No. 20-1004

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 FROM THE
UNITED STATES COURT OF APPEALS
FOR THE THIRTEENTH CIRCUIT

BRIEF FOR THE PETITIONER

JANUARY 20, 2022

TEAM NUMBER 36
COUNSEL FOR RESPONDENT

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 Bankruptcy Court for the District of Moot found for the Chapter 7 Trustee on both questions.

The United States Court of Appeals for the Thirteenth Circuit affirmed. R. at 3.

STATEMENT OF JURISDICTION

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

STATUTES INVOLVED

The statutes at issue are 11 U.S.C. § 547(c)(4), 11 U.S.C. § 503(b)(9), and 11 U.S.C. § 365(d)(3).

The relevant text is produced in Appendix A.

STATEMENT OF THE CASE

William Tell's (Respondent) arduous slide into bankruptcy began back in 2005 when he opened a well-respected, successful independent coffeehouse in Terrapin, Moot. R. at 3. In 2009, Tell's coffeehouse was a quick success, even winning Java Digest's, a top coffee industry magazine, 2009 "Independent Coffeehouse of the Year" award and garnered a devoted customer base. R. at 3–4. However, by 2017 the coffeehouse's revenue had ground to a halt and Respondent debtor entered into an agreement with Petitioner, Touch of Grey, in the hopes of reorganizing and reinvigorating the business. R. at 4.

Petitioner is an international coffee company that owns upwards of 1,900 coffeehouses in cities throughout the world, some that are owned by the corporate entity and other that are franchised. R. at 3. In 2017, Petitioner began seeking out local "neighborhood coffeehouses" in hopes of striking franchising deals so it could branch into new markets. R. at 4. Tell's coffeehouse fit Petitioner's needs to a tee, and thus a deal was struck. R. at 3.

Under the agreement, Respondent debtor would become a franchise while retaining their original name exclusively selling a line of Petitioner's coffee products branded "Dark Star." R. at 4. Aiming to bolster the reopening of Respondent's now franchised coffeehouse Petitioner purchased a freshly renovated warehouse in downtown Terrapin and entered into a twenty-year, triple-net lease with Respondent on July 1, 2018. R. at 4. Per the lease, Respondent agreed to pay monthly rent amounting to $25,000 "due in advance on the first day of each month." R. at 4. After placing the final touches on the warehouse Respondent closed its original establishment and opened the new "Terrapin Station Coffeehouse," on December 1, 2018. R. at 5. This marked the beginning of the end for Respondent.

Immediately, Respondent began facing hardship. The initial plan to use the coffeehouse to break into the local nightlife became a non-stater. R. at 5. Moreover, Respondent faced active resistance and hostility from a local ground who discovered Respondent's affiliation with Petitioner. R. at 5. As a result, Respondent limped through 2019 and became unable to satisfy debts it owed Petitioner, including approximately $700,000 for Dark Star products. R. at 5. Petitioner, accordingly, sent Respondent a notice of default on December 5, 2019, threatening to end the franchise agreement. R. at 5.

In an effort to save its sinking ship, Respondent signed a forbearance agreement with Petitioner on December 7, 2019, in which Petitioner would not terminate the franchise agreement and in return Respondent would (a) provide a payment of $250,000 for outstanding debt on Dark Star products, (b) reaffirm its obligations under the lease, and (c) release any causes of actions it had against Petitioner. R. at 5. The agreement went into effect and Respondent satisfied the $250,000 payment the same day. R. at 5. A mere two weeks later on December 18, 2019, Respondent purchased $200,000 worth of Dark Star products on credit. R. at 5.

However, Respondent took another hard blow in the holiday season of 2019 and made the grueling decision to file a petition for relief under chapter 11 of the Bankruptcy Code on January 5, 2020. R. at 6. Although, as of the petition date, Respondent was current on its lease obligations it had accrued a debt of $650,000 in goods to Petitioner and an additional $500,000 to other unsecured creditors, who were now refusing to provide Respondent with goods on credit. R. at 6. Respondent immediately filed a number of "first day motions" stating its intention to reorganize its business and continue operations as the original coffeehouse. R. at 6. Included in the motions, Respondent sought to continue selling Dark Star products under the franchise agreement and to be allowed to find a sub-lessee for the Petitioner's warehouse. R. at 6. Both motions were supported

by Petitioner's own Counsel. R. at 6. Two weeks later Petitioner sought court approval to pay the $200,000 it owed Petitioner for the value of the new goods that was provided back on December 18, 2019. R. at 6–7. Reluctantly, the bankruptcy court granted Respondent permission to pay Petitioner and ordered payment under an 11 U.S.C. § 503(b)(9) administrative expense. R. at 7.

Unfortunately for Respondent, its reorganization efforts could not have come at a poorer time. Due to the COVID-19 pandemic Respondent was forced to permanently close its doors and cease operations on May 5, 2020. R. at 7. The very next day Respondent filed a motion to reject the Lease and franchise agreement pursuant to 11 U.S.C. §365(a). R. at 7. Although Petitioner did not oppose the Lease rejection it did seek compulsion of payment by Respondent for the May rent, claiming it came due on May 1st. R. at 7–8. In a hearing on May 29, 2020, the bankruptcy court granted the motions to reject the lease and franchise agreements but did not reach a decision on Petitioner's rent request. R. at 8. In the same hearing Respondent announced it was altering its chapter 11 bankruptcy petition to a chapter 7 petition pursuant to 11 U.S.C. 1112(a), and a trustee was appointed to represent Respondent. R. at 7.

Trustee made the decision to (1) object to Petitioner's rent motion pursuant to 11 U.S.C. § 365(d)(3) and (2) commence adversary proceedings in an attempt to recover the $250,000 payment Respondent made to Petitioner under the forbearance agreement. R. at 7. Petitioner responded by arguing it was entitled to reduce its preference liability exposure under 11 U.S.C. § 547(c)(4). R. at 7. The bankruptcy court ruled in favor of Respondent on both issues, and after filing a timely appeal, the Thirteenth Circuit Court of Appeals affirmed. R. at 8.

SUMMARY OF THE ARGUMENT

This Court should affirm the decision of the Thirteenth Circuit Court of Appeals and hold for Respondent on both issues presented.

On the first issue, a creditor cannot assert a new value defense where the debtor has made an "otherwise unavoidable transfer." A mere reserve of funds to satisfy a court-ordered administrative expense under 11 U.S.C. § 503(b)(9) constitutes a valid transfer because the debtor has relinquished control of the funds. Additionally, 11 U.S.C. § 549, which dictates the avoidance of post-petition payments indicates that a transfer may be avoided only if not authorized by the Bankruptcy Code or the bankruptcy court. After receiving $200,000 of goods two weeks before filing for bankruptcy, Debtor was ordered by the bankruptcy court to fulfil the value of goods received. R. at 5–7. Debtor responded to the order by hastily making the prescribed payment and as such Debtor made an otherwise unavoidable transfer. R. at 7.

As such, the question inevitably becomes, when an otherwise unavoidable transfer must occur to preclude a creditor from asserting a new value defense. To this point, this Court should affirm the Thirteenth Circuit's opinion for three reasons. First, nothing in 11 U.S.C. § 547(c)(4) indicates that the preference analysis is limited to transfers made pre-petition. § 547(c)(4) certainly makes reference to "otherwise unavoidable transfer" but it unambiguously does not make reference to any temporal limitations. Courts have previously refused to read words or concepts not plainly stated and when a provision is plain on its face the Court need not turn to pre-code practice or legislative history for interpretation.

Second, the word transfer is not susceptible to multiple meanings depending on its placement in the Code. Transfer, like § 547(c)(4) itself, makes no mention of a temporal connotation. As such, a transfer, per the language of the provision, can necessarily occur pre- or

post-petition. Third, the use of the word 'debtor' within § 547(c)(4) does not indicate a temporal restriction. The word 'debtor' appears in multiple sections of the Bankruptcy Code with both pre- and post-petition connotations, implying that it can apply to both depending on the wording of the specific provision. Additionally, prior courts have refused to give weight to a dual entity theory, specifically stating that the argument "does not withstand scrutiny."

Finally, holding that a creditor can assert a new value defense even when they have received full compensation would fly in the face of the primary policy goals of the Bankruptcy Code, promoting equality among creditors and encouraging creditors to support struggling entities.

On the second issue, the statute is ambiguous as to exactly *when* an obligation arises. It is unclear if pre-paid rent that matures and is due on the first day of the month, regardless of actual tenant occupancy and final amount truly owed, constitutes and obligation under § 365(d)(3). As such the statute, which is designed to be an exception to the provisions of the Code governing administrative expenses, creates an ambiguity post-petition, pre-rejection rent due on the month of vacation must be paid in full or on a proration basis.

As such, this Court should turn to the context of this provision within the greater Code and its legislative purpose. Upon looking at the legislative history, it is clear that this provision is indented to allow trustees and debtors-in-possession to make current payments for current, actually received, services such as utilities and space. An obligation to pay for services not received by the estate would harm the estate, and by extension the equitable relief for creditors—which is an absurd result contrary to the text, purpose, and general public policy of the statute. Continuing the longstanding and sensible approach of proration is the only resolution that conforms with this provision's Congressional command.

Thus, we humbly ask this honorable Court to affirm the decision below on both issues.

STANDARD OF REVIEW

The facts of this case are undisputed. R. at 9. This appeal presents only questions of law, which are reviewed *de novo*. *Texas v. Soileau (In re Soileau)*, 488 F.3d 302, 305 (5th Cir. 2007).

ARGUMENT

This Court should affirm the Thirteenth Circuit Court of Appeals holding that 11 U.S.C. § 547(c)(4) precludes Petitioner from asserting the new value defense for goods subject to a satisfied administrative expense under 11 U.S.C. § 503(b)(9).

I. The Thirteenth Circuit Correctly Ruled That a Creditor's New Value Defense Under 11 U.S.C. § 547(C)(4) is Limited Where Value is Paid for According to a Court-Ordered Administrative Expense Per 11 U.S.C. § 503(B)(9).

Petitioner's assertion that it is entitled to reduce their preference exposure by the $200,000 in goods sold to the Respondent debtor pursuant to 11 U.S.C. § 547(c)(4) is unwarranted given the provision's language and underlying policy considerations. Central to the subsequent new value defense established in § 547(c)(4) is the preservation of the underlying policies of the Bankruptcy Code—encouraging creditors to support financially troubled entities and promoting the equality of treatment among creditors. *TI Acquisition, LLC v. Southern Polymer, Inc. (In re TI Acquisition)*, 429 B.R. 377, 384 (Bankr. N.D. Ga. 2010).

To date, courts have struggled in resolving whether a creditor may reduce its preference exposure by applying new value under § 547(c)(4) even though the new value was paid for in full post-petition per a court-ordered administrative expense under 11 U.S.C. § 503(b)(9). *See In re TI Acquisition*, 429 B.R. at 385 ("A creditor that delivered goods to the debtor pre-petition is not entitled to the new value defense under § 547(c)(4 when that creditor has been paid in full by a § 503(b)(9) claim); *cf Commissary Operations, Inc. v. Dot Foods, Inc. (In re Commissary Operations, Inc.)*, 421 B.R. 873, 879 (Bankr. M.D. Tenn. 2010) ("[D]eliveries entitled to

§ 503(b)(9) claim status are not disqualified from consittuting new value for purposes of . . . § 547(c)(4)"). A narrow majority of courts, however, have held that a creditor cannot be both paid in full for the new value it granted a debtor and use that value to reduce its preference exposure. *See Beaulieu Liquidating Tr. v. Fabric Sources, Inc. (In re Beaulieu Grp., LLC)*, 616 B.R. 857, 878 (Bankr. N.D. Ga. 2020); *see also Circuit City Stores, Inc. v. Mitsubishi Dig. Elecs. Am. (In re Circuit City Stores, Inc.)*, 2010 WL 4956022, at *9 (Bankr. E.D. Va. Dec. 1, 2010); *see also In re TI Acquisition*, 429 B.R. at 385.

Under 11 U.S.C. § 547(b), a trustee may to avoid, or claw back, a transfer of an interest in the debtor's property to a creditor if the trustee can establish that the transfer was made within ninety days prior to the bankruptcy petition date. Creditors may defend against a trustee's avoidance of a preferential transfer by utilizing the defenses enumerated in § 547(c). Important to the present case, § 547(c)(4) sets forth the subsequent new value defense which provides that a preferential transfer to or for the benefit of a creditor cannot be avoided:

> [T]o 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 such new value the debtor did not make an *otherwise unavoidable transfer* to or for the benefit of such creditor.

11. U.S.C. 547(c)(4) (emphasis added).

Currently, the prevailing approach with respect to the new value defense is called the "subsequent advance" approach which allows paid and unpaid new value so long as the payment on the new vale itself is an avoidable transfer.[1] *In re TI Acquisition*, 429 B.R. at 381. Accordingly, under § 547(c)(4) "the new value defense is only available if the new value was repaid with a subsequent

[1] The court in *In re TI Acquisition* broached a second new value defense approach, denoted as the "remains unpaid" approach. Recent cases, however, have rejected that the payment must remain unpaid for the new value defense to be available. *See e.g., Miller v. JNJ Logistics LLC (In re Proliance Int'l, Inc.)*, 514 B.R. 426 (Bankr. D. Del. 2014); *see also Kaye v. Blue Bell Creameries, Inc. (In re BFW Liquidation, LLC), 899 F.3d 1178 (11th Cir. 2018).*

transfer that is itself avoidable." *In re Circuit City*, 2010 WL 4956022, at *7. Thus, for a new value defense to be thwarted the debtor must make a transfer that is otherwise unavoidable. *Id.*

A. Respondent's Payment for the Value of the New Goods Petitioner Provided is an "Otherwise Unavoidable Transfer."

A payment which fulfills a court-ordered § 503(b)(9) administrative expense satisfies § 547(c)(4)'s definition of a transfer. First, the Bankruptcy Code defines 'transfer' broadly under 11 U.S.C. § 101(54)(D) to mean "each mode, direct or indirect, absolute, or conditional, voluntary, or involuntary, of disposing of or parting with property . . . or an interest in property." 11 U.S.C. § 101(54)(D). As such, 'transfers' include distributions, such as payments, that satisfy an administrative expense under § 503(b)(9). *In re Beaulieu Grp., LLC 616 B.R.* at 870. Additionally, merely holding funds in reserves to satisfy a § 503(b)(9) administrative payment is considered sufficient to constitute a transfer under § 547(c)(4). *In re TI Acquisition,* 429 B.R. at 381 (finding that a creditor's new value defense is reduced under the subsequent advance approach where a § 503(b)(9) administrative expense fund is established because the debtor is denied the uninhibited use of the new value and thus the estate is not replenished); *see also In re Circuit City*, 2010 WL 4956022, at *6; *see also In re Beaulieu Grp., LLC, 616 B.R.* at 870. Certainly then, a satisfied § 503(b)(9) administrative expense constitutes a transfer. Consequently, Respondent's payment to Petitioner, mere days after a court granted the administrative expense, is sufficient to satisfy the transfer requirement to preclude Petitioner from asserting a new value defense. R. at 7.

Moreover, the payment of a § 503(b)(9) administrative expense is "otherwise unavoidable." Whether a transfer is otherwise unavoidable "turns on the provisions of the Bankruptcy Code governing the powers of a trustee." *also In re Circuit City*, 2010 WL 4956022, at *7. Administrative expenses are necessarily carried out post-petition and thus 11 U.S.C. § 549, which deals with the avoidance of post-petition transfers, is the most applicable section of the

Bankruptcy Code. *Id.* at *8. Section 549 permits a trustee to avoid a post-petition transfer only if the transfer was not authorized by the Bankruptcy Code or if the transfer was not authorized by the bankruptcy court. 11 U.S.C. § 549(a). Here, Respondent was ordered by the Bankruptcy Court to make a $200,000 payment to Petitioner, and thus the claim is not avoidable per § 549. Accordingly, the administrative expense payment is 'otherwise unavoidable.' *See In re Circuit City*, 2010 WL 4956022, at *8 (holding that because a creditor's § 503(b)(9) is not avoidable under any other Bankruptcy Code provision it is an "otherwise unavoidable transfer").

In the case at hand, Respondent was directed by the bankruptcy court to pay Petitioner $200,000, the value of the goods received less than two weeks before filing for bankruptcy, as an administrative expense under § 503(b)(9). R. at 6–7. Respondent did not simply establish a fund with which to pay the administrative expense. Rather, it hastily complied with the court-order and paid Petitioner the full value listed on the invoice mere days after the ruling came down. R. at 7. Accordingly, Respondent's timely compliance with the court order via actual payment was an otherwise unavoidable transfer. Thus, we turn to the imperative question of *when* an otherwise unavoidable transfer must be made to preclude a creditor from asserting the new value defense.

B. The Plain Meaning of 11 U.S.C. § 547(C)(4) Supports Extending the Preference Analysis to Post-Petition Events.

An 'otherwise unavoidable transfer' need not be made pre-petition to limit a defendant's reliance on the subsequent new value defense. Canons of construction are simply rules of thumb that help courts determine the meaning of statute verbiage. *Conn. Nat'l Bank v.* Germain, 503 U.S. 249, 253 (1992). Before relying on any other cardinal canon, a court should always begin with the plain meaning rule—that "a legislature says in a statute what it means and means in a statute what it says." *Id.* at 253–254. Accordingly, an analysis of a Bankruptcy Code provision starts "with the text." *Mission Prod. Holdings, Inc. v. Tempnology, LLC*, 139 S. Ct. 1652, 1661 (2019).

1. A Plain Reading of the Provision Shows That an "Otherwise Unavoidable Transfer" is Restricted to Pre-Petition Transfers.

11 U.S.C. § 547(c)(4) never explicitly limits an "otherwise unavoidable transfer" to ones that occur pre-petition. Rather, courts have recognized that § 547(c)(4) strictly states that a creditor cannot use a new value as a defense against a trustee to avoid an earlier preference where the debtor paid for the new value with an otherwise unavoidable transfer. *Kaye v. Blue Bell Creameries, Inc. (In re BFW Liquidation, LLC)*, 899 F.3d 1178, 1189 (11th Cir. 2018).

Certainly, a creditor's new value need not remain unpaid for a creditor to establish a defense under § 547(c)(4). *Id.* at 1189; s*ee also, Miller v. JNJ Logistics LLC (In re Proliance Int'l, Inc.)*, 514 B.R. 426 (Bankr. D. Del. 2014). Indeed, the *BFW Liquidation* court accurately held that § 547(c)(4) makes no indication that a preference liability offset is only available for new value that remains unpaid. *BFW Liquidation*, 899 F.3d at 1189.

Correspondingly, § 547 makes no mention that the preference analysis must exclusively involve pre-petition otherwise unavoidable transfers. The *BFW Liquidation* court's reasoning uniformly applies throughout the provision and to impart the reasoning into one portion of the statute but not the rest would result in ludicrous and inconsistent outcomes. The statutory language of § 547(c)(4) goes no further than to "only exclude paid new value that is paid for with an otherwise unavoidable transfer." *Id.*

Furthermore, § 547(c)(4)'s silence on setting a definitive time frame for conducting the preference analysis, distinguishing it from its pre-code counterpart, does not create ambiguity. It is true that § 547(c)(4)'s ancestor statute, 11 U.S.C. § 96(c), expressly provided that new value needed to "*remain unpaid at the time of the adjudication*."[2] *See* 11 U.S.C. § 96(c) (1976). It is

[2] § 60 of the Bankruptcy Act of 1989 was eventually recodified into 11 U.S.C. §96(c) (1976). Two years later Congress again recodified the new value defense under 11 U.S.C. 547(c)(4).

clear, then that prior to the enactment of § 547(c)(4) that the new value defense not only required the value remain unpaid but also that the analysis be conducted pre-petition.

However, Congress's enactment of § 547(c)(4) in 1978 expressly omitted the "remains unpaid" and the "prior to adjudication" language. *See* Bankruptcy Reform Act of 1978, §§101, 401, 92 Stat. at 2598–99, 2682. Such changes in statutory language generally indicate Congressional intent to change the meaning of the statute. *Edwards v. Prime, Inc.*, 602 F.3d 1276, 1299 (11th Cir. 2010). Further, § 547(c)(4) is no mere recodification of the prior statutory language. *BFW Liquidation*, 899 F.3d at 1191. Rather, because there is no evidence to the contrary, the omission of both prongs evidences a Congressional intent to change the provision's requirements into "something substantively different." *Id.*

Congress's intentionality in removing the temporal language is reinforced in the very next subsection of §§ 547, 547(c)(5). This provision, which grants preference defendants a shield for certain transfers creating perfected security interests, expressly conditions the protection on the transfers being made "as of the date of the filing of the petition." 11 U.S.C. § 547(c)(5). *See also* 11 U.S.C. §§ 502(d), 542(c), 550, 551, 749, 766, 783, 1101 (all containing explicit temporal requirements). Certainly, when reforming the Bankruptcy Code in 1978, Congress knew how to impose temporal limitations—and yet intentionally excluded such language—in § 547(c)(4). Thus, we are rightfully railroaded into the conclusion that Congress meant for the current new value provision to be free of any temporal limitations.

2. The Word "Transfer" Has No Temporal Meaning Within § 547(C)(4).

Comparably, the word transfer, within the meaning of § 547(c)(4), does not hold any temporal limitations. § 101(54)(D), defines the term transfer broadly.[3] *See* 11 U.S.C. § 101(54)(D).

[3] Under the Code, transfer means "each mode, direct or indirect, absolute, or conditional, voluntary, or involuntary, of disposing of or parting with – (i) property; or (ii) an interest in property." 11 U.S.C. 101(54)(D).

Similar to the overall language of §§ 547(c)(4), 101(54)(D) makes no indication that a transfer must occur pre-petition. *Id.* In fact, the provision explicitly says that "transfer *means*" one of the enumerated subsections. *Id.* The use of the word "mean" has been interpreted by this Court to establish an exclusive definition of a term of art. *Groman v. Commissioner of Internal Revenue*, 58 S. Ct. 108, 111 (1937) ("[W]hen an exclusive definition is intended the word 'means' is employed."); Accordingly, 'transfer' is not susceptible to multiple interpretations based on its place within the Code and a valid transfer can occur pre- or post-petition.

Furthermore, the conclusion that 'transfer' is not subject to a temporal construction is further reinforced by other provisions within the Code. "Transfer" occurs in a number of different Bankruptcy provisions with both pre-petition and post-petition connotations. *See* 11 U.S.C. §§ 502(d), 550, 551, 749 (referencing both pre-petition and post-petition transfers within the same statutory sections). For example, transfers made under §547(b) must occur on, or within, ninety days "*before* the date" of the petition. 11 U.S.C. 547(b) (emphasis added). Conversely, § 549 allows avoidance for a transfer of estate property that "occurs *after* the commencement of the case." 11 U.S.C. 549(a) (emphasis added). Even within other § 547 defenses, Congress selectively chose when to include ancillary temporal language and elected not to qualify § 547(c)(4)'s 'otherwise unavoidable transfer' with such restrictions, thus making this argument unpersuasive. *See Friedmans' Liquidating Tr. V. Roth Staffing Cos. LP (In re Friedman's Inc.)*, 738 F.3d 547, 555 (3d Cir, 2013) (holding that an argument that 'transfer' denotes a temporal connotation within the meaning of § 547(c)(4) is "without merit").

3. The Provision's Use of the Word "Debtor" Does Not Imply a Temporal Limitation.

Moreover, the preference window is not closed at the petition date simply because the transfer was made post-petition. Relying on the so-called dual entity theory, petitioner asserts that

because § 547(c)(4) uses the term "debtor" and not "debtor in possession" or "trustee" that the provision expressly limits the transfer to a pre-petition timeframe. Although true that § 547(c)(4) references the debtor as the entity making the unavoidable transfer, the Bankruptcy Code does not make this same significant distinction that this particular wording creates conditions limiting preference analysis to pre-petition events. First, mirroring the Code's definition of transfer, the term debtor as defined by § 101(13) contains no temporal qualifiers. 11 U.S.C. § 101(13). Rather, a debtor is simply defined as a "person or municipality concerning which a case under this title has been commenced." *Id.* Indeed, a number of other provisions in the Bankruptcy Code refer to a debtor in the post-petition context. *See* 11 U.S.C. § 329 (referring to attorneys representing a "debtor" in case under the title); 11 U.S.C. § 521 (describing a debtor's post-petition duties).

Second, § 1101(1) concretely asserts that a debtor in possession is the debtor except when a person qualifies under § 322 of the Code. In the present case, a trustee was appointed to the case, but such appointment was not enacted until May 29, 2020, when Respondent announced the conversion from chapter 11 to chapter 7 bankruptcy. R. at 8. The trustee came into control of the case more than four months after Respondent's initial petition and the fulfillment of the § 503(b)(9) administrative expense payment. *Id.* Until May of 2020, Respondent was attempting to mount a comeback and reorganize its business, and thus was essentially acting as both debtor and debtor in possession. *Id.* Accordingly, when the payment mere days after receiving the court order to do so, Respondent was, in fact, acting as the debtor. R. at 7.

Finally, courts have assessed the dual-entity theory in other Bankruptcy Code context and found "no profit in an exhaustive effort to identify which . . . term represents the closest analogy to the debtor-in-possession." *N.L.R.B. v. Bildisco and Bildisco*, 104 S. Ct. 1188, 1197 (1984) (finding that debtor in possession was the "same entity" that existed prior to the bankruptcy filing).

Similarly, the court in *In re Friedman's Inc.*, one of petitioner's most favorable cases, refused to base its decision on the distinction between debtor and debtor in possession. *Friedmans' Liquidating Tr. V. Roth Staffing Cos. LP (In re Friedman's Inc.)*, 738 F.3d 547, 555 (3d Cir, 2013) (finding that the dual entity theory "does not withstand scrutiny"). Thus, the dual entity theory does not hold significant weight in this case and even if it did Respondent was acting as the debtor.

4. 11 U.S.C. § 547(C)(4)'s Context does Not Limit the Preference Analysis to Pre-Petition Events.

Petitioner asserts that the language of § 547(c)(4) is not unambiguous and thus the statute must be read in context with the statutory scheme. *See National Ass'n of Home Builders v. Defenders of Wildlife*, 127 S. Ct. 2518, 2534 (2007). Even if this Court were to find the statutory language of § 547(c)(4) to be ambiguous, the context of the provision supports a finding that an 'otherwise unavoidable transfer' may occur post-petition.

First, it should be noted that the title of the section is not indicative of the statute requiring the preference analysis be conducted solely pre-petition. Although a title of a statute may, in specific circumstances, be used to resolve ambiguity, it cannot "trump the plain meaning of [the] text." *Brotherhood of R.R. Trainmen v. Baltimore & O.R. Co.*, 67 S. Ct. 1387, 1392 (1947). Accordingly, the statute's name is not controlling unless the plain meaning of the text cannot be deciphered.

Second, § 547(b)(5)'s "hypothetical liquidation" being performed as of the petition date is not inconsistent with allowing post-petition payments by the debtor to offset a new value defense. § 547(b)(5) is a codification of this Court's holding in *Palmer Clay Co. v. Brown*: specifically, the holding that whether a particular transfer is preferential is not to be determined by what the situation would have been had the debtor's assets been liquidated and distributed at the time the preference payment was made but rather, by the "actual effect of the payment as determined when

bankruptcy results." *Palmer Clay Prod. V. Brown*, 56 S. Ct. 450, 451 (1936). Accordingly, the time period attached to different elements in a prima facie case for a preference vary. *In re Beaulieu Grp., LLC*, 616 B.R. at 874. This continues into § 547(c)(4), as noted by the *TI Acquisition* Court: "the defense of § 547(c)(4) does not limit itself to the pre-petition period." *In re TI Acquisition*, 429 B.R. at 385. In fact, it was noted there that "[p]ost bankruptcy facts are thus required for proper consideration of § 547 recovery actions." *Id.* Resultingly, the fact that the payment made by Respondent subsequent to their bankruptcy petition would be a necessary consideration in determining if Petitioner is entitled to reduce their preference liability exposure under § 547(c)(4).

Third, Petitioner's statute of limitations argument is irrelevant in the present case. Although some proponents may see an appeal to matching the date the preference analysis is conducted to the day the statute of limitations begins running, it, generally speaking, cannot be done at the petition date. *In re Beaulieu Grp., LLC*, 616 B.R. at 875. This stems from the fact that at the time of the petition there are a number of unknown variables with respect to the amount of payments made, the day the payments cleared, and when such payments were even initiated. *Id.* It is easy to imagine a situation where a debtor initiates a payment one day, files a bankruptcy petition the next, but the payment does not clear until the day after the petition is initiated. These variables are necessary components in the calculus of a preference analysis.

Additionally, Congress has imposed a specific limitation period for some avoidance actions. § 549, for example, has a different statute of limitation requiring claims to be brought by the "earlier of two years after the transfer sought to be avoided or the time the bankruptcy case is closed or dismissed." 11 U.S.C. 549(d). These different statute of limitations periods set forth an indication that the general statute of limitation argument is "not persuasive." *In re Beaulieu Grp., Inc.*, 616 B.R. at 875.

C. The Underlying Policies of Equal Treatment of Creditors and Encouraging Creditors to Aid Struggling Entities Supports Affirming the Thirteenth Circuit's Holding.

Fortifying the decision that Section 547(c)(4) is not restricted to pre-petition events is the underlying policies of the provision. A principal policy underlying § 547 is "encourage[ing] creditors to continue extending credit to financially troubled entities. . ." *Charisma Investment Company, N.V. v. Airport Sys., Inc. (In re Jet Florida Sys., Inc.)*, 841 F.2d 1082, 1083 (11th Cir. 1988). Furthermore, the preference provision facilitates the "prime bankruptcy policy of equality of distribution among creditors," *Union Bank v. Wolas*, 112 S. Ct. 527, 533 (1991). Accordingly, the new value defense provision's language is construed to foster such schema by limiting the defense to the extent the estate has been enhanced by the creditor's actions. *In re TI Acquisition*, 429 B.R. at 384.

Although the Thirteenth Circuit Court of Appeals majority opinion used the term "double dipping," this is not to be taken in the traditional sense. Certainly, in this case, and those resembling it, Petitioner would not be receiving a double payment on the same invoice. However, courts have held that allowing both payment of the §503(b)(9) claim and an offset of preference liability allows creditors a benefit at the detriment of both the estate and the other involved creditors and thus giving a singular creditor an "improved position relative to all other creditors." *In re Beaulieu Grp., LLC,* 616 B.R. at 875.

Specifically, endowing a creditor with the ability to recover an administrative payment under §503(b)(9) and allowing them to subsequently reduce what it must repay the estate by the new value reduces a debtor's available asset value, in turn decreasing the amount at the debtor's disposal with which to satisfy other creditor's claims. *Id.* Certainly, unpaid new value or value paid through an avoidable transfer maintains the balance between debtor and creditor. *In re Kroh*

Bros. Dev. Co., 930 F.2d 648, 654 (8th Cir. 1991). However, paid new value coalesced with preference exposure reduction creates a "payment plus treatment" in which some creditors will receive staggeringly less reimbursement in favor of a single creditor being allowed to receive payment and dodge a preference claw-back. *In re Beaulieu Grp., LLC*, 616 B.R. at 875. If such a mechanic were to be allowed, what incentive would there be for a creditor to ever expose itself to a scenario where it continues to do business on credit with a debtor simply for it to be burned when the debtor petitions for bankruptcy and the estate cannot provide even a modicum of value the creditor provided the debtor.

Indeed, we see a similar situation playing out in this case. Petitioner's preference liability with the new value versus without differs by $200,000. R. at 5–7. Allowing Petitioner to have its payment and simultaneously reduce its exposure allows it a much greater portion of the reimbursement funds at Respondents disposal, thereby significantly increases its standing when compared to other creditors. Certainly, Petitioner was not Respondents only creditor. In fact, at the time of the petition Respondent owed north of $500,000 to other creditors, who were refusing to provide Respondent with the goods that Respondent may have used to right its sinking ship. R. at 6. Allowing Petitioner to resist the preference claw back would reinforce to these other creditors that in future transactions with struggling business partners they should not offer any supplies because they will not receive fair reimbursement if that entity does eventually fail. As such, allowing this unharmonious combination to stand means to completely undercut both of the key policies of §547. *In re Beaulieu Grp., LLC*, 616 B.R. at 875.

II. A Trustee Has No Obligation Under 11 U.S.C. § 365(D)(3) to Pay 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.

The purpose of 11 U.S.C. § 365(d)(3) is to assure that landlords receive current payment under their leases while debtor determines whether lease should be assumed or rejected.[4] Congress added Section 365(d)(3) in 1984 as part of the "Shopping Center Amendments" to the Bankruptcy Code contained in the Bankruptcy Amendments and Federal Judgeship Act of 1984 to protect real property lessors during the period between the date the petition is filed and the date the debtor assumes or rejects a pre-petition lease.[5] Although courts "generally agree that Section 365(d)(3) requires continued performance by Chapter 11 debtors and trustees under a lease of nonresidential real property until the lease is assumed or rejected," Courts split as to what constitutes an obligation "arising from and after the order for relief" and, accordingly, diverge in their interpretation and application of Section 365(d)(3).[6] Two approaches have been used to ascertain when an obligation arises under a lease—the "proration approach" and the "billing date approach."[7]

The "proration approach," or "accrual approach," favored first by the Tenth Circuit and now Thirteenth Circuit, along with a majority of district bankruptcy courts, asserts that lease obligations "arise" under § 365(d)(3) as the obligations accrue, not simply when they are billed,

[4] Pub.L. No. 98–353, 98 Stat. 333 (1984); *See generally* 3 Collier on Bankruptcy ¶ 365.04[1][b] (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2011).
[5] Pub.L. No. 98–353, 98 Stat. 333 (1984)
[6] *In re Burival*, 406 B.R. 548, 552 (B.A.P. 8th Cir. 2009), aff'd, 613 F.3d 810 (8th Cir. 2010) (citing Adelphia Bus. Solutions, Inc. v. Abnos, 482 F.3d 602, 606 (2nd Cir.2007); *Pacific Shores Dev., LLC v. At Home Corp. (In re At Home Corp.)*, 392 F.3d 1064, 1068 (9th Cir. 2004); *Bala v. Kaler (In re Racing Servs., Inc.)*, 340 B.R. 73 (8th Cir. BAP 2006)). Regardless of approach, failure of the trustee or debtor-in-possession to perform post-petition obligations entitles the lessor to a post-petition administrative claim.
[7] *In re CCI Wireless*, LLC, 279 B.R. 590, 593 (Bankr. D. Colo. 2002), aff'd, 297 B.R. 133 (D. Colo. 2003); *see also* Aaron H. Stulman, *Stub Rent Under Section 365(d)(3): A Call for A Unified Approach*, 36 DEL. J. CORP. L. 655 (2011) (discussing "stub rent" which is rent due for the interim period between the petition date in the bankruptcy case and the end of the debtor's first month in bankruptcy).

and that the debtor or trustee is required to pay only those lease obligations that accrue after the Conversion Date and prior to the date of rejection or assumption.[8]

The "performance date approach," also called the "billing date approach," favored by a minority of district bankruptcy courts, but by a number of circuit courts and appellate panels, requires a trustee (or debtor-in-possession) to perform the obligation in whole, at the time required in the lease, despite the trustee or debtor no longer occupying the space.[9]

The Seventh Circuit partially joins in the "billing date" approach but makes a notable distinction between (a) portions of real estate taxes that accrue and therefore arise pre-petition and (b) paying in full a rent obligation that arose entirely post-petition and pre-rejection, but covers a period of time that extends beyond rejection of the lease. *Compare*, *In re Handy Andy Home Improvement Ctrs., Inc.*, 144 F.3d 1125 (7th Cir. 1998), *with HA-LO Indus., Inc. v. CenterPoint Properties Tr.*, 342 F.3d 794, 799 (7th Cir. 2003). This distinction is not in play here, as the only disputed amounts are those dealing with rent billed pre-rejection for space unoccupied post-rejection.

A. The Text of the Statute is Ambiguous at to When an Obligation Arises.

The statute states, in pertinent part, that: "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). As the Supreme Court has

[8] *In re Handy Andy Home Improvement Ctrs., Inc.*, 144 F.3d 1125 (7th Cir. 1998); *In re Furr's Supermarkets, Inc.*, 283 B.R. 60, 70 (B.A.P. 10th Cir. 2002); *In re Stone Barn*, 398 B.R. 359 (Bankr. S.D.N.Y. 2008); *In re All for a Dollar, Inc*., 174 B.R. 358, 361 (Bankr.D.Mass.1994) ("A majority of courts considering this question have adhered to the long-standing practice of prorating payment of a debtor's obligations under a lease, regardless of the billing date.").

[9] *See, e.g., Centerpoint Props. v. Montgomery Ward Holding Corp.* (*In re Montgomery Ward Holding Corp.*), 268 F.3d 17 205, 209-10 (3d Cir. 2001); *Koenig Sporting Goods, Inc. v. Morse Road Co*. *(In re Koenig Sporting Goods, Inc.)*, 203 F.3d 986, 989 (6th Cir. 2000); *In re Burival*, 613 F.3d 810 (8th Cir. 2010); *In re Cukierman*, 265 F.3d 846, 848 (9th Cir. 2001).

made clear that (unless a strict interpretation of the text produces an absurd result) the role of the courts is to apply the text as written. *Lamie v. U.S. Tr.*, 540 U.S. 526, 534 (2004).

The language of section 365(d)(3) only requires "the trustee to perform obligations as they become due under the terms of the lease" regardless of their benefit—or detriment—to the estate. *In re KDA Grp., Inc.*, 574 B.R. 556, 558 (Bankr. W.D. Pa. 2017). This requirement is in contrast to language in § 503(b)(1), where the lessor must show the claims were "actual, necessary costs and expenses of preserving the estate," which means they "must benefit the estate as a whole." *Id.* As the Eighth Circuit rightly points out: "section 365(d)(3) expressly preempts subsection 503(b)(1)." *In re Burival*, 613 F.3d at 812 (8th Cir. 2010). The preemption "takes [landlords] out from under the 'actual, necessary' provision of § 503(b)(1) and allows them during that awkward post-petition prerejection period to collect the rent fixed in the lease." *In re Andy Home Improvement Centers, Inc.*, 144 F.3d at 1128.

The ambiguity here pertains to the word "obligation" and if those obligations "arise" in real-time or instantly at the point of billing, even if that billing is in advance. *In re GCP CT Sch. Acquisition*, LLC, 443 B.R. 243, 254 (Bankr. D. Mass. 2010). The Bankruptcy Code does not define the term "obligation," but the majority of courts have concluded that its usage is ambiguous because "[a] debtor's 'obligation' under a nonresidential real property lease may arise as it is accrued, or it may arise when the landlord submits the bill to the debtor-tenant." *In re Phar–Mor, Inc.*, 290 B.R. 319, 324 (Bankr.N.D.Ohio 2003). As one court explained the ambiguity:

> If obligation were interpreted to refer to the entire amount that matures and becomes payable on a given date, without regard to whether any part of the amount accrued pre-petition, then . . . § 365(d)(3) would conflict with, and constitute an exception to, the provisions governing claims. Section 365(d)(3) expressly indicates that it is meant to constitute an exception to the provisions of the Code governing administrative expenses, which are strictly post-petition in nature, but it does not state that it is meant to constitute an exception to the provisions governing claims. Therefore, without looking behind the language of the Code itself, one can fairly

> question whether Congress intended by § 365(d)(3) to require payment of amounts that accrued pre-petition. The statutory language is inherently ambiguous; and courts are well justified in looking beyond it to understand the legislative intent.

In re Learningsmith, Inc., 253 B.R. 131, 134 (Bankr.D.Mass.2000) (footnotes omitted).

It is also notable that the word "obligation" is modified by "arising from and after the order for relief." If the obligation—in a statute specifically discussing non-residential leases—was merely based on the timing due in a contractual lease, then the language "arising from and after the order for relief" would be rendered superfluous.

Further, this statute only applies to obligations not already covered by section 365(b)(2), which relieves a trustee from a duty to cure defaults for "a lease or executory contract that relate[s], among other things, to the commencement of a case under the Bankruptcy Code." *In re Stone Barn Manhattan LLC*, 398 B.R. 359, 365 (Bankr. S.D.N.Y. 2008) (internal quotations omitted). Because the obligation to make pre-petition payments of rent on a timely basis is one that the debtor need not fulfill as a direct consequence of the bankruptcy filing, if the trustee (or debtor-in-possession) ultimately rejects the lease, the amount owed under it would be either an administrative expense claim or a simple, unsecured debt. *See Id.* at 365–66.

As illustrated in the present case, the debtor was current in all obligations under the lease on the petition day in January, and no party disputes that the post-petition rent that was accrued while the debtor was occupying the space was an obligation that the trustee needed to pay. R. at 6–7. No party objects to the fact that the debtor effectively rejected the lease on May 5, 2020. R. at 8. As the trustee must pay for obligations "until such lease is assumed or rejected," what is due to the lessor from the trustee (assuming a rejection) is limited to the pre-rejection obligations "arising from and after the order for relief."

The rent on a twenty-year lease being prepaid at the beginning of every month is a matter of accounting convenience, not the creation of a (new) obligation to pay and stay for the entire month. Had a regular tenant broken the lease, setting aside explicit damages for that breach, the tenant would still only be obligated to pay for the time actually spent as a tenant. Similarly, a trustee does not adopt an obligation to pay a landlord money that the tenant would have been entitled to keep under a regular lease termination. In the case of a landlord with no other outstanding issues with the debtor, a requirement that the estate pay the entire month's rent for a debtor-tenant rejecting the lease on the second day of the month (as in *In re Koenig Sporting Goods, Inc.*) would mean that the trustee would need to pay then, soon after the rejection is made effective, immediately seek to recover the overpaid rent—a situation which lends a degree of silliness that reasonable interpretation can avoid.

Even if this Court finds ambiguity within the meaning of "obligation" and when they "arise," the legislative history and purpose of the statute strongly favor the Respondent's position. "[W]hen Congress' words admit of 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 vacuum." *In re Manis Lumber Co.*, 430 B.R. 269, 279 (Bankr. N.D. Ga. 2009) (quoting *Thinking Machines Corp. v. Mellon Fin. Servs. Corp. # 1* (*In re Thinking Machines Corp.*), 67 F.3d 1021, 1025 (1st Cir.1995)).

B. Proration Best Serves the Purposes of the Statute and the Bankruptcy Code.

Prior to the enactment of Section 365(d)(3), if a debtor failed to make payments under a commercial lease, the landlord's remedy was to assert an administrative claim under § 503(b)(1)(A). *In re Imperial Beverage Group, LLC*, 457 B.R. 490, 497 (Bankr. N.D. Tex. 2011).

Congress enacted § 365(d)(3) to "ensure that the debtor-tenants [of nonresidential property] pay their rent, common area and other charges on time, pending the trustee's assumption or rejection of the lease." 130 Cong. Rec. S8891, 599 (1984) (statement of Sen. Hatch). Prior to section 365, "[t]he law was, quite simply, that the estate was liable only for the payment of rent for the period of time after the filing of the petition that it actually occupied the premises, and then only to the extent of the value of that occupancy." *In re Manis Lumber Co.*, 430 B.R. at 274.

Congress, in passing the amendments creating section 365(d)(3), was intending to protect the interest of creditor-landlords (particularly in the context of shopping malls), by allowing money to come out of the bankruptcy estate while the trustee or debtor-in-possession reviewed the lease and the financial status of the estate.[10] Thus, Congress hoped to protect the landlord (and non-debtor tenants in the context of a mall) from the free-riding problem of a debtor-tenant no longer paying rent, but still receiving services from the landlord, primarily utilities and the use of space. Courts have found "[n]othing in the legislative history indicat[ing] 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 post-petition, prerejection period, regardless of billing date." *In re Child World, Inc.*, 161 B.R. 571, 575–76 (S.D.N.Y. 1993). Indeed, the only legislative history describing the specific purpose of this amendment is a statement from Senator Orin Hatch:

> [One] problem is that during the time the debtor has vacated space but has not yet decided whether to assume or reject the lease, the trustee has stopped making payments due under the lease. These payments include rent due the landlord and common area charges which are paid by all the tenants according to the amount of space they lease. In this situation, the landlord is forced to provide **current services**—the use of its property, utilities, security, and other services—without current payment. No other creditor is put in this position. In addition, the other tenants often must increase their common area charge payments to compensate for the trustee's failure to make the required payments for the debtor.

[10] S. REP. NO. 98-527, S. REP. NO. 98-527, 98th Cong., 2d Sess., at 1 (1985); S. REP. NO. 98-65, S. REP. NO. 98-65, 98th Cong., 1st Sess. 27 (1983); S. REP. NO. 98-70, S. REP. NO. 98-70, 98th Cong., 1st Sess., at 1 (1983).

> The bill would lessen these problems by requiring the trustee to perform all the obligations of the debtor under a lease of nonresidential real property at the time required in the lease. This timely performance requirement will insure [sic] that debtor-tenants pay their rent, common area, and other charges on time pending the trustee's assumption or rejection of the lease.

130 CONG. REC. S8891 (daily ed. June 29, 1984) (statement of Sen. Hatch) (emphasis added).

Because the obligation to pay rent arises each day, the landlord can recover rent under § 365(d)(3) up until the rejection period. The damage that the landlord suffers is not the total months loss in rent, as the space in question becomes vacant post-rejection. Rather, the "economic burden contractually imposed on a landlord prior to rejection is the number of days that a trustee had the right of occupancy, and, correspondingly, that the landlord provided the space and services incident thereto (such as payment of taxes and utilities)." *In re NETtel Corp., Inc.*, 289 B.R. 486, 489 (Bankr. D.D.C. 2002). There is no disagreement that, upon rejection of a lease, the debtor-tenant loses all rights to occupy the leased space. *Id.* ("Upon rejection of a commercial lease, the trustee abandons his right to enjoy occupancy under the lease"). As such, this understanding should reinforce the idea that the debtor does not owe the landlord for the cost of unoccupied space, as a fitting with the "general principle of bankruptcy law pertaining to administrative expense claims that the estate should not bear an expense for which it receives no benefit." *In re Manis Lumber Co.*, 430 B.R. at 276. To put it simply, the purpose of § 365 was to have the estate pay for "current services" for the debtor, not services given to a vacant space.[11]

Additionally, there are provisions within the same section, such as section 365(b)(3)(C) and section 365(f)(1), that deal with limitations on a debtor-tenant's ability to assign a lease. *See, e.g., In re Trak Auto Corp.*, 367 F.3d 237, 244 (4th Cir. 2004) (rejecting an assumption and

[11] One court even goes so far as to assert that administrative rent claims stop the date *before* rejection, effectively giving the debtor-tenant a free day to move out. *In re KDA Group, Inc.*, 574 B.R. 556, 561, 64 Bankr. Ct. Dec. (CRR) 178 (Bankr. W.D. Pa. 2017) ("rent obligations which accrue on the rejection date cannot be allowed as an administrative expense under § 365(d)(3)").

assignment from a debtor tenant for not comporting with restrictions on assignment within the lease). This shows a contemplation by Congress that a debtor-tenant could, in fact, assign the remaining lease to another commercial entity (likely to take the debtor's place inside the mall) and not owe the rental cost difference to the landlord in the case of assumption and assignment.

Here, Petitioner argues that the surrendered, unoccupied space has caused harm by failing to satisfy an obligation to the landlord that the tenant-debtor had. Even if this argument is true, however, that harm still arose *after* rejection, and thus the landlord's compensation (if any) would be sought either by an administrative expense under section 503(b)(1) and would go through the analysis of being an "actual, necessary costs and expense of preserving the estate" (which it would likely not be, as the premises is vacant), or the amount owed to the landlord would simply be unsecured debt, and the landlord would have to join the other unsecured creditors for this amount. Either way, the cost of the unoccupied space would not be covered under section 365(d)(3), and thus not an "obligation" that the trustee would need to pay as contemplated by the section. *See, e.g.*¸ *In re Imperial Beverage Grp., LLC*, 457 B.R. 490, 504 (Bankr. N.D. Tex. 2011) (clarifying that all post-rejection administrative expenses for landlords must come from section 503(b)(1)(A)).

If the billing date approach is adopted, and a debtor owes a landlord for the entire month, regardless of accrual occupation, then there is no incentive for a debtor to vacate until the last day of the month for any lease. Although this may seem a small inconvenience with single stores, a debtor-tenant can have multiple stores and be rejecting multiple leases through a region or nationwide. Meaning that a chapter 7 debtor with multiple locations that wanted to close business and reject all leases on the 15th of a month would still be required to pay half a month's rent for every location. This is a cost that not only fails to help preserve the estate—but directly harms it.

Not only is the Petitioner's argument unfair to the debtor, but it also harms other creditors. As the Supreme Court pointed out in *Reading Co. v. Brown*, one "decisive, statutory objective" in bankruptcy is "fairness to all persons having claims against an insolvent." 391 U.S. 471 (1968). The ability to reject burdensome post-petition obligations is one of the most fundamental rights of a trustee or debtor-in-possession (and thus the creditor body generally) under the Bankruptcy Code. *In re Ames Dep't Stores, Inc.*, 306 B.R. 43, 52 (Bankr. S.D.N.Y. 2004). To elevate a landlord to a position of super priority—beyond that of secured creditors—would "frustrate the entire purpose of rejection if, in order to reject and thereby be relieved of a burdensome executory contract, the debtor were required, as a condition to doing so, to comply with one of the very aspects of the agreement that is burdensome." *Id.* [12] Thus, the proration approach, giving the trustee only the obligation to pay for obligations post-petition, pre-rejection, best harmonizes with the language of the statute, its legislative intent, and the greater goals of the bankruptcy code.

CONCLUSION

On the first issue before it, this Court should abide by the precedent set forth in *In re Circuit City*, *In re Beaulieu Grp.*, and *In re TI Acquisition* by holding that an unavoidable post-petition transfer on account of new value extended subsequent to a preference should limit the use of § 547(c)(4) by the amount of the unavoidable transfer. On the second issue, this Court should find ambiguity as to when an obligation arises in the context of 11 U.S.C. § 365(d)(3), and enforce the statute consistently with its purpose and legislative history by adopting the proration approach. Thus, we humbly ask this honorable Court to affirm the decision below.

[12] *See also* 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, 960 (2017) (describing the merits of both the accrual and billing methods in their interaction with administrative cost claims).

APPENDEX

11 U.S.C. § 547(c)(4)

(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

11 U.S.C. § 503(b)(9)

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

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

11 U.S.C. § 365(d)(3)

(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, 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.