No. 21-0909

IN THE

Supreme Court of the United States

IN RE TERRAPIN STATION, LLC, DEBTORS

TOUCH OF GREY ROASTER, INC., PETITIONER

V.

CASEY JONES, CHAPTER 7 TRUSTEE, RESPONDENT

ON APPEAL FROM THE
UNITED STATES COURT OF APPEALS
FOR THE THIRTEENTH CIRCUIT

BRIEF FOR THE RESPONDENT

TEAM NUMBER 30

JANUARY 20, 2022

COUNSEL FOR RESPONDENT

QUESTIONS PRESENTED

I. Whether a trustee may limit a creditor's new value preference defense pursuant to 11 U.S.C. § 547(c)(4) when the debtor-in-possession paid for such new value in full pursuant to 11 U.S.C. § 503(b)(9).

II. Whether a trustee is required to perform the obligations of a debtor under 11 U.S.C. § 365(d)(3) by paying rent that became due before rejection of an unexpired non-residential real property lease but is allocable to the period after the effective date of rejection and vacation of the premises.

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The Thirteenth Circuit Court of Appeals' decision is available at No. 21-0909 and reprinted at Record 2. Both the Bankruptcy Court for the District of Moot and the United States District Court for the District of Moot decided in favor of Casey Jones, Chapter 7 Trustee and the affiliated debtor, Terrapin Station, LLC. On appeal, the United States Court of Appeals for the Thirteenth Circuit affirmed in favor of Terrapin Station, LLC.

STATEMENT OF JURISDICTION

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

PERTINENT STATUTORY PROVISIONS

This action contemplates statutory construction of certain provisions of Title 11 of the United States Code.

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. § 365 provides:

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

STATEMENT OF THE CASE

I. Factual History

William Tell was a successful business owner before Touch of Grey came into his life. R. at 3. In fact, that is precisely why Touch of Grey approached Tell in its efforts to increase its market share. R. at 4. Touch of Grey needed independent coffeeshop owners to surreptitiously agree to become franchisees so that customers would still feel they were patronizing small businesses when, in truth, they were supporting an industry giant. R. at 4.

When Touch of Grey came calling in 2017, Tell's earnings had leveled out, and he readily agreed to the partnership. R. at 4. Tell's original coffeeshop would not be revamped, however, as part of the agreement he signed required him to lease premises bought and owned by Touch of Grey. R. at 4-5. The premises were located in a downtown neighborhood, quite different from where Tell's original store had operated, and were leased to Tell under a twenty-year triple-net lease. R. at 4. The rent was set at $25,000, which Tell was required to pay to Touch of Grey on the first day of each month for use of the premises for the following month. R. at 4.

Touch of Grey wanted Tell to succeed because it wanted a piece of the independent coffeehouse market. R. at 4. In 2018, it purchased the downtown premises in the hopes that Tell would cater to the downtown crowd by providing new food and alcoholic offerings and hosting live entertainment. R. at 4. To further the local coffeeshop ruse, Tell was also required to exclusively sell Touch of Grey's "Dark Star" products, which were designed to disguise the fact that they originated with Touch of Grey. R. at 4. Tell was required under the franchise agreement to purchase these Dark Star products from Touch of Grey. R. at 4.

Unfortunately, Touch of Grey's hopes that Tell would succeed were unwise. The location of the premises was ill-informed and the local coffeeshop ruse was quickly uncovered to Tell's detriment. R. at 5. Only one year into his operations as a franchisee, Tell found himself unable to pay his debts. R. at 5. Though he was able to maintain payments for the premises under the lease agreement, Tell had amassed $700,000 in debts to Touch of Grey by trying to operate the store the way Touch of Grey had designed it. R. at 5.

To dissuade Touch of Grey from terminating the franchise agreement, Tell agreed to pay Touch of Grey $250,000 towards his outstanding debts in addition to reaffirming his obligations under the lease agreement. R. at 5. On December 7, 2019, Tell did just that, paying Touch of Grey $250,000. R. at 5. Shortly thereafter, to continue operations as required by Touch of Grey, Tell ordered another $200,000 worth of Dark Star products to be sold at the coffeeshop. R. at 5. Touch of Grey agreed to provide the $200,000 in supplies to Tell on credit, and the supplies were delivered on December 18, 2019. R. at 5.

Despite this arrangement, things only got worse for Tell's operations. R. at 6. Less than 20 days after Touch of Grey supplied additional Dark Star products on credit, Tell filed for chapter 11 bankruptcy relief. R. at 6. At the time of this filing, Tell was still current on his monthly rent payments for the leased premises, but he owed Touch of Grey $650,000 for unsecured debts, which included $200,000 for the supplies he had received on credit on December 18, 2019. R. at 6. He also owed other creditors $500,000 for additional unsecured debts. R. at 6.

In an unsuccessful attempt to resolve his debts and reorganize his business, Tell filed a number of "first day motions" that indicated his intention to revert back to more traditional coffeeshop procedures and to sublease part of the premises to reduce his monthly rent payments.

R. at 6. Shortly thereafter, Tell submitted a motion to the bankruptcy court requesting to pay Touch of Grey for the $200,000 of supplies that Touch of Grey had sent him in late December. R. at 6. The motion claimed that Touch of Grey was a "critical vendor" and that continued business with Touch of Grey was critical to Tell's reorganization strategy. R. at 6. Furthermore, Tell argued that Touch of Grey was unwilling to continue selling him the Dark Star products that he was required to sell unless Tell paid for the previously advanced new value. R. at 6.

In response to the request for a critical vendor payment, the United State Trustee noted that critical vendor payments are not supported under the Bankruptcy Code. R. at 7. The bankruptcy court, inclined to agree with the Trustee, approved a transfer to pay for the previously advanced new value but did so as an administrative expense under 11 U.S.C. § 503(b)(9) rather than a critical vendor payment. R. at 7. Tell subsequently paid Touch of Grey the $200,000 for the previously advanced new value. R. at 7.

Despite his best efforts, Tell's reorganization plan failed to save the struggling coffeeshop amidst the COVID-19 global pandemic. R. at 7. On May 5, 2020, Tell permanently closed up shop and vacated the premises. R. at 7. On May 6, 2020, Tell filed a motion with the bankruptcy court to quit the Lease and the franchise agreement as of the date of the motion. R. at 7. Tell filed this motion pursuant to 11 U.S.C. § 365(a). R. at 7. Two days later, Touch of Grey attempted to compel payment of the May rent for the premises. R. at 7. Touch of Grey stated in its motion that it was unopposed to Tell rejecting the Lease but that it was nonetheless owed the May rent payment under 11 U.S.C. § 365(d)(3). R. at 8. Touch of Grey's theory was that the rent payment had been due prior to rejection of the lease, and so even though the payment was being made in advance of Tell occupying the premises for the month, Touch of Grey was still entitled to receive it. R. at 8.

On May 29, 2020, the bankruptcy court convened to hear both Tell's motion to reject the lease and Touch of Grey's motion to compel payment of the rent due under the lease. R. at 8. At this hearing, Tell converted his chapter 11 case to a chapter 7 case pursuant to section 1112(a) of the Bankruptcy Code without objection. R. at 8. The Trustee was also appointed as the chapter 7 trustee for Tell's estate. R. at 8. The Trustee took a more assertive approach in preserving value for the estate and explicitly objected to Touch of Grey's motion to compel payment for all of the May rent. R. at 8. At the same time, the Trustee sought to avoid and recover the $250,000 preferential payment Tell had made to Touch of Grey in December 2019. R. at 8.

Despite attempts to mediate the matter, the questions of whether the estate owed Touch of Grey for the entirety of the rent for May and whether the estate was able to claw back the preferential payment made in December 2019 proceeded to a summary judgment hearing before the bankruptcy court. R. at 9.

II. PROCEDURAL HISTORY

On a motion for summary judgment, the Bankruptcy Court for the District of Moot and the United States District Court for the District of Moot ruled in favor of Terrapin Station on both issues. R. at 3. On appeal, the Court of Appeals for the Thirteenth Circuit also affirmed, ruling in favor of Terrapin Station, LLC. The three-judge panel held that (1) section 547(c)(4) prohibits a new value defense where new value has been paid for an unavoidable transfer, and (2) section 365(d)(3) does not require the trustee to satisfy obligations allocable to the post-rejection period. R. at 3.

STANDARD OF REVIEW

The questions presented in this matter involve questions of law because the issues are centered on the statutory interpretation of the Bankruptcy Code.[1] As a result, the appropriate standard of review for this appeal is *de novo*. *Texas v. Soileau (In re Soileau)*, 488 F.3d 302, 305 (5th Cir. 2007).

SUMMARY OF THE ARGUMENT

In interpreting Bankruptcy Code provisions, this Court looks first to the plain language of a given statutory provision. If ambiguity arises, this Court next examines the context of the statutory provision and "look[s] to the provisions of the whole law, and to its object and policy." *Kelly v. Robinson*, 479 U.S. 36, 43 (1986). If statutory context and policy considerations still fail to elucidate a provision's proper interpretation, this Court necessarily looks to pre-Code practice and legislative history to find meaning.

Section 547(c)(4) of the Bankruptcy Code is clear and unambiguous. Section 547(c)(4) gives a trustee or debtor-in-possession power to limit a preference defense when supplies that were provided to the debtor on credit are subsequently paid for by an unavoidable transfer. An administrative expense, by its nature as a post-petition payment, qualifies as an unavoidable transfer because it requires approval by the bankruptcy court. To that end, section 549 explicitly states that a trustee may not avoid a transfer that is approved by the bankruptcy court. Arguments to the counter rely heavily, and erroneously, on interpretations of grammatical construction that belie the policy goals of both the bankruptcy system and the administrative expense doctrine.

[1] The Bankruptcy Code is set forth in 11 U.S.C. §§ 101 et seq. Specific chapters of the Bankruptcy Code are identified as "chapter_" and specific sections of the Bankruptcy Code are identified herein as "section_."

Even where counterarguments are entertained, statutory context and legislative history provide evidence that the plain meaning of section 547(c)(4) is the only proper reading of it. Contextualizing section 547(c)(4) illustrates that the overarching policy goals of the bankruptcy system and the goals of the administrative expense expansion under the Bankruptcy Abuse and Consumer Protection Act of 2005 work together rather than at odds with one another. That is, preservation of value in the estate and equity among similarly situated creditors is congruent with encouraging creditors to work with troubled businesses. Creditors who continue to do business with troubled debtors ultimately preserve value and help create a more equitable distribution in cases where debtors must cease operations altogether.

On the other hand, the plain language of section 365(d)(3) is more nuanced. Section 365 gives a trustee power to assume or reject any executory contract or unexpired lease of the debtor, subject to court approval, while simultaneously imposing a duty to perform all obligations of the debtor in a timely fashion as they become due. Ambiguity arises because the plain language of section 365(d)(3) fails to clearly identify whether monthly rent, paid in advance, must be paid in full when it is due even though the trustee is empowered reject the lease and abandon the premises before the paid-for month is over.

The only acceptable interpretation of section 365(d)(3) is a proration approach, which limits the trustee's rent liability to a prorated amount reflecting the number of days the premises were occupied by the debtor prior to rejection of the lease. The context of section 365 as a whole underscores the proration approach as the appropriate application of subsection (d)(3). Even if that context alone is not enough, failing to use the proration approach in favor of the billing-date approach would run counter to bankruptcy policy because it would create windfalls for either leaseholders or trustees depending on the petition date. Thus, which party becomes the beneficiary of the windfall is heavily fact-dependent. The proration approach not only squares with the language of the provision but also fits within the statutory context. The opposing approach reduces certainty for creditors and fails to coincide with broader policy goals of preservation of value in the estate and equitable distribution.

ARGUMENT

This Court should affirm the Thirteenth Circuit's holding that 11 U.S.C. § 547(c)(4) prohibits a new value preference defense where new value has been paid for by an unavoidable transfer. This Court should further affirm the Thirteenth Circuit's decision to apply the proration approach to 11 U.S.C. § 365(d)(3).

I. The Thirteenth Circuit correctly adopted the plain meaning of 11 U.S.C. § 547(c)(4) as limiting Touch of Grey's new value preference defense because Terrapin Station used an administrative expense to pay for the new value in full.

Section 547(c)(4) has been the source of some excitement in bankruptcy courts for some time now. The subsection addresses the New Value Defense that creditors are entitled to use to limit preference exposure in cases where they have supplied goods or services on credit subsequent to a preferential payment. Many courts have resolved issues revolving around whether new value invoices must remain unpaid in order to serve as a limit on preference exposure (they need not), but more recently the interplay of section 547(c)(4) and the relatively recently enacted administrative expense provision encapsulated by section 503(b)(9) have become the focus of bankruptcy courts across the nation.

The Thirteenth Circuit correctly adopted a plain meaning of section 547(c)(4) that reflects a reasoned approach to analyzing preferential payments and the trustee's ability to claw them back post-petition. Section 547(c)(4) contains no temporal language and is situated in the chapter of the Bankruptcy Code dedicated to "Creditors, Debtors, and the Estate." 11 U.S.C. Ch. 5.

Grammatically, section 547(c)(4) is complex, but it is unambiguous. The Thirteenth Circuit also properly elucidated that any complexity left unanswered by the plain language of the provision itself can be clarified by turning to the context of the statute and the policy supporting its passage.

A. The plain meaning of Section 547(c)(4) unambiguously prohibits a new value preference defense where new value has been paid for by an unavoidable transfer.

To understand why the trustee in this case rightfully asserts that the estate's payment of the creditor's 503(b)(9) administrative expense reduces the creditor's preference defense, courts look first to the plain language of section 547(c)(4). The plain meaning of section 547(c)(4), while admittedly complicated, is clear and unambiguous. The provision at issue here resides within section 547, which covers preferential transfers. A preferential transfer under this section is a payment made to or for the benefit of a creditor on the basis of an antecedent debt. 11 U.S.C. § 547(b)(1)-(2). To constitute a preferential transfer, the payment must have been made while the debtor was insolvent, i.e. in the 90 days preceding the debtor's petition for bankruptcy, and must allow the creditor to receive more than it would if the estate were distributed under Chapter 7. 11 U.S.C. § 547(b)(3)-(5). The term "preference" is used to reflect that a transfer made under the circumstances described in section 547(b) amounts to the debtor giving preferential treatment to one or more creditors over other creditors who are equally entitled to distributions under Bankruptcy Code procedures.

In application, section 547(c)(4) allows a trustee or debtor-in-possession to fight a preference defense when new value that was supplied on credit is paid for by an unavoidable transfer.

The text of section 547(c)(4) reads:

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

11 U.S.C. § 547(c)(4).

For the purposes of this case, new value is defined in section 547(a) as "money or money's worth in goods, services, or new credit." Neither Touch of Grey nor Terrapin Station is contending that the new value extended by Touch of Grey has been secured by an otherwise unavoidable security interest. The remaining question is whether after Touch of Grey provided new value in the form of supplies to Terrapin Station on December 18, 2019 Terrapin Station then made an otherwise unavoidable transfer to Touch of Grey. Touch of Grey will no doubt argue that a post-petition payment fails to constitute an unavoidable transfer, but the plain language is clear: "there is no requirement within section 547(c)(4) which limits the universe of facts to be considered to those arising pre-petition." *MMR Holding Corp. v. C & C Consultants, Inc. (In re MMR Holding Corp.)*, 203 B.R. 605, 609 (Bankr. M.D. La. 1996).

Section 547(c)(4) requires careful reading because it contains a complex issue of law, but it is far from ambiguous when analyzed with attention to its detail. While Touch of Grey may argue otherwise, the use of a double negative in section 547(c)(4) does not render its plain meaning ambiguous. See *Wahoski v. American & Efrid, Inc. (In re Pillowtex Corp.)*, 416 B.R. 124 (Bankr.D.Del.2009). The presence of a double negative simply makes a statute complicated, and while applying this statute "requires several levels of analysis, [] each step is clear and the process leads to a single result." *Boyd v. The Water Doctor (In re Check Reporting Servs.)*, 140 B.R. 425, 434 (Bankr. W.D. Mich. 1992).

The first step in this analysis is understanding the plain meaning of section 547(c)(4) as a prohibition on avoidance of certain transfers. That is, trustees are prohibited from clawing back payments made during the preference period if the creditor subsequently provided money's worth in goods (i.e. new value). The second step is to understand the plain meaning of section 547(c)(4)(B) as a limit on the prohibition laid out in section 547(c)(4). *In re IRFM, Inc.*, 52 F.3d 228, 231 (9th Cir. 1995). The next step is seeing that subparagraph (B) limits the justification for creditors who are trying to use the new value defense in cases where the new value has been subsequently paid for by an unavoidable transfer. Put another way, if Terrapin paid for the new value and that payment is not voidable by the trustee then Touch of Grey is unable to keep the preferential payment it received. *Id*. See also *Matter of Toyota of Jefferson, Inc.*, 14 F.3d 1088, 1093 n. 2 (5th Cir.1994), *Check Reporting Servs.*, 140 B.R. at 434. Notably, there is no explicit temporal limitation written into the statute that precludes post-petition payments from being unavoidable transfers. The plain language states only that the payment for new value must be an "otherwise unavoidable transfer" to limit a creditor's new value defense. 11 U.S.C. § 547(c)(4)(B). As the Eleventh Circuit pointed out in *Kaye v. Blue Bell Creameries, Inc. (In re BFW Liquidation, LLC)*, 899 F.3d 1178, 1189 (11th Cir. 2018), all that section 547(c)(4) states is that "if the debtor paid for the new value with an 'otherwise unavoidable transfer,' then the creditor cannot use that new value as a defense against the trustee's attempt to avoid an earlier preference."

Touch of Grey argues that the past tense “did not” in subsection (B) allows for a preference defense even when new value has been paid for by an unavoidable transfer if that transfer is made post-petition. This argument stems largely from contextualizing, which will be addressed in the next section, but the plain meaning of the past tense “did not” can be disposed of here. The Eleventh Circuit, in *BFW Liquidation*, determined that statutory history supported its reading that section 547(c)(4) was not a strictly backward-looking provision. 899 F.3d at 1190. The court came to this conclusion by looking at Section 60(c) of the Bankruptcy Act of 1898, codified at 11 U.S.C. § 96(c), which was the predecessor to section 547(c)(4). It stated:

> If a creditor has been preferred, and afterward in good faith gives the debtor further credit without security of any kind for property which becomes a part of the debtor's estate, the amount of such new credit *remaining unpaid* at the time of the adjudication in bankruptcy may be set off against the amount which would otherwise be recoverable from him.

11 U.S.C. § 96(c) (1976) (emphasis added).

Based on the fact that the updated language of section 547(c)(4) conspicuously lacked reference to new credit remaining unpaid, the Eleventh Circuit found that “one can plausibly infer that […] Congress intended to eliminate § 60(c)'s requirement that new value remain unpaid, and to replace that requirement with something substantively different.” *In re BFW Liquidation*, 899 F.3d at 1191. In the same decision, the Eleventh Circuit correctly found that manifesting a cutoff date for payment would require importing a meaning to the statute that just was not present in its plain language. *Id* at 1190. While Touch of Grey here agrees that new value need not remain unpaid to constitute a qualified challenge to a preference defense, it has created a cutoff date for when that payment must be made without any statutory language to back it up. R. at 10, footnote 5.

Given Touch of Grey's agreement that new value need not remain unpaid, the appropriate analysis in this case is the "subsequent advance" approach embraced by the Fourth Circuit in *Hall v. Chrysler Credit Corp. (In re JKJ Chevrolet, Inc.)*, 412 F.3d 545 (4th Cir.2005). Using the "subsequent advance" approach, to have a successful preference defense under section 547(c)(4)(B) a creditor must show that the new value extended has not been paid for with an otherwise *unavoidable* transfer. See *In re BFW Liquidation, LLC*, 899 F.3d 1178, *In re Pillowtex Corp.*, 416 B.R. 124. Under this approach, and pursuant to the plain language of section 547(c)(4)(B), when a debtor makes a subsequent advance to pay for new value extended after receipt of a preferential transfer, the new value defense is only available if that subsequent advance is itself avoidable. *Circuit City Stores, Inc. v. Mitsubishi Dig. Elecs. Am. (In re Circuit City Stores, Inc.)*, 2010 WL 4956022, at *7 (Bankr. E.D. Va. Dec. 1, 2010).

One question at the heart of this matter is thus whether the administrative expense payment the estate made to Touch of Grey on account of the prepetition new value it had extended counts as a "transfer" as it's meant in 547(c)(4)(B). Here too the plain meaning of the statute supports the trustee's approach. Section 101(54)(D) defines "transfer" as "each mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with […] property […] or an interest in property." Thus, any distribution of property or an interest in property, including an administrative expense paid out under section 503(b)(9), fits within the statutory definition of a transfer. See *Beaulieu Liquidating Tr. v. Fabric Sources, Inc. (In re Beaulieu Grp., LLC),* 616 B.R. 857, 878 (Bankr. N.D. Ga. 2020), appeal docketed sub nom *Auriga Polymers Inc. v. PMCM2, LLC*, No. 20-14647 (11th Cir. Dec. 11, 2020).

The only issue that remains is what is meant by "otherwise unavoidable" in subsection (c)(4)(B). Under the Bankruptcy Code, a preferential transfer is voidable by the trustee where an allowance rule permits the trustee to avoid it. *In re Circuit City Stores, Inc.,* 2010 WL 4956022, at *9. Section 549 of the Code, addressed in greater detail below, expressly limits avoidance of post-petition transfers "authorized under this title or by the court." 11 U.S.C. § 549(a)(2)(B). The multi-step plain meaning analysis of section 547(c)(4) thus concludes by reading "otherwise unavoidable transfer" as requiring the trustee to show, as it has here, that any transfer paying for new value is unavoidable. While certain cases might require a trustee to show that it has no authorization to avoid a preferential transfer, this case involves an explicit statutory limitation in section 549 on the trustee's power to avoid transfers that have been authorized by the court. The plain meaning of section 547(c)(4) is complex but unambiguously in support of the trustee's action to limit the creditor's new value defense by the amount it received as an administrative expense payment.

B. Statutory context supports defining administrative expenses paid under Section 503(b)(9) as "unavoidable transfers" that extinguish a creditor's new value defense.

When the plain language of a Bankruptcy Code provision has appeared ambiguous at first blush, this Court has been hesitant to interpret it as such, choosing instead to examine the context of the statutory provision and suggesting that courts "not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy." *Kelly v. Robinson*, 479 U.S. 36, 43 (1986). Contextualizing confusing provisions is thus key in resolving the meaning of a specific provision and whether it is ambiguous enough to warrant interpretation beyond its plain language. If close examination of the statutory context and associated policy goals still results in a meaning that is unclear, courts then turn to pre-Code practice and legislative history to find meaning. See *In re Price*, 370 F.3d 362, 369 (3d Cir.

2004). These tools of construction, however, "are to be relied upon only when, ultimately, the meaning of a provision is not plain." *Id*.

The context of section 547(c)(4) is clear and in favor of the trustee in this case. The statutory limitation on the availability of a new value defense, namely that an unavoidable transfer has been affected to pay for such new value, has no temporal limitation, and an unavoidable transfer occurs post-petition when the bankruptcy court authorizes a post-petition transfer. Touch of Grey here will no doubt argue that a transfer that takes place after a debtor has filed its petition for bankruptcy is not in fact a transfer as that term is meant in section 547(c)(4), but that argument relies heavily on misappropriated context and fails even then to reflect the purpose of the statutory provision at issue.

Of the Bankruptcy Code provisions dealing with transfer avoidance, only section 549 of the Bankruptcy Code applies to the present case and avoidance of payments made post-petition. Section 549, titled "Postpetition Transfers," reads, in pertinent part:

> The trustee may avoid a transfer of property of the estate—
>
> (1) that occurs after the commencement of the case
>
> (2) (A) that is authorized only under section 303(f) or 542(c) of this title; or
>
> (B) that is not authorized under this title or by the court.

11 U.S.C. § 549.

In other words, section 549 permits a trustee to avoid a transfer made after the petition date if the transfer was not authorized by the Bankruptcy Code or if the transfer was not authorized by the bankruptcy court. Here, the bankruptcy court authorized the 503(b)(9) administrative expense payment from the estate to the creditor, making it an unavoidable transfer under section 549. As noted above, section 549 is titled "postpetition *transfers*" (emphasis added) and refers explicitly to a "transfer of property of the estate." Id. For this reason, Touch of Grey's argument that section 547(c)(4) uses "transfer" intentionally to limit the statute's reach to prepetition transfers as opposed to post-petition distributions by the estate falls flat.

Likewise, Touch of Grey's argument that section 547(c)(4) deliberately uses "debtor" instead of "debtor-in-possession" or "trustee" and therefore refers only to prepetition payments for new value is misguided. As this Court noted in *NLRB v. Bildisco & Bildisco*, "it is sensible to view the debtor-in-possession as the same 'entity' which existed before the filing of the bankruptcy petition but empowered by virtue of the Bankruptcy Code to deal with its contracts and property in a manner it could not have done absent the bankruptcy filing." 465 U.S. 513, 528 (1984). The Third Circuit resolved similarly that this line of reasoning does not withstand scrutiny. The Bankruptcy Code, the Third Circuit points out, declines to define a "debtor" strictly as a pre-petition entity, "but also many other provisions in the Code refer to 'debtors' in the post-petition context. See, e.g., 11 U.S.C. § 329 (referring to attorneys representing "a debtor" in a case under the title); and § 521 (describing a debtor's post-petition duties)." *Friedman's Liquidating Tr. V. Roth Staffing Cos. LP (In re Friedman's Inc.)*, 738 F.3d 547, 554-55 (3d Cir. 2013).

Finally, even if this Court finds the plain language of section 547(c)(4) ambiguous, the Thirteenth Circuit in this case correctly identified Congress's ability to impose a time limit when it wants to. See 11 U.S.C. § 547(c)(5),. Touch of Grey's argument that the preference defense limitation set out in section 547(c)(4)(B) is located within the "preferences" and is therefore limited to the specific pre-petition preference period is inapplicable here. Preference defenses are only time-limited where a provision reflects an explicit time constraint. *Id.* Furthermore, section 547 is situated in Subchapter III, which is titled "The Estate," which tends to suggest post-petition goings on. If this Court determines that the ambiguity of the provision extends beyond even where statutory context can explain it, the Senate Report prepared in conjunction with the enactment of Section 547 is illustrative, if only to show that the language of the statute reflects its purpose. The Senate Report stated that Section 547(c)(4):

> codifies the net result rule […] of current law. If the creditor and the debtor have more than one exchange during the 90-day period, the exchanges are netted out according to the formula in paragraph (4).

S. Rep. No. 95-989, 95th Cong. 2d Sess. 88 (1978).

The "codifie[d] net result rule" fails to show up in the final codified version of section 547(c)(4), however. The new value defense does not require netting all transfers between debtor and creditor during the preference period. Subsection (c)(4) only applies to new value advanced by a creditor after receipt of a preferential payment. It is only that new value that can be used to reduce the amount of the preference exposure. Not to mention, the legislative history, such as there is, neglects the "otherwise unavoidable transfer" provision in the final statute. There is no indication that Congress intended a temporal limit to attach to that part of the provision, even though the legislative history advances a "netting" approach. In fact, the netting approach has largely been abandoned by Bankruptcy courts as a vestige of pre-modern Bankruptcy practices. See *New York City Shoes, Inc. v. Bentley Int'l (In re New York City Shoes, Inc.)*, 880 F.2d 679, 680 (3d Cir. 1989); *In re Prescott*, 805 F.2d 719, 728 (7th Cir. 1986); *McClendon v. Cal-Wood Door (In re Wadsworth Bldg. Components, Inc.)*, 711 F.2d 122, 123-24 (9th Cir. 1983); *Waldschmidt v. Ranier (In re Fulghum Constr. Corp.)*, 706 F.2d 171, 173-74 (6th Cir.), cert. denied, 464 U.S. 935 (1983); *Laker v. Vallette (In re Toyota of Jefferson, Inc.)*, 14 F.3d 1088, 1092 (5th Cir. 1994).

This Court has consistently held that Congressional intent, even when it is expressly enshrined in legislative history, cannot be read into a statute that has a plain meaning interpretation that makes sense. See *Union Bank v. Wolas*, 502 U.S. 151, 158 (1991) (explaining that Congress failing to consider consequences of enacting a statute is insufficient to refute its plain meaning). Relying on practices used prior to the enactment of the BACPA when, as here, the plain language of the statute noticeably fails to include those practices would create more inequitable results than a careful application of the statute's plain meaning.

C. Congruent policies underlying Sections 547(b), 547(c)(4), and 503(b)(9) necessitate limiting a creditors new value defense where new value has been paid for by an unavoidable transfer.

Though the plain meaning and statutory context are enough here to establish that an unavoidable transfer such as the trustee made here limits the availability of a preference defense, the policies that underlie sections 547(b), 547(c)(4), and 503(b)(9) reveal a broader reason to find in the trustee's favor.

The primary policy that underlies section 547(b) is the same policy that lies at the heart of the Bankruptcy Code. Similarly situated creditors should be treated equally, and a creditor who is treated preferentially should disgorge itself of any preferential treatment it received in the days leading up to the petition. H.R.Rep. No. 95–595, at 177-179, U.S.Code Cong. & Admin.News 1978, p. 6329. See also *Union Bank v. Wolas*, 502 U.S. 151 (1991). While the Third Circuit appears to believe that exceptions swallow the rule when it comes to treating creditors equally, the legislative history of section 547(b) is more nuanced than that. The point, according to the Committee Report, was not that all creditors are equal but that *similarly situated* creditors should be treated equally in bankruptcy proceedings.

Section 547(b) has a secondary purpose as well. The House committee explained that letting the trustee avoid transfers that occur in a short period before bankruptcy, creditors are dissuaded from "racing to the courthouse to dismember the debtor during his slide into bankruptcy." H.R.Rep. No. 95–595, at 177-179, U.S.Code Cong. & Admin.News 1978, p. 6329. That this protects debtors from speedy reprisal by their creditors is part of its purpose, but not the entirety of it. Section 547(c)(4) gives debtors a way out of a difficult financial situation by working with, rather than at the mercy of, their creditors. *Id*. The key to understanding section 547(c)(4)'s place in the Bankruptcy Code is recognizing that it also preserves value for the estate and for a greater share of creditors, effectively by stopping circling creditors from landing and taking as much as they can carry. Even when the Code appears to serve a debtor and reorganization, the overarching purpose of equitable distribution and creditor protection is still at play.

Similarly, the policy behind section 503(b)(9) is designed to protect creditors. Section 503(b)(9) states in pertinent part:

> [T]here shall be allowed 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.

Section 503(b)(9) was enacted as part of the Bankruptcy Abuse and Consumer Protection Act of 2005 (BACPA) and situates some trade creditors ahead of priority unsecured creditors and all other general unsecured creditors. The trade creditors served by section 503(b)(9) typically only hold general unsecured claims and, without access to administrative expense payments, could be left in a greater lurch having continued to do business with a failing enterprise. See *In re Circuit City Stores, Inc.*, 2010 WL 4956022, at *9, *TI Acquisition, LLC v. Southern Polymer, Inc. (In re TI Acquisition, LLC)*, 429 B.R. 377, 384-85 (Bank. N.D. Ga. 2010).

To bring it all together, Touch of Grey's knowledge of the availability of the new value defense no doubt emboldened it to continue business dealings with Terrapin Station. When a creditor supplies a debtor with goods pre-petition, however, the creditor does not know whether a bankruptcy will be filed within 20 days of receipt of the shipment. A creditor cannot be certain that it may be eligible to assert a section 503(b)(9) claim post-petition. From a creditor's pre-petition position, "there is no difference in incentive if the new value defense the creditor may have relied on is lost as a result of a § 503(b)(9) claim." *In re TI Acquisition, LLC*, 429 B.R. at 385. Further, when an approved section 503(b)(9) claim is paid, as it was in this case, the creditor has been paid in full for the new value supplied to the debtor, and "paying creditors in full for their claims is the ultimate method of encouraging them to continue trade with the debtor." *Id*. To allow Touch of Grey to receive the benefit of keeping the preferential payment it received prepetition, to the extent that it provided new value, *and* to receive the benefit of an administrative expense payment would be to allow Touch of Grey to "double dip" in a way that disparages the estate and runs counter to the principles underlying the bankruptcy system. *Commissary Operations, Inc. v. Dot Foods, Inc. (In re Commissary Operations, Inc.)*, 421 B.R. 873, 879 (Bankr. M.D. Tenn. 2010).

Finally, it is important to note that a payment made pursuant to a critical vendor order is notably different from the statutory priority of a section 503(b)(9) claim. The United States Trustee's opposition to Touch of Grey being designated a critical vendor was warranted and requires additional attention. R. at 6-7. A critical vendor order gives the debtor-in-possession power to negotiate the creditor's "critical vendor" designation while conditioning status as a "critical vendor" on the creditor's agreement to continue providing credit post-petition to the debtor-in-possession. *Phoenix Rest. Grp., Inc. v. Ajilon Prof'l Staffing LLC (In re Phoenix Rest.*

Grp., Inc.), 317 B.R. 491, 496 (Bankr. M.D. Tenn. 2004). Another condition that can be incorporated in the critical vendor order is the logistics of handling preference liability of a critical vendor creditor, "which can ensure that the value received by the debtor-in-possession is sufficient to justify the favored treatment." *Id*.

The negotiability of critical vendor orders makes it clear that it is necessary to distinguish between payments executed for section 503(b)(9) claims and payments pursuant to critical vendor orders. That is, the Bankruptcy Court does not afford a pre-petition debtor a right to negotiate conditions on goods supplied within the section 503(b)(9) period the way that it affords a post-petition debtor-in-possession the right to negotiate for terms on critical vendor orders. *In re TI Acquisition, LLC*, 429 B.R. at 382. Furthermore, a bankruptcy court may refuse to approve payment of pre-petition commitments to critical vendors while section 503(b)(9) allows no such a distinction. *Id*.

Section 547(c)(4) has created a conundrum for courts. The plain language of the statute is complicated and requires close reading and step-by-step application to the facts of a given case. Here, Terrapin Station paid Touch of Grey for an antecedent debt, which would ordinarily be clawed back post-petition. However, Touch of Grey subsequently advanced new value in the form of supplies to the debtor, creating a preference defense under section 547(c)(4). Terrapin Station ultimately paid for those supplies post-petition, however, by requesting and receiving approval from the bankruptcy court to make an unavoidable transfer in the form of an administrative expense payment under section 503(b)(9). Section 547(c)(4)(B) unambiguously states that such a payment means that Touch of Grey's preference defense is no longer applicable, and context and policy support this reading. The policy supporting continued collaboration between creditors and troubled businesses and the overarching policy of equity among similarly situated creditors both support disallowing "double dipping" by Touch of Grey which has been paid for its new value by an unavoidable transfer in the form of the administrative expense payment executed here.

II. The Thirteenth Circuit correctly adopted the proration approach in analyzing 11 U.S.C. § 365(d)(3), requiring trustees to pay rent for any unexpired lease of non-residential real property at a prorated amount covering only the period post-petition until the lease is rejected.

Whereas the meaning of section 547(c)(4) is clear, if somewhat complex, section 365(d)(3) presents significant ambiguities. The Thirteenth Circuit adeptly analyzed the statute and arrived at the appropriate conclusion that the section requires the adoption of the proration approach to post-petition, pre-rejection rent, known as "stub-rent". Under section 365, a trustee has the choice to assume or reject any executory contract or unexpired lease of the debtor, subject to court approval. 11 U.S.C. § 365(a). However, the statute also imposes a duty on trustees. Until the lease is assumed or rejected, the trustee must "timely perform all obligations of the debtor…arising from and after the order for relief under any unexpired lease of nonresidential real property." 11 USCS § 365(d)(3).

Courts are split in their interpretation of section 365(d)(3). Some have incorrectly adopted the billing-date approach, holding that a trustee must pay the entire rent due as required by the terms of the preexisting lease regardless of the amount of time the premises are occupied. *See In re Montgomery Ward Holding Corp.*, 268 F.3d 205 (3d Cir. 2001), *Koenig Sporting Goods, Inc. v. Morse Rd. Co. (In re Koenig Sporting Goods*), 229 B.R. 388 (B.A.P. 6th Cir. 1999). Others properly use the proration approach, in which trustees may pay rent at a prorated rate for continued use of the space until the lease is accepted or rejected. *See El Paso Props. Corp. v. Gonzales (In re Furr's Supermarkets, Inc.)*, 283 B.R. 60 (B.A.P. 10th Cir. 2012), *In re NETtel Corp.,* 289 B.R. 486 (Bankr. D.C. 2002). By analyzing section 365 in its proper context and understanding policy ramifications of both options, the Thirteenth Circuit Court of Appeals correctly adopted the proration approach.

A. The proration approach is appropriate considering the ambiguous language in section 365(d)(3), its context within the bankruptcy code, and its legislative history.

Any analysis of a statute's construction must begin with the language itself. *St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531, 541 (1978). This does not mean statutes must be construed in a vacuum, however. "Statutory provisions (including, and perhaps especially, those in the Bankruptcy Code) must be construed in pari materia, and one statutory provision in the Bankruptcy Code cannot be considered without reference to other relevant provisions of the same statute, and its object and policy." *In re Ames Dep't Stores, Inc.*, 306 B.R. 43 (Bankr. S.D.N.Y. 2004). Where the plain meaning of the statute is clear and produces no absurd results, further inquiry is unnecessary. But where the language is ambiguous, one must discern the drafters' intent. *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 242 (1989) ("In [ambiguous] cases, the intention of the drafters, rather than the strict language, controls.").

Courts are split as to whether section 365(d)(3) is ambiguous. *Ames*, 306 B.R. at 66. Although Touch of Grey contends that there is no ambiguity in the statute, the existence of a circuit split is strong evidence to the contrary, and closer examination of the law further reveals the potential for multiple interpretations.

Section 365(d)(3) 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 . . ., until such lease is assumed or rejected, notwithstanding section 503(b)(1) of this title." 11 U.S.C. § 365(d)(3). The plain language of the statute does not indicate whether obligations arise at the instant rent is due under the terms of the lease or the obligation accrues over continued post-petition use of the premises in unclear. *Ames*, 306 B.R. at 67. Moreover, the clause "until such lease is assumed or rejected" can be understood to modify the either the word "perform" or "obligations." *Id*. The latter interpretation supports the proration approach by indicating that the obligation ceases as soon as the lease has been accepted or rejected. The former is consistent with the absolutist billing-date approach.

The final clause adds additional ambiguity. Some courts have taken the phrase "notwithstanding section 503(b)(1)" to grant the lessor "superpriority" for payment of debts over and above other administrative expenses. *See, e.g., In re Telesphere Commc'ns, Inc.*, 148 B.R. 525, 532 (Bankr. N.D. Ill. 1992). Other interpretations are narrower, with post-petition lease obligations only fully guaranteed where it is reasonably clear the estate's funds are sufficient to pay all other administrative claimants. *See In re Speiss*, 145 B.R. 597, 607-08 (Bankr. N.D.Ill. 1992); *Maroon v. Four Star Pizza (In re Four Star Pizza)*, 135 B.R. 498, 500 (Bankr. W.D. Pa. 1992); *In re Virginia Packing Supply Co.*, 122 B.R. 491, 494 (Bankr. E.D. Va. 1990); *In re Orient River Inv.*, 112 B.R. 126 (Bankr. E.D. Pa. 1990); In re Granada, 88 B.R. 369, 375 (Bankr. D. Utah 1988). Still other courts have rejected the idea that section 365(d)(3) affords landlords any special treatment, requiring them to prove the reasonableness of the rent and prove they are an administrative expense under 503(b)(1). *See In re Orvco, Inc.*, 95 B.R. 724, 728 (B.A.P 9th Cir. 1989); *In re Mr. Gatti's,* 164 B.R. 929, 946 (Bankr. W.D. Tex. 1994); *In re Tammey Jewels, Inc.*, 116 B.R. 292, 294 (Bankr. M.D. Fla. 1990). The broad range of conclusion reached by courts demonstrates the need to step beyond the plain language of section 365(d)(3).

Though facially ambiguous, section 365(d)(3) is better understood in light of the broader statute and supporting Code provisions. Section 365(g) states that rejecting an unexpired lease of the debtor "constitutes a breach of such contract or lease." Section 502(g)(1) then adds that claims arising from such a rejection are to be treated "the same as if such claim had arisen before the date of the filing of the petition." In other words, they are to be construed as unsecured claims rather than administrative expense claims. Similarly, the proration approach leaves post-rejection rent unsecured, ensuring that landlords only receive administrative priority in the pre-rejection, post-petition period. Applying the billing-date approach to section 365(d)(3) would undermine sections 365(g) and 502(g)(1) by placing landlords' interests above other creditors in the post-rejection period. *Ames*, 306 B.R. at 70.

The billing date approach is also at odds with section 365(d)(4). Under that section, debtors immediately lose their right to occupancy following the rejection of their lease. *See In re NETtel Corp.*, 289 B.R. 486, 489 (Bankr. D.D.C. 2002). This makes sense under the proration approach where the debtor is not paying for use of the premises past the rejection date. However, under the billing-date approach, a debtor might be forced to pay weeks or even months-worth of rent for a space they would not be allowed to occupy post-rejection of the lease.

In addition to its statutory context, the legislative history of section 365 supports the proration approach. Passed in 1984, section 365(d)(3) was intended to remedy a flaw in the 1978 Bankruptcy Code that was particularly harmful to landlords. Josef S. Athanas & Scott A. Semenek, *Pro-ration of Rent Dead in Third and Sixth Circuits-Landlords Won the Battle, But Will They Lose the War?*, 19 BANKR. DEV. J. 123, 125-26 (2002). Prior to 1984 landlords could not evict a tenant in the post-petition, pre-rejection period because the tenant's possible interest in the lease was protected by an automatic stay under 11 U.S.C. § 362. *In re Handy Andy Home Improvement Ctrs*, 144 F.3d 1125, 1128 (7th Cir. 1998). At the same time, the landlord was denied compensation for current services provided unless they proved to the court that rent was an "actual and necessary" cost warranting administrative expense classification under section

503(b)(1). *Id*. When lessors did seek 503(b)(1) compensation, courts would typically prorate the full value of the rent over the post-petition, pre-rejection period. *Child World v. Campbell/Massachusetts Tr. (In re Child World)*, 161 B.R. 571, 574 (S.D.N.Y. 1993).

The position of lessors prior to the addition of section 365(d)(3) was unique. Landlords had been the only creditors forced to continue working with debtors on terms dictated by the bankruptcy court because eviction was not an available option due to the automatic stay. *Handy Andy*, 144 F.3d at 1128. Congress passed section 365(d)(3) to ensure landlords would receive “current payment” for “current services provided” without having to resort to section 503(b)(1). 130 CONG. REC. (1984), as reprinted in 1984 U.S.C.C.A.N. 576, 598-99 (statement of Sen. Hatch). While the legislative fix was clearly intended to shift some power back to landlords, there is no indication that legislators sought to favor landlords interests above other creditors by guaranteeing compensation for landlords outside the post-petition, pre-rejection period. *Id*.

Furthermore, the language does not indicate that Congress sought to deviate from the practice of prorating rent established through the section 503(b)(1) process prior to the 1984 amendment. In *Cohen v. de la Cruz*, 523 U.S. 213 (1998), this Court stated it would “not read the Bankruptcy Code to erode past bankruptcy practice absent a clear indication that Congress intended such a departure.” *Id*. at 221 (citing *Penn. Dep't of Pub. Welfare v. Davenport*, 495 U.S. 552, 563 (1990)). Given the ambiguity of section 365(d)(3) described above, Congress did not clearly indicate its intention to shift to the billing-date approach.

B. The proration approach avoids outcomes that are absurd or that deviate from the policy goals of the bankruptcy code.

Although the meaning of section 365(d)(3) as understood through its role within the Bankruptcy Code and its legislative history is sufficient to reject Touch of Grey’s claim, there are additional practical reasons why Congress preferred the proration approach. Proration is a straightforward method of compensating landlords that is easy to apply and equitable in its results. Conversely, the billing-date approach has the potential to produce absurd results that may favor either the creditor or debtor depending on the circumstance. Moreover, these results often cut against the goals of the Bankruptcy Code.

To begin, the billing-date approach encourages manipulative practices by both creditors and debtors. Landlords with leeway on when they can charge tenants certain fees can manipulate their billing to ensure the charges become post-petition administrative expenses. *See In re Trak Auto Corp.*, 277 B.R. 655, 663 (Bankr. E.D. Va. 2002)("Adopting a method where debtor's liability would turn solely on when bills are issued has the potential to create a windfall for a landlord who decides to manipulate when it bills the debtor for taxes and CAM charges so that the amounts due become a post-petition claim."). The approach can also be easily abused to landlords' detriment. *See In re Linens Holding Co*., No. 08-10832(CSS), 2009 WL 2163235 (Bankr. D. Del. June 12, 2009). For example, a tenant that owes $100,000 in rent on August 1st can choose to file their petition on August 2nd. As a result, the landlord's $100,000 claim for August rent becomes a general unsecured claim rather than an administrative expense. Gary P. Spencer, *A Simple Solution for Stub Rent? How Proposed Changes to the Treatment of Stub Rent Could Lead to Unforeseen Consequences*, 36 REV. BANKING & FIN. L. 915, 951 (2016). Under the billing-date approach, this tenant is not compelled to pay rent for their continued use of the premises, in essence receiving an "unsecured, interest-free" loan from the landlord. *Id. See also In re Circuit City Stores,* Inc, 447 B.R. 475, 510 (Bankr. E.D. Va. 2009). Conversely, the proration approach precludes manipulative filing by guaranteeing landlords are paid for post-petition services rendered and no more.

The potential inequity of the billing-date approach increases with the length of time a single payment covers. In *Child World*, 150 B.R. at 330, tax payments were made prospectively six months in advance. In *In re Swanton Corp*., 58 B.R. 474, 475 (Bankr. S.D.N.Y. 1986) payment was made on an annual basis. As the court in *In re NETtel Corp., Inc*., 289 B.R. 486, 48-90 (Bankr. D.D.C. 2002) states, "it is undesirable to interpret section 365(d)(3) as operating in a manner … that depends on the fortuity of the time of the month of the order for relief" and unlikely that Congress intended to produce such an absurd result. *Id* at 490.

The arbitrary nature of the billing-date approach, which allocates full sums based on the day of the month rather than actual services rendered, creates windfalls "not once in a while, but in practically every case." Athanas & Semenek, 19 BANKR. DEV. J. at 138. A debtor can achieve a windfall through the manipulative filing practices described above, while the landlord may achieve a windfall where, as here, the tenant rejects the lease shortly after rent is due. Under this circumstance, the landlord receives full payment for the period from the debtor but can also re-rent the space at full price to a third-party.

Although the dissent in the Thirteenth Circuit's decision recognizes that the billing-date approach makes windfalls possible, it brushes aside the concern by arguing that Touch of Grey would have been unlikely to find a new tenant and claiming a guarantee of a single month's rent is too insignificant to constitute a windfall. Even if it is granted that Touch of Grey could not quickly find a new tenant, a detail that is not found in the factual record, the argument remains short-sighted by ignoring the many instances where the term of rent is much longer or where a debtor manipulates their filing date to avoid paying rent for an entire month. Courts subscribing to the billing-date approach can and have produced such results. In *In re Appletree Mkts.*, 139 B.R. 417 (Bankr. S.D. Tex. 1992) the court ruled that a debtor who held several leases with their creditor on varying monthly, quarterly, and annual payment structures, did not have to pay any of them by virtue of filing on January 2nd, one day after rent for each was due.

Windfalls created by the billing-date approach are at odds with the goals of the Bankruptcy Code. This Court has often stated that "obtaining a maximum and equitable distribution for creditors and ensuring a 'fresh start' for individual debtors" are the core tenants of federal bankruptcy law. *BFP v. Resolution Tr. Corp*., 511 U.S. 531, 563 (1994) (citing *Stellwagen v. Clum*, 245 U.S. 605, 617 (1918); *Williams v. United States Fidelity & Guaranty Co.*, 236 U.S. 549, 554-555 (1915)). When landlords are granted the full rent under a lease despite only providing the debtor their services for a fraction of the billing period, the landlord secures a disproportionate amount of the estate's value at the expense of unsecured creditors and those receiving payments strictly for administrative services rendered. *See Newman v. McCrory Corp. (In re McCrory Corp.)*, 210 B.R. 934, 939-40 (S.D.N.Y. 1997). Conversely, windfalls that favor debtors undermine the goal of obtaining maximum distribution for creditors by forcing landlords to continue providing their services without any payment. The lost value to creditors in these cases can reach millions of dollars. *See In re Circuit City Stores, Inc.*, 447 B.R. 475, 510 (Bankr. E.D. Va. 2009)("The unpaid Stub Rent for Advance Leases is approximately $ 20 to $ 25 million.").

Leading practitioners in the field endorse the proration approach as a means to avoid such absurd and inequitable results. In a 2014 review of Chapter 11, the American Bankruptcy Institute (ABI) wrote that Chapter 11 is intended help creditors and debtors achieve a "soft landing" from reorganization so they can "minimize . . . disruptions" and "develop a feasible restructuring strategy that benefits all stakeholders." AM. BANKR. INST., AMERICAN BANKRUPTCY INSTITUTE COMMISSION TO STUDY REFORM OF CHAPTER 11, FINAL REPORT AND

RECOMMENDATIONS 20 (2014) [hereinafter ABI COMMISSION REPORT]. To achieve this goal and help make Chapter 11 "more efficient and cost-effective," the ABI made several recommendations. ABI COMMISSION REPORT at 129. In examining section 365(d)(3), they found that the proration approach was fairer and best achieved these goals. *Id* at 134.

The bankruptcy court, the United States District Court for the District of Moot, and the Thirteenth Circuit each drew the same conclusion by applying the proration approach in the present case. Awarding Touch of Grey $4,032.26 prorated rent for the five days Terrapin Station occupied the premises strikes the appropriate balance between providing Touch of Grey fair consideration for post-petition services rendered without awarding a windfall or incentivizing manipulative filing practices by future bankruptcy filers. R. at 20. Moreover, it best fulfills the goals of the Bankruptcy Code and Congress' intent to ensure landlords receive "current payment" for "current services performed."

CONCLUSION

The Bankruptcy Code statutes at the heart of the two issues before the Court vary in their ambiguity and therefore require different analytical approaches. Section 547(c)(4), while complex in its construction, is clear in its purpose. Creditors may not claim new value preference defense where new value has been paid for by an unavoidable transfer. Conversely, section 365(d)(3) is facially ambiguous, but its surrounding legal framework and Congress' intent point decidedly in favor of adopting the proration approach to stub rent. For the reasons stated, this Court should affirm the decision of the Thirteenth Court of Appeals.