No. 21-0909

IN THE

Supreme Court of the United States

OCTOBER TERM, 2021

IN RE TERRAPIN STATION, LLC, DEBTOR,

TOUCH OF GREY ROASTERS, INC., PETITIONER

V.

CASEY JONES, CHAPTER 7 TRUSTEE, RESPONDENT.

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

BRIEF FOR RESPONDENT

Team R. 40
Counsel for Respondent

QUESTIONS PRESENTED

1. Whether a seller of goods is entitled to reduce its preference exposure pursuant to 11 U.S.C. § 547(c)(4) by the value of goods sold even though the debtor in possession paid for such goods in full pursuant to 11 U.S.C. § 503(b)(9).

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

TABLE OF CONTENTS

QUESTIONS PRESENTED……....i

TABLE OF CONTENTS……...……...…..ii

TABLE OF AUTHORITIES…….….iv

OPINIONS BELOW……...vi

STATEMENT OF JURISDICTION……..vi

STATUTORY PROVISIONS……vi

STATEMENT OF THE CASE……1

SUMMARY OF THE ARGUMENT……..3

ARGUMENT……...5

I. STANDARD OF REVIEW……...5

II. THE COURT SHOULD AFFIRM THE LOWER COURT'S RULING THAT A CREDITOR MAY NOT REDUCE ITS PREFERENCE EXPOSURE BY APPLYING A NEW VALUE DEFENSE UNDER §547(C)(4) WHEN THE DEBTOR IN POSSESSION PAID FOR SUCH GOODS IN FULL ACCORDING TO § 503(B)(9)……5

A. Interpretation Of A Statute Must Begin With The Plain Language……6
   1. Temporal Limitations On Section 547(C)(4)……...7

B. Section 547(c)(4) And Section 503(b)(9), When Read Together, Should Be Construed In A Manner That Harmonizes Them……9

C. The Payment Of An Administrative Expense Is An Otherwise Unavoidable Transfer……..10
   1. Approaches To A New Value Defense……..……11

D. Allowing A Creditor To Apply A New Value Defense Under Section 547(C)(4) When The Debtor Already Paid The Creditor For Such Goods In Full According To Section 503(B)(9) Runs Counter To The Bankruptcy Code's Policy Goals ……...…….12

E. Opposing Arguments To Sections C & D……13

III. THE TEXT OF SECTION 365(d)(3) IS AMBIGUOUS AND LEGISLATIVE HISTORY, CANONS OF STATUTORY CONSTRUCTION, AND EQUITABLE OBJECTIVES OF THE BANKRUPTCY CODE COMPEL THE PRORATION OF RENT FOR UNEXPIRED LEASES OF NONRESIDENTIAL REAL PROPERTY..……15

A. The Text Of Section 365(D)(3) Renders Multiple Interpretations……....15

B. Forbidding Proration Of Rent For Rejected Leases Is Contrary To The Legislative Purpose Behind Bankruptcy Code Section 365(D)(3) Of Ensuring That Landlords Receive "*Current* Payment For *Current* Services Provided."....17

C. Forbidding Proration Of Rent For Rejected Leases Is Incompatible With Other Sections Of The Bankruptcy Code And Its Equitable Objective Of Securing Equal Distribution Among Creditors...……19

CONCLUSION……..……22

APPENDIX A…….…….....I

APPENDIX B……...……..II

APPENDIX C……..……..III

APPENDIX D……...……..……..VI

APPENDIX E…….……...…….X

TABLE OF AUTHORITIES

UNITED STATES SUPREME COURT CASES

Cohen v. De La Cruz, 523 U.S. 213 (1998)……..…..20

Conn. Nat'l Bank v. Germain, 503 U.S. 249 (1992)……...6

Howard Delivery Serv. v. Zurich Am. Ins. Co., 547 U.S. 651 (2006)……..21

Lamie v. U.S. Trustee, 540 U.S. 526 (2004)……...6

United States v. Ron Pair Enters. , 489 U.S. 235 (1989)……15, 19

Union Bank v. Wolas, 502 U.S. 151 (1991)……..12

UNITED STATES COURTS OF APPEALS

Centerpoint Props. v. Montgomery Ward Holding Corp. (in Re Montgomery Ward Holding Corp.), 268 F.3d 205, 211 (3d Cir. 2001).....16,17

HA-LO Indus. v. CenterPoint Props. Tr., 342 F.3d 794 (7th Cir. 2003).....17

In re Handy Andy Home Improvement Ctrs., 144 F.3d 1125 (7th Cir. 1998).....15,17,19,20

Koenig Sporting Goods, Inc. v. Morse Rd. Co. (In re Koenig Sporting Goods, Inc.), 203 F.3d 986 (6th Cir. 2000).....17

Texas v. Soileau (In re Soileau), 488 F.3d 302 (5th Cir. 2007).....5

UNITED STATES BANKRUPTCY COURT CASES

El Paso Props. Corp. v. Gonzales (In re Furr's Supermarkets, Inc.), 283 B.R. 60, 68 (B.A.P. 10th Cir. 2002).....17

In re Ames Dep't Stores, Inc., 306 B.R. 43 (Bankr. S.D.N.Y. 2004)…….…….15, 16, 18, 19

In re Beaulieu Group, LLC, NO. 19-4209-BEM, 2020 WL 7330537……..……..…7

In re Beaulieu Group, LLC, 616 B.R. 857 (Bankr. N.D. Ga. 2020).....8, 10, 14

In re Circuit City Stores, Inc., No. 08–35653–KRH, 2010 WL 4956022……...10, 11

In re Circuit City Stores, Inc., 515 B.R. 302 (Bankr. E.D. Va. 2014)…….7, 8

In re Commissary Operations, Inc., 421 B.R. 873 (Bankr. M.D. Tenn. 2010)……...…….8, 9

In re Friedman's Inc., 738 F.3d 547 (Bankr. N.D. Ga. 2013)…….…7, 8

In re GCP CT Sch. Acquisition, LLC, 443 B.R. 243 (Bankr. D. Mass. 2010).....15, 16, 20

In re MMR Holding Corp., 203 B.R. 605 (Bankr. M.D. La. 1996)……..…….13

In re NETtel Corp., 289 B.R. 486 (Bankr. D.D.C. 2002)……15, 16, 18, 21

In re Phoenix Restaurant Group, Inc., 317 B.R. 491 (Bankr. M.D. Tenn. 2004)……..14

In re Roberds, Inc., 315 B.R. 443 (Bankr. S.D. Ohio 2004)……..13

In re TI Acquisition, LLC, 429 B.R. 377 (Bankr. N.D. Ga. 2010)……..5, 7, 9, 11, 12

STATE COURTS

Child World v. Campbell/Massachusetts Tr. (In re Child World), 161 B.R. 571 (S.D.N.Y. 1993)……....15, 20

FEDERAL STATUTES

11 U.S.C. § 365…….…….2, 3, 5, 15, 16, 17, 18, 19, 20, 21, 22

11 U.S.C. § 502 ……..……12, 21

11 U.S.C. § 503…….…….2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 17, 20

11 U.S.C. § 547……...…….…….3, 4, 5, 6, 8, 9, 10, 12, 14, 21

11 U.S.C. § 550…….……3

OPINIONS BELOW

The Bankruptcy Court for the District of Moot ruled in favor of the Trustee on both questions holding that Touch of Grey could not use the value of the goods reflected on the Invoice as new value to reduce its preference exposure given that the Invoice was paid pursuant to Section 503(b)(9). R. at 9. It also held that 365(d)(3) only required the Debtor to pay rent for the five days that it had occupied the Premises prior to rejection. R. at 9. The District Court affirmed on both issues. R. at 9. The Thirteenth Circuit also affirmed holding that Section 547(c)(4) precludes a defendant from asserting new values for goods subject to a satisfied administrative expense under Section 503(b)(9) and that Section 365(d)(3) does not require the trustee to satisfy obligations allocable to the post-rejection period. R. at 3, 10 and 15. The Supreme Court of the United States then granted Touch of Grey's petition for writ of certiorari.

STATEMENT OF JURISDICTION

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

STATUTORY PROVISIONS

The relevant statutory provisions involved in this case are listed below and reproduced in Appendices A through E.

11 U.S.C. § 365

11 U.S.C. § 502

11 U.S.C. § 503

11 U.S.C. § 547

11 U.S.C. § 550

STATEMENT OF THE CASE

Touch of Grey, the creditor, and Respondent ("the Debtor") entered into a contractual relationship after Touch of Grey approached Debtor with the opportunity to franchise a neighborhood coffee house. R. at 4. The coffee house would sell Touch of Grey's new line of coffee products known as "Dark Star." R at 4. To facilitate the opening of the new coffeehouse, Touch of Grey purchased and leased to Debtor a recently renovated warehouse space ("the Premises"). R. at 4. On July 1, 2018, the Debtor, as tenant, and Touch of Grey, as landlord, entered into a *Lease Agreement* (the "Lease") for the Premises. R. at 4. The same day, the Debtor, as franchisee, entered into a franchise agreement whereby the debtor would exclusively sell "Dark Star" branded products purchased from Touch of Grey. R at. 4.

Unfortunately, the coffeehouse encountered difficulties from the start. R. at 5. The Debtors' efforts to join the town nightlife failed to gain traction, and a local group of independent coffeehouse owners launched an advertising campaign that hurt the Debtor's sales. R. at 5.

With lower-than-expected sales and above-market rent under the Lease, the Debtor struggled throughout 2019. R. at 5. The debtor became unable to pay its debts as early as September 2019. By November 1, 2019, it owed Touch of Grey over $700,000 for Dark Star-branded goods. R. at 5. Based on the Debtor's poor performance, Touch of Grey issued a notice of default on December 5, 2019. On December 7, 2019, the parties entered into a forbearance agreement. R at 5. Touch of Grey agreed to forebear from terminating the franchise agreement in exchange for payment of $250,000 from the Debtor for outstanding invoices, reaffirmation by the Debtor of its obligations under the Lease, and a release of any and all claims or causes of action that the Debtor had against Touch of Grey. R. at 5. The

same day, the Debtor made the $250,000 payment to Touch of Grey. R. at 5.

On December 18, 2019, the Debtor purchased an additional $200,000 worth of Dark Star product from Touch of Grey. R. at 5. To induce Touch of Grey to sell the goods, Debtor signed a guarantee with respect to the invoice ("the Invoice"). R at 5. The goods were delivered on December 21, 2019. R. at 6.

Unfortunately, the Debtor continued to have disappointing sales numbers and filed a petition for relief under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the District of Moot on January 5, 2020 (the "Petition Date"). R. at 6.

However, the Debtor owed Touch of Grey $650,000 (including the amount due under the Invoice) for goods that it had purchased. R. at 6. The Debtor had no secured debt but owed over $500,000 to other unsecured creditors, some of whom were refusing to provide the Debtor with goods and services on credit. R. at 6.

Two weeks later, the Debtor filed a motion requesting authority to pay $200,000 to Touch of Grey, asserting that it was a "critical vendor." R. at 6. The $200,000 would apply to the Invoice as an administrative expense under 503(b)(9). R. at 7. The court awarded Touch of Grey an administrative expense under section 503(b)(9) for the value of goods sold as reflected on the Invoice. R. at 7. The Debtor made the payment days later. R. at 7.

Unfortunately, the reorganization under relief of Chapter 11 was unsuccessful and on May 5, 2020, the Debtor permanently ceased operations, vacated the Premises, and returned the keys to Touch of Grey. R. at 7 On May 6, 2020, Debtor filed a motion with the bankruptcy court to reject the Lease and the franchise agreement with Touch of Grey as of the date of the date of the motion pursuant to section 365(a). R. at 7. On May 8, 2020, Touch of Grey filed a motion seeking to compel payment of the May rent, which became due under

the Lease on May 1st. R. at 7-8. It asserted that it was entitled to a payment in full for the May rent, pursuant to section 365(d)(3). R. at 8.

On May 29, 2020, the Debtor converted its Chapter 11 case to a Chapter 7 case, and a Trustee was appointed for the Debtor's estate. R at 8. The Trustee commenced an adversary proceeding to avoid and recover the $250,000 payment that the Debtor had made to Touch of Grey as a preferential transfer under 547(b) and 550(a). R. at 8. Touch of Grey filed an affirmative defense asserting that it was entitled to reduce any preference exposure by the $200,000 in goods that it sold to the Debtor under section 547(c)(4). R. at 8. The bankruptcy court held that Touch of Grey could not use the value of the goods reflected on the Invoice as new value to reduce its preference exposure given that the Invoice was paid pursuant to section 503(b)(9). R. at 9. Accordingly, a judgment in the amount of $250,000 was entered in favor of the Trustee and against Touch of Grey. R at 9. The bankruptcy court also concluded that section 365(d)(3) only required the Debtor to pay rent for the five days that it had occupied the Premises prior to rejection. R at 9.

SUMMARY OF ARGUMENT

This Court should affirm the appellate court's decision because the plain language of §547(c)(4) and §503(b)(9), when read together, confirm the use of an administrative claim and a new value defense against the same set of goods is contrary to the bankruptcy code's intended goals.

The first issue discusses interpretation of each statute, and how to harmonize the interpretations when reading the statutes together. The circuit courts that have addressed this issue in the realm of bankruptcy have interpreted the statutes using the "plain language"

approach. Unless there is ambiguity in the wording of a statute or an interpretation would run counter to the fundamental purpose Congress intended the statute to serve, courts should interpret the language of section 503(b)(9) and 547(c)(4) using the ordinary meaning of each word.

Using the plain language and harmonizing the interpretations of each statute leads into the next question: are section 503(b)(9) administrative expenses unavoidable transfers under the 547(c)(4) under the new value defense, and if so is this in line with the policy objectives of each statute? As an expense both guaranteed by the Debtor and authorized by the court, the answer is yes. This renders the use of both a new value defense under section 547(c)(4) and the granting of an administrative expense against the same set of goods out of alignment with the policy goals of each statute. The Bankruptcy Code serves to encourage dealing with troubled businesses and equal treatment amongst creditors. Allowing Touch of Grey to reduce its preference and get paid for the same set of goods runs counter to these goals.

Regarding the second issue, this Court should uphold the appellate court's proration of rent for the unexpired lease of nonresidential real property under §365(d)(3).

First, the text of §365(d)(3) of the Bankruptcy Code renders more than one interpretation, but the legislative history favors the continued proration of rent for rejected leases. The proration of rent ensures that, regardless of the billing date, landlords receive payment for services provided during the post-petition, pre-rejection period. To hold otherwise would result in an inequitable distribution of the Debtor's limited resources. Furthermore, the "billing date" approach advocated by Touch of Grey is incompatible with the rest of the Bankruptcy Court. Thus, in order to comply with Congress's intention to protect landlords from becoming involuntary creditors during the post-petition, pre-rejection period and remain consistent with the

overall Code's objective of securing equal distribution among creditors, this Court should affirm the court of appeals conclusion that Debtor is only liable for rent attributable to the five days it was in possession of the Premises.

ARGUMENT

I. STANDARD OF REVIEW

The facts of this case are not in dispute. Each of the issues presented involves the Bankruptcy Court's conclusions of law and implicates matters of statutory interpretation. Accordingly, this Court's review is *de novo*. Texas v. Soileau (In re Soileau), 488 F.3d 302, 305 (5th Cir. 2007).

II. THE COURT SHOULD AFFIRM THE LOWER COURT'S RULING THAT A CREDITOR MAY NOT REDUCE ITS PREFERENCE EXPOSURE BY APPLYING A NEW VALUE DEFENSE UNDER §547(C)(4) WHEN THE DEBTOR IN POSSESSION PAID FOR SUCH GOODS IN FULL ACCORDING TO § 503(B)(9).

Section 547(c) contains nine exceptions or defenses to the trustee's ability to avoid a preferential transfer. Section 547(c)(4) focuses on allowing the seller to recover pre-petition transfers made by the debtor to a creditor. In re TI Acquisition, LLC, 429 B.R. 377, 380 (Bankr. N.D. Ga. 2010). Specifically, it permits a creditor to reduce its liability for a preferential transfer by the value of the goods or services provided to the debtor after the receipt of the transfer.

§503(b)(9) gives an unpaid seller an administrative expense for deliveries made by the debtor within twenty days before the debtor's bankruptcy petition. This provision provides creditors an administrative expense for the value of goods received by the debtor within 20 days prior to the petition date so long as that the goods were sold to the debtor in the ordinary course of the debtor's business.

Touch of Grey received an administrative expense under Section 503(b)(9) from the Debtor in the amount of $200,000 for goods sold to the debtor. After payment of the administrative expense, the Debtor commenced an adversary proceeding seeking to avoid and recover a $250,000 payment to Touch of Grey pursuant to the forbearance agreement the debtor made as a preferential transfer pursuant to Section 547(b). Touch of Grey asserts the affirmative defense that it is entitled to reduce any preference exposure by the $200,000 in goods it sold to the Debtor (as reflected on the Invoice) pursuant to Section 547(c)(4).

By receiving payment for the $200,000 then using the payment amount to reduce the amount of the preferential transfer, the defendant is "double-dipping." Touch of Grey was compensated for its shipment of goods in the amount of $200,000. Reducing its preference by $200,000 on top of this effectively doubles its compensation for the same amount of goods while failing to enlarge the debtor's estate through added value.

Furthermore, allowing both a reduction in preference and an administrative claim gives unfair preferential treatment to Touch of Grey, and by extension fails to advance the underlying policy of both statutes to encourage creditors and suppliers to continue doing business with the Debtor.

A. Interpretation of a Statute Must Begin with the Plain Language

Under the plain language interpretation of a statute, courts must presume that the legislature "says in statute what it means and means in statute what it says." Connecticut Nat. Bank v. Germain, 503 U.S. 249, 253-54 (1992). This "plain language" method of statute interpretation is the best approach since it "respects the words of Congress." Lamie v. U.S. Trustee, 540 U.S. 526, 536 (2004). "In this manner we avoid the pitfalls that plague too quick a turn to the more controversial realm of legislative history." Id.

The plain language of section 547(c)(4) "focuses on recovering pre-petition transfers made by the debtor to a creditor." In re TI Acquisition, LLC, 429 B.R. 377, 380 (Bankr. N.D. Ga. 2010). Under the plain language of the statute 503(b)(9), payment of a §503(b)(9) claim is an otherwise unavoidable transfer. In re Beaulieu Group, LLC, NO. 19-4209-BEM, 2020 WL 7330537 at *4. "Where the statutory language is unambiguous, the court should not consider statutory purpose or legislative history." In re Friedman's Inc., 738 F.3d 547, 553 (Bankr. N.D. Ga. 2013). Here, there is no ambiguity around either statute. Both statutes are clear about dealing with the recovery of pre-petition transfers between a debtor and a creditor, and under the plain language interpretation of each statute, there is nothing that forbids consideration of post-petition payments in the analysis.

1. Temporal Limitations on Section 547(c)(4)

Section 547(c)(4)(B) states the trustee may not avoid a transfer where a creditor gave new value to the benefit of the debtor - "on account of which new value the debtor did not make an otherwise unavoidable transfer to or for the benefit of such creditor." Notably absent within the plain language of the statute is a temporal requirement for the unavoidable transfer. The language of § 547(c)(4)(B) does not contain any limitation as to when new value may be repaid. In re Circuit City Stores, Inc., 515 B.R. 302, 314 (Bankr. E.D. Va. 2014). Thus, under the plain language interpretation of the statute an otherwise unavoidable transfer made after a bankruptcy petition cannot be left out when determining a creditor's preference.

Touch of Grey asserts other provisions of the Bankruptcy Code make it clear that any analysis under section 574(c)(4) ends at the petition date. According to the petitioner, if section 547(c)(4)(B) were to be read without a temporal limitation, "the time period involved would be totally open-ended such that any payment, at any time, could defeat a new value defense." In re

Friedman's Inc., 738 F.3d 547, 554 (Bankr. N.D. Ga. 2013). Instead, Touch of Grey argues the "preference window of §547 closed on the date of the filing of the bankruptcy petition and post-petition payments cannot be used to deplete pre-petition 'new value.'" In re Commissary Operations, Inc., 421 B.R. 873, 876 (Bankr. M.D. Tenn. 2010). Based on the foregoing, Touch of Grey believes its administrative expense does not negate its new value defense under 547(c)(4).

To determine the true preference amount of a creditor, Touch of Grey would use the "hypothetical liquidation test." In re Friedman's Inc., 738 F.3d 547, 556 (Bankr. N.D. Ga. 2013). Under this test, courts must compare the payment received by the creditor during the preference period with what the creditor would have received if the payment had not been made and the debtor's assets were liquidated and distributed to creditors "to the extent provided by the provisions of [the] title." Id. Courts have held that this test should be performed as of the petition date even though the statute does not specify the date to be used. Id.

Touch of Grey's argument fails for two reasons. First, the Third Circuit clearly indicated in Friedman that it did not intend for its decision to extend to § 503(b)(9) claims. In re Friedman's Inc., 738 F.3d 547, at 561 n. 9. Instead, the court made clear they were only considering the effect of payments made pursuant to a Wage Order.". In re Circuit City Stores, Inc., 515 B.R. 302, 313 (Bankr. E.D. Va. 2014). Unlike Friedman, Touch of Grey has only an administrative expense, and it is specific to goods sold, not employee wages. In fact, no wage order is present in Touch of Grey's case. Second, the text is plain and unambiguous. It does not include any requirements regarding the timing of a debtor's payment of new value for defensive purposes." In re Beaulieu Group, LLC, 616 B.R. 857, 873 (Bankr. N.D. Ga.2020). Touch of Grey's assertion of a temporal requirement around post-petition payment is an assumption that cannot be justified by any verbiage in the statute under a plain language interpretation of it. Thus,

the "hypothetical liquidation test" is an inappropriate method of calculating the petitioner's preference, and the post-petition payment must be included when evaluating Touch of Grey's preference amount.

B. Section 547(c)(4) and Section 503(b)(9), When Read Together, Should be Construed in a Manner that Harmonizes Them.

When read in a manner that harmonizes statues 503(b)(9) and 547(c)(4), the $200,000 payment from the Debtor to Touch of Grey can only be classified as an otherwise unavoidable transfer and thus cannot be used to reduce Touch of Grey's preference amount.

Avoidance actions pursuant to 11 U.S.C. § 547 and administrative expense claims pursuant to 11 U.S.C. § 503(b) (9) both deal with pre-petition transfers between a debtor and a creditor. In re TI Acquisition, LLC, 429 B.R. 377, 379 (Bankr. N.D. Ga. 2010). Touch of Grey argues that Section 547(c)(4) asserts a "new value" defense where the creditor provides money or money's worth in goods, services, is "neither void nor voidable by the Debtor under any applicable law." In re Commissary Operations, Inc., 421 B.R. 873, 876 (Bankr. M.D. Tenn. 2010). To determine the validity of this claim, Section 503(b)(9) must be viewed within the context of Touch of Grey's section 547(c)(4) new value defense. Section 503(b)(9) encompasses "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 business." *11 U.S.C. § 503(b)(9)*. This means goods sold by the creditor 20 days before filing bankruptcy to the debtor are entitled to an administrative expense. Here, there is no question that Touch of Grey has an administrative claim in the amount of $200,000. $200,000 in goods were sold to the debtor on December 18, 2019, and the Debtor filed a petition for relief under chapter 11 on January 5, 2020. This claim was affirmed by the bankruptcy court and paid days later.

However, Touch of Grey is wrong when it asserts that the same $200,000 in goods it sold

cannot be voided by the Debtor under section 547(c)(4). Section 547(c)(4) offers creditor's what is known as the subsequent new value defense. Under this statute, if the debtor makes a preferential payment to the creditor and the creditor thereafter provides the debtor with new value, that new value is a defense to a preference claim so long as the debtor does not make an "otherwise unavoidable transfer" on account of that new value. In re Beaulieu Group, LLC, 616 B.R. 857, 866 (Bankr. N.D. Ga.2020). In other words, the "new value" defense provides that, to the extent a creditor gives "new value" to the debtor after receiving preferential payments, the creditor is entitled to reduce its preference exposure by offsetting the new value against the preferential payments.

While Touch of Grey did provide "new value" to the Debtor, it is precluded from asserting it as a defense because the Debtor made an otherwise unavoidable transfer. "[T]hat because the payment of a creditor's Bankruptcy Code § 503(b)(9) administrative claim for the value of goods transferred to a debtor in the twenty-day period immediately preceding the commencement of a bankruptcy case is an "otherwise unavoidable transfer" as that term is used in § 547(c)(4)(B) of the Bankruptcy Code, the recipient of such a payment is not entitled to utilize the value of those same goods as the basis for a new value defense under § 547(c)(4) of the Bankruptcy Code. In re Circuit City Stores, Inc., No. 08–35653–KRH, 2010 WL 4956022 at *1. Here, Touch of Grey's shipment of goods to Debtor is classified by the court as a section 503(b)(9) claim, and thus constitutes an otherwise unavoidable transfer. This negates the 547(c)(4) defense leaving Touch of Grey unable to reduce its preference exposure by the $200,000 in goods it provided the Debtor.

C. The Payment of an Administrative Expense is an Otherwise Unavoidable Transfer.

The critical provision in the issue before the Court is whether or not the debtor made "an

otherwise unavoidable transfer to or for the benefit of such creditor" on account of the new value it received from the creditor. In re Circuit City Stores, Inc., No. 08–35653–KRH, 2010 WL 4956022 at *6. Under the plain language of the statute, the $200,000 payment against Touch of Grey's §503(b)(9) claim is an otherwise unavoidable transfer.

1. Approaches to a New Value Defense

To determine whether a creditor is entitled to the new value defense or will have it negated by an otherwise unavoidable transfer, two prevailing approaches are used in the analysis. In re TI Acquisition, LLC, 429 B.R. 377, 382-84 (Bankr. N.D. Ga. 2010). The first approach is the "remains unpaid" approach. Id. Under this approach, new value must remain unpaid in order for it to be effectively used by the creditor to offset an otherwise avoidable transfer. Id. Here, Touch of Grey is asserting a new value of defense of $200,000 based on the goods it sold to the Debtor. Touch of Grey's defense fails under the "new value" approach as the new value was paid by the debtor as an administrative expense authorized by the court. Since the new value was paid rather than remaining unpaid, Touch of Grey cannot use it to assert a new value defense as a court-ordered or unavoidable transfer was made.

The second approach is the "subsequent advance" approach." Id. This approach requires that the new value have not been paid by or secured by an unavoidable transfer. Id. Here, Touch of Grey Asserts the new value defense of $200,000 based on the goods it sold to the debtor. This amount was secured based on: (i) the signed personal guarantee from the Debtor, and (ii) by the issuance of an administrative expense from the court. Both methods of securing debt create an unavoidable transfer being made to Touch of Grey which negates their new value defense.

D. Allowing a Creditor to Apply a New Value Defense Under section 547(c)(4) When the Debtor Already Paid the Creditor for Such Goods in Full According to section 503(b)(9) Runs Counter to Congress's Policy Goals.

The essence of the new value defense is to preserve the policy objectives underlying preference provisions of the Bankruptcy Code. In re TI Acquisition, LLC, 429 B.R. 377, 384 (Bankr. N.D. Ga. 2010). There are two main policy objectives behind allowing creditors the new value defense.

"The first objective is to encourage creditors to continue extending credit to financially troubled entities while discouraging a panic-stricken race to the courthouse." In re TI Acquisition, LLC, 429 B.R. 377, 384 (Bankr. N.D. Ga. 2010). The second objective "is to promote equality of treatment among creditors." Id.

The question before the court is whether allowing a new value defense and administrative expense for the same $200,000 in goods sold to the debtor is in the spirit of these policy goals.

Section 503(b)(9) serves to further the first policy objective. Section 503(b)(9) claims are those claims that have been allowed by the court and are fully funded. In re TI Acquisition, LLC, 429 B.R. 377, 385 (Bankr. N.D. Ga. 2010). These administrative expenses are allowed by the bankruptcy code to encourage creditors to continue doing business with the debtor. Id. By continuing to do business with a debtor, the debtor can continue to operate its business and (hopefully) generate revenue to continue paying down its debts to all creditors.

Section 547's underlying policy goal goes to the second objective, equality among all creditors. Union Bank v. Wolas, 502 U.S. 151, 151 (1991). By preventing any creditor from receiving preferential treatment relative to other creditors, section 547 ensures what assets (if any) are left are divided up fairly.

Here, Touch of Grey's new value defense coupled with an administrative defense against the same $200,000 in goods does nothing to further either policy goal. By allowing and paying the administrative claim along with the new value defense, the Debtor must not only pay Touch

of Grey, but will be unable to recover the preference payment that would otherwise be available for distribution to other creditors. This amounts to unequal treatment of the Debtor's creditors. Furthermore, it hurts the Debtor's chances of continuing to do business and pay down its debt as other creditors will be averse to doing business with the Debtor when the available assets used to pay them are being given to other suppliers such as Touch of Grey in an unequal manner. To ensure the policy goals of the bankruptcy code are met, Touch of Grey may take either a $200,000 administrative expense or a reduction in its preference value of $200,000, but not both.

E. Opposing Arguments to Sections C & D

Touch of Grey asserts a post-petition payment under 503(b)(9) is not an "otherwise unavoidable transfer. In repaying the subsequent new value, Touch of Grey tells the court to ask itself, "Did the Debtor, in repaying the subsequent new value provided by the Creditor, repay with a transfer that ultimately can be avoided by the Debtor?" In re Roberds, Inc., 315 B.R. 443, 469 (Bankr. S.D. Ohio 2004). If that repayment by the Debtor ultimately can be avoided, the subsequent new value provided should still be allowed as a defense. Id. If the court adopts this view, the question the court must determine is if the $200,000 dollar payment to Touch of Grey is unavoidable. This payment would be considered unavoidable if Touch of Grey was given an assignment order. In re MMR Holding Corp., 203 B.R. 605, 610 (Bankr. M.D. La. 1996). Here, the Debtor assigned a personal guarantee to Touch of Grey, and the court ordered an administrative expense to be assigned to Touch of Grey for the same goods. Thus, the 503(b)(9) transfer is unavoidable.

Touch of Grey argues that the allowance of both a section 547(c)(4) defense and a 503(b)(9) administrative expense support the policy goals behind Congress's enactment of each statute. Touch of Grey believes the policy behind § 547(c)(4) is two-fold. First, it encourages

creditors to continue to do business with troubled businesses, which may allow some to avoid bankruptcy altogether. In re Phoenix Restaurant Group, Inc., 317 B.R. 491, 495 (Bankr. M.D. Tenn. 2004). Second, because a creditor doing business with an entity in bankruptcy is beneficial to the entity's estate, "a subsequent advance is excepted because a creditor who contributes new value in return for payments from the incipient bankruptcy ... should not later be deemed to have depleted the bankruptcy estate to the disadvantage of other creditors." Id. By allowing an administrative expense for the $200,000 in goods sold to the Debtor along with a 547(c)(4) defense, Touch of Grey asserts it incentivizes critical suppliers to continue doing business with a troubled business. Additionally, because Touch of Grey contributed new value to the business, they believe they should not now be penalized simply because it disadvantages other creditors. This argument fails on both policy points. First, it fails to address the policy of equality of treatment while failing to materially advance the policy of encouraging creditors to continue to do business on credit with the debtor. In re Beaulieu Group, LLC, 616 B.R. 857, 875 (Bankr. N.D. Ga.2020). By giving a preference defense and an administrative claim for the same goods, Touch of Grey's interests are significantly advanced relative to other creditors. Second, this unequal treatment also discourages other creditors from doing business with the Debtor. This is because they will consider other creditors such as Touch of Grey to have priority for any remaining assets and funds. Touch of Grey is not the only critical creditor who did business with the Debtor, and other suppliers critical to the Debtor should not have their contributions to the business discounted.

III. THE TEXT OF SECTION 365(d)(3) IS AMBIGUOUS AND LEGISLATIVE HISTORY, CANONS OF STATUTORY CONSTRUCTION, AND EQUITABLE OBJECTIVES OF THE BANKRUPTCY CODE COMPEL THE PRORATION OF RENTS FOR UNEXPIRED LEASES OF NONRESIDENTIAL REAL PROPERTY

A. The Text of Section 365(d)(3) Renders Multiple Interpretations.

This Court must decide whether a debtor-tenant is liable, under Section 365(d)(3), for rent billed before the debtor's rejection of a lease but allocable to a post-rejection period. Section 365(d)(3) provides, in 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, notwithstanding section 503(b)(1) of this title.

As noted earlier, when interpreting a statute, courts begin with the language of the statute itself. United States v. Ron Pair Enters., 489 U.S. 241, 109 S. Ct. 1026 (1989). If the statute's language is plain, the sole function of the courts is to enforce it according to its terms. Id. However, the majority of courts that have interpreted this section of the Code have concluded that the text of section 365(d)(3) is ambiguous and susceptible to more than one interpretation. Child World v. Campbell/Massachusetts Tr. (In re Child World), 161 B.R. 571, 574 (S.D.N.Y. 1993); In re NETtel Corp., 289 B.R. 486, 492 (Bankr. D.D.C. 2002); In re Ames Dep't Stores, Inc., 306 B.R. 43, 59 (Bankr. S.D.N.Y. 2004); In re GCP CT Sch. Acquisition, LLC, 443 B.R. 243, 254 (Bankr. D. Mass. 2010).

The court in In re Handy Andy Home Improvement Ctrs., struggled with identifying what the "from" adds to the "after." It drew attention to the statutory phrase "arising from" the order for relief as distinct from arising after it. 144 F.3d 1125, 1127 (7th Cir. 1998). The court in NETtel Corp. concluded that– in a practical and fundamental economic sense–the term "arising" is susceptible of being used in an accrual sense. 289 B.R. at 490. Thus, a landlord's right to compensation should be based on the actual days the tenant was entitled to occupancy. Relying in part on the *NETtel* Corp. court's *reasoning*, the court in In re Ames Dep't Stores, Inc. also

concluded that section 365(d)(3) is ambiguous because "(1) "Arises" can be construed to mean having arisen in (a) absolutist terms or (b) in an accrual sense. And (2) "until such lease is assumed or rejected" can be construed to modify (a) "perform"--in which case it would support an absolutist view, inconsistent with prorating--or (b) equally or more plausibly, "obligations"--in which case prorating would be necessary and appropriate." 306 B.R. at 67. The court reasoned that a literalist approach results in near-absurdity when obligations billable to the tenant are allocable to periods going far in advance. Id. at 73. Likewise, In GCP CT Sch. Acquisition, the court pointed out that the term "obligations" is not defined in the Bankruptcy Code. 443 B.R. at 254. It concluded that the usage of the word "arises" when considered in relation to the term "obligations" is ambiguous because "[a] debtor's obligation under a nonresidential real property lease may arise as it is accrued, or it may arise when the landlord submits the bill to the debtor-tenant." Id.

In the present case, the court of appeals correctly sided with the majority and found that, when read in isolation, the text of Section 365(d)(3) is ambiguous. R. 18. It stated that while the statute clearly identifies what the Debtor must do (perform), it is silent about how to determine when the Debtor's obligation arises. Id.

Although a smaller number of courts have held that Section 365(d)(3) is unambiguous, their reasoning is not persuasive. One court concluded that the statute is unambiguous, but paradoxically also found syntactic ambiguity in the text. Centerpoint Props. v. Montgomery Ward Holding Corp. (in Re Montgomery Ward Holding Corp.), 268 F.3d 205, 211 (3d Cir. 2001).

It stated that "it is not clear whether the preposition "from" should be read to modify the most proximate noun, "order," or the more remote, "lease."" Id. at 208. Others have simply avoided

analyzing the issue altogether. Two other courts of appeals concluded that the statute is unambiguous, yet their analysis lacks any substantive discussion as to why the courts regarded section 365(d)(3) as unambiguous. *See* Koenig Sporting Goods, Inc. v. Morse Rd. Co. (In re Koenig Sporting Goods, Inc.), 203 F.3d 986 (6th Cir. 2000) and HA-LO Indus. v. CenterPoint Props. Tr., 342 F.3d 794 (7th Cir. 2003). Thus, because it is possible to construe section 365(d)(3) in two distinct ways, it is proper to turn to the legislative history, pre-1984 law, and the objectives of the Bankruptcy Code as a whole to ascertain the correct interpretation.

B. Forbidding Proration Of Rent For Rejected Leases Would Be Contrary To The Legislative Purpose Behind Bankruptcy Code Section 365(D)(3) Of Ensuring That Landlords Receive "*Current* Payment For *Current* Services Provided."

The primary goal of section 365(d)(3) is to prevent landlords from becoming involuntary post-petition creditors. El Paso Props. Corp. v. Gonzales (In re Furr's Supermarkets, Inc.), 283 B.R. 60, 68 (B.A.P. 10th Cir. 2002). In enacting section 365(d)(3) Congress intended to protect landlords who are forced to continue to provide services without payment during the awkward period of entry of the tenant into bankruptcy and the decision to assume or reject the lease. In re Handy Andy Home Improvement Ctrs., 144 F.3d at 1128. Before the enactment of 365(d)(3) an automatic stay would prevent the landlord from evicting the tenant, the "actual and necessary" provision of section 503(b)(1) might prevent the landlord from collecting the rent without legal expense. Id. Thus, section 365(d)(3) allows landlords to collect rent during the post-petition pre-rejection period. This ensures that landlords are not forced to provide uncompensated services. In Re Montgomery Ward Holding Corp., 268 F.3d at 210. But "there ought not be any administrative claim attributable to the estate's nonexistent right of occupancy during the post-rejection period, otherwise the estate will be saddled with a burden that rejection is designed to

avoid." In re Ames Dep't Stores, Inc., 306 B.R. at 74. The Bankruptcy Code "was not intended to pay landlords for services not actually provided to the estate." NETtel, 289 B.R. at 492. Although § 365(d)(3) requires that a debtor perform its obligations under a nonresidential real property lease, nothing in that provision requires a debtor to pay rent on property it no longer has a right to occupy because it has rejected the lease. Id.

Like the debtor-tenants in Ames Dep't Stores, Inc., who rejected multiple leases mid-month and vacated the premises on the date of rejection, Debtor in this case vacated the Premises on May 5, 2020, returned the keys to Touch of Grey, and filed a motion to reject the Lease the next day. Thus, proration of rent for actual days of occupancy is necessary to avoid extending Section 365(d)(3) beyond its intended effect. Otherwise, nothing prevents the landlord from leasing the Premises to another tenant for the remainder of the month and collecting rent from that tenant as well. Therefore, the bankruptcy court correctly concluded that the Debtor is only obligated to pay rent for the five days of May that it had occupied the Premises prior to rejection.

Unlike the debtor in In Re Montgomery Ward Holding Corp., where the debtor was required to pay taxes for a period (largely pre-petition) in which it had possessed and used the property. In the present case, the Debtors are being asked to pay rent on property which they had ceased to use and to which they no longer had any occupancy rights. Second, In Re Montgomery Ward Holding Corp., decided whether an obligation arose pre-petition or post-petition when it was attributable to both periods but billed only post-petition. In that case, the debtor remained in possession of the property for the full lease period, thus there was no question that the debtor was liable for the full amount of the taxes, making the issue simply of *how* the debt should be classified for priority purposes. In contrast, the issue here is whether the debtor is liable for rent that is attributable to a post-rejection period simply because it was billed in the

pre-rejection period.

Touch of Grey may argue that the billing date should determine the Debtor's obligations because the Debtor was in complete control over the rejection date, but this argument must fail. First, because as the court in In re Handy Andy Home Improvement Ctrs. noted, this encourages strategic moves of landlords and tenants. 144 F.3d at 1128. In that case, the court noted that had the landlord forwarded the tax bill to the tenant as soon as it received it –a month before the tenant filed bankruptcy–rather than waiting until after the tenant entered bankruptcy, the bill would have been for a pre-petition debt under the landlord's "billing date" theory. Id. Thus, the landlord may have delayed billing the tenant *precisely* to seek payment under Section 365(d)(3). Second, declining to permit post-rejection prorating could just as easily prejudice a landlord because some obligations are computed and billed by the landlord in arrears. In re Ames Dep't Stores, Inc., 306 B.R. at 70. Under such circumstances a landlord would not be entitled to payment for services provided during the post-petition, pre-rejection period simply because it billed the tenant a day after it rejected the lease.

Thus, when a textual application of a statute produces a result plainly at odds with the intention of its drafters, the intention of the drafters, not the exact text, controls. United States v. Ron Pair Enters., 489 U.S. at 242.

C. Forbidding Proration Of Rent For Rejected Leases Is Incompatible With Other Sections Of The Bankruptcy Code And It's Equitable Objective Of Securing Equal Distribution Among Creditors.

The whole-text canon of statutory interpretation requires that the text of a statute be construed as a whole. Thus, statutory language, like any other language, should be read in context. In re Handy Andy Home Improvement Ctrs. 144 F.3d at 1128. The context consists not merely of other sentences, but also of the situation to which the language pertains and the

bankruptcy code as a whole. Id. Here, the situation concerns a class of post-petition debts.

Prior to the enactment of § 365(d)(3) debtor's lease obligations in the post-petition, pre-rejection period were handled under the general statute for administrative expenses, 11 U.S.C. §503. In re Child World), 161 B.R. at 574. In applying § 503(b)(1), the courts would allow as an administrative expense the full amount of the rent, if it was not clearly unreasonable, *prorated* over the post-petition, pre-rejection period regardless of when it was billed. Id. This priority was construed narrowly since the presumption in bankruptcy cases is that the debtor's limited resources should be equally distributed among his creditors. Id. Section 365(d)(3) modified the existing law by providing that the amount to be paid by debtor pending assumption or rejection of the lease should be the amount provided in the lease. It removed the bankruptcy courts' ability to review the terms of the lease for reasonableness. Id. at 575. However, "nothing in the legislative history indicates that Congress intended §365(d)(3) to overturn the long-standing practice under §503(b)(1) of prorating debtor-tenants' rent to cover only the post-petition, pre-rejection period, regardless of billing date." In re GCP CT Sch. Acquisition, LLC, 443 B.R. at 254.

Therefore, the Bankruptcy Code should not be read to replace past bankruptcy practices absent a clear indication that Congress intended such a result. Cohen v. De La Cruz, 523 U.S. 213, 221, 118 S. Ct. 1212 (1998).

Touch of Grey might argue that the date by which the tenant must pay the bill determines whether the debt is pre-petition or post-petition even if it is allocable to a period of time after the lease is rejected. However, this argument must fail because such a position would transform pre-petition debt into debt with administrative priority, contrary to the strict standards Congress has enforced for such priority. In re Ames Dep't Stores, Inc., 306 B.R. at 77. Even courts that have

employed this rigid "billing date" standard have failed to address how this interpretation can be implied in conjunction with other provisions of the Code, like 365(g) and 502(g), which explicitly deal with obligations after rejection. Id. To require payment for obligations allocable to the post-rejection period would be to render those provisions null. Id. at 69. Therefore, Section 365(d)(3) should be interpreted as dealing with the obligations arising under the lease for the tenant's right to occupy the property in the post-petition, pre-rejection period, and as fixing that compensation at the rate agreed to in the lease. NETtel, 289 B.R. at 492.

Furthermore, Touch of Grey's request for rent for a period for when it provided no services to the tenant is inequitable to other creditors. Such a result is clearly at odds with the Code's main objective of securing equal distribution among creditors. Howard Delivery Serv. v. Zurich Am. Ins. Co., 547 U.S. 651, 655, 126 S. Ct. 2105 (2006). The amount of that windfall, moreover, would be potentially unlimited, for a lessor could receive and keep months or even years of advance rent under the "billing date" approach advocated by Touch of Gray. NETtel, 289 B.R. at 490. For example, a debtor whose lease requires it to pay rent for the upcoming year on December 31 would be responsible for the full year's rent even if the debtor rejected the lease on January 2. But as the court in NETtel observed, "Congress did not likely intend such absurd results." Id. In that case, the court held that as long as the debtor vacates the Premises by the date of rejection, it is only responsible for the post-rejection period of the lease as an unsecured claim for rejection damages. In re NETtel Corp., Inc., 289 B.R. at 491.

Following this logic, the windfall could also just as easily benefit the debtor to the detriment of the landlord. For example, if rent consisted of a single annual payment, and the payment did not come due during the post-petition, pre-rejection period, the landlord would receive no payment under §365(d)(3) for the time the tenant occupied the premises pending

assumption or rejection of the lease. Thus, forbidding proration of rent for rejected leases is inequitable because it results in a windfall to either landlord or tenant. In this case, requiring the debtor to pay that windfall, and reducing the money available for other creditors, would be contrary to the equitable purposes of the Bankruptcy Code.

Thus, because the statute is ambiguous and the legislative history, canons of construction, and equitable objectives of the bankruptcy code compel the proration of rents for unexpired leases of nonresidential real property under section of 365(d)(3), the Debtor is only required to pay rent for the five days that it occupied the Premises Prior to rejection.

CONCLUSION

For the foregoing reasons, Debtor respectfully requests this Court affirm the judgment of the Court of Appeals for the Thirteenth Circuit.

Respectfully submitted,

Team 40

Counsel for Respondent

Date: January 20, 2022

APPENDIX A

11 U.S. Code § 502

(a)-(f) omitted

(g)

(1) A claim arising from the rejection, under section 365 of this title or under a plan under chapter 9, 11, 12, or 13 of this title, of an executory contract or unexpired lease of the debtor that has not been assumed shall be determined, and shall be allowed under subsection (a), (b), or (c) of this section or disallowed under subsection (d) or (e) of this section, the same as if such claim had arisen before the date of the filing of the petition.

(2) A claim for damages calculated in accordance with section 562 shall be allowed under subsection (a), (b), or (c), or disallowed under subsection (d) or (e), as if such claim had arisen before the date of the filing of the petition.

(h-k) omitted

APPENDIX B

11 U.S.C. § 503(b)(9)

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

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

(1-8) [omitted]

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

(c) [omitted]

APPENDIX C

11 U.S.C § 547

(a) In this section—

"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;

"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;

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

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

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

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

(3) made while the debtor was insolvent;

(4) made—

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

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

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

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

(B)the transfer had not been made; and

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

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

(1) 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;

(5-9) [omitted]

(d-j) [omitted]

APPENDIX D

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)–(c) [omitted]

(d)

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.

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

(3)

(A) The trustee shall timely perform all the obligations of the debtor, except those specified in section 365(b)(2), arising from and after the order for relief under any unexpired lease of nonresidential real property, until such lease is assumed or rejected, notwithstanding section 503(b)(1) of this

title. The court may extend, for cause, the time for performance of any such obligation that arises within 60 days after the date of the order for relief, but the time for performance shall not be extended beyond such 60-day period, except as provided in subparagraph **(**B**).**This subsection shall not be deemed to affect the trustee's obligations under the provisions of subsection (b) or (f) of this section. Acceptance of any such performance does not constitute waiver or relinquishment of the lessor's rights under such lease or under this title.

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

(i) the date that is 60 days after the date of the order for relief, which may be extended by the court for an additional period of 60 days if the court determines that the debtor is continuing to experience a material financial hardship due, directly or indirectly, to the coronavirus disease 2019 (COVID–19) pandemic; or

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

(C) An obligation described in subparagraph (A) for which an extension is

granted under subparagraph (B) shall be treated as an administrative expense described in section 507(a)(2) for the purpose of section 1191(e).

(4)

(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 210 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 210-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)–(p) [omitted]

Appendix E

11 U.S. Code § 550

(a) Except as otherwise provided in this section, to the extent that a transfer is avoided under section 544, 545, 547, 548, 549, 553(b), or 724(a) of this title, the trustee may recover, for the benefit of the estate, the property transferred, or, if the court so orders, the value of such property, from—

(1) the initial transferee of such transfer or the entity for whose benefit such transfer was made; or

(2) any immediate or mediate transferee of such initial transferee

(b-f) [omitted]