Team 20

Docket 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 RESPONDENT

Team Number 20

Counsel for Respondent

QUESTIONS PRESENTED

I. Whether a seller of goods is barred from claiming a reduction of its preference exposure by the value of the goods pursuant to 11 U.S.C. § 547(c)(4) when the seller of goods has already received payment in full pursuant to 11 U.S.C § 503(b)(9) for such goods.

II. Whether a trustee's duty under 11 U.S.C. § 365(d)(3) to timely perform a debtor's obligations requires rent be paid prior to rejection of an unexpired non-residential real property lease even though the funds are apportionable to the period after the effective date of rejection.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

UNITED STATES SUPREME COURT CASES:

UNITED STATES CIRCUIT COURTS OF APPEALS:

UNITED STATES DISTRICT COURT CASES:

UNITED STATES BANKRUPTCY COURT CASES:

STATUTORY PROVISIONS AND RULES:

LEGISLATIVE HISTORY:

OPINIONS BELOW

The Thirteenth Circuit Court of Appeals' decision is available at No. 20-0803 and is republished at Record 2. On both issues presented, the bankruptcy court and the United States District Court for the District of Moot decided against Touch of Grey. On appeal, the United States Court of Appeals for the Thirteenth Circuit affirmed the Bankruptcy Court on both issues, finding in favor of the Trustee.

STATEMENT OF JURISDICTION

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

PERTINENT STATUTORY PROVISIONS

This action necessitates the statutory construction of certain provisions of Title 11 of the United States Code. The pertinent federal statutes controlling this case are 11 U.S.C. §§ 547(c)(4), 503(b)(9), 365(d)(3) of the United States Bankruptcy Code. The relevant portion of these statutes is stated below.

The relevant portion of 11 U.S.C. § 547(c)(4) provides:

> **(c)** 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)** no 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

The relevant portion of 11 U.S.C. § 503(b)(9) provides:

> **(b)** After notice and a hearing, there shall be allowed administrative expenses…including--
>
> **(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.

The relevant portion of 11 U.S.C. § 365(d)(3) provides:

> **(d)(3)(A)** 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, until such lease is assumed or rejected, notwithstanding section 503(b)(1) of this title.

STATEMENT OF THE CASE

I. FACTUAL HISTORY

Terrapin Station, LLC (Debtor) was first founded as an independent coffeehouse in 2005. R. at 3. To expand their own business, Touch of Grey Roasters (Petitioner) sought to franchise with Debtor in the fall of 2017. R. at 4. Petitioner's goal was to enter and grow in the expanding marketplace of local, independent businesses. R. at 4. With this goal in mind, Petitioner proposed the business would continue operating under Debtor's established name. R. at 4. Both parties agreed to proceed with the plan to franchise. R. at 4.

Petitioner agreed to purchase and lease a space for this new venture to Debtor, located at 5877 Shakedown Street (Premises). R. at 4. On July 1, 2018, the franchise agreement was entered into, and listed Debtor as franchisee and Petitioner as franchisor. R. at 4. On the same date, Debtor and Petitioner entered into a lease agreement (the Lease), listing Debtor as tenant and Petitioner as landlord. R. at 4. The Lease was a twenty-year triple-net lease and required Debtor to pay an above market rate rental payment of $25,000 per month, "due in advance on the first day of each month." R. at 4-5.

After Premises were finished in November 2018, Debtor's original coffeehouse closed, and the new coffeehouse named "Terrapin Station Coffeehouse" opened on December 1, 2018. R at 5. After less than a year in business, in September 2019, Debtor first became unable to pay debts as the came due. R. at 5. Debtor remained current under the rental obligations to Petitioner, however by November 1, 2019, Debtor had accrued $700,000 in debt to Petitioner for goods Petitioner provided to Debtor. R. at 5. Petitioner threatened, among other things, to terminate the franchise agreement and sent a notice of default to Debtor on December 5, 2019.

The parties agreed that upon receipt of (1) a payment of $250,000 from Debtor to Petitioner, (2) reaffirmation of Debtor of its obligations under the Lease, and (3) Debtor's

agreement to release all liabilities Debtor may assert against Petitioner, Petitioner would not terminate the franchise agreement. R. at 5. The $250,000 payment was to be used for the specific purpose of paying down the outstanding invoices of the goods Petitioner had previously provided to Debtor. R. at 5. This $250,000 payment was made according to the agreement on December 7, 2019. R. at 5.

Following receipt of the payment, Petitioner extended credit to Debtor in the form of goods, valued at $200,000 on December 18, 2019. R. at 5. The goods surrounding this transaction were delivered on December 21, 2019. R. at 6. However, Debtor determined on January 5, 2020, that it was unable to continue its business on its current path and filed a petition for relief under chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the District of Moot. R. at 6.

At the date of petition, Debtor was current under its Lease obligations with Petitioner, but did have outstanding invoices totaling $650,000. R. at 6. Debtor had additional debts which totaled over $500,000 among other unsecured creditors, some of which were unwilling to continue providing Debtor with goods and services based on credit. R. at 6. As a result, on January 19, 2020, Debtor sought court approval to allow a payment of $200,000 to go to Petitioner, asserting they were a "critical vendor." R. at 6. Debtor advised the court that the entirety of the $200,000 payment would be applied to the credit Petitioner extended to Debtor in the form of goods which occurred on December 18, 2019. R. at 5 and 7. Both parties have stipulated that the goods from the December 18, 2019, transaction satisfy the requirements of qualifying as an administrative expense under section 503(b)(9). The United States Trustee opposed the motion. R. at 7. The bankruptcy court admitted its uncertainty if such a critical

vendor payment was permissible. R. at 7. The court ultimately approved the payment to Petitioner as an administrative expense under section 503(b)(9). R. at 7.

A few days following the court's approval, Debtor made the $200,000 payment to Petitioner. R. at 7. Following receipt of the payment, Petitioner resumed selling goods on credit to the Debtor. R. at 7. However, Debtors' continued efforts to right the business were further frustrated when it was forced to close its doors in March 2020 due to the COVID-19 pandemic. R. at 7. Debtor attempted to reopen the business in April of 2020, but ultimately decided the business was no longer sustainable and made the decision to permanently close its doors on May 5, 2020. R. at 7.

Following the closing of the business, Debtor filed a motion with the bankruptcy court on May 6, 2020, to reject Lease and franchise agreement with Petitioner as of the date of the motion per section 365(a). R. at 7. Petitioner filed a motion on May 8, 2020, seeking to compel payment of May rent, asserting the full amount became due under the Lease on May 1, 2020. R. at 7-8. Petitioner did not oppose rejection of the lease, but asserted they were entitled to the entire $25,000 rental payment, pursuant to section 365(d)(3). R. at 4 and 8. Both motions had hearings set for May 29, 2020. R. at 8.

At the May 29, 2020, hearing, the court granted Debtor's motion to reject the Lease and franchise agreement effective May 5, 2020, yet declined to rule on Petitioner's request for May rent. R. at 8. On May 29, 2020, Debtor sought to convert its case from a chapter 11 case to a case under chapter 7 pursuant to section 1112(a). R. at 8. No parties objected, and an order of conversion was entered. R. at 8. In response, the Trustee (Respondent) (1) objected to Petitioner's motion to compel payment of the entirety of May's rent pursuant to section 365(d)(3) and (2) commenced adversary proceedings seeking to avoid and recover the $250,000

payment Debtor made to Petition as a preferential transfer pursuant to sections 547(b) and 550(a). R. at 8. Both parties agreed that because the disagreement surround issues of law, they would turn to the court for guidance. R. at 9.

II. PROCEDURAL HISTORY

The bankruptcy court and the United States District Court for the District of Moot ruled in favor of the Trustee on both issues. R. at 3. On appeal, the United States Court of Appeals for the Thirteenth Circuit affirmed in favor of the Trustee and against Touch of Grey on both issues. R. at 3. The holdings from these lower courts adopt the relief sought by Respondent. R. at 3.

STANDARD OF REVIEW

The parties do not dispute the facts surrounding this case. Rather, the questions presented herein solely involve questions of law based on interpretations of the Bankruptcy Code.[1] This dictates a de novo standard of review. *Highmark Inc. v. Allcare Health Mgmt. Sys., Inc.*, 572 U.S. 559, 563 (2014). As a result, this Court must decide the issues presented as if it was the court originally assigned to the case. *Razavi v. Comm'r of Internal Revenue*, 74 F.3d 125, 127 (6th Cir. 1996).

SUMMARY OF THE ARGUMENT

This brief first examines how 11 U.S.C. § 547(c)(4) and 11 U.S.C. § 503(b)(9) interact. Respondent asks that this Court uphold the Thirteenth Circuit's decision and find that when post-petition administrative expenses are paid pursuant to section 503(b)(9), such payment nullifies a seller of good's ability to assert a new value defense under 11 U.S.C. § 547(c)(4) because the payment is an "otherwise unavoidable transfer." This reasoning is supported both by the plain

[1] The Bankruptcy Code is set forth in 11 U.S.C. §§ 101 *et seq*. Specific sections of the Bankruptcy Code are identified herein as "section ___."

language of section 547(c)(4) and achieving an overarching goal of the bankruptcy – to provide equal treatment among similarly situated creditors.

There are few on-point published decisions regarding this issue, as section 503(b)(9) was amended into the Bankruptcy Code only recently in 2005. However, the majority of courts hold that a seller of goods cannot claim both sections 503(b)(9) and 547(c)(4) as it results in creating a benefit to one creditor at the expense of other similarly situated creditors. This would occur by the seller of goods being paid in full for the value provided to the debtor under section 503(b)(9) and additionally use that same value to reduce its preference exposure under section 547(c)(4). This conclusion is supported in two ways. First, there is no temporal limitation contained within the plain language of section 547(c)(4). It is unambiguous, further evidenced through time limitations included in other provisions of the same section. When the Bankruptcy Code is unambiguous, this Court should not look to change or alter the language intended and used by Congress. Second, manipulating the intersection between 547(c)(4) and 503(b)(9) counters the purpose of Bankruptcy Law. The Bankruptcy Code seeks to create an equal playing field between involved parties. Permitting a creditor to claim both sections 503(b)(9) and 547(c)(4) results in creating an unfair advantage for one creditor at the direct expense of other creditors. Therefore, this Court should hold that a seller of goods is not entitled to reduce its preference exposure under section 547(c)(4) by the value of goods sold when payment in full has already been guaranteed by way of section 503(b)(9).

Further, this brief examines when a trustee's duty to timely perform the obligations of a debtor under 11 U.S.C. § 365(d)(3) arises regarding payment of rent due prior to the rejection of an unexpired non-residential lease on real property when a portion is attributable to a period after the effective date of rejection. Respondent asks that this Court uphold the Thirteenth Circuit's

decision and find adoption of the proration to be the correct approach. Such a holding would be in line with the majority approach to calculating a debtor tenant's post-petition rent.

The language of section 365(d)(3) is ambiguous and the legislative history along with fundamental bankruptcy purpose and policy requires this equitable approach. The language of section 365(d)(3) may be interpreted to mean a trustee's obligation to pay post-petition rent to arise on the billing date stated in the lease, as supports the billing date approach, or to mean the trustee's rental obligation arises as it accrues daily, as supports the proration approach. Due to the two possible interpretations of section 365(d)(3)'s language, a court must turn to the legislative history. The statute at issue reveals Congress' intent to provide landlords with timely payment for the property they provide to debtor tenants during the post-petition, pre-rejection period. Proration of a debtor's post-petition rent achieves this purpose without contradicting or frustrating Code policy and procedure. Unlike proration, the billing date approach produces results that contradict and frustrate the policy of equal treatment to creditors, the purpose of administrative expenses, the purpose behind the rejection of a lease, and the goal of reorganization of the debtor.

By interpreting section 365(d)(3) to require a trustee's rental obligation to arise on the billing date would result in awarding a windfall to landlords in the form of payment for rent allocable to the post-rejection period, a period where debtor tenants have no right to occupancy because of the rejection of their lease. By finding a trustee's rental obligation to arise as it accrues, proration avoids this inequitable result and serves Congress' intent behind § 365(d)(3) by ensuring debtors only compensate landlords for days of occupancy. Therefore, this Court should find the language of section 365(d)(3) requires the adoption of the proration approach.

ARGUMENT

I. THE THIRTEENTH CIRCUIT CORRECTLY RULED THAT WHEN POST-PETITION ADMINISTRATIVE EXPENSES ARE PAID PURSUANT TO 11 U.S.C. § 503(b)(9), SUCH A PAYMENT IS AN "OTHERWISE UNAVOIDABLE TRANSFER" AND THEREBY NULLIFIES A CREDITOR'S ABILITY TO ASSERT A NEW VALUE DEFENSE UNDER 11 U.S.C. § 547(c)(4).

Petitioner is seeking to marginalize the debtor's estate by receiving administrative expenses paid pursuant to 11 U.S.C. § 503(b)(9) and asserting a "New Value Defense" under 11 U.S.C. § 547(c)(4) for the administrative expenses already paid post-petition by Debtor. Section 503(b)(9) was not created as a "payment plus" program, but rather as a defense mechanism for sellers of goods so that they may not be disadvantaged in the future. This issue then hinges on if equality may still exist among creditors. If the new value defense in section 547(c)(4) is interpreted in a way as to allow sellers of goods to use section 503(b)(9) as a "payment plus," then equality among creditors cannot exist. Courts are split on this relatively new issue, and the Thirteenth Circuit correctly denied a seller of goods the ability to receive administrative expenses paid pursuant to section 503(b)(9) and also assert a new value defense, for the expenses, under section 547(c)(4).

Section 547 was established so sellers of goods may receive an equal distribution from the common debtor so there may still be an ongoing buyer-seller relationship between the parties. 11 U.S.C. § 547. Turning to the section at issue, the plain language of section 547(c)(4) protects sellers of goods from having to give up transfers made by the debtor, which the seller of goods provided new value for. The Bankruptcy Code's definition of transfer excludes any sort of temporal limitation. 11 U.S.C. § 101(54)(D). This Court has instructed that the first step of statutory interpretation turns on the plain language of the statute. *Ardestani v. INS*, 502 U.S. 129, 135 (1991). When a statute's language "has a plain and unambiguous meaning" for the particular of the case [*such as an omission of a time limitation on "otherwise unavoidable*

transfers"], and the "statutory scheme is coherent and consistent," this Court has directed that the analysis may stop. *Id*. (emphasis added). This Court provided guiding factors to determine if a statute is plain or ambiguous by considering the statute's plain language and its context. *Id*.

This Court should find the language of section 11 U.S.C. 547(c)(4) has a plain and unambiguous meaning for three reasons. First, the statute omits any plain language imposing a time limitation for an "otherwise unavoidable transfer" that occurs pre-petition. 11 U.S.C. § 547(c)(4). Second, if a seller of goods receives payment in full pursuant to section 503(b)(9), in addition to claiming a reduction of its preference exposure pursuant to section 547(c)(4), then creditors cannot be treated equally. Third, asserting a distinction between the term "debtor" and "debtor in possession" as a determinative factor is an attempt to discreetly mislead this Court.

A. The plain language of 11 U.S.C. § 547(c)(4) and the context of § 547 dictate that § 547(c)(4) is unambiguous and has no temporal limitation which restricts its use.

Section 547(c)(4) of chapter 11 of the United States Code is unambiguous in its language and provides no temporal limitations to restrict its use. Congress made an intentional choice for section 547(c)(4) to exclude a temporal limitation. This Court's precedent instructs that a statute should not be expanded when a "plain, non-absurd meaning is 'in view.'" *Lamie v. U.S. Tr.*, 540 U.S. 526, 538 (2004). The statute provides that:

> 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 plain meaning of this statute should dictate this Court's decision again today. Just because a statute may be complicated, does not mean it is ambiguous. *Boyd v. The Water Doctor (In re Check Reporting Servs., Inc.)*, 140 B.R. 425, 434 (Bankr. W.D. Mich. 1992). Further, "[t]here is a basic difference between filling a gap left by Congress' silence and rewriting rules that Congress has affirmatively and specifically enacted." *Lamie*, 540 U.S. at 539 (quoting *Mobil Oil Corp v. Higginbotham*, 436 U.S. 618, 625 (1978)).

Reading section 547(c)(4) as attaching a temporal limitation to the word "transfer" would be improper. This Court's jurisprudence suggests that words with specific definitions within the Bankruptcy Code should be read in such a way to agree with their intended definitions. *Groman v. Commissioner*, 302. U.S. 82, 86 (1937). Congress has shown, even within section 547(c), when it intends to include or exclude temporal limitations.[2] If Congress wanted to, Congress would have included a temporal limitation within the plain language of § 547(c)(4), but it did not.

There are few cases on this specific issue before the Court. However, a majority of courts have held that paying an administrative expense pursuant to section 503(b)(9) is an "otherwise unavoidable transfer" under section 547(c)(4) because there is no temporal limitation within section 547(c)(4).[3] Likewise, this Court should hold that when post-petition administrative expenses are paid pursuant to section 503(b)(9), such a payment is an "otherwise

[2] *See* 11 U.S.C. § 547(b)(A).

[3] *See, e.g., Beaulieu Liquidating Tr. Fabric Sources, Inc. (In re Beaulieu Grp., LLC)*, 616 B.R. 857, 878 (Bankr. N.D. Ga. 2020); *see also Circuit City Stores, Inc. v. Mitsubishi Dig. Elecs. Am. (In re Circuit City Stores, Inc.)*, 2010 WL 4956022, at *9 (Bankr. E.D. Va. Dec. 1, 2010); *see also Hall v. Chrysler Credit Corp. (In re JKJ Chevrolet, Inc.)*, 412 F.3d (4th Cir. 2005) ("[E]ven if [debtor] repaid all of the new value, *under the plain terms of the statute* whether those payments deprive [creditor] of its new value defense depends on whether the payments were *otherwise unavoidable."*) (emphasis added); *see also Moglia v. Am. Psych Ass'n (In re Login Bros. Book Co.)*, 294 B.R. 297, 300 (Bankr. N.D. Ill. 2003) ("the *plain language* and policy behind the statute indicate that the *timing of a repayment of new value is irrelevant*.") (emphasis added).

unavoidable transfer" and thereby nullifies a creditor's ability to assert a new value defense under section 547(c)(4).

1. The plain language of § 547(c)(4) does not place a temporal limitation on the ability to claim a reduction of preference exposure and reading one into the statute would be improper.

A plain language reading of section 547(c)(4) makes clear that there is no temporal limitation attached to "an otherwise unavoidable transfer." This Court has made clear that Congress does not hide temporal limitations. *Accord Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001). No indication within the plain text instructs the "otherwise unavoidable transfer" refers only to transfers that occur pre-petition. As demonstrated by neighboring provisions within section 547(c), Congress makes an intentional choice when and when not to impose temporal limitations.[4]

Congress made an intentional choice within section 547(c)(4) to exclude a temporal limitation.[5] This Court's precedent instructs that a statute should need not be expanded where a "plain, non-absurd meaning is 'in view.'" *Lamie*, 540 U.S. at 538. To expand section 547(c)(4) by reading a temporal limitation into the "otherwise unavoidable transfer" would be improper. *Id.* Even if not allowing a seller of goods a "payment plus" (as Petitioner is intending to do today) seems "too harsh," this Court has demonstrated an "unwillingness" to weaken Congress' word choice. *Id*. Such word choice results from "the supremacy of the Legislature," and recognizes that Congress usually votes on the bill's language. *Id*. (citing *U.S. v. Locke*, 471 U.S. 84, 95 (1985)).

Additionally, attaching a temporal limitation to the word transfer in section 547(c)(4) is

[4] *See*, *e.g.*, 11 U.S.C. § 547(c)(5) (The trustee may not avoid under this section a transfer creating a perfected security interest in inventory or a receivable or the proceeds except, with respect to a transfer to which § (b)(4)(A) applies, *90 days before the date of the filing petition*) (emphasis added).
[5] *See generally* 11 U.S.C. §§ 547(b)(4); 547(c)(5); 547(e)(2); 549.

inappropriate. *Id.* Petitioner asserts that the "transfer" mentioned within section 547(c)(4) must occur pre-petition with the petition date being a "hard stop" for preferences. R. at 12. However, this claim is unfounded. The Bankruptcy Code provides that the word transfer means "each mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing with…property…or an interest in property." 11 U.S.C. § 101(54)(D). This Court has instructed that when words have specific definitions within the Bankruptcy Code, that word is to be read in agreement with its intended definition. *Groman*, 302 U.S. at 86 (1937). Therefore, this Court should continue to read the word "transfer" with its intended meaning, outside of any temporal limitation, because such limitation is absent within the meaning of transfer within the Bankruptcy Code.

Congress' act of imposing temporal limitations to transfers within section 547 and others further demonstrates its intention for choosing when and when not to impose such limitations. To read a temporal limitation into a statute, as Petitioner requests, fails to recognize where Congress *has* attached temporal limitations to transfers within the Bankruptcy Code. Specifically, within the section at issue, a neighboring provision provides a trustee may avoid any transfer of an interest of the debtor in property made *on or within 90 days* before the filing date of the petition. 11 U.S.C. § 547(b)(4)(A) (emphasis added). If Congress had intended to, it would have included a temporal limitation either within the definition of "transfer" or within the plain language of section 547(c)(4). Instead, Congress excluded such a limitation from both. Therefore, placing a temporal limitation into section 547(c)(4) would be improper.

2. Evaluating the context of § 547 further supports that there is no temporal limitation placed upon pre-petition transactions.

Although the plain meaning of section 547(c)(4) is unambiguous, the payment of administrative expenses pursuant to section 503(b)(9) must still be an "otherwise unavoidable

transfer" under this statute. Here, the administrative expense was $200,000, sent by Debtor to Petitioner, for the value of the coffee, pursuant to section 503(b)(9) and approved by the Bankruptcy Court. R. at 7. When administrative expenses are paid post-petition, section 549 applies. 11 U.S.C. § 549. A trustee may avoid a transfer made after the petition date if the transfer was not authorized by either the Bankruptcy Code or the Bankruptcy Court. 11 U.S.C. § 549(a)(2)(B). Therefore, the only statute that 547(c)(4) should be contextualized with is section 549 and 547(b).

Reading statutes also depends on their context, *King v. St. Vincent's Hosp*., 502 U.S. 215, 221 (1991) (citing *Shell Oil v. Iowa Dept. of Revenue*, 488 U.S. 19, 26 (1988), because this Court's jurisprudence follows that statutes should be read as a whole, not just as an individual provision. *Id*. (citing *Massachusetts v. Morash*, 490 U.S. 107, 115 (1989). Petitioner argues that section 547(c)(4) should be read contextually, by pointing toward 547(b)(4), which includes a temporal restriction on transfers. R. at 14. True, both sections 547(b)(4) and 547(c) deal with transfers with temporal limitations. 11 U.S.C. §§ 547(b)(4) and 547(c). However, this directly contradicts the expression unius exclusio alterius canon of statutory interpretation, which provides the inclusion of one implies the exclusion of another. This applies to the issue before the Court evidenced through Congress' purposefully choice to include temporal limitations in some subsections and exclude temporal limitations in others. Petitioner offers circular reasoning claiming there are different treatments for transfers throughout the Bankruptcy Code by pointing to both section 547(b)(4) and the preamble to section 547(c).[6] R. at 14. Further, section 547(c)(4) cannot be construed to apply only to pre-petition events because the allowed administrative expense pursuant to section 503(b)(9) would also qualify for the defense. *In re*

[6] *See, e.g., King*, 502 U.S. at 221-22 (explaining there are different treatments among various classes for various provisions within the applicable statute).

Bellanca Aircraft Corp., 850 F.2d 1275, 1284-1285 (8th Cir. 1988). New value extended by a seller of goods post-petition is still paid for by an "otherwise unavoidable transfer." *In re MMR Holding Corp*., 203 B.R. 605, 609 (Bankr. M.D. La. 1996).

This Court's jurisprudence demonstrates that certain terms apply only to section 547(c), not to section 547(b), so a delivery date rule pursuant to section 547(b) is unnecessary. *Barnhill v. Johnson*, 503 U.S. 393, 401-402 (1992). Section 547(c) is filled with exceptions to section 547(b)'s "rule permitting recovery of preferential transfers." *Id.* at 402. Section 547(c)(1) establishes the exception for transfers exchanging new value between the debtor and the seller of goods, and subsection (c)(2) establishes the exception for transfers within the ordinary course of business between the debtor and the seller of goods. *Id*. These exceptions within subsection (c) are intended to encourage creditors to continue business with debtors by eliminating the creditor's fear of having to relinquish previously received payment. *Id*. This specialized purpose provides reasoning to this Court to decline to apply a non-relatable temporal limitation by reading section 547(c) in context with section 547(b). *Id*. Therefore, Petitioner's contention that section 547(c)(4) and section 547(b) should be read together to create a temporal limitation here is not viable.

B. Allowing a seller of goods to receive a payment in full pursuant to § 503(b)(9) in addition to claiming a reduction of its preference exposure pursuant to § 547(c)(4) violates an established goal of bankruptcy for equal treatment among creditors.

Section 547(c)(4) is recognized as a preference statute. This preference statute was crafted with the intent of treating creditors equally, and there is a proper balance when analyzing them. *In re Friedman's Inc.*, 738 F.3d 547, 558 (3d Cir. 2013). However, the intent behind section 503(b)(9), a recognized administrative priority statute, is to give creditors administrative priority status for amounts owed to them for goods delivered within 20 days of a debtor's bankruptcy filing. *Id*. at 553 n. 2.

Allowing a seller of goods to receive full payment under section 503(b)(9) and claim a reduction of its preference exposure under section 547(c)(4) grants a benefit to the seller at the expense of other creditors. Permitting such a loophole would frustrate an overarching goal of bankruptcy, to ensure equal treatment of similarly situated creditors. This Court has never created such a loophole that would permit a creditor to receive such a benefit at the expense of other creditors and should not do so here. As such, this Court should find that a seller of goods is barred from claiming a reduction of its preference exposure under section 547(c)(4) when the goods have already been paid in full per section 503(b)(9).

1. The objective of the preference statute is to effectuate the goal of equal treatment of creditors.

An overarching goal throughout the Bankruptcy Code is to ensure the equal treatment of similarly situated creditors. This Court has held that "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 share equally." *Union Bank v. Wolas*, 502 U.S. 151, 161 (1991) (quoting H.R. Rep. No. 95-595 at 178 (1977)). The intent of Congress in crafting section 503(b)(9) was to allow creditors who provided the debtor goods within the 20 days leading up to the petition date to qualify for administrative priority status regarding the value of the goods extended.

An underlying principle of preferential treatment is to "encourage creditors to continue extending credit to financially troubled entities while discouraging a panic-stricken race to the courthouse." *In re BFW Liquidation, LLC*, 899 F.3d 1178, 1193 (11th Cir. 2018). The new value exception provided under section 547(c)(4) promotes this underlying principle by restricting the exception to creditors' amount which enriched the estate. *In re Jet Fla. Sys., Inc.*, 841 F.2d 1082, 1084 (11th Cir. 1988). Refusing to allow the value of the goods that qualify

under section 503(b)(9) to also qualify as a new value under section 547(c)(4) best effectuates the goal of equal treatment amongst similarly situated creditors. To find otherwise would go against the established authority of this Court. *Union Bank v. Wolas*, 502 U.S. at 161. Imposing a limitation on the stated goal of equal treatment among creditors will lead to unequal disbursements among similar creditors.

2. The direct impact of allowing a creditor to utilize § 547(c)(4) in conjunction with § 503(b)(9) results in the creation of a benefit to one creditor at the detriment of other similarly situated creditors.

To allow a seller of goods to receive full payment for the goods provided through section 503(b)(9) while allowing them to claim a reduction of their preference exposure through section 547(c)(4) creates a benefit to one creditor at the expense of other creditors. *In re Beaulieu Grp.*, LLC, 616 B.R. 857, 875 (Bankr. N.D. Ga. 2020). Although this case is currently under appeal, the Bankruptcy Court was unwavering in its opinion. This Court has instructed that Bankruptcy Court opinions demand that reviewing courts grant weight in line with the idea that Bankruptcy Courts rule correctly a majority of the time. *Bullard v. Blue Hills Bank*, 135 S.Ct., 1686, 1695 (2015). The Bankruptcy Court in *Beaulieu* held that:

> Requiring both payment of the § 503(b)(9) claim and offset of preference liability *improves the creditor's position relative to all other creditors* that continued to do business with the debtor and received preferential payments by giving the § 503(b)(9) claimant payment for the new value plus reducing what it must repay, which in turn reduces the amount available to pay all general unsecured creditors. This "payment plus" treatment, while not double-dipping in the sense that Defendant is not being paid twice for the same invoice, *undercuts equality of treatment* while failing to materially advance the policy of encouraging creditors to continue to do business on credit with the debtor.

In re Beaulieu Grp., LLC, 616 B.R at 875. (emphasis added).

The determinative factor when deciding if a section 547(c)(4) defense is available after a preferential transfer has been made to the creditor should turn on the impact such payment has on the estate. *In re Kroh Bros. Dev. Co.*, 930 F.2d 648, 654 (8th Cir. 1991)

(citing *Matter of Formed Tubes, Inc.* (*In re Formed Tubes*), 46 B.R. 645, 647 n.4 (Bankr. E.D. Mich. 1985)). The origin of such a payment is not a factor that impacts the creditor's ability to assert a reduction in its preference exposure under section 547(c)(4). *Id.* Permitting a creditor to claim a reduction of its preference exposure under section 547(c)(4) when the creditor has already received payment in full for the goods provided through section 503(b)(9) would cause a depletion of the assets of the estate. This depletion will create a benefit to a single creditor at the direct expense of other unsecured creditors.

C. When evaluating the present issue, it is misleading to the Court to assert a distinction between the term "debtor" and "debtor in possession" as a determinative factor.

"Debtor" is defined as a "person or municipality concerning which a case under this title has been commenced." 11 U.S.C. § 101(13). There is no temporal limitation contained within this definition. *Id.* The Bankruptcy Code makes no distinction between the terms "debtor" and "debtor in possession." *See* 11 U.S.C. §1101(1). The exception, which would permit the two terms to be read as having different meanings, does not apply to the facts presently before the Court, as there is no assertion or stipulation that the trustee is qualified under section 322 of the Bankruptcy Code. *Id.* As a result, the term "debtor in possession" should be read as meaning "debtor" when evaluating a Chapter 11 case. *U.S. Through Arg. Stabilization & Conservation Serv. v. Gerth*, 991 F.2d 1428, 1436 (8th Cir. 1993) (indicating a distinction between the terms should not be made).

While this Court has not yet addressed if a distinction should be found in the use of "debtor" and "debtor in possession" when evaluating section 547, this Court has addressed this issue about section 365 of the Bankruptcy Code. *NLRB v. Bildisco & Bildisco,* 465 U.S. 513 (1984). This Court held that a distinction between the two terms should not be made. *Id.* at

528. There are sections of the Bankruptcy Code[7] that provide payment or transfer occurring post-petition can be made by a debtor in possession or a trustee. However, throughout the Bankruptcy Code, "debtor" is referred to in the context of both pre-petition and post-petition, further showing a distinction based upon a temporal limitation should not be made between the terms. Asserting that a temporal limitation must be read into section 547(c) based on the variation of use between these two terms is misleading to the Court. This Court should find that a temporal limitation may not be read into section 547(c) based solely on the use of the term "debtor."

II. THE THIRTEENTH CIRCUIT CORRECTLY ADOPTED THE PRORATION APPROACH WHEN CALCULATING RENT DUE BY A DEBTOR TENANT TO A LANDLORD FOR THE POST-PETITION PRE-REJECTION PERIOD UNDER 11 U.S.C. § 365(d)(3).

This court should adopt the proration approach when calculating a debtor tenant's post-petition, pre-rejection rent under section 365(d)(3) because the statute's ambiguous language reviewed in accord with principles of statutory interpretation along with bankruptcy purpose and policy require proration. The language of section 365(d)(3) is ambiguous, evidenced by two reasonable interpretations that have been reached by courts in its extensive litigation history. *Child World, Inc. v. Campbell/Massachusetts Trust* (*In re Child World, Inc*.), 161 B.R. 571, 575 (S.D.N.Y. 1993). Section 365(d)(3)'s language could be read to allow the application of the billing date approach, finding the obligation of a trustee to pay rent arises on the billing date stated in the lease. *In re Ames Dep't Stores, Inc.*, 306 B.R. 43, 67 (Bankr. S.D.N.Y. 2004). Conversely, the language of section 365(d)(3) can be read to support the adoption of the proration approach, finding the obligation of the trustee to pay rent arises as it accrues. *Id.* This

[7] *See generally* 11 U.S.C. §§ 363(b)(1); 365(d)(3); 1114(c)(1).

discord among courts confirms the conclusion that the language of section 365(d)(3) is ambiguous.

A review of the statute's legislative history reveals the intent of Congress to remedy landlords' position as involuntary creditors to debtor tenants during the post-petition, pre-rejection period by providing landlords with "current payment" for their "current services" pending assumption or rejection of a lease. *Id.* at 68. This stated intent is best achieved through the adoption of the proration approach, which guarantees timely rent payments to landlords for rent allocable to the post-petition, pre-rejection period. Additionally, proration avoids the inequitable and arbitrary results produced by the billing date approach.

The application of the proration approach guarantees debtors only pay for services they received from landlords because the obligation to pay rent arises by days of occupancy, which ceases upon rejection of the lease. *Id* at 70-71. Allowing the obligation to pay rent to arise on the billing date requires debtor tenants to pay rent for a period in which they have no right to occupy the property. *Id.* If this Court adopts the billing date approach, it will result in a windfall to landlords at the expense of the debtor and to the detriment to other creditors. *In re Child World, Inc.*, 161 B.R. at 576. Such an effect violates the policy of equal treatment of creditors, the purpose of administrative expense claims, the purpose of rejecting a lease, and will frustrate the goal of reorganizing the debtor. *In re NETtel Corp., Inc.*, 289 B.R. 486, 490-93 (Bankr. D.D.C. 2002). The same conclusion cannot be made regarding the proration approach. *Id.*

The proration approach avoids violating the policy of equal treatment of creditors. *Id.* Further, the purpose of administrative expense claims is best achieved by the proration approach by only giving priority to expenses beneficial to the operation of the debtor's business pending assumption or rejection of the lease. *Id.* Proration avoids placing inequitable and illogical

burdens on debtor tenants and achieves the purpose of rejecting a lease by simultaneously ceasing a trustee's obligation to pay rent and their right to occupancy of the landlord's property. *Id.* at 490-92. The application of proration to a trustee's rental obligation under section 365(d)(3) best achieves Congress' stated intent while furthering long-established bankruptcy purpose and policy. As a result, this Court should adopt the proration approach and reject the billing date approach.

A. The language of section 365(d)(3) is ambiguous, and principles of statutory interpretation require the adoption of the proration approach.

A well-established rule of statutory interpretation dictates that where the language of a statute is plain and unambiguous, a court's sole function is enforcing it according to its terms. *U.S. v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989). However, where statutory language is unclear, courts must look to the legislative history to discern Congress' intent. *In re Child World, Inc.*, 161 B.R. 574 (citing *Blum v. Stenson*, 465 U.S. 886, 896 (1984)). Even when the language of a statute is facially clear, a court should look further when "a literal interpretation would lead to internal inconsistencies, an absurd result, or an interpretation inconsistent with the intent of Congress." *Vergos v. Gregg's Enterprises, Inc.*, 159 F.3d 989, 990 (6th Cir. 1998).

1. Due to the use of broad terms within section 365(d)(3) which permit multiple logical interpretations, no plain meaning is discernible.

The majority of courts have found section 365(d)(3) ambiguous because of its broad language that allows for more than one plausible interpretation. *In re Child World, Inc*., 161 B.R. 576. Both the term "arises" and the phrase "until such lease is assumed or rejected" may be construed in differing ways. *In re Ames Dep't Stores, Inc.*, 306 B.R. at 67 (citing 11 U.S.C. § 365(d)(3)). The term "arises" can be interpreted to mean having arisen by the date stated in the lease, which supports the billing day approach. *Id.* This term can also be interpreted to mean

having arisen by daily accrual, which supports the proration approach. *Id.* The phrase "until such lease is assumed or rejected," can be interpreted as a modifier of either the word "perform" or of the word "obligations." *Id.* Reading the phrase as a modifier of "perform" would indicate all performance as required under the lease, as supported by the billing date approach. *Id.* While reading the phrase as a modifier of the word "obligations" would indicate the trustee's obligation to perform extends only until the time of assumption or rejection of the lease, as supported by the proration approach. *Id.* Based on section 365(d)(3)'s plain language alone, each approach may be a plausible interpretation of 365(d)(3), thereby rendering the statute ambiguous.[8]

The inability to discern a "plain language" meaning from section 365(d)(3) is exemplified by twenty years of litigation history in bankruptcy and circuit courts. The majority of courts have found section 365(d)(3)'s language to be ambiguous as there is no plain meaning that precludes other possible interpretations. *In re Child World, Inc.*, 161 B.R. at 576. When faced with a similar situation of interpreting neighboring section 11 U.S.C. § 365(b)(2)(D), which could plausibly be interpreted two ways, the court held the section to be ambiguous. *Eagle Ins. Co. v. BankVest Capital Corp*. (*In re BankVest Cap. Corp.*), 360 F.3d 291, 296 (1st Cir. 2004). The court reasoned that it was "hard-pressed to endorse any 'plain meaning' argument where, as here, other federal courts have reached conflicting answers…based on the same plain language." *Id.* at 297.

The ambiguity within section 365(d)(3) is further shown by the results the billing date approach may yield. Even when the language of a statute may seem to have a plain meaning, it may be necessary to look outside the plain language when such interpretations could produce

[8] *In re Thinking Machines Corp.,* 67 F.3d 1021, 1025 (1st Cir. 1995) (stating "when congress' words admit more than one reasonable interpretation, 'plain meaning' becomes an impossible dream, and an inquiring court must look to the policies, principles and purposes underlying that statute in order to construe it. Congress, after all, does not legislate in a vacuum.").

absurd or illogical results. *Vergos*, 159 F.3d 989 at 990. A court should not interpret ambiguous statutes in a way that allows the statute to "conflict and disturb the overall purpose and function of the code." *In re R.H. Macy & Co., Inc.*, 170 B.R. 69, 73 (Bankr. S.D.N.Y. 1994). Accepting the plain language interpretation of section 365(d)(3) and applying the billing date approach yields results at odds with fundamental bankruptcy purpose and procedure. Therefore, following Bankruptcy Code interpretation precedent, this Court should find section 365(d)(3) is ambiguous, thus statutory interpretation principles must be applied to properly interpret its meaning.

2. Application of the principles of statutory interpretation requires the adoption of the proration approach.

Statutory interpretation compels a look into the legislative history of section 365(d)(3) as well as relevant statutory provisions of the Code that contribute to discerning its purpose. A holistic reading of section 365(d)(3) demonstrates Congress' intent and how the section should be applied in relation to its surrounding provisions. The application of these principles of statutory interpretation makes two points clear. First, proration of a debtor tenant's rent best accomplishes Congress' intent behind section 365(d)(3). Second, proration best supports and furthers the purpose of other relevant bankruptcy provisions.

a. Congress's intent to provide landlords with "current payment" for "current services" through section 365(d)(3) is best achieved through the proration approach.

Before the enactment of section 365(d)(3), the proration of rent was overwhelmingly applied by courts to post-petition rent and real estate taxes. *In re Child World, Inc.*, 161 B.R. at 574-75. This Court established, "[it]…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) (citing *Penn. Dep't of pub. Welfare v. Davenport*, 495

U.S. 552, 563 (1990)). The legislative history of section 365(d)(3) contains an insightful comment by Senator Hatch explaining the statute's purpose of remedying the prejudice to landlords created by the automatic stay which prevented landlords from ejecting defaulting tenants during the post-petition, pre-rejection period.[9] *In re Ames Dep't Stores, Inc.*, 306 B.R. at 68.

Until the enactment of section 365(d)(3), a landlord's only recourse for obtaining rent owed during this period was through a section 503(b)(1) administrative expense claim. *In re Handy Andy Home Improvement Centers, Inc.*, 144 F.3d 1125, 1128 (7th Cir. 1998). A 503(b)(1) claim requires claims to be for "actual, necessary costs and expenses of preserving the estate." *Id.* Landlords were often not granted payment for the post-petition, pre-rejection period until well after the rejection of the lease because a court must first assess an administrative expense claim to assure it satisfies the requirements. *Id.* The direct result caused landlords to provide property without current payment, thereby becoming involuntary creditors to debtor tenants. *Id.* A two-fold purpose of section 365(d)(3) becomes clear from Senator Hatch's comments. *In re Child World, Inc.,* 161 B.R. at 575. The first purpose is to give post-petition, pre-rejection claims automatic administrative expense priority to ensure timely payment to landlords contemporaneous with the services they provide. *Id.* The second purpose is to fix the expense amount at the number stated in the lease. *Id.*

Applying this Court's guidance established in *Cohen* to section 365(d)(3) indicates "a clear indication that Congress intended" to depart from the long-used application of the proration

[9] "…the landlord is forced to provide current services-the use of its property…without current payment… The bill would lessen these problems by requiring the trustee to perform all obligations of the debtor under a lease of nonresidential real property at the time required in the lease. This timely performance requirement will ensure that debtor-tenants pay their rent…on time pending the trustee's assumption or rejection of the lease." H.R. Conf. Rep. No. 98-882, at 589-99 (1984), *as reprinted in* 1984 U.S.C.C.A.N. 576.

approach is indeed absent. *In re Child World, Inc.*, 161 B.R. at 575-76; *Cohen*, 523 U.S. at 221 (citing *Penn. Dep't of pub. Welfare*, 495 U.S. at 563). This conclusion is in line with reasoning established through the District Court in the Southern District of New York upon review of a Bankruptcy Court decision. *In re Child World, Inc.,* 161 B.R. at 575-76. This Court has signaled that Bankruptcy Court decisions must be given appropriate weight as they rule correctly most of the time. *Bullard v. Blue Hills Bank*, 135 S.Ct., 1686, 1695 (2015). The Bankruptcy Court found proration to be the approach intended by Congress, explaining, "[n]othing in the legislative history indicates that Congress intended section 365(d)(3) to overturn the long-standing practice under section 505(b)(1) of prorating debtor-tenants' rent to cover only the post-petition, pre-rejection period, regardless of [the] billing date." *In re Child World, Inc.,* 161 B.R. at 575-76.

The proration approach best achieves the two-fold purpose Congress intended by enacting section 365(d)(3) by ensuring landlords receive current payment for the current services they are providing at the rate stated in the lease. A court applying the proration approach can ensure such. If a landlord comes before a court soon after the post-petition rent becomes overdue and before a debtor has assumed or rejected the lease, the court may order payment of the overdue rent in full, providing timely compensation to the landlord for their services. *In re NETtel Corp., Inc.*, 289 B.R. at 496. The consequence of failure to comply would result in immediate rejection of the lease. *Id.* The order to pay overdue rent could be subject to adjustment in the case the lease is later rejected during the period the rent payment covers. *Id.* In this situation, the rent would be prorated, and the debtor tenant would be reimbursed by the landlord for the days allocable to the post-rejection period, thereby guaranteeing the debtor tenant pays only for days of occupancy. *Id.*

The Bankruptcy Court went on to clarify that proration *does not* provide an opportunity for a trustee to sidestep their timely rental obligation simply because that obligation may turn out to arise post-rejection. *Id.* (emphasis added). A trustee is still required to abide by the requirements of the lease under a proration approach. Since the rental obligation accrues daily, proration guarantees debtor tenants only pay for services they were provided. As a result, the obligation only arises during the post-petition, pre-rejection occupancy of the property. The ability to ensure current payment to landlords for current services while guaranteeing debtor tenants only pay for services received clarifies why the proration approach was intended by Congress. *Id.* at 490 (explaining proration achieves fairness for both landlords and the bankruptcy estate). Such persuasive benefits give further credence to why the proration of rent is a long-established practice in bankruptcy proceedings. *In re Ames Dep't Stores, Inc.*, 306 B.R. at 69. Congress has given no indication that it intended to move away from the practice of prorating rent. *Id.*

Analyzing the legislative history and Congress' intent behind the law is often the most illuminating process when interpreting ambiguous law. *In re Child World, Inc.*, 161 B.R. at 574. This is true in analyzing the present statute at issue. Upon determining Congress' intent through legislative history, that purpose is best achieved through the proration approach because landlords receive current payment for current services. Further, the adoption of proration does not disrupt the established practice of prorating rent without a clear Congressional intent to do so, which is a requirement established by this Court. *Cohen*, 523 U.S. at 221 (1998) (citing *Penn. Dep't of pub. Welfare*, 495 U.S. at 563). Therefore, to best effectuate the intended goal of Congress, this Court should adopt the proration approach regarding rent due prior to the rejection

of an unexpired non-residential real property lease when the funds are allocable to a period after the effective date of rejection.

b. Reading section 365(d)(3) in harmony with sections 365(g) and 502(g) render unperformed post-rejection obligations as general unsecured claims rather than an administrative expense under 503(b)(1).

Long established bankruptcy precedent dictates that while interpreting a statute's language is the starting point, the analysis cannot stop there. *In re Boodrow*, 126 F.3d 43, 49 (2d Cir. 1997). This is especially true when the statute is ambiguous. *Id.* The Supreme Court has expanded on this point and instructed that a proper analysis must include all relevant provisions within the same statute be read in conjunction with the provision at issue. *In re Ames Dep't Stores, Inc.*, 306 B.R. at 66 (citing *Kelly v. Robinson*, 479 U.S. 36, 43 (1986)). Therefore, the proper analysis must include looking at the provision as a whole, in addition to its policy and objective. *Id.* This is especially true when interpreting Bankruptcy Code. *In re Ames Dep't Stores, Inc.*, 306 B.R. at 66. Following established guidance, to properly interpret section 365(d)(3), it must be read in conjunction with sections 365(g) and 502(g). *Id. at 70.*

Section 365(g) establishes rejection of unexpired leases as a breach of the lease. 11 U.S.C. § 365(g) (2020). Section 502(g) establishes all unperformed post-rejection obligations flowing from such a breach as pre-petition, general unsecured claims with lower priority than given to administrative expense claims. 11 U.S.C. § 502(g) (2021); 11 U.S.C. § 507(a)(2) (2021) (Establishing administrative expense claims are granted priority over general unsecured claims). The purpose of the sections is to ensure equal treatment of creditors. *In re Ames Dep't Stores, Inc.*, 306 B.R. at 70-71. Treating unperformed post-rejection obligations as administrative expenses, rather than pre-petition claims, provides a windfall to landlords in the form of payment for non-existent occupancy of their property. *Id.* This windfall is the result of the billing date approach. A reading of sections 365(g) and 502(g) along with section 365(d)(3) clarifies the

intent of Congress to treat unperformed post-rejection obligations as pre-petition general unsecured claims, rather than an administrative expense. *Id.* Adoption of the proration approach would support this outcome, while adoption of the billing date approach would not. *Id.*

Under the billing date approach, a trustee's obligation to pay the full month's rent arises on the billing date. This approach gives rent allocable to the post-rejection period administrative expense priority over claims of other creditors. Such an interpretation of section 365(d)(3) directly contradicts the purpose and plain meaning of sections 502(g) and 365(d). *Id.* Such a reading completely disregards the stated purpose of section 365(d)(3), to give current pay for current services, by instead awarding landlords payment for services not being currently provided. *In re Child World, Inc.*, 161 B.R. at 576. For these reasons, the adoption of the billing approach will result in a windfall that burdens the debtor and other creditors. *Id.*

Under the proration approach, the obligation to pay rent accrues based on daily occupancy, resulting in only post-petition, pre-rejection rent being granted administrative expense priority. *In re Handy Andy Home Improvement Center, Inc.*, 144 F.3d at 1127-28. This allows the maximum amount of funds to be available for creditors to partake in equally. Congress would not intend section 365(d)(3) to treat unperformed post-rejection obligations as administrative expenses as this would be in direct contradiction of its instruction to treat them as pre-petition, general unsecured claims under section 502(g). *In re Ames Dep't Stores, Inc.*, 306 B.R. at 70. Therefore, a holistic look at section 365(d)(3) and its relevant statutory provisions compels this Court's adoption of the proration approach.

B. The established purposes and policies of the Bankruptcy Code are best achieved through the adoption of the proration approach.

Bankruptcy Code has an overall goal of reorganizing debtors while treating all similarly situated creditors equally. It is well established that Code provisions are written with the intent of

best achieving this goal. When attempting to interpret ambiguous Code provisions, courts should be guided by this purpose and should not interpret the law in ways that will disturb this goal. Of the two possible interpretations of section 365(d)(3), the proration approach avoids violating the policy of equal treatment of creditors by treating all creditors equally. Prorating a debtor tenant's rental obligation also comports with the purpose of administrative expense claims and rejection of leases. Lastly, the proration approach supports the overall goal of reorganization of the debtor by guaranteeing a debtor only pays for post-petition, pre-rejection services.

1. The billing date approach goes against Code purpose and policy by yielding inequitable and arbitrary results that burden the debtor and provide a windfall to landlords.

Statutory language must be read in context, consisting of other relevant provisions as well as the real-world situations to which the statutory provisions apply. *In re Ames Dep't Stores, Inc.*, 306 B.R. at 69-70. The analysis of several courts[10] which have adopted the proration approach emphasize the billing date approach's result of inequitable and arbitrary outcomes which contradict the very fundamentals of bankruptcy policy. Application of the billing date approach provides a windfall to landlords violating the policy of equal treatment of creditors. *In re Child World, Inc.*, 161 B.R. at 576. Further, it burdens debtor tenants with payment for services not received contradicting the purpose behind administrative expense claims as well as the purpose behind lease rejections. *In re NETtel Corp., Inc.*, 289 B.R. at 491-92. The billing date approach also frustrates the overall goal of reorganizing the debtor by placing inequitable burdens on debtor tenants. *Id.*

a. Adoption of the billing date approach will result in a windfall to landlords, which violates the established policy of equal treatment amongst similarly situated creditors.

[10] *See generally In re NETtel Corp., Inc.*, 289 B.R. 486; *In re Child World, Inc.*, 161 B.R. 571; *In re Ames Dep't Stores, Inc.*, 306 B.R. 43; *In re Handy Andy Home Improvement Center, Inc.*, 144 F.3d 1125.

The purpose of section 365(d)(3) to remedy landlords' position as involuntary creditors derives from the policy of equal treatment of creditors. *In re Ames Dep't Stores, Inc.*, 306 B.R. at 68-69. Bankruptcy Code instructs courts to narrowly construe statutes governing the priority of creditor's claims to treat creditors as equally as possible. Bankr.Code, 11 U.S.C.A. § 503; *In re Child World, Inc.*, 161 B.R. at 577. Construing section 365(d)(3) to allow landlords to recover rent due prior to the rejection of an unexpired non-residential real property lease when funds are allocable to the period after the effective date of rejection would be improper. Not only would such a reading disregard the guidance provided in section 503(b)(1) entirely, but it would also result in a windfall to landlords to the detriment of other creditors. *Id.* at 576.

The potential for an absurd windfall to landlords is best evidenced through leases that call for annual rent payments. Under the billing date approach, an annual lease payment that happens to be due during the post-petition, pre-rejection period would obligate a trustee to pay the full year's rent. *In re NETtel Corp., Inc.*, 289 B.R. at 490. This would give an entire year's rent payment administrative expense priority. Depending on the length of time between rejection of the lease and the year-end, a trustee could end up paying a full year's rent for a property they no longer have the right to occupy. *Id.* The direct impact results in keeping that amount from being distributed amongst other creditors. *Id.* This type of absurd result should be found to go against the intent of Congress. *Id.*

A seemingly analogous issue addressed alongside the issue of proration of rent is that of real estate taxes. While facially these issues may appear different, this Court can and should look to these types of cases for guidance as there is no impactful distinction between them. A few courts have adopted the proration approach for real estate taxes and the billing date approach for monthly rental obligations, reasoning the difference is in the way the two accrue. *In re Phar-*

Mor, Inc., 290 B.R. 319, 327-28 (Bankr. N.D. Ohio 2003); *HA-LO Indus., Inc. v. CenterPoint Properties Tr.*, 342 F.3d 794, 799-800 (7th Cir. 2003). However, this reasoning is flawed.

Finding taxes to be a past "sunk cost" that should be prorated because they are commonly billed in arrears (at the end of the period), as opposed to payment in advance, as is common with rent, is an illogical distinction. *In re Ames Dep't Stores, Inc.*, 306 B.R. at 72. It is misleading to label taxes as a sunk cost while labeling paid in advance rent as a resource needed to continue the business. This ignores the fact that a debtor has no right to occupancy past rejection of the lease. If the debtor cannot occupy the property post-rejection, rent allocable to the post-rejection period provides no benefit to the operation of the debtor's business. *Id.* at 71. Real estate taxes and rent allocable to any period outside of the post-petition, pre-rejection period is a cost that provides no current services for the post-petition operation of the debtor's business and therefore should be prorated. *Id.* at 71-72.

Perhaps a more evident flaw in the distinction between real estate tax reimbursement and rent obligation is the lack of such an indication in the language of section 365(d)(3). Section 365(d)(3) makes no distinction between tax and rent obligations. *Id.* 78-79. This fact should be of particular significance to those advocating for the adoption of the billing date approach, who rest on asserting the statute's language is unambiguous. *Id.* Further, there is no distinction between leases payable in arrears versus payable in advance within section 365(d)(3). *Id.* Nor is there a distinction made between leases requiring monthly rent payments versus annual payments. *Id.* Allowing these distinctions to be made in determining the proper approach goes against a principled analysis of the law and the plain language of section 365(d)(3). *Id.* at 72. Adopting the billing date approach for monthly rental leases only, while conceding differing lease terms could call for a different approach ignores the possible inequitable results of the

billing date approach. *Id.* Such a distinction is not supported by the contents of section 365(d)(3). *Id.* Adoption of such a rule does not contribute to the uniformity of laws and does not support the purpose of section 365(d)(3). *Id.*

The billing date approach also allows the possibility of "double recovery" for landlords. *In re Ames Dep't Stores, Inc.*, 306 B.R. at 71. The rejection of a lease strips debtor tenants of their right to occupy the property, thereby allowing landlords the ability to re-lease the property to a new tenant at that point. *Id.* In this described situation, application of the billing date approach would reward "double recovery" to landlords by allowing receipt of payment for the post-rejection rental period from the debtor tenant's estate in addition to rent for the same period from the new tenant. *Id.* This result favors landlords over similarly situated creditors and frustrates the intent of section 365(d)(3) by overcorrecting the burden on landlords with double rent recovery. *Id.*

Allowing the billing date to determine when a rental obligation arises could also exacerbate the prejudice to landlords that section 365(d)(3) is intended to correct. Landlords themselves could become the victim of this approach in instances where a lease calling for a quarterly or annual rent payment becomes due outside of the post-petition, pre-rejection period. *In re Child World, Inc.*, 161 B.R. at 576. This would result in the landlord receiving no current rental payment pending assumption or rejection of the lease. *Id.* This is not a fictitious concern as such a result has already occurred. *Id.* (citing *In re Appletree Markets Inc.*, 139 B.R. 417 (Bankr. S.D. Tex. 1992)). The court, adopting the billing date approach, held the debtor tenant was not required to pay the monthly, quarterly, and annual rent that fell due a mere one day before the filing of the petition, but were related almost entirely to the post-petition period. *Id.* In these instances, the landlord, rather than the debtor, is burdened. However, ultimately the

same result of unequal treatment occurs, thus contradicting the purpose of section 365(d)(3) and the policy of equal treatment of creditors. *Id.*

b. The billing date approach contradicts the purpose of administrative expense claims and lease rejections while also frustrating the goal of debtor reorganization by requiring debtors to pay for services not received.

Requiring debtor tenants to pay rent allocable to a period outside of the post-petition, pre-rejection period burdens the debtor tenant and goes against the purpose of established bankruptcy policies. The purpose of a section 503(b)(1) administrative expense claim and the purpose behind allowing debtor tenants the ability to reject leases is frustrated by the application of the billing date approach. *In re NETtel Corp., Inc.*, 289 B.R. at 491-92. Further, the inequitable burden the billing date approach places on debtors is unsupported by the overall goal of reorganization.

The purpose behind a section 503(b)(1) administrative expense claim is to benefit a debtor in possession.[11] *In re Handy Andy Home Improvement Center, Inc.*, 144 F.3d at 1127. To achieve this goal, Congress enacted section 503(b)(1) which gave expenses incurred for the benefit of the business during the post-petition, pre-rejection period priority over pre-petition general unsecured claims to prevent creditors from terminating business with the debtor in possession. *In re Child World, Inc.,* 161 B.R. at 574. This purpose along with the intent of section 365(d)(3) clarifies the meaning of the phrase "notwithstanding section 503(b)(1) of this title," as used in section 365(d)(3). *In re Ames Dep't Stores, Inc.*, 306 B.R. at 70. The phrase is not meant to undo the purpose of administrative expenses of contributing to the operation of the debtor's business. *Id.* It is instead meant to do away with the burden of requiring landlords to prove to the court that the rental expense is contributing to the business, as this requirement

[11] Debtors still in possession of their business needed a way to continue the operation of their business as long as current revenue is covering the current cost in order to prevent the debtor from collapsing prematurely under their already existing debts. *In re Handy Andy Home Improvement Center, Inc.*, 144 F.3d at 1227.

causes a delay in compensating landlords. *Id.* Therefore, under section 365(d)(3), landlords are automatically granted the priority of administrative expense for the service of providing commercial property for the period pending assumption or rejection. The billing date approach, however, would require rent payment beyond that period. This directly contradicts the intent behind administrative expenses by burdening the debtor in possession for a nonexistent right of occupancy. *In re NETtel Corp., Inc.*, 289 B.R. at 492.

The billing date approach goes against the purpose of rejecting a lease for the same reason. Debtor tenants are given the option to assume a lease if they determine it to still be financially beneficial to them. *Id.* at 491. By doing so, a debtor remains subject to all its obligations under the lease as administrative expense claims. *Id.* Conversely, when the lease is no longer beneficial to a debtor, they have the option to reject it. *Id.* This enables the debtor to forfeit their right to occupancy in exchange for waiving their obligations under the lease as administrative expense claims they would otherwise be required to pay. *Id.* Requiring a debtor tenant to pay rent allocable to the post-rejection period under the billing date approach would impose the very burden the option of rejecting a lease was designed to avoid. *Id.* at 492. It is inequitable and against principles of bankruptcy and accounting to read section 365(d)(3) as ceasing the landlord's obligation at the time of rejection yet continuing the obligation of the debtor tenant. *Id.* at 491-92. For this reason, section 365(d)(3) should be read as dealing only with the "obligations arising under the lease for the estate's right to use the property," pending assumption of rejection of the lease. *Id.* at 492.

The application of the billing date approach would result in section 365(d)(3) frustrating the purpose and policy behind multiple Bankruptcy Code provisions. *See generally In re NETtel Corp., Inc.*, 289 B.R. 486; *In re Child World, Inc.*, 161 B.R. 571. When the frustration of Code

purpose and policy is a clear result of an interpretation, a court is not to interpret a statutory provision in such a way. *In re R.H. Macy & Co., Inc.*, 170 B.R. at 73. Accordingly, this Court should find that proration is the intended and proper approach when applying section 365(d)(3) to a trustee's post-petition, pre-rejection rent obligation.

2. The policy of equal treatment of creditors and the goal of reorganization for the debtor dictates the adoption of the proration approach as it avoids favoritism of landlords over similarly situated creditors.

Adoption of the proration approach best achieves the fundamental bankruptcy purposes and policy by promoting successful reorganization of the debtor while treating all similarly situated creditors equally. *In re NETtel Corp., Inc.*, 289 B.R. at 491-92. The inequitable and arbitrary results produced by the billing date approach are avoided through proration. This has been a determinative factor for courts[12] when deciding to adopt proration. The majority of courts that have addressed this issue have held proration to be the proper approach. *In re Child World, Inc*., 161 B.R. at 576.

Prorating a debtor tenant's post-rejection rent avoids "extending section 365(d)(3) beyond its intended effect." *In re Ames Dep't Stores, Inc.*, 306 B.R. at 65. Proration results in a debtor only paying for services they received during the post-petition, pre-rejection period for the benefit of keeping their business running. This achieves the intent behind a section 505(b)(1) administrative expense claim without providing any favoritism to landlords over other creditors. *In re NETtel Corp., Inc.*, 289 B.R. at 492-93. Adoption of the proration approach also ensures landlords receive current payment for the property they provide to debtors pending assumption

[12] *See generally In re Child World, Inc.*, 161 B.R. 571; *In re NETtel Corp., Inc.*, 289 B.R. 486; *In re Ames Dep't Stores, Inc.*, 306 B.R. 43; *In re Handy Andy Home Improvement Center, Inc.*, 144 F.3d 1125; *In re Trak Auto Corp.*, 277 B.R. 655 (Bankr. E.D. Va. 2002).

or rejection of the lease, further achieving section 365(d)(3)'s intended purpose. *In re Child World, Inc.*, 161 B.R. at 576.

A considerably analogous case to the one at hand arose in the Southern District of New York's Bankruptcy Court. *In re Ames Dep't Stores, Inc.,* 306 B.R. 43. Likewise to the facts of the present case, it involved a claim arising from a rejection of a commercial lease for unpaid rent due in advance of the first of the month. *Id.* at 47. In this parallel case, the proration approach was adopted after the court found it to be the proper construction of section 365(d)(3) when considering its legislative history. *Id.* at 68. This conclusion relied on the guidance provided in *NETtel*, which too deals with a claim arising from the rejection of a lease for monthly rent. *In re NETtel Corp., Inc.*, 289 B.R. at 488. It was determined that the compensation obligation of a trustee fundamentally arose on the date of occupancy. *Id.* at 490-91. The reasoning went on to state that finding otherwise would subject landlords to the requirements of a section 503(b)(1) administrative expense claim, in direct contradiction to the purpose of section 365(d)(3). *Id.*

A heavily cited dissenting opinion, which outlines the pitfalls of the billing date approach, has guided courts who have adopted proration. *Centerpoint Props. v. Montgomery Ward Holding Corp.* (*In re Montgomery Ward Holding Corp.*), 268 F.3d 205, 212-15 (3d Cir. 2001) (Mansmann, J., dissenting); *In re Ames Dep't Stores, Inc.*, 306 B.R. at75; *In re NETtel Corp., Inc.*, 289 B.R. at 490. The dissenting opinion explains how "[n]othing in the text is inconsistent with the common-sense view that when an obligation arises may be fixed by its intrinsic nature and/or by the extrinsic circumstances of its accrual." *In re Montgomery Ward Holding Corp.*, 268 F.3d at 213 (Mansmann, J., dissenting). It goes on to point out the incorrectness of elevating the "accident or artifice of the billing date above the economic reality

of the accrual." *Id.* Such results places form over substance, in direct contradiction to section 365(d)(3)'s emphasis of substance over form. *Id.*

Proration is necessary not just for the protection of the debtor and other creditors, but for landlords as well. *In re NETtel Corp., Inc.*, 289 B.R. at 493. There are two situations in which proration of rent is required to protect landlords from the confines of section 503(b)(1). *Id.* The first instance arises when the lease requires the rent to be paid in advance and the due date falls before the filing of the petition. *Id.* The second instance arises when the lease requires rent to be paid in arrears and the due date falls after the rejection of the lease. *Id.* The billing date approach leaves landlords disadvantaged in both situations. *Id.* Conversely, proration will lead to equitable results that best achieve the intent of section 365(d)(3), by ensuring landlords receive current payment for current services. *In re Ames Dep't Stores, Inc.*, 306 B.R. at 65.

By prorating a debtor tenant's rent, the purpose Congress intended for section 365(d)(3) is accomplished while supporting, rather than frustrating, the purposes and policies of the Bankruptcy Code. For this reason, this Court should adopt the proration approach to calculating rent due by a debtor tenant to a landlord for the post-petition, pre-rejection period under 11 U.S.C. § 365(d)(3).

CONCLUSION

For the foregoing reasons, the decision of the Thirteenth Circuit should be affirmed. If instead relief is granted in line with Petitioner's request, both issues before the Court will result in unequal treatment of similarly situated creditors. Respondent respectfully requests that this Court affirm the decision of the Thirteenth Circuit.