

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,

v.

HONEST ALLEN'S, INC.,

RESPONDENT.

December 12, 2007

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRTEENTH CIRCUIT IS GRANTED, LIMITED TO CONSIDERATION OF THE FOLLOWING QUESTIONS:

1. Whether an agreement granting one creditor the right to vote the claim of another creditor is enforceable in a Chapter 11 case.
2. Whether a Chapter 11 plan of reorganization may be confirmed where a senior class voluntarily gives up value to a junior class without paying in full the claims of an intermediate rejecting class.

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**UNITED STATES COURT OF APPEALS
FOR THE THIRTEENTH CIRCUIT**

IN RE HONEST ALLEN’S, INC., DEBTOR

Case No. 07-4080

The Schweiker Fund,

Appellant/Cross-Appellee,

v.

Honest Allen’s, Inc.,

Appellee/Cross-Appellant.

Decided: October 10, 2007

Before Judges Glynn, Sabella and Ruggero

Glynn, Circuit Judge, for the Court.

The present appeal arises from the confirmation of a plan of reorganization in a Chapter 11 bankruptcy proceeding. Although the Debtor, Honest Allen’s, Inc. (hereinafter the “Debtor”), is nominally involved, the real dispute is between its two major creditors: a senior secured lender, Fong Capital Partners (hereinafter “Fong”), and a subordinated and now unsecured lender, The Schweiker Fund (hereinafter “Schweiker”). At the inception of the lending relationships, Fong and Schweiker entered into an inter-creditor agreement. The principal purpose of the agreement was to subordinate Schweiker’s claim and corollary lien to Fong’s claim and lien. However, the agreement also granted to Fong the right to vote Schweiker’s claim in any bankruptcy proceeding involving the Debtor. That is precisely what Fong did here, voting Schweiker’s claim in favor of a plan of reorganization that Schweiker opposed.

Schweiker's substantive objection to the plan is that it contains a "give-up," whereby Fong redirects part of its bankruptcy distribution to the sole shareholder of the Debtor. Schweiker argues that such a give-up violates the "absolute priority rule" because the shareholder is junior to Schweiker and is receiving property under the plan before Schweiker has been paid in full. The Bankruptcy Court ruled in Schweiker's favor on the voting issue, but confirmed the plan over its objection, holding that give-up provisions were permissible. Schweiker appealed the confirmation order. The Debtor cross-appealed, challenging the Bankruptcy Court's disqualification of the vote Fong filed on Schweiker's claim. The District Court affirmed the Bankruptcy Court without opinion. For the reasons explained below, we also affirm.

I. Factual Background and Procedural History

This appeal arises out of the Chapter 11 bankruptcy case filed in May of 2006 by Honest Allen's, Inc., a chain of several dozen automobile dealerships operating in the northeastern United States. The Debtor sells inexpensive new and used automobiles and is well known in its market area for folksy humorous advertisements featuring its sole shareholder, Allen Levine. The advertising has been very effective, and market surveys show that the automobile buying public associates Levine's "Honest Allen" television persona with the business and believes that they will be treated fairly and given great deals at Honest Allen's.

In 2003, the Debtor was a successful, but much smaller operation, consisting of only six dealerships. Seeking to expand, the Debtor employed an investment banker who arranged a loan package consisting of the Fong and Schweiker loans. Fong advanced \$100 million and Schweiker advanced \$10 million. The loans were secured by perfected liens on all of the Debtor's assets. For both loans, the principal was repayable in a single balloon payment in June of 2006, with quarterly payments of accrued interest in the interim. Contemporaneous with the loans, Fong and Schweiker entered into an inter-creditor subordination agreement. Under the

agreement, Schweiker subordinated its claim and lien to the claim and lien of Fong, thereby giving Fong a first priority security interest in the Debtor's assets and relegating Schweiker to second lien status. In addition, the inter-creditor agreement contained a number of provisions designed to ensure that Schweiker would be a "silent second." Among these was the voting rights provision at issue here. Specifically, the inter-creditor agreement provides in relevant part 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 such other action (including, without limitation, voting Schweiker's debt) as it may deem necessary or advisable for the exercise, protection, or enforcement of any of the rights or interests of Fong." According to testimony introduced at the confirmation hearing, the parties expected that the Debtor's collateral would be sufficient to fully secure the debt owed to Fong, with a surplus sufficient to secure most of the Schweiker debt. Because of its subordinate position, the interest rate on the Schweiker loan was higher than that on the Fong loan.

Things went well initially. The Debtor expanded to its current size and successfully established itself as the leading dealer in its market niche. By early 2005, the value of the Debtor's assets exceeded the combined debt of both Fong and Schweiker. However, in the late summer and fall of 2005, the major automobile manufacturers engaged in a series of price wars, each offering deeply discounted "employee pricing" deals on new cars. This resulted in record new car sales during late 2005, but meant that there was very little demand for new or used automobiles in 2006. Moreover, rising gasoline prices further depressed automobile sales. With the business faltering and no hope of a quick revival of consumer demand for automobiles, Fong and Schweiker refused to extend or refinance their loans. The Debtor sought, but was unable to find, new investors willing to refinance its debt. Consequently, facing \$110 million in balloon principal payments coming due in June of 2006, the Debtor filed for relief under Chapter 11 of

the Bankruptcy Code in May of 2006.

The case proceeded calmly, with the major parties co-operating. A professional Chief Restructuring Officer was employed and a number of changes were implemented, including closing several unprofitable locations and establishing better inventory and financial controls. Both Fong and Schweiker filed proofs of claim for their respective debts. The cordial relationship between Fong and Schweiker broke down during the plan negotiations. Fong and Schweiker disagreed as to the value of the Debtor's business. As testimony at the confirmation hearing indicated, Schweiker's valuation expert valued the enterprise at \$109 million as a going concern, whereas the valuation experts presented by Fong and the Debtor both valued it at only \$95 million. All three valuation experts agreed that the liquidation value of the Debtor's enterprise was less than \$75 million.

With the impasse between Fong and Schweiker threatening the prospects of saving the business, Fong decided to assert the rights granted to it under the inter-creditor agreement. The Debtor proposed a plan supported by Fong that was based on the lower valuation, namely, \$95 million. The proposed plan classified claims and interests as follows: Class A was a secured class consisting of Fong's \$100 million claim; Class B was the class of unsecured creditors, consisting of Schweiker's \$10 million claim,¹ and three smaller unsecured vendor claims aggregating \$120,000²; and Class C consisted of the shareholder interest of Levine, the Debtor's sole shareholder. The plan provided that Fong would receive, on account of its Class A claim, \$50 million, payable over 10 years with a market rate of interest and secured by a first priority security interest in all assets of the reorganized debtor, plus 80 percent of the stock in the

¹ Although Schweiker initially held a second lien position, its claim was treated as an unsecured claim under the proposed plan because the low valuation of the Debtor left no collateral value to support its claimed secured status. *See* 11 U.S.C. § 506(a)(1) (2007) (limiting allowed secured claim to collateral value).

² Most of the unsecured claims against the Debtor, other than the Schweiker claim and the few remaining claims in Class B, were paid in full earlier in the case pursuant to a "critical vendor" order. No party objected to that order and it is not before us here.

reorganized debtor. The Class B claimants would receive, on account of their claims, 10 percent of the stock in the reorganized debtor, distributed pro rata in proportion to the amounts of their claims. Levine, on account of his shareholder interest, would also receive 10 percent of the stock in the reorganized debtor. Thus, the Debtor would emerge from bankruptcy owing only \$50 million in secured debt. Fong would be its majority shareholder with an 80 percent stake, and Levine, Schweiker and the other unsecured creditors would be minority shareholders.

Class A (Fong) and Class C (Levine) both voted to accept the plan. In Class B, the three vendors voted to accept the plan. Two ballots were filed for Schweiker's claim. One, submitted by Schweiker, rejected the plan. The other, submitted by Fong on behalf of Schweiker pursuant to the authority granted to it by the inter-creditor agreement, accepted the plan. Whether Schweiker's vote is counted for or against the plan is important for purposes of confirmation because Schweiker's claim is large enough to "veto" class acceptance. Thus, if the ballot cast by Fong is accepted, then Class B accepts the plan and it can be confirmed, without regard to the absolute priority rule and the fact that Class C receives property in the form of stock in the reorganized debtor. *See generally* 11 U.S.C. 1129(a) & (b) (2007).

If, on the other hand, the ballot cast by Schweiker is accepted, then Class B will be a non-accepting class because the Schweiker claim represents more than a third of the total debt voting in Class B and Schweiker's vote rejecting the proposed plan would block acceptance by the class. *See* 11 U.S.C. § 1126(c) (2007). The presence of a non-accepting class of unsecured claims triggers the "cram down" provisions of § 1129(b)(2)(B)(ii). *See* 11 U.S.C. § 1129(b)(2)(B)(ii) (2007). Under that section, a plan that does not pay the claims of the dissenting class in full can be confirmed only if "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" *Id.* This provision often is referred to as the absolute priority

rule because it works to preserve the relative priority of claims and interests in a cram down context. In short, the absolute priority rule provides that unless each holder of a claim in a dissenting unsecured class will receive property of a value, as of the effective date of the plan, equal to the allowed amount of such claim, equity is not permitted to retain or receive any property in the reorganized debtor. Since Levine's shareholder interest in Class C is junior to the unsecured claims in Class B, his receipt of stock in the reorganized debtor ordinarily would violate the absolute priority rule and make confirmation of the plan impossible.

Schweiker filed an objection to the confirmation of the proposed plan. The Honorable Grant Cartwright, Chief Bankruptcy Judge for the District of Moot, held a plan confirmation hearing at which Fong, Schweiker and the Debtor presented both testimony and argument. Judge Cartwright ruled in favor of Schweiker on the ballot question, holding that the voting rights provision of the inter-creditor agreement was not enforceable in a bankruptcy case. Turning to the issue of cram down, while recognizing that the receipt of stock by Levine ordinarily would violate the absolute priority rule, Judge Cartwright held that the rule is not violated when the property received by the junior class is the result of a gift by a senior class of part of the distribution that the senior class otherwise would have received.

As noted earlier, there was conflicting testimony on the value of the Debtor's business. The Bankruptcy Court accepted the testimony of the Debtor's and Fong's valuation experts and determined that the business had a going concern value of no more than \$95 million, and a liquidation value of no more than \$75 million.³ All three valuation experts testified that at least \$10 million of the going concern value would be lost if Levine no longer appeared in advertising as the public personification of the business. Fong's "gift" of stock to Levine was necessary in

³ Although Schweiker's \$109 million valuation arguably would give it a \$9 million secured claim and a \$1 million unsecured claim (*see* 11 U.S.C. § 506(a)(1)), it has not pursued that argument here. Although it challenged valuation and classification in the District Court, the only challenge it has raised in this Court to the confirmation order is the give-up issue.

order to persuade him to continue his affiliation with the business.⁴ Having determined that the total value of the reorganized business was less than the allowed amount of Fong's \$100 million claim, the Bankruptcy Court held that the gift of stock given to Class C did not implicate the absolute priority rule because that stock represented part of the distribution to which Fong was entitled.

Schweiker filed a timely appeal from the order of confirmation.⁵ The Debtor cross-appealed, challenging the Bankruptcy Court's disallowance of the ballot Fong filed for the Schweiker claim. The Honorable Sue Liu, United States District Judge for the District of Moot, affirmed without opinion. This appeal followed.

II. Discussion

In civil appeals, a lower court's findings of fact are accorded special deference, and will not be disturbed on appeal unless "clearly erroneous." *Hirschfeld v. Spanakos*, 104 F.3d 16, 19 (2d Cir. 1997) (citation omitted). However, a district court's conclusions of law are reviewed *de novo*, and an appellate court need not pay any level of deference to a lower court's conclusions of law. *Keach v. United States Trust Co.*, 419 F.3d 626, 634 (7th Cir. 2005) (citation omitted). Since neither party challenges the lower court's factual findings, there is no need for us to review the District Court's factual findings. The findings of fact will be accepted for the purposes of deciding this appeal. Thus, the Court will address each legal issue in turn.

A. Senior Creditor Give-Ups Are Consistent With The Absolute Priority Rule

We agree with the lower courts that the absolute priority rule simply is not implicated where a senior secured creditor voluntarily cedes a portion of the proceeds of its collateral to a junior class. While the absolute priority rule, as embodied in § 1129(b)(2)(B)(ii), prevents a

⁴ In a side agreement, Levine entered into a 10 year advertising agreement and covenant not to compete. Testimony indicated that Levine refused to enter into that agreement and threatened to vote against the proposed plan of reorganization unless he "got something for his stock."

⁵ The Bankruptcy Court stayed the confirmation order pending the outcome of this appeal.

junior interest holder like Levine from receiving a distribution of property from the estate where a more senior dissenting class of claims is not being paid in full, it does not prevent a secured creditor from gifting part of its collateral proceeds to the junior interest holder. *See In re World Health Alternatives, Inc.*, 344 B.R. 291, 298-99 (Bankr. D. Del. 2006). “[C]reditors are generally free to do whatever they wish with the bankruptcy dividends they receive, including share them with other creditors.” *Official Comm. of Unsecured Creditors v. Stern (In re SPM Mfg. Corp.)*, 984 F.2d 1305, 1313 (1st Cir. 1993).

Unsecured creditors and interest holders have no property interests in estate assets, but merely a right to share in the estate’s residual value in accordance with the Code’s priority of distribution scheme. In contrast, secured creditors hold property interests in specific assets and are entitled to the proceeds of their collateral. Thus, unlike unsecured creditors and interest holders, the distribution to a secured creditor is based on its property rights and not on the Code’s general priority of distribution scheme. *Cf. In re Tri-County Water Ass’n, Inc.*, 91 B.R. 547, 549 (Bankr. D.S.D. 1988) (“A secured creditor’s interest in its collateral is a substantive property right created by nonbankruptcy law which may not be substantially impaired when bankruptcy intervenes.”) In the instant case Fong holds a perfected first priority security interest on all of the Debtor’s assets, with the amount of its claim exceeding both the liquidation and going concern values of the enterprise. Fong was entitled to receive the entirety of the estate and, because it held a perfected security interest, that property was not subject to distribution under the Bankruptcy Code’s priority of distribution scheme.⁶ Thus, the property given to Levine by Fong was a carve out of Fong’s collateral proceeds and not a distribution of property from the estate to which the absolute priority rule might apply. *See SPM*, 984 F.2d at 1313-14 (permitting give-up

⁶ We need not address the more difficult question of whether an unsecured creditor may give-up value consistent with the absolute priority rule. While an unsecured class give-up was not permitted in *In re Armstrong World Industries, Inc.*, 432 F.3d 507 (3d Cir. 2005), the Third Circuit Court of Appeals was careful to distinguish cases allowing secured creditor give-ups. *See id.* at 514.

by senior secured creditor); *In re Genesis Health Ventures, Inc.*, 266 B.R. 591, 602, 617-18 (Bankr. D. Del. 2001) (permitting give-up by senior secured creditor), *appeal dismissed*, 280 B.R. 339 (D. Del 2002); *cf.*, *In re MCorp Fin., Inc.*, 160 B.R. 941, 948 (S.D. Tex. 1993) (permitting give-up by senior bondholders).

It is well established that creditors are permitted to transfer or assign their claims, in whole or in part. *See, e.g.*, Fed. R. Bankr. P. 3001(c)(2) (establishing procedures for transferred claims). While Fong's gift to Levine can be viewed as a diversion of its collateral proceeds, it can also be viewed as a transfer by Fong to Levine of part of its secured claim (*i.e.*, a partial assignment of its *right* to receive a distribution). *See SPM*, 984 F.2d at 1313. Fong's claim is its property and not property of the estate or property to which other creditors may claim any entitlement. No doubt, Fong generally is free to dispose of its property as it wishes. Neither the absolute priority rule nor any other bankruptcy principle prevents Fong from assigning to Levine part of its right to a bankruptcy distribution.

Neither Schweiker nor the other creditors in the intervening class are harmed by the gift of stock to Levine. Schweiker is simply "out of the money" in this deeply insolvent estate. Schweiker would receive nothing in a Chapter 7 liquidation. Even in a reorganization, Schweiker is not entitled to any distribution because the going concern value of the Debtor is not even sufficient to satisfy Fong's senior secured claim. Although under no obligation to do so, Fong voluntarily gifted stock to both the unsecured and shareholder classes.⁷ Class B is already receiving far more than its share and should not be able to extract more through a strained interpretation of the absolute priority rule. *See MCorp*, 160 B.R. at 959-62 (permitting give-up as long as intermediate class receives at least as much as it would without the give-up).

⁷ Even if the absolute priority rule applies, Levine's receipt of stock was on account of Fong's gift, and not treatment under the plan on account of Levine's prior shareholder interest. *See* 11 U.S.C. § 1129(b)(2)(B)(ii) (2007); *cf. In re Worldcom, Inc.*, 2003 WL 23861928, *60-61 (Bankr. S.D.N.Y. 2003) (noting that junior class received value on account of contribution from other classes and not as treatment under the plan).

Based on the foregoing, the Bankruptcy Court correctly held that the plan of reorganization could be confirmed over the objection of the class of unsecured creditors.

B. Voting Agreements Are Enforceable In Chapter 11 Cases

While our interpretation of the absolute priority rule provides sufficient grounds to affirm the confirmation order, we believe that the order can also be affirmed on the grounds that the voting provision of the inter-creditor subordination agreement is enforceable. *Moriarty v. Svec*, 164 F.3d 323, 328 (7th Cir. 1998) (noting that an appeals court can review “each and every theory the district court relied upon in deciding the case”) (citation omitted). In this regard, we disagree with the lower courts’ views that such provisions are not enforceable in Chapter 11 bankruptcy cases.

We see no reason to alter the nonbankruptcy bargain of two sophisticated creditors absent some express provision to that effect in the Bankruptcy Code. Here, Schweiker agreed to subordinate its rights, claim and lien in all respects to the rights, claim and lien of Fong. The voting provision was simply one of many ways in which Schweiker’s rights were subordinated to Fong’s. Schweiker is a sophisticated hedge fund, well advised and fully able to assess the risks and rewards attendant to speculative investments like this one. Schweiker made its bargain and should not now be able to wriggle out of the deal after having received the high interest rate and whatever other benefits it demanded in exchange for accepting a completely subordinated and totally silent position. *See In re Inter Urban Broad. of Cincinnati, Inc.*, 1994 WL 646176, *2 (E.D. La. Nov. 16, 1994), *dismissed*, 74 F.3d 1238 (5th Cir. 1995) (table) (holding that a subordination agreement is enforceable in a bankruptcy case to the same extent that such agreement is enforceable under nonbankruptcy law) (citations omitted). Schweiker has an easy remedy available if it believes that Fong’s actions are unfair or harmful to it. It can pay Fong’s \$100 million claim in full and in cash and be freed from all of the burdens of its subordination

agreement. Absent that, we have no sympathy for Schweiker's argument that it deserves protection of the bankruptcy rights that it voluntarily relinquished.

Parties are generally free to waive their rights as long as they do so knowingly and voluntarily, even in matters involving rights granted by the Constitution in criminal proceedings. *United States v. Nguyen*, 235 F.3d 1179, 1182 (9th Cir. 2000) (“knowing and voluntary waivers of appellate rights in criminal cases are ‘regularly enforced.’ ‘The sole test of a waiver’s validity is whether it was made knowingly and voluntarily.’”) (citation omitted). We might refuse to enforce certain pre-bankruptcy waivers of bankruptcy rights granted to debtors against their creditors, or *vis a versa*, because of the special issues raised by such waivers. *See, e.g., In re Trans World Airlines, Inc.*, 261 B.R. 103, 115 (Bankr. D. Del. 2001) (holding that “a pre-bankruptcy debtor simply does not have the capacity to waive rights bestowed by the Bankruptcy Code upon a debtor in possession, particularly where those rights are as fundamental as the automatic stay.”) However, this case does not involve the waiver of bankruptcy rights against the estate, but merely the allocation of those rights between two sophisticated consenting creditors. In this instance, our inclination is supported by the express language of § 510(a) of the Bankruptcy Code, which provides, “[a] subordination agreement is enforceable in a case under this title to the same extent that such agreement is enforceable under applicable nonbankruptcy law.” 11 U.S.C. § 510(a) (2007). Thus, with respect to inter-creditor subordination agreements, the Code’s clear command is to look to nonbankruptcy law and enforce them to the full extent that they may be enforced under that law. There is no assertion here that this term of the inter-creditor subordination agreement is not enforceable under the laws of the State of Moot, which govern this transaction. Section 510(a) leaves no room to use “bankruptcy policy” to override valid contractual subordination provisions.

Schweiker argues that reading § 510(a) together with § 1126(a) shows that voting rights provisions are not included within the protective scope of § 510(a) subordination provisions.⁸ Schweiker relies on the § 1126(a) statement that “[t]he *holder* of a claim ... may accept or reject a plan” to argue that bankruptcy law permits only the holder, and no one else, to vote. *See* 11 U.S.C. § 1126(a) (2007) (emphasis added). Since Schweiker never assigned its claim to Fong, Schweiker argues that Fong is not a holder and therefore cannot vote the claim regardless of the terms of the inter-creditor agreement. *See Bank of Am. 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). That argument relies on a misreading of § 1126(a). While that section does authorize the holder to vote its claim, it says nothing about whether a holder may delegate or even bargain away its voting rights. *See Blue Ridge Investors, II, LP v. Wachovia Bank (In re Aerosol Packaging, LLC)*, 362 B.R. 43, 47 (Bankr. N.D. Ga. 2006). Further, the Federal Rules of Bankruptcy Procedure recognize that a party may delegate, assign or otherwise transfer the right to vote. Rule 3018, which deals with Chapter 11 voting, expressly provides that the vote can “be signed by the creditor ... or an authorized agent.” *See* Fed. R. Bankr. P. 3018(c). Similarly, the general rule for representation, Rule 9010, provides that a creditor may “perform any act ... by an authorized agent, attorney in fact, or proxy.” *See* Fed. R. Bankr. P. 9010(a). Here, Fong was duly authorized by the inter-creditor subordination agreement to vote Schweiker’s claim. As the holder of a power coupled with an interest, Fong was not required to act in the interest of Schweiker, but was free to act in furtherance of its own interest in voting Schweiker’s claim. *See Aerosol*, 362 B.R. at 47.

⁸ We similarly reject the argument that the term “subordination” as used in § 510(a) is limited to provisions establishing payment or lien priority. The ordinary meaning of the term “subordinate” also includes being subject to the control of another – precisely the effect of the voting provision at issue. *See* WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 2277 (2002). Thus, voting rights provisions are within the scope of § 510(a). *See In re Curtis Ctr Ltd. P’ship*, 192 B.R. 648, 659-60 (Bankr. E.D. Pa. 1996); *cf., In re Itemlab, Inc.*, 197 F. Supp. 194, 196 (E.D.N.Y. 1961) (permitting senior creditor to vote junior creditor’s claim because subordination agreements have long been recognized and enforced by bankruptcy courts).

III. Conclusion

For the foregoing reasons, we affirm the judgment of the District Court and remand the matter for further proceedings consistent with this opinion.

Sabella, Circuit Judge, dissenting:

I must respectfully dissent from the majority's disposition of this case with respect to both issues on appeal.

A. Only The Holder May Vote A Claim

The question of whether a senior creditor may vote the claim of a subordinated creditor is answered clearly and in the negative by the plain language of § 1126(a). The section provides that “the holder of a claim ... may accept or reject a plan.” *See* 11 U.S.C. § 1126(a) (2007). This language means that *only* the holder may vote. No provision of the Code, or of the Federal Rules of Bankruptcy Procedure authorizes anyone other than the holder to vote a claim.¹ The majority's view that § 1126(a) merely permits the holder, among other parties, to vote its claim, is inconsistent with bankruptcy policy and with the remainder of § 1126.

Even if I were inclined to interpret § 1126(a) to vest in the holder of a claim a non-exclusive power to vote it, that option has been foreclosed by the Supreme Court's analysis of virtually identical language in *Hartford Underwriters Insurance Co. v. Union Planters Bank, N.A.*, 530 U.S. 1 (2000). There a unanimous Court flatly rejected, on plain language grounds, the argument that the language “the trustee may” in § 506(c) vested a non-exclusive power in the trustee. *Id.* at 6. Similar to § 506(c), the statutory language of § 1126(a) is clear, explicit, unambiguous, and absolute. It names the holder of a claim and only the holder as the party with the power to accept or reject a plan. This restrictive use of the term “may” is confirmed by the second sentence of § 1126(a), which states that the Secretary of the Treasury “may accept or reject the plan” on behalf of the United States. *See* 11 U.S.C. § 1126(a) (2007). Would the majority contend that the Secretary of the Treasury is free to delegate to the Secretary of Defense

¹ Contrary to the majority's view, neither Federal Rule of Bankruptcy Procedure 3018 nor 9010 authorize the delegation, assignment or transfer of the right to vote a claim. The references to “authorized agent,” “attorney in fact,” and “proxy” simply recognize that holders, such as corporations and other artificial entities, may have to act through agents. Those terms, especially when read in context, do not even hint that a non-holder is authorized to vote a claim contrary to the wishes of the holder. *See In re 203 N. LaSalle St. P'ship*, 246 B.R. at 331-32.

(or to a private creditor pursuant to a subordination agreement) the power to vote claims of the United States? Such a reading of § 1126(a) would be non-sensical.

The majority's interpretation also loses sight of the purpose of class voting in Chapter 11 cases. Bankruptcy claims may be bought and sold, and the voting rights associated with those claims will pass to the buyer, who becomes the new holder. *See* Fed. R. Bankr. P. 3001(e) (providing mechanism for changing record holder of transferred claims). However, those voting rights cannot be severed from the associated claims and then bargained and traded away to entities holding no economic stake in the underlying claims. Such trading in voting rights would wreck havoc on the carefully crafted Chapter 11 scheme Congress envisioned. The concept behind class voting is that similarly situated creditors vote as a group and that a majority of creditors with similar interests can bind dissenting class members. *See* 11 U.S.C. §§ 1126(c) & 1129(a)(8) (2007). This is the reason why the § 1122 classification rules require that all claims in a class be "substantially similar." *See* 11 U.S.C. § 1122(a) (2007). The § 1126(a) requirement that only the holder vote the claim is an integral part of this scheme, and one that creditors are not permitted to alter through private side agreements. If, as proposed here, a senior secured creditor who holds no economic interest in the unsecured class can control class acceptance or rejection through its power to vote the large claim of a subordinated unsecured creditor, then the Code's classification and voting scheme will be undone to the great harm of the other creditors in that class.

Further, unlike the majority, I read § 510(a) as a limited grant of deference to nonbankruptcy inter-creditor agreements. If, as the majority suggests, all inter-creditor agreements are enforceable absent an express prohibition in the Code, then § 510(a) would be unnecessary. The only sensible interpretation of § 510(a) is that it defines the extent to which an inter-creditor agreement may alter the otherwise applicable bankruptcy rules. Read in this fashion, § 510(a) permits creditors to alter distributional priorities *only*. *See* 203 N. LaSalle St.

P'ship, 246 B.R. at 331; *In re Hinderliter Indus., Inc.*, 228 B.R. 848, 850 (Bankr. E.D. Tex. 1999); *Beatrice Foods Co. v. Hart Ski Mfg. Co. (In re Hart Ski Mfg. Co.)*, 5 B.R. 734, 736 (Bankr. D. Minn. 1980). Since § 510(a) does not speak to waivers or alteration of other rights, those provisions of inter-creditor agreements are not enforceable in bankruptcy cases. The assignment of voting rights in the inter-creditor agreement is not a subordination agreement.² The Bankruptcy Court properly rejected the ballot filed by Fong.

B. Give-Up Provisions Violate The Code's Confirmation Standards

Distilled to its essence, the majority's argument in favor of permitting class-skipping gifts is that a creditor is free to do what it wants with its bankruptcy distribution. I agree. My disagreement with the majority is not about *what* a creditor may do, but rather *how*. While Fong is free to give whatever it wants to Levine, it is not free to usurp the plan confirmation process and the coercive powers of the Bankruptcy Court by making that gift through a crammed down plan of reorganization. See *In re OCA, Inc.*, 357 B.R. 72, 87 (Bankr. E.D. La. 2006).

The Chapter 11 process provides many potential advantages to a senior secured creditor, like Fong, seeking to maximize the value of its collateral. For example, and by way of illustration, it can use that process to preserve going concern values by operating the business, to stay the value-destroying actions of competing creditors, to resolve disputed claims, to modify collective bargaining agreements, and to cure, assume and assign otherwise non-transferable contracts. It can also use the plan confirmation process to bind dissenting creditors and dissenting classes of creditors to a plan in the event that no consensual plan can be negotiated. But if it wishes to use the bankruptcy process to force a non-consensual plan on dissenting creditors, then it must play by the rules.

² The majority's reliance on a lay dictionary for an "ordinary meaning" of subordination is misplaced. The proper question is what that term means in a legal context -- where it refers to the relative ranking of rights and not to issues unrelated to distributional priority. See *BLACK'S LAW DICTIONARY* 1467 (8th ed. 2004).

Those rules are clear. Whatever force the majority's argument for a special secured creditor rule may have, we are dealing with a statute and our duty is to apply it according to its terms. See *Lamie v. United States Trustee*, 540 U.S. 526, 534 (2004) (citing *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000)). Section 1129(b)(2)(B)(ii) provides a clear directive for situations like the instant case. If, as here, a dissenting senior class is not being paid in full, then the plan may be confirmed only if "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 claim or interest any property."³ 11 U.S.C. § 1129(b)(2)(B)(ii) (2007). Because Levine is the holder of a junior interest and will receive stock under the plan on account of that interest, the plan cannot be confirmed.

Section 1129(b)(2)(B)(ii) includes no exception for class-skipping creditor give-ups. The only issue is whether Levine receives property "under the plan." The source of the property or its nature⁴ is simply irrelevant. Were there any question that § 1129(b)(2)(B)(ii) prohibits class-skipping give-ups, it is answered by the legislative history to the Code. As the floor statements of Representative Don Edwards and Senator Dennis DeConcini explain, "[A] senior class will not be able to give-up value to a junior class over the dissent of an intervening class unless the intervening class receives the full amount, as opposed to value, of its claims or interests." 124 Cong. Rec. 32,408 & 34,007 (1978) (remarks of Rep. Edwards on Sept. 28, 1978, and remarks of

³ Levine's insistence that he "[get] something for his stock" in exchange for voting for the plan demonstrates that he is receiving property under the proposed plan "on account of" his prior shareholder interest. See *In re Armstrong World Indus., Inc.*, 432 F.3d 507, 515-16 (3d Cir. 2005)

⁴ I fail to see the distinction the majority attempts to draw between secured creditor and unsecured creditor give-ups. The fact that a secured creditor has a lien does not remove the collateral from the property of the estate. See 11 U.S.C. § 541 (2007); *In re Rock Rubber & Supply Co. of Conn., Inc.*, 345 B.R. 37, 40 (Bankr. D. Conn. 2006) ("[A]ll [of] the debtor's property must be included in the bankruptcy estate ... even property ... in which a creditor has a security interest.") (quoting *United States v. Whiting Pools, Inc.*, 462 U.S. 198, 204 (1983)). Thus, the secured creditor is not giving up its property. Rather, just like unsecured creditors, the secured creditor's bankruptcy distribution is based on the Code's distribution scheme. While its lien rights entitle it to a higher priority of distribution, it is incorrect to view that as a simple return of the collateral or its proceeds. This is particularly true in the Chapter 11 context, where the collateral usually is neither liquidated nor returned to the secured creditor. Instead the secured creditor receives a stream of future payments measured by the value of its collateral. See 11 U.S.C. 1129(b)(2007) (providing treatment of dissenting secured creditor class). Here, for example, the property being

Sen. DeConcini on Oct. 5, 1978, respectively). Further, the prohibition of class-skipping give-ups is necessary in order to prevent squeeze-outs and to preserve the negotiating power that Congress intended to give non-consenting classes. *See Armstrong World*, 432 F.3d at 514-15.

For the aforementioned reasons, I cannot join the majority's opinion and must respectfully dissent.

given to Levine is stock in the reorganized debtor; hardly what would normally be considered the proceeds of collateral.