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 Writ Of Certiorari from the
United States Court of Appeals
For the Thirteenth Circuit

BRIEF FOR THE PETITIONER

January 20, 2022

TEAM NUMBER 41
COUNSEL FOR PETITIONER

QUESTIONS PRESENTED

I. Whether 11 U.S.C. § 547(c)(4) allows a seller of goods to reduce its preference exposure by the value of goods sold even though while, under 11 U.S.C. § 503(b)(9), the debtor in possession paid for such goods in full.

II. Whether 11 U.S.C. § 365(d)(3) requires a trustee to timely perform the obligations of the debtor by paying rent due prior to the rejection of an unexpired non-residential property lease but allocable to the period following date of rejection.

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The opinion of the United States Court of Appeals for the Thirteenth Circuit is available at No. 20-0803 and reprinted at Record 2.

STATEMENT OF JURISDICTION

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

STATUTORY PROVISIONS INVOLVED

This action implicates statutory construction of certain provisions of Title 11 of the United States Code. The relevant statutory provisions in this case are listed below.

The relevant portion of 11 U.S.C. § 365:

> **(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)** 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:

(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;

STATEMENT OF FACTS

I. Factual History

Petitioner, Touch of Grey Roasters, Inc. ("Touch of Grey"), is an industry leading international coffee house chain and lender that did business with Debtor, Terrapin Station, LLC (the "Debtor"). R. at 2. Debtor is an independent coffeehouse who entered into a Lease and Franchise Agreement with Touch of Grey. R. at 4.

The Coffeehouse. In 2005, the Debtor was founded as an independent coffeehouse by its sole member, William Tell ('Tell"), in the Town of Terrapin, Moot. R. at 3. Touch of Grey is an international coffee company and coffeehouse R. at 3. In 2017, Touch of Grey began to open a series of new "neighborhood coffeehouses" in response to increased consumer demand for local, independent businesses. R. at 4. These "new" neighborhood coffeehouses would retain their existing brand, and instead begin to sell a new line of coffee products produced by Touch of Grey. R. at 4. In addition, these coffeehouses would provide expanded food offerings and, at night, would offer alcoholic beverages and host live music and poetry readings. Over time, the Debtor's business earnings had become stagnant and its store was in need of remodeling. R. at 4. In the fall of 2017, Touch of Grey approached Tell to inquire if the Debtor would be interested in franchising a neighborhood coffeehouse in Terrapin. R. at 4.

The Venture. Tell was intrigued to partner with an industry giant, and thus, the Debtor decided to move forward with the venture. R. at 4. To facilitate the opening of the new coffeehouse, Touch of Grey agreed that it would purchase and lease to the Debtor a recently renovated warehouse space (the "Premise") in the downtown entertainment district of Terrapin. R. at 4. On July 1, 2018, Touch of Grey, as landlord, and the Debtor, as tenant, entered into a Lease Agreement (the "Lease) that required the Debtor to pay monthly rent in the amount of

$25,000, with rent being "due in advance on the first day of each month." R. at 4. That same day, Touch of Grey, as franchisor, and the Debtor, as franchisee, entered into a Franchise Agreement whereby the Debtor would exclusively sell Touch of Grey's "Dark Star" branded products, purchased directly from Touch of Grey. R. at 4. On December 1, 2018, the new "Terrapin Station Coffeehouse" opened. However, the new location encountered various difficulties from the start, and by September 2019, the Debtor was unable to pay its debts. R. at 5.

The Default. By November 1, 2019, the Debtor owed Touch of Grey over $700,000 for the goods purchased under the Franchise Agreement. R. at 5. On December 5, 2019, due to the Debtor's inability to remain current on its obligations, Touch of Grey (*hereinafter* the "Creditor") sent the Debtor a notice of default threatening to terminate the Franchise Agreement. On December 7, 2019, the parties entered into a forbearance agreement wherein the Creditor agreed to forbear from terminating the Agreement in exchange for: (i) a payment of $250,000 from the Debtor on account of the outstanding invoice for "Dark Star" products; (ii) reaffirmation by the Debtor of its obligations under the Lease; and (iii) a release of any and all claims or causes of action that the Debtor had against the Creditor. R. at 5. That same day, the Debtor made the $250,000 payment to the Creditor. R. at 5. Soon after, the Debtor purchased an additional $200,000 worth of "Dark Star" products from the Creditor on credit, as set forth on an invoice dated December 18, 2019 (the "Invoice"). R. at 5. Nevertheless, due to underperforming during the holiday season, the Debtor filed a petition for relief under chapter 11in the Bankruptcy Court for the District of Moot on January 5, 2020 (the "Petition Date"). R. at 6.

II. Procedural History

On the Petition Date, the Debtor was current on its lease obligations to the Creditor, but still owed $650,000 to Creditor for the goods purchased on credit. R. at 6. Although Debtor did

not have secured debt, they still owed over $500,000 to other unsecured creditors (some of which refused to provide Debtor with goods and services on credit). R. at 6. On that same day, the Debtor filed several motions and its bankruptcy petition. R. at 6. In response, Tell stated that he intended to reorganize the Debtor and he hoped to find a sublessee for a portion of the Premise to reduce Debtor's rent. R. at 6. Debtor proposed to continue to sell the Dark Star products under the Franchise Agreement; although the Creditor had concerns about the Debtor's reorganization strategy, they were willing to engage in good faith discussions with the Debtor. R. at 6.

On January 19, 2020 (two weeks after the Petition Date), the Debtor alleged the Creditor was a "critical vendor," and filed a motion to pay $200,000 to the Creditor to continue to sell goods on credit to Debtor. R. at 6. The United States Trustee opposed this motion, arguing the Bankruptcy Code does not authorize critical vendor payments. R. at 7. However, given the important role the Creditor played in Debtor's reorganization plan, counsel for the creditors' committee supported the motion. R. at 7.

In response to the motion, the Bankruptcy Court stated they were not inclined to approve the critical vendor payment since they were uncertain of whether the Bankruptcy Code would permit this payment. R. at 7. Nonetheless, the Court proceeded to award the Creditor an administrative expense instead pursuant to § 503(b)(9) for the value of the goods sold and would permit an immediate payment of the administrative expense. R. at 7. Several days later, the Debtor made the $200,000 payment to the Creditor. Upon receipt of the funds, the Creditor resumed selling goods on credit to the Debtor, who continued their operations. R. at 7.

Although the Debtor made several efforts to reorganize, due to the COVID-19 pandemic, these attempts were unsuccessful; initially, the Debtor temporarily closed its doors and on May 5, 2020, the Debtor permanently ceased operations and vacated the premises. R. at 7. Creditor

did not oppose the rejection of the lease effective on this date. R. at 8. On May 6, 2020, the Debtor filed a motion to reject the Lease and Franchise Agreement effective on this date pursuant to § 365(a). R. at 8.

On May 8, 2020, the Creditor filed a motion with the bankruptcy court requesting that the court compel the Debtor paid the rent for all of May; Creditor asserted that pursuant to § 365(d)(3), Debtor was required to pay May's rent since the rent was due on May 1st, which was before the rejection date (May 5th). R. at 8. On May 29, 2020, Debtor stated they were converting their chapter 11 case to a case under chapter 7 of the Bankruptcy Code case pursuant to § 1112(a). R. at 8. Subsequently, an order was entered converting the case to chapter 7 and appointed Casey Jones (the "Trustee") as the chapter 7 trustee for Debtor's estate. R. at 8. On this date, the court also granted Debtor's motion to reject the Lease and Franchise Agreement effective as of May 5, 2020. R. at 8.

The Trustee objected and commenced a proceeding seeking to avoid and recover the $250,000 that the Debtor made to the Creditor pursuant to § 547(b) and § 550(a). R. at 8. The parties attempted to resolve these disputes through mediation, which was unsuccessful. R. at 8.

The parties filed cross-motions for summary judgment. R. at 9. The parties agreed to hold a hearing regarding Creditor's request for the May 2020 rent and a hearing for summary judgment motion. R. at 9. Following the hearing, the court ruled in favor of the Trustee on both issues. R. at 9. The court concluded that pursuant to § 365(d)(3), the Debtor only was required to pay rent for the first five days of the month prior to rejection of the lease; as a result, the court granted Creditor an administrative expense of $4,032.26, rather than the full $25,000. R. at 9. Additionally, the court granted summary judgment to the Trustee; the court held that the Creditor could not use the value of the goods on the invoice as a new value to reduce its preference

exposure since the invoice was paid pursuant to § 503(b)(9). R. at 9. Accordingly, the Court entered a judgment for $250,000 in favor of the Trustee. R. at 9.

Creditor timely appealed both decisions to the United States District Court for the District of Moot. R. at 9. The District Court affirmed the lower court's decision on both issues. R. at 9. Creditor timely filed a notice of appeal with the United States Court of Appeals for the Thirteenth Circuit, and the Court affirmed. R. at 9. Creditor appealed to the Supreme Court of the United States, and the Court granted a Writ of Certiorari. R. at 9.

STANDARD OF REVIEW

The standard of review is *de novo*. The issues before this Court are pure questions of law. Thus, because the parties only present questions of law, *de novo* is the appropriate standard of review. *Texas v. Soileau (In re Soileau)*, 488 F.3d 302, 305 (5th Cir. 2007). Under *de novo* review, this Court decides the issues as if it were the original trial court in the matter. *Razavi v. Comm'r of Internal Revenue*, 74 F.3d 125, 127 (6th Cir. 1996) (quotation omitted).

SUMMARY OF THE ARGUMENT

The Thirteenth Circuit Court of Appeals incorrectly held that the Creditor could not use the value of the goods reflected on the Invoice as new value to reduce its preference exposure given that the Invoice was paid pursuant to § 503(b)(9), and that § 365(d)(3) only required the Debtor to pay rent for the five days that it had occupied the Premises prior to rejection of the Lease. Further, the lower court's decision misapplies existing law because (1) the cut-off date for § 547(c)(4) analysis ends at the petition date and (2) the plain language of § 365(d)(3) compels the trustee to perform all obligations that arise pre-rejection but are allocable post-rejection. As such, this Court should reverse the Thirteenth Circuit's decision and find in favor of Touch of Grey on both counts.

Congress enacted § 503(b)(9) to ensure that creditors, who frequently were burned in bankruptcy by debtors who purchased goods at a time when it is known that payment for goods will not have to be tendered since bankruptcy is imminent, were shielded when they continue to deal with business troubled debtors. Over time, substantial precedent has established that the most natural and only consistent reading of § 547(c)(4) is that the preference analysis window closes on the petition date. While the Third Circuit Court of Appeals, granted only persuasive authority over this ruling, has established that post-petition payments are irrelevant for purposes of subsequent new value defense. This Court cannot establish prior precedent that the petition date is not the cut-off, and this case does not prove to be an exception. Overall, § 503(b)(9) of the Bankruptcy Code does not expressly limit a creditor's use of new value defenses under § 547(c)(4). Therefore, the bankruptcy court did not have the discretion to overrule the parties' preference exposure payment and new value defense.

Although precedent indicates that the petition date serves as a hard stop during preference analysis calculation, the lower court mistakenly has found that the subsequent new value defense in § 547(c)(4) would result in § 503(b)(9) being used as a sword against such creditors who extend credit past the petition date. The Bankruptcy Court may deny enforcement of § 547(c)(4) defense if a creditor has not met their burden in proving that the transfer to a debtor was unavoidable, rather than avoidable. Here, however, the Bankruptcy Court failed to engage in any analysis, for it simply invalidated the transfer arrangements and new value defense without explaining why any inherent conflict exists. Simply put, the Bankruptcy Court established their ruling based on the fact that, "if Touch of Grey prevails, the world will end not in fire, but in a bankruptcy court." R. at 22. Ultimately, the majority failed to properly analyze the plain language of § 547(c)(4), its statutory context, and the underlying policy goals of the Bankruptcy

Code. Thus, the bankruptcy court erroneously exercised its discretion because § 503(b)(9) does not serve as a limit to § 547(c)(4) new value defenses.

Additionally, the Trustee must pay Touch of Grey the rent owed for all of May 2020 since 11 U.S.C. § 365(d)(3) compels trustees to pay rent for their unexpired non-residential property lease that arose prior to the rejection date. 11 U.S.C. § 365(d)(3) states that 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." Courts have diverging opinions on how to properly interpret this statute. Under the billing date approach, courts interpret 365(d)(3) to mean that trustees must perform the debtor's obligations according to the lease notwithstanding rejection. Contrastingly, under the proration approach, courts construe 365(d)(3) to mean that the trustee's obligations that arise during the period post-petition and pre-rejection should not extend further than the rejection date.

It is appropriate to interpret 11 U.S.C. § 365(d)(3) using the billing date approach for several reasons. First, the plain meaning of § 365(d)(3) clearly and unambiguously demonstrates that the Trustee must pay rent that was due before rejection but applicable following the rejection date. Additionally, the context of § 365(d)(3) makes it clear that the Trustee must pay rent due May 1st (pre-rejection) but allocable to the period after May 5th (post-rejection). The legislative history supports interpreting § 365(d)(3) under the billing date approach. Furthermore, it is not necessary to interpret the section in context with the Bankruptcy Code. Lastly, equity favors the billing date approach. Accordingly, § 365(d)(3) provides that the trustee must perform the obligations to the debtor despite the rejection of the lease; the Trustee must pay Touch of Grey rent for the entire month of May 2020.

ARGUMENT

This Court should reverse the Thirteenth Circuit's holding that 11 U.S.C. § 547(c)(4) precludes a defendant from asserting new value for goods subject to a satisfied administrative expense under 11. U.S.C. § 503(b)(9). This ruling is erroneous because the petition date serves as a hard stop for preferences, thereby rendering inconsequential to its new value defense anything that occurs post-petition, including a transfer that satisfies its administrative expense under § 503(b)(9). Additionally, this Court should reverse the Thirteenth Circuit's holding that 11. U.S.C. § 365(d)(3) does not require the trustee to satisfy obligations allocable to the post-rejection period. This holding is erroneous because § 365(d)(3) clearly and unequivocally mandates a trustee to timely perform all the obligations arising from and after the order for relief under any unexpired lease of nonresidential real property.

I. Under § 547(c)(4) The Creditor Should Be Permitted To Reduce Its Preference Exposure By The Value Of The Invoice Paid Pursuant To § 503(b)(9).

Enacted in the 1980s, § 547(b) of the Bankruptcy Code vests the bankruptcy trustee with broad powers to avoid preferential transfers to a creditor. A trustee may avoid, for the benefit of all creditors, a transfer of an interest in the debtor's property to a creditor if the trustee can demonstrate, among other things, that the transfer was made on or within 90-days before the petition date. 11 U.S.C. § 547(b), (g). By giving the trustee this power, Congress subsequently provided that the trustee bear the burden of proof on all elements of a preference listed in § 547(b). 11 U.S.C. § 547(g). Congress' policy behind this implementation is to discourage creditors from racing to dismember a debtor sliding into bankruptcy, and to promote equality of distribution to creditors in the debtor's bankruptcy. *See* Deborah L. Thorne and Jesus E. Batista, *Are All Creditor "Animals" Equal? Treatment of New Value Under § 547,* 23 AM. BANKR. INST. J., Apr. 2004, at 22.

Congress enacted § 547(c) to encourage creditors to deal with troubled businesses, and not, as Respondent attempts to propose, to ensure the equitable treatment of creditors. *Bergquist v. Anderson-Greenwood Aviation Corp. (In re Bellanca Aircraft Corp.)*, 850 F.2d 1275, 1281 (8th Cir. 1988). The concept within § 547(c)(4) codifies that the estate, and consequently the other creditors, are not harmed by the transfers. If the transfer is within this exception, it was made in exchange for new value and the new value augments the estate in the same proportion as the value of the transfer; therefore, the estate does not suffer any injury. *Miller v. JNJ Logistics LLC* (*In re Proliance Int'l, Inc.*), 513 B.R. 426, 431 (Bankr. D. Del. 2014). Here, Respondent does not challenge that new value need not "remain unpaid" in order for a creditor to establish a defense under § 547(c)(4); rather; they attempt to argue that a creditor cannot reduce its preference exposure under § 547(c)(4), and, at the same time, be paid in full for the value it provided to the debtor under § 503(b)(9). Respondent believes that a creditor who attempts to utilize the aforementioned code sections simultaneously are "double dipping" given that it would disrupt the equality of distribution among creditors that bankruptcy law attempts to achieve. This argument reflects a misunderstanding of Congress' intent to establish equality among creditors; a ruling in favor of Respondent would undo what Congress approved by penalizing creditors for accepting payment and continuing to do business with a debtor in bankruptcy.

In 2005, Congress specifically amended the Bankruptcy Code to include § 503(b)(9) to elevate a group of trade creditors, who previously only held general unsecured claims, ahead of all other general and priority unsecured creditors. Congress enacted § 503(b)(9) to shield creditors, who so frequently have been burned in bankruptcy by debtors who purchase goods at a time when it is known that bankruptcy is imminent and that payment for the goods will not have to be tendered. R. at. 22. To force a creditor to choose between asserting a § 503(b)(9) claim and

preserving its right to assert a subsequent new value defense that includes deliveries made to the debtor within the 20 days prior to the bankruptcy filing would work a disservice on Congress' inherent policy goals when enacting § 503(b)(9) and § 547(c)(4). *Commissary Operations, Inc. v. Dot Foods, Inc. (In re Commissary Operations, Inc.)*, 421 B.R. 873, 879 (Bankr. M.D. Tenn. 2010). Requiring creditors to make such a choice would chill their willingness to do business with troubled entities, and in essence, deprive sellers of goods of the benefits Congress conferred upon them when it enacted § 503(b)(9). *Id*.

Respondent fails to expressly identify the fact that post-petition new value should not be calculated in pre-petition preference calculations. Rather, Respondent cites a narrow majority of courts that reason that because § 547(c)(4) contains no temporal limitation, the payment of an administrative expense under § 503(b)(9) constitutes an "otherwise unavoidable transfer" under § 547(c)(5). Respondent contends that the Code's silence indicates that Congress did not intend to limit pre or post-petition defense by a creditor. However logically, and as a matter of statutory consistency, the Respondent's argument fails. Nothing in the Bankruptcy Code or in the arguments advanced by the Respondent should persuade the Court that the new value analysis should extend past the Petition Date. A statute is to be read as a whole, since the meaning of statutory language, plain or not, depends on context. *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991). Therefore, this Court should reverse the holding of the Thirteenth Circuit and permit the Creditor to reduce its preference exposure by applying new value under § 547(c)(4) even though such new value was paid for in full post-petition under § 503(b)9).

A. Congress Expressly Intended For Creditors To Utilize § 503(b)(9) And To Preserve Their Right To Assert A Subsequent New Value Defense Under § 547(c)(4).

In *Friedman's Liquidating Tr. v. Roth Staffing Cos. LP*, the Third Circuit Court of Appeals reasoned because the Bankruptcy Code does not set forth a cutoff for when an

"otherwise unavoidable transfer" should be considered in computing "new value," the Court should look to caselaw. *Friedman's Liquidating Tr. v. Roth Staffing Cos. LP (In re Friedman's Inc.)*, 738 F.3d 547, 551 (3d Cir. 2013). The Court concluded the cutoff should be the petition date, and where an "otherwise unavoidable transfer" is made after filing a bankruptcy petition, it does not affect the new value defense. *Id*. at 549. Relying on language from precedent caselaw, the Court described the three requirements for establishing a new value defense as follows:

> (1) the creditor must have received a transfer that is otherwise voidable as a preference under § 547(b); (2) after receiving the preferential transfer, the preferred creditor must advance "new value" to the debtor on an unsecured basis; and (3) the debtor must not have fully compensated the creditor for the "new value" as of the date that it filed its bankruptcy petition.

Id. at 551. Here, among several contextual indicators in the Code that point to the petition date as the cutoff for analysis of the new value defense, Creditor can establish the requirements set forth above. The first two factors can be easily resolved; as on December 7, 2019, the Creditor received a transfer preference of $250,000 from Debtor, and on December 18, Creditor advanced $200,000 in new value to Debtor. R. at 5. In fact, the majority opinion below held that these factors did not lead to the issue of the defense by the Creditor. For the third, and most often contested, factor is the date of when the new value was compensated. Because Respondent can only point to the fact that if post-petition payments by a debtor are not considered in the Court's analysis of a creditor's preference liability, the creditor will receive a "windfall" and be unjustly favored over other creditors, this Court should hold that the petition date should serve as a hard stop for new value analysis. The Petition Date, of January 5, 2020, when Debtor filed for relief under chapter 11 of the Bankruptcy Code must, therefore, serve as a cut-off date for our analysis.

The structure of the Code contains many post-petition mechanisms for ensuring that similarly situated creditors are treated equally. For this reason, preference analysis need not account for post-petition activity. It is not our role to second guess how Congress has balanced

these sometimes competing policies in different provisions of the Code. *Union Bank v. Wolas*, 502 U.S. 151, 162 (1991). The Court should find that closing § 547(c)(4) analyses at the petition 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. 11 U.S.C. §§ 364 & 503(b). In fact, this Court has already indicated that we must look to the context with other relevant provisions, "Because an administrative expense, even one under § 503(b)(9), is paid post-petition, we turn to § 549, which is the only avoidance power that could apply based on the facts in this case." R. at 13. This Court relies on § 549(a) that a post-petition transfer that is not authorized by the court or by the Code can be recovered by the trustee or debtor-in-possession. Further, in this case, Debtor was authorized by the bankruptcy court, and thus held Creditor is precluded from using the value to reduce its preference exposure. R. at 13. Nonetheless, we must notice that § 549(a)(1) refers to a transfer of property of the estate, and not to a payment made by the debtor, rendering the earlier analysis by the Court void. In this case, as with many others, we must look at all relevant provisions of the Code before reaching a conclusion. Therefore, any comprehensive analysis under § 547(c)(4) should conclude at the petition date.

1. Based On The Text Of The Statute, Read In Context With Other Relevant Provisions, Any Analysis Under § 547(c)(4) Ends At The Petition Date.

As a general matter, § 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 Inc.*, 738 F.3d at 556. It would make sense that the calculation of the amount of the preference, and application of any new value reduced by subsequent transfers, would relate to that time period. The Bankruptcy Code's primary avoidance provisions, §§ 547 and 548, measure

time from a common endpoint, the petition date. *Kaye v. Accord Mfg., Inc.(In re Murray, Inc.),* 2007 WL 5595447, at *2 (Bankr. M.D. Tenn. June 6, 2007). The petition date also serves as a starting place under § 549 for avoidance actions brought to recover transfers of property made by the estate after the commencement of the case. *Id*. at 5.

Looking at subsequent subsections within § 547, Courts have already found that the necessary cutoff date should be performed as of the petition date even though the statute does not specify the date to be used. In § 547(b)(5), the "the hypothetical liquidation test," which requires courts to compare the payment received by a preference defendant with what the creditor would have received in a hypothetical liquidation if the payment had not been made, must be performed as of the petition date. *See* NORTON BANKR. L. & PRAC. § 66:12 (3d. ed. 2021). While § 547(b)(5), like § 547(c)(4), does not on its face contain when the test should be performed by, Courts have utilized contextual indicators within the Code to point to the petition date as the cut off. *In re Friedman's Inc.,* 738 F.3d 556 (quoting *In re Union Meeting Partners,* 163 B.R. 229 at 237). Extending preference analysis past the petition date would be inconsistent with § 547(b)(5), as it would with § 547(c)(4).

Additionally within § 547, we can look toward the "improvements-in-position" test articulated in § 547(c)(5). This provision provides a defense from preference liability for a creditor with a floating lien on a debtor's inventory and receivables, so long as the creditor did not improve its position during the preference period. 11 U.S.C. § 547(c)(5). Notably, the provision does include the phrase "as of the date of the filing of the petition." Respondent will argue that the statutory context within this section directly favors their argument that the Code's silence within § 547(c)(4) provides no cut-off date for the analysis. Conversely, the opposite will be true. This omission from § 547(c)(4) was intentional, since Congress knew how to set forth a

relevant time period when it thought it applied. *In re Friedman's Inc.*, 738 F.3d at 556. Pursuant to 11 U.S.C. § 547(c)(4), a creditor is protected from avoidance of an allegedly preferential transfer to the extent that after the transfer, the creditor "gave new value to or for the benefit of the debtor." New value helps a creditor reduce its preference liability if that new value is not secured by an otherwise unavoidable security interest. 11 U.S.C. § 547(c)(4)(A). Where Respondent argument falls short is that a creditor's right to assert an administrative expense claim under § 503(b)(9) is not linked to or conditioned upon the creditor's separate, potential right to assert a reclamation claim against the debtor pursuant to § 546(c). *In re Commissary Operations, Inc.*, 421 B.R. at 877. As the Court in Commissary stated, to force a creditor to choose between asserting a § 503(b)(9) claim and preserving its right to assert a subsequent new value defense that includes deliveries made to the debtor within the 20 days prior to the bankruptcy filing would work a disservice on Congress' inherent policy goals when enacting 11 U.S.C. §§ 503(b)(9) and 547(c)(4); requiring creditors to make such a choice would chill their willingness to do business with troubled entities. *Id*. at 878. Considering if we allow post-petition payments to affect the preference analysis, it would seem logical also to consider post-petition extensions of new value to be available as a defense. However, the vast majority of courts, and the legislative history that back it up, that have considered this issue have concluded that new value advanced after the petition date should not be considered in a creditor's new value defense.

2. Even Though The Code Is Silent On When A Payment Must Be Made By Debtor To Defeat A Creditor's New Value Defense, Legislative History Indicates The Petition Date As A Cutoff For Analysis Of The New Value Defense.

Throughout § 547, "the debtor" refers to the pre-petition entity that transferred property or engaged in business with the preference defendant. *Phoenix Rest. Grp., Inc. v. Ajilon Prof'l Staffing LLC (In re Phoenix Rest. Grp., Inc.)*, 317 B.R. 491, 497 (Bankr. M.D. Tenn. 2004). §

547(c)(4)(B) focuses on actions of the debtor "on account of which new value the debtor did not make an otherwise unavoidable transfer." Had Congress intended § 547(c)(4)(B) to account for payments made post-petition the section would have included something like "an otherwise unavoidable transfer of an interest of the estate in property to or for the benefit of such creditor." *Id*. Instead, Congress disqualified only new value paid for by "the debtor" with an otherwise unavoidable transfer. 11 U.S.C. § 547(c)(4)(B).

In *Circuit City Stores, Inc. v. Mitsubishi Dig. Elecs. Am.*, the court held that, because the payment of the creditor's § 503(b)(9) administrative claim for the value of goods transferred to a debtor in the twenty-day period immediately preceding the commencement of a bankruptcy case was an "otherwise unavoidable transfer" as that term was used in 11 U.S.C.S. § 547(c)(4)(B), the creditor was not entitled to utilize the value of those same goods as the basis for a new value defense under § 547(c)(4). *Circuit City Stores, Inc. v. Mitsubishi Dig. Elecs. Am. (In re Circuit City Stores, Inc.),* 2010 WL 4956022, at *9 (Bankr. E.D. Va. Dec. 1, 2010). The majority indicated that it was not persuasive to grammatically dissect the phrase, "on account of which new value the debtor did not make an otherwise unavoidable transfer," by emphasizing 'make' was drafted in the past tense. However, this Court relies on the ruling in *In re Circuit City Stores* that, "the creditor could succeed under either § 503(b)(9) or § 547(c)(4), but not both." *Id*. at 11.

It is worth noting that the Court in *In re Circuit City Stores, Inc.* relied on the language Congress specified utilizing § 547(c)(4) along with § 503(b)(9) that "Mitsubishi (Creditor) can get credit only once for the goods it supplied to the Debtors in the twenty-day period preceding the Petition Date." *Id.* at *30. The Court recognized the concept of double-dipping, and effectively laid out the concept of the Petition Date as the cut-off for § 547(c)(4) analysis. In this case, we find that the payment under § 503(b)(9) occurred after the Petition Date, unlike in *In re*

Circuit City Stores, Inc.. During the standard course under § 547, we find that the statute of limitations for filing a preference avoidance action in a voluntary case begins to run on the petition date. *In re Friedman's Inc.*, 738 F.3d at 556. If Congress had intended to allow for post-petition transactions to affect the impact on the estate, it is likely that it would have crafted a different statute of limitations. The fact 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. *Id*. 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 and thus disrupt both creditors and to the estate. If Congress had intended to significantly impact the subsequent new value defense when it enacted § 503(b)(9), one would think that there would be at least some discussion of such change in legislative history.

B. By Extending Revolving Credit To Financially Troubled Debtors, Creditors Help Debtor Potentially Avoid Bankruptcy Altogether And Promote Equality Of Distribution Among All Creditors As Policy Allows.

Given the nearly identical policies behind the enactment of § 503(b)(9) and § 547(c)(4), the former should not be interpreted in a manner that would cause harm to trade creditors who support a debtor by reducing their subsequent new value defense that existed prior to its enactment. In *Dewsnup v. Timm*, the 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. *Dewsnup v. Timm*, 502 U.S. 410, 419 (1992). It is important to reward trade creditors who provide new value to a distressed debtor, as such creditors replenish the estate

when it is in extreme financial distress, thereby maximizing its reorganization hopes and minimizing the likelihood that the patient will die on the operating table.

The fact that the trade creditor happens to get paid for such new value pursuant to § 503(b)(9) does not negate the importance of reviving a debtor's business. Forcing a creditor to choose between asserting an administrative expense and preserving its right to assert its full subsequent new value defense would work a disservice on Congress's aforementioned policy goals by "chilling their willingness to do business with troubled entities." *In re Commissary Operations*, 421 B.R. at 879. The inequity of the majority's approach is highlighted by the facts of this very case.

1. § 503(b)(9) Encourages Trade Creditors To Continue To Extend Credit To A Financially Distressed Debtor And Discourages Abuse By Debtors Who Seek To Acquire Goods At A Time When Bankruptcy Is Imminent.

By requiring creditors to choose between guaranteeing an administrative expense or continuing to do business with a 'troubled entity' in essence deprives sellers of goods of the benefits Congress conferred upon them when it enacted § 503(b)(9). The Court in *In re Commissary* established this policy is supported by the fact that when § 503(b)(9) was added, Congress did not amend § 547(c)(4), which was enacted 25 years prior, to include a new subsection reducing new value by the amount of any § 503(b)(9) claim. *In re Commissary Operations*, 421 B.R. at 878. As will be touched upon in the following section, there is nothing in the plain language of § 503(b)(9) or § 547(c)(4) that indicates any Congressional intent to offset the intended benefits that § 503(b)(9) confers upon sellers through a reduction of available new value in defending a preference action.

In this case, Creditor agreed to continue supporting the debtor post-petition by selling additional goods on credit. Further, *In re Commissary* Court reasoned that

> The deliveries benefit the estate . . . regardless of whether the § 503(b)(9) claimants are paid at a later date for those deliveries. Even if the creditor receives a limited post-petition payment on its § 503(b)(9) claim to cover the "value" of the goods, the debtor-in-possession has realized the mark-up profit on the re-sale of the goods (or use of the goods incorporated into a finished product for sale, for a manufacturing or distributor debtor) and has the ability to fill an order to its customers' satisfaction. Meeting and fulfilling the expectation of customers achieves the most important goal of a business entity – to maximize its goodwill.

Id. at 878. Respondent argues that no benefit is brought upon the debtor post-petition, but that is merely no more than a red-hearing to distract the court from the reality of bankruptcy law. § 503(b)(9) is one of those circumstances in the statute where a preference in favor of a subset of creditors is entirely proper. Congress clearly intended to afford special treatment to sellers of goods. Where, as here, the seller supports the debtor's reorganization efforts both prior to and after the petition date, the special treatment is particularly appropriate to discourage debtors from taking advantage of an impending bankruptcy petition.

In *TI Acquisition, LLC v. Southern Polymer, Inc*., the Court reasons that denying a creditor the new value defense when the creditor's claim under § 503(b)(9) is paid in full and is for the same goods for which the creditor seeks new value is the best way to foster the policies behind the new value defense. *TI Acquisition, LLC v. Southern Polymer, Inc. (In re TI Acquisition, LLC),* 429 B.R. 377, 381 (Bankr. N.D. Ga. 2010). Further, the new value defense may encourage the creditor to continue extending credit to a financially troubled entity and the creditor is rewarded with the full payment of its claims. *Id*. at 385. Secondly, they reason that providing a creditor with full payment of its § 503(b)(9) administrative claim and allowing the estate to recover preference payments in full is the best way to promote the equal treatment of creditors because it gives the § 503(b)(9) credit full value for its claim, but only does so one time. *Id*. at 386.. Nevertheless, Respondent in the former case, and this case, ignore the clear intent of Congress that new value advanced by creditors should be available to debtors in the

conduct of their business. Consequently, a debtor's purchase of supplies or payment of employee salaries and other expenses with new value received is the fully anticipated result of a new value advance, even though the immediate effect of such may be to temporarily expend funds otherwise available for distribution. That new value might be routed directly from a preferred creditor to a third party on behalf and for the benefit of a debtor, rather than to the debtor first, does not alter the fact that the estate is augmented, albeit indirectly, in a manner contemplated by the language of § 547(c)(4).

2. § 547(c)(4) Enables A Creditor Who Continues To Extend Credit To The Debtor, Perhaps In Implicit Reliance On Prior Payments, To Prevent Increasing Their Bankruptcy Loss.

Respondent argues that allowing Creditor to "double dip"—contrary to policies underlying bankruptcy law—by asserting a new value defense even though it did not replenish the Debtor's estate. Once again, this is no more than a red hearing to distract the court. In effect, by permitting trustee to avoid pre-bankruptcy transfers that occur within a short period before bankruptcy, creditors are discouraged from racing to the courthouse to dismember the debtor during their slide into bankruptcy. The protection afforded to the debtor often enables them to work their way out of a difficult financial situation through cooperation with all of their creditors. Further, the preference provisions facilitate the prime bankruptcy policy of equality of distribution among creditors of the debtor. Respondent’s reference to a creditor's "double dipping" is misleading because it implies the creditor is receiving payment for goods or services that were never provided, or that the creditor is being paid twice, which, in fact, is not true.

Additionally, Respondent urges if post-petition payments by a debtor are not considered in the Court's analysis of a creditor's preference liability, the creditor will receive a "windfall" and will be unjustly favored over other creditors. Respondent argues, similar to *Friedman*

Respondent, that the debtor's estate is not replenished when the debtor makes a transfer to the creditor after the petition date, and that the creditor unfairly receives double payment, once post-petition, and once indirectly as an offset against its preference liability to the estate. *In re Friedman's Inc.*, 738 F.3d at 552. Nevertheless, it is clear 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. The possibility that a debtor may pay a creditor's § 503(b)(9) claim post-petition does not negate the value represented by the claim that the creditor provided to the debtor. The deliveries benefit the estate regardless of whether the § 503(b)(9) claimants are paid at a later date for those deliveries. A ruling as the Respondent suggests would be in direct contravention to one of the chief policy goals underpinning the preference statute.

C. Despite The Majority Concluding That An Administrative Expense Under § 503(b)(9) Is An Otherwise Unavoidable Transfer, The Plain Meaning Of § 547(c)(4) Warrants The Preference Analysis To Close At The Petition Date.

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 Friedman's Inc.*, 738 F.3d 554 (quoting *In re Price*, 370 F.3d 362 at 369). The plain language of § 547 closes the preference window at the petition, limiting the § 547(c)(4) defense to new value supplied and payments made before the debtor crosses into bankruptcy. In *In re Bellanca Aircraft Corp*, the Eighth Circuit Court of Appeals held that post-petition goods or services provided to a debtor in possession do not qualify as "new value" for purposes of § 547(c)(4): " 'for the benefit of the debtor' implies 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." *In re Bellanca Aircraft Corp*, 850 F.2d at 1283. The filing of a bankruptcy petition is understood to be a

fundamental demarcation point between two entities: the debtor and the trustee/debtor in possession. Respondent urges the court to abide by the Supreme Court who reasoned, "when the statue'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). While Respondent agrees that § 547(c)(4)'s double negative causes it to be somewhat complicated, it is not necessarily an ambiguous one, as we all find. Rather, shifting our focus away from the double negative with § 547(c)(4), the plain meaning of debtor should narrow the court's application to only pre-petition transfers. Therefore, any comprehensive analysis under § 547(c)(4) should conclude at the petition date.

1. Congress Demonstrated The Distinction Between Debtor and Trustee, Or Debtor In Possession, Within § 547 That Payments Made Post-Petition Are By The Trustee And Not The Debtor.

Congress has demonstrated that it knew how to distinguish between the "debtor" and a "trustee" in § 547(a). The majority opinion relies on the fact that Congress "does not, one might say, hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457. 468 (2001). Within § 547(a) it defines "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). To interpret the term "debtor" in § 547(c)(4)(b) to include the trustee would render the reference to "the debtor or the trustee" in the definition of "new value" redundant. *Hibbs v. Winn*, 542 U.S. 88, 101 (2004).

The court in *In re Phoenix Restaurant Group Inc.* found that no case decided under Section 547(c)(4) that permitted a transferee to successfully defend an action for the recovery of a preference based upon a subsequent advance that was made post-petition. *In re Phoenix Rest. Grp., Inc*, 317 B.R. 498 (citing *Schwinn Plan Comm. v. AFS Cycle & Co. Ltd. ,* 205 B.R. 557

(Bankr.N.D.Ill.1997)). The plain language of § 547 closes the preference window at the petition, limiting the § 547(c)(4) defense to new value supplied and payments made before the debtor crosses into bankruptcy, e.g. prior to the trustee taking over the estate. Noting that the purpose of 11 U.S.C. § 547 is to level the playing field for creditors that continue to do business with a financially troubled company, the Court in *Kaye v. Accord Mfg., Inc.* found that, "these considerations change when the petition is filed and the debtor becomes a bankruptcy estate under the administration of the bankruptcy court and subject to the scrutiny of creditors, committees, the U.S. Trustee, etc." *In re Murray, Inc.*, 2007 WL 5595447, at *4.

Respondent appeals to the majority that broadly looking at the term “transfer” includes a payment to satisfy an administrative expense under § 503(b)(9), even if the trustee makes the transfer. However, Respondent’s “plain” language analysis should fall short. Because the trustee convinced the Court that Creditor was so critical to the operation of the Debtor's business and the company's reorganization efforts, special treatment was carved out for this particular creditors. Now the Trustee would undo what the Court approved by penalizing the Creditor for accepting the critical vendor payment and continuing to do business with a debtor in bankruptcy. The mixed message that such a ruling would send for future bankruptcies is problematic, and the harm that could come to future debtors from this approach is of great concern to the Court. Of course, the Trustee would not have the ability to raise this issue had Creditor simply ceased providing goods to the Debtor on credit prior to the Petition Date.

However, the Court in *In re TI Acquisition, LLC* found otherwise. The Court found that by analyzing the contextual structure of the Code, along with the plain meaning behind § 503(b), § 503(b)(9) joins §§ 503(b)(3)(A), 503(b)(3)(E) and 503(b)(4) in describing pre-petition expenses that are to be accorded administrative expense priority, even though most of the other

paragraphs in § 503(b) are expenses incurred by the debtor post-petition. *In re TI Acquisition, LLC*, 429 B.R. at 380. The Court by looking at the plain meaning of § 503(b)(9) related the section to reclamation claims reasoning that goods subject to a reclamation claim are returned to the creditor, the estate is not enhanced by those goods; similarly, once a creditor has been given an allowed § 503(b)(9) administrative claim and the claim has been paid (or, as here, reserved for), it is clear that the estate was not enhanced by the "new value." *Id*. at 382. The reasoning behind this decision ignores the benefit to debtors and the plain meaning of reclamation claims.

The major distinction between § 503(b)(9) claims and reclamation claims is that § 503(b)(9) claims are, by nature, post-petition claims, whereas a reclamation claim may exist under state law whenever a debtor is insolvent, regardless of bankruptcy filings pre or post-petition. In effect, Respondent attempts to delude the positive effect of enhancing new value to the otherwise defeated debtor post-petition. Additionally, the facts of *In re TI Acquisition, LLC* were similar, should be starkly contrasted from this case. In the aforementioned case, while the creditor's claim was pending, the debtor filed an adversary proceeding against the creditor, seeking a determination that certain transfers were avoidable under § 547(b), and the creditor raised a "new value" defense under § 547(c)(4). *Id*. at 379. The court found that the creditor was not entitled to use the new value defense because its claim under § 503(b)(9) had already been allowed and was fully funded. The difference, e.g. ordering of claims, is what sets this case apart. Creditor in the current case attempts to utilize § 547(c)(4) defense for a pre-petition preference payment by the Debtor, while utilizing § 503(b)(9) for a subsequent new value advancement of credit post-petition. While Creditor is being compensated twice, the Debtor is being, and has already been, compensated for each payment to Creditor. The plain meaning of each section permits Creditor to utilize the law as Congress had deemed fit, in order to promote the Debtor’s

business and provide amble opportunities for other creditors to be compensated further given Debtor's prolonged business venture. As reasoned in *In re Commissary Operations, Inc.*, when a creditor ships goods pre-petition, the creditor never knows whether a bankruptcy will be filed within 20 days of receipt of the shipment. *Id*. at 385. The creditor cannot, therefore, know that it may be able to assert a § 503(b)(9) claim. From the creditor's pre-petition perspective, there is no difference in incentive if the new value defense the creditor may have relied on is lost as a result of a § 503(b)(9) claim. *Id*. at 386. Consequently, by reading the statutes plainly, as intended by Congress, when utilized in the way Creditor has proven, a creditor has not "double-dipped" as Respondent suggests, but merely utilizes the law as equity sees fit.

II. Pursuant to 11 U.S.C. § 365(d)(3), the Trustee must pay Creditor The 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.

11 U.S.C. § 365(d)(3) asserts 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." 11 U.S.C. § 365(d)(3). Generally, the courts agree § 365(d)(3) provides that the trustee must "perform" pending rejection. However, this is the extent of their consensus; historically, the courts diverge regarding the "proper" approach for interpreting § 365(d)(3). Some courts apply the proration approach and construe §365(d)(3) to mean the trustee's obligations that arise post-petition but pre-rejection should not extend further than the rejection date. *In re NETtel Corp., Inc*., 289 B.R. at 491-92. Conversely, other courts apply the billing date approach. Under the billing date approach, the Trustee must perform the debtor's obligations according to the lease notwithstanding rejection. *In re Koenig Sporting Goods, Inc.*, 203 F.3d at 989. Despite this divide, the billing date approach clearly prevails as the appropriate method for interpreting § 365(d)(3).

Under the billing date approach, the Trustee must perform the debtor's obligations

according to the lease notwithstanding rejection. The billing date approach is appropriate since the plain meaning of § 365(d)(3) is clear and unambiguous. *See Bullock's, Inc. v. Lakewood Mall Shopping Ctr. (In re R.H. Macy & Co., Inc.)*, 1994 WL 482948 (S.D.N.Y. Feb. 23, 1994) (Sotomayor, J.); *Centerpoint Props. v. Montgomery Ward Holding Corp. (In re Montgomery Ward Holding Corp.)*, 268 F.3d 205 (3d Cir. 2001); *In re Koenig Sporting Goods, Inc.*, 203 F.3d at 439. Furthermore, the context of Section 365(d)(3) and equity considerations support adopting the billing date approach. *See HA-LO Indus., Inc. v. Centerpoint Props. Tr.*, 342 F.3d 794, 799 (7th Cir. 2003); *In re Montgomery Ward Holding Corp.*, 268 F.3d at 205; *In re Koenig Sporting Goods, Inc.*, 203 F.3d at 439. For these reasons, the billing date approach is the appropriate method for interpreting § 365(d)(3) in the case at hand. Applying this approach, it is clear that the Trustee owes Touch of Grey rent for the entire month of May.

Courts that adopt the proration approach attempt to justify their approach by claiming that § 365(d)(3) is ambiguous and therefore interpreters should consider the statute's context. *Child World, Inc. v. Campbell/Massachusetts Trust (In re Child World, Inc.)*, 161 B.R. 571, 574-75 (S.D.N.Y. 1993) (collecting cases). These Courts attempt to further rationalize that proration is supported by the context of other Bankruptcy Code provisions and public policy. *In re Handy Andy Home Improvement Ctrs., Inc*., 144 F.3d, 1125 (7th Cir. 1998); *In re NETtel Corp., Inc*., 289 B.R. 486, 491-92 (Bankr. D.D.C. 2002) However, this argument approach is extremely weak when compared with the logic for applying the billing date approach.

For the foregoing reasons, § 365(d)(3) suggests the Trustee must pay Touch of Grey the rent due prior to rejection but allocable after rejection.

A. The Plain Language Of § 365(d)(3) Is Clear And Unambiguous.

The text in § 365(d)(3) clearly and unambiguously requires the Trustee to pay Touch of Grey rent for the entire month of May 2020. To properly interpret a statute, the Court must consult "the language of the statute itself" since their sole function is to enforce statutes "according to its terms." *U.S. v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989) (citation omitted). Notably, when the words of a statute are unambiguous, then "the judicial inquiry is complete." *HA-LO Indus., Inc.*, 342 F.3d at 797 (quoting *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253–54, 112 S.Ct. 1146, 117 L.Ed.2d 391 (1992). In its relevant part, § 365(d)(3) states that "the trustee … timely perform all the obligations … arising from and after the order for relief under any unexpired lease of nonresidential real property until such lease is assumed or rejected. 11 U.S.C. § 365(d)(3).

From solely reading the plain language in § 365(d)(3), Congress's intent is clear; Congress clearly intends for the trustee to "perform the lease in accordance with its terms." *In re Montgomery Ward Holding Corp.*, 268 F.3d at 209. Furthermore, Congress unequivocally compels the trustee to perform "all obligations" that arise before the rejection of the lease. In the case at hand, the lease's terms required that the Trustee pay monthly rent "in advance on the first day of each month." Thus, the Trustee's obligation to pay rent for the entire month of May 2020 arose on May 1st. This obligation arose prior to the rejection date (May 5th). Following the billing approach interpretation of § 365(d)(3), it is indisputable that the Trustee in the case at hand must pay rent for all of May 2020.

The Sixth Circuit Court of Appeals in *In re Koenig Sporting, Inc.* directly supports our interpretation of § 365(d)(3). In *In re Koenig Sporting, Inc*, the Court was asked to determine whether § 365(d)(3) requires that a debtor pay rent for the entire month when the lease required that the debtor pay rent on December 1st and the debtor rejected the lease on December 2nd. *In*

re Koenig Sporting Goods, Inc., 203 F.3d at 989. The Court applied the billing date approach and accordingly held that the lessor was entitled to the full month's rent. *Id.* The Court explained that the billing date approach is the proper method to analyze the Section since Section 365(d)(3) is "unambiguous." *Id.*

The Court's decision in *Koenig* is highly relevant since its facts are nearly identical to the circumstances surrounding our case. In both cases, the "obligation" specified in the lease is the same; in each case, the lease requires that the trustee pay a monthly nonresidential real property Lease. *Id.* Additionally, the obligation to pay the monthly rent in both cases arose post-petition and pre-rejection; in *Koenig*, the property rent was due on December 1st, and the trustee rejected the lease and vacated the property on December 2nd. *Id.* Similarly, in our case, the Trustee rejected the lease on May 5th when the lease required that the Trustee pay rent on May 1st. Since the circumstances in our case are identical to those in *Koenig*, we must similarly conclude that the "obligation" to pay rent pursuant to Section 365(d)(3) is also unambiguous.

Although the plain meaning of § 365(d)(3) clearly and unequivocally compels the Trustee to perform all obligations that arise before rejection but are allocable after rejection, courts that support proration attempt to find ambiguity in this very clear statute. *In re Ames Dep't Stores, Inc.*, 306 B.R. 43 (Bankr. S.D.N.Y. 2004) (Gerber, J.). However, the argument that §365(d)(3) is ambiguous is void since courts presented with facts similar to ours concluded that § 365(d)(3) is clear and unambiguous.

1. The Word "Obligation" As Indicated In § 365(d)(3) Is Clear and Unambiguous.

The use of "obligation" in § 365(d)(3) clearly and unambiguously indicates that the trustee must pay rent for the entirety of May 2020. § 365(d)(3) states that the Trustee must "timely perform all the *obligations*" that arise pursuant to "an unexpired lease of a

nonresidential property prior to rejection." 11 U.S.C. § 365(d)(3). As defined in Black's Law Dictionary, "obligation" means that one has a "legal duty to do something." BLACK'S LAW DICTIONARY 491 (2d ed. 2001). Traditionally, statues are created in accordance with their "ordinary, contemporary common meaning." *Pioneer Inv. Serv. Co. v. Brunswick Assoc. Ltd. P'ship*, 507 U.S. 380, 388 (1993) (citation omitted). Following this approach, § 365(d)(3) states that the trustee has a "legal duty" to pay rent for the entirety of May 2020 because the entire month's rent payment was due before rejection.

Notably, courts agree that the meaning of "obligation" in Section 365(d)(3) clearly and unambiguously refers to its ordinary meaning. In *In re R.H. Macy & Co., Inc.*, the Court assessed the meaning of "obligation" as mentioned in § 365(d)(3). *In re R.H. Macy & Co., Inc.)*, 1994 WL 482948 at *12. Ultimately, the Court refused to create ambiguity where none existed and held that "the word 'obligation' in § 365(d)(3) "clearly and unambiguously" referred to its ordinary meaning. *Id.* Both our case and *In re R.H. Macy & Co., Inc.* address whether Section 365(d)(3) requires the lessee to comply with the terms of the lease following Chapter 11 bankruptcy; In *R.H. Macy & Co., Inc.*, the issue is whether § 365(d)(3) required the trustee to make the entire payment called for in the lease. *Id.* Similarly, in our case, the issue is whether the Trustee is required to make the month's entire rent payment as specified in the lease. Thus, the court's interpretation of "obligation" in *R.H. Macy & Co., Inc.* is applicable to our case.

The Court in *R.H. Macy & Co., Inc.* was not alone in concluding that "obligation" in Section 365(d)(3) refers to a legal duty. In *In re Montgomery Ward Holding Corp.*, the Third Circuit Court of Appeals assessed what Congress meant by "obligations of the debtor arising under a lease after the order of relief." *In re Montgomery Ward Holding Corp.,* 268 F.3d at 206. The Court concluded that "obligation" should be interpreted in accordance with its ordinary

meaning since "in the context of a lease contract" the ordinary meaning was the most straightforward understanding of the term. *Id.* at 209.

Since the circumstances in *Montgomery* are similar to those in the present case, the term "obligation" should be construed according to its ordinary meaning. In our case, Touch of Grey requested the Trustee pay rent for the entire month of May when they rejected the lease on May 5th. Similarly, in *Montgomery*, the lessor demanded the trustee pay taxes for the entire year even though Montgomery rejected the lease several months into the year. *Id* at 207.

Courts that support proration attempt to argue this approach is necessary since "obligation," as mentioned in § 365(d)(3), means "claim" (instead of legal duty pursuant to the ordinary meaning). However, Congress chose to include "obligation" in Section 365(d)(3) rather than the word "claim." If Congress "wanted to use the concept of a claim" in this statute, they "knew how to do so." *In re R.H. Macy & Co., Inc.)*, 1994 WL 482948 at *12. Moreover, previous courts have determined that "claim" was the proper meaning of obligation under entirely different circumstances. For example, in *In re Child World, Inc.*, the court concludes that "obligation" means "claim." *In re Child World, Inc.*, 161 B.R. 574-75. However, the timing of the "obligation" is very different in each case. In *Child World*, the Court assesses whether the lessor should be reimbursed for real estate taxes that arose prepetition. *Id.* Contrastingly, in our case, the issue is whether the Trustee is required to pay an entire month's rent that arose post-petition and pre-rejection.

To conclude, § 365(d)(3) clearly and unambiguously requires the Trustee to pay Touch of Grey rent for the entire month of May.

B. The Context Of § 365(d)(3) Makes It Clear That Trustees Must Pay Rent That Is Due Prior To The Rejection But Allocable To The Period After Rejection

Although § 365(d)(3) is clear on its face, it is still a "fundamental cannon of statutory construction" to read statutes in their context to understand their "place in the statutory scheme." *Roberts v. Sea-Land Servs., Inc*., 566 U.S. 93, 101 (2012). It is appropriate to analyze § 365(d)(3) in the context of its legislative history of the Bankruptcy Code since this history is detailed and extensive. I*n re Montgomery Ward Holding Corp.,* 268 F.3d at 210. Furthermore, it is not necessary to analyze 365(d)(3) in the context of other sections in the Bankruptcy Code; courts that have analyzed 365(d)(3) in this context opted to do so pursuant to facts entirely different from those in our case. *In re Handy Andy Home Improvement Ctrs., Inc*., 144 F.3d at 1128. Upon conducting this contextual analysis, it is evident that the billing approach is the best method for interpreting § 365(d)(3).

1. The Legislative History of § 365(d)(3) Supports The Billing Approach.

The legislative history of the Bankruptcy Code unequivocally supports interpreting § 365(d)(3) to mean that the trustee must perform the debtor's obligations in accordance with the lease notwithstanding the rejection. When Congress enacted the Code in 1978, it did not contain 365(d)(3). The Code did include § 365(d)(2), which stated that the debtor had until confirmation of a plan to decide whether to assume or reject an unexpired lease. 11 U.S.C. § 365(d)(2). In addition, the Code included § 503(b)(1)(A), which provided that rent due to a landlord post-petition was an administrative expense. 11 U.S.C. § 503(b)(1)(A).

Sections 365(d)(2) and 503(b)(1)(A) placed many administrative burdens on landlords; Consequently, these Sections made "collecting post-petition lease obligations … an unsatisfactory arrangement." I*n re Montgomery Ward Holding Corp.,* 268 F.3d at 210 (citing Joshua Fruchter, *To Bind or Not to Bind—Bankruptcy Code § 365(d)(3): Statutory Minefield,* 68 Am. Bankr. L.J. 437, 437 (1994)). Congress recognized the disadvantages that these provisions

posed to landlords and thus amended the Code in 1984 to provide relief. Specifically, to "enhance the treatment" of nonresidential real property lessors, Congress enacted § 365(d)(3) and § 365(d)(4). *Id.* In its relevant part, 365(d)(3) states that "the trustee … timely perform all the obligations … arising from and after the order for relief under any unexpired lease of nonresidential real property, until such lease is assumed or rejected." 11 U.S.C. § 365(d)(3). Additionally, § 365(d)(4) provides that a nonresidential real property lease is determined rejected if it is not assumed or rejected within 120 days after the petition date. 11 U.S.C. § 365(d)(4).

Since the Code was amended in response to the difficulty that landlords faced with "collecting post-petition lease obligations," it is appropriate to conclude that Congress intended for courts to interpret § 365(d)(3) such that trustees will perform their lease obligations notwithstanding rejection. I*n re Montgomery Ward Holding Corp.,* 268 F.3d at 210. Notably, Senator Orrin Hatch, who was a conferee in the original act, supports our position:

> Tenants often must increase their common area charge payments to compensate for the trustee's failure to make the required payments 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 insure 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. (1984), *as reprinted in* 1984 U.S.C.C.A.N. 576, 598-99.

Additionally, the Third Circuit Court of Appeals considered the legislative history, and in turn, supported interpreting § 365(d)(3) under the billing approach. In *re Montgomery Ward Holding Corp,* the Court asked whether § 365(d)(3) required the trustee to make the entire payment required in the lease when the payment was due post-petition but pre-rejection. I*n re Montgomery Ward Holding Corp.,* 268 F.3d at 207. In its analysis, the Court consulted the legislative history of Section 365(d)(3). *Id.* at 208. The Court determined the legislative history clearly depicts Congress amended the Code and added §365(d)(3) to resolve the "problem" that

landlords faced regarding non-residential property. *Id.* Accordingly, the Court applied the billing date approach and held that the Trustee was required to pay the rent due post-rejection. *Id.*

The court's legislative analysis and holding in *Montgomery* are pertinent given the continuity of facts between *Montgomery* and our case. In *Montgomery,* the debtor's obligation that was specified in the unexpired non-residential property arose post-petition and pre-rejection. *Id.* at 211. Analogously, in our case, the trustee's obligation to pay May's rent pursuant to the lease agreement arose following the petition date but proceeded the rejection date.

Courts that support proration argue that the Code's legislative history does not support the billing date approach; these courts allege that Congress only wanted to ensure the landlord received its "current payment" for the "current services" provided when they amended the Code. However, the cases where courts concluded such address an entirely different set of facts from our case at hand. For example, in *In re Handy Andy Home Improvement Ctrs. Inc.,* the Court held the legislative history of §365(d)(3) supported the proration approach. *In re Handy Andy Home Improvement Ctrs., Inc*., 144 F.3d at 1128. However, the court addressed circumstances where the trustee's non-rent expenses were accrued partly pre-petition but were not billed until the post-petition and pre-rejection period. *Id.* Contrastingly, in our case, the trustee's rent was allocable post-rejection but billed in the post-petition and pre-rejection time period. Accordingly, the findings in *In re Handy Andy Home Improvement Ctrs. Inc.* are inapplicable to our case.

2. Reading § 365(d)(3) In Context With Other Sections Of The Bankruptcy Code Is Not Pertinent To Determining The Meaning Of The Statute.

Given the unique circumstances in our case, it is unnecessary to read §365(d)(3) in the context of other Bankruptcy Code sections. Courts that support proration argue that § 365(d)(3) should be interpreted in the context of § 365(g), § 502(b)(6), and § 502(g) since these sections note unperformed obligations after the rejection date are treated as unsecured claims rather than

administrative expenses. *In re NETtel Corp., Inc*., 289 B.R. 486, 491-92 (Bankr. D.D.C. 2002); *accord Mission Prod. Holdings*, 139 S. Ct. at 1665. Courts that adopt this perspective attempt to argue § 365(d)(3) indicates the debtor can escape its obligation under the lease post-rejection.

However, it is crucial to note courts that interpreted § 365(d)(3) in the context of other statutes were presented with entirely different circumstances. In *In re NETtel Corp., Inc.* (where the court supposed proration approach based on the context of the statute), the Trustee informed the landlord that they intended to reject the lease on October 31, 2000. *In re NETtel Corp., Inc*., 289 B.R. 488. However, the Trustee remained on the premises until December 15, 2000, which was almost two months after rejection. *Id.* Accordingly, the landlord sought payment for rent for November and December. *Id.* Contrastingly, the Trustee in our case did not remain on the property during the time period the rent was requested for; the Trustee owed rent for all of May 2020 and vacated the premises on May 5, 2020. Given that the two scenarios are entirely different, the court's finding in *In re NETtel Corp., Inc*., is inapplicable to our case.

It is crucial to interpret §365(d)(3) in its legislative context rather than in the context of other Bankruptcy Code provisions. In the context of its legislative history, § 365(d)(3) indicates that the Trustee has an obligation to pay rent for the unexpired non-residential property lease that arose prior to rejection but is allocable post-rejection.

C. Interpreting § 365(d)(3) Under The Billing Date Approach Supports Equity

The billing date approach is the appropriate mechanism for interpreting § 365(d)(3) since this perspective supports equity. When a trustee rejects the lease they are in complete control of this process and have the power to decide when to inform the landlord of rejection. *In re Koenig Sporting Goods, Inc.*, 203 F.3d at 800; *HA-LO Indus., Inc. v. Centerpoint Props. Tr.*, 342 F.3d 800. Thus, in the present case, the Trustee could have easily rejected the lease before payment

was due. Contrastingly, landlords (such as Touch of Grey) have no authority over the lease rejection process. *Id.* Interpreting § 365(d)(3) under the billing date approach ensures landlords are not left in a difficult financial position when a trustee fails to timely reject a lease. *Id.*

Several courts recognize that landlords are powerless in the rejection process and thus apply the billing date approach to promote equity. *In re Koenig Sporting Goods, Inc.,* 203 F.3d at 800; *HA-LO Indus., Inc. v. Centerpoint Props. Tr.,* 342 F.3d 800. In *HA-LO Industries v. Centerpoint,* the trustee rejected a lease on November 2nd when its obligation to pay rent for the entire month of November arose on November 1st. *HA-LO Indus., Inc. v. Centerpoint Props. Tr.*, 342 F.3d 797. The Court deemed that the billing date was the proper mechanism for analyzing § 365(d)(3) since this method was equitable; the court noted that the trustee could easily have rejected the lease earlier and would not have been required to pay rent at all. *Id.* at 99.

Furthermore, in *In re Koenig Sporting Goods, Inc.*, the debtor's lease required that they rent for the entire month of December on December 1st. *In re Koenig Sporting Goods, Inc.,* 203 F.3d at 988. The debtor rejected the lease on December 2nd. *Id.* The court applied the billing date approach and held that the lessor was entitled to the full month's rent. *Id.* at 990. The court reasoned this was equitable since the debtor alone had control over the obligation to pay rent and elected to reject the lease one day after the rent was due. *Id.* at 989.

The application of the billing date approach in *HA-LO Indus., Inc.* and *In re Koenig Sporting Goods, Inc.* is crucial since the circumstances in our case are identical to those in the precedent cases; in all three cases, the Trustee rejected an unexpired lease on a non-residential real property several days after the rent was due for the entire month. In *HA-LO Indus., Inc.,* the Trustee rejected the lease on November 2nd when they were required to pay November's rent on November 1st. *HA-LO Indus., Inc. v. Centerpoint Props. Tr.*, 342 F.3d 796. Furthermore, *In re*

Koenig Sporting Goods, Inc., rent was due on December 1st and the trustee rejected the lease and vacated the property on December 2nd. *In re Koenig Sporting Goods, Inc.*, 203 F.3d at 988. Similarly, in our case, the Trustee rejected the unexpired lease on nonresidential real property on May 5th when May's rent was due on May 1st. Given these similarities, the billing date approach is the proper method for analyzing § 365(d)(3) since it promotes equity in unfair circumstances.

Courts that support the proration approach allege that the billing date approach is unfair since it results in a "windfall" for lessors. *In re Stone Barn Manhattan LLC*, 398 B.R. 359, 368 (Bankr. S.D.N.Y. 2008). However, this is not the case; under the billing date approach, the lessor receives "that to which it is entitled under Section 365(d)(3) and the debtor is obligated to pay under the lease." *In re Koenig Sporting Goods, Inc.*, 203 F.3d at 988. Furthermore, even if a debtor pays the entire month's rent, the landlord still does not receive compensation for the rest of the lease period where they will not receive income from the debtor. Thus, this argument that the billing approach results in a windfall is invalid. Equity requires the court to interpret § 365(d)(3) to mean that the Trustee must pay rent for the entire month of May.

CONCLUSION

The Thirteenth Circuit Court of Appeals incorrectly affirmed the bankruptcy court's decision because, in doing so, it misapplied existing law, as (1) 11 U.S.C. § 503(b)(9) did not limit the use of exerting a 11 U.S.C. § 547(c)(4) defense post-petition, and (2) 11 U.S.C. § 365(d)(3) did not prevent a trustee from performing all obligations that arise prior to rejection. Thus, this Court should reverse the holding of the Thirteenth Circuit Court of Appeals.

Respectfully submitted,

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