No. 21-0909

IN THE

Supreme Court of the United States

OCTOBER TERM, 2021

IN RE TERRAPIN STATION, LLC, DEBTOR,

TOUCH OF GREY ROASTERS, INC., PETITIONER

V.

CASEY JONES, CHAPTER 7 TRUSTEE, RESPONDENT.

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

PETITIONER'S BRIEF

TEAM P. 37
Counsel for Petitioner

QUESTIONS PRESENTED

I. Whether a seller of goods who provides subsequent new value to a distressed debtor pre-petition is entitled to reduce its preference exposure pursuant to 11 U.S.C. § 547(c)(4)'s defense when the goods were paid for post-petition pursuant to 11 U.S.C. § 503(b)(9)?

II. Whether a trustee's failure to reject a non-residential commercial lease before the debtor's rental obligation arose requires the trustee to pay the full amount due under the lease pursuant to 11 U.S.C. § 365(d)(3)(A)?

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OPINIONS BELOW

The Bankruptcy Court for the District of Moot ruled in favor of the Chapter 7 Trustee, Casey Jones, on both questions. R. at 3. On Appeal, the United States District Court for the District of Moot and the United States Court of Appeals for the Thirteenth Circuit affirmed both holdings. R. at 3. The court ruled that (1) Touch of Grey could not use the Invoice as new value under §547(c)(4) to reduce its preference exposure since the Invoice was paid for post-petition pursuant to §503(b)(9), and (2) section 365(d)(3)(A) allows the Debtor to pay prorated rent for the time it occupied the Premises rather than the rate obligated under the terms of the Lease. R. at 9.

STATEMENT OF JURISDICTION

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

STATUTES INVOLVED

The relevant federal laws controlling this case are 11 U.S.C. §§ 365(d)(3)(A), 503(b)(1), 503(b)(9), 547(c)(4) of the United States Bankruptcy Code. These provisions are attached in Appendix A.

STATEMENT OF THE CASE

I. Facts

William Tell, as its sole member, founded Terrapin Station, LLC (hereinafter the "Debtor" or "Terrapin Station") in 2005, which operated as a popular and successful local coffeehouse in the Town of Terrapin, Moot. R. at 3. By 2009, Terrapin Station was acknowledged as the "Independent Coffeehouse of the Year" in a leading coffee industry trade magazine. *Id.*

In 2017, Terrapin Station's path crossed with Touch of Grey Roasters, Inc. (the "Creditor" or "Petitioner" or "TOG")—an international coffee company and coffeehouse chain—during TOG's development of its "neighborhood coffeehouses" initiative. R. at 3. The "neighborhood coffeehouses" initiative would empower local coffeehouse owners to expand their already successful businesses and strengthen their impact in their local communities through live music and poetry readings. R. at 4. The backbone of the initiative consisted of local coffeehouses selling TOG's new line of coffee products, "Dark Star," along with new food offerings and longer hours of operation. *Id.* When TOG offered Mr. Tell the opportunity to become one of their local neighborhood coffeehouses, he responded quickly because (1) he favored the neighborhood coffeehouse initiative, (2) TOG was well recognized as an industry giant, and (3) Terrapin Station's earnings were stagnant and needed a growth opportunity. *Id.*

Talks between Terrapin Station and TOG resulted in two agreements solidified on July 1, 2018—both at issue in this case. R. at 4. The first agreement was the "Franchise Agreement" which listed TOG as the franchisor and Terrapin Station as the franchisee and set forth that Terrapin Station would only buy and sell TOG's "Dark Star" products. *Id.* The second agreement was the triple-net Lease Agreement (the "Lease") which governed a renovated warehouse space in the downtown district of Terrapin (the "Premises"). *Id.* The Lease listed Terrapin Station as the tenant and TOG as the landlord, setting forth that Terrapin Station would pay $25,000 rent "due in

advance on the first day of each month" for twenty years and remain responsible for the ongoing expenses of the property. *Id.* Five months to date of both agreements, December 1, 2018, TOG had remained true to its promises and the new Terrapin Station coffee was open to the public. R. at 5. However, due to unfortunate circumstances, like local coffeehouse owners protesting the venture and failing to integrate into the local nightlife scene, the Debtor struggled to remain true to its promises under the Franchise Agreement throughout 2019. *Id.*

By November 2019's holiday season, a time when most businesses can expect to see a rise in profits, Terrapin Station's sales were lower than expected and it owed TOG over $700,000 under the Franchise Agreement. R. at 5. TOG hoped that Terrapin Station would repay its obligations under the Franchise Agreement because it remained current on its obligations under the Lease. *Id.* However, after twelve months of extending credit, on December 5, 2019, Terrapin Station finally issued a notice of default and warned of a potential termination of the Franchise Agreement. *Id.* TOG had not given up on Terrapin Station, and Terrapin Station had not given up on TOG to support it. *Id.* TOG and Terrapin Station spent two days working diligently to reach an agreement to discourage the termination of the Franchise Agreement and on December 7, 2019, the parties entered into the "Forbearance Agreement." *Id.*

The Forbearance Agreement aimed to meet two overarching goals—help Terrapin Station reach its goal of increasing sales and maintain the July 1, 2018 agreements. R. at 5. The Forbearance Agreement would allow each business to thrive without harm because Terrapin Station would (i) pay $250,000 of the $700,000 it owed for Dark Star products under the Franchise Agreement, (ii) promise to continue meeting its obligations under the Lease, and (iii) release any potential claims or causes of action against TOG. *Id.* Terrapin Station made its payment that day and then owed TOG $450,000 under the Franchise Agreement. *Id.* The reduction of debt owed to

TOG was short-lived when Terrapin Station requested an additional $200,000 worth of Dark Star products on December 18, 2019, in order to keep the business operating. *Id.* The products were provided on credit (the "Invoice"). *Id.* As a supportive creditor, TOG provided the Dark Star products three days later. *Id.* Despite the efforts of the Forbearance Agreement, Terrapin Station owed TOG $650,000, only $50,000 shy of what it owed a few weeks prior. R. at 6.

Terrapin Station started its new year with a stark realization—the holiday sales were not enough to meets its obligations and its creditors refused to provide additional goods and services on credit, but maybe it could still reach its goal of becoming a viable business. R. at 6. With the supervision of a court-appointed trustee, Terrapin Station was certain that it could remain current on its obligations under the Lease, repay the $650,000 owed under the Franchise Agreement and Invoice, and repay the $500,000 owed to other creditors. R. at 6.

II. Procedural History

On January 5, 2020 (the "Petition Date"), Terrapin Station filed its chapter 11 petition, along with its "first day" motions and a supporting declaration written by Mr. Tell (the "Declaration"), in the United States Bankruptcy Court for the District of Moot (the "Bankruptcy Court"). R. at 6. The Declaration set promising objectives: (1) return to traditional coffeehouse operations and hours, (2) find a sub-lessee for some of the Premises, and (3) continue selling TOG's Dark Star products. *Id.* At the end of January, Terrapin Station submitted a motion to the Bankruptcy Court requesting authority to pay the $200,000 Invoice to TOG under an 11 U.S.C. § 503(b)(9) administrative expense claim and a critical vendor payment. *Id.* at 6-7. The Creditors' Committee supported the Debtor's motion given how central TOG would be to the Debtor's reorganization. *Id.* at 7. The Bankruptcy Court granted the motion under the Section 503(b)(9) administrative expense claim for the "the value of any goods received by the debtor within *20 days before the date of commencement of a case* under this title in which the goods have been *sold to*

the debtor in the ordinary course of such debtor's business." 11 U.S.C. § 503(b)(9) (emphasis added); R. at 7.

The reorganization strategy helped the business stay afloat, but the start of the global pandemic in March 2020 thwarted the Debtor's strategy when it had to temporarily closed its doors. R. at 7. When the Debtor reopened its doors in April 2020 the customers did not return. *Id.* Yet, Terrapin Station kept the Premises open until May 5, 2020. *Id.* Terrapin Station closed its doors and stopped all operations; the next day Terrapin Station filed a motion to reject the Lease and the Franchise Agreement under 11 U.S.C. § 365(a). R. at 7. In response, TOG was not opposed to rejecting the Lease as of May 5, 2020, however it filed a motion seeking to compel payment of May's rent. TOG argued that 11 U.S.C. § 365(d)(3)(A) allows payment for rent due for "any unexpired lease of nonresidential real property," such as the Premises. R. at 7-8.

The Bankruptcy Court set a virtual schedule hearing for the motions on May 29, 2020. R. at 8. On the day of the schedule hearing, Terrapin Station announced to its creditors that under 11 U.S.C. § 1112(a) it would convert its chapter 11 case to a chapter 7 case. *Id.* None of the parties contested, the order for conversion was granted, and a chapter 7 trustee (the "Trustee") was appointed. *Id.* The Bankruptcy Court granted the Debtor's motion to reject the Lease and the Franchise Agreement as of May 5, 2020, but it did not rule on TOG's request for payment and ordered for additional briefing. *Id.*

The Trustee hired counsel and "took an aggressive posture with respect to [TOG]," by (1) objecting TOG's motion to compel payment of the May rent under 11 U.S.C. § 365(d)(3)(A), and (2) commencing an adversary proceeding to avoid and recover the $250,000 payment made by the Terrapin Station under the pre-petition Forbearance Agreement as a preferential transfer under 11 U.S.C. §§ 547(b) and 550(a). R. at 8. TOG filed an answer and its affirmative responses in the

adversary proceeding which asserted that the Creditor was entitled to reduce its preference exposure—the pre-petition $250,000 Forbearance Agreement payment—by the pre-petition $200,000 Invoice under 11 U.S.C. § 547(c)(4)'s subsequent new value defense. *Id.* Mediation efforts regarding the motion and the adversary proceeding were unsuccessful. R. at 9.

The Bankruptcy Court ruled in favor of the Trustee on both issues. R. at 9. On direct appeal, the Court of Appeals for the Thirteenth Circuit affirmed the holdings that (1) TOG could not use the Invoice as new value under §547(c)(4) to reduce its preference exposure since the Invoice was paid for post-petition pursuant to §503(b)(9), and (2) section 365(d)(3)(A) allows the Debtor to pay prorated rent for the time it occupied the Premises rather than the rate obligated under the terms of the Lease. *Id.* TOG then timely filed this appeal. *Id.*

STANDARD OF REVIEW

The facts in the case are not in dispute by the parties. R. at 9. The Thirteenth Circuit's holding that a seller of goods' receipt of a §503(b)(9) payment prevents its reduction of its preference exposure under the Bankruptcy Code's subsequent new value defense and that a creditor is not entitled to receive the full rent obligation owed by the Debtor under an unexpired lease under §365(d)(3)(A) are both questions of law, which are reviewed *de novo*. *Highmark Inc. v. Allcare Health Mgmt. Sys., Inc.*, 572 U.S. 559, 562 (2014); *Ornelas v. United States*, 517 U.S. 690, 699 (1996). "Under a *de novo* standard of review, the reviewing court decides an issue as if the court were the original trial court in the matter." *Razavi v. Comm'r of Internal Revenue*, 74 F.3d 125, 127 (6th Cir. 1996).

SUMMARY OF THE ARGUMENT

First, TOG asserts that the $250,000 Forbearance Agreement, its preference exposure, should be reduced by the $200,000 Invoice, because the preference analysis is limited to pre-

petition transfers. It asserts that the function of the subsequent new value defense entitles it to reduce its preference exposure, even when the new value has been paid in full pursuant to 11 U.S.C. § 503(b)(9). TOG contends that the plain language of 11 U.S.C. § 547(c)(4) is limited to "otherwise unavoidable transfers" paid for ***prior to the Petition Date***, which does not include the post-petition payment of its administrative claim. TOG affirms this argument by pointing to other provisions that do account for post-petition transactions.

Further, when §547 ("Preferences") is read within the proper statutory context of the Bankruptcy Code, along with its legislative history, the period for determining preference claims and their defenses is limited to transfers ***prior to the Petition Date***. And finally, TOG shows how the policy considerations for rewarding trade creditors' who support distressed debtors set the cutoff for preference liability ***as of the Petition Date***. This is evidenced by practical scenarios of debtors and creditors in the COVID-19 economy. Therefore, with respect to the first issue, the Court should find that TOG can reduce its preference exposure by the subsequent new value of goods under the Invoice and limit the Trustee's avoidance and recovery to $50,000.

Second, TOG asserts that the Trustee is obligated to pay the $25,000 owed under the non-residential Lease as of May 1, 2020, since it did not timely reject the Lease. TOG argues that the plain language of §365(d)(3)(A) unambiguously requires the debtor in possession to perform all obligations that arise under the terms of an unexpired lease. Any perceived ambiguities, if they exist at all, are resolved by applying the common contemporary definitions of the operative terms, "obligation" and "arises." The proper reading of §365(d)(3)(A) requires the Debtor to perform all duties under the unexpired lease after the bankruptcy petition is filed. Thus, because the Debtor's obligation arose in advance of May 1, 2020, and the Trustee decided not to reject the lease until May 5, 2020, the Trustee must satisfy the full rent obligation according to the Lease's terms.

Additionally, the legislative history of §365(d)(3)(A) provides a clear indication that Congress intended to end the practice of prorating the Debtor's rent obligation when the Trustee ***delays its decision to reject a lease until after a rent obligation comes due***. Congress replaced this practice with the billing date approach, which mandates the debtor in possession to pay its obligations as of the date determined by the Lease and not the date of rejection. Rather than force commercial landlords to go through time consuming administrative expense procedures, where recovery of rent obligations could be limited to amounts less than the terms of the lease, Congress required on-time payments of lease obligations to satisfy commercial landlords' separate financial obligations. Therefore, the Court should hold that the Trustee is obligated to fulfil the full rent obligation owed by Terrapin Station according to the Lease's billing date pursuant to 11 U.S.C. § 365(d)(3)(A).

ARGUMENT

I. Touch Of Grey Can Reduce Its Preference Exposure by Its Invoice Under the Subsequent New Value Defense Because Post-Petition Transfers Are Irrelevant to Preference Analysis

The first issue before the Court is whether TOG's affirmative defense of subsequent new value under 11 U.S.C. § 547(c)(4) entitles it to reduce its preference exposure when its administrative expense claim under 11 U.S.C. § 503(b)(9)[1] has been paid. More specifically, the Petitioner asks the Court to limit the Trustee's avoidance power to pre-petition transfers in its

[1] Section 503(b)(9) was added to the Bankruptcy Code through The Bankruptcy Abuse Prevention and Consumer Protection Act ("BAPCPA"), Pub. L. No. 109-8, 119 Stat. 23 (2005). A creditor can be paid an administrative expense for—

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

11 U.S.C. § 503(b)(9) (emphasis added). The parties do not dispute whether the $200,000 worth of goods in the Invoice qualify as administrative expense priority. "Section 503(b)(9) was enacted to shield trade creditors, who so frequently have been burned in bankruptcy by debtors who purchase goods at a time when it is known that bankruptcy is imminent and that payment for the goods will not have to be tendered." R. at 22 (Weir, J., dissenting).

preference analysis under 11 U.S.C. § 547(b). The Court will find that post-petition transfers are irrelevant to a subsequent new value defense. Therefore, the Court should hold that pursuant to §547(c)(4)'s subsequent new value defense TOG can reduce its preference exposure under the Forbearance Agreement ($250,000) by the value of the goods shipped to Terrapin Station in the Invoice ($200,000) allowing the Trustee's avoidance and recovery of $50,000.

Section 547(c)(4)'s subsequent new value defense is triggered when a trustee aims to avoid and recover a preferential transfer. 11 U.S.C. § 547(b), (c)(4). The Trustee and TOG do not dispute whether the Forbearance Agreement payment of $250,000 is a preferential transfer, because it satisfied each of the elements required by § 547(b)[2] that would allow the Trustee to avoid it. R. at 9 n.3. TOG will meet its burden of proving a subsequent new value defense,[3] by showing first that the plain language of §547(c)(4) limits subsequent new value to the petition date and should not include post-petition transfers. Second, TOG will clarify any ambiguities that have led to differing constructions by examining the statutory structure of §547, which affirms the petition date as the cutoff for determining new value in a preference analysis. And finally, TOG will highlight how the policy considerations of the Bankruptcy Code and the practical applications of §547(c)(4) support its argument.

A. The Plain Language of Section 547 Limits the Subsequent New Value Analysis to the Petition Date and Should Not Include Post-Petition Transfers

The Court interprets the Bankruptcy Code, "where all such inquiries must begin[,] with the language of the statute itself." *See Ransom v. FIA Card Servs., N.A.*, 562 U.S. 61, 69 (2011)

[2] A ***preferential transfer is established when*** there has been (1) a transfer—money or property—by the debtor, (2) made to or for the benefit of a creditor, (3) for a debt owed before the transfer was made, (4) while the debtor was insolvent, (5) within 90 days before the bankruptcy filing (or one year if the transfer was to an insider), (6) and it allows a creditor to receive more than it would have received in a chapter 7 liquidation. *See* 11 U.S.C. § 547(b)(1)-(5).

[3] Section 547(g) highlights that "the creditor or party in interest against whom recovery or avoidance is sought has the burden of proving the nonavoidability of a transfer under subsection (c) of [Section 547]." 11 U.S.C. § 547(g).

(internal quotation and citation omitted); *see also Mission Prod. Holdings, Inc. v. Tempnology, LLC*, 139 S. Ct. 1652, 1661 (2019). The relevant statutory language for the subsequent new value defense found in 11 U.S.C. § 547(c)(4) states

> (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;

11 U.S.C. § 547(c)(4) (emphasis added).[4] This text is found in "Preferences." 11 U.S.C. § 547.

i. The Title of Section 547 Limits Preference Analysis to the Petition Date

First, "[t]he title of a statute and the heading of a section are tools available for the resolution of a doubt about the meaning of the statute." *Almendarez-Torres v. United States*, 523 U.S. 224, 234 (1998). The reading of the title "preferences" to implicate a preference period set before the petition date is affirmed by the statutory requirements of a preference in §547(b).[5] Specifically, §547 denotes that for a transfer to qualify as a preference it *must take place either 90 days or one year before the petition date*. *See* 11 U.S.C. § 547(b)(4)(A)-(B).

The Third Circuit examined whether "a post-petition payment to a creditor pursuant to a Wage Order entered at a debtor's request reduce the creditor's new value defense—and thereby increase preference liability—the same as it would if the payment had been made pre-petition." *Friedman's Liquidating Tr. V. Roth Staffing Cos. LP (In re Friedman's Inc.)*, 738 F.3d 547, 549 (3d Cir. 2013). Its analysis began with the title of the section, stating that it seemed as though the entire

[4] Section 547(a)(2) states that "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"; *see also* R. at 10 (the parties do not dispute that the new value need not "remain unpaid" for Touch of Grey to assert a subsequent new value defense); *see also Miller v. JNJ Logistics LLC (In re Proliance Int'l, Inc.),* 514 B.R. 426 (Bankr. D. Del. 2014); *BFW Liquidation,* 899 F.3d 1178, 1189 (11th Cir. 2018).

[5] *See supra* note 1.

section "concerns transfers occurring during the preference period, which is by definition pre-petition (i.e., the 90 days before the filing of the petition)." *Friedman's*, 738 F.3d at 555. The term "preferences" signals to courts that a payment was made to a creditor during the 90-days before the filing of the petition. *See In re Beaulieu Grp.*, LLC, 616 B.R. 857, 865 (Bankr. N.D. Ga. 2020) ("Debtor made payments to Defendant during the 90-day prepetition period that the Court will assume for purposes of this analysis constitutes preferences."). This Court should use the plain language of §547(c)(4)'s title to find preference analysis is limited to pre-petition transfers.

ii. The Absence of a Temporal Limitation for "Otherwise Unavoidable Transfers" in Section 547(c)(4)(B) Does Not Presume an Inclusion of Post-Petition Transfers

The plain language of §547's subsequent new value defense has two prongs. *Friedman's*, 738 F.3d at 555. First, it asks the Court to acknowledge that there was a transfer made to the creditor, after which the creditor gave new value to the debtor that was not secured by an otherwise unavoidable security interest. 11 U.S.C. § 547(c)(4)(A). In this case, the parties do not disagree that after Terrapin Station paid $250,000 to TOG, the creditor created *new value* by extending $200,000 worth of goods to Terrapin Station. R. at 5. Second, the text asks the Court to ensure that an otherwise unavoidable transfer was not made to the creditor to account for the new value extended. 11 U.S.C. § 547(c)(4)(B). It is this prong that divides TOG and the Trustee. The questions here are "*when* an otherwise unavoidable transfer must be made in order to preclude a creditor from using the underlying value as new value to reduce its preference exposure under 547(c)(4)" and *what* qualifies as an "otherwise unavoidable transfer." R. at 12 (emphasis in original).

TOG answers that a creditor is precluded from using new value to reduce its preference exposure when an otherwise unavoidable transfer is made ***post-petition***. TOG's Invoice was paid *after* the filing of the chapter 11 petition under §503(b)(9); the administrative expense payment

does not qualify as an "otherwise unavoidable transfer" because it was not a pre-petition transfer. R. at 6-9. The Trustee argues that the silence of §547(c)(4)(B) which does not have a temporal limitation on transfers like the other affirmative defenses, and in turn, reads an "otherwise unavoidable transfer" to include post-petition transfers such as the administrative expense payment. R. at 12-13. TOG disagrees with the Trustee's reading of the plain language, because *what* is an otherwise avoidable transfer is based upon *when* the transfer takes place. Courts that have addressed the meaning of "otherwise unavoidable transfer" in §547(c)(4) have been wary to presume an inclusion of post-petition transfers and instead have given great weight to statutory context of the plain language in their evaluation.[6]

The Supreme Court often assigns the same meaning to identical words throughout a section of a statute when the specific term is repeated multiple times. *See Brown v. Gardner*, 513 U.S. 115, 118 (1994). As the creditor in *In re Beaulieu Grp., LLC* stated to the Eleventh Circuit in its briefing, on the same issue in this case, "Congress does not regulate, and responsible statutory interpretation is not undertaken, in a vacuum. Instead, the context of language informs its meaning." Appellant's Reply Br., *Auriga Polymers Inc. v. PMCM2, LLC (In re Beaulieu Grp., LLC)*, No. 20-14647 (11th Cir. Filed Apr. 23, 2021), 2021 WL 1761919, at *7.

References to "transfers" in §547 pertain to pre-petition transfers, both explicitly and implicitly. The first example is §547(b) which allows a Trustee to "avoid any transfer of an interest of the debtor in property" and limits such transfers prior to the petition date. 11 U.S.C. §547(b)(4). The second example of "transfer" referenced in §547(c)(2), the ordinary course of business

[6] *See Friedman's Inc.*, 738 F.3d 547, 554-55 (3d Cir. 2013) ("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."); *New York City Shoes, Inc. v. Bentley Int'l, Inc. (In re New York City Shoes, Inc.)*, 880 F.2d 679, 680 (3d Cir. 1989); *Commissary Ops., Inc. v. Dot Foods, Inc. (In re Commissary Ops., Inc.)*, 421 B.R. 873, 879 (Bankr. M.D. Tenn. 2010); *Phoenix Rest. Grp., Inc. v. Ajilon Prof'l Staffing LLC (In re Phoenix Rest Grp., Inc.)*, 317 B.R. 491, 496 (Bankr. M.D. Tenn. 2004).

defense, is limited by the debtor's payments to the creditor prior to the petition. 11 U.S.C. § 547(c)(2). The third example, §547(c)(5), the improvement in position test, limits "transfers" by "the date of the filing of the petition." 11 U.S.C. § 547(c)(5). The provisions in §547 consistently reference "transfer" in the pre-petition context. *See generally,* 11 U.S.C. § 547.

If Congress meant for "transfer" to be read in the context of post-petition transfers, it would have done so explicitly, given that the entire section applies to transfers by the petition date. *Id.* The Eighth Circuit explicitly denounced the inclusion of post-petition transfers in the preference analysis, because the plain language of §547 accurately captures how Congress intended for it to be limited to the pre-petition period. *Bergquist v. Anderson-Greenwood Aviation Corp. (In re Bellanca Aircraft Corp.),* 850 F.2d 1275, 1284-85 (8th Cir. 1988) ("[B]ecause of the significant subsequent words: 'to the extent that…such creditor gave new value to or for the *benefit of the debtor*'…[t]hese words imply that subsequent advances of new value are only those given pre-petition."). The Trustee relies on district court decisions to assert its claim that "otherwise unavoidable transfers" cannot constitute new value when they have been paid, because their analyses include post-petition payments; they also analogize administrative expense payments to reclamation claims. [7] These arguments fail.

There is no indication why the court would apply the meaning of "otherwise unavoidable transfers" in §547(c)(4) to administrative expense claims and not to other post-petition transfers. Reclamation claims[8] have strict use limitations whereas the "otherwise unavoidable transfers" in §547(c)(4)(B) do not. *See Commissary Ops., Inc.*, 421 B.R. at 877-78 (differentiating reclamation

[7] *See Circuit City Stores, Inc. v. Mitsubishi Dig. Elecs. Am, Inc. (In re Circuit City Stores, Inc.),* 2010 WL 4956022, at *1, *8 (Bankr. E.D. Va. Dec. 1, 2010); *TI Acquisition, LLC v. Southern Polymer, Inc. (In re Acquisition, LLC),* 429 B.R. 377, 385 (Bankr. N.D. Ga. 2010).

[8] "[G]oods subject to reclamation do not enhance the debtor to the extent the value of those goods can be reclaimed." *In re Phoenix Rest Grp., Inc.*, 373 B.R. at 548.

claims from post-petition claims). First, reclamation goods do not enhance the debtor's estate because they must be used in a limited manner, whereas goods provided under a 503(b)(9) claim can be used at the debtor's discretion. *Commissary Ops.*, 421 B.R. at 877-78. Second, delivered goods under a 503(b)(9) claim do not allow a creditor to claim a lien or otherwise repossess the goods, as would be true for reclamation goods. Appellant's Reply Br., *In re Beaulieu Grp., LLC)*, No. 20-14647 (11th Cir. filed Apr. 23, 2021), 2021 WL 1761919, at *15 (citing *Commissary Ops., Inc.*, 421 B.R. at 877-79). And finally, the Third Circuit has instead analogized §503(b)(9) post-petition payments to the Wage Order evaluated in its analysis of a new value defense by a creditor. *Friedman's*, at 554; *see also Commissary Ops.*, 421 B.R. at 878 ("Section 503(b)(9) claims are analogous to critical vendor claims.").

The overinclusion of post-petition transfers in the reading of "otherwise avoidable transfers" would make the Trustee's avoidance powers under §547(b) superfluous, because there are other provisions of the Bankruptcy Code that allow the Trustee to avoid post-petition transfers.[9] Such exclusion of post-petition transfers from §547(c)(4) analysis aligns with the Supreme Court's precedent of not reading "the Bankruptcy Code to erode past bankruptcy practices absent a clear indication that Congress intended such practice." *Cohen v. de la Cruz*, 523 U.S. 213, 221 (1998). Section 547 preference analyses have been limited to pre-petition transfers and the Court should not deviate from that practice in evaluating TOG's subsequent new value defense. Therefore, the language of §547 along with examination of other post-petition transfers, supports TOG's argument that its §503(b)(9) payment should not prohibit its ability to reduce its preference exposure by the new value extended under the Invoice, because it was a post-petition transfer.

[9] *See* 11 U.S.C. § 549 ("Postpetition Transactions").

The plain language of §547 supports a reading of "otherwise unavoidable transfer" within the context of prepetition transfers and the legislative history supports this interpretation. The Committee Report explicitly states that it limits "the trustee to ***avoid prebankruptcy transfers*** that occur ***within a short period of time before bankruptcy***." H.R. Rep. No. 95-595, at 177-78, U.S. Code Cog. & Admin. News 1978, pp. 6137, 6138 (emphasis added). In *Friedman's*, the Third Circuit relied on this Committee Report to find in favor of the creditor. "[E]xplanation of the purpose focuses on the pre-petition period: 'to deter the "race of diligence" of creditors to dismember the debtor before bankruptcy furthers the…goal of…equality of distribution.'…Thus, it makes sense that the equality should be measured, and inequalities rectified, as of the petition date." *Friedman's*, 738 F.3d at 558. The Court need not look further than the legislative history which clearly articulates congressional intent to limit preference avoidance claims and their defenses to prepetition transfers. However, to help the Court further understand the limitations of the subsequent new value defense in §547(c)(4), TOG looks to §547 in its statutory entirety.

B. The Statutory Context and Legislative History of Section 547 Limits the Subsequent New Value Defense to the Petition Date and Should Not Include Post-Petition Transfers

"The starting point for all statutory interpretation is the language of the statute itself [,]" and then "the entire statutory context" since "context is king." *United States v. DBB, Inc.*, 180 F.3d 1277, 1281 (11th Cir. 1999); *see also Wachovia Bank, N.A. v. United States*, 455 F.3d 1261, 1267 (11th Cir. 2006). "The purpose of §574(c)(4) is precisely to encourage trade creditors to continue dealing with troubled businesses." *Gold Coast Seed Co. v. Spokane Seed Co. (In re Gold Coast Seed Co.)*, 30 B.R. 551, 553 (9th Cir. 1983); *see also Bellanca*, 850 F.2d at 1280. And this purpose is reflected in the statutory structure and history of §547. *Id.* The Court has enlightened others to "not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy." *Kelly v. Robinson*, 479 U.S. 36, 43 (1986).

The Bankruptcy Code is intentionally written by Congress and the Supreme Court has been wary to view provisions set forth in the Bankruptcy Code as ambiguous. "As the Supreme Court has often noted, '[s]tatutory construction is a holistic endeavor,' and this is especially true of the Bankruptcy Code." *Official Comm. Of Unsecured Creditors of Cybergenics Corp., ex rel Cybergenics Corp. v. Chinery*, 330 F.3d 548, 559 (3d Cir. 2003) (quoting *United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988)). The Third Circuit in its analysis of whether an otherwise unavoidable transfer affected a new value defense "examin[ed] §547(c)(4) in the context of the Bankruptcy Code as a whole" by looking to (1) the requirements of labeling a transfer as a preference in §547, (2) the temporal limitation of the hypothetical liquidation test, and (3) the statute of limitations for a Trustee to assert their avoidance power of a preferential transfer in §546(a). *Friedman's*, 738 F.3d 547, 555 (3d Cir. 2013). TOG implores the Court to engage with a subsequent new value defense to preference analysis evaluation in the same manner.

i. The Requirements for Determining a Preferential Transfer in Section 547(b) Limits Analysis to the Petition Date

First, there are five explicit requirements that a transfer must demonstrate for a Trustee to execute a preference avoidance action under §547. *See* Appendix*;* 11 U.S.C. § 547(b)(1)-(5). The requirements vary in interpretation difficulty but are collectively clear in their purpose—setting the stage for a Trustee to avoid and recover specific prepetition transfers to a creditor. ***Each element of §547(b) must be met*** for a Trustee to exercise its avoidance power of a preferential transfer. 11 U.S.C. § 547(b).

The fourth requirement for a Trustee to avoid a preferential transfer sets two clear temporal limitations to either: "(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." 11 U.S.C. § 547(b)(4) (emphasis added). These two subsections create what has now become known as the "preference period" to be used in a preference analysis. It has been argued that "[i]f the transfer occurs *after* the bankruptcy petition date then the preference claim would fail as a matter of law because the fourth essential element that the transfer occurs in the 90-day or one-year period before the bankruptcy filing cannot be established." Appellant's Opening Br., *Auriga Polymers Inc. v. PMCM2, LLC (In re Beaulieu Grp., LLC)*, No. 20-14647 (11th Cir. Filed Feb. 3, 2021), 2021 WL 423317, at *16. TOG also relies on a leading bankruptcy treatise which instructs practitioners to start their preference analysis using the 90 days preceding the "petition filing." *See* § 66:12. Preferential effect (Code § 547(b)(5)), 4 NORTON BANKR. L. & PRAC. 3d § 66:12. When the Bankruptcy Court granted Terrapin Station's motion to authorize payment of $200,000 to TOG as an administrative expense under §503(b)(9), the Debtor was multiple weeks post the filing of its Chapter 11 petition. R. at 6.

Congress made sure to differentiate the governance of post-petition transfers in §549 ("Postpetition Transactions") of the Bankruptcy Code. Courts have interpreted the separate governance of post-petition transactions to highlight congressional intent to use the petition date as the start date for analyzing avoidance actions for transfers made after the filing of the petition.[10] "If we read §547(c)(4)(B) to allow post-petition payments to defeat a new value defense, the calculation of preference liability could change depending on when the preference avoidance action was filed." *Friedman's,* 738 F.3d at 556. And such a reading has been extended by courts since the Eighth Circuit's definition of new value in *Bellanca*, where the court found the plain language of §547(c)(4) to "imply that subsequent advance of new value are only those given pre-petition, because any post-petition advances are given to the debtor's *estate*, not to the debtor."

[10] *See Kaye v. Accord Mfg, Inc. (In re Murray, Inc.)*, 2007 WL 5595447, at *2 (Bankr. M.D. Tenn. June 6, 2007).

850 F.2d at 1284 (emphasis in original) (internal citations omitted).[11] "Where a single creditor freely offsets otherwise avoidable transfers with funds expended post-petition…notwithstanding possible prejudice to other creditors would ignore the orderly mechanisms established by Congress to protect all interested parties concerned." *In re Bellanca Aircraft Corp.*, 56 B.R. 339, 396-97 (Bankr. D. Minn. 1985).

ii. The Specific Requirement of a Transfer meeting the Hypothetical Liquidation Test in Section 547(b)(5) Limits the Determination of New Value to the Petition Date

Next, the fifth requirement for a Trustee to avoid a preferential transfer creates what is known in practice as the hypothetical liquidation test. "The hypothetical liquidation test requires courts to compare the payment received by a creditor during the preference period with what the creditor would have received if the payment had not been made and the debtor's assets were liquidated and distributed to creditors 'to the extent provided by the provisions of [the] title.'" *Friedman's*, 738 F.3d at 556 (citing 11 U.S.C. § 547(b)(5)).

Section 547(b)(5) has been found by the Supreme Court's holding in *Palmer Clay Prods. Co. v. Brown* to set the petition date as the cutoff for the hypothetical liquidation test analysis. 297 U.S. 227 (1936); *see also* 5 Collier on Bankruptcy ¶ 547.03 (16th ed. 2013); *Friedman's*, 738 F.3d at 556 (Third Circuit applies codification to determine that the petition date is the cutoff for determining new value). Such inclusion of post-petition payments, such as a §503(b)(9) claim, would contradict the temporal limitation set for evaluating a transfer in the specific hypothetical liquidation test and the overall identification of whether it is preferential. In sum, the statutory provisions of the Bankruptcy Code, along with the evaluation of §547 in its entirety, uphold a solid

[11] Many courts, including recently in 2021, have agreed with the Eighth Circuit's interpretation of new value being limited to pre-petition transfers. *See In re Slamdunk Enters.*, No. 17-60566, 2021 WL 389081, at *28 (Bankr. E.D. Tex. Jan. 29, 2021); *see also Official Comm. Of Unsecured Creditors v. Tyson Foods, Inc. (In re Quantum Foods, LLC)*, 554 B.R. 729, 732 (Bankr. D. Del. 2016); *Wiscovitvh-Rentas v. PDCM Assoc., S.E. (In re PMC Mktg. Corp.)*, 518 B.R. 150, 157 (B.A.P. 1st Cir. 2014).

foundation for this Court to find that the subsequent new value defense in §547(c)(4) is limited to the petition date and should not include post-petition transfers. Yet, if the Court were to question the foundation for limiting the subsequent new value defense to prepetition transfers, TOG encourages the Court to examine the subsequent new value defense with respect to policy considerations and real-world scenarios.

iii. The Statute of Limitations for Trustees to Exercise Preference Avoidance is Based upon the Petition Date

Lastly, the statute of limitations also supports TOG's argument that preference analysis is set as of the petition date. The Third Circuit examined how the plain language of §546(a) sets the statute of limitations for a Trustee to exercise a preference avoidance power as of the Petition Date. 11 U.S.C. § 546(a)[12]; *Friedman's*, 738 F.3d at 556. "If Congress had intended to allow for post-petition transactions to affect the impact on the estate, it is likely that it would have crafted a different statute of limitations." *Id.* The Eighth Circuit affirmed a bankruptcy court's holding that two proposed claims were barred from the Trustee's avoidance power under §547, even though they would have been alleged as preferences, because the two-year statute of limitations had run. *Bellanca*, 850 F.2d at 1283.

The Trustee in this case limits the interpretation of a subsequent new value defense to its plain language in §547(c)(4)(B) only to assert its claim that there is no temporal limitation and the new value given to TOG pursuant to the post-petition administrative expense payment is an

[12] 11 U.S.C. § 546(a) ("Limitations on Avoiding Powers"); *see also Friedman's*, 738 F.3d at 556 n.6.

> (a) An action or proceeding under section…547…of this title may not be commenced after the earlier of—
>
> (1) the later of—
>
> (A) 2 years after the entry of the order for relief; or
>
> (B) 1 year after the appointment or election of the first trustee under section 702, 1104, 1163, 1202, or 1302 of this title if such appointment or such election occurs before the expiration of the period specified in subparagraph (A); or
>
> (2) the time the case is closed or dismissed.

"otherwise unavoidable transfer." TOG urges the Court to not grossly presume an inclusion of post-petition transfer into §547(c)(4)(B) due to the exclusion of an explicit temporal limitation. "Read[ing] the statute in this manner, the time period involved would be totally open-ended such that any payment, at any time, could defeat a new value defense." *Friedman's*, 738 F.3d at 554. Therefore, TOG will next examine the subsequent new value defense in its statutory context, to demonstrate that the plain language of "otherwise unavoidable transfers" in §547(c)(4)(B) is limited to pre-petition transfers."

C. The Practical Contexts and Policy Considerations of Section 547(c)(4)'s Subsequent New Value Defense in a COVID World Supports Touch of Grey's Argument

Having begun in 2020, COVID-19 has kept bankruptcy practitioners on their heels as amendments are made to the Bankruptcy Code to accommodate the peculiar positions that debtors of all sorts find themselves. Practitioners have witnessed a rise in trustees preference claims against creditors of debtors ranging from educational institutions to healthcare facilities and to construction companies. Now more than ever, creditors will be gravely disadvantaged by trustees' avoidance powers, if the Court does not affirm the temporal limitation for a preferential transfer being that of the petition date.

i. Touch of Grey's Subsequent New Value Defense is Appropriate Because Its Actions Were Those Congress Aimed to Reward

"First, [§547(c)(4)] is designed 'to encourage trade creditors to continue dealing with troubled businesses…Second, [it] is designed to 'treat fairly a creditor who has replenished the estate after having received a preference.'" *New York City Shoes*, 880 F.2d at 680-81 (emphasis omitted) (quoting *In re Almarc Mfg.*, 62 B.R. 684, 688 (Bankr. N.D. Ill. 1986)).[13] TOG did not

[13] *See also In re Murray, Inc.*, 2007 WL 5595447, at *2 ("[The creditor] did what the Bankruptcy Code encouraged creditors to do; it continued to supply goods to the Debtor on credit literally up to the Petition Date…and the Court finds no legal basis to deny Accord the benefit of the defense to which it is remains otherwise entitled.").

function as a greedy creditor in its dealings with the Debtor and made ample efforts to help Terrapin Station get back on track and operate in the black including negotiating the Forbearance Agreement and extending another line of credit under the Invoice to help Terrapin Station stave off bankruptcy just a little while longer. R. at 7. TOG did exactly what the Bankruptcy Code encouraged it to do.[14]

The subsequent new value provided to Terrapin Station's estate through the Invoice worth $200,000 of the only goods sold by the business was a replenishment of the estate, allowing the business to hold on just a little while longer before the start of the pandemic. R. at 5-7. TOG is the type of trade creditor Congress had in mind when it created the affirmative defenses to preference avoidance claims. 11 U.S.C. § 547(c). The possibility that a debtor may pay a creditor's §503(b)(9) claim post-petition does not negate the value represented by the claim that the creditor provided to the debtor. "The deliveries benefit the estate…regardless of whether the §503(b)(9) claimants are paid at a later date for those deliveries." *Commissary Operations, Inc.*, 421 B.R. at 878.

Unfortunately, many creditors are finding themselves in the same position as TOG after extending subsequent new value to a debtor, only for the global pandemic to gravely alter any plans of consumers enjoying the businesses they frequently visited, reduce businesses abilities to serve its customers and consumers, and thwarting creditors investments in already struggling businesses. "To force a creditor to choose between asserting a §503(b)(9) claim and preserving its right to assert a subsequent new value defense that includes deliveries made to the debtor within the 20 days prior to the bankruptcy filing would work a disservice on Congress' inherent policy

[14] "[Section § 547(c)(4)] encourages creditors to continue to do business with and lend new money to financially distressed debtors. Without this exception, creditors would have a significant disincentive to continue to do business with a financially troubled debtor, because doing so would increase a creditor's preference liability in a debtor's bankruptcy." Deborah L. Thorne & Jesus E. Batista, *Are All Creditor 'Animals' Equal? Treatment of New Value Under § 547*, 23 AM. BANKR. INST. J., Apr. 2004, at 53-54.

goals when enacting §§503(b)(9) and 547(c)(4),” by reducing “creditors willingness to do business with troubled entities” and “depriv[ing] sellers of goods of the benefits Congress conferred upon them.” *Commissary Ops.*, 421 B.R. at 879.

In this case, the Creditors’ Committee explicitly expressed at Terrapin Station’s hearing for the Motion Requesting Authority to Pay $200,000 to TOG that “the committee supported the motion given the importance of TOG to the Debtor’s reorganization.” R. at 7. All parties involved stipulated that payment of the Invoice to TOG satisfied an administrative expense claim, which is deemed to be vital to preserving the Debtor’s estate. R. at 7. These actions evidence a pertinent understanding amongst creditors that they were not all equally situated with respect to the going concern value of Terrapin Station; the amount of debt owed to TOG surpassed the aggregate debt owed to the other unsecured creditors. R. at 6. But also, there was an understanding that the Court’s treatment of such a vulnerable, heavily invested, creditor at the start of a global pandemic had implications for *similarly situated creditors* in other bankruptcies bound to overwhelm the courts as the global pandemic’s effects permanently affected the direction of the economy.

The $200,000 administrative expense claim did not apply to the already existing debts owed by Terrapin Station to TOG, but rather covered an immediate preference period Invoice for goods essential to Terrapin Station’s attempted avoidance of filing bankruptcy. R. at 7. As the Third Circuit noted in its analysis, the Trustee’s belief that allowing TOG’s new value defense would be “double-dipping” is incorrect and “misleading because it implies that the creditor is receiving payment for goods or services that were never provided, or that the creditor is being paid twice.” *Friedman’s*, 738 F.3d at 559. Therefore, to consider the §503(b)(9) payment as a contribution to debt owed under the original Franchise Agreement would be a gross error. The 503(b)(9) payment was to cover subsequent new value that replenished the Debtor’s estate during

its time of need. The Third Circuit made clear that "even if a creditor is paid post-petition for new value it provided pre-petition, the creditor still replenished the debtor's estate during the preference period, and therefore aided the debtor in avoiding bankruptcy to whatever extent possible." *Friedman's*, 738 F.3d at 558.

ii. The Practical Contexts of Section 547(c)(4)'s New Value Defense Meets the Policy Considerations of the Bankruptcy Code

As many creditors have replenished the estates of debtors prior to the filing of a petition, they now find themselves in a myriad of circumstances that require them to fight for payments made in bankruptcy that trustees unfairly aim to claw back and recover. The Appellant in an Eleventh Circuit appeal asks the exact question TOG has presented to this Court. In its briefing, the Appellant provides a chart of three realistic scenarios[15] under the application of the subsequent new value defense interpretations purported by a trustee's view and that of a creditor. Appellant's Opening Br., 2021 WL 423317, at *42. Each scenario demonstrates that the limitation of the subsequent new value defense to prepetition transfer ***does not*** lead to absurd results inconsistent with the purpose, plain language, or policy considerations of §547. In sum, TOG has demonstrated through the textual, contextual, and practical analysis that it is entitled to reduce its preference exposure under subsequent new value defense pursuant to §547(c)(4), because preference analysis is limited by the petition date. Next, the Court's analysis should turn to TOG's entitlement to its full rent obligation in the post-petition prerejection period under the Lease Agreement.

II. Touch Of Grey Is Entitled to Its Full Rent Obligation Owed by The Debtor In The Post-Petition Prerejection Period Under The Lease

Prior to 1984, landlords who leased premises to debtors that failed to meet their obligations sought continued payment of rent and other post-petition charges exclusively as administrative

[15] See *Appendix*, at -#-, for complete chart.

expenses under 11 U.S.C. § 503. *See Centerpoint Props. v. Montgomery Ward Holding Corp. (In re Montgomery Ward Holding Corp.)*, 268 F.3d 205, 210 (3d Cir. 2001). *Id*. Practitioners found that the time-consuming practice inequitably forced landlords to provide ongoing services and space to the estate without receiving timely payment to satisfy their own obligations. *Id*. (citing H.R. Rep. No. 882, 95th Cong., 2d Sess., reprinted in 1984 U.S.C.C.A.N. 576). As a correction, Congress adopted 11 U.S.C. § 365(d)(3) as a part of the Bankruptcy Amendments and Federal Judgeship Act of 1984 to alleviate the burdens on landlords by requiring timely compliance with the terms of the lease. *Id*.[16]

Section 365(a) gives a trustee the authority to assume or reject an executory contract or unexpired lease upon court approval. 11 U.S.C. §365(a); *Mission Prod. Holdings, Inc. v. Tempnology, LLC*, 139 S. Ct. 1652, 1658 (2019). "Section 365(a) enables the debtor (or its trustee) … to decide whether the contract is a good deal for the estate going forward." *Id*. If the trustee determines that an agreement is not a "good deal" for the estate, the trustee may reject the agreement, and "repudiate any further performance of [his or her] duties." *Id*. (quoting *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 522, n. 6 (1984).) However even when a debtor rejects an executory contract "the counterparty retains the rights it has received under the agreement." *Mission Prod. Holdings*, 139 S. Ct. at 1662.

Specifically, 11 U.S.C §365(d)(3)(A)[18] applies to unexpired leases for non-residential real property. 11 U.S.C. §365(d)(3)(A). Interpreting the statute, circuit courts agree that §365(d)(3)(A) unambiguously establishes which obligations the trustee must perform pending assumption or rejection and when those obligations arise. *See e.g., Centerpoint Props. v. Montgomery Ward Holding Corp. (In re Montgomery Ward Holding Corp.)*, 268 F.3d at 205 ("The clear and express

[16] The 2020 amendments to the Bankruptcy Code added the (d)(3)(A) designation which added ", except as provided in subparagraph (B)" in the second sentence. See P.L. 116-260, § 1001(f)(1); 11 U.S.C. § 356(d)(3)(A).

intent of §365(d)(3) is to require the trustee to perform the lease in accordance with its terms…any interpretation must look to the terms of the lease to determine both the nature of the 'obligation' and when it 'arises.'"); *see also In re Koenig Sporting Goods, Inc.*, 203 F.3d 986, 989-90 (2000); *HA-LO Indus., Inc. v. Centerpoint Props. Tr.*, 342 F.3d 794, 799 (7th Cir. 2003); *Burival v. Roehrich (In re Burival)*, 613 F.3d 810, 813 (8th Cir. 2010) (same).

Applying the plain meaning of §365(d)(3)(A) and Congress' demonstrated intent, TOG will show that the burden was on the Trustee, after determining that the continued payment of rent constituted a "bad deal" for the estate, to reject the lease before the $25,000 payment came due. This case arises out of the Trustee's failure to make a decision to reject the lease in timely a manner. TOG asserts that under of §365(d)(3)(A)'s timely performance requirement, it is entitled to the $25,000 rent obligation that became due five days before the date of rejection.

A. Sections 365(d)(3)(A) unambiguously requires the debtor in possession to perform all obligations as they arise under the terms of an unexpired lease

The plain reading of 11 U.S.C. §365(d)(3)(A)[17] establishes that the Trustee is obligated to pay the entire rent obligation owed to TOG that came due five days before the date of rejection. First, the Court should look to the text of the Bankruptcy Code to control the issue. *See St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531,541 (1978) ("The starting point in any case involving construction of a statute is the language itself."). A strong preference in favor of a statute's language exists because "[t]here is…no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes"' *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 570 (1982) (internal quotation marks omitted).

Where application of a statutes plain language does not amount to an absurd result, "the sole function of the courts …is to enforce it according to its terms." *Lamie v. U.S. Tr.*, 540 U.S.

[17] R See *Appendix*, at 1.

526, 534 (2004). When courts construe the meaning of the Bankruptcy Code's undefined language traditional principles of statutory construction require that words in a statute be accorded their "ordinary, contemporary, common meaning." *Pioneer Inv. Serv. Co. v. Brunswick Assoc. Ltd. P'ship*, 507 U.S. 380, 388 (1993). Congress generally meant for the Bankruptcy Code to "incorporate the established meaning" of "terms that have accumulated settled meaning." *Field v. Mans*, 516 U.S. 59, 69 (1995).

Circuit courts tasked with interpreting 11 U.S.C. §365(d)(3)(A) have applied the plain meaning unambiguously by entitling a landlord to *timely and full payment* of obligations that arise under an unexpired lease prior to rejection. These courts include the United States Court of Appeals for the Third, Fourth, Sixth, Seventh, and Eighth Circuits. See *In re Montgomery Ward Holding Corp.*, 268 F.3d at 205 ("Under §365(d)(3), Debtor's obligation must be fulfilled . . .in full"); *Rose's Stores, Inc.v. Saul Subsidiary I, L.P. (In re Roses's Stores, Inc.)*, No. 97-2654, 1998 WL 393984 (4th Cir. July 10, 1998) (same); *In re Koenig Sporting Goods, Inc.*, 203 F.3d at 986 (same); *HA-LO Indus., Inc. v. Centerpoint Props. Tr.*, 342 F.3d at 799 (Same); *Burival v. Roehrich (In re Burival)*, 613 F.3d at 813 (same).

Despite the unanimity of other circuits, the majority relying on lower court rationales allege two points of ambiguity within the wording of §365(d)(3)(A). First, the majority claims that the statute is ambiguous because "the term 'arises' fails to "definitively tell us exactly when a debtor's obligations arise under section 365(d)(3)." R. at 17-18; *see also In re Ames Dept. Stores, Inc.*, 306 B.R. 43, 63 (2004). Second, the majority claims that 365(d)(3)(A) is ambiguous because the phrase "until such lease is assumed or rejected" can be construed to modify the term "perform," such that the Trustee must make any payment due under a lease until such time as it is rejected, or the term "obligations" such that the Trustee's duty to perform the obligation ceases upon rejection. R. at

18. However, simply "because a particular provision may be, by itself, susceptible to differing constructions does not mean that the provision is therefore ambiguous." *In re Price*, 370 F.3d at 369. Both perceived ambiguities are resolved by applying the common contemporary definitions of the operative terms "obligation" and "arises.

Here, neither "obligation" nor the term "arises" are defined within the Bankruptcy Code. Accordingly, interpretation requires a court to apply contemporary and common definitions. An obligation is ordinarily defined as "[t]hat which a person is bound to do or forbear." Black's Law Dictionary 1074 (6th ed. 1990). "Arise" is commonly defined as "to come into being." Webster's Ninth New Collegiate Dictionary 102 (1983). Thus, the proper reading of §365(d)(3)(A) requires the debtor (or the debtor's trustee) to perform all duties that it is bound to perform if they come into being under the unexpired lease, after the bankruptcy is filed. *See In re Krystal Co.*, 194 B.R. 161, 164 (Bkrtcy.E.D.Tenn.1996) (supporting a conclusion that the obligation must be paid at the "time required in the lease.").

The Court should find here, as the majority of circuit courts have, that 11 U.S.C. § 365(d)(3)(A) is unambiguous after applying the common contemporary definitions of "obligation" and "arise." In this case, the terms of the Lease dictated that the rent would be "due in advance of the first day of each month." R. at 4. Therefore, Terrapin Station's—and thus the Trustee's—obligation arose in advance of May 1, 2020. R. at 6-7. When the Trustee decided not to reject the lease until May 5, 2020, R. at 8, under §365(d)(3)(A) the Trustee had a duty to satisfy all obligation under the lease until the date of rejection. Accordingly, the Trustee must satisfy the full rent "obligation" according to the terms "under an unexpired lease." Congress' choice of the word obligation performs a key role in interpretation of the statute at large.

i. Congress used the word "obligation" to specify that the unexpired and unrejected lease determined when the obligation "arises"

Prorating a rent obligation that arises under a commercial lease until the date of rejection conflicts with Congress' use of the word "obligation" rather than "claim." Congress chose the word obligation for a reason as it "says in a statute what it means and means in a statute what it says there." *Connecticut Nat'l Bank v. Germain,* 503 U.S. 249, 254 (1992). The Court should not treat "obligation" and "claim" as synonyms for purposes of applying §365(d)(3)(A) to a tenant's post-petition obligations. As then Judge Sotomayor reasoned in *R.H. Macy*, "to equate obligation with claims is more of a stretch than normal statutory construction should permit." *R.H. Macy & Co. v. Lakewood Mall Shopping Ctr.,* 1994 U.S. Dist. LEXIS 21364, *11-12 (Sotomayor J.).

Nevertheless, proponents of the proration approach argue that it can be reconciled with the text by interpreting "obligation" as actually meaning "claim." *See e.g., Child World, Inc. v. Campbell/Massachusetts Trust (In re Child World, Inc.),* 161 B.R. 571, 574 (S.D.N.Y.1993). Under this theory, the tenant has an "obligation" when the landlord has a "claim." *In re Montgomery Ward Holding Corp.*, 268 F.3d at 209. Under this interpretation "[u]nmatured rights to payment under a lease exist from the date the lease is executed, and no right to payment would ever arise under an unexpired lease after the order for relief." *Id.*

However, Congress has demonstrated that it knows how to intentionally encompass the word "claim" within a statute's operative language. *See, e.g.*, 11 U.S.C. § 348(d) ("granting priority for claims arising after order for relief and before conversion"); *id.* §503 ("providing for allowance of administrative expenses, rather than administrative claims"); *id.* §507(a) ("designating different priorities for various pre-petition claims against debtor") (quoting Appellant's Opening Br., *In re Montgomery Ward Holding Corp.*, (3d. Cir. Filed June 18, 2000), 2000 WL 33982738, at *17. The Bankruptcy Code expressly uses the word "claims" when it means

claims. To presume that Congress meant "claim" and not "obligation" "alters Congressional intent and creates ambiguity where none exists." *In re Montgomery Ward Holding Corp.*, 268 F.3d at 209.

The Thirds Circuit found that allowing the two meanings to overlap renders §365(d)(3) superfluous "because the provision would never grant the unpaid rent any administrative priority as dictated by the sections." *In re Montgomery Ward Holding Corp.*, 268 F.3d at 209. Similarly, the bankruptcy court in *F&M Distributors* pointed out that substituting "obligation" for "claim," would render the arising language of §356(d)(3) superfluous because "everything required by the lease [would] be considered a ***pre-petition obligation***." 197 B.R. 829, 832 (Bankr. E.D. Michigan 1995) (emphasis added); *See also Hibbs v. Winn*, 542 U.S. 88, 101 (2004) ("A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant…"). The fact that the legislature chose the word "obligation" instead should indicate that a different meaning was intended. If Congress intended for §365(d)(3)(A) to encompass the broad reach of a "claim," it would have used the word "claim." *See In re Montgomery Ward Holding Corp.*, 268 F.3d at 209-10.

Here, because Congress used the narrower word "obligation" instead of "claim" as defined by the bankruptcy code, the debtor must perform what it "is bound to do or forbear," under the terms of the unexpired lease. The Trustee was required to reject the Lease before the rent came due or pay that entire obligation on time. The lower court incorrectly allowed the Trustee to choose neither option. The Trustee was incorrect to prorate the rent because the unrejected lease provisions are not evaluated under the same standards as administrative expenses.

ii. Congress granted commercial lessors administrative priority for the full payment of rent obligations by exempting 11 U.S.C. § 365(d)(3(A)) from the standards of § 503(b)(1)

Congress expressly rejected the proration of pre-rejection obligation by exempting claims made under §365(d)(3)(A) from the mechanism used by courts in determining the allowance of administrative claims under §503(b)(1). Section 503(b)(1) provides, in its relevant portion that: "[a]fter notice and a hearing, there shall be allowed administrative expenses…, including--(1) (A) the actual, necessary costs and expenses of preserving the estate…" 11 U.S.C. §503(b)(1). Proration of obligations owed by the debtor, as frequently employed under §503(b)(1) is largely attributable to the courts need to assess the "actual, necessary costs" to preserve the estate. *See Child World,* 161 B.R. at 575–76 (referring to "the long-standing practice under §503(b)(1) of prorating debtor tenant's rent to cover only the post-petition, prerejection period, regardless of billing date.").

However, the Supreme Court directs that "every clause and word used by Congress must be given effect." *United States v. Menasche*, 348 U.S. 528, 538-39 (1955). The express exception from the "actual, necessary costs" standard of administrative expenses under §503(b)(1) clearly indicates that the obligations are owed despite whether they are deemed necessary by the debtor or trustee. *See In re Montgomery Ward Holding Corp.*, 268 F.3d at 215 ("[11 U.S.C. § 365(d)(3)] was aimed…relieving [landlords] from the "actual and necessary" analysis required under § 503(b)(1).").

Specifically, the phrase "notwithstanding section 503(b)(1)" in §365(d)(3)(A) provides an express exception from §503(b)(1) relieving claims made under §365(d)(3)(A) from the requirements of §503(b)(1)(A). *See In re Goody's Family Clothing Inc.*, 610 F.3d 812, 817 (3d Cir. 2010), ("'notwithstanding"…means "in spite of" or "without prevention or obstruction from

or by"…[and thus] "§ 365(d)(3) is best understood as an exception to the general procedures of §503(b)(1) that ordinarily apply.").

Therefore, the phrase "notwithstanding section 503(b)(1)" at the end of §365(d)(3)(A) mandates continued performance by a trustee of the full rent obligations under a nonresidential realty lease. This is because "any reduction based on subsection 503(b)(1) would violate the specific language of §365(d)(3)." *In re Burival*, 613 F.3d 810, 812 (8th Cir. 2010) (quoting *In re Pacific–Atlantic Trading Co.*, 27 F.3d at 404–05); *see also Krystal Co.*, 194 B.R. at 163 ("[T]he concepts of accrual, proration and allocation—so necessary for distinguishing between prepetition debts and administrative expenses in the context of §503(b)(1)—are irrelevant and inapplicable under §365(d)(3).").

Here, when the Bankruptcy Court allowed the Trustee to pay only a small fraction of the owed rent obligation for its actual use of the Premises, it in effect applied the "actual, necessary cost" analytical framework of §503(b)(1), which congress expressly prohibited through the exempting language: "notwithstanding section 503(b)(1)." Rather than pay for Terrapin Station's actual use of the Premises, the Trustee was required to continue to pay rent as the obligation arose under the lease. In this case, that means the entire $25,000 obligation was due in advance of May 1st, 2020. To prorate the obligation effectively alters the terms of the lease each party bargained for.

iii. Congress did not empower bankruptcy courts to alter lease obligations "based on the equities of the case" as it did in other sections of the Bankruptcy Code

As opposed to express exemption from the requirements for approval of administrative expense under 11 U.S.C. § 503(b)(1), Congress did not provide a provision stating that approval of claims under §365(d)(3)(A) will be given only after "notice and a hearing based on the equities of the case" as it did in other provision of this section. This suggests that Congress did not intend

for the court to apply the "actual, necessary costs" analysis that ordinarily takes place under §503(b)(1) to adjust obligation owed under the unrejected lease. *What are "Administrative Expenses" Under § 503 (b) of Bankruptcy Code*, 140 A.L.R. Fed. 1, 2a.

In the 1994 Bankruptcy Reform Act—ten years after the enactment of §365(d)(3)—Congress added the requirement of timely performance of all obligations of the debtor during the 60-day period post-petition and pre-assumption or rejection of personal property. 11 U.S.C §365(d)(10). The language of §365(d)(10), since recodified to §365(d)(5) [18], is the same as §365(d)(3)(A) except for the inclusion of the phrase "*unless the court, after notice and a hearing and based on the equities of the case, orders otherwise with respect to the obligations or timely performance thereof.*" 11 U.S.C §365(d)(5) (emphasis added). From this language, courts interpret §365(d)(5) to allow a bankruptcy court to modify the obligations of the debtor after notice and a hearing based on notions of equity. *See T & N Ltd. v. Computer Sales Int'l, Inc. (In re Federal-Mogul Global, Inc.)*, 222 Fed. App'x 196, 201 (3d Cir. Mar. 15, 2007).

Notably, Congress did not place this language within §365(d)(3) in 1984 and has not added the equities exception even up through the latest update in 2020. Applying the statute according to its terms, *see Lamie v. United States Trustee*, 540 U.S. at 53, where Congress, under §365(d)(5), allows courts to apply the analysis of §503(b)(1) if equities of the case demanded so, it does not allow the court as much leeway under §365(d)(3(A). Congress, in §365(d)(5) demonstrates that it knows how to provide a bankruptcy court with the leeway to adjust obligations owed under a lease as it did in the case of personal property within §365(d)(5). To provide the bankruptcy courts with the power to alter unrejected commercial leases without the express authority to do so would

[18] 11 U.S.C. §365(d)(10) was recodified by the 2005 BAPCPA amendments and moved to §365(d)(5).

improperly render the language of §365(d)(5) superfluous. *See Hibbs v. Winn*, 542 U.S. at 101 ("A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous…").

Here, the Court should find that the placement of phrase "*unless the court, after notice and a hearing and based on the equities of the case, orders otherwise with respect to the obligations or timely performance thereof,*" in the specific context of personal property limits the ability of a bankruptcy court to adjust the obligation in the context of a commercial lease when the language is not included within §365(d)(3)(A). Accordingly, the Court should not prorate the Terrapin Station's rent obligation to TOG and instead require the Trustee to make the entire rent payment based on the billing date as Congress intended.

B. Proration of the Debtor's Rent Obligations to Touch of Grey Conflicts with the Legislative Intent of Section 365(d)(3) and other relevant provisions within the bankruptcy code.

Importantly, it should not be necessary for this Court to look to the legislative history of 11 U.S.C. § 365(d)(3)(A) because the language of the statute is plain and unambiguous. *See Ron Pair Enters, Inc.*, 489 U.S. at 242 ("As long as the statutory scheme is coherent and consistent, there is generally no need for a court to inquire beyond the plain language of the statute."). However, even if the Court finds that the statute is ambiguous, the legislative history behind the statute indicates that Congress intended to correct inequities faced by commercial landlords prior to enactment of §365(d)(3).

i. Congress intended to reverse proration because of the prior-existing treatment of Commercial Landlords

The legislative history behind §365(d)(3)(A) clearly indicates that Congress intended to shift from pre-1984 proration practice to a more consistent billing date approach. The Supreme Court holds as a rule of statutory construction that when construing bankruptcy codifications, "if

Congress intends for legislation to change the interpretation of a judicially created concept, it makes the intent specific. *Midlantic Nat'l Bank v. New Jersey Dep't of Envtl. Protection,* 474 U.S. 494, 501 (1986)). Congress demonstrated its intent to end the judicially created practice or prorating obligations owed to commercial landlord through §365(d)(3)(A)'s focus on timely performance. *See* 11 U.S.C. 365(d)(3)(A).

Prior to 1984, landlords who leased a commercial space to a debtor sought payment of rent and other post-petition charges as administrative expenses, applying §503(b)(1). *See Palmer v. Palmer,* 104 F.2d 161, 163 (2d Cir.), *cert. denied*, 308 U.S. 590 (1939) (The Court allowed as an administrative expense the full amount, prorated over the post-petition, prerejection period, as long as it was not clearly unreasonable.) Commentators point to various economic burdens placed on landlords under the previous scheme. First, landlords were forced to follow time-consuming procedures of an application, notice, and hearing. *See In re Montgomery Ward Holding Corp.*, 268 F.3d at 215 (citing Joshua Fruchter, *To Bind or Not to Bind—Bankruptcy Code § 365(d)(3): Statutory Minefield*, 68 Am. Bankr. L.J. 437, 437 (1994)). Second, landlords could only recover the reasonable value of the DIP's actual use and occupancy of the premises meaning that the court could limit a landlord's recovery to a fair market rate where the contract rate in the lease appeared clearly unreasonable. *Id*. And third, courts could delay payment of the amount awarded to landlords until confirmation of a plan. *Id*.

This prior arrangement frustrated commercial landlords because commonly, when bank extend mortgages to commercial landlords, they require that the rent obligation is paid in advance of the first day of the month. Senator Hatch in his legislative identified a specific problem §365(d)(3) was intended to correct:

> [D]uring 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…"[t]he 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."

H.R. REP. No. 95–595, at 348 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6304.

Notably, Senator Hatch stated that "the timely performance requirement [would] ensure that debtor-tenants pay their rent, common area, and other charges **on time** pending the trustee's assumption or rejection of the lease." *Id*. This focus on **on time payment** is determinative. It indicates that time that an obligation arises should favor the Commercial Lessor as the creditor. *See In re Koenig Sporting Goods, Inc.*, 203 F.3d at 986 (quoting H.R. REP. No. 95–595, at 348) (stating that the purpose of §365(d)(3) was to "prevent parties in contractual or lease relationships with the debtor from being left in doubt concerning their status vis-a-vis the estate.").

Senator Hatch's legislative statements suggest that "the purpose [of §365(d)(3)] was to relieve the burden placed on nonresidential real property lessors (or 'landlords') during the period between a tenant's bankruptcy petition and assumption or rejection of a lease." *In re Koenig Sporting Goods, Inc.*, 203 F.3d at 989; *see also In re Montgomery Ward Holding Corp.*, 268 F.3d at 211. ("Congress amended the Bankruptcy Code in 1984 for the purpose of altering the existing practice by enhancing the treatment afforded to non-residential real property lessors."). These statements indicate that commercial lessors such as TOG are entitled to full and on-time payment of rent obligation under an unexpired.

However, despite the prior mistreatment of landlords under a proration approach, the opinion below attempts to characterize full payment as a financial "windfall," because it provides priority to administrative expenses claimed by Commercial landlords prerejection. R. at 33. However, rather than "windfall," full payment of a rent obligation is, as the Sixth Circuit

characterized "that to which it is entitled under §365(d)(3)." *In re Koenig Sporting Goods, Inc.*, 203 F.3d at 989-90. Congress intended for §365(d)(3) to "shift the burden of indecision to the debtor" so that the debtor or in this case the Trustee is bound to perform the pre-rejection obligations of the debtor. The Trustee must now continue to perform all the obligations under a lease "or make up its mind to reject it before some onerous payment comes due during the prerejection period." *Id.* (citing *Krystal*, 194 B.R. at 164.).

In this case, the pandemic caused Terrapin Station to temporarily close its doors in March and then permanently in April 2020. R. at 7. Yet, Terrapin Station and the Trustee kept the Premises open until May 5, 2020. *Id.* The burden was on the Trustee to decide to reject the obligation before it arises so that TOG could be sure of its contracts with Terrapin Station to allow TOG to meet its own obligations. Proration of the obligation uniquely places TOG and landlords in similar positions at a detriment because their own their ability to meet their own obligation is out at risk in a particularly uncertain post COVID-19 economy. As in *Koenig*, the Trustee had complete control over the obligation and failed to reject the lease before the rent obligation came due. Both equity and the billing date included within the Lease favor full payment $25,000 to TOG.

CONCLUSION

The Thirteenth Circuit erred in its decisions with respect to both issues. For the foregoing reasons, the Court should hold that TOG should allowed to reduce its preference exposure under its subsequent new value defense pursuant to 11 U.S.C. § 547(c)(4) by the payment of its administrative expense under 11 U.S.C. § 503(b)(9) limiting the Trustee's recovery to $50,000. Further, TOG is entitled to the $25,000 rent obligation that became due five days before the date of rejection.

APPENDIX A

11 U.S.C.A. § 365(d). Executory Contracts and Unexpired Leases.

(d)

(1) In a case under chapter 7 of this title, if the trustee does not assume or reject an executory contract or unexpired lease of residential real property or of personal property of the debtor within 60 days after the order for relief, or within such additional time as the court, for cause, within such 60-day period, fixes, then such contract or lease is deemed rejected.

(2) In a case under chapter 9, 11, 12, or 13 of this title, the trustee may assume or reject an executory contract or unexpired lease of residential real property or of personal property of the debtor at any time before the confirmation of a plan but the court, on the request of any party to such contract or lease, may order the trustee to determine within a specified period of time whether to assume or reject such contract or lease.

(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.

(B) In a case under subchapter V of chapter 11, the time for performance of an obligation described in subparagraph (A) arising under any unexpired lease of nonresidential real property may be extended by the court if the debtor is experiencing or has experienced a material financial hardship due, directly or indirectly, to the coronavirus disease 2019 (COVID–19) pandemic until the earlier of—

(i) the date that is 60 days after the date of the order for relief, which may be extended by the court for an additional period of 60 days if the court determines that the debtor is continuing to experience a material financial hardship due, directly or indirectly, to the coronavirus disease 2019 (COVID–19) pandemic; or

(ii) the date on which the lease is assumed or rejected under this section.

(C) An obligation described in subparagraph (A) for which an extension is granted under subparagraph (B) shall be treated as an administrative expense described in section 507(a)(2) for the purpose of section 1191(e).

(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 210 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 210-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.

(5) The trustee shall timely perform all of the obligations of the debtor, except those specified in section 365(b)(2), first arising from or after 60 days after the order for relief in a case under chapter 11 of this title under an unexpired lease of personal property (other than personal property leased to an individual primarily for personal, family, or household purposes), until such lease is assumed or rejected notwithstanding section 503(b)(1) of this title, unless the court, after notice and a hearing and based on the equities of the case, orders otherwise with respect to the obligations or timely performance thereof. This subsection shall not be deemed to affect the trustee's obligations under the provisions of subsection (b) or (f). 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.A. § 503(b)(1). Allowance of Administrative Expenses.

(b) After notice and a hearing, there shall be allowed administrative expenses, other than claims allowed under section 502(f) of this title, including--

(1)

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

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

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

11 U.S.C.A. § 503(b)(9). 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--

(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.A. § 547. Preferences.

(a) In this section--

(1) "inventory" means personal property leased or furnished, held for sale or lease, or to be furnished under a contract for service, raw materials, work in process, or materials used or consumed in a business, including farm products such as crops or livestock, held for sale or lease;

(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;

(3) "receivable" means right to payment, whether or not such right has been earned by performance; and

(4) a debt for a tax is incurred on the day when such tax is last payable without penalty, including any extension.

(b) Except as provided in subsections (c) and (i) of this section, the trustee may 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--

(1) to the extent that such transfer was--

(A) intended by the debtor and the creditor to or for whose benefit such transfer was made to be a contemporaneous exchange for new value given to the debtor; and

(B) in fact a substantially contemporaneous exchange;

(2) to the extent that such transfer was in payment of a debt incurred by the debtor in the ordinary course of business or financial affairs of the debtor and the transferee, and such transfer was--

(A) made in the ordinary course of business or financial affairs of the debtor and the transferee; or

(B) made according to ordinary business terms;

(3) that creates a security interest in property acquired by the debtor--

(A) to the extent such security interest secures new value that was--

(i) given at or after the signing of a security agreement that contains a description of such property as collateral;

(ii) given by or on behalf of the secured party under such agreement;

(iii) given to enable the debtor to acquire such property; and

(iv) in fact used by the debtor to acquire such property; and

(B) that is perfected on or before 30 days after the debtor receives possession of such property;

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

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

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

(5) that creates a perfected security interest in inventory or a receivable or the proceeds of either, except to the extent that the aggregate of all such transfers to the transferee caused a reduction, as of the date of the filing of the petition and to the prejudice of other creditors holding unsecured claims, of any amount by which the debt secured by such security interest exceeded the value of all security interests for such debt on the later of--

(A)

(i) with respect to a transfer to which subsection (b)(4)(A) of this section applies, 90 days before the date of the filing of the petition; or

(ii) with respect to a transfer to which subsection (b)(4)(B) of this section applies, one year before the date of the filing of the petition; or

(B) the date on which new value was first given under the security agreement creating such security interest;

(6) that is the fixing of a statutory lien that is not avoidable under section 545 of this title;

(7) to the extent such transfer was a bona fide payment of a debt for a domestic support obligation;

(8) if, in a case filed by an individual debtor whose debts are primarily consumer debts, the aggregate value of all property that constitutes or is affected by such transfer is less than $600; or

(9) if, in a case filed by a debtor whose debts are not primarily consumer debts, the aggregate value of all property that constitutes or is affected by such transfer is less than $6,425.

(d) The trustee may avoid a transfer of an interest in property of the debtor transferred to or for the benefit of a surety to secure reimbursement of such a surety that furnished a bond or other obligation to dissolve a judicial lien that would have been avoidable by the trustee under subsection (b) of this section. The liability of such surety under such bond or obligation shall be discharged to the extent of the value of such property recovered by the trustee or the amount paid to the trustee.

(e)

(1) For the purposes of this section--

(A) a transfer of real property other than fixtures, but including the interest of a seller or purchaser under a contract for the sale of real property, is perfected when a bona fide purchaser of such property from the debtor against whom applicable law permits such transfer to be perfected cannot acquire an interest that is superior to the interest of the transferee; and

(B) a transfer of a fixture or property other than real property is perfected when a creditor on a simple contract cannot acquire a judicial lien that is superior to the interest of the transferee.

(2) For the purposes of this section, except as provided in paragraph (3) of this subsection, a transfer is made--

(A) at the time such transfer takes effect between the transferor and the transferee, if such transfer is perfected at, or within 30 days after, such time, except as provided in subsection (c)(3)(B);

(B) at the time such transfer is perfected, if such transfer is perfected after such 30 days; or

(C) immediately before the date of the filing of the petition, if such transfer is not perfected at the later of--

(i) the commencement of the case; or

(ii) 30 days after such transfer takes effect between the transferor and the transferee.

(3) For the purposes of this section, a transfer is not made until the debtor has acquired rights in the property transferred.

(f) For the purposes of this section, the debtor is presumed to have been insolvent on and during the 90 days immediately preceding the date of the filing of the petition.

(g) For the purposes of this section, the trustee has the burden of proving the avoidability of a transfer under subsection (b) of this section, and the creditor or party in interest against whom recovery or avoidance is sought has the burden of proving the nonavoidability of a transfer under subsection (c) of this section.

(h) The trustee may not avoid a transfer if such transfer was made as a part of an alternative repayment schedule between the debtor and any creditor of the debtor created by an approved nonprofit budget and credit counseling agency.

(i) If the trustee avoids under subsection (b) a transfer made between 90 days and 1 year before the date of the filing of the petition, by the debtor to an entity that is not an insider for the benefit of a creditor that is an insider, such transfer shall be considered to be avoided under this section only with respect to the creditor that is an insider.

APPENDIX B

SOURCE: Appellant's Opening Br., *Auriga Polymers Inc. v. PMCM2, LLC (In re Beaulieu Grp., LLC)*, No. 20-14647 (11th Cir. filed Feb. 3, 2021), 2021 WL 423317, at *42 (emphasis in original).

Scenario One: **Illusory 503(b)(9) Priority** (a) A creditor provided exactly the same amount of new value within 20 days before the petition date as the prior transfers received by that creditor during the preference period, and (b) the trustee has sufficient funds to pay 100% of administrative claims but will not make a distribution to unsecured creditors.

Result under Auriga's Interpretation:

Creditor receives payment for the value of goods delivered during the 20 days prior to the petition date as an administrative expense, and has a complete subsequent new value defense to preference liability.

Consistent with the purpose of section 547(c)

(4). No absurd result.

Result under Liquidating Trustee's:

Interpretation: Creditor receives payment for the value of goods delivered during the 20 daysprior to the petition date as an administrative expense, but has to return the full amount of itsrecovery because the payment on its 503(b)(9) claim created preference liability in the same amount.

Inconsistent with the purpose of section 547(c)

(4). An absurd result. Such creditor is no better off after enactment of § 503(b)(9). *See Friedman's*, 738 F.3d at 561 ("giving with onehand and taking away with the other.").

Scenario Two: **Illusory Critical Vendor Payments** Debtor-in-possession seeks to encourage a critical vendor

to continue to ship goods on credit post-petition by paying a portion of the supplier's prepetition claims, whichincludes 503(b)(9) and general unsecured claims.

Result under Auriga's Interpretation:	Consistent with the purpose of section 547(c)
Creditor receives critical vendor payments, continues to provide support necessary for the debtor-in-possession to continue operations, and the post-petition critical vendor payments do not create preference liability.	(4). No absurd result.

Result under Liquidating Trustee's:	Inconsistent with the purpose of section 547(c)
Interpretation: Critical vendor payments on the creditor's 503(b)(9) goods can create dollar for dollar preference liability, such that the creditor's preference liability is increased in the amount of the critical vendor payments received.	(4). An absurd result. Critical vendors would bevery reluctant to continue to support the debtor-in-possession.

Scenario Three: **Fluctuating Liability** Hundreds of preference lawsuits are filed on the last day of the two year statute of limitations period. At the time, the debtor-in-possession is unable to confirm that it will be administratively solvent (able to pay administrative priority claims in full). It is not until a year later that a Chapter 11 plan is filed and confirmed, providing for the payment of § 503(b)(9) claims in full.

Result under Auriga's Interpretation:	Consistent with the purpose of section 547(c)
Preference plaintiffs and defendants proceed with certainty as to the amount of their	(4). No absurd result.

subsequent new value defenses, which are fixedas of the petition date.

Result under Liquidating Trustee's:

Interpretation: Preference plaintiffs and defendants face changing available subsequent new value and shifting liability. After a year of litigation, a defendant's liability may shift dramatically at a time when the Court is

deliberating on a summary judgment motion, orthe parties are on the eve of trial.

Inconsistent with the purpose of section 547(c)

(4). An absurd result.