No.

In the Supreme Court of the United States

SOUTHWEST SECURITIES, FSB, PETITIONER

v.

MILO H. SEGNER, JR., TRUSTEE.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Under the general rule in bankruptcy, the trustee is obligated to preserve estate property and pay the costs of that preservation using estate funds. Under Section 506(c) of the Bankruptcy Code, 11 U.S.C. 506(c), Congress provided a "narrow" and "extraordinary" exception to that general rule. It authorizes the trustee to "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*." 11 U.S.C. 506(c) (emphasis added).

In this case, the trustee retained encumbered property in the hope of selling it to benefit unsecured creditors. After a year of maintaining and marketing the property, the trustee determined that the property had no equity for the general estate, so it finally abandoned the property to the secured creditor. It then sought, under Section 506(c), to have the secured creditor pay the trustee's ordinary costs of maintaining the property before it was abandoned. The Fifth Circuit, in an acknowledged conflict with the Seventh Circuit, authorized the surcharge.

The question presented is:

For the period before a trustee abandons encumbered property, whether, under 11 U.S.C. 506(c), secured creditors are obligated to shoulder the trustee's maintenance costs when retaining encumbered property in the hope of benefiting other creditors.

PARTIES TO THE PROCEEDING BELOW AND RULE 29.6 STATEMENT

Petitioner is Southwest Securities, FSB, the appellant below and a participant in the proceedings in the bankruptcy court.

Respondent is Milo H. Segner, Jr., the appellee below and Trustee of the Domistyle, Inc., Creditor's Trust.

Southwest Securities, FSB, merged with Plains Capital Bank, which is a wholly owned subsidiary of PlainsCapital Corporation, which itself is a wholly owned subsidiary of Hilltop Holdings Inc., a publicly traded company (NYSE: HTH).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases—continued:

Constitution and statutes:

Page

Statutes—continued:

Miscellaneous:

In the Supreme Court of the United States

No.

SOUTHWEST SECURITIES, FSB, PETITIONER

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MILO H. SEGNER, JR., TRUSTEE.

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

PETITION FOR A WRIT OF CERTIORARI

Southwest Securities, FSB respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-18a) is reported at 811 F.3d 691. The order of the bankruptcy court (App., *infra*, 19a-22a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 29, 2015. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

Section 506(c) of Title 11 of the United States Code provides a narrow exception to the general rule that ad-

ministrative expenses are not satisfied out of collateral property but instead must be satisfied out of the unencumbered assets of the estate:

> 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.

STATEMENT

1. When a debtor files a bankruptcy petition, an estate is created that generally includes all the debtor's assets. See 11 U.S.C. 541. A trustee is appointed to manage those assets for the estate and the general creditors. The trustee has a duty to maximize value for the estate and the general creditors. See, *e.g.*, *In re Trim-X, Inc.*, 695 F.2d 296, 299 (7th Cir. 1982). The trustee also has a duty to preserve estate property: he cannot let property waste and must preserve and maintain estate property as a reasonably prudent owner would. See, *e.g.*, 11 U.S.C. 503(b)(1)(A); 11 U.S.C. 704(a)(2); *In re Modern Plastics Corp.*, 543 B.R. 819, 830 (Bankr. W.D. Mich. 2016). Because the trustee's primary obligation is to unsecured creditors, he should not spend estate assets to benefit only secured creditors.

As part of these duties, the trustee must determine if there is any equity in encumbered property for the estate and unsecured creditors. *Trim-X*, 695 F.2d at 299. A trustee should only retain encumbered property if he believes that doing so will realize value for the unsecured creditors. *Ibid.* If property will not present any value for unsecured creditors—because the secured claim eliminates any excess equity in the property—the property should be abandoned. 11 U.S.C. 554(a) ("After notice and

a hearing, the trustee may abandon any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate."). Secured liens are typically supposed to pass through bankruptcy unaffected.

As a general rule, the costs of preserving estate property is an administrative expense, which is not satisfied out of collateral property but rather borne out of unencumbered estate assets. App., *infra*, 6a. The Bankruptcy Code, however, has a "narrow" and "extraordinary" exception to this general rule under 11 U.S.C. 506(c). Congress sharply limited this section to surcharging 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."

2. This case involves the bankruptcy of Domistyle, Inc.—a manufacturer and purveyor of home goods. App., *infra*, 2a. In April 2013, Domistyle was placed in receivership. *Ibid.* The receiver, Milo Segner (trustee) "initiated Chapter 11 proceedings on the belief that Domistyle had sufficient equity to reorganize and emerge from bankruptcy as a going concern." *Ibid.* The trustee's "belief turned out to be incorrect." *Ibid.*

"One of [Domistyle's] most valuable assets was an industrial building located on 17 acres of real property in Laredo ('Property')." App., *infra*, 2a. Southwest Securities, FSB (Southwest) is a secured creditor that held a $3.69 million lien on the Property. *Ibid.* "Recent appraisals had valued the Property at approximately $6 million." *Ibid.* The trustee "thus believed that there was considerable equity in the Property that could be used to pay junior and unsecured creditors." *Id.* at 2a-3a. Rather than abandon the property to Southwest, the trustee acted on that belief. See generally *id.* at 3a-4a. Specifically:

"Employing the services of a commercial real estate firm, [the trustee] marketed the Property from approximately August 2013 until May 2014." App., *infra*, 3a. "Throughout this time, [the trustee] paid the following expenses related to the Property: security, repairs to the roof and electrical system, mowing, landscaping, utilities, and insurance premiums." *Ibid.* "Despite his efforts, [the trustee] never received an offer sufficient to pay [Southwest's] secured claim and any superior tax claims in full." *Ibid.*

After failed negotiations with Southwest, App., *infra*, 3a-4a, the trustee eventually "filed a 'motion to abandon' the Property as 'burdensome and of inconsequential value to [unsecured creditors]." *Id.* at 4a. The motion was recognized by all sides as a clear attempt by the trustee "to disavow any continuing interest in or obligation toward the Property." *Id.* at 4a n.4.

"A few weeks later, with the motion to abandon still pending, [the trustee] moved to surcharge the expenses paid in maintaining the Property from the start of the bankruptcy case." App., *infra*, 4a. Southwest "objected to the requested surcharge." *Ibid.*

3. "In August 2014, the bankruptcy court held an evidentiary hearing on the abandonment and surcharge motions." App., *infra*, 4a. Southwest and the trustee "reached a partial settlement during the hearing." *Ibid.* Under that settlement, the Property would be abandoned as of September 13, 2014 and Southwest "would reimburse [the trustee] for preservation and maintenance expenses as of June 1, 2014, which is just days after [the trustee] had expressed an intent to abandon the Property." *Id.* at 4a-5a.

The parties continued to dispute, however, whether 11 U.S.C. 506(c) permitted any surcharge of the Property for "expenses incurred prior to that date." App., *infra*,

5a. "After hearing testimony and argument, the bankruptcy court [accepted the trustee's legal position and] granted a surcharge against the Property * * * ." *Id.* at 4a.

Southwest "timely appealed." App., *infra*, 5a. "At the request of both sides, [the Fifth Circuit] approved a direct appeal to the circuit under 28 U.S.C. § 158(d)." *Ibid.*

4. The court of appeals affirmed. App., *infra*, 1a-18a. As described in more detail below, the court held that Southwest "benefited" from the trustee's efforts to preserve the property during the trustee's retention of the property. See, *e.g.*, *id.* at 16a. It so held despite the fact that the trustee retained the property to "realize equity for the estate," and despite Southwest's *lack* of ownership during the trustee's stewardship. *Id.* at 2a. It specifically rejected the Seventh Circuit's contrary view—which refuses to permit surcharge before the property is abandoned—as "not persuas[ive]." *Id.* at 13a.

This petition followed.

REASONS FOR GRANTING THE PETITION

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 encumbered property to benefit unsecured creditors. This issue has squarely divided the circuits, and it has split panels on multiple courts of appeals. The panel openly acknowledged that its decision is directly at odds with the Seventh Circuit, and it hints (correctly) at tension between its decision and precedent in multiple other courts (including the Eighth Circuit).

While this division is truly substantial, this Court regularly grants review to resolve even shallow splits in the bankruptcy context. Indeed, in the last two terms alone, it has granted review in two separate bankruptcy

cases involving only 1-1 splits—in one case, granting review to resolve exactly the same conflict acknowledged by the Fifth Circuit here.

And this conflict is hardly insignificant: as even the trustee admits, this issue "very frequently" arises in bankruptcies nationwide (C.A. Br. 48), and this case is a perfect vehicle for resolving this important question. If Southwest is correct that the trustee's maintenance costs are not reimbursable (as the Seventh Circuit would hold), it will prevail—full stop. This single, critical issue is thus outcome-determinative of this case. As it stands now, however, trustees may look to secured creditors to foot the bill whenever a trustee retains encumbered property in the hope of possibly extracting equity for other creditors. That holding expands this "narrow" and "extraordinary" statutory exception into a sweeping new rule, and it portends staggering economic consequences in the aggregate for ordinary bankruptcy cases. Review is warranted.

A. As The Decision Below Expressly Acknowledged, There Is A Square Circuit Conflict

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. App., *infra*, 6a-16a. This issue has squarely divided the courts (see, *e.g.*, *In re Trim-X, Inc.*, 695 F.2d 296 (7th Cir. 1982)), and it has split panels on at least two other courts of appeals (see *Loudoun Leasing Dev. Co.* v. *Ford Motor Credit Co. (In re K&L Lakeland, Inc.)*, 128 F.3d 203 (4th Cir. 1997); *Brookfield Prod. Credit Ass'n* v. *Barron*, 738 F.2d 951 (8th Cir. 1984)). The holding below creates a direct, acknowledged conflict with settled law in the Seventh and Eighth Circuits, and it departs from multiple

decisions in district and bankruptcy courts. These conflicts plainly warrant the Court's review.

1. The decision below is directly at odds with the Seventh Circuit's decision in *Trim-X*. For over three decades, the Seventh Circuit, unlike the Fifth Circuit, has held that trustees may not surcharge their costs while retaining property to benefit unsecured creditors. 695 F.2d at 301 (holding that "expenses incurred prior to the time the trustee determined [the estate] had no equity in the assets *were not for the benefit*" *of the secured creditor*) (emphasis added).

In *Trim-X*, a trustee initially retained secured property to have it appraised for the estate. 695 F.2d at 297. During this period, the trustee incurred "use and occupancy expenses of $15,000," "security costs of $2,667.40," and "utility charges of $1,367.71." *Ibid.* Upon discovering that the property "held no equity for the estate" (because its value "was less than the amount of [the] secured interest"), the trustee moved to abandon the property, and also sought relief under Section 506(c) to surcharge the pre-abandonment "expenses he had incurred in preserving the assets." *Ibid.*

The Seventh Circuit rejected the trustee's claim. 695 F.2d at 301. As the court explained, Section 506(c) requires a showing that expenses "'benefit'" the secured creditor; the trustee's pre-abandonment expenses, however, preserved property under the estate's control, and Section 506(c) "'was not intended as a substitute for the recovery of administrative expenses that are appropriately the responsibility of the debtor's estate.'" *Ibid.* (quoting *In re Codesco, Inc.*, 18 B.R. 225, 230 (Bankr. S.D.N.Y. 1982)). Accordingly, the Seventh Circuit held, "the expenses incurred prior to the trustee's petition for abandonment were not for the benefit of [the secured creditor]," even if those expenses left the "assets un-

harmed." *Ibid.*; see also, *e.g.*, *Heidelberg Harris, Inc.* v. *Grogan (In re Estate Design & Forms, Inc.)*, 200 B.R. 138, 143 (E.D. Mich. 1996) (following *Trim-X* in holding that "[m]ere expenses of retaining possession during the period before abandonment are not subject to a surcharge").[1]

In the decision below, by contrast, the Fifth Circuit held that a surcharge was appropriate for precisely the kind of pre-abandonment expenses that *Trim-X* disallowed. See App., *infra*, 14a-16a. The Fifth Circuit expressly acknowledged that its decision departed from the Seventh Circuit's "holding," but was "not persuaded to rule otherwise." *Id.* at 13a-14a. This direct conflict leaves "expenses incurred prior to the trustee's petition for abandonment" (*Trim-X*, 695 F.2d at 301) eligible for relief (or not) depending on whether the bankruptcy case happens to arise in the Fifth or Seventh Circuit.

2. The decision below also squarely conflicts with the Eighth Circuit's decision in *Brookfield*. In that case, like *Trim-X*, the Eighth Circuit held that debtors could not shift costs of "preserving" encumbered property while retaining control over that property. 738 F.2d at 951.

The debtors in *Brookfield* "operate[d] a turkey farm and hatchery" and "raise[d] cattle and crops." 738 F.2d at 951. At the time they declared bankruptcy, a secured creditor had a valid security interest in "all crops, turkeys, cattle, machinery, and accounts receivable." *Id.* at 951-952. The secured creditor was ultimately granted permission to foreclose, and the debtors sought to recov-

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[1] The Seventh Circuit also held that "the expenses that accrued after the trustee filed his petition to abandon * * * went to preserving assets that ultimately were abandoned to [the secured creditor]," and thus "benefited the secured creditor" for purposes of Section 506(c). 695 F.2d at 301.

er their expense in preserving the collateral (by, for example, caring for and feeding the livestock). The lower courts ultimately refused any surcharge because the creditor did not "benefit[] from such expenditures" within the meaning of Section 506(c). *Id.* at 952.

In a split decision, the Eighth Circuit affirmed. The majority found that a debtor has an "'independent duty of reasonable care regarding the property in his possession.'" *Id.* at 953. The debtors were thus responsible for estate property under their control, and could not shift those costs (pre-foreclosure) to the secured creditor. *Ibid.* (citing *Codesco*, 18 B.R. at 229-230). Because the debtor insisted on retaining the property, any "benefit" must actually *improve* the creditor's original position; merely preserving the status quo is not enough. *Ibid.*

The dissent, like the Fifth Circuit, disagreed. *Id.* at 954 (Bright, J., dissenting) (rejecting the majority's view because "the monies expended by the Borrons for the care and feeding of the collateral have inured principally to the benefit of the creditor"; "[i]n keeping with the equitable principles underlying section 506(c), the creditor should bear the cost of this benefit").

In sum, there is little doubt that had the Eighth Circuit's 2-1 majority agreed with the Fifth Circuit's reasoning, *Brookfield* would have come out the other way.[2]

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[2] While the Fifth Circuit is correct that the *Brookfield* majority also rejected surcharge "in part" due to the debtor's failure to "'ascribe actual expenses to specific items of collateral'" (App., *infra*, 11a), that reasoning hardly discounts the *other* "part" of *Brookfield*'s holding: unlike the Fifth Circuit, the Eighth Circuit refused to find any "benefit" where the initial baseline was merely preserved while the property remained in the debtor's control. That reading of Section 506(c) is consistent with the Seventh Circuit's decision in *Trim-X* but irreconcilable with the Fifth Circuit's decision.

3. The confusion over this issue does not stop with the 2-1 split among these three circuits. The same issue has divided other panels, and it continues to confound district and bankruptcy courts nationwide. See, *e.g.*, *K&L Lakeland*, 128 F.3d at 205-206, 209-210, 211, 213 (three-way split on the panel); *In re Mall at One Assocs., L.P.*, 185 B.R. 981, 988-989 (Bankr. E.D. Pa. 1995); *In re Proto-Specialties, Inc.*, 43 B.R. 81, 83-84 (Bankr. D. Ariz. 1984).

Indeed, over a decade ago, this Court was forced to reserve decision on the question presented here. *Hartford Underwriters Ins. Co.* v. *Union Planters Bank, N.A.*, 530 U.S. 1, 5 (2000) ("Although it was contested below," the petitioner failed to preserve the question of "whether * * * the worker's compensation insurance constituted a 'benefit to the holder' within the meaning of § 506(c)"). The situation has now gotten worse, not better, especially in light of the decision below. There is a clear and intractable split, and the Court's review is urgently needed to resolve this highly important and frequently recurring question.

B. The Decision Below Is Incorrect

1. Review is also warranted because the decision below is incorrect. As a traditional rule, the Bankruptcy Code creates a simple default that is both fair and reasonable: If the trustee retains property as estate property, it must account for that property as any reasonably prudent owner would. That means the trustee is responsible for the costs of maintaining the property—and it must pay for those costs out of the estate's general assets.

Section 506(c) reflects a "narrow" and "extraordinary" exception to this general rule. *In re P.C., Ltd.*, 929 F.2d 203, 205 (5th Cir. 1991). It textually requires a "benefit" to a secured creditor, and other courts (includ-

ing the Seventh and Eighth Circuits) have refused to find any "benefit" where secured creditors are forced to await the trustee's efforts to serve *other parties*, and then asked to shoulder the burden of maintaining the status quo during the trustee's activities. *Trim-X*, 695 F.2d at 301; *Heidelberg Harris*, 200 B.R. at 142. These courts, correctly, hold that this is a not a "benefit" under any ordinary understanding of that term; it is merely the avoidance of *harm*. See, *e.g.*, *Trim-X*, 695 F.2d at 301 (finding no statutory "benefit[]" where assets are merely left "unharmed"); *Heidelberg Harris*, 200 B.R. at 142-143; *Mall at One Assocs.*, 185 B.R. at 988-989.

Southwest did not "benefit" from the trustee retaining the status quo rather than transferring the property immediately to Southwest. If the trustee wishes to retain property, he is responsible (under the "general rule in bankruptcy") to shoulder those costs using "'the unencumbered assets of the estate.'" App., *infra*, 6a (quoting 4 *Collier on Bankruptcy* ¶ 506.05 (16th ed. 2015)); see also *Loudoun Leasing*, 128 F.3d at 207; *Heidelberg*, 200 B.R. at 142. It cannot shift the ordinary costs of maintaining or marketing collateral to secured creditors.

Yet the Fifth Circuit's disposition sharply departs from that "general rule of bankruptcy." Here, the trustee elected to retain encumbered property, rather than abandon it to Southwest, in order to benefit unsecured creditors. It was free to make that decision to maximize value for the estate; but there is no rule requiring Southwest to accept the burdens of property ownership without its corresponding benefits. As other courts have held, if the trustee retains property to benefit other parties, it cannot surcharge the expense of its activities by looking to secured creditors. See *Trim-X*, 695 F.2d at 301 (Section 506(c) "'was not intended as a substitute for the recovery of administrative expenses that are appro-

priately the responsibility of the debtor's estate'") (quoting *In re Codesco, Inc.*, 18 B.R. 225, 230 (Bankr. S.D.N.Y. 1982)). The Fifth Circuit's contrary holding is at odds with Section 506(c)'s plain text, statutory purpose, and historic backdrop, and it should be reversed.

2. In reaching the opposite conclusion, the Fifth Circuit insists that Southwest's argument is "unmoored from the statutory text" (App., *infra*, 16a), but that is incorrect. Southwest construes the term "benefit"—a *statutory* term—in the same way that the Seventh Circuit construed the same term. It has the advantage of respecting the "[t]raditional[]" rule that trustees cover expenses out of estate funds (*Trim-X*, 695 F.2d at 301), and it appropriately cabins an "extraordinary" departure to the narrow set of cases that Congress intended (*P.C., Ltd.*, 929 F.2d at 205)—not the unsettling reformulation that the Fifth Circuit invites here.

Moreover, the Fifth Circuit cannot explain why secured creditors "benefit" at all when they are asked to pay the costs of property ownership without the benefit of actually owning property. This stands the "general rule in bankruptcy" on its head, and transforms a "sharply limited" exception into a sweeping new presumption. See *In re Visual Indus., Inc.*, 57 F.2d 321, 325 (3d Cir. 1995). Had Congress truly intended for secured creditors to pay months (or even years) of maintenance while trustees attempt to sell property to benefit *other* creditors, Congress surely would have used clearer language than this.

Nor is the Fifth Circuit correct that its construction is necessary to avoid "unjust enrichment." App., *infra*, 14a. There is nothing remotely "unjust" about asking the estate to cover property costs while the estate insists on retaining ownership and control of the property. When the trustee refuses to abandon the property, it prevents

the secured creditor from obtaining immediate access and control of the property *in its condition as of the petition's filing*. If the property were abandoned that day, the secured creditor would have access to the property in exactly that condition. There is no "benefit"—much less a "windfall" or "unjust enrichment"—to ask the estate to bear the costs of maintaining the status quo while the estate insists on using or marketing the property for the estate's benefit. As the Seventh Circuit correctly noted, those costs (all necessary to preserve the baseline that existed on the petition date) do not confer any "benefit" on the secured creditor; they simply ensure the absence of *harm*.

Congress understood that secured interests would pass through bankruptcy unaffected. Yet the Fifth Circuit's rule affects those interests in a profound way: it obligates secured creditors to subsidize a trustee's decision to retain property in the hope of obtaining equity for other creditors. It deprives secured creditors of the opportunity to immediately use or dispose of the property on their own terms (without the concern of obtaining a premium to extract equity for other creditors). That bears little resemblance to the "narrow" exception Congress authorized to ensure that the estate is not holding the bag during periods where a trustee must care for property after formally transferring it from the estate.

C. The Proper Construction Of Section 506(c) Is A Recurring Question Of Great Importance

This case presents an entrenched split on an important question of statutory construction that frequently arises in bankruptcies nationwide. Yet this question will rarely be litigated at the circuit level, and it will continue to generate confusion in a sweeping array of cases until it is resolved by this Court. Immediate review is warranted.

1. As explained previously, the Fifth Circuit below held that, under 11 U.S.C. 506(c), secured property may be surcharged (for costs and expenses incurred to maintain or attempt a sale of the property) when a trustee unquestionably retains collateral *to benefit unsecured creditors*. App., *infra*, 6a-16a.

The contrary rule has been the law in the Seventh Circuit (and other courts) for decades. See *supra* Part A. It is beyond dispute that petitioner would have prevailed had this case arisen in the Seventh Circuit. And, as explained in further detail below, only this Court's guidance can restore uniformity on this important issue.

Moreover, the need for uniformity is particularly strong in this context. There is an overriding (even *constitutional*) importance of "uniform[ity]" in bankruptcy. U.S. Const. Art. I, § 8, cl. 4. For that reason, the Court routinely grants review to resolve conflicts over the interpretation or application of the Bankruptcy Code. See, *e.g.*, *Bullock* v. *BankChampaign, N.A.*, 133 S. Ct. 1754, 1758 (2013); *Hall* v. *United States*, 132 S. Ct. 1882, 1886 & n.1 (2012); *Ransom* v. *FIA Card Servs., N.A.*, 131 S. Ct. 716, 723 & n.4 (2011). And this is true even with *shallow* conflicts.[3]

2. The importance of the question presented is undeniable. As the trustee himself admits (see C.A. Br. 48), it is "frequently" recurring. See also *In re Wyckoff*, 52 B.R. 164, 165 (Bankr. E.D. Mich. 1985) ("[t]he volume of caselaw on the question of expenses chargeable to a se-

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[3] The Court, for example, granted review last Term to resolve a 1-1 split between the Fifth Circuit and the Ninth Circuit, see *Baker Botts L.L.P.* v. *ASARCO LLC*, 135 S. Ct. 2158, 2163 (2015), and it granted review again a term earlier to resolve the precise split arising here—a conflict between the Fifth Circuit and the Seventh Circuit, see *Clark* v. *Rameker*, 134 S. Ct. 2242, 2246 (2014).

cured party is huge"). It arises virtually every time a trustee retains encumbered property in the hope of benefiting unsecured creditors. That situation is commonplace in bankruptcy—indeed, it arises every time a trustee retains property to assess its value.

The consequence of the Fifth Circuit's decision is accordingly stark: in light of this fact-pattern's commonality, the decision below would expand a "narrow" statutory exception into a sweeping new rule, and it portends staggering economic consequences in the aggregate for ordinary bankruptcies. Contra *In re Visual Indus., Inc.*, 57 F.3d 321, 325 (3d Cir. 1995) ("The circumstances under which a claimant may rely on § 506(c) are, as we have pointed out, sharply limited."). Trustees will routinely have to guess whether to retain property without knowing whether the costs will be borne out of the estate or by the secured creditor. And secured creditors, in turn, will have to evaluate plans—and seek preemptive relief—to avoid situations where the trustee incurs costs for other creditors that will ultimately diminish the value of the secured claim.

Bankruptcies cannot function properly where the participants are unaware of the ground rules. This issue is critically important to litigants and the proper administration of the Bankruptcy Code, and it warrants the Court's immediate attention.

3. Review is particularly warranted here because the split is both square and entrenched. There is no reason to believe that the Seventh Circuit will change its position. *Trim-X* has been settled law in the Seventh Circuit for over three decades, and it has provided a workable rule for administering bankruptcies during that extended period. The decision has been cited and followed repeatedly by courts nationwide. And the same is true of the Eighth Circuit, which adopted effectively the same

rule (even over a dissent). It is exceedingly unlikely that one (much less both) circuits would suddenly shift positions without any controlling change in the law.

Nor will the Fifth Circuit likely abandon its new position. The court readily confronted contrary precedent, asserted it was not "persuaded," and openly created a circuit conflict. In light of its emphatic rejection of *Trim-X*, there is simply no reason to think the Fifth Circuit will back down and adopt the majority position.

This situation calls out for immediate intervention. These circuits have construed the same statutory language in exactly the opposite way. This is a binary question: One interpretation is correct and the other is wrong. There is no point to additional percolation: Courts nationwide will now have to pick one view or the other, which will only add intolerable confusion in an area that demands "uniform[ity]." *Railway Labor Executives' Ass'n* v. *Gibbons*, 455 U.S. 457, 468 (1982)).

It is also highly unlikely that the Court will have another opportunity to revisit this important question any time soon. It is well documented that bankruptcy appeals rarely reach the circuit level, despite raising important issues that arise with great frequency. See, *e.g.*, Troy A. McKenzie, *Judicial Independence, Autonomy, and the Bankruptcy Courts*, 62 Stan. L. Rev. 747, 782 (2010) ("The nature of bankruptcy cases tends to discourage further appellate review in the Article III courts because of the twin concerns of delay and cost associated with prolonged litigation."). Few litigants will find enough at stake to litigate in the bankruptcy courts and continue all the way through the appellate process. This is the unusual case where the question is squarely presented at this advanced stage. The Court should take advantage of the opportunity to grant review and resolve the conflict over this important statutory question.

D. This Is An Ideal Vehicle For Considering The Question Presented

This case is an ideal vehicle for resolution of the question presented. It is undisputed that the trustee retained this property in an effort to benefit unsecured creditors. See App., *infra*, 2a ("The trustee thus spent the better part of a year attempting to sell the property and realize the supposed equity for the estate."). It is undisputed that the vast majority of the trustee's expenses consisted of ordinary maintenance and upkeep—the kind of costs that routinely attend property ownership. See Trustee's C.A. Br. 8-9 (openly attributing $386,000 of the original surcharge to "security," "maintenance, including mowing and shrub control," "utilities, consisting of electricity, gas, and water," and "insurance"). And it is undisputed that the trustee's expenses were otherwise necessary and reasonable under the circumstances. App., *infra*, 6a.

The entire dispute thus turns on a pure question of law: whether Section 506(c) permits a trustee to retain property to benefit unsecured creditors, and then pass along the costs to a secured creditor. Had this case arisen in the Seventh Circuit or Eighth Circuit, the secured creditor would have prevailed, but it lost due to the happenstance that the bankruptcy case was filed in Texas, not Illinois or Missouri. This is an ideal vehicle for resolving this critically important legal question.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MARCH 2016

APPENDIX

TABLE OF CONTENTS

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 14-41463

In the Matter of: DOMISTYLE, INCORPORATED

Debtor

SOUTHWEST SECURITIES, FSB,

Appellant

v.

MILO H. SEGNER, JR., in his capacity as Trustee of the Domistyle, Incorporated Creditor's Trust,

Appellee

Appeal from the United States Bankruptcy Court for the Eastern District of Texas

Filed: December 29, 2015

Before: BENAVIDES, DENNIS, and COSTA, Circuit Judges.

GREGG COSTA, Circuit Judge:

Debtor Domistyle, Inc. owned a candle factory located on several acres in Laredo. At the inception of

the bankruptcy, everyone believed the property was worth more than its three outstanding mortgages, which gave the largest security interest to Southwest Securities FSB. The trustee thus spent the better part of a year attempting to sell the property and realize the supposed equity for the estate. When those efforts proved unsuccessful, dispelling any notion that there was equity in the property, the trustee abandoned the property to Southwest. That left one question for the bankruptcy case that we confront in this appeal: Should the estate or the secured creditor pay the property's maintenance expenses incurred while the trustee was trying to sell the property?

I.

Domistyle was a manufacturer and purveyor of home goods. It was placed in receivership in April 2013. Shortly thereafter, the receiver, Milo Segner, initiated Chapter 11 proceedings on the belief that Domistyle had sufficient equity to reorganize and emerge from bankruptcy as a going concern.[1] This belief turned out to be incorrect, and many secured and unsecured creditors—as well as professionals involved in the bankruptcy—will likely see no or severely diminished recovery.

One of the debtor's most valuable assets was an industrial building located on 17 acres of real property in Laredo ("Property"). The primary lien on the Property was held by Southwest in the amount of $3.69 mil-

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1 The decision to file under Chapter 11 rather than Chapter 7 was motivated by Domistyle's representations as to the worth of its assets. Segner would have filed under Chapter 7 had he realized the true worth of the debtor's assets.

lion.[2] Recent appraisals had valued the Property at approximately $6 million. Segner thus believed that there was considerable equity in the Property that could be used to pay junior and unsecured creditors.

In early 2014, a plan of liquidation was confirmed. It established a "Liquidating Trust" with Segner as trustee. The plan gave the Trust until May 1, 2014 to sell the Property at a price sufficiently high to cover the value of the mortgage loan owed to Southwest Securities. It also obligated the Trust to "maintain reasonable insurance" and "own the Real Property as a reasonably prudent owner would own it."

Segner's efforts to sell the Property began before the plan of liquidation was finalized and confirmed. Employing the services of a commercial real estate firm, he marketed the Property from approximately August 2013 until May 2014. Throughout this time, he paid the following expenses related to the Property: security, repairs to the roof and electrical system, mowing, landscaping, utilities, and insurance premiums.

Despite his efforts, Segner never received an offer sufficient to pay Southwest's secured claim and any superior tax claims in full. The only offer received, for $4 million, required Southwest's approval because the net proceeds from the sale would not provide for full payment of Southwest's lien. At that time, Segner asked Southwest to reimburse the Trust for some of the "surcharge"—the ongoing preservation and maintenance expenses being shouldered by the Trust.

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[2] Junior lienholders are Frost Bank and the Buell Group; the exact priority of their respective claims is not established in the record.

Southwest did not agree to the proposed terms, and the sale did not go through.

The May 1st deadline arrived but Southwest did not exercise either option available to it under the plan: foreclosure or a deed-in-lieu. Meanwhile, Segner continued to pursue a deal with the party who had offered $4 million. Segner lost the buyer on or around May 22nd. Soon after, he informed Southwest that he intended to cease paying certain expenses, including "insurance, security and utility service." Southwest objected because "such action would virtually destroy any value remaining in the Laredo Property." Segner then filed a "motion to abandon" the Property as "burdensome and of inconsequential value to the Liquidating Trust."[3] Southwest objected to the abandonment.

A few weeks later, with the motion to abandon still pending, Segner moved to surcharge the expenses paid in maintaining the Property from the start of the bankruptcy case. The plan had explicitly reserved the Trust's right to seek surcharge to the extent allowable under Section 506(c) of the Bankruptcy Code, so long as the Trust had expended "actual funds" to "third parties" that "directly related to preserving or enhancing the Real Property;" stated examples included "security, *ad valorem* taxes against the Real Property, repairs to any improvement or fixture, re-

[3] Segner acknowledges that he did not follow the abandonment procedure provided for in the Bankruptcy Code. We use the term "abandonment" as it was used in the proceedings below: as a mechanism for Segner to disavow any continuing interest in or obligation toward the Property.

placements of any improvement or fixture, and electricity."[4] Southwest objected to the requested surcharge.

In August 2014, the bankruptcy court held an evidentiary hearing on the abandonment and surcharge motions. The parties reached a partial settlement during the hearing, agreeing that the Trust would abandon the Property as of September 13, 2014 and that Southwest would reimburse Segner for preservation and maintenance expenses as of June 1, 2014, which is just days after Segner had expressed an intent to abandon the Property. Whether expenses incurred prior to that date should be subject to surcharge remained contested. After hearing testimony and argument, the bankruptcy court granted a surcharge against the Property for those expenses in the form of a priming lien.[5] Southwest timely appealed. At the request of both

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[4] The plan also listed examples of expenses that Segner could not seek to surcharge. These are "attorney's fees and expenses, the Trustee's time spent attempting to market the Real Property, and intangible expenses of the Estate."

[5] At oral argument, Southwest presented a jurisdictional argument absent from its briefing: that pursuant to *In re Skuna River Lumber, LLC*, 564 F.3d 353 (5th Cir. 2009), the bankruptcy court lost jurisdiction over the Property once it approved abandonment and therefore lacked authority to order the surcharge. We acknowledged in *Skuna Lumber* that a bankruptcy court "ceases to have jurisdiction over [] property" that is "transferred out of a bankruptcy estate free and clear of all liens." 564 F.3d at 355. We disagree, however, that the sequence of events below present a jurisdictional problem under *Skuna Lumber*. The bankruptcy court here ordered the surcharge from the bench on August 13, 2014—*before* the effective date of abandonment, which was September 13, 2014. Although the surcharge was not memorialized and formally entered until September 24, 2014, this ministerial act simply confirmed the bankruptcy court's bench-made ruling on August 13, 2014.

sides, we approved a direct appeal to the circuit under 28 U.S.C. § 158(d).

II.

The general rule in bankruptcy is that administrative expenses cannot be satisfied out of collateral property "but must be borne out of the unencumbered assets of the estate." 4 COLLIER ON BANKRUPTCY ¶ 506.05 (16th ed. 2015). Section 506(c) provides a "narrow" and "extraordinary" exception to this general rule. *See In re P.C., Ltd.*, 929 F.2d 203, 205 (5th Cir. 1991). It states that:

> 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.

11 U.S.C. § 506(c). To recover expenses under this provision, the trustee bears the burden of proving the following: "(1) the expenditure was necessary, (2) the amounts expended were reasonable, and (3) the creditor benefitted from the expenses." *In re Delta Towers, Ltd.*, 924 F.2d 74, 76 (5th Cir. 1991). A bankruptcy court's finding of fact in the Section 506(c) analysis is reviewed for clear error. *See id.* Any legal conclusion is reviewed *de novo*. *See id.*

Southwest contends that Segner's request for surcharge fails on the last of these elements: that Southwest did not benefit from the expenses paid by Segner to preserve the Property. In rebuttal, Segner identifies at least two benefits enjoyed by Southwest: (1) receiving the Property with its value preserved and (2) avoiding preservation costs during the nearly 14 months that

the Property was part of the Liquidating Trust. The bankruptcy court sided with Segner, concluding that "Southwest benefited, and the property, the collateral benefited from the expenses."

There are two components to Southwest's argument that Segner failed to meet the benefit requirement of Section 506(c). First, Southwest contends that the bankruptcy court incorrectly found that the expenses were incurred primarily for its benefit simply because it was the only creditor who received any payment from the Property. Second, even if the expenses were incurred primarily for its benefit, Southwest argues that there was insufficient evidence of the extent of any benefit it actually received.

A.

The first question is whether, as Southwest maintains, Section 506(c) is limited to expenses incurred by the trustee with a specific and exclusive intent to benefit the secured creditor. Such was not the case here, because Segner admitted to maintaining the Property with the intent of benefiting Southwest *and* the estate: he kept the Property in good shape to further his goal of selling it at a price above the amount of Southwest's lien, with the difference going to junior and unsecured creditors. Southwest refers to its proposed exclusive-intent-based rule as the "forward-looking" part of Section 506(c)'s benefit requirement.[6] It relies for support on our statement in *Delta Towers* "requiring that the claimant incur the expenses *primarily* for the benefit of

[6] There is no question that Section 506(c)'s benefit requirement has a retrospective component: did the secured creditor actually benefit? Whether retrospective benefit was established below is the subject of Southwest's second argument.

the secured creditor." 924 F.2d at 77 (emphasis added); *see also P.C. Ltd.*, 929 F.2d at 205 ("*Delta Towers* held that the benefit element requires 'that the claimant incurred the expenses primarily for the benefit of the secured creditor . . . .'" (quoting *Delta Towers*, 924 F.2d at 77)); *In re Senior-G & A Op. Co., Inc.*, 957 F.2d 1290, 1300 (5th Cir. 1992) ("In order to support a surcharge under Section 506(c), . . . the expenditures . . . must have been made primarily for the creditor's benefit." (citing *Delta Towers*, 924 F.2d at 77)).

Where does *Delta Tower*'s "primarily for the benefit of" language come from? Not the Bankruptcy Code. Section 506(c) speaks of "costs and expenses" that are "reasonable" and "necessary . . . [to] preserv[e], or dispos[e] of" collateral property. 11 U.S.C. § 506(c). It limits the amount of surcharge to "the extent of any benefit to the holder" of the claim secured by the collateral property. *Id.* Section 506(c) thus does not include an express requirement that the money be spent with any particular beneficiary in mind.

Consistent with the statute's text, the Collier's treatise focuses on the backward-looking aspect of the benefit inquiry: did the secured creditor in fact benefit from the expenses? *See, e.g.*, 4 COLLIER ON BANKRUPTCY ¶ 506.05 ("In general, a secured creditor receives a 'benefit' within the meaning of section 506(c) if the relevant expense preserved or increased the value of its collateral."); *id.* ¶ 506.05[6][c] ("[T]he facts of a particular case may justify charging the holder of a secured claim with certain expenses if a clear benefit to the secured creditor can be demonstrated."). The rationale for this "hindsight" approach is to prevent unjust enrichment: "a secured creditor should not reap the benefit of actions taken to preserve the secured creditor's collateral

without shouldering the cost." *Id.* ¶ 506.05; *see also In re JKJ Chevrolet, Inc.*, 26 F.3d 481, 483 (4th Cir. 1994) ("The purpose of this provision [11 U.S.C. § 506(c)] is to prevent a windfall to a secured creditor at the expense of the estate."). Similarly, our case law administering Section 506(c) has emphasized the unfairness of requiring "'the general estate and unsecured creditors . . . to bear the cost of protecting what is not theirs,'" an inequity that can be avoided by surcharge. *See Senior-G & A*, 957 F.2d at 1298 (quoting *In re Codesco, Inc.*, 18 B.R. 225, 230 (Bankr. S.D.N.Y. 1982)).

No such inequity results, however, when the estate bears the burden of general administrative costs which only incidentally benefit a secured creditor. Nonetheless, some trustees or administrative claimants have tried to invoke the statute—as they invoked the preexisting legal rule on which the statute is based[7]—as a way to recover general administrative costs from fully encumbered assets. *See, e.g., In re Sonoma V*, 24 B.R. 600, 603–04 (B.A.P. 9th Cir. 1982) (application to surcharge legal fees arising from "general bankruptcy matters" and litigation between the debtor and another creditor); *Codesco*, 18 B.R. at 228 (application to surcharge legal fees incurred by debtor in failed reorganization). There was an arguable statutory basis for doing so. Consider what is probably the most standard and significant general administrative expense: legal fees for debtor's counsel. Amounts paid to debtor's counsel

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[7] Section 506(c) codified a "long, but somewhat inconsistent, line of cases . . . expressing and applying the equitable principle that a lienholder may be charged with the reasonable costs and expenses incurred by the estate that are necessary to preserve or dispose of the lienholder's collateral to the extent that the lienholder derives a benefit as a result." 4 COLLIER ON BANKRUPTCY ¶ 506.05[1].

assisting with a reorganization or liquidation can be reasonable and necessary, and they often benefit a secured creditor. In *Codesco*, for example, these three requirements may well have been met in a case in which counsel sought to surcharge its fees—including fees related to negotiating the sale of a number of assets and for "day-to-day handling of vast array of problems, including litigation, insurance, financing, employee concerns, and related matters"—against collateral (accounts receivable and certain real property) securing the claim of a creditor. *See* 18 B.R. at 228. Yet the court denied the surcharge, concluding that the reorganization legal services were "primarily of benefit to the debtor" and any "tertiary benefit bestowed upon the secured property . . . is too indefinite and remote" to support surcharge. *Id.* at 229. Courts thus developed the judicial gloss of the "primarily for the benefit of the secured creditor" requirement to prevent Section 506(c) from swallowing the principle that general administrative costs must be borne by the estate. *See* 4 COLLIER ON BANKRUPTCY ¶ 506.05[6][c] (characterizing the trend in cases to "requir[e] that [an] expenditure . . . be designed primarily to bestow a benefit on the secured creditor" as a way of "stat[ing] [the] concept" that "care should be taken to distinguish expenses that truly contribute to the preservation or enhancement of the secured creditor's position" from "those that have no such effect").

Reflecting these origins of the "primarily for the benefit of" language, a number of circuit cases applying it over the years have stressed the lack of a direct connection between given expenses and the collateral at issue. These include the two circuit cases cited in *Delta Towers* as authority for the requirement: *In re Cascade Hydraulics and Utility Service, Inc.*, 815 F.2d 546 (9th

Cir. 1987), and *Brookfield Production Credit Ass'n v. Borron*, 738 F.2d 951 (8th Cir. 1984). The expenses in *Cascade Hydraulics* included telephone expenses, federal withholding taxes, social security taxes, attorney fees, and executive compensation arising from operation of the debtor's business before it was liquidated. *See* 815 F.2d at 547. The Ninth Circuit reversed an order surcharging these expenses because there was no showing that these expenses "helped dispose of or preserve the value of the collateral." *Id.* at 549. Notably, costs associated with the sale of the collateral were also surcharged but were not disputed by the secured creditor. *See id.* at 548 n.1. *Brookfield Production* makes the same distinction. That case involved the debtors' costs in caring for and feeding turkeys and livestock, *see Brookfield Production*, 738 F.2d at 954 (Bright, J., dissenting), only some of which served as collateral for debt owed to the secured creditor. *Id.* at 952 (majority opinion). The Eighth Circuit approved the lower court's decision to reject surcharge due in part to the debtor's failure to "ascribe actual expenses to specific items of collateral." *Id.*; *see also id.* at 954 (Bright, J., dissenting) ("Concededly, [debtors] have not provided the court with a specific accounting of expenditures that went to specific items of collateral . . . ."). A number of courts of appeals have made explicit the necessary connection between the expense and the collateral. *See, e.g., In re K & L Lakeland, Inc.*, 128 F.3d 203, 210 (4th Cir. 1997) (criticizing lower court for failing to identify how the expenses were "incurred primarily to protect or preserve [the secured creditor's] collateral"); *Cascade Hydraulics*, 815 F.2d at 548 ("To satisfy the benefit test of section 506(c), Cascade must establish in quantifiable terms that it expended funds directly to protect and preserve the collateral."); *see also In re*

Towne, Inc., 536 Fed. App'x 265, 269 (3d Cir. 2013) (affirming bankruptcy court's finding that "'the primary benefit of [the attorney's] legal services was to the Debtors . . . rather than to preservation of the collateral of [the secured creditor]'").

Like these other circuits, we accept that an expense which was not incurred primarily to preserve or dispose of encumbered property cannot meet the requirement of being incurred 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.

Our holding also finds support in one of our few decisions applying *Delta Towers*'s "primarily for the benefit of the creditor" language. *Senior-G & A* held that a secured creditor had "misread[]" our case law in arguing that workover expenses, which were necessary to boost production from a well, could not have been incurred "primarily" for its benefit because it had only a 59.5% interest in the well's production. Emphasizing that the "primarily for the creditor's benefit" inquiry is "particularly case specific," we rejected the creditor's argument that *primarily* means *solely* with a commonsense explanation: the "very fact that PSI received 59.5% of the production rendered the workover expenses 'primarily' for its benefit." *Senior-G & A*, 957 F.2d at 1300. Likewise here. Even under the since-discredited view that the Property was worth $6 million, South-

west's lien represented almost two-thirds of the collateral's value. The possibility at the time the expenses were incurred that they could also benefit other creditors does not render surcharge unavailable.[8]

We are not persuaded to rule otherwise by two cases, both from outside our circuit, that Southwest reads as supporting a rule that expenses are never incurred for the "primary benefit" of the secured creditor when the trustee is trying to realize value for the estate: *In re Trim-X, Inc.*, 695 F.2d 296 (7th Cir. 1982), and *In re Estate Design & Forms*, 200 B.R. 138 (E.D. Mich. 1996). The expenses to be surcharged in *Trim-X* were storage, security, and utility charges associated with warehousing unspecified encumbered "assets." *See* 695 F.2d at 297. As relevant here, the trustee sought to surcharge expenses incurred between the start of the bankruptcy case and the date on which the trustee moved to abandon the property based on an appraisal that showed that the stored goods had no equity. *Id.* Although it acknowledged that the secured creditor benefited from the expenses "in the sense that it received the assets unharmed," the Seventh Circuit agreed with the bankruptcy court's conclusion that "expenses incurred prior to the time the trustee determined [the debtor] had no equity in the assets were not for the benefit of [the secured creditor]." *Id.* at 301; *see also Estate Design & Forms*, 200 B.R. at 142 (reading *Trim-X* as "narrow[ing] the period of time in which a Trustee could surcharge a secured creditor" for expenses). The Sev-

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[8] If the benefit to other creditors had been realized, there likely would be no surcharge issue. As Segner notes, the Bankruptcy Code gives a secured creditor priority of payment, which means that its interest is the last available source of recovery for collateral-related expenses.

enth Circuit worried that "placing the responsibility for these expenses on a secured creditor would discourage a trustee from taking reasonable steps to assess an estate's position." *Trim-X*, 695 F.2d at 301.

We have never applied this holding from *Trim-X*, which *Delta Towers* cited as only one of many cases defining the general elements of Section 506(c) surcharge.[9] *See Delta Towers,* 924 F.2d at 76. We see a number of problems with a rule foreclosing the possibility of Section 506(c) surcharge for any expenses incurred prior to attempted abandonment. First, it is inconsistent with our earlier pronouncement that the "section 506(c) analysis is particularly case specific." *Senior-G & A*, 957 F.2d at 1300. Second, it can result in the unjust enrichment that the statute aims to prevent. *Id.* at 1298. Such would be the case here if Southwest were to avoid the surcharge, given that there is no indication it could have sold the Property earlier and avoided these expenses. Third, it would limit Section 506(c) to expenses incurred during the usually brief window of time when the trustee has attempted to abandon but has not been authorized to abandon. This is the likely effect of *Trim-X* because a trustee's fiduciary duty means that any cost incurred prior to abandonment

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[9] Southwest must look outside our case law for its proposed rule, as we have never relied upon *Delta Towers*'s "primarily for the benefit of the secured creditor" language to reject surcharge. *See Senior-G & A*, 957 at 1300 (finding the requirement met); *P.C., Ltd.*, 929 F.2d at 205–06 (remanding and instructing lower courts to take evidence on the necessity and reasonableness of the expenses and to reassess "the potential extent of benefit" to the secured creditor); *Delta Towers*, 924 F.2d at 77–78 (reversing district court and reinstating bankruptcy court's order denying surcharge because the bankruptcy court's factual finding that the secured creditor received no benefit was not clearly erroneous).

must be undertaken with at least some hope that the estate will benefit. *See In re Pearson Indus., Inc.*, 178 B.R. 753, 761 (Bankr. C.D. Ill. 1995) ("A Chapter 7 trustee in bankruptcy represents the interest of the unsecured creditors and not the secured creditors. . . . [W]here property is fully encumbered, abandonment is the order of the day. A Chapter 7 Trustee should not act as a mere conduit for the benefit of secured creditors only."). Given these concerns, we see no basis for adopting a rule that is largely unmoored from the statutory text,[10] especially when the Supreme Court has twice had to emphasize the importance of fidelity to the text of this very statute. *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 13-14 (2000); *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989) (both interpreting Section 506).

This does not mean that the statute fails to account for the Seventh Circuit's concern that a trustee should

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10 The Seventh Circuit acknowledged that Section 506(c) codified a long-standing "exception" to the general rule that administrative expenses cannot be charged against secured creditors. It then downplayed the importance of the statute's text in order to reach its holding:

> Although the emphasis under the new statute is on "benefit" to the secured creditor, considerations of "consent" and "causation" [from pre-codification case law] are still relevant.
>
> The bankruptcy court's determination that the expenses incurred prior to the trustee's petition for abandonment were not for the benefit of [the secured creditor] is consistent with this rule. Although the secured creditor eventually "benefited" from these expenses in the sense that it received the assets unharmed, it did not in any way consent to or cause these expenses.

Trim-X, 695 F.2d at 301 (citations omitted).

have an incentive to act promptly in determining whether an asset has equity for the estate. Section 506(c) provides a mechanism for policing the expeditiousness of a trustee's actions. It limits the trustee's recovery to "necessary" preservation and disposal costs and expenses. *See* 11 U.S.C. § 506(c). To the extent that a trustee holds an asset longer than necessary to determine and realize its value, and the value turns out to be less than the creditor's secured interest, the creditor can challenge the necessity of the costs incurred by the trustee.[11]

B.

That leaves Southwest's argument that Segner failed to quantify the extent to which Southwest actually "benefitted from the expenses" in hindsight. *Delta Towers*, 924 F.2d at 76. It seems obvious that Southwest obtained some benefit from the expenses. 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

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[11] For good reasons, Southwest does not challenge the necessity of the expenses in this case. First, no one disputed the appraisals that indicated about two million dollars of equity in the Property. Second, there is no indication that Southwest would have been able to sell the Property sooner if Segner had not attempted to obtain the equity cushion for the estate. In the approximately ten months that Segner marketed the Property, only one offer was received; it was presented to Southwest for approval, but the offer did not cover the entire amount of Southwest's lien.

remaining in the Laredo Property." But the statute requires the bankruptcy court to determine how much benefit the secured creditor actually received. *See* 11 U.S.C. § 506(c) (authorizing surcharge "to the extent of any benefit" to the secured creditor). As one court has framed the inquiry, in order to surcharge expenses, the trustee must "'show that absent the costs expended the property would yield less to the creditor than it does as a result of the expenditure.'" *Brookfield*, 738 F.2d at 952 (quoting approvingly from the district court opinion below); *see also In re Baum's Bologna, Inc.*, 50 B.R. 689, 691 (Bankr. E.D. Pa. 1985) (refusing to order surcharge when the debtor's attorney did not prove that the secured creditor "would have received less absent [the attorney's] efforts"). We have characterized this aspect of the benefit analysis as requiring that the secured creditor received a "direct and quantifiable" benefit. *See Senior-G & A*, 957 F.2d at 1300.

The bankruptcy court did not clearly err in finding that Southwest received a direct and quantifiable benefit from Segner's stewardship of the Property. Although Southwest claims that the court lacked any evidence of the *extent* to which Southwest benefited from the expenses, the testimony of Segner's experienced real estate broker was that the value preserved was at least as much as the amount expended.[12] Southwest cross examined the broker but did not offer a competing expert or a contradictory valuation. Based on the testimony of Segner's witness, the bankruptcy court

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12 Southwest claims that the broker's testimony was unreliable under *Daubert* and should be disregarded. This argument was not raised below or in Southwest's initial brief on appeal and is waived. *See Dixon v. Toyota Motor Credit Corp.*, 794 F.3d 507, 508 (5th Cir. 2015) ("Arguments raised for the first time in a reply brief are waived.").

found a benefit to Southwest that was, at minimum, equal to the amount of the expenses paid.

Southwest argues that the bankruptcy court "confused the mathematical exercise of adding up the expenditures with the 'direct quantifiable benefit' *to the secured creditor* meant by this Court in analyzing section 506(c)." The bankruptcy court's bench-made ruling is susceptible to that reading in isolation. Earlier in the hearing, however, the bankruptcy court specifically asked counsel "where in the evidence there's a quantification of the benefit to the creditor and how much, so we can add it up." From the transcript as a whole, it is clear that the bankruptcy court ultimately accepted the "benefit" proven up and argued by Segner: that each dollar of expense preserved at least one dollar of value.

The bankruptcy court's factual findings cannot be reversed absent clear error. *Delta Towers*, 924 F.2d at 76. Put another way, "a determination of whether expenses meet the requirements of [Section] 506(c) depends upon the facts of the particular case" and this court sitting in review "does not enjoy absolute freedom to make its own findings" after "re-weigh[ing] the evidence." *Id.* at 77–78.

III.

As the bankruptcy court noted, the outcome of this proceeding was regrettable. Everyone believed that Southwest was oversecured and that the Property, properly preserved, would yield additional recovery to the estate as a whole. Everyone was wrong. But Southwest's articulated rule that would preclude surcharge of pre-abandonment expenses stretches Section 506(c) beyond its text and contradicts its equitable purpose.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

In re:	§	
	§	
DOMISTYLE, INC.	§	Case No. 13-40944
	§	
Debtor.	§	

ORDER GRANTING SURCHARGE AND ORDERING PRIMING LIEN

CAME ON FOR HEARING on the 13th day of August, 2014, the *Motion of the Liquidating Trustee to Surcharge Southwest Securities FSB and Its Collateral* (the "Motion"), filed by Milo H. Segner, Jr. (the "Trustee"), the trustee of the postconfirmation Domistyle, Inc. Creditors Trust (the "Liquidating Trust"), whereby the Trustee seeks a surcharge against Southwest Securities, FSB ("Southwest") and its collateral, consisting of real property and improvements generally located at 1820 Aguila Azteca, Laredo, Texas 78043 (the "Property"). Having considered the Motion, the objection thereto, the arguments of counsel, and the evidence admitted at said hearing, and finding that the Court has core jurisdiction to enter this Order, and for the reasons stated at said hearing, it is hereby:

ORDERED that the Motion is GRANTED IN PART and DENIED IN PART as provided for herein; it is further

ORDERED that the request by the Trustee, on behalf of the Liquidating Trust, to assess a surcharge against Southwest directly is in all things DENIED; it is further

ORDERED that the Trustee, on behalf of the Liquidating Trust, is ALLOWED a surcharge against the Prope11y in the amount of $338,327.00 (the "Surcharge"), representing actual and necessary amounts expended in this Bankruptcy Case from its beginning through May 31, 2014 to preserve the value of the Property; it is further

ORDERED that the Surcharge shall be secured by a lien against the Property, which lien primes the lien of Southwest and all other lienholders, and all other liens, encumbrances, interests, and claims against the Property, save solely any *ad valorem* lien of any taxing authority for real property taxes assessed against the Property which is otherwise accorded the highest priority of lien under applicable non-bankruptcy law; it is further

ORDERED that, unless this Order is stayed or superseded on or before October 2, 2014, the Trustee is authorized, on October 3, 2014 or thereafter, to record this Order against the Property, whereupon this order shall serve as notice to the world of the existence, validity, extent, and priority of the Surcharge and of the lien securing the same; it is further

ORDERED that no document or instrument other than this Order is required to evidence or perfect the lien security the Surcharge, and that the recording of this Order against the Property shall be all that is required to evidence and perfect the Surcharge and the lien securing the same; it is further

ORDERED that no disposition of the Property or the exercise of any lien against the Property shall be effective against the Liquidating Trust without actual, written notice provided to the Liquidating Trust; it is further

ORDERED that the Surcharge shall bear interest from the date of entry of this Order through to payment in full, at the rate of .1 % annual simple interest, which interest shall be included in the lien created by this Order; it is further

ORDERED that, unless this Order is stayed or superseded, if the Surcharge is not paid in full within one year of the entry of this Order, the Liquidating Trust may take appropriate steps under Texas law to foreclose the lien created by this Order; it is further

ORDERED that the Trustee, for the Liquidating Trust, shall release the lien created by this Order upon payment or settlement of the Surcharge, by recording against the Property a release of the lien created by this Order (if this Order has otherwise been recorded against the Property); it is further

ORDERED that the Court otherwise reserves the power and authority to release the lien created by this Order, by motion filed with the Court by Southwest, its nominees, assigns or successors, or any owner of the Property, person in interest or other appropriate person, and served upon the Liquidating Trust; it is further

ORDERED that the Court shall retain jurisdiction to the maximum extent permitted by law to interpret and enforce this Order, including with respect to the Surcharge and the lien created by this Order; it is further

ORDERED that all other and further relief requested in the Motion not expressly granted herein is hereby DENIED.

SO ORDERED.

Signed on 9/24/2014

/s/ Brenda T. Rhoades SR

HONORABLE BRENDA T. RHOADES,
UNITED STATES BANKRUPTCY JUDGE

APPROVED AS TO FORM ONLY:

By: /s/ Kirte M. Kinser (w/ permission)
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ATTORNEYS FOR SOUTHWEST SECURITIES, FSB

APPENDIX C

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

In re:	§	
	§	
DOMISTYLE, INC.	§	Case No. 13-40944
	§	
Debtor.	§	

AGREED ORDER ON MOTION TO ABANDON

CAME ON FOR HEARING on the 13th day of August, 2014, *Motion of the Liquidating Trustee to Abandon Laredo Real Property* [docket no. 328] (the "Motion"), filed by Milo H. Segner, Jr. (the "Trustee"), the trustee of the postconfirmation Domistyle, Inc. Creditors Trust (the "Liquidating Trust"), whereby the Trustee, on behalf of the Liquidating Trust, seeks to abandon certain real property and improvements generally located at 1820 Aguila Azteca, Laredo, Texas 78043 (the "Property") and serving as the collateral for Southwest Securities, FSB ("Southwest"). During said hearing, the parties announced that they had resolved the Motion. This Agreed Order represents said agreement of the parties and, to the extent necessary, it is approved by this Court. Accordingly, it is hereby:

ORDERED that the Motion is GRANTED as provided for herein; it is further

ORDERED that the Property shall be deemed ABANDONED on September 13, 2014 by the Liquidating Trust and, to the extent applicable, the Trustee, *pro-*

vided, *however*, that the Liquidating Trust shall continue to provide and to pay for security, utilities, repairs, maintenance, and insurance for the Property (substantially as it has heretofore been doing and otherwise in accordance with the Second Amended Plan of Liquidation) through October 7, 2014; it is further

ORDERED that, on or before October 7, 2014, Southwest shall pay to the Trustee, for the benefit of the Liquidating Trust, the sum of $47,012.00, plus an additional sum equal to the actual amount incurred by the Liquidating Trust in connection with the Property from August 1, 2014 through October 7, 2014 for security labor, utilities, general liability and umbrella insurance, and property insurance ("Permitted Expenses"); it is further

ORDERED that proof, in a form acceptable to Southwest, of any Permitted Expenses actually incurred by Liquidating Trust and paid between August 1, 2014 through October 7, 2014, must be submitted to Southwest for reimbursement no later than October 31, 2014 and Southwest, unless it otherwise objects to such expenses, shall pay the same no later than November 15, 2014; it is further

ORDERED that proof, in a form acceptable to Southwest, of any Permitted Expenses actually incurred by the Liquidating Trust, but not paid by October 7, 2014, shall be submitted to Southwest by October 31, 2014 for direct payment by Southwest; it is further

ORDERED that, to the extent the Liquidating Trust is entitled to a refund, recoupment, apportionment, or reduction of any kind of any expense (applicable to the period June 1, 2014 through October 7, 2014), including but not limited to, insurance premiums, as to which the

Trustee and Liquidating Trust shall pursue with reasonable due diligence, the Trustee, on behalf of the Liquidating Trust, shall within three (3) business days after receipt of the same pay the same over to Southwest or otherwise provide for Southwest to receive the benefit thereof; it is further

ORDERED that the Court shall retain jurisdiction to the maximum extent permitted by law to interpret and enforce this Order. It is further

ORDERED that all other and further relief requested in the Motion but not expressly granted herein is DENIED.

SO ORDERED.

Signed on 9/16/2014

/s/ Brenda T. Rhoades SR

HONORABLE BRENDA T. RHOADES,
UNITED STATES BANKRUPTCY JUDGE

AGREED AS TO SUBSTANCE AND FORM:

MUNSCH HARDT KOPF & HARR, P.C.

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