Team 3

No. 21-0909

IN THE

SUPREME COURT OF THE UNITED STATES

IN RE TERRAPIN STATION, *DEBTOR*,

TOUCH OF GREY ROASTERS, INC., *PETITIONER*,

V.

CASEY JONES, CHAPTER 7 TRUSTEE, *RESPONDENT*.

ON APPEAL FROM THE
UNITED STATES COURT OF APPEALS
FOR THE THIRTEENTH CIRCUIT

BRIEF FOR THE PETITIONER

TEAM NUMBER 3
COUNSEL FOR PETITIONER

JANUARY 20, 2022

QUESTIONS PRESENTED

I. When a creditor is entitled to a subsequent new value defense under 11 U.S.C. § 547(c)(4), should the amount of that defense be reduced by that creditor's receipt of a court ordered post-petition payment under 11 U.S.C. § 503(b)(9) even though the preference analysis closes at the petition date?

II. When rent is due under a lease agreement on a certain date between the order of relief and the rejection date, must a trustee timely pay rent on that date pursuant to 11 U.S.C. § 365(d)(3)'s requirement that a trustee timely perform all of the debtor's obligations that arise under a lease before the rejection date?

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OPINIONS BELOW

The opinion of the Thirteenth Circuit is available at No. 20-0803 and reprinted at page two of the Record.

STATEMENT OF JURISDICTION

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

RELEVANT STATUTORY PROVISIONS

The relevant statutory provisions are provided in full in the attached appendices.

STATEMENT OF THE CASE

The first issue on appeal concerns a fundamental goal of the Bankruptcy Code: to provide debtors the ability to rehabilitate and receive a financial fresh start from onerous debts. This goal is accomplished by the provisions in the Bankruptcy Code that encourage a creditor's continued participation in the debtor's business during the time directly before, and immediately following, the bankruptcy petition date. To this end, a creditor who provides continued financial support to a debtor should not be precluded from asserting a new value defense on account of a court ordered post-petition payment. This, to be sure, would improperly punish that creditor. The Thirteenth Circuit's decision, however, stands in direct contravention of this principle. This Court should therefore reverse.

The second issue on appeal involves section 365(d)(3), which Congress enacted in order to protect a landlord whose lessee files for bankruptcy. But the Thirteenth Circuit's decision unfairly strips such landlords of the protections afforded to them under the clear, unambiguous language of the statute. Bound by those statutory limitations, the Thirteenth Circuit should have held that a trustee must pay the debtor's rent payment in full when it becomes due under the terms of a lease agreement. It erred in ruling otherwise. Consequently, this Court should reverse.

Touch of Grey Roasters, Inc., and Terrapin Station, LLC, Join Forces.

Petitioner, Touch of Grey Roasters, Inc. ("Touch of Grey"), is an internationally recognized coffee manufacturer and coffeehouse company. R. at 3. Its notoriety stems from its award winning light roast coffee, "Morning Dew," and its highly-regarded blend, "Dire Wolf," which are sold in over 1,900 stores around the world. *Id.* In response to increased demand for smaller, independent local businesses, Touch of Grey established "neighborhood coffeehouses" through local franchises. *Id.* To embody the local coffee shop persona, these local franchises sold a new blend called "Dark Star." *Id.* These "neighborhood coffeehouses" doubled as "speak-easy" lounges, offering alcoholic

beverages, live music, and poetry readings. R. at 4. This business model sparked the relationship between Touch of Grey and Terrapin Station, LLC[1] ("Debtor"). *Id.*

In 2009, the Debtor and its owner, William Tell ("Tell"), were previously recognized by a leading coffee industry trade magazine as the "Independent Coffeehouse of the Year." *Id.* In 2017, Touch of Grey approached Tell "to see if he would be interested in franchising a neighborhood coffeehouse in Terrapin." *Id.* Thereafter, the parties "agreed to move forward with the venture." *Id.*

The Parties' Franchise Agreement and Lease Agreement.

Touch of Grey then purchased a newly renovated warehouse ("Shakedown") in Terrapin's downtown entertainment district to lease to the Debtor. *Id.* Shakedown was located at 5877 Shakedown Street, Terrapin. *Id.* The Debtor and Touch of Grey entered into a long-term lease agreement on July 1, 2018. *Id.* A key provision in the twenty-year triple-net lease agreement ("Lease") required the Debtor to pay monthly rent in the amount of $25,000 "on the first day of each month." *Id.* That day, the parties entered into a franchise agreement that required the Debtor to exclusively sell Touch of Grey's "Dark Star" blend. *Id.*

Touch of Grey Issues a Notice of Default on Terrapin Station.

The Debtor struggled throughout 2019. R. at 5. According to a declaration signed by Tell, the Debtor was unable to pay its debts as early as September 2019. *Id.* By November 1, 2019, the Debtor owed Touch of Grey over $700,000 for "Dark Star" products it purchased, despite remaining current on rent payments for Shakedown under the Lease. *Id.* On December 5, 2019, Touch of Grey sent a notice of default to the Debtor. *Id.*

Touch of Grey Tries to Keep the Debtor Afloat by Entering into a Forbearance Agreement.

On December 7, 2019, Touch of Grey agreed to refrain from terminating the franchise

[1] Not to be confused with *Terrapin Station*, the ninth studio album released by the Grateful Dead on July 27, 1977.

agreement pursuant to a forbearance agreement ("Forbearance Agreement") with the Debtor. *Id.* The terms of the Forbearance Agreement required the Debtor: (1) to pay Touch of Grey $250,000 for outstanding invoices for Dark Star products; (2) to reaffirm the terms of the Lease; and (3) to release any claims the Debtor had against Touch of Grey. *Id.* That day, the Debtor paid Touch of Grey $250,000 pursuant to the terms of the Forbearance Agreement. *Id.*

In order to induce Touch of Grey to sell the Debtor $200,000 worth of Dark Star products on credit, Tell signed a personal guaranty with respect to the invoice for the purchase. *Id.* On December 21, 2019, Touch of Grey delivered the $200,000 worth of goods as listed in the invoice. R. at 6.

Despite Touch of Grey's Efforts to Revitalize the Business, Terrapin Station Files for Chapter 11 Bankruptcy.

On January 5, 2020 ("Petition Date"), the Debtor filed for bankruptcy under chapter 11 of the Bankruptcy Code with the United States Bankruptcy Court for the District of Moot. *Id.* On the Petition Date, the Debtor possessed only unsecured debt, owing $650,000 to Touch of Grey and $500,000 to other general unsecured creditors. *Id.* All of the remaining unsecured creditors refused to financially support the Debtor, except for Touch of Grey, who continued to provide goods and services to the Debtor. *Id.* Counsel for Touch of Grey then "appeared at the first day hearings and stated that, although her client had serious concerns with the Debtor's reorganization strategy, it was engaged in ongoing, good faith discussions with the Debtor about a path forward." *Id.*

The Debtor's Critical Vendor Motion and Touch of Grey's Administrative Priority.

Recognizing the importance of Touch of Grey's continued financial support, the Debtor filed several first day motions accompanied by a declaration from Tell, in which he proposed: (1) to continue to exclusively sell Dark Star products as required by the Franchise Agreement; and (2) to find a sub-lessee to stay current on rent payments to Touch of Grey under the Lease. *Id.*

The Debtor then filed a motion with the Bankruptcy Court ("Motion") requesting

authorization to make a $200,000 post-petition payment to Touch of Grey. *Id.* In so doing, the Debtor specified that Touch of Grey was a "critical vendor" that deserved special administrative priority under section 503(b)(9) for delivering the goods identified in the invoice. R. at 7. The Debtor noted that those creditors who refused to financially assist the Debtor would not be prejudiced by the priority payment. *Id.* At the hearing, the creditor's committee supported the Motion, recognizing Touch of Grey's crucial financial role in the Debtor's reorganization plan. *Id.* All parties, including the United States Trustee, stipulated that the goods in the invoice satisfied the requirements for an administrative expense under section 503(b)(9). *Id.*

The Bankruptcy Court agreed with the Debtor that Touch of Grey deserved special administrative priority under section 503(b)(9) for the value of the goods sold in the invoice, but declined to call Touch of Grey a "critical vendor" because it was uncertain whether such classification existed under the Bankruptcy Code in this circumstance. *Id.* Days later, the Debtor paid Touch of Grey $200,000, and Touch of Grey continued to sell goods to the Debtor on credit to financially facilitate the Debtor's reorganization. *Id.*

The Chapter 7 Bankruptcy Trustee Attempts to Withhold Rent and Claw Back the Debtor's Court Ordered Post-Petition Payment.

On May 1, 2020, the day that rent was due, the Debtor had not yet paid rent.[2] *Id.* The Debtor nevertheless continued conducting business at Shakedown pursuant to its reorganization plan. R. at 7. It was not until May 5, 2020, that the Debtor ceased all business operations and vacated Shakedown. *Id.* That day, the Debtor filed a motion with the Bankruptcy Court seeking to reject the Lease and the Franchise Agreement with Touch of Grey under section 365(a). *Id.* Touch of Grey did not oppose the motion to reject. R. at 7–8. Instead, Touch of Grey filed a motion on May 8, 2020, requesting the Debtor to pay its rent for the month of May under section 365(d)(3). R. at 8. The

[2] In the lyrical spirit of *Touch of Grey*, the tune made famous by the Grateful Dead, one might say that the Debtor knew its rent was "in arrears." *See* GRATEFUL DEAD, *Touch of Grey*, *on* IN THE DARK (Arista 1987).

Bankruptcy Court, however, did not set the hearing until May 29, 2020. *Id.*

At the hearing, the Debtor announced it was converting its chapter 11 case to a chapter 7 liquidation case without objection. *Id.* Accordingly, the bankruptcy judge entered an order appointing a chapter 7 trustee ("Trustee") to the case. *Id.* At the same hearing, the bankruptcy judge granted the Debtor's motion to reject the Lease and the Franchise Agreement, stating that the order retroactively made the rejection effective on May 5, 2020. *Id.* The bankruptcy judge, however, declined to rule on Touch of Grey's motion to compel the overdue rent payment for the month of May. *Id.*

After retaining counsel, the Trustee took a hostile position against Touch of Grey. *Id.* In spite of section 365(d)(3), the Trustee asserted that the Debtor was not required to fully perform the obligations of the Lease even though the Debtor still occupied Shakedown on May 1, 2020. *Id.* The Trustee argued that the Debtor was only responsible for the five days of rent on a pro-rated basis. *Id.* In addition, the Trustee commenced an adversary proceeding against Touch of Grey, attempting to use its avoidance powers solely under sections 547(b) and 505(a) to retrieve the Debtor's $250,000 preferential transfer made on December 7, 2020. *Id.* In responding to the Trustee's complaint, Touch of Grey asserted that it had a subsequent new value defense under section 547(c)(4) because it provided subsequent new value to the Debtor when it delivered $200,000 worth of Dark Star products. *Id.*

Proceedings Below.

Following briefing and oral argument, "the bankruptcy court ruled in favor of the Trustee on both issues." R. at 9. The ruling permitted the Trustee to avoid the Debtor's $250,000 pre-petition payment to Touch of Grey. *Id.* In doing so, the court concluded that Touch of Grey's new value defense failed because it was subsequently paid for the goods as listed in the invoice under section 503(b)(9). *Id.* The court also ordered the Trustee to pay Touch of Grey $4,032.26 in rent even though the full amount of $25,000 was due on May 1, 2020, prior to the Debtor's rejection. *Id.*

Thereafter, Touch of Grey appealed on both issues to the United States District Court for the District of Moot, which affirmed the Bankruptcy Court's rulings. *Id.* Touch of Grey then appealed on both issues to the United States Court of Appeals for the Thirteenth Circuit. *Id.* The Thirteenth Circuit also affirmed the Bankruptcy Court's rulings on both issues. *Id.*

STANDARD OF REVIEW

This Court reviews questions of law *de novo* "without the slightest deference" to the decisions below. *U.S. Bank Nat. Ass'n ex rel. CWCapital Asset Management LLC v. Village at Lakeridge, LLC*, 128 S. Ct. 960, 965 (2018). Because the issues presented here both concern questions of law, this Court's review is *de novo*.

SUMMARY OF THE ARGUMENT

The first issue on appeal, as noted above, concerns the convergence of sections 547(c)(4) and 503(b)(9): may the amount of a creditor's new value defense be reduced on account of a court ordered post-petition payment pursuant to section 503(b)(9)? If so, then a creditor like Touch of Grey would be unable to limit its preference exposure by the value of goods it subsequently supplied to the debtor. This incorrect result would stand in contradiction of the very rationale underlying the subsequent new value defense: to encourage creditors to continue providing products to companies that may be in the throes of financial misfortune but have yet to file for bankruptcy. As we will demonstrate in the argument that follows, the amount of a creditor's new value defense should not—and cannot be—reduced on account of a court-ordered post-petition payment pursuant to section 503(b)(9).

In defiance of these principles, the Trustee urges this Court to conclude that a creditor is prohibited from asserting a subsequent new value defense merely because that creditor has been paid a court ordered post-petition bankruptcy expense pursuant to section 503(b)(9). The Trustee's arguments must be rejected for several reasons.

First, section 547(b) indicates that a post-petition payment is not an "otherwise unavoidable transfer" because, among other things, the plain language of that section closes the preference window at the petition date. As a result, the new value defense under section 547(c)(4) defense is constrained to new value provided and payments effectuated *before* the debtor crosses into bankruptcy. Second, the context of section 547 proves that the amount of a creditor's subsequent new value is fixed at the petition date. This notion is supported by all other related provisions within the section, which deem the petition date a "hard-stop" for the preference analysis. Third, Congress did not intend for post-petition payments to defeat a new value defense because doing so would chill a creditor's incentive to continue providing goods to distressed entities. This would run counter to the goals of the Bankruptcy Code. Instead, it is clear that Congress intended the separate and distinct sections to be independent of one another. A creditor, in turn, should have—and does have—the ability to assert a subsequent new value defense without that right being limited by a post-petition payment. For these reasons, as described more fully below, this Court should reverse the Thirteenth Circuit's decision.

The second issue on appeal involves section 365(d)(3) and a trustee's obligations under a nonresidential real property lease during the sensitive period between the petition and rejection dates. The decision below labored to ascribe ambiguity to an unambiguous statute. Section 365(d)(3)'s unambiguous language requires the trustee to perform all obligations of the debtor that arise from and after the order of relief under any unexpired lease of nonresidential real property until the point of rejection. Under the lease agreement between Terrapin Station and Touch of Grey, the Debtor's obligation was to pay rent in full on the first of every month. For that reason, Touch of Grey is owed the full amount of rent pursuant to the terms of the lease agreement because the debtor's obligation to timely pay rent in full became due prior to rejection.

Congress created section 365(d)(3) to protect the rights of commercial landlords by ensuring

that a trustee perform all obligations of the debtor pursuant to the terms of the lease. Thus, the section was enacted to relieve the burden of uncertainty that results when a lessee files for bankruptcy. This Congressional purpose is reinforced by apt policy justifications and legislative history. As demonstrated herein, the Thirteenth Circuit ignored the statute's intended purpose. This Court should therefore reverse the Thirteenth Circuit's decision.

ARGUMENT

I. THE AMOUNT OF A CREDITOR'S SUBSEQUENT NEW VALUE DEFENSE IS FIXED AT THE PETITION DATE AND MAY NOT BE REDUCED BY A POST-PETITION PAYMENT.

It is a thoroughly settled principle of the Bankruptcy Code that a transfer may be avoidable when the trustee can establish that the transfer to the creditor occurred "on or within 90 days ***before***" the petition date. *See* 11 U.S.C. § 547(b). That is because, among other things, the plain language of section 547(b) instructs that a "preferential transfer" must have occurred prior to the bankruptcy petition date. There are caveats to the general rule, of course. Indeed, a creditor may assert various statutory defenses in an attempt to avoid having to relinquish a preferential payment. The aim behind these exceptions or defenses is to urge trade creditors to continue providing goods to a financially troubled company without fear of a payment claw back in the event that a bankruptcy filing cannot be avoided. *See, e.g.*, *Jones Truck Lines, Inc. v. Full Serv. Leasing Corp.*, 83 F.3d 253, 257 n.3 (8th Cir. 1996).

One of these defenses designed to mitigate preference risk is the subsequent new value defense. The "new value" defense provides that, to the extent a creditor provides "new value" to the debtor after receiving a preferential payment, the creditor is authorized to reduce its preference exposure by offsetting the new value against that preferential payment. *See* 11 U.S.C. § 547(c)(4). The new value defense is not available when the debtor makes "an otherwise unavoidable transfer" to the creditor on account of the new value provided. *See id.*

Post-petition payments authorized by the bankruptcy court and the Bankruptcy Code are not "otherwise unavoidable transfers" for purposes of the subsequent new value defense. Numerous textual and contextual indicators in the Code, in addition to various policy considerations, signal that preference liability is fixed as of the petition date. For at least those reasons, as explained below, a court ordered post-petition payment under section 503(b)(9) must not diminish the amount of a creditor's subsequent new value defense. This Court should therefore reverse the decision below and conclude that a new value defense may not be limited on account of a court ordered administrative payment pursuant to section 503(b)(9).

A. The Plain Language of Section 547(c)(4) Indicates that a Post-Petition Payment Cannot Be an "Otherwise Unavoidable Transfer."

The plain terms of section 547(c)(4) "close[] the preference window at the petition [date], limiting the 547(c)(4) defense to new value supplied and payments made ***before*** the debtor crosses into bankruptcy." *Phoenix Rest. Grp., Inc. v. Ajilon Prof'l Staffing LLC (In re Phoenix Rest. Grp., Inc.)*, 317 B.R. 491, 496 (Bankr. M.D. Tenn. 2004) (emphasis added). Consequently, the preference analysis goes no further than the petition date. In this case, the trustee nevertheless attempts to eliminate a creditor's ability to invoke the subsequent new value defense by utilizing its avoidance powers to claw back a post-petition payment made by Terrapin Station. The Trustee's reasoning, however, is fundamentally flawed.

As an initial matter, we turn first to the text of section 547(c)(4)—the necessary starting point for this Court's interpretation of a Bankruptcy Code provision. *See Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253–54 (1992). Section 547(c)(4) provides, in pertinent part:

> (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 of for the benefit of the debtor—
> (A) not secured by an otherwise unavoidable security interest; and

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

11 U.S.C. § 547(c)(4) (emphasis added).

When "the statute's language is plain, the sole function of the courts . . . is to enforce it according to its terms." *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000). Simply put, the final clause of section 547(c)(4)(B) is dispositive here. According to its terms, a trustee may not utilize a debtor's post-petition payment to defeat a subsequent new value defense. This is because (1) the final clause uses the past tense to describe a debtor's actions; (2) it uses the word "transfer," and (3) it is constrained to the specific temporal framework established in section 547.

1. Section 547(c)(4)(B)'s Use of the Word "Debtor" Restricts "Otherwise Unavoidable Transfers" to Pre-Petition Payments.

It is also thoroughly settled that Congress' unambiguous use of the word "debtor" refers to a prepetition entity. Thus, the intentional use of the word "debtor" implicates a prepetition scope to section 547(c)(4), which closes the preference window at the petition date. *See In re Phoenix Rest. Grp., Inc.*, 317 B.R. at 496.

In the Chapter 11 context, "debtor" refers to the prepetition business or individual. Upon the debtor filing for Chapter 11 bankruptcy, the Code transforms the "debtor" into the debtor-in-possession. *See* 11 U.S.C. § 1101(1). Because the petition date is the procedural point when this title change takes place, a creditor's new value defense cannot be affected by a debtor-in-possession's post-petition payment. And so, by describing a transfer as one made by the "debtor," Congress indicated that the statute's preference analysis looks backwards from the petition date. Therefore, Congressional use of the word "debtor" in section 547(c)(4)(B) indicates that the preference period only accounts for transfers made when the debtor—as opposed to a debtor-in-possession or trustee—

is the legal entity making a payment or transferring property. *See In re Phoenix Rest. Grp., Inc.*, 317 B.R. at 496; *see also Field v. Maryland Motor Truck Assoc. Workers Compensation Self–Insurance Group (In re George Transfer, Inc.)*, 259 B.R. 89, 96 (Bankr. D. Md. 2001) ("Unfortunately for the defendant, its refund to the debtors does not qualify under Section 547(c)(4) as 'new value' because it was made postpetition. Indeed, this Court has found no case decided under Section 547(c)(4) that permitted a transferee to successfully defend an action for the recovery of a preference based upon a subsequent advance that was made postpetition.") (citing *Schwinn Plan Comm. v. AFS Cycle & Co. Ltd. (In re Schwinn Bicycle Co.)*, 205 B.R. 557 (Bankr. N.D. Ill. 1997)); *Clark v. Frank B. Hall & Co. of Colo. (In re Sharoff Food Serv., Inc.)*, 179 B.R. 669, 678 (Bankr. D. Colo. 1995) ("[T]he specific language 'to or for the benefit of the debtor' [indicates] that the subsequent advances of new value are only those given prepetition, because any post-petition advances are given to the debtor's estate, not the debtor."); *Wallach v. Vulcan Steam Forging (In re D.J. Mgmt. Group)*, 161 B.R. 5 (Bankr. W.D.N.Y. 1993); *Wolinsky v. Central Vermont Teachers Credit Union (In re Ford)*, 98 B.R. 669 (Bankr. D. Vt. 1989); *Warsco v. Ryan (In re Richards)*, 92 B.R. 369 (Bankr. N.D. Ind. 1988); *Cullen v. TDK Elec. Corp. (In re Antinarelli Enter., Inc.)*, 76 B.R. 247 (Bankr. D. Mass. 1987); *Official Labor Creditors Comm. v. Jet Florida Sys., Inc. (In re Jet Florida Sys., Inc.)*, 80 B.R. 544 (S.D. Fla. 1987).

This distinction between a debtor and a debtor-in-possession is dispositive of the issue here because Courts presume that "Congress says in a statute what it means and means in a statute what it says there." *Conn. Nat. Bank*, 503 U.S. at 254. Accordingly, this Court should recognize Congress' intent for "otherwise unavoidable transfers" in section 547(c)(4)(B) to mean only those transfers made by the debtor—a prepetition entity— and ***not*** a "debtor-in-possession"—a post-petition entity. To be sure, if "Congress intended § 547(c)(4)(B) to account for payments made post-petition, the section would have included something like an otherwise unavoidable transfer of an interest of the

estate in property to or for the benefit of such creditor." *In re Phoenix Rest. Grp., Inc.*, 317 B.R. at 497; *see also Kaye v. Blue Bell Creameries, Inc.*, 899 F.3d 1178, 1189 (11th Cir. 2018) (explaining that "the debtor must not have made an otherwise unavoidable transfer").

2. *Section 547(c)(4)(B)'s Use of the Word "Transfer" Implicates a Debtor's Prepetition Payment Made During the Preference Period.*

a. For Purposes of Determining a New Value Defense, an "Otherwise Unavoidable Transfer" Must Have Occurred "On or Within 90 Days Before" the Petition Date.

Section 547(b) describes what "transfers" are avoidable, and of significance here is its condition that they occur within 90 days of the petition date. The "transfers" referred to in section 547(c)(4)(B) must be analyzed within this clear temporal context because these transfers refer back to the comprehensive description of "transfers" as established in section 547(b); an interpretation bolstered by the use of a modifier referencing section 547(b) each time the word "transfer" is employed in section 547(c). The bolded modifiers below are instructive:

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

11 U.S.C. § 547(c)(4) (emphasis added).

Despite acknowledging that the word ***transfer*** "impose[s] temporal restrictions" upon the preference analysis, the Thirteenth Circuit nonetheless held that a court authorized post-petition payment could constitute an "otherwise unavoidable transfer." This is mistakenly suggested. Without instruction from Congress indicating a deviation from the meaning "transfer" as used throughout section 547, this Court must interpret section 547(c)(4)(B)'s deployment of the word "transfer" as only implicating payments made by the debtor before the petition date. Consequently, Terrapin

Station's payment to Touch of Grey is not an "otherwise unavoidable transfer" because, among other things, it was made post-petition. This conclusion amply illustrates the applicable principle here: goods that are paid for by the debtor post-petition under section 503(b)(9) are unsettled and outstanding for purposes of determining the amount of a creditor's new value defense. And so, the petition date fixes the amount of a creditor's subsequent new value defense.

b. Section 549 Cannot Render a Payment an "Otherwise Unavoidable Transfer" for Purposes of Calculating a New Value Defense.

The "application of § 547(c)(4) requires prior determination of whether the transfer is protected ***under other portions of Code § 547***." *In re Phoenix Rest. Grp., Inc.*, 317 B.R. at 499–500 (quoting *In re George Transfer, Inc.*, 259 B.R. at 95 (emphasis in original)). That means that the analysis of a new value defense is restricted to section 547. There is not a scintilla of evidence within the text of section 547 that can dovetail this Court's inquiry to section 549; indeed, neither section is expressly subject to the other section. *See United States v. Ron Pair Enterprises, Inc.*, 498 U.S. 235, 241 (1989) (indicating that the "plain meaning of legislation should be conclusive"). For that reason, the Trustee cannot point to any persuasive legal authority to suggest otherwise. In short, section 549 does not preclude Touch of Grey from reducing its preference exposure as section 549 cannot be read or understood as controlling the application of section 547. *See* 11 U.S.C. § 549.

In defiance of these tenets, the Thirteenth Circuit wrongfully utilized a provision *outside* of section 547 to conjure meaning for a phrase *inside* section 547. As noted above, the appropriate analysis—and *only* analysis—utilizes provisions within section 547. *See, e.g.*, *Phoenix Rest. Grp., Inc.*, 317 B.R. at 499–500. Doing so, is dispositive of this issue. That is, an "otherwise unavoidable transfer" must be one that occurs prepetition. Accordingly, Touch of Grey's new value defense should not be limited merely because it received a post-petition administrative payment under section 503(b)(9).

B. The Context of Section 547 Demonstrates that the Amount of a Creditor's Subsequent New Value is Fixed at the Petition Date.

When section 547(c)(4) is read within the context of section 547 it reinforces the statute's logical conclusion: "that post-petition payments by a debtor do not affect a creditor's new value defense." *Friedman's Liquidating Trust v. Roth Staffing Companies LP (In re Friedman's Inc.)*, 738 F.3d 547, 557 (3d Cir. 2013). This Court has recognized time and again that "the meaning of statutory language, plain or not, depends on context." *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991). For this reason alone, "context is king" in statutory interpretation. *See Wachovia Bank, N.A. v. United States*, 455 F.3d 1261, 1267 (11th Cir. 2006). Adhering to this bedrock principle renders only one result: that the amount of Touch of Grey's new value defense may not be affected by Terrapin Station's post-petition payment. Indeed, the Thirteenth Circuit's erroneous decision explicitly rejected all contextual clues within section 547. As explained below, that analysis is partial at best, and misleading at worst.

1. Numerous Provisions Within Section 547 Cut Off the Preference Analysis at the Petition Date.

a. Section 547(b)(5)

The preference test under section 547(b)(5) or "hypothetical liquidation test" must be "performed as of the petition date," despite not having—like section 547(c)(4)—an explicit temporal limitation that references the petition date. *See In re Friedman's Inc.*, 738 F.3d at 556; *Falcon Creditor Trust v. First Ins. Funding (In re Falcon Prods.)*, 381 B.R. 543, 547 (8th Cir. BAP 2008) ("Supreme Court precedent requires that the hypothetical liquidation test be conducted as of the petition date"); *see also* 5 Collier on Bankruptcy ¶ 547.03 (16th ed. 2013) (indicating that § 547(b)(5) codifies holding from *Palmer Clay Products Co. v. Brown*, 297 U.S. 227 (1936), which set the petition date as date to be used in hypothetical liquidation analysis). To be sure, "[e]xtending [the] preference analysis [in section 547(c)(4)] past the petition date would be inconsistent with §

547(b)(5)." *See In re Friedman's Inc.*, 738 F.3d at 556. To avoid such an incongruous result, this Court should find that the preference analysis is fixed as of the petition date. *See id.*

b. Section 547(c)(5)

Section 547(c)(5)'s defense against a trustee's avoidance action with respect to floating liens on inventory and receivables explicitly includes the phrase "as of the date of the filing of the petition." *See* 11 U.S.C. § 547(c)(5). This is supportive of Congress' intention with respect to court ordered post-petition payments as well as there is no logical reason for Congress to treat the two defenses differently. This Court should therefore adhere to sound principles of logic, uniformity, and consistency, and deduce that this explicit temporal restriction supports the notion that section 547(c)(4)'s preference period cuts off at the same time as that of section 547(c)(5). *See In re Friedman's Inc.*, 738 F.3d at 556.

Reaching the opposite conclusion, as the Thirteenth Circuit did below, would make section 547(c)(4) the only provision that does not confine the preference analysis to prepetition payments. There is absolutely nothing in the Bankruptcy Code, however, that supports that notion.

c. The Statute of Limitations for Preference Avoidance Actions Under Section 547.

This Court should also constrain the preference analysis to the time period preceding the petition date because "the statute of limitations for filing a preference avoidance action begins to run on the petition date." *See id.*; *see also* 11 U.S.C. § 546. This bolsters the concept that the cause of action accrues as of the petition date. *See id.* Relatedly, the Third Circuit aptly reasoned that "[i]f Congress had intended to allow for post-petition transactions to affect the impact on the estate, it is likely that it would have crafted a different statute of limitations." *Id.* Otherwise, the date of determining a creditor's preference liability would be a moving target, changing with every new case before a bankruptcy court. *See id.* Logically, and as a matter of statutory equilibrium, this Court

should seek to avoid such an awkward and unworkable result, and hold instead that the petition date marks the end of the preference analysis.

2. Since a Creditor Cannot Utilize Post-Petition "New Value" in Support of its Section 547(c)(4) Defense, a Debtor-in-Possession's Post-Petition Transfer Should Not Be Considered in a Preference Analysis.

It is universally understood that a creditor cannot bolster its new value defense with post-petition new value it provided. Correspondingly, post-petition payments to a creditor should ***not*** reduce the amount of its new-value defense. *See id.* at 557. Unsurprisingly, the "vast majority of courts" have held that "new value advanced after the petition date should not be considered in a creditor's new value defense." *See id.* (citing *Bergquist v. Anderson–Greenwood Aviation Corp. (In re Bellanca Aircraft Corp.)*, 820 F.2d 1275 (8th Cir. 1988)); *see also In re TennOhio Transportation Co.*, 255 B.R. 307 (Bankr. S.D. Ohio 2000); *In re Jet Florida System, Inc.*, 59 B.R. 886 (Bankr. S.D. Fla.1986); *Columbia Packing Co. v. Allied Container Corp. (In re Columbia Packing Co.)*, 44 B.R. 613 (Bankr. D. Mass. 1984); *Tidwell v. Atlanta Gas Light Co. (In re Georgia Steel, Inc.)*, 38 B.R. 829 (Bankr. M.D. Ga. 1984).

To this logical end, post-petition payments made by the debtor-in-possession should similarly be excluded from a preference analysis under section 547. *See Kaye v. Accord Mfg., Inc. (In re Murray, Inc.)*, No. 04–13611, 2007 WL 5595447, at *2 (Bankr. M.D. Tenn. June 6, 2007) ("Logically, and as a matter of statutory consistency, the Trustee's argument fails."). Touch of Grey's new value defense should therefore not be affected by its receipt of a post-petition payment. *See generally In re Rocor Int'l, Inc.*, 352 B.R. 319, 333 (Bankr. W.D. Okla. 2006); *In re D.J. Mgmt. Grp.*, 161 B.R. 5, 6 (Bankr. W.D.N.Y. 1993); *In re Jolly ''N,'' Inc.*, 122 B.R. 897, 909–10 (Bankr. D. N.J. 1991); *In re Vunovich*, 74 B.R. 629, 632 (D. Kan. 1987).

3. The Title of Section 547, "Preferences," Implies that it is Concerned Only with Transactions During the Preference Period.

The title of section 547 is clear enough: "Preferences." This Congressional labeling suggests that the subsequent provisions concern ***<u>preferences</u>***: transfers that occur during the preference period. *See Friedman's*, 738 F.3d at 555. As noted above, the "preference period" is the 90-day period leading up to the petition date. *See id.* In other words, it is not—and cannot be—the period after the petition date.

The leading decision, from the capable pen of Judge Marjorie Rendell, put the logical point this way:

> [A]s a general matter, § 547 is titled ''Preferences,'' and therefore suggests that it concerns transactions occurring during the preference period, which is by definition pre-petition (i.e., the 90 days before the filing of the petition). It would make sense that the calculation of the amount of the preference, and application of any new value reduced by subsequent transfers, would relate to that time period.

Id. Rather than centering, as the Trustee does, on a temporal framework not derived from the section at issue, Touch of Grey urges this Court to operate within the particular time frame that the section at issue sets forth. That is, that preferences concern payments that occurred during the preference period: the 90 days before the filing of the bankruptcy petition date. To be sure, using the section's title to buttress a reasonable interpretation of the text and context of section 547(c)(4) is sound and, in our view, leaves no doubt that the preference analysis extends no further than the petition date.

C. Congress Did Not Intend for Post-Petition Payments to Limit a New Value Defense.

The underlying policy considerations of sections 547(c)(4) and 503(b)(9) support limiting the preference period to a time frame before the petition date thereby leaving a creditor's new value defense unaffected by a section 503(b)(9) priority payment. That is because both sections were enacted in order to promote a creditor's willingness to do business with financially stressed entities. Section 547(c)(4)'s new value defense is designed "to encourage trade creditors to continue dealing with troubled businesses . . . [and] to treat fairly a creditor who has replenished the estate after having received a preference." *Friedman's*, 738 F.3d at 558 (internal quotations omitted). Similarly, section

503(b)(9) is aimed at "giving trade creditors a post-petition priority for the value of goods delivered to the debtor within 20 days of the petition." *Commissary Operations Inc. v. Dot Foods, Inc. (In re Commissary Operations, Inc.)*, 421 B.R. 873, 879 (Bankr. M.D. Tenn. 2010).

Extending the preference analysis beyond the petition date would, as Judge Marion Harrison sensibly noted, "force a creditor to choose between asserting a § 503(b)(9) claim and preserving its right to assert a subsequent new value defense that includes deliveries made to the debtor within the 20 days prior to the bankruptcy filing would work a disservice on Congress' inherent policy goals that were baked-in to those sections." *Id.*

The effect of requiring creditors to make such a choice would unmistakably create a chilling effect—one that would discourage otherwise willing creditors from doing business with struggling businesses that may possibly, or already have, filed for bankruptcy. *See id.* Section 503(b)(9) was enacted as a shield to protect otherwise unsecured creditors who may only receive "pennies on the dollar" for general unsecured claims in a chapter 11 liquidation and who "so frequently have been burned in bankruptcy who purchase goods at a time when it is known that bankruptcy is imminent and that payment of goods will not be tendered." *Touch of Grey Roasters, Inc. v. Jones (In re Terrapin Station, LLC)*, Case No. 20-0803, (13th Cir. March 4, 2021) (Weir, J., dissenting). Section 503(b)(9) was not designed, however, to be used a sword that punishes a creditor like Touch of Grey who continues to support the business of a struggling debtor like Terrapin Station.

The notion that limiting section 547(c)(4)'s preference analysis to prepetition payments would create an opportunity for a creditor to "double dip" by securing section 503(b)(9) administrative priority is wrongfully suggested. The creditor who delivers goods of subsequent new value to offset a prior preferential payment does not receive any additional value; the creditor simply receives the full price of the value of goods it subsequently delivered to the debtor. After Touch of Grey advanced new value on December 21, 2020, the Debtor owed Touch of Grey $200,000 for the value of the

goods that had been purchased on credit. The creditor, in turn, does not receive more than what it is owed when it is paid post-petition; the creditor merely receives payment for the value of the goods it provided.

A creditor who continues to support a debtor in both pre-and-post-petition phases should not be punished for receiving a court ordered administrative payment under section 503(b)(9) by being precluded from asserting a new value defense. Unfazed by the fact that all other creditors refused to continue supporting Terrapin Station, Touch of Grey continued to financially assist Terrapin Station during its uncertain financial times. Therefore, Touch of Grey is ***not*** similarly situated to other unsecured creditors. The Code was designed not to penalize but to encourage and reward a creditor like Touch of Grey for continuing to provide goods to a debtor like Terrapin Station.

In sum, it is clear that the policy rationale underpinning sections 547(c)(4) and 503(b)(9) weighs in favor of permitting Touch of Grey to assert a new value defense without fearing that a court ordered post-petition administrative payment would create additional preference liability. It is respectfully submitted that this Court should reverse the Thirteenth Circuit's decision.

II. TOUCH OF GREY IS ENTITLED TO TIMELY RENT PAYMENT FOR THE FULL MONTH OF MAY BECAUSE SECTION 365(d)(3) REQUIRES THE TRUSTEE TO COMPLY WITH THE LEASE PROVISIONS BEFORE REJECTION.

The second issue before the Court is another question of statutory interpretation. Here too, the Thirteenth Circuit reached the wrong conclusion. The Thirteenth Circuit held that the Trustee may dispense with its obligations under a nonresidential real property lease agreement to pay rent on a certain date even though that date was prior to rejection. This result, however, contravenes the clear and unambiguous language of the statute.

The Bankruptcy Code provides the debtor-in-possession the ability to assume or reject an executory contract or unexpired lease agreement with the bankruptcy court's approval. *See* 11 U.S.C. § 365(a). The question for many vendors, distributors, and landlords becomes: what must the debtor-

in-possession do, pursuant to the contract's terms, after they have filed for bankruptcy? At least as it pertains to landlords, like Touch of Grey, section 365(d)(3) answers that question. It provides, in pertinent part, that the "trustee shall timely perform all the obligations of the debtor . . . arising from and after the order for relief under any unexpired lease of nonresidential real property, until such lease is assumed or rejected." *See* 11 U.S.C. § 365(d)(3).

Despite the statute's plain language, courts are divided as to whether a landlord is entitled to the full payment of rent for a given term when the debtor-in-possession rejects the lease just a short time after the payment was due under the contract's terms. Some courts, including the Thirteenth Circuit, have incorrectly held that a landlord is only entitled to a pro-rated payment of the rent based on the time period that the debtor actually occupied the property (the "proration approach"). The proration approach is at odds with the Congressional purpose in enacting section 365(d)(3). For these reasons, among others, this Court should reverse the decision below, adopt the "billing date approach," and hold that Touch of Grey is entitled to the timely payment of the rent for the entire month of May 2020, as required by the lease's terms.

A. The Plain and Unambiguous Language of Section 365(d)(3)'s Text Requires Full and Timely Payment of the May Rent.

This Court should reverse the decision below because, contrary to the Thirteenth Circuit's determination, the language of section 365(d)(3) and terms of the lease demand that the Trustee pay Touch of Grey in full. Section 365(d)(3) requires timely performance of the debtor's post-petition obligations under unexpired leases according to the terms of the lease:

> 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.

11 U.S.C. § 365(d)(3) (emphasis added).

When the language of the statute is plain and unambiguous, the "judicial inquiry is complete."

See Conn. Nat'l Bank v. Germain, 503 U.S. 249, 253–54 (1992). Departing from the language of the statute and resorting to judicially created rules of statutory construction would only be appropriate in rare cases. *See id.* And this case is not one of them. Indeed, this case is not the type of "rare" situation that requires judicial crafting of a rule or remedy to cure poor Congressional draftsmanship.

The Thirteenth Circuit nonetheless determined that the statute was ambiguous. When section 365(d)(3) is applied here, it yields a straightforward result: rent must be paid according to the terms of the lease even if the rent will cover a period of time post-rejection. *See HA-LO Indus., Inc. v. Centerpoint Props. Tr.*, 342 F.3d 794, 799 (7th Cir. 2003). Touch of Grey urges this Court to follow its well-established principle in interpreting statutory provisions: that the words of a statutory provision should be interpreted in accordance with their "ordinary, contemporary, common meaning." *Pioneer Inv. Serv. Co. v. Brunswick Assoc. Ltd. P'ship*, 507 U.S. 380, 388 (1993); *see also In re Oreck Corp.*, 506 B.R. 500, 506 (Bankr. M.D. Tenn. 2014).

When that principle is applied here, Terrapin Station's "obligation" to pay rent under the lease "arose" on the "first of the month," which is when it was required under the lease to pay its rent in full for the month of May. It is universally understood that an "obligation" under a contract is a legal duty to do or not do something. *See* BLACK'S LAW DICTIONARY 491 (2d ed. 2001). Section 365(d)(3) does ***not*** vaguely require performance of Debtor's obligations; indeed, it requires ***timely*** performance of the obligations ***as dictated by the lease***. Therefore, the terms of the lease control a trustee's obligation to pay rent.

In this case, the terms of the lease obligated the Trustee to pay rent for the entire month of May on the first of the month. The proration approach, however, runs contrary to the terms of the lease and section 365(d)(3) itself. On the other hand, the billing approach aligns with the statutory text because it calls for the debtor to perform obligations as they become due under the terms of the lease. *See Centerpoint Props. v. Montgomery Ward Holding Corp. (In re Montgomery Ward Holding*

Corp.), 268 F.3d 205, 209 (3d Cir. 2001).

In *HA-LO*, the Seventh Circuit addressed the precise question presented here. In short, the Seventh Circuit correctly reasoned that the lessee was required to pay the full amount of rent in accordance with the lease's provisions. *See HA-LO Indus., Inc.*, 342 F.3d at 799. The Seventh Circuit rejected the debtor's argument that it should only be responsible for paying rent for the time it actually occupied the subject property. *Id.* at 800. Instead, the Seventh Circuit went on to conclude that the debtor had to pay the disputed month's rent in full on the day it was due even if the rent covered a period of time after the lease was rejected. *Id.* at 799. Factually indistinguishable from the instant case, the debtor in *HA-LO* was obligated to pay the full rent payment in advance on the first of the month. *See Id.* at 796.

As the Seventh Circuit acknowledged, the purpose of 365(d)(3) is "to relieve the burden placed on nonresidential real property lessors (or 'landlords') during the period between a tenant's bankruptcy petition and assumption or rejection of a lease." *Id.* (citing *Koenig Sporting Goods, Inc. v. Morse Road Co. (In re Koenig Sporting Goods, Inc.)*, 203 F.3d 986, 988 (6th Cir. 2000)). Further, the court noted that if the debtor had simply rejected the lease the day before rent was due under the lease—rather than the day after the rent was due—it would not have been obligated to pay rent for the month under the statute. *Id.* Thus, "by requiring the trustee to timely pay the debtor's rent, Congress clearly placed the burden on the trustee to promptly and properly reject the lease if it has no intention of assuming it and, in the meantime, to continue to perform the debtor's obligations under the lease." *Towers v. Chickering and Gregory (In re Pacific–Atlantic Trading Co.)*, 27 F.3d 40, 405 (9th Cir. 1994).

The Thirteenth Circuit, however, departed from the statute's unambiguous language and purpose and adopted the proration approach. Specifically, the court opined that the word "arising," as used to describe the word "obligations" is susceptible to different meanings. The court reasoned

that because one could stretch the language of the statute to conceivably mean something other than what the words say, the court is allowed to fashion its own rule. But by the court's own reasoning, a seemingly complicated statute is not necessarily an unreasonable one.

Even if the outer bounds of the meaning of the words in section 365(d)(3) could create some confusion as to when, or how, an obligation under the lease must be performed, every federal appellate court that has considered this exact circumstance has held that section 365(d)(3) is unambiguous. *See Burival v. Roehrich* (*In re Burival*), 613 F.3d 810 (8th Cir. 2010); *HA-LO Indus., Inc.*, 342 F.3d at 799; *In re Montgomery Ward Holding Corp.*, 268 F.3d 205 (3d Cir. 2001); *In re Koenig Sporting Goods, Inc.*, 203 F.3d 986 (6th Cir. 2000). The Thirteenth Circuit's decision violated the unwritten rule that Circuit Courts of Appeal should interpret statutes so as to avoid creating splits and confusion in lower courts. *See Ultra Petroleum Corp. v. Ad Hoc Comm. of Unsecured Creditors* (*In re Ultra Petroleum Corp.*), 943 F.3d 758, 763 (5th Cir. 2019).

The Thirteenth Circuit's textual justification for "proration" equates "obligation" with the statutorily defined term "claim." *See In re Montgomery Ward*, 268 F.3d at 209. Under this approach, an obligation would include an "unmatured right to payment" because the Bankruptcy Code defines claim in this way. *See id.* Thus, an "obligation" can arise before the tenant is obliged to perform. *Id.*

In *In re Montgomery Ward Holding, Corp.*, the Third Circuit identified two reasons explaining why this interpretation makes little sense. First, the Third Circuit noted that Congress chose to use the word "obligation" rather than "claim." *See id.* Congress knew—and knows—how to use the defined term "claim." Indeed, it did so many times throughout the Code. *See id.* If Congress intended for "obligation" to be synonymous with "claim," then why use a different word? In our view, Congress chose the word "obligation" because it knew the term would carry its ordinary meaning. *See id.* That, to be sure, would not be an improper logical leap. This Court should give weight to this explicit Congressional choice and steer clear of harmonizing two words that have two

separate legal meanings.

Second, the Third Circuit reasoned that interpreting "obligation" to be a "claim," would render section 365(d)(3) superfluous. *See id.* That is because "[u]nmatured rights to payment under a lease exist from the date the lease is executed, and no right to payment would ever arise under an unexpired lease after the order for relief." *See id.* In this case, the rent was due on the first of the month. The rent is not premised on the Debtor's use of the property, but rather, its right to use the property for the length of the term—whether it chooses to use it or not. Therefore, only requiring the Trustee to pay prorated rent based on the Debtor's usage changes the terms of the Lease into a "you-get-what-you-pay-for" contract. Rent payment under the Lease is not retroactive; it would therefore make no sense for this Court to construe the statute in this way.

Relatedly, the Third Circuit said it best when it concluded that "any reading that provided an analytical foundation for such proration would be inconsistent with what would appear to be the fundamental tenet of the text—that it is the ***terms of the lease*** that determine the obligation and when it arose." *Id.* (emphasis added). The plain meaning of the text supports only one approach: the billing approach. This Court therefore should adhere to section 365(d)(3)'s plain language.

B. Section 365(d)(3)'s Intended Purpose Further Supports the Statute's Plain Meaning.

"The purpose of § 365(d) is to prevent parties in contractual or lease relationships with the debtor from being left in doubt concerning their status vis-a-vis the estate." *HA-LO Indus., Inc.*, 342 F.3d 794, 799 (7th Cir. 2003). For at least that reason, "[v]irtually all courts have agreed that it was intended to alleviate the [sic] burdens of landlords by requiring timely compliance with the terms of the lease." *See In re Montgomery Ward*, 268 F.3d at 210.

The most logically sound reading of section 365(d)(3) is one that aligns with the political purpose behind the statute. When one simply does that, it is clear that the statute requires full performance of the rent obligation when it becomes due on the first of the month. This comports with

the provision's intended purpose because it "shift[s] the burden of indecision to the debtor." *See In re Koenig Sporting Goods, Inc.*, 203 F.3d at 989–90.

It is undisputed that the debtor-in-possession has the power to decide when to reject the lease. Correspondingly, the debtor-in-possession must "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 pre-rejection period." *Id.* Previously, landlords unfairly shouldered the burden of uncertainty "during the period between a tenant's bankruptcy petition and assumption or rejection of a lease." *Id.* Section 365(d)(3) relieved them of that burden. *Id.* But here, the hearing was not held until May 29, 2020. During that period, Touch of Grey did not have the legal authority to sign into a new lease agreement with another tenant. By allowing a trustee to escape its obligation under the lease and only pay partial rent, the Thirteenth Circuit improperly placed a burden of uncertainty on landlords once again.

C. The Legislative History Behind Section 365(d)(3) Confirms That Rent Must be Paid in Full.

The plain meaning of section 365(d)(3) is further supported by Congressional legislative history. Although resorting to legislative history is improper when the language of the statute is unambiguous, the legislative history of section 365(d) provides further guidance here. *See Reves v. Ernst & Young*, 507 U.S. 170, 177 (1993).

For example, the late Senator Orrin Hatch, a sponsor of the Bankruptcy Amendments of 1984, stated that the "landlord is forced to provide current services—the use of its property, utilities, security, and other services—without current payment. No other creditor is put in this position." 130 CONG. REC. (1984), *as reprinted in* 1984 U.S.C.C.A.N. 576, 598–99. It follows that section 365(d)(3) was enacted to protect landlords in circumstances like Touch of Grey's. Senator Hatch further stated that section 365(d), would diminish the problems he identified by:

> . . . requiring the trustee ***to perform all the obligations of the debtor under a lease*** of nonresidential real property ***at the time required in the lease***. This timely performance

> requirement will ensure that debtor-tenants ***pay their rent***, common area, and other charges on time pending the trustee's assumption or rejection of the lease.

Id. (emphasis added).

At minimum, Senator Hatch's words demonstrate that the statute was designed to require a trustee to timely pay rent according to the lease's terms prior to rejecting the lease contract. Nothing in the statute's legislative history even arguably suggests that the Trustee would not be required to pay the rent in full when the lease agreement so requires. This Court should therefore conclude that the Trustee is required to timely pay rent according to the lease's terms prior to rejecting the lease contract. In this case, Touch of Grey should recover the full balance of the lease for May 2020 because Terrapin Station's rent was due in full on May 1, 2020, prior to the Trustee's rejection of the lease. Accordingly, this Court should reverse the Thirteenth Circuit's decision.

CONCLUSION

For the foregoing reasons, Touch of Grey respectfully requests that this Court reverse the Thirteenth Circuit's judgment on both issues.

Respectfully submitted,
Team 3
Counsel for Respondent

Dated: January 20, 2022

APPENDIX A

11 U.S.C. § 365

(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)(1) If there has been a default in an executory contract or unexpired lease of the debtor, the trustee may not assume such contract or lease unless, at the time of assumption of such contract or lease, the trustee--

(A) cures, or provides adequate assurance that the trustee will promptly cure, such default other than a default that is a breach of a provision relating to the satisfaction of any provision (other than a penalty rate or penalty provision) relating to a default arising from any failure to perform nonmonetary obligations under an unexpired lease of real property, if it is impossible for the trustee to cure such default by performing nonmonetary acts at and after the time of assumption, except that if such default arises from a failure to operate in accordance with a nonresidential real property lease, then such default shall be cured by performance at and after the time of assumption in accordance with such lease, and pecuniary losses resulting from such default shall be compensated in accordance with the provisions of this paragraph;

(B) compensates, or provides adequate assurance that the trustee will promptly compensate, a party other than the debtor to such contract or lease, for any actual pecuniary loss to such party resulting from such default; and

(C) provides adequate assurance of future performance under such contract or lease.

(2) Paragraph (1) of this subsection does not apply to a default that is a breach of a provision relating to--

(A) the insolvency or financial condition of the debtor at any time before the closing of the case;

(B) the commencement of a case under this title;

(C) the appointment of or taking possession by a trustee in a case under this title or a custodian before such commencement; or

(D) the satisfaction of any penalty rate or penalty provision relating to a default arising from any failure by the debtor to perform nonmonetary obligations under the executory contract or unexpired lease.

(3) For the purposes of paragraph (1) of this subsection and paragraph (2)(B) of subsection (f), adequate assurance of future performance of a lease of real property in a shopping center includes adequate assurance--

(A) of the source of rent and other consideration due under such lease, and in the case of an assignment, that the financial condition and operating performance of the proposed assignee and its guarantors, if any, shall be similar to the financial condition and operating performance of the debtor and its guarantors, if any, as of the time the debtor became the lessee under the lease;

(B) that any percentage rent due under such lease will not decline substantially;

(C) that assumption or assignment of such lease is subject to all the provisions thereof, including (but not limited to) provisions such as a radius, location, use, or exclusivity provision, and will not breach any such provision contained in any other lease, financing agreement, or master agreement relating to such shopping center; and

(D) that assumption or assignment of such lease will not disrupt any tenant mix or balance in such shopping center.

(4) Notwithstanding any other provision of this section, if there has been a default in an unexpired lease of the debtor, other than a default of a kind specified in paragraph (2) of this subsection, the trustee may not require a lessor to provide services or supplies incidental to such lease before assumption of such lease unless the lessor is compensated under the terms of such lease for any services and supplies provided under such lease before assumption of such lease.

(c) The trustee may not assume or assign any executory contract or unexpired lease of the debtor, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties, if--

(1)(A) applicable law excuses a party, other than the debtor, to such contract or lease from accepting performance from or rendering performance to an entity other than the debtor or the debtor in possession, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties; and

(B) such party does not consent to such assumption or assignment; or

(2) such contract is a contract to make a loan, or extend other debt financing or financial accommodations, to or for the benefit of the debtor, or to issue a security of the debtor; or

(3) such lease is of nonresidential real property and has been terminated under applicable nonbankruptcy law prior to the order for relief.

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

(4)(A) Subject to subparagraph (B), an unexpired lease of nonresidential real property under which the debtor is the lessee shall be deemed rejected, and the trustee shall immediately surrender that nonresidential real property to the lessor, if the trustee does not assume or reject the unexpired lease by the earlier of--

(i) the date that is 120 days after the date of the order for relief; or

(ii) the date of the entry of an order confirming a plan.

(B)(i) The court may extend the period determined under subparagraph (A), prior to the expiration of the 120-day period, for 90 days on the motion of the trustee or lessor for cause.

(ii) If the court grants an extension under clause (i), the court may grant a subsequent extension only upon prior written consent of the lessor in each instance.

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

(e)(1) Notwithstanding a provision in an executory contract or unexpired lease, or in applicable law, an executory contract or unexpired lease of the debtor may not be terminated or modified, and any right or obligation under such contract or lease may not be terminated or modified, at any time after the commencement of the case solely because of a provision in such contract or lease that is conditioned on--

(A) the insolvency or financial condition of the debtor at any time before the closing of the case;

(B) the commencement of a case under this title; or

(C) the appointment of or taking possession by a trustee in a case under this title or a custodian before such commencement.

(2) Paragraph (1) of this subsection does not apply to an executory contract or unexpired lease of the debtor, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties, if--

(A)(i) applicable law excuses a party, other than the debtor, to such contract or lease from accepting performance from or rendering performance to the trustee or to an assignee of such contract or lease, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties; and

(ii) such party does not consent to such assumption or assignment; or

(B) such contract is a contract to make a loan, or extend other debt financing or financial accommodations, to or for the benefit of the debtor, or to issue a security of the debtor.

(f)(1) Except as provided in subsections (b) and (c) of this section, notwithstanding a provision in an executory contract or unexpired lease of the debtor, or in applicable law, that prohibits, restricts, or conditions the assignment of such contract or lease, the trustee may assign such contract or lease under paragraph (2) of this subsection.

(2) The trustee may assign an executory contract or unexpired lease of the debtor only if--

(A) the trustee assumes such contract or lease in accordance with the provisions of this section; and

(B) adequate assurance of future performance by the assignee of such contract or lease is provided, whether or not there has been a default in such contract or lease.

(3) Notwithstanding a provision in an executory contract or unexpired lease of the debtor, or in applicable law that terminates or modifies, or permits a party other than the debtor to terminate or modify, such contract or lease or a right or obligation under such contract or lease on account of an assignment of such contract or lease, such contract, lease, right, or obligation may not be terminated or modified under such provision because of the assumption or assignment of such contract or lease by the trustee.

(g) Except as provided in subsections (h)(2) and (i)(2) of this section, the rejection of an executory contract or unexpired lease of the debtor constitutes a breach of such contract or lease--

(1) if such contract or lease has not been assumed under this section or under a plan confirmed under chapter 9, 11, 12, or 13 of this title, immediately before the date of the filing of the petition; or

(2) if such contract or lease has been assumed under this section or under a plan confirmed under chapter 9, 11, 12, or 13 of this title--

(A) if before such rejection the case has not been converted under section 1112 , 1208 , or 1307 of this title, at the time of such rejection; or

(B) if before such rejection the case has been converted under section 1112 , 1208 , or 1307 of this title--

(i) immediately before the date of such conversion, if such contract or lease was assumed before such conversion; or

(ii) at the time of such rejection, if such contract or lease was assumed after such conversion.

(h)(1)(A) If the trustee rejects an unexpired lease of real property under which the debtor is the lessor and--

(i) if the rejection by the trustee amounts to such a breach as would entitle the lessee to treat such lease as terminated by virtue of its terms, applicable nonbankruptcy law, or any agreement made by the lessee, then the lessee under such lease may treat such lease as terminated by the rejection; or

(ii) if the term of such lease has commenced, the lessee may retain its rights under such lease (including rights such as those relating to the amount and timing of payment of rent and other amounts payable by the lessee and any right of use, possession, quiet enjoyment, subletting, assignment, or hypothecation) that are in or appurtenant to the real property for the balance of the term of such lease and for any renewal or extension of such rights to the extent that such rights are enforceable under applicable nonbankruptcy law.

(B) If the lessee retains its rights under subparagraph (A)(ii), the lessee may offset against the rent reserved under such lease for the balance of the term after the date of the rejection of such lease and for the term of any renewal or extension of such lease, the value of any damage caused by the nonperformance after the date of such rejection, of any obligation of the debtor under such lease, but the lessee shall not have any other right against the estate or the debtor on account of any damage occurring after such date caused by such nonperformance.

(C) The rejection of a lease of real property in a shopping center with respect to which the lessee elects to retain its rights under subparagraph (A)(ii) does not affect the enforceability under applicable nonbankruptcy law of any provision in the lease pertaining to radius, location, use, exclusivity, or tenant mix or balance.

(D) In this paragraph, "lessee" includes any successor, assign, or mortgagee permitted under the terms of such lease.

(2)(A) If the trustee rejects a timeshare interest under a timeshare plan under which the debtor is the timeshare interest seller and--

(i) if the rejection amounts to such a breach as would entitle the timeshare interest purchaser to treat the timeshare plan as terminated under its terms, applicable nonbankruptcy law, or any agreement made by timeshare interest purchaser, the timeshare interest purchaser under the timeshare plan may treat the timeshare plan as terminated by such rejection; or

(ii) if the term of such timeshare interest has commenced, then the timeshare interest purchaser may retain its rights in such timeshare interest for the balance of such term and for any term of renewal or extension of such timeshare interest to the extent that such rights are enforceable under applicable nonbankruptcy law.

(B) If the timeshare interest purchaser retains its rights under subparagraph (A), such timeshare interest purchaser may offset against the moneys due for such timeshare interest for the balance of the term after the date of the rejection of such timeshare interest, and the term of any renewal or extension of such timeshare interest, the value of any damage caused by the nonperformance after the date of such rejection, of any obligation of the debtor under such timeshare plan, but the timeshare interest purchaser shall not have any right against the estate or the debtor on account of any damage occurring after such date caused by such nonperformance.

(i)(1) If the trustee rejects an executory contract of the debtor for the sale of real property or for the sale of a timeshare interest under a timeshare plan, under which the purchaser is in possession, such purchaser may treat such contract as terminated, or, in the alternative, may remain in possession of such real property or timeshare interest.

(2) If such purchaser remains in possession--

(A) such purchaser shall continue to make all payments due under such contract, but may, 1 offset against such payments any damages occurring after the date of the rejection of such contract caused by the nonperformance of any obligation of the debtor after such date, but such purchaser does not have any rights against the estate on account of any damages arising after such date from such rejection, other than such offset; and

(B) the trustee shall deliver title to such purchaser in accordance with the provisions of such contract, but is relieved of all other obligations to perform under such contract.

(j) A purchaser that treats an executory contract as terminated under subsection (i) of this section, or a party whose executory contract to purchase real property from the debtor is rejected and under which such party is not in possession, has a lien on the interest of the debtor in such property for the recovery of any portion of the purchase price that such purchaser or party has paid.

(k) Assignment by the trustee to an entity of a contract or lease assumed under this section relieves the trustee and the estate from any liability for any breach of such contract or lease occurring after such assignment.

(l) If an unexpired lease under which the debtor is the lessee is assigned pursuant to this section, the lessor of the property may require a deposit or other security for the performance of the debtor's obligations under the lease substantially the same as would have been required by the landlord upon the initial leasing to a similar tenant.

(m) For purposes of this section 365 and sections 541(b)(2) and 362(b)(10) , leases of real property shall include any rental agreement to use real property.

(n)(1) If the trustee rejects an executory contract under which the debtor is a licensor of a right to intellectual property, the licensee under such contract may elect--

(A) to treat such contract as terminated by such rejection if such rejection by the trustee amounts to such a breach as would entitle the licensee to treat such contract as terminated by virtue of its own terms, applicable nonbankruptcy law, or an agreement made by the licensee with another entity; or

(B) to retain its rights (including a right to enforce any exclusivity provision of such contract, but excluding any other right under applicable nonbankruptcy law to specific performance of such contract) under such contract and under any agreement supplementary to such contract, to such intellectual property (including any embodiment of such intellectual property to the extent protected by applicable nonbankruptcy law), as such rights existed immediately before the case commenced, for--

(i) the duration of such contract; and

(ii) any period for which such contract may be extended by the licensee as of right under applicable nonbankruptcy law.

(2) If the licensee elects to retain its rights, as described in paragraph (1)(B) of this subsection, under such contract--

(A) the trustee shall allow the licensee to exercise such rights;

(B) the licensee shall make all royalty payments due under such contract for the duration of such contract and for any period described in paragraph (1)(B) of this subsection for which the licensee extends such contract; and

(C) the licensee shall be deemed to waive--

(i) any right of setoff it may have with respect to such contract under this title or applicable nonbankruptcy law; and

(ii) any claim allowable under section 503(b) of this title arising from the performance of such contract.

(3) If the licensee elects to retain its rights, as described in paragraph (1)(B) of this subsection, then on the written request of the licensee the trustee shall--

(A) to the extent provided in such contract, or any agreement supplementary to such contract, provide to the licensee any intellectual property (including such embodiment) held by the trustee; and

(B) not interfere with the rights of the licensee as provided in such contract, or any agreement supplementary to such contract, to such intellectual property (including such embodiment) including any right to obtain such intellectual property (or such embodiment) from another entity.

(4) Unless and until the trustee rejects such contract, on the written request of the licensee the trustee shall--

(A) to the extent provided in such contract or any agreement supplementary to such contract--

(i) perform such contract; or

(ii) provide to the licensee such intellectual property (including any embodiment of such intellectual property to the extent protected by applicable nonbankruptcy law) held by the trustee; and

(B) not interfere with the rights of the licensee as provided in such contract, or any agreement supplementary to such contract, to such intellectual property (including such embodiment), including any right to obtain such intellectual property (or such embodiment) from another entity.

(o) In a case under chapter 11 of this title, the trustee shall be deemed to have assumed (consistent with the debtor's other obligations under section 507), and shall immediately cure any deficit under, any commitment by the debtor to a Federal depository institutions regulatory agency (or predecessor to such agency) to maintain the capital of an insured depository institution, and any claim for a subsequent breach of the obligations thereunder shall be entitled to priority under section 507 . This subsection shall not extend any commitment that would otherwise be terminated by any act of such an agency.

(p)(1) If a lease of personal property is rejected or not timely assumed by the trustee under subsection (d), the leased property is no longer property of the estate and the stay under section 362(a) is automatically terminated.

(2)(A) If the debtor in a case under chapter 7 is an individual, the debtor may notify the creditor in writing that the debtor desires to assume the lease. Upon being so notified, the creditor may, at its option, notify the debtor that it is willing to have the lease assumed by the debtor and may condition such assumption on cure of any outstanding default on terms set by the contract.

(B) If, not later than 30 days after notice is provided under subparagraph (A), the debtor notifies the lessor in writing that the lease is assumed, the liability under the lease will be assumed by the debtor and not by the estate.

(C) The stay under section 362 and the injunction under section 524(a) (2) shall not be violated by notification of the debtor and negotiation of cure under this subsection.

(3) In a case under chapter 11 in which the debtor is an individual and in a case under chapter 13, if the debtor is the lessee with respect to personal property and the lease is not assumed in the plan confirmed by the court, the lease is deemed rejected as of the conclusion of the hearing on confirmation. If the lease is rejected, the stay under section 362 and any stay under section 1301 is automatically terminated with respect to the property subject to the lease.

APPENDIX B

11 U.S.C. § 503

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

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

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

(B) any tax--

(i) incurred by the estate, whether secured or unsecured, including property taxes for which liability is in rem, in personam, or both, except a tax of a kind specified in section 507(a)(8) of this title; or

(ii) attributable to an excessive allowance of a tentative carryback adjustment that the estate received, whether the taxable year to which such adjustment relates ended before or after the commencement of the case;

(C) any fine, penalty, or reduction in credit relating to a tax of a kind specified in subparagraph (B) of this paragraph; and

(D) notwithstanding the requirements of subsection (a), a governmental unit shall not be required to file a request for the payment of an expense described in subparagraph (B) or (C), as a condition of its being an allowed administrative expense;

(2) compensation and reimbursement awarded under section 330(a) of this title;

(3) the actual, necessary expenses, other than compensation and reimbursement specified in paragraph (4) of this subsection, incurred by--

(A) a creditor that files a petition under section 303 of this title;

(B) a creditor that recovers, after the court's approval, for the benefit of the estate any property transferred or concealed by the debtor;

(C) a creditor in connection with the prosecution of a criminal offense relating to the case or to the business or property of the debtor;

(D) a creditor, an indenture trustee, an equity security holder, or a committee representing creditors or equity security holders other than a committee appointed under section 1102 of this title, in making a substantial contribution in a case under chapter 9 or 11 of this title;

(E) a custodian superseded under section 543 of this title, and compensation for the services of such custodian; or

(F) a member of a committee appointed under section 1102 of this title, if such expenses are incurred in the performance of the duties of such committee;

(4) reasonable compensation for professional services rendered by an attorney or an accountant of an entity whose expense is allowable under subparagraph (A), (B), (C), (D), or (E) of paragraph (3) of this subsection, based on the time, the nature, the extent, and the value of such services, and the cost of comparable services other than in a case under this title, and reimbursement for actual, necessary expenses incurred by such attorney or accountant;

(5) reasonable compensation for services rendered by an indenture trustee in making a substantial contribution in a case under chapter 9 or 11 of this title, based on the time, the nature, the extent, and the value of such services, and the cost of comparable services other than in a case under this title;

(6) the fees and mileage payable under chapter 119 of title 28;

(7) with respect to a nonresidential real property lease previously assumed under section 365 , and subsequently rejected, a sum equal to all monetary obligations due, excluding those arising from or relating to a failure to operate or a penalty provision, for the period of 2 years following the later of the rejection date or the date of actual turnover of the premises, without reduction or setoff for any reason whatsoever except for sums actually received or to be received from an entity other than the debtor, and the claim for remaining sums due for the balance of the term of the lease shall be a claim under section 502(b)(6) ;

(8) the actual, necessary costs and expenses of closing a health care business incurred by a trustee or by a Federal agency (as defined in section 551(1) of title 5) or a department or agency of a State or political subdivision thereof, including any cost or expense incurred--

(A) in disposing of patient records in accordance with section 351 ; or

(B) in connection with transferring patients from the health care business that is in the process of being closed to another health care business; and

(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) Notwithstanding subsection (b), there shall neither be allowed, nor paid--

(1) a transfer made to, or an obligation incurred for the benefit of, an insider of the debtor for the purpose of inducing such person to remain with the debtor's business, absent a finding by the court based on evidence in the record that--

(A) the transfer or obligation is essential to retention of the person because the individual has a bona fide job offer from another business at the same or greater rate of compensation;

(B) the services provided by the person are essential to the survival of the business; and

(C) either--

(i) the amount of the transfer made to, or obligation incurred for the benefit of, the person is not greater than an amount equal to 10 times the amount of the mean transfer or obligation of a similar kind given to nonmanagement employees for any purpose during the calendar year in which the transfer is made or the obligation is incurred; or

(ii) if no such similar transfers were made to, or obligations were incurred for the benefit of, such nonmanagement employees during such calendar year, the amount of the transfer or obligation is not greater than an amount equal to 25 percent of the amount of any similar transfer or obligation made to or incurred for the benefit of such insider for any purpose during the calendar year before the year in which such transfer is made or obligation is incurred;

(2) a severance payment to an insider of the debtor, unless--

(A) the payment is part of a program that is generally applicable to all full-time employees; and

(B) the amount of the payment is not greater than 10 times the amount of the mean severance pay given to nonmanagement employees during the calendar year in which the payment is made; or

(3) other transfers or obligations that are outside the ordinary course of business and not justified by the facts and circumstances of the case, including transfers made to, or obligations incurred for the benefit of, officers, managers, or consultants hired after the date of the filing of the petition.

APPENDIX C

11 U.S.C. § 547

(a) In this section--

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

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

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

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

(b) Except as provided in subsections (c) and (i) of this section, the trustee may avoid any transfer of an interest of the debtor in property--

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

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

(3) made while the debtor was insolvent;

(4) made--

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

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

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

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

(B) the transfer had not been made; and

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

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

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

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

(B) in fact a substantially contemporaneous exchange;

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

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

(B) made according to ordinary business terms;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(9) if, in a case filed by a debtor whose debts are not primarily consumer debts, the aggregate value of all property that constitutes or is affected by such transfer is less than $6,425 1.

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

(e)(1) For the purposes of this section--

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

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

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

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

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

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

(i) the commencement of the case; or

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

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

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

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

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

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

APPENDIX D

11 U.S.C. § 549

(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.

(b) In an involuntary case, the trustee may not avoid under subsection (a) of this section a transfer made after the commencement of such case but before the order for relief to the extent any value, including services, but not including satisfaction or securing of a debt that arose before the commencement of the case, is given after the commencement of the case in exchange for such transfer, notwithstanding any notice or knowledge of the case that the transferee has.

(c) The trustee may not avoid under subsection (a) of this section a transfer of an interest in real property to a good faith purchaser without knowledge of the commencement of the case and for present fair equivalent value unless a copy or notice of the petition was filed, where a transfer of an interest in such real property may be recorded to perfect such transfer, before such transfer is so perfected that a bona fide purchaser of such real property, against whom applicable law permits such transfer to be perfected, could not acquire an interest that is superior to such interest of such good faith purchaser. A good faith purchaser without knowledge of the commencement of the case and for less than present fair equivalent value has a lien on the property transferred to the extent of any present value given, unless a copy or notice of the petition was so filed before such transfer was so perfected.

(d) An action or proceeding under this section may not be commenced after the earlier of--

(1) two years after the date of the transfer sought to be avoided; or

(2) the time the case is closed or dismissed.