24-255-bk
In re Avianca Holdings S.A.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2024

(Argued: October 23, 2024 Decided: February 3, 2025)

Docket No. 24-255-bk

IN RE: AVIANCA HOLDINGS S.A.,
Debtor.

AVIANCA HOLDINGS S.A.,

Debtor-Appellant,

— v. —

BURNHAM STERLING & COMPANY LLC and BABCOCK & BROWN SECURITIES LLC,

Creditors-Appellees.[*]

B e f o r e:

WESLEY, LYNCH, and KAHN, *Circuit Judges*.

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[*] The Clerk of Court is respectfully directed to amend the official caption in this case to conform to the caption above.

Debtor-Appellant Avianca Holdings S.A. agreed to pay the Creditor-Appellees Burnham Sterling and Company LLC and Babcock & Brown Securities, LLC (the "Initiators") additional rental payments on a fixed schedule in 20 different aircraft leases. Avianca failed to pay certain of those additional rental payments that came due more than 60 days after Avianca filed for bankruptcy but before the leases were assumed or rejected. The Initiators accordingly moved to compel payment under 11 U.S.C. § 365(d)(5), which requires the debtor-in-possession to "timely perform all of the obligations of the debtor . . . first arising from or after 60 days after the order for relief . . . under an unexpired lease of personal property . . . until such lease is assumed or rejected." The bankruptcy court (Jones, *J.*) granted the motion, concluding that Avianca's obligation to pay first arose when the additional rental payments came due under the fixed schedule in the leases. Avianca appealed, and the district court (Failla, *J.*) affirmed. Avianca now appeals to us, arguing that its obligation to pay the additional rental payments first arose pre-petition when the leases were executed. For the reasons discussed below, we agree with the bankruptcy court and hold that the additional rental payments first arose as they came due under the leases' terms.

AFFIRMED.

MICHAEL F. HOLBEIN, (John G. McCarthy, *on the brief*), Smith, Gambrell & Russell, LLP, Atlanta, GA and New York, NY, *for* Debtor-Appellant Avianca Holdings S.A.

PETER FRIEDMAN, (Matthew P. Kremer and Nicole Molner, *on the brief*), O'Melveny & Myers LLP, New York, NY, *for* Creditors-Appellees Burnham Sterling and Company LLC and Babcock & Brown Securities LLC.

GERARD E. LYNCH, *Circuit Judge*:

When Debtor-Appellant Avianca Holdings S.A. filed for bankruptcy, it stopped paying Creditors-Appellees Burnham Sterling and Company LLC and Babcock & Brown Securities, LLC (the "Initiators") additional rental payments that it owed them under pre-set schedules contained in 20 unexpired airplane leases. Under those schedules, certain of those additional rental payments came due more than 60 days after Avianca filed for bankruptcy but before Avianca assumed or rejected the operative leases. The Initiators moved to compel payment of those additional rental payments on a priority basis under 11 U.S.C. § 365(d)(5). The bankruptcy court (David S. Jones, *J.*) granted the motion. On appeal, the district court (Katherine P. Failla, *J.*) agreed with the bankruptcy court's decision and affirmed. Avianca now appeals to us. For the reasons discussed below, we AFFIRM the judgment of the district court.

BACKGROUND

Debtor-Appellant Avianca Holdings S.A., one of the largest Latin American airlines, filed for Chapter 11 bankruptcy on May 10, 2020, citing the COVID-19 pandemic as the cause for its financial distress. During the pendency of its bankruptcy, Avianca operated its airline business as a debtor-in-possession.

Accordingly, Avianca retained the statutory authority to decide whether to assume or reject its unexpired airplane leases, through which Avianca obtained "many of the aircraft it used to carry out its business operations." *In re Avianca Holdings S.A. ("Avianca I")*, 20-11133, 2023 WL 494255, at *2 (Bankr. S.D.N.Y. Jan. 26, 2023); *see* 11 U.S.C. §§ 365(a), 1107(a).[1] This appeal centers on the consequences of Avianca's failure to pay Creditor-Appellees Burnham Sterling and Company LLC and Babcock & Brown Securities, LLC (the "Initiators") fixed payments owed in exchange for the Initiator's brokerage services and due pursuant to unexpired airplane leases during the time between 60 days after the order for relief in its bankruptcy case and Avianca's decision to reject those leases.[2] Avianca nonetheless paid rent to the aircraft lessors pursuant to the same leases.

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[1] The parties do not dispute the underlying facts found by the bankruptcy court. Accordingly, for purposes of resolving this appeal, we accept the bankruptcy court's factual findings as true.

[2] Avianca's "commencement" of its voluntary Chapter 11 case "constitute[d] [the] order for relief." 11 U.S.C. § 301(b); *see also Bell v. Bell (In re Bell)*, 225 F.3d 203, 209 (2d Cir. 2000) ("The commencement of a voluntary case under Chapter 11 constitutes an order for relief."). Accordingly, this opinion treats the petition date as the date of the order for relief.

I. The Unexpired Airplane Leases

To understand the parties' dispute, we start at the beginning of the contractual relationship between the Initiators and Avianca. Commencing in 2014, the Initiators provided brokerage services to Avianca, with the goal of securing suitable airplanes for Avianca to lease. The Initiators proved quite successful in this endeavor, brokering 20 aircraft leases on Avianca's behalf. The Initiators completed all that work before Avianca filed for bankruptcy. In other words, Avianca entered all 20 of the brokered airplane leases pre-petition and received no post-petition brokerage services from the Initiators.

Under the terms of the brokered aircraft leases, the Initiators were to be compensated for the already rendered brokerage services by payments, contractually characterized as "additional rental payment[s]," that Avianca was required to pay on a pre-set schedule over the lifetime of the lease. Motion to Compel Compliance ¶ 5, *In re Avianca Holdings S.A.*, No. 20-11133, 2023 WL 494255 (Bankr. S.D.N.Y. Jan. 26, 2023), ECF No. 2657. The leases deemed those additional rental payments to be the unconditional obligations of Avianca. As relevant to the instant appeal, Avianca paid the actual lessors of the aircraft for rent that came due under the leases' schedules. But Avianca failed to pay the

Initiators those additional rental payments - the brokers fees the parties contractually agreed to pay over time - that came due between 60 days after the petition date and before Avianca made the decision of whether to assume or reject the operative leases. Ultimately, over the course of two years, Avianca gradually rejected all 20 airplane leases under which it owed additional rental payments to the Initiators.

II. Proceedings Below

To safeguard their right to recover those additional rental payments, the Initiators filed proofs of claim and moved to compel Avianca to pay the balance due. The Initiators argued that their claims were entitled to priority treatment under 11 U.S.C. § 365(d)(5), which requires the debtor-in-possession to "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."[3]

[3] The Initiators also argued that their claims were entitled to priority treatment under 11 U.S.C. § 503(b)(1), which grants administrative expense priority to "the actual, necessary costs and expenses of preserving the estate." The bankruptcy court disagreed, holding that the Initiators were not entitled to an administrative expense claim because the Initiators did "not establish[] a post-petition transaction or benefit to the estate as required to support allowance of an administrative claim under section 503(b)." *Avianca I*, 2023 WL 494255, at *7.

The Initiators' position was that Avianca's obligation to pay the additional rental payments first arose as the payments came due under the leases' schedules, which was at least 60 days after the petition date. The Initiators did not seek priority treatment for payments that came due during the 60-day grace period.

Avianca objected. In its view, the "obligations" to pay the Initiators arose pre-petition, not 60 days after the petition date, because the Initiators rendered all of their brokerage services pre-petition and the payment terms in the leases were set prior to Avianca's bankruptcy filing. Avianca thus contended that the Initiators were entitled only to a general unsecured claim.

Ultimately, the bankruptcy court sided with the Initiators based on "both the plain meaning of [Section 365(d)(5)] and the commercial realities of the parties' arrangement." *Avianca I*, 2023 WL 494255, at *4. Specifically, the bankruptcy court observed that the statutory text "refers to plural 'all obligations' of the debtor 'arising' under 'a lease' (a singular noun)," which the bankruptcy court interpreted as "signal[ing] that each separate payment requirement under 'a' lease constitutes a separate 'obligation,' not merely one portion of a singular,

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Neither party appealed that portion of the bankruptcy court's decision, so it is not before us.

overarching 'obligation' embodied in the underlying lease document." *Id.* And per the terms of the leases, "no payment was due – and thus the debtor had no payment obligation as to any future scheduled payment – until and unless its due date was reached." *Id.* With those two observations in hand, the bankruptcy court concluded that Avianca's obligation to pay the relevant additional rental payments arose, for purposes of Section 365(d)(5), on the dates specified in the schedule in the leases. *Id.* at *4–5. Accordingly, the bankruptcy court granted the Initiators' motion to compel and ordered Avianca to pay the Initiators $4,338,484.66. *See Avianca I*, 2023 WL 494255, at *1, 8; Order at 2, *In re Avianca Holdings S.A.*, No. 20-11133 (Bankr. S.D.N.Y. Jan. 31, 2023), ECF No. 2714.

Avianca appealed that decision to the district court. The district court affirmed the bankruptcy court's decision, concluding that "[t]he natural reading of the statute, in concert with the text of the Lease Agreements, dictates that [Avianca's] obligation to make the disputed payments arose when each such payment came due." *In re Avianca Holdings S.A.*, 23 Civ. 1211, 2023 WL 9016495, at *5, *8 (S.D.N.Y. Dec. 29, 2023). The district court added that Avianca's obligation to pay the full amount owed followed "their strategic decision to neither reject nor assume the [l]eases during the prescribed sixty-day grace

period." *Id.* at *7. Had Avianca acted within that grace period, the Initiators would have been left with an unsecured pre-petition claim. *See id.* This timely appeal ensued.

DISCUSSION

This appeal presents a single question: did Avianca's obligation to pay the additional rental payments "first aris[e] from or after 60 days after the order for relief in a case under chapter 11 of this title"? *See* 11 U.S.C. § 365(d)(5). Avianca contends that the answer is no because its payment obligations arose pre-petition when the leases were executed and the Initiators services were complete. The Initiators, on the other hand, insist that the answer is yes because Avianca's payment obligations arose as the additional rental payments came due under the payment schedules in the aircraft leases. Ultimately, the parties' dispute centers on the proper interpretation of Section 365(d)(5), an issue of law we review *de novo*. *See Anderson v. Credit One Bank, N.A. (In re Anderson)*, 884 F.3d 382, 387 (2d Cir. 2018). For the reasons discussed below, we agree with the Initiators and hold that Avianca's "obligations" to pay the relevant additional rental payments arose when they came due pursuant to the leases.

I. Statutory Background

To contextualize the narrow legal issue we are tasked with resolving, it is necessary to understand the basic mechanics of assumption and rejection. As a general rule, a debtor-in-possession is permitted to "assume or reject any executory contract or unexpired lease of the debtor" with the bankruptcy court's approval. *COR Route 5 Co., LLC v. Penn Traffic Co. (In re Penn Traffic Co.*), 524 F.3d 373, 378 (2d Cir. 2008). Assumption means that the debtor is electing to "continue performance," *id.*, while rejection means the debtor is "repudiating any further performance of its duties," *Mission Prod. Holdings, Inc. v. Tempnology, LLC*, 587 U.S. 370, 374 (2019). The debtor-in-possession is granted such flexibility so that it may reject contracts that are "burdensome" to the estate but assume beneficial contracts when it would like to "force [its contractual counterparties] to continue to do business with it when the bankruptcy filing might otherwise make them reluctant to do so." *Frito-Lay, Inc. v. LTV Steel Co. (In re Chateaugay Corp.)*, 10 F.3d 944, 954–55 (2d Cir. 1993) (quotation marks omitted); *see also ReGen Cap. v. Halperin (In re Wireless Data, Inc.)*, 547 F.3d 484, 488 (2d Cir. 2008).

Assumption and rejection have vastly different consequences for a debtor's contractual creditors. Section 365 of the Bankruptcy Code delineates those

consequences for "executory contracts," generally, and "unexpired leases," more specifically. If the debtor assumes an executory contract, the debtor must cure, or provide adequate assurances that it will cure, most outstanding contractual defaults. *In re Penn Traffic*, 524 F.3d at 378; 11 U.S.C. § 365(b)(1)(A). And once assumed, the debtor must pay the amounts that come due under the contract as administrative expenses of the estate. *See N.L.R.B. v. Bildisco & Bildisco*, 465 U.S. 513, 531–32 (1984); *Chateaugay*, 10 F.3d at 955. On the other hand, if a debtor rejects an executory contract, the rejection is treated as a breach of that contract that occurred "immediately before the date of the filing of the petition." 11 U.S.C. § 365(g)(1); *see also Med. Malpractice Ins. Ass'n v. Hirsch (In re Lavigne)*, 114 F.3d 379, 387 (2d Cir. 1997); 11 U.S.C. § 502(g)(1). As a result, a creditor whose claim arises from a rejected executory contract will have only "an unsecured prepetition claim against the estate" for the breach. *In re Penn Traffic*, 524 F.3d at 378; *see also Mission Prod. Holdings*, 587 U.S. at 374. The ultimate result is that a creditor owed payment under an assumed contract is in a much better position to recover in full than a creditor owed payment under a rejected contract.

Although the decision of assumption or rejection has rippling consequences for creditors, the debtor is generally not required to make a

decision about its executory contracts immediately after filing for Chapter 11, or even within any set time frame before plan confirmation. *See* 11 U.S.C. § 365(d)(2); *Theatre Holding Corp. v. Mauro*, 681 F.2d 102, 104–05 (2d Cir. 1982). Consequently, as occurred here, time will often elapse between when the debtor files for bankruptcy and when the debtor makes a decision with respect to its assumption or rejection of certain contracts. During that waiting period, creditors sit in limbo with respect to the ultimate status of their executory contracts with the debtor, as the automatic stay prevents creditors from terminating those contracts. *See Lehman Bros. Special Fin. Inc. v. Branch Banking & Trust Co. (In re Lehman Bros. Holdings, Inc.)*, 970 F.3d 91, 101–02 (2d Cir. 2020). And, generally speaking, those creditors will receive a payment during this waiting period only "[i]f the debtor-in-possession elects to continue to receive benefits from" them under the contract. *Bildisco & Bildisco*, 465 U.S. at 531. However, in such circumstances, "the debtor-in-possession is obligated to pay [only] for the reasonable value of those services," which may or may not equal the amount "specified in the contract." *Id.*

Creditors owed money under unexpired leases of nonresidential real property or personal property, however, are granted enhanced protections

during the waiting period following the initial bankruptcy filing. For those types of unexpired leases, the debtor must resume making any contractually-set payments that arise after a certain period of time during the bankruptcy before the relevant lease is assumed or rejected, regardless of whether the debtor is receiving a post-petition benefit. *See* 11 U.S.C. § 365(d)(3), (d)(5). Specifically, for unexpired leases of nonresidential real property, the debtor-in-possession must "timely perform all the obligations of the debtor, except those specified in section 365(b)(2), arising from and after the order for relief under any unexpired lease of nonresidential real property, until such lease is assumed or rejected, notwithstanding section 503(b)(1) of this title." 11 U.S.C. § 365(d)(3). Similarly, for unexpired leases of personal property, Section 365(d)(5) requires the debtor-in-possession to:

> timely perform all of the obligations of the debtor, except those specified in section 365(b)(2), first arising from or after 60 days after the order for relief in a case under chapter 11 of this title under an unexpired lease of personal property . . . 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.

11 U.S.C. § 365(d)(5).

Given the above statutory scheme, the Initiators' sole path to a priority claim here is through Section 365(d)(5), rather than Section 503(b), because it is undisputed that the Initiators did not provide any post-petition services to Avianca. However, that requires the Initiators to show that Avianca's obligation to pay the additional rental payments first arose at least 60 days after the petition date. Otherwise, the Initiators will be left holding a general unsecured claim for the breach of the operative leases. The distinction between a priority claim and a general unsecured claim will be consequential for the Initiators, as it is the difference between payment in full and recovering pennies on the dollar.

II. When Obligations Arise Under 11 U.S.C. § 365(d)(5)

With the basic mechanics and stakes clarified, we turn to the immediate task at hand: interpreting the text of Section 365(d)(5) to determine when Avianca's obligation to pay the additional rental payments arose. At first glance, the question seems straightforward, but lurking beneath the surface is a deep, pre-existing split of authority regarding the proper method for determining when a debtor's obligation arises.[4] On the one hand, the "accrual" approach,

[4] The split has crystallized in the context of Section 365(d)(3), applicable to leases of real property, which is similar to Section 365(d)(5) in relevant part in that it also requires the debtor-in-possession to "timely perform all the obligations of

which aligns with Avianca's position on appeal, requires the debtor to pay only those obligations that accrued post-petition, irrespective of when those obligations come due under the operative lease.[5] On the other hand, the "billing date" approach, which the Initiators advocate here, requires the debtor to pay obligations once they come due under the operative lease, regardless of when the obligation can be said to have accrued.[6]

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the debtor . . . arising from 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); *see CIT Communications Fin. Corp. v. Midway Airlines Corp. (In re Midway Airlines Corp.)*, 406 F.3d 229, 234 (4th Cir. 2005) (noting the statutory provision applicable to unexpired leases of personal property "is modeled on a very similar provision of the Code, § 365(d)(3).").

[5] *See In re Ames Dep't Stores, Inc.*, 306 B.R. 43, 63–65 (Bankr. S.D.N.Y. 2004); *Child World, Inc. v. Campbell/Mass. Trust (In re Child World, Inc.)*, 161 B.R. 571, 573–77 (S.D.N.Y. 1993); *Newman v. McCrory Corp. (In re McCrory Corp.)*, 210 B.R. 934, 939–40 (S.D.N.Y. 1997); *In re Stone Barn Manhattan LLC*, 398 B.R. 359, 365–68 (Bankr. S.D.N.Y. 2008); *In re Victory Mkts., Inc.*, 196 B.R. 6, 8–10 (Bankr. N.D.N.Y. 1996); *In re Door to Door Storage, Inc.*, C17-1385, 2018 WL 1899361, at *2 (W.D. Wash. Apr. 20, 2018); *El Paso Props. Corp. v. Gonzales* (*In re Furr's Supermarkets, Inc.)*, 283 B.R. 60, 62 (B.A.P. 10th Cir. 2002); *In re Handy Andy Home Improvement Ctrs., Inc.*, 144 F.3d 1125, 1126–29 (7th Cir. 1998).

[6] *See Centerpoint Props. v. Montgomery Ward Holding Corp. (In re Montgomery Ward Holding Corp.)*, 268 F.3d 205, 209–12 (3d Cir. 2001); *Burival v. Creditor Comm. (In re Burival)*, 406 B.R. 548, 550, 551–54 (B.A.P. 8th Cir. 2009); *Koenig Sporting Goods, Inc. v. Morse Road Co. (In re Koenig Sporting Goods, Inc.)*, 203 F.3d 986, 989–90 (6th Cir. 2000); *Bullock's Inc. v. Lakewood Mall Shopping Ctr. (In re R.H. Macy & Co., Inc.)*, 93 Civ. 4414, 1994 WL 482948, at *10–13 (S.D.N.Y. Feb. 23, 1994) (Sotomayor, J.);

In addressing this question, we begin with the text of the relevant provision. Section 365(d)(5) states, in relevant part, that the debtor-in-possession "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." 11 U.S.C. § 365(d)(5). The crux of the parties' dispute hinges on the meaning of the word "arise." Avianca contends that an obligation arises when it becomes unconditional, which in this case was when the leases were executed pre-petition. The Initiators, meanwhile, argue that an obligation arises when it comes due under the terms of the lease, which here was more than 60 days after the petition date, per the fixed schedule in the leases.

At first blush, both parties have put forward plausible interpretations of the word "arise" because Section 365(d)(5) does not explicitly specify when an obligation can be said to have arisen. Where particular words are susceptible to multiple interpretations, "we must . . . 'interpret the relevant words not in a

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Urban Retail Props. v. Loews Cineplex Ent. Corp., 01 Civ. 8946, 2002 WL 535479, at *5–8 (S.D.N.Y. Apr. 9, 2002); *HA-LO Indus., Inc. v. CenterPoint Props. Trust*, 342 F.3d 794, 796, 798–800 (7th Cir. 2003).

vacuum, but with reference to the statutory context,'" which includes the terms surrounding the relevant words. *Torres v. Lynch*, 578 U.S. 452, 459 (2016), quoting *Abramski v. United States*, 573 U.S. 169, 179 (2014); *see Southwest Airlines v. Saxon,* 596 U.S. 450, 455 (2022). Situating Section 365(d)(5) in its appropriate statutory context, we conclude that an obligation first "arises" when payment comes due under the terms of a lease.

We find two contextual clues most helpful in this endeavor. First, Subsection 365(d)(5) requires the debtor to "timely perform" its obligations. 11 U.S.C. § 365(d)(5). "Perform" means "to carry into effect, [or] discharge (a service, duty, etc.)." *Perform,* OXFORD ENGLISH DICTIONARY, https://www.oed.com/search/dictionary/?scope=Entries&q=perform (last visited Jan. 9, 2025); *see also Perform*, MERRIAM WEBSTER UNABRIDGED, https://unabridged.merriam-webster.com/unabridged/perform (last visited Jan. 9, 2025) ("to adhere to the terms of: treat as an obligation: implement, fulfill"). The use of the word "perform," therefore, is telling, as it requires the existence of some presently existing duty that the debtor must fulfill. Second, when Section 365(d)(5) refers to the debtor's "obligations," what it means is "[a]n act or course of action to which a person is . . . legally bound," *Obligation*, OXFORD ENGLISH

DICTIONARY,

https://www.oed.com/search/dictionary/?scope=Entries&q=obligation (last visited Jan. 9, 2025). *See also Obligation*, MERRIAM WEBSTER UNABRIDGED, https://unabridged.merriam-webster.com/unabridged/obligation (last visited Jan. 9, 2025) ("a duty arising by contract: a legal liability").

With those other terms in mind, the phrase "first arising from or after 60 days after the order for relief," 11 U.S.C. § 365(d)(5), is best understood as specifying that the duty the debtor must perform has to "originate from" or "come into being" under an unexpired lease of personal property 60 days after the order for relief or later. *See Arise,* MERRIAM WEBSTER UNABRIDGED, https://unabridged.merriam-webster.com/unabridged/arise (last visited Jan. 10, 2025)*; see also Arise*, BLACK'S LAW DICTIONARY (12th ed. 2024) ("To originate; to stem (from)" or "[t]o result (from)"). Otherwise, there would be no presently existing duty for the debtor to perform. Putting it all together then, Section 365(d)(5) requires the debtor-in-possession to perform the debtor's contractual duties that come into being under an unexpired lease of personal property at least 60 days after the order for relief. That is the "billing date" approach.

The broader statutory scheme confirms that we have landed on the appropriate interpretation of the text. First, our approach recognizes the critical difference between when a creditor's claim arises and when a debtor's obligation arises, while Avianca's position conflates them. Second, our interpretation comports with the statutory directive that a creditor is entitled to payment under Section 365(d)(5) (the specific rule applicable to leases of personal property) without complying with the requirements of Section 503(b)(1) (a general provision covering administrative expenses of the bankruptcy estate), while Avianca's approach would reimpose Section 503(b)(1)'s requirement that there be a post-petition benefit to the estate.

To understand the first structural point, we provide a brief overview of how the Bankruptcy Code instructs us to determine whether a creditor's claim has arisen pre-petition. We start with the statutory definitions of "creditor" and "claim." A "creditor" is an "entity that has a *claim* against the debtor that *arose at the time of or before the order for relief concerning the debtor*," 11 U.S.C. § 101(10)(A) (emphasis added), and a "claim" is defined, in relevant part, as a "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed,

legal, equitable, secured or unsecured," 11 U.S.C. § 101(5)(A). In other words, "[a] claim is (1) a right to payment (2) that arose before the filing of the petition." *Elliott v. Gen. Motors LLC (In re Motors Liquidation Co.)*, 829 F.3d 135, 156 (2d Cir. 2016). We have explained that "[a] claim will be deemed to have arisen pre-petition if the relationship between the debtor and the creditor contained all of the elements necessary to give rise to a legal obligation – 'a right to payment' – under the relevant non-bankruptcy law." *Olin Corp. v. Riverwood Int'l Corp. (In re Manville Forest Prods. Corp.*), 209 F.3d 125, 129 (2d Cir. 2000) (quotation marks omitted). As applied specifically to contractually grounded claims, we have held, for example, that a contractual right to indemnification was a claim arising pre-petition because "[u]nder contract law, a right to payment based on a written indemnification contract arises at the time the indemnification agreement is executed." *Id.*

That explanation lays bare Avianca's gambit on appeal. Avianca's position, that its obligation arose pre-petition because the obligation to pay the Initiators was unconditional upon execution of the leases, mirrors almost exactly the logic for determining whether a contractual *claim* has arisen pre-petition. But we must be mindful that Section 365(d)(5) speaks in terms of the *debtor's obligations*, not the

creditor's claims. That is because "Congress's use of 'certain language in one part of the statute and different language in another' can indicate that 'different meanings were intended.'" *Sebelius v. Auburn Regional Med. Ctr.*, 568 U.S. 145, 156 (2013), quoting *Sosa v. Alvarez-Machain*, 542 U.S. 692, 711 n.9 (2004); *see also Pulsifer v. United States*, 601 U.S. 124, 149 (2024) ("In a given statute, the same term usually has the same meaning and different terms usually have different meanings."). We accordingly decline Avianca's invitation to adopt a reading of Section 365(d)(5) that would conflate when a creditor's claim arises with when a debtor's obligation arises. Instead, to account for the variation in terminology, we apply a different test to determine when a debtor's obligation arises, namely, whether payment has come due under the terms of the lease.

We now turn to the second structural point: that Section 365(d)(5) should be interpreted to impose different requirements for priority treatment than those imposed by Section 503(b)(1) for administrative expense priority. Section 365(d)(5) explicitly requires priority payment of the debtor's obligations first arising 60 days post-petition "*notwithstanding* section 503(b)(1) of this title." 11 U.S.C. § 365(d)(5) (emphasis added). The text therefore exempts creditors from the following requirements under Section 503(b)(1): providing notice; attending a

hearing; and showing that the payments at issue constitute "the actual, necessary costs and expenses of preserving the estate," meaning that the debtor received a post-petition benefit from the creditor's services. 11 U.S.C. § 503(b)(1)(A); *Nostas Assocs. v. Costich (In re Klein Sleep Prods., Inc.*), 78 F.3d 18, 22 (2d Cir. 1996); *Supplee v. Bethlehem Steel Corp. (In re Bethlehem Steel Corp.)*, 479 F.3d 167, 172 (2d Cir. 2007). Avianca's position, "that the estate should not bear an expense for which it receives no benefit," Appellant Br. at 17, advocates for a post-petition benefit requirement. That position is directly at odds with the text of Section 365(d)(5).

Avianca's veiled advocacy for the imposition of a post-petition benefit requirement reveals an even deeper flaw with the accrual approach. The accrual approach "adhere[s] to the long-standing, pre-1984 practice of prorating payment of a debtor's obligations under a lease, regardless of the billing date" that developed under Section 503(b)(1). *McCrory*, 210 B.R. at 937. Adherence to such a past practice, however, is proper only if Congress has not provided "a clear indication that [it] intended . . . a departure" from past practice. *Hamilton v. Lanning*, 560 U.S. 505, 517 (2010), quoting *Travelers Casualty & Surety Co. of America v. Pac. Gas & Elec. Co.*, 549 U.S. 443, 454 (2007). Here, we read the language of Section 365(d)(5), with its express provision that it applies

"notwithstanding [S]ection 503(b)(1)," as providing precisely such a clear and explicit instruction to depart from the prior practice under the latter provision.[7] Section 365(d)(5) breaks with the requirements of Section 503(b)(1) and refocuses the relevant inquiry on whether the debtor has a performance obligation, instead of on whether the debtor receives a post-petition benefit. In sum, we conclude that the "billing date" approach, not the accrual approach, best comports with the broader statutory scheme.

Finally, our interpretation of Section 365(d)(5) aligns with sound bankruptcy policy, despite Avianca's protestations to the contrary. At bottom, "the purpose [of] § 365 is to balance the state law contract right of the creditor to receive the benefit of his bargain with the federal law equitable right of the debtor to have an opportunity to reorganize." *Coleman Oil Co. v. Circle K Corp. (In re Circle K Corp.*), 190 B.R. 370, 376 (B.A.P. 9th Cir. 1995). Balances, of course, can be struck in different ways. As the House Report explains, Section 365(d)(5), in

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[7] We further note that Section 365(d)(5) was added to the code in 1994, *after* Section 503(b)(1) had already been promulgated as part of the initial restructuring of the Bankruptcy Code in 1978. *See* Bankruptcy Reform Act of 1994, Pub. L. 103-394, § 219, 108 Stat. 4106, 4128–29; Bankruptcy Act of 1978, Pub. L. 95-598, § 503, 92 Stat. 2549, 2581. That provides additional evidence that Congress enacted Section 365(d)(5) to exempt creditors under unexpired leases of personal property from the requirements of Section 503(b)(1).

particular, was designed to tip the balance slightly in favor of creditor protection as compared to the baseline rules set out elsewhere in the Code:

> Under current law, when a debtor files for bankruptcy, it has an unspecified period of time to determine whether to assume or reject a lease of personal property. Pending a decision to assume or reject, lessors are permitted to petition the court to require the lessee to make lease payments to the extent use of the property actually benefits the estate. Section 220 responds to concerns that this procedure may be unduly burdensome on lessors of personal property, while safeguarding the debtors ability to make orderly decisions regarding assumption or rejection. The section amends section 365(d) to specify that 60 days after the order for relief the debtor must perform all obligations under an equipment lease, unless the court, after notice and a hearing and based on the equities of the case, orders otherwise. This will shift to the debtor the burden of bringing a motion while allowing the debtor sufficient breathing room after the bankruptcy petition to make an informed decision.

H.R. Rep. No. 103-835, at 50 (1994), *as reprinted in* 1994 U.S.C.C.A.N. 3340, 3359.

Accordingly, Section 365(d)(5) is best understood as a specific intervention that grants creditors under unexpired leases of personal property priority treatment, over other general unsecured creditors, and that shifts the burden to the debtor to bring a motion if that priority treatment will result in inequities in order to ameliorate the unique burdens that creditors under unexpired leases of personal property face. Specifically, Section 365(d)(5) requires the debtor to automatically resume making timely payments under its unexpired personal

property lease for obligations that arise 60 days post-petition, without the relevant creditors seeking priority treatment.

At the same time, however, the debtor is granted two safety valves in case the automatic resumption of payments interferes with the administration of the estate. The first is that the debtor has a 60 day grace period during which it can make a decision about assumption or rejection before it has to resume making timely payments under the lease. The second is that the debtor can petition the bankruptcy court for a hearing to amend its payment obligations after the 60 day grace period elapses. At such a hearing, the debtor could raise the exact concern that Avianca emphasizes as supporting its position on appeal: that resuming payments would constitute a windfall to certain creditors who completed all their services pre-petition.

Tellingly, Avianca chose not to use either of the safety valves that Congress built into Section 365(d)(5) to remedy any inequities that may stem from requiring it to resume making its payments under the terms of the aircraft leases. Instead, Avianca decided to pick and choose amongst its contractual creditors, paying the lessors of the aircraft but not the Initiators, and then cried foul after the fact by raising the specter of an undue windfall to the Initiators at the expense

of other general unsecured creditors. To the extent any windfall exists, it is the result of Avianca's own choice not to assume or reject the unexpired leases promptly or petition for a hearing to amend its payment obligations to the Initiators after the grace period expired. We decline Avianca's invitation to bend the statutory language beyond recognition to save Avianca from the consequences of its own choices which will require it to pay the Initiators on a priority basis. Therefore, we hold that the billing date approach is the approach most consistent with the text of Section 365(d)(5), the Bankruptcy Code as a whole, and sound bankruptcy policy.

CONCLUSION

We have considered the Avianca's remaining arguments and find them to be without merit. We accordingly AFFIRM the judgment of the district court.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re AVIANCA HOLDINGS S.A., *et al.*, Appellants-Debtors and Reorganized Debtors.	Bankruptcy Case No. 20-11133 (MG) 23 Civ. 1211 (KPF) **OPINION AND ORDER**

KATHERINE POLK FAILLA, District Judge:

Before the Court is an appeal from (a) the Decision of the United States Bankruptcy Court for the Southern District of New York (the "Bankruptcy Court") 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) Reorganized Debtors' Twenty-Fourth and Twenty-Fifth Omnibus Objections to Proofs of Claim, entered January 26, 2023 (the "January 26, 2023 Decision" or the "Decision"); and (b) the correlative Order Granting in Part 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 Overruling in Part Reorganized Debtors' Twenty-Fourth and Twenty-Fifth Omnibus Objections to Proofs of Claim, entered January 31, 2023 (the "January 31, 2023 Order" or the "Order"). The Decision and the Order both concern the treatment under the Bankruptcy Code of certain fees due to broker-initiators in connection with certain aircraft leases. For the reasons set forth in the remainder of this Opinion, this Court affirms the Decision and the Order of the Bankruptcy Court.

BACKGROUND[1]

A. Factual Background

In 2014, Avianca Holdings S.A, subsequently known as HVA Associated Corp. ("HVA"), and two of its former affiliates, Aerovías del Continente Americano S.A. Avianca ("Aerovías") and Taca International Airlines, S.A. ("Taca," and together with HVA and Aerovías, "Avianca" or "Appellants") contracted with Burnham Sterling and Company LLC ("Burnham") and Babcock & Brown Securities LLC ("Babcock," and together with Burnham, the "Brokers" or "Appellees"), to arrange the financing and leasing of certain aircraft. (*See, e.g.*, A96-98). The Brokers thereafter originated twenty such leases on behalf of Avianca (the "Leases"). (A128-29, 132-33).

Rather than paying the Brokers contemporaneously for their services, under the applicable lease agreements (the "Lease Agreements"), Avianca was obligated to make "Additional Rental Payments" ("ARPs") to the respective lessors for the ultimate benefit of the Brokers in increments over the life of the Leases. (A25-26). By way of example, the Lease Agreement between Aircol 7, as Lessor, and Aerovías, dated April 25, 2019, includes the following provision:

> The Lessee shall on each Additional Rental Payment Date pay to the Lessor at the [Broker] Account, by way of additional rental payment, installments of the

[1] The facts set forth in this Opinion are drawn from the parties' submissions pursuant to Federal Rule of Bankruptcy Procedure 8014. Citations in this Opinion to the Appendix use the convention "A[page number]." For ease of reference, the Court refers to the Brief of Appellants Debtors and Reorganized Debtors as "Avianca Br." (Dkt. #9); to the Brief of Appellees Burnham Sterling and Company LLC and Babcock & Brown Securities LLC as "Broker Opp." (Dkt. #10); to the Reply Brief of Appellants Debtors and Reorganized Debtors as "Avianca Reply" (Dkt. #11); to the Bankruptcy Court's January 26, 2023 Decision as "Bankr. Op." (A296-312); and to the Bankruptcy Court's January 31, 2023 Order as "Order" (A313-315).

> [Broker] Compensation .... The Sub-Lessee acknowledges that the [Brokers] ha[ve] already provided services prior to the Delivery Date, and accordingly agrees that the Sub-Lessee's obligations to pay the [Broker] Fees hereunder are unconditional.

(A25). Each of the Lease Agreements included a schedule fixing the dates on which the ARPs were to be made. (*Id.*). Additionally, the Lease Agreements designated the Brokers as express third-party beneficiaries with the power to enforce their rights under the Agreements. (A26).

On May 10, 2020, Avianca petitioned for bankruptcy in accordance with Chapter 11 of the United States Bankruptcy Code (the "Petition"). (A4-5). Laying the basis for the instant dispute, Section 365(d)(5) of the Bankruptcy Code arguably required Avianca, after a sixty-day grace period from the date it filed the Petition, to "timely perform all of [its] obligations" under any unexpired leases to which it was a party, unless it affirmatively "assumed" or "rejected" such leases. 11 U.S.C. § 365(d)(5). That is, following the sixty-day grace period, Avianca had to begin making all payments that were due under any of the unaccepted or un-rejected Lease Agreements *in full*, *i.e.*, not at any reduced rate extended to other Chapter 11 debts under the Bankruptcy Code.

Avianca did not assume or reject any of the Leases — the terms of which extended well beyond Avianca's bankruptcy (*see* Bankr. Op. 2) — during the sixty-day grace period provided for by Section 365(d)(5) (A176). Instead, Avianca gradually rejected the Leases over the course of the ensuing two years. (*See* Dkt. #4 at 4-7 (cataloging the dates on which each Lease Agreement was rejected)). Accordingly, under the Brokers' reading of Section 365(d)(5),

Avianca was responsible for paying "all obligations" under each Lease from the day the sixty-day grace period ended until the day the respective Lease was rejected. (A8-10).

Notwithstanding this obligation, Avianca failed to make any of the ARPs that came due under any of the Leases after the grace period had expired. (A7). Accordingly, the Brokers received only a portion of the aggregate ARPs they were owed under the Lease Agreements. In an effort to recoup these amounts, the Brokers filed multiple proofs of claim with the Bankruptcy Court related to the ARPs that had come due in the period from sixty days after the Petition was filed to the date that the corresponding Lease was rejected. (*See, e.g.*, A18-19, A84-85). Two of those claims, both filed in the HVA case, are relevant to this appeal: Burnham's Proof of Claim No. 4033 (the "4033 Claim") and Babcock's Proof of Claim No. 4038 (the "4038 Claim," and together with the 4033 Claim, the "Claims"). (*Id.*).

On November 20, 2022, the Brokers filed a motion seeking to compel immediate payment of the ARPs asserted in the Claims. (A1-95). In pertinent part, the Brokers argued that the subject ARPs were entitled to heightened priority under Bankruptcy Code Sections 503(b) and 365(d)(5). (A8-10). On December 2, 2022, Avianca filed objections to the Claims, contesting the applicability of Section 365(d) to the subject ARPs and arguing that the Claims should be treated as general unsecured claims — *i.e.*, like other pre-Petition debts — because the ARPs were earned during the pre-Petition period. (A96-121, A127-54). On January 9, 2023, the Brokers filed a consolidated response

to the objections and in further support of their motion to compel (A170-83), and on January 18, 2023, Avianca filed its reply (A184-231).

In its January 26, 2023 Decision, the Bankruptcy Court found that the ARPs at issue in the Claims were entitled to priority treatment under Section 365(d)(5), insofar as Avianca was obligated to timely and completely pay the Claims. (Bankr. Op. 3-4, 17). The Bankruptcy Court therefore partially granted the Brokers' motion to compel compliance with Section 365(d)(5) and denied Avianca's objections in that regard. (*Id.*).[2] The Bankruptcy Court ordered Avianca to pay the Brokers $4,338,484.66, the sum total of all ARPs that had arisen sixty days after the Petition up to the point that each corresponding Lease was rejected. (Order 2).

B. Procedural Background

Soon after the Bankruptcy Court issued the Decision and the Order, on February 13, 2023, Avianca filed an appeal with this Court. (*See generally* Dkt. #1). By Order dated February 14, 2023, the Court indicated that the briefing schedule in this case would be dictated by Federal Rules of Bankruptcy Procedure 8014 through 8018. (Dkt. #3). Accordingly, on February 27, 2023, Appellant filed a Statement of Issues and Designation of Record on Appeal (Dkt. #4), which Record was made available to the Court on March 29, 2023

[2] While adopting their construction of Section 365(d)(5), the Bankruptcy Court rejected the Brokers' arguments that the Claims should be categorized as administrative claims pursuant to Bankruptcy Code Section 503(b). (Bankr. Op. 4). The Brokers do not appeal from this component of the Decision and the Order. As noted in the text, to the extent that this Opinion uses the term "priority" in connection with the Claims, it is referring only to the requirements of timely and complete payment under Section 365(d)(5).

(Dkt. #7). Thereafter, on April 28, 2023, Appellant filed its brief in support of its appeal and accompanying documents. (Dkt. #9). Appellees filed their opposing brief on May 30, 2023 (Dkt. #10), and Appellant filed a further reply brief on June 13, 2023 (Dkt. #11).

DISCUSSION

A. Applicable Law

1. The Standard of Review

District courts have jurisdiction to hear appeals from decisions of a bankruptcy court pursuant to 28 U.S.C. § 158(a), which provides in relevant part that "[t]he district courts of the United States shall have jurisdiction to hear appeals ... from final judgment, orders, and decrees ... of bankruptcy judges[.]" 28 U.S.C. § 158(a). A district court reviews the legal conclusions of a bankruptcy court *de novo*, *i.e.*, "without the slightest deference." *U.S. Bank Nat. Ass'n ex rel. CWCapital Asset Mgmt. LLC* v. *Vill. at Lakeridge, LLC*, 583 U.S. 387, 393 (2018). On the other hand, a bankruptcy court's factual determinations are reviewed for clear error. *See In re Anderson*, 884 F.3d 382, 387 (2d Cir. 2018) (citing *In re U.S. Lines, Inc.*, 197 F.3d 631, 640-41 (2d Cir. 1999)); *see also In re Lyondell Chem. Co.*, 585 B.R. 41, 52 (S.D.N.Y. 2018).

2. Section 365(d) of the Bankruptcy Code

Section 365 of the Bankruptcy Code enables a Chapter 11 trustee to, "with court approval, assume or reject any executory contract or unexpired lease of the debtor." *In re Penn Traffic Co.*, 524 F.3d 373, 378 (2d Cir. 2008). Under Section 365, assumption is "a decision to continue performance ...

[maintaining] the parties' rights to future performance under the contract or lease." *Id.* Rejection, on the other hand, amounts to "a decision to breach the contract or lease," *id.*, upon which its "obligations [are] reduced to general unsecured claims for pre[-]petition damages pursuant to 11 U.S.C. § 365(g)(1)," *In re Child World, Inc.*, 147 B.R. 847, 852 (Bankr. S.D.N.Y. 1992).

The purpose of Section 365 is to "balance the state law contract right of the creditor to receive the benefit of his bargain with the federal law equitable right of the debtor to have an opportunity to reorganize." *In re Circle K Corp.*, 190 B.R. 370, 376 (B.A.P. 9th Cir. 1995), *aff'd*, 127 F.3d 904 (9th Cir. 1997); *accord In re Chateaugay Corp.*, 10 F.3d 944, 954-55 (2d Cir. 1993). It achieves this purpose by "forcing the debtor to abide by [a] contract['s] provisions during pendency of the bankruptcy and cure any pre[-]petition defaults upon assumption," while, at the same time, "prohibiting the creditor from enforcing any pre[-]petition default remedies." *In re Circle K Corp.*, 190 B.R. at 376; *see also In re Chateaugay Corp.*, 10 F.3d at 955; *In re New Almacs, Inc.*, 196 B.R. 244, 250 (Bankr. N.D.N.Y. 1996) ("[The] debtor should be afforded a reasonable opportunity to decide whether to assume or reject a lease … [a]t the same time, the lessor is entitled to a certain degree of special consideration in the instance where it is being forced to await the debtor's decision[.]").

Relevant to the instant appeal, Section 365(d)(5) details the protections afforded to a creditor-lessor of personal property in the period before a debtor decides to assume or reject a lease. Specifically, it provides that:

> The trustee shall timely perform all of the obligations of the debtor … first arising … after [sixty] 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 … 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.

11 U.S.C. § 365(d)(5). In other words, following a petition for bankruptcy, a Chapter 11 trustee must perform all of the debtor's obligations under any unexpired lease of personal property arising after the expiration of the sixty-day grace period until that lease is assumed or rejected — unless the court orders otherwise. *In re Glob. Container Lines Ltd.*, No. 09-78585 (AST), 2013 WL 12575666, at *3 (Bankr. E.D.N.Y. Apr. 9, 2013); *see also Adelphia Bus. Sols., Inc.* v. *Abnos*, 482 F.3d 602, 605-06 (2d Cir. 2007).

B. Analysis

The narrow issue presented by Avianca's appeal is whether the Bankruptcy Court erred in holding that the ARPs owed by Avianca to the Brokers pursuant to the Lease Agreements are entitled to priority under Section 365(d)(5) of the Bankruptcy Code. As just noted, an obligation may be entitled to such priority if it "aris[es]" after the bankruptcy filing. 11 U.S.C. § 365(d)(5). According to Appellants, the ARPs "arose" when they became "unconditional" obligations of the Appellants, *i.e.*, upon execution of the Lease Agreements (and before the relevant bankruptcy filing). (Avianca Br. 7). For their part, Appellees counter that the obligations to pay the ARPs — which were scheduled to be paid in installments over the term of the Leases, including

during the post-Petition period — "arose" on those incremental due dates. (Broker Opp. 2).

This Court reviews *de novo* the Bankruptcy Court's legal determination that the ARPs owed by Appellants to Appellees — specifically, the ARPs that came due after the grace period and before the particular Lease was rejected — are entitled to priority treatment under Section 365(d)(5). For the reasons set forth below, the Court agrees with the Bankruptcy Court's determination. In particular, the Court finds that Appellants' obligation to make the disputed payments "arose" upon their respective due dates for purposes of Section 365(d)(5), and as such, that those ARPs merit timely and complete payment by Appellants pursuant to that provision. Accordingly, the Court affirms the decision of the Bankruptcy Court.

In making this determination, the Court relies primarily on the text of Section 365(d)(5). Importantly, the Court is guided by case law interpreting the text of Section 365(d)(5) as well as that of its sister provision, Section 365(d)(3). The Court cites both sets of cases but, for clarity, refers only to Section 365(d)(5) herein.[3]

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[3] Section 365(d)(5) of the Bankruptcy Code was modeled after Section 365(d)(3), both of which were added to the Bankruptcy Code in 1994 to enable lessors to recover post-petition lease payments from a debtor prior to acceptance or rejection of an unexpired lease. *See In re Lakeshore Const. Co. of Wolfeboro, Inc.*, 390 B.R. 751, 755-56 (Bankr. D.N.H. 2008). Section 365(d)(3) pertains to unexpired leases of nonresidential real property, while Section 365(d)(5) pertains to unexpired leases of personal property, "other than personal property leased to an individual primarily for personal, family, or household purposes." *Compare* 11 U.S.C. § 365(d)(3), *with id.* § 365(d)(5).

Given the similarity in text, origin, and purpose of the two provisions (as well as the relative dearth of case law interpreting Section 365(d)(5)), courts often look to decisions construing Section 365(d)(3) in cases involving Section 365(d)(5). *See, e.g.*, *In re Bella Logistics LLC*, 583 B.R. 674, 679 n.7 (Bankr. W.D. Tex. 2018); *In re Pettingill*

As a threshold matter, courts are split as to whether the language of Section 365(d)(5) is ambiguous. Some courts have concluded in the affirmative. *See, e.g.*, *In re GCP CT Sch. Acquisition, LLC*, 443 B.R. 243, 253-55 (Bankr. D. Mass. 2010); *Heathcon Holdings, LLC* v. *Dunn Indus., LLC* (*In re Dunn Indus., LLC*), 320 B.R. 86, 90 (Bankr. D. Md. 2005); *In re Ames Dep't Stores, Inc.*, 306 B.R. 43, 65 (Bankr. S.D.N.Y. 2004); *In re Travel 2000, Inc.*, 264 B.R. 444, 450 (Bankr. W.D. Mich. 2001). These courts often parse the words "obligation" — *see, e.g.*, *In re Child World, Inc.*, 161 B.R. 571, 574 (S.D.N.Y. 1993) ("Black's Law Dictionary states that obligation is 'a generic word having many, wide, and varied meanings, according to the context in which it is used.'" (alterations adopted)) — and "arise" — *see, e.g.*, *In re Ames*, 306 B.R. at 67 ("'[A]rise' can be understood in either an absolutist or accrual sense[.]") — to conclude that the aggregate amount of a particular lease obligation (*e.g.*, regular contributions to property taxes) should be prorated for Section

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Enterprises, Inc., 486 B.R. 524, 531-32 (Bankr. D.N.M. 2013); *In re Lakeshore Const. Co. of Wolfeboro, Inc.*, 390 B.R. at 756; *see also In re Fed.-Mogul Glob. Inc.*, 222 F. App'x 196, 199 (3d Cir. 2007) (unpublished decision); *In re Midway Airlines Corp.*, 406 F.3d 229, 234 (4th Cir. 2005); *cf. In re Sylva Corp.*, 519 B.R. 776, 781 (B.A.P. 8th Cir. 2014) ("[While] the operative language of [Section] 365(d)(3) and (d)(5) are similar enough that cases under [Section] 365(d)(3) … are relevant to provide guidance to a court interpreting a situation under [Section] 365(d)(5), they are not necessarily 'automatic' or 'dispositive.'").

The Court nonetheless acknowledges that Section 365(d)(3) and Section 365(d)(5) are not identical. Among other things,

> Section 365(d)[(5)] applies only to chapter 11 cases, whereas [Section] 365(d)(3) is not limited by chapter. Also, under [Section] 365(d)(3) the trustee is required to perform all lease obligations immediately upon entry of an order for relief. Under [Section] 365(d)[(5)] the trustee is not required to perform until sixty-one days after the entry of an order for relief.

In re Midway Airlines Corp., 406 F.3d at 234 n.1.

365(d)(5) purposes into pre-petition and post-petition periods in accordance with the life of the lease.

For example, in *In re Child World*, the court considered a Chapter 11 debtor's obligation, under a nonresidential real property lease, to pay its share of property taxes on a shopping center. 161 B.R. at 572-73 ("Child World's rent under the [l]ease consisted of a monthly base charge, a percentage of gross profits, and Child World's proportionate share of the net amount of all real estate taxes and assessments levied and assessed against the shopping center."). At issue was a bill that came due in June 1992, more than five weeks after Child World petitioned for bankruptcy in early May 1992, corresponding to real estate taxes that had been assessed for the period from January to June of that year. *Id.* The court determined that the bill should be prorated for Section 365(d)(5) purposes to cover only those taxes that were accrued during the post-petition, pre-rejection period. *Id.* at 575-77.

Other courts view the text of Section 365(d)(5) as unambiguous, at least as applied under the circumstances. For these courts, the task of "applying [Section 365(d)(5)] [i]s straightforward: any obligation of the debtor under the lease which becomes due after [the petition] and before the lease is assumed or rejected must be paid or otherwise fulfilled when due." *In re Burival*, 406 B.R. 548, 552 (B.A.P. 8th Cir. 2009), *aff'd*, 613 F.3d 810 (8th Cir. 2010); *see also, e.g.*, *HA-LO Indus., Inc.* v. *CenterPoint Props. Trust*, 342 F.3d 794, 797-800 (7th Cir. 2003); *CenterPoint Props.* v. *Montgomery Ward Holding Corp.* (*In re Montgomery Ward Holding Corp.*), 268 F.3d 205, 208-12 (3rd Cir. 2001); *Koenig*

Sporting Goods, Inc. v. *Morse Road Co.* (*In re Koenig Sporting Goods, Inc.*), 203 F.3d 986, 988-90 (6th Cir. 2000).

For example, in *In re Burival*, a partnership of farmers entered into a lease of crop land, which lease set the annual rent for the period from March 2007 through February 2008 at $166,129. 406 B.R. at 550-51. This amount was to be paid in two installments, on the first days of April and December 2007. *Id.* The farmers filed for Chapter 11 bankruptcy at the end of November 2007. *Id.* Notwithstanding the fact that a portion of the rent owed under the December 1, 2007 bill corresponded to the pre-petition period, the court determined that the entire amount of the December 1, 2007 rent bill was covered by Section 365(d), having come due after the relevant bankruptcy petition. *Id.* at 556.

This Court finds the reasoning of the latter group of courts to be the more persuasive for the instant case. The natural reading of the statute, in concert with the text of the Lease Agreements, dictates that Appellants' obligation to make the disputed payments arose when each such payment came due. Significantly, use of the word "unconditional" in the Lease Agreements to describe the obligation to pay the ARPs does not impact the timing of when such an obligation "arises"; rather, it impacts only the obligor's right to insist upon payment after the obligation has arisen.

The parties to the Leases — all sophisticated entities — contracted in a manner that makes plain their intent to ensure that Appellants' payment obligations did *not* arise at the time the Lease Agreements were signed. While

the Court agrees with Appellants that "the [ARPs], which compensate the [Brokers] for services already rendered … are significantly and materially different from rental obligations" (Avianca Br. 13), the parties nonetheless chose to define the amounts as "Additional Rent Payments" in the Lease Agreements. In so doing, the parties explicitly likened the ARPs to traditional rent payments, the most basic obligation under any lease (and one that unequivocally arises when it comes due monthly or otherwise). (*See also* Bankr. Op. 13 ("The parties' decision to term Avianca's obligations to the [Brokers] 'lease' obligations, in a way that squarely fits within [S]ection 365(d)(5), can only have been intentional.")). For this reason, the statute and the Lease Agreements — by their terms — bring the ARPs within the ambit of Section 365(d)(5). *See In re Montgomery Ward Holding Corp.*, 268 F.3d at 209 ("The clear and express intent of § 365(d)[5] is to require the trustee to perform the lease in accordance with its terms … an approach which calls for the trustee to perform obligations as they become due under the terms of the lease fits comfortably with the statutory text.").

Conversely, the Court finds Appellants' reading of Section 365(d)(5) — at least as applied in this case — to be strained. Section 365(d)(5) requires a Chapter 11 trustee to "perform all of the obligations of the debtor" in the post-petition, pre-rejection period. 11 U.S.C. § 365(d)(5). Accepting Appellants' argument that their "obligation" to pay the ARPs "arose" when the Lease Agreements were signed would not "fit comfortably" with the statutory text, particularly considering Section 365(d)(5)'s use of the verb "perform." After all,

upon the parties' signing of the Lease Agreements, Appellants had no obligations to "perform." Quite the opposite: Appellants were not required to perform any of the relevant obligations until the date that each of the ARPs came due. As such, it is on those dates that Appellants' respective obligations arose. *See In re R.H. Macy & Co., Inc.*, 152 B.R. 869, 873 (Bankr. S.D.N.Y. 1993) ("The ordinary meaning of the word obligation refers to '[t]hat which a person is bound to do or forbear' … [but] [t]here was no obligation for the [d]ebtor to perform prior to the [p]etition [d]ate." (quoting *Obligation*, BLACK'S LAW DICTIONARY (6th ed. 1990))), *aff'd*, No. 93 Civ. 4414 (SS), 1994 WL 482948 (S.D.N.Y. Feb. 23, 1994).

Having concluded that the application of the statute is unambiguous in the instant case, the Court need not address Appellants' other arguments concerning the policy (*see* Avianca Br. 17; Avianca Reply 7-8), and legislative history (*see* Avianca Br. 15-16; Avianca Reply 7-8), underlying Section 365(d)(5). Nonetheless, the Court does so briefly, for the purpose of demonstrating that there are legislative history and policy arguments favoring Appellees' position as well.

First, in arguing that the Brokers should not be compensated at a higher rate than other creditors who also completed work for Avianca in the pre-Petition period, Avianca appeals generally to the Bankruptcy Code's policy of "treating like creditors the same." (Avianca Br. 17). But the Court cannot conclude that this policy necessarily supports Avianca's view. The instant case is complicated in part by the peculiar nature of the "obligations" at issue. The

cases on which Avianca relies involve almost exclusively the application of Section 365(d) to periodically assessed rent payments or real estate and property taxes. In contrast, this case involves broker-initiation fees specifically defined under the Lease Agreements as "Additional Rent Payments." Unlike the rent and tax cases, the time period in which the services underlying the ARPs falls is undisputedly pre-Petition (and, in fact, pre-Lease).

For this reason, the proration/accrual approach of the *Child World* line of cases (*i.e.*, those cases finding the text of Section 365(d)(5) to be ambiguous) operates atypically in the instant case. Because all of Appellees' services were rendered prior to the execution of the Lease Agreements, there is nothing that "accrues" (*e.g.*, aggregate property taxes owed) over the life of the Leases. Accordingly, were it to adopt such an approach, the Court could only conclude that the entire amount of the ARPs arose pre-Petition and was undeserving of treatment under Section 365(d)(5).

This conclusion is, of course, precisely what Appellants seek. But such a conclusion would not seem to be consonant with the pursuit of equity amongst potential creditors. *In re Burival*, 406 B.R. at 552-53. That is, it is not obvious to the Court that the Brokers, whose work for Avianca has long since been completed, and who carefully negotiated the terms of the Lease Agreements years ago to account for a myriad of contingencies, should be relegated to stand alongside Avianca's more recent creditors, or earlier creditors who lacked the Brokers' foresight. (*See also* Bankr. Op. 13 ("[E]nforcing such a conscious negotiating decision that renders Avianca's recurring payment obligations to

the Initiators 'obligations of the debtor' under a 'lease' does not strike the Court as a windfall that can be said to contravene the intent of Congress nearly 30 years after it enacted [S]ection 365(d)(5) using words that perfectly describe the parties' negotiated arrangements here.")).

Second, the Court does not agree that the legislative history of Section 365(d)(5) unreservedly supports Appellants' interpretation of the statute. As an initial matter, it cannot be the case that "ensur[ing] landlords received current payment for current services" (Avianca Br. 16 (internal quotation marks omitted)), was the sole (or even primary) motivation of Congress in enacting Section 365(d). If it was, one would wonder why — as the Bankruptcy Court explained in its decision — Section 365(d)(5) "expressly and unambiguously requires timely payment of 'all of the obligations of the debtor' under a lease, not merely 'rent' and not merely payments to 'lessors.'" (Bankr. Op. 8).

More to the point, Congress also intended Section 365(d) to "'prevent parties in contractual or lease relationships with the debtor from being left in doubt concerning their status vis-à-vis the estate.'" *Tully Constr. Co.* v. *Cannonsburg Envtl. Assocs.* (*In re Cannonsburg Envtl. Assocs.),* 72 F.3d 1260, 1266 (6th Cir. 1996) (quoting H.R. REP. No. 95-595, at 348 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 5963, 6304). Section 365(d)(5)'s unequivocal language (*i.e.*, that the debtor must perform "all obligations" for those leases that are neither rejected nor assumed after the sixty-day grace period) was supposed to encourage debtors to "make up [their] mind to reject [a lease] before some onerous payment comes due during the prerejection period." *In re Krystal Co.*,

194 B.R. 161, 164 (Bankr. E.D. Tenn. 1996). And on this point, it bears noting that "[Avianca] alone was in the position to control [the Brokers'] entitlement to payment of [the ARPs in the post-Petition period.] If [Avianca] had rejected the [L]ease[s] [earlier,] it would not have been obligated to pay [the ARPs] under 11 U.S.C. § 365(d)[5]." *In re Koenig Sporting Goods, Inc.*, 203 F.3d at 989. As such, categorizing the post-Petition ARPs as general unsecured claims — as opposed to payments Appellants are now obligated to make under the Bankruptcy Code following their strategic decision to neither reject nor assume the Leases during the prescribed sixty-day grace period — would undermine the legislative goal of encouraging debtors to make decisions regarding their unexpired leases in a timely fashion.

Ultimately, policy and legislative history fail to overcome the clear text of Section 365(d)(5). For this reason, as then-District Judge Sonia Sotomayor did in *In re R.H. Macy & Co., Inc.*, this Court "decline[s]… to read into [Section 365(d)(5),] an unambiguous, clear statute[,] a revision based on … considerations" external to the text. No. 93 Civ. 4414 (SS), 1994 WL 482948, at *12 (S.D.N.Y. Feb. 23, 1994). The unavoidable conclusion resulting from the language of the parties' carefully negotiated Lease Agreements is that the disputed ARPs are "obligations of the debtor ... first arising … after the [petition] in a case under chapter 11 of this title under an unexpired lease of personal property[.]" 11 U.S.C. § 365(d)(5). The Bankruptcy Court was therefore correct to conclude that they were subject to timely and complete payment by Appellants under Section 365(d)(5).

CONCLUSION

Based upon the foregoing analysis, the decision of the Bankruptcy Court is AFFIRMED. The Clerk of Court is directed terminate all pending motions, adjourn all remaining dates, and close this case.

SO ORDERED.

Dated: December 29, 2023
New York, New York

Katherine Polk Failla

KATHERINE POLK FAILLA
United States District Judge

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	Chapter 11
AVIANCA HOLDINGS S.A., *et al*.,[1]	Case No. 20-11133 (MG)
Debtors and Reorganized Debtors.	

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) REORGANIZED DEBTORS' TWENTY-FOURTH AND TWENTY-FIFTH OMNIBUS OBJECTIONS TO PROOFS OF CLAIM

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[1] The Debtors and Reorganized Debtors in these chapter 11 cases, and each Debtor's and Reorganized Debtor's federal tax identification number (to the extent applicable), are as follows: Avianca Holdings S.A. (N/A) n/k/a HVA Associated Corp.; Aero Transporte de Carga Unión, S.A. de C.V. (N/A); Aeroinversiones de Honduras, S.A. (N/A); Aerovías del Continente Americano S.A. Avianca (N/A); Airlease Holdings One Ltd. (N/A); America Central (Canada) Corp. (00-1071563); America Central Corp. (65-0444665); AV International Holdco S.A. (N/A); AV International Holdings S.A. (N/A); AV International Investments S.A. (N/A); AV International Ventures S.A. (N/A); AV Investments One Colombia S.A.S. (N/A); AV Investments Two Colombia S.A.S. (N/A); AV Loyalty Bermuda Ltd. (N/A); AV Taca International Holdco S.A. (N/A); Aviacorp Enterprises S.A. (N/A); Avianca Costa Rica S.A. (N/A); Avianca Leasing, LLC (47-2628716); Avianca, Inc. (13-1868573); Avianca-Ecuador S.A. (N/A); Aviaservicios, S.A. (N/A); Aviateca, S.A. (N/A); Avifreight Holding Mexico, S.A.P.I. de C.V. (N/A); C.R. Int'l Enterprises, Inc. (59-2240957); Grupo Taca Holdings Limited (N/A); International Trade Marks Agency Inc. (N/A); Inversiones del Caribe, S.A. (N/A); Isleña de Inversiones, S.A. de C.V. (N/A); Latin Airways Corp. (N/A); Latin Logistics, LLC (41-2187926); Nicaragüense de Aviación, Sociedad Anónima (N/A); Regional Express Américas S.A.S. (N/A); Ronair N.V. (N/A); Servicio Terrestre, Aéreo y Rampa S.A. (N/A); Servicios Aeroportuarios Integrados SAI S.A.S. (92-4006439); Taca de Honduras, S.A. de C.V. (N/A); Taca de México, S.A. (N/A); Taca International Airlines S.A. (N/A); Taca S.A. (N/A); Tampa Cargo S.A.S. (N/A); Technical and Training Services, S.A. de C.V. (N/A). The Debtors' and Reorganized Debtors' principal offices are located at Avenida Calle 26 # 59 – 15 Bogotá, Colombia.

Before the Court are two claim objections and one motion centering on the same dispute between the Reorganized Debtors, which this decision refers to as Avianca, and two entities that served as brokers or initiators of aircraft leases by which Avianca leased aircraft that were necessary to Avianca's business as an airline. Those entities are Burnham Sterling and Company LLC and Babcock & Brown Securities LLC, referred to in this decision as the "Initiators."

The dispute involves services rendered by the Initiators in furtherance of Avianca's entry into aircraft lease agreements before Avianca commenced its Chapter 11 case in this Court. The terms of the leases that the Initiators helped arrange extended well past Avianca's bankruptcy petition date. The express terms of the leases and/or documents incorporated into the main lease documents required Avianca to compensate the Initiators for their services through scheduled lease payments that, like the leases themselves, extended well past Avianca's eventual petition date, and Avianca acknowledged at oral argument that the required payments are fairly characterized as payments due under the leases.

The Initiators each filed timely proofs of claim, among other things asserting secured prepetition claims for unpaid pre-petition amounts due, and/or administrative claims for unpaid amounts that, under the agreed payment schedule imposed by the relevant leases, were due to be paid after Avianca's petition date. Avianca filed objections to the Initiators' Proofs of Claim raising essentially identical arguments, namely, that the claims were not secured and therefore should be reclassified as general unsecured claims; that the Initiators were not entitled to administrative claims on account of amounts that became due after the petition date but that were earned entirely in the pre-petition period; and that various duplicative claims should be expunged in favor of one allowed, general unsecured claim per Initiator creditor. [*See* 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]].

Meanwhile, the Initiators filed a motion of their own, to "compel compliance with 11 U.S.C. § 365(d)(5) and 503(b)" [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]]. That motion sought an order compelling immediate payment of amounts asserted in the Initiators' proofs of claim, at least those that became due after Avianca's petition date. The motion also sought an order deeming those amounts to constitute an allowed administrative claim against the estate.

For the reasons that follow, the Court grants in part the Initiators' motion to compel insofar as they seek an order requiring the timely payment of certain post-petition amounts due; denies the Initiators' motion insofar as it seeks allowance of an administrative claim for those amounts; and correspondingly denies the part of Avianca's claim objection that argues that the Initiators are not entitled to relief under section 365(d)(5), while granting the portion of the claim objection that seeks reclassification of the Initiators' pre-petition claim and expungement of duplicative claims.

By way of brief overview of the Court's analysis, Code section 365(d)(5) provides that the Initiators are entitled to "timely perform[ance]" of "all" of Avianca's lease obligations that "aris[e]" beginning 60 days after Avianca's petition date until the assumption or rejection of the relevant lease or leases. The governing agreements establish that the post-petition payment obligations were and are obligations of the debtor under a lease. Further, those payment obligations required payments on specified post-petition dates, and therefore, notwithstanding Avianca's contentions to the contrary, the lease-imposed payment obligations at issue "arose" on

the various dates that the leases made them due. The Initiators are not, however, entitled to an allowed administrative claim pursuant to section 503(b), because those payments have not been shown to constitute "actual, necessary costs and expenses of preserving the estate," nor have the Initiators provided a post-petition service or conferred a benefit on the estate, as is ordinarily required as a condition of the allowance of an administrative claim. Finally, as noted, the Court sustains Avianca's claim objections to the extent it challenges the Initiators' assertion of secured status for their proofs of claim, and to the extent it seeks to expunge duplicative claims.

BACKGROUND

The facts that are central to this dispute are not contested, and are summarized only in salient part here. The parties' pleadings and exhibits provide more detailed histories of the transactions at issue. Counsel also provided helpful clarifications and factual background during argument on January 25, 2023, which this decision relies on without formal citation to the transcript, as the drafting of this decision had been substantially completed before the transcript became available.

As is typical of many airlines, Avianca leased at least many of the aircraft it used to carry out its business operations. Avianca retained or contracted for the Initiators to assist Avianca in locating suitable aircraft for Avianca to lease on acceptable terms, and the Initiators did so. The result was the leases that play a role in this dispute, all of which were entered into before Avianca's bankruptcy petition. The Initiators' work in furtherance of the lease transactions was completed before the petition date, and there is no contention that the Initiators performed any relevant services for Avianca at any time after Avianca's petition date. The claim objections and Initiators' motion all concern payment obligations that are imposed by aircraft lease agreements and do not concern any obligations arising at or after the time of any lease's rejection.

Rather than pay the Initiators contemporaneously for their services, Avianca and each aircraft's owner/lessor negotiated and agreed to adopt as requirements of the relevant leases that Avianca's obligations to the Initiators would be paid in specified amounts on specified dates running over time. Avianca acknowledged at oral argument that the terms of the relevant leases require these payments to be made according to pre-agreed schedules. By way of slightly more detailed example, the Initiators explain that section 5.2 of the lease agreement labeled "MSN 3992" provides that "[t]he Lessee shall on each Additional Rental Payment Date pay to the Lessor at the Initiator Account, by way of additional rental payment, installments of the Initiator Compensation . . . . [T]he . . . obligations to pay the Initiator Fees hereunder are unconditional." [Initiators' Mot. to Compel [ECF No. 2657] at 3–4]. And Avianca's papers acknowledge that its obligations to the Initiators were "styled as additional or supplemental rent, which the Debtors [*i.e.*, Avianca] pay in the first instance to a lessor/owner trust." [Debtors' 24th Omnibus Claim Obj. [ECF No. 2661] at 7].

Further, Avianca does not dispute (and the Initiators confirm) that the Initiators seek payment of amounts that, according to the relevant leases and related documents, first became due on or after 60 days following Avianca's petition date, do not extend past the date of any assumption or rejection of any aircraft lease, and have not been paid.

Avianca has objected to the Initiators' assertion that their claim is secured, and the Initiators do not oppose the request to reclassify the claim as unsecured. The Initiators likewise do not oppose the portion of Avianca's claim objection that seeks to expunge certain duplicative claims.

The Court heard argument on the claim objections and the Initiators' motion to compel on January 25, 2023.

DISCUSSION

A. The Initiators' Entitlement to Payment Is Pursuant to Lease Obligations That Arose After Avianca's Petition Date

The Initiators' position flows from the literal meaning of Code section 365(d)(5), which provides, with inapplicable exceptions omitted: "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 [Chapter 11 case] 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 upon the equities of the case, orders otherwise with respect to the obligations or timely performance thereof." 11 U.S.C. § 365(d)(5). The Initiators observe (as is not contested) that the parties' dispute relates to "an unexpired lease of personal property" and that the leases have not been, at least for the periods for which the Initiators seek compensation, "assumed or rejected." The Initiators also observe that the payment obligations at issue are "obligations of the debtor . . . under" the governing leases and associated transaction documents. Avianca acknowledged at argument, at a minimum, that the lease agreements require the scheduled payments that the Initiators seek to compel.

In opposition, Avianca emphasizes that the Initiators' entitlement to the payments flows from work that the Initiators performed and completed before Avianca's petition date, such that in Avianca's view all the Initiators have is a contractually required payment schedule on account of a prepetition obligation—thus merely an unsecured prepetition claim, not something that should support an administrative claim under the Code [Debtors' 24th Omnibus Claim Obj. [ECF No. 2661] at 11], and "not 'true lease' obligations as contemplated in section 365(d)(5)" [*id.* at 9]. Avianca's papers did not pinpoint any inaccuracy in the Initiators' analysis of the governing statutory text, but emphasized policy considerations and legislative history, arguing

that the purpose of section 365(d)(5) was to protect commercial landlords or lessors who otherwise suffered prejudice when debtors languished in bankruptcy without paying rent and other obligations to landlords or lessors, thus unfairly jeopardizing the economic health of parties that were legally obliged to have continuing dealings with a debtor. [*Id.* at 9–10 (citing *In re Hayes Lemmerz Int'l, Inc.*, 340 B.R. 461, 472 (Bankr. D. Del. 2006) (describing Congressional intent in enacting section 365(d)(5) as being to "give special protection to qualified lessors"); *In re Pudgie's Dev. of NY, Inc.*, 202 B.R. 832, 837 (Bankr. S.D.N.Y. 1996) (opining that the similarly drafted section 365(d)(3) should be "strictly construed" and holding that a prepetition lease's requirement that the lessee pay attorney fees was not entitled to full repayment under section 365(d)(3) notwithstanding that the fees were not billed until after the petition date, where the payment obligation "may fortuitously arise before or after the time period in question"); *In re Child World, Inc.*, 161 B.R. 571, 576 (Bankr. S.D.N.Y. 1993) ("Allowing landlords to recover for items of rent which are billed during the postpetition, prerejection period, but which represent payment for services rendered by the landlord outside this time period, would grant landlords a windfall payment, to the detriment of other creditors, without any support from the legislative history."))].

At argument, Avianca sharpened its efforts to harmonize these observations with the text of section 365(d)(5), arguing that the fact that the Initiators' services were complete and the payment dates agreed to before Avianca's petition date means that Avianca's payment obligation "arose" before the petition date, and is not an obligation of the debtor that, in the words of section 365(d)(5), was "first arising from or after 60 days after the order for relief" (*i.e.*, Avianca's bankruptcy petition filing date). The Court, however, finds this argument unpersuasive. Neither party identified case law expressly defining "arising from" as that phrase

is used in section 365(d)(5), but the Initiators correctly observe that, under the leases' terms, no payment was due—and thus the debtor had no payment obligation as to any future scheduled payment—until and unless its due date was reached. Further, the statute refers to plural "all obligations" of the debtor "arising" under "a lease" (a singular noun), which signals that each separate payment requirement under "a" lease constitutes a separate "obligation," not merely one portion of a singular, overarching "obligation" embodied in the underlying lease document. The Court is satisfied that both the plain meaning of the statutory terms and the commercial realities of the parties' arrangement here was that there are multiple payment "obligations" that "arise" on their respective due dates as specified in the applicable leases—just as the obligation to pay rent for future periods undisputedly "arises" for purposes of section 365(d)(3) and (d)(5) not upon the signing of the lease, but upon the due dates specified by the lease.

Meanwhile, as to whether the payment obligations can be said to be among "all of the obligations of the debtor" under the leases, the parties agreed at oral argument that the payment obligations at issue are imposed under the leases at issue, which are unexpired leases of personal property. The Court acknowledges the policy and equitable concerns emphasized by Avianca as voiced in *Pudgie's* and *Child World*, and those decisions as well as Avianca here correctly characterize at least a substantial animating concern voiced in relevant legislative history of protecting lessors with ongoing obligations to a debtor, which may apply with less force to payment obligations to parties other than the lessor even when those obligations are imposed by the terms of the lease. But the Bankruptcy Code expressly and unambiguously requires timely payment of "all of the obligations of the debtor" under a lease, not merely "rent" and not merely payments to "lessors." 11 U.S.C. § 365(d)(5). And equitable or policy concerns and legislative history do not control if the statute's express, unambiguous language dictates a different result.

Food Mktg. Inst. v. Argus Leader Media, 139 S. Ct. 2356, 2364 (2019) ("In statutory interpretation disputes, a court's proper starting point lies in a careful examination of the ordinary meaning and structure of the law itself. Where, as here, that examination yields a clear answer, judges must stop. Even those of us who sometimes consult legislative history will never allow it to be used to 'muddy' the meaning of 'clear statutory language.'") (citations omitted); *In re R.H. Macy & Co., Inc.*, No. 93 CIV. 4414, 1994 WL 482948, at *4, *12 (S.D.N.Y. Feb. 23, 1994) (Sotomayor, J.) ("The problem that I have is that I am persuaded by the policy arguments set forth by Judge Goettel in Childworld [sic]. * * * Unlike Judge Goettel, I cannot create an ambiguity [in section 365(d)(3)] where I see none exists . . . . I must interpret 'obligation' according to its ordinary meaning. . . . I decline, as did the court in [another case], to read into an unambiguous, clear statute a revision based on policy considerations. I feel compelled to follow the clear and unambiguous terms of the statute[.]"). Or, as the Initiators put it, "Section 365(d)(5) should not be read to include language it clearly does not." [Burnham Sterling and Company LLC and Babcock & Brown Securities LLC's Consolidated Reply (I) in Resp. to Reorganized Debtors' Twenty-Fourth and Twenty-Fifth Omnibus Objs. to Proofs of Claim and (II) in Further Supp. of Mot. to Compel [ECF No. 2689] at 8 (citing Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 93–100 (2012); *Rotkiske v. Klemm*, 140 S. Ct. 355, 360–61 (2019); *Iselin v. United States*, 270 U.S. 245, 251 (1926))].

The case law invoked by Avianca does not overcome this textual analysis to support the result it seeks, both because reliance on equity and policy cannot overcome an express statutory command, and because the cases Avianca relies on are materially distinguishable.

In *Pudgie's*, the Court relied on the fact that the contracts in question—unlike those at issue here—did not require payments to be made on a date certain or according to a set schedule,

such that the payment obligation could arise "fortuitously" either within or outside the statutorily required full-pay period—thus not constituting the type of payments that the statute should be read to mean in requiring "timely" payment of post-petition lease obligations. 202 B.R. at 837. The Court declined to deem such a haphazard payment schedule a requirement for rent payments within the time frame specified by section 365(d)(3) (which all parties and the Court agree has no material analytical differences from subsection (d)(5) except that it applies to real property leases rather than personal property leases). *Id.* As the Initiators emphasize, however, this distinctive factual characteristic that justified the Court's decision in *Pudgie's* is absent here; rather, the lease obligations here concededly make payment for the benefit of the Initiators due as part of each periodic rent payment due under the governing leases. [Initiators' Mot. to Compel [ECF No. 2657] at 3–4]. In fact, *Pudgie's* supports the Initiators' position here because it emphasizes that the statute affords a "preferred position with respect to those obligations arising under the lease in a contractually determined time frame," 202 B.R. 837—exactly what exists here.

Meanwhile, the outcome of *Child World* arguably supports Avianca's position, but it is at least partially distinguishable, and, to the extent it can be said to call for a denial of the Initiators' motion, the Court respectfully declines to follow it because such a reading would be contrary to the unambiguous command of section 365(d)(5) for reasons already stated. *Child World* concerned a debtor-tenant's lease obligation to reimburse a trust-landlord for taxes related to the leased property. The trust billed the Debtor/tenant for tax amounts due without regard to whether the obligations arose before or after the petition date. The Court held that section 365(d)(3) did not require the debtor to make reimbursements for taxes that accrued before the petition, notwithstanding that the bills were sent after the petition date. 161 B.R. at 576–77. The

Court reasoned that these obligations did not come due during the statutorily covered post-petition period. *Id.* In so holding, the Court relied on legislative history reflecting the policy objective of ensuring that landlords would be paid by "debtor-tenants" for "current services," *id.* at 576, and opined that payments that were billed post-petition for "services rendered by the landlord outside this time period [] would grant landlords a windfall payment, to the detriment of other creditors, without any support from the legislative history." *Id.*

The Initiators observe that here, unlike in *Child World*, Avianca's payment obligations not only arise under the leases, but by the leases' terms are due and at all pre- and post-petition times were always due *on dates specified by the leases* that fall within the period that the Code dictates must be timely paid in full. The Court can conceive of no construction that makes these payment obligations under the leases anything other than Avianca payment "obligations" under the leases whose "timely" payment necessarily falls within the post-petition time frame addressed by section 365(d)(5). *Supra* at 7–8. Thus, unlike *Child World*, there is no element of happenstance or timing uncertainty here that could arguably bring the payment obligation outside the scope of section 365(d)(5).

Child World thus is materially distinguishable on its facts, and the materiality of its factual difference from the present situation resulted in a legal analysis that did not assume that the plain terms of section 365(d)(3) squarely govern. In other words, the Court in *Child World* did not deem present or analytically contend with the existence of unambiguous statutory language that compelled a ruling in favor of the landlord. Yet here, for the reasons explained above, the statute's unambiguous terms control and mandate the "timely" payment of an explicit lease obligation that the Initiators seek to enforce. *See supra* at 6–9. In keeping with that analysis, to the extent *Child World* is deemed to hold that timely full-payment obligations under

section 365(d)(3) or (d)(5) exist only as to landlords or lessors themselves (which overstates the holding of *Child World*), or to hold that lease payments that are due post-petition but that are owed on account of pre-petition events do not constitute such obligations, the Court respectfully declines to follow such a holding, because the statute itself calls for full and timely payment of "all of the obligations of the debtor" under the lease in question, not merely "rent" or "those obligations that are directly payable to the landlord or lessor." Reference to legislative history or policy concerns is insufficient to override Congress's explicit command. *See R.H. Macy*, 1994 WL 482948, at *12.

Not only are the legislative history and policy concerns identified by Avianca not sufficient to override the unambiguous and squarely applicable statutory text, there are also policy and statutory considerations that point in favor of the Court's ruling today. First, section 365(d)(5) requires timely payment of lease obligations "notwithstanding section 503(b)(1) of this title," which provides that administrative claims "shall be allowed" if they are "actual, necessary costs and expenses of preserving the estate. . . ." 11 U.S.C. § 503(b)(1)(A). Thus, section 365(d)(5) omits any benefit to the estate requirement, unlike the standard that governs the requested allowance of administrative claims. This reality, in turn, lessens the persuasiveness of objections that requiring full payment of all of a debtor's lease obligations results in a "windfall," because Congress in enacting section 365(d)(5) explicitly *required* at least some degree of what otherwise might be a windfall by saying that payments required by leases are due without regard to the limits on availability of administrative claims under section 503(b).

Moreover, section 365(d)(5) has been in effect since 1994. *See In re Oreck Corp.*, 506 B.R. 500, 503 n.6 (Bankr. M.D. Tenn. 2014) (noting that § 365(d)(5) was "formerly § 365(d)(1) as enacted in 1994"). The parties to the leases and related transaction documents at issue here

are sophisticated, major financial concerns, including a major international airline, presumably sophisticated international aircraft leasing brokers, and (according to document excerpts attached to Avianca's reply) major financial institutions including Wilmington Trust and Wells Fargo Bank. The leases and transaction documents post-date the statute's enactment. The parties' decision to term Avianca's obligations to the Initiators "lease" obligations, in a way that squarely fits within section 365(d)(5), can only have been intentional. The Court has no basis to speculate why the parties chose to proceed this way, but enforcing such a conscious negotiating decision that renders Avianca's recurring payment obligations to the Initiators "obligations of the debtor" under a "lease" does not strike the Court as a windfall that can be said to contravene the intent of Congress nearly 30 years after it enacted section 365(d)(5) using words that perfectly describe the parties' negotiated arrangements here. Indeed, as the Initiators observed at argument and Avianca did not dispute, although section 365(d)(5) includes language authorizing courts to excuse payments otherwise required by the section "after notice and a hearing and based on the equities on the case," Avianca has not proposed such a hearing, nor has it invoked that portion of the statute in its response to the Initiators' contentions.

The Court pauses to note that, although the parties' briefs do not meaningfully discuss cases interpreting sections 365(d)(3) or (d)(5) besides *Pudgie's* and *Child World*, the Court's own research has identified several other such cases, and the Court has considered them. *Child World* itself cites more than ten of these cases on both sides of the issue, noting that some of them "interpreted § 365(d)(3) as providing that the billing date determines when lease obligations arise" even though the taxes which were billed post-petition had accrued during "a period which was almost entirely prepetition," but opining that "[a] substantial majority of [the cases] concluded that under § 365(d)(3), rent should be prorated to cover only the postpetition,

prerejection period, regardless of the fortuity of the billing date." 161 B.R. at 576 (collecting cases). The Court need not spend any time discussing these other cases other than to note that they exist. The parties did not cite any of these cases, and even if they had, the Court's own review has identified no analytically relevant difference between these cases and *Child World* which would compel the Court to alter its conclusion that the outcome here is dictated by the unambiguous, plain language of the statute. Quite simply, the Court considers then-Judge Sotomayor's analysis in *R.H. Macy*, 1994 WL 482948, at *11–13, to be both correct, and squarely on point here. *See supra* at 9.

Finally, in addition to seeking to compel payment pursuant to section 365(d)(5), the Initiators' motion seeks allowance of an administrative claim pursuant to Code section 503(b). Allowance of such a claim, however, requires a two-part showing: "first, there must be a postpetition transaction, making it a transaction between the debtor-in-possession and the creditor; and second, the estate must receive a benefit from the transaction. . . . In other words, to qualify for administrative priority, a debtor's obligation to make a payment must have arisen out of a *postpetition* transaction between the creditor and the debtor." *In re Grubb & Ellis Co.*, 478 B.R. 622, 624–25 (Bankr. S.D.N.Y. 2012) (citations omitted). The showing the Initiators have made is that they are entitled to payment under section 365(d)(5), but they have not established a post-petition transaction or benefit to the estate as required to support allowance of an administrative claim under section 503(b). The motion's request for allowance of an administrative claim is therefore denied.

B. Post-Petition Stipulations Do Not Extinguish the Initiators' Entitlements

Avianca also argues that it entered into various post-petition stipulations which it contends, without citing any law, "modified the terms of each of the lease agreements at issue, and—once

so-ordered by the Court—[] took precedence over the lease agreements and suspended the operation thereof, including payment of the initiator fees." [Reply in Supp. of Reorganized Debtors' Twenty-Fourth and Twenty-Fifth Omnibus Objs. to Proofs of Claim [ECF No. 2699] at 7–8; *see also* Debtors' 24th Omnibus Claim Obj. [ECF No. 2661] at 11–12]. Although Avianca refers to several such stipulations, it cites only one, which it calls the "Second Stipulation," as apparently illustrative of the rest. [Debtors' 24th Omnibus Claim Obj. [ECF No. 2661] at 11–12 (citing Second Stipulation and Order Between Debtors and Aircraft Counterparties Concerning Certain Aircraft [ECF No. 401])]. But Avianca fails to cite any specific provision of the Second Stipulation that purports either to (a) relieve Avianca of its obligations to the Initiators specifically, or (b) supersede or suspend the entirety of the underlying lease agreements more generally. Having reviewed the Second Stipulation itself, the Court has identified no such provisions, nor did Avianca identify any such provision when asked at oral argument.

On the contrary, the Court agrees with the Initiators that, because the Second Stipulation expressly and repeatedly contemplates the potential future "assumption of the applicable Original Aircraft Agreements [including the leases] pursuant to section 365 of the Bankruptcy Code" and/or the potential future "reject[ion of] the Aircraft Agreements [including the leases]" [Second Stipulation [ECF No. 401] at 2–10], the Second Stipulation cannot have extinguished the leases, and that the stipulation is insufficient to relieve Avianca of its lease obligations to the Initiators given the explicit wording of section 365(d)(5). As the Initiators rightly point out, section 365(d)(5) requires the performance of lease obligations "arising from or after 60 days after the [petition date] . . . *until such lease is assumed or rejected*" [Initiators' Reply [ECF No. 2689] at 9 (quoting 11 U.S.C. § 365(d)(5)) (alterations in original)], which the Second Stipulation made clear would not occur until some future date. Avianca counters that the Initiators could and should have

objected "at the time the Second Stipulations were filed and approved" [Debtors' Reply [ECF No. 2699] at 8], but Avianca has not shown that the Initiators had reason or need to object. Rather, the Second Stipulation does not purport to alter the Initiators' rights under the leases, so the Initiators had no need to object to it.

The Court does not reach the Initiators' additional argument that they cannot be bound by the Second Stipulation because they are not parties to it. [Initiators' Reply [ECF No. 2689] at 9–10]. The Initiators do not appear on the Second Stipulation's list of parties on whom it is binding [Second Stipulation [ECF No. 401] at 9)], but the Initiators are third-party beneficiaries under the original leases, and neither the Initiators nor Avianca has briefed the issue of whether and to what extent a Court-approved, post-petition stipulation may modify the express rights of a third-party beneficiary under a pre-petition lease agreement. For purposes of the present dispute, it is sufficient that the Second Stipulation, by its terms, does not purport to modify the Initiators' rights under the leases and under section 365(d)(5), even assuming that it could do so. Therefore, for the reasons stated above, the Court denies Avianca's claim objection to the extent it is premised on the Second Stipulation purportedly relieving Avianca of its obligations to the Initiators. The Court accordingly also rejects the argument that the Second Stipulation defeats the Initiators' motion to compel.

C. The Initiators' Duplicative Claims Should Be Expunged, and Their Claims Are Not Secured

Requiring far less discussion is Avianca's objection to the Initiators' assertion that their pre-petition claim was secured as opposed to unsecured, and Avianca's objection to various duplicative claims asserted by the Initiators. [Debtors' 24th Omnibus Claim Obj. [ECF No. 2661] at 8–9, 12–14]. The Initiators concede that their pre-petition claim is not secured, and that duplicative claims can be expunged in favor of one already-filed proof of claim that accurately

sets forth pre-petition amounts due to the Initiators. [Initiators' Reply [ECF No. 2689] at 10–11]. The Court grants Avianca's objection to the extent it seeks to reclassify the Initiators' claim for pre-petition amounts due to general unsecured status, and the Court grants Avianca's request to expunge duplicative claims. The parties confirmed at oral argument that there is no remaining dispute on these aspects of the claim objection, and they have reached agreement on which claims are to be expunged as duplicative.

CONCLUSION

For the reasons stated above, the Initiators' motion to compel compliance with section 365(d)(5) is granted, and the Court will direct payment of amounts due under that section. The Court, however, denies the Initiators' motion to the extent it seeks allowance of an administrative claim pursuant to Code section 503(b). The Court sustains Avianca's claim objections to the extent they seek to reclassify the Initiators' secured claim and expunge duplicative claims, but denies the objections to the extent they seek to disallow the Initiators' request for payment of post-petition amounts due to them under the leases as required by Code section 365(d)(5).

The parties are to confer and, on or before January 27, 2023, if practicable, jointly submit a proposed order implementing the rulings in this decision.

It is so ordered.

Dated: New York, New York
January 26, 2023

s/ David S. Jones
Honorable David S. Jones
United States Bankruptcy Judge