No.

In the Supreme Court of the United States

JOY DENBY-PETERSON,
PETITIONER

V.

NU2U AUTO WORLD AND PINE VALLEY MOTORS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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I

QUESTION PRESENTED

Whether a creditor who maintains possession of property in which a bankruptcy estate has an interest violates the Bankruptcy Code's automatic stay provision, 11 U.S.C. § 362(a), by refusing to return that property to the debtor or trustee upon receiving notice of the bankruptcy petition?

RELATED PROCEEDINGS

United States Bankruptcy Court for the District of New Jersey

In re Denby-Peterson, No. 17–15532–ABA (October 20, 2017—granting motion for turnover and denying motion for sanctions for violation of the automatic stay); (March 29, 2018—dismissing the bankruptcy petition)

United States District Court for the District of New Jersey

Denby-Peterson v. *NU2U Auto World*, Civil No. 17-9985 (NLH) (November 1, 2018) (affirming the October 20, 2017 judgment of the bankruptcy court)

United States Court of Appeals for the Third Circuit

In re Denby-Peterson, No. 18-3562 (October 28, 2019) (affirming the judgment of the district court)

TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Page(s)

Cases:

Statutory Provisions:

PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-32a) is reported at 941 F.3d 115. The opinion of the district court (App., *infra*, 33a-53a) is reported at 595 B.R. 184. The opinion of the bankruptcy court (App., *infra*, 54a-89a) is reported at 576 B.R. 66.

JURISDICTION

The Third Circuit entered judgment on October 28, 2019. On January 17, 2020, Justice Alito granted an extension of time to file a petition for a writ of certiorari until February 26, 2020. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

11 U.S.C. § 362(a) provides in pertinent part:

> Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title * * * operates as a stay, applicable to all entities, of— * * *
>
> (3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate.

11 U.S.C. § 541(a) provides in pertinent part:

> The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:

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

11 U.S.C. § 542(a) provides in pertinent part:

> 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 * * * 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.

STATEMENT

1. Under the Bankruptcy Code, filing a bankruptcy petition creates a bankruptcy estate, 11 U.S.C. § 541(a)(1) and automatically stays certain actions, *id.* § 362(a)(3). The bankruptcy estate includes all the debtor's legal and equitable interests in property, "wherever located and by whomever held." *Id.* § 541(a)(1). The automatic stay forbids creditors from, among other things, engaging in "any act * * * to exercise control over property of the estate," *Id.* § 362(a)(3), thereby preventing creditors from interfering with the administration of the estate. The Code's turnover provision, *id.* § 542(a), works in tandem with the automatic stay, requiring creditors to return to the estate any property "that the trustee may use, sell, or lease." *Ibid.* The right to turnover may be enforced through a motion filed with the bankruptcy court.

2. Petitioner Joy Denby-Peterson purchased a used 2008 Chevrolet Corvette in July 2016, App., *infra*, 59a, which she financed through the seller, Pine Valley Motors, *ibid.* Petitioner's creditors[1] repossessed the vehicle in early 2017 following her failure to make a required payment. *Id.* at 4a-5a. As a result, petitioner "lost work because she could not travel to the patients she treated as a licensed practical nurse," *id.* at 35a, and lost some personal property that was within the car, *id.* at 65a.

Ms. Denby-Peterson subsequently filed a voluntary Chapter 13 bankruptcy petition. App., *infra*, 5a. She promptly notified the creditors of the filing and informed them of their obligation to return the car pursuant to the automatic stay. *Id.* at 5a-6a. The creditors refused, instead retaining possession of petitioner's vehicle. *Id.* at 6a.

3. Ms. Denby-Peterson then moved to compel turnover of the car and to impose sanctions on her creditors for violating the automatic stay. App., *infra*, 6a. The bankruptcy court ordered the creditors to return the car, finding that it was indeed part of the bankruptcy estate and thus subject to turnover. *Id.* at 75a. The court denied petitioner's motion for sanctions, however, concluding that the creditors had not violated the automatic stay by retaining possession of the car. *Id.* at 86a-87a.

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[1] After the initial sale, Pine Valley Motors assigned its interest in petitioner's vehicle to an affiliate, NU2U Auto World. App., *infra*, 4a. The petition refers to both entities collectively as "the creditors."

The bankruptcy court recognized a circuit split on the question of whether retaining possession of property which had been repossessed prior to a bankruptcy filing violates the automatic stay. App., *infra*, 80a-83a. Siding with the minority circuits, it concluded it does not. App., *infra*, 85a-86a. The court expressed concern that requiring a creditor to automatically return property of the debtor would "not allow for the possibility of defenses to turnover." *Id.* at 85a.

4. The district court affirmed. App., *infra*, 34a. Pointing to the text of § 362, the court concluded that the automatic stay is "prospective in nature," reasoning that "the exercise of control is not stayed, but the act to exercise control is stayed." *Id.* at 43a. The district court also concluded that its interpretation "balances both sides" by "prohibit[ing] creditors from taking post-petition action" while still "allow[ing] a bankruptcy court to fully consider a creditor's defenses to turnover." *Id.* at 46a.

5. The Third Circuit also affirmed. The court focused on the language of 11 U.S.C. § 362(a)(3), which prohibits the creditors from taking "any act * * * to exercise control over property." The court concluded that the term "act * * * to exercise control" "prohibit[s] creditors [only] from taking any *affirmative* act to exercise control over property of the estate" after receiving notice of a bankruptcy petition. App., *infra*, 18a (emphasis added). The court also reasoned that its interpretation comported with the purpose of the automatic stay: to "maintain the status quo." *Id.* at 20a (emphasis omitted). Finally, the court found that the legislative history "provides no guidance" about

the relevant question. *Id.* at 22a. Thus, because the creditors did not "affirmative[ly] act to exercise control" over petitioner's vehicle after she informed them of her bankruptcy, they had not violated the automatic stay and were not liable for sanctions. *Id.* at 19a.

ARGUMENT

In the decision below, the Third Circuit deepened a circuit split on the question whether a creditor violates bankruptcy's automatic stay by retaining property in which a bankruptcy estate has an interest despite having received notice of the bankruptcy petition. See App., *infra*, 14a (describing split). By holding that a creditor does not, the Third Circuit sided with the Tenth and D.C. Circuits[2] against the Second, Seventh, Eighth, Ninth, and Eleventh Circuits.[3]

On December 18, 2018, this Court granted the petition for a writ of certiorari in *City of Chicago* v. *Fulton* (No. 19-357) in order to resolve precisely the question presented in this case. Accordingly, this Court should hold this petition and dispose of it in light of its decision in *Fulton*.

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[2] See *In re Cowen*, 849 F.3d 943 (10th Cir. 2017); *United States* v. *Inslaw, Inc.*, 932 F.2d 1467 (D.C. Cir. 1991).

[3] See *In re Weber*, 719 F.3d 72 (2d Cir. 2013); *In re Fulton*, 926 F.3d 916 (7th Cir. 2019); *In re Knaus*, 889 F.2d 773 (8th Cir. 1989); *In re Del Mission Ltd.*, 98 F.3d 1147 (9th Cir. 1996); *In re Rozier*, 376 F.3d 1323 (11th Cir. 2004).

CONCLUSION

The petition for a writ of certiorari should be held pending this Court's decision in *City of Chicago* v. *Fulton* (No. 19-357) and then disposed of as appropriate in light of that decision.

Respectfully submitted.

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FEBRUARY 2020

APPENDIX

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 18-3562

In re: JOY DENBY-PETERSON,
Appellant

Appeal from the United States District Court
for the District of New Jersey
(D.C. No. 1-17-cv-09985)
District Judge: Hon. Noel L. Hillman

Argued May 23, 2019

Before: McKEE, SHWARTZ, and FUENTES, *Circuit Judges*.

(Filed: October 28, 2019)

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OPINION OF THE COURT

FUENTES, *Circuit Judge*.

At the center of this bankruptcy appeal is "America's first sports car": the Chevrolet Corvette.[1] Joy Denby-Peterson purchased a Chevrolet Corvette in July 2016. Several months later, the Corvette was repossessed by creditors after Denby-Peterson defaulted on her car payments. Denby-Peterson

[1] H.R. Res. 970, 110th Cong. (2008).

subsequently filed an emergency voluntary Chapter 13 petition in the Bankruptcy Court for the District of New Jersey. She then notified the creditors of the bankruptcy filing and demanded that they return the Corvette to her.

After the creditors did not comply with her demand, Denby-Peterson filed a motion for turnover in the Bankruptcy Court. She sought an order (1) compelling the creditors to return the Corvette to her, and (2) imposing sanctions for the creditors' alleged violation of the Bankruptcy Code's automatic stay.[2] The Bankruptcy Court entered an order mandating turnover of the Corvette to Denby-Peterson but denying Denby-Peterson's request for sanctions. The Bankruptcy Court denied the sanctions request on the basis that the creditors did not violate the automatic stay by failing to return the repossessed Corvette to Denby-Peterson upon receiving notice of the bankruptcy filing. Denby-Peterson appeals from an order of the District Court affirming the Bankruptcy Court.

We are now presented with an issue of first impression for our Court: whether, upon notice of the debtor's bankruptcy, a secured creditor's failure to return collateral that was repossessed pre-bankruptcy petition is a violation of the automatic stay. We answer in the negative, and thus join the minority of our sister courts—the Tenth and D.C. Circuits—in holding that a secured creditor does not have an affirmative obligation under the automatic stay to

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[2] *See* 11 U.S.C. §§ 362(a)(3), (k).

return a debtor's collateral to the bankruptcy estate immediately upon notice of the debtor's bankruptcy because failure to return the collateral received pre-petition does not constitute "an[] act . . . to exercise control over property of the estate."[3] We will therefore affirm the order of the District Court affirming the Bankruptcy Court.

I.

A. Facts

On July 21, 2016, Debtor Joy Denby-Peterson purchased a used yellow 2008 Chevrolet Corvette from a car dealership named Pine Valley Motors. To finance her purchase, Denby-Peterson entered into a retail installment contract with Pine Valley Motors, which, in turn, assigned its rights under the contract to its affiliate company, NU2U Auto World.[4] Under the contract, Denby-Peterson agreed to pay (1) a $3,000 cash down payment; (2) a deferred down payment of $2,491 by August 11, 2016 to pay sales taxes and registration fees to obtain permanent license plate tags; and (3) weekly installment payments of $200 for 212 weeks. Between July 2016 and February 2017, Denby-Peterson made payments totaling $9,200 under the contract, including the $3,000 down payment applied on the day of the sale. She never made the required down payment of $2,491. As a result, the creditors repossessed the Corvette in

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[3] *Id*. § 362(a)(3).

[4] For the sake of brevity, we will collectively refer to Pine Valley Motors and NU2U Auto World as "the creditors."

February or March 2017.[5] The Corvette was never titled or registered in Denby-Peterson's name.

B. Bankruptcy Court Proceedings

i. Denby-Peterson's Chapter 13 Bankruptcy Petition

After the Corvette was repossessed, Denby-Peterson filed a voluntary petition for relief under Chapter 13 of the Bankruptcy Code on March 21, 2017. Under Section 362 of the Code, the filing of the petition triggered an automatic stay of "any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate."[6]

Within two days, the creditors received notice of Denby-Peterson's bankruptcy filing. Counsel for Denby-Peterson had notified them of the filing and demanded that they return the Corvette to Denby-

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[5] The retail installment contract's "repossession" clause states, in relevant part: "[i]f you are in default, we may take the vehicle from you after we give you any notice required by law." Bankr. Petition No. 17-15532-ABA, Doc. No. 17-5 at 3. "Default," in turn, is defined as including, among other things: (1) "failure to pay any installment when due"; (2) "failure to perform or breach of any section of th[e] contract"; and (3) "failure to obtain and maintain the insurance required by th[e] contract." *Id.*

Before the Bankruptcy Court, the parties disputed the date of repossession. Denby-Peterson claimed that the Corvette was repossessed on March 13, 2017, while the creditors claimed that it was repossessed one month earlier, in February 2017. All parties nevertheless agree that the repossession occurred before Denby-Peterson filed for bankruptcy.

[6] 11 U.S.C. § 362(a)(3).

Peterson. Counsel also maintained that the creditors' failure to return the Corvette would result in a violation of the automatic stay. He faxed a letter to the creditors which stated, in relevant part:

> **BE ADVISED** your failure to release the vehicle to Ms. Denby-Peterson is a violation of the Automatic Stay. If the vehicle has not been released before 5pm today, this firm will seek damages, costs, and attorneys' fees against your company for willful violations of the automatic stay.[7]

The creditors did not comply with Denby-Peterson's demand and thus remained in possession of the Corvette.

ii. Denby-Peterson's Motion for Turnover and Sanctions

Denby-Peterson then filed a motion[8] for turnover in Bankruptcy Court, asking the Bankruptcy Court to (1) order the creditors to return the Corvette to her, and (2) impose sanctions for the creditors alleged violation of the automatic stay. Denby-Peterson sought costs and attorneys' fees for filing the motion; compensation for "non-economic damages"; punitive

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[7] Bankr. Petition No. 17-15532-ABA, Doc. No. 5-3 at 3. *See* 11 U.S.C. § 362(k)(1).

[8] The motion was entitled "motion for return of repossessed auto and seeking sanctions against creditor for violat[ing] the automatic stay." Bankr. Petition No. 17-15532-ABA, Doc. No. 5 (original in uppercase and bold).

damages; and "all other relief the Court deem[ed] just and equitable."[9]

The creditors opposed the motion. They also filed a proof of claim, asserting a security interest in the Corvette in the amount of $28,773.[10]

iii. The Bankruptcy Court's Decision

Following a two-day hearing, the Bankruptcy Court issued a written decision and order granting the motion in part and denying it in part. The Bankruptcy Court, *inter alia*, granted Denby-Peterson's request for turnover and thus ordered the creditors to return the Corvette to Denby-Peterson within seven days, but denied Denby-Peterson's sanctions request.

The Bankruptcy Court held, *inter alia*, that (1) the creditors must return the Corvette under the Bankruptcy Code's turnover provision in Section

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[9] Bankr. Petition No. 17-15532-ABA, Doc. No. 5-7 at 3. *See* 11 U.S.C. § 362(k)(1) (stating, in relevant part, that "an individual injured by any willful violation of a stay . . . shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages"); *see also In re Lansaw*, 853 F.3d 657, 667 (3d Cir. 2017), *cert. denied sub nom. Zokaites v. Lansaw*, 138 S. Ct. 1001 (2018) ("expressly concluding that 'actual damages' under § 362(k)(1) include damages for emotional distress resulting from a willful violation of the automatic stay.").

[10] The retail installment contract's "security interest" clause provides that (1) Denby-Peterson gave the creditors a security interest in, *inter alia*, the Corvette, and (2) the security interest "cover[ed] all amounts [she] owe[d]." Bankr. Petition No. 17-15532-ABA, Doc. No. 17-5 at 3.

542(a),[11] and (2) the creditors did not violate the automatic stay by retaining possession of the Corvette upon receiving notice of the bankruptcy filing. Thus, the Bankruptcy Court determined that the creditors were not liable for sanctions based on an alleged violation of the automatic stay.

In reaching its holdings, the Bankruptcy Court found that Denby-Peterson had an equitable interest in the Corvette at the time of the bankruptcy filing, and therefore, the Corvette was property of the estate subject to turnover.[12]

Next, the Bankruptcy Court considered whether the creditors violated the automatic stay by failing to return the Corvette after learning of the bankruptcy filing. It identified the split among our sister circuits on this issue, pointing out that the Second, Seventh, Eighth, and Ninth Circuits ("the majority") have held that the Bankruptcy Code's turnover provision requires immediate turnover of estate property that was seized pre-petition and that failure to do so violates the automatic stay.[13] However, the Tenth and

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[11] *See* 11 U.S.C. § 542(a) (stating, in relevant part, that "an entity, other than a custodian, in possession, custody, or control, during the case, of property that the [debtor] may use, sell, or lease under section 363 of this title . . . shall deliver to the [debtor], and account for, such property or the value of such property, unless such property is of inconsequential value or benefit to the estate").

[12] *See id.* § 541(a) (defining "property of the estate," in relevant part, as "all legal or equitable interests of the debtor in property as of the commencement of the case").

[13] *See In re Fulton*, 926 F.3d 916 (7th Cir. 2019); *In re Weber*, 719 F.3d 72 (2d Cir. 2013); *In re Del Mission Ltd.*, 98 F.3d 1147 (9th

D.C. Circuits ("the minority") "have instead held that a creditor does not violate the stay in regard to property of the estate if it merely maintains the status quo."[14] The Bankruptcy Court noted that the minority was critical of the majority's rule that Section 542(a)'s turnover provision "is self-effectuating" because "it does not allow for the possibility of defenses to turnover."[15]

The Bankruptcy Court ultimately adopted the minority position, describing it as "particularly persuasive"[16] and pointing out that "[f]rom the inception of this case there was an issue regarding exactly what . . . [Denby-Peterson]'s interest in . . . [the Corvette] was."[17] Accordingly, the Bankruptcy Court concluded that the creditors did not violate the automatic stay by failing to turn over the Corvette to Denby-Peterson "prior to adjudication of . . . [her] right to redeem the [Corvette]," and thus, sanctions were not warranted.[18]

Cir. 1996); *In re Knaus*, 889 F.2d 773 (8th Cir. 1989); *see also In re Rozier*, 376 F.3d 1323, 1324 (11th Cir. 2004) (per curiam) (holding that the "district court did not err by affirming the bankruptcy court's order holding [the creditor] in willful contempt of the automatic stay . . . by refusing to return the vehicle").

[14] *In re Denby-Peterson*, 576 B.R. 66, 80 (Bankr. D.N.J. 2017) (citing *In re Cowen*, 849 F.3d 943 (10th Cir. 2017); *United States v. Inslaw, Inc.*, 932 F.2d 1467 (D.C. Cir. 1991)).

[15] *Denby-Peterson*, 576 B.R. at 82.

[16] *Id.*

[17] *Id.*

[18] *Id.* at 83.

C. Denby-Peterson's Appeal to the District Court

Denby-Peterson appealed the Bankruptcy Court's order denying her sanctions request. Similar to the Bankruptcy Court, the District Court found "the minority position more persuasive."[19] The District Court thus affirmed the Bankruptcy Court's order denying Denby-Peterson's sanctions request.[20]

Denby-Peterson now appeals to our Court.[21] Because the creditors are not participating in this

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[19] *Denby-Peterson v. Nu2u Auto World*, 595 B.R. 184, 190 (D.N.J. 2018).

[20] While Denby-Peterson's appeal to the District Court was pending, the Bankruptcy Court dismissed the underlying bankruptcy case based on Denby-Peterson's failure to make all required pre-confirmation payments to the Trustee. Before addressing the merits of the appeal, the District Court concluded that Denby-Peterson's appeal was not mooted by the dismissal because the automatic-stay-related issue "is an ancillary issue not closely intertwined with the underlying bankruptcy." *Denby-Peterson*, 595 B.R. at 188.

[21] The District Court had jurisdiction under 28 U.S.C. § 158(a). We have jurisdiction under 28 U.S.C. § 158(d)(1). Because the District Court acted as an appellate court, we review its determinations *de novo*. *In re Bocchino*, 794 F.3d 376, 379 (3d Cir. 2015). We review the legal conclusions of the Bankruptcy Court *de novo* and its factual determinations for clear error. *Id.* at 380.

Generally, "[t]he imposition or denial of sanctions is subject to abuse-of-discretion review." *In re Miller*, 730 F.3d 198, 203 (3d Cir. 2013). We have not, however, addressed our standard of review for the imposition or denial of sanctions for violations of the automatic stay. We nevertheless need not do so now given that (1) the Bankruptcy Court denied sanctions based on its conclusion that the creditors did not violate the automatic stay, and (2) we now hold that both the Bankruptcy Court and the

appeal, we appointed Craig Goldblatt as *amicus curiae* to defend the judgment of the District Court.[22]

II.

On appeal, Denby-Peterson renews her argument that the creditors violated the automatic stay by not returning the repossessed Corvette upon learning of the bankruptcy filing. To provide context for the issue before us, we will discuss the Bankruptcy Code's automatic stay before addressing the merits of this appeal.

Under Section 362 of the Bankruptcy Code, entitled "[a]utomatic stay," the filing of a bankruptcy petition automatically triggers a stay.[23] Of particular relevance to this appeal, subsection (a)(3) provides that a bankruptcy petition "operates as a stay, applicable to all entities, of . . . any act to obtain possession of property of the estate . . . or to exercise control over property of the estate."[24] Property of the bankruptcy estate, in turn, generally includes "all legal or equitable interests of the debtor in property as

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District Court correctly concluded that there was no such violation.

[22] We thank Mr. Goldblatt for his excellent briefing and oral advocacy in this matter.

[23] 11 U.S.C. § 362.

[24] *Id.* § 362(a)(3). *See* H.R. Rep. No. 95-595, at 340 (1977) (stating that "[s]ubsection (a) defines the scope of the automatic stay, by listing the acts that are stayed by the commencement of the case").

of the commencement of the case,"[25] "wherever located and by whomever held."[26]

The automatic stay imposed by the Bankruptcy Code has a "twofold" purpose:

> (1) to protect the debtor, by stopping all collection efforts, harassment, and foreclosure actions, thereby giving the debtor a respite from creditors and a chance 'to attempt a repayment or reorganization plan or simply be relieved of the financial pressures that drove him [or her] into bankruptcy;' and (2) to protect 'creditors by preventing particular creditors from acting unilaterally in self-interest to obtain payment from a debtor to the detriment of other creditors.'[27]

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[25] 11 U.S.C. § 541(a)(1).

[26] *Id.* § 541(a). In a Chapter 13 case, such as this case, the concept of property of the estate is broader. *See id.* § 1306(a)(1) (providing that the Chapter 13 estate includes, in addition to the property specified in Section 541, property "that the debtor acquires after the commencement of the bankruptcy case" but before the case is either closed, dismissed, or converted).

[27] *Constitution Bank v. Tubbs*, 68 F.3d 685, 691 (3d Cir. 1995) (quoting *Maritime Elec. Co. v. United Jersey Bank*, 959 F.2d 1194, 1204 (3d Cir. 1991)). *See Taggart v. Lorenzen*, 139 S. Ct. 1795, 1804 (2019) (explaining that the automatic stay "aims to prevent damaging disruptions to the administration of a bankruptcy case in the short run"); *Inslaw*, 932 F.2d at 1473 ("The object of the automatic stay provision is essentially to solve a collective action problem—to make sure that creditors do not destroy the bankrupt estate in their scramble for relief.").

In furtherance of the automatic stay's overarching purpose, Section 362(a)(3) "prevent[s] dismemberment of the estate," and enables an "orderly" distribution of the debtor's assets.[28]

The consequences for willful violations of the automatic stay are set forth in Section 362(k) which provides that, subject to one exception, "an individual injured by any willful violation" of the automatic stay is entitled to "actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages."[29] We have explained that "[i]t is a willful violation of the automatic stay when a creditor violates the stay with knowledge that the bankruptcy petition has been filed. Willfulness does not require that the creditor intend to violate the automatic stay provision, rather it requires that the acts which violate the stay be intentional."[30]

III.

With the foregoing statutory background in mind, we now turn our attention to the issue of first impression before our Court: whether, upon receiving notice of a bankruptcy petition, a secured creditor violates the automatic stay by maintaining possession of collateral that it lawfully repossessed pre-petition. Specifically, we must decide whether the creditors' failure to return the Corvette to Denby-Peterson upon

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[28] H.R. Rep. No. 95-595, at 341.

[29] 11 U.S.C. § 362(k)(1). *See id.* § 362(k)(2) (providing a "good faith" exception to Section 362(k)(1)).

[30] *In re Lansdale Family Rests., Inc.*, 977 F.2d 826, 829 (3d Cir. 1992) (internal citations omitted).

learning of her bankruptcy filing was a violation of the automatic stay.[31]

As we previously acknowledged, there is a circuit split on this issue, which we have not yet joined. Under the majority position, held by the Second, Seventh, Eighth, Ninth, and Eleventh Circuits, a secured creditor, upon learning of the bankruptcy filing, must return the collateral to the debtor and failure to do so violates the automatic stay.[32] However, both the Tenth and D.C. Circuits disagree with the majority's interpretation of the automatic stay provision.[33] Under their view, a secured creditor is not obligated to return the collateral to the debtor until the debtor obtains a court order from the Bankruptcy Court requiring the creditor to do so. Thus, according to the minority, a creditor does not violate the automatic stay by retaining possession of the collateral after being notified of the bankruptcy filing.

Here, Denby-Peterson urges us to adopt the view of the majority of our sister circuits, advancing two theories in support of her position that the creditors violated the automatic stay. First, she maintains that the creditors' failure to return the Corvette violated the plain language of Section 362(a)(3)'s automatic stay provision by being "an[] act . . . to exercise control

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[31] It is undisputed here that the creditors repossessed the Corvette before Denby-Peterson had filed for bankruptcy and that the Corvette was property of Denby-Peterson's bankruptcy estate.

[32] *See Fulton*, 926 F.3d 916; *Weber*, 719 F.3d 72; *Del Mission*, 98 F.3d 1147; *Knaus*, 889 F.2d 773; *Rozier*, 376 F.3d 1323.

[33] *See Cowen*, 849 F.3d 943; *Inslaw*, 932 F.2d 1467.

over property of the estate."[34] Second, Denby-Peterson asserts that Section 362(a)(3)'s automatic stay provision and Section 542(a)'s turnover provision operate together such that a violation of the turnover provision results in a violation of the automatic stay. Thus, according to Denby-Peterson, the creditors were required to immediately turn over the Corvette, and by not doing so, they violated the automatic stay. For the reasons that follow, we are not persuaded by those arguments and thus hold that the creditors in this case did not violate the automatic stay. In so holding, we join the minority of our sister circuits.

IV.

A.

We begin our interpretation of Section 362(a)(3) of the Bankruptcy Code "where all such inquiries must begin: with the language of the statute itself."[35]

In examining the Bankruptcy Code, we are not "guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy."[36] Thus, to determine the plainness

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[34] 11 U.S.C. § 362(a)(3).

[35] *Ransom v. FIA Card Servs., N.A.*, 562 U.S. 61, 69 (2011) (internal quotation marks omitted).

[36] *Kelly v. Robinson*, 479 U.S. 36, 43 (1986) (internal quotation marks omitted). *See In re Price*, 370 F.3d 362, 369 (3d Cir. 2004) (emphasizing that "in interpreting the Bankruptcy Code, the Supreme Court has been reluctant to declare its provisions ambiguous, preferring instead to take a broader, contextual view"); *Official Comm. of Unsecured Creditors of Cybergenics Corp., ex rel. Cybergenics Corp. v. Chinery*, 330 F.3d 548, 559 (3d Cir. 2003) ("Statutory construction is a holistic endeavor, and this

or ambiguity of Section 362(a)(3)'s statutory language, in addition to considering the statutory language itself, we may also engage in "a studied examination of the statutory context."[37] If we ultimately determine that a provision "is clear and unambiguous, [we] must simply apply it."[38] However, if we find that a provision is ambiguous,[39] "we then turn to pre-Code practice and legislative history to find meaning."[40]

With these principles of construction in mind, we will now examine the language of Section 362(a)(3). To reiterate, Section 362(a)(3) provides, in relevant part, that the filing of a bankruptcy petition "operates as a stay . . . of . . . any act to . . . exercise control over property of the estate."[41] According to Denby-Peterson, under the plain language of the automatic stay, a creditor who does not turn over property of the estate after a debtor demands its return exercises control over that property, thereby violating the automatic stay. While we agree that Section 362(a)(3) is unambiguous, we decline to hold that a plain reading of that Section compels the conclusion that the creditors in this case violated the automatic stay by failing to turn over the Corvette to Denby-Peterson.

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is especially true of the Bankruptcy Code." (quotation marks, alterations and citations omitted)).

[37] *Price*, 370 F.3d at 369.

[38] *In re KB Toys Inc.*, 736 F.3d 247, 251 (3d Cir. 2013) (citing *Roth v. Norfalco L.L.C.*, 651 F.3d 367, 379 (3d Cir. 2011)).

[39] *See Price*, 370 F.3d at 369 (explaining that "a provision is ambiguous when, despite a studied examination of the statutory context, the natural reading of a provision remains elusive").

[40] *In re Friedman's Inc.*, 738 F.3d 547, 554 (3d Cir. 2013).

[41] 11 U.S.C. § 362(a)(3).

The operative terms and phrases of Section 362(a)(3) are "stay," "act," and "exercise control." Because the Bankruptcy Code does not define them, we must look to their ordinary meanings.[42]

We start with the meaning of the word "stay." *Black's Law Dictionary* defines "stay" as "[t]he postponement or halting of a proceeding, judgment, or the like" or "[a]n order to suspend all or part of a judicial proceeding or a judgment resulting from that proceeding."[43] Moreover, *Webster's Third New International Dictionary* defines "stay" as a noun (as it is used in Section 362) as: (1) "a bringing to a stop," (2) "the action of halting," and (3) "the state of being stopped."[44]

Next, the noun "act" means, among other things, "[s]omething done; the action or process of achieving this."[45] *Black's Law Dictionary* similarly defines "act,"

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[42] *See Lamar, Archer & Cofrin, LLP v. Appling*, 138 S. Ct. 1752, 1759 (2018).

[43] Stay, *Black's Law Dictionary* (11th ed. 2019). Black's Law Dictionary further defines "automatic stay" as "[a] bar to all judicial and extrajudicial collection efforts against the debtor or the debtor's property, subject to specific statutory exceptions." *Id.*

[44] *Webster's Third New International Dictionary* 2231 (1993); *see* Stay, Oxford English Dictionary Online, https://www.oed.com/view/Entry/189408?rskey=uCJBz6&result=3&isAdvanced=false (including, among its definitions of "stay," "[t]he action of stopping or bringing to a stand or pause") (last visited Aug. 15, 2019).

[45] Act, Oxford English Dictionary Online, https://www.oed.com/view/Entry/1888?rskey=eprROF&result=4 (last visited Aug. 15, 2019).

in relevant part, as "[s]omething done or performed," or "[t]he process of doing or performing."[46]

Finally, as to the phrase "exercise control," we will separately consider the verb "exercise" and the noun "control." The relevant definition of "exercise" is "[t]o put in action or motion."[47] *Webster's Third New International Dictionary* also defines "exercise," in relevant part, as "to . . . make effective in action."[48] Additionally, "control," as a noun, means, among other things, "[t]he fact or power of directing and regulating the actions of people or things; direction, management; command."[49]

From these definitions, we gather that Section 362(a)(3) prohibits creditors from taking any affirmative act to exercise control over property of the estate. As correctly pointed out by the District Court, the statutory language "is prospective in nature . . . the *exercise* of control is not stayed, but the *act to* exercise control is stayed."[50] Therefore, we agree with

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[46] Act, *Black's Law Dictionary* (11th ed. 2019).

[47] Exercise, Oxford English Dictionary Online, https://www.oed.com/view/Entry/66089?rskey=QNVdyF&result=2&isAdvanced=false (last visited Aug. 15, 2019); *see* Exercise, *Black's Law Dictionary* (11th ed. 2019) (describing "exercise" as meaning, in relevant part, "[t]o make use of; to put into action").

[48] *Webster's Third New International Dictionary* 795.

[49] Control, Oxford English Dictionary Online, https://www.oed.com/view/Entry/40562?rskey=qZlHZj&result=1 (last visited Aug. 15, 2019); *see* Control, *Black's Law Dictionary* (11th ed. 2019) (identifying "the power or authority to manage, direct, or oversee" as one of the definitions of "control").

[50] *Denby-Peterson*, 595 B.R. at 190.

the minority position held by two of our sister courts—the text of Section 362(a)(3) requires a post-petition affirmative act to exercise control over property of the estate.[51]

B.

Here, a post-petition affirmative act to exercise control over the Corvette is not present. The creditors repossessed the Corvette before Denby-Peterson had filed for bankruptcy. Accordingly, pre-bankruptcy petition, the creditors had possession and control of the Corvette, and post-bankruptcy petition, the creditors merely passively retained that same possession and control. Although the creditors exercised control over the Corvette by keeping it in their possession after learning of the bankruptcy filing, the requisite post-petition affirmative "act . . . to exercise control over" the Corvette is not present in this case.[52] An application of the plain language of the statute to the facts of this case thus shows that the creditors did not violate the automatic stay.[53]

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[51] *See Cowen*, 849 F.3d at 949 (concluding that Section 362(a)(3) "stays entities from *doing* something to . . . exercise control over the estate's property"); *Inslaw*, 932 F.2d at 1474 ("The automatic stay, as its name suggests, serves as a restraint only on acts to gain possession or control over property of the estate.").

[52] 11 U.S.C. § 362(a)(3).

[53] Denby-Peterson's characterization of the creditors' post-petition behavior as a refusal to return the Corvette upon request does not alter our conclusion. A creditor's refusal to comply with a debtor's turnover request is not an affirmative act; rather, it is inaction. Denby-Peterson's attempt to reframe creditors' failure to act as an affirmative act is unavailing as it does not alter the passive nature of the creditors' post-petition role in relation to

Our conclusion is bolstered by the legislative purpose and underlying policy goals of the automatic stay. It is well-established that one of the automatic stay's primary purposes is "'*to maintain the status quo* between the debtor and [his] creditors, thereby affording the parties and the [Bankruptcy] Court an opportunity to appropriately resolve competing economic interests in an orderly and effective way.'"[54] Here, the creditors had possession of the Corvette both before and after the bankruptcy filing. Thus, by keeping possession of the Corvette after learning of the bankruptcy filing, the creditors preserved the pre-petition status quo. To hold that such a retention of possession violates the automatic stay would directly contravene the status-quo aims of the automatic stay.

In sum, the plain language of the automatic stay provision in Section 362(a)(3) and the automatic stay's legislative purpose indicate that Congress did not intend passive retention to qualify as "an act to . . . exercise control over property of the estate."[55] In light of our interpretation of Section 362(a)(3), we thus hold that the creditors did not engage in a post-petition "act to . . . exercise control" over the Corvette and thus did not violate the automatic stay.[56]

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the Corvette. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 555 (2012) (recognizing "the distinction between doing something and doing nothing").

[54] *Taylor v. Slick*, 178 F.3d 698, 702 (3d Cir. 1999) (quoting *Zeoli v. RIHT Mortg. Corp.*, 148 B.R. 698, 700 (D.N.H. 1993)) (emphasis and alteration in original).

[55] 11 U.S.C. § 362(a)(3).

[56] *Id.*

C.

Denby-Peterson, on the other hand, disregards the automatic stay's legislative purpose and instead relies on Section 362(a)(3)'s scarce legislative history to support her position. She maintains that her "plain language reading of Section 362 is bolstered by the 1984 Amendments to the Bankruptcy Code."[57] We disagree.

Given Section 362(a)(3)'s unambiguous text, we need not resort to legislative history to uncover its meaning.[58] In any event, we point out that the relevant legislative history fails to shed light on Congress's intent behind the 1984 addition of the "exercise control over property of the estate" clause. The legislative history reveals that, as originally enacted in 1978, Section 362(a)(3) only stayed "any act to obtain possession of property of the estate or of property from the estate."[59] Thereafter, in 1984, Congress amended Section 362(a)(3) by inserting the "or to exercise control over property of the estate" clause.[60] Congress, however, "gave no explanation of its intent."[61]

Denby-Peterson nevertheless urges us to follow the Seventh Circuit's view that "the mere fact that Congress expanded the provision to prohibit conduct

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[57] Appellant's Br. at 13.
[58] *See Doe v. Hesketh*, 828 F.3d 159, 167 (3d Cir. 2016).
[59] Bankruptcy Reform Act of 1978, Pub. L. 95-598, § 362(a)(3), 92 Stat. 2549, 2570 (1978).
[60] Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 362(a)(3), 98 Stat. 333, 371 (1984).
[61] *In re Young*, 193 B.R. 620, 623 (Bankr. D.D.C. 1996).

above and beyond obtaining possession of an asset suggests that it intended to include conduct by creditors who seized an asset pre-petition."[62] We will not do so because the legislative history would be pertinent only to the extent that Congress clearly expressed an intent to interpret Section 362(a)(3) contrary to its plain language. Here, Congress did not express any intent, much less an intent to include creditors' passive retention of property that was seized pre-petition.[63] Moreover, even assuming that Section 362(a)(3) is ambiguous, thereby warranting consideration of legislative history, the legislative history's silence provides no guidance regarding Congress's rationale for adding the "or to exercise control over property of the estate" clause. Accordingly, the interpretation that Denby-Peterson urges us to adopt is unsupported by Section 362(a)(3)'s legislative history as well as its statutory language.

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[62] *Thompson v. Gen. Motors Acceptance Corp., LLC*, 566 F.3d 699, 702 (7th Cir. 2009). *See Fulton*, 926 F.3d at 923 (declining to overrule *Thompson* and reiterating that the amendment "suggested congressional intent to make the stay more inclusive by including conduct of 'creditors who seized an asset pre-petition'" (quoting *Thompson*, 566 F.3d at 702)); *see also Weber*, 719 F.3d at 80 (describing the amendment as a "significant textual enlargement" that supports the view that "Congress intended to prevent creditors from retaining property of the debtor in derogation of the bankruptcy procedure . . . without regard to what party was in possession of the property in question when the petition was filed").

[63] *See Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980) ("Absent a clearly expressed legislative intention to the contrary, th[e] [statutory] language must ordinarily be regarded as conclusive.").

V.

We now consider Denby-Peterson's final attempt to overcome the plain language of Section 362(a)(3). Denby-Peterson asserts that Section 362's automatic stay should be read in conjunction with Section 542(a)'s allegedly self-effectuating turnover provision. We are not persuaded.

Under Section 542(a), creditors who are in possession of property of the estate must turn over such property to the debtor "during the [Bankruptcy] case."[64] The turnover provision states, in relevant part, that "an entity, other than a custodian," such as a creditor,[65]

> in possession, custody, or control, during the case, of property that the [debtor] may use, sell, or lease under section 363 . . . , or that the debtor may exempt under section 522 . . . shall deliver to the [debtor], and account for, such property or the value of such property, unless such property is of inconsequential value or benefit to the estate.[66]

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[64] 11 U.S.C. § 542(a). In a Chapter 13 case, such as this case, the debtor retains control over property of the estate. *See id.* § 1306(b). Accordingly, a Chapter 13 trustee does not take possession or liquidate property of the estate, except with respect to money collected for the purpose of making distributions to creditors under a plan. *See id.* §§ 1302, 1303.

[65] *See id.* § 101(10)(A).

[66] *Id.* § 542(a). *See id.* § 1303 (providing the Chapter 13 debtor "the rights and powers of a trustee under sections 363(b), 363(d), 363(e), 363(f), and 363(l)"); *id.* § 1306(b) (stating, in relevant part,

Denby-Peterson contends that we should join the majority of our sister circuits and conclude that: (1) Section 542(a)'s turnover provision is self-executing; (2) therefore, the creditors had a mandatory duty to return the Corvette to Denby-Peterson upon receiving notice of the bankruptcy filing; and (3) when the creditors rejected Denby-Peterson's demand for turnover, they violated the automatic stay.[67] We respectfully disagree with the majority. For the following reasons, we conclude that Denby-Peterson's threefold argument is unpersuasive.

A.

First, in our view, Section 542(a)'s turnover provision is not self-executing; in other words, a creditor's obligation to turn over estate property to the debtor is not automatic.[68] Rather, the turnover provision requires the debtor to bring an adversary proceeding in Bankruptcy Court in order to give the Court the opportunity to determine whether the property is subject to turnover under Section 542(a).

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that "the [Chapter 13] debtor shall remain in possession of all property of the estate").

[67] *See Fulton*, 926 F.3d 916; *Weber*, 719 F.3d 72; *Del Mission*, 98 F.3d 1147; *Knaus*, 889 F.2d 773.

[68] *But see Fulton*, 926 F.3d at 924 (reaffirming that Section 362(a)(3) "becomes effective immediately upon filing the petition and is not dependent on the debtor first bringing a turnover action"); *Weber*, 719 F.3d at 79 ("Section 542 requires that any entity in possession of property of the estate deliver it to the trustees, without condition or any further action: the provision is self-executing." (internal quotation marks omitted)).

Both the Federal Rules of Bankruptcy Procedure and the text of the turnover provision support our conclusion by demonstrating that the debtor's right to turnover is subject to substantive and procedural requirements that must be evaluated by the Bankruptcy Court.[69] It is only after the Bankruptcy Court determines whether those requirements are met that the debtor's right to turnover is triggered.

i.

We start with the procedure behind turnover. Denby-Peterson argues that a creditor's duty to turn over collateral is automatically triggered when a creditor receives notice of the bankruptcy petition. In other words, procedurally, says Denby-Peterson, all the debtor must do to initiate turnover is file a bankruptcy petition and notify the creditor of the filing. However, Federal Rule of Bankruptcy Procedure 7001(1) explicitly indicates otherwise. Under that Rule, the debtor must bring a request for turnover in an adversary proceeding before a Bankruptcy Court.[70] Accordingly, contrary to Denby-Peterson's claim, the debtor must not only file a bankruptcy petition, he or she must also initiate a turnover proceeding by (1) filing a complaint in Bankruptcy Court and (2) serving a creditor with a

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[69] *See* 4 Norton Bankr. L. & Prac. 3d § 62:3 (2019) (stating that "several [Bankruptcy] Code provisions play a role in determining whether a turnover will be ordered pursuant to Code § 542(a)").

[70] *See* Fed. R. Bankr. P. 7001(1) (identifying, in relevant part, "a proceeding to recover money or property" as an adversary proceeding).

copy of the complaint.[71] This procedural requirement negates any possibility that a creditor's duty to turn over property is automatic.[72]

ii.

Moreover, the plain language of the Bankruptcy Code's turnover provision also shows that the provision is not self-effectuating. Section 542(a) provides that only property of the estate, as defined in Section 541, that is either (1) "property that the [debtor] may use, sell, or lease under section 363" or (2) property "that the debtor may exempt under

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[71] "An adversary proceeding is essentially a self-contained trial—still within the original bankruptcy case—in which a panoply of additional procedures apply," *In re Mansaray-Ruffin*, 530 F.3d 230, 234 (3d Cir. 2008) (citing Fed. R. Bankr. P. 7001-7087), including the requirement that a complaint must be filed to commence such a proceeding, *see* Fed. R. Bankr. P. 7003 (stating that Federal Rule of Civil Procedure 3 "applies in adversary proceedings").

[72] Here, as noted by the Bankruptcy Court, Denby-Peterson did not initiate an adversary proceeding. Instead, she filed a motion for turnover entitled, in relevant part, "Motion for Return of Repossessed Auto." *Denby-Peterson*, 576 B.R. at 69.

Faced with this procedural posture, the Bankruptcy Court concluded that the parties waived their right to an adversary proceeding. *See In re Village Mobile Homes, Inc.*, 947 F.2d 1282, 1283 (5th Cir. 1991) ("Compliance with the requisites of an adversary proceeding may be excused by waiver of the parties."). Treating the matter as a contested motion, the Court then addressed the merits of the turnover request. This difference in the procedural mechanism used to achieve turnover does not change our conclusion because, regardless of the form, a debtor must initiate a procedural event before the Bankruptcy Court in order for turnover to occur, if applicable, under the Bankruptcy Court's supervision.

section 522," is subject to turnover.[73] The turnover provision also explicitly limits the right to turnover to estate property that (1) is in the possession, custody or control of a creditor, and (2) is not "of inconsequential value or benefit to the estate."[74] Thus, on its face, the turnover provision includes numerous explicit conditions that must be satisfied before a property is subject to turnover.

In the case before us today, Denby-Peterson asks us to essentially ignore Section 542(a)'s statutory prerequisites and find that a creditor must immediately turn over any collateral that a debtor deems to be subject to turnover. We will not do so. We further note that mandating creditors to automatically turn over any property that the debtor deems worthy of turnover would allow debtors to temporarily strip creditors of their rights to assert affirmative defenses such as laches,[75] or to claim that the property is not property of the estate. While it is true that creditors would presumably be able to assert these defenses in Bankruptcy Court after turning over the collateral to the debtor, we do not read the turnover provision as placing the onus on creditors to surrender the collateral and then immediately file a motion in Bankruptcy Court asserting their rights.

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[73] 11 U.S.C. § 542(a).

[74] *Id.*

[75] *See In re Mushroom Transp. Co., Inc.*, 382 F.3d 325, 337 (3d Cir. 2004); *see also In re Stancil*, 473 B.R. 478, 484 (Bankr. D.D.C. 2012) ("The plain language of section 542(a) demonstrates that establishing inconsequential value or benefit to the estate is an affirmative defense to a turnover action.").

In sum, in light of the plain language of Section 542(a)'s turnover provision, and the procedural and substantive requirements underlying turnover, it would be illogical for us to interpret the turnover provision as imposing an automatic duty on creditors to turn over collateral to the debtor upon learning of a bankruptcy petition. We therefore reject Denby-Peterson's claim that the turnover provision is self-effectuating.[76] Instead, we conclude that the turnover

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[76] Denby-Peterson's reliance on the Supreme Court's decision in *United States v. Whiting Pools, Inc.* is misplaced. 462 U.S. 198, 201 (1983). Contrary to Denby-Peterson's claim that *Whiting Pools* implicitly supports the proposition that the turnover provision is self-effectuating, *Whiting Pools* suggests the opposite: that the turnover provision is not self-effectuating because adequate protection can serve as a condition precedent before turnover. *See* 11 U.S.C. § 542(a) (providing that "property that the [debtor] may use, sell, or lease under section 363" may be subject to turnover); *id.* § 363(e) (stating, in relevant part, that "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"); *id.* § 361 (providing examples of "adequate protection").

In *Whiting Pools*, the Bankruptcy Court, not the Chapter 11 debtor, ordered the creditor to turn over property to the debtor. 462 U.S. at 201. Moreover, it did so only "on the condition that [the Chapter 11 corporate-debtor] provide the [creditor] with specified [adequate] protection for its interests." *Id. See id.* at n.7 ("Pursuant to [Section 363(e) of the Bankruptcy Code], the Bankruptcy Court set the following conditions to protect the tax lien: [the debtor] was to pay the [creditor] $20,000 before the turnover occurred; [the debtor] also was to pay $1,000 a month until the taxes were satisfied; the [creditor] was to retain its lien during this period; and if [the debtor] failed to make the payments, the stay was to be lifted."). *Whiting Pools* thus

provision is effectuated by virtue of judicial action. The Chapter 13 debtor must first seek court intervention, such as through an adversary proceeding, and then the Bankruptcy Court, not the debtor, must ultimately decide whether certain property must be turned over to the debtor.[77]

B.

Additionally, we point out that our interpretation of the turnover provision is not changed by the turnover provision's use of the phrase "shall deliver to the [debtor]."[78] As argued by Denby-Peterson, it may well be so that the word "shall" strongly suggests that turnover is mandatory.[79] However, turnover is

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suggests that turnover is required upon (1) the debtor's filing of a motion for turnover, and (2) the issuance of a court order.

[77] We also note that under pre-Code practice, turnover was not viewed as self-effectuating. Before the Bankruptcy Code was enacted, a secured creditor, who had repossessed collateral pre-bankruptcy, retained possession pending the Bankruptcy Court's entry of a turnover order, *see* Ralph Brubaker, *Turnover, Adequate Protection, and the Automatic Stay (Part I): Origins and Evolution of the Turnover Power*, 33 Bankr. L. Letter No. 8, at 4-7 (Aug. 2013), and "[n]othing in the legislative history evinces a congressional intent to depart from that [pre-Code] practice." *Whiting Pools*, 462 U.S. at 208. *See In re VistaCare Grp., LLC*, 678 F.3d 218, 227-28 (3d Cir. 2012) (recognizing that "courts should be 'reluctant to accept arguments that would interpret the Code . . . to effect a major change in pre-Code practice,' absent at least some suggestion in the legislative history that such a change was intended" (quoting *Dewsnup v. Timm*, 502 U.S. 410, 419 (1992))).

[78] 11 U.S.C. § 542(a).

[79] *See Alabama v. Bozeman*, 533 U.S. 146, 153 (2001) ("The word 'shall' is ordinarily the language of command." (internal quotation marks omitted)); *Dessouki v. Att'y Gen. of United*

mandatory only in the context of an adversary proceeding presided over by the Bankruptcy Court. Under Rule 7001(1), the debtor must bring an adversary proceeding seeking turnover. True, the turnover provision states: "shall deliver," but the question before us is when must a creditor deliver? The answer is when the Bankruptcy Court says so in the context of an adversary proceeding brought under Rule 7001(1). We view the statutory and procedural framework as: (1) the Chapter 13 debtor must seek court relief, such as by initiating an adversary proceeding requesting turnover; (2) the Bankruptcy Court then determines whether the property is subject to turnover; and (3) if it is, in accordance with that determination, the Bankruptcy Court issues a court order compelling a creditor to turn over property to the debtor.

Our conclusion is further supported by the United States Supreme Court's reasoning in *Citizens Bank of Maryland v. Strumpf*.[80] In that case, the Court considered the interplay between the automatic stay[81] and the turnover provision in Section 542(b). Notably,

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States, 915 F.3d 964, 966 (3d Cir. 2019) (recognizing that "the word 'shall' imposes a mandatory requirement"); *see also* Shall, *Black's Law Dictionary* (11th ed. 2019) (defining "shall," in relevant part, as "[h]as a duty to; more broadly, is required to," and characterizing that usage as "the mandatory sense that drafters typically intend and that courts typically uphold").

[80] 516 U.S. 16 (1995).

[81] As relevant to *Strumpf*, the filing of a bankruptcy petition stays "the setoff of any debt owing to the debtor that arose before the commencement of the [bankruptcy] case . . . against any claim against the debtor." 11 U.S.C. § 362(a)(7).

notwithstanding the word "shall" in that turnover provision, the *Strumpf* Court did not interpret the provision as self-executing.

Section 542(b)'s turnover provision states: "an entity that owes a debt that is property of the estate . . . *shall* pay such debt to . . . the trustee."[82] However, an entity is excused from that obligation "to the extent that such debt may be offset under section 553 . . . against a claim against the debtor."[83] Thus, similar to the turnover provision at issue in this case, the turnover provision in subsection (b) includes the word "shall" as well as a defense to turnover.

In *Strumpf*, the Supreme Court held that a bank's temporary withholding of funds in a debtor's bank account, pending resolution of the bank's setoff right,[84] did not violate the automatic stay. In reaching that holding, the Court reasoned, among other things, that interpreting Section 542(b)'s turnover provision as self-executing would "eviscerate" the provision's exceptions to the duty to pay.[85] Here, we likewise decline to interpret Section 542(a)'s "shall deliver" clause in a way that would disregard the provision's explicit defenses.[86]

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[82] *Id.* § 542(b) (emphasis added).
[83] *Id.*
[84] *See Strumpf*, 516 U.S. at 19 ("Petitioner refused to pay its debt, not permanently and absolutely, but only while it sought relief under § 362(d) from the automatic stay.").
[85] *Id*. at 20.
[86] *See Smith v. City of Jackson*, 544 U.S. 228, 233 (2005) ("[W]hen Congress uses the same language in two statutes having similar purposes . . . it is appropriate to presume that Congress intended that text to have the same meaning in both statutes.").

C.

Even assuming the turnover provision is self-executing, as pointed out by the Tenth Circuit, "there is still no textual link between [Section] 542 and [Section] 362."[87] The language of the automatic stay provision and the turnover provision do not refer to each other. The absence of an express textual link between the two provisions indicates that they should not be read together, so violation of the turnover provision would not warrant sanctions for violation of the automatic stay provision.

VI.

Guided by the plain language of the Bankruptcy Code's automatic stay and turnover provisions, the legislative purpose and policy goals of the automatic stay, and the reasoning of the Supreme Court and our two sister circuits, we hold that a creditor in possession of collateral that was repossessed before a bankruptcy filing does not violate the automatic stay by retaining the collateral post-bankruptcy petition.

We will thus affirm the order of the District Court affirming the Bankruptcy Court's order denying Denby-Peterson's request for sanctions.

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[87] *Cowen*, 849 F.3d at 950.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

JOY DENBY-PETERSON,

Appellant,

v.

NU2U AUTO WORLD and
PINE VALLEY MOTORS,

Appellees.

Civil No. 17-9985 (NLH)

OPINION

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HILLMAN, **District Judge**

This appeal arises from the Bankruptcy Court's order denying Appellant Joy Denby-Peterson's ("Appellant" or "Denby-Peterson") sanctions request, concerning an alleged violation of an automatic stay by Appellees Nu2u Auto World ("Nu2u") and Pine Valley Motors ("PVM" and, collectively, "Appellees"). For the reasons expressed below, the decision of the Bankruptcy Court will be affirmed, and this appeal will be dismissed.

BACKGROUND

This Court takes its brief recitation of facts from the briefs and notes any factual disputes where applicable. On July 21, 2016, Denby-Peterson purchased a 2008 Chevrolet Corvette (the "Vehicle") from PVM. On the same day, Denby-Peterson entered into a Retail Installment Contract (the "Contract") which required her to make certain down payments and installment payments. This was assigned to Nu2u.

The contract required (1) an initial $3,000 down payment, (2) installment payments of $200 per week for 212 weeks, and (3) a deferred $2,491 down payment on or before August 11, 2016. Under the Contract, if Denby-Peterson did not make the deferred down payment, any excess payments would be applied to it. Denby-Peterson paid the initial down payment, did not pay the deferred down payment, and began to miss installment payments. Appellees did not apply her installment payments to the deferred down payments. Regardless, Nu2u (through a third-party) repossessed

the Vehicle.[1] After the repossession of the Vehicle, Denby-Peterson lost work because she could not travel to the patients she treated as a licensed practical nurse.

On March 21, 2017, Denby-Peterson filed the underlying Chapter 13 bankruptcy petition. Denby-Peterson, through her attorneys, notified Nu2u of the bankruptcy proceeding and demanded Nu2u return the vehicle to Denby-Peterson. Nu2u did not return the vehicle and Denby-Peterson filed a Motion for Turnover (the "Motion") on March 24, 2017. The Motion included a request for sanctions for Nu2u's alleged violation of the automatic stay under 11 U.S.C. § 362(k).

Nu2u resisted the Motion on April 3, 2017 by asserting that although Denby-Peterson had purchased the Vehicle she had surrendered all rights in the Vehicle when she signed a document on February 22, 2017 allegedly waiving her right to redeem the Vehicle (the "Waiver Document"). Nu2u alleged this document was signed when Denby-Peterson visited Nu2u to retrieve her personal property from the Vehicle after

[1] The date of repossession was disputed strenuously at the hearing mentioned infra, as it was central to the underlying dispute of the parties concerning the signing of a waiver and whether turnover was warranted. Except for chronological purposes, the date of repossession is not particularly important to this dispute. For the sake of completeness, Appellees assert February 19, 2017 was the date of repossession and Appellant asserts it was on March 12, 2017. Both dates are before the filing of the underlying bankruptcy petition.

repossession.[2] Additionally, Nu2u filed a Proof of Claim, asserting a security interest in the Vehicle.

On August 16 and 17, 2017, the United States Bankruptcy Court for the District of New Jersey (the "Bankruptcy Court") held a plenary hearing on the Motion. Post-hearing memoranda were filed. On October 20, 2017, the Bankruptcy Court issued an Order and Opinion.

Of relevance, the Opinion held that Denby-Peterson was the lawful owner of the Vehicle, the Waiver Document was invalid under New Jersey law, and Nu2u was not liable for sanctions for retaining possession of the Vehicle after the automatic stay was instituted. The contents of the hearing and the Bankruptcy Court Opinion and Order will be discussed in further detail infra where relevant.

Denby-Peterson filed a timely notice of appeal on October 30, 2017. The issues presented infra were fully briefed by both parties. On May 4, 2018, the Bankruptcy Court dismissed the underlying bankruptcy case. On October 3, 2018, this Court issued an Order to Show Cause why this appeal was not mooted by the dismissal of the underlying case. Denby-Peterson timely responded to the Order to Show Cause on October 13, 2018. This appeal is ripe for adjudication.

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[2] Denby-Peterson stated in the underlying proceeding that she never visited Nu2u and never received her personal property on that date.

DISCUSSION

A. Subject Matter Jurisdiction

This Court has jurisdiction over the appeal from the Bankruptcy Court's October 20, 2017 order pursuant to 28 U.S.C. § 158(a), which provides in relevant part: "The district courts of the United States shall have jurisdiction to hear appeals from final judgments, orders and decrees . . . of bankruptcy judges entered in cases and proceedings referred to the bankruptcy judges under section 157 of this title. An appeal under this subsection shall be taken only to the district court for the judicial district in which the bankruptcy judge is serving."

B. Mootness

This Court, sua sponte, ordered Appellant to show cause why this appeal was not mooted by the May 4, 2018 dismissal of the underlying bankruptcy case. Appellant responded to this Order to Show Cause within the allotted time. This Court is satisfied with Appellant's response that this matter is not moot.

In coming to this conclusion, this Court considered the following. "In the bankruptcy context, the determination of whether a case becomes moot on the dismissal of the bankruptcy hinges on the question of how closely the issue in the case is connected to the underlying bankruptcy." Tellewoyan v. Wells Fargo Home Mortg., No. 05-4653 (FLW), 2006 U.S. Dist. LEXIS 55558, at *3 (D.N.J. Aug. 10, 2006) (quoting In re Pattullo, 271 F.3d 898, 901 (9th Cir. 2001)). The appeal concerns issues related to an alleged violation of

the automatic stay. This question is an ancillary issue not closely intertwined with the underlying bankruptcy.

Circuit law agrees with this assessment. In cases where damages under 11 U.S.C. § 362(k) are at issue and the bankruptcy has been dismissed, the § 362(k) controversy generally survives. Javens v. City of Hazel Park (In re Javens), 107 F.3d 359, 364 n.2 (6th Cir. 1997). See also Lawson v. Tilem (In re Lawson), 156 Bankr. 43, 45 (B.A.P. 9th Cir. 1993); In re Carraher, 971 F.2d 327, 328 (9th Cir. 1992); In re Morris, 950 F.2d 1531, 1534 (11th Cir. 1992); Price v. Rochford, 947 F.2d 829, 830-31 (7th Cir. 1991); In re Smith, 866 F.2d 576, 580 (3d Cir. 1989). As Appellant points out, "[a] Court must have the power to compensate victims of violations of the automatic stay and punish the violators, even after the conclusion of the underlying bankruptcy case." Johnson v. Smith (In re Johnson), 575 F.3d 1079, 1083 (10th Cir. 2009) (citing Davis v. Courington (In re Davis), 177 B.R. 907, 911 (B.A.P. 9th Cir. 1995)). This Court finds this appeal is not moot and will decide it on the merits.

C. Standard of Review

In reviewing a determination of the bankruptcy court, the district courts "review the bankruptcy court's legal determinations de novo, its factual findings for clear error and its exercise of discretion for abuse thereof." Reconstituted Comm. of Unsecured Creditors of the United Healthcare Sys., Inc. v. State of N.J. Dep't of Labor (In re United Healthcare Sys.), 396 F.3d 247, 249 (3d Cir. 2005) (quoting Interface Grp.-Nev. v. TWA (In re TWA), 145 F.3d 124, 130-31 (3d Cir. 1998)).

D. Analysis

The central question presented by this appeal is what path this Court will take in the face of a split between the Circuit Courts - and no Third Circuit case law explicitly deciding the split - over the imposition of sanctions in cases of pre-petition repossession of vehicles. Surrounding this central legal question are a number of other legal and factual arguments specific to this case. This Court will address each of Appellant's arguments in the order presented.

Before addressing Appellant's arguments, some background on the specific statutory provision at issue is instructive. Once a Chapter 13 petition is filed in a bankruptcy court, it "operates as a stay, applicable to all entities." 11 U.S.C. § 362(a). Of relevance, this automatic stay applies against "any act . . . to exercise control over property of the estate." 11 U.S.C. § 362(a)(3). This clause was only added to the Bankruptcy Code in 1984. See PL 98 Stat 353, July 10, 1984.

Subsection (k) provides the relevant rules for imposition of penalties resulting from a violation of an automatic stay. If the violation is "willful" then "actual damages, including costs and attorneys' fees" must be awarded and punitive damages may be awarded. If the violation is "taken by the entity in the good faith belief that subsection (h) applies to the debtor" then recovery is limited to "actual damages."

The property that should be turned over from creditors to the estate is delineated by 11 U.S.C. § 542. This part of the Bankruptcy Code requires turnover of

"property that the trustee may use, sell, or lease." 11 U.S.C. § 542(a).

No party here disputes that (1) the Vehicle was property Denby-Peterson could have used, (2) the Vehicle was eventually turned over to Denby-Peterson, and (3) Nu2u did not violate the Bankruptcy Court's Order requiring turnover of the Vehicle. Instead, the parties dispute which rule governs return of a vehicle repossessed pre-petition and not returned upon the institution of an automatic stay.

a. The Bankruptcy Court's Adoption of the Minority Position

Appellant asserts there is a Circuit split on the issue presented supra and that the Third Circuit has not decided which position it will take. Appellant argues the Bankruptcy Court chose the position of the minority and that the majority position is more consonant with the intent and purpose of the Bankruptcy Code. Appellees agree the Bankruptcy Court applied the minority position. But, Appellees assert even if this Circuit has not determined which side of the split it will choose - if either - this District has consistently employed the minority position. As a result, Appellees argue there is no legal error evidenced in the Bankruptcy Court's application of the minority rule.

The split has been ably described by the Bankruptcy Court and the parties. The majority position, which is followed in the Second, Seventh, Eighth, and Ninth Circuit Courts of Appeals advises that a creditor violates the automatic stay when it fails to affirmatively and immediately return qualifying property of the

debtor that was seized pre-petition. Weber v. SEFCU (In re Weber), 719 F.3d 72 (2d Cir. 2013); Thompson v. Gen. Motors Acceptance Corp., LLC, 566 F.3d 699 (7th Cir. 2009); Cal. Emp't Dev. Dep't. v. Taxel (In re Del Mission), 98 F.3d 1147 (9th Cir. 1996); Knaus v. Concordia Lumber Co. (In re Knaus), 889 F.2d 773 (8th Cir. 1989). These courts interpret the 1984 addition to the Bankruptcy Code to broaden the scope of the automatic stay to require affirmative action.

The minority position, on the other hand, has only been followed in the Tenth and District of Columbia Circuit Court of Appeals. This position finds no violation of the automatic stay as long as the creditor merely maintains the status quo in effect at the time of the automatic stay. WD Equip., LLC v. Cowen (In re Cowen), 849 F.3d 943 (10th Cir. 2017); United States v. Inslaw, Inc., 932 F.2d 1467 (D.C. Cir. 1991). The minority position interprets the 1984 addition to the Bankruptcy Code to reach out to previously unaddressed actions to exercise control that do not result in actual possession.

This District, according to the Bankruptcy Court, has followed the minority position for the past twenty years.[3] Appellant argues in her brief that the

[3] Unfortunately, neither the litigants nor the Bankruptcy Court was able to provide citation to case law evidencing this practice. This Court was able to find one case, Carr v. Sec. Sav. & Loan Ass'n, 130 B.R. 434, 435 (D.N.J. 1991), in which there was a factual citation to this practice. This provides some evidence for the practice and the rule in this District, which requires return of a vehicle pursuant to the automatic stay once proof of insurance is provided.

Bankruptcy Court is incorrect, and that New Jersey courts "have uniformly followed the majority rule," citing In re Sussex SkyDive, LLC, No. 14-30236-ABA, 2016 Bankr. LEXIS 1862 (Bankr. D.N.J. Apr. 27, 2016) and In re Stamper, No. 03-49235, 2008 Bankr. LEXIS 733 (Bankr. D. N.J. Mar. 17, 2008). As the Bankruptcy Court explained in its Opinion, this characterization is incorrect.

Both In re Sussex SkyDive, LLC and In re Stamper involve wrongful post-petition action not maintenance of the status quo. In re Sussex SkyDive, LLC concerned a landlord who refused to allow debtor to retrieve an airplane. 2016 Bankr. LEXIS 1862, at *10-13. The landlord had no argument that it had any interest in the airplane at any point in time. Id. at *20. This is distinguishable from the instant case, where there appeared to be a genuine dispute over the interest held by the parties in the Vehicle. Regardless, considering that the bankruptcy judge in this matter wrote the opinion in the In re Sussex SkyDive, LLC matter there is no reason to doubt his interpretation of its meaning.

In re Stamper involved a settlement between a pro se debtor and a creditor after a Chapter 13 bankruptcy was instituted. 2008 Bankr. LEXIS 733, at *5. When newly-retained counsel discovered the settlement had been erroneously paid and demanded the creditor to refund the payment, the creditor refused. Id. at *6. While In re Stamper cites the majority rule, it does not apply it, as the case involved post-petition - not pre-petition - action violating the stay. Id. at *16-17.

Examining the law de novo, this Court finds the minority position more persuasive. First, the language

used in 11 U.S.C. § 362 is prospective in nature. The relevant statutory provision states that it "operates as a stay" of "any act . . . to exercise control over property of the estate." 11 U.S.C. § 362(a)(3) (emphasis added). As is clear from the statutory text, the exercise of control is not stayed, but the act to exercise control is stayed. Considering there is no case law cited before 1984 showing the other clause in this subsection - which is subject to the same prospective prefatory language - reaches pre-petition action, there is no reason to treat the added language any differently. See Cohen v. De La Cruz (In re Cohen), 106 F.3d 52, 58 (3d Cir. 1997) ("[T]he Supreme Court has observed that a court should 'not read the Bankruptcy Code to erode past bankruptcy practice absent a clear indication that Congress intended such a departure.'" (quoting Pa. Dep't of Pub. Welfare v. Davenport, 495 U.S. 552, 563 (1990))).

Second, Congress is able to craft statutory text that imposes affirmative duties. The examples of laws which do this are too numerous to count. Yet, when Congress had the opportunity in 1984 to insert an affirmative turnover duty into § 362(a), it did not do so. Congress could have stated under § 362(a) that creditors must turnover property in their possession upon institution of the automatic stay.[4] Instead, it added language to broaden prohibitions on actions taken post-petition that

[4] The citation by Appellant to 11 U.S.C. § 542 is unavailing. Just as Congress is able to draft language creating affirmative duties, it is also able to insert cross-citations. It did not do that in § 362. It would be unwise - not to mention unfair - to insert that cross-citation for Congress in the absence of clear evidence Congress intended to do so. This Court will not take on the role of legislator here.

do not reach the level of possession but still amount to an exercise of control.

Third, the majority rule's reading of broader protections into 11 U.S.C. § 362(a)(3), especially in the absence of clear statutory language or legislative history (of which there is none) reaches impermissibly beyond the text of the statute. In re Cowen presents a more faithful reading of the addition of the "control" clause into § 362(a)(3) which suffers none of the infirmities of the majority's position:

> "Since an act designed to change control of property could be tantamount to obtaining possession and have the same effect, it appears that § 362(a)(3) was merely tightened to obtain full protection." In re Bernstein, 252 B.R. 846, 848 (Bankr. D.D.C. 2000). "[U]se of the word 'control' in the 1984 amendment to § 362(a)(3) suggests that the drafters meant to distinguish the newly prohibited 'control' from the already-prohibited acts to obtain 'possession,' in order to reach nonpossessory conduct that would nonetheless interfere with the estate's authority over a particular property interest." Ralph Brubaker, *Turnover, Adequate Protection, and the Automatic Stay (Part II): Who is "Exercising Control" Over What?*, 33 No. 9 Bankruptcy Law Letter NL 1 (September 2013).
>
> It's not hard to come up with examples of such "acts" that "exercise control" over, but do not "obtain possession of," the estate's property, e.g., a creditor in possession who improperly

> sells property belonging to the estate. Similarly, "intangible property rights that belong to the estate, such as contract rights or causes of action are incapable of real possession unless they are reified. Yet, (a)(3) preserves and guards against interference with them by staying any act to exercise control over estate property." In re Hall, 502 B.R. 650, 665 (Bankr. D.D.C. 2014). If Congress had meant to add an affirmative obligation - to the automatic stay provision no less, as opposed to the turnover provision - to turn over property belonging to the estate, it would have done so explicitly. The majority rule finds no support in the text or its legislative history.

849 F.3d at 949-50. This Court refuses to read the statute more broadly than its plan [sic] language permits.

Moreover, this reading of the language has been adopted in both the District of New Jersey and the Eastern District of Pennsylvania. See Larami Ltd. v. Yes! Entm't Corp., 244 B.R. 56, 59 (D.N.J. 2000) ("In 1984, this section was amended to add the language 'or exercise control over.' The apparent purpose of the amendment was to prevent industrious plaintiffs from avoiding the prohibition on 'possessing' property by assuming control over the property."); Amplifier Research Corp. v. Hart, 144 B.R. 693, 694 (E.D. Pa. 1992) ("Congress evidently believed that the purpose of staying acts for possession was defeated if plaintiffs were still free to try to control or otherwise direct how the debtor used his property.").

Fourth, this rule provides adequate protections for both debtors and creditors. Appellant is correct: "[t]he primary goal of reorganization bankruptcy is to group all of the debtor's property together in his estate such that he may rehabilitate his credit and pay off his debts . . . ." Thompson, 566 F.3d at 702. But, as the previous sentence suggests, this is only the "primary" goal - not the only goal. Bankruptcy also operates to ensure the debtor "pay[s] off his debts."

The minority rule wisely balances both sides. The minority rule still prohibits creditors from taking post-petition action that would give them possession or control over qualifying property. This ensures that the property will remain a part of the estate and allows for a bankruptcy court to distribute those assets to all claimants in an orderly and just manner. It also still allows damages for wrongful post-petition conduct. Debtor's [sic] may still request a creditor to return property repossessed pre-petition and may still move for a turnover of the property before a bankruptcy court. This allows a bankruptcy court to fully consider a creditor's defenses to turnover before a creditor has to turnover property to the estate.[5]

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[5] It is also important to note that if a creditor engages in abusive litigation behavior to evade turnover, then a bankruptcy court still has inherent power to hold the creditor in contempt or impose sanctions. See Theokary v. Shay (In re Theokary), 592 F. App'x 102, 106 (3d Cir. 2015) (stating it has long been held that a court has "the ability to do whatever is reasonably necessary to deter abuse of the judicial process." (quoting Eash v. Riggins Trucking Inc., 757 F.2d 557, 567 (3d Cir. 1985) (en banc))).

Most importantly, as the Bankruptcy Court pointed out here, an affirmative duty still exists in certain circumstances. If the creditor demands proof of insurance for a vehicle, naming it as loss payee, and the debtor complies, the creditor will be in violation of the automatic stay unless the vehicle is returned to the debtor. This protects both the interest of the debtor and creditor, as it assures both that in case of accident, insurance will cover the loss.[6]

Reviewing this legal issue de novo, this Court finds no reason to disturb the ruling of the Bankruptcy Court. This Court will apply the minority position. Specifically, in this case, the Court finds a creditor has not violated an automatic stay for retaining a vehicle lawfully seized pre-petition as long as the debtor has not produced an insurance policy denoting the creditor as the loss payee.

b. The Bankruptcy Court's Decision Finding No Violation of the Automatic Stay under the Minority Position

In the alternative, Appellant argues if the minority rule is applied to this case, then the Bankruptcy Court still committed error in its application of the rule to these facts. Appellant cites the case of In re Cowen, 849 F.3d 943 (10th Cir. 2017) asserting it is factually similar to this case thus compelling imposition of sanctions. Appellees disagree, arguing the facts allowing imposition of sanctions in In re Cowen differ

[6] This Court will not separately address Appellant's policy arguments, as it has done so here. Those policies [sic] arguments do not persuade this Court to alter its decision that the minority rule should apply in this case.

significantly from the facts presented by the present case.

In re Cowen is a unique case with exceptional facts. The case involved two trucks owned by Jared Cowen. Id. at 945. After one truck broke down, Mr. Cowen borrowed money in exchange for a lien on the broken truck in order to repair it. Id. The other truck was also subject to a lien. Id. The truck broke down again and Mr. Cowen was unable to make his payments on either truck involved. Id. At least one of the trucks was repossessed under dubious circumstances. Id. Mr. Cowen filed a voluntary Chapter 13 petition and requested immediate return of both the trucks. Id. at 946.

The creditors in this action, Aaron Williams and his son-in-law Bert Dring, refused to return the trucks. Id. at 945. Mr. Cowen successfully moved the bankruptcy court to issue turnover orders against the creditors for both of the trucks. Id. at 946. Mr. Williams and Mr. Dring still refused to comply and were then made defendants in an adversary proceeding for violation of an automatic stay. Id. The defendants to the adversary proceeding asserted that they had terminated Mr. Cowen's rights in the trucks before the bankruptcy petition was ever filed. Id. The bankruptcy court found, explicitly, that the defendants "manufactured the paperwork . . . after the bankruptcy filing," "likely forged documents," likely "gave perjured testimony," and "coached their witnesses on what to testify to during [ ] breaks." Id.

Appellees here are correct: In re Cowen is distinguishable. Appellant argues that the basis for

sanctions in In re Cowen was the manufacture of documents, perjured testimony, and coaching of witnesses. Unlike the bankruptcy court in In re Cowen, the Bankruptcy Court here did not find that any of these acts occurred - either pre- or post-petition. On that basis alone, this case and In re Cowen are distinguishable.

Reviewing the record, this Court finds no clear error upon which it could overturn the Bankruptcy Court's factual findings. The Bankruptcy Court ably summed up the testimony presented to it: "the parties presented very different stories through unconvincing testimony of unbelievable witnesses, focusing on issues the court did not find relevant." While witnesses may have been "unbelievable," this Court can find no clear evidence of the manufacture of documents, perjury, or the coaching of witnesses. At worst, this Court's review of the testimony finds interested witnesses viewing their foggy memory through the lens of their present circumstance. This is not In re Cowen.[7] This Court, finding no clear error, will not disturb the Bankruptcy Court's findings on this matter.

c. The Bankruptcy Court's Finding that Denby-Peterson's True Interest in the Vehicle Was Unknown at the Date of Bankruptcy Filing

Appellant also argues that the Bankruptcy Court's finding that the true interest in the Vehicle was unknown at the date of the bankruptcy filing was erroneous. Appellant appears to present three

[7] The Court also notes that In re Cowen, coming out of the Tenth Circuit, is only controlling so far as it is persuasive.

arguments: (1) Appellees' litigation position was contradictory, which is evidence that it never truly believed Denby-Peterson voluntarily surrendered all right to the Vehicle; (2) Appellant claims it was clear as a matter of law that the Waiver Document was ineffective in surrendering Denby-Peterson's interest in the Vehicle; (3) even if there was a bona fide dispute, Appellees were still required to turnover over [sic] the Vehicle because of the automatic stay.

Appellees counter that the minority rule permits a creditor who has repossessed property pre-petition to retain that property until insurance is presented designating the creditor as loss payee. Appellees also argue that the factual circumstances which became clear at trial were not clear at the time the proceeding commenced. In other words, Appellant unfairly presents the facts in hindsight.

Appellant's first argument is unavailing. Litigants commonly take contradictory positions in litigation.[8] In fact, even the Federal Rules of Civil Procedure allow a plaintiff to plead in the alternative. See FED. R. CIV. P. 8(d)(2). This is not uncommon nor indicative of the Appellees' true belief. It appears Appellees' counsel was merely attempting to protect his clients' interests by ensuring, no matter what the Bankruptcy Court may rule, his clients would be protected.

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[8] In fact, even Appellant's argument suffers from this infirmity. On one hand, Appellant argues there was no bona fide dispute, while on the other, she argues - even if there was - turnover was required.

Appellant's second argument also misses the mark. Appellant is correct, as a matter of law, that the Waiver Document did not effectuate a surrender of the Vehicle by Denby-Peterson. No party disputes that holding. But, that does not mean that Appellant is entitled to damages under 11 U.S.C. § 362(k). Under the minority rule, these circumstances do not present a violation of the stay as Appellees merely maintained the status quo - regardless of whether their waiver argument was well or poorly reasoned.[9] If Appellant wanted sanctions, she could have appealed to the Bankruptcy Court's equitable powers for redress of this alleged litigation abuse. Those same sanctions do not arise under § 362(k).[10]

Appellant's third argument also does not persuade this Court that the Bankruptcy Court committed error. The cases Appellant cites refer to the scope of the automatic stay. Appellant is right: property only arguably a part of the estate is subject to the automatic stay. But, in light of this Court's holding that the minority rule applies, Appellees conduct is not sanctionable.

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[9] Appellant does suffer from hindsight bias in this argument. Even determining whether there was an equitable interest in this case took an evidentiary hearing and multiple witnesses. The source: a lack of information flowing from client to counsel on both sides.

[10] Again, the Court notes here that Appellant could have avoided this conundrum entirely if Appellant would have produced to Appellees insurance designating them as the loss payee. She never did so. If she did, and Appellees still refused to return the Vehicle, Appellant may have had grounds for damages based on a willful violation of the automatic stay.

d. The Bankruptcy Court's Finding that No Proof Was Offered at Trial that the Vehicle Was Insured[11]

Finally, Appellant contests the Bankruptcy Court's finding that no evidence was offered at the plenary hearing to prove Appellant's car was insured. Specifically, the Bankruptcy Court found in its Opinion that "there was no proof at trial that [Denby-Peterson] had any insurance at the time of filing . . . ."

This is a question of fact and this Court will not reverse the Bankruptcy Court absent clear error. There was no clear error here. To contest the Bankruptcy Court's finding, Appellant offers one piece of her testimony stating her "insurance was intact" at the time of the bankruptcy filing and "the insurance company . . . sent [Nu2u and PVM] the information from their own office via fax."

But, other evidence was elicited during cross-examination bringing that statement into doubt. Even though Denby-Peterson claimed she had insurance at the time, she never produced a document showing the insurance. This in spite of the fact that it was specifically requested by Nu2u and PVM prior to trial.

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[11] Appellant argues in her reply brief that Appellees' argument concerning insurance is a red herring. In short, Appellant argues the Appellees would not have turned over the vehicle even if they were presented with insurance. But, Appellees noted in their first response that no insurance had been presented. This should have spurred Appellant into action to provide proof. Appellant did not respond to that argument and has given this Court no citation to the record showing she ever provided adequate, documentary proof.

Ultimately, when contradictory facts are presented to a factfinder, the factfinder must rely on his credibility determination of the witness. It is particularly appropriate to rely on the trial court's credibility determinations absent clear error. Here, it is undisputed that the Bankruptcy Court found Denby-Peterson's testimony on this point not credible. This finding, combined with the conflicting testimony and lack of documentation provides ample reasoning for the Bankruptcy Court's factual finding. Thus, there is no clear error. This Court will not disturb the Bankruptcy Court's finding.[12]

CONCLUSION

This Court, having reviewed the briefs of both parties and the record presented, finds no legal or factual reason to disturb the ruling of the Bankruptcy Court. The Bankruptcy Court will be affirmed and this appeal will be dismissed.

An appropriate Order will be entered.

Date: November 1, 2018 s/ Noel L. Hillman

At Camden, New Jersey NOEL L. HILLMAN, U.S.D.J.

[12] Even if this finding constituted clear error, it was harmless. There is no testimony on the record that the insurance named Nu2u as loss payee.

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW JERSEY

In Re: Joy R. Denby-Peterson Debtor.	Case No.: 17-15532-ABA Chapter: 13 Judge: Andrew B. Altenburg, Jr.

MEMORANDUM DECISION

I. INTRODUCTION

This court has been asked to decide a dispute between a debtor seeking return of a vehicle that she needs to drive to work and her personal property from inside the vehicle, and the creditor that repossessed it prepetition and refused to return it because it believed that the debtor had surrendered it. The debtor seeks turnover of the vehicle under 11 U.S.C. § 542(a) and damages for violation of the automatic stay under 11 U.S.C. § 362(a)(3).

In applying section 362(a)(3) to the retention of the car postpetition, this court must determine whether the debtor had an interest in the vehicle, an issue of mixed facts and law. After a review of the deficient record and evidence, the compiled facts of this case show that there was not a violation of the automatic stay with regard to the failure of the creditor to return the vehicle.

Nevertheless, the vehicle must be returned to the debtor pursuant to section 542 and the debtor may redeem the vehicle through her chapter 13 plan, subject to confirmation requirements.

Regarding the personal property, which the creditor denies having, the court finds it more likely than not that the creditor did not return the property. It must be returned within seven days of the date of that order. As agreed prior to the hearing on the matter, the court will determine the appropriate relief under sections 362 and/or 542 in a separate hearing.

II. JURISDICTION AND VENUE

The court has jurisdiction over this contested matter under 28 U.S.C. §§ 1334(a) and 157(a)(2)(A), (E), (O) and the Standing Order of the United States District Court July 23, 1984, as amended on September 18, 2012, referring all bankruptcy cases to the bankruptcy court. This matter is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2)(L). Venue is proper in this Court pursuant to 28 U.S.C. § 1408. The statutory predicates for the relief sought herein are 11 U.S.C. §§ 362(a)(3) and 542(a)(1). Pursuant to Fed. R. Bankr. P. 7052, the court issues the following findings of fact and conclusions of law.

III. PROCEDURAL HISTORY

The debtor, Joy R. Denby-Peterson ("Debtor"), filed an emergency petition under chapter 13 of the Bankruptcy Code on March 21, 2017. Three days later

she filed a Motion for Return of Repossessed Auto[1] and for Sanctions for Violation of Automatic Stay against Pine Valley Motors ("Pine Valley") on shortened time. Doc. Nos. 5, 6. Pine Valley filed opposition on April 3, 2017. Doc. No. 17. At the hearing held April 4, 2017, the parties agreed that a plenary hearing was necessary. The court also ordered Pine Valley to return the Debtor's personal property that day. The court scheduled the plenary hearing for April 13, 2017, but it was adjourned at the request of the parties to May 12, 2017. On May 11, 2017, the court held a telephonic hearing where, on request of the Debtor, the plenary hearing was again adjourned, to a date to be determined, to allow discovery to be completed. The court instructed Pine Valley not to dispose, use, sell,

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[1] Some courts state that enforcement of this turnover right must be sought by adversary proceeding, citing Federal Rule of Bankruptcy Procedure 7001(1). Rule 7001(1) provides that an adversary proceeding is required in "a proceeding to recover money or property . . . ." While it seems clear that this would then apply to actions brought under section 550(a), providing for a trustee to "*recover*, for the benefit of the estate, the property transferred," it is not so clear that it also applies to turnover of property of the estate. *See Chapter 13 Practice & Procedure*, § 15:12 (ed. Drake, Bonapfel, Goodman, June 2017) (stating though technically a request for immediate turnover requires an adversary proceeding, Fed. R. Bankr. P. 7065, 7001(7), courts "traditionally" have treated violation of the stay as contempt that may be sought by motion). But the creditors here waived the procedures, and both parties exercised their discovery rights without issue. *See In re Pluta,* 200 B.R. 740, 741, n. 1 (Bankr. D. Mass. 1996) (stating that turnover should have been brought by complaint, but that the defect is waivable and the respondent did not raise it).

lease, or otherwise transfer possession or ownership of the vehicle pending final resolution of the Debtor's motion. On August 7, 2017, the parties filed a Joint Statement of Undisputed Material Facts. Doc. No. 42 ("JS"). Finally, a plenary hearing was commenced on August 16, 2017 and concluded on August 17, 2017. The court having received the parties' post-hearing briefs, this matter is now ripe for disposition.

IV. FINDINGS OF FACT

Preliminarily, the court notes that it had difficulty determining the facts in this case as the parties presented very different stories through unconvincing testimony of unbelievable witnesses, focusing on issues the court did not find relevant.[2] But based on the shifting burdens, some testimony against interest, and what it hopes is sound reasoning, the court has constructed what it believes most likely occurred. At the damages phase of this contested matter, the parties will

[2] For example, the parties spent much time at the hearing trying to prove when the vehicle was repossessed, February or March, presumably to prove whether the Waiver, dated in February, was legitimate. Yet both failed to submit conclusive evidence and the court certainly did not find the testimony of the Debtor, Mr. Cohen, Mr. Pinto or Henry Thai helpful. But, where was the tow truck driver? The Debtor had deposed the driver, but did not make her available for trial. The driver was the agent of Pine Valley, but Pine Valley also did not produce her for trial, or, in her absence, produce her partner or authenticated documentary evidence. Nevertheless, as will be explained later, the date of the repossession was not necessary to disposition.

be estopped from challenging any of the findings of fact made here.

The Debtor is a practical nurse who primarily earns income on an independent contractor basis. 1T, at p. 15, 45.[3] She is contracted out to "different facilities," such as the correctional system, and rehabilitation and long term care facilities. *Id.* She attends to patients throughout New Jersey. *Id.*, at pp. 15, 43.

Pine Valley and NU2U Auto World ("NU2U") (collectively, "the Creditors") are car dealerships that offer "buy here, pay here" financing services. JS, at ¶ 8. Anthony Pinto and Kenneth Cohen are informal partners agreeing to equally share in ownership of Pine Valley. 2T, at pp. 10, 109. Mr. Cohen owns NU2U, a limited liability company. 2T, at p. 10. Pine Valley routinely accepts installment sales payments on behalf of NU2U. JS, at ¶ 9. The two companies share the same computer system. 2T, at p. 41. Any employee can go into the computer system to authorize a repossession. 2T, at p. 140-41.

Mr. Pinto is the "primary" employee at Pine Valley. 2T, at p. 11. There is only one other employee there, but sometimes NU2U employees will help out. 2T, at p. 11. Similarly, Mr. Pinto is not employed by NU2U, but "helps out" there sometimes, using its mechanic, and going to auctions with its employees. 2T, at p. 140.

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[3] Citation to the transcripts will be denoted by 1T for the August 16th testimony and 2T for the August 17th testimony.

The Debtor testified that after her Mercedes was destroyed in a flash flood on July 1, 2016 she went to Pine Valley to purchase a "new" used car. 1T, at pp. 39, 43, 46. She had met Mr. Pinto three to five years prior and "had continuously told him [she] wanted a Corvette." 1T, at p. 43. *See* 1 T, at pp. 46, 115. On July 21, 2016, the Debtor and Pine Valley entered into a Buyer's Order whereby the Debtor bought and Pine Valley sold a yellow 2008 Chevrolet Corvette (the "Vehicle"). JS, at ¶¶ 1, 2. The parties entered into a Precomputed Retail Installment Contract (the "Contract") dated July 21, 2016, to supply financing to the Debtor through Pine Valley. JS, at ¶ 3; ex. D-2. Pine Valley simultaneously assigned the Contract to NU2U. JS, at ¶ 7; ex. D-2. The total to be paid by the Debtor was $53,382.33.

The Contract required a $3,000 down payment and then a "deferred down payment" of $2,491 to pay taxes and obtain permanent license plate tags ("taxes and tags") to be paid by August 11, 2016. JS, at ¶ 4; ex. D-2.[4] The Creditors retained full responsibility for processing this through the Department of Motor Vehicles. 1T, at p. 146. The Contract also required

[4] Examination of the Contract's itemization reveals that $391.50 of the $2,491.15 may have been financed. The disclosed amount financed of $26,995.00 consists of the cash price of $26,603.50 plus a $144.50 title fee plus a $250.00 documentary fee. These fees added to the $2,099.95 sales tax equal $2,491.50. If they were not part of the amount financed, then the Truth-in-Lending ("TILA") Disclosure may have been inaccurate. These inaccuracies lend support to questioning the credibility of Messrs. Pinto and Cohen.

regular weekly payments of $200 beginning July 29, 2016 for 212 weeks, with a payment in week 213 of $0.03. Ex. D-2. Mr. Pinto testified that the interest rate was also 23.99 percent. 2T, at p. 110. Every customer who finances a vehicle through Pine Valley is charged that rate. *Id.* The Contract designated that the sale was a "consumer creditor contract" with the Vehicle being for "Personal, Family or Household Use." Ex. D-2, at ¶¶ 32, 3. Regarding repossession, the Contract provided that "Personal property found in the vehicle will be stored at your expense and may be returned to you if you identify it. We will dispose of such property after we have given you any notice and time to recover it that the law requires." Ex. D-2, at ¶ 17. Mr. Pinto was completely unaware of this provision. 1T, at 114.

Another document signed by the Debtor and Mr. Pinto provided that if the Debtor failed to pay the taxes and tags balance within the allotted temporary tag time, then the Creditors would apply all regular Vehicle payments toward the taxes and tags until they were paid in full. Ex. D-4. Pine Valley recommended in this document that payments be made on the deferred down payment "so it is not all due at one time." *Id.* Pine Valley warned that if this deferred down payment was not paid in full by the due date, then the Vehicle would be subject to repossession. *Id.* It also warned that it would be illegal for the Debtor to drive the Vehicle until she received her plates. *Id.* It stated that additional fees would apply "after 14 days," *id.*, but nowhere is it specified what these fees would be. A document titled "Pick-Up Note Acknowledgement," initialed by the

Debtor, also stated that she owed one deferred payment of $2,491, due on August 11, 2016. Ex. C-2.

Between July 21, 2016 and February 16, 2017, the Debtor made payments totaling $9,200 under the Contract, including the $3,000 down payment applied on the day of the sale. JS, at ¶ 10. She did not make the lump sum payment of $2,491 on August 11, 2016, or ever make a $2,491 lump sum payment. JS, at ¶ 6. She testified that she did not know about the $2,491 payment requirement until she visited Pine Valley about a month after purchasing the vehicle to ask when she would receive her permanent tags. 1T, at pp. 18-19. She did not read any documents at the time she signed them. 1T, at pp. 19, 43, 49-51, 63, 74. She testified that she was not given copies of the documents she signed. 1T, at pp. 19-20, 75.

The Creditors applied $3,000 of the Debtor's payments to the down payment and $5,700 of regular payments to installment payments due under the Contract. JS, at ¶ 11, ex. D-3. They also applied $400 of her regular payments to taxes and tags on September 16, 2016 and $100 to taxes and tags on January 18, 2017. Ex. D-3. Reviewing the transaction history, the Debtor made payments over 28 weeks.[5] In week 7, her

[5] The Transaction History, ex. D-3, only lists 14 due dates, representing the dates the Debtor was paid through. 1T, at p. 121. For example, Mr. Pinto testified that on October 7, 2016, the Debtor's payments only caught her up to her September 16, 2016 amount due. 1T, at p. 122. There were actually 28 weeks between the first payment on July 21, 2016 and the last on February 26, 2017.

payments exceeded the $200 a week she owed, with her having paid $800 extra by week 28, excluding the deferred down payment. Therefore, at a minimum the Creditors should have applied $800 to the deferred down payment. Consequently, by not applying all of the Debtor's payments first to the taxes and tags, the Creditors breached their contract with the Debtor that provided that all regular Vehicle payments would be applied to the taxes and tags until that amount was paid in full, Ex. D-4, and left the Debtor without title and valid tags.

Mr. Pinto testified that "she just pleaded with me to please put them towards the car so the car wouldn't get repossessed[,]" but then stated "or it's just a mistake on my part[,]" and then changed to "I think it was just me, I was going to take the rap for it if something – you know, if I got in trouble for it." 1T, at 112. Mr. Cohen stated that this language about applying first to taxes and tags "until it is paid in full" which may result in the car being repossessed, and that it is illegal to drive the car until the plates are received, is just "to scare someone to do the right thing," i.e., "to pay their payments and pay their tax and tags." 2T, at p. 22. The Vehicle was never titled or registered in the name of the Debtor. JS, ¶ 12. She drove the Vehicle with temporary tags. 1T, at p. 18, even after their expiration. 1T, at p. 83.

The Debtor was evasive regarding whether she was ever in default, testifying only that "perhaps" she sometimes paid late, 1T, at p. 21, and that nobody ever told her that she was behind. 1T, at pp. 68, 70. But she did admit that after a radiator repair cost more than Mr.

Pinto had estimated, she advised him that her next payment would be late and that he agreed to that. 1T, at pp. 23, 68.[6]

The Debtor paid for repairs on the Vehicle at least twice. One concerned the radiator, mentioned above. After speaking with Mr. Pinto, she was convinced to have "his guy" repair it rather than take the Vehicle to a dealership. 1T, at p. 22. She claimed that Mr. Pinto quoted her $200 and that a dealership would charge her $800. *Id.* After the repair cost $534, ex. D-12, she complained to Mr. Pinto and, as stated above, explained that her next Vehicle payment would be late. 1T, at p. 23. She also had a repair done to the passenger door that was misaligned and ripping the framing. 1T, at p. 24. A scratch on the Vehicle, 1T, at p. 25, may have been repaired at the same time. The repair cost at least $1,756. Ex. D-13.

Mr. Cohen met the Debtor after she had the radiator replaced at NU2U's mechanic and it cost more than Mr. Pinto had led her to expect. 1T, at p. 22; 2T, at p. 15. Mr. Cohen testified that she yelled at him in the showroom. 2T, at p. 15. She initially left without paying, but then returned and paid. 2T, at p. 16.

The parties dispute what date the Vehicle was repossessed. The Debtor contends she discovered the Vehicle missing on the morning of March 13, 2017. 1T, at p. 26. She recalls the date because she was starting a

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[6] When she discovered the Vehicle gone from her driveway, she texted Mr. Pinto that "I told you I was going to be late." 1T, at p. 27; ex. D-10. Thus the court does not understand why she was so imprecise on the stand about whether she ever was in default.

new job that morning. 1T, at pp. 25-26. She also alleges that she called and texted Mr. Pinto complaining that her Vehicle was gone. 1T, at pp. 26-27.

The Creditors argue that the Vehicle was repossessed in February 2017. While Mr. Pinto recalls the Debtor calling him about the Vehicle being repossessed, he insists that it was on February 19, 2016. 1T, at p. 128. He does not recall what time of day she called. *Id.* He testified that a few days after the Vehicle was repossessed, the Debtor came in and signed a waiver document. 1T, at pp. 129-130. Mr. Pinto contends that the Debtor signed this document at that time, collected her personal belongings from the Vehicle, and left. 1T, at pp. 130-131. That document states:

To Whom It May Concern,

> Notice is given that the debtor under the security agreement dated 07/21/2016, in which Pine Valley Motors is the secured party for the performance of which 2008 Chevrolet Corvette [VIN] was given to secure the performance agreement. Debtor acknowledges (his/her/its) default under the security agreement and waives all rights to Notification of Disposition of the collateral under section 12A:9-611 of the New Jersey Uniform Commercial Code and rights to redeem the collateral, whether those rights arise under the security agreement or pursuant to Section 12A:9-623 of the New Jersey Uniform Commercial Code.

Ex. D-11, p. 17-2 (the "Waiver"). The document is a form that that [sic] Pine Valley then runs through a printer to add its name, address and phone numbers, the date, the subject car and its VIN, the date of the security agreement, and the debtor's name. 1T, at pp. 131-32. Thus Pine Valley has the capability of having a buyer sign the document in blank and later running it through a printer to add the particulars, including the date.

Not only does the Debtor not recall ever signing the Waiver document, she swears she did not get her personal belongings back. She testified that she likes to pack her car up ahead of time when starting a new job assignment. 1T, at p. 28. Prior to the repossession, she alleges she had in the car her school books, her nursing licenses from three states, her medical information, her bank debit card, $750 in cash, prescription eyeglasses, her high school diploma and her nursing diploma, but not her purse. 1T, at pp. 28, 76. She testified that she packed the Vehicle up on Saturday, March 11 for a job that began on Monday, March 13. 1T, at p. 55. She entered into evidence a copy of her replacement Social Security card that was reissued April 11, 2017, and testified that she obtained a copy of her driver's license on April 6, 2017. *See* 1T, at pp. 33-34; ex. D-15. She additionally testified that a few days after her Vehicle was repossessed, her bank account was hacked into, with over $10,000 stolen. 1T, at p. 66.

The Debtor testified that the first time she went to Pine Valley after the repossession, Mr. Pinto told her she had to pay $530 to get her personal property back. 1T, at p. 29. The second time was after this bankruptcy case was filed and she was directed to return to Pine

Valley to collect her belongings. 1T, at pp. 29-30. She testified that it cost her $120 round trip to take a cab there. 1T, at p. 30. She says that Mr. Pinto told her that the Vehicle was not there and that she had already gotten her belongings back. 1T, at pp. 30-31.[7]

The court believes it is more likely than not that the Debtor did not get her personal property back. While the court finds it hard to believe that someone would leave valuables such as the Debtor did in a car for two nights, and at times might find someone claiming to act in a palpably unreasonable manner as lying, not everyone acts reasonably. Weighed against the testimony of the Creditors on the subject, the court finds their positions less believable.

For example, Mr. Cohen testified,

> . . . [U]sually what we do is, because of the cost of keys nowadays, everybody always wants their stuff out of the car, so we offer, if you bring up your key, you can then get your stuff out of the car.

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[7] The court finds it troubling that the Creditors would allow the Debtor to waste time and money on a trip to their facility to recover the personal property when they subsequently took the position that they were not in possession of the personal property. Everyone in the courtroom that day was aware that the Debtor was going to make that trip but NO ONE from the Creditors side cautioned the Debtor or her counsel that the personal property was allegedly not in their possession. It shows a lack of candor to the court and the Debtor.

2T, at p. 25. If the customer does not bring back the key, then

> Their stuff goes into storage, and in the event we decide to sue them, they can then deal with the storage company to get their stuff out. We sue them for the balance of the money. But we do hold everybody's stuff for at least 30 days before it goes into storage.

2T, at p. 26.

Despite referring to a storage company, on further questioning Mr. Cohen revealed that storage is actually a trailer on the property with a lock on it. 2T, at p. 44. Though he admitted that if the buyer does not give back the key, "I believe it's a civil matter, but most of the time they get their belongings anyway, because it's usually not very expensive cars. But if it is an expensive car, we kind of push the issue that we'll bring your car back . . . ." 2T, at p. 44. If they don't return the key, then he has to get a key cut for the car. 2T, at p. 45. But as for their possessions, "I say how about this, it's something fair. Bring up the key, I'll give you your possessions. If I had already made a key, then I just give them their possessions because it doesn't benefit me." 2T, at p. 45.

Mr. Pinto testified that the Debtor returned the key after she got her personal property. 1T, at p. 143. "I'm pretty sure she left it right on my desk." 2T, at p. 143. But he had testified at a deposition that he did not know whether the Debtor retrieved her personal property, whether there was any property to retrieve, and that he never saw the Vehicle again. 1T, at p. 136.

In addition, Mr. Pinto testified that "typically" he has customers sign a piece of paper saying that they picked up their personal property. 1T, at p. 144. But when asked whether he did so with the Debtor, he prevaricated "I mean, again, every situation is different. I mean this [the Waiver] is what I printed out at the time, that she was kind of done with the car. You know, give us the key, take your stuff out, you know." 1T, at p. 145.

To summarize, the Creditors pressure buyers into returning the Vehicle key by withholding access to the Vehicle to collect their belongings. They say they have buyers sign a receipt acknowledging return of the belongings, but the Creditors did not follow their usual procedures and have the Debtor do so in this case. Mr. Pinto testified inconsistently about whether the Debtor had retrieved her property. There was no evidence submitted that reflected a return of the personal property. There was animosity between these parties, such that the court can believe that the Creditors would act vengefully toward the Debtor. Finally, the Debtor produced a key at the hearing with a Corvette logo on it, which was examined by the Creditors, while the Creditors did not produce a key. While this alone is not solid evidence that this was the key to the Vehicle, the court finds it is more likely than not the key to the Vehicle.

Finally, as stated above, the Debtor filed her bankruptcy case on March 21, 2017. Pine Valley received notice of the filing on March 23, 2017. JS, at ¶ 13. The following day, the Debtor filed the motion now before the court. She filed a plan proposing to cure and

reinstate the Vehicle. Doc. No. 13. NU2U filed a proof of claim in the amount of $28,773. Ex. D-8.

V. CONCLUSIONS OF LAW

The Debtor seeks turnover of the Vehicle and sanctions for violation of the automatic stay. The court first addresses whether she has a right to turnover.

A. Turnover

Section 363(b) permits a trustee "after notice and a hearing, [to] use, sell, or lease, other than in the ordinary course of business, property of the estate. . ." and section 363(d) allows a trustee to use, sell or lease section 363(b) property to the extent not inconsistent with any relief granted under section 362(c), (d), (e) or (f). 11 U.S.C. §§ 363(b), (d). In turn, section 542(a) provides that "an entity, other than a custodian, in possession, custody, or control, during the case, of property that the trustee may use, sell, or lease under section 363 of this title, or that the debtor may exempt under section 522 of this title, shall deliver to the trustee, and account for, such property or the value of such property, unless such property is of inconsequential value or benefit to the estate." 11 U.S.C. § 542(a). Property of the estate includes "[a]ll legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. § 541(a)(1). *See Westmoreland Human Opportunities, Inc. v. Walsh*, 246 F.3d 233, 241 (3d Cir. 2001).

In chapter 13, the debtor, not the trustee, has standing under section 542(a). *In re Sharon*, 234 B.R. 676, 687 (B.A.P. 6th Cir. 1999) ("To the extent a Chapter

13 debtor can then use property of the estate under § 363, the debtor succeeds to the mandate in § 542(a) that compels delivery of property that is usable under § 363."). *See In re Dash*, 267 B.R. 915, 917 (Bankr. D.N.J. 2001) (tracing section 1303 to sections 363(b) and 542(a)). *See also In re McCann*, 537 B.R. 172, 178 n. 3 (Bankr. S.D.N.Y. 2015) (chapter 13 debtors have the right to use non-business property without prior court approval); *In re Laflamme*, 397 B.R. 194, 205 (Bankr. D.N.H. 2008); *Collier on Bankruptcy*, ¶ 1303.02 (Matthew Bender 2017) ("Congress apparently felt that there was no need to explicitly state the right of a nonbusiness chapter 13 debtor to use property in the ordinary course of the debtor's affairs, since section 1306(b) expressly authorizes the chapter 13 debtor to retain possession of all property of the estate.").[8]

Thus, as a chapter 13 debtor, the Debtor had the right to request turnover of property that she could use, sell or lease. The Creditors should have returned her personal property when she asked for it on April 4. They provided no legal basis for retaining it. Alternatively, if they threw out her property, then they breached their contract that requires them to give a buyer notice prior to disposal.

As for the Vehicle, the Creditors argue that it was not titled in the Debtor's name, she also surrendered the Vehicle, and there was no insurance on the Vehicle.

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[8] For ease of reading, where in this opinion the court references a debtor's right to turnover, it means a chapter 13 debtor's right. In chapter 7, the turnover right belongs to the trustee.

The question becomes, what was the Debtor's interest in the Vehicle at the time of filing?

i. Equitable interest in the Vehicle

Several bankruptcy courts have recognized that beneficial or equitable ownership may trump legal title for purposes of property of the estate where the applicable state law so provides. *See In re DuFoe*, 392 B.R. 534, 539 (Bankr. W.D.N.Y. 2008) (rebuttable presumption under New York's Vehicle and Traffic Law that one other than the title owner can be the beneficial or equitable owner of a vehicle); *In re Groves*, 05-76317, 2006 WL 6211798, at *5 (Bankr. N.D. Ohio Apr. 13, 2006) (vehicle not property of the estate where debtor held legal title only in vehicle solely for the benefit of her son); *In re Garberding,* 338 B.R. 463 (Bankr. D. Colo. 2005) (presumption of ownership rebutted by title owner's boyfriend who made all payments, paid for insurance and maintenance, and was the exclusive driver). *But see In re Kirk*, 381 B.R. 800, 802 (Bankr. M.D. Fla. 2007) (debtor failed to rebut presumption that she had no legal or beneficial interest in vehicle titled in her and her daughter's name, purchased by daughter's grandfather for and driven solely by her daughter, but with insurance and maintenance paid for by the debtor). *See also In re Moore*, 448 B.R. 93, 100 (Bankr. N.D. Ga. 2011) (where debtors pawned vehicles, but still retained right to possession, legal title, beneficial ownership interest subject to automatic divestment, and the right to maintain possession and redeem, vehicles were property of the estate at the time of the filing of the case).

New Jersey courts have granted in insurance coverage cases that "there may be more than one 'owner' of a vehicle." *Verriest v. INA Underwriters Ins. Co.*, 142 N.J. 401, 408 (1995). In so deciding *Verriest*, the New Jersey Supreme Court cited with approval *Am. Hardware Mut. Ins. Co. v. Muller*, 98 N.J. Super. 119, 236 A.2d 182 (1967), *aff'd*, 103 N.J. Super. 9, 246 A.2d 493 (1968), a case where, in order to obtain financing, legal title of a vehicle was placed in the name of David Muller, but his father, Ernest, made the payments on, used, and maintained the vehicle, and Ernest purchased the subject insurance in his name. *See Muller*, 98 N.J. Super. at 122. The *Muller* court held that title papers, which are synonymous with certificate of ownership, were evidence of ownership of a vehicle, but not conclusive evidence. *Id.*, at 128. For purposes of insurance coverage, it decided the car was owned by Ernest.

In so holding, the *Verriest* court considered the factors listed in a case decided by the Supreme Court of Washington:

> (a) Who paid for the car, (b) who had the right to control the use of the car, (c) the intent of the parties who bought and sold the car, (d) the intent of the parents and the child relative to ownership, (e) to whom did the seller make delivery of the car, (f) who exercised property rights in the car from the date of its purchase to the date of the accident, and (g) any other circumstantial evidence [that] may tend to establish the fact of ownership.

Verriest, at 409-10 (citing *Coffman v. McFadden*, 68 *Wash.*2d 954, 416 P.2d 99, 102 (1966)).

Another New Jersey court, also citing *Muller*, commented that this deviation from title ownership is appropriate to find that the insurance policy covers the actual user of the vehicle—the beneficial owner—rather than one who is merely a title owner. *Friedman v. Royal Globe Ins. Companies,* 137 N.J. Super. 192, 197 (Law. Div. 1975). *See Dobrolowski v. R.C. Chevrolet, Inc.*, 227 N.J. Super. 412, 415 (Law. Div. 1988) ("The owner of the vehicle is usually the person who holds the title and in whose name the vehicle is registered, but this is not always the case."). The Third Circuit has also extended this idea to stock ownership. *See Yonadi v. C.I.R.*, 21 F.3d 1292, 1298 (3d Cir. 1994) (citing *Muller* in holding that "New Jersey law does not require strict compliance with the formalities of stock ownership registration in order to recognize ownership interest.").

Thus it was not a reach for our sister court in applying New Jersey law to extend *Muller* to the bankruptcy context. There, the court held that vehicles registered in employees' names but used for the benefit of the corporate debtor, with loan payments made by the corporate debtor, were owned by the debtor for purposes of property of the estate. *In re B & P Distributors, Inc.*, 1 B.R. 426, 427 (Bankr. E.D. Pa. 1979). "Under New Jersey law, the certificate of title is not the sole determinant of ownership. It creates only a rebuttable presumption of ownership." *Id.,* at 427. *Accord In re Potter's Landscape Nursery, Inc.*, 44 B.R. 198 (Bankr. E.D. Pa. 1984).

Building on *Muller, B & P* and *Potter's Landscape*, the court *In re Rutledge*, 115 B.R. 344, 346 (Bankr. N.D. Ala. 1990), *aff'd sub nom. Matter of Rutledge,* 121 B.R. 609 (N.D. Ala. 1990), also found equitable ownership in a vehicle for purposes of determining whether it was property of the estate and subject to a turnover order. There the debtor had made all payments, made a down-payment, transferred title on a trade-in car to the creditor, placed insurance on the car in her name with the creditor as loss-payee, negotiated a refinancing of the car with the creditor, and remained in possession of the car, even though the car had been purchased under her father's credit and was titled in his name. *Id.*

Here, Mr. Pinto admitted that the Debtor "definitely purchased the car, absolutely." 1T, at p. 114. The Debtor possessed, made weekly payments on, and maintained the Vehicle. She made costly repairs. She exercised all rights to it up until its repossession. Though she did not have legal title, Mr. Pinto admitted that paying the taxes and obtaining the tags were the sole responsibility of the Creditors. Without question, the Debtor had an equitable ownership in the Vehicle.

More importantly, the fact that the taxes and tags had not been obtained in this case was solely the Creditors' fault and actually a breach of its contract. The Creditors failed to obtain title in the Debtor's name despite that the Debtor made more than enough regular Vehicle payments to cover this cost. If the Creditors had done what they were contractually required to do, at the time of the repossession the Vehicle would have been titled in the Debtor's name, establishing her as the actual legal owner. It seems a proper remedy for the

Creditors' breach of contract would be to return the parties to their positions prior to the breach. *Petron Scientech, Inc. v. Zapletal*, 16-1091, 2017 WL 2992079, at *3 (3d Cir. July 14, 2017) (citing *Furst v. Einstein Moomjy, Inc.*, 182 N.J. 1, 860 A.2d 435, 442 (2004)) and *Marina Dist. Dev. Co., LLC v. Ivey*, 223 F. Supp. 3d 216, 221 (D.N.J. 2016) (citing *Totaro, Duffy, Cannova and Company, L.L.C. v. Lane, Middleton & Company, L.L.C.*, 191 N.J. 1, 921 A.2d 1100, 1107 (2007)).

Accordingly, this court finds that the Debtor, at minimum, had an equitable interest in, if not was, the equitable owner of the Vehicle at the time of the bankruptcy filing. Because of that equitable interest/ownership, upon the filing of her petition, the Vehicle was property of the estate under section 541(a)(1) that she could use and thus request turnover from the Creditors.

ii. Surrender of the Vehicle

The court makes this finding despite the Creditors' argument that the Debtor surrendered the Vehicle to it prepetition. The court acknowledges that the parties debated when or even if the Debtor signed the Waiver. Regardless, for several reasons, the Waiver does not serve to exclude the Vehicle from property of the estate.

The first is the most obvious. Nowhere in the Waiver does the word "surrender" appear. It acknowledges a default and waives notice and a right to redeem, but nowhere does it state the Debtor surrendered the Vehicle. Therefore, there is no surrender to rebut her equitable interest in the Vehicle.

More importantly, the purported waiver of a right to redeem is invalid as New Jersey's Commercial Code prohibits waiver of a right of redemption in these circumstances. The Waiver purports to have the Debtor waive her rights under New Jersey's Commercial Code sections 12A:9-611 and 12A:9-623. Section 610 of New Jersey's Commercial Code provides that, "[a]fter default, a secured party may sell, lease, license, or otherwise dispose of any or all of the collateral in its present condition or following any commercially reasonable preparation or processing." N.J.S.A. 12A:9-610. Section 9-611 then provides that the secured party must send notice of disposition of the collateral to the Debtor. N.J.S.A. 12A:9-611(b). Section 9-623 permits a debtor to redeem collateral, N.J.S.A. 12A:9-623(a), "at any time" before the creditor:

- has collected collateral under 12A:9-607[9]

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[9] "Collection" appears to refer to liquid assets. *See* Uniform Commercial Code Comment 2 to N.J.S.A. 12A:9-607 ("Collateral consisting of rights to payment is not only the most liquid asset of a typical debtor's business but also is property that may be collected without any interruption of the debtor's business. . . . This section allows the assignee to liquidate collateral by collecting whatever may become due on the collateral, whether or not the method of collection contemplated by the security arrangement before default was direct (i.e., payment by the account debtor to the assignee, "notification" financing) or indirect (i.e., payment by the account debtor to the assignor, "nonnotification" financing)."). *See, e.g. Major's Furniture Mart, Inc. v. Castle Credit Corp.*, 602 F.2d 538, 542 (3d Cir. 1979) (applying UCC § 9-502, the precursor to § 9-607). *See also In re Herbst,* 469 B.R. 299, 304 (Bankr. W.D. Wis. 2012) ("The phrase "collection of collateral" under Revised U.C.C. § 9-623 is new but the listing is apparently a clarification, rather than a substantive

- has disposed of collateral or entered into a contract for its disposition, or
- has accepted collateral in full or partial satisfaction of the obligation it secures.

N.J.S.A. 12A:9-623(c)(1)-(3) (amended eff. Jan. 8, 2002).[10]

The Creditors assert that by signing the Waiver, the Debtor waived her right to redeem and to notice of disposition of the collateral. But while the Commercial Code provides for waiver of the right to redeem collateral, it specifically excepts consumer-goods transactions from the waiver right:

> (c) Waiver of redemption right. Except in a consumer-goods transaction, a debtor or secondary obligor may waive the right to redeem collateral under 12A:9-623 only by an agreement to that effect entered into and authenticated after default.

N.J.S.A. 12A:9-624(c).

Under the Commercial Code, a consumer transaction is one in which "(i) an individual incurs an obligation primarily for personal, family, or household purposes, (ii) a security interest secures the obligation,

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change. 1 *Secured Transactions Under the Uniform Commercial Code*, § 8.16[2] (Matthew Bender 2012)."). Certainly, Creditors cannot claim they collected their collateral in accordance with 12A:9-607.

[10] Notably, there is no 30-day deadline. The court does not know why Mr. Cohen believes he may re-sell vehicles after 30 days. *See* 2T, at p. 36.

and (iii) the collateral is held or acquired primarily for personal, family, or household purposes." N.J.S.A. 12A:9-102.

Clearly this Vehicle was purchased for personal use. Indeed, the Contract specifically designated the Vehicle as for "personal, family or household use" and states that the agreement is a "consumer credit contract." Accordingly, regardless of if or when the Debtor signed the Waiver, it was invalid under New Jersey law. Thus, not only did the Debtor not surrender the Vehicle by signing the Waiver, she did not waive her right to redeem it.

And as the Creditors had neither collected, disposed of, entered into a contract for disposition, or accepted the collateral in full or partial satisfaction of the obligation prior to the filing of the bankruptcy petition—NU2U's filing of a proof of claim in the amount of $28,773 negates any suggestion that it accepted the collateral in full or partial satisfaction of the obligation, *see* ex. D- 8—the debtor's right to redeem remains.[11]

Thus, not only did the Debtor have a right to request turnover of the Vehicle as an equitable owner of the Vehicle, the "Waiver" is invalid and her right to redeem remained in place at the time of her bankruptcy filing. Her right to redeem also represents an equitable

[11] The court was aware going into the plenary hearing of this invalidity, as sections 611 and 623 are cited in the Waiver itself. It was pleased that the Debtor in her post-trial brief also picked up on the issue.

interest that became property of the estate under section 541(a)(1) upon filing her petition.

B. Automatic Stay

Having established that the interest in the Vehicle and right to redeem are property of the estate, the court now turns to whether the Creditors violated the stay by refusing turnover of the Vehicle and/or the personal possessions. This raises an issue of the interaction between sections 542(a), 363(e) and 362(a)(3): turnover, adequate protection, and the automatic stay.

Section 542(a) was discussed above. Section 363(e) provides:

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

11 U.S.C. § 363(e).

Courts analyzing whether a failure to turn over property violates the automatic stay consider section 362(a)(3), which provides:

> (a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title . . . operates as a stay, applicable to all entities, of— . . .
>
> (3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate. . . .

11 U.S.C. § 362(a)(3).

Congress added "or to exercise control" to section 362(a)(3) by the Bankruptcy Amendments and Federal Judgeship Act of 1984, *In re Sharon,* 200 B.R. at 187, without explanation. *In re Young*, 193 B.R. at 623; *In re Sw. Equip. Rental, Inc.*, 1-88-00033, 1990 WL 129972, at *3 (Bankr. E.D. Tenn. Feb. 8, 1990). The meaning of that phrase, "to exercise control," is the subject of a circuit split made more challenging by the absence of any legislative history on the amendment, *see In re Sw. Equip. Rental, Inc.*, 1-88-00033, 1990 WL 129972, at *3 (Bankr. E.D. Tenn. Feb. 8, 1990), to explain Congress's intent.

Four circuit courts of appeal have held that section 542(a) requires immediate turnover of property that the debtor can use, and that failure to do so violates section 362(a)(3)'s "to exercise control" provision. *Weber v. SEFCU (In re Weber)*, 719 F.3d 72, 82 (2d Cir. 2013); *Thompson v. General Motors Acceptance Corp., LLC (In re Thompson)*, 566 F.3d 699, 703 (7th Cir. 2009); *California Employment Dev. Dept. v. Taxel (In re Del Mission Ltd.)*, 98 F.3d 1147, 1151-52 (9th Cir. 1996); *Knaus v. Concordia Lumber Co., Inc. (In re Knaus),* 889 F.2d 773, 775 (8th Cir. 1989). *See also TranSouth Fin.*

Corp. v. Sharon (In re Sharon), 234 B.R. 676, 682 (B.A.P. 6th Cir. 1999); *In re Colortran, Inc.*, 210 B.R. 823, 827 (B.A.P. 9th Cir. 1997), *aff'd in part, vacated in part on other grounds,* 165 F.3d 35 (9th Cir. 1998). Some courts additionally hold that this pertains even if the secured creditor is not adequately protected, relief that it must separately petition the court for. *Weber*, 719 F.3d at 81-82; *Thompson,* 566 F.3d at 708; *Sharon,* 234 B.R. at 683; *Colortran*, 210 B.R. at 827.

Two circuit courts of appeal have instead held that a creditor does not violate the stay in regard to property of the estate if it merely maintains the status quo. *In re Cowen,* 849 F.3d 943 (10th Cir. 2017); *U.S. v. Inslaw*, 932 F.2d 1467 (D.C. Cir. 1991). These courts and those following them emphasize that 362(a)(3)'s language, "an act . . . to exercise control," is forward-looking, and thus a creditor must take some new, postpetition action to exercise control over the property of the estate in order to violate the stay. *In re Cowen*, 849 F.3d 943, 949 (10th Cir. 2017) ("This section, then, stays entities from *doing* something to obtain possession of or to exercise control over the estate's property. It does not cover 'the act of passively holding onto an asset,' *Thompson*, 566 F.3d at 703, nor does it impose an affirmative obligation to turnover property to the estate.") (emphasis in original); *United States v. Inslaw, Inc.*, 932 at 1474 ("The statutory language makes clear that the stay applies only to acts taken *after* the petition is filed."); *In re Hall*, 502 B.R. 650, 665 (Bankr. D.D.C. 2014) ("[T]he 'act . . . to exercise control' language itself suggests that an affirmative act of exercising control is required."); *In re APF Co.*, 274 B.R. 408 (Bankr. D. Del. 2001) (J. Walsh)

(". . . Plaintiffs must show that NYLCare engaged in conduct which was an affirmative post-petition act manifesting either an exercise of control over property of the estate, or collecting, assessing or recovering such property in order to demonstrate a stay violation."); *In re Young,* 193 B.R. 620, 629 (Bankr. D.D.C. 1996) (". . . the stay is intended only to *prohibit* postpetition affirmative acts by creditors and thus acts as a freeze of the status quo at petition.").

These *status quo* courts read sections 542(a) and 363(e) together to allow a debtor to request turnover of property he or she can use while allowing the creditor to respond with a request for adequate protection.[12] *In re Hall,* at 659. *See In re Quality Health Care*, 215 B.R. 543, 581 (Bankr. N.D. Ind. 1997), *appeal denied, cause remanded sub nom. Gouveia v. I.R.S.*, 228 B.R. 412 (N.D. Ind. 1998) ("However, the cases are legion, that because § 542(a) expressly refers to § 363, before a secured creditor is required to turnover property of the Debtor's estate, the Trustee must first provide the IRS with adequate protection as to lien interest."). Refusing to turn property over because the creditor is not adequately protected is not the kind of postpetition "control" that violates the stay. *Cowen*, 849 F.3d at 949.[13] Instead, a creditor wrongly withholding property

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[12] It must be remembered that here, the Debtor's Motion was filed 3 days after the bankruptcy filing to be heard on shortened time. Creditors timely opposed the motion, effectively setting forth their counter demand for relief.

[13] "Exercise control" may be an easier concept to apply to intangible property, such as contract rights. *See In re Hall,* 502 B.R. at 665.

may be sanctioned under the court's contempt power under section 105(a) after an order for turnover has been entered and disobeyed. *In re Cowen,* 849 F.3d at 950; *In re Hall*, 502 B.R. at 650.

i. The Vehicle

The Third Circuit Court of Appeals has not addressed the issue, and the district and bankruptcy courts for the District of New Jersey have not definitively expressed an opinion.[14] For at least the last 20 years, in this judge's recollection, the practice in this district has been that a creditor holding a car repossessed prepetition may request proof of insurance naming it as loss payee prior to turnover without violating the stay. But once proof of insurance has been produced, the creditor violates the stay by not returning the car. Yet it could find no case rationalizing this. Section 362(b) does not include an exception for adequate protection. The District Court's *Carr* decision has been cited as supporting the majority opinion because it held that "the bank's failure to turn over debtor's car upon the filing of debtor's bankruptcy petition constituted a violation of the automatic stay." *Carr v. Sec. Sav. & Loan Ass'n*, 130 B.R. 434, 435

[14] Interestingly, in the context of the automatic stay and section 108(a), which tolls limitations periods, the Third Circuit commented "That Congress intended § 362 to prohibit only certain types of affirmative action is evidenced by the statute's language, (*i.e.,* "enforcement"; "proceeding"; "act to obtain") and by its corresponding non-utilization of terms which appropriately describe the extension or suspension of a statutory period." *Ctys. Contracting & Const. Co. v. Constitution Life Ins. Co.,* 855 F.2d 1054, 1059 (3d Cir. 1988).

(D.N.J. 1991). But it also stated "Security Savings was obliged to turn over the repossessed car immediately after the filing of the second petition *and the verification of insurance*." *Id.*, at 436 (emphasis added).[15] The court sees no reason to abandon the long established practice of maintaining the *status quo* in repossessed vehicle cases until a debtor provides proper proof of adequate protection, i.e., insurance.[16]

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[15] Despite that *Carr* cites to *In re Loof,* 41 B.R. 855 (Bankr. E.D. Pa. 1984), the court in *In re Najafi,* 154 B.R. 185 (Bankr. E.D. Pa. 1993), agreed with the minority position that a debtor "must both provide adequate protection to the creditor and seek affirmative relief to obtain a turnover." *Najafi,* at 194 (*abrogated on other grounds by In re Mehta*, 310 F.3d 308 (3d Cir. 2002)). The *Najafi* court also cited *Loof* as supporting its position.

As an aside, since there was no proof at trial that the Debtor had *any* insurance at the time of filing, *see* 1T, at p. 36-39 (testifying that she did not bring proof of insurance to the plenary hearing, despite the Creditors having requested it in discovery), the court cannot fault the Creditors for not turning the Vehicle over. New Jersey requires that prior to anyone driving an automobile or motorcycle in this state, the vehicle be registered. N.J. Stat. § 39:3-4. Registration, among other things, requires proof of insurance. N.J. Stat. § 39:3-4. Minimally, a registered New Jersey driver must carry motor vehicle liability coverage. N.J. Stat. § 39:6B-1, N.J.S.A. 39:6A-3.

[16] Indeed it makes no sense to the court to require an immediate turnover of a vehicle only to have a creditor immediately turn around and file a stay relief motion due to a lack of adequate protection because of a lack of insurance especially when insurance on a vehicle is mandatory under state law and adequate protection is necessary to protect a creditor's interest in the first place. To that end, the court is mindful that the law tries to avoid absurd results. *See e.g. Citizens Bank of Maryland v. Strumpf*, 516 U.S. 16, 18 (1995) (in setoff situations recognizing:

In cases involving other types of property, New Jersey bankruptcy courts, including this court, have cited the majority position without discussion. *See In re Sussex SkyDive, LLC*, 2016 Bankr. LEXIS 1862 (Bankr. D.N.J. Apr. 27, 2016) (regarding an airplane, citing the majority in stating that "creditors have an affirmative duty to turn over property of the estate once notified of a bankruptcy filing"); *In re Stamper*, 2008 WL 724237 (Bankr. D.N.J. Mar. 17, 2008) (citing *Del Mission* and *Sharon* to sanction a failure to turn over funds paid postpetition as a violation of the stay). But those cases are distinguishable. *Sussex SkyDive* involved a landlord wrongfully exercising control over property that was clearly property of the estate and *Stamper* involved an unperfected judgment lien creditor wrongfully exercising control over property of the estate. Both cases involved creditor affirmative actions postpetition to exercise control over property of the estate, thereby affecting the *status quo* that would not have been permitted under the minority view.

In this case, this court finds the minority position particularly persuasive. That position criticizes the majority's claim that section 542(a) is self-effectuating, as it does not allow for the possibility of defenses to turnover. From the inception of this case there was an issue regarding exactly what the Debtor's interest in the Vehicle was. Only after analyzing the Contract between the parties, examining the relevant law and vetting the uncertain evidence and arguments of the parties, did

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"the absurdity of making A pay B when B owes A.") (citing *Studley v. Boylston Nat. Bank*, 229 U.S. 523, 528 (1913)).

the court make a determination, through this decision, of exactly what the Debtor's interest in the Vehicle was. The Debtor's interest was not readily obvious—there was a prepetition default in payments, there was a prepetition repossession, the Debtor did not have possession of the Vehicle, the Vehicle was never titled in the Debtor's name and a Waiver was purportedly signed. It was only after the court conducted its analysis that the error of the Creditors' position came to light. During this time, the Vehicle has remained in the possession of the Creditors and no further actions against it have been taken. The *status quo* has been maintained while the court considered its decision. It would simply be unfair to declare a stay violation for not turning the Vehicle over when the Debtor's true interest in the Vehicle was unknown. *See United States v. Inslaw*, 932 F.2d at 1472 ("It is settled law that the debtor cannot use the turnover provisions to liquidate contract disputes or otherwise demand assets whose title is in dispute."); *In re Hall*, 502 B.R. at 663 ("Only upon entry of a turnover order adjudicating the estate's ownership of the property could there be a contempt for failing to turn over the property."). The Creditors will be ordered to turn the Vehicle over, but will not be sanctioned under section 362 for failing to turn it over prior to adjudication of the Debtor's right to redeem the Vehicle.

The court notes also that the Debtor did not specify under which paragraph of section 362(a) she proceeds. In her motion, she only discusses the stay as a mechanism to discontinue any pending collection proceedings and "restore the status quo as it existed at

the time of the filing of the bankruptcy petition." Doc. No. 5-7, p. 3 (quoting *In re Johnson*, 262 B.R. 831, 847-48 (Bankr. D. Idaho 2001). But she did not allege that the Creditors attempted to collect on their claim against her, and it does not appear that the Creditors took any action regarding the Vehicle postpetition. Thus, sanctions are not warranted.

ii. The Personal Property

The personal property presents a different result. There is no question that at the time of the bankruptcy filing, the Debtor had a legal right to her possessions and the Creditors had no right to that property. Unlike the Vehicle, there is no question of ownership. Indeed, the Creditors provided no basis in law for keeping this property from the Debtor and the court cannot fathom one. Certainly the Debtor could use her licenses, credit cards, and cash, in this chapter 13 case. Thus section 542(a) was applicable. The Creditors had no security interest in the property, therefore there is no issue of adequate protection, despite the Creditors' desire to protect themselves from the cost of having a new key cut. Based upon the testimony provided by the Creditors, the personal property should still be in the possession of the Creditors. No credible evidence supports their position that the personal property was returned to the Debtor and in fact, the court finds that the Creditors completely lack credibility on this point. Through their own testimony it is clear that the Creditors did not follow any of their procedures, contractual or otherwise, with regard to the return or disposition of the personal property. There is no proof that supports their version of the facts. The court is also

at a loss as to why they would make the Debtor go on a wild goose chase after the bankruptcy was filed if they were certain they did not have the personal property. Indeed, suspicious.

Even though the court believes it is more likely than not that the Creditors did not return the personal property to the Debtor, the evidence does not show that the Creditors are still in possession of the personal property or were in possession of it at the time of the bankruptcy filing. The court cannot determine with certainty whether there has been a stay violation under section 362 as to the personal property.[17] Therefore, the court will order return of the personal property within seven days of the entry of this opinion. If the property is returned, the court will consider sanctions for a stay violation and/or contempt. If the property is not returned within that time, the court will entertain sanctions for contempt. While "[c]riminal contempt sanctions are punitive in nature and are imposed to vindicate the authority of the court . . . sanctions in civil contempt proceedings may be employed 'for either or both of two purposes: to coerce the defendant into compliance with the court's order, and to compensate the complainant for losses sustained.'" *Local 28 of Sheet Metal Workers' Int'l Ass'n v. E.E.O.C.*, 478 U.S. 421, 443 (1986) (quoting *United States v. Mine Workers,* 330 U.S. 258, 302, (1947)). In so holding, the court notes that the Debtor's claim that she has been unable to work due to not having her Vehicle is a damage related to turnover of the Vehicle that the court is not sanctioning. Unless

[17] A return of the personal property will go to a mitigation of damages.

she shows that she needed those personal possessions in order to work, the loss of wages may not be part of any damages. Also, the Debtor has a duty to mitigate damages. Relatedly, the Creditors will not be allowed reimbursement or set off of their repair costs or their post-repossession storage, as these actions were done for their own benefit and/or while they were in breach of their contract.

v. CONCLUSION

Based on the foregoing, the Debtor's Motion for Return of Repossessed Auto will be granted. Her Motion for Sanctions for Violation of Automatic Stay will be denied as to the Vehicle. The Creditors will also be ordered to return the personal property. The court reserves its opinion as to appropriate sanctions, if any, with regard to the personal property.

An appropriate judgment has been entered consistent with this decision.

The court reserves the right to revise its findings of fact and conclusions of law.

/s/ Andrew B. Altenburg, Jr.
United States Bankruptcy Judge

Dated: October 20, 2017