No. 21-0909

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 to
the United States Court of Appeals
for the Thirteenth Circuit

BRIEF FOR THE PETITIONER

Team Number 1

Counsel for Petitioner

QUESTIONS PRESENTED

1. Does the trustee's distribution of funds sufficient to pay Touch of Grey's administrative expenses pursuant to 11 U.S.C. § 503(b)(9) constitute an "otherwise unavoidable transfer" by the debtor, such that the creditor may not use the new value as part of its affirmative defense of subsequent new value under 11 U.S.C. § 547(c)(4)?

2. Under 11 U.S.C. § 365(d)(3), when the debtor alone was in the position to control when to reject an unexpired non-residential real property lease, must a trustee perform all lease obligations of the debtor pursuant to the terms of the lease or, alternatively, make payments that are allocable only to the prerejection period?

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OPINIONS BELOW

The United States Bankruptcy Court for the District of Moot answered both questions presented in favor of the trustee. The United States Court of Appeals for the Thirteenth Circuit affirmed the judgment of the Bankruptcy Court in finding that (1) under 11 U.S.C. § 547(c)(4), 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 11 U.S.C. § 503(b)(9); (2) 11 U.S.C. § 365(b)(3) does not require the trustee to perform the lease obligations which was allocable to the post-petition period. The Thirteenth Circuit Court of Appeals' opinion is reproduced as the record in this appeal.

STATEMENT OF JURISDICTION

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

STATUTORY PROVISIONS

This case involves interpreting 11 U.S.C § 547 and 11 U.S.C § 365 of the Bankruptcy Code. The relevant statutory provisions are set forth in Appendix A below.

STATEMENT OF FACTS

I. Factual History

A. Background Information

Touch of Grey is an international coffee company and coffeehouse chain, headquartered in San Francisco, California. (R. at 3). Touch of Grey is well known for its certified free-trade coffee beans, and has award-winning coffee roasts and blends. (R. at 3). To expand growth in new markets and in response to increased customer demand for local, independent business, Touch of Grey endeavored to partner with already-existing independent neighborhood coffeehouses to market a new line of coffee products in 2017. (R. at 4).

A popular and successful independent coffeehouse named Terrapin Station, LLC (the "Debtor") was found by William Tell in the Town of Terrapin, Moot in 2005. (R. at 3). The business, while enjoying a small but loyal customer base, experienced stagnated earnings by fall of 2017. (R. at 4). Additionally, the Debtor's premises were in disrepair, and in need of capital for remodeling. (*Id.*). Touch of Grey approached Tell at this time to propose a franchise opportunity. (*Id.*). The parties moved forward with the partnership. (*Id.*).

Under the terms of the agreement, Touch of Grey purchased and leased a newly renovated space (the "Premises") to the Debtor to facilitate opening a new store. (*Id.*). On July 1, 2018, the parties entered into a twenty-year triple-net Lease Agreement ("Lease"), with monthly rent in the amount of $25,000, "due in advance on the first day of each month." (*Id.*). That same day, Touch of Grey and the Debtor entered into a franchise agreement whereby the Debtor would exclusively sell "Dark Star" branded products, purchased from Touch of Grey. (*Id.*).

On December 1, 2018, the new "Terrapin Station Coffeehouse" opened in the new premises. (R. at 5). Unfortunately, the Debtor's business struggled from the outset. (*Id.*). As early as September 2019, the Debtor could not pay its financial obligations on time. (*Id.*). Though Debtor remained current on rent under the Lease, by November 1, 2019, the Debtor owed Touch of Grey over $700,000 for Dark Star products. (*Id.*). On December 5, Touch of Grey sent the Debtor a notice of default threatening to terminate the franchise agreement. (*Id.*).

The parties entered into a forbearance agreement on December 7, 2019. (*Id.*). Touch of Grey agreed to forbear from terminating the franchise agreement once the Debtor: (1) made a $250,000 payment for the Dark Star products debt, (2) reaffirmed its obligations under the Lease; and (3) released all claims or causes of action against Touch of Grey. (*Id.*). Upon signing the agreement, the Debtor immediately made the $250,000 payment. (*Id.*). Less than two weeks later, on December 18, the Debtor purchased another $200,000 worth of Dark Star products on credit as set forth on a December 18, 2019 invoice ("Invoice"), which were delivered on December 21. (*Id.*).

B. Chapter 11 Bankruptcy Filing

The Debtor's prospects did not improve. Finally, after an underwhelming holiday season, the Debtor filed for relief under chapter 11 of the Bankruptcy Code on January 5, 2020. (R. at 6). At this point, the Debtor had not fallen behind on rent for the premises, but still owed Touch of Grey $650,000 for goods it had purchased. (*Id.*). The Debtor owed over $500,000 to other unsecured creditors as well. (*Id.*). Unlike Touch of Grey, some of these creditors would no longer provide the Debtor with goods or services on credit. (*Id.*).

Tell was still hopeful about the Debtor's future. He explained to the court that he intended to reorganize the Debtor by returning to a traditional coffeehouse operation, and finding a sub-lessee for a portion of the Premises. (*Id.*). The Debtor would continue to sell the

Dark Star products, as required under the franchise agreement. (*Id.*). Touch of Grey was still seriously concerned with the Debtor's reorganization strategy. (*Id.*). However, in recognition of Debtor's reliance on Touch of Grey for its reorganization strategy, Touch of Grey engaged in ongoing, good faith discussions with the Debtor about a path forward. (*Id.*).

Two weeks after the Petition Date, the Debtor requested leave of the court to pay $200,000 on the Invoice to Touch of Grey as a "critical vendor." (*Id.*). This invoice was entitled to priority in payment as an administrative expense pursuant to 11 U.S.C. § 503(b)(9). (*Id.*). The court agreed to award Touch of Grey an administrative expense under section 503(b)(9) for the value of the goods sold. (*Id.*). Touch of Grey resumed selling goods to the Debtor on credit once it received the $200,000 payment. (*Id.*).

The Debtor's attempts at reorganization were failing even before the pandemic hit. (*Id.*). However, after shutting down temporarily in March 2020, and disappointing sales in April 2020, on May 5, 2020, the Debtor permanently ceased operations. (*Id.*). The following day, the Debtor filed a motion with the court to reject both the Lease and the franchise agreement with Touch of Grey as of the date of motion. (*Id.*). On May 8, Touch of Grey filed a motion to compel payment of the May rent. (*Id.*). Though Touch of Grey did not oppose rejection of the lease as of May 5, it asserted it was entitled in full payment for the month of May, pursuant to § 365(d)(3). (R. at 8).

C. Chapter 7 Liquidation

At the beginning of the hearing held on May 29, 2020, the Debtor converted its chapter 11 case to a chapter 7 case. (*Id.*). The Trustee was appointed. (*Id.*). The bankruptcy court granted the Debtor's motion to reject both the Lease and the franchise agreement, effective May 5, 2020. (*Id.*).

Once the Trustee retained counsel, it took an aggressive posture against Touch of Grey. (*Id.*). The Trustee objected to Touch of Grey's motion to compel payment for the entire

month of May. (*Id.*). The Trustee also commenced an preference claim seeking to avoid and recover the $250,000 payment the Debtor made to Touch of Grey pursuant to the forbearance agreement on December 7, 2019. (*Id.*). In response, Touch of Grey asserted the subsequent new value defense to the Trustee's preference claim under 11 U.S.C. § 547 (c)(4). (*Id.*). Mediation was unsuccessful, and the parties filed cross-motions for summary judgment. (R. at 9).

II. Procedural Posture

The Bankruptcy Court for the District of Moot ruled in favor of the Trustee on both issues. (R. at 9). The court concluded that 11 U.S.C. § 365(d)(3) only required the Debtor to pay rent for the five days that it had occupied the Premises prior to rejection. (*Id.*). The bankruptcy court granted summary judgment to the Trustee, 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 section 503(b)(9). (*Id.*). Accordingly, a judgment in the amount of $250,000 was entered in favor of the Trustee and against Touch of Grey. (*Id.*). Touch of Grey timely appealed to the United States District Court for the District of Moot, which affirmed. (*Id.*). Touch of Grey thereafter timely appealed to the Thirteenth Circuit Court of Appeals, which also affirmed on both issues. (*Id.*). The Petitioner timely petitioned this Court for writ of certiorari, which this Court granted.

STATEMENT OF ARGUMENT

The Thirteenth Circuit erred in its interpretation of 11 U.S.C. § 547(c)(4), and this Court should reverse its decision. Instead of conducting a full statutory analysis, the Thirteenth Circuit decided that, because the statute did not provide an explicit temporal cutoff for "otherwise unavoidable transfers," no cutoff existed. This conclusion is not only illogical, but flies in the face of Supreme Court precedent declaring that statutory silence "normally creates ambiguity. It does not resolve it." *Barnhart v. Walton*, 535 U.S. 212, 218 (2002).

Even still, the statute's language implies that the subsequent new value defense calculation includes only pre-petition transfers. In 11 U.S.C. § 547, the term "transfer" is used only to refer to preferential transfers, which by definition occur within the 90 days prior to the petition date. The statute's use of the term "debtor" instead of "estate" or "debtor-in-possession" excludes post-petition transfers by its terms. Additionally, "otherwise unavoidable transfer" can only mean one of the other defenses to preference claims, which does not include administrative expense distributions under 11 U.S.C. § 503(b)(9). Finally, the Trustee's reading of the statute would also mean that new value could be extended beyond the petition date, which is impractical, and unsupported by case law.

Further statutory context clues, such as the title of the section ("Preferences") and the statute of limitations support that the petition date cuts off the calculation. Other provisions of 11 U.S.C. § 547, such as § 547(c)(5), have been read to cut off calculation at the preference date.

Even if this Court finds the statute to be ambiguous in light of the above, the legislative history confirms Touch of Grey's position. The Senate Committee Report accompanying the 1978 amendments refer only to exchanges within the 90-day pre-petition period when discussing 11 U.S.C. § 547(c)(4).

This Court can be secure in overturning the Thirteenth Circuit's decision because bankruptcy policy encourages creditors to continue doing business with troubled debtors. Nor is Touch of Grey "double-dipping." Touch of Grey has received no more than payment on an outstanding invoice for supplying a struggling debtor as it attempted to avoid bankruptcy.

The Thirteenth Circuit also erred in its interpretation of 11 U.S.C. § 365(d)(3). This section requires a trustee to satisfy all lease obligations under an unexpired nonresidential real property lease even if parts of the obligations are allocable to a post-rejection period. The Thirteenth Circuit erroneously held that § 365(d)(3) is ambiguous because the terms

"obligations," "arise," and "under any unexpired lease of nonresidential real property" have more than one meanings. However, § 365 (d)(3) plainly compels a trustee to perform all the lease obligations of the debtor that arise prior to rejection. Unlike the term "claim," which is defined under the Bankruptcy Code as encompassing unmatured and contingent rights to payment, the term "obligations" should be construed narrowly based on its common meaning which covers legally binding duties only. As the statute intentionally uses the term "obligations" instead of the broader term "claim," the trustee is required to perform lease obligations pursuant to the terms of the lease in the context of § 365 (d)(3).

The plain language of the statute also unambiguously mandates that the terms of the lease govern *when* a debtor's obligation "arises." Since the term "arise" is tied with an unexpired nonresidential real property lease under § 365 (d)(3), this term can only be construed as an absolute occurrence rather than an accrual method. The grammatical structure of the statute also compels the Court to read the phrase "under any unexpired lease of nonresidential real property" as the modifier of the verb "perform" in the context of § 365(d)(3). The "under" phrase is placed between two phrases of time restrictions: "after the order for relief" and "until such lease is assumed or rejected." This placement prevents us from reading these two phrases of time restrictions as an consecutive period of time. Consequently, the phrase "under any unexpired lease of nonresidential real property" modifies the term "perform."

Because the meaning of § 365(d)(3) is plain and unambiguous, it is inappropriate to examine pre-Code practices or legislative history. Even still, Congress expressly intended to alter pre-Code practices by exempting landlords from proving the existence of an administrative priority claim under 11 U.S.C. § 503(b)(1) in order to obtain payment under § 365(d)(3). The scant legislative history of § 365(d)(3) also supports the billing date approach. Section 365(d)(3) was adopted to protect the landlord, rather than preserve the estate.

According to Senate floor remarks, the obligations of the debtor under a lease of nonresidential real property should be performed "at the time required in the lease."

The Thirteenth Circuit erroneously employed the so-called "proration" methodology to prevent landlords from gaining a "windfall" under § 365(d)(3). Because the debtor, not the landlord, is in the complete control of when to reject the lease, equity as well as the statute favors full payment to the landlord pursuant to the lease.

Therefore, the Thirteenth Circuit's decision should be reversed because the statutory text plainly indicates the Debtor's obligation under the lease was for the full month of May as of May 1. This is further supported by legislative history indicating congressional intent to alter pre-Code practices. Furthermore, principles of equity favor full payment to the landlord once the debtor rejects the lease.

The Thirteenth Circuit's decision should be reversed on both issues.

STANDARD OF REVIEW

The questions presented are based on statutory interpretation of the Bankruptcy Code, and, as such, are pure issues of law. *Highmark Inc. v. Allcare Health Mgmt. Sys., Inc.*, 572 U.S. 559, 563 (2014). 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).

ARGUMENT

I. The Language and Context of 11 U.S.C. § 547 (c)(4) Indicates that Congress Contemplated Only Pre-Petition Transfers In the Preference Calculation.

Touch of Grey may assert the subsequent new value defense to preference liability because 11 U.S.C. § 547 (c)(4) contemplates only transfers that occurred prior to the petition date, or, at best, is too ambiguous to end the analysis with the plain language. If the text is too ambiguous to rule on by itself, Touch of Grey's position is easily supported by statutory context and holistic Bankruptcy Code analysis, the legislative history, and policy justifications encouraging creditors to continue doing business with struggling debtors.

A. The Text of Section 547 (c)(4) Implies That "Otherwise Unavoidable Transfers" Do Not Include Post-Petition Administrative Expense Distributions.

The Code's text indicates only pre-petition transfers are contemplated for the subsequent new value defense. An analysis of the Bankruptcy Code must always begin with the text of the Code itself. *Mission Prod. Holdings, Inc. v. Tempnology, LLC*, – U.S. –, 139 S. Ct. 1652, 1661 (2019). The subsequent new value defense, enacted in 1978, reads:

> The trustee may not avoid under this section a transfer;
>
> (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).

The double negative in § 547(c)(4)(B) belies straightforward comprehension. Simply put, the new value defense is unavailable to a creditor if the debtor paid for the new value with an "otherwise unavoidable transfer." *See also Kaye v. Blue Bell Creameries, Inc. (In re BFW Liquidation, LLC)*, 899 F.3d 1178, 1189 (11th Cir. 2018) ("So long as the transfer that pays for the new value is itself avoidable, that transfer is not a barrier to assertion of § 547(c)(4)'s subsequent-new-value defense.") (internal citations omitted).

In 2005, Congress enacted the Bankruptcy Abuse Prevention and Consumer Protection Act ("BAPCPA"). As part of this new law, Congress added 11 U.S.C. § 503 (b)(9), which entitles a supplier to an administrative expense payment from the debtor's estate, if the supplier provided goods 20 days before the petition date. Such expenses may only be distributed from the debtor's estate upon permission from the court, after notice and hearing. 11 U.S.C. § 503(a)–(b).

At issue in this case is whether the "otherwise unavoidable transfer" in 11 U.S.C. § 547(c)(4)(B) includes post-petition administrative expense distributions under § 503(b)(9). Touch of Grey contends that, upon close examination of 11 U.S.C. § 547(c)(4) and its statutory context, the section contemplates only pre-petition transfers, as was pre-Code practice, and administrative expenses after the petition date do not preclude asserting the subsequent new value defense.

1. The plain language of Section 547(c)(4) is silent as to the timing of the "otherwise unavoidable transfer," creating ambiguity, not certainty.

As the Thirteenth Circuit observed, § 547(c)(4) "is anything but user friendly." (R. at 12). Still, "the plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997). We begin with the language itself.

When looking solely at § 547 (c)(4), the text contains no language defining timing for the "otherwise unavoidable transfer." Statutory silence on a legal issue with practical implications "normally creates ambiguity. It does not resolve it." *Barnhart v. Walton*, 535 U.S. 212, 218 (2002). Yet the Trustee would have us take this statutory silence to mean the deadline for payments may be extended indefinitely. In agreement with the Trustee, the Thirteenth Circuit made short shrift of its plain language analysis, broadly asserting that the "text of the

statute contains no limitation at all regarding the time to consider whether a payment on account of new value is 'otherwise unavoidable.'" (R. at 12). This conclusion was altogether too hasty, especially considering the only sister Circuit to analyze the issue used the same logic on the exact same text, but came to the opposite conclusion. *Friedman's Liquidating Trust v. Roth Staffing Cos. LP* (*Friedman's*), 738 F.3d 547, 554 (3d Cir. 2013) ("Because the drafters could have set forth a cutoff date, but did not, Appellant urges there is no limit. This reading has some appeal, but does not take into account the context in which the provision is found."). The Thirteenth Circuit's tone as it diverged from the Third Circuit was seemingly unconcerned, even as it created a deep circuit split in the space of a few sentences.

When a statute "in its precise terms, is not explicit," this Court normally considers the statute to be ambiguous. *Negusi v. Holder*, 555 U.S. 511, 518 (2009). For example, in *Negusi*, the Attorney General argued that, since the Immigration and Nationality Act ("INA") did not list duress or coercion as an exception to its "persecutor-ban", there must be no statutory exception. 555 U.S. at 517–18. This Court disagreed. *Id.* On balance, since the statute was silent, and the petitioner's linguistic analysis of the term "persecution" held water as well, the statute was too ambiguous for a conclusive plain language analysis. *Id.* at 518. This case's issue is similar in that the Bankruptcy Code also contains no explicit limitation as to when the "otherwise unavoidable transfer" must occur. 11 U.S.C. § 547(c)(4)(B).

The difference between the facts of this case and *Negusi* lies in the weight of statutory context clues in the Bankruptcy Code as compared to the INA. In *Negusi*, the petitioner argued that "persecution" implies moral blameworthiness, and thus implied the availability of a coercion or duress defense. 555 U.S. at 518. Though the Court found this argument weak, on balance it found the language ambiguous because the statute did not speak to the precise issue. *Id.* Here, the *Negusi* petitioner's argument pales in comparison to the weight of context clues in 11 U.S.C. § 547 (c)(4). *See infra*, A.2 – B.5.

Furthermore, even if this Court found the provision to be ambiguous, the practice on this issue before 1978 was to cut off preference calculations (including their defenses) at the petition date. The Supreme Court "will not read the Bankruptcy Code to erode past bankruptcy practice absent a clear indication that Congress intended such a departure." *Cohen v. de la Cruz*, 523 U.S. 213, 221 (1998). The silence of 11 U.S.C. § 547 (c)(4) is altogether inconclusive, but a multitude of statutory clues and context indicate that the subsequent new value defense must include only pre-petition transfers.

2. The term "transfer" as used in Section 547 refers only to preferential transfers, which by definition must occur 90 days before the petition date.

The "otherwise unavoidable transfer" qualifier to the new value defense must refer to pre-petition transfers based on the use of the word "transfer" in this section.

Though the Bankruptcy Code defines "transfer" for the entire chapter, this definition is very broad and does not aid the specific construction of § 547. *See* 11 U.S.C. § 101 (54)(D) ("Transfer means... each mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with property or an interest in property."). 11 U.S.C. § 547 (b), however, defines a preferential "transfer" very specifically. Of particular importance is § 547(b)(4), identifying preferential transfers as those "made on or within 90 days before the date of the filing of the petition."

After defining a preferential transfer, the statute goes on to list nine exceptions to preferential transfers, one of which is the subsequent new value defense. The beginning of this section states, "the trustee may not avoid *under this section* a transfer..." § 547 (c). This key language clarifies that a "transfer" under (c) refers only to a preferential transfer, as defined in § 547 (b).

Now we arrive at the new value defense. Read continuously, the relevant pieces read:

> The trustee may not avoid under this section a *transfer* 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... 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) (emphasis added). The term "transfer" is used three times, in one sentence. When used in one sentence, identical words are strongly presumed to have the same meaning. *Brown v. Gardner*, 513 U.S. 115, 118 (1994). Consequently, each and every use of the word "transfer" in this sentence must presumptively refer to preferential transfers as defined in § 547 (b).[1]

The Trustee's interpretation, by including transfers occurring beyond the petition date, would result in the final use of the term "transfer" having a more expansive meaning than the former two, which flies in the face of statutory construction principles. *See Iselin v. United States*, 270 U.S. 245, 251 (1926) (refusing to construe a statute to enlarge its scope). Indeed, this use of "transfer" would be the only type of transfer within this section that encompasses post-petition transfers. This conclusion is illogical. The most reasonable interpretation of the word "transfer" in this context is that the term is consistent with every other usage of the term in § 547; referring only to pre-petition transfers.

3. If otherwise unavoidable transfers under Section 547(c)(4)(B) extend beyond the petition date, new value may also extend beyond the petition date, which renders the statute internally inconsistent and contrary to established case law.

Just as § 547(c)(4) describes no temporal limitation for the otherwise unavoidable transfer, it also includes no temporal limitation for the subsequent new value extended. Under the Trustee's reading of the statute, it follows that new value may also be extended by the creditor to the debtor well beyond the Petition date. This fails as a matter of statutory inconsistency, and because it contradicts the vast majority of case law.

[1] This argument is bolstered by Congress use of the past-tense in § 547 (c)(4)(B) (i.e. "gave new value. . ."; not secured by an otherwise. . ."; "did not make. . ."). This tense choice indicates that the "otherwise unavoidable transfer" is a condition precedent to qualifying for the subsequent new value defense, which all must have occurred prior to the petition date.

The Third Circuit in *Friedman's* explained the inconsistency inherent in this reading. 738 F.3d at 557 ("If there is no temporal limit on 547(c)(4)(B), then the time for extension of new value itself—not just the 'otherwise unavoidable transfer' paying the new value—must also be open-ended."). Yet, as the Third Circuit explained, courts almost universally refuse to consider new value advanced after the petition date in the new value preference defense. *Friedman's*, 738 F.3d at 557 (listing six bankruptcy court cases and one Eighth Circuit case in support).

"[T]he Trustee would have the Court conclude that post-petition payments remain in play while post-petition advances of new value are excluded from the analysis under 547(c)(4). Logically, and as a matter of statutory consistency, the Trustee's argument fails." *In re Murray, Inc.*, No. 04-13611, 2007 WL 5595447, at *2 (Bankr. M.D. Tenn. June 6, 2007). As a practical matter, ending the new value analysis at the petition date simplifies the preference calculation, establishing certainty for debtors and creditors alike. The Trustee cannot have it both ways; either new value and "otherwise unavoidable transfers" may extend beyond the petition date, or both must end at the petition date.[2] The latter is the only correct choice, considering statutory consistency and the bulk of court decisions on the issue.

4. The administrative expense distributed to Touch of Grey under Section 503(b)(9) was not an "otherwise unavoidable transfer" under Section 547(c)(4).

The construction of § 547(c)(4) implies that an "otherwise unavoidable transfer" refers to one of the eight other exceptions to preferential transfer avoidance, and consequently, must occur before the petition date.

11 U.S.C. § 547 (c)(4) is one of nine creditor exceptions to preference avoidance by the trustee, including, for example, the "ordinary course of business" defense to preference avoidance. 11 U.S.C. § 547 (c)(2). The use of the phrase "otherwise unavoidable transfer" in

[2] We decline to wake up to "find a day that broke up [our] mind, destroyed [our] notion of circular time," (see *Sway* by the Rolling Stones), as much as the Respondents may wish this we could.

§ 547(c)(4)(B) naturally refers to one of the other eight exceptions. 11 U.S.C. § 547(c)(1)–(9). By referencing the other exceptions, the "transfer" in question would otherwise be a preferential transfer, subject to all § 547 (b) elements, including the 90-day pre-petition element. Consequently, the "otherwise unavoidable transfer" could only occur pre-petition.

In an attempt to characterize the Debtor's administrative expense as an "otherwise unavoidable transfer," the Thirteenth Circuit scours the Bankruptcy Code, eventually landing in 11 U.S.C. § 549. (R. at 13). This section simply states that post-petition transfers which are not authorized by the court are avoidable by the trustee. 11 U.S.C. § 549 (a). However, the Thirteenth Circuit took this to also mean that the reverse must be true; any post-petition transfers which *are* authorized by the court are therefore *unavoidable* under § 547(c)(4)(B). (R. at 13). This reasoning contradicts itself. The text of § 549 (a) sets out only those transfers which the trustee *may* avoid; the exceptions to § 549 (a) avoidable transfers are then listed in § 549 (b)–(c). Thus, for the post-petition transfer in this case to be "otherwise unavoidable," it would need to fit § 549 (b) or (c). As § 549 (b) governs involuntary bankruptcy proceedings, and (c) concerns only real property, the administrative expense at issue in this case does not fit either exception in § 549.

The administrative expense distribution in this case fits neither of the unavoidable transfer exceptions in § 549, nor any of the unavoidable transfer exceptions in § 547 (c). Therefore, the administrative expense distribution cannot be an "otherwise unavoidable transfer" under § 547 (c)(4).

5. Had Congress intended to include both pre- and post-petition transfers, it would have used "trustee" or "debtor-in-possession" or "estate," since the term "debtor" implies actions taken by the debtor prior to filing the petition.

Congress used the word "debtor" in drafting § 547(c)(4). The use of the word "debtor" as opposed to "estate," "trustee," or "debtor-in-possession" implies that the transfers in

question include only pre-petition transfers. The Thirteenth Circuit dismissed Congress' use of this terminology too readily.

Once a debtor files for bankruptcy, they are no longer referred to as a "debtor," but rather a "debtor-in-possession." If Congress had expressed specific intent regarding the inclusion of post-petition transfers, it should have composed the statute to say "on account of which new value **the debtor or debtor-in-possession** did not make an otherwise unavoidable transfer to or for the benefit of such creditor." Congress made clear it contemplated the distinction elsewhere in § 547.[3] A number of bankruptcy courts have already found this argument persuasive. *See, e.g.*, *In re Phoenix Rest. Grp., Inc.*, 317 B.R. 491, 497 (Bankr. M.D. Tenn. 2004) (postulating that, had Congress intended post-petition payments to be included in § 547(c)(4)(B), "the section would have included something like 'an otherwise unavoidable transfer of an interest of the estate in property.'"); *In re Sharoff Food Serv., Inc.*, 179 B.R. 669, 678 (Bankr. D.Co. 1995) ("Any post-petition advances are given to the debtor's estate, not the debtor"); *In re D.J. Mgmt. Grp.*, 161 B.R. 5, 6 (Bankr. W.D.N.Y. 1993) ("If Congress had intended to recognize a new value exception for credit extended to the 'estate' or to the 'trustee,' it would not have used the word 'debtor.'") (some internal quotations omitted).

At a minimum, the omission of phraseology such as "debtor-in-possession" renders § 547 (c)(4) too ambiguous to accept that Congress intended post-petition transfers to be included in the calculation. Still, taking the text at face value, use of the word "debtor" would impliedly preclude transfers made from the debtor's estate, including administrative transfers such as the one at issue in this case.

[3] "'[N]ew value' means money or money's worth in goods, services, or new credit, or release by a transferee of property previously transferred to such transferee in a transaction that is neither void nor voidable by the debtor or the trustee." 11 U.S.C. § 547(a)(2).

B. Statutory Context Implies Section 547 Governs Only Pre-Petition Transfers.

The surrounding context of § 547 further implies Congress contemplated only pre-petition transfers for the calculation of the subsequent new value defense. Before declaring a section ambiguous, courts must undertake a thorough analysis. *Friedman's*, 738 F.3d at 554. Statutory construction "is a holistic endeavor," especially when considering the Bankruptcy Code. *United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988). The section title, statute of limitations, and hypothetical liquidation test all indicate Congress contemplated only pre-petition transfers.

1. Section 547 is titled "Preferences," implying the section governs only pre-petition transfers.

First and foremost, the section is titled "Preferences." *See Almendarez-Torres v. United States*, 523 U.S. 224, 234 (1998) ("[T]he title of a statute and the heading of a section are tools available for the resolution of a doubt about the meaning of a statute." (internal quotation marks omitted)). The section only undertakes to define avoidable preferences, and set out nine exceptions to preferential transfers. As the Third Circuit has already observed, this title "suggests that it concerns transactions occurring during the preference period." *Friedman's*, at 555. 11 U.S.C. § 547.

2. The statute of limitations for filing a preference avoidance action begins on the petition date.

The statute of limitations for filing a preference avoidance action under § 547 begins running on the petition date. 11 U.S.C. § 546 (a). Including post-petition transfers into the preference calculation would seriously muddle the preference exposure calculation if Trustees were to encounter a statute of limitations problem. Furthermore, "If Congress had intended to allow for post-petition transactions to affect the impact on the estate, it is likely that it would have crafted a different statute of limitations." *See Friedman's*, 738 F.3d at 556. As a statutory

interpretation context clue, as well as a practical matter, this indicates § 547 (c)(4) only contemplates pre-petition transfers.

3. The hypothetical liquidation analysis occurs on the petition date.

Under 11 U.S.C. § 547 (b)(5), courts must conduct a hypothetical analysis comparing payment received by a creditor during the preference period with what the creditor might have received had the payment not been made, as under a chapter 7 filing. Though the statute does not explicitly detail when the analysis must be performed, courts have determined this "hypothetical liquidation analysis" must be performed by the petition date. *In re Friedman's*, 738 F.3d at 556 (citing *In re Union Meeting Partners*, 163 B.R. 229, 237 (Bankr. E.D. Pa. 1994); 5 Collier on Bankruptcy ¶ 547.03 (16th ed. 2013)). This provides key insight into the subsequent new value defense, because "extending preference analysis past the petition date would be inconsistent with § 547(b)(5)." *Id.*

The text and context of the subsequent new value defense strongly implies that only pre-petition transfers should factor into the subsequent new value defense, or, at best, the statute is ambiguous.

C. Legislative History Ascertains That Section 547 (c)(4) Includes Only Pre-Petition Transfers.

A full textual and contextual analysis of § 547 (c)(4) makes clear that Congress only contemplated pre-petition transfers to qualify the subsequent new value defense. However, if this Court concludes that the provision is ambiguous, contemporaneous legislative history speaks directly on this issue. "Where, as here, the resolution of a question of federal law turns on a statute and the intention of Congress, we look first to the statutory language and then to the legislative history if the statutory language is unclear." *Blum v. Stenson*, 465 U.S. 886, 896 (1984). It is exceedingly clear that the drafters of the Bankruptcy Code intended the subsequent new value defense to include only pre-petition transfers.

The Senate Committee Report that accompanies the 1978 Bankruptcy Code amendments explicitly referred to § 547 (c)(4) as calculating only pre-petition payments. "If the creditor and the debtor have more than one exchange **during the 90-day period**, the exchanges are netted out according to the formula in paragraph (4)." S. Rep. 95-989 (1978), 1978 U.S.C.C.A.N. 5787, 5874 (emphasis added).

Congress could hardly be clearer. "The exchanges" must be the preference payment, the extension of new value, and any otherwise unavoidable transfers pursuant to § 547 (c)(4). The Committee Report clearly limits these exchanges to those that occur during the 90-day pre-petition period. Though Congress enacted § 503 (b)(9) subsequent to § 547 (c)(4), there is no legislative history contextualizing § 503 (b)(9) that indicates Congress intended for administrative expense claims to also be part of that calculation under § 547 (c)(4). Because the Thirteenth Circuit came to an interpretation "fundamentally at odds" with the expressed legislative intent, their decision must be overturned. *Ron Pair Enters., Inc.*, 489 U.S. 235, 242 (1989).

D. Bankruptcy Policy Underlying Section 547 (c)(4) Encourages Creditors to Continue Doing Business with Troubled Debtors

In justifying its decision, the Thirteenth Circuit relies entirely on one of the Code's policy considerations, namely, equal distribution among creditors. (R. at 15). This reliance is unpersuasive because § 547(c)(4) and § 503(b)(9) were drafted with entirely different policies in mind.

1. The subsequent new value defense was designed to encourage creditors to continue doing business with troubled debtors.

The purpose of the subsequent new value defense is specifically to encourage creditors to continue doing business with troubled debtors. *Jones Truck Lines, Inc. v. Full Serv. Leasing Corp.*, 83 F.3d 253, 257 n.3 (8th Cir. 1996) ("Congress intended to discourage creditors from racing to the courthouse to dismember the debtor during his slide into bankruptcy.") (internal

citations and quotations omitted). *See also In Re Phoenix Rest Group, Inc.* at 547; *In re Energy Coop.*, 130 B.R. 781, 789 (1991) ("The policy behind allowing a new value defense is to encourage creditors to continue to extend credit to a financially distressed debtor up to the date that the debtor files bankruptcy.").

The purpose of 11 U.S.C. § 503 (b)(9) is similar, and has little to do with equality of distribution among creditors. Administrative expense claims provide peace of mind to creditors so they may continue extending credit to businesses heading for bankruptcy. *In re Arts Dairy, LLC*, 414 B.R. 219, 220–21 (N.D. Ohio 2009). Additionally, it discourages debtors from acquiring goods at a time payment for the goods would not have to be tendered. *Id. See also In re ADI Liquidation, Inc.*, No. BR 14-12092 (KJC), 2019 WL 211528 at *5 (D. Del. Jan. 16, 2019) ("Congress spoke clearly when it gave certain creditors preferential treatment under § 503(b)(9).").

To interpret § 547 (c)(4) otherwise would engender too much uncertainty for creditors when dealing with a troubled business. Once the bankruptcy petition is filed, should the creditor assert its subsequent new value defense to preference liability, or should it file for an administrative expense claim? Forcing such a choice would naturally "chill their willingness to do business with troubled entities." *See Commissary Operations, Inc. v. Dot Foods, Inc. (In Re Commissary Operations Group, Inc.*, 421 B.R. 873, 879 (M.D. Tenn. 2010).

"If it is a rule in bankruptcy that all creditors must be treated equally, surely the exceptions swallow the rule." *Friedman's*, 738 F.3d at 560. With nine exceptions to the trustee's ability to avoid preference transfers, a more apt characterization of the Code's policy is that improper preferences must be avoided. The administrative expense rule, which relies on the court's approval, is not an improper preference transfer. Here, Touch of Grey was willing to continue doing business with the Debtor, even after it was aware of its financial troubles as

early as November 2019. Touch of Grey's behavior is exactly the manner of conducting business that the Bankruptcy Code is drafted to encourage.

2. The creditor's right to request a section 503(b)(9) administrative expense is not "double-dipping."

The Thirteenth Circuit was wrong to accuse Touch of Grey of "double dipping" by attempting to avoid preference transfers through the use of the subsequent new value defense because it creates the false impression that Touch of Grey is being paid twice the amount it is owed. (R. at 15). This is false. *See Friedman's*, 738 F.3d at 559 ("Appellant's reference to a creditor's 'double dipping' is misleading because it implies that the creditor is receiving payment for goods or services that were never provided, or that the creditor is being paid twice.").

Touch of Grey shipped Dark Star products to the Debtor on credit. After the bankruptcy petition was filed, Touch of Grey received administrative expense payments on an already outstanding invoice. Here, the Trustee is attempting to claw back earlier payments made to Touch of Grey, for goods which the Debtor needed to stay above water. Touch of Grey has not been unjustly enriched, it was simply paid for the goods and services it provided to the debtor.

It is also important to understand the nature of administrative expenses. As explained in *In re Commissary Operations, Inc.*, an administrative expense claim only affords a creditor the right to request priority payment from the court for goods to which the creditor no longer has any claim. 421 B.R. at 877. The goods "are exactly the same as money or money's worth as goods shipped free of the seller's strings." *Id.* at 878. Unjust enrichment could occur if, for example, the creditor successfully defended against a preference claim, received payment for administrative expenses, *and* retained a reclamation right to the goods. *See id.* at 878 (distinguishing § 503(b)(9) claims from reclamation claims with reference to the subsequent new value defense and post-petition transfers). That is not the case here. Nor is paying the

administrative expense up to the debtor-in-possession, either – it is entirely dependent upon whether the court approves the claim. *Id.* at 878.

By the plain language of 11 U.S.C. § 547(c)(4), post-petition administrative expenses cannot be included in the subsequent new value defense calculation; at best, § 547(c)(4) is too ambiguous to end the analysis with the text. Considering the statutory context, legislative history, and the policy underlying the subsequent new value defense, the Thirteenth Court erred in allowing post-petition transfers into the subsequent new value defense calculation.

II. Section 365(d)(3) Unambiguously Requires a Debtor to Perform Its Lease Obligations Pursuant to the Terms of the Lease, Which Mandates the Trustee to Pay Rent for the Entirety of the Month During Which the Lease Was Rejected.

The Thirteenth Circuit erred also in holding that 11. U.S.C. § 365(d)(3) does not require the trustee to perform the lease obligations which were due prior to rejection but allocable to the post rejection period. Section 365 empowers a trustee to assume or reject an executory contract or unexpired lease upon court approval. 11 U.S.C. § 365(a). Section 365(d)(3) specifically establishes *what* the trustee must do with respect to an unexpired nonresidential property lease during the post-petition, prerejection period. 11 U.S.C. § 365(d)(3). The text of § 365 (d)(3) is plain; a trustee must perform the obligations of a lease for the entirety of the month during which the lease was rejected. By mistakenly importing a "proration" methodology into § 365(d)(3), the Thirteenth Circuit disregarded the plain language of the statute and set a dangerous precedent of legislating from the bench.

A. The Plain Language of Section 365(d)(3) Requires a Debtor to Perform Its Lease Obligations Pursuant to the Terms of the Lease.

"The starting point in any case involving construction of a statute is the language itself." *St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531, 541 (1978); *see United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989). A court should always turn first to the cardinal canon of construction—the Plain Meaning Rule—before all others. *Conn. Nat'l Bank v. Germain*¸ 503 U.S. 249, 253 (1992). If the text of the statute is plain, no further statutory

interpretation is required. *Ron Pair Enters., Inc.*, 489 U.S. at 242. This Court has repeatedly reiterated the importance of the Plain Meaning Rule that when the statute is clear, "the sole function of the court is to enforce it according to its terms." *Id.*, at 241 (quoting *Caminetti v. United States*, 242 U.S. 470, 485 (1917)).

Section 365 (d)(3) requires tenants to perform all obligations arising under a lease during the often-lengthy period between the filing of a bankruptcy petition until the debtor/tenant rejects or assumes the lease. The provision provides, in pertinent part:

> The trustee shall timely perform all the *obligations* of the debtor, except those specified in § 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) (emphasis added).

Contrary to the opinion below, even though the terms "obligations" and "arise" are not defined by the Bankruptcy Code, § 365 (d)(3) is not ambiguous. Traditional principles of statutory construction define these words according to their "ordinary, contemporary, common meaning." *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. Partnership*, 507 U.S. 380, 388 (1993) (*quoting Perrin v. United States*, 444 U.S. 37 (1979)). To "arise" is defined as "[t]o originate; to stem (from)." *Black's Law Dictionary* 133 (11th ed. 2019).The term "obligation" is defined as "[a] formal, binding agreement or acknowledgement of a liability to pay a certain amount or to do a certain thing for a particular person or set of persoons." *Black's Law Dictionary* 1292 (11th ed. 2019). In the context of a nonresidential lease, the most natural reading of the term "obligations" seems to be "something that one is legally required to perform under the terms of the lease." *In re Montgomery Ward Holding Corp.*, 268 F.3d 205, 209 (3d Cir. 2001).

Incorporating the ordinary meanings into the statute, the plain language of § 365(d)(3) mandates the trustee to perform all binding duties that originate from and under an unexpired lease during the post-petition, prerejection period. As more fully discussed in Section II.A.1

and Section II.A.2, Congress did not define the duties of the tenant by using the broader term "claim" or by stating such duties arise under the Bankruptcy Code. Instead, the language of § 365(d)(3) ties the tenant's duties to the term of an unexpired lease. Therefore, the lease controls when the Debtor's obligation arises. In this case, when the lease was rejected on May 5th, 2020, the trustee was required to pay the full amount that was due on May 1, 2020 (i.e., the billing date approach), not to pay rent for the first five days only (i.e., the proration approach). By its plain meaning, § 365(d)(3) simply requires the trustee to pay the May rent in full and without proration as it came due during the prerejection period.

1. The Thirteenth Circuit's reading of the term "obligations" conflicts with the plain meaning of the statute as Congress deliberately chose to use the term "obligations" rather than the broader term "claim" in Section 365(d)(3).

Congress "says in a statute what it means and means in a statute what it says." *Conn. Nat'l Bank*, 503 U.S. at 254. While the term "claim" is defined in the Bankruptcy Code under 11 U.S.C. § 101 (5)(A) as a "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, *unmatured*, disputed, undisputed, legal, *equitable*, secured, or unsecured," Congress still chose to use the term "obligations" in 11 U.S.C. § 365(d)(3) instead of the defined term "claim." 11 U.S.C. § 101(5)(A) (emphasis added). As discussed above, the common meaning of "obligations" covers legally binding duties only, but the definition of the term "claim" encompasses any right to payment, including contingent, unmatured, or unliquidated ones. *See Geiger v. Commonwealth of Pa. (In re Geiger)*, 143 B.R. 30, 32 (E.D. Pa. 1992) ("[t]here is no question that Congress intended to adopt the broadest possible definition of the term 'claim' when it enacted 11 U.S.C. § 101(5), which speaks in terms of a 'right to payment.'").

The Thirteenth Circuit's conclusion that the term "obligations" is susceptible to more than one meaning is incorrect. By holding that the word "obligations" could be construed as "either an absolute occurrence" or "something that is continuing to accrue," the Thirteenth

Circuit erroneously confused the meaning of a narrow term "obligations" with that of the broader word "claim." (R. at 17.) In the context of nonresidential property lease, a legally binding "obligation" to pay rent is always defined pursuant to the term of the lease as an absolute occurrence. Only an unmatured or equitable right to payment could continue to accrue. Specifically, for the rent payment allocable from May 6th to May 31st, the Thirteenth Circuit's approach mistakenly transformed a post-petition right to payment, which had been specified under the terms of a lease, into a contingent or unmatured post-rejection duty to pay.

As Judge Sotomayor mentioned in *Bullock's, Inc. v. Lakewood Mall Shopping Ctr. (In re R.H. Macy & Co., Inc.)*, it is "abundantly clear that Congress knew quite well what 'claim' meant." 1994 WL 482948, at *12 (S.D.N.Y. Feb. 23, 1994) (Sotomayor, J.) Such term is used throughout the Bankruptcy Code. *See, e.g.*, 11 U.S.C. § 348(d) (granting priority for claims arising after order for relief and before conversion); *id.* § 503(b)(1) (providing for allowance of administrative expenses, rather than administrative claims); *id.* § 507(a) (designating different priorities for various pre-petition claims against debtor). If Congress intended for Section 365(d)(3) to encompass the broad reach of "claim" to incorporate unmatured and equitable rights to payment, it would have provided so. *See In re DeCicco of Montvale, Inc.*, 239 B.R. 475, 480 (Bankr. D.N.J. 1999). Therefore, it is inappropriate to presume that Congress meant "claim" and not "obligations" when drafting § 365(d)(3), as the language of the statute clearly rejects such presumption. *See Matter of F & M Distributors, Inc.*, 197 B.R. 829, 832 (Bankr. E.D. Mich. 1995) (finding that the terms "obligation" and "claim" do not have the same meaning in the context of Section 365(d)(3)).

Furthermore, the Thirteenth Circuit's approach, which equated "obligations" with "claims," leads to an absurd result in tax liability cases—the nullification of § 365(d)(3). In a lease agreement under which a tenant agrees to pay the property taxes, the tax bill is paid annually by the landlord to the government and the tenant is required to reimburse the same

amount of money to the landlord. Therefore, no lease "claim" arises *after the petition of bankruptcy* because the Debtor's duty to reimburse the taxes arises *at the signing of the lease*—not the accrual of the landlord's tax liability. *See In re Montgomery Ward Holding Corp.*, 268 F.3d at 209 (holding that unmatured rights to payment under a lease "exist from the date the lease is executed, and no right to payment would ever arise under an unexpired lease after the order for relief."). If the Thirteenth Circuit's conclusion were adopted, a landlord could never compel a tenant to perform the contractual obligations of paying property taxes under § 365(d)(5) because unmatured rights to reimbursement arose prior to the bankruptcy petition and could only be treated as unsecured debts. This Court has held that terms should be "so limited in their application as not to lead to injustice, oppression, or an absurd consequence." *United States v. Kirby*, 74 U.S. 482, 486 (1869). Such reading would render the "arising" language of § 365(d)(3) superfluous and "could not be what Congress meant." *Matter of F & M Distributors, Inc.*, 197 B.R. 829, 832 (Bankr. E.D. Mich. 1995).

The statute plainly requires the debtor to "timely perform" its "obligations . . . under any unexpired lease. . ." until the lease has been assumed or rejected. 11 U.S.C. § 365(d)(3). The only plausible reading of the term "obligations" is to construe it as an absolute occurrence pursuant to the lease, rather than a claim continuing to accrue as time goes by. Contrary to the Thirteenth Circuit, the statute is not ambiguous and a billing date approach which fits the plain meaning of § 365(d)(3) should be adopted.

2. Section 365(d)(3) unambiguously mandates that the terms of the lease govern *when* a debtor's obligation "arises."

11 U.S.C. § 365(d)(3) specifically ties the obligations of a debtor with the term of the lease by providing that "the trustee shall timely perform all the obligations of the debtor…arising from and after the order for relief under any unexpired lease of nonresidential real property…" Although the language "arising from and after the order for relief under any unexpired lease" is difficult to understand, it does not necessarily follow that the provision is

ambiguous. Here, unlike the statutory silence seen in 11 U.S.C. § 547 (c)(4) (*see supra* Section I.A.i), the text provides an answer.

As the Third Circuit discussed in *In re Montgomery Ward Holding Corp.*, there are two possible readings for this phrase: 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. The majority of *In re Montgomery Holding Corp.* court adopted the preposition as modifying the term "lease" and read the requirement as relating to obligations "arising from[,] and after the order of relief under[,] any unexpired lease." *Id.* The dissenting opinion of Judge Mansamann read the preposition as modifying the more proximate noun, "order," and construed the phrase "from and after" as a redundant pair, just like the common phrases "over and above" and "cease and desist," and used it in the sense of "commencing with." *Id.*, at 212, n.1 (Mansmann, J., dissenting). Using the second approach, the language of § 365(d)(3) should be construed as relating to obligations "arising from and after [the date of] the order for relief under any unexpired lease."

After carefully comparing these two approaches, we believe the second approach is more persuasive. The first approach, which inserted commas to resolve the perceivable difficulty with the usage of "from," creates a new usage problem. While "obligations arising from any unexpired lease" and "obligations arising under any unexpired lease" are also a redundant pair, restricting "under any unexpired lease" to "after the order of relief," while leaving the window open for "obligations arising from any unexpired lease" without any time restrictions, renders the modifier "after the order of relief" meaningless. That approach directly contradicts the core function of § 365(d)(3). By contrast, the second approach creates no similar confusion. It is not uncommon to use the phrase "from and after" to mean "from and after the date of a certain event."

Under both approaches, however, the phrase "from and" has some overlaps with the rest of the provision, and the word "arising" is closely tied to the unexpired nonresidential property lease. Even though there could be some syntactical dispute regarding the "from and after" language of § 365(d)(3), the statute clearly requires that "an obligation arises under a lease for the purposes of § 365(d)(3) *when the legally enforceable duty to perform arises under that lease*." *Id.*, at 211; *see also In re Koenig Sporting Goods, Inc.*, 203 F.3d 986 (6th Cir. 2000) (where rent for the coming month was due under the lease on the first of the month and the tenant rejected the lease on the second, "§ 365(d)(3) is unambiguous as to the debtor's rent obligation and requires payment of the full month's rent."). Again, the Thirteenth Circuit's purported reading that "arise" could be understood in an accrual sense confused the "obligations" arising from the term of the lease with the "claims" based on the Bankruptcy Code or other equitable remedies. This interpretation conflicts with the plain meaning of the statute and should be rejected.

3. The grammatical structure of the statute compels the phrase "until such lease is assumed or rejected" to modify the term "perform."

The Thirteenth Circuit erroneously found ambiguity in the phrase "until such lease is assumed or rejected" when none existed. The pertinent language of § 365(d)(3) provides that "[t]he trustee shall timely perform all the obligations of the debtor. . . arising from and after the order for relief under any unexpired lease of nonresidential real property, until such lease is assumed or rejected." 11 U.S.C. § 365(d)(3). Based its reasoning on *In re Ames Dep't Stores, Inc.*, the Thirteenth Circuit held that the phrase "until such lease is assumed or rejected" was subject to two plausible interpretations. 306 B.R. 43, 67 (Bankr. S.D.N.Y. 2004). The Thirteenth Circuit concluded that the phrase could be construed to modify the term "perform," supporting a billing date approach, or it could be read as modifying the term "obligations," which meant the "obligations" were used in an accrual sense and such accrual obligations terminated at the time of rejection.

The Thirteenth Circuit's second reading ignored the text of § 365(d)(3). The statute grammatically placed the phrase "under any unexpired lease of nonresidential real property" between two phrases of time restrictions, "after the order for relief" and "until such lease is assumed or rejected." If Congress intended these two phrases to be read as a consecutive time frame modifying the term "obligations," the conditional modifier "under any unexpired lease of nonresidential real property" should have been placed either in front of or after the consecutive restriction window rather than inserted in the middle. By placing the phrase "under any unexpired lease of nonresidential real property" and a comma after the expression "arising from and after the order for relief," the modifier of the term "obligations" ends. The natural reading of the structure of the sentence requires us to construe the phrase "until such lease is assumed or rejected" as modifying the more remote verb "perform."

According to the textual analysis above, the language of § 365(d)(3) clearly and unambiguously requires the debtor to perform its obligations pursuant to the lease term, which mandates the trustee to pay the rent in entirety for the month in which the lease was rejected.

B. Given that the Language of Section 365(d)(3) Expressly Exempted Landlords from Section 503(b)(1) Requirements, Congress Intended to Alter the Pre-Code Practices.

The Thirteenth Circuit erroneously contended that, absent a clear indication that Congress intended to depart from the pre-Code practice of some courts to prorate the debtor's pre- and post-rejection rent duties, such proration approach should not be altered. (R. at 19). Prior to the enactment of § 365(d)(3), post-petition lease obligations of a tenant lease were generally handled under 11 U.S.C. § 503(b) as administrative expenses. *See In re Ames Dep't Stores, Inc.*, 306 B.R. at 68. The "actual, necessary costs and expenses of preserving the estate" are treated as administrative expenses for the purpose of § 503(b) and given priority over general unsecured debts. 11 U.S.C § 503(b)(1)(A). The Thirteenth Circuit mistakenly held that,

since § 503(b)(1) claims are often treated in an accrual approach (i.e., proration), the proration methodology should be imported into § 365(d)(3) as well.

This Court should reject the Thirteenth Circuit's contention which imported the pre-1984 proration methodology into § 365(d)(3) for several reasons. First, when the language of a statute is clear and plain, it is inappropriate to examine pre-Code practices or legislative history. *See Ron Pair Enters., Inc.*, 489 U.S. at 241. Second, given that § 365(d)(3) creates a special exemption to § 503(b)(1) requirements for landlords and the requirement of § 365(d)(3) is distinguished from the pre-1984 administrative expenses claims, Congress expressly altered pre-Code practices. Third, the billing date approach is consistent with the limited legislative history of § 365(d)(3) and nothing in the legislative history supports importation of the proration methodology.

1. Because the plain language of Section 365(d)(3) is clear and unambiguous, it is improper to examine pre-Code practices.

When the statute's language is plain and unambiguous, the inquiry should end. *Ron Pair Enters., Inc.*, 489 U.S. at 241. The sole function of the courts is to enforce the statute according to its plain language. *Caminetti v. United States*, 242 U.S. at 485. As discussed above, the language of § 365(d)(3) clearly expresses congressional intent—that the debtor is required to perform its post-petition, pre-rejection obligations pursuant to the term of the lease—with sufficient precision so that "reference to legislative history and to pre-Code practice is hardly necessary." *Ron Pair Enters., Inc.*, 489 U.S. at 241. The plain statutory language should be conclusive, except in the "rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters." *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982). As more fully discussed in Section II.B.3, Congress enacted § 365(d)(3) to ameliorate the perceived inequities that landlords of commercial properties had faced prior to assumption or rejection of their lease. It is clear that adopting the billing date

approach does not contravene the intent of the framers of the Code. The inquiry should end there, and pre-Code practices are irrelevant to the present application of the statute.

2. By exempting landlords from proving compliance with Section 503(b)(1), Congress altered pre-Code practice.

Even if this Court deems the pre-Code practices relevant, however, the prior proration approach of some courts under § 503(b)(1) does not bind this Court to import the same methodology into § 365(d)(3). The concept of accrual is tied with the § 503(b)(1) requirement of proving necessity for "preserving the estate." By exempting landlords from proving compliance with § 503(b)(1) in the context of § 365(d)(3), Congress clearly deviated from the pre-Code approach.

As discussed above, the pre-1984 proration approach was based on § 503(b)(1) claims. To establish a prima facie case under § 503(b)(1), the creditor must satisfy the two-prong test: (1) the claim arises post-petition and as a result of actions taken by debtor-in-possession; and (2) administrative expenses claimed must benefit the estate. *See Toma Steel Supply, Inc. v. TransAmerican Natural Gas Corp. (In Matter of TransaAmerican Natural Gas Corp.)*, 978 F.2d 1409, 1416 (5th Cir. 1992). In the case of commercial property leases, the landlord must prove that the tenant's occupancy of the premises was an actual and necessary benefit to the estate for the purpose of § 503. *In re Goody's Fam. Clothing Inc.*, 610 F.3d 812, 818 (3d Cir. 2010). Prior to the enactment of § 365(d)(3), a commercial landlord's claims were frequently prorated between pre-petition and post-petition claims because the landlord had to prove administrative expense priority under § 503(b)(1) in order to get post-petition payments. *See, e.g., West Virginia Department of Tax & Revenue v. IRS (In re Columbia Gas Transmission Corp.)*, 37 F.3d 982, 984 (3d Cir. 1994), *cert. denied,* 514 U.S. 1082 (1995). The rationale of the proration approach in the context of § 503(b)(1) is tied with the "actual and necessary benefit" requirement.

However, § 365(d)(3) provides a special exception to the § 503(b) requirements by stating that "[t]he trustee shall timely perform all the obligations of the debtor. . . *notwithstanding* section 503(b)(1) of this title." 11 U.S.C. § 365(d)(3) (emphasis added). The term "notwithstanding" in this provision means "in spite of" or "without prevention or obstruction from or by." *Webster's Third New Int'l Dictionary* 1545 (1971). This means that § 365(d)(3) applies without prevention or obstruction from or by § 503(b)(1). Thus, the post-petition payments in the context of § 365(d)(3) are not limited to those "necessary for preserving the estate." *See In re Krystal Co.*, 194 B.R. 161, 163 (Bankr. E.D. Tenn. 1996). The concepts of "accrual, proration and allocation"—so necessary for distinguishing between pre-petition unsecured debts and post-petition administrative expenses under § 503 (b)(1) —is irrelevant and inapplicable under § 365 (d)(3). *See In re Krystal Co.*, 194 B.R. at 163.

This conclusion is further illustrated by comparing the language of § 365 (d)(3) and that of § 503 (b)(1). The phrase "actual, necessary costs and expenses of preserving the estate," which sets the fundamental rationale for the accrual approach of § 503(b) claims, was given up in the context of § 365(d)(3). Therefore, contrary to the Thirteenth Circuit's contention, such a difference demonstrated the congressional intent to depart from the pre-Code proration practices rather than to reinforce them.

3. The legislative history of Section 365(d)(3) supports adoption of the billing date approach.

Since the language of § 365(d)(3) is unambiguous, there is no justification for consulting the legislative history. *Ron Pair Enters., Inc.*, 489 U.S. at 241. Nevertheless, should the Court elect to consider legislative history, it clearly supports adoption of the billing date approach.

The meager legislative history of § 365(d)(3) consists of the floor remarks of Senator Orrin Hatch, a conferee on the Bankruptcy Amendments and Federal Judgeship Act of 1984:

> This subtitle contains three major substantive provisions which are intended to *remedy serious problems caused shopping centers and their solvent tenants* by the administration of the bankruptcy code.
> …
> A second and related problem is that during the time the debtor has vacated space but has not yet decided whether to assume or reject the lease, the trustee [or debtor-in-possession] has stopped making payments due under the lease. These payments include rent due the landlord and common area charges which are paid by all the tenants according to the amount of space they lease. In this situation, the landlord is forced to provide current services—the use of its property, utilities, security, and other services—without current payment. No other creditor is put in this position. In addition, the other tenants often must increase their common area charge payments to compensate for the trustee's failure to make the required payments for the debtor.
> This bill would lessen these problems by *requiring the trustee to perform all the obligations of the debtor under a lease of nonresidential real property at the time required in the lease*. This timely performance requirement will insure that debtor tenants pay their rent, common area, and other charges on time pending the trustee's assumption or rejection of the lease.

H.R. Rep. No. 882, 95th Cong., 2d Sess., *reprinted in* 1984 U.S.C.C.A.N. 576 (emphasis added).

Senator Hatch's remarks confirm Congress' intent to adopt a billing date approach in the context of § 365(d)(3). By stating that all the obligations of the debtor under a lease of nonresidential real property should be performed "at the time required in the lease," Senator Hatch made it clear that the debtor or the trustee should perform the obligations of the debtor according to the term of the lease. By contrast, a proration approach requires the court to calculate the tenant's liabilities after the rejection (which is usually after the due date of the rent) and to prorate the landlord's entitlement to claims based on the days of actual occupancy. Such method ignored the contractual requirements to perform "all" the obligations "at the time required in the lease."

Some courts, including the Thirteenth Circuit, misread Senator Hatch's remarks to support—rather than to prohibit—the adoption of a proration approach by focusing on Senator Hatch's discussion of the landlords' pre-Code situation where they were forced to "provide current services"—the use of its property, utilities, security, and other services—without "current payment." *See, e.g.*, *In re Ernst Home Ctr., Inc.*, 209 B.R. 955, 964 (Bankr. W.D.

Wash. 1997); *Child World, Inc. v. Campbell/Mass. Trust (In re Child World, Inc.)*, 161 B.R. 571, 575 (S.D.N.Y. 1993). They erroneously concluded that Congress only intended for § 365(d)(3) to ensure that the landlord was compensated for those services he performed on behalf of the debtor in the post-petition, pre-rejection period. See *In re Child World, Inc.*, 161 B.R at 575-76.

Such an interpretation erred for several reasons. First, as discussed above, this reading ignores Senator Hatch's remarks that § 365(d)(3) was designed to compel the trustee to perform all the lease obligations at the time required in the lease.

Second, although Senator Hatch used the phrases "current services" and "current payments" to illustrate the problems faced by commercial property landlords prior to the enactment of § 365(d)(3), the illustrative language about the *problem* does not by itself limit *the legislative solutions*. There is no indication in the legislative history that Senator Hatch's remarks on the situation was a comprehensive story. The phrases "current services" and "current payment" are not defined and we cannot figure out the cost of the current services based on the scant discussion here. Significantly, Senator Hatch's remarks make no mention of the concepts of accrual or proration of charges, and it is possible that Senator Hatch only talked about the most outrageous outcomes to demonstrate the problems caused by the pre-Code practices. As Senator Hatch provided a clear legislative solution to the problem discussed, that is, to "requir[e] the trustee to perform all the obligations of the debtor under a lease of nonresidential real property at the time required in the lease," it should not be trumped or restricted by the language of problem descriptions.

Third, the Thirteenth Circuit erred in emphasizing the phrases "current services" and "current payment" because § 365(d)(3) was enacted to protect the landlord rather than preserving the estate. *See In re Krystal Co.*, 194 B.R. at 163. While § 503 (b)(1) administrative expenses are given priority in order to preserve the estate, Senator Hatch specifically provided

that § 365 (d)(3) was adopted to "remedy serious problems caused shopping centers and their solvent tenants by the administration of the bankruptcy code." From the reading of the statute and the legislative history, it seems that Congress found the commercial property landlord and its solvent tenants "particularly vulnerable creditors under the old procedures." *Id.* at 164. Since the objective of § 365 (d)(3) was to protect those vulnerable creditors rather than the estate, it is inappropriate to focus on the "current" phrases or to prorate the charges based on the analysis that is similar to § 503(b)(1)(A). Absent a clear indication from Congress that accrual and proration were intended to operate within § 365(d)(3), this Court should enforce the statute's plain and unambiguous language.

C. Receipt of the Full Month's Rent Is Not a Windfall to the Landlord Because the Debtor, Not the Landlord, Controls the Date of Rejection.

The Thirteenth Circuit justified the proration approach by claiming that it "equitably balances the interest of the estate, including its creditors, and the landlord." (R. at 21). It held that applying the plain language of § 365 (d)(3) would prove prejudicial to landlords, especially in cases where a trustee rejected the debtor's lease with the landlord and vacated the premises just a few days after an advance monthly rental payment was due. This policy argument is flawed because the debtor, not the landlord, is in the position to control the timing of rejection. *See In re Koenig Sporting Goods, Inc.*, 203 F.3d at 989. Contrary to the Thirteenth Circuit, the landlords do not gain an unfair "windfall," but rather preserve the benefits of their bargain in their leases. Under § 365(d)(3), the burden of indecision was shifted to the debtor—"the debtor must now continue to perform all the obligations of its lease or make up its mind to reject it before some onerous payment comes due during the prerejection period." *In re Krystal Co.*, 194 B.R. at 164. Just so; in this current case, the Debtor could have avoided paying the May rent if it selected to reject the Lease with Touch of Grey by the end of April. Since it was the Debtor's own choice to reject the Lease five days after the May rent was due, it is unreasonable to conclude that Touch of Grey, a particularly vulnerable creditor facilitating the reorganization

plan in good faith with the Debtor, was unjustly enriched from an event that it did not have control of. We believe equity, as well as the statute, favors full payment to Touch of Grey.

By adopting a proration approach with § 365 (d)(3), the Thirteenth Circuit ignored the plain language of the statute to achieve a policy goal which was at best questionable. Unlike the preferential exposure issue, there is no ambiguity in the context of § 365 (d)(3). We would like to echo that in such cases, the policy determinations are left for Congress, not the court. To enforce the statute according to its plain meaning, this Court should reject the Thirteenth Circuit's proration approach.

CONCLUSION

For the reasons stated herein, Petitioner respectfully asks this Court to reverse the decision of the Thirteenth Circuit Court of Appeals on both issues.

Team 1P

Counsel for Petitioner

APPENDIX A

11 U.S.C. § 365(d)(3):
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. 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.

11 U.S.C. § 503(b)(1)(A):
After notice and a hearing, there shall be allowed administrative expenses, other than claims allowed under section 502(f) of this title, including—

(1)

(A) the actual, necessary costs and expenses of preserving the estate including—

11 U.S.C. § 503:
(a) An entity may timely file a request for payment of an administrative expense, or may tardily file such request if permitted by the court for cause.
(b) After notice and a hearing, there shall be allowed, administrative expenses, other than claims allowed under section 502(f) of this title [11 USCS § 502(f)], 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. § 507(a)(1)(A):
(a) The following expenses and claims have priority in the following order:

(1) First:

(A) Allowed unsecured claims for domestic support obligations that, as of the date of the filing of the petition in a case under this title, are owed to or recoverable by a spouse, former spouse, or child of the debtor, or such child's parent, legal guardian, or responsible relative, without regard to whether the claim is filed by such person or is filed by a governmental unit on behalf of such person, on the condition that funds received under this paragraph by a governmental unit under this title after the date of the filing of the petition shall be applied and distributed in accordance with applicable nonbankruptcy law.

11 U.S.C. § 547:
(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 [11 USCS §§ 701 et seq.];

(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 [11 USCS §§ 101 et seq.].

(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) that creates a perfected security interest in inventory or a receivable or the proceeds of either, except to the extent that the aggregate of all such transfers to the transferee caused a reduction, as of the date of the filing of the petition and to the prejudice of other creditors holding unsecured claims, of any amount by which the debt secured by such security interest exceeded the value of all security interests for such debt on the later of—

(A)

(i) with respect to a transfer to which subsection (b)(4)(A) of this section applies, 90 days before the date of the filing of the petition; or

(ii) with respect to a transfer to which subsection (b)(4)(B) of this section applies, one year before the date of the filing of the petition; or

(B) the date on which new value was first given under the security agreement creating such security interest;

(6)–(9) [omitted]

(d)–(j) [omitted]