Team 5

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

BRIEF FOR THE PETITIONER

TEAM 5
COUNSEL FOR PETITIONER

JANUARY 20, 2022

QUESTIONS PRESENTED

I. Under 11 U.S.C. § 547(c)(4), is a creditor entitled to assert a new value defense where that creditor has been paid for such new value post-petition, pursuant to 11 U.S.C. § 503(b)(9), when the other section 547 preference liability calculations do not consider post-petition payments and to do so runs contrary to the policy goals of section 547 and the Bankruptcy Code as a whole?

II. Under 11 U.S.C. § 365(d)(3), must a trustee timely perform the obligations of a debtor when the debtor has failed to pay rent due prior to the rejection of an unexpired non-residential real property lease where the plain language, legislative history, and policy implications of the relevant statute all favor timely performance?

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF CONTENTS II

TABLE OF AUTHORITIES IV

OPINIONS BELOW VII

STATEMENT OF JURISDICTION VII

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS VII

STATEMENT OF THE CASE 1

I. FACTUAL HISTORY 1

A. Terrapin Station and Touch of Grey Roasters Enter Into Franchising Agreement. 1
B. The Debtor files a chapter 11 bankruptcy petition. 3
C. Debtor files a motion to make a "critical vendor" payment to Touch of Grey. 4
D. Debtor permanently ceases operations and rejects the Lease. 5

II. PROCEDURAL HISTORY 6

STANDARD OF REVIEW 6

SUMMARY OF THE ARGUMENT 7

ARGUMENT 9

I. THE THIRTEENTH CIRCUIT ERRED IN DENYING TOUCH OF GREY THE ABILITY TO REDUCE ITS PREFERENCE EXPOSURE BY THE VALUE OF GOODS DELIVERED ON CREDIT AFTER THE PREFERENTIAL TRANSFER BECAUSE THE GOODS REMAINED UNPAID AT THE TIME THE BANKRUPTCY PETITION WAS FILED. 10

A. Examination of 11 U.S.C. § 547(c)(4), in the context of the preferences section in its entirety, shows that post-petition payments to a creditor should not effect that creditor's new value defense because the other preference liability calclulations in section 547 do not consider post-petition events. *11*

1. The Hypothetical Liquidation Test is performed as of the date the petition was filed. 13
2. Under 11 U.S.C. § 547(c)(5), preference liability calculations for floating lien creditors do not consider post-petition events. 17
3. Advances of new value that occur after the petition date are not considered in a creditor's new value defense. 15
4. The statute of limitations in a preference avoidance action begins to toll as of the date the petition was filed. 16

B. Cutting off the preference analysis at the petition date is in line with the policy goals encouraging creditors to continue working with troubled businesses and ensuring fair treatment among similarly situated creditors. *18*

1. 11 U.S.C. § 547(c)(4) was designed to encourage creditors to aid a debtor on the eve of bankruptcy. 19
2. A common policy objective woven throughout the entire Bankruptcy Code is equal treatment of creditors. 20

II. THE THIRTEENTH CIRCUIT INCORRECTLY ADOPTED AND APPLIED THE "PRORATION APPROACH" WHICH FAILS TO COMPORT WITH THE PRINCIPLES OF STATUTORY INTERPRETATION. 21

A. The plain meaning of 11 U.S.C. § 365(d)(3) unambiguously dictates application of the Billing Date Approach, which precludes the refusal to pay the full monthly rent amount for the month of May. *22*

B. The legislative history of 365(d)(3) also supports the Billing Date Approach, which requires the trustee to pay the rent in full. *28*

CONCLUSION 30

TABLE OF AUTHORITIES

Cases **Page(s)**

Crandon v. United States,
494 U.S. 152 (1990) 18

Fla. Dep't of Revenue v. Piccadilly Cafeterias, Inc.,
554 U.S. 33 (2008) 16

Grogan v. Garner,
498 U.S. 279 (1991) 18

HA-LO Indus., Inc. v. Centerpoint Props. Tr.,
342 F.3d 794 (7th Cir. 2003) 24, 26

In re Almarc Mfg.,
62 B.R. 684 (Bankr. N.D. Ill. 1986) 19

In re American International Airways, Inc.,
56 B.R. 551 (Bankr. E.D. Pa. 1986) 10, 19

In re At Home Corp.,
392 F.3d 1064 (9th Cir. 2004) 28

In re Bellanca Aircraft Corp.,
850 F.2d 1275 (8th Cir. 1988) 17

In re Braniff, Inc.,
154 B.R. 773 (Bankr. M.D. Fla. 1993) 11, 19

In re Murray, Inc.,
04-13611, 2007 Bankr. LEXIS 4738, at *4–5 (Bankr. M.D. Tenn. June 6, 2007) 19

In re Burival,
613 F.3d 810 (8th Cir. 2010) 24

In re Burvial,
406 B.R. 548 (8th Cir. 2009) 23, 28

In re Commissary Operations, Inc.,
421 B.R. 873 (Bankr. M.D. Tenn. 2010) 19

In re Energy Coop., Inc.,
130 B.R. 781 (Bankr. N.D. Ill. 1991) 10

In re Falcon Prods.,
381 B.R. 543 (B.A.P. 8th Cir. 2007) 13

In re Friedman's Inc.,
738 F.3d 547 (3d Cir. 2013) 17

In re Koenig Sporting Goods, Inc.,
203 F.3d 986 (6th Cir. 2000) 24, 25, 26

In re Krystal Co.,
194 B.R. 161 (Bankr. E.D. Tenn. 1996) 25
In re Montgomery Ward Holding Corp.,
268 F.3d 205 (3d Cir. 2001) 24, 29
In re Paula Saker & Co., Inc.,
53 B.R. 630 (Bankr. S.D.N.Y. 1985) 10
In re R.H. Macy & Co., Inc.,
1994 WL 482948 (S.D.N.Y. Feb 23, 1994) 21
In re Schabel,
338 B.R. 376 (Bankr. E.D. Wis. 2005) 18
In re Tenna Corp.,
801 F.2d 819 (6th Cir. 1986) 13, 14
Johnson v. Home State Bank,
501 U.S. 78 (1991) 18
Kawaauhau v. Geiger,
523 U.S. 57 (1998) 18
Lamie v. U.S. Trustee,
540 U.S. 526 (2004) 23, 24, 27
N.Y. Cty. Nat'l Bank v. Massey,
192 U.S. 138 (1904) 24
Palmer Clay Prods. Co. v. Brown,
297 U.S. 227 (1936) 13
Pioneer Inv. Serv. Co. v. Brunswick Assoc. Ltd. P'ship,
507 U.S. 380 (1993) 22
Puerto Rico v. Franklin Cal. Tax-Free Tr.,
136 U.S. 1938, 1946 (2016) 27
U.S. v. Ron Pair Enters., Inc.,
489 U.S. 235 (1989) 24, 27
Union Bank v. Wolas,
502 U.S. 151 (1991) 20
United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs.,
484 U.S. 365 (1988) 11, 12

Statutes

11 U.S.C. 503(b)(9) 5–8, 17, 19, 20
11 U.S.C. § 365(d)(2) 28

11 U.S.C. § 365(d)(3) 21–30
11 U.S.C. § 503(b)(1)(A) 28
11 U.S.C. § 546(a) 15
11 U.S.C. § 547 (b)(4)(a) 11
11 U.S.C. § 547(b)(5) 13
11 U.S.C. § 547(c)(4) 11, 12, 19
11 U.S.C. § 365(a) 5
11 U.S.C. §365(b)(2) 8, 22
11 U.S.C. § 503(b)(1) 8, 22, 23

OPINIONS BELOW

The United State Court of Appeals for Thirteenth Circuit's decision is available at No. 20-0803 and reprinted at Record 2. The District of Moot Bankruptcy Court decided in favor of Casey Jones, Chapter 7 Trustee for the Debtor, Terrapin Station, LLC, on both issues. The Thirteenth Circuit Court of Appeals affirmed the decision of the Bankruptcy Court in favor of Casey Jones, Chapter 7 Trustee.

STATEMENT OF JURISDICTION

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

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

This action implicates several provisions from Title 11 of the United States Code including 11 U.S.C. § 547(c)(4); 11 U.S.C. 503(b)(9); 11 U.S.C. § 365(d)(3). The aforementioned provisions are restated in the Appendix.

The relevant portion of 11 U.S.C. § 547(c)(4) reads:

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

The relevant portion of 11 U.S.C. § 503(b)(9) reads:

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

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

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

subsection shall not be deemed to affect the trustee's obligations under the provisions of subsection (b) or (f) of this section. Acceptance of any such performance does not constitute waiver or relinquishment of the lessor's rights under such lease or under this title.

> **(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).

STATEMENT OF THE CASE

This appeal arises out of the Respondent's attempt to shift the preference analysis to include post-petition events and unfairly increase a creditor's preference liability. The ruling below runs contrary to an overarching policy goal of the Bankruptcy Code by allowing the Respondent to jeopardize the fair treatment of creditors. Further, the Respondent attempts to sidestep the procedural requirements of the Bankruptcy Code codified in section 365(d)(3) by looking past the statutory language which states that the trustee must pay any obligations of the debtor that arise prior to the rejection of the lease. Accordingly, the bankruptcy proceeding underlying this appeal threatens to jeopardize the Petitioner's rights as a landlord.

I. FACTUAL HISTORY

A. Terrapin Station and Touch of Grey Roasters Enter Into a Franchising Agreement.

In 2005, William Tell (“Tell”) founded Respondent Terrapin Station, LLC (the “Debtor”) as its sole member to establish a coffeehouse. R. at 3. For several years, the Debtor operated a successful independent coffeehouse in Terrapin, Moot. R. at 3. Touch of Grey Roasters, Inc. (“Touch of Grey”) is an international coffee company and coffeehouse chain with 1,900 coffeehouses worldwide and is headquartered in San Francisco, California. R. at 3.

In 2017, Touch of Grey opened a series of “neighborhood coffeehouses” to be franchised with owners of existing independent coffeehouses. R. at 4. These coffeehouses are not branded as Touch of Grey stores and sell a new line of Touch of Grey coffee products called “Dark Star.” R. at 4. That same year, the Debtor agreed to franchise a Touch of Grey neighborhood coffeehouse in Terrapin. R. at 4. The neighborhood coffeehouses would depart from traditional coffeehouse operations by offering a more expansive menu, including alcohol served at nighttime, and live music and poetry readings. R. at 4.

To facilitate the opening of the coffeehouse, Touch of Grey purchased a warehouse space at 5877 Shakedown Street (“the Premises”), in the downtown entertainment district of Terrapin, to be leased to the Debtor. R. at 4. On July 1, 2018, Touch of Grey and the Debtor entered into two agreements: a lease agreement for the Premises and a franchise agreement. R. at 4. The lease agreement (“the Lease”) was a twenty-year, triple-net lease that required the Debtor to pay monthly rent payments of $25,000, due in advance, on the first day of each month. R. at 4. The franchise agreement stipulated that the Debtor would exclusively sell “Dark Star” products purchased from Touch of Grey. R. at 4. On December 1, 2018, the Debtor opened the new “Terrapin Station Coffeehouse” and simultaneously closed its original coffeehouse. R. at 5.

B. The Debtor Files a Chapter 11 Bankruptcy Petition.

Soon after opening the new coffeehouse, the Debtor struggled to make sales. R. at 5. An ad hoc group of local independent coffeehouses disapproved of the Debtor's relationship with Touch of Grey and launched an effective local ad campaign that painted the Debtor as "big coffee in disguise." R. at 5. Additionally, the Debtor's nighttime offerings of live music and poetry readings were unsuccessful in drawing business. R. at 5. Due to low sales and above-market rent under the Lease, the Debtor struggled financially, and by September of 2019 was unable to pay its debts. R. at 5. While the Debtor remained current on its rent obligations to Touch of Grey under the Lease, by November 1, 2019, it owed Touch of Grey over $700,000 for the Dark Star products it had purchased. R. at 5.

On December 5, 2019, Touch of Grey sent the Debtor a notice of default and threatened to terminate the franchise agreement. R. at 5. Two days later, on December 7, 2019, Touch of Grey and the Debtor entered into a forbearance agreement where Touch of Grey agreed to forbear from terminating the franchise agreement in exchange for: (i) a payment by the Debtor to Touch of Grey in the amount of $250,000 on account of the outstanding invoices for Dark Star products; (ii) a reaffirmation by the Debtor of its obligations under the Lease; and (iii) the release by the Debtor of any and all claims or causes of action that the Debtor may have against Touch of Grey. R. at 5. That same day, the Debtor completed the payment of $250,000 to Touch of Grey. R. at 5.

On December 18, 2019, the Debtor purchased an additional $200,000 worth of Dark Star products from Touch of Grey on credit, as shown on an invoice from that date (the "Invoice"). R. at 5. To induce Touch of Grey to sell the Debtor the goods, Tell signed a personal guarantee of the purchase price. R. at 5–6. On December 21, 2019, the goods identified on the invoice were delivered to the Debtor. R. at 6.

On January 5, 2020 (the "Petition Date"), the Debtor filed a petition for relief under chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the District of Moot. R. at 6. On the Petition Date, the Debtor was current on its rent obligations to Touch of Grey under the Lease, but owed Touch of Grey $650,000, including the amount due under the Invoice. R. at 6. The Debtor owed $500,000 to other unsecured creditors, some of whom refused to continue to provide the Debtor with goods and services on credit. R. at 6.

The Debtor filed multiple "first day" motions, supported by a declaration from Tell, with the bankruptcy petition. R. at 6. In the declaration, Tell stated he intended to reorganize the Debtor reverting to regular coffeehouse operations. R. at 6. Additionally, Tell intended to find a sub-lessee for a portion of the Premises to help alleviate the Debtor's rent burden. R. at 6. As required by the franchise agreement, the Debtor intended to continue selling Dark Star products. R. at 6. Counsel for Touch of Grey appeared at the first day hearings and stated that it had concerns with the Debtor's reorganization strategy, but was engaged in "ongoing, good faith discussions" with the Debtor regarding a plan for moving forward. R. at 6.

C. Debtor Files a Motion to Make a "Critical Vendor" Payment to Touch of Grey.

Two weeks after the Petition Date, the Debtor filed a motion asking the court to authorize a payment in the amount of $200,000, from the Debtor to Touch of Grey, to be applied to the Invoice. R. at 6. The Debtor argued that Touch of Grey was a "critical vendor" to its reorganization plan and the $200,000 payment was necessary because Touch of Grey was unwilling to sell goods to the Debtor on credit in its absence. R. at 6. The counsel for the newly appointed creditors' committee supported the motion. R. at 7. The United States Trustee (the "Trustee") argued critical vendor payments are not authorized under the Bankruptcy Code. R. at 7. The Bankruptcy Court did not approve the payment as a critical vendor payment, but nevertheless awarded Touch of Grey

an administrative expense under section 503(b)(9) for the value of the goods as stated on the Invoice, and allowed immediate payment, which the Debtor completed days later. R. at 7. Touch of Grey then resumed selling the Debtor goods on credit. R. at 7.

D. Debtor Permanently Ceases Operations and Rejects the Lease.

The Debtor's reorganization failed due to the COVID-19 pandemic and the Debtor permanently ceased operations on May 5, 2020, vacated the Premises, and returned the keys to Touch of Grey. R. at 7. On May 6, 2020, the Debtor filed a motion to reject both the Lease and the franchise agreement, as of the date of the motion, pursuant to section 365(a). R. at 7. Two days later, on May 8, 2020, Touch of Grey filed a motion seeking to compel payment full payment of the May rent pursuant to section 365(d)(3), as the rent payment came due prior to the date of rejection. R. at 7. Touch of Grey did not oppose the rejection of the Lease. R. at 7–8. At a virtual hearing on both motions on May 29, 2020, the debtor announced it was converting the case from chapter 11 to chapter 7, which was met with no objections. R. at 8. Additionally, the court granted the Debtor's motion to reject the lease and the franchise agreement but declined to rule on Touch of Grey request for the May rent and requested additional briefing on the issue. R. at 8.

Counsel for the Trustee objected to Touch of Grey's motion to compel payment of the May 2020 rent on the grounds that the relief was inequitable to other creditors, as the debtor only occupied the premises for the first five days of May 2020. R. at 8. Additionally, the Trustee commenced an adversary proceeding seeking to avoid, as a preferential transfer, the $250,000 payment the Debtor made to Touch of Grey under the forbearance agreement pursuant to sections 547(b) and 550(a). R. at 8. In its answer, Touch of Grey asserted an affirmative defense pursuant to section 547(c), stating that it was entitled to reduce its preference exposure by the $200,000 in goods that it sold to the debtor as shown on the Invoice. R. at 8.

After an unsuccessful attempt at mediation, Touch of Grey and the Debtor filed cross motions for summary judgment on the new value dispute. R. at 8–9. It was agreed that Touch of Grey's request for payment of the May 2020 rent would be addressed at the same time as the hearing on the motions for summary judgment. R. at 9.

II. PROCEDURAL HISTORY

The Bankruptcy Court ruled in favor of the Trustee on both issues. R. at 9. The court ruled that section 365(d)(3) required the Debtor only pay rent for the five days it occupied the Premises prior to rejection of the lease and thus awarded Touch of Grey an administrative expense in the amount of $4,032.26. R. at 9. Additionally, the court granted summary judgment to the Trustee, entering a judgment in the amount of $250,000 against Touch of Grey, holding that Touch of Grey could not reduce its preference exposure by the $250,000 value of the goods it delivered to the Debtor pursuant to the Invoice, given that the Invoice was paid pursuant to section 503(b)(9). R. at 9.

Touch of Grey timely appealed both decisions on a consolidated basis to the United States District Court for the District of Moot. R. at 9. The district court affirmed on both issues. R. at 9. Touch of Grey then timely filed a notice of appeal with the United States Court of Appeals for the Thirteenth Circuit. The Thirteenth Circuit affirmed on both issues. R. at 9.

STANDARD OF REVIEW

The issues addressed in this appeal are pure issues of law based on interpretation of the United States Bankruptcy Code. The parties do not dispute the facts of this case. Thus, the standard of review for this appeal is *de novo*. *See, e.g.*, *In re Soileau*, 488 F.4d 302, 305 (5th Cir. 2007).

SUMMARY OF THE ARGUMENT

Touch of Grey should be able to reduce its preference exposure by the $250,000 worth of new Dark Star goods it provided to the Debtor because post-petition payments should not be included in a section 547 preference analysis. The preferences section of the Bankruptcy Code is the vehicle through which a trustee can preserve a bankruptcy estate that has been reduced by transfers made to creditors prior to the initiation of a bankruptcy proceeding. The preferences section does this by allowing a trustee to claw back preferential transfers made to creditors on the eve of bankruptcy that have the effect of favoring one creditor over another. The preferences section also enumerates several defenses that a creditor may use to reduce its preference liability or even prevent a trustee from unwinding a transfer entirely. In drafting the preferences section, Congress sought not only to promote the equal treatment of creditors but to reward the creditor who aids a financially troubled debtor on the brink of bankruptcy.

One of the defenses enumerated in the preference section is the new value defense. The new value defense allows a creditor to offset its preference exposure by the value of goods or services provided to the debtor, on credit, on the eve of bankruptcy. Section 503(b)(9) of the Bankruptcy Code allows a creditor to be paid an administrative expense for the value of any goods the debtor received from the creditor within the twenty days prior to the commencement of the bankruptcy case. Where a creditor asserts a new value defense in an avoidance action and received a post-petition payment from the bankruptcy estate pursuant to section 503(b)(9) prior to such proceeding, an issue arises requiring courts to determine if the new value defense may still be used despite the post-petition payment. Courts are currently split on the issue.

The Supreme Court of the United States approaches ambiguity in the Bankruptcy Code by viewing the allegedly ambiguous provision in light of the context of the section that the provision

is contained in, as well as the Bankruptcy Code as a whole. Here, when the new value defense is considered in the context of the preferences section in its entirety, it becomes evident that including post-petition payments in new value defense preference liability calculations puts the new value defense in striking contrast to the other section 547 preference liability calculations, as the other calculations do not include post-petition payments or events. Moreover, including post-petition payments may result in unfair treatment of creditors and punishes the creditor who aids a financially troubled debtor—two results that run contrary to the policy goals behind section 547 and the Bankruptcy Code. Thus, because post-petition payments should not be considered in the preference liability calculation for a creditor asserting the new value defense, the section 503(b)(9) payment made to Touch of Grey should not affect its ability to offset its preference in this action.

Regarding the second issue presented to this Court, the Thirteenth Circuit erred in adopting and applying the Proration Approach rather than the Billing Date Approach to a matter squarely governed by section 365(d)(3) of the Bankruptcy Code. The Proration Approach to the statute allows a debtor to pay rent on prorated basis after it has rejected a lease, even after the date on which a lease agreement requires rent payment. The Billing Approach requires a debtor to pay full monthly rent where it rejects a lease after the date on which rent comes due.

This Court should reverse the decision of the Thirteenth Circuit and apply the Billing Date Approach for two reasons. First, statutory interpretation guidelines support the Billing Date Approach because the statutory language of §365(d)(3) is unambiguous. Second, policy considerations and legislative history favor the application of the Billing Date Approach because §365(d)(3) was enacted to even the playing field between landlords and tenants which historically favored tenants.

The Supreme Court has long held that where a statute's language is plain, the sole function of the courts is to enforce the statute according to its terms. Therefore, in cases of unambiguous statutes, there is no need for the court to delve into policy implications or legislative history. Rather, the assessment begins and ends with a reading of the statutory text. Section 365(d)(3) plainly requires a trustee to pay obligations of the debtor that arise before a lease is assumed or rejected. Here, The Lease required that rent be paid in full on the first day of every month. Irrespective of the terms of the agreement, the Debtor neglected to pay the rent for May 2020 in full on May 1, 2020 and rejected the lease five days later. Thus, the Billing Date Approach is consistent with the plain terms of section 365(d)(3), and it should be applied to ensure the Trustee pays the May 2020 rent to Touch of Grey in full, in accordance with the statutory language.

The Billing Date Approach is also supported by the limited legislative history that exists with respect to section 365(d)(3). Section 365(d)(3) was enacted in 1984 to even the playing field between landlords and debtors. Its enactment was meant to ensure that decisions regarding the assumption or rejection of non-residential real property leases are timely made, and that landlords will receive payment of all lease obligations until such decision is made. Therefore, even if the statutory text was not plain enough to prove that the Billing Date Approach should be applied, the legislative history exemplifies that Congress intended to fix the exact issue created by the Proration Approach when it enacted section 365(d)(3).

ARGUMENT

This Court should reverse the decision of the Thirteenth Circuit Court of Appeals and find that Touch of Grey is entitled to offset its preference exposure by the value of the Dark Star goods delivered to the Debtor on December 21, 2019, because the value of the goods remained unpaid as of the date the bankruptcy petition was filed. This Court should also reverse the Thirteenth

Circuit's decision to apply the Proration Approach in cases depending upon 11 U.S.C. § 365(d)(3) because this method ignores the canon of statutory interpretation.

I. THE THIRTEENTH CIRCUIT ERRED IN DENYING TOUCH OF GREY THE ABILITY TO REDUCE ITS PREFERENCE EXPOSURE BY THE VALUE OF GOODS DELIVERED ON CREDIT AFTER THE PREFERENTIAL TRANSFER BECAUSE THE GOODS REMAINED UNPAID AT THE TIME THE BANKRUPTCY PETITION WAS FILED.

When a creditor who has previously received a preferential transfer supplies a debtor with new value on the eve of bankruptcy that remains unpaid until after the filing of the bankruptcy petition, an issue arises where courts must determine whether the post-petition payment of pre-petition invoices affects the creditor's ability to use that new value as grounds for a section 547(c)(4) new value defense. 5 Collier on Bankruptcy ¶ 547.04 (16th ed. 2021). The Thirteenth Circuit was misguided in its analysis of the case at hand and improperly considered the post-petition administrative expense payment from the Debtor to Touch of Grey in its preference analysis. *See Friedman's Liquidating Trust v. Roth Staffing Cos. LP (In re Friedman's Inc.)*, 738 F.3d 547, 554 (3d Cir. 2013) (finding preference liability calculations present in section 547 generally do not consider post-petition payments and thus post-petition payments to a creditor asserting the new value defense should not reduce such a defense by increasing preference liability); *In re Energy Coop., Inc.*, 130 B.R. 781, 789 (Bankr. N.D. Ill. 1991) (finding post-preference extension of new value must be unpaid as of the date of the petition); *In re American International Airways, Inc.,* 56 B.R. 551, 554 (Bankr. E.D. Pa. 1986) (holding that new value must be unpaid on the date the bankruptcy petition is filed); *In re Paula Saker & Co., Inc.,* 53 B.R. 630, 633 (Bankr. S.D.N.Y. 1985) (concluding that new value provided after a preferential transfer prior to the date a bankruptcy petition is filed may be offset by the amount of new value that remains unpaid as of the date of filing); *Braniff, Inc. v. Sundstrand Data Control, Inc. (In re Braniff, Inc.)*,

154 B.R. 773, 784 (Bankr. M.D. Fla. 1993) ("the law requires new value remain unpaid as of the petition date not as of the date a bankruptcy court later adjudicated a preference action by the debtor").

The contexts of both the Bankruptcy Code and the preference section lend to the conclusion that the only events to be included in a preference analysis—provided the transfer in question was not made to an insider—are those events occurring in the preference window, which is the ninety days prior to the filing of the bankruptcy petition. 11 U.S.C. § 547 (b)(4)(a). Because the value of the Dark Star goods delivered to the Debtor pursuant to the Invoice were unpaid on the Petition Date, the post-petition payment from the Debtor to Touch of Grey should not be considered in Touch of Grey's preference liability calculations. R. at 6. Therefore, the preferential transfer of $250,000 made by the Debtor to Touch of Grey, pursuant to the forbearance agreement, may be offset by the $200,000 worth of Dark Star products delivered to the Debtor, on credit, on December 21, 2019.

A. Examination of 11 U.S.C. § 547(c)(4) in the context of the preferences section in its entirety shows that post-petition payments to a creditor should not affect that creditor's new value defense because the other preference liability calculations in section 547 do not consider post-petition events.

Courts should not consider post-petition payments and events when evaluating a creditor's new value defense because such payments and events are not considered when conducting other preference liability calculation under section 547. The Supreme Court has stated numerous times that statutory construction is a holistic endeavor. *E.g.*, *United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371 (1988). Statutory provisions that appear to contain some level of ambiguity can often be resolved by viewing that provision in light of the entire statutory scheme. *Id.* Considering the Bankruptcy Code in its entirety, or whole sections of the code, can clarify the meaning of a specific provision as the terminology may be used elsewhere, or a certain

interpretation the provision may be more conducive to the overall effect of the statutory scheme. *Id.*

The new value defense is articulated in section 547(c)(4) of the Bankruptcy Code and provides an affirmative defense to a preferential transfer that allows a creditor to offset the amount of money they must return to the bankruptcy estate by the value of goods provided to the debtor on credit prior to the debtor's filing of a bankruptcy petition. 11 U.S.C. § 547(c)(4). The statute reads:

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

11 U.S.C. § 547(c)(4).

The preferences section of the Bankruptcy Code, section 547, enumerates the elements that must be met for a transfer to be considered preferential, and thus avoidable, and provides nine exceptions that may either render a transfer entirely out of reach of the trustee or modify a creditor's preference liability in some way. 11 U.S.C. § 547. Other section 547 preference calculations, like the Hypothetical Liquidation Test and Improvement in Position Test, consider only actions that occurred in the preference window and disregard post-petition events. *In re Friedman's Inc.*, 738 F.3d at 554. Because courts do not consider post-petition events when evaluating preference liability in the context of other section 547 defenses and liability calculations, courts should not consider post-petition events when evaluating preference liability for a creditor asserting a new value defense. *Id.*

1. The Hypothetical Liquidation Test is performed as of the date the petition was filed.

Courts should not consider post-petition events in evaluating a new value defense because post-petition events are not considered in the application of the Hypothetical Liquidation Test ("HLT"). The HLT is used to determine if the fifth element of a preferential transfer is met, which is whether the alleged preferential transfer enabled a creditor to receive more than it would have in a chapter 7 liquidation case had the transfer not been made ("the fifth element"). 11 U.S.C. § 547(b)(5). It is well established that the HLT is performed as of the date the petition was filed. *See Palmer Clay Prods. Co. v. Brown*, 297 U.S. 227, 228–29 (1936); *In re Tenna Corp.*, 801 F.2d 819, 823 (6th Cir. 1986) (holding that the testing date for hypothetical liquidation analysis is the date the petition is filed); *Falcon Creditor Trust v. First Ins. Funding (In re Falcon Prods.)*, 381 B.R. 543, 547 (B.A.P. 8th Cir. 2007) (holding that the hypothetical liquidation test must be conducted as of the petition date).

Post-petition events are not considered when applying the HLT because doing so would result in inconsistencies in preference calculations depending on the date of the adversary proceeding and allow the trustee to manipulate a creditor's preference liability. *In re Tenna Corp.*, 801 F.2d at 823. In *Tenna*, the debtor made an allegedly preferential payment to the International Revenue Service ("IRS") prior to filing for bankruptcy. *Id.* at 819. After filing a chapter 11 petition, the debtor borrowed money from lenders to continue operating and granted these lenders super-priority liens on all of the debtor's property. *Id.* at 820. Several months later, the trustee initiated avoidance proceedings against the IRS to recover the payment made to it by the debtor prior to the debtor's filing. *Id.* The trustee argued that, in its analysis of the fifth element, the court should conduct the HLT as of the date of the adversary proceeding. *Id.* The IRS argued the HLT should be conducted as of the date of filing. *Id.* at 821. Because the debtor incurred post-petition debt in

the continued operation of its business that resulted in creditors gaining claims of higher priority than the IRS liens, conducting the HLT as of the date of the adversary proceeding would reduce the amount the IRS would be deemed to have recovered in liquidation, and bring the trustee closer to satisfaction of the fifth element. *Id.* at 821. The court found that the HLT must be conducted as of the date of filing because to allow the analysis to take place at any point post-petition, i.e., at the time of the adversary proceeding, would be "inconceivable and illogical," because it would allow a trustee to manipulate the timing of proceedings to ensure a transfer will be deemed a preference. *Id.* at 823.

Here, like the trustee in *Tenna*, the Debtor advocates for the evaluation of Touch of Grey's preference liability as of the date of the avoidance action rather than at the time of filing. R. at 8. The court in *Tenna* found that allowing the HLT to be conducted on the whim of the trustee is "inconceivable and illogical," because the trustee could alter whether a transfer satisfies the fifth element by strategically timing the point at which the adversary proceeding and HLT would take place. Similarly, here, allowing the preference liability calculations of a creditor asserting a new value defense ("New Value Creditor") to be conducted at a time of the trustee's choosing would have the same aforementioned effect because the trustee has the ability to alter whether that creditor may offset a preferential transfer pursuant to section 547(c)(4) *and* receive a post-petition payment by manipulating the time at which the avoidance action is filed. *In re Friedman's Inc.,* 738 F.3d at 556. Thus, because post-petition events are not considered in the application of the HLT to avoid inconsistencies and manipulation, post-petition events should not be considered in the evaluation of a new value defense to avoid the same ill-effects.

2. Under 11 U.S.C. § 547 (c)(5), preference liability calculations for floating lien creditors do not consider post-petition events.

Since the Improvement in Position Test ("IPT") in section 547(c)(5) does not consider post-petition events, neither should preference liability calculations for New Value Creditors because requiring only one to do so creates inconsistency in the preference defenses available to creditors. The IPT is articulated in preference defense 11 U.S.C. § 547(c)(5) and is performed where a creditor holding a floating lien on a debtor's inventory and receivables has received a preferential transfer. 11 U.S.C. § 547(c)(5). Under this defense, a creditor can shield itself from preference liability to the extent that the value of the collateral on the date the petition was filed remained the same as the value of the collateral on the date ninety days before filing. 11 U.S.C. § 547(c)(5). Because the text of section 547 specifically articulates a test must be performed, Congress provided two measuring dates for which a creditor's preference liability must be evaluated: (1) ninety days prior to filing and (2) the date of filing. *See Fla. Dep't of Revenue v. Piccadilly Cafeterias, Inc.*, 554 U.S. 33, 45 (2008) (finding temporal language present in one section of the code does not necessarily imply a lack of congressional intent to apply a temporal element in another section and merely shows the temporal language is "indispensable to the operative meaning of the provisions in which they appear").

By specifically providing that the IPT need not consider those activities occurring post-petition, Congress demonstrates that it is not concerned with any improvement in position that a creditor may incur post-petition. This reasoning can be applied to new value defense calculations. If Congress has no interest in increasing the preference liability of a floating lien creditor who has improved its position post-petition, it would be inconsistent to find that Congress would seek to increase the preference liability of a creditor who extended new value to a debtor on the eve of bankruptcy and received a post-petition payment for that value. Thus, because the IPT does not

consider post-petition events, preference liability calculations for a New Value Creditor should not consider post-petition events.

3. Advances of new value that occur after the petition date are not considered in a creditor's new value defense.

Post-petition payments to a creditor should not affect a New Value Creditor's preference liability because the creditor is conversely disallowed from altering its own preference liability by post-petition extension of new value to the debtor. *See In re Friedman's Inc.,* 738 F.3d at 577. When a creditor advances new value to a debtor post-petition, it is well established that the creditor will not be able to offset a prior preferential transfer by the amount of the post-petition new value. *E.g., In re Bellanca Aircraft Corp.*, 850 F.2d 1275, 1284 (8th Cir. 1988); *Kaye v. Accord Mfg., Inc. (In re Murray, Inc.)*, No. 04-13611, 2007 Bankr. LEXIS 4738, at *4–5 (Bankr. M.D. Tenn. June 6, 2007). In *Kaye*, a creditor received a preferential transfer from a debtor and subsequently extended new value to that debtor. *Id.* at 6–7. The trustee then requested the court approve a critical vendor payment to this creditor so the debtor could continue operating, which the court did approve. *Id.* After the post-petition critical vendor payment on account of the new value had been made from the debtor to the creditor, the trustee then sought to bar the creditor from offsetting its preference liability by the amount of the new value it had extended to the debtor, reasoning that the creditor had already been paid by the critical vendor payment. *Id.* at 7. The court found the trustee's attempt to use the post-petition payment to increase the creditor's preference exposure was illogical and failed because a defendant in a preference action is not entitled to benefit from the incorporation of post-petition new value extended to the debtor into its new value defense. *Id.* at 6.

Here, like the trustee in *Kaye*, who attempted to strip a creditor of its new value defense via a court-approved critical vendor payment, the Debtor attempts to strip Touch of Grey of its

new value defense via the court-approved 503(b)(9) administrative expense payment. R. at 7–8. As stated by the court in *Kaye*, to allow the Debtor to urge this Court to conclude that post-petition payments remain in play while post-petition extensions of new value do not is "illogical" and would unfairly disadvantage creditors. Thus, because a creditor is not entitled to include post-petition extension of new value in its preference liability calculations, a trustee should not be entitled to include post-petition payments to that creditor in its preference liability calculations.

4. The statute of limitations in a preference avoidance action begins to toll as of the date the petition was filed.

Allowing post-petition events to be included in a new value defense preference calculation may produce arbitrary and inconsistent results in bankruptcy cases that span multiple years. The statute of limitations for filing a preference action begins on the date a bankruptcy petition is filed. Section 546(a) provides:

> (a) An action or proceeding under section 544, 545, 547, 548, or 553 of this title may not be commenced after the earlier of—
>
> (1) the later of—
> (A) 2 years after the entry of the order for relief; or
> (B) 1 year after the appointment or election of the first trustee under section 702, 1104, 1163, 1202, or 1302 of this title if such appointment or such election occurs before the expiration of the period specified in subparagraph (A); or
>
> (2) the time the case is closed or dismissed.

11 U.S.C. § 546(a).

Where the statute of limitations for a preference action has nearly run, a trustee must institute an avoidance action or lose the ability to unwind a preferential transfer. 11 U.S.C. § 546(a). Therefore, a trustee may be forced to institute an action against a creditor who has not yet received a court authorized post-petition unavoidable transfer on account of new value that the creditor supplied the debtor with pre-petition. The creditor can then offset its preference liability

in the avoidance action and subsequently collect payment for the new value after the preference action is concluded. The resulting consequence would be arbitrary and treat similarly situated creditors unequally because one creditor may be able to use new value to both receive payment and offset preference liability and another creditor may be limited to availing itself of only one of these options.

Moreover, the Bankruptcy Code contains a specific section that governs the avoidance of post-petition transfers which bolsters the conclusion that post-petition activity is not intended to be considered in section 547 preferences analyses. *See In re Friedman's Inc.,* 738 F.3d at 555. It would be "illogical" and "send mixed signals" to conclude that an unavoidable post-petition transfer, specifically provided for in section 549 and with its own rules regarding a statute of limitations, would affect pre-petition preference analyses under section 547. *Id.* Thus, post-petition events should not be considered in new value defense calculations because the inclusion of post-petition events in preference liability calculations for a New Value Creditor would create inconsistent results in bankruptcy cases that span multiple years.

B. Cutting off the preference analysis at the petition date is in line with the policy goals encouraging creditors to continue working with troubled businesses and ensuring fair treatment among similarly situated creditors.

Policy goals of the preference section and the Bankruptcy Code as a whole support the conclusion that post-petition payments should not be included in a new value defense analysis. The Supreme Court often resolves perceived ambiguities in Bankruptcy Code provisions by looking to the overall policy goals of the section the provision is contained in as well as the Bankruptcy Code as a whole. *Kawaauhau v. Geiger*, 523 U.S. 57, 62 (1998); *Johnson v. Home State Bank*, 501 U.S. 78, 83 (1991); *see also Grogan v. Garner,* 498 U.S. 279 (1991) (quoting *Crandon v. United States*, 494 U.S. 152, 158 (1990) ("in determining the meaning of the statute,

we look not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy")).

Allowing a creditor to offset its preference liability by providing new value to a debtor is in line with a policy goal of the preference section as a whole: rewarding those creditors who have continued working with a debtor on the eve of bankruptcy. *Id.*; *see also McKloskey v. Schabel (In re Schabel)*, 338 B.R. 376, 380–81 (Bankr. E.D. Wis. 2005) (holding that the proper interpretation of section 547(c)(4) is that new value must remain unpaid at the time of filing, which comports with Congress's intent to protect creditors who aid a troubled debtor and replenish preferential payments by extending new value).

Providing treatment to a creditor based on the circumstances surrounding its relationship to a debtor is not unique to the preference section and is in line with an overarching policy goal of the Bankruptcy Code: providing equal treatment to similarly situated creditors. *In re Friedman's Inc.*, 738 F.3d at 554. Thus, because the overall context of the preferences section and the Bankruptcy Code as a whole supports the conclusion that post-petition transfers are not to be considered in preference liability calculations, the Thirteenth Circuit erred in including the $200,000 administrative expense payment in their analysis of Touch of Grey's preference liability.

1. 11 U.S.C. § 547(c)(4) was designed to encourage creditors to aid a debtor on the eve of bankruptcy.

Allowing post-petition payments to be considered in new value defense preference liability calculations negates the intended effect of the defense. The intention behind section 547(c)(4) is to encourage creditors to deal with troubled businesses and treat fairly and reward those creditors who have done so. *In re Friedman's Inc.,* 738 F.3d at 558; *In re Braniff, Inc.*,154 B.R. at 787; *In re Almarc Mfg.*, 62 B.R. 684, 687–88 (Bankr. N.D. Ill. 1986); *In re American International Airways, Inc.,* 56 B.R. at 554.

To require a creditor who has received a preferential transfer and subsequently extended new value to a debtor pre-petition to choose between receiving a payment pursuant to a section 503(b)(9) claim or using the new value to offset its preference liability would run contrary to Congress' intent behind section 547(c)(4) because it would "chill [the creditor's] willingness to do business with troubled entities," and deprive the creditor of the benefits Congress awarded it when it enacted both sections 503(b)(9) and 547(c)(4). *Commissary Operations, Inc. v. Dot Foods, Inc. (In re Commissary Operations, Inc.)*, 421 B.R. 873, 879 (Bankr. M.D. Tenn. 2010); *In re Murray, Inc.*, 2007 Bankr. LEXIS 4738, at *4–5 (2007) (holding that a trustee's intent to use a first day order to strip a creditor of its new value defense was problematic because it penalized the creditor for a dealing with a financially troubled debtor on the eve of bankruptcy).

If it were established that post-petition payments by a debtor to a creditor are considered in new value defense preference calculations, creditors like Touch of Grey may choose to stop doing business with troubled debtors. Where a creditor ceases dealings with a debtor, it can not only hurt the debtor's reorganization effort, but it may render the debtor completely unable to reorganize which in turn hurts all creditors. Thus, courts should not consider post-petition payments in evaluating the preference liability of a New Value creditor because doing so runs contrary to Congress' intent to encourage and reward creditors who work with a financially troubled debtor.

2. A common policy objective woven throughout the entire Bankruptcy Code is equal treatment of creditors.

A policy underlying the Bankruptcy Code is that creditors should be treated equally. *Union Bank v. Wolas*, 502 U.S. 151, 161 (1991). This does not mean that all creditors must be treated identically regardless of the status of their claim. *In re Friedman's Inc.* 738 F.3d at 560–61. Throughout the Bankruptcy Code, the priority of creditors' claims is determined by the many

provisions of the code that dictate which creditors are paid at a higher priority than other creditors. *Id.* For example, section 503(b)(9) claimants seem similar to creditors holding general unsecured claims but take priority over general unsecured creditors as administrative expenses. *Id.* Often, critical vendors are given special treatment over other creditors. *Id.* A more accurate statement is that the intention of the Bankruptcy Code is to treat similarly situated creditors similarly. *Id.* Thus, all creditors who provide new value to a debtor pre-petition should be afforded the ability to offset their preference exposure under the section 547(c)(4) new value defense.

Considering post-petition payments in calculating the preference liability of a New Value Creditor has the effect of treating creditors unequally. The group of similarly situated creditors in question are only those creditors who afforded the debtor new value prior to the debtor's filing for bankruptcy. One of the issues that arises when post-petition payments are considered in preference liability calculations for a new value creditor is that the liability could change depending on the time the preference avoidance action takes place. *Id.* at 556. Where two new value creditors have received post-petition payment for new value, one creditor may be able to also use the new value to offset their preference liability in an avoidance action, and the other may not, depending on whether the avoidance action was filed before or after the post-petition payment for the new value occurred. Thus, the policy goal of equal treatment of similarly situated creditors is supported by including only pre-petition events in the preference liability calculations of a new value creditor.

II. THE THIRTEENTH CIRCUIT INCORRECTLY ADOPTED AND APPLIED THE "PRORATION APPROACH" WHICH FAILS TO COMPORT WITH THE PRINCIPLES OF STATUTORY INTERPRETATION.

In a bankruptcy proceeding, when a debtor rejects an unexpired lease for non-residential property, the issue becomes whether a trustee must perform the obligations of the debtor including paying rent due prior to the rejection of the lease but allocable to the period after the date of rejection. 11 U.S.C. § 365(d)(3). Courts are curiously divided on this issue, applying either the

"Proration Approach" or the "Billing Date Approach." Here, the Thirteenth Circuit both incorrectly adopted the Proration Approach and improperly applied it, causing a conflict with the statutory text, because a plain reading of section 365(d)(3) shows that the Debtor's obligation arose prior to its rejection of the Lease, requiring payment of the full rent amount to Touch of Grey.

Section 365(d)(3) entrusts a trustee or debtor-in-possession with timely performing all obligations of a debtor during, and after, the order for relief under any unexpired lease of nonresidential real property, until such lease is assumed or rejected. 11 U.S.C. § 365(d)(3). While the Bankruptcy Code does not outright define the word "obligation", its meaning is illuminated by section 365(d). *Bullock's, Inc. v. Lakewood Mall Shopping Ctr. (In re R.H. Macy & Co., Inc.)*, No. 93-CIV-4414, 1994 WL 482948, at *12 (S.D.N.Y. Feb. 23, 1994). Traditional principles of statutory construction require that words in a statute be accorded their "ordinary, contemporary, common meaning." *Pioneer Inv. Serv. Co. v. Brunswick Assoc. Ltd. P'ship*, 507 U.S. 380, 388 (1993). Accordingly, the common meaning of the word "obligation" is a legal duty to do something. *See* BLACK'S LAW DICTIONARY 491 (2d ed. 2001). Here, because the Debtor was bound by the lease agreement it entered into, the legal duty to perform on the contract and make monthly rent payments is an obligation and subject to the command of section 365(d)(3).

A. The plain meaning of 11 U.S.C. § 365(d)(3) dictates application of the Billing Date Approach, which precludes the Debtor's refusal to pay the full monthly rent amount for May 2020.

Section 365(d)(3) of the Bankruptcy Code provides language that prohibits a trustee from refusing to perform a duty that arises prior to the order of relief but before assumption or rejection. Congress articulated the statute in the affirmative which, by its plain language, requires a trustee to "perform" all of a debtor's obligations until the lease is assumed or rejected. Specifically, the Billing Date Approach adheres to the affirmative language ("shall… perform"), while the

Proration Approach effectively replaces "shall… perform" with "may partially perform." In relevant part, the statute reads:

> (d)(3)(A) The trustee <u>*shall timely perform*</u> all the obligations of the debtor, except those specified in section 365(b)(2), arising from and after the order for relief under any unexpired lease of nonresidential real property, until such lease is assumed or rejected, notwithstanding section 503(b)(1) of this title.

11 U.S.C. § 365(d)(3) (emphasis added).

Here, the duty that the Trustee is required to perform is the payment of rent, and no plain reading of section 365(d)(3) allows the Trustee to avoid consequences for paying less than the full monthly rent amount for May 2020. Therefore, the Trustee must pay the entire $25,000 to Touch of Grey.

A straightforward reading of section 365(d)(3) lends itself to the Billing Date Approach because, where the language is clear, it is a court's job to enforce the statutory language. *Lamie v. U.S. Trustee*, 540 U.S. 526, 534 (2004). Section 365(d)(3) plainly states that the *trustee* shall timely perform all the obligations of the debtor (here, Terrapin Station) that arise under a non-expired lease of non-residential property from and after the order for relief (here, January 5, 2020) until such lease is assumed or rejected (here, May 5, 2020). The language is clear: the debtor shall timely perform all obligations arising from and after the order for relief until the lease is assumed or rejected. Conversely, the Proration Approach requires courts to view an unambiguous statute as ambiguous in order to make a policy determination on what is equitable, which is not in a court's purview.

Here, it is undisputed that the Lease required the Debtor to pay the full monthly rent, in the amount of $25,000, "in advance on the first day of each month." R. at 4. Because the "obligation" to pay such rent arose on May 1, 2020, four days prior to the rejection of the Lease, the Debtor (and the Trustee, as its successor) is required under the statute to "timely" pay such rent. It is

irrelevant whether payment of such rent is equitable to the estate or other creditors, or whether the estate received an actual benefit, as Congress expressly mandated in section 365(d)(3) that such obligations be paid "notwithstanding section 503(b)(1) of this title." Section 503(b)(1) deals with administrative expenses, or the actual, necessary costs and expenses of preserving the estate. 11 U.S.C. § 503(b)(1). Thus, the Billing Date Approach neatly conforms to statutory language. This approach creates a bright-line test: if a rent payment is due during the post-petition, pre-rejection period, it must be paid pursuant to section 365(d)(3), with no need for proration. *In re Burvial*, 406 B.R. 548, 552 (8th Cir. 2009).

Further, prior to the Thirteenth Circuit's ruling in this case, all circuit courts that have addressed this issue in the context of post-petition rent due under an unexpired lease of non-residential real property have adopted the Billing Date Approach. *See Burival v. Roehrich (In re Burival)*, 613 F.3d 810 (8th Cir. 2010); *HA-LO Indus., Inc. v. Centerpoint Props. Tr.*, 342 F.3d 794, 799 (7th Cir. 2003); *Centerpoint Props. v. Montgomery Ward Holding Corp. (In re Montgomery Ward Holding Corp.)*, 268 F.3d 205 (3d Cir. 2001); *Koenig Sporting Goods, Inc. v. Morse Road Co. (In re Koenig Sporting Goods, Inc.)*, 203 F.3d 986 (6th Cir. 2000).

The task of interpreting a statute "begins where all such inquiries must begin: with the language of the statute itself." *U.S. v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989). The Supreme Court has repeatedly stated that "when the statute's language is plain, the sole function of the courts—at least where the disposition required by text is not absurd—is to enforce it according to its terms." *Lamie*, 540 U.S. at 534. Further, the Supreme Court has advocated for decades that a court's job is to apply the law as written and leave policy determinations to Congress. *See, e.g.*, *N.Y. Cty. Nat'l Bank v. Massey*, 192 U.S. 138, 146 (1904) ("We are to interpret statutes, not to make them.").

Section 365(d)(3)'s plain language requires a debtor to pay rent for the entirety of the month during which the lease was rejected. In *Koenig*, the debtor voluntarily filed for bankruptcy under chapter 11 on August 18, 1997. 203 F.3d at 988. Several months later, the debtor notified the landlord that it was rejecting the lease effective the same day the debtor ended up vacating the premises. *Id.* The terms of the debtor's lease with its landlord provided that monthly rent was due in advance on the first day of each month. *Id.* at 987. The Sixth Circuit held that the plain language of § 365(d)(3) required the debtor to pay rent for the entirety of the month during which the lease was rejected. *Id.* at 989. The court noted that under the circumstances of the case, § 365(d)(3) was "unambiguous" as to the debtor's rent obligation and required payment of the full month's rent. *Id.* The court went on to reject the debtor's argument that equity and "common sense" require adoption of the proration approach, concluding that equity likewise favors full payment to the landlord. *Id.* It reasoned that the purpose of the statute is to "prevent parties in contractual or lease relationships with the debtor from being left in doubt concerning their status vis-à-vis the estate" and "to relieve the burden placed on nonresidential real property lessors (or 'landlords') during the period between a tenant's bankruptcy petition and assumption or rejection of lease." *Id.*

Further, as the *Koenig* court explained, in a case involving a month-to-month, payment-in-advance lease, where the debtor had complete control over the obligation, equity also favors full payment to the landlord. *Id.*; *see also In re Krystal Co.*, 194 B.R. 161, 164 (Bankr. E.D. Tenn. 1996) (emphasizing that "Congress intended § 365(d)(3) to shift the burden of indecision to the debtor: the debtor must now continue to perform all the obligations of its lease or make up its mind to reject it before some onerous payment comes due during the prerejection period"). The debtor alone was in the position to control debtor's entitlement to payment of rent for December. *Id.* The

debtor, itself, made an election to reject the lease one day after the debtor's monthly rent obligation would arise, and thus, equity favors full payment to the landlord. *Id.*

Here, the Trustee is responsible for paying the full $25,000 rent because he rejected the lease four days after the date on which the Debtor's obligation arose. Similar to *Koenig*, where the debtor knowingly rejected the lease after rent became due for the month of December and was found liable for December rent in its entirety, the Debtor here rejected the lease just days after rent became due for the month of May and should also be responsible for paying May 2020's rent in full. A plain reading of section 365(d)(3) supports the conclusion that because the rent obligation arose prior to rejection of the lease, payment in full for the month of May is required.

Policy implications also favor payment in full of obligations that arise prior to the rejection of a lease. In *HA-LO Industries, Inc.*, the bankruptcy court held that the debtor was obligated to pay rent for the entire month of November rather than just the prorated amount for the three days it occupied the office building after rejecting the lease. 342 F.3d at 797. The Seventh Circuit affirmed the bankruptcy court, explaining that equity, as well as the statute favors full payment because the debtor alone controlled the landlord's entitlement to payment of rent for the month of November. *Id.* at 800. If the debtor rejected the lease prior to November 1, rather than November 2, it would not have been obligated to pay rent for November under section 365(d)(3). *Id.* Instead, it elected to reject the lease one day after its monthly rent obligation to the landlord arose. *Id.* The Seventh Circuit also denied the debtor's argument that proration should be applied since occupancy lasted less than a full month, declining to read the lease more broadly than the parties themselves provided. *Id.* at 801.

Here, equity, in addition to the statutory language, also favors full payment of rent for May 2020. Similar to the debtor in *HA-LO Indus., Inc.*, who alone was in complete control over the

obligation, the Debtor could have rejected the lease prior to May 1, 2020, but instead waited until May 6, allowing the obligation for May rent to arise pre-rejection, and forcing the Debtor to be responsible for full May rent under § 365(d)(3). Further, proration should not be applied despite the short period of time the Debtor remained in the premises post-rejection because, as mentioned in *HA-LO Industries, Inc.*, written contracts are presumptively complete in and of themselves, and this Court should not interpret the Lease more broadly than the Debtor and Touch of Grey originally intended.

While the Thirteenth Circuit concluded that application of the Billing Date Approach results in a windfall for Touch of Grey, it is a trustee, not a landlord, who controls the date of rejection. *See, e.g.*, *In re Koenig Sporting Goods, Inc.*, 203 F.3d at 989; *HA-LO Indus., Inc.*, 342 F.3d at 800. Therefore, the fact that Touch of Grey receives full rent when the property was only used for five days of the month is not significant with respect to equity. If it were, landlords would be put in the unfair position that section 365(d)(3) was aimed at resolving in the first place. For example, if landlords were only entitled to rent from the time spent on the premises, rather than the rent due under the lease agreement, debtors would have the option of staying on the premises after rejection, until they decided it was most convenient for them. It would also cause lessors to become much more selective when choosing a lessee. This sort of debtor's cost-benefit analysis is inconsistent with the purposes and policies of the Bankruptcy Code.

The Thirteenth Circuit also suggests that the Billing Date Approach results in a windfall because, in addition to receiving the rental payment, "the landlord has an opportunity to lease the vacated premises to a third party". R. at 21. While it is possible for the landlord to lease the premises to a new lessee after the previous lessee has vacated, it is highly unlikely that Touch of Grey would have been able to find a new tenant and collect rent from them for the month of May

2020 after receiving the Debtor's keys on May 5, 2020. Thus, the Billing Date Approach does not unfairly favor landlords.

B. The legislative history of section 365(d)(3) also supports the Billing Date Approach, which requires the trustee to pay the rent in full because the Bankruptcy Code was amended to make sure landlords were paid in full.

When the words of the statute are plain and clear, as they are here, a court has no need to inquire beyond the plain meaning of the statute. *Ron Pair Enters.*, 489 U.S. at 240–41. In fact, the starting point in discerning congressional intent is the existing statutory text itself. *Lamie*, 540 U.S. at 527. In cases such as the one presently before this Court, where the language of the statute is plain, the construction inquiry should end and courts should enforce the statute according to its terms. *Ron Pair Enters.*, 489 U.S. at 241. Further, the plain text of the Bankruptcy Code begins and ends our analysis. *Puerto Rico v. Franklin Cal. Tax-Free Tr.*, 136 U.S. 1938, 1946 (2016). Because the statutory language is unambiguous, it is unnecessary to resort to policy implications and legislative history. Nevertheless, the limited legislative history and supports use of the Billing Date Approach because section 365(d)(3) was enacted to protect the interests of commercial landlords.

The Bankruptcy Code, as initially enacted in 1978, treated landlords harshly. Landlords, compared to other creditors, were unfairly disadvantaged because they were forced to continue to provide current services to the debtor during the reorganization proceeding without payment and without the ability to re-rent the space to another tenant until after the debtor decided to assume or reject the lease. *In re At Home Corp.*, 392 F.3d 1064, 1068 (9th Cir. 2004). Section 365(d)(2) provided that a debtor has until confirmation of a plan to decide whether to assume or reject an unexpired lease. 11 U.S.C. § 365(d)(2). Additionally, rent due to a landlord post-petition was a mere administrative expense under § 503(b)(1)(A), assuming that the landlord could establish that

the unpaid post-filing rent was an "actual, necessary cost… of preserving the estate." 11 U.S.C. § 503(b)(1)(A). These two provisions allowed debtors to stay in rented premises indefinitely post-petition without paying rent, as long as a landlord did not file a motion to compel payment and prove entitlement to an administrative expense. Further, administrative expenses are only paid in full to the extent that the bankruptcy estate is administratively solvent, making it even less likely that landlords are paid. Therefore, prior to the enactment of section 365(d)(3), landlords were unable to collect on rent due under the lease, and instead could only hope to receive the actual necessary costs and expenses of preserving the debtor's estate. *Burvial*, 406 B.R. at 553.

Consequently, Congress amended the Bankruptcy Code in 1984 and enacted section 365(d)(3) to assist landlords. This provision was passed to ensure that a debtor timely performs its fixed obligations under a non-residential real property lease. *In re Handy Andy Home Improvement Centers, Inc.*, 144 F.3d 1125, 1128 (7th Cir. 1998). Section 365(d)(3)'s enactment ensures that decisions regarding the assumption or rejection of non-residential real property leases are timely, and that landlords will receive payment of all lease obligations until such decision is made. *Id.*

Congress amended the Bankruptcy Code in 1984 for the purpose of altering the existing practice by enhancing the treatment afforded to non-residential real property lessors. In *Montgomery Ward*, the debtor executed a lease on a commercial property in Illinois owned by the landlord. 268 F.3d at 207. The debtor subsequently filed for bankruptcy under chapter 11. *Id.* The debtor continued to make use of the premises as debtor-in-possession, but failed to assume or reject the lease prior to lease's expiration. *Id.* Instead of paying the taxes due on the property in full, the debtor remitted payment only for the prorated portion of taxes attributable to the period subsequent to the debtor's petition for bankruptcy relief. *Id.* In response, the landlord filed a motion pursuant to section 365(d)(3) in the bankruptcy court seeking payment in full of the debtor's tax

reimbursement obligations pursuant to the lease. *Id.* at 208. The Third Circuit found that because a straightforward interpretation of the text of section 365(d)(3) produces a rational result and no other reasonable interpretation is consistent with the text, section 365(d)(3) is not ambiguous. *Id.* at 210. Thus, the landlord was entitled to payment in full of the debtor's tax obligations. *Id.* However, and most importantly for the argument at hand, the Third Circuit explained that even though it has no justification for consulting legislative history (since the text is unambiguous), it believed that the limited legislative history of section 365(d)(3) is consistent with its reading of the text. *Id.* The Third Circuit also states that virtually all courts have agreed that it was intended to alleviate the above described burdens of landlords by requiring timely compliance with the terms of the lease. *Id.*

Here, the limited legislative history also helps add support to a finding that Touch of Grey is entitled to payment in full for May 2020. Like in *Montgomery Ward*, where the debtor is found liable for the unpaid taxes even before consulting legislative history, a plain reading of section 365(d)(3) leads unequivocally to the conclusion that the trustee must pay May 2020's rent in full. However, the Third Circuit's discussion of legislative history in *Montgomery Ward* exemplifies how section 365(d)(3) was enacted to ensure landlords are paid in these exact circumstances and applies across the board to the issue of timely payment of obligations under a non-residential real property lease, including the case at hand. Therefore, the legislative history on this issue suggests that Congress intended to adopt the Billing Date Approach.

CONCLUSION

The Thirteenth Circuit erroneously included the section 503(b)(9) payment of $200,000 from the Debtor to Touch of Grey in its evaluation of Touch of Grey's new value defense. Since the $200,000 payment was made to Touch of Grey after the petition was filed, it cannot be included

in the preference analysis and has no effect whatsoever on Touch of Grey's preference liability calculations. The Thirteenth Circuit also incorrectly applied the Proration Approach under section 365(d)(3), which is inconsistent with the statutory language of section 365(d)(3) because it allows debtors to sidestep obligations that may arise prior to the rejection of a lease. Since the Debtor rejected the lease after the payment obligation arose, the Debtor is liable for the full rent for May 2020. For these reasons, we respectfully ask this Court to reverse the decision of the Thirteenth Circuit Court of Appeals.