No. 15-1223

In the Supreme Court of the United States

SOUTHWEST SECURITIES, FSB,

Petitioner,

v.

MILO H. SEGNER, JR., TRUSTEE,

Respondent.

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

RESPONSE OF MILO H. SEGNER, JR., TRUSTEE, IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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RULE 29.6 STATEMENT

Milo H. Segner, Jr., is the Trustee of the Domistyle, Incorporated Creditor's Trust, created pursuant to the provisions of Chapter 11 of the United States Bankruptcy Code by order of the Bankruptcy Court. Although the Trust has numerous creditors with an indirect interest in this proceeding, none of those creditors or beneficiaries has any direct interest in this proceeding. There is no corporate parent of the Trust, and the Trust is not publicly traded (nor are its beneficial interests).

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Milo H. Segner, Jr. (the "Trustee"), as trustee of the Domistyle, Incorporated Creditor's Trust (the "Trust"), files this Response in opposition to the *Petition for a Writ of Certiorari* (the "Petition"), filed by Southwest Securities, FSB ("Southwest"), respectfully requesting that the Court deny the Petition.

OPINIONS BELOW

Southwest has correctly identified the opinion of the United States Court of Appeals for the Fifth Circuit, reported at *Southwest Securities FSB v. Segner (In the Matter of Domistyle, Inc.)*, 811 F.3d 691 (5th Cir. 2015) (the "Opinion"). The order of the United States Bankruptcy Court for the Eastern District of Texas, Sherman Division (the "Bankruptcy Court"), giving rise to the appeal below is not reported, but is accurately included by Southwest with its Petition.

JURISDICTION

Southwest has correctly cited this Court's jurisdiction as arising under 28 U.S.C. § 1254.

STATUTORY PROVISION INVOLVED

Southwest has accurately cited the statutory provision involved as 11 U.S.C. § 506(c). Although other statutes form the framework for the present dispute, given that the Bankruptcy Code is an integrated, comprehensive statute, none of those other statutes are directly involved.

STATEMENT

The Trustee does not disagree with Southwest's *Statement* of the case, although he

disagrees with the implications therein concerning the abandonment of the Property and the facts and circumstances surrounding the same, because Southwest presents a one-sided view of the facts to suggest that the Trustee's retention and ultimate abandonment of the Property were anything less than fully transparent and agreed to by Southwest, or were otherwise somehow inconsistent with the Trustee's duties. The Trustee will therefore address the issues in some detail so that the Court better understands the factual and equitable nature of the underlying considerations.

As Southwest notes, the Trustee (and Southwest, *see* ROA.155) believed the Property to be worth upwards of $6 million. Given that Southwest was owed less than $4 million, the Trustee determined to attempt to sell the Property for the benefit of all creditors—including Southwest, which would have to be paid in full first. Indeed, simply abandoning the Property to Southwest without attempting to free up more than $2 million of equity for the benefit of junior creditors would arguably have breached the Trustee's fiduciary duties, given that the Trustee's primary fiduciary duty is to maximize the value of the estate for unsecured creditors. *See, e.g., In re Vic Supply Co. Inc.*, 227 F.3d 928, 931 (7th Cir. 2000). Southwest fully understood the situation, and agreed with the Trustee's efforts to market the Property—including with full knowledge that the Trustee would be expending estate resources to maintain, repair, and safeguard the Property. ROA.1949:25-1950:1.

The bankruptcy case was filed under Chapter 11 of the Bankruptcy Code. Pursuant to Chapter 11 of the Bankruptcy Code, *see* 11 U.S.C. §§ 1101, *et. seq.*, the Trustee (then the receiver for Domistyle, Inc.) filed a proposed Chapter 11 plan of liquidation (the "Plan"), which the Bankruptcy Court confirmed on April 16, 2014. ROA.102 *et. seq.* Southwest agreed to the Plan. ROA.1949:25-1950:1. A central feature of the Plan was its treatment of the claims of Southwest and its handling of the Property.

First, the Plan provided that the Trustee would continue holding and marketing the Property. *See* Plan at §§ 5.2 & 5.5. Second, the Plan preapproved any sale of the Property by the Trustee, provided that the sale would yield sufficient net proceeds to pay Southwest's claims and liens in full, including all default interest. *See* Plan at § 5.5(ii). Third, in order to provide finality, the Plan contained a deadline of May 1, 2014 (subject to certain automatic extensions) for the Trustee to sell the Property. *See* Plan at § 5.5(iv). If the Trustee failed to sell the Property for sufficient net funds by that deadline, then Southwest would be permitted to either foreclose on its lien or demand a deed in lieu of foreclosure. *See* Plan at § 5.5(v). Fourth, to ensure that the Property was protected during the period that the Trustee retained it, the Plan required the Trustee to "own the [Property] as a reasonably prudent owner would own it," including by such things as purchasing property insurance. *See* Plan at § 5.6. Finally, the Plan expressly contemplated the potential of a surcharge, reserving

and preserving all parties' rights regarding the same for both the pre-Plan and the post-Plan period, and specifically detailing which expenses may be eligible for surcharge (such as security, repairs, and utilities) and which expenses would not be eligible for surcharge (such as attorney's fees). *See* Plan at § 5.9.

May 1, 2014 came and went, and the Trustee was unable to obtain a contract for sale of the Property that would yield sufficient net proceeds. The Trustee therefore expected Southwest to either immediately foreclose on its lien or demand a deed in lieu of foreclosure. Neither happened. Instead, Southwest took no action, demanding, however, that the Trustee continue making all necessary expenditures related to the Property. ROA. 1742. This left the Trustee in an impossible position: one the one hand, the deadline to sell the Property passed and Southwest refused to exercise its rights, while on the other hand the Plan required the Trustee to continue expending funds to maintain and preserve property which the Trust no longer could obtain any benefit from.

It is for this reason that the Trustee filed his motion to abandon the Property—simply to require Southwest to take *some* action, as opposed to a traditional bankruptcy abandonment where a trustee promptly abandons burdensome assets of inconsequential value to the estate. Ultimately, the parties resolved the abandonment issue and compromised the surcharge claim in part, limiting the issue to be tried below to the extent and

allowance of the surcharge claim for the pre-abandonment period.

Moreover, in June, 2014, and as the Trustee was attempting to require Southwest to exercise its rights, the Trustee informed Southwest that he intended to cease making payments related to the Property, which Southwest responded to with a demand that the Trustee continue making such payments:

> the Receiver/Liquidating Trustee has threatened to stop maintaining insurance, security, and utility service, among other things, to the Laredo Property. Of course, such action would virtually destroy any value remaining in the Laredo Property and, we believe, violates the Plan approved in this case.

ROA.2081. This is similar to a May 16, 2014 communication from Southwest wherein Southwest relayed to the Trustee its understanding that insurance, security and utilities, along with all other matters needed to preserve the Laredo building and it's [sic] value, will remain in place and be paid by the Receiver/Liquidating Trust." ROA.902.

There can therefore be no question that expenditures for insurance, security, and utility services, among other things, actually and necessarily benefited the Property and Southwest by *preserving* the value of Southwest's collateral—not making them would "virtually destroy any value

remaining"—and expenses for preserving value are expressly provided for in the surcharge statute itself. *See* 11 U.S.C. § 506(c).

Clearly, therefore, Southwest understood that the Trustee was holding the Property for the purpose of attempting to sell the Property, first and foremost to benefit Southwest, which would have to be paid in full prior to any junior creditors receiving any sale proceeds. Southwest understood that the Trustee was making payments related to the Property, that the Trustee was required to make those payments pursuant to the very Plan agreed to, and that the payments were actual and necessary to preserve the value of the Property. Southwest also clearly understood that the Trustee was reserving the estate's surcharge claim, going so far as to agree with the Trustee on the types of expenses that would be eligible for a surcharge and those that would not be. Indeed, the provisions of the Plan aside, any reasonably prudent secured creditor would know of the surcharge provision in the Bankruptcy Code. Southwest was perfectly content to let the Trustee do this, knowing that it would benefit from the surcharged expenses whether it was paid in full or whether it received the Property, with the added benefit that it could hold on to its capital while someone else paid its expenses.

At any time, if it was concerned with anything that the Trustee was doing or not doing, Southwest could have sought relief under the Bankruptcy Code to foreclose on the Property, or for adequate protection of its interests, or for various other

protections and rights accorded the secured creditor. It never sought any such relief, or any relief at all. ROA.1887:14-22. Indeed, and rather remarkably, not only did Southwest fail to exercise its rights after the Plan deadline expired, it even contested the Trustee's attempt to abandon the Property, compromising the issue only at the hearing. That, more than anything, evidences Southwest's intentions all along and demonstrates precisely why the surcharge statute exists and why surcharging a secured creditor is necessary and equitable to prevent unjust enrichment.

In the end, only one creditor and party benefited from the surcharge expenses: Southwest, because it foreclosed on the Property for a credit bid and obtained at least a dollar-for-dollar benefit by way of preserving and enhancing the value of its collateral. ROA.1890:11-13. No other creditor or party benefitted at all. The Bankruptcy Court was absolutely correct, as a matter of simple logic as well as undeniable fact, that "Southwest benefited . . . And that given that as it turns out Southwest is the only secured creditor who will be paid, the expenses were incurred primarily for Southwest Securities." ROA.1962-63.

SUMMARY OF ARGUMENT

As the Fifth Circuit correctly noted, and as Southwest admits in its *Question Presented*, Southwest's argument relies on prospective intent: *i.e.* that the Trustee's "hope" to benefit creditors in

addition to Southwest defeats his surcharge claim or, stated more appropriately, that the Trustee must have intended to benefit Southwest and Southwest alone in order to qualify for a surcharge. No requirement of "intent" appears anywhere in the statute, however, the statute instead focusing on actual, retrospective benefit on the secured creditor. Because the statute contains no element of "intent," and because this Court has repeatedly cautioned against reading an element into an otherwise clear and unambiguous statute, Southwest's argument must fail. The balance of Southwest's analysis actually ignores its own *Question Presented* and instead analyzes actual, retrospective benefit, which is an issue on which all opinions agree—as they must, since this element appears in the statute itself. There is no circuit split on that issue; indeed, there is no circuit or lower court that has adopted prospective "intent" as an element. Because actual benefit is a question of fact, on which the Bankruptcy Court had substantial evidence as well as Southwest's own admissions, which finding of fact the Fifth Circuit affirmed applying the correct standard of review, there is no error, there is no circuit split, and there is no issue or reason meriting this Court's review of what was fundamentally a factual question applying a clear and unambiguous statute. Southwest's resort, if any, lies with Congress.

ARGUMENT

A. NO "COMPELLING REASONS" OR NEED FOR THIS COURT'S SUPERVISORY POWER

Southwest seeks simply to have this Court read into a statute language that is not there. This Court has counseled against such super-legislative additions on many occasions, and has instructed lower courts against that practice. Because Southwest seeks nothing more than to have this Court rewrite the statute as it wants the statute written, there are no "compelling reasons" to grant Southwest's petition and there is no departure from accepted and usual judicial proceedings such as to warrant this Court's supervisory power.

Southwest phrases the issue before the Court as one concerning a trustee's "hope of benefiting other creditors." *See* Petition (Question Presented). Aside from being factually incorrect, the fundamental problem with Southwest's argument is that it reads into the governing statute an "intent" or *mens rea* element that simply is not there. The governing statute, 11 U.S.C. § 506(c), which provides that a secured creditor's collateral may be surcharged in favor of a bankruptcy estate under certain conditions, provides as follows:

> The trustee may recover from property securing an allowed secured claim the reasonable, necessary costs and expenses of preserving, or disposing of,

> such property to the extent of any benefit to the holder of such claim, including the payment of all ad valorem property taxes with respect to the property.

Simply put, the statute makes no mention of intent one way or the other: the Trustee's "hope," or lack thereof, to benefit any creditor, a secured creditor, an unsecured creditor, the bankruptcy estate, or a debtor simply does not matter. All that matters is that the surcharged costs were: (i) reasonable; (ii) necessary; (iii) expenses to preserve or dispose of property; and (iv) which conferred a benefit on the secured creditor. Each of these is a question of fact, on which the Bankruptcy Court heard overwhelming evidence, which the Bankruptcy Court found as a matter of fact, and which the Fifth Circuit affirmed as a matter of fact.

Indeed, the argument that a trustee must specifically intend to benefit the secured creditor—and no one else—has no precedent in the law, is at odds with logic and the Bankruptcy Code, and is incompatible with a trustee's fiduciary duties. These fiduciary duties prevent a trustee from seeking to benefit solely a secured creditor, because a trustee is the fiduciary of the estate and not an agent for any given creditor. *See, e.g., In re Rambo*, 297 B.R. 418, 433 (Bankr. E.D. Pa. 2003); *In re Feinstein Family P'Ship*, 247 B.R. 502, 507 (Bankr. M.D. Fla. 2000). Indeed, Southwest acknowledges that, "[b]ecause the trustee's primary obligation is to unsecured

creditors, he should not spend estate assets to benefit only secured creditors." Petition at p. 2. Furthermore, the Bankruptcy Code presumes that a secured creditor is fully capable of protecting (and motivated to protect) its own interests, whereas it is the unsecured creditors who rely on a trustee. *See, e.g., In re Louis Rosenberg Auto Parts Inc.*, 209 B.R. 668, 672 n. 4 (Bankr. W.D. Pa. 1997); *In the Matter of Schwen's Inc.*, 19 B.R. 681, 694 (Bankr. D. Minn. 1981). Therefore, considering Southwest's argument in light of these fiduciary dynamics results in writing the statute out of the Bankruptcy Code: *if* a trustee must specifically and exclusively intend to benefit a secured creditor in order to qualify for a surcharge, yet a trustee should not expend estate resources "to benefit only secured creditors," then a secured creditor would never be subject to a surcharge.

The process here worked exactly as intended and ordered by Congress pursuant to its statute. The Trustee retained the Property not for the sake of retaining it or to create a claim for surcharge. Rather, he retained it because he (and Southwest) believed that there were millions of dollars of equity in the Property which, after payment of Southwest's lien, could be used to benefit the estate.[1] The

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[1] As an aside, had the Trustee succeeded in selling the Property for the price that everyone expected the Property to be worth, thereby freeing up funds for junior creditors, Southwest would never have been subject to a surcharge. This is because a surcharge is in effect a priming lien *in rem* against the

Trustee retained the Property with Southwest's consent, and with the requirement that the Trustee maintain the Property as an ordinary and prudent owner would. Southwest not only acquiesced to the Trustee holding the Property as he marketed it, but it did nothing to obtain the Property while, at all times, as a sophisticated lender it knew that a surcharge was possible.

Indeed, the Plan expressly reserved surcharge rights and went so far as to delineate those expenses that qualified from those that did not. *See* Plan at § 5.9. The funds that the Trustee expended were tangible, actual, and necessary expenses (which was not contested below by Southwest) to maintain, repair and secure the Property, to keep utilities on, and to maintain the outside premises in a safe manner—exactly those expenses provided for in the Plan. None of the funds expended were the costs of administering the Estate, or were intangible or soft costs, or were the fees of the Trustee or his professionals.

In the end, when Southwest obtained the Property, it obtained at least a dollar-for-dollar value by way of the preservation of its collateral for many

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collateral. If, in such a scenario, a surcharge was ordered, the surcharge would be paid first, but the full value of Southwest's lien would remain, and would have to be paid from the equity that would otherwise exist prior to any funds flowing to junior creditors. The situation arises here only because, despite everyone's good faith and reasonableness, the Property simply did not generate the value that was expected from professional appraisals.

months, as opposed to obtaining a boarded up, vandalized building, probably with squatters living in it, with fixtures stolen, with exposed wiring and a leaky roof, and with a wilderness allowed to grow outside. Or, Southwest would have had to pay the same costs itself to avoid this result. Someone else paid to preserve Southwest's collateral, and it is absolutely equitable and required by Congress that Southwest should pay the costs. Thus, if this case merits this Court's attention, then that merit would be only to provide a textbook example to all trustees, secured creditors, and courts for exactly how a surcharge should work and for why one is required, as opposed to Southwest's invitation to have this Court read language into the statute that is simply not there.

The second fundamental problem with Southwest's argument is that it is not factually correct. Southwest's argument hinges on a trustee retaining collateral in the "hope of benefiting other creditors." Here, however, the Trustee retained Southwest's collateral *with Southwest's permission* in the hopes of benefiting the collateral itself, which of necessity would mean that the Trustee, if he intended to benefit any person, intended to benefit Southwest first and foremost, as Southwest would have to be paid in full first. Thus, if intent plays any role in the analysis, the Trustee's intent here was to benefit Southwest *and* potentially junior creditors; not junior creditors alone.

As recognized by the Fifth Circuit, Southwest's argument distills to whether section

506(c) "is limited to expenses incurred by the trustee with a specific and exclusive intent to benefit the secured creditor." *Opinion*, 811 F.3d at 696. And, as found by the Bankruptcy Court and the Fifth Circuit, although the Trustee lacked intent to benefit Southwest only, the Trustee admitted "to maintaining the Property with the intent of benefiting Southwest *and* the estate." *Id.* (emphasis in original). Thus, if intent to benefit a secured creditor is required, the Trustee had that intent. The only difference is that, instead of intending to benefit only Southwest, he intended to also benefit the estate—something that is at the very core of a Trustee's duties and actions.

The balance of Southwest's arguments and case law simply focus on whether actual benefit was conferred and who that benefit was conferred on. The Trustee has never disagreed—actual benefit on the secured creditor is required, as correctly held by the Bankruptcy Court and affirmed by the Fifth Circuit. Thus, Southwest's argument that, "if the trustee retains property to benefit other parties, it cannot surcharge the expense," Petition at p. 11, is simply inapposite to the issue actually appealed. Here, there can be no question that actual benefit on Southwest was conferred.

B. THE APPEAL DOES NOT PRESENT A RECURRING QUESTION OF GREAT IMPORTANCE

Surcharges under the Bankruptcy Code do indeed arise in many bankruptcy cases. But the

proposition that Southwest advocates does not. Section 506(c) imposes a factual analysis: are expenses reasonable, actual, necessary, and beneficial? As such, trials and appeals concerning the same are usually limited to factual disputes and a factual review, as indeed was the case below. The Trustee and his counsel, having administered many bankruptcy cases, and the Bankruptcy Court, having presided over many bankruptcy cases, have never before encountered an argument where a secured creditor contested a surcharge because a trustee failed to subjectively intend to benefit the secured creditor only. As the Bankruptcy Court held, "at the end of the day, intent is irrelevant, it's who actually benefitted."[2]

Southwest, in arguing the importance and reoccurrence of the issue, informs the Court that the Fifth Circuit held that a surcharge is appropriate "when a trustee unquestionably retains collateral *to benefit unsecured creditors*." Petition at p. 14. The Fifth Circuit made no such holding. Rather, the Fifth Circuit looked at whether actual benefit was conferred on Southwest *and Southwest only*, concluding that the Bankruptcy Court correctly found said benefit as a question of fact:

> we accept that an expense which was not incurred primarily to preserve or dispose of encumbered property cannot meet the requirement of being incurred

[2] August 13, 2014 Transcript at 169:23-24.

> primarily for the benefit of the secured creditor. But we also accept the inverse: that an expense incurred primarily to preserve or dispose of encumbered property meets the requirement. The necessary direct relationship between the expenses and the collateral is obvious here; all of the surcharged expenses related only to preserving the value of the Property and preparing it for sale. Indeed, only expenses "*directly related* to preserving or enhancing the Real Property" could be the subject of a surcharge motion pursuant to the plan of liquidation.

Opinion, 811 F.3d at 698 (emphasis in original).

Southwest simply misses the point of its argument, because it fails to understand the significance of the language it uses, the Fifth Circuit used, and other courts have used. Namely, what does it mean to retain collateral to benefit a creditor? Southwest would read this phrase as implying an element of intent; *i.e.* "to retain collateral [in order] to benefit a creditor." But that is not the language used. 'To benefit a creditor' means just that, and focuses on whether the creditor was actually benefited. The Fifth Circuit correctly, and unremarkably, held that this requires a hindsight test, which test the Trustee easily met. *See id.* at 700. Either the issue is one of intent, or it is one of

benefit. If it is one of intent, the courts below were correct in rejecting any notion that the Trustee's intent mattered. If the issue is one of actual benefit, the courts below were correct that each dollar of surcharged expenses actually benefited Southwest by at least one dollar.

C. THERE IS NO CIRCUIT SPLIT

Southwest argues that the opinion below not only represents a circuit split, but goes so far as to acknowledge a circuit split. This is not correct—at best the opinion below conflicts with a prior opinion from the Fifth Circuit itself, and then only for the proposition that Southwest argued that opinion stood for. In order for there to be a circuit split, there would have to be at least one circuit that has held that a trustee must specifically intend to benefit the secured creditor in order to qualify for a surcharge. There is no circuit that so holds—there is not even any lower court opinion with any such extraordinary holding.

At its core, Southwest again misses its own point by phrasing the issue that has allegedly split the circuits as follows:

> According to the Fifth Circuit, under 11 U.S.C. 506(c), courts may compel secured creditors to cover the estate's costs when a trustee retains and markets encumbered property to benefit *unsecured* creditors. This issue

> has squarely divided the courts, and it has split panels on at least two other courts of appeals.

Petition at p. 6 (emphasis in original) (citations omitted).

The foregoing does not concern intent. It concerns whether there has been a benefit to unsecured creditors as opposed to secured creditors. The Trustee has never argued that benefiting unsecured creditors qualifies for a surcharge. Those were not the facts below—the courts below found clear dollar-for-dollar benefit to Southwest and not to unsecured creditors (who could not have benefited because Southwest took back the Property and foreclosed). There is simply no dispute with the Trustee, with the Fifth Circuit, or amongst the circuits, that expenses which benefit unsecured creditors as opposed to the secured creditor do not give rise to a surcharge. To the extent Southwest argues that this represents a circuit split, it is a Straw Man argument, for no circuit has held that benefitting unsecured creditors and not the secured creditor qualifies. Indeed, benefit to the secured creditor is expressly required by statute.

Southwest argues that the Fifth Circuit's opinion conflicts with the Seventh Circuit's opinion in *In re Trim-X Inc.*, 695 F.2d 296 (7th Cir. 1982), and that the Fifth Circuit openly acknowledged that its decision is directly at odds with the Seventh Circuit. The Fifth Circuit did not acknowledge any "split," and instead merely refused to apply *Trim-X*

in the sense that Southwest read *Trim-X*. *Opinion* 811 F.3d at 699 (discussing *Trim-X* as "Southwest reads"). It must also be remembered that *Trim-X* did not set forth a rule of law, but rather affirmed the lower court's findings of fact, which the Seventh Circuit described as "opaque." *In re Trim-X Inc.*, 695 F.2d at 298.

Nowhere did the Seventh Circuit pronounce a categorical rule denying a surcharge for any reason, much less the one proposed by Southwest. Nowhere did the Seventh Circuit comment either way on Southwest's requested rule that a trustee must intend to benefit solely the secured creditor prior to a surcharge being available. The Seventh Circuit rejected the surcharge because the expenses benefited only unsecured creditors and not the secured creditor. That is a correct holding of law, and it is exactly what the Fifth Circuit held below. But that has nothing to do with a trustee's intent or with the facts below.

Southwest also argues that the opinion below conflicts with the Eight Circuit's opinion in *Brookfield Prod. Credit Ass'n v. Barron*, 738 F.2d 951 (8th Cir. 1984). Nowhere does *Brookfield* require any intent to benefit the secured creditor, much less exclusive intent. Rather, unremarkably, *Brookfield* reiterates that expenses must primarily benefit the secured creditor, that the benefit must be direct and quantifiable, that actual expenses must be ascribed to specific collateral, and that there was no benefit to the secured creditor because the debtor sold the secured creditor's collateral (towards which

the expenses were made) and did not provide the proceeds of the sale to the secured creditor. *See id.* at 952-53. The secured creditor received neither its collateral (unlike Southwest) nor the proceeds of its collateral, yet the debtor sought to surcharge the creditor. It is no way surprising or controversial that the surcharge would then be denied. Nothing about the opinion below conflicts with *Brookfield* because, like *Brookfield*, the Fifth Circuit requires a direct and quantifiable benefit to the secured creditor.

None of the other opinions discussed by Southwest concern a trustee's intent *vis a vis* a secured creditor at all. *In re K&L Lakeland Inc.* considered the question of whether a landlord could surcharge a secured creditor for unpaid postpetition rent, allegedly benefiting the secured creditor (with liens in automobiles) by protecting that collateral. 128 F.3d 203, 204-05 (4th Cir. 1997). However, the rent was not actually paid by the debtor. *See id.* The question therefore was whether the unpaid rent was an "actual" expense within section 506(c). That question is of no relevance to this appeal. Likewise, this Court's opinion in *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.,* 530 U.S. 1 (2000), is of no relevance here, for in that opinion the Court held that only a trustee had standing to seek a surcharge while individual administrative creditors did not. Nevertheless, *Hartford Underwriters* answers the proposition that Southwest advocates:

> In any event, we do not sit to assess the relative merits of different approaches to various bankruptcy problems. It suffices that the natural reading of the text produces the result we announce. Achieving a better policy outcome—if what petitioner urges is that—is a task for Congress, not the courts.

Id. at 13. So here, to the extent that subjective, prospective intent is a better policy outcome, Southwest's remedy lies with Congress.

Southwest's arguments below rested on a pair of prior Fifth Circuit opinions: *In the Matter of P.C. Ltd.*, 929 F.2d 203 (5th Cir. 1991) and *In the Matter of Delta Towers Ltd.*, 924 F.2d 74 (5th Cir. 1991). These opinions required "that the claimant incurred the expenses primarily for the benefit of the secured creditor." *In the Matter of P.C. Ltd.*, 929 F.2d at 205. Southwest focused on the word "incurred," which Southwest read as necessitating a subjective, prospective, intent, since to "incur" an expense occurs prior to paying the expense. Thus, Southwest argued below that prior Fifth Circuit precedent required prospective intent to benefit the secured creditor, because only then can the expenses be "incurred" to benefit the secured creditor.

The Fifth Circuit rejected Southwest's argument, refusing to read any "intent" requirement into the statute, and refusing to interpret or apply its prior precedent in the manner in which Southwest advocated. At most, therefore, this

appeal represents an intra-circuit split, as opposed to an inter-circuit split, and then only if one reads the prior Fifth Circuit precedent in the extraordinary manner advanced by Southwest.

If the Trustee misunderstands Southwest's argument, and if in fact Southwest is arguing that it did not benefit from the surcharged expenses, then the Trustee notes that this is a question of fact which has been appropriately disposed of by the courts below. The Court need look no further than the Fifth Circuit's own recitation of undisputed facts on the issue:

> Consider the security, lawn mowing, and roof repairs paid for by Segner, to name just a few of the expenses surcharged. Absent these, Southwest may have been left trying to sell a vacant building damaged by vandalism, filled with overgrown weeds, and saddled with a leaking roof. Southwest recognized as much when it objected to Segner's proposal to stop paying the expenses, explaining that "such action would virtually destroy any value remaining in the Laredo Property."

Opinion, 811 F.3d at 700. With respect to the quantification of the benefit conferred on Southwest, the Trustee's expert witness quantified the benefit as worth at least as much as the expenses, Southwest cross-examined the expert in open court,

Southwest offered no evidence or expert opinion of its own, and the Bankruptcy Court was fully justified in accepting the expert's opinion, as well as the Trustee's own opinion on the issue. *See id.* at 701. Indeed, it is only common sense that a repair to a roof, or to exposed wiring, provides at least as much value as the expense (and considerably more, for a buyer would pay less for the property had he to incur and pay the expense himself).

And, lest it be lost in Southwest's present argument, the Court need only consider what Southwest wrote to the Trustee when he threatened to stop making the surcharged expenses, "such action would virtually destroy any value remaining in the Laredo Property." ROA.2081. The issue below—correctly—was whether Southwest actually benefited from the surcharged expenses, which it most certainly did. The statute requires that Southwest compensate the Trustee for the benefit conferred, and there is nothing inequitable, revolutionary, or absurd about that.

CONCLUSION

The Petition should be denied, as no issue raised by Southwest, and no issue or fact tried or decided below, rises to the level required to merit this Court's attention, the issues below instead being decided on the facts applying a clear, unambiguous, and equitable statute, which Southwest simply wishes to write out of the books for all practical purposes.

Respectfully Submitted.

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