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 47
Counsel for Petitioner

QUESTIONS PRESENTED

I. Whether a preference defendant is required to reduce its subsequent new value defense by the full payment of an administrative expense claim made according to 11 U.S.C. § 503(b)(9)?

II. Does 11 U.S.C. § 365(d)(3) require a trustee to timely time perform the obligations of a debtor by paying rent according to the terms of a lease, even if a portion of the rent is allocable to the period after the effective date of rejection?

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The Thirteenth Circuit Court of Appeals' decision is available at No. 20-0803 and reprinted at Record 2 (hereinafter "R."). The bankruptcy court decided in favor of the Trustee, Casey Jones. On appeal, both the United States District Court for the District of Moot and the United States Court of Appeals for the Thirteenth Circuit affirmed in favor of the Trustee, Casey Jones.

STATEMENT OF JURISDICTION

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

STATUTES INVOLVED

The statutory provisions excerpted below are relevant in determining this case. Provisions from title 11 are restated in full in Appendix A.

The relevant portion of 11 U.S.C. § 365 provides:

> (a) Except as provided in sections 765 and 766 of this title and in subsections (b), (c), and (d) of this section, the trustee, subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor.
>
> (d)
>
> > (3)(A) The trustee shall timely perform all the obligations of the debtor, except those specified in section 365(b)(2), arising from and after the order for relief under any unexpired lease of nonresidential real property, until such lease is assumed or rejected, notwithstanding section 503(b)(1) of this title. 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 a waiver or relinquishment of the lessor's rights under such lease or under this title.

> (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.
>
> (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.

The relevant portion of 11 U.S.C. § 503 provides:

> (b) After notice and a hearing, there shall be allowed administrative expenses, other than claims allowed under section 502(f) of this title, including- -
>
> > (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;
>
> (9) the value of any goods received by the debtor within 20 days before the date of commencement of a case under this title in which the goods have been sold to the debtor in the ordinary course of such debtor's business.

The relevant portion of 11 U.S.C. § 547 provides:

> (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;

(B) the transfer had not been made; and

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

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

(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[.]

(g) For the purposes of this section, the trustee has the burden of proving the avoidability of a transfer under subsection (b) of this section, and the creditor or party in interest against whom recovery or avoidance is sought has the burden of proving the nonavoidability of a transfer under subsection (c) of this section.

STATEMENT OF THE CASE

I. FACTS

A. The Debtor and Touch of Grey enter into a franchise agreement, but the new venture struggles almost immediately.

After several years of operating an independent, successful coffeehouse, the Debtor's business began to stagnate. R. at 3-4. Faced with a store that needed remodeling, the Debtor agreed to enter a franchise agreement with Touch of Grey on July 1, 2018. R. at 4. As part of the franchise agreement, Touch of Grey agreed to purchase a newly renovated space, which it would then lease to the Debtor. R. at 4. According to the terms of the lease agreement, the Debtor was obligated to pay rent "in advance on the first day of each month." R. at 4.

Unfortunately, the new coffeehouse was less successful than anticipated, and the Debtor began encountering solvency issues just over a year after signing the lease agreement with Touch of Grey. R. at 5. By November, 2019, the Debtor owed Touch of Grey over $700,000 for goods purchased, prompting Touch of Grey to threaten to terminate the franchise agreement. R. at 5.

In light of these difficulties, the parties entered into a forbearance agreement on December 7, 2019; as part of this agreement, Touch of Grey agreed not to terminate the franchise agreement. R. at 5. In exchange, the Debtor paid $250,000 to Touch of Grey towards outstanding invoices, the Debtor reaffirmed its obligations under the lease, and relinquished any and all claims or causes of action it may have had against Touch of Grey. R. at 5. Subsequently, on December 18, 2019, the Debtor purchased an additional $200,000 worth of goods from Touch of Grey on credit; the purchase was recorded on an invoice, and the same goods were delivered three days later. R. at 5-6.

B. Continued difficulties cause the Debtor to seek bankruptcy protection.

Though the Debtor was current on its lease obligations, the Debtor owed Touch of Grey

$650,000 for goods, prompting the former to file a petition for relief pursuant to chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the District of Moot on January 5, 2020. R. at 6. With the intent to reorganize, the Debtor filed a motion requesting to make a $200,000 payment to Touch of Grey, a "critical vendor" in the Debtor's view, essential to its plan to reorganize. R. at 6. In its motion, the Debtor was clear that the payment would be applied to its outstanding invoice and that the payment, an administrative expense entitled to priority under § 503(b)(9), would not adversely affect other creditors. R. at 7. The bankruptcy court approved the administrative expense for the value of the goods sold; upon receipt of payment, Touch of Grey resumed selling its goods to the Debtor on credit, thereby sustaining the Debtor's continued operations. R. at 7.

C. COVID-19 adds to the Debtor's difficulties; the Debtor converts its bankruptcy case to chapter 7.

The Debtor's troubles continued, exacerbated by the COVID-19 pandemic, causing the Debtor to permanently cease operations on May 5, 2020, vacating its retail space and returning the keys to Touch of Grey the same day. R. at 7. The following day, the Debtor exercised its right under § 365(a) to reject its lease and franchise agreements with Touch of Grey. R. at 7. On May 8, 2020, Touch of Grey filed a motion in which it sought to compel the Debtor under § 365(d)(3) to pay the rent for the entire month of May, contending that the Debtor was obligated to pay since the entire month's rent came due prior to the rejection of the lease. R. at 7-8. A hearing was scheduled by the bankruptcy court for May 29, 2020 to consider both of Touch of Grey's motions. R. at 8.

At the hearing, the Debtor converted its case from chapter 11 to chapter 7, to which no party objected. R. at 8. Additionally, the Debtor's motion to reject its lease and franchise agreements with Touch of Grey was granted by the court, effective May 5, 2020. R. at 8.

Subsequently, the chapter 7 Trustee objected to Touch of Grey's motion to compel payment for the entire month of May; additionally, the Trustee sought to avoid and recover the $250,000 payment made by the Debtor as part of its forbearance agreement with Touch of Grey, arguing that such payment was a preferential transfer under § 547(b) and § 550(a). R. at 8. In response, Touch of Grey made an affirmative defense, arguing that it could reduce its preference exposure under § 547(c)(4) by $200,000, representing the amount of goods it sold to the Debtor. R. at 8. Attempts by the parties to mediate their disputes were unsuccessful. R. at 8.

II. PROCEDURAL HISTORY

Before the court, then, were two issues: the subsequent new value dispute and Touch of Grey's request for the entire amount of May's rent. R. at 8. The bankruptcy court ruled in favor of the Trustee on both issues, holding that Touch of Grey could not reduce its preference exposure using the value of the goods and finding that § 365(d)(3) required the Debtor to pay for only the days it occupied the leased space prior to rejection. R. at 8. Touch of Grey timely appealed to the United States District Court for the District of Moot, which affirmed the bankruptcy court's rulings. R. at 8. Touch of Grey again appealed to the Thirteenth Circuit, which also affirmed the decisions of the bankruptcy court. R. at 8.

STANDARD OF REVIEW

The questions presented are based on statutory interpretation of the Bankruptcy Code and, as such, are pure issues of law. Therefore, the standard of review for this appeal is de novo. *Texas v. Soileau* (*In re Soileau*), 488 F.3d 302, 305 (5th Cir. 2007).

SUMMARY OF THE ARGUMENT

The Thirteenth Circuit erred when it held that § 547(c)(4) precluded Touch of Grey from reducing its preference liability by the value of goods paid for under its § 503(b)(9) administrative expense. Strong contextual indicators and a consistent reading of § 547(c)(4) require the provision to exclude post-petition transfers from the preference liability analysis. The Thirteenth Circuit's narrow interpretation falls short of what is required to determine the proper meaning of the subsequent new value defense. Furthermore, the policies underlying § 547(c)(4) reveal that the preference liability analysis excludes post-petition transfers. Failing to allow Touch of Grey to reduce its preference exposure by the full amount of its 503(b)(9) administrative expense goes against the unambiguous purpose of § 547(c)(4).

The Thirteenth Circuit also erred when it held that the chapter 7 Trustee for the Debtor's estate was only required to pay the rent that had accrued through the date of rejection. The language and grammar of § 365(d)(3) clearly and unambiguously mandate that a chapter 7 trustee must fulfill the obligations of the Debtor according to the relevant lease agreement(s). The Thirteenth Circuit's analysis of the language and grammar of the statute obscured what is otherwise clear on the face of the statutory text. Because § 365(d)(3) is clear and unambiguous, the Thirteenth Circuit's analysis of the statute's legislative history was superfluous. Nevertheless, the statute's legislative history reveals that § 365(d)(3) was enacted to protect landlords from insolvent tenants. Finally, awarding Touch of Grey the full amount of May's rent is an equitable outcome for both parties.

For these reasons, this Court should reverse the judgement of the Thirteenth Circuit on both questions presented.

ARGUMENT

This Court should reverse the judgment of the Thirteenth Circuit.

I. SECTION 547(C)(4) DOES NOT PRECLUDE A PREFERENCE DEFENDANT FROM REDUCING ITS PREFERENCE LIABILITY BY THE VALUE OF GOODS PAID UNDER A SECTION 503(B)(9) ADMINISTRATIVE EXPENSE.

The Thirteenth Circuit erroneously held that § 547(c)(4) precludes a creditor from reducing its preference exposure by the value of goods paid for under a § 503(b)(9) administrative expense. R. at 9. Under § 547(b), a trustee has the power to avoid preferential transfers made by the debtor to a creditor that, among other things, were made on or within ninety days of the bankruptcy petition filing. A preferential transfer "has the effect of giving the creditor a recovery in excess of the recovery that would have been available under a liquidation procedure." NORTON BANKR. L. & PRAC. §66:12 (3d. ed. 2021). Nonetheless, there are several exceptions to this avoidance power. Namely, § 547(c)(4), permits a creditor to reduce its preferential liability by the value of goods or services that were provided to a debtor following a preferential transfer. Importantly, "to the extent that such goods or services are paid for by the debtor, the creditor can still assert a new value defense for the value of such goods and services provided that such payment is itself avoidable." R. at 11.

Outside of § 547, a creditor also has the right to assert an administrative expense claim for:

> the value of any goods received by the debtor within 20 days before the date of commencement of a case under [title 11] in which the goods have been sold to the debtor in the ordinary course of such debtor's business.

11 U.S.C. § 503(b)(9). Administrative expense claims are non-avoidable post-petition transfers. *Beaulieu Liquidating Tr. v. Fabric Sources, Inc. (In re Beaulieu Grp., LLC)*, 616 B.R. 857, 869 (Bankr. N.D. Ga. 2020) ("Because the Code authorizes the payment of § 503(b)(9) expenses, they are not avoidable under § 549 or any other section of the Code.").

Therefore, the question arises whether a non-avoidable post-petition transfer on account of goods or services provided can impact a creditor's new value defense. Some courts have held these post-petition transfers must reduce a creditor's § 547(c)(4) defense. *In re Beaulieu Group* 616 B.R. at 878 (finding the value represented in a fully satisfied 503(b)(9) administrative expense cannot be used to offset a creditor's preference liability). Others have held that post-petition otherwise unavoidable transfers do not affect the new value defense. *Friedman's Liquidating Tr. v. Roth Staffing Cos. LP (In re Friedman's Inc.)*, 738 F.3d 547, 549 (3d Cir. 2013) ("[w]here an 'otherwise unavoidable transfer' is made after the filing of a bankruptcy petition, it does not affect the new value defense.").

In finding that § 503(b)(9) claims impact a creditor's new value defense, the Thirteenth Circuit inappropriately departed from the intended application of § 547(c)(4). The Thirteenth Circuit should have expanded its statutory analysis to reveal § 547(c)(4)'s proper interpretation. This Court should do the same. Statutory context and the polices underlying the Bankruptcy Code clearly show that new value for the subsequent value defense calculus is limited to transfers made on or within the 90 days before the bankruptcy petition filing. Therefore, the statute's intended application compels this Court to reverse the judgment of the Thirteenth Circuit, allowing Touch of Grey to use the value of goods reflected on the Invoice as new value to reduce its preference exposure.

A. The Thirteenth Circuit erred in its statutory interpretation of Section 547(c)(4)(B) because it failed to read the statute as a whole and missed key contextual indicators that reveal the true intent of the subsequent new value defense.

The Thirteenth Circuit's analysis of § 547(c)(4) fails to capture the statue's plain and unambiguous application for this particular issue. The Court's narrow focus on the text of § 547(c)(4) restricted its analysis, causing it to miss critical contextual indicators that reveal the

proper scope of the subsequent new value defense. To determine the statute's clear resolution of this issue the court should have considered "[t]he statute's language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Kaye v. Blue Bell Creameries, Inc. (In re BFW Liquidation, LLC)*, 899 F.3d 1178, 1188 (11th Cir. 2018).

1. The petition date is the cutoff point for determining whether a payment on account of new value is "otherwise unavoidable."

The timeframe for considering whether a payment on account of new value can increase a creditor's preference exposure ends at the petition date. The Thirteenth Circuit failed to reach this conclusion because it read §547(c)(4)(B) in isolation from the rest of § 547. The Court inferred the lack of temporal language implied the § 547(c)(4)(B) analysis is open-ended. While this interpretation may have "some appeal . . . [it] does not take into account the context in which the provision is found." *In re Friedman's Inc.*, 738 F.3d at 554. Proper statutory analysis requires that "a statute be read as a whole . . . since the meaning of statutory language, plain or not, depends on context." *King v. St. Vincent's Hosp*., 502 U.S. 215, 221 (1991).

Here, the Court should have considered the statute of limitations for a preference avoidance generally begins to run on the bankruptcy petition date. 11 U.S.C. § 546(a). *In re Friedman's*, 738 F.3d at 556. This fact "supports the notion that the cause of action begins to run on the petition date," and therefore strongly implies the cutoff date for the preference analysis is the petition date. In addition, there is "some appeal to having a fixed point at which a preference amount can be determined, and defenses anticipated." *In re Beaulieu,* 616 B.R. at 875. Furthermore, if post-petition transfers are allowed to reduce subsequent new value defense, "the calculation of preference liability could change depending on when the preference avoidance action is filed." *In re Friedman's*, 738 F.3d at 556. For these reasons, this Court should not overlook the prescribed

statute of limitations when determining the cutoff date for the subsequent new value defense calculus.

2. Post-petition transfers are not considered "otherwise unavoidable transfers" under the subsequent new value defense.

Similarly, the Thirteenth Circuit's reading of the word "transfer" fails to capture § 547(c)(4)'s intent. The court's reliance on the word's broad definition misses its meaning in the subsequent new value defense. *Barnhill v. Johnson*, 503 U.S. 393, 401 (1992) (declining to interpret a word by its open-ended definition). Several courts have agreed "transfer" does not impose a temporal limit on § 547(c)(4)(B). *In re Beaulieu* 616 B.R. 870; *In re Friedman's* 738 F.3d at 554-55.

Regardless, this court should rely on other contextual indicators to determine if post-petition transfers are excluded from § 547(c)(4). For starters, this court should note the title of § 547 is "Preferences." By definition the preference period is defined as the 90 days prior to the filing of the bankruptcy definition. Therefore, the title suggests that this section only concerns transfers within the ninety days prior to the petition filing. Furthermore, § 549 titled "Postpetition transactions" separately deals with post-petition transaction and post-petition transfers. I*n re Freidman's*, 738 F.3d at 555, n.2. However, as Judge Weir notes, the title's definition while informative does not control the meaning of the entire provision. R. at 24 (Weir, J., dissenting). Furthermore, the Thirteenth Circuit could have informed its meaning of otherwise unavoidable transfers under § 547(c)(4) by looking at that section's interaction with transfers analogous to § 503(b)(9).

This court should have considered whether transfers that are similar 503(b)(9) claims are considered otherwise unavoidable under the subsequent new value defense. In doing so, the Thirteenth Circuit would have noted that payments made under the Critical Vendor Doctrine or

Wage Orders do not reduce the subsequent new value defense. The *Friedman's* decision held that § 503(b)(9) administrative expenses are analogous to both wage orders and critical vendor orders. *In re Friedman's*, 738 F.3d at 553 n.2. These contextual indicators are more helpful for determining what does not constitute an otherwise unavoidable transfer under § 547(c)(4)(B). Therefore, to properly determine the scope of the subsequent new value defense, this Court should not adopt this aspect of the analysis performed by Thirteenth Circuit.

3. The use of the word "debtor" indicates Section 547(c)(4) analysis is limited to the prepetition period.

Similarly, the Court's analysis of word "debtor" as used in §547(c)(4) is incomplete. The Thirteenth Circuit rejects the implication that "debtor" limits the subsequent new value defense analysis to the prepetition period. R. at 13. This conclusion has been echoed by other courts. *In re Friedman's*, 738 F.3d at 555; *In re Beaulieu* 616 B.R. at 870. While this may seem informative, other courts have found the use of the word "debtor" as opposed to "debtor-in-possession" or "trustee" implied the defense excluded post-petition transfers. *Phoenix Rest. Grp., Inc. v. Ajilon Prof'l Staffing LLC (In re Phoenix Rest. Grp., Inc.)*, 317 B.R. 491, 497 (Bankr. M.D. Tenn. 2004). ("Had Congress intended to account for §547(c)(4)(B) to account for payments made postpetition, the section 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"); *Bergquist v. Anderson-Greenwood Aviation Corp. (In re Bellanca Aircraft Corp.)*, 850 F.2d 1275, 1284 (8th Cir. 1988) (finding § 547(c)(4)'s language limits the subsequent new value analysis to pre-petition transfers, "because any post-petition advances are given to the debtor's *estate*, not the debtor."); R. at 23 (Weir, J., dissenting). *But see NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 528 (1984).

Another contextual indicator suggesting the use of debtor is significant is that in § 547(a) both the words "trustee" and "debtor" are included in the definition of new value. "Interpreting

the term 'debtor' in section 547(c)(4)(B) to include trustee would render the reference to 'the debtor or the trustee' superfluous." R. at 23, n.11. (Weir, J., dissenting). *See Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253 (1992) ("Courts should disfavor interpretation of statutes that render language, superfluous."). In addition, "throughout § 547, 'the debtor' refers to the prepetition entity that transferred property or engaged in business with the preference defendant." *In re Phoenix Rest. Grp., Inc.*, 317 B.R. at 497. Therefore, this Court should find that use of the word "debtor" excludes post-petition transfers from the subsequent new value analysis.

In conclusion, for the reasons mentioned above, this Court should not adopt the analysis relied on by the Thirteenth Circuit because it missed several key contextual indicators that shed light on the proper interpretation of the subsequent new value defense.

B. The Thirteenth Circuit erred in its analysis of Section 547(c)(4) because its interpretation results in severe inconsistencies.

In addition to the errors the Thirteenth Circuit made above, the Court misses further contextual indicators. The Court's flawed interpretation causes the statute to become inconsistent with other provisions within § 547, with its own application, and with the expressed legislative intent. Therefore, this Court should not adopt the Thirteenth Circuit's analysis and instead find that the subsequent new value defense calculus is limited to the prepetition period.

1. When Section 547(c)(4) is read in context with other relevant provisions, it becomes clear the transfers at issue under Section 547(c)(4)(B) are limited to the pre-petition period.

The Court's interpretation of what can constitute an otherwise avoidable transfer under § 547(c)(4)(B) ignores other provisions within § 547. The court notes the word "transfer" as used in § 547(c)(4) and the preamble to 547(c) do not require the transfers at issue to occur during the preference period. R. at 14.

However, there is more to the analysis. § 547(b)(5)'s "hypothetical liquidation test" supports the notion that post-petition transfers are excluded from the subsequent new value defense analysis. § 547(b)(5)'s hypothetical liquidation test requires a court to determine if a preference defendant received a greater payment than they would have if the debtor's assets were liquidated and distributed to creditors. *In re Friedman's*, 738 F.3d at 556. Importantly, this test must be performed as of the petition date. Therefore, extending the preference analysis past the petition date would be inconsistent with § 547(b)(5). Furthermore, there are other provisions in the Bankruptcy Code that specifically deal with post-petition transfers and the avoidance of such transfers. *See* 11 U.S.C. § 549; *In re Friedman's*, 738 F. 3d at 561 ("The scheme of the Bankruptcy Code contains numerous post-petition mechanisms for ensuring that similarly situated creditors are treated equally. For this reason, preference analysis need not account for post-petition activity."); *In re Phoenix Rest. Grp., Inc.*, 317 B.R. at 497 ("closing §547(c)(4) analyses at the petition is consistent with other Code remedies that only apply post petition."). Therefore, this Court should keep the preference analysis consistent and exclude post-petition transfers from the subsequent new value analysis.

2. A consistent reading of Section 547(c)(4)(B) requires the petition date to be the cutoff for purposes of the subsequent new value defense.

The Thirteenth Circuit notes that nothing in the text itself nor the fact that the section was drafted in the past tense requires the petition date be the cutoff point for the subsequent new value analysis. However, in order to maintain a consistent interpretation of §547(c)(4)(B), the petition date must be the cutoff. The majority of courts have held that a creditor should not be able to use post-petition extensions of new value in its subsequent new value defense. *In re Phoenix Rest. Grp., Inc.*, 317 B.R. at 496 (citations omitted) ("Indeed, this Court has found no case decided under Section 547(c)(4) that permitted a transferee to successfully defend an action for the recovery of a

preference based upon a subsequent advance that was made postpetition."). Therefore, it would be inconsistent to allow post-petition payments on account of new value to impact a creditor's subsequent new value defense. If a creditor cannot use extensions of new value to reduce its preference exposure, its preference exposure should not be increased by payment on account value.

3. The Thirteenth Circuit's interpretation of the subsequent new value defense is inconsistent with the statute's legislative history.

The Thirteenth Circuit's interpretation directly contradicts both the statutory and legislative history. Although courts should refer to the plain meaning of the statutory language, a mechanical adherence to a statute's plain language should not occur "when doing so would produce a result fundamentally at odds with the intent of the drafters as expressed in the legislative history." *Boyd v. The Water Doctor (In re Check Reporting Servs., Inc.)*, 140 B.R. 425, 434 (quoting *U.S. v Ron Pair Enters.*, *Inc.*, 489, U.S. 235, 242).

Importantly, §60(c) of the Bankruptcy Act of 1898, the predecessor statute to § 547(c)(4)(B), included a temporal limitation on the new value that could be used to reduce preference exposure. While this language was left out of 547(c)(4)(B), this fact does not imply that Congress intentionally left the subsequent new value defense open-ended. "[W]hen Congress amends a Bankruptcy Law, it does not write on a clean slate." *Dewsnup v. Timm*, 502 U.S. 410, 419 (1992). Therefore, courts should be reluctant to interpret the Bankruptcy Code in a way that "effects a major change in pre-Code practice that is not the subject of at least some discussion in the legislative history." *Id*. Here, the legislative history here does not support the view that the omission of temporal language was intentional. *In re Beaulieu Grp. LLC*, 616 B.R. at 872. Rather, it was not likely that Congress intended §547(c)(4)(B) to be "totally open-ended such that any payment, at any time, could defeat the new value defense." *In re Friedman's*, 738 F.3d' at 554. Therefore, it is clear that important contextual indicators and a consistent reading of § 547(c)(4)(B)

require the subsequent new value defense calculus to be limited to the prepetition period. The policies underlying § 547(c)(4)(B) and § 503(b)(9) support this conclusion.

C. The policies underlying Section 547(c)(4) support the petition date as the cutoff for the subsequent new value defense analysis.

The Thirteenth Circuit's interpretation does not further the policy goals underlying § 547 (c). Conversely, the underlying policy goals of § 547(c)(4) indicate the preference liability analysis is cutoff at the petition date. Despite the Thirteenth Circuit's concerns, closing the preference analysis at the petition date will not result in creditors' receiving a windfall or double-dipping. Therefore, this Court should reverse the decision of the Thirteenth Circuit and close the preference analysis at the petition date.

1. Limiting the preference liability analysis does not reduce the equality of distribution among creditors.

The Thirteenth Circuit erred in noting its interpretation "is further supported by an overarching purpose of bankruptcy law—the equality of distribution among creditors." R. at 15. This contention is likely based on the idea that creditors who have rights to § 503(b)(9) administrative expense and subsequent new value defense claims should not be in a better position than other creditors that did not extend new value to debtors on or within the 20 days leading up the bankruptcy filing. However, different treatment among the two groups is justified because the strict equality of distribution among *all* creditors is not a goal in bankruptcy code. *In re Friedman's*, 738 F.3d at 560 ("[W]e have held that the policy underlying § 547 is that of 'equal distribution among *similarly situated creditors.*"). Furthermore, "[i]nequality per se is not to be avoided; indeed and justified inequality sometimes prevails, usually based on what is in the best interests of the estate." *In re Friedman's*, 738 F.3d at 560. As the Third Circuit Court of Appeals noted:

> If it is a rule in bankruptcy that all creditors must be treated equally, surely the exceptions swallow the rule. It could be said that some creditors are treated more equally than others. There are special provisions for aircraft leases and shopping center leases, and some claims are given priority over others.

In re Friedman's 738 F. 3d at 560. Therefore, the type of equality the Thirteenth Circuit seeks to achieve does not align with the underlying policy of equality of distribution.

2. This Court should reward trade creditors who continue to work with struggling businesses.

While the equality of distribution among creditors is a policy goal underlying § 547, the subsequent new value defense was intended to encourage trade creditors to deal with struggling businesses. As noted by the Eighth Circuit Court of Appeals:

> The general avoidance portion of the Bankruptcy Code was intended to "facilitate the prime bankruptcy policy of equality of distribution among creditors of the debtor." Nevertheless, the subsequent advance rule, Section 547(c)(4), "was not enacted to ensure equitable treatment of creditors, but rather is intended to encourage creditors to deal with troubled businesses."

In re Bellanca Aircraft Corp., 850 F.2d at 1280 (citations omitted). While these policies may sometimes conflict, it is not the Court's role to determine the proper balance between them. *Union Bank v. Wolas*, 502 U.S. 151, 162 (1991) ("Whether Congress has wisely balanced the sometimes conflicting polices underlying § 547 is not a question that we are authorized to decide."). It is also important to reward creditors who continue to provide new value to distressed businesses and increase the likelihood that the reorganization effort will be successful. *In re Freidman's*, 738 3d. at 559 ("Even if a creditor is paid post-petition for new value it provided pre-petition, the creditor still replenished the debtor's estate during the preference period, and therefore aided the debtor in avoiding bankruptcy to whatever extent possible."). Creditors' willingness to work with troubled entities will be reduced if it is forced to choose between asserting a § 503(b)(9) administrative expense claim and preserving its right to assert its full subsequent new value defense. *Commissary*

Operations Inc. v. Dot Foods, Inc. (In re Commissary Operations, *Inc.*), 421 B.R. 873, 879 (Bankr. M.D. Tenn. 2010). Therefore, this Court should not adopt an approach that does so.

II. THE THIRTEENTH CIRCUIT ERRED WHEN IT CONCLUDED THAT, UNDER SECTION 365(d)(3), THE TRUSTEE WAS ONLY REQUIRED TO PAY TOUCH OF GREY FOR THE RENT THAT HAD ACCRUED THROUGH THE EFFECTIVE DATE OF REJECTION.

§ 365(d)(3) requires the chapter 7 trustee for the debtor's estate to pay Touch of Grey the entire amount of rent due for May pursuant to the lease agreement between the parties. The statute directs the trustee to perform "all the obligations of the debtor," which are defined by unexpired leases of nonresidential real property. The trustee must fulfill these obligations for the duration of the period described by the statute, namely, the period between the petition date and the date at which the lease is either assumed or rejected. During this period, the lease agreement, entered into voluntarily by the parties, defines their obligations, including the times at which the obligations must be performed. The unambiguous, plain meaning of the statutory text, the statute's legislative history, and concerns for equity compel this Court to reverse the judgment of the Thirteenth Circuit and award Touch of Grey that for which it bargained under the lease agreement with the debtor.

A. Because there is no ambiguity in the text of section 365(d)(3), the Thirteenth Circuit's analysis obfuscated what is otherwise clear.

The court's analysis of the language of § 365(d)(3) misconstrued or overlooked critical syntactical relationships, thereby obscuring the otherwise unambiguous meaning of the statute.

1. "Arise" has a clear syntactical function obscured by the Thirteenth Circuit's analysis.

The Thirteenth Circuit's analysis focused exclusively on the uninflected form of the verb "to arise," failing to give any attention to its form as it appears in the statutory text. This oversight conceals the clarity provided by the statute's syntax. Though other courts have made the same error, *e.g. In re Oreck Corp.*, 506 B.R. 500, 504 (Bankr. M.D. Tenn. 2014), analysis of statutory

language must meticulously adhere to inflected forms, gleaning insights from grammatical and syntactical relationships apparent on the face of the statute. Indeed, certain proration decisions have failed to recognize how the participle functions within the statute, perhaps because "arising" is treated in its uninflected form. *See, e.g., In re Ames Dep't Stores, Inc.*, 306 B.R. 43, 67 (Bankr. S.D.N.Y. 2004).

"Arising" is an adjectival participle that, on a plain reading, *must* modify "obligations." The participle certainly cannot modify the verb "to perform," since the participial phrase in no way describes how the trustee is to perform. Indeed, the most natural reading recognizes that the phrase beginning with "arising" modifies "obligations." *In re Krystal Co.*, 194 B.R. 161, 163 (Bankr. E.D. Tenn. 1996). The dependent clause beginning with the participle, then, answers the question of *which* obligations the trustee shall timely perform; in this case, it is the obligations *arising under any expired lease* which the trustee is required to perform. That is, questions about when or how obligations arise are answered by the lease, a conclusion required by the language and grammar of the statute. Thus, the Thirteenth Circuit correctly noted that "arises" should be considered in relation to "obligations," but the court failed to capitalize on this observation. Indeed, failure to recognize the function of the participle led the court to conclude that "the term 'arises' fails to definitively tell us exactly when a debtor's obligations arise under section 365(d)(3)." R. at 17-18. "Arising" simply clarifies which obligations the trustee must perform, namely, obligations defined by the lease; the statute, then, cannot define when obligations arise because obligations only arise pursuant to individual lease agreements. The answer to the court's observation regarding when obligations arise lies in the lease agreement; the text of the statute does not elucidate when obligations arise because it does not and cannot purport to do so. The statute directs the reader to the instrument that does define when those obligations arise, namely,

the lease. This is the conclusion compelled by the syntactical function of the participle within the statute, a feature of the statute's unambiguous meaning.

The entire participial phrase beginning with "arising" ("arising from and after the order for relief under any unexpired lease of nonresidential real property") is oddly worded, but not ambiguous. *See Lamie v. U.S. Tr.*, 540 U.S. 526, 534 (2004) (holding that an "awkward . . . even ungrammatical" statute is not ambiguous). The clause has five prepositions, three of which, highlighted here, are curious and require parsing: "arising **from** and **after** the order for relief **under** any unexpired lease of nonresidential property." Because the participle that introduces the phrase must modify "obligations," that relationship helps determine the objects of the prepositions and, thus, the meaning of the dependent clause. "After" is certainly temporal and its object is "the order;" thus, the clause concerns obligations that arise at a point in time after the order for relief. "From" and "under," however, are less clear. If "from" has "lease" as its object, a grammatically acceptable reading, the clause could be read as concerning obligations that arise from, in the sense of according to, any unexpired lease. Some courts have understood the preposition in this way, *e.g., Centerpoint Props v. Montgomery Holding Corp. (In re Montgomery Ward Holding Corp.)*, 268 F.3d 205, 208 (3d Cir. 2001).[1] However, if "from" has "lease" as its object, that leaves the preposition "under" without an object. The *Montgomery Ward* court could not reconcile this, leading it to elide "from" in its gloss of the statute: "[t]he issue for resolution then is what Congress meant when it referred to 'obligations of the debtor arising under a lease after the order of relief.'" *Id*. *See also In re Handy Andy Home Improvement Ctrs.*, 144 F.3d 1125, 1127 (7th Cir. 1998) ("We can't figure out what the 'from' adds to the 'after'"). Therefore, the only syntactically reasonable understanding of these prepositions requires "under" to have "lease" as its object. Thus,

[1] The *Montgomery Ward* court's analysis, however, is not technically correct because it misstates the relationship between prepositions and their objects (i.e., prepositions do not modify their objects).

the clause concerns obligations arising under, in the sense of pursuant to, a lease. *In re Imperial Beverage Group, LLC*, 457 B.R. 490, 501 (Bankr. N.D. Tex. 2011). The preposition "from," then, must be understood in connection with "after," as indicated by the conjunction "and." Thus, the clause concerns obligations arising *at the point of* the order for relief *and thereafter*, *until* such lease is assumed or rejected. One can rephrase the participial phrase in a way that highlights the sum of the grammatical functions of each part thusly: "arising under any expired lease, from the point of the order for relief and thereafter until such lease is assumed or rejected." The phrase has been understood in this way by some courts, *e.g., In re NETtel Corp., Inc.*, 289 B.R. 486, 489 (Bankr. D.D.C. 2002).

Finally, the Thirteenth Circuit erred when it held that "arises . . . can be either an absolute occurrence or something that is continuing to accrue." R. at 17. The court's examination of the tense of the participle, an attempt to answer legal questions with grammar, further obscured the statute's plain meaning. Tense is a feature of the verbal component of a participle, but here, functioning adjectivally, the verbal component of the participle recedes. Context mandates that the participle take on the function of an adjective, thus minimizing notions of tense.[2] Understood in this way, the statute answers the court's question of when obligations arise by directing readers to the lease(s) in question.

2. The meaning of "arising under" outside bankruptcy elucidates its meaning in section 365(d)(3).

The Thirteenth Circuit correctly notes that "[t]he term 'arises' is not defined by the Bankruptcy Code." R. at 17. When a term is not defined in the Code, "it means in the Code what it means in . . . law outside bankruptcy." *Mission Prod. Holdings, Inc. v. Tempnology, LLC*, 139

[2] To borrow a concept from linguistics, "arising," is one possible surface structure manifestation of a deep structure adjective.

S. Ct. 1652, 1661 (2019). *See also Field v. Mans*, 516 U.S. 59, 69 (1995) (holding, in the context of bankruptcy, that "it is . . . well established that '[w]here Congress uses terms that have accumulated settled meaning under . . . the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of those terms'") (quoting *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 739 (1989)).

Therefore, law outside Bankruptcy sheds light on the meaning of "arising under" in § 365(d)(3): an item arises under another when the former is *based upon* the latter. "It is the settled interpretation of these words . . . that a suit *arises under* the Constitution and laws of the United States only when the plaintiff's statement of his own cause of action shows that it is *based upon* those laws or that Constitution." *Louisville & Nashville R. Co. v. Mottley*, 211 U.S. 149, 152 (1908) (emphasis added). Further, an item arises under another when the latter is an essential element of the former; "[h]ow and when a case arises 'under the Constitution' . . . has been much considered . . . To bring a case within the statute, a right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action." *Gully v. First Nat. Bank*, 299 U.S. 109, 112 (1936). Finally, an item arises under another when the latter creates the former: "28 U.S.C. § 1331 provides federal jurisdiction of all civil actions 'arising under' federal law . . . Most directly, and most often, federal jurisdiction attaches when federal law *creates* the cause of action asserted." *Merrill Lynch, Pierce, Fenner & Smith Inc., v. Manning*, 578 U.S. 374, 383 (2016) (emphasis added).

With respect to § 365(d)(3), obligations that "arise under" a lease are based upon that lease, the lease is essential to forming the obligations, and the lease creates the obligations. Any question, then, about the nature of the obligations or when the obligations must be performed must be answered by the lease because the obligations depend in their entirety on the lease. The lease, into

which both parties entered voluntarily, defines the nature and timing of obligations since the obligations "arise under" the lease. Thus, the intent of Congress, expressed in the words of the statute, directs courts to examine the relevant lease(s) when determining the duties of the trustee in a bankruptcy proceeding.

3. The meaning and use of "obligations" is also clear and precludes a proration approach.

As established, the plain meaning and grammar of the statute are clear. Congress' choice of the term "obligations" is likewise clear and instructive. *Bullock's, Inc. v. Lakewood Mall Shopping Ctr. (In re R.H. Macy & Co., Inc.)*, 1994 WL 482948, at *12 (S.D.N.Y. Feb. 23, 1994) (Sotomayor, J.). Obligations "arise" pursuant to a lease; without the lease, the obligations in question would not exist.[3] Indeed, "[i]n the context of a lease contract . . . the most straightforward understanding of an obligation is something that one is legally required to perform under the terms of the lease and that such an obligation arises when one becomes legally obligated to perform." Because this is, in fact, "the most straightforward understanding of 'obligation,'" proration decisions even concede this point. *See In re NETtel Corp*, 289 B.R. at 494 (holding that "[t]he statute does contemplate that the lease terms govern when the trustee should 'timely perform' an obligation").

Because, according to the language of the statutory text, the nature and timing of obligations must be determined by the terms of the relevant lease(s), courts adopting a proration approach assume, without textual justification, that "a rental obligation arises under the lease based on the corresponding period of occupancy under the lease." *Id*. at 490. By importing an extraneous requirement into § 365(d)(3), courts adopting a proration approach undercut the express language

[3] Of course, obligations can arise from instruments other than a lease, but § 365(d)(3) limits the obligations to those arising from a particular subset of leases.

of the statute. If a particular lease agreement subject to § 365(d)(3) analysis defines rental obligations in a way that does not depend on occupancy, then, by defining obligations in terms of occupancy, a proration approach would undercut the language of the statute, which requires that obligations be defined by that particular lease. Defining obligations based on occupancy, without regard to the terms of the relevant lease(s), produces results that potentially contradict the plain language of the statute, which is why the proration approach requires the language to be "sufficiently flexible to accommodate this view[.]" *Id*. *See also Burlington N. R.R. Co. v. Dant & Russell, Inc. (In re Dant & Russell, Inc.)*, 853 F.2d 700, 707-08 (9th Cir. 1988) (showing that actual occupancy is more similar to benefit-to-the-estate analysis under § 503).

Additionally, Congress' choice of "obligations" and not "claim" in § 365(d)(3) further precludes a proration approach. *See In re Montgomery Ward*, 268 F.3d at 209 (observing that proration decisions posit some overlap between "obligations" and "claims"). "Claim" as defined by the Code, is an "unmatured right to payment;" thus, because "[u]nmatured rights to payment under a lease exist from the date the lease is executed, and no right to payment would ever arise under an unexpired lease after the order for relief[,]" obligations cannot arise before the lessee is obligated to perform. *Id*.

4. The Thirteenth Circuit erred when it held that the phrase "until such lease is assumed or rejected" is ambiguous.

The court's final grammatical analysis is also misguided, leading the court to incorrectly conclude that "the text of section 365(d)(3) is ambiguous." R. at 18. At the root of the court's confusion is whether the phrase ("until such lease is assumed or rejected") modifies "perform" or "obligations." R. at 18. The difference, according to the court, leads to two distinct outcomes, thus confirming the presence of ambiguity in the statute.

The court's analysis, however, ignores the grammatical relationship between "perform" and "obligations." In this context, "perform" is a transitive verb, requiring its object ("obligations"). As such, the verb and its object form a single semantic unit; any analysis that attempts to separate the two ignores this relationship and is therefore beyond the limits of what the language supports. Indeed, without the object, the verb is meaningless; likewise, without the verb, "obligations" has no meaning. Thus, whether the phrase beginning with "until" modifies "performs" or "obligations," the result is the same: the obligations must be performed up to the point of assumption or rejection.

B. The Thirteenth Circuit erred in its analysis of the statutory context.

The court erred in its analysis of the statutory context because it assumed its conclusion from the outset. After determining that "the text of section 365(d)(3) is ambiguous," the court looked to "sections 365(g), 502(b)(6) and 502(g), all of which clearly establish that *unperformed obligations after rejection* are treated as general unsecured claims, not administrative expenses under section 503(b)." R. at 18 (emphasis added). Despite its conclusion regarding the ambiguity of the statutory text, the court continued its analysis with the assumption that § 365(d)(3) requires prorating the rent based on occupancy. Indeed, only by assuming a proration approach can the court label the remainder of the rent due for May as an "unperformed obligation[] after rejection" rather than an obligation that arose pursuant to a lease. Further, by assuming a proration approach in its analysis of the statutory context, the court undermined its own conclusion that the text of § 365(d)(3) is ambiguous.

Additionally, a significant contextual clue is absent from the court's analysis: the function of the phrase "notwithstanding section 503(b)(1) of this title," which sheds light on how

obligations arising prior to rejection are to be understood. Contrasting the "obligations" of § 365(d)(3) against the requirements of § 503(b)(1) is revealing:

> The "notwithstanding" phrase means that the obligations in question are to be paid "in spite of" the operation of § 503(b)(1), which would otherwise limit postpetition payments to those necessary for "preserving the estate." Thus, these prerejection obligations are not to be viewed as administrative expenses, but as obligations to be "timely perform[ed]" under the lease. Moreover, since the payment of these obligations is not designed to preserve the *estate* (but rather the vulnerable *landlord*), the concepts of accrual, proration and allocation—so necessary for distinguishing between prepetition debts and administrative expenses in the context of § 503(b)(1)—are irrelevant and inapplicable under § 365(d)(3).

In re Krystal Co., 194 B.R. 161, 163 (Bankr. E.D. Tenn. 1996) (citations omitted); *see also Burival v. Roehrich (In re Burival)*, 613 F.3d 810, 812 (8th Cir. 2010) ("Rent obligations in such leases must be performed when they arise after filing and before rejection; any reduction based on subsection 503(b)(1) would violate the specific language of § 365(d)(3)"). Thus, because § 365(d)(3) operates in spite of § 503(b)(1), the "obligations" of § 365(d)(3) are not concerned with the preservation of the estate but with the fulfillment of obligations imposed by the lease agreements into which the debtor voluntarily entered, which, unlike § 503(b)(1), may "lack a corresponding benefit to the estate." *In re Ames Dep't. Stores, Inc.* 306 B.R. 43, 52 (Bankr. S.D.N.Y. 2004). *See also In re Aguado*, No.: 21-00679-5-DMW, 2021 WL 5869466, at *4 (Bankr. E.D. N.C. Dec 10, 2021) ("The language in § 365(d)(3) makes clear that the standards of § 503(b)(1) do not apply to a debtor's obligations on an unexpired lease of nonresidential real property"); *In re Florida Lifestyle Apparel, Inc.*, 221 B.R. 897, 899 (Bankr. M.D. Fla. 1997) ("The literal language of Section 365(d)(3) which requires a trustee to perform all obligations under leases of nonresidential real property, including the obligation to make timely rent payments, is interpreted to waive the requirement that the lessor must demonstrate that the estate benefited from the post-petition rental charge which would otherwise be required pursuant to Section 503(b)(1) of the Bankruptcy Code.").

C. The Thirteenth Circuit misstated the relationship between past bankruptcy practice and section 365(d)(3).

The Thirteenth Circuit held that, when it enacted § 365(d)(3), Congress "in no way" intended to deviate from the prior practice, where "courts overwhelmingly applied the proration approach[.]" R. at 19. In the court's view, were Congress to depart from past bankruptcy practice, it would have to clearly and specifically indicate its intention to do so. To support this proposition, the Thirteenth Circuit appealed to two of this Court's prior decisions. "[T]he Bankruptcy Code should not be 'read . . . to erode past bankruptcy practice absent a clear indication that Congress intended such a departure[.]" R. at 19 (quoting *Cohen v. De La Cruz*, 523 U.S. 213, 221 (1998)). Further, "'if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific,' particularly in the context of bankruptcy codifications." R. at 19 (quoting *Midlantic Nat'l Bank v. New Jersey Dep't of Envtl. Prot.*, 474 U.S. 494, 501 (1986)).

The Thirteenth Circuit, however, overlooked significant factual differences between those cases and the case at bar. In *Midlantic*, the chapter 7 trustee, on behalf of an oil waste processing facility, sought to abandon a contaminated facility pursuant to § 554(a) because it was burdensome to the estate; the state of New York objected to the abandonment, which "would threaten the public's health and safety, and would violate state and federal law." 474 U.S. at 498. Nevertheless, the abandonment was approved, leaving New York with the burden to decontaminate the facility. This Court reversed, finding that § 554 codified a judge-made practice; importantly, "where state law or general equitable principles protected certain public interests, those interests were not overridden by the judge-made abandonment power." *Id*. at 499. That is, part of the judge-made practice was "the established corollary that a trustee could not exercise his abandonment power in violation of certain state and federal laws." *Id*. at 501. Thus, specific and explicit Congressional intent to change the features of the judge-made abandonment power was necessary because, were

abandonment under § 554 to be permitted under those facts, the Court would have permitted the exercise of abandonment in violation of state and federal laws. The Court would not conclude that "Congress has granted a trustee in bankruptcy powers that would lend support to a right to abandon property in contravention of state or local laws designed to protect public health or safety." *Id*. at 502. Indeed, Congress certainly intended "that the trustee is not to have *carte blanche* to ignore nonbankruptcy law." *Id*. Therefore, under the facts of *Midlantic*, Congress would certainly have to have the clear and express intent to depart from the contours of the judge-made practice when it enacted § 554 because a departure from that practice would have allowed trustees to exercise power in bankruptcy that contravened state and federal laws.

The Thirteenth Circuit, therefore, overstated the importance of continuity between prior practice and § 365(d)(3) in this case. The *Midlantic* decision "did not rest solely, or even primarily, on a presumption of continuity with pre-Code practice." *U.S. v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 244 (1989). In fact, the Court "looked to pre-Code practice for interpretive assistance, because it appeared that a literal application of the statute would be 'demonstrably at odds with the intentions of its drafters.'" *Id*. (quoting *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982)). Thus, because a plain reading of § 365(d)(3) cannot be said to be at odds with Congress' intent as it was in *Midlantic*, the issue of continuity with prior practice does not apply with the same force as the Thirteenth Circuit suggested it does. Indeed, *Midlantic* allows courts to "determine whether Congress has expressed an intent to change the interpretation of a judicially created concept in enacting the Code." *U.S. v. Ron Pair Enterprises, Inc.*, 489 U.S. at 245. This ability, though, is not without limitation: such an exercise is only appropriate when statutory language is ambiguous and an interpretation of the language would result in a conflict with state or federal laws. *Id*.

The result under *Cohen* is similar. There, the meaning of the statute was settled by plain-meaning analysis of the text; the Court's reading of the statute was indeed "[t]he most straightforward reading[.]" *Cohen v. De La Cruz*, 523 U.S. at 218. The historical practice that predated the statute simply "reinforce[d]" the Court's reading. *Id*. at 221. That is, the examination of the historical practice, only supplementing the Court's textual analysis, added nothing new or additional. The standard articulated in *Cohen*, then, was so important because, were the Court to read the statute in a way that departed from historical practice, the result would have been absurd, namely, allowing "the debtor . . . to discharge any liability for losses caused by his fraud in excess of the amount he initially received, *leaving the creditor far short of being made whole*[,]" representing a significant departure from the intent of the fraud exception to dischargeability. *Id*. at 223 (emphasis added).

Therefore, in this case, a departure from prior bankruptcy practice would not require the same clear and specific indications from Congress as were required in *Midlantic* and *Cohen*. The Thirteenth Circuit's citation of *Midlantic* does not constitute a rule of statutory interpretation that applies the same way in every case; the importance of prior bankruptcy practice must be determined on a case by case basis. *U.S. v. Ron Pair Enterprises, Inc.*, 489 U.S. at 245. The plain meaning of § 365(d)(3) does not lead to an absurd result or contravene nonbankruptcy law. The task, then, is to implement the will of Congress expressed in the unambiguous statutory language of § 365(d)(3). *See In re Montgomery Ward*, 268 F.3d at 211-12 ("[i]t seems clear to us . . . that Congress enacted § 365(d)(3) for the purpose of altering a pre-Code practice that had created a problem for landlords of non-residential property and that our task is to determine the nature of the change based on the text chosen").

Finally, with respect to continuity between past practice and § 365(d)(3), the Thirteenth Circuit's contention (that Congress did not intend to alter the ubiquitous practice of proration) begs several questions. First, if proration was, in fact, the typical practice, then why enact a statute? If Congress did prefer a proration approach, then it could have been silent and allowed the practice to continue. Second, if Congress intended to enact a statute meant to codify the practice of proration, then why is the statue devoid of any proration language? Advocates of a proration approach bear the burden of explaining why Congress intended to codify a ubiquitous practice with a statute that makes no reference to that practice. Indeed, when Congress does enact statutes to codify past practices, the resulting statutes do so expressly. *See Norwest Bank Worthington v. Ahlers*, 485 U.S. 197, 202 (1988) (observing that the absolute priority rule, which "had its genesis in judicial construction . . . has since gained express statutory force") (citations omitted).

D. The Thirteenth Circuit erred by inquiring beyond the plain language of the statute; nevertheless, the statute's legislative history favors Touch of Grey.

Because the language and grammar of § 365(d)(3) are clear and unambiguous, the Thirteenth Circuit erred when it looked to the legislative history. *See U.S. v. Ron Pair Enterprises, Inc.*, 489 U.S. at 240-41 ("as long as the statutory scheme is coherent and consistent, there generally is no need for a court to inquire beyond the plain language of the statute"); *Toibb v. Radloff*, 501 U.S. 157, 162 (1991) (declining to examine legislative history when the statutory language was not unclear and holding that "a court appropriately may refer to a statute's legislative history to resolve statutory ambiguity"); *see also Lamie v. U.S. Tr.*, 540 U.S. at 534 (holding that "[t]he starting point in discerning congressional intent is the existing statutory text and not the predecessor statutes") (citations omitted); *Bank of America Nat. Trust and Sav. Ass'n v. 203 North LsSalle St. P'ship*, 526 U.S. 434, 444 (1999) (observing that "history is helpful" to understand "creatures of law antedating the current Bankruptcy Code" expressed in the Code with "inexact

language"). In *Ron Pair*, the Court found that the statute expressed Congress' intent "with sufficient precision so that reference to legislative history and pre-Code practice is hardly necessary." 489 U.S. at 241. Here, as in *Ron Pair*, a finding of "sufficient precision" can be established by a "natural reading" that "is also mandated by the grammatical structure of the statute." *Id*. Therefore, the plain meaning of § 365(d)(3) required no further analysis. *See Koenig Sporting Goods, Inc. v. Morse Road Co. (In re Koenig Sporting Goods, Inc)*, 229 B.R. 388, 390 (B.A.P. 6th Cir 1999) ("Writing on a clean slate, we would prudently end our analysis with this plain language application of §365(d)(3)."); *Koenig Sporting Goods, Inc. v. Morse Road Co. (In re Koenig Sporting Goods, Inc.)*, 203 F.3d 986, 988 (6th Cir. 2000) ("When a statute is unambiguous, resort to legislative history and policy considerations is improper."); *In re Montgomery Ward Holding Corp.*, 268 F.3d 205, 210 ("Finding a straightforward interpretation that produces a rational result and no other reasonable interpretation consistent with the text, we are constrained to hold that § 365(d)(3) is not ambiguous. We thus have no justification for consulting legislative history").

Even though consultation of the legislative history is inappropriate, such a consultation redounds to the benefit of Touch of Grey. In short, the legislative history of § 365(d)(3) protects landlords. "There is no dispute as to the purpose of § 365(d)(3). Congress enacted the statute to ameliorate the perceived inequities that lessors of nonresidential real property had faced during the period after a Chapter 11 filing but before assumption or rejection." *In re Stone Barn Manhattan LLC*, 398 B.R. 359, 361 (Bankr. S.D.N.Y. 2008); *see also In re Montgomery Ward*, 268 F.3d at 210 ("[v]irtually all courts have agreed that [§ 365(d)(3)] was intended to alleviate the . . . burdens of landlords by requiring timely compliance with the terms of the lease"). Prior to the enactment of § 365(d)(3), "the landlord was in an awkward spot during the interval between the entry of the

tenant into bankruptcy and the tenant's decision to assume or reject the unexpired lease." *In re Handy Andy Home Improvement Ctrs.*, 144 F.3d at 1128. This "awkward spot" arose because "the landlord was being forced to deal with his bankrupt tenant on whatever terms the bankruptcy court imposed because he could not evict him." *Id*. Thus, § 365(d)(3) was passed by Congress "*[t]o give relief to landlords[.]*" *Id*. (emphasis added). The legislative history is explicit regarding the "awkward spot" into which landlords were placed: a landlord was "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 re Montgomery Ward*, 268 F.3d at 210 (quoting H.R. Rep. No. 882, 95th Cong., 2d Sess.1984).

Further, the legislative history reveals that § 365(d)(3) "was designed to protect the landlord rather than the estate by disarming § 503(b)(1)'s practices and procedures[.]" *In re Krystal Co.*, 194 B.R. at 163; *see also Burival v. Creditor Comm. (In re Burival)*, 406 B.R. 548, 553 (B.A.P. 8th Cir. 2009) (holding that Congress intended to provide "special treatment for non-residential landlords"). Indeed, the relevant portions of the legislative history

> avoid the confusing "arising from and after" language of § 365(d)(3) and significantly make no mention of the concepts of accrual or proration of charges. There is no mention of "actual or necessary" expenses as might be expected if § 503(b)(1) were still operative. There is only the categorical "timely performance requirement" as an antidote to the problems "caused ... by the administration of the bankruptcy code." When read in conjunction with the statute as it must be, this "problem" language can only refer to § 503(b)(1), for that is the subsection specifically overridden by the amendment. Section 503(b)(1)'s essential concepts, accrual and proration, cannot be shown to have survived in § 365(d)(3), where they are unnecessary on a plain reading of the statute, and it makes no sense to force them.

In re Krystal Co., 194 B.R. at 164. Therefore, the plain language of the statute and the legislative history entitle Touch of Grey to the full amount of May's rent.

E. Principles of Equity support a ruling in favor of Touch of Grey.

The Thirteenth Circuit mischaracterized Touch of Grey's receipt of the full amount of

May's rent: "the proration approach carefully adheres to one of the fundamental tenets of the Bankruptcy Code by circumscribing any windfall to the landlord that could otherwise arise under the billing date approach." R. at 20; *see also In re GCP CT School Acquisition, LLC*, 443 B.R. 243, 254-55 (Bankr. D. Mass. 2010) ("[a]llowing landlords to recover for items of rent which are billed during the postpetition, prerejection period, but which represent payment for services rendered by the landlord outside this time period, would grant landlords a windfall payment").

A "windfall" is an *unanticipated* benefit. *Windfall*, *Black's Law Dictionary* (11th ed. 2019). To award Touch of Grey the full rent for May is *not* to grant Touch of Grey a windfall payment: Touch of Grey has ordered its affairs with the expectation that the debtor will honor the obligations to which it agreed under the lease. Accordingly, Touch of Grey anticipates this income so that it can, in turn, honor its obligations with its creditors. Therefore, "windfall" language is inapposite and mischaracterizes the issue. "Windfall" language is especially inaccurate give the purpose for which § 365(d)(3) was enacted, namely, to provide protection for landlords when they are forced to deal with insolvent tenants.

Equitable concerns also favor an award for Touch of Grey given the debtor's unilateral control over the date of rejection. The debtor could have exercised its ability to avoid an additional month of rent payment by rejecting the lease at the end of the prior month, but declined to exercise that ability; therefore, the debtor is responsible for the outcome. Indeed, "[t]he debtor alone was in the position to control . . . [the landlord's] entitlement of payment of rent[.]" *In re Koenig*, 203 F.3d at 989.

The Thirteenth Circuit dismissed this argument in a footnote, finding the "rationale to be misguided." R. at 20 n.8. The court cited two cases for support, neither of which adequately addresses the merits of the argument. Nevertheless, the so-called "billing approach" is entirely

predictable, allowing parties to order their affairs accordingly. If a debtor wishes to not pay an entire month's rent, it can reject the lease before its obligations become due under the lease; if the debtor chooses to occupy for a day or two, it pays for the entire month. *HA-LO Indus., Inc. v. CenterPoint Props. Tr.*, 342 F.3d 794, 800 (7th Cir. 2003). Alternatively, a proration approach only allows the debtor/tenant to plan, providing no protection for the landlord, who stops receiving payment at the moment decided by the debtor. Courts advocating for a proration approach have suggested that such an approach "allows both landlords and tenants to get what they bargained for – current service for current payment – at the rate agreed to in the lease[.]" *In re Stone Barn Manhattan LLC*, 398 B.R. at 364. This approach, however, misconstrues the nature of the bargain between landlord and tenant: the former ordered her affairs around the expectation of income from the property for the term stated in the lease. The tenant's financial situation has frustrated those expectations, so the landlord will *not* receive that for which she bargained. A billing date approach is more equitable because, while the landlord will still not receive the full benefit of the bargain, she will at least receive the anticipated income through the end of a given month, thereby reducing her losses. Such an approach reduces the inequity that results from the debtor/tenant having unilateral control over the moment of rejection.

CONCLUSION

Allowing a trade creditor to use the value of its administrative expense under § 547(c)(4) does not result in a windfall or permit the creditor to double dip. Rather, it ensures trade creditors are granted the full benefit Congress intended to give them when it enacted § 547(c)(4) and § 503(b)(9). The consistent reading and application of § 547(c)(4) indicates post-petition transfers should be excluded from the subsequent new value defense calculus. Therefore, this Court should allow Touch of Grey to use the value of its administrative expense under § 547(c)(4) to offset its preference liability.

Additionally, this case presents this Court an opportunity to affirm the intent of Congress expressed in § 365(d)(3). By ruling in favor of Touch of Grey and awarding it the entire amount of rent due for May, this Court will extend to Touch of Grey the protection Congress sought to provide for landlords unwittingly caught up in bankruptcy proceedings. While the debtor afforded itself the protection provided to it by the Bankruptcy Code, a ruling in favor of Touch of Grey will ensure that Touch of Grey's interests are also protected.

WHEREFORE, PREMISES CONSIDERED, Petitioner respectfully prays that this Court reverse the decision of the Thirteenth Circuit.

Respectfully Submitted,

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Counsel for Petitioner

APPENDIX A: Selected Sections from Title 11 of the U.S. Code.

Section 365. Executory contracts and unexpired leases

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

(b)(1) If there has been a default in an executory contract or unexpired lease of the debtor, the trustee may not assume such contract or lease unless, at the time of assumption of such contract or lease, the trustee—

> (A) cures, or provides adequate assurance that the trustee will promptly cure, such default other than a default that is a breach of a provision relating to the satisfaction of any provision (other than a penalty rate or penalty provision) relating to a default arising from any failure to perform nonmonetary obligations under an unexpired lease of real property, if it is impossible for the trustee to cure such default by performing nonmonetary acts at and after the time of assumption, except that if such default arises from a failure to operate in accordance with a nonresidential real property lease, then such default shall be cured by performance at and after the time of assumption in accordance with such lease, and pecuniary losses resulting from such default shall be compensated in accordance with the provisions of this paragraph;
>
> (B) compensates, or provides adequate assurance that the trustee will promptly compensate, a party other than the debtor to such contract or lease, for any actual pecuniary loss to such party resulting from such default; and
>
> (C) provides adequate assurance of future performance under such contract or lease.

(2) Paragraph (1) of this subsection does not apply to a default that is a breach of a provision relating to—

> (A) the insolvency or financial condition of the debtor at any time before the closing of the case;
>
> (B) the commencement of a case under this title;
>
> (C) the appointment of or taking possession by a trustee in a case under this title or a custodian before such commencement; or
>
> (D) the satisfaction of any penalty rate or penalty provision relating to a default arising from any failure by the debtor to perform nonmonetary obligations under the executory contract or unexpired lease.

(3) For the purposes of paragraph (1) of this subsection and paragraph (2)(B) of subsection (f), adequate assurance of future performance of a lease of real property in a shopping center includes adequate assurance—

> (A) of the source of rent and other consideration due under such lease, and in the case of an assignment, that the financial condition and operating performance of the proposed assignee and its guarantors, if any, shall be similar to the financial condition and operating performance of the debtor and its guarantors, if any, as of the time the debtor became the lessee under the lease;
>
> (B) that any percentage rent due under such lease will not decline substantially;
>
> (C) that assumption or assignment of such lease is subject to all the provisions thereof, including (but not limited to) provisions such as a radius, location, use, or exclusivity provision, and will not breach any such provision contained in any other lease, financing agreement, or master agreement relating to such shopping center; and
>
> (D) that assumption or assignment of such lease will not disrupt any tenant mix or balance in such shopping center.

(4) Notwithstanding any other provision of this section, if there has been a default in an unexpired lease of the debtor, other than a default of a kind specified in paragraph (2) of this subsection, the trustee may not require a lessor to provide services or supplies incidental to such lease before assumption of such lease unless the lessor is compensated under the terms of such lease for any services and supplies provided under such lease before assumption of such lease.

(c) The trustee may not assume or assign any executory contract or unexpired lease of the debtor, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties, if—

> (1)(A) applicable law excuses a party, other than the debtor, to such contract or lease from accepting performance from or rendering performance to an entity other than the debtor or the debtor in possession, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties; and
>
> (B) such party does not consent to such assumption or assignment; or
>
> (2) such contract is a contract to make a loan, or extend other debt financing or financial accommodations, to or for the benefit of the debtor, or to issue a security of the debtor; or
>
> (3) such lease is of nonresidential real property and has been terminated under applicable nonbankruptcy law prior to the order for relief.

(d)(1) In a case under chapter 7 of this title, if the trustee does not assume or reject an executory contract or unexpired lease of residential real property or of personal property of the debtor within 60 days after the order for relief, or within such additional time as the court, for cause, within such 60-day period, fixes, then such contract or lease is deemed rejected.

(2) In a case under chapter 9, 11, 12, or 13 of this title, 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, 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) for the purpose of section 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) The trustee shall timely perform all of the obligations of the debtor, except those specified in section 365(b)(2), first arising from or after 60 days after the order for relief in a case under chapter 11 of this title under an unexpired lease of personal property (other than personal property leased to an individual primarily for personal, family, or household purposes), until such lease is assumed or rejected notwithstanding section 503(b)(1) of this title, unless the court, after notice and a hearing and based on the equities of the case, orders otherwise with respect to the obligations or timely performance thereof. This subsection shall not be deemed to affect the trustee's obligations under the provisions of subsection (b) or (f). Acceptance of any such performance does not constitute waiver or relinquishment of the lessor's rights under such lease or under this title.

(e)(1) Notwithstanding a provision in an executory contract or unexpired lease, or in applicable law, an executory contract or unexpired lease of the debtor may not be terminated or modified, and any right or obligation under such contract or lease may not be terminated or modified, at any time after the commencement of the case solely because of a provision in such contract or lease that is conditioned on—

> (A) the insolvency or financial condition of the debtor at any time before the closing of the case;
>
> (B) the commencement of a case under this title; or
>
> (C) the appointment of or taking possession by a trustee in a case under this title or a custodian before such commencement.

(2) Paragraph (1) of this subsection does not apply to an executory contract or unexpired lease of the debtor, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties, if—

> (A)(i) applicable law excuses a party, other than the debtor, to such contract or lease from accepting performance from or rendering performance to the trustee or to an assignee of such contract or lease, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties; and
>
> (ii) such party does not consent to such assumption or assignment; or
>
> (B) such contract is a contract to make a loan, or extend other debt financing or financial accommodations, to or for the benefit of the debtor, or to issue a security of the debtor.

(f)(1) Except as provided in subsections (b) and (c) of this section, notwithstanding a provision in an executory contract or unexpired lease of the debtor, or in applicable law, that prohibits, restricts, or conditions the assignment of such contract or lease, the trustee may assign such contract or lease under paragraph (2) of this subsection.

(2) The trustee may assign an executory contract or unexpired lease of the debtor only if—

> (A) the trustee assumes such contract or lease in accordance with the provisions of this section; and
>
> (B) adequate assurance of future performance by the assignee of such contract or lease is provided, whether or not there has been a default in such contract or lease.

(3) Notwithstanding a provision in an executory contract or unexpired lease of the debtor, or in applicable law that terminates or modifies, or permits a party other than the debtor to terminate or modify, such contract or lease or a right or obligation under such contract or lease on account of an assignment of such contract or lease, such contract, lease, right, or obligation may not be terminated or modified under such provision because of the assumption or assignment of such contract or lease by the trustee.

(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)(1)(A) If the trustee rejects an unexpired lease of real property under which the debtor is the lessor and—

> (i) if the rejection by the trustee amounts to such a breach as would entitle the lessee to treat such lease as terminated by virtue of its terms, applicable nonbankruptcy law, or any agreement made by the lessee, then the lessee under such lease may treat such lease as terminated by the rejection; or

(ii) if the term of such lease has commenced, the lessee may retain its rights under such lease (including rights such as those relating to the amount and timing of payment of rent and other amounts payable by the lessee and any right of use, possession, quiet enjoyment, subletting, assignment, or hypothecation) that are in or appurtenant to the real property for the balance of the term of such lease and for any renewal or extension of such rights to the extent that such rights are enforceable under applicable nonbankruptcy law.

(B) If the lessee retains its rights under subparagraph (A)(ii), the lessee may offset against the rent reserved under such lease for the balance of the term after the date of the rejection of such lease and for the term of any renewal or extension of such lease, the value of any damage caused by the nonperformance after the date of such rejection, of any obligation of the debtor under such lease, but the lessee shall not have any other right against the estate or the debtor on account of any damage occurring after such date caused by such nonperformance.

(C) The rejection of a lease of real property in a shopping center with respect to which the lessee elects to retain its rights under subparagraph (A)(ii) does not affect the enforceability under applicable nonbankruptcy law of any provision in the lease pertaining to radius, location, use, exclusivity, or tenant mix or balance.
(D) In this paragraph, "lessee" includes any successor, assign, or mortgagee permitted under the terms of such lease.

(2)(A) If the trustee rejects a timeshare interest under a timeshare plan under which the debtor is the timeshare interest seller and—

(i) if the rejection amounts to such a breach as would entitle the timeshare interest purchaser to treat the timeshare plan as terminated under its terms, applicable nonbankruptcy law, or any agreement made by timeshare interest purchaser, the timeshare interest purchaser under the timeshare plan may treat the timeshare plan as terminated by such rejection; or

(ii) if the term of such timeshare interest has commenced, then the timeshare interest purchaser may retain its rights in such timeshare interest for the balance of such term and for any term of renewal or extension of such timeshare interest to the extent that such rights are enforceable under applicable nonbankruptcy law.

(B) If the timeshare interest purchaser retains its rights under subparagraph (A), such timeshare interest purchaser may offset against the moneys due for such timeshare interest for the balance of the term after the date of the rejection of such timeshare interest, and the term of any renewal or extension of such timeshare interest, the value of any damage caused by the nonperformance after the date of such rejection, of any obligation of the debtor under such timeshare plan, but the timeshare interest purchaser shall not have any right against the estate or the debtor on account of any damage occurring after such date caused by such nonperformance.

(i)(1) If the trustee rejects an executory contract of the debtor for the sale of real property or for the sale of a timeshare interest under a timeshare plan, under which the purchaser is in possession,

such purchaser may treat such contract as terminated, or, in the alternative, may remain in possession of such real property or timeshare interest.

(2) If such purchaser remains in possession—

> (A) such purchaser shall continue to make all payments due under such contract, but may,1 offset against such payments any damages occurring after the date of the rejection of such contract caused by the nonperformance of any obligation of the debtor after such date, but such purchaser does not have any rights against the estate on account of any damages arising after such date from such rejection, other than such offset; and
>
> (B) the trustee shall deliver title to such purchaser in accordance with the provisions of such contract, but is relieved of all other obligations to perform under such contract.

(j) A purchaser that treats an executory contract as terminated under subsection (i) of this section, or a party whose executory contract to purchase real property from the debtor is rejected and under which such party is not in possession, has a lien on the interest of the debtor in such property for the recovery of any portion of the purchase price that such purchaser or party has paid.

(k) Assignment by the trustee to an entity of a contract or lease assumed under this section relieves the trustee and the estate from any liability for any breach of such contract or lease occurring after such assignment.

(l) If an unexpired lease under which the debtor is the lessee is assigned pursuant to this section, the lessor of the property may require a deposit or other security for the performance of the debtor's obligations under the lease substantially the same as would have been required by the landlord upon the initial leasing to a similar tenant.

(m) For purposes of this section 365 and sections 541(b)(2) and 362(b)(10), leases of real property shall include any rental agreement to use real property.

(n)(1) If the trustee rejects an executory contract under which the debtor is a licensor of a right to intellectual property, the licensee under such contract may elect—

> (A) to treat such contract as terminated by such rejection if such rejection by the trustee amounts to such a breach as would entitle the licensee to treat such contract as terminated by virtue of its own terms, applicable nonbankruptcy law, or an agreement made by the licensee with another entity; or
>
> (B) to retain its rights (including a right to enforce any exclusivity provision of such contract, but excluding any other right under applicable nonbankruptcy law to specific performance of such contract) under such contract and under any agreement supplementary to such contract, to such intellectual property (including any embodiment of such intellectual property to the extent protected by applicable nonbankruptcy law), as such rights existed immediately before the case commenced, for—

(i) the duration of such contract; and

(ii) any period for which such contract may be extended by the licensee as of right under applicable nonbankruptcy law.

(2) If the licensee elects to retain its rights, as described in paragraph (1)(B) of this subsection, under such contract—

(A) the trustee shall allow the licensee to exercise such rights;

(B) the licensee shall make all royalty payments due under such contract for the duration of such contract and for any period described in paragraph (1)(B) of this subsection for which the licensee extends such contract; and

(C) the licensee shall be deemed to waive—

(i) any right of setoff it may have with respect to such contract under this title or applicable nonbankruptcy law; and

(ii) any claim allowable under section 503(b) of this title arising from the performance of such contract.

(3) If the licensee elects to retain its rights, as described in paragraph (1)(B) of this subsection, then on the written request of the licensee the trustee shall—

(A) to the extent provided in such contract, or any agreement supplementary to such contract, provide to the licensee any intellectual property (including such embodiment) held by the trustee; and

(B) not interfere with the rights of the licensee as provided in such contract, or any agreement supplementary to such contract, to such intellectual property (including such embodiment) including any right to obtain such intellectual property (or such embodiment) from another entity.

(4) Unless and until the trustee rejects such contract, on the written request of the licensee the trustee shall—

(A) to the extent provided in such contract or any agreement supplementary to such contract—

(i) perform such contract; or

(ii) provide to the licensee such intellectual property (including any embodiment of such intellectual property to the extent protected by applicable nonbankruptcy law) held by the trustee; and

(B) not interfere with the rights of the licensee as provided in such contract, or any agreement supplementary to such contract, to such intellectual property (including such embodiment), including any right to obtain such intellectual property (or such embodiment) from another entity.

(o) In a case under chapter 11 of this title, the trustee shall be deemed to have assumed (consistent with the debtor's other obligations under section 507), and shall immediately cure any deficit under, any commitment by the debtor to a Federal depository institutions regulatory agency (or predecessor to such agency) to maintain the capital of an insured depository institution, and any claim for a subsequent breach of the obligations thereunder shall be entitled to priority under section 507. This subsection shall not extend any commitment that would otherwise be terminated by any act of such an agency.

(p)(1) If a lease of personal property is rejected or not timely assumed by the trustee under subsection (d), the leased property is no longer property of the estate and the stay under section 362(a) is automatically terminated.

(2)(A) If the debtor in a case under chapter 7 is an individual, the debtor may notify the creditor in writing that the debtor desires to assume the lease. Upon being so notified, the creditor may, at its option, notify the debtor that it is willing to have the lease assumed by the debtor and may condition such assumption on cure of any outstanding default on terms set by the contract.

(B) If, not later than 30 days after notice is provided under subparagraph (A), the debtor notifies the lessor in writing that the lease is assumed, the liability under the lease will be assumed by the debtor and not by the estate.

(C) The stay under section 362 and the injunction under section 524(a)(2) shall not be violated by notification of the debtor and negotiation of cure under this subsection.

(3) In a case under chapter 11 in which the debtor is an individual and in a case under chapter 13, if the debtor is the lessee with respect to personal property and the lease is not assumed in the plan confirmed by the court, the lease is deemed rejected as of the conclusion of the hearing on confirmation. If the lease is rejected, the stay under section 362 and any stay under section 1301 is automatically terminated with respect to the property subject to the lease.

Section 503. Allowance of administrative expenses

(a) An entity may timely file a request for payment of an administrative expense, or may tardily file such request if permitted by the court for cause.

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

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

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

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

(B) any tax—

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

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

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

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

(2) compensation and reimbursement awarded under section 330(a) of this title;

(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;

(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, in making a substantial contribution in a case under chapter 9 or 11 of this title;

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

(F) a member of a committee appointed under section 1102 of this title, 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, 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;

(7) with respect to a nonresidential real property lease previously assumed under section 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);

(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) 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; 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) Notwithstanding subsection (b), there shall neither be allowed, nor paid—

(1) a transfer made to, or an obligation incurred for the benefit of, an insider of the debtor for the purpose of inducing such person to remain with the debtor's business, absent a finding by the court based on evidence in the record that—

(A) the transfer or obligation is essential to retention of the person because the individual has a bona fide job offer from another business at the same or greater rate of compensation;

(B) the services provided by the person are essential to the survival of the business; and

(C) either—

(i) the amount of the transfer made to, or obligation incurred for the benefit of, the person is not greater than an amount equal to 10 times the amount of the mean transfer or obligation of a similar kind given to nonmanagement employees for any purpose during the calendar year in which the transfer is made or the obligation is incurred; or

(ii) if no such similar transfers were made to, or obligations were incurred for the benefit of, such nonmanagement employees during such calendar year, the amount of the transfer or obligation is not greater than an amount equal to 25 percent of the amount of any similar transfer or obligation made to or incurred for the benefit of such insider for any purpose during the calendar year before the year in which such transfer is made or obligation is incurred;

(2) a severance payment to an insider of the debtor, unless—

(A) the payment is part of a program that is generally applicable to all full-time employees; and

(B) the amount of the payment is not greater than 10 times the amount of the mean severance pay given to nonmanagement employees during the calendar year in which the payment is made; or

(3) other transfers or obligations that are outside the ordinary course of business and not justified by the facts and circumstances of the case, including transfers made to, or obligations incurred for the benefit of, officers, managers, or consultants hired after the date of the filing of the petition.

Section 547. Preferences

(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;

(B) the transfer had not been made; and

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

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

(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;

(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 [originally "$5,000", adjusted effective April 1, 2019]

(d) The trustee may avoid a transfer of an interest in property of the debtor transferred to or for the benefit of a surety to secure reimbursement of such a surety that furnished a bond or other obligation to dissolve a judicial lien that would have been avoidable by the trustee under subsection (b) of this section. The liability of such surety under such bond or obligation shall be discharged to the extent of the value of such property recovered by the trustee or the amount paid to the trustee.

(e)(1) For the purposes of this section—

(A) a transfer of real property other than fixtures, but including the interest of a seller or purchaser under a contract for the sale of real property, is perfected when a bona fide purchaser of such property from the debtor against whom applicable law permits such transfer to be perfected cannot acquire an interest that is superior to the interest of the transferee; and

(B) a transfer of a fixture or property other than real property is perfected when a creditor on a simple contract cannot acquire a judicial lien that is superior to the interest of the transferee.

(2) For the purposes of this section, except as provided in paragraph (3) of this subsection, a transfer is made—

(A) at the time such transfer takes effect between the transferor and the transferee, if such transfer is perfected at, or within 30 days after, such time, except as provided in subsection (c)(3)(B);

(B) at the time such transfer is perfected, if such transfer is perfected after such 30 days; or

(C) immediately before the date of the filing of the petition, if such transfer is not perfected at the later of—

(i) the commencement of the case; or

(ii) 30 days after such transfer takes effect between the transferor and the transferee.

(3) For the purposes of this section, a transfer is not made until the debtor has acquired rights in the property transferred.

(f) For the purposes of this section, the debtor is presumed to have been insolvent on and during the 90 days immediately preceding the date of the filing of the petition.

(g) For the purposes of this section, the trustee has the burden of proving the avoidability of a transfer under subsection (b) of this section, and the creditor or party in interest against whom recovery or avoidance is sought has the burden of proving the nonavoidability of a transfer under subsection (c) of this section.

(h) The trustee may not avoid a transfer if such transfer was made as a part of an alternative repayment schedule between the debtor and any creditor of the debtor created by an approved nonprofit budget and credit counseling agency.

(i) If the trustee avoids under subsection (b) a transfer made between 90 days and 1 year before the date of the filing of the petition, by the debtor to an entity that is not an insider for the benefit of a creditor that is an insider, such transfer shall be considered to be avoided under this section only with respect to the creditor that is an insider.

(j)(1) In this subsection:

(A) The term "covered payment of rental arrearages" means a payment of arrearages that-
-

(i) is made in connection with an agreement or arrangement—

(I) between the debtor and a lessor to defer or postpone the payment of rent and other periodic charges under a lease of nonresidential real property; and

(II) made or entered into on or after March 13, 2020;

(ii) does not exceed the amount of rental and other periodic charges agreed to under the lease of nonresidential real property described in clause (i)(I) before March 13, 2020; and

(iii) does not include fees, penalties, or interest in an amount greater than the amount of fees, penalties, or interest—

(I) scheduled to be paid under the lease of nonresidential real property described in clause (i)(I); or

(II) that the debtor would owe if the debtor had made every payment due under the lease of nonresidential real property described in clause (i)(I) on time and in full before March 13, 2020.

(B) The term "covered payment of supplier arrearages" means a payment of arrearages that—

(i) is made in connection with an agreement or arrangement—

(I) between the debtor and a supplier of goods or services to defer or postpone the payment of amounts due under an executory contract for goods or services; and

(II) made or entered into on or after March 13, 2020;

(ii) does not exceed the amount due under the executory contract described in clause (i)(I) before March 13, 2020; and

(iii) does not include fees, penalties, or interest in an amount greater than the amount of fees, penalties, or interest—

(I) scheduled to be paid under the executory contract described in clause (i)(I); or

(II) that the debtor would owe if the debtor had made every payment due under the executory contract described in clause (i)(I) on time and in full before March 13, 2020.

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

(A) a covered payment of rental arrearages; or

(B) a covered payment of supplier arrearages.