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.

Brief for Respondent

Team Number 4
Counsel for Respondent

QUESTIONS PRESENTED

I. Where a court authorizes a creditor to be paid in full post-petition under section 503(b)(9) for goods supplied to the debtor pre-petition, may the creditor use that same value to offset the preference liability?

II. Where a lease provides for payment on the first of the month and the debtor surrenders the premises to the landlord after the first but before the end of the month, under section 365(d)(3), must the trustee pay the full month's rent?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

United States Supreme Court Cases

Federal Court of Appeals Cases

Federal District Court Cases

Statutes

Other Authorities

OPINIONS BELOW

The Thirteenth Circuit Court of Appeals' decision is available at No. 20-0803 and reprinted at Record 2. Both the bankruptcy court and the Bankruptcy Appellate Panel for the Thirteenth Circuit decided in favor of Terrapin Station, LLC. On appeal, the United States Court of Appeals for the Thirteenth Circuit affirmed.

STATEMENT OF JURISDICTION

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

PERTINENT STATUTORY PROVISIONS

This action implicates statutory construction of certain provisions of Title 11 of the United States Code.

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

> **(d)(3)(A)** The trustee shall timely perform all the obligations of the debtor, except those specified in section 365(b)(2), arising from and after the order for relief under any unexpired lease of nonresidential real property, until such lease is assumed or rejected, notwithstanding section 503(b)(1) of this title. The court may extend, for cause, the time for performance of any such obligation that arises within 60 days after the date of the order for relief, but the time for performance shall not be extended beyond such 60-day period. 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. Beginning of the Partnership

In 2005, William Tell founded Terrapin Station, LLC ("Debtor"), to establish a coffeehouse which operated independently for several years thereafter. (R. 3.) Touch of Grey Roasters, Inc. ("Touch of Grey") is a coffee company with over 1,900 corporate-owned and franchised stores globally. (*Id.*) In 2017, Touch of Grey opened a series of new "neighborhood coffeehouses" that it franchised with owners of existing independent coffeehouses. (R. 4.) These independent stores sold "Dark Star" products, and the offerings expanded from coffee to a larger food menu and alcoholic beverages at night. (*Id.*) Touch of Grey negotiated with Tell in the fall of 2017 to franchise a neighborhood coffeehouse in the town of Terrapin, Moot. (*Id.*) Touch of Grey agreed to purchase and lease to Debtor a warehouse space in the downtown entertainment district of Terrapin. (*Id.*) On July 1, 2018, they entered into a lease agreement ("Lease"), with Debtor as tenant and Touch of Grey as landlord. (*Id.*) This twenty-year triple-net lease required Debtor to pay $25,000 in monthly rent, with the rent being "due in advance on the first day of each month." (*Id.*) On the same day, they entered into a franchise agreement, where Debtor, as franchisee, would exclusively sell "Dark Star" branded products purchased from Touch of Grey, the franchisor. (*Id.*)

II. Difficult Times for Terrapin Station Coffeehouse

On December 1, 2018, the new "Terrapin Station Coffeehouse" opened, and Debtor's original coffeehouse simultaneously closed. (R. 5.) The new location, however, suffered several difficulties from the start, including lack of community interest, burdening Debtor with lower-than-expected sales. (*Id.*) These setbacks, combined with above-market rent under the Lease, caused Debtor to struggle throughout 2019. (*Id.*) Debtor was unable to pay its debts as early as September of 2019, and by November 1, Debtor owed Touch of Grey over $700,000 for Dark Star-

branded goods that it had purchased. (*Id.*) On December 5, 2019, Touch of Grey sent Debtor a notice of default, threatening termination of the franchise agreement. (*Id.*) A forbearance agreement was entered into on December 7 where Touch of Grey agreed to forbear termination of the franchise agreement. (*Id.*) In exchange for the forbearance, Touch of Grey wanted (i) a $250,000 payment on account of the outstanding invoices for Dark Star products, (ii) Debtor to reaffirm its obligations under the Lease, and (iii) Debtor to release any and all claims it had against Touch of Grey. (*Id.*) On December 7, Debtor made the $250,000 payment to Touch of Grey. (*Id.*)

Debtor purchased an additional $200,000 worth of Dark Star products from Touch of Grey on credit, as set forth on an invoice ("Invoice") dated December 18, 2019. (*Id.*) Tell signed a personal guarantee with respect to the Invoice, and Debtor received the goods identified on the Invoice on December 21, 2019. (R. 5-6.)

III. Filing for Bankruptcy and Lease Rejection

On January 5, 2020 ("Petition Date"), Debtor filed for relief under chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the District of Moot. (R. 6.) On the Petition Date, Debtor owed Touch of Grey $650,000 (including the amount due under the Invoice) for goods purchased. (*Id.*) Debtor, however, was current on its obligations to Touch of Grey under the Lease. (*Id.*) Debtor, having no secured debt, owed over $500,000 to other unsecured creditors, some of whom refused to provide Debtor with goods and services on credit. (*Id.*) Debtor filed several "first day" motions along with the petition, supported by the declaration by Tell that he intended to reorganize Debtor and return to traditional coffeehouse operations and hours. (*Id.*) Tell further stated he hoped to find a sub-lessee for a portion of the premises in order to reduce Debtor's rent burden. (*Id.*) Debtor continued to sell Dark Star products, as required under the franchise agreement. (*Id.*) Counsel for Touch of Grey stated at the first day hearings that her client had

concerns about Debtor's reorganization strategy but that it was "engaged in ongoing, good faith discussions with Debtor about a path forward." (*Id.*) Debtor argued that its continued relationship with Touch of Grey was critical to reorganization and that it needed to make the payment because Touch of Grey was refusing to sell goods to Debtor post-petition without the payment. (*Id.*) Days after the bankruptcy court awarded Touch of Grey an administrative expense under section 503(b)(9), Debtor made a $200,000 payment to Touch of Grey. (*Id.*) Touch of Grey then resumed selling goods on credit, which allowed Debtor to continue to operate. (R. 7.)

Debtor's reorganization was unsuccessful. (*Id.*) Additionally, Debtor had to temporarily close in March 2020 due to the COVID-19 pandemic but reopened in April. (*Id.*) On May 5, 2020, Debtor permanently ceased operations because customers did not return. (*Id.*) Debtor vacated the premises and returned its keys to Touch of Grey that same day. (*Id.*)

Pursuant to section 365(a), Debtor filed a motion on May 6, 2020, to reject the Lease and franchise agreement. (*Id.*) On May 8, Touch of Grey filed a motion to compel payment of the May rent, which was due May 1st. (*Id.*) While Touch of Grey did not oppose Debtor's May 5th rejection of the lease, Touch of Grey argued it was entitled to full payment of the May rent. (R. 7-8.)

IV. Conversion to Chapter 7 Bankruptcy Case

On May 29, 2020, Debtor's case was converted to a chapter 7 case pursuant to section 1112(a) as no parties objected to Debtor's request for this change. (R. 8.) An order converting the case and appointing Casey Jones ("Trustee") as the chapter 7 trustee for Debtor's estate was entered. (*Id.*) The bankruptcy court also granted Debtor's motion to reject the Lease and the franchise agreement effective as of May 5, 2020. (*Id.*) The court requested additional briefing on Touch of Grey's request for payment of the May rent. (*Id.*) Trustee objected to Touch of Grey's motion to compel payment and further commenced an adversary proceeding that sought to avoid

and recover the $250,000 payment Debtor had made to Touch of Grey as a preferential transfer pursuant to sections 547(b) and 550(a). (*Id.*) Touch of Grey answered with the affirmative defense that it was entitled to reduce any preference exposure by the $200,000 in goods sold to Debtor on the Invoice pursuant to section 547(c)(4). (*Id.*)

The mediation attempt between the parties was unsuccessful. (*Id.*) On July 23, 2020, the parties decided to file cross-motions for summary judgment because the subsequent new value defense was a purely legal defense. (R. 9.) The bankruptcy court ruled in favor of Trustee on both the subsequent new value issue and Touch of Grey's request for payment of the May 2020 rent. (*Id.*) Concluding that section 365(d)(3) only required Debtor to pay rent for the five days that it had occupied the premises before rejection, the court awarded an administrative expense of $4,032.26 instead of the full $25,000. (*Id.*) Further, in the adversary proceeding, the bankruptcy court granted summary judgment to Trustee. (*Id.*) The court held that the value of the goods reflected on the Invoice could not be used by Touch of Grey as new value to reduce its preference exposure because the Invoice was paid pursuant to section 503(b)(9). (*Id.*) A judgment was entered against Touch of Grey for $250,000. (*Id.*) Touch of Grey appealed to the United States District Court for the District of Moot. (*Id.*) The district court and then the United States Court of Appeals for the Thirteenth Circuit affirmed the bankruptcy court on both issues. (*Id.*) The Thirteenth Circuit was unable to "endorse" Touch of Grey's "double dip" because it was such a fundamental departure from bankruptcy policy. (R. 15.) Touch of Grey appealed to this Court. (R. 9.)

STANDARD OF REVIEW

The standard of review for issues of law, as in this case, is *de novo*. *In re Friedman's Inc.*, 738 F.3d 547, 547 (3d Cir. 2013). A *de novo* review means an independent review. *In re Marciano*, 459 B.R. 27, 34 (B.A.P. 9th Cir. 2011).

SUMMARY OF THE ARGUMENT

The Thirteenth Circuit correctly held that: (i) a creditor may not, after being paid in full under section 503(b)(9) for goods supplied to a debtor pre-petition, use the same value to assert the new value defense to offset its preference liability and (ii) section 365(d)(3) calls for the proration approach. The answers to both issues lie squarely within the statute.

Section 547(c)(4) provides that a creditor may reduce its preference liability by subtracting the value of goods or services provided to the debtor subsequent to the receipt of the transfer, except where the new value is paid by an otherwise unavoidable transfer. Section 101(54)(D) defines a transfer as any disposition, affirming the payment made to Touch of Grey is a transfer. This transfer became "otherwise unavoidable" under section 549 because the authorization was made "by the court." The plain language of section 547(c)(4) contains no temporal demarcation regarding when a transfer becomes "otherwise unavoidable," precluding Touch of Grey from adding one. The plain language supports the bankruptcy policy for equal treatment of creditors and rehabilitation without the need for bankruptcy.

Moreover, section 365(d)(3) provides that a trustee must timely perform obligations that arise from and after the order for relief. The statute's plain language unambiguously dictates that the obligations of the trustee begin at the order for relief and end with rejection of the lease. Obligating a trustee to pay for a post-rejection benefit goes beyond what the plain language requires. Even if the Court finds ambiguity, the Court should read section 365(d)(3) in light of all the relevant statutory text. Additionally, the legislative history supports the proration approach because Congress only intended for section 365(d)(3) to require trustees to make current payment for current services at the time required in the lease. Lastly, the proration approach comports with the fundamental principle of the Code—equality of distribution among creditors. The billing date

approach allows a landlord to receive more than its fair share of the estate. Proration, on the other hand, ensures landlords receive payment in full for the services provided and saves the rest of the estate for equitable distribution.

ARGUMENT

This Court should affirm the Thirteenth Circuit Court of Appeals' holding that a seller of goods is not entitled to reduce its preference exposure pursuant to section 547(c)(4) by the value of goods sold even though the debtor in possession paid for such goods in full pursuant to section 503(b)(9). This Court should further affirm the circuit court's decision to apply the proration approach of section 365(d)(3).

I. The Thirteenth Circuit Correctly Ruled That the Bankruptcy Code Precludes Touch of Grey From Asserting a New Value Defense for Goods Subject To a Satisfied Administrative Expense.

A creditor creates a troubling issue for courts when it receives a transfer in satisfaction of an administrative expense under section 503(b)(9) and seeks to use that same value to reduce its preference exposure through section 547(c)(4). Courts are split on this, either applying a plain meaning interpretation or a strained contextual analysis of the statute. The Thirteenth Circuit correctly adopted the plain meaning approach in its understanding of the Bankruptcy Code because the text and the fundamental aims of bankruptcy law support it.

Touch of Grey ("Creditor") incorrectly interprets the Code for the following reasons. First, the payment made by Debtor was an "otherwise unavoidable transfer" because it was authorized by the bankruptcy court as a section 503(b)(9) administrative expense. Second, the statutory language of section 547(c)(4) is clear, and no language supports Creditor's assertion that a cutoff exists on the Petition Date, making it clearly erroneous. Finally, to rule in favor of Creditor would

disregard one of the Code's fundamental principles—equality of distribution among creditors. *See In re Jet Florida Sys., Inc.*, 841 F.2d 1082, 1082 (11th Cir. 1988).

A. Payment of an Administrative Expense under Section 503(b)(9) Is an "Otherwise Unavoidable Transfer" under Section 547(c)(4) and Precludes Creditor from Reducing its Preference Exposure.

The language in section 503(b)(9) provides a creditor priority for transfers in satisfaction of an administrative expense for:

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

11 U.S.C. § 503(b)(9). The argument by Creditor that the payment made does not resemble a transfer, but in fact a distribution, defies logic because a transfer under the Code has a broad definition that includes the payment. With an authorization by the bankruptcy court, the transfer becomes "otherwise unavoidable" and precludes the use of a new value defense by Creditor.

(i) Debtor's Payment of the Administrative Expense Was a Transfer Pursuant to Section 101(54)(D) of the Bankruptcy Code.

In this case, Debtor made a "transfer to or for the benefit of the creditor" on account of the new value Debtor received from Creditor. The payment of $200,000 made by Debtor constitutes a transfer because the Bankruptcy Code clearly states that the word "transfer" means "*each mode*, direct or indirect, absolute of conditional, voluntary or involuntary, of disposing of or parting with— (i) property; or (ii) an interest in property." 11 U.S.C. § 101(54)(D) (emphasis added). "Nothing in the definition of 'transfer' excludes distributions. While not all transfers are distributions, all distributions—or at least those at issue in this proceeding—are transfers." *See Beaulieu Liquidating Tr. v. Fabric Sources, Inc. (In re Beaulieu Grp., LLC)*, 616 B.R. 857, 870 (Bankr. N.D. Ga. 2020). The record indicates that the distribution performed by Debtor to Creditor

indeed constitutes a transfer, and the argument made by Creditor lacks merit after a careful reading of section 101(54)(D).

(ii) The Payment Made Was an "Otherwise Unavoidable Transfer" Because It Was an Authorized Administrative Expense Payment by the Bankruptcy Court.

The administrative expense provision gives priority for creditors that provide goods to a debtor within 20 days prior to petition date for goods sold to a debtor in the ordinary course of such debtor's business. 11 U.S.C. § 503(b)(9). In this instance, the bankruptcy court authorized the payment to Creditor pursuant to an administrative expense under section 503(b)(9). (R. 7.) The transfer by Debtor to Creditor on account of the section 503(b)(9) claim bars the use of a new value defense if said transfer for the benefit of the creditor is an "otherwise unavoidable transfer."

This transfer happens to be unavoidable under the relevant applicable sections 544, 545, 547, 548, 549, 553(b) and 724(a) because the payment occurred post-petition and did not involve the fixing of a lien. Only section 549 of the Bankruptcy Code applies in this case. "That section of the Bankruptcy Code permits a trustee to avoid a transfer made after the petition date if the transfer was not authorized by the Bankruptcy Code or if the transfer was not authorized by the bankruptcy court." *In re Cir. City Stores, Inc.*, No. 08-35653-KRH, 2010 WL 4956022, at *8 (Bankr. E.D. Va. Dec. 1, 2010). The record clearly indicates that the bankruptcy court authorized the payment of the administrative expense. (R. 7.) Because section 503(b)(9) makes such a transfer unavoidable, the new value from the transfer does not become available to Creditor to offset preference liability. The transfer by Debtor to Creditor in the amount of $200,000 constitutes an otherwise unavoidable transfer to satisfy an administrative expense under 503(b)(9). This bars the use of the new value defense under the plain meaning of section 547(c)(4)(B) of the Bankruptcy Code. *See In re Cir. City Stores, Inc.*, 2010 WL 4956022 at *9.

B. The Text of Section 547(c)(4) Contains No Limitation Regarding the Time to Consider Whether a Payment on Account of New Value is "Otherwise Unavoidable."

The text of the Bankruptcy Code does not support Creditor's proposition that section 547(c)(4) limits the phrase "otherwise unavoidable transfer" to transfers that occurred pre-petition. Where a statute provides unambiguous language, the judicial inquiry ends. *McCarthan v. Dir. Of Goodwill Indus.-Suncoast*, 851 F.3d 1076, 1123 (11th Cir. 2017). Congress would have explicitly added a temporal limitation in the statute if that were its intent. The statute reads as follows:

> A trustee's ability to avoid a preferential transfer under section 547(b) is subject to defenses available to a defendant under section 547(c), including when a transfer is made
> (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). Creditor creates a cutoff date that is not mentioned in the statute and should otherwise not be inferred because section 547(c)(4)(B) clearly establishes the new value defense guideline.

(i) A Plain Meaning Interpretation of the Text Should be Employed Because the Text is Unambiguous and Clear.

The issue here centers on statutory interpretation. This begins, of course, with the plain language of the statute. *U.S. v. Ron Pair Enters. Inc.*, 489 U.S. 235, 241 (1989); *Villarreal v. R.J. Reynolds Tobacco Co.*, 839 F.3d 958, 970 (11th Cir. 2016) ("Only when the statute is susceptible to more than one reasonable interpretation can a court look beyond the statute to assist in interpretation."). Where the statute's language is unambiguous and the statutory scheme is coherent and consistent, judicial inquiry ends; courts must interpret the statute according to its plain meaning. *McCarthan*, 851 F.3d at 1123.

Section 547(c)(4) reads awkwardly, but that does not make it ambiguous on the point at issue. *Boyd v. The Water Doctor (In re Check Reporting Servs.)*, 140 B.R. 425, 434 (Bankr. W.D. Mich. 1992) ("Although [section 547(c)(4)] does contain a double negative, this makes the statute complicated, not ambiguous . . . . Applying the statute requires several levels of analysis, but each step is clear and the process leads to a single result.").

(ii) Section 547(c)(4) Does Not Limit Preference Analysis to Pre-petition Transfers.

Relying on the plain meaning of section 547(c)(4), the text of the statute contains no limitation regarding when a payment on account of new value becomes "otherwise unavoidable." The language of the text lacks any express or direct language on the matter, implying that no temporal limitation on a debtor's transfer on account of new value exists. *In re Beaulieu Group, LLC*, 616 B.R. at 871 (Bankr. N.D. Ga. 2020). This Court should not find Creditor's interpretation that the Petition Date serves as a cutoff for the purposes of establishing a new value defense persuasive. In interpreting statute, "courts give words of statute their ordinary, contemporary, common meaning, absent an indication that Congress intended these words to bear some different import." *Stapleton v. Weiderhold (In re Weiderhold)*, 381 B.R. 626, 629 (Bankr. M.D. Pa. 2008). For that reason, the court should give effect to the words of the statute based on their plain meaning or dictionary definition wherever possible. *Id.* Because there does not appear to be an inference in section 547(c)(4)(B) that limits the "otherwise unavoidable transfer" phrase to transfers that occurred pre-petition, the Court here must rule in favor of Trustee by adhering to the plain meaning of the statute.

The court in *In re BFW Liquidation* emphasized that section 547(c)(4)(B) only states that "if the debtor paid for the new value with an 'otherwise unavoidable transfer,' then the creditor cannot use that new value as a defense against the trustee's attempt to avoid an earlier preference."

Kaye v. Blue Bell Creameries, Inc. (In re BFW Liquidation, LLC), 899 F.3d 1178, 1196 (11th Cir. 2018). Here, Creditor attempts to persuade the Court to allow it to incorrectly bypass the plain meaning of the statute. Creditor misinterprets the statute because a temporal demarcation line on the Petition Date does not exist in the text to support its position. *See id.* In addition to the incorrect textual interpretation by Creditor, its argument is also an inequitable arrangement to other creditors that would eviscerate the policy goals of the Bankruptcy Code. *See In re Jet Florida Sys., Inc.*, 841 F.2d at 1082.

(iii) If Congress Intended to Create a Temporal Line on the Petition Date, It Would Have Done so Explicitly.

The language of the statute embodies Congress' intent. *See In re Beaulieu Group, LLC*, 616 B.R. at 872. In this instance, that does not include any requirement that the otherwise unavoidable transfer occurs pre-petition. The plain meaning respects the words of Congress, making it the only correct interpretation. *Lamie v. U.S. Tr.*, 540 U.S. 526, 536 (2004). Though a plain, simple meaning exists, Creditor unnecessarily seeks to read into the statute and create an interpretation that goes beyond the language. *See Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978) ("There is a basic difference between filling a gap left by Congress' silence and rewriting rules that Congress has affirmatively and specifically enacted.").

If Congress intended to create a cutoff date to pre-petition transfers in section 547(c)(4), it would have written this limit into the statute as it did in section 547(c)(5). Even the Third Circuit in *In re Friedman's Inc.* found the admission of the phrase "as of the date of the filing of the petition" in section 547(c)(5) to be a viable argument that the omission from section 547(c)(4) was intentionally excluded. 738 F.3d at 556. Congress knew how to set forth a relevant time when it thought the temporal limitation applied. Here, it was not needed. Creditor's interpretation would

be inconsistent with the intent of Congress because an explicit indication of a temporal limitation would have been present like in section 547(c)(5).

C. Legislative History and Policy Dictate That This Preference Reduction Would Be a Gross Departure from Fundamental Pillars of Bankruptcy Law.

As the plain language of the Code is unambiguous in the fact that an "otherwise unavoidable transfer" precludes a creditor from using the new value defense, examining the legislative history of section 547(c)(4) is unnecessary. Further, the policy underlying bankruptcy law and the new value defense is supported by a plain text reading and understanding of the statute.

(i) The Legislative History of Section 547(c)(4) Is Unavailing to Alter the Plain Text of the Statute Due to Its Unambiguous Nature.

The legislative history of section 547(c)(4) is not needed to determine its meaning because section 547(c)(4) does not contain ambiguity. There is no reason to go beyond the plain language of an unambiguous statute. *In re BFW*, 899 F.3d at 1189-90. The Eleventh Circuit held that the plain language of section 547(c)(4) excludes paid new value for a creditor's defense when that new value is an "otherwise unavoidable transfer." *Id.* The majority of circuit courts agree that the new value does not have to be unpaid, but the transfer that pays for the new value has to be avoidable in order to assert the new value defense. *In re Calumet Photographic, Inc.*, 594 B.R. 879, 882 (Bankr. N.D. Ill. 2019).

The legislative history of section 547(c)(4) exemplifies that a statute's misleading history makes it appropriate to ignore said history for purposes of statutory construction and interpretation. *In re Ford*, 98 B.R. 669, 676 (Bankr. D. Vt. 1989). The legislative history of section 547(c)(4) from the first session of the 95th Congress is as follows:

> *The fourth exception codifies the net result rule in section 60c of current law*. If the creditor and the debtor have more than one exchange during the 90–day period, the exchanges are netted out according to the formula in paragraph (4). Any new value

> that the creditor advances must be unsecured in order for it to qualify under this exception.

Id. (citation omitted). The court in *In re Ford*, agreeing with the second and sixth circuits, disregarded the legislative history of section 547(c)(4) because the "fourth" exception did not actually codify the "net result" rule. *Id.* at 678. Under section 547(c)(4), not all exchanges between a debtor and creditor net out during the 90-day period. A creditor's advancement of new value subsequent to preference receipt is netted against the avoidable preferences. This limited legislative history, given its inaccuracy, should not be used for construction or interpretation of section 547(c)(4).

Additionally, this legislative history does not mention Congress' meaning of or give any temporal indication regarding the phrase "otherwise unavoidable transfer" in section 547(c)(4). Because section 547(c)(4) does not contain any time restraint, it should be applied to pre- and post-petition events, like the payment in this case. The post-petition payment authorization by the bankruptcy court made it an unavoidable transfer. *See* 11 U.S.C. § 549(a)(2)(B) (trustee may avoid a transfer made after petition date is not authorized by the bankruptcy court).

With regard to the new value defense, section 547(c)(4)(B) departs from the pre-Code practice because the pre-Code statute gave an express limitation regarding new value remaining unpaid and an express temporal limitation. 11 U.S.C. § 96(c) (1976) ("[T]he amount of such new credit remaining unpaid at the time of the adjudication in bankruptcy may be set off against the amount which would otherwise be recoverable from him."). Analyzing the pre-Code version or any practice of the statute is not useful and should therefore be disregarded. This statute, plain on its face, makes it unnecessary to look to the inaccurate legislative history or any comparison to pre-Code practice.

(ii) The Major Policy Goals Embedded in the Preference Statute Would Be Ignored by Allowing This Preference Reduction.

This Court previously ruled that the preference section of the Bankruptcy Code has two main purposes. *Union Bank v. Wolas*, 502 U.S. 151, 161 (1991). Equality of distribution among creditors is the primary bankruptcy policy furthered by the preference provisions in section 547. *Id.* A debtor is able to take back transfers made to a single creditor within ninety days before bankruptcy, allowing this money to instead be distributed equally among creditors. *Id.*; *In re SGSM Acquisition Co., LLC*, 439 F.3d 233, 238 (5th Cir. 2006). A debtor's ability to avoid transfers that occur right before petition discourages the "race to the courthouse" by creditors to dismantle the debtor during bankruptcy. *Wolas*, 502 U.S. at 161. This facilitates cooperation between a debtor and its creditors, which can often enable the debtor to work its way out of bankruptcy. *Id.* The cooperation mutually benefits a debtor and its creditors, as the debtor can reach financial security again and the creditors can likely recover the money owed to them. Some creditors receive payments for shipments of goods that allow a debtor to continue to operate, like the Dark Star products purchased by Debtor and reflected on the Invoice. (R. 5.) In certain cases, these payments should allow creditors to reduce their preference exposure through the new value defense found in section 547(c)(4). However, this case is not an example of the new value defense because Creditor received full payment under section 503(b)(9) for the value of the goods.

The legislative history behind section 503(b)(9) is sparse and not demonstrative of Congress' policy goals. Section 546(c) does clarify that section 503(b)(9) is available for creditors with reclamation rights. *In re NE Opco, Inc.*, 501 B.R. 233 (Bankr. D. Del. 2013). Congress intended for section 503(b)(9) to ensure a creditor will receive some value for goods delivered before bankruptcy when that creditor is otherwise entitled to a reclamation claim. *See In re Commissary Operations, Inc.*, 421 B.R. 873, 879 (Bankr. M.D. Tenn. 2010). There is, however,

no way to confirm Congress' intent when enacting section 503(b)(9). Therefore, the Order of the Thirteenth Circuit is not against the policy interests or considerations of Congress.

(iii) Allowing Creditor to Reduce Its Preference Exposure Negatively Impacts the Estate and Its Creditors.

The new value defense requires that (i) a creditor must have received a transfer that is otherwise voidable as a preference under section 547(b); (ii) after receiving the preferential transfer, the preferred creditor must advance the "new value" to the debtor on an unsecured basis; and (iii) a debtor must not have fully compensated the creditor for the "new value" as of the date that it filed its bankruptcy petition. *In re New York City Shoes, Inc.*, 880 F.2d 679, 680 (3d Cir. 1989). The recovery on the preference comes into the bankruptcy estate to be distributed to the unsecured creditors. If the funds cannot be clawed back from Creditor, the estate and its other creditors are left at a disadvantage. For this reason, the new value should not offset Creditor's preference liability because the transfer does not replenish the value of Debtor's assets, as the Creditor was already fully compensated for the new value.

If Creditor could reduce its preference exposure by the $200,000 in goods from the Invoice, this would give an unfair advantage to Creditor while simultaneously damaging the estate and its other creditors. This improves Creditor's position relative to the other creditors that also continued to do business with Debtor. The superior position given to Creditor does not advance the primary policies of bankruptcy—that there should be equality of distribution among creditors and that a debtor should continue to do business with its creditors to rehabilitate without bankruptcy.

Additionally, shielding Creditor's preference liability would constitute "double-dipping." While not a double payment, Creditor receiving $200,000 and then being allowed to reduce its preference exposure by the exact amount is unfair. Creditor should not benefit again from this Invoice because that would be antithetical to the aims and ideals of the Code. This double benefit

would give Creditor an advantage over the estate's other creditors not able to do the same thing. As the Thirteenth Circuit correctly ruled, endorsement of Creditor's attempted "double dip" hinders the purposes of the preference section of the Bankruptcy Code. (R. 15.)

II. The Thirteenth Circuit Correctly Adopted and Applied the Proration Interpretation of Section 365(d)(3), Which Requires a Trustee to Only Pay Lease Obligations for the Days between the Order for Relief and Rejection of the Lease.

Section 365(d)(3) provides unambiguous language that requires a trustee to pay rent allocable to the post-petition, pre-rejection period because the trustee is only required to perform until the lease is assumed or rejected. *See* 11 U.S.C. § 365(d)(3). In whole, the statute reads that a "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 section 503(b)(1) of this title." *Id*. Courts have interpreted when the "obligations" of a trustee "arise" in two different ways. *Koenig Sporting Goods, Inc. v. Morse Road Co. (In re Koenig Sporting Goods, Inc.)*, 229 B.R. 388, 390 (B.A.P. 6th Cir. 1999). Under the proration approach, a trustee must only pay amounts due under a lease for the days after the order for relief and before the rejection of the lease. *Id.* at 391. The trustee does not have to pay for any benefits conferred pre-petition or post-rejection. *Id.* Under the billing date approach, a trustee must pay any amount due under a lease during the post-petition, pre-rejection period in full, regardless of whether the payment is for a pre-petition or post-rejection benefit. *Id.* at 390.

This Court should adopt the proration approach because it better comports with principles of statutory interpretation, the legislative history of the statute supports it, and it fits with the underlying purposes and policies of the Bankruptcy Code. *See generally In re Ames Dep't Stores, Inc.*, 306 B.R. 43 (Bankr. S.D.N.Y. 2004).

A. The Proration Approach Better Comports with Principles of Statutory Interpretation.

Statutory construction begins with the text of the statute itself, and courts may only look beyond the language when the language is ambiguous. *In re Ames Dep't Stores, Inc.*, 306 B.R. at 65; *Lamie*, 540 U.S. at 534. (internal citations and quotations omitted) ("It is well established 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."). Courts must presume that Congress says in a statute what it means and means what it says. *Rubin v. United States*, 449 U.S. 424, 430 (1981). For an ambiguous statute, however, courts should interpret the statute in light of *all* the relevant statutory text. *In re Ames Dep't Stores, Inc.*, 306 B.R. at 66. Additionally, courts must not interpret the Bankruptcy Code in a way that erodes past bankruptcy practices without a clear indication that Congress intended that result. *Cohen v. De La Cruz*, 523 U.S. 213, 221 (1998) (citation omitted).

(i) Section 365(d)(3) Unambiguously Dictates the Trustee Must Only Pay Prorated Rent for the Post-petition, Pre-rejection Period.

The language of section 365(d)(3) plainly states that a trustee must not pay for any post-rejection lease obligation. *See* 11 U.S.C. § 365(d)(3). The Code does not define "obligations," but the "most straightforward" meaning of obligation is something someone has to do. *Centerpoint Props. v. Montgomery Ward Holding Corp. (In re Montgomery Ward Holding Corp.)*, 268 F.3d 205, 209 (3d Cir. 2001). The statute further states that a trustee only has obligations that arise "from and after the order for relief" until the "lease is assumed or rejected." 11 U.S.C. § 365(d)(3). If courts required a trustee to pay for any post-rejection benefit, then the trustee would be paying for a period beyond what the statute requires—until the assumption or rejection of the lease. *See In re Ames Dep't Stores, Inc.*, 306 B.R. at 67. The text of section 365(d)(3) supports proration

because the obligations of a trustee end when a debtor rejects a lease, meaning the trustee does not have to pay for any post-rejection benefit. *See id.*

Here, the "obligations" of Trustee began on January 5, 2020, and ended on May 5, 2020. (R. 6-7.) On January 5, 2020, Debtor filed for bankruptcy. (R. 6.) On that date, the obligations of Trustee began under section 365(d)(3). *See* 11 U.S.C. § 365(d)(3). On May 5, 2020, Debtor rejected the Lease, vacated the premises, and returned the keys to Touch of Grey ("Landlord"). (R. 7.) On that date, the obligations of Trustee ended under section 365(d)(3). *See* 11 U.S.C. § 365(d)(3). Debtor remained current on the lease until May 2020. (R. 6.) If the Court required Trustee to pay the full May rent due under the Lease, Trustee would pay for more than section 365(d)(3) requires because any obligation after May 5, 2020, constitutes a post-rejection obligation. The plain text of section 365(d)(3) supports Trustee only having to pay $4,032.26 for the May 2020 rent. (R. 9.)

(ii) Reading Section 365(d)(3) In Context Of Other Sections Establishes That Congress Intended for the Proration Approach to Be Used.

Even if the Court finds that section 365(d)(3) is ambiguous, the language of sections 365(g), 502(b)(6), and 502(g) makes clear that Congress intended for section 365(d)(3) to follow the proration approach. *In re NETtel Corp., Inc.*, 289 B.R. 486, 491 (Bankr. D.D.C. 2002). Section 365(d)(3) must be read in the context of other sections because statutory text cannot be construed in a vacuum. *Roberts v. Sea-Land Servs., Inc.*, 566 U.S. 93, 101 (2012); s*ee In re Matter of Handy Andy Home Improvement Ctrs.*, 144 F.3d 1125, 1128 (7th Cir. 1998) ("When context is disregarded, silliness results.").

Once a trustee rejects a lease, the estate no longer has to pay that obligation as an administrative claim. *In re NETtel Corp., Inc.*, 289 B.R. at 491. The rent that accrued pre-petition is payable as an unsecured claim. *El Paso Props. Corp. v. Gonzales (In re Furr's Supermarkets,*

Inc.), 283 B.R. 60, 69 (B.A.P. 10th Cir. 2012) (citing 11 U.S.C. § 502(b)(6)). The court in *In re NETtel Corp., Inc.* explained, "[u]pon rejection, in contrast to assumption, the estate is not burdened with the obligations under the lease as an administrative claim. Instead, under sections 365(g) and 502(g), rejection constitutes a breach, and the breach is deemed to have arisen pre-petition." 289 B.R. at 491. Rejection ends a debtor's right of occupancy and in exchange, the estate does not have to pay for any future right of occupancy as an administrative claim. *Id.* This is reinforced by the fact that section 365(d)(4) requires a debtor to "immediately" surrender the premises to the landlord. *See* 11 U.S.C. § 365(d)(4). Since the debtor must immediately surrender the premises, it follows that the trustee should immediately be able to cease making payments.

Under section 365(d)(3), only claims that accrued over the post-petition, pre-rejection period have administrative priority because sections 365(g), 502(b)(6), and 502(g) treat unperformed obligations as general unsecured claims, not administrative expenses. *See In re NETtel Corp., Inc.*, 289 B.R. at 491. For example, "[a] trade creditor does not, by virtue of continuing to sell to the debtor after . . . bankruptcy, obtain a priority for what the debtor owes him for goods or services sold to the debtor before the bankruptcy." *In re Matter of Handy Andy Home Improvement Ctrs.*, 144 F.3d at 1128. The billing date approach would give landlords precisely that priority because a trustee or debtor in possession would have to pay the landlord for a post-rejection benefit. *See id.*

(iii) Because Congress Did Not Explicitly Do Away With Pre-section 365(d)(3) Practice, the Proration Approach Should Be Used.

If Congress intends to change practice by passing a statute, Congress makes that intent "unmistakably clear." *Cohen*, 523 U.S. at 222. Courts have followed this rule with particular care when interpreting new bankruptcy provisions. *Midlantic Nat'l Bank v. New Jersey Dep't of Envtl. Protection*, 474 U.S. 494, 501 (1986). This Court has been reluctant to accept arguments that

interpret the Bankruptcy Code, "however vague the particular language under consideration might be, to effect 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) (emphasis added).

Before 1984, when section 365(d)(3) was enacted, landlords could be paid for obligations that accrued during the post-petition, pre-rejection period under section 503(b)(1). *Newman v. McCrory Corp. (In re McCrory Corp.)*, 210 B.R. 934, 936 (S.D.N.Y. 1993). Courts allowed administrative expenses for landlords for "actual, necessary costs and expenses of preserving the estate." Victoria Kothari, *11 U.S.C. § 365(d)(3): A Conceptual Status Argument for Proration*, 13 AM. BANK. INST. L. REV. 297, 305 (2005). Though given first priority among unsecured creditors, courts allowed landlords to recover rent payments according to an objective worth standard, not the lease term. *In re Dant & Russell, Inc.*, 853 F.2d 700, 707 (9th Cir. 1998). During the section 503(b)(1) period, courts prorated any amount awarded over the post-petition, pre-rejection period. *In re 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).

Congress made sweeping changes regarding how and when landlords pay trustees when it enacted section 365(d)(3), but the proration approach remained unchanged. *See In re Furr's Supermarkets, Inc.*, 283 B.R. at 68. If Congress intended to change the practice of proration, one would expect for Congress to make its intent "unmistakably clear." *See Cohen*, 523 U.S. at 222. In *Dewsnup*, though interpreting a different provision of the Bankruptcy Code, this Court stated, "given the ambiguity here, to attribute to Congress the intention to grant a debtor [a] broad new remedy . . . *without the new remedy's being mentioned somewhere in the Code itself* or *in the annals of Congress* is not plausible." 502 U.S. at 420 (emphasis added). The language of section 365(d)(3) does not mention "billing date" or its synonyms anywhere. *See* 11 U.S.C. § 365(d)(3).

Additionally, if Congress intended to change the longstanding practice of proration, one would expect language such as "this section repeals" in the legislative history. *See, e.g.*, *Nat'l Automatic Laundry and Cleaning Council v. Schultz*, 443 F.2d 689, 705 (D.C. Cir. 1971) (citation omitted) (quoting a Senate Committee Report stating "[t]his section repeals the minimum wage and overtime exemption . . ."); *Frey v. United States*, 558 F.2d 270, 273 (5th Cir. 1977) (citation omitted) (quoting a House report stating "[t]his section repeals the provisions of existing law which deal with narcotics . . ."). We do not have that here. *See In re Child World*, 161 B.R. at 574. Neither the language of the statute nor the legislative history reveals that Congress intended to change the pre-1984 proration approach. *Cohen*, 523 U.S. at 222.

B. The Legislative History of Section 365(d)(3) Supports the Proration Approach.

Using section 503(b)(1) instead of section 365(d)(3) for post-petition, pre-rejection debts on leases caused issues for landlords. *See generally* Joshua Fruchter, *To Bind Or Not to Bind—Bankruptcy Code § 365(d)(3): Statutory Minefield*, 68 AM. BANKR. L.J. 437, 437-38 (1994). Landlords could only receive payment with notice and a formal hearing. *Id.* at 438. Additionally, because the amount recovered by landlords was determined by the objective worth test and not the lease term, landlords received less money than they contracted for. *Id.* The objective worth test meant that landlords might only be paid for the amount of space a debtor occupied. *Id.* (The section 503(b)(1) standard meant that "if a DIP physically occupied only a portion of the premises, it would . . . only be liable for the pro rata rent corresponding to the percentage of space actually occupied . . . ."). Because the bankruptcy courts had discretion in determining the timing of administrative payments, landlords received delayed payments. *Id.* During this proceeding, the automatic stay prevented a landlord from evicting the tenant. *Robinson v. Chicago Housing Auth.*, 54 F.3d 316, 317-18 (7th Cir. 1995). Landlords had to provide ongoing services and space to the

estate without receiving current payment, becoming "involuntary creditors." *Id.*; *In re Furr's Supermarkets, Inc.*, 283 B.R. at 69.

Congress enacted section 365(d)(3) to provide current relief to lessors who became involuntary creditors. *In re Furr's Supermarkets, Inc.*, 283 B.R. at 68. It is undisputed that section 365(d)(3) sought to remedy two injustices: (i) the long wait landlords endured to receive any compensation for providing the debtor with property and other services, and (ii) that landlords frequently did not receive the benefit of their bargain due to prevailing rental rates changing. *In re Ames Dep't Stores, Inc.*, 306 B.R. at 68. Nothing in the legislative history, however, suggests that Congress intended to do anything more than require debtors to provide "current payment" for "current services." *In re McCrory Corp.*, 210 B.R. at 939.

(i) The Legislative History of Section 365(d)(3) Makes Clear That Congress Only Intended to Change the "Actual, Necessary" Requirement for Landlord.

The legislative history of the statute supports the proration approach because it shows that Congress only intended for landlords to receive current payment for current services. *See In re NETtel Corp., Inc.*, 289 B.R. at 492. Senator Hatch, a conferee on the 1984 amendments, stated the following about the purpose of section 365(d)(3):

> [During the post-petition, pre-rejection period,] the landlord is forced to provide *current services* . . . without *current payment*. No other creditor is put in this position. 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 (statement of Sen. Hatch) [hereinafter "Statement of Hatch"] (emphasis added).

Senator Hatch's statement shows that Congress wanted to get rid of the section 503(b)(1) effect of landlords getting delayed payments that they did not bargain for. *See id.* Section 365(d)(3)

takes landlords out from the "actual, necessary" provision of section 503(b)(1) and allows landlords to collect the rent fixed in the lease on time. *In re Matter of Handy Andy Home Improvement Ctrs.*, 144 F.3d at 1128. All post-petition creditors may be prevented from collecting timely payment under section 503(b)(1) but most others voluntarily deal with a bankrupt, unlike landlords. *Id.* Because landlords became involuntary creditors during this period, Congress took out the "actual, necessary" requirement from landlords and made it so that they get *current payment* for *current services at the time required in the lease*. *See* Statement of Hatch at 598-99.

The Senator's words support the proration approach because the landlord does not provide "current services" after rejection of a lease. *In re Ames Dep't Stores, Inc.*, 306 B.R. at 71. When a debtor rejects a lease, the debtor does not have the right to continued occupancy. *Id.* The landlord does not have to keep providing "current services," meaning the debtor does not have to keep providing "current payment." *Id.* This is further supported by the fact that, upon rejection, the landlord can rent the premises to another tenant. *Id.* If a landlord is allowed to recover the full month's rent from a debtor that rejected a lease before the end of the month and, at the same time, the landlord rents the premises to someone else, the landlord would get double recovery. *Id.* Such a possibility would result in a windfall payment for the landlord, but a huge detriment to the estate's other creditors. *In re Child World, Inc.*, 161 B.R. at 576.

(ii) The Billing Date Approach Would Be Contrary to Congress' Intent.

The billing date approach would, in some instances, put landlords in a worse position than section 503(b)(1) because it can prevent landlords from recovering any rent payment as an administrative expense. *See In re Ames Dep't Stores, Inc.*, 306 B.R. at 70 ("[F]ailure to [prorate] could in [some] cases actually *prejudice* landlords . . . for instance, when taxes, common area maintenance, or . . . other obligations must be collected in arrears (after the amount billed became

known), and the debtor has already rejected . . . ."). This effect can be seen in *In re Comdisco, Inc.* because the court did not permit the landlord to recoup rent as an administrative expense under section 365(d)(3). *See* 272 B.R. 671 (Bankr. N.D. Ill. 2002).

In *In re Comdisco, Inc.*, the court held that a landlord could not recover rent payment under section 365(d)(3) because the rent became due before the debtor filed for bankruptcy. *Id.* at 676. In that case, a creditor leased two properties to a debtor—one in Oregon and one in California. *Id.* at 673. The debtor filed a motion to reject the Oregon property on July 16 and the court later entered an order providing the date of rejection as July 16. *Id.* The landlord did not receive payment under section 365(d)(3) because the rent became due on the first of the month, before the petition date. *Id.* at 676. If the court had used the proration approach, however, the landlord would have been timely awarded the rent payment for July 16 under section 365(d)(3). *See In re Koenig Sporting Goods, Inc.*, 229 B.R. at 391 (defining the proration approach). In that case, because the court used the billing date approach, the landlord could only possibly be recompensed for the July 16th rent as an administrative expense under the old method—section 503(b)(1). *See In re Goody's Family Clothing Inc.*, 610 F.3d at 814. The Supreme Court has not decided whether section 365(d)(3) preempts section 503(b)(1), however, so landlords could be left without administrative expense recourse in a situation like *In re Comdisco, Inc.* when courts apply the billing date approach. *See id.* at 816. Even if section 365(d)(3) does not preempt section 503(b)(1), landlords would be in the same position as before section 365(d)(3)—receiving delayed payments they did not bargain for. *In re Matter of Handy Andy Home Improvement Ctrs.*, 144 F.3d at 1128.

The billing date approach also disadvantages debtors because they have to pay landlords for no services. *See In re McCrory Corp.*, 210 B.R. at 940. In *In re McCrory Corp.*, the court used the proration approach and held that a debtor-tenant only had to pay prorated taxes under section

365(d)(3) for the post-petition, pre-rejection period. *Id.* In that case, the debtor rejected a lease on February 5, 1996. *Id.* at 934. State law mandated taxes being billed prospectively for the entire year on January 31. *Id.* at 935. If the billing date approach had been used, the debtor would have been forced to pay taxes for the full year while having only occupied the property for a little over a month. *Id.* at 940.

Following the billing date approach would also result in uneconomic bankruptcy planning because debtors would purposely avoid payments under section 365(d)(3), which Congress could not have intended. *In re Stone Barn Manhattan LLC,* 398 B.R. at 368. If courts do not adopt the proration approach, debtors would be encouraged to file on the second day of a month to prevent timely paying rent as an administrative expense. *Id.*

Here, if the Court adopts the billing date approach, Trustee will be required to pay Landlord $25,000 worth of rent when Debtor only occupied the premises for five days. (R. 7.) Landlord will receive an additional payment for 26/31 days in May (or about 84% of the rent) while not providing *any* services to Debtor. (*Id.*) That is not what Congress could have intended when it changed the law so that landlords would get only "current payment" for "current services." *See In re McCrory Corp.*, 210 B.R. at 937 ("The majority of courts…rely heavily on the legislative history behind the subsection . . . . Congress sought only to ensure that landlords receive 'current payment' for 'current services' provided."). For 26/31 days, Landlord provided *no* services at all. (R. 7.) It follows that for those 26/31 days, Landlord should not receive any payment under section 365(d)(3).

C. The Proration Approach Fits with the Underlying Purposes and Policies of the Bankruptcy Code.

The proration approach should be adopted because the bankruptcy court is essentially a court of equity, applying principles and rules of equity jurisprudence. *In re Ionosphere Clubs,*

Inc., 85 F.3d 992, 999 (2d Cir. 1996) (citations omitted). Because of this, the primary aim of the Code is to ensure equal distribution among creditors. *Howard Delivery Serv., Inc. v. Zurich Am. Ins. Co.*, 547 U.S. 651, 655 (2006) (citations omitted). Preferential treatment of a class of creditors can only occur when clearly authorized by Congress. *See Nathanson v. NLRB*, 344 U.S. 25, 29 (1952).

Congress intended for section 365(d)(3) to put landlords on equal footing as other creditors, not to grant them a windfall at the expense of other creditors because if that had been Congress' intention, it would have made its intent clear. *In re Best Products Co.*, 206 B.R. 404, 406-07 (Bankr. E.D. Va. 1997). The billing date approach, followed by a minority of courts, grants a windfall to landlords and severely changes the priority and distribution scheme under the Code. This is because it diminishes the return that other creditors receive, even though the landlord provides no value to the debtor. *In re Child World, Inc.*, 161 B.R. at 576. The proration approach, on the other hand, balances the rights of the landlord, estate, and other creditors because it allows landlords to be paid on time for the services provided, while not unnecessarily diminishing the return to other debtors. *See* Kothari, *supra* at 297.

Here, Debtor owes over $500,000 to creditors other than Landlord whose return would decrease under the billing date approach. (R. 6.) Under the proration approach, Trustee would only be required to pay Landlord $4,032.26 for the pre-rejection portion of the May 2020 rent. (R. 9.) Under the billing date approach, the close to $21,000 of rent owed under the lease for days Debtor did not occupy the premises would be awarded to Landlord. This, however, would not ensure equal distribution among creditors. *See Howard Delivery Serv.,* 547 U.S. at 655 (citations omitted). It would instead grant a windfall to Landlord while disadvantaging Debtor's other creditors. *See In re Child World, Inc.*, 161 B.R. at 576. Proration, on the other hand, would allow Landlord to

immediately recover the prorated rent while saving the rest of the money of the estate for other debts. *See* Kothari, *supra* at 297.

CONCLUSION

For the foregoing reasons, this Court should affirm the decision of the Thirteenth Circuit, finding that (i) a creditor that supplied goods to the debtor pre-petition is excluded from using the new value defense under section 547(c)(4) when that creditor has received a transfer in satisfaction of an administrative expense and (ii) section 365(d)(3) does not require a trustee to pay rent due during the post-petition, pre-rejection period but allocable to the post-rejection period.

APPENDIX A

11 U.S.C. § 96 (1976) – Preferred creditors

. . .

(c) If a creditor has been preferred, and afterward in good faith gives the debtor further credit without security of any kind for property which becomes a part of the debtor's estate, the amount of such new credit remaining unpaid at the time of the adjudication in bankruptcy may be set off against the amount which would otherwise be recoverable from him.

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11 U.S.C. § 101 – Definitions

. . .

(54) The term "transfer" means—

(D) each mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with—

(i) property; or

(ii) an interest in property.

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

. . .

(d)

(3)(A) The trustee shall timely perform all the obligations of the debtor, except those specified in section 365(b)(2), arising from and after the order for relief under any unexpired lease of nonresidential real property, until such lease is assumed or rejected, notwithstanding section 503(b)(1) of this title. The court may extend, for cause, the time for performance of any such obligation that arises within 60 days after the date of the order for relief, but the time for performance shall not be extended beyond such 60-day period. 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.

. . .

(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—

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

(a) A claim or interest, proof of which is filed under section 501 of this title, is deemed allowed, unless a party in interest, including a creditor of a general partner in a partnership that is a debtor in a case under chapter 7 of this title, objects.
(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—

. . .

(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;

(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. § 546 – Limitations on avoiding powers

. . .

(c)

(1) Except as provided in subsection (d) of this section and in section 507(c), and subject to the prior rights of a holder of a security interest in such goods or the proceeds thereof, the rights and powers of the trustee under sections 544(a), 545, 547, and 549 are subject to the right of a seller of goods that has sold goods to the debtor, in the ordinary course of such seller's business, to reclaim such goods if the debtor has received such goods while insolvent, within 45 days before the date of the commencement of a case under this title, but such seller may not reclaim such goods unless such seller demands in writing reclamation of such goods—

(A) not later than 45 days after the date of receipt of such goods by the debtor; or

(B) not later than 20 days after the date of commencement of the case, if the 45-day period expires after the commencement of the case.

(2) If a seller of goods fails to provide notice in the manner described in paragraph (1), the seller still may assert the rights contained in section 503(b)(9).

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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;
(5) that creates a perfected security interest in inventory or a receivable or the proceeds of either, except to the extent that the aggregate of all such transfers to the transferee caused a reduction, as of the date of the filing of the petition and to the prejudice of other creditors holding unsecured claims, of any amount by which the debt secured by such security interest exceeded the value of all security interests for such debt on the later of—
(A)
(i) with respect to a transfer to which subsection (b)(4)(A) of this section applies, 90 days before the date of the filing of the petition; or
(ii) with respect to a transfer to which subsection (b)(4)(B) of this section applies, one year before the date of the filing of the petition; or
(B) the date on which new value was first given under the security agreement creating such security interest;

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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.

(b) In an involuntary case, the trustee may not avoid under subsection (a) of this section a transfer made after the commencement of such case but before the order for relief to the extent any value, including services, but not including satisfaction or securing of a debt that arose before the commencement of the case, is given after the commencement of the case in exchange for such transfer, notwithstanding any notice or knowledge of the case that the transferee has.

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11 U.S.C. § 550 – Liability of transferee of avoided transfer

(a) Except as otherwise provided in this section, to the extent that a transfer is avoided under section 544, 545, 547, 548, 549, 553(b), or 724(a) of this title, the trustee may recover, for the benefit of the estate, the property transferred, or, if the court so orders, the value of such property, from--

(1) the initial transferee of such transfer or the entity for whose benefit such transfer was made; or

(2) any immediate or mediate transferee of such initial transferee.