No. 21-0909

IN THE

Supreme Court of the United States

IN RE TERRAPIN STATION, LLC, DEBTOR,

TOUCH OF GREY ROASTERS, INC., PETITIONER

V.

CASEY JONES, RESPONDENT.

On Appeal From The United States Court of Appeals For The Thirteenth Circuit

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BRIEF FOR THE PETITIONER

JANUARY 20, 2021

TEAM NUMBER 45

COUNSEL FOR PETITIONER

QUESTIONS PRESENTED

I. Whether a creditor may use a new value defense to reduce its preference liability pursuant to 11 U.S.C. § 547(c)(4) for goods that the creditor was paid for, post-petition, pursuant to 11 U.S.C. §503(b)(9).

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

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The Thirteenth Circuit Court of Appeals' decision is available at No. 21-0909. The bankruptcy court decided in favor of the Debtor. On direct appeal, the United States Court of Appeals for the Thirteenth Circuit affirmed in favor of the Debtor on both issues.

STATEMENT OF JURISDICTION

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

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

This action implicates statutory construction of certain provisions of Title 11 of the United States Code. There is a further balance in reading the language of the Code and recognizing its harmony to the Federal Arbitration Act.

The relevant portion of 11 U.S.C. § 2 provides:

> **(c)**The trustee may not avoid under this section a transfer—
>
> **(4)**to or for the benefit of a creditor, to the extent that, after such transfer, such creditor gave new value to or for the benefit of the debtor—
> **(A)**not secured by an otherwise unavoidable security interest; and
> **(B)**on account of which new value the debtor did not make an otherwise unavoidable transfer to or for the benefit of such creditor;

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

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

STATEMENT OF FACTS

Terrapin Station, LLC ("the Debtor"), was founded in 2005, in the Town of Terrapin, Moot, by William Tell ("Tell") for the purpose of becoming a coffee house. R. at 3. After opening up a coffeehouse, the Debtor soon found itself in a favorable position, becoming a popular and successful independent coffeehouse. R. at 3. After years of success, including recognition as "Independent Coffeehouse of the Year" in 2009 by The Java Digest, Debtor decided to go into business with a large coffeehouse, Touch of Grey Roasters, Inc. ("Touch of Grey"). R. at 4.

In mid-2017, Touch of Grey contacted Tell to inquire whether the Debtor would be interested in franchising a neighborhood coffeehouse in Terrapin. R. at 4. This was part of Touch of Grey's campaign to open "neighborhood coffeehouses" that would not be visibly associated with Touch of Grey. R. at 4. Instead, Touch of Grey and the owner of the "neighborhood coffeehouse" would sign a franchise agreement and the coffeehouse would seem like a mom and pop. R. at 4. These neighborhood coffeehouses would then sell Touch of Grey's new line of coffee, "Dark Star." R. at 4. Teller was interested in and ultimately agreed to going through with Touch of Grey's plans. R. at 4.

To kick the business relationship off, Touch of Grey and the Debtor agreed that Touch of Grey would purchase and lease a warehouse located at 5877 Shakedown Street (the "premises"). R. at 4. On July 1, 2018, both parties entered into a Lease Agreement, (the "Lease"). R. at 4. The agreement stated that Touch of Grey would be the landlord, the Debtor would be the tenant and the Debtor would pay Touch of Grey $25,000 a month. R. at 4. One caveat of the Lease was that

the rent would be "due in advance on the first day of each month." R. at 4. On that same day, Touch of Grey and the Debtor entered in a franchise agreement, Touch of Grey as franchiser and the Debtor as franchisee. R. at 4. This agreement stipulated that the Debtor had to exclusively sell "Dark Star" products that would be purchased from Touch of Grey. R. at 4. On December 1, 2018, then new "Terrapin Station Coffeehouse" opened for business and the Debtor's original coffeehouse closed. R. at 5. From the start, the new location fared poorly, first a local advertising campaign vilified the Debtor for working with a larger coffeehouse. R. at 5. Next, the Debtor could not manage to attract business in its new location. R. at 5. The Debtor soon became financially distressed and, according to the first day declaration signed by Tell in the Debtor's bankruptcy case, the Debtor was unable to pay its debts on time as early as September 2019. R. at 5.

The Debtor still managed to pay its rent obligations under the Lease, by November 1, 2019, the Debtor owed Touch of Grey over $700,000 for Dark-Star products. R. at 5. On December 5, 2019, Touch of Grey sent the Debtor a notice of default, suggesting that it might need to terminate the franchise agreement. R. at 5.

Soon after, on December 7, 2019, both parties entered into a forbearance agreement. R. at 5. This agreement specified that Touch of Grey would forbear from terminating the franchise agreement in exchange for three things: first, a payment of $250,000 from the Debtor on account of the outstanding invoices for Dark Star products; second, reaffirmation by the Debtor of its obligations under the Lease; and third, a resale of all claims or causes of action that the Debtor had against Touch of Grey. R. at 5. On that same day, the Debtor paid Touch of Grey $250,000. R. at 5. A few days later, on December 18, 2019, the Debtor made another purchase of Dark Star

from Touch of Grey worth $200,000, on credit. R. at 5. This purchase was set forth on an invoice dated December 18, 2019 (the "Invoice"). The goods were subsequently delivered three days later. R. at 6.

Only a few weeks later, on January 5, 2020 (the "Petition Date"), the Debtor filed a petition for relief under chapter 11 of the Bankruptcy Code. R. at 6. As of the Petition Date, the Debtor owed Touch of Grey $650,000, which included the amount due for the Invoice, for goods that it purchased. R. at 6. The Debtor then proposed a plan in which it could keep its business afloat. R. at 6. To help keep its plan afloat, debtor filed a motion requesting authority to pay $200,000 to Touch of Grey, claiming that it was a "critical vendor." R. at 6. The bankruptcy court ultimately allowed the transfer, but it was classified as an administrative expense under § 503(b)(9) for the value of the goods sold as reflected on the Invoice. R. at 7. The Debtor then made the payment to Touch of Grey shortly after. R. at 7. Touch of Grey subsequently continued selling good to the Debtor on credit. R. at 7.

Despite the Debtor's attempt to stay afloat, the emergence of COVID-19 ultimately caused the Debtor to cease operations. R. at 7. On May 6, 2020, the Debtor filed a motion with the bankruptcy court to reject the Lease and the franchise agreement with Touch of Grey as of the date pursuant to § 365(a). R. at 7. Touch of Grey then file a motion seeking to compel payment of the full rent due for May, which pursuant to the agreement was due on May 1st. In that Motion, Touch of Grey specified that it did not oppose the Debtor's rejection of the Lease. R. at 8. Touch of Grey only argued that the Debtor was still obligated to pay the full rent pursuant to § 365(d)(3) because rent was due before the day of rejection. R. at 8. A virtual hearing was then held on May 29, 2020, to settle these issues. R. at 8. The Debtor first

announced that it was converting its chapter 11 case to a case under Chapter 7 of the Bankruptcy Code pursuant to section 1112(a). R. at 8. The judge then assigned a chapter 7 trustee to the Debtor's estate. R. at 8.

After being appointed, the trustee hired counsel and objected to Touch of Grey's motion to compel the payment for all of may's rent pursuant to § 365(d)(3). R. at 8. Furthermore, the trustee commenced an adversary proceeding to avoid and recover the $250,000 payment made to Touch of Grey pursuant to the forbearance agreement. R. at 8. Both parties subsequently filed motions for summary judgement regarding the two issues. R. at 9. The bankruptcy court ruled first that the Debtor was only obligated to pay the first five days of rent pursuant to section 365(d)(3). R. at 8. Second, the court ruled that Touch of Grey could not reduce its preferential exposure by the value of the goods stated in the Invoice as new value. R. at 9.

STANDARD OF REVIEW

Both issues on appeal are based on interpretations of the Bankruptcy Code, which is pure law. Thus, the standard of review is de novo. In re Wiredyne, 3 F.3d 1125, 1126 (7th Cir. 1993).

SUMMARY OF ARGUMENT

The Thirteenth Circuit Court of Appeals erred by holding that the post-petition payment made to Touch of Grey diminished its new value defense under § 547(c)(4). A creditor's new value defense under § 547(c)(4) should not be affected by a post-petition payment made to that creditor pursuant to § 503(b)(9). The plain language of the statute, the statutory context and the underlying policy considerations all lean strongly in favor of this conclusion. First, looking to the plain language of § 547(c)(4), the provision uses the word "debtor" to refer to the person who makes an "otherwise unavoidable transfer" to the creditor. The word "debtor" signals that the entity has not filed a petition yet. This point is confirmed by the fact that § 547 uses the word "debtor" exclusively to refer to the transferor of an interest in property, pre-petition. So, the plain language of § 547(c)(4) refers to an otherwise unavoidable transfer made to the creditor pre-petition. In the case at hand, the transfer was made post-petition and thus should not affect Touch of Grey's new value defense.

Next, the statutory context also infers that § 547(c)(4) should not consider post-petition payments. First, § 547 is titled "Preferences" which suggests that it concerns transactions occurring during the preference period which are transactions made during the ninety days before filing. Next, the hypothetical liquidation test under § 547(b)(5) instructs courts to compare a payment received by a creditor during the preference period with what that creditor would have

received if that payment was not made and the debtor's assets were liquidated and disseminated to creditors. Courts say that this hypothetical liquidation test should be cutoff at the petition date even though no date is specified in the statute. It would be inconsistent to hold § 547(c)(4)'s cutoff date after a petition is filed and § 547(b)(5)'s cutoff date at the petition date. Thirdly, the statute of limitations for filing preference avoidance actions starts on the petition date under § 547. It would again be inconsistent with the statutory scheme to read § 547 as allowing for causes of action to accrue after the statute of limitations starts to run. Lastly, new value given under § 547(c)(4) is not counted if it was given after the petition date. Therefore, it would be unfair to allow a debtor's payment post-petition to diminish a creditor's new value defense but not to allow new value given to the debtor, post-petition, to reduce a creditor's preference liability.

The policy considerations underlying § 547 and the Bankruptcy Code itself also lead to the opposite conclusion of the lower court. § 547(c)(4) was enacted to encourage creditors to continue doing business with a company who is in a rough spot financially. Allowing a creditor to reduce its preference liability by the new value given, despite being paid for that new value post-petition, would further that goal. Additionally, § 547(c)(4) aims to allow a debtor to work with its creditors so the debtor can avoid bankruptcy altogether. § 547 generally aims for equality of distribution among creditors. By allowing creditors to maintain its new value defense even if it was paid post-petition pursuant to § 503(b)(9) post-petition, creditors will be much more inclined to lend troubled debtors a hand because they will have an additional safety net. This will ultimately ensure that the debtor is in the best position possible to avoid bankruptcy so it can

eventually pay its creditors off in full as opposed to pennies on the dollar in a bankruptcy proceeding.

The Thirteenth Circuit Court of Appeals erred in holding that the Trustee is not required to pay Touch of Grey the rent owed on the first of May because the plain language of section 365(d)(3) compels the trustee to perform all obligations that arise prior to rejection. The Supreme Court has a long history of first looking at the plain text of the statute in issues that require statutory interpretation. Section 365(d)(3) is clear and unambiguous, leaving no space for the argument that Trustee is not required to pay the rent owed to Touch of Grey on May 1st. The plain reading of these two phrases is that when a duty arises under an unexpired lease of nonresidential property after the order of relief but before assumption or rejection, the duty must be timely performed. Because May 1st falls within that time frame, the Trustee is required to pay the full amount of rent owed on that day as part of the Lease.

This billing approach, known as the billing date approach, should be applied rather than the proration approach applied by the Thirteenth Circuit Court of Appeals. The Thirteenth Circuit's decision to apply the proration approach in the context of an agreed upon lease payment comes due after a request for relief and before an assumption or rejection. If the Thirteenth Circuit's decision stands, an established principle followed by almost every circuit will be ignored.

In addition, Congress did not intend to create an exception for tenants in this awkward period between the request and assumption or rejection. The argument that making a tenant pay for the entire month's rent even though only occupying the building until the request for relief assumption or rejection is unjust or absurd is a flawed argument. Congressional statements and

public policy surrounding this section all point to the importance of fairness to the landlord as well as the importance to establishing a clear rule. A clear rule allows tenants and landlords to operate within lease agreements during periods where a tenant is going through the procedures of bankruptcy without having questions or disputes about when rent is due. Applying the proration approach in this context contradicts congressional intent and public policy because it only punishes landlords as they would have the additional cost of trying to find another renter to even attempt to recoup lost rent for the remainder of the month.

ARGUMENT

I. THE POST-PETITION PAYMENT MADE TO TOUCH OF GREY PURSUANT TO § 503(B)(9) DOES NOT PRECLUDE TOUCH OF GREY FROM REDUCING ITS PREFERENCE EXPOSURE BY THE VALUE OF THE INVOICE PURSUANT TO § 547(C)(4).

The lower court's ruling barring Touch of Grey from reducing its preference exposure by the value of the Invoice should not stand because the plain language of § 547(c)(4), its statutory context, and the relevant policy considerations all lean strongly toward the opposite conclusion. Section 547(b) permits a trustee to avoid certain preferential transfers made by a debtor, to a creditor. See 11 U.S.C. § 547(b). A preferential transfer is a transfer made from a debtor's estate to a creditor that, among other things, was initiated within 90 days prior to the debtor filing for bankruptcy. See Beaulieu Liquidating Tr. v. Fabric Sources, Inc. (In re Beaulieu Grp., LLC), 616 B.R. 857, n.3 (Bankr. N.D. Ga. 2020). On the other hand, § 547(c)(4) and § 503(b)(9) both create exceptions to § 547(b)'s avoidance powers. § 547(c)(4) states:

> 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— . . .
>
> (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). New value is defined as, among other things, "money's worth in goods . . ." 11 U.S.C. 547(a)(2). Additionally, § 503(b)(9) allows for an administrative expense to be paid to a creditor 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). A creditor may only make a § 503(b)(9) claim after the debtor has filed their bankruptcy petition. Thus, "at the time the goods

are shipped to the debtor, the claimant does not even know it is shipping within the 11 U.S.C. § 503(b)(9) period." Commissary Operations, Inc. v. Dot Foods, Inc. (In re Commissary Operations, Inc.), 421 B.R. 873, 877 (Bankr. M.D. Tenn. 2010).

In the case at hand, the statutory language unambiguously expresses that an "otherwise unavoidable transfer to or for the benefit of such creditor" does not include a post-petition transfer under § 503(b)(9). This notion is reinforced by the statutory context of § 547(c)(4) and the underlying policy goals of the Bankruptcy Code. Therefore, the payment made to Touch of Grey by the Debtor on account of the Invoice should not affect Touch of Grey's preference exposure pursuant to its § 547(c)(4) defense.

a. The plain language of § 547(c)(4) makes clear that a debtor's estate's post-petition payment to a creditor pursuant to § 503(b)(9) does not affect that creditor's § 547(c)(4) defense.

Because § 547(c)(4) refers only to "an otherwise unavoidable transfer" made by the "debtor," "[t]he plain language of § 547 closes the preference window at the petition, limiting the § 547(c)(4) defense to new value supplied and payments made before the debtor crosses into bankruptcy." 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).

"'The starting point in statutory interpretation is the language of the statute itself.'" Kaye v. Blue Bell Creameries, Inc.(In re BFW Liquidation, LLC), 899 F.3d 1178, 1188 (11th Cir. 2018) (quoting Bankston v. Then, 615 F.3d 1364, 1367 (11th Cir. 2010)). "If the 'language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case,' and 'the statutory scheme is coherent and consistent,' the inquiry is over." Warshauer v. Solis, 577 F.3d 1330, 1335 (11th Cir. 2009) (quoting Robinson v. Shell Oil Co., 519 U.S. 337, 340 (1997)). "In determining whether a statute is plain or ambiguous, [courts] consider 'the language itself,

the specific context in which that language is used, and the broader context of the statute as a whole.'" Warshauer, 577 F.3d at 1335 (quoting Robinson, 519 U.S. at 341).

Once a debtor has petitioned for bankruptcy, it is no longer the debtor who transfers or receives an interest in property, it is the debtor's estate, the trustee, or the debtor-in-possession. See Wallach v. Vulcan Stream Forging (In re D.J. Mgmt. Grp.), 161 B.R. 5 (Bankr. W.D.N.Y. 1993) ("The phrase "the debtor" is systematically used throughout the Bankruptcy Code to connote an entity different from "the estate," "the Trustee," or "the debtor-in-possession."); see also Clark v. Frank B. Hall & Co. of Colo (In re Sharoff Food Serv., Inc.), 179 B.R. 669, 678 (Bankr. D. Colo. 1995) ("any post-petition advances are given to the debtor's estate, not the debtor."). So, by specifying that the entity that makes an "otherwise unavoidable transfer" is the "debtor," § 547(c)(4) must be read as referring exclusively to otherwise unavoidable transfers made pre-petition. 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) (quoting Bergquist v. Anderson-Greenwood Aviation Corp.) (In re Bellanca Aircraft Corp.), 850 F.2d 1284 (8th Cir. 1988)) ("'for the *benefit of the debtor* * * * ' ... impl[ies] that subsequent advances of new value are only those given pre-petition, because any post-petition advances are given to the debtor's *estate,* not to the debtor.'"). Consequently, because the language is plain and unambiguous, the analysis should stop here. See Robinson, 519 U.S. at 340.

This point is confirmed by simply looking at the rest of § 547; the word "debtor" is only mentioned when referring to the pre-petition entity. See In re Phoenix Rest. Grp., Inc., 317 B.R. at 497 ("Throughout § 547, 'the debtor' refers to the *pre-petition* entity that transferred property or engaged in business with the preference defendant."); see e.g. 11 U.S.C. § 547(b), (d), (i). If, on the other hand, "Congress intended §547(c)(4)(B) to account for payments made post-

petition, the section would have included something like 'an otherwise unavoidable transfer of an interest of the estate in property to or for the benefit of such creditor.'" In re Phoenix Rest. Grp., Inc., 317 B.R. at 497.

In its opposition of the above argument, the lower court relies on two cases, both of which base their conclusions on faulty logic. First, the lower court points to Friedman's Liquidating Tr. v. Roth Staffing Cos. LP (In re Friedman's Inc.). 738 F.3d 547, 555 (3d Cir. 2013). The court in Friedman's points out that both § 329 and § 521 use the word "debtor" as referring to a post-petition entity. Id. The court then makes a logical leap, supposing that § 547(c)(4)'s reference to "debtor" thus could refer to either a pre- or post-petition debtor. Id. at 555. Second, lower court points to NLRB v. Bildisco & Bildisco. 465 U.S. 513, 528 (1984). The Court in NLRB merely viewed "the debtor-in-possession as the same 'entity' which existed before the filing of the bankruptcy petition but empowered by virtue of the Bankruptcy Code to deal with its contracts and property in a manner it could not have done absent the bankruptcy filing.". The lower court's focus on these cases is misguided. Id.

Looking first to the argument made in In re Friedman's Inc., the court there cites statutes that refer to a "debtor" as an entity but never as the post-petition transferor. 738 F.3d at 555. § 329 merely refers to an attorney representing a "debtor"; there is no mention of fees paid by the debtor. See 11 U.S.C. § 329. Furthermore, once a payment or other transfer in property is made to that attorney post-petition, the attorney is paid by the debtor's estate, not the debtor. See In re Golden Fleece Beverages, Inc., No. 21 B 12228, 2021 WL 6015422, at *4 (Bankr. N.D. Ill. Nov. 24, 2021). Similarly, §521 refers to a debtor's duties post-petition but fails to use the term "debtor" as the entity making or receiving any payments or interests in property post-petition. See 11 U.S.C. § 521. Hence, neither statute stands for the proposition that a payment made by a

debtor's estate post-petition would be referred to as a payment by a "debtor" in the Bankruptcy Code.

Lastly, the lower court cites NLRB in its argument, but NLRB does not stand for the proposition that "debtor" and "debtor-in-possession" or "trustee" are interchangeable like the lower court believed. The Court in NLRB merely stated that in the employment contract context, a debtor-in-possession is the "entity" "which existed before the filing of the bankruptcy petition but empowered by virtue of the Bankruptcy Code to deal with its contracts and property in a manner it could not have done absent the bankruptcy filing." 465 U.S. at 528. This reading merely acknowledges that a debtor-in-possession must still honor, to some extent, a contract that the debtor signed pre-petition.

Thus, because § 547(c)(4) speaks exclusively about otherwise unavoidable transfers made by the debtor, it is unambiguous that § 547(c)(4) relates only to transfers made to a creditor pre-petition. A payment made post-petition would not be a payment from the debtor but a payment from the debtor's estate or the trustee. Consequently, the payment made to Touch of Grey pursuant to § 503(b)(9) should not affect Touch of Grey's § 547(c)(4) defense. Holding otherwise would be inconsistent with the language of the statute. See Iberiabank v. Beneva 41-I, LLC, 701 F.3d 916, 924 (11th Cir. 2012) ("If the text of the statute is unambiguous, we need look no further.").

b. Even if the language of §547(c)(4) is ambiguous, the statutory context confirms the notion that a post-petition payment made to a creditor pursuant to §503(b)(9) does not affect that creditor's new value defense.

In addition to the plain language of § 547(c)(4) unambiguously "limiting the § 547(c)(4) defense to new value supplied and payments made before the debtor crosses into bankruptcy," it would be inconsistent with § 547's statutory scheme to hold otherwise. In Re Phoenix Rest.

Group, Inc., 317 B.R. at 496. In interpreting statutes, courts can look to headings and titles to "shed light on some ambiguous word or phrase." Brotherhood of R. R. Trainmen v. Balt. & O. R. Co., 33 U.S. 519, 528-29 (1947). So, "as a general matter, § 547 is titled 'Preferences,' and therefore suggests that it concerns transactions occurring during the preference period, which is by definition pre-petition (i.e., the 90 days before the filing of the petition)." In re Friedman's Inc., 738 F.3d at 555. It can thus be inferred that the "application of any new value reduced by subsequent transfers, would relate to that time period." Id.

Next, under § 547(b)(5), a trustee can avoid a transfer if it fails the "hypothetical liquidation test." 11 U.S.C. § 547(b)(5). This test instructs 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." In re Friedman's Inc., 738 F.3d at 556. Even though it is not specified in § 547(b)(5), "[c]ourts have held that the hypothetical liquidation test should be performed as of the petition date." Id.; see Union Meeting Partners v. Lincoln Nat'l Life Ins. Co. (In re Union Meeting Partners), 163, B.R. 229, 237 (Bankr. E.D. Pa. 1994); Tenna Corp. v. U.S. (In re Tenna Corp.), 801 F.2d 819, 823 (6th Cir. 1986) (holding the hypothetical liquidation test is performed as of the petition date). The "hypothetical liquidation test" first proves that the absence of an explicit cutoff date does not preclude the petition date from acting as one. In fact, "[e]xtending preference analysis past the petition date would be inconsistent with § 547(b)(5)" because courts would be reading two separate cutoff dates into the same statute when both subsections fail to state a date. In re Friedman's Inc., 738 F.3d at 556.

Third, "the statute of limitations for filing a preference avoidance action under § 547 in a voluntary case begins to run on the petition date." Id. at 556; see 11 U.S.C. § 546. Following the

lower court's ruling would then lead to scenarios where the statute of limitations starts to run before any cause of action has even accrued. Clearly then Congress did not intend for "otherwise unavoidable transfer" to include post-petition transfers. Conversely, 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." In re Friedman's Inc., 738 F.3d at 556.

Lastly, if courts read § 547(c)(4) as allowing post-petition payments to diminish a creditor's new value defense, courts should likewise read it as reducing a creditor's preference liability when that creditor gives a debtor new value post-petition. "However, the vast majority of courts that have considered this issue have concluded that new value advanced after the petition date should not be considered in a creditor's new value defense." Id. at 557; see In re Bellanca Aircraft Corp., 850 F.2d at 1284-85; Rocin Int'l, Inc. v. Alta AH & L (In re Rocor Int'l Inc.), 352 B.R. 319, 333 (Bankr. W.D. Okla. 2006). This is inconsistent with a reading of § 547(c)(4) that looks to "otherwise unavoidable transfers" that were made pre- and post-petition. § 547(c)(4) states, "such creditor gave new value to or for the benefit of the debtor" without mentioning a timeframe. 11 U.S.C. § 547(c)(4). Thus, it defies logic for courts to allow post-petition transfers from the debtor to factor into its § 547(c)(4) analysis but disallow new value given by creditor post-petition. See Kaye v. Accord Mfg., Inc. (In re Murray, Inc.), 2007 WL 5595447, at *2 (Bankr. M.D. Tenn. June 6, 2007) ("Trustee would have the Court conclude that post-petition payments remain in play while post-petition advances of new value are excluded from the analysis under § 547(c)(4). Logically, and as a matter of statutory consistency, the Trustee's argument fails.").

c. The policy goals underlying both § 547(c)(4) and § 503(b)(9) lead to the conclusion that a post-petition payment to a creditor pursuant to § 503(b)(9) should not affect that creditor's § 547(c)(4) defense.

Normally, when a debtor makes a preferential transfer to a creditor, a trustee may avoid that transfer. 11 U.S.C. § 547(b). There are two reasons for granting the trustee this power. First, it discourages creditors "from racing to the courthouse to dismember the debtor during his slide to bankruptcy," and second, it promotes the "equality of distribution among creditors of the debtors." Union Bank v. Wolas, 502 U.S. 151, 161 (1991) (quoting H.R. Rep. No. 95-595, at 177-78 (1977)). Similarly, there are two fundamental policy functions behind the enactment of § 547(c)(4). First, "[i]t encourages creditors to continue to do business with troubled businesses, which may allow some to avoid bankruptcy altogether." In re Phoenix Rest. Group, Inc., 317 B.R. at 495. Second, a creditor who extends subsequent new value to a debtor is not "deplet[ing] the bankruptcy estate to the disadvantage of other creditors. Charisma Inv. Co. v. Airport Sys., Inc. (In re Jet Fla. Sys., Inc.), 841 F.2d 1082, 1083 (11th Cir. 1988) (per curiam). The new value will essentially "[balance] the preferential effect of a prior transfer from the debtor." In re Phoenix Rest. Group, Inc., 317 B.R. at 495.

With these policy goals in mind, it is important to first point out that new value given under § 547(c)(4) benefits the debtor—and other creditors—"regardless of whether the § 503(b)(9) claimants are paid at a later date for those deliveries." In re Commissary Operations, Inc., 421 B.R. at 878. By extending a debtor new value when the debtor is in financial trouble, especially in the form of inventory, the creditor is allowing the debtor to sell and receive a profit from the inventory and keep goodwill with its customers. See id. at 878-79. This benefits the debtor by allowing the debtor to keep doing business so it can try to avoid bankruptcy. Most importantly, this benefits other creditors three-fold. First, if the debtor can avoid bankruptcy, the

creditors have a much better chance of recovering the full amount the debtor owed them as opposed to pennies on the dollar in a bankruptcy proceeding. Second, if the debtor eventually petitions for bankruptcy, the profit gained by continuing business longer than it would have without the advancement of new value would enhance the estate, allowing for a larger payout to the creditors. Lastly, suppose the debtor chooses to declare chapter eleven bankruptcy. In that case, the debtor maintained goodwill with its customers, allowing for the debtor's business to keep the customers and pay back its creditors. See id. at 878-79. Thus, by disincentivizing creditors from giving new value to troubled debtors, this Court will not only run afoul of the policy goals § 547(c)(4) was meant to further but it will simultaneously hurt the goals behind § 547(b).

Next, by allowing Touch of Grey to reduce its preference liability by the value of the invoice, this Court would be furthering the purpose of § 547(c)(4) by encouraging creditors to continue trade with troubled businesses. Likewise, this Court would be promoting the Congressional policy underlying § 503(b)(9), "giving trade creditors a post-petition priority for the value of goods delivered to the debtor within 20 days of the petition." Id. at 879. Forcing creditors to choose between their 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 chill their willingness to do business with troubled entities." Id. Consequently, this hesitancy would ultimately hurt the debtor and would be averse to the policy goals of the Bankruptcy Code. Conversely, some courts argue that the policy goals of the Bankruptcy Code will be furthered by denying a creditor its ability to reduce its preference liability pursuant to § 547(c)(4) if the creditor was paid on account of the new value post-petition. See Circuit City Stores, Inc. v. Mitsubishi Dig. Elecs. Am. (In re Circuit City Stores, Inc.), 2010 WL 4956022, at *9 (Bankr.

E.D. Va. 2010); In re Beaulieu Grp., LLC, 616 B.R. 857 at 874-76. These courts argue that allowing a creditor to receive a § 503(b)(9) payment for the new value given and allowing the creditor to offset its preference liability using the same new value would not further the policy goal of equality to all creditors. See In re Circuit City Stores, Inc., 2010 WL 4956022, at *9 ("To allow a supplier of goods to a debtor to use the delivery of the same materials as the basis for both a § 547(c)(4) defense and a § 503(b)(9) administrative claim would not give equal treatment to all creditors."). Other courts argue that allowing a creditor to receive a preference reduction and a § 503(b)(9) payment for the new value given would deplete the estate. TI Acquisition, LLC v. Southern Polymer, Inc. (In re TI Acquisition, LLC), 429 B.R. 377, 384-85 (Bank. N.D. Ga. 2010) ("[Creditor's] delivery of goods to Debtor pre-petition enlarged the Debtor's estate. Upon full payment to [creditor], the Debtor's estate is no longer enlarged by the delivery."). Both arguments miss key points that dramatically change the analysis.

First, looking toward the argument that emphasizes the inequality of creditors, the Bankruptcy Code does not aim to treat all creditors absolutely equally, it aims for "equal distribution among similarly situated creditors". U.S. Trustee v. First Jersey Securities, Inc. (In re First Jersey Securities, Inc.), 180, F.3d 504, 511 (3d Cir. 1999); see also In re Friedman's Inc., 738 F.3d at 560 ("the Bankruptcy Code does not give equal treatment to the claims of *all* creditors, but rather carves out special treatment for creditors or claims of certain kinds."). If Congress intended to treat all creditors equally, "surely the exceptions swallow the rule." In re Friedman's Inc., 738 F.3d at 560 ("some creditors are treated more equally than others. There are special provisions for aircraft leases and shopping center leases, and some claims are given priority over others. . . . reasoned and justified inequality sometimes prevails, usually based on what is in the best interest of the estate."). This point is best made by looking at § 547(c)(4)

itself: "§ 547(c)(4) was not enacted to ensure equitable treatment of creditors, but rather is intended to encourage creditors to deal with troubled businesses." Chaitman v. Paisano Automotive Liquids, Inc. (In re Almarc Mfg., Inc.), 62 B.R. 684, 687-88 (Bankr. N.D. Ill. 1986); see also Gold Coast Seed Co. v. Spokane Seed Co. (In re Gold Coast Seed Co.), 30 B.R. 551, 553 (9th Cir. 1983) ("The purpose of § 547(c)(4) is precisely to encourage trade creditors to continue dealing with troubled businesses."). Thus, relying exclusively on the policy goal of treating creditors equally turns a blind eye to the Bankruptcy Code in its entirety.

Next, allowing a creditor to reduce its preference liability by subsequent new value given, despite receiving a payment for that new value pursuant to § 503(b)(9), still replenishes the debtor's estate. Notwithstanding the fact that a creditor is paid post-petition for new value it delivered to a debtor pre-petition, at the time new value was given, the creditor replenished the debtor's estate and helped the debtor avoid bankruptcy to the extent possible. See In re Friedman's Inc., 738 F.3d at 559; In re Commissary Operations, Inc., 421 B.R. at 878 ("[T]he debtor-in-possession has realized the mark-up profit on the re-sale of the goods (or use of the goods incorporated into a finished product for sale, for a manufacturing or distributor debtor) and has the ability to fill an order to its customers' satisfaction."). Therefore, the estate is not being depleted; it was enlarged due to the new value given, regardless of whether a § 503(b)(9) payment was made to the creditor post-petition.

To conclude, a § 503(b)(9) payment received by a creditor should not affect that creditor's new value defense under § 547(c)(4) for a multitude of reasons. First, the plain language of § 547(c)(4) cuts off the analysis at the petition date. Second, the context of § 547(c)(4) reinforces the notion that § 547(c)(4) should be read in a way that does not account for payments made to the creditor post-petition. Lastly, the underlying policy goals of § 547(c)(4)

and the Bankruptcy Code both lean strongly in favor of the same conclusion. Therefore, the § 503(b)(9) payment made to Touch of Grey should not affect Touch of Grey's use of the invoice in its new value defense.

II. THE THIRTEENTH CIRCUIT COURT OF APPEALS ERRED IN HOLDING THAT TRUSTEE IS NOT REQUIRED TO PAY TOUCH OF GREY THE RENT OWED ON THE FIRST OF MAY BECAUSE THE PLAIN LANGUAGE OF SECTION 365(d)(3) COMPELS THE TRUSTEE TO PERFORM ALL OBLIGATIONS THAT ARISE PRIOR TO REJECTION.

No ambiguity exists in section 365(d)(3). Section 365(d)(3) clearly states that a trustee "shall timely perform all the obligations . . . arising from and after the order for relief under any unexpired lease of nonresidential real property, until such lease is assumed or rejected. . . ." 11 U.S.C. § 365(d)(3). Here, the Trustee's Lease with Touch of Grey required a lease payment on May 1, 2020. The bankruptcy court granted the Trustee's motion to reject the Lease and franchise agreement effective as of May 5, 2020. This Court should apply the plain meaning of section 365(d)(3) and hold that the Trustee must pay the May 1st rent owed to Touch of Grey since it is an obligation that arose prior to the rejection on May 5th.

a. The language of the statute does not create ambiguities about whether an unexpired lease payment due before a rejection must be timely performed.

When it comes to interpreting statutes, the Supreme Court has a long history of emphasizing that inquiries of interpretation must begin with the statute of the language itself. U.S. v. Ron Pair Enters., Inc., 489 U.S. 235, 241 (1989). In opinions spanning over a century, the Supreme Court has made it clear that it is Congress's job to create statutes and the Court's job to interpret them as written. See N.Y. Cty. Nat'l Bank v. Massey, *192 U.S. 138, 146 (1904);*

Bostock v. Clayton County, Georgia, *140 S.Ct. 1731 (2020)*. Thus, this Court should first consider the plain language of section 365(d)(3).

First, Section 365(d)(3) requires that a "trustee timely perform all the obligations of the debtor…" Lower courts have determined the term "obligation" to be "clear and unambiguous. In re R.H. Macy & Co., Inc., 1994 WL 482948 (S.D.N.Y.,1994). Furthermore, the ordinary, common meaning of "obligation" is a duty to do something. Dictionary definitions also establish that an obligation is something that must be done because of laws or rules. See *Obligation,* Black's Law Dictionary (10th ed. 2014); *Obligation* Meriam Webster's Dictionary (11th ed.2020). Here, there is no ambiguity that Trustee's rent payment is owed to Touch of Grey by law, and thus an obligation.

The two following phrases in the section explain what obligations must be performed and when. The phrases immediately follow the phase discussed above and need to be read together to understand how they connect: "arising from and after the order for relief under any expired lease of nonresidential real property until such lease is assumed or rejected." The plain reading of these two phrases is that when a duty arises under an unexpired lease of nonresidential property after the order of relief but before assumption or rejection, the duty must be timely performed. Here, the duty that arises is the requirement that the Debtor pay Touch of Grey on the first of each month. R. at 4. Since the rejection of the Lease occurred on May 5th, the Debtor was required to timely pay the month's rent on May 1st. The statute's language is clear and unambiguous.

b. The proration approach should not be applied here because circuit courts of appeal have historically opted for the billing date approach rather than the proration approach in the context of post-petition rent due under an unexpired lease of non-residential real property.

The Thirteenth Circuit Court of Appeals is correct in its assessment that the proration approach has been adopted by a slight majority of circuit courts. However, the context of when the proration approach applies versus when the billing date approach (also known as performance date approach) applies is critical. Prior to the Thirteenth Circuit's ruling in the present case, all circuit courts have decided that the billing approach is correct when a rent payment becomes due after the petition and before the assumption or rejection — the exact scenario in the present case. See Burival 613 F.3d 810; HA-LO Indus., Inc. v. Centerpoint Props. Tr., 342 F.3d 794, 799 (7th Cir. 2003); Centerpoint Props. v. Montgomery Ward Holding Corp, 268 F.3d 205 (3d Cir. 2001); Koenig Sporting Goods, Inc. v. Morse Road Co., 203 F.3d 986 (6th Cir. 2000).

In Koenig, the United States Court of Appeals for the Sixth Circuit interpreted section 365(d)(3) of the Bankruptcy Code in their ruling that the billing date approach was correct. The Sixth Circuit held that, pursuant to 365(d)(3), when monthly rent is payable in advance on the first day of the month, a debtor must pay rent for the entire month when a lease is rejected after the first day of the month, even if the debtor rejects the lease and vacates the premises on the second day of the month. In re Koenig Sporting Goods, Inc., 203 F.3d at 990.

In November 1993, the debtor/lessee, Koenig Sporting Goods, Inc., entered into a ten-year lease with the lessor, Morse Road Company, under which Koenig was obligated to pay Morse $8,500 on the first of each month for that month's rent. *Id*. at 987. On August 18, 1997, Koenig filed for protection under chapter 11 of the Bankruptcy Code, then the debtor notified Morse that it would reject the lease effective December 2, 1997, and the debtor vacated the premises on that date. Id. Morse filed a request with the bankruptcy court seeking payment of rent for the full month of December. Id. Koenig objected to Morse's request, arguing that

Bankruptcy Code section 365(d)(3) only entitles Morse to the pro rata value of the rent for the first two days of the month of December when Koenig occupied the premises, or $516.13. Id. at 987-988.

The debtor argued that the language of section 365(d)(3), specifically the "obligations of the debtor . . . arising from and after the order for relief," is ambiguous, as evidenced by a split of authority among the bankruptcy and district courts as to whether a debtor is obligated to pay a full month's rent, or only the pro rata share for the days the debtor actually occupied the property. Id. at 989. The debtor asserted that, due to the alleged statutory ambiguity, the court is required to look beyond the language of the statute to determine Congress's intent. The Sixth Circuit disagreed and found that the language of the statute was unambiguous with respect to the debtor's rent obligation. Id. at 990.

The Third Circuit Court of Appeals came to a nearly identical conclusion in Centerpoint Props. v. Montgomery Ward Holding Corp. The Third Circuit found it difficult to reconcile the proration approach with the text of 365(d)(3) in the same situation where rent became due after the request for relief and before the assumption or rejection, stating:

> The clear and express intent of § 365(d)(3) is to require the trustee to perform the lease in accordance with its terms. To be consistent with this intent, any interpretation must look to the terms of the lease to determine both the nature of the “obligation” and when it “arises.” If one accepts this premise, it is difficult to find a textual basis for a proration approach. On the other hand, an approach which calls for the trustee to perform obligations as they become due under the terms of the lease fits comfortably with the statutory text.

In re Montgomery Ward Holding Co., 268 F.3d at 209. If the Third Circuit were to look at the nature of the obligation in question and when it arises, it would also see that rent for the Lease was to be paid by the Debtor on May 1st. By their reasoning, Debtor would be required to pay the rent as it came due rather than pay a prorated fee.

Circuit courts of appeal have firmly put themselves on the side of 365(3)(d) being unambiguous when the question of whether a debtor must pay rent if it comes due between the time of the request and the assumption or rejection. The facts of this case are on point with Kroenig and Montgomery Ward. The Thirteenth Circuit Court of Appeals took a dramatic turn from all other circuit courts by ruling that the Debtor must only pay the prorated rate rather than what was due on the billing date. This Court should reverse that decision and remove the newly created split that misinterprets 365(d)(3).

c. The Thirteenth Circuit Court's interpretation of 365(d)(3) contradicts the congressional intent behind the section.

Section 365(d)(3) alters the former Bankruptcy Act's rule that the amount of a landlord's claim was limited to the value of the premises or the value of the "use and occupancy." As the Fifth Circuit explained in In re Handy Andy Home Improvement Centers, Inc., 144 F.3d 1125 (7th Cir. 1998):

> Until [§365(d)(3)'s] enactment in 1984, the landlord was in an awkward spot during the interval between the entry of the tenant into bankruptcy and the tenant's decision to assume or reject the unexpired lease. At the same time that the automatic stay would prevent the landlord from evicting the tenant, the "actual, necessary" provision of §503(b)(1). . . might prevent the landlord from collecting the rent in full, promptly and without legal expense. . . . To give relief to

> landlords, Congress passed §365(d)(3), which. . . allows them during that awkward post-petition pre-rejection period to collect the rent fixed in the lease.

Id. Touch of Grey is in the exact "awkward post-petition pre-rejection period" the Fifth Circuit mentions. It is the intent of the section to allow a landlord like Touch of Grey to collect the rent that is fixed in the lease.

Furthermore, Senator Orrin Hatch, a conferee to the original act stated:

> In this situation, the landlord is forced to provide current services—the use of its property, utilities, security, and other services—without current payment. No other creditor is put in this position. In addition, the other tenants often must increase their common area charge payments to compensate for the trustee's failure to make the required payments for the debtor. The bill would lessen these problems by requiring the trustee to perform all the obligations of the debtor under a lease of nonresidential real property at the time required in the lease. This timely performance requirement will ensure that debtor-tenants pay their rent, common area, and other charges on time pending the trustee's assumption or rejection of the lease.

130 CONG. REC. (1984), as reprinted in 1984 U.S.C.C.A.N. 576, 598-99 (emphasis added). Hatch's comments and the Fifth Circuit's analysis of the congressional intent simply do not create questions about what is expected from debtor-tenants and landlords in the unique situation of being in between a request for relief and rejection. Debtor-tenants are required to perform the obligations arising in that period.

There could certainly be an argument that this interpretation is only beneficial to creditors and harms small businesses struggling with bankruptcy by forcing them to pay rent for a period where they do not even occupy the space. Although it may appear to benefit only creditors, it also provides a clear rule upon which debtors may rely for determining the best time to reject a lease. It is clear that the costs to a debtor of delaying lease rejection for even one or two days may be significant if additional rent obligations under the lease will arise. Debtor-tenants have clear notice under this statute.

The trustee controls the date of rejection. See In re Koenig, 203 F.3d at 989; HA-LO Indus 342 F.3d at 800. Here, the Trustee, not Touch of Grey decided when to reject the lease. Had Trustee rejected the lease on April 30th, no rent would have been owed to Touch of Grey for the month of May. It is understandable that the Thirteenth Circuit was sympathetic to the Trustee because they would have been paying full rent for a month they were only in the building for a few days. But siding with Trustee means the inverse applies to Touch of Grey and it will not receive a full month's rent that was contracted for and will now have the additional cost of finding another renter. Siding with the plain meaning of 365(d)(3) and congressional intent behind the statute provides the most harmonious outcome as debtor-tenants like the Trustee in the present case can avoid paying the next rent installment by the timing of their rejection and landlords like Touch of Grey will have enough notice to seek other renters.

CONCLUSION

For the reasons mentioned above, we respectfully request that this Court find that the post-petition payment made to Touch of Grey does not affect its new value defense and that the Debtor pay the full value of May's rent.