No. 21-0909

IN THE

# Supreme Court of the United States

IN RE TERRAPIN STATION, LLC, DEBTOR,

TOUCH OF GREY ROASTERS, INC.,
*Petitioner,*

v.

CASEY JONES, CHAPTER 7 TRUSTEE,
*Respondent.*

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

**BRIEF FOR THE RESPONDENT**

TEAM NUMBER 32
COUNSEL FOR RESPONDENT

JANUARY 20, 2022

## QUESTIONS PRESENTED

I. Whether a seller of goods is entitled to reduce its preference exposure pursuant to 11 U.S.C. § 547(c)(4) by the value of goods sold even though the debtor in possession paid for such goods in full pursuant to 11 U.S.C. § 503(b)(9).

II. Whether a trustee must timely perform the obligations of a debtor under 11 U.S.C. § 365(d)(3) by paying rent due prior to the rejection of an unexpired non-residential real property lease but allocable to the period after the effective date of rejection.

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## OPINIONS BELOW

The Thirteenth Circuit Court of Appeals' decision is available at No. 20-0803. The bankruptcy court decided in favor of the Chapter 7 Trustee, Casey Jones. On direct appeal, the United States Court of Appeals for the Thirteenth Circuit affirmed in favor of the Chapter 7 Trustee, Casey Jones on both issues.

## STATEMENT OF JURISDICTION

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

## PERTINENT STATUTORY PROVISIONS

This action implicates 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--
**(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;

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

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

## STATEMENT OF THE CASE

### I. Factual History

#### A. Debtor, Terrapin Station, LLC, and Petitioner, Touch of Grey, enter into Franchise Agreement and Lease Agreement.

Debtor, Terrapin Station, LLC, is a coffeehouse in Terrapin, Moot, founded by its only member, William Tell ("Tell"). R. at 3. In 2017 Petitioner, Touch of Grey, headquartered in San Francisco, CA, approached Tell about quietly franchising Terrapin Station, LLC. *Id.* at 4. With profits becoming stagnant, and in need of remodeling, the Debtor entered into a franchise agreement ("Franchise Agreement") with Touch of Grey on July 1, 2018, wherein the Debtor would exclusively sell "Dark Star" branded products purchased from Touch of Grey. *Id.* The Debtor also agreed to increase operation hours as well as offer live music, poetry readings, and alcoholic beverages at night. *Id.* The same day, Touch of Grey leased the Debtor a recently remodeled warehouse, located at 5877 Shakedown Street (the "Premises"). *Id.* Under the twenty-year, triple-net lease ("Lease") the Debtor would pay a monthly rent of $25,000, "due in advance on the first day of each month." *Id.* On December 1, 2018, the new "Terrapin Station Coffeehouse" at the Premises opened, and the old location closed. *Id.* at 5.

Unfortunately, due to low sales at a new location burdened with above-market rent, the Debtor failed to pay debts as they became due starting in September 2019. *Id.* By November 1, 2019, the Debtor owed $700,000 for inventory it had purchased from Touch of Grey, and on December 5, 2019, Touch of Grey sent the Debtor a notice of default which threatened to terminate the franchise agreement. *Id.*

#### B. Terrapin Station, LLC, and Touch of Grey, enter into a Forbearance Agreement and Terrapin Station, LLC, purchases additional inventory from Touch of Grey.

On December 7, 2019, the Debtor and Touch of Grey entered into a forbearance

agreement ("Forbearance Agreement") wherein Touch of Grey would forbear foreclosure in exchange for: (1) a payment of $250,000 on the outstanding debt, (2) the Debtor's reaffirmation of the Lease, and (3) the Debtor's release of all causes of action against Touch of Grey. R. at 5. On the same day the Debtor also made payment to Touch of Grey for $250,000. *Id.* On December 18, 2019, the Debtor purchased $200,000 of additional "Dark Star" branded inventory on credit. *Id.* The Debtor received the inventory on December 21, 2019. *Id.* at 6.

### C. Terrapin Station, LLC files for Chapter 11 Bankruptcy and makes an administrative payment to Touch of Grey pursuant to § 503(b)(9).

On January 5, 2020 ("Petition Date") the Debtor filed a petition for relief in the United States Bankruptcy Court for the District of Moot under Chapter 11 of the Bankruptcy Code. R at 6. Although at the time the Debtor was current on its obligations under the Lease, the Debtor owed Touch of Grey $650,000 for inventory it had purchased. *Id.* The Debtor owed an additional $500,000 to other unsecured creditors, some of whom refused to provide the Debtor with additional goods and services on credit. *Id.*

The debtor proposed a reorganization plan wherein the Debtor would return to normal coffeehouse hours, sub-lease a part of the Premises, continue selling "Dark Star" products and, after motion, pay Touch of Grey $200,000 as a "critical vendor." *Id.* The Debtor argued that Touch of Grey was critical to the Debtor's continued operation and that Touch of Grey refused to continue selling goods on credit without the payment. *Id.* The bankruptcy court awarded a $200,000 administrative expense to Touch of Grey pursuant to 11 U.S.C. § 503(b)(9). *Id.* at 7. The Debtor then paid Touch of Grey the $200,000 administrative expense ("Payment") and resumed purchasing goods on credit from Touch of Grey. *Id.*

**D. Terrapin Station, LLC rejects the Lease and the Franchise Agreement pursuant to § 365(a), and converts to a Chapter 7 case pursuant to § 1112(a).**

Unfortunately, after being forced to temporarily close due to the COVID-19 pandemic, customers failed to return to Terrapin Station, LLC, and the Debtor permanently closed on May 5, 2020. R. at 7. On May 6, 2020, after leaving the Premises and returning the keys to Touch of Grey, the Debtor motioned to reject the Lease and the Franchise Agreement pursuant to 11 U.S.C. § 365(a). *Id.* On May 8, 2020, Touch of Grey filed a motion seeking to compel payment for the May rent, arguing that Touch of Grey was entitled to full payment because the rent became due on May 1, 2020, before the date of rejection on May 6, 2020. *Id.* at 7-8.

On May 29, 2020, at the outset of the hearing on the two motions, the Debtor announced that it was converting from a Chapter 11 to a Chapter 7 case pursuant to 11 U.S.C. § 1112(a). *Id.* at 8. The conversion successful, Casey Jones (the "Trustee") was appointed Trustee of the Debtor's estate. *Id.* Having granted the rejection of the Lease as of May 5, 2020, the court ordered additional briefing on the rejection of the Lease. *Id.*

**E. Chapter 11 Trustee objects to Motion to Compel Payment and seeks avoidance of the $250,000 payment pursuant to §§ 547(b) and 550(a).**

The Trustee objected to the motion to compel payment for the May rent pursuant to 11 U.S.C. § 365(d)(3), arguing that to allow the entire May rent to be paid in full would be inequitable to other creditors because the Debtor only occupied the Premises for five days in May. R. at 8. The Trustee additionally sought the avoidance of the $250,000 payment pursuant to the Forbearance Agreement under 11 U.S.C. §§ 547(b) and 550(a). *Id.* In response, Touch of Grey asserted that it was entitled to a reduction of its preference exposure by the $200,000 worth of "Dark Star" products it had sold the Debtor pursuant to § 547(c)(4). *Id.* Though mediation proved unsuccessful, the parties agreed to file cross-motions for summary judgement on the

matter of Touch of Grey's entitlement to preference exposure under § 547(c)(4). *Id.* at 9.

## II. Procedural History

The bankruptcy court ruled in favor of the Trustee on both issues: (1) granting an administrative expense of $4,032.26 to Touch of Grey for the rent owed prior to the date of rejection of the Lease, and (2) entering a judgement against Touch of Grey in the amount of $250,000, disallowing the reduction of preference exposure under 11 U.S.C. § 547(c)(4). R. at 9.

Touch of Grey appealed both decisions to the United States District Court for the District of Moot, which affirmed on both issues. *Id.* On appeal,the Court of Appeals for the Thirteenth Circuit again affirmed in favor of the Trustee on both issues. *Id.*

## STANDARD OF REVIEW

Both issues on appeal are based on interpretations certain sections of the Bankruptcy Code, which is pure law. R. at 9. Thus, the standard of review is de novo. *In re Chang*, 163 F.3d 1138, 1140 (9th Cir. 1998).

## SUMMARY OF THE ARGUMENT

First, the Bankruptcy court system holds as one of its most important policies the system of fair and equitable distribution amongst creditors. It is clear from the way Congress has written the Bankruptcy Code itself, that the rules are designed to give creditors as much as an equal opportunity to recover assets as possible. Protecting an equal distribution is why the Code includes provisions avoiding preference payments – precisely because they give select creditors an unequitable advantage over other creditors. It follows then that there is no reason, Code-based or policy-based, to allow a select creditor to not only receive a priority administrative payment, but then also use that same value *again* to reduce its preference exposure. The plain language of

the statute, as well as at statutory context, legislative history, and essential policy ideas all support this notion.

When looking at interpreting any statute, courts start with what the statue itself. The plain language of 11 U.S.C. § 547(c)(4), is unambiguous. The statute contains no temporal limitation on when a transfer must be deemed unavoidable. There is no need to complicate an analysis. To do so would be attempting to add limitations to the statute that simply are not there and were not intended. This court should follow § 547(c)(4) as it is written and find that the Thirteenth Circuit was correct in its ruling that precludes the Defendant from using a new value defense for goods already paid in full as a 11 U.S.C. § 503(b)(9) administrative expense.

The administrative expense is an unavoidable transfer, rendering moot the § 547(c)(4) new value defense. As the transfer was made post-petition, there is only one statute applicable that could be used to avoid the transfer, 11 U.S.C. § 549. However, § 549 is inapplicable as well. Section 549(a)(2)(B) simply states that a trustee can avoid a post-petition transfer if it is not authorized under § 549 or by the court. However, the transfer was already authorized. The trial court authorized it as an administrative expense, allowing Defendant to take the transfer without issue. Therefore since 549 does not apply, nor does any other statute, this transfer is unavoidable for purposes of a 547(c)(4) calculation.

Finally, Bankruptcy policy makes it clear that this would be inequitable. Allowing Defendant to keep its administrative expense payment and reduce the amount it would pay back into the estate for its preference exposure, would be inequitably remove significant assets that might otherwise be available for other creditors.

Second, Congress enacted 11 U.S.C. § 365(d)(3) to ameliorate the perceived inequities that lessors of nonresidential real property had faced during the period after a Chapter 11 filing

but *before* assumption or rejection. Courts have been sharpy divided through the years as to if the language of § 365(d)(3) is ambiguous or not—specifically the terms "obligations" and "arising." Supporters of the analysis that § 365(d)(3) is unambiguous, also conform to the idea of the "billing approach." The billing approach supports the notion that the debtors' obligations arise at the moment there is a legally enforceable duty to perform under the lease. In contrast, supporters of the analysis that § 365(d)(3) *is* ambiguous conform to the idea of the "proration approach." The proration approach supports the notion that debtors' obligations arise as they accrue over a post-petition, pre-rejection period, resulting in a pro-rata apportionment of the obligation. As is inherent from a circuit split and a vast amount of case law arguing the meaning of § 365(d)(3), the words "obligations" and "arising" are subject to differing interpretations, creating ambiguity within the statute. This ambiguity is resolved through a look into the statutory context, legislative history, and policy of the Bankruptcy Code, which ultimately supports the proration approach.

This Court should construe § 365(d)(3) *in pari materia* with the provisions of the Code involving "claims," specifically, §§ 365(g), 502(b)(6) and 502(g). This construction illuminates the fact that the Code provides a definition for the term "claim" but fails to provide a definition for the word "obligation." Therefore, without a stated definition, an analysis that refers to an obligation becoming payable at a given time without considering *when* the obligation accrued would be at odds with the Code sections regarding claims. As such, the billing approach would conflict with these sections by allowing landlords to receive superior treatment to other creditors. This is at direct conflict with one of the fundamental policies of the Bankruptcy Code—treating similarly situated creditors equally.

A look into the legislative history reveals that the 1984 amendment to the Code was to put landlords and debtors on equal footing during the post-petition, pre-rejection period.

Similarly, § 365(d)(3) should not be read as a clean slate of bankruptcy policy which ignores prior practice, nor can it. There is no evidence that Congress intentionally meant to erode § 503(b)(1) through amending § 365(d)(3). Proration therefore aligns with the intent of Congress—making sure landlords are given current payment for current services. It then follows that the courts rejection of the proration approach in *Koenig* and *Montgomery Ward* completely ignores the statutory interpretation of § 365(d)(3) and the policies of the Bankruptcy Code. Adherence to the billing approach is in conflict with the most fundamental purposes of the Bankruptcy Code—proration on the other hand is consistent with these purposes and the intent of Congress when enacting § 365(d)(3).

For these reasons, the Court should affirm the Thirteenth Circuit's holdings.

## ARGUMENT

### I. The Thirteenth Circuit correctly ruled that 11 U.S.C. § 547(C)(4) precludes the Defendant from asserting new value for goods subject to a satisfied administrative expense under 11 U.S.C. § 503(B)(9).

One of the core tenants of bankruptcy law is fairness amongst the creditors. *Howard Delivery Serv., Inc. v. Zurich Am. Ins. Co.*, 547 U.S. 651, 655 (2006). "[T]he Bankruptcy Code aims, in the main, to secure equal distribution among creditors." *Id.* (citations omitted). Allowing the Defendant, Touch of Grey, to be paid in full for goods sold to the debtor pursuant to 11 U.S.C. § 503(b)(9), while simultaneously allowing the Defendant to use that same value to reduce its preference exposure pursuant to 11 U.S.C. § 547(c)(4), allows the Defendant to "double dip" into the assets of the bankruptcy estate, thereby reducing the amount available to other creditors and denying them an equal distribution. The Thirteenth Circuit correctly reached this conclusion based upon the plain language of § 547(c)(4), as well as the overarching policy goals of the Bankruptcy Code. *See* § 547(c)(4). This Court should find that, (1) under the plain language of §

547(c)(4), no time restriction exists for determining whether a transfer is unavoidable, and (2) that the § 503(b)(9) administrative payment is an otherwise unavoidable transfer for purposes of the § 547(c)(4) calculation.

**A. The plain language of 11 U.S.C. § 547(c)(4) unambiguously omits a temporal restriction, thereby precluding the Defendant from a new value defense.**

Analysis of a statute always begins with the plain meaning of the text. *Carcieri v. Salazar*, 555 U.S. 379, 387, 129 S. Ct. 1058, 1063–64 (2009) ("We must first determine whether the statutory text is plain and unambiguous. If it is, we must apply the statute according to its terms."). The language of 11 U.S.C. § 547(c)(4) is clear. The statue directs that the Defendant may use its new value defense provided that such new value goods or services are paid for by the Debtor, and such payment is itself avoidable. § 547(c)(4). The statue makes no mention of a temporal limitation on when such transfer or payment is to be considered "otherwise unavoidable." *See id.*

**B. Legislative history supports an interpretation of 11 U.S.C. § 547(c)(4) without a temporal limitation.**

Congress intentionally omitted any temporal limitation from applying to 11 U.S.C. § 547(c)(4). Looking at the legislative history of the statute, the § 547(c)(4)(B) exception serves as a modern codification of the former Bankruptcy Code's section 60c. *See* 11 U.S.C. § 547(c)(4)(B); *see also* Bankruptcy Act, ch. 575, § 60c, 52 Stat. 870 (1938) (codified at 11 U.S.C. § 96(c) (1964)). Nevertheless, key differences exist that distinguish the two statutes. *Matter of Craig Oil Co.*, 31 B.R. 402, 406–09 (Bankr. M.D. Ga. 1983), *aff'd sub nom. In re Craig Oil Co.*, 785 F.2d 1563 (11th Cir. 1986). The prior section 60c rule specifically included a temporal restriction, the 90-day preference period, in its calculation formula.[1] However, in passing §

[1] "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, at 88 (1978), *as reprinted in* 1978 U.S.C.C.A.N.

547(c)(4)(B), the modern bankruptcy statute, Congress omitted the time restriction. *See* § 547(c)(4)(B). *Compare* 11 U.S.C. § 547(c)(4)(B) *with* Bankruptcy Act, ch. 575, § 60c, 52 Stat. 870 (1938) (codified at 11 U.S.C. § 96(c) (1964)).

Prior to the passage of the Bankruptcy Reform Act in 1978, Congress created a special commission to recommend changes to the Code. *See* REP. OF THE COMM'N ON THE BANKR. L., H.R. DOC. NO. 93-137, pt. II (1973). This commission determined that "a transfer is not avoidable to the extent of new value given at the time of the transfer or at *any time* thereafter. In determining the amount of new value given, the value of any security taken for it shall be deducted." (emphasis added). *Id.* at 167. In addition, another congressional commission separately came to a similar conclusion: "If a transferee who did not give new value at the time of a transfer thereafter delivers goods to the debtor or makes further advances to him or otherwise gives new value, then, to the extent of the new value so given, the transfer is not voidable." REP. OF THE COMM'N ON COORDINATION OF THE BANKR. ACT & THE UNIF. COM. CODE, appended to H.R. REP. NO. 95-595, at 204, 210 (1970) (Conf. Rep.), *as reprinted in* 1978 U.S.C.C.A.N 6164, 6169.

The plain language of § 547(c)(4)(B) more substantially reflects these recommendations made by Congress's own commissions than the prior section 60c rule. *See id.*; *compare* § 547(c)(4)(B) *with* Ch. 575, § 60c, 52 Stat. 870 (1938) (codified at § 96(c) (1964)). As such, Congress intentionally omitted from the 1978 revision of the Bankruptcy Code the temporal restriction on when such § 547(c)(4)(B) transfers must be determined as unavoidable. *See* H.R. REP. NO. 95-595, at 204, 210. Due to this intentional omission, the majority of courts interpreting § 547(c)(4)(B) have come to the same conclusion. *See, e.g., Beaulieu Liquidating Tr. v. Fabric*

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5787, 5874; H.R. REP. NO. 95-595, at 374 (1974), *as reprinted in* 1978 U.S.C.C.A.N 5963, 6330.

*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); *see also Circuit City Stores, Inc. v. Mitsubishi Dig. Elecs. Am. (In re Circuit City Stores, Inc.),* 2010 WL 4956022, at *9 (Bankr. E.D. Va. Dec. 1, 2010).

**C. The Statutory Construction of 11 U.S.C. § 547(c)(4) supports an interpretation of 11 U.S.C. § 547(c)(4) without a temporal limitation.**

In addition to the legislative history and intent of Congress, the statutory construction of 11 U.S.C. § 547 further evidence's Congress' specific intent not to include such a temporal limitation upon subsection (c)(4) transfers. *Compare* 11 U.S.C. §§ 547(b)(5) *and* (c)(5) *with* § 547(c)(4)(B). Several other areas of § 547 contain language that creates specific time restrictions. *Id.* Section 547(b)(5) requires a court to perform a hypothetical liquidation test, the analysis of which includes payments that must have been made on the petition date. *See* NORTON BANKR. L. & PRAC. § 66:12 (3d. ed. 2021). Additionally, one of the other exceptions in § 547(c), specifically § 547(c)(5), is limited to transfers made "as of the date of the filing of the petition." § 547(c)(5). The act of including language that creates a time limitation in these sections, but omitting it in others, shows that Congress knew when and how to impose such temporal restrictions and included or omitted such restrictions where intended. *See* § 547(c)(5); *see also In re Beaulieu Grp., LLC*, 616 B.R. 857, 878 (Bankr. N.D. Ga. 2020).

The Thirteenth Circuit's dissenting opinion and the Appellant's argument principally rely on the Third Circuit's analysis in *Friedman's Liquidating Tr. v. Roth Staffing Cos. LP (In re Friedman's Inc.)*, 738 F.3d 547, 554–55 (3d Cir. 2013). The *Friedman* court claimed to look at the context of § 547 in deriving its reasoning: "[W]e rest this conclusion primarily on the context and policy of the Code, rather than specific language" *Id.* at 554. However, the *Friedman* court's

analysis of the context of § 547 appears faulty. The court reasoned that because some of the sections under § 547(c)(4) clearly refer back to the 90-day preference period, the section at issue—although worded differently—should also refer back to this time restriction. *Id.* This reasoning is misplaced. The fact that two subsections of § 547 clearly indicate a temporal restriction, while § 547(c)(4)(B) *does not*, demonstrates Congress' clear intent to omit such a restriction in § 547(c)(4)(B). *Compare* §§ 547(b)(5) *and* (c)(5) *with* § 547(c)(4)(B). Given that Congress included temporal restrictions in subsections (b)(5) and (c)(5), Congress could have just as easily done the same in subsection (c)(4)(B), yet it did not. Rather, Congress intentionally wrote subsection (c)(4)(B) differently so as not to include a temporal restriction. *See* § 547(c)(4)(B). *Friedman* even acknowledges this interpretation, stating, "[t]he converse could be argued, however; namely, that this omission from § 547(c)(4) was intentional, since Congress knew how to set forth a relevant time period when it thought it applied." 738 F.3d at 556. *Friedman,* though, instead of relying on the plain language of the statute itself, argued instead that, "on balance, we believe that the policy of improvement of position prior to the petition date is central to the concept of preference" *Id.* As discussed above, this reasoning is misplaced. The plain language written eclipses such a policy argument, and by relying on a policy-derived interpretation that ignores the plain language of the statute, *Friedman* should not be controlling in this case. Along with the Thirteenth Circuit, the majority of courts have correctly held that § 547(c)(4) contains no temporal limitation. *See, e.g., 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); *see also Circuit City Stores, Inc. v. Mitsubishi Dig. Elecs. Am. (In re Circuit City Stores, Inc.),* 2010 WL 4956022, at *9 (Bankr. E.D. Va. Dec. 1, 2010).

Therefore, and as discussed below, the post-petition payment of the administrative expense under 11 U.S.C. § 503(b)(9) is an unavoidable transfer under § 547(c)(4)(B).

**D. Payment of the 11 U.S.C. § 503(b)(9) administrative expense is an unavoidable transfer for purposes of a 11 U.S.C. § 547(c)(4)(B) calculation.**

The Bankruptcy code provides a wide-ranging definition of a "transfer." 11 U.S.C. § 101(54). Subsection (54)(D) further defines the term to include "each mode, direct or indirect, . . . voluntary or involuntary, . . . of disposing of or parting with (i) property; or (ii) an interest in property." § 101(54)(D). This broad definition necessarily includes a 11 U.S.C. § 503(b)(9) administrative expense. *See In re Beaulieu Grp., LLC,* 616 B.R. 857, 870 (Bankr. N.D. Ga. 2020) *appeal docketed sub nom. Auriga Polymers Inc. v. PMCM2, LLC,* No. 20-14647 (11th Cir. Dec. 11, 2020). The dissenting opinion from the lower court states however that such an administrative payment remains unpaid by the Debtor, for as a post-petition transfer, the transfer is made by the *trustee* or the *debtor in possession*. *In re Terrapin Station, LLC*, No. 20-0803, at *28 (13th Cir. 2021) (Weir, J., dissenting). The dissent then concludes that since the transfer here was not made "by the debtor," the transfer cannot be used for a 11 U.S.C. § 547(c)(4) calculation, as the wording in § 547(c)(4) specifically states, "by the debtor." *Id.*

This argument, however, is strained at best. While it is true that Congress knows to distinguish between when a debtor or trustee makes a payment, such a distinguishment for purposes of § 547(c)(4) are unnecessary. Indeed, and as stated by the lower court's analysis of the fact, the Debtor in this case made the payment directly. R. at 7. In addition, even if the Trustee had made the payment from the property of the estate, such a transfer would still fit under the § 101(54)(D) definition, for such a transfer would qualify as an "indirect . . . parting with . . . an interest in property." § 101(54)(D). The Debtor is the one who must actually make

said payment, yet even when made by a different party, the Debtor is still indirectly parting with their interest in that payment. *Id.* Accordingly, the § 503(b)(9) administrative payment is a transfer by the Debtor for purposes of § 547(c)(4). Not only is the payment a transfer, the payment is also unavoidable.

Furthermore, the plain language of the Code allows for debtors to make such payments. At the time of the transfer at issue, the Debtor had a Chapter 11 case. R. at 6. Accordingly, under 11 U.S.C. § 1129 governing a Chapter 11 plan, "the court shall confirm a plan only if . . . [a]ny payment made or to be made by the proponent, [or] *by the debtor* . . . has been approved by, or is subject to approval of the court as reasonable." 11 U.SC. § 1129(a)(4) (emphasis added). This language suggests that debtors *can* make post-petition payments, and as such, nothing in the Code expressly precludes such a payment. It follows then that the Debtor in this case could and did make such payment, satisfying the requirements of § 547(c)(4).

Qualified as a transfer under § 101(54)(D), and paid post-petition, only 11 U.S.C. § 549 could possibly apply in the avoiding of such a transfer. *Cf.* 11 U.S.C. §§ 544, 545, 547, 548, 553, 724(a). However, even this section remains inapplicable, making the payment in question an unavoidable transfer. *See* 11 U.S.C. § 549. Section 549 does not apply. *See id.* Section 549 provides that the trustee may avoid the post-petition payment if the transfer is not authorized either within the Code, or by the court. *Id.* However, the payment in this case was specifically authorized as an administrative expense by the lower court. R. at 7. Therefore, no applicable Bankruptcy statute exists to avoid the payment at issue, making such payment an "otherwise unavoidable transfer" pursuant to § 547(c)(4)(B). *See In re Circuit City Stores, Inc.*, 2010 WL 4956022, at *8 (Bankr. E.D. Va. Dec. 1, 2010); *see also MMR Holding Corp. v. C & C Consultants, Inc. (In re MMR Holding Corp.)*, 203 B.R. 605, 609–11 (Bankr. M.D. La. 1996).

### E. The bankruptcy policy of equality of distribution among the creditors favors this analysis.

Finally, bankruptcy policy also supports this analysis. To reiterate the opinion of the lower court, "[one of the] overarching purpose[s] of bankruptcy law [is[ the equality of distribution among creditors." *In re Terrapin Station, LLC*, No. 20-0803, at *15 (13th Cir. 2021) (citing *Union Bank v. Wolas*, 502 U.S. 151, 161 (1991)). In the case at hand, allowing Touch of Grey to keep the 11 U.S.C. § 503(b)(9) administrative payment denies the other creditors a significant share of the estate's total assets. The administrative payment removes $200,000 from the total assets available despite the Debtor owing other unsecured creditors over $500,000. R. at 6. If, in addition to the administrative payment, the Court permits Touch of Grey to further reduce its preference exposure, the other creditors will be denied another $200,000. Such a result leaves even fewer assets available in the remaining asset pool while providing a single creditor $400,000, a significant proportion.

## II. The Thirteenth Circuit correctly ruled that 11 U.S.C. § 365(d)(3) does not require the Trustee to satisfy obligations allocable to the post-rejection period.

Courts are split as to the meaning of the language in 11 U.S.C. § 365(d)(3) but have come to two conclusions: the statute can be unambiguous—supporting the "billing approach" or the statute can be ambiguous—supporting the "proration approach." The pertinent portion of § 365(d)(3) provides: "The trustee shall timely perform all the obligations of the debtor, except those specified in § 365(b)(2), arising from and after the order of relief under any expired lease of nonresidential real property, until such lease is assumed or rejected, notwithstanding § 503(b)(1) of this title." § 365(d)(3).

Both terms, "obligation" and "arise," are susceptible to more than one meaning. Therefore, it is proper to look to canons of construction, legislative history, and overall policy of

the Bankruptcy Code to correctly decipher § 365(d)(3). In this case, the proration approach best aligns with the statutory scheme of § 365(d)(3) which Congress intended, along with the fundamental purposes and policies of bankruptcy law. Further, the minority of circuit court's argument for applying the billing date approach and its reliance on *Koenig* and *Montgomery Ward* is misguided.

Requiring the trustee to satisfy obligations allocable to the post-rejection period cannot be what Congress intended by enacting § 365(d)(3). As such, the decision of the Thirteenth Circuit should be affirmed.

**A. The plain language of 11 U.S.C. § 365(d)(3) is ambiguous because there is ambiguity in the word "obligation" as it relates to "arise."**

In considering the statute's diverse array of prior interpretations, the plain language of 11 U.S.C. § 365(d)(3) is ambiguous. The divergence of various court opinions on the statute evidences the ambiguity of § 365(d)(3). *See, e.g., In re Ames Dep't Stores, Inc.*, 306 B.R. 43, 65. (Bankr. S.D.N.Y. 2004) (declaring § 365(d)(3) ambiguous); *In re Montgomery Ward Holding Corp.,* 268 F.3d 205, 211 (3d Cir. 2001) (reaching the conclusion that § 365(d)(3) is unambiguous with some reluctance given that other courts have reached the opposite conclusion).

The Thirteenth Circuit majority reasonably found ambiguity in the statute without the need for interpretive "backflips," *In re Terrapin Station, LLC*, No. 20-0803, at *28 (13th Cir. 2021) (Weir, J., dissenting), for courts have been split on this issue for years. *In re S. Star Foods, Inc*., 122 F.3d 712, 715 (10th Cir. 1998) (acknowledging that the "existence of a split in the circuits in the interpretation of § 365(d)(3) is, in itself, evidence of the ambiguity in the language."). Given the abundance of case law analyzing the meaning of § 365(d)(3), "a court cannot possibly declare the language to be 'clear' when, as a matter of empirical reality,

significant numbers of jurists have reasonable, good-faith disputes over its meaning. A judicial fiat declaring a statute to be unambiguous does not make it so." *Allapattah Servs., Inc., v. Exxon Corp.*, 362 F.3d 739, 747 (11th Cir. 2004) (Tjoflat, J., dissenting).

Furthermore, the statute is ambiguous on its face. The statute directs the trustee to "timely perform all the *obligations* of the debtor," § 365(d)(3) (emphasis added), yet the common meaning of the word obligation is, "[a] generic word . . . having many, wide, and varied meanings, according to the context in which it is used." *In re Child World, Inc.,* 161 B.R. 571, 574 (S.D.N.Y. 1993). Therefore, the word "obligation" must be contextually analyzed in conjunction with the word "arise." *Id.* at 576 (noting that obligations can be read to arise when billed or accrued, and the ambiguity is perhaps caused by the lack of definition for the term obligation in the Bankruptcy Code).

To overcome such ambiguity and find the proper interpretation, 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, 66 (Bankr. S.D.N.Y. 2004). In this vein, Thirteenth Circuit got it right, explaining that, "[i]n this case, we need look no further than sections 365(g), 502(b)(6) and 502(g), all of which clearly establish that unperformed obligations after rejection are treated as general unsecured claims, not administrative expenses under section 503(b)." *In re Terrapin Station, LLC*, No. 20-0803, at *16. Given this guidance, the proper interpretation of § 365(d)(3), when read in conjunction with Bankruptcy Code sections concerning the treatment of claims, becomes clearer. Thus, the unperformed obligations after rejection in this case fail to qualify as § 503(b) administrative expenses, and therefore fail to *arise* as obligations of the trustee under §

365(d)(3). *See In re Child World, Inc.,* 161 B.R. 571, 576 (S.D.N.Y. 1993) (explaining that "claim" is a defined term under 11. U.S.C. § 105(5) and that a claim is determined as of the petition date under 11 U.S.C. § 502(b).).

Given § 365(d)(3)'s ambiguity, this Court, guided by the doctrine of *in pari materia*, should construe § 365(d)(3) to comport with §§ 365(g), 502(b)(6) and 502(g). Any other interpretation risks losing sight of the collective bankruptcy statutes' overarching "object and policy." *In re Ames Dep't Stores, Inc.*, 306 B.R. at 66. In doing so, the Court will find that the proration approach best aligns with the statutory scheme of the Bankruptcy Code's relevant statutes.

**B. The proration approach better fits with the legislative history, prior practice, and policy of the Bankruptcy Code.**

To properly construe an *in pari materia* interpretation of 11 U.S.C. § 365(d)(3), the Court must consider the legislative history, prior practice and policy of the Bankruptcy Code more generally, for the "object and policy," *In re Ames Dep't Stores, Inc.*, 306 B.R. 43, 66 (Bankr. S.D.N.Y. 2004), of the statutes should ultimately lead the Court's interpretation.

The starting point in discerning congressional intent is the existing statutory text. *In re Child World, Inc.,* 161 B.R. 571, 574 (S.D.N.Y. 1993). But as the Supreme Court has often noted, "statutory construction is a holistic endeavor." *United Sav. Ass'n of Texas v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371 (1988); *In re McSheridan*, 184 B.R. 91, 101 n.11 (9th Cir. 1995) (citing *In re R.H. Macy & Co., Inc.*, 170 B.R. 69, 73 (Bankr. S.D.N.Y. 1994). "The court must look beyond the language of the statute . . . when the text is ambiguous or when, although the statute is facially clear, a literal interpretation would lead to internal inconsistencies, an absurd result, or an interpretation inconsistent with the intent of Congress." *Vergos v. Gregg's Enters., Inc.,* 159 F.3d 989, 990 (6th Cir. 1998); *see also Thinking Mach. Corp. v. Mellon Fin.*

*Servs. Corp. (In re Thinking Machs. Corp.)*, 67 F.3d 1021, 1025 (1st Cir. 1995) (stating "when Congress' words admit more than one reasonable interpretation, 'plain meaning' becomes an impossible dream, and an inquiring court must look to the policies, principles and purposes underlying the statute in order to construe it. Congress after all, does not legislate in a vaccum.") Further, "[s]tatutory amendments are not written on a clean slate; as such, tracing the immediate post-petitions landlord-debtor relationship from pre-Code practice through § 365(d)(3) provides a historical reference for judicial interpretation of Congressional intent where the plain language does not suffice." *See* Victoria Kothari, *11 U.S.C. § 365(d)(3): A Conceptual Status Argument for Proration*, 13 AM. BANKR. INST. L. REV. 297 (2005).

The Bankruptcy Code of 1978 was generally hard on landlords, until lobbyists persuaded Congress to "even the playing field between landlords and debtors." *See* 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, 126 (2002). The 1984 amendment "afforded landlords an enhanced right to timely performance under a commercial lease . . . but it did not disturb the principle that courts should construe the accrual of obligations during the post-petition, pre-rejection period in a manner that faithfully carries out the purpose of the bankruptcy laws as a whole, as well as provide appropriate protection to landlords." *In re Stone Barn Manhattan LLC*, 398 B.R. 359, 366 (Bankr. S.D.N.Y. 2008). Kothari observes that a common sense reading of the statute indicates that the "legislation was related to issues of creditor equality, of timeliness of payments and of a desire to prevent administrative cost shifting from the debtor to innocent parties. There is nothing in the statutory language that could be inferred as providing a clear indication that Congress intended to depart from prior practice." *See Cohen v. De la Cruz*, 523 U.S. 213, 221–22 (1998) (declining to apply a specific version of

statutory interpretation because Congress's intent was not "unmistakably clear"). As such, the language and legislative history of § 365(d)(3) cannot support the "elimination of the pre-1984 practice of proration." *In re NETtel Corp., Inc.,* 289 B.R. 486, 492 (Bankr. D.D.C. 2002). The court in *In re Stone Barn Manhattan* is especially on point in its analysis stating:

> Nothing in the legislative history indicates that Congress intended § 365(d)(3) to overturn the long-standing practice under § 503(b)(1) of prorating debtor-tenants' rent to cover only the postpetition, prerejection period, regardless of billing date. Moreover, the logic of requiring debtor-tenants to pay for the 'current services' their landlords must provide during the postpetition, prerejection period dictates that to the extent such payments consist of rent, they should be prorated to cover only the postpetition, prerejection period. Allowing landlords to recover for items of rent which are billed during the postpetition, prerejection period, but which represent payment for services rendered by the landlord outside this time period, would grant landlords a windfall payment, to the detriment of other creditors, without any support from the legislative history.

*In re Stone Barn Manhattan LLC,* 398 B.R. 359, 366 (Bankr. S.D.N.Y. 2008) (citing *In re Child World*, 161 B.R. at 575-576).

This analysis further enforces the notion that the proration method "provide[s] landlords with current payment for current services" as Congress intended. *In re NETtel Corp., Inc.*, at 493. Stated another way, § 365(d)(3) was enacted to protect landlords *before* assumption or rejection of the lease. The facts of this case are distinct from this purpose. After the petition date of January 5, debtor was current as to his rent obligations in efforts to the reorganization of the business. R. at 6. After the Covid-19 pandemic halted business, and staying in business was no longer feasible, the lease was then rejected on May 5. *Id.* The debtor promptly vacated the premises and returned the keys to Touch of Grey. *Id.* As such, requiring the estate to pay as an obligation rent for which the debtor no longer receives any benefit falls outside of what Congress intended—protecting landlords from pre-petition obligations. There is no indication from Congress that it "intended to expand a landlord's rights to include compensation with regard to a period after which the landlord was entitled to possession…" *In re Manis Lumber Co.,* 430 B.R.

269, 277 (Bankr. N.D. Ga. 2009). If the trustee were required to pay the entirety of the post-rejection May rent, it would produce an absurd result "totally at odds with the established bankruptcy principle that a bankruptcy estate pay only for what it uses." *Id.* Therefore, the proration approach is proper here. Congress did not intend to require that the debtor pay rent once Touch of Grey is entitled to possession and the debtor is no longer receiving any benefit.

Finally, counterarguments advocating for the billing approach necessarily ignore the broader "object and policy" of the Bankruptcy Code, for such a ruling would only encourage parties to abuse the Bankruptcy Code's rules. A minority of circuit courts, as well as the dissent from the Thirteenth Circuit, relied on the decisions in *Koenig* and *Montgomery Ward* to bolster their argument for applying the billing approach. Both cases reject the proration approach and declare that "obligations under the lease are due in full when billed, whether or not they relate to the prepetition or postpetition period." *See* 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, 126 (2002). However, the billing approach creates a bright line rule that encourages both debtors and landlords to abuse its rules:

> While *Montgomery Ward* may provide a bright line rule, it will also promote the type of lawyering that should not be encouraged in our bankruptcy system. The billing method would prompt Maryland lessors to time their presentation of tax bills to tenants they anticipate might file bankruptcy in hope of making the entire bill a post-petition priority expense, while prospective Debtors would time their bankruptcy filings based on the receipt of tax bills in order to render an entire years' tax obligation an unsecured pre-petition debt. Both behaviors are solely to obtain advantage and do nothing to preserve the relative positions of the parties on a level playing field while reorganizing."
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> *In re Dunn Indus., L.L.C.*, 320 B.R. 86, 93 (Bankr. D. Md. 2005).

This reasoning is easily paralleled with rent rather than taxes. *See* 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, 126 (2002) (warning that "[l]andlords can

expect to see bankruptcy cases filed the day after rental and/or tax obligations come due under their leases, as claims for such obligations will be considered mere general unsecured claims.”). *Koenig* and *Montgomery Ward* are also “at odds with the policy that postpetition claims should be given priority over prepetition claims to enable the debtor to keep operating for as long as its current revenue covers current costs. By requiring the debtor to pay prepetition rent and prepetition taxes, this priority scheme is being ignored.” *Id.* The dissent argues that “it is irrelevant whether payment of such obligations is equitable to the estate and its creditors” because “Congress expressly mandated in section 365(d)(3) that such obligations be paid ‘notwithstanding section 503(b)(1) of this title.’” *In re Terrapin Station, LLC*, No. 20-0803, at *29 (13th Cir. 2021) (Weir, J., dissenting). If this was truly the intent of Congress, “it would have enacted conforming amendments to sections 503 . . . along with the amendments to section 365(d).” *In re Furr's Supermarkets, Inc.,* 283 B.R. 60, 69 (B.A.P. 10th Cir. 2002). This argument “unravels the priority scheme of the Bankruptcy Code.” *Id.* Citing the Supreme Court, the Thirteenth Circuit stated that, “the Bankruptcy Code aims, in the main, to secure equal distribution among creditors. We take into account, as well, *the complementary principle that preferential treatment of a class of creditors is in order only when clearly authorized by Congress.*” *Howard Delivery Serv., Inc. v. Zurich Am. Ins. Co.*, 547 U.S. 651, 655 (2006) (citations omitted) (emphasis added).

Furthermore, the dissent argues that Touch of Grey would not receive any windfall because the trustee could have rejected the lease four days earlier. The Court of Appeals in *Koenig* had an identical argument. However, “[t]hat premise is somewhat flawed because rejection of a commercial lease (other than deemed rejection under § 365(d)(4)) requires a court order. There are often cases in which the trustee, despite valiant efforts, is unable to obtain entry

of the order of rejection prior to a payment for future occupancy being due under the lease." *In re NETtel Corp., Inc.,* 289 B.R. 486, 495 n.15 (Bankr. D.D.C. 2002).

## CONCLUSION

The Court should affirm the Thirteenth Circuit's holdings that (1) 11 U.S.C. § 547(c)(4) precludes the Defendant from asserting the new value for goods defense subject to a satisfied administrative expense under 11 U.S.C. § 503(b)(9), R. at 10, and that (2) 11 U.S.C. § 365(d)(3) does not require the Trustee to satisfy obligations that are allocable to the post-rejection period. R. at 15.