No. 20-1004

IN THE

Supreme Court of the United States

OCTOBER TERM, 2021

IN RE TERRAPIN STATION, LLC, DEBTOR,

TOUCH OF GREY ROASTERS, INC., PETITIONER

V.

CASEY JONES, CHAPTER 7 TRUSTEE, RESPONDENT.

ON WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS

FOR THE THIRTEENTH CIRCUIT

BRIEF FOR PETITIONER

TEAM NO. 29

Counsel for Petitioner

QUESTIONS PRESENTED

1. Under 11 U.S.C. § 547(c)(4) and 11 U.S.C. § 503(b)(9), is a seller of goods entitled to reduce its preference exposure through the subsequent value exception, despite receiving postpetition payment for the goods as an administrative expense?

2. Under 11 U.S.C. § 365(d)(3), is a trustee required to perform obligations in compliance with the terms of an unexpired lease for non-residential real property when those obligations occur postpetition and prior to the debtor in possession's rejection?

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The United States Bankruptcy Court for the District of Moot held for Respondent, Casey Jones, Chapter 7 Trustee, on both issues. Specifically, the bankruptcy court found that: (1) 11 U.S.C. § 547(c)(4) precludes a defendant from asserting new value for goods subject to a satisfied administrative expense under § 503(b)(9) and (2) 11 U.S.C. § 365(d)(3) does not require the trustee to satisfy obligations allocable to the post-rejection period. The Thirteenth Circuit Court of Appeals affirmed on both issues. This Court then granted Petitioner, Touch of Grey Roasters, Inc.'s, petition for writ of certiorari.

STATEMENT OF JURISDICTION

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

PERTINENT STATUTORY PROVISIONS

This action involves a statutory interpretation of particular provisions of Title 11 of the United States Code. These statutory provisions are outlined below and are also restated in the Appendix.

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—
>
> (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. § 509(b)(9) provides:

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

> (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.

STATEMENT OF FACTS

Touch of Grey is an award-winning international coffee company with over 1,900 corporate-owned and franchised coffeehouses around the world. R. at 3. Touch of Grey planned to build a series of new "neighborhood coffeehouses" in 2017 in response to rising consumer demand for local, independent coffee shops. R. at 4. The local coffee shops would be franchised with existing independent coffeehouse operators. R. at 4. Although the shops would maintain their own branding as opposed to that of Touch of Grey, they would be allowed to sell a new line of Touch of Grey coffee products called "Dark Star." R. at 4.

In fall of 2017, as part of its "neighborhood coffeehouses" plan, Touch of Grey entered into an informal franchise venture with Terrapin Station, LLC (the "Debtor") via discussion with Mr. William Tell, the sole proprietor. R. at 2–4. Mr. Tell's coffee shop suffered from stagnant earnings and needed remodeling. R. at 4. Accordingly, in order to move forward with their franchise venture, Touch of Grey bought a recently renovated warehouse and leased the premises to the Debtor. R. at 4. Touch of Grey and the Debtor, as lessor and lessee, respectively, signed a Lease Agreement (the "Lease") on July 1, 2018. R. at 4. The Lease was a twenty-year lease that required the Debtor to pay a $25,000 monthly rent, which was due on the first of each month. R. at 4. On the same day, the parties formally entered into a franchise agreement that required the Debtor to purchase Touch of Grey's Dark Star products and sell them at its shop. R. at 4.

Unfortunately, the Debtor's business strategy did not pan out and sales fell short of expectations. R. at 5. While the Debtor managed to stay current on its rent, it owed over $700,000 for previously purchased Dark Star products by November 1, 2019. R. at 5. On December 5, 2019, out of growing concern regarding the Debtor's financial woes, Touch of Grey sent a notice of default to the Debtor. R. at 5. Two days later, the parties entered into a forbearance agreement. R.

at 5. As part of the agreement the Debtor agreed to pay Touch of Grey $250,000 for previously purchased Dark Star products. R. at 5. In exchange Touch of Grey agreed to forbear termination of the franchise agreement. R. at 5. On the same day, December 7, 2019, the Debtor was able to make the $250,000 payment. R. at 5.

On December 18, 2019, Touch of Grey extended $200,000 worth of additional Dark Star products on credit backed by a personal guarantee from Mr. Tell. R. at 5, 6. The Debtor received the goods on December 21, 2019, but only a couple of weeks later, on January 5, 2020, the Debtor filed for Chapter 11 bankruptcy in the United States Bankruptcy Court for the District of Moot. R. at 6. On the petition date, although the Debtor remained current on its rent, it owed Touch of Grey $650,000 for previously purchased goods. R. at 6. Other unsecured creditors, owed over $500,000, were unwilling to render goods and services to the debtor on credit. R. at 6.

As part of its reorganization efforts, the Debtor sought to continue selling Touch of Grey's Dark Star products. R. at 6. Like other creditors, however, Touch of Grey felt reluctant to continue selling goods to the Debtor on credit postpetition. R. at 6. Accordingly, two weeks after its Chapter 11 petition, the Debtor requested to make a critical vendor payment to Touch of Grey for $200,000 in order to induce continued business with Touch of Grey. R. at 6. The creditors' committee supported the Debtor's motion for the $200,000 payment because of Touch of Grey's indispensable role in the reorganization plan. R. at 7. The bankruptcy court ultimately denied the Debtor's critical vendor payment request but granted $200,000 payment to Touch of Grey as an administrative expense. R. at 7. As a result, the Debtor was able to pay Touch of Grey $200,000 and continue operating. R. at 7.

Regrettably, the Debtor's reorganization efforts failed. R. at 7. May 5, 2020, the Debtor permanently closed and vacated the leased premises. R. at 7. The following day, the Debtor filed

a motion to reject the lease and franchise agreement with Touch of Grey. R. at 7. On May 8, 2020, Touch of Grey responded with a motion to require payment of the May rent, which had been due on May 1, in full. R. at 7, 8. A hearing on both motions was held on May 29, 2020. At the hearing, the Debtor announced and, the bankruptcy court granted, its conversion to Chapter 7. R. at 8. The court also granted the Debtor's rejection of the lease effective May 5, 2020. R. at 8. Instead of ruling on Touch of Grey's motion to compel the full payment of the May rent, the court ordered additional briefing on the matter. R. at 8.

Subsequently, the Chapter 7 Trustee opposed paying the full May rent on the grounds that the Debtor had occupied the premises for only the first five days of the month. R. at 8. Thus, the Trustee averred that only prorated rent for the five days of May should be paid to Touch of Grey. R. at 8. The Trustee also initiated an adversary proceeding to avoid the $250,000 prepetition payment the Debtor made to Touch of Grey as part of their forbearance agreement. R. at 8. The Trustee argued that this $250,000 payment constituted a preferential transfer which the estate is entitled to avoid. R. at 8. Touch of Grey responded that, under the subsequent value exception, it could reduce its preference exposure by the $200,000 of products it extended on credit to the Debtor prepetition. R. at 8. The Trustee countered that, because Touch of Grey had been paid $200,000 for the products as an administrative expense postpetition, it was not entitled to the subsequent value defense.

The bankruptcy court: (1) denied Touch of Grey the $200,000 reduction to preference exposure and (2) awarded only $4,032.26 to account for the first five days of the May rental period. R. at 9. The bankruptcy court's ruling was affirmed by the District Court. R. at 9. Touch of Grey then appealed to the United States Court of Appeals for the Thirteenth Circuit. R. at 9. That court

again ruled in favor of the Trustee on both issues. R. at 9. In response, Touch of Grey filed a timely petition for writ of certiorari which this Court granted. R. at 1.

STANDARD OF REVIEW

The facts of this case are undisputed. R. at 9. Therefore, only questions involving interpretation of the United States Bankruptcy Code remain, and such questions are questions of law. When there are only questions of law, the appropriate standard of review is de novo. *Highmark Inc. v. Allcare Health Mgmt. Sys., Inc.*, 572 U.S. 559, 563 (2014). Under de novo review, this Court must decide questions of law as though it was the original court reviewing the case. *Razavi v. Comm'r of Internal Revenue*, 74 F.3d 125, 127 (6th Cir. 1996).

SUMMARY OF THE ARGUMENT

A key policy of the Bankruptcy Code is to prioritize payment to creditors and lessors who provide goods and services to debtors, both postpetition and throughout the reorganization process. This policy allows the debtor to continue operating throughout the reorganization, to the ultimate benefit of the estate. Touch of Grey, as a supplier of goods and a lessor, supported Terrapin Station before and during its reorganization efforts. Not only did the Thirteenth Circuit's ruling unjustly penalize Touch of Grey for its cooperation with the Debtor; it also undermined Congress' aim of encouraging creditors and lessors to work with troubled debtors for the estate's overall benefit. To enact Congress' purpose in this and future cases, this Court should overrule the incorrect decisions of the Thirteenth Circuit Court of Appeals.

As to the first issue, the Thirteenth Circuit erred in finding that a payment for administrative expenses under § 503(b)(9) defeats the subsequent value exception outlined in § 547(c)(4). The plain meaning of the word "debtor" in § 547(c)(4) unambiguously limits "otherwise unavoidable transfers" to those made prepetition, because postpetition there is no property of the debtor—only

of the estate. Postpetition uses of the word "debtor" in the Code do not occur in the same act. Further, they refer to a debtor as an individual actor, rather than an owner of property. This Court has said that when identical words are used with different intents throughout an act, they should not be presumed to have the same meaning.

Should this Court find that § 547(c)(4) is ambiguous, the broader context of the Bankruptcy Code and Congress' policy goals for the two statutes at issue support a finding that the petition date is the cut-off for preference analysis. The statute of limitations for preference actions begins to run on the petition date under § 546. Under § 547(c)(5), transfers that defeat the floating lien exception must occur prior to the petition date. Because the petition date is the cut-off for preference analysis in related provisions, it stands to reason that it is the cut-off for § 547(c)(4) as well. Congress did not need to explicitly set the petition date as a cut-off for § 547(c)(4), because its use of the term "debtor" plainly indicated that all transfers defeating the subsequent value exception must occur prepetition.

Lending further support to the petition as a cut-off for preference analysis, lower courts have consistently conducted § 547(b)(5)'s hypothetical liquidation test as of the petition date. Lower courts have also disallowed the extension of new value after the petition date to create standing for a creditor to invoke the subsequent value exception in § 547(c)(4). If the petition date is used as the cut-off for preference analysis in all these areas, it stands to reason that transfers made after the petition date should not factor in to the subsequent value exception.

Finally, Congress' complementary policy goals for §§ 547(c)(4) and 503(b)(9)—encouraging creditors to do business with troubled debtors—would be undermined by allowing a transfer made under § 503(b)(9) to defeat the § 547(c)(4) exception. Congress intended both provisions to protect creditors who cooperate with debtors. Indeed, Congress' enactment of distinct

pre- and postpetition protections for creditors who work with troubled debtors prepetition further supports the petition date as a clear demarcation that should not be crossed in preference analysis.

Regarding the second issue before this Court, the Thirteenth Circuit erred in finding that § 365(d)(3) does not require the trustee to satisfy obligations allocable to the post-rejection period. Section 365(a) of the Bankruptcy Code affords a debtor in possession the power to assume or reject an unexpired lease. The Code further supplies, via § 365(d)(3), that when an unexpired lease is one for non-residential real property, the debtor in possession or trustee must perform the obligations under the lease that arise between the date of petition and the point at which the debtor in possession rejects the lease.

The Thirteenth Circuit Court of Appeals, in its construction of § 365(d)(3), applied a proration approach. This approach allows a debtor in possession or trustee to bypass obligations in the lease that arise postpetition and prerejection but that are allocable to the post-rejection period. This interpretation of § 365(d)(3) is incorrect because it ignores the plain language of that provision. The plain meaning of the text of § 365(d)(3) is clear and unambiguous and read as such requires application of the billing date approach. The billing date approach asserts that the trustee or debtor in possession is to perform all obligations per the terms of the lease if those obligations arise postpetition and prior to rejection.

To begin, "obligations" is a word with a common legal meaning suggestive of a duty. Congress was careful with § 365(d)(3) to outline where the duty in question originates from—the lease. Leases are contracts. Principles of contract interpretation, like those of statutory interpretation, are clear that the unambiguous and clear language of a contract should prevail. Therefore, it would make sense that the plain reading of § 365(d)(3) would direct courts to a lease

in determining both the what and when associated with an obligation to be performed under § 365(d)(3).

Further, a reading of § 365(d)(3) that looks at the terms "obligations," "arises," and "under any unexpired lease" in context and conjunction with one another gives additional support to the application of the billing date approach. Statutes should be read in consideration of the context of the entire provision and giving meaning and effect to each word or phrase. A determination that "obligations" are subject to interpretation as either fixed or accruing is misplaced because it ignores the directive of Congress that obligations -arise under the terms of the lease.

Even if one assumes that the language of § 365(d)(3) is ambiguous, the legislative history and policy implications of that provision clearly necessitate application of the billing date approach as well. The purpose of § 365(d)(3) was to provide for landlords who were forced to resort to legal processes, and at the risk of being awarded less-than-full payment, to collect rent from debtors postpetition and prerejection. Lessors, forced to provide services to debtors as a result of the automatic stay, were often delayed or denied full payment for those services—unlike other postpetition creditors who could collect for their goods or services. Congress' creation of § 365(d)(3) changed that in an effort to be fairer to lessors in this unenviable position. With the addition of § 365(d)(3) in 1984, Congress abrogated the proration standard that existed pre-1984 and that was developed in concert with the standard of § 503(b)(1). Accordingly, Congress indicated its approval of the billing date approach through the creation of § 365(d)(3).

Further, a look at the policies underlying the Bankruptcy Code leads to the same result. The Code prioritizes postpetition creditors over the estate. This aligns with the overall goal of providing for the estate by promoting ongoing business by the debtor or debtor in possession. Postpetition creditors are essential to furthering that goal. Lessors of real property are essentially

forced, by the nature of the automatic stay, to become a postpetition creditor and provide a service, in the form of property, to the debtor in possession until such time that the debtor in possession rejects the lease. A reading of § 365(d)(3) that allows for lessors to be paid in full according to the lease, the billing date approach, comports with these goals of prioritizing postpetition creditors who allow a debtor in possession to keep open to the doors to its business.

Finally, the billing date approach is most equitable in balancing power between the lessor and the debtor in possession. The debtor in possession ultimately determines when and whether to assume or reject an unexpired lease. This is completely sensical because the debtor in possession is in the best position to know both the terms of the lease and the ever-changing nature of its financial status. However, such a position also affords the debtor in possession the opportunity to take advantage of the lessor via the nature of when they decide to reject a lease. Therefore, a billing date approach balances out this power by affording a sense of security to the lessor in knowing it will be paid as those obligations arise and as they were negotiated for in the lease.

ARGUMENT

This Court should correct the error of the Thirteenth Circuit Court of Appeals by holding that payment for administrative expenses under § 503(b)(9) does not defeat the subsequent value exception as outlined in § 547(c)(4). In addition, this Court should overrule the circuit court's acceptance of the proration approach which interprets § 365(d)(3) as not requiring the trustee to satisfy obligations allocable to the post-rejection period and apply the billing date approach which correctly interprets § 365(d)(3) and requires payment of obligations per the terms of a lease.

I. SECTIONS 547(c)(4) AND 503(b)(9) OF THE BANKRUPTCY CODE ENTITLE THE PETITIONER TO REDUCE ITS PREFERENCE EXPOSURE THROUGH THE SUBSEQUENT VALUE EXCEPTION, DESPITE RECEIVING POSTPETITION PAYMENT FOR THE GOODS AS AN ADMINISTRATIVE EXPENSE.

Section 547 of the Bankruptcy Code allows a trustee to "avoid any transfer of an interest of the debtor in property" that meets certain provisions. In particular, a trustee may recover transfers that: (1) are made to a creditor on account of prior debt; (2) are within ninety days of the petition; and (3) allow the creditor to receive more than it would have in a Chapter 7 bankruptcy. 11 U.S.C. § 547(b). Section 547 contains five exceptions to the general avoidance rule. Relevant to the case at hand is § 547(c)(4), which provides that:

> 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). This exception is known as the subsequent value defense.

This Court has been asked to consider whether a creditor can invoke the subsequent value defense if the goods or services extended as new value are paid for postpetition as an administrative expense under § 503(b)(9). Section 503(b)(9) allows prioritized administrative expenses, "including . . . 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." 11 U.S.C. § 503(b)(9).

The plain language of § 547(c)(4) is unambiguously indicates that the petition date is a "cut-off point" for preference analysis, such that payments made postpetition cannot defeat a subsequent value defense. Even if this Court finds that § 547(c)(4) is ambiguous, it can still find that the statutory context, as well as the complementary policy goals of §§ 547(c)(4) and 503(b)(9),

establish the petition date as a hard cut-off for preference analysis. If preference analysis is conducted as of the petition date, then postpetition transfers, including prioritized administrative expenses under § 503(b)(9), cannot defeat the subsequent value defense.

A. The plain language of § 547(c)(4) supports the petition date as a "cut-off" point for preference analysis, because the term "debtor" temporally limits "otherwise unavoidable transfers" to those that occur prepetition.

In interpreting the plain language of the phrase "otherwise unavoidable transfer" in 547(c)(4), this Court should begin by following its "cardinal rule that a statute is to be read as a whole, since the meaning of statutory language, plain or not, depends on context." *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991) (quotations omitted). Section 547(c)(4)(B) reads:

> 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)(B) (emphasis added). As the Eighth Circuit has noted, the word "debtor" necessarily references a prepetition timeline, because postpetition there is no property of the debtor—only of the estate. *See In re Bellanca Aircraft Corp.*, 850 F.2d 1275, 1284 (8th Cir. 1988).

The Third Circuit has found this argument unpersuasive, observing that other Code provisions use "debtor" in a postpetition context. *In re Friedman's Inc.*, 738 F.3d 547, 555 (2013). But this Court has noted that:

> [T]he presumption that 'identical words used in different parts of the same act are intended to have the same meaning . . . readily yields whenever there is such variation in the connection in which words are used as reasonably to warrant the conclusion that they were employed in different parts of the act with different intent.

Roberts v. Sea-Land Serv., Inc., 566 U.S. 93, 108 (2012) (citing *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 595 (2004); *U.S. v. Cleveland Indians Baseball Co.*, 532 U.S. 200, 213 (2001)).

In its criticism, the Third Circuit cites Code provisions that use "debtor" with different intent. Section 329 discusses the responsibilities of debtors' attorneys and § 521 outlines the debtors' role postpetition, both refer to the debtor as an individual actor in the bankruptcy. *In re Friedman's Inc.*, 738 F.3d at 555. Section 547(c)(4) discusses "debtor" as the possessor of property. Because "debtor" is employed with different intent in the Code provisions cited by the Third Circuit than in § 547, the *In re Friedman's* court's criticism is not valid.

If § 547(c)(4)(B) is read in its statutory context the phrase, "the debtor did not make an otherwise unavoidable transfer" unambiguously refers only to prepetition transfers that are actually made by the *debtor*, not the debtor in possession or trustee.[1] 11 U.S.C. § 547(c)(4)(B). Thus, the plain language of the text temporally limits "otherwise unavoidable transfers" to those made prepetition.

Here, Touch of Grey extended $200,000 of credit to Terrapin, LLC prepetition. Postpetition, Terrapin, LLC—the Debtor—was unable to make an otherwise unavoidable transfer, because all its property was then property of the estate. When the bankruptcy court approved an administrative payment, the *estate* transferred the property—not the debtor. Thus, the estate's postpetition administrative payment to Touch of Grey cannot defeat Touch of Grey's subsequent value defense.

B. Even if this Court finds "otherwise unavoidable transfer" to be ambiguous, the context of the Code in general and Congress' specific policy goals for § 547(c)(4) and § 503(b)(9) indicate that the petition date is the cut-off for preference analysis.

This Court has written that "the text is only the starting point" of statutory interpretation. *Kelly v. Robinson*, 479 U.S. 36, 43 (1986). "'In expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the *provisions of the whole law*, and to its

[1] It is irrelevant that Mr. Tell made a personal guarantee for the extension of new value, because the bankruptcy court approved the estate's transfer postpetition. R. at 4, 7.

object and policy.'" *Id.* (quoting *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 222 (1986) (subsequent citation information removed)) (emphasis added). Even if this Court finds § 547(c)(4) to be ambiguous, it should still find that postpetition transfers under § 503(b)(9) cannot defeat the subsequent value exception, based on the Code as a whole and Congress' policy goals for the two provisions.

1. If this Court is to read § 547(c)(4)(B) consistently with other Code provisions, it must set the petition date as a cut-off for transfers defeating the subsequent value exception.

Courts should read the statute as a whole, in such a way that each individual subsection is consistent with other Code provisions. *See King*, 502 U.S. at 221*; see also United Savings Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. at 365, 374 (1988) (finding that a reading of a Code provision that is inconsistent with the rest of the statute cannot be correct). If this Court is to read § 547(c)(4)(B) consistently with other Code provisions, it must set the petition date as a cut-off for transfers defeating the subsequent value exception.

In §§ 546 and 547, Congress established the petition as the relevant cut-off date for avoidance exceptions. Section 546 sets the statute of limitations for proceedings under § 547 at "2 years after the entry of the order for relief; or 1 year after the appointment" of the trustee. *See In re Friedman's*, 738 F.3d at 556. As the Third Circuit noted, "[i]f 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." *Id.* That the statute of limitations begins to run on the petition date "suggests that the calculation of preference liability should remain constant pre-petition." *Id.* This desired consistency would not be possible if postpetition transfers could defeat a subsequent value defense. *Id.*

Similarly, Congress in § 547(c)(5) explicitly states that transfers defeating the floating lien exception must occur prior to the petition date. The floating lien exception limits a trustee's avoidance power only to the extent that a creditor's position was improved by a new security interest in inventory or receivables. 11 U.S.C. § 547(c)(5). In this way, it is analogous to the subsequent value exception, which only allows a trustee to recover transfers in excess of the new credit extended to the debtor prepetition. 11 U.S.C. § 547(c)(4). The fact that Congress set the petition date as a cut-off for a similar exception supports the petition date as a cut-off for § 547(c)(4) as well. *See In re Friedman's Inc.*, 738 F.3d at 556. The Third Circuit notes that an opposite argument could be made: Congress clearly knew how to establish the petition date as a cut-off and chose not to do so for § 547(c)(4). *Id.* But Congress also used the word "debtor" in § 547(c)(4)—a choice that established the petition date as a cut-off without the need to explicitly make it so. The word "debtor" is not used in § 547(c)(5).

Additionally, previous caselaw has acknowledged the petition date as a cut-off for various provisions in § 547. Section 547(b)(5) establishes a "hypothetical liquidation test," wherein courts compare how much the creditor received in the transfer with how much it would have received in a Chapter 7 filing. 11 U.S.C. § 547(b)(5). Courts have typically conducted the hypothetical liquidation test as of the petition date. *In re Friedman's,* 738 F.3d at 555-56. This Court's holding in *Palmer Clay Production Company v. Brown*, which was codified by § 547 (b)(5), further supports the petition date as a cut-off for the hypothetical liquidation test. 297 U.S. 227, 229 (1936) ("Whether a creditor has received a preference is to be determined . . . by the actual effect of the payment as determined when bankruptcy results.").

Courts have also used the petition date as the cut-off for the extension of new value under § 547(c)(4). For example, the Eighth Circuit held in *In re Bellanca Aircraft Corporation* that

postpetition transfers could not provide new value for the purposes of the subsequent value exception. 850 F.2d at 1284. If a creditor cannot extend new value past the petition date, it stands to reason that administrative payments made past the petition date cannot defeat the subsequent value exception. Otherwise, there would be inconsistent cut-offs for the preference analysis.

Thus, in order to read § 547(c)(4)(B) consistently with other Code provisions, this Court should establish the petition date as the cut-off for challenges to the subsequent value exception. If the petition date is a cut-off, postpetition transfers cannot defeat the subsequent value exception.

2. The section's title—*Preferences*—indicates Congress' intent that "otherwise unavoidable transfer" be limited to those transfers that occurred during the preference period.

A statute's title may play a role in interpreting ambiguous words or phrases in the statute. *Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 483 (2001). As the Third Circuit notes, the fact that Congress titled § 547 *Preferences* "suggests that it concerns transactions occurring during the preference period, which is by definition pre-petition." *In re Friedman's*, 738 F.3d at 555. It follows that the preference analysis would close out at the petition date, rendering postpetition transfers irrelevant in either establishing or defeating the subsequent new value defense. *Id.*

3. Congress' enactment of distinct pre- and postpetition protections for creditors aiding troubled businesses reinforces the petition date as a cut-off.

In looking to the whole law, courts should not read a "single sentence or member of a sentence" in isolation, but rather consider how different provisions interact with one another to make up the whole. *Kelly*, 479 U.S. at 43. When read as a whole law, the prepetition provisions contained in § 547(c)(4) and the postpetition provisions in § 503(b)(9) serve distinct pre- and postpetition purposes through distinct pre- and postpetition mechanisms. The prepetition mechanisms in § 547(c)(4) govern avoidance exceptions, and the postpetition mechanisms in § 503(b)(9) govern administrative expenses. *Id.* The two need not overlap one another, as Congress

enacted each for its specific purpose. *Id.* As the Third Circuit has noted: "The scheme of the Bankruptcy Code contains numerous post-petition mechanisms for ensuring that similarly situated creditors are not treated equally. For this reason, preference analysis need not account for post-petition activity." *In re Friedman's Inc.*, 738 F.3d at 561. The fact that Congress enacted two distinct provisions for the pre- and postpetition periods supports the notion of the petition as a cut-off date for avoidance actions.

4. Allowing a postpetition administrative expense payment to defeat the subsequent value exception would undermine Congress' complementary policy goals for each section.

Courts should look to the "object and policy" of a statute to aid in ascertaining its meaning. *Kelly*, 479 U.S. at 43. Both provisions encourage creditors to continue doing business with debtors, thereby allowing the debtor's business to flourish as much as possible both before and after the bankruptcy filing. In so doing, these creditors increase the overall value of the estate for all who are owed money.

Congress' purpose in drafting § 547(c)(4), encouraging creditors to do business with troubled debtors, sometimes has the happy result of preventing bankruptcies altogether. *Union Bank v. Wolas*, 502 U.S. 151, 161 (1991). In the alternative, a creditor's extension of new credit to a struggling debtor may at least shore up the business, thereby enlarging the estate and making available more funds for all creditors. *Id.* Without the subsequent value exception, a creditor would not be encouraged to extend further credit that "enables [the debtor] to work his way out of a difficult financial situation" or have more funds available to pay creditors. *Id.* In seeking to incentivize creditors to continue working with troubled businesses, Congress assured them in § 547(c)(4) that they would not be penalized more than any other unsecured creditor for doing so.

Administrative expenses under § 503(b)(9) serve a similar, but distinct, policy goal. In § 503(b)(9) Congress gave priority payment status to "goods that are in the debtor's possession prepetition and then used by the debtor-in-possession post-petition to continue operations." *In re Commissary Ops., Inc.*, 421 B.R. 873, 877–78 (Bankr. M.D. Tenn. 2010). Administrative expense claims involve the continued functioning of the business, for the benefit of the estate, postpetition. *Id.* Section 547(c)(4) assures creditors that they will not be any worse off than other creditors of their class for lending subsequent new value. *In re Bellanca Aircraft Corp.*, 850 F.2d at 1280. Section 503(b)(9) focuses on the functioning of the business postpetition for the benefit of the estate and all other creditors. *In re Commissary Ops., Inc.*, 421 B.R. at 877–78.[2]

The provisions' purposes are similar in that they encourage behavior that benefits the estate both pre- and postpetition. This purpose transcends the benefit of any one creditor, by enlarging the estate for the good of all creditors. This purpose also transcends any one bankruptcy: by affirming Congress' intent to encourage behavior with specific pre- and postpetition benefit, this Court will broadcast to all future creditors that it is safe to work with troubled businesses. Allowing a § 503(b)(9) transfer to defeat the § 547(c)(4) exception would undermine Congress' complementary policy goals for each provision. *In re Friedman's Inc.*, 738 F.3d at 561.

Further, if Congress had wanted to allow transfers under § 503(b)(9) to defeat the subsequent value exception of § 547(c)(4), it likely would have indicated that intent in the statute itself. *In re Commissary Ops., Inc.*, 421 B.R. at 877–78. In order to give effect to Congress' distinct policy goals for each provision, this Court cannot allow a trustee to essentially revoke the payment

[2] In the case at hand, the bankruptcy court approved the administrative expense priority payment for exactly this reason: all creditors agreed that Touch of Grey was essential to the continued functioning of the business, and the transfer that was made under § 503(b)(9) encouraged Touch of Grey to continue doing business with the debtor post-bankruptcy. R. 6–7.

Congress intended a creditor receive under § 503(b)(9) to defeat an explicit exception Congress carved out in § 547(c)(4). *See In re Friedman's Inc.*, 738 F.3d at 561.

5. Policy arguments related to equal distribution, "double dipping," and the replenishment of the estate are unpersuasive.

Some courts have argued that allowing creditors to utilize the subsequent value defense and receive administrative priority for the same goods sold undercuts the prime bankruptcy policy goal of equal distribution. *See, e.g., In re Beaulieu Group, LLC*, 616 B.R. 857, 877 (Bankr. S.D. Ga. 2020). This emphasis on the broad policy of equal distribution ignores Congress' more tailored policy goals in carving out specific exceptions for those creditors who work with troubled businesses, to the ultimate benefit of the entire estate. *In re Bellanca Aircraft Corp.*, 850 F.2d at 1280 (quotation removed).

In the same vein, creditors who utilize the subsequent value defense and receive administrative priority are not "double dipping," because they are not receiving a double payment for the same goods. *See, e.g., In re TI Acquisition, LLC*, 429 B.R. 377, 385 (Bankr. N.D. Ga. 2010). A creditor who is paid for goods in the ninety days prepetition and then extends new goods or credit within twenty days of the petition, subsequently receiving payment for those goods as an administrative expense, is receiving one payment for each set of goods extended. *In re Friedman's Inc.*, 738 F.3d at 561. Because the creditor received money for "goods and services actually provided," it was "never unjustly enriched." *Id.*

Ignoring this Court's explanation of § 547's purpose, some courts have argued that § 547(c)(4) seeks to reward creditors for replenishing the estate. *See, e.g., In re TI Acquisition, LLC*, 429 B.R. at 384. These courts reason that postpetition payments render the subsequent value defense invalid, because once goods are paid for the estate is no longer enlarged. *Id.* However, this argument "conflates the formula for calculating new value with the objective of the new value

defense." *In re Friedman's Inc.*, 738 F.3d at 558–59. The replenishment of the estate is not the purpose of § 547(c)(4).[3] Instead, the subsequent value defense disincentivizes the race to the courthouse and encourages creditor-debtor cooperation. *Union Bank*, 502 U.S. at 161. The protection afforded the debtor may even "enable him to work his way out of a difficult financial situation through cooperation with all of his creditors." *Id.* The subsequent value defense further encourages this cooperation. *In re Bellanca Aircraft Corp.*, 850 F.2d at 1280.

Here, Touch of Grey provided goods that were essential to the functioning of Terrapin, LLC's business. Even after initial indications that Terrapin, LLC was in financial trouble, Touch of Grey continued working with the Debtor. In so doing, Touch of Grey benefited the entire estate when Terrapin, LLC was able to continue selling coffee. Congress protected Touch of Grey's extension of new value with § 547(c)(4). Despite its misgivings, Touch of Grey continued working with Terrapin, LLC after its bankruptcy filing, in part because it had received the administrative payment that the bankruptcy court allowed the estate to pay. Congress protected Touch of Grey's cooperation with § 503(b)(9). If this Court does not enact Congress' purpose in both sections, it will not only treat Touch of Grey unfairly but also broadcast to all future creditors that it is unsafe to work with troubled businesses. This outcome would be directly adverse to Congress' purposes.

The plain language of § 547(c)(4) unambiguously provides that Touch of Grey should be permitted a subsequent value defense. The Debtor, Terrapin, LLC, never made an "otherwise avoidable transfer." Instead, the postpetition administrative expense transfer came out of the estate. Further, the overall context of the Code indicates that the preference analysis should stop at the petition date, disallowing postpetition transfers to defeat the subsequent value defense. If the

[3] Because Congress' purpose in enacting §§ 547(c)(4) and 503(b)(9) were to encourage creditor-debtor cooperation, and not to replenish the estate, comparisons to reclamation claims are not on point. *See, e.g., In re TI Acquisition, LLC*, 429 B.R. at 384.

statute of limitations and hypothetical liquidation test are as of the petition date, and if transfers made after the petition cannot defeat the floating lien exception or add new value for the purposes of § 547(c)(4), it stands to reason that transfers made postpetition cannot defeat the subsequent value exception either. Additionally, allowing an administrative expense payment to defeat the subsequent value defense would undermine Congress' complementary policy goals for each section. Indeed, Congress' enactment of distinct pre- and postpetition protections for creditors who cooperate with debtors highlights the petition date as a demarcation. Preference analysis should not cross over the petition, and the estate's postpetition transfer should not cancel out Touch of Grey's prepetition extension of new value.

II. SECTION 365(d)(3) OF THE BANKRUPTCY CODE REQUIRES THE TRUSTEE TO PERFORM ALL OBLIGATIONS THAT ARISE AFTER THE ORDER OF RELIEF AND PRIOR TO THE POINT OF REJECTION ACCORDING TO THE TERMS OF AN UNEXPIRED LEASE FOR NON-RESIDENTIAL REAL PROPERTY.

Section 365(a) of the Bankruptcy Code provides the trustee or debtor in possession with the power to "assume or reject any executory contract or unexpired lease of the debtor." 11 U.S.C. § 365(a); *see* 11 U.S.C. § 1107(a) ("a debtor in possession shall have all the rights . . . and powers, and shall perform all the functions and duties . . . of a trustee serving in a case under [Chapter 11]."). This provision "provides the trustee or the debtor-in-possession with the means to release the estate of the duty to perform on burdensome obligations." *In re Ames Dept. Stores, Inc.*, 306 B. R. 43, 52 (Bankr. S.D. N.Y. 2004).

Section 365(d)(3) is directly applicable when the "burdensome obligation" rejected by the debtor in possession is an unexpired lease for non-residential real property. 11 U.S.C. § 365(d)(3); *In re Ames Dept. Stores, Inc.*, 306 B. R. at 52. Essentially, this section of the Code governs the

performance of terms and obligations that arise under this specific type of lease during the period of time subsequent to the order for relief and prior to the point of rejection. 11 U.S.C. § 365(d)(3).

The point of contention in this case is when and how said obligations arise. Lower courts have responded to this question in two ways. The first is to interpret § 365(d)(3) to mean that a trustee or debtor in possession's obligation terminates at the point of rejection, and thus obligations which are subject to accrual stop accruing upon rejection of the contract. *See, e.g., In re NETtel Corp., Inc*., 289 B.R. 486, 487–88 (Bankr. D.D.C. 2002). This is also referred to as the proration approach. *See, e.g., In re Ames Dep't Stores, Inc.*, 306 B.R. at 80. The second method is based on the interpretation that § 365(d)(3) demands that the trustee or debtor in possession perform all obligations per the terms of the lease if they arise prior to rejection, regardless of whether the nature of the obligation is one subject to accrual. *See, e.g., Centerpoint Props. v. Montgomery Ward Holding Corp. (In re Montgomery Ward Holding Corp.)*, 268 F.3d 17 205, 209 (3d Cir. 2001). This method is also known as the performance or billing date approach. *See e.g., Koenig Sporting Goods, Inc. v. Morse Road Co. (In re Koenig Sporting Goods, Inc.)*, 203 F.3d 986, 989 (6th Cir. 2000); *In re Handy Andy Home Improvement Ctrs., Inc*., 144 F.3d 1125, 1129 (7th Cir. 1998).

Section 365(d)(3) of the Code is unambiguous and the plain language of the statute clearly requires that *all obligations under an unexpired lease* for non-residential real property must be *timely* performed by the trustee when such obligations arise during this specified time period. 11 U.S.C. § 365(d)(3) (emphasis added). Therefore, the billing date approach is the one required by the text of § 365(d)(3). Further, even if § 365(d)(3) is found to be ambiguous, legislative history, policy considerations, and the principles of fairness and equity lead to the same result.

A. Section 365(d)(3) is unambiguous and the plain text of the statute requires application of the billing date approach.

When faced with a question of statutory interpretation, a court's first inquiry must be an examination of "whether the statutory text is plain and unambiguous." *Carcieri v. Salazar*, 555 U.S. 379, 387 (2009). If the statute is plain and unambiguous, then it is well established that "the sole function of the courts is to enforce it according to its terms." *Caminetti v. United States*, 242 U.S. 470, 485 (1917).

The statutory text at issue here is § 365(d)(3) of the Bankruptcy Code. This section, in pertinent part, requires 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, until such lease is assumed or rejected, notwithstanding section 503(b)(1) of this title.

11 U.S.C. § 365(d)(3). The type of obligations meant to be addressed in this provision is clear from the statute: "all obligations . . . under any unexpired lease of nonresidential real property." *Id.* Additionally, the statute provides a time frame for which this provision is applicable: after the order of relief and prior to the point of rejection. *Id.* What is purportedly unclear is when a particular obligation arises. However, a plain reading of the statute reveals the correct answer—*when* an obligation arises is in accordance with the terms of the lease, also known as the billing date approach.

First, courts must examine the plain meaning of the words and phrases as laid out in the statutory text in question. Unless Congress has indicated otherwise, "words in a statute are assumed to bear their 'ordinary, contemporary, common meaning.'" *Walters v. Metro. Educ. Enters.*, 519 U.S. 202, 207 (1997) (quoting *Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership*, 507 U.S. 380, 388 (1993)). The term "obligation" is not defined

anywhere in the Bankruptcy Code. However, it is regularly understood to mean a "a legal or moral duty to do or not do something." Obligations, Black's Law Dictionary (9th ed. 2009). The legal duty or obligation here, as is made clear by § 365(d)(3), originates from the lease. 11 U.S.C. § 365(d)(3); *In re Montgomery Ward Holding Co.*, 268 F.3d at 209 ("The clear and express intent of § 365(d)(3) is to require the trustee to perform the lease in accordance with its terms."). Additionally, a lease is commonly defined as a contract. *Stoltz v. Brattleboro Hous. Auth. (In re Stoltz),* 315 F.3d 80, 90 (2d Cir. 2002) ("[A] lease is '[a] contract by which a rightful possessor of real property conveys the right to use and occupy that property in exchange for consideration.'") (quoting Lease, Black's Law Dictionary (7th ed. 1999)). Applying "common-sense canons of contract interpretation," it is well established that "contracts containing unambiguous language must be construed according to their plain and natural meaning." *Burnham v. Guardian Life Ins. Co.*, 873 F.2d 486, 489 (1st Cir. 1989); *Smart v. Gillette Co. Long-Term Disability Plan*, 70 F.3d 173, 178 (1st Cir. 1995). Therefore, it would make little sense for Congress to direct courts to the lease to determine *what* the obligation is, only to have courts abandon the terms of the lease where such terms clearly outline *when* the obligation arises. A plain reading of the statutory language requires no such result.

Courts applying the proration approach have done so on the grounds that § 365(d)(3) is ambiguous, citing issues with the term "arises." The primary contention is that the term "arises" when coupled with the word "obligations" is ambiguous because obligations can arise in a manner that is fixed, such as a billing date, or the obligation can arise upon accrual. *See e.g., In re GCP CT School Acquisition, LLC*, 443 B.R. 243, 254 (Bankr. D. Mass. 2010) ("a debtor's obligation under a nonresidential real property lease may arise as it is accrued, or it may arise when the landlord submits the bill to the debtor-tenant") (internal quotations omitted). However, this point

does more to support the fact that the billing date approach is clearly required by the language of the statute. Courts finding in support of the proration approach are correct in their assertion 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). But the obligations in question are not those of an intrinsic nature, they are the obligations specifically set out in the lease. *See* 11 U.S.C. § 365(d)(3). The obligation "accrues" according to the terms of the lease. For example, if the lease in question is a contract for the right to possess non-residential property over the course of a period of five years, and the terms of the lease require the payment of monthly rent, then the extrinsic nature of the circumstances would mean the obligation to pay rent accrues monthly, even though the contract covers a term of five years. Therefore, a finding that the terms "obligations" and "arises" are ambiguous requires courts to completely ignore Congress' directive that the obligations to be performed are those "under any unexpired lease of nonresidential real property." 11 U.S.C. § 365(d)(3). Such a construction is contrary to the principle that "[s]tatutory language must be read in context since a phrase gathers meaning from the words around it." *Gen. Dynamics Land Sys. v. Cline*, 540 U.S. 581, 596 (2004) (internal quotations and citations omitted).

Here, the obligation in question is the payment of the May 2020 rent as outlined in a lease for a non-residential real property. The order for relief in this bankruptcy case is the same date as the date of petition, January 5, 2020. *See* 11 U.S.C. 301(b) ("The commencement of a voluntary case under a chapter of this title constitutes an order for relief under such chapter."). The debtor in possession rejected the lease effective May 5, 2020. However, on May 1, 2020, rent for the month of May, in the amount of twenty-five thousand dollars, became due under the lease. Because the payment of the May rent in this case is an obligation that arose after the order of relief on January

5, 2020, and prior to the point of rejection on May 5, 2020, § 365(d)(3) governs. Accordingly, because a plain reading of § 365(d)(3) requires application of the billing date approach, Touch of Grey is entitled to timely payment of the May 2020 rent in its entirety.

B. Even if § 365(d)(3) is ambiguous, legislative history, policy considerations, and the principles of fairness and equity result in an interpretation of the provision that requires application of the billing date approach.

Even if § 365(d)(3) is ambiguous, the legislative history, policy considerations, and principles of fairness and equity support the billing approach. "When a statute is ambiguous, we look to its purpose and may consider the statute's policy implications in determining what Congress intended." *In re Koenig Sporting Goods, Inc.*, 203 F.3d at 988–89; *see also Heydenfeldt v. Daney Gold & Silver Mining Co.*, 93 U.S. 634, 638 (1876). An examination of the legislative history of § 365(d)(3), the Code purpose and policy considerations, and the principles of equity and fairness ultimately lead to an interpretation of § 365(d)(3) that favors application of the billing date approach.

1. The legislative history of § 365(d)(3) indicates an intent to protect and provide for lessors separately from other types of postpetition creditors.

The legislative history of § 365(d)(3) supports the billing date approach. This provision was added to the Code in 1984 as part of the Bankruptcy Amendments and Federal Judgeship Act. Before 1984, lessors were stuck in the unenviable position of "being forced to deal with [lessees] on whatever terms the bankruptcy court imposed because" the automatic stay precluded the debtor-lessee's eviction. *In re Handy Andy Home Improvement Ctrs., Inc.*, 144 F.3d at 1128.

Prior to the 1984 amendments, lessors were required to satisfy the "actual, necessary" provision of § 503(b)(1) in order to collect rent during the time period between the petition date and the lessee's assumption or rejection of an unexpired lease. *Id.* Under the 503(b)(1) standard, lessors could "only recover the reasonable value of the DIP's actual use and occupancy of the

premises." *In re Montgomery Ward Holding Corp*., 268 F.3d at 210 (quoting Joshua Fruchter, *To Bind or Not to Bind—Bankruptcy Code § 365(d)(3): Statutory Minefield*, 68 Am. Bankr. L.J. 437, 437 (1994)). This proved to be very problematic to lessors because this standard could, for example, result in a situation where a landlord's recovery was limited to only a pro rata share of the rent if the lessee could show that it "occupied only a portion of the premises." *Id.* Bankruptcy courts could, and on many occasions did, deny lessors the fully contracted for rent. *See In re Ames Dep't Stores, Inc.*, 306 B.R. at 68. It is this pre- 1984 amendment application of the 503(b)(1) standard that resulted in the proration approach. *See, e.g.*, *Child World, Inc. v. Campbell/Massachusetts Trust (In re Child World, Inc.)*, 161 B.R. 571, 576 (S.D.N.Y. 1993); *see also In re Krystal Co.*, 194 B.R. 161, 163 (Bankr. E.D. Tenn. 1996).

Further disadvantaging lessors, the pre-1984 standard left the timing of payments at the bankruptcy court's discretion. *In re Montgomery Ward Holding Corp*., 268 F.3d at 210; *In re Child World, Inc.*, 161 B.R. at 575 ("Often in Chapter 11 cases, administrative expenses are not required to be paid until confirmation.").

It was in response to these issues that Congress adopted § 365(d)(3) "to relieve landlords of the uncertainty of collecting rent fixed in the lease 'in full, promptly, and without legal expense' during the awkward postpetition prerejection period." *HA-LO Industries, Inc. v. CenterPoint Properties Tr.*, 342 F.3d 794, 799 (7th Cir. 2003); *In re Handy Andy Home Improvement Ctrs., Inc*., 144 F.3d at 1128 ("To give relief to landlords, Congress passed § 365(d)(3), which takes them out from under the 'actual, necessary' provision of 503(b)(1) and allows them during that awkward postpetition prerejection period to collect the rent fixed in the lease."). Undoubtedly, Congress "intended to alleviate the above described burdens of landlords by requiring timely compliance

with the terms of the lease." *In re Montgomery Ward Holding Corp*., 268 F.3d at 210. Senator Hatch's statements regarding the 1984 amendment reinforce this intention:

> [D]uring the time the debtor has vacated space but has not yet decided whether to assume or reject the lease, the trustee 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.
>
> *The 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

130 Cong. Rec. (1984), *as reprinted in* 1984 U.S.C.C.A.N. 576, 599 (emphasis added). As Senator Hatch's statement demonstrates, the analysis for determining the extent of "all the obligations of the debtor" giving rise to a priority claim under § 365(d)(3) starts and ends with the lease. 11 U.S.C. § 365(d)(3); *In re Montgomery Ward Holding Corp*., 268 F.3d at 211 ("[A]n obligation arises under a lease for the purposes of § 365(d)(3) when the legally enforceable duty to perform arises under that lease."). Specifically, while "§ 365(d)(3) gives lessors a priority claim similar to an administrative expense claim under § 503(b)(1)," unlike the typical § 503(b)(1) claims, lessors' § 365(d)(3) claims entitle them "to current payment of the amounts required under their leases" without having "to establish value or prove a benefit to the estate." *El Paso Props. Corp. v. Gonzales (In re Furr's Supermarkets, Inc.),* 283 B.R. 60, 65 (Bankr. App. 10th Cir. 2002); *see also In re Goody's Fam. Clothing Inc.*, 610 F.3d 812, 818 (3d Cir. 2010) ("The purpose of § 365(d)(3)

is to protect landlords from the burdensome requirements of § 503(b)(1) in securing payment from non-occupying debtors.")

Courts applying the proration approach have done so, in part, because of the courts' pre-1984 history of applying this approach. *See In re NETtel Corp., Inc.*, 289 B.R. at 493. However, in adopting § 365(d)(3) and abandoning § 503(b)(1) as the standard for the collection postpetition, pre-rejection rent, Congress abrogated the associated pre-1984 practice of proration. *In re Montgomery Ward Holding Corp*., 268 F.3d at 211–12. In place of the old proration approach, Congress contemplated exercising the billing date approach. *In re Krystal Co.*, 194 B.R. at 163 (because payment of prerejection "obligations [are] not designed to preserve the estate (but rather the vulnerable landlord), the concepts of accrual, proration and allocation—so necessary for distinguishing between prepetition debts and administrative expenses in the context of § 503(b)(1)—are irrelevant and inapplicable under § 365(d)(3)."). Indeed, to conclude "that 'obligations' arise as they become due under the terms of the lease," almost tautologically follows from Senator's Hatch's desire to require "the trustee to perform all the obligations of the debtor under a lease… at the time required in the lease." *In re GCP CT School Acquisition, LLC*, 443 B.R. at 255; 130 Cong. Rec. (1984), *as reprinted in* 1984 U.S.C.C.A.N. 576, 599.

Significantly, Senator Hatch's remarks "make no mention of the concepts of accrual or proration of charges." *In re Krystal Co.*, 194 B.R. at 164. Instead, "[t]here is only the categorical "timely performance requirement"' that relates to the terms of a lease. *Id.*

2. The billing date approach is most reflective of the purposes and policies behind the Bankruptcy Code.

It is also clear how the billing date approach comports with the purposes and policies of the Bankruptcy Code. The billing date approach is entirely consistent with "the purpose of giving postpetition creditors a high priority in the distribution of the debtor's estate." *In re Handy Andy*

Home Improvement Ctrs., Inc., 144 F.3d at 1127. The purpose is to propel the debtor to continue operating through the bankruptcy process so "long as its current revenues cover its current costs." *Id.* By prioritizing postpetition debt, the debtor is allowed "to ignore [their prepetition] sunk costs" and "treat bygones as bygones." *Id.*

Under the billing date approach the debtor's current costs include arising lease obligations as they become due under the terms of the lease so long as they become due between the petition and the rejection dates. *HA-LO Industries, Inc.*, 342 F.3d at 799 (7th Cir. 2003). These lease obligations include rent becoming due postpetition and prerejection despite the corresponding rental period extending past rejection. *Id.* Such rent is '"not a sunk cost that relates to a time before the bankruptcy case, but a charge for the consumption of a resource during the administration of the case ..., and costs of administration must be paid."' *Id.* (quoting *In re Comdisco, Inc.*, 272 B.R. 671, 674–75 (Bankr. N.D. Ill. 2002)). In other words, the entirety of such rent amount as proscribed in the lease (including for the postrejection rental period) is part of a debtor's current costs associated with continued operation during bankruptcy. Accordingly, the entirety of the rent—as opposed to a prorated version—merits prioritization as postpetition debt.

3. The principles of fairness and equity require application of the billing date approach to balance the power between lessors and debtors in possession because the debtor in possession is already given the power of assumption or rejection.

Finally, beyond legislative intent and policy considerations, equity also favors the billing date approach. Section 365(a) of the Bankruptcy Code provides that "the *trustee* . . . *may* assume or reject any executory contract or unexpired lease of the debtor." 11 U.S.C. § 365(a) (emphasis added). Essentially, the trustee or debtor in possession has the power to determine whether or not it wants to satisfy its obligations under the lease. *In re Duckwall-ALCO Stores, Inc.*, 150 B.R. 965, 971 (D. Kan. 1993) ("[T]he language of the Code envisions a unilateral decision on the part of the

trustee or debtor-in-possession whether to reject or assume the unexpired lease, subject only to the court's approval."). The debtor in possession, as a party to the contract, knows how much and when the rent per a monthly lease is due. Further, the debtor in possession is in the best position to know the financial condition of its debt. Therefore, under § 365(d)(3), the debtor in possession or trustee has the responsibility to either "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. Considering the debtor in possession's unilateral control of entitlement to rent, it is consistent with principles of fairness and equity to place upon the debtor in possession the burden of reaping what it sows.

Some courts have argued that the billing date approach allows for inequity in favor of the lessor. For example, in *In re Child World, Incorporated* the petition date was on May 6 and the taxes for January to June of that year were due according to the lease on June 15. *In re Child World, Inc.*, 161 B.R. at 572. The rejection date occurred on September 4. *Id.* Utilizing the billing date approach would have forced the trustee to pay the taxes that accrued prepetition and prerejection. There, the bankruptcy court was concerned that the billing date approach would unfairly privilege the lessor above a prepetition creditor. *Id.* However, this court did not consider the fact that the debtor has unilateral control of the dates of petition and rejection. For example, in *In re Oreck Corporation*, the full month's rent was due on May 1, but because the petition was filed on May 6, lessors sought proration of rent for May's postpetition rental period. *In re Oreck Corp*., 506 B.R. 500, 501-02 (Bankr. M.D. Tenn. 2014). There, a billing date approach disadvantaged the lessor as a result of debtor's control of the timing of the petition. Thus, § 365(d)(3) cuts both ways. However, to the extent that debtors in possession control the timing of their voluntary petitions, they also control the direction § 365(d)(3) will cut. *Id.* ("Debtors

contemplating a bankruptcy filing must take into consideration numerous factors in timing their petitions. Lease obligations are merely one more factor to consider in determining when to file a bankruptcy petition."). Accordingly, debtor-lessees' complaints about lack of fairness and equity in the face of misgivings about the effects of § 365(d)(3) ring hollow.

The plain meaning of § 365(d)(3) of the Bankruptcy Code clearly and unambiguously requires use of the billing date approach. Moreover, the legislative history, policy considerations, and principles of fairness and equity only reaffirm this interpretation. Applying the billing date approach to the case at bar, Touch of Grey must receive the full amount of rent for the May 2020 rental period because the obligation to make payment arose on May 1, a date during postpetition and prerejection period. Accordingly, this Court should reverse the Thirteenth Circuit's decision to award Touch of Grey a prorated rent amount and instead grant the entirety of May rent as required by § 365(d)(3).

CONCLUSION

The Bankruptcy Code affords special treatment to creditors and lessors who provide goods and services to debtors during the reorganization process. The underlying goal of such treatment is to allow the debtor to continue operations to both allow for reorganization and provide for the estate. The instant case provides an example of how one entity, as creditor and lessor, supported a debtor-business during its reorganization efforts and should be properly compensated for such support. It is for this reason and those stated above, this Court should overrule the decisions of the Thirteenth Circuit Court of Appeals.

APPENDIX A

11 U.S.C. §547 – Preferences

. . .

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

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

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

(3) made while the debtor was insolvent;

(4) made—

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

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

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

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

(B) the transfer had not been made; and

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

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

. . .

(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;

. . .

APPENDIX B

11 U.S.C. § 503(b)(9) – Allowance of Administrative Expenses

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

APPENDIX C

11 U.S.C. § 365 – Executory Contracts and Unexpired Leases

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

. . .

(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.

APPENDIX D

11 U.S.C. § 503(b)(1) -

. . .

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

(1)

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

(i) wages, salaries, and commissions for services rendered after the commencement of the case; and

(ii) wages and benefits awarded pursuant to a judicial proceeding or a proceeding of the National Labor Relations Board as back pay attributable to any period of time occurring after commencement of the case under this title, as a result of a violation of Federal or State law by the debtor, without regard to the time of the occurrence of unlawful conduct on which such award is based or to whether any services were rendered, if the court determines that payment of wages and benefits by reason of the operation of this clause will not substantially increase the probability of layoff or termination of current employees, or of nonpayment of domestic support obligations, during the case under this title;

(B) any tax—

> **(i)** incurred by the estate, whether secured or unsecured, including property taxes for which liability is in rem, in personam, or both, except a tax of a kind specified in section 507(a)(8) of this title; or
>
> **(ii)** attributable to an excessive allowance of a tentative carryback adjustment that the estate received, whether the taxable year to which such adjustment relates ended before or after the commencement of the case;
>
> **(C)** any fine, penalty, or reduction in credit relating to a tax of a kind specified in subparagraph (B) of this paragraph; and
>
> **(D)** notwithstanding the requirements of subsection (a), a governmental unit shall not be required to file a request for the payment of an expense described in subparagraph (B) or (C), as a condition of its being an allowed administrative expense;

. . .