No. 21-0909

IN THE

Supreme Court of the United States

OCTOBER TERM, 2021

IN RE TERRAPIN STATION, LLC, *Debtor*,

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

v.

CASEY JONES, CHAPTER 7 TRUSTEE, *Respondent*.

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

BRIEF FOR PETITIONER

TEAM P35

Counsel for Petitioner

QUESTIONS PRESENTED

I. Whether a seller of goods is entitled to reduce its preference exposure by applying new value under 11 U.SC. § 547(c)(4) even where new value was paid for in full post-petition under 11 U.S.C. § 503(b)(9).

II. Whether 11 U.S.C. § 365(d)(3) mandates the use of the Billing Date Approach to require a trustee to timely perform the obligations of a debtor during the post-petition pre-rejection period and pay the entirety of rent owed.

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OPINIONS BELOW

In unreported opinions, the United States Bankruptcy Court for the District of Moot granted summary judgment to the Trustee, ruling against Touch of Grey on both issues. The United States District Court for the District of Moot affirmed. R. at 9. The United States Court of Appeals for the Thirteenth Circuit also affirmed; its opinion is reproduced as the record in this appeal.

STATEMENT OF JURISDICTION

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

STATUTORY PROVISIONS

11 U.S.C. § 365

(a) Except as provided in sections 765 and 766 of this title 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.

(b) – (c) [omitted]

(d)

(1) [omitted]

(2) In a case under chapter 9, 11, 12, or 13 of this title [11 USCS §§ 901 et seq., 1101 et seq., 1201 et seq., or 1301 et seq.], the trustee may assume or reject an executory contract or unexpired lease of residential real property or of personal property of the debtor at any time before the confirmation of a plan but the court, on the request of any party to such contract or lease, may order the trustee to determine within a specified period of time whether to assume or reject such contract or lease.

(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.

(B) In a case under subchapter V of chapter 11 [11 USCS §§ 1181et seq.], the time for performance of an obligation described in subparagraph (A) arising under any unexpired lease of nonresidential real property may be extended by the court if the debtor is experiencing or has experienced a material financial hardship due,

directly or indirectly, to the coronavirus disease 2019 (COVID-19) pandemic until the earlier of—

(i) the date that is 60 days after the date of the order for relief, which may be extended by the court for an additional period of 60 days if the court determines that the debtor is continuing to experience a material financial hardship due, directly or indirectly, to the coronavirus disease 2019 (COVID-19) pandemic; or

(ii) the date on which the lease is assumed or rejected under this section.

(C) An obligation described in subparagraph (A) for which an extension is granted under subparagraph (B) shall be treated as an administrative expense described in section 507(a)(2) [11 USCS § 507(a)(2)] for the purpose of section 1191(e) [11 USCS § 1191(e)].

(4)

(A) Subject to subparagraph (B), an unexpired lease of nonresidential real property under which the debtor is the lessee shall be deemed rejected, and the trustee shall immediately surrender that nonresidential real property to the lessor, if the trustee does not assume or reject the unexpired lease by the earlier of—

(i) the date that is 210 days after the date of the order for relief; or

(ii) the date of the entry of an order confirming a plan.

(B)

(i) The court may extend the period determined under subparagraph (A), prior to the expiration of the 210-day period, for 90 days on the motion of the trustee or lessor for cause.

(ii) If the court grants an extension under clause (i), the court may grant a subsequent extension only upon prior written consent of the lessor in each instance.

(5) [omitted]

(e) – (f) [omitted]

(g) Except as provided in subsections (h)(2) and (i)(2) of this section, the rejection of an executory contract or unexpired lease of the debtor constitutes a breach of such contract or lease—

(1) if such contract or lease has not been assumed under this section or under a plan confirmed under chapter 9, 11, 12, or 13 of this title, immediately before the date of the filing of the petition; or

(2) if such contract or lease has been assumed under this section or under a plan confirmed under chapter 9, 11, 12, or 13 of this title—

(A) if before such rejection the case has not been converted under section 1112, 1208, or 1307 of this title, at the time of such rejection; or

(B) if before such rejection the case has been converted under section 1112, 1208, or 1307 of this title—

(i) immediately before the date of such conversion, if such contract or lease was assumed before such conversion; or

(ii) at the time of such rejection, if such contract or lease was assumed after such conversion.

(h) – (p) [omitted]

11 U.S.C. § 503

(a) [omitted]

(b) After notice and a hearing, there shall be allowed, administrative expenses, other than claims allowed under section 502(f) of this title [11 USCS § 502(f)], including—

(1)

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

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

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

(B) any tax—

(i) incurred by the estate, whether secured or unsecured, including property taxes for which liability is in rem, in personam, or both, except a tax of a kind specified in section 507(a)(8) of this title [11 USCS § 507(a)(8)]; or

(ii) attributable to an excessive allowance of a tentative carryback adjustment that the estate received, whether the taxable year to which such adjustment relates ended before or after the commencement of the case;

(C) any fine, penalty, or reduction in credit relating to a tax of a kind specified in subparagraph (B) of this paragraph; and

(D) notwithstanding the requirements of subsection (a), a governmental unit shall not be required to file a request for the payment of an expense described in subparagraph (B) or (C), as a condition of its being an allowed administrative expense;

(2) compensation and reimbursement awarded under section 330(a) of this title [11 USCS § 330(a)];

(3) the actual, necessary expenses, other than compensation and reimbursement specified in paragraph (4) of this subsection, incurred by—

(A) a creditor that files a petition under section 303 of this title [11 USCS § 303];

(B) a creditor that recovers, after the court's approval, for the benefit of the estate any property transferred or concealed by the debtor;

(C) a creditor in connection with the prosecution of a criminal offense relating to the case or to the business or property of the debtor;

(D) a creditor, an indenture trustee, an equity security holder, or a committee representing creditors or equity security holders other than a committee appointed under section 1102 of this title [11 USCS § 1102], in making a substantial contribution in a case under chapter 9 or 11 of this title [11 USCS §§ 901 et seq. or 1101 et seq.];

(E) a custodian superseded under section 543 of this title [11 USCS § 543], and compensation for the services of such custodian; or

(F) a member of a committee appointed under section 1102 of this title [11 USCS § 1102], if such expenses are incurred in the performance of the duties of such committee;

(4) reasonable compensation for professional services rendered by an attorney or an accountant of an entity whose expense is allowable under subparagraph (A), (B), (C), (D), or (E) of paragraph (3) of this subsection, based on the time, the nature, the extent, and the value of such services, and the cost of comparable services other than in a case under this title, and reimbursement for actual, necessary expenses incurred by such attorney or accountant;

(5) reasonable compensation for services rendered by an indenture trustee in making a substantial contribution in a case under chapter 9 or 11 of this title [11 USCS §§ 901 et seq.; 1101 et seq.], based on the time, the nature, the extent, and the value of such services, and the cost of comparable services other than in a case under this title;

(6) the fees and mileage payable under chapter 119 of title 28 [28 USCS §§ 1821 et seq.];

(7) with respect to a nonresidential real property lease previously assumed under section 365 [11 USCS § 365], and subsequently rejected, a sum equal to all monetary obligations due, excluding those arising from or relating to a failure to operate or a penalty provision, for the period of 2 years following the later of the rejection date or the date of actual turnover of the premises, without reduction or setoff for any reason whatsoever except for sums actually received or to be received from an entity other than the debtor, and the claim for remaining sums due for the balance of the term of the lease shall be a claim under section 502(b)(6) [11 USCS § 502(b)(6)];

(8) the actual, necessary costs and expenses of closing a health care business incurred by a trustee or by a Federal agency (as defined in section 551(1) of title 5 [5 USCS § 551(1)]) or a department or agency of a State or political subdivision thereof, including any cost or expense incurred—

(A) in disposing of patient records in accordance with section 351 [11 USCS § 351]; or

(B) in connection with transferring patients from the health care business that is in the process of being closed to another health care business; and

(9) the value of any goods received by the debtor within 20 days before the date of commencement of a case under this title in which the goods have been sold to the debtor in the ordinary course of such debtor's business.

(c) [omitted]

11 U.S.C. § 547

(a) In this section—

(1) "inventory" means personal property leased or furnished, held for sale or lease, or to be furnished under a contract for service, raw materials, work in process, or materials used or consumed in a business, including farm products such as crops or livestock, held for sale or lease;

(2) "new value" means money or money's worth in goods, services, or new credit, or release by a transferee of property previously transferred to such transferee in a transaction that is neither void nor voidable by the debtor or the trustee under any

applicable law, including proceeds of such property, but does not include an obligation substituted for an existing obligation;

(3) "receivable" means right to payment, whether or not such right has been earned by performance; and

(4) a debt for a tax is incurred on the day when such tax is last payable without penalty, including any extension.

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

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

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

(3) made while the debtor was insolvent;

(4) made—

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

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

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

(A) the case were a case under chapter 7 of this title [11 USCS §§ 701 et seq.];

(B) the transfer had not been made; and

(C) such creditor received payment of such debt to the extent provided by the provisions of this title [11 USCS §§ 101 et seq.].

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

(1) to the extent that such transfer was—

(A) intended by the debtor and the creditor to or for whose benefit such transfer was made to be a contemporaneous exchange for new value given to the debtor; and

(B) in fact a substantially contemporaneous exchange;

(2) to the extent that such transfer was in payment of a debt incurred by the debtor in the ordinary course of business or financial affairs of the debtor and the transferee, and such transfer was—

(A) made in the ordinary course of business or financial affairs of the debtor and the transferee; or

(B) made according to ordinary business terms;

(3) that creates a security interest in property acquired by the debtor—

(A) to the extent such security interest secures new value that was—

(i) given at or after the signing of a security agreement that contains a description of such property as collateral;

(ii) given by or on behalf of the secured party under such agreement;

(iii) given to enable the debtor to acquire such property; and

(iv) in fact used by the debtor to acquire such property; and

(B) that is perfected on or before 30 days after the debtor receives possession of such property;

(4) to or for the benefit of a creditor, to the extent that, after such transfer, such creditor gave new value to or for the benefit of the debtor—

(A) not secured by an otherwise unavoidable security interest; and
(B) on account of which new value the debtor did not make an otherwise unavoidable transfer to or for the benefit of such creditor;

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

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

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

(6) that is the fixing of a statutory lien that is not avoidable under section 545 of this title [11 USCS § 545];

(7) to the extent such transfer was a bona fide payment of a debt for a domestic support obligation;

(8) if, in a case filed by an individual debtor whose debts are primarily consumer debts, the aggregate value of all property that constitutes or is affected by such transfer is less than $600; or

(9) if, in a case filed by a debtor whose debts are not primarily consumer debts, the aggregate value of all property that constitutes or is affected by such transfer is less than $6,825.

(d) – (j) [omitted]

11 U.S.C. § 549

(a) Except as provided in subsection (b) or (c) of this section, the trustee may avoid a transfer of property of the estate –

(1) that occurs after the commencement of the case; and

(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.

(b) – (d) [omitted]

STATEMENT OF THE CASE

Terrapin Station, LLC, the Debtor, operated a local independent coffeehouse in the Town of Terrapin for several years. R. at 3. Touch of Grey Roasters, Inc., the Petitioner, operates over 1,900 coffeehouses internationally. *Id.* To expand its markets, Touch of Grey decided to open a series of neighborhood coffeehouses in 2017. R. at 4. Touch of Grey approached William Tell, Terrapin Station's founder and sole member, about franchising one of these neighborhood coffeehouses. *Id.* As part of the deal, Touch of Grey agreed to buy and lease a renovated warehouse space to Terrapin Station. *Id.*

In July of 2018, the parties entered into two agreements: a lease agreement for the Premises and a franchise agreement. R. at 4. Under the lease agreement, Terrapin Station agreed to pay Touch of Grey $25,000 monthly for twenty years for the warehouse space, with such rent "due in advance on the first day of each month." *Id.* Under the franchise agreement, Terrapin Station agreed to buy Touch of Grey's branded products and exclusively sell those products. *Id.* Terrapin Station's original coffeehouse closed, and the new coffeehouse opened in December of 2018. R. at 5.

Unfortunately, the new coffeehouse struggled throughout the next year. *Id.* Terrapin Station stayed current on its rent obligations under the lease agreement but accumulated $700,000 in debt to Touch of Grey for the branded goods it had purchased. *Id.* On December 5, 2019, just one year after the new coffeehouse opened, Touch of Grey sent Terrapin Station a notice of default threatening to terminate the franchise agreement. *Id.*

Two days after Touch of Grey sent the notice of default, the parties entered into a forbearance agreement in which Touch of Grey agreed to forbear from terminating the franchise agreement in exchange for: (i) a payment of $250,000 from Terrapin Station for the outstanding

invoices for Touch of Grey's products, (ii) reaffirmation by Terrapin Station of its obligations under the lease agreement, and (iii) a release of any claims or causes of action that Terrapin Station might have had against Touch of Grey. *Id.* Terrapin Station paid $250,000 to Touch of Grey that same day. *Id.* About a week and a half later, Terrapin Station bought another $200,000 worth of products from Touch of Grey on credit and Tell signed a personal guarantee on the invoice. *Id.* However, the extra product and holiday season did not improve Terrapin Station's sales. R. at 6.

On January 5, 2020, Terrapin Station filed a petition for relief under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the District of Moot. *Id.* Terrapin Station was current on its rent obligations under the lease agreement, but it owed Touch of Grey $650,000 in all for goods it had purchased. *Id.* It also owed $500,000 in only unsecured debt to other creditors. *Id.*

Terrapin Station filed several motions along with its bankruptcy petition, which Tell supported with personal declarations. *Id.* In the declarations, Tell also stated his intent to reorganize Terrapin Station into its original coffeehouse and continue selling Touch of Grey's branded products as required under the franchise agreement. *Id.* Touch of Grey engaged in ongoing, good faith discussions with Terrapin Station about an ongoing business relationship. *Id.*

Two weeks later, Terrapin Station filed a motion requesting authority to pay $200,000 to Touch of Grey pursuant to the invoice. *Id.* It argued that Touch of Grey was a "critical vendor" because the ongoing relationship with Touch of Grey was critical to Terrapin Station's reorganization plans and Touch of Grey would not sell goods to Terrapin Station on credit post-petition without the payment. *Id.* Terrapin Station also argued that the invoice was entitled to priority payment as an administrative expense. R. at 7. The United States Trustee opposed the motion, arguing that critical vendor payments are not authorized under the Bankruptcy Code. *Id.*

The bankruptcy court did not approve the critical vendor payment but awarded Touch of Grey an administrative expense and allowed Terrapin Station to pay the expense immediately. *Id.* Terrapin Station paid Touch of Grey $200,000 days later. *Id.* Touch of Grey accepted the payment and continued to sell goods to and do business with Terrapin Station, which was critical to Terrapin Station's reorganization efforts. *Id.* Unfortunately, the efforts were unsuccessful, and Terrapin Station permanently closed the coffeehouse on May 5, 2020. *Id.* Terrapin Station vacated the warehouse space and returned the keys to Touch of Grey. *Id.*

The next day, Terrapin Station filed a motion with the bankruptcy court to reject the lease and franchise agreements with Touch of Grey. *Id.* However, because the May rent became due on May 1 under the lease, Touch of Grey filed a motion to compel payment of the month's rent. *Id.* In the motion, Touch of Grey clarified that it did not oppose rejection of the lease effective May 5, but it was entitled to payment that became due on May 1. R. at 7-8.

At a virtual hearing on the motions later that month, Terrapin Station converted its chapter 11 case to chapter 7. R. at 8. Touch of Grey did not object and the bankruptcy court granted the conversion, appointing Petitioner Casey Jones as the Trustee. *Id.* The court also granted Terrapin Station's motion to reject the lease and franchise agreements effective May 5 but required additional briefing before ruling on Touch of Grey's request for payment of the May rent. *Id.*

Petitioner Jones then took an "aggressive posture" against Touch of Grey. *Id.* Jones not only objected to Touch of Grey's motion to compel payment of the May rent, but also filed an action against Touch of Grey to avoid and recover the $250,000 payment from Terrapin Station to Touch of Grey as required under the forbearance agreement. *Id.* Touch of Grey promptly filed an answer with affirmative defenses, including the new value defense permitted under Section 547(c)(4). *Id.*

After an unsuccessful mediation, the bankruptcy court ruled in favor of Jones on both issues. R. at 9. First, it found that Section 365(d)(3) only required Terrapin Station to pay rent for the five days it occupied and granted Touch of Grey a reduced administrative expense. *Id.* Second, it ruled that Touch of Grey could not reduce its preference exposure by applying "new value" for the $200,000 worth of goods delivered in the 20 days prior to the bankruptcy filing and granted summary judgment in favor of Jones. *Id.*

Touch of Grey timely appealed both issues to the United States District Court for the District of Moot, which affirmed both issues. *Id.* Touch of Grey then timely appealed to the United States Court of Appeals for the Thirteenth Circuit, which also affirmed both issues. *Id.*

SUMMARY OF THE ARGUMENT

Section 547(c)(4) unambiguously allows Touch of Grey to assert a new value defense to reduce its preference exposure even though the new value was paid for in full post-petition. When determining whether a statute is ambiguous, courts not only look at the plain language, but also the statutory context and policy considerations. Instead of declaring a provision of the Bankruptcy Code ambiguous, courts prefer to take a broad, contextual view of the whole law. After an examination of the statute using these canons of statutory interpretation, Section 547(c)(4) is unambiguous. And Section 547(c)(4) unambiguously shows that the new value defense is not depleted by post-petition transactions such as the 503(b)(9) administrative expense in this case.

First, the plain language of Section 547(c)(4) closes the preference window at petition, making any payments made post-petition irrelevant to the new value defense analysis. Use of the term "debtor" in Section 547(c)(4) instead of "debtor-in-possession" or "estate" shows that the provision only refers to pre-petition activity. And even if post-petition payments were considered, the 503(b)(9) expense was not a "transfer" but a distribution. Accordingly, the Section 503(b)(9)

administrative expense paid post-petition was not an "otherwise unavoidable *transfer*" under 547(c)(4)(B) and does not preclude Touch of Grey from asserting the new value defense.

Second, the statutory context surrounding Section 547 further shows that post-petition payments do not affect the application of the new value defense. Section 547 is titled 'Preferences,' suggesting that it only concerns transactions made within the preference period (i.e., the 90-Day period prior to bankruptcy filing). Other areas of the code also mark the date of petition as a common beginning and endpoint. For example, the Code's primary avoidance provisions, Sections 547 and 548, both measure time from the petition date. Conversely, post-petition transactions and avoidance of post-petition transfers are separately dealt with in Section 549(a)(1). Additionally, the statute of limitations for a preference avoidance action under Section 547 begins on petition date. Congress would have created a different statute of limitations if it intended for post-petition transfers to affect the estate. It would be inconsistent to allow post-petition payments to affect the preference analysis when post-petition extension of new value by a creditor cannot be used to reduce the creditor's preference exposure.

Third, the similar policy goals of Sections 503(b)(9) and 547(c)(4) should not be used against each other to deplete a creditor's use of the new value defense. Both sections serve to protect creditors and promote further business with debtors. Touch of Grey was instrumental in Terrapin Station's reorganization efforts when it extended goods on credit to aid Debtor, and it should not now be penalized for continuing business with Debtor. True, the goal of the Bankruptcy Code is that all creditors should be treated equally. But Touch of Grey's close relationship with Terrapin Station's business entitles it to more equitable treatment. Indeed, Terrapin Station considered Touch of Grey a critical vendor, essential to the Debtor's success. If critical vendors

are not deprived of the new value defense due to post-petition payments, neither should Section 503(b)(9) claimants.

Because plain language, statutory context, and policy goals of Sections 547(c)(4) and 503(b)(9) show there is a clear cut off at petition date for the new value defense, post-petition payments are not relevant to the analysis of the defense. Therefore, the administrative expense paid post-petition does not affect Touch of Grey's new value defense and it is not precluded from reducing its preference exposure pursuant to Section 547(c)(4). The Thirteenth Circuit held otherwise and should be reversed.

Turning to the second issue, the Billing Date Approach, rather than the proration approach, is the correct test under Section 365(d)(3). The Billing Date Approach better complies with the statute and utilizes the language of the lease for the correct date to determine the amount of rent owed during the post-petition pre-rejection period. Conversely, the proration approach ignores the language of the lease all together, opting to prorate the amount of rent per day. This Court should reverse the decision of the Thirteenth Circuit and adopt the Billing Date Approach for three reasons. First, the plain language of Section 365(d)(3) mandates the application of the Billing Date Approach. Second, the canons of statutory construction further support an interpretation of adopting the Billing Date Approach. Third, important public policy considerations and the overall purpose of the Bankruptcy Code will be upheld by applying the Billing Date Approach to the post-petition pre-rejection period.

The plain language of Section 365(d)(3) promotes the legislative intent to adopt the Billing Date Approach. When a statute is unambiguous on its face, the court must construe the statutory terms according to their ordinary and common meaning. Although courts are divided regarding the terms of Section 365(d)(3), application of their common meaning unambiguously reflects that

the terms of the lease will dictate what a party's obligation is and when it arises within commercial lease cases. Under the language of both the Lease and Section 365(d)(3), Touch of Grey is entitled to the full payment of $25,000 rent for the month of May.

Additionally, the context and legislative history of Section 365(d)(3) logically establish that the plain purpose of the statute is best accomplished with the Billing Date Approach. Looking at the context of Chapter 11, different approaches are to be adopted under different sections. This is due to the differing time periods, issues, and terms found within the sections. These differences establish that, while proration may be proper for some sections, it is not proper for Section 365(d)(3). Context also establishes that Congress intentionally chose not to adopt an accrual, or proration, application within Section 365(d)(3) based on the use of "accrue" in several sections but not Section 365(d)(3). This establishes a presumption that Congress intended to have proration not apply under this statute.

Legislative history of the Bankruptcy Code further supports the Billing Date Approach. Originally, the Code was unfair to landlords because it allowed debtors to take advantage of property without paying the landlords, leaving landlords without just compensation. This problematic system occurred by using proration. Congress recognized the unfair treatment and amended the Code in 1984. The purpose of this amendment was to resolve the problems proration caused by ensuring timely payment of all lease obligations at the time required in the lease (i.e., the billing date). Congress intended the 1984 Amendment to replace proration and enforce the rights of landlords. Accordingly, the pre-amendment practice of proration no longer applies to post-petition pre-rejection claims under Section 365(d)(3).

Third, the Billing Date Approach is the most reasonable way to ensure equitable remedies and compliance with the purpose of the Bankruptcy Code. It may seem unfair to allow preferential

treatment to a landlord over other creditors, but Congress authorized this preferential treatment as it was the whole purpose behind enacting Section 365(d)(3). By giving the landlords a chance to have an advantage, Congress was ensuring an equitable and fair distribution. While the Billing Date Approach could allow for windfalls, those windfalls are now a possibility for all parties rather than just the debtors under the pre-amendment proration practice. The Billing Date Approach provides the most equitable and fair compensation because it would be inequitable to allow Terrapin Station to prorate rent and bypass the contractual language agreed to simply by rejecting the Lease a few days late.

Ultimately, plain language, context and legislative history, and policy goals support the clear intent of Section 365(d)(3) to adopt the Billing Date Approach. This Court should reverse the Thirteenth Circuit and adopt the Billing Date Approach.

ARGUMENT

I. Touch of Grey is entitled to reduce its preference exposure by applying new value pursuant to Section 547(c)(4) because post-petition Section 503(b)(9) administrative expenses are irrelevant to the new value defense.

The Thirteenth Circuit incorrectly held that Terrapin Station's post-petition payment was an "otherwise unavoidable transfer" and precluded Touch of Grey from using the amount paid as "new value" to reduce its preference exposure. Where an "otherwise unavoidable transfer" is made after the filing of a bankruptcy petition, it is irrelevant for the purposes of the new value defense. *In re Friedman's,* 738 F.3d 547, 554-55 (3rd Cir. 2013). The post-petition payment at issue was made pursuant to a court approved Section 503(b)(9) administrative expense. Section 503(b)(9) allows administrative expenses of the value of goods received by the debtor within the 20 days before filing of bankruptcy if such goods have been sold to the debtor in the ordinary course of business. 11 U.S.C. § 503(b)(9).

Section 547(b) gives the trustee the ability to avoid a preferential transfer in the 90-day period prior to bankruptcy filing. 11 U.S.C. § 547(b). The trustee's ability to avoid a transfer is subject to the Section 547(c)(4) new value defense. Under Section 547(c)(4), a trustee may not avoid a transfer to a creditor if the creditor gave new value to the debtor pre-petition. 11 U.S.C. § 547(c)(4). This defense is only applicable if the new value is (1) not secured by an otherwise unavoidable security interest and (2) debtor did not make an otherwise unavoidable transfer to the creditor. *Id.* Therefore, the new value defense is not applicable where the debtor makes an "otherwise unavoidable transfer" to the creditor based on the value received. 11 U.S.C. § 547(c)(4)(B).

The plain language of Section 547(c)(4) and the statutory context of the Bankruptcy Code show that the cut off for the new value defense analysis is the date of petition filing. Additionally, the intermingling policy goals of Sections 547(c)(4) and 503(b)(9) indicate that Touch of Grey is permitted to reduce its preference exposure even though its Section 503(b)(9) administrative expense was repaid post-petition.

A. The plain language of Section 547(c)(4) closes the preference window at filing.

"When the statutory language is plain, the sole function of the courts [...] is to enforce it according to its terms." *In re Friedman's,* 738 F.3d at 553. Section 547(c)(4) is silent as to when a payment must be made to defeat a creditor's new value defense. However, this does not mean that there is no temporal limitation. The plain language of the statute "closes the preference window at the petition, limiting the 547(c)(4) defense to new value supplied and payments made before the debtor crosses into bankruptcy." *In re Phoenix Rest. Grp., Inc.*, 317 B.R. 491, 496 (Bankr. M.D. Tenn. 2004). *See also In re Phoenix Rest. Grp., Inc.,* 373 B.R. 541, 547 (M.D. Tenn. 2007) ("The preference window of § 547 closed on the date of the filing of the bankruptcy petition

and the post-petition payments could not be used to deplete pre-petition 'new value'") and *In re Commissary Operations, Inc.,* 421 B.R. 873, 879 (Bankr. M.D. Tenn. 2010) ("There is nothing in the plain language of 11 U.S.C. § 503(b)(9) or 11 U.S.C § 547(c)(4) that indicates any Congressional intent to offset the intended benefits that 11 U.S.C. § 503(b)(9) confers upon sellers through a reduction of available new value in defending a preference action").

To begin, Section 547(c)(4) only applies to the "new value given to or for the benefit of the *debtor*." 11 U.S.C. § 547(c)(4) (emphasis added). The filing of a bankruptcy petition creates an estate which is an entity separate and distinct from the "debtor." *In re Bellanca Aircraft Corp.,* 850 F.2d 1275, 1284 (8th Cir. 1988). Use of the word "debtor" rather than "estate" or "debtor-in-possession" shows that the provision only refers to pre-petition activity rather than post-petition. *Id.* Accordingly, payments made post-petition pursuant to Section 503(b)(9) are not paid for by "the debtor." *Id.*

The term "debtor" refers to "the prepetition entity that transferred property or engaged in business with the preference defendant." *In re Phoenix Rest. Grp.*, 317 B.R. at 496. If Congress intended to include post-petition payments, "it would have included something like 'an otherwise unavoidable transfer of an interest of the estate in property to or for the benefit of such creditor.'" *Id.* Congress could have drafted an exception into Section 503(b)(9) and/or Section 547(c)(4) if it meant to include post-petition entities. 2010 No. 6 Norton Bankr. L. Adviser 2. The fact that this was not the approach taken by Congress indicates that the new value defense does not include post-petition activity. *In re Phoenix Rest. Grp.*, 317 B.R. at 491. Therefore, post-petition payments are irrelevant to the calculation of the new value defense.

It is undisputed that new value need not "remain unpaid" for a creditor to establish a defense under Section 547(c)(4). R. 10, n. 5. But even in cases where courts continue to follow the

approach that new value must "remain unpaid," these courts cut off analysis of the new value defense at filing of petition. *See In re Energy Co-op., Inc.,* 130 B.R. 781, 789 (N.D. Ill. 1991) ("the requirement that the new value remain unpaid applies only through the date of the filing of the bankruptcy petition."); *In re Almarc Mfg., Inc.*, 62 B.R. 684, 686 (Bankr. N.D. Ill. 1986) ("[A]dditional post-preference unsecured credit must be unpaid in whole or in part as of the date of the petition."); *In re New York City Shoes, Inc.,* 880 F.2d 679, 680 (3rd Cir. 1989) ("[T]he debtor must not have fully compensated the creditor for the "new value" to the debtor as of the date that it filed its bankruptcy petition."). There is a clear endpoint when applying the new value defense, and that is the date of petition.

Even if post-petition payments are to be considered in the new value analysis, Debtor's estate made a "distribution" to Touch of Grey when it satisfied its Section 503(b)(9) administrative expense rather than a "transfer." *In re Beaulieu Grp., LLC,* 616 B.R. 857, 870 (Bankr. N.D. Ga. 2020). It is only "otherwise unavoidable *transfer[s]*" that preclude a creditor's use of the new value defense. 11 U.S.C. § 547(c)(4)(B) (emphasis added). Payments made by an estate pursuant to a plan is a distribution and not a transfer. *Id.* Other sections in the Bankruptcy Code reflect this principle. *See* 11 U.S.C. § 1129(a)(9)(A) (holders of § 503(b)(9) claims "will receive on account of such claim cash equal to the allowed amount of such claim" on the effective date of the Chapter 11 plan and does not refer to the payment as a transfer); 11 U.S.C. § 726(a) (recognizing that payments from the estate are distributions); 11 U.S.C. § 1143 (recognizing that payments under a confirmed plan are distributions); 11 U.S.C. § 1222(b)(8) (referring to "distribution" of property of the estate); 11 U.S.C. § 1225(b)(1)(C) (referring to distributions under the plan); 11 U.S.C. § 1329(a)(3) (governing plan modifications that alter the amount of "distributions" to creditors).

Transfers and distributions are distinct concepts. Section 547(c)(4)(B) refers to "transfers" rather than distributions. The Bankruptcy Court approved Terrapin Station's Section 503(b)(9) administrative expense as a "distribution." Accordingly, Section 547(c)(4)(B) does not preclude Touch of Grey from asserting its new value defense.

B. The statutory context surrounding Section 547 indicates that payments made post-petition are not relevant to the new value defense analysis.

Courts are divided on whether post-petition transfers are relevant to the use of Section 547(c)(4) new value defense. However, a disagreement among courts does not also mean that a statute is ambiguous. *In re Friedman's,* 738 F.3d at 554. ("[J]ust because a particular provision may be… susceptible to differing constructions does not mean that the provision is therefore ambiguous"). Statutory context is "key in determining the meaning of a particular provision and whether or not it is ambiguous." *Id*. The Supreme Court prefers to take a broader, contextual view when determining the ambiguity of a statute, looking at "the whole law, and to its object and policy." *Id.* If, "after close examination of the statutory context and underlying policy goals, the plain meaning of a provision is still unclear, we… turn to pre-Code practice and legislative history to find meaning." *Id.* But these are "tools of last resort." *Id.* The plain language and statutory context reveal the unambiguous meaning of Section 547(c)(4) and do not require reference to the history of Section 547(c)(4). *Id.* Still, the context of the Bankruptcy Code as a whole may be helpful.

First, imposing a cut off for the new value analysis at petition date is consistent with other remedies in the Bankruptcy Code that only apply to post-petition transactions. *In re Phoenix Rest. Grp.,* 317 B.R. at 497. Other sections of the Bankruptcy Code construe the petition date as a common beginning and endpoint. For example, under Sections 364 and 503(b), "creditors who continue to supply the estate with goods and services post-petition are given special priority for

payment from the bankruptcy estate." *Id.* (citing 11 U.S.C. § 364; 11 U.S.C. § 503(b)). Additionally, the Code's "primary avoidance provisions… both measure time from the petition date." *In re Murray, Inc.,* No. 04-13611, 2007 WL 5595447, at *2 (Bankr. M.D. Tenn. June 6, 2007) (citing 11 U.S.C. § 547; 11 U.S.C. § 548). The petition date also serves as a starting place for avoidance actions brought to recover transfers of property made in the time post-petition. 11 U.S.C. § 549(a)(1) ("the trustee may avoid a transfer of property of the estate that occurs after the commencement of the case[.]"). This section's use of the language "property of the estate" as opposed to "the debtor" further distinguishes the time in which the transfer occurs. *In re Phoenix Rest. Grp.*, 317 B.R. at 497. In this case, that time would be post-petition.

The Third Circuit's description of the effect that a post-petition wage order has on a creditor's new value defense is also helpful. *See In re Friedman's*, 738 F.3d at 547. In *Friedman*, The Third Circuit held that the statutory context surrounding Section 547 reflects its intent to limit the analysis of the new value defense to only pre-petition payments. *Id.* First, Section 547 is titled 'Preferences,' which suggests that it concerns transactions occurring during the preference period. *Id.* at 555. The preference period is the 90-days preceding the filing of bankruptcy petition. *Id.* Therefore, any calculation of the amount of preference, and analysis of the new value reduced by subsequent transfers, would clearly refer to this time period. *Id.*

Additionally, if post-petition payments are considered "an otherwise unavoidable transfer" then the analysis for the new value defense would be incompatible with the hypothetical liquidation test, which is conducted as of petition date. *In re Friedman's,* 738 F.3d at 556. Section 547(b)(5) "requires the bankruptcy court to 'undo' the transfers in question and then construct a hypothetical liquidation of the debtor as of the petition date to determine whether the defendant-creditor received more as a result of the transfers than it would have received in a Chapter 7

liquidation case." *In re Union Meeting Partners,* 163 B.R. 229, 236 (Bankr. E.D. Pa. 1994). For a trustee to apply the test, it must show "that the creditor was preferred some amount, and it cannot succeed if it is proven that (1) the creditor was fully secured; (2) the transfer was nothing more than a seizure of the secured creditor's collateral; or (3) the unsecured creditors would be paid in full in a Chapter 7 case." The hypothetical liquidation test "must be construed as of the date of petition," and transfers made after filing of petition are not considered. *Id.*

Another example is the statute of limitations for a preference avoidance action. The statute of limitations for a preference avoidance action under Section 547 begins on the petition date. *In re Friedman's,* 738 F.3d at 556 (citing 11 U.S.C. § 546). This suggests that the calculation of preference liability should remain constant post-petition. *Id.* If post-petition transactions are used to affect the use of the new value defense, these calculations would change depending on when the preference action was filed. *Id.* Therefore, "if Congress had intended to allow for post-petition transfers to affect the impact of the estate, it likely would have crafted a different statute of limitations." *Id.*

Finally, it would be inequitable to allow a post-petition payment to affect the preference analysis when post-petition extensions of new value by a creditor cannot be used to reduce such creditor's preference exposure. *In re Friedman's,* 738 F.3d at 557. See *In re D.J. Mgmt. Grp.,* 161 B.R. 5 (Bankr. W.D.N.Y. 1993) (supplier was not entitled to "new value" credit for supplies that it provided post-petition, not to debtor, but to debtor's bankruptcy estate) and *In re Ford*, 98 B.R. 669 (Bkrtcy. D. Vt. 1989) (creditor advances occurring post-petition could not constitute "new value," within meaning the of Section 547(c)(4)). A determination that post-petition advances of new value to a debtor is excluded from the Section 547(c)(4) analysis but also allowing for post-

petition payments to affect the application of the creditor's defense is inconsistent with statutory interpretation. *In re Murray, Inc.*, 2007 WL 5595447 at *2 (Bankr. M.D. Tenn. June 6, 2007).

C. The intermingling policy goals of Sections 503(b)(9) and 547(c)(4) serve to protect creditors and promote further business with debtors and should not be used against each other to affect the new value defense.

1. These policy goals serve to protect creditors such as Touch of Grey.

The policy goals of Section 503(b)(9) are two-fold. *In re Arts Diary, LLC,* 414 B.R. 219, 220 (Bankr. N.D. Ohio 2009). First, the statute encourages "trade creditors to continue to extend credit to a debtor potentially heading for bankruptcy." *Id.* Second, it discourages "abuse by debtors who seek to acquire goods at a time when it is known that bankruptcy is imminent and that payment for the goods will not have to be tendered." *Id.* Therefore, the goals of Section 503(b)(9) work to not only encourage creditors to continue doing business with debtors, but also protect such creditors from debtors who knowingly acquire goods at a time that bankruptcy is looming near. *Id.*

The policy goals of Section 547(c)(4) are similar. The statute seeks to "encourage creditors to continue doing business with troubled debtors by protecting transfers received by creditors from preference actions to the extent that the creditors provided goods that replenished the estate during the preference period." *In re Schabel*, 338 B.R. 376, 380 (Bankr. E.D. Wis. 2005). This exception clearly works to protect creditors who extend a "revolving credit" to a debtor. *Id.* This protection of creditors is not unfair because the payments "are replenished by the preferred creditor's extensions of new value to the debtor." *Id. See also In re Almarc Mfg., Inc.,* 62 B.R. at 688 ("The key focus under [Section] 547(c)(4) is to treat fairly a creditor who has replenished the estate after having received a preference.")

These sections should not work against each other because doing so would be a disservice to their similar intended policy goals. *In re Commissary Operations*, 421 B.R. at 879. ("To force

a creditor to choose between asserting a § 503(b)(9) claim and preserving its right to assert a subsequent new value defense that includes deliveries made to the debtor within the 20 days prior to the bankruptcy filing would work a disservice on Congress' inherent policy goals when enacting § 503(b)(9) and § 547(c)(4)").

Respondent seeks to undo what the court approved by penalizing Touch of Grey for accepting the Section 503(b)(9) administrative payment and continuing to do business with the Debtor in bankruptcy. This ruling sends a mixed message to future bankruptcies. *In re Murray, Inc.,* No. 04-13611, 2007 WL 5595447, at *2 (Bankr. M.D. Tenn. June 6, 2007). Precluding creditors from using the new value extended to a debtor simply because the creditor was repaid post-petition pursuant to a Section 503(b)(9) administrative expense would discourage such creditors from continuing business with debtors. *Id.* Future debtors on the brink of bankruptcy would then have no creditors to aid them in their reorganization efforts. *Id.*

2. Touch of Grey does not receive a windfall by applying the new value defense.

The logic of the new value defense "is that an otherwise preferential transfer is not avoidable to the extent that, after the transfer the creditor gave the debtor 'new value' in a form that replenished the debtor." *Phoenix Rest. Grp.*, 317 B.R. at 495. Even if Touch of Grey was paid post-petition for the new value it provided pre-petition, it nevertheless "replenished the debtor" during the preference period. *Friedman,* 738 F.3d at 559. Doing so aided Terrapin Station in some extent to avoid bankruptcy, at least for some time. *Id.* The record expressly shows that the relationship with Touch of Grey was instrumental in Debtor's reorganization efforts. R. 6. Touch of Grey extended goods on credit after Debtor had fallen on hard times, and this credit allowed it to continue operations. This pre-petition extension of value is exactly the type of continued business relationship that both Sections 547(c)(4) and 503(b)(9) seek to encourage.

Second, it is a general rule in Bankruptcy that "all creditors be treated equally." *In re Friedman's Inc.,* 738 F.3d. at 560. But this principle requires context. The policy underlying Section 547(c)(4) is that of "equal distribution among *similarly situated creditors.*" *Id*. (emphasis added). Touch of Grey is not similarly situated to Debtor's other creditors. Petitioner should be treated better than other creditors because, as mentioned above, it had a close relationship with Debtor and enhanced the Debtor pre-petition. Accordingly, Respondent's other unsecured creditors should not receive the same treatment as Touch of Grey.

Indeed, Debtor even considered Touch of Grey a "critical vendor." R. 6. Critical vendors are "key suppliers of a product or service to the debtor," making them essential to the success of a debtor's continued business operations and reorganization. Critical Vendor Status in Bankruptcy, Practical Law Practice Note 1-518-9996. Critical vendor claims are analogous to 503(b)(9) claims, such as the one in this case. *In re Commissary Operations, Inc.*, 421 B.R. at 873.

Conversely, a Section 503(b)(9) administrative claim is very different from a reclamation claim. *Id.* In *In re Phoenix Rest. Grp.,* 373 B.R. 541, the court ruled against the creditor, holding that the amount of the reclamation claim could be used to deplete the pre-petition "new value" because the creditor essentially kept "strings" on the goods and thus, the goods did not constitute "new value." *Id.* Section 503(b)(9) does not allow a creditor to repossess the delivered goods or require debtor to segregate and hold in trust goods for the benefit of the creditor. *In re Commissary Operations, Inc.*, 421 B.R. at 878. In a Section 503(b)(9) claim, a debtor is free to use the goods, essentially eliminating any "strings" of the creditor. *Id.* Because of this, a Section 503(b)(9) claim does give the debtor new value. *Id.*

The court in *Commissary Operations* also analyzed the effect of a Section 503(b)(9) claim on the new value defense, holding that a post-petition payment of pre-petition new value as a

Section 503(b)(9) administrative claim does not preclude the claimant from asserting the new value defense. *Id.* at 875. The court stated that this reasoning is consistent with the underlying policy goals of both Sections 547(c)(4) and 503(b)(9), to encourage a creditor to continue business with troubled debtors. *Id.* at 879.

The public policy behind these statutory provisions reflect no reason why Touch of Grey should be precluded from asserting the Section 547(c)(4) new value defense simply because it was paid pursuant to the Section 503(b)(9) administrative claim post-petition. This Court should reverse the Thirteenth Circuit and hold that a creditor is entitled to reduce its preference exposure by applying new value under Section 547(c)(4).

II. The Thirteenth Circuit incorrectly adopted and applied the proration approach over the Billing Date Approach in determining the amount of rent owed to Touch of Grey.

The ultimate purpose of the Bankruptcy Code is to provide clear statutes for simple and uniform rulings that will treat all "similarly situated creditors equally." Aaron H. Stulman, *Stub Rent Under Section 365(d)(3): A Call for A Unified Approach*, 36 Del. J. Corp. L. 655, 668 (2011). However, this purpose is not always accomplished. One example is the interpretation and application of Section 365(d)(3) in reference to "stub rent." *Id.* at 656. Section 365(d)(3) provides, in relevant part:

> 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.

11 U.S.C. § 365(d)(3). Section 365(d)(3) applies to the post-petition, pre-rejection period obligations of trustees. 2 Norton Bankr. L. & Prac. 3d § 46:42. It is applicable specifically to situations where a debtor forgoes paying rent that is usually due on the first of the month prior to the petition date of bankruptcy, and then, a landlord asks the court to compel payment of the full

month's rent, including the portion of the month after the petition date. Stulman at 656. This is the case here. To rule on this issue, courts must apply Section 365(d)(3) and decide whether to use the proration method or the Billing Date Approach when determining the amount of rent to be paid. *Id.*

Courts are divided as to which is the proper method to apply under Section 365(d)(3) to properly dispose of a "stub rent" claim. The proration approach allows for obligations of a lease relating to pre-petition but billed post-petition to be prorated per day of the month of filing. *Id.* at 670. Here, since Terrapin Station rejected the Lease on May 5th, but rent was due May 1st, it would be obligated to pay the prorated rent for only 5 days of the month under this approach. In contrast, the Billing Date Approach provides the landlord with a full month's rent because the date on the lease acts as the "operative date" when determining what type of expense the rent is. *Id.* at 667. This approach would allow Touch of Grey to recover the entirety of May's rent owed to it under the Lease rather than just the first five days of the month, which is the most equitable outcome.

When a statute is unambiguous, the language of the statute is where the inquiry begins and ends. *United States v. Ron Pair Enters., Inc.* 489 U.S. 235, 241 (1989). All federal circuit courts and several bankruptcy courts that have addressed the issue have found that adopting the Billing Date Approach is the proper interpretation of Section 365(d)(3). Adopting the Billing Date Approach is the outcome that most comports with the canons of statutory interpretation, precedent, and legislative history. The language of Section 365(d)(3) that clearly requires a trustee to timely perform all obligations arising during the post-petition pre-rejection period combined with the language of the Lease requiring the payment of the entirety of May's rent on May 1st, compels the Trustee to pay the entire rent amount for the month.

A. The Thirteenth Circuit incorrectly found the text of Section 365(d)(3) ambiguous because its ordinary, common meaning renders the statute clear

on its face.

When interpreting statutes, courts must follow the canons of statutory interpretation. 1 Norton Bankr. L. & Prac. 3d § 2:22. The first canon requires courts to look at the plain language of the statute. *Id.* The purpose of looking to the plain language, along with the other canons of statutory interpretation, is to determine and comport with the congressional intent without looking to extrinsic resources. *See, e.g, Lamie v. U.S. Tr.*, 540 U.S. 526, 534 (2004); *In re Mr. Gatti's, Inc.*, 164 B.R. 929, 931 (Bankr. W.D. Tex. 1994). The language of the statute itself is where the inquiry begins and where it ends when the statute is found to be unambiguous. *Ron Pair Enters., Inc.,* 489 U.S. at 241. If no ambiguous language is found, courts may not apply any further interpretation tools beyond the plain language of the statute. *Barnhart v. Sigmon Coal Co.,* 534 U.S. 438, 450 (2002). Because the purpose of statutory interpretation is to determine the legislative intent behind the statute, the plain language will express the intent when it is clear, coherent, and consistent. *Ron Pair Enters., Inc.,* 489 U.S. at 240-241.

The first step of statutory interpretation is "to determine whether the statute at issue has a plain and unambiguous meaning with regard to the particular dispute in the case." *Barnhart,* 534 U.S. at 450, *citing Robinson v. Shell Oil Co.,* 519 U.S. 337, 340 (1997). When an unambiguous meaning is found, the court's sole function is to enforce the statute according to its terms, not to try to construe it to mean anything other than what is written. *Ron Pair Enters., Inc.,* 489 U.S. at 240-241. It is the court's job to only apply the black letter law as it is written, not determine policy. *N.Y. Cty. Nat'l Bank v. Massey*, 192 U.S. 138, 140 (1904). Policy determinations are left to Congress, not the courts. *Id.* When reading Section 365(d)(3), there have been common words that have been argued to be ambiguous (Stulman at 663-665), but the plain language interpretation of the statute leaves no ambiguity to be found by these words. Thus, resorting to legislative history

or policy is improper, and Section 365(d)(3)'s language is conclusive. *In re Koenig Sporting Goods, Inc.*, 203 F.3d 986, 988 (6th Cir. 2000).

1. The plain language of Section 365(d)(3) unambiguously requires use of the Billing Date Approach when determining a trustee's performance.

If there is an unambiguous interpretation to be found, the court must "interpret the words consistent with their ordinary meaning at the time of enactment." *Wis. Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2070 (2018) (*quoting Perrin v. United States*, 444 U.S. 37, 42 (1979)). Absent any specific indication to the contrary, courts must adopt the "ordinary, contemporary, and common meaning" of the language in a statute. *Pioneer Inv. Servs. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 388 (1993). There are several terms in Section 365(d)(3) that some courts have found ambiguous, but their meanings are clear when looking at the plain language.

Of the terms deemed ambiguous, the Bankruptcy Code does not define "obligation" or "arise." Due to this lack clarity, the proper definition of these terms must be found elsewhere. "Obligation" has the most straightforward understanding to be "something that one is legally required to perform under the terms of the lease." *In re Montgomery Ward*, 268 F.3d 205, 209 (3d Cir. 2001); *In re Goody's Family Clothing, Inc.,* 392 B.R. 604, 609 (Bankr. D. Del. 2008). Black's Law Dictionary defines the term as "a legal or moral duty to do or not do something; a formal, binding agreement or acknowledgement of liability to pay a certain amount or do a certain thing for a particular person or set of persons, especially arising out of a contract." *Obligation*, Black's Law Dictionary (11th edition 2019). Webster Dictionary defines this term as "something you must do because of a law or promise [such as with a contract]." *Obligation*, Merriam-Webster Dictionary (11th edition 2003). Considering these definitions altogether, the ordinary meaning of "obligation" is something a party is legally bound to do under the terms of the lease.

Some courts that adopt a proration approach attempt to define "obligation" as a "claim." Stulman at 664; *In re Child World* 161 B.R. 871, 573-574 (S.D.N.Y. 1993). However, the Bankruptcy Code defines the word "claim" as:

> (A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or
> (B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured.

11 USC § 101(5). Based on this definition, conflating "obligation" with "claim" would mean no right to payment would ever arise subsequently under a lease during the pendency of a tenant's bankruptcy case. Supp. Brief in Support of Landlord's Request for Payment of Property Taxes under 11 USC § 365(d)(3) at 10, *In re Senior Care Centers, LLC,* (No. 18-33967 BJH). The ordinary meaning of "obligation" is to be conclusive regarding the understanding of the term. This means it cannot be equated with a completely different term such as "claim," and its meaning within Section 365(d)(3) is clear on its face.

The Bankruptcy Code also does not define the term "arises." This lack of a definition is what has divided courts over whether to adopt the proration or billing date approach. *In re Montgomery Ward Holding Corp.*, 268 F.3d 205, 209 (3d Cir. 2001). However, courts find clarity in looking to the ordinary meaning found in Black's Law Dictionary – "to originate; to stem from." *In re FFP Operating Partners, L.P.,* 2004 Bankr. LEXIS 884 (Bankr. N.D. Tex. June 16, 2004). Webster Dictionary further defines this term as "to begin to occur or to exist." *Arises*, Merriam-Webster Dictionary (11th edition 2003).

The Thirteenth Circuit and other proration courts find that "arises" can be construed in two different but reasonable ways, and that its meaning requires reference to legislative history. *In re*

FFP Operating Partners, L.P. at *10. But this argument hinges on the fact that the statute does not have explicit language regarding how to determine when the obligation arises. The ordinary meaning of the term and the "fundamental tenet of the text" indicate that the terms of the lease are to determine what the obligation is and when it arises. *In re Montgomery Ward*, 268 F.3d at 209. This is because the plain language of the statute cannot be utilized alone when interpreting Section 365(d)(3). The ordinary meanings of "obligation" and "arise" mandate that the terms of the Lease must be interpreted along with Section 365(d)(3) to provide when the "obligation" to pay the rent "arose" or originated.

The parties' terms should not be overlooked, especially when the parties are two intelligent and advanced parties like those in this case. *See In re DeCicco of Montvale, Inc.*, 1999 Bankr. LEXIS 1233, *25 (Bankr. D.N.J. Aug. 31, 1999). The language of the contract is important when interpreting the parties' obligations. *Id.* The Lease required the Debtor to pay monthly rent of $25,000 due "on the first day of each month." R. at 4. For May, the payment of rent was due on May 1st. R. at 7. There were clear terms dictated for rent and both parties knew that date because it was in the contract. The date the obligation originates was when the rent payment was due. The plain language of the above terms paired with the language of the Lease establishes there is only one clear outcome. The billing date of May 1st is when the obligation to pay May's rent originated, and, thus, Touch of Grey is entitled to the full payment of May's rent because the obligation to pay such rent arose on May 1st, not each day.

2. All circuit courts that have addressed this issue have unanimously adopted the Billing Date Approach because it best comports with Section 365(d)(3).

The Thirteenth Circuit correctly stated that a slight majority of *states* use the proration approach. However, all federal circuit courts that have considered this issue have adopted the

Billing Date Approach. *See In re Koenig Sporting Goods, Inc.* 203 F.3d 794 (6th Cir. 2000); *HA-LO Indus., Inc. v. CenterPoint Props. Tr.,* 342 F.3d 794 (7th Cir. 2003); *In re Burival*, 406 B.R. 548 (B.A.P. 8th Cir. 2009); *In re Cukierman*, 265 F.3d 846 (9th Cir. 2001). Even several bankruptcy courts have adopted the Billing Date Approach. Gary P. Spencer, Jr., *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, *Fn.* 131 (Spring 2017). Because the goal in bankruptcy is to generally have uniform laws, courts generally dislike forming circuit splits and find the majority more favorable. *See*, *e.g.*, *United States v. Graves*, 908 F.3d 137, 142 (5th Cir. 2018), *In re Ultra Petroleum Corp.,* 943 F.3d 758, 763 (5th Cir. 2019) ("We are always chary to create a circuit split"). Accordingly, this Court should side with the federal majority and adopt the Billing Date Approach.

The federal circuit courts that have adopted the Billing Date Approach also apply a bright line rule requiring payment of full rent as required by the lease, honoring the date that rent is due under the lease. *See, e.g., In re Koenig Sporting Goods, Inc.* 203 F.3d at 989; *Centerpoint Props. Tr.*, 342 F.3d at 799. This rule precludes the argument of ambiguity within Section 365(d)(3) because the language of the contract has full rent due on the first of every month. *In re Koenig Sporting Goods, Inc.*, 203 F.3d 794. The simplicity of this bright line rule allows for immediate payment to landlords, reduction of delays and disputes, and expeditious resolution of bankruptcy cases. *In re Cukierman*, 265 F.3d 846, 851 (9th Cir. 2001). The date on the lease should act as the operative date to determine whether rent is a pre- or post-petition expense, and the debtor should not be able to wait until the second day of the month to file their petition as it forces the hand of the landlords regarding the types of claims they should file. *Id.* The contract should be given priority, regardless of the actual use of the property. *Id.* at 850.

The Sixth Circuit adopted the Billing Date Approach in *In re Koenig Sporting Goods, Inc.* when it held that Section 365(d)(3)'s plain language required the debtor to pay rent for the entire month during which the lease was rejected. 203 F.3d 986 at 989. In *Koenig*, the debtor operated a sporting goods store until August of 1997, when he filed for bankruptcy. *Id.* at 987-988. The debtor rejected his lease and vacated the property on December 2, 1997, and the landlord requested and won the payment of the rent for the full month of December. *Id.* at 988. The debtor appealed, arguing that the landlord was only entitled to a pro rata value of rent for the two days of occupation. *Id.* The terms of the lease obligated the debtor to pay the rent for each month in advance on the first day of each month. *Id.* at 987.

The Sixth Circuit found the obligation to pay rent in this situation arose on December 1st, which was during the post-petition pre-rejection period. *Id.* at 989. It also found that Section 365(d)(3) was unambiguous regarding when the debtor's obligation came to be and that it required payment of a full month's rent. *Id.* The court rejected the policy, equity, and "common sense" arguments for a proration method adoption because the debtor alone was in the position to control the landlord's payment of December rent. *Id.* If the debtor wanted a different outcome, all he had to do was elect to reject the lease earlier. *Id.* There was no ambiguity in the lease or the statute regarding when the rent obligation was to be paid. *Id*. Such is the case here.

The Seventh Circuit also adopted the Billing Date Approach when it decided *Centerpoint* and ruled that Section 365(d)(3) clearly provides that a trustee is to satisfy all obligations under a lease as they come due. 342 F.3d 794. In *Centerpoint*, the debtor was leasing an office building, with the terms of the lease obligating him to pay monthly rent on the first day of each month. *Id.* at 796. The debtor filed bankruptcy in July of 2001. *Id.* He then rejected the lease November 2nd and vacated the premises effective November 4th. *Id.* The debtor paid the landlord a prorated

amount of rent for the days he planned to remain on the premises, but the landlord sought an order to compel payment of the full month's rent. *Id.* at 797. After the lower court concluded that Section 365(d)(3) required payment of the full month's rent, the debtor appealed. *Id.* at 797.

The Seventh Circuit affirmed the lower court's decision, reasoning that the statute was clear on its face that obligations must be timely fulfilled from the time they arise post-petition and pre-rejection. *Id.* at 798. The court reasoned that the language of Section 365(d)(3) was clear and provided the necessary timeline as to what obligations were to be paid when. *Id.* at 797-798. "Courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Id.* at 797-798, *quoting Rubin v. United States*, 449 U.S. (1981). Under the lease, the date the obligation to pay rent became due was on November 1st, prior to the rejection of the lease. *Id.* at 798. The Seventh Circuit rejected the idea that its decision in *In re Handy Andy Home Improvement Centers, Inc.* was binding because it addressed a situation in which there was a sunk cost that relates to a time before the bankruptcy, something that monthly rent is not. *Id.* at 798-799. Rather, the binding rationale was that "the clear and express intention of [Section] 365(d)(3) is to require the trustee to perform the lease in accordance with its terms." *Id.* at 799, *quoting In re Montgomery Ward*, 268 F.3d 205, 209 (3rd Cir. 2001) (adopting the Sixth Circuit rationale in *In re Koenig*). The Billing Date Approach is the only approach that serves this purpose.

B. Even if the Court looks past the plain language, the context and legislative history of Section 365(d)(3) both support the Billing Date Approach.

If a court must go further than the plain language of a statute, the next canons of statutory interpretation are to look at the context of the statute and the legislative history. Courts are permitted to use these rules of construction, look beyond the plain language of the statute, and consider extrinsic evidence only where the language of the statute is ambiguous. 1 Norton Bankr. L. & Prac. 3d § 2:22. If there is an ambiguous issue, "the intention of the drafters, rather than the

strict language controls." *United States v. Ron Pair Enters., Inc.* 489 U.S. 235, 242 (1989). The courts will then rely heavily on legislative intent and context of the surrounding statutes. *Newman v. McCrory Corp.*, 210 B.R. 934, 937-938. (S.D.N.Y. 1997). This legislative intent, however, cannot become "a wedge to broaden language the Court finds to be otherwise unambiguous." *In re Oreck Corp.,* 506 B.R. 500, 505 (Bankr. M.D. Tenn. 2014). Courts must construe Section 365(d)(3) for the plain purpose of the law, and the Billing Date Approach is the only method that accomplishes that result.

1. When considering the context surrounding Section 365(d)(3), the necessity of adopting the Billing Date Approach is clear.

A fundamental canon of statutory construction is to read the words of a statute in context to their placement in the overall statutory scheme. *See In re Handy Andy Home Improvement Ctrs., Inc.*, 144 F.3d 1125, 1128 (7th Cir. 2003). When the language of a statute is found to be ambiguous, its language is to be read in the context of the entire context of the code. *In re Handy Andy*, 144 F.3d at 1128. The Thirteenth Circuit argued that looking to other sections of Chapter 11 establish that unperformed obligations after rejection are treated as claims, not administrative expenses. However, two of the subsections the Thirteenth Circuit points to address claims arising *from* the rejection, not *prior* to rejection as Section 365(d)(3) addresses. *In re FFP Operating Partners., L.P.,* 2004 Bankr. LEXIS at *15-16 (addressing Sections 365(g) and 502(g)).

There are different issues being addressed within these sections that treat obligations after rejection as unsecured claims than what Section 365(d)(3) attempts to do. *Id.* at *16. It protects the landlord from a delayed decision-making process. *Id.* at *17. It does not describe what the claims would be after rejection. *Id.* Because there are different time periods and issues being dealt with by the subsections relied on by the 13th Circuit, different approaches will be utilized for them than

will be for Section 365(d)(3). *Id.* at *15-17. What works for those subsections (proration) will not work for another section like Section 365(d)(3) (the Billing Date Approach).

In re FFP Operating Partners., L.P. further establishes that, because the word "arise" is not defined in the Bankruptcy Code, it cannot be said that this term can both be construed in two different ways and then have the context used to determine what the meaning of the statute is. *Id.* at *9-10. To allow for ambiguity to be found and then both the legislative history and other Code provisions to be analyzed does not allow for the "straightforward" conclusion of proration that *In re Ames Dep't Stores* found. *Id.* at *10-11. That court argued that "arises" can be reasonably construed to in an "accrual sense" to justify the adoption of the proration approach, but Congress chose not to use the word "accrue" in Section 365(d)(3). *Id.* at *11-12. Congress did, however, use the term "accrue" in several provisions of the Code where it intended to provide for periodic accumulation. *See, e.g.,* § 522(d)(8) (providing certain exemptions for *accrued* dividends or interest under an immature life insurance contract); § 550(e)(1)(A)(providing a lien to a good faith transferee in the lesser amount of the cost of improvements to the property less any profit realized by or *accruing* to such transferee); 761(10)(A)(ii) (defining "customer property" to include profits or contractual or other rights *accruing* to a customer as a result of a commodity contract).

Because Congress has used the word "accrue" in other Code provisions, Congress could have used the same language in Section 365(d)(3) if it wanted the Section to provide for something which accumulates periodically. *Id.* It is presumed that Congress acts intentionally and purposely when it includes certain language in one section of a statute but omits it in another. *Id.* at *12 (citing *BFP v. Resolution Trust Corp.*, 511 U.S. 531 (1994)). Accordingly, Congress must have meant something different than periodically accumulated amounts in Section 365(d)(3). That

something is reasonably interpreted to be that the stub rent is to be determined under a Billing Date Approach.

2. The legislative history reflects the Congressional intent to ensure landlords receive immediate payment for lease obligations.

The Thirteenth Circuit, among other courts, reasoned that the Supreme Court has lessened the application of plain language when it "effect[s] a major change in the practice under the Code" that already exists. *McCrory Corp.*, 210 B.R. at 939; R. at 19. However, this reasoning is debunked when there is support for such a change in the legislative history. *Id.*, *quoting in Re Klein Sleep Products, Inc.* 78 F.3d 18, 27 (2d Cir. 1996) ("the Supreme Court has been reluctant to accept arguments … to effect a change in pre-Code practice that is not the subject of at least some discussion in the legislative history."). Both the Respondent and Thirteenth Circuit argue that legislative history is important when understanding the application of Section 365(d)(3), but the "statutory point in discerning congressional intent is the existing, not pre-existing statute [or code]." *In re FFP Operating Partner, L.P.*, 2004 Bankr. LEXIS at *12. Even still, the legislative history supports the adoption of the Billing Date Approach rather than proration.

Prior to 1984, the courts applied a proration approach. While there is nothing in Section 365(d)(3) that explicitly changes that practice, it does not mean that the proration approach should be adopted today. True, legislation must explicitly state a departure from those practices. *McCrory*, 210 B.R. at 937-938. But the legislature did exactly that when implementing its 1984 Amendments to the Bankruptcy Code. *In re Burival*, 406 B.R. at 553; *In Re Mr. Gatti's, Inc.,* 164 B.R. at 932. When the proration approach was utilized pre-amendment, it unfairly disadvantaged commercial landlords by forcing them to continue to provide current services to the debtor during the reorganization proceeding, all without payment. *Id*. Under the proration approach, the landlord would only receive the actual necessary costs and expenses needed to preserve the estate if a debtor

rejected the lease rather than the rent that was due under the lease. *Id.* This was one of the problems that the 1984 amendments sought to alleviate. 130 Cong. Rec. (1984), *as reprinted in* 1984 U.S.C.C.A.N. 576, 598-599.

As the Thirteenth Circuit recognizes, there is a scant amount of legislative history relating to the adoption of Section 365(d)(3). But the dissent correctly points out that the one senator who did discuss its purpose described the adoption of a Billing Date Approach. *In re Child World,* 161 B.R. 571, 575 (S.D.N.Y. 1993); *In re Mr. Gatti's, Inc.,* 164 B.R. at 932. Senator Orrin Hatch, a conferee to the original act, supports the conclusion that the 1984 amendment was to ameliorate the problems that a proration approach caused by ensuring timely payment of all lease obligations. 130 Cong. Rec. (1984). Senator Hatch established there is no real doubt the intention of Section 365(d)(3) was to enhance the protections for landlords. *In re Mr. Gatti's, Inc.,* 164 B.R. at 932. He explained that Congress sought to stop having landlords put in the position of no payment, and the bill would "lessen these problems by requiring the trustee to perform all of the obligations of the debtor under a lease … at the time required in the lease." *Id.* This reasoning for the adoption of Section 365(d)(3) gives the definition of the Billing Date Approach as to the reason behind the 1984 amendments, seeking to explicitly replace the proration approach. *Id.* This furthers the plain language argument that the intention behind the enactment is plain on its face.

True, there is only a change in the pre-amendment practice when there is a dictated reason to do so. But that reason is present in the scarce legislative history specifically describing the adoption of Section 365(d)(3). *In re Child World,* 161 B.R. 571, 575 (S.D.N.Y. 1993). The 1984 amendment intended to alter the system that was allowing problems to arise for landlords, placing them in a position no other creditor is placed in. *Id.*; 130 Cong. Rec. (1984). Because the pre-amendment method was proration and the amendments sought to fix the problems caused by the

method, the pre-amendment practice of proration cannot be argued to still apply. *Id.* Additionally, the "proration approach is inconsistent with what would appear to be the fundamental tenet of the text -- that it is the terms of the lease that determine the obligation and when it arose." *In re Montgomery Ward*, 268 F.3d at 209.

The plain language of Section 365(d)(3) dictated the lease terms to be binding. Departure from this to other rules of statutory construction is only proper when the literal application of the statute will "produce a result demonstrably at odds with the" drafters' intentions. *In re Koenig Sporting Goods, Inc.* 203 F.3d at 988. The purpose of Section 365(d)(3) has been dictated by its legislative history to be to relieve the burden on landlords of nonresidential real property during the post-petition, pre-rejection period. The proration approach is at odds with this purpose, not the Billing Date Approach. Thus, the Billing Date Approach is the proper approach under both the plain language and legislative history of Section 365(d)(3).

C. Public policy favors the Billing Date Approach as it is the most reasonable interpretation of Section 365(d)(3) and allows for compliance with the overall purpose of the Bankruptcy Code.

Many courts have recognized that one of the purposes behind the Bankruptcy code is to provide and ensure fair payment to creditors. *See, e.g.,Copley v. United States,* 959 F.3d 118, 125 (4th Cir. 2020); *In re Kunz*, 489 F.3d 1072, 1074-1075 (10th Cir. 2007), *Howard Delivery Serv., Inc. v. Zurich Am. Ins. Co.,* 547 U.S. 651, 655 (2006). To achieve this goal, Bankruptcy courts are essentially courts of equity that apply "the principles and rules of equity jurisprudence." *McCrory Corp.* at 940, *quoting In re Ionosphere Clubs, Inc.,*85 F.3d 992, 999 (2d Cir. 1996). The Thirteenth Circuit incorrectly held that the proration approach was the only approach that would achieve any such equitable relief and remain in compliance with the fundamental tenets of the Bankruptcy Code.

"Preferential treatment of a class of creditors is in order only when clearly authorized by Congress." *Howard Delivery Serv., Inc.*, 547 U.S. at 655. That is exactly what Congress intended when it enacted Section 365(d)(3): it wanted to provide special treatment for non-residential landlords being taken advantage of in pre-1984 amendment bankruptcy, particularly when there was delayed decision-making. *In re Burival*, 406 B.R. 548 (B.A.P. 8th Cir. 2009). Courts that have adopted the Billing Date Approach recognized there are possible windfalls to both debtors and landlords, but these windfalls were the intention of the 1984 amendments. *Id.* at 553. These windfalls comport with the equitable and fair purpose of the Bankruptcy Code to provide equitable distribution because, prior to 1984, windfalls were only available to the debtor. *Id.* A debtor was able to forego paying rent and stay on the property while the landlord was unable to collect rent or evict. *Id.* Congress sought to change proration and fix these problems. *Id.* Now, there is the ability to have the opportunity for both parties to receive what they are owed. Debtors have always been able to have windfalls within the Bankruptcy Code, and Congress intended for landlords to also have an advantage within the Code.

The Billing Date Approach aligns with the purpose of the Code as it would treat Touch of Grey fairly and equitably. This approach would allow Touch of Grey to receive the full payment of $25,000 for rent that it bargained for in the Lease. The proration approach would lead to the opposite result – an unfair payment of only $4,032.26, less than one-fifth of the agreed upon rent. This would effectively return to the pre-amendment practices that Congress sought to overcome. This would achieve the exact opposite of a fair and equitable remedy. Accordingly, the best approach would be to award full payment to Touch of Grey and not allow the Trustee to use Bankruptcy to circumvent the contract.

Billing Date Approach courts have recognized that the language of Section 365(d)(3) "compels a specific result without regard to the impact to the respective parties". *In re Appletree Markets*, 139 B.R. at 421. That specific result is for the Billing Date Approach to be adopted, regardless of the few possible windfalls that both parties could take advantage of. Ultimately, any windfall that is possible under a Billing Date Approach does not outweigh the fact that the plain meaning is what governs. *In Re Senior Care Centers, LLC.* at 14. This Court should reverse the Thirteenth Circuit and adopt the Billing Date Approach for determining the amount of rent a trustee should be required to pay during the post-petition pre-rejection period of an unexpired commercial lease.

CONCLUSION

The judgment of the United States Court of Appeals for the Thirteenth Circuit should be REVERSED.

Respectfully submitted,

TEAM P35
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