23 Civ. 1211 (KPF)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re AVIANCA HOLDINGS S.A., *et al.*, Appellants-Debtors and Reorganized Debtors.	Hon. Katherine Polk Failla

BRIEF FOR APPELLEES BURNHAM STERLING AND COMPANY LLC AND BABCOCK & BROWN SECURITIES LLC

Peter Friedman
O'MELVENY & MYERS LLP
1625 Eye Street, NW
Washington, D.C. 20006
Phone: 202-383-5300
Email: pfriedman@omm.com

Matthew P. Kremer
O'MELVENY & MYERS LLP
7 Times Square
New York, NY 10018
Phone: 212-326-2000
Email: mkremer@omm.com

Counsel for Appellees Burnham Sterling and Company LLC and Babcock & Brown Securities LLC

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 8012 of the Federal Rules of Bankruptcy Procedure, Appellee Burnham Sterling and Company LLC states that it has no corporate parents. No publicly held corporation owns more than 10% of its stock.

Appellant Babcock & Brown Securities LLC states that it is a wholly owned subsidiary of Burnham Securities Holdings LLC. No publicly held corporation owns more than 10% of its stock.

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PRELIMINARY STATEMENT[1]

Bankruptcy Code section 365(d)(5) requires a debtor to perform "all of the obligations of the debtor" under a personal property lease first arising sixty days after a chapter 11 filing until that lease is assumed or rejected. The text of the statute dictates that the terms of the lease govern when a debtor's "obligation" arises. In this instance, the applicable Lease Agreements obligate the Debtors to pay Burnham's Initiator Fees as "Additional Rental Payments" on a fixed schedule. The terms of the Lease Agreements provide that certain payments came due during the period from the sixtieth day after the Debtors filed for bankruptcy through the date the Debtors rejected the Lease Agreements—the period covered by section 365(d)(5). Therefore, under section 365(d)(5)'s clear and unambiguous language and the ordinary meaning of the words selected by Congress in drafting and enacting the statute, the Debtors were obligated to pay the Initiator Fees to Burnham in full as the Bankruptcy Court correctly held.

[1] As used herein, (i) "Burnham" refers collectively to Burnham Sterling and Company LLC and Babcock & Brown Securities LLC f/k/a Burnham Sterling Securities LLC; (ii) "Initiator Fees" means those fees that are due and owing to Burnham under the terms of the various Lease Agreements and ancillary documents, which total $4,338,484.66 for the period sixty days after the Petition Date through the rejection of the Lease Agreements; and (iii) "Lease Agreements" means the various lease agreements and ancillary documents related to the following aircraft transactions: EAIV 2015 (Group 1): MSNs 6617, 6692, 6739, 37507; EAIV 2015 (Group 2): MSNs 6767, 6511, 37508, 6746; EAIV 2016: MSNs 37511, 7284, 7318; JOLCO (2017): MSNs 7887, 7928; JOLCO (2018): MSNs 65315, 8300; JOLCO (2019): MSNs 3988, 3992, 4281, 4284; and JOLCO (2017): MSNs 39407.

To avoid this outcome, the Debtors improperly seek to rewrite section 365(d)(5) so that Burnham has only an unsecured claim for amounts arising sixty days after the petition date. In doing so, the Debtors aim to repay Burnham only a fraction of the Initiator Fees—while unsecured creditors receive less than a cent on the dollar under the plan of reorganization, a creditor that benefits from section 365(d)(5) is entitled to payment in full of those obligations that come due during the statutory period (in this case, more than $4 million). The Debtors argue that because the obligation to pay the Initiator Fees was "unconditional," the obligation arose pre-petition, when the Lease Agreements were entered—not on the dates those payments were due under the Lease Agreements. But Bankruptcy Code section 365(d)(5) requires a debtor to timely perform its obligations under a personal property lease. Thus, the debtor's obligations arise when the debtor normally performs them as they become due until a debtor rejects the contract. For the Initiator Fees, such enforceable duty arises on each Additional Rental Payment date that occurred on or after the sixtieth day following the Debtors' bankruptcy. This is what Congress intended and what the Bankruptcy Court correctly held.

Congress did not define the debtor's duties in section 365(d)(5) by saying that a lease counterparty has a "claim" under the Bankruptcy Code for amounts due under the contract. In fact, the word "claim"—which includes "a right to payment" even if unmatured, contingent or unliquidated—never appears in section 365(d)(5), and

that was not an oversight.[2] This is a departure from Bankruptcy Code section 502(g), which addresses the treatment of a creditor's rights against the debtor upon the rejection of an executory contract and uses the word "claim." Section 365(d)(5), on the other hand, addresses the duties a debtor must timely perform and, therefore, appropriately uses the word "obligation."[3] Congress intentionally used the term "obligation," and this Court should give this term its ordinary meaning. Because the language of section 365(d)(5) is clear and unambiguous, the Debtors' legislative history and policy related arguments are misplaced.

Bankruptcy Code section 365(d)(5) is clear that the Lease Agreements dictate the relationship between the Debtors and Burnham and such agreements unmistakably provide that the obligation to pay the Initiator Fees arose post-petition, during the 365(d)(5) period. This Court should enforce such lease terms and affirm the Bankruptcy Court's decision.

COUNTER STATEMENT OF ISSUES

Whether the United States Bankruptcy Court for the Southern District of New York correctly held that the Debtors must pay Burnham the Initiator Fees pursuant to section 365(d)(5) of the Bankruptcy Code where the obligation to pay such fees is established by a fixed payment schedule according to the Lease

[2] *See* 11 U.S.C. § 101(5)(A) and § 365(d)(5).

[3] *Cf.* 11 U.S.C. § 365(d)(5) and § 502(g).

Agreements and the payments came due, pursuant to the Lease Agreements' terms, during the period sixty days after the bankruptcy filing and before the Lease Agreements were assumed or rejected?

STATEMENT OF CASE

The facts of this case are not contested and are summarized only in salient part here. The Debtors began contracting with Burnham in 2014 to arrange the financing and leasing of certain aircraft. Rather than pay Burnham contemporaneously for its services, the Debtors agreed to pay the Initiator Fees over time through "Additional Rental Payments" under various Lease Agreements. Each applicable Lease Agreement includes a schedule fixing the dates and amounts of the Additional Rental Payments. Burnham is designated as an express third-party beneficiary under the Lease Agreements, with the power to enforce its rights under such agreements.

On May 10, 2020, the Debtors filed voluntary petitions for relief under chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Southern District of New York. Burnham timely asserted its rights to payment of the unpaid Initiator Fees, including by filing a motion to compel payment of the Initiator Fees pursuant to Bankruptcy Code section 365(d)(5).[4] The Debtors

[4] *Burnham Sterling and Company LLC and Babcock & Brown Securities LLC's Mot. to Compel Compliance with 11 U.S.C. §§ 365(d)(5) and 503(b)* [ECF No. 2657]. Burnham also filed proofs of claim 2038, 2055, 2057, and 4033 in the Avianca Holdings S.A. case (Case No. 20-11133); 4027, 4034 and 4035 in the Taca International Airlines S.A. case (Case No. 20-11168); and 4022, 4026, 4036, and 4037 in the Aerovías del Continente Americano S.A. Avianca case (Case No. 20-11134).

objected on various grounds, including that its obligations to Burnham should be reclassified as general unsecured claims on the grounds that the Initiator Fees were earned during the pre-petition period.[5]

The Debtors took no action with respect to the Lease Agreements during the sixty-day grace period provided by Bankruptcy Code section 365(d)(5). Instead, the Lease Agreements were gradually rejected over a period of more than two years after the sixty-day grace period ended. During this pre-rejection period, the Initiator Fees came due—as specified in the Lease Agreements—on each Additional Rental Payment date but the Debtors failed to make any payments.

The Bankruptcy Court issued its opinion on January 26, 2023, holding that Bankruptcy Code section 365(d)(5) required the Debtors to timely perform obligations during the period sixty days after the petition date and that the Debtors failed to do so. The Bankruptcy Court required the Debtors to pay the $4,209,773.27 in Initiator Fees (and interest) under the terms of the Lease Agreements.

SUMMARY OF ARGUMENT

The Bankruptcy Court's decision and order granting Burnham's motion to compel payment of fees should be affirmed. Bankruptcy Code section 365(d)(5) is unambiguous—it requires a debtor to perform its "obligations" under a lease after a

[5] *Reorganized Debtors' Twenty-Fourth Omnibus Obj. to Proofs of Claim* [ECF No. 2661]; *Reorganized Debtors' Twenty-Fifth Omnibus Obj. to Proofs of Claim* [ECF No. 2663].

sixty-day grace period until that lease is assumed or rejected. Here, that required Debtors to timely perform all duties and satisfy all obligations as they came due until the Lease Agreements were assumed or rejected. Congress did not grant a contract counterparty a "claim" or "debt" if the debtor failed to perform its obligations. Instead, section 365(d)(5) mandates the Debtors to perform its obligations under the Lease Agreements, which, in turn, required the Debtors to pay the Initiator Fees on the fixed payment dates that occurred during the applicable post-petition period (*i.e.*, after the sixtieth day up until the date of rejection).

Purported policy concerns and legislative history—like those discussed by the Debtors—are irrelevant when the statute's express, unambiguous language dictates a clear result. It happens, though, that policy favors affirming the Bankruptcy Court's decision because Bankruptcy Code section 365(d)(5) dispels with any requirement that a contract-counterparty show that it provided a benefit to the debtor's estate to obtain the benefits of that section (*i.e.* performance of the lease). This is a departure from section 503 of the Bankruptcy Code—which generally requires a creditor to prove a benefit to the estate before it can obtain administrative priority status for a post-petition claim. Elimination of this requirement from section 365(d)(5) signifies that a debtor is required to timely perform its lease obligation irrespective of whether or not the counterparty can prove that the services provided were reasonable or a "benefit to the estate." Thus awarding payment to Burnham

based on the lease terms, not on account of the services provided, is consistent with the policy underlying section 365(d)(5). Also, it is obvious and well-established that parties are free to contract, and courts should enforce such arms-length agreements. Accordingly, the Bankruptcy Court's decision and order should be affirmed.

ARGUMENT

This case involves a straightforward application of Bankruptcy Code section 365(d)(5), which provides in pertinent part:

> The trustee shall timely perform all of the obligations of the debtor . . . 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 . . . 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.

The Bankruptcy Court properly concluded that the language of Bankruptcy Code section 365(d)(5) is unambiguous. As discussed below, the ordinary meaning of the terms "obligation" and "arise" unmistakably support Burnham's position and the Bankruptcy Court's decision that the Debtors' obligation to pay the Initiator Fees arises periodically over the term of the Lease Agreements, as each payment becomes due.

A. The requirement to pay the Initiator Fees is an "obligation" under the unambiguous terms of Bankruptcy Code section 365(d)(5).

Bankruptcy Code section 365(d)(5) requires a debtor to "timely perform all of the obligations of the debtor . . . ." Traditional principles of statutory construction

require that statutory language be given its "ordinary, contemporary, common meaning."[6] The term "obligation" is not defined in the Bankruptcy Code, but *Black's Law Dictionary* defines the word as "anything that a person is bound to do or forbear from doing, whether the duty is imposed by law, contract, promise, social relations, courtesy, kindness, or morality."[7] In the context of a lease, the term refers to "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."[8]

The Debtors argue that the word "obligation" is a corollary to "claim" and the court should look to fundamental principles of when a "claim" arises under the Bankruptcy Code in interpreting section 365(d)(5).[9] A "claim" is defined broadly to include a "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured or unsecured . . . ."[10] The Debtors argue that the "obligation" to pay the Initiator Fees, like a "claim," arose pre-petition because the defined term used in the Lease Agreement provides that the obligation was

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[6] *Pioneer Inv. Serv. Co. v. Brunswick Assoc. Ltd. P'ship*, 507 U.S. 380 (1993).

[7] *Obligation*, Black's Law Dictionary (11th ed. 2019).

[8] *See Centerpoint Props. v. Montgomery Ward Holding Corp. (In re Montgomery Ward Holding Corp.)*, 268 F.3d 205, 209 (3d Cir. 2001).

[9] *Brief of Appellant Debtors and Reorganized Debtors*, Case No. 23 Civ. 1211 (KPF), at 12 (Apr. 28, 2023), ECF No. 9 ("Appellant Br.").

[10] 11 U.S.C. § 101(5)(A).

"unconditional"—notwithstanding that the payment obligation was unmatured and contingent on the Additional Rental Payment dates occurring.[11] This interpretation is contrary to the meaning of "obligation," as then-Judge Sonia Sotomayor held in *In re R.H. Macy & Co., Inc.*[12] There, the court rejected the debtor's assertion that it was not liable to pay taxes that accrued pre-petition but were not assessed until post-petition because the landlord merely held a pre-petition, unmatured claim for payment of the taxes.[13] Judge Sotomayor focused on the plain language of section 365(d)(3)—which mirrors section 365(d)(5)—and the use of the word "obligation" in lieu of "claim." There is no question that Congress intended to adopt the broadest possible definition of the term "claim" when it enacted section 101(5), which speaks of a "right to payment."[14] Under the definition of "claim," duties under a lease may arise when the lease is signed—whether it is contingent, unmatured, or unliquidated at that time. Congress opted for a different approach in enacting section 365(d)(3) and 365(d)(5), using "obligation" instead of "claim" to describe a debtor's duties.

Notably, "claim" is used many times in the Bankruptcy Code, but not in section 365(d)(5). Bankruptcy Code section 502(g) specifically provides for the

[11] Appellant Br. 10, 12–13.

[12] *In re R.H. Macy & Co., Inc.,* Case No. 93 Civ. 4414 (SS), 1994 WL 482948, at *11–12 (S.D.N.Y. 1994).

[13] *Id*. at *11–13.

[14] *Geiger v. Commonwealth of Pennsylvania (In re Geiger)*, 143 B.R. 30, 32 (E.D. Pa. 1992).

treatment of a "claim" arising from the rejection of an executory contract other than personal property leases under section 365. No such language exists in section 365(d)(5), which commands that the debtor timely perform contractual obligations. Courts presume that Congress acts intentionally when it uses language in one part of a statute and different language or omits it in another.[15] Thus, courts should not conclude that "claims" as used throughout the Bankruptcy Code and "obligations" as used in section 365(d)(5) mean "the same thing in both places."[16] Accordingly, Judge Sotomayor concluded that equating "obligation" with "claim" "is more of a stretch than normal statutory construction would permit."[17] As a result, the court concluded that the real estate taxes at issue represented an obligation of the debtor under the lease that arose after the bankruptcy, when such tax liability was assessed and billed, and had to be timely performed in accordance with section 365(d)(3).[18]

Subsequently, this court again concluded that the word "obligations" was unambiguous on its face in *Urban Retail Properties v. Loews Cineplex Entertainment Corp*.[19] There, a lease required a debtor to reimburse a landlord

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[15] *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 543–44 (2012); *Dep't of Homeland Sec. v. Maclean*, 574 U.S. 383, 391 (2015).

[16] *Maclean*, 574 U.S. at 392.

[17] *R.H. Macy & Co., Inc*., 1994 WL 482948, at *4.

[18] *Id.* at *13.

[19] *Urban Retail Props. v. Loews Cineplex Ent. Corp.*, Case No. 01 Civ. 8946 (RWS), 2002 WL 535479, at *6–7 (S.D.N.Y. Apr. 9, 2002).

$1 million for construction costs incurred by the landlord "on or before the Rental Commencement Date," which was two months after the bankruptcy petition. The debtors argued that the payment was a pre-petition obligation that falls outside of section 365(d)(3) since the vast majority of the costs to be reimbursed were incurred pre-petition. The court rejected this argument, finding that a natural reading of the statute meant that the lease obligations must be performed as they come due under the terms of the lease.[20]

The prevailing case law in this district is clear and consistent with plain language: debtors are required to perform post-petition lease obligations even if such obligations can be traced to pre-petition "claims." Debtors allege that there is ambiguity in the statute, but such ambiguity only arises by inserting words into section 365(d)(5) that are not there. Accordingly, this Court should give "obligation" its ordinary meaning.

B. Debtors' obligation to pay the Initiator Fees arose sixty days after the Petition Date and before rejection of the Lease Agreements.

Section 365(d)(5) requires payment of lease obligations that "aris[e]" from and after the sixtieth day following the petition date until such lease is assumed or rejected. The Debtors argue that their lease obligations arose pre-petition when the leases were entered.[21] This misunderstands what arise means and the nature of the

[20] *Id.* at *6, *8.

[21] Appellant Br. 10, n. 11.

obligations. The definition of "arise" is "to come into being or to attention."[22] In *Urban Retail*, this court found that the word "arising" in section 365, when read with "obligations," means that "obligations must be paid in full when the governing lease indicates the obligor is required to pay."[23] Several other courts have recognized this same conclusion.[24] Courts look to the terms of the lease to determine the obligation and when it arises.[25]

Here, the obligation to pay Initiator Fees—like traditional rental payments—arises periodically according to the schedule under the Lease Agreements. The Debtors' argument that the obligation to pay the Initiator Fees arose when it became "unconditional," not when it came due, is wrong.[26] That the obligations to pay Initiator Fees were unconditional does not mean that they arose when the Leases were executed; instead it means that there were no conditions precedent to the obligations as they came due. Such "hell or high water" language is not uncommon in contracts. Courts understand these clauses to mean that the obligations to pay rent

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[22] *Arise*, Merriam-Webster Dictionary, www.merriam-webster.com/dictionary/arise.

[23] *Urban Retail*, 2002 WL 535479, at *6–7.

[24] *E.g., Montgomery Ward,* 268 F.3d at 211 (finding that an obligation arises under a lease when the legally enforceable duty to perform arises under the lease); *Bernstein v. RJL Leasing (In re White River Corp.)*, 799 F.2d 631 (10th Cir. 1986); *Fisher v. New York City Dept. of Housing Preservation & Dev. (In re Pan Trading Corp., S.A.)*, 125 B.R. 869, 876 (Bankr. S.D.N.Y. 1991) ("[L]ease payment obligations arise when they become due and payable, and not when the lease is signed . . . .").

[25] *Montgomery Ward*, 268 F.3d at 209.

[26] Appellant Br. 10, n. 11.

on a fixed schedule under a lease is absolute and unconditional.[27] However, the obligation to pay rent (or here, the Initiator Fees) is not legally enforceable until the applicable rental payment date occurs, notwithstanding this "hell or high water" clause.

In arguing that the obligation arose pre-petition, the Debtors again conflate the concept of "obligation" and "claim." As discussed, these are different concepts. A claim is a right to payment and an obligation is something a person is bound to do. To conflate the terms, as the Debtors do, is to ignore that Congress "says in a statute what it means and means in a statute what it says."[28] Also, substituting "claim" for "obligation" in section 365(d)(5) would produce absurd results. In *In re F&M Distributors, Inc*., the bankruptcy court held that although a portion of a tax bill related to a pre-petition period, the debtor was required to pay the entire bill when it came due because the debtor did not have an obligation to pay until the post-petition period.[29] The court noted that "in one broad sense, the 'obligation' to pay the taxes 'arose' when the lease was originally signed, but that could not be what Congress meant . . . ."[30] If it were, "everything required by the lease [would] be

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[27] *See Wells Fargo Bank, N.A. v. BrooksAmerica Mortg. Corp*., 419 F.3d 107, 110 (2d Cir. 2005) (finding that in the context of a finance lease, a hell-or-high-water clause requires the lessee to make periodic payments under the lease regardless of defective performance by the lessor).

[28] *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992).

[29] 197 B.R. 829, 831 (Bankr. E.D. Mich. 1995).

[30] *Id.* at 832.

considered a pre-petition obligation" rendering the "arising" language superfluous.[31] The same is true here. To interpret "obligation" as "claim" would mean that virtually everything due and owing under the Lease Agreements, including traditional rental payments, would be deemed to "arise" pre-petition. To avoid this absurd result, this Court should not treat "obligation" and "claim" as synonyms when applying section 365(d)(5).

C. The policy concerns and legislative history raised by the Debtors do not change the result.

The equitable or policy concerns and legislative history raised by the Debtors do not control where, as here, the statute's express, unambiguous language dictates a different result.[32] Specifically, the Debtors argue that the statute is meant to protect only "lessors" with ongoing obligations to the estate.[33] Not so. Section 365(d)(5) unambiguously requires timely performance of "all obligations of the debtor" not just "rent" payments and not just payments made to "lessors." As the Bankruptcy Court properly held, the policy arguments invoked by the Debtors cannot overcome this express statutory command.[34]

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[31] *Id.*

[32] *Chen v. Major League Baseball Props., Inc.*, 798 F.3d 72, 76 (2d Cir. 2015) (holding that when a statute is unambiguous, the interpretation of a statute ends with its words and courts only consider the legislative intent behind a statute where the statute is ambiguous).

[33] *See* Appellant Br. 15.

[34] *Decision Resolving (I) Burnham Sterling and Company LLC and Babcock & Brown Securities LLC's Motion to Compel Compliance with 11 U.S.C. §§ 365(d)(5) and 503(b), and (II)*

There is also no inequity in requiring the Debtors to perform their contractual obligations. The Bankruptcy Code gives a debtor a breathing spell of sixty days to decide whether to assume or reject a personal property lease. If the debtor lets the lease continue unmodified, it must perform its contractual obligations. Here, the Debtors did not exercise their right to assume or reject (or seek to modify) the Lease Agreements during the sixty-day grace period. Having made that choice, it is not inequitable to make the Debtors perform under the Lease Agreements and pursuant to the Bankruptcy Code.

As the Bankruptcy Court observed, there are also other reasons to enforce Bankruptcy Code section 365(d)(5) as written. The statute expressly provides that a party need not prove that it has an administrative priority claim within the meaning of section 503(b)(1) to benefit from section 365(d)(5). This means that Congress explicitly dispensed with the "benefit to the estate" requirement in section 365(d)(5). The Debtors' argument that because Burnham's services were rendered pre-petition it should be disqualified from payment under 365(d)(5) is wrong—the statute makes

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Reorganized Debtors' Twenty-Fourth and Twenty-Fifth Omnibus Objections to Proofs of Claim, *In re Avianca Holdings S.A.*, Case No. 20-11133 (MG), at 8–9, 12 (Bankr. S.D.N.Y. Jan. 26, 2023) [ECF No. 2707] ("And equitable or policy concerns and legislative history do not control if the statute's express, unambiguous language dictates a different result." ("Bankruptcy Court Decision"); *Manchester Env't Coal. v. E.P.A.*, 612 F.2d 56, 60 (2d Cir. 1979) (holding that "courts should not 'ignore the ordinary meaning of (the) plain language' of the statute, even though effectuating that meaning may have undesirable public policy ramifications" (quoting *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 173 (1978)).

this issue irrelevant.[35] Indeed, courts regularly allow claims under Bankruptcy Code section 365(d)(5) when there is no benefit to the estate.[36] Moreover, the elimination of the benefit to the estate requirement provides further proof that section 365(d)(5) requires a debtor to timely perform *all* lease obligations without exception and regardless of whether or not the counterparty can establish that the services were unreasonable or not beneficial. Thus requiring payment of Burnham's Initiator Fees furthers 365(d)(5)'s overarching policy of requiring a debtor to perform its lease obligations.

D. The Bankruptcy Court's ruling supports the freedom to contract.

Enforcing the lease terms is also consistent with New York's strong policy favoring freedom of contract—ensuring that contracts are generally enforceable by their terms.[37] Provisions of contractual agreements should not be rendered inoperable by exercising equitable principles.[38] Here, the Lease Agreements were

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[35] *VFS Leasing Co. v. Wyoming Sand & Stone Co. (In re Wyoming Sand & Stone Co.)*, 393 B.R. 359, 361 (M.D. Pa. 2008) ("Benefit to the estate is not an issue under § 365(d)(5), and, in the absence of intervening action by the Debtor, the obligation to perform under the lease remains.").

[36] *See id.* at 361–62 (allowing the creditor's administrative claim for two months of lease payments accrued during the section 365(d)(5) period even though the leased vehicle was not operated); *In re Lakeshore Const. Co. of Wolfeboro, Inc.*, 390 B.R. 751, 756 (Bankr. D.N.H. 2008) (holding that actual and necessary use of the property in question is not required under section 365(d)(5)).

[37] *Centi v. McGillin*, 34 N.Y.3d 1072, 1073 (N.Y. 2019) (citing *159 MP Corp. v. Redbridge Bedford, LLC*, 33 N.Y.3d 353, 359-61 (N.Y. 2019)).

[38] *Sea Tow Servs. Int'l, Inc. v. Tampa Bay Marine Recovery, Inc.*, Case No. 20-CV-2877(JS)(SIL), 2022 WL 5122728, at *13 (E.D.N.Y. Sept. 30, 2022); *EMA Fin., LLC v. NFusz, Inc.*, 444 F. Supp. 3d 530, 543 (S.D.N.Y. 2020) (declining to rewrite a contract's choice of law clause over arguments that enforcing the clause would be "truly obnoxious" because it would undermine the state's "interest in promoting certainty and predictability in commercial contracting.").

enacted well after 1994, when section 365(d)(5) went into effect.[39] As sophisticated parties, the Debtors and Burnham negotiated the Lease Agreements to refer to the Debtors' obligations to Burnham as "lease" obligations to be paid over time. The consequence of this decision places the Debtors' obligations "squarely within section 365(d)(5)."[40] This also does not result in an improper windfall for Burnham. As the Bankruptcy Court stated: This does not cause a "windfall that can be said to contravene the intent of Congress nearly thirty years after it enacted 365(d)(5) using words that perfectly describe the parties' negotiated arrangements here."[41] Accordingly, the Court need not speculate why the parties chose to structure the Debtors' obligations to Burnham in the way they did, but the Court should enforce the contract as written.

CONCLUSION

For the foregoing reasons, the Initiator Fees are lease obligations which arose post-petition and must be paid by the Debtors pursuant to the plain, unambiguous language of Bankruptcy Code section 365(d)(5). Thus, Burnham requests that the Court affirm the order of the Bankruptcy Court.

[39] Bankruptcy Court Decision 12–13.

[40] *Id.* at 13.

[41] *Id.*

Dated: May 30, 2023
New York, New York

Respectfully submitted,

/s/ Matthew P. Kremer

MATTHEW P. KREMER
O'MELVENY & MYERS LLP
7 Times Square
New York, New York 10036
Tel: (212) 326-2000
Fax: (212) 326-2061

-and-

PETER FRIEDMAN
O'MELVENY & MYERS LLP
1625 Eye Street, NW
Washington, D.C. 20006
Tel: (202) 383-5300
Fax: (202) 383-5414

Counsel for Appellees Burnham Sterling and Company LLC and Babcock & Brown Securities LLC