No. 21-0909

IN THE

Supreme Court of the United States

OCTOBER TERM, 2022

IN RE TERRAPIN STATION, LLC, DEBTOR,

TOUCH OF GREY ROASTERS, INC.,
PETITIONER

v.

CASEY JONES, CHAPTER 7 TRUSTEE,
RESPONDENT.

On Writ of Certiorari to
the United States Court of Appeals
for the Thirteenth Circuit

BRIEF FOR PETITIONER

January 20, 2022

Team Number 23
Counsel for Petitioner

QUESTIONS PRESENTED

1. Whether a creditor is entitled to reduce its preference exposure by asserting a new value defense under 11 U.S.C. § 547(c)(4) after the debtor in possession paid for such value pursuant to 11 U.S.C. § 503(b)(9).

2. Whether a trustee must timely perform the obligations of a debtor under 11 U.S.C. § 365(d)(3) 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.

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OPINIONS BELOW

The United States Bankruptcy Court for the District of Moot ruled in favor of the Trustee on both issues presented. On consolidated appeal, the United States District Court for the District of Moot affirmed on both points. On appeal, the Thirteenth Circuit Court of Appeals affirmed. The decision of the Thirteenth Circuit Court of Appeals is reproduced in the record on appeal. This Court granted the Appellant, Touch of Grey's, petition for writ of certiorari.

STATEMENT OF JURISDICTION

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

PERTINENT STATUTORY PROVISIONS

This action involves statutory interpretation of certain portions of Title 11 of the United States Code. The implicated statutes in this case are excerpted in relevant part as follows. These provisions, among others, are restated in Appendix A.

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

> "(d)
>
> (3) 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. 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."

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

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

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

> "(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;"

STATEMENT OF THE CASE

I. Factual History

Fighting to stay alive Terrapin Station, LLC, (the "Debtor"), filed a chapter 11 bankruptcy petition in the Bankruptcy Court for the District of Moot on January 5, 2020. R. at 6. At the first day of hearings, Counsel for Petitioner, Touch of Grey Roasters, Inc. ("Touch of Grey"), expressed serious concerns about the Debtor's precarious financial situation. R. at 6. Despite these concerns, Touch of Grey fully supported the Debtor's efforts to reorganize under chapter 11. R. at 6. This support was vital to the Debtor and early in the proceedings all parties agreed that "an ongoing relationship with Touch of Grey was critical to the Debtor's reorganization plans." R. at 6. Although the reorganization effort eventually failed, Touch of Grey's willingness to continue a business relationship with the Debtor was its only fighting chance at successfully reorganizing. Despite Touch of Grey's willingness to bear the risk of doing business with the Debtor, both on the verge of and in the midst of bankruptcy, Casey Jones, the chapter 7 trustee for the Debtor's bankruptcy estate (the "Trustee") now seeks to claw back the protections that Congress granted to Touch of Grey for taking on this very risk.

The critical relationship between Touch of Grey and the Debtor began in the fall of 2017. R. at 4. Touch of Grey is an internationally renowned coffee company that operates coffeehouses and sells award-winning, certified free-trade coffee products. R. at 3. In 2017 Touch of Grey approached William Tell ("Tell"), the owner of a local coffeehouse in Terrapin, to offer Tell the opportunity to franchise a Touch of Grey coffeehouse. R. at 3, 4. In the franchise agreement, Touch of Grey and Tell agreed that the new "Terrapin Station Coffeehouse" would exclusively sell products purchased from Touch of Grey. R. at 4. To facilitate opening a new premises, Touch of Grey also agreed to purchase a space located at 5877 Shakedown Street, in order to lease the

premises to the Debtor. R. at 4. Touch of Grey and Tell then entered into a twenty-year triple-net lease agreement (the "Lease") at the agreed upon rate of $25,000 "due in advance on the first day of each month." R. at 4.

Terrapin Station Coffeehouse began operations on December 1, 2018 but suffered from lower than expected sales. R. at 5. By September 2019, the Debtor owed Touch of Grey over $700,000 for goods purchased on credit. R. at 5. Despite the large debt owed, on December 7, 2019, Touch of Grey agreed to forbear from terminating the franchise agreement. R. 5 In exchange, the Debtor agreed to pay $250,000 towards the outstanding $700,000 debt and reaffirm its obligations under the Lease with the same terms. R. at 5. The Debtor made good on the forbearance agreement and paid Touch of Grey $250,000 of the debt owed. R. at 5. Later that month, on December 18, 2019, the Debtor purchased an additional $200,000 worth of goods from Touch of Grey on credit. R. at 5.

Despite the Debtor's best efforts to improve sales, it filed for chapter 11 bankruptcy relief on January 5, 2020. R. at 6. At the time of filing, the Debtor was current on the Lease, but owed Touch of Grey $650,000 in unsecured debt for Dark Star products purchased on credit. R. at 6. The Debtor also owed $500,000 in unsecured debt to other creditors, many of whom refused to provide the Debtor with goods or services post-petition. R. at 6. Touch of Grey, while wary of the risk involved in extending credit to a company in bankruptcy, agreed to sell the Debtor goods on credit in exchange for a $200,000 post-petition payment. R. at 6. The Debtor petitioned the Court to allow the $200,000 payment to Touch of Grey, arguing that an ongoing business relationship with Touch of Grey was critical to a successful plan of reorganization. R. at 6. The Bankruptcy Court allowed the $200,000 payment to Touch of Grey as a § 503(b)(9) administrative expense and the debtor in possession made the post-petition transfer. R. at 7.

Touch of Grey continued to sell goods on credit to the Debtor, which allowed it to continue operations until March 2020 when the Covid-19 pandemic forced the Debtor to shut its doors. R. at 7. On May 5, 2020, the Debtor permanently shuttered and vacated 5877 Shakedown Street. R. at 7. With no hopes left at reorganizing, the Debtor then filed a motion to reject the Lease and the franchise agreement under § 365(a). R. at 7. Touch of Grey responded with a motion seeking to compel the payment of the rent that became due on May 1. R. at 7. A hearing on these matters took place on May 29, 2020, at which time the Debtor converted its case to chapter 7 as allowed under § 1112(a) and the bankruptcy court granted the motion to reject the Lease, withholding judgement on the request for payment of May rent. R. at 8.

After conversion to chapter 7, the Trustee "took an aggressive posture," seeking to unravel much of the work Touch of Grey did to maximize the potential for the Debtor to succeed in its reorganization efforts. R. at 8. The Trustee objected to the motion to compel payment of full May rent and commenced an adversary proceeding to claw back the $250,000 forbearance payment made by the Debtor on December 7, 2019. R. at 8. In response to the Trustee's adversary action, Touch of Grey asserted that it was entitled to reduce any preference exposure by $200,000 for the goods sold to the Debtor on credit on December 18, 2019.

II. Procedural History

The Bankruptcy Court found in favor of the Trustee on both the motion to compel the payment for rent and the effort to avoid the $250,000 paid to Touch of Grey within the preference window. R. at 9. Touch of Grey appealed both decisions on a consolidated basis to the District Court for the District of Moot. R. at 9. The District Court affirmed on both points. R. at 9. On appeal, the Thirteenth Circuit affirmed, holding that (1) § 547(c)(4) precludes a creditor from asserting a new value defense for goods subject to a satisfied administrative expense under §

503(b)(9), and (2) § 365(d)(3) does not require the trustee to satisfy obligations allocable to the post-rejection period. R. at 10, 15.

STANDARD OF REVIEW

The facts as detailed above are undisputed. The issues before this Court are questions of law. When the Court is presented with questions of law, the standard of review is *de novo*. *Pierce v. Underwood*, 487 U.S. 552, 558 (1988).

SUMMARY OF THE ARGUMENT

Touch of Grey provided credit to the Debtor during a financially treacherous time when the Debtor's other creditors refused to take on the same risk. Congress, recognizing the vital importance of credit, goods, and suppliers to a successful reorganization, offers trade creditors that accept this risk priority positions and preferential treatment over other creditors in a bankruptcy. The Trustee now seeks to undercut the policy goals Congress imported into the Bankruptcy Code[1] by denying Touch of Grey the statutorily guaranteed new value defense in § 547(c)(4) simply because it offered the Debtor credit both before and after the bankruptcy commenced. This claw back action is impermissible under the plain language of § 547(c)(4) and undermines the basic policies that run throughout the Code.

The Bankruptcy Code permits a creditor to assert a new value defense under § 547(c)(4) and receive payment in full for an administrative claim under § 503(b)(9). The language of the Code is clear—§ 547(c)(4) applies to pre-petition transfers by a *debtor* while § 503(b)(9) applies to post-petition transfers by a *debtor in possession*. The Thirteenth Circuit incorrectly reads §

[1] The Bankruptcy Code is 11 U.S.C. §§ 101 *et seq.* The Bankruptcy Code is hereinafter referenced as the "Bankruptcy Code" or the "Code." Specific references to sections of 11 U.S.C. §§ 101 *et seq.* are hereinafter identified as "§ __."

547(c)(4) without a temporal limitation, but this holding ignores the plain meaning of the word "debtor," the temporal limitations that separate the pre-petition period from the post-petition period elsewhere in the Code, and the clear motivation of Congress to reward creditors who extend credit despite the risks of dealing with an insolvent debtor. This Court should not stray from the plain meaning of § 547(c)(4) and undercut Congress' clearly expressed policy goals at the same time. To do so would breed absurd results and ignore the very basic statutory construction prescriptions this Court has abided by for years. The plain meaning of § 547(c)(4) unambiguously states that for a transfer to be preferential, such transfer must be made by the debtor prior to the petition date. This Court should allow Touch of Grey to assert the $200,000 value extended to the Debtor post-petition as new value under § 547(c)(4) thereby limiting its preference exposure to $50,000.

This Court should also reject the Thirteenth Circuit's use of the "proration" approach. The plain language of § 365 (d)(3) is clear—the trustee is required to perform the Lease in accordance with its terms. The applicable canons of statutory construction do not upset this reading, and, in fact, confirm that the "billing date" approach is the more appropriate reading of the statute. The "billing date" approach better accords with the statutory scheme of the Code as a whole.

When reading § 365(d)(3) together, Congress clearly intended to focus on the terms of the Lease to determine both the nature of the "obligation" and when it "arises." 11 U.S.C. § 365(d)(3). The "proration" approach conflicts with this principle and should therefore be rejected.

Moreover, the policy goals behind the adoption of § 365 (d)(3) address the concern regarding a debtor's ability to manipulate a billing date system by filing the day after rent is due, thus creating a windfall for the debtor at the expense of the landlord. *See* Pub. L. No. 98-353, 98 Stat. 333 (1984). Thus, application of the "billing date" approach is consistent with Congress's

intention to achieve the overarching goals of the Bankruptcy Code by protecting commercial landlords who were unfairly disadvantaged in the pre-1984 Code. Additionally, a Court may only exercise its power to reach for fair results within the confines of the Code. If Congress consciously intended that the debtor in possession or trustee, and not the landlord, should bear the economic burden of the uncertainty during the prerejection period, courts do not have the power to alter this scheme simply because the results appear arbitrary.

ARGUMENT

I. THE THIRTEENTH CIRCUIT ERRED IN DETERMINING THAT TOUCH OF GREY MAY NOT ASSERT THE NEW VALUE OF AN ALLOWED ADMINISTRATIVE EXPENSE TO REDUCE ITS PREFERENCE EXPOSURE.

Fundamentally, bankruptcy relief in the United States offers Debtors a fresh start. *See e.g. Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934). This fresh start, however, must be balanced against a similarly fundamental goal—the fair distribution of assets to creditors. *Granfinanciera v. Nordberg*, 492 U.S. 33, 94 (1989). To achieve the proper balance, Congress, among other provisions of the Code, carefully constructed § 547, wherein the Trustee may claw back any payments the Debtor made on or within ninety days of the petition date. 11 U.S.C. § 547(b). This power allows the Trustee to take back property the Debtor transferred shortly before filing for bankruptcy relief and place that property in the bankruptcy estate so that the assets may be shared among all creditors. R. at 10. Thus, § 547(b) gives a trustee the power to hurt one creditor for the benefit of the collective bankruptcy estate. The concept of the estate is codified in § 547(c)(4), which offers creditors who received an otherwise "preferential transfer" a defense to an attempted claw back action for transfers that secured new value used to augment the estate. *In re Proliance Int'l, Inc.*, 514 B.R. 426, 430-31 (Bankr. D. Del. 2014). In whole, § 547(c)(4) states "[t]he trustee may not avoid under this section a transfer—

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

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

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

11 U.S.C. § 547(c)(4) (emphasis added). Thus, when a creditor assists the Debtor and augments the bankruptcy estate, the transfer to that creditor is exempted and the Trustee may not claw back that property because the estate did not suffer an injury. *See In re Proliance Int'l, Inc.*, 514 B.R. at 430-31.

In 2005, Congress amended the Code to include § 503(b)(9). The amendment aided the policy goals of § 547(c)(4) by awarding a priority unsecured claim to any creditor that provides assistance to the estate in the form of goods sold to the debtor in the ordinary course of business within twenty days of the petition date. 11 U.S.C. § 503(b)(9); 11 U.S.C § 507(a)(2). Despite the complimentary nature of the two sections, the intersection of § 547(c)(4) and § 503(b)(9) has resulted in a Circuit split. *In re Friedman's Inc.*, 738 F.3d 547, 553 (3d Cir. 2013) ("District and bankruptcy courts are nearly equally divided on this issue.")[2] This Court should resolve that split in favor of the Petitioner, Touch of Grey, because the satisfaction of an administrative expense under § 503(b)(9) is not an "otherwise unavoidable transfer" under § 547(c)(4)(B). Where the $200,000 satisfaction of a § 503(b)(9) administrative expense is not an "otherwise unavoidable transfer," Touch of Grey may apply $200,000 as "new value" to reduce its preference exposure to

[2] While the Thirteenth Circuit claims that "the majority of courts reason that because section 547(c)(4) contains no temporal limitation, the payment of an administrative expense under section 503(b)(9) constitutes an 'otherwise unavoidable transfer' under section 547(c)(4)", as recently as January 2021 another court analyzing the issue found that the majority of cases held otherwise. *See In re Slamdunk Enters.*, Nos. 17-60566, 18-6006, 2021 Bankr. LEXIS 206, at *84 (Bankr. E.D. Tex. Jan. 29, 2021) ("Most courts addressing the issue appear to have agreed with the Eighth Circuit's conclusion that the specific words in the text of § 547(c)(4)—"new value to or for the benefit of the debtor"—"imply that subsequent advances of new value are only those given pre-petition, because any post-petition advances are given to the debtor's estate, not to the debtor.")

$50,000. *See In re Commissary Operations, Inc.*, 421 B.R. 873, 879 (Bankr. M.D. Tenn. 2010); *see also In re Friedman's Inc.*, 738 F.3d at 554-55.

A. The Plain Meaning of 11 U.S.C § 547(c)(4) Unambiguously Freezes Preference Analysis on the Petition Date, therefore Post-Petition Payments Authorized under § 503(b)(9) may be Asserted as New Value to Reduce Preference Exposure.

This Court's interpretation of the Bankruptcy Code must start where all questions of statutory interpretation begin—the plain language of the statute itself. *Ransom v. FIA Card Servs., N.A.*, 562 U.S. 61, 69 (2011).

1. The plain language of § 547(c)(4) refers to the debtor pre-petition, thereby imposing a temporal limitation on preference analysis.

The Thirteenth Circuit correctly found § 547(c)(4) "unequivocally unambiguous." R at 12. However, the Court erred in rejecting Touch of Grey's argument that the use of the word "debtor" in § 547 limits the preferential inquiry to pre-petition transfers only. The plain language of § 547(c)(4) limits the new value defense to value supplied and payments made by the debtor before filing the petition. *In re Phx. Rest. Grp., Inc.*, 317 B.R. 491, 496 (Bankr. M.D. Tenn. 2004).

§ 547(c)(4) allows creditors to escape the Trustee's claw back power if the creditor can demonstrate that the debtor did not repay the new value with an "otherwise unavoidable transfer." 11 U.S.C. § 547(c)(4)(B). Since Congress amended the Bankruptcy Code in 2005, Courts have been divided as to whether new value that is paid post-petition—such as an allowed administrative expense under § 503(b)(9)—is an "otherwise unavoidable transfer" under § 547(c)(4)(B). The fact that courts are divided in their interpretations of § 547(c)(4)(B) does not mean, however, that the provision is necessarily ambiguous. *In re Price*, 370 F.3d 362, 369 (3d Cir. 2004) ("[J]ust because a particular provision may be, by itself, susceptible to differing constructions does not mean that the provision is therefore ambiguous.").

The plain text of § 547(c)(4) is unambiguous because the statute uses the word "debtor." Filing a chapter 11 bankruptcy petition creates a legal distinction between the pre-bankruptcy debtor and the post-petition debtor in possession. *In re Mayco Plastics, Inc.*, 389 B.R. 7, 31 (Bankr. E.D. Mich. 2008) ("The debtor-in-possession is considered to be a separate legal entity from the debtor himself.") This demarcation between the debtor and the debtor in possession is legally significant, delineating two separate entities. *Id.* at 31-32. Throughout the Bankruptcy Code, Congress made sure to address the debtor and the debtor in possession (or trustee) as two separate entities, including in § 547(a) where Congress defined "new value" as "money or money's worth in goods, services, or new credit . . . that is neither void nor voidable by the *debtor or the trustee* under any applicable law." 11 U.S.C. § 547(a) (emphasis added). Therefore, the plain language of § 547(c)(4) which reads "on account of which the *debtor* did not make an otherwise unavoidable transfer" does not include any post-petition transfers made by the *debtor in possession*. 11 U.S.C. § 547(c)(4)(B) (emphasis added).

The Thirteenth Circuit erred by "reject[ing] any argument that the use of the word 'debtor' in § 547(c)(4) somehow limits that section to prepetition transfers." R. at 13. This Court has emphasized that statutory interpretation "must give effect to every word of a statute wherever possible." *Ransom*, 562 U.S. at 70. To hold that the term "debtor" in § 547(c)(4)(B) includes the trustee (or the debtor in possession acting as trustee) in addition to the pre-petition debtor, ignores Congress' explicit reference to "the debtor or the trustee" in § 547(a). This error ignores the statutory interpretation principle that "[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant. . ." *Hibbs v. Winn*, 542 U.S. 88, 101 (2004).

2. Other provisions of the bankruptcy code add context and support the conclusion that § 547(c)(4) creates a temporal limitation on preferential transfers.

In addition to looking at the plain language of a statute, this Court has emphasized that statutory interpretation should "not…be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy." *United States v. Heirs of Boisdore*, 49 U.S. (8 How.) 113, 122 (1849) (cited over seventy times). This goal of holistic interpretation is especially important given the unique context of the Bankruptcy Code. *See Official Comm. of Unsecured Creditors of Cybergenics Corp. ex rel. Cybergenics Corp. v. Chinery*, 330 F.3d 548, 559 (3d Cir. 2003) (en banc). Therefore, this Court should look for context to enhance the plain language of § 547(c)(4). Here, the plain meaning of § 547(c)(4) is supported by the entire Bankruptcy Code in context and purpose. *Ransom*, 562 U.S. at 70.

First, § 547 is titled "Preferences," which refers to transfers of property "on or within 90 days *before* the date of the filing of the petition." 11 U.S.C. § 547(b)(4)(A) (emphasis added). Despite § 547 not specifying a cutoff date, the hypothetical liquidation test in § 547(b)(5) uses the petition date as an implicit cutoff based on the language of the statute. *See, e.g.*, *In re Union Meeting Partners*, 163 B.R. 229, 237 (Bankr. E.D. Pa. 1994); see also *In re Tenna Corp.*, 801 F.2d 819. 823 (6th Cir. 1986) ("in the context of § 547(b), Congress' stated concern is reflected only for those creditors with claims against the debtor's estate on the date the petition is filed."); *see also* 5 Collier on Bankruptcy ¶ 547.03 (16th ed. 2021) (stating that § 547(b)(5) codifies *Palmer Clay Products Co. v. Brown*, 297 U.S. 227 (1936) holding petition date is the date to be used in hypothetical liquidation analysis). The use of the petition date in the hypothetical liquidation test "points to that date as the cutoff for determining new value." *In re Friedman's Inc.*, 738 F.3d at 555-56.

Second, that "the statute of limitations for a preference avoidance action under § 547 generally begins on the petition date suggests that the calculation of preference liability should remain constant post-petition. If we read § 547(c)(4)(B) to allow post-petition payments to defeat a new value defense, the calculation of preference liability could change depending on when the preference avoidance action was filed." *Id.* at 556. Under the Thirteenth Circuit's interpretation of § 547(c)(4), preference liability could change well after the Trustee has already brought an adversary proceeding to avoid a pre-petition transfer. This inconsistency within § 547 would lead to absurd results.

Third, imposing a temporal limitation on preference analysis is consistent with many other Code remedies that only apply post-petition. For example, creditors who continue to supply the debtor in possession with goods and services post-petition are granted priority over other creditors who do not provide post-petition goods, services, or credit. *In re Phx. Rest. Grp., Inc.*, 317 B.R. at 497; *see e.g.* 11 U.S.C. §§ 364 & 503(b); *see also In re Ford*, 98 B.R. 669, 683 (Bankr. D. Vt. 1989) ("Once a bankruptcy petition is filed, however, other sections of the Code provide protection to parties advancing credit.") To find § 547 cannot limit preferential transfers to the ninety days pre-petition does not comport with the rest of the Code.

3. The temporal limitation of § 547(c)(4) allows § 503(b)(9) claims to be asserted as "new value" to reduce preference exposure.

The satisfaction of an administrative expense under § 503(b)(9) is not an "otherwise unavoidable transfer," and therefore Touch of Grey can apply the value associated with its fully satisfied administrative expense as "new value" under § 547(c)(4). *See In re Friedman's Inc.*, 738 F.3d at 554-55. § 547(c)(4) closes the preference window on the petition date because the language "on account of which the *debtor* did not make an otherwise unavoidable transfer" does not include

any post-petition transfers made by the *debtor in possession*. Therefore, for a preferential transfer to negate the new value defense, such transfer must occur before the Debtor files a petition.

On December 7, 2019, the Debtor made a preferential transfer of $250,000 to Touch of Grey. However, "after such transfer" Touch of Grey then "gave new value to… the debtor" in the amount of $200,000 in goods purchased on credit. On January 5, 2020, the Debtor filed for bankruptcy without making another preferential transfer to Touch of Grey. Therefore, after Touch of Grey extended $200,000 in new value to the Debtor, the Debtor did not make an "otherwise unavoidable transfer" prior to the petition date. Because the plain language of § 547(c)(4) refers only to transfers made by the Debtor prior to the filing of a bankruptcy petition, the Debtor made no "otherwise unavoidable" transfers to Touch of Grey. Therefore, the Trustee may not avoid the $200,000 of new value that Touch of Grey gave the Debtor pre-petition.

The Thirteenth Circuit contends that payments under § 503(b)(9) are an "otherwise unavoidable transfer" because § 549 of the Bankruptcy Code allows avoidance of post-petition transfers by the debtor unless authorized by the Code or the Court. 11 U.S.C. § 549(a)(2)(B); R. at 13. However, where a Court has authorized the payment of an administrative claim, as the Court did in this case, that transfer becomes "unavoidable." R. at 13. As established above, the plain language of § 547(c)(4) freezes the Court's inquiry as to whether a transfer was "otherwise unavoidable" to pre-petition transfers. Thus, the Circuit Court improperly applied § 549 which applies to post-petition transfers only.

B. Sound Bankruptcy Policy Supports the Conclusion that a Trade Creditor May be Paid an Administrative Expense and Reduce its Preference Exposure by the Same Amount.

1. The Bankruptcy Code carefully balances the dual goals of giving debtors a chance to start over and ensuring creditors are satisfied.

When the Debtor filed for chapter 11 it was looking for a path forward and a second chance to get things right. R. at 6. The Supreme Court recognized "[t]he fundamental purpose of reorganization is to prevent a debtor from going into liquidation." *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 528 (1984). In addition to offering debtors a fresh start, chapter 11 also "embodies the general [Bankruptcy] Code policy of maximizing the value of the bankruptcy estate." *Fla. Dep't of Revenue v. Piccadilly Cafeterias, Inc.*, 554 U.S. 33, 56 (2008) (citing *Toibb* v. *Radloff*, 501 U.S. 157, 163 (1991)). Thus, in crafting the Bankruptcy Code, Congress sought to balance the dueling goals of reorganizing a business and maximizing the property available to satisfy creditors. *Bank of America Nat. Trust and Sav. Assn. v. 203 North LaSalle Street Partnership*, 526 U.S. 434, 453 (1999).

2. To achieve the dual goals of keeping the debtor in possession alive and benefiting creditors, the Bankruptcy Code treats creditors equitably, not equally.

To expand the bankruptcy estate and the assets available to satisfy creditors, § 547(b) gives the Trustee the power to "claw back" transfers made to the debtor in the ninety days preceding the filing of the petition, thus benefitting creditors as a collective, rather than one preferred creditor. *See* 11 U.S.C. § 547(b). However, the Code also provides defenses to the Trustee's claw back power, allowing creditors to hold on to assets transferred to them by the debtor within the preference period when the transfer does not harm other creditors, but rather benefits the bankruptcy estate as a whole. *See In re Proliance Int'l, Inc.*, 514 B.R. at 430-31. In this way, § 547 seeks to protect the ever-important concept of the bankruptcy estate. *Id.* (explaining where a

transfer offers a debtor new value, a preferential transfer "augments the estate in the same proportion as the value of the transfer; therefore, the estate does not suffer any injury.")

3. *When a creditor contributes to the estate or aids in the efforts to successfully reorganize, the Code elevates this creditor over others.*

Congress baked into the Code incentives "to encourage creditors to deal with troubled businesses in the hope of rehabilitation." *S. Tech. Coll. v. Hood*, 89 F.3d 1381, 1384 (8th Cir. 1996) (quoting *In re Kroh Bros. Dev. Co.*, 930 F.2d 648, 651 (8th Cir. 1991). This codified preferential treatment means that in a bankruptcy "inequality per se is not to be avoided; indeed, reasoned and justified inequality sometimes prevails, usually based on what is in the best interest of the estate." *In re Friedman's Inc.*, 738 F.3d at 560.

In the Debtor's bankruptcy, all parties agreed that "an ongoing relationship with Touch of Grey was critical to the Debtor's reorganization plans." R. at 6. Touch of Grey provided Terrapin with much needed credit at two important junctures. First, when the Debtor was over $450,000 in default, Touch of Grey agreed to supply the Debtor with $200,000 worth of Dark Star products on credit. R. at 5. Second, while in bankruptcy, Touch of Grey continued to sell goods on credit to the Debtor when many other creditors refused to provide the Debtor with goods and services on credit. R. at 6. Although the reorganization effort eventually failed, Touch of Grey's willingness to continue a business relationship with the Debtor was its only fighting chance at successfully reorganizing.

The Trustee now attempts to undercut the essential role Touch of Grey played in the attempted reorganization and seeks to deny the new value credit it is entitled to under § 547(c)(4). The subsequent new value defense "encourage[s] trade creditors to continue to extend credit to a debtor potentially heading for bankruptcy" by providing them a level of protection from their preference exposure. *In re Arts Dairy, LLC*, 414 B.R. 219, 220 (Bankr. N.D. Ohio 2009). When

creditors agree to extend credit to a struggling debtor, the Code places this debtor in a position above the other creditors who declined to take the incentive of a priority position in a future bankruptcy. *In re Almarc Mfg.*, 62 B.R. 684, 687-88 (Bankr. N.D. Ill. 1986) ("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.") § 547(c), along with other provisions of the Code, treats creditors equitably, not equally.

In 2005, Congress expanded on the equitable treatment of creditors by adding § 503(b)(9) to the Code. § 547(c)(4) and § 503(b)(9) are born from the same policy—to encourage creditors to extend credit to financially distressed companies. *In re Arts Dairy, LLC*, 414 B.R. at 220. By adding § 503(b)(9), Congress did not intend to impact the new value defense. *See Dewsnup v. Timm*, 502 U.S. 410, 419 (1992) ("[T]his court has been reluctant to accept arguments that would interpret the Code, however vague the particular language under consideration might be, to affect a major change in pre-Code practice that is not the subject of at least some discussion in the legislative history.") Therefore, with the addition of § 503(b)(9) Congress intended to further incentivize creditors to extend credit to distressed Debtors, rather than to undercut the new value defense that was already available to trade creditors prior to the 2005 amendments.

4. *It would be unequitable to force Touch of Grey to choose between the remedies it is statutorily entitled to under § 503(b)(9) and § 547(c)(4).*

Several courts, like the Thirteenth Circuit, have held that it is unfair to allow creditors to "double dip" with the satisfaction of administrative expense and later using the value of this satisfaction to reduce preference exposure. This argument, however, ignores the text of the Code and unfairly deprives creditors of the priorities afforded them under the Bankruptcy Code. Forcing a creditor to choose between asserting an administrative expense and preserving the right to assert their new value defense in full not only negates the text of the Code,but would undermine

Congress' policy goals by "[chilling]…willingness to do business with troubled entities." *In re Commissary Operations*, 421 B.R. at 879. When a creditor supports the debtor's efforts to survive bankruptcy, Congress clearly intends to afford special treatment to these creditors. Nowhere in the text of the Code does Congress necessitate a choice between asserting a § 547(c)(4) defense or accepting a § 503(b)(9) priority.

To quote Circuit Judge Weir's dissent, "Touch of Grey's preference exposure on the Petition Date was $50,000. Under [the Thirteenth Circuit's] ruling, its willingness to support the Debtor's reorganization efforts post-petition by selling goods on credit in exchange for immediate payment of its undisputed § 503(b)(9) administrative expense results in a $200,000 increase in its preference exposure. The majority's approach not only negates the benefits Congress intended to confer upon creditors like Touch of Grey, but it also cruelly creates liability where none previously existed. That cannot be correct." R. at 27-28.

II. THE THIRTEENTH CIRCUIT ERRED IN DETERMINING THAT SECTION 365(D)(3) DOES NOT REQUIRE THE TRUSTEE TO SATISFY OBLIGATIONS ALLOCABLE TO THE POST-REJECTION PERIOD.

In a chapter 11 reorganization or a chapter 7 liquidation under the Bankruptcy Code, a creditor must, by definition, possess a right to payment against the debtor, or more accurately, the estate.[3] Congress added § 365(d)(3) to the Code with the Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333 (1984). Although the 1984 amendments to § 365 are frequently referred to as the "shopping center amendments", the language of § 365 simply refers to "nonresidential real property." Thus, § 365(d)(3) is applicable to business premises in general. *See In re O. P. Held, Inc*., 77 B.R. 388, 389 (Bankr. N.D.N.Y. 1987). A circuit split has resulted from the court's application of § 365(d)(3). The "proration test" requires the court to

[3] *See* 11 U.S.C. §§ 101(5), (10) The filing of a voluntary petition by a debtor automatically commences the bankruptcy case and creates an estate. 11 U.S.C. § 301.

calculate the pro rata amount of rent, taxes and other expenses attributable to the prerejection period and to order the debtor in possession or trustee to pay only that sum. *See, e.g., El Paso Props. Corp. v. Gonzales (In re Furr's Supermarkets, Inc.)*, 283 B.R. 60, 69-70 (B.A.P. 10th Cir. 2012); *In re Ames Dep't Stores, Inc.*, 306 B.R. 43, 65 (Bankr. S.D.N.Y. 2004) (Gerber, J.). In contrast, the "billing date test" finds that a court should order the debtor in possession or trustee to pay all bills submitted by the landlord during the prerejection period, regardless of whether a portion of the bill corresponds to charges that accrued prepetition. *See, e.g., Centerpoint Props. v. Montgomery Ward Holding Corp. (In re Montgomery Ward Holding Corp.)*, 268 F.3d 205, 209-10 (3d Cir. 2001*); Koenig Sporting Goods, Inc. v. Morse Road Co. (In re Koenig Sporting Goods, Inc.)*, 203 F.3d 986, 989 (6th Cir. 2000). The plain language, legislative history, and policy of § 365(d)(3) mandate that the Court apply the "billing date" approach.

First, the clear and express intent of § 365(d)(3) is to require the trustee to perform the lease in accordance with its terms. *See In re Montgomery Ward Holding Corp.,* 268 F.3d at 209-10. To be consistent with this clear intent, any statutory interpretation must look to the terms of a lease to determine both the nature of the "obligation" and when it "arises." *Id*. If one accepts this premise, it is difficult to find a textual basis for a proration approach. On the other hand, 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. *In re Montgomery Ward Holding Corp*., 268 F.3d at 208.

Second, the legislative history of § 365(d)(3) suggests that the purpose of § 365(d)(3) sought "to relieve the burden placed on nonresidential real property lessors (or 'landlords') during the period between a tenant's bankruptcy petition and assumption or rejection of a lease," supporting petitioner's entitlement to a full month's rent. *In re DeCicco of Montvale, Inc.*, 239 B.R. 475, 478-83 (Bankr. D.N.J. 1999); *see also In re Krystal Co.,* 194 B.R. 161, 163-64

(Bankr. E.D. Tenn. 1996); *In re F&M Distribs*., 197 B.R. 829, 832-33 (Bankr. E.D. Mich. 1995*); In re Duckwall-Alco Stores Inc.*, 150 B.R. 965, 974-75 (D. Kan. 1993); *In re R.H. Macy & Co.*, 152 B.R. 869, 872-73 (Bankr. S.D.N.Y. 1993).

Third, policy considerations, equity, and "common sense" all favor full payment of the May rent to Touch of Grey. To quote Circuit Judge Weir's dissent, "while there are admittedly aspects to the proration approach that are desirable, policy determinations are left for Congress. Judges are tasked with applying the law as written". R. 28-29. Here, because the Lease mandated payment of the entirety of the May rent on May 1st, four days before rejection occurred, the Trustee is required under § 365(d)(3) to make such payment.

This Court should reverse the decision of the Thirteenth Circuit and hold that the trustee must timely perform the obligations of a debtor under 11 U.S.C. § 365(d)(3) by paying Touch of Grey the entirety of the May rent.

A. § 365(d)(3) is Unambiguous as to the Debtor's Rent Obligation and Requires Payment of the Full Month's Rent.

All cases of statutory interpretation involving the Code must begin with the language itself. *See Toibb v. Radloff,* 501 U.S. at 163-64. The Supreme Court has repeatedly stated that "when the statute's language is plain, the sole function of the courts at least where the disposition required by the text is not absurd – is to enforce it according to its terms." *Lamie v. U.S. Tr*., 540 U.S. 526, 534 (2004) (internal citations and quotations omitted). Therefore, if the statue is unambiguous, it is not a courts' role to make arguably better laws than those fashioned by Congress. *See Toibb*, 501 U.S. at 160-161; *see also Touche Ross & Co. v. Redington*, 442 U.S. 560, 578 (1979).

§ 365(d)(3) establishes what the trustee must do pending assumption or rejection. 11 U.S.C. § 365(d)(3). The pertinent part of § 365(d)(3) 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, until such lease is assumed or rejected, notwithstanding § 503(b)(1) of this title." 11 U.S.C. § 365(d)(3). Courts are sharply divided with respect to when the obligation arises, that is whether an "obligation" "arises" every day on a pro-rata basis or "arises" when billed, typically at the beginning of the month.

1. *Congress intended the "billing date" approach when referencing "obligations of the debtor arising under a lease after the order of relief."*

In analyzing the language of § 365(d)(3), many courts find the words "obligation" and "arise" are sufficiently unambiguous so as to make it clear that rent due prior to the rejection of an unexpired non-residential real property lease must be paid in full, without proration, at the time they come due under the terms of the lease, during the prerejection period. *See e.g., In re Montgomery Ward Holding Corp*., 268 F.3d at 209 (where rent for the coming month due on the first of the month and tenant rejected lease on the second, "§ 365(d)(3) is unambiguous as to the debtor's rent obligation and requires payment of the full month's rent" because proration would be inconsistent with the statute*)*; *see also In re Burival*, 613 F.3d 810, 812-13 (8th Cir. 2010) (§ 365(d)(3) is not ambiguous when applied to lease payment due two days after petition—entire payment characterized post-petition based on contract due date, without regard to use by or benefit to the estate.)

Although the meaning of the word "obligation" is not defined in the code, the common meaning of the word is clearly defined in Black's Law Dictionary as "any duty imposed by law, promise, contract, relations of society, courtesy, kindness, etc." BLACK'S LAW DICTIONARY 491 (2d ed. 2001). The language is clear: the term "obligation" in § 365(d)(3) mandates a contractual performance, requiring the Trustee to perform the Lease in accordance with its terms. *In re Montgomery Ward Holding Corp.,* 268 F.3d at 209. In *In re R.H. Macy & Co*, then-Judge Sotomayor concluded that the word "obligation" in § 365(d)(3) clearly and unambiguously

required the debtor to pay all charges that become due and payable post-petition under a lease. *In re R.H. Macy & Co., Inc.*, No. 93 Civ. 4414 (SS), 1994 U.S. Dist. LEXIS 21364, *12-13 (S.D.N.Y. Feb. 23, 1994). In this case, the court again reinforced the idea given that § 365(d)(3) describes acts that the debtor must do. If Congress intended to obligate a debtor in possession to satisfy only those lease liabilities accruing during the prerejection period, it could have used the term "debt" or “claim”, rather than "obligation”. *See id*; *see also In re Duckwall-Alco Stores*, 150 B.R. at 976 (stating that "the language of § 365(d)(3) is clear in imposing the duty to comply with all lease obligations arising after the order for relief. . .The lease did not provide for payment of taxes to the landlord as they accrued.")

2. *To require a trustee to perform all obligations "arising from . . . the order of relief " would make little sense and would be entirely inconsistent with congressional intent.*

The Thirteenth Circuit, in adopting the proration method, mistakenly concluded that the phrase "until such lease is assumed or rejected" has two plausible interpretations. The interpretation that "until such lease is assumed or rejected" modifies "obligations" would incorrectly assume that the obligation must somehow arise from the prerejection period—that is, be an administrative expense—before the obligation is payable. *See In re Krystal Co.*, 194 B.R. 161 (Bankr. E.D.Tenn. 1996). In *Krystal*, the court reasoned that the language “notwithstanding section 503(b)(1) of this title" directly precludes viewing such obligations as administrative expenses. *See id*. at 163. "Notwithstanding" means that the obligations in question are to be paid "in spite of" the operation of § 503(b)(1), which would otherwise limit post-petition payments to those necessary for "preserving the estate." *Id*. Moreover, because "payment of these obligations is not designed to preserve the *estate* (but rather the vulnerable *landlord*), the concepts of proration—so necessary for distinguishing between pre-petition debts and administrative expenses in the context of § 503(b)(1)—are irrelevant and inapplicable under § 365(d)(3)." *Id*. Thus, if the

alleged ambiguity of § 365(d)(3) that is advocated by the Thirteenth Circuit only arises by imputing concepts explicitly rejected by the statutory language employed by Congress, this Court should decline to conclude that the drafters intended otherwise. *See Webster v. Reprod. Health Servs*., 492 U.S. 490, 515 (1989).

3. Other provisions of the Bankruptcy Code fail to support an adoption of the "proration" approach.

Plain meaning should also hold true when viewed in the context of the Code. *Roberts v. Sea-Land Servs.*, Inc., 566 U.S. 93, 101 (2012). However, the Thirteenth Circuit's interpretation relying on §§ 365(g), 502(b)(6), and 502(g) is not consistent with the text. The Thirteenth Circuit explained that because these sections clearly establish that unperformed obligations after rejection are treated as general unsecured claims, not administrative expenses under § 503(b), the Debtor can escape all of its future contract obligations, without having to pay much of anything in return. R. at 18-19.

This analysis, however, was completed without acknowledging that § 365(d)(3) is not determinative[4] in a situation where the debtor does not timely perform its obligations under a nonresidential property lease and neither assumes nor rejects the lease within sixty days of the order for relief. 11 U.S.C. § 365(d)(3); 11 U.S.C. § 365(d)(4). Because the Code does not expressly confer administrative expense status on post-petition, pre-rejection claims, the Thirteenth Circuit's

[4] Some courts hold that § 365(d)(3) imposes administrative expense status on claims for post-petition, pre-rejection lease obligations. *See, e.g., In re Cukierman*, 265 F.3d 846, 850 (9th Cir. 2001); *In re Pacific-Atlantic Trading Co.*, 27 F.3d 401, 405 (9th Cir. 1994); *In re Furr's Supermarkets, Inc.*, 283 B.R. 60, 69 (B.A.P. 10th Cir. 2002). Other courts have interpreted Section 365(d)(3) as silent on the subject and, therefore, not a legislative mandate conferring administrative expense status on post-petition, pre-rejection claims. *See, e.g., In re Orvco, Inc.*, 95 B.R. 724, 727 (B.A.P 9th Cir. 1989). Under this theory, without express authority to elevate the claim to administrative expense status, the claim must be an unsecured non-priority claim unless the Landlord can establish an entitlement to priority status under § 503(b)(1) of the Bankruptcy Code. However, such uncertainty does not affect a courts' adoption of the "billing date" approach based on the plain meaning rule. *See In re Burival*, 613 F.3d 810, 812-13 (8th Cir. 2010).

assumption of postrejection rent as an unsecured, non-priority claim is irrelevant to the issue at hand. *See, e.g., In re Orvco, Inc.*, 95 B.R. 724, 727 (B.A.P 9th Cir. 1989).

B. The Legislative History of § 365(d)(3) Further Confirms that Congress Intended the Billing Approach Instead of the Proration Approach.

Although there is no need to resort to legislative history, the legislative history of § 365(d)(3) is more consistent with the adoption of the "billing date" approach than the "proration" approach. In 1984, Congress enacted § 365(d)(3) as part of the Shopping Center Amendments to protect the interests of commercial landlords who, compared to other creditors, were unfairly disadvantaged because they were forced to continue to provide services to the debtor post-petition without payment and without the ability to re-rent the space to another tenant until after the debtor decided to assume or reject the lease. *In re At Home Corp.*, 392 F.3d 1064, 1068 (9th Cir. 2004) (citing 130 Cong. Rec. S8891 (1984), reprinted in 1984 U.S.C.C.A.N. 590, 598-99 (statement of Sen. Hatch). Prior to the enactment of § 365(d)(3), when a debtor rejected the lease, the landlord only received the actual necessary costs and expenses of preserving the debtor's estate rather than the rent due under the lease. *Id.* Recognizing the unfairness of such an approach, Congress enacted the Shopping Center Amendments to solve this problem by ensuring that chapter 11 debtors continued to perform obligations under commercial leases, including the obligation to pay rent, notwithstanding the consideration of any benefit to the bankruptcy estate. *Id*. at 1068-69.

Based on the legislative history, Congress intended § 365(d)(3) to change pre-1984 Code and caselaw that courts should treat the debtor in possession or trustee as bound by the terms of any unexpired non-residential lease until it moved to reject. The thoughtful examination made by the court in *Krystal* is illuminating. *See Krystal*, 194 B.R. at 164. The court of *Krystal* found it significant that Senator Hatch, a conferee on the originating act, did not refer to the concepts of accrual or proration. *See id*. Rather, the court observed that Senator Hatch's statements only

mentioned the categorical "timely performance requirement" as an antidote to the problems "caused . . . by the administration of the bankruptcy code." *See id*. Thus, when read in conjunction with the statute, this "problem" language can only refer to § 503(b)(1), for that is the subsection specifically overridden by the amendment. The essential concept of § 503(b)(1), accrual and proration, cannot have survived the addition of § 365(d)(3). *See In re DeCicco of Montvale, Inc*., 239 B.R. 475, 478-483 (Bankr. D.N.J. 1999); *see also In re Krystal*, 194 B.R. at 165; *see also In re R.H. Macy & Co., Inc*., 152 B.R. at 869.

Where possible the court should not "read the Bankruptcy Code to erode past bankruptcy practice absent a clear indication that Congress intended such a departure." *Cohen v. De La Cruz*, 523 U.S. 213, 221(1998) (internal quotations and citations omitted). It is clear, however, that Congress enacted § 365(d)(3) for the purpose of altering a pre-Code practice that had created inequity for landlords of non-residential property.

C. Application of the Billing Date Approach is Consistent with the Purposes and Public Policy of the Bankruptcy Code.

As noted by the Circuit Court, this Court should strive to reach the goal of equal distribution among creditors under the Bankruptcy Code and the corollary principle that provisions allowing preferences must be tightly construed. R. at 28; *Howard Delivery Serv., Inc. v. Zurich Am. Ins. Co.*, 547 U.S. 651, 655 (2006).

In so stating, however, the Thirteenth Circuit ignored that § 365(d)(3) was enacted to cure the inequities from the pre-1984 Code. Before Congress adopted § 365(d)(3), absent a landlord filing a motion to compel payment and proving that the unpaid post-filing rent was an actual and necessary cost of preserving the debtor's estate, the debtor could remain in the rented space indefinitely without paying rent. § 365(d)(3) was designed with the purpose "to relieve the burden placed on nonresidential real property lessors (or "landlords') during the period between a tenant's

bankruptcy petition and assumption or rejection of a lease." *In re Koenig Sporting Goods, Inc.*, 203 F.3d 986, 989 (6th Cir. 2000). Reading § 365(d)(3) and the legislative history together, Congress specifically intended to exempt a tenant's lease obligations to its landlord from the workings of the Code's administrative expense provisions because Congress believed nonresidential landlords and other solvent tenants were particularly vulnerable creditors under the old Code procedures. *See id; see also In re Krystal Co.*, 194 B.R. at 161. Because the payment of these obligations is designed to protect the landlord, not the estate, the concepts of accrual, proration and allocation are irrelevant to achieve the purpose and public policies under § 365(d)(3).

1. Application of the billing date does not result in a windfall for Touch of Gray.

The Thirteenth Circuit worries that the "billing date" approach may give a landlord priority over other creditors with respect to obligations which accrue pre-petition but are not payable until post-petition. However, such analysis ignores that § 365(d)(3) shifted the burden of indecision from the landlord to the debtor, who under the statute must perform the lease obligations or decide to reject the lease before an obligation becomes due. *In re Koenig Sporting Goods, Inc.*, 203 F.3d 986, 989 (6th Cir. 2000). In practically every case, because the debtor controls when it files its chapter 11 case and when it rejects leases, the windfall will almost always fall on the side of the debtor, at the expense of landlords. *In re Krystal Co.*, 194 B.R. at 161.

Koenig is a perfect example of "strategic behavior" by the debtor under the "proration approach". *Id*. In *Koenig,* the debtor rejected the lease on December 2 with the billing date for the rent due on December 1. *Id*. The court ruled that the entire month's rent was due to the landlord even though the debtor rejected the lease for thirty of the thirty-one days. *Id*. The court stated "[i]f the debtor had rejected the lease effective November 30, 1997, rather than December 2, it would not have been obligated to pay rent for December under 11 U.S.C. § 365(d)(3)." *Id*. Because of the

burden shift, the court in *Koenig* specifically rejected debtor's argument that "equity, and 'common sense' compel[led] adoption of the proration method in [that] context." *See id*; *see also Krystal*, 194 B.R. at 164 (emphasizing that "Congress intended § 365(d)(3) to shift the burden of indecision to the debtor: the debtor must now continue to perform all the obligations of its lease or make up its mind to reject it before some onerous payment comes due during the prerejection period. That is a sensible adjustment of this particular debtor-creditor relationship.")

The present case illustrates the point in *Koening* well. Here, it is not disputed that the Lease required the Debtor to pay the full monthly rent, in the amount of $25,000, "in advance on the first day of each month." R. at 4. Because the "obligation" to pay such rent arose on May 1, 2020, four days prior to rejection of the Lease, the debtor in possession and the Trustee are required under the statute to "timely" pay such rent. *Id.* By requiring the Trustee to timely pay the debtor's rent, Congress clearly placed the burden on the Trustee to promptly and properly reject the lease under the Lease terms or, in the meantime, to continue to perform the debtor's obligations under the Lease. In addition, the Debtor's reaffirmation of its obligation under the Lease after its first default reinforces the parties' understanding that the rent should be paid "in advance on the first day of each month." R. at 5. As Congress expressly mandated in § 365(d)(3), such obligations should be paid "notwithstanding section 503(b)(1) of this title," adoption of "proration approach" would contradict the statute by considering whether payment of such obligations is equitable.

2. *The undesirable results arising from a billing date theory should not alter the plain meaning of the statute to satisfy policy concerns.*

Although arbitrary results may eventually arise under a billing date theory, as a matter of "judicial philosophy", the Court should not alter the "clear, plain meaning" of the statute to satisfy policy concerns. *See In re R.H. Macy & Co., Inc.*, 1994 U.S. Dist. LEXIS 21364 *aff'g* 152 B.R. 869 (Bankr. S.D.N.Y. 1993). In affirming the bankruptcy court's decision, then-Judge Sotomayor,

while finding the "policy aspects of the proportion approach" argument might be persuasive, concluded that the word "obligation," as used in the context of § 365(d)(3), was "clear and unambiguous" to support the "billing date" approach. *See id*; *see also In re Montgomery Ward Holding Corp.,* 268 F.3d at 209-10 (concluding that "that there are aspects to a proration approach that Congress might have found desirable. It is not [court's] role, however, to make arguably better laws than those fashioned by Congress); *see also Northwest Bank v. Ahlers*, 485 U.S. 197, 207-08 (1988) ("whatever equitable powers remain in the bankruptcy courts must be exercised within the confines of the Code").

CONCLUSION

The plain meaning of § 547(c)(4) limits the analysis of preferential transfers to pre-petition actions while § 503(b)(9) grants trade creditors a priority for post-petition assistance. While the sections focus on similar policy goals, the two do not overlap temporally. Creditors, if statutorily eligible, should be able to take advance of both provisions. Moreover, the plain language coupled with the legislative history of § 365(d)(3) mandates that this Court apply the "billing date" test and focus on the terms of the Lease to determine the nature of the Trustee's obligations as they become due. Application of the "billing date" test is, policy-wise, exactly what Congress sought to achieve when it enacted § 365(d)(3)—providing special treatment for non-residential landlords. A creditor should not be admonished as being "greedy" simply for seeking the relief Congress provides for in the Code. For the reasons stated above, this Court should reverse the decision of the Thirteenth Court of Appeals.

APPENDIX A

11 U.S. Code § 101 – Definitions.

(5) The term "claim" means—

(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; or

(B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured.

…

(10) The term "creditor" means—

(A) entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor;

(B) entity that has a claim against the estate of a kind specified in section 348(d), 502(f), 502(g), 502(h) or 502(i) of this title; or

(C) entity that has a community claim.

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11 U.S. Code § 301 - Voluntary cases.

(a) A voluntary case under a chapter of this title is commenced by the filing with the bankruptcy court of a petition under such chapter by an entity that may be a debtor under such chapter.

(b) The commencement of a voluntary case under a chapter of this title constitutes an order for relief under such chapter.

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11 U.S.C § 364. Obtaining credit.

(a) If the trustee is authorized to operate the business of the debtor under section 721, 1108, 1203, 1204, or 1304 of this title, unless the court orders otherwise, the trustee may obtain unsecured credit and incur unsecured debt in the ordinary course of business allowable under section 503(b)(1) of this title as an administrative expense.

(b) The court, after notice and a hearing, may authorize the trustee to obtain unsecured credit or to incur unsecured debt other than under subsection (a) of this section, allowable under section 503(b)(1) of this title as an administrative expense.

(c) If the trustee is unable to obtain unsecured credit allowable under section 503(b)(1) of this title as an administrative expense, the court, after notice and a hearing, may authorize the obtaining of credit or the incurring of debt—

(1) with priority over any or all administrative expenses of the kind specified in section 503(b) or 507(b) of this title;

(2) secured by a lien on property of the estate that is not otherwise subject to a lien; or

(3) secured by a junior lien on property of the estate that is subject to a lien.

(d)

(1) The court, after notice and a hearing, may authorize the obtaining of credit or the incurring of debt secured by a senior or equal lien on property of the estate that is subject to a lien only if—

(A) the trustee is unable to obtain such credit otherwise; and

(B) there is adequate protection of the interest of the holder of the lien on the property of the estate on which such senior or equal lien is proposed to be granted.

(2) In any hearing under this subsection, the trustee has the burden of proof on the issue of adequate protection.

(e) The reversal or modification on appeal of an authorization under this section to obtain credit or incur debt, or of a grant under this section of a priority or a lien, does not affect the validity of any debt so incurred, or any priority or lien so granted, to an entity that extended such credit in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and the incurring of such debt, or the granting of such priority or lien, were stayed pending appeal.

(f) Except with respect to an entity that is an underwriter as defined in section 1145(b) of this title, section 5 of the Securities Act of 1933, the Trust Indenture Act of 1939, and any State or local law requiring registration for offer or sale of a security or registration or licensing of an issuer of, underwriter of, or broker or dealer in, a security does not apply to the offer or sale under this section of a security that is not an equity security.

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11 U.S.C. § 365. Executory contracts and unexpired leases.

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

…

(d)

(3) 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. 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.

(4)

(A) Subject to subparagraph (B), an unexpired lease of nonresidential real property under which the debtor is the lessee shall be deemed rejected, and the trustee shall immediately surrender that nonresidential real property to the lessor, if the trustee does not assume or reject the unexpired lease by the earlier of—

(i) the date that is 120 days after the date of the order for relief; or

(ii) the date of the entry of an order confirming a plan.

(B)

(i) The court may extend the period determined under subparagraph (A), prior to the expiration of the 120-day period, for 90 days on the motion of the trustee or lessor for cause.

(ii) If the court grants an extension under clause (i), the court may grant a subsequent extension only upon prior written consent of the lessor in each instance.

…

(g) Except as provided in subsections (h)(2) and (i)(2) of this section, the rejection of an executory contract or unexpired lease of the debtor constitutes a breach of such contract or lease—

(1) if such contract or lease has not been assumed under this section or under a plan confirmed under chapter 9, 11, 12, or 13 of this title, immediately before the date of the filing of the petition; or

(2) if such contract or lease has been assumed under this section or under a plan confirmed under chapter 9, 11, 12, or 13 of this title—

(A) if before such rejection the case has not been converted under section 1112, 1208, or 1307 of this title, at the time of such rejection; or

(B) if before such rejection the case has been converted under section 1112, 1208, or 1307 of this title—

(i) immediately before the date of such conversion, if such contract or lease was assumed before such conversion; or

(ii) at the time of such rejection, if such contract or lease was assumed after such conversion.

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11 U.S.C § 502. Allowance of claims of interests.

(b) Except as provided in subsections (e)(2), (f), (g), (h) and (i) of this section, if such objection to a claim is made, the court, after notice and a hearing, shall determine the amount of such claim in lawful currency of the United States as of the date of the filing of the petition, and shall allow such claim in such amount, except to the extent that—

…

(6) if such claim is the claim of a lessor for damages resulting from the termination of a lease of real property, such claim exceeds—

(A) the rent reserved by such lease, without acceleration, for the greater of one year, or 15 percent, not to exceed three years, of the remaining term of such lease, following the earlier of—

(i) the date of the filing of the petition; and

(ii) the date on which such lessor repossessed, or the lessee surrendered, the leased property; plus

(B) any unpaid rent due under such lease, without acceleration, on the earlier of such dates;

…

(g)

(1) A claim arising from the rejection, under section 365 of this title or under a plan under chapter 9, 11, 12, or 13 of this title, of an executory contract or unexpired lease of the

debtor that has not been assumed shall be determined, and shall be allowed under subsection (a), (b), or (c) of this section or disallowed under subsection (d) or (e) of this section, the same as if such claim had arisen before the date of the filing of the petition.
(2) A claim for damages calculated in accordance with section 562 shall be allowed under subsection (a), (b), or (c), or disallowed under subsection (d) or (e), as if such claim had arisen before the date of the filing of the petition.

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11 U.S.C. § 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—

(1)

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

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

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

(B) any tax—

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

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

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

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

…

(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.

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11 U.S.C § 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),[1] and any fees and charges assessed against the estate under chapter 123 of title 28.

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11 U.S.C. § 547. Preferences.

(b) Except as provided in subsections (c), (i), and (j) of this section, the trustee may, based on reasonable due diligence in the circumstances of the case and taking into account a party's known or reasonably knowable affirmative defenses under subsection (c), avoid any transfer of an interest of the debtor in property—

(1) to or for the benefit of a creditor;

(2) for or on account of an antecedent debt owed by the debtor before such transfer was made;

(3) made while the debtor was insolvent;

(4) made—

(A) on or within 90 days before the date of the filing of the petition; or

(B) between ninety days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider; and

(5) that enables such creditor to receive more than such creditor would receive if—

(A) the case were a case under chapter 7 of this title;

(B) the transfer had not been made; and

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

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

…

(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;

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11 U.S.C. § 549. Postpetition transactions.

(a) Except as provided in subsection (b) or (c) of this section, the trustee may avoid a transfer of property of the estate—

(1) that occurs after the commencement of the case; and

(2)

(A) that is authorized only under section 303(f) or 542(c) of this title; or
(B) that is not authorized under this title or by the court.

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11 U.S.C § 1112. Conversion or dismissal.

(a) The debtor may convert a case under this chapter to a case under chapter 7 of this title unless—
(1) the debtor is not a debtor in possession;
(2) the case originally was commenced as an involuntary case under this chapter; or
(3) the case was converted to a case under this chapter other than on the debtor's request.