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Manuel Farach

Spirit Airlines, Inc. v. Maizes, Case No. 17-14415 (11th Cir. 2018).

Parties, by their choosing to adopt the Commercial Rules of the American Arbitration Association, indicate a "clear and unmistakable" intent to have an arbitrator decide whether their particular arbitration agreement permits class arbitration.

Kaye v. Blue Bell Creameries, Inc. (In re BFW Liquidation, LLC), No. 17-13588 (11th Cir. 2018).

"New value" does not need to remain unpaid to constitute a defense under 11 U.S.C. § 547(c)(4) against a preference action; the statement to the contrary in *Charisma Investment Company, N.V. v. Airport Systems, Inc.* (In re Jet Florida System, Inc.), 841 F.2d 1082 (11th Cir. 1988), is *dictum* and is not binding precedent.

XIP Technologies, LLC v. Ascend Global Services, LLC, Case No. 2D17-3718 (Fla. 2d DCA 2018).

A court may not, by temporary injunction, order a party to continue performing a contract when the aggrieved party has an adequate remedy at law for damages, but may issue an injunction to prevent the total destruction of a business as that constitutes an inadequate remedy at law.

Aquasol Condominium Association, Inc. v. HSBC Bank USA, National Association, Case No. 3D17-352 (Fla. 3d DCA 2018).

A lender need prove only that is the holder or owner of a note, i.e., it does not have to prove it is both owner and holder, in order to have standing.

Winfield Investments, LLC v. Pascal-Gaston Investments, LLC, Case No. 5D17-1304 (Fla. 5th DCA 2018).

A defendant cannot be held liable for fraudulently misrepresenting that a property is free of mortgages if the existence of the mortgage is obvious to him, i.e., can be ascertained through a search of the public records. Moreover, the Fifth District again certifies the following question to the Florida Supreme Court:

> DID THE COURT IN *BUTLER* OVERRULE THE DECISIONS IN *BESETT*, *JOHNSON*, AND *SCHOTTENSTEIN* BY HOLDING THAT JUSTIFIABLE RELIANCE IS NOT AN ESSENTIAL ELEMENT OF FRAUDULENT MISREPRESENTATION?

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-14415

D.C. Docket No. 0:17-cv-61086-BB

SPIRIT AIRLINES, INC.,
a Delaware Corporation,

Plaintiff - Appellant,

versus

STEVEN MAIZES,
an individual,
VINCENT ANZALONE,
an individual,
LEE TRAYLOR,
an individual,
HOWARD MADENBERG,
an individual,

Defendants - Appellees.

Appeal from the United States District Court
for the Southern District of Florida

(August 15, 2018)

Before WILLIAM PRYOR and MARTIN, Circuit Judges, and WOOD,* District Judge.

MARTIN, Circuit Judge:

This appeal presents the question of whether it is a judge or an arbitrator who must decide if the arbitration agreement between Spirit Airlines, Inc. and members of its $9 Fare Club allows for arbitration of claims brought by a class of claimants. To answer this question, we must, in turn, decide whether the agreement's choice of American Arbitration Association rules, standing alone, is clear and unmistakable evidence that Spirit intended that the arbitrator decide this question. Following the reasoning of Terminix International Co. v. Palmer Ranch Ltd. Partnership, 432 F.3d 1327, 1332 (11th Cir. 2005), we conclude that it is, so the arbitrator will decide. For this reason and a few others we will discuss, we affirm.

I. Background

On April 12, 2017, Steven Maizes and three other class representatives filed a claim in arbitration against Spirit Airlines, Inc. on behalf of a class of consumers. The claim arose out of Spirit's offer of membership in a club called the "$9 Fare Club," for a yearly membership fee of $59.95. Spirit advertised that club members would "experience the ultimate in cost savings" and could "cancel at any time."

* Honorable Lisa Wood, United States District Judge for the Southern District of Georgia, sitting by designation.

But the class representatives alleged Spirit broke several promises made in the $9 Fare Club Agreement. The details of these promises, and whether or how they were broken, are not the subject of this appeal.

Soon after, on May 30, Spirit filed suit against the class representatives in federal court in the Southern District of Florida. Spirit's lawsuit sought a declaration that the agreement's arbitration clause does not authorize class arbitration claims. The agreement's arbitration clause states:

> This Agreement and the terms of membership shall be governed and construed in accordance with the laws of the State of Florida without giving effect to the choice of law provisions thereof. Any dispute arising between Members and Spirit will be resolved by submission to arbitration in Broward County, State of Florida in accordance with the rules of the American Arbitration Association then in effect. Notwithstanding the foregoing, nothing in this Agreement is intended or shall be construed to negate or otherwise affect the consumer protection laws of the state in which Members reside.

Shortly after Spirit filed its suit, it asked the District Court to impose a preliminary injunction to stop the arbitration of class claims. The class representatives, in turn, moved to dismiss Spirit's lawsuit, saying subject matter jurisdiction did not exist in federal court. The District Court held a hearing on both motions. During the hearing, Spirit's counsel said he would like to have Spirit's vice president testify "that there was never an intent to arbitrate more than one dispute at a time." Spirit's counsel said that the vice president's testimony would be relevant "[i]f there is an ambiguity as to what's intended" in the agreement.

After the hearing, the District Court denied Spirit's request for an injunction and dismissed the case. The District Court ruled that the agreement's choice of AAA rules incorporated Rule 3 of the Supplementary Rules for Class Actions, which designates the arbitrator to decide whether the arbitration agreement permits class arbitration. Because the AAA rules require the arbitrator to decide this question, the court dismissed the case for lack of jurisdiction. This appeal followed.

II. Standard of Review

"We review de novo the district court's grant of a motion to dismiss and compel arbitration." Bodine v. Cook's Pest Control Inc., 830 F.3d 1320, 1324 (11th Cir. 2016).

III. Discussion

Arbitrations routinely generate three categories of dispute. First, there are the merits of the disagreement. Second, there is a dispute about whether the parties agreed to arbitrate their disagreement. Third, parties disagree about who gets to decide whether they agreed to arbitrate their differences. See First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 942, 115 S. Ct. 1920, 1923 (1995).

In First Options, the Supreme Court told us how to go about determining whether the parties agreed to have a court or an arbitrator decide whether they agreed to arbitrate the dispute. Id. at 944, 115 S. Ct. at 1924. The Court observed

that when parties enter into an arbitration agreement, they "often might not focus" on who should decide whether their agreement to arbitrate extends to a given dispute. Id. at 945, 115 S. Ct. at 1925. With this in mind, the Court directed lower courts to never assume the parties agreed to have an arbitrator decide questions of arbitrability "unless there is clear and unmistakable evidence that they did so." Id. at 944, 115 S. Ct. at 1924 (alterations adopted and quotation omitted).

Here, the parties dispute whether the agreement's choice of AAA arbitration rules amounts to "clear and unmistakable" evidence of the parties' intent to have an arbitrator decide whether the agreement permits class arbitration.[1] Spirit points to opinions from four other circuits to argue that the incorporation of AAA rules, standing alone, is not enough to overcome the First Options presumption. We have concluded to the contrary.

Our court's opinion in Terminix weighs heavily in our consideration. In Terminix, Palmer Ranch sued Terminix in Florida state court. 432 F.3d at 1329. Terminix responded by suing Palmer Ranch in federal court to compel it to

[1] Neither this circuit nor the Supreme Court has resolved whether the availability of class arbitration is a question of arbitrability under First Options. See Oxford Health Plans LLC v. Sutter, 569 U.S. 564, 569 n.2, 133 S. Ct. 2064, 2068 n.2 (2013); S. Commc'ns Servs., Inc. v. Thomas, 720 F.3d 1352, 1358 n.6 (11th Cir. 2013). But see Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444, 452, 123 S. Ct. 2402, 2407 (2003) (plurality opinion) (stating that class arbitrability was not a question of "whether they agreed to arbitrate a matter," but a question of "what kind of arbitration proceeding the parties agreed to" (emphasis removed)). On appeal, the class representatives did not dispute Spirit's argument that the availability of class arbitration is a question of arbitrability. Because the parties agreed this issue is a question of arbitrability, we assume it without deciding the issue.

arbitrate based on agreements between the parties. Id. Palmer Ranch responded that the arbitration agreements were not enforceable because they eliminated Palmer Ranch's statutory remedies and rights under Florida's Deceptive and Unfair Trade Practices Act. Id. The District Court agreed with Palmer Ranch, held the agreements unenforceable, and denied Terminix's motion to compel arbitration. Id. at 1329–31.

On appeal, this Court reversed and directed the District Court to grant the motion to compel arbitration. Id. at 1333. We observed that Rule 8(a) of the AAA Commercial Arbitration Rules provides that "the arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement." Id. at 1332 (alteration adopted). Based on Rule 8(a), Terminix held that the parties' choice of AAA's Commercial Arbitration Rules was clear and unmistakable evidence that they intended an arbitrator to decide whether the arbitration agreements were enforceable. Id.

The reasoning of Terminix applies here as well. The parties' agreement plainly chose AAA rules. Those rules include AAA's Supplementary Rules for Class Arbitrations, which, true to their name, supplement the other AAA rules. [2]

[2] AAA maintains a number of industry specific rules like the "Commercial Arbitration Rules and Mediation Procedures," "Consumer Arbitration Rules," "Labor Arbitration Rules," "International Dispute Resolution Procedures," among others. See Am. Arbitration Ass'n, AAA

Supplementary Rule 3 provides that an arbitrator shall decide whether an arbitration clause permits class arbitration.[3] According to Terminix, this is clear and unmistakable evidence that the parties chose to have an arbitrator decide whether their agreement provided for class arbitration.[4] See id.

Spirit argues that we should demand a higher showing for questions of class arbitrability than for other questions of arbitrability. It says this higher burden is needed because class arbitration dramatically changes what ordinarily goes on in arbitration. See Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 686–

Court and Time-Tested Rules & Procedures, https://www.adr.org/active-rules. The effect of Supplementary Rule 1(a) is to "supplement any other applicable AAA rules."

[3] In full, Supplementary Rule 3 provides:

> Upon appointment, the arbitrator shall determine as a threshold matter, in a reasoned, partial final award on the construction of the arbitration clause, whether the applicable arbitration clause permits the arbitration to proceed on behalf of or against a class (the "Clause Construction Award"). The arbitrator shall stay all proceedings following the issuance of the Clause Construction Award for a period of at least 30 days to permit any party to move a court of competent jurisdiction to confirm or to vacate the Clause Construction Award. Once all parties inform the arbitrator in writing during the period of the stay that they do not intend to seek judicial review of the Clause Construction Award, or once the requisite time period expires without any party having informed the arbitrator that it has done so, the arbitrator may proceed with the arbitration on the basis stated in the Clause Construction Award. If any party informs the arbitrator within the period provided that it has sought judicial review, the arbitrator may stay further proceedings, or some part of them, until the arbitrator is informed of the ruling of the court.
>
> In construing the applicable arbitration clause, the arbitrator shall not consider the existence of these Supplementary Rules, or any other AAA rules, to be a factor either in favor of or against permitting the arbitration to proceed on a class basis.

[4] The Fifth Circuit has adopted a similar approach. See Robinson v. J & K Admin. Mgmt. Servs., Inc., 817 F.3d 193, 196 (5th Cir. 2016); Reed v. Fla. Metro. Univ., Inc., 681 F.3d 630, 634–35 (5th Cir. 2012), abrogated on other grounds by Oxford Health Plans, 569 U.S. at 568, 133 S. Ct. at 2068.

87, 130 S. Ct. 1758, 1776 (2010) (explaining differences between class and bilateral arbitration). Spirit's argument has some authority. Four circuits have held that adoption of the AAA rules is not clear and unmistakable evidence of the parties' intent to have an arbitrator decide whether the agreement allows class arbitration. See Catamaran Corp. v. Towncrest Pharmacy, 864 F.3d 966, 972–73 (8th Cir. 2017); Chesapeake Appalachia, LLC v. Scout Petroleum, LLC, 809 F.3d 746, 762–63 (3d Cir. 2016); Dell Webb Cmtys., Inc. v. Carlson, 817 F.3d 867, 876–77 (4th Cir. 2015); Reed Elsevier, Inc. ex rel. LexisNexis Div. v. Crockett, 734 F.3d 594, 599–600 (6th Cir. 2013).

While we respect the work of our sister circuits, we have read Supreme Court precedent differently. The out-of-circuit cases relied upon by Spirit import the reasoning of Stolt-Nielsen, 559 U.S. at 684, 130 S. Ct. at 1774–75. See Reed Elsevier, 734 F.3d at 599 (citing Stolt-Nielsen, 559 U.S. at 684–85, 130 S. Ct. at 1774–75); Chesapeake Appalachia, 809 F.3d at 760 ("We nevertheless have looked to these 'clause construction' cases [like Stolt-Nielsen] for guidance in answering the 'who decides' question."). In contrast, we read Stolt-Nielsen to address the question of whether an agreement allows class arbitration at all, separate from the issue of who decides the question to begin with. See 559 U.S. at 684, 130 S. Ct. at 1775. We agree with Spirit that these circuits have created a higher burden for showing "clear and unmistakable" evidence for questions of

class arbitrability than for ordinary questions of arbitrability. See, e.g., Catamaran, 864 F.3d at 973 ("The risks incurred by defendants in class arbitration . . . and the difficulties presented by class arbitration . . . all demand a more particular delegation of the issue than we may otherwise deem sufficient in bilateral disputes."). However, we find no basis for that higher burden in Supreme Court precedent.[5]

At oral argument, Spirit made a new argument based on the last paragraph of Supplementary Rule 3. This paragraph says "[i]n construing the applicable arbitration clause, the arbitrator shall not consider the existence of these Supplementary Rules, or any other AAA rules, to be a factor either in favor of or against permitting the arbitration to proceed on a class basis." According to Spirit, this paragraph means a court should not consider the existence of the Supplementary Rules when deciding whether the parties empowered the arbitrator to decide the question of class arbitrability.

[5] The reasoning of Stolt-Nielsen lends credence to the idea that the availability of class arbitration is not presumptively for courts to decide. First Options's holding that courts presumably decide questions of arbitrability was based on an empirical claim that parties are not likely to have focused on the "who decides" question when they reached their agreement. First Options, 514 U.S. at 944–45, 115 S. Ct. at 1924–25. But it seems to us that if the change from bilateral to class arbitration is as important as Stolt-Nielsen states, 559 U.S. at 686–87, 130 S. Ct. at 1776, then we would expect Spirit to have thought about who it wanted to decide that issue when it drafted the arbitration agreement. In this way, at least for the question of who decides the availability of class arbitration, Stolt-Nielsen may be at odds with the empirical premise at the heart of First Options's holding. We need consider this no further, however, because we view Spirit's choice of AAA rules as "clear and unmistakable" evidence that it wanted the arbitrator to decide whether this agreement permits class arbitration. See Terminix, 432 F.3d at 1332.

Again, we understand Spirit's argument to substitute the question of whether a particular agreement permits class arbitration for the different question of whether the agreement delegates the decision on that question to the arbitrator. We read the last paragraph of Supplementary Rule 3 to mean simply that the existence of the Supplementary Rules has no effect on whether the agreement permits class arbitration.

Spirit also argues the agreement's choice of Florida law makes the agreement ambiguous about whether the Florida Arbitration Code or the AAA rules apply. In this regard, we look back at the arbitration clause again, this time with different emphasis:

> This Agreement and the terms of membership shall be governed and construed in accordance with the laws of the State of Florida without giving effect to the choice of law provisions thereof. Any dispute arising between Members and Spirit will be resolved by submission to arbitration in Broward County, State of Florida in accordance with the rules of the American Arbitration Association then in effect. Notwithstanding the foregoing, nothing in this Agreement is intended or shall be construed to negate or otherwise affect the consumer protection laws of the state in which Members reside.

Spirit says the choice of "the laws of the State of Florida" incorporates the Florida Arbitration Code. And Florida's Arbitration Code reserves questions of arbitrability for courts. See Fla. Stat. § 682.02(2). According to Spirit, the ambiguity created by the simultaneous incorporation of the Florida Arbitration

Code and the AAA rules means the District Court must decide whether the agreement permits class arbitration.

Yet any perceived ambiguity in Spirit's agreement can be resolved through normal interpretive methods. See City of Homestead v. Johnson, 760 So. 2d 80, 84 (Fla. 2000) ("[W]e rely upon the rule of construction requiring courts to read provisions of a contract harmoniously in order to give effect to all portions thereof."). The best interpretation of Spirit's agreement is that Florida law covers the parties' substantive rights and duties while the choice of AAA rules covers dispute resolution procedures. See Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 63–64, 115 S. Ct. 1212, 1219 (1995) (giving an arbitration agreement a similar construction). Thus the agreement is not ambiguous.

Finally, Spirit argues the District Court should be reversed because it did not apply the correct legal standard and instead decided an issue of fact on the motion to dismiss. Somewhat relatedly, Spirit says the District Court erred by not allowing its vice president to testify about Spirit's intent in choosing the AAA rules.

There is no merit to these arguments. The arbitration agreement was attached to Spirit's complaint, was central to the case, and its authenticity was not disputed. It was therefore appropriate for the District Court to consider it in deciding the class representatives' motion to dismiss for lack of subject matter

jurisdiction. See Maxcess, Inc. v. Lucent Techs., Inc., 433 F.3d 1337, 1340 n.3 (11th Cir. 2005) (per curiam); see also Fed. R. Civ. P. 10(c) ("A copy of a written instrument that is an exhibit to a pleading is a part of the pleading for all purposes."). And interpretation of the agreement is a question of law, not fact. See Inetianbor v. CashCall, Inc., 768 F.3d 1346, 1350 (11th Cir. 2014).

Also, by finding the arbitration agreement clearly and unmistakably evidenced the parties' intent to arbitrate the class arbitration question, the District Court implicitly found the agreement is not ambiguous on that issue. See First Options, 514 U.S. at 944–45, 115 S. Ct. at 1924. As a result, the District Court was not permitted to rely on testimony from Spirit's vice president to explain the agreement's meaning, and was correct to reject the offer of that testimony. See, e.g., Lab. Corp. of Am. v. McKown, 829 So. 2d 311, 313 (Fla. 5th DCA 2002) ("[W]hen the terms and provisions of a contract are unambiguous and complete, parol evidence is not admissible to define or explain them." (quotation omitted)). There was no error in refusing this testimony.

AFFIRMED.

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-13588

B.K. Docket No. 2:09-bk-00634-TOM11

In re: BFW LIQUIDATION, LLC,

Debtor.

WILLIAM S. KAYE,
Trustee of the BFW Liquidating Trust,

Plaintiff-Appellee,

versus

BLUE BELL CREAMERIES, INC.,

Defendant-Appellant.

Appeal from the United States Bankruptcy Court
for the Northern District of Alabama

(August 14, 2018)

Before MARTIN, JULIE CARNES, and GILMAN,[*] Circuit Judges.

JULIE CARNES, Circuit Judge:

Bruno's Supermarkets, LLC ("the Debtor") filed for bankruptcy under Chapter 11. In administering and ultimately liquidating the bankruptcy estate, the Trustee filed an adversary proceeding against Blue Bell Creameries, Inc. ("Blue Bell") to recover monies the Trustee contended were owed by Blue Bell to the estate. Specifically, the Trustee sought to recover from Blue Bell more than $500,000 in a series of payments that Blue Bell had received from the Debtor during the 90-day period preceding the Debtor's bankruptcy filing. Each payment by the Debtor was made for recent shipments of ice cream and other merchandise that Blue Bell had delivered to the Debtor for the latter to sell to the public.

Blue Bell acknowledged that the payments it received from the Debtor constituted preferences under 11 U.S.C. § 547(b),[1] which meant that absent a valid defense by Blue Bell, the Trustee would be empowered to "avoid" those payments: that is, require Blue Bell to repay the money it had earlier been paid by the Debtor for goods it had actually delivered. Blue Bell argued below that it had just such a defense. Specifically, 11 U.S.C. § 547(c)(4) prohibits "avoidance" by the trustee to

[*] Honorable Ronald Lee Gilman, United States Circuit Judge for the Sixth Circuit, sitting by designation.

[1] In pertinent part, as defined by § 547(b), a preference occurs when an insolvent debtor transfers money to pay a creditor for a prior debt within 90 days before filing a bankruptcy petition.

the extent the recipient of payments during the preference period provided "new value" to the debtor during that same period.

Despite Blue Bell having provided new value to the Debtor here—lots of ice cream products that the latter was able to sell to its customers in its efforts to remain financially afloat—the bankruptcy court concluded that it was bound by our precedent to reject, in large part, Blue Bell's new-value defense. Specifically, relying on *Charisma Investment Company, N.V. v. Airport Systems, Inc. (In re Jet Florida System, Inc.)*, 841 F.2d 1082 (11th Cir. 1988), the bankruptcy court held that Blue Bell was entitled to an offset against its preference liability only to the extent that any new value it extended to the Debtor "remained unpaid" as of the date the bankruptcy petition was filed. Because Blue Bell was paid for many of the products that it had delivered, the bankruptcy court concluded that *Jet Florida System* prevented Blue Bell from using the new-value defense to defeat the Trustee's efforts to "avoid" such payments. As a result, the court ruled that Blue Bell had to return much of the money it had been paid for the goods it provided the Debtor.

Blue Bell appeals the bankruptcy court's decision. After careful review, and with the benefit of oral argument, we conclude that the language in *Jet Florida System* relied on by the bankruptcy court was dictum and, as such, it does not bind us. Construing § 547(c)(4) anew, we conclude that it does not require new value to

remain unpaid. We therefore vacate the bankruptcy court's judgment and remand for a new calculation of Blue Bell's preference liability.

BACKGROUND

I. Factual Background

The Debtor, Bruno's Supermarkets, LLC,[2] was a grocery-store chain with more than 60 stores in Alabama and Florida. Blue Bell sold ice cream and related products to the Debtor on credit. The Debtor traditionally paid Blue Bell twice weekly, meaning that, under that payment scheme, the Debtor remained current as to the money it owed Blue Bell.

The Debtor began suffering from liquidity problems, however, and in August 2008, it hired an advisory firm to provide guidance on cash-flow management. Absent immediate action, the Debtor expected to run out of cash. On the advisory firm's recommendation, the Debtor began writing checks to its vendors, including Blue Bell, only once a week, not twice. It also began "stretching," or delaying, payments, which occasionally included cutting checks and then holding those checks for a period of time. Under this new "slow-pay" protocol, the Debtor would ultimately pay Blue Bell for the products it had delivered, but it would take longer to do so. This practice also resulted in Blue Bell receiving payments at

[2] During the underlying bankruptcy proceedings, the Debtor sold all of its intellectual property—including its name—and changed its name to BFW Liquidation, LLC.

irregular intervals, particularly during the 90 days immediately preceding the bankruptcy filing.

Between November 7, 2008, and February 5, 2009,[3] the Debtor paid Blue Bell a total of $563,869.37 in 13 separate payments. At least $250,000 of that total was for products that Blue Bell had delivered to the Debtor before November 7, 2008. During the same time period—between November 7, 2008, and February 5, 2009—Blue Bell delivered $435,705.65 worth of ice cream and other merchandise to the Debtor's grocery stores. Blue Bell delivered these products in relatively small batches on an almost daily basis, making about 1,700 separate deliveries. These transactions are summarized in the following chart[4]:

Date / Time Period	**Invoices / Deliveries from Blue Bell to the Debtor**	**Payments the Debtor Made to Blue Bell**
Nov. 7, 2008 – Nov. 11, 2008	$24,271.70	
Nov. 12, 2008		$43,924.47
Nov. 12, 2008 – Nov. 24, 2008	$108,872.64	
Nov. 25, 2008		$67,821.23
Nov. 25, 2008 – Dec. 1, 2008	$42,858.51	
Dec. 2, 2008		$55,149.91
Dec. 2, 2008 – Dec. 4, 2008	$11,523.17	
Dec. 5, 2008		$27,485.38
Dec. 5, 2008 – Dec. 8, 2008	$13,783.29	
Dec. 9, 2008		$33,320.61

[3] February 5, 2009, is the date on which the debtor filed its bankruptcy petition. November 7, 2008, began the 90-day period prior to the filing.

[4] The information in this chart is derived from an exhibit that the Trustee introduced at trial. In its initial brief on appeal, Blue Bell concedes that the Trustee's exhibit is accurate.

Dec. 9, 2008 – Dec. 14, 2008	$41,029.32	
Dec. 15, 2008		$26,327.00
Dec. 15, 2008 – Jan. 4, 2009	$101,670.75	
Jan. 5, 2009		$59,980.15
Jan. 5, 2009	$10,337.94	
Jan. 6, 2009		$55,508.85
Jan. 6, 2009 – Jan. 12, 2009	$39,041.37	
Jan. 13, 2009		$47,162.09
Jan. 13, 2009 – Jan. 19, 2009	$23,737.88	
Jan. 20, 2009		$28,483.07
Jan. 20, 2009 – Jan. 29, 2009	$10,297.79	
Jan. 30, 2009		$33,186.46
Jan. 30, 2009		$48,213.42
Jan. 30, 2009 – Feb. 2, 2009	$7,246.81	
Feb. 3, 2009		$37,306.73
Feb. 3, 2009	$1,034.48	

II. Procedural History

The Debtor filed a voluntary Chapter 11 bankruptcy petition on February 5, 2009. On September 25, 2009, the bankruptcy court confirmed the Debtor's Fourth Amended Plan of Liquidation. Pursuant to the plan and confirmation order, William Kaye ("the Trustee") was appointed the liquidating trustee for the Debtor's bankruptcy estate. Acting for the benefit of the bankruptcy estate, the Trustee was responsible for enforcing any avoidance actions that might lie against creditors of the Debtor.

In January 2011, the Trustee brought this adversary proceeding against Blue Bell seeking to avoid, as a preference, the $563,869.37 that the Debtor had paid to Blue Bell during the 90-day period prior to the filing of the bankruptcy petition:

that is, any payments made between November 7, 2008, and February 5, 2009. Blue Bell and the Trustee eventually stipulated that all of the elements of a preference claim under 11 U.S.C. § 547(b) had been satisfied with respect to each of the transfers making up the $563,869.37. That is, Blue Bell had received these monies during the preference period and they were in payment of a prior debt.

Blue Bell asserted two defenses to the Trustee's preference claims: § 547(c)(2)'s ordinary-course-of-business defense and § 547(c)(4)'s subsequent-new-value defense. The bankruptcy court rejected Blue Bell's invocation of the ordinary-course-of-business defense. Blue Bell does not challenge that ruling on appeal.

With respect to the subsequent-new-value defense, the bankruptcy court concluded that Blue Bell was entitled to an offset against its preference liability only to the extent that any new value it extended to the Debtor during the preference period "remained unpaid" as of the petition date. The court relied on *Jet Florida System*, in which our Court stated that § 547(c)(4) had "generally been read to require . . . that the new value must remain unpaid." *See In re Jet Fla. Sys., Inc.*, 841 F.2d at 1083.

Excluding all new value for which the Debtor had paid, the bankruptcy court concluded that the Trustee could avoid—that is, claw back—$438,496.47 of the $563,869.37 transferred to Blue Bell during the preference period. It reached this

figure by relying on the calculations of the Trustee's expert witness, who had analyzed the Debtor's books and records and traced each of the 13 payments made during the preference period to the particular invoices those payments were designated to cover. Any invoice the Debtor had paid was excluded from the amount of new value that Blue Bell could use to offset its preference liability. The bankruptcy court entered judgment in favor of the Trustee and against Blue Bell on December 20, 2016.

Blue Bell filed a notice of appeal to the district court. Shortly thereafter, Blue Bell and the Trustee jointly certified that an immediate appeal of the bankruptcy court's order directly to this Court would materially advance the progress of the case.[5] Blue Bell then filed a petition for permission to appeal the bankruptcy court's order directly to this Court. A panel of this Court granted the petition, and we now turn to the merits of Blue Bell's appeal.

[5] Under 28 U.S.C. § 158(d)(2), the district court, the bankruptcy court, or the parties acting jointly, may certify an order of the bankruptcy court for direct appeal to this Court if (1) the order involves a question of law as to which there is no controlling decision of this Court or of the Supreme Court; (2) the order involves a matter of public importance; (3) the order involves a question of law requiring resolution of conflicting decisions; or (4) an immediate appeal may materially advance the progress of the case or proceeding in which the appeal is taken. 28 U.S.C. § 158(d)(2)(A). Here, the parties jointly certified that an immediate appeal of the bankruptcy court's order directly to this Court would materially advance the progress of the adversary proceeding.

DISCUSSION

Blue Bell argues that the statement in *Jet Florida System* indicating that new value must remain unpaid is dictum, and that the statute does not set out any such requirement. The Trustee argues that the statement at issue in *Jet Florida System* constitutes precedent that we are bound to follow. Even if that statement is dictum, however, the Trustee contends that policy considerations nonetheless weigh in favor of requiring new value to remain unpaid in order for that new value to offset a defendant's preference liability. The Trustee further argues, in the alternative, that transfers avoidable as a preference under § 547(b), and on no other ground, are "otherwise unavoidable" under § 547(c)(4)(B) and, therefore, any new value paid for with such transfers cannot offset a creditor's preference liability.

I. Whether the Statement in *Jet Florida System* Indicating that § 547(c)(4) Requires New Value to "Remain Unpaid" Is Dictum

A. Definition of "Dictum"

"*Dictum* is a term that has been variously defined as a statement that neither constitutes the holding of a case, nor arises from a part of the opinion that is necessary to the holding of the case." *Black v. United States*, 373 F.3d 1140, 1144 (11th Cir. 2004) (citing *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 66–67 (1996), and *United States v. Hunter*, 172 F.3d 1307, 1310 (11th Cir. 1999) (Ed Carnes, J., concurring)). Whether a particular statement constitutes a holding or dictum depends on the facts of the case. *See Edwards v. Prime, Inc.*, 602 F.3d

1276, 1298 (11th Cir. 2010) ("[R]egardless of what a court says in its opinion, the decision can hold nothing beyond the facts of that case."). If a statement is "not necessary to the result the Court reached in the case," then that statement is dictum. *See Hunter*, 172 F.3d at 1310 (Ed Carnes, J., concurring); *see also United States v. Caraballo-Martinez*, 866 F.3d 1233, 1244 (11th Cir. 2017) ("[D]icta is defined as those portions of an opinion that are not necessary to deciding the case then before us." (quoting *United States v. Kaley*, 579 F.3d 1246, 1253 n.10 (11th Cir. 2009))), *cert. denied*, 138 S. Ct. 566 (2017).

"[D]icta is not binding on anyone for any purpose." *Edwards*, 602 F.3d at 1298. Accordingly, if the statement in *Jet Florida System* indicating that new value must remain unpaid is dictum, then we are "free to give . . . fresh consideration" to this question. *Great Lakes Dredge & Dock Co. v. Tanker Robert Watt Miller*, 957 F.2d 1575, 1578 (11th Cir. 1992).

B. The Statement at Issue in *Jet Florida System* Is Dictum

Section 547(c)(4), in pertinent part, prohibits the Trustee from avoiding a transfer to a creditor (that is, requiring reimbursement from the creditor) if, after the transfer, the creditor gave new value to the debtor that was "not secured by an otherwise unavoidable security interest" and "on account of which new value the debtor did not make an otherwise unavoidable transfer" to the creditor. The statute makes no mention of any requirement that any new value provided by a creditor

remain unpaid. Nevertheless, in *Jet Florida System*, we opined that § 547(c)(4) "ha[d] generally been read to require: (1) that the creditor must have extended the new value after receiving the challenged payments, (2) that the new value must have been unsecured, and (3) that the new value must remain unpaid." *In re Jet Fla. Sys., Inc.*, 841 F.2d at 1083. We relied on three bankruptcy court opinions as the basis for this observation. *Id.* (citing *Waldschmidt v. Ranier (In re Fulghum Const. Corp.)*, 45 B.R. 112, 119 (Bankr. M.D. Tenn. 1984), *aff'd*, 78 B.R. 146 (M.D. Tenn. 1987), *rev'd*, 872 F.2d 739 (6th Cir. 1989); *Keydata Corp. v. Bos. Edison Co. (In re Keydata Corp.)*, 37 B.R. 324, 328 (Bankr. D. Mass. 1983); *Pettigrew v. Tr. Co. Bank (In re Bishop)*, 17 B.R. 180, 183 (Bankr. N.D. Ga. 1982)).

The trustee[6] in *Jet Florida System* had sought to avoid, as a preference, almost $12,000 in rent for a warehouse that the debtor had paid to the appellant during the preference period, arguing that because the debtor had vacated the premises before the beginning of the preference period, the latter received no value from the rental premises. *See id.* at 1082–83. The appellant argued that it was

[6] The district court's opinion in *Jet Florida System* indicates that the adversary proceeding in that case was brought by Air Florida, Inc. (the debtor) and Air Florida System, Inc. *See Charisma Inv. Co., N.V. v. Air Fla. Sys., Inc.*, 68 B.R. 596, 598 (S.D. Fla. 1986). Therefore, it appears that Air Florida, Inc. was acting as a debtor in possession with all the rights of a trustee. *See* 11 U.S.C. § 1107(a). For ease of discussion, and because Air Florida, Inc. was standing "in the shoes of a trustee," *Fanelli v. Hensley (In re Triangle Chemicals, Inc.)*, 697 F.2d 1280, 1284 (5th Cir. 1983), we refer to the plaintiff in *Jet Florida System* as "the trustee," which is consistent with West's synopsis at the beginning of this Court's opinion in *Jet Florida System*. *See In re Jet Fla. Sys., Inc.*, 841 F.2d at 1082.

nonetheless entitled to an offset against its preference liability under § 547(c)(4) because, notwithstanding the debtor's choice not to make use of the offer, the appellant had continued to make the leased premises available to the debtor, which in itself constituted the providing of new value. The bankruptcy court found that the debtor had indeed vacated the premises before the beginning of the preference period. *Id.* at 1082, 1084. The district court found no error in that finding and, as a result, concluded that the appellant had not provided any new value to the debtor. That being so, the court held that the new-value defense was not applicable, and the appellant had to give the money back to the bankruptcy estate. *Id.* at 1083.

On appeal, we agreed with the district court and held that, absent any use of the leased premises by the debtor, simply making the premises available to the debtor did not confer a "material benefit" on the debtor sufficient to constitute "new value." *Id.* at 1084. In other words, the extent of our ruling was to hold that the appellant had not provided any new value to the debtor subsequent to his payment of almost $12,000.

In our earlier recitation of the elements of § 547(c)(4)'s new-value defense, however, we had noted that, in addition to requiring the providing of new value subsequent to a payment—the prong on which the appellant floundered—there were two other elements: "that the new value must have been unsecured" and "that the new value must remain unpaid." *Id.* at 1083. Although we cited those

additional two elements, neither played any role in our decision. Indeed, we noted that both elements had "concededly been satisfied." *Id.*

For this reason, our statement in *Jet Florida System* indicating that new value must remain unpaid was dictum. This purported requirement was never at issue in the case and it played no role in our decision or reasoning. *See Black*, 373 F.3d at 1144; *Hunter*, 172 F.3d at 1310 (Ed Carnes, J., concurring). Because our statement in *Jet Florida System* indicating that § 547(c)(4) requires new value to remain unpaid is dictum, we are "free to give . . . fresh consideration" to the question of whether § 547(c)(4) requires new value to remain unpaid. *See Great Lakes Dredge & Dock Co.*, 957 F.2d at 1578. We do so now.

II. <u>Whether § 547(c)(4) Requires New Value to Remain Unpaid</u>

Having analyzed the plain language of the statute, as well as the history of its development, we hold that § 547(c)(4) does not require new value to remain unpaid. As to the Trustee's argument that policy considerations support its interpretation, we disagree and conclude that policy considerations strongly disfavor the Trustee's position. We explain why.

A. Standard of Review and Analytical Framework

Questions of statutory interpretation are reviewed *de novo*. *Bankston v. Then*, 615 F.3d 1364, 1367 (11th Cir. 2010); *see also Pollitzer v. Gebhardt*, 860 F.3d 1334, 1338 (11th Cir. 2017) ("Interpretations of the [Bankruptcy] Code are

questions of law that we review *de novo*."). "The starting point in statutory interpretation is the language of the statute itself." *Bankston*, 615 F.3d at 1367 (quoting *Warshauer v. Solis*, 577 F.3d 1330, 1335 (11th Cir. 2009)). "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." *Id.* (quoting *Warshauer*, 577 F.3d at 1335). "In determining whether a statute is plain or ambiguous, we consider 'the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.'" *Id.* (quoting *Warshauer*, 577 F.3d at 1335); *see also Robinson v. Shell Oil Co.*, 519 U.S. 337, 340–41 (1997). Statutory language is ambiguous if it is susceptible to more than one reasonable interpretation. *Med. Transp. Mgmt. Corp. v. Comm'r of I.R.S.*, 506 F.3d 1364, 1368 (11th Cir. 2007).

B. The plain, unambiguous, language of § 547(c)(4) does not require new value to remain unpaid

Under § 547(b) of the Bankruptcy Code, a bankruptcy trustee may avoid certain transfers that the debtor made to a creditor within 90 days of the petition date.[7] A transfer that meets the requirements for avoidance under § 547(b) is

[7] Specifically, § 547(b) provides:

> (b) Except as provided in subsections (c) and (i) of [§ 547], the trustee may avoid any transfer of an interest of the debtor in property—
>
> (1) to or for the benefit of a creditor;

called a preference, and the trustee has the burden of proof on whether any particular transfer meets those requirements. *See* 11 U.S.C. § 547(g).

If a transfer is avoided under § 547(b), then the trustee may recover the amount of the transfer from the creditor to whom the transfer was made.[8] *See id.* § 547(b) (providing for avoidance of a preferential transfer); *id.* § 550(a) (providing for recovery of the amount of an avoided preferential transfer). The creditor will then have only an unsecured claim against the bankruptcy estate for the amount recovered by the trustee. *See id.* § 502(h).

> (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 [the Bankruptcy Code];
> >
> > (B) the transfer had not been made; and
> >
> > (C) such creditor received payment of such debt to the extent provided by the provisions of [the Bankruptcy Code].

[8] In addition, any claim that the creditor has against the estate will be disallowed until the creditor repays the amount of the avoided transfer. 11 U.S.C. § 502(d).

Section 547(c) excepts from avoidance certain transfers that would otherwise be avoidable under § 547(b). One of those exceptions—the subsequent-new-value defense—is defined in § 547(c)(4), which 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 . . . .

Id. § 547(c)(4). The creditor against whom avoidance is sought under § 547(b) has the burden of proving nonavoidability under § 547(c). *Id.* § 547(g).

Nothing in the language of § 547(c)(4) indicates that an offset to a creditor's § 547(b) preference liability is available only for new value that remains unpaid. Instead, the plain language of the statute requires only that (1) any new value given by the creditor must not be secured by an otherwise unavoidable security interest and (2) the debtor must not have made an otherwise unavoidable transfer to or for the benefit of the creditor on account of the new value given. *See id.*

By its plain terms, then, the statute only excludes "paid" new value that is paid for with "an otherwise unavoidable transfer." *See id.* § 547(c)(4)(B).

Therefore, so long as the transfer that pays for the new value is itself avoidable, that transfer is not a barrier to assertion of § 547(c)(4)'s subsequent-new-value defense. *See id.*

In reaching this conclusion, we find common ground with the Fourth, Fifth, Eighth, and Ninth Circuits. *See Hall v. Chrysler Credit Corp. (In re JKJ Chevrolet, Inc.)*, 412 F.3d 545, 551–52 (4th Cir. 2005) (rejecting the idea that § 547(c)(4) requires new value to remain unpaid and holding that, "under the plain terms of the statute," whether payments for new value deprive a creditor of the statute's new-value defense "depends on whether the payments were *otherwise unavoidable*" (emphasis in original)); *Jones Truck Lines, Inc. v. Cent. States, Se. & Sw. Areas Pension Fund (In re Jones Truck Lines, Inc.)*, 130 F.3d 323, 329 (8th Cir. 1997) (concluding that, "under the plain language of § 547(c)(4)(B)," payments that the creditor received from the debtor after providing new value did not prevent the creditor from using that new value as a defense to avoidance because the payments at issue were themselves "otherwise avoidable"); *Mosier v. Ever–Fresh Food Co. (In re IRFM, Inc.)*, 52 F.3d 228, 231–33 (9th Cir. 1995) (holding that "a new value defense is permitted unless the debtor repays the new value by a transfer which is otherwise unavoidable"); *Laker v. Vallette (In re Toyota of Jefferson, Inc.)*, 14 F.3d 1088, 1090–93, 1093 n.2 (5th Cir. 1994) (holding that a creditor was entitled to § 547(c)(4)'s subsequent-new-value defense because, although the

debtor had paid for the new value provided, it did so "with preferences that were not 'otherwise unavoidable'").[9]

C. The statutory history of § 547(c)(4) supports our conclusion that new value need not remain unpaid

When the plain language of a statute is unambiguous, we need not—indeed, should not—look beyond that plain language to determine its meaning. *Iberiabank v. Beneva 41-I, LLC*, 701 F.3d 916, 924 (11th Cir. 2012) ("We look first to the text of the statute. If the text of the statute is unambiguous, we need look no further." (citation omitted)); *see also Villarreal v. R.J. Reynolds Tobacco Co.*, 839 F.3d 958, 969–70 (11th Cir. 2016) (en banc), *cert. denied*, 137 S. Ct. 2292 (2017). Here, the plain language of § 547(c)(4) unambiguously excludes paid new value as a defense to a creditor's preference liability only when that new value is paid for with an "otherwise unavoidable transfer." 11 U.S.C. § 547(c)(4)(B). We therefore have no need to examine other interpretive resources, such as predecessor statutes, to determine whether we should divine a broader preclusion of paid new value under

[9] By contrast, in 1986, the Seventh Circuit held, without much discussion, that § 547(c)(4) does require new value to remain unpaid. *In re Prescott*, 805 F.2d 719, 727–28 (7th Cir. 1986). Since then, the Seventh Circuit has continued to follow that approach. *See, e.g.*, *P.A. Bergner & Co. v. Bank One, Milwaukee, N.A. (In re P.A. Bergner & Co.)*, 140 F.3d 1111, 1121 (7th Cir. 1998). A few years later, the Third Circuit also stated in a conclusory fashion that § 547(c)(4) requires new value to remain unpaid. *N.Y.C. Shoes, Inc. v. Bentley Int'l, Inc. (In re N.Y.C. Shoes, Inc.)*, 880 F.2d 679, 680 (3d Cir. 1989). However, whether § 547(c)(4) requires new value to remain unpaid was not at issue in that case. *See id.* at 681–82; *cf. Friedman's Liquidating Tr. v. Roth Staffing Cos. (In re Friedman's Inc.)*, 738 F.3d 547, 551–52 (3d Cir. 2013) (concluding that the statement in *New York City Shoes* indicating that new value must remain unpaid as of the petition date was not a holding with respect to whether post-petition petition payments could affect a creditor's subsequent-new-value defense).

§ 547(c)(4). *See, e.g.*, *Lamie v. U.S. Trustee*, 540 U.S. 526, 534 (2004) ("The starting point in discerning congressional intent is the existing statutory text, and not the predecessor statutes." (citation omitted)); *see also Koons Buick Pontiac GMC, Inc. v. Nigh*, 543 U.S. 50, 62–63 (2004) (utilizing statutory history to resolve ambiguity in the plain language of a statute); *id.* at 66–67 (Kennedy, J., concurring) (endorsing the use of statutory history to resolve ambiguity in the text of a statute); *id.* at 67–68 (Thomas, J., concurring in judgment) (same).

Nevertheless, we are cognizant of the statutory history of § 547(c)(4), and our review of § 547(c)(4)'s predecessor statute bolsters our conclusion that new value need not remain unpaid. *Cf. Koch Foods, Inc. v. Sec'y, U.S. Dep't of Labor*, 712 F.3d 476, 480–86 (11th Cir. 2013) (reasoning that statutory history bolstered an interpretation of unambiguous statutory text). Section 547(c)(4) was enacted as part of the Bankruptcy Reform Act of 1978. *See* Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, § 101, 92 Stat. 2549, 2598–99.[10] The predecessor to § 547(c)(4) was § 60(c) of the Bankruptcy Act of 1898. *See, e.g.*, S. Rep. No. 95-989, at 88 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 5787, 5874; H.R. Rep. No. 95-595, at 374 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 5963, 6330;

[10] Section 547(c)(4) has not been amended since it was enacted in 1978. *See* 11 U.S.C. § 547 note (2012) (Amendments). *Compare* Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, § 101, 92 Stat. 2549, 2598–99, *with* 11 U.S.C. § 547(c)(4) (2012).

see also 11 U.S.C. tbl.II (Supp. III 1979) (identifying 11 U.S.C. § 96(c) (1976) as the predecessor to § 547(c)).[11]

Prior to the enactment of § 547(c)(4), § 60(c) provided as follows:

> If a creditor has been preferred, and afterward in good faith gives the debtor further credit without security of any kind for property which becomes a part of the debtor's estate, the amount of such new credit *remaining unpaid* at the time of the adjudication in bankruptcy may be set off against the amount which would otherwise be recoverable from him.

11 U.S.C. § 96(c) (1976) (emphasis added).[12]

When Congress repealed this provision in 1978 and replaced it with § 547(c)(4), the "remaining unpaid" language was replaced with § 547(c)(4)(B)'s requirement that the debtor "not make an otherwise unavoidable transfer to or for the benefit of" the creditor who gave new value. *See* Bankruptcy Reform Act of 1978 §§ 101, 401, 92 Stat. at 2598–99, 2682. *Compare* 11 U.S.C. § 96(c) (1976), *with* 11 U.S.C. § 547(c)(4)(B) (Supp. III 1979). "As we have explained, 'changes in statutory language generally indicate an intent to change the meaning of the

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[11] Section 60(c) of the Bankruptcy Act of 1898 was codified at 11 U.S.C. § 96(c) in the pre-1978 version of title 11. *See* 11 U.S.C. § 547 note (2012) (Senate Report No. 95-989) ("The fourth exception codifies the net result rule in section 60c of current law [section 96(c) of former title 11]." (brackets in original)). *Compare* Bankruptcy Act of 1898, ch. 541, § 60(c), 30 Stat. 544, 562, *with* 11 U.S.C. § 96(c) (1976).

[12] With the exception of two spelling changes in 1938, § 60(c) remained unchanged from its enactment in 1898 until its repeal in 1978. *See* 11 U.S.C. § 96 note (1976) (Amendments) (declaring that, in 1938, § 96(c) was "reenacted without change"); Chandler Act, ch. 575, sec. 1, § 60(c), 52 Stat. 840, 870 (1938) (changing "afterwards" to "afterward" and "estates" to "estate" in the statutory text). *Compare* 11 U.S.C. § 96(c) (1934), *and* Bankruptcy Act of 1898 § 60(c), 30 Stat. at 562, *with* 11 U.S.C. § 96(c) (Supp. IV 1938), *and* 11 U.S.C. § 96(c) (1976).

statute.'" *Edwards*, 602 F.3d at 1299 (quoting *DIRECTV, Inc. v. Brown*, 371 F.3d 814, 817 (11th Cir. 2004)); *see also* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 256 (2012) ("[A] change in the language of a prior statute presumably connotes a change in meaning."). Accordingly, in the absence of any evidence to the contrary, one can plausibly infer that, by replacing § 60(c)'s "remaining unpaid" language with new language that omits any such requirement, Congress intended to eliminate § 60(c)'s requirement that new value remain unpaid, and to replace that requirement with something substantively different.

Of course, when a change in statutory language results from a mere recodification of the statute, making an assumption about the absence of earlier language becomes a trickier proposition. *See, e.g.*, *Fla. Agency for Health Care Admin. v. Bayou Shores SNF, LLC (In re Bayou Shores SNF, LLC)*, 828 F.3d 1297, 1300 (11th Cir. 2016); *Koch Foods, Inc.*, 712 F.3d at 486. When statutory language is changed in a recodification, it is ordinarily presumed that the change in language does not connote a change in meaning "unless Congress's intention to make a substantive change is 'clearly expressed.'" *In re Bayou Shores SNF, LLC*, 828 F.3d at 1300 (quoting *United States v. Ryder*, 110 U.S. 729, 740 (1884)).

Section 547(c)(4), however, is not a mere recodification of § 60(c). Rather, § 547(c)(4) constitutes a substantive departure from the way exchanges of value

between creditors and debtors during the preference period were handled under the Bankruptcy Act of 1898. That § 547(c)(4) worked a substantive change in the way new value may be used to offset preference liability is not only evidenced by the clear change in statutory language, but also suggested by the history leading to its enactment.

In 1970, Congress established the Commission on the Bankruptcy Laws of the United States ("the Commission") to "study, analyze, evaluate, and recommend changes to the [Bankruptcy Act of 1898]." Act of July 24, 1970, Pub. L. No. 91-354, § 1, 84 Stat. 468, 468. The Commission ultimately recommended "a substantial revision of the preference section." Comm'n on the Bankr. Laws of the U.S., Report of the Commission on the Bankruptcy Laws of the United States, H.R. Doc. No. 93-137, pt.I, at 201 (1973). With respect to § 60(c), the Commission specifically recommended eliminating the requirement that new value remain unpaid on the petition date, stating:

> The provision in the present Act (section 60c) provides that if a creditor has been preferred and afterwards in good faith gives further credit to the debtor without security, the amount of the new credit unpaid at the date of bankruptcy may be set off against the amount recoverable from him on account of the preference.
>
> The Commission recommends changes eliminating (a) the "remaining unpaid" provision; (b) the good faith requirement of any new credit extension; and (c) the requirement that no security be taken for the new credit.

Id. at 210.[13] That the Commission specifically recommended eliminating § 60(c)'s "remaining unpaid" requirement cuts against an inference that Congress might have intended to preserve that requirement when it replaced the "remaining unpaid" language in § 60(c) with § 547(c)(4)(B)'s requirement that the debtor "not make an otherwise unavoidable transfer" to the creditor who received the preference.

Given that all other signs point toward a conclusion that § 547(c)(4) represents a departure from, rather than a recodification of, the "remaining unpaid" requirement in § 60(c), we conclude that removal of the "remaining unpaid" language effected a substantive change in the meaning of the statute. Thus, a

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[13] The Commission produced a proposed bankruptcy act that was introduced in both houses of Congress. *See* S. 236, 94th Cong. (1975); H.R. 31, 94th Cong. (1975); H.R. 10792, 93d Cong. (1973); S. Rep. No. 95-989, at 2 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 5787, 5788; H.R. Rep. No. 95-595, at 2 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 5963, 5964; Comm'n on the Bankr. Laws of the U.S., Report of the Commission on the Bankruptcy Laws of the United States, H.R. Doc. No. 93-137, pt.II (1973). With respect to the subsequent-new-value defense, the Commission's proposed legislation stated:

> A transfer is not voidable to the extent of new value given at the time of the transfer or at any time thereafter. In determining the amount of new value given, the value of any security taken for it shall be deducted.

Comm'n on the Bankr. Laws of the U.S., Report of the Commission on the Bankruptcy Laws of the United States, H.R. Doc. No. 93-137, pt.II, at 167 (1973). Although a competing bill drafted by the National Conference of Bankruptcy Judges ("NCBJ") was also introduced in both houses of Congress, that bill's subsequent-new-value provision was identical to the Commission's proposal. *Compare* S. 236, 94th Cong. § 4-607(c)(2) (1975) (the Commission's proposal as introduced in the Senate), *and* H.R. 31, 94th Cong. § 4-607(c)(2) (1975) (the Commission's proposal as introduced in the House), *with* S. 235, 94th Cong. § 4-607(c)(2) (1975) (the NCBJ's proposal as introduced in the Senate), *and* H.R. 32, 94th Cong. § 4-607(c)(2) (1975) (the NCBJ's proposal as introduced in the House).

review of the statutory development of § 547(c)(4) bolsters our conclusion that § 547(c)(4) does not require new value to remain unpaid.

Nonetheless, in light of the unambiguous statutory language, we would reach the same conclusion even if it could be shown that Congress did not intend a substantive change in the meaning of the statute when it replaced § 60(c)'s "remaining unpaid" language with § 547(c)(4)(B)'s requirement that the debtor "not make an otherwise unavoidable transfer to or for the benefit of" the creditor who gave new value. *Cf. United States v. Wells*, 519 U.S. 482, 496–97 (1997) (concluding that a change in statutory language effected a substantive change in meaning even though the Reviser's Note to the amended statute explained that the amendment "was without change of substance"); Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 257 (2012) ("The new text is the law, and where it clearly makes a change, that governs. This is so even when the legislative history consisting of the codifiers' report expresses the intent to make no change.").

D. Policy considerations also weigh in favor of a conclusion that new value need not remain unpaid

The Trustee argues that, notwithstanding the statutory language, we should nonetheless rule for him because policy considerations favor his argument that new value must remain unpaid in order for a creditor to rely on the new-value defense. Our interpretation of the language of the statute obviously trumps any opposing

policy argument. But even if it didn't, we would disagree with the Trustee that policy considerations support his interpretation. To the contrary, we think that policy considerations strongly disfavor his position.

As we noted in *Jet Florida System*, one of the "principal policy objectives underlying the preference provisions of the Bankruptcy Code" is "to encourage creditors to continue extending credit to financially troubled entities while discouraging a panic-stricken race to the courthouse." 841 F.2d at 1083; *accord Union Bank v. Wolas*, 502 U.S. 151, 161 (1991). "Another related objective of this section is to promote equality of treatment among creditors." *In re Jet Fla. Sys., Inc.*, 841 F.2d at 1083; *see also Wolas*, 502 U.S. at 161 ("Second, and more important, the preference provisions facilitate the prime bankruptcy policy of equality of distribution among creditors of the debtor.").

1. Encouraging creditors to continue extending credit to financially troubled entities

Requiring new value to "remain unpaid" would hinder the policy objective of encouraging vendors to continue extending credit to financially troubled debtors, especially in situations like this one in which the vendor and the debtor regularly engaged in relatively short-term credit transactions. If new value must remain unpaid, then vendors who sense that a debtor is in financial difficulty will have an incentive to stop delivering any goods because any payments they receive,

after extension of a short-term period of credit on these deliveries, might be avoided, and thereby clawed back by the trustee in bankruptcy.

By contrast, if new value need not remain unpaid, then a vendor can continue extending short-term credit to the debtor without fear of having all of the payments it receives for its newly delivered goods clawed back by the trustee in bankruptcy. So long as the vendor continues to extend additional credit to the debtor, it is at risk of losing only a portion of the payments it receives from the debtor, as explained below. Thus, a conclusion that new value need not remain unpaid promotes one of the "principal policy objectives underlying the preference provisions of the Bankruptcy Code"—encouraging creditors to continue extending credit to financially troubled debtors. *See In re Jet Fla. Sys., Inc.*, 841 F.2d at 1083.

A chart can perhaps best illustrate the above concepts. The following chart illustrates a scenario where the vendor-creditor ships $1,000 worth of goods to the debtor every other week, and the debtor pays for those goods one week after delivery.

	Transfer from creditor to debtor	**Transfer from debtor to creditor**
Transfer 1	$1,000 in goods	
Transfer 2		$1,000 in cash
Transfer 3	$1,000 in goods	
Transfer 4		$1,000 in cash
Transfer 5	$1,000 in goods	

Transfer 6		$1,000 in cash
Transfer 7	$1,000 in goods	
Transfer 8		$1,000 in cash
Transfer 9	$1,000 in goods	
Transfer 10		$1,000 in cash
DEBTOR'S BANKRUPTCY FILING		

Even-numbered transfers—Numbers 2, 4, 6, 8, and 10—show five payments, in the amount of $1,000 each, by the debtor to the vendor-creditor within the 90-day preference period, meaning that each such payment is potentially avoidable by a trustee. Transfers 3, 5, 7, and 9, which show the shipment of goods by the vendor, constitute equivalent new value in the total amount of $4,000 provided by the vendor subsequent to payments 2, 4, 6, and 8, respectively.[14] That being so, and under Blue Bell's position, this $4,000 in new goods shipped would wash $4,000 of the previous payments made by the debtor, for purposes of avoidability. Yet, under the Trustee's position, the vendor loses this new-value defense because, after conferring new value via the shipment of goods equivalent to the previous payment made by the debtor, the debtor later paid off the value of the shipped goods that constituted the new value. Specifically, Transfer 4 paid off Transfer 3; Transfer 6 paid off Transfer 5; Transfer 8 paid off Transfer 7; and Transfer 10 paid off Transfer 9. According to the position of the Trustee in this

[14] Transfer 1 is not a candidate for a "new-value" set-off because there is no prior cash payment from the debtor for it to set off.

case, the vendor in the above scenario would be required to repay the entirety of the $5,000 paid to him by the debtor, even though new value was conferred on the debtor as to $4,000 of these payments.

Blue Bell argues that a subsequent payment by the debtor to the vendor-creditor for new value that was previously provided to the former does not negate the defense as to the particular new value in question. Adopting that position, the vendor in this scenario would be protected by the new-value defense as to debtor payments 2, 4, 6, and 8 because, subsequent to each of these payments by the debtor, the vendor provided new value to the debtor in the form of new goods shipped. It is only the last $1,000 payment by the debtor—Transfer 10—that Blue Bell concedes would be avoidable by the trustee because the vendor delivered no goods after this last payment by the debtor, meaning the vendor provided no subsequent new value. Because it would lack a new-value defense to the preference represented by this last payment, the vendor would have to repay the estate the $1,000; it would then have a corresponding unsecured claim against the estate for that same $1,000. But the vendor would be entitled to retain the remaining $4,000. *See* 11 U.S.C. §§ 547(b), 550(a), 502(h).

Notably, this is the same situation the vendor would have found itself in had it simply stopped doing business with the debtor after Transfer 2: it would have had to return that $1,000, and it would have had a $1,000 unsecured claim against

the estate based on Transfer 2. It would have owed the estate no additional moneys as a clawback by the trustee for any preferences. Yet, the debtor (and the estate it leaves behind) would be in a worse position had the vendor decided to abandon the debtor after Transfer 2. Had that been the case, the debtor would not have received the $4,000 worth of future shipments of goods. With those additional shipments, however, the debtor had additional goods that it could sell to its customers, and thereby potentially increase the size of the estate available at the time of the later bankruptcy filing.

Consider, moreover, the strong disincentives for a vendor to continue supplying an ailing customer with goods if the Trustee's position wins out. Under the interpretation the Trustee gives the new-value defense, the vendor would have to return all of the payments it subsequently received for the new value it provided the debtor. Were this the rule, a prudent vendor, sensing financial problems by the debtor, would be foolish to continue delivering goods to the debtor following Transfer 2. *Cf. Laker v. Vallette (In re Toyota of Jefferson, Inc.)*, 14 F.3d 1088, 1091 (5th Cir. 1994) (noting that, without the protection of § 547(c)(4), "a creditor who continues to extend credit to the debtor, perhaps in implicit reliance on prior payments, would merely be increasing his bankruptcy loss"). Indeed, focusing on post-Transfer 2 events set out in the chart, not only would the vendor have to return the entirety of the payments it had received for goods it had delivered under the

Trustee's interpretation, but it would also be out $4,000 in the value of the goods it had provided the debtor: $4,000 worth of goods that it could have to sold to another grocery store.

In short, were the Trustee's approach applicable, a sensible vendor should immediately cut off the debtor, which would likely hasten the latter's financial demise and his ensuing bankruptcy. Yet, the bankruptcy estate would almost always be better off if a vendor continues to supply the debtor with goods to sell, and the new-value defense, as interpreted by Blue Bell, would encourage it to do so.

2. Promoting equality of treatment among creditors

The Trustee argues that requiring new value to remain unpaid is necessary to ensure that short-term creditors like Blue Bell are treated the same as longer-term creditors whom the debtor did not repay during the preference period. We disagree with the Trustee's suggestion that longer-term creditors will necessarily be worse off in the absence of a requirement that new value remain unpaid.

As explained above, if new value must remain unpaid, then short-term creditors will have an incentive to stop extending credit to the debtor as soon as they sense that the debtor might be experiencing financial difficulty. As a result, such creditors might refuse to provide the debtor with the goods and services it needs to continue in business unless they receive payment in advance or on a COD

(cash on delivery) basis. *See, e.g.*, 11 U.S.C. § 547(b)(2) (providing that, in order to constitute an avoidable preference, a transfer from the debtor to a creditor must be made on account of an antecedent debt); *see also id.* § 547(c)(1) (providing that a trustee may not avoid a contemporaneous exchange for new value). The debtor would then be deprived of the valuable opportunity to receive credit in the form of money, goods, and services at a time when it may need such credit more than ever. And, all else being equal, with the vendor ceasing any new deliveries, the estate is ultimately left in the same position it would have been in had this short-term creditor instead been permitted to rely on a subsequent-new-value defense without any requirement that new value remain unpaid.

Moreover, by encouraging creditors to continue extending credit to financially troubled debtors, § 547(c)(4) has the potential to help such debtors avoid bankruptcy altogether, an outcome that longer-term creditors would almost certainly choose. We therefore find unpersuasive the Trustee's argument that it is necessary to require new value to remain unpaid in order to ensure that longer-term creditors are treated fairly in comparison with short-term creditors who extend new value to the debtor during the preference period.

III. Whether Transfers Avoidable as Preferences Under § 547(b), and on No Other Ground, Are "Otherwise Unavoidable" Under § 547(c)(4)(B)

In the alternative, the Trustee argues that even if subsequent payment by the debtor does not defeat the new-value defense, Blue Bell is still not entitled to assert

that defense because of another preclusion in § 547: specifically, § 547(c)(4)(B). Reading subsection (B) together with the other language of subsection (4), the provision prohibits the trustee from undoing a transfer to the creditor where the creditor has subsequently provided new value if, "on account" of this new value, the debtor did not make "an otherwise unavoidable" transfer for the benefit of the creditor.[15]

Admittedly, the double-negatives in the statutory language make for some difficult parsing. But to translate: § 547(c)(4)(B) prevents the trustee from undoing (avoiding) a transfer of money from the debtor to a creditor to the extent that, after the transfer, the creditor gave new value to the debtor, unless the debtor made an "otherwise unavoidable transfer" to the creditor "on account of" that new value. So, if the debtor paid for the new value with an "otherwise unavoidable transfer," then the creditor cannot use that new value as a defense against the trustee's attempt to avoid an earlier preference. Conversely, if the debtor makes a payment for the new value that is itself avoidable, then the creditor can avail itself of the new-value defense.

Before attempting to articulate the Trustee's argument, it is helpful to step back and examine the broader context of avoidance provisions within the

[15] To repeat, § 547(c)(4)(B) provides in pertinent part: "The trustee may not avoid under this section a transfer . . . 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 . . . on account of which new value the debtor did not make an otherwise unavoidable transfer to or for the benefit of such creditor."

Bankruptcy Code. When a debtor files for bankruptcy, any transfer that the debtor made shortly before the filing naturally becomes the subject of skepticism, particularly for creditors who would receive more money from a pro rata distribution of the debtor's estate if those transfers had not been made. For example, if a debtor with $100,000 in assets transferred all of those assets to a single creditor only days before filing for bankruptcy, leaving nothing available for his other creditors, those other creditors would naturally view that transfer suspiciously and seek a way to bring the money back into the estate so that they might receive a portion of it when the estate is distributed.

To prevent the inequity that could result if the debtor improperly favored some creditors over others shortly before filing for bankruptcy, and to promote "the prime bankruptcy policy of equality of distribution among creditors," *Wolas*, 502 U.S. at 161, the Bankruptcy Code allows a trustee to "avoid"—that is, undo[16]—certain pre-bankruptcy transfers. *See, e.g.*, 11 U.S.C. §§ 544(b), 547(b), 548(a).

For example, § 548(a) allows a trustee to avoid a fraudulent transfer. A fraudulent transfer is one that was made within two years of the petition date in

[16] Because we are dealing here with transfers of money in payment for goods received by the Debtor, and because the Trustee sought both avoidance of the transfers and recovery from Blue Bell in the same complaint, we need not concern ourselves with the distinction between avoidance and recovery for purposes of our analysis. *See* 11 U.S.C. § 551 (providing that any transfer avoided by the trustee under certain sections of the Bankruptcy Code, including §§ 547 and 548, is "preserved for the benefit of the estate"); *id.* § 550(a) (providing that, after a transfer is avoided, the trustee may recover the property transferred or the value of that property from the initial transferee or a subsequent transferee).

which either (1) the debtor received less than a reasonably equivalent value in exchange for the transfer and was insolvent on the date that the transfer was made, *id.* § 548(a)(1)(B); or (2) the debtor made the transfer with the intent to hinder, delay, or defraud its creditors, *id.* § 548(a)(1)(A). *See Merit Mgmt. Grp., LP v. FTI Consulting, Inc.*, 138 S. Ct. 883, 888–89 (2018). No fraudulent transfers were alleged to have occurred in this case.

Under § 547(b), a trustee may avoid a transfer that constitutes a "preference."[17] *See, e.g.*, *Fid. Fin. Servs., Inc. v. Fink*, 522 U.S. 211, 214–17 (1998). As defined by § 547, a preference is any transfer made by the debtor within 90 days of the petition date if that transfer was made "for or on account of" an antecedent debt, was made while the debtor was insolvent, and enabled the creditor who received it to receive more than it would have otherwise received in a Chapter 7 liquidation. 11 U.S.C. § 547(b). The payments to Blue Bell by the Debtor are conceded to be preferences.

Yet, not all preferences will ultimately be avoidable by the trustee because the Bankruptcy Code creates defenses that a creditor may use to prevent the trustee from avoiding a preference payment made by the debtor. For example, if the "creditor" has provided "new value" to a debtor by selling the latter an item and

[17] And a trustee has other avoidance powers besides those described in §§ 547 and 548. For example, a trustee may also avoid certain post-petition transfers and set-offs, under §§ 549 and 553(b)(1), respectively.

receiving payment from the debtor in what constitutes a substantially contemporaneous exchange, then that transfer by the debtor to the creditor is not avoidable. *See id.* § 547(c)(1). A contemporaneous cash payment or COD delivery would be examples of this type of unavoidable preference. There were no contemporaneous cash payments or COD deliveries in this case.

In addition, a payment by the debtor of debt incurred in the ordinary course of business, with the payment to the creditor being made according to ordinary business terms, is a type of preference that the trustee is not permitted to avoid. *See id.* § 547(c)(2). Further, with certain qualifications, the trustee cannot avoid a transfer that creates a perfected purchase money security interest. *See id.* § 547(c)(3). Neither type of transfer is at issue in this case. Finally,[18] we have debtor transfers followed by the providing of new value by the creditor, which is at issue in this case. *See id.* § 547(c)(4).

With this context in mind, we now circle back to the Trustee's argument. To repeat our earlier dissection of the pertinent statutory language, if the debtor paid for the new value with an "otherwise unavoidable transfer," then the creditor cannot use that new value as a defense against the trustee's attempt to avoid an earlier preference. Conversely, if the debtor makes a payment for the new value that is itself avoidable, then the creditor can avail itself of the new-value defense.

[18] There are other exceptions, not pertinent to this case, included in § 547(c).

In this case, the Debtor clearly made post-new value payments that were avoidable. After Blue Bell delivered ice cream (which constituted the new value for previous payments by the Debtor), the Debtor made payments that all agree satisfied the elements of a preference under § 547(b).

Thus, because such payments by the debtor constituted preferences, they were avoidable, meaning Blue Bell seemingly has the winning argument when it asserts that § 547(c)(4) prevents the Trustee from avoiding any payments to the extent they were followed by the delivery of goods of equivalent value. The Trustee, however contends that because the statute uses the word "otherwise" in qualifying the unavoidable transfer that the debtor's payment cannot represent—"on account of which new value the debtor did not make an <u>otherwise</u> unavoidable transfer"—Blue Bell loses. Why? Well, the Trustee acknowledges that all of these payments by the Debtor were preferences under § 547, and hence avoidable. But, says the Trustee, the "otherwise" qualifier means that the avoidability of a debtor's payment cannot be derived from § 547, but instead it must come from somewhere else. The somewhere else would presumably be § 548, which prohibits fraudulent transfers, and which the Trustee uses as his example of an "otherwise avoidable" transfer that would be sufficient to allow a creditor to avail itself of the new-value defense under § 547(c)(4).

Of course, if correct, the Trustee's argument effectively eviscerates the new-value defense. Under his example, the creditor could take advantage of the defense only if the subsequent transfer by the debtor constituted a fraudulent transfer. But success in that endeavor would be a Pyrrhic victory because obviously the transfer would then be avoided as being fraudulent. In essence, the Trustee's argument largely renders § 547(c)(4) an empty set: not a result one would reasonably think Congress to have intended when it drafted this language.

Leaving aside the illogical end result of the Trustee's argument, we disagree with his interpretation of the statute. We read the phrase "otherwise unavoidable transfer" in § 547(c)(4)(B) as referring to transfers that are unavoidable for reasons other than § 547(c)(4)'s subsequent-new-value defense. Section 547(c)(4) excepts from avoidance transfers that otherwise meet all of the requirements for avoidance under § 547(b). In other words, § 547(c)(4) renders otherwise avoidable transfers unavoidable. The phrase "otherwise unavoidable transfer" in a provision that renders transfers unavoidable naturally means a transfer that is unavoidable for reasons other than that provision. Our interpretation is bolstered by the fact that § 547(c)(4) is only one exception to avoidability contained within a list of such exceptions. *See* 11 U.S.C. § 547(c)(1)–(9). Thus, a transfer that is rendered unavoidable by one of those other exceptions, such as § 547(c)(2)'s ordinary-

course-of-business defense, can naturally be said to be "otherwise unavoidable" for purposes of § 547(c)(4)(B).

We are not the first court to conclude that "otherwise unavoidable transfer" in § 547(c)(4)(B) means a transfer that is unavoidable for reasons other than § 547(c)(4). *Accord Phx. Rest. Grp., Inc. v. Ajilon Prof'l Staffing LLC (In re Phx. Rest. Grp., Inc.)*, 317 B.R. 491, 499–500 (Bankr. M.D. Tenn. 2004); *Boyd v. Water Doctor (In re Check Reporting Servs., Inc.)*, 140 B.R. 425, 431–32, 435–36 (Bankr. W.D. Mich. 1992); *see also Roberds, Inc. v. Boyhill Furniture (In re Roberds, Inc.)*, 315 B.R. 443, 470–74 (Bankr. S.D. Ohio 2004). With respect to the Trustee's particular interpretation of the statute, the Trustee acknowledges that no other court has adopted his reading of "otherwise unavoidable" in § 547(c)(4)(B). In fact, courts have rejected the Trustee's interpretation. *See, e.g.*, *In re Check Reporting Servs., Inc.*, 140 B.R. at 431–32, 435–36; *cf. In re IRFM, Inc.*, 52 F.3d at 233 (concluding that transfers avoidable as preferences under § 547(b) were not "otherwise unavoidable"). We likewise reject the Trustee's argument that transfers that are avoidable under § 547(b), and on no other ground, are "otherwise unavoidable" for purposes of § 547(c)(4)(B).

CONCLUSION

The statement in *Jet Florida System* indicating that § 547(c)(4) requires new value to "remain unpaid" is dictum. We are therefore free to give fresh

consideration to the question of whether § 547(c)(4) requires new value to remain unpaid. Having analyzed that statute, we hold that § 547(c)(4) does not require new value to remain unpaid. Nor do we find the Trustee's argument based on § 547(c)(4)(B) to be meritorious. We therefore **REVERSE** and **VACATE** the bankruptcy court's judgment and **REMAND** for a new calculation of Blue Bell's preference liability.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

XIP TECHNOLOGIES, LLC, Appellant, v. ASCEND GLOBAL SERVICES, LLC, Appellee.	))))))))))	Case No. 2D17-3718

Opinion filed August 15, 2018.

Appeal from the Circuit Court for Lee County; Alane C. Laboda, Judge.

John C. Webb of John Webb Legal Group, P.L., Fort Myers, for Appellant.

Louis D. D'Agostino of Cheffy Passidomo, P.A., Naples; and Richard Cimino of Richard D. Cimino, P.A., Naples, for Appellee.

SLEET, Judge.

XIP Technologies, LLC, challenges the modified temporary injunction entered against it and in favor of Ascend Global Services, LLC, in Ascend's action against XIP for breach of contract, conversion, civil theft, and injunctive relief. We reverse.

XIP and Ascend entered into a contract by which Ascend would pay XIP a monthly fee in exchange for the use of XIP computer software that enabled Ascend to accept credit card payments from its customers. Pursuant to the contract, XIP's merchant services account captured all credit card purchases by Ascend customers and deposited all monies received into Ascend's account. XIP also tracked all of Ascend's customer information, customer purchases, and sales transactions and provided this client data to Ascend. For its part, Ascend was required to pay XIP a monthly base fee of $10,000, which was due on the fifth day of each month. In the event that Ascend did not pay the fee within five days of the due date, its license and access to the XIP software system would be suspended until all outstanding fees were paid in full. Ascend concedes that it was often late making its monthly fee payments and that it failed to make the $10,000 payments for June, July, and August 2017. However, at some point, XIP stopped communicating with Ascend's vendors, marketing representatives, and customers; stopped accepting credit card payments for products sold to Ascend's customers; and stopped transferring to Ascend funds from the sales of its products and memberships. Ascend alleges that this happened before it first failed to make its monthly fee payment in June 2017.

Ascend filed suit against XIP, asserting claims for breach of contract, conversion, civil theft, and injunctive relief. Ascend alleged that XIP breached the contract by failing to remit monies due, provide customer data, and accept credit card payments from Ascend's customers. Ascend's conversion and civil theft counts alleged that XIP failed to pay approximately $117,000 due to Ascend from XIP's merchant services account. As to the timing of the breaches and who breached first, Ascend's

complaint alleged that XIP started withholding customer data as early as February 2017.

After filing its complaint, Ascend filed a verified emergency motion for temporary injunction, seeking to prevent XIP from withholding revenue and customer data and to require XIP to continue providing the services spelled out in the parties' contract. The trial court referred the matter to a general magistrate, who held a hearing for which only Ascend was given notice. Following the ex parte hearing, the magistrate entered a report and recommendation in which it concluded that XIP's withholding of Ascend's net sales revenues and data files "has resulted in irreparable harm to" Ascend. The magistrate recommended injunctive relief, further concluding that Ascend "has no adequate remedy at law," that Ascend "has a likelihood of success on the merits for a permanent injunction," and that the temporary injunction will serve the public interest. The trial court adopted the report and recommendation and entered a temporary injunction. XIP moved to dissolve the temporary injunction, and following a hearing, the trial court entered an order granting in part and denying in part the motion. The court then entered a modified temporary injunction, which incorporated the factual findings and legal conclusions set forth in the magistrate's report and recommendation and provided as follows:

> 1. Defendant XIP Technologies, LLC, . . . [is] enjoined from: (i) withholding any net revenues belonging to plaintiff; (ii) withholding from plaintiff any records and genealogy data regarding sales transactions; (iii) refusing to respond to plaintiff's vendors and sales agents' requests for information and assistance; and (v) cutting plaintiff off from its computer software system and denying plaintiff its license rights under the License & Application Provider Agreement.

> 2. XIP is directed to forthwith pay over to plaintiff all of its net sales revenues it is now holding in the amount of $117,291.54 (i.e., XIP's receipts on behalf of plaintiff, minus XIP's fees minus a reserve of $37,155.36) and to continue paying over said revenues on a regular basis at least two (2) times weekly, so long as the parties continue to do business together.
>
> 3. Plaintiff shall forthwith pay defendant XIP the fees for its services rendered for May 2017, $1,000.00 and $10,000.00 for each of the months of June, July and August, 2017. Thereafter, plaintiff shall pay [d]efendants monthly invoices within thirty (30) days of receipt, so long as the parties do business with each other.
>
> 4. XIP is further directed to forthwith provide to plaintiff all of its genealogy data and customer proprietary information gathered since August 16, 2016.
>
> 5. XIP is further directed to forthwith reactivate its payment system, business management system and other software applicable to plaintiff's business.
>
> 6. A bond in the amount of Eighty Thousand Dollars ($80,000.00) shall be posted by plaintiff in order to make this Order effective.

XIP now appeals, first arguing that the trial court erred in directing it to pay $117,291.54 to Ascend because there was no showing of irreparable harm or a lack of an adequate remedy at law. We agree.

An order on a motion for temporary injunction entered by a trial court must be based on the likelihood of irreparable harm, the unavailability of an adequate remedy at law, the substantial likelihood of success on the merits, and considerations of public interest. Richard v. Behavioral Healthcare Options, Inc., 647 So. 2d 976, 978 (Fla. 2d DCA 1994). "The trial court has wide discretion to grant or deny a temporary injunction, and the appellate court will not intercede unless the grieving party clearly shows an abuse of discretion." Id.

In the temporary injunction here, the trial court adopted and incorporated the report and recommendation in which the magistrate concluded that the withholding of revenue and client data information caused Ascend irreparable harm for which Ascend has no adequate remedy at law. However, by directing XIP to pay Ascend approximately $117,000 for withheld sales revenues, the trial court demonstrated that Ascend has an adequate remedy at law in the form of money damages. By awarding that sum to Ascend at this stage of the proceedings, the trial court effectively decided the underlying breach of contract claim in Ascend's favor and awarded damages on the claim. This was an abuse of discretion.

XIP's defense below to the breach of contract claim is that Ascend breached first by failing to pay its $10,000 monthly fees and that such alleviated its obligation to perform under the contract. Accordingly, which party is entitled to all or any portion of the withheld revenues is an issue to be determined by the ultimate outcome of the lawsuit. If indeed XIP is determined to be in breach of the parties' contract, Ascend will have an adequate remedy at law in the form of damages to replace the withheld revenues. Because damages are available, there is no irreparable harm. See City of Miami Springs v. Steffen, 423 So. 2d 930, 931 (Fla. 3d DCA 1982) (reversing the entry of a temporary injunction that directed defendants to pay plaintiffs $53,491.21 in back wages and concluding there is "no irreparable harm for the purpose of a temporary injunction where the harm can be adequately compensated for by a monetary award"); see also B.G.H. Ins. Syndicate, Inc. v. Pres. Fire & Cas. Co., 549 So. 2d 197, 198 (Fla. 3d DCA 1989) (stating that "irreparable harm is not established where the potential loss can be adequately compensated for by a monetary award" and that an

"ability to obtain a money judgment . . . should a breach of contract be proven, is an adequate remedy at law"). Therefore, the trial court abused its discretion by including in the temporary injunction a direction that XIP pay Ascend $117,291.54 for withheld revenues.

In coming to this conclusion, we acknowledge Ascend's argument that because it is a multilevel business structure in which members are paid commissions from fees paid by other members, XIP's withholding revenue renders it unable to pay its members' commissions, resulting in the loss of members and the ultimate destruction of the business—which would be an irreparable harm with no adequate remedy at law. However, that argument is not supported by the evidence presented below. At the hearing on the motion to dissolve injunction, Ascend's CEO testified that he "had to keep on putting money into [the business] to pay the bills and to supply our members what was due them. . . . We're still doing [that] today." He responded affirmatively when asked if Ascend was satisfying its financial obligations to its members but added that if he had stopped putting his own money into the business, the company <u>would have</u> stopped operating. As such, the evidence below was that Ascend had obtained finances to continue operating albeit through a personal financial loss to its CEO. Accordingly, it was an abuse of discretion for the trial court to adopt the magistrate's unsupported factual finding that Ascend "<u>has</u>, by the conduct of XIP, <u>been forced to suspend its operations</u>." (Emphasis added.) And any personal funds Ascend's CEO has put into the business to make up for revenues collected but not remitted by XIP is a harm that is personal to him, not Ascend, and one that, like the withheld sales revenues, can be remedied by money damages. We therefore reverse the portion of the modified

temporary injunction that directs XIP to pay $117,291.54 to Ascend. Consequently, we also reverse the portion of the temporary injunction that directs Ascend to pay XIP the $10,000 fee it failed to pay in June, July, and August 2017 as some sort of equitable offset for the withheld revenues.

XIP next argues that the trial court abused its discretion in determining that it had caused Ascend irreparable harm for which there is no adequate remedy at law by withholding client data and refusing to continue to process Ascend's customers' credit card payments during the pendency of the underlying lawsuit. We cannot agree, however, because the unrefuted evidence below was that these actions by XIP would result in the total destruction of Ascend's business. This was sufficient to establish irreparable harm without an adequate legal remedy. See Richard, 647 So. 2d at 978 (concluding that a showing that "irreparable injury would occur" in the form of "the destruction of [the movant's] business" was a sufficient basis for a temporary injunction (emphasis added)).

Nevertheless, we must also reverse this portion of the temporary injunction because XIP is correct in arguing that the trial court failed to include the required findings of fact as to Ascend's likelihood of success on the merits and whether the temporary injunction was in the public interest. See Fla. R. Civ. P. 1.610(c) ("Every injunction shall specify the reasons for entry."); Randolph v. Antioch Farms Feed & Grain Corp., 903 So. 2d 384, 385 (Fla. 2d DCA 2005) ("An order granting a temporary injunction must strictly comply with [rule] 1.610. Of primary importance is the trial court's obligation to state sufficient factual findings in support of each element entitling a party to a temporary injunction."). "[T]he trial court's order must contain '[c]lear, definite,

and unequivocally sufficient factual findings [to] support each of the four conclusions necessary to justify entry of a preliminary injunction.' " Salazar v. Hometeam Pest Defense, Inc., 230 So. 3d 619, 621 (Fla. 2d DCA 2017) (alterations in original) (quoting Liberty Fin. Mortg. Corp. v. Clampitt, 667 So. 2d 880, 881 (Fla. 2d DCA 1996)). This requires "more than parrot[ing] each tine of the four-prong test." City of Jacksonville v. Naegele Outdoor Advert. Co., 634 So. 2d 750, 754 (Fla. 1st DCA 1994), approved, 659 So. 2d 1046 (Fla. 1995).

Here, the trial court incorporated the magistrate's report and recommendation, which with regard to these two prongs merely stated that there is a likelihood that Ascend will succeed on the merits and that the public's interest will be served by entry of the temporary injunction. Such does not amount to strict compliance with rule 1.610(c)'s requirement to specify the factual basis for entry of the injunction. As such, the temporary injunction is insufficient and must be reversed. See Randolph, 903 So. 2d at 385 ("The single error of failing to provide sufficient findings requires us to reverse and remand for further proceedings.").

Accordingly, we reverse the portion of the injunction that directs XIP to pay $117,291.54 to Ascend for withheld net revenues and directs Ascend to pay $30,000 to XIP for unpaid fees. Additionally, we reverse for lack of required findings the portions of the injunction that direct XIP to provide Ascend with all of its client data gathered since August 16, 2016, and to continue performing under the parties' contract during the pendency of the underlying lawsuit. On remand, the trial court may again enter a temporary injunction directing XIP to provide Ascend with its client data and to continue

performing under the parties' contract but only if it includes the required findings as to each of the necessary four prongs.

Reversed and remanded.

SILBERMAN and CRENSHAW, JJ., Concur.

Third District Court of Appeal

State of Florida

Opinion filed August 15, 2018.
Not final until disposition of timely filed motion for rehearing.

No. 3D17-352
Lower Tribunal No. 13-29724

Aquasol Condominium Association, Inc.,
Appellant,

vs.

HSBC Bank USA, National Association, etc.,
Appellee.

An Appeal from the Circuit Court for Miami-Dade County, Michael Hanzman and Rodolfo A. Ruiz, Judges.

Jacobs Legal, PLLC, and Bruce Jacobs, for appellant.

DeLuca Law Group, PLLC, and Shawn Taylor (Fort Lauderdale), for appellee.

Before LAGOA, EMAS and FERNANDEZ, JJ.

EMAS, J.

INTRODUCTION

Appellant, Aquasol Condominium Association, Inc. ("Aquasol"), appeals from a final judgment of foreclosure in favor of appellee, HSBC Bank USA, N.A. ("HSBC"), following a nonjury trial. We affirm, finding no merit in the issues raised by appellant, and write to discuss two of those issues.

PROCEEDINGS BELOW

In September 2013, HSBC filed an action to foreclose on a condominium unit in the Aquasol Condominium in Miami Beach.[1] In January 2017, the case proceeded to a nonjury trial. At trial, there was no dispute that at the time it filed the instant action, HSBC was the holder of the note that was secured by a mortgage. HSBC introduced, without objection, the original note, which was in HSBC's possession at the inception of the action.[2]

Nevertheless, Aquasol contended during the trial that HSBC Bank could not establish standing to foreclose because it was required to prove it was the holder *and* owner of the note. After hearing Aquasol's position in this regard, the trial court rejected the argument, advising counsel that under the law, HSBC was not

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[1] At the time that HSBC filed its foreclosure action, the unit had already been foreclosed upon by Aquasol, and thus, Aquasol defended the action.

[2] Further, the evidence introduced at trial established that the original note came into HSBC's possession indorsed in blank, and that HSBC subsequently indorsed the note to itself. See § 673.2051(3), Fla. Stat. (2013) (providing: "The holder may convert a blank indorsement that consists only of a signature into a special indorsement by writing, above the signature of the indorser, words identifying the person to whom the instrument is made payable.")

required to establish it was the owner *and* holder of the note in order to establish standing, but must only establish that it was the holder *or* owner of the note.

Nevertheless, counsel for Aquasol[3] continued to press this position, and repeatedly attempted to question one of HSBC's witnesses about whether HSBC owned the note. HSBC objected to the questions as irrelevant and the trial court sustained the objections and directed Aquasol's counsel to move on to a new line of questioning. Aquasol's counsel persisted nonetheless, through argument to (and with) the trial court and questions posed to the witness. The trial court advised counsel that the line of questioning was irrelevant, that the record had been preserved, and that if counsel continued this line of questioning, he would be held in contempt.

At that point, Aquasol's counsel orally moved for a continuance so he could prepare a written motion for disqualification of the trial judge, contending that the trial judge had "prejudged" the case. The trial judge denied the request for a continuance at that point, but took a recess shortly thereafter, advising Aquasol's counsel he could prepare and submit a written motion for disqualification, and that the trial court would address the written motion when the trial resumed. When the trial judge returned to the bench, Aquasol's counsel requested some additional time to complete the motion, which the trial court granted, and then denied a subsequent

[3] Counsel for Aquasol in this appeal also represented Aquasol at the trial.

request for further additional time. Thereafter, the written motion was presented to the trial judge, who denied it as legally insufficient.

The trial proceeded to conclusion, and the trial court entered a final judgment of foreclosure in favor of HSBC, determining, inter alia, that HSBC had the requisite standing.[4] Aquasol filed a motion for rehearing; however, that motion did not address in any fashion the trial court's mid-trial denial of Aquasol's motion for disqualification or denial of the motion for continuance.

DISCUSSION AND ANALYSIS

1. The Motion for Disqualification

On appeal, Aquasol asserts that the trial court erred in denying its motion for disqualification. Generally, we review de novo a trial court's order denying a motion for disqualification. Gregory v. State, 118 So. 3d 770, 778 (Fla. 2013). To the extent that Aquasol asserts error in the trial court's denial of its motion for continuance or for further additional time (to prepare a written motion) we review this claim for an abuse of discretion. See Taylor v. Mazda Motor of Am., Inc., 934 So. 2d 518 (Fla. 3d DCA 2005).

A motion to disqualify a trial judge is properly denied where it is legally insufficient. Thompson v. State, 759 So. 2d 650, 659 (Fla. 2000). In order to be legally sufficient, "a motion to disqualify a judge 'must be well-founded and

[4] Aquasol moved for an involuntary dismissal based on an asserted lack of standing, which the trial court denied.

contain facts germane to the judge's undue bias, prejudice, or sympathy.'" Id. (quoting Rivera v. State, 717 So. 2d 477, 480-81 (Fla. 1998)). Of significance, "an adverse ruling is not a legally sufficient ground to disqualify the trial judge." Id. at 660. See also, Lomax v. Reynolds, 119 So. 3d 562 (Fla. 3d DCA 2013); Clark v. Clark, 159 So. 3d 1015 (Fla. 1st DCA 2015) (noting: "It is well-settled that adverse rulings are insufficient to show bias"); Campbell Soup Co. v. Roberts, 676 So. 2d 435 (Fla. 2d DCA 1995).

In the instant case, there was no dispute—and Aquasol conceded—that HSBC Bank was the holder of the note at the inception of the case. Thus, there was nothing in this regard for the trial court to "prejudge," as the parties were in agreement on this singular operative fact. The trial court's conclusion that one's status as a holder of the note is sufficient to confer standing was a legal determination made by the trial court after hearing significant argument from Aquasol's counsel, not a factual determination made prior to presentation of the evidence. Accordingly, Aquasol's motion to disqualify the trial judge was legally insufficient because it was premised on nothing more than its disagreement with an adverse legal ruling, and failed to establish that the court's actions "would create in a reasonably prudent person a well-founded fear of not receiving a fair and impartial trial." Rodriguez v. State, 919 So. 2d 1252, 1274 (Fla. 2005).

Further, the trial court did not abuse its discretion in denying a continuance to Aquasol. At the beginning of the trial, the trial court had a discussion with counsel for both parties regarding the legal issue of whether HSBC had standing if it was only the holder (but not the owner) of the note. As discussed previously, the trial court addressed this legal issue and stated its conclusion on the record. Thereafter, when Aquasol's counsel began asking questions of HSBC's witness that went to ownership of the note, HSBC objected to the questions as irrelevant. The trial court sustained the objections, as Aquasol had already conceded HSBC was the holder of the note at inception, and the trial court determined that, as a matter of law, this was sufficient to establish standing.

Nevertheless, Aquasol's counsel insisted on circling back to the legal determination previously made by the court, and persisted in pursuing the same line of questioning deemed irrelevant by the court. After the trial court sustained several more objections to this line of questioning, and advised counsel to stop pursuing this line of questioning (under pain of contempt),[5] the following exchange took place:

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[5] We commend the trial court for the patience it exhibited before resorting to the threat of sanctions. Though the transcript is but a cold record, it nevertheless reveals the heat (rather than light) brought by Aquasol's counsel, who continued to defy the trial court's previous rulings, continued to reargue legal positions previously decided, and continued to pursue a line of questioning ruled irrelevant. An attorney is not entitled to defy a court's ruling merely because he thinks it incorrect, and can be held in contempt for such conduct even if it turns out the trial court's ruling was erroneous. Rubin v. State, 490 So. 2d 1001, 1003 (Fla. 3d DCA

> MR. JACOBS [counsel for Aquasol]: I'm just putting on the record, Your Honor, that I asked the Court to consider whether the Court has already pre-judged the case and has already decided the issues before hearing all the evidence and hearing all the facts, before hearing all my arguments, which, I think, the fact that Your Honor –
>
> THE COURT: What is your motion, Mr. Jacobs?
>
> MR. JACOBS: I'm asking the Court to continue this trial so that I can file a proper motion for disqualification, and I do that with a heavy heart—
>
> THE COURT: Okay, your motion's denied. Do you have any further questions for this witness?
>
> MR. JACOBS: I'm laying the record, please, Your Honor. The Florida Supreme Court instructs that when a lawyer makes a motion to disqualify a judge, **because that motion must be in writing, I cannot make that motion for disqualification orally. I have to go back to my office, I have to prepare it,** it has to be signed by the client, and then I can submit it to the Court, and if the Court finds that it's legally sufficient, or that it is legally sufficient on its face, then it must be granted.
>
> THE COURT: Your motion for continuance is denied.

(Emphasis added.)

1986) (holding: "It is well settled in this state, and elsewhere, that where a court acting with proper jurisdiction and authority renders an order, an aggrieved party's failure to abide by the order may be punished by contempt even if the order is ultimately found to be erroneous"); Ward v. State, 354 So. 2d 438, 439 (Fla. 3d DCA 1978) (holding: "The orderly conduct of a trial requires that a defendant and his attorney obey the rulings of the trial judge and appeal those rulings which are objectionable. A refusal to obey the rulings of the trial judge on the ground that the ruling is improper may result in the inability of the courts to administer justice.")

Aquasol contends that, because counsel is not permitted to make an oral motion for disqualification during trial, the trial court was required to grant a continuance to allow him to file a written motion. Aquasol's premise is incorrect, however, as this very circumstance is expressly provided for in Florida Rule of Judicial Administration 2.330(e):

> A motion to disqualify shall be filed within a reasonable time not to exceed 10 days after discovery of the facts constituting the grounds for the motion and shall be promptly presented to the court for an immediate ruling. **Any motion for disqualification made during a hearing or trial** must be based on facts discovered during the hearing or trial and **may be stated on the record**, **provided that it is also promptly reduced to writing** in compliance with subdivision (c) and promptly filed. A motion made during hearing or trial shall be ruled on immediately.[6]

(Emphasis added.)

Aquasol did not make an oral motion for disqualification, instead requesting a continuance of the trial to prepare a written motion. When the trial court denied the motion for continuance, Aquasol's counsel should have, pursuant to the rule, orally stated its motion for disqualification on the record. And although the requested continuance was denied at that point, the trial court shortly thereafter recessed the trial and advised counsel that he could take that opportunity to put his

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[6] This provision, permitting an oral motion for disqualification during trial or hearing, was added by a 2003 amendment to the rule, see Amendments to the Florida Rules of Judicial Admin. (2-Year Cycle), 851 So. 2d 698 (Fla. 2003), rendering inapposite the pre-amendment cases relied upon by Aquasol.

motion in writing and file it with the court. Upon returning to the bench to resume the trial, the trial court permitted counsel additional time to complete the written motion. Aquasol's counsel requested further additional time, which the trial court denied, and we find no abuse of discretion in the trial court's decision. Upon our review of the record, we conclude that Aquasol's counsel was given a reasonable opportunity to make an oral motion for disqualification (which he did not do) and was given a reasonable opportunity to prepare and file a written motion for disqualification (which he did do and which was properly determined to be legally insufficient). We further note that Aquasol never filed a supplement to its written motion for disqualification, and in its motion for rehearing before the trial court, and its briefs on appeal, Aquasol failed to allege how it was prejudiced by the trial court's denial of further additional time, and failed to proffer what other allegations it would have included in its written motion if allotted such further additional time.

2. HSBC's Standing to Foreclose

This brings us to the corollary issue raised by Aquasol on appeal: that HSBC, as holder of the note, lacked standing to foreclose because it was not the holder *and* owner of the note. We review this question de novo. Sosa v. Safeway Premium Fin. Co., 73 So. 3d 91 (Fla. 2011); Wells Fargo Bank, N.A. v. Morcom, 125 So. 3d 320 (Fla. 5th DCA 2013). We conclude, as this court and our sister

courts have previously held, that HSBC had standing to foreclose if at the time of filing the action it was the holder *or* owner of the note.

We begin by pointing out that this issue was recently addressed by this court in HSBC Bank USA, N.A. v. Buset, 241 So. 3d 882 (Fla. 3d DCA 2018). In its briefs, however, Aquasol has failed even to acknowledge, much less address, the Buset opinion.[7] This is all the more curious given the fact that counsel for Aquasol was also counsel of record for Buset in that appeal, so it is difficult to fathom how this failure could be attributed to mere oversight. We take this opportunity to remind Aquasol's counsel that the Rules of Professional Conduct mandate candor toward the tribunal. See Rule Regulating the Florida Bar 4-3.3(a)(3), which provides that "[a] lawyer shall not knowingly . . . fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel." See Dilallo v. Riding Safely, Inc., 687 So. 2d 353, 355 (Fla. 4th DCA 1997) (observing that "the Rules of Professional Conduct of the Florida Bar require candor toward the tribunal, and a duty of competence. Rule 4–1.1 and Rule 4–3.3(3) imply a duty to know and disclose to the court adverse legal authority.")

[7] Our opinion in Buset was released on January 7, 2018. The initial brief in the instant appeal was filed on April 10, 2018. The reply brief was filed on June 18, 2018. Although Buset was still pending rehearing at the time, it nevertheless was binding precedent, and Aquasol was duty-bound to cite it. See Rock v. State, 800 So. 2d 298 (Fla. 3d DCA 2001); Kraay v. State, 148 So. 3d 789 (Fla. 1st DCA 2014).

See also Lieberman v. Lieberman, 160 So. 3d 73 (Fla. 4th DCA 2014) (awarding appellate attorney's fees as a sanction for counsel's failure to acknowledge clear and unambiguous controlling case law directly adverse to his client's position, resulting in unnecessary and protracted litigation).

Our opinion in Buset was issued just three days before trial commenced in the instant case. In fact, Aquasol's counsel took the same position he urged in Buset, contending that HSBC was required to prove it held and owned the note. The trial court then correctly noted our recent rejection of that argument:

> MR. JACOBS: It has been the law since the late 1800s, Florida Supreme Court precedent says that you must prove you own and hold the note and mortgage. And that law has been shifted, I think, in an unconstitutional way in foreclosures.
>
> THE COURT: You'll preserve that for appeal because our appellate court just said [in Buset] you either have to own or hold the note.

As the trial court accurately noted, we held in Buset, 241 So. 3d at 888-89:

> Because a foreclosure case is an action to enforce a negotiable instrument, standing in a foreclosure case is not based upon ownership of the note; it is based instead on whether the plaintiff is a "person entitled to enforce." § 673.3011. The term "person entitled to enforce" is a technical, defined term in all versions of the Uniform Commercial Code, including Florida's. Id. An entity may qualify as a "person entitled to enforce" for several reasons, but the most common reason is that the entity is "the holder of the instrument." Id. In a case where the plaintiff is asserting standing based upon its status as a "person entitled to enforce" because it is the holder of the

> instrument, proof of who owns the note is not necessary or even relevant to the issue of standing. Id. ("A person may be a person entitled to enforce the instrument even though the person is not the owner of the instrument or is in wrongful possession of the instrument.")
>
> Proof of who owns the note, such as a chain of title, may be relevant to a dispute where a person claims his or her ownership interest trumps the interest of the holder, but the borrower cannot make this argument on its own; instead, the person making that claim must be "joined in the action and personally assert[ ] the claim against the person entitled to enforce the instrument." § 673.3051(3). Even then, ownership is not relevant to standing so much as the question of who is the ultimate beneficial owner of the proceeds of the foreclosure, an issue not normally or necessarily part of a foreclosure case. (Footnote omitted).

Our decision in Buset is consistent with the decisions of our sister courts. See e.g., Wilmington Savings Fund Society, FSB v. Louissaint, 212 So. 3d 473, 475-76 (Fla. 5th DCA 2017)(holding: "'A person entitled to enforce the note and foreclose on a mortgage is the holder of the note, a non-holder in possession of the note who has the rights of a holder, or a person not in possession of the note who is entitled to enforce under section 673.3091, Florida Statutes.'" (quoting Gorel v. Bank of N.Y. Mellon, 165 So.3d 44, 46 (Fla. 5th DCA 2015))) "'If an indorsement is made by the holder of an instrument and it is not a special indorsement, it is a "blank indorsement." When indorsed in blank, an instrument becomes payable to bearer and may be negotiated by transfer of possession alone until specially indorsed.'" (citing § 673.2051(2), Fla. Stat. (2015)). "'[U]nder the

Uniform Commercial Code, a plaintiff is not required to be both the owner and holder of the note in order to have standing to foreclose'" (quoting Tilus v. AS Michai, LLC, 161 So. 3d 1284, 1285-86 (Fla. 4th DCA 2015))); Phan v. Deutsche Bank Nat. Trust Co., ex rel. First Franklin Mortg. Loan Trust 2006-FF11, 198 So. 3d 744 (Fla. 2d DCA 2016); Meilleur v. HSBC Bank USA, N.A., 194 So. 3d 512 (Fla. 4th DCA 2016); Tilus, 161 So. 3d at 1285-86 (holding: "The plaintiff must prove that it had standing to foreclose at the time the lawsuit was filed. We clarify, however, that under the Uniform Commercial Code, a plaintiff is not required to be both the owner and holder of the note in order to have standing to foreclose. Instead, the plaintiff may establish standing by showing that it owns or holds the note, or is otherwise entitled to enforce the note" (internal citations and footnote omitted)); Murray v. HSBC Bank USA, 157 So. 3d 355 (Fla. 4th DCA 2015); Lewis v. J.P. Morgan Chase Bank, 138 So. 3d 1212 (Fla. 4th DCA 2014); Stone v. BankUnited, 115 So. 3d 411 (Fla. 2d DCA 2013); U.S. Bank Nat. Ass'n v. Knight, 90 So. 3d 824, 826 (Fla. 4th DCA 2012)(observing: "Thus, to have standing, an owner or holder of a note, indorsed in blank, need only show that he possessed the note at the institution of a foreclosure suit; the mortgage necessarily and equitably follows the note."); McLean v. JP Morgan Chase Bank Nat'l Ass'n, 79 So. 3d 170 (Fla 4th DCA 2012); Riggs v. Aurora Loan Servs., LLC, 36 So. 3d 932 (Fla. 4th DCA 2010); Mazine v. M & I Bank, 67 So. 3d 1129, 1131 (Fla. 1st

DCA 2011) ("Because a promissory note is a negotiable instrument and because a mortgage provides the security for the repayment of the note, the person having standing to foreclose a note secured by a mortgage may be either the holder of the note or a nonholder in possession of the note who has the rights of a holder."); Taylor v. Deutsche Bank Nat. Trust Co., 44 So. 3d 618 (Fla. 5th DCA 2010).

In support of its position, Aquasol relies upon Florida Supreme Court decisions from the late 1800's and early 1900's. As our sister courts have done, we reject this argument, as those decisions were based upon the then-existing common law, long before the Legislature's adoption of the Florida Uniform Commercial Code, including Chapter 673 (entitled "Uniform Commercial Code: Negotiable Instruments"), which governs the issue presented. See, e.g., Morcom, 125 So. 3d at 322 (noting: "Appellees cite Florida Supreme Court precedent dating back to the late 1800s to suggest Appellant must both hold and own the note and mortgage to satisfy the standing requirement for a foreclosure action. The cases Appellees cite are not persuasive because the supreme court decided the cases prior to the adoption of the now-instructive and binding Florida UCC"); Tilus, 161 So. 3d at 1286.

Affirmed.

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

NOT FINAL UNTIL TIME EXPIRES TO
FILE MOTION FOR REHEARING AND
DISPOSITION THEREOF IF FILED

WINFIELD INVESTMENTS, LLC, IVAN
BROTHERTON, DAISY BROTHERTON,
ARTHUR WINFIELD AND GLORIA WINFIELD,

Appellants,

v. Case No. 5D17-1304

PASCAL-GASTON INVESTMENTS, LLC,

Appellee.
_____/

Opinion filed August 17, 2018

Appeal from the Circuit Court
for Orange County,
Donald A. Myers, Jr., Judge.

Quoc Van, Sanford, for Appellants.

Keith A. Graham and Shannon M. Wiggins,
of Marchena and Graham, P.A., Orlando,
for Appellee.

PER CURIAM.

Ivan and Daisy Brotherton, and Arthur and Gloria Winfield (collectively "Defendants"), appeal the trial court's final judgment, which found Defendants liable for breach of warranty, unjust enrichment, and fraud. As to the count for breach of warranty, the trial court found Defendants individually liable by piercing the corporate veil of Winfield Investments, LLC. (Defendants were the sole members of Winfield Investments.) We

affirm the judgment of liability regarding breach of warranty without further discussion. For the reasons explained, we reverse the remainder of the judgment under review.

In 2005 Adriana and Blanca Leon executed a purchase-money mortgage and promissory note in favor of U.S. Bank. The mortgage was recorded in the public records of Orange County, Florida as a lien against the property. In 2011 U.S. Bank filed a foreclosure complaint against the Leons and Glenmuir Homeowners Association, Inc. ("Glenmuir") alleging continuing default beginning September 2009. In January 2012, Glenmuir filed a cross-claim for foreclosure against the Leons claiming that they had failed to pay assessment fees.

In April 2012, a trial court entered a final judgment of foreclosure in Glenmuir's favor on its junior lien and ordered the Clerk of Court to sell the property at a public sale if the Leons failed to pay the amount owed. In May 2012, Defendants, through Winfield Investments, purchased the property by bidding $12,700 at the foreclosure sale. The certificate of title issued to Defendants was captioned "U.S. Bank National Association, as Trustee for the Certificateholders of Harborview Mortgage Loan Trust . . . v. Adriana P. Leon, Blanca Leon, et al."

Five months later, in October 2012, Pascal-Gaston Investments, LLC ("PGI"), through Maurice Simpson, a realtor hired by PGI to handle the transaction, offered to purchase the property from Winfield Investments. The parties eventually entered into a contract, which provided in pertinent part that the property was "[p]urchased as is, subject to lien amounts being verified." This contract was executed by both parties in early November 2012. In the contract, PGI promised to pay Defendants $70,000. In exchange, Defendants promised to "convey marketable title to the Real Property."

PGI hired First American Title Insurance Company ("First American") to perform the title search. As previously indicated, the mortgage in favor of U. S. Bank was recorded in the public records as a lien on the property. A cursory search of those records would have revealed the existence of the mortgage in the chain of title. Nevertheless, First American informed PGI before closing that all liens on the property had been cleared, offered to insure title, and prepared a warranty deed. First American subsequently paid PGI the limits of its title insurance policy for its failure to reveal the existence of the mortgage.

On November 29, 2012, Defendants executed the warranty deed in favor of PGI. All Defendants signed the deed. The deed contained a covenant against encumbrances, stating that the property was "free of all encumbrances except taxes," and a covenant of warranty, promising that Defendants would "defend [title] against the lawful claims of all persons." On December 21, 2012, U.S. Bank obtained a final summary judgment of mortgage foreclosure in its favor, in which the trial court found that U.S. Bank was owed $441,297.08 on its senior lien.

From December 2012 until March 2013, one of PGI's members—Ted Khoury, who held equal ownership of the company with his wife—worked to improve the subject property. Because the property had been severely vandalized, Khoury replaced the air conditioning system, the doors and door frames, the kitchen cabinets, the kitchen island, and the electrical system; he sanded the floors, painted the interior, and completely replaced a bathroom, among other improvements. In a deposition, Khoury testified that he spent about $36,000 on labor and materials, excluding his own efforts. He testified that the "labor [he] put into the property" was worth "about $15,000."

In early April 2013, Khoury found an eviction notice on the front door. He soon discovered that "U.S. Bank had a first mortgage on the property." PGI sent a demand letter to Defendants requesting defense of title, but Defendants did not make an effort to defend it. After PGI received $70,000 from First American, the limit of the title insurance policy, PGI purchased the property from U.S. Bank for $202,342.

PGI filed suit against Defendants. The amended complaint filed by PGI included in pertinent part the following counts: breach of warranty by Winfield Investments, acting as a "mere instrumentality of [Defendants] for fraudulent . . . purposes"; unjust enrichment; and fraud. In its unjust enrichment count, PGI argued: "In the alternative that this Court finds that the Defendants are not personally liable under the Warranty Deed for breach of warranty, the Defendants are not in privity of contract with PGI and are liable to PGI for unjust enrichment."

On February 28 and March 2, 2017, the trial court held a non-jury trial resulting in the final judgment we review. As we have previously indicated, we affirm without further discussion that part of the final judgment imposing individual liability on Defendants for breach of warranty. Therefore, the focus of this opinion will be the remaining counts.

As to the part of the final judgment finding Defendants liable for unjust enrichment, we reverse. Upon de novo review of the trial court's legal conclusions, the count of unjust enrichment cannot be upheld. "Florida courts have held that a plaintiff cannot pursue a quasi-contract claim for unjust enrichment if an express contract exists concerning the same subject matter." Diamond "S" Dev. Corp. v. Mercantile Bank, 989 So. 2d 696, 697 (Fla. 1st DCA 2008); accord Hazen v. Cobb, 117 So. 853, 858 (Fla. 1928) ("The law will

not imply a contract where a valid express one exists. This rule is supported by the great weight of authority.”).

Regarding the fraud count, the trial court found Defendants liable based on three theories: fraudulently misrepresenting in the warranty deed that the property was free from all encumbrances, fraudulently concealing the mortgage, and fraudulently promising to defend the title without intending to do so. Regarding the final theory, we reverse because stipulations contained in a warranty deed, even if untrue, do not constitute fraud in the sale. See Paine v. Kemp, 82 So. 53, 54 (Fla. 1919); cf. White v. Crandall, 143 So. 871, 879 (Fla. 1932) (holding that once a purchaser accepts a deed pursuant to a contract for sale, “the transaction is closed, and the purchaser is confined to his action for breach of the covenant”).

Defendants contend that the mortgage was recorded in the public records and, therefore, knowledge of its existence should have been imputed to PGI. Based on the facts and circumstances of this particular case, we conclude that the existence of the recorded mortgage was obvious to PGI and that the fraudulent misrepresentation or concealment of the mortgage by Defendants could not form the basis of a finding of fraud by the trial court.

In Butler v. Yusem, 44 So. 3d 102 (Fla. 2010), the Florida Supreme Court held:

> Justifiable reliance is not a necessary element of fraudulent misrepresentation. As we have stated, there are four elements of fraudulent misrepresentation: “(1) a false statement concerning a material fact; (2) the representor’s knowledge that the representation is false; (3) an intention that the representation induce another to act on it; and (4) consequent injury by the party acting in reliance on the representation.” Johnson, 480 So. 2d at 627 (emphasis added). This is consistent with our prior opinion in Besett, 389 So. 2d at 998, holding that in an action involving fraudulent

> misrepresentation, the buyers did not need to allege that they had investigated the truth of the misrepresentations because for this claim, "a recipient may rely on the truth of a representation, even though its falsity could have been ascertained had he made an investigation, unless he knows the representation to be false or its falsity is obvious to him." As we have explained, "the policy behind our holding in Besett is to prohibit one who purposely uses false information to induce another into a transaction from profiting from such wrongdoing." Gilchrist Timber Co. v. ITT Rayonier, Inc., 696 So. 2d 334, 336-37 (Fla. 1997).

44 So. 3d at 105. Therefore, although under Butler justifiable reliance was not a necessary element of fraudulent misrepresentation that PGI had to prove, because the mortgage in the instant case was recorded in the public records as a lien on the property, we believe that it was obvious to PGI under Besett v. Basnett, 389 So. 2d 995, 998 (Fla. 1980), and M/I Schottenstein Homes, Inc. v. Azam, 813 So. 2d 91, 95 (Fla. 2002). See Schottenstein, 813 So. 2d at 95 (holding that situations may exist when information within a parcel's chain of title renders certain misrepresentations regarding title obviously false because "an examination of these documents prior to a transfer of the real property is entirely expected").

We note that in Schottenstein, the Florida Supreme Court acknowledged that in Besett it adopted sections 540 and 541 of the Restatement (Second) of Torts. 813 So. 2d at 93. Section 540 provided in pertinent part that "[t]he recipient of a fraudulent misrepresentation of fact is justified in relying upon its truth, although he might have ascertained the falsity . . . had he made an investigation." Besett, 389 So. 2d at 997 (quoting Restatement (Second) of Torts § 540 (Am. Law Inst. 1976)). On the other hand, section 541 provided that "[t]he recipient of a fraudulent misrepresentation is not justified in relying upon its truth if he knows that it is false or its falsity is obvious to him." Id.

(quoting Restatement (Second) of Torts § 541). The court also adopted a comment to section 541, which explained that the falsity of a misrepresentation is obvious if it would be made apparent by "a cursory examination or investigation." Id. (quoting Restatement (Second) of Torts § 541 cmt. a). As this court explained in Billington v. Ginn-La Pine Island, Ltd., 192 So. 3d 77, 81 n.4 (Fla. 5th DCA 2016), the adoption of these sections of the Restatement indicated that justifiable reliance was an essential element of fraudulent misrepresentation, and justifiable reliance likewise appeared to be an essential element under the holdings of Schottenstein and Johnson v. Davis, 480 So. 2d 625, 628 (Fla. 1985). See Johnson, 480 So. 2d at 628 ("[T]he Davises' reliance on the truth of the Johnsons' representation was justified . . . ."). However, the court in Butler did not say that it was overruling the holdings of those cases when it held that justifiable reliance was not an element of fraudulent misrepresentation. 44 So. 3d at 105. As this court noted in Billington, the Florida Supreme Court does not overrule itself sub silentio. 192 So. 3d at 81 n.4. Therefore, this court in Billington certified a question of great public importance: whether the decision in Butler meant to overrule prior decisions regarding the justifiable reliance requirement. Id. at 85. We likewise certify a similar question to the Florida Supreme Court as a matter of great public importance:

> DID THE COURT IN BUTLER OVERRULE THE DECISIONS IN BESETT, JOHNSON, AND SCHOTTENSTEIN BY HOLDING THAT JUSTIFIABLE RELIANCE IS NOT AN ESSENTIAL ELEMENT OF FRAUDULENT MISREPRESENTATION?

In conclusion, we affirm that part of the judgment finding Defendants individually liable to PGI for breach of warranty. We reverse the remainder of the judgment and

remand this case to the trial court to enter judgment in favor of PGI only for breach of warranty.

AFFIRMED in part; REVERSED in part; REMANDED; QUESTION CERTIFIED.

SAWAYA, PALMER and TORPY, JJ., concur.