Team 22

No. 21-0909

IN THE

# Supreme Court of the United States

IN RE TERRAPIN STATION, LLC, DEBTOR.

TOUCH OF GREY ROASTERS, INC.,
*PETITIONER*

V.

CASEY JONES, CHAPTER 7 TRUSTEE
*RESPONDENT.*

*ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE THIRTEENTH CIRCUIT*

**BRIEF FOR THE RESPONDENT**

TEAM NUMBER 22
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JANUARY 20, 2022

## QUESTIONS PRESENTED

1. Whether a creditor providing value and receiving payment for such value pursuant to 11 U.S.C. § 503(b)(9) can assert that same value to reduce its preference exposure liability pursuant to the subsequent new value defense of 11 U.S.C. § 547(c)(4)?
2. Whether a debtor's obligations arising from and after the order of relief under any unexpired lease of nonresidential real property pursuant to 11 U.S.C. § 365(d)(3) are allocable for only the post-petition, pre-rejection period or are determined by the express terms of the lease, irrespective of the timing of rejection?

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## OPINIONS BELOW

Both the Bankruptcy Court and the District Court for the District of Moot ruled in favor of Casey Jones, the Chapter 7 Trustee. 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

The pertinent statutory provisions of the Bankruptcy Code are 11 U.S.C. §§ 365, 503, and 547.[1] The relevant portions are provided herein.

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

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

. . . .

(d)(1) In a case under chapter 7 of this title, . . .

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

**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--

> . . .

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[1] References within this brief to Title 11 of the United States Code may be to the Bankruptcy Code or to the statutory section provisions.

(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.

**11 U.S.C. § 547. Preferences**

(a) In this section—

. . .

(2) "new value" means money or money's worth in goods, services, or new credit, or release by a transferee of property previously transferred to such transferee in a transaction that is neither void nor voidable by the debtor or the trustee under any applicable law, including proceeds of such property, but does not include an obligation substituted for an existing obligation;

. . .

(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[.]

## STANDARD OF REVIEW

There is no factual dispute between the parties in controversy. The questions to be answered by this Court is purely legal in nature, and thus, the review standard should be *de novo*. *United States v. Fryberg*, 854 F.3d 1126, 1131 (9th Cir. 2017). Under the *de novo* standard, the appellate court should act as though it were the original trial court deciding the issues originally. *In re Energy Future Holdings Corp*., 990 F.3d 728, 736 (3d Cir. 2021) ("We review the Bankruptcy Court's 'conclusions of law, including its interpretation of the Bankruptcy Code' *de novo*.") (quoting *In re Tribune Co*., 972 F.3d 228, 237 (3d Cir. 2020).

## STATEMENT OF THE FACTS AND CASE

In 2017, Touch of Grey Roasters, Inc. ("Touch of Grey"), an international coffee company and coffeehouse, sought to grow its business and expand into new markets by developing a series of neighborhood coffeehouses. (R. at 4). As part of its expansion efforts, Touch of Grey approached local coffee shop owner, William Tell ("Tell"), who owned a successful independent coffee shop, to see if he would be interested in franchising a coffeehouse in Terrapin. (R. at 4). Although Tell had a strong customer base, his coffee shop sales became stagnant, and his existing building needed remodeling. (R. at 4). Tell was intrigued by Touch of Grey's neighborhood coffeehouse concept, and the parties decided to partner together. (R. at 4).

To facilitate the opening of a new coffeehouse, Touch of Grey purchased newly renovated property, located at 5877 Shakedown Street (the "Premises"), in the downtown district of Terrapin. (R. at 4). Touch of Grey leased the Premises to Terrapin Station, LLC ("Terrapin Station" or the "Debtor"). (R. at 4). On July 1, 2018, the parties entered into a twenty-year, triple net lease agreement (the "Lease"). (R. at 4). The Lease required monthly rent of $25,000.00 due in advance on the first day of each month, which proved to be an above-market rental rate. (R. at 4-5).

Additionally, on July 1, 2018, Touch of Grey and Terrapin Station entered into a franchise agreement that required Terrapin Station to exclusively sell Touch of Grey's "Dark Star" branded coffee products. (R. at 4).

The new "Terrapin Station Coffeehouse" opened on December 1, 2018; however, Terrapin Station struggled from the start. (R. at 5). A group of local independent coffeehouses started a local advertising campaign claiming that Terrapin Station was "big coffee" in disguise, and Terrapin struggled to make inroads with the nightlife scene. (R. at 5). As a result, sales were lower than expected, and Terrapin Station struggled throughout 2019. (R. at 5).

By September 2019, Terrapin Station was behind in paying its debts, although it remained current on its rent. (R. at 5). By November 1, 2019, Terrapin Station owed Touch of Grey more than $700,000.00 for the "Dark Star" branded products it purchased. (R. at 5). On December 5, 2019, Touch of Grey sent Terrapin Station a notice of default, threatening to terminate the franchise agreement. (R. at 5).

On December 7, 2019, the parties entered into a forbearance agreement wherein Terrapin Station made a $250,000.00 payment to Touch of Grey (among other things) and in exchange, Touch of Grey agreed to forbear from terminating the franchise agreement. (R. at 5). On December 18, 2019, Terrapin Station purchased another $200,000.00 in product from Touch of Grey on credit. (R. at 5). The goods were delivered to Terrapin Station on December 21, 2019. (R. at 6).

Sales remained disappointing through the holiday season, and Terrapin Station filed a Chapter 11 bankruptcy case on January 5, 2020 (the "Petition Date"). (R. at 6). As of the Petition Date, Terrapin Station owed Touch of Grey more than $650,000.00 for goods it purchased. (R. at 6). Terrapin Station was current on the Lease as of the Petition Date. (R. at 6). In addition, Terrapin Station owed $500,000.00 to other unsecured creditors. (R. at 6). As part of the Debtor's first day motions, Tell filed a declaration stating that Terrapin Station would reorganize by returning to traditional coffeeshop hours, sub-leasing a portion of the Premises to reduce its rental burden, and continuing to sell the Dark Star-branded products. (R. at 6). Counsel for Touch of Grey appeared at the first-day hearings and stated that it was engaged in ongoing good-faith discussions with Terrapin Station about a path through bankruptcy. (R. at 6).

Two weeks later, Terrapin Station sought court approval to pay $200,000.00 to Touch of Grey, asserting it was a critical vendor. (R. at 6). Terrapin Station emphasized that the $200,000.00 was entitled to priority as an administrative expense pursuant to 11 U.S.C. § 503(b)(9). (R. at 6-7). Because Touch of Grey was unwilling to sell any further goods on credit absent a payment, the creditors' committee supported the request due to the importance of Touch of Grey to the reorganization effort. (R. at 7). After oral argument, the bankruptcy court denied the critical vendor request but awarded Touch of Grey an administrative expense in the amount of $200,000.00 pursuant to § 503(b)(9). (R. at 7). Additionally, the bankruptcy court allowed immediate payment of the administrative expense. (R. at 7). Days later, Terrapin Station made the payment to Touch of Grey. (R. at 7).

In March 2020, Terrapin Station was forced to temporarily close its doors because of the COVID-19 pandemic. (R. at 7). It reopened in April, but customers failed to return, and Terrapin Station ceased operations on May 5, 2020, vacated the Premises, and returned its keys to Touch of Grey. (R. at 7). On May 6, 2020, Terrapin Station filed a motion with the bankruptcy court seeking to reject the Lease and franchise agreement pursuant to 11 U.S.C. § 365. (R. at 7).

On May 8, 2020, Touch of Grey filed a motion seeking to compel payment of May rent due under the Lease. (R. at 7). Touch of Grey stated that it did not oppose rejection of Lease effective on May 5, 2020, but that it was entitled to payment in full for the May rent because it came due prior to the rejection date. (R. at 7-8). The bankruptcy court held a hearing on both motions on May 29, 2020. (R. at 8).

At the hearing on May 29, 2020, the bankruptcy case was converted to Chapter 7, and Casey Jones was appointed the Chapter 7 trustee (the "Trustee"). (R. at 8). At the same hearing, the bankruptcy court granted the Debtor's motion to reject the Lease and franchise agreement with Touch of Grey. (R. at 8).

The Trustee objected to Touch of Grey's motion to compel payment of the entirety of the May rent, arguing that payment of the full rent was inequitable when the Debtor only occupied the Premises for 5 days during the month of May. (R. at 8). The Trustee also filed an adversary proceeding to recover the $250,000.00 payment as a preference under 11 U.S.C. §§ 547(b) and 550(a) (R. at 8). Touch of Grey opposed the action, arguing that its preference liability should be reduced by $200,000.00 under the 11 U.S.C. § 547(c)(4) subsequent new value defense. (R. at 8). The parties stipulated that because the subsequent new value issue was purely legal, they would file cross motions for summary judgment. (R. at 9). The parties further agreed to hold the hearing on the request for payment of the May 2020 rent at the same time as the hearing on the motions for summary judgment. (R. at 9).

The bankruptcy court ruled in favor of the Trustee on both issues. (R. at 9). The bankruptcy court held that § 365(d)(3) required the Debtor to pay rent only for the five days it occupied the Premises and disallowed the use of the subsequent new value defense under § 547(c)(4) for value paid pursuant to § 503(b)(9). (R. at 9). Touch of Grey appealed to the district court, which affirmed the bankruptcy court. (R. at 9). Touch of Grey then filed an appeal to the Thirteenth Circuit Court of Appeals, which likewise affirmed the decision of the bankruptcy court. (R. at 9).

## SUMMARY OF THE ARGUMENT

The Bankruptcy Code has two main goals: to ensure equality of distributions to creditors and to encourage creditors to work with struggling debtors. Nevertheless, equality among creditors must be balanced against the laws of fairness and practicability from the viewpoint of the estate. The Thirteenth Circuit Court of Appeals properly struck such a balance when it affirmed the bankruptcy court's findings that: (i) Touch of Grey could not assert the new value defense for value provided to the Debtor when the same value was paid post-petition pursuant to 11 U.S.C. § 503(b)(9); and (ii) Touch of Grey was entitled only to payment of the post-petition rent that accrued as of the effective date of the Trustee's rejection of its nonresidential Lease.

The plain language of 11 U.S.C. § 547(c)(4), the context of § 547, and policy considerations support the conclusion that a creditor may not benefit from the subsequent new value defense when the value advanced is paid for pursuant to § 503(b)(9). There is nothing within the plain and unambiguous language of § 547(c)(4) that limits the "otherwise unavoidable transfer" analysis to the pre-petition period. Rather, the statute only requires an analysis of whether an "otherwise unavoidable transfer" occurred. If Congress intended to limit the "otherwise unavoidable transfer" of § 547(c)(4) to pre-petition transfers, it would have done so expressly as it has in many other provisions of the Bankruptcy Code. Additionally, the grammar and tense of § 547(c)(4) do not place a temporal limitation on the "otherwise unavoidable transfer" analysis. Difficult grammar or tense use do not override the plain and unambiguous language of the statute. Whatever grammatical dissection of § 547(c)(4) is performed, the result is the same—there is no explicit or implied temporal limitation for when an "otherwise unavoidable transfer" must occur.

Likewise, a review of the context of the Bankruptcy Code and § 547 show there is no implied temporal limitation in § 547(c)(4). Touch of Grey and the dissent argue that: (i) the title of § 547 limits transfers in § 547(c)(4) to the pre-petition period; (ii) the hypothetical liquidation test in § 547(b)(5) is performed on the petition date and therefore limits the new value analysis to the petition date; (iii) the statute of limitations somehow creates a temporal limitation in § 547(c)(4); (iv) advancement of new value post-petition cannot be used to reduce a creditor's preference exposure and thus must likewise limit the "otherwise unavoidable transfer" provision of the new value defense to the pre-petition period; and (v) other post-petition payments permitted under the Bankruptcy Code limit the "otherwise unavoidable transfer" language of § 547(c)(4) to pre-petition transfers. These arguments are without merit.

Section 547 is simply entitled "Preferences." While a court is permitted to consider the title of a statutory section to resolve any ambiguity that may be present in the statutory language, the title of the statute cannot outweigh the plain meaning of the text. The text of § 547(c)(4) is clear, and the title of § 547 provides no assistance in determining when an "otherwise unavoidable transfer" must occur. Additionally, although the hypothetical liquidation test occurs as of the petition date, post-petition events may affect the test and are properly considered by the court. Further, the statute of limitations is simply a jurisdictional limitation as to when certain actions can be brought under the Bankruptcy Code. It cannot be used to import a temporal limitation into § 547(c)(4). Touch of Grey and the dissent are also concerned that it "would be inequitable to allow a post-petition payment to affect the preference analysis when post-petition extensions of new value by a creditor cannot be used to reduce such creditor's preference exposure." The dissent fails to understand that new value advanced post-petition is generally paid for by an "otherwise unavoidable transfer," thus making its inclusion in the new value defense improper. Lastly, the dissent argues that payments on account of general unsecured claims are not "otherwise unavoidable transfers" and, thus, the same should be said of post-petition payments made under §

503(b)(9). This is incorrect. The Bankruptcy Code creates real distinctions between distributions made to general unsecured creditors and payments of § 503(b)(9) claims. One claim cannot simply be substituted for the other.

The Thirteenth Circuit likewise correctly affirmed the bankruptcy court's application of the proration approach, resulting in a determination that the Trustee was required to pay rent to Touch of Grey only through May 5, 2020, the effective date of the Debtor's rejection of its Lease with Touch of Grey. Although the language of 11 U.S.C. § 365(d)(3) is clear as to a trustee's performance with respect to a debtor's obligations under an unexpired nonresidential lease, it is unclear as to the time-period included within that obligation period and whether a trustee must satisfy the debtor's contractual obligations solely throughout the course of the post-petition, pre-rejection period or must satisfy all of the debtor's contractual obligations notwithstanding the effective date of rejection. Thus, the plain language of § 365(d)(3) is ambiguous because it can be reasonably construed in two plausible ways, resulting in two possible approaches: the proration approach, under which a trustee is required to pay only the lease obligations that accrue post-petition and pre-rejection, and the billing date approach, under which the trustee must pay all lease obligations in full when they are billed, irrespective of when rejection occurs. Because the statute is ambiguous, the Court should look to pre-enactment procedures employed by the bankruptcy courts as well as the legislative history for § 365, both of which support utilizing the proration approach.

Furthermore, application of the proration approach is consistent with the practices of bankruptcy courts prior to enactment of § 365, which the Court may interpret as Congress simply codifying those judicial practices. Legislative history reflects that by enacting § 365(d)(3), Congress intended to protect landlords by ensuring that they received payment for the services being currently provided to debtors during the interval between commencement of the case and the trustee's decision to assume or reject an unexpired nonresidential lease. The proration approach accomplishes Congress's intent to protect the interests of landlords while also balancing the equities between all creditors and the debtor.

As previously stated, the policy goals of the Bankruptcy Code are to promote equality of distribution among creditor and to encourage dealings between creditors and struggling debtors. Both policy goals are better met when a creditor is not permitted to assert a new value defense for the same value paid post-petition pursuant to 11 U.S.C. §503(b)(9) and when a debtor's obligations under § 365(d)(3) are limited to the post-petition, pre-rejection period. Sections 365, 503, and 547 were designed to protect certain creditors and their interests while striving for a balance between all creditors and debtors that facilitates fairness and practicability. As such, the Thirteenth Circuit correctly determined that the transfer made by the Debtor–and authorized by the bankruptcy court pursuant to § 503(b)(9)–could be used to limit Touch of Grey's subsequent new value defense under § 547(c)(4) and that the Debtor's obligation to pay rent to Touch of Grey for May 2020, was limited to $4,032.26, representing the post-petition, pre-rejection period through the effective date of the Lease as of May 5, 2020.

## ARGUMENT

### I. THE THIRTEENTH CIRCUIT CORRECTLY RULED THAT A CREDITOR PROVIDING VALUE AND RECEIVING PAYMENT PURSUANT TO 11 U.S.C. § 503(b)(9) CANNOT USE THAT SAME VALUE TO REDUCE ITS PREFERENCE LIABILITY UNDER 11 U.S.C. § 547(c)(4).

Two important purposes of the Bankruptcy Code are to promote equality of distribution among creditors and to encourage creditors to continue business dealings with troubled debtors, both pre- and post-petition. *Charisma Inv. Co., N.V. v. Airport Sys., Inc. (In re Jet Florida Sys., Inc.)*, 841 F.2d 1082, 1083 (11th Cir. 1988). Section 547 carries out these very purposes.

Specifically, § 547 provides a creditor with a subsequent new value defense that can be used to offset its preference liability when the creditor gave new value to or for the benefit of the debtor 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). This defense offers protection to creditors so that they may continue doing business with entities even during troubled times.

Decades after the codification of § 547, Congress enacted § 503(b)(9), which entitles creditors to an administrative expense for the value of goods received by and sold to the debtor in the ordinary course of business within twenty days before the petition date. 11 U.S.C. § 503(b)(9). The enactment of § 503(b)(9) poses a unique question to bankruptcy courts: whether payment of an administrative expense claim under § 503(b)(9) and the subsequent new value defense in § 547(c)(4) can be used in tandem, or, more simply, whether a creditor is allowed to be paid in full for the value of goods delivered twenty days before the petition date and be permitted to offset its preference liability with the same value. A majority of courts answer this question in the negative, finding that the plain language of § 547(c)(4), the context surrounding § 547, and policy considerations support such a conclusion. *See*, *e.g., Gonzales v. Sun Life Ins. Co. (In re Furr's Supermarkets, Inc.)*, 485 B.R. 672, 734 (Bankr. D.N.M. 2012) (finding that post-petition payments made under an employee benefits order can be used to limit the creditor's new value defense); *Hall v. Ford Motor Credit Co. (In re JKJ Chevrolet, Inc.*), 412 F.3d 545, 555 n.6 (4th Cir. 2005) (holding that post-petition transfers may be considered under § 547(c)(4)(B); *TI Acquisition v. Southern Polymer, Inc. (In re TI Acquisition, LLC)*, 429 B.R. 377, 385 (Bankr. N.D. Ga. 2010) (stating that a creditor cannot receive payment on a § 503(b)(9) claim and receive a new value credit for the same goods); *Circuit City Stores, Inc. v. Mitsubishi Digital Elecs. Am. Inc. (In re Circuit City Stores, Inc.),* Adv. No. 10-03068-KRH, 2010 WL 4956022, at *1, *9 (Bankr. E.D.

Va. Dec. 1, 2010) (same).

### A. Section 547(c)(4) does not Limit the "Otherwise Unavoidable Transfer" Analysis to the Pre-Petition Period.

The plain language of § 547(c)(4) does not include a temporal limitation, either explicitly or impliedly regarding the "otherwise unavoidable transfer" language. There is no basis to limit the "otherwise unavoidable transfer" to the pre-petition period, as the only requirement contained in the statute is that an "otherwise unavoidable transfer" be made. 11 U.S.C. § 547(c)(4). Additionally, the grammatical conundrum asserted in opposition of this argument is incorrect. Although the statute is written in the past tense, it does not imply a temporal limitation for transfers. Finally, the any assertion of a dual entity theory is a red herring, in that, it is well established that any transfer made for the benefit of a creditor is made on behalf of the debtor, regardless of whether it was made by the debtor, debtor-in-possession, or trustee.

#### *(i) The plain language of § 547(c)(4) has no temporal limitation.*

A legal question pertaining to the analysis of the Bankruptcy Code begins with the analysis of the statute in controversy. *See, e.g., Mission Prod. Holdings, Inc. v. Tempnology, LLC,* ___ U.S. ___, 139 S. Ct. 1652, 1658 (2019). When the words of a statute are unambiguous, a court should not analyze the statute further and the judicial inquiry is over. *Connecticut Nat'l Bank v. Germain,* 503 U.S. 249, 253-54 (1992). Under § 547(c)(4), a trustee may not avoid a transfer—

> (4) to 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).

It should be noted that although § 547 is not particularly user-friendly, as there are double negatives and multiple subparts that are lengthy in nature, simply being difficult to read does not mean the statute is ambiguous. *Boyd v. The Water Doctor (In re Check Reporting Servs., Inc.)*, 140 B.R. 425, 434 (Bankr. W.D. Mich. 1992). A statute that is complicated is not one that is ambiguous. *Id.* Furthermore, the Eleventh Circuit previously held that § 547(c)(4) is unambiguous and it

> Excludes paid new value as a defense to a creditor's preference liability only when that new value is paid for with an "otherwise unavoidable transfer." 11 U.S.C. § 547(c)(4)(B). We therefore have no need to examine other interpretive resources, such as predecessor statutes, to determine whether we should divine a broader preclusion of paid new value under § 547(c)(4).

*Kaye v. Blue Bell Creameries, Inc. (In re BFW Liquidation, LLC)*, 899 F.3d 1178, 1190 (11th Cir. 2018). Because there is no ambiguity in the plain language of § 547, the Court should read and interpret the statute in accordance with its plain meaning.

Touch of Grey argues that the petition date is a "hard stop" for preference payments and that any post-petition payments, including any administrative expenses paid pursuant to § 503(b)(9), are irrelevant to the subsequent new value defense. (R. at 12). There is nothing in the plain text of § 547(c)(4) that supports such an argument. "Nothing in the language of § 547(c)(4) indicate[s] that an offset to a creditor's section 547(b) preference liability is available only for new value that remains unpaid." *Id.* at 1189. In fact, the only recognized exclusion is "paid new value that is paid for with 'an otherwise unavoidable transfer,'" which has no temporal limitation attached to its requirement. *Id.; see also Bankston v. Then*, 615 F.3d 1364, 1367-68 (11th Cir. 2010) (refusing to import words into a statute when the plain language of such statute contained no such words). Simply, the only requirement of § 547(c)(4) is that the new value cannot be paid with an otherwise unavoidable transfer—regardless of when the transfer occurred. *In re BFW Liquidation, LLC*, 899 F.3d at 1190. If this Court were to impute a temporal limitation not already set, it would be crossing the "gap left by Congress' silence and rewriting rules that Congress has affirmatively and specifically enacted." *Lamie v. United States Tr.,* 540 U.S. 526, 538 (2004) (citation omitted).

This argument is further bolstered when the other defenses in § 547 are examined—specifically the improvement in position test contained in § 547(c)(5). Section 547(c)(5) contains an express temporal limitation with inclusion of the language "as of the date of the filing of the petition…" 11 U.S.C. § 547(c)(5). If Congress found it necessary to import a temporal requirement to the subsequent new value defense it would have done so explicitly. "[T]he words used by Congress matter." *Merck & Co. v. United States Dep't of Health & Hum. Servs.*, 385 F. Supp. 3d 81, 90 (D.D.C. 2019), *aff'd,* 962 F.3d 531 (D.C. Cir. 2020); *see also Sierra Club v. Korleski,* 681 F.3d 342, 350 (6th Cir. 2012) ("In construing a statute, the words matter."). Conversely, it should be noted that the words Congress does *not* use have the same importance in analysis. *See Friedman's Liquidating Trust v. Roth Staffing Cos. LP (In re Friedman's)*, 778 F.3d 547, 556 (3d Cir. 2013). Congress demonstrated that it was more than capable of including precise language when it intended to impose a time restraint within a statute and the lack of such language in § 547(c)(4) suggests that Congress did not intend for the new value defense to have a temporal limitation. *See*, *e.g.,* 11 U.S.C. §§ 544 (including a temporal limitation with use of the language "at the commencement of the case"); 545 (same); 553 (same); 547 (including a temporal limitation with the use of the language "on or before the date of the filing of the petition"); and 548 (same). Even the Third Circuit in *Friedman's*, the case most heavily relied on in the dissent and by Touch of Grey, recognized that the omission of any language indicating a time frame in which the defense be asserted 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 566.

*(ii) The tense and grammar of § 547 do not require the "otherwise unavoidable transfer" to be made pre-petition.*

Touch of Grey argues that because the phrase "on account of which new value the debtor did not make an otherwise unavoidable transfer" was drafted in the past tense, it is indicative of a cutoff for determining whether a transfer is otherwise unavoidable. (R. at 14). The tense of the statute, however, does not create a temporal limitation. *Beaulieu Liquidating Tr. v. Fabric Sources, Inc. (In re Beaulieu Grp., LLC)*, 616 B.R. 857, 898 (Bankr. N.D. Ga. 2020) (rejecting the argument that the tense of the statute imposes a temporal limitation because it was drafted in the past tense and finding that "nothing in the statute designates the petition date as the cut-off point for the lookback period as opposed to the date at which preference liability is determined or some other date"). The requirement is simply that the transfer occur at some time before it is determined if the new value defense is applicable. In *Friedman's*, the Third Circuit rejected this grammatical argument. *In re Friedman's Inc.,* 738 F.3d at 554-55 ("Rather than focusing ... on the presence or absence of individual words and phrases within § 547(c)(4)(B), we take a broader approach to our analysis, examining the provision in the context of the Bankruptcy Code as a whole). Finally, as previously argued, if Congress intended to exclude post-petition events by writing the phrase in the past tense, it would have done so explicitly just as it did in other provisions of the Bankruptcy Code. *See*, *e.g.,* 11 U.S.C. §§ 544 (including a temporal limitation with use of the language "at the commencement of the case"); 545 (same); 553 (same); 547 (including a temporal limitation with the use of the language "on or before the date of the filing of the petition"); and 548 (same).

*(iii) Use of the word "debtor" in § 547(c)(4) does not suggest a temporal limitation.*

The dissent argues that § 547(c)(4)(B) "expressly limits the phrase 'otherwise unavoidable transfer' to a transfer made by "the debtor.'" (R. at 23). Essentially, the dissent argues that the word "debtor" somehow connotates some temporal limitation. This assertion is incorrect.

The Bankruptcy Code does not impose a temporal requirement to the definition of the word debtor. Rather, a "debtor" is merely "a person or municipality concerning which a case under this title has been commenced." 11 U.S.C. § 101(13). There are numerous instances where the Bankruptcy Code uses the word "debtor" in both the pre-petition and post-petition context. *In re Friedman's*, 738 F.3d at 555; *see*, *e.g.,* 11 U.S.C. §§ 329 (referring to attorneys representing "a debtor" in a case under the title) and 521 (describing a debtor's post-petition duties). Therefore, any assertion that use of the word "debtor" implies a temporal limitation is unfounded.

The dissent also states that any payments made post-petition cannot be made by the debtor but are instead made by either the debtor-in-possession or the trustee. (R. at 23). Section 1101(1) specifically states that "debtor-in-possession ***means debtor*** except when a person has qualified under section 322 of this title is serving as trustee in the case…" 11 U.S.C. § 1101(1) (emphasis added). While a trustee was appointed in this case, the appointment did not occur until after payment of the § 503(b)(9) administrative expense. (R. at 7-8). Therefore, at the time of payment, Terrapin Station was both the debtor and the debtor-in-possession in the case. Given that the debtor-in-possession is the debtor, any post-petition transfers made by Terrapin Station were being made by the debtor.

### B. There are no Contextual Indicators in the Bankruptcy Code that Establish the Petition Date as the Cutoff for Analysis of the New Value Defense.

Touch of Grey and the dissent argue that there are several contextual indicators in § 547 and the Bankruptcy Code that would end the analysis of the new value defense on the petition date. (R. at 14-15; 22-24). In making such arguments, they rely heavily on the *Friedman's* decision from the Third Circuit. (R. at 14-15; 22-24). Specifically, Touch of Grey and the dissent argue that: (i) the title of § 547 limits transfers in § 547(c)(4) to the pre-petition period; (ii) the hypothetical liquidation test in § 547(b)(5) is performed on the petition date and therefore limits the new value analysis to the petition date; (iii) the statute of limitations somehow creates a temporal limitation in § 547(c)(4); (iv) the advancement of new value post-petition cannot be used to reduce a creditor's preference exposure and thus must likewise limit the "otherwise unavoidable transfer" provision of the new value defense to the pre-petition period; and (v) other post-petition payments permitted under the Bankruptcy Code limits the "otherwise unavoidable transfer" language of § 547(c)(4) to pre-petition transfers. (R. at 13-15; 22-28). However, the Thirteenth Circuit correctly found that the strained contextual analysis performed by the Third Circuit, and adopted by the dissent, was flawed and should not be followed.

*(i) The title of § 547 serves little, if any, purpose in determining when an "otherwise unavoidable transfer" must occur under § 547(c)(4).*

The dissent reasoned that because § 547 is entitled "Preferences," the title somehow suggests that the entire focus of § 547 is concerned only with pre-petition actions. (R. at 24). This analysis was also espoused by the Third Circuit in *Friedman's*, whereby the court found that a debtor making an "otherwise unavoidable transfer" post-petition on account of a pre-petition debt, created a pre-petition preference. *In re Friedman's Inc.,* 738 F.3d at 547. This is not how the preference statute works. Touch of Grey received $250,000.00 in pre-petition transfers that qualified as preferences and that could potentially be avoided. (R. at 5). The preference exposure was not created when the Debtor paid Touch of Grey's § 503(b)(9) administrative expense or when the court determined that payment of the administrative expense was an "otherwise unavoidable transfer" pursuant to 11 U.S.C. § 549—it already existed. *In re Beaulieu Grp.*, LLC, 616 B.R. at 873. Additionally, while a court is permitted to consider the title of a statutory section to resolve any ambiguity that may be present in the statutory language, the title of the statute cannot outweigh the plain meaning of the text. *Id.*, *citing to United Mine Workers of Am. Combined Benefit Fund* *v. Toffel (In re Walter Energy, Inc.),* 911 F.3d 1121, 1154 n.37 (11th Cir. 2018) (citing *Brotherhood of R.R. Trainmen v. Baltimore & O.R. Co.*, 331 U.S. 519, 528-29 (1947)). Section 547 is simply entitled "Preferences." The title does not have any temporal limitations because it can be used in the past, present, or future tense as it is written.

*(ii) The hypothetical liquidation test does not limit the new value analysis to the petition date.*

The hypothetical liquidation test requires courts to determine whether the transfers received by the creditor during the preference period enabled the creditor to receive more than it otherwise would receive in a Chapter 7 case if the transfers were not made. 11 U.S.C. § 547(b)(5). While this analysis takes place as of the petition date, it does not mean that a court cannot take into account events occurring post-petition. *In re Beaulieu Grp., LLC*, 616 B.R. at 874; *In re JKJ Chevrolet, Inc.*, 412 F.3d at 553 n. 6 (stating that post-petition transfers are properly considered in a preference analysis). In fact, the court in *TI Acquisitions* expressly recognized that post-petition events necessarily impact the hypothetical liquidation test:

> The preference period only involves transfers made by the debtor that occur pre-petition, but the defense of § 547(c)(4) does not limit itself to the pre-petition period. Indeed, the requirements for making out a *prima facie* case for preference recovery include a determination of the extent of payment a creditor would receive in a Chapter 7 case. Post-bankruptcy facts are thus required for proper consideration of § 547 recovery actions. The holder of an administrative claim in a Chapter 7 case—even one created post-petition by § 503(b)(9)—is treated differently than other unsecured creditors. That post-petition fact may impact whether a trustee is able to make out a *prima facie* case under 11 U.S.C. § 547(b)(5).

*TI Acquisitions*, 429 B.R. at 385. A prime example establishing that post-petition events should be considered in the hypothetical liquidation test is where a company in bankruptcy chooses to sell some or all of its assets post-petition. Post-petition marketing efforts may create a situation where an auction, with many bidders, occurs and results in substantially more funds to make distributions to creditors. Another example would be when a company in bankruptcy discovers, post-petition, that the product it makes is linked to some physical or environmental harm that renders the product less valuable or even valueless. This discovery necessarily lowers the company's value. These are prime examples of when post-petition events can influence the hypothetical liquidation test and should not be ignored. Without considering these post-petition events, the hypothetical liquidation analysis would be incomplete.

*(iii) The statute of limitations does not create a temporal limit for the new value analysis.*

According to the dissent, "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 the preference liability should remain constant post-petition." (R. at 24); *see also In re Friedman's Inc*., 738 F.3d at 556. The courts adopting this argument generally find that there is some appeal in having a fixed reference point at which a preference amount can be determined, and defenses anticipated, i.e., the petition date. *In re Beaulieu Grp.,* 616 B.R. at 875. Unfortunately, the preference analysis cannot be performed at the petition date because there are many unknowns with respect to the exact amount of payments, when payments cleared, and when other checks or other payments were initiated. *Id.* The statute of limitations has no bearing on when an "otherwise unavoidable transfer" must occur under § 547(c)(4). It merely limits the timing in which a preference action may be brought and nothing more. *See* 11 U.S.C. § 546.

*(iv) Post petition advances are of no relevance to the new value defense.*

The dissent is concerned that it "would be inequitable to allow a post-petition payment to affect the preference analysis when post-petition extensions of new value by a creditor cannot be used to reduce such creditor's preference exposure." (R. at 24); *In re Friedman's Inc.,* 738 F.3d at 556. The dissent fails to understand that new value advanced post-petition is generally paid for by an "otherwise unavoidable transfer," thus making its inclusion in the new value defense improper.

For example, in many bankruptcies, a debtor continues its operations post-petition, and vendors continue supplying goods to the debtor. Debtors generally pay for these post-petition goods because the Bankruptcy Code allows such payments. *See* 11 U.S.C. § 363 (allowing a debtor to use, sell, or lease property in the ordinary course of its business). Because the payment of such post-petition new value was authorized by the Bankruptcy Code, it is an "otherwise unavoidable transfer" and cannot qualify as new value under § 547(c)(4). *See* 11 U.S.C. § 549(a)(2)(B).

*(v) Other post-petition transfers permitted by the Bankruptcy Code are irrelevant as to what constitutes an "otherwise unavoidable transfer" under § 547(c)(4).*

Finally, the dissent states that there is no real distinction between payment of § 503(b)(9) expenses as opposed to payments of unsecured claims. (R. at 25). Specifically, the dissent argues that payments on account of general unsecured claims are not "otherwise unavoidable transfers" and, thus, the same should be said of post-petition payments made under § 503(b)(9). The creditor in *In re Beaulieu Group* advanced the same argument. *In re Beaulieu Grp.*, 616 B.R. at 878. The bankruptcy court noted that there was a distinction between distributions made to general unsecured creditors and payments of § 503(b)(9) claims. *Id.* at 875. The court in *Beaulieu* found that:

> it is difficult if not impossible to make a final calculation on distributions to general unsecured claims until the total amount of both preference liability and allowed general unsecured claims has been established. If the distributions on general unsecured claims could alter preference liability under § 547(c)(4), which in turn alters the amount of the general unsecured claim, then where does it end? Congress cannot have intended to created such an endless loop. The same loop does not arise with § 503(b)(9) claims, because once the amount of such claim is determined, then the preference liability and any resulting general unsecured claim can both be calculated with finality.

*Id*. at 877 n.11. Therefore, there are valid reasons to treat § 503(b)(9) payments differently from distributions to general unsecured creditors.

### C. Policy Considerations Support the Conclusion that the Bankruptcy Code Limits the Use of the Subsequent New Value Defense When a § 503(b)(9) Administrative Expense Payment Was Received.

Courts find two main policies within the preference statute to further the Bankruptcy Code's goals. First, "[a] principal policy objective underlying the preference provisions of the Bankruptcy Code [was] to encourage creditors to continue extending credit to financially troubled entitled while discouraging a panic-stricken race to the courthouse." *In re Jet Florida Sys., Inc.,* 841 F.2d at 1084. Secondly, "and more important[ly], the preference provisions facilitated the prime bankruptcy policy of equality of distribution among creditors of the debtor." *Union Bank v. Wolas,* 502 U.S. 151, 161, (1991). Sections 547 and 503 are designed to protect creditors and their interests while promoting the equality that the Bankruptcy Code strives to achieve. Nevertheless, equality among creditors must be balanced against the laws of fairness and practicability from the viewpoint of the estate. Sections 547 and 503, when examined individually, undoubtedly protect creditors as a whole, but if they are used together, §§ 547 and 503 may overly favor one creditor over others and ultimately harm the estate's ability to pay all its creditors.

To begin, "denying a creditor the new value defense when the creditor's § 503(b)(9) claim is paid in full and for the same goods for which the creditor seeks new value is the best way to foster the policies behind the new value defense." *In re TI Acquisition, LLC,* 429 B.R. at 385-86. Adopting Touch of Grey's argument that the subsequent new value defense and the administrative expenses sections should be used in tandem would directly contradict one of the most important concerns that that Bankruptcy Code endorses: equality among creditors. *Id.* at 384 (holding that the subsequent new value defense furthers the goal of the equal treatment of creditors because it applies only where "the bankruptcy estate has been enhanced by the creditor's actions."). If allowed, Touch of Grey would receive the monetary benefit that comes with being paid its administrative expenses in full in addition to receiving the preference liability offset that it would receive were it allowed to use the subsequent new value defense. When the administrative expenses are paid and the subsequent new value defense is also asserted, a creditor would benefit from double dipping, resulting in a windfall to that particular creditor to the detriment to the estate and other creditors. *See generally, Wolas*, 502 U.S. at 161; *BFW Liquidation*, 899 F.3d at 1193; *In re Jet Florida Sys., Inc.,* 841 F.2d at 1083. While there is no "liquid" monetary benefit to the creditor under § 547(c)(4), its preference liability exposure is decreased, thus creating both a legal and financial benefit to the detriment of other creditors. *In re Beaulieu Grp., LLC,* 616 B.R. at 876. Further,

> [r]equiring both payment of the § 503(b)(9) claim and offset of preference liability improves the creditor's position relative to all other creditors that continued to do business with the debtor and received preferential payments by giving the § 503(b)(9) claimant payment for the new value plus reducing what it must repay, which in turn reduces the amount available to pay all general unsecured creditors. This "payment plus" treatment, while not double-dipping in the sense that Defendant is not being paid twice for the same invoice, undercuts equality of treatment while failing to materially advance the policy of encouraging creditors to continue to do business on credit with the debtor.

*Id.* at 875. Essentially, when one creditor has received a preference payment and payment of an administrative expense, the estate may be depleted such that other creditors are at a disadvantage when compared. *Id*.

Finally, the Court should balance §§ 547 and 503 along with associated policy concerns to achieve a more equitable result among all creditors. While allowing a creditor to use both the new value defense and receive payment for a § 503(b)(9) administrative expense may increase creditors' willingness to continue working with troubled businesses, doing so could spell disaster for an already struggling bankruptcy estate. The estate would be diminished of its assets to distribute to other creditors, thus only a small minority of creditors that have been preferred would be paid a fair share of what they are owed. The Court must weigh the detriment to the estate against the benefit of the creditors in order to ensure an equitable and balanced result for the debtor, the estate, and all creditors as a whole.

## II. THE THIRTEENTH CIRCUIT CORRECTLY FOUND THAT UNDER 11 U.S.C. § 365(d)(3), A TRUSTEE MUST ONLY SATISFY OBLIGATIONS OF A DEBTOR ALLOCABLE TO THE POST-REJECTION PERIOD UNDER AN UNEXPIRED LEASE OF NONRESIDENTIAL REAL PROPERTY.

A trustee's decision to assume or reject an unexpired lease of nonresidential real property depends on the welfare of the estate. Section 365 grants a trustee the authority to "assume or reject any executory contract or unexpired lease of the debtor, subject to the court's approval." 11 U.S.C. § 365(a). An underlying purpose of § 365 is to "allow a debtor to escape onerous and burdensome contracts in which the obligations of the debtor far exceed any possible benefit to the estate." *In re Leibinger-Roberts, Inc.*, 105 B.R. 208, 211 (Bankr. E.D.N.Y. 1989). To simplify, if the debtor – or its trustee – find that satisfying its contractual obligations will advance the interests of the estate, the debtor, or its trustee, should "assume the contract, fulfilling its obligations while benefiting from the counterparty's performance." *Mission Prod. Holdings, Inc.*, 139 S. Ct. at 1658. In contrast, if the debtor – or its trustee – finds fulfilling its contractual obligations outweighs the benefits received by the estate from its performance, the debtor should "reject the contract, repudiating any further performance of its duties." *Id.* Thus, § 365 aims to institute balance between the rights of the non-debtor contracting party to receive the benefits of the debtor's performance of the contract and the right of the debtor's creditors to be relieved of an obligation that further burdens the estate.

Determining when a trustee must timely perform all the obligations of the debtor with regards to an unexpired lease of nonresidential real property under § 365(d)(3) has been a controversial debate amongst the courts. As stated by the Thirteenth Circuit § 365(d)(3), which requires 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[,]" 11 U.S.C. §365(d)(3), unquestionably "establishes *what* the trustee must do (*i.e.*, perform) pending assumption or rejection[, but the courts are sharply divided, however, with respect to *when* the obligation to do it arises." (R. at 17). The Thirteenth Circuit correctly determined that Touch of Grey was entitled only to payment of the rent that had accrued through May 5, the effective date of the Trustee's rejection of the Debtor's Lease with Touch of Grey.

### A. The Statutory Construction of § 365(d)(3) Indicates a Trustee's Obligation to Pay Rent Under an Unexpired Lease of Nonresidential Real Property Ceases After the Effective Date of Rejection.

As with any statute, courts must "look first to its language, giving the words their ordinary meaning." *Roberts v. Sea-Land Servs.*, 566 U.S. 93, 100 (2012). "Statutory language, however, 'cannot be construed in a vacuum. It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.'" *Id*. at 101 (quoting *Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 809 (1989)). The intended purpose of § 365(d)(3) is to serve as a remedial measure for instances where the debtor has not decided whether to assume or reject the lease but has ceased making payments under the lease, forcing the landlord to provide current services without the power to evict the debtor. *El Paso Props. Corp. v. Gonzales (In re Furr's Supermarkets, Inc.)*, 283 B.R. 60, 66 (B.A.P. 10th Cir. 2012). "Section 365(d)(3) lessens 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 pending its assumption or rejection." *Id.* Although the enactment of § 365(d)(3) was intended to redress this issue, the ambiguous language of the statute fails to specify the moment in which the trustee has met the temporal requirement of performing all of the debtor's obligations.

Given this ambiguity, § 365(d)(3) has cultivated a notable "split of authority as to what constitutes an obligation 'arising from and after the order for relief,' provided that the Bankruptcy Code is opaque in defining the term 'obligation.'" *In re GCP CT Sch. Acquisition LLC*, 443 B.R. 243, 254 (Bankr. D. Mass 2010). Determining whether a trustee has timely performed all of the obligations of the debtor is contingent on the effective date of rejection. As previously stated, under § 365, "a trustee shall timely perform all the obligations of the debtor …." 11 U.S.C. § 365(d)(3). However, interpretating the extent to which the trustee is required to timely perform the debtor's obligations has remained ambiguous and a conflict between the courts, which has led to two deciding approaches: the proration approach and the billing date approach. *In re Furr's Supermarkets, Inc.*, 283 B.R. at 66. Both approaches seek to resolve the following inquiry: whether a trustee, upon rejection of an unexpired lease for nonresidential real property, must satisfy the debtor's contractual obligations solely throughout the course of the post-petition, pre-rejection period or must satisfy all of the debtor's contractual obligations notwithstanding the effective date of rejection. Under the proration approach, "the debtor or trustee is required to pay only those lease obligations that accrue after the [order for relief or] Conversion Date and prior to the date of rejection or assumption." *Id*. at 70. In contrast, the billing date approach provides that "obligations under a lease 'arise' when they are billed and must be paid in full irrespective of whether the obligations accrued before or after the order for relief." *Id*. at 62. Notwithstanding the conflict amongst the courts, for the following reasons, the proration rule is the more compelling approach, better serves the purposes of the Bankruptcy Code to promote equality of distribution among creditors and to encourage creditors to continue business dealings with troubled debtors, both pre- and post-petition, *In re Jet Florida Sys., Inc.*, 841 F.2d at 1083, codifies the pre-§ 365 proration practice, and should be adopted by this Court.

As previously stated, "[i]n construing a statute, the words matter." *Sierra Club*, 681 F.3d at 350. Correspondingly, the Supreme Court has instructed bankruptcy courts to acknowledge that Congress "does not write on a clean slate" when amending existing statutes. *In re Las Vegas Monorail Co.*, 429 B.R. 770, 777 (Bankr. D. Nev. 2010) (quoting *Dewnsup v. Timm*, 502 U.S. 410, 417 (1992)). Furthermore, "the normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific," a procedure that the Supreme Court has followed with particular care in construing the scope of bankruptcy codifications. *Midlantic Nat'l Bank v. N.J. Dep't of Envtl. Prot.*, 474 U.S. 494, 501 (1986) (quoting *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 266-67 (1979)). Accordingly, when making statutory interpretations, courts must not read "the Bankruptcy Code to erode past bankruptcy practices absent a clear indication that Congress intended such a departure." *Hamilton v. Lanning*, 560 U.S. 505, 517 (2010).

Touch of Grey and the dissent argue that the language of § 365(d)(3) is not ambiguous; however, "[a] statute is ambiguous if it is susceptible to more than one reasonable interpretation." *Alaska Wilderness League v. EPA*, 727 F.3d 934, 938 (9th Cir. 2013) (emphasis added). As stated by the Thirteenth Circuit, the statutory language of § 365(d)(3) is ambiguous as to when a trustee's obligation arises, and "[t]he phrase 'until such lease is assumed or rejected' is likewise subject to two plausible interpretations given its grammatical placement." (R. at 18). The vague nature of § 365(d)(3) further becomes apparent "when [it] is read in conjunction with the sections of the Bankruptcy Code that deal with "claims" and their treatment." *In re Phar-Mor, Inc.*, 290 B.R. 319, 324 (Bankr. N.D. Ohio 2003). "If obligation were interpreted to refer to the entire amount that matures and becomes payable on a given date, without regard to whether any part of the amount accrued pre-petition, then . . . § 365(d)(3) would conflict with, and constitute and exception to, the provisions [of the Code] governing claims." *In re Learningsmith, Inc.*, 253 B.R. 131, 134 (Bankr. D. Mass. 2000). Such an interpretation would run afoul of the position of § 365(d)(3) within the overall statutory scheme of the Code because "[§] 365(d)(3) expressly indicates that it is meant to constitute an exception to the provisions of the Code governing administrative expenses, which are strictly post-petition in nature, but it does not state that it is meant to constitute an exception to the provisions governing claims." *Id*.

Although § 365(d)(3) is ambiguous as to *when* the trustee must perform, based on courts' application of a proration approach pre-§ 365(d)(3) in conjunction with the balancing of the equities purpose behind the Bankruptcy Code, the Thirteenth Circuit correctly determined that the plain language of the statute better lends itself to a proration interpretation to answer the question of *when*.

### B. Interpretating § 365(d)(3) Under the Proration Approach is Consistent with the Underlying Legislative Intent Behind § 365(d)(3) and the Policies of the Bankruptcy Code.

Construing § 365(d)(3) under the proration approach promotes the rudimentary purposes of the statute manifested by Congress that justified its enactment while also preserving prior judicial practices of courts interpreting the Bankruptcy Code. As previously discussed, the proration approach and the billing date approach have emerged as the two predominant interpretations of § 365(d)(3) to define when a trustee must timely perform the obligations of a debtor arising under an unexpired lease for nonresidential real property. *In re Furr's Supermarkets, Inc.*, 283 B.R. at 66. The proration approach recognizes that a debtor-tenant's obligation under § 365(d)(3) "to provide landlords of nonresidential real property full and timely payment for services due under an unexpired lease [arises] during the post-petition, pre-rejection period." *In re Phar-Mor, Inc.*, 290 B.R. at 323. Conversely, under the billing date approach, a debtor-tenant's obligation arises "when it is billed and must be paid in full irrespective of whether the obligations accrued before or after the order for relief." *In re Furr's Supermarkets, Inc*., 283 B.R. at 62. For the following reasons, the proration approach better advances the objectives of § 365(d)(3) illustrated within the legislative history as well as endorses the deep-rooted policies and practices of the Bankruptcy Code.

A vast majority of courts have held "[t]he legislative history provides compelling evidence that Congress did not intend § 365(d)(3) to include debtor-tenants' rental obligations arising prepetition, but billed postpetition." *Child World, Inc. v. Campbell/Mass. Trust (In Re Child World, Inc.)*, 161 B.R. 571, 574 (S.D.N.Y. 1993). The fundamental purpose of § 365(d)(3), as articulated by the legislative history, is solely to "ensure that a landlord received 'current payment' for 'current services.'" *In re GCP CT Sch. Acquisition LLC*, 443 B.R. at 254. Specifically, Congress enacted § 365(d)(3) to relieve landlords from the "awkward . . . interval between the entry of the tenant into bankruptcy and the tenant's decision to assume or reject the unexpired lease" without undermining the priority of the other post-petition creditors "in the distribution of the debtor's estate." *In re Handy Andy Home Improvement Ctrs. Inc.*, 144 F.3d 1125, 1127-28 (7th Cir. 1998); *see also Tenucp Prop. LLC v. Riley (In re GCP CT Sch. Acquisition, LLC)*, 429 B.R. 817, 825 (B.A.P. 10th Cir. 2010) (stating that § 365(d)(3) "was added to the Code to 'alleviate the unique financial strains the Code placed upon the commercial lessor,' namely that the lessor was formerly unable to collect rent from the debtor-tenant while at the same time prevented from taking any action to re-let the premises." (quoting *In re Iron Age Corp.*, 378 B.R. 419, 423 (Bankr. D. Mass. 2007)). In light of the legislative history, the proration approach embodies Congress's intent behind enacting § 365(d)(3) by distinguishing obligations that arise during the post-petition, pre-rejection period "to enable the debtor to keep going for as long as its current revenues cover its current costs, so that it does not collapse prematurely due to its existing debt." *In re Handy Andy Home Improvement Ctrs. Inc.*, 144 F.3d at 1127. This intent is buttressed by Congress's enactment of subsection (d)(4), which expressly directs the trustee to "immediately surrender [the] nonresidential real property to the lessor." 11 U.S.C. § 365(d)(4); *see also In re Longua*, 58 B.R. 503, 505 (Bankr. W.D. Wis. 1986) (stating that subsections (d)(3) and (d)(4) "impose a strict and inflexible requirement of timely performance upon the trustee.").

"The intent of Congress, evidenced both by the statutory language and the legislative history, makes clear that [§] 365(d) was amended to protect lessors from the risk of loss in bankruptcy cases due to the trustee failing to make timely provision for unexpired leases." *In re Macomb Occupational Health Care, LLC*, 300 B.R. 270, 289 (Bankr. E.D. Mich. 2003). There is no transparent indication Congress enacted § 365(d)(3) to abrogate "the longstanding practice under § 503(b)(1) of prorating debtor-tenants' rent to cover only the post-petition, pre-rejection period, regardless of the billing date." *In re Child World, Inc.*, 161 B.R. at 576. "Before the enactment of § 365(d)(3), the payment of post-petition lease obligations, prior to assumption or rejection of an unexpired lease, was governed by 11 U.S.C. § 503(b)(1) [, which] states that "there shall be allowed administrative expenses … including – the actual, necessary costs and expense of preserving the estate ….'" *In re Phar-Mor, Inc.*, 290 B.R. at 322 (quoting 11 U.S.C. § 503(b)(1)). Moreover, § 503(b)(1) predisposed landlords with the burden of providing services to a debtor-tenant while the debtor's creditors were given the liberty of continuing or ceasing business obligations with the debtor. *Id.* at 323. In response, Congress passed § 365(d)(3) "to relieve the burden placed on nonresidential real property lessors (or 'landlords') during the period between [the date] a tenant's bankruptcy petition [is filed] and assumption or rejection of a lease." *Id.* (quoting *Omni Partners, L.P. v. Pudgie's Dev. of NY, Inc. (In re Pudgie's Dev. of NY, Inc.)*, 239

B.R. 688, 692 (S.D.N.Y. 1999) (quotations omitted)). Construing § 365(d)(3) as requiring debtor-tenants as anything but "provid[ing] landlords of nonresidential real property full and timely payment for services due under an unexpired lease during the post-petition, pre-rejection period" would nullify a judicially instituted concept, absent a specific intent of Congress, because, prior to enactment of § 365(d)(3), the bankruptcy courts' accustomed practice was to allow "as an administrative expense the full amount of the rent at the contract rate, so long as it was not clearly unreasonable but prorated that rent over the post-petition, pre-rejection period, regardless of the billing date." *Newman v. McCrory Corp. (In re McCrory Corp.)*, 210 B.R. 934, 936 (S.D.N.Y. 1997).

"In compelling payment of rent for occupancy during the prerejection period, § 365(d)(3) does not purport to negate the traditional notions of when a claim relating to rights under a lease will be classified as arising during the period after the order for relief and prior to the rejection of the lease." *In re NETtel Corp., Inc.*, 289 B.R. 486, 495 (Bankr. D.D.C. 2002). To the contrary, the billing date approach institutes partiality that defies the fundamental intention of § 365(d)(3). Under the billing date rule, "[t]he clear and express intent of § 365(d)(3) is to require the trustee to perform the lease in accordance with its terms . . . [and] any interpretation must look to the terms of the lease to determine both the nature of the 'obligation' and when it 'arises.'" *In re Furr's Supermarkets, Inc.*, 283 B.R. at 68. To elucidate, a trustee's obligation pursuant to § 365(d)(3) would arise when the trustee is legally required to perform under the terms of the lease contract. *Id*. For this reason, the landlord would assume priority over the claims of the debtor's creditors, which would ultimately cripple the estate because the trustee would be obligated to make all of the requisite payments under the lease irrespective of the date of rejection. Therefore, the billing date approach frustrates the underlying purpose of the enactment of § 365 because it does not "allow a debtor to escape onerous and burdensome contracts in which the obligations of the debtor far exceed any possible benefit to the estate." *In re Leibinger-Roberts, Inc.*, 105 B.R. at 211.

Utilizing the proration approach, the bankruptcy court determined that Touch of Grey was entitled to an administrative expense of $4,032.26 for rent that accrued between May 1 and May 5, 2020, the effective date of the Lease rejection. (R. at 9). Had the bankruptcy court instead employed the billing date approach, Touch of Grey's administrative expense would have been $25,000.00 for the entire month of May, notwithstanding that the Debtor surrendered the premises on May 5, at which time Touch of Grey was entitled to relet the property to another tenant. Thus, under the billing date approach, Touch of Grey would have received an additional administrative expense of $20,967.74 (*i.e.*, an additional $4,193.55 per day for the five days the Debtor actually occupied the premises in May 2020). As exemplified in this case, were the Court to adopt the billing date approach, as argued by Touch of Grey and the dissent, landlords such as Touch of Grey would be entitled to a windfall to the detriment of debtors and their non-landlord creditors, thus directly contravening the notion of equitable distribution among creditors.

The Bankruptcy Code strives to balance equality among creditors against the laws of fairness and practicability from the viewpoint of the estate. For the aforementioned reasons, the statutory language of 11 U.S.C. § 365(d)(3) is ambiguous with regard to a debtor's "obligation" under an unexpired lease of nonresidential real property. Due to this ambiguity, there has been a split of decisions amongst bankruptcy courts, resulting in implementation by the courts of the proration approach and the billing date approach. The proration approach, however, better aligns with pre-§ 365(d)(3) judicially created bankruptcy practices as well as the legislative history of the statute. Therefore, this Court should adopt the proration approach, through which a debtor's obligation with respect to an unexpired nonresidential lease is allocable solely to the post-petition, pre-rejection period.

## CONCLUSION

The Thirteenth Circuit correctly affirmed that a creditor providing value and receiving payment for such new value under § 503(b)(9) cannot use that same value to offset its preference liability under § 547(c)(4). The plain language of § 547(c)(4), the context surrounding § 547, and policy considerations support this conclusion. Specifically, the plain language of § 547(c)(4) does not include a temporal limitation, either explicitly or impliedly. If Congress intended to limit the "otherwise unavoidable transfer" of § 547(c)(4) to pre-petition transfers, it would have done so expressly as it has in many other provisions of the Bankruptcy Code. Additionally, whatever grammatical dissection of the statute is performed, the result is the same—there is no explicit or implied temporal limitation for when an "otherwise unavoidable transfer" must occur. Further, any assertion of a dual entity theory is a red herring and irrelevant to the timing of an "otherwise unavoidable transfer." Likewise, a review of the context of the Bankruptcy Code and § 547 show there is no temporal limitation in § 547(c)(4). There is nothing in the title of "Preferences," the hypothetical liquidation test, the statute of limitations, or any other contextual argument that indicates an actual or implied limit of the "otherwise unavoidable transfer" to the pre-petition period. Finally, not allowing a creditor that provided value and received payment for such value under § 503(b)(9) to use the same value to offset its preference liability under § 547(c)(4) preserves two important policy goals of the Bankruptcy Code, namely encouraging creditors to continue dealing with the troubled business and equality of distribution among creditors.

The Thirteenth Circuit also correctly affirmed the bankruptcy court's determination that the statutory language of § 365(d)(3) is ambiguous with regard to the timing of when a debtor's "obligation" arises under an unexpired lease of nonresidential real property. This ambiguity has led to a split of decisions amongst the courts, resulting in implementation of two plausible approaches. Under the proration approach, a trustee is required to pay only the obligations under an unexpired nonresidential lease that accrue post-petition and pre-rejection, and under the billing date approach, the trustee must pay all lease obligations in full when they are billed, irrespective of when rejection occurs. The proration approach, however, better aligns with the practices of bankruptcy courts prior to enactment of § 365(d)(3), as evidenced by the legislative history of the statute and better achieves the goals of the Bankruptcy Code to promote fairness and equitable distribution amongst creditors while encouraging them to continue doing business with the debtor during the bankruptcy. Therefore, this Court should adopt the proration approach, through which a debtor's obligation with respect to a nonresidential lease is allocable solely to the post-petition, pre-rejection period.

For these reasons, Casey Jones, the Chapter 7 Trustee, respectfully requests that this Court affirm the decision of the Thirteenth Circuit Court of Appeals.