
No. 07-628

IN THE
Supreme Court of the United States
OCTOBER TERM, 2007

IN RE HONEST ALLEN'S, INC.,
Debtor

The Schweiker Fund,
Petitioner,

-versus-

Honest Allen's, Inc.,
Respondent.

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

BRIEF FOR PETITIONER

Team Number P23
Attorneys for the Petitioner

QUESTIONS PRESENTED

- I. Can a pre-bankruptcy inter-creditor agreement grant one creditor the right to vote the claim of another creditor in Chapter 11 in direction contradiction to § 1126(a) which expressly provides that the holder of a claim or interest may vote to accept or reject the plan?

- II. Can a senior secured creditor “gift” or “carve-out” value from its claim and distribute that value to a junior equity holder through a plan of reorganization without violating the absolute priority rule?

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OPINIONS BELOW

The bankruptcy court for the District of Moot held that 1) the voting provision contained in the subordination agreement was not enforceable and 2) the plan's distribution of stock to Levine did not violate the absolute priority rule. (R. 7). The United States District Judge for the District of Moot affirmed the bankruptcy court ruling without opinion. (R. 8). The Thirteenth Circuit Court of Appeals, in an unpublished decision The Schweiker Fund v. Honest Allen's, Inc. (In re Honest Allen's, Inc.), No. 07-480 (13th Cir. Oct. 10, 2007) (Sabella, J. dissenting), affirmed the confirmation of the plan holding that a senior creditor may gift to a junior creditor without violating the absolute priority rule, but reversed the lower courts' holding that the voting provision in the subordination agreement was not enforceable. (R. 2-19).

STATEMENT OF JURISDICTION

Rule VIII of the Official Rules for the Sixteenth Annual Chief Judge Conrad B. Duberstein Bankruptcy Moot Court Competition waives a formal statement of jurisdiction.

STATUTORY PROVISIONS

The following federal statutes are relevant to the facts of this case and are set forth in the appendices: 11 U.S.C. 101; 11 U.S.C. § 330; 11 U.S.C. § 501; 11 U.S.C. § 506; 11 U.S.C. § 510; 11 U.S.C. § 1121; 11 U.S.C. § 1122; 11 U.S.C. § 1126; 11 U.S.C. § 1129; and 28 U.S.C. § 2075.

STATEMENT OF THE CASE

Petitioner has been denied his rights under bankruptcy. First, the respondent has silenced the petitioner by inappropriately asserting petitioner's right to vote under § 1126. Moreover, the respondent has further impinged upon the petitioner's rights under the Bankruptcy Code by providing a distribution to a junior creditor without paying the petitioner the full value of his claim in contravention of the absolute priority rule.

Honest Allen's, Inc. (hereinafter "Debtor") filed a Chapter 11 bankruptcy case in May of 2006. (R. 3). The Debtor is a chain of automobile dealerships that do business in the northeastern part of the United States. (R. 3). The Debtor's sole shareholder is Allen Levine (hereinafter "Levine"). (R. 3). In 2003, the Debtor in an attempt to expand its business entered into a loan package with the Fong and Schweiker groups. (R. 3). The package included \$110 million dollars of financing. (R. 3). The Fong group advanced \$100 million and the Schweiker group advanced \$10 million. (R. 3). The loans required quarterly interest payments with the principal payable as a single balloon payment in June 2006. (R. 3). As part of the loan package, both groups received perfected liens in the Debtor's assets. (R. 3).

Contemporaneously with the loan package, Fong and Schweiker entered into an inter-creditor subordination agreement (hereinafter "Agreement"). (R. 3). As part of the Agreement, Schweiker's loan took a second lien status to Fong's. (R. 4). In addition to the change in priority, the Agreement contained provisions to assure that Schweiker was a "silent second." (R. 4). In fact, the Agreement provides that "Fong is hereby irrevocably authorized and empowered (in its own name or in the name of Schweiker) to file proofs of claim and take other such action (including, without limitation, voting Schweiker's debt) as it may deem necessary or advisable for the exercise, protection, or enforcement of any rights or interests of Fong." (R. 4). Schweiker received a higher interest rate on its loan in exchange for the subordinate position. (R. 4).

At the beginning things went well for the Debtor. (R. 4). By 2005, the Debtor was able to expand its business and become the leading dealer in its market niche. (R. 4). At this time, the Debtor's assets surpassed the value of the loan package. (R. 4). Nevertheless, in late 2005, the Debtor began to feel the heat of dropping used car sales. (R. 4). By the beginning of 2006, used car sales had suffered greatly due to "employee pricing" deals by the manufacturers. (R. 4). Used

car sales also continued to stagger because of increasing gas prices. (R. 4). As a result of declining sales, the Debtor attempted to refinance the loan package with Fong, Schweiker, and new investors. (R. 4). None of the parties, however, were willing to refinance the loans. (R. 4). With the due date of the balloon payment on the horizon, the Debtor filed for Chapter 11 bankruptcy in May of 2006. (R. 4-5).

At first, the bankruptcy proceeded smoothly with all the major parties working together. (R. 5). Both Fong and Schweiker filed proofs of claim. (R. 5). It was not until plan negotiations that the relationship between Fong and Schweiker began to deteriorate. (R. 5). The two creditors disagreed as to the going concern value of the Debtor. (R. 5). Schweiker believed the value of the Debtor's business was \$109 million, while both the Debtor and Fong believed the value was \$95 million. (R. 5). Because the parties could not come to an agreement, Fong negotiated a side agreement with Levine. (R. 8 n.4). Fong and Levine entered into an advertising agreement that included a covenant not to compete. (R. 8 n.4). In addition, Levine threatened to not vote for the plan unless he received something for his stock. (R. 8 n.4). So as part of the plan, Levine was to receive 10 percent of the stock in the reorganized debtor on account of his shareholder interest. (R. 6). It was at this time that Fong attempted to exercise its alleged rights under the Agreement and vote on behalf of Schweiker to approve the proposed plan. (R. 5).

The proposed plan created three classes: Class A consists of Fong's \$100 million claim; Class B consists of the unsecured claims including three vendors' claims totaling \$120,000 and Schweiker's \$10 million claim; and Class C consists of the shareholder interests of which Levine is the sole shareholder. (R. 5). The plan provided that Fong would receive \$50 million payable over 10 years. (R. 5). It also provided that the loan would accrue interest at the market rate and was secured by a first priority security interest in the reorganized debtor's assets. (R. 5). In

addition to the loan, Fong would receive 80 percent of the stock in the reorganized debtor, all this on account of Fong's Class A secured claim. (R. 5-6). The unsecured claims in Class B would receive 10 percent of the stock in the reorganized debtor distributed on a pro rata basis. (R. 6). Finally, Class C would receive 10 percent of the stock in the reorganized debtor. (R. 6). In the end, the reorganized debtor would emerge with \$50 million in secured debt owed to Fong, and Fong would be the majority shareholder with both Levine and Schweiker, along with the other unsecured creditors, as the minority shareholders. (R. 6).

As expected, both Fong and Levine accepted the plan, meaning that both Class A and C had accepted. (R. 6). In Class B, the three vendors voted to accept the plan; however, both Schweiker and Fong submitted ballots for Schweiker's claim. (R. 6). Schweiker's ballot rejected the plan, while Fong's ballot accepted the plan. (R. 6). This situation created a problem. If Schweiker's ballot counts, then the plan would have to be crammed down according to the Bankruptcy Code because Class B did not accept the proposed plan. (R. 6). Alternatively, if Fong's ballot counts, then the plan does not have to be crammed down because all classes accept the plan. (R. 6). Schweiker objected to the confirmation of the plan. (R. 7). Schweiker argued before Chief Judge Cartwright that the voting provision of the Agreement was not enforceable, and therefore, Fong should not have been able to vote Schweiker's claim. And, because the voting agreement was not enforceable, the plan violates the absolute priority rule by distributing stock to Levine without paying the Class B claims in full. (R. 6).

Chief Judge Cartwright held that the voting provision of the Agreement was not enforceable, but that the stock payment to Levine did not violate the absolute priority rule because it was a gift. (R. 6). Because Fong was entitled to all of the stock as the value of the Debtor's business was less than Fong's secured claim, the court reasoned that Fong merely

shared or gifted part of its entitled distribution. (R. 7). The District Court of Moot affirmed the bankruptcy court's holdings without opinion. (R. 7). The Thirteenth Circuit Court of Appeals affirmed the holding that the stock payment to Levine did not violate the absolute priority rule, but reversed the lower courts' holding that the voting provision was not enforceable. (R. 2-19).

SUMMARY OF THE ARGUMENT

Respondent challenges Congress's authority by rewriting the Bankruptcy Code. Respondent circumvents the plain language of the Bankruptcy Code by redefining who may vote a claim under Chapter 11. The respondent further creates an exception to the absolute priority rule in order to distribute property through a plan to a junior creditor.

Despite the ruling below, the holder of the claim is the proper party to vote to accept or reject the plan of reorganization. Section 1126(a) explicitly states that it is the holder of the claim that votes in plan confirmation. Thus, a pre-petition inter-creditor agreement that grants a purported right to vote to another creditor is unenforceable in a bankruptcy case. Also, subordination agreements like the one entered into here only affect the priority of the claims in the distribution of estate assets. A subordination agreement does not transfer rights from one creditor to another, especially rights that are created by the Bankruptcy Code. Additionally, absent some limit on § 510(a), pre-bankruptcy subordination agreements could be structured to undo basic bankruptcy rights, thus defeating the purpose of the Code. And, if all subordination agreements outside of bankruptcy are enforceable, as the Respondent suggests, then § 510(a) would be unnecessary. Therefore, Schweiker, as the holder of the claim, was the proper party to vote for acceptance or rejection of the Debtor's plan of reorganization.

In addition, Fong was not the agent of Schweiker. Agency requires that the agent consent to act at the direction of the principal and the agent consent to be controlled by the principal.

Here, Fong did neither; he did not consent to act at the direction of Schweiker, nor did he consent to be controlled by Schweiker. Therefore, Fong could not vote Schweiker's claim because no agency relationship existed. Even if the Court finds that Fong was an agent, Fong was not Schweiker's agent holding a power coupled with an interest. The inter-creditor agreement did not grant to Fong an interest in Schweiker's claim; it only subordinated Schweiker's claim to Fong's. Because the Agreement did not grant an interest in Schweiker's claim, Fong did not hold a power coupled with an interest. Fong had to vote in the best interests of Schweiker. Fong's failure to vote in Schweiker's best interest violates the purported agency relationship and causes Fong's vote to be invalid.

Moreover, this Court should hold that pre-bankruptcy inter-creditor agreements transferring the right to vote to another creditor are unenforceable because parties cannot contract away rights not yet conferred to them. Enforcing these pre-bankruptcy agreements hampers the bankruptcy process by limiting or defeating the negotiating power of certain creditors. If these voting provisions are enforceable, then large creditors will control the reorganization process to assure their maximum benefit. Also, the agreements lessen the Debtor's opportunities to create real work outs through outside financing.

In addition, upholding the pre-bankruptcy voting agreement defeats the purpose of class voting. Congress intended that all creditors would have a part in the reorganization of the debtor through class participation and voting. Allowing the transfer of only the voting rights of a claim places creditors that belong to a different class in a class in which the creditor is not substantially similar to the other members of the class. Also, it defeats Congress's intention that the holder of a claim would play an important role in the debtor's reorganization. Upholding pre-bankruptcy

voting assignments allows a party that might not have an interest in the reorganization to affect the holder of a claim's relationship with the debtor.

Not only did the Court of Appeals err by holding the inter-creditor agreement enforceable, the court erred by holding that the plan did not violate the absolute priority rule. Because Schweiker's vote counts, Class B did not accept the plan, and the plan must follow the provisions of 11 U.S.C. § 1129(a). Class B is an impaired class because the unsecured creditors will not receive the total value of their claims. Thus, to "cram down" the plan under § 1129(b)(2)(B)(ii), the plan must not distribute property of the estate to a junior class if an intermediate class does not receive the full value of its allowed claim. The plan at issue in this case grants stock to Class C without paying, in full, the claims of Class B. Therefore, the plan violates the absolute priority rule, and therefore cannot be confirmed.

Furthermore, the Respondent argues that Levine contributes new value, and therefore the court should recognize an exception to the absolute priority plan and confirm the proposed plan over Petitioner's objection. While an exception to the absolute priority rule has not been formally recognized, this Court noted in dicta that shareholders might be able to participate in a plan of reorganization if the shareholders contributed new value in money or money's worth. However, even if this Court decides that a new value exception does exist, Respondent's have failed to show that Levine's contribution of future services is a contribution of money or money's worth, as required by the exception. Levine's promise to continue to perform services is merely an intangible, inalienable asset that fails to qualify as a contribution of money's worth. Accordingly, the new value exception does not apply in this case.

Finally, this Court should reverse the Thirteenth Circuit Court of Appeals because allowing a secured creditor to force a plan on an unsecured creditor will have long lasting

repercussions on bankruptcy law. The purpose of the absolute priority rule is to prevent collaboration between debtors and large creditors who seek to develop plans that will benefit both parties to the expense of third parties. Here, Levine and Fong have created a plan that allows for the Debtor's shareholder to retain equity in the company even though, according to the Code, Levine is not entitled to it. This is the type of situation the absolute priority rule was designed to prevent. Here the equity holder is getting a deal otherwise impermissible.

ARGUMENT

I. VOTING PROVISIONS CONTAINED IN PRE-PETITION INTER-CREDITOR AGREEMENTS ARE NOT ENFORCEABLE IN A BANKRUPTCY CASE.

A. Applying the plain language of the statute, Schweiker is the proper party to vote its claim in bankruptcy.

When a court is asked to interpret the language of a statute, the court must follow the proper canon of construction. See Connecticut Nat'l Bank v. Germain, 503 U.S. 249, 253 (1992). The cardinal canon of statutory construction is that "courts must presume that a legislature says in a statute what it means and means in a statute what it says there." Id. When the language of the statute is unambiguous, then the court must not go outside the language of the statute. United States v. Ron Pair Enter., 489 U.S. 235, 241 (1989). In other words, the court should not look at legislative history or pre-code case law to determine the meaning of the unambiguous statutory language. Lamie v. United States Tr., 540 U.S. 526, 534 (2004). It is only when the enforcement of the statute results in an absurdity, should the court turn to legislative history or pre-code case law. Id.

In a Chapter 11 bankruptcy case, parties to the bankruptcy have the right to accept or reject the plan of reorganization proposed by the debtor or another party. See 11 U.S.C. § 1126 (2006). This right to vote on the plan arises because of the Bankruptcy Code. Under § 1126, the

“holder of a claim or interest ... may accept or reject a plan.” Id. The Code defines a claim under § 101(5) as the “right to payment.” 11 U.S.C. § 101(5). While interest is not defined under the Code, § 501(a) speaks of one who is a holder of an interest as an equity security holder of the debtor. 11 U.S.C. § 501(a). Due to Schweiker’s unsecured claim of \$10 million, it is the holder of a claim that has the right to vote to accept or reject the plan. Moreover, Fong is not a holder of an interest due to the pre-bankruptcy Agreement because a holder of an interest has an equity position in the debtor. See § 501(a). Therefore, Fong is not a holder of a claim or interest entitled to vote the \$10 million unsecured claim.

The statutory right granted by § 1126 must be interpreted by this Court according to its plain language, unless the plain reading of the statute creates an absurd result. See Lamie, 540 U.S. at 534 (citations omitted). Here, the plain reading of the statute does not create an absurd result, and therefore, Schweiker is the proper party to vote its claim. Schweiker is the holder of a \$10 million unsecured claim. Once the Debtor filed its bankruptcy case, Schweiker received the right to vote in the Debtor’s plan of reorganization. While Fong argues that the right to vote transferred under the subordination agreement, this argument is incorrect. See Bank of Am., N.A. v. N. LaSalle St. Ltd. P’ship (In re 203 N. LaSalle St. P’ship), 246 B.R. 325, 331 (Bankr. N.D. Ill. 2000). Generally, pre-bankruptcy agreements do not trump the Bankruptcy Code. Id. Applying the plain language of § 1126, the Code only authorizes the holder of a claim to accept or reject a plan of reorganization. See § 1126. Thus, Schweiker is the proper party to vote because it is the holder of a \$10 million unsecured claim, and despite the subordination agreement, Schweiker continued to be the holder of the claim.

This Court has interpreted a similar statute, § 506, in almost the exact same way. See Hartford Underwriters Ins. Co. v. Union Planters Bank, 530 U.S. 1 (2000). In Hartford

Underwriters, the Court was asked to interpret § 506(c) which states that “[t]he trustee may recover from property securing an allowed secured claim the reasonable, necessary costs and expenses of preserving, or disposing of, such property to the extent of any benefit to the holder of such claim.” § 506(c); see also Hartford Underwriters, 530 U.S. at 4. Hartford Underwriters dealt with an administrative claimant who brought an action seeking to use § 506(c) to recover property, or the costs associated with maintaining the property, from the secured creditor. Hartford Underwriters, 530 U.S. at 4. This Court in analyzing whether an administrative claimant could invoke § 506(c) looked to the plain language of the statute. Id. at 6-9. This Court held that the plain language of § 506(c), stating that “[t]he trustee may recover,” was unambiguous and exclusively granted the trustee the right to recover under § 506(c). Id. at 7. “Where a statute...names the parties granted the right to invoke its provisions, only those parties may act.” Id. at 6-7 (citations omitted).

Additionally, this Court interpreted § 330 in a similar fashion. See Lamie, 540 U.S. at 533-34. In Lamie, a debtor’s attorney brought an action to receive payment for its services as an administrative claim under § 330. Id. at 529. This Court, looking to the plain language of the statute, held that the statute permitted only those listed in the statute, trustee, consumer privacy ombudsman, an ombudsman, or a professional person, to collect professional fees from the bankruptcy estate. Id. at 538; See § 330. Because “debtor’s attorney” was not on the list in § 330, the debtor’s attorney could not collect for professional services from the estate. Lamie, 540 U.S. at 538.

Just as the trustee was exclusive in § 506, and the named parties were exclusive in § 330, the holder of a claim is exclusive in § 1126. Section 1126 contains similar language, “[t]he holder of a claim or interest ... may accept or reject a plan.” § 1126. In fact, the section further

provides that “the Secretary of the Treasury may accept or reject the plan on behalf of the United States.” Id. It would be absurd not to follow the plain language of § 1126 and allow someone other than the holder of a claim to vote in regards to the plan, just like it would be absurd to allow someone other than the Secretary of the Treasury to vote on behalf of the United States, say like the Secretary of Defense.

Although nothing in the code says that rights, such as voting, may not be transferred, such a broad interpretation of the Code cannot be accepted. It would be absurd to read the Code as granting every action that is not expressly prohibited. In In re Hart Ski, where the court held a pre-bankruptcy waiver of a creditor’s right to seek relief from the automatic stay unenforceable, the court stated that the Bankruptcy Code guaranteed rights such as the right to seek relief from the automatic stay, the right to vote on a plan, and the right to object to confirmation. Beatrice Foods Co. v. Hart Ski Mfg. Co., Inc. (In re Hart Ski Mfg. Co., Inc.), 5 B.R. 734, 736 (Bankr. D. Minn. 1980). These rights, guaranteed by the Bankruptcy Code, cannot be modified by private contract. Id. The court went on to say that only priority of distribution may be affected by a pre-bankruptcy agreement prior to the commencement of a bankruptcy case. Id.

Thus, this Court should reverse the Thirteenth Circuit Court of Appeals decision because Schweiker is the holder of the claim. Applying the plain language of the statute, Schweiker, as the holder of the claim, is the proper party to vote to accept or reject the plan. See § 1126(a).

B. Fong does not qualify as an agent or a proxy of Schweiker under bankruptcy rules 3018 and 9010.

The Thirteenth Circuit also erred by holding that Fong was an authorized agent of Schweiker, and therefore, Fong was allowed to vote Schweiker’s claim. (R. 13). The Thirteenth Circuit recognized that the plain language of § 1126(a) requires that the holder of the claim vote to accept or reject the plan. (R. 13). The court erred, however, by stating that bankruptcy rule

3018 coupled with rule 9010 allows for Fong to vote on Schweiker's behalf. (R. 13). However, the Bankruptcy Rules shall not "abridge, enlarge, or modify any substantive right." 28 U.S.C. § 2075 (2006). Federal Bankruptcy Rule 3018 states that the acceptance or rejection of a plan should be in writing and signed by the creditor or its authorized agent. Fed. R. Bankr. P. 3018. Rule 9010 further gives power to any agent to file a proof of claim or vote to accept or reject a plan. Fed. R. Bankr. P. 9010. The context of the rules is to allow a corporate creditor to act through its president, or other authorized agent, to file a proof of claim and to vote regarding the plan because corporate entities cannot act by themselves. Orsini v. Interiors of Yesterday, LLC (In re Interiors of Yesterday, LLC), 284 B.R. 19, 40 (Bankr. D. Conn. 2002). Also, the rule contemplates situations where a creditor might allow for its attorney to act on its behalf. The rules do not contemplate parties transferring voting rights to other parties by agreements outside of bankruptcy. Furthermore, the rules cannot supersede the language of the Code. 28 U.S.C. § 2075; see also United States v. Towers (In re Pac. Atl. Trading Co.), 33 F.3d 1064, 1066 (9th Cir. 1994) ("any conflict between the Bankruptcy Code and the Bankruptcy Rules must be settled in favor of the Code."); In re Stoecker, 179 F.3d 546, 552 (7th Cir. 1999) ("But in a conflict between the Code and the rules, the Code controls."). Therefore, due to the context of rules 3018 and 9010 and the plain language of § 1126 only the holder of a claim can vote to accept or reject the plan. 11 U.S.C. § 1126.

Even if this Court does find that rules 3018 and 9010 allow for any type of agent to vote, Fong cannot vote Schweiker's claim because Fong was not an agent. Neither the Code nor the Bankruptcy Rules define agent. The Restatement (Third) of Agency defines the agency relationship as follows:

Agency is the fiduciary relationship that arises when one person (a "principal") manifests assent to another person (an "agent") that the agent shall act on the

principal's behalf and subject to the principal's control, and the agent manifests assent or consents so to act.

Restatement (Third) of Agency § 1.01 (2006). Thus, one must consent to be controlled and consent to act at the direction of the principal for an agency relationship to arise. See Restatement (Third) of Agency §§ 8.01-8.12 (discussing the fiduciary relationship between agent and principal).

Here, however, an agency relationship never arose. Fong never agreed to act under Schweiker's control and never agreed to act at the direction of Schweiker. (R. 4). Rather, the inter-creditor agreement expressly provided that Fong act in its own best interests and not those of Schweiker. (R. 4). In addition, if a party alleging to be an agent acts without actual authority, then the purported agent's actions are void. Kahler v. FirstPlus Financial, Inc. (In re FirstPlus Financial, Inc.), 248 B.R. 60, 70 (Bankr. N.D. Tex. 2000). Here, because an agency relationship never arose or in the alternative Fong acted without actual authority, his actions are void.

In re FirstPlus Financial is similar to this case. The court in In re FirstPlus Financial dealt with the validity of filing a proof of claim by a purported agent. There, the representatives of a class filed a class proof of claim in the debtor's bankruptcy. Before the class was certified under Bankruptcy Rule 7023, the debtor objected to the proof of claim as improperly filed under Bankruptcy Rule 3001. Bankruptcy Rule 3001(b) states that "[a] proof of claim shall be executed by the creditor or the creditor's authorized agent." Fed. R. Bankr. P. 3001(b). The court held that the lack of class certification did not grant the representatives "authorized agent" status to file a proof of claim on behalf of the class. In re FirstPlus Financial, 248 B.R. at 70. The court disallowed the proof of claim finding it defective because it was not filed by the creditor or its authorized agent. Id.

Here, Fong's vote does not count because Fong is not the authorized agent of Schweiker. Just like a proof of claim filed by an unauthorized agent is invalid, so too a ballot cast by an unauthorized agent is invalid. See Id.

Fong further contends that it held a power coupled with an interest, and therefore, he did not have to vote in the best interests of Schweiker. (R. 13). To hold a power coupled with an interest, the holder of a power must also have a proprietary interest in the subject matter of the agency. Restatement (Third) of Agency § 3.12 c. C. Thus, for Fong to have a power coupled with an interest, the power to vote must have been accompanied by a proprietary interest in Schweiker's claim. This was not the case. Fong did not hold a proprietary interest in the subject matter of the alleged agency. See Restatement (Third) of Agency § 3.12 c. C. The inter-creditor agreement purported to give Fong the right to vote Schweiker's claim in bankruptcy, but did not give an interest in Schweiker's claim. (R. 3-4). Therefore, Fong did not hold a power coupled with an interest and did not have the right to vote.

The petitioner prays that this Court reverse the Thirteenth Circuit's opinion because Fong was not an authorized agent as required by Bankruptcy Rule 3018. Moreover, § 1126(a) requires that the holder of the claim, Schweiker, vote to accept or reject the plan.

C. Section 510(a) is limited in scope.

Schweiker seeks to enforce its rights under bankruptcy. Schweiker did voluntarily enter into the subordination agreement and does not contest the priority of his claim. However, Schweiker has the right, as the holder of a claim, to vote because Congress granted this right to creditors under the Bankruptcy Code. Section 510 is limited in scope and does not affect substantive bankruptcy rights.

Section 510(a) of the Bankruptcy Code states that “[a] subordination agreement is enforceable...to the same extent that such agreement is enforceable under applicable nonbankruptcy law.” § 510(a). While the Thirteenth Circuit properly referenced the statute, its definition of subordination was improper. According to Black’s Law Dictionary, a subordination agreement is an agreement between two creditors holding interest in the same property in which one creditor agrees that its interest will be reduced to a lower priority status. Black’s Law Dictionary 75 (8th ed. 2004). Using the legal definition of subordination, a subordination agreement does not transfer one creditor’s *rights* to another, but only affects the *priority of distribution* between the creditors. See In re N. LaSalle St. P’ship, 246 B.R. at 331 (emphasis added).

The court in In re Hart Ski Mfg. Co., Inc. held “[t]he intent of § 510(a) ... is to allow the consensual and contractual priority of payment to be maintained between creditors among themselves in a bankruptcy proceedings.” In re Hart Ski, 5 B.R. at 736. The court addressed similar issues involved in this case and stated that “[t]he Bankruptcy Code guarantees each secured creditor certain rights, regardless of subordination. These rights include...the right to participate in the voting for confirmation or rejection of any plan of reorganization.” Id. The court went on to reason that Congress did not intend to allow for parties to alter the rights granted by the Bankruptcy Code, through a subordination agreement, that did not deal with distributions of assets. Id. With this intent in mind, courts have been reluctant to enforce pre-bankruptcy agreements that alter a parties’ bankruptcy rights. See Hayhoe v. Cole (In re Cole), 226 B.R. 647, 652 n.7 (B.A.P. 9th Cir. 1998) (noting decisions by different courts that did not enforce pre-bankruptcy agreements). Many courts have prevented the use of pre-bankruptcy agreements that alter a debtor’s right to the automatic stay, In re Pease, 195 B.R. 431, 435

(Bankr. D. Neb. 1996), a creditor's right to seek relief from the automatic stay, In re Hart Ski, 5 B.R. at 736, a debtor's right to receive a discharge, In re Cole, 226 B.R. at 651, a debtor-in-possession's right to assume or reject a contract, In re Trans World Airlines, Inc., 261 B.R. 103, 115 (Bankr. D. Del. 2001), and a creditor's right to vote on a plan, In re N. LaSalle St., 246 B.R. at 331.

Respondents argue that because the voting provision was wrapped inside of a subordination agreement, it should be enforced because subordination agreements are enforceable in bankruptcy under § 510. (R. 12). Such an argument allows for any transfer of substantive bankruptcy rights so long as it is wrapped inside of a subordination agreement. Absent some limit, pre-bankruptcy subordination agreements could be crafted to undo basic bankruptcy rights provided by the Code. This would not only defeat the intent of Congress in granting bankruptcy rights, but would render § 510 useless. Rather, § 510 is a limited grant of deference to non-bankruptcy law that defines the extent to which inter-creditor agreements may alter otherwise applicable bankruptcy rules. Because § 510 does not speak to waiver or alterations of substantive bankruptcy rights, but only to subordination, § 510 only enforces provisions that alter the priority of asset distribution. See § 510(a); In re 203 N. LaSalle, 246 B.R. at 331; In re Hart Ski, 5 B.R. at 736.

Therefore, this Court should reverse the Thirteenth Circuit Court of Appeals holding that the pre-bankruptcy inter-creditor agreement is enforceable because § 510(a) is limited in scope because it exclusively deals with the subordination of priority in the distribution of assets to creditors. Furthermore, courts have held, and rightly so, that parties cannot contract away or out of substantive bankruptcy rights due to the intent of Congress.

D. Private Parties cannot contract away the policies of the Bankruptcy Code.

When Congress uses its constitutional powers to grant substantive rights to parties, parties cannot freely contract around those rights without the express authority of Congress. ABC-NACO, Inc. v. Bank of America, N.A. (In re ABC-NACO, Inc.), 331 B.R. 773, 782 (Bankr. N.D. Ill. 2005) (citing Connolly v. PBGC, 475 U.S. 211, 223-24 (1986)). The purpose of the Bankruptcy Code is to allow for the reorganization of a debtor that is not possible under non-bankruptcy law. See In re 203 N. LaSalle, 246 B.R. at 331. Without the substantive protections granted by the Bankruptcy Code for both debtors and creditors, reorganization no longer becomes a possibility. Large secured creditors will be able to manipulate smaller creditors into transferring rights, such as voting rights, before the rights even arise. If private parties can contract away rights granted by the Bankruptcy Code, then there would be no need for the Bankruptcy Code. For these reasons several courts have held that neither debtors nor creditors can contract out rights under bankruptcy. See id. (holding that a creditor cannot contract away its right to vote); See also In re Hart Ski, 5 B.R. at 736 (holding that a creditor cannot contract away its right to seek relief from the automatic stay); In re Trans World Airlines, Inc., 261 B.R. at 114 (holding that a debtor cannot contract away its right to assume or reject a contract under § 363); In re Cole, 226 B.R. 647 (holding that a debtor cannot waive its right to a discharge); In re ABC-NACO, 331 B.R. 773 (holding that contractual provisions that attempt to define the treatment of parties in bankruptcy are not enforceable).

Moreover, allowing for a creditor to transfer his voting rights under § 1126 destroys the purpose of class voting under § 1122. The purpose of class voting is to place claims or interests that are substantially similar within the same class. 11 U.S.C. § 1122. By doing so, each class has the ability to veto the plan of reorganization if the class feels that it is treated unfairly and is

impaired. § 1129. Yet, allowing for an unsecured creditor to transfer its voting right to a secured creditor destroys the purpose of § 1122. Now the secured creditor, whose claim is not substantially similar to the other class members, can vote in its best interests. Such is the case here. Fong has voted for the plan because under the plan, Fong will receive one hundred percent of its allowed secured claim. Fong is not substantially similar to the remainder of Class B creditors because its claim is secured and unimpaired. Allowing for parties to transfer its voting rights, such as in this case, makes both §§ 1122 and 1126 superfluous because the holder is no longer voting, and the claims are no longer substantially similar within the class. Thus, private agreements that make statutes superfluous should not be upheld.

Another purpose behind class voting is an impaired class of creditors has a stronger bargaining position because they have the power to veto the plan. This veto power brings to the table the ability for the creditors to negotiate better treatment of its claims with the debtor. This is especially important in Chapter 11 cases, because the debtor is expected to be a going concern once it exits bankruptcy and has a better chance of fulfilling its credit obligations. Taking away this power from an impaired class prevents the most efficient and effective reorganization.

Furthermore, the Thirteenth Circuit's decision grants huge power to the aggressive secured lender. Once a large secured lender has a voting provision in its subordination agreement, the large secured lender can use the plan process to usurp power from the debtor and other creditors. As is the case here, Fong used its proposed voting right to force a plan upon all creditors and the Debtor. Large creditors, like Fong, will use these so called waivers of voting rights to maximize its gain in bankruptcy to the detriment of both creditors and debtors.

Most importantly, a holder of a claim maintains an interest in its claim. Although a creditor is subordinated, it has an interest in the way its claim is treated. If the assets are

sufficient in a given estate, a subordinated claim has the potential to receive a distribution. Congress intended to protect that potential by allowing a subordinated claim to be voted by the holder of the claim. See § 1126. This assures that the holder of the subordinated claim has a role in the negotiation and confirmation of the plan – a role that would otherwise be eliminated by enforcing transfers of Chapter 11 voting rights. Therefore, it is against public policy to allow a non-holder to vote the claim of another because the holder maintains an interest in its claim.

This Court should reverse the Thirteenth Circuit’s decision because it grants large creditors the ability to manipulate the reorganization process for its own benefit. Only Congress can determine rights in bankruptcy. In re ABC-NACO, 331 B.R. at 782. Accordingly, this Court should hold as a matter of public policy that private parties cannot contract away the substantive rights granted by the Bankruptcy Code.

II. A PLAN THAT DISTRIBUTES PROPERTY TO A JUNIOR CREDITOR OVER THE OBJECTION OF AN INTERVENING CLASS VIOLATES THE ABSOLUTE PRIORITY RULE.

A. According to the plain language of § 1129(b)(2)(B)(ii), the plan’s distribution of stock to Levine violates the absolute priority rule.

When a court is asked to interpret the language of a statute, the court must follow the proper canon of construction. See Germain, 503 U.S. at 253. The cardinal canon of statutory construction is that “courts must presume that a legislature says in a statute what it means and means in a statute what it says there.” Id. When the language of the statute is plain and unambiguous, the court’s is to enforce the statute according to its terms. Ron Pair Enter., 489 U.S. at 241. In other words, the court should not look at legislative history or pre-code case law to determine the meaning of the unambiguous statutory language. Lamie, 540 U.S. at 534.

In Chapter 11 bankruptcy, the debtor or another party proposes a plan of reorganization. § 1121. The proposed plan must be confirmed by the court according to § 1129(a). If all of the

parties consent or vote to accept the plan, then the court can confirm the plan even though the plan impairs one or more classes of creditors. § 1129(a)(8). However, if the impaired class does not accept the plan, then the court can confirm the plan only if the plan is found to be fair and equitable. § 1129(b)(1). This “cram down” provision gives the court the right to force an impaired creditor to accept the proposed plan so long as the plan meets the requirements of § 1129(b)(2)(B)(i), (ii). See In re Armstrong World Indus., Inc., 432 F.3d 507, 512 (3d Cir. 2005).

To meet the fair and equitable standard, the plan must either pay unsecured creditors the full value of their allowed claim, or any claim junior to the impaired claim shall not receive property from the estate “on account of” its junior claim. § 1129(b)(2)(B)(i)-(ii). This provision of the Bankruptcy Code is better known as the absolute priority rule. The absolute priority rule prevents junior creditors from receiving a distribution from the plan when more senior creditors are not paid in full and object to the plan. In re Armstrong World Indus., Inc., 432 F.3d at 513.

Unless the language of a statute is ambiguous or would produce an absurd result, this Court must follow the plain language of the statute. See Lamie, 540 U.S. at 534 (citations omitted). Here the language of the statute is clear and unambiguous. It states that junior creditors cannot receive property on account of its junior claim if a senior impaired class has objected. § 1129(b)(2)(B)(ii).

In this case, the Debtor’s plan violates the absolute priority rule. The plan proposes that Fong receive a \$50 million secured loan and 80 percent of the stock in the reorganized debtor, while both Schweiker and Levine will receive 10 percent of the stock in the reorganized debtor. (R. 5-6). Levine, the junior interest holder, will receive property despite the fact that Schweiker,

a senior unsecured creditor, is impaired, has objected to the plan, and has not received value equal to the amount of its allowed claim.

The Thirteenth Circuit, along with the Respondent, believes that the plan does not implicate the absolute priority rule because Fong “carved out” of its distribution the amount given to both Schweiker and Levine. (R. 8-11). The Thirteenth Circuit, in its holding, relied heavily on a First Circuit decision that held “carve outs” made from a secured creditor’s distribution were allowable even if the distribution was made over a dissenting intermediate class of creditors. See Official Comm. of Unsecured Creditors v. Stern (In re SPM Mfg. Corp.), 984 F.2d 1305 (1st Cir. 1993). However, In re SPM is distinguishable from the case at hand.

First, as a Chapter 7 case, the absolute priority rule was inapplicable. In In re SPM, the debtor originally filed a Chapter 11 case, but the case was converted to Chapter 7 at the time of the First Circuit opinion. Id. at 1308-10. Chapter 7 does contain a priority scheme, but it does not mandate the priority quite like Chapter 11 does. Second, the sharing of proceeds in that case occurred only after distribution. In this case, respondents propose the distribution scheme as part of the Chapter 11 plan and not through an outside agreement. Unlike In re SPM, the Debtor is not liquidating and the plan purports to modify the legal relations between the Debtor and its creditors in contravention to the absolute priority rule.

The Respondent further argues that because Fong is giving up part of its rightful distribution under bankruptcy, the “carve out” falls outside of the absolute priority rule. Fong argues that the Code does not mention carve outs because in essence Fong is gifting to the junior creditors what is rightfully Fong’s. If the code is ambiguous on the issue of carve outs, the Court should look to Congress’s intention as to the meaning of the statute. Lamie, 540 U.S. at 534. Representative Edwards’ and Senator DeConcini’s floor statements clarify that “a senior class

will not be able to give-up value to a junior class over the dissent of an intervening class.” 124 Cong. Rec. 32,408 & 34,007 (1978) (remarks of Rep. Edwards on Sept. 28, 1978, and remarks of Sen. DeConcini on Oct. 5, 1978). Congress’s intention was to prevent secured lenders from manipulating the system by pushing down a plan by side stepping senior creditors. Congress effectuated its intent by carefully drafting § 1129(b)(2)(B)(ii) to prohibit such maneuvers within the context of Chapter 11.

The Debtor’s plan of reorganization violates the absolute priority rule because it distributes property to Levine, a junior interest holder, over the objections of Schweiker, an impaired senior unsecured creditor, without paying Schweiker’s claim in full. See § 1129(b)(2)(B)(ii). This proposed “carve out” goes not only against the statute, but Congress’s intention to prevent secured creditors from giving up value to a junior class over the senior class objections. Therefore, this Court should apply the plain language of the statute and reverse the Thirteenth Circuit’s decision because the plan should not be confirmed for violation of the absolute priority rule.

B. The plan’s distribution of stock to Levine is “on account of” Levine’s equity interest in the debtor.

Respondent further argues that even if the Court follows the plain language of the statute, the distribution to Levine does not run afoul of the absolute priority rule because the distribution is not “on account of” Levine’s junior claim. Fong bases this argument on the long debate that has gone through the courts as to whether or not a “new value” exception applies to the absolute priority rule. Yet, when this Court last faced the new value exception, it rightfully refused to decide the matter because the plan in that case violated the absolute priority rule. See Bank of Am. Nat’l Trust and Sav. Ass’n v. 203 N. LaSalle St. P’ship, 526 U.S. 434, 443 (1999). As such, this Court has never officially endorsed the new value exception.

The history of the new value exception begins with this Court in Case v. Los Angeles Lumber Products Co. Under the Bankruptcy Act, Chapter X required that a court assure that any plan of reorganization was fair and equitable. Case v. Los Angeles Lumber Products Co., 308 U.S. 106, 114 (1939). The duty to assure that the plan was fair and equitable existed even if the majority of creditors accepted the plan. Id. at 115. In fact, in Case, the creditors had overwhelmingly accepted the plan. Id. This Court held that the plan violated the fair and equitable rule because the shareholders were to receive a distribution of new stock without full payment to the bondholders. Id. at 123. Thus at this time bankruptcy law required that the plan be accepted by every creditor, and if one creditor objected to the plan, the plan could not be found fair and equitable. Id. To some how lighten the strict rule required under Chapter X of the Bankruptcy Act, Justice Douglas stated in dicta:

It is, of course, clear that there are circumstances under which stockholders may participate in a plan of reorganization of an insolvent debtor.... [T]his Court stress[ed] the necessity, at times, of seeking new money “essential to the success of the undertaking” from the old stockholders. Where that necessity exists and the old stockholders make a fresh contribution and receive in return a participation reasonably equivalent to their contribution, no objection can be made.... If, however, those conditions we have mentioned are satisfied, the creditor cannot complain that he is not accorded “his full right of priority against the corporate assets.”

Case, 308 U.S. at 121-22. This Court went on to state in dicta that the contribution had to be in “money or money’s worth, reasonably equivalent in view of all the circumstances to the participation of the stockholder.” Id. Nonetheless, this Court held the plan violated the fair and equitable requirement because the stockholders only guaranteed continued continuity of management and financial standing and influence in the community. Id.

The debate concerning the new value exception continued after Congress passed the 1978 Bankruptcy Code. Congress passed § 1129(b)(2)(B) which in essence codified the judicially

created rule of what makes a plan fair and equitable. See Northwest Bank Worthington v. Ahlers, 485 U.S. 197, 202 (1988). This rule still created problems for the lower court because of the “on account of” language and whether or not the exception to the fair and equitable rule, stated in Case, survived the enactment of the Code. Id. at 203 n.3. Once again this Court held that the plan in Ahlers violated the codified version of the absolute priority rule without addressing whether or not the comments of Justice Douglas survived the passage of the Code. Id. And once again most recently, this Court held that the plan in North LaSalle violated the absolute priority rule without deciding as to whether a new value exception exists. N. LaSalle, 526 U.S. at 443. Thus, this Court has never formally recognized an exception to the absolute priority rule based on the contribution of new value to the debtor. The Court should once again decline to create a judicial exception to the absolute priority rule. The case at hand is similar to North LaSalle in that the plan violates the plain language of the absolute priority rule.

The plan proposed by Fong and the Debtor violates the absolute priority rule. The plan distributes property to Levine without paying the entire amount of Schweiker’s claim. (R. 6). The plan cannot be confirmed because the Code prohibits the cram down of a plan against Schweiker Levine received property without paying the full amount of Schweiker’s claim. See 11 U.S.C. § 1129(b)(2)(B); see also N. LaSalle, 526 U.S. at 443 (holding that the absolute right to purchase new stock of the reorganized debtor qualified as property and as such violated the absolute priority rule); Ahlers, 485 U.S. at 203 n.3 (holding that the plan violated the absolute priority rule because the debtor retained an interest in the property without meeting the requirements of § 1129(b)(2)(B)); and Case, 308 U.S. at 132 (holding that the plan was not fair and equitable because the stockholders received new stock in the debtor over the objection of the bondholders).

In fact, the record stipulates that Levine is receiving the stock under the plan “on account of his shareholder interest.” (R. 6). The record also states that the “‘gift’ of stock to Levine was necessary in order to persuade him to continue his affiliation with the business.” (R. 7-8). Levine refused to make any concessions with Fong and even threatened to vote against the plan unless he received something for his equity interest. (R. 8 n.4). Levine, the junior creditor, is receiving property through the plan “on account of” his pre-bankruptcy equity interest. As such, unless Schweiker is paid the full amount of his allowed claim, the plan violates the absolute priority rule.

Therefore, this Court should reverse the Thirteenth Circuit’s decision and hold that the plan, regardless of whether or not a new value exception exists, violates the absolute priority rule. See N. LaSalle, 526 U.S. at 443. Levine is receiving property on account of his junior claim or interest before Schweiker is paid in full. This violates the plain language of § 1129(b)(2)(B). The plan cannot be confirmed as currently drafted.

C. Levine’s promise to continue working and promoting the reorganized debtor does not qualify as new value to overcome the absolute priority rule.

As stated, this Court has never officially recognized a new value exception to the absolute priority rule. N. LaSalle, 526 U.S. at 443. If this Court decides that a new value exception does exist, Levine’s promise to continue working and promoting the reorganized debtor does not qualify as new value to overcome the absolute priority rule. Ahlers, 485 U.S. at 206.

The factors to determine whether a new value exception applies can best be summarized in In re OCA, Inc. In In re OCA, Inc., the bankruptcy court for the Eastern District of Louisiana found that to allow the equity holders to meet the new value exception, “there must be 1) a contribution that is new capital; 2) the contribution must be necessary for a successful

reorganization; 3) the contribution must be in money or money's worth; and 4) the contribution must be reasonably equivalent to the value of the property acquired by the equity holders." In re OCA, Inc., 357 B.R. 72, 90 (Bankr. E.D. La. 2006) (citing N. LaSalle, 526 U.S. at 445 (quoting Case, 308 U.S. at 121-22)). The issue in Levine's case is whether Levine has contributed money or money's worth.

This Court has commented as to what was meant by contribution of money or money's worth. In Case, the Court stated that stockholders' "financial standing and influence in the community" did not provide new capital to the debtor as an exception to the fair and equitable requirement. Case, 308 U.S. at 122. The Court spoke of community standing as intangibles that could not be considered new capital. Id. This Court, later in Ahlers, was presented with shareholders that agreed to continue to work for the debtor once the debtor exited bankruptcy. Ahlers, 485 U.S. at 201. The Court had to decide whether or not labor constituted what Justice Douglas described as money or money's worth. The Ahlers Court held that future labor was an intangible, inalienable, and unenforceable promise. Id. at 204. "Unlike 'money or money's worth,' a promise of future services cannot be exchanged in any market for something of value to the creditors today.... [A] promise to contribute future labor, management, or expertise [is not] sufficient to qualify for the *Los Angeles Lumber* exception to the absolute priority rule." Id.

Levine's promise or agreement to provide advertising for the reorganized debtor does not qualify as money or money's worth to satisfy the new value exception. See In re OCA, 357 B.R. at 90; Ahlers, 485 U.S. at 204. Levine's promise is nothing more than an intangible promise. The promise to promote the company does not have a ready market in which Schweiker could receive the value of its claim today. Nor is the promise something that could be readily traded on an

open market. Thus, Levine's guarantee to continue to do promotions for the reorganized debtor does not qualify as new value.

Respondent argues that both parties' experts agree that without Levine the company would not be worth as much outside of bankruptcy. While the record shows that with Levine, the company would be worth more, this value is considered to be nothing more than goodwill. Under the Black's Law Dictionary definition of goodwill, goodwill is an intangible asset based on management's contribution to the company or perception of the company to the public. Black's Law Dictionary 715 (8th ed. 2004). Thus, no matter if the value of the company would be higher because of Levine's goodwill, this value is intangible and inalienable. See Case, 308 U.S. at 122. Therefore, the added value because of goodwill does not satisfy the money or money's worth prong of the new value exception.

Petitioner prays that this Court reverse the Thirteenth Circuit's decision because even if a new value exception to the absolute priority rule exists, it does not apply in this case. Levine's contribution to continue as a promoter of the reorganized debtor is not money or money's worth. The promise is an intangible that has no market value. Furthermore, the value added by retaining Levine does not meet the money or money's worth requirement because it is goodwill. Goodwill as defined by Black's Law Dictionary is an intangible benefit experienced by the company.

D. The essential purpose of the absolute priority rule will be defeated if secured creditors are allowed to redistribute through a plan their distribution of estate assets.

This Court must reverse the Thirteenth Circuit's decision because allowing for a debtor to side-step or circumvent the absolute priority rule will damage the bankruptcy process. The Bankruptcy Code provides for debtors to reorganize its affairs in a manner that benefits all creditors. The purpose is to put every interested party on a level playing field governed by the

Bankruptcy Code. The Respondents ask this Court to bypass the plain language of the Code to allow for Levine to receive a much better deal than it should receive under the Code. See § 1129(b)(2)(B).

This case illustrates a perfect example of a debtor collaborating with a creditor to bargain its way into more of a distribution than it deserves. Here, Levine has negotiated with the secured creditor to receive a distribution under the plan when the Code prevents such an action. However, the Thirteenth Circuit has opened the door for future violations of the absolute priority rule so long as the plan describes its actions as a gift or carve-out. Now large creditors will work together with equity shareholders or other junior creditors to cram down a plan that clearly violates the absolute priority rule.

Also, just like the effects of allowing someone other than the creditor or its authorized agent to vote its claim, the impermissible cram down of a plan defeats the class voting provision of § 1122. Section 1122 has become superfluous because large senior creditors will just structure the plan to gift part of its distribution to another junior creditor. This result will lessen the importance of negotiation between all creditors and the debtor. Furthermore, it will create huge losses to creditors and the estate. Instead of seeking an outside buyer of the debtor, the large creditor will collaborate with the current equity holders to push through its plan. This will create inefficient reorganizations and only create repeat bankruptcy proceedings.

For these policy reasons, this Court should reverse the Thirteenth Circuit's decision to affirm the plan confirmation. The plan should not be confirmed because it violates the absolute priority rule and public policy. Thus, the case should be remanded to the bankruptcy court to enter an order denying confirmation of the plan.

CONCLUSION

For the foregoing reasons, the Petitioner respectfully prays that this Court reverse the decision of the Thirteenth Circuit Court of Appeals and remand with directions to hold the voting agreement unenforceable as a violation of the Bankruptcy Code and hold that the plan should not be confirmed because it violates the absolute priority rule due to the payment of stock by Fong to Levine.

Respectfully Submitted,

Counsel for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Brief for Petitioner was mailed by certified U.S. mail, return receipt requested, to Counsel for the Respondent on February 5, 2008.

Counsel for Petitioner

APPENDIX A

11 U.S.C. § 101 (2006)

§ 101. Definitions

In this title the following definitions shall apply:

[]

(5) The term “claim” means--

(A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or

(B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured.

[]

APPENDIX B

11 U.S.C. § 330 (2006)

§ 330. Compensation of officers

(a)(1) After notice to the parties in interest and the United States Trustee and a hearing, and subject to sections 326, 328, and 329, the court may award to a trustee, a consumer privacy ombudsman appointed under section 332, an examiner, an ombudsman appointed under section 333, or a professional person employed under section 327 or 1103--

(A) reasonable compensation for actual, necessary services rendered by the trustee, examiner, ombudsman, professional person, or attorney and by any paraprofessional person employed by any such person; and

(B) reimbursement for actual, necessary expenses.

□

APPENDIX C

11 U.S.C. § 501 (2006)

§ 501. Filing of proofs of claims or interests

(a) A creditor or an indenture trustee may file a proof of claim. An equity security holder may file a proof of interest.

□

APPENDIX D

11 U.S.C. § 506 (2006)

§ 506. Determination of secured status

[]

(c) The trustee may recover from property securing an allowed secured claim the reasonable, necessary costs and expenses of preserving, or disposing of, such property to the extent of any benefit to the holder of such claim, including the payment of all ad valorem property taxes with respect to the property.

[]

APPENDIX E

11 U.S.C. § 510 (2006)

§ 510. Subordination

(a) A subordination agreement is enforceable in a case under this title to the same extent that such agreement is enforceable under applicable nonbankruptcy law.

□

APPENDIX F

11 U.S.C. § 1121 (2006)

§ 1121. Who may file a plan

(a) The debtor may file a plan with a petition commencing a voluntary case, or at any time in a voluntary case or an involuntary case.

(b) Except as otherwise provided in this section, only the debtor may file a plan until after 120 days after the date of the order for relief under this chapter.

(c) Any party in interest, including the debtor, the trustee, a creditors' committee, an equity security holders' committee, a creditor, an equity security holder, or any indenture trustee, may file a plan if and only if--

(1) a trustee has been appointed under this chapter;

(2) the debtor has not filed a plan before 120 days after the date of the order for relief under this chapter; or

(3) the debtor has not filed a plan that has been accepted, before 180 days after the date of the order for relief under this chapter, by each class of claims or interests that is impaired under the plan.

[]

APPENDIX G

11 U.S.C. § 1122 (2006)

§ 1122. Classification of claims or interests

(a) Except as provided in subsection (b) of this section, a plan may place a claim or an interest in a particular class only if such claim or interest is substantially similar to the other claims or interests of such class.

(b) A plan may designate a separate class of claims consisting only of every unsecured claim that is less than or reduced to an amount that the court approves as reasonable and necessary for administrative convenience.

APPENDIX H

11 U.S.C. § 1126 (2006)

§ 1126. Acceptance of plan

(a) The holder of a claim or interest allowed under section 502 of this title may accept or reject a plan. If the United States is a creditor or equity security holder, the Secretary of the Treasury may accept or reject the plan on behalf of the United States.

[]

APPENDIX I

11 U.S.C. § 1129 (2006)

§ 1129. Confirmation of plan

[]

(b)(1) Notwithstanding section 510(a) of this title, if all of the applicable requirements of subsection (a) of this section other than paragraph (8) are met with respect to a plan, the court, on request of the proponent of the plan, shall confirm the plan notwithstanding the requirements of such paragraph if the plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan.

(2) For the purpose of this subsection, the condition that a plan be fair and equitable with respect to a class includes the following requirements:

[]

(B) With respect to a class of unsecured claims--

(i) the plan provides that each holder of a claim of such class receive or retain on account of such claim property of a value, as of the effective date of the plan, equal to the allowed amount of such claim; or

(ii) the holder of any claim or interest that is junior to the claims of such class will not receive or retain under the plan on account of such junior claim or interest any property, except that in a case in which the debtor is an individual, the debtor may retain property included in the estate under section 1115, subject to the requirements of subsection (a)(14) of this section.

[]

APPENDIX J

28 U.S.C. § 2075 (2006)

§ 2075. Bankruptcy rules

The Supreme Court shall have the power to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure in cases under title 11.

Such rules shall not abridge, enlarge, or modify any substantive right.

The Supreme Court shall transmit to Congress not later than May 1 of the year in which a rule prescribed under this section is to become effective a copy of the proposed rule. The rule shall take effect no earlier than December 1 of the year in which it is transmitted to Congress unless otherwise provided by law.

The bankruptcy rules promulgated under this section shall prescribe a form for the statement required under section 707(b)(2)(C) of title 11 and may provide general rules on the content of such statement.