession "is the essence of exercising control" over property. *Id.* at 682. To hold otherwise would be inconsistent with Congress' intention to prevent creditors from retaining property of the estate "in derogation of . . . bankruptcy procedure and the broad goals" of the Bankruptcy Code. *In re Weber*, 719 F.3d at 80.

Perhaps acknowledging that its plain meaning analysis is incomplete, the majority looks beyond section 362(a)(3). According to the majority, section 542(a), which requires turnover of property of the estate, is not self-effectuating, meaning that a trustee must affirmatively request turnover as a prerequisite to any violation of the automatic stay under section 362(a)(3). The majority's interpretation is not supported by the Bankruptcy Code and, for the most part, was rejected by the United States Supreme Court in *United States v. Whiting Pools*, 462 U.S. 198, 206-207 (1983).

Congress chose to use the term "shall," not the permissive "may," in section 542(a), signaling that turnover of property of the estate is mandatory. *See Kingdomware Tech., Inc. v. United States*, __ U.S. __, 136 S. Ct. 1969, 1977 (2016) (citations omitted). Regardless of the circumstances, creditors are required to turn over property of the estate without the need for the trustee to first seek relief from the court. 5 COLLIER ON BANKRUPTCY ¶ 542.03 (16th ed. 2017) ("By its express terms, [section 542] is self executing, and does not require that the trustee take any action or commence a proceeding or obtain a court order to compel the turnover."). As evidenced by section 542(e), Congress knew how to require court intervention. Yet Congress chose not to do so with respect to section 542(a). *Compare* 11 U.S.C. § 542(a) ("shall deliver") *with* 11 U.S.C. § 542(e) (court may require turnover only "after notice and a hearing"). In this case, Weinberg was required to promptly turn over the snow plow trucks because they were property of the estate. Weinberg's continued control over the trucks violated the automatic stay

in that it denied the Debtor the ability to use such trucks to further its reorganization efforts. It is that simple.

Notwithstanding the Debtor's right to use property of the estate, the majority reads an exception into sections 362(a)(3) and 542(a) by concluding that a creditor's right to adequate protection under section 363(e) somehow excuses turnover. The majority's interpretation is at odds with *Whiting Pools*, wherein the Court explained that:

> [Section 542(a)] requires an entity (other than a custodian) holding any property of the debtor that the trustee can use under § 363 to turn that property over to the trustee. Given the broad scope of the reorganization estate, property of the debtor repossessed by a secured creditor falls within this rule, and therefore may be drawn into the estate. While there are explicit limitations on the reach of § 542(a), none requires that the debtor hold a possessory interest in the property at the commencement of the reorganization proceedings. . .
>
> In effect, § 542(a) grants to the estate a possessory interest in certain property of the debtor that was not held by the debtor at the commencement of the reorganization proceedings.

*Whiting Pools*, 462 U.S. at 206-207 (internal citations and footnotes omitted).

The majority takes no issue with *Whiting Pools*, nor can it. Instead, the majority focuses on the Court's statement that certain "explicit limitations" may excuse turnover under section 542(a). The majority concludes that such limitations must logically include a creditor's right to adequate protection under section 363(e).[15] Practically speaking, this conclusion has some appeal, especially where a creditor's security interest in property of the estate is wholly-

[15] The majority also identifies two other explicit limitations. First, section 542(a) does not require turnover of property that is not property of the estate. Second, even if the property constitutes property of the estate, such property is of inconsequential value or benefit to the estate. I do not disagree with these general observations. However, if there is a dispute regarding whether the property is property of the estate under section 541, it will be litigated. *See* Fed. R. Bankr. P. 7001(1). In the event that the non-debtor party prevails, there will be no violation of the automatic stay under section 362(a)(3). Similarly, if the property is of inconsequential value or benefit to the estate, it will be litigated or the property abandoned. *See* 11 U.S.C. § 554.

dependent on continuous possession. *Whiting Pools*, however, undercuts the majority's conclusion.

*Whiting Pools* identifies three exceptions to section 542(a), none of which include adequate protection under section 363(e). *Id.* at 206 n.12. The Court explained that "[s]ection 542(a) simply requires the [creditor] to seek protection of its interest according to the congressionally established procedures, rather than by withholding the seized property. . ." *Id*. at 211-12; *see In re Weber*, 719 F.3d at 80; *Rutherford v. Auto Cash, Inc. (In re Rutherford)*, 329 B.R. 886, 895-96 (Bankr. N.D. Ga. 2005). Those "established procedures" include any request for adequate protection under section 363(e) which, unlike section 542(a), is not self-executing. 11 U.S.C. § 363(e); *see Whiting Pools*, 462 U.S. at 204 ("at the secured creditor's insistence," bankruptcy court must condition trustee's ability to use, sell or lease property of estate); *see also In re Kain*, 86 B.R. 506, 512 (Bankr. W.D. Mich. 1988) ("[I]f you don't ask for it, you won't get it.").[16] In short, the majority's reliance on sections 363(e) and 542(a) is "exactly the argument rejected by the Supreme Court in *Whiting Pools*." *In re Sharon*, 234 B.R. at 683.

Finally, from a policy perspective, I cannot overlook the potentially problematic consequences of the majority's conclusion. As one of our sister circuits observed:

> [i]f persons who could make no substantial adverse claim to a debtor's property in their possession could, without cost to themselves, compel the debtor or his trustee to bring suit as a prerequisite to returning the property, the powers of a bankruptcy court and its officers to collect the estate for the benefit of creditors would be vastly reduced.

*In re Del Mission Ltd.*, 98 F.3d at 1151 (quotation omitted).

[16] According to the majority, creditors dependent on a possessory lien will be severely prejudiced by having to turnover such property pending a request for adequate protection. Not so. The Bankruptcy Code and the Bankruptcy Rules already protect against this possibility. *Stephens v. Guaranteed Auto, Inc. (In re Stephens)*, 495 B.R. 608, 614 (Bankr. N.D. Ga. 2013) (identifying means by which creditor can protect its interest while still complying with sections 362 and 542).

This appeal is a case in point from the standpoint of a commercial debtor in chapter 11. Through Weinberg's "act," he initially impeded the Debtor's reorganization efforts. As if that were not enough, he subsequently prevented the Trustee from maximizing value for the estate and its creditors by disrupting the proposed sale to Tenth Avenue. The majority's interpretation of the statute is perhaps even more troublesome when viewed from the perspective of a consumer debtor in chapter 13, who may, for example, need a repossessed vehicle to travel to work, thereby enabling him to generate income from which to fund his plan and provide for his family. *See Thompson*, 566 F.3d at 702 ("An asset actively used by a debtor serves a greater purpose to both the debtor and his creditors than an asset sitting idle on a creditor's lot.").

For all intents and purposes, the majority's conclusion now requires piecemeal assembly of the estate, the consequences of which are twofold. First, debtors will be denied any realistic prospect of reorganization and the fresh start to which they would otherwise be entitled. Second, creditors will be deprived of the maximum distribution of estate assets due to increased costs of administration. This cannot be what Congress had in mind.

For these reasons, it is clear that Weinberg's conduct constituted a violation of the automatic stay. I would therefore reverse the decision of the bankruptcy court and remand for a determination as to the appropriate amount of sanctions against Weinberg under sections 362(a)(3) and 105(a).

## II. Section 503(b)(3)(D) Precludes Allowance of an Administrative Expense for Making a Substantial Contribution in a Chapter 7 Case

Again relying on the "minority approach" recently endorsed by one of our sister circuits, the majority concludes that a creditor may be awarded an administrative expense under section 503(b) for a substantial contribution made in a chapter 7 case, notwithstanding the express restriction in section 503(b)(3)(D) that confines such administrative expenses to chapters 9 and

11. *See, e.g.*, *Mediofactoring v. McDermott (In re Connolly N. Am., LLC)*, 802 F.3d 810, 819 (6th Cir. 2015). The majority reasons that by using the word "including" in the introductory paragraph to section 503(b), section 503(b)(3)(D) is but one example of a multitude of administrative expenses, the allowance of which should be shaped by equitable principles.

With its holding today, the majority sacrifices decades of bankruptcy jurisprudence by reducing section 503(b) to nothing more than an equitable statute without any restrictions whatsoever. As recognized by the majority of courts to have considered this issue, section 503(b)(3)(D) prohibits courts from allowing administrative expenses for substantial contributions made in chapter 7 cases. *See, e.g.*, *In re Lloyd Sec., Inc*., 75 F.3d 853, 857 (3d Cir. 1996); *Lebron v. Mechem Fin. Inc*., 27 F.3d 937, 946 (3d Cir. 1994); *In re Fesco Plastics Corp., Inc*., 996 F.2d 152, 157 n.5 (7th Cir. 1993); *see also Goodman v. Phillip R. Curtis Enter., Inc.*, 809 F.2d 228, 231 n.4 (4th Cir. 1987); *In re Am. Motor Club, Inc*., 125 B.R. 79, 82 (Bankr. E.D.N.Y. 1991) (Duberstein, J.). For the second time today, I must respectfully dissent.

As the Supreme Court has repeatedly reminded us, "[w]hen the statute's language is plain, the sole function of the courts – at least where the disposition required by the text is not absurd – is to enforce it according to its terms." *Lamie v. U.S. Trustee*, 540 U.S. 526, 534 (2004) (citation and internal quotations omitted). Here, the starting point is section 503(b)(3)(D), which provides that certain parties in interest, including creditors, are entitled to an administrative expense for "making a substantial contribution in a case under chapter 9 or 11. . ." 11 U.S.C. § 503(b)(3)(D).

Congress clearly knew how to provide for an administrative expense for making a substantial contribution. While it did so with respect to cases under chapters 9 and 11, Congress chose not to with respect to chapter 7. *In re Hackney*, 351 B.R. 179, 201 (Bankr. N.D. Ala.

2006) (citation omitted)); *see also Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) (Congress "says in a statute what it means and means in a statute what it says there."). Unlike the majority, I decline "to engage in speculation" nor will I "attempt to divine congressional wisdom." *U.S. Trustee v. Farm Credit Bank of Omaha (In re Peterson)*, 152 B.R. 612, 614 (D.S.D. 1993). Congress made a decision to exclude an administrative expense for a substantial contribution in chapter 7, and the courts have a duty to follow it. The inquiry should therefore end here.

For reasons unpersuasive to me, the majority disregards the plain meaning of section 503(b)(3)(D), as well as the oft-stated principle that administrative expenses are to be strictly construed to ensure equality of distributions from the bankruptcy estate. *See generally* 4 COLLIER ON BANKRUPTCY ¶ 503.06 (16th ed. 2017). While I do not disagree with the general observation that the use of the term "including" is illustrative, the majority takes it too far. Section 503(b) establishes a non-exhaustive list of nine administrative expenses that may be allowed. 11 U.S.C. § 503(b)(1)-(9). Notwithstanding this non-exhaustive list, Congress also imposed certain restrictions, six of which are contained in the subsections to section 503(b)(3). *See*, *e.g.*, *In re Engler*, 500 B.R. 163, 174 (Bankr. M.D. Fla. 2013) (citations omitted); *In re Blount*, 276 B.R. 753, 764 (Bankr. M.D. La. 2002).

Unlike section 503(b), section 503(b)(3) does not use the term "including," giving rise to the inference that the list of administrative expenses allowable under section 503(b)(3) is exhaustive, at least with respect to those categories of administrative expenses set forth in that subsection. *See* 11 U.S.C. § 503(b)(3)(A)-(F); *compare* 11 U.S.C. § 503(b)(1)(A) (using term "including") with 11 U.S.C. § 503(b)(3) (omitting term "including"). When, like here, a statute sets forth a series of items in a general rule but excludes the term "including," the canon of

*expressio unius est exclusio alterius* applies, under which a court infers an intention to restrict the statute's application to only those specific examples listed. *Mosier v. Kupetz (In re United Educ. & Software)*, 2005 WL 6960237, at *7 (B.A.P. 9th Cir. Oct. 7, 2005) (citation omitted); *see also Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992) (more specific statute governs the more general when both address same subject matter). Section 503(b)(3)(D) thus acts as a counter-balance to the term "including" in the introductory paragraph of section 503(b) by limiting the circumstances under which an administrative expense for a substantial contribution can be allowed. *See In re Fontainebleau Las Vegas Holdings, LLC*, 574 B.R. 895, 903 (Bankr. S.D. Fla. 2017) (citation omitted).

By reducing section 503(b)(3)(D) to a mere illustration, the majority renders that subsection without any meaning whatsoever. *Cf. TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (citations omitted) (statute should be construed so as not to render any clause, sentence, or word superfluous, void or insignificant). Attempting to overcome this flaw, the majority proclaims that section 503(b)(3)(D) nonetheless has a purpose. According to the majority, section 503(b)(3)(D) is part of a "contextual framework" designed to provide "guidance" to the courts. The majority reasons that Congress did not include chapter 7 in section 503(b)(3)(D) because only in rare cases will a creditor need to fulfill the duties of a chapter 7 trustee or the United States Trustee. Yet the legislative history to section 503(b)(3)(D) reveals that Congress purposely limited the scope of section 503(b)(3)(D) so as to exclude chapter 7. *See In re Connolly N. Am., LLC*, 802 F.3d at 821-22 (O'Malley, J., dissenting) (citations omitted). Simply because Congress did not foresee the need for a creditor to make a substantial contribution in a chapter 7 case does not justify a departure from the plain meaning of section 503(b)(3)(D).

The majority relies heavily on *Connolly*, a split decision from the Sixth Circuit. For several reasons, *Connolly* is not persuasive. First, *Connolly* attempts to cloak its reliance on principles of equity by suggesting that the plain meaning rule dictates the outcome. *See In re Connolly N. Am., LLC*, 802 F.3d at 814-15. Equity, however, only goes so far in bankruptcy. *See, e.g.*, *Law v. Siegel*, __ U.S. __, 134 S. Ct. 1188, 1194-95 (2014). Second, the majority's use of equity to afford relief to Weinberg is wholly unnecessary. Congress provided creditors like Weinberg with a means by which to obtain an administrative expense for their efforts to recover fraudulently transferred property, provided they first seek court approval. *See* 11 U.S.C. § 503(b)(3)(B); 11 U.S.C. § 503(b)(4). Third, *Connolly* is an outlier. *In re Connolly N. Am.*, 802 F.3d at 822-23 n.2 (O'Malley, J., dissenting) (collecting cases). At the time *Connolly* was decided, 86% of the courts confronted with the issue held that a court cannot allow an administrative expense for a substantial contribution in chapter 7, while only 14% agreed with the *Connolly* majority. *In re Health Trio, Inc.*, 584 B.R. 342, 353 (Bankr. D. Colo. 2018). There is a reason for such disparity in the case law – the limitations established by section 503(b)(3)(D) could not be more clear.[17]

In sum, the majority's conclusion does not comport with Congress' directive under section 503(b)(3)(D), no matter how inequitable the result may be to creditors like Weinberg. Whether intended or not, the majority's decision will have consequences far beyond section 503(b)(3)(D). Taking the majority's holding to its logical conclusion, administrative expenses in this circuit are no longer subject to any boundaries, restrictions or limitations. They may now be

[17] As the *Connolly* dissent notes, *Connolly* arguably created an intra-circuit split within the Sixth Circuit. *See In re Connolly N. Am., LLC*, 802 F.3d at 822 (O'Malley, J., dissenting) (citing and discussing *Hyundai Translead, Inc. v. Jackson Truck & Trailer Repair, Inc. (In re Trailer Source, Inc.)*, 555 F.3d 231, 243 (6th Cir. 2009)).

allowed in any and all forms.[18] This could not have been Congress' intent. I therefore cannot join the majority's opinion on this issue and again must respectfully dissent.

[18] With its decision today, the majority has seemingly transformed section 503(b) into a statute founded in nothing more than equity. The majority's interpretation begs the question – do any of this court's previous decisions regarding administrative expenses under section 503(b) remain precedential, or are the lower courts in this circuit now given the discretion to rule as they choose based solely on the equities?