TEAM 10 P

No. 19-1004

IN THE

Supreme Court of the United States

OCTOBER TERM, 2019

IN RE TUMBLING DICE, INC. *ET AL.*,
Debtors,

TUMBLING DICE, INC. *ET AL.*,
Petitioner,

v.

UNDER MY THUMB, INC.,
Respondent.

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

BRIEF FOR PETITIONER

TEAM 10 P
COUNSEL FOR PETITIONER

QUESTIONS PRESENTED

1. Whether 11 U.S.C. § 365(c)(1) permits a debtor in possession to assume an executory contract over the objection of the non-debtor party to such contract when the debtor in possession intends to assume, but not assign, the executory contract.
2. Whether a joint, multi-debtor plan is confirmable under 11 U.S.C. § 1129(a)(10) where one impaired class of claims of any one debtor under the plan has voted to accept the plan.

TABLE OF CONTENTS

Page(s)

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

OPINIONS BELOW ix

STATEMENT OF JURISDICTION ix

STATUTORY PROVISIONS ix

STATEMENT OF FACTS 1

SUMMARY OF THE ARGUMENT 6

ARGUMENT 9

I. SECTION 365(c)(1) DOES NOT PRECLUDE DEVELOPMENT FROM ASSUMING ITS PREPETITION RIGHTS UNDER A NON-EXCLUSIVE LICENSE OF INTELLECTUAL PROPERTY. 9

A. The Plain Meaning of § 365(c)(1) Does Not Bar a Debtor in Possession from Assuming the Debtor's Rights and Obligations Under a Non-Exclusive License Agreement. 10

1. *Permitting Development to Assume its Prepetition Rights Under the Agreement is Consistent with the Plain Meaning of § 365(c)(1).* 10

2. *The Hypothetical Test Misconstrues the Plain Meaning of § 365(c)(1) and is Diametric to the Goals of Chapter 11.* 12

3. *In this Context, the Trustee Does not Equate to the Debtor in Possession.* 16

B. Allowing Development to Assume the Agreement Comports with the Legislative History of § 365(c)(1), which Confirms § 365(c)(1)'s Plain Meaning. 18

II. UNDER A JOINT, MULTI-DEBTOR PLAN, § 1129(A)(10) ONLY REQUIRES ACCEPTANCE FROM ONE IMPAIRED CLASS OF CLAIMS OF ANY ONE DEBTOR. 20

A. The Plain Language of § 1129(a)(10) Indicates that Acceptance from Only One Impaired Class of Claims Under a Joint, Multi-Debtor Plan is Required. 21

1. *The Plain Language of § 1129(a)(10) Refers to a Single Plan.* 22

2. *The "Per Plan" Approach Complies with the Overall Statutory Scheme.* 23

B. The "Per Plan" Approach Furthers the Overarching Purpose of Both Chapter 11 and § 1129(a)(10). 24

1. *The "Per Plan" Approach Provides More Than Some Indicia of Support from Impaired Creditors.* 24

2. *Reading § 1129(a)(10) in the Broader Context of Chapter 11 Requires the "Per Plan" Approach.* 26

C. Section 1129(a)(10) Does Not Require a Multi-Debtor Plan, without an Accepting Class of Impaired Creditors for Each Individual Debtor, to be Substantively Consolidated. 27

1. *Joint Administration is Necessary Due to Debtors' Integrated, yet Separate, Corporate Structure.* 28

2. *Based on the Plan's More than Favorable Treatment of Under My Thumb, Substantive Consolidation is Not Appropriate or Necessary to Satisfy § 1129(a)(10).* 29

3. *Section 1129(a)(10) is Merely a Technical Requirement, Conferring No Substantive Rights to Creditors.* 31

CONCLUSION 33

APPENDIX A 34

APPENDIX B 35

APPENDIX C 37

TABLE OF AUTHORITIES

United States Supreme Court Cases **Page(s)**

Chapman v. Houston Welfare Rights Org.,
441 U.S. 600 (1983) 21

Hardt v. Reliance Stand. Life Ins. Co.,
560 U.S. 242 (2010) 22

Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.,
530 U.S. 1 (2000) 24

Iselin v. United States,
270 U.S. 245 (1926) 22

Kelly v. Robinson,
479 U.S. 36 (1986) 23

King v. Burwell,
135 S. Ct. 2480 (2015) 23

N.C.P. Marketing Grp., Inc. v. BG Star Prod., Inc.,
129 S. Ct. 1577 (2009) 9, 15

Negonsott v. Samuels,
507 U.S. 99 (1993) 13

N.L.R.B. v. Bildisco & Bildisco,
465 U.S. 513 (1984) .... *passim*

Pittsburgh & Lake Erie R.R. Co. v. Railway Labor Exec. Ass'n,
491 U.S. 490 (1989) 23

Ransom v. FIA Card Servs., N.A.,
562 U.S. 61 (2011) 16, 17

Toibb v. Radloff,
501 U.S. 157 (1991) 27

United States v. Ron Pair Enter. Inc.,
489 U.S. 235 (1989) 14, 21

Watt v. Alaska,
451 U.S. 259 (1981) 24

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229 F.3d 750 (9th Cir. 2000) 30

Bonneville Power Admin. v. Mirant Corp. (In re Mirant Corp.),
440 F.3d 238 (5th Cir. 2006) 9, 11

Brockett v. Winkle Terra Cotta Co.,
81 F.2d 949 (8th Cir. 1936) 31

Cle-Ware Indus., Inc. v. Sokolsky (In re Cle-Ware Indus., Inc.),
493 F.2d 863 (6th Cir. 1974) 17

Hardemon v. City at Boston,
144 F.3d 24 (1st Cir. 1998) 9

In re Augie/Restivo Baking Co., Ltd.,
860 F.2d 515 (2d Cir. 1988) 30

In re Combustion Eng'g, Inc.,
391 F.3d 190 (3d Cir. 2004) 24

In re James Cable,
27 F.3d 534 (11th Cir. 1994) 12

In re Owens Corning,
419 F.3d 195 (3d Cir. 2005) 27, 30

In re West Elecs, Inc.,
852 F.2d 79 (3rd Cir. 1988) 10

In re Windsor on the River Assocs., Ltd.,
7 F.3d 127 (8th Cir. 1993) 21, 24, 26

JPMCC 2007-C1 Grasslawn Lodging, LLC v. Transwest Resort Props., Inc. (In re Transwest Resort Props., Inc.),
881 F.3d 724 (9th Cir. 2018) .... *passim*

Perlman v. Catapult Entm't, Inc. (In re Catapult Entm't, Inc.),
165 F.3d 747 (9th Cir. 1999) .... *passim*

RCI Tech. Corp. v. Sunterra Corp. (In re Sunterra Corp.),
361 F.3d 257 (4th Cir. 2004) 10, 13, 19

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31 F.3d 1102 (11th Cir. 1994) 29

Summit Inv. & Dev. Corp. v. Leroux,
69 F.3d 608 (1st Cir.1995) 9, 16

United States Bankruptcy Court Cases

In re Bataa/Kierland, LLC,
476 B.R. 558 (Bankr. D. Ariz. 2012) 31

In re Blair,
226 B.R. 502 (Bankr. D. Me. 1998) 27

In re Cumberland Corral, LLC,
No. 313-06325, 2014 WL 948473 (Bankr. M.D. Tenn. 2014) 9

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No. 12-49219, 2013 WL 5220139 (Bankr. N.D. Ill. 2013) 12

In re Enron Corp.,
No. 01–16034, 2004 Bankr. LEXIS 2549 (Bankr. S.D.N.Y. 2004) 28, 29, 32

In re Footstar, Inc.,
323 B.R. 566 (Bankr. S.D.N.Y. 2005) 18, 20

In re Hartec Enter., Inc.,
117 B.R. 865 (Bankr. W.D. Tex. 1990) 17

In re Hernandez,
285 B.R. 435 (Bankr. D. Ariz. 2002) 15

In re JER/Jameson Mezz Borrower II, LLC,
461 B.R. 293 (Bankr. D. Del. 2011) 20

In re LOOP 76, LLC,
442 B.R. 713 (Bankr. D. Ariz. 2010) 32

In re SGPA, Inc.,
2001 WL 34750646 (Bankr. M.D. Pa. 2001) 20, 30, 33

In re Snider Bros., Inc.,
18 B.R. 230 (Bankr. D. Mass. 1982) 29

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2010 WL 11492265 (Bankr. D. Nev. 2010) 21

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464 B.R. 126 (Bankr. D. Del. 2011) 21, 22, 23, 25

JPMorgan Chase Bank, N.A. v. Charter Commc'ns Operating, LLC,
(In re Charter Commc'ns), 419 B.R. 221 (Bankr. S.D.N.Y. 2009) 21, 28, 29

Statutes & Rules

11 U.S.C. § 102 (2018) 22

11 U.S.C. § 365 (2018) .... *passim*

11 U.S.C. § 1107 (2018) 16

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Reading *Law: The Interpretation of Legal Texts* (2012) 22, 26

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Pub. L. No. 98-353, 98 Stat. 333 (1984) 19

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Pub. L. No. 95-598, 92 Stat. 2549 (1978) 19

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Michelle Morgan Harner *et al.*, *Debtors Beware: The Expanding Universe of Non-Assumable/Non-Assignable Contracts in Bankruptcy*, 13 AM. BANKR. INST. L. REV. 187 (Spring 2005) 14

Thomas M. Mackey, *Post-Footstar Balancing: Toward Better Constructions of § 365(c)(1) & Beyond*, 84 AM. BANKR. L.J. 405 (Fall 2010) 9

OPINIONS BELOW

The bankruptcy court held that under 11 U.S.C. § 365(c)(1), Development was not precluded from assuming the non-exclusive software license over Under My Thumb's objection and that the Plan satisfied the requirements of § 1129(a)(10) because only one impaired class of claims from any debtor under a joint, multi-debtor plan is must vote to accept the plan. Petitioner appealed to the Bankruptcy Appellate Panel which affirmed on both issues. Petitioner then appealed to the United States Court of Appeals for the Thirteenth Circuit which reversed the bankruptcy court on both issues, holding in its opinion that: § 365(c)(1) precludes assumption of a non-exclusive license of intellectual property by a debtor in possession over the objection of the licensor; and § 1129(a)(10) requires acceptance from an impaired class of claims of each debtor under a joint, multi-debtor plan. This Court granted certiorari for the October Term 2019.

STATEMENT OF JURISDICTION

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

STATUTORY PROVISIONS INVOLVED

The Bankruptcy Code ("the Code") provisions listed below are relevant to determine the present case. These provisions are reproduced in Appendices A through C.

11 U.S.C. §§ 102(7), 365, 1129(a), 1129(b)(1) (2018).

STATEMENT OF FACTS

The Debtors

Tumbling Dice, Inc. ("TDI") and its subsidiaries amount to one of the largest gaming operations in the United States. R. at 4. TDI is the textbook example of the honest, but unfortunate debtor that seeks refuge within the Code to overcome its troubling times. TDI is a holding company utilized to hold the membership interests of nine wholly owned debtor-subsidiaries (together, the "Debtors"). R. at 4. Eight of the nine debtor-subsidiaries each operate a luxury casino and resort (collectively, the "Operating Debtors"), with the remaining debtor-subsidiary, Tumbling Dice Development, LLC ("Development"), serving a limited purpose, only as the licensee of a non-exclusive software license agreement with Under My Thumb, Inc. ("Under My Thumb"). R. at 4.

The Loyalty Program

Integral to the Debtors' success is its loyalty program, Club Satisfaction, which undoubtedly contributes to the Debtors' preeminent status in the gaming industry. R. at 4–5. Club In 2008, Development contracted with Under My Thumb to create a new comprehensive, integrated software system (the "Software") in order to modernize Club Satisfaction and ensure the Debtor remained successful. R. at 4. Notwithstanding the substantial increase in revenue provided by this innovative incentive program, it also provided the Debtors with invaluable analytics, including detailed information on each guest's activity. R. at 5. This individualized data gave Debtors the ability to tailor enticing offers to each guest based on their habits and preferences; a feature which became an indispensable element of the Debtors' success after Club Satisfaction was revamped. R. at 5.

The Agreements with Under My Thumb

Development agreed to reimburse Under My Thumb 70% of the $10 million development costs incurred to create the Software, despite Under My Thumb marketing and licensing similar versions to other parties. R. at 4–5. Development's partial reimbursement was memorialized pursuant to an unsecured $7 million promissory note (the "R&D Note"). R. at 4. Separate from the R&D Note, Under My Thumb and Development entered into a license agreement (the "Agreement"), thereby granting Development a non-exclusive license to use the copyrighted and patented Software, which extended its benefits to Development's affiliated entities. R. at 5.

The Agreement prohibited the Debtors from assigning or sublicensing their rights to others without Under My Thumb's written consent. R. at 5. As consideration for the license, Development agreed to pay Under My Thumb a monthly fee based on the spending activity of Club Satisfaction members. R. at 5. Club Satisfaction's success exceeded expectations and provided Under My Thumb with higher than expected monthly payments, affording a substantial benefit to Under My Thumb. R. at 4–6.

The Leveraged Buy-Out

In December 2011, the hedge fund Start Me Up, Inc. ("SMU") acquired the stock of TDI through a leveraged buy-out (the "LBO"). R. at 6. Through the LBO, TDI and the Operating Debtors granted a syndicated group of lenders (the "Lenders") first priority liens on their assets in exchange for a $3 billion loan. R. at 6. With Development's limited role in Debtors' overall structure, combined with the non-exclusive nature of the Software license and certain restrictive covenants in the R&D Note, Development was not required to act as a borrower or guarantor under the credit facility provided by the Lenders. R. at 6. After some time, the Debtors began to feel the burden of the significant, unserviceable debt load accompanying the LBO. R. at 6. In 2015, despite

remaining current for nearly seven years, the Debtors could no longer make payments on the R&D Note. R. at 6. Because continued use of the Software was critical to the Debtors' chance at a successful reorganization, the Debtors continued making higher than expected monthly payments to Under My Thumb under the Agreement. R. at 6.

The Bankruptcy Cases

On January 11, 2016 (the "Petition Date"), TDI and each of the Operating Debtors commenced chapter 11 cases. R. at 3. For the convenience of the parties and to ease the burden on the bankruptcy court, the Debtors' cases were jointly administered. R. at 3–4. The Debtors were authorized by the bankruptcy court to continue using the prepetition cash management system of their integrated business enterprise. R. at 4. The Debtors acknowledged that a principal goal of the bankruptcy cases was to negotiate with the Lenders to restructure the debt load shackling the Debtors' continued success. R. at 6. On the Petition Date, TDI and each of the Operating Debtors jointly and severally owed the Lenders approximately $2.8 billion. R. at 6. The Debtors unsecured liabilities amounted to an estimated $120 million owed to unsecured creditors, which included $6 million owed to Under My Thumb pursuant to the R&D Note. R. at 6.

Plan Proposal and the Plan's Terms

To effectuate restructuring the Debtors' hindering debt load, the Debtors actively participated in lengthy negotiations, which included non-binding mediation ordered by the bankruptcy court. R. at 6. With Under My Thumb declining to participate in either, the Debtors and their stakeholders reached a deal that was memorialized in a plan support agreement. R. at 6–7. The plan support agreement provided the Debtors would restructure substantially all the secured indebtedness owed to the Lenders through a lower interest rate and extend the payment term to twenty years. R. at 7. SMU was to provide a capital infusion allowing a 55% distribution to

unsecured creditors, including Under My Thumb, resulting in a pro rata distribution of $66 million to the Debtors' unsecured creditors, and in exchange, SMU would retain its equity interest in the Debtors. R. at 7. Importantly, under the proposed plan, the Debtors' overall corporate structure would maintain its prepetition status quo, while Debtors' existing shares and membership interests would be cancelled and reissued in the reorganized Debtors. R. at 7.

In August 2016, the Debtors filed the Plan and disclosure statement on behalf of all the Debtors. R. at 7. While the Plan was a joint plan, it expressly stated, "the Debtors' estates are not being substantively consolidated and no Debtor is to become liable for the obligations of another." R. at 7. The Plan proposed to assume the Agreement, allowing Under My Thumb to retain its lucrative monthly payments, along with the 55% distribution pursuant to the $6 million obligation owed by Development. R. at 7. The Plan's treatment of Under My Thumb was favorable to any conceivable liquidation scenario, as the distributions under the Plan greatly exceed the value of Developments' assets. R. at 7.

Under My Thumb initially viewed the Plan favorably based on the indisputably favorable outcome, but that support faded after it learned how the Debtors were funding the Plan. R. at 7–8. While SMU was directly funding $31 million necessary to effectuate the $66 million distribution to unsecured creditors, the remaining $35 million was invested by Sympathy for the Devil ("SFD"). R. at 7–8. In exchange for contributing most of this capital infusion, SFD would receive 51% of the voting shares of the reorganized TDI and several seats on TDI's reconstituted board of directors, with SMU retaining the remaining 49%. R. at 8.

Confirmation of the Plan

The plan received near universal support from all creditor groups, including the affirmative vote of one impaired class from each of TDI and the Operating Debtors. R. at 8. Unfortunately,

Under My Thumb let concerns for SFD's involvement hinder confirmation for all the Debtors by voting to reject the Plan. R. at 8. Because Under My Thumb controlled Development's only class of creditors, Under My Thumb's rejection left Development with no impaired accepting class, thereby jeopardizing the entirety of the Debtors' reorganization efforts. R. at 8.

SUMMARY OF THE ARGUMENT

This Court should reverse the Thirteenth Circuit and find that: (1) under § 365(c)(1) a debtor in possession is not precluded from assuming an executory contract when it has no intention of assigning the contract to a third party; and (2) under a proper interpretation of § 1129(a)(10)'s plain language—keeping the overall purpose of chapter 11 in mind—once one impaired class of claims of any one debtor votes in favor of a joint, multi-debtor plan, § 1129(a)(10) is satisfied as to the entire plan.

The first certified question on appeal can be answered by interpreting the plain meaning of the statute against the backdrop of the overall statutory scheme and legislative intent. The language of § 365(c)(1) is clear—the trustee may not assume or assign an executory contract over the objection of the contract counterparty where applicable law assignment to a party other than the debtor or debtor in possession. This view gives effect to each and every word used in § 365(c)(1). Moreover, this interpretation is consistent with both the purpose of § 365(c), which is intended to balance the rights of the debtor and its contract counterparties, and the overarching purpose of chapter 11—to facilitate a successful reorganization.

Section 365(c)(1) explicitly refers to the trustee—not a debtor in possession—in stating who is barred from assuming or assigning an executory contract when applicable law bars performance by a third party. This provision ensures that the nondebtor parties to an executory contract are not required to render performance to, or accept performance from, someone other than the debtor, the original party to the contract. However, the debtor in possession—unlike a trustee—is not a third party to the contract and merely seeks to resume where the prepetition debtor left off. Therefore, the applicable law referred to in § 365(c)(1)(A) is not implicated when a debtor in possession assumes an executory contract with no intention of assigning it to a third party.

Moreover, the conclusion that a debtor in possession is not barred by § 365(c)(1) from assuming an executory contract is supported by the purpose of chapter 11—encouraging a successful reorganization. Many times, a debtor's executory contracts are the lifeblood of their business, an effective reorganization will be inhibited if the debtor is precluded from assuming its rights under that contract. Preventing the debtor's continued use of these critical executory contracts when there is no material change to the parties to the contract furthers the goal of a successful reorganization. Accordingly, the decision of the Thirteenth Circuit should be reversed and § 365(c)(1) should be read in a manner considers the actual circumstances of each case, thus allowing a debtor in possession to assume the executory contract where it has no intention of assigning the contract to a third party.

The second certified question on appeal can be answered solely by the statute's plain language. The language is plain—only one impaired creditor of any single debtor under a plan needs to accept the plan. This view of § 1129(a)(10), also referred to as the "per plan" approach, is reinforced by the context and purpose of both § 1129 and the entirety of chapter 11. First, when a statute's language is plain, it must be enforced according to its terms. The terms of § 1129(a)(10) refer to a single plan without distinguishing between single-debtor and multi-debtor plans. Further, nothing in § 1129(a)(10) irreconcilably conflicts with the other subsections in § 1129 when applied on a "per plan" basis.

Second, the plain language of a statute must be read in context, or it is otherwise meaningless. When analyzing the context of § 1129(a)(10), the purpose is clear—to confirm plans with at least some indication of creditor support and reject plans with none. The "per plan" approach is consistent with this purpose because it only requires "at least one class of claims" to accept the plan. The opposing "per debtor" view, which requires at least one class of claims to

accept for each individual debtor, only functions to impermissibly expand the purpose of § 1129(a)(10).

Further, the purpose of chapter 11—to promote successful reorganizations over liquidations—is advanced by the "per plan" approach because it clears the path to organization from unnecessary barriers. In contrast, applying the "per debtor" approach makes it exceedingly difficult for debtors to have their plans confirmed, and in this case, would likely force the debtor into liquidation, which is what Congress was trying to avoid when it enacted chapter 11.

Third, interpreting § 1129(a)(10) to apply on a "per plan" basis does not require a joint, multi-debtor plan to be substantively consolidated. A jointly administered multi-debtor plan is appropriate for complex business enterprises that operate on an integrated basis so long as they maintain corporate separateness. While substantive consolidation is used as a remedy for creditors adversely affected by joint plans, the Plan here is extremely favorable to all impaired creditors, including Under My Thumb. Moreover, unlike the Thirteenth Circuit Court held below, § 1129(a)(10) is merely a procedural requirement and does not confer any substantive rights to objecting creditors. Debtors' Plan is supported almost unanimously, and Under My Thumb, whose claim is worth less than five percent of the total unsecured claims, should not be able to single-handedly destroy the Plan for the rest of the creditors.

As set forth below, Petitioner TDI respectfully submits that allowing Development to assume the Agreement is consistent with the plain meaning of § 365(c)(1) where it has no intention of assigning the Agreement to a third party and this conclusion upholds the policy and purpose behind chapter 11. Moreover, approving this Plan of reorganization will benefit all creditors, including Under My Thumb, and to allow one creditor to dictate the Debtors' reorganization efforts is wholly at odds with the Debtors' ability to restructure their business.

ARGUMENT

I. SECTION 365(c)(1) DOES NOT PRECLUDE DEVELOPMENT FROM ASSUMING ITS PREPETITION RIGHTS UNDER A NON-EXCLUSIVE LICENSE OF INTELLECTUAL PROPERTY.

The proper interpretation of § 365(c)(1) is an important issue both for bankruptcy courts applying it and for businesses that rely on certain executory contracts in their day to day operations. *See N.C.P. Marketing Grp., Inc. v. BG Star Prod., Inc.*, 129 S. Ct. 1577, 1577 (2009) (denying certiorari) ("The division over the meaning of § 365(c)(1) is an important one to resolve for bankruptcy courts and for businesses that seek reorganization."). The divide over § 365(c)(1)'s interpretation has given rise to two approaches. The actual test has been adopted by two circuit courts[1] and the vast majority of bankruptcy courts[2] and propounds that the debtor in possession should only be precluded from assuming or assigning an executory contract if such assumption or assignment would *actually* require the non-debtor counterparty to accept performance from someone other than the debtor or debtor in possession.[3] Stated another way, "where assignment is not contemplated, the applicable law cannot bar assumption." *In re Cumberland Corral, LLC*, 2014 WL 948473, *23. Under the actual test, the bankruptcy court is afforded discretion to determine whether the nondebtor counterparty will be required to accept performance under the

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[1] *Summit Inv. & Dev. Corp. v. Leroux*, 69 F.3d 608 (1st Cir. 1995); *Institut Pasteur v. Cambridge Biotech Corp.*, 104 F.3d 489 (1st Cir. 1997); abrogated on other grounds by *Hardemon v. City at Boston*, 144 F.3d 24 (1st Cir. 1998). *See also Bonneville Power Admin. v. Mirant Corp. (In re Mirant Corp.),* 440 F.3d 238 (5th Cir. 2006) (interpreting § 365(e)(2) instead of § 365(c)(1) but adopting "actual" test).

[2] *See, e.g.*, *In re Cumberland Corral*, 2014 WL 948473 at *23; *In re Footstar*, 323 B.R. at 569 n.2 (collecting cases).

[3] It should be noted that there are two views that obtain the result contemplated under the actual test. The traditional actual test hinges on whether the debtor actually intends to assign the executory contract. Recent decisions reach similar results but turn their focus away from the "assumption or assignment" language of § 365(c)(1) and instead focus on that provision's use of the word "trustee." This approach was promulgated by the Bankruptcy Court for the Southern District of New York in *In re Footstar*, and has been applauded as a cogent reconciliation of the actual test vs. hypothetical test debate because it conforms with both the literal text of § 365(c)(1) and the purpose of the Code. *See, e.g.*, Thomas M. Mackey, *Post-Footstar Balancing: Toward Better Constructions of § 365(c)(1) & Beyond*, 84 AM. BANKR. L.J. 405, 405 (Fall 2010).

executory contract from someone other than the debtor (or its postpetition likeness) with whom the licensor originally contracted.

Court's rejecting the actual test interpret § 365(c)(1) to preclude a debtor in possession from assuming an executory contract where applicable law excuses the nondebtor counterparty from performance and that counterparty objects to assumption, even where the debtor in possession does not intend to assign the license to a third party. *See, e.g.*, *RCI Tech. Corp. v. Sunterra Corp. (In re Sunterra Corp.)*, 361 F.3d 257, 271 (4th Cir. 2004); *Perlman v. Catapult Entm't, Inc. (In re Catapult Entm't, Inc.)*, 165 F.3d 747, 754–55 (9th Cir. 1999); *In re West Elecs, Inc.*, 852 F.2d 79, 83 (3rd Cir. 1988). Courts following the hypothetical test reach their conclusion by giving incredible weight to the phrase "trustee may not assume or assign" and conclude that "if non-bankruptcy law provides that the [contract counterparty] would have to consent to an assignment of the [] contract to a third party, *i.e.*, someone other than the debtor or debtor in possession," then the debtor in possession cannot assume it. *In re West*, 852 F.3d at 83. This conclusion is couched in the belief that "trustee," as used in § 365(c) is interchangeable with debtor in possession and that "assume or assign" must be construed in the disjunctive. However, an interpretation that allows a debtor in possession to assume an executory contract where it has no intention of assigning the executory contract stays true to the canons of interpretation and comports with the underlying purpose of chapter 11 and the legislative history of § 365(c)(1).

A. The Plain Meaning of § 365(c)(1) Does Not Bar a Debtor in Possession from Assuming the Debtor's Rights and Obligations Under a Non-Exclusive License Agreement.

1. Permitting Development to Assume its Prepetition Rights Under the Agreement is Consistent with the Plain Meaning of § 365(c)(1).

Development may assume the Agreement over the objection of Under My Thumb because the plain meaning of every word employed in § 365(c)(1)(A) does not bar a debtor in possession

from merely assuming it prepetition rights and obligation under an intellectual property license. Because the Debtors have no intention of assigning the Agreement to a party "other than the debtor or debtor in possession," § 365(c)(1)(A) is not implicated, nor is the "applicable law" to which that section refers.

The plain language of § 365(c)(1)(A) does not bar Development from assuming its prepetition rights under the Agreement with Under My Thumb. Section 365(c)(1), in relevant part, provides that:

> (c) The *trustee* may not assume or assign any executory contract . . . of the debtor . . . if--
>
> (1)(A) applicable law excuses a party. . . from accepting performance from . . . an entity other than the *debtor or debtor in possession* . . . and (B) such party does not consent to assumption or assignment.

11 U.S.C. § 365(c)(1) (2018) (emphasis added). While this provision prevents an entity other than the debtor or debtor in possession from assuming the debtor's rights under a license over the objection of the licensor, Development, as one of the Debtors in Possession, complies with the requirements of § 365(c)(1)(A). Thus, the applicable law referred to in § 365(c)(1)(B) is not implicated. In contrast, where a trustee seeks to assume an intellectual property license, the licensor is being asked to accept performance from "an entity other than the debtor or debtor in possession," and it is logical to allow the licensor to have a say in whether the trustee may assume such license.

The actual test contemplates whether a nondebtor licensor of intellectual property will be required to accept performance from someone other than the debtor or debtor in possession. *See In re Mirant Corp.*, 440 F.3d at 248 (defining the actual approach as a determination by the bankruptcy court, on a case by case basis, whether the nondebtor party's contract "will actually be assigned or [whether] the nondebtor party will in fact be asked to accept performance from or render performance to a party—including the trustee—other than the party with whom it originally

contracted”). This view is confirmed by Congress’ use of the word “trustee” in § 365(c)(1), which is inarguably an entity other than the debtor or debtor in possession. Accordingly, Development may assume the Agreement where, “under the actual circumstances, [Under My Thumb] would not be forced to accept performance from a party other than” Development. *In re Edison Mission Energy*, No. 12-49219, 2013 WL 5220139, at *11 (Bankr. N.D. Ill. 2013).

The actual test contemplates whether a nondebtor licensor of intellectual property will be required to accept performance from someone other than the debtor or debtor in possession. *See In re Mirant Corp.*, 440 F.3d at 248 (defining the actual approach as a determination by the bankruptcy court, on a case by case basis, whether the nondebtor party’s contract “will actually be assigned or [whether] the nondebtor party will in fact be asked to accept performance from or render performance to a party—including the trustee—other than the party with whom it originally contracted”). Accordingly, Development may assume the Agreement where, “under the actual circumstances, [Under My Thumb] would not be forced to accept performance from a party other than” Development. *In re Edison Mission Energy*, No. 12-49219, 2013 WL 5220139, at *11 (Bankr. N.D. Ill. 2013).

Here, the plain meaning of § 365(c)(1) does not preclude Development from assuming the Agreement. Moreover, as is the case in many chapter 11 cases, allowing Development to assume an executory contract critical to its operation gives Development the greatest possible chance at a successful reorganization by allowing its continued use of assets which are essential to a successful reorganization for the benefit of all creditors.

2. The Hypothetical Test Misconstrues the Plain Meaning of § 365(c)(1) and is Diametric to the Goals of Chapter 11.

The hypothetical test ignores the facts of each case in favor of an overly rigid, abstract approach that precludes analysis who is actually rendering postpetition performance. The courts

to follow this test hold that where a nondebtor counterparty to an executory contract is excused from accepting performance from a hypothetical third party, the debtor in possession may not assume the executory contract. *In re Catapult Entm't*, *Inc.,* 165 F.3d at 755. To reach this conclusion, these courts opine that, by using the phrase "assume or assign," Congress contemplates a hypothetical test. *See id.* ("The literal language of § 365(c)(1) is thus said to establish a 'hypothetical test.'"); *In re James Cable*, 27 F.3d 534, 537 (11th Cir. 1994) (characterizing § 365(c)(1) as presenting a hypothetical question). However, in attempting to propound a literal interpretation of § 365(c)(1), these courts ignore well-established canons of statutory interpretation and frustrate the purpose of chapter 11.

While staying true to the intentions of Congress is an important priority, the interpretation of § 365(c)(1) cannot be done by solely focusing on its prefatory clause, especially where there are interpretations that better comport with the plain meaning of the statute and are more consistent with the purpose of the Bankruptcy Code. By relying on this troubled interpretation of § 365(c)(1), compelling arguments against the hypothetical test are given short shrift. Namely, these courts disavow any ambiguity in § 365(c)(1) and dismiss the hypothetical test's glaring conflict with Congress' choice of words in § 365(c)(1), other provisions of the Code, and the Code's policy goals. *See In re Catapult Entm't, Inc*., 165 F.3d at 753 ("[B]ecause we discern no ambiguity in the plain statutory language, we need not resort to legislative history."); *In re Sunterra*, 361 F.3d at 267 (stating that § 365(c)(1) "may be read literally without creating an irreconcilable conflict within itself," its neighboring provisions, or the Code's policy goals).

This conclusion reached by the hypothetical test is couched in the belief that Congress' use of the word "or" in the phrase "assume or assign" cannot be construed as meaning "and," which is the result suggested by early decisions adopting the actual test. *See In re Sunterra*, 361 F.3d at

268–69. By focusing on the term "or" in the prefatory clause of § 365(c)(1), courts following the hypothetical test lose sight of the well-established principles of statutory interpretation. Notably, these courts fail to give effect to the statutes' remaining text. *See Negonsott v. Samuels*, 507 U.S. 99, 106 (1993) (quotation and citation omitted) (asserting that "courts must give effect to every clause and word of a statute"). Not only does this give insufficient consideration to the term "trustee" in the prefatory clause of § 365(c)(1), but it negates Congress' later amendment to add the phrase "or debtor in possession" in § 365(c)(1)(A).

Likewise, the hypothetical test renders the words "or assign" in § 365(c)(1) superfluous. Pursuant to § 365(f), a contract cannot be assigned unless it is first assumed. *See* 11 U.S.C. § 365(f)(2)(A) (2018). Accordingly, because assumption is a prerequisite for assignment, there was no need for Congress to include the words "or assign" in § 365(c)(1). *See In re Cardinal Indus., Inc.*, 116 B.R. at 977 ("[I]f non-assignability of a contract is sufficient . . . to preclude assumption by the trustee, then there was no reason for Congress to provide that the trustee 'may not assume *or assign*' such contracts.").

Courts applying the hypothetical test find that Congress' intent is clear and use the purportedly unambiguous language as a shield against the absurd results this test produces. *See In re Catapult Entm't, Inc.,* 165 F.3d at 749 (stating that courts applying the actual test "forsake the statutory language . . . [to] better accomplish[] the intent of Congress). However, § 365(c)(1)'s ambiguity is exemplified by the extensive reasoning provided both by courts applying the hypothetical test and those rejecting it.[4] Notwithstanding the reasoning provided by these courts, there is ambiguity on the face of § 365(c)(1).

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[4] *See* Michelle Morgan Harner, *et al.*, *Debtors Beware: The Expanding Universe of Non-Assumable/Non-Assignable Contracts in Bankruptcy*, 13 AM. BANKR. INST. L. REV. 187, 239 (Spring 2005) ("Given the split in the courts on this issue, the plain language of [§] 365(c)(1) cannot provide the basis for resolving the controversy regarding the application of this section when the debtor merely seeks to assume an executory contract . . . .").

Even if the plain language were interpreted to preclude assumption by a debtor in possession, such an interpretation would be demonstrably at odds with the intentions of the drafters. *See United States v. Ron Pair Enter., Inc.*, 489 U.S. 235 (1989) (declaring that, "although the plain meaning of statutes must generally be enforced . . . statutes should not be interpreted to produce results that are unreasonable in lights if the drafters' intentions"). Despite the contrary conclusion reached by courts following the hypothetical test, if the plain language of § 365(c)(1) were interpreted to bar Development from assuming a non-exclusive license of software, that would produce an array of absurd results, both in this case and in other chapter 11 reorganizations. For this reason, the American Bankruptcy Institute Commission to Study the Reform of Chapter 11 voted to reject the hypothetical test in favor of the actual test.[5] Bankruptcy courts bound by their circuit's adoption of the hypothetical test have recognized the adversity apparent in following this test and upholding the goals of chapter 11. *See, e.g.*, *In re Hernandez*, 285 B.R. 435, 441–42 (Bankr. D. Ariz. 2002) (recognizing the struggle in applying the hypothetical test where assumption of an executory contract is critical to a debtor's reorganization). Interpreting § 365(c)(1) to preclude a debtor in possession from assuming a critical license for intellectual property would thwart the reorganization efforts of many chapter 11 debtors, and this result is absurd considering the fundamental purpose of chapter 11 reorganizing a struggling debtor. *See N.L.R.B. v. Bildisco & Bildisco*, 465 U.S. 513, 528 (1984) (stating that the "[f]undamental purpose of reorganization is to prevent a debtor from going into liquidation").

Further, while the rights of nondebtor parties to an executory contract must be balanced with those of the debtor, the hypothetical test provides a windfall to those nondebtor parties by affording them the option to renege on their agreement with the Debtor—merely because it is

[5] American Bankruptcy Institute, *Commission to Study the Reform of Chapter 11*, 2012-2014 Final Report and Recommendations 124 (2014).

attempting to obtain a fresh start. This inequity has been acknowledged by the Supreme Court. *See N.C.P. Marketing Group*, 129 S. Ct. at 1577 (recognizing that the hypothetical test affords nondebtor parties to executory contracts greater rights than they had outside of bankruptcy).

Notwithstanding its questionable results, it is hard to argue that the hypothetical test stays true to § 365(c)(1)'s text—insofar as the phrase "assume or assign" is concerned. However, as mentioned above and covered more thoroughly in the preceding section, Development may still assume the Agreement while interpreting § 365(c)(1) in a manner that stays true to the plain meaning of the phrase "assume or assign."

3. In this Context, Trustee Does not Equate to the Debtor in Possession.

Even if this court were to read § 365(c)(1) as precluding the trustee from assuming an executory contract when he or she has no actual intent of assigning it, Development is not precluded from assuming the Agreement. Although propounding to adopt a literal reading of § 365(c)(1), courts adopting the hypothetical test have professed the troubling belief that "trustee," as it is used in § 365(c)(1), includes a debtor in possession. *See, e.g.*, *In re Catapult Entm't*, *Inc.,* 165 F.3d at 750. This goes against the literal reading purportedly followed by these courts because the trustee is undoubtedly an entity other than the debtor or debtor in possession. While it is true that a debtor in possession possesses many of the rights of a trustee, *see* 11 U.S.C. § 1107 (2018) (defining the rights, powers, and duties of a debtor in possession), a debtor in possession, unlike a trustee, is not a third party to a debtor's executory contracts. Accordingly, Development may still assume the Agreement because the applicable law referenced in § 365(c)(1)(A) is not implicated by the debtor in possession—an entity that bears little distinction from the debtor. This conclusion is reinforced by giving equal weight to the entirety of § 365(c).

Giving weight to the entirety of § 365(c)(1)(A), as this Court is required to do, a debtor in possession is not precluded from assuming the debtor's rights under an intellectual property license. *See Ransom*, 562 U.S. at 70. The plain meaning of § 365(c) is clear: a trustee may not assume or assign an executory contract where applicable law allows the licensor to object to assumption or assignment to a third party. *Leroux*, 69 F.3d at 612. However, where the debtor in possession is the party seeking to assume an executory contract, the applicable law referred to in § 365(c)(1)(A) is not implicated. This view is consistent with the definition of a debtor in possession provided by this Court in *Bildisco & Bildisco*. *See* 465 U.S. at 528 ("[I]t is sensible to view the debtor-in-possession as the same 'entity' which existed before the filing of the bankruptcy petition, but empowered by virtue of the Bankruptcy Code to deal with its contracts and property in a manner it could not have employed absent the bankruptcy filing").

It is axiomatic that a trustee and a debtor in possession are two distinct entities. Indeed, while the debtor in possession is has certain powers of a trustee, the debtor in possession is merely the postpetition rendition of the debtor and is indistinguishable both in the bankruptcy context and for purposes of general contract law. *See, e.g.*, *Cle-Ware Indus., Inc. v. Sokolsky (In re Cle-Ware Indus., Inc.)*, 493 F.2d 863, 871 (6th Cir. 1974) ("The debtor and debtor-in-possession is one and the same person."). The trustee, unlike a debtor in possession, is clearly an entity other than the debtor. While there are distinctions between a debtor and a debtor in possession, none are relevant in the context of assuming the prepetition rights held by the debtor. Therefore, the plain meaning of "trustee" in § 365(c)(1) refers to an individual that is distinct from both the debtor and the debtor in possession. And it likewise follows that this distinction is consistent with the right of a nondebtor party to an executory contract to refuse performance from an entity other than the debtor or debtor in possession.

Moreover, the fact that debtor in possession is specifically mentioned in § 365(c)(1)(A) shows Congress' intent to differentiate the term "trustee" in its § 365(c)(1)'s prefatory clause. Interpreting § 365(c)(1) in a manner that allows Development to assume its prepetition rights under the Agreement to use the Software gives meaning and effect to each word in this provision. *See Ransom v. FIA Card Servs., N.A.*, 562 U.S. 61, 70 (2011) (citations omitted) (asserting that the courts "must give effect to every word of a statute, wherever possible"). For example, the phrase "other than a debtor or debtor in possession" would be lifeless and rendered surplusage by an interpretation precluding the debtor in possession from assuming performance of an executory contract. *In re Hartec Enter., Inc.*, 117 B.R. 865, 871–72 (Bankr. W.D. Tex. 1990) ("If the directive of [§] 365(c)(1) is to prohibit assumption whenever applicable law excuses performance relative to any entity other than the debtor, why add the words 'or debtor in possession?'"). This interpretation of § 365(c)(1) also comports with this Court's precedent rebutting the legal "fiction" presuming a prepetition debtor and a postpetition debtor in possession are to be treated as separate legal entities. *See Bildisco & Bildisco*, 465 U.S. at 528.

The conclusion contemplated by the actual test is reinforced when the court is confronted with the oxymoron that would result if "trustee" also referred to the debtor in possession. As identified by the court in *Footstar*, reading § 365(c)(1) in such a manner would state that "the *debtor in possession* may not assume . . . any contract if . . . accepting performance from or rendering performance to an entity *other than the debtor in possession*." 323 B.R. at 573. This illustration reinforces the conclusion that "trustee," as it is used in § 365(c)(1), does not refer to a debtor in possession.

B. Allowing Development to Assume the Agreement Comports with the Legislative History of § 365(c)(1), which Confirms § 365(c)(1)'s Plain Meaning.

A review of § 365(c)(1)'s legislative history confirms the conclusion compelled by § 365(c)(1)'s plain meaning and purpose—this provision protects nondebtor contract counterparties by allowing them to consent to assumption or assignment by a third party "other than the debtor or debtor in possession." Because of the ambiguity surrounding § 365(c)(1) and the existence of more than one plausible interpretation, it is necessary to review its legislative history to glean Congress' intent.

In enacting § 365(c)(1), Congress did not envision barring a debtor in possession from assuming its nonassignable contracts. *See In re Footstar*, 323 B.R. at 574. Section 365(c)(1)(A), as originally passed in 1978 provided that the trustee "may not assume or assign an executory contract" if "applicable law excuses a party, other than the debtor . . . from accepting performance from or rendering performance *to the trustee*." Bankruptcy Reform Act of 1878, Pub. L. No. 95-598, 92 Stat. 2549, 2575 (1978) (emphasis added). Shortly after § 365(c)(1) was originally passed, Congress considered clarifying § 365(c) in the Bankruptcy Technical Correction Act of 1980 (the "1980 Act"). *See* H.R. Rep. No. 96-1195, § 27(b) (1980). That legislation was accompanied by a report published by the Committee on the Judiciary explaining the reasoning for the suggested changes. *Id.* Among other changes, there was a proposed amendment to § 365(c)(1)(A) that would replace "trustee" with "an entity other than the debtor or the debtor in possession." *Id.* Explaining this proposed amendment, the report explained:

> This amendment makes it clear that the prohibition against a trustee's power to assume an executory contract *does not apply where it is the debtor that is in possession* and the performance to be given or received under a personal service contract *will be the same as if no petition had been filed* because of the personal nature of the contract.

Id. (emphasis added). The report further stated that "it is also premature to change a statute that has been in effect for such a short period of time where it is not really known to what extent these concerns are other than transitory." *Id.*

Ultimately, Congress chose to heed the report's disclaimer on an amendment being premature and did not amend § 365(c)(1) until 1984. Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333 (1984). The 1984 amendment adopted the precise wording contemplated in 1980 and changed "the trustee" with "an entity other than the debtor or debtor in possession." *Id.* Despite the 1984 amendment adopting the precise wording of 1980 Act, courts adopting the hypothetical test rely on the fact that § 365(c)(1) remained unchanged in the 1980 Act to rebut clear congressional intent provided in the accompanying report. *See, e.g.*, *In re Sunterra Corp.*, 361 F.3d at 270. While this argument may have merit if the amendment enacted in 1984 swayed from the language proposed by the 1980 Act, the 1980 report by the Committee on the Judiciary "clearly addressed the very amendment adopted in 1984 and just as clearly expressed that Committee's view as to the inapplicability of [§ 365(c)(1)] to a debtor in possession's assumption." *In re Footstar*, 323 B.R. at 575. Because the report addressed the very amendment that occurred in 1984, it provides a clear indication of Congress' intention to allow a debtor in possession to assume an executory contract where continued performance will be the same as if no petition had been filed.

Accordingly, the legislative history supports the conclusion compelled by § 365(c)(1)'s plain language—§ 365(c)(1) does not limit a debtor in possession's assumption of an executory contract where applicable law precludes a third party from assuming the contract over the objection of the contract counterparty. Therefore, consistent with the plain meaning and purpose of § 365(c)(1), this Court should permit Development's assumption of the Agreement.

II. UNDER A JOINT, MULTI-DEBTOR PLAN, § 1129(a)(10) ONLY REQUIRES ACCEPTANCE FROM ONE IMPAIRED CLASS OF CLAIMS OF ANY ONE DEBTOR.

The Code sets forth several requirements for confirmation of a plan. 11 U.S.C § 1129 (2018). Section 1129(a)(10) requires that "at least one class of claims that is impaired under the plan has accepted the plan." *Id.* § 1129(a)(10). In the context of jointly administered plans with multiple debtors, two diverging interpretations of § 1129(a)(10) have led to conflicting results for debtors seeking reorganization.[6]

Under the "per plan" approach, courts have held that acceptance from one impaired class of claims of any one debtor under the plan is sufficient to satisfy § 1129(a)(10). *E.g.*, *JPMCC 2007-C1 Grasslawn Lodging, LLC v. Transwest Resort Props., Inc. (In re Transwest Resort Props., Inc.)*, 881 F.3d 724 (9th Cir. 2018) (decided unanimously); *In re Station Casinos, Inc.*, 2010 WL 11492265 (Bankr. D. Nev. 2010); *JPMorgan Chase Bank, N.A. v. Charter Commc'ns Operating, LLC (In re Charter Commc'ns)*, 419 B.R. 221 (Bankr. S.D.N.Y. 2009).

In contrast, courts following the "per debtor" approach have held that § 1129(a)(10) requires acceptance from an impaired class of claims from each individual debtor under a plan. *E.g.*, *In re Tribune Co.*, 464 B.R. 126 (Bankr. D. Del. 2011). By using the "per debtor" approach, courts misinterpret the plain language and obstruct Congress' intent behind chapter 11 reorganizations.

Thus, this Court should adopt the "per plan" approach because it accords with the fundamental principles of statutory interpretation and furthers the overarching purpose of both chapter 11 and § 1129(a)(10). Accordingly, this Court should find § 1129(a)(10) applies on a "per

[6] *See In re SGPA, Inc.*, 2001 WL 34750646, at *16–17 (Bankr. M.D. Pa. 2001) (confirming the multi-debtors' proposed plan for reorganization); *but see In re JER/Jameson Mezz Borrower II, LLC*, 461 B.R. 293 (Bankr. D. Del. 2011) (rejecting the debtor's proposed plan for reorganization and dismissing the chapter 11 petition).

plan" basis and reverse the Thirteenth Circuit to hold the Debtors have satisfied all requirement for confirmation.

A. The Plain Language of § 1129(a)(10) Indicates that Acceptance from Only One Impaired Class of Claims Under a Joint, Multi-Debtor Plan is Required.

Judicial inquiry begins with the plain language of the statute. *United States v. Ron Pair Enter. Inc.*, 489 U.S. 235, 241 (1989). When the language is clear and unambiguous, it is also where judicial inquiry ends. *Id.* To ascertain the meaning of the language, the statute must be read in context—"in light of the purposes Congress sought to serve." *In re Windsor on the River Assocs., Ltd.*, 7 F.3d 127, 130 (8th Cir. 1993) (quoting *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 608 (1983)). The plain language and "purpose[] Congress sought to serve" in enacting chapter 11 supports the view that under a joint, multi-debtor plan, the affirmative vote of one impaired class of claims of any debtor is sufficient to satisfy § 1129(a)(10). Thus, this Court should adopt the "per plan" approach.

1. The Plain Language of § 1129(a)(10) Refers to a Single Plan.

When the language is plain, a statute must be enforced according to its terms. *Hardt v. Reliance Stand. Life Ins. Co.*, 560 U.S. 242, 251 (2010).

The language of § 1129(a)(10) plainly and expressly requires at least one impaired class of claims "under the plan" to accept "the plan." § 1129(a)(10). The statute refers to a single "plan"—it does not create a distinction, nor make an exception, for single-debtor or multi-debtor plans. *In re Transwest*, 881 F.3d at 729. While Congress could have easily included a provision delineating an exception for joint, multi-debtor plans, it chose not to do so. *Id.* The omission of which cannot be supplied by the courts because "[t]o supply omissions transcends the judicial function." *Iselin v. United States*, 270 U.S. 245, 251 (1926); Antonin Scalia & Bryan A. Garner, Reading Law: *The*

Interpretation of Legal Texts 94 (2012). Thus, the language is plain: § 1129(a)(10) requires acceptance from only one impaired class of claims under a reorganization plan regardless of whether there is one debtor or multiple debtors.

Courts adopting the "per debtor" approach interpret § 1129(a)(10) by imputing the plural to the word "plan." *E.g.*, *In re Tribune Co.*, 464 B.R. at 182 (applying rule of construction 11 U.S.C. § 102(7) (2018), which provides, "the singular includes the plural"). This interpretation requires the illogical conclusion that a joint, multi-debtor plan consists of separate plans for each individual debtor. *Id.* But if each debtor was proceeding under its own separate plan, as a result of having satisfied § 1129(a)(10), each debtor would then be allowed to proceed to confirmation without affirmative votes from the other debtor's impaired classes. Alexander J. Gacos, *Reconciling the "Per-Plan" Approach*, 14 SETON HALL CIR. REV. 295, 312 (2018). However, before the debtors could proceed to confirmation, those who fail to meet the requirements of § 1129(a)(10) would be required to be dropped from the joint plan, logically contradicting the notion that the debtors are in fact proceeding under their own separate plans. Gacos, *supra*, at 312; *see In re Tribune Co.*, 464 B.R. at 184 (contradicting its own conclusion that each debtor is proceeding under its own separate plan by stating that an alternative option for plan confirmation would be to drop those debtors coming up short).

Thus, the plain language of § 1129(a)(10) affirms the "per plan" approach as it expressly requires at least one impaired class of claims "under the plan" to accept "the plan."

2. The "Per Plan" Approach Complies with the Overall Statutory Scheme.

A statute must be read in context, with regard to its "place in the overall statutory scheme." *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015) (citations omitted). Thus, the statute must be read as a whole, not just as an individual provision. *Kelly v. Robinson*, 479 U.S. 36, 43 (1986).

The Thirteenth Circuit Court below, along with *Tribune*, concluded that the "per plan" approach in a jointly administered case is irreconcilable with the rest of § 1129. *In re Tribune Co.*, 464 B.R. at 183; R. at 19. Specifically, the court noted that the requirements in §§ 1129(a)(1), (a)(3), and (a)(8) cannot be satisfied unless all debtors comply with those provisions; thus, subsection (a)(10) must also apply to all debtors.[7] R. at 19–20.

However, nothing in the subsections of § 1129(a) indicate that they apply to each individual debtor under a joint plan. *In re Transwest*, 881 F.3d at 730. And, even if they did, it does not also mean that § 1129(a)(10) must apply to each debtor as well. *See Pittsburgh & Lake Erie R.R. Co. v. Railway Labor Exec. Ass'n*, 491 U.S. 490, 510 (1989) (citations omitted) (maintaining that when two statutory provisions are able to co-exist, courts are obligated to honor both individually and "regard each as effective," so long as there is no opposing congressional intent).

Because nothing in the subsections of § 1129(a) indicate they are to be applied on a "per debtor" basis and adopting the "per plan" approach does not conflict with the overall statutory scheme, the Court should "regard each as effective." *Watt v. Alaska*, 451 U.S. 259, 267 (1981) (finding that courts should read statutes in a way "to give effect to each . . . while preserving their sense and purpose"). After all, the Court must presume "that Congress says in a statute what it means and means in a statute what it says there." *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) (citation omitted).

[7] *See generally* 11 U.S.C. § 1129(a)(1) (requiring that "[t]he plan complies with the applicable provisions of this title"); § 1129(a)(3) (requiring that "[t]he plan has been proposed in good faith"); § 1129(a)(8) (requiring that "each class of claims . . . has accepted the plan").

B. The "Per Plan" Approach Furthers the Overarching Purpose of Both Chapter 11 and § 1129(a)(10).

1. *The "Per Plan" Approach Provides More Than Some Indicia of Support from Impaired Creditors.*

Congress enacted § 1129(a)(10) to ensure that a plan seeking confirmation receives at least "some indicia of support by affected creditors and prevent confirmation where such support is lacking."[8] *In re Combustion Eng'g, Inc.*, 391 F.3d 190, 243–44 (3d Cir. 2004) (citations omitted). A proposed plan that has no support from impaired creditors cannot serve the purpose of § 1129(a)(10). *In re Windsor*, 7 F.3d at 131. An affirmative vote by a single impaired class of creditors under a joint, multi-debtor plan is enough to provide "some indicia of support." *In re Transwest*, 881 F.3d at 729 (finding that "once a *single* impaired class accepts a plan, section 1129(a)(10) is satisfied as to the entire plan") (emphasis added).

Here, there is more than "some indicia of support." In fact, the impaired creditors overwhelmingly support the Plan. R. at 8. All but one of the Debtors received acceptance by an impaired class of creditors, leaving only Development without an accepting class. R. at 8. Not only is the Plan approved by a majority of the impaired creditors, those accepting the Plan hold a majority of the claims. *See* David M. Neff, *The Ongoing Debate Over One Debtor vs. One Plan*, 2018 No. 8 NORTON BANKR. L. ADVISER NL 1 (stating that courts are more likely to apply the "per plan" approach "when confirming the plan would not be inequitable in light of the sizes of the claim pools voting in favor of and against the plan").

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[8] The American Bankruptcy Institute Chapter 11 Reform Commission ("the Commission") recently recommended abolishing § 1129(a)(10) due to the potential abuses by both creditors and debtors. *See* American Bankruptcy Institute, *Commission to Study the Reform of Chapter 11, 2012-2014 Final Report and Recommendations* 260 (2014). The Commission debated this idea and considered alternatives to its complete abolishment. *Id.* Most notably, the Commission considered "retaining section 1129(a)(10) on a per plan basis" to limit potential abuses. *Id.* After determining "the potential delay, cost, gamesmanship, and value destruction" linked to § 1129(a)(10) outweighed its "presumptive gating role," the Commission recommended its complete abolishment. *Id.* at 261.

In contrast, courts holding that § 1129(a)(10) mandates a "per debtor" approach have refused to confirm joint, multi-debtor plans that lacked substantial approval from and resulted in inequitable treatment of impaired creditors. *See, e.g.*, *In re Tribune Co.*, 464 B.R. at 180–81. In *Tribune*, the court refused to confirm a plan after the proponents sought to cramdown creditors holding over $10 billion in senior debt. *Id.* at 207. Additionally, 109 out of 111 debtors had not produced an accepting impaired class under the plan, and out of the three accepting classes, the third affirmative vote consisted of a single creditor holding a $47 claim. *Id.* Unlike the approving classes in *Tribune*, here, the accepting impaired creditors hold over $110 million in claims while the sole objecting creditor, Under My Thumb, holds just over a $6 million claim. The substantial approval of the Plan by the impaired creditors, who hold 95% of the claim pool, indicate more than just "some indicia of support by affected creditors."

Applying the "per debtor" approach to prevent confirmation of plans lacking substantial approval contradicts the express purpose of § 1129(a)(10) because the plain language of § 1129(a)(10) only requires acceptance of one impaired class—far less than substantial approval. Accordingly, while the "per plan" approach furthers the purpose prescribed by the statute, the "per debtor" approach impermissibly expands it. Scalia & Garner, *supra* at 57 ("To find such a purpose in the absence of a clear indication in the text is to provide the judge's answer rather than the text's answer to the question.").

Thus, when read in context, § 1129(a)(10) reinforces the view that Congress' use of the singular "plan" prescribes the "per plan" approach because it furthers the Code's underlying purpose—confirming plans with "some indicia of support."

2. Reading § 1129(a)(10) in the Broader Context of Chapter 11 Requires the "Per Plan" Approach.

Although protecting a creditor's interests is one objective of chapter 11, this Court has maintained that the central purpose is successful reorganization. *Bildisco & Bildisco*, 465 U.S. at 527 (asserting that bankruptcy courts "must focus on the ultimate goal of Chapter 11"—providing a successful reorganization for debtors). This is consistent with the policy that reorganizations are preferred over chapter 7 liquidations, which result in the dissolution of businesses and substantially smaller recoveries for creditors. *See* H.R. Rep. 95-595, at 220 (1978) ("The purpose of a business reorganization case, unlike a liquidation case, is to restructure a business's finances so that it may continue to operate, provide its employees with jobs, pay its creditors, and produce a return for its stockholders.").

Reading § 1129(a)(10) "in light of the purposes Congress sought to serve," requires the application of the "per plan" approach. *In re Windsor*, 7 F.3d at 130. In contrast, the "per debtor" approach frustrates the primary purpose of chapter 11 by impeding debtor's path to confirmation and consequently preventing successful reorganizations. Here, because Development's participation is essential to the joint Plan, requiring that each debtor produce an accepting impaired class makes it unlikely the Debtors will be able to successfully reorganize. R. at 5. In turn, the Debtors would likely be forced into liquidation where all parties would be worse off with the dissolution of the businesses and the unsecured creditors, including Under My Thumb, receiving just "pennies on the dollar."

Not only does the "per debtor" approach obstruct the primary goal of chapter 11, it also undermines another policy embraced by the Code—maximizing [the] value of the bankruptcy estate." *Toibb v. Radloff*, 501 U.S. 157, 163 (1991) (emphasizing that allowing a debtor to reorganize under chapter 11 serves Congress' purpose where the value of the debtor's estate will

be greater under chapter 11 than if liquidated). Applying the "per debtor" approach here would allow a single impaired class to overrule the overwhelming support from other classes and prevent the confirmation of a plan designed to preserve the maximum value of the estate.

Thus, neither the plain language of § 1129(a)(10) nor the overarching purpose of chapter 11 require the "per debtor" approach.

C. Section 1129(a)(10) Does Not Require a Multi-Debtor Plan, without an Accepting Class of Impaired Creditors for Each Individual Debtor, to be Substantively Consolidated.

Joint administration is a "creature of procedural convenience." *In re Blair*, 226 B.R. 502, 505 (Bankr. D. Me. 1998). It allows complex businesses with multiple interrelated debtors, each filing their own bankruptcy petitions, to administer their cases together and avoid unnecessary duplication of efforts. *Id.* Joint administration also leaves creditor's rights untouched. *In re Owens Corning*, 419 F.3d 195, 205 (3d Cir. 2005). In contrast, substantive consolidation is an equitable remedy granted for the benefit of creditors who have been harmed by either their reliance on the debtors as a single entity prepetition or by the debtor's assets and liabilities becoming inextricably intertwined postpetition. *Id.* at 208–11. Substantive consolidation results in the merging of the separate entities into one, by which the creditor's claims "against separate debtors morphe to claims against the consolidated survivor." *Id.* at 205–09 (citations omitted); *but see In re Transwest*, 881 F.3d at 731 (Friedland, J., concurring) (explaining how in a joint administration, there is "no merging of assets and liabilities of the debtors," and creditors can only seek payment from their own debtor).

Here, § 1129(a)(10) does not require Debtors to have substantively consolidated. First, joint administration is necessary in this case because the Debtors operate on an integrated basis while still maintaining corporate separateness. Second, substantive consolidation would not be

appropriate because neither Under My Thumb or any other impaired creditor is prejudiced under the Plan. Third, applying the "per plan" approach to § 1129(a)(10) does not alter a creditor's substantive legal rights as it is merely a technical requirement for the Debtors to satisfy for confirmation.

Therefore, this Court should reverse the Thirteenth Circuit and hold the "per plan" approach more applicable based on the facts of this case.

1. Joint Administration is Necessary Due to Debtors' Integrated, yet Separate, Corporate Structure.

Joint administration is appropriate for complex business structures operating on an integrated basis while still maintaining corporate separateness. *In re Charter Commc'ns*, 419 B.R. at 251. If more than one debtor's assets and claims start merging into one, however, corporate separateness is no longer. *See In re Enron Corp.*, No. 01–16034, 2004 Bankr. LEXIS 2549, at *235 (Bankr. S.D.N.Y. 2004) (finding that in a jointly administered case, because the plan essentially merged the debtors' assets and allowed creditors to go after any debtor for recovery, the plan contained a substantive consolidation component because it lacked corporate separateness).

In *Charter*, the debtors' corporate enterprise consisted of multiple subsidiaries that were wholly owned by a holding company. 419 B.R. at 251. The individual subsidiaries lacked their own independent board of directors, resulting in the holding company sharing a close relationship with the debtor-subsidiaries. *Id.* at 251. Additionally, while the financial condition of one affiliate affected the others, each entity remained distinct. *Id.* at 270. Consequently, the court determined the debtors effectively operated on an integrated basis yet maintained corporate separateness. For those reasons, the court held that under such corporate structure, a joint, multi-debtor plan was "reasonable and administratively convenient," and the joint plan was confirmed. *Id.* at 232, 266.

Like the corporate enterprise in *Charter*, the Debtors in this case also have a history of operating on an integrated basis. The holding company, TDI, was formed to own the membership interests of its nine wholly owned debtor-subsidiaries. R. at 4. And just like the debtors in *Charter*, the financial condition of each Operating Debtor here effects the other by the use of an integrated cash management system. Additionally, the fact that all Operating Debtors are being managed by their corporate parent makes it even more appropriate for the Debtors to propose a joint Plan, as the court held in *Charter*. Importantly, unlike in *Enron*, the Debtors' corporate separateness has remained, and the individual claims of creditors against specific debtors have not morphed into claims against the consolidated survivor. Debtors' entities have not and will not merged at any point.

2. *Based on the Plan's More than Favorable Treatment of Under My Thumb, Substantive Consolidation is Not Appropriate or Necessary to Satisfy § 1129(a)(10).*

The "only real criterion" to determine if substantive consolidation should be authorized is if the "economic prejudice of continued debtor separateness outweighs the economic prejudice of consolidation." *Reider v. Fed. Deposit Ins. Corp. (In re Reider)*, 31 F.3d 1102, 1107–08 (11th Cir. 1994) (citations omitted); *In re Snider Bros., Inc.*, 18 B.R. 230, 234 (Bankr. D. Mass. 1982). *See In re Transwest*, 881 F.3d at 732 (finding that substantive consolidation is generally used to promote fairness to creditors that relied on entity unity at the outset). Moreover, by reviewing each record on a case by case basis, courts can "ensure that substantive consolidation effects its sole aim: fairness to all creditors." *Alexander v. Compton (In re Bonham)*, 229 F.3d 750, 765 (9th Cir. 2000).

Substantive consolidation should be used sparingly and defensively, only to "remedy identifiable harms" to ensure all creditors are treated equitably. *In re Augie/Restivo Baking Co.,*

Ltd., 860 F.2d 515, 518 (2d Cir. 1988); *In re Owens Corning*, 419 F.3d at 211, 205–09 (requiring that a plan must adversely affect the objecting creditor to warrant substantive consolidation). If in a joint, multi-debtor plan, an objecting creditor is treated no differently than if the cases were substantively consolidated, there is no need for substantive consolidation. *See In re SGPA, Inc.*, 2001 WL 34750646, at *17 (finding that the creditors were not adversely affected under the joint plan and because the result would be the same under substantive consolidation, they were not required to consolidate).

Here, like in *SGPA*, whether the Debtors are substantively consolidated or jointly administered has no adverse economic effect on Under My Thumb. All the unsecured creditors, including Under My Thumb, are being treated fairly under the Plan; each creditor is receiving a 55% distribution from Debtors' reorganized business enterprise overall, which far exceeds what the creditors would obtain through a liquidation. R. at 30–31. Not only is Under My Thumb receiving a favorable distribution, the Plan allows Under My Thumb to retain its monthly revenue stream under the Agreement—all of which would not be possible if Debtors were forced into liquidation. R. at 7. Thus, because all creditors in this case are being treated more than fair under the Plan, the Debtors have *no need* to substantively consolidate and are not required to do so to satisfy § 1129(a)(10).

3. *Section 1129(a)(10) is Merely a Technical Requirement, Conferring No Substantive Rights to Creditors.*

The nature of a chapter 11 reorganization affects a creditor's existing legal rights. *See Brockett v. Winkle Terra Cotta Co.*, 81 F.2d 949, 953 (8th Cir. 1936) (explaining that reorganizations "may involve extinguishment of some interests," and the changes in legal rights

are what bring reorganization matters into court). Moreover, the process of cramdown[9] limits a creditor's rights further by forcing confirmation over a creditor's objection, in order to provide a successful reorganization—the underlying policy of chapter 11. *Bildisco & Bildisco*, 465 U.S. at 527.

The Thirteenth Circuit Court below reasoned that applying § 1129(a)(10) on a "per plan" basis affects a creditor's substantive rights because it essentially diminishes the impaired creditor's vote and nullifies its leverage in negotiations. R. at 21. But the court's point of focus is misplaced. Section 1129(a)(10) does not aim to protect creditor's substantive rights; it is merely a technical requirement for confirming a reorganization plan. *In re Bataa/Kierland, LLC*, 476 B.R. 558, 578–79 (Bankr. D. Ariz. 2012) (explaining how the Ninth Circuit has implicitly adopted § 1129(a)(10) as a "purely technical requirement that neither protects nor confers any substantive rights" to objecting creditors). If anything limits a creditor's substantive rights, it would be a reorganization plan that effectively substantively consolidates the debtors—not the interpretation of § 1129(a)(10) itself. *See In re Transwest*, 881 F.3d at 732–33 (Friedland, J., concurring) (arguing that the problem was not the interpretation of § 1129(a)(10), but rather how the *reorganization plan* itself treated the debtors). Because there is nothing in the Plan here that provides for the substantive consolidation of the debtors, proceeding on a "per plan" basis to satisfy the technical requirement of § 1129(a)(10) has no effect on the objecting creditor's rights.

In this case, the Plan was overwhelmingly favored by the majority of impaired creditors, and initially, Under My Thumb had a favorable view of the Plan as well. R. at 17. It was only when Under My Thumb learned of SFD's involvement in Debtors' reorganization that Under My Thumb

[9] Generally, a reorganization plan can only be confirmed if each class of impaired creditors consents, 11 U.S.C. § 1129(a)(8); but in certain situations, a "cramdown" may occur that allows a plan to be confirmed over the objection of one or more creditors. *In re Transwest*, 881 F.3d at 729; COLLIER ON BANKRUPTCY, at 1129.01 (16th ed. 2018).

became hesitant. R. at 7–8. We can presume Under My Thumb became suspicious of the Plan because SFD's portfolio of companies includes Under My Thumb's direct competitor. R. at 8. However, an unsecured creditor like Under My Thumb should not be given a veto power to destroy Debtors' entire Plan—solely because it is Development's only creditor—based on its own irrational fears of SFD possibly stealing its software. *See In re LOOP 76, LLC*, 442 B.R. 713, 722 (Bankr. D. Ariz. 2010) (citations omitted) (concluding that there is no legislative support providing creditors the ability to single-handedly defeat the confirmation of a plan merely because they are the only creditor under any one debtor).

Further, there are other provisions in § 1129 that provide substantive guarantees to creditors. For example, the plan must be "proposed in good faith" under § 1129(a)(3) and be in the "best interest of creditors" under § 1129(a)(7). *In re Enron Corp.*, 2004 Bankr. LEXIS 2549, at *222–24. For purposes of a cramdown, the plan must also be "fair and equitable" and "not discriminate unfairly." 11 U.S.C. § 1129(b)(1) (2018).

The view that § 1129(a)(10) is merely a technical requirement, not a substantive guarantee is further evidenced by the courts' treatment of this provision. In treating § 1129(a)(10) as a technical requirement, the courts have used the other substantive protections in § 1129 to remedy the unfair treatment of creditors. *See In re Enron Corp.*, 2004 Bankr. LEXIS 2549, at *234–35 (concluding that § 1129(a)(10) applied on a "per plan" basis but ultimately decided the case under the discrimination and fair and equitable provisions of § 1129(b)(1)); *In re SGPA, Inc.*, 2001 WL 34750646, at *26 (concluding that § 1129(a)(10) applied on a "per plan" basis but confirmed the plan primarily on the fair and equitable requirements of § 1129(b)).

The Code provides objecting creditors with safeguards, apart from § 1129(a)(10), that more appropriately and effectively protect the interests of impaired classes. By exercising the

appropriate creditor protections and not requiring debtors to substantively consolidate, courts will be able to reconcile the "per plan" approach with entity separateness principles. Thus, the Thirteenth Circuit Court below wrongly interpreted § 1129(a)(10) as a substantive protection, and this Court should reverse its decision.

CONCLUSION

In sum, Petitioner, Tumbling Dice, Inc., respectfully requests this Court reverse the judgment of the United States Court of Appeals for the Thirteenth Circuit and hold: (1) under § 365(c)(1), a debtor in possession may assume an executory contract provided it has no actual intent to assign the contract to a third party; and (2) under a proper interpretation of § 1129(a)(10)'s plain language—keeping the overall purpose of chapter 11 in mind—once one impaired class of claims of any one debtor votes in favor of a joint, multi-debtor plan, § 1129(a)(10) is satisfied as to the entire plan.

Respectfully Submitted,

Team 10 P

Counsel for Petitioner

APPENDIX A

11 U.S.C. § 102(7) (2018)

Rules of Construction

In this title—

(7) the singular includes the plural;

APPENDIX B

11 U.S.C. § 365 (2018)

Executory Contracts and Unexpired Leases

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

(b) [omitted]

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

> **(1)(A)** applicable law excuses a party, other than the debtor, to such contract or lease from accepting performance from or rendering performance to an entity other than the debtor or the debtor in possession, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties;
>
> **(B)** such party does not consent to such assumption or assignment; or
>
> **(2)** such contract is a contract to make a loan, or extend other debt financing or financial accommodations, to or for the benefit of the debtor, or to issue a security of the debtor; or
>
> **(3)** such lease is of nonresidential real property and has been terminated under applicable nonbankruptcy law prior to the order for relief.

(d-e) [omitted]

(f)(1) Except as provided in subsections (b) and (c) of this section, notwithstanding a provision in an executory contract or unexpired lease of the debtor, or in applicable law, that prohibits,

restricts, or conditions the assignment of such contract or lease, the trustee may assign such contract or lease under paragraph (2) of this subsection.

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

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

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

APPENDIX C

11 U.S.C. § 1129 (2018)

Confirmation of Plan

(a) The court shall confirm a plan only if all of the following requirements are met:

(1) The plan complies with the applicable provisions of this title.

(2) The proponent of the plan complies with the applicable provisions of this title.

(3) The plan has been proposed in good faith and not by any means forbidden by law.

(4–6) [omitted]

(7) With respect to each impaired class of claims or interests—

(A) each holder of a claim or interest of such class--

(i) has accepted the plan; or

(ii) will receive or retain under the plan on account of such claim or interest property of a value, as of the effective date of the plan, that is not less than the amount that such holder would so receive or retain if the debtor were liquidated under chapter 7 of this title on such date; or

(B) if section 1111(b)(2) of this title applies to the claims of such class, each holder of a claim of such class will receive or retain under the plan on account of such claim property of a value, as of the effective date of the plan, that is not less than the value of such holder's interest in the estate's interest in the property that secures such claims.

(8) With respect to each class of claims or interests--

(A) such class has accepted the plan; or

(B) such class is not impaired under the plan.

(9) [omitted]

(10) If a class of claims is impaired under the plan, at least one class of claims that is impaired under the plan has accepted the plan, determined without including any acceptance of the plan by any insider.

(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.