No. 21-0909

IN THE

Supreme Court of the United States

OCTOBER TERM, 2021

IN RE TERRAPIN STATION, LLC,

Debtor,

TOUCH OF GREY ROASTER, INC,

Petitioner,

V.

CASEY JONES, CHAPTER 7 TRUSTEE,

Respondent.

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

BRIEF FOR PETITIONER

Team Number 9
Counsel for Petitioner

QUESTIONS PRESENTED

I. Does 11 U.S.C. § 547(c)(4) impose a temporal limitation of the debtor's petition date on a creditor's affirmative defense of subsequent new value that is paid in full post-petition pursuant to an 11 U.S.C. § 503(b)(9) administrative expense?

II. Does 11 U.S.C. § 365(d)(3) allow a lessor to compel a trustee to timely perform obligations of a debtor that arise prior to the date of rejection of an unexpired non-residential real property lease?

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The Thirteenth Circuit Court of Appeals' decision is available at No. 20-0803. The Bankruptcy Court for the District of Moot decided in favor of the United States Trustee. On appeal, the United States Court of Appeals for the Thirteenth Circuit affirmed the Bankruptcy Court's decision in favor of the Trustee.

STATEMENT OF JURISDICTION

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

PERTINENT STATUTORY PROVISIONS

11 U.S.C. § 365 Executory Contracts and Unexpired Leases

(a) – (c) [omitted]

(d)

(1) – (2) [omitted]

(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.

(4) – (5) [omitted]

(e) – (p) [omitted]

11 U.S.C. § 503 Allowance of administrative expenses

(a) [omitted]

(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)-(8) [omitted]

(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.

(c) [omitted]

11 U.S.C. § 547 Preferences

(a) – (b) [omitted]

(c) The Trustee may not avoid under this section a transfer –

(1) – (3) [omitted]

(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) – (9) [omitted]

(d) – (i) [omitted]

STATEMENT OF THE CASE

I. FACTUAL HISTORY

A. William Tell's Small Business and Stagnant Sales

This case involves William Tell (Tell), who began his long journey into bankruptcy when he decided to establish an independent coffeehouse in the town of Terrapin. Moot. R. at 3. As the sole member of his coffeehouse, Terrapin Station, LLC (Terrapin), he was met with initial success, winning "Independent Coffeehouse of the Year", from a leading coffee industry trade magazine. R. at 3. Although he was winning awards, after a decade in operation, the coffeehouse was treading water and he was having trouble increasing sales. R. at 4.

In addition to the subpar sales, the building needed costly remodeling. R. at 4. While the coffeehouse had loyal customers Terrapin was still unable to pay for the much-needed remodeling at their current sales. R. at 4. Weighing heavily on the sole member of the coffeehouse. Tell was desperate for a solution to Terrapin's financial distress. R. at 4.

B. Touch of Grey's Industry Status Intrigues William Tell with Help Increasing Business and Relocation

Shortly thereafter, the answer to Terrapin's issues presented itself when the business was approached by an international coffee company and coffeehouse chain, Touch of Grey Roasters, Inc. (Touch of Grey), with an opportunity to partner and franchise a "neighborhood coffeehouse" in the town of Terrapin. R. at 4. Touch of Grey, although headquartered in San Francisco, operates over 1,900 coffeehouses all around the world. R. at 3. In addition to their worldwide presence, they are known for their highly rated and award-winning coffee blends. R. at 3. Tell loved the chance to partner with an industry giant and knew this could help solve Terrapin's current poor sales and financial hardship in regard to the building. R. at 4. Without any hesitation, the parties agreed to move forward with the partnership. R. at 4. To help bring the

coffeehouse to life, Touch of Grey agreed to purchase and lease a recently renovated warehouse, located in the downtown district of Terrapin. R. at 4.

The parties, with Terrapin, as tenant, and Touch of Grey, as the landlord, contracted a Lease Agreement (the "Lease") for the warehouse. R. at 4. The Lease term was for twenty years, with a rent of $25,000, being "due in advance on the first day of each month." R. at 4. That same day, the parties agreed to a franchise agreement with Touch of Grey, as franchisor, and Terrapin, as franchisee. Terrapin was to exclusively sell products purchased from Touch of Grey. R. at 4. After four months of building preparations, the new "Terrapin Station Coffeehouse" (Terrapin Station) opened shortly after the agreements were signed. R. at 5. Tell was also able to rid himself of the problems at the original coffeehouse by completely closing its doors after thirteen long years in operation. R. at 5.

C. Terrapin Station Coffeehouse's Business Struggles and Subsequent Bankruptcy Filings

At no fault of Touch of Grey, Terrapin Station struggled from the start. R. at 5. The coffeehouse was unable to fit in with the local independent coffeehouse owners. R. at 5. To add to the issue, Tell attempted to add a nightlife segment of the business, and this proved to be unsuccessful. R. at 5. As a result of the lower-than-expected sales, Terrapin Station climbed its way into over $700,000 worth of debt for products it had purchased from Touch of Grey within the first 11 months of operation. R. at 5.

As a result of Terrapin Station's $700,000 of debt, Touch of Grey was forced to respond with a notice of default. R. at 5. The parties were able to come together and agree to a forbearance agreement. R. at 5. In the agreement, Touch of Grey would continue the franchise agreement in exchange for (1) a payment of $250,000 towards the outstanding debt, (2) reaffirmation of Terrapin Station's obligation under the Lease, and (3) a release of any claims

that Terrapin Station had against Touch of Grey. R. at 5. That same day, Terrapin Station made the required payment. R. at 5.

Two weeks later, to assist Terrapin Station with their business, Touch of Grey sold an additional $200,000 worth of products to Terrapin Station on credit. Tell also signed a personal guarantee promising to pay for the goods. R. at 5, 6.

A short two weeks later and after an unsuccessful holiday season, Terrapin Station filed a chapter 11 petition for relief in the United States Bankruptcy Court for the District of Moot on January 5, 2020 (the "Petition Date"). As of the Petition Date, Terrapin station was current on its rent but still owed Touch of Grey $650,000 for goods it had already received. R. at 6.

D. Terrapin Station Coffeehouse's Reorganization Plan and Touch of Grey's Continued Assistance

Tell made it clear that he intended to reorganize Terrapin Station by returning to normal coffeehouse hours and find a tenant to rent out part of the building to help with the cost of the rent. R. at 6. As early as the first bankruptcy court hearings, Touch of Grey communicated their concerns with Terrapin Station's reorganization strategy but nonetheless still tried to progress with the partnership. R. at 6. As a result of these ongoing discussions, Terrapin Station motioned the court requesting authority to pay Touch of Grey $200,000 towards the outstanding balance in order to keep receiving goods on credit. The court approved at an administrative expense pursuant to section 503(b)(9) of the Bankruptcy Code. R. at 6-7. After this approval, Touch of Grey received the $200,000 payment and continued selling goods on credit to Terrapin Station which allowed them to remain in business. R. at 7.

Unfortunately, the reorganization plan was anything but successful. R. at 7. Terrapin Station was unable to find a tenant for the building and in March 2020 the COVID-19 pandemic

temporarily forced them to close their doors. R. at 7. Although they only closed for one month, when they reopened, the customers did not return. R. at 7.

E. Terrapin Station Coffeehouse Permanently Ceases Operation Despite Touch of Grey's Continued Support

On May 1, 2020, Terrapin Station failed to pay rent to Touch of Grey and then on May 5, 2020, Terrapin Station Coffeehouse permanently ceased operations. R. at 7. The following day, Terrapin Station filed a motion to reject the Lease and franchise agreement pursuant to section 365(a) seeking to avoid payment for the May rent. R. at 7. Two days later, Touch of Grey filed a motion seeking to compel payment of the full rent amount due on May 1, 2020. This was pursuant to section 365(d)(3), they agreed to the rejection but claimed the rent was due before the date of rejection. R. at 7-8. The court granted Terrapin Station's motion to reject the Lease and franchise agreement but did not rule on Touch of Grey's request for the May rent. R. at 8. The Bankruptcy Court for the District of Moot ruled in favor of the Trustee. R. at 8. Touch of Grey appealed. R. at 8. On appeal, the Thirteenth Circuit affirmed the bankruptcy court's decision and ruled in favor of the Trustee. R. at 8.

II. PROCEDURAL HISTORY

Terrapin Station filed a petition for relief under chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the District of Moot on January 5, 2020. R. at 6. Two weeks later, they filed a motion with the court requesting authority to pay Touch of Grey $200,000 as a critical vendor. R. at 6. The United States Trustee opposed the motion although there was support from counsel for the newly appointed creditor's committee. R. at 7. The court granted the $200,000 payment as an administrative expense pursuant to section 503(b)(9) for the value of the goods sold. R. at 7.

On May 6, 2020, Terrapin Station filed an additional motion rejecting the Lease and franchise agreements pursuant to section 365(a). R. at 7. Touch of Grey responded on May 8, 2020, with a motion seeking to compel payment of the May rent, arguing that the full amount was due on May 1, 2020, before the date of rejection pursuant to section 365(d)(3). R. at 7-8. At the next hearing, Terrapin Station announced that it was converting its chapter 11 bankruptcy to a chapter 7 bankruptcy pursuant to section 1112(a) of the Bankruptcy Code. R. at 8. The court granted Terrapin Station's motion to reject the Lease and franchise agreements effective May 5, 2020 but did not rule on the issue of the May 2020 rent.

At the next hearing, Touch of Grey was met with opposition from the Trustee. R. at 8. First, the Trustee objected to the full payment of the May 2020 rent pursuant to section 365(d)(3), arguing that the building was only occupied for the first five days of the month. R. at 8. Second, the Trustee sought recovery of the $250,000 forbearance agreement payment pursuant to sections 547(b) and 550(a). Touch of Grey argued the affirmative defenses that it was entitled to reduce its preference exposure by the goods it sold after the $250,000 payment, valued at $200,000 pursuant to section 547(c)(4). Thus, reducing its preference exposure to $50,000. Additionally, the parties stipulated that the new value does not need to remain unpaid in order for a creditor to establish a 547(c)(4) defense. R. at 10.

The bankruptcy court issued a ruling in favor of the Trustee on both issues. R. at 3. After a timely appeal by Touch of Grey, the Court of Appeals for the Thirteenth Circuit affirmed the bankruptcy court's decision and ruled in favor of the Trustee. R. at 3, 8. The appellate court held that (1) such payment was an "otherwise unavoidable transfer" that cannot constitute new value under section 547(c)(4) given that the invoice was paid pursuant to section 503(b)(9) and that there is no temporal limitation explicitly stated in 547(c)(4), and (2) under section 365(d)(3), the

landlord is only entitled to the rent that had accrued through the effective date of rejection. R. at 9, 13, 17.

STATEMENT OF THE STANDARD OF REVIEW

Each party concedes to the facts presented therefore this case concerns issues of law. R. at 9. Issues of law are reviewed by this Court *de novo*. *Texas v. Soileau (In re Soileau)*, 488 F.3d 302, 305 (5th Cir. 2007). Under a *de novo* standard of review, the case would be decided as if the court were the first to review the matter. *Razavi v. Comm'r of Internal Revenue*, 74 F.3d 125, 127 (6th Cir. 1996) (quotation omitted).

ARGUMENT

I. The Supreme Court of the United States should Find that Section 547(c)(4) of the Bankruptcy Code Does Not Preclude Touch of Grey from Reducing its Preference Exposure by Subsequent New Value that is Paid Post-Petition Pursuant to Section 503(b)(9).

This Court should rule that Touch of Grey can use the subsequent new value delivered to Terrapin pre-petition as grounds for a 503(b)(9) administrative expense and a 547(c)(4) affirmative defense to reduce their preference exposure. There are numerous indicators in the reading of section 547 of the Bankruptcy Code that indicate that Congress intended the cutoff date for the analysis of a new value defense to be the petition date. *In re Friedman's Inc.*, 738 F.3d 547, 555 (3d Cir. 2013).

Additionally, using the petition date of the debtor as the cutoff for a preference analysis meets the policy goals and legislative intent of section 547 and the Bankruptcy Code. In our case, the preference analysis should end on January 5, 2020, the petition date. With a January 5, 2020, petition date the payment of $200,000 to Touch of Grey pursuant to the courts order should not be included in the analysis of Touch of Grey's new value defense. Touch of Grey should be found to have a preference exposure of only $50,000.

A. The Most Natural and Consistent Reading of Sections 547(c)(4) and 503(b)(9) is that the Preference Analysis Window Closes on the Petition Date of the Debtor.

Terrapin's bankruptcy filing date of January 5th, 2020, should be the cutoff day for Touch of Grey's new value defense and preference liability analysis. While 547(c)(4) does not explicitly state when a payment must be made by a debtor to defeat a creditor's new value defense, that does not mean that it is ambiguous. *Id.* at 553.

The context of a statute must be analyzed to determine the statute's meaning and if the statute is ambiguous or not. *Id.* at 554. If our analysis is simply based on the lack of language (no

explicit time limitations) then we are not taking into account, the context of the entire statute, bankruptcy code, and the intent of the legislatures. *Id*.

1. The Statutory Context of Section 547 of the Bankruptcy Code Leads to a Conclusion that the Petition Date of the Debtor is the Cutoff Date for a Preference Analysis.

In *In re Friedman* the debtor started in chapter 7 and later amended to chapter 11 bankruptcy. The debtor made preferential payments to the creditor for services performed. After these preferential transfers but before the petition date of the debtor the creditor provided additional services to the debtor. The amount owed to the creditor for these services remained unpaid as of the debtor's petition date. The debtor then filed a motion post-petition seeking to pay the creditor for services provided. The debtor reasoned that if the creditor was not paid then there would likely be a loss of employees. *Id.* at 549. The court granted Debtor's motion and entered a wage order resulting in payment to the creditor for services provided.

Later in the case when the debtor transferred to a chapter 11 filing, an action was commenced on behalf of the debtor that sought to recover the pre-petition transfer to the creditor as preferential treatment. In response, the creditor claimed a new value defense pursuant to 547(c)(4). *Id.* at 550, 551. The court held that the creditor was entitled to the administrative expense payment made pursuant to 547(b)(9) and their new value defense reasoning that the new value defense analysis ends at the petition date. *Id.* at 562.

The court reasoned, and we contend that this reasoning should be followed, that the statutory context of the bankruptcy code indicates that the petition date should be used as the cutoff date in a subsequent new value analysis along with the underlying policies in the preference provision and the new value defense provision. *Id.* at 555, 557. It is important to note that in *In re Conex Holdings, LLC*, the United States District Court in Delaware went on to find

that the holding in Friedman was not limited to wage orders and should be interpreted broadly. *In re Conex Holdings, LLC,* 534 B.R. 606, 611 (D. Del. 2015).

Friedman is directly analogous to the case at hand. Both cases involve court-ordered payments made post-petition for services or goods rendered pre-petition with the goal of continuing to support a business in its reorganization efforts. Like in *Friedman* our case involves a creditor who was attempting to work with a struggling business by providing them the ability to serve their customer base. In both cases, the creditors were working to meet the goals of the legislative intent behind sections 547 and 503 of the bankruptcy code.

a. Section 547 of the Bankruptcy Code is Titled Preferences.

First, Section 547 of the Bankruptcy Code is titled "Preferences." This indicates that it was meant to only concern transactions that occurred pre-petition. The title "Preferences" suggest that the section refers to transactions that occur during the "preference period." *Friedman's*, 738 F.3d at 555. The "preference period" occurs within the 90-days pre-petition. *Id* at 555. In the current case, the preference period would be the 90-days before the January 5, 2020, petition date of Terrapin. The payment at issue is the $200,000 503(b)(9) administrative expense and this occurred post-petition. This payment should not be included in Touch of Grey's new value defense analysis as it occurred after Terrapin's petition date.

b. The Statute of Limitations to File a Preference Avoidance Begins on the Debtor's Petition Date.

Second, the statute of limitations for a debtor to file a preference avoidance begins to run on the petition date. *Id.* 556. This would indicate that for the calculation of a creditor's preference liability to remain constant post-petition we need to also use the petition date as the cutoff for a new value defense analysis. If post-petition payments are allowed to defeat a creditor's new value defense, then the preference liability calculation could also change

depending on when the preference avoidance action is filed. *Id.* at 556. The injury to the estate could fluctuate over time. R. at 24.

In our case, Terrapin had originally filed under chapter 11 in hopes of reorganizing their business. The reason that Terrapin motioned for the 503(b)(9) administrative expense to pay Touch of Grey so that they could continue receiving goods and build their business and goodwill with their customer base. Now, Terrapin has amended to a chapter 7 bankruptcy and has closed its business for good. This means, under the current ruling, that any payments that happened between the petition date of January 5, 2020, and the amended filing on May 29, 2020, could be used against Touch of Grey. This would not only fluctuate the preference analysis but also discourage creditors from working with a business that is attempting to reorganize in fear of later being forced to pay back money that the debtor paid in an attempt to save their business. By using the petition date as the cutoff date for the preference analysis there would be consistent with the preference avoidance statute of limitations and would provide comfort to creditors when working with a business that is attempting to reorganize.

c. Allowing Post-Petition Payments to Affect the Preference Analysis would be Inconsistent with Not Allowing Post-Petition Extensions of New Value to be Included in the Analysis as Well.

Third, post-petition payments should not affect the preference analysis as this would be inconsistent unless the courts also allowed post-petition extensions of new value to be available as a defense. *Friedman's*, 738 F.3d at 557. "Although §547(c)(4) only specifies that new value be given to a debtor subsequent to a preference payment, courts have read the petition date into the statute as a cutoff. At least one court has found that the logic leading to the conclusion that post-petition new value should not be considered in the preference analysis also applies to the issue before us." *Id.* at 557.

Meaning that because we do not consider new value given post-petition in our calculations, we should also not include post-petition payments. "[I]t makes sense that the equality should be measured, and inequalities rectified, as of the petition date" *Id.* at 9.

d. Ending the 547-Preference Analysis on the Petition Date is Consistent with Other Code Remedies and Other Contextual Reasonings.

Fourth, in *In re Phoenix Restaurant Group, Inc.* the court states that "[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." *In re Phoenix Rest. Grp., Inc.*, 317 B.R. 491, 496 (Bankr. M.D. Tenn. 2004).

In *Phoenix,* the debtor operated several family-style restaurants and hired a creditor to work as an accountant/bookkeeper. At issue was if a post-petition payment affects a 547(c)(4) new value defense claim made by the creditor. The court held that "[c]losing the §547(c)(4) analyses at the petition is consistent with other Code remedies that only apply post-petition. Creditors who continue to supply the debtor-in-possession with goods and services post-petition are provided special priority for payment from the bankruptcy estate." *Id.* at 497.

Recently, in *In re Beaulieu,* a court held that post-petition payments should be included in a preference analysis. The court relied on *BFW Liquidation*, "[t]he Court respectfully disagrees with the Third Circuit because, based on the *BFW Liquidation* opinion, this Court is persuaded the Eleventh Circuit would be more likely to find that the lack of a temporal limit was intentional." *In re Beaulieu Grp., LLC*, 616 B.R. 857, 873 (Bankr. N.D. Ga. 2020).

However, this is not analogous to our case. The holding in *BFW Liquidation* is that 547(c)(4) does not require new value to remain unpaid as of the petition date. The holding does not address any temporal limitations regarding payments of a 503(b)(9) admin expense. *In re BFW Liquidation, LLC*, 899 F.3d 1178, 1183 (11th Cir. 2018). In our case, the parties stipulated

that "new value need not 'remain unpaid'" R. at 10. As such, the holdings in *In re Beaulieu* and *BFW Liquidation* does not apply to our case.

Finally, in *In re Ames Department Stores, Inc.* the court states that "the Bankruptcy Code gives a higher priority to requests for administrative expenses than to prepetition claims in order to encourage third parties to supply goods and services on credit to the estate, to the benefit of all of the estate's creditors." *In re Ames Dep't Stores, Inc.*, 582 F.3d 422, 431 (2d Cir. 2009). This is illustrative of the fact that statutory context is important in determining the meaning of a statute.

2. The Legislative Intent and Policy Behind Section 547 of the Bankruptcy Code also Leads to the Conclusion that the Petition of the Debtor is the Cutoff Date for a Preference Analysis.

Terrapin's bankruptcy filing date of January 5th, 2020, should be the cutoff day for Touch of Grey's new value defense. If post-petition payments from the debtor are considered, then the legislative intent and policy behind 503(b)(9) and 547(c)(4) are defeated.

There were two goals articulated for section 547 of the Bankruptcy Code. The first is to discourage creditors from racing to the courthouse to "dismember the creditor during his slide into bankruptcy." *Friedman's*, 738 F.3d at 557(citing union bank). And second, to facilitate equality in distributions among creditors of a debtor. *Id.* at 558. Both goals of section 547 refer to pre-petition actions. This would indicate that "equality should be measured, and inequalities rectified, as of the petition date." *Id.*

Section 503(b)(9) also has two main goals. These goals include encouraging creditors to continue working with businesses that are financially troubled and to ensure that creditors who replenish a debtor's estate are treated fairly. *Id.*

Several cases argue that when a creditor is able to claim a 503(b)(9) expense and use that amount as new value they are "double-dipping", but this overlooks the intent of 503(b)(9). *Id.* at

559. The point is that "the creditor still replenished the debtor's estate during the preference period, and therefore aided the debtor in avoiding bankruptcy to whatever extent possible." *Id.*

Additionally, the creditor is not receiving a windfall or "double-dipping" as suggested in many cases. This argument is misleading as it suggests that the creditor was unjustly enriched. *Id*. This is simply not the case. The debtor received goods that are still in their possession, that they can still use to make a profit, and that the creditor is not getting back. The creditor is simply receiving payment for the goods that were provided to the debtor. In our case Terrapin received $200,000 worth of goods from Touch of Grey on December 21, 2019. Touch of Grey has not asked to reclaim these goods and as such Terrapin was able to use them to serve their customers or resell to their customers, thus building goodwill with their customer base and community.

In *In re TI Acquisitions, LLC,* that court held that the creditor was not entitled to claim a 503(b)(9) administrative expense and use the new value defense to offset their preference liability. *In re TI Acquisition, LLC,* 429 B.R. 377, 385 (Bankr. N.D. Ga. 2010). The court stated that a 503(b)(b) administrative expense has the same effect as a reclamation claim. *Id.* at 381. This is not true; in *Friedman* and *Commissary*, the courts explain that with reclamation the debtor no longer has the goods and is unable to use them to enhance their business and create customer goodwill. *Friedman's*, 738 F.3d at 559, *In re Commissary Operations, Inc.*, 421 B.R. 873, 877 (Bankr. M.D. Tenn. 2010).

While with a 503(b)(9) administrative expense the debtor is able to keep the goods and still make a profit off of them and enhance their customer goodwill. This meets one of the main goals of the 503(b)(9) statute which is to replenish the debtor's estate during the preference period and aid the debtor in attempting to avoid bankruptcy. Again, in our case, Terrapin was able to retain $200,000 worth of goods for use in the business.

In *In re Commissary* the debtor was involved in the wholesale distribution of food and other items to chain restaurants and restaurant franchises. *Commissary,* 421 B.R. at 875. Over 200 creditors were involved in this case and the issue before the court was if a creditor receives a 503(b)(9) payment can they still use that as new value under 547(c)(4). The court held "that deliveries entitled to §503(b)(9) claim status are not disqualified from constituting new value for purposes of 11 U.S.C. §§547(a)(2) and 547(c)(4)." *Id.* at 879. One of the chief reasons that the court held this is because 503(b)(9) claim can only be made after the debtor's petition date and the Creditor does not have the right to reclaim the goods provided pre-petition but only to request priority payment for the goods. *Id.* at 878. This is analogous to our case. Touch of Grey provided goods to Terrapin pre-petition, Terrapin filed their bankruptcy petition, Touch of Grey did not request a return of goods. This means that Terrapin was still able to use the goods provided in their business.

A debtor can still obtain value and customer goodwill by use of the goods after a 503(b)(9) administrative expense is paid. Section 503(b)(9) was enacted to protect creditors who are often left at a loss because debtors purchase goods from them at a time when they know that bankruptcy is forthcoming, and they will be unable to make the payments for such goods. R. at 22. This receipt of new value meets one of the goals of 503(b)(9), to replenish the estate, it would not make sense to then turn around and punish a creditor for meeting the legislative intent of 503(b)(9).

Additionally, a finding that allows a 503(b)(9) administrative expense to diminish a creditor's new value defense claim would go against the goal of ensuring that creditors who work to replenish a debtor's estate are treated fairly. In *In re Ames,* the court states that "[i]f trade vendors felt that a preference could be used to prevent the payment of their administrative claim,

they would be extremely reluctant to extend post-petition credit to a chapter 11 debtor." *Ames*, 582 F.3d at 431.

A finding contrary to this would be inequitable because as of the petition date Touch of Grey's preference liability would be $50,000 and under the current ruling, it flies to $250,000. Under this ruling Congress's intent behind passing 503(b)(9) is null and void. The creditor is being punished for working with a financially unstable business. Not only that, but it creates liability where it would not otherwise exist. R. at 28. Touch of Grey attempted to work with Terrapin in order to give them a chance a reorganization and as the ruling currently stands, Touch of Grey is being punished for working with Terrapin when they were finically unstable. This court should find that the petition date of Terrapin is the cutoff date for the analysis related to preference exposure and new value defense claim.

II. The Supreme Court of the United States Should Find that Section 365(d)(3) of the Bankruptcy Code requires the Trustee to Satisfy Obligations that Arise Prior to Rejection.

The Thirteenth Circuit incorrectly ruled that Section 365(d)(3) does not require the trustee to satisfy obligations allocable to the post-rejection period. The issue is not the duration of the obligation, it is rather the onset of the obligation itself. Section 365(d)(3) concerns unexpired leases for non-residential real property, stating that:

> The trustee shall timely perform all the obligations of the debtor arising from and after the order for relief under any unexpired lease of non-residential real property, until such lease is assumed or rejected, notwithstanding section 503(b)(1) of this title.

11 U.S.C. § 365(d)(3). Thus, this section establishes that a trustee must perform all obligations pending assumption or rejection. While the Thirteenth Circuit correctly ascertained the obligation that the Trustee must perform, paying rent to Touch of Grey for the month of May, it incorrectly put a limitation on the duration of that obligation, rather than look at the onset of the

obligation. The rent became due on May 1st for the month of May, and the rejection took place on May 5th. R. at 4, 7-8.

A. The Statutory Language of Section 365(d)(3) of the Bankruptcy Code is Unambiguous.

The function of the Court is "to interpret statutes, not make them." *N.Y. Cty. Nat'l Bank v. Massey*, 192 U.S. 138, 146 (1904). As such when interpreting a statute, the Court must begin with "with the language of the statute itself." *U.S. v. Ron Pair Enters., Inc*., 489 U.S. 235, 241 (1989) (citation omitted). When the language of the statute is plain, statutory language "is also where the inquiry should end … 'the sole function of the courts is to enforce it according to its terms.'" *Id.* (quotation omitted).

The Thirteenth Circuit incorrectly ruled that the word 'arises' fails to discern when a debtor's obligations arise under section 365(d)(3), hence making the term 'obligations' susceptible to more than one meaning, citing, *In re Montgomery Ward Holding Corp.*, 268 F.3d at 213 (Mansmann, J., dissenting).

However, the Court should apply the traditional principles of statutory construction that require "the words in a statute be accorded their 'ordinary, contemporary, common meaning.'" *R.H. Macy & Co. v. Lakewood Mall Shopping Ctr.*, 1994 U.S. Dist. LEXIS 21364, at *31-32 (S.D.N.Y. Feb. 23, 1994). The court, applying those principles to found "the word 'obligation'" in Section 365(d) to be clear and unambiguous." *Id.* The common meaning of 'obligation' is a legal duty, by which a person is bound to do or not to do a certain thing. Obligation, *Black's Law Dictionary* (2nd ed. 1910).

Hence under these clear principles, section 365(d)(3) clearly and unambiguously means, that the duty of paying the rent by the Trustee, which arises under the unexpired lease of the non-residential real property, after the order for relief, but before assumption or rejection must be

timely performed. The duty is to pay the rent on the first day of each month, as such the monthly rent for May must be paid; the rejection occurred on May 5th but the obligation to pay the rent was May 1st.

There has been a divide in the courts regarding the duration of the obligation. Some courts have created ambiguity and have adopted the proration approach, interpreting section 365(d)(3); the trustee's obligations post-petition and prerejection should not extend beyond the point of rejection. *In re Furr's Supermarkets, Inc.*, 283 B.R. 60 (B.A.P. 10th Cir. 2002). The Thirteenth Circuit incorrectly applied this proration approach and instead should apply the billing-date approach. Under the billing-date approach, the trustee must perform the debtor's obligations in accordance with the lease. *In re Montgomery Ward Holding Corp.*, 268 F.3d 205 (3d Cir. 2001).

B. The Court Should Apply the Billing-Date Approach to Calculate that the Obligations Arise Prior to Rejection.

1. The Legislative History intended that Landlords receive payment of all lease obligations until a decision regarding the assumption or rejection of non-residential real property lease is made.

The Thirteenth Circuit incorrectly applied the proration approach citing that the Bankruptcy Code should not be "read . . . to erode past bankruptcy practice absent a clear indication that Congress intended such a departure" *Cohen v. De La Cruz*, 523 U.S. 213, 221 (1998) (internal quotations and citations omitted). The Thirteenth Circuit was incorrect because there was a clear indication and intent of Congress to erode past bankruptcy practice. The existing bankruptcy practice before the amendment of the Bankruptcy Code, which was harsh on landlords, made it conceivable for a debtor to stay in a rented premises indefinitely post-petition without paying rent. R. at 31, 32. Recognizing this unfairness Congress amended the Bankruptcy Code in 1984. R. at 32. Senator Orrin Hatch stated as the bill for the amendments was passed:

> 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.

As such Congress intended to erode the existing practice of the harsh treatment of landlords, and the billing-date approach is more appropriate with the statutory interpretation both through legislative history and statutory interpretation.

2. Judicial History on Appeal has Continually Rejected the Proration Approach in Favor of the Billing-Date Approach.

Although a slight majority of courts have adopted a proration approach, before the ruling by the Thirteenth Circuit, *all* circuit courts of appeal, addressing post-petition rent due under an unexpired lease of non-residential real property, have adopted the billing-date approach. The Eighth Circuit in *In re Burival*, 613 F.3d 810 (8th Cir. 2010*)*; The Seventh Circuit in *HA-LO Indus., Inc. v. Centerpoint Props. Tr.*, 342 F.3d 794, 799 (7th Cir. 2003); The Sixth Circuit in *In re Koenig Sporting Goods, Inc.*, 203 F.3d 986 (6th Cir. 2000), 203 F.3d 986 (6th Cir. 2000); The Third Circuit in *In re Montgomery Ward Holding Corp.*, 268 F.3d 205 (3d Cir. 2001).

In *Koenig*, the Sixth Circuit held that the statute's plain language required the billing-date approach to be adopted. The court required a debtor, a sporting goods retailer, to pay the full month's rent when the lease was rejected, and premises vacated, on the second of the month. The language of the lease, like the Touch of Grey lease, required that rent be paid on the first of the month. The court reasoned that the purpose of section 365(d) is to relieve the burden placed on

the non-residential real property lessors or landlords during the time between a tenant's bankruptcy petition and assumption or rejection of a lease. *In re Koenig Sporting Goods, Inc.*, 203 F.3d at 987- 990.

The Third Circuit Court of Appeals similarly rejected the proration approach stating that "[t]he clear and express 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.'" *In re Montgomery Ward Holding Co.*, 268 F.3d at 209. The court reasoned that accepting this premise, there is no basis for the proration approach, and the court went on to accept the billing-date approach to be consistent with the statutory text. *Id.*

Hence, the vast majority of circuit courts of appeal have accepted the billing date approach to be more in line with the statutory text, legislative intent, as well as the more equitable approach in interpreting section 365(d)(3). Under this interpretation, the Court should hold, keeping in line with the existing circuit courts of appeal approach, that Touch of Grey is entitled to the full month's rent of May 2020, given the language of the lease and the language of the statute.

CONCLUSION

For the foregoing reasons, this Court should reverse the decisions of the Court of Appeals of the Thirteenth Circuit on both issues and find in favor of the Petitioner.

Respectfully Submitted,
Team Appellant 9
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