

NO. 21-0909

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2021

**IN RE TERRAPIN STATION, LLC, DEBTOR
TOUCH OF GREY ROASTERS, INC., PETITIONER**

v.

CASEY JONES, CHAPTER 7 TRUSTEE, RESPONDENT

**ON WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS
FOR THE THIRTEENTH CIRCUIT**

BRIEF FOR PETITIONER

Team P. 39
Counsel for Petitioner

QUESTIONS PRESENTED

- I. Whether a seller of goods is entitled to reduce its preference exposure pursuant to 11 U.S.C. § 547(c)(4) by the value of goods sold even though the debtor in possession paid for such goods in full pursuant to 11 U.S.C. § 503(b)(9)?
- II. Whether a trustee must timely perform the obligations of a debtor under 11 U.S.C. § 365(d)(3) by paying rent due prior to the rejection of an unexpired nonresidential real property lease but allocable to the period after the effective date of rejection?

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OPINIONS BELOW

The Thirteenth Circuit Court of Appeals opinion can be located at Case No. 21-0909. Both the Thirteenth Circuit and the District Court of Moot affirmed the Bankruptcy Court of Moot’s decision that the section 547(c)(4) defense should not apply, and section 365(d)(3) should follow the “proration” approach.

STATEMENT OF JURISDICTION

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

STATEMENT OF CONSTITUTIONAL AND STATUTORY PROVISIONS

The statutory provisions relevant to the case before the Court are listed below and provided in the Appendices.

11 U.S.C. § 365(a)

11 U.S.C. § 365(d)(3)

11 U.S.C. § 503(b)(9)

11 U.S.C. § 547(a)

11 U.S.C. § 547(b)

11 U.S.C. § 547(c)(4)

11 U.S.C. § 549(a)

11 U.S.C. § 1107(a)

11 U.S.C. § 1112(a)

SUMMARY OF THE FACTS

Touch of Grey Roasters, Inc. (“Touch of Grey”) is an award-winning international coffee chain associated with the use of free-trade coffee. R. at 3. In 2017, Touch of Grey began to promote small, independently owned coffeehouses. *Id.* at 4. Touch of Grey started to franchise new “neighborhood coffeehouses” run by owners of existing independent coffeehouses. *Id.* These new coffeehouses would sell Touch of Grey’s new line, “Dark Star” products. *Id.* These newly franchised coffeehouses would include expanded food offerings, poetry readings, live music, and serve alcoholic beverages at night. *Id.*

Terrapin Station, LLC (the “Debtor”) is a limited liability company owned by Mr. William Tell (“Mr. Tell”), its sole member. R. at 3. Mr. Tell operated a small independent coffeehouse in the Town of Terrapin, Moot. *Id.* Even still, Mr. Tell’s independent coffeehouse earnings stagnated and the business needed revitalization. *Id.* at 4.

Touch of Grey approached the Debtor about the new “neighborhood coffeehouse” concept. *Id.* Mr. Tell was intrigued by the ability to partner his small independent coffeehouse with Touch of Grey, an industry leader, and agreed to move forward with the venture. *Id.* Touch of Grey then bought a warehouse located at 5877 Shakedown Street (“Premises”) for the Debtor to operate the franchise. *Id.* On July 1, 2018, the Debtor entered into a Lease Arrangement (the “Lease”) with Touch of Grey for the Premises. *Id.* The Lease was a twenty-year triple net lease that required the Debtor to pay monthly rent of \$25,000. *Id.* The Lease requires rent to be “due in advance of the first day of each month.” *Id.*

On December 1, 2018, the Debtor opened “Terrapin Station Coffeehouse.” *Id.* at 5. The Debtor’s business operated without incident for the majority of 2019. *Id.* Yet by November 1, 2019, it owed Touch of Grey \$700,000 for the Dark Star goods it had purchased. *Id.* On December

5, 2019, Touch of Grey sent the Debtor a notice of default but continued to supply Dark Star products to the Debtor. *Id.*

On December 7, 2019, Touch of Grey and the Debtor entered into a Forbearance Agreement. *Id.* In the Agreement, “Touch of Grey agreed to forbear from terminating the franchise agreement in exchange for the following: (i) a payment of \$250,000 from the Debtor on account of the outstanding invoices for Dark Star products, (ii) reaffirmation by the Debtor of its obligations under the Lease, and (iii) a release of any and all claims or causes of action that the Debtor had against Touch of Grey.” *Id.* The Debtor paid Touch of Grey \$250,000 on the day of the forbearance agreement. *Id.* Additionally, on December 18, 2019, the Debtor ordered an additional \$200,000 of Dark Star goods from Touch of Grey on credit received the goods on December 21, 2019. *Id.* at 5, 6.

The Debtor filed for bankruptcy under chapter 11 on January 5, 2020 (the “Petition Date”) in the United States Bankruptcy Court for the District of Moot. *Id.* During this period, the Debtor was current under the Lease. *Id.* Even so, the Debtor owed Touch of Grey \$650,000, including the amount identified under the invoice. *Id.*

The Debtor proposed to continue selling Dark Star products during the chapter 11 reorganization. *Id.* Two weeks later, the Debtor filed a “critical vendor” motion that requested authority to pay Touch of Grey \$200,000, arguing that Touch of Grey was critical to its reorganization effort. *Id.* Once paid, Touch of Grey agreed to continue selling goods on credit to the Debtor. *Id.* The United States Trustee opposed the motion, asserting that the Bankruptcy Code (the “Code”) does not authorize critical vendor payments. *Id.* at 7. But the Debtor’s creditors’ committee supported the motion, given Touch of Grey’s importance to the reorganization efforts. *Id.* The trial court awarded Touch of Grey an administrative expense under section 503(b)(9) for

the value of the goods sold reflected on the “invoice.” *Id.* The court denied the critical vendor motion. *Id.* The Debtor paid Touch of Grey \$200,000 several days later and Touch of Grey resumed selling goods on credit to the Debtor. *Id.*

The Debtor closed its doors during the COVID-19 pandemic, and on May 5, 2020, the Debtor permanently vacated the Premises. *Id.* On May 6, 2020, the Debtor filed a motion with the trial court to reject the Lease under section 365(a). *Id.* Touch of Grey moved to compel payment of the rent arising May 1, 2020, under section 365(d)(3). *Id.* at 8. The Court held a virtual hearing on May 29, 2020, where the Debtor announced it was converting to chapter 7 under section 1112(a). *Id.* After the conversion, the chapter 7 trustee (the “Trustee”) took an aggressive posture, objecting to the motion to compel the payment of May rent and commencing an adversary proceeding to recover the \$250,000 under section 547(b). *Id.* Touch of Grey filed an answer and asserted the new value defense under section 547(c)(4). *Id.* The trial court ruled for the Trustee on both issues. *Id.* at 9. The District Court of Moot and the Thirteenth Circuit upheld these decisions. *Id.*

SUMMARY OF THE ARGUMENT

This Court should reverse the lower court’s decisions and find that section 547(c)(4) allows for preference exposure reduction by the value of a post-petition claim and that section 365(d)(3) follows the “billing day” approach.

I. Section 547(c)(4)

Section 547(c)(4) can be used as a defense to a preference action when a claim is paid post-petition because: (1) Touch of Grey extended new value to the Debtor, (2) the plain language of section 547(c)(4)(b)— read with a broader contextual view— closes the analysis at the Petition Date, and (3) to incentivize trade creditors. Section 547(c)(4) states that a creditor who gives new value to the debtor is entitled to a preference defense after receiving a preferential transfer. In addition, section 547(a)(2) defines new value as “money, or money’s worth of goods, services, or new credit” Touch of Grey extended new value to the Debtor by extending \$200,000 of new credit and thus is entitled to a section 547(c)(4) defense.

The Respondent will argue the section 503(b)(9) claim is an unavoidable transfer. But that argument does not support the plain language of section 547(c)(4)(B). There are several contextual indicators in the Code that point to the petition date as a cut off for analysis of the new value defense. First, section 547 is titled “Preferences,” suggesting that it concerns transactions during the preference analysis. Second, section 547(c)(4) aligns with the “hypothetical liquidation test,” which uses the petition date as the cut off for determining new value. Third, the statute of limitations for filing a preference avoidance action begins at the petition date. Finally, the “improvement-in-position test” only considers transfers before the petition date. Therefore, because the section 547(c)(4) analysis closes at the petition date, and Touch of Grey’s

administrative claim under section 503(b)(9) was paid after the petition date, the unavoidable transfer analysis is inaplicable.

The original intent of section 547(c)(4) was to incentivize trade creditors to continue dealing with distressed businesses. The petition date serving as a hard stop for the preference payments allows the creditor to fulfill the statute's purpose of dealing with distressed businesses. Accordingly, this Court should reverse the finding of the lower court that a section 547(c)(4) defense cannot apply when a post-petition payment under section 503(b)(9) is paid.

II. Section 365(d)(3)

This Court should find that section 365(d)(3) should follow the "billing day" approach for these three reasons: (1) the plain language of section 365(d)(3), (2) the legislative intent of section 365(d)(3), and (3) the policy goals of section 365(d)(3). Section 365(d)(3) states, "the trustee shall timely perform all the obligations of the Debtor." This Court has stated that a statute's plain language should be conclusive. The plain language of a statute is conclusive, and the statute says, "shall timely perform all obligations." Therefore, section 365(d)(3)'s plain language is unambiguous and should follow the "billing day" approach and require full payment for May 2020.

The legislative intent of section 365(d)(3) aids this Court in finding the "billing day" approach is more appropriate. Section 365(d)(3) was added to the Code in 1984 to alleviate burdens on landlords by requiring timely compliance with the terms of the lease. Thus, the legislative intent of section 365(d)(3) supports the "billing day" approach.

Finally, this Court should note that the original policy goal for section 365(d)(3) was to protect vulnerable landlords. Congress aimed to protect commercial landlords, with section 365(d)(3), who faced unfair treatment in their claims for unpaid rent yet were still forced to provide services. Considering the policy goals of 365(d)(3), this Court should not be hesitant in adopting

the “billing day” approach. The “billing day” approach follows section 365(d)(3)’s plain language, legislative intent, and policy goals. Thus, this Court should reverse the lower court finding for the “proration” approach.

ARGUMENT

When reviewing a bankruptcy court’s conclusions of law, they are addressed under a *de novo* standard of review. *In re Soileau*, 488 F.3d 302, 305 (5th Cir. 2007). Under a *de novo* standard of review, the reviewing court decides an issue as the trial court. *Razavi v. Comm’r of Internal Revenue*, 74 F.3d 125, 127 (6th Cir. 1996). Touch of Grey raises two questions: (I) whether section 547(c)(4) allows for the reduction of preference exposure by the value of a post-petition section 503(b)(9) claim; and (II) should section 365(d)(3) follow the “billing day” approach. Because the parties do not dispute the facts, these questions are based on the bankruptcy court’s conclusions of law on the Code. R. at 9. Therefore, this Court’s standard of review for these questions is *de novo*.

D) TOUCH OF GREY CAN REDUCE ITS PREFERENCE EXPOSURE THROUGH THE SUBSEQUENT NEW VALUE DEFENSE DESPITE RECEIVING A POST-PETITION PAYMENT.

A trustee may not avoid transfers to a creditor when the creditor has extended new value to the debtor after receiving a preferential transfer. 11 U.S.C. § 547(c)(4). The use of the subsequent new value defense when receiving a post-petition payment remains a contested issue among the courts. Accordingly, the Thirteenth Circuit erred when it held that Touch of Grey could not use the subsequent new value defense after receiving an administrative expense payment from the Debtor post-petition.

A. TOUCH OF GREY PROVIDED “NEW VALUE” TO THE DEBTOR.

This Court held that when the language of a statute is plain, a court’s role is to enforce the statute according to its terms. *Lamie v. U.S. Tr.*, 540 U.S. 526, 534 (2004). Under the subsequent new value defense, a creditor is protected from avoidance of a preferential transfer if the creditor provided “new value to or for the benefit of the debtor” after such transfer. 11 U.S.C. § 547(c)(4); *see also In re Commissary Operations, Inc.*, 421 B.R. 873, 876 (Bankr. M.D. Tenn. 2010). A “preferential transfer” is a payment made to a creditor on an antecedent debt, on or within 90 days

of the petition date, while a debtor was insolvent. 11 U.S.C. § 547(b). “New value” is defined as, “money or money’s worth in goods, services, or new credit[.]” 11 U.S.C. § 547(a)(2); *see also In re Commissary Operations, Inc.*, 421 B.R. at 876.

i. *In re Commissary* supports that Touch of Grey gave new value.

The court in *In re Commissary* held that deliveries entitled to a section 503(b)(9) claim could constitute new value under sections 547(a)(2) and 547(c)(4). *Id.* at 879. In that case, the debtor was a wholesale distribution business for chain restaurants. *Id.* at 875. The debtor made several alleged preferential transfers to its creditors ninety days before the petition date. *Id.* Under section 503(b)(9), the creditors asserted administrative claims. *Id.* Subsequently, the debtor began adversary proceedings seeking recovery of the preference payments. *Id.* The creditors raised the subsequent new value defense, which applies to new value provided to the debtor within twenty days of the bankruptcy petition. *Id.* The court analyzed the plain language of the subsequent new value defense and the definition of new value under section 547(a)(2). *Id.* at 876. The court’s analysis reasoned that a creditor is protected from avoidance of an alleged preference transfer if the creditor gave new value after a prior preferential transfer. *Id.* The court then concluded that the creditor’s right to a subsequent new value defense is not altered by a section 503(b)(9) claim because the claim arises after the petition date. *R.* at 7. After the preferential transfer, the court determined that goods shipped to and received by the debtor within twenty days of the petition date satisfy the definition of new value. *Id.* at 878.

In re Commissary is analogous to this case. Touch of Grey received \$250,000 on December 7, 2019, from the Debtor. *R.* at 5. On December 18, 2019, Touch of Grey then provided the Debtor with \$200,000 of new credit under an invoice. *Id.* Touch of Grey delivered the goods from the invoice on December 21, 2019. *Id.* at 6. On January 5, 2020, the Debtor filed for relief under

chapter 11 of the Code. *Id.* at 6. The bankruptcy court awarded Touch of Grey a section 503(b)(9) claim post-petition. *Id.* at 7. The Trustee then started adversary proceedings against Touch of Grey for the December 7, 2019, transfer. *Id.* at 8. In response, Touch of Grey asserted a subsequent new value defense of \$200,000 from the invoice and goods delivered to the Debtor. *Id.* The section 503(b)(9) claim did not arise until several weeks after the Petition Date. *Id.* at 7.

After applying the same analysis as *Commissary*, Touch of Grey provided new value because it shipped goods on credit to the debtor on December 21, 2019. *Id.* at 5, 6. Touch of Grey received a preferential transfer on December 7, 2019, and later provided \$200,000 of prepetition new credit. *Id.* at 5. Credit qualifies as new value. As a result, Touch of Grey is entitled to the subsequent new value defense.

ii. Credit is new value.

Touch of Grey extended new value in a \$200,000 credit to the Debtor. *Id.* at 5. New value is defined as, among other things, “money or money’s worth in goods, services, or new credit.” 11 U.S.C. § 547(a)(2). In *In re Toyota of Jefferson, Inc.*, the creditor advanced a series of checks to Toyota, the debtor. *In re Toyota of Jefferson, Inc.*, 14 F.3d 1088, 1089 (5th Cir. 1994). The debtor satisfied payment for the advances. *Id.* 1089–90. The creditor deposited the payments within the ninety-day preference window. *Id.* at 1090. When the debtor filed a voluntary petition for relief under chapter 11, the trustee filed an adversary proceeding, seeking to recover all payments made to the creditor. *Id.* The Magistrate Judge found that all payments were preferential, but only the last payment could be recovered. *Id.* The Judge reasoned that the initial transactions were simply “the same money being passed back and forth.” *Id.* Thus, avoiding these payments would be unjust enrichment of the estate. *Id.*

The trustee timely appealed, arguing that because the defenses outlined in sections 547(c)(1) and (c)(2) was inapplicable, the bankruptcy estate should be replenished by all payments. *Id.* at 1091. The creditor asserted the subsequent new value defense. *Id.* The court determined that the defense applied, and looked to the role that section 547(c)(4) was meant to play by its drafters *Id.* The court found that the subsequent new value defense “most obviously applies to revolving credit relationships.” *Id.* (quoting Raymond T. Nimmer, *Security Interests in Bankruptcy: An Overview of Section 547 of the Code*, 17 Hous. L. Rev. 289, 299 (1980)). The court also looked to policy considerations of the exception. *In re Toyota of Jefferson, Inc.*, 14 F.3d at 1091. The court noted that a creditor who continues to extend credit to a debtor would only increase his bankruptcy loss without the defense. *Id.*

Additionally, the subsequent new value defense encourages creditors to continue their revolving credit relationships with financially distressed debtors so they might avoid bankruptcy altogether. *Id.* Finally, the court determined that since an extension of new value followed the first preferential payments, they could not be clawed back into the estate. *In re Toyota of Jefferson, Inc.*, 14 F.3d at 1092.

Here, the Debtor made a \$250,000 preferential payment to Touch of Grey on December 7, 2019. R. at 5. Touch of Grey advanced new value in a \$200,000 credit to the Debtor following this payment. *Id.* The Debtor used the entire amount of the credit to purchase new essential products for business. *Id.* at 4–5. Before Touch of Grey’s advance, it became clear that the Debtor was in financial distress. *Id.* at 5. It could not pay its debts as they became due in September 2019. *Id.* at 5. It owed Touch of Grey \$700,000 by November 2019. *Id.* at 5. Aggravating its situation, the Debtor owed \$500,000 to other creditors. *Id.* at 6. These creditors refused to sell the Debtor goods

on credit. *Id.* It would be nonsensical to disqualify credit as new value since Touch of Grey was one of the few remaining creditors willing to help the Debtor avoid bankruptcy.

B. SECTION 547(C)(4) IS UNAMBIGUOUS.

The defense to a preference claim, described in section 547(c)(4), closes the window for preference analysis at the petition date. There is a narrow split among district and bankruptcy courts as to whether a temporal limitation applies to preference analysis. Stephen D. Lerner, Third Circuit Rules Postpetition Payments Do Not Affect the New Value Defense Under § 547(c)(4), 2014 Norton Bankr. L. Adviser 1, 2 (2014). A slight majority of courts hold that there is no temporal limitation. By contrast, an increasing minority of courts hold that the petition date serves as a “hard stop” for preference analysis—disallowing query of court-ordered payments post-petition. *Id.* This Court noted that when interpreting the “Code, the Supreme Court has been reluctant to declare its provisions ambiguous, preferring instead to take a broader, contextual view, and urging courts to ‘not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and its object and policy.’” *Kelly v. Robinson*, 479 U.S. 36, 43 (1986) (“As the Supreme Court has often noted, ‘[s]tatutory construction [] is a holistic endeavor,’ and this is especially true of the Bankruptcy Code.”) (quoting *United Sav. Ass’n of Tex. v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371, 108 S.Ct. 626, 98 L.Ed.2d 740 (1998)). This Court has applied this principle to the Code, prescribing courts to interpret the various sections of the Code as part of a “comprehensive scheme.” *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012). Many contextual indicators show that the petition date serves as a hard stop to preference analysis, allowing post-petition payments to offset one’s preference liability (or “ending preference analysis at the petition date”).

In *Friedman*, the debtor made an \$81,997 payment to the creditor for staffing services within the ninety-day preference period. *In re Friedman's Inc.*, 738 F.3d 547, 549–62 (3d Cir. 2013). The creditor later extended services valued at \$100,660. *Id.* at 549. The debtor ultimately filed for bankruptcy under chapter 11 and later converted to chapter 7. *Id.* at 549. As of the petition date, the debtor had around 3,500 employees, of which it had outstanding obligations for \$4 million. *Id.* The debtor requested permission from the court to pay its employees prepetition wages. *Id.* Without the court's approval, the debtor reasoned that its employees would depart en masse, resulting in "irreparable harm" to reorganization. *Id.* The court subsequently granted the debtor's motion, and it paid its creditor \$72,412 for prepetition staffing services. *Id.* at 550. Friedman's Liquidating Trust, the successor in interest to the debtor, sued to avoid the transfers made to the creditor as preferences. *Id.* The creditor asserted the subsequent new value defense. *Id.* The creditor argued that the trustee could not avoid the transfers because it extended a new value, \$100,660, that exceeded the initial preferential transfer, \$81,997. *Id.* The trust responded that the new value defense had to be reduced by the post-petition payment made to the creditor because the post-petition payment was made under a wage order. *Id.* The court reasoned that since the payment was "an otherwise unavoidable" as a court-ordered payment, the creditor's new value defense had to be reduced by the payment. *Id.* at 551. The court relied on case law in holding that the "otherwise unavoidable" transfer was made post-petition, and therefore, it could not enter preference calculation. *Id.* at 551. The District Court affirmed the bankruptcy court's holding but found that language in caselaw to be dicta. *Id.* The court conceded that the language in the caselaw it relied on could also be construed as dicta. *Id.* The trust administrator appealed, arguing that the District Court erred in relying on dicta rather than the plain language of section 547(c)(4) and allowing the creditor to "double-dip" contrary to policies underlying bankruptcy law. *Id.*

The Third Circuit Court agreed with the trust administrator and found the language used to be dicta. *Id.* at 552. Having concluded that no prior opinion bound the court, it turned to the plain language of section 547(c)(4)(B) as recommended by the trust administrator. *Id.* at 553. In doing so, the court contextualized the new value defense with surrounding provisions of the Code. *Id.* at 553–57. It found several indicators that point to the petition date as a cutoff for preference calculations. *Id.* at 555. The court first looked to the provision as a whole. *Id.* It noted that as a general matter, section 547 is titled “Preferences,” inferring that all subsections of the provision fall within the ninety-day prepetition preference window. *Id.* The court then found the subsequent new value defense to follow the “hypothetical liquidation test” described in section 547(b)(5) of the Code. *Id.* at 556. Courts have required this test to be performed as of the petition date. *Id.* It then analyzed the interplay between the new value defense and the statute of limitations for filing a preference avoidance action under section 546. *Id.* The statute of limitations for filing a preference avoidance action is either two years after confirmation or one year after a trustee is appointed. 11 U.S.C. § 546. The court found that if it allowed post-petition preference analysis, it would clash with the statute of limitations, disrupting a trustee’s ability to calculate preferences. *Id.* Next, the court found that the new value defense was congruous with the “improvement-in-possession” defense outlined in section 547(c)(5) of the Code. *Id.* The court noted that since the defense states, “as of the date of the filing of the petition,” its direct neighboring provision section 547(c)(4) should also comply with this rule. *Id.* Finally, the court noted that almost no courts allow post-petition new value as a defense. *Id.* at 557. Thus, to allow a trustee or debtor-in-possession to calculate preference liability post-petition would be unreasonable.

The court then addressed the trust administrator’s policy argument. *Id.* at 562. It rejected the trust administrator’s assertion that the policy goals, to prevent “double-dipping,” should

compel the court to rule in its favor. *Id.* The Third Circuit relied on the policy goals of section 547 being twofold: The first goal is to encourage creditors to continue extending credit to financially troubled businesses while discouraging a panic-stricken race to the courthouse by creditors; *Id.* “Second, and more importantly, the preference provisions facilitate the prime bankruptcy policy of equality of distribution among creditors of the debtor.” *Id.* at 558.

The Third Circuit explained that by extending new value to a debtor, the creditor effectively replenishes the estate by aiding the debtor to avoid bankruptcy. *Id.* It also concluded that the assertion of “double-dipping” was misleading because “it implies that the creditor is receiving payment for goods or services that were never provided, or that the creditor is being paid twice.” *Id.* To maintain equality of distribution, a creditor who is repaid post-petition for new value should be treated identically to one who is repaid prepetition. *Id.* at 559.

By extending new value to the Debtor, Touch of Grey allowed it to reorganize under chapter 11 of the Code. R. at 6. During the chapter 11 reorganization, Touch of Grey extended additional new value—but did not assert it as a defense. *Id.* at 7. Here, Touch of Grey only asserts that the prepetition \$200,000 credit should reduce its preference exposure. *Id.* at 5. Bestowing deference to equality in bankruptcy, Touch of Grey only sought to use the prepetition new value to reduce its preference exposure. *Id.* at 8. Further, enabling the trustee to claw back the preference because the court authorized a post-petition payment would defeat the entire purpose of the subsequent new value defense. This reasoning serves no purpose when contrasted with the overall policy goals of section 547—equality of distribution.

- i. The “hypothetical liquidation test,” the “improvement in position test,” and the statute of limitations for a preference action show that the preference analysis closes on the petition date.**

The subsequent new value defense cooperates with the “hypothetical liquidation test.” This Court has held that the “hypothetical liquidation test” should be performed as of the petition date, stopping post-petition preference analysis like section 547(c)(4). *In re Friedman’s Inc.*, 738 F.3d at 556; *see also* 5 Collier on Bankruptcy 547.03(16th ed. 2013) (stating that section 547(b)(5) codifies holding from *Palmer Clay Prod. Co. v. Brown*, 297 U.S. 227 (1936)), in setting petition date to be used in hypothetical liquidation analysis); *In re Tenna Corp.*, 801 F.2d 819, 820-24 (6th Cir. 1986) (holding that the hypothetical liquidation test must be performed as of the petition date); *Cf. In re LCO Enter.*, 12 F.3d 938, 938-46 (9th Cir. 1993) (“court must determine the relative positions of the creditors on the date the petition is filed”).

Courts have used this test to compare a preference payment received by a creditor with what the creditor would have received in a hypothetical chapter 7 liquidation. 11 U.S.C. § 547(b)(5). Section 547(b)(5) provides that a trustee may avoid payments by the debtor that granted the recipient a more significant benefit than a similarly situated creditor would have received in a hypothetical liquidation executed on the petition date. *Palmer Clay Prod. Co.* 297 U.S. at 229. Suppose the creditor is found to have derived a cognizable benefit. In that case, the preferential transfer is avoidable only if it diminishes the estate to the detriment of creditors of the same class. *Kapela*, 649 F.2d at 892.

Since the hypothetical liquidation test is used to determine whether a payment can be avoided as a preference, the date used is considered essential. *In re Tenna Corp.*, 801 F.2d at 820. The balance of assets available for distribution could be different post-petition. *Id.* at 821. The petition date is important because it analyzes the ninety-day preference period. Because this

avoidance test should be performed at the petition date, ending further inquiry, statutory interpretation calls on section 547(c)(4) to be read the same.

Additionally, section 547(c)(5) is an analogous defense to section 547(c)(4) and thus should be read the same. The “improvement-in-position test” provides a preference defense to a creditor with a floating lien on a debtor’s inventory and receivables. *In re Friedman’s Inc.*, 738 F.3d at 556. This defense is available “so long as the creditor did not improve its position during the preference period.” *Id.* Section 547(c)(5) includes only those transfers “as of the date of the filing of the petition.” *Id.* In *In re Friedman’s Inc.*, the court stated Congress intended to limit the analysis to the petition date in section 547(c)(5). *Id.* Because both section 547(c)(4) and section 547(c)(5) serve as defenses under section 547(c), the court reasoned that Congress intended for the petition date analysis to apply to section 547(c)(4). *Id.*

Lastly, the statute of limitations for filing a preference avoidance action in a voluntary bankruptcy case begins to run on the petition date operating effortlessly with the reasoning that section 547(c)(4) sets the petition date as the cutoff for preference analysis. *Id.* at 556. Because the statute of limitations for a preference avoidance action under section 546 generally begins on the petition date, it is inferred that preference calculation also ends at the petition date. *Id.* If section 547(c)(4) is read to allow post-petition payments to defeat a new value defense, the calculation of preference liability may change. *Id.* This disruption of a trustee’s cause of action conflicts with the purpose of a statute of limitations. *Id.* Thus, in reading sections 546 and 547(c)(4) together, the petition date serves as the end to preference liability analysis.

ii. Section 547(c)(4) complies with the definition of new value and a trustee’s avoidance power.

Section 547(c)(4) complies with sections 547(a) and section 549. Section 547(c)(4)(B) focuses on actions of the debtor “on account of which new value the debtor did not make an

otherwise unavoidable transfer” Throughout sections 547 and 549, “the debtor” refers to the prepetition entity that transferred property or engaged in business with the preference defendant. 11 U.S.C. §§ 547, 549.

The trustee or debtor-in-possession can recover a post-petition transfer not authorized by the court or by the Code under section 549: “the trustee may avoid a transfer of property of the estate that occurs after the commencement of the case [.]” 11 U.S.C. § 549(a)(1). Notice that this section delineates a transfer of *property of the estate* and excludes a payment made by a debtor. *In re Phoenix Rest. Grp., Inc.*, 373 B.R. 541, 547 (M.D.Tenn. 2007). Congress further shows that it knew how to distinguish between the “debtor” and a “trustee” in section 547(a), where it defined “new value” as “money or money’s worth in goods, services, or new credit . . . that is neither void nor voidable by the debtor or the trustee under any applicable law.” 11 U.S.C. § 547(a). Interpreting the term “debtor” in section 547(c)(4)(B) to include the trustee would render the reference to “the debtor or the trustee” in the definition of “new value” under section 547(a) superfluous. 11 U.S.C. § 547(a); *see also Hibbs v. Winn*, 542 U.S. 88, 101 (2004).

If Congress intended section 547(c)(4) to account for payments made post-petition, the section would have included language consistent with “an otherwise unavoidable transfer of an interest of the estate in property to or for the benefit of such creditor.” Instead, Congress disallowed only new value paid for by “the debtor” with an otherwise unavoidable transfer. 11 U.S.C. § 547(c)(4)(B); *see also In re Phoenix Rest. Grp., Inc.*, 373 B.R. 546. Similarly, the post-petition transfer made here was made by the debtor-in-possession out of an interest of the estate. R at 7. Thus, it is contextually inconsistent with the plain language of sections 547 and 549 and places it out of reach of preference analysis.

C. DISQUALIFYING POST-PETITION PAYMENTS TO REDUCE PREFERENCE EXPOSURE WOULD IMPOSE A CHILLING EFFECT ON TRADE CREDITORS' WILLINGNESS TO EXTEND CREDIT TO DISTRESSED BUSINESSES CONTRARY TO CONGRESS' INTENT.

In applying the subsequent new value defense, courts consistently look to the policy objectives underlying the preference provisions of the Code. The House Committee Report shows that the purpose of the preference section is two-fold: (1) to discourage creditors from racing to the courthouse and (2) to maintain equality of distribution among a debtors creditors. H. R. REP. No. 95-595, at 6137-6138 (1978). Additionally, without the protection of section 547(c)(4), a creditor that continues to extend new value to the debtor would only be increasing his bankruptcy loss. *In re Toyota of Jefferson, Inc.*, 14 F.3d (quoting Raymond T. Nimmer, *Security Interests in Bankruptcy: An Overview of Section 547 of the Code*, 17 Hous.L.Rev. 289, 299 (1980)). Forcing a creditor to choose between an administrative expense and the statutory defense in section 547(c)(4), conflicts with the long-standing interpretation and treatment of the subsequent new value defense. *In re Commissary Operations, Inc.*, 421 B.R. 876 (Bankr. M.D. Tenn. 2010).

In *Union Bank*, the debtor borrowed \$7 million from the creditor and subsequently made preferential transfers. *Union Bank v. Wolas*, 502 U.S. 151 (1991). The debtor paid the creditor interest for the loan totaling \$100,000 and a loan commitment fee of \$2,500. *Id.* at 153. The trustee filed a complaint against the bank to recover these payments under section 547(b) of the Code. *Id.* The bankruptcy court found that the loans were made “in the ordinary course of business.” *Id.* Thus, the trustee could not avoid the preferential payments under the ordinary course of business defense outlined in section 547(c)(2). *Id.* The ordinary course of business defense is an alternative to the subsequent new value defense. It disallows a trustee to avoid a transfer if such transfer was: “(A) made in the ordinary course of business or financial affairs of the debtor and the transferee; and (B) made according to ordinary business terms.” 11 U.S.C. § 547(c)(2). In finding that the

ordinary course of business defense was available to long-term creditors, this Court first looked to the plain language of section 547. *Id.* This Court then looked to the history and policy of section 547. *Id.* at 529–34.

Similarly, Touch of Grey asserted the subsequent new value defense under section 547(c)(4). R. at 8. Thus, this Court is again called on to analyze Congress' intent in an analogous defense. By allowing Touch of Grey to assert the subsequent new value defense to offset its preference exposure, this Court would uphold its policy analysis of the preference provisions. Touch of Grey was one of the few remaining trade creditors who continued to extend credit to the Debtor, even beyond the Petition Date. *Id.* at 6–7. The continued extension of credit to the Debtor directly results from Congress' intent to encourage creditors to continue to deal with distressed businesses. H. R. REP. No. 95-595, at 6137–38 (1978). Section 547(c)(4)(B) executes the intention of Congress with precision by incentivizing Touch of Grey to continue supporting a business needing help. R. at 5, 7. Touch of Grey consistently supported the Debtor long before it slid into bankruptcy. *Id.* at 4–7. Touch of Grey bought a newly renovated warehouse for the Debtor to begin its franchise. *Id.* at 4. Additionally, Touch of Grey served as the Debtor's franchisor and exclusive supplier of Dark Star Brand products. *Id.* at 4. By December 5, 2019, the Debtor owed Touch of Grey \$700,000. *Id.* at 5. However, Touch of Grey refrained from terminating the franchise agreement with the Debtor and continued extending credit both prepetition and post-petition. *Id.* at 5–7. With these extensions of credit, Touch of Grey gave the Debtor a chance to operate for another six months while paying its other creditors. *Id.* at 5–7. Without the protection afforded by the subsequent new value defense, Touch of Grey would only be increasing its loss in bankruptcy. Further, the creditors' committee supported post-petition payment to Touch of Grey to continue reorganization. *Id.* at 7. Therefore, this incentive supports the overarching purpose of the

preference provisions as stated by Congress—maintaining equality of distribution among creditors. H. R. REP. No. 95-595, at 6138 (1978).

D. The 503(B)(9) Payment is an Otherwise Avoidable Transfer as a Critical Vendor Payment.

Even if this Court does not conclude that the petition date serves as a “hard stop,” a 503(b)(9) payment is an otherwise avoidable transfer as a critical vendor payment. Although a trial court did not rely on a specific defense, it may offer alternative bases for upholding the judgment provided there is record support for their arguments. *Cox v. Sunbelt Sav. Ass’n*, 896 F.2d 957, 959 n.2 (5th Cir. 1990). While no Code provision expressly defines the elements needed to be met to qualify as a critical vendor, courts have invoked implied authority under various sections of the Code in applying the doctrine of necessity.

In *In re Phoenix*, the court granted the debtor-in-possession a critical vendor motion, authorizing it to pay one of its creditors. *In re Phoenix Rest. Grp., Inc.*, 373 B.R. 541 (M.D. Tenn. 2007). The creditors’ committee objected although this particular creditor was the sole supplier able to provide necessary inventory to the debtor during its reorganization. *Id.* at 544. The supplier threatened to stop supplying inventory unless the debtor-in-possession made payments on the supplier’s prepetition claims. *Id.* The Plan Administrator sought to avoid these transfers in an adversary proceeding, and the critical vendor pled various defenses, including the subsequent new value defense. *Id.* at 545. The court refused to accept the trustee’s position that the post-petition payments made by the debtor-in-possession under a critical vendor order were “otherwise unavoidable” transfers that could deplete new value given. The court reasoned that the preference window closes on the petition date. Thus, post-petition payments could not be used to reduce new value.

Like *Phoenix*, Touch of Grey was the only vendor authorized to provide necessary inventory per the parties' franchise agreement. R. at 4. Further, the creditors' committee supported the Debtor's assertion that Touch of Grey was a critical vendor. *Id.* at 6. Similarly, Touch of Grey was unwilling to extend additional credit to the Debtor without a post-petition payment. *Id.* at 6. Touch of Grey was the Debtor's only supplier of products making it a critical component for reorganization. *Id.* at 4. Following the reasoning in *Phoenix*, the post-petition transfer to Touch of Grey should be authorized under a critical vendor motion. Thus, transfers made under a critical vendor motion may not be used to analyze preference liability since it is made post-petition. The lower court declined to analyze whether the payment under a critical vendor order should be approved. *Id.* at 7. However, Touch of Grey is a critical vendor because it aligns with *Phoenix* and other case law requirements, as explained in more detail below. Accordingly, payments made under critical vendor motions are avoidable, satisfying all elements under the subsequent new value defense.

i. Touch of Grey is a critical vendor.

Touch of Grey qualifies as a critical vendor. Under the Seventh Circuit, to be eligible as such, it is necessary to show: (1) that the disfavored creditors will be as well off with reorganization as with liquidation; and (2) that the supposedly critical vendor would have ceased deliveries if old debts were left unpaid while the litigation continued. *In re Kmart Corp.*, 359 F.3d 866, 867–74 (7th Cir. 2004). Although the lower court did not attempt to analyze whether Touch of Grey qualifies as a critical vendor, the record shows that the Debtor's motion should have been granted as explained in more detail below.

Here, the committee representing the interests of all the Debtor's creditors endorsed the critical vendor motion. R. at 7. The Debtor asserted that Touch of Grey would not extend more

credit absent a partial payment of the debt owed. *Id.* at 6. The critical vendor elements under the Seventh Circuit are met. Touch of Grey qualifies as a critical vendor for the following reasons: (1) the creditors' committee determined that the remaining creditors would be as well off with reorganization and (2) Touch of Grey would cease extending credit absent partial payment of old debts.

ii. Critical Vendor payments may be used to reduce preference liability.

Touch of Grey may reduce its preference exposure by receiving a critical vendor payment. The doctrine of necessity provides that creditors who continue to do business post-petition with a debtor are essential to the debtor's reorganization. Nick J. Vizey, *Acquiring Critical Vendor Status*, 24 No. 3 Corp Couns Quarterly ART 1 (2008). These critical vendors may be entitled to receive priority payments on the prepetition obligations owed to them. *Id.* In *In re Phoenix*, the court granted the debtor-in-possession a Critical Vendor Motion, authorizing it to pay one of its creditors. *In re Phoenix Rest. Grp., Inc.*, 373 B.R. at 541 (holding that a trustee or debtor-in-possession may not use post-petition payments under the Critical Vendor Order to deplete prepetition new value given).

Not only does Touch of Grey meet all elements to qualify as a critical vendor, but the doctrine of necessity also provides that it has a right to receive payment on prepetition debts. Here, the prepetition debt is in the form of a \$200,000 credit that Touch of Grey extended to The Debtor. R. at 5. Touch of Grey served as The Debtor's landlord and franchisor. *Id.* at 4. Allowance of the continued occupation of the premises and further extension of new value was essential to the Debtor's reorganization efforts as Touch of Grey continued post-petition discussions to reorganize. *Id.* at 6. Because critical vendor payments are made post-petition and thus are not entered into

preference calculations in some courts, satisfaction on a critical vendor motion should not deplete Touch of Grey's subsequent new value defense.

II) THE THIRTEENTH CIRCUIT INCORRECTLY INTERPRETED SECTION 365(D)(3), WHICH IS CLEAR AS TO THE DEBTOR'S OBLIGATION TIMELY TO PERFORM UNDER ANY UNEXPIRED LEASE OF NONRESIDENTIAL REAL PROPERTY.

When a tenant who is bound by an unexpired lease for nonresidential real property files a bankruptcy petition, the landlord has the right to require the tenant to continue timely performance of their obligations under the lease, until that lease is either assumed or rejected. 11 U.S.C. 365(d)(3). Even still, a split exists among the courts as to whether section 365(d)(3) requires the debtor-tenant to pay the full month of rent or a prorated portion of the rent due when the debtor-tenant rejects a lease after the payment date comes due. The Thirteenth Circuit erred when it held that the Debtor is only liable for a prorated amount of rent for the days it occupied the property.

A. THE PLAIN LANGUAGE OF SECTION 365(D)(3) MAKES THE STATUTE CLEAR.

The task of resolving the dispute over the meaning begins where all such inquiries must begin: with the statute's language. *Ransom v. FIA Card Servs.*, N.A., 562 U.S. 61, 131 S. Ct. 716, 178 L. Ed. 2d 603 (2011) (quoting *United States v. Ron Pair Enter.*, 489 U.S. 235, 241, 109 S. Ct. 1026, 1030 (1989)). The plain language of section 365(d)(3) directly supports requiring timely performance of rental obligations under a lease for nonresidential real property. Section 365(d)(3) states: The trustee shall timely perform all the obligations of the Debtor. 11 U.S.C. § 365.

The plain language of section 365(d)(3) supports Touch of Grey's petition for full payment for May rent because the Debtor had an obligation under the lease terms to pay rent on the first of the month. The Sixth Circuit held that the obligation to pay rent arose on the first day of the month about a post-petition lease but pre-rejection. *In re Koenig Sporting Goods, Inc.*, 203 F.3d 986 (6th

Cir. 2000). In *Koenig*, the debtor-tenant had an obligation under the lease to pay rent on the first day of the month. *Id.* at 989. The debtor-tenant rejected the lease on the second day of the month and petitioned the Court to prorate the rental obligation for the number of days he was on the property. *Id.* at 988. The Court reasoned that section 365(d)(3) was unambiguous related to the debtors rent payment obligation and required a full month's rent payment. *Id.* at 989. The Court noted that the debtor-tenant was solely responsible for controlling when the entitlement of rent payment was due by rejecting the lease on the second day of the month. *Id.* The Court ruled that the statute favors payment of the entire amount of rent by the debtor-tenant. *Id.*

The Bankruptcy Court for the Southern District of Texas also examined a similar issue when it held that both the text and intent of section 365(d)(3) are unambiguous and require the debtor to timely perform all obligations under the lease. *In re CEC Ent., Inc.*, 625 B.R. 344 (Bankr. S.D. Tex. 2020). The Court noted that the language of section 365(d)(3) is unambiguous and requires timely performance by a debtor-lessee under a commercial lease. *Id.* at 353. The Court further noted that it could not override the statutory mandate of timely performance set out by section 365(d)(3). *Id.*

The lease terms determine the amount of rent due for the period before the rejection of a lease. As the record shows, the Debtor, and Touch of Grey entered into a twenty-five-year lease agreement on July 1, 2018. R. at 4. The Lease terms required the Debtor to pay Touch of Grey monthly rent on the first day of each month. *Id.* Section 365(d)(3) requires the timely performance of all obligations under any unexpired lease of nonresidential real property until such lease is assumed or rejected.

Because this was a chapter 11 case at the relevant time, a debtor-in-possession has the duties of a trustee. *See* 11 U.S.C. § 1107(a); *In re Cukierman*, 265 F.3d 846, 849 (9th Cir. 2001).

The Lease terms stipulated the Debtor's obligation to pay rent on the first of the month. R. at 4. Per the Lease, the Debtor was to pay \$25,000 in monthly rent on the first day of each month. *Id.* Section 365(d)(3) explicitly denotes the requirement of timely performance of all obligations under a lease of nonresidential real property. Here, the Debtor had an obligation, per the lease terms, to pay rent in full on May 1, 2020.

This case addresses a similar issue as that examined in *Koenig*. In this case, The Debtor rejected a lease for nonresidential real property after the obligation for monthly rent came due. Similarly, in *Koenig*, the Lease stipulates that rent is due on the first day of each month. Additionally, as in *Koenig*, the Debtor in this case, rejected the Lease a few days after the first of the month. The court in *Koenig* examined the statute's plain language to determine that the debtor was liable for the full amount of rent because the language of section 365 supported this obligation to pay rent on the first of the month. This Court should find that the plain meaning of section 365(d)(3) is unambiguous. Similarly, in *In re CEC Ent., Inc.*, the Court also decided held that section 365(d)(3) is clear and requires a debtor to pay the full amount of rent under the lease terms to comply with the statute's mandate of timely performance. As decided by both *Koenig* and *In re CEC Ent., Inc.*, the statute's plain language requires that the debtor-tenant pay rent, according to the lease, when rent is due.

B. THE BILLING DATE APPROACH FOLLOWS LEGISLATIVE INTENT.

The Courts below erred when it held that the proration approach better conforms to the plain language of section 365(d)(3). Adopting a proration approach would render Congress's intent meaningless. In viewing the statute by its plain meaning, the billing date approach requires timely performance under section 365(d)(3). Any interpretation of "obligation" or "timely performance" must be considered per the terms of the lease agreement contract. Section 365(d)(3) was added to the Code in 1984 to alleviate burdens on landlords by requiring timely compliance with the terms

of the lease. See *In re Montgomery Ward Holding Corp.*, 268 F.3d 205, 210 (3d Cir. 2001); *In re Hitz Rest. Grp.*, 616 B.R. 374, 376 (Bankr. N.D. Ill. 2020).

The legislative history reflects congressional concern that lessors of nonresidential real property were forced to extend credit to an estate during the time given for assumption or rejection of the lease. *In re Hitz Rest. Grp.*, 616 B.R. 374, 376 (Bankr. N.D. Ill. 2020). Senator Orrin Hatch, a conferee of section 365(d)(3), stated: “[T]he landlord is forced to provide current services -- the use of its property, utilities, security, and other services -- without current payment. No other creditor is put in this position...The bill would lessen these problems by requiring the trustee to perform all the obligations of the Debtor under a lease of nonresidential real property at the time required in the lease.” H.R.Rep. No. 882, 95th Cong., 2d Sess.1984, *reprinted in* 1984 U.S.C.C.A.N. 576.

The Sixth Circuit adopted the billing date approach to determine the amount of rent owed in the month when the debtor rejected the lease. *In re Koenig Sporting Goods, Inc.*, 203 F.3d 986. In *Koenig*, the Court held that a debtor had an obligation to pay rent for the entire month because the rent was due per the lease terms on the first day. Although the debtor rejected the lease on the second day of the month, the Court found that the language of section 365(d)(3) was unambiguous and rejected the proration approach.

The Eighth Circuit similarly found that the language of section 365(d)(3) is clear. *In re Burival*, 406 B.R. 548 (B.A.P. 8th Cir. 2009). In this case, the court examined the rent owed by a debtor who leased cropland and was required to pay rent twice a year in April and December. *Id.* The debtor petitioned for bankruptcy in November. *Id.* The bankruptcy court prorated the rent between the prepetition and post-petition periods, but the Eighth Circuit reversed, basing their decision on the plain language of section 365(d)(3). *Id.* The Eighth Circuit addressed Congress’

intent of section 365(d)(3), holding that the statute requires a debtor or trustee to perform all obligations when they come due. *Id.* at 553. The court reasoned that the debtor becomes a fiduciary to its creditors and must consider the timing of their petitions. *Id.* at 554. The court further noted that leases are another factor that a debtor must consider when filing a bankruptcy petition. *Id.* The court noted that a billing date approach was more extreme in a case in which rent was due twice a year, but the court was constrained to follow the language of section 365(d)(3). *Id.*

Likewise, the Bankruptcy Court for the Southern District of Texas, examined when a debtors obligation to pay rent arose post-petition. *In re CEC Ent., Inc.*, 625 B.R. 344. In that case, the debtors requested that the court abate rent payments because of restrictions placed on business stemming from COVID-19. *Id.* at 349. The court found that section 365(d)(3) expressly prohibits the court from allowing an extension beyond the initial 60-day period after the order for relief. *Id.* at 352. After reviewing each lease in question, the court determined the court held that under the lease terms, the debtor had an obligation to pay rent when rent came due. *Id.*

The Debtor eagerly entered into a lease with Touch of Grey on July 1, 2018. R. at 4. That lease stipulated that rent was due on the first day of each month. *Id.* The Debtor was aware of his obligation to pay rent, on time, in the amount of \$25,000. *Id.* The lower court cites *In re GCP CT Sch. Acquisition, LLC*, 443 B.R. 243, 254 n. 70 (Bankr. D. Mass. 2010). R. at 17. In its decision, the Court holds that the term “obligations” is a vague term that could have more than one meaning. *Id.* The lower court further concludes that “arises” does not state when a debtors obligations arise under 365(d)(3). R. at 18. *In re Montgomery Ward* defined the term obligation citing Black’s Law Dictionary. The court noted that *Black’s* defines “obligation” as a legal duty to do or not do something; a duty imposed by law or contract; a duty arising by contract. *Id.* In 1984, when the statute was passed, Black’s law dictionary defined “obligation” as: That a person is bound to do

or forbear; any duty imposed by law, promise, or contract. Black's Law Dictionary (5th ed. 1968). Likewise, the Debtor was aware of its obligation to pay rent, in full, and on time, the plain meaning of the language used in the statute reaches the same conclusion—that the Debtor had an obligation on May 1, 2020, to pay the total amount of rent due.

The *Burival* court examined the legislative history of section 365(d)(3) and the statutes intent to protect landlords who were forced to continue to provide service to debtors without compensation. *In re Burival*, 406 B.R. 548, 553. In reading Senator Hatch's comments, the statute's legislative intent is clear—timely performance of rent payments—pending the assumption or rejection of the lease. *Id.* As this Court has held, the plain language of a statute should be conclusive. *Ron Pair Enter.*, 489 U.S. 235. The plain language of section 365(d)(3) is not ambiguous and should be interpreted by the statute's language. Additionally, by examining the legislative intent of section 365(d)(3) it also stands to reason that the Debtor, in this case, had an obligation, under the Lease, to provide Touch of Gray with a payment for the full month's rent.

Congress enacted section 365(d)(3) to protect the interests of commercial landlords. Compared to other creditors, landlords were unfairly disadvantaged because they were forced to continue to provide current services to the debtor during the reorganization proceeding without payment and without the ability to re-rent the space to another tenant until after the debtor decided to assume or reject the lease. *In re Burival*, 406 B.R. 548, 553 (B.A.P. 8th Cir. 2009), *aff'd*, 613 F.3d 810 (8th Cir. 2010). By adding section 365(d)(3), Congress aimed at protecting commercial landlords who faced unfair treatment in their claims for unpaid rent yet were still forced to provide services such as the continued use of their property, utilities, and other services. *In re Montgomery Ward Holding Corp.*, 268 F.3d 205, 210 (3d Cir. 2001). Congress also intended to shift the burden of indecision to the debtor: the debtor must now continue to perform all the obligations of its lease

or make up its mind to reject it before some onerous payment comes due during the prerejection period. *In re Krystal Co.*, 194 B.R. 161, 164 (Bankr. E.D. Tenn. 1996). Because section 365(d)(3) provides that determining when a debtor's obligations to the landlord arise stems from the unexpired lease terms, there is no need to look beyond the lease agreement.

C. SECTION 365(d)(3) WAS ADDED TO THE CODE TO PROTECT LANDLORDS' INTERESTS.

Allowing a debtor to escape its obligations to pay the landlord on time would result in section 365(d)(3) becoming superfluous. By ignoring the plain mandates of the statute and the intent of Congress when it enacted the statute, landlords would be placed in the same position that caused Congress to pass the statute in the first place.

In *Koenig*, the Court noted that a debtor alone controls when an obligation to pay rent arises by choosing when to reject the lease. *In re Koenig Sporting Goods, Inc.*, 203 F.3d 986, 989. Like the debtor *Koenig*, the Debtor in this case had complete control over the date of rejection. Touch of Grey did not have a say on the Debtors choice to assume or reject the lease. Additionally, the Consolidated Appropriations Act, 2021 ("CAA"), which grants an extension to assume or reject a lease, was signed into law on December 27, 2020. *Consolidated Appropriations Act, 2021, 2020* Enacted H.R. 133, 116 Enacted H.R. 133, Part 6 of 6. The CAA grants a debtor, who has experienced or is continuing to experience a material financial hardship due to COVID-19 210 days to assume or reject an unexpired lease for nonresidential real property. *Id.* A debtor also can petition the Court for an additional 90-day extension. 11 U.S.C. 365(d)(4).

Unlike the options given to debtors, landlords are at the mercy of a debtor's indecision. Because a landlord must wait for the debtor to decide whether they will continue under the lease, section 365(d)(3) was enacted to ensure that landlords are timely compensated. The lower court notes that allowing a billing date approach to the Debtor's obligations creates "absurd and

egregious” results. R. at 21. Yet this observation is flawed. The Debtor and Touch of Grey bargained for the benefits of the lease agreement contract as it agreed to and entered into that contract. *Id.* at 4. Section 365(d)(3) protects both parties’ right to contract for an agreement that suits their needs. The lease agreement would have noted the intention if the parties intended a rent proration. The lease agreement states that rent is due on the first day of each month, and the Debtor agreed to those terms. *Id.* at 4.

Lastly, as the Dissent correctly states, “Judges are tasked with applying the law as written.” *Id.* at 28. Policy determinations are left to Congress. Congress intended to protect landlords from the unfair treatment they experienced in their claims before 1984. Congress chose the specific language of the statute to serve the purpose of requiring timely performance. If Congress had intended a different outcome, it would have stated so. If Congress were to seek a different result, it would say so. In all events, all policy determinations fall under Congress and not the Court.

CONCLUSION

This Court should reverse the decisions of the lower courts. Touch of Grey should receive the subsequent new value defense. First, Touch of Grey met the elements of the subsequent new valued defense because Touch of Grey extended new value after receiving a transfer from the Debtor. Second, the plain language of section 547(c)(4)(B) read with a broader contextual view closes the analysis at the petition date, eliminating the unavoidable transfer analysis. Finally, to remain in line with the policy goals of the subsequent new value defense to incentivize trade creditors.

Additionally, this Court should find that the Debtor must pay the May rent as described in the lease terms. This Court should adopt the “billing day” approach as it accounts for the plain language of section 365(d)(3), the legislative intent of section 365(d)(3), and the policy goals of section 365(d)(3). This Court should reverse the lower court’s decision for the above reasons.

Counsel for Petitioner

Team P. 39

APPENDIX A

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

(a) Except as provided in sections 765 and 766 of this title and in subsections (b), (c), and (d) of this section, the trustee, subject to the court’s approval, may assume or reject any executory contract or unexpired lease of the debtor.

(b)-(c) [omitted]

(d)

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

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

(3)

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

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

(i) the date that is 60 days after the date of the order for relief, which may be extended by the court for an additional period of 60 days if the court

determines that the debtor is continuing to experience a material financial hardship due, directly or indirectly, to the coronavirus disease 2019 (COVID-19) pandemic; or

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

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

(4)-(5) [omitted]

(e)-(p) [omitted]

APPENDIX B

11 U.S.C § 503– Allowance of Administrative Expenses

(a) An entity may timely file a request for payment of an administrative expense, or may tardily file such request if permitted by the court for cause.

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

(1)-(8) [omitted]

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

(c) [omitted]

APPENDIX C

11 U.S.C § 547 – Preferences

a) In this section--

(1) [omitted]

(2) “new value” means money or money’s worth in goods, services, or new credit, or release by a transferee of property previously transferred to such transferee in a transaction that is neither void nor voidable by the debtor or the trustee under any applicable law, including proceeds of such property, but does not include an obligation substituted for an existing obligation;

(3) - (4) [omitted]

(b) Except as provided in subsections (c), (i), and (j) of this section, the trustee may, based on reasonable due diligence in the circumstances of the case and taking into account a party’s known or reasonably knowable affirmative defenses under subsection (c), avoid any transfer of an interest of the debtor in property—

(1) to or for the benefit of a creditor;

(2) for or on account of an antecedent debt owed by the debtor before such transfer was made;

(3) made while the debtor was insolvent;

(4) made--

(A) on or within 90 days before the date of the filing of the petition; or

(B) between ninety days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider; and

(5) that enables such creditor to receive more than such creditor would receive if--

(A) the case were a case under chapter 7 of this title;

(B) the transfer had not been made; and

(C) such creditor received payment of such debt to the extent provided by the provisions of this title.

(c) The trustee may not avoid under this section a transfer--

(1)-(3) [omitted]

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

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

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

(5)-(9) [omitted]

(d) [omitted]

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

(g)-(j) [omitted]

APPENDIX D

11 U.S.C § 549 – Post Petition Transactions

(a) Except as provided in subsection (b) or (c) of this section, the trustee may avoid a transfer of property of the estate—

(1) that occurs after the commencement of the case; and

(2)

(A) that is authorized only under section 303(f) or 542(c) of this title; or

(B) that is not authorized under this title or by the court.

(a)-(d) [omitted]

APPENDIX E

11 U.S.C. § 1107 - Rights, Powers, and Duties of Debtor in Possession

(a) Subject to any limitations on a trustee serving in a case under this chapter, and to such limitations or conditions as the court prescribes, a debtor in possession shall have all the rights, other than the right to compensation under section 330 of this title, and powers, and shall perform all the functions and duties, except the duties specified in sections 1106(a)(2), (3), and (4) of this title, of a trustee serving in a case under this chapter.

(b) [omitted]

APPENDIX F

11 U.S.C. § 1112 – Conversion or Dismissal

(a) The debtor may convert a case under this chapter to a case under chapter 7 of this title unless—

- (1) the debtor is not a debtor in possession;
- (2) the case originally was commenced as an involuntary case under this chapter; or
- (3) the case was converted to a case under this chapter other than on the debtor's request.

(b)- (f) [omitted]