No. 21-0909

IN THE

Supreme Court of the United States

OCTOBER TERM, 2021

IN RE TERRAPIN STATION, LLC, DEBTOR,

TOUCH OF GREY ROASTERS, INC., PETITIONER

v.

CASEY JONES, CHAPTER 7 TRUSTEE, RESPONDENT

On Appeal from the United States
Court of Appeals for the Thirteenth Circuit

Brief for Petitioner

Team P19
Counsel for Petitioner

Oral Argument Requested

QUESTIONS PRESENTED

I. Whether a seller of goods is entitled under the Bankruptcy Code to recover the value it provided under section 503(b)(9) and use the same value to reduce its preference exposure under a section 547(c)(4) new value defense.

II. Whether, pursuant to 11 U.S.C §365(d)(3), a trustee is required to perform all obligations that is imposed upon the debtor subject to the terms of the lease, and those specific terms be the governing basis for when payments are owed when paying rent that is due prior to the rejection of an unexpired non-residential real property lease.

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OPINIONS BELOW

The United States Bankruptcy Court for the District of Moot ruled in favor of the Trustee for both issues. R. at 9. The United States District court for the District of Moot affirmed the Bankruptcy Court's ruling. R. at 9. Upon appeal, the United States Court of Appeals for the Thirteenth Circuit affirmed. R. at 9. The Creditors now appeal both matters to this Court and this Court granted certiorari. R. at 1.

STATEMENT OF JURISDICTION

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

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions involved in this case are reproduced in Appendices A.

STATEMENT OF THE CASE

This appeal arises from the misfortunes of a coffeehouse in the Town of Terrapin, Moot. R. at 3.

The Parties. In 2017, Touch of Grey Roasters, Inc. (hereinafter "Touch of Grey" or the "Petitioner"), a multinational coffee company with its headquarters in San Francisco, California, began its attempt to enter more localized markets throughout the United States by supporting local businesses with its initiative known as "neighborhood coffeehouses." R. at 3-4. In its plan, Touch of Grey would franchise with owners of existing businesses in an attempt to assist in easing the stains of expanding revenue. R. at 4. To achieve this goal, the Petitioner would supply the business owners with a range of offerings, ranging from traditional drinks like coffee and various teas to alcohol beverages in the evening hours. R. at 4. As part of the plan, the franchisee would purchase goods from the Dark Star line of coffee form Touch of Grey. R. at 4. One such franchisee was the owner of the Debtor, William Tell ("Tell"), who had previously, in 2005, established an award-winning, independent coffeehouse in Terrapin which thrived in the community. R. at 3. In 2017, Touch of Grey and Tell entered into an agreement to franchise the Debtor. R. at 4. Pursuant to the franchising agreement, Touch of Grey purchased and leased for the Debtor the warehouse at 5877 Shakedown Street (the "Premises"). R. at 4. Touch of Grey chose the Premises for its unique location near the downtown entertainment district. R. at 4. On July 1, 2018, Touch of Grey and the Debtor (hereinafter collectively the "Parties") entered into a franchising agreement, where Touch of Grey acted as franchisor and the Debtor as franchisee. R. at 4. Pursuant to the agreement between the Parties, the Debtor would exclusively sell Tough of Grey products such as Dark Star. R. at 4.

The Lease. Also on July 1, 2018, following discussion between the Parties, Touch of Grey, as lessor, and the Debtor, as lessee, entered into a *Lease Agreement* (the "Lease"). R. at 4. As agreed by the Parties, the Lease consisted of terms which included a twenty-year triple-net lease and a monthly rent of $25,000 for the Premises. R. at 4. Pursuant to the Lease, the Debtor was required to pay the rent to Touch of Grey with the aforesaid rent "due in advance on the first day of each month." R. at 4.

Decline of Business. Unfortunately, locals conducted a coordinated smear campaign against the Parties. R. at 5. Moreover, the Debtor suffered from an inability to make sales in the downtown area. R. at 5. The inability to generate sales ultimately resulted in the Debtor failing to pay debts in September of 2019 – some fourteen month since the commencement of the franchise agreement. R. at 5. By November 1, 2019, Touch of Grey was owed over $700,000 for Dark Star goods. R. at 5. Concerned over its investment as well as the financial state of the Debtor, Touch of Grey, on December 7, 2019, sent a notice of default to the Debtor which listed termination of the franchise agreement as a possible outcome of continued on its current trajectory. R. at 5.

Two days after sending the notice of default, on December 7, 2019, the Debtor agreed to enter into a forbearance agreement with Touch of Grey that forbore the termination of the franchise agreement provided that Debtor (i) pay $250,000 for the continued and outstanding invoices for Dark Star products, (ii) reaffirm Touch of Grey of the Debtor's adherence to the Lease, and (iii) release Touch of Grey of any and all claims or causes of action. R. at 5. Fortunately, on the same day, the Debtor successfully made the $250,000 payment to Touch of Grey. R. at 5.

The Invoice. To aid in continued operations of the business, Touch of Grey agreed to sell to the Debtor an additional $200,000 worth of Dark Star products on credit on December 18, 2019. R. at 5. In the invoice of this transaction (hereinafter the "Invoice"), it is evidenced that Tell agreed

to sign a personal guaranty with respects to this Invoice. R. at 5. Upon receipt of the personal guaranty, Touch of Grey promptly delivered all goods listed within the Invoice. R. at 5.

Bankruptcy. Unfortunately, holiday sales for the Debtor failed to generate any momentum in tackling its debts. R. at 6. Due to this, on January 5, 2020 (the "Petition Date") the Debtor filed a petition for relief under chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the District of Moot. . R. at 6. Still current on its obligations in the Lease, the Debtor ultimately owed $650,000 to Touch of Grey which consisted of the following: (i) the original payments owed, less the forbearance agreement's $250,000, and (ii) the additional $200,000 listed in the Invoice. The Debtor owed an additional $500,000 to other unsecured creditors of which some continued to refuse to assist in providing goods and services to the Debtor during the bankruptcy. . R. at 6.

Pursuant to the several "first day" motions supported by Tell, Tell highlighted his intention to reorganize the Debtor so as to continue operating during regular coffeehouse hours. . R. at 6. He also intended to sub-let a portion of the Premises. R. at 6. Throughout the Debtor's first day hearings, Touch of Grey continually showed its intention to work with the Debtor to achieve an effective reorganization despite some concerns regarding Debtor's strategy. R. at 6.

Following this, the Debtor sought for Touch of Grey to be regarded by the bankruptcy court as a critical vendor. R. at 6. To achieve this the Debtor intended to pay $200,000 toward the Invoice to Touch of Grey pursuant to Section 503(b)(9). R. at 6.This was ultimately challenged by the United States Trustee who argued that critical vendor payments were unlawful. R. at 6. Unfortunately, the bankruptcy court opted against allowing the payment – uncertain of the validity of critical vendor payments. R. at 6. The Debtor would eventually be permitted to make a payment to Touch of Grey and consequently resume business. R. at 6. This came to an abrupt halt when the COVID-19 pandemic hit the State of Moot as it did all other states. R. at 6. This proved the straw

that broke the camel's back for the Debtor and on May 5, 2020, the Debtor ceased business and vacated the Premises. R. at 6. On May 6, 2020, the Debtor filed a motion to reject the Lease as well as the franchise agreement. R. at 6. On May 8, 2020, Touch of Grey filed a motion to compel the Debtor to pay the May rent despite not opposing the rejection itself. R. at 6-7. The court chose not to decide on the issue of rent but requested that the parties brief the court on the matter. R. at 8.

On May 29, 2020, the Debtor converted the chapter 11 bankruptcy into a case under Chapter 7 pursuant to section 1112(a) of the Bankruptcy Code. R. at 8. Following the conversion, the Trustee first challenged Touch of Grey's motion to compel payment of the rent owed in its entirety. R. at 8. Following this, the Trustee brought suit to avoid and recover the $250,000 paid to Touch of Grey pursuant to the forbearance agreement between the parties as a preferential transfer pursuant to sections 547(b) and 550(a). R. at 8. Touch of Grey responded to action by asserting its right to reduce preference exposure by the $200,000 paid by the debtor for goods pursuant to section 547(c)(4). R. at 7.

Following a slew of mediation attempts, the parties stipulated to file cross-motions for summary judgment. R. at 8-9. Following briefs and oral argument, the bankruptcy court ruled in favor of the Trustee. R. at 9. The court also held that Touch of Grey could not reduce preference exposure by using the value of goods from the preference exposure based on section 503(b)(9). R. at 9. This resulted in a judgment of $250,000. R. at 9. The court ruled that section 365(d)(3) allowed the Debtor to prorate its rent – effectively allowing it to pay a fraction what was required by the lease. R. at 9. Instead of the agreed $25,000, the Debtor would only pay $4,032.26 for the prorated portion. R. at 9.

Touch of Grey appealed to no avail in the United States District Court for the District of Moot. Subsequently, it appealed to the United States Court of Appeals for the Thirteenth Circuit, also to no avail. Touch of Grey now appeals to this Court on both matters.

SUMMARY OF THE ARGUMENT

The Thirteenth Circuit's improper ruling must be overturned, because a debtor, pursuant to Section 547(c)(4) and 503(b)(9), may validly reduce its preference exposure by asserting the new value defense. The Thirteenth Circuit's second ruling that a debtor may prorate the amount due when rejecting a lease after the rent's due date because Section 365(d)(3) affords the landlord the protection of pre-rejection being paid in full.

As stated above, a debtor may legally reduce the preference exposure when applying the new value defense. The plain language of Section 547(c)(4) permits the reduction of preference exposure. Pursuant to a plethora of Supreme Court precedent, it is hornbook law to read an unambiguous statute by its plain language. Even with less clear statutory interpretation, the first step rests in the plain language of the statute itself. Moreover, Section 503(b)(9) must be read with its neighboring statutes in mind, including Section 547(c)(4). These two Sections read together do not create any sort of windfall or unjust favor for creditors. Section 503(b)(9) also gives creditors the ability to seek a priority status that ensures better treatment by way of its administrative expense claim. The policy behind Section 547(c)(4) is to encourage creditors to continue to lending credit to a company they do business with, even if that company may soon be filing for bankruptcy. By the same token, Section 503(b)(9) was enacted by Congress to protect creditors by giving them post-petition priority equivalent to the value of the goods delivered to the debtor within twenty days prior to the bankruptcy petition.

Secondly, the Thirteenth Circuit incorrectly adopts the proration approach interpretation of Section 365(d)(3), which requires the landlord to receive payment of for the use and occupancy of the Premises rather than allowing the landlord to receive what is validly agreed upon by the parties. Section 365 plainly and unambiguously requires payment in full of post-petition, pre-rejection obligations. The proration approach invariably runs counter to this goal. The obligation to pay the lease in full became due at the beginning of the month and before the date of rejection. Therefore, per Section 365(d)(3), the statute plainly requires the Debtor to fulfill its obligation in full. More specifically, the lease itself becomes delinquent on its due date if not successfully paid. Moreover, the Congress's sole purpose in enacting Section 365(d)(3) centers around the protection of the landlord rather than the tenant.

ARGUMENT

This Court should reverse the Thirteenth Circuit Court of Appeals' decision to preclude a Defendant from asserting new value for goods subject to a satisfied administrative expense under Section 503(b)(9). This Court should further reverse the circuit court's decision to uphold the proration approach.

I. UNDER 11 U.S.C. SECTION 547(C)(4) AND SECTION 503(B)(9), A DEBTOR MAY LEGALLY REDUCE ITS PREFERENCE EXPOSURE BY THE NEW VALUE DEFENSE ASSERTED.

The Bankruptcy Code is comprised of several goals for both creditors and debtors. One fundamental purpose of the Bankruptcy Code that must not be forgotten is to ensure creditors receive their fair share of debts owed to them. *Central Va. Comm. College v. Katz*, 546 U.S. 356, 364 (2006). To ensure all purposes of the Bankruptcy Code are met, the Supreme Court "directed that the Bankruptcy Code be read as a comprehensive scheme and that courts be guided by its object and policy." *Zazzali v. United States*, 554 B.R. 234, 239 (D. Idaho 2015); See *Kelly v. Robinson*, 479 U.S. 36, 43 (1986).

A new issue rising in the bankruptcy sphere is whether a creditor may reduce its preference exposure by applying new value through section 547(c)(4) even if the new value was fully paid for post-petition through section 503(b)(9). A preference is formed under section 547 if a transfer of goods from the creditor to the debtor occurs within 90 days prior to the filing of a bankruptcy petition. 11 U.S.C. § 547. If a trustee attempts to void the preference, the creditor has several defenses under section 547, one being the new value defense. *Id.* Section 547(c)(4) allows a creditor to offset against a preferential transfer if the creditor later gave new value to the debtor after the prior preferential transfer. 11 U.S.C. § 547(c)(4). Parallel to section 547(c)(4) is section 503(b)(9), which affords creditors an administrative expense claim for "the value of any goods received by the debtor within 20 days before the date of commencement of a case under this title in which the goods have been sold to the debtor in the ordinary course of such debtor's business." 11 U.S.C. § 503(b)(9).

A. The plain meaning of 11 U.S.C. Section 547(c)(4), when read with Section 503(b)(9), allows for a reduction in preference exposure.

The Supreme Court has always taken the "on its face" approach for when a statute's language is clear and unambiguous. See *Davis v. State*, 426 M.D. 211, 218-19 (M.D. 2012). This limits courts to analyze and apply only the law as it is written and nothing beyond. *Id.* If the language in a statute is clear and unambiguous then the courts job is to simply enforce the statute on its face. *In re Brown*, 505 B.R. 638, 645 (E.D. Pa. 2014). (citing *Jimenez v. Quaterman*, 555 U.S. 113, 118 (2009); *see also Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000); *see also In re Price*, 370 F.3d 362, 368 (3rd Cir. 2010). Consistent with this approach, it seems logical that a clear reading of section 547(c)(4), with a contextual view of the Bankruptcy Code allows a creditor to afford both a new value defense under section 547(c)(4) and a preferential claim under section 503(b)(9). Importantly, courts should be cautious in their understanding and interpretation of statutes on a case-by-case basis.

> Courts must exercise caution in applying the plain meaning rule. Its beguiling simplicity may mask a host of reasons why a statute, apparently clear and unambiguous on its face, may for one reason or another give rise to legitimate (i.e., nonfrivolous) differences of opinion concerning the statute's meaning. In such a case, it can rarely be said that the legislation is indeed free from all ambiguity and is crystal clear in its meaning.

State ex rel. Helman v. Gallegos, 117 N.M. 346, 353 (1994).

Section 547(c)(4) on its face is not inherently clear and concise. Even so, the plain language of section 547(c)(4) "closes the preference window at the petition, limiting the section 547(c)(4) defense to new value supplied and payments made before the debtor crosses into bankruptcy." *Phoenix Rest. Grp., Inc. v. Ajilon Prof'l Staffing, LLC (In re Phoenix Rest. Grp., Inc.)*, 317 B.R. 491, 496 (Bankr. M.D. Tenn. 2004). While a poorly written statute does not inherently become an ambiguous one, if this Court finds section 547(c)(4) somewhat unclear and potentially ambiguous, any ambiguity is easily explained in a broader context with section 503(b)(9) and the Bankruptcy Code as a whole.

1. Any ambiguity that does exist in Section 547(c)(4) can be overcome by legislative intent and contextual history.

Statutory interpretation is a holistic endeavor that requires a case-by-case analyze. If plain reading of the language in a statute is not clear, then it is ambiguous. *Friedman's Liquidating Trust v. Roth Staffing Cos. LP, (In re Friedman's Inc.)*, 738 F.3d 547, 554 (3rd Cir. 2013) (*citing In re Price*, 370 F.3d at 369). When statutes are ambiguous the court must then look towards legislative history and policy regarding the statute(s) in question. *Id.* Additionally, "the Supreme Court has observed that a court should 'not read the Bankruptcy Code to erode past bankruptcy practice absent a clear indication that Congress intended such a departure.'" *Pa. Dep't of Pub. Welfare v. Davenport*, 495 U.S. 552, 563 (1990).

More specifically to the issue at hand, "Congress enacted the Bankruptcy Abuse Prevention and Consumer Protection Act to correct perceived abuses of the bankruptcy system." *Ransom v. FIA Card Servs.*, 562 U.S. 61, 64 (2011) (citing *Milavetz, Gallop & Milavetz, P.A. v. United States*,

559 U.S. 229, 231-32 (2010). The very intent that Congress placed behind the Bankruptcy Abuse Prevention and Consumer Protection Act ("BAPCA") stands to be ignored if courts fail to adopt a cohesive policy that allows creditors to assert both an administrative expense and protect its right to assert a subsequent new value defense. *In re Commissary Operations,* 421 B.R. at 879. Nothing in section 547(c)(4), section 503(b)(9), or the Bankruptcy Code suggests that Congress intended for creditors, who lend a helping hand to distressed companies, to be punished for their sympathetic efforts.

a. *Section 547(c)(4) read within the proper context confirms the cut-off date for analysis is at the petition date.*

While plain language is the crux of statutory interpretation, it cannot be applicable if it would lead to an absurd result. *United States v. Silva*, 443 F.3d 795, 798 (11th Cir. 2006). This is why courts notoriously look to the entire statutory context as a rule of thumb to determine interpretation. *Id.* Generally speaking, "section 547 is titled "Preferences," and therefore suggests that it concerns transactions occurring during the preference period, which is by definition pre-petition." *In re Friedman's*, 738 F.3d 547 at 555. It logically follows that the calculation of any preferences would refer back to any pre-petition transfers. *Id.* Accordingly, any calculations to determine a new value defense pursuant to section 547(c)(4) would be cut-off at the petition date. *Id.*

Another contextual element found in section 547(c)(4) is the difference between "debtor" and "trustee." In the bankruptcy setting, debtors are the pre-petition entities while a trustee or an estate proves as an appointed post-petition entity. *Phoenix Rest. Grp., Inc. v. Ajilon Prof'l Staffing LLC, (In re Phoenix)*, 317 B.R. 491, 497 (Bankr. M.D. Tenn. 2004). Consistently, these post-petition entities in the Bankruptcy Code have been referred to as "the estate." "the Trustee," or "the debtor-in-possession." *In re D.J. Mgmt. Grp.,* 161 B.R. 5, 6 (Bankr. W.D.N.Y. 1993). As stated in section 547(c)(4), "new value" is to be advanced "for the benefit of the debtor." *In re Phoenix,* 317 B.R. 491 at 496. This implies that advances of new value can only be given prior to

the petition date because the statute refers to the debtor himself and not the estate, the trustee, or the debtor in possession. *Id.* Any advances given post-petition are given to the debtor's estate and are considered irrelevant for new value defense analysis. *Id.* If Congress intended section 547(c)(4) to account for post-petition payments, then it would have specifically stated so by placing the interest in the trustee or the estate. *In re Phoenix*, 317 B.R. at 497. Additionally, cutting off section 547(c)(4) analysis at the petition date "is consistent with other Code remedies that only apply post-petition. Creditors who continue to supply the debtor-in-possession with goods and services post-petition are provided special priority for payment from the bankruptcy estate." *Id.* at 497; See 11 U.S.C. §§ 364 & 503(b); s*ee also Wolinsky v. Central Vermont Teachers Credit Union*, 98 B.R. 669, 683 (Bankr. D. Vt. 1989).

Here, on December 7, 2019, the Debtor paid $250,000.00, a mere fraction of what was owed, to Touch of Grey pursuant to a forbearance agreement the parties voluntarily entered into. R. at 5. According to the terms of the agreement, Touch of Grey then provided "new value" in the form of goods to the Debtor. R. at 5. The new goods totaled to $200,000.00, and this was placed on credit. R. at 5. The Petition Date occurred on January 5, 2020. R. at 6.

As previously mentioned, section 547 is entitled "preferences," and the case at hand is a prime example of when preferences should be afforded to creditors based on a new value defense. In fact, both parties in this case agree that the subsequent new value defense is applicable. R. at 9. The dispute here lies in whether Touch of Grey may reap the benefits of a new value defense while a section 503(b)(9) preference claim is already in play. R. at 10. Based on the above reasonings, Touch of Grey is in fact entitled to both sections of the Bankruptcy Code. Touch of Grey proved itself as a preferred creditor to the Debtor while his business struggled and even continued to provide goods well after the petition for bankruptcy was filed. R. at 7. Additionally, as outlined in section 547(c)(4), the Debtor himself is the one who received the new value of goods prior to the petition date. R. at 6. This directly aligns with the cut-off date for new value analysis being at the Petition Date. Therefore, there is no question that this case involves a section 547(c)(4) new value defense, and there is no question that this case involves a section 503(b)(9) claim as awarded

by the court. Given that the new value defense analysis should end pre-petition, Touch of Grey is entitled to reap the benefits of both section 547(c)(4) and section 503(b)(9).

b. The statute of limitations for filing a preference also confirms the cut-off date for Section 547(c)(4) analysis ends at the petition date.

"The statute of limitations for filing a preference avoidance action under section 547 in a voluntary case begins to run on the petition date. This supports the notion that the cause of action accrues as of that date." *In re Friedman's*, 738 F.3d 547 at 555; *See* 11 U.S.C. § 546. If Congress intended for this section to carry on into post-petition transactions, it would have directly said so or changed the statute of limitations itself. *Id.* Even if this Court determines that post-petition payments can affect the preference analysis, it will then only logically follow that new value would still be available as a defense. *Id.* at 557.

Further, a test referred to as the "hypothetical liquidation test" is located within section 547 and requires that the test be performed prior to the petition date. *Id.* at 556. This provides a substantial correlation that points the petition date to the cutoff for determining new value. *Id.* Similar to section 547(c)(4), "courts have held that this test should be performed as of the petition date even though the statute does not specify the date to be used." *Id.* (quoting), *e.g., In re Union Meeting Partners*, 163 B.R. 229, 237 (Bankr. E.D. Pa. 1994) (holding that hypothetical liquidation analysis must be conducted as of date bankruptcy petition is filed); *see also* 5 Collier on Bankruptcy ¶ 547.03 (16th ed.2013) (stating that § 547(b)(5) codifies holding from *Palmer Clay Products Co. v. Brown*, 297 U.S. 227, 56 (1936), in setting petition date as date to be used in hypothetical liquidation analysis). Allowing the preference analysis to extend past the petition date to determine new value for section 547(c)(4) would be wholly inconsistent with the petition date cutoff analysis for section 547(b)(5). *Id.* Also, under a theory of the canons of statutory construction, it is presumed that a specific word used repeatedly within a statute means the same thing throughout the statute. *Brown v. Gardner*, 513 U.S. 115, 118 (1994).

While courts disagree as to the cutoff for analysis at the petition date, it not only reads this way but appears more logical from a contextual viewpoint. *Commissary Operations, Inc. v. Dot Foods, Inc., (In re Commissary),* 421 B.R. 873 at 879. If courts agree to consider post-petition payments to be analyzed for new value, then courts would also need to agree to consider post-petition extensions for new value defenses. *Id.* at 557. Be that as it may, a majority of courts that have already determined that the petition date is the cutoff for considering a creditor's new value defense. *Id. (citing In re Bellanca Aircraft Corp.,* 850 F.2d 1275, 1284–85 (8th Cir. 1988); *In re Rocor Int'l, Inc.,* 352 B.R. 319, 333 (Bankr. W.D. Okla. 2006); *In re George Transfer, Inc.,* 259 B.R. 89, 96 (Bankr. D. Md. 2001); *In re Sharoff Food Serv., Inc.,* 179 B.R. 669, 678 (Bankr. D. Co. 1995); *In re D.J. Mgmt. Grp.,* 161 B.R. 5, 6 (Bankr. W.D. N.Y. 1993); *In re Jolly "N," Inc.,* 122 B.R. 897, 909–10 (Bankr. D. N.J. 1991); *In re Vunovich,* 74 B.R. 629, 632 (D. Kan. 1987)).

Here, it is important to restate that the Petition Date occurred on January 5, 2020. R. at 6. This is the same date that the statute of limitations lock begins counting running. It logically follows that any payments made before the Petition Date are the payments to be analyzed for purposes of the new value defense. Applying this logic, Touch of Grey is then entitled to the new value defense for payments prior to the Petition Date because goods to keep the Debtor's company alive were provided. R. at 5. Touch of Grey was not required by law to continue to help a struggling business, but did so willingly. Thus, Touch of Grey at the very least deserves what has been written out in the Bankruptcy Code to be provided to them. Here, that requires that Touch of Grey receive payment in full for value they provided to the Debtor under section 503(b)(9) and section 547(c)(4).

B. 11 U.S.C. Section 503(b)(9) must be analyzed and treated equally with all other Code Sections, including Section 547(c)(4).

11 U.S.C. section 503(b)(9) was officially added to the Bankruptcy Code in 2005 as a part of the BAPCA. BANKRUPTCY ABUSE PREVENTION AND CONSUMER PROTECTION ACT OF 2005, 109 P.L. 8, 119 Stat. 23 (2005). This Act was introduced to the Bankruptcy Code to provide additional

protection to certain creditors. *Id.* At the time section 503(b)(9) was introduced to the Bankruptcy world, section 547(c)(4) had existed for almost 30 years. BANKRUPTCY REFORM ACT OF 1978, P.L. 95-598, 92 Stat. 2549 (1978). Therefore, Congress was well aware of section 547(c)(4) when it enacted section 503(b)(9) decades later. If Congress had intended anything but unanimity among the sections, then it would have directly laid out the new rules and limitations without question.

The truth of the matter is that section 503(b)(9) can and must be read harmoniously with section 547(c)(4). These two sections read together do not create any sort of windfall or unjust favor for creditors. *In re Friedman's,* 738 F.3d 547 at 559. In fact, the two sections share similar standards by entitling creditors to an administrative expense for the value of goods received by the debtor as long as it is within 20 days prior to the petition date. 11 U.S.C. 503(b)(9). However, a falsehood floating around from other courts claims that "allowing both new value credit and payment of [a] section 503(b)(9) claim elevates the claim of that creditor and results in double payment to that creditor. *Id. citing In re T.I. Acquisition, LLC,* 429 B.R. 377, 385 (Bankr. N.D. Ga. 2010). This doubling-dipping argument simply is not true because "it implies that the creditor is receiving payment for goods or services that were never provided, or that the creditor is being paid twice." *Id.*

Circulation of the "double dipping" argument is so detrimental to creditors that it is failing the bankruptcy system as a whole. Courts have egregiously asserted that creditors seeking to assert a subsequent new value defense along with a section 503(b)(9) claim would then be permitted to recover double of what they are owed. *Circuit City II*, 515 B.R. 302, 313-314 (Bankr. E.D. Va. 2014); *TI Acquisition*, 429 B.R. 377 at 385. Not only is this argument a fallacy, but it is also prejudicially misleading by promoting that creditors are being paid twice. *In re Friedman's,* 738 F.3d 547 at 559. Additionally, the Third Circuit said it best when it articulated that, "even if a creditor is paid post-petition for new value it provided pre-petition, the creditor still replenished the debtor's estate during the preference period, and therefore aided the debtor in avoiding bankruptcy to whatever extent possible." *Id.* Therefore, there is no unjust enrichment being provided to creditors who willingly assist failing companies on the brink of bankruptcy. Goods

and services continue to be exchanged for money, which is typically in the form of credit. This completely destroys the argument that creditors would be double dipping if allowed to offer a new value defense along with an administrative expense claim.

Another falsehood swarming this topic is that all creditors are created equal. Bankruptcy by its very nature has been designed to create equal treatment not among all creditors, but among similarly situated creditors. *Quinn Wholesale, Inc. v. Northern,* 100 B.R. 271, 275 (Bankr. M.D. N.C. 1988). For example, secured creditors receive protections such as adequate protection payments or use of cash collateral. *In re Friedman's,* 738 F.3d 547 at 560. Section 503(b)(9) also gives creditors the ability to seek a priority status that ensures better treatment by way of its administrative expense claim. *In re Beaulieu Group, LLC,* 616 B.R. 857, 876 (Bankr. N.D. Ga. 2020). This section of the Bankruptcy Code allows for 503(b)(9) creditors to be treated accordingly over remaining general unsecured creditors. *In re Friedman's,* 738 F.3d 547 at 561.

Additionally, affording creditors their bankruptcy right to a new value defense and an administrative expense claim does not override the Bankruptcy Code by creating unequal treatment of creditors. Some courts have concluded that equal treatment of creditors weighs heavily in favor of denying new value credit for allowed and paid section 503(b)(9) claims. *In re T.I. Acquisitions,* 429 B.R. at 385. However, "it could be said that some creditors are treated more equally than others." *In re Friedman's,* 738 F.3d 547 at 560. The Eighth Circuit even noted that section 547(c)(4) "was not enacted to ensure equitable treatment of creditors, but rather is intended to encourage creditors to deal with troubled businesses." *In re Bellanca Aircraft Corp.,* 850 F.2d at 1280. This idea of more equally than others is only furthered when critical vendors are involved. "A critical vendor who provided new value during the preference period need not be treated the same as another creditor who provided new value but is not considered by the debtor and the bankruptcy court to be a critical vendor post-petition. They are not similarly situated." *In re Friedman's,* 738 F.3d 547 at 560, 561.

Here, Touch of Grey provided $200,000.00 worth of goods on credit to the Debtor fifteen days before the Petition Date, which is within the preference period for new value. R. at 6. These

goods were willingly provided despite the fact that the Debtor, at the time, owed Touch of Grey $650,000.00. R. at 6. After the Debtor's bankruptcy petition was filed, the Debtor filed a motion requesting to pay Touch of Grey as a critical vendor. R. at 6. The court granted the motion allowing Touch of Grey to receive the payment as an administrative expense under section 503(b)(9). R. at 7. Again, at the time, the Debtor still owed Touch of Grey $650,000.00. R. at 6. The Debtor immediately paid Touch of Grey $200,000.00 pursuant to the Court Order as a 503(b)(9) claim. R. at 7.

However, the money Touch of Grey received was always for goods actually provided. R. at 5. Prior to filing for bankruptcy, the Debtor owed Touch of Grey well over $700,000.00. R. at 5. The parties came to a mutual agreement for the Debtor to pay Touch of Grey $250,000.00 to continue doing regular business. R. at. 5. This payment occurred long before the Debtor filed for bankruptcy. R. at 6. Within a week after the forbearance agreement, the Debtor purchased $200,000.00 worth of coffee products from Touch of Grey. R. at 5. At this point in time, Touch of Grey was continuing to work with the Debtor before he even became a debtor. R. at 5. Fastforward post-petition, the Debtor paid Touch of Grey an additional $200,000.00, but this payment comes after the Debtor owed Touch of Grey several hundreds of thousands of dollars plus put another $50,000.00 on credit from the last purchase before filing for bankruptcy. R. at 5. Therefore, Touch of Grey was never unjustly enriched by these transactions because each transaction was for goods given to the Debtor. Touch of Grey supplies the Debtor with products for its coffee shop. R. at 3. What Touch of Grey has not done is participate in the fallacy known as "double-dipping." It is quite literally impossible.

Also, time and time again Touch of Grey has proven themselves to be a preferred creditor. R. at 5 and 6. Despite the Debtor being in a financial bind as early as September 2019, Touch of Grey came to a mutual agreement to continue doing business to try and keep the Debtor afloat. R. at 5. Once the Debtor filed for bankruptcy Touch of Grey still provided themselves to be willing to help the Debtor's plans to re-organize. R. at 7. Whether or not the re-organization plans panned out are irrelevant to determine that Touch of Grey more than proved themselves to be a preferential

creditor. R. at 7. For this reason, Touch of Grey should be treated as such given that the Bankruptcy Code itself has carved out these preferences towards creditors.

C. The central goal of Bankruptcy is only achieved when Sections 547(c)(4) and 503(b)(9) are read harmoniously.

Bankruptcy as a whole is made up of several competing goals. Bankruptcy courts are dealt the difficult task of balancing a debtor's fresh start with the goods a creditor is rightfully owed. *In re Cross*, 255 B.R. 25, 32 (Bankr. N.D. Ind. 2000). Due to the "inherent tension between debtors and creditors, in crafting the current Bankruptcy Code, Congress necessarily allocated the consequences of bankruptcy between debtors and creditors." *Id.* More specifically, the intent behind section 547(c)(4) is to encourage creditors to continue to work with distressed companies while maintaining a sense of protection to the extent that the creditor extends her new credit. *Mosier v. Ever-Fresh Foods Co., (In re IRFM, Inc.)*, 144 B.R. 886, 890 (Bankr. C.D. Cal. 1992). The policy behind section 547(c)(4) is to encourage creditors to continue to lending credit to a company they do business with, even if that company may soon be filing for bankruptcy. *In re Arts Dairy, LLC*, 414 B.R. 219, 220 (Bankr. N.D. Ohio 2009). By the same token, section 503(b)(9) was enacted by Congress to protect creditors by giving them post-petition priority equivalent to the value of the goods delivered to the debtor within twenty days prior to the bankruptcy petition. *Id.* Section 503(b)(9) allows debtors to continue doing business without abusing creditors despite emerging bankruptcy proceedings. *Id.* Forcing creditors to decide whether to assert a section 503(b)(9) administrative expense claim or a section 547(c)(4) new value defense defeats Congress' entire purpose for enacting the Bankruptcy Abuse Prevention and Consumer Protection Act, which contains section 503(b)(9). *In re Commissary*, 421 B.R. 873 at 879. If courts fail to uphold creditors congressional rights to both code sections, then it would go directly against the intent of Congress as if section 503(b)(9) never existed.

Here, the Debtor in this case began running into financial trouble as early as September 2019. R. at 5. Despite the financial trouble, Touch of Grey continued to do business with the Debtor and sold an additional $200,000 worth of coffee products to the Debtor on December 18, 2019. R. at 5. The Debtor owed Touch of Grey $650,000 as of the Petition Date. R. at 6. Even so, Touch of Grey agreed to continue to engage in good faith dealings with the Debtor moving forward. R. at 6. Touch of Grey continued to work with the Debtor even after the Petition Date to ensure a good faith relationship and help to move the Debtor's reorganization plan forward. R. at 7. Despite Touch of Grey's best efforts to maintain a good faith relationship, the Debtor was forced to temporarily close in March 2020. R. at 7. The debtor then permanently closed on May 5, 2020. R. at 7. This case displays the policy reasoning behind sections 547(c)(4) and 503(b)(9) to a tee. Everything that sections 547(c)(4) and 503(b)(9) were enacted to promote were promoted in this case when the Debtor, a struggling business, was sent a helping hand from Touch of Grey.

Touch of Grey never wavered from expressing anything but its commitment to work with the Debtor despite his financial destress. Additionally, one of the two main reasons behind section 503(b)(9) is to protect creditors from debtors who may abuse their willingness to help. As early as September 2019, the Debtor knew he could no longer make payments for bills each month. R. at 5. A month later the Debtor knew he owed Touch of Grey $700,000. R. at 5. The Debtor filed a petition for relief under chapter 11 of the Bankruptcy Code, and even then, Touch of Grey continued to work with the Debtor in good faith. R. at 6. Touch of Grey should not face unfair punishment from this Court when the pinnacle of Bankruptcy policy all points to all of Touch of Grey's actions through their business with the Debtor.

II. THE THIRTEENTH CIRCUIT INCORRECTLY ADOPTS THE PRORATION APPROACH INTERPRETATION OF 11 U.S.C. § 365(d)(3), WHICH REQUIRES THE LANDLORD TO RECEIVE PAYMENT FOR THE USE AND OCCUPANCY OF THE PREMISES AT THE RENTAL RATE PRESCRIBED UNDER THE LEASE THROUGH THE DATE OF REJECTION.

The bankruptcy code has specific provisions related to unexpired leases of nonresidential property. However, there exist a split among courts as to whether section 365(d)(3) requires a trustee to timely perform the obligations of a debtor by paying rent due prior to the rejection of an unexpired non-residential real property lease but allocable to the period after the effective date of rejection. By depending on the plain language of the statute and robust public policy rationales, the Thirteenth Circuit Court of Appeals incorrectly adopted the proration interpretation.

A. The plain meaning of 11 U.S.C. § 365(d)(3) is unambiguous and requires payment, in full of post-petition, pre-rejection rent obligations in unexpired leases of non-residential real property.

The first step of statutory construction is looking at the language of the statute. *Hartford Underwriters Ins. Co v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000). When a statutes language is presented with clarity and clear meaning, only extraordinary circumstances would suggest that the inquiry is not finished. *United States v. Ron Pair Enters*., 489 U.S. 235, 237 (1989). Following that logic, when a bankruptcy code provision is clear and without ambiguity, the plain language controls so long as an absurd result is not the outcome or is "demonstrably at odds with the intentions of its drafters." *Id*. When resolving any dispute concerning the meaning of a statute, an inquiry must begin with the language of the statute itself. *Landreth Timber Co. v. Landreth*, 471 U.S. 681 (1985). In *Ron Pair Enters*, this court held that when statutory language is plain, the principal role of the court is to enforce that language according to its terms. *Ron Pairs Enters*, 489 U.S. at 237. The plain language of section 365(d)(3) is not ambiguous and requires payment, in full of post-petition, pre-rejection rent obligations in unexpired leases of non-residential real property. *Burival v. Roehrich*, 613 F.3d 810 (2010).

Section 365(d)(3) states:

> (A) The trustee shall timely perform all the obligations of the debtor, except those specified in section 365(b)(2), arising from and after

> the order for relief under any unexpired lease of nonresidential real property, until such lease is assumed or rejected, notwithstanding section 503(b)(1) of this title.

11 U.S.C. § 365 (d)(3)

Specifically, section 365(d)(3) mandates that the trustee timely perform all "obligations" that arise under an unexpired lease of non-residential real property. 11 U.S.C. § 365 (d)(3). The natural reading of section 365(d)(3) does not offer a divided meaning; it simply means that a trustee is to timely fulfill the obligations according to the terms under an unexpired lease when such obligations arise after the order for relief is entered and prior to rejection of the lease. *In re Koenig Sporting Goods, Inc*., 203 F.3d 986 (6th Cir. 2000). Therefore, section 365(d)(3) cannot be read in any other way, and a reading of section 365(d)(3) as a whole reinforces the need for such an interpretation. *Id*.

1. <u>The plain language of section 365(d)(3) supports the billing date approach, particularly because the lease has now been rejected and the obligations that came due are already delinquent and untimely.</u>

Section 365(d)(3) of the Bankruptcy Code requires a trustee or a debtor in possession, awaiting assumption or rejection of a non-residential real property lease to "*timely perform all obligations*…," meaning that the trustee must adhere to the debtor's obligations by way of the terms of the lease notwithstanding the act of rejection. 11 U.S.C. § 365 (d)(3). *Roehrich*, 613 F.3d 810 (2010). This approach is known as the billing date approach, which is the only appropriate approach to take in regard to the plain meaning of the statute. *Koenig Sporting Goods, Inc*., 203 F.3d 986 (6th Cir. 2000). More specifically, the billing date approach requires the debtor in possession to pay rent according to the terms of the lease during the prerejection period regardless of whether a portion of that rent corresponds to charges that occur prepetition. Some courts, however, that are swayed by the proration approach, meaning that they believe the language of section 365(d)(3) allows them to follow the pre-1984 method of prorating rent between the pre-

petition and pre-rejection timeline, interpret the word "obligation" within the text of 365(d)(3) in relation to the statutorily defined term "claim". *In re Child World, Inc*, 161 B.R. 571, 574 (S.D.N.Y. 1993). The term "claim" is defined by the Bankruptcy Code as including an "unmatured right to payment," therefore those who take the proration approach suggest that an "obligation" can arise prior to when the tenant is obligated to perform. *Id*.

Those in favor of the proration approach find issue as to whether such obligations constitute pre-petition or post-petition claims against the debtor under section 101(5), which is where the term "claim" is defined. *In re R.H. Macy & Co*., 152 B.R. 869, 873 n.3 (S.D.N.Y. 1993). The position is thus taken that a pre-petition claim is not required by the tenant to be performed in a timely manner. *Id*. This suggestion, however, proves to have many difficulties. Id. Congress, in writing this statute, did not use the term "claim" which is used consistently through the entirety of the Code. *Id*. Congress instead used the word "Obligation". *Id*. It is important to note that Congress indeed knew how to use the word claim, and therefore could have used it in writing section 365(d)(3). *In re Montgomery Ward Holding Corp*., 268 F.3d 205, 209-10 (3rd Cir. 2001). When evaluating statutory construction, "courts properly assume, absent sufficient indication to the contrary, that Congress intends the words in its enactments to carry 'their ordinary, contemporary, common meaning.'". *Perrin v. United States,* 444 U.S. 37, 42, 62 L. Ed. 2d 199, 100 S. Ct. 311 (1979). As such, it is wholly inappropriate to weigh in equal favor the term obligation with the term claim and to analyze that when an "obligation" emerges under a lease of nonresidential real property that it must be equated to the meaning of the term "claim".

The standard interpretation of the word "obligation" specifies to "that which a person is bound to do or forbear." *Black's Law Dictionary* 1074 (6th ed. 1990). Here, the obligation is the payment of rent in the amount of $25,000 "in advance on the first day of each month." As the

record shows, the obligation of the debtor was to pay rent on May 1, 2020, wherefore it is important to note that such an obligation was due four days prior to the rejection of the Lease. R. at 7. Accordingly, when looking to the plain language of the statute, the rent due on the first of May represents an obligation of the debtor under the lease that arose after the order for relief, which must be timely performed in accordance with section 365(d)(3).

The most natural interpretation of section 365(d)(3) is that Congress intended to require all of the debtor's payment obligations subject to the lease until the time the debtor is to reject the lease in question. *In re Krystal Co.*, 194 B.R. 161(Bankr. E.D.Tenn. 1996). Courts that adopt the proration approach, wrongly ascertain that the "arising from" language channels a meaning that the obligation must in some way emerge from the prerejection period. *Id*. In other words, that it is construed to be an administrative expense before the obligation would even be payable. *Id*. Such a viewpoint is incorrect, because within the statute is the language "notwithstanding section 503(b)(1) of this title," which goes to directly preclude the viewpoint that such obligations are administrative expenses. *Id.* The phrase "notwithstanding" provides meaning that the obligations in question must be paid "in spite of" the instrumentality of section 503(b)(1), which would contrarily reduce post-petition payments to that which is necessary to "preserving the estate." *Id*. Therefore, prerejection obligations should not be looked at as administrative expenses, but rather as obligations that are required to be "timely performed" under the terms of the lease. *Id*. It is then to be recognized that because the payment of such obligations is not meant to preserve the estate, but indeed the unprotected landlord, such notions of accrual, proration and allocation, which are very much so needed when distinguishing between prepetition debts and administrative expenses in reference to section 503(b)(1), are ultimately extraneous and inapplicable under section 365(d)(3) *Id*.

2. There is no other reasonable interpretation that is consistent with the text of Section 365(d)(3)

Section 365(d)(3) is both clear and express, as it requires the trustee to follow the terms of the lease. *In re Montgomery Ward Holding Corp*., 268 F.3d 205, 209-10 (3rd Cir. 2001). Consistency can only be upheld with the intent of section 365(d)(3) when all interpretations look to the terms of the lease to determine the heart of the "obligation: and when it "arises". *Id*. When this premises is accepted by the individual reading the statute, they must go through challenging hoops to find a textual basis for a proration approach. *Id*. However, it is with great ease, and smooth sailing to take an approach that summons for the trustee to execute obligations as they become due by way of the terms of the lease, thereby creating a comfortable fit with the statutory text. *Id*.

When a landlord has a "claim", the tenant then has a "obligation". *Id*. Because the Code defines "claim" as being inclusive of an unmatured right to payment" it is suggested that an "obligation" can thus be raised before the tenant is actually obligated to perform its duties. *Id*. As already pointed out, Congress has taken steps to include the word "obligation" rather than claim. Additionally, it is just as important to understand that such a reading would transpose the section 365(d)(3) as superfluous. *Id*.

Rights that are unmatured to payment arising under a lease are in existence from the date the lease is carried out, and no such right to payment would ever spring forth from an unexpired lease after the order for relief. *Id*. When one includes rights that are unmatured to payments, they are left with a default of unsound analytical foundation for prorating the obligation of the tenant to reimburse the landlord for rent on the basis of the date of the order. *Id*. Any reading that could possibly be construed in such a way that provides an analytical foundation would thus be inconsistent with what is the core and fundamental canon of section 365(d)(3). *Id*. With such

reason, it is therefore structurally sound to conclude that 365(d)(3) produces text that is straightforward and as such produces a rational result. *Id*. By way if this, section 365(d)(3) is not ambiguous. *Id*.

Here, because the language of the statute is not ambiguous, the trustee , Casey Jones, must adhere to the plain language of the statute. Thus, meaning that Casey Jones as required by the statute had an obligation, by way of the debtor, to pay the rent due on the first of May according to the terms of the lease that arose after the order for relief, which was to be timely performed in accordance with section 365(d)(3). The payment of rent was not timely performed, as it was not payed in advance on the first day of the month of May. R. at 7.

B. Even if Section 365(d)(3) is ambiguous, the sole purpose of Congress revising Section 365 was aimed at strengthening landlords, not tenants.

The beginning of modern bankruptcy legislation started with the Bankruptcy Act of 1938, which amended the Bankruptcy Reform Act of 1989. Gary P. Spencer Jr., Note, *A Simple Solution for Stub Rent? How Proposed Changes to the Treatment of Stub Rent Could Lead to Unforeseen Consequences*, 36 Rev. Banking & Fin. L. 915 (2017). The reform act is the predecessor of the Bankruptcy Code. Bankruptcy Act of 1898, Pub. L. No. 696, 30 State 544 (repealed 1978). The Act of 1938 "substantially revised virtually all of the provisions of the 1898 Act" and it codified a large portion of the dominant case law surrounding a trustee's authority to assume or reject unexpired leases, including commercial leases. Act of June 22, 1938, Ch. 575, § 70(b), 52 State. 840, 880. Charles J. Tabb, *The History of the Bankruptcy Laws in the United States*, 3 Am. Bankr. Inst. L. Rev. 5 (1995). It is notable that section 70(b) of the 1938 Act afforded commercial landlords particular protections if their tenant filed for relief of bankruptcy. Carl Wilde, *The Chandler Act*, 14 Ind. L.J. 2 (1938). Section 70(b) gave landlords the ability to swiftly retake their

property from their tenant in the event the tenant sought relief of bankruptcy by warranting that the lease was terminated through reason of the commencement of the bankruptcy case. Collier on Real Estate Transactions, supra note 6.

With the enactment of the code, the scales of power were dramatically altered between tenants and landlords with the enactment of the Code. Within the Bankruptcy Reform Act of 1978, Congress took away 70(b) and, in its place, put in Section 365. Act of June 22, 1938, Ch. 575, § 70(b), 52 Stat. 840, 880, repealed. Under this change, the only way a landlord could collect post-filing rent were by means of filing an administrative expense claim under 503(b)(1), which put a strong burden on commercial landlords. Gary P. Spencer Jr., Note, *A Simple Solution for Stub Rent?* 36 Rev. Banking & Fin. L. 915 (2017). After the enactment of the Code of 1978, however, Congress wanted to better balance the interest of tenants and landlords, wherefore, in turn, they established the Leasehold Management Amendments, which amended Section 365(d)(1) and 365(d)(2) and added section 365(d)(3) and 365(d)(4). Id. The revisions of section 365(d) in addition to the amendments of Section 365(d) demonstrates the very core of Congress's intent to encourage "commercial landlords' timely receipt of post-petition rent from debtors in Chapter 11 proceedings." *Id*.

1. Congress enacted Section 365(d)(3) for the purpose of altering a pre-Code practice that had created a problem for landlords of non-residential property.

The relevant legislative history supports the notion that Congress enacted section 365(d)(3) to fully bind the debtor-in-possession by an unexpired lease and is so bound until the debtor-in-possession notifies the landlord with an express rejection. Senator Hatch's legislative remarks with respect to section 365(d)(3) demonstrates the intent of Congress, as he stated:

> This subtitle contains three major substantive provisions which are intended to remedy serious problems caused shopping centers and their solvent tenants by the

> administration of the bankruptcy code… A second and related problem is that during the time the debtor has vacated space but has not yet decided whether to assume or reject the lease, the trustee has stopped making payments under the lease. In this situation, the landlord is forced to provide *current* services—the use of its property, utilities, security, and other services—without *current* payment. No other creditor is put in this position. In addition, the other tenants often must increase their common area charge payments to compensate for the debtor. The bill would lessen these problems by requiring the trustee to perform *all* the obligations of the debtor under a lease of nonresidential real property *at the time required in the lease*. This timely performance requirement will ensure that debtor-tenants pay their rent, common area, and other charges on time pending the trustee's assumption or rejection of the lease.

130 cong. Rec. S8887, 8895 (daily ed. June 29,1984) (Statement of Sen. Hatch) (emphasis added)

Some courts, such as the Southern District of New York in *Child World v. Campbell/Massachusetts Trust* look to Senator Hatch's statement of when he states that under the pre-1984 code, landlords had no choice but to "provide current services…without current payment" as their proof that Congress still intended to take a proration approach. *Child World, Inc*, 161 B.R. 571, 574 (S.D.N.Y. 1993). However, that particular comment of "current services" simply describes the situation that Congress identified; it does not by any means describe the enacted solution. Joshua Fruchter, *To Bind or Not to Bind- Bankruptcy Code § 365(d)(3): Statutory Minefield*, 68 Am. Bankr. L.J. 437 (1994). When looking farther down the quoted paragraph, Senator Hatch explains the relief put in place when he states that "this bill would lessen [landlords] problems by requiring the trustee to perform all the obligations of the debtor under a lease of nonresidential real property at the time required in the lease." *Id*. Such language demonstrates a clear anticipation of Senator Hatch that the trustee or debtor-in-possession would be required to perform all obligations that are imposed upon the debtor subject to the terms of the lease, and that those specific terms would be the governing basis for when payments are do and in what amount. *Id*.

In fact, contrary to the language of the statute when it states, " the trustee shall timely perform all the obligations of the debtor…arising from and after the order for relief under any unexpired lease of nonresidential real property," a statement that is ambiguous, the legislative history does not use the dubitable "arising" phrase, and unambiguously refers to the time when lease obligations must be met as specified by the lease. *Id*. Consequently, the proration approach is therefore not appropriate if Congress intended that the terms of an unexpired nonresidential real property lease remain fully enforceable during the prerejection period. *Id*.

Senator Hatch's discussion avoids completely the perplexing "arising from and after" language of section 365(d)(3) and it very clearly makes no remarks of the notions of accrual or proration of charges. *In re Krystal Co.*, 194 B.R. 161(Bankr. E.D.Tenn. 1996). There is no talk at all about "actual or necessary" expenses as would be anticipated if section 503(b)(1) were still in working order. *Id*. What is left is the unambiguously explicit and direct "timely performance requirement" as a solution to the problems "caused…by the administration of the bankruptcy code." *Id*. When read together with the statute as it has to be, such "problem" language can only appertain to section 503(b)(1), as that is the subsection that is directly nullified by the amendment. *Id*. There is absolutely no rational sense to force the notions of section 503(b)(1), such as accrual and proration, because they do not survive section 365(d)(3); thus, making it unnecessary on a plain reading of the statute itself. *Id*.

2. <u>The statute ought not be interpreted in a fashion that will encourage frustration of the congressional intent that landlords be paid on a current basis pending a determination to reject or assume.</u>

Some courts have held that a landlord who asserts a claim under section 365(d)(3) must still meet the "actual and necessary" requirement of section 503(b)(1). *In re Orvco Inc*., 95 B.R. 724, 728 (B.A.P. 9th Cir. 1989). These courts contend that the terms of the lease are not binding

on the debtor-in-possession and should instead determine the debtor-in-possession's rent based on the actual use of the premises by the debtor-in-possession. *To Bind or Not to Bind- Bankruptcy Code § 365(d)(3): Statutory Minefield*, 68 Am. Bankr. L.J. 437 (1994). As a result, Courts adopting the proration approach hold that section 365(d)(3) only confers upon landlords the right to immediate payment of "actual and necessary", which does not demonstrate the scope of changes intended by Congress. *Id*. Thus, according to Courts who take the proration approach, section 365(d)(3) only changed the timing, but not the specific measure of landlord claims that arise during the prerejection period. *Id*.

Before section 365(d)(3) was enacted by Congress, the payment of lease obligations post-petition before the lease was assumed or rejected of an unexpired lease was governed by 11 U.S.C. § 503(B)(1). *In re Par-Mor, Inc*, 290 B.R. 319, 324 (Bankr. N.D. Ohio 2003). Courts generally used section 503(b)(1) to prorate both the rent and tax obligations during the period between post-petition and pre-rejection. *Id*. "Pursuant to this subsection courts ordinarily allowed as an administrative expense the full amount of the rent at the contract rate, so long as it was not clearly unreasonable, but prorated that rent over the post-petition , pre-rejection period." *In re McCrory Corp*., 210 B.R. 934, 936 (S.D.N.Y. 1997). When the debtor-tenant was required under the terms of the lease to pay back the landlord for real-estate taxes, courts generally only allowed the real estate taxes to receive a prorated payment as an administrative expense, over the period of post-petition, pre-rejection. *In re J. Bain*, Inc., 554 F.2d 25, 256-5 (5th Cir. 1977); *In re Lackow bros., Inc*., 18 B.R. 770, 772 (Bankr. S.D. Fla. 1982); *In re CRS Architectural Metals Corp*, 1. B.R. 729, 732 (Bankr. E.D.N.Y. 1979).

Debtor-tenants are now required under section 365(d)(3) to pay landlords of nonresidential real property during the post-petition, pre-rejection period full and timely payment for services

owed under an unexpired lease. *11 U.S.C. § 365(d)(3)*. When interpreting the legislative history, the Sixth Circuit Court of Appeals found that when the terms of the lease is a month to month, payment-in advance lease, and the payment of the lease is owed during the post-petition, pre-rejection period, the landlord is then entitled to entire months lease, and it does not matter as to the amount of time that has passed since the date of the rent was owed and the date the bankruptcy petition was filed. *In re Koenig Sporting Goods, Inc*., 203 D3d 986, 989 (6th Circuit 2000). The Court in *Koenig* stated "the specific obligation to pay rent for December 1997 arose on December 1, which was during the post-petition, prerejection period. Under these circumstances, § 365(d)(3) is unambiguous as to the debtors rent obligation and requires payment of the full month's rent". Under facts very much so similar to that of the case at hand, the specific obligation of the trustee to pay Touch of Grey for May 2020 arose on May 1, which was during the post-petition, pre-rejection period.

CONCLUSION

For the forgoing reasons, the Petitioner, Touch of Grey, respectfully urges this Court to overrule the Thirteenth Circuit's decision on both issues.

Respectfully Submitted,

Counsel for Petitioner

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

§ 365. Executory contracts and unexpired leases.

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

(B) In a case under subchapter V of chapter 11, the time for performance of an obligation described in subparagraph (A) arising under any unexpired lease of nonresidential real property may be extended by the court if the debtor is experiencing or has experienced a material financial hardship due, directly or indirectly, to the coronavirus disease 2019 (COVID-19) pandemic until the earlier of—

(i) the date that is 60 days after the date of the order for relief, which may be extended by the court for an additional period of 60 days if the court determines that the debtor is continuing to experience a material financial hardship due, directly or indirectly, to the coronavirus disease 2019 (COVID-19) pandemic; or

(ii) the date on which the lease is assumed or rejected under this section.

(C) An obligation described in subparagraph (A) for which an extension is granted under subparagraph (B) shall be treated as an administrative expense described in section 507(a)(2) for the purpose of section 1191(e).

§ 503. Allowance of Administrative Expenses.

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

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

§ 507. Priorities.

(a) The following expenses and claims have priority in the following order:

(2) Second, administrative expenses allowed under section 503(b) of this title, unsecured claims of any Federal reserve bank related to loans made through programs or facilities authorized under section 13(3) of the Federal Reserve Act (12 U.S.C. 343), and any fees and charges assessed against the estate under chapter 123 of title 28.

§ 547. Preference.

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

(4) to or for the benefit of a creditor, to the extent that, after such transfer, such creditor gave new value to or for the benefit of the debtor—

(A) not secured by an otherwise unavoidable security interest; and

(B) on account of which new value the debtor did not make an otherwise unavoidable transfer to or for the benefit of such creditor;