No. 21-0909

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2021

IN RE TERRAPIN STATION, LLC, DEBTOR,

TOUCH OF GREY ROASTERS, INC., PETITIONER

V.

CASEY JONES, CHAPTER 7 TRUSTEE, RESPONDENT.

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

Brief for Petitioner

Team P25
Counsel for Petitioner

QUESTIONS PRESENTED

I. Whether Touch of Grey, a critical vendor who sold goods to the Debtor on credit and continued to support the Debtor's reorganization plan after the Debtor filed bankruptcy, is entitled to use the new value defense analysis to reduce its preference exposure pursuant to 11. U.S.C. § 574(c)(4) even though Touch of Grey was paid in full for the goods as an administrative expense pursuant to 11. U.S.C. § 503(b)(9).

II. Whether 11 U.S.C. § 365(d)(3) requires the Trustee to timely perform the obligations of the Debtor in the context of post-petition rent due to Touch of Grey under an unexpired lease of nonresidential real property.

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OPINIONS BELOW

The United States Court of Appeals for the Thirteenth Circuit ("Thirteenth Circuit") affirmed the decision from the United States District Court for the District of Moot on both issues appealed in Case No. 20-0803. The full opinion of the Thirteenth Circuit is reproduced as the record in this appeal. [R at 1-33.]

For the first issue, the Thirteenth Circuit held that section 547(c)(4) of the Bankruptcy Code precludes the Petitioner from asserting new value for goods subject to a satisfied administrative expense under section 503(b)(9). [R. at 10]. The Thirteenth Circuit reasoned that the payment of an administrative expense is not an "otherwise unavoidable transfer" that constitutes new value under section 504(c)(4). [R. at 13]. According to the Thirteenth Circuit's statutory analysis, section 504(c)(4) is not ambiguous, and it does not impose a limitation regarding the time to consider whether a payment on account of new value is "otherwise unavoidable." [R. at 12-13]. According to the Thirteenth Circuit's analysis on congressional intent, Congress does not intend to impose such a time limitation, which would otherwise violate the equal treatment principle of the Bankruptcy Code. [R. at 14-15]. Accordingly, the Thirteenth Circuit ruled that the Petitioner is not allowed to reduce its preference exposure pursuant to section 547(c)(4). [R. at 15].

For the second issue, the Thirteenth Circuit held that section 365(d)(3) does not require the Respondent to satisfy obligations allocable to the post-rejection period. [R. at 15]. According to the Thirteenth Circuit's statutory analysis, the text of section 365(d)(3) is ambiguous because the statute fails to explicate when a debtor's obligations "arise" and the phrase "until such lease is assumed or rejected" has two plausible interpretations. [R. at 18]. Relying on the context of section 365(d)(3) and the Bankruptcy Code, the Thirteenth Circuit concluded that the Debtor is allowed to escape obligations allocable to the post-rejection period through rejection. [R. at 18-19]. In

addition, the Thirteenth Circuit found no support in the legislative history that Congress intended to elevate a portion of a landlord's post-rejection damages claim to an administrative expense, and instead adopted the proration approach. Accordingly, the Thirteenth Circuit ruled that the Petitioner is only entitled to an administrative expense in the amount of the pre-rejection portion of the Debtor's obligations. [R. at 17].

STATEMENT OF JURISDICTION

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

STATUTORY PROVISIONS

The relevant statutory provisions involved in this case are listed below and are reproduced in Appendices A – C.

11 U.S.C. § 547 *et seq.*

11 U.S.C. § 503(b)

11 U.S.C. § 365(d)

STATEMENT OF FACTS

The long and strange trip into bankruptcy of Terrapin Station, LLC, (the "Debtor") was a classic case of instant success turned brokedown palace. Founded by its sole member, William Tell ("Tell") in 2005, the Debtor began as an independent coffeehouse in the Town of Terrapin, Moot, and quickly collected a loyal customer base. [R. at 3]. Recognizing the strong consumer demand for independent coffeehouses, Touch of Grey Roasters, Inc. ("Touch of Grey"), an international coffee company and coffeehouse chain, planned to open a series of "neighborhood coffeehouses" that would sell their new line of "Dark Star" coffee products. [R. at 4]. Despite its early success, by the fall of 2017, the Debtor's business had plateaued and its store was in need of

remodeling. [R. at 4]. Therefore, when Touch of Grey approached Tell to see if the Debtor would be interested in franchising a new neighborhood coffeehouse, Tell agreed to move forward with the venture. [R. at 4].

To facilitate the opening of the new "Terrapin Station Coffeehouse," Touch of Grey purchased a recently renovated space (the "Premises") in Terrapin and agreed to lease it to the Debtor. [R. at 4-5]. The parties entered into a *Lease Agreement* ("the Lease") on July 1, 2018, for the Premises. [R. at 4]. Under the terms of the Lease, the Debtor, as tenant, would pay Touch of Grey, as landlord, monthly rent in the amount of $25,000, with such rent being "due in advance on the first day of each month." [R. at 4]. The same day as they entered into the Lease, the parties signed a franchise agreement, which required the Debtor, as franchisee, to exclusively sell Dark Star-branded products purchased directly from Touch of Grey. [R. at 4].

The new Terrapin Station Coffeehouse opened on December 1, 2018, and Debtor's original coffeehouse simultaneously closed. [R. at 5]. Unfortunately, the new location failed to gain traction in the Terrapin community, and the resulting lower than expected sales caused the Debtor to struggle financially throughout 2019. [R. at 5]. By November of 2019, the Debtor was unable to pay its debts as they became due and owed Touch of Grey, alone, over $700,000 for Dark Star-branded goods that it had purchased. [R. at 5]. Despite the Debtor's financial difficulty, instead of terminating the franchise immediately, Touch of Grey was willing to enter into a forbearance agreement with the Debtor. [R. at 5]. Accordingly, the Debtor paid $250,000 of the outstanding invoices for Dark Star products and reaffirmed its obligations under the Lease, in exchange for Touch of Grey's forbearance from terminating the franchise agreement. [R. at 5]. On December 18, 2019, Touch of Grey continued to sell the Debtor another $200,000 worth of Dark Star products

on credit. [R. at 5]. Touch of Grey delivered the products and invoice (the "Invoice") to the Debtor on December 21, 2019. However, the Debtor did not make a payment under the Invoice. [R. at 6].

Facing mounting debts and disappointing sales, the Debtor filed a petition for relief under chapter 11 of the Bankruptcy Code on January 5, 2020 (the "Petition Date"). [R. at 6]. On the Petition Date, the Debtor owed Touch of Grey $650,000 (including the amount due under the Invoice), and over $500,000 to other unsecured creditors. [R. at 6]. Despite the debts, Tell stated that he wished to reorganize the Debtor and planned to continue to adhere to the terms of the franchise agreement. [R. at 6]. As a critical vendor, Touch of Grey remained in ongoing, good faith discussions with the Debtor about its reorganization plan. [R. at 6].

Realizing Touch of Grey's importance to its reorganization, the Debtor subsequently filed a motion requesting that the bankruptcy court allow it to pay Touch of Grey $200,000 for the pre-petition products it purchased on December 18, 2020. [R. at 5]. Although a debtor normally does not pay pre-petition claims during the post-petition stage, the creditors' committee supported the motion, considering that Touch of Grey was a critical vendor. [R. at 7]. The bankruptcy court allowed the payment on another ground: that the payment to a critical vendor would qualify as an administrative expense under section 503(b)(9) for the value of the goods sold on the Invoice. [R. at 7]. The Debtor made the payment days later and Touch of Grey resumed selling goods to the Debtor on credit, allowing the Debtor to continue its operations. [R. at 7].

Almost immediately after beginning the reorganization process, the Debtor was forced to halt operations in March 2020 due to the COVID-19 pandemic. [R. at 7]. While the Debtor reopened for the month of April, shutdown became inevitable. [R. at 7]. On May 5, 2020, the Debtor permanently ceased operations and vacated the Premises. [R. at 7]. The next day, the

Debtor filed a motion with the bankruptcy court to reject both the Lease and the franchise agreement with Touch of Grey pursuant to section 365(a). [R. at 7].

In response, Touch of Grey filed a motion to seeking to compel payment of the May rent, which became due under the Lease on May 1, 2020. [R. at 7]. Although it did not oppose the Debtor's rejection of the Lease, it asserted that it was entitled to payment of the May rent in full, pursuant to section 365(d)(3), because the rent became due prior to the Debtor's rejection of the Lease. [R. at 8].

Before the hearing on the motions, the Debtor converted its chapter 11 case to a chapter 7 case. [R. at 8]. As such, the bankruptcy court entered an order appointing Casey Jones (the "Trustee") as the chapter 7 trustee for the Debtor's estate. [R. at 8]. The bankruptcy court also granted the Debtor's motion to reject the Lease and franchise agreement effective as of May 5, 2020, but required additional briefing on Touch of Grey's request for payment of the May rent. [R. at 8].

In the time between, the Trustee objected to Touch of Grey's motion to compel payment pursuant to section 365(d)(3), asserting that payment was inequitable to other creditors because the Debtor only occupied the Premises for the first five days of the month. [R. at 8]. The Trustee also initiated an adversary proceeding against Touch of Grey, seeking to "claw back" the $250,000 payment that the Debtor had made to it under the forbearance agreement as a preferential transfer pursuant to sections 547(b) and 550(a). [R. at 8]. Touch of Grey immediately filed an answer, asserting that it was entitled to reduce its preference exposure by the $200,000 in goods sold (shown on the Invoice) pursuant to section 547(c)(4). [R. at 8].

After failed attempts at mediation, the bankruptcy court ruled in favor of the Trustee on both issues. [R. at 9]. Accordingly, the court entered a judgment in the amount of $250,000 in

favor of the Trustee and granted Touch of Grey an administrative expense in the amount of $4,032.26, rather than the $25,000 it sought. [R. at 9]. Touch of Grey timely brought a consolidated appeal to the District Court for the District of Moot, which affirmed the bankruptcy court. [R. at 9]. The Thirteenth Circuit likewise affirmed, and Touch of Grey timely petitioned this Court for a writ of certiorari, which it granted. [R. at 1, 3].

STANDARD OF REVIEW

Touch of Grey does not dispute the facts set forth in the record. Rather, the issues Touch of Grey raises on appeal are purely questions of law and are, therefore, subject to *de novo* review. *See, e.g.*, *Texas v. Soileau (In re Soileau)*, 488 F.3d 302, 305 (5th Cir. 2007). Under a *de novo* standard of review, the reviewing court acts as though it was the original trial court in the matter. *See, e.g.*, *Razavi v. Comm'r of Internal Revenue*, 74 F.3d 125, 127 (6th Cir. 1996) (quotation omitted). Statutory interpretation is a question of law subject to *de novo* review. *See, e.g.*, *Koenig Sporting Goods, Inc. v. Morse Road Co. (In re Koenig Sporting Goods, Inc.)*, 203 F.3d 986, 988 (6th Cir. 2000).

ARGUMENT

I. Touch of Grey May Reduce Its Preference Exposure by Applying New Value Under Section 547(c)(4) even Though Such New Value Was Paid for in Full Post-Petition Under Section 503(b)(9).

Touch of Grey may invoke the new value defense under section 547(c)(4) to reduce its preference exposure even though the new value was paid for in full post-petition under section 503(b)(9). Section 547(b) permits a trustee to avoid a preferential transfer of an interest in the debtor's property to a creditor if the transfer was made within 90 days before the date on which the debtor files a petition for bankruptcy. 11 U.S.C. § 547(b). However, section 547(c)(4) offers creditors a new value defense to the preferential transfer under section 547(b). *See* 11 U.S.C. §§

547(b), (c)(4). Section 547(c)(4) states that a creditor can reduce its preference exposure, "to the extent that, after such transfer, [the creditor] gave new value to 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 such creditor." 11 U.S.C. § 547(c)(4).

In this case, Touch of Grey, the creditor, gave new value to its Debtor–(A) "not secured by an otherwise unavoidable security interest" because the Debtor had no secured debt. Therefore, section 547(c)(4)(A) is not in dispute. The key issue in dispute remains in section 547(c)(4)(B). Touch of Grey argues that it can satisfy section 547(c)(4)(B) because the new value paid in full post-petition under section 503(b)(9) did not constitute an "otherwise unavoidable transfer." An analysis of the statutory language, policy implications, and legislative history of the Bankruptcy Code indicates that the petition date is the cutoff to consider whether a payment constitutes an "otherwise unavoidable transfer."

A. Statutory Analysis Indicates That Section 547(c)(4) Designates the Petition Date as the Cutoff to Determine Whether a Payment Constitutes an "Otherwise Unavoidable Transfer."

A statutory analysis indicates that section 547(c)(4) designates the petition date as the cutoff to determine whether a payment constitutes an "otherwise unavoidable transfer." The statutory analysis focuses on the plain language of section 547(c)(4) and its statutory context.

First, we must begin with the plain language of the statute. *See Friedman's Liquidating Tr. v. Roth Staffing Cos. LP* (*In re Friedman's Inc.*), 738 F.3d 547, 553 (3d Cir. 2013). When the statutory language is plain, the sole function of the court is to enforce the statute. *Id*. The court does not need to consider statutory purpose or legislative history unless the language of the statute is ambiguous or unclear. *Id*. Here, section 547(c)(4) is silent on when the payment must be made to constitute an "otherwise unavoidable transfer." *Id*. Although many courts are split on whether

the petition date should be used to determine the timing issue, it does not mean section 547(c)(4) is necessarily ambiguous on its application. *Compare In re Friedman's Inc.*, 738 F.3d at 554 (holding that the new value defense under section 547(c)(4) that required that the debtor must not have fully compensated a creditor for "new value" as of the date that it filed the bankruptcy petition) *with Beaulieu Liquidating Tr. v. Fabric Sources, Inc. (In re Beaulieu Grp., LLC)*, 616 B.R. 857, 878 (Bankr. N.D. Ga. 2020) (suggesting that there is no cutoff date or temporal limitation under section 547(c)(4) as a creditor who has been paid in full under section 503(b)(9) cannot use the new value defense to reduce preference exposure).

The plain language of section 547(c)(4) "closes the preference window at the petition," limiting the section 547(c)(4) new value defense to payments made before the petition date. *Phoenix Rest. Grp., Inc. v. Ajilon Pro. Staffing LLC (In re Phoenix Rest. Grp., Inc.)*, 317 B.R. 491, 496 (Bankr. M.D. Tenn. 2004). Section 547(c)(4)(B) explicates that an "otherwise unavoidable transfer" must be new value made by "*the debtor*," not "*the trustee*." *See Bergquist v. Anderson-Greenwood Aviation Corp*. (*In re Bellanca Aircraft Corp*.), 850 F.2d 1275-1284 (8th Cir. 1988). However, section 547(a)(2) identifies "new value" as "money . . . that is neither void nor voidable by *the debtor* or *the trustee*," suggesting that only new value made by "the debtor" may constitute an "otherwise unavoidable transfer." 11 U.S.C. § 547(a)(2). The debtor is a prepetition entity. *See id.* Post-petition payments are not made by *the debtor*, but *the trustee* or *the debtor*-in-possession. *See id.* Thus, post-petition payments made under section 503(b)(9) may not constitute an "otherwise unavoidable transfer" under section 547(c)(4)(B). *In re Phoenix Rest. Grp., Inc.*, 317 B.R. at 494.

The meaning of statutory language, plain or not, depends on context. *See King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991). The interpretation of section 547(c)(4) in the context

of Bankruptcy Code sections also shows that the petition date is the cutoff for the new value defense. First, section 547 is titled as "Preferences," suggesting that section 547 governs bankruptcy issues that occur in the preference period. 11 U.S.C. § 547. "Preference period" refers to the pre-petition period, or 90 days prior to the bankruptcy filing. *In re Friedman's Inc.*, 738 F.3d at 549. Consequently, section 547(c)(4)(B) should also limit an "otherwise unavoidable transfer" that occurs in the preference period or the pre-petition period. *Id*.

Second, Congress has expressly imposed the petition date as the cutoff for other matters under section 547. For instance, section 547(b)(5) requires a court to construct a hypothetical liquidation analysis to compare what a creditor receives during the preference period with what the creditor would have received in a chapter 7 liquidation case. *See* 11 U.S.C. § 547; *Union Meeting Partners v. Lincoln Nat'l Life Ins. (In re Union Meeting Partners)*, 163 B.R. 229, 236 (Bankr. E.D. Pa. 1994). Despite the silence of section 547(b)(5), courts have held that the hypothetical liquidation analysis must be conducted as of the petition date. *Id.* Section 547 (c)(5) specifies the cutoff date "as of the date of the filing of the petition . . . ." 11 U.S.C. § 547(c)(4). The Thirteenth Circuit used section 547 (c)(5) to argue that section 547(c)(4) does not contain a cutoff date simply because the date is not specified. The Thirteenth Circuit's reasoning is untenable. Leaving the cutoff date unspecified does not necessarily mean there is no cutoff date. *In re Friedman's Inc.*, 738 F.3d at 554. If there is no cutoff date, then transfers made during either the prepetition or post-petition period would constitute "otherwise unavoidable transfer(s)" under section 547(c)(4). *Id.* Such a reading of section 547(c)(4) would be inconsistent with section 547(b)(5). *See* 11 U.S.C. §§ 547(b)(5), (c)(4). In addition, reading the petition date as the cutoff under section 547(c)(4) would make it consistent with Section 547(c)(5). *See* 11 U.S.C. §§ 547(c)(4), (c)(5).

Third, according to section 547(a), the petition date triggers the statute of limitations for filing to avoid a preferential transfer, suggesting that under section 547(c)(4), the new value defense against the preference avoidance action should set the petition date as a cutoff. *In re Friedman's Inc.*, 738 F.3d at 556. After all, if Congress had intended to allow for post-petition transactions to affect the creditor's new value defense, Congress could have crafted a different statute of limitations. *Id*.

In this case, the Debtor was authorized by the bankruptcy court to pay its creditor, Touch of Grey, an administrative expense ($200,000 from a previous delivery of Dark Star products) pursuant to section 503(b)(9). The administrative expense was paid in full after the Debtor filed bankruptcy in January 2020. Thus, the payment was made post-petition. Such a payment does not constitute an "otherwise unavoidable transfer" under section 547(c)(4) because the petition date is the cutoff to consider a payment as an "otherwise unavoidable transfer."

Relying on the statute's plain language, Touch of Grey could argue that section 547(c)(4) "closes the preference window at the petition." Touch of Grey could also argue that the administrative expense was authorized by the bankruptcy court and paid by the Trustee or the debtor-in-possession, not the Debtor itself. However, the plain language of section 547(c)(4) specifies that an "otherwise unavoidable transfer" must be made by the Debtor.

In addition, relying on the context of section 547(c)(4), Touch of Grey could make three arguments. First, 547(c)(4) is a subsection of section 547, which concerns issues occurring in the preference period. Second, reading the petition date as the cutoff to consider whether a payment constitutes an "otherwise unavoidable transfer" is the only way to make section 547(c)(4) consistent with the interpretations of section 547(c)(5)'s timing restriction and section 547(b)(5)'s hypothetical liquidation test. Third, section 546(a) considers the petition date as the beginning of

the statute of limitations for a preference avoidance action, suggesting that section 547(c)(5) imposes the petition date as the cutoff. In conclusion, Touch of Grey is still entitled to reduce its preference exposure under section 547(c)(4) even though the new value was paid for in full post-petition pursuant to section 503(b)(9).

B. Both Policy Implications and Legislative History Support the Conclusion That Touch of Grey Is Entitled to Reduce Its Preference Exposure Under Section 547(c)(4) even Though the New Value Was Paid for in Full Post-Petition Pursuant to Section 503(b)(9).

In addition to statutory analysis, both policy implications and legislative history support the conclusion that Touch of Grey is entitled to reduce its preference exposure under section 547(c)(4) even though the new value was paid for in full post-petition pursuant to section 503(b)(9).

Some courts have concluded that the creditor's new value defense under section 547(c)(4) does not include new value advanced during the post-petition period. *See In re Friedman's Inc.*, 738 F.3d at 557; *see also Kaye v. Accord Mfg., Inc. (In re Murray, Inc.)*, 2007 WL 5595447, at *2 (Bankr. M.D. Tenn. June 6, 2007). Therefore, it would be inequitable to allow post-petition transfers to affect the preference analysis because otherwise post-petition extensions of new value should be available for creditors as a defense. *In re Friedman's Inc.*, 738 F.3d at 560.

The Thirteenth Circuit's policy reasoning is that reducing the creditor's preference exposure through the new value defense under section 547(c)(4) is an inequitable treatment, causing "double dipping" as the new value may be paid in full post-petition under section 503(b)(9). The Thirteenth Circuit's argument is untenable for three reasons.

First, in terms of congressional intent, neither the language of section 547(c)(4) nor section 503(b)(9) indicates that Congress intends to prohibit the new value defense. *See Commissary Operations, Inc. v. Dot Foods, Inc. (In re Commissary Operations, Inc.)*, 421 B.R. 873, 879

(Bankr. M.D. Tenn. 2010). Section 503(b)(9) allows a creditor to receive payment of goods sold to a debtor "in the ordinary course of its business within 20 days prior to the petition date." 11 U.S.C. § 503(b)(9). The debtor may pay a critical vendor in the full amount post-petition for a pre-petition new value invoice. *In re Phoenix Rest. Grp., Inc*., 317 B.R. at 496. Such "new value" under section 503(b)(9) does not constitute an "otherwise unavoidable transfer" for the purpose of subsequent new value analysis under section 547(c)(4). *In re Commissary Operations, Inc.*, 421 B.R. at 876.

Second, in terms of legislative history, when Congress created Section 503(b)(9) in 2005, 25 years after the enactment of section 547(c)(4), Congress did not amend section 547(c)(4) to require a reduction of new value by any amount that is paid under section 503(b)(9). *See* Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23, § 1227 (2005). The United States Supreme Court has been "reluctant to accept arguments that would 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). Therefore, lacking a discussion about the legislative history regarding the impact of enacting section 503(b)(9) on section 547(c)(4), it is likely that the enactment of section 503(b)(9) does not preclude subsequent new value defense under section 547(c)(4).

Last of all, in terms of the policy goals of section 503(b)(9) and section 547(c)(4), the Thirteenth Circuit's equal treatment principle and "double dipping" theory are untenable because "inequality *per se* is not to be avoided." *In re Friedman's Inc.*, 738 F.3d at 560. A proper interpretation should not "result in absolutely equal treatment of all unsecured claims." *Id.* Rather, the Bankruptcy Code does allow some creditors to be treated more equally than others. *Id*. In

particular, the policy goals of section 503(b)(9) and section 547(c)(4) below explain why creditors who receive payment in full under section 503(b)(9) could get "special treatment" for using the subsequent new value defense under section 547(c)(4).

Congress intended to enact section 547(c)(4) and section 503(b)(9) for two reasons. First, section 547(c)(4) protects debtors by encouraging trade creditors to continue to do business with and extend credit to a debtor in financial trouble and heading for bankruptcy. *See In re Arts Dairy, LLC*, 414 B.R. 219, 220 (Bankr. N.D. Ohio 2009). Second, conversely, section 503(b)(9) protects creditors by discouraging abuse by debtors who seek to obtain goods or service prior to a potential bankruptcy and in that payment for the goods or services does not have to be tendered. *Id*.

As a result, Congress does not intend to force a creditor to choose exclusively between a payment under section 503(b)(9) for the value of goods delivered to the debtor within 20 days of the petition and asserting a subsequent new value defense to reduce its preference exposure. *In re Commissary Operations, Inc.*, 421 B.R. at 879. Requiring creditors to make such a choice would chill creditors' willingness to continue to do business with financially troubled debtors. *Id*. Notably, creditors continuing support to debtors in financial trouble is significantly important. *Id*. Creditors' right to receive payment by selling goods or services to the debtor heading for bankruptcy "does not negate the fact that the continuing business with the creditor can help the debtor or debtor-in-possession realize the mark-up profit in the re-sale of the goods and obtain the ability to satisfy its customers, [achieving] the most important goals of a business entity–to maximize its goodwill." *Id*. Therefore, not forcing creditors to make such a choice is consistent with Congress' inherent policy goals behind enacting section 503(b)(9) and section 547(c)(4).

In this case, both policy implications and legislative history support the conclusion that Touch of Grey is entitled to the subsequent new value defense under section 547(c)(4) even though the new value was paid in full post-petition under section 503(b)(9).

Touch of Grey is a vendor who leased a newly renovated space and provided Dark Star products to the Debtor. The Debtor struggled throughout 2019. However, Touch of Grey continued to support the Debtor's reorganization after it filed bankruptcy in January 2020. Touch of Grey engaged in ongoing, good faith discussions with the Debtor regarding its reorganization strategy. The Debtor recognized Touch of Grey as critical to its reorganization plan and requested the authority to pay Touch of Grey in full ($200,000 from a previous delivery of Dark Star products) as an administrative expense pursuant to section 503(b)(9).

As discussed above, Congress intends to protect critical vendors like Touch of Grey who continued to do business with the Debtor heading for bankruptcy. To be consistent with Congress' inherent policy goals, Touch of Grey should not be forced to choose between a payment of $200,000 under Section 503(b)(9) for the value of Dark Star products delivered and asserting a new value defense to reduce its preference exposure under section 547(c)(4). In conclusion, there should not be a $200,000 increase in its preference exposure only because Touch of Grey was paid in full pursuant to section 503(b)(9).

II. Touch of Grey Is Entitled to Payment of the May 2020 Rent in Full Under Section 365(d)(3).

The Thirteenth Circuit erred in concluding that section 365(d)(3) only requires the Debtor to pay rent for the five days that it had occupied the Premises prior to rejection of the Lease because the statute unambiguously compels the Trustee to perform all obligations that arise prior to rejection. As such, Touch of Grey is entitled to payment of an administrative expense for the full $25,000 of May 2020 rent that became due under the Lease before rejection. First, traditional

principles of statutory interpretation *require* payment of the rent in full. Second, a look at the policy implications and legislative history behind the enactment of section 365(d)(3) further support the same conclusion.

A. The Plain Language of Section 365(d)(3) Unambiguously Compels the Trustee to Perform All Obligations That Arise Prior to Rejection.

Rather than jump through hoops to find ambiguity in a clearly written statute, this Court should hold that section 365(d)(3) requires what it clearly and unambiguously says, payment of the May 2020 rent in full. For years, the Supreme Court has emphasized that the inquiry begins with one cardinal canon: "courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253 (1992). If the statute's language is plain, "the sole function of the courts is to enforce it according to its terms." *Caminetti v. U.S.*, 242 U.S. 470, 485 (1917). In other words, if the words of a statute are unambiguous, then the first canon is also the last, and the judicial inquiry is complete. *See, e.g.*, *Conn. Nat'l Bank*, 503 U.S. at 254. This formula reflects the constitutional principle of separation of powers, requiring courts to "interpret statutes, not to make them." *N.Y. Cty. Nat'l Bank v. Massey*, 192 U.S. 138, 146 (1904); *see also, Lamie v. U.S. Tr.*, 540 U.S. 526, 542 (2004) ("It is beyond our province to rescue Congress from its drafting errors, and to provide for what we might think . . . is the preferred result.") (quotation omitted). Courts that stray beyond their enumerated roles jeopardize the foundations of this Nation's government, as the legislative branch of the government alone has the authority to make and, if it sees fit, amend the law. *See, e.g.*, *Caminetti*, 242 U.S. at 490-91.

Section 365(d)(3) specifically applies to unexpired leases of nonresidential real property, by providing, in relevant part, that: "The trustee shall timely perform all the obligations of the debtor . . . arising from and after the order of relief under any unexpired lease of nonresidential

real property, until such lease is assumed or rejected, notwithstanding section 503(b)(1) of this title." 11 U.S.C. § 365(d)(3). The statute, therefore, requires the trustee to perform all "obligations" of the debtor "arising" under an unexpired lease of nonresidential real property prior to assumption or rejection. Though "obligations" and "arising" are not defined in the Bankruptcy Code, traditional principles of statutory construction require that words in a statute carry their "ordinary, contemporary, common meaning." *Pioneer Inv. Serv. Co. v. Brunswick Assoc. Ltd. P'ship*, 507 U.S. 380, 388 (1993). The common meaning of the word "obligation" is a legal duty to do something. *Obligation,* Black's Law Dictionary (11th ed. 2019). The common meaning of the word "arise" is to originate from. *Arise*, Black's Law Dictionary (11th ed. 2019). Therefore, considered together, the plain language of section 365(d)(3) compels the trustee to perform all of the legal duties of the debtor that originated prior to rejection or assumption of any unexpired lease of nonresidential real property.

Excepting the Thirteenth Circuit, all circuit courts of appeal that have interpreted section 365(d)(3) in the context of post-petition rent due under an unexpired lease of nonresidential real property have held that the plain language of the statute is unambiguous. *See Burival v. Roehrich (In re Burival),* 613 F.3d 810 (8th Cir. 2010); *HA-LO Indus., Inc. v. CenterPoint Props. Tr.*, 342 F.3d 794 (7th Cir. 2003); *Centerpoint Props. v. Montgomery Ward Holding Corp. (In re Montgomery Ward Holding Corp.)*, 268 F.3d 205 (3d Cir. 2001); *In re Koenig Sporting Goods, Inc.*, 203 F.3d 986 (6th Cir. 2000). Finding no ambiguity, these courts have adopted what is known as the "billing date" approach, which requires the trustee to perform the lease in accordance with its terms. *See, e.g.*, *In re Montgomery Ward Holding Corp.*, 268 F.3d at 210 ("Finding a straightforward interpretation that produces a rational result and no other reasonable interpretation consistent with the text, we are constrained to hold that § 365(d)(3) is not ambiguous.").

Some courts, however, have instead concluded that the plain language of section 365(d)(3) is ambiguous. *See, e.g.*, *El Paso Props. Corp. v. Gonzales (In re Furr's Supermarkets, Inc.)*, 283 B.R. 60 (B.A.P. 10th Cir. 2012); *In re Ames Dep't Stores, Inc.*, 306 B.R. 43 (Bankr. S.D.N.Y. 2004) (Gerber, J.); *In re NETtel Corp.,* 289 B.R. 486 (Bankr. D.D.C. 2002) (Teel, J.). Noticeably, the reasons for ambiguity vary. *See, e.g.*, *In re NETtel Corp.*, 289 B.R. at 496 ("The term 'arising' is susceptible of being used in an accrual sense: a rental obligation arises under the lease based on the corresponding period of occupancy under the lease."); *In re Ames Dep't Stores, Inc.*, 306 B.R. at 67 ("[I]t is the modifiers associated with 'obligations' . . . that create the ambiguity."); *In re Furr's Supermarkets, Inc.*, 283 B.R. at 66 n.8 ("The existence of a split in the circuits in the interpretation of § 365(d)(3) is, in itself, evidence of the ambiguity in the language."). However, finding ambiguity, generally, these courts uniformly go beyond the words of section 365(d)(3) and consider secondary canons of statutory construction, legislative history, and policy implications, to reach a different result. *See, e.g.*, *In re Furr's Supermarkets, Inc.*, 283 B.R. at 68. This result, known as the "proration" approach, interprets section 365(d)(3) to require the trustee only to pay a portion of the rent due under the lease, prorated for the number of days the lease was used before rejection. *See, e.g.*, *In re NETtel Corp., Inc.*, 289 B.R. at 494 ("Congress must have intended that rental obligations arise on an accrual basis at the same time as the corresponding right of use and occupancy.").

The Trustee urges this Court to look past the plain language of section 365(d)(3) and import its own idea of how the statute should work, hoping that idea is favorable to the proration approach. Such a finding would open the door to cherry-picked policy and equity arguments that, though admittedly desirable in some aspects, nevertheless fail to divine Congress' true intent better than the words that it drafted. However, the rules of statutory interpretation require that this Court begin

with the plain language of the statute and go no further if the meaning is clear. Giving the words "obligation" and "arise" their common meanings, the plain language of section 365(d)(3) compels the Trustee to perform all of the legal duties of the Debtor that originated prior to rejection or assumption of any unexpired lease of nonresidential real property. In this case, the legal duty is the Debtor's contractual obligation to pay rent each month. It is undisputed that the Lease required the Debtor to pay monthly rent in the amount of $25,000, with such rent being "due in advance on the first day of each month." Therefore, via the terms of the Lease, the duty originated on the first day of the month, May 1, 2020. As this was five days prior to the Debtor's rejection of the lease, section 365(d)(3) unambiguously compels the Trustee to perform the lease in accordance with its terms. Unless this Court is to substitute Congress' intent for its own, section 365(d)(3), too, must be enforced according to its terms. As such, the Trustee must "timely perform" the obligations of the Debtor and pay Touch of Grey the $25,000 of May 2020 rent that it is owed under section 365(d)(3).

B. Section 365(d)(3) Is Unambiguous. Even if the Court Finds That It Is Ambiguous, Both Legislative History and Policy Implications Support the Billing Date Approach Mandated by Section 365(d)(3).

As section 365(d)(3) is unambiguous, it is unnecessary to consider sources of interpretation beyond the plain language of the statute itself. *See In re Koenig Sporting Goods, Inc.*, 203 F.3d at 988. Nonetheless, when a statute is ambiguous, a court may look to its purpose and consider extrinsic information, such as the statute's legislative history and policy implications, in determining what Congress intended. *Id.* at 989. Even if this Court finds that the language of the text is ambiguous, the legislative history and policy implications, if considered, further support the conclusion that Congress intended to apply the billing date approach when it enacted section 365(d)(3).

The purpose of section 365(d)(3) was to grant greater protections to landlords during the period between a tenant's bankruptcy petition and assumption or rejection of a lease. Prior to 1984, landlords who leased premises to a debtor-in-possession had to jump through hoops to collect post-petition lease obligations as administrative expenses under section 503. *See* Joshua Fruchter, *To Bind or Not to Bind–Bankruptcy Code § 365(d)(3): Statutory Minefield*, 68 Am. Bankr. L.J. 437, 437 (1994). As bankruptcy courts exercise discretion with the timing of payment of administrative expenses, landlords were often forced to wait until plan confirmation to recover rent owed to them under the terms of the lease. *Id.* Exacerbating this problem, section 365(d)(2)'s provision that a debtor had until confirmation of a plan to decide whether to assume or reject an unexpired lease meant that a debtor could stay in the landlord's premises indefinitely post-petition without paying rent. 11 U.S.C. § 365(d)(2). This imbalance of control between debtor-tenants and their landlords under the Bankruptcy Code resulted in heavy economic burdens on landlords, as they were forced to provide ongoing services and space to debtor-tenants without timely compensation.

Seeking to address this imbalance, Congress amended the Bankruptcy Code in 1984, enacting section 365(d)(3) alongside other provisions, such as section 365(d)(4), which shortens the window of time post-petition that a debtor-tenant can prolong its decision whether to assume or reject an unexpired lease. 11 U.S.C. § 365(d)(4). That this was the purpose of the amendments is further supported by the statement of Senator Orrin Hatch, a conferee on the originating act, when he explained:

> This subtitle contains three major substantive provisions which are *intended to remedy serious problems* caused shopping centers and their solvent tenants by the administration of the bankruptcy code.... A second and related problem is that during the time the debtor has vacated space but has not yet decided whether to assume or reject the lease, the trustee has stopped making payments under the lease. In this situation, the landlord is forced to provide current services—the use of its property, utilities, security, and other services—without current payment. No other creditor is put in this position. In addition, the other

> tenants often must increase their common area charge payments to compensate for the trustee's failure to make the required payments for the debtor. *The bill would lessen these problems by requiring the trustee to perform all the obligations of the debtor under a lease of nonresidential real property at the time required in the lease.* This timely performance requirement will insure that debtor-tenants pay their rent, common area, and other charges on time pending the trustee's assumption or rejection of the lease.

H.R. Rep. No. 882, 95th Cong., 2d Sess., reprinted in 1984 U.S.C.C.A.N. 576, 598-99 (emphasis added). Additionally, as noted by the United States Court of Appeals for the Third Circuit, "virtually all courts have agreed that [section 365(d)(3)] was intended to alleviate the . . . burdens of landlords by requiring timely compliance with the terms of the lease." *In re Montgomery Ward Holding Corp.*, 268 F.3d at 210.

Relying on the canon that the Bankruptcy Code should not be read to erode past bankruptcy practice absent a clear indication that Congress intended such a departure, the Thirteenth Circuit reasoned that the billing approach is inconsistent with the legislative history to section 365(d)(3). The fundamental flaw in this analysis is that congressional enactment of section 365(d)(3) is, itself, the clear indication that Congress intended to depart from the past-practice of proration. In passing the 1984 amendments, Congress' clear and express purpose was to "remedy serious problems" in the treatment of landlords under the statutory scheme. Notably, Senator Hatch's statements avoid using the "arising" language that the Thirteenth Circuit took issue with in the first place. If the plain language of section 365(d)(3) is not indisputably clear, the legislative purpose is: the Trustee must perform the obligations of the Debtor "at the time required in the lease."

The policy implication of requiring the Trustee to perform the lease in accordance with its terms, as mandated by the billing date approach, is that the Debtor is still required to pay rent for the twenty-six days left in the month after it rejected the lease and vacated the premises. This result, rather than resulting in a windfall to Touch of Grey, reflects a policy determination that the

burden should fall on the party that controls the date of rejection. *See, e.g.*, *In re Krystal Co.*, 194 B.R. 161, 164 (Bankr. E.D. Tenn. 1996) ("Congress intended § 365(d)(3) to shift the burden of indecision to the debtor: the debtor must now continue to perform all the obligations of its lease or make up its mind to reject it before some onerous payment comes due during the prerejection period."). While this result, taken to the extreme (e.g., a lease that provides for payment of rent, years, rather than months, in advance), could hypothetically result in a true windfall to the landlord, that is not the case before this Court today. In any matter, such an extreme case would be better dealt with through a claim of unjust enrichment than by rewriting a statute that, in all but the rarest cases, yields a reasonable result.

CONCLUSION

For the foregoing reasons, Touch of Grey respectfully requests this Court to reverse the decisions of the Thirteenth Circuit and hold that Touch of Grey is both entitled to reduce its preference exposure and to immediate payment of the May 2020 rent in full.

APPENDIX A

11 U.S.C. § 547
Preferences

§ 547(a)
(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.

§ 547(b)
(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.

§ 547(c)(4)

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.

§ 547(c)(5)

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

APPENDIX B

11 U.S.C. § 503(b)
Administrative expenses

§ 503(b)(1)
(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.

§ 503(b)(9)
(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.

APPENDIX C

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

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

§ 365(d)(4)
(A) Subject to subparagraph (B), an unexpired lease of nonresidential real property under which the debtor is the lessee shall be deemed rejected, and the trustee shall immediately surrender that nonresidential real property to the lessor, if the trustee does not assume or reject the unexpired lease by the earlier of—

(i) the date that is 120 days after the date of the order for relief; or
(ii) the date of the entry of an order confirming a plan.

(B)

(i) The court may extend the period determined under subparagraph (A), prior to the expiration of the 120-day period, for 90 days on the motion of the trustee or lessor for cause.
(ii) If the court grants an extension under clause (i), the court may grant a subsequent extension only upon prior written consent of the lessor in each instance.