No. 20-0909

IN THE

Supreme Court of the United States

OCTOBER TERM, 2021

IN RE TERRAPIN STATION, LLC,
Debtor,

TOUCH OF GREY ROASTERS, INC.,
Petitioner,

V.

CASEY JONES, CHAPTER 7 TRUSTEE,
Respondent.

On Writ of Certiorari from the
United States Court of Appeals
for the Thirteenth Circuit

BRIEF FOR RESPONDENT

Team Number 18
Counsel for
Respondent

QUESTIONS PRESENTED

I. Does 11 U.S.C. § 547(c)(4) entitle a seller of goods to reduce its preference exposure by the value of goods sold even though the debtor in possession paid for such goods in full post-petition pursuant to an allowed 11 U.S.C. § 503(b)(9) administrative expense, despite the absence of any language restricting § 547(c)(4) to pre-petition transfers, when the result leads to duplicative recovery for the creditor?

II. Does 11 U.S.C. § 365(d)(3) require a trustee to pay rent to a landlord for the post-petition period prior to the rejection of an unexpired lease even though the debtor surrendered the property on the effective date of rejection as approved by court order?

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The Thirteenth Circuit Court of Appeals' decision is available at No. 20-0909 and reprinted at Record ("R") 2. The Bankruptcy Court for the District of Moot ruled in favor of the trustee, Casey Jones, on both issues. On appeal, the United States District Court for the District of Moot affirmed. In a subsequent appeal, the United States Court of Appeals for the Thirteenth Circuit also affirmed the lower courts' ruling on both issues in favor of Jones.

STATEMENT OF JURISDICTION

The formal statement of jurisdiction is waived pursuant to Competition Rule VIII.

PERTINENT STATUTORY PROVISIONS

11 U.S.C. § 547 Preferences

(a) [omitted]

(b) Except as provided in subsections (c), (i), and (j) of this section, the trustee may, based on reasonable due diligence in the circumstances of the case and taking into account a party's known or reasonably knowable affirmative defenses under subsection (c), avoid any transfer of an interest of the debtor in property—

(1) to or for the benefit of a creditor;

(2) for or on account of an antecedent debt owed by the debtor before such transfer was made;

(3) made while the debtor was insolvent;

(4) made—

(A) on or within 90 days before the date of the filing of the petition; or

(B) between ninety days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider; and

(5) that enables such creditor to receive more than such creditor would receive if—

(A) the case were a case under chapter 7 of this title;

(B) the transfer had not been made; and

(C) such creditor received payment of such debt to the extent provided by the provisions of this title.

(c) The trustee may not avoid under this section a transfer—

(1) – (3) [omitted]

(4) to or for the benefit of a creditor, to the extent that, after such transfer, such creditor gave new value to or for the benefit of the debtor—

(A) not secured by an otherwise unavoidable security interest; and
(B) on account of which new value the debtor did not make an otherwise unavoidable transfer to or for the benefit of such creditor;

(5) – (9) [omitted]

(d) – (j) [omitted]

11 U.S.C. § 503 Allowance of administrative expenses

(a) [omitted]

(b) After notice and a hearing, there shall be allowed administrative expenses, other than claims allowed under section 502(f) of this title, including—

(1) – (8) [omitted]

(9) the value of any goods received by the debtor within 20 days before the date of commencement of a case under this title in which the goods have been sold to the debtor in the ordinary course of such debtor's business.

(c) [omitted]

11 U.S.C. § 365 Executory contracts and unexpired leases

(a) Except as provided in sections 765 and 766 of this title and in subsections (b), (c), and (d) of this section, the trustee, subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor.

(b)(1) If there has been a default in an executory contract or unexpired lease of the debtor, the trustee may not assume such contract or lease unless, at the time of assumption of such contract or lease, the trustee--

(A) - (C) [omitted]

(2) - (4) [omitted]

(c) [omitted]

(d)(1) In a case under chapter 7 of this title, if the trustee does not assume or reject an executory contract or unexpired lease of residential real property or of personal property of the debtor within 60 days after the order for relief, or within such additional time as the court, for cause, within such 60-day period, fixes, then such contract or lease is deemed rejected.

(2) [omitted]

(3)(A) The trustee shall timely perform all the obligations of the debtor, except those specified in section 365(b)(2), arising from and after the order for relief under any unexpired lease of nonresidential real property, until such lease is assumed or rejected, notwithstanding section 503(b)(1) of this title. The court may extend, for cause, the time for performance of any such obligation that arises within 60 days after the date of the order for relief, but the time for performance shall not be extended beyond such 60-day period, except as provided in subparagraph (B). This subsection shall not be deemed to affect the trustee's obligations under the provisions of subsection (b) or (f) of this section.

Acceptance of any such performance does not constitute waiver or relinquishment of the lessor's rights under such lease or under this title.

(B) - (C) [omitted]

(4) - (5) [omitted]

(e) - (f) [omitted]

(g) Except as provided in subsections (h)(2) and (i)(2) of this section, the rejection of an executory contract or unexpired lease of the debtor constitutes a breach of such contract or lease-

(h) - (p) [omitted]

STATEMENT OF THE CASE

III. FACTUAL HISTORY

A. William Tell Successfully Starts an Independent Coffeehouse, Terrapin Station, LLC

In 2005, William Tell ("Tell") founded Terrapin Station, LLC ("Terrapin") an independent coffeehouse in Terrapin, Moot. R. at 3. In 2009, Terrapin was named "Independent Coffeehouse of the Year" by Java Digest. R. at 3. Terrapin's immediate success attracted the attention of Touch of Grey Roasters, Inc. ("Touch of Grey" or "Petitioner"), an international coffee company with 1,900 coffeehouses around the world. R. at 3. In an effort to expand their markets, Touch of Grey opened a series of neighborhood coffeehouses in 2017, one of which was to be franchised by Terrapin, which had a pre-established loyal customer base in Moot. R. at 4. The two companies moved forward with this joint venture in hopes of increased earnings for both parties. R. at 4.

B. Terrapin Enters into a Franchise Agreement with Touch of Grey

Once Terrapin agreed to this franchise opportunity, Touch of Grey offered to purchase and lease a renovated warehouse (the "Premises") that would serve as the new coffeehouse. R. at 4. On July 1, 2018, Terrapin and Touch of Grey entered into a lease agreement ("Lease") in which Touch of Grey would serve as landlord and collect monthly rent payments in the amount of $25,000 on the first day of each month. R. at 4. On that same day, Terrapin and Touch of Grey entered into a franchise agreement in which Terrapin would exclusively sell "Dark Star" branded products to be purchased from Touch of Grey. R. at 4.

C. Terrapin and Touch of Grey Face Unforeseen Circumstances

Terrapin opened their new coffeehouse at the Premises on December 1, 2018; however, they encountered difficulties when a local group of independent coffeehouse owners began

campaigning against Terrapin for their affiliation with Touch of Grey. R. at 5. Additionally, Terrapin's efforts to keep up with the nightlife scene on Shakedown Street were fruitless. R. at 5. As such, Terrapin struggled to make financial ends meet and therefore became unable to pay their debts as of September 2019. R. at 5. Terrapin continued timely payment of its rent obligations under the Lease, but by November 1, 2019, they owed Touch of Grey over $700,000 for Dark Star branded goods that had been purchased. R. at 5. In response to this debt, Touch of Grey sent a notice of default on December 5, 2019, to Terrapin threatening to terminate the franchise agreement. R. at 5.

On December 7, 2019, Terrapin and Touch of Grey entered into a forbearance agreement. R. at 5. This agreement affirmed that Touch of Grey would forbear from terminating the franchise agreement in exchange for: (i) a payment of $250,000 by Terrapin for outstanding invoices owed to Touch of Grey, (ii) reassurance by Terrapin that it would continue to make rental payments under the Lease, and (iii) a release of any and all claims or causes of action that Terrapin might have against Touch of Grey. R. at 5. Terrapin promptly made the $250,000 payment to Touch of Grey on the same day. R. at 5.

On December 18, 2019, Terrapin purchased an additional $200,000 worth of Dark Star branded coffee on credit from Touch of Grey. R. at 5. Tell, the sole owner of Terrapin, signed a personal guaranty with respect to this $200,000 purchase. R. at 6. Said goods were delivered on December 21, 2019. R. at 6.

IV. PROCEDURAL HISTORY

A. The Initial Bankruptcy Petition is Filed

Terrapin voluntarily filed a petition for relief under chapter 11 of the Bankruptcy Code on January 5, 2020 ("Petition Date") in the District of Moot. R. at 6. Terrapin remained current with

its rent obligations to Touch of Grey; however, Tell hoped to find a sub-lessee for a portion of the Premises. R. at 6. Terrapin still owed Touch of Grey $650,000 — $200,000 on credit, and over $500,000 to other unsecured creditors, some of whom were refusing to provide Terrapin with goods and services on credit. R. at 6.

Weeks later, Terrapin filed a motion with the court requesting authority to pay the $200,000 it owed to Touch of Grey on credit, asserting that they were a critical vendor and therefore unwilling to sell goods on credit. R. at 6. Terrapin also asserted that the $200,000 was entitled to priority as an administrative expense pursuant to § 503(b)(9) and therefore would not prejudice other creditors. R. at 7. This amount is reflected in an invoice ("Invoice") that was issued to Terrapin, which the court granted as an administrative expense pursuant to § 503(b)(9). R. at 5. Terrapin made the Invoice payment a few days later and Touch of Grey resumed selling goods on credit to Terrapin. R. at 7.

Unbeknownst to Terrapin, the COVID-19 pandemic would force many businesses to close their doors, at least temporarily, including themselves. R. at 7. Terrapin was able to re-open their doors in April 2020, but customers did not return. R. at 7. On May 5, 2020, Terrapin permanently ceased operations, vacated the Premises, and returned the keys to Touch of Grey. R. at 7. On May 6, 2020, Terrapin filed a motion with the bankruptcy court to reject the Lease and terminate the franchise agreement with Touch of Grey as of the date of the motion pursuant to § 365(a). R. at 7. In response, Touch of Grey filed a motion on May 8, 2020, seeking to compel payment of the May rent pursuant to § 365(d)(3); however, they did not oppose the rejection of the Lease effective May 5, 2020. R. at 7-8. Because of the ongoing pandemic, a virtual hearing for both Terrapin's and Touch of Grey's motions was scheduled for May 29, 2020. R. at 8.

B. Terrapin Converts its Petition to Chapter 7 Bankruptcy

At the outset of the virtual hearing on May 29, 2020, Terrapin converted its chapter 11 case to a chapter 7 case pursuant to § 1112(a) and an order appointing a trustee for the Terrapin estate was entered. R. at 8. At this same hearing, the court granted Terrapin's motion to reject both the Lease and the franchise agreement effective as of May 5, 2020. R. at 8. The court requested additional briefing on the issue of Touch of Grey's request for payment of the May rent in full. R. at 8.

After retaining counsel, the trustee, Casey Jones ("Jones") objected to Touch of Grey's motion to compel payment for the entirety of the May rent pursuant to § 365(d)(3), arguing that such relief was unfair to other creditors because Terrapin only occupied the Premises for the first five days of May 2020. R. at 8. Additionally, Jones commenced an adversary proceeding seeking to avoid and recover the payment that Terrapin had made to Touch of Grey pursuant to the forbearance agreement as a preferential transfer under § 547(b) and § 550(a). R. at 8. Touch of Grey responded by arguing that they were entitled to reduce any preference exposure by the $200,000 in goods that it sold to Terrapin, reflected in the Invoice, pursuant to § 547(c)(4). R. at 8. Both parties agreed to stay all proceedings while they attempted to resolve their disputes through mediation which ultimately failed. R. at 8-9.

A status conference was held with the court on July 23, 2020, in which both parties agreed to file cross-motions for summary judgment because the subsequent new value dispute was a purely legal issue. R. at 9. In regard to Touch of Grey's request for payment in full of the May 2020 rent, a hearing would be held on this motion at the same hearing on the motions for summary judgment. R. at 9.

C. The Bankruptcy Court Rules in Favor of Jones

The bankruptcy court ruled in favor of Jones on both issues. R. at 9. The court decided that § 365(d)(3) only required Terrapin to pay rent for the five days that it occupied the Premises prior to rejection. R. at 9. Therefore, instead of receiving the entire $25,000, Touch of Grey was granted an administrative expense for $4,032.26 for the pre-rejection portion of the May 2020 rent. R. at 9. As for the adversary proceeding, the court granted summary judgment to Jones, holding that Touch of Grey could not use the value of the goods reflected on the Invoice as new value to reduce its preference exposure, given that the Invoice was paid pursuant to § 503(b)(9). R. at 9. As such, a judgment in the amount of $250,000 was entered in favor of Jones. R. at 9.

Touch of Grey appealed both decisions to the United States District Court for the District of Moot. R. at 9. The district court affirmed both issues. Touch of Grey subsequently filed a notice of appeal with the United States Court of Appeals for the Thirteenth Circuit, which also affirmed the bankruptcy court on both issues. R. at 9.

STATEMENT OF THE STANDARD OF REVIEW

The parties do not dispute the facts in this case. R. at 9. The questions presented are pure issues of law because they are based on interpretation of the Bankruptcy Code. Therefore, the standard of review for this appeal is de novo. *Texas v. Soileau (In re Soileau)*, 488 F.3d 302, 305 (5th Cir. 2007).

SUMMARY OF THE ARGUMENT

This Court should affirm the decision of the Court of Appeals for the Thirteenth Circuit on both issues in favor of the trustee. This holding is in line with bankruptcy goals of promoting continued business between creditors and debtors; it furthers equality amongst creditors; and prevents the erosion of prior bankruptcy practice when Congress has not stated an express intent to do so.

The Bankruptcy Code consists of provisions balancing rights and protections of creditors and debtors alike. Section 547 is one such area where this is carried out, in which § 547(b) provides a trustee with the power to avoid a preferential transfer up to 90 days before the filing of a bankruptcy petition. Section 547(c) explains when a trustee cannot avoid a transfer, effectively creating defenses for creditors who naturally want to reduce their preference exposure. Specifically, § 547(c)(4)(B), the subsequent new value defense, shields sellers of goods when the debtor made an avoidable transfer after the supplier provided new value benefitting the debtor. Policy considerations behind the preference defenses are to encourage continued business of creditors with debtors and to promote equality between creditors. The enactment of § 503(b)(9) seeks to also further the bankruptcy policy goal of encouraging creditors to work with debtors, despite their precarious financial status. This section provides creditors with an administrative expense priority for the value of goods received by the debtor 20 days before the filing date where the goods have been sold in the ordinary course of business. This amendment, added to the Code as part of the Bankruptcy Abuse Prevention and Consumer Protection Act ("BAPCPA"), is notable because it elevates a group of creditors ahead of other priority claimants. Further, as an administrative expense claim, it means creditors are typically paid in full, or receive alternative remedy prior to confirmation of a reorganization plan.

The interaction of § 547(c)(4) and § 503(b)(9) has divided circuit courts, specifically regarding the issue of whether a seller of goods can reduce its preference exposure by applying new value pursuant to § 547(c)(4), even though the debtor in possession paid for such goods in full post-petition, in accordance with § 503(b)(9). A majority of courts correctly say no. Opposing courts, most notably the *Friedman's* court, maintain that the transfers carried out post-petition are not included in a new value defense analysis because § 547(c)(4) cuts off as of the petition date. Therefore, even if a creditor has been paid its § 503(b)(9) claim, it may still reduce its preference liability by the value of goods sold, pursuant to § 547(c)(4). This flawed reasoning does not lend itself to the plain meaning of the statute, does not conform with statutory canons of interpretation, and does not advance the bankruptcy policy goals. Congress included "date of the filing of the petition" 179 times throughout the Code, 89 of which of which specify "*before* the date of filing the petition." Not once are those terms used in § 547(c)(4). This Court, upon looking at the plain meaning of the statute, should hold that it is unambiguous in this intentional omission—nor should such a limitation be read into the statute. Terrapin paid $200,000 in full to Touch of Grey, pursuant to a court mandated § 503(b)(9) administrative expense claim. With that money repaid, Touch of Grey would receive a windfall, effectively receiving double recovery if this value were to additionally be used to reduce its preference liability under § 547(c)(4). Therefore, this Court should hold that Touch of Grey is prohibited from reducing its preference exposure under § 547(c)(4) by its administrative expense, representing the value of goods it supplied Terrapin, when it was paid in full post-petition for the goods in accordance with § 503(b)(9).

As for the second issue, the Thirteenth Circuit correctly held that Touch of Grey was only entitled to payment for the five days that Terrapin had occupied the Premises under the guidance

of § 365(d)(3). A debtor who has entered bankruptcy is entitled to reject any executory contract or unexpired lease pursuant to 11 U.S.C. § 365(a). Terrapin filed their petition for bankruptcy on January 5, 2020. During this time a debtor in possession or trustee must also remain current on its obligations under said executory contract or unexpired lease. Pursuant to § 365(a), Terrapin filed a motion to reject the Lease between themselves and Touch of Grey on May 5, 2020, while continuing to be current on its obligations under the Lease. Court approval is a condition precedent to the effectiveness of a trustee's rejection of a non-residential lease. Additionally, a court's power to reject an unexpired lease may operate retroactively. Here, the court used that power to make Terrapin's effective date of rejection May 5th, which was the day that the motion for rejection had been filed.

However, the question then becomes how this Court should decide whether Touch of Grey is entitled to the full month's rent for May 2020 or just the five days for which Terrapin occupied the Premises. This requires an examination of two different approaches to a debtor's obligations during the post-petition pre-rejection period which has caused a circuit split: the proration approach and the billing date approach. A majority of courts follow the proration approach that was introduced prior to adoption of the Bankruptcy Code while a minority of courts follow the billing date approach. The billing date approach provides a shortsighted method for determining rent payment that only looks to the date rent becomes payable under the terms of the lease. It does not consider the ultimate purpose of rent – payment for full use and enjoyment of the premises for the entire month. As the landlord can be paid an administrative expense for a period of time where the debtor may not be using the property, this approach only deprives similarly situated creditors of what they would otherwise be entitled to. This Court should not award a landlord such windfall, especially where that landlord has slept on their property

obligations by failing to attempt to mitigate damages once the debtor has surrendered the leased property. Furthermore, there is no specific language that adopts either approach, but congressional history and statutory interpretation support adoption of the proration approach.

The goals that the bankruptcy process seeks to achieve are promoted when the proration approach is applied to § 365(d)(3). In proration jurisdictions, the rent owed is prorated according to the date the lease is rejected in relation to when it became due under the lease. This approach promotes fairness and uniform results. This consistency allows courts to avoid absurd results such as windfalls and disparate treatment of similarly situated creditors. Further, the proration approach promotes simplicity and predictability within the Bankruptcy Code whereas the billing approach only presents administrative challenges and raises more questions of equality for the court to address. Thus, this Court should affirm the decision of the Thirteenth Circuit and hold in favor of the Trustee on both issues.

ARGUMENT

I. THE THIRTEENTH CIRCUIT CORRECTLY HELD THAT A SELLER OF GOODS IS NOT ENTITLED TO REDUCE ITS PREFERENCE EXPOSURE WHEN THE DEBTOR IN POSSESSION PAID FOR SUCH GOODS IN FULL PURSUANT TO A COURT ORDERED § 503(B)(9) ADMINISTRATIVE EXPENSE.

This Court should affirm the Thirteenth Circuit's decision in favor of the trustee Casey Jones ("Jones") and hold that a § 503(b)(9) administrative expense representing the value of goods supplied to the debtor, paid in full post-petition, cannot be used to offset a preference as new value and subsequently deducted from a preferential transfer liability under § 547(c)(4).

Section 547 showcases Congress's attempt to balance the rights of both creditors and debtors. Section 547(b) grants a trustee power to avoid preferential transfers carried out on or within ninety days of bankruptcy filing. *See* 11 U.S.C. § 547(b); Deborah L. Thorne and Jesus E. Batista, *Are All Creditor "Animals" Equal? Treatment of New Value Under § 547*, 23 AM. BANKR. INST. J., Apr. 2004, at 22. Creditors, however, are offered protections from these broad avoidance powers in the Bankruptcy Code in § 547(c)(4), which provides for defenses against preference voidability and recovery. 11 U.S.C. § 547(c)(4); Thorne, *supra* at 22. This statute allows for the reduction of preference liability by the value of goods supplied. R. at 10. More specifically, § 547(c)(4)(B), the "subsequent new value provision," provides a shield to creditors to the extent a creditor gave new value after the preference that benefitted the debtor, on account of such new value the debtor did not constitute an otherwise unavoidable transfer. Thorne, *supra* at 22. The overall purpose of § 547 is encompassed in two major goals:

> First . . . creditors are discouraged from racing to the courthouse to dismember the debtor during his slide into bankruptcy. Second, and more important, the preference provisions facilitate the prime bankruptcy policy of equality of distribution among creditors of the debtor. Any creditor that received a greater payment than others of his class is required to disgorge so that all may have equally.

H.R.Rep. No. 95–595 (1978), at 177–78.

In 2005, Congress created a new category of administrative expense, which was added to the Bankruptcy Code as part of the BAPCPA. *See* Paul R. Hage & Patrick R. Mohan, *Recent Developments in Section 503—Administrative Expenses*, 2015 ANN. SURV. OF BANKR. L. 19 (2015). This statute, § 503(b)(9), states that an administrative expense shall be allowed for the value of any goods received by the debtor within 20 days before the date of filing the bankruptcy petition if the goods were sold in the ordinary course of business. *Id.* In doing so, it elevates a group of trade creditors above all other general creditors. *Id.* Similar to the purpose behind § 547(c)(4), the impetus for enacting § 503(b)(9), is to encourage creditors to continue business with debtors and promote equality of creditors. *Id.*

The issue this Court must determine is whether a court-ordered administrative expense, paid post-petition under § 503(b)(9), can count as new value and offset preference exposure under the § 547(c)(4)(B) exception. Circuits are split in their holding of this issue, but the majority correctly agree that post-petition payment of a § 503(b)(9) administrative expense cannot be used to offset new value. R. at 11. To determine the outcome of the issue presented, this Court must first look to the plain language of § 547(c)(4) and should find in line with the majority – the plain language of § 547(c)(4) is "unequivocally unambiguous." R. at 12. No language exists in the statute stating that transfers pursuant to § 547(c)(4) terminate at the petition date for the purposes of determining new value. Terrapin paid the court-ordered administrative expense under § 503(b)(9), therefore Touch of Grey is prohibited from using the $200,000 received to offset their preference as new value. Statutory interpretation using canons of construction and contextual analysis also provide insight into the meaning and interpretation of § 547(c)(4). *See Gustafson v. Alloyd Co.,* 513 U.S. 561, 570, 577 (1995); *Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 486 (2006). Finally, courts will look to bankruptcy policies to determine the

appropriate interpretation of statutes. The most frequently cited case by minorities courts, *Friedman's,* should be rejected as having an incorrect holding, and nevertheless be distinguished from the case at hand. In *Friedman's,* the Third Circuit held that transfers carried out post-petition are not included in a new value defense analysis because § 547(c)(4) cuts off as of the petition date. *See Friedman's Liquidating Tr. v. Roth Staffing Cos. LP (In re Friedman's Inc.)*, 738 F.3d 547, 549 (3d Cir. 2013). However, this is an incorrect reading of § 547(c)(4), which contains no pre- or post-petition language. Further, it is distinguishable from this case because it was not about an administrative expense pursuant to § 503(b)(9), but instead a Wage Order payment. *Id.* at 551.

This brief will first discuss the plain and unambiguous language of § 547(c)(4). Then, it will analyze relevant statutory construction principles and overall context, concluding with an analysis of bankruptcy policy. These steps lead to a clear conclusion that Touch of Grey cannot receive a reduced preference exposure because it already received a fully paid, court-mandated administrative expense under § 503(b)(9).

A. Section 547(c)(4) Prohibits Reduction of Preference Exposure by the Value of Goods Sold because the Plain Language Does Not Include a Temporal Restriction that Closes the Preference Analysis Window on the Petition Date.

i. The language of § 547(c)(4) is plain and unambiguous, thus judicial inquiry must end there.

The statutory language of § 547(c)(4) is plain because of its omission of any temporal language, and thus unambiguously includes transfers carried out during the post-petition period. Every bankruptcy statutory interpretation case begins with an analysis of the plain text. R. at 12. When the text is unambiguous, the inquiry ends. *See Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992). Even if a statute is "awkward, and even ungrammatical," it is not necessarily deemed ambiguous. *Lamie v. United States Trustee*, 540 U.S. 526, 527 (2004). This Court has

previously confirmed that "Congress says in a statute what it means and means in a statute what it says there." *Conn. Nat'l Bank*, 503 U.S. at 254. As such, the petitioner "bears an 'exceptionally heavy' burden of persua[sion]" when seeking to overcome the plain language of a statute. *Patterson v. Shumate,* 504 U.S. 753, 760 (1992) (quoting *Union Bank v. Wolas*, 502 U.S. 151, 155-56 (1991). Section 547(c)(4) contains two defenses to a preference when a transfer is made:

> (4) to or for the benefit of a creditor, to the extent that, after such transfer, such creditor gave new value to or for the benefit of the debtor—
>
> (A) not secured by an otherwise unavoidable security interest; and
>
> (B) on account of which new value the debtor did not make an otherwise unavoidable transfer to or for the benefit of such creditor.

11 U.S.C. § 547(c)(4). There is no temporal limit in the statute as to when new value is paid. Nowhere does the statute include "prior to the filing of the bankruptcy" or "closes on the day of the filing," or any express language restricting transfers to the pre-petition time period. Undoubtedly, the plain language of § 547(c)(4) precludes reading in a temporal restriction that does not exist. *See Silvers v. Sony Pictures Ent., Inc.*, 402 F.3d 881, 885 (9th Cir. 2005).

The Petitioner and dissent incorrectly searched for an implied temporal restriction where none exists. R. at 23. Dissecting the statute and defining each of its parts clearly demonstrates this. The relevant portion of transfer is defined as "each mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with—(i) property; or (ii) an interest in property." 11 U.S.C. § 101(54)(D). The $200,000 paid by Terrapin is certainly a transfer under this definition because the money paid is property that was parted with. Further, both Petitioner and the dissent reason that the use of "debtor" in the statute implies a petition date cut-off because the debtor in possession actually paid for the goods. R. at 23 (Weir, J. dissenting). Debtor, defined in §101(13), means "person or municipality concerning which a case under this title has been commenced." 11 U.S.C. § 101(13). In a chapter 11 bankruptcy, "debtor

in possession" refers to the debtor, unless they are the trustee. 11 U.S.C. § 1101. The definitions provided in the Bankruptcy Code show this argument fails because a debtor in possession is not characterized as a "wholly new entity," and in fact is viewed as the "same entity which existed before the filing of the bankruptcy petition." *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 528 (1984).

A majority of courts have ruled that a creditor who was paid an administrative expense under § 503(b)(9) is not entitled to *additionally* deduct this value from their preference exposure. *See e.g., Circuit City Stores, Inc. v. Mitsubishi Dig. Elecs. Am. (In re Circuit City Stores, Inc.)*, 2010 WL 4956022 at *1 (Bankr. E.D. Va. Dec. 1, 2010); *TI Acquisition, LLC v. Southern Polymer, Inc. (In re TI Acquisition, LLC)*, 429 B.R. 377, 378 (Bank. N.D. Ga. 2010); *Beaulieu Liquidating Tr. v. Fabric Sources, Inc. (In re Beaulieu Grp., LLC)*, 616 B.R. 857, 858 (Bankr. N.D. Ga. 2020). In *In re Circuit City Stores, Inc.* the Bankruptcy Court for Virginia, after determining the supplier's § 503(b)(9) transfer constituted an "otherwise unavoidable transfer" under § 547(c)(4)(B), held it could not use the value of that transfer as a basis for new value. *In re Circuit City Stores, Inc.*, 2010 WL 4956022 at *1. Instead, the court provided the supplier two options—claim an administrative expense under § 503(b)(9) *or* use the value of the goods as new value under § 547(c)(4), but held it "may not do both." *Id.* at *9. This Court should follow the majority's line of reasoning and hold that the plain language of § 547(c)(4) precludes Touch of Grey's ability to reduce their preference exposure when they have already received an allowed and fully paid § 503(b)(9) administrative expense claim.

ii. *Friedman's* was incorrectly decided and distinguishable from the present case.

The dissent heavily relies on the holding and reasoning of *Friedman's*—a case this Court should reject for two reasons: (1) *Friedman's* was wrongly decided and (2) the facts are

distinguishable from the present case. *Friedman's* held "an otherwise unavoidable transfer," per a Wage Order, occurring after the bankruptcy petition date, may not increase preference liability for the creditor. *In re Friedman's Inc.*, 738 F.3d at 549.

This Court should determine the Third Circuit in *Friedman's* performed an incorrect reading of § 547(c)(4) and drafted text that is not present in the statute. The subsequent advance exception is not tied to the petition date because there is an absence of language in the statute regarding dates. Further, the *Friedman's* court relied on the title of the statute, "Preferences," to further its argument that § 547(c)(4) pertains to transfers in the pre-petition period. *In re Friedman's Inc.*, 738 F.3d at 555. However, titles are not determinative in deciding plain meaning. *See Carter v. United States,* 530 U.S. 255, 256 (2000) ("the title of a statute is of use only when it sheds light on some ambiguous word or phrase in the statute itself"). There is no ambiguous language in § 547(c)(4), therefore claiming the title supports an interpretation of a petition date cutoff, as the dissent does, is inappropriate. A label cannot replace a plain meaning. Reasoning in this way defeats the purpose of the actual text drafted by Congress if courts can decide interpretations based on titles that go contrary to the actual language of the statute.

This Court should distinguish the case at issue from *Friedman's* because the facts are significantly different. In *Friedman's,* the supplier received a paid wage priority, not a § 503(b)(9) claim. *In re Friedman's Inc.*, 738 F.3d at 549. Touch of Grey did not receive a critical vendor payment—a payment dissimilar to a § 503(b)(9) claim. *See In re TI Acquisition, LLC*, 429 B.R. at 382 (reasoning "[p]ayment pursuant to a critical vendor order differs markedly from the statutory priority accorded to § 503(b)(9) claims). This a material distinction, given that § 503(b)(9) payments are "mandatory under the Bankruptcy Code" and critical vendor payments are dependent on court approval. *See* Paul R. Hage & Patrick R. Mohan, *Is it Still New Value?*

Application of Section 503(b)(9) to the Subsequent New Value Preference Defense, 19 J. BANKR. L. & PRAC. 4, Art. 7 (2010). As such, "[i]t is appropriate to distinguish between payments pursuant to § 503(b)(9) and payment pursuant to critical vendor orders." *In re TI Acquisition, LLC*, 429 B.R. at 382. Notably, the *Friedman's* court itself acknowledged that it only considered Wage Order payments, and "clearly indicated that it did not intend for its decision to extend to § 503(b)(9) claims. *Siegel v. Sony Elecs., Inc. (In re Circuit City Stores, Inc.)*, 515 B.R. 302, 313-14 (Bankr. E.D. Va. 2014).

B. Principles of Statutory Interpretation and Contextualization Prohibit Restricting Transfers to the Pre-Petition Period for New Value Purposes.

i. The absence of express time limitations precludes reading into the statute any time restriction.

It is not within the purview of courts to read in language that does not exist, in accordance with statutory canon *expressio unius est exclusion alterius*. This canon "creates a presumption that when a statute designates certain persons, things, or manners of operation, all omissions should be understood as exclusions." *Boudette v. Barnette*, 923 F.2d 754, 757 (9th Cir. 1991). Section 547(c)(4) excludes any time limit, and courts may not introduce a time restriction that simply does not exist.

Congress knows how to include temporal language when it wants to, and surely could have done so in this provision. It is telling that Congress included an express temporal restriction directly after § 547(c)(4)(B), as the language of § 547(c)(5) includes "as of the date of the filing of the petition." 11 U.S.C. § 547(c)(5). This stark difference in language shows the "omission was intentional" and a plain reading does not create a pre-petition restriction for transfers. *In re Beaulieu Grp., LLC*, 616 B.R. at 872; *see also* 11 U.S.C. § 549 (specifying a trustee may avoid a transfer "that occurs after the commencement of the case"). Congress included "date of the filing of the petition" 179 times throughout the Code, and of those 89 specify "*before* the date of filing

the petition." *See generally* 11 U.S.C. §§ 101 et seq (emphasis added). Congress has proven its ability to restrict Code provisions based on the bankruptcy filing date, and precisely chose the words of § 547(c)(4) to deliberately leave this language out. Courts cannot attempt to supersede this clear language Congress has provided.[1]

ii. Interpreting § 547(c)(4)(B) to include post-petition transfers does not produce an absurd result.

Prohibiting a creditor from using the same transfer both as an administrative expense under § 503(b)(9) and as new value under § 547(c)(4) does not lead to an absurd result. On the other hand, a creditor receiving payment twice *is* absurd. This Court has long held that when a "statute's language is plain, 'the sole function of the courts'"—at least where the disposition required by the text is not absurd— "'is to enforce it according to its terms.'" *United States v. Ron Pair Enters.*, 489 U.S. 235, 241 (1989) (quoting *Caminetti v. United States*, 242 U.S. 470, 485 (1917)).

Not only is the prevention of double recovery not absurd, if this Court finds that the literal interpretation of the statute is at odds with Congressional intent, it is still up to Congress to make adjustments. *See Lamie*, 540 U.S. at 542. This Court should reject the minority's interpretation because it would lead to double recovery for creditors. Here, if Touch of Grey's argument were accepted, they would receive a deduction from preference liability *in addition to* the $200,000 paid post-petition., thereby interpreting a statute to produce an absurd result.

iii. Contextual analysis of § 547(c)(4) provides evidence post-petition transfers are included when determining the new value defense.

This Court must reconcile § 547(c)(4) and § 503(b)(9) using contextual analysis, further determining interpretation by looking at not only all of the words in the statute, but the context in

[1] Congress further demonstrated its desire to restrict provisions by date in § § 506, 542(c), 550, and 749.

which they are used. *See Dolan*, 546 U.S. at 486. The context of § 503(b)(9) supports the position that a post-petition transfer is considered an "otherwise unavoidable transfer" for new value purposes. For a creditor to be able to use a transfer as new value to reduce preference exposure, it must be an "otherwise unavoidable transfer." 11 U.S.C. § 547(c)(4)(B). The dissent contends that the transfer is not an "otherwise unavoidable transfer" by analogizing post-petition payments of general unsecured claims to those payments made under § 503(b)(9) claims. R. at 25 (Weir, J. dissenting). This reasoning, however, directly contradicts the Bankruptcy Code. As stated by one court, "[b]ecause the Code authorizes the payment of § 503(b)(9) expenses, they are not avoidable under § 549 or any other section of the Code." *In re Beaulieu Grp., LLC*, 616 B.R. at 869. The court in *In re Circuit City* looked to § § 544, 545, 547, 548, 549, 553(b), and 724(a) of the Bankruptcy Code, before determining only § 549, titled "Postpetition transfers," was relevant in determining whether the § 503(b)(9) payment was avoidable. 11 U.S.C. § 549; *In re Circuit City Stores, Inc.*, 2010 WL 4956022, at *8 (explaining other provisions inapplicable because they related to prepetition transfers or applied only to liens). Under § 549, a transfer is avoidable after the bankruptcy filing if it was not authorized by either the Code or by the bankruptcy court. *Id*. at *8. From this analysis, the court reasoned that the reserve fund that was created for the seller of goods was an otherwise unavoidable transfer due to its § 503(b)(9) claim, thereby eliminating the preference defense under § 547(c)(4)(B). *Id.* at *7. Likewise, § 549 does not permit Touch of Grey to reduce its preference exposure because the bankruptcy court ordered the § 503(b)(9) claim payment.

The dissent next opined that the hypothetical liquidation test pursuant to § 547(b)(5), which is performed as of the petition date, conflicts with § 547(c)(4)(B) if interpreted in line with the Thirteenth Circuit. R. at 24 (Weir, J. dissenting). This interpretation, however, contradicts

precedent set by this very Court in *Palmer Clay Prod. Co. v. Brown*, the inception of the hypothetical liquidation test, which was subsequently codified into the Bankruptcy Code. 11 U.S.C. § 547(b)(5); *see Palmer Clay Prod. Co. v. Brown,* 297 U.S. 227, 229 (1936). Although the petition date is the cutoff for preferences, defenses to preferences are not bound by this same restriction. *See In re Beaulieu Grp., LLC*, 616 B.R. at 874. ("Under § 547, different time periods continue to apply to different parts of the statute). Events after the commencement of bankruptcy, notably § 503(b)(9) claims, are necessary to determine a § 547 prima facie preference case because they impact other creditors, and therefore should be included in a § 547(c)(4)(B) analysis. *See In re TI Acquisition, LLC*, 429 B.R. at 385.

Further, the dissent argues that because the statute of limitations for filing a preference generally commences on the petition date, so too does preference exposure expire. R. at 24 (Weir, J. dissenting). Even when § 503(b)(9) claims are absent from a preference analysis, they are often not completed at the petition date because specific details regarding payments remain unclear. *In re Beaulieu Grp., LLC*, 616 B.R. at 875 (stating "preference actions are rarely brought early on in a case"). Therefore, "the statute of limitations argument is not persuasive." *See id.* (concluding the "concern is of little effect").

While text is the starting point to determine statutory meaning, even if the text is clear, as it is in this case, it is helpful to look at a statute's objects and policies. *Kelly v. Robinson,* 479 U.S. 36, 43-44 (1986).

C. Applying the Majority View Advances Bankruptcy Policy by Preventing Duplicative Exposure, Promoting Creditors to Continue Business with Debtors, and Allowing for Equality of Distribution Among Creditors.

This Court should affirm the Thirteenth Circuit because it is in line with policy goals of both § 547(c) and § 503(b)(9). The purpose behind § 547(c)(4) defenses is two-fold – to

encourage creditors to conduct business with debtors despite their precarious financial status, and to promote equality of distribution among creditors. *See In re Beaulieu Grp., LLC*, 616 B.R. at 875 (explaining defenses create a "[level] playing field" for creditors when interpreted to prevent double exposure). The purposes behind enacting § 503(b)(9) are similar. R. at 26 (Weir, J. dissenting). A plain reading of § 547(c)(4) without transfer date restrictions promotes both policy goals. *See In re Circuit City Stores, Inc.*, 2010 WL 4956022 at *9 (noting "[a] contrary ruling would contravene the dual goals of the Bankruptcy Code"). Even if this Court finds that it does not advance the policy goals, it nevertheless should hold in favor of Jones because if Petitioner seeks what they consider a better policy outcome, that is "a task for Congress, not the courts." *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A*., 530 U.S. 1, 13-14 (2000).

To the first goal, affirming the Thirteenth Circuit in this case would further this objective because "when an allowed § 503(b)(9) claim is guaranteed payment … the creditor will get paid in full for the value delivered to the debtor, and paying creditors in full for their claims is the ultimate method of encouraging them to continue trade with the debtor." *In re TI Acquisition, LLC*, 429 B.R. at 385. The dissent discusses its policy concerns by claiming creditors will be unwilling to continue business with debtors because they must choose either a § 503(b)(9) administrative expense claim or new value defense. R. at 27 (Weir, J. dissenting). This argument does not hold weight because creditors are unaware of whether they will even qualify for a § 503(b)(9) administrative expense, as they are in the dark whether bankruptcy will be petitioned within 20 days of the transfer.

> When a creditor ships goods pre-petition . . . the creditor never knows whether a bankruptcy will be filed within 20 days of receipt of the shipment. The creditor cannot, therefore, know that it may be able to assert a § 503(b)(9) claim. From the creditor's pre-petition perspective, there is no difference in incentive if the new value defense the creditor may have relied on is lost.

In re TI Acquisition, LLC, 429 B.R. at 385.

The second goal of equality among creditors cannot be accomplished when the result is double recovery for a seller of goods. This policy is neglected if this Court holds in line with the *Friedman's* court. The *Friedman's* court ignored the consequence of the decision — double recovery, which goes against the bankruptcy policy of equality of distribution.

> To allow a supplier of goods to a debtor to use the delivery of the same materials as the basis for both a § 547(c)(4) defense and a § 503(b)(9) administrative claim would not give equal treatment to all creditors. The supplier would be receiving, in essence, a double payment. The estate would be required to fund the administrative claim but would be unable to pursue the preference action."

See In re Circuit City Stores, Inc., 2010 WL 4956022, at *9. In the case before this Court, Touch of Grey would receive credit *and* a deduction. This prejudices unsecured creditors because it results in a reduction of the distribution of those creditors. Therefore, This Court should find that Touch of Grey cannot receive a reduced preference exposure because it already received an allowed administrative expense pursuant to § 503(b)(9) that Terrapin paid in full.

II. THE THIRTEENTH CIRCUIT PROPERLY HELD THAT 11 U.S.C. § 365(D)(3) DOES NOT REQUIRE THE TRUSTEE TO PAY RENT TO A LANDLORD FOR THE POST-PETITION PERIOD PRIOR TO THE REJECTION OF AN UNEXPIRED LEASE WHERE THE DEBTOR SURRENDERED THE PROPERTY ON THE DATE OF REJECTION.

This Court should affirm the decision of the Thirteenth Circuit and hold that § 365(d)(3) does not require Jones to pay rent to Touch of Grey for the post-petition period prior to the rejection of the unexpired lease when Terrapin surrendered the property on the date of rejection.

Section 365 was enacted to allow a debtor in possession or trustee to assume or reject any executory contract or unexpired lease as a means of relieving the estate of burdensome obligations. *See In re Chateaugay Corp.*, 10 F.3d 944, 954 (2d Cir. 1993). Section 365 was amended in 1984 with the passage of the Bankruptcy Amendments and Federal Judgeship Act to include § 365(d)(3), which states that the trustee is required to "timely perform all obligations of

the debtor, except those specified in section 365(b)(2), arising from and after the order for relief." 11 U.S.C. § 365(d)(3). What was amended to resolve uncertainties has now created multiple ambiguities. *See* Victoria Kothari, *11 U.S.C. S 365(d)(3): A Conceptual Status Argument for Proration*, 13 AM. BANKR. INST. L. REV. 297, 299 (2005).

To start, it is unclear whether the preposition "from" should be read to modify the most proximate noun, "order," or the more remote, "lease." *See Centerpoint Props. v. Montgomery Ward Holding Corp. (In re Montgomery Ward Holding Corp.)*, 268 F.3d 205, 208 (3d Cir. 2001). Additionally, the term 'obligation' is not defined by the Bankruptcy Code and therefore principles dictate this word be accorded its "ordinary, contemporary, common meaning." *Pioneer Inv. Serv. Co. v. Brunswick Assoc. Ltd. P'ship*, 507 U.S. 380, 388 (1993). Black's Law Dictionary defines it as "that which a person is bound to do or forebear; any duty imposed by law, promise, contract, relations of society, courtesy, kindness, etc." BLACK'S LAW DICTIONARY 968 (5th ed. 1979). Finally, Congress does not define what timely performance should entail. These three ambiguities therefore lead to the issue in this case, which is whether a tenant's obligations, such as paying rent, arise from when they accrue or when they are billed. *El Paso Props. Corp. v. Gonzales (In re Furr's Supermarkets, Inc.),* 283 B.R. 60, 70 (B.A.P. 10th Cir. 2002). These two understandings are better described in practice: the proration approach versus the billing date approach.

The language of § 365(d)(3) is ambiguous and therefore this Court should turn towards statutory interpretation and congressional intent to determine the outcome of this issue. *See Thinking Machines Corporation v. Mellon Financial Services Corporation (In re Thinking Machines Corp.)*, 67 F.3d 1021, 1025 (1st Cir. 1995) (holding that when plain meaning becomes impossible, an inquiring court must look at the policies, principles and purposes underlying the

statute in order to construe it). As such, a majority of the circuit courts have held that the proration approach is more aligned with congressional intent and the goals of the Bankruptcy Code. This brief will analyze the plain language of the statute, followed by application of canons of statutory construction, and finally a review of relevant policy.

A. Section 365(d)(3) Does Not Require the Trustee to Pay Rent to a Landlord for the Post-Petition Period When the Plain Language of the Statute is Ambiguous.

Section 365 was enacted to allow a trustee to either assume or rejection an executory contract or unexpired lease of the debtor. *See In re Chateaugay Corp.*, 10 F.3d at 954. Accordingly, § 365(a) states that:

> Except as provided in sections 765 and 766 of this title and in subsections (b), (c), and (d) of this section, the trustee, subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor. 11 U.S.C. § 365(a).

A debtor is more likely to assume a lease when the nonresidential property adds value to the estate and reject the lease when the property is burdensome. *See Mission Prod. Holdings, Inc. v. Tempnology, LLC*, 139 S. Ct. 1652, 1658 (2019). Rejection of an executory contract or unexpired lease does not change the rights of the parties to the contract, "but merely means the bankruptcy estate itself will not become a party to it." Hon. Joan N. Feeney, Hon. Michael G. Williamson, and Michael J. Stepan, Esq., Bankruptcy Law Manual § 16:17 (5d. 2021-2).

If a debtor is to reject the executory contract or unexpired lease, a motion for rejection must be timely filed as set forth in § 365(d)(1). 11 U.S.C. § 365(d)(1). Failure to do so results in automatic rejection.[2] *Id.* Additionally, the trustee or debtor in possession must perform all post-petition obligations under the lease, such as the payment of rent, until the nonresidential lease is either assumed or rejected. Bankruptcy Law Manual § 16:26. A majority of courts have held that

[2] There is no automatic rejection in this case and therefore is inapplicable.

court approval is a condition precedent to the effectiveness of a trustee's rejection of a nonresidential lease. *See In re Thinking Machines Corp.*, 67 F.3d at 1023. Additionally, a court's power to reject an unexpired lease may operate retroactively. *See In re GCP CT Sch. Acquisition, LLC*, 443 B.R. 243, 251 (Bankr. D. Mass. 2010). Here, the court used that power to make Terrapin's effective date of rejection May 5th, which was the day that the motion for rejection had been filed. Therefore, the date of approval, not the date of filing controls. *Id*., at 1025. The plain language of § 365(d)(3) states that:

> the trustee shall timely perform all the obligations of the debtor, except those specified in section 365(b)(2), arising from and after the order for relief under any unexpired lease of nonresidential real property, until such lease is assumed or rejected, notwithstanding section 503(b)(1) of this title. 11 U.S.C. § 365(d)(3).

Prior to the 1984 amendments, a landlord's collection of rent was given post-petition debt status. *Kothari, supra* at 299. Post-petition debts are typically administrative expenses which are defined as the actual necessary costs and expenses of preserving the estate. 11 U.S.C. § 503(b)(1)(A). Section 365(d)(3) is an exception to this rule. As such, landlords are entitled to unsecured claims. *Id.* Therefore, rejection of an unexpired lease ends a trustee's right to occupancy, but in exchange the estate is relieved of the liability for future occupancy as an administrative claim. *See In re NETtel Corp., Inc.*, 289 B.R. 486, 491 (Bankr. D.D.C. 2002). Section 503(b)(1) is complied with in this case because the trustee already agreed to pay $4,032.26, which covers the five days in May 2020 that Terrapin occupied the premises.

Before enactment of the 1984 amendments, landlords were in a precarious position between when the tenant entered bankruptcy and the tenant's decision to assume or reject the unexpired lease. *See In re Handy Andy Home Improvement Ctrs.*, 144 F.3d 1125, 1128 (7th Cir. 1998). During this time, the landlord was prevented from taking any action to regain control of the property and as such repayment of post-petition rent was not guaranteed. *Kothari*, *supra* at

299. As part of the amendment process, Congress added § 365(d)(3) under the Leasehold Management Amendments. Gary P Spencer Jr., *A Simple Solution for Stub Rent? How Proposed Changes to the Treatment of Stub Rent Could Lead to Unforeseen Consequences*, 36 REV. OF BANKING & FINANCIAL L. 915, 924 (2016). Section 365(d)(3) gives relief to landlords, taking them out from under the "actual, necessary" provision of § 503(b)(1) and allows them to collect the rent fixed in the lease during the post-petition pre-rejection period. *See Kothari*, at 299. Even though this amendment was included to resolve "unintended consequences of the 1978 Act," it has since created additional statutory uncertainties. *Id*.

These statutory uncertainties result from ill-defined meanings of "timely performance," "obligation," "arise from and after." Specifically, it is unclear whether the preposition "from" should be read to modify the most proximate noun, "order," or the more remote, "lease." *See In re Montgomery Ward Holding Corp*., 268 F.3d at 208. Additionally, the term "obligation" is not defined by the Bankruptcy Code and therefore statutory principles dictate word is accorded its "ordinary, contemporary, common meaning." *Pioneer Inv. Serv. Co.*, 507 U.S. at 388. This Court should look at the statute and terms of the lease to determine how obligation is defined. Finally, timely performance has resulted in two separate timelines: obligations being completed when they are billed versus when they are accrued. *See In re Furr's Supermarkets, Inc.*, 283 B.R. at 70.

Various circuits have chosen to interpret this statute and its complexities in two ways: the billing date approach and the proration approach. Courts that have adopted the billing date approach argue landlords are entitled to the full month's rent for the post-petition pre-rejection period because the debtor in possession or trustee determine when to file a motion for rejection. *See Koenig Sporting Goods, Inc. v. Morse Road Co. (In re Koenig Sporting Goods, Inc.),* 203 F.3d 986, 988 (6th Cir. 2000). Circuits that have adopted the proration approach instead maintain

that the aim of § 365(d)(3) is to provide landlords with current pay for current services, therefore putting them on the same playing field as other creditors. *See In re GCP CT Sch. Acquisition, LLC*, 443 B.R. at 254. If a debtor or trustee rejects a lease, the prepetition rent payment is an unsecured claim and in the event of a rejection, the post-petition rent payment constitutes an administrative expense under § 503(b)(1)(A). *See In re Furr's Supermarkets, Inc.*, 283 B.R. at 69. As such, because the lower court determined that Terrapin had successfully rejected the lease on May 5th and employed the proration approach, Touch of Grey is only entitled to five days' worth of the May 2020 rent—not the entire month's rent.

B. Canons Of Statutory Construction and Congressional Intent Show that the Proration Approach of Determining Post-Petition Rental Payments to a Landlord is Aligned with the Intended Effect of 11 U.S.C. § 365(d)(3).

When the plain language of a statute proves to be ambiguous on its face, the implication is that the statute can be read in more than one way. *See In re Thinking Machines Corp*., 67 F.3d at 1025. Section 365(d)(3) is ambiguous because it is unclear from the plain language alone whether the statute intended a trustee's obligations to include paying landlords an entire month's rent or only paying them for current services during the post-petition pre-rejection period. As such, when there is more than one reasonable interpretation of a statute, an inquiring court must look at the policies, principles and purposes underlying the statute in order to construe it. *Id*.

Additionally, statutory language should be read in context with real-life situations to which the language pertains. *In re Furr's Supermarkets, Inc.*, 283 B.R. at 69. A statute should not be read in isolation because disregard for context can lead to silliness and absurd results. *In re Handy Andy Home Improvement Ctrs.*, 144 F.3d at 1128. For this reason, § 365(d)(3) should be interpreted in connection with § 502 as well as the additional sections of § 365. These two statutes, specifically sections § 365(g) and § 502(g) note that failures to honor lease obligations

after rejection results in pre-petition claims. *Id*., at 67. Allowing a landlord entitlement to a full month's rent payment puts them beyond the same footing as other trade creditors by allowing them to turn their pre-petition claims into post-petition claims. *Child World, Inc. v. Campbell/Massachusetts Trust (In re Child World, Inc.)*, 161 B.R. 571, 575-76 (S.D.N.Y. 1993). Therefore, this Court would be allowing landlords to have super priority status, yet nothing in the text or legislative history shows that Congress intended this when the 1984 amendments were made. *In re Montgomery Ward Holding Corp.*, 268 F.3d at 215 (Mansmann, J. dissenting). As such, adopting the billing date approach would invite absurd results.

Courts are also instructed to interpret statutes in a way that is consistent with the Bankruptcy Code and overall statutory scheme. *See Roberts v. Sea-Land Servs., Inc.*, 566 U.S. 93, 101 (2012). The proration approach is more aligned with bankruptcy principles, including equality of distribution among creditors and the corollary principle that preference provisions must be narrowly construed. *Howard Delivery Serv., Inc. v. Zurich Am. Ins. Co.*, 547 U.S. 651, 653 (2006). Courts should stay away from making decisions that are at the detriment to other creditors. *In re GCP CT Sch. Acquisition, LLC*, 443 B.R. at 254. An effective rejection under the proration approach entitles the landlord to an unsecured claim equal to the amount of time which the debtor occupied the premises thereby putting the landlord in the same position as other trade creditors. To put it more bluntly, adoption of the billing date approach would allow landlords to "leapfrog over other unsecured creditors." *In re Furr's Supermarkets, Inc*., 283 B.R. at 69. It should be noted that previous courts that have agreed with the billing date approach recognize that it impinges upon normal bankruptcy principles and priorities. *In re Koenig Sporting Goods, Inc.*, 203 F.3d at 988.

Finally, courts are reminded that amendments to the Bankruptcy Code do not supplant prior practice unless Congress has stated such intent to do so. *Cohen v. De La Cruz*, 523 U.S. 213, 221 (1998). Additionally, Congress does not write on a clean slate. *Dewsnup v. Timm*, 502 U.S. 410, 419 (1992). Pre-Code practice employed the proration approach towards collecting rent in a post-petition pre-rejection period. Judges are "admonished not to read the Bankruptcy Code to erode past bankruptcy practice absent a clear indication that Congress intended such a departure." *In re Montgomery Ward Holding Corp.*, 268 F.3d at 211. Prior to enactment of § 365(d)(3), a debtor-tenant's rent would be prorated to cover the post-petition pre-rejection period, regardless of the billing date. *In re Child World, Inc.*, 161 B.R. 571, 576. If Congress had intended for § 365(d)(3) to change the practice of pro-ration approach to billing date approach, it would have made that intent specific. *See Midlantic Nat'l Bank v. New Jersey Dep't of Envtl. Prot.,* 474 U.S. 494, 501 (1986). There is no indication that Congress intended for § 365(d)(3) to erode decades of caselaw which support the use of the proration approach.

C. Applications of the Billing Date Approach Throughout the Circuit Split Show that the Proration Method Leads to More Desirable Results and a More Practical Interpretation of 11 U.S.C § 365(d)(3) that Better Achieves the Goals of Bankruptcy.

i. The billing date approach has proven, in the minority of circuit courts that adhere to it, that it is a flawed approach that leads to undesirable bankruptcy practices and windfalls to the landlord.

The ambiguity of how §365(d)(3) is read has led to disparate treatment of rent for commercial landlords under the Code. *See* Spencer, *supra* at 959. Though the billing date approach and proration approach are fundamentally different, they both aim to clarify how obligations of commercial landlords and tenants should be analyzed. *Id.*

Courts that have adopted the billing date approach look to the date rent obligations are contractually due under the terms of the lease. *In Re Koenig Sporting Goods Inc.,* 203 F.3d at

990. The court in *Koenig* held that the debtor had to pay rent to a commercial landlord for the entire month because rent was due on the first of the month under the lease, despite the debtor rejecting the lease on the second. *Id.* at 990. This is the methodology Petitioner requests this Court to apply, as rent was due and payable on May 1, 2020, even though the lease was rejected on May 5, 2020. However, the billing date approach is laden with a plethora of flaws and consequences that fly in the face of the policy behind the Bankruptcy Code.

First, the billing date approach is inherently unfair to other creditors. As every other similarly situated creditor waits their turn in line for their portion of the debtor's estate, the landlord is able to gain an administrative expense for a period where the debtor is not making use of the property. Section 503(b)(1) of the Bankruptcy Code allows administrative expenses for "the actual, necessary costs and expenses of preserving the estate." 11 U.S.C. § 503(b)(1). If this Court requires Terrapin to pay an entire month's rent of $25,000, Touch of Grey would gain an administrative expense although Terrapin already ceased operations and vacated the Premises. This decision would further deplete the pot for other general unsecured creditors.

Similarly, applying the billing date approach to the treatment of the lease will provide Petitioner with an unnecessary windfall. *In re Koenig Sporting Goods, Inc.*, 203 F.3d at 989. Terrapin surrendered the keys to the Premises on May 5, 2020. At no time did Petitioner file a motion for relief from stay with respect to the Premises. Petitioner could have placed Terrapin's property in storage and continued to make profitable use of the Premises. Landlords with a claim for damages resulting from a debtor's breach of a lease have an obligation to attempt to mitigate damages suffered by attempting to relet the premises. COLLIER ON BANKRUPTCY ¶ 502.03 (Richard Levin & Henry J. Sommer eds., 16th ed.). Furthermore, the debtor should only have to pay for what it actually uses. *In re Ames Dep't Stores, Inc*., 306 B.R. at 48. There is no question

that Petitioner would be entitled to compensation under § 503(b) if Terrapin had sought continued occupancy after the date of rejection, where it benefitted the estate. *Id*. However, in this case, Terrapin only used the Premises for five days before surrendering access to the building. Should this Court allow Petitioner to receive compensation despite Terrapin's efforts to cease use of the Premises would be an absurd result. It has long been settled that if a court's decision, in keeping with the Bankruptcy Code, effectuates an absurd result, it should be disallowed. *Vergos v. Gregg's Enters*., Inc., 159 F.3d 989, 990 (6th Cir. 1998). In this instance under the billing date approach, Petitioner would be paid more than it is entitled to for use of the Premises. *See Kothari*, *supra* at 25. This would "inappropriately burden the administration of the bankruptcy estate[,] unfairly favor[ing] landlords over similarly situated pre-petition creditors." *See Kothari, supra* at 10. Here, Petitioner should have filed for a relief from stay, moved Terrapin's property, and relet the Premises to another tenant. Instead, Petitioner relies on this Court to make them whole at the expense of the other creditors.

Though the Bankruptcy Amendments were passed in 1984, there is no language within the statute adopting either approach. In the absence of statutory text, the American Bankruptcy Institute ("ABI") has expressed preference for the proration approach and recommended the statute be clarified to reflect such preference. *Final Report of the ABI Commission to Study the Reform of Chapter 11* at 129 (American Bankruptcy Institute, 2012-2014). The ABI is the largest multi-disciplinary organization dedicated to research and education on matters related to insolvency. *Id.* at 2. Since 1982, the ABI has provided Congress and the public with analyses of various bankruptcy issues. *Id.* However, the ABI's Commissioners, made up of the most prominent insolvency and restructuring practitioners in the United States, have expressed a preference for the proration method. *Id.* After a review of existing case law, citing both the

billing and proration methods, the Commissioners' official recommendation declares the proration method fair and most closely aligned with the purpose of § 365 (d)(3). *Id.* As a result, the trustee would treat rent accrued prior to the petition date as a pre-petition claim, and rent accrued on or after the petition date as a post-petition obligation. *Id.* at 129. The trustee should be required to pay post-petition rent obligation on or before 30 days after the petition date or date of the order for relief, whichever is later. *Id*. Most importantly, the trustee should pay all subsequent rent obligations accruing post-petition but prior to any rejection of the lease on a timely basis in accordance with the terms of the lease. *Id.* These recommendations further demonstrate that the lower court's ruling should be affirmed, and Petitioner should only receive rent for the first five days of May 2020 in the amount of $4,032.26.

A fundamental policy of the Bankruptcy Code is to not only facilitate soft landings in the form of business reorganizations or fresh starts, but also to uniformly administer the processes of the Code. U.S. CONST. art. I, § 8, cl. 4 (authorizing Congress to "establish . . . uniform Laws on the subject of Bankruptcies throughout the United States"). Applying the billing date approach leads to undesirable practices of bankruptcy law, including forum shopping. *See Spencer, supra* at 948. Forum shopping is a form of strategic decision making about where a debtor will want to file for reorganization based on where the highest probability for success lies. *Id.* at 948-949. For example, it would be advantageous to file in a billing date jurisdiction immediately after the day rent has become due under the lease. Terrapin could have waited until May 2, 2020, to file for bankruptcy where the $25,000 owed for payable rent on May 1, 2020, would become a general unsecured claim. This would allow Terrapin to essentially avoid paying rent for the entire month of May, while possibly still making use of the Premises. *Id.* at 950-951. This would ultimately amount to an unsecured loan that provides liquidity to Terrapin with free use of the Premises

under the automatic stay. *Id* at 951. Thus, if given the choice, where payment of rent is of great consideration to a commercial debtor, they will choose to file for bankruptcy shortly after the date rent is due because of the financial flexibility this ill-borne practice provides.

The language of § 365(d)(3) of the Code is not plain in its meaning. The Code fails to provide a clear definition of when an obligation "arises" under § 365(d)(3). *See Kothari, supra* at 8. Common meaning in the usage of the terms does not clearly support the billing date or proration method interpretation. *Id*. Furthermore, courts should fully examine whether "a literal interpretation would lead to internal inconsistencies, an absurd result, or an interpretation inconsistent with the intent of Congress." *See Vergos v. Gregg's Enters., Inc.*, 159 F.3d 989, 990 (6th Cir. 1998). Here, Petitioner under the billing date approach would be getting paid more than it is entitled to because Terrapin should only be charged with paying for what it uses. Terrapin surrendered the keys to the Premises on May 5, 2020, and ceased operations. Petitioner failed to make any effort to mitigate damages as required by landlords.

ii. <u>The proration method allows for fair treatment of debtors and similarly situated creditors while promoting simplicity, consistency and avoiding absurd results and practices.</u>

In opposition to the billing date approach is the proration approach, otherwise known as the proration approach. First and foremost, the proration approach is the appropriate interpretation of § 365(d)(3), as it is predicated upon fairness and achieving uniform results. *See Spencer, supra* at 960. Additionally, the Code aims to secure equal distribution among creditors. *See Howard Delivery Serv., Inc*, 547 U.S. at 653. The Code does not bar the practice of treating differently situated creditors distinctly; however, as discussed in *Reading Co. v. Brown*, one "decisive, statutory objective" in bankruptcy is "fairness to all persons having claims against an insolvent." *Reading Co. v. Brown*, 391 U.S. 471, 477 (1968). If this Court were to apply the

billing date approach, it would be inadvertently diluting the estate from which other creditors will be seeking payment. This windfall to Petitioner is inherently unfair to the other general unsecured creditors, as the Court would be awarding a full month's rent for what was only five days' use of the Premises.

The proration method also allows the court to produce the most consistent results by affording both commercial landlords and tenants the opportunity to realize what was mutually bargained for under the prepetition lease – occupancy of a property for an agreed upon rate. *In re Stone Barn Manhattan LLC*, 398 B.R. 359, 364 (Bankr. S.D.N.Y. 2008). Another benefit is that it prevents debtors from obtaining a windfall at the expense of the commercial landlord who is essentially "stuck" in a purgatory, unable to evict the debtor tenant or seek non-bankruptcy remedies due to the automatic stay. *See Spencer, supra* at 960. Avoiding this absurd result is a basic tenet of the Code.

Petitioner relies on case law where the courts not only admitted reluctance in its ruling, but even circumnavigated congressional intent. *In re Montgomery Ward Holding Corp*., 268 F.3d at 211. The court in *Montgomery* that adopted the billing date approach, acknowledged its unfair elements. *Id.* After applying the billing date approach to tax payment obligations due under a lease, the court noted its reluctance in reading § 365(d)(3) as unambiguous. *Id.* The court then attempted to reconcile the idea that while it recognizes Congress finds the proration approach to be more desirable, the court clearly saw that Congress enacted § 365(d)(3) to alter pre-Code practice by reading words into the statute that are not there. *Id.* The *Montgomery* court was correct in saying that it is not their role to create laws better than those fashioned by Congress. *Id.* However, it remains a mystery why the court attempted to do so by incorrectly applying the billing date method.

Finally, it must be emphasized that the proration method promotes simplicity, uniformity, and predictability within the Code. *See Spencer, supra* at 961. In contrast, the billing date approach presents administrative challenges. *Id.* Courts using the billing date approach must delve into real estate valuation practices such as "yearly versus monthly leases, arrears versus in advance payment, and taxes versus rent obligations." *Id.* Furthermore, the billing date approach only adds confusion when courts are faced with applying its principles. *Id.* The court in *Koenig* applied the billing date approach and allowed the landlord's priority administrative expense claim for rent where the tenant filed for bankruptcy after missing rental payments. *In Re Koenig Sporting Goods Inc.,* 203 F.3d at 989. The application of the proration method is not only easier to determine and thus easier to apply, but it is also consistent with other provisions of the Code. *See Spencer, supra* at 962.

Absent plain language within § 365(d)(3), the original intent of Congress cannot be ignored. Congress approved the pre-Code practice of using the proration method and has since done nothing to indicate that it wishes to stray from well-established practices. Furthermore, the ABI has recommended that the statute itself be clarified to reflect an adoption of the proration approach. The legislative intent of § 365(d)(3) has been clearly defined to mean that both the landlord and tenant alike receive what was mutually bargained for. Here, on July 1, 2018, the parties entered the Lease to provide a location for Terrapin to operate their business for a payment of $25,000 per month. Without a doubt, neither Terrapin nor Petitioner intended for any part of the amount of rent to be paid for time where the Premises would be vacant. Terrapin effectively vacated the Premises on May 5, 2020, by ceasing all operations and surrendering the keys back to Petitioner. This is further emphasized by the lower court, as it granted Terrapin's motion to reject the Lease on May 29, 2020, but dated the effectiveness of the rejection as May

5, 2020. Terrapin should not be punished for Petitioner's failure to fulfil its legal obligation to mitigate the resulting damages after the keys were surrendered.

The bankruptcy process cannot function properly unless debtors are able to seek a feasible means of reorganization or a fresh start. Likewise, similarly situated creditors must also have the opportunity to fair treatment. Here, if the Court were to apply the flawed billing date approach, Petitioner would receive more than its fair share. Not only would this Court be rewarding the Petitioner for sleeping on its obligations as a landlord, but granting the full month's rent would deplete the estate of $20,967.74, robbing other general unsecured creditors of what they are rightfully entitled to. If the Court wishes to uphold the basic principles and tenets of the Code, it must acknowledge that the proration approach is a superior tool to ensure the scales between creditors and debtors are balanced. This Court should affirm the decision of the lower court and hold that § 365(d)(3) of the Bankruptcy Code is to be interpreted regarding the rejection of the Lease using the proration method.

CONCLUSION

For the foregoing reasons, this Court should affirm the decisions of the Court of Appeals for the Thirteenth Circuit on both issues and find in favor of Respondent.

Respectfully Submitted,

Team Respondent 18
Counsel for Respondent
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